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My Body, My Choice: Should Physician-Assisted Suicide Be Legalized in the United States for Individuals with Chronic Mental Illness?

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MY BODY, MY CHOICE: SHOULD PHYSICIAN-ASSISTED SUICIDE BE LEGALIZED IN THE UNITED STATES FOR INDIVIDUALS WITH CHRONIC MENTAL ILLNESS?

by: Angelika Anderson*

ABSTRACT

Many individuals with mental illness wish to die because the symptoms of their illness are unbearable. They shoot, suffocate, and poison themselves to make their pain go away. Because this is a statistical reality, a more certain and less violent means of death should be legalized. This Comment advocates for the legalization of physician-assisted suicide (“PAS”). As of 2022, nine states and the District of Columbia have legalized PAS for terminal illness, but this Comment argues that all fifty states should legalize PAS and not only for terminal illness, but for chronic mental illness as well. To do so, this Comment suggests minimum requirements legislators can adopt regarding which mental illnesses the PAS legislation should cover, how to assess competence to consent, and in what form that consent must be offered.

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I. INTRODUCTION

Ron Deprez was the second-youngest of four children.¹ He was raised primarily by his mother.² While attending Franklin and Marshall College, he co-captained the football team.³ Then, after receiving a Master's degree from the Harvard School of Public Health, Ron became an epidemiologist.⁴ He then founded his own firm and non-profit organization.⁵ In his private life, he ran 18 marathons, navigated remote stretches of Africa, and learned to wire a house, skin a deer, and ride a motorcycle.⁶ But at the age of 75, he was ravaged by Lou Gehrig's Disease.⁷ The disease was "caus[ing] his nerve cells to degenerate and die."⁸ He would eventually lose the ability to walk; and he would grow susceptible to choking, difficulty breathing, and pneumonia.⁹ He would degenerate in this way for the next three to five years until ultimately passing away.¹⁰ Thanks to his state's¹¹ recently passed

1. Esmé E. Deprez, *How I Helped My Dad Die*, BLOOMBERG BUSINESSWEEK (Jan. 27, 2021, 5:00 AM), <https://www.bloomberg.com/news/features/2021-01-27/death-with-dignity-how-i-helped-my-dad-die> [https://perma.cc/3K3H-YJPE]. For a good comparison of similar stories to Ron's, see Robert Gehrke, *Facing a Terminal Illness, Kylie Wanted to Die with Dignity. But the State Said She Didn't Have the Right.*, SALT LAKE TRIBUNE (Feb. 7, 2022, 8:00 AM), <https://www.sltrib.com/news/health/2022/02/07/facing-terminal-illness/> [https://perma.cc/74TM-SDFB] (desiring PAS, but being rejected PAS in her battle with Lou Gehrig's disease); see also Joshua Rhett Miller, *Ex-lawmaker Battling Cancer Uses Legislation He Helped Pass to End Life*, N.Y. POST (Jan. 21, 2022, 12:26 PM), <https://nypost.com/2022/01/21/willem-jewett-uses-legislation-he-helped-pass-to-end-life/> [https://perma.cc/GM9B-UZ7W] (using PAS in his battle with mucosal melanoma); Linda Van Zandt, *Op-Ed: My Aunt's Struggle with Assisted Suicide: There Was Death, but Not Enough Dignity*, L.A. TIMES (Aug. 14, 2016, 5:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-van-zandt-assisted-suicide-20160814-snap-story.html> [https://perma.cc/5HSR-3CQM] (using PAS in battle with Lou Gehrig's disease, but delayed doing so by numerous PAS restrictions); Eyder Peralta, *As Planned, Right-To-Die Advocate Brittany Maynard Ends Her Life*, NPR (Nov. 3, 2014, 8:27 AM) <https://www.npr.org/sections/thetwo-way/2014/11/03/361094919/as-planned-right-to-die-advocate-brittany-maynard-ends-her-life> [https://perma.cc/KG8C-NNGV] (using PAS in her struggle with a stage 4 malignant brain tumor). For stories of individuals with terminal illnesses who wished for access to PAS, see *Stories*, DEATH WITH DIGNITY, <https://deathwithdignity.org/stories/> [https://perma.cc/8DWE-UKDD].

2. Deprez, *supra* note 1.

3. *Id.*; *Obituary: Ronald David Deprez*, PORTLAND PRESS HERALD (May 17, 2020) <https://www.pressherald.com/2020/05/17/obituaryronald-david-deprez/> [https://perma.cc/2YFE-L264].

4. Deprez, *supra* note 1; *Obituary: Ronald David Deprez*, *supra* note 3.

5. Deprez, *supra* note 1.

6. *Id.*

7. See *id.*; see also *What is ALS?*, ALS Ass'n, <https://www.als.org/understanding-als/what-is-als> [https://perma.cc/7QMM-QU4D] (explaining how the death of motor neurons causes one to lose voluntary muscle action and eventually die).

8. Deprez, *supra* note 1.

9. *Id.*

10. *Id.*

11. ME. REV. STAT. ANN. tit. 22, § 2140(4) (West, Westlaw with emergency legis. through Chapter 1 of 2023 1st Reg. Sess. of 131st Leg.).

PAS law,¹² however, Ron chose something else—to end his life on his own terms.¹³

For his final days, Ron joined his family in the house he spent years turning into a home.¹⁴ Together, they looked through plastic storage bins of old photos for the last time.¹⁵ They shared Ron’s favorite meal, drank good wine, and read poems by Mary Mackey.¹⁶ The next day around four in the afternoon, Ron began the PAS process by taking an antinausea drug and the drug that would stop his heart.¹⁷ He followed the drugs with shots from an Irish whiskey he had been saving.¹⁸ As the family waited by his side, they listened to David Bromberg’s version of “Mr. Bojangles” and sang along.¹⁹ Finally, Ron mentioned that this was “an immensely better way to die than being hooked up to tubes in a hospital bed.”²⁰ With that, he swallowed some sedatives and closed his eyes for the last time.²¹ For hours he laid there looking as though was he napping.²² His daughter even rested her head on his arm.²³ By around eight-o’clock that evening, Ron’s heart finally gave out and he was gone.²⁴

PAS laws like the one Ron used to end his suffering do not currently exist at the federal level in the United States.²⁵ In fact, the Supreme Court decided that the “liberty clause” in the Fourteenth Amendment of the Constitution does not protect a person’s right to commit suicide or to receive assistance in doing so.²⁶ The Supreme Court’s decision, however, did not limit a state’s ability to grant the right to PAS.²⁷ Rather, states have the power and discretion to determine the legal means or process of dying.²⁸ As of 2022, nine states and

12. PAS is the intentional killing of oneself using the medical means or medical knowledge provided by a physician. *See, e.g., Suicide*, BLACK’S LAW DICTIONARY (11th ed. 2019). For a background on PAS, see Candice T. Player, *Death with Dignity and Mental Disorder*, 60 ARIZ. L. REV. 115, 121–23 (2018).

13. Deprez, *supra* note 1.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *See* *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997) (“Our holding permits this debate to continue, as it should in a democratic society.”).

26. *Id.* at 705–06.

27. *See id.* at 735 (“Our holding permits this debate to continue, as it should in a democratic society.”).

28. *See, e.g., T.L. v. Cook Child.’s Med. Ctr.*, 607 S.W.3d 9, 54–55 (Tex. Ct. App. 2020); *see also Glucksberg*, 521 U.S. at 720 (stating that the court must exercise great care when extending constitutional protection to an asserted right because it places the matter outside public debate and legislative action).

the District of Columbia²⁹ allow PAS for *terminal* illnesses:³⁰ California,³¹ Colorado,³² Hawaii,³³ Maine,³⁴ New Jersey,³⁵ New Mexico,³⁶ Oregon,³⁷ Vermont,³⁸ and Washington.³⁹ But imagine that instead of Lou Gehrig's disease, Ron heard voices, hallucinated, or felt depressed for weeks at a time. Imagine that Ron had felt this way for years and that the symptoms kept him from forming close relationships with family, making friends, getting married, receiving an education, or having a job. Should Ron in this case not have the same option to choose to end his lifelong, unbearable, and incurable suffering? Because many with mental illness contemplate death as a means for ending such suffering,⁴⁰ this Comment advocates for the passage of PAS in all fifty states and to include access to individuals with a lifelong, recurring mental illness for which there is no cure. In this Comment, these mental illnesses are referred to as chronic mental illnesses.

PAS should be available to those with chronic mental illness who meet certain minimum requirements. First, individuals with a chronic mental illness should have exhausted all other mental health treatment options and yet still experience intolerable and unbearable symptoms. Next, for individuals to consent to PAS, (1) they should know they have a chronic mental illness; (2) they should not be experiencing symptoms at the time of consent that prevent them from mak-

29. D.C. CODE ANN. §§ 7-661.02 to .03 (West, Westlaw through Dec. 28, 2022).

30. *In Your State, DEATH WITH DIGNITY*, <https://deathwithdignity.org/states/> (last updated Nov. 1, 2021) [<https://perma.cc/3D86-DF6C>]. Though there is not PAS legislation in Montana, the Montana Supreme Court has ruled that “under § 45-2-211, MCA, a terminally ill patient’s consent to physician aid in dying constitutes a statutory defense to a charge of homicide against the aiding physician when no other consent exceptions apply.” *Baxter v. State*, 224 P.3d 1211, 1222 (Mont. 2009).

31. CAL. HEALTH & SAFETY CODE § 443.2 (West, Westlaw with all laws through Ch. 997 of 2022 Reg. Sess.).

32. COLO. REV. STAT. ANN. § 25-48-103 (West, Westlaw through 2d Reg. Sess., 73d Gen. Assemb. (2022)).

33. HAW. REV. STAT. ANN. §327L-2 (West, Westlaw through end of 2022 Reg. Sess.).

34. ME. REV. STAT. ANN. tit. 22, § 2140(4) (West, Westlaw with emergency legis. through Chapter 1 of 2023 1st Reg. Sess. of 131st Leg.).

35. N.J. STAT. ANN. § 2C:11-6 (West, Westlaw with laws through L.2023, c. 2).

36. N.M. STAT. ANN. § 24-7C-3 (West, Westlaw through 2022 2d Reg. Sess. & 3d Spec. Sess. of 55th Leg. (2022)).

37. OR. REV. STAT. ANN. § 127.805(1) (West, Westlaw through laws enacted in 2022 Reg. Sess. of 81st Leg. Assemb.).

38. VT. STAT. ANN. tit. 18, § 5283 (West, Westlaw through Chapters 186 (end) & M-19 (end) of Adjourned Sess. of 2021-2022 Vt. Gen. Assemb. (2022)).

39. WASH. REV. CODE ANN. § 70.245.020 (West, Westlaw with all legis. from 2022 Reg. Sess. of Wash. Leg.).

40. See Celia Watson Seupel, *Blocking Paths to Suicide*, N.Y. TIMES (Mar. 9, 2015), <https://www.nytimes.com/2015/03/10/health/blocking-the-paths-to-suicide.html> [<https://perma.cc/8KPK-AT83>] (“‘What people experience before attempting suicide is a combination of panic, agitation and franticness,’ he said. ‘A desire to escape from unbearable pain and feeling trapped.’”).

ing a rational choice to end their life; and (3) their choice should be well-reasoned. Lastly, to ensure that the PAS request reflects the individuals' true wishes, states may require that consent be repeated, informed, voluntary, or made without undue influence or coercion.

To influence legislators to adopt the above minimum requirements for future PAS legislation, this Comment will begin in Section II with an argument for the legalization of PAS based on the importance of bodily autonomy. Then, because many may not have experienced mental illness or understand how mental illness manifests, Section III will introduce the symptoms of several chronic mental illnesses and detail how chronic mental illness and suicide relate. Specifically, this Section will include the suicide rates for each of the listed chronic mental illnesses as well as stories of suicide attempts for those with chronic mental illness. Section III will end by advocating for PAS as a more certain and humane method for ending one's life. Next, Section IV will provide legislators with a more thorough explanation for the above suggested minimum requirements. In particular, Section IV will address which mental illnesses should qualify for PAS, how someone with mind-altering symptoms can give consent for PAS, and in what form that consent must be offered. Lastly, Section V will summarize each of the above Sections.

II. ARGUMENT FOR LEGALIZATION

States should legalize PAS because Americans value the right to make choices for their bodies, especially choices regarding their healthcare. In fact, Americans exercise the right to make these choices frequently. They also maintain the right to make these choices despite causing themselves bodily harm or death. PAS is therefore just one more healthcare option that patients can consider when deciding how to manage incurable and unbearable illnesses, even if that means choosing when and how to die.

The general arguments for and against PAS were famously discussed in the 1997 Supreme Court case of *Washington v. Glucksberg*.⁴¹ Notable opposition to PAS included Washington state's interest in preserving human life,⁴² protecting the integrity and ethics of the medical profession,⁴³ and protecting vulnerable groups.⁴⁴ Decades later, these arguments have remained unaddressed. Even in 2019, with the legalization of PAS in Hawaii,⁴⁵ the arguments for and against PAS

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

42. *Id.* at 728.

43. *Id.* at 731.

44. *Id.* at 731–32. The Court also recognized that PAS could lead to voluntary or involuntary euthanasia. *Id.* at 732–33.

45. HAW. REV. STAT. ANN. § 327L-2 (West, Westlaw through end of 2022 Reg. Sess.); see also NAT'L COUNCIL ON DISABILITY, THE DANGER OF ASSISTED SUICIDE LAWS 20 (Oct. 9, 2019), https://ncd.gov/sites/default/files/NCD_Assisted_Suicide_Re

continued. The Hawaiian Committee on Health and Human Services collected hundreds of pages of testimony from organizations and individuals regarding the legalization of PAS.⁴⁶ Similar to the arguments in *Washington v. Glucksberg*, the opposition focused on concerns that PAS allows families to coerce vulnerable members to end their lives,⁴⁷ PAS leads to euthanasia,⁴⁸ PAS goes against the doctor's role as healer,⁴⁹ medical science can manage physical suffering without PAS,⁵⁰ legalizing PAS increases suicide rates,⁵¹ and PAS is murder and therefore goes against moral teachings.⁵² Despite these concerns, there was nevertheless strong support for the bill. The Administrative Director for the Office of the Governor of Hawaii wrote, "The Governor's Office believes this bill is important to allow terminally ill patients to decide for themselves when and how their lives should end."⁵³ In fact, many other individuals who testified also supported a patient's right to choose.⁵⁴ Considering the continued arguments for and against PAS, legislators who have yet to legalize PAS may wonder

port_508.pdf [https://perma.cc/UP4B-VJQR] (stating that PAS is offered instead of other treatment because it is a cheaper option for insurers).

46. *The Following Testimonies Were Received with Notice the Organization(s)/ Individual(s) Will Be Present to Testify at the Hearing*, COMM. ON HEALTH & HUM. SERVS., 1 (Feb. 27, 2018), https://www.capitol.hawaii.gov/Session2018/Testimony/HB2739_TESTIMONY_HHS-JUD_02-27-18_.PDF [https://perma.cc/UW6J-YH2W].

47. *See id.* at 35, 109, 130, 146.

48. *See, e.g., id.* at 37.

49. *See, e.g., id.* at 38, 115, 761; *see also Physician-Assisted Suicide*, AMA, <https://www.ama-assn.org/delivering-care/ethics/physician-assisted-suicide> [https://perma.cc/7MRB-GC78] (describing PAS as "fundamentally incompatible with the physician's role as healer").

50. *See, e.g., COMM. ON HEALTH & HUM. SERVS., supra* note 46, at 115, 130, 134.

51. *See, e.g., id.* at 112, 1141 (calling PAS a "social contagion" and describing fear that PAS will teach teens that suicide is the answer).

52. *See, e.g., id.* at 74, 92, 108, 1045, 1155, 1232, 1268, 1277, 1283. For more information, see Elliot N. Dorff, *Assisted Suicide*, 13 J. L. & RELIGION 263, 286–87 (1998–99) (Judaism); Benjamin Gesundheit, *Suicide – A Halakhic and Moral Analysis of Masekhet Semahot, Chapter 2, Laws 1-6*, 35 TRADITION: J. ORTHODOX JEWISH THOUGHT 34 (2001) (Judaism); Mohammed Madadin et al., Abstract, *The Islamic Perspective on Physician-Assisted Suicide and Euthanasia*, 60(4) MED. SCI. L. 278, 283 (2020) (Islam); *Sahih Al Bukhari, Hadith 5778 of the Book of Medicine*, ISLAMICFINDER, <https://www.islamicfinder.org/hadith/bukhari/medicine/5778/> [https://perma.cc/TJ4U-UUCN] (Islam); *Letter Samaritanus Bonus of the Congregation for the Doctrine of Faith on the Care of Persons in the Critical and Terminal Phases in Life*, HOLY SEE PRESS OFFICE (Sept. 22, 2020) (emphasis in original), <https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2020/09/22/200922a.html> [https://perma.cc/U6K9-NYEA] (Catholicism); *Resolution on Euthanasia and Assisted Suicide*, SBC (June 1, 1992), <https://www.sbc.net/resource-library/resolutions/resolution-on-euthanasia-and-assisted-suicide/> [https://perma.cc/Q49F-4AK2] (Southern Baptist).

53. *See, e.g., COMM. ON HEALTH & HUM. SERVS., supra* note 46, at 2.

54. *See, e.g., id.* at 16, 18, 19, 24, 28, 75, 97 (documenting one individual's belief as "I HAVE AN INALIENABLE RIGHT TO CHOOSE HOW MY LIFE WILL END") (emphasis in original).

whether the argument for autonomy is strong enough to overcome this litany of other concerns regarding PAS. The answer is yes.

Every day, American adults have the right to make choices for their bodies that can negatively affect their health. For example, Americans can choose to consume unhealthy food,⁵⁵ alcohol,⁵⁶ or tobacco products⁵⁷ even if those products increase the risk of heart disease,⁵⁸ which is one of the leading causes of death in America.⁵⁹ American adults also have the right to refuse blood transfusions necessary to combat leukemia and other illnesses, which can cause death.⁶⁰ During the COVID-19 pandemic, Americans—some arguing “my body, my choice”⁶¹—exercised the right to not wear a mask⁶² or receive a vaccine⁶³ that could prevent serious illness.⁶⁴ American adults even have

55. See *Big Mac® Combo Meal*, MCDONALD’S, <https://www.mcdonalds.com/us/en-us/meal/big-mac-meal.html> [<https://perma.cc/RKE4-UTNJ>] (showing that a Big Mac® Combo Meal contains 1080 calories, 64% of one’s daily value of saturated fats, and 57% of one’s daily value of sodium); see also *Pelman v. McDonald’s Corp.*, 237 F. Supp. 2d 512, 533 (S.D.N.Y. 2003) (“If a person knows or should know that eating copious orders of supersized McDonalds’ products is unhealthy . . . it is not the place of the law to protect them from their own excesses.”).

56. See JACK DANIELS, <https://www.jackdaniels.com/en-us> [<https://perma.cc/3KJF-MHXA>] (advertising alcoholic products but providing links for visitors to find out more about “responsible drinking”); see also U.S. CONST. amend. XXI. *But see* 23 U.S.C. § 158(a)(2) (requiring one be 21 years of age in order to *purchase* or *publicly possess* alcohol).

57. See MARLBORO, <http://www.marlboro.com> [<https://perma.cc/AD8Q-LNGU>] (warning that cigarette smoke contains carbon monoxide, but still offering coupons for visitors to purchase Marlboro products). *But see* 21 U.S.C. § 387f (requiring one be 21 years of age in order to *purchase* tobacco and allowing the Secretary of Health and Human Services to restrict the sale of and access to tobacco if appropriate for the protection of public health).

58. *Know Your Risk for Heart Disease*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/heartdisease/risk_factors.htm [<https://perma.cc/AT35-D8UV>] (stating that eating foods high in saturated fats, trans fats, and cholesterol, consuming too much alcohol, and using tobacco can increase one’s risk of heart disease).

59. *Heart Disease Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/heartdisease/facts.htm> [<https://perma.cc/3LTU-DVZ7>].

60. See Mikkael A. Sekeres, *God and Doctor*, N.Y. TIMES (Apr. 25, 2013, 12:36 PM), <https://well.blogs.nytimes.com/2013/04/25/god-and-doctor/> [<https://perma.cc/PK3E-8DKW>].

61. See e.g., Bruce Selcraig, *Wearing a Mask – Or Not – Becomes Political for Some Texans*, SAN ANTONIO EXPRESS NEWS, <https://www.expressnews.com/news/local/article/Wearing-a-mask-or-not-becomes-political-15292340.php> (last updated May 26, 2020) [<https://perma.cc/VE28-8BUY>].

62. See, e.g., Tex. Exec. Ord. No. GA-36 (2021), <https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2021/GA-36.pdf> [<https://perma.cc/AS7L-39AW>] (prohibiting government entities and officials in Texas from mandating face coverings); see also Selcraig, *supra* note 61 (quoting one 79-year-old, cancer-surviving Texan who said, “My immune system may be compromised, but the government will not tell me I have to wear a mask.”).

63. See, e.g., Tex. Exec. Ord. No. GA-40 (2021), <https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2021/GA-40.pdf> [<https://perma.cc/T3NM-7FCQ>] (prohibiting vaccine mandates in Texas); see also Jesus Jiménez & Niraj Chokshi, *Texas Hospital Workers Suspended over Mandatory Vaccine Policy*, N.Y. TIMES (June 8,

the option to take this one step further and refuse all life-sustaining treatment, such as CPR, by executing a do-not-resuscitate order (“DNR”) or an advanced directive that instructs doctors to let the patients die in certain emergency situations.⁶⁵ All of this to say that Americans have, exercise, and retain the ability to make choices for their bodies, even if those choices have negative side effects. If Americans value bodily autonomy so highly, then PAS is consistent with American ideals because it offers Americans one more option for choosing what is best for their bodies, even if that is death.

When Americans make choices for their bodies, they do so with access to expert advice. Specifically, Americans go to their doctors when they are ill, and the doctors use their expertise to suggest a treatment plan. A patient can therefore take this information and make an informed decision about what is best for himself and his body. For example, if a patient refuses treatment and accepts death by natural causes, he can enter a hospice facility where he is provided with round-the-clock pain management until he passes.⁶⁶ So, even in accepting death, a patient’s doctor helps take care of him through the process. But, while PAS is illegal, patients with unbearable and incurable illnesses are left to make difficult choices about death without the information or support they need from their doctors. Patients are then left relying on whatever other means they have available to them to hasten death. One such way is to refuse all liquids, foods, and medications.⁶⁷ As time passes, these patients wither away thirsty, hungry, and in pain while their loved ones are forced to watch.⁶⁸ The separation

2021), <https://www.nytimes.com/2021/06/07/us/texas-hospital-workers-suspended-over-mandatory-vaccine-policy.html> [<https://perma.cc/W8PE-QCWE>] (quoting one hospital employee who said that if the hospital employees backed down to the vaccination requirement then “[e]verybody across the nation is going to be forced to get things into their body that they don’t want. . .”).

64. *How to Protect Yourself & Others*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last updated Feb. 25, 2022) [<https://perma.cc/SPG4-734Q>].

65. See *infra* Section IV.B.1.

66. See *Hospice & Palliative Care*, ACCENTCARE, <https://accentcare.com/our-services/hospice-palliative-care/> [<https://perma.cc/9CYS-8LUL>].

67. Jane E. Brody, *When Patients Choose to End Their Lives*, N.Y. TIMES (Apr. 5, 2021), <https://www.nytimes.com/2021/04/05/well/live/aid-in-dying.html> [<https://perma.cc/NZ6H-DRD9>]; see also John F. Burns, *Briton Who Fought for Assisted Suicide Is Dead*, N.Y. TIMES (Aug. 22, 2012), <https://www.nytimes.com/2012/08/23/world/europe/tony-nicklinson-who-fought-for-assisted-suicide-is-dead.html> [<https://perma.cc/YQ3R-9DSQ>] (detailing the death of Mr. Nicklinson who developed locked-in syndrome, an incurable condition in which a patient loses all motor functions but remains awake and aware with all cognitive abilities, by the refusal of food after a panel of High Court judges rejected his request for help in ending his life).

68. See Burns, *supra* note 67; see also Kat Pirnak, *‘He Asked Me to Shoot Him’: Widow Wants Assisted Dying Legalised After Husband Starved to Death*, MYLONDON (Feb. 11, 2022, 5:23 PM), <https://www.mylondon.news/news/south-london-news/he-asked-shoot-him-widow-23068816> [<https://perma.cc/X2NK-HQDJ>] (describing how Angela Kilenyi was forced to watch her husband, Tom Kilenyi, “starve and dehydrate to death” because the United Kingdom prohibits assisted suicide).

between patient and doctor is therefore incongruent with how we otherwise approach healthcare.

Consequently, state legislators should legalize PAS to give Americans the choice “to die with dignity, to control where and when they die, and to control their physical and mental state at the time of death.”⁶⁹ A very integral part of the ability to make these choices is access to a doctor. Without it, Americans can only rely on methods otherwise available to them, which are potentially less humane and less guaranteed.⁷⁰

III. MENTAL ILLNESS & SUICIDE

At least thirteen countries have legalized PAS or euthanasia through legislation, decriminalization, or court ruling.⁷¹ In all but four

69. Laura Trenaman-Molin, *Physician-Assisted Suicide: Should Texas Be Different?*, 33 Hous. L. Rev. 1475, 1482 (1997); see also Jon Schuppe & Melanie Bencosme, *An ALS Patient's Dilemma: End His Own Life, or Die Slowly of the Disease?*, NBC NEWS (Apr. 13, 2019, 4:44 AM), <https://www.nbcnews.com/news/us-news/als-patient-s-dilemma-end-his-own-life-or-die-n993421> [<https://perma.cc/BHF6-BQ5G>] (acquiring the lethal prescription through PAS, but choosing not to take it).

70. See, e.g., Player, *supra* note 12, at 133–34 (“Patients who are dying sometimes choose to hasten their deaths by refusing life-sustaining medical treatment, or through a process known as voluntary stopping eating and drinking (‘VSED’). . . . VSED can take one to three weeks to result in death[.]”); see, e.g., Brody, *supra* note 67 (explaining how alternatives to PAS can be “excruciating to witness”).

71. Stefan J. Bos, *Austria: Assisted Suicide Legalized Despite Church Opposition*, VATICAN NEWS (Jan. 2, 2022, 4:24 PM), <https://www.vaticannews.va/en/world/news/2022-01/austria-assisted-suicide-legalized-catholic-bishops-opposition.html> [<https://perma.cc/SFF7-GEEF>]; *Euthanasie* [*Euthanasia*], SERVICE PUBLIC FÉDÉRAL, SANTÉ PUBLIQUE, SÉCURITÉ DE LA CHAÎNE ALIMENTAIRE ET ENVIRONNEMENT [FEDERAL PUBLIC SERVICE, HEALTH, FOOD CHAIN SAFETY AND ENVIRONMENT] (Jan. 27, 2016), <https://www.health.belgium.be/en/node/22874> [<https://perma.cc/YU3K-E8GH>] (Belg.) (then in Google Chrome, click “English” on the Google Translate pop-up); *Canada's New Medical Assistance in Dying (MAID) Law*, GOVERNMENT OF CANADA (July 7, 2021), <https://www.justice.gc.ca/eng/cj-jp/ad-am/bk-di.html> [<https://perma.cc/T5VQ-TACQ>]; *Euthanasie: Assistance au Suicide* [*Euthanasia: Assisted Suicide*], LE GOUVERNEMENT DU GRAND-DUCHÉ DE LUXEMBOURG [THE GOVERNMENT OF THE GRAND DUCHY OF LUXEMBOURG] (Jan. 20, 2020), <https://sante.public.lu/fr/droits/fin-vie/euthanasie/index.html> [<https://perma.cc/SAW5-WHCF>] (then in Google Chrome, click “English” on the Google Translate pop-up); *Euthanasia, Assisted Suicide and Non-Resuscitation on Request*, GOVERNMENT OF THE NETHERLANDS, <https://www.government.nl/topics/euthanasia/euthanasia-assisted-suicide-and-non-resuscitation-on-request> [<https://perma.cc/DB3B-LW3X>]; *Assisted Dying Service*, MINISTRY OF HEALTH (May 17, 2022), <https://www.health.govt.nz/our-work/life-stages/assisted-dying-service> [<https://perma.cc/J8N4-UJZT>] (N.Z.); *Eutanasia y Suicidio Asistido en España* [*Euthanasia and Assisted Suicide in Spain*], DERECHO A MORIR DIGNAMENTE [RIGHT TO DIE WITH DIGNITY], <https://derechoamorir.org/eutanasia-espana/> [<https://perma.cc/NJ9C-N3Z4>] (then click “English” on the Google Translate pop-up); SCHWEIZERISCHES STRAFGESETZBUCH [CRIMINAL CODE] Dec. 21, 1937, SR 757 (1938), art. 115 (Switz.), translated in Christian Schwarzenegger & Sarah J. Summers, *Criminal Law and Assisted Suicide in Switzerland*, UNIVERSITY OF ZURICH FACULTY OF LAW (Feb. 3, 2005), <https://www.ius.uzh.ch/dam/jcr:00000000-5624-ccd2-ffff-ffffa664e063/assisted-suicide-Switzerland.pdf> [<https://perma.cc/5HTN-3JMB>]; *Voluntary Assisted Dying*, DEP'T. OF HEALTH (Feb. 12, 2022), <https://www.health.tas.gov.au/>

of these countries, PAS is limited to terminal illnesses.⁷² The rest of the world presumably does not feel comfortable allowing those with a non-fatal mental illness to choose to die before their time. In other words, people may feel that a person with mental illness just needs to wait long enough for things to get better; that to allow someone with a mental illness to end his life would be “giving up” on that person’s potential to one day be happy.⁷³ This belief is likely rooted in a misunderstanding of mental illness, its symptoms, its severity, or its prognosis. Consequently, those with mental illness do not receive the same compassion in end-of-life planning as those with a physical illness. But mental illness is just as real as physical illness and therefore deserving of the same end-of-life options that Ron received in his battle with Lou Gehrig’s disease.⁷⁴

Aurelia Brouwers was a 29-year-old Dutch woman who had an intolerable mental illness.⁷⁵ Beginning at age 12, Ms. Brouwers suffered from chronic depression, anxiety, psychoses, and auditory hallucinations.⁷⁶ After 20 failed suicide attempts, Ms. Brouwers recounted that she did not know the concept of happiness and just wanted to be free.⁷⁷ Though she originally sought treatment for her illness, she eventually determined that “[f]or people like me there isn’t always a solution – you can’t keep taking medicine, you can’t pray indefinitely. . . . At some point you just have to stop.”⁷⁸ So, on a Friday afternoon, with loved ones and two medics by her side, Ms. Brouwers drank a doctor-prescribed lethal dose of medication and ended her life.⁷⁹ Ms. Brouwers thus found the peace she was looking for through her country’s euthanasia laws. Ms. Brouwers’s story helps those without mental illness see how difficult and real mental illness is and how some individuals with mental illness may not want to live with it.

health-topics/voluntary-assisted-dying [https://perma.cc/KK53-GV9T] (Tasmania); *supra* Section I (U.S.); *Voluntary Assisted Dying*, VICT. STATE GOV. DEP’T. OF HEALTH (June 16, 2022), <https://www.health.vic.gov.au/patient-care/voluntary-assisted-dying> [https://perma.cc/S9Y4-DUZ3] (Austl.); *Voluntary Assisted Dying*, GOV. OF W. AUSTRALIA, DEP’T. OF HEALTH (July 20, 2021), <https://ww2.health.wa.gov.au/voluntaryassisteddying> [https://perma.cc/2W9E-KLGW] (Austl.); Sarah Mroz et. al, *Assisted Dying Around the World: A Status Quaestionis*, 10 ANNALS OF PALLIATIVE MED. 3541, 3543–44 (2021), (adding Colombia and Germany).

72. See discussion *infra* Section IV.A.

73. See Player, *supra* note 12, at 152 (citing research suggesting that having PAS as an option actually gives patients peace of mind to continue their lives).

74. Deprez, *supra* note 1.

75. Linda Pressly, *The Troubled 29-Year-Old Helped to Die by Dutch Doctors*, BBC NEWS (Aug. 9, 2018), <https://www.bbc.com/news/stories-45117163> [https://perma.cc/4CX6-M2QH].

76. *Id.* Cf. Player, *supra* note 12, at 138 (describing “Alice” and her PAS request after 30 years of unsuccessful mental health treatments for depression).

77. Pressly, *supra* note 75.

78. *Id.*

79. *Id.*

Depending on the age of onset, which can range from childhood⁸⁰ to late adulthood,⁸¹ a person may experience the symptoms of his chronic mental illness for a lifetime. But it is important to note that symptoms are not predictable and uniform.⁸² Individuals with a particular mental illness may feel symptoms more severely or frequently than others with the same illness.⁸³ Even within the same person, symptoms can wax and wane throughout one's life.⁸⁴ Some individuals may also have more than one mental illness.⁸⁵ Because symptoms are not uniform, this Section will provide "averages" for chronic mental illnesses such as schizophrenia, schizoaffective disorder, bipolar disorder, major depressive disorder, panic disorder, and obsessive-compulsive disorder ("OCD"). This list is not exhaustive but rather illustrates the range of conditions that may cause a significantly reduced quality of life and that may necessitate PAS. This Comment will not address mental illnesses that are characterized by temporary, acute episodes, however, because these are not considered "chronic" for purposes of this Comment.⁸⁶

The first chronic mental illnesses addressed in this Comment are schizophrenia and schizoaffective disorder. Symptoms for these conditions include delusions, hallucinations, disorganized thinking, grossly disorganized or abnormal motor behavior, and "negative symptoms" like diminished emotional expression.⁸⁷ "Approximately 5%–6% of individuals with schizophrenia die by suicide, about 20% attempt suicide on one or more occasions, and many more have significant suicidal ideation."⁸⁸ Additionally, the risk that these individuals attempt

80. *E.g.*, AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 205 (5th ed. 2013) [hereinafter *DSM V*].

81. *E.g.*, *id.* at 136.

82. *E.g.*, *id.* at 105, 108, 165, 210.

83. *E.g.*, *id.* at 165. ("The course of major depressive disorder is quite variable, such that some individuals rarely, if ever, experience remission (a period of 2 or more months with no symptoms, or only one or two symptoms to no more than a mild degree), while others experience many years with few or no symptoms between discrete episodes.")

84. *E.g.*, *id.* at 108, 165, 210.

85. *E.g.*, *id.* at 105 ("Comorbidity with anxiety disorders is increasingly recognized in schizophrenia. Rates of obsessive-compulsive disorder and panic disorder are elevated in individuals with schizophrenia compared with the general population.")

86. *E.g.*, *id.* at 95 ("By definition, a diagnosis of brief psychotic disorder requires a full remission of all symptoms and an eventual full return to the premorbid level of functioning within 1 month of the onset of the disturbance.")

87. *Id.* at 87–88. Delusions are beliefs that do not change even after the individual receives information that conflicts with his belief. For example, a person with delusions may believe an organization like the FBI is harassing him, he has exceptional abilities like God, or an outside source has removed his organs from his body. *Id.* at 87. Hallucinations include such experiences as hearing voices that are not there. *Id.* Individuals with disorganized thinking may switch from one topic to another or answer questions with completely unrelated content. *Id.* at 88. Grossly disorganized or abnormal motor behavior can include "childlike 'silliness' to unpredictable agitation." *Id.*

88. *Id.* at 104.

suicide remains high over their lifespan.⁸⁹ Similarly, approximately 5% of those with schizoaffective disorder—a disorder than can be understood as a combination of schizophrenia and a depressive or manic episode as described below—die by suicide.⁹⁰

Another chronic condition is bipolar disorder, both type I⁹¹ and II.⁹² With this condition, individuals can experience manic episodes, hypomanic episodes, and major depressive episodes.⁹³ A manic episode lasts at least a week and can include grandiose thinking and poor judgment that often lead to reckless involvement in activities with catastrophic effects.⁹⁴ Similarly, the individual may experience reduced need for sleep, which may cause him to go days without sleeping.⁹⁵ The individual may also be distracted, limiting his ability to hold a conversation or follow instructions.⁹⁶ A major depressive episode is measured during a two-week period and can include markedly diminished pleasure in activities, significant weight loss, insomnia or hypersomnia, feelings of worthlessness, diminished ability to think or concentrate, and recurrent thoughts of death.⁹⁷ Those with bipolar disorder may have one episode during their lifetime, or they may have four or more in a twelve-month period.⁹⁸ The suicide rate for “bipolar disorder is estimated to be at least 15 times that of the general population” and “may account for one-quarter of all completed suicides.”⁹⁹ About “one-third of individuals with bipolar II disorder report a lifetime history of suicide attempt[s].”¹⁰⁰ Related to these depressive episodes is another condition called major depressive disorder.¹⁰¹ The same depressive symptoms described above are also present with major depressive disorder and are also measured during a two-week period.¹⁰² These symptoms can recur so frequently that some individuals with major depressive disorder do not go more than two months without experiencing them.¹⁰³ Even more, there is a risk that someone

89. *Id.*

90. *Id.* at 105, 109. Evidence indicates a higher suicide rate in North America for those with schizophrenia and schizoaffective disorder than in European, South American, and Indian populations. *Id.*

91. *Id.* at 130.

92. *Id.* at 136.

93. *Id.* at 124–25.

94. *Id.* at 129.

95. *Id.* at 128.

96. *Id.*

97. *Id.* at 125.

98. *Id.* at 123–24, 136.

99. *Id.* at 131.

100. *Id.* at 138.

101. *Id.* at 155.

102. *Id.* at 125, 160–61. Major depressive disorder, however, does not include the manic episodes that bipolar disorder does. *Id.* at 124, 160–61.

103. *Id.* at 165. Others can go years without symptoms between discrete episodes. *Id.*

with major depressive disorder will attempt suicide at any time during these episodes.¹⁰⁴

Last in this Comment, but not the only remaining chronic mental illnesses with a reportable suicide rate, are panic disorder and OCD.¹⁰⁵ Individuals with panic disorder experience recurrent and unexpected panic attacks that cause persistent concern for future attacks or a change in behavior to avoid future attacks.¹⁰⁶ “Panic attacks and a diagnosis of panic disorder in the past 12 months are related to a higher rate of suicide attempts and suicidal ideation.”¹⁰⁷ Next, OCD is a condition defined by the “presence of obsessions, compulsions, or both.”¹⁰⁸ An obsession is a “recurrent and persistent thought[], urge[], or image[]” that “[t]he individual attempts to ignore or suppress.”¹⁰⁹ A compulsion is a repetitive and time consuming behavior “the individual feels driven to perform in response to an obsession or according to rules that must be rigidly applied.”¹¹⁰ The behaviors are “aimed at preventing or reducing anxiety or distress, or preventing some dreaded event or situation” that is “not connected in a realistic way” to what the person is trying to reduce.¹¹¹ For example, someone with OCD may “arrang[e] items symmetrically to prevent harm to a loved one.”¹¹² Someone may also perform washing rituals, like showering for hours a day until it feels “just right.”¹¹³ “Suicidal thoughts occur at some point in as many as about half of individuals with OCD” and up to one-quarter have reported attempting suicide.¹¹⁴

All of these chronic mental illnesses reduce one’s quality of life. Schizophrenia limits one’s educational and employment opportunities “even when [one’s] cognitive skills are sufficient for the tasks at hand.”¹¹⁵ As a result, most individuals with schizophrenia “are employed at a lower level than their parents.”¹¹⁶ Schizophrenia is also associated with social dysfunction.¹¹⁷ Most individuals with schizophrenia “do not marry or have limited social contacts outside of their family.”¹¹⁸ Also, “[l]ife expectancy is reduced in individuals with

104. *Id.* at 167.

105. *Id.* at 212, 240.

106. *Id.* at 208.

107. *Id.* at 212.

108. *Id.* at 237.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 238.

113. *Id.*

114. *Id.* at 240.

115. *Id.* at 104.

116. *Id.*

117. *Id.* at 104.

118. *Id.*

schizophrenia because of associated medical conditions.”¹¹⁹ Although many with bipolar disorder are fully functional between episodes, “approximately 30% show severe impairment in work role function.”¹²⁰ Impairment in functionality results “in lower socioeconomic status despite equivalent levels of education when compared with the general population.”¹²¹ For those with major depressive disorder, impairment can be very mild or cause such incapacity that the individual cannot manage basic self-care needs.¹²² “Individuals with panic disorder may be frequently absent from work or school for doctor and emergency room visits,” which can cause them to lose their job or to drop out of school.¹²³ “OCD is associated with reduced quality of life as well as high levels of social and occupational impairment.”¹²⁴ For example, obsessions about harm can cause one with OCD to avoid relationships with family and friends, and obsessions about symmetry can cause one to turn in projects at school or work late as he tries to make them “just right.”¹²⁵ Given these reductions in one’s quality of life over a lifetime, death may seem like a more bearable option.¹²⁶

The methods for attempting or completing suicide vary. For one man with schizophrenia named Joe, it was an unsuccessful attempt of mixing whisky and pills.¹²⁷ For a young man named Terrance, it was jumping from his eight-story housing project weeks before his twentieth birthday.¹²⁸ His mom found his lifeless body still on the sidewalk.¹²⁹ For a young man suffering from bipolar disorder named Kevin, it was leaping from the Golden Gate bridge and surviving.¹³⁰ Others have used the internet to learn different ways to commit sui-

119. *Id.* at 105 (“Weight gain, diabetes, metabolic syndrome, and cardiovascular and pulmonary disease are more common in schizophrenia than in the general population.”).

120. *Id.* at 131.

121. *Id.*

122. *Id.* at 167.

123. *Id.* at 212.

124. *Id.* at 240.

125. *Id.*

126. See Seupel, *supra* note 40 (“‘What people experience before attempting suicide is a combination of panic, agitation and franticness,’ he said. ‘A desire to escape from unbearable pain and feeling trapped.’”).

127. Tara Parker-Pope, *One Man’s Story of Schizophrenia*, N.Y. TIMES (Aug. 6, 2011, 7:23 PM), <https://well.blogs.nytimes.com/2011/08/06/one-mans-story-of-schizophrenia/> [<https://perma.cc/6DW9-QKJ4>].

128. Niko Koppel, *Coping with Bipolar Disorder, and the Death of a Son*, N.Y. TIMES (Jan. 17, 2009), <https://www.nytimes.com/2009/01/18/nyregion/18neediest.html> [<https://perma.cc/LU9H-TUWQ>].

129. *Id.*

130. Scott Anderson, *The Urge to End It All*, N.Y. TIMES MAG. (July 6, 2008), <https://www.nytimes.com/2008/07/06/magazine/06suicide-t.html> [<https://perma.cc/855G-PELD>].

cide: for example, by ingesting a meat preservative.¹³¹ Of all these methods, people most commonly end their lives by firearm, suffocation, or poisoning.¹³² But since not every suicide attempt ends in death, one may be left with serious and life-altering consequences. For instance, Debbie, a mother and wife, is partly paralyzed and walks with a cane after she shot herself in the head.¹³³ She survived because her husband found her bleeding in the bathtub and called for an ambulance.¹³⁴ Considering stories like Debbie's, PAS may serve as a more humane option for those with mental illness who choose to end their lives. It provides a means that is less violent—and more certain.¹³⁵ It may also be more humane for the family members of those who wish to die because it prevents a family member from finding his loved one's corpse.¹³⁶

IV. PROPOSED LEGISLATION

In order to legalize PAS and include access to those with mental illness, three important issues must be addressed: what kinds of mental illness qualify, how can someone with mind-altering symptoms consent to death, and what form must that consent take. This Section addresses those issues by examining existing PAS laws and looking to other contexts where patients possessed the capacity to give consent. First, individuals with chronic mental illness that (1) experience unbearable symptoms and (2) have exhausted all other mental health treatment options should qualify. Second, for individuals to consent to PAS, they must show that their consent was made knowingly and intelligently. They may demonstrate this by showing that (1) they know they have a mental illness and that this condition is chronic; (2) they are not experiencing symptoms of their mental illness at the time of consent that prevent them from making a rational choice to end their life; and (3) their decision to end their life is well-reasoned. Third, their consent may have to be repeated, informed, or made voluntarily

131. Megan Twohey & Gabriel J.X. Dance, *Where the Despairing Log on, and Learn Ways to Die*, N.Y. TIMES (Dec. 9, 2021) <https://www.nytimes.com/interactive/2021/12/09/us/where-the-despairing-log-on.html> [<https://perma.cc/Z92Y-A6KR>].

132. *Suicide*, NAT'L INST. OF MENTAL HEALTH, <https://www.nimh.nih.gov/health/statistics/suicide> [<https://perma.cc/ZQ3H-NWFB>].

133. Anderson, *supra* note 130.

134. *Id.*

135. See Dino F. Druda et al., *Deliberate Self-poisoning with a Lethal Dose of Pentobarbital with Confirmatory Serum Drug Concentrations: Survival After Cardiac Arrest with Supportive Care*, 15 J. MED. TOXICOLOGY 45, 45 (2019) <https://doi.org/10.1007/s13181-018-0675-3> (“Pentobarbital (Nembutal) is . . . recommended as a drug for euthanasia or assisted suicide due to its rapid onset of coma and perception of a peaceful death.”). *But see* REG'L EUTHANASIA REV. COMMS., ANNUAL REPORT 2020, 11 (Apr. 2021), <https://www.euthanasiecommissie.nl/de-toetsingscommissies/uitspraken/jaarverslagen/2020/april/15/jaarverslag-2020> [<https://perma.cc/7RT4-Q7AR>] (reporting that some patients do not die in the agreed upon time period after ingesting the lethal prescription and a doctor then performs the termination of life).

136. See Koppel, *supra* note 128; see also Anderson, *supra* note 130.

without undue influence or coercion. These requirements are the minimum that legislators should include in their PAS legislation, and they are described in more detail below. This Section does not, however, include additions beyond these minimum requirements. For example, state legislators may consider including an age requirement or a provision protecting physicians from liability or discipline for refusing to honor a request for PAS so long as the physician connects the patient with another healthcare provider offering PAS.¹³⁷

A. *Assessing Qualifying Conditions*

Though a humane option for those wishing to end their suffering, PAS legalization is not yet common, especially for those with mental illness. The only North American country to once legalize PAS for mental illness was Canada, but it has paused access until 2023 to ensure appropriate safeguards are in place.¹³⁸ Besides Canada, only four other countries have legalized PAS for mental illness: the Netherlands,¹³⁹ Luxembourg,¹⁴⁰ Belgium,¹⁴¹ and Switzerland.¹⁴² Unlike Canada, these PAS laws were not paused and are instead still in use today. For example, the Regional Euthanasia Review Committee for the Netherlands reported 6,938 notifications of euthanasia for 2020, with 88 being for people with psychiatric conditions.¹⁴³ Since these are the only countries that have legalized PAS for mental illness and their legislation remains in effect, the PAS laws from these countries can be the foundation for budding American PAS laws. In particular, these

137. CAL. HEALTH & SAFETY CODE § 443.14(e)(1)–(4) (West, Westlaw with all laws through Ch. 997 of 2022 Reg. Sess.).

138. *Canada's New Medical Assistance in Dying (MAID) Law*, *supra* note 71.

139. *Wet Toetsing Levensbeëindiging op Verzoek en Hulp bij Zelfdoding [Termination of Life on Request and Assisted Suicide Act]*, OVERHEID WETTENBANK [GOVERNMENT LAW BANK], <https://wetten.overheid.nl/BWBR0012410/2021-10-01> [<https://perma.cc/TU4Z-PKMM>]; GOVERNMENT OF THE NETHERLANDS, *supra* note 71.

140. LE GOUVERNEMENT DU GRAND-DUCHÉ DE LUXEMBOURG [THE GOVERNMENT OF THE GRAND DUCHY OF LUXEMBOURG], *supra* note 71.

141. SERVICE PUBLIC FÉDÉRAL, SANTÉ PUBLIQUE, SÉCURITÉ DE LA CHAÎNE ALIMENTAIRE ET ENVIRONNEMENT [FEDERAL PUBLIC SERVICE, HEALTH, FOOD CHAIN SAFETY AND ENVIRONMENT], *supra* note 71.

142. Henning Hachtel et al., *Practical Issues of Medical Experts in Assessing Persons with Mental Illness Asking for Assisted Dying in Switzerland*, FRONTIERS IN PSYCHIATRY, July 07, 2002, at 2, <https://www.frontiersin.org/articles/10.3389/fpsyt.2022.909194/full>, <https://doi.org/10.3389/fpsyt.2022.909194>.

143. REG'L EUTHANASIA REV. COMMS., *supra* note 135, at 11–12; *see also* PUB. HEALTH DIV., CTR. FOR HEALTH STATS., OREGON DEATH WITH DIGNITY ACT: 2020 DATA SUMMARY, 5 (2021), <https://www.oregon.gov/oha/ph/providerpartnerresources/evaluationresearch/deathwithdignityact/documents/year23.pdf> [<https://perma.cc/S4GH-M9RH>] (stating that 370 people received a lethal prescription in Oregon in 2020 and “[s]ince the law was passed in 1997, a total of 2,895 people have received prescriptions under the [Death with Dignity Act] and 1,905 people (66%) have died from ingesting the medications”).

jurisdictions clarify how to determine which mental illnesses qualify for PAS.¹⁴⁴

The Netherlands, Luxembourg, Belgium, Switzerland, and Canada provide general qualifiers for determining which mental illnesses qualify for PAS, instead of listing which mental illnesses specifically qualify for PAS, and which do not. In the Netherlands, a patient qualifies if his suffering is hopeless and unbearable and if he and his physician concluded that there is no reasonable alternative solution.¹⁴⁵ In Luxembourg, the patient must suffer from an irreversible, “dead-end” medical situation with no prospect of improvement.¹⁴⁶ The patient must also suffer psychologically from his health situation.¹⁴⁷ In Belgium, the patient at the time of his request must suffer from a hopeless medical situation and report constant psychological suffering resulting from a pathological, serious, or incurable disease.¹⁴⁸ In Switzerland, the law only decriminalizes PAS, so it offers no qualifiers.¹⁴⁹ But providers of PAS, such as doctors, may implement their own specific requirements.¹⁵⁰ Though Canada’s PAS law is relatively new, and the country has presently excluded PAS for mental illness until 2023, it is helpful to note that Canada previously required a patient to have had a serious and incurable illness and to be in an advanced state of irreversible decline in capability.¹⁵¹ The patient must also have endured intolerable psychological suffering that acceptable conditions could not otherwise alleviate.¹⁵²

American lawmakers should note that none of these laws specify which mental illnesses qualify for PAS. Nor do they offer a standard of measurement for which symptoms qualify as unbearable or intolerable. Instead, these jurisdictions rely on healthcare providers to determine which individual patients qualify on a case-by-case basis.¹⁵³ By

144. See OVERHEID WETTENBANK [GOVERNMENT LAW BANK], *supra* note 139; LE GOUVERNEMENT DU GRAND-DUCHÉ DE LUXEMBOURG [THE GOVERNMENT OF THE GRAND DUCHY OF LUXEMBOURG], *supra* note 71; SERVICE PUBLIC FÉDÉRAL, SANTÉ PUBLIQUE, SÉCURITÉ DE LA CHAÎNE ALIMENTAIRE ET ENVIRONNEMENT [FEDERAL PUBLIC SERVICE, HEALTH, FOOD CHAIN SAFETY AND ENVIRONMENT], *supra* note 71; SCHWEIZERISCHES STRAFGESETZBUCH [SWISS CRIMINAL CODE], *supra* note 71, at 5.

145. OVERHEID WETTENBANK [GOVERNMENT LAW BANK], *supra* note 139.

146. LE GOUVERNEMENT DU GRAND-DUCHÉ DE LUXEMBOURG [THE GOVERNMENT OF THE GRAND DUCHY OF LUXEMBOURG], *supra* note 71.

147. *Id.*

148. SERVICE PUBLIC FÉDÉRAL, SANTÉ PUBLIQUE, SÉCURITÉ DE LA CHAÎNE ALIMENTAIRE ET ENVIRONNEMENT [FEDERAL PUBLIC SERVICE, HEALTH, FOOD CHAIN SAFETY AND ENVIRONMENT], *supra* note 71.

149. SCHWEIZERISCHES STRAFGESETZBUCH [SWISS CRIMINAL CODE], *supra* note 71, at 5.

150. *FAQ*, DIGNITAS, http://www.dignitas.ch/index.php?option=com_content&view=Article&id=69&Itemid=136&lang=en (last updated Feb. 10, 2022) [<https://perma.cc/6B3Z-FLKV>]; see also *FAQ*, EXIT, <https://exit.ch/en/englisch/faq/> [<https://perma.cc/N2VQ-JE4R>].

151. *Canada’s New Medical Assistance in Dying (MAID) Law*, *supra* note 71.

152. *Id.*

153. *E.g.*, OVERHEID WETTENBANK [GOVERNMENT LAW BANK], *supra* note 139.

taking the common qualifiers from each of these jurisdictions, American legislators can decide which mental illnesses should qualify for PAS. Specifically, American states should require (1) that a patient experiences symptoms from his chronic mental illness that are unbearable; and (2) that a patient exhaust all treatment options before qualifying for PAS. To enforce these standards, a healthcare provider should confirm that the illness is unbearable for the patient and that the patient has exhausted all available treatment options.¹⁵⁴

B. *Assessing Competence to Consent*

There are several contexts in America where competence is assessed before one can exercise a certain right.¹⁵⁵ For example, competence is measured before individuals can draft a will.¹⁵⁶ There are times that the law may deem an individual incompetent to exercise his rights, however. Legislators have anticipated such situations and drafted laws that protect a person's rights even when he has reduced competence. For instance, a minor who is not normally considered legally competent to consent may receive a judicial bypass to exercise her right to receive an abortion procedure¹⁵⁷ even without her parent's consent.¹⁵⁸ Because it is not a new concept for legislators to draft laws that anticipate reduced competence, legislators should be able to draft PAS legislation that allows those who experience mind-altering symptoms to give legal consent during lucid periods.¹⁵⁹ To do so, legis-

154. See Linda Ganzini et al., *Evaluation of Competence to Consent to Assisted Suicide: Views of Forensic Psychiatrists*, 157 AM. J. PSYCHIATRY 595, 599 (2000) ("For the majority of respondents, a patient requesting assisted suicide would be found competent after an evaluation by two independent examiners, followed by judicial or local administrative review, rendering a determination of competence at a clear and convincing level of proof. The presence of major depression automatically would result in a finding of incompetence. In contrast, some courts have stated that the presence of a mental disorder does not automatically infer incompetence to make medical decisions."); see also Player, *supra* note 12, at 156–57 (citing research suggesting that PAS may be difficult to obtain because assessing physicians may be hesitant to deem a patient competent based on internal biases or may refuse to provide PAS services thereby causing patients to "doctor-shop").

155. See, e.g., MASS. GEN. LAWS ANN. ch. 190B, § 2-501 (West, Westlaw through 2022 2d Ann. Sess.).

156. See, e.g., *id.*; 755 ILL. COMP. STAT. ANN. 5/4-1 (West, Westlaw through P.A. 102-1140 of 2022 Reg. Sess.); Stephen v. Coleman, 533 S.W.2d 444, 448–49 (Tex. Civ. App. 1976).

157. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992).

158. See, e.g., ARIZ. REV. STAT. ANN. § 36-2152(B) (West, Westlaw through 2d Reg. Sess. of 55th Leg. (2022)); TENN. CODE ANN. § 37-10-303(2)(b) (West, Westlaw with laws from 2022 2d Reg. Sess. of 112th Tenn. Gen. Assemb.); TEX. FAM. CODE ANN. § 33.003(a) (West, Westlaw through end of 2021 Reg. & Called Sess. of 87th Leg.).

159. See *infra* Section IV.B.2; see also Player, *supra* note 12, at 137–38 ("Objections based on the presumption that people with mental disorders are incompetent to decide to hasten their deaths are based on outmoded beliefs about the relationship between mental disorder and competence. . . . [A] large empirical literature has shown that mental disorders are not synonymous with incompetence.").

lators can use competence requirements from contexts in which those with mental illness in America have historically consented to death. Legislators can also use competence requirements from foreign jurisdictions that have legalized PAS for mental illness.¹⁶⁰

1. Competence to Choose Potential Death

In alignment with America's belief in autonomy, many U.S. states allow a person to choose the time of one's natural death by executing two different documents that preauthorize healthcare providers to withhold life-sustaining treatment from a patient.¹⁶¹ One is called an advanced directive¹⁶² and the other is called a "do not resuscitate order," better known as a "DNR."¹⁶³ Using an advanced directive, a patient may request to discontinue all treatment, other than that used to keep him comfortable, to allow the patient to die.¹⁶⁴ For instance, further medical testing may be limited and the patient may instead receive medication to reduce his pain while he dies naturally.¹⁶⁵ Using a DNR, a patient may request that no one revive him once his breathing or heartbeat stops.¹⁶⁶ For instance, a patient may request in advance that artificial ventilations or CPR should not be performed.¹⁶⁷

160. For example, an organization that provides PAS for mental illness in Switzerland, depends on "an in-depth psychiatric appraisal concerning the capacity of judgement and discernment in regard of the wish for a self-determined end of life, also confirming that this wish is not a symptom of the psychiatric illness but a well-considered balance[d] decision." *DIGNITAS*, *supra* note 150; *see also* *EXIT*, *supra* note 150 (stating that Switzerland requires an individual to have faculty of judgment where he or she knows what he or she is doing in order to request PAS for mental illness).

161. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. §§ 166.031(1), .081(6)(A) (West, Westlaw through end of 2021 Reg. & Called Sess. of 87th Leg.); *see also* Karen Telschow Johnson, *Death in Texas: The Documents That Control Medical Treatment and End-of-Life Decisions*, 11 Tex. Tech. Est. Plan. & Cmty. Prop. L. J. 75, 85–86 (2018) (discussing a non-statutory document supported by the Texas Medical Association called the "Five Wishes Document").

162. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 166.031(1) (West, Westlaw through end of 2021 Reg. & Called Sess. of 87th Leg.); CAL. PROB. CODE § 4670 (West, Westlaw with all laws through Ch. 997 of 2022 Reg. Sess.). This is also called a "living will." *See* TENN. CODE ANN. § 32-11-103(4) (West, Westlaw with laws from 2022 2d Reg. Sess. of 112th Tenn. Gen. Assemb.).

163. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 166.081(6)(A) (West, Westlaw through end of 2021 Reg. & Called Sess. of 87th Leg.); MICH. COMP. LAWS ANN. § 333.1053(1) (West, Westlaw through P.A.2023, No. 3, of 2023 Reg. Sess., 102d Leg.).

164. *See, e.g.*, Johnson, *supra* note 161, at 78.

165. *Advanced Care Planning: Health Care Directives*, NAT'L INST. ON AGING, <https://www.nia.nih.gov/health/advance-care-planning-health-care-directives> (last updated Jan. 15, 2018) [<https://perma.cc/B9MG-8K8Q>].

166. *See, e.g.*, Johnson, *supra* note 161, at 80.

167. *Out of Hospital Do Not Resuscitate Program*, TEX. HEALTH & HUM. SERVS., <https://dshs.texas.gov/emstraumasystems/dnr.shtm> (last updated Aug. 10, 2021) [<https://perma.cc/XD4Y-5NUD>]. *But see* Player, *supra* note 12, at 131 (telling the hypothetical story of one adult who drowns a child and a different adult who sees a child drowning but does not help as a demonstration that some people may not likely see one as less morally reprehensible than the other. "Defenders of the moral equivalence

Each document allows patients to give advanced consent, meant to prevent extended pain and suffering, and to die naturally instead.¹⁶⁸

To execute an advanced directive¹⁶⁹ or a DNR,¹⁷⁰ a patient must be competent. Competence means, for example, that an individual possesses “the ability, based on reasonable medical judgment, to understand and appreciate the nature and consequences of a treatment decision, including the significant benefits and harms of and reasonable alternatives to a proposed treatment decision.”¹⁷¹ Aside from having a certain level of cognitive ability, some states require the individual to also be an adult.¹⁷² Having a mental illness does not necessarily preclude one from executing an advanced directive or a DNR.¹⁷³ For example, someone with a mental illness may be legally competent to execute one of these documents during a lucid period when symptoms are not altering his ability to reason and understand.¹⁷⁴

Because competence can come in waves for individuals executing an advanced directive or a DNR, legislators drafted the law in anticipation of this reduced competence. Before a period of incompetence, a patient may execute a written directive.¹⁷⁵ Then, during a period of incompetence, the law allows a physician to rely on that previously

thesis argue that the distinction between a killing and a letting die, itself, ‘has no moral importance.’”) (quoting James Rachels, *Active and Passive Euthanasia*, 292 *NEW ENG. J. MED.* 78, 78 (1975)).

168. *NAT’L INST. ON AGING*, *supra* note 165.

169. *See, e.g.*, MD. CODE ANN., HEALTH-GEN. § 5-602(a)(1) (West, Westlaw through all legis. from 2022 Reg. Sess. of Gen. Assemb.); IND. CODE ANN. § 16-36-7-4 (West, Westlaw with all legis. of 2022 2d Reg. Sess.); TEX. HEALTH & SAFETY CODE ANN. §§ 166.032(a), .034(a) (West, Westlaw through end of 2021 Reg. & Called Sess. of 87th Leg.).

170. *See, e.g., id.* § 166.082(a) (Westlaw).

171. *Id.* § 166.002(4) (Westlaw); *see also* IND. CODE ANN. § 16-36-7-15 (West, Westlaw with all legis. of 2022 2d Reg. Sess.) (“As used in this chapter, ‘incapacity’ and ‘incapacitated’ mean that an individual is unable to comprehend and weigh relevant information and to make and communicate a reasoned health care decision.”).

172. *See, e.g.*, N.Y. PUB. HEALTH LAW § 2994-c (McKinney through L.2022, chapters 1 to 841); IND. CODE ANN. § 16-36-7-4 (West, Westlaw with all legis. of 2022 2d Reg. Sess.); TEX. HEALTH & SAFETY CODE ANN. § 166.084(a) (Westlaw).

173. *See In re G.G.*, 224 A.3d 494, 502 (Vt. 2019) (“We disagree with the court’s suggestion that patient lacked capacity merely because he continued to have a mental illness.”); *see also* *Graham v. Fla. Dept. of Child. & Fams.*, 970 So. 2d 438 (Fla. Dist. Ct. App. 2007); *Tex. Health Harris Methodist Hosp. Fort Worth v. Frausto*, No. 05-14-00895-CV, 2015 WL 1941515, at *1 (Tex. Ct. App. Apr. 30, 2015) (refraining from making a decision regarding whether a DNR was validly made by a woman with a long history of mental illness). One may also execute a declaration for mental health treatment as long as he understands the nature and consequences of the proposed treatment and has the ability to make mental health treatment decisions. *E.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 137.001(6) (West, Westlaw through end of 2021 Reg. & Called Sess. of 87th Leg.).

174. *See In re G.G.*, 224 A.3d at 502 (“Although patient has been found incompetent in the past . . . this does not mean that he was incompetent in August 2017, when the advance directive was executed.”).

175. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. §§ 166.032-.033 (Westlaw).

executed document.¹⁷⁶ Similarly for a DNR, a patient may execute a DNR or designate an agent before a period of incompetence.¹⁷⁷ Then, during that period of incompetence, the law allows a physician to rely on the DNR in the person's record or the patient's agent to make decisions on the patient's behalf.¹⁷⁸ This anticipatory drafting allows patients with waves of competence to have their wishes honored even in times of incompetence.

Legislators should apply the above competence requirements and anticipatory drafting to PAS legislation. First, the test for competence under a PAS law should follow the requirements for an advanced directive or a DNR by requiring the adult patient to understand and appreciate the nature and consequences of seeking and accepting a lethal prescription of barbiturates (a standard also called "informed consent").¹⁷⁹ Competence should then only be required and assessed at the time of consent and not at the time of action. Expressed differently, an adult patient's previous consent for PAS may be honored on a date when the patient is not competent (as defined below).¹⁸⁰ This requirement mirrors the above example of advanced directives and DNRs but also follows the anticipatory drafting of states that have legalized PAS for terminal illnesses.¹⁸¹

2. Competence to Choose Imminent Death

For one to consent to PAS is to consent to absolute death. An advanced directive and a DNR do not guarantee a patient's death because a triggering emergency, like a heart attack, may not occur.¹⁸² Therefore, PAS legislation should incorporate more than just the competence requirements demanded by an advanced directive or a DNR.

176. *See, e.g., id.*

177. *Id.* § 166.082(c)–(d) (Westlaw).

178. *Id.*

179. *See* discussion *infra* Section IV.B.2–3 (requiring a person requesting PAS to reason through his decision or to give informed consent); *see also* Player, *supra* note 12, at 139–40 (defining competence as a combination of "(i) the ability to *understand*; (ii) the ability to *appreciate* the significance of medical information; (iii) the ability to *reason*; and (iv) the ability to *communicate* a choice.").

180. *See infra* Section IV.B.2.

181. *See, e.g.,* D.C. CODE ANN. § 7-661.04(b) (West, Westlaw through Dec. 28, 2022) (requiring that if a patient is suffering from a psychiatric or psychological disorder, no covered medication shall be prescribed until the patient receives counseling and is determined to no longer be suffering from the disorder); N.M. STAT. ANN. § 24-7C-4 (West, Westlaw through 2022 2d Reg. Sess. & 3d Spec. Sess. of 55th Leg. (2022)) (stating the individual requesting PAS cannot be determined to have capacity until a mental health professional evaluates the individual); CAL. HEALTH & SAFETY CODE § 443.5(a)(A)(iii) (West, Westlaw with all laws through Ch. 997 of 2022 Reg. Sess.) ("If a mental health specialist assessment referral is made, no aid-in-dying drugs shall be prescribed until the mental health specialist determines that the individual has the capacity to make medical decisions and is not suffering from impaired judgment due to a mental disorder.").

182. *See* NAT'L INST. ON AGING, *supra* note 165.

Specifically, legislatures should adopt the competence requirements for a context in which one consents to absolute death. In America, for example, this is when individuals waive appeals on death row. To waive an appeal on death row, the defendant's waiver must be knowing and intelligent.¹⁸³ But, of the 106 prisoners who waived appeals across the country between 1973 and 2003, 82 had a mental illness.¹⁸⁴ How can one determine whether someone with mental illness is giving knowing and intelligent consent? One must determine whether the defendant "has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation[;] or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises."¹⁸⁵

One particular case demonstrates what these requirements are and how courts have applied these requirements to those with mental illness.¹⁸⁶ In *Rumbaugh v. Proconier*, Charles Rumbaugh was convicted of capital murder and sentenced to death.¹⁸⁷ Though he was entitled to further review, Rumbaugh asked his counsel to take no additional steps to attack his conviction and sentence.¹⁸⁸ Instead, Rumbaugh asked the state trial judge to set his execution without further delay.¹⁸⁹ Rumbaugh's parents filed a motion for stay of execution.¹⁹⁰ The two argued that Charles did not have the mental capacity to waive his right to attack his death sentence.¹⁹¹

At a hearing to determine Charles's mental competence, Charles voluntarily took the stand.¹⁹² He stated that he understood his situation very well and believed his decision to waive his appeal was a logical and rational one.¹⁹³ He was so certain of his choice that he told the court he was going to take matters into his own hands.¹⁹⁴ He said, "If they don't want to take me down there and execute me, I'll make

183. *Gilmore v. Utah*, 429 U.S. 1012, 1013 (1976); *Whitmore v. Arkansas*, 495 U.S. 149, 150 (1990); see also *State v. Motts*, 707 S.E.2d 804, 810 (S.C. 2011); *State v. Bordelon*, 33 So. 3d 842, 856 (La. 2009) (per curiam); *State v. Dodd*, 838 P.2d 86, 97 (Wash. 1992) (en banc).

184. John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939, 962, 989 (2005).

185. *Rees v. Peyton*, 384 U.S. 312, 314 (1966); see also *Motts*, 707 S.E.2d at 809 (adopting a two-step test: first, whether the convicted defendant understands the nature of the proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment; second, whether the convicted defendant possesses sufficient capacity or ability to rationally communicate with counsel).

186. *Rumbaugh v. Proconier*, 753 F.2d 395, 396 (5th Cir. 1985).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 397.

191. *Id.* at 396.

192. *Id.* at 397.

193. *Id.*

194. *Id.*

them shoot me.” Charles then pulled a knife-like weapon from his pocket, advanced on a deputy U.S. Marshal, and was shot.¹⁹⁵ Charles nevertheless survived.¹⁹⁶ Even after this failed suicide attempt, the district court decided Charles was mentally competent to make the decision to forgo further judicial proceedings.¹⁹⁷ Charles’s parents appealed.¹⁹⁸

The 5th Circuit Court of Appeals held that there was sufficient evidence to support the district court’s finding that Charles was competent.¹⁹⁹ Applying the test from the Supreme Court case of *Rees v. Peyton*,²⁰⁰ the 5th Circuit questioned (1) whether Charles was suffering from a mental disease or defect; (2) whether that disease or defect prevented Charles from “understanding his legal position and the options available to him[.]” and (3) whether that disease or defect, if it “does not prevent him from understanding his legal position and the options available to him, nevertheless, prevent[ed] him from making a rational choice among his options.”²⁰¹ In its decision, the court was persuaded by the fact Charles understood that there was no hope of successful treatment for his severe depression at that time.²⁰² He then admitted that had there been, he might have chosen to appeal.²⁰³ So despite attempting to force a deputy U.S. Marshal to end his life at a competency hearing²⁰⁴ and despite having depression²⁰⁵ (and potentially schizophrenia²⁰⁶), Charles’s ability to reason demonstrated his competence to choose death over life.²⁰⁷ Therefore, just because someone desires to die does not mean they are mentally incompetent.²⁰⁸ There may be personal and unique circumstances specific to one individual that make death a more bearable—and therefore a more reasonable—option.

To give those with the desire to end their suffering the ability to consent to PAS, legislators should adopt the above test for determining knowing and intelligent consent. In adopting this test, this Comment argues for some alterations. First, the test should specify whether the individual has a chronic mental illness instead of asking

195. *Id.*

196. *Id.*

197. *Id.* at 397–98.

198. *Id.* at 398.

199. *Id.* at 403.

200. *Rees v. Peyton*, 384 U.S. 312, 314 (1966).

201. *Rumbaugh*, 753 F.2d at 398.

202. *Id.* at 402.

203. *Id.*

204. *Id.* at 397.

205. *Id.* at 490.

206. *Id.* at 405 (Goldberg, J., dissenting).

207. *Id.* at 403.

208. *Id.* (stating that the court could not conclude that a person who “finds his life situation intolerable and who welcomes an end to the life experience” is necessarily legally incompetent to waive an appeal and accept the death sentence).

whether the individual has any mental illness. Next, instead of requiring the individual to understand the legal options of waiving an appeal, the language should more directly apply to a PAS request. Specifically, legislators should adopt the following test: (1) does the individual requesting PAS know he has a mental illness that is chronic; (2) is the individual experiencing symptoms of his mental illness at the time of consent that prevent him from making a rational choice to end his life; and (3) is his decision to end his life well-reasoned.²⁰⁹ If the answer to each question is *yes*, *no*, *yes*, respectively, then that person has shown competence to consent to PAS.

C. Form of Consent

Because one of the concerns of PAS legalization is that vulnerable populations will request PAS due to coercion, legislators in the United States and abroad have drafted safeguards to guarantee that a person's consent to PAS demonstrates his true wishes. Requirements dictate how many requests must be made,²¹⁰ whether those requests must be written or oral,²¹¹ and whether those requests must be informed or voluntary.²¹² This Section describes the PAS requirements already in place in the United States and abroad and warns legislatures to adopt only as many safeguards as absolutely necessary as to not overburden

209. *Id.*

210. See COLO. REV. STAT. ANN. § 25-48-103 (West, Westlaw through 2d Reg. Sess., 73d Gen. Assemb. (2022)); D.C. CODE ANN. §§ 7-661.02 to .03 (West, Westlaw through Dec. 28, 2022); HAW. REV. STAT. ANN. § 327L-2 (West, Westlaw through end of 2022 Reg. Sess.); ME. REV. STAT. ANN. tit. 22, § 2140(4) (West, Westlaw with emergency legis. through Chapter 1 of 2023 1st Reg. Sess. of 131st Leg.); OR. REV. STAT. ANN. § 127.850 (West, Westlaw through laws enacted in 2022 Reg. Sess. of 81st Leg. Assemb.); VT. STAT. ANN. tit. 18, § 5283 (West, Westlaw through Chapters 186 (end) & M-19 (end) of Adjourned Sess. of 2021-2022 Vt. Gen. Assemb. (2022)); WASH. REV. CODE ANN. § 70.245.090 (West, Westlaw with all legis. from 2022 Reg. Sess. of Wash. Leg.).

211. See COLO. REV. STAT. ANN. § 25-48-103 (West, Westlaw through 2d Reg. Sess., 73d Gen. Assemb. (2022)); D.C. CODE ANN. § 7-661.02 to .03 (West, Westlaw through Dec. 28, 2022); HAW. REV. STAT. ANN. § 327L-2 (West, Westlaw through end of 2022 Reg. Sess.); ME. REV. STAT. ANN. tit. 22, § 2140(4) (West, Westlaw with emergency legis. through Chapter 1 of 2023 1st Reg. Sess. of 131st Leg.); OR. REV. STAT. ANN. § 127.850 (West, Westlaw through laws enacted in 2022 Reg. Sess. of 81st Leg. Assemb.); VT. STAT. ANN. tit. 18, § 5283 (West, Westlaw through Chapters 186 (end) & M-19 (end) of Adjourned Sess. of 2021-2022 Vt. Gen. Assemb. (2022)); WASH. REV. CODE ANN. § 70.245.090 (West, Westlaw with all legis. from 2022 Reg. Sess. of Wash. Leg.).

212. See CAL. HEALTH & SAFETY CODE § 443.2 (West, Westlaw with all laws through Ch. 997 of 2022 Reg. Sess.); COLO. REV. STAT. ANN. § 25-48-103 (West, Westlaw through 2d Reg. Sess., 73d Gen. Assemb. (2022)); N.M. STAT. ANN. § 24-7C-3 (West, Westlaw through 2022 2d Reg. Sess. & 3d Spec. Sess. of 55th Leg. (2022)); OR. REV. STAT. ANN. § 127.830 (West, Westlaw through laws enacted in 2022 Reg. Sess. of 81st Leg. Assemb.); VT. STAT. ANN. tit. 18, § 5283 (West, Westlaw through Chapters 186 (end) & M-19 (end) of Adjourned Sess. of 2021-2022 Vt. Gen. Assemb. (2022)); WASH. REV. CODE ANN. § 70.245.020 (West, Westlaw with all legis. from 2022 Reg. Sess. of Wash. Leg.).

those seeking PAS. This Section does not, however, specify which existing PAS requirements should be adopted because the laws are so varied. Instead, this Section encourages each state to choose the requirements that best serve its constituents.

Every U.S. state, and the District of Columbia, that has legalized PAS requires more than one request for a patient to qualify and also requires that a patient wait for periods of time in between each request.²¹³ The requirements for these multiple requests take different forms. One approach adopted by several states requires patients to first make an oral request and a written request.²¹⁴ The written request must be signed and dated by the patient, and attested to by witnesses in the patient's presence.²¹⁵ Then, at least 15 days after making the initial oral request, the patient must reiterate the oral request.²¹⁶ At that time, the physician shall offer the patient an opportunity to rescind the request.²¹⁷ Hawaii has a similar approach, but the two oral requests must be 20 days apart.²¹⁸ Another approach from Maine is to require at least 15 days to elapse between the initial oral request and the date of a written request.²¹⁹ Then, at least 48 hours must elapse

213. See N.Y. DOM. REL. LAW § 13-b (McKinney through L.2022, chapters 1 to 841) (creating a 24-hour waiting period to get married); MICH. COMP. LAWS ANN. § 333.17014 (West, Westlaw through P.A.2023, No. 3, of 2023 Reg. Sess., 102d Leg.) (“A 24-hour waiting period affords a woman, in light of the information provided by the physician or a qualified person assisting the physician, an opportunity to reflect on her decision and to seek counsel of family and friends in making her decision [to receive an abortion].”)

214. See COLO. REV. STAT. ANN. § 25-48-103 (West, Westlaw through 2d Reg. Sess., 73d Gen. Assemb. (2022)); D.C. CODE ANN. § 7-661.02 through .03 (West, Westlaw through Dec. 28, 2022); VT. STAT. ANN. tit. 18, § 5283 (West, Westlaw through Chapters 186 (end) & M-19 (end) of Adjourned Sess. of 2021-2022 Vt. Gen. Assemb. (2022)); WASH. REV. CODE ANN. § 70.245.090 (West, Westlaw with all legis. from 2022 Reg. Sess. of Wash. Leg.).

215. See COLO. REV. STAT. ANN. § 25-48-103 (West, Westlaw through 2d Reg. Sess., 73d Gen. Assemb. (2022)); D.C. CODE ANN. § 7-661.02 through .03 (West, Westlaw through Dec. 28, 2022); VT. STAT. ANN. tit. 18, § 5283 (West, Westlaw through Chapters 186 (end) & M-19 (end) of Adjourned Sess. of 2021-2022 Vt. Gen. Assemb. (2022)); WASH. REV. CODE ANN. § 70.245.090 (West, Westlaw with all legis. from 2022 Reg. Sess. of Wash. Leg.).

216. See COLO. REV. STAT. ANN. § 25-48-103 (West, Westlaw through 2d Reg. Sess., 73d Gen. Assemb. (2022)); D.C. CODE ANN. § 7-661.02 through .03 (West, Westlaw through Dec. 28, 2022); VT. STAT. ANN. tit. 18, § 5283 (West, Westlaw through Chapters 186 (end) & M-19 (end) of Adjourned Sess. of 2021-2022 Vt. Gen. Assemb. (2022)); WASH. REV. CODE ANN. § 70.245.090 (West, Westlaw with all legis. from 2022 Reg. Sess. of Wash. Leg.).

217. See WASH. REV. CODE ANN. § 70.245.090 (West, Westlaw through 2022 Reg. Sess. Wash. Leg.); VT. STAT. ANN. tit. 18, § 5283 (West, Westlaw through Acts 77 through 81 Reg. Sess. 2021-2022 Vt. Gen. Assemb. (2022)).

218. HAW. REV. STAT. ANN. § 327L-2 (West, Westlaw through end of 2022 Reg. Sess.).

219. ME. REV. STAT. ANN. tit. 22, § 2140(4) (West, Westlaw with emergency legis. through Chapter 1 of 2023 1st Reg. Sess. of 131st Leg.).

between the written request and the doctor's prescription.²²⁰ Alternatively, Oregon requires that no less than 15 days shall pass between an initial oral request and the doctor's prescription.²²¹ If the request is written, the waiting period is 48 hours.²²² States also require that the request for PAS be informed,²²³ voluntary,²²⁴ or made without undue influence²²⁵ or coercion.²²⁶ To be informed, the physician must inform the patient of his medical diagnosis and prognosis, the risks associated with taking the medication to be prescribed, and any feasible alternatives to PAS.²²⁷

International jurisdictions have similar requirements. In Belgium, the request must be voluntary, well-considered and repeated, and not the result of any external pressure.²²⁸ In Canada, the request need only be voluntary.²²⁹ In the Netherlands, a patient can consent to PAS only if he voluntarily and carefully considers his request for PAS.²³⁰ In Luxembourg, the request must be voluntary and not the result of external pressure.²³¹ The patient must also make the request thought-

220. *Id.*; N.M. STAT. ANN. § 24-7C-3 (West, Westlaw through 2022 2d Reg. Sess. & 3d Spec. Sess. of 55th Leg. (2022)).

221. OR. REV. STAT. ANN. § 127.850 (West, Westlaw through laws enacted in 2022 Reg. Sess. of 81st Leg. Assemb.).

222. *Id.*

223. N.M. STAT. ANN. § 24-7C-3 (West, Westlaw through 2022 2d Reg. Sess. & 3d Spec. Sess. of 55th Leg. (2022)); OR. REV. STAT. ANN. § 127.830 (West, Westlaw through laws enacted in 2022 Reg. Sess. of 81st Leg. Assemb.); VT. STAT. ANN. tit. 18, § 5283 (West, Westlaw through Chapters 186 (end) & M-19 (end) of Adjourned Sess. of 2021-2022 Vt. Gen. Assemb. (2022)); WASH. REV. CODE ANN. § 70.245.090 (West, Westlaw with all legis. from 2022 Reg. Sess. of Wash. Leg.).

224. CAL. HEALTH & SAFETY CODE § 443.2 (West, Westlaw with all laws through Ch. 997 of 2022 Reg. Sess.); COLO. REV. STAT. ANN. § 25-48-103 (West, Westlaw through 2d Reg. Sess., 73d Gen. Assemb. (2022)); N.M. STAT. ANN. § 24-7C-3 (West, Westlaw through 2022 2d Reg. Sess. & 3d Spec. Sess. of 55th Leg. (2022)); VT. STAT. ANN. tit. 18, § 5283 (West, Westlaw through Chapters 186 (end) & M-19 (end) of Adjourned Sess. of 2021-2022 Vt. Gen. Assemb. (2022)).

225. N.M. STAT. ANN. § 24-7C-3 (West, Westlaw through 2022 2d Reg. Sess. & 3d Spec. Sess. of 55th Leg. (2022)).

226. COLO. REV. STAT. ANN. § 25-48-103 (West, Westlaw through 2d Reg. Sess., 73d Gen. Assemb. (2022)); N.M. STAT. ANN. § 24-7C-3 (West, Westlaw through 2022 2d Reg. Sess. & 3d Spec. Sess. of 55th Leg. (2022)).

227. ME. REV. STAT. ANN. tit. 22, § 2140(4) (West, Westlaw with emergency legis. through Chapter 1 of 2023 1st Reg. Sess. of 131st Leg.); OR. REV. STAT. ANN. § 127.815 (West, Westlaw through laws enacted in 2022 Reg. Sess. of 81st Leg. Assemb.); VT. STAT. ANN. tit. 18, § 5283 (West, Westlaw through Chapters 186 (end) & M-19 (end) of Adjourned Sess. of 2021-2022 Vt. Gen. Assemb. (2022)); WASH. REV. CODE ANN. § 70.245.040 (West, Westlaw with all legis. from 2022 Reg. Sess. of Wash. Leg.).

228. *The Belgian Act on Euthanasia of May, 28th 2002*, 10 EUR. J. OF HEALTH L. 329, 329 (2003); *see also Legislation*, Euthanasia: FPS Public Health, *supra* note 71.

229. An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying), S.C. 2016, c 3 (Can.).

230. OVERHEID WETTENBANK [GOVERNMENT LAW BANK], *supra* note 139.

231. Loi du 16 Mars 2009 sur L'euthanasie et L'assistance au Suicide, art. 2 (Neth.), [Law of March 16, 2009 on Euthanasia and Assisted Suicide, art. 2], <https://legilux.public.lu/eli/etat/leg/loi/2009/03/16/n2/jo> [<https://perma.cc/C9AN-54DV>].

fully and repeatedly.²³² In Switzerland, the Federal Supreme Court may require the person wishing to die to know what he is doing, to not act on impulse, to have a persistent wish to die, to not be under the influence of a third party, and to perform the suicide by his own hand.²³³

For those states that have yet to legalize PAS because they worry about the legitimacy of a PAS request,²³⁴ legislators can draft versions of the above safeguards in their own PAS laws. Specifically, legislators can require that a request be repeated, informed, and made voluntarily without undue influence or coercion. However, such restrictions have unduly delayed some patients who attempted to use PAS in the United States.²³⁵ To avoid this, lawmakers should only adopt the minimum safeguards necessary to protect their citizens' interests. This way, the purpose of PAS legislation is not frustrated when individuals are forced to once again resort to more readily available means like firearm, suffocation, and poisoning.²³⁶

By adopting the above minimum requirements, legislators create a safety valve in the law that only allows those who truly want to end their suffering access to death through PAS. This safety valve resolves some of the concerns raised by critics of PAS. Specifically, by requiring repeated requests for PAS, individuals acting impulsively or under coercion will not have immediate access to PAS, which may protect them from ever gaining access. The requirement for a repeated request thus protects vulnerable groups from coercion and preserves human life. Legislators should therefore be encouraged that with intentional and anticipatory drafting, they can include provisions beyond these minimum requirements that resolve other PAS concerns, too. For instance, legislators can consider provisions that provide bodily autonomy while still protecting the doctor's role as healer and the integrity of the medical profession. State legislators will also have the opportunity when drafting PAS provisions beyond these minimum re-

232. SERVICE PUBLIC FÉDÉRAL, SANTÉ PUBLIQUE, SÉCURITÉ DE LA CHAÎNE ALIMENTAIRE ET ENVIRONNEMENT [FEDERAL PUBLIC SERVICE, HEALTH, FOOD CHAIN SAFETY AND ENVIRONMENT], *supra* note 71.

233. EXIT, *supra* note 150. For a new method of physician-less suicide in Switzerland, see Christine Hauser, *A 3-D Printed Pod Inflames the Assisted Suicide Debate*, N.Y. TIMES (Dec. 16, 2021), <https://www.nytimes.com/2021/12/16/world/europe/suicide-pods-switzerland.html> [<https://perma.cc/UZA6-C4B9>] (describing how the pod causes the person sitting inside to die by filling with nitrogen thereby replacing the oxygen inside).

234. See *Washington v. Glucksberg*, 521 U.S. 702, 731–32 (1997); see also COMM. ON HEALTH & HUM. SERVS., *supra* note 46, at 35, 109, 130, 146.

235. See Miller, *supra* note 1 (criticizing the state's "'completely meaningless' waiting periods and multiple in-person requests" by saying, "If anyone wants to suggest that I, or anyone else who's gotten to this state, hasn't thought long and deeply about this, and if they've made the request, hasn't done it with information, or at the end of the day, conviction—they're crazy"); see also Van Zandt, *supra* note 1 (using PAS in battle with Lou Gehrig's disease but delayed by numerous PAS restrictions).

236. NAT'L INST. OF MENTAL HEALTH, *supra* note 132.

quirements to consider the moral teachings of those they represent, whether further studies prove or disprove that PAS increases general suicide rates, and whether legalization of PAS will one day lead to the use of euthanasia. No matter the additional provisions, state legislators who legalize PAS and who adopt the above minimum requirements will provide those constituents with chronic mental illness access to peace through a means that protects bodily autonomy and follows legal precedent regarding competence and consent.

V. CONCLUSION

PAS is the intentional killing of oneself using the medical means or medical knowledge provided by a physician.²³⁷ PAS is not provided for at the federal level in the United States, but nine states and the District of Columbia have legalized it for patients with terminal illnesses.²³⁸ This Comment advocates that all fifty states should legalize PAS and include access to those with chronic mental illness.

The argument for legalizing PAS revolves around bodily autonomy.²³⁹ Specifically, Americans value the right to make choices for their bodies regarding healthcare. To make these choices, Americans rely on doctors. But while PAS is illegal, patients desiring to end their suffering are separated from the support of their doctors. Consequently, terminal patients must resort to other means, such as refusing food and water, to cause their own death.²⁴⁰ Such means are painful for the patients and their families.²⁴¹

Bodily autonomy for those with mental illness is also important. People with mental illness, not just physical illness, contemplate death as a means for ending their suffering.²⁴² Symptoms of chronic mental illness affect one's quality of life to a point where some find the symptoms unbearable.²⁴³ The legalization of PAS should therefore extend to individuals with chronic mental illness—an inclusion already legalized in four European countries²⁴⁴—so that those with unbearable

237. See, e.g., *Suicide*, BLACK'S LAW DICTIONARY (11th ed. 2019).

238. DEATH WITH DIGNITY, *supra* note 30.

239. See, e.g., COMM. ON HEALTH & HUM. SERVS., *supra* note 46, at 2.

240. Brody, *supra* note 67; see also Burns, *supra* note 67 (detailing the death of Mr. Nicklinson who developed locked-in syndrome, an incurable condition in which a patient loses all motor functions but remains awake and aware with all cognitive abilities, by the refusal of food after a panel of High Court judges rejected his request for help in ending his life).

241. Brody, *supra* note 67; see also Burns, *supra* note 67.

242. See Seupel, *supra* note 40 (“‘What people experience before attempting suicide is a combination of panic, agitation and franticness,’ he said. ‘A desire to escape from unbearable pain and feeling trapped.’”).

243. See *supra* Part III.

244. OVERHEID WETTENBANK [GOVERNMENT LAW BANK], *supra* note 139; GOVERNMENT OF THE NETHERLANDS, *supra* note 71; LE GOUVERNEMENT DU GRAND-DUCHÉ DE LUXEMBOURG [THE GOVERNMENT OF THE GRAND DUCHY OF LUXEMBOURG], *supra* note 71; SERVICE PUBLIC FÉDÉRAL, SANTÉ PUBLIQUE, SÉCURITÉ DE

symptoms may choose to end their suffering humanely. Otherwise, these individuals are also left resorting to other less guaranteed or inhumane methods of suicide like firearm, suffocation, or poisoning.²⁴⁵

To legalize PAS with an inclusion for individuals with chronic mental illness, three questions must be answered: (1) what kinds of mental illnesses qualify; (2) how can someone with mind-altering symptoms consent to death; and (3) in what form should consent be offered. The answers to these questions are as follows. First, PAS should be available to those with chronic mental illness who have exhausted all other mental health treatment options but find themselves still experiencing intolerable and unbearable symptoms. Second, to determine competence (i.e., whether the consent to PAS is knowing and intelligent), the individuals must show that (i) they know they have a mental illness and that this condition is chronic; (ii) they are not experiencing symptoms of their mental illness at the time of consent that prevent them from making a rational choice to end their life; and (iii) their decision to end their life is well-reasoned. Third, states may consider having a reasonable set of safeguards that restrict consent to only that which is repeated, informed, voluntary, and made without undue influence or coercion. By legalizing PAS and adopting these minimum requirements, state legislators can provide individuals with a terminal illness *or* a mental illness a more humane method to end their suffering.

LA CHAÎNE ALIMENTAIRE ET ENVIRONNEMENT [FEDERAL PUBLIC SERVICE, HEALTH, FOOD CHAIN SAFETY AND ENVIRONMENT], *supra* note 71; Schwarzenegger, *supra* note 71.

245. NAT'L INST. OF MENTAL HEALTH, *supra* note 132.

