Assisted Suicide: An Interest Not A Right.

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ASSISTED SUICIDE: AN INTEREST NOT A RIGHT.

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Introduction:

When I took Biomedical Ethics in the spring semester of my junior year it became evident to me that there were many modern medical procedures that had deep moral and political implications. Narrowing my focus down to assisted suicide rights was not easy, but I ultimately chose it because of the amount of court decisions and philosophical literature both old and new on suicide. Many people experience the difficulties associated with end of life decisions when either they themselves or a loved one face the final days of their lives. Given modern technologies that allow life to be maintained for longer and longer periods of time, decisions about how and when people choose to die will affect almost everyone.

By physician assisted suicide I am referring to a procedure where a patient may request assistance in killing him or herself from a licensed physician. The Doctor then prescribes a lethal dose of drugs that the patient may take on their own when they choose. Physician assisted suicide does not involve the physician actively killing the patient; the patient must take the lethal dose of medication themselves.

I approached this work from two perspectives, both legal and philosophical, to try and reach an understanding on what type of situations suicide assistance would be acceptable. The work is broken down into five chapters with the first two laying a background for my argument and the second three articulating my critique on assisted suicide rights.

Chapter one examines the philosophical background into suicide. I only examine suicide because the philosophers in my study did not even contemplate assistance. I look at five different philosophers, Thomas Hobbes, John Locke, David Hume, John Donne, and Immanuel Kant. The purpose of the first chapter is to look at criticisms and defenses of suicide from the
perspective of human intuitions. If we value self-preservation above all else then we have reason not to commit suicide. However, the question of why we value self-preservation is not as clear.

Thomas Hobbes argues a position that a person valuing their own survival above all else is irrational if they choose to commit suicide, but his reasoning for why we choose self-preservation seems to be Biblically derived. John Locke directly states that people do not own their lives, they belong to God and therefore suicide is wrong in the same sense as stealing. I then contrast these two viewpoints with the views of David Hume and John Donne philosophers who believed that there was no way of justifying laws against suicide because of man’s inability to understand the motives. Immanuel Kant provides an interesting additional perspective because of the way he opposes suicide even though he promotes autonomous decision-making.

Chapter two examines the U.S. Supreme Court case history that has developed our understanding of medical procedures protected under the right to privacy. I examine the right to refuse life-sustaining treatment as explained by the case of *Cruzan v. Missouri*, 497 U.S. 261 (1990), and compare the ruling of that case with the development in the case of *Washington v. Glucksberg*, 521 U.S. 702 (1997), where the court actually ruled on assisted suicide. I conclude the section with a look at the cases of *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), where the court lays out criteria for the right to privacy as developed through the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments. The second chapter lays out the arguments for a right to receive suicide assistance and shows how the court rejected that right.

Chapter 3 is where my arguments begin to take shape. I argue that the concept of a right to receive suicide assistance under a general right to privacy is far too broad. The Philosopher’s Brief argues that assisted suicide should be protected under a general right to make deeply
personal and intimate decisions. That reasoning is actually mistaken because it fails to separate the circumstances that necessitate protection from those that do not. The right to make deeply intimate medical decisions is far too broad and inclusive of a concept. It fails to meet Constitutional, moral, and pragmatic criteria that I argue are necessary for right-hood.

In chapter four I begin to narrow the specific area of suicide assistance that might need protection. Many cases where there is concern over doctors assisting in suicide or even euthanazing their patients they focus on the removal of life sustaining treatment. The concern arises out of the fact that many patients are unconscious or comatose at the time treatment is removed. The consent of the patient is often questioned unless there is an explicit directive. I argue that these patients in irreversible comas are in all actuality dead. Considering the aspects of life that are valuable to individuals a new definition of death, one that acknowledges what we value about being human, should be accepted. This chapter helps to narrow what area assisted suicide applies to and helps gain an understanding of what about life we truly value.

Chapter five concludes with a much narrower conception of the right to receive suicide assistance. It recognizes that people may have the right to receive suicide assistance in certain circumstances. I argue that those circumstances are best protected by a state-created liberty interest. A liberty interest does not force the state to permit suicide assistance in all cases, and it provides the patient with stronger claims to receive medical assistance in the form of life ending drugs.

I have provided a background and argument that demonstrates how broad rights are not always the best for of protection for certain medical interests. I instead provide an alternative solution where states do not feel curtailed in their options to govern themselves, and patients still maintain some power of autonomy on the particular subject. Understanding that decisions made
in the end of life are deeply personal makes it difficult to pass judgment on who should and
should not receive suicide assistance. Throughout this work I never say that any particular
situation should or should not be acceptable. Instead, I contend that once we have established a
system that protects the right to suicide assistance in a very narrow fashion, that the decisions
should then be made on a case-by-case basis taking into account the circumstances and
consequences of each individual decision.
Chapter 1: Suicide and Philosophy

In order to gain a full understanding of how we discuss and conceive the right to die it is imperative that I examine the concept of a right. What I am looking at is the idea of an absolute rule. Is there a point where philosophers can find agreement that suicide is permissible or impermissible? Since the current argument is couched in modern liberal terms, I examine the meaning of a right as it can be applied to suicide from the perspective of classical liberalism. I begin my examination with Thomas Hobbes, and John Locke who, among other things, are considered the founders of modern liberal theory. Much liberal theory focuses on personal ownership and autonomy in decision making, however, Locke and Hobbes, are quite averse to the concept of permitting suicide. They focus on the idea of valuing one's own life, the most valuable interest is in the preservation of the self. David Hume, the third theorist, argues that a value in self-preservation, the initial assumption, is in and of itself flawed. He takes a less Biblically oriented stance towards the value of human life and concludes that suicide is not an immoral or sinful act. John Donne, more of a poet than a theorist, makes a similar argument in Biathanatos. He demonstrates that even during the 16-1700’s there were two sides to the question of suicide. Donne is most valuable for the language that he utilizes to describe reasons for committing suicide. He does not use rights claims, but rather claims about motivations. I examine Immanuel Kant last and while one might expect Kant, a founder of the concept of autonomy, to agree with the personal choice inherent in suicide, he instead fears the idea. No matter his best efforts to derive a reasoned argument, he still returns to a Biblical basis for preservation of the self. The unique fear that Kant has towards suicide stems from his
appreciation of the stoics, combined with his inability to mesh their acceptance of suicide with his own theories.

Many modern political arguments about the right to die rely on two things, the concept of right and patient autonomy in making decisions. Examining classical thoughts on suicide gives not only a sense of rights and autonomy, but also what will be very useful later on is an historical understanding of how suicide was viewed by scholars. The problem is that in modern arguments too many assumptions are made on both sides without a proper understanding of terminology; whether it is asserting rights claims for mere desires, or arguing that there is no historical support for a right to die. I wish to be clear from the start that the classical philosophical examinations that I am conducting here deal with suicide directly, not with assisted suicide. At the time much of my source material was written medical dilemmas like the ones we experience in our modern world are the result of technical advantages that the philosophers could never have imagined.

The term “right to die” is often written in quotations denoting an uncertainty behind the truth of the claim (Kass, 202). I want to examine exactly what the term means first before examining the classical liberal understandings of rights in relation to suicide. The definition of right to die as stated by it proponents is:

People have the right, as autonomous moral agents, to decide in certain circumstances that their quality of life is so diminished that continued existence is humanly pointless and may therefore be ended by themselves (Charlesworth, 33).

Charlesworth is expressing the right in its most specific sense. None of the classical liberal arguments examine this topic precisely, but there is enough discussion of suicide, and self-interest that conclusions can be drawn about assisted suicide. As a result, it is important that I examine these initial foundations of rights and suicide before advancing my own argument. Connections can be drawn between these classical liberals and modern court rulings that help to
explain the reasons for certain rulings and the historical basis for society reaching this discussion.

Kant utilizes similar language to that which is used in the definition of right to die. He does not speak in rights terms. Instead, he discusses suicide directly in terms of means vs. ends. Arguments involving the definition of a right to die focus at least partially on the autonomy of the patient. Kant outlines the idea of autonomy and rational choice, he values these ideas deeply, and it is important to take into consideration why he values autonomy and still argues against suicide.

The goal of suicide assistance is to provide people with a means of controlling the conditions and circumstances of their death. It is stated in terms of a right so that the government will have no say in the outlawing of doctor patient decisions about death. The autonomy discussed above is more in terms of the ability to freely choose to prevent pain more so than simply a right to be autonomous in medical decision-making. By examining the historical contexts first, paying close attention to the classical understandings of liberalism, and looking for some type of standard or rule that can be applicable to moral judgments of suicide I can utilize this as a basis for understanding assistance later on.

There is one term I wish to clarify now before approaching the bulk of my analysis of the philosophers; the term is “sanctity of life.” When utilized in popular rhetoric it often fails to capture the depth of the discussion in both suicide and abortion (Kass, 233). Pope John Paul II articulates a definition of the sanctity of life in his Encyclical Letter dated August 16, 1993. An unborn child has the rights of a person, “among which in the first place is the inviolable right of every innocent being to life” (Paul in Steinbock et. al., 463).” While the Pope is referencing abortion, the concept of sanctity of life is one where the argument in favor of some type of
sacred life is derived from a God given gift. I will not utilize his terminology for two reasons: one, it is too general, it can apply to all forms of life those that are not even human depending on the definition of the term. Second, the term has inherent religious connotations, and I wish to derive explanations in favor or opposed to assisted suicide through reason rather than religious claims. The goal of the philosophers that I examine is to utilize reason as well, but they seem to slip back to Biblical references when reasons don’t suit their theories. They utilize the term self-preservation and claim that we have a general interest in self-preservation. The term itself is not moral and does not have religious connotations, but the answer to why we choose to preserve the self may have a deeper religious meaning.

Hobbes and Locke view the concept of rights as preserving the self and the people. Thomas Hobbes claims that it is the nature of man to use his power for the preservation of himself. He argues that the Law of Nature is a general rule that prevents men from doing anything that contributes to their own demise (Hobbes, 189). The law of nature is a liberty that all men have to exercise within their own use of reason. Liberty is the absence of external impediments that would stop a man from acting as he chooses. Liberty has one restriction and that is a man exercising his own judgment must be able to continue that exercise. Hobbes claims that liberties “cannot hinder him from using the power left him (Hobbes, 189).” It is then permissible for one to pursue freedom to the extent that it preserves the self.

Rights are ever present in a state of nature and they can be exchanged with other individuals and the sovereigns through the use of contracts. This might lead one to believe that there would be a right to die within these rights that Hobbes mentions. We can deduce, however, that there is most definitely no right to death because of the rights that Hobbes specifically says
won’t be exchanged, and in all actuality can’t be exchanged. First, the exchange must be voluntary and second it must intend to do some good to the individual.

And therefore there be some Rights, which no man can be understood by any words, or other signes, to have abandoned, or transferred. As first a man cannot lay down the right of resisting them, that assault him by force, to take away his life; because he cannot be understood to ayme thereby, at any Good to himselfe (Hobbes, 192).

The argument above specifically claims that the rights that cannot be abandoned through reason are those rights that allow persons to preserve themselves. But, Hobbes does utilize the term “good” in reference to what a person does for him or herself. How is Hobbes then related to modern rights?

Modern interpretations of rights turn on the idea of good for the populous. If we are to think in a utilitarian sense it might do a person more good to die rather than live through pain and die. It has to be taken into account though that Hobbes is not thinking of good in the same sense. He is writing during a time period where no one tends to suffer from prolonged life and long painful deaths. A death may be painful but it will most likely be quick. A final point in Hobbes that may rectify him with the modern dilemma is his understanding of how men think rationally.

When Leon Kass cites Hobbes he makes a claim about the blameless liberty. Kass views the real problem as muddling wants and abilities with rights. Just because I can do something doesn’t create a right to do something (Kass, 204). For Hobbes what creates a valuable right is something that does not challenge a man’s desire for self-preservation. That something more is found in a focus on the duty of the government. Hobbes always has the ultimate goal of establishing order through the use of a sovereign. The reason rights are transferred is because man needs to escape the condition of war. Man is interested in liberty and maintaining power over others, but a sovereign takes control because men will not honor contracts thus making life
dangerous (Hobbes, 223). The ultimate goal should be to preserve one’s self, and Hobbes comments indirectly on suicide just a few lines down from his claim that rights are exchanged to do good:

And therefore if a man by words, or other signes, seem to despoyle himselfe of the End, for which those signes were intended; he is not to be understood as if he meant it, or that it was his will; but that he was ignorant of how such words and actions were to be interpreted (Hobbes, 192).

At the least a person claiming a right to suicide is mistaken, and at the worst they are completely ignorant of what words mean. Hobbes’ argument stems from a fundamental principle that the main interest of man is self-preservation. He argues a rights claim that causing self-injury is irrational, and that the sole reason a sovereign exists is to provide this order that an interest in self-preservation needs. In turn it would make no sense to claim a right to self-termination from the sovereign. In Hobbes’ view we are perfectly capable of killing ourselves on our own without the permission or right of the sovereign. A driving factor for installing, and obeying the sovereign is derived from a realization that one is “worse off” in the state of nature. Being worse off is not just to exist in a disadvantaged state, but also contains the threat of death (Neal, 647). The threat is of no value when a person does not fear it. Hobbes’ entire theory relies on the belief that valuing your own life will always take priority. Hobbes articulates a solution to the state of nature is derived through the sovereign.

However, he faces a problem with installing the sovereign. To make the first step an individual must expose himself as prey to the others in the state of nature (Neal, 682). If an individual does fear death, installing a sovereign requires someone to place him or herself in a position where death is very plausible. Ultimately everyone must agree to submit to the
sovereign at the same time thus avoiding the threat of death. He ascribes to the golden rule as a method of solving this dilemma.

This is the law of the Gospel; whatsoever you require that others should do to you, that do ye to them. And that law of all men...(Hobbes, 190).

Hobbes’ answer to the dilemma provides some evidence as to where he derives the notion of self-preservation as a basic interest. It is important to derive from the golden rule is that it refers directly to the Bible. His desire to derive solution from rational thought experiments fails at this very point. Hobbes is strengthening his claim with explicit references to the Christian belief that you do unto others, as you would have them do unto you. He uses the claim as an argument. There is nothing more used to substantiate the claim other than the fact that it was derived from the Bible. If we were to carry the reasoning over to certain inherent assumptions within Hobbes the possibility exists that self-preservation is derived from the same beliefs. In accepting Judeo-Christian beliefs the idea that we are not owners of our own bodies is accepted, thus making it impossible to justify suicide. This reliance on Judeo-Christian beliefs does not require that we dismiss Hobbes’ claims on their face, but it should be acknowledged because many of the arguments in favor of allowing suicide are articulated while critiquing these basic assumptions.

There is a similar adherence to Judeo-Christian beliefs inherent in the arguments of John Locke. In his discussion on Slavery he directly addresses the issue of ownership of our bodies. In other texts specifically his discussions on property and parents, it appears that Locke is endorsing a belief in self-ownership. But Locke really tries to draw the line on what self-ownership can and can’t be used for; you may own property, but your body is not a property that may be possessed.
John Locke’s opposition to suicide is more evident than that of other philosophers because of the way he discusses slavery. In the Second Treatise of Government Locke directly addresses the question of man’s control over himself.

For a man, not having the power of his own life, cannot, by compact, or his own consent, enslave himself to any one, nor put himself under the absolute, arbitrary power of another, to take away his life, when he pleases. No body can give more power than he has himself; and he that cannot take his own life, cannot give another power over it (Locke in Morgan et. al., 747).

In this quote Locke clearly remarks on suicide claiming that no man can take his own life, but he also appears to make an argument that fits very closely with arguments about physician assisted suicide. If no person has possession over his or her body, the human body is clearly not the property of an individual, they have no ability to hand their life over to others. No amount of consent can allow a doctor to assist his patient in committing suicide because the patient in this case does not possess the ability to give consent. A person is not at liberty to kill him or herself if they do not posses control over their own bodies. It would follow that if they do not have the liberty then they do not have the right to commit suicide or request others to help them end their own lives.

Locke derives the ban on suicide directly from his claims about God and the influence God has over man. Locke is very straightforward about this claim. Locke states early in section II of his Treatise that while man may be in the state of liberty he does not possess license to dispose of his own life.

For men being all the workmanship of one omnipotent and infinitely wise Maker; all the servants of one sovereign master, sent into the world by his order, and about his business; they are his property, whose workmanship they are, made to last during his, not another’s pleasure (Locke in Morgan et. al., 742).
Locke’s prohibition on suicide is a direct result of our coming from God (Windstrup, 169). Utilizing the same techniques that grant man property God has gained dominion over us. God has created man; it says so in the Bible, and for Locke that is sufficient to provide evidence for his argument.

Suicide as a taboo provides the same value for Locke that it did for Hobbes. With Locke we aren’t self-interested so much as we need a reason to feel obligated to our fellow man. We have a duty to our fellow man that is destroyed when suicide is permissible (Windstrup, 170). Locke points to nature citing the concept of preservation of the species that is seen within all species. Care for children is a good example; while it may at times appear as if a parent is risking self-destruction, it is for a higher good of preserving the species. Parents have a duty to provide for children during the important stage of childhood (Locke in Morgan et. al., 757).

The first argument, the one that Locke endorses, claims that God possesses the existence and life of man. Locke makes this ownership quite evident in his discussion of paternal power. While we all may exist in a state where men are equal by their design, all beings are not equal. God is always standing in a position of ownership of humans.

Locke does not protect himself from the criticism that his concept of self-ownership is bound up with Judeo-Christian beliefs. The only owner of humans is God. God used his labor to create us, “And God said, let us make man in our image, after our likeness...” so he possesses us like we can possess land (Genesis 1:26). He is therefore the only one justified in destroying us.

While the Lockean argument may appear to go against certain claims that he makes about property ownership. Specifically how man gains property:

Thus this law of reason makes the deer that Indian’s who hath killed it; it is allowed to be his goods, who hath bestowed his labor upon it, though before it was the common right of every one (Locke in Morgan et. al., 749).
The question then remains why does man not own his own life if he owns property, a derivative of his or her labor. By pointing out that God owns us through his labor Locke obfuscates the ultimate claim to self-ownership. It is not irrational to commit suicide, but rather something akin to stealing. God owns you so he can do with you as he pleases, but you do not enjoy the same privileges.

David Hume argues a different position entirely. He did not need to rely on our conception of God as creator because he was not looking for a reason to preserve the self. He disputes the reliance on religion, throwing away common conceptions and drawing very different conclusions than both Hobbes and Locke. Hume ignores Locke’s labor theory and challenges all Judeo-Christian beliefs inherent in political discourse (Shrader-Freschette, 202). God does not own people, and if he does, Hume argues, He does a poor job of caring for what He does own.

In Hume’s fours dissertations he challenges Religion directly. “The belief of invisible, intelligent power has been generally diffused over the human race, in all places and in all ages... (Hume, Dissertation 1 B).” He wants to point out the inconsistencies in this diffusion. There have been many exceptions to the ideas on natural law, and the ideas themselves lack a certain uniformity. So when claims are made about suicide as a sin, those claims need to be put into perspective. If religious law is not uniform in its reason, then perhaps suicide is not a sin.

Hume proposes that misfortunes, particularly those of health, rob a person of the enjoyment of life, and suicide is a reasonable and welcome alternative (Uhlmann, 35). Hume addresses two particular arguments posed by the Christian religion that are against suicide. First, suicide disturbs the office of divine providence, and thereby disturbs the order of the universe. Second, Hume addresses a deeper argument about the natural order of the universe, and the disruption caused by suicide. He answers these questions very simply, but to get at an
understanding of whether he would support a right or not I need to examine his philosophy in regards to morality and the enlightenment.

Hume first addresses the claim that suicide disrupts the ownership that God holds over us. He argues that this claim places humans in the position of property of God. We attribute floods, disease, fire, and natural disaster to the hand of God. If God is careless with his property and watches it become destroyed on a daily basis, why then can we not claim that God is the source of suicide? Suicide is just another method that God possesses for eliminating people from the population (Uhlmann, 35). We are not bound as humans to protect ourselves from the risk of injury, yet direct injury is somehow offensive to morals.

Hume takes his argument a step further and addresses the second claim. If we believe that there is a God-given natural order to the world, then it follows that to disrupt the natural order is wrong (Uhlmann, 35). We often times do not find fault in disturbing the natural order of the environmental world, so “what then is the crime of turning a few ounces of blood from their natural channel (Hume, #5)?” Many suicides are not direct rejections of God; rather they are born of the desire to eliminate pain. He argues that the desire to eliminate pain is not a sin, but may actually benefit society when the person is no longer of value the body politic (Uhlmann, 36). One might say that diverting a river is not the same as the death of a person. Hume however, gives no more merit to the life of a man that that of an oyster. Animals and humans are subject to the same laws of God. We should not apply more value to one than the other (Hume, #4). From Hume’s position there is no crime in killing a human because the body is certainly of little value.

The view that human life is no more valuable than an oyster is part of Hume’s critique of traditional Christian values. Hobbes and Locke both assume that man is superior in some way
and that his or her life is to be valued and preserved. They do so by drawing ultimately on biblical references when their reliance on reason fails to achieve the ends they desire. But Hume really argues that if we look at the world man is tossed about in the process the same way as all other creatures.

Since therefore the lives of men are for ever dependent on the general laws of matter and motion, is a man's disposing of his life criminal, because in every case it is criminal to encroach upon these laws, or disturb their operation (Hume, #4)?

There exist far too many instances where encroaching upon the laws of nature is championed. If one were to avoid death they would effectively change the laws of nature in the same way. Why is avoiding death not just as abhorrent to the senses of natural motions as actually bringing death about?

The two claims that Hume disputes are not claims to rights, but rather claims about immortality and sin. Hume argues that suicide is not a sin, but he does not really speak of it in terms of a right. His framework, even though it does not make explicit rights claims, can be viewed as supportive of the modern rights debate. In order to determine the way in which his framework would support a rights claim we need to examine how Hume is viewing suicide in his time period. He does not discuss rights because most of the laws from his time period are based around the idea that they are divinely oriented. The time period from which Hume is writing must be evaluated based on the relation of God to the people. It would follow that in a society where discussion is based around religion the arguments would be inherently religious in nature or at least the language would discuss terms like sin rather than rights. Finally, the general philosophy of Hume would tend to imply a belief in dying as a right.

He is arguing against a conception of sin, which is treated as a violation of law, and against the king as the representative of God. The king hands down law based on claim to
divinity. His punishment is incredibly harsh because crimes are sins, more than just legal violations. A crime represents a direct affront to God’s law. The arguments that Hume makes regard sins and morality. If the King is a religious icon one might be inclined, or certainly capable of discussing what we consider in terms of their position as sins. Examples of this discussion are legal punishments for suicide. Oftentimes people were punished by the legal system because suicide being an affront to God’s ownership of us was a sin.

The time period is one in which the sovereign, by the arguments of Hobbes and Locke, is considered to be a direct representative of God. When an individual commits a crime against the sovereign he is punished for the commission of a sin against God. Damiens, the regicide, was dismembered and burned on a stake because his attempt to kill the king was incredibly heinous. He was attempting to kill a representative of God. The public spectacle and punishment of the body represented the way legal claims were tied closely with the power of God and the commission of sin (Foucault, 51).

Hume is also writing slightly before the time period of the enlightenment, and he is discussing the differences between reason and faith. As Albert Camus points out shortly after the death of Hume comes the French Revolution, a revolution based on the triumph of reason over faith. He claims that the French Revolution articulated, “If God is denied, the King must die (Camus, 114).” So the attempt was to eliminate the position of the sovereign as the hand of God. Hume is an example of this deep rift between reason and faith. His work provides an example of reasoned argument that disagrees with faith.

The final aspect of Hume that would lead me to argue that he favored suicide as a right is his general philosophy. Hume is often considered a relativist (Uhlmann, 32). He argues that there is no rational for distinguishing moral beliefs. There were principles that give rise to
original beliefs, but that all our laws and current beliefs are the result of “those accidents and causes...which direct its operation (Hume, Dissertation 1 B, 1T).” Reason has the goal of discovering truth or false hood however emotional action based disputes cannot be evaluated with reason. “Reason is wholly inactive, and can never be the source of so active a principle as conscience, or a sense of morals (Hume in Morgan et. al., 823).”

So, why would I argue that the framework of Hume’s argument lends itself to rights claims? I would argue a rights claim because while he argues that there is no sin in killing one’s self he also expresses the belief that killing one’s self to alleviate pain has certain positive connotations.

human life may be unhappy, and that my existence, if further prolonged, would become ineligible...for the good which I have already enjoyed, and for the power with which I am endowed of escaping the ill that threatens me (Hume, #5).

Some people have lived happy lives and their continued existence in their degenerating state puts a taint on the memory of their life. Killing one’s self then becomes a morally acceptable action when his or her life reaches a certain stage. Hume’s argument is read to imply that the king has no reasoned argument to prevent suicide on moral grounds, and therefore has no right to punish it. The right of the King being stripped away then returns that power to the individual.

John Donne like David Hume challenges traditional Christian beliefs in his work Biathanatos written in 1644. He does not take the initial assumption, as Locke and Hobbes do, that self-preservation takes priority in life. He asks two important questions: what is sin, and can one sin be more prominent than another? For instance how can we support martyrdom without calling it a sin? Donne provides a perspective from that of a conflicted individual. He did not necessarily write from the position of a disinterested party, in fact, many of his writings
explicitly discuss his own personal desire to die. He had a deep interest in the psychology of individuals, and he utilized examinations into suicide to try and uncover knowledge about the study of human psychology (Roberts, 965).

Donne has a deep Christian devotion so he discusses sin as synonymous with law, the same way Hume discussed it earlier. The most egregious of sins are those that break natural law. He wants to try and balance this idea by pointing out the differences between natural law and divine law. In most political thought breaking natural law is the most heinous of acts and cannot be committed by a rational person (Donne, Part 1, Diss. 1, Section 7). He argues the question of why suicide would be worse than lying or visa versa.

All is obedience or disobedience ...self-homicide is not so intrinsically ill as to ly. Which is also-evident by Cajetan (b) where he affirmes, that I may not to save my life, accuse myself upon the Racke (Donne, Part 1, Diss. 1. Sec. 1).

Donne is referring to Tommaso deVio Gaetani Cajetan a theologian who remarked that a man when being tortured to confess couldn’t save his soul by lying. In other words one may be tortured to confess, by not confessing their death is certain, but they are not permitted the opportunity save themselves through confession because confession would entail lying. This example shows how a martyr commits suicide by actively choosing not to lie thus guaranteeing death. Suicide is still unacceptable, but the concept of lying outweighs the interest in life. Donne argues that suicide occurs as a result of moods rather than choice. In the example a person on the rack is in despair, such despair that they can only relieve it through death (Noon, 378). The emotion is what causes the desire to die not a conscious rational choice.

Donne finds his greatest conflict with the example of a martyr. The law cites God as its source for banning suicide; the sin of killing oneself makes the action illegal. He finds it odd
though that suicide is never explicitly condemned within scripture. There are multiple reasons for suicide and in the end the only judge should be God (Uhlmann, 31).

Yet I think this is not that law of nature which those abhorrers of self-homicide complain to be violated by that act. For so they might as well accuse all disciplines and austerite, and affectations of martyrdom... (Donne, Part1, Diss. 1, Sec. 8).

Donne is explaining how Christian martyrdom is suicide, yet we do not judge it to be a sin. There are three types of suicide: general, for the glory of God, and to save the lives and souls of others. These distinctions really highlight the way Donne tries to convey suicide as a mood not a choice. In the end the only one suitable for passing judgment is God. “Some things are natural to the species, and other things to the particular person (Donne, Part 1, Diss. 2, Sec. 2).” He refuses to accept the universality of certain natural laws. Donne does this by pointing to the hypocrisy of suicide laws simply asking why do we punish actions we do not fully understand? The moods of a person cannot be judged in the way we judge a choice so we are in no position to judge suicide.

Immanual Kant struggles with suicide in a similar fashion because he views these types of decisions as choices, autonomous choices that need to be explained using rational procedures. In his work the Foundation of the Metaphysics of Morals, Kant considers the question of whether a person may take his own life if he deems it to be pointless. Given modern arguments about the autonomy of the patient to rationally choose to end their own life, one might even expect Kant to applaud this autonomy (Charlesworth, 30). Kant views suicide as an insult to humanity itself. A person who commits suicide goes against all that society finds important, because this makes society nervous there is a tendency to reject the action (Noon, 371). Given Kant’s esteem for ancient Greek and Roman philosophers he faces a dilemma in aligning his beliefs with the Stoics, a group he has great respect for (Seidler, 429).
The question that Kant examines stems from a man contemplating suicide because continued existence would cause him more pain than dying. Kant directs his critique of suicide at those individuals that choose suicide over attempting to face and overcome the obstacles that stand in their way. He refers to suicide attempts as stripping the humanity from the person that makes the attempt. Kant has the utmost distain for these types of suicide, “We look upon a suicide as carrion (Seidler, 441).”

The rule of conduct that permits a person to commit suicide is self-love. Kant argues that self-love does not really justify suicide, because to use suicide it presupposes that the agent continue to exist. Self-love by its nature promotes self-preservation as in Locke and Hobbes. Kant is really relying on the same Christian assumptions that life takes priority. According to Tom Beauchamp Kant argues that when a person chooses to kill him or her self they are treating their life as a means to an end (Uhlmann, 42). The life of a person should always be considered an end in itself because when they are treated as a means they become a thing that can be used. To commit suicide represents a lack of concern for ones own person. For Kant it was a method of avoiding the difficulties of life (Charlesworth, 31). Since Kant does not endorse the concept of suicide as an autonomous action; he would most certainly not endorse it as a right.

Kant spent much of his time looking for a universal moral law. In terms of suicide he wants to be able to declare suicide as immoral and wrong. He wants to make this declaration through the use of an absolute rule, or a rule that cannot be overridden by other considerations (Boyle in Kuhse et. al., 72). The idea that a person treats others as ends not means is one way of outlining an absolute rule, but Kant had a second rule that suicide appears to violate. The Categorical Imperative is a type of absolute rule that argues there are things known as imperfect duties in the world and that they are summed up in short maxims that people would desire to be
universal. We are required to act according to these maxims no matter what the consequences because these are absolute moral laws (Boyle, 74). Suicide would be wrong under the definition of imperfect duties because if we universalized suicide it would mean that anyone could kill him or herself.

Neither the concept of treating a person always as an end, nor imperfect duties are without their criticism. Kant is oftentimes critiqued on his belief that we should never treat a person as a means. Very often in life we find ourselves treating others as means without any visibly ill effect. Ends for Kant are a rational duty, and so he tries to balance his argument by claiming that dying in battle or as a martyr is more acceptable because of the rational duty (Atwell, 434). He appears to subscribe to certain religious foundations even though his theories are derived through reason. The important points to derive from Kant is that even though suicide is an autonomous choice is a choice that goes against all of what society holds dear. For that reason alone he dismisses suicide as a rational choice.

Even the idea of an impartial duty is faulted because it does not relate well to actual situations. To universalize a rule about not lying means that in every situation it is immoral to lie and does not take into account situations where lying might fulfill a separate good. “Cases arise in which it is unclear whether a given act is or is not an act of the prohibitive kind…(Boyle in Kuhse et. al., 77).” So Kant is faulted for deriving a universalizable law that does not take into account possible consequences of an act in all situations. In regards to suicide Kant is laying the claim that it is always wrong, however there may be times, like Donne’s un-relievable depression, when suicide is actually a necessary choice.

These classical debates over suicide do not really answer the question of suicide morality one way or another. At best they demonstrates how difficult a concept it is for the living, who
enjoy their lives, to contemplate such an action. Given the wide range of philosophical arguments about suicide one would expect that assisted suicide would have a similar debate, and in fact it does. In the next chapter I examine the modern debate of medically provided suicide assistance. Instead of looking directly to philosophical inquiries I examine the active debate that has occurred within the courts. The work that I have done here of untangling certain strains of thought about suicide will assist me greatly in explaining what exactly assisted suicide should be recognized as in the future.
Chapter 2:  
The Courts Discuss a Right to Die.

The U.S. Courts have been as divided about the right to die as classical liberal philosophers were about suicide in general. In this chapter I examine the way courts have discussed the question of a right to die. I want to show how they have dealt with the idea of assistance in dying as a right granted under the Due Process Clause of the Fourteenth Amendment. This chapter will focus on two cases that have decided how assisted suicide should be treated for now, and the history that led to the decisions in each case. Claims of a right to die have to be brought through the Due Process Clause of the Fourteenth Amendment. The first truly important case that discusses rights in regards to medical procedures that result in death was *Cruzan v. Missouri*, 497 U.S. 261 (1990). The Cruzan Court discussed the right of a patient, more specifically the Liberty Interest of a patient, to have life sustaining treatment removed at the request of family members. The second case of *Washington v. Glucksberg*, 521 U.S. 702 (1997), focuses on the actual question of assisted suicide, and statutes developed by the State of Washington making such assistance a felony. I conclude with a brief look at *Planned Parenthood v. Casey*, 505 U.S. 833, a decision cited extensively in the Court’s decision on the topic of suicide assistance, and the case of *Griswold v. Connecticut*, 381 U.S. 479, where the concepts of privacy rights and the Due Process clause were first developed.


The case of *Cruzan v. Missouri* involves a young woman, Nancy Cruzan, who fell into a coma after a car accident. After several months of gastrostomy feeding, it became evident that she would not recover. The family requested that the feeding tubes be removed, but the State health provider required a court order before doing so. The lower court approved the removal,
but was overturned on appeal to the State Supreme Court, because the court felt that the evidence provided was not sufficient to claim an interest by Cruzan in having the tube removed. The Cruzans appealed the case to the Supreme Court. Justice Rehnquist wrote the opinion of the Court in regards to the specific question: “whether Cruzan has a right under the United States Constitution which would require the hospital to withdraw life sustaining treatment from her under these circumstances (497 U.S. 264).” This case does not deal directly with an assisted right to die, but rather with a right to refuse life saving treatment, and the power of the State to create procedural requirements in these regards.

The Court in a 5-4 decision upheld the Missouri statute requiring that evidence be provided for the withdrawal of life saving treatment. There have been many similar State level cases, the most prominent involving Karen Quinlan in New Jersey where the State Supreme Court held that the state’s interest is weakened when the degree of bodily invasion is increased and the prognosis becomes increasingly grim (497 U.S. 270). The court in New Jersey concluded that the state did not have a substantial interest in preserving the life of Ms. Quinlan against the wishes of her family. Judge Rehnquist argues that the method employed by the New Jersey Supreme Court of balancing interests has not really been used in subsequent cases. Instead he focuses on common-law traditions, because rights afforded under the Due Process Clause are traditionally done out of a long-standing historical basis for the right in question. He also utilizes the notion of informed consent because the competency of Ms. Cruzan is in question. Ms. Cruzan’s competency is in question to the extent that she is not conscious and the burden is on the parents to prove that removal of life support is something a competent Nancy Cruzan would desire (497 U.S. 271).
In writing the opinion of the Court, Justice Rehnquist holds certain State interests to be of importance that are also applicable to the right to die issue. The State is to remain neutral in ruling on the pain and suffering levels of a person, but cannot remain neutral with concerns over the death and starvation of person. Justice Rehnquist makes two statements that demonstrate this concern:

…we think that the state may properly decline to make judgments about the quality of life that a particular individual may enjoy... (497 U.S. 282).

The state may if it wishes remain neutral in regards to pain and suffering, and make its assessment based solely on a life versus death analysis.

(States) demonstrate their commitment to life by treating homicide as a serious crime...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 (497 U.S. 281).

The Court thus grants the state the ability to regulate end of life decisions because the government has always had an interest in protecting life. However, it is not the responsibility of the state to determine the “quality” of that life. As O’Conner wrote in Planned Parenthood, there is a need for the state not to rule on the value of one life over another. The Cruzan Court declines to rule on the quality of life or make moral judgments in that regard, but will uphold the long-standing interest of the state in maintaining human life no matter what condition that life may be in. The Court did not read the right to die or remove lifesaving measures into the protections from procedural constraints contained in the Fourteenth Amendment.

There are certain portions of this opinion considered to be beneficial to the right to die argument. Justice Rehnquist discussed the idea of a liberty interest in refusing lifesaving
treatment. The liberty interest is valuable and detrimental to the concept of a right to determine the way in which one dies. The reasoning was as follows:

We have a long-standing precedent for a person being free from bodily intrusion against their will. A competent person is recognized by the Fourteenth Amendment as possessing a Liberty interest in regards to artificially delivered food and water. An incompetent person on the other hand maintains no such right.

We held that a seriously retarded adult had a liberty interest in safety and freedom from bodily restraint. Youngberg, however, did not deal with decisions to administer or with hold medical treatment (497 U.S. 280).

The Court, in acknowledging a liberty interest to refuse life saving treatment for competent adults, may also be construed as finding a liberty interest in assisted suicide. One might be able to claim that a competent adult requesting assistance with suicide might be granted that assistance. After all, the end result of removing a feeding tube and taking action to end one’s life is essentially the same.

The Cruzan case is different because the fact that she was unconscious made her incompetent and unable to comment on the removal of her feeding tube. When the patient is incompetent, the state is permitted to require proof that refusal of life sustaining treatments is in the interest of the patient. The state restrictions were therefore Constitutional, and the decision lies in the Courts as to whether there is enough evidence to deduce that Cruzan would wish to have the tubes removed. In chapter four I examine how decisions such as these may not even have a place in the courts if a new definition of death is adopted.

Scalia’s Concurrence

Justice Scalia provides a concurring opinion about the distinction between removal of treatment with that of active actions towards killing or suicide. His opinion is worth examining
because it appears to predict the introduction of cases like Washington v. Glucksberg. Justice Scalia is leery of the holding concluding that removal of life saving treatment is indistinguishable from that of ordinary suicide, and that the decision should ultimately be left up to the political process of each State. Scalia clearly announces his desire to keep these types of decisions out of the federal courts:

I would have preferred that we announce, clearly and promptly, that the federal courts have no business in this field; that American law has always accorded the State the power to prevent, by force if necessary, suicide...(497 U.S. 293).

Justice Scalia argues that given the Constitution and how it is constructed, the Justices of the Court are no better equipped to answer the questions posed in Cruzan than any random American. Scalia also expresses dissent in regards to the refusal of treatment vs. assisted suicide. He sees no distinction between passive allowance of death and active facilitation of death.

It would not make much sense to say that one may not kill oneself by walking into the sea, but may sit on the beach until submerged by the incoming tide...the intelligent line does not fall between action and inaction but between those forms of inaction that consist of abstaining from “ordinary” care and those that consist of abstaining from “excessive” or “heroic” measures (497 U.S. 296).

For what all of Scalia’s tongue and cheek remarks are worth, he is essentially arguing that removal of treatment in the Cruzan case is no different than the assistance of suicide in any other case. Scalia holds the opposite of right to die proponents; he remarks that if it is permissible for the state to regulate assisted suicide, then it is equally permissible for the state to limit the withdrawal of life saving treatment (497 U.S. 297). Some proponents argue that since the Court has found a liberty interest in refusing life saving treatment there must also be a similar ability to receive assistance in suicide (Dworkin in Uhlmann et. al., 79). Like Scalia, they agree that no line can be drawn between action and inaction.
Dworkin’s Critique

Philosopher Ronald Dworkin provides an experts critique of this case directly refuting the opinion of Justice Rehnquist. The dissents of Justices Brennan, Marshall, Blackmun, and Stevens do not systematically examine each point of the Court’s opinion in the way that Dworkin does in his article. For that reason I will not examine the dissents, and instead have opted to look directly at the Dworkin article. In his analysis he breaks Rehnquist’s decision down into two parts, an argument for the incompetent and an argument for the State. He also examines Justice Scalia’s concurrence and argues that his presumption about a State’s ability to prevent suicide in all cases is overly broad.

Dworkin argues that Rehnquist’s conclusion about the interest of protecting the incompetent is question begging. The Court is presuming that it is normally in the best interest of an unconscious patient to be kept alive unless they have a directive stating otherwise. The neutrality towards quality of life really is a judgment that views living as always positive (Dworkin in Uhlmann, 81). Dworkin accepts that Cruzan would not improve, and argues that the ruling of the Court fails to acknowledge a value in being human. Instead, in an attempt to remain neutral, they have valued the body and avoidance of pain as a priority.

If the only thing people worried about, or wanted to avoid, were pain and other unpleasant physical experiences, then of course they would be indifferent about whether, if they became permanently comatose, their bodies continued to live or not. But people care about many other things as well (Dworkin in Uhlmann et. al., 82).

Dworkin does not have a complaint over State imposed procedural constraints to ensure that the wishes of a comatose patient are to end his or her treatment. He faults the Court for not acknowledging that the Cruzans had fulfilled all the requirements in place by the State of Missouri and were still denied the request. The State’s procedures were therefore not in the
interest of Cruzan or vegetative patients in general. The Constitutionality of refusal by the State to allow the removal of life saving treatment must be found in another realm (Dworkin in Uhlmann, 84).

Dworkin examines the second question about the state’s interest in preserving life. This argument parallels the classical liberal understanding of rights entailing the interest of self-preservation. Dworkin differentiates between a State interest in the life of citizens and the wellbeing of citizens, favoring well-being over mere continued existence.

But the State’s obvious and general concern with its citizens’ well-being does not give it a reason to preserve someone’s life when his or her welfare would be better served by being permitted to die with dignity. (Dworkin in Uhlmann et. al., 85)

The Court was attempting to avoid a judgment call on the value of life. Dworkin sees the Court as holding that the state should not be choosing who has a valuable life and who does not. Neutrality should be accepted in the case of Cruzan and the state should always blindly protect self-preservation in the bodily sense. In the case of the incompetent, it is up to the State Court to decide if the procedural limits have been met. In essence the goal of the state is to maintain life unless directed otherwise through a competent account of the individual refusing treatment. In contrast, Dworkin is arguing that the wellbeing of a person to have a happy healthy life should be protected over this blind adherence to life. He claims that the Court’s reasoning makes a right to die even more difficult an issue because they do not recognize a Constitutional right to well-being. The state interest in preserving life no matter what can result in people being kept alive in painful and humiliating conditions.

Dworkin also takes the time to address flaws in Scalia’s concurrence. He argues that Scalia relies too heavily on historical constraints that are inherently plagued by religious
connotations. Contraceptives were regulated by the State at one time, but the Court in *Griswold v. Connecticut* held that historical precedent was outdated, finding a significant liberty interest of individuals (Dworkin in Uhlmann et. al., 85). Dworkin argues that, just as historical precedent was overturned in that case, it should be done in *Cruzan*.

Dworkin faults Scalia on a second point as well. To claim that no line can be drawn between assisted suicide and removal of life saving treatment creates a situation in which refusal to have a severe amputation or incapacitating operation is the same as suicide. (Dworkin in Uhlmann et. al., 86) Dworkin does not want to claim that removal of life saving treatment is the same as suicide because it becomes very difficult to differentiate between cases like *Cruzan* and treatments that are yet to be administered by physicians. The dispute over suicide vs. removal of life saving treatment is really the source of the next two cases. Because the Court failed to differentiate removal of life saving treatment from assisted suicide in *Cruzan*, they left open the idea of a liberty interest in suicide assistance.


The following two cases, *Washington v. Glucksberg, 521 U.S. 702 (1997)*, and *Vacco v. Quill, 521 U.S. 793 (1997)*, are the result of public debate that arose over the meaning of a liberty interest in the removal of life saving treatment discussed in the *Cruzan* decision. The Court attempts to clarify their ruling in *Cruzan* within the context of a right to die. The question is whether the right to remove life saving treatment could carry over to active assistance in dying since the end result of each is the same. A 1975 Washington State statute made it a felony to promote a suicide attempt if a person is knowingly aiding the process. New York State also enacted a similar regulation in 1994. Physicians working with terminally ill patients brought the *Glucksberg* case to the Court. The Court issued identical rulings in both cases, but in the case of
Washington v. Glucksberg an extended version of Justice Souter’s concurring opinion is provided. For this reason I will examine the Glucksberg case rather than the Vacco case because the decisions are otherwise identical.

The complaint brought before the Court was that the Washington Statute violated the Due Process Clause of the Fourteenth Amendment by inflicting “Arbitrary Impositions” and “Purposeless Restraints” upon doctors and their patients. (521 U.S. 752) The claim made in this case is one of Substantive Due Process, which requires that the legislation needs to be reasonable in its content in order to further a legitimate governmental interest. (C.J. S. Constitutional Law §§ 964, 970-975) The government argued that the statute does not violate the Due Process clause for two reasons. First, there are no deep historical roots associated with suicide and the respondent’s claim is beyond the recognition of the Constitution. Second, the State makes a four-part argument that legalizing assisted suicide creates a slippery slope where mistakes will be made and the wrong people will die.

I begin with the second argument forwarded by the Chief Justice in the Court opinion. The second argument must be broken down into its sections because the Philosopher’s Brief presented by many well-known legal scholars articulates specific arguments against each section. First, the State is concerned that the term “terminally ill” cannot be clearly defined and assisted suicide will expand to individuals that may live for a much longer time. Second, the right would not be confined to the mentally competent because mental competency cannot always be confidently determined. Third, a right to die might entail other forms of assistance including euthanasia. Fourth, the right to physician assistance cannot be distinguished from assistance of the family, friends, or health-care workers. (521 U.S. 755)
The Philosopher’s Brief

Philosophers, Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, and Judith Jarvis Thompson, present an Amicus Curie brief known popularly as the Philosophers’ Brief. In the brief they dispute the claims of the state, arguing that the Cruzan decision supports a liberty interest in dying and that the state’s interest does not warrant a ban on all assisted suicide. Examining their argument in depth helps to understand the ultimate decision of the Court in these cases. I choose to examine the respondent’s side first because it is the side that ultimately is rejected by the Court, and it is important to see what exactly the respondent is arguing before we see why the Court holds that the argument is not sufficient to warrant a Constitutional protection.

The Philosopher’s Brief utilizes the argument of the Court in the Cruzan decision to acknowledge a liberty interest in refusing life-sustaining treatment. The philosophers make three distinct arguments about assisted suicide. First, it is a liberty interest protected under the Due Process Clause of the Fourteenth Amendment. Second, the Court decisions in Planned Parenthood v. Casey and Cruzan v. Missouri reason in such a way as to imply a liberty interest in the case of Washington v. Glucksberg. Third, the State interests are not sufficient to warrant a complete ban on assisted suicide.

The first argument focuses on the concept of patient autonomy. The Due Process Clause of the Fourteenth Amendment protects liberty interests, specifically the interest expressed in the case at bar. Liberty interests are protected because decisions as deeply personal as end of life decisions should be left to the patient to decide.

A person’s interest in following his own convictions at the end of life is so central a part of the more general right to make “intimate
and personal choices” for himself that a failure to protect that particular interest would undermine the general right altogether. (Dworkin et. al. in Steinbock et. al., 387)

The philosophers argue that end of life decisions are deeply personal and should be protected in the same way other deeply personal issues are protected. It may not be the same as marriage, abortion, or contraceptives but it is just as deeply personal. They are arguing against a majority tyranny that decides the way people may die.

The second point discusses the nature of autonomy and how it applies to the Glucksberg case. The brief utilizes the case of Planned Parenthood v. Casey to extrapolate the concept of autonomy in personal decisions. Cruzan v. Missouri provides for the same liberty interest that is articulated in the case at bar.

In Casey the Court held that people have the right to define their own concept of existence. The philosopher’s draw on how choosing to have or not have an abortion gravely and deeply alters the life direction of the woman.

Like a woman’s decision whether to have an abortion, a decision to die involves one’s very “destiny” and inevitably will be “shaped to a large extent on (one’s) own conception of (one’s) spiritual imperatives and (one’s) place in society. (Dworkin et. al. in Steinbock et. al., 388)

The Court reasoned that something that deeply affects the life of an individual is protected under autonomy. Therefore, the philosophers contended that the right to die is deeply personal and should be protected under the Fourteenth Amendment in the same way.

The philosophers acknowledge a distinction that is drawn between the Cruzan case and the case at bar by the Solicitor General. The Cruzan holding concerned a person’s ability to reject unwanted bodily invasion. Preventing life saving treatment is distinguished by the Solicitor General in his brief to the Glucksberg Court as different from the right to die. In one, a
method is being withheld and in the other a method is administered. The brief argues that no such distinction should be drawn.

If it is permissible for a doctor deliberately to withdraw medical treatment in order to allow death to result from a natural process, then it is equally permissible for him to help his patient hasten his own death more actively, if that is the patient’s express wish. (Dworkin et. al. in Steinbock et. al., 389)

They argue that refraining from acting is not morally different from taking action to end death. *Cruzan* concluded that states could not prevent doctors from deliberately causing death through the termination of life support. Similarly there should be no prohibition on doctors using more direct humane means to end a person’s life when it is in the patient’s interest.

The third argument forwarded by the philosophers is that the state interest is not strong enough to ban assisted suicide. There are three points that support the final argument. First, the *Cruzan* decision supports a liberty interest. Second, nothing in the record supports the conclusion that there is an increased risk of mistakes. Third, the risks that are cited are not substantial enough to warrant a complete ban.

*Cruzan* is used as a basis to discuss the risks posed to the State by permitting assisted suicide. Life support may be removed at the wishes of the patient, running a risk that the patient is incompetent to make the request, but the state interest still fails to outweigh the interest of the patient’s autonomy in choosing removal of treatment. In the case of assisted suicide the risk that a patient may be incompetent or may have been coerced exists just as much as it does in removal of treatment. Therefore, the argument about patient competency or coercion should not obtain in suicide assistance the same way that it does not obtain in treatment removal. There is no concern in the *Cruzan* decision that the State cannot create proper safeguards to prevent these mistakes.
Nothing in the case at bar supports the conclusion of the Solicitor General’s brief that no rules or regulations could reduce the risks of a mistake. The philosophers argue that:

Indeed, several very detailed schemes for regulating physician-assisted suicide have been submitted to the voters of some states and one has been enacted. (Dworkin et. al. in Steinbock et. al., 391)

There have been systems invented to prevent mistakes, and it is unreasonable to think that none of the systems would be effective in preventing mistakes. The unique nature of the question being whether or not a state has a sufficiently compelling interest in the risk of error associated with assisted suicide so that it may adjust the value of the specific complaint. In other words what is the reasonable chance that a procedure will be performed in error, and the patient’s actual wish would have been to live. The step that the state takes must be based on interests more compelling than the risk of a mistake if the question truly involves a liberty interest. Because mistakes can occur is not a sufficient reason to warrant a Constitutional restriction on the patient’s right to many different choices. The philosophers argue that the decision of the Court in the case at bar cannot argue that a prohibition serves the interest of many terminally ill patients by preventing the chance of the wrong person receiving assistance. (Dworkin et. al. in Steinbock et. al., 392)

The Court’s Opinion

The Court’s divided decision in the Washington v. Glucksberg and Vacco v. Quill cases speaks to both sides of the debate on a right to die, and the proper interpretation of the Court’s decision in the Cruzan case. Justice Rehnquist’s opinion can be broken down into four parts: the history of suicide, to what extent the Fourteenth Amendment does and does not apply given the history of suicide, a clarification of the Court’s reasoning in Cruzan, and the danger to terminally ill patients due to a shift in the public view of a valuable life. First, he utilizes the history of
suicide in order to argue that unless we have some long established history of accepting the practice in question, a Due Process right to privacy claim does not necessarily apply. Justice Rehnquist begins by taking us back to the rules and regulations of the 1600’s and the laws articulated in the common law of Rhode Island. While we eventually abandoned the harsh common law penalties for suicide, (“Virginia also required ignominious burial for suicides... (521 U.S. 713)”) we are yet to accept suicide socially.

Attitudes toward suicide itself have changed since Bracton (A legal treatise writer from the thirteenth century that argued any sane person who commits suicide may be punished by the King.), but our laws have consistently condemned, and continue to prohibit, assisting suicide. (521 U.S. 719)

The Chief Justice argues that although opinions have changed over time, we are a long way from establishing an historical basis for suicide assistance. The right to discuss contraceptives with a physician is protected under the Due Process clause. It is legal because marriage, the situation under which Griswold was decided, has long been protected under common law. Marriage is considered a deeply private institution. This case is the background that Justice Rehnquist uses to analyze the Washington statute regulating assisted suicide.

The second part of the Court’s holding examines to what the Due Process Clause currently applies. Chief Justice Rehnquist argues that the right to privacy provides protection from unwanted governmental intrusion into private affairs. The sphere that has always been protected “include the rights to marry (Loving v. Virginia... {1967}); to have children (Skinner v. Oklahoma ex rel. Williamson... {1942}); to direct the education and upbringing of one’s children (Meyer v. Nebraska... {1923});...to marital privacy (Griswold v. Connecticut... {1965}).” (521 U.S. 720) The list continues for over a page. The Court notes that it has always been leery of expanding the liberties protected under Due Process, because asserting new rights positions “the
matter outside the arena of public debate and legislative action.” (521 U.S. 720) If the Court rules in favor of the Respondent the debate over a right to die would be placed outside the realm of legislative action.

The Court ends its citation of past Due Process precedents by acknowledging that while the *Cruzan* decision recognized a liberty interest in refusing life saving treatment, it did not deal with active assistance in dying. Given the Philosopher’s Brief, it is necessary to distinguish the case of *Cruzan* from that of the case at bar. The Court argues that they were in fact ruling on a completely different issue in *Cruzan*. *Cruzan* was not acknowledging a right to die, but rather that competent persons had a “constitutionally protected right to refuse lifesaving hydration and nutrition.” (497 U.S. 287) The question in *Glucksberg* is whether the liberty protected under the Due Process Clause protects a right to commit suicide, and receive assistance in the process of committing said suicide. (521 U.S. 723) The *Cruzan* decision only recognized a liberty interest in refusing lifesaving treatment, something that the Court treats separate from suicide.

Given the historical treatment of suicide, there is no way the Court can endorse a claim of National Tradition for the source of a liberty interest in the case. Justice Rehnquist argues that they are forced to examine the case as a substantive claim to due process, meaning that even though there is no historical precedent for this type of procedure there is a precedent for individual autonomy. Freedom in decision-making is the substantive question and that separates the discussion from suicide. The respondent’s argue that the substantive claim is represented in the cases of *Cruzan* and *Planned Parenthood v. Casey*, 505 U.S. 833. These cases articulate a general tradition of self-sovereignty and Casey in particular articulates the protection of “basic and intimate exercises of personal autonomy (521 U.S. 724).” The Court turns then to reexamine *Cruzan* and *Casey* in light of the substantive due process claim.
The Court dismisses *Cruzan* as representative in this case because *Cruzan* was acknowledging the removal of life saving treatment.

Given the common-law rule that forced medication was a battery, and the long-standing legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation’s history and constitutional traditions (521 U.S. 725).

In the *Glucksberg* case, the Court has ruled that there is no longstanding tradition of assisted suicide, and therefore a suicide assistance claim can be distinguished from the long-standing tradition of refusing medical treatment. This argument is exactly what Justice Scalia was concerned with in his concurrence in *Cruzan*. As I discussed earlier, he did not believe there was a substantial difference that could be drawn between death due to inaction and death due to actual action. In both cases he argued the person is committing suicide. The Court is skirting that issue here by arguing instead that we need to narrowly understand what historical tradition has allowed and what it hasn’t allowed. For example, a person may be able to refuse stitches for a cut in the same way he or she may refuse a feeding tube while in a coma. The Court argues that situations, like the ones in the example, are similar when there is no direct action that results in the death of the patient, and both situations allow the physician to fulfill his longstanding duty as healer (521 U.S. 732).

In the case of *Planned Parenthood v. Casey* the respondents argue that the Court held that protected liberties included “the most intimate and personal choices a person may make in a lifetime (505 U.S. 851).” The respondents claim that decisions about how and when to die are similarly personal. The Court argues that this is an improper generalization of a very specific liberty interest in *Casey*. The conclusions in Casey are not indicative of a simple “philosophic exercise.” They did not suggest that broad sweeping assumptions could be drawn that would
include all intimate and personal decisions. (521 U.S. 727) Because of the law’s long history of rejecting assistance in suicide, the Court holds that there is no fundamental liberty interest in the case at bar.

In assessing a substantive claim, not only must there be an individual interest determined under the Due Process clause, but the possibility of a state interest must also be examined. The Due Process Clause requires that a statute banning the practice of a right must have a rational legitimate governmental interest in enacting such a statute. The Court holds that the interest of the state does exist because of possible dangers to terminally ill patients as well as regular patient by not enforcing the statute.

The Chief Justice outlines four reasons why the state has a legitimate interest in enforcing their statute. First, the state possesses an “unqualified interest” in the preservation of human life. Washington is permitted in insisting that all life no matter the quality or mental condition is to be protected from beginning to end (521 U.S. 729). Second, the state has an interest in protecting the integrity of the medical profession. The Court is referencing a general concern over how doctors will be viewed if they begin to assist individuals in dying, an action in direct opposition to the physician’s role as healer (521 U.S. 731).

Third, the Court holds that the State possesses an interest in protecting vulnerable groups from abuse, neglect, and mistakes (521 U.S. 731). The concern is that the disabled and terminally ill may be led to believe that they have a duty to die thus devaluing their lives in comparison to others. A similar slippery slope argument is also acknowledged in the Courts fourth and final reason that assisted suicide may lead to voluntary and involuntary euthanasia (521 U.S. 732).
Ultimately the Court sees no need to weigh the strengths of each reason, but rather to acknowledge that reasons exist. The reasons are important and legitimate; therefore the Washington Statute serves a reasonable legitimate governmental interest. Thus, the Court holds in this case that there is not a substantial liberty interest in choosing the nature of one’s death, and that the Washington Statute is in compliance with the Due Process Clause of the Fourteenth Amendment.

**Souter’s Concurrence**

Justice Souter in his concurrence disagrees with the reasoning of the Court in regards to how the complaint about the way in which the Washington Statute deprived them of their liberty was formulated. His opinion will be helpful for my conclusion in chapter 5 where I argue that while there might not be a right, there is, or should be a liberty interest in assisted suicide. Souter holds that the complaint is more narrowly defined than the way the Court treats it. “Their claim, rather, is that the State has no substantively adequate justification for barring the assistance sought by the patient and sought to be offered by the physician.” (521 U.S. 756) Justice Souter does not want to contend that just because at this moment the right at issue is too uncertain that the courts will never be able to hold a liberty interest. Instead, he is agreeing with the Court in one aspect that to articulate a right at this time would give it a finality that is not warranted, but on the other hand he believes that there might be room for a liberty interest. Souter argues that the Courts are too constrained to properly rule on these matters, and that it is best left up to the legislatures where the tools exist for dealing with these developing issues (521 U.S. 789). He finds that holding a general blanket rule against suicide in all situations may in certain situations come into conflict with the legitimate interests of citizens.
The Precedent for Due Process

Two of the cases cited extensively in the Court opinions of Glucksberg and Cruzan are Griswold v. Connecticut, 381 U.S. 479 (1965), and Planned Parenthood v. Casey, 505 U.S. 833 (1992). Both cases are very important in determining an answer to the right to die question because, depending on how one interprets the rulings, they are either protecting relations between individuals, or they are protecting actual medical products and procedures. In Griswold the Court interpreted a right to privacy contained in the Fourteenth Amendment. That recognition has expanded what are known as unenumerated rights, such as the right to make deeply personal life changing decisions. Griswold sets the standard for evaluating the legality of state statutes in light of the Due Process Clause of the Fourteenth Amendment. Casey is cited in the Philosopher’s Brief, as well as the Court’s decision in Glucksberg, as articulating a right to autonomy in medical decision-making. The case ultimately reaffirms Roe v. Wade, and provides a basis for the privacy argument held in the Philosopher’s Brief.

In the case of Griswold v. Connecticut the court articulates a strong understanding of the right to privacy. However, this right to privacy exists to protect specific interests. It is imperative that we examine what exactly the Court is protecting. The focus of the Court’s opinion in this case came to bear greatly on the understanding of historical national tradition. Chief Justice Rehnquist in the opinion of Glucksberg interpreted the Due process rights outlined in Griswold as focusing on the relationship of individuals not the product, a contraceptive. In Griswold, the Court is clearly not contemplating suicide legislation, but if interpreted as protecting relationships it is protecting something similar to suicide assistance. Griswold is respecting the right to private discussions with an individual’s health care provider about contraceptives.
A Connecticut statute made the use of contraceptives illegal. The appeals court upheld the ruling that under the statute a doctor was not permitted to recommend contraceptive devices to his or her patients. The director of Planned Parenthood, Griswold, appealed the case to the Supreme Court where the lower courts opinion was reversed in a six-two decision. The decision, written by Justice Douglas, articulates the interest of the Court in a right to privacy. The Constitutional basis relied upon by Justice Douglas is found in the Due Process Clause of the Fourteenth Amendment. Douglas finds that the Connecticut statute “operates directly on an intimate relation of husband and wife and their physician’s role in one aspect of that relation (381 U.S. 482).”

Nowhere in the constitution is there any recognition that the relations of a married couple are protected. For a statute to violate the intimate relations of a doctor and his married patients there needs to be recognition of those intimate relations as a fundamental right or liberty. The Court calls these unenumerated rights (rights not explicitly listed in the Constitution), and they are contained under what is known as the penumbra of privacy rights found in the Fourteenth Amendment’s Due Process Clause. (381 U.S. 483) The Court holds that a penumbra of privacy rights has been created through earlier precedents. For instance, the Griswold decision represents the First, Third, Fourth, Fifth, and Ninth Amendments applied through the Fourteenth Amendment the case at bar involves a relationship that lies “within the zone of privacy created” by these fundamental Constitutional guarantees. (381 U.S. 485)

The final paragraph is the most important aspect of the case in regards to the cases I have already examined. The Court has outlined the institution of marriage as being protected under a penumbra of privacy rights. Justice Douglas writing for the Court refers to marriage as:

a right of privacy older than the Bill of Rights--older than our political parties, older than our school system. Marriage is a
coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life... (381 U.S. 486)

In reversing the decision of the lower court, the Supreme Court recognizes a right to privacy in the institution of marriage. It can best be interpreted from the quote above that the institution of marriage possesses the right to privacy because of its long-standing existence in the American moral and cultural landscape. As Glucksberg points out, the Court is less willing to support a right to privacy in cases involving an institution that has not existed for so very long. The final point that the Griswold Court makes is that the institution of marriage “promotes a way of life...” The Glucksberg Court clearly went back to this understanding when they argued the aspect of a right to make life-ending decisions was not a long-standing institution or an institution that promotes a way of life. Planned Parenthood v. Casey further articulated the idea of Due Process specifically in relation to a person’s medical decision. Casey is important because of the way that it deals with a medical procedure that involves deeply personal decisions, and how these procedures and decisions are protected under the Due Process Clause.

The Court reaffirmed the decision of Roe v. Wade in Planned Parenthood v. Casey. The case discusses and reaffirms the Constitutional right of a woman to be autonomous in regards to her personal reproductive choices. The case is cited extensively in the decision in Glucksberg and ultimately provides the basis for the reasoning of petitioner in that case.

The State of Pennsylvania enacted a statute that regulated aspects of an abortion. The statute focused on the need for a wife to inform her spouse about an abortion, for the parents to grant signed consent if their daughter is a minor, and it required a twenty-four hour waiting period. The statute was appealed to the Supreme Court as being unconstitutional on its face. The Court in a divided decision found that certain provisions of the statute were unconstitutional,
specifically the twenty-four hour waiting period, and they reaffirmed the decision of Roe v. Wade. Justices O’Conner, Kennedy, and Souter writing the opinion of the Court reaffirm the concept of a right to privacy and liberty protection inherent in the rights of a woman’s autonomy. The Court’s decision was very muddled, they affirmed in part, reversed in part, and ultimately remanded the decision. The opinion is broken down into as may parts as the statute in the case had, and the Justices had great difficulty agreeing on any one particular portion of the case. I am only interested in reasoning that is pertinent to the citations in Glucksberg.

In reaffirming Roe v. Wade the Court states the three main points of Roe. The second and third points are most applicable because they deal specifically with the ability of the state to protect the life of a viable fetus and woman. The Court specifically reaffirms:

Before viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure...the (third) principle (reaffirmed is) that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. (505 U.S. 846)

The Court reaffirms the right to an abortion on the grounds that the state does not have a significant interest in protecting a non-viable fetus. Once the fetus becomes capable of living outside the womb or rather a viable human, the state then has a reasonable interest in protecting that life. They also affirm an interest of the state in protecting the life of the individual giving birth. The Court clearly states an interest of the state in protecting the health and life of the woman and fetus. From the one quote above it is easy to deduce that the Court makes a distinction between a fetus and a child: “the fetus that may become a child.” Unlike assisted suicide the doctor performing an abortion is not killing a child or person in the eyes of the Court.
Where exactly are these new rights found within the Constitution? The Court points to the Due Process Clause of the Fourteenth Amendment. (505 U.S. 847) They read into the Due Process Clause more than just the rights protected under the Bill of Rights, but as discussed in Griswold there are certain unenumerated rights. They have never accepted a view that the only rights are those articulated in the Constitution. The Court holds that “there is a realm of personal liberty which the government may not enter.” (505 U.S. 847) The unenumerated rights may not be obvious at this time, and so an expansion of the protections provided by the Due Process Clause may be warranted in the future. As the respondents in Glucksberg argued the Courts should make the expansion at this time. Their hope was for the Fourteenth Amendment to be read as applicable to the personal decisions inherent in a right to die with physician aid.

The Glucksberg Court holds that they are required to uphold the liberty of all persons and not to mandate a personal moral code. While this means that the Glucksberg Court can decide to permit socially divisive practices in the interest of personal liberties, they later outline exactly where they have found personal decisions to be protected. “Our law affords Constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.” (505 U.S. 851) These decisions fundamentally affect a person, and are therefore safe from unwarranted governmental intrusion. As Glucksberg held, suicide does not have the historical basis, and even given how personal doctor patient decisions are, the state still has enough of an interest that they may prohibit assistance in suicide.

The Court in most cases has favored leaving questions that involve personal decisions that are the result of advanced technological development up to the state legislatures. At the time they ruled on Glucksberg and Cruzan all the Justices agreed that the Court does not have the
tools to deal with these end of life issues. In the future they may be able to make more solid decisions.

In the following chapter I address how the Court is in fact correct in finding that there is not a right to receive assistance in committing suicide. The Glucksberg Court is correct in finding that the Court lacks the means of evaluating these deeply personal questions, and in fact the courts should not evaluate these questions. Now that I have presented all of the pertinent Constitutional cases and classical liberal discourses on suicide, I address my argument to whether there should be a right to die.
Chapter 3:
Is There a General Right to Suicide Assistance?

In the last two chapters I outlined the opinions of some liberal philosophers, and the public debate that has occurred through the courts. In this chapter I argue that thinking about assisted suicide as a right is the wrong way to formulate concerns over dying assistance. There are Constitutional, ethical, and policy dilemmas that ultimately prevent suicide assistance from obtaining the level of right-hood. The Constitutional dilemma discusses how, the way courts determine due process claims prevents suicide assistance in particular from obtaining the level of a right. The Philosopher’s Brief arguing in favor of a right to die incorrectly interprets the Cruzan and Casey decisions as providing valuable precedents. The Constitutional dilemma is comparable to that of the universalizability problem found in Kant, in the sense that right-hood entails duties that in this case might apply to only very narrow circumstances.

The ethical dilemma will explain how assisted suicide viewed as a right still fails to sort out when it may be correct to receive/provide assistance. Justice Scalia has strong concerns about the ethical implications of the Cruzan decision because of a difficulty in distinguishing removal of treatment from active assistance. I also want to examine a scenario that Justice O’Connor’s opinion in Glucksberg implies, where we experience great difficulty in determining who should receive treatment. Finally, I conclude the ethical section with an analysis of the slippery slope and chance of error arguments that tend to flow from the reasoning of both Justices Scalia and O’Connor.

The final section discusses policy dilemmas where I deal with the pragmatic problems created by ruling on specific medical procedures as rights. The courts do not possess the language necessary for dealing with end of life decisions. In the way Donne and Locke missed
each other’s arguments when discussing suicide, the courts and patients miss each others arguments when discussing suicide assistance. Thus the Glucksberg Court was correct in choosing not to rule on the question of whether a right to suicide assistance could exist, and instead just ruled on the question of sufficient state interest. Finally, the Court was acting cautiously and in the right direction because of difficulties found in past cases like Roe v. Wade when a Court ruling caused excessive public backlash.

These three dilemmas show how there really should not be a right let alone could be a right to receive suicide assistance, however they do not rule out the possible need for such medical procedures. Even though it is best we do not think of suicide assistance as a right there may be narrow situations where it is a legitimate request, and the individual might have specific interests. I discuss this area as a liberty interest in chapter five, but begin the examination here of the claim for a right to receive suicide assistance.

The Constitutional Dilemma

Within the Constitutional dilemma section I examine the question strictly as a right protected under the Due Process Clause of the 14th Amendment. In order to assess how the concept of assisted suicide fits within the Due Process Clause what Due Process under the 14th Amendment does and does not protect must be examined. While new protections under claims of privacy rights appear every year there are certain guidelines that make the claim reach the status of righthood. The opinions in Griswold and Casey will also be compared in order to create an understanding of how assisted suicide as discussed in Glucksberg compares to the fundamental rights of these other cases. My comparison will flesh out the idea of privacy rights in terms of assisted suicide. I am specifically arguing that there is not a substantial enough link to advocate assisted suicide as a right.
The Court in *Connecticut v. Griswold*, 381 U.S. 479 (1965), while substantively ruling on the Constitutionality of a contraceptive statute proceeded to loosely define the concept of privacy rights (Dixon, 198). The penumbra is created through the First, Third, Fourth, Fifth, and Ninth Amendments being applied to the states through the Fourteenth Amendment. The first four Amendments create the general context for a right to privacy, and the Ninth Amendment simply affirms that even though certain rights are not articulated, privacy rights for instance, does not mean that those rights do not exist. All of these Amendments create the concept that the people have a certain realm of privacy, and that the government needs a significant interest to invade that realm (381 U.S. 485). The *Griswold* Court argues that this penumbra of privacy is found in the long historically significant institution of marriage. As soon as the Court published their decision attorneys and law professors were discussing the generalization of this ruling beyond the realm of birth control (Dixon, 217).

The Court in *Roe v. Wade*, 367 U.S. 497 (1973), expands that penumbra; to include abortion rights or a woman’s right to choose. The most recent decision of *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), reaffirms that privacy right. The *Roe* decision really creates the concept that a medical procedure itself, a procedure that could be argued as uncommon, might also be protected under the right to privacy. The *Casey* Court narrows the definition of abortion rights under the Due Process Clause of the Fourteenth Amendment. While they acknowledge the right to an abortion, that right is only permissible when balanced against a state interest of preserving life. The Court actually reaffirms the duty of the state to preserve life. Their holding is not about a right to a medical procedure, but about a state interest in preventing a medical procedure. They specifically hold that, “the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right
to elect the procedure (505 U.S. 846).” The Casey Court holds that the state interest does not exist before “viability” of the fetus. They are adopting the viability definition as a replacement for the original trimester definition found in Roe (Whitman, 1986). So only when the life of a human being is not in question does the state interest fail against individual interests. Autonomy is only protected under specific situations. The Casey court really turned their attention away from the medical discussion and focused on the idea that they were protecting the ability of women to live according to their own goals and values (Whitman, 1984). They even changed the way states could regulate abortions allowing states to fulfill an interest in potential life, but holding that the state cannot place an undo burden upon a woman seeking an abortion of a nonviable fetus. The Court is in essence, even though they do not specifically state it, holding that only total barriers are unacceptable (Whitman, 1987).

From these two decisions I now have some general criteria with which to examine the concept of assisted suicide. I want to look for something that would be protected under the penumbra of privacy rights outlined in Griswold, that has a long historical precedent in American moral and cultural landscape, and if a state law were to be passed banning the action that the state law would not be fulfilling a significant state interest. Assisted suicide fails to meet any of the criteria outlined by Due Process protections.

Assisted suicide when argued as a substantive right must fall under the privacy rights created by the First, Third, Fourth, and Fifth Amendments. The philosophers argue that because the questions involved in end of life decisions are so deeply personal that they are similar to those decisions about contraceptives in Griswold, and that they are protected as a private decision. The right to die is part of a general “right to make intimate and personal choices” for (one’s self and) that a failure to protest that particular interest would undermine the general right
altogether (Dworkin et. al., in Steinbock et. al., 387).” The philosophers are mistaken in this particular case because they are adhering to a general right, a right of self-determination. While such a general right is helpful in protecting people in their private lives it goes too far. A general right tends towards the idea of a moral law. It is applicable to all, but it does not take into account the circumstances of a particular situation. When the question is answered in a moral fashion the goal is to apply it to any and every situation and that does not properly take into consideration the consequences of a particular action (Ladd in Davis et. al., 32). The action is moral as long as it operates within the realm of a right to self-determination.

The philosophers’ argument appears to be making a similar mistake to the one made by Kant in the first chapter. Kant attempted to find a universalizable moral law. He believed in the idea of imperfect duties, but unfortunately those duties can lead to dogmatism. For example a person could be so devoted to fulfilling his or her duty not to lie that they do so at the expense of someone’s life. While debate does rage over this complaint, it does appear that rules cannot be exceptionless (Boyle in Kuhse et. al., 73-75). The philosophers do not argue that the suicide assistance is exceptionless, but their claim about a general right of self-determination appears to be operating on a more intuitive level than the actual physical action of suicide assistance. The simplistic generality of this right lends itself to conflict. When these conflicts arise the right must be examined at a more critical level (Hare in Kushe et. al., 84-85). That’s why the specific criteria of substantive due process rights must be examined. Therefore, assisted suicide needs to be examined in terms of the historical moral and cultural landscape.

There is a distinction between the privacy rights represented in the Griswold case and those that are argued for in the Glucksberg case, specifically the concept that the penumbra of privacy rights contains a long-standing historical precedent. “We deal with a right of privacy
older than the Bill of Rights…intimate to the degree of being sacred (381 U.S. 487).” Marriage rights and the privacy rights protected under the institution of marriage in this particular case are distinguishable from the right to die.

As Justice Rehnquist correctly remarks the case for a right to die must be examined behind the “backdrop of (American) history, tradition, and practice (521 U.S. 720).” When examining the history of assisted suicide we find that it does not contain the longstanding historical importance necessary for a due process claim. The way Justice Rehnquist formulates the decision he focuses on the broader question of a liberty in committing suicide. By doing this he does tend to miss the more specific claim about individuals in the process of dying, and experiencing great pain (Minow, 4). However, given that the philosopher’s initial contention is much more broad, so broad as to include the general interest in personal decisions, formulating the due process analysis to include the general action of suicide does not miss the main issue. The philosophers are actually mistaken when they assert a very broad right and then essentially point to something, assisted suicide, as falling under that very broad claim.

A consideration of the narrower concern over the individuals with terminal illness and in great pain, also fails to demonstrate a substantial historical basis for the practice. “Thanks in part to the power of medicine to preserve and prolong life, many of us are fated to end our lives in years of debility, dependence and disgrace (Kass, 201).” The doctor-patient relationship is longstanding while suicide assistance is not. By lumping the question of suicide in with the relationship between doctors and patients the philosophers create a due process claim. Suicide assistance is not an established medical treatment or method of fulfilling the duty of a physician (Kass in Foley et. al., 22). The historical argument is differentiated from abortion arguments because abortion is not involving what the court considers to be an individual life, instead it is
strictly interpreting the autonomy of a woman where state interest in life does not apply. While suicide on the other hand has been discussed since the beginning of modern society, the concept of assistance from a physician as a way of fulfilling his or her duties is not common. Even though the decision is deeply personal there is no protected right because of the lack of an historical precedent. Modern technological advancement has created the narrower question, and considering the lack of historical precedent for the modern concept of assistance the court must instead examine the historical precedent found in suicide.

By examining just the content of chapter one’s philosophical inquiry we can see that there is no real historical tradition of accepting suicide. While Donne and Hume have difficulty-finding suicide to be immoral through reasoning it is clear from their text that suicide was not a generally accepted practice. In the province that was to become the State of Rhode Island the law declared suicides conducted with premeditated hatred towards one’s self resulted in the forfeiture of his goods to the king, unless it was determined that the man was not competent when committing suicide (521 U.S. 714). Barring the question of an action falling under the penumbra of privacy rights and within the historical tradition of America, there remains one other aspect of Due Process. The final most important question asks whether the state has a significant interest in preventing a certain action. The interpretation that I am providing really relies on combining both the question of historical significance and state interest. Rehnquist’s claim that the right to suicide assistance in a broad sense does not exist relies on the fact that in the examination of the actual act of suicide, the act itself directly conflicts with the state interest in preserving life.

Prohibiting assisted suicide certainly falls within the state’s interest in preserving life. The Court in the Casey decision creates the concept that a medical procedure itself might also be
protected under the right to privacy. The Casey Court’s actions represent an expansion away from the contraceptives of the Griswold decision. Assisted suicide could represent further expansion of the same reasoning found in Casey. The question of suicide however fails the most important test found in Casey. While the Casey Court acknowledges the right to a medical procedure they specifically note that they are not advocating the killing of another human being. The Court actually reaffirms the duty of the state to preserve life. Their holding is not about a right to a medical procedure, but about a state interest in preventing a medical procedure (505 U.S. 846). This ruling has nothing to do with the end of a life; it separates the question of human life away and upholds a choice in terms of a general right to autonomy. Autonomy is only protected under specific situations. There are very strong and legitimate reasons not to protect assisted suicide because it conflicts directly with the state interest in preserving life.

The Casey Court was ruling on the right of a woman to autonomy in personal decision-making, but their ruling specifically stops at the viability of a fetus. The fundamental right that they recognized, free choice, needed to be reconciled with the procedure, abortion. The Court chose to do so by advocating viability as the defining line between a human and a non-human. When the fetus is not considered to be a human the state interest in preserving life ceases to exist. The Glucksberg Court explains that even though Casey recognizes many Due Process Clause privacy rights and that it demonstrates that many of those rights arise from personal autonomy, it is not to be read as prescriptive. The ruling “does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected… (521 U.S. 728).” The Court proceeds to dismiss this particular aspect of Due Process on the grounds that it is not historically significant. There is one other reason for dismissing the right to die from the same protection in Casey. Specifically the fact that nowhere in Casey does the medical
procedure involve the ending of a life. The right to autonomy existed before the Court’s decision. All they merely determined was that abortion at a certain time did not represent the taking of a life, and therefore a sufficient state interest in interfering with this autonomous decision did not exist. On the other hand the right to die deals exclusively with death of a human being and the precedent in *Casey* does not apply in the same sense. There may be a way in which the continued existence of a person trumps the state interest in preserving life, but it is not the broad sense of autonomy in making personal decisions.

The Constitutional dilemma cannot be fully settled until I distinguish the *Cruzan* decision from assisted suicide. Part of the philosopher’s claim about deeply personal decisions is derived from the reasoning in *Cruzan* that finds a liberty interest in the refusal of life sustaining treatment. The right to assisted suicide focuses on the personal nature of the doctor-patient relationship. Their comparison provides insufficient support for assisted suicide based on two grounds: first the court was recognizing only a liberty interest in refusal of treatment, which under certain circumstances can be regulated by the state. Second, the question leads into the ethical dilemma the there may or may not be a way of distinguishing removal of treatment from active suicide assistance.

A liberty interest defined in the *Cruzan* decision does not obtain the level of a generalized right. The right to refuse medical treatment does not fall under the general right to privacy.

The issue whether a person's right to refuse medical treatment is protected by the Federal Constitution is properly analyzed in terms of the person's liberty interest under the due process clause of the Fourteenth Amendment, rather than in terms of a generalized constitutional right of privacy (Constitutional Law § 101.3, 5A 5B).

The liberty interest in refusing life saving treatment does in fact have many restrictions, and to use it as an argument for a broader more generalized right is to miss the definition of the term
itself. Even though a general right can have restrictions placed on it a narrower conception of the right would provide an easier more coherent method for regulation.

The court has held that patients may be required to receive medical vaccinations and in the case of drunken driving stops their blood may be drawn against their will (Jacobson v. Massachusetts, 197 U.S. 11 (1905); Schmerber v. California, 384 U.S. 757 (1966). Not only can treatment be forced upon individuals against their will in certain situations, but it can also be withheld. Service at a hospital entails a physician patient relationship or conversation before services or treatments are rendered. Nothing requires the hospital to provide treatment; in fact the hospital may deny treatment if cases are nonemergency or if they merely have no space (Powers, 1460). The Supreme Court of Alabama in deciding a question of hospital responsibility, Birmingham Baptist Hospital v. Crews, 229 Ala. 398 (1934), holds that the hospital need not provide any reason for refusal of service, even if that refusal results in the death of the patient (229 Ala. 399). These approaches show how even though the refusal of treatment is treated as a liberty interest because of a person’s right to be let alone, Union Pacific Railway Company v. Botsford, 141 U.S. 250 (1891), the interest in being let alone can be overruled in certain instances. The philosophers were incorrect in their attempt to find a broader generalized right in assisted suicide from the narrower less protected liberty interest of treatment refusal. They should have argued for a narrower right that would recognize suicide assistance.

**Ethical Dilemma**

The second error in utilizing the *Cruzan* decision in arguing for a right to suicide assistance is that it fails to take into account the difference between suicide assistance and a patient’s refusal of life saving treatment. The question of what differentiates *Cruzan* from assisted suicide is an ethical question. There are two ways to interpret *Cruzan* the first version is
articulated by Justice Scalia in his Cruzan concurrence where he argues that there is no substantial difference between action and inaction. The second interpretation argues that there is a substantial difference between removal of treatment and active assistance. Ronald Dworkin provides this interpretation. I argue that the difficulty in defining the line between action and inaction not only eliminates Cruzan as a useful precedent for assisted suicide, but also shows how due to such confusion the declaration of a general right is impossible.

The Philosopher’s Brief argues that in order for the Court to maintain consistency it must acknowledge that the liberty interest articulated in the Cruzan decision allows for the same liberty interest with assisted suicide (Dworkin et. al. in Steinbock et. al., 388). Justice Scalia in his concurrence of Cruzan expresses some general concern over how a right to refuse is differentiated from assistance in death. “The second asserted distinction -- suggested by the recent cases canvassed by the Court concerning the right to refuse treatment…relies on the dichotomy between action and inaction (497 U.S. 297).” He saw before the decision came out that there would be a link drawn between the liberty interest in refusing treatment and an interest in receiving assistance. He makes a very astute point by claiming:

It would not make much sense to say that one may not kill oneself by walking into the sea, but may sit on the beach until submerged by the incoming tide (497 U.S. 297)…

So then the question becomes how is there not a liberty interest asserted by the position that one maintains a right to refuse treatment that ultimately results in death? Even harsher criticisms have been leveled asking whether or not the action of removing life-sustaining treatment, thus hastening death, might border on euthanasia (Macklin in Harris et. al., 110). The differentiation is based on active removal versus passive removal. Some argue that permitting a
disease to run its course counts as passive action on the part of the doctor, while removal of life support already in place is an active facilitation of death (Macklin in Harris et. al., 117).

Justice Scalia in his account does not consider the way we utilize the language of suicide. He is speaking to the individual’s choice not the doctor’s actions. If the person sitting on the beach was trapped and the only way he or she could move would be to denounce his or her family we would not say that they committed suicide if the person choose not to denounce his or her family. Similarly if a person refuses a blood transfusion because of religious beliefs it is not called suicide, but rather the fulfillment of a religious devotion. Ronald Dworkin argues that it is just foolish to equate refusing a serious operation with an active choice to commit suicide. The refusal to go through with a medical treatment is just not thought of as suicide (Dworkin in Uhlmann et. al., 86).

Justice Scalia also fails to consider the reasoning behind a liberty interest in refusing life-sustaining treatment. There is an ethical argument that examines the consequences of not being able to refuse life-sustaining treatment versus not being able to receive suicide assistance. Being forced to receive life-sustaining treatment can imprison a patient. If the treatment is not removed they can be forced into “a particular, all consuming, totally dependent, and indeed rigidly standardized life: the life of one confined to a hospital bed…”(Kamisar in Foley et. al., 72). Being unable to receive suicide assistance would, in many cases, not result in being locked into machines that maintain your life. The burden placed on those individuals that wish to refuse treatment would be far greater and possibly more painful and degrading than the burden placed on the individuals who cannot receive suicide assistance.

The more scathing argument where removal of treatment is linked with active euthanasia on the part of the doctor is slightly more difficult to overcome, although I do see a difference in
the way a doctor could actively hasten the death of a patient through an injection versus the removal of treatment. The actions in question do not reach the same level as those of euthanasia or suicide assistance. By examining the way a disease can naturally take the life of a patient, it does not appear that the euthanasia argument has a good grasp of the moral principles involved. It is impermissible for a doctor to allow a patient to bleed out because that is the natural process involved, just as it is unethical for a doctor to remove a patient’s leg if they request that it not be removed (Dworkin et. al., in Steinbock et. al., 389). The doctor is ultimately removing an artificial source of life from the patient at the request of the patient. While the removal of the treatment hastens the patient’s death it is the fulfillment of a patient’s interest in what can and cannot be imposed upon their body that is being tested.

There is a distinction that removal of treatment involves some type of external constraint placed on the patient, and now they are requesting its removal. Just because the patient is on a respirator does not make the respirator part of the patient. Similarly we would not say that because he or she pierced their ear and now has an earring that they are removing a part of their body when they take the earring off. The distinction is over what is imposed versus what is naturally part of the patient. If the state refuses to allow patient’s to refuse treatment they are imposing external constraints on an individual. In essence they are preventing the person from removing their earring.

In addition the court can also look at a utilitarian argument about the number of individuals impaired by an inability to refuse treatment. The number of people damaged by being unable to refuse treatment would be much larger than those burdened by the inability to refuse suicide assistance. Justice Brennan even points out that three-fourths of the people who die in this country die in hospital beds or long term care facilities; a ban on refusal of treatment
would effect far more people in a much more severe fashion than assisted suicide bans (Kamisar in Foley et. al., 73).

The philosophers contend that the Cruzan decision is not just expressive of the narrow refusal definition, but that it is focusing on a much more broad right, the right to make deeply personal decisions (Dworkin et. al., in Steinbock et. al., 389). The danger of this broad right is that it does not make proper distinctions between which personal decisions are protected and which ones are not. The desire in the Glucksberg case may have been to examine the narrower group of individuals burdened by a ban on suicide assistance, but the articulation of a generalized right really damages any chance the Glucksberg Court might have had to rule on the effected individuals (Minow, 5). I believe that the reasons for rejecting the general right to make deeply personal decisions may reside in the realm of the slippery slope argument. Although slippery slope claims fail to follow certain rules of logically valid arguments, they carry a large amount of weight in bioethical discussions (Hartogh in Kuhse et. al., 280).

The slippery slope argument follows a standard format. If option A is selected consequences B through D are likely to occur. What ever happens we all agree that consequence C is the worst thing that could result from option A, and no rational person would want consequence C to occur. The slippery slope is then articulated in two different ways. One is if option A is selected consequence C will inevitably occur and become common practice. Two is if option A is selected consequence C will increase in occurrence if it does not become common practice. Justification for consequence C will be created by the justifications for the other consequences. The conclusion should be not to select option A (Hartogh in Kuhse et. al., 281-282).
The assisted suicide debate creates two slippery slope arguments. The first one involves the lines that are drawn if a general right is found in personal decision making. The second is a line that is drawn about what in life is considered valuable. There is actual evidentiary support for both slippery slope arguments.

The first argument asks if we accept a general right to make personal decisions then who is prevented from seeking suicide assistance. A teenager who has lost his or her significant other may claim a right to suicide assistance; I call this consequence C. Everyone agrees consequence C should not occur, but if the general right is adopted consequence C will inevitably occur or at least be laid claim to in the courts. Therefore we should not adopt a general right. Justice O’Connor explicitly writes in her concurrence that the Court is ruling on a “general right to commit suicide” which would not have prevented the teenager from making a legitimate claim. She further notes this as the reason for the Court to not dismiss the Washington statute:

The difficulty in defining terminal illness and the risk that a dying patient's request for assistance in ending his or her life might not be truly voluntary justifies the prohibitions on assisted suicide we uphold here (521 U.S.739).

The second argument asks if we start allowing people to receive suicide assistance does it imply that certain people have an obligation to die. People are receiving suicide assistance and they are all of a certain age and medical condition. When people reach the same age and condition as those committing suicide they begin to feel an obligation to commit suicide; I call this option F. No one wants option F but it is an option that has a certain probability of occurring as a result of suicide assistance. Suicide assistance should not be provided.

There are several sources for these slippery slope arguments many of which stem from the fear of Nazi enacted euthanasia during WWII:
(The extermination) started from small beginnings. The beginnings at first were merely a subtle shift in emphasis in the basic attitude of the physicians...that there is such a thing as life not worthy to be lived. This attitude in its early stages concerned itself with the severely and chronically sick. Gradually the sphere of those to be included in this category was enlarged to encompass the socially unproductive, the ideologically unwanted and finally all non-Germans (Alexander in Macklin, 120).

Peter Singer and Helga Kuhse argue that there is not a sufficient link between what is discussed now and what occurred with the Nazis. The key link being that the Nazis believed in contributions to a racial entity, the Volk, something that our modern discussion lacks (Macklin, 120). David Lamb objects to this claim stating that even though there is not a Volk, modern science has adopted a more utilitarian approach towards medicine that runs the risk of promoting that which is best for the citizens (Lamb in Macklin, 121). A general right could therefore run the risk of expansion similar to that discussed by Lamb.

Slippery slope arguments cannot be applied to questions of basic moral truths, but they can be applied to more conventional arguments (Hartogh in Kuhse et. al., 287). I am arguing that the general right that advocates suicide assistance is a very conventional argument; it involves what people are generally concerned with when suicide is discussed. There are two philosophical arguments one by Ronald Dworkin and another by John Hardwig that demonstrate how a simple argument about assisting a narrow group of patients could be expanded if discussed in terms of a general right, thus actually justifying the concerns over a movement towards euthanasia. There is also a recent case of euthanasia in Switzerland that demonstrates the very expansion that the slippery slope argues against.

Ronald Dworkin in an article about what in life is sacred states that the simplistic loss of life argument, where just the loss of life no matter duration or quality is bad, does not properly take into account views we have about people. “It ignores the crucial truth that waste of life is
often greater and more tragic because of what has already happened in the past (Dworkin in Harris et. al., 174).” There are many concerns that encompass a desire to die some of which involve how the person will be remembered in their last days of life. The persons past is related to their current situation in order to make a determination about their future life’s worth. I am not contesting why a person may choose to receive suicide assistance or whether such assistance in certain situations should be provided. I am contesting the argument that a general right to make personal decisions will lead to an adjustment in belief sets. A general right allows many people in different situations to request suicide assistance. Public understanding of that assistance could eventually change to encompass a broader explanation about what in life is valuable. These adjusted beliefs are a result of the slippery slope and ultimately possess the ability to create a duty to die.

My point is clarified by John Hardwig’s argument in favor of a duty to die. He discusses how an older person in the last months or years of their life could place an undo burden upon family members by need for personal care or expensive hospice stays (Hardwig in Steinbock et. al., 419). Although he discusses mentally stable patients that rationally choose of their own free will to commit suicide, his argument allows for the possibility that elderly people especially, will be pressured into committing suicide. A duty to die necessarily implies that there is a group of individuals in society that are deemed unnecessary. His argument is highlighted by the recent Swiss decision where the court held that, "If the death wish is based on an autonomous decision which takes all circumstances into account, then a mentally ill person can be prescribed sodium-pentobarbital and thereby be assisted in suicide (Brown, 2007)." The Swiss have recently ruled and permitted the very action that a slippery slope argument articulates as unacceptable. Suddenly mental illness is sufficient to justify suicide assistance.
These arguments do not rule out permitting assisted suicide, but they speak to the larger risk in generalized rights. They are mainly concerned with where lines can be drawn with broad definitions. The ethical dilemmas provide a strong reason for not declaring a general right, but do not necessarily rule out the existence of a narrow interest in assisted suicide as a medical procedure. There is a third dilemma that makes the general rights claims less desirable when they are associated with the pragmatic concerns of medically oriented court decisions.

**Pragmatic Dilemma**

The final dilemma that prevents a general right to suicide assistance is a pragmatic concern. Timothy Quill provides a personal example that demonstrates how discussions in suicide fail to properly meet with legal language. In the same way Donne discusses the inability for us to understand why a person commits suicide it is impossible for the courts to use language to determine assisted suicide. The courts cannot fulfill the requirements of hermeneutical discourse. Justice Ginsberg provides an analysis of pragmatic problems created by *Roe v. Wade* that can be equated to possible problems in a general right to assisted suicide. The Court’s ruling in *Glucksberg* is therefore consistent in permitting public discourse and avoiding excessive possibly detrimental backlash.

A good example of suicide assistance that demonstrates how the decision itself should not be a right, and how there is no way courts can really get at the heart of the decision at hand is the case of Dr. Timothy Quill and his patient, Diane. This example demonstrates how doctors themselves are usually in the best position to deal with their patient’s concerns over death. The important aspect of his case is that the language used does not mesh with the language of the courts. Dr. Quill’s example begins with treatment refusal by his patient, and develops into a question of suicide assistance from the perspective of a deeply personal relationship.
Dr. Quill had been seeing Diane as a patient for over eight years and had the difficult job of telling her that she was suffering from leukemia. Diane had suffered from vaginal cancer earlier in her life and subsequently depression and alcoholism. When she found out that she would have to fight leukemia with only a 25% chance of survival, she chose not to receive treatment. Rather than dealing with months of painful radiation treatment side effects she chose to live her life normally for as long as possible before the leukemia took it (Quill in Steinbock et. al., 378). Her decision to commit suicide came when she realized that she did not wish to suffer the indignity found in the loss of her motor skills. She contacted Dr. Quill and requested sleeping pills, the only reason he prescribed them was because of his long relationship with Diane and his understanding of her desire to be in control of her life. Not wishing for her to be preoccupied with concern over death he agreed to provide her with the pills as an option when it became necessary (Quill in Steinbock et. al., 379). Quill outlines the true nature of what he learned from treating Diane:

Diane taught me about the range of help I can provide if I know people well and if I allow them to say what they really want. She taught me about life, death, and honesty and about taking charge and facing tragedy squarely when it strikes (Quill in Steinbock et. al., 380).

The relationship that Dr. Quill had with Diane allowed him to make the decisions that he did. There is no real way to relate this type of discussion and understanding to the language that courts must utilize in determining rights. The conclusion of Dr. Quill’s article discusses the medical community and the idea that what he is dealing with is not an accepted medical practice. This gives greater weight to a position that advocates further exploration of assisted suicide, but not the absolute acknowledgment of a right. Diane never expressed her desire to end her life in a less painful way as a right, she merely asked for the option to avoid a more painful and
humiliating few days before her death. The aloneness of the decision itself makes it such a sensitive situation that even Dr. Quill has difficulty understanding (Quill in Steinbock et. al., 380).

Our language of rights does not fit with what we recognize as a decision so personal the physicians may not even be able to fully understand it. John Ladd, a biomedical ethicist from Brown, provides an argument against a rights interpretation of suicide assistance on the basis that it never truly grapples with the concerns of the patient. In his discussion of rights as they apply to suicide he focuses on two distinct angles of rights, moral and legal. He argues that the moral and legal rights go hand in hand but only the moral rights are “eternal” or “absolute,” meaning that they exist before legal rights. Like we saw with civil rights in the United States moral rights are realized first as rights that ought to be legal (Ladd in Davis et. al., 15). So at best we would be discussing the right to die on a moral level, or what I have been categorizing as the general universalizable level, it must have always existed whether we have noted it or not. He argues that rights are not always legitimate language for these types of discussions.

The truth of the matter is that the language of rights is not always the best ethical language for handling morally perplexing situations arising in the medical context (Ladd in Davis et. al., 19).

The Glucksberg Court was consistent in their reasoning to rule that the concept of a right in these circumstances overly simplifies the true nature of the question. Something so sensitive as a right to die is at a level of privacy and personal concern that a different approach must be utilized. Most arguments that focus on the personal nature of the cases really leave the courts with no tools to deal with the problems. “Compassion, humanity, or a personal relationship may provide more appropriate reasons for a decision than a reference to rights.” Claims to rights imply a certain absence of trust among family members and doctors when the relationship should
be closer and more personal (Ladd in Davis et. al., 19). The debate over fundamental Due Process Rights does not provide a method for understanding the deep emotional concern associated with many end of life decisions. Each case is going to be significantly different from another and one broad declaration of a right seems to reduce the value of that very decision.

A good example of how rights based language does not support a right to assisted suicide can be found in the discussion of philosophers from chapter one. John Donne more than any of the philosophers demonstrates the language necessary for grasping a decision to end one’s life. He discusses the plethora of reasons for committing suicide, and how it is not up to outside observers to determine the reasons for any individual suicide. The difficulty in making a moral claim about how suicide might be a violation of natural law similar to the way we discuss the reasons for deeply personal decisions. Just like we have no way of understanding why a man may “abstain from all such conversation of marriage” we have no way of understanding why a man might choose to end his own life. It makes it difficult to apply natural law or in this case rights based language to a deeply personal decision (Donne, Part 1, Dist. 2, Sect. 2).

Hume provides further support for the idea that rights claims are not the proper place for suicide discussions when he asserts that reason has no place in determining conscience (Hume in Morgan et. al., 823). If we examine the method for determining a rights claim we see that the language relies heavily upon reason and therefore suffers from an inability to accurately grapple with the intimate decisions of patients. It is best that courts, given that they lack the language, not try and deal with these types of deeply personal decisions. The disagreement over language leads to inconsistent court rulings. Roe v. Wade is an example of how an attempt by the Court to combine medical terminology with moral and rights based claims created public backlash because of an inconsistent method for determining the right of a woman to choose.
Justice Ginsburg articulated a concern in the *Roe* decision that because the Court officially closed public debate over abortion rights they reversed the movement of society towards the liberalization of the practice. The sweeping nature of the *Roe* Court’s ruling, “stimulated the mobilization of a right-to-life movement and an attendant reaction reaction in Congress (63 N.C.L. Rev. 382).” Had the *Roe* Court ruled only on the Texas abortion statute and not elected for a descriptive “medical approach” the legislative trends towards liberalized abortion laws might have continued, and the backlash might not have been as strong (63 N.C. L. Rev. 383). A similar reaction would be inevitable from a court decision finding a right to die, particularly because of the necessity that the court outline medical procedures. The languages once again fail to mesh, and any attempt by the court to facilitate the movement towards suicide assistance might result in a backlash similar to that found in *Roe*. Additionally, because of the definitions used in *Roe* about fetus viability and trimesters many laws have been created restricting abortion rights. These have been based on the advancement of science in its ability to sustain the viability of a fetus at earlier and earlier stages outside of the womb (63N.C. L. Rev. 383; Wingert, Feb. 2007).

Taking the pragmatic concerns into account the Glucksberg Court correctly ruled to abstain from commenting on the right to assisted suicide. “Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society (521 U.S. 736).” Chief Justice Rehnquist realized that the court would never agree to a general right to commit suicide or receive assistance in so doing. If the Court is to recognize a right it must be outlined in a narrower sense. He therefore formulated the conclusion to permit further review in the states and by the Court. “(A)t least five Justices make it clear that
some kind of interest could indeed obtain constitutional solicitude in another future case (Minow, 11).” The decision of the Glucksberg court did ultimately produce its desired effect of simulating public debate. Some of the largest changes came through direct democratic action (Dinan, 20). I examine the value and effect of these changes in chapter five, but for now the important point is that leaving the questions up to the public in some instances, suicide assistance in particular, can be the correct choice when a generalized right is not evident.

**Conclusion**

Given the Constitutional, ethical, and pragmatic dilemmas associated with assisted suicide being protected under a general right to make momentous personal decisions the Court was correct in not finding a right to assisted suicide. My argument has faulted the proponents of a right to die for desiring too general of a right. Throughout much of my argument I have stated that opposition to assisted suicide holds weight when addressing the general right to suicide, but if the interests of an individual were defined in narrower sense then there might be a protected liberty interest. In chapter five I argue that by narrowing assisted suicide to a liberty interest then certain parties, those with legitimate claims, would be able to make a claim against the state interest in preserving life. In this sense rights can be recognized, slowly at first, in a way that allows the genuinely narrow interest in suicide assistance cases to prevail.

In order to narrow my final discussion the next chapter looks at those patients whose higher brain functions have ceased, but are not considered legally dead. These people may be able to request removal of life-sustaining treatment through a pre-signed directive or the consent of a guardian, but I argue that there is no need to even make these considerations because these patients are already dead. There is no need then to even contemplate the interests of the patient. I want the majority of the people I discuss in chapter 5 to be competent and conscious
individuals with claims for assistance. The brain death argument will allow me to narrow the question about rights or liberty interest to something that courts might be able to handle, or at least make the question small enough so that it does not have the Constitutional, ethical, and pragmatic dilemmas that the broader rights interpretation faces.
Chapter 4: When Do We Die?

Many of the most difficult medical decisions involve comatose patients who cannot physically request treatment removal, and have left no written record requesting removal under certain circumstances. The Cruzan decision was a court ruling on this very topic, the removal of life-sustaining measures without a written directive from the patient. The dilemma in question might not appear to coincide with the problems faced in suicide assistance, but it relates in one distinct way. The decision to remove life-sustaining treatment as discussed in chapter three is often muddled by questions of action and inaction. Some argue that removal of life sustaining treatment after it has been implemented constitutes active assistance in dying. Others argue that the removal of treatment is letting the person die naturally thus not representing active hastening of death (Beauchamp in Quill et. al., 119; Kass, 223). I examine in this chapter how if the medical definition of death is changed, then in many cases the argument between active hastening of death and letting die in treatment removal will be a moot point. The new definition of death will be important for chapter five where I argue in favor of a very narrow form of suicide assistance.

Why Higher Brain Death?

The current definition of death is whole brain death (Singer, 21). Whole brain death denotes that a patient has died when both their cerebral cortex and brain stem have ceased to properly function. The patient is then unable to maintain heart and lung function without the support of machines. Even though machines can maintain bodily functions in this particular state the generally accepted practice is to declare that the person is deceased. This definition is
part of the biological argument for death (Green, 106). The state of Missouri has this definition officially written into statute:

For all legal purposes, the occurrence of human death shall be determined in accordance with the usual and customary standards of medical practice, provided that death shall not be determined to have occurred unless the following minimal conditions have been met:

"(1) When respiration and circulation are not artificially maintained, there is an irreversible cessation of spontaneous respiration and circulation; or
"(2) When respiration and circulation are artificially maintained, and there is total and irreversible cessation of all brain function, including the brain stem and that such determination is made by a licensed physician." Mo. Rev. Stat. § 194.005 (1986), (521 U.S. 267).

Many other states have adopted similar statutes for defining death because of an official medical committee report. In August of 1968 Henry Beecher formed a Harvard medical committee to examine the definition of brain death. They concluded that in the cases of people on life support they are officially dead when it is assessed that the brain stem and cerebral cortex are considered irreversibly damaged. This definition became commonly understood as whole brain death (Singer, 24). The reasons behind the committee decision were both medical and morally based. The advancement of medical technologies allowed the committee to gain a better grasp on when the body ceases to maintain normal functions, and a big utilitarian concern of theirs revolved around organ retrieval. More viable organs could be harvested if the new definition of death became commonly accepted. Peter Singer cites these reasons for the committee’s decision pointing to a first draft of their report that relied heavily upon organ harvesting as the reason for their conclusions (Singer, 25).
However, there are more persuasive reasons than the utilitarian ones, outlined by Peter Singer, for adopting whole brain death as a morally acceptable practice. David Lamb makes a poignant distinction in regards to whole brain death:

The corpus of a decapitated individual without a functioning brainstem would not be alive even if its blood-circulation and body temperature could be indefinitely prolonged by artificial means. On these terms the essential characteristics of life reside in the brain. (Lamb, 39)

The characteristics of a living person reside in the person’s brain; replacing the entirety of all brain functions does not mean the person is still alive. There is a general acceptance that what is valued in the life of a human being resides not in their physical functions, but something more that sits inside the person’s brain. I intend to argue that this moral discussion about what we value in a person can be narrowed to include only higher brain functions.

While the face and body of a person is important in identifying them, it is not really the person that one knows. If in the quote Lamb had replaced machines with brain stem, would that change the question of essential characteristics? I think it would have a minimal effect, because the brain stem is like the machines, it provides a way of maintaining temperature and circulation. The medical community did not adopt whole brain death because the part of the person that allows certain functions to take place had ceased to operate. If that were the case, if our definition of death as articulated in Black’s Law Dictionary, where the measure is still the cessation of vital functions, breathing and heartbeat, were still the accepted definition then many people would be considered dead (Garner, 428). No one is arguing that people with pacemakers, or people conscious inside of iron lungs are dead, but they are in a position where their vital functions have been replaced by machines (Green, 109). Because we let machines replace vital functions and still consider people to be very much alive, it appears as if a more accurate
definition of death would not rely on the part of the brain that controls those vital functions. Instead a more accurate definition would rely on the portion that we include along with the brain stem when constituting total brain death.

The cerebral cortex provides a person with all of their cognitive abilities. When a loved one dies we do not think back to the way they breathed or the way their heart beat. We instead think of the things they did and said. If the part of the person that allows them to develop in terms of personality, emotions, and cognitive abilities ceases to exist, and they are only capable of breathing and making their heart beat then the person isn’t really there (Singer, 49). Even from a religious standpoint, the part of the person that wishes and hopes for the salvation of their soul has dissipated. All that is left is the processes of the body, the actual restrictions that many pray to escape from when they die (Dworkin in Harris, 201). The medical community needs to make a moral, philosophical claim about what it means to be human. The part of the person that matters, that makes them human, is dead when their cerebral cortex is dead. If the scientific question of whether or not the portion of the brain that causes thought, feelings, speech, and voluntary movement is ever going to recover can be answered, then that sate where recovery is impossible needs to be accepted as a form of death.

If someone suggested to me that my body might survive death of the neocortex for several months or years, provided it were fed and cleaned properly, etc., that would have no greater appeal to me than preservation of my appendix in a bottle of formaldehyde. For in the sense in which life has value for human beings, I would have been dead all that time (Pucetti, 252).

The reason the individual in the quote above would find no value in being maintained in the described state is because the part of him that he understands to be living is dead. The concept of higher brain death narrows the area of value. A person with irreversible damage to the cerebral hemispheres of their brain is dead. Many people on life support currently would
then be classified as dead and removal from respirators or feeding tubes would not have the same ethical debate over active or passive death hastening. To fulfill this type of definition I need to first establish what the medical and legal community defines individuals in a vegetative state as being. The Court obtains its definition of a vegetative state from Dr. Fred Plum, coiner of the term, and expert in the case of *In re Jobes*, 108 N.J. 394 (1987).

Vegetative state describes a body which is functioning entirely in terms of its internal controls. It maintains temperature. It maintains heartbeat and pulmonary ventilation. It maintains digestive activity. It maintains reflex activity of muscles and nerves for low-level conditioned responses. But there is no behavioral evidence of either self-awareness or awareness of the surroundings in a learned manner (108 N.J. 403, 529).

Vegetative states are the result of higher brain death, loss of cognizant functions of the cerebral cortex. The question about what makes us human appears to point to this type of state. What makes us “human” is everything but the basic vital functions. The question is then “Do we value ‘life’ even if unconscious, or do we value life only as a vehicle for consciousness (Glover, 45)?” The way people determine personal identity can be discussed from the perspective of a brain transplant, no matter how mythical the process may seem at this point in time.

If an individual X has her brain transplanted into the body of individual Y, and for these purposes Y is dead his brain is destroyed, then X does not become Y just because her brain is now in Y’s body. If X can communicate through the body of Y it would become quite evident that X still exists despite no longer having the same body (Green, 125). There is a further level that is more plausible given my argument. “(A) brain dead body (that) has similarly been stripped of the identity of the formerly associated person (no longer maintains the person)...It is not necessary that the brain actually be removed for personal identity to quit the body (Green, 126).”
It is my argument that given the way people view themselves they are likely to ascribe what makes them human to be embodied in their personal identity. Like an appendix in formaldehyde it is unlikely for people to believe that as a permanently comatose patient they are still living. While Michael Green in his essay on brain death does not go so far as to include higher brain dead patients in the category of deceased individuals, I believe we can include those people because to say that the person is gone but they are still alive is contradictory. The body of a comatose person is still performing certain processes no differently than machines continue to perform certain processes. If we do not acknowledge a person in that condition as dead we run the risk of reducing our own conceptions about what we value as human.

Pragmatic Concerns

A pragmatic example of these interests coming to a head can be found in the Terri Schiavo case where the right to remove a feeding tube from a woman in a vegetative state was being fought over by family members. Schiavo’s husband was in a seven-year dispute with her parents over the removal of life support. The dispute was appealed all the way to the U.S. Supreme Court were it was denied certiorari, eventually resulting in the removal of the feeding tube (Sosa et. al., <http://www.cnn.com/2005/LAW/03/18/schiavo.brain-damaged>). Had the concern not been over the life of Terri Schiavo the case would have been significantly different. A change in the definition of death affects the overall language utilized in the Schiavo dispute and eliminates the state interest in determining who has the genuine concerns of the patient involved. There is no longer a need to determine if removal of life support were something the patient would have desired since there is not life to support. All of these disputes turn on the state’s desire to maintain life; the determination of the Court even in abortion cases turns on the question of life.
The opinion of the Court in *Casey*, their reinforcement of *Roe*, states clearly that the interest of the state turns on the “viability” or humanness of the fetus. “(A)t a later point in fetal development the State’s interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted (505 U.S. 870).” The decision in *Casey* as well as *Roe* is dependent on the question of life. There is no question about the State interest in protecting life, but rather a question of whether life is at issue or not. Just like trying to answer the question of when life begins can clarify abortion concerns, the question of when life ends can clarify assisted suicide concerns. The Schiavo case would have been a debate over a dead body just like the Cruzan case would have been a similar debate.

**Why Medicine Should Change.**

Leon Kass argues that when “Looking down on the body and meditating on the meaning of its nakedness…we learn of human weakness, vulnerability, (and)…special interpersonal relationships, (that are) as crucial to our humanity as is our rationality (Kass, 182).” While Kass’ claim is valid in part, and it helps explain debates over burial rights or even debates like the Schiavo case, it does not provide an answer sufficient to claim that the body constitutes a living being. His quote explains communitarian positions about our sex, constituting how we are treated in different cultures and our body shape and design helping to shape our consciousness (Sandel, 191). However, our consciousness cannot be shaped if consciousness does not exist. Kass provides a better articulation of the consciousness aspect in being human when he states:

(The scientific view of man) undermines our self-conception as free, thoughtful and responsible beings, worthy of respect because we alone among the animals have minds and hearts that aim far higher than the mere perpetuation of our genes. (Kass, 137)

While I have been stating that my goal is to narrow the idea of brain death further by promoting higher brain death, I am really admitting that the part of a human being that we value,
the part that gives us personality and the ability to interact with our environment, is what also
determines whether we are living or dead. The current medical positions on death do undermine
our views on what constitutes a person in the way Kass articulated, but the new definition of
death would do no such thing. “The associated concept of death (higher brain death) will be in
terms of the loss of that which is essential to being an individual.” (Lamb, 42)

The Medical and legal communities should therefore look for a time of death definition
that describes the moment when a person ceases to be human. That point must be during higher
brain death. Deaths are now often defined as processes, is the system still functioning, does the
metabolism still work, and are they pink and warm to the touch? While these questions are
important none of them when answered in the affirmative constitute the person, rather they
constitute functions of a person. By allowing functions once thought to be inherently human to
be reproduced by machines we have extended the concept of death to involve multiple stages.
Baruch A. Brody in his article, “How Much of the Brain Must be Dead?” argues that death
should not be considered an event, but rather a process (Brody in Steinbock et. al. 282). Consciousness is what makes us human; it separates us from trees and inanimate objects. We do
not feel for a forest of trees when we see them burning in a forest fire the same way we feel for a
person or even a cat when he or she is set a blaze. By understanding this distinction higher brain
death as a definition can help to find a point of singularity in the dying process where the person
can then be considered dead.

Outcomes

How would the Cruzan decision then change, or more importantly the right to die
question in Glucksberg? The Cruzan decision would change to the extent that a state interest in
“maintaining life” would no longer exist. The State of Missouri has a claim only in so far as they
are preserving the life of an individual. The rules that require the determination of the patient’s last wishes would not apply in a situation where the patient is already dead. The liberty interest in removal of life sustaining treatment would still apply, however in Cruzan the treatments would not even be regarded as life sustaining.

The Terri Schiavo case would also be viewed differently if the concept of higher brain death were adopted. The discussion over Terry Schiavo was actually not about keeping the woman alive, but who receives burial rights in the form of either an actual burial or the personally incurred expense of keeping a body on a feeding tube. In the same way that some people have their bodies preserved for museum displays, keeping the bodily functions of Terri Schiavo going serves as a way of preserving the body not the life. The questions in her case were not as deep as who removes her life support, but rather who should take responsibility for the body. A new definition of death would not have resolved the familial dispute in the Schiavo case, because there would still be a question over who gets the body, and if a member so desired who keeps the feeding tubes in and pays for the space and maintenance of the deceased body. A new definition of death would have helped preserve the question about what we value as being Terri Schaivo the person in a way that it was not preserved under current definitions.

The Glucksberg decision might not change as significantly as these other cases. The individuals involved in the Glucksberg case were physicians who had patients that requested assistance in ending their lives. The concern in Glucksberg would not directly change because of higher brain death, but would at least eliminate a large number of cases with severely debilitated patients. In the next chapter my goal is to narrow what we see suicide assistance as constituting. When assistance is narrowed and no longer construed as a broad right, then particular cases will exist where patients can rationally request assistance without coercion.
The Missouri statute cited earlier would change to the extent that people would be declared dead earlier in the process thus eliminating that group from the debate. The concern of Justice O’Conner cannot be eliminated with a change in the definition of death. She argues that there is a difficulty in determining who qualifies for suicide assistance, who has a legitimate claim, and who does not have such a claim (521 U.S. 737). The teenager who has been dumped and seeks suicide assistance does not meet brain death requirements the same as the paralyzed adult who is still conscious. The trouble that the Glucksberg Court still faces is in making decisions about specific cases. If assisted suicide is not at the level of a general right, but we recognize certain situations where it might exist as a legitimate medical option for ease of suffering then how should it be treated? The decisions between doctors and patients are so broad and varied that there needs to be a narrow area where suicide assistance can be recognized, yet at the same time giving the state the means to ban assistance in many other cases. A new definition of death approaches a question of what we as a society can value as the embodiment of a person, but there may be even narrower standards for certain individuals. Those individuals with narrower conceptions may have rights claims to suicide assistance at certain stages in their life.
Chapter 5:
A Liberty Interest

Now that I have discussed the lack of a broad general right to die and narrowed the scope of the discussion by arguing in favor of a new definition of death, I conclude with an examination of a possible legal solution to the assisted suicide debate. The new definition of death alleviates concerns over patients who are not conscious and where removal of treatment might be construed to be an active killing of some type. Therefore a decision to be made by a panel or court need only deal with patients who are consciously requesting suicide assistance.

The case of assisted suicide, a terminally ill patient suffering from an incurable disease seeking assistance in the last days of his or her life, is best understood as a state-created liberty interest rather than a fundamental right. A state-created liberty interest in assisted suicide is more consistent with *Cruzan* because it recognizes specific circumstances where suicide assistance is protected. The effects of a state-created liberty interest would be three fold: 1.) it would be consistent with the *Glucksberg* decision, 2.) it would protect the interests of patients who do not want to lose their dignity and experience extreme pain and suffering, and 3.) it would allow for continued public debate. While this conclusion will not alleviate all objections, especially religious ones, it will allow patients to exercise a little more power in medical decision at the end of life than they have now.

**Liberty Interest**

I have derived the definition of a state-created liberty interest from three places the case of *Clemans v. Mississippi*, 494 U.S. 738 (1990), the *Cruzan* Court Decision and the legal notes of that decision, and the legal notes of the *Glucksberg* Court decision. A traditional liberty interest is “an interest protected by the due process clauses of state and federal constitutions (C.J.S.
Constitutional Law §§ 977-978).” A state-created liberty interest is a protection under the Fourteenth Amendment that is created not from the Constitution, but from state law. Even though the Clemons Court did not find a liberty interest in their decision, they recognized that Mississippi law could create an “unqualified liberty interest under the Due Process Clause of the Fourteenth Amendment (494 U.S. 746).” Hewitt v. Helms, 459 U.S. 460 (1983) employed a methodology for identifying state-created liberty interests that emphasized "the language of a particular regulation" instead of "the nature of the deprivation (459 U.S. 472)." The language of the statutes themselves provides the basis for the individual’s liberty interest.

The Cruzan decision and legal notes provide further backing that liberty interests in general do not obtain the same level of protections as general rights. The Cruzan Court outlines the procedure necessary for determining the existence of a liberty interest as:

The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions. In Jacobson v. Massachusetts, 197 U.S. 11, 24-30, 49 L. Ed. 643, 25 S. Ct. 358 (1905), for instance, the Court balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease. (497 U.S. 279).

The procedure, of balancing an individual liberty interest against a reasonable state interest, when applied to state-created liberty interest will ask that state interests be balanced against state laws and regulations, which created an opposing position to that of the state interests. As the procedure lays out, just the fact that an interest has been recognized does not mean that a particular regulation may not violate that specific interest, it must be weighed against “relevant state interests (Constitutional Law §525, 4).” Relevant state interest is a reduced standard of proof from that of significant state interest. This means a state does not need as great an interest in order to regulate an individual liberty interest. The reduced standards of state interest are
created because the Court in *Cruzan* does not find the interest in treatment refusal as deriving from general privacy rights but rather from the liberty interest in due process.

The issue whether a person's right to refuse medical treatment is protected by the Federal Constitution is properly analyzed in terms of the person's liberty interest under the due process clause of the Fourteenth Amendment, rather than in terms of a generalized constitutional right of privacy (Constitutional Law §101.3, [5A] [5B]).

The *Cruzan* Court did not want to find a right to refuse treatment through a generalized right, including the First, Third, Fourth, and Fifth Amendments, instead they opted for a more narrow definition provided through the liberty interests created under just the Fourteenth Amendment. The respondents in *Glucksberg* went wrong when they approached the idea of suicide assistance as a broad fundamental right to protect deeply personal decisions. The Justices in *Glucksberg* entertained the idea of a right to receive assistance in dying, but it required that the question and rights claim be reduced in scope (Minow, 5). By reducing the scope of a right to die I can argue that in specific circumstances there may be a claim to a state-created liberty interest.

Using the State of Ohio as an example, although the interests could change from state to state, the revised code specifically regulates the right to receive suicide assistance, but it also regulates hospital care. Title 38 §3795.03, holds that doctors may provide pain relief in the form of medication and may do so even though that it appears to hasten death (§3795.03, A). Combine this particular obligation to relieve pain even if it results in the appearance of hastening death with the liberty interest of treatment refusal in *Cruzan* and there may be a state-created liberty interest.

One of the central ethical dilemmas discussed in chapter three is based on finding the difference between action and inaction. The Ohio Statute states that an “action” that “appears”
to hasten death is acceptable. The question is then narrowed to: does someone who is suffering from a debilitating disease and experiencing great pain have an interest in suicide assistance if the medical community lacks the ability to alleviate the pain in any other way? If the answer to that question is yes then there exists a state-created liberty interest in receiving suicide assistance, and some people may have their autonomy to choose death protected. There may be broader questions than this one that can be entertained, but for my analysis I believe this question helps to fulfill some of the interest in suicide assistance.

**Effect of Liberty Interest**

The goal of providing suicide assistance is to fulfill the claims to personal dignity and the alleviation of pain sought by terminally ill patients. The value of a life is not determined solely by the subjective interests of one individual, or by the interests of a community as a whole drawing on a specific history. Instead life is valued as a combination of those two factors (Dworkin in Harris et. al., 193-194). That is why the state (community) has an interest in preserving lives, but individuals still possess a value claim about their own lives in particular. A state-created liberty interest requires that both of these factors be weighed.

The *Cruzan* Court realized that patients placed on life support could become trapped in hospital beds attached to machines (Kamisar, 72). Similarly we have individuals who know that the inevitable progression of their lives will result in them being trapped on machines and they wish to avoid that type of predicament. They have weighed the value of their lives against the Hobbesian interest in self-preservation and found that their interest in pain avoidance as well as loss of dignity has outweighed their interest in life (Hobbes, 192). Despite the claims of Hobbes, people can rationally weigh interests and make decisions about ending their lives in deeply emotional states (Kübler-Ross, 66). Peter Singer notes that we do come to points in our lives
where we have to evaluate the value of continued existence.

We all like the notion of intrinsic worth of human life. We accept such a noble idea without much critical scrutiny, as long as it does not restrict us from doing what we really think is important. Then one day we find it is making us do things that are manifestly pointless, or likely to lead to disaster (Singer, 57).

Refusing treatment allows people, like Diane, Dr. Quill’s patient who requested suicide assistance, to make choices about where continued life and a battle against disease might lead. The liberty interest in dying fulfills this particular concept as well and allows an individual to avoid circumstances that might be more disastrous than just dying. Such as loss of motor functions, severe debilitating pain, or continued existence in a hospital bed attached to machines that perform some of their most base functions (Quill in Steinbock et. al., 379). A state-created liberty interest reflects this same process of weighing a particular life’s history and future against a broad general interest of staying alive. The state has obligations to follow certain patient directives completely, to alleviate pain whenever possible, and to promote the general welfare of the people (497 U.S. 271; Title 38 §3795.03 A; U.S. Constitution Preamble). The state then has to weigh all these particular obligations against its relevant interests (Constitutional Law §525, 4).

The procedure for determining the protection of a liberty interest allows for the adjudication of these very narrowly defined suicide assistance questions. Returning to the slippery slope argument of chapter three we find that the success of the argument was based on the broad nature of the initial rights claim. A slippery slope was possible because regulation would fail or the justification of one act would serve as justification for another. Utilizing two different scenarios where assisted suicide is requested, one with a teenage boy the other a fifty-year old woman, can demonstrate how the liberty interest avoids the pitfalls that are inherent in
the fundamental right argument of a right to die.

In the first case, the teenage boy goes to a psychiatrist and tells him that he wants assistance in the form of drugs to end his own life because he has lost his girlfriend. He cites clinical depression, loss of dignity, and a desire to end emotional pain as reasons for receiving assistance. He claims that the girl who dumped him did it in such a humiliating and public way that he has been stripped of all his pride, and that he faces ridicule day in and day out while at school. He wants to exercise his liberty interest in determining the manner of his death, and he wants to end his life now because of the unbearable suffering that he is experiencing.

In the second scenario, the fifty-year-old woman has been diagnosed with cancer for the second time in her life. The first time was in her early thirties and it took a year of painful chemotherapy treatment to overcome the disease. She has opted to not deal with the pain and suffering associated with another year’s worth of treatment mainly due to the slim likelihood that she would overcome the cancer a second time. Like Diane she wants to remain in control of her bodily functions and avoid burdening her family with the care that will be necessary in the advanced stages of her disease. She requests that when the time comes and she becomes bedridden that the doctor prescribe her a means of ending her own life.

The motives and intentions of a person in any given situation tend to shape our view of that person’s actions. In each example there are significantly different motivations behind the actions of the characters involved. The teenager case borders on the slippery slope argument because the teenager’s situation results in consequences that all of society has decided they do not want to see occur. The claim is made in relation to the justifications for similar claims. The fifty year-old woman on the other hand is in a similar situation as Diane from the Quill example because of her deteriorating state and the certainty of her impending death. A liberty interest
helps adjudicate these claims because it examines the value of each character's motivation. The liberty interest approach does not try to create a Kantian universalizable claim about when suicide assistance is permissible and when it is not. Each claim needs to be examined, either by a court or a state-approved medical board, thus protecting against dogmatism (Boyle in Kuhse et al., 74; ORS 127.800-127.897 in Steinbock et al. 381). Even the slippery slope argument, reflected in the teenager example, is resolved by a narrower definition because the consequence, where death is inevitable and physical pain is most likely severe, do not even obtain (Hartough, in Kuhse et al., 281). Consequences, motivations, and levels of state interest are weighed against each other to allow each deeply personal decision to have its own value.

My approach so far does not resolve religious Lockeans' problems that do not acknowledge possession of our own bodies. Returning to Locke's objections to suicide and the Pope's definition of the sanctity of life, we find the arguments centered in the assumption that God owns our bodies (Locke in Morgan et al., 742; Paul in Steinbock et al., 463). “The appeal to sanctity of life uses the image of property: a person’s life belongs not to him but to God (Dworkin in Harris, 201).” I don't believe my argument will answer their complaints nor can it. An argument that answers those types of complaints would have to effectively change the way the complaints conceive life, and even there the dogmatism of the initial conception of life would be difficult if not impossible to overcome. To be consistent Locke needs to argue that the state also lacks any ability to make rules about the lives of individuals. Ronald Dworkin makes it clear that these decisions are not black and white; oftentimes an individual does not even know how to explain his or her own convictions on these issues (Dworkin in Harris et al., 157).

John Donne actually demonstrates the lack of clarity in understanding suicide idea when he discussed the situation in which a man is so depressed that suicide is the only way out. He
leaves the reader to contemplate a decision that is so extreme that it is virtually impossible to comprehend (Roberts, 965).

The argument I have provided only tries to narrow legal conception of what we can understand a person to be experiencing so that better judgments can be made as to the resolution of specific suicide assistance cases. The concept of a state-created liberty interest follows the desires of many Justices in the Griswold Court’s ruling as well as the pragmatic concerns of Justice Ginsberg by promoting the continuation of public debate. It allows for the state to have some freedom in their regulations, while providing protections that many Justice’s believed terminally ill patients should possess.

Justice O’Conner, one of the Justices that acknowledged the possibility of a narrower interest in suicide assistance, argued that it is very difficult to determine whether a person is voluntarily choosing to take his or her own life, and under what circumstances a person choosing to end his or her own life may legitimately claim that interest (521 U.S.739). When she concurred with the Court’s opinion, she was agreeing that there is no general right to commit suicide and that the general claim by the respondent did not exist. However, she noted that she would entertain the idea of some restrictions on the state’s ability to punish the practice (Minow, 5). “I write separately to make it clear that there is also room for further debate about the limits that the Constitution places on the power of the States to punish the practice (521 U.S. 739).” So she acknowledges what I have chosen to call a state-created liberty interest in assisted suicide. The existence of the liberty interest places some restrictions on the state’s ability to punish the practice, but at the same time it does not place the state in a corner where it feels as if its being forced to comply with the Court’s wishes.
One of the key pragmatic concerns in chapter three focused on the problem with the courts attempting to denote specific medical procedures and ultimately pigeonholing states into accepting the procedure as a right (63 N.C. L. Rev. 383). By denoting a liberty interest courts or hospital panels could rule on assisted suicide in specific instances, but leave open the large area where suicide assistance does not outweigh the state interests at stake. Because of the very narrow liberty interest that I am discussing the states will be forced to acknowledge the interests of individuals in avoiding pain, yet at the same time maintain legislation that highly regulates the process.

The process remains open with a state-created liberty interest approach. Since the interest does not rule out preventing suicide assistance in certain circumstances it fulfills the goals set forth by the Glucksberg Court for continued open public debate. After the Glucksberg decision eight legislatures choose to examine bills legalizing assisted suicide. Although these bills did not pass, they received more support than before the Court ruling. In California the Death with Dignity Act made it through committee but fell short of garnering enough support from the entire assembly (Dinan, 7). Democratic debate also took place in the form of ballot initiatives; Oregon passed a second death with dignity act, this time by a wider margin, and Michigan placed a referendum on the ballot. “By choosing instead to defer the resolution of the issue to the political process, the Court in Glucksberg ensured that deliberation would continue within the states, through legislative debate in a number of instances as well (as) through direct citizen participation in others (Dinan, 11).” The Court averted the very problems that Justice Ginsberg contests came as a result of the Roe decision. Similarly, a liberty interest would and should not hinder a continued debate because it is not as absolute as a broad general right and it leaves the states with many options as to how they will handle the interest. Since the interest is
established through laws and procedures of the state, the control that states tend to desire in their law making would continue.

Throughout this paper I have argued that there is not a broad general right to receive suicide assistance. Instead, I have argued that if the question of suicide assistance is narrowed, first through a new definition of death, and then further through a state-created liberty interest that recognizes the motivations and consequence of an individual’s situation, that state power to regulate certain instances of suicide assistance can be limited. The proposed approach will not make everyone happy but it avoids the imposition first and foremost on the patient as well as on the state. By allowing the states leeway for further regulation legislative solutions that consider the lives of the individuals involved can be achieved. The process of assessing and determining if a state-created liberty interest exists in any one particular state could be quite slow, but if both parties can be secure in their level of control, the state in protecting lives and the individual in control over his or her death, then greater gains will most certainly be made.
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