

ISSUE 8

*One does/does not have a constitutional
right to suicide, assisted suicide,
or euthanasia*



Law and Assisted Suicide



COMING AT LAST TO LAW

I've often thought of the ways in which the scenario with my father might have been different if assisted suicide had been legal at the time. I guess that my sister and I would not have been afraid of committing a crime and being charged with some form of homicide (although my sister was probably far less afraid of any legal consequences than me; when she is doing something she believes in, she tends to be fearless). I think we both would have still been frightened about bumbling and making Dad's suffering even worse while, at the same time, being judged by our father as incompetents. On the other hand, had there been PAS, and Dad requested it, I can't imagine going very far in attempting to talk him out of it. I would have even helped him find a doctor because by then he was far too ill to navigate medical channels alone. At that time, I would still have felt it was wrong but that, ultimately, it was not my right to impose my moral beliefs on a suffering, dying, 79-year-old man.

Even now the thought of helping Dad die makes me very uncomfortable. That I no longer believe such an action to be immoral does not diminish the awfulness of having to make such a choice. It is disturbing to imagine helping him, knowing that I would conduct what was in effect a death ceremony through which I would converse with him and then stick him into the running car, shut the door, and watch and wait knowing that I was literally seeing my own father die before my eyes; in fact, waiting for

him to die, because that was the whole point. Of course, with PAS it might have been less traumatic. Instead of a garage complete with storage boxes, gardening tools, and oil-stained concrete, it would have been a medical bed. Instead of me and my sister, duct tape, and rubber hoses, it would have been a doctor providing medicine. Clean. Sterile. Medical.

While obviously this discussion is filled with strong emotions for me, as we at last come to the question of legality, the literature and concepts fall within the center of my expertise. I am a guilty, confused, hopeful, sad, grieving son. I am also an attorney and law professor. So, if I appear to slip into that role, it is not to use the academic role to shield me from my feelings. Rather, it is because I believe that readers cannot really appreciate what they read and hear about legal decisions concerning assisted suicide without some basic understanding of the various policies involved and the decisional methodology courts have employed to assess constitutional claims of a right to assisted suicide.

Our completed moral analysis will not have a direct bearing on these questions. Law is not bound to trace the path of morality.¹ Law may include prudential considerations: practical ends, social needs, ease or difficulty of enforcement, and such. In other words, law is a pragmatic tool of social policy, although as part of that policy it can set aspirational norms. While criminal law does often coincide with the immoral (theft, murder), not everything that we might consider immoral is illegal (e.g., cheating at the game of monopoly). On the other hand, not everything we make illegal has moral content. Traffic signs merely reflect some planner's idea of how best to coordinate the flow of traffic. If you run a stop sign under circumstances that endanger others, under those circumstances the stop sign law does seem to bear a certain moral quality. We all know our reaction when we see someone who violates the rules at an intersection and almost causes a serious collision. But you violate that same stop sign law if you run a stop sign at 3:00 am on a country road with a full moon and no cars in sight. The law is indifferent to the magnitude of the risk taken (from which any moral content would emanate) in favor of uniform deterrence and bright line enforcement. If you run a stop sign, you've violated the law.

One could, of course, question any attempt to make a sharp distinction between social policy, on the one hand, and morality on the other. After all, social policy may be motivated by morality, may be directed at achieving moral values, and may even use moral labels to achieve instrumental ends. Morality, on the other hand, does not label for the sake of labeling.

The labeling is instrumental, intended to channel individual behavioral choices. Yet even recognizing such deconstructive possibilities, I find the distinction between morality and social policy a useful one for a discussion about assisted-suicide. Whether a particular debate has a more moral or pragmatic tone very much alters the nature of how the debaters' message is given and received and the possible paths down which the discussion is reasonably likely to proceed.

TWO MISCONCEPTIONS BASED ON THE FACT
THAT THE LAWS CRIMINALIZING SUICIDE
HAVE BEEN REPEALED

Early in our history, suicide was illegal. Today suicide is not a crime, although assisted suicide is illegal in most states. Our decision to decriminalize suicide in America certainly takes us a long way from the days in European history when the corpses of suicides were buried at crossroads² with stakes in their hearts,³ desecrated,⁴ hung⁵ (so that, in some bizarre logic, they could not escape the "punishment" of hanging), or floated down a river in barrels⁶ (so they wouldn't return). They were denied burial in consecrated ground⁷ and had all their goods and land forfeited⁸ (something that would violate the Bill of Attainder clause of the Constitution).⁹ Such a forfeiture would not take place if a jury found the deceased mentally incompetent, however, and by the end of the nineteenth century juries routinely found such persons to be non compos mentis, thereby mitigating somewhat the harshness of the law toward the survivors of the deceased.¹⁰

Some may argue that the decision of every legislature in this country to withdraw the criminal sanction from suicide represents approval of the individual's decision to kill himself or herself and even a tacit acknowledgment that the private decision to commit suicide is beyond the interest of society and the law. I do not believe that either of these inferences is correct.

Decriminalization Does Not Indicate Societal Approval of Suicide

As to the first inference,¹¹ there are a number of reasons to conclude that, while suicide is an undesirable action, it is bad social policy to try to deal with that action within the criminal justice system.¹² Most people who attempt suicide suffer from some type of mental disorder. Since they rarely threaten others, it demonstrates our sensitivity and compassion that we

take them out of a system whose primary purpose is to label individuals as blameworthy and then to punish them. Those who attempt (but fail) to commit suicide have suffered enough, and further punishment would border on the sadistic (“Your suicide failed, and you lived, so you’re under arrest”). Also the threat of arrest, trial, and punishment would hardly be a deterrent to those contemplating suicide. Such persons plan to kill themselves, and among all the consequences they fear if they botch it the criminal sanction likely would be far down the list. Admittedly, the threat of criminal punishment theoretically might deter those who don’t really intend to die in their attempt (the so-called cry for help), but among whose ranks a certain number do inadvertently die. But even with these, I think our first reaction would be that they need treatment not a jail cell. After all, if they were depressed before, a stay in jail is not likely to be just what the doctor ordered.

In fact, criminalization in this particular context will have the tendency to be counterproductive with regard to channeling those attempting suicide into the mental health system. It is true that a criminal court judge can put a defendant on probation and order mental health treatment. But to get to that point, the individual must be prosecuted and made a defendant in the criminal justice system. Under these circumstances, particularly when there is no guarantee that a particular judge will order treatment, it is likely that people close to the person attempting suicide will not even report the attempt (or will characterize it as an accident). As a result, those who need treatment and those close to them will be deterred from even acknowledging that they have gotten to the point where they have tried to take their own lives. Therefore, although taking suicide off the criminal books was good social policy, it does not mean that the society lacked good reasons for wishing to discourage suicide.

*Decriminalization Does Not Mean That Suicide
is beyond the Interests of Society and Its Laws*

Withdrawing suicide from the criminal books likewise does not support the inference that suicide is a totally private matter beyond all interests of the law. In formulating laws against suicide, the legislatures were relying on their so-called police powers. The sweep of these powers, in spite of the law enforcement ring to the name, covers all matters of public health and safety (and, to an extent, morals), including housing codes, restaurant

hygiene, regulation of access to pornography by children, and such. In employing this power to legislate against suicide, the state has traditionally arrayed a list of very plausible, though hardly undebatable, state interests to justify an absolute legal ban on suicide. This same list appears in almost every court opinion that involves a discussion of withdrawing lifesaving medical treatment and assisted suicide, including PAS. Each of these interests plainly has general merit,¹³ which refutes any claim that suicide, assisted suicide, and euthanasia are beyond the interests of society and law.

The Highest Obligation of Society Is to Protect Life

One finds oneself at a loss to quibble with this notion regarding the obligation of society to protect life. Even if you think a society has higher obligations, this one has to rank near the top.¹⁴ We look to and count on the state to protect us from being murdered or run over by a drunken driver.

Also, even though the practice reeks with paternalism, in matters affecting our health we do let the state protect us from ourselves. Young people may not legally buy cigarettes, and none of us may legally buy heroin. Bartenders may not serve intoxicated patrons. The FDA may deny us access to medicines not yet proven safe and effective. Surely suicide is a health-affecting decision that is far more determinative of our well-being than any of these. Also, by making suicide illegal, the state sets a societal norm that killing yourself is “wrong” (i.e., the state expresses moral disapproval), and the image created by this norm may be just enough to deter some people from killing themselves on a momentary impulse.¹⁵

Letting People Kill Themselves Symbolically Devalues Life throughout the Society

The idea here is that if we condone people killing themselves we may risk more than the loss of such individuals from our society. We risk sending a ripple through our society in which, beginning with our acceptance of suicide, we begin to devalue life, cheapen it, and make it less significant.¹⁶

When I hear about someone committing suicide, I feel a little hollow and sad. I do not have the sense of life being devalued. In fact, I feel quite the contrary. I think how tragic it is that life, which can be so wondrous, was so painful for that person. On the other hand, one could argue that the deceased, by committing suicide, provides an “image” of possibilities (particularly when broadcast through pervasive media), possibilities that now will be seen by some as falling within a range of heretofore unimag-

ined choices. The result might then be a few more suicides. This is plausible: Witness the copycat phenomenon of shootings in public schools.

Social Costs and Dislocation

Having considered these consequences (e.g., support for dependents, the emotional shock and long-term effects on survivors, and so on) in the discussion of formal utilitarianism and suicide and assisted suicide, I have concluded that they are legitimate given the appropriate context (chapter 3).

Loss of Productive Citizens

Suicide deprives society of citizens, people who could have served in its armed forces, produced products and offered services, paid taxes, and participated in its social and political life. As such, suicide harms society by diminishing its resources, and society accordingly has an interest in stopping it. This makes sense except unless you consider that we don't outlaw smoking, dangerous recreational pursuits, and such. Why choose to focus on the statistically small group of would-be suicides? There are a number of possible answers. The point of these other activities is not death, nor is death a certain outcome. They do not deprive the society of *all* the citizen's potential. Also, unlike suicide, those other activities have some perceived social utility.

A Matter of Public Concern: Assisted Suicide

When you add assisted suicide to the mix, things change a bit. Now, from the state's perspective, you are no longer concerned with an individual who is acting privately. You must add all the concerns that accompany the participation of a third party discussed in chapter 3.¹⁷ When you add physicians to the mix, you have left the notion of an individual acting privately far behind. You now have the medical profession, a governmentally regulated calling, and with it all the concerns about the slippery slope discussed in chapter 7. Only this time these concerns appear through the lens of law and social policy rather than just individual morality.

CONSTITUTIONAL CLAIMS TO ASSISTED SUICIDE

U.S. Supreme Court Law and Analysis

While academics have proposed that a right to assisted suicide can be founded on the First Amendment right to religious freedom,¹⁸ the two

grounds that commonly have been raised in support of a claim of a constitutional right are *fundamental rights* (specifically, the protection of our right to “liberty” found in the due process clause of the federal Constitution) and *equal protection*. In *Washington v. Glucksberg*¹⁹ and *Vacco v. Quill*,²⁰ the U.S. Supreme Court rejected both the fundamental rights and the equal protection claims.

Rather, the Supreme Court left it to the various state legislatures to determine whether to permit or forbid such practices. My point in examining the legal arguments that support a right to suicide, assisted suicide, and euthanasia is not to demonstrate how they are correct or incorrect or to critique the opinions of the court. Rather, I want to show that, given the legal standards and techniques of interpretation available to the court, combined with the intense moral debate in this country concerning assisted suicide, one can expect the court to provide answers consistent with the individual justice’s sincere moral beliefs. I am not saying that individual judges will intentionally manipulate the law to produce results they know are wrong. Rather, it is my belief after over 30 years of working in the law that, in a morally charged arena such as assisted suicide, in which reasonable people differ in their moral views, the law of fundamental rights and equal protection provides a language in which the expression of one’s own moral predilections will seem natural and correct.

In this arena, the language to which I am referring is expressed within the “standard of review.” Appellate courts, of which the U.S. Supreme Court is one, do not review legal decisions in a vacuum but rather assess the cases in front of them through the frame of text-based guides, which are termed standards of review. These guidelines reflect the nature of the subject matter being reviewed and the hierarchy of legal relations among levels of courts and between courts and other branches of government. The standards of review federal courts employ when assessing the constitutionality of particular pieces of legislation are characterized in terms of levels of scrutiny.

The key to case outcomes under either fundamental rights or equal protection analysis is what level of scrutiny the court applies when reviewing a particular statute. This concept of “scrutiny” refers to how carefully the court will question the rationale underlying a piece of legislation. Generally, the courts show great deference to the work of this elected branch of government and require only “minimal rationality” or “rational basis” for the legislation.²¹ Under this standard, if the judge can imagine any justification, even if it seems completely misguided, the law will not be

found unconstitutional. There is, however, a much higher level of scrutiny known as “strict scrutiny.” If this level of scrutiny is applied, the judge will really dig into the statute and its purported rationale and will only find the statute constitutional if the piece of legislation is “narrowly tailored” to serve a “compelling state interest.”²²

If the rational basis standard is applied, the party challenging a state statute (e.g., one forbidding PAS) will lose; if the standard of strict scrutiny is applied, there’s a real shot at winning. As I’ll now discuss, the rules for deciding which level of scrutiny should apply are sufficiently malleable that the outcome is unpredictable (save knowing the moral predisposition of the judge).

ARGUMENTS THAT ASSISTED SUICIDE IS A “FUNDAMENTAL” CONSTITUTIONAL RIGHT

If a right is fundamental, the court will review any law that unduly burdens that right under a strict scrutiny analysis.²³ If a right is not fundamental, the court will review the law through a minimum rationality lens. Simple. The only real question is whether the particular right in question is or is not a fundamental constitutional right.

The Nature of the Right

When you really look at the argument, no one claims that there is an identifiable right to assisted suicide literally written into the Constitution akin to the right to counsel or to be free from unreasonable searches and seizures. Rather, assisted suicide is seen as a concrete manifestation of some broader right of which assisted suicide is an expression. The right has often been termed a right to *privacy*. Yet, while suicide is surely an intimate decision that is often carried out in private, assisted suicide is not. Nor is the concern really one of privacy in the sense of a media personality being stalked by a tabloid photographer with a telephoto lens. If it is privacy, it is privacy in the sense of being left alone by the government to lead our lives as we choose as long as we are not hurting anyone. In other words, we’re really talking about autonomy and the correlative right to make choices about how we wish to live our lives.²⁴ And, whether or not one finds autonomy to be a viable concept for purposes of moral analysis (chapter 6), it most assuredly is a legitimate political and legal construct within a system of liberal democracy.

For me, though, positing that the right to assisted suicide is underlain by our right to make autonomous choices is not a final answer as to the precise right being sought to protect. Suicide, assisted suicide, and euthanasia are actions chosen as a means to terminate life; they are the product of choice. But what is the precise nature of the *choice* that people are seeking the freedom to make? I have found various expressions of this choice characterized as a right: (1) to waive the right to live, (2) to die, (3) to die in the time and manner we choose, and (4) to die with dignity. I will look closely at each of these before I go on to discuss the legal methodology employed by the courts in determining whether a claimed right qualifies as a fundamental right.

The Right to Waive the Right to Live

That there is a “right to waive the right to live” is an interesting argument because its first premise is the same as the first premise of the legal version of the position against assisted suicide, that is, that the primary function of society is to protect life.²⁵ I have a “right to live.” If I have a right to live, that right is for my protection and is *my* right. As such, I can waive that right, just like I can waive my right against self-incrimination and confess or waive my right against illegal search and seizure and consent to police looking through my house. To be sure, we sometimes require a waiver ceremony or ritual in which persons waiving must appear before some formal body or tribunal to make sure they fully understand the right(s) they are giving up and that this is their unfettered choice.²⁶ And maybe that would be a good idea in this case, given the irreparable nature of the decision, the concern about coercion, and even the risk of disguised homicide. But in the end I should be able to give up my right to live and end my life however I choose. This argument has a nice rhetorical ring to it, but ultimately it is unconvincing.

What can it mean to say you have a “right to live” when people *always* die and die all around us from a variety of causes? I do not think that the idea would resonate well with most if I refused to serve my country in a war because I think the particular action is too dangerous and thereby unduly burdens my right to live. In fact, we do not really possess anything that can be characterized as a true right to live. I do have a fundamental right that my life not be taken without due process, that is, that I “not be killed unjustly.” But that is not the same as a right to live.

Moreover, even if I have a right to live, the state may have sufficient interests in my well-being and its effect on others as to deny me the right

to waive it.²⁷ This is hardly without precedent. I have a right to be free from “harmful and offensive touching” (i.e., battery). I’m glad that people can’t legally hit me whenever I go out shopping. But even if I wanted to consent to being hit (other than in, e.g., a sanctioned boxing match), I could not. The law will not let me waive my protection against battery. As another example, I have the right to a direct appeal in a death penalty conviction. The state has such significant interests in a fair and accurate determination in such a case, however, that in many state jurisdictions I cannot waive this right to appeal. Finally, while I am protected by the Thirteenth Amendment against being sold into slavery, that institution is so offensive to a modern society that in many state jurisdictions I cannot waive the protection of the Thirteenth Amendment and voluntarily sell myself into slavery.²⁸ So, even if I have a right to live (which is questionable), the state does not necessarily have to let me waive that right.

The Right to Die

At first blush, this seems a bit silly. We will all certainly obtain the benefits of this right since we will all eventually die. That, however, does not give fair breath to this phrase. What seems to be implied is that at some point, when life is unremittingly intolerable and there is no hope for the future, one has as much right to end one’s life as to continue living it. It is not a claim for at-will suicide and death on demand. The question, however, is how broad a narrative this phrase envisions. If the concept envisions a 32-year-old depressed paraplegic, those espousing such a concept would be relatively isolated from even the mainstream of those who support assisted suicide. To the extent the envisioned narrative moves toward those suffering from AIDS and ALS and then toward people like my father, the concept moves into the political mainstream. As such, it might lead to success in the legislative arena, but for reasons which will be discussed in the section on legal analysis, claiming this right as fundamental and meriting the resulting legally mandated deference is unlikely to be successful in court.²⁹

The Right to Die in the Time and Manner We Choose

I think we all have a vision of our *Thanatos*, our “good death.”³⁰ We have had a good life, are not suffering, and are at peace with the world and those we love. Some might wish to go to sleep one night and just not awake, while others may wish to be more aware of the approaching moment of death so that they can consciously say good-bye. Yet there is only so much in life that one can control. Anyone who has children learns that rather

quickly. Needing to control all things makes us incomplete, separated from the rich experiences that come when we do not control. The idea of a “right” to control the time and manner of our death is a strange one, as if we could control death. Death defines us; we do not define death. That we are even in a position to control the time or manner of our death is a matter of random chance. Unless we propose that everyone carry “death buttons” on their wrists, moreover, this opportunity for control is unlikely to be available to the majority of us. Again, it will just be random chance. But perhaps I am not being fair. This right, like the others, is not free floating but is moored to a discrete set of narratives of the sick and suffering. As such, it is in substance a rhetorical alternative to the right to die.

The Right to Death with Dignity

This “right to death with dignity” has constituted a rallying cry for assisted suicide proponents,³¹ not because of the logical import of this right but because of the emotionally powerful narrative image it triggers. The image is of persons near the end of life. Their lives are kept in suspension by a complex of tubes and machines. Weak moans are the only evidence of their suffering. They soil themselves like newborns, as day by day their mental faculties further degenerate. What is lying there on the hospital bed is a cruel parody even of them in old age and less than a shadow of them as they were when strong and productive. They cannot bear to look or have those close to them watch. Please let them end it and die with dignity.

If you see it this way, then you see it this way, and my thoughts probably do not matter. There are other ways, however, to look at the issue of dignity. Initially, we are not really talking about *death* with dignity. Death is just death. I suppose that, if we were to attempt to place such a label on death, some would argue that it is the final indignity as it takes *everything* and there is no way to make it otherwise. Others might disagree and say that death cannot take away the parts of us that exist in those we’ve touched during our lives. For me, death is neither dignified nor undignified; it just is. Whatever we may conclude about whether death is dignified or undignified by definition, the right we are considering is more accurately portrayed as dying with dignity.

What is dignity? One view is that it’s innate in being human.³² If that’s so, you can’t help but die with dignity. Another view is that it is a function of human reason.³³ If that’s so, it would seem that killing yourself because you are losing your reason would maintain your dignity. Still another view is that people “earn” their dignity by the way they conduct themselves.³⁴ If

so, whether or not you die with dignity has nothing to do with how many tubes are protruding from you. Perhaps, as to this latter notion, we should not confuse the notion of basic human dignity (which can be offended by harsh prisoner of war camps or segregation laws) with that of a dignified person, the latter being a socially inscribed quality few of us possess.

For me, dignity has less to do with our environment than how we react to it. In fact, it would seem to be at its apex when it is maintained in the face of extreme indignity. I will never forget the quiet dignity of the black defendant in the movie *To Kill a Mockingbird* as he took the stand facing the full force of a racist social system.

This image of the horrifyingly undignified death that underlies the concept of death with dignity, while understandable in this culture, is just that—a construction of this culture. We are, after all, animals, albeit very clever ones. We devote entire aisles of our drugstores to diapers for adults. Incontinence happens. So what is our obsession with this very rigid notion of dignity?

I felt bad for my folks when they were suffering physical or emotional pain. My father was often confused and pissed all over himself when I helped him to the bathroom. I thought he was extraordinarily brave, my hero. My mother often spoke nonsense and would suddenly swear a blue streak that would make a sailor blush. I loved that she had made a life, even a crazy one. My parents were not undignified; they were sick.³⁵

But now let's take a huge step back from this human reality to a more distanced, abstracted realm. I want to look at how courts actually decide cases using the concept of fundamental rights under the Constitution. What does losing the ability to control your bladder or the gradual dissipation of your mental acumen have to do with any protected right under our Constitution?

THE CURRENT INTERPRETIVE TECHNIQUE FOR DETERMINING IF CLAIMED CONSTITUTIONAL RIGHTS ARE FUNDAMENTAL

The current analysis employed by the courts to determine whether a claimed right, although it doesn't appear in the literal text of the Constitution, nonetheless merits protection as "fundamental" has several parts.³⁶ First, the right claimed to be fundamental to liberty must be "carefully described." Second, it must be "deeply rooted" in the traditions of our nation so as to be "implicit in our view of ordered liberty." Without going

any further, it should be clear to you that with indeterminate, subjective modifying terms such as *deeply* and *implicit* at the center of the analysis there is not going to be very much predictive dependability to it. You and I can apply this analysis to the same claim, come to opposite conclusions, and both sound reasonable. Deeper analysis only confirms this initial impression.

Let's begin with what seems to be the easiest portion of the interpretive technique, the careful description of the claimed fundamental right. After the 1965 *Griswold* case, which struck down a state law denying married couples access to contraceptives and information about them, I'd have said that the right involved could be carefully described as "marital privacy,"³⁷ a right protecting the essential features of that special and intimate relationship. I would have been wrong. It turns out that seven years later, in striking down laws denying contraceptives to unmarried couples, the court characterized the right as "protecting individual decisions in matters of childbearing from unjustified intrusions by the state."³⁸ I sometimes tell my students, only half jokingly, that you don't know what a Supreme Court case means until the next case, when they discuss it. Court members, times, and cultural attitudes change. It is not uncommon for the Supreme Court to reinterpret the meaning of its own prior language without acknowledging that it is doing so. After all, the court likes to give the sense that there is some stability to its precedents.

The second requirement, that of being deeply rooted in "tradition," is even more problematic. What counts as a deeply rooted tradition in our national ethos? If it's the particular practice, then miscegenation laws forbidding blacks and whites to marry, segregated schools, and abortion bans would still be on the books. Those, more than the opposite practices, were national traditions when the cases were decided.

The malleable nature of this aspect of the analysis is illustrated by the case of *Bowers v. Hardwick* (1986), wherein the court upheld a state law banning gay sex between consenting adult men in their own home. The analysis looked at history and found that sodomy was not a big part of the American tradition.³⁹ But what about the right to be left alone in our homes if we are not hurting anyone? What about the deeply rooted tradition that the state will not impose particular religious views on its citizens? The court's choice of the "tradition" as sodomy, thus characterizing the conduct in question in its most concrete, literal form, predetermined the outcome of the analysis.⁴⁰

"Implicit in ordered liberty" presents the same uncontrollable interpre-

tive flexibility because it depends on how broad or narrow a frame you use to interpret the right. Let's go back to *Bowers*. If in *Bowers* the right was interpreted to run from *Griswold* and *Roe v. Wade* as that of making fundamental decisions about our personal, intimate relationships, then the right to have sex in the privacy of one's own home fairly could have been found to be implicit in our concept of liberty. If, on the other hand, you define it as "having gay sex," then it is likely not implicit. The *Bowers'* court, in fact, did neither. The justices constructed an interpretive frame so that the line of cases spawned by *Griswold* and *Roe* were not about making intimate relational decisions in our lives but about "procreation." That pretty much leaves gay men out. This is a game you can never count on winning.

Seventeen years later a somewhat different mix of Supreme Court justices considered a state law banning male sodomy. Reading the law as if restricted to gay persons, the court defined the right involved not as the right to engage in gay sex but as that of mature, consenting adults to be free to engage in private sexual conduct in the privacy of their homes. Not surprisingly, with that definition of the right, the court easily reversed *Bowers v. Hardwick*. The interpretative methodology made this flip-flop as easy as had been reaching the initial *Bowers* decision.⁴¹

INTERPRETIVE TECHNIQUES FOR FINDING FUNDAMENTAL RIGHTS AND THE ASSISTED SUICIDE CASE

Deeply Rooted

As I've noted, the Supreme Court considered (and rejected by a vote of nine to nothing) a claim that assisted suicide was a fundamental constitutional right (*Washington v. Glucksberg*, 1997). As in *Bowers*, the court characterized the tradition involved in its most concrete terms, that is, as helping someone commit suicide.⁴² From there, the analysis was predictable. Far from being "deeply rooted," for over 700 years the common-law tradition has punished or otherwise disapproved of suicide and assisted suicide.⁴³ The justices, of course, could have chosen as their tradition one that goes back at least to that society on which most of Western civilization, including democracy, is founded: the ancient Greeks and the tradition of "relieving suffering at the end of life." And the advent of life-prolonging medical technology that was not available for most of the past 700 years

(during which time people with diseases generally died quickly) could have played a role in the court's story of tradition. These were just not rhetorical moves the court wished to make.

Implicit in Ordered Liberty

The proponents of assisted suicide were hoping to clear the “implicit liberty” hurdle of the analysis by citing the following language from the last case at that time upholding the constitutional right to abortion, *Planned Parenthood v. Casey* (1992).

“[There is] a realm of personal liberty the government may not enter . . . [and at the heart of this liberty is the right to] define our own concept of existence, of meaning . . .”

That argument had carried the day for PAS supporters in the federal appellate courts. The *Glucksberg* court, however, refused to employ this frame.⁴⁴ As discussed, the court instead relied on the literal, concrete characterization of the proposed action as “suicide with assistance.” As was true with the “deeply rooted” analysis, once the court chose this concrete framing of the issue, the result was a foregone conclusion.

ARGUMENTS THAT BANNING SUICIDE AND ASSISTED SUICIDE VIOLATES EQUAL PROTECTION: EQUAL PROTECTION BASICS

Legislation frequently makes distinctions among classes of people, placing benefits on some, burdens on others. The principle of equal protection in its most basic application ensures that legislation will not make arbitrary distinctions. Thus, doubling the license fee for cars with red as opposed to blue floor mats would be constitutionally troubling. Proponents using this equal protection argument as a constitutional basis for opposing the legality of any legislation barring assisted suicide would claim that the distinction between forbidden assisted suicide and permitted double effect, refusing treatment, pulling the plug, and terminal sedation is as “arbitrary and capricious” as the line between the red and blue floor mats.

In most cases, the court will apply the most minimal review of the legislature's justification for any distinction in a statute (e.g., persons over 18 and under 18, those who own dogs and those who don't, property owners

and renters). As we have already discussed, this “level of scrutiny” is called “minimum rationality” or “rational basis.” But imagine that you went to put money in a parking meter and it said, “50 cents an hour, except one dollar an hour for Asian Americans.” Would a court approve this law by accepting or making up some rational basis (e.g., Asian Americans make more use of the public school system per capita than other racial groups and should therefore contribute more to the public coffers) or does this demand a different legal approach?

As you have likely sensed from this example, laws making distinctions based on race are a different matter. It is not that such distinctions can never be made; they can. Rather, before a statute can pass constitutional muster when it treats, for example, Hispanics differently than Asians or African Americans differently than Caucasians, the court will apply an intense level of scrutiny looking at the legislature’s actual justifications and in effect deciding whether these distinctions along racial lines are really necessary (“narrowly tailored to serve a compelling state interest”). Similarly, when the distinction is grounded in gender, in order to pass constitutional muster, the law must not reflect a gender stereotype, the law must serve an important government objective, the chosen mean must be “substantially related to the objectives,” and the objectives must be genuine.

But are state statutes barring assisted suicide properly subject to these higher levels of scrutiny or just rational basis?

THE EQUAL PROTECTION CLAUSE AND SUICIDE

With that background, we can now return to equal protection and suicide. The argument is that those who have lifesaving treatments that can be refused, plugs that can be pulled, a need for pain medications that can kill, or the wish to be terminally sedated can end their lives. Those equally sick and suffering who don’t happen to need a respirator, pain medication, or such are forbidden to end their lives.⁴⁵ That distinction in the law violates equal protection. Let’s look at this very appealing argument that the Supreme Court unequivocally rejected a bit more closely.⁴⁶

People Like My Father and the Appropriate Standard of Scrutiny

I do not think that even if we define the class to contour with my father’s circumstances this results in a class that necessarily is entitled to the higher

levels of scrutiny; rather, minimum rationality will provide the standard for review.

The elderly dying were neither the subject of the Fourteenth Amendment nor, as far as I know, historical objects of discrimination.⁴⁷ In fact, before the medicalization of death, they were taken care of by family members in their homes. While they cannot participate in the political process in their current condition, they hardly represent anything akin to an “insular racial minority” that has been systematically cut out of meaningful participation in the political process.⁴⁸ They cover the full spectrum of race, gender, and wealth. When young and healthy, they had the opportunity to influence the democratic, political process—in fact, they may have been congresspersons or even the president. In their current state, many have influential family networks and the support of organizations such as AARP. And their interests, which coincide with a broad and powerful spectrum of the society, are likely to be protected by the active middle aged, who (unlike youths) know that their time with old age and likely illness is on the horizon. So I don’t think strict scrutiny is likely.

Nor can I see anything about the class comparable to gender. With gender, one had harmful stereotypes.⁴⁹ There are certainly such stereotypes about older people. My grandmother used to tell me how furious she would get because “people either talk to you like you’re some kind of little child . . . or they think you can’t hear and they have to scream at you.” I do not know of comparable stereotypes, however, concerning the elderly dying that would require courts to carefully screen legislation that may affect them.

All of the Accepted Methods That Can Result in Terminating a Life Can Be “Rationally” Distinguished from Assisted Suicide for Purposes of an Equal Protection Analysis

Let me use terminating life-sustaining treatment (pulling the plug) as an example of why the equal protection argument fails under a minimum scrutiny or rational basis analysis. A similar result would follow such an analysis of PDE, refusing treatment, and terminal sedation.

The argument here is that we should permit people to die this way and in fact most people who die in hospitals and nursing homes will die this way (or through related methods such as withdrawing artificially provided food and hydration, do not resuscitate orders, intentional decisions not to

treat flu or pneumonia, and such).⁵⁰ Yet this is indistinguishable from intentional killing. Hence the equal protection claims. And when you review basic principles of the criminal law this position surely has some merit.

Legal Principles Regarding Shortening of Life

If I come upon my worst enemy lying on the ground in his death throes resulting from a mortal wound administered by another and I put a bullet in his head, I'm guilty of murder.⁵¹ Every moment of life has equal value in the eyes of the criminal law. As a consequence, if I intentionally shorten that life for even one of those moments I am a murderer. Besides the philosophical basis for this rule, there are pragmatic aspects. Law requires some clarity in application. If intentionally shortening a life by one minute did not count as homicide, what about three minutes? Seventeen minutes? Four hours and 32 minutes? The law avoids such imponderables by setting a clear line—a single moment.

Shortening Life in the Medical Context

From this it should follow that if I withdraw artificially provided food and hydration from a dying patient (who is not in the final phase of dying where withdrawal will not accelerate death), and this shortens his or her life, I have committed an intentional killing.

However, the fact that analytically there may be no difference under criminal law principles between delivering the coup de grâce to my enemy and pulling the plug, and, therefore, a fortiori between intentional killing and pulling the plug, does not mean that these different situations cannot rationally justify different treatment. Again, those delineating the boundaries must consider policy as well as neat, analytic lines. The narrative of the deathbed, resting within the co-narrative of the neutral, nonemotional world of medical science, comfortably separates pulling the plug from intentional killings on the streets. In other words, we can treat the two situations differently without concern that how we deal with one will affect the other. They are not of the same world in any of our eyes; one is criminal, one is medical.

But, what about treating pulling the plug differently from assisted self-killing? That, after all, is the focus of the equal protection argument. In the first place, most people do not talk about pulling the plug as the equivalent of administering a lethal injection. And how we talk and think about things is important in social policy settings.⁵² It informs what people will

comfortably support and what are the current cultural norms, the currently accepted boundaries. That does not make dominant majority perceptions right. We only have to look at discrimination against women and racial minorities to know that. In fact, the Constitution is in part constructed to protect the minority against the potential tyranny of the majority (e.g., through the Bill of Rights). Yet, when in legitimate doubt, following an existing line that also happens to be the one of least resistance is not a bad maxim for policymakers. We accept pulling the plug, and even likely depend on it (as we do the related means such as DNR), as an unarticulated means of rationing scarce medical resources at the end of life. Through these means (and PDE) we already have a powerful method for terminating the lives of most suffering, terminally ill people. So why open the whole suicide/assisted suicide can of worms? In fact, some have argued that it is only through holding the line between pulling the plug, on one hand, and assisted suicide, on the other, that medicine has managed to keep the courts out of the former.⁵³

In the second place, pulling the plug is naturally self-limiting and circumscribed. It is narrowly limited as to time, place, and circumstances: a hospital, a dying patient (I'm not concerned for our purposes with those in persistent vegetative states) who is dependent on a machine with a few days or hours to live. Suicide, even for the terminally ill, can cover a far broader scenario of time, place, and circumstances.

Of course, you do not have to accept this analysis, and you may be very persuasive in voicing your disagreement. Saying something is incorrect in your view, however, is leaps and bounds away from labeling the position as irrational. And I do not think that you can credibly take the position that distinguishing pulling the plug from assisted suicide lacks even a rational basis.

Again the same would hold true for PDE, refusing lifesaving treatment, and terminal sedation.