IN THE SUPREME COURT OF THE UNITED STATES

no. 96-110

STATE OF WASHINGTON, *ET AL.*
Petitioners,
v.

HAROLD GLUCKSBERG, *ET AL.*,
Respondents.

SUMMARY OF ARGUMENT

The first question before the Court must be one of jurisprudence. A proper resolution of this case requires that before the issue of rights is addressed, that this Court first recognize that the paramount and fundamental first principles of our constitutional jurisprudence presuppose that every human life has the utmost value, regardless of its subjective quality. The Court must also evaluate the claims of assisted-suicide advocates with objective legal reasoning and not the subjective desires of the moment.

Consideration of this case in light of the unconditional respect and worth each person possesses and deserves, together with the lessons of history and tradition, demonstrates beyond any doubt that the pretended right to physician-assisted suicide does not and could not exist. The present and future interests in human life are wholly inalienable. Just as our legal system prohibits an individual from becoming a slave regardless of any choice on his part to become one, our jurisprudence of life precludes anyone from having a right to kill himself, with or without assistance.

Even if such a right did exist, the compelling interest in protecting the integrity of society and the family overrides such a right. Families are gravely threatened by suicide and prohibition of such conduct substantially advances that compelling interest in safeguarding the family from harm. The family exists to provide its members patience and love, not a perversion of mercy through death. Likewise, government exists for the protection of society, not for its destruction. Declaration of physician-assisted suicide as a constitutional right would destroy our system of law and would gravely threaten the integrity of the family.

ARGUMENT

"*Liberty finds no refuge in a jurisprudence of doubt*."
-- Opening line from *Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992)(joint opinion).

I. FUNDAMENTAL FIRST PRINCIPLES MUST BE EXAMINED FOR A PROPER RESOLUTION OF THIS CASE, ESPECIALLY THE UNDERLYING PREMISE OF THE CONSTITUTION THAT HUMAN LIFE IS INHERENTLY VALUABLE REGARDLESS OF "QUALITY."

Before the claim to a fundamental right to physician aid-in-dying can be thoughtfully considered, the much broader issues of jurisprudence and the philosophical foundations of law and human rights must first be addressed. Failure to consider them would make proper resolution of this case just as impossible as if the persons involved were all speaking a different language. It would also vastly increase the probability of error in the final decision.

A. It is Essential that the Court Consider from the Outset the Objective Philosophical Underpinnings of the Constitution.

1. Failure to Recognize the Necessity of Beginning with Correct Legal Premises have Caused Distortions and Confusion in the Law, Which Must be Avoided Here.

Any intelligent examination of legal issues requires the use of reason and rational thought. The reasoning process begins with certain underlying premises from which conclusions and the ultimate resolution of the issue may be drawn. If the premise from which the examination begins is faulty, the conclusion to the problem will be even more so. As Aristotle pointed out, "The least initial deviation from the truth is multiplied later a thousandfold." M. Adler, Ten Philosophical Mistakes *xiii* (1985). This necessity for avoiding an erroneous premise is crucial where profound social issues are concerned. Errors in the beginning have severe and sometimes catastrophic consequences for society, as Thomas Jefferson warns:

> A departure from principle in one instance becomes precedent for a second; that second for a third; and so on, till the bulk of the society is reduced to be mere automatons of misery, and to have no sensibilities left but for sinning and suffering. Then begins, indeed, the *bellum omnium in omnia*, which some philosophers observing to be so general in this world, have mistaken for the natural, instead of the abusive state of man.

T. Jefferson, Letter to Samuel Kercheval (July 12, 1816).

Unfortunately, this is precisely what has occurred as a result of errors implicit in this Court's privacy and abortion jurisprudence. The erroneous underpinnings of those cases has by logic been extended far beyond anything which may be considered just and has caused a severe distortion in law itself. "*Bellum omnium in omnia*" is no exaggeration. Neither is the concept of the slippery slope, except that we were at top of that slope in those prior cases; in this case we are now at the bottom of that slope and are in danger of plunging right into the abyss. Justice Scalia was correct when he said in *Cruzan v. Director, Missouri Dept. of Health* that the Court

> [is] poised to confuse [the] enterprise [of end-of-life regulation] as successfully as we have confused the enterprise of legislating concerning abortion -- requiring it to be conducted against a background of federal constitutional imperatives that are unknown because they are being newly crafted from Term to Term.

497 U.S. 261, 292-93 (1990)(Scalia, J., concurring).

It is true, as suicide advocates contend, that there is a certain logical consistency in the proposition that if a person has the right to kill another human person while he is in the womb, *Casey* and *Roe*, then she also has a right to kill herself by starvation, *Cruzan*, or by lethal injection, and to have help doing it. This however, merely confirms more profoundly how *Casey* was wrongly decided and erroneously reasoned, as well as demonstrating the absolute necessity of first considering jurisprudential questions. That line of precedent is not dispositive of the issues here.

As shown more fully below, it cannot be argued that the pretended right to kill one's self, or to have assistance in doing so, is "deeply rooted in the nation's traditions and history. Indeed, the opposite is

true." *Compassion in Dying v. Washington*, 85 F.3d 1440, 1445 (9th Cir. 1996)(O'Scannlain, J., dissenting). Suicide "is universally considered as unnatural, aberrant, and, in the end inhuman." J. Baechler, Les Suicides 6 (Basic Books 1979) (extensive sociological study on suicide).

When logic leads to such an absurd conclusion, it can only be because there is a faulty premise in the argument. It is imperative, then, that this Court begin its examination of this case with the proper foundation and understanding of constitutional first principles to avoid that absurd and unjust conclusion in this case.[1]

2. The Constitution Presupposes the Existence of Self-Evident Truths and must be Interpreted Objectively not by the Arbitrary Dictates of Judges.

In this case especially, it is essential for the Court to consider at the outset fundamental first principles, the philosophical premises that are the foundation of our society and system of law, for this case strikes directly at the heart of civil society. In too many previous cases, the Court has avoided this fundamental first question, often relying solely upon principles of *stare decisis*, creating a "jurisprudence of doubt" in which "liberty finds no refuge." *Casey*, 505 U.S. at 844.

American constitutional jurisprudence is, and properly understood always has been, objective, grounded in the common law of reason and the understanding that truths are absolute, transcendent, and immutable. It is not a "jurisprudence of doubt." It presupposes that truth and error exist and that they are knowable. Fundamental rights of life and liberty do not change with the winds or the times, rather, "every generation is equal in rights to the generations which preceded it." T. Paine, The Rights of Man 66 (1791) (Penguin Classics 1985); U.S. Const. Preamble. It is a *Constitution* the judiciary is called upon to interpret, not seven commandments written on the barn at Orwell's Animal Farm, subject to arbitrary alteration without the explicit consent of the governed.

Essential life and liberty are not slippery, subjective, or relative concepts under the Constitution. Neither they nor truth can be created by simple *fiat*, they can only be discovered through reason.

B. Anglo-American Law is Grounded upon a Jurisprudence of

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[1] *Casey* and *Cruzan* both involved the purposeful termination of human life. Both have come to be viewed as jettisoning an inviolability and sanctity of life jurisprudence in favor of promoting a relativistic, arbitrary, absolute-will approach, although the joint opinion in *Casey* took pains to stress that the Court was relying more upon *stare decisis* then legal reasoning. The conclusion that there is a right to self-destruction, while logically consistent with this contemporary precedent, is nevertheless an irrational one, incompatible with reason and the lessons of history. Consequently, the premises upon which *Roe* and other abortion cases are based, that some human life is less meaningful and valuable than others and that an individual's free choice of will reigns supreme, and the premises of *Casey* that following and extending precedent is more important that legal reasoning, must be flawed and should be rejected, both in this case and in future cases before the Court involving the purposeful destruction of human life.

Life.

1. The Court Must Reject the Relativistic and Utilitarian Jurisprudence of Doubt Urged by Supporters of Assisted-Suicide: Death Plays no Part in any Concept of Ordered Liberty.

Our constitutional system is a *jurisprudence of life* and the enjoyment of life. Death plays no part in our system. It is a jurisprudence which recognizes the inherent dignity, sanctity, and equality of all human life. If one person is devalued in law, we are all degraded. For this reason, our Nation waged civil war after the Court attempted to deny these facts in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), with that decision being repudiated and right and truth triumphing.

American constitutional law rejects the "jurisprudence of doubt," the subjective approach advanced by advocates of assisted suicide, which is grounded in utilitarian situational ethics, cost-benefit analysis, and the arbitrary will of individuals or judges. Our jurisprudence rejects any premise that truths are relative or positive, or that the value of human life is dependent on its "quality." The Constitution is instead grounded upon the principle that there exists an objective standard of right and wrong, against which human actions can be measured and regulated. The Fourteenth Amendment did not enact Spencer's "Social Statics." *Lochner v. New York*, 198 U.S. 45, 75 (1905)(Holmes, J., dissenting).

The Court is well aware of the criticism that has arisen from its abortion jurisprudence, with the effect of shaking the confidence of many of this Nation's citizens. "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986). Keeping that in mind, the Court must be careful in its determination of whether asserted individual interests are fundamental or otherwise constitutionally protected. Otherwise, an interest which is merely desirable might be confused with that which is essential to liberty, and thereby frustrate the legitimate goals of society.

2. All Decent Systems of Ordered Liberty Recognize the Essential Dignity and Worth of Every Human Being.

The position of aid-in-dying promoters is premised on an idea that the final solution to the problems of illness is nihilistic death. The decisions of the lower courts share this premise, which permeates their opinions, that the incurably sick are better off dead. In fact, in *Compassion in Dying v. Washington*, the limited *en banc* Ninth Circuit borders on declaring death to be an ethical imperative, describing the terminally ill in horrific terms as suffering "unmitigated torture," "needless, excruciating pain," and "protracted agony." 79 F.3d 790, 834-36 (9th Cir. 1996). The court even went so far as to proclaim that ending the lives of the terminally ill is a benefit whereas preserving life is a burden since society has no interest in preserving the lives of terminally ill persons. 79 F.3d at 837-38.

The Ninth Circuit stated that it would not "pile injury upon injury" by leaving prohibitions upon intentional killing to remain in place and was reluctant to even say that is would be improper for terminally ill persons to take their lives for economic reasons. 79 F.3d at 826. Instead, the court castigated advocates for the poor and the physically disabled and mentally impaired for opposing medicalized death, inferring

that the quality of life for such persons must be so inherently low that they would be better off if they were put down.:

> seriously impaired individuals will, along with non-impaired individuals, be the beneficiaries of the liberty interest asserted here . . . if they are not afforded the option to control their own fate, they like many others will be compelled, against their will, to endure unusual and protracted suffering.

Id. Rather than oppose death, the court said, these advocates should be concerned that the poor and minorities "will not be afforded a fair opportunity to obtain the medical assistance to which they are entitled -- the assistance that would allow them to end their lives with a measure of dignity." *Id.* at 825.

Assisted suicide supporters and the lower courts are wrong. Our constitutional system recognizes individuals as subjects, persons with intrinsic worth and quality, not as objects or things to be used and then disposed of. *Contra, Roe v. Wade*, 410 U.S. 113, 163 (1973)(only "meaningful life" is worthy of protection of the laws). It is not life which is relative, but "choice." Life is an inviolable value in and of itself, it is not merely a means or resource to some utilitarian end. "Choice" is not an inherent virtue, its value lie only in the specifics of that choice.

Liberty, as understood by our constitutional system and jurisprudence, does not and cannot mean absolute personal autonomy, which is chaotic anarchy, rather, it means *ordered liberty*. "Our basic concept of the essential dignity and worth of every human being [is] a concept at the root of any decent system of ordered liberty." *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966)(Stewart, J., concurring).

True liberty under the law requires a sanctity of life viewpoint. It is a "first tenet of our governmental, religious, and ethical tradition is the intrinsic worth of every individual, no matter how degenerate." *Meachum v. Fano*, 427 U.S. 215, 232 (1976)(Stevens, J., dissenting). In fact, it is universally recognized as the first tenet of every decent society. This is exemplified in the judgment of the West German Constitutional Court on February 25, 1975, which was decided after the harsh lesson from the history of Germany's experience with physician-assisted death in the 1930s and 40s, when hundreds of thousands of incurably sick, terminally ill, and mentally incompetent persons were provided the "benefit" of a "mercy killing" by medical means:

> Where human life exists, human dignity is present to it; it is not decisive that the bearer of this dignity himself be conscious of it and know personally how to preserve it. . . . Human life represents an ultimate value . . . it is the living foundation of human dignity and the prerequisite for all other fundamental rights. . . . Human beings possess an inherent worth as individuals in order of creation which uncompromisingly demands unconditional respect for the life of every human being, even for the apparently socially "worthless."

reprinted in "West German Abortion Decision," 9 J.Mar.J.Prac. & Proc. 605, 641-42 and 662 (1976). The Roman Catholic Church similarly points out this universal view of the absolute and unqualified value of all human life, regardless of quality:

> Human life is the basis of all good and is the necessary source and condition of every human activity and of

> society . . . No one can make an attempt on the life of an innocent person without [violating] a fundamental right and therefore without committing a crime of the utmost gravity.

Declaration on Euthanasia, Congregation for the Doctrine of the Faith (1980).

3. Anglo-American Jurisprudence is Premised upon Placing Paramount Value upon the Lives of Each Person, Even the Most Insignificant and Base Members of Society.

Most helpful in understanding the unconditional worth of all human life in American jurisprudence are cases involving the use of deadly force and capital punishment against those whom are arguably the worst members of society or otherwise pose a great threat to the lives of others. Even though the alternative is an oppressive lifetime of imprisonment, where quality of life is negligible, many Justices of the Court have stated that the death penalty is in all circumstances cruel and unusual punishment, largely because our "society [is one] that so strongly affirms the sanctity of life," and the inherent value of human life, regardless of quality. *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring in *per curiam* decision).

For this reason, deprivation of life through deadly force or capital punishment is constitutionally permissible and lawfully applied only in the most extreme cases and as a last resort for purposes of societal self-protection. *See e.g., Jurek v. Texas*, 428 U.S. 262 (1976) (death penalty is constitutional if defendant remains a continuing threat to society); *Coker v. Georgia*, 433 U.S. 584 (1977) (commission of rape during armed robbery by previously convicted murderer is not serious enough to justify imposition of death); *Tennessee v. Garner*, 471 U.S. 1 (1985)(deadly force may be used against fleeing felon only if he presents a substantial danger to others). This is consistent with the long-standing rule of law that life may be taken only to preserve life.

Also helpful in understanding the first principles which underlie Anglo-American law is the common law defense of duress. Duress exists when a defendant is threatened with imminent death if he does not commit a given crime. Because our system of law presupposes human life to be so inherently worthy, duress will completely excuse the person from conviction, even for very serious offenses such as treason, robbery, kidnapping, and arson. 1 Wharton's Criminal Law 322 *et seq.*, § 52 (15th ed. 1993).

The idea advanced by assisted death advocates and the courts below that society's interest in preserving life is diminished for the sick or disabled, *Compassion in Dying*, 79 F.3d at 837-38 (the state's interest lessens as the potential for life diminishes), is abhorrent to our law. It is neither a defense nor mitigating factor in a murder case that the victim is either terminal or disabled. It has long been a principle of the criminal law that,

> if at the time of defendant's conduct the victim is living, it matters not that he was dying, as from a mortal wound inflicted by a third person. Defendant is guilty of homicide if he merely accelerates the victim's death.

2 Wharton's Criminal Law 143, § 117 (15th ed. 1994)(citations omitted). It is homicide, not a merciful or dignified fundamental right, "to kill one already dying, to accelerate one's death, to kill one condemned to be executed the next day, or to kill a 'worthless' victim." LaFave and Scott, Criminal Law 533, ch. 7 § 67 (1972)(citations omitted).

With these concepts in mind, it is undeniable that death and killing are neither implicit in any concept of ordered liberty nor are they any part of autonomy or "quality of life." To the contrary, life is the *sine qua non* of ordered liberty; autonomy and quality of life only have meaning in life and existence. Protection of life is the *raison d'etre* of government and civil society. Slaughter and death are implicit only in cruelty and tyranny.

II. HISTORY AND TRADITION MUST SUPPORT THE MANY DISTINCT INTERESTS INVOLVED IN THIS CLAIM TO PHYSICIAN-ASSISTED DEATH FOR THEM TO BE DEEMED FUNDAMENTAL.

"Substantive due process analysis must begin with a careful description of the asserted right." *Reno v. Flores*, 507 U.S. 292, 302 (1993). This claimed right must also been considered in the proper context, "to look at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people [is] like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body." *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) (plurality opinion).

When the interest is accurately identified, then its nature and extent may be determined. Determining if a right or liberty is fundamental, important, or otherwise, must not be done in a subjective manner, much less by the arbitrary dictates of judges. Rather, courts must resort to objective reason, with appropriate acknowledgement of the wisdom of the ages, encompassed within history and tradition.

A. Physician-Assisted Suicide Involves Many Novel and Distinct Claimed Interests.

1. Physician Assistance in the Destruction of Life Presents Issues of Criminal Law, not Medicine.

Aid-in-death advocates assert in this case an exemption from generally applicable criminal laws outlawing murder and/or assisting another to commit suicide. Application of such laws to persons who are competent and terminally ill, they insist, violates their right to be dead by means of a physician affirmatively helping them to cause their own death, either passively or actively.[2] The claim is quite extraordinary. If this Court affirms the court below, it will invalidate "the laws of the many States that still make such conduct illegal and have done so for a very long time. The case [thus] calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate." *Bowers*, 478 U.S. at 190.

"This case does not require a judgment on whether laws against [assisted suicide] between consenting adults in general, or between [terminally ill patients and physicians] in particular, are wise or

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[2] "[W]hat are we *really* talking about? It is the alleged right to have *another* person end one's life . . . this case is about the role of physicians in bringing about death." *Compassion in Dying*, 85 F.3d at 1447 (Trott, J., dissenting) (emphasis in original). "'Physician-assisted death' includes both physician-assisted suicide and voluntary active euthanasia. In emphasizes the physician's role as an assistant to an act initiated by the patient. Doctors 'killing' patients is technically correct, but it . . . brings out uneasy visions." T. Quill, Death and Dignity 139 (1993).

desirable," *Id.* at 190. Such policy considerations are generally within the province of the legislature, however, it is important to consider them here to the extent that they provide guidance as to the existence and extent of individual and government interests. In doing so, those considerations dictate that the lower court be reversed.

The interests at issue here need to be fully understood: This is *not a medical issue*. It is an issue of *criminal law*. This case presents no unique issues which differ from any other case of intentional killing with malice aforethought, that is, murder, where "consent" is claimed as a defense.

2. For Physician-Assisted Death to be Declared a Fundamental Right, the Court Must Recognize Several New and Extraordinary Interests.

Terminally ill persons who wish to kill themselves by medical means with the help of a doctor involves more than one isolated interest. Considered in its various constituent parts, this course of action involves the *tangible* components of the actual life and existence of the individual and his conduct, together with several claimed *intangible* interests. These intangible interests include the present right to life of the individual and his future interest in continued life.

In order for advocates of physician-assisted suicide to succeed in the Supreme Court, however, there must be recognition of other interests as well: a right of the individual to be dead; a corollary right to kill that individual (either by himself or by another); a right of the individual to have assistance; and a right of an assistant to provide that aid in killing. The existence of one of these rights does *not* compel the existence of any of the others. Moreover, these intangible interests of the right to life and the asserted right to be dead are contradictory. Before one can purposefully give up the enjoyment of life, therefore, he must first waive the right to it, likewise liberty.

Where the tangible components are concerned, it is clear that rulings of the judiciary are wholly irrelevant to the matter. Indeed, in this respect, this case presents no justiciable controversy. Competent terminally ill persons have the *power* to kill themselves, whether or not they have the *right* to do so. *See Compassion in Dying*, 79 F.3d at 834-36; D. Humphry, Final Exit (1991) (a self-help book on how to kill one's self). If the person succeeds in terminating his life, obviously, the person is not subject to punishment. Existing laws neither prevent, chill, nor substantially deprive the determined person the ability of to take his own life. If there is such a right to self-inflicted death, existing laws obviously infringe that right only incidently and therefore, not unconstitutionally.

French sociologist Jean Baechler explains in his book *Les Suicides* (1979), an extensive study on contributing factors of suicide, that suicidal behavior "is a response to a problem [which can be external or internal, real or imagined], a situation that obliges the subject to take up a position and find a way out," but this problem is *not* the continuation of life itself. Baechler at 11. The answer then is to find the appropriate solution, not the final solution, to alleviate, not the life, but the pain or suffering of those who purportedly wish to die. Assisting a suicide, therefore, is not only not dignified or an act of true mercy, it does not even address the true problem of the afflicted

individual.

B. To be Deemed "Fundamental," a Right Must Either Exist in the Positive Law or Manifest itself in History and Tradition.

If a right is so fundamental, so obvious, so inherent or implied in liberty as to exist without positive acknowledgement in the law, as in the amendment process, *e.g.* Bill of Rights, it will nevertheless manifest itself in other ways. Ours is a constitution of and by the People: any right which is truly fundamental will necessarily enjoy a consensus, not merely of a day as aid-in-dying supporters insist, but throughout the ages. The fundamental nature of a right will manifest itself through objective reasoning and by the assent of the people as shown in their history, traditions, conscience, and common law, or will be recognized by the world in international law as a basic human right.

Conversely, the intrinsic criminal nature of an act will also be universally recognized as such. That physician-assisted death is *per se* a crime and not a fundamental right has, in fact, been the judgment of humanity, as applied to the German experience with euthanasia in the 1930s and 40s. *See generally, United States v. Karl Brandt, et al.* 1-2 Trial of War Criminals Before the Nuremberg Military Tribunal (1950); *United States v. Alfons Klein, et al.*, The Hadamar Trial (E. Kintner ed. 1949); L. Alexander, "Medical Science Under Dictatorship," 241 New Eng. J.Med. 39 (1949); M. Burleigh, Death and Deliverance: "Euthanasia" in Germany 1900-45 (1994); H. Friedlander, The Origins of Nazi Genocide: From Euthanasia to the Final Solution (1995); H. Gallagher, By Trust Betrayed: Patients, Physicians, and the License to Kill in the Third Reich (1990); R. Lifton, The Nazi Doctors: Medical Killing and the Psychology of Genocide (1986); B. Müller-Hill, Murderous Science (1988); R. Proctor, Racial Hygiene: Medicine Under the Nazis (1988); and Brief of *Amicus Curiae* Family Research Council in *Vacco v. Quill*, no. 95-1858.

Included in the category of fundamental liberties are those that are "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed' [and] those liberties that are 'deeply rooted in this Nation's history and tradition.'" *Bowers*, 478 U.S. at 191-92. It is clear that none of these formulations would indicate that physicians, the terminally ill, or disabled persons have any right to be treated differently from the healthy and able or otherwise are privileged to be exempt from generally applicable laws against purposeful termination of human life. Neither the Constitution nor legal reasoning support the existence of a fundamental right to surrender the inalienable right to life. Far from being fundamental, claims to *any* right to be dead, to kill one's self, to seek assistance to kill, or to aid another to take his own life, are wholly unsound. Indeed, the right to intentionally kill has always been limited to instances of *self-preservation*, never self-destruction. Consent has never been deemed a defense to homicide.

As in *Bowers*, "proscriptions against that conduct have ancient roots. [Aiding a suicide] was a criminal offense at common law," 478 U.S. at 192, and was also forbidden by the statutory law of most of the states upon the adoption of the original Constitution and the Fourteenth Amendment. "Against this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." *Id*. at 194.

III. THERE IS NO RIGHT OR LIBERTY OF PHYSICIAN-ASSISTED SUICIDE IN ANGLO-

AMERICAN LAW, HISTORY OR TRADITION.

The Ninth Circuit and physician assisted-suicide proponents cited at length that litany of cases involving privacy interests under substantive due process from *Griswold* to *Roe* to *Casey* to *Cruzan*. (*Cruzan* is actually a procedural due process case, not a substantive due process case. It did not recognize any new constitutional rights but merely assumed the existence of a certain right in order to decide the issue of what the standard of proof should be. The Court held that a clear and convincing evidence standard was not unconstitutional.) Further discussion of those cases is not needed here, suffice to say it is evident that none of

> the rights announced in those cases bears any resemblance to the claimed constitutional right [to have assistance in committing suicide] that is asserted in this case. No connection between family, marriage, or procreation on the one hand and [death, killing, and helping to kill] on the other has been demonstrated. Moreover, any claim that those cases nevertheless stand for the proposition that any kind of [deadly] conduct between consenting adults is constitutionally insulated from state proscription is unsupportable.

Bowers, 478 U.S. at 190-91.

The "deliberate extinguishment of human life by the State is uniquely degrading to human dignity," *Furman*, 408 U.S. at 291 (Brennan, J., concurring), and it is no less so when committed by the healers of society. Even assisted suicide advocate Derek Humphry admits in his book, The Right to Die 218 (1986), that "Judeo-Christian tradition has always held life sacred, and the law in America has reflected that belief."

A. There is No Right to Commit Suicide: The Right to Life is Inalienable and Cannot be Waived.

A person cannot exercise a right to kill himself without first waiving his right to life, but this right is not waivable. There is no right to give up one's right to life or to be free from freedom.

Our constitutional system is based on law, reason, and equality. The first end of civil society is the peaceful protection and preservation of life and liberty. Civil society does not exist to facilitate either death or slavery. Properly understood, life and liberty are wholly inalienable. Neither may be waived, surrendered, transferred, traded, or sold. *Declaration of Independence;* U.S. Const. Amend. XIII.

It has been the understanding since before the Nation's founding that a person cannot divest himself or his posterity of these essential rights. Furthermore, "[t]ort law and criminal law have never recognized a right to let others enslave you, mutilate you, or kill you," *Compassion in Dying v. Washington*, 49 F.3d 586, 594 (9th Cir. 1995), nor could they. "'A first tenet of our governmental, religious, and ethical tradition is the intrinsic worth of every individual, no matter how degenerate." *Meachum*, 427 U.S. at 232 (Stevens, J., dissenting).

Death, like slavery, is a condition of having no rights at all; a dead person "has indeed 'lost the right to have rights.'" *Furman*, 408 U.S. at 290 (Brennan, J., concurring). The assertion that individuals have a right to have no rights is a logical absurdity, as is the idea that the life and liberty components of due process contradict one another, rather than being complementary.

These concepts violate not only rational legal reasoning, but the Thirteenth Amendment as well, which explicitly declares the essence of

liberty to be inalienable. Even John Stuart Mill, champion of utilitarian liberty, acknowledges this logical limit on the "freedom" which assisted death supporters claim:

> But by selling himself for a slave, he abdicates his liberty; he forgoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself. He is no longer free, but is thenceforth in a position which has no longer the presumption in its favor that would be afforded by his voluntarily remaining in it. *The principle of freedom cannot require that he should be free not to be free. It is not freedom to be allowed to alienate his freedom.*

J.S. Mill, On Liberty 173 chap. V (1859) (Penguin Classics 1987) (emphasis added). Liberty is "one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects . . . I think it clear that even the [prison] inmate retains an unalienable interest in liberty." *Meachum*, 427 U.S. at 230 and 233 (Stevens, J., dissenting).

Like the essence of liberty, life too cannot be alienated. This was understood by John Locke, whose ideas spurred the Revolution and Founding:

> 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. Nobody can give more power than he has himself and he that cannot take away his own life cannot give another power over it.

J. Locke, Second Treatise on Civil Government, ch. IV § 22 (1690).

To be sure, there are other interests which are inalienable as well. The rights to self-government and revolution are inalienable. *Declaration of Independence*. The absolute freedoms of thought and conscience cannot be waived and the attempt to do so by use of drugs is a crime. The right to marry and, more recently, liberty to divorce have been considered interests not subject to alienation. Under the *Roe* rational, the alleged right to abortion cannot be waived or contracted away by a woman. *Planned Parenthood v. Danforth*, 428 U.S. 52, 68-71 (1976).

Advocates of physician-assisted death cannot deny that agreements not to do these acts would be unenforceable. No court of equity would ever compel their performance. Likewise, an agreement to commit suicide would be unenforceable because the right to life cannot be given away, regardless of the desire of the individual. The dead have no rights and there is no right to have no rights.

These persons confuse the *power* or ability to destroy life with a *right* to do so. The two are not co-equal. We do not create our own lives, it is delegated and endowed upon us. To be sure, it is not possible for the individual to create his own life. While a person has the power to take his own life, he does not possess the power to create it. Not having the power of life, it is impossible for the right to life to be waived or delegated to another.

There exists instead a "fundamental, sacred, and unalterable law of self-preservation," Locke, ch. XIII § 149, so that suicide "is an offense against nature . . . because it is contrary to [these] rules of self-preservation." *Hales v. Petit*, 1 Plowd. 253, 261, 75 Eng.Rep. 387, 399 (C.B. 1565). Consequently, an individual is "not [at] liberty to destroy

himself. . . Every one [is] bound to preserve himself and not to quit his station willfully." Locke, ch. II § 6.

Hales v. Petit has stated the case law on suicide for over four hundred years. In it, Judge Lord Dyer stated that suicide is a grave wrong, "it is in a degree of murder, and not of homicide or manslaughter [for] murder is the killing a man with malice prepense." 1 Plowd. 253, 261, 75 Eng.Rep. 387, 399 (C.B. 1565); *see also, Rex v. Ward*, 1 Lev. 8, 83 Eng.Rep. 270 (1672) ("a *felo de se* is a murderer in the highest degree"); *Toomes v. Etherington*, 1 Wm. Saund. 353, 85 Eng.Rep. 515 (1675).

A person's life "cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures, merely upon their own authority." 1 W. Blackstone, Commentaries on the Laws of England 129, ch. I (1765). All other common law commentators agree, "No man hath the absolute interest of himself." 1 M. Hale, Pleas of the Crown 411 (1736) (suicide is *homicidium sui-ipsius*, a felony against a man's self); 1 W. Hawkins, Pleas of the Crown 68, ch.27 § 4 (1716).

Indeed, the common law of reason cannot permit suicide because it is an act of malice *per se*. 1 E. East, Pleas of the Crown 229, ch.V § 16 (1803) ("Malice may also be directed to the destruction of a man's own life which denominates the party *felo de se*"). Such a right could exist, if at all, only in the positive law, never in the unwritten law. But even where it is permitted, there is only tyranny not law. "Whenever the constitution of a state vests in any man, or body of men, a power of destroying at pleasure. . . such constitution is in the highest degree tyrannical." 1 Blackstone at 129.

B. Waiver of the Right to Life by Terminally Ill or Others Can Never be Knowingly, Intelligently, or Voluntarily Made: There is Always a Reasonable Doubt Regarding the Intention of a Person Receiving a Medicalized Death.

Even if the right to life could be relinquished, the lower court must be reversed since the presumption against an individual's waiver of any constitutional right, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), cannot be overcome. A waiver of a constitutional right must be "an intentional relinquishment or abandonment of a known right or privilege." *Id.* "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). Yet, no waiver of life can ever be intelligently or knowingly made with any awareness of the likely consequences since no one knows what happens after we die,

> ay, there's the rub, for in that sleep of death, what dreams may come when we have shuffled off this mortal coil, must give us pause . . . the dread of something after death, the undiscovered country, from whose bourn no traveler returns, puzzles the will.

Hamlet, Act III, sc. 1, v. 65-68, 78-80 (1601).

To be sure, Dr. Timothy Quill, respondent in *Vacco v. Quill* (no. 95-1858), admits in his recent book that, "In physician-assisted suicide, the patient commits the final act herself. The physician's participation is indirect, and *there can always be a reasonable doubt about the intention* as long as the prescribed drug has other medicinal uses." T. Quill, Death and Dignity 141 (1993)(emphasis added).

Besides, once the right to life is waived, the individual no longer has any rights at all. There would then be no rights left to be infringed upon if government then prohibits his self-destruction. Having given up his rights, such an individual could not be heard to complain of violation of those rights.

Similarly, even if there is a right to suicide, prohibition on assistance does not infringe or unduly burden that "right" since the individual is not precluded from doing the act themselves. Again, in this respect, this case presents no justiciable controversy. That is not to say, however, that simply because one has power and free will to choose to do a given act that he has the right. And it cannot be argued that there is a right to assist separate and apart from any supposed right to self-destruction.

C. It is not Possible for the Law to Recognize any Right to be Dead or to be Non-Existent.

1. There is no Value in Nothingness: it Cannot be Presumed Under the Constitution that there is Less Suffering After Death.

Liberty to kill one's self is premised upon a belief that death brings nonexistence and that nonexistence is better than painful existence, *i.e.* nothing is better than something, or nothing is more than something. However, "better" and "quality" only have meaning or make sense if they exist. Rights, too, only make sense in the realm of the existent. The idea that nonexistence is of greater value than continued life is foreign to reason and the law. There is little, if any, interest in non-existence. Again, the dead have no rights and there is no right to have no rights.

If assisted suicide advocates are correct and death brings *nihilism*, that is, total nothingness, it hardly need be pointed out that a dead man cannot be happier than he was while alive, he cannot enjoy death. He cannot enjoy anything period. Nonexistence cannot be a good because it cannot be anything at all, except the absence of existent life.

If these persons are wrong and life is transcendent, continuing to exist even after worldly death, either spiritually or through reincarnation, again, it would need to be premised on a belief that the after-life (or the next life) is better than this one. But since there is no evidence of what occurs after death beyond religious teachings, it cannot be said by assisted-death advocates that there is an absence of suffering in the after-life.

In either event, the premise that a terminally ill person is better off dead is not one that is rational or credible. These are not precepts which can be presumed in law. That understood, it is clear that the only cognizable interest which such persons in that circumstance have is a right to the ability to improve the conditions of that existence, what Jefferson referred to as "the pursuit of happiness." *Declaration of Independence*. If a terminally ill or other person suffers physical pain or mental anguish, then the solution is to alleviate that pain and suffering. He may not, consistent with the Constitution, assert a right to the "final solution" of death.

2. Repudiation of Wrongful Life as a Cause of Action Illustrates the Refusal of the Law to Recognize any Value in Being Dead or Nonexistent.

A wrongful life action raises claims quite similar to those asserted by the physicians in these cases. It is brought by or on behalf of a disabled child for a physician's failure to warn the parents during pregnancy of potential "defects," thereby denying the mother an opportunity to terminate the life of that child by abortion.

Courts have overwhelmingly rejected these theories that the life of the disabled (or less than perfect) child is worth less than the child's nonexistence. There can be no value to a person in death. Whether the person is in perfect health or in ill health, or has or does not have impairments or disabilities, the person's life is valuable, precious, and worthy of protection, courts have routinely ruled.[3]

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[3] *See Bruggmann v. Schimke*, 239 Kan. 245, 718 P.2d 635 (1986) *Troppi v. Scarf*, 31 Mich.App. 240, 187 N.W.2d 511 (1971); *Dumer v. St. Michael's Hospital*, 69 Wis. 2d 766, 773, 233 N.W.2d 372, 375-76 (1975); *Elliott v. Brown*, 361 So. 2d 546, 548 (Ala. 1978); *Becker v. Schwartz*, 46 N.Y.2d 401, 412, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978)(no fundamental right to be born as a whole, functional human being); *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979)(later overruled); *Beardsley v. Wierdsma*, 650 P.2d 288, 292 (Wyo. 1982); *Miller v. Duhart*, 637 S.W.2d 183 (Mo.App. 1982); *Strohmaier v. Assoc. in Obstet. & Gyn.*, 122 Mich.App. 116, 332 N.W.2d 432 (1982); *Schork v. Huber*, 648 S.W.2d 861 (Ky. 1983); *Blake v. Cruz*, 108 Idaho 253, 259-60, 698 P.2d 315, 322 (1984); *Nelson v. Krusen*, 678 S.W.2d 918, 925 (Tex. 1984); *Azzolino v. Dingfelder*, 315 N.C. 103, 109, 337 S.E.2d 528, 533 (1985); *James G. v. Caserta*, 332 S.E.2d 872 (W.Va. 1985); *Smith v. Cote*, 513 A.2d 341, 353 (N.H. 1986)(courts have "no business declaring that among

The "wrongful life" non-cause of action presents no issues which differ from those being considered here. The idea of a right to be dead is a theory completely contradictory to law, which precludes any right to die or be dead.

3. Decriminalization of Suicide does not Create any New Rights or Reduce Society's Interest in Preventing Suicide and Preserving Life.

Proponents of assisted death and the lower courts insist that recent changes in statutory law to decriminalize suicide and suicide attempts have had the effect of creating a right to be dead and non-existent and eliminating any government interest in this area. But decriminalization of attempted suicide by government does not indicate a lesser concern or interest, only a change in the approach in combatting it.

While attempting suicide is no longer a ground for deprivation of liberty under the criminal law, it is still a ground for involuntary confinement and physical restraint under due process and mental commitment law. *See e.g., Addington v. Texas*, 441 U.S. 418 (1979). In this way, government has merely transferred its interest from the criminal arena to the civil. Consequently, the interest of government in preventing death and protecting life is just as compelling as it always has been.

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the living are people who never should have been born"); *Lininger v. Eisenbaum*, 764 P.2d 1202 (Colo. 1988); *Girdley v. Coats*, 825 S.W.2d 295 (Mo. 1992); *Greco v. United States*, 111 Nev. 405, 893 P.2d 345 (1995).

D. There is No Right or Liberty to Kill Unless it is for Purposes of Self-Preservation.

Assisted suicide advocates seek constitutional approval for the calculated killing of human beings. But even if the individual has a right to die, he does not necessarily also have the additional right to kill, regardless of whether he is the victim or someone else is. Prohibitions against killing are not limited to causing the death of others, self-termination is also forbidden.

These advocates confuse a right to *receive* death, with a right to *cause* it. Yet, the law has always recognized that an individual has a right to kill only for purposes of preservation of life.

The crime of murder is composed of two evils, cause and effect. Murder is outlawed by the common law and statute for two reasons: (1) to prevent the death of the victim and (2) to prevent the act of killing. Consequently, if murder is attempted but no injury results, the *actus reus* is still *mala in se* and a great crime. Similarly, with suicide, "our Laws have always had such an Abhorrence of this Crime . . . for where-ever Death is caused by an Act done with a murdrous Intent, it makes the Offender a Murderer." 1 W. Hawkins, Pleas of the Crown 68, ch.27 § 4 (1716).

This is illustrated in the case of *Hales v. Petit*, where Sir James Hales intentionally drowned himself. It was held that, while death was unfortunate, "the throwing himself into the water was the act that made the felony," not the effect of death, which only made the act even more evil. 1 Plowd. at 263, 75 Eng.Rep. at 402. The court noted that a coroner's inquisition determined that Hales "voluntarily entered into the said river, and himself therein he feloniously and voluntarily drowned, against the peace of the said late King and Queen." *Id.* at 255, 75 Eng.Rep. at 390. Consequently, the court adopted the reasoning of one of the attorneys who argued that "the act done by Sir James Hales, which is evil and the cause of his death, is the throwing himself into the water, and the death is but a sequel thereof, and this evil act ought some way to be punished." *Id.* at 259, 75 Eng.Rep. at 397.

E. The Supposed Rights of an Individual to Obtain Assistance in Dying and of Another to Provide that Assistance do not Exist.

Under the common law, it has been shown, a person providing assistance to a suicide is guilty of murder because killing itself is wrong, regardless of who commits it. It follows from this that a person cannot give another the power to kill him or to assist in his self-destruction.

> [It] being out of a man's power so to submit himself to another as to give him liberty to destroy him, God and nature never allowing a man so to abandon himself as to neglect his own preservation, and since he cannot take away his own life, neither can he give another power to take it.

Locke, ch. XIV § 168.

Just as an accessory who aids a principal to kill a victim is guilty of murder, even though he did not pull the trigger but only supplied the gun, so too is one who assists self-killing guilty of murder.

> A person who assists another in committing suicide, as by supplying him with the means of killing himself or by killing him as part of a suicide pact, is guilty of murder for the suicide's death, the latter's consent not being a bar to prosec-

ution.

2 Wharton's Criminal Law 406, § 176 (15th ed. 1994). Neither consent nor explicit request of the victim have ever been considered to be either a defense or mitigating factor to a charge of murder.

> A is guilty of murder if he is actually the agent of B's death, notwithstanding the fact that he acted at B's request. . . . [In fact,] under appropriate circumstances, one who causes another to commit suicide may be guilty of murder even though he did not intend for the other person to take his own life.

LaFave & Scott, Criminal Law § 74.[4] "He who kills another upon his Desire or Command, is in the Judgment of the Law as much a Murderer, as if he had done it merely of his own head." Hawkins at 68, ch.27 § 6.

F. Life is a Social Duty, Precluding any Right to Destroy

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[4] *See also, Burnett v. People*, 204 Ill. 208, 68 N.E. 505 (1903) (aiding or encouraging victim to overdose on morphine is murder); *People v. Kent*, 41 Misc. 191, 83 NYS 948 (1903)(encouraging and assisting woman to commit suicide by cutting throat is manslaughter); *Com. v. Hicks*, 118 Ky. 265, 82 S.W. 165 (1904) (accessory before the fact of suicide by providing morphine is murder); *Turner v. State*, 119 Tenn. 663, 108 S.W. 1139 (1908) - (consent to shooting of victim by suicide pact is not a defense to murder); *State v. Webb*, 216 Mo. 378, 115 S.W. 998 (1909)(defendant could be guilty of manslaughter even when he is shot by victim, who then shoots herself by agreement); *McMahan v. State*, 168 Ala. 70, 53 So. 89 (1910) (shooting another pursuant to suicide pact is murder because the agreement is a factor in causing death); *State v. Jones*, 87 S.C. 17, 67 S.E. 160 (1910) (same); *Farrell v. State*, 111 Ark. 180, 163 S.W. 768 (1914) (supplying morphine to victim and enticing her to kill herself is murder); *People v. Bouse*, 199 Ore. 676, 264 P.2d 800 (1953) (*later overruled on other grounds*,)- (drowning victim in bathtub, with consent, after she expressed wish to die by (a) holding head under water is murder and (b) helping her into bathtub is manslaughter); *People v. Matlock*, 51 Cal.2d 682, 336 P.2d 505 (1959) (strangling victim at his request is murder); *Persampieri v. Commonwealth*, 343 Mass. 19, 175 N.E.2d 387 (1961) (supplying rifle and taunting drunk and depressed victim who had threatened suicide is murder); *In re Thomas C.*, 183 Cal.App.3d 786, 228 Cal.Rptr. 430 (1986) (where defendant causes death of victim it is murder, not assisted suicide); *Goodin v. Tex.*, 726 S.W.2d 956, *affd., en banc*, 750 S.W.2d 789 (1987) (shooting victim at his request is murder); *People v. Cleaves*, 229 Cal.App.3d 367, 280 Cal.Rptr. 146 (1991) (tying up victim so he can strangle himself is murder); *People v. Duffy*, 586 N.Y.S.2d 150, *app.den.* 80 NY2d 929 (1992)(giving loaded rifle to depressed victim and encouraging him to kill himself is manslaughter); *Gentry v. Ind.*, 625 S.E.2d 1268 (1993), *reh. denied*, (1994) (causing suffocation after unsuccessful suicide attempt is murder); *N.M. v. Sexson*, 869 P.2d 301 (1994) (shooting another during suicide pact is murder, not assisting suicide).

that Life.

Not only is the right to life incapable of being waived, and therefore there being no "right to kill one's self," but the individual has an affirmative duty to continue living, arising either out of family obligations or implicit social compact. To be a member of society, the person must be alive and remain alive. It is the pretended right of self-destruction which would be alienable if it existed, not life. It can and must necessarily be given up upon entrance into organized society. Accordingly,

> The law regards [suicide] as an heinous offence, though the party himself may at first view appear to have been the only sufferer: for as the public have a right to every man's assistance, he who voluntarily kills himself is with respect to the public as criminal as one who kills another. It is equally an offence against the fundamental law of society, which is protection.

1 E. East, Pleas of the Crown 219, ch.V § 5 (1803).

This right to "every man's assistance" is especially important where the family is concerned. An individual has a duty of support which is owed other family members which could not be fulfilled if he were permitted to kill himself. Terminal illness does not relieve an individual of this duty and obligation; terminal does not mean incapacitated.

Suicide of one can also be a significant risk factor in the suicide of another because of the example that is set. An individual in society has a duty to not set such destructive examples, be he terminally ill or merely overcome by life's burdens. For, in killing himself he

> has offended the King, in giving such an example to his subjects, and it belongs to the King, who has the government of the people, to take care that no evil example be given them, and an evil example is an offence against him.

Hales, 1 Plowd. at 261, 75 Eng.Rep. at 400.

This duty and obligation of support to family members and society in general precludes the existence of any right to avoid those obligations through death. Moreover, the foregoing has conclusively shown that neither the Constitution nor legal reasoning support the existence of any right to surrender the inalienable right to life, to be dead, to kill one's self, to seek assistance to kill, or to aid another to take his own life.

Regrettably, abortion/privacy precedent has caused a jurisprudence of doubt in this area where there should be no doubt whatsoever. There is not, never has been, and never can be a right to assisted suicide. Claims to the contrary *should* be deemed frivolous and totally devoid of merit since it is not even a close issue. That two circuits have ruled in favor of these claims is alarming, but not surprising, considering the distortion in the law which this Court's unique abortion jurisprudence has generated. That precedent, and the premises upon which they are based, that life and liberty are subjective, relative concepts subject to the absolute will of the individual, is patently flawed, both in logic as well as history and tradition. That precedent should not be extended but disregarded. The Constitution is grounded upon a jurisprudence of life, not death; it deals with objective truths not utilitarian cost-benefit analysis. The ruling of the court below should be reversed.

V. PROHIBITIONS AGAINST PHYSICIAN-ASSISTED DEATH SUBSTANTIALLY ADVANCE

THE COMPELLING GOVERNMENT INTEREST IN PROTECTING THE INTEGRITY OF THE FAMILY AND THE LIVES OF OTHERS IN SOCIETY.

The family is the first and most basic unit of society. The integrity of the family is therefore a fundamental aspect of liberty which is essential to civil society. *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977). Accordingly, its protection is a compelling interest. Even if a right to physician-assisted death did exist, the lower court must nevertheless be reversed since this overwhelming government interest substantially supports its prohibition.

Suicide is an intensely social act, even more so when another person is involved and necessary to its completion. The practice of suicide, even without assistance, is a serious threat to the family already. Legalizing assistance in self-destruction would cause an even more profound change in the way the family and other relationships between people are considered. The family is the sanctuary of life, it could not survive in a culture of death; it exists to be our "brother's keeper," not his killer. *Genesis* 4:8-10. Sanctioning the evil of medicalized assisted death would only further undermine those most crucial units in society of marriage, family, and community, with the potential for destroying tranquil society and civilization itself.

This is recognized by many moral leaders. In his recent encyclical, Pope John Paul II cautions that assisted suicide is an attack against society which

> [goes] directly against respect for life and they represent a direct threat to the entire culture of human rights. It is a threat capable, in the end, of jeopardizing the very meaning of democratic coexistence: rather than societies of "people living together," our cities risk becoming societies of people who are rejected, marginalized, uprooted and oppressed.

John Paul II, *Evangelium Vitae* § 18 (1995).

A. Assisted Suicide is an Profoundly Social Act with Social Consequences, not a Private Act with only Personal Consequences.

1. Helping Another Intentionally Cause his Death is a Social Act Amenable to Social Control, Since it has a Dramatic Impact on Others.

Each of the decisions below refer to this pretended right as one which is "personal and intimate." Nothing could be further from the truth. No privacy is involved here. As with abortion, a person "cannot be isolated in her" decision to terminate human life. *Roe*, 410 U.S. at 159. Two or more persons combining together to intentionally cause the death of one is intensely social. It is also a commercial activity, since it would be safe to presume that the facilitator of death would want to get paid for his services rendered.

The interest asserted here is not only an associational one, but is contingent upon the consent of another, namely the assistant. If consent of one member of society is required to exercise this right, requiring the assent of society as a whole cannot be considered unreasonable. Since nothing in the Constitution gives an individual a right to compel another person to assent or to provide assistance, civil society cannot be required to give its assent to one of its members to help destroy himself.

> The case of a person who solicits another to do an act is not strictly a case of self-regarding conduct. To give advice or

> offer inducements to anyone is a social act and may therefore, like actions in general which affect others, be supposed amenable to social control.

Mill, On Liberty at 168, ch. V.

Furthermore, because this involves conduct by more than one person, it must necessarily have an impact on others in society, not just the individual and "those rights which appertain to an individual as a member of society are relative and stand in relation to others." 1 Blackstone at 119. The impact which suicide on others is further confirmed by sociological proof:

> The suicide of an individual can cause more than a simple episode of grief or a limited period of pain in the people he leaves behind; it can ruin their lives. . . . [death] produces feelings of isolation and loneliness . . . and it may produce rage and feelings of abandonment in the survivor, who sees himself as deserted. . . . when the death is due to suicide, the normal grief reaction becomes much more complex [and] the fact of suicide adds to the ordinary grief a new component of guilt, [which] is often ruinous and absolute . . . Counselling of the survivors may help, but even with counseling the psychological damage to the survivor may be extensive and sometimes permanent.

M. Battin, Ethical Issues in Suicide 79-80 (1982) (citations omitted).

The damage left in the wake of self-extermination is not limited to psychological injury, however.

> There are many other forms of damage which suicide may render to the survivors: for instance, legal, financial, and insurance-associated difficulties, as well as readjustment and job-related difficulties rooted in ostracism by one's social or religious group. . . . ostracism of a suicide survivor often constitutes a severe hardship; coupled with genuine grief and with practical difficulties, it can be ruinous. It is almost impossible to overestimate the impact suicide can have on other, especially closely related, individuals.

Battin at 80 (citations omitted).

2. Involvement of Another Person in Suicide can Itself be a Causal Factor in the Commission of Less Than Voluntary Death.

The intentional causation of the death of a human being does not occur in a social vacuum, especially when another person is involved and is necessary to its accomplishment. If care is taken to involve a second party in a suicide attempt, it is usually not a serious or true desire; if the individual really wanted to die, he or she would do the act themselves without tipping off others. Baechler, *Les Suicides* 19 (1979). With someone to "assist" then, it is much more likely that the death will actually result.

Even when the victim voices some reservations, the assistant might possibly disregard those reservations and believe the previous determination to be the victim's "true" intention. Agreements to kill, through suicide pacts or otherwise, can themselves be a causal factor in the commission of involuntary suicide because with the agreement the individual feels obligated to continue and the other person is there to ensure that the individual does not lose his nerve.

3. Self-Destruction is Inherently a Group Dynamic and Often it Causes Other Imitative Suicides.

Suicide is not merely a personal dynamic, but a group one. In his classic 1897 study, Suicide: A Study of Sociology 145 (1951), the French pioneer and father of modern sociology, Emile Durkheim, determined that it is based on "social causes and is itself a collective phenomenon." Self-destruction is not a private act with only personal causes, rather, the characteristics of the social group a person is involved makes suicide more or less likely. Durkheim found that suicide rates are higher when people feel either weak ties to a social group (egoistic suicide) or bonds so great that this ultimate sacrifice is seen as necessary for the good of others (altruistic suicide). Social instability also contributes greatly to suicide rates (anomic suicide). *Id.*

The law has long recognized that suicide has great negative social impact. Killing one's self harms others, such as the family, since, "by their example and evil tendency, they threaten and endanger the subversion of all civil society." 4 Blackstone, Commentaries on the Laws of England 176 (1769); *Hales*, 1 Plowd. at 261, 75 Eng.Rep. at 400.

> [If] by his vices or follies a person does no direct harm to others, he is nevertheless (it may be said) injurious by his example; and ought to be compelled to control himself, for the sake of those whom the sight or knowledge of his conduct might corrupt or mislead.

Mill at 147, ch. IV.

The law in this regard is irrefutably supported by empirical evidence. Self-destruction has been shown to cause extensive damage due to the harmful example it sets. Several authoritative sociological studies demonstrate beyond any doubt that suicide is often an imitative act. *See Report of the Secretary's Task Force on Youth Suicide. Vol. 2: "Risk Factors for Youth Suicide,"* (Davidson & Linnoila eds. 1991)(Dept. of Health and Human Services)(hereinafter "HHS Report"). In fact, suicide epidemics have periodically occurred throughout the world, with large numbers of people purposefully killing themselves over a short period of time. Among these are suicide epidemics in: Greece, Fifth century B.C.; Egypt, Third century B.C.; Rome, first century A.D.; Italy, 15th century; France, 18th century; southern Africa, 19th century; Germany, 19th century; and Japan, 1930's. T. Marzen, *et al.*, "Suicide: A Constitutional Right?" 24 Duq.L.Rev. 1, 141-42 (1985); Baechler at 4.

Unfortunately, we in this country are not immune to the phenomenon of copycat suicides.

> It is true that suicide rates do rise after the suicide of a public figure; that suicide rates are higher among children of persons who have killed themselves and in families where suicide has occurred; and that mimetic suicides frequently occur in which one individual replicates as precisely as possible the manner of someone else's suicide.

Battin at 95.

This should not be surprising because when others are killing themselves, it is easier for the individual, or even expected of him. Baechler at 27. If some are killing themselves it is more likely that others will too because it is either an option they had not previously considered or it prompted those who were already thinking about it to actually do it, especially when it is glorified in the media or the

appearance of social approval is given. HHS Report; Phillips, The Influence of Suggestion on Suicide, 39 Amer.Socio.Rev. 340 (1974).

Psychologist Harry Hoberman calls this imitative behavior the "cohort effect" and has found that it exists especially for youth suicide.

> It is now quite apparent that suicide, along with other types of violent behavior, is contagious. [One study] has demonstrated that suicide rates rise after the suicides of public figures and that the rise is proportional to the amount of publicity the suicide received. [Another study] showed that the number of suicides following television news stories about suicide was greater than would be expected . . . adolescents at risk for suicide are strongly influenced by the attention society and the media devotes to suicide; that youth suicide is a contagious, imitative phenomenon.

H. Hoberman, The Impact of Sanctioned Assisted Suicide on Adolescents, 4 Issues in Law & Med. 191, 197-200 (1988).

Suicide advocate Derek Humphry points out in his book The Right to Die, that after a number of highly publicized cases, beginning with Karen Quinlan in 1976,

> Mercy killings rose ten times in the 1980's compared to any five-year period since 1920, while murder-suicide, double suicides, and assisted suicides involving the terminally ill increased forty times as desperate elderly people felt obligated to take the law and fate into their own hands.

Humphry at *xi*.

As "death-with-dignity legislation was adopted by more and more states," Humphry adds, "the incidence of reported mercy killings increased at an alarming rate." *Id.* at 224. In fact, the phenomenon is so widespread that the Centers for Disease Control and other heath agencies "have formed special units to deal with the so-called 'cluster suicides.'" Marzen at 142.

B. Assisted Suicide has a Harmful Effect on the Family in Particular, Including Greatly Increasing the Risk of Suicide by Other Family Members, Which Government has Constitutional Authority to Prevent.

1. Suicide has a Severe and Destabilizing Effect on the Family.

There are many legitimate and compelling state interests in prohibiting assisted death, by physicians or by others. *See e.g., Compassion in Dying v. Washington*, 49 F.3d 586, 591-93 (9th Cir. 1995); Judiciary Committee, Report on the Revised Washington Criminal Code 153 (Dec. 3, 1970). The most compelling of these interests are essentially the same interests which government has in prohibiting any other intentional killing with malice aforethought. The interest which most concerns the family is obviously in protecting of the integrity of the family, for it is clear that a person's family history of other members attempting or committing suicide is a significant risk factor that that person will also kill himself.

Guarding against such evils is the very reason for the existence of government. Those concerns must prevail over whatever interest a person may have in killing himself, if any. "When the patient's exercise of his free choice could adversely and directly affect the health, safety, or security of others, the patient's right of self-determination must

frequently give way." *In re Conroy*, 486 A.2d 1209, 1225 (N.J. 1985).

Physician assisted death is like any other crime: an offense against society, *not* the individual victim. It is all of society, and the family in particular, which is threatened and harmed when one is involved in the purposeful killing of a human person. Suicide, the intentional disposal of life, has as much of a destabilizing and injurious effect on society and the family as those other "freedoms" our enlightened age has conferred upon the people, including divorce, extramarital sex, abortion, illegitimacy, and burdens placed upon teaching children moral values. The result has been, this Court can plainly see, one broken home and dysfunctional family after another.

Suicide is not only an act of death, but also of desertion. Prof. Battin, who has extensively studied the impact suicide has on others, describes the effect that a person's intentionally caused death has on his surviving family.

> The suicide of an individual may have serious and painful effects on his immediate family and friends. It causes grief and emotional pain; it may also cause other distress, such as the economic deprivation incurred if the victim was the central supporter of the family. It may deprive children of a parent, a spouse of conjugal companionship, and friends, acquaintances, and fellow-workers of the benefits and pleasures of association with the victim. Some of these effects may be more severe and more damaging than others, but in general, suicide can cause deep grief and deprivation to family and friends.

Battin at 78. Such anguish is no less painful where the person is terminally ill. In fact, it is even more so where death is intentional. In that case, the deprivation is an act of purposeful desertion by the decedent, with survivors suffering extreme guilt because they know that the illness was not the cause of death, rather, they combined to kill that loved one.

2. Suicide has a Devastating Effect of Greatly Increasing the Risk that Other, Healthy, Family Members will Kill Themselves.

Often times the effect suicide, assisted or not, has on the family can be devastating. Countless alarming studies demonstrate that the commission of suicide by a family member or close friend greatly increases the risk of other members killing themselves. *See* HHS Report; D. Lester, Understanding and Preventing Suicide 65-71 (1990); Roy, "Family History of Suicide," 40 Arch.Gen.Psych. 971 (1983). Some researchers have even determined that "a person is *nine times more likely to commit suicide* if he or she comes from a family with a prior suicide." R. Robinson, Survivors of Suicide 100 (1989)(emphasis added). This is due, in part, to the pressure which one suicide places on others on the edge to take the plunge.

Most illustrative of this is the case of Joseph Cruzan, father of Nancy. He committed suicide on August 17-18, 1996. The fight he led to permit his daughter to die by withholding food and water was a factor. He was suffering from depression and never overcame the toll Nancy's death took on him, his attorney said. "He never dug out of the hole felt by the loss of a child." N. Wishart, *Right-to-die activist Cruzan kills himself*, Washington Times A-6 (August 19, 1996).

It is thought that one cause of contagious suicide is that

individuals "become increasingly desensitized about death." Hoberman at 200. Other studies indicate that the decisive factors are societal-wide declines in moral conditions: despair, failure of nerve, lack of energy, alcoholism, sexual promiscuity, and secularism. Baechler at 5; T. Masaryk, Suicide and the Meaning of Civilization (1881)(*reprinted* Univ. Chicago 1970).

> Sanctioned suicide cannot help but diminish the taboo against choosing death over life, a factor which certainly plays a role in limiting the number of people who impulsively consider suicide and then act on that consideration. . . . knowledge of a right to suicide may function to legitimate the young psychiatrically disturbed person's perception that their own acute, intense distress is sufficient cause for them to consider their lives too burdensome to continue experiencing.

Hoberman at 202-03.

Where the participation of a member of society's healing professions or of the family is involved in the purposeful infliction of death, either by active participation or encouragement, the harm caused is even more acute. In those cases, the wrongful act is committed not only by the person being killed, but by the assistant.

> Even when not motivated by a selfish refusal to be burdened with the life of someone who is suffering, euthanasia must be called a false mercy, and indeed a disturbing 'perversion' of mercy. True 'compassion' leads to sharing another's pain; it does not kill the person whose suffering we cannot bear. Moreover, the act of euthanasia appears all the more perverse if it is carried out by those, like relatives, who are supposed to treat a family member with patience and love, or by those, such as doctors, who by virtue of their specific profession are supposed to care for the sick person even in the most painful terminal stages.

Evangelium Vitae at § 66.

Assisted suicide causes harm to both the assistant and his victim in that it deprives the afflicted person of that *true* compassion and dignity which he is owed by his family, as well as degrading and corrupting the conscience of the helper in death. It has other devastating effects on the family, sometimes ending in the needless death of another member, other times merely ending in destruction of the family unit and significant economic harm. Giving legal approval to medicalized death would be even more corrosive to the integrity of the family and society in general. Prevention of suicide substantial advances the compelling interest in family and social integrity. Thus, even if a right of self-destruction with assistance did exist, there are overriding concerns which require its prohibition.

C. Prohibition of "Legitimate" Physician Aid-in-Dying is Necessary to Permit Prosecution for "Illegitimate" Murder.

Government not only has a compelling interest in prohibiting physician-assisted suicide for its own sake, but also in prohibiting it for prophylactic reasons under murder laws in general. If the lower court is affirmed, it will be impossible, considering the evidence and medical involvement in a great number of cases, for law enforcement to be able to differentiate between "legitimate" assisted suicide and those

deaths which are purely "illegitimate" premeditated murder.

Physicians and other "assistants," then, would not only have a *de jure* authorization to aid in dying, but *de facto* immunity from prosecution for any type of criminal homicide, so long as it was committed by gas, lethal injection, or other medical means. Even if government were to try to regulate the practice, assistants would then claim that such regulation "unduly burdens" their rights, and as has happened with abortion jurisprudence, even the most reasonable regulation would be struck down.

To accomplish the goal of enforcing homicide laws against "illegitimate" killings, which physician assisted-suicide supporters concede is a permissible governmental purpose, all assisted suicides must necessarily be forbidden. This would impose no substantial burdens which are not necessary to accomplish that goal since the person seeking death has the power, regardless, to kill himself with or without assistance, prohibiting assistance is only an incidental burden on that power, even were it a right.

CONCLUSION

There is no provision of the Constitution forbids a state from outlawing the intentional killing of a human being directly or by suicide, assisted or not. The Supreme Court should assert the jurisprudence of life and reject the claims of physician assisted-suicide advocates.

November 11, 1996 Respectfully Submitted,

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