

# Constitutional Challenges to Bans On “Assisted Suicide”: The View From Without and Within

By ROBERT A. SEDLER\*

## Introduction

Michigan is the home state of “assisted suicide’s” most visible practitioner, Dr. Jack Kevorkian. Although public opinion polls in Michigan show strong support for assisted suicide in certain circumstances, and for that matter, for Dr. Kevorkian himself, efforts to “stop Kevorkian” have long been a prominent feature of the Michigan legal and political scene. Kevorkian’s assisted suicide activity has been strongly opposed by a number of legislators and prosecutors, and by the politically powerful Michigan Right to Life lobby.<sup>1</sup> During the 1992-93 session, a number of bills dealing with assisted suicide were introduced in the Michigan Legislature, ranging from permitting assisted suicide in certain circumstances<sup>2</sup> to completely prohibiting assisted suicide in all circumstances.<sup>3</sup> Faced with this politically-charged and highly controversial issue, the Michigan Legislature decided to do what legislatures often do in such a situation—appoint a blue ribbon commission to study the matter. The day before the agreed-upon bill establishing the study commission<sup>4</sup> was to be voted on in the Michigan House, however, Kevorkian performed another of his now familiar

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1. Gene Schabath & Robert Ourlan, *Kevorkian Opponents Want Aided-Suicide Ban Moved Up*, DET. NEWS, Feb. 16, 1993.

2. S. 211, 87th Leg., Reg. Sess. (Mich. 1993).

3. S. 32, 86th Leg., Reg. Sess. (Mich. 1991).

4. The study commission was directed to make recommendations to the legislature on the entire subject of “assisted suicide”—including whether or not “assisted suicide” should be made a criminal offense.

assisted suicides, which, as usual, received nationwide media coverage.<sup>5</sup> This renewed the legislative clamor: “Stop Kevorkian” and “Don’t let Michigan become the Nation’s suicide capitol.” The study-commission bill was amended on the floor of the House to add a provision making assisted suicide a criminal offense. The amended bill was quickly passed by the House and the Senate and signed into law by the Governor.<sup>6</sup>

Michigan’s ban on assisted suicide is sweeping in scope. Under the law, a person is guilty of “criminal assistance to suicide” if that person “has knowledge that another person intends to commit or attempt to commit suicide and . . . intentionally (a) [p]rovides the physical means by which the other person attempts or commits suicide [or] (b)[p]articipates in a physical act by which the other person attempts or commits suicide.”<sup>7</sup> The only intent necessary for a violation of the law is the intent to “provide the physical means” or “participate in a physical act” with the “knowledge that another person intends to commit or attempt to commit suicide.” *There need not be any intent that the other person should actually commit suicide.* So if a terminally ill person has told a spouse or friend, “I sometimes wish I could die,” and the spouse or friend provides the glass of water that the terminally ill person uses to swallow a lethal dose of medication, the spouse or friend has violated the law. The furnishing of the “physical means” with the requisite knowledge that a person has threatened suicide is sufficient to subject the spouse or friend to up to four years’ imprisonment.

The law does not make any exception for the terminally ill, and specifically defines assisted suicide to include the prescription of lethal medications by a physician to a terminally ill patient for the purpose of enabling the patient to use the medications to hasten inevitable death.<sup>8</sup> Thus, Michigan law prohibits a physician from prescribing medications to terminally ill patients in quantities that would empower the patients to use the medications to hasten inevitable death, and prohibits them from instructing patients how to make use of the medications for this purpose. In other words, in Michigan, a termi-

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5. *Michigan Vote Declares Assisted Suicide a Felony*, WASH. POST, Nov. 25, 1992, at A2.

6. See MICH. COMP. LAWS § 752.1027 (1993).

7. *Id.* at § 752.1027(1).

8. The law states that it does not apply to “[a] licensed health care professional who administers, prescribes, or dispenses medications or procedures to relieve a person’s pain or discomfort, even if the medication or procedure may hasten or increase the risk of death. . . .” *Id.* at § 752.1027(3).

nally ill person, no matter how excruciating that person's pain and suffering, will not be able to receive any assistance from a physician, family member, or friend, in implementing that person's decision to hasten inevitable death. For these and other reasons, the American Civil Liberties Union of Michigan has asserted a constitutional challenge to the state's ban on assisted suicide.

This Article's analysis of constitutional challenges to bans on assisted suicide comes "from without and within"—from the dual perspectives of the author's role as an academic commentator and as a constitutional litigator.<sup>9</sup> To the extent that the impartial and dispassionate perspective of a pure legal scholar is considered a virtue, this perspective is admittedly lacking. However, participation as an advocate can yield insights that detached scholarly observation cannot provide.

Initially, this Article will discuss the ACLU's substantive constitutional challenge to Michigan's ban on assisted suicide.<sup>10</sup> The basis of that challenge to the ban<sup>11</sup> is a limited one, specifically that the ban on assisted suicide is unconstitutional insofar as it prohibits terminally ill persons from making use of physician-prescribed medications to hasten inevitable death. The Article then engages the "slippery slope" argument, distinguishing between the application of a ban on assisted suicide to terminally ill persons and persons who have become so debilitated by illness that their life has become "unendurable," and other persons, who wish to end their life "for whatever reason."<sup>12</sup> This Article argues that, under applicable Supreme Court doctrine and precedent, a ban on assisted suicide is unconstitutional as applied to the terminally ill and to the physically debilitated persons who wish to end their "unendurable" life, but is constitutional in its completely hypothetical application to persons who wish to end their life "for whatever reason." In advancing this

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9. The author has approached other legal questions in this manner. See Robert A. Sedler, *The Unconstitutionality of Campus Bans on "Racist Speech:" The View from Without and Within*, 53 U. PITT. L. REV. 631 (1992); Robert A. Sedler, *The Summary Contempt Power and the Constitution: The View from Without and Within*, 51 N.Y.U. L. REV. 34 (1976); Robert A. Sedler, *Metropolitan Desegregation in the Wake of Milliken: On Losing Big Battles and Winning Small Wars: The View Largely from Within*, 1975 WASH. U. L.Q. 535; Robert A. Sedler, *The Procedural Defense in Selective Service Prosecutions: The View from Without and Within*, 56 IOWA L. REV. 1121 (1971).

10. See *infra* notes 13-47 and accompanying text.

11. In addition to the substantive constitutional challenge and the challenge to the process by which the law was enacted, see *infra* notes 13-18 and accompanying text, the law has been challenged as being unconstitutionally vague and indefinite.

12. See *infra* notes 48-61 and accompanying text.

view, this Article develops the “*choice principle*.” The concluding portion of the Article contends that the choice principle protects a person’s decision to prolong life as well as to terminate it, and so imposes significant constitutional restraints on any governmental effort to “ration” the health care necessary to prolong the life of terminally ill persons or very old persons or to alleviate the condition of physically debilitated or disabled persons.

## I. The Constitutional Right of the Terminally Ill to Hasten Inevitable Death

The ACLU’s substantive constitutional challenge to Michigan’s ban on assisted suicide is based on the Fourteenth Amendment’s due process guarantee of liberty. The ACLU and this Article argue that the Fourteenth Amendment protects the right of terminally ill patients to hasten their inevitable death, and that Michigan’s ban on assisted suicide is unconstitutional as an undue burden on that right. In developing this constitutional challenge, this Article responds to the contention advanced by opponents of assisted suicide, such as Professor Yale Kamisar, that laws against assisted suicide are fully constitutional.<sup>13</sup> In so doing this Article frames the issue for the specific context of the ACLU constitutional challenge to Michigan’s ban on assisted suicide. This is quite different from the way the opponents of assisted suicide have typically framed the issue.

### A. Properly Framing the Issue

A distinguished constitutional scholar has observed: “Once taken into our constitutional law system, the dialogue takes on a new seriousness. It is, therefore, critically important that we get the questions right and the answers right, because constitutional law is written in concrete and is not easily washed out by rain or tears.”<sup>14</sup> The right question, as regards the ACLU challenge to Michigan’s ban on assisted suicide, is not whether there is a constitutional right to assisted suicide or a constitutional right to die. Rather, the right question is about a terminally ill person’s right to hasten inevitable death. The right question is whether an absolute ban on the use of physician-prescribed medications by a terminally ill person to hasten that person’s inevitable death, *if and when the person chooses to do so*, is an undue

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13. See Yale Kamisar, *Are Laws Against Assisted Suicide Unconstitutional?*, HASTINGS CTR. REP., May-June 1993, at 32.

14. Robert G. Dixon, Jr., Bakke: *A Constitutional Analysis*, 67 CAL. L. REV. 69, 70 (1979).

burden<sup>15</sup> on that person's due process liberty interest. Any undue burden here is a violation of the Fourteenth Amendment's Due Process Clause<sup>16</sup> and thus unconstitutional.

As in many constitutional cases, an understanding of the ACLU challenge to Michigan's assisted suicide ban must begin by looking at the people who are bringing the challenge and how the ban affects what they want to do. The ACLU did not bring the constitutional challenge to the law on behalf of Dr. Kevorkian,<sup>17</sup> on behalf of proponents of voluntary euthanasia, or on behalf of non-terminally ill persons who wish to terminate an unendurable existence. The principal plaintiffs in the case are both terminally ill cancer patients who want to have the *choice* to hasten their inevitable death by taking a lethal dose of physician-prescribed medications, and the physicians who want to prescribe medications so that their patients will have this choice. The physician plaintiffs do *not* want to give lethal injections to terminally ill patients, nor to perform voluntary euthanasia in any way whatsoever, and the patient plaintiffs do not want to have their lives ended in such a manner.

What the patient plaintiffs do want, and what the physician plaintiffs want to provide, is *patient empowerment* to choose to hasten inevitable death. The physician plaintiffs want to be permitted, when they consider it medically appropriate, to provide their patients with barbiturates, opiates, or other medications in sufficient quantities that the patients may, at the time of their own choosing, immediately terminate their lives by consuming a lethal dosage. In this respect, patient empowerment encompasses both pain control and the hastening of inevitable death. The patient takes the medications to relieve pain, but if the pain becomes so unbearable that the patient no longer wants to continue living with it, or if the patient simply does not want to go on living any longer, the patient can "take the whole bottle," so to speak, and bring the suffering to a merciful end.

Unlike Dr. Kevorkian's assisted suicides, and unlike voluntary euthanasia, patient empowerment means that physician intervention is not necessary at the time of death, and that there may not be direct physician involvement with the patient's death at all. There are no

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15. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (plurality opinion).

16. The 14th Amendment to the United States Constitution states in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ." U.S. CONST. amend XIV, § 1.

17. By tacit mutual agreement the ACLU and Dr. Kevorkian have kept at some considerable distance from each other.

“suicide machines” or television cameras. There is no appointed time at which the physician comes to the patient’s home or hospital room to administer a lethal injection. Everything is in the patient’s control. Only the patient, or family members, friends, or the physician, if the patient so chooses, will know of the patient’s decision before it is carried out. The only sign of death is the empty bottle. The patient herself has determined the *timing* of her inevitable death and her release from unbearable pain and suffering.

Once the right of terminally ill patients to hasten their inevitable death by the use of physician-prescribed medications is firmly established as a matter of constitutional law, much of the controversy over assisted suicide may dissipate by its own force. At the least, the controversy will no longer involve the terminally ill. Once it is understood by both physicians and patients that physicians are legally permitted to prescribe medications in such quantities as to empower the terminally ill patient to make the choice to hasten inevitable death, there will no longer be any need for Dr. Kevorkian and his suicide machine. And there may not even be a need for voluntary euthanasia. A terminally ill patient will be able to obtain the necessary quantity of lethal medications from the patient’s physician, and if the particular physician refuses to prescribe them, the patient can simply find another physician. Consequently the controversy over assisted suicide, at least in regard to terminally ill patients, may well be superseded by the constitutional recognition of patient empowerment to hasten inevitable death.<sup>18</sup>

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18. Derek Humphry, the founder and from 1980-1992, the Executive Director of the Hemlock Society, has defined “assisted suicide” as “[p]roviding the means by which a person can take his or her own life,” such as a physician’s supplying medications with the intention that a terminally ill person be able to use those medications to bring about that person’s death, and “active voluntary euthanasia” as “[t]he action of one person directly helping another to die on request,” such as “a physician agreeing to give a terminally ill person a lethal injection.” DEREK HUMPHRY, *LAWFUL EXIT: THE LIMITS OF FREEDOM FOR HELP IN DYING* 12 (1993). Mr. Humphry argues that both “assisted suicide” and “active voluntary euthanasia” should be legally permitted, because some terminally ill persons will be unable to administer their own medications, and because many terminally ill persons prefer the intervention of a physician to bring about their death. *Id.* at 81-86. As a constitutional matter, a statute permitting the prescription, but not the administration of lethal dosages of medications would be constitutional unless it was empirically demonstrated that some number of terminally ill persons were unable to make effective use of the medications. If this was demonstrated, then the regulation would be unconstitutional as imposing an “undue burden” on the right of terminally ill persons to hasten their inevitable death. See generally *Casey*, 112 S. Ct. at 2791 (plurality opinion).

Professor Kamisar, who contends that a ban on assisted suicide should properly extend to the terminally ill,<sup>19</sup> is somewhat troubled by the narrow and specific nature of the ACLU's substantive constitutional challenge to Michigan's ban on assisted suicide. He says that the ACLU is engaging in "good advocacy" tactics when it "only assert[s] the rights of the *terminally ill* who may desire death by suicide."<sup>20</sup> As explained above, however, the ACLU challenge to Michigan's assisted suicide ban only involves the constitutionality of that ban as applied to terminally ill persons, because only terminally ill persons and physicians treating terminally ill persons are seeking to challenge the ban in this case. Moreover, the challenge is not to the law's general prohibition against assisted suicide—the plaintiffs in this case do not care about a ban on Dr. Kevorkian's suicide machine or a ban on physician-administered lethal injections—but only to the ban on physician-prescribed medications that would empower terminally ill persons to make the choice to hasten their inevitable death.

For this reason, the constitutional issue presented in the ACLU challenge is relatively narrow and quite specific. It is also the issue that Professor Kamisar and the other opponents of assisted suicide find the most troubling, because they have great difficulty in responding to the issue on the merits. They have a hard time justifying requiring terminally ill people to bear unbearable pain and suffering, and denying them the right to hasten their inevitable death. This is why they quickly change the subject and warn of the slippery slope that will follow if terminally ill people were empowered to use physician-prescribed medications to hasten their inevitable death.

The fact that the issue presented in the ACLU challenge to Michigan's ban on assisted suicide is so specific is not, as Professor Kamisar says, simply "good advocacy." Nor is it, as Professor Kamisar also asserts, "the technique of overcoming opposition to a desired goal by proceeding step by step."<sup>21</sup> Instead, it is the way that constitutional issues are supposed to be litigated in the American constitutional system. In the American constitutional system, constitutional law develops in a "line of growth," on a case-by-case, issue-by-issue basis. Indeed, a fundamental principle of constitutional adjudication is that, "constitutional issues . . . will not be determined . . . in broader terms than are required by the precise facts to which the ruling is to be ap-

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19. Kamisar, *supra* note 13, at 36 ("There is no principled way to distinguish for constitutional purposes between the terminally ill and others who desire 'death by suicide.'").

20. *Id.*

21. *Id.*

plied.”<sup>22</sup> The meaning of a constitutional provision develops incrementally, and that provision’s line of growth strongly influences its application in particular cases.<sup>23</sup>

The line of growth of constitutional doctrine is clearly illustrated by the development of the constitutional protection of a woman’s right to have an abortion. The protection of abortion is part of the constitutional protection afforded to the broader interest of reproductive freedom, which in turn is a part of the even broader liberty interest textually protected by the Fourteenth Amendment’s Due Process Clause. The constitutional protection of reproductive freedom as a due process liberty interest traces back to a 1942 Supreme Court decision holding unconstitutional the discriminatory sterilization of convicted felons.<sup>24</sup> The concept of reproductive freedom as a fundamental right, first recognized by the Court in that case, was later invoked by the Court in 1965 to hold unconstitutional a ban on the use of contraceptives by married couples,<sup>25</sup> and then, in 1972, invoked to strike down a ban on access to contraceptives by unmarried persons.<sup>26</sup>

So when the Court in the celebrated and controversial 1973 case of *Roe v. Wade*<sup>27</sup> had to confront the constitutionality of anti-abortion laws, reproductive freedom had already been established as a fundamental right. The question before the Court in *Roe* was whether the state’s interest in protecting potential human life from the moment of conception was “sufficiently compelling” to justify a prohibition on a pregnant woman’s entitlement to a medical abortion.<sup>28</sup> The Court held that this interest was not sufficiently compelling until the stage of viability had been reached,<sup>29</sup> and so in effect held that a woman had a constitutionally protected right to a pre-viability abortion. In its 1992 decision of *Planned Parenthood v. Casey*,<sup>30</sup> the Court reaffirmed the essential holding of *Roe v. Wade*, but modified the decision somewhat by holding that the state could regulate the abortion procedure, even

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22. See the Supreme Court’s classic discussion of this point in *Rescue Army v. Municipal Court*, 331 U.S. 549, 569 (1947).

23. See the discussion in Robert A. Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective*, 44 OHIO ST. L.J. 93, 118-20 (1983). The concept of “line of growth” of constitutional doctrine is explained in Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1034 (1981).

24. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

25. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

26. *Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1972).

27. 410 U.S. 113 (1973).

28. *Id.* at 154.

29. *Id.* at 163-64.

30. 112 S. Ct. 2791 (1992) (plurality opinion).



for the purpose of discouraging women from having an abortion, so long as the particular regulation did not impose an "undue burden" on the woman's decision whether or not to have an abortion.<sup>31</sup>

In light of the case-by-case, issue-by-issue development of constitutional doctrine, the ACLU's constitutional challenge to Michigan's assisted suicide ban thus does not involve a claimed right to assisted suicide or a claimed "right to die." It involves the specific question of whether the liberty protected by the Fourteenth Amendment's Due Process Clause embraces the right of a terminally ill person to choose to hasten inevitable death and, if so, whether Michigan's absolute ban on the use of physician-prescribed medications to hasten inevitable death is unconstitutional as an undue burden on that right. In actual constitutional litigation, that issue must be confronted directly with reference to applicable Supreme Court constitutional doctrine and precedents, and it cannot be avoided by "slippery slope" and "but what if" kinds of arguments. Although these arguments may be appropriate for academic or political discourse, they have no place in constitutional litigation, and cannot be relied on to avoid confronting the specific constitutional issue presented in the case before the court.

In contending that there is no constitutional right to assisted suicide, Professor Kamisar does not directly address the constitutionality of a ban against the use of physician-prescribed medications by terminally ill persons to hasten their inevitable death. Instead, he insists that for constitutional purposes, there is no principled way to distinguish between terminally ill persons seeking to hasten their inevitable death and anybody else desiring "death by suicide."<sup>32</sup> In the real world, of course, we have no difficulty identifying the terminally ill. They are patients who will die from a specific disease within a relatively short period of time. Their medical treatment is limited to alleviating their pain, and the only thing that is not certain is the precise time when their death will occur. They thus constitute a distinct and identifiable class of persons, clearly separate from all other persons

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31. *Id.* at 2818-19. Applying the undue burden standard, the Court upheld a Pennsylvania law imposing a 24-hour waiting period before the woman could have the abortion and another requirement relating to physician-furnished information. *Id.* But the Court invalidated a requirement that a married woman's husband be notified of her intention to have an abortion. *Id.* at 2826-31. The Court concluded that a fear of violence by her husband when informed of her decision to have an abortion could discourage some small number of women from having an abortion. *Id.* Thus, the requirement imposed an undue burden on the woman's abortion decision, and so was unconstitutional. *Id.*

32. Kamisar, *supra* note 13, at 36.

who, to use Professor Kamisar's term, might seek death by suicide.<sup>33</sup> And for this reason, it is not only possible, but indeed quite proper, in the context of the ACLU challenge to Michigan's ban on assisted suicide, to limit the challenge to the unconstitutionality of the law insofar as it prohibits terminally ill persons from making the choice to hasten inevitable death by the use of physician-prescribed medications.

## B. The Right to Hasten Inevitable Death

The first part of the substantive constitutional challenge to Michigan's assisted suicide law is that the liberty protected by the Fourteenth Amendment's Due Process Clause embraces the right of a terminally ill person to hasten inevitable death. The essence of the liberty protected by the Due Process Clause is personal autonomy. A person has the right to bodily integrity, to control of that person's own body, and to define that person's own existence. As the Supreme Court recently stated in *Casey*:

It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter . . . . It is settled now . . . that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, as well as bodily integrity . . . . At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>34</sup>

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33. It is appalling that the pejorative label "suicide" would be put on a terminally ill person's choice to hasten his or her inevitable death. In no meaningful sense of the term can a terminally ill person's choice to hasten his or her inevitable death by the use of physician-prescribed medications be labeled a suicide. The term suicide conjures up the image of a person jumping off a bridge or "blowing his brains out." The terminally ill person, who is facing death, and who seeks to have the choice to hasten inevitable death by the use of physician-prescribed medications, is not committing suicide by ending a life that otherwise is of indefinite duration. The life of the terminally ill person is coming to an end, and the question is whether the terminally ill person must undergo unbearable suffering until death comes naturally, or whether that person can end the unbearable suffering by the use of physician-prescribed medications.

Professor Kamisar does not say very much about the terminally ill, emphasizing instead that most people who commit suicide are not terminally ill. *Id.* at 38. He, along with most other opponents of assisted suicide, is rather uncomfortable when talking about the terminally ill. So Professor Kamisar quickly brushes them off when he says that there is no principled way to limit the purported right to commit suicide to the terminally ill. *Id.* at 36-37. The opponents of assisted suicide then start down the familiar "slippery slope," suggesting that once we start allowing terminally ill people to hasten their inevitable death, we are but a few steps away from putting all "old and sick people" on the modern equivalent of an "ice floe going out to sea" and ridding ourselves of the "inconvenience" of having to care for them. *Id.* at 39.

34. *Casey*, 112 S. Ct. at 2805-07 (plurality opinion) (footnotes omitted).

A person's entitlement to bodily integrity and control over that person's own body protects the person's right to refuse unwanted medical treatment, including the right of a competent adult person to make the personal decision to discontinue life-saving medical treatment.<sup>35</sup> It protects the right of a woman to have an abortion<sup>36</sup> and the right of men and women to use contraception in order to prevent pregnancy.<sup>37</sup> For the same reasons, a terminally ill person's right to control that person's own body must include the right to make decisions about the voluntary termination of that person's life. Terminally ill persons must have the right to make the "most basic decisions about . . . bodily integrity," "the right to define [their] own concept of existence" and "the attributes of [their] personhood," without the "compulsion of the [s]tate."<sup>38</sup> Thus, logically, they must have the right to decide whether to undergo unbearable suffering until death comes naturally, or to hasten their inevitable death by the use of physician-prescribed medications.

In arguing that any constitutional protection of a right to die does not include protection of a "right to assisted suicide," Professor Kamisar says that there is a difference between withholding or withdrawing life-sustaining medical treatment and affirmatively committing suicide.<sup>39</sup> This is true. But it is also irrelevant to resolving whether the right of terminally ill persons to hasten their inevitable death is a protected due process liberty interest and whether an absolute ban on the use of physician-prescribed medications for this purpose is an undue burden on the exercise of that right.

Professor Kamisar does not explicate any principled difference, *in constitutional terms*, between the right of a competent terminally ill person to hasten inevitable death by refusing life-sustaining medical treatment and the right of the same competent terminally ill person to hasten inevitable death using physician-prescribed medications. No

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35. See *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 279 (1990) ("[W]e assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition."). In her separate opinion in *Cruzan*, Justice O'Connor fully developed the reasons why the right of a person to refuse life-saving medical treatment is encompassed within the liberty protected by the Fourteenth Amendment's Due Process Clause. ("[T]he liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water."). *Id.* at 287-89 (O'Connor, J., concurring).

36. *Roe v. Wade*, 410 U.S. 113 (1973); *Casey*, 112 S. Ct. at 2791.

37. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

38. *Casey*, 112 S. Ct. at 2805-07.

39. Kamisar, *supra* note 13, at 33-35.

principled difference can be found in the applicable constitutional doctrine, and Professor Kamisar does not suggest one. Just as the personal autonomy reflected in the constitutional right of reproductive freedom protects both the right of a woman to use contraception to prevent pregnancy from occurring and her right to have an abortion to terminate an unwanted pregnancy that has already occurred, the right of a terminally ill person to bodily integrity includes the right to hasten inevitable death, either by discontinuing life-saving medical treatment, or by taking a lethal dose of physician-prescribed medications.<sup>40</sup>

### C. Constitutional Protection of the Right to Hasten Inevitable Death

As pointed out above, what is protected by the Fourteenth Amendment's Due Process Clause is liberty, and a number of specific individual interests are encompassed within this protection. It is true, as opponents of assisted suicide contend, that the Constitution does not specifically guarantee the right to commit suicide or the right to die. But it is equally true that the Constitution does not specifically guarantee the right to obtain an abortion, or to use contraception, or for that matter, to marry or to parent children. Rather, all of these specific individual interests are encompassed within the Due Process Clause's guarantee of liberty, and, under applicable constitutional doctrine and precedent, any governmental interference with these interests is subject to constitutional challenge and must be justified.

Under the Court's two-tier standard of review for due process and equal protection challenges, the degree of justification required for an interference with a specific individual interest depends on whether that interest is treated by the Court as constituting a "fundamental right."<sup>41</sup> If it is, then the exacting compelling governmental

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40. For a further discussion of this point, see John A. Robertson, *Cruzan and the Constitutional Status of Nontreatment Decisions for Incompetent Patients*, 25 GA. L. REV. 1139, 1176-77 (1991) ("If the competent patient has a right to cause her death passively by refusing medical care, then her right to kill herself by active means should logically follow as should her right to have the assistance of others in pursuing that end. State prohibitions on suicide or assisted suicide may be viewed as imposing bodily burdens—by preventing their removal—just as forcing unwanted treatment on a competent person imposes bodily burdens. Suicide enables the patient to avoid the bodily burdens of severe illness and a life no longer worth living, just as the refusals of medical care do. This logic would also make consensual active euthanasia a constitutional right of a competent patient unable to cause her own death.").

41. Fundamental rights have been defined as those rights which are "so rooted in the traditions and conscience of our people as to be fundamental." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). See the discussion of fundamental rights in *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

interest standard applies instead of the less restrictive rational basis standard.<sup>42</sup> Looking to the precedents, particularly to *Roe v. Wade* and *Casey*, it would surely seem that the individual's interest in bodily integrity and in having the right to define one's own concept of existence that is reflected in the decision to hasten inevitable death qualifies as a fundamental right, so as to bring into play the compelling governmental interest standard of review.

If the Court were to apply the test from *Casey*, it should find that an absolute ban on the use of physician-prescribed medications imposes an undue burden on the right of a terminally ill person to hasten inevitable death. In *Casey*, the Supreme Court held that a state may not impose an undue burden on the exercise of a person's fundamental right to bodily integrity and control over that person's own body.<sup>43</sup> The Court held that a law imposes an undue burden on the exercise of a woman's right to have an abortion when it places a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.<sup>44</sup> A ban on the use of physician-prescribed medications obviously places a substantial obstacle in the path of a terminally ill person seeking to hasten inevitable death. Indeed, a more extreme burden on the exercise of that right cannot be imagined, and for this reason, Michigan's ban on the use of physician-prescribed medications for this purpose is unconstitutional.<sup>45</sup>

The state cannot assert *any* valid interest in requiring a terminally ill person to undergo unbearable pain and suffering until death comes naturally. The interest typically asserted to justify a ban on assisted suicide is that of preserving life, or as Professor Kamisar puts it, in

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42. The compelling government interest standard requires that when the government uses a classification based upon a fundamental right, it must show that the classification is necessary (narrowly tailored) to a compelling or overriding government interest. JOHN E. NOWACK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 579 (4th ed. 1991).

43. *Casey*, 112 S. Ct. at 2819 (plurality opinion).

44. *Id.* at 2804.

45. There is no question, of course, that the state, in the exercise of its power to impose reasonable regulations on the practice of medicine, could constitutionally regulate physician participation in assisting the voluntary termination of life. Such regulations would be constitutional so long as they did not impose an undue burden on the right of a competent terminally ill person to hastening inevitable death. For example, the state might limit physician participation in assisting the voluntary termination of life to practicing clinical physicians and/or to clinical physicians who have been directly involved in the care of the terminally ill patient. Such a regulation would assumedly be constitutional, because it would not prevent the competent terminally ill person from obtaining physician assistance in implementing his or her decision to hasten inevitable death. For an example of a proposed regulation of physician participation in the voluntary termination of life, see the model "Death with Dignity Act," in HUMPHRY, *supra* note 18, at 133-52 (1993).

preventing the disregard for life that he sees resulting from a “suicide-permissive” society.<sup>46</sup> But there can be no valid interest in preserving life when there is no life left to preserve. A ban on the use of physician-prescribed medications by a terminally ill person to hasten that person’s inevitable death does not advance any conceivable interest in preserving life. Quite to the contrary, it does nothing more than force a terminally ill person to undergo continued unbearable suffering until death mercifully intervenes.

As stated at the outset, in constitutional litigation, it is “critically important that we get the questions right and the answers right.”<sup>47</sup> The question presented in the ACLU challenge to Michigan’s ban on assisted suicide is whether the absolute ban on the use of physician-prescribed medications by terminally ill persons to hasten their inevitable death is an undue burden on the liberty protected by the Fourteenth Amendment’s Due Process Clause. The answer to this question, in terms of the constitutional doctrine and precedents applicable to the right of personal autonomy, should be resoundingly in the affirmative.

## II. A Journey Down the “Slippery Slope”

This section of the Article joins Professor Kamisar and the other opponents of assisted suicide in a journey down the purported slippery slope of legalizing assisted suicide and considers constitutional challenges to a ban on assisted suicide that did not involve the terminally ill. As emphasized above, all the ACLU seeks is a holding that a ban on assisted suicide is unconstitutional as applied to use of physician-prescribed medications by terminally ill persons to hasten their inevitable death. The holding would be a relevant but not a controlling precedent in a future case involving the constitutionality of a law that prohibited suicide assistance to a person who was not terminally ill, or that prohibited suicide machines or physician euthanasia. Whether or not that precedent would be extended in future cases will be determined only if and when those cases arise. This Part, however, considers hypothetical future cases involving other applications of a ban against assisted suicide.

In arguing that the Constitution should not protect a right to assisted suicide, Professor Kamisar says that there is no principled way to distinguish for constitutional purposes between the terminally ill

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46. Kamisar, *supra* note 13, at 39.

47. Dixon, *supra* note 14, at 70.

and others who desire "death by suicide."<sup>48</sup> He goes on to say that, in certain circumstances, life may be unendurable for one who is not terminally ill, and asks if that person should have the same right to assisted suicide that is being asserted for one who is terminally ill.<sup>49</sup> Professor Kamisar's observations are true in part, but only in part. The person who is not terminally ill but who desires what Professor Kamisar calls "death by suicide" must base his or her constitutional claim on the same Fourteenth Amendment liberty interest on which we have based the constitutional claim of the terminally ill person to hasten inevitable death by the use of physician-prescribed medications. And there can be no doubt that the Fourteenth Amendment's guarantee of liberty, as defined by the Court in *Casey*, would extend to a person's desire to end a life which has become unendurable.<sup>50</sup> For constitutional purposes, however, the situation of these persons is at least potentially different from the situation of persons who are terminally ill in regard to the justification that the state may be able to assert for its interference with their choice to end an unendurable life.

Consider a case involving a hypothetical state law that prohibits all assisted suicide except for the use of physician-prescribed medications by terminally ill persons to hasten inevitable death. This law is challenged first by a person who has become so debilitated by multiple sclerosis that the person is unable to move from his bed in a nursing home, requires constant nursing care, and cannot eat or perform bodily functions without the assistance of others. The person wants to end his life by consuming a quantity of lethal medications, which his physician is willing to prescribe for him. That person contends that the law is unconstitutional insofar as it prevents him from obtaining physician-prescribed medications so that he can end his unendurable life. There is no doubt that if this person's condition were such that he could be kept alive only by being put on a respirator, he could refuse to be put on the respirator or, if he had already been put on one, could insist on being removed from it. As has been discussed previously, a competent adult has the right to make the personal decision to discon-

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48. Kamisar, *supra* note 13, at 36.

49. *Id.*

50. Again, to take the language from *Casey*, these persons have the right to make the "most basic decisions about . . . bodily integrity," the right to "define [their] own concept of existence" and "the attributes of their own personhood" without the "compulsion of the state." The right to choose whether to continue to live a life that has become unendurable or whether to bring that life to an end precisely because it has become unendurable is encompassed by these concepts. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2805-07 (1992) (plurality opinion).

tinue life-saving medical treatment.<sup>51</sup> Professor Kamisar has said that there is a difference between the withholding or withdrawal of life-saving medical treatment and "affirmatively committing suicide."<sup>52</sup> As we have pointed out however, this difference is irrelevant as to whether the person's interest in ending a life that for that person has become unendurable is a protected liberty interest for due process purposes. But is it relevant in regard to the justification that the state can give for the interference with this person's liberty interest by denying him the use of physician-prescribed medications for this purpose?

Again, what is the justification that the state can assert in this situation? The claim of the multiple sclerosis victim that for him life has become unendurable, like the claim of the terminally ill person seeking to hasten inevitable death, is objectively reasonable. A rational person in the circumstances of the multiple sclerosis victim, like a rational person who is terminally ill, could indeed reasonably conclude that the continuation of life has become unendurable. So, it seems that the state would have a difficult time asserting the justification that it is trying to prevent an irrational person from committing an act that would cause his death. The state then would be forced to rely on the essential justification that it asserts to justify any ban on assisted suicide, that of "preserving life," or as Professor Kamisar puts it, in preventing a "suicide-permissive" society.<sup>53</sup>

In the case of the terminally ill person, this asserted preserving life justification is easily countered, as discussed, by noting that there can be no valid interest in preserving life when there is no life left to preserve. Here, there is life left to preserve. The person debilitated by multiple sclerosis may live for some additional years, and the state's interest in preserving life is admittedly advanced to some degree by keeping that person alive against his will.

The constitutional question then becomes whether this asserted interest in preserving life is of sufficient constitutional importance to outweigh the interest of the multiple sclerosis victim in ending a life that has become unendurable. The answer to this question requires constitutional balancing. The state's asserted preservation-of-life interest must be balanced against the resulting interference with the

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51. See *supra* note 35 and accompanying text. For examples of such cases see, e.g., *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127 (1986); *State v. McAfee*, 385 S.E.2d 651 (Ga. 1989); *McKay v. Bergstedt*, 801 P.2d 617 (Nev. 1990).

52. Kamisar, *supra* note 13, at 33-35.

53. *Id.* at 39.



personal autonomy of the person seeking to end an unendurable life. This justification is not likely to be found sufficient in the balancing equation. In *Roe v. Wade*,<sup>54</sup> for example, the Court held that the state's interest in protecting potential human life was not of sufficient constitutional importance to outweigh the interest of the pregnant woman in bodily integrity. Assuming that a person's right to end a life that has become unendurable would be treated by the Court as a fundamental right for due process purposes, then the *Roe v. Wade* precedent may loom large in the balancing equation. There, the right of the pregnant woman to control of her own body outweighed the state's interest in protecting the right to life of the fetus, notwithstanding that the great majority of pregnancies will end in a live birth. In the assisted suicide case there is not even any third party life that the state is seeking to protect. The state's asserted interest in the preservation of life turns out to be no more than a symbolic interest, which would seem to be of even less constitutional importance than the tangible preservation of life interest that was found insufficient in *Roe v. Wade*. And since the multiple sclerosis victim is helpless to bring about his own death, a ban on physician assistance to enable him to do so is obviously an undue burden on his right to end an unendurable life.

Once we get beyond the terminally ill and the physically debilitated, for whom life has become unendurable, do we need to proceed further down the "slippery slope?" It is difficult to posit a realistic constitutional challenge to a ban on assisted suicide brought by a person who is not terminally ill or physically debilitated. Nonetheless, for the sake of completeness, let us posit the following hypothetical case. Jones wants to kill himself, but does not own a gun. He prevails on his friend Smith, who does own a gun, to give him the gun and show him how to use it. Smith does so, Jones kills himself, and Smith is prosecuted for a violation of the state's ban on assisted suicide.<sup>55</sup> Smith asserts in defense that the prosecution against him for assisting Jones' suicide violates Jones' constitutional rights, and we may assume that Smith would be permitted to assert this defense.<sup>56</sup>

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54. 410 U.S. 113, 163-64 (1973).

55. In *State v. Bauer*, 471 N.W.2d 363 (Minn. App. 1991), a 17-year-old defendant was convicted of aiding a suicide and fetal homicide, when his 18-year-old girlfriend, who was pregnant with his child, killed herself as part of a purported "suicide pact" between them. He furnished the gun that she used to kill herself, but claimed that he tried to talk her out of it and that she killed herself as he walked away.

56. *Cf. Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a physician being tried as an accessory to a violation of the state's anti-contraceptive law for furnishing contraceptives to a married couple could assert the constitutional right of the married couple to use contraceptives).

Here the state's preservation-of-life justification is much more substantial than in the case of the terminally ill person or the multiple sclerosis victim for whom life has become unendurable. Here, the state's justification is tangible rather than symbolic, and involves the state's interest in protecting Smith against himself, so to speak. Contrary to Professor Kamisar's fears, we are not in danger of becoming a suicide-permissive society, and we do not believe that it is objectively rational for people to commit suicide. We will try to stop someone from jumping off a bridge or blowing his brains out. Someone who attempts suicide may be suffering from a form of mental illness at that time, so that the attempt at suicide is considered to be pathological and irrational.

It is well-settled that the state may, consistent with due process, impose restrictions on a person's freedom in order to prevent that person from doing something that the legislature considers harmful to that person's health or safety.<sup>57</sup> This principle—that the government has the power to protect us from ourselves—is relied upon to defeat due process challenges to a host of restrictions on individual freedom, such as substance abuse laws, cyclist helmet laws, and mandatory seat belt laws.<sup>58</sup> It is also relied on to justify the involuntary commitment of a person who is “a danger to [himself].”<sup>59</sup> Undoubtedly the courts would invoke this principle to sustain the constitutionality of a ban on assisted suicide as applied to persons who are not terminally ill or not so physically debilitated that it is objectively reasonable for them to find that their life has become unendurable.<sup>60</sup>

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57. This principle is recognized in early cases sustaining against due process challenges the constitutionality of laws limiting the number of hours that an employee could work on the ground that the laws were necessary to protect employee health. *See, e.g.*, *Bunting v. Oregon*, 243 U.S. 426 (1917) (manufacturing); *Muller v. Oregon*, 208 U.S. 412 (1908) (hours of work for women); *Holden v. Hardy*, 169 U.S. 366 (1898) (underground mining).

58. As Professor Tribe has observed:

[T]here are few constitutional checks on the government's power to protect us from ourselves, whether by requiring the wearing of crash helmets and seat belts, or by banning the smoking of tobacco, the snorting of cocaine, or the recreational use of all-terrain vehicles. The intuition that one's safety is wholly one's own business is simply too far out of phase with the reality of our interdependent society to find any plausible expression in our constitutional order.

LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1372-73 (2d ed. 1988).

59. *See, e.g.* *Heller v. Doe*, 113 S. Ct. 2637, 2644-47 (1993).

60. From a doctrinal standpoint, the courts might say that the right to commit suicide in this context is not a fundamental right, so that the rational basis standard of review applies. Or they may say that the state's interest in preventing a person from committing suicide in this context is “compelling.” Either way, in this circumstance, they will sustain the constitutionality of the application of the ban against assisted suicide.

Essentially, under applicable constitutional doctrine and precedent, where it matters, bans on assisted suicide should be held to be unconstitutional. These bans matter for people who are terminally ill and for people who are so physically debilitated that for them life has become unendurable. It is these people who need the assistance of their physicians to prescribe lethal medications so that they can bring their lives to a merciful end. And it is to these people and the physicians who seek to assist them that current bans on assisted suicide are being directed.

Allowing these people to receive physician-prescribed medications to bring their lives to a merciful end will not result in a suicide-permissive society. Rather, it will allow them to have control over their own destiny, and, in the words of the *Casey* Court, to "define [their] own concept of existence, of meaning, of the universe, and of the mystery of human life."<sup>61</sup>

### Concluding Note: The "Right to Go On Living"

Opponents of assisted suicide have argued one step further down the purported slippery slope. They have contended that once terminally ill people are allowed to hasten their inevitable deaths or physi-

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In this connection, mention should be made of the rather bizarre case of *Donaldson v. Lungren*, 2 Cal. App. 4th 1614 (1992). This was a suit brought against the state attorney-general, asserting a broad constitutional challenge to the state's law against assisted suicide. One of the plaintiffs was suffering from an incurable brain disease, and he alleged that he wanted to commit suicide with the assistance of the other plaintiff, so that his body could be cryogenically preserved. It was his hope that sometime in the future, when a cure for his disease was found, his body may be brought back to life. He sought among other things, a "judicial declaration that he has a constitutional right to cryogenic suspension premortem with the assistance of others," an injunction against the prosecution of the other plaintiff for a violation of the assisted suicide law, and a court order to prevent the county coroner from examining his remains. *Id.* at 1618-19.

In rejecting this broad constitutional challenge to the assisted suicide law, the court emphasized that the state had a "legitimate competing interest in protecting society against abuses," which was "more significant than merely the abstract interest in preserving life no matter what the quality of that life is." *Id.* at 1622. The ban against assisted suicide, said the court, "protect[s] the lives of those who wish to live no matter what their circumstances," and "[t]he state's interest must prevail over the individual because of the difficulty, if not the impossibility, of evaluating the motives of the assister or determining the presence of undue influence." *Id.* at 1622-23. The court also noted that the ban would "discourage those who might encourage a suicide to advance personal motives," and that "suicide is an expression of mental illness." *Id.* at 1624.

As this case demonstrates, a broad constitutional challenge to a ban on assisted suicide cannot be sustained, since the state does have a valid interest in protecting people from themselves, particularly when they want to kill themselves so that their body can be frozen and they can come back to life sometime in the future.

61. *Planned Parenthood v. Casey*, 112 S. Ct. at 2791, 2807 (1992) (plurality opinion).

cally debilitated people to end their unendurable lives, we as a society are but a few steps away from putting all "old and sick people" on the modern equivalent of an "ice floe going out to sea" and ridding ourselves of the inconvenience of having to care for them.<sup>62</sup> From a constitutional standpoint, nothing could be further from the truth.

This Article has argued that the constitutional protection of personal autonomy embraces the right of terminally ill persons to hasten their inevitable deaths and the right of physically debilitated persons to end their unendurable lives. The constitutional protection of personal autonomy is even-handed. It means the right to choose between available alternatives. The same Constitution, for example, that protects the right of a woman to choose to have an abortion also protects her right to choose not to have an abortion. Thus, the state cannot compel a pregnant woman to have an abortion any more than it can prevent her from having one. By the same token, the Constitution that protects the right of a terminally ill person to choose to hasten inevitable death also protects that person's right to choose *not* to hasten inevitable death. The specter of government euthanasia that is at the end of Professor Kamisar's slippery slope would be constitutionally impermissible. More specifically, any governmental efforts to ration medical care would be subject to serious constitutional challenges precisely because they would interfere with the right of old and sick people, and of people who are terminally ill, to make the choice to go on with their lives.

At this point, there are no direct governmental efforts to ration medical care under governmentally sponsored programs of medical assistance, such as Medicare and Medicaid. But let us posit a health care system, such as that which might emerge from the Clinton health care proposal, in which there would be sufficient governmental involvement in the delivery of *all* health care so as to satisfy the state action requirement for constitutional purposes. Let us further suppose that in an effort to keep health care costs down, the government adopts regulations that eliminate costly life-prolonging treatments for terminally ill or very old persons, and that eliminate costly medical

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62. Kamisar, *supra* note 13, at 39. Professor Kamisar asks:

In a climate in which suicide is the "rational" thing to do, or at least a "reasonable" option, will it become the unreasonable thing *not* to do? The noble thing *to* do? In a suicide-permissive society plagued by shortages of various kinds and a growing population of "nonproductive" people, how likely is it that an old or ill person will be encouraged to spare both herself and her family the agony of a slow decline, even though she would not have considered suicide on her own?

*Id.* (footnotes omitted).

treatments that would alleviate the condition of physically debilitated and disabled persons.

The justification of controlling medical costs or that “treatment won’t do them any good anyway,” will probably not be constitutionally sufficient to justify a denial of costly medical treatment that is necessary to support a terminally ill person’s choice to continue living. Also, it will probably not be constitutionally sufficient to justify a denial of medical treatment that is necessary to prolong the life of very old persons, or that is necessary to alleviate the condition of physically debilitated or disabled persons.

The *choice principle*<sup>63</sup>—the constitutional guarantee of personal autonomy embodied in the Fourteenth Amendment’s Due Process Clause—protects the right of terminally ill persons to hasten their inevitable death and the right of physically debilitated persons to end a life that for them has become unendurable. The same choice principle protects equally the right of the terminally ill to go on living. Once this is understood, it may be that the slippery slope will no longer be so frightening to opponents of assisted suicide, and that they will no longer be so fearful of a Constitution that protects the right to choose to go on living in the same manner as it protects the right to choose to die.

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63. The choice principle relates to governmental interference with an individual’s choice to make decisions about that person’s own life. It does not refer to “choice” in a philosophical or psychological sense. People are subject to external pressures in all of the decisions that they make and it may be, as Professor Kamisar contends, *supra* note 13, at 39, that once a constitutional right to terminate life in some circumstances is recognized, the “old and sick” will come under pressure to end their lives. However, it cannot be a valid constitutional justification for a governmental interference with an individual’s choice to make decisions about that individual’s own life that some persons will be pressured when they are making that choice. It cannot be doubted that some women are pressured by their husbands, their boyfriends or their parents to have an abortion, and that in the absence of such pressure, they would make the choice to continue their pregnancies. This cannot be a constitutional justification for a prohibition on abortion. By the same token, the fact that some terminally ill persons may feel pressured to make the choice to hasten their inevitable death cannot constitutionally justify a prohibition on their right to make that choice. Of course, the government can adopt reasonable regulations to ensure that this choice, like any other choice, is voluntary and informed.

