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COMMENTS

THE RIGHT TO DIE: AN EXTENSION OF THE RIGHT TO PRIVACY

In August of 1984, the Detroit Metro Times was asked to list a classified ad seeking a compassionate individual to euthanize a severely paralyzed accident victim.¹ Although the newspaper found such an advertisement unacceptable, it sought to discover the individual's identity.² Further inquiry disclosed an unbearable personal tragedy that compelled a once vibrant person to seek a painless, dignified death.³

The victim, Mathew,⁴ was severely injured when his motorcycle struck an oncoming car.⁵ His spinal cord was severed as he collided with the car windshield.⁶ As a result of the accident, Mathew is now a quadriplegic.⁷ Though Mathew has limited use of his hands, his legs will always be useless.⁸ He requires constant atten-

1. Chicago Tribune, Jan. 28, 1985, § 4, at 1, col. 1 [hereinafter cited as *Tribune*]. Euthanasia is the mercy act or practice of painlessly putting to death persons suffering from an incurable and distressing disease. BLACK'S LAW DICTIONARY 497 (5th ed. 1979). For a general discussion of euthanasia and its legal ramifications, see Delgado, *Euthanasia Reconsidered—The Choice of Death as an Aspect of the Right of Privacy*, 17 ARIZ. L. REV. 474 (1974); Comment, *Legal Aspects of Euthanasia*, 36 ALB. L. REV. 674 (1972); Comment, *The Right to Die*, 10 CAL. W.L. REV. 613 (1974); Comment, *Proposed State Euthanasia Statutes: A Philosophical and Legal Analysis*, 3 HOFSTRA L. REV. 115 (1975); Comment, *In re Storar: Euthanasia for Incompetent Patients, A Proposed Model*, 3 PACE L. REV. 351 (1983); Note, *Live or Let Die: Who Decides an Incompetent's Fate? In Re Eichner*, 1982 B.Y.U. L. REV. 387 (1982).

2. *Tribune*, *supra* note 1, at 1, col. 1. It is a crime to seek help to kill yourself. See *infra* note 14.

3. *Tribune*, *supra* note 1, at 1, col. 1.

4. Mathew is not the young man's true name. His name has been changed at his request.

5. *Tribune*, *supra* note 1, at 2, col. 1.

6. *Id.* at 1, col. 3.

7. *Id.* Up until his accident, Mathew had been an outdoorsman. *Id.* at 1, col. 2. He loved being in the woods, studying the trees, wildlife and nature. *Id.* The possibilities were limitless for a young, healthy, enterprising teenager; especially for Mathew who had planned to attend college. *Id.* at col. 3. Because he lacked the finances, Mathew signed for three years of Army duty to help pay for his education. *Id.* His accident occurred on the way home from visiting his terminally ill grandmother just prior to leaving for basic training. *Id.* at 2, col. 1. As a result of the accident, Mathew had a break in his fifth vertebrae, causing paralysis from that point of his spinal cord down. *Id.* at 1, col. 3.

8. *Id.* at 2, col. 2.

tion. Muscle spasms sometimes jerk him into dangerous positions.⁹ His skin is so tender that wearing even a light shirt is painful.¹⁰ These are only a few examples of the problems Mathew must cope with daily.¹¹ The constant emotional, physical and psychic pain that Mathew suffers has taken its toll on him and those around him, and thus he sought relief through death.¹² This desire prompted him to send his classified ad to the Detroit Metro Times.

In a life-oriented society the expression of a desire to die is often controversial and misunderstood. Indeed, our society has expressed through its criminal law the moral judgment that, with certain narrow exceptions,¹³ all forms of killing are wrong.¹⁴ Our courts, however, are increasingly being called upon to determine the legal ramifications of when an individual, such as Mathew, decides that death is preferable to an intolerable life.¹⁵ The exigency of the circumstances often renders prolonged judicial consideration unacceptable.¹⁶ A reliable solution, yielding more predictable re-

9. *Id.* at col. 3.

10. *Id.*

11. Mathew must also constantly sip water through a long straw rigged to a nearby coffee pot to maintain his low body temperature. *Id.* at col. 4. A catheter running through his abdomen is a constant source of infection. *Id.* His bowels function sporadically and only with the aid of suppositories. *Id.* Sitting up in a chair with the aid of a nurse takes over an hour; a simple shower takes four hours. *Id.* at col. 6.

12. *Id.* at col. 5.

13. The most common exceptions are capital punishment and war.

14. See Richard, *Constitutional Privacy, The Right to Die and the Meaning of Life: A Moral Analysis*, 22 WM. & MARY L. REV. 327, 372 (1981). The underlying moral condemnation of all acts inflicting death rests on a number of grounds:

(1) life as God's property, (2) life as the property of the state, (3) the immorality of despair, (4) life as the unalienable basis of moral personality, (5) harms to determinate third parties, (6) paternalistic arguments about the irrationality of a decision to die, and (7) wedge arguments [arguments asserting that while some decisions to die may be rationale, there is no way to express in law this judgment without allowing in arguments for killing that are clearly unethical].

Id. While suicide itself is no longer a crime in most states, aiding and abetting suicide is a criminal offense. W. LAFAYE & A. SCOTT, JR., *HANDBOOK ON CRIMINAL LAW* 568-91 (1972). Because the victim's consent is not an affirmative defense in a criminal prosecution for homicide, a person who is incapable of committing suicide is also prevented from permitting another to terminate his life. See *id.* at 408. Euthanasia is treated, therefore, as a form of murder. This explains the unacceptability of Mathew's ad. See *supra* text accompanying note 2.

15. For a discussion of state and federal cases considering this issue, see *infra* notes 23-63.

16. Recently, two decisions permitting the termination of life support measures were rendered after the individuals in question had already died. On December 27, 1984, a California Court of Appeals awarded a posthumous victory to William F. Bartling, who died in November of 1984. *Bartling v. Superior Court*, No. B007907, slip op. (Cal. Ct. App. Dec. 27, 1984). The Superior Court of New Jersey held that a competent patient has the right to decline any medical treatment including feedings, and should retain that right when and if he becomes

sults, is therefore desirable.

Whether the problem takes the form of terminating life support systems¹⁷ or refusing medical treatment,¹⁸ the right to die is, in either situation, encompassed within the constitutionally protected right to privacy.¹⁹ The United States Supreme Court, however, has denied certiorari in a number of cases where it could have clarified the constitutional status of the right to die.²⁰ This comment surveys both federal and state case law concerning the right to die. Next, it examines the Supreme Court's analysis of the constitutional right to privacy and suggests that the right to die is encompassed within that right.²¹ Finally, this comment proposes practical guidelines for the application of constitutional principles in right to die cases.

I. DEVELOPMENT OF THE RIGHT TO DIE IN STATE AND FEDERAL CASE LAW

Most cases concerning the right to die can be classified into three categories. The first category encompasses incompetent²² individuals facing certain death.²³ The second involves competent in-

incompetent. *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985). The court heard the case even though the patient, Claire Conroy, died in 1983. *Id.* at 334, 486 A.2d at 1219. The court noted that the importance of issues presented by appeal required their resolution despite their mootness. *Id.*

17. For a discussion of cases which involve the termination of life support apparatus, see *infra* notes 26-44 and accompanying text.

18. For a discussion of cases which involve the refusal of medical care, see *infra* notes 45-52 and accompanying text.

19. See Delgado, *Euthanasia Reconsidered—The Choice of Death as an Aspect of the Right of Privacy*, 17 ARIZ. L. REV. 474 (1975); Comment, *The Right to Die*, 10 CAL. W.L. REV. 613 (1974); Comment, *The Right of Privacy and the Terminally-Ill Patient: Establishing The "Right-to-Die"*, 31 MERCER L. REV. 603 (1980); Note, *Right to Privacy—Removal of Life Support Systems: Leach v. Akron General Medical Center*, 16 AKRON L. REV. 162 (1982).

20. *In re Quinlan*, 70 N.J. 10, 335 A.2d 647, *cert. denied*, 429 U.S. 922 (1976); *Anderson v. Raleigh Fitkin-Paul Morgan Memorial Hosp.*, 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964); *Jones v. President & Directors of Georgetown College, Inc.*, 331 F.2d 1000, *cert. denied*, 377 U.S. 978 (1964); *Pericone v. New Jersey*, 37 N.J. 463, 181 A.2d 751, *cert. denied*, 371 U.S. 890 (1962); *Lambrenz v. People ex rel. Wallace*, 411 Ill. 618, 109 N.E.2d 767, *cert. denied*, 344 U.S. 824 (1952).

21. For a discussion of *Griswold v. Connecticut*, 381 U.S. 479 (1965), which held that there is a constitutionally protected right of privacy, see *infra* note 69. For a discussion of the zone of autonomy created by the right to privacy, see *infra* note 72.

22. As used in this comment, incompetency denotes a lack of ability, legal qualification, or fitness to discharge the required duty. BLACK'S LAW DICTIONARY 688-89 (7th ed. 1979). Competency indicates the ability, legal qualification, or fitness to discharge the required duty.

23. See, e.g., *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (young woman described as being in chronic vegetative state), *cert. denied*, 429 U.S. 922 (1976); *In re Eichner*, 102 Misc. 2d 184, 423 N.Y.S.2d 580 (1979) (individual in coma with no hope of return to cognitive sapient life).

dividuals who are terminally ill.²⁴ The final category is composed of physically healthy individuals who have decided to terminate their lives rather than face an unpleasant future.²⁵

*In re Quinlan*²⁶ is an example of the cases encountered in the first category.²⁷ Karen Quinlan, a victim of a drug overdose, was in a chronic persistent vegetative state.²⁸ Karen's father sought to be appointed as her guardian so that he could authorize the discontinuance of all extraordinary procedures necessary to sustain her vital processes.²⁹

The primary issue in *Quinlan* was Karen's constitutional right to privacy.³⁰ The court had little trouble in concluding that if the constitutional right to privacy was broad enough to encompass a woman's decision to terminate her pregnancy under certain circumstances,³¹ then it was also broad enough to encompass a patient's decision to decline medical treatment.³² More problematic was the

24. See, e.g., *Lane v. Candura*, 6 Mass. App. 377, 376 N.E.2d 1232 (1978) (patient decided not to submit to surgical amputation of gangrenous leg); *In re Quackenbush*, 156 N.J. Super. 282, 383 A.2d 785 (1978) (72 year old patient refused to authorize surgery necessary to save life).

25. See *In re Caulk*, 125 N.H. 226, 480 A.2d 93 (1984) (prisoner facing life imprisonment wished to starve himself to death); *State ex rel. White v. Narick*, 292 S.E.2d 54 (W. Va. 1982) (prisoners fasting in order to secure improved prison conditions expressed desire to die for the cause).

26. 70 N.J. 10, 355 A.2d 647, cert. denied, 429 U.S. 922 (1976). In *Quinlan*, a father sought to be appointed guardian of his comatose 21 year old daughter with the authorization to discontinue all extraordinary procedures necessary to sustain his daughter's vital processes. *Id.* at 14, 355 A.2d at 651.

27. See also *In re Severns*, 425 A.2d 156 (Del. Ch. 1980) (individual in coma as a result of damage to her brain stem incurred when her neck was broken); *John F. Kennedy Memorial Hosp., Inc. v. Blutworth*, 432 So. 2d 611 (Fla. Dist. Ct. App. 1983) (terminally ill patient in coma required life supporting apparatus to maintain vital functions); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977) (plaintiff did not wish to subject severely retarded 67 year old man suffering from acute leukemia to chemotherapy treatment); *In re Eichner*, 102 Misc. 2d 184, 423 N.Y.S.2d 580 (1979) (individual in a permanent vegetative state with a prognosis of lethality as a result of brain stem anoxia); *Leach v. Akron Gen. Medical Center*, 68 Ohio Misc. 1, 426 N.E.2d 809 (1980) (semi-comatose individual on life support system after cardiac arrest); *In re Welfare of Coyler*, 99 Wash. 2d 114, 660 P.2d 738 (1983) (patient in chronic vegetative state after cardiopulmonary arrest).

28. *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, cert. denied, 429 U.S. 922 (1976). A person in a chronic vegetative state is as an individual who maintains the vegetative parts of neurological function but who no longer has any cognitive function. *Id.* at 14, 355 A.2d at 651. Cognitive functions are the mental processes of comprehension, judgment, memory and reasoning. BLACK'S LAW DICTIONARY 235 (5th ed. 1979).

29. *Quinlan*, 70 N.J. at 14, 355 A.2d at 651. Karen Quinlan was comatose and required a respirator to assist her in breathing. *Id.* at 17, 355 A.2d at 654.

30. *Id.* at 25, 355 A.2d at 662.

31. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

32. *Quinlan*, 70 N.J. at 26, 355 A.2d at 663. *But cf.* *John F. Kennedy Memorial Hosp., Inc. v. Heston*, 58 N.J. 576, 279 A.2d 670 (1971) (court ordered blood transfusion administered to 22 year old Jehovah's Witness).

fact that Karen was incapable of making such a decision. The court stated, however, that if Karen would have been able to perceive her irreversible condition without altering her prognosis, she would have had the right to discontinue her life support apparatus.³³ The court held that Karen's decision to terminate through natural forces her non-cognitive, vegetative existence was a valuable incident of her right to privacy,³⁴ and could not be discarded merely because Karen was unable to consciously make that decision for herself.³⁵ Accordingly, the court ruled that the only practical way to prevent destruction of the right was to permit a guardian to make Karen's decision for her.³⁶

The *Quinlan* court's recognition that an individual has a right to die came in the form of a decision requiring that Karen Quinlan's father be appointed her guardian with the power to decide whether to continue life sustaining measures.³⁷ *Quinlan*, and its progeny, however, recognized that such a right was not absolute.³⁸ Arrayed against an individual's right to die are state interests such as the preservation of life,³⁹ the protection of third parties,⁴⁰ the prevention of suicide and the provision of latitude for physicians and hospitals to fulfill their ethical obligations.⁴¹ Courts must, therefore, balance the individual's right to die against these state interests. Generally, as the degree of bodily invasion necessary to sustain life

33. *Quinlan*, 70 N.J. at 26, 355 A.2d at 663.

34. *Id.* at 27, 355 A.2d at 664.

35. *Id.* A sleeping person has rights, as does someone who has temporarily lost consciousness. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 936, n.11 (1978) [hereinafter cited as TRIBE]. Someone who has died, however, cannot be said to have rights in the usual sense. *Id.* While Karen Quinlan was not dead, the task of giving content to the idea that she had rights, in view of the fact that she could make no decisions about how to exercise any such rights, was a difficult one indeed for the court. *Id.*

36. *Quinlan*, 70 N.J. at 26, 355 A.2d at 664.

37. *Id.* at 34, 355 A.2d at 671.

38. *See id.* at 26, 355 A.2d at 663; *See also* Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 735, 370 N.E.2d 417, 424 (1977); *In re Eichner*, 102 Misc. 2d 184, 193, 423 N.Y.S.2d 580, 589 (1979).

39. *Saikewicz*, 373 Mass. at 735, 370 N.E.2d at 424; *Quinlan*, 70 N.J. at 26, 355 A.2d at 663; *Eichner*, 102 Misc. 2d at 193, 423 N.Y.S.2d at 589.

40. The third parties that states have a putative interest in protecting are children and other dependents. *Saikewicz*, 373 Mass. at 736, 370 N.E.2d at 425; *Eichner*, 102 Misc. 2d at 194, 423 N.Y.S.2d at 590.

41. *Saikewicz*, 373 Mass. at 737, 370 N.E.2d at 426; *Eichner*, 102 Misc. 2d at 194, 423 N.Y.S.2d at 590. Courts have expressed concern that individual decisions regarding the prolongation of life might diminish the value placed on the concept of living. *Saikewicz*, 373 Mass. at 737, 370 N.E.2d at 426. The *Saikewicz* court, however, was ahead of its time in perceiving that the constitutional right of privacy stands for the proposition that the expression of individual free choice and self-determination is a fundamental constituent of life. *Id.* In this context, the decision to refuse treatment does not lessen the value of life, but it is the failure to allow a competent human being the right to make that decision which degrades life's value. *Id.*

increases, and the prognosis dims, courts have held that the state's interest in maintaining life weakens, and the individual's right to die must prevail.⁴²

In the first category of cases, courts are presented with the most compelling arguments for recognition of the right to die. Although courts are forced to allow a third person to make the incompetent's decision, it is recognized that there is little value in requiring that a person incapable of leading a meaningful life or of contributing to society be maintained on life support systems.⁴³ Similarly, it is not fruitful to require a severely retarded person to undergo serious and potentially painful surgery merely to postpone an inevitable death.⁴⁴ Society has no interest in maintaining an unproductive life.

A second category of cases, presenting somewhat less compelling circumstances, involves competent⁴⁵ individuals who decline medical treatment necessary to prolong their lives.⁴⁶ The circum-

42. *Quinlan*, 70 N.J. at 27, 355 A.2d at 664.

43. *See id.* at 10, 355 A.2d at 647. The court did not hesitate to decide that no compelling interest of the state could compel Karen to "endure the unendurable, only to vegetate a few measureable months with no realistic possibility of returning to any semblance of cognitive or sapient life." *Id.* at 26, 355 A.2d at 663. One might well ask what the individual and society stand to gain by allocating scarce medical resources to the maintenance of the remains, the mere shell, of a once vibrant life. It is this commentator's opinion that there is nothing to gain when life is maintained in this state. Once it is determined that the condition of a person in a vegetative, non-cognitive state is medically irreversible, every effort to preserve the last vestiges of human dignity should be made. Hence, the only humane solution is to allow that person's life to terminate by natural causes.

44. In *Superintendent of Belchertown v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977), the court stated that it would make little sense to force Saikewicz, who was profoundly mentally retarded, to undergo chemotherapy. *Id.* at 741, 370 N.E.2d at 430. The court noted that patients who request chemotherapy know the risks involved and can appreciate the painful side-effects when they arrive. The court questioned the recognizable benefits in forcing Saikewicz to undergo treatment outside his previous experience that would cause him pain and discomfort, require his removal to strange surroundings, and possibly require that he be restrained for extended periods of time. *Id.* The court concluded that it could not require Saikewicz to undergo therapy when he could not comprehend the potential benefits that might be derived from treatment, *id.*, and would die with little pain or discomfort if the disease from which he was suffering was allowed to run its natural course. *Id.* at 732, 370 N.E.2d at 421.

45. For the definition of competence, see *supra* note 22.

46. *See Satz v. Perlmutter*, 379 So. 2d 359 (Fla. 1980) (competent adult patient with no minor dependents suffering from terminal illness held to have constitutional right to refuse extraordinary treatment); *In re Brook's Estate*, 32 Ill. 2d 361, 205 N.E.2d 435 (1965) (authorization of blood transfusion without patient's notice held to be in violation of her constitutional rights); *Lane v. Candura*, 6 Mass. App. 377, 376 N.E.2d 1232 (1978) (77 year old widow held competent enough to refuse to submit to surgical amputation of her leg even though it meant certain death); *In re Quackenbush*, 156 N.J. Super. 282, 383 A.2d 785 (1978) (72 year old patient competent enough to refuse to submit to amputation of gangrenous leg); *In re Melideo*, 88 Misc. 2d 974, 390 N.Y.S.2d 523 (1976) (deci-

stances under which the decision to die is made in this category are broader and more varied than in the previous category. Unlike the cases in the previous category, courts must rule on the validity of a potentially savable individual's decision to die.⁴⁷ The subtle difference between the first and second categories is the distinction between those situations in which the withholding of extraordinary measures may be viewed as allowing an illness to run its course and those in which the same actions may be deemed to have been the cause of death.⁴⁸

In the second category, decisions to refuse medical treatment have been permitted even though the decision amounted to the taking of the patient's own life.⁴⁹ For example, courts have supported the right of a Jehovah's Witness to forego a life-saving blood transfusion because it was against her religion.⁵⁰ Courts have also allowed elderly individuals the right to refuse amputation of gangrenous limbs.⁵¹ Thus, courts have permitted individuals to refuse life-saving medical treatment and terminate their potentially

sion by 23 year old patient who was fully competent and had no children to refuse life saving blood transfusion had to be honored); *Erickson v. Dilgard*, 44 Misc. 2d 27, 252 N.Y.S.2d 705 (1962) (adult patient had a right to refuse a blood transfusion even if medical opinion was to the effect that patient's decision not to accept blood was just about the taking of patient's own life).

47. In *In re Quinlan*, 70 N.J. 10, 47, 355 A.2d 647, 667, *cert. denied*, 429 U.S. 922 (1976), as in *Superintendent of Belchertown v. Saikewicz*, 373 Mass. 728, 737, 370 N.E.2d 417, 423 (1977), the courts noted that in many cases the effect of using extraordinary measures to prolong life is to "only prolong suffering" but that physicians distinguish between curing the ill and comforting the dying; that they will not treat the curable as if they are dying but refuse to treat the hopeless and dying as if they are curable. *Quinlan*, 70 N.J. at 47, 355 A.2d at 667; *Saikewicz*, 375 Mass. at 737, 370 N.E.2d at 423.

48. For a discussion of causation, see *infra* note 99.

49. *Ericson v. Dilgard*, 44 Misc. 2d 27, 28, 252 N.Y.S.2d 705, 706 (1962) (avoidable death certain if individual did not receive blood transfusion).

50. *In re Brook's Estate*, 32 Ill. 2d 361, 205 N.E.2d 435 (1965). Jehovah's Witnesses refuse blood transfusions because the Bible prohibits internal consumption of blood in Leviticus 17:10. See also *In re Melideo*, 88 Misc. 2d 974, 390 N.Y.S.2d 523 (1976) (23 year old Jehovah's Witness who was fully competent could not be forced to accept blood transfusion); *Erickson v. Dilgard*, 44 Misc. 2d 27, 252 N.Y.S.2d 705 (1962) (competent adult refused to allow administration of a blood transfusion during an ulcer operation); *but see* *Application of President and Directors of Georgetown College, Inc.*, 331 F.2d 1000, *cert. denied*, 377 U.S. 978 (1964) (blood transfusion ordered where patient was critically ill and deemed incompetent by the court); *John F. Kennedy Memorial Hosp., Inc. v. Heston*, 58 N.J. 576, 279 A.2d 670 (1971) (court ordered administration of blood transfusion to Jehovah's Witness after holding that there is no right to die).

51. *Lane v. Candura*, 6 Mass. App. 377, 376 N.E.2d 1232 (1978) (77 year old widow held competent enough to refuse to submit to surgical amputation of her leg even though it meant certain death); *In re Quackenbush*, 156 N.J. Super. 282, 383 A.2d 785 (1978) (72 year old held competent enough to refuse to submit to amputation of gangrenous leg). See also *Satz v. Perlmutter*, 379 So. 2d 359 (Fla. 1980) (competent adult patient suffering from a terminal illness has the constitutional right to refuse or discontinue extraordinary medical treatment).

savable lives.⁵²

Many of the decisions permitting individuals to choose life over death speak in terms of the right to refuse medical treatment, rather than the right to die.⁵³ Courts have, however, allowed individuals to terminate their potentially savable lives even where they have found the decision repugnant and foolish.⁵⁴ To be consistent with a system of government which gives the greatest possible protection to individuals in the furtherance of their desires, individuals must be allowed, according to some courts, to make even foolish decisions.⁵⁵

The final category involves competent individuals who are physically healthy, but nonetheless, desire to terminate their lives.⁵⁶ In the third category, it is quite clear that the individual's decision to die is the cause of death, rather than the discontinuance of a mechanism that postpones an otherwise inevitable death. For instance, in *In re Caulk*,⁵⁷ a healthy inmate in a New Hampshire state prison, facing a possible life sentence, sought to starve himself to death.⁵⁸ Caulk insisted that he was not committing suicide, but rather was allowing himself to die.⁵⁹

The *Caulk* court noted that individuals have a constitutional right to privacy arising from a high regard for human dignity and self-determination.⁶⁰ Such a right may be asserted to prevent unwanted infringements of bodily integrity.⁶¹ The court found, however, that the state's interests in preserving Caulk's life, namely preventing suicide and promoting justice, were more compelling than his right to bodily integrity.⁶² While the court never expressly considered Caulk's right to die, its affirmance of such a right is implicit in its analysis of the state's interests which are typically bal-

52. See e.g., *In re Melideo*, 88 Misc. 2d 974, 390 N.Y.S.2d 523 (1976) (young woman allowed to refuse blood transfusion though suffering from severe, post-operative uterine hemorrhage).

53. For a list of cases which speak in terms of the right to refuse medical treatment, see *supra* note 51.

54. *In re Brook's Estate*, 32 Ill. 2d 361, 374, 205 N.E.2d 435, 442 (1965) (court considered appellant's beliefs to be unwise, foolish and ridiculous).

55. See, e.g., *Ericson v. Dilgard*, 44 Misc. 2d 27, 28, 252 N.Y.S.2d 705, 706 (1962) (court refused to disregard patient's wishes on the basis of medical opinion alone).

56. *In re Caulk*, 125 N.H. 226, 480 A.2d 93 (1984); *State ex rel. White v. Narick*, 292 S.E.2d 54 (W. Va. 1982). These cases involved prisoners starving themselves to death.

57. 125 N.H. 226, 480 A.2d 93 (1984).

58. *Id.* at 227, 480 A.2d at 94.

59. *Id.*

60. *Id.* at 230, 480 A.2d at 95.

61. *Id.*

62. *Id.*

anced against the individual's right to die.⁶³

The decisions allowing individuals to exercise their right to die have concluded that the right to die is encompassed within their constitutional right to privacy.⁶⁴ The right to die is recognized as a qualified right which must be balanced against competing state interests.⁶⁵ The cases in the first category, concerning terminally ill incompetents, and those in the second category, concerning terminally ill competent, represent instances in which the individual's right to die is deemed to outweigh the state's interest in abrogating that right.⁶⁶ The cases in the third category, concerning physically healthy individuals who wish to terminate their lives, illustrate instances where courts implicitly acknowledge the right to die, but generally find that asserted state interests outweigh that right.⁶⁷ The Supreme Court has yet to address the issue of whether the Constitution protects the right of an individual to choose death over life.⁶⁸ Analysis of the case law, however, leads to the conclusion

63. The court's decision that the state interests involved were compelling obviated the need to examine the nature of Caulk's claimed constitutional rights. The court's affirmance of Caulk's right to die, however, is implicit in its decision. Had the court wished to do so, it could have denied that the right of privacy is broad enough to encompass the right to die and avoided the discussion of state interests. See *id.* at 226, 480 A.2d at 93. That the court proceeded directly to such a discussion signifies that the court did in fact believe that Caulk had a constitutional right to die.

64. For a discussion of cases considering the right to die, see *supra* notes 23-63 and accompanying text.

65. See *supra* text accompanying notes 37-42. But see *John F. Kennedy Memorial Hosp., Inc. v. Heston*, 58 N.J. 576, 279 A.2d 670 (1971) (specifically holding that there is no right to die).

66. For a discussion of category one and category two cases, see *supra* notes 23-52 and accompanying text.

67. For a discussion of category three cases, see *supra* notes 56-63 and accompanying text.

68. In *England v. Louisiana State Board of Medical Examiners*, 259 F.2d 626 (5th Cir. 1958), *reh'g denied*, 263 F.2d 661, *cert. denied*, 359 U.S. 1012 (1959), the Supreme Court denied certiorari in a case where the lower court held that the state cannot deny to any individual the right to exercise a reasonable choice of method in the treatment of his illness, 259 F.2d at 627, apparently satisfied with that decision. Also, Chief Justice Burger, while sitting as a Circuit Judge for the District of Columbia, included the choice of refusing medical treatment, even at a great risk of death, among the privacy rights. *Application of President and Directors of Georgetown College, Inc.*, 331 F.2d 1010, 1017 (D.C. Cir. 1964) (denying rehearing en banc) (dissenting opinion). On the strength of these cases, one court has held that there is a constitutional right, encompassed by the right of privacy, to choose the controversial treatment of acupuncture. *Andrews v. L.G. Ballard, D.O.*, 498 F. Supp. 1038, 1050-51 (S.D. Tex. 1980). In another case, however, the Supreme Court permitted the government to interfere with the interstate shipment and sale of Laetrile. *United States v. Rutherford*, 442 U.S. 544, 559 (1979). The court noted that to allow Laetrile, with no proven effectiveness, to be used in the treatment of cancer "would lead to needless deaths and suffering among patients characterized as terminal who could actually be helped by legitimate therapy." *Id.* at 557. This decision raises the question of whether or not the Court would allow an individual to refuse life saving medical treatment as the lower courts have done.

that the right to die is encompassed within the constitutional right to privacy.

II. PRIVACY: PROCREATION, ABORTION AND THE RIGHT TO DIE

In *Griswold v. Connecticut*,⁶⁹ the Supreme Court held that a constitutionally protected right to privacy existed within the penumbras⁷⁰ of the Bill of Rights.⁷¹ In doing so, the Court created a

69. 381 U.S. 479 (1965). In *Griswold*, the executive director of the Planned Parenthood League of Connecticut, and its medical director, a licensed physician, were convicted as accessories for giving married persons information and medical advice on how to prevent conception and, following examination, prescribing a contraceptive device or material for the wife's use. *Id.* at 480. The Court noted that section 53-32 of the General Statutes of Connecticut (1958 rev.), under which the appellants were convicted, provided that "[a]ny person who uses any drug, medicinal article or instrument for the purpose of preventing contraception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." *Id.* In addition, § 54-196 of the Connecticut statute provided that "[a]ny person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender." *Id.* Appellants were found guilty as accessories and fined \$100 each, against their claim that the accessory statute as so applied violated the fourteenth amendment. *Id.*

The Supreme Court held that the state could not make the marital use of contraceptives a crime and, therefore, could not punish someone who provided married persons with contraceptives, or with information concerning their use, for the crime of aiding and abetting such use. *Id.* at 485. Although the separately concurring Justices offered differing rationales, the majority opinion was plainly outraged at the only imaginable means of enforcing the law. Justice Douglas' majority opinion asked whether the Court would "allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?" *Id.* at 485.

Griswold was the genesis for the modern day right of privacy and marked the beginning of a new area of judicial intervention into state legislation. Time and again the Court has stepped in to strike state legislation as violative of its new right of privacy. See e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (Texas criminal abortion statutes held unconstitutional); *Doe v. Bolton*, 410 U.S. 179 (1973) (procedural requirements of Georgia criminal abortion statutes held unconstitutional). That the right of privacy is controversial goes almost without saying. Justice Rehnquist, dissenting in *Roe*, 410 U.S. 171-78, likened the majority's decision to the long defunct majority opinion in *Lochner v. New York*, 198 U.S. 45 (1905), a case indicative of an era in which the Supreme Court was quite willing to scrutinize and invalidate economic regulations pursuant to the due process clause. One commentator has gone so far as to regard privacy as but a name for "a bag of unrelated goodies." *TRIBE, supra* note 35, at 887.

The right of privacy draws its controversial nature from the fact that it is not explicitly stated in the Constitution. The *Griswold* Court found the right lurking in the penumbras emanating from the various guarantees of the Bill of Rights. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). As a result, decisions invoking the right of privacy have been met with stiff resistance and sometimes violent opposition. The abortion decisions, more than fourteen years after their inception, remain the instigators of violent public reaction. See e.g., Florida, *More Abortion Bombings*, *NEWSWEEK*, January 7, at 17 (1985).

70. Webster's Dictionary defines a penumbra as "[a] space of partial illumination . . . between the perfect shadow on all sides and the full light;" "[a] surrounding or adjoining region in which something exists in a lesser degree." Webster's Seventh New Collegiate Dictionary 625 (7th ed. 1967). Illusory, in-

zone of autonomy which protects individuals from governmental intrusion.⁷² To determine whether the right to die lies within this zone of individual autonomy, one may analyze the judicial treatment of an analogous interest: the right to terminate a pregnancy.⁷³ The decisions considering the right to terminate a pregnancy, however, do not address the individual's interest in terminating his life.⁷⁴ Yet there are similarities between the two situations which suggest that the rationale of the abortion cases may be extended to right to die cases as well.⁷⁵

In *Roe v. Wade*,⁷⁶ the Court held that the right to privacy is broad enough to encompass a woman's decision to terminate her pregnancy.⁷⁷ In reaching this conclusion, the Court relied upon a series of cases which found a constitutionally protected interest in decisions concerning procreation, marriage, and family life.⁷⁸ Its

deed! Illusion is defined as the "perception of something objectively existing in such a way as to cause misinterpretation of its actual nature." *Id.* at 415.

71. *Griswold*, 381 U.S. at 484.

72. *Id.* See Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1411 (1974). Professor Henkin argues that, with respect to the right of privacy, the Court has been vindicating not a right to freedom from official intrusion, but a right to freedom from official regulation. *Id.* at 1424. He states that the denomination "right of privacy" is, therefore, misleading, if not mistaken, *Id.* at 1410, in that the right has brought little new protection for what most people think of as privacy; the right to be free from unwanted intrusion, to be secreted and secretive, a right to be unknown. *Id.* at 1419. Henkin correctly notes that what the Supreme Court has given us is something essentially different and farther reaching; an additional zone of autonomy of presumptive immunity from governmental regulation. This becomes apparent when reviewing the privacy cases. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (protecting decision to terminate pregnancy during first trimester from regulation); *Griswold*, 381 U.S. 479 (protecting the right to use contraceptives from regulation).

73. See *Roe*, 410 U.S. 113, and *Doe*, 410 U.S. 179.

74. See *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

75. For a discussion of the similarities between the right to die and the right to have an abortion, see *infra* notes 85-107 and accompanying text.

76. 410 U.S. 113 (1973).

77. In *Roe*, a pregnant single woman brought a class action challenging the constitutionality of Texas' criminal abortion laws, which proscribed procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. *Id.* at 117-18. After a detailed review of the history of abortions, the court held that in the first trimester of pregnancy a woman, upon the advice of a physician, could decide to terminate her pregnancy free from state regulation. *Id.* at 163. The court held that in the second trimester, the state's important and legitimate interest in the health of the mother reached the compelling point, justifying state regulation of abortion procedures. *Id.* Finally, the Court held that after the point of viability, approximately the beginning of the third trimester, the state's interest in protecting the potentiality of life might permit it to completely proscribe abortion. *Id.*

78. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right to privacy includes right of individuals to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child); *Loving v. Virginia*, 388 U.S. 1 (1967) (freedom to marry is one of the vital personal rights essential to man's orderly pursuit of happiness); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (marriage and procreation are fundamen-

examination of those cases revealed that the decisions protected by the right to privacy satisfy two criteria: first, they are personal decisions involving an individual's self or family, and second, they are important decisions affecting one's life or development.⁷⁹ These two criteria suggest that the right to privacy extends to other important and intimate areas as well.⁸⁰ Indeed, recent Supreme Court opinions signal that decisions concerning marriage, procreation, and family life are merely illustrative of the types of decisions that fall within an individual's constitutionally protected zone of privacy.⁸¹

Roe v. Wade and its progeny are the latest in a long line of cases that protect the right to make important decisions about personal matters against governmental intrusion. The common law held that there is no right more sacred than the right of every individual to possess and control himself, free from any restraint or interference from others.⁸² The Supreme Court echoed this maxim when it held that the right to reproduce is one of man's basic civil rights.⁸³ The Court has also recognized and afforded equal protection to an individual's decision not to bear a child.⁸⁴ Together, these holdings stand for the proposition that the individual shall control whether he or she will be the source of another life. When the abortion cases are regarded as part of a series of decisions allocating the choice of whether to bear a child, they represent a view in favor of leaving the choice with the individual rather than the majority, rather than a decision in favor of abortion.⁸⁵ The abortion decisions can be viewed, therefore, as a reaffirmation of the principle that the

tal to the very existence and survival of the race); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (unreasonable interference with the liberty of parents and guardians to direct the upbringing of children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (the rights of an individual to choose a vocation, bring up children, and worship God according to his own conscience are essential to man's orderly pursuit of happiness).

79. *Andrews v. L.G. Ballard, D.O.*, 498 F. Supp. 1038, 1046 (S.D. Tex. 1980) (court performed similar examination of privacy cases).

80. See *supra* note 78 for a partial list of the rights presently included within the right to privacy.

81. In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Court stated that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453.

82. *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (Court stated that the right to one's person may be equated to a "right of complete immunity to be let alone").

83. *Skinner*, 316 U.S. at 541 (struck down state law providing for the sterilization of anyone convicted two or more times for felonies involving moral turpitude).

84. *Griswold*, 381 U.S. at 485 (struck down state law prohibiting the sale of contraceptives and giving advice on how to properly use contraceptives).

85. TRIBE, *supra* note 35, at 933. Professor Tribe argues that the abortion decisions might lose some of their controversial character if viewed in this context. *Id.*

constitutional right to privacy protects an individual's autonomy in making decisions which involve intimate matters.⁸⁶ No decision ever made is more intimate or momentous than the decision to terminate one's own life.⁸⁷ The right to die is, therefore, a logical extension of the right to privacy and should be considered to fall within its zone of autonomy.

Besides the intimacy factor, other similarities exist between the abortion decisions and the right to die. The three categories of cases developed above⁸⁸ illustrate the close parallel between abortion cases and right to die cases. In *Roe v. Wade*,⁸⁹ the Court concluded that the right of privacy encompasses the abortion decision, but that the right is qualified and must be balanced against important state interests.⁹⁰ In developing guidelines to determine when the state's interests become sufficiently compelling to outweigh the individual rights, the Court examined the stage of pregnancy at which the abortion was sought.⁹¹ This method of analysis fostered a resulting framework which is equally applicable to the three categories of right to die cases developed above.⁹²

The *Roe* Court held that during the first trimester of pregnancy, the patient and her physician should be free to determine, without state regulation, whether the patient's pregnancy should be terminated.⁹³ The woman's decision to terminate her pregnancy

86. Delgado, *Euthanasia Reconsidered—The Choice of Death as an Aspect of the Right of Privacy*, 17 ARIZ. L. REV. 474, 477 (1975).

87. Cf. *Andrews v. Ballard*, 498 F. Supp. 1038, 1047 (S.D. Tex. 1980) (in ruling on whether a patient could choose to undergo acupuncture, the court held that one's health is a uniquely personal possession and that the decision of how to treat that possession is of a no less personal nature).

88. For a discussion of the right to die as developed in lower court cases, see *supra* notes 23-63 and accompanying text.

89. 410 U.S. 113 (1973).

90. *Id.* at 154. Deciding when state interests outweigh individual interests, however, proved troublesome for the Court. See *id.* at 154-64. The Court refused to isolate the woman in her pregnancy. *Id.* at 159. Texas argued that life begins at conception and is present throughout pregnancy, and that it therefore had a compelling interest in protecting that life from and after conception. *Id.* Although the Court agreed that the state's interest in protecting life was compelling, it refused to accept Texas' theory on when life begins. *Id.* at 162-63. To do so would have allowed Texas to proscribe abortion entirely, which the Court was unwilling to do. The pregnant woman also had rights at stake. *Id.* Faced with assertions that life begins at conception and the fact that the Constitution does not define the word "person," the Court chose to side-step the issue of when life begins. *Id.* at 147-64. The Court held that at some point the health of the mother became a significant state interest. *Id.* The Court also held that the state's interest in the potentiality of life becomes compelling at the point of viability, when the fetus "presumably has the capability of meaningful life outside the mother's womb." *Id.* at 163 (emphasis supplied).

91. See *id.* at 159-64.

92. For a discussion of the three categories, see *supra* notes 22-63 and accompanying text.

93. *Roe*, 410 U.S. at 163.

within the first trimester is analogous to the first category of cases allowing for the terminally ill incompetent's decision to terminate life support measures or refuse medical treatment.⁹⁴ Any asserted state interests are outweighed and the individual should be allowed to make the decision to terminate life without state interference.⁹⁵

The *Roe* court held that at the beginning of the second trimester the state's interest in protecting maternal health becomes compelling.⁹⁶ From that point on a state may regulate the abortion procedure.⁹⁷ Decisions to seek an abortion during the second trimester are similar to those decisions in the second category where terminally ill, but competent, individuals choose to terminate or refuse medical treatment.⁹⁸ Abortion during the second trimester may jeopardize maternal health and, if the patient dies, may be deemed to have been the cause of death. Similarly, the decision of a terminally ill, competent individual to refuse necessary medical treatment may be deemed to have been the cause of death.⁹⁹

94. For a discussion of category one cases, see *supra* notes 26-44 and accompanying text.

95. One recognized state interest is the maintenance of the integrity of the medical profession. See *infra* note 113. Arguably this interest applies to any decision to die. It may also be said to apply to the decision to terminate a pregnancy through abortion. It does not appear to rise to the point of being compelling in either category one right to die cases or first trimester abortion cases.

96. *Roe*, 410 U.S. at 163.

97. *Id.* The state may regulate the procedure as a necessary measure to protect maternal health. *Id.* The facts indicated that, due to modern medical techniques, the mortality rates for women undergoing early abortions appeared to be as low as or lower than the rates for normal childbirth. *Id.* at 149.

98. For a discussion of category two cases, see *supra* notes 45-55 and accompanying text.

99. All the category one decisions allowed necessary care to be terminated *only* if the incompetent was irreversibly vegetative or suffered from a terminal illness, the treatment of which would only postpone an inevitable death. To date, no court has allowed a guardian to refuse treatment on behalf of an incompetent suffering from a curable condition. See, e.g., *In re Storar*, 52 N.Y.S.2d 363, 420 N.E.2d 64 (1981) (guardian not permitted to refuse blood transfusions on behalf of severely retarded man bleeding from ulcers in his bladder); *In re Sampson*, 323 N.Y.S.2d 253, 37 A.D.2d 668 (1971) (parents' religious beliefs not allowed to interfere with blood transfusions necessary to save minor child's life), *aff'd*, 292 N.Y.2d 900, 278 N.E.2d 918 (1972). In category two, however, the courts have allowed individual's to refuse potentially curable medical treatment. For a discussion of category two cases see *supra* notes 45-55 and accompanying text. The act of refusal is, therefore, the cause of death; not the illness. In category one, the illness is the cause of death, not the act of refusal.

While all the cases cited in category two affirm the individual's decision to die, this affirmance was in some instances given begrudgingly. See, e.g., *In re Brook's Estate*, 32 Ill. 2d 361, 205 N.E.2d 435 (1965) (court held that decision to refuse blood transfusion must be honored even though foolish). It is conceivable that a situation could arise where a court would hold that the state's interests in preserving life and protecting third parties outweighed the individual's interests. In *In re Melideo*, 88 Misc. 2d 974, 300 N.Y.S.2d 523 (1976), the court affirmed a young woman's decision to refuse a life-saving blood transfusion only after finding that she was competent, was not pregnant, and had no children. *Id.* at 975, 300 N.Y.S.2d at 524. A state would, therefore, probably be allowed to

Finally, the *Roe* Court held that the state's important and legitimate interest in potential fetal life becomes compelling at viability: a point near the beginning of the third trimester.¹⁰⁰ The state will not permit¹⁰¹ an abortion during that period because the fetus presumably has the capability of meaningful life outside the mother's womb.¹⁰² An analogous situation is found in the case of the physically healthy individual who decides that death is preferable to life.¹⁰³ To date, courts have refused to permit a physically healthy individual to decide that death is preferable to life and then act on that decision.¹⁰⁴ The state's interests are considered compelling under these circumstances.¹⁰⁵ Protecting potential fetal life and preventing physically healthy individuals from terminating their lives are quite similar.¹⁰⁶ As with state regulations of abortion after the point of viability, state regulations abrogating a physically healthy individual's right to die will most likely be upheld as constitutional.¹⁰⁷

effect regulations to further these interests in a category two situation, much as it can regulate abortion procedures to ensure maternal health during second trimester abortions. See *supra* note 97 for a discussion of second trimester abortion regulation.

100. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

101. *Id.* Such proscription was held to be qualified when abortion becomes necessary to save the life or health of the mother. *Id.* at 163-64.

102. *Id.* at 163.

103. For a discussion of category three cases, see *supra* notes 56-63 and accompanying text.

104. For a list of citations to category three cases, see *supra* note 25.

105. For a discussion of category three cases, see *supra* note 56-63 and accompanying text.

106. Terminating the life of a viable fetus through abortion is feticide. See, e.g., ILL. REV. STAT. ch. 38, § 9-1.1 (Supp. 1983). Section 9-1 of Chapter 38 defines murder as an intentional killing without lawful justification. Ch. 38, § 9-1. Because murder is not expressly limited to the killing of one person by another, under Illinois law the taking of one's own life can be construed as murder. Chapter 38 includes murder and feticide under the general heading of "homicide." ILL. REV. STAT. ch. 38, § 9 (1983).

107. Like a woman forced to bear an unwanted child, an individual forced to continue life while suffering severe physical and psychological detriments faces the prospect of a distressful life and future. *Roe v. Wade*, 410 U.S. 113, 153 (1973). The individual who is compelled to continue living may be required to exhaust his personal fortune in an undertaking not of his own choosing can be likened to the mother forced to raise a child whose care she does not choose to assume. Finally, one commentator has argued that the overtones of population growth, pollution, and poverty present in the abortion cases have companions in the issue of self-determination. Delgado, *Euthanasia Reconsidered—The Choice of Death as an Aspect of the Right of Privacy*, 17 ARIZ. L. REV. 474, 479 (1975). Delgado argues that, in view of their shortage and attendant high cost, the use of medical facilities to compel the unwilling to live misallocates scarce resources. *Id.* In addition, he points out that disallowing a person the right to die, in appropriate circumstances, forces an individual to deplete personal financial resources which they might prefer to distribute to loved ones rather than the medical profession. *Id.*

III. SUGGESTED GUIDELINES

The *Roe* interest analysis is beneficial in establishing guidelines for the application of constitutional principles in right to die cases. It allows for a balancing of the individual's interests in remaining free from governmental intrusion against the state's interests in interfering with the exercise of an individual's constitutional rights. When one state interest becomes sufficiently compelling, it governs over the individual's discretion to act on a desired goal.¹⁰⁸ As each separate and discrete state interest¹⁰⁹ becomes compelling at a different point,¹¹⁰ the individual's constitutional right is further restricted. This process is evident from the varying deference accorded the abortion decision based upon the trimester in which the decision is made.¹¹¹ State interests in interfering with a person's decision to terminate his or her life also become compelling at different points, depending upon which of the three categories an individual falls within.¹¹²

There is little justification for state interference with the decision to terminate the life sustaining care required to keep an incompetent individual facing certain death alive.¹¹³ Under these circumstances, the state's interest in abrogating the right to die is not sufficiently compelling.¹¹⁴ The restrictions that should be applied in deciding not to postpone the death of a terminally ill incompetent are procedural in nature and are designed to ensure that the decision is correct under the circumstances.¹¹⁵ Once the decision is

108. See *Roe v. Wade*, 410 U.S. 113, 162-63 (1973) (Court stated that the state's interests in regulating abortion increase as the woman approaches term, and at some point during pregnancy become compelling).

109. The primary state interests with respect to the abortion issue are the protection of maternal health and the potentiality of life. *Id.* at 163.

110. *Id.*

111. *Id.*

112. For a discussion of the three categories, see *supra* notes 22-63 and accompanying text.

113. While the state's interest in maintaining a high standard of medical ethics is always present, it is not necessary to interfere significantly with the decision to protect this interest. For a discussion of the underlying justification for this interest, see *supra* note 41. There is a major concern that the value of life will be diminished if guardians are allowed to decide when to terminate an incompetent's life with no government intervention, and thus substantially eroding medical ethics. *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 735, 370 N.E.2d 417, 426 (1977).

114. A terminal diagnosis obviates the state's interest in preserving life where it is unlikely that there are third persons, such as dependent children, that require protection. For cases defining the interests of third parties, see *supra* note 40. In addition, it does not amount to suicide to refuse medical treatment and thus avoid the postponement of death. For a discussion of suicide, see *supra* note 14.

115. The decision to terminate life-sustaining care for a terminally ill incompetent should not be made in a cavalier fashion. It is clear that the person making the decision for the incompetent must arrive at a decision that the in-

made, the steps necessary to carry out that decision may be taken with little or no state interference.

In the case of a competent, yet terminally ill, individual who decides to refuse treatment,¹¹⁶ the state's interest in preserving life and protecting third parties becomes sufficiently compelling. Unlike the trimester framework employed in the abortion cases, the boundaries between the three right to die categories are frequently blurred. The broad range of factual situations found in this second category will affect the ultimate fate of the individual's right to die. For instance, elderly, competent individuals can refuse their consent to having a gangrenous limb amputated with little or no governmental interference, even though the decision may be deemed to be the cause of the individual's death.¹¹⁷ This situation closely resembles that in the first category because it is unproductive to require an elderly adult to submit to the amputation.¹¹⁸ On the other hand, a court order requiring a young mother to submit to a blood transfusion may be justified as compelling on the basis of the state's interest in preserving life and protecting children.¹¹⁹

In the second category, therefore, courts will consider the patient's age and the number of dependents. Elderly individuals without dependent children will be afforded greater latitude in deciding to refuse life saving medical treatment. Young adults with depen-

competent, if able to and given the circumstances, would have made. *In re Quinlan*, 70 N.J. 10, 37, 355 A.2d 647, 664 (1976). The Supreme Court of New Jersey has recently set out three tests for legal guardians to follow in determining the actual wishes of the incompetent patient. *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985). The subjective test considers the patient's own statements, such as a living will, or any other evidence, such as religious beliefs. *Id.* at 335, 486 A.2d at 1229-31. For a general discussion of living wills, see Comment, *The "Living Will"—An Individual's Exercise of His Rights of Privacy and Self-Determinations*, 7 LOY. U. CHI. L.J. 714 (1976); Note, *The "Living Will": The Right to Death With Dignity?* 26 CASE. W. RES. 485 (1976). The limited objective standard includes some trustworthy evidence of the patient's wishes. *In re Conroy*, 98 N.J. at —, 486 A.2d at 1232. In addition, the decision maker must be satisfied that the burdens of a patient's continued life, with the treatment, outweigh the benefits of life. *Id.* Finally, in the absence of trustworthy evidence, the guardian can use a purely objective standard. The guardian must find that the net burdens of the patient's life, with the treatment, must clearly outweigh the benefits of life, and any unavoidable, recurring and severe pain associated with the ailment would be inhumane if the patient continued to live. *Id.* at 342, 486 A.2d at 1232. The court indicated that such determinations would be subject to state administrative review. *Id.* at 350, 486 A.2d at 1241.

116. For a discussion of category two cases, see *supra* notes 45-55.

117. See *Lane v. Candura*, 6 Mass. App. 377, 376 N.E.2d 1232 (1978).

118. For further discussion of category one characteristics, see *supra* notes 46 & 47 and accompanying text.

119. See *In re Melideo*, 88 Misc. 2d 974, 975, 390 N.Y.S.2d 523, 524 (1976) (court specifically noted that patient was competent, was not pregnant, and did not have children when it upheld decision to forego blood transfusion on religious grounds).

dent children will be denied the privilege of exercising their right to die.

Turning to the third category of cases, a physically healthy person's decision that death is preferable to life¹²⁰ is similar to the decision to terminate a pregnancy during the third trimester. Under these circumstances, total proscription of the individual's right to die is justifiable.¹²¹ The state interests of preserving life, protecting third parties, maintaining medical ethics, and preventing suicide are sufficiently compelling.¹²² Under no circumstances, therefore, would a physically healthy individual be allowed to exercise his or her right to die.

Application of these guidelines will better illustrate the usefulness of the foregoing analysis and answer the rhetorical question previously posed: Is society, within the framework of the right of privacy, capable of providing Mathew with an alternative to a painful existence? The first step is to categorize Mathew's situation. The second step is to examine the state's interests in preserving his life. Finally, Mathew's interests must be examined and balanced against those of the state.

Mathew's situation is most analogous to that encountered when a terminally ill, yet competent individual decides to refuse care.¹²³ Mathew's vital functions would ultimately cease without proper care. Because Mathew's situation falls into the second category, the state's interests in preserving his life and protecting third parties must be viewed as compelling.¹²⁴ For the state to prevail over Mathew's fundamental right to die,¹²⁵ however, it must prove that

120. For a discussion of category three cases, see *supra* notes 56-63 and accompanying text.

121. For a discussion of the similarities between third trimester abortions and category three decisions to die, see *supra* note 107 and accompanying text.

122. For a discussion of these state interests, see *supra* notes 38-41 and accompanying text.

123. For a discussion of Mathew's condition, see *supra* notes 1-12 and accompanying text.

124. For a discussion of category two cases, see *supra* notes 44-55 and accompanying text.

125. For a general discussion of fundamental, or preferred rights, see TRIBE, *supra* note 35 at 564-75. The Supreme Court has provided no clear definition of what rights are considered fundamental. Certainly those rights expressly set forth in the Constitution are fundamental. The Court has, however, defined some rights not expressly contained in the Constitution as fundamental. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of privacy as existing in the penumbras emanating from the Bill of Rights). To obtain the requisite insight on this issue, it is necessary to examine the criteria which the Court applies in its efforts to identify what rights are fundamental. In the past the Court has searched for "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" and thus "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), for those principles basic to "our system of jurisprudence," *In re Oliver*, 333 U.S. 257, 273 (1948), and for principles that are required for the protection of ultimate decency in a

its actions are necessary to promote a compelling governmental in-

civilized society. See *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968). Professor Tribe contends that the enterprise of discovering and defending fundamental constitutional rights is inseparable from the much larger enterprise of identifying the element of being human. TRIBE, *supra* note 35 at 574. Therefore, to assert that the right to die is a fundamental right is to elevate it to the level of "those attributes of an individual which are irreducible in his selfhood." *Id.* at 889. Two separate lines of argument help to define the elements of being human.

Justice Brandeis, dissenting in *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), wrote that the founding fathers "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone. . . ." *Id.* Brandeis' right to be let alone has been suggested as the basis for the judicial recognition of a right of personhood. See Craven, *Personhood: The Right to be Let Alone*, 1976 DUKE L.J. 699 (1976). The idea of a fundamental right of personhood rests on the idea that, even though one's identity is constantly altered by the rewards, penalties, and constraint's of one's social environment, the personhood resulting from this process is sufficiently one's own to be deemed fundamental in confrontation with governmental intrusion. TRIBE, *supra* note 35 at 890. Noting that to define liberty is to confine it and to that extent deny it, Justice Craven asserts that an individual should retain the right to engage in any form of activity unless there exists a countervailing state interest of sufficient weight to justify restricting his conduct. Craven, *supra* at 706 (1976). At a minimum, personhood would encompass the freedom to engage in any activity which injures no one else. *Id.*

In seeking to define the necessary elements of personhood, another commentator would examine the idea of human rights as expressed in the Constitution. Richards, *Constitutional Privacy, The Right to Die and the Meaning of Life: A Moral Analysis*, 22 WM. & MARY L. REV. 327 (1981). Richards suggests that the idea of human rights can be focused upon in terms of two features: rational autonomy and equality. *Id.* at 339. Autonomy, in the sense basic to human rights, is an assumption about the capacities of individuals, as people, to act on higher order plans of action that take as their object one's life and the way it is lived. *Id.* This is the central difference between animals and humans: no animal other than man appears to have the capacity for self evaluation. *Id.* at 340. It is this autonomous nature of people that the Constitution seeks to protect and which the right of privacy shields from arbitrary governmental intrusion. The idea of human rights places an equal weight on each person's capacity for autonomy and expresses equal concern and respect for the capacity of people to equally develop and take ultimate responsibility for how they live their lives. *Id.* at 343.

Together the right to personhood, as espoused by Craven and Richards' analysis of constitutional human rights through the ideas of rational autonomy and equality, stand for the proposition that individuals are capable of making certain intimate decisions with regard to their lives and that they should be allowed to do so as long as society at large is not injured. To this end, the Supreme Court has protected such basic human elements as, for example, procreation, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); the right to use contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965); marriage, *Loving v. Virginia*, 388 U.S. 1 (1967); the right to possess and enjoy obscene literature in private, *Stanley v. Georgia*, 394 U.S. 557 (1969); and the right of a woman to terminate her pregnancy, *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973). It becomes apparent that it is intimate matters, such as these basic decisions concerning the every day lives of people as human beings, that are the fundamental rights protected by the Constitution. Because people have such broad latitude in defining the meaning of their lives, they must have, consistent therewith, the corollary right to define the meaning of their deaths. By ac-

terest.¹²⁶ The question that must be answered, therefore, is whether prohibiting Mathew from refusing proper care is necessary to protect the state's asserted interests.¹²⁷

Mathew's life is punctuated with pain and misery; his condition is terminal. He has no dependents. Mathew's mind, however, is clear and sharp and the possibility exists that he can make a contribution to society. Therefore, the state has a legitimate interest in maintaining his life. The state's interest is outweighed, however, when balanced against the reality of Mathew's shattered life marked with mental and physical pain and suffering.¹²⁸ Much as a young adult has the right to refuse a blood transfusion for religious reasons,¹²⁹ Mathew should be allowed to refuse medical treatment and, thereby, terminate his life.

IV. CONCLUSION

The right to die is encompassed within the constitutional right to privacy. The courts, increasingly called upon to render opinions concerning decisions to die, lack effective guidance because the Supreme Court has not issued a firm statement on the constitutional status of the right to die. Individuals seeking to exercise their right to die are forced to do so through a long and cumbersome judicial process. In some instances, a favorable judgment is not received until long after the individual's death.

The cases which have developed the right to die can be grouped into three categories. These categories fit neatly into the Supreme Court's consideration of the abortion decision based upon the trimester in which the abortion is sought. Applying the Court's reasoning in the abortion decisions to right to die cases establishes workable guidelines for courts faced with a future right to die decision. Individuals should not have to suffer while the ponderous mechanism of the law grinds slowly toward an inevitable conclusion—individuals have a right to die.

Vincent T. Borst

knowledging the right to die in appropriate circumstances, we secure to persons the fundamental human right upon which they may call their life their own.

126. For a general discussion of this strict scrutiny standard, see J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 418-19 (2d ed. 1983).

127. *Id.*

128. Society has a superficial interest in a creative mind. Requiring a tortured individual to continue to live in order that society may access such a mind at its leisure, however, cannot be justified under any circumstances.

129. *In re Melideo*, 88 Misc. 2d 974, 975, 390 N.Y.S.2d 523, 524 (1976).