It's My Body and I'll Die If I Want to: A Property-Based Argument in Support of Assisted Suicide

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IT'S MY BODY AND I'LL DIE IF I WANT TO: A PROPERTY-BASED ARGUMENT IN SUPPORT OF ASSISTED SUICIDE

I AM NOT AN ADVOCATE FOR FREQUENT CHANGES IN LAWS AND CONSTITUTIONS. BUT LAWS AND INSTITUTIONS MUST GO HAND IN HAND WITH THE PROGRESS OF THE HUMAN MIND. AS THAT BECOMES MORE DEVELOPED, MORE ENLIGHTENED, AS NEW DISCOVERIES ARE MADE, NEW TRUTHS DISCOVERED AND MANNERS AND OPINIONS CHANGE, WITH THE CHANGE OF CIRCUMSTANCES, INSTITUTIONS MUST ADVANCE ALSO TO KEEP PACE WITH THE TIMES. WE MIGHT AS WELL REQUIRE A MAN TO WEAR STILL THE COAT WHICH FITTED HIM WHEN A BOY AS CIVILIZED SOCIETY TO REMAIN EVER UNDER THE REGIMEN OF THEIR BARBAROUS ANCESTORS.¹

Does the United States Constitution encompass a right to die? The Supreme Court has ruled in the affirmative—there is at least a limited right to die.² Just how far does this right go? May a person refuse potentially lifesaving medical treatment? The Court has answered this with a resounding "yes."³ May a patient discontinue treatment currently underway? Again, the Court has answered in the affirmative.⁴

Refusal of lifesaving medical treatment and discontinuance of life-prolonging medical treatment surely hastens one's death where it might

². See Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 277 (1990). “This is the first case in which we have been squarely presented with the issue whether the United States Constitution grants what is in common parlance referred to as a 'right to die.”’ Id. “The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.” Id. at 278.
³. “[T]he common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment.” Id. at 277. “[F]or purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.” Id. at 279.
⁴. See id. at 271-80.

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otherwise be avoided for a period of time—often for years. So why, then, do laws and institutions draw a line where someone wishes to hasten his or her own death outside the context of lifesaving or life-prolonging medical treatment? American law is willing to accept suicide and attempted suicide without imposing criminal penalties. However, when a person assists in a suicide, society is unwilling to let the act go unpunished.

This Comment will examine the ethical and legal treatment of suicide and assisted suicide, and will develop an argument in support of assisted suicide. Part I of this Comment will provide a brief historical overview of the legal ramifications of suicide and assisted suicide. Part II will review recent statutory developments in the area of assisted suicide. Part III will analyze the development of the constitutional “right to die.” Part IV will discuss cases in which individuals have attempted to expand the right to die into a right to assisted suicide, and the failure of such arguments to persuade the courts. Part V will develop and discuss an alternative argument in support of assisted suicide, based on property rights in one’s own body. This Comment will define property and then demonstrate how one’s body fits within this definition. This Comment will undertake a moral and legal analysis of the body as property and conclude that because one’s body is his or her property, suicide and assisted suicide are within one’s legal and moral rights.

I. Legal Ramifications of Suicide and Assisted Suicide—Past and Present

“Under the common law, suicide was murder,” and committing sui-


6. The majority of American states have laws that impose criminal penalties on persons who assist others to commit suicide. Cruzan, 497 U.S. at 280 (citing George P. Smith, II, All’s Well That Ends Well: Toward a Policy of Assisted Rational Suicide or Merely Enlightened Self-Determination?, 22 U.C. Davis L. Rev. 275, 290-91 n.106 (1989) (compiling statutes)) [hereinafter All’s Well That Ends Well]. “Thirty-two states explicitly criminalize assisted suicide; 11 more states treat it as a crime [of murder] under common law.” Brad Knickerbocker, Oregon’s Suicide Measure Draws Hippocratic Fire, CHRISTIAN SCI. MONITOR, Nov. 14, 1994, at A1, A8 [hereinafter Oregon’s Suicide Measure].

7. Kevorkian, 517 N.W.2d at 295 (citing Cruzan, 497 U.S. at 294 (Scalia, J., concurring)). “Murder is where a person of sound memory and discretion unlawfully kills any reasonable creature in being, in the peace of the state, with malice prepense or aforethought, either express or implied.” Id. (quoting People v. Aaron, 299 N.W.2d 304 (1980)).
cide resulted in “criminal liabilities and harsh penalties.”

Currently, however, neither suicide nor attempted suicide is a crime in any one of the United States. Suicide was decriminalized, “not because the act does not fall within the definition of murder, but because no punishment is provided for self-murder.” Under the common law, assisting a suicide also fell within the definition of murder. However, the enactment of laws specifically barring assisted suicide has eliminated the need for its inclusion in the common law definition of murder. If probable cause exists to believe a person’s death was the direct result of a defendant’s act, the defendant can be properly charged with murder. But where a person is involved only in the events leading up to another person’s suicide, such as providing the means, the defendant can only be charged with assisting in a suicide. If suicide and attempted suicide are no longer considered criminal, how can it be that assisting a person to complete a noncriminal act can itself be criminal? “It is logically incomprehensible that a person can be charged with a capital crime of aiding and abetting a lawful act.”


9. Kevorkian, 517 N.W.2d at 298 (Shelton, J., dissenting).

10. Id. at 295. The punishment that was provided for suicide (self-murder) under the common law is no longer practiced because it is inappropriate. Id. at 295 n.3.

11. See Kevorkian, 527 N.W.2d at 738.

12. See supra note 6 and accompanying text.

13. See Kevorkian, 527 N.W.2d at 738 (“[W]e would overrule Roberts to the extent that it can be read to support the view that the common-law definition of murder encompasses the act of intentionally providing the means by which a person commits suicide.”) (footnote omitted); see also id. at 739 n.71 (“Suicide is, by definition, the killing of oneself. Our analysis recognizes a distinction between killing oneself and being killed by another. Because suicide is not murder and is no longer viewed as criminal, assisting suicide is its own species of crime.”) (citation omitted).

14. Id. at 738.

15. Id. at 738-39.

16. Kevorkian, 517 N.W.2d at 298.

17. “The American Law Institute’s Model Penal Code, which is widely regarded as the greatest criminal law reform project of this century, criminalizes aiding or soliciting another to commit suicide, but does not criminalize suicide or attempted suicide.” Id. at 295 (citation omitted).

18. Id. at 298 (Shelton, J., dissenting); see All’s Well That Ends Well, supra note 6, at 307. According to Professor George P. Smith:

The social and religious standards that hold suicide immoral prevent the law from dealing forthrightly with the dilemma. The law’s resolution allows one to commit suicide legally, yet prohibits aid by another in completing the act. This “old-fash-
II. RECENT STATUTORY DEVELOPMENTS IN ASSISTED SUICIDE

In recent years, the citizens of Washington, California, and Oregon voted on proposals to legalize physician-assisted suicide. In 1991, the citizens of Washington voted on Initiative 119, which would have allowed physicians to legally assist in a patient's suicide and to legally engage in voluntary active euthanasia. The results of the election were close—forty-six percent in favor, fifty-four percent against. In 1992, California voted on a similar proposal, Proposition 161, which was also defeated by the same margin.

Oregon is the only state that has enacted an assisted suicide initiative. However, following the narrow passage of Oregon Ballot Measure 16 in

Id. (citation omitted).


20. See sources cited supra note 19. Physician-assisted suicide "occurs where the physician gives the patient the means to commit suicide." Gunderson & Mayo, supra note 19, at 292 n.1. For example, "giving the patient a prescription for barbiturates which the patient could use to kill himself or herself." Id. at 281. Voluntary active euthanasia "occurs where the doctor does the killing." Id. at 292 n.1. An example of voluntary active euthanasia is the administering of a lethal injection. Id. at 281 (footnote omitted).

21. Major Events in Movement, supra note 19, at A22; Oregon's Suicide Measure, supra note 6, at A8.

22. Major Events in Movement, supra note 19, at A22; Oregon's Suicide Measure, supra note 6, at A8. It is interesting that both the Washington and California measures were defeated by the same margin—eight percentage points. Defeat of the two measures occurred despite preelection polls indicating that most people in Washington and California favored the measures. Id.

23. See Oregon's Suicide Measure, supra note 6, at A1. Oregon Ballot Measure 16, The Oregon Death With Dignity Act, provides in part:

An adult who is capable, is a resident of Oregon, and has been determined by the attending physician and consulting physician to be suffering from a terminal disease, and who has voluntarily expressed his or her wish to die, may make a written request for medication for the purpose of ending his or her life in a humane and dignified manner in accordance with this Act.

The Oregon Death With Dignity Act § 2.01 (1994), reprinted in OFFICIAL 1994 GENERAL ELECTION VOTER'S PAMPHLET—STATEWIDE MEASURES.
1994, a federal judge issued a preliminary injunction preventing Oregon from putting the law into effect until a determination could be made as to its constitutionality. The same judge has since issued a permanent injunction based upon his determination that the law violates the equal protection clause of the United States Constitution.

Today, no state grants its citizens the right to commit assisted suicide. One may end his or her own life by committing suicide, but one cannot engage others to assist them in doing so. Therefore, one's control in this respect is dependent upon the ability to act for one's self. What then does an individual do when he or she is unable to act independently—such as in the case of a person who is a quadriplegic, a person with advanced multiple sclerosis, or an individual who is comatose or in a persistent vegetative state—yet the person has made it clear that, under such circumstances, he or she wishes to end his or her life? This question has led to the development of "right to die" jurisprudence.

24. Measure 16 passed with a 52% majority vote. Oregon's Suicide Measure, supra note 6, at A1.


26. Lee, 891 F. Supp. at 1437. "Measure 16 provides a means to commit suicide to a severely overinclusive class who may be competent, incompetent, unduly influenced or abused by others. The state interest and the disparate treatment are not rationally related and Measure 16, therefore, violates the Constitution of the United States." Id. (footnote omitted); Judge Strikes Down Oregon's Suicide Law, N.Y. TIMES, Aug. 4, 1995, at A15.

27. It appears that many Americans currently favor such a right. But one must keep in mind that opinions and attitudes on the issue of assisted suicide fluctuate with the times. In 1982, a national poll indicated that 68% of Americans favored legal access to physician-assisted suicide. George P. Smith, II, Reviving the Swan, Extending the Curse of Methusela, or Adhering to the Kevorkian Ethic?, 2 CAMBRIDGE Q. OF HEALTHCARE ETHICS 49, 50 (1993) (citations omitted) [hereinafter Reviving the Swan]. A decade later, in the Washington and California elections, only 46% of voters supported access to physician-assisted suicide, see supra notes 20-22 and accompanying text, despite preelection polls indicating that most people in those states favored the measures, Oregon's Suicide Measure, supra note 6, at A8. In December 1993, a national poll indicated that 73% of those surveyed favored legal access to physician-assisted suicide. Id. In November 1994, the citizens of Oregon voted in favor of such a right by a 52% majority. Id. at A1. Then in 1995, 12 states introduced legislation aimed at legalizing physician-assisted suicide. Major Events in Movement, supra note 19, at A22.


29. Id.

30. See All's Well That Ends Well, supra note 6, at 307.
III. DEVELOPMENT OF A CONSTITUTIONAL "RIGHT TO DIE"

A. In re Quinlan

*In re Quinlan* is "generally regarded as the landmark decision concerning the refusal of life-sustaining medical treatment." In re *Quinlan* involved a request by the father of a comatose young woman, Karen Ann Quinlan, to be designated the guardian of his daughter and her property. The father asserted that such guardianship, if granted, should provide him the power to "authorize the discontinuance of all extraordinary medical procedures allegedly sustaining Karen's vital processes and hence her life, since these measures . . . present[ed] no hope of her eventual recovery." The New Jersey Supreme Court held that:

If . . . there is no reasonable possibility of Karen's ever emerging from her present comatose condition to a cognitive, sapient state, the present life-support system may be withdrawn and said action shall be without any civil or criminal liability therefor on the part of any participant, whether guardian, physician, hospital or others.

According to the court, a comatose individual has a right to privacy protected by the United States Constitution "to be free from bodily invasion by further treatment (a respirator), that the right was not diminished by her mental incompetency, and that her father could refuse such treatment on her behalf." After *Quinlan*, many courts permitted or would permit withholding or withdrawing artificial nutrition and hydration from either incompetent or competent individuals based upon rights grounded in the common law right to informed consent or in a constitutional right to privacy.

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33. In re Quinlan, 355 A.2d at 651.
34. Id.
35. Id. at 672.
36. Kevorkian, 527 N.W.2d at 725 n.28. In 1976, when Karen Ann Quinlan was 22, she was removed from her respirator. Joyce Wadler, *Karen Ann Quinlan: A Family's Faith*, *WASH. POST*, May 26, 1981, at A1. However, long after Karen was removed from her respirator, her comatose life continued. Id. Tragically, Karen Ann Quinlan, whose name became synonymous with both "death with dignity" and a patient's right to die, remained alive but comatose for ten years after artificial respiration was discontinued. See *All's Well That Ends Well*, supra note 6, at 385.
Although many courts have found a right to refuse medical treatment through a generalized right to privacy, the United States Supreme Court has not.\(^\text{38}\)

**B. Cruzan v. Director, Missouri Department of Health**

*Cruzan v. Director, Missouri Department of Health*\(^{39}\) was the first case to present the United States Supreme Court with the issue of whether the Constitution grants a "right to die."\(^{40}\) In *Cruzan*, the Court was asked to determine the constitutionality of a Missouri statute that restricted a couple from ending "the artificial nutrition and hydration of their brain-damaged daughter, absent clear and convincing evidence of her wishes."\(^{41}\) The Court upheld the Missouri statute\(^{42}\) and observed, "The principle that a *competent* person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."\(^{43}\) However, the narrow question in *Cruzan* related with holding chemotherapy from profoundly retarded 67-year-old man suffering from leukemia; *In re Storar*, 420 N.E.2d 64 (N.Y.), *cert. denied*, 454 U.S. 858 (1981) (right to refuse treatment adequately supported by the informed consent doctrine); *In re Conroy*, 486 A.2d 1209 (N.J. 1985) (right to self-determination and informed consent permit removal of nasogastric feeding tube from 84-year-old incompetent nursing home resident suffering irreversible mental and physical ailments); *In re Conservatorship of Drabick*, 245 Cal. Rptr. 840, *cert. denied*, 488 U.S. 958 (1988) (right to refuse treatment grounded in common law and constitutional right to privacy incorporated into state probate statute permitting removal, at request of conservator, of nasogastric feeding tube from 44-year-old man in persistent vegetative state); *In re Estate of Longeway*, 549 N.E.2d 292 (Ill. 1989) (doctrine of informed consent permits discontinuance of artificial nutrition and hydration of 76-year-old woman rendered incompetent from a series of strokes); McConnell v. Beverly Enterprises-Connecticut, Inc., 553 A.2d 596 (Conn. 1989) (right to withdraw artificial nutrition and hydration found in state statute based on common law and constitutional rights of self-determination); *see also id.* at 275 n.5 (citing Bouvia v. Superior Court, 255 Cal. Rptr. 297 (Cal. App. 1986) ("competent 28-year-old quadriplegic had right to removal of nasogastric feeding tube inserted against her will"); Bartling v. Superior Court, 209 Cal. Rptr. 220 (Cal. App. 1984) ("competent 70-year-old, seriously ill man had right to the removal of respirator"); Barber v. Superior Court, 195 Cal. Rptr. 484 (Cal. App. 1983) ("physicians could not be prosecuted for homicide on account of removing respirator and intravenous feeding tubes of patient in persistent vegetative state")).

\(^{38}\) *Cruzan*, 497 U.S. at 279 n.7.


\(^{40}\) *Id.* at 277.


\(^{42}\) *Cruzan*, 497 U.S. at 284 ("In sum, we conclude that a State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state.").

\(^{43}\) *Id.* at 278 (emphasis added).
to an incompetent brain-damaged patient. For purposes of the case, though, the Court "assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse life-saving hydration and nutrition." The United States Supreme Court couched this right in terms of a Fourteenth Amendment liberty interest, rather than as a generalized right of privacy as many state and lower federal courts have done.

The Court in *Cruzan* held that when an incompetent patient's guardian seeks to refuse life-sustaining medical treatment on behalf of the patient, the state has a legitimate right to demand clear and convincing evidence of the patient's desire to terminate treatment. However, regardless of the evidentiary burden required in the case of an incompetent person, the Court found a general right to refuse treatment—a "right to die"—based upon the patient's Fourteenth Amendment liberty interests.

IV. EXTENSION OF THE CONSTITUTIONAL "RIGHT TO DIE" TO THE DEVELOPMENT OF A CONSTITUTIONAL RIGHT TO ASSISTED SUICIDE

A. Compassion in Dying v. Washington

In May 1994, the United States District Court for the Western District of Washington decided the case of *Compassion in Dying v. Washington*. At the time the case arose, Washington had no legal prohibition on either suicide or attempted suicide. However, Washington did have a law banning both aiding and causing the suicide of another. In *Compassion in Dying*, a case of first impression, the district court was asked to

44. Id. at 265 ("Nancy Beth Cruzan was rendered incompetent as a result of severe injuries sustained during an automobile accident. . . . She ha[s] virtually no chance of recovering her cognitive faculties.").
45. Id. at 279.
46. Id. at 279 n.7.
47. Id. at 263 ("Missouri may legitimately seek to safeguard the personal element of this choice [between life and death] through the imposition of heightened evidentiary requirements."). K.G. Biagi, *Moore v. Regents of the University of California: Patients, Property Rights, and Public Policy*, 35 St. Louis U. L.J. 433, 452 (1991) (citing *Cruzan*, 497 U.S. at 263); "The state's interest in preserving life permits it to place the burden of an erroneous decision to refuse medical treatment on the individuals seeking to terminate life-sustaining treatment." Id. at 452 n.154.
48. See *Cruzan*, 497 U.S. at 284.
49. See id. at 279 n.7.
50. 850 F. Supp. 1454 (W.D. Wash. 1994), rev'd, 49 F.3d 586 (9th Cir.), reh'g, en banc, granted, 62 F.3d 299 (9th Cir. 1995).
51. Id. at 1458.
52. Id.
rule on the constitutionality of Washington's criminal prohibition against physician-assisted suicide. The plaintiffs asserted that mentally competent, terminally ill adults have a Fourteenth Amendment liberty interest that extends to a personal choice to commit physician-assisted suicide. The plaintiffs argued that such individuals have a right protected by the Constitution to be free from undue governmental interference with their personal decision to hasten death, and thereby avoid prolonged suffering. Relying on the United States Supreme Court decisions in Planned Parenthood v. Casey and Cruzan v. Director, Missouri Department of Health, the district court held that competent, terminally ill adults have a constitutional right under the Fourteenth Amendment to hasten their death by committing physician-assisted suicide. The district court declared the Washington law unconstitutional because of the undue burden it placed on the exercise of a liberty interest protected by the Fourteenth Amendment.

The district court found the reasoning in Casey “highly instructive and almost prescriptive” on the issue of what liberty interest may exist in the choice made by a terminally ill person to commit suicide. Following the reasoning in Casey, the court explained that this case concerns matters that involve intimate and personal choices that are central to one's personal dignity and autonomy, and central to the liberty interests protected by the Fourteenth Amendment.

In addition, the district court also found Cruzan “instructive.” On Cruzan the court wrote:

53. Id. at 1455-56.
54. Id. at 1459.
55. Id.
58. Compassion in Dying, 850 F. Supp. at 1462.
59. Id. at 1467.
60. Id. at 1459.
61. Id. The issue in Case involved a woman's right to choose abortion, and did not address the issue of the liberty interest that may attach to a terminally ill person's choice to commit suicide. Id. However, the district court in Compassion in Dying relied on Casey for assistance in defining the somewhat abstract concept of "liberty" as applied to the issue of assisted suicide: "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." Id. (quoting Planned Parenthood v. Casey, 112 S. Ct. 2791, 2807 (1992)).
62. Id.
63. Id. at 1461.
This court is confident that, squarely faced with the issue, the Supreme Court would reaffirm Justice Rehnquist's tentative conclusion in *Cruzan* that a competent person has a protected liberty interest in refusing unwanted medical treatment, even when that treatment is life-sustaining and refusal or withdrawal of the treatment would mean certain death.\(^{64}\)

The court then questioned whether the Fourteenth Amendment liberty interest recognizes a difference between refusal of unwanted medical treatment which will inevitably result in death and procuring the aid of a physician to assist in committing suicide during the final stage of life.\(^ {65}\) The court answered that under the Constitution no distinction can be drawn between refusal of life-sustaining medical treatment and physician-assisted suicide.\(^ {66}\)

The district court also addressed the plaintiffs' equal protection claim.\(^ {67}\) The plaintiffs asserted that the Washington law made an unconstitutional distinction between two similarly situated groups of mentally competent, terminally ill adults.\(^ {68}\) The court summarized the argument by stating that:

Under current state law, those terminally ill persons whose condition involves the use of life-sustaining equipment may lawfully obtain medical assistance in terminating such treatment, including food and water, and thereby hasten death, while those who also suffer from terminal illness, but whose treatment does not involve the use of life support systems, are denied the option of hastening death with medical assistance.\(^ {69}\)

The court found that the two groups of terminally ill adults were similarly situated and held the law "unconstitutional because it violates the right to equal protection under the Fourteenth Amendment by prohibiting physician-assisted suicide while permitting the refusal or withdrawal of life support systems for terminally ill individuals."\(^ {70}\) The court held that the law violated the Fourteenth Amendment's equal protection clause and also held that Washington's law violated a protected Fourteenth Amendment liberty interest.\(^ {71}\)

\(^{64}\) *Id.*

\(^{65}\) *Id.*

\(^{66}\) *Id.*

\(^{67}\) *Id.* at 1466-67.

\(^{68}\) *Id.* at 1466.

\(^{69}\) *Id.* (footnote omitted).

\(^{70}\) *Id.* at 1467.

\(^{71}\) *Id.*
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This decision was appealed, and in March 1995, the United States Court of Appeals for the Ninth Circuit reversed the lower court. The court cited several reasons for its reversal, including the district court’s misinterpretation or misapplication of existing law, the court’s failure to consider the State’s interests, and failure to address the classic “slippery slope” argument.

The court of appeals accused the district court of quoting Casey out of context and opined that doing so led to an unsound result. The appellate court reasoned that by relying on the language quoted from Casey, the lower court’s ruling could not be limited to terminally ill persons.

If at the heart of the liberty protected by the Fourteenth Amendment is this uncurtailable ability to believe and to act on one’s deepest beliefs about life, the right to suicide and the right to assistance in suicide are the prerogative of at least every sane adult. The attempt to restrict such rights to the terminally ill is illusory. If such liberty exists in this context, as Casey asserted in the context of reproductive rights, every man and woman in the United States must enjoy it.

The court of appeals also expressed concern that the district court’s decision lacked support in recent precedent and in our nation’s tradi-

72. Compassion in Dying v. Washington, 49 F.3d 586 (9th Cir.), reh’g, en banc, granted, 62 F.3d 299 (9th Cir. 1995).
73. Id. at 594. “The conclusion of the district court that the statute deprived the plaintiffs of a liberty protected by the Fourteenth Amendment and denied them equal protection of the laws cannot be sustained.” Id. at 590.
74. Id. at 590.
75. Id. at 591.
76. Id. at 593-94.
77. Id. at 590-91.
78. Id.
79. Id. at 591. The appeals court is correct in this regard. The right to assisted suicide cannot be limited solely to terminally ill adults—all adults must enjoy the same rights. The court of appeals expressed concern that “[t]he depressed twenty-one year old, the romantically-devastated twenty-eight year old, [and] the alcoholic forty-year old . . . [might] also assert[ ] their personal liberty.” Id. at 590-91. However, this would be their prerogative. One may feel sympathy or empathy for these individuals, but this does not mean one person has the right to interfere with another person’s liberty. The fact that someone is defendant does not mean they automatically forfeit their constitutional rights. Remember that doctors do not have to assist in a suicide. Doctors frequently choose to refuse patient requests for elective treatment or surgery that the physician feels is unnecessary. If a physician so desired, he or she could ask the patient to consult a psychiatrist before prescribing a fatal dose of medication. Some guidelines would surely be required for the protection of patients and physicians, but that is not the focus of this Comment—the only concern here is whether the right to assisted suicide exists, not how to regulate the exercise of this right.
tions. According to the court, during the existence of our country no constitutional right to assisted suicide "has ever been asserted and upheld by a court of final jurisdiction. . . . [A] federal court should not invent a constitutional right unknown to the past . . . ." The court of appeals concluded that while they do have compassion for those who are suffering, "[c]ompassion cannot be the compass of a federal judge." Rather, "[t]hat compass is the Constitution of the United States."

The soundness of the court of appeals' criticisms of the district court can be questioned. First, the district court did recognize that it was swimming in uncharted waters. Faced with a lack of precedent, the district court should not have been faulted for trying to resolve the case in the manner they thought best. More importantly, the appellate court may have misread the direction that their so-called "constitutional compass" was pointing, as its view of the compass' needle may have been blurred by predecisional bias. The attorneys for Compassion in Dying, in appeal to the Chief Judge of the Ninth Circuit, asserted that the author of the majority opinion, Judge John Noonan, Jr., criticized the district

80. *Id.* at 591.
81. *Id.* At this point, the reader should refer back to the language quoted from Thomas Jefferson in the text accompanying note 1, see Inscription, supra note 1, and with that in mind, realize that fundamental liberty is not a "constitutional right unknown to the past." *Compassion in Dying,* 49 F.3d at 591. If it were, the Supreme Court would not have upheld a woman's constitutional right to an abortion in Roe v. Wade, 410 U.S. 113 (1973), following a history of criminal punishment for abortion, which was subsequently affirmed in Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992). The liberty interest found by the Supreme Court to support a woman's right to an abortion is based on creative application of tested common law and constitutional principles. As exemplified by *Roe v. Wade,* the law must be a living, evolving body, that adapts to serve society's needs.
82. *Compassion in Dying,* 49 F.3d at 594.
83. *Id.*
84. *Id.*
85. The law, equity and justice must not themselves quail and be helpless in the face of modern technological marvels presenting questions hitherto unthought of. Where a [patient], or a parent, or a doctor, or a hospital, or a State seeks the process and response of a court, it must answer with its most informed conception of justice in the previously unexplored circumstances presented to it. That is its obligation . . . for the actors and those having an interest in the matter should not go without [a] remedy.
court opinion based upon his well documented anti-abortion beliefs. Prior to his appointment to the federal bench, Judge Noonan was a prominent leader in the anti-abortion movement, and is well-known for his criticism of Supreme Court decisions that uphold the right to abortion. The appeal criticized Noonan's opinion as being based upon religion and morality, and not upon a legitimate state interest. In August 1995, the Chief Judge of the Ninth Circuit rendered a decision and ordered that the case be reheard en banc. Regardless of the Ninth Circuit's opinion on rehearing, the losing side will likely appeal to the United States Supreme Court, providing the Supreme Court a unique opportunity to decide the issue of whether there is a constitutionally protected right to assisted suicide.

B. State v. Kevorkian

In December 1994, the Supreme Court of Michigan decided People v. Kevorkian, a case involving an issue similar to the one in Compassion in Dying: Whether the State of Michigan's ban on assisted suicide is unconstitutional. The court held that "[t]he United States Constitution does not prohibit a state from imposing criminal penalties on one who assists another in committing suicide." The Supreme Court of Michigan rendered its decision subsequent to the federal district court's decision in Compassion in Dying, but prior to the Ninth Circuit's decision in the same case. In the course of its analysis, the Michigan court addressed the district court opinion in Compassion in Dying.
sion in Dying" and criticized the district court for many of the same reasons given subsequently by the United States Court of Appeals for the Ninth Circuit. The Michigan court disagreed with the federal district court that either *Cruzan* or *Casey* dictates that the United States Supreme Court would hold that any person, including one who is terminally ill, has a Fourteenth Amendment liberty interest in committing suicide.

The Supreme Court of Michigan addressed the "right to die" cases of *Quinlan* and *Cruzan*, and the abortion case of *Casey*, but refused to apply the notion of fundamental liberties established by those cases to the area of assisted suicide. According to the court:

[D]efendant Kevorkian advance[s] several theories why this Court should find that there is a protected liberty interest in assisted suicide, at least with regard to the terminally ill. All of the theories, of course, assume a fundamental liberty interest in suicide itself.

An attempt to find a liberty interest in assisted suicide independent of a liberty interest in suicide itself cannot succeed. If the due process clause does not encompass a fundamental right to end one's life, it cannot encompass a right to assistance in ending one's life.

The due process clause does, most assuredly, encompass a fundamental right to end one's life; a "right to die," as established by *Quinlan* and *Cruzan*. Therefore, following the reasoning of the Supreme Court of Michigan, the due process clause *can* encompass a right to assistance in ending one's life. Recall Justice Rehnquist's statement in *Cruzan* that the Court "assume[s] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." The district court in *Compassion in Dying* correctly interpreted Justice Rehnquist's statement by noting that, "squarely faced with the issue, the Supreme Court would reaffirm Justice Rehnquist's tentative conclusion in *Cruzan* that a competent person has a protected liberty interest in refusing unwanted medical treatment, even

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97. Kevorkian, 527 N.W.2d at 727-33.
98. See id. at 728-33.
99. Id. at 728. "Those who assert such a right misapprehend the nature of the holdings in those cases." Id.
100. Id. at 724-27.
101. Id. at 726.
102. Id. at 726 n.35.
103. *Cruzan*, 497 U.S. at 279.
when that treatment is life-sustaining and refusal or withdrawal of the treatment would mean certain death."^{104}

C. Prior Moral and Legal Arguments Have Failed to Establish a Constitutional Right to Assisted Suicide

The moral and legal arguments based on privacy and individual liberty offered to date in support of an individual’s right to assisted suicide have not been successful in the courts.^{105} However, as evidenced by the federal district court decision in Compassion in Dying, at least some judges appear willing to recognize that “laws and institutions must go hand in hand with the progress of the human mind,”^{106} and to judicially grant individuals the right to assisted suicide. Although, as exemplified by the federal appellate court’s decision in Compassion in Dying and the Supreme Court of Michigan’s decision in Kevorkian, many judges are not so willing to take this action.

Liberty is not the only constitutional grant that may provide a basis to argue for a right to assisted suicide. Perhaps if the plaintiffs’ attorneys in those previous cases had attempted an alternative argument in support of assisted suicide—specifically, that one’s own body is one’s property and that the rights of property ownership should attach to the human body—the courts may have been willing to find a right to assisted suicide in the United States Constitution. The Fifth and Fourteenth Amendments to the United States Constitution not only grant liberty rights to individuals, but property rights as well.^{107} The Fifth Amendment states, “No person shall . . . be deprived of life, liberty, or property, without due process of law.”^{108} While the Fifth Amendment applies to the federal government, a similar restriction on the deprivation of one’s property rights is imposed upon the states by the Fourteenth Amendment.^{109} Therefore, a constitutional property-based argument may be the key to successfully upholding a person’s right to assisted suicide.

^{104} Compassion in Dying, 850 F. Supp. at 1461 (emphasis added).
^{105} “It is not likely that our era will be judged as one which fostered the growth of individual liberty.” RUSSELL SCOTT, THE BODY AS PROPERTY 248 (1981).
^{106} See Inscription, supra note 1.
^{107} See U.S. CONST. amend. V; U.S. CONST. amend. XIV.
^{108} U.S. CONST. amend. V (emphasis added).
^{109} U.S. CONST. amend. XIV.
V. An Alternative Constitutional Argument in Support of Assisted Suicide: Property Rights in the Human Body

A. Definitions of Property

In defining "property," Black's Law Dictionary states:

The term is said to extend to every species of valuable right and interest. More specifically, ownership; the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude every one else from interfering with it. That dominion or indefinite right of use or disposition which one may lawfully exercise over particular things or subjects. The exclusive right of possessing, enjoying, and disposing of a thing. The highest right a man can have to anything.110

Stephen Munzer, an author who has written on property rights in the body, states, "'Property rights,' as generally understood, form a bundle that includes claim-rights to possess, use, manage, and receive income; powers to transfer, waive, exclude, and abandon; liberties to consume or destroy; and immunity from expropriation without compensation."111

According to Jan Narveson, another author in the field of self-ownership, "The essence of 'property' . . . is that it is a right to determine, insofar as one can, what happens to that which is said to be one's property."112

These definitions encompass a broad range of rights; they refer generally to "things," which no doubt include both real and personal property.113 But questions remain. Does the term "property" include the human body? May people rightly view their body parts or their whole bodies as their personal property? Do people own themselves?114 Is there self-ownership such that people may do with their own bodies as they want? And if there is self-ownership, do people have a property right to commit suicide (liberties to consume or destroy115), and for that matter, do they have the right to obtain assistance in doing so (assisted

113. See Biagi, supra note 47, at 447 (citing R. Cunningham, W. Stoebuck et al., The Law of Property § 1.2, at 3 (1984)) ("Property rights concern the legally protected interests that people have with respect to 'things.'").
114. See Narveson, supra note 112, at 247.
115. See Munzer, supra note 111, at 320.
suicide), or even to have others do so for them (voluntary active euthanasia)?

B. Analysis of the Body as Property: Do People Own Themselves?

To answer the above questions, one must undertake both a moral and a legal analysis. As will be made apparent, a moral analysis yields a positive answer to the above questions and results in the finding that people do indeed own their bodies and do have a moral right to do with them as they please—including the right commit suicide, to obtain assistance in doing so, and to have others do so for them. A legal analysis yields a similar answer, but a thorough legal analysis is difficult given that attorneys have not yet put forth property-based arguments on the issue of assisted suicide, thereby failing to give courts the impetus to find legal property rights in the human body.

Commentators and philosophers differ as to how the above questions should be answered. Much of the commentary and analysis of the body as property is in the area of body parts or organ donation. However, the same moral and legal arguments that support property rights in body parts apply equally to the body as a whole. This leads to the logical conclusion that people own their bodies as a whole unit and may dispose of them as they please, including by means of suicide, assisted suicide, or voluntary active euthanasia. Even if one does not agree that the legal arguments apply equally to whole bodies as they do to body parts, "[a]t a moral level ownership gives one certain rights and allows one to make certain claims, whether or not they are supported in law." 119

1. Moral Analysis of the Body as Property

a. Immanuel Kant

Immanuel Kant, the eighteenth century German philosopher, asserted

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116. See Narveson, supra note 112, at 247.
117. See generally Scott, supra note 105 (spare body parts, organs and tissues, organ donation, and body ownership); see also Biagi, supra note 47, at 448-50 (cadavers, organ donation, donation of replenishable body parts); Randy W. Marusyk & Margaret S. Swain, A Question of Property Rights in the Human Body, 21 OTTAWA L. REV. 351, 352 (1989) (human tissue and bodily substances); Munzer, supra note 111, at 321 ("The context is one in which the chief issue is whether parts of the human body can be given away or sold.").
118. Munzer asserts that "[b]ody parts differ in many ways from whole bodies," Munzer, supra note 111, at 322, but in the context of a discussion of suicide and assisted suicide, with a view of the body as property, this statement simply is not correct. All the same property rights that attach to body parts also attach to whole bodies.
119. LAW, HEALTH & MEDICAL REGULATION, supra note 28, at 37.
that there are no property rights in body parts. According to Kant, "[a] 'human being'... is not entitled to sell his limbs for money, even if he were offered ten thousand thalers for a single finger." Kant reasoned, "If he were so entitled, he could sell all his [or her] limbs." Kant's beliefs derive from the notion that human beings have a free will. However, if a human being does indeed have a free will, then surely he or she has a moral right to "sell all his [or her] limbs." What is the notion of a free will if it does not include the freedom (the moral right) to do as one pleases with his or her body, including the freedom to sell one's limbs?

In regards to prostitution, Kant asserted that:

To let one's person out on hire and to surrender it to another for the satisfaction of his sexual desire in return for money is the depth of infamy. The underlying moral principle is that man is not his own property and cannot do with his body what he will.

This passage and the statements regarding the sale of one's limbs exemplify Kant's view that it would be "self-contradictory" to be both the owner and the object of ownership. According to Kant, "a person cannot be a property and so cannot be a thing which can be owned, for it is impossible to be a person and a thing, the proprietor and the property." It may be argued, in response to Kant, that the notion of a free will includes the freedom (the moral right) to view ourselves as "a thing," to view ourselves as our own property, and to sell ourselves for others' sexual gratification should we so desire.

120. Munzer, supra note 111, at 321-22.
121. Id. at 319 (citing IMMANUEL KANT, LECTURES ON ETHICS [1775-80] 124 (L. Infield trans., 1963) [hereinafter KANT'S LECTURES]).
122. Id. at 323.
123. See id. at 323. Kant states, "We can dispose of things which have no freedom but not of a being which has a free will. A man who sells himself makes himself a thing and, as he has jettisoned his person, it is open to anyone to deal with him as he pleases." Id. (citing KANT'S LECTURES at 124).
124. Id. (citing KANT'S LECTURES at 165-66).
125. See id. at 165.
126. See id. at 165.
127. See id. at 165.
128. See id. at 165.
Strong disagreement may be taken with Kant's views, and it appears much of American society does disagree. Today, Americans widely recognize property rights in the human body, and indeed, find it both morally and legally acceptable to view the body as property, at least in some circumstances. For example, the current state of organ donation in the United States allows individuals to make anatomical gifts upon death. The right to make such gifts, and the right to transfer such property, recognizes property rights in the human body.

Science, medicine, and the law have advanced to a point where it is possible to make anatomical gifts. Surgeons have the scientific knowledge, medical technology, skills, and tools to harvest organs from one body and successfully transplant the organs into another body, often greatly extending the lifespan of the recipient. State legislatures, in response to these scientific and technological advances, have enacted legislation allowing such transfers of body parts. American society has advanced to a point where many people recognize the value of such medical technology, and therefore, are willing to make their bodies and the bodies of their loved ones available for use in lifesaving transplants. Had Kant realized 220 years ago that organ donation would someday be widely utilized to save human lives, he may have had a different view on property rights in the human body.

This Comment argues, in opposition to Kant, that there are property rights in body parts. If there is a moral and legal right to donate a body part, it involves a choice to transfer, and hence, is a property right in the body as defined above.

128. In 1968, the National Conference on Uniform Laws adopted the Uniform Anatomical Gift Act in an attempt to rectify the legal problems involved with organ donation, and thereby increase the number of organs available for transplantation. Biagi, supra note 47, at 448 n.121. Under the UAGA, an individual may make a gift of body parts or the whole body to take effect after death. Id. at 448-49. By 1971, all 50 states and the District of Columbia had adopted the UAGA. Id. (citing C. Levy, THE HUMAN BODY AND THE LAW: LEGAL & ETHICAL CONSIDERATIONS IN HUMAN EXPERIMENTATION 59-63 (2d ed. 1983)). The UAGA addresses the issue of consent to postmortem anatomical gifts, but does not address the issue of consent to transplantation by living donors. Id. at 449 n.122 (citing Comment, Regulating the "Gift of Life"—The 1987 Uniform Anatomical Gift Act, 65 WASH. L. REV. 171, 177 (1990)). A kidney is the only vital organ currently capable of transplantation from a live donor. Id. (citing Levy, supra). But other body parts that living donors may donate include bone marrow, blood, and skin. Id.

129. See Munzer, supra note 111, at 321.

130. See supra note 118 and accompanying text (arguing that there are property rights in whole bodies).
own themselves, and therefore, have a moral right to do with their bodies as they please. This moral property right includes the right to terminate one's existence prior to when it would otherwise end and to obtain assistance in doing so.

b. John Locke

The line of thought on self-ownership, as it relates to the moral status of suicide, stems from the individualist tradition of property rights. According to this view, persons are their own property. John Locke, the seventeenth century English philosopher, claimed that "every man has a property in his own person. This, nobody has any right to but himself." Locke made this statement in relation to the performance of labor and the products or fruits of one's labor. However, this Comment, like Jan Narveson's writings, ventures to extend Locke's proclamation to suicide and actually proceeds even further than Narveson's writings to extend Locke's proclamation to assisted suicide.

Jan Narveson, in the individualist tradition, aptly argues that:

"[T]here is no important distinction between things that are essential parts of myself [i.e., body parts], so that it would be strictly impossible to give them to others or to destroy them without thereby destroying myself as well, and things that are so inessential that I would see no difference between life with them and life without them [i.e., other personal property]. There is no essential distinction regarding what it is for them to be my property. But there is a difference of fundamentality. Were I not the owner of my mind, and in many cases of my bodily parts, the whole idea of external property would be superfluous and indefinable. 'It's yours, but you can't do anything with it!' is silly talk.

Accordingly, it seems to me that the idea of self-ownership is coherent. Indeed, one may reasonably argue that the whole idea of ownership of anything presupposes the idea of ownership of oneself. If that is true, then at least self-ownership is as coherent as property ownership in general.

As previously stated, the essence of property rights is that the posses-

132. Id.
133. Id.
134. See id. at 248, 249; see also LAW, HEALTH & MEDICAL REGULATION, supra note 28, at 46 (labor puts a value on everything).
135. Narveson, supra note 112, at 249 (footnote omitted).
sor has the right to determine what happens to those things that are said to be his or her property. Narveson correctly observes that because people have the right to do as they wish with their own property, it follows that people also have the right to do as they wish with their own life—including terminating it by committing suicide. Narveson points out, however, that Locke would reject such an argument. Narveson writes:

Locke, of course, was notorious for holding the belief that we do not have the right to destroy ourselves. But then, he seems to have thought that because he thought we were all the property of God, when you get right down to it. Would he have held that God had the the [sic] right to destroy us? Probably. Therefore, it appears from Narveson's interpretation of Locke's writings that Locke tied the right to destroy property to ownership of that property. Locke envisioned property rights in the same way as they are articulated in this Comment. That is, because human beings are all the property of God, according to Locke, only God can rightfully destroy us.

Law and rationality both agree with Locke that the right to destroy property is tied to ownership of that property. However, one may permissibly disagree with Locke's position that people are the property of God. This statement is not intended to anger those who hold strong religious beliefs, and it is understandable that many people equate one's religion with one's moral code. However, the focus of this Comment is not on the topic of religious morality. This Comment argues that one may have an individual moral code that operates in conjunction with one's religious beliefs, yet does not strictly follow "antiquated" religious teachings. This Comment maintains that people are the owners of themselves, and with this comes the right to consume or destroy oneself.

Locke argued that the rights of one person are necessarily constrained

136. Id. at 247.
137. Id.
138. Id.
139. Id. at 249-50.
140. See id.
141. For a discussion of the morality of suicide and assisted suicide analyzed from the differing religious perspectives of Reform Judaism and Roman Catholicism, see Alvin J. Reins, Reform Judaism, Bioethics, and Abortion, J. REFORM JUDAISM at 44-48 (1990).
142. See All's Well That Ends Well, supra note 6, at 307 (pertinent language quoted supra note 18).
by the rights of other persons. If all people have the moral right to the use of their bodies, it follows that no one has the moral right to use their body in such a way as to interfere with others' use of their bodies. Narveson writes that:

Each person has . . . an enormous repertoire of possible actions available to him or her. That is simply the way we are. Now, the hypothesis of freedom is that selection among these actions is to be done by the person whose repertoire it is. Limitations from the outside are to be imposed only in the interest of the like liberty of others. Suicide is on the list. It does not, in the absence of special arrangements, appear to interfere with that 'like liberty' of others. Thus, we would seem to have a prima facie case for the legitimacy of suicide.

While this Comment is substantially in agreement with Narveson's argument, Narveson stops short of a logical conclusion. Munzer defines property rights to include "powers to transfer . . . [and] liberties to consume or destroy." According to Narveson, one has the moral right to do as one wishes with one's property—including the right to do as one wishes with one's body (e.g., commit suicide). Accordingly, one also has the "power to transfer" the "liberties to consume or destroy" to another to exercise on one's behalf. Thus, if people have the moral right to commit suicide, they also have the moral right to seek assistance in committing suicide, or for that matter, to request that it be done for them (voluntary active euthanasia).

Suppose, for example, that one develops a fondness for the sound of breaking glass and purchases a large quantity of fine china specifically for the purpose of shattering it on his or her kitchen floor. To an outsider this may appear irrational and even ludicrous. However, the person with the fetish has purchased the property rights to break the fine china, and these rights include "powers to transfer . . . [and] liberties to consume or destroy." As long as the exercise of these property rights does not interfere with any other person's exercise of their own property rights, or endanger the safety of others, it is morally (and legally) acceptable for one to purchase and break all the fine china he or she wishes. In addition, because property rights include powers to transfer, the fetishist may

143. Narveson, supra note 112, at 248.
144. Id.
145. Id. at 250.
146. Munzer, supra note 111, at 320 (emphasis added).
147. Narveson, supra note 112, at 247.
148. Munzer, supra note 111, at 320 (emphasis added).
give the china to an acquaintance on the condition that the other assist
him in breaking the china, or on the condition that the acquaintance
break the dishes for him while he sits on his sofa drinking a glass of chi-
anti, simply for the fetishist’s auditory enjoyment.

This argument is an extension of the assertions offered by Locke and
Narveson. Locke claims that everyone has a property right in one’s own
person.\textsuperscript{149} Narveson argues that because one has the right to do as he or
she wishes with his or her own property, it follows that one also has the
right to do as he or she wishes with one’s own life—including terminating
it by committing suicide.\textsuperscript{150} This leads to the logical conclusion that be-
cause one has property rights in their own body, and may morally commit
suicide, there is no reason to prevent the full exercise of those moral
property rights, including the “powers to transfer . . . [and the] liberties to
consume or destroy,”\textsuperscript{151} and to thereby obtain assistance in one’s own
suicide.

2. Legal Analysis of the Body as Property

a. The United States Constitution

1. The Fifth and Fourteenth Amendments

The mandates of the Fifth and Fourteenth Amendments,\textsuperscript{152} as they ap-
ply to property, appear to indicate that no person can be deprived of any
of the rights that attach to the ownership of property without due process
of law, including the right to transfer and the right to consume or destroy.
If, as argued above, the body is property, then each time a person wishes
to destroy his or her property by committing suicide, or wishes to transfer
the right to destroy his or her property by seeking assistance in commit-
ting suicide, then that person cannot be deprived of such property rights
without due process of law.

One might argue that the separation of the words “life” and “property”
in the Fifth and Fourteenth Amendments would go against the notion of
treating the body as property for the purposes of suicide and assisted sui-
cide. However, in committing suicide or assisted suicide, one is not exer-
cising his or her right to life; rather, one is exercising a “right to die.”
The right to life applies to situations of capital punishment, and this is

\textsuperscript{149} Narveson, \textit{supra} note 112, at 247.
\textsuperscript{150} \textit{Id.} Narveson points out, however, that Locke would reject such an argument. \textit{Id.}
at 247, 249-50.
\textsuperscript{151} Munzer, \textit{supra} note 111, at 320 (emphasis added).
\textsuperscript{152} See \textit{supra} notes 107-09 and accompanying text.
what the drafters had in mind when the provision was written. However, the "right to die" was not specifically addressed by the drafters and was only later established through the case law as a liberty right. As has been explained above, courts are unwilling to apply the right to die encompassed by the liberty interest found in the Fifth and Fourteenth Amendments to the situation of suicide and assisted suicide. Therefore, this "right to die," as applied to suicide and assisted suicide, would best be protected and extended through a view of the body as property.

2. The Thirteenth Amendment

The Thirteenth Amendment to the United States Constitution provides that, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The Thirteenth Amendment appears to grant property rights in the human body. Because the Thirteenth Amendment expressly prohibits


The United States Constitution provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law." The pre-constitutional understanding of the scope of these rights derived from the Magna Carta and the English common law tradition, as embodied in the writings of Sir Edward Coke and Sir William Blackstone: "life" refers to the physical existence that capital punishment terminates; "liberty" is freedom from bodily restraint; "property" refers to possession, both real and personal.

154. See In re Quinlan, 355 A.2d 647 (N.J.), cert. denied sub nom. Garger v. New Jersey, 429 U.S. 922 (1976) (comatose patient has a privacy right grounded in the federal constitution to be free from bodily invasion by further treatment (a respirator), the right is not diminished by mental incompetency, and the patient's father may refuse such treatment on her behalf); Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 279 n.7 (1990) ("Although many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest.") (citing Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986)).

155. See Compassion in Dying v. Washington, 49 F.3d 586, 591 (9th Cir. 1995) ("[N]o constitutional right to aid in killing oneself has ever been asserted and upheld by a court of final jurisdiction. . . . [A] federal court should not invent a constitutional right unknown to the past and antithetical to the defense of human life . . . ."); see also People v. Kevorkian, 527 N.W.2d 714, 728 (Mich. 1994), cert. denied sub nom. Hobbins v. Kelley, 115 S. Ct. 1795 (1995) ("We disagree . . . that the Supreme Court would find that any persons, including the terminally ill, have a liberty interest in suicide that is protected by the Fourteenth Amendment.").

156. U.S. CONST. amend. XIII.

157. See id.; see also Biagi, supra note 47, at 452 (explaining how the Thirteenth Amendment supports property rights in one's own body).
slavery and involuntary servitude, at first glance it would appear to deny the availability of any property interest in the human body. However, the prohibitions of the Thirteenth Amendment could be construed as supporting one’s right of exclusive control over their own physical being, in which case, the Thirteenth Amendment is consistent with the existence of property rights in one’s own body.

Although the notion that one person may be owned by another violates our sense of human dignity, a significant difference exists between ownership in the context of slavery and a person’s ownership rights with respect to his or her own body. “While slavery abolishes one’s personal autonomy, exclusive control over one’s own body enhances personal autonomy and privacy.” Therefore, in more than one place, the United States Constitution seems to support the right to commit suicide and assisted suicide through a view of the body as property.

b. Moore v. Regents of the University of California: Clarification or Confusion?

In 1988, the California Court of Appeal decided Moore v. Regents of the University of California (“Moore I”), in which the court found property rights in human body parts in the context of an action for conversion. The case involved the defendant’s “non-consensual use of the plaintiff’s cancerous spleen cells to develop pharmaceutical products of enormous commercial value.”

The issue in Moore I was whether the plaintiff had personal property rights in the tissue and substances of his body and, if so, whether these rights were violated when the defendants used his tissue for commercial

158. U.S. Const. amend. XIII; Biagi, supra note 47, at 452.
159. Biagi, supra note 47, at 452.
160. Id. (citing Comment, Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue, 34 UCLA L. Rev. 207, 224-25 (1986)).
161. Id. at 433.
162. Id. at 433 n.4 (citing Danforth, Cells, Sales, and Royalties: The Patient’s Right to a Portion of the Profits, 6 Yale L. & Pol. Rev. 179, 192 (1988)).
164. Id. at 505. “The rights of dominion over one’s own body, and the interests one has therein, are recognized in many cases. These rights and interests are so akin to property interests that it would be a subterfuge to call them something else.” Id. “The essence of a property interest—the ultimate right of control—therefore exists with regard to one’s own human body.” Id. at 506. This was the first decision to conclusively establish that one holds property rights in one’s own body. Marusyk & Swain, supra note 117, at 354.
165. Marusyk & Swain, supra note 117, at 352.
The plaintiff, John Moore, asserted a right to a portion of the financial rewards from the new pharmaceutical products that had been developed through the use of his cancerous spleen cells. The court ruled in favor of the plaintiff, reasoning that Moore owned his cancerous cells and continued to own them even after his splenectomy. The court found that the defendants had converted Moore's personal property by creating a cell-line therefrom using recombinant DNA technology. The court held that the plaintiff had property rights in his body for the purposes of a conversion action. Following this decision, property rights were recognized to exist in body parts.

The defendants then appealed the decision to the Supreme Court of California ("Moore II"). The Supreme Court of California reversed the holding that Moore could maintain a cause of action for conversion, and held instead that Moore could assert a cause of action against his physicians for breach of fiduciary duty or lack of informed consent. The court in Moore II denied Moore any property rights in the patented cell-line that had been derived from his tissues.

The court did not, however, expressly deny that there are property rights in the human body. Instead, the court simply declined to apply the common law tort of conversion to the facts of this case. In fact, the court noted that there may be purposes for which there are property rights in excised cells. The court wrote, "While we do not purport to hold that excised cells can never be property for any purpose whatsoever, the novelty of Moore's claim demands express consideration of the poli-

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166. Id.
167. LAW, HEALTH & MEDICAL REGULATION, supra note 28, at 48.
168. Moore, 249 Cal. Rptr. at 505 ("Plaintiff's spleen, which contained certain cells, was something over which plaintiff enjoyed the unrestricted right to use, control and disposition."); Marusyk & Swain, supra note 117, at 354.
169. Moore, 249 Cal. Rptr. at 510 ("Any use to which there was no consent, or which is not within the accepted understanding of the patient, is a conversion."); Marusyk & Swain, supra note 117, at 354.
170. Moore, 249 Cal. Rptr. at 506-07. "Even though the rights and interests one has over one's own body may be subject to important limitations because of public health concerns, the absence of unlimited or unrestricted dominion and control does not negate the existence of a property right for the purpose of a conversion action." Id.
171. Marusyk & Swain, supra note 117, at 370 (property rights exist in human tissue).
173. Id. at 497; Biagi, supra note 47, at 434.
174. Moore, 793 P.2d at 497.
175. Id. at 493.
176. Id.
177. Id.
cies to be served by extending liability.’

Although the court in Moore II correctly extended protection to the plaintiff under the doctrine of informed consent, this protection is no substitute for the protection provided by property interests in one’s own tissues. The recognition of one’s right to participate in the commercial development of his or her tissues, and to share in the financial rewards therefrom, is supported by current property rights theories, and would further the right of personal autonomy that is the thrust of the informed consent doctrine. The court in Moore II should also have allowed Moore to maintain an action for conversion.

In Moore II, the court asserted that because Moore had no expectation of retaining possession of his cells following their removal, he could not maintain an action for conversion unless he had retained an ownership interest in them. This assertion, however, is based upon an erroneous assumption. Although Moore may not have expected to have actual physical possession of his spleen following the surgery, “he did expect to have constructive possession through the right to control the disposition of his tissues.” In fact, the physicians and researchers led Moore to believe he had the right to control the disposition of his tissues through their use of consent forms.

Initially, John Moore had signed a written consent form authorizing the splenectomy. However, the physicians and researchers actively concealed from Moore their intentions to use his cells for research and to profit therefrom. During one follow-up visit, the physicians extracted tissue from Moore and presented him with a consent form to allow them to engage in research, which he signed. At that point, John Moore surely must have believed that by signing the consent form he had the right to control the disposition of his tissues. On a different occasion, Moore again had tissue extracted, to which he consented; however, this time he expressly denied defendants the right to do further research.

178. Id.
180. Id. (citation omitted).
181. Moore, 793 P.2d at 488-89.
182. See Biagi, supra note 47, at 458.
183. Id.
184. See Moore, 249 Cal. Rptr. at 500-01; Moore, 793 P.2d at 481.
185. Moore, 793 P.2d at 481.
186. Id.
187. Moore, 249 Cal. Rptr. at 500-01.
188. Id. at 501.
In spite of this express lack of consent, the physicians continued their exploitation of Moore's cells. As stated in Moore I, "[a]ny use to which there was no consent, or which is not within the accepted understanding of the patient, is a conversion."

It has been aptly stated that the Moore II decision is "contrary to common law and statutory recognition of property rights in the body, and is offensive to societal values of equality and fundamental fairness." It is difficult to comprehend how Moore can be denied property rights and cannot affirmatively claim his own financial interest in his bodily tissues, particularly when the very same tissues are considered by the court to be the property of another.

Under traditional common law principles, the right of a patient to control the future use of his surgically removed organ or tissues is protected by the law of conversion. Generally, the tort of conversion protects one not only from interference with the right of possession of one's property, but also protects against unauthorized use of one's property or improper interference with one's right to control the use of one's property.

The majority opinion in Moore II failed to recognize that a patient generally has the right to determine, prior to removal of a body part, how the part will be used after removal. Moreover, the majority failed to identify authority that indicates to the contrary. The most closely related

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189. Id.
190. Id. at 510.
192. Id. (footnote omitted); see also Moore, 249 Cal. App. at 507 (“Defendants' position that plaintiff cannot own his tissue, but that they can, is fraught with irony. . . . We cannot reconcile defendant's assertion of what appears to be their property interest in removed tissue and the resulting cell-line with their contention that the source of the material has no rights therein.”).
193. See Moore, 793 P.2d at 502 (Broussard, J., concurring in part and dissenting in part).
194. Id. In his opinion concurring in part and dissenting in part in Moore II, Justice Broussard wrote:

Sections 227 and 228 of the Restatement Second of Torts specifically provide in this regard that "[o]ne who uses a chattel in a manner which is a serious violation of the right of another to control its use is subject to liability to the other for conversion" and that "[o]ne who is authorized to make a particular use of a chattel, and uses it in a manner exceeding the authorization, is subject to liability for conversion to another whose right to control the use of the chattel is thereby seriously violated."

195. Id. at 501 (Broussard, J., concurring in part and dissenting in part).
196. Id.
statutory scheme in effect in California at the time of Moore I and Moore II, the Uniform Anatomical Gift Act ("UAGA"), makes it clear that a patient does have a right to determine post-removal use of a body part. Although the UAGA only applies to postmortem anatomical gifts, the general rule of "donor control" is "clearly not limited to that setting." According to Justice Broussard, who concurred in part and dissented in part in Moore II:

In the transplantation context, for example, it is common for a living donor to designate the specific donee—often a relative—who is to receive a donated organ. If a hospital, after removing an organ from such a donor, decided on its own to give the organ to a different donee, no one would deny that the hospital had violated the legal right of the donor by its unauthorized use of the donated organ. Accordingly, it is clear under California law that a patient has the right, prior to the removal of an organ, to control the use to which the organ will be put after removal.

Property rights under the UAGA include the right to control the disposition of one's body after death, but not the right to transfer, for financial gain, body parts that will be used for transplantation. The imminent lifesaving capabilities of organ transplantation account for the general contempt for a market-based system of organ acquisition. However, the prohibition on sales of organs apparently does not apply to the sale of bodily tissues used for research or commercial purposes. Because the companies that are developing biological products operate at a profit, donation of tissues for commercial purposes warrants compensation to the donors. If researchers have an intention to profit from research using another's body parts, it is only fair that the person be informed of such an intention and be compensated for his or her consensual participation. If John Moore had not been faced with secrecy and deception on the part of his physicians, and they had fully informed him of their intentions, he could have legally released all property rights in the excised cancerous

197. See supra note 128 (discussing the UAGA).
198. See Moore, 793 P.2d at 501 (Broussard, J., concurring in part and dissenting in part).
199. Id. at 502.
200. Id.
201. Biagi, supra note 47, at 449.
202. Id. at 449 n.124.
203. Id. (citing CAL. HEALTH & SAFETY CODE § 7155 (Deering 1990)).
204. Id. (citing generally Comment, Spleen for Sale: Moore v. Regents of the University of California and the Right to Sell Parts of Your Body, 51 OHIO ST. L.J. 499 (1990)).
spleen cells through monetary compensation.  

Moore II incorrectly failed to affirm the extension of the tort of conversion to John Moore's allegations. Property rights do exist in body parts and whole bodies, and the Supreme Court of California erroneously reversed the holding of Moore I that John Moore held property rights in his body for the purposes of a conversion action.

3. Cruzan v. Director, Missouri Department of Health

Cruzan v. Director, Missouri Department of Health 206 deserves one more brief comment in the context of a legal analysis of the body as property. In its introductory discussion, the Supreme Court addressed the genesis of the informed consent doctrine. 207 It appears from their discussion that the informed consent doctrine grew not only out of the common law torts of assault and battery, but also out of a view of the body as property, or a view that some of the rights that we normally associate with property also attach to one's own body. 208 The Court wrote that:

Before the turn of the century, this Court observed that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." 209

The Court also stated that Justice Cardozo, while on the Court of Appeals of New York, aptly described the doctrine of informed consent as the right of "[e]very human being of adult years and sound mind . . . to determine what shall be done with his own body." 210 So, perhaps the doctrine of informed consent, as applied by the court in Moore II, does not preclude the application of the tort of conversion because it would appear that both conversion and informed consent grew out of the rights to control the use and disposition of one's property.

205. See id. at 449 n.124 (citing CAL. HEALTH & SAFETY CODE § 7155 (Deering 1990)).
207. Id. at 269.
208. Id.
209. Id. (citing Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891)) (emphasis added).
210. Id. (citing Schloendorff v. Society of N. Y. Hosp., 105 N.E. 92, 93 (1914)) (emphasis added).
VI. Conclusion

Many more individuals—human beings with compassionate loved ones who care deeply for them—will likely die agonizing, painful, and humiliating deaths before friends, family, and physicians will be able to assist them in ending their interminable suffering without experiencing legal or professional sanctions. Some courts appear willing to help, but do not believe they have the legal basis to do so. Attorneys must give the courts new arguments upon which to decide these types of cases, or else the courts will not be able to show proper compassion for suffering individuals. Voters appear ready to support the individual's right to choose death over life, but when they do, as in Oregon, courts are questioning the constitutionality of the action and are not upholding the will of the people. The actions of state legislatures are mixed. While some legislatures are introducing legislation to permit assisted suicide, others are enacting laws specifically prohibiting assisted suicide. With such uncertainty, lobbying initiatives directed at district representatives may not provide the entire solution.

The solution to this problem lies in the development of a sound legal and moral argument to support an individual's right to choose death over life. The success of this argument, both in the courts and in the legislatures, depends on its ties to tested legal principles. Historically, property rights have provided people the power to do what they want with what is their own. A property-based argument provides suffering people the legal and moral ammunition to exercise their rights to commit suicide and to have others assist them in doing so.

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