

FREEDOM AND COMPASSION FOR ALL: THE PHYSICALLY INCAPACITATED HAVE A HUMAN RIGHT TO ASSISTED DEATH

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I. INTRODUCTION

This comment sets forth a simple premise: a person who cannot physically end his or her own life – but is mentally competent and expresses a desire to do so – has a right to assistance in effectuating that wish. This premise is grounded in fundamental fairness; it seeks to equalize the practical effect of a system of laws that, even though it may proscribe it, still allows a physically capable individual to commit suicide while prohibiting that same act for the disabled. Furthermore, the principles that underlie the right of an incapacitated person to assisted death are so universal that courts should interpret them as embodied in the Universal Declaration of Human Rights.

First, I will explore the history and nature of human rights, from their philosophical inception in classical civilizations¹ through their codification in the Universal Declaration of Human Rights and the two treaties that accompany it, the International Covenant on Civil and Political Rights and the International

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1. See *infra* Part II (discussing the origins of human rights).

Covenant on Economic and Social Rights.² This comment will argue that the strongest current running through the historical line of human rights theory is personal autonomy; that is, the right to freedom of movement and to be free from unwarranted physical harm. The right of a disabled individual to the same choice afforded others fits squarely within the human rights framework and, therefore, should be recognized by international courts.

Next, to introduce the legal debate I will examine the contrasting cases of Diane Pretty and Christian Rossiter.³ In the former, an English woman sought assistance from her husband in effectuating her intent to commit suicide. In turn, her husband sought declaratory relief from British courts and the European Court of Human Rights to ensure that he would not be prosecuted for doing so.⁴ Both courts denied the Prettys the relief they sought,⁵ holding instead that Britain would be entitled to prosecute Mr. Pretty. By contrast, the Supreme Court of Western Australia granted Mr. Rossiter the right to die by declaring that his caretakers, the Brightwater Care Group, would not be criminally liable for complying with his wishes by ceasing to provide him with nutrition and hydration.⁶ The contrast between the Rossiter and Pretty cases highlights the hypocrisy inherent in the prohibition of assisted death for the disabled.

I will then reject the popular and misconceived notion that affirmatively aiding the death of another is somehow morally reprehensible, whereas simply removing life-sustaining treatment like a feeding tube is not.⁷ I examine both situations using traditional models of causation in order to demonstrate that, in either, the individual providing the assistance (whether removing the life-sustaining treatment or providing some sort of affirmative aid) in fact causes the death of the individual. This analysis demonstrates that both actions have the same moral and ethical repercussions. First, it eliminates the contention that the right I advocate is unwarranted because it is morally wrong and second, it reaches the more important policy considerations that should truly control the debate.

I also examine the slippery slope argument, which, in addition to having been employed by numerous courts, appears to be the most persuasive argument against assisted death.⁸ However, the slippery slope argument should not defeat the right I advocate here for two reasons. First, as commentators have brought to light, it lacks statistical support even in places where physician-assisted suicide has been

2. See *infra* text accompanying notes 15-31 (explaining the Universal Declaration of Human Rights and related treaties).

3. See *infra* Part III (discussing the cases of Diane Pretty and Christian Rossiter).

4. *Pretty v. United Kingdom*, App. No. 2346/02, 35 Eur. Ct. H.R. paras. 1, 2 (2002), available at http://www.pusc.it/can/p_martinagar/lrgiurisprinternaz/HUDOC/Pretty/PRETTY%20vs%20UNITED%20KINGDOMen2346-02.pdf.

5. See *id.* (describing the procedural history of the case).

6. *Brightwater Care Group (Inc.) v Rossiter*, [2009] WASC 229 para. 49 (Austl.).

7. See *infra* Part IV.B (describing the reasoning of courts in finding that PAS and VAE are morally reprehensible).

8. See *infra* Part IV.C (explaining and rejecting the slippery slope argument).

legalized, such as the Netherlands.⁹ Second, the right I advocate is a narrow one, grounded not in any particular political viewpoint, but rather in fundamental fairness. As a result, I believe it will be simple to administer and regulate this right, as opposed to the more complex normative regimes necessary in places that have legalized physician assisted suicide (PAS), such as the Netherlands or Oregon.

To clarify that final point, I hold no preconceived notions of whether, in the abstract, a person should be legally entitled to the aid of another in committing suicide. I fully understand and support the state's interest in protecting the lives of its citizens in all contexts. As such, this comment is not intended to denounce that interest. Instead, I aim to bring to light a fundamentally unfair aspect of the otherwise reasonable proscription of assisted suicide. The fact is, regardless of what any statute or court says, a person of sound body who wants to commit suicide can do so. However, a spastic quadriplegic will never be able to effectuate that desire. The manifest inequality of rights in that situation should not be tolerated. Thus, I will lastly explain why there should be a human right to a life-ending procedure.

II. HUMAN RIGHTS AND THEIR PHILOSOPHICAL BASIS

“Inasmuch as, upon final analysis, [natural rights] are an expression of moral claims, they are a power lever of legal reform. The moral claims of today are often the legal rights of tomorrow.”

- *Hersch Lauterpacht*¹⁰

Modern human rights consist of a broad mixture of entitlements that range from reproductive autonomy and freedom from torture to the right to have a nationality.¹¹ They rest on the notion that all human beings, by virtue of their humanity, are entitled to personal autonomy, freedom from oppression, and the fulfillment of basic needs.¹² In theory, human rights transcend ideological and political differences, applying to all humans regardless of where they live or what

9. E.g., Penney Lewis, *The Empirical Slippery Slope from Voluntary to Non-Voluntary Euthanasia*, 35 J.L. MED. & ETHICS 197, 198 (2007) (hereinafter *The Empirical Slippery Slope*).

10. HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 74 (Garland Publ'g 1973) (1950). Lauterpacht was a member of the United Nations International Law Commission from 1953-1954 and the International Court of Justice from 1954 to 1960. *Sir Hersch Lauterpacht, 1897-1960*, LAUTERPACHT CENTRE FOR INTERNATIONAL LAW, http://www.icil.cam.ac.uk/about_the_centre/sir_hersch_lauterpacht.php (last visited Sept. 29, 2010). Former ICJ President Stephen M. Schwebel wrote that Lauterpacht's "attainments are unsurpassed by any international lawyer of this century." STEPHEN M. SCHWEBEL, *INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS* xiii (Cambridge: Grotius) (1987).

11. See Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/217, at 71 (Dec. 10, 1948) [hereinafter Universal Declaration], available at <http://www.un.org/en/documents/udhr/> (listing human rights that people are entitled to).

12. See LOUIS HENKIN, *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 1 (Columbia Univ. Press) (1981) (describing the development of the Covenant on Civil and Political Rights).

they believe in.¹³ The validity of human rights depends on universal standards because they are “flexible enough to rise above differences among political systems.”¹⁴

In the twentieth century, “perhaps the first significant attempt to articulate and enforce . . . principles of human rights” emerged from the aftermath of World War II.¹⁵ Representatives of the Allied powers expressed basic ideas of human rights at the Nuremberg trials, during which Allied tribunals tried and convicted Nazis for “crimes against humanity.”¹⁶ Crimes against humanity, however, provided a very limited notion of human rights by today’s standards and encompassed only that conduct that was beyond the pale of humanity.¹⁷ At the Nuremberg trials, this concept was defined in terms of the failure to meet minimal ethical obligations to human beings by engaging in “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war.”¹⁸

Shortly thereafter, the concept of international human rights expanded with the creation of the United Nations (U.N.) in 1945.¹⁹ The U.N. Charter, which entered into force that year, provided that signatory governments would promote “universal respect for, and observance of, human rights and fundamental freedoms.”²⁰ The Universal Declaration of Human Rights (Universal Declaration) enumerated those rights and freedoms.²¹ In contrast to the standard used at Nuremberg (crimes against humanity), the Universal Declaration is extremely broad. It states that “[e]veryone has the right to life, liberty and security of person,”²² that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,”²³ and that “[e]veryone has the right to recognition everywhere as a person before the law,”²⁴ to name just a few of its provisions.”

13. *See id.* (describing the concept of human rights and how they apply).

14. *Id.* at 2.

15. Joy Gordon, *The Concept of Human Rights: The History and Meaning of Its Politicization*, 23 BROOK. J. INT'L L. 689, 702 (1998).

16. *Id.* at 702-03.

17. *See id.* at 703 (describing the crimes for which the Nazis were prosecuted at Nuremberg).

18. *Id.* (citing the Charter of the International Military Tribunal art. 6(c), Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 284).

19. *See Gordon, supra* note 15, at 704. The U.N. is an “international organization founded in 1945 after the Second World War by 51 countries committed to maintaining international peace and security, developing friendly relations among nations and promoting social progress, better living standards and human rights.” United Nations, UN at a Glance, <http://www.un.org/en/aboutun/> (last visited Sept. 29, 2010).

20. U.N. Charter art. 55(c), *available at* <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf>.

21. *See generally* Universal Declaration, *supra* note 11 (describing the rights and freedoms every person is entitled to by virtue of their existence).

22. *Id.* art. 3.

23. *Id.* art. 5.

24. *Id.* art. 6.

Most importantly, the Universal Declaration expanded the notion of human rights by defining them not in terms of murder and torture, but as an entitlement. According to the Universal Declaration, all human beings are entitled to that which is necessary to live a full and complete life in every aspect – a full and complete life which includes political, economic and social aspects.²⁵ Despite this expansive language, the Universal Declaration is legally nonbinding and contains no enforcement mechanism.²⁶ In the 1960s, the U.N. became increasingly concerned with the problematic non-enforceability of the Universal Declaration and set about producing legally binding documents and mechanisms to enforce the rights enumerated therein.²⁷ As a result of these efforts, the U.N. developed two separate covenants, the International Covenant on Economic, Social and Cultural Rights (ICESCR)²⁸ and the International Covenant on Civil and Political Rights (ICCPR).²⁹ While the ICCPR is legally binding and contains an enforcement mechanism, the ICESCR is nonbinding and legally unenforceable.³⁰

This section will explain the current body of human rights. It will first explore the philosophical basis for human rights from a historical perspective, leading up to the formulation of the current system. It will then explain the divide in modern human rights law – both in terms of theory and enforcement – between political and civil rights, on the one hand, and social and economic rights on the other. To understand why the right I advocate deserves recognition as a human right, one must first understand the system into which it must fit.

The dominant conception of human rights is that they protect that which is “essential to human life.”³¹ Although there are those who assume that the essentials of human life are self-evident, human rights theories have deep historical roots.³² Many authors have cited early religious documents as the first sources of human rights.³³ However, philosophical theories that support modern human rights began with the concept of natural rights first articulated by the ancient Greeks.³⁴ Maurice Cranston stated that for the “[S]toics of the Hellenistic period . . . [natural law] embodied those elementary principles which were apparent, they believed, to the ‘eye of reason’ alone.”³⁵

25. *Id.* at preamble.

26. Gordon, *supra* note 15, at 705.

27. *Id.*

28. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, available at <http://www2.ohchr.org/english/law/cescr.htm>.

29. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, available at <http://www2.ohchr.org/english/law/ccpr.htm>.

30. Gordon, *supra* note 15, at 708-09.

31. Gordon, *supra* note 15, at 728.

32. See, e.g., MICHAEL HAAS, INTERNATIONAL HUMAN RIGHTS 11 (Routledge) (2008) (discussing, *inter alia*, the Code of Hammurabi and the Torah as sources of human rights).

33. *Id.*

34. HAAS, *supra* note 32, at 28; see also MAURICE CRANSTON, WHAT ARE HUMAN RIGHTS? 10 (Taplinger Publ'n Co.) (1973) (describing the origins of human rights).

35. CRANSTON, *supra* note 34, at 10-11.

Centuries later, the Roman senator Cicero promulgated the Hellenistic concept of natural law.³⁶ Many scholars believe that Cicero first articulated the modern concept of natural law by arguing for a universal moral law to which all humans, even the executive or monarch, should answer.³⁷ Thus, for Cicero, natural law transcended the law of states; it had a superior status because it was derived from rational thought.³⁸ Christianity, which flourished after the fall of the classical civilizations, adopted and incorporated the concept of natural law into its canon, substituting God as the higher authority to which all must answer.³⁹ By appealing to a divinity instead of a secular individualist philosophy, Christianity placed even more emphasis on natural law than either the Greeks or Romans.⁴⁰

The concept of natural law re-emerged during the Enlightenment period when secular humanist thinkers revived individualist philosophies in lieu of divine forces.⁴¹ In particular, Thomas Hobbes and John Locke, with their competing views on human nature,⁴² both wrote of the natural rights that belonged to man in a state of nature.⁴³ They believed that government derived its authority from its ability to guarantee an individual's right to security.⁴⁴ Locke expanded on the idea of individual security, however, and posited that a legitimate government should guarantee the individual's right to life, liberty, and property.⁴⁵ Thomas Jefferson supplanted Locke's theory with the well-recognized right to pursue happiness, famously stated in the Declaration of Independence.⁴⁶ This provision closely

36. HAAS, *supra* note 32, at 17.

37. *Id.*

38. *Id.*; see also CRANSTON, *supra* note 35, at 11.

39. CRANSTON, *supra* note 35, at 11.

40. *Id.*

41. HAAS, *supra* note 32, at 19-21.

42. Compare THOMAS HOBBS, LEVIATHAN 95 (Broadview Press 2005) (1651) ("Hereby it is manifest that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war as is of every man against everyman.") with JOHN LOCKE, TWO TREATISES OF GOVERNMENT 298 (Cambridge Univ. Press 1960) (1689) ("And here we have the plain *difference between the State of Nature, and the State of War*, which however some Men have confounded, are as far distant, as a State of Peace, Good Will, Mutual Assistance, and Preservation, and a State of Enmity, Malice, Violence, and Mutual Destruction are one from another.").

43. HOBBS, *supra* note 42, at 212 ("Natural [laws] are those which have been laws from all eternity, and are called not only natural, but also moral laws, consisting in the moral virtues, as justice, equity, and all habits of the mind that conduce to peace and charity . . ."); LOCKE, *supra* note 42, at 348 ("Men [are] . . . by Nature, all free, equal and independent . . .").

44. HOBBS, *supra* note 42, at 99 (emphasis removed) ("[A] man [is] willing, when others are so too, as far forth as for peace and defense of himself he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men as he would allow other men against himself."); LOCKE, *supra* note 43, at 300 (emphasis removed) ("To avoid this State of War . . . is one great reason of Mens putting themselves into Society, and quitting the State of Nature.").

45. See LOCKE, *supra* note 42, at 341-42 (describing the government's role in protecting individuals' freedoms).

46. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

resembles Article 3 of the Universal Declaration⁴⁷ and in other national constitutions.⁴⁸

Yet, what did the Enlightenment thinkers – and those before them – have in mind when they declared that every man was entitled to life, liberty, and (for Jefferson) the pursuit of happiness? In other words, what specific types of rights did these philosophers envision? The right to life, despite the modern convolution of the term in the context of the abortion debate,⁴⁹ may be understood as the right not to die a violent death or suffer an injury at the hands of another.⁵⁰ Indeed, the very notion of society begins with the creation of rules; and the prohibition of murder easily stands out as the most important.⁵¹ As Cranston writes,

A society is not a mass, or crowd, or series; it is a group of persons, each related to the others by a shared adherence to a set of rules. . . . Even the most odious types of human society must recognize the right to life of those people who are considered to be both loyal and fully human.⁵²

Most governments prohibit citizens from injuring one another.⁵³ Moral justifications are still necessary and are given for acts such as capital punishment, indiscriminate bombings of cities during war, commission of the most heinous crimes and self-defense (or other *jus ad bellum*⁵⁴ justifications), respectively.

For the ancient Greeks, liberty meant the freedom of movement.⁵⁵ The philosopher Epictetus⁵⁶ used the term “eleutheria,” which means “to go where one wills.”⁵⁷ Of course, freedom of movement is not an unlimited right.⁵⁸ Moreover, the Universal Declaration includes a litany of human liberties derived from Enlightenment thinking, including freedom to own property and freedom of expression.⁵⁹ Although “it would be excessive to claim that what we understand today as liberty is . . . traceable to the pre-Enlightenment period,”⁶⁰ the teachings

47. Universal Declaration, *supra* note 11, art. 3.

48. *E.g.*, NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] art. 13 (Japan).

49. Nevertheless, the abortion debate is instructive because both sides claim to respect the right to life – those who advocate a woman’s right to choose often claim that life has not begun at the time the woman seeks to terminate her pregnancy.

50. *See* CRANSTON, *supra* note 34, at 25 (describing individual human rights).

51. *See id.* at 26 (chronicling the evolution of human rights).

52. CRANSTON, *supra* note 34, at 26.

53. *See id.* (noting that although every society will have its own rules, every society must have rules against the use of violence against the life and person of others).

54. *Jus bellum dicendi* is the right of proclaiming war. BLACK’S LAW DICTIONARY 937 (9th ed. 2009).

55. *Id.* at 31.

56. *See generally* JOHN M. COOPER ET AL., THE PHILOSOPHY OF EPICTETUS (Theodore Scaltsas & Andrew S. Mason eds., 2007).

57. CRANSTON, *supra* note 34, at 31.

58. *See id.* at 31-32 (describing political and social impediments to physical movement).

59. *See, e.g.*, UNIVERSAL DECLARATION, *supra* note 11, arts. 17, 19.

60. MICHELINE R. ISHAY, THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA 27 (Univ. of Cal. Press 2004).

of ancient religious texts provide insight into the ideas articulated by the Enlightenment thinkers.

The Code of Hammurabi⁶¹ and the Hebrew Bible contain the first recorded ideas of fairness and righteousness.⁶² Hammurabi's Code contained prohibitions against calumny, bribery, and the corruption of judges.⁶³ The Hebrew Bible condemns those immoral acts and lays an even stronger foundation for modern concepts of morality: Leviticus 19:18 reads "Love thy neighbor as thyself."⁶⁴ In addition, the moral code of the Hebrew Bible employs universal principles and applies equally to alien and native: "[J]udge righteously between every man and his brother, and the stranger that is with him."⁶⁵ Although the rights set forth in the Universal Declaration were not expressly derived from Hammurabi's Code and the Hebrew Bible, their inclusion was undoubtedly influenced by principles of morality, fairness, and righteousness contained in these texts.

To understand the transition from those principles to the modern view of rights, one must look principally to the concepts of individual rights that emerged from the American and French Revolutions in the late eighteenth century. The French Declaration of the Rights of Man and Citizen of 1789 ("Declaration of the Rights of Man") echoes the language of Jefferson and the American Declaration of Independence and asserts that "ignorance, forgetfulness or contempt of the rights of man [are] the only causes of public misfortunes and the corruption of governments. . . ."⁶⁶ It sets forth certain principles, including:

1. Men are born and remain free equal in rights
2. The aim of every political association is the preservation of the natural and imprescriptible rights of man. These are liberty, property, security, and resistance to oppression. . . .
4. Liberty consists in the power to do anything that does not injure others; accordingly, the exercise of the natural rights of each man has no limits except those that secure to the other members of society the enjoyment these same rights. . . .
6. Law is the expression of the general will . . . It must be the same for all, whether it protects or punishes. All citizens (are) equal in its eyes. . . .⁶⁷

61. See generally ROBERT FRANCIS HARPER, THE CODE OF HAMMURABI, KING OF BABYLON, ABOUT 2250 B.C. (photo. reprint 1994) (Robert Francis Harper trans., Univ. of Chicago Press, 1904) (giving a complete translation of the Code of Hammurabi).

62. See ISHAY, *supra* note 60, at 28-29 (explaining that the Code of Hammurabi included concepts of progressive justice, such as the "eye for eye" rule, while the Hebrew Bible applied the laws more universally to include both "alien and native").

63. ISHAY, *supra* note 60, at 28-29.

64. *Id.*

65. *Id.* at 28.

66. THE FRENCH DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN AND THE AMERICAN BILL OF RIGHTS: A BICENTENNIAL COMMEMORATION 1789-1989, S.J. Res. 317, 100th Cong. (Jan. 25, 1988) [hereinafter DECLARATION OF THE RIGHTS OF MAN].

67. *Id.* arts. 1, 2, 4, 6.

These principles should be familiar to Americans as they share much with those expressed in the American Constitution's Bill of Rights.⁶⁸ Arguably, they also represent the principles of natural law embodied in the Universal Declaration, as they represent the culmination of Enlightenment thought.

But why should we codify positive human rights at all if natural rights provide the paradigm of righteousness? First and foremost, an individual may violate natural law at will, just as he or she may violate a positive proscription such as a criminal statute.⁶⁹ The framers of the Universal Declaration had the memories of Nazi Germany fresh in their minds.⁷⁰ Positive rights bring with them associated duties to protect those rights, and the framers felt that, in the wake of World War II, imposing such affirmative duties on the governments of the world would reduce the threat of future atrocities.⁷¹ In fact, critics of natural law, such as Jeremy Bentham, have argued that natural rights are not rights at all because even when an individual "has" a natural right she has nothing but an idea in her head.⁷² By contrast, under the theory of positive law, a right is a description of how the state will act under certain circumstances.⁷³

To help elucidate these positive rights, Cranston contends that the criteria for determining a human right are "practicability" and "paramount importance."⁷⁴ As to practicability, he argues in favor of political and civil rights rather than social and economic ones; political and civil rights can be asserted more practically because they only entail restricting government and may "be readily secured by legislation."⁷⁵ On the other hand, writes Cranston, attempting to assert social and economic rights is often frivolous because bringing about change in these arenas is more difficult to achieve through legislation.⁷⁶ For example, the right to "holidays with pay,"⁷⁷ even with the force of the Universal Declaration supporting it, is impossible to enforce in those parts of the world where industrialization has hardly begun.⁷⁸

As to the second test of a human right, "paramount importance," Cranston suggests that it is "a paramount duty to relieve great distress, as it is not a paramount duty to give pleasure."⁷⁹ For example, he explains that

68. Compare U.S. CONST. amends. I-X with DECLARATION OF THE RIGHTS OF MAN, *supra* note 66.

69. Gordon, *supra* note 15, at 707-08.

70. *Id.* at 702-04.

71. *Id.*

72. Gordon, *supra* note 15, at 756-57 (discussing Bentham's criticism of natural rights).

73. *Id.* at 756.

74. CRANSTON, *supra* note 34, at 66-67.

75. *Id.*

76. CRANSTON, *supra* note 34, at 66.

77. Universal Declaration, *supra* note 11, art. 24 ("Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.").

78. CRANSTON, *supra* note 34, at 66.

79. *Id.* at 67.

Common sense knows that fire engines and ambulances are essential services, whereas fun fairs and holiday camps are not. Liberality and kindness are reckoned moral virtues; but they are not moral duties in the sense that the obligation to rescue a drowning child is a moral duty.⁸⁰

For Cranston, then, one cannot consider the concept of a right without the associated concept of duty; only those rights with an associated and enforceable duty should be codified as positive norms.⁸¹

Cranston's distinction is highly relevant when one considers that the Universal Declaration contains two broad types of human rights: political and civil rights, on the one hand, and economic and social rights on the other.⁸² While the political and social rights embodied in the Universal Declaration represent the traditional human rights developed by the Enlightenment thinkers, the economic and social rights are generally regarded as mere aspirations.⁸³ One cannot effectively implement economic and social rights by legislation, because they require more than restraining government action.⁸⁴

Political and civil rights, however, are readily enforceable because they require only the restraint of government action.⁸⁵ In addition, because the Enlightenment thinkers posited only political and civil rights and not economic and social rights, only political and civil rights were included in the influential political documents of the age, such as the Declaration of the Rights of Man.⁸⁶ After World War II, governments generally took political and civil rights more seriously than the developing concept of economic and social rights.⁸⁷ As a result, when the U.N. created the Human Rights Commission and pressured it to draft a covenant to enforce the Universal Declaration, the resulting document covered only political and civil rights.⁸⁸

Among other scholars, Joy Gordon has criticized the politicization of human rights over the course of the twentieth century, particularly attacking this selective enforcement of political and civil rights.⁸⁹ Gordon points out the obvious irony in the enforcement of political and civil rights alone: such individual rights become trivial when the individual cannot satisfy his or her economic needs.⁹⁰ She posits three concepts of human rights: (1) a concept protecting the minimal and most urgent conditions for human life, such as protection from extreme physical

80. *Id.*

81. *Id.* at 68-69.

82. *See id.* at 53-54 (noting that the Universal Declaration includes political and civil rights such as the protection of "life, liberty, property, equality, justice, and pursuit of happiness" and economic and social rights such as the right to social security, education, equal pay for equal work, and right to rest, leisure and periodic holidays).

83. CRANSTON, *supra* note 34, at 53-54.

84. CRANSTON, *supra* note 34, at 66.

85. *Id.*

86. *Id.* at 53-54.

87. *Id.* at 54-55.

88. *Id.* at 55.

89. Gordon, *supra* note 15, at 710.

90. *Id.* at 721-29.

violence; (2) everything immediately necessary for human beings to live, which entails protection from physical violence and economic security; and (3) everything necessary for a full and good life, including economic security and, as a secondary consideration, political and civil rights, including freedom of speech, press, association, travel, and political participation.⁹¹

Despite the irony, for the reasons identified by Cranston, only political and civil rights are currently enforceable because they alone ascribe the type of duty, both from a practical and moral perspective, deserving of a positive right. However, the right to physician-assisted suicide for terminally-ill patients who have expressed a continued desire to die with dignity fits squarely within the framework of positive civil rights currently enforced by the U.N. and codified in the ICCPR. In order to demonstrate this, I articulate the exact right I advocate by contrasting two conflicting cases. In these cases, two courts reached opposite results when presented with same question: whether to grant the right to die to an individual who wants to die, but who cannot physically take his or her own life.

III. CONTRASTING CASES

A. *Diane Pretty*

Diane Pretty applied to compel the Director of Public Prosecutions to provide her and her husband prior assurance that her husband would not be prosecuted if he helped Mrs. Pretty commit suicide.⁹² Mrs. Pretty suffered from motor neuron disease, a degenerative illness that had reduced her to complete dependency on others.⁹³ She was unable to speak, move about, or control her bodily functions.⁹⁴ She faced a humiliating death and had no hope of recovery.⁹⁵ However, on November 29, 2001, the British House of Lords refused her application.⁹⁶

91. Gordon, *supra* note 15, at 787-88.

92. *Pretty v. Dir. of Pub. Prosecutions*, [2001] UKHL 61, (2002) 1 A.C. (H.L.) 800 [¶ 1] (H.L.) (appeal taken from Eng.), available at <http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd011129/pretty-1.htm>.

93. *Id.* For information regarding motor neurone disease, see *Motor Neuron Diseases Fact Sheet*, NAT'L INST. OF NEUROLOGICAL DISORDERS AND STROKE, NAT'L INSTS. OF HEALTH, http://www.ninds.nih.gov/disorders/motor_neuron_diseases/detail_motor_neuron_diseases.htm (last visited Sept. 30, 2010).

94. *Pretty v. United Kingdom*, App. No. 2346/02, 35 Eur. Ct. H.R. para. 1 (2002), available at http://www.pusc.it/can/p_martinagar/lrgiurisprinternaz/HUDOC/Pretty/PRETTY%20vs%20UNITED%20KINGDOMen2346-02.pdf.

95. *Id.* paras. 1- 2.

96. *Pretty v. Dir. of Pub. Prosecutions*, (2002) 1 A.C. (H.L.) 800 [¶ 1].

Mrs. Pretty appealed⁹⁷ to the European Court of Human Rights (ECHR).⁹⁸ She put forward arguments for a right to die under Articles 2, 3, 8, and 9 of the Convention.⁹⁹ With respect to Article 2, Mrs. Pretty argued that the right to die could be derived from the right to life embodied in Article 2.¹⁰⁰ The court rejected this argument on the grounds that Article 2 is directed towards allowing individuals to lead the life they want, and, therefore, at the preservation of life and protection from third-party harm.¹⁰¹

Mrs. Pretty then made an argument pursuant to Article 3, the prohibition of torture and other inhuman or degrading treatment or punishment.¹⁰² The prosecutor, she argued, inflicted inhuman and degrading treatment upon her by refusing to abstain from prosecuting her husband should he assist in her suicide.¹⁰³ As a result, the State failed to protect her from suffering.¹⁰⁴ The court simply held that this interpretation of Article 3 “places a new and extended construction of the concept of treatment, which, as found by the House of Lords, goes beyond the ordinary meaning of the word.”¹⁰⁵ This reinforced the position that Article 3 protects individuals only from intentionally-inflicted harm and, therefore, cannot obligate the State to permit actions aimed at ending life.¹⁰⁶ It also held that Article 9 (the protection of freedom of thought, conscience, and religion), was similarly too narrow to obligate life-ending actions, even though such action could manifest a personal and even religious choice.¹⁰⁷

Both the House of Lords and the ECHR recognized that Article 8 protects an individual’s “private life.”¹⁰⁸ However, both also concluded that this concept is so broad that it evades precise definition and, therefore, its protection could not restrain the DPP from prosecuting Mrs. Pretty’s husband.¹⁰⁹ While some judges, such as Lord Hope, acknowledged that Mrs. Pretty had a right to self-determination under Article 8, he concluded that to “imply into these words a

97. *Pretty v. United Kingdom*, App. No. 2346/02, 35 Eur. Ct. H.R. para. 1.

98. The ECHR was established in 1950 pursuant to The Convention for the Protection of Certain Rights and Freedoms, and entered into force in 1953. The Convention “gave effect to certain of the rights stated in the Universal Declaration on Human Rights and established a judicial organ with jurisdiction to find against States that do not fulfill their undertakings.” *FAQ*, EUROPEAN COURT OF HUMAN RIGHTS, <http://www.echr.coe.int/50/en/#faq> (last visited Mar. 1, 2010).

99. *Pretty v. United Kingdom*, App. No. 2346/02, 35 Eur. Ct. H.R. paras. 36-83; Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, 3, 8, 9, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter Convention].

100. *Pretty v. United Kingdom*, App. No. 2346/02, 35 Eur. Ct. H.R. paras. 34-35.

101. *Id.* paras. 39-40.

102. *Id.* para. 43.

103. *Pretty v. United Kingdom*, App. No. 2346/02, 35 Eur. Ct. H.R. para. 54.

104. *Id.*

105. *Id.*

106. *Id.* paras. 54-56.

107. *Id.* para. 82.

108. *Id.* paras. 61, 74; *Pretty v. Dir. of Pub. Prosecutions*, (2002) 1 A.C. (H.L.) 800 [¶¶ 23-24].

109. *Pretty v. Dir. of Pub. Prosecutions*, (2002) 1 A.C. (H.L.) 800 [¶ 19].

positive obligation to give effect to her wish to end her life by means of assisted suicide . . . would . . . ‘stretch the meaning of the words too far.’”¹¹⁰

The ECHR, however, recognized that the facts of Mrs. Pretty’s case did engage her right to personal autonomy under Article 8(2) of the Convention.¹¹¹

This article states that:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.¹¹²

To that end, the ECHR wrote:

[I]t is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.¹¹³

Because of the ECHR’s recognition of Mrs. Pretty’s substantive right to autonomy, it found that the restriction required further justification under Article 14.¹¹⁴ Article 14 prohibits “discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”¹¹⁵ Mrs. Pretty argued that Section 2(1) of the Suicide Act of 1961 was discriminatory because it “prevents the disabled, but not the able-bodied, [from] exercising their right to commit suicide.”¹¹⁶ The House of Lords emphasized her attorney’s use of the term “right,” and, therefore, discounted this contention because the able-bodied have no such right.¹¹⁷ The Lords also reasoned that the law simply treated Mrs. Pretty like everyone else.¹¹⁸

The ECHR disagreed with this interpretation and instead reasoned that a State justification for discrimination was required. Indeed, the ECHR had already recognized that “[t]he right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”¹¹⁹ In Mrs. Pretty’s case, however, the court

110. *Id.* [¶ 100].

111. *Pretty v. United Kingdom*, App. No. 2346/02, 35 Eur. Ct. H.R. para. 86.

112. Convention, *supra* note 99, art. 8, ¶ 2.

113. *Pretty v. United Kingdom*, App. No. 2346/02, 35 Eur. Ct. H.R. para. 65.

114. *Pretty v. United Kingdom*, App. No. 2346/02, 35 Eur. Ct. H.R. para. 88.

115. Convention, *supra* note 99, art. 14.

116. *Pretty v. Dir. of Pub. Prosecutions*, 1 A.C. (H.L.) 800 [¶¶ 35].

117. *Id.* [¶ 35].

118. *Id.* [¶¶ 35-36].

119. *Thlimmenos v. Greece*, 31 E.H.R.R. 411, 424, ¶ 44 (2000). In *Thlimmenos*, a Greek

agreed with the British government that discriminating against those who are able to commit suicide and those who are not is justified because the “borderline between the two categories will often be a very fine one.”¹²⁰ In other words, the difficulty in determining who is entitled to assisted suicide is so great that any deviation from an absolute prohibition threatens the protection of life, at which the Suicide Act of 1961 was aimed.¹²¹

Mrs. Pretty’s case received a significant degree of attention in the British media.¹²² The BBC News deemed the ECHR’s decision a “historic ruling.”¹²³ The media quickly noted the difference between the case of Mrs. Pretty and another “Miss. B,” whom the House of Lords had granted the right to die just weeks prior to the ECHR’s decision.¹²⁴ In reporting on the right to die cases recently decided, the BBC News found, “[t]he crucial difference between the two is that Miss B was asking for her treatment – a ventilator – to be stopped, whereas Diane Pretty requested active intervention to end her life.”¹²⁵

Indeed, courts have continuously recognized the distinction between the right to terminate life-sustaining treatment (such as the removal of a ventilator) and the right to another’s assistance in committing suicide. This distinction has largely determined the extent of the right to die under modern human rights law. The more recent case of Christian Rossiter illustrates the difficulty in distinguishing between the removal of life-sustaining treatment and giving affirmative aid to an individual who cannot effectuate her own death.

B. Christian Rossiter

Christian Rossiter,¹²⁶ a citizen and life-long resident of Australia, suffered three devastating injuries over a twenty-year span that eventually rendered him a spastic quadriplegic.¹²⁷ Consequently, he was eventually admitted to the Brightwater Care Facility in Manangaroo, south of Perth.¹²⁸ Rossiter’s tragic injuries robbed him of virtually all physical movement; he retained “limited foot

national alleged that the refusal of authorities to appoint him to a post because of a criminal conviction for insubordination for refusing to enlist in the army for religious beliefs was a breach of Article 9 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms; the Court found there had been a violation of both articles of the convention. *See id.*

120. *Pretty v. United Kingdom*, App. No. 2346/02, 35 Eur. Ct. H.R. para. 88.

121. *Id.*

122. *E.g.*, David Barrett & Geoff Meade, *Euro Court Rejects Diane Pretty’s ‘Right to Die’ Appeal*, THE INDEPENDENT, Apr. 29, 2002, <http://www.independent.co.uk/news/uk/crime/euro-court-rejects-diane-pretty-s-right-to-die-appeal-658517.html>; *see also Pretty Condemns Right-to-Die Ruling*, BBC NEWS, Apr. 29, 2002, <http://news.bbc.co.uk/2/hi/health/1958270.stm>.

123. *Pretty Condemns Right-to-Die Ruling*, *supra* note 122.

124. *Id.*

125. *Pretty Condemns Right-to-Die Ruling*, *supra* note 122.

126. *Rossiter*, [2009] WASC 229 para. 6.

127. For more information on quadriplegia, *see Quadriplegia and Cerebral Palsy*, CEREBRAL PALSY SOURCE, http://www.cerebralpalsysource.com/Types_of_CP/quadruplegia_cp/index.html (last visited Mar. 1, 2010).

128. *Rossiter*, [2009] WASC 229 para. 5.

movement and the ability to wiggle one finger.”¹²⁹ He could not take nutrition or hydration orally and instead relied on a percutaneous endoscopic gastrostomy tube (PEG)¹³⁰ for his nourishment.¹³¹ Rossiter relied on others for the “necessaries of life,” including “regular turning, cleaning, assistance with bowel movements, physiotherapy, occupational therapy and speech pathology.”¹³²

A clinical neuropsychologist testified that despite his physical condition, Rossiter possessed full mental capacity and understood both his condition and the consequences of his actions.¹³³ Rossiter “clearly and unequivocally” expressed his desire to die to both his doctor and the Brightwater staff on numerous occasions, but his physical condition prevented him from taking his own life.¹³⁴ As a result, he directed the Brightwater staff to discontinue the provision of nutrition and hydration through the PEG.¹³⁵ He repeated the request several times, stating that he wished the PEG be maintained only to the extent necessary to provide him the requisite hydration to dissolve his painkilling medication.¹³⁶ Rossiter understood that he would die of starvation if the PEG were removed.¹³⁷

Because Brightwater sought to avoid criminal or civil liability for granting Rossiter’s request, it repeatedly petitioned local courts to make declarations with respect to its rights and obligations.¹³⁸ As the Western Australia Supreme Court wrote:

Mr. Rossiter is not a child, nor is he terminally ill, or dying. He is not in a vegetative state, nor does he lack capacity to communicate his wishes. . . . [T]his is a case in which a person with full mental capacity and the ability to communicate his wishes has directed those who have assumed responsibility for his care to discontinue the provision of treatment which maintains his existence.¹³⁹

This distinguishes Mr. Rossiter’s case from that of Mrs. Pretty from a purely factual standpoint. Mr. Rossiter asked the court to permit his caretakers to terminate his life-sustaining treatment; that is, to refrain from feeding and

129. *Id.* para. 7.

130. A PEG is a “safe and effective way to provide food, liquids and medications (when appropriate) directly into the stomach. The procedure is done for patients who are having difficulty swallowing.” *Overview - Percutaneous Endoscopic Gastrostomy Tube (PEG)*, CLEVELAND CLINIC, http://my.clevelandclinic.org/services/Percutaneous_Endoscopic_Gastrostomy_PEG/hic_Percutaneous_Endoscopic_Gastrostomy_PEG.aspx (last visited Feb. 27, 2010).

131. *Rossiter*, [2009] WASC 229 para. 8.

132. *Id.* para. 7.

133. *Id.* paras. 12-14.

134. *Id.* para. 11.

135. *Rossiter*, [2009] WASC 229 para. 11.

136. *Id.*

137. *Id.* para. 12.

138. *Id.* para. 17.

139. *Id.* para. 17.

hydrating him except for the extent necessary to administer his pain medication.¹⁴⁰ Mrs. Pretty did not depend on any life-sustaining treatment *per se* and, therefore, needed an affirmative act in order to end her life.¹⁴¹

Yet, the scenarios faced by the courts in these two situations differ only in a minor sense. Had Mr. Rossiter suffered a slightly less debilitating injury, he might have been left in the same situation as Mrs. Pretty – that is to say, he may have been completely paralyzed and unable to control his bodily functions except to the extent that, like Mrs. Pretty, he was able to feed and hydrate himself. Conversely, had Mrs. Pretty been unfortunate enough to suffer a more serious injury, she would have been in the same situation as Mr. Rossiter. It is with this thin distinction in mind that one should examine the reasoning of the Supreme Court of Western Australia in Christian Rossiter's case.

First, after narrowing the scope of the question presented to the facts of the case at bar, Chief Justice Martin analyzed the common-law as it pertained to Mr. Rossiter's case.¹⁴² Specifically, the Chief Justice enumerated three applicable common-law principles: the presumed competency to consent to or refuse medical treatment,¹⁴³ the right to autonomy or self-determination,¹⁴⁴ and the right of a medical care provider to abide by the wishes of a patient who refuses medical treatment.¹⁴⁵

The right to refuse medical treatment, wrote the Chief Justice, depends on the mental capacity of the patient, meaning the extent to which the patient understands the risks and consequences of the options available to him.¹⁴⁶ Because Mr. Rossiter's lengthy medical examination demonstrated that he fully understood the consequences of his argument, Chief Justice Martin found that the first common-law principle was not in dispute.¹⁴⁷

The right to autonomy or self-determination was found to contain two dimensions. First, it related to "respect for the individual human being and in particular for his or her right to choose how he or she should live his or her life."¹⁴⁸ The Chief Justice cited Justice Cardozo's statement as the right of "every human being of adult years and sound mind . . . to determine what shall be done with his own body."¹⁴⁹ Importantly, these common-law principles provide the underpinnings of "the established legal requirement that the informed consent of the patient is required before any medical treatment can be undertaken lawfully."¹⁵⁰ Second, as a corollary, no individual of full capacity is "obliged to

140. *Id.* para. 11.

141. *Pretty v. Dir. of Pub. Prosecutions*, (2002) 1 A.C. (H.L.) 800 [¶¶ 1].

142. *Rossiter*, [2009] WASC 229 para. 22.

143. *Id.* para. 23.

144. *Id.* para. 24.

145. *Rossiter*, [2009] WASC 229 para. 26.

146. *Id.* para. 23.

147. *Id.*

148. *Id.* para. 24.

149. *Id.* (quoting *Schloendorff v. Soc'y of N.Y. Hosp.* 105 N.E. 92, 93 (N.Y. 1914)).

150. *Id.* ¶ 25.

give consent to medical treatment.”¹⁵¹ As discussed above, the Chief Justice was already satisfied with Mr. Rossiter’s medical and legal capacity to understand that his request would result in his certain death.

Chief Justice Martin contrasted these entrenched rights with two provisions in the Criminal Code of Western Australia. The first, § 262, provides:

Duty to provide necessities of life

It is the duty of every person having charge of another who is unable by reason of age, sickness, mental impairment, detention, or any other cause, to withdraw himself from such charge, and who is unable to provide himself with the necessities of life, whether the charge is undertaken under a contract, or is imposed by law, or arises by reason of any act, whether lawful or unlawful, of the person who has such charge, to provide for that other person the necessities of life; and he is held to have caused any consequences which result to the life or health of the other person by reason of any omission to perform that duty.¹⁵²

The second code provision, § 259, reads:

Surgical and medical treatment

- (1) A person is not criminally responsible for administering, in good faith and with reasonable care and skill, surgical or medical treatment (including palliative care) –
 - (a) to another person for that other person’s benefit; or
 - (b) to an unborn child for the preservation of the mother’s life, if the administration of the treatment is reasonable, having regard to the patient’s state at the time and to all the circumstances of the case.
- (2) A person is not responsible for not administering or ceasing to administer, in good faith and with reasonable care and skill, surgical or medical treatment (including palliative care) if not administering or ceasing to administer the treatment is reasonable, having regard to the patient’s state at the time and to all the circumstances of the case.¹⁵³

The Chief Justice held that § 262 was not relevant to Brightwater’s potential criminal liability in this case. At first glance, he wrote, § 262 might appear to apply to Mr. Rossiter because of Brightwater’s control over his care.¹⁵⁴ However, upon closer examination, the phrase “having charge of another” suggests that the section only applies to an individual who “lacks the capacity to direct or control their own destiny.”¹⁵⁵ Therefore, because Mr. Rossiter “enjoys the mental capacity to make informed and insightful decisions in respect of his future treatment,” he was not within Brightwater’s charge, for purposes of § 262.¹⁵⁶ As a result, the

151. *Rossiter*, [2009] WASC 229 para. 26.

152. *Criminal Code Act Compilation Act 1913* (WA) § 262.

153. *Criminal Code Act Compilation Act 1913* (WA) § 259.

154. *Rossiter*, [2009] WASC 229 para. 40.

155. *Id.* para. 39.

156. *Id.* para. 42.

Chief Justice concluded that § 262 imposed no duty of care on Brightwater to provide Mr. Rossiter with the “necessaries of life against his wishes.”¹⁵⁷

Next, the court considered the applicability of § 259, which, in the words of the Chief Justice, “provides that a person is not criminally responsible for not administering medical treatment (including palliative care) if that course is reasonable, having regard to the patient’s state of mind [at the time] and to all the circumstances of the case.”¹⁵⁸ The court noted that subsection (2) was added specifically to give effect to living wills, through which individuals have legal capacity to determine their medical treatment after they lose the mental or physical capacity to do so.¹⁵⁹

In light of that purpose, Chief Justice Martin found that “the entire thrust of the legislation which resulted in the introduction of subsection (2) of [§] 259 was aimed at giving force and effect to the common law principle of autonomy and self-determination[.]”¹⁶⁰ As a result, he concluded that § 259 provided Brightwater with a “complete defence if they discontinue providing nutrition and hydration services at Mr. Rossiter’s request.”¹⁶¹ The court effectively granted Brightwater provisional immunity from prosecution under § 260, and Mr. Rossiter the right to die according to his own terms.

IV. MRS. PRETTY AND MR. ROSSITER: IS THERE A DIFFERENCE?

In this section, I examine the rights implicated in the previous two cases and explain that any legal difference between them is illusory. In section IV.A, I discuss the current debate between various types of life-ending procedures in order to clarify my position with respect to the right I advocate. In part IV.B, I explain the moral debate between euthanasia and removing or terminating life-sustaining treatment. Finally, in part IV.C, I outline the slippery slope argument that both courts and opponents of euthanasia employ to justify complete governmental prohibition of the procedure. Specifically, I argue that the situations in *Pretty* and *Rossiter* should be viewed as legally indistinguishable for two reasons. First, the desired procedures were identical from a moral perspective. Second, the slippery slope argument used by the ECHR in *Pretty* does not justify the discrimination it supported.

A. *Clarifying the Debate*

Both the Brightwater Care Facility and Christian Rossiter sought some sort of right to resolve their difficult situation without criminal liability. But what rights were they claiming? Mr. Rossiter, like Mrs. Pretty, obviously claimed some form of a right to die. The possible meaning of term right to die, however, has been expanded in recent years to encompass four distinct legal rights:

157. *Id.* para. 42.

158. *Id.* para. 44.

159. *Id.* para. 45.

160. *Rossiter*, [2009] WASC 229 para. 48.

161. *Id.*

1. The right to reject or terminate life-saving or life-sustaining treatment;
2. The right to commit suicide, also known as “rational” suicide;
3. The right to another’s help in committing suicide or “assisted suicide”; and
4. The right to voluntary active euthanasia.¹⁶²

As to the first type of right to die, Courts in most Western nations recognize the right to refuse or terminate life-saving treatment.¹⁶³ The *Rossiter* court also acknowledged the common-law right to refuse treatment, grounded both in the requirement for consent to negate battery and the right of autonomy or self-determination, which I will examine later.¹⁶⁴ Likewise, most nations no longer criminalize suicide, defined as ending one’s life without the aid of another.¹⁶⁵ The last two rights, by contrast, require an individual to request the help of another in ending his or her life. These final two rights are morally indistinguishable, both from each other and from the first two rights to die.

B. Physician-Assisted Suicide vs. Voluntary Active Euthanasia

Physician-assisted suicide (PAS) is the “ending of one’s life through the voluntary self-administration of lethal medications prescribed by a physician for that purpose.”¹⁶⁶ PAS requires that the patient carry out the final act, such as self-administration of a life-ending substance.¹⁶⁷ By contrast, voluntary active euthanasia (VAE) has been defined as “[authorizing] another to kill you intentionally and directly.”¹⁶⁸ In recent years, VAE has come to mean the “act of painlessly killing competent and rational persons suffering from incurable disease who voluntarily make this request.”¹⁶⁹ Unlike in PAS, this final act is not carried out by the patient. I will employ this formulation of VAE in the remainder of this article.

162. Yale Kamisar, *The “Right to Die”: A Catchy but Confusing Slogan*, 73 MICH. B.J. 184, 184 (1994).

163. *See Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 277 (1990) (recognizing that the common law doctrine of informed consent implies a right to refuse treatment).

164. *Rossiter*, [2009] WASC 229 para. 24.

165. PENNEY LEWIS, *ASSISTED DYING AND LEGAL CHANGE* 29 (2007) (“Given that suicide is now a legal act in most jurisdictions, the basic premise of [equality-based legalization rights] is that individuals who would require assistance . . . are denied the *choice* which is available to all other mentally competent adult persons.”).

166. Katrina George, *A Woman’s Choice? The Gendered Risks of Voluntary Euthanasia and Physician-Assisted Suicide*, 15 MED. L. REV. 1, 1, n.1 (2007) (distinguishing between different definitions of PAS).

167. Rohith Srinivas, *Exploring the Potential for American Death Tourism*, 13 MICH. ST. U. J. MED. & L. 91, 94 (2009).

168. Kamisar, *supra* note 161, at 184.

169. Malcolm de Roubaix, *Are There Limits to Respect for Autonomy in Bioethics?*, 27 MED. & L. 365, 394 (2008).

Numerous commentators have discussed the difference between PAS and VAE from a moral perspective.¹⁷⁰ Specifically, writers have focused on the significance of a patient performing the final act – the difference, for example, between a doctor pressing a button and the patient ingesting a lethal dose of medication.¹⁷¹ A patient's ability to change his or her mind at the last moment may have legal significance, particularly because of the difficulty in determining whether the patient maintains his or her certainty until the final moment after choosing to be euthanized. However, as I will explain below, requirements that are already in place in certain jurisdictions¹⁷² can satisfy the need to establish the patient's intent with legal certainty.

As opposed to the murky distinction between PAS and VAE, the line separating voluntary from involuntary euthanasia is readily apparent. VAE involves, "one person [helping] another in putting an end to his/her life, in response to a repeated and informed consent, under certain pre-established conditions, according to his/her request and/or will, and through painless means."¹⁷³ In contrast, involuntary euthanasia involves situations where the patient has not consented.¹⁷⁴ Although I will later address the "slippery slope" problem of drawing a line between voluntary and involuntary euthanasia,¹⁷⁵ it is important to first focus on VAE.

C. *The Permitted/Forbidden Line: A Moral Distinction?*

Most countries distinguish the withdrawal of life-sustaining treatment, which they permit, from both PAS and VAE, which they forbid. These countries, and their courts, distinguish between these acts in two ways: the inherent moral rightness or wrongness of the acts and the overall resulting "bad consequences."¹⁷⁶ In this section, I argue that the moral distinction between these acts is illusory and, therefore, the only valid justification for prohibiting PAS and VAE lies in the possibility of bad consequences.

Courts use both causation and intention to explain the moral permissibility of withdrawing life-saving treatment.¹⁷⁷ Those that employ causation as a means of distinguishing the two argue that withdrawing life-sustaining treatment via PAS merely *permits* a natural death, whereas VAE actually *causes* death (and therefore

170. See, e.g., N. Ferreira, *Latest Legal and Social Developments in the Euthanasia Debate: Bad Moral Consciences and Political Unrest*, 26 MED. & L. 387 (2007) (explaining the debate and arguing that the distinction lacks substance from a moral perspective).

171. Srinivas, *supra* note 167, at 94 ("Leaving the final decision to the patient allows her to change her mind until the last moment, preserving an important element of autonomy.").

172. E.g. *Cruzan*, 497 U.S. at 274-81 (citing various jurisdictions that require a clear and convincing evidence standard to prove patient's intent).

173. N. Ferreira, *supra* 170, at 390.

174. *Id.*

175. See generally *The Empirical Slippery Slope*, *supra* note 9.

176. Alister Browne, *Causation, Intention, and Active Euthanasia*, 15 CAMBRIDGE Q. HEALTHCARE ETHICS 71, 71 (2006); see *In re Conroy*, 98 N.J. 321, 369-370 (1985) (rejecting the moral distinction between actively assisting suicide and passively allowing another to die).

177. Browne, *supra* note 175, at 72.

equates to homicide).¹⁷⁸ As a result, courts have concluded that the former is intrinsically right, the latter intrinsically wrong. Consider the following, written by the Supreme Court of New Jersey:

In any event, declining life-sustaining medical treatment may not properly be viewed as an attempt to commit suicide. Refusing medical intervention merely allows the disease to take its natural course; if death were eventually to occur, it would be the result, primarily, of the underlying disease, and not the result of a self-inflicted injury.¹⁷⁹

The *Conroy* court took the position that the refusal of life-sustaining treatment would represent just one cause of death, but not the primary one.

Along the same line of reasoning, the Quebec Superior Court wrote in *Nancy B. v. Hotel Dieu de Quebec et al.*,¹⁸⁰ that “homicide and suicide are not natural deaths, whereas in the present case, if plaintiff’s death takes place after the respiratory support treatment is stopped at her request, it would be the result of nature taking its course.”¹⁸¹ Thus, while the Supreme Court of New Jersey in *Conroy* suggests that the removal of treatment was not the *primary* cause, the Quebec Superior Court seemingly suggests that it would not actually cause the patient’s death at all. However, neither of these arguments supports the proposition that removing treatment is intrinsically “right” from a moral standpoint because they both fail standard causation analyses.

An event may cause another in four ways.¹⁸² First, as tort law instructs, X may be a “but-for” cause of Y. Y may have many causes; however, if but for X, Y would not have occurred, then X is a “but-for” cause of Y. For example, if X causes Y and Y causes Z, then X is the “but for” cause of Z. The fact that X may not be the proximate cause does not change this fact. Thus, “because the physician’s action caused the patient to return to her natural disease condition, and that condition caused the patient’s death, the physician caused the patient’s death.”¹⁸³ In this respect, one can clearly see that the removal of life-sustaining treatment is a “but-for” cause of the patient’s death.

Second, X may be a condition “the manipulation of which brought about the event in question.”¹⁸⁴ In other words, if the manipulation of X brought about Y, then X caused Y. Again, the removal of life-sustaining treatment clearly satisfies this second test. Assuming that X represents life-sustaining treatment such as a feeding tube, and its manipulation, i.e., removal, brings about the death of the patient, then it caused the patient’s death regardless of the underlying medical condition.

178. *Id.*

179. *In re Conroy*, 98 N.J. at 350-51.

180. [1992] 86 D.L.R. (4th) 385 (Can.).

181. *Nancy B. v. Hotel-Dieu de Quebec et al.*, [1992] 86 D.L.R. (4th) 385, 394 (Can.).

182. Browne, *supra* note 175, at 73-74.

183. *Id.*

184. *Id.*

The third view of causation looks at “the set of conditions, among those and only those that occurred, which are individually necessary and jointly sufficient for the event in question.”¹⁸⁵ This view holds that multiple equally important conditions caused the event.¹⁸⁶ Dr. Alister Browne wrote:

It is not only striking a match that is the cause of its lighting; the match must be dry, there must be oxygen in the vicinity, there cannot be a high wind, and so forth. Because all of these conditions are equally necessary, we cannot show favoritism and pick out any one as the cause.¹⁸⁷

According to this view, the removal of the feeding tube and the underlying illness contribute equally to the death of the patient (in addition to all of the causes of the illness, etc.). For this reason, we cannot favor one over another, and again, the removal of the feeding tube must be said to cause the patient’s death.

Fourth, the condition may be just one within a necessary set of conditions, yet singled out because of some noteworthy attribute.¹⁸⁸ Causation in this theory depends on the viewpoint of the speaker. Therefore, removing the feeding tube *may* be a cause or the cause of death according to the speaker, but it depends on what the speaker chooses to emphasize. If the doctor did not know that the treatment had been removed, for example, the speaker might find that and removal was a cause, or the cause, of the patient’s death.¹⁸⁹ Because removing the feeding tube may be found to be the cause of death under any of the four theories of causation, one cannot distinguish the moral permissibility of withdrawing life-sustaining treatment from PAS or VAE based on causation.

However, courts have also attempted to distinguish based on intention by arguing, for example, that doctors participating in PAS or VAE intend to cause death whereas those who provide palliative care intend to end suffering.¹⁹⁰ In *Rodriguez v. British Columbia (District Attorney)*, for example, a woman sought the right to assisted suicide in the Canadian legal system once she was no longer able to kill herself.¹⁹¹ She argued, as I do here, that the law discriminated against the disabled.¹⁹² The court rejected her argument and Justice Sopinka focused largely on intent when he wrote:

The administration of drugs designed for pain control in dosages which the physician knows will hasten death constitutes active contribution to death by any standard. However, the distinction drawn here is one based upon intention – in the case of palliative care the intention is to ease pain, which has the effect of hastening death, while in the case of assisted suicide, the intention is undeniably to cause death.¹⁹³

185. *Id.*

186. *Id.*

187. *Id.*

188. Browne, *supra* note 175, at 74.

189. *Id.*

190. *Rodriguez v. B.C. (Attorney General)*, [1993] 3 S.C.R. 519, 607 (Can.).

191. *Id.* at 520.

192. *Id.* at 534-35.

193. *Id.* at 607.

For two reasons, however, a moral line based on intention does not withstand careful analysis. First, and most obviously, causing death is not *the* intention of assisted suicide, but rather one of several, including easing pain.¹⁹⁴ Physicians performing PAS or VAE might also seek to honor the patient's or family's wish.¹⁹⁵ Second, as Browne writes, a person's intention "depends on what the person believes, not what is the case, and because anyone can come to believe anything, any action can have any intention."¹⁹⁶ If moral permissibility turned on intention, we could never determine permissibility before determining a person's intention. Thus, we could not determine permissibility beforehand. The flaws in such a system of determining moral permissibility make it unworkable.

Neither causation nor intention supports a moral line between withdrawing life-sustaining treatment and PAS or VAE. Causation does not work because a simple analysis shows that in both situations the person removing the treatment or providing assistance actually causes the patient's death.¹⁹⁷ Similarly, because intention depends on the intent of the individual performing the act, it is simply too uncertain to provide any moral or legal guidance. Thus, because courts use causation and intention to define morality,¹⁹⁸ there is simply no moral distinction between removing life-sustaining treatment and either PAS or VAE.

D. The Slippery Slope

Without the moral distinction between the different mechanisms of assisted dying, the remaining argument against a human right to die is that it creates a dangerous public policy. Traditionally, courts have recognized that the state has a strong interest in protecting human life.¹⁹⁹ According to this argument, the strength of that interest justifies the state's total ban on assisted death, even though such death might otherwise be desirable (like in situations where a person wants to die and has a valid reason for that wish).²⁰⁰

Courts traditionally employ a slippery slope argument in justifying a government's complete proscription of assisted death.²⁰¹ Slippery slope arguments "claim that endorsing some premise, doing some action, or adopting some policy

194. Browne, *supra* note 175, at 77.

195. *Id.*

196. *Id.*

197. *See supra* text accompanying notes 181-89.

198. *See supra* note 177 (explaining the causation view that distinguishes between allowing a natural death and causing death).

199. *E.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (upholding Washington state's ban on assisted suicide); *Pretty v. Dir. of Pub. Prosecutions*, (2002) 1 A.C. (H.L.) 800 [¶ 35] (upholding U.K. prohibition against assisted suicide).

200. *See, e.g.*, *Glucksberg*, 521 U.S. at 728-32 (determining that the State of Washington has a legitimate interest in preserving life that, along with other legitimate interests, justifies the State's prohibition of assisted suicide).

201. *See, e.g., id.* at 732-34 (accepting the slippery slope argument "that permitting assisted suicide will start [the State] down the path to voluntary and perhaps even involuntary euthanasia").

will lead to some definite outcome that is generally judged to be wrong or bad.”²⁰² The slope is slippery if there are “no plausible halting points between the initial commitment to a premise, action, or policy and the resultant bad outcome.”²⁰³ As a result, “[t]he desire to avoid such projected future consequences provides adequate reasons for not taking the first step.”²⁰⁴

Legal scholars often employ slippery slope arguments because of their natural focus on the future.²⁰⁵ As Frederick Shauer writes, lawyers today are called upon:

[T]o consider the behavior of others who tomorrow will have to apply or interpret today’s decisions. The prevalence of [the] slippery slope arguments in law may reflect a societal understanding that proceeding through law rather than in some other fashion involves being bound in some important way to the past, and responsible in some equally important way to the future.²⁰⁶

Slippery slope arguments therefore commonly arise in the context of proposed changes to the law.²⁰⁷ More specifically, opponents of legal changes that would seemingly liberalize the law in a given context employ the slippery slope to caution against such changes.²⁰⁸ Therefore, even if the first step, standing alone, is logical and cannot be argued against, a dearth of limiting measures opens the door to the slippery slope.²⁰⁹

Those who oppose the legalization of assisted death employ the slippery slope argument in its various forms in an attempt to demonstrate the implausibility of implementing an otherwise desirable policy.²¹⁰ At the outset, it is important to recall that the ECHR in the Diane Pretty case employed the slippery slope argument to justify Britain’s discrimination against the physically incapacitated, which it held would otherwise violate Article 14 of the Convention.²¹¹ The ECHR wrote that the distinction between those who are able to take their own lives and those who cannot is a “fine one;” as a result, the British government was entitled as a matter of policy to ban the practice as a whole.²¹² In other words, forbidding Mr. Pretty from aiding his wife to end her life was justified because the line between who is physically-able and who is not may be difficult to see. As a result, allowing Mr. Pretty to aid in her suicide would, theoretically, create a precedent that could be used by those who are not truly similarly situated.

Critics have employed the slippery slope argument more generally to admonish those in favor of permitting PAS. These critics fear the slide from

202. Walter Wright, *Historical Analogies, Slippery Slopes, and the Question of Euthanasia*, 28 J. L. MED. & ETHICS 176, 177 (2000).

203. *Id.*

204. *Id.*

205. Frederick Shauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 383 (1985).

206. *Id.*

207. *Id.*

208. *Id.* at 382.

209. Schauer, *supra* note 205, at 382-83.

210. See PENNEY LEWIS, *supra* note 164, at 164-69.

211. *Pretty v. United Kingdom*, App. No. 2346/02, 35 Eur. Ct. H.R. para. 89.

212. *Id.* para. 89.

voluntary to non-voluntary procedures. The empirical slippery slope argument holds that, while there is a moral (or legal) distinction between voluntary and non-voluntary euthanasia, we are simply bad at abiding by it. In other words:

[O]nce we allow voluntary euthanasia . . . we may (or will) fail to make the crucial distinction, and then we will reach the morally unacceptable outcome of allowing involuntary euthanasia; or perhaps even though we will make the relevant distinction, we will not act accordingly for some reason (perhaps a political reason, or a reason that has to do with weakness of will, or some other reason).²¹³

In support of this claim, some of these critics allude to the example of Nazi Germany, arguing that reducing the value of human life is inherently dangerous.²¹⁴ For example, Walter Wright uses the Netherlands case study to argue that the danger of the slippery slope is real.²¹⁵ Others have done the same.²¹⁶ These critics rely predominantly on the Dutch evidence in “termination of life without an explicit request” cases to make their point.

After the Netherlands legalized euthanasia in 1990 it appointed the Rummelink Commission, supported by the Dutch Royal Medical Association, to research the practice.²¹⁷ According to reports from 1990, 1995, and 2001, assisted suicide comprised just 0.2% of all deaths in the Netherlands during those years, while voluntary euthanasia took place in 1.7% of all deaths.²¹⁸ According to the 1990 report, for example, 2,300 people received life-ending treatment upon request, while 1,040 were killed without knowledge of or consenting to the procedure.²¹⁹

At first glance, that statistic might lead one to conclude that the legalization of assisted death in the Netherlands led directly down the slippery slope. It might also suggest that the human right I am advocating would also lead to that same result. There is no doubt that the fear of non-voluntary euthanasia is a legitimate one; however, for two reasons, fears of a slippery slope leading to that end are not legitimate in this case. The first reason deals with flaws in the analysis of the Dutch case, and the second relates more specifically to the right I am advocating and the situations in which it will be implicated.

213. David Enoch, *Once You Start Using Slippery Slope Arguments, You're on a Very Slippery Slope*, 21 OXFORD J. LEGAL STUD. 629, 631 (2001).

214. See, e.g., Wright, *supra* note 205, at 176.

215. *Id.* at 181.

216. Henk Jochemsen & John Keown, *Voluntary Euthanasia Under Control? Further Empirical Evidence from the Netherlands*, 25 J. MED. ETHICS 16, 20-21 (1999); John Keown, *The Law and Practice of Euthanasia in the Netherlands*, 108 L. Q. REV. 51, 61-78 (1992).

217. P.J. van der Maas et al., *Euthanasia and Other Medical Decisions Concerning the End of Life: An Investigation Performed upon Request of the Commission of Inquiry into the Medical Practice Concerning Euthanasia*, 21 HEALTH POL'Y, Nos. 1 & 2, 3-4 (1992) (Neth.).

218. Bregje D. Onwuteaka-Philipsen et al., *Euthanasia and Other End-of-Life Decisions in the Netherlands in 1990, 1995, and 2001*, 32 LANCET 395, 396 (2003).

219. Wright, *supra* note 205, at 183.

First, in order for there to be a slippery slope from voluntary to non-voluntary euthanasia, the legalization of the latter must in fact *cause* the increase in non-voluntary procedures.²²⁰ If not, there can be no claim that the legalization actually creates the slippery slope. The evidence for an increase in non-voluntary euthanasia as a result of legalization in the Netherlands is suspect because no data exists for any time prior to the 1990 Rummelink Report, which took place after legalization. In addition, the percentage of non-voluntary euthanasia has remained constant over the course of the Rummelink Reports, from 1990 to 2001. If the slippery slope were in fact leading to an increase in non-voluntary euthanasia, one would expect its rate of occurrence to increase after legalization. At least one commentator has suggested that the lack of such an increase indicates there is no slippery slope.²²¹ Regardless, there is no direct evidence that legalization causes an increase in the rate of non-voluntary euthanasia.²²²

In lieu of direct evidence, another indication of a slippery slope would be a comparatively higher rate of non-voluntary euthanasia in jurisdictions in which voluntary euthanasia has been legalized.²²³ If rates of non-voluntary euthanasia are higher in jurisdictions that legalized voluntary euthanasia, as compared to those where both voluntary and non-voluntary are illegal, then such statistical proof may indirectly support an inference that legalization leads to a comparatively higher rate of non-voluntary euthanasia.²²⁴ However, as Penney Lewis has shown through her empirical study,²²⁵ the Netherlands case has not provided definitive, comparative evidence to suggest that legalization increases the rate of non-voluntary euthanasia.²²⁶ For example, Lewis uses surveys of doctors and death certificates to demonstrate that the rates of non-voluntary euthanasia in Australia, Belgium (pre-legalization), and Denmark were all higher than in the Netherlands (which was the only jurisdiction where either form of termination of life was legal at the time of the study).²²⁷ Moreover, there is evidence that non-voluntary euthanasia occurs in other jurisdictions, including Canada, New Zealand, the United States, and the United Kingdom.²²⁸ This should not come entirely as a surprise, especially given the discussion above about lethal palliation.²²⁹ In any

220. *The Empirical Slippery Slope*, *supra* note 9, at 198.

221. Jocelyn Downie, *The Contested Lessons of Euthanasia in the Netherlands*, 8 HEALTH L.J. 119, 135 (2000).

222. *The Empirical Slippery Slope*, *supra* note 9, at 205.

223. *See id.* at 201 (comparing the rates of non-voluntary euthanasia in the Netherlands, where euthanasia is legal, to the rates in other countries that have not legalized euthanasia); *see also* John Griffiths, *Comparative Reflections: Is the Dutch Case Unique?*, in REGULATING PHYSICIAN-NEGOTIATED DEATH 197, 202 (Albert Klihn et al. eds., 2001) (“[T]here is no evidence that . . . termination of life without a request has become more frequent since legislation in 1984, and no evidence that it is more frequent in the Netherlands than elsewhere.”).

224. *The Empirical Slippery Slope*, *supra* note 9, at 201.

225. *Id.* at 200-02.

226. *Id.* at 201.

227. *Id.*

228. *Id.* at 202.

229. *See supra* notes 188-94 and accompanying text.

event, comparative evidence is unreliable for a number of reasons, which extend beyond the scope of my current argument.²³⁰

Empirical and comparative evidence of the effects of legalization in the Netherlands tend to point in both directions. Advocates of legalization and its opponents can find support in data showing significant numbers of non-voluntary euthanasia in the Netherlands after the voluntary type was legalized. At the same time, comparative data from other countries shows that doctors across the globe continue to terminate life without explicit request from the patient, even in jurisdictions that totally prohibit assisted death. The uncertainty of empirical evidence makes it impossible to say with any precision that legalization leads to an increase in non-voluntary euthanasia. Consequently, the empirical slippery slope argument does not justify the discrimination against those who cannot, by their own means, end their lives.

But more fundamentally, the supposed justification for the slippery slope argument – the difficulty in ascertaining exactly who qualifies for the procedure – plays, at most, a minimal role when the true issue concerns physical incapacity. To recall, in *Pretty*, the ECHR upheld Britain’s total proscription of assisted suicide because “cogent reasons exist . . . for not seeking to distinguish between those who are able and those who are unable to commit suicide unaided [because] . . . [t]he borderline between the two categories will often be a very fine one. . . .”²³¹ As a practical matter, this argument is unconvincing. An individual seeking the procedure would need to establish two conditions: a desire to die, and the lack of physical capacity to effectuate that desire.

As to the first, courts have already recognized that an individual needs only mental capacity in order to refuse medical treatment.²³² In *Rossiter*, the Supreme Court of Western Australia found that such a right was grounded in the common law.²³³ In 1990, the United States Supreme Court found the same to be true in the case of Nancy Cruzan.²³⁴ Both courts agreed that personal autonomy was central to the right to refuse treatment.²³⁵ However, more importantly for present purposes, the right to refuse treatment rests solely on the individual’s capacity to make a rational decision.²³⁶ In *Cruzan*, the Supreme Court held that Missouri could impose a clear and convincing evidentiary standard for determining whether or not an

230. See *The Empirical Slippery Slope*, *supra* note 9, at 202-04 (stating that legal and cultural differences between countries, such as their conflicting attitudes concerning the extent of a patient’s autonomy in a doctor-patient relationship, make valid comparisons problematic).

231. *Pretty v. United Kingdom*, App. No. 2346/02, 35 Eur. Ct. H.R. para. 88.

232. See, e.g., *Cruzan*, 497 U.S. at 278 (stating that prior U.S. federal court decisions established the principle that a competent person has a constitutionally protected liberty interest to refuse unwanted medical treatment).

233. *Rossiter*, [2009] WASC 229 para. 23.

234. *Cruzan*, 497 U.S. at 277 (“[T]he common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment.”).

235. *Rossiter*, [2009] WASC 229 para. 23; *Cruzan*, 497 U.S. at 270.

236. *Cruzan*, 497 U.S. at 277.

individual desired to die.²³⁷ However, in a situation where a person expresses a wish to die but cannot physically commit suicide, questions of capacity or the veracity of the desire rarely arise. As a result, clear and convincing evidence should suffice to establish the desire to die for a person with full mental capacity.

As opposed to mental capacity, proving physical incapacity would require an expansion of the current law.²³⁸ However, nothing suggests that satisfying a legal standard for physical incapacity would be any more difficult than satisfying the clear and convincing standard required in the United States under *Cruzan*. As one scholar writes:

[I]f courts and doctors were to be given the guideline that they have to be fully satisfied that the individual concerned is physically unable to commit suicide unaided and mentally competent to make a choice about their own life and death (which indicates a higher level of conviction than mere greater likelihood on a balance of probabilities), dangers for the vulnerable or a general tendency to extend the exception to able-bodied persons merely seeking a more convenient way to die could effectively be avoided.²³⁹

Thus, with adequate medical and legal standards in place, the physical incapacity requirement poses no greater challenges than those inherent in establishing mental capacity, which courts have already shown a willingness to decide.

The slippery slope poses no threat to the argument that a human right exists for deserving individuals to receive life-ending treatment. The statistical evidence that is customarily relied upon to support a slippery slope concern is inconclusive. Further, the government could ensure with relative ease that such treatment is provided only to those individuals whose circumstances warrant its use. Moreover, the slippery slope argument that legalization will lead to a decrease in the value of human life does not apply because of the narrow exception I propose. Putting a compassionate end to needless discrimination against the physically incapacitated actually places life on a higher pedestal. In fact, it is for this very reason that the right to die should be a human right.

V. A VERY HUMAN RIGHT

The right of the physically incapacitated to VAE should be recognized as a human right because it fits squarely within the generally accepted framework of human rights.²⁴⁰ As discussed above,²⁴¹ Cranston proposes a three-part test to determine whether a given right qualifies as a human right.²⁴² First, the right must

237. *Id.* at 284.

238. Antje Pedain, *The Human Rights Dimension of the Dianne Pretty Case*, 62 CAMBRIDGE L.J. 181, 202 (2003).

239. *Id.* at 202.

240. *See* Cranston, *supra* note 34, at 65-71.

241. *See supra* notes 75-83 and accompanying text.

242. Cranston, *supra* note 34, at 65-71.

be practicable.²⁴³ Second, it should be a “genuinely universal moral right.”²⁴⁴ Third, it must satisfy the test of “paramount importance.”²⁴⁵

As to practicability, the case of the Netherlands makes clear that a government can easily implement physician-assisted death within a systematic, well-regulated framework with rules and oversight.²⁴⁶ Although the Dutch system has received significant criticism for the prevalence of non-voluntary procedures,²⁴⁷ neither empirical data nor comparative statistics demonstrate that legalization is the cause. As a result, the right I envision satisfies the practicability prong, based on the historical evidence from the Netherlands alone.

Furthermore, courts have already accepted the duty to determine mental capacity for purposes of determining when an individual can terminate or decline treatment.²⁴⁸ Consequently, there is no reason to believe that courts cannot make the same type of factual inquiry into physical capacity. The physical and mental capacity inquiries seem substantially similar; both require the testimony or affidavit of one or more medical doctors. Based on the severity of most cases of physical incapacity, doctors (and courts, for that matter) might actually find it easier to make a determination of physical incapacity, as compared to mental capacity. Regardless, the fact that courts have already demonstrated a willingness to inquire into mental incapacity for medical purposes shows that adding a physical incapacity prong is quite practicable.

However, the inquiry does not end here. As Cranston writes,²⁴⁹ the Universal Declaration defines human rights as those which ‘everyone’ has.²⁵⁰ As a result, even some rights embodied in the Universal Declaration do not truly qualify as human rights.²⁵¹ For example, the right to holidays with pay does not pass muster according to Cranston because:

[I]t is a right that is necessarily limited to those persons who are *paid* in any case, that is to say, to the *employé* class. Since not everyone belongs to this class, the right cannot be a universal right, a right which, in the terminology of the Universal Declaration, ‘everyone’ has. That the right

243. *Id.* at 66.

244. *Id.* at 67.

245. *Id.*

246. *See generally* ROBERT POOL, *NEGOTIATING A GOOD DEATH: EUTHANASIA IN THE NETHERLANDS* (2000) (providing a thorough discussion of the Netherlands case).

247. *See* Wright, *supra* note 200, at 183 (“[Dutch] doctors . . . killed 1,040 people who did not know or consent to what was happening . . . despite the fact that 14% of these patients were fully competent, and 72% had never given any indication that they would want their lives terminated.”).

248. *See e.g.*, *Cruzan*, 497 U.S. at 278 (stating that prior U.S. federal court decisions established the principle that a competent person has a constitutionally protected liberty interest to refuse unwanted medical treatment).

249. Cranston, *supra* note 34, at 65-71.

250. *Id.* at 67 (citing Universal Declaration of Human Rights, G.A. Res. 217 (II) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948)).

251. *Id.*

to a holiday with pay is for many people a real moral right, I would not for one moment deny. But it is a right which . . . can be claimed by members of a specific class of persons *because* they are members of that class.²⁵²

As a result, a right qualifies as a human right only if everyone can claim it, regardless of membership in a specific class.

The right of the physically incapacitated to life-ending treatment easily satisfies this test. Unlike the right to holidays with pay, which requires employment as a precursor, it has no requisite precondition. Anyone could have the misfortune of falling into a state of total physical incapacity. The risk applies equally to all people. While some might say that physical incapacity is the same sort of precondition as employment in the example outlined by Cranston, I argue that Cranston used this example because many people simply cannot, and will not, find employment in the formal sense envisioned by the mostly European drafters of the Universal Declaration. Thus, it is unrealistic for many people to obtain the right to holidays with pay. Falling into a state of physical incapacity is diametrically opposed to employment. It could happen to anyone, anywhere in the world, at any moment for almost any reason; it just requires a mere stroke of misfortune. As a result, just as the Universal Declaration envisions, everyone can truly claim this right.

Finally, this right satisfies the test of paramount importance. Only the most important rights carry an associated duty to protect those rights.²⁵³ As discussed above, Cranston, through this lens, argues that “it is a paramount duty to relieve great distress, as it not a paramount duty to give pleasure.”²⁵⁴ An individual who wishes to die but suffers such complete physical incapacity that she cannot effectuate that desire could not help but experience great distress. Alleviating this distress by giving that individual a right to a life-ending procedure satisfies the test of paramount importance on logical grounds alone.

The 1993 case of *Airdale NHS Trust v. Bland*,²⁵⁵ noted that “[s]ubject to exceptions like self-defence, human life is inviolate even if the person in question has consented to its violation.”²⁵⁶ The ECHR approved this reasoning in the case of *Mrs. Pretty*.²⁵⁷ However, we should keep statements like this in context. The case of *Mr. Rossiter*, among others, demonstrates that this proposition has some carefully defined exceptions. Importantly, just after quoting *Airdale*, the ECHR attempted to distinguish “the cessation of life-saving or life-prolonging treatment on the one hand and the taking of action lacking medical, therapeutic[,] or palliative justification but intended solely to terminate life on the other.”²⁵⁸ I have

252. *Id.*

253. *Id.* at 68-69.

254. *Id.* at 67.

255. *Airdale NHS Trust v. Bland*, [1993] A.C. 789 (H.L.)

256. *Id.* at 831.

257. *Pretty v. United Kingdom*, App. No. 2346/02, 35 Eur. Ct. H.R. para. 9.

258. *Id.*

argued²⁵⁹ that such an intent-based distinction is illusory because a doctor providing life-ending care in this situation can intend to achieve several goals, including therapeutic and palliative ones. Thus, a human right to a life-ending procedure for the physically incapacitated maintains the inviolability of human life precisely because it provides much needed relief – both physical and mental – for a person suffering in a way most can hardly imagine.

VI. CONCLUSION

Courts should recognize the right to a life-ending procedure for the physically incapacitated as a human right. The right satisfies the criteria for a human right in a variety of ways. It also fits in the human rights framework much more clearly than the aspirational rights enumerated in the ICESCR. In addition, the right would further the concept of personal autonomy that lies at the heart of the modern normative human rights system.

The legal regime of the Netherlands demonstrates the practicability of a broad legalization of physician assisted death. Yet the right I advocate does not require such breadth in legalization. By contrast, its practicability comes from the narrow degree of legalization it would require. Indeed, courts have already demonstrated a willingness to make determinations of mental capacity, so extending that inquiry into the realm of physical incapacity requires only a small logical step, dictated by compassion. Such a step would not create a slippery slope because governments could closely regulate the physical incapacity requirement by requiring something akin to clear and convincing evidence, as American courts currently do for mental capacity.

Finally, the reasoning employed by courts in right to die cases simply fails to justify total governmental bans of physician assisted death. From a moral perspective, one cannot distinguish the termination of life-sustaining treatment from VAE. As a result, as long as courts uphold the former as a permissible exercise of personal autonomy, they should also do so for the latter. The time has come to put a compassionate end to discrimination against the physically incapacitated by affording them the right to end their suffering.

259. *See supra* notes 188-194 and accompanying text.