The right to die in American and South African constitutional law

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Abstract

Since controlling one’s own death emerged as a legal question in the 1970s in the United States of America it has remained both a contentious and undecided legal issue in that country. As a matter of constitutional law it seems clear that there is no general right to die in American law, only the limited right to refuse medical treatment. In federal constitutional law this unenumerated right flows, according to the US Supreme Court, from the liberty interest protected in the Fourteenth Amendment and as such forms part of the court’s substantive due process jurisprudence. Other US courts have found that this right may be based on First Amendment religious rights, the general unenumerated right to privacy or on state constitutional privacy rights. An analysis of the right to die in South African constitutional law based upon the experience in the US suggests that in South Africa there will most likely develop a much broader constitutional right to die than is the case in the US. This is partly due to a larger range of enumerated fundamental rights being protected in the South African 1996 Constitution which will allow the Constitutional Court to shy away from the problematic substantive due process analysis with which the US Supreme Court has had to grapple in this context. While the US jurisprudence regarding the right to die provides a solid comparative point of departure for a South African analysis, local courts should be mindful of the significant differences between the jurisdictions, which might be dispositive in this instance.

INTRODUCTION

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INTRODUCTION

Since controlling one's own death emerged as a legal question in the 1970s in the United States of America, it has remained both a contentious and an undecided legal issue in that country. Such control is traditionally referred to as the right to die in legal debate. However, this term is made up of a number of specific and distinct concepts which include the refusal of life-saving and life-sustaining medical treatment, suicide, and assisted suicide. As although not the first case to deal with the concept of choosing one's own death, the New Jersey Supreme Court decision in *Re Quinlan* 70 NJ 10, 355 A 2d 647 (1976), was the landmark start of the continually growing jurisprudence on death and dying in the US, especially in setting the stage for a rights-based analysis of this issue. As I shall indicate below, the relevant cases preceding Quinlan mostly concerned the refusal to receive any treatment due to religious objections, mostly from Jehovah's Witnesses, and was thus not directly focused at choosing death. See generally Normal L Cantor 'Twenty-five years after Quinlan: a review of the jurisprudence of death and dying 29 (2001) J Med & Ethics 182, 182-184; Normal L Cantor 'A patient's decision to decline life-saving medical treatment: bodily integrity versus the preservation of life' (1973) 26 Rutgers LR 228, 230-236.

Euthanasia and assisted suicide remains a topic of much debate today in America. In a number of states legislative initiatives have recently been launched to either legalise or criminalise assisted suicide and in a few instances it also involved referendums. Only in Oregon has such an initiative been successful with the enactment, following a referendum, of the Death with Dignity Act, Or Rev Stat §§127 800-897 (1997), while in California and Washington similar initiatives failed, William J Tarnow 'Recognizing a fundamental liberty interest protecting the right to die: an analysis of statutes which criminalize or legalize physician-assisted suicide' (1996) 4 Elder LJ 407, 437-440. A multitude of bills proposing to legalise assisted-suicide have also failed to pass State legislatures in recent years, see Washington v Glucksberg 521 US 702 (1997) 717 fn 15. Many states have recently reaffirmed the ban on assisted suicide by strengthening and clarifying relevant statutes, see the concurring opinion of Justice Souter in Washington v Glucksberg above at 775 fn 15. This debate has also resounded outside legislatures where assisted suicide practices such as those performed and advocated by Jack Kevorkian have created much media attention and scholarly debate, see Neil M Gorsuch 'The right to assisted suicide and euthanasia' 23 (2000) Harv JL & Pub Pol'y 599, 600-602; for a bibliography of legal and medical commentary on the issue of refusing life-sustaining medical treatment up to 1992 see Coordinating Council on Life-Sustaining Medical Treatment Decision Making by the Courts; guidelines for state court decision making in life-sustaining medical treatment cases 191-205 (2ed 1993); for a compilation of legal essays dealing with physician-assisted suicide, see Linda L Emanuel (ed) Regulating how we die (1998).

Despite three Supreme Court decisions regarding the choice to die in the 1990s, no final answer has emerged. In the first of these cases, *Cruzan v Director, Missouri Department of Health* 497 US 261 (1990), the Supreme Court refrained from expressing a final opinion on the matter and referred it back to the states to work out, see O'Connor J, concurring at 292; in its 1997 judgment in Washington v Glucksberg above at 738, Stevens, J, in a concurring opinion, noted: 'The Court ends its opinion with the important observation that our holding today is fully consistent with a continuation of the vigorous debate about "physician-assisted suicide." I write separately to make it clear that there is also room for further debate about the limits that the Constitution places on the power of the States to punish the practice.'

These concepts are sometimes categorised as different forms of euthanasia. 'Passive euthanasia' refers to the withholding or withdrawal of treatment which would result in death at the request of the patient, while 'active euthanasia' refers to assisted suicide at the request of the patient ie tangible steps are taken to end the patient's life, see Bryan A Garner (ed) *Black's law dictionary* (7ed 1999) 575. Rita Maré 'Criminal law and the Bill of Rights' in *The Bill Of Rights compendium* 2A-17 and 2A-18 (1996). However, these definitions are not that clear and there seems to exist
a matter of constitutional law it seems clear at least that there is no general right to die in American law. As far as there is a right to die, it exists as the limited right to refuse medical treatment. In federal constitutional law this unenumerated right flows, according to the Supreme Court, from the liberty interest protected in the Fourteenth Amendment and as such forms part of the court's substantive due process jurisprudence. Other courts have found that this right may be based on First Amendment religious rights or the general unenumerated right to privacy. In state constitutional law the right to refuse treatment has also in the main been based on the right to privacy.

In contrast to the paucity of constitutional rights available in the US on which to base a right to die, the South African Constitution contains a number of rights which might serve as a potential bases for such a right. However, in the time since the enactment of the South African 1996 Constitution this issue has not been raised in the Constitutional Court and remains open to speculation. In this contribution I suggest a possible analysis of the right to die in South African constitutional law based upon the experience in the US. This analysis is not restricted to the specific recognised rights which might provide a basis for the right to die, but also compares the methods of constitutional interpretation in the context of right-to-die-jurisprudence in the US to constitutional interpretation in South Africa. I proceed to discuss the current position in American constitutional law as far as the existence of a right to die is concerned. I investigate both federal and state constitutional law. My goal in this discussion is not to critique the jurisprudence, but merely to set it out some variance in their use in the literature, see Robert M Hardaway et al 'The right to die and the Ninth Amendment: compassion and dying after Glucksberg and Vacco' 7 Geo Mason LR 313, 323, 327 (1999); Leslie Joan Harris 'Semantics and policy in physician-assisted Death: piercing the verbal veil' (1997) 5 Elder LJ 251, 269-270. The term 'euthanasia' itself also signifies a subset of the general right to die, because it only refers to death decisions by patients who are already facing death due to some other cause, see Garner above at 575. Semantically the term 'right to die' is a broader concept which also includes death decisions by perfectly healthy individuals.

will use the term 'right to die' in its broadest definition to signify the right of an individual to choose and effect his/her own death. In contrast I will refer specifically to subsets of this right when I have a more restricted concept in mind eg the right to refuse treatment or the right to assisted-suicide.

The relevant section of the Fourteenth Amendment to the US Constitution reads as follows: 'Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'


in order to compare it to South African constitutional law. Thereupon my focus shifts to the South African 1996 Constitution and I examine the specific rights which might be relevant in the search for a right to die. In this analysis I use the American jurisprudence as a point of departure and point out the similarities and differences between the two systems which might cause a different outcome in South Africa. My conclusion from this comparative analysis is that in South Africa there will most likely develop a much broader constitutional right to die than is the case in the US.

AMERICAN CONSTITUTIONAL LAW
The existence of the right to die has been debated for at least twenty-five years in the US. This debate has been waged in both federal and state constitutional law. Since the very restrictive rulings of the Supreme Court in Washington v Glucksberg and Vacco v Quill, the focus of the debate has shifted to a large extent to State law. State courts have often found or rejected aspects of the right to die on bases other than the Fourteenth Amendment, some of them in common law, but also some of them in state constitutions.

14 I will, however, note the main points of critique levelled against the current position, but these will mostly rest on the large volume of existing literature on the issue.
15 The New Jersey Supreme Court decision in Quinlan n 1 above, could surely be characterised as the trigger of this debate, but, as I have also indicated, Quinlan was preceded by a number of cases addressing aspects of the right to die which had already drawn scholarly attention prior to Quinlan.
16 This is not to suggest that the legal treatment of death and death choices has been restricted to constitutional debate. There is a large volume of statutes addressing end-of-life circumstances as well as much common law relevant to this issue, see Coordinating Council on Life-Sustaining Medical Treatment Decision Making by the Courts Guidelines for state court decision making in life-sustaining medical treatment cases 209-221 (2ed 1993) (listing a large number of statutes relevant to the refusal of life-sustaining medical treatment); Society for the Right to Die Refusal of treatment legislation: a state by state compilation of enacted and model statutes (1991); James M Hankins The common law right of bodily self-determination in Connecticut: life and death after Stamford Hospital v Vega (1997) 29 Conn LR 945; Alan Meisel Physician-assisted suicide: rights and risks to vulnerable communities: physician-assisted suicide: a common law roadmap for state courts (1997) 24 Fordham Urb LJ 817; Edward J O'Brien Refusing life-sustaining treatment: can we just say no? (1992) 67 Notre Dame LR 677 (reviewing both common law and statutory law relevant to the refusal of treatment). My focus in this paper is, however, exclusively on the constitutional dimension of the debate.
17 Note 3 above (addressing the right to assisted suicide in terms of the due process clause of the Fourteenth Amendment), see discussion below notes 37-44 and accompanying text.
18 521 US 793 (1997) (dealing with the right to assisted suicide in terms of the equal protection clause of the Fourteenth Amendment), see discussion below notes 45-57 and accompanying text.
19 Also in the context of the right to refuse treatment the Supreme Court has very narrowly tailored its ruling in Cruzan in order to allow states to develop a more detailed jurisprudence, Cruzan n 3 above 292 (O'Connor, J, concurring).
Federal constitutional law

The Supreme Court has addressed the issue of a right to die in three cases.20 These three cases define the basic position in federal law: there exists a limited right to die, which is restricted to the right to refuse medical treatment and excludes any right to suicide or assisted suicide.

The first instance in which the Supreme Court directly addressed the right to die was the 1990 case of *Cruzan v Director, Missouri Department of Health.*21 In this case the court had to decide whether an incompetent person has the right to require the removal of life-sustaining treatment.22 Nancy Cruzan was in a ‘persistent vegetative state’23 as the result of a car accident.24 Her parents, acting as her co-guardians, requested the relevant Missouri hospital to remove life-sustaining treatment from Nancy, claiming that this was in line with her wishes expressed before the accident, not to be kept alive under such circumstances.25 The hospital demanded a court order before it would oblige.26 However, Missouri courts refused to grant such an order, ruling that the petitioners had not proved by clear and convincing evidence that this was indeed the patient’s wishes.27 Without such proof the petitioners did not have the mandate under Missouri law to request such a withdrawal of treatment.28 Subsequently they appealed to the US Supreme Court which granted certiorari and affirmed the constitutionality of Missouri’s clear and convincing evidence standard.29 In the course of the judgment the court stated that from its previous decisions dealing with the Fourteenth

20*Cruzan* n 3 above, *Washington* n 2 above and *Vacco* n 18 above.


22*Cruzan* n 3 above at 269; Note ‘How technology has affected the legal system: the twilight zone of Nancy Beth Cruzan: a case study of Nancy Beth Cruzan v Director, Missouri Department of Health’ (1991) 34 *How LJ* 201.

23*Cruzan* n 3 above at 266 — this condition is described by the court as: ‘a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function,’ the brief for the American Medical Association as *amicus curiae* before the court explained this state as: ‘best understood[.] ... one of the conditions in which patients have suffered a loss of consciousness.’ See also the detailed description of Nancy Cruzan’s condition, id at 266 footnote 1, as well as the expert opinion of Dr Fred Plum, a specialist in the field, quoted there by the court.

24*Id* at 266.

25*Id* at 267.

26*Id* at 268.

27*Id* at 265–269.

28*Cruzan v Harmon* 760 S W 2d 408 (Mo 1988).

29*Cruzan* n 3 above at 256.
Amendment due process clause, it could be inferred that an individual has the 'constitutionally protected liberty interest in refusing unwanted medical treatment', and that for the purpose of the case the court would assume that a competent person has the right to refuse lifesaving hydration and nutrition. The limited right recognised by the court is thus based on substantive due process grounds as a liberty interest. The court was careful not to depict this right as a fundamental right. The recognition of this right did not, however, imply that the challenged standard of proof in Missouri was unconstitutional. To determine whether the individual's rights had been infringed, the court balanced her liberty interest against the relevant state interests and because the right recognised by the court was not a fundamental one, the state interests had only to be rational and not compelling to pass constitutional scrutiny. The state's interests included the interest in the protection and preservation of human life. The court subsequently found that the mechanism of a high burden of proof in this instance served the state's interest in a narrowly tailored way without infringing too much on the individual's liberty interest and therefore passed constitutional scrutiny.

In 1997 the Supreme Court again addressed the right to die. This time the
court had to determine whether there is a constitutionally protected right to assisted suicide as a component of the right to die. In two judgments handed down at the same time, Washington v Glucksberg\(^\text{37}\) and Vacco v Quill,\(^\text{38}\) the court came to the conclusion that there is no such right.\(^\text{39}\) In both these cases the petitioners challenged state statutes outlawing assisted suicide.\(^\text{40}\) In Glucksberg the claim was, like that in Cruzan, based on the due process clause of the Fourteenth Amendment, that is substantive due process.\(^\text{41}\) After an extensive inquiry into the American 'Nation's history, legal traditions and practices,'\(^\text{42}\) the court concluded that the Fourteenth Amendment does not

\(^{37}\)Note 2 above.

\(^{38}\)Note 18 above at 793.

\(^{39}\)For a discussion of these cases see Gorsuch n 2 above at 613–619; Vincent J Samar 'Is the right to die dead?' (2000) 50 Depaul LR 221, 222–234 (discussing these decisions from a morality perspective and proposing an alternative route for future right to die decisions); Kim C Arestad 'Vacco v Quill and the debate over physician-assisted suicide: is the right to die protected by the Fourteenth Amendment?' (1999) 15 NYU Sch J Hum Rts 511, 513–545; Frederick R Parker, Jr 'Washington v Glucksberg and Vacco v Quill: an analysis of the amicus curiae briefs and the Supreme Court's majority and concurring opinions, (1999) 43 St Louis LJ 469; Jill A Melchoir 'Casenote: the quiet battle for the heart of liberty — a victory for the cautious' Washington n 2 above, (1998) 66 U Cin LR 1359; Gina D Patterson 'The Supreme Court passes the torch on physician assisted suicide: Washington v Glucksberg and Vacco v Quill' (1998) 35 Hous LR 851; Nicole Testa 'Sentence to life? An analysis of the United States Supreme Court’s decision in Washington v Glucksberg (1998) 22 Nova LR 821; Adam J Cohen 'The open door: will the right to die survive Washington v Glucksberg and Vacco v Quill?' (1997/98) 16 Buff Jour Pub Int Law 79, 91–107; Martha Minow 'Which question? Which lie? Reflections on the physician-assisted suicide cases' (1997) 1 Sup Ct Rev (describing the opinions in these two cases as a juggling of two lies: the first that physicians do not already administer assisted suicides despite legislative bans and the second that legally permitting assisted suicide would not result in dying patients being forced into death, concluding that the court appropriately picked the first lie to countenance at the expense of the second).

\(^{40}\)In Washington n 2 above, the petitioners challenged Wash Rev Code §9A 36 060 (1994) which provides that '[p]romoting a suicide attempt' is a felony, punishable by imprisonment and/or a fine. In Vacco n 18 above, the petitioners challenged NY Penal Law §125.15 (McKinney 1987) which provides: 'A person is guilty of manslaughter ... when ... he intentionally causes or aids another person to commit suicide.'

\(^{41}\)Washington n 2 above at 705.

\(^{42}\)Id at 710. This is one of the ways in substantive due process jurisprudence to determine whether an unenumerated right is protected under the liberty interest protected by the Fourteenth Amendment. See Sunstein n 32 above at 1133–1136; Tarnow n 2 above at 424; David Crump 'How do the courts really discover unenumerated fundamental rights? Cataloguing the methods of judicial alchemy' (1996) 19 Harv JL & Pub Pol’y 795, 838–898 (identifying eleven different methodologies through which courts formulate unenumerated fundamental rights, including the historical approach). In right-to-die cases this method often plays a dispositive role, like it did in this instance in the Supreme Court. However, this approach is not above suspicion. Some courts and commentators have indicated that the outcome of such a historical investigation depends largely on the level of specificity at which the question is posed or the specific focus of the inquiry. If the focus is very specific, eg whether physician-assisted suicide is historically recognised in American law, the outcome will be that of the Supreme Court in Glucksberg, but if the question is phrased broader, eg the historical protection and recognition of strong bodily autonomy or self-determination, the outcome is more likely to be the opposite. See Compassion in Dying v Washington 79 F 3d 790, 803 (9th cir 1996) (en banc) where Judge Reinhardt criticised the court's earlier historical investigation
include a liberty interest in assisted suicide. The court also indicated that the right to refuse treatment recognised in *Cruzan* does not compel the recognition of the right to assisted suicide, because these two concepts are "widely and reasonably regarded as quite distinct." This distinction between the right to refuse treatment and the right to assisted suicide is confirmed and strengthened by the second judgment, *Vacco v Quill*. There the claim was based not on the due process clause of the Fourteenth Amendment, but on the equal protection clause of that Amendment. The argument presented by the petitioners was that New York law allows competent persons to refuse life-sustaining treatment, but outlaws assisted suicide while the two concepts boil down to the same thing, namely the individual's control over the manner and time of her death. This results in unequal protection under the laws, so the argument went. Apart from finding that the distinction drawn in New York law neither infringes a fundamental right nor involves a suspect class, resulting in very 'light' review, which only requires a rational relation to some legitimate government end, the court came to the conclusion that the relevant law did indeed treat like cases alike and that there was no inequality involved. This conclusion is based on the premise that there is a clear and rational distinction between the right to refuse medical treatment and assisted suicide. As long as everyone has the same right to refuse medical treatment, and everyone is denied the right to assisted suicide in the same way, there is no ground for an equality challenge to the statute. In the absence of a fundamental right to assisted suicide, which would have required a compelling state interest to save the statutory bans from unconstitutionality, the court had to find only a rational relation to a legitimate state interest in order to uphold the statutes. The court had no difficulty in finding such legitimate government interests that as too narrow and indicating that a broader look at history, especially early Jewish and Christian tradition, reveals a much less negative view of suicide; Darrel W Amundsen 'The ninth circuit court's treatment of the history of suicide by ancient Jews and Christians in Compassion in Dying v State of Washington: historical naive or special pleading' (1998) 13 Issues L & Med at 365 (criticising Judge Reinhardt's approach, concluding that 'his analysis ... is not only simplistic but is essentially inaccurate'); Gorsuch n 2 above at 620-641 (criticising Judge Reinhardt's analysis and concluding that there is little if any historical recognition of the right to assisted suicide); Hardaway et al n 4 above at 318-321, 348-355 (asserting that a broad approach, defining the issue as the right to control one's own body, should result in recognition of the right to die, including the right to assisted suicide, under the Ninth Amendment of the US Constitution).

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43 *Washington* n 2 above at 728.
44 *Id* at 726.
45 *Vacco* n 18 above at 797.
46 *Id* at 798.
47 *Id* at 798.
48 *Id* at 799.
49 *Id* at 800-808. For a discussion of the action/inaction distinction at work here see below n 58.
50 *Id* at 800.
51 *Id* at 808; *Washington* n 2 above at 728.
bear a rational relation to the statutory bans. These interests include the preservation of human life and the accompanying prohibition of intentional killing, the prevention of suicide, protecting the integrity and ethics of the medical profession, protecting vulnerable groups from being pressured into involuntary end-of-life decisions, and avoiding a slide down the path to euthanasia.

The combined result of these Supreme Court cases is that there is no general right to die; that the only protected interest provided by the federal Constitution regarding end-of-life choices, is the right to refuse life-saving treatment based on the Fourteenth Amendment's due process clause, and specifically that there is no right to assisted suicide. Right-to-die jurisprudence is thus based on a passive/active distinction. There is a constitutionally protected interest in allowing death to run its course, but no such interest in hastening or inducing that course.

52Washington n 2 above at 728-730.
53Id at 730-731 ("all admit that suicide is a serious public-health problem," '[t]he state has an interest in preventing suicide, and in studying, identifying, and treating its causes,' 'legal physician-assisted suicide could make it more difficult for the State to protect depressed or mentally ill persons, or those who are suffering from untreated pain, from suicidal impulses'.)
54Id at 731 ("physician-assisted suicide could ... undermine the trust that is essential to the doctor-patient relationship by blurring the time-honored line between healing and harming.")
55Such as the poor, the elderly, and disabled persons, id at 731.
56Id at 731-732 ("[w]e have recognized ... the real risk of subtle coercion and undue influence in end-of-life situations", '[i]f physician-assisted suicide were permitted, many might resort to it to spare their families the substantial financial burden of end-of-life health-care costs, 'the State's assisted-suicide ban reflects and reinforces its policy that the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy.")
57Id at 732-733 ("what is couched as a limited right to 'physician-assisted suicide' is likely, in effect, a much broader license, which could prove extremely difficult to police and contain ... [t]he ban on assisting suicide prevents such erosion.") The court also referred to the experience in the Netherlands, were euthanasia has been legalised, which seems to support this fear, ibid.
58This distinction is sometimes characterised as allowing nature to run its course on the one hand and not protecting artificial interference with natural death on the other hand, see Cruzan n 3 above at 296 (Scalia J concurring); Vacco n 18 above at 801. However, such a distinction is not accurate. The right to refuse medical treatment is in no way linked to the cause of the patient's medical condition. This means that even a person who has inflicted some fatal condition on him/herself can claim the right to refuse medical treatment which would avert certain death. In such an instance there can be no reasonable claim that the person's death is nature running its course, while allowing that person to be assisted in completing the suicide would interfere with the natural occurrence of death (although both the New Jersey Supreme Court and Superior Court concluded that there was not enough information available in the case of Quinlan n 1 above, to determine with certainty what the original cause of Karen Quinlan's vegetative state was, the neurologist who examined her speculated that it might have been caused by an overdose of drugs, this did not, however, play any significant role in deciding the case, In Re Quinlan 137 NJ Super 227, 348 A 2d 801 (NJ Super ct ch div 1975) modified 70 N J 10, 355 A 2d 647 (NJ 1976); see also Melvin I Urofsky Letting go — death, dying and the law (1994) 11. There is of course more fundamental problems with this active/passive (action/inaction) distinction in the sense that such a distinction is completely indeterminate. There is essentially no way to draw the line
Although the Supreme Court based the existing federal right to die squarely on the Fourteenth Amendment, lower courts have found other pegs in the federal Constitution on which to hang the right to die. The earliest cases dealing with the right to refuse life-saving medical treatment based the right on the individual’s constitutional right to freely exercise her religious beliefs, that is, a First Amendment right. Many of these cases did not between action and inaction. Scalia J puts it as follows in his concurring opinion in Cruzan n 3 above at 296: ‘It would not make much sense to say that one may not kill oneself by walking into the sea, but may sit on the beach until submerged by the incoming tide.’ A good illustration of the difficulty (in my opinion fundamental impossibility) in coherently drawing the distinction between a passive right to die and an active right to die emerges from the case of McKay v Bergstedt 106 Nev 808 801 P 2d 617 (1990). In this case a mentally competent quadriplegic, who was dependent on a respirator to stay alive, sought a court order permitting him to remove the respirator which would result in his death. The petitioner had been dependent on the aid of the respirator for twenty-three years and had an indefinite life-expectancy. While being respirator-dependent, the petitioner completed elementary and high school, wrote poetry and as the court stated: ‘lived a useful and productive life’ (McKay id at 819). The majority held that the petitioner did have the right to remove the respirator as part of his right to refuse medical treatment. In reaching this conclusion the court relied heavily on the distinction between a natural death and an unnaturally induced/hastened death, ie suicide. It found that the petitioner’s case fell into the first instance, and that although removing the respirator would result in his death, that would be a death due to natural causes and could not be depicted as suicide. The court focused on the petitioner’s physical condition depicting it as ‘dire’, and found on that basis that his right to refuse treatment outweighed any interests of the state. Also on this ground the court distinguished the current instance from assisted suicide. The court contrasted the physical condition of the petitioner as ground for granting the order from any possible mental state which could be claimed as similar ground. According to the majority, a life unbearably miserable because of a particular mental state would not justify a similar outcome as in the present instance, id at 820. In a very strong dissent Springer J, rejected the majority’s distinction between a natural death and suicide in this case. The judge argued that the petitioner’s respirator could not be defined as mere treatment which could be refused. At 834 the judge said: ‘Use of the term “natural death” in this case is only a natural and understandable way of averting the excruciating truth. [The petitioner’s] explicit and express desire and intention was that of putting an immediate end to his own life. That is not what one would call a “natural death”: There was nothing natural about [the petitioner’s] death; he killed himself.’ See also Tarnow n 2 above at 431–432; Gorsuch n 2 above at 645–646; Sunstein n 32 above at 1127, 1137, 1153; David Orentlicher ‘The legalization of physician assisted suicide: a very modest revolution’ 38 (1997) BCLR 443. For a more philosophical discussion of this distinction see Dan W Brock Life and death (1993) 202–213.

The First Amendment to the US Constitution reads as follows: ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.’

In most instances these cases involve Jehovah’s Witnesses who refuse to receive blood transfusions due to their religious beliefs: Re Estate of Brooks 32 Ill 2d 361 205 NE2d 435 (1965); Holmes v Silver Cross Hospital 340 F Supp 125 (DC Ill 1972); In Re Osborne 294 A2d 372 (Dist Col App 1972); Re Melideo 88 Misc 2d 974 390 NYS2d 523 (1976); Mercy Hospital Inc v Jackson 62 Md App 409 489 A2d 1130 (1985); St Mary’s Hospital v Ramsey 465 So 2d 666 10 FLW 809 (Fla App D4 1985); Public Health Trust v Woms 541 So 2d 96 14 FLW 112 (Fla 1989); In Re Brown 294 Ill App 3d 159 228 Ill Dec 525 689 NE 2d 397 (1st Dist 1997); see also Michael Katz ‘The doctor’s dilemma: duty and risk in the treatment of Jehovah’s Witnesses’ (1996) 113 South African LJ 484. Religious objections to medical treatment are not,
necessarily involve a decision to die by the individual, but rather addressed the general question concerning religious beliefs which forbid medical treatment, despite the consequences. Like all fundamental rights, this right to refuse treatment based on First Amendment religious rights is not absolute and can be overridden by compelling state interests. The state interests identified by courts in these instances closely resemble the interests identified by the Supreme Court in its three right-to-die cases discussed above. These include the state's interest in preservation of life, protection of innocent third parties, prevention of suicide, and maintenance of the ethical integrity of the medical profession. Basing the right to refuse medical treatment on First Amendment religious rights creates a very restrictive approach to the right to die. On this analysis there can be no generally applicable right to die — whether the individual may refuse medical treatment would depend

however, restricted to Jehovah's Witnesses, see Montgomery v Board of Retirement of Kern County Employees' Retirement Assoc 33 Cal App 3d 447 109 Cal Rptr 181 (1973) (allowing a member of the Church of God (Evening Light Saints) to refuse surgery due to her religious convictions without which there was a high degree that she would die in the near future); Quinlan n 1 above, itself also included an examination of the religious dimension of the decision to withdraw lifesaving treatment in terms of Roman Catholic teaching.

However, in a number of these instances the court recognised that the effect of the refusal to receive treatment would be the death of the patient, thus making the decisions in fact right-to-die decisions, see Public Health Trust v Wons, St Mary's Hospital v Ramsey and Montgomery v Board of Retirement of Kern County Employees' Retirement Assoc n 60 above.

This interest is the one that is not closely correlated to the interests identified by the Supreme Court. It usually refers specifically to the rights of minor children or even a fetus where a parent refuses to receive life-saving treatment in religious rights-based cases. Holmes n 60 above, stating that support of minor children might justify infringing on the patient's free exercise of religious beliefs in refusing treatment); see also In Re Brown n 60 above; Re Melideo 88 Misc 2d 974 390 NYS2d 523 (1976). A number of courts have qualified this factor by stating that while the state does have an interest in protecting the nurturing and support of a child by two parents, this in itself cannot override one parent's right to refuse life-saving treatment on religious grounds, In Re Brown, above, where it was stated that where there are two parents and the patient's co-parent is able and willing to support the children, the state's interest in protecting the minor children cannot be determinative); Public Health Trust n 60 above at 97-98. The interests of minor children also play an obvious dispositive role in the instance where the parent refuses medical treatment not for him/herself, but for the child in his/her capacity as guardian of that child. These cases should be distinguished from the current analysis because of the child-guardian relationship and the role courts play in overseeing that relationship. Deciding whether a parent can refuse treatment of his/her minor child, where that child has not been in a position to express an opinion on the matter, eg in the case of an infant, is a complex question which requires an analysis of family law questions in addition to the current analysis which falls beyond the scope of this article. See also n 95 below.

In Re Brown and Public Health Trust n 60 above.

In this instance 'general' refers to a right which applies to all even though the right is limited in content to certain specific aspects eg the right to refuse medical treatment — it is thus still a limited right, but one which is also a restricted limited right in the sense that the limited right is only available to a select group or on very restricted grounds.
on whether she bases her refusal on religious beliefs. The case law indicates that this is not a very common practice, there does not seem to be a very large group of religious teachings which forbid medical treatment. Despite its restrictive application, basing the right to refuse medical treatment on First Amendment religious freedom seems to be a strong basis. This is evident from the continued reliance on this approach after more generally applicable bases have been recognised, notably grounding the right to die on general privacy rights and Fourteenth Amendment liberty interests. The Supreme Court has not pronounced on this approach and it remains at least a potential basis for the right to die in federal constitutional law.

The second alternative approach to the Supreme Court's Fourteenth Amendment analysis of the right to die recognised by lower courts, especially following the landmark decision in Re Quinlan, is to base the right on the unenumerated federal constitutional right to privacy. In Quinlan the court referred to the Supreme Court's decisions recognising an unwritten constitutional right to privacy which exists in the penumbra of specific constitutional rights, and stated that 'this right is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances'. It is clear that the court did not intend to formulate a general right to refuse treatment applicable in all circumstances. The court circumscribed its position by asserting that the state's legitimate interests in

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66 Whether a court will examine the veracity or grounds of a religious claim is highly doubtful, although there is no clear indication either way in case law. Courts that have recognised the patient's right to refuse treatment on religious grounds seem to simply accept the patient's claim of religious beliefs, although some exceptions exist where the court has looked into the teachings of the particular religious belief, see eg Quinlan n 2 above at 658–660, but even in this case the court adopted a highly deferential attitude towards the briefs submitted by the religious organisation. On the difficulty of defining religion in courts see generally Gerhard van der Schyff 'The legal definition of religion and its application' (2002) 119 South African LJ 288.

67 As indicated above, the cases which have allowed refusal of treatment on religious grounds have done so almost exclusively in the context of Jehovah's Witnesses who refused blood transfers, see n 60 above.

68 See eg In Re Brown, Public Health Trust, Mercy Hospital and St Mary's Hospital n 60 above.

69 This approach was established by the landmark Quinlan case n 1 above, see discussion below notes 71–77 and accompanying text. Tom Stacy n 35 above at 557–581, presents the argument that the privacy right as basis for the right to refuse treatment can be seen as an extension of the First Amendment right of religious freedom.

70 This is of course the ground upon which the Supreme Court decided its three right-to-die cases and on which the Cruzan right to refuse medical treatment is based, see notes 21–58 above and accompanying text.

71 Note 1 above.

72 Especially Griswold n 32 above at 484–486 where Justice Douglas, writing for the court, argued that the First, Fourth, Fifth, and Ninth Amendments, when read together and applied through the Fourteenth Amendment created a zone of privacy in which the individual had the freedom to make decisions without government interference. See also Laurence H Tribe American constitutional law (2ed 1988) 1302–1435.

73 Quinlan n 1 above.
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opposing the refusal to receive treatment\textsuperscript{74} weaken and the patient's privacy rights increase as the extent of the treatment, that is the bodily invasion, grows, to reach a point where the patient's rights overcome the state's interests and at that point the patient has a right to refuse treatment.\textsuperscript{75} Determining whether the specific patient has the right to refuse treatment thus involves an investigation into the severity of the patient's condition and the extent of treatment required. Since \textit{Quinlan}, the privacy approach has been applied by a great number of courts in right-to-die cases.\textsuperscript{76} However, the Supreme Court has explicitly refused to endorse this approach. In \textit{Cruzan} the court said that although many state courts have used the right to privacy as the basis for the right to refuse medical treatment, the Supreme Court has never done so and considers the Fourteenth Amendment liberty interest as a better approach.\textsuperscript{77} The court has thus not rejected the privacy approach outright, but has rather preferred the Fourteenth Amendment liberty approach above privacy.

\section*{State constitutional law}

Since the Supreme Court began moving away from expanding fundamental rights protection under the federal Constitution in the late 1970s, there has been a natural revitalisation of interest in state constitutions.\textsuperscript{78} I call this a natural move, because in the face of the low probability that the Supreme Court will expand federal constitutional rights to provide protection to a litigant in a particular novel case, that litigant will look to other sources on which to base her claim and state constitutions in all likelihood will be the next best thing. Justice Brennan fuelled this move when he wrote in 1977 that 'the decisions of the [Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law'.\textsuperscript{79} Especially in those fields where the Supreme Court has not pronounced an opinion, provided vague, open or uncertain guidelines regarding a fundamental right, defined a right very narrowly or refused to

\textsuperscript{74}In this case the court identified basically two state interests \textit{viz} the preservation of human life and the protection of the integrity of the medical profession, \textit{id} at 39

\textsuperscript{75}Id at 40.

\textsuperscript{76}\textit{Superintendent of Belchertown State School v Saikewicz} 373 Mass 728 370 NE 2d 417 (1977); \textit{Suenram v Society of Valley Hospital} 155 NJ Super 593 383 A 2d 143 (1977); \textit{Re Quackenbush} 156 NJ Super 282 383 A 2d 785 (1978); \textit{Satz v Perlmutter} 362 So 2d 160 (Fla Dist Ct App 1977) aff'd 379 So 2d 359 (Fla 1980); \textit{Lane v Candura} 1978 Adv Sheets 588 376 NE 2d 1232 93 ALR 3d 59 (1978 Mass App); \textit{Severns v Wilmington Medical Center Inc} 421 A 2d 1334 (Del 1980); \textit{Leach v Akron Gen Med Center} 68 Ohio Misc 1 426 NE 2d 809 (Com Pl 1980); \textit{St Mary's Hospital} n 60 above; \textit{Gray v Romeo} 697 F Supp 580 (DRI 1988); \textit{Public Health Trust} n 60 above.

\textsuperscript{77}\textit{Cruzan} n 3 above at 279 footnote 7.


\textsuperscript{79}William J Brennan, Jr 'State constitutions and the protection of individual rights' (1977) 90 \textit{Harv LR} 489 502.
recognise the existence of a federal constitutional right, state constitutions may be important. In these instances state constitutions may provide the individual with more extensive rights than the federal Constitution does. Against this background, the right to die is a natural candidate for state constitutional analysis. This is the case because, as I have indicated above, the Supreme Court has thus far only recognised a very limited federal right to die, that is the right to refuse medical treatment, and has explicitly rejected any federal constitutional basis for the right to assisted suicide. Furthermore, the majority of the court in *Cruzan* only assumed the existence of the federal right to refuse medical treatment. The federal basis of the right to die is thus very limited and quite flimsy.

The *Quinlan* court already recognised that a state constitutional right to privacy may provide the basis for the right to refuse medical treatment. This has been echoed by courts in a number of other states. Since the Supreme Court's near-rejection of the federal right to privacy as the basis for the right to refuse medical treatment, state constitutional privacy rights are and will continue to provide the basis for the right to refuse treatment under a privacy analysis. The experience in Florida provides an example of this shift towards state constitutional privacy rights. In the 1980 case of *Satz v Perlmutter*, the Florida Supreme Court recognised the right to refuse medical treatment relying exclusively on a federal right to privacy. When the court revisited

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80 For an overview of such instances see 'Developments in the law — the interpretation of state constitutional rights' (1982) 95 Harv LR 1324.

81 Brennan n 79 above at 491; see also Brennan n 78 above at 242–248 (discussing greater protection of fundamental rights under state constitutions regarding consensual homosexual sex, paternity rights, abortion rights); Robert F Williams 'Equality guarantees in state constitutional law' (1985) 63 Tex LR 1195 (discussing equal protection rights under state constitutions); AE Dick Howard 'State constitutions and the environment' (1972) 58 Va LR 193 196–198 (discussing environmental rights under state constitutions in the absence of environmental rights in the federal Constitution); G Alan Tarr 'Church and state in the States' (1989) 64 Wash LR 73 (discussing religious guarantees under state constitutions).

82 Note 3 above at 279 ('for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.').

83 *Quinlan* n 1 above at 40 ('Nor is such a right of privacy forgotten in the New Jersey Constitution — the court did not, however, elaborate on the state constitutional basis for the right.').


85 *Cruzan* n 3 above at 279 footnote 7.

86 379 So 2d 359 (Fla 1980).

87 At this time the Florida Constitution did not include an explicit right to privacy. Such a right was only added to the Florida Constitution in 1980. See Thomas A Eaton & Edward J Larson 'Experimenting with the 'right to die'' in the laboratory of the states' (1991) 25 Ga LR 1253 1264; see also Major B Harding et al 'Right to be let alone? — Has the adoption of article 1, section 23 in the Florida Constitution, which explicitly provides for a state right of privacy, resulted in greater privacy...
the right to refuse treatment in 1990, that is after *Cruzan*, it relied extensively on the state constitutional right to privacy in reaffirming the right to refuse treatment. 88

Currently ten state constitutions contain explicit privacy clauses, varying in scope. 89 Apart from providing a litigant with a stronger claim to the right to die based on privacy because of the fact that these are explicit constitutional rights, many of the courts in these and other states 90 have also held that their state constitutional privacy rights are broader than that of the federal Constitution. 91 Despite this seemingly stronger basis for a more general right to die, several state courts have echoed the Supreme Court’s findings in *Washington v Glucksberg* 92 in rejecting the right to assisted suicide. 93 However, there can be no doubt that this jurisprudence is in a developmental stage and strong state constitutional privacy rights may just provide the basis

88 In *Re Browning* 568 So 2d 4 (Fla 1990); Eaton & Larson n 87 above at 1266.

89 Alaska Constitution art I §22; Arizona Constitution art II, §8; Cal Constitution art I, §1; Flde Constitution art I, §12; Haw Constitution art I, §7; Ill Constitution art I, §6; LA Constitution art I, §5; Mont Constitution art II, §10; SC Constitution art I, §10; Wash Constitution art I, §7.

90 Most state courts recognise the existence of state constitutional privacy rights even in the absence of an explicit provision in the state constitution granting such rights. In a number of these states the privacy rights are also much stronger than that provided by the federal Constitution. See eg Brennan n 78 above at 251-255 (discussing privacy jurisprudence in Kentucky courts and noting that the unenumerated privacy rights granted by Kentucky courts based on state constitutional law are generally much stronger than federal privacy rights); Timothy O Lenz ‘‘Rights talk’’ about privacy in state courts’ (1997) 60 Alb LR 1613 (discussing various state constitutional privacy rights and the interpretation given to them by state courts); Dorothy Toth Beasley ‘Federalism and the protection of individual rights: the American constitutional perspective’ (1995) 11 Ga St U LR 681 730 (discussing the recognition of state constitutional privacy rights, even in the absence of explicit constitutional clauses, which are broader than the federal privacy right.)

91 Eg *City of Santa Barbara v Adamson* 27 Cal 3d 123 130 n 3 610 P 2d 436 440 n 3, 164 Cal Rptr 539, 543 n 3 (1980) (‘‘The federal right of privacy in general appears to be narrower than what the voters approved in 1972 when they added privacy to the California Constitution.’); *State v Kam* 748 P 2d 372 377 (Haw 1988) (noting that the Hawaii Constitution provides much greater privacy rights than the Federal Constitution); for an extensive discussion of the jurisprudence regarding state constitutional privacy rights, see Silverstein n 78 above at 215 228-273; ‘J Clark Kelso California’s constitutional right to privacy’ (1992) 19 Pepp LR 327 (discussing in detail the origin of the Californian constitutional privacy right and the expansive interpretation given to it by state courts.)

92 Note 2 above.

93 *Sampson and Doe v State of Alaska* 31 P 3d 88 95 (Alaska 2001) (‘‘We reject [the] ... contention that physician-assisted suicide is a fundamental right within the core meaning of the Alaska Constitution’s privacy ... clause.’); *Donaldson v Van De Kamp* 4 Cal Rptr 2d 59 60 (ct app 1992) (rejecting the existence of a right to assisted suicide based on the Californian Constitution’s right to privacy); *Krischer v McIver* 697 So 2d 97 103 (Fla 1997) (reversing a lower court’s ruling that the Florida Constitution grants the right to an individual suicide based on the explicit privacy right).
for a more general right to die in the future. 94

SOUTH AFRICAN CONSTITUTIONAL LAW
The South African Constitutional Court has not yet addressed the issue of a right to die. 95 This is not surprising, seeing that South Africa's constitutional

94 See the argument presented by Brennan n 78 above at 251-255 for the recognition of the right to assisted suicide in Kentucky, based on the state constitutional right to privacy; see also Eaton & Larson n 87 above at 1265 1321-1327. As indicated above in n 2 and accompanying text, a large number of state legislatures have in the recent past addressed the issue of a right to die in the form of either renewed or new statutory bans on assisted suicide or the introduction of bills to legalise assisted suicide. As states continue to grapple with this issue, state courts will no doubt participate in reaching a final determination on the right to die, even if it is only in the form of constitutional challenges to state legislation. In Washington n 2 above at 735 the Supreme Court stated: 'Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.' Another reason why state courts may provide a stronger ground for a right to die in the future is because a number of these rights are deemed fundamental so that any state interference has to be based on compelling state interests rather than merely a rational connection to a legitimate state interest, as was required by the Supreme Court in Cruzan n 3 above at 279, see above notes 21-36 and accompanying text. In Public Health Trust n 60 above, the Florida Supreme Court noted that a compelling state interest is required to override the individual's right to refuse medical treatment based on his/her rights regarding religion and privacy. Although the majority relied on previous decisions, which were based on the federal right to privacy, the concurring opinion explicitly stated that it should be borne in mind that those decisions predated the addition of an explicit right to privacy to the state constitution, which is broader than the federal right so that the court should engage in a higher degree of scrutiny to decide whether the alleged state interests override the patient's fundamental rights. See also Kempic n 78 above at 323 (noting that the state constitutional right to privacy provides state courts with the clearest standard for a right to refuse medical treatment and results in the strongest precedent in such instances); Bonham n 78 above at 1335 (noting the advantages of a fundamental rights approach to interpreting state constitutions and fashioning unenumerated fundamental rights from such an interpretation, including the right to privacy).

95 This is not to say that death choices have not been addressed at all in South Africa. A tentative step towards a constitutional analysis of death choices has recently been taken by Judge Jajbhay in the matter of Hay v B and Others 2003 3 SA 492 (W). In this case, a paediatrician at the Garden City Clinic applied to court for an order allowing her to administer a blood transfusion to an infant in her care. The parents of the infant refused permission for such a transfusion, citing religious objections. The judge did not enter into an analysis of the surrounding issues in any depth, finding that because the infant would in all probability die without the transfusion, allowing the transfusion was clearly in the child's best interest, which is the overriding principle when a court has to act in its capacity as upper guardian of minors. The court also expressly distinguished the case before it from cases where there are a real question of a death choice ie cases where there are decisions by adults 'capable and competent of deciding' for themselves. The court briefly considered relevant constitutional rights, specifically the right to life and the right to freedom of religion. However, because the court was dealing with a minor, and an infant at that, the analysis took on a different dimension from the one discussed here, in that the right to life in the context of the child's best interest played an obvious dispositive role. Apart from this case, South Africa, as the US, has an extensive body of common law jurisprudence dealing with choices and means of dying, see Castell v De Greeff 1994 4 SA 408 (C) (recognising the common law right of the patient to refuse life-saving medical treatment, independent of whether the patient is terminally ill or not); Clarke v Hurst NO 1992 4 SA 630 (D) (allowing the
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democracy is only ten years old as compared to the 215 years of the US, where the Supreme Court addressed this issue for the first time just over a decade ago.96 In this part I use the American experience as a guide to suggest an analysis for the right to die in South African constitutional law. The South African 1996 Constitution explicitly authorises courts to consider foreign law when interpreting the Bill of Rights.97 Any casual perusal of the Constitutional Court’s judgments would confirm that this invitation is extensively taken up by the court and American constitutional law is one of the most cited foreign examples.98 Recognising the similarities and differences between the experience of defining the right to die in the US and current South African constitutional law is thus an important part of determining the existence of a right to die in South Africa. My discussion starts with a comparison between the two systems of the specific rights used in American constitutional law as a basis for a right to die. This is followed by an examination of other rights in the South African 1996 Constitution which may be relevant to a right to die and which are not (explicitly) present in the US Constitution. Thirdly, I look at the state interests identified by American courts which counter the individual’s right to die and the role these may play in the South African analysis.

removal of life-sustaining medical treatment to a patient in a permanent vegetative state based on the patient’s previous statements); S v Smorenburg 1992 CPD (unreported) (declaring that assisted suicide is unlawful despite the assistant’s motive of ending the suffering of the patient); Ex parte Die Minister van Justisie: In Re S v Grotjohn 1970 2 SA 355 (A) (ruling that whether a person who aids another in committing suicide is guilty of murder, manslaughter, attempted murder or no crime at all, depends on the facts of the case); S v Hartmann 1975 3 SA 532 (C) (convicting a person of murder who injected his terminally ill father with drugs which resulted in his immediate death in an attempt to end his suffering); see also South African Law Commission ‘Euthanasia and the artificial preservation of life’ Working Paper 53 (March 1994), Mare n 4 above at 2A-17, 2A-18 to 2A-19. On the legislative front the South African Law Commission completed a study and published a report on euthanasia in 1998, proposing a bill which would regulate the right to refuse medical treatment. The commission could not reach a final answer to active euthanasia ie assisted suicide and made three alternative recommendations viz that the present prohibition of euthanasia be confirmed; that medical practitioners be allowed to assist in suicides upon request from the patient; and that assisted suicide be sanctioned by an interdisciplinary committee upon request from the patient. The South African Law Commission ‘Euthanasia and the artificial preservation of life’ Report Project 86 (November 1998). No legislation has been passed in reaction to this report yet.

96In the 1990 decision of Cruzan n 3 above at 261.
97The 1996 Constitution s 39(1)(c). The Constitutional Court has further intimated that foreign constitutional law will be a useful point of departure in instances where no local constitutional principles have emerged as yet, see Mistry v Interim Medical and Dental Council of South Africa and Others 1998 4 SA 1127 (CC) part 3.
Freedom, religion, privacy and equality
The South African 1996 Constitution explicitly protects the fundamental rights of freedom and security of the person,99 privacy,100 freedom of religion, belief and opinion,101 and equality.102 As indicated above, these are all fundamental rights which have been implicated in American constitutional law as relevant in the debate regarding the right to die.

The South African equivalent of the American liberty interest is expressed in section 12 of the 1996 Constitution as freedom and security of the person. The most relevant part of section 12 for the current discussion is found in subsection (2)(b), which states: 'Everyone has the right to bodily and psychological integrity, which includes the right — ... (b) to security in and control over their body.' This explicit entrenchment of bodily autonomy presents a very strong basis for a right to die in South African constitutional law. Because of the open nature of the liberty clause in the US Constitution, American courts had to determine the content of that right by looking at various exogenous factors such as tradition and legal history.103 These factors will play a much smaller role in the South African analysis due to the strong explicit right.104 However, although it might be persuasively argued that the right to bodily integrity will include the right to refuse unwanted medical treatment, it is less clear that a more general right to die will be recognised under section 12. In this regard the interpretation of the 1996 Constitution will play just as big a role in formulating a right to die in South

99The 1996 Constitution s 12: '(1) Everyone has the right to freedom and security of the person, which includes the right — a. not to be deprived of freedom arbitrarily or without just cause; b. not to be detained without trial; c. to be free from all forms of violence from either public or private sources; d. not to be tortured in any way, and e. not to be treated or punished in a cruel, inhuman or degrading way. (2) Everyone has the right to bodily and psychological integrity, which includes the right — a. to make decisions concerning reproduction; b. to security in and control over their body; and c. not to be subjected to medical or scientific experiments without their informed consent.'

100Id at s 14: 'Everyone has the right to privacy, which includes the right not to have — a. their person or home searched; b. their property searched; c. their possessions seized; or d. the privacy of their communications infringed.'

101Id at s 15(1): '(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.'

102Id at s 9: ' (1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

103See discussion n 42 above and accompanying text.

104See the discussion of the role of history in South African constitutional interpretation below notes 123-126 and accompanying text.
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African constitutional law as it did in the American example. However, as I will shortly indicate, there is a significant difference in constitutional interpretation between the two systems, which might yield a substantially distinct outcome.

The Constitutional Court first extensively interpreted the constitutional right to freedom in the Interim Constitution in the case of Ferreira v Levin. In this case Judge Ackerman defined the freedom right very broadly in a way which closely mirrors Fourteenth Amendment liberty jurisprudence in the US. He defines the right as 'the right of individuals not to have "obstacles to possible choices and activities" placed in their way by ... the State'. He further concludes that this broad right includes a number of unenumerated 'residual freedom rights' — those rights which guarantee the freedom of the individual from state intervention, but are not explicitly entrenched elsewhere in the 1996 Constitution. The majority of the court, however, rejected this approach. The court concluded that the freedom right's 'primary, but not necessarily the only, purpose ... [was] ... to ensure that the physical integrity of every person is protected'. The majority thus favoured a much more narrow reading of the right, but did not close the door completely to the recognition of unenumerated rights under the general freedom right. Much of this debate has changed since the enactment of

Constitution of the Republic of South Africa, Act 300 of 1993 s 11: '(1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial. (2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.'

Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 1 BCLR 1 (CC), 1995 SACLR LEXIS 298. The only case preceding this judgment in which the court seriously considered the right to freedom is Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison 1995 10 BCLR 1382 (CC), 1995 SACLR LEXIS 275. In that case the court did not in any detail discuss the content or scope of the right to freedom. Kriegler J, writing for the court, merely stated at par 10: 'It is to determine whether that right is limited by the legislative provisions under scrutiny in these cases, it really is not necessary to determine the outer boundaries of the right. Nor is it necessary to examine ... the precise content of the right. Certainly to put someone in prison is a limitation of that person's right to freedom.' On the Ferreira case and subsequent development of the freedom right by the Constitutional Court see De Waal n 13 above at 247-250, Johan de Waal 'Is there a general and residual right to procedural fairness in South Africa? (1997) 13 SAFHR 228, 230 et seq.

Ferreira n 106 above at paras 45-69. Judge Ackerman explicitly notes that this is directly analogous to American substantive due process jurisprudence, par 87, and even refers to the cornerstone of substantive due process in the US, Lochner v New York 198 US 45 (1905) in par 65 of the judgment.

Id at par 54 (footnote omitted) 69.

Id at par 69.

Id per Chaskalson P at paras 158, 169.

Id at par 170.

The court concluded that its interpretation of the freedom right in this instance 'does not mean that ... [the court] must construe section 11(1) as dealing only with physical integrity' and that in the rare occasion where a freedom of a fundamental nature is not explicitly protected in the Constitution, the court may rely on the section 11 freedom right to provide such protection, id at paras 170, 184. The majority explicitly stated that the problems of substantive due process jurisprudence in the US should be avoided in South Africa as far as possible, especially the danger
the 1996 Constitution, due to the more precise and expanded wording of the freedom right in section 12 of the 1996 Constitution. Given the explicit protection accorded bodily autonomy in section 12(2), the court may now be more willing to engage in Judge Ackerman's broad interpretation of freedom in a given instance and recognise the existence of unenumerated rights related to bodily integrity such as a right to die. The fear of the majority in *Ferreira v Levin* of opening the American Pandora's box of substantive due process is much alleviated by this precise explicit right to bodily integrity. The jump from this explicit right to the recognition of a general unenumerated right to die is now much smaller and there remains no great danger of judicial intrusion on legislative powers in such a recognition.

In addressing this question the point of departure must be the text of the 1996 Constitution. Section 12(2)(b) states in an unqualified way that every person has the right to 'control over their body'. I would suggest that the better approach for the court would be to recognise that this unqualified control includes all decisions regarding death. This at least would be a simple textual interpretation. However, there can be no doubt that there are multiple interpretations of this seemingly clear text making any 'simple textual' interpretation inconclusive. The Constitutional Court has stated that any interpretation of the text should 'give ... expression to the underlying values of such jurisprudence causing the judicial branch to encroach on the sphere of the legislative branch, *id* at paras 176-178,182-183 (quoting Justice Holmes' famous dissent in *Lochner* n 107 above. The debate about unenumerated rights under the Interim Constitution was also fuelled by the different standards for the limitation of fundamental rights under section 33 of that Constitution. While limitations of the section 11 freedom right had to be necessary to pass constitutional muster, many other fundamental rights could be limited on reasonable grounds as explicitly provided by section 33. This was clearly an approach closely related to the different standards applied in American law to determine constitutional infringement of individual rights *ie* strict scrutiny for those rights which are deemed fundamental and only rational basis scrutiny for those rights not deemed fundamental. The majority in *Ferreira* n 106 above could not accept that all unenumerated rights could require a 'necessary' standard because they were based on section 11, while many explicitly protected rights only required a 'reasonable' standard, see *id* at par 173.

And also due to the new limitations clause, section 36, which sets a single standard for the limitation of all protected rights, thus discarding the American example of directly applying different levels of scrutiny. The standard set for a limitation is now proportional to the specific right. See Marius Pieterse 'Constructing freedom jurisprudence' (2001) 118 South African LJ 87, 96.

The court can more readily claim that it is only determining the content of the right to control one's body in recognising a right to die than was previously the case when it would have had to distil such a right from a general right to freedom which would have seemed much more like legislating.

In terms of South African constitutional interpretation, the court can still later restrict this right by allowing limitations on it under the limitations clause, s 36 of the 1996 Constitution, see discussion below under *State interests*. My suggestion is that this is a better approach than starting off with a limited interpretation of the freedom right to exclude certain aspects of the right to die, like assisted suicide.

This much was recognised by the Constitutional Court at the outset of its jurisprudence in *S v Zuma* 1995 (4) BCLR 401 (CC) par 20, where Kentridge AJ said: 'I am well aware of the fallacy of supposing that general language must have a single "objective meaning".'
of the Constitution. This purposive, value oriented or teleological interpretation of the 1996 Constitution has become the cornerstone of the Constitutional Court’s interpretative approach. In determining the content of the section 12(2) freedom right in the context of the right to die, the values that will be important for the court to consider are autonomy and dignity. Individual autonomy or self-determination is certainly at the core of the freedom protected by section 12 and specifically bodily autonomy in section 12(2). These values dictate that every individual be granted complete and exclusive power over the choices concerning his or her body. In his concurring judgment in *Ferreira v Levin* Judge Sachs states that the definition of freedom should reinforce ‘the value of maximising effective personal choice.

The value of human dignity is also one that will be important in interpreting the freedom right in this context. Although human dignity is a distinct fundamental right explicitly protected in section 10 of the 1996 Constitution, it is also a very important value which underlies the entire 1996 Constitution and especially the Bill of Rights. As I shall indicate below in my discussion of the right to human dignity, this value is of considerable significance in the context of a right to die. The choice of death and its manner and timing is quite often influenced by concerns regarding dignity — the desire that life should end in a dignified manner. When interpreting the right to bodily freedom in section 12(2) of the 1996 Constitution, the court must bear in mind that preserving this dignity should be a central goal of granting individuals the right to complete control and free choice over their bodies and should therefore extend to end-of-life decisions.

One major difference in constitutional interpretation between the US and South Africa is the use of history and tradition. This may be crucial in the current context. As I have indicated above, American courts often examine in detail US history and legal traditions in determining whether a specific claim is constitutionally protected as a liberty interest in substantive due process.
analysis. Furthermore, as I have also indicated, this examination has been dispositive in many right-to-die cases, specifically in rejecting a general and broad right to die. In South African constitutional interpretation almost the opposite is true. In S v Mhlungu Mahomed J described the 1996 Constitution as 'a ringing and decisive break with the past.' Whereas the historical absence or denial of a claimed fundamental right, in this case the right to die, may be dispositive in American constitutional law towards rejecting that claim, the very same history may support the recognition of such a right under the new constitutional order in South Africa. Thus, as far as this comparative examination of the question of a right to die is concerned, one determinative cause of the outcome in American constitutional law is not merely absent in South Africa, but might even have the opposite effect. I would suggest that against the background of the expansive constitutional interpretation mandated in the Ferreira case, and the new explicit protection of the right to control over one's body in section 12 of the 1996

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123 See n 42 above and accompanying text.
124 See Washington n 2 above at 710-719.
125 S v Mhlungu and Others 1995 (7) BCLR 793 (CC), 1995 SACLR LEXIS 247, par 8.
126 This line of reasoning finds support in the application of the mischief rule of statutory interpretation to constitutional interpretation in South Africa. In terms of this rule a statute must be interpreted in light of the 'mischief' which it was meant to remedy. In Qozeleni v Minister of Law and Order and Another 1994 3 SA 625 (E) 635B Foneman J applied this rule to constitutional interpretation in general by stating that 'the only material difference between that common law-approach and the present approach [ie of constitutional interpretation] is the recognition that the previous constitutional system of this country was the fundamental "mischief" to be remedied by the application of the new Constitution' (quoted with approval by Kentridge AJ in S v Zuma n 116 above at par 17). Applying this reasoning to the present argument yields the result that the historical absence of a specific fundamental right (especially pre-1994) might in fact be a 'mischief', which the 1996 Constitution aims to redress and thus indicate the present existence of such a right. On the mischief rule in general and its application to constitutional interpretation see Du Plessis n 118 above at 96-97, 117-118, 259, 267; De Ville n 118 above at 254, 247.
127 A good illustration of this difference is the previously contrasting rulings on the constitutional protection of homosexual sex by the US Supreme Court and South African Constitutional Court. In the case of Bowers v Hardwick 478 US 186 (1986), the US Supreme Court declared that homosexual sex is not protected under the US Constitution's Fourteenth Amendment, basing its judgment inter alia on the absence of historical protection of such an interest, id at 192-195. The South African Constitutional Court came to the opposite conclusion in declaring the common law offence of sodomy unconstitutional, also basing its judgment inter alia on the absence of legal protection afforded to homosexual couples, National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1998 (12) BCLR 1517 (CC) paras 14-16. Although Bowers has recently been overturned by the Supreme Court in the case of Lawrence n 32 above, with the result that South African and US law now conform on this point, the Fourteenth Amendment analysis followed under Bowers did not change. In fact the Supreme Court affirmed the approach regarding the absence or presence of historical protection of particular interests in deciding whether such interests are constitutionally guaranteed. In its decision in Lawrence, the court merely came to a different factual conclusion from that in Bowers regarding the historical treatment of sodomy, resulting in the different outcome.
128 Even though it was only recognised for use in rare occasions by the court and not as broadly as Judge Ackerman proposed.
Constitution, understood in the light of the core values of autonomy, self-determination and human dignity, there exists a very strong basis for the recognition of a general right to die in South African constitutional law.  

The right to freedom of religion, guaranteed in section 15 of the 1996 Constitution, may provide a supplementary basis for constitutional recognition of the right to die in South Africa, similar to the experience in the US. Like the American example this right will also not provide a basis for a general or universally applicable right to die. It will at most grant constitutional protection to the right to refuse medical treatment, and then only in those cases where real religious objections to such treatment exist, which is relatively rare as the American experience has shown. It nevertheless remains an option in particular instances where such a religious ground exists in fact.

The second major constitutional basis for a right to die, both in the US and South Africa is the right to privacy. Section 14 of the South African 1996 Constitution guarantees everyone's right to privacy. This right shields an 'inner sanctum' of the individual from state interference, a sphere of private intimacy and autonomy. This aspect of the privacy right overlaps with the freedom interest discussed above under section 12(2) of the 1996 Constitution. It guarantees to the individual the freedom to make certain fundamentally private choices without interference. These choices relate to a

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129 At this point in the analysis I am only contending that the recognition of the existence of such a constitutionally protected right per se seems highly probable. Whether this right would, as a further step, in a given instance be enforced to cause a particular legal provision or state action to be unconstitutional depends on the limitation analysis in the particular case. This second stage of constitutional review is discussed in general terms under State interests below.

130 See notes 60-70 above and accompanying text.

131 In a study regarding religious teachings on euthanasia, Gerald A Larue found that only one major religion contained strands which advocate suicide or assisted suicide, viz a number of Hindu sects like Jainism. All other religions targeted in the study either explicitly forbid euthanasia or had no official opinion on the subject, which at least meant that they did not actively advocate any form of suicide: Gerald A Larue *Euthanasia and religion* (1985) (reviewing the position in Judaism, the various Christian churches, the Theosophical Society, ethical culture and humanism, Sikh Dharma, Hinduism, Buddhism, Krishna, Islam and the Baha'is). Furthermore, I seriously doubt whether the Constitutional Court will recognise a right to (assisted) suicide specifically based on religious freedom in the absence of similar generally applicable rights. The judgment of the court in *Prince v President of the Law Society of the Cape of Good Hope & Others* 2002 (3) BCLR 231 (CC), 2002 SACLR LEXIS 1, lends support to this conclusion. In that case the court recognised that there might be a religious claim to the use of cannabis which is generally prohibited in law, but that impracticalities in the administration of such a claim justifies the limitation of the religious right and that the bar is thus not unconstitutional id at paras 130, 134. See also Gerhard van der Schyff 'The right to religious objection in South African law' (2002) 119 South African LJ 526 531-533.

132 Bernsten and Others v Bester NO and Others 1996 (4) BCLR 449 (CC) 1996 SACLR LEXIS 3 at par 67; *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd And Others v Smit NO And Others* 2001 1 SA 545 (CC) at par 18.

133 National Coalition for Gay and Lesbian Equality n 127 above at par 32.

134 De Waal note 13 above at 271.
person's body, his relationships and his home. Choices regarding one's own death undoubtedly fall within this 'inner sanctum' — it is indeed difficult to imagine any event more private than death. On this score the right to die will find a strong base in the right to privacy. It should also be noted that the right to privacy in the South African 1996 Constitution is generally stronger than that in American constitutional law. This much is evident from the Constitutional Court's ruling in the National Coalition for Gay and Lesbian Equality case, where it held that criminalising sodomy is unconstitutional based on, amongst other fundamental rights, the right to privacy. In contrast the US Supreme Court came to the opposite conclusion in Bowers v Hardwick. The existing limited right to die in the US has since its inception in Quinlan relied heavily on the right to privacy. The stronger right to privacy in South Africa is thus another reason for concluding that a more general right to die might be recognised by the South African Constitutional Court.

The final fundamental right which exists in both American and South African constitutional law and which is relevant in recognising a general right to die, is the right to equality. In the US the argument has been made that the right to assisted suicide is identical to the right to refuse medical treatment and should therefore be likewise constitutionally recognised due to the right to the equal protection of the laws. Such a recognition would thus constitute a truly general right to die. As I have also indicated above, this argument has failed largely due to the Supreme Court distinguishing between refusing life-saving or life-sustaining medical treatment and (assisted) suicide.

The right to equality in South Africa is very strong. Not only is it explicitly guaranteed in section 9 of the 1996 Constitution, but it is also recognised as

135 Bernstein n 132 above at par 65; Investigating Directorate: Serious Economic Offences n 132 above at pars 15-18.
136 In Washington n 2 above at 736, O'Connor, J alludes to this when she starts her concurring opinion with the words: 'Death will be different for each of us.'
137 The other rights upon which the court based its decision are the right to equality and the right to dignity, National Coalition for Gay and Lesbian Equality n 127 above at pars 27, 28.
138 Id at par 32: 'The way in which we give expression to our sexuality is at the core of this area of private intimacy ... invasion of that precinct will be a breach of our privacy.'
139 Note 127 above (finding that the constitutional right to privacy does not include the right to homosexual conduct). The Constitutional Court explicitly distinguished the South African constitutional position regarding inter alia privacy, from the American position and Bowers n 127 above, and in reaching its conclusion regarding sodomy, National Coalition for Gay and Lesbian Equality n 127 above paras 53-55. Although Bowers has now been overturned by the Supreme Court in Lawrence n 32 above and a stronger concept of the right to privacy seems to be emerging in US constitutional law, the right to die cases have all been decided on the law as reflected in Bowers. From a comparative perspective the previous position remains therefore relevant.
140 Quinlan n 1 above.
141 See discussion above notes 71-77, 83-94 and accompanying text.
142 Vacco n 18 above, see also discussion above notes 45-57 and accompanying text.
143 See above notes 49-50, 58 and accompanying text.
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one of the founding values of the state and a core value in interpreting the Bill of Rights. However, the success of a claim for a general right to die based on equality in South Africa, may depend on whether the Constitutional Court will join the US Supreme Court in the above-mentioned differentiation. This is based on the assumption that the court will recognise the existence of a limited right to die in the form of a right to refuse medical treatment. Working from this assumption, the argument proceeds that a person seeking to end his or her life by means of suicide or assisted-suicide, in other words active euthanasia, should enjoy the same protection and benefit of the law as the person wishing to end his or her life by refusal of medical treatment, in other words passive euthanasia. For such an argument to succeed, the applicant will have to show that there is a differentiation between people or categories of people and that the differentiation does not bear a rational connection to a legitimate government purpose. The distinction accepted by the Supreme Court might be similarly used to counter the equality argument in South Africa in either stage of the test. Focusing on the first part of the test for the moment, the opposing stance would be that there is no differentiation as no person is allowed active euthanasia, while every person is allowed passive euthanasia. In other words, there is no common ground from which to make the required comparison in order to show differentiation, like persons are treated alike. Such an argument would not, however, be persuasive in the South African context. The Constitutional Court has since its first analysis of the right to equality, subscribed to a substantive concept of equality as opposed to formal equality and has developed that concept in a number of subsequent decisions. This approach differs materially from the US Supreme Court's

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144 Section 1 of the 1996 Constitution states that '[t]he Republic of South Africa is ... founded on ... (a) ... the achievement of equality'.
145 Section 39 of the 1996 Constitution states that '[w]hen interpreting the Bill of Rights, a court ... must promote the values that underlie an open and democratic society based on ... equality'.
146 At least in part.
147 Harken v Lane NO & others 1998 1 SA 300 (CC) par 53; see also Johan de Waal 'Equality and the Constitutional Court' (2002) 14 SA Merc LJ 141 143–144.
148 Between refusing life-saving or life-sustaining medical treatment and (assisted) suicide.
149 I return to the second part of the test, viz the rational connection with a legitimate government purpose, immediately below when I discuss the argument based on a combination of the rights to dignity and equality, see notes 169–173 below and accompanying text.
150 This argument is based on the view that the equal protection clause requires that 'people in the same position should be treated the same', see De Waal n 13 above at 206.
151 Brink v Kitschoff NO 1996 (6) BCLR 752 (CC).
more formal approach to equality.\textsuperscript{153} The substantive approach to equality entails an investigation into the impact of the impugned legal provision on the applicant, taking into account that individual's context.\textsuperscript{154} The question is thus less whether particular individuals are treated differently, and more whether the law affects those individuals in an equal manner. Where the law allows one person to take her life by refusing medical treatment, but prohibits another from achieving the same result by different means, the treatment is clearly differential. The next step in the inquiry would be whether such differentiation is rationally connected to a legitimate government purpose.\textsuperscript{155}

Opinions differ on the exact scope of this second leg of the equality test\textsuperscript{156} and the Constitutional Court has not been consistent in this regard.\textsuperscript{157} Whether the court uses a low level of scrutiny, where the government will merely have to show a rational basis for its purpose with the differentiation; or a higher level of scrutiny, where the government will have to convince the court on the available evidence that the differentiation actually achieves its purpose, rationality in both instances depends on whether the basic differentiation is a rational one.\textsuperscript{158} That is, can one consistently draw the line between refusing treatment and taking your own life, or conversely, between action and inaction in determining your own death? Without such consistency, the government acts in an arbitrary manner and such action falls foul of the right to equality.\textsuperscript{159}


\textsuperscript{154}Albertyn n 152 above at 57–58.

\textsuperscript{155}I return to this second leg of the test when I examine the state interests concerned in a right to die analysis generally, see notes 181–197 and accompanying text.

\textsuperscript{156}Some commentators suggest that this leg only requires the court to ascertain whether a legitimate government purpose exists and whether that purpose isrationally connected to the differentiation in question, see Albertyn n 152 above at 68–69. Other commentators, notably De Waal, point to different levels of scrutiny (albeit inconsistently) by the Constitutional Court, depending on whether the differentiation in question has a bearing on constitutional interests, that is, when the relevant law or conduct impacts differentially on constitutional interests or not. Where there is no such impact, the court employs what De Waal calls 'rational basis review', which merely requires the government to show a rational basis for believing that a legitimate purpose can be achieved by the differentiation. If, however, the differentiation does impact on constitutional interests, the court employs 'rational connection review', in which case the government will have to show that the differentiation does in fact achieve the legitimate purpose. See De Waal n 147 above at 145–148.

\textsuperscript{157}De Waal n 147 above at 148; Albertyn n 152 above at 69–74.

\textsuperscript{158}The Constitutional Court has stated that rationality is the key requirement under this part of the equality right. In Prinsloo v Van der Linde 1997 3 SA 1012 (CC) par 25 the court said: 'The state should not regulate in an arbitrary manner ... The purpose of this aspect of equality [section 9(1)] is, therefore, to ensure that the state is bound to function in a rational manner ... .'

\textsuperscript{159}Such an infringement of the right to equality may still pass constitutional muster if it amounts to a justifiable limitation of the constitutional right under s 36 of the 1996 constitution. I return to this stage of constitutional review below when I discuss the limitation argument in general, see notes 181–197 and accompanying.
Given the constitutional mandate of comparative constitutional interpretation\(^{160}\) and the Constitutional Court's strong tendency to look at American, and specifically US Supreme Court jurisprudence, there can be no doubt that the distinction between refusing treatment on the one hand and (assisted) suicide on the other will be mooted in a right-to-die debate. I would propose that the Constitutional Court must consider very carefully whether it could consistently justify and uphold this distinction in all practical circumstances, before simply joining the US Supreme Court in rejecting any equality argument towards a general right to die. As I have indicated above, this is not such a clear or easy distinction in practice.\(^{161}\) The right to equality may also provide a strong basis for a general right to die in South Africa when used in conjunction with the right to dignity, as I will indicate below.\(^{162}\) This argument will go beyond the American example and make it even more difficult for the Constitutional Court to follow the US Supreme Court's rejection of the equality argument.

Dignity and life

Dignity is a key concept in any analysis of the right to die.\(^{163}\) In the American right to die jurisprudence dignity is a value often referred to.\(^{164}\) However, in the US it remains merely a value of varying persuasiveness, which serves as an underlying foundation for the various constitutional rights advanced in right to die cases.\(^{165}\) Dignity also underpins most of the rights relevant to text. It should be noted though, that it is difficult to see how an infringement of the equality right will ever constitute a justifiable limitation of that right under s 36 where the test for such limitation is in essence the same, or a very similar test as the one to determine whether the right is infringed in the first place. In this regard see De Waal n 13 above 204-206.

\(^{160}\)Section 39(1)(c) of the 1996 Constitution.

\(^{161}\)See n 58 above.

\(^{162}\)See notes 168-173 below and accompanying text.

\(^{163}\)Many of those petitioning courts for orders confirming their right to die are motivated by a desire to end their lives in a dignified manner. It is the wish to maintain dignity in death which underlie their choices, see Quinlan n 1 above at 38-39 (describing the petitioner's claim in that case as seeking 'authorization to abandon ... procedures which can only maintain for a time a body having no potential for resumption or continuance of other than a "vegetative" state').

\(^{164}\)In his dissenting opinion in Cruzan n 3 above at 302, Brennan J concludes that 'Nancy Cruzan is entitled to choose to die with dignity' and therefore should have an unobstructed right to refuse medical treatment. In Gray n 76 above, the court stated that '[t]he cases that recognize a federal right to control fundamental medical decisions ... reflect a concern for an individual's dignity. The Court has emphasized an individual's dignity in maintaining bodily integrity and in controlling decisions about invasive medical procedures ... .' The right to die has also been labelled as the right to die with dignity, especially in the context of a broad right which includes the right to assisted suicide, see David J Garrow 'Constitutional Law and Civil Rights Symposium, Part II. The right to die: death with dignity in America' (1998) 68 Miss LJ 407. The only statute in the US which allows assisted-suicide, is the Oregon statute codified at Or Rev Stat §127.800 (1996) entitled the Death with Dignity Act.

\(^{165}\)Some commentators suggest that it is merely a label or semantic tool used by advocates of a general right to die to counter the negative connotations attached to the word 'suicide' which forms an integral part of the broad right to die promoted by these advocates, see Garrow n 164 above at 407; Harris n 4 above
death choices in South African constitutional law, as I have indicated above. But in contrast to American constitutional law, dignity in South Africa also has substantive constitutional content as a distinct and explicitly guaranteed fundamental right. As such, dignity should play an important role in the right to die analysis in South African constitutional law. The Constitutional Court has recognised the right to dignity along with the right to life as the most important fundamental rights guaranteed by the 1996 Constitution. In *S v Makwanyane* Chaskalson P declared:

The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in the Bill of Rights. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.

To the extent that a general right to die is based on human dignity, such a right would thus deserve strong constitutional protection in South Africa. This argument is strengthened by adding an equality element to the analysis based on the right to dignity. In general the Constitutional Court has made it clear that equality and dignity are intertwined in South African constitutional law. When the right to choose (the manner and timing of) one's own death is based on a claim to human dignity, a subsequent claim to equality may result in the recognition of a general right to die in South Africa where it has failed in American constitutional law. This route would start off with the recognition of the right to refuse life-saving medical treatment as constitutionally protected under amongst others the right to human dignity. Subsequently, the claim in a particular case would be that the right to (assisted) suicide should also be constitutionally protected due to the same claim to human dignity as in the first case. Refusing to allow the claim based on the right to die in this second instance, where it is premised on the same dignity interest, would result in unfair discrimination. The differentiation between the first and second claims would amount to discrimination seeing that it is clearly 'based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings.' This discrimination will furthermore amount to unfair discrimination and hence be an infringement of section 9, exactly because of its disparate impact on the fundamental dignity of the victim. Support for this contention is found in the

above at 253, 268.

As I have shown, it is not only proclaimed by the South African 1996 Constitution as a founding value of the Republic and a core value to be taken into account in constitutional interpretation, but in practice it also plays a major role in the Constitutional Court's jurisprudence regarding the rights to freedom and privacy, see n 120 above and accompanying text.

Section 10 of the 1996 Constitution guarantees the inherent human dignity of every individual.

*S v Makwanyane* n 117 above at par 144.

See *Prinsloo* n 158 above at par 31; *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC) at par 41.

See *Vacco* n 18 above and discussion above at n 45-57 and accompanying text.

This is the standard to determine whether differentiation on a non-listed ground (that is a ground not listed in s 9(3)) amounts to discrimination, see *Harksen* n 147 above at par 46.
following statement of the Constitutional Court in Prinsloo v Van der Linde:
'In our view unfair discrimination ... principally means treating persons
differently in a way which impairs their fundamental dignity as human beings,
who are inherently equal in dignity.' A simple illustration will perhaps best
demonstrate this point. Say patient A is permanently dependent on life-
sustaining medical treatment due to the advanced stages of a terminal
illness, causing her to be constrained to a hospital bed in an intensive
care unit. She approaches the court for an order to withdraw this treatment,
claiming that her human dignity is impaired by her continued existence in this
state without any hope of recovery. The court grants this order, thereby
recognising a limited right to die, that is the right to refuse medical treatment,
amongst others based on the right to human dignity. Now patient B who
suffers from a debilitating illness which would in time cause him to become
dependent on the permanent fulltime care of others and eventually result in
his death, also approaches the court. Patient B requests an order allowing his
physician to administer to him an injection which would immediately cause his
death. His claim is, like that of patient A, based on human dignity, that is he
does not wish to endure the continued erosion of his dignity to the point of
death. In this instance, refusing patient B's claim would in my opinion result
in unfair discrimination.

The final fundamental right which might be relevant in the analysis of a right
to die in South African constitutional law, is the right to life. Although this
right is also protected in American constitutional law it has not been put
forward as a basis for the right to die in the US. The right to life in the South
African 1996 Constitution is unqualified and this has led the Constitutional
Court to conclude that it demands stronger protection than that demanded by
other constitutions. The Constitutional Court has also said that the right
to life is not restricted to the right to physical existence. In S v Makwanyane O'Regan J, stated this conclusion as follows:

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Prinsloo n 158 above at par 31. Although I would argue that the impact on the
individual's dignity would be dispositive in this context to show that the
differentiation amounts to unfair discrimination, there are a number of other
factors which may be taken into consideration when making this determination.
These include the position of the complainant in society and whether she has been
subjected to patterns of discrimination in the past; the nature of the discrimination
and the purpose it is meant to achieve. These considerations are very similar, if not
identical, to the factors taken into consideration when making a determination
under the general limitations clause, s 36, which I shall return to below, see notes
181-197 and accompanying text. See De Waal n 13 above at 204-206; but see
Albertyn n 152 above at 115-117 contra.

pr patient A suffers from chronic renal failure and requires ongoing renal dialysis
treatment to stay alive.

Section 11 of the 1996 Constitution.

The Fifth and Fourteenth Amendments of the US Constitution guarantee everyone
the right not to 'be deprived of life, liberty, or property, without the due process
of law'.

S v Makwanyane n 117 above at pars 38-40, 85; De Waal n 13 above at 224-225.

S v Makwanyane n 117 above at par 326-327 (O'Regan J concurring), approved
by the court in Soobramoney v Minister of Health, KwaZulu-Natal 1997 (12) BCLR
1696 (CC), 1997 SACLR LEXIS 41 par 31.
It is not life as mere organic matter that the 1996 Constitution cherishes, but the right to human life: the right to share in the experience of humanity. This concept of human life is at the centre of our constitutional values... [t]he right to life is more than existence — it is the right to be treated as a human being with dignity. Without dignity, human life is substantially diminished. 178

This broader concept of life, including some element of the quality of life, may provide a basis for claiming a constitutional right to die. Like the arguments based on dignity, many petitioners in US courts have claimed, and many courts recognised, the deterioration of the quality of life as the central motivation for their desire to exercise their right to die. 179 Following this argument the Constitutional Court may recognise that at some stage of the deterioration of the quality of life a person has the right to choose death rather than continued life below the quality guaranteed by the 1996 Constitution, as part of the right to life. This analysis views death as part of life, that is the end of life is just as much part of life as its beginning. 180

State interests
Judicial review under the South African Bill of Rights follows a method roughly equivalent to the American substantive due process analysis. That is, the court first determines whether the claimed right does indeed have constitutionally protected status and then, secondly, that right is balanced against any countervailing state interests to determine whether the particular law under scrutiny is unconstitutional or not. 181 In the South African context the structure of this analysis is prescribed by the 1996 Constitution itself. Section 36 of the 1996 Constitution 182 contains the limitation clause in terms of which any right in the Bill of Rights may be limited, that is an infringement of a right may be justified under this clause, and thus saved from unconstitutionality. In the current analysis the question is what the state interests involved in the debate regarding a right to die are which might justify

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178 S v Makwanyane n 117 above at par 326-327.
179 Quinlan n 1 above at 39-40; McKay n 58 above at 817.
180 At least one Constitutional Court judge has, however, hinted at the possibility that the right to life might have the opposite effect of precluding the right to die, see S v Makoane n 117 above at par 268 (Mahomed DP concurring). I return to this issue under State interests below, when I discuss the state interests which might militate against recognition of a right to die.
181 Cruzan n 3 above at 279; see generally, Stone n 32 above; Tribe n 32 above. There is, of course, also significant differences between the two systems within this shared method. In South African constitutional law there are no levels of scrutiny in the second part of the review like in American constitutional law, all limitations of fundamental rights are tested under the same balancing standard; this difference was explicitly recognised by the Constitutional Court in Prince n 131 above at par 128. On the existence of different levels of scrutiny, which bears close resemblance to the American position, specifically in the context of the Constitutional Court's approach to the right to equality, see De Waal n 147 above at 145-148.
182 Section 36 of the 1996 Constitution reads: "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including — (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose."
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limitations of such a right. This segment of the analysis will most probably be influenced to the greatest extent by the American experience in this debate. US courts have identified a number of state interests which militate against the recognition of a broad right to die. Those are the preservation of human life and the accompanying prohibition of intentional killing, the prevention of suicide, protecting the integrity and ethics of the medical profession, protecting vulnerable groups from being pressured into involuntary end-of-life decisions, and avoiding a slide down the path to euthanasia. These identified interests are very general ones, almost to the extent that they can be termed values with universal application and are thus undoubtedly present and valid state interests in South Africa. The Constitutional Court has in the past recognised that values identified by American courts may not only be valid in the South African context, but also be consistent with local values such as ubuntu. The court is thus no stranger to borrowing directly in these types of analyses from American jurisprudence and I suggest that the right to die question will be just such an instance.

The most prominent state interest identified by American courts is the protection of life. In South Africa the right to life has been recognised as one of the two most important human rights. Respect for human life has become one of the core values of the new South African democracy and therefore a key interest of the state. In the proportionality test, contemplated by section 36 of the 1996 Constitution in determining whether a specific limitation of a fundamental right is justified, the state's interest in protecting human life and the respect for life will carry much weight.

[Note references and citations]
Mahomed DP hinted at this in *S v Makwanyane*, but refrained from any speculation about the outcome of such an argument:

Does the "right to life", within the meaning of s 9 [of the Interim Constitution], preclude the practitioner of scientific medicine from withdrawing the modern mechanisms which mechanically and artificially enable physical breathing in a terminal patient to continue, long beyond the point when the "brain is dead" and beyond the point when a human being ceases to be "human" although some unfocused claim to qualify as a "being" is still retained? If not, can such a practitioner go beyond the point of passive withdrawal into the area of active intervention? When? Under what circumstances? 190

An argument *contra* a general, broad right to die, based on the state's interest in protecting life would thus be an important one before the court. This is strengthened by the pre-1994 South African state's poor record of valuing all life on an equal basis and protecting the dignity of each citizen's life. Given the colonial and apartheid abuses regarding protection of human life in general, the South African state's interest in protecting life *per se* is a very strong one. Whether this will carry the day, will depend on whether the court views a person's desire to die and continued dignity in death as part of respect for life. And that will be the case if the court interprets the right to die, and consequently the state's interest in maintaining the sanctity of life, broadly as more than mere physical existence, signifying a certain quality of life. 191

An important difference between the South African and American right-to-die analysis to keep in mind, is the fundamental nature of the right under the South African 1996 Constitution as opposed to the American position. The fact that the US Supreme Court found the general right to die explicitly to be not fundamental, meant that the countervailing state interests only had to pass a minimal rationality test to justify the restrictions on the broader right to die, that is assisted suicide. 192 In the South African context the analysis above suggests that the right to die will be a fundamental human right, because of its origin in the rights to liberty, privacy, religion, life, equality and/or dignity — all fundamental rights. The state interests militating against a general right to die will thus have to be much stronger to oust that right from constitutional protection. 193 I would suggest that of those state interests identified by American courts, noted above, only the interest in protecting human life could prevail under such a standard. And as I have also indicated above, the...
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existence of this interest in right-to-die cases depends largely on how the court reads the right to life. Furthermore, the state's interest in protecting life will be significantly reduced in instances where the person claiming the right to die faces the serious deterioration of quality of life and human dignity due to some debilitating condition. Abstracted from the particular human life at issue, and in the face of life remaining only as near 'meaningless' physical existence, it is difficult to imagine that the court will view the state's claim to an interest in protecting life as paramount.

The final point to bear in mind in the analysis of state interests militating against a general right to die, is that section 36 of the 1996 Constitution also requires that the means used by the state to achieve the desired purpose in the limitation be as restrictive as possible. A blanket bar on the general right to die, for example outlawing assisted suicide in its entirety, will be very difficult to maintain under this requirement. Especially since the South African Law Commission has already drafted several proposals on regulating assisted suicide to assure that the main dangers are minimised, it would be near impossible for the state to maintain that a general bar is the only and best tailored way of materialising its legitimate interests in this regard.

CONCLUSION

In the US the constitutional debate regarding a right to die has been ongoing for more that twenty-five years without a general consensus emerging. The issue remains today just as contentious as in 1976 when the landmark Quinlan-case was decided and has branched out to cover a much broader field than it did at that time. Despite, and perhaps because of, the lack of consensus, there is today a considerable volume of jurisprudence in America addressing the various aspects of the right to die. In the new South African constitutional democracy the question of a right to die has not yet emerged. When it does, the American experience can provide a very helpful background to the analysis. One of the more significant aspects of the US experience which should not be lost on South African courts is the immense complexity of this question due to the wide range of interests/rights which

194Eg in a permanent vegetative state like Karen Quinlan in Quinlan n 1 above or Nancy Cruzan in Cruzan n 3 above at 261.

195Arguing that physical deterioration impacts on the value placed on life itself and hence has an influence on the importance of protecting that life from the state's perspective, naturally raises the spectre of placing differing values on life reminiscent of colonial and apartheid South Africa. The comments made above regarding the importance of protecting life as a state interest militating against a general right to die (see n 191 and accompanying text), specifically in South Africa, should be kept in mind here as well.

196Section 36(1)(e).

197The South African Law Commission Report Project 86 n 95 above at 140-150.

198Quinlan n 1 above.

199Quinlan id only dealt with the question of allowing a patient in a permanent vegetative state to withdraw life-sustaining medical treatment. Since then, the debate has broadened to include requests by competent patients to remove such treatment and also claims for assisted suicide.
This debate. However, it is important to keep the significant differences between the two legal systems in mind and to evaluate the examples in the broader context of the debate in American constitutional law. Against this background, I suggest that a broader right to die will emerge in South African constitutional law than did in the US. This is due to a larger range of enumerated fundamental rights being protected in the South African 1996 Constitution which will allow the Constitutional Court to shy away from the problematic substantive due process analysis with which the US Supreme Court has had to grapple.

The analysis is rendered even more complex by the fact that the question of a right to die also has roots in a large number of other disciplines, such as medicine, religion and philosophy. The corresponding debate in these fields also have implications for the legal analysis. For example, the ethics of the medical profession is a state interest working against the recognition of a (legal) right to die (see n 54 above and accompanying text). One pertinent legal-philosophical question which will have to be answered is the extent to which the whole concept or system of human rights carries a bias towards life. That is, should there be some form of presumption in favour of life, either as a value or substantive right, in human rights analysis?

The South African Constitutional Court has hinted at something to this effect in stating that life is one of the core/most important rights/values in the 1996 Constitution (see above notes 187-188 and accompanying text). In the right-to-die analysis the more philosophical question will be whether human rights should aim at protecting or promoting life as such or rather freedom of choice, for they may be in conflict in this context. The ambit of this question, however, falls far beyond the scope of this paper, but serves merely to illustrate the complexity involved in this debate.