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Introduction

There is growing concern both nationally¹ and abroad² about the on-going attempts to expand the boundaries of the “right to die.”³ The majority of countries worldwide regard this active assistance in dying as illegal.⁴ However, a few States worldwide have adopted a progressive approach to end of life situations and have allowed physician assisted suicide. A question that remains for States that allow for death with assistance is who can request to die with the help of a physician?

This paper explores the boundaries of the right to die by focusing on physician-assisted suicide as practiced in Switzerland which while recognized for its comparatively relaxed policies, has been criticized for lacking clear procedures, specifically for the mentally ill to access physician assisted suicide.⁵ Furthermore, this paper discusses the gap in Swiss law that allows for the chronically depressed/mentally ill patients to have the same opportunities as patients with terminal illnesses to access physician assisted suicide. The discussion introduces the current safeguards that Switzerland has in place in order to avoid systemic abuses or where patients lack the mental capacity to make such a thought-provoking decision. Lastly, this paper argues that in the absence of explicit regulation, the current Swiss approach for allowing physician assisted suicide for the mentally ill/chronically depressed patient is correct because it adequately aims to prevent systemic abuses, is in line with current national and state legal frameworks, and addresses common ethical concerns.

¹ Timothy Egan, *Washington Voters Weigh If There is a Right to Die*, N.Y. TIMES, Oct. 14, 1991 at A1.

² Jacob M. Appel, *A Suicide Right for the Mentally Ill? A Swiss Cases opens a New Debate*, 37 HASTINGS CENT. REP. 21 (2007).

³ See *In re Quinlan*, 355 A.2d 647, 647 (1976), cert. denied, 429 U.S. 922 (1976).

⁴ *FRONTLINE: The Suicide Tourist* (NBC television), available at <http://www.pbs.org/wgbh/pages/frontline/suicidetourist/>

⁵ Appel, *supra* note 2, at 21.

Part I defines the parameters of the “right to die with assistance” and identifies who has historically been able to request such practices in Switzerland. It argues that current Swiss legislative framework does not preclude a mentally ill/chronically depressed patient from physician assisted suicide. Part II explores the legality of physician assisted suicide in Switzerland and discusses the boundaries for mentally ill/chronically depressed patients. It argues that current Swiss case law guarantees the right to die with assistance and that this right to die with assistance does not preclude mentally ill/chronically depressed patients. To do otherwise undermines individual autonomy, undercuts the philosophical premise of physician assisted suicide and in certain circumstances may violate the law. Lastly, Part III advocates, barring certain issues of severe incompetency, that a mentally ill/chronically depressed patient should be able to avail themselves to the use of physician assisted suicide and argues why Switzerland best addresses the interests of personal autonomy and the right to life.

Part I. Swiss Law on Physician Assisted Suicide

Physician assisted suicide must first be defined and differentiated from other terms often used in conjunction with physician assisted suicide in discussing its moral, ethical, and legal viability before its application can be discussed.⁶ A “right to die” has generally been recognized both domestically and abroad generally referring to a patient’s ability to refuse unwanted medical treatment such as withdrawing life supporting measures that would result in the patients’ death.⁷ Individual autonomy provides the foundational principle for a right to die; a patient

⁶ Note, *Physician-Assisted Suicide and the Right to Die with Assistance*, 105 HARV. L. REV. 2021 (1992).

⁷ *Id.*

should have an active role in making fundamental decisions about their own treatment.⁸ Moreover, a patient's "right to die with assistance" refers to a patient's right to request a physician to purposefully perform an act that would intentionally end the patient's life.⁹

An assisted death can occur in one of two ways: (1) euthanasia¹⁰ otherwise referred to as "mercy killing" involves a physician actively injecting a patient with a drug to terminate her life or (2) physician assisted suicide¹¹ where a physician prescribes an ingestible drug that the patient takes to end her own life. Therefore, for this paper, the term physician assisted suicide refers to a physician legally prescribing a prescription drug, such as sodium pentobarbital, to a patient with the purpose of the patient self-administering the drug to end her own life.¹²

The legality of physician-assisted suicide varies greatly depending on the country in which a patient resides¹³ and the condition from which she suffers.¹⁴ Typically, there are several factors that determine whether a patient has the right to die. Most laws require that the patient suffer from a terminal illness where death is imminent¹⁵ and competent to be eligible for physician-assisted suicide.¹⁶ Additionally a treating physician must agree to the process.¹⁷

Each State treats these requirements with varying degrees of legality. Switzerland in particular has challenged and continues to challenge the notions that physician assisted suicide requires a medical professional be present¹⁸ and that a requesting patient have a terminal

⁸ *Id.*

⁹ *Id.*

¹⁰ Andres Freit et al., *Assisted Suicide as Conducted by a "Right-to-Die"- Society in Switzerland: A Descriptive Analysis of 43 Consecutive Cases*, 131 SWISS MED. WKLY 375 (2001).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Robert Adorno, *Nonphysician-Assisted Suicide in Switzerland*, 22 CQH 1 (2013).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

illness.¹⁹ The next section explores the history of physician assisted suicide in Switzerland, from its origin to its current state of legality.

A: History of Physician Assisted Suicide in Switzerland

The prevailing viewpoint in the world, as shown by explicit law, is that the right to die does not equate to the right to die with assistance.²⁰ As a result, the majority of countries prohibit dying with assistance, through the use of physician assisted suicide, euthanasia or otherwise.²¹ However, a few U.S states and European nations have enacted legislation or their courts have issued opinions allowing physician assisted suicide.²² The Swiss model of assisted suicide has been considered to be one of the most liberal of all the States that allow for assisted suicide in its application because of its non-penalization statute and the expansive role of non-governmental organizations in the process.²³ Additionally, Switzerland is the only jurisdiction of all the jurisdictions that allow for physician assisted suicide to allow foreigners to request an assisted death.²⁴ This situation has become synonymous with the term “suicide tourism.”²⁵

According to current Swiss legislation of assisted suicide, anyone can assist in the suicide process.²⁶ However the typical process involves the patient applicant, a physician, and a non-governmental right-to-die organization.²⁷ Typically, a patient will apply for an assisted suicide to a right-to-die organization such as EXIT or Dignitas.²⁸ The organization will then evaluate the

¹⁹ *Id.*

²⁰ *FRONTLINE: The Suicide Tourist* (NBC television), available at <http://www.pbs.org/wgbh/pages/frontline/suicidetourist/>

²¹ Georg Bosshar et al., *Open Regulation and Practice in Assisted Dying*, 132 SWISS MED. WKLY 527 (2002).

²² *Id.*

²³ *Id.*

²⁴ Appel, *supra* note 2, at 1.

²⁵ Gregory Higginbotham, *Assisted-Suicide Tourism: Is it Tourism?*, 6 TOURISMOS 177 (2011).

²⁶ SCHWEIZERISCHES STRAFGESETZBUCH [STGB] [CRIMINAL CODE], art. 115 (Switz.).

²⁷ Adorno, *supra* note 15, at 3.

²⁸ *Id.*

application according to the applicant's prognosis, suffering, and disability.²⁹ Then a physician will evaluate the applicant for mental competency and prescribe a life-ending drug such as sodium pentobarbital.³⁰ Lastly, the applicant will self-administer the drug to complete the process.³¹

The current Swiss model for physician assisted suicide has been shaped both by the tradition of assisted suicide in Switzerland and the establishment of these non-governmental right-to-die organizations.³² Currently there are a number of Swiss laws that help govern the practice of physician assisted suicide; however, there are no Swiss physician assisted suicide statutes that explicitly permit or prohibit the practice.³³ Instead, Swiss tradition gives insight into the development of physician assisted suicide in Switzerland.

Assisted Suicide without any self-interest has been legal in Switzerland since 1918.³⁴ Historically, assisting a friend in her suicide was regarded as an honorable deed: an unselfish act.³⁵ This tradition was first approved into Swiss law in 1937 the federal parliament passed Article 115³⁶ of the Swiss Penal Code, which prohibited the assistance in suicide when motivated by selfish reasons.³⁷ The current provisions from the Swiss Criminal Code are state:

Article 114 – Homicide at the victim's request³⁸

Any person who for commendable motives, and in particular out of compassion, causes the death of a person at the person's own genuine and

²⁹ Russel D. Ogden et al., *Assisted Suicide by Oxygen Deprivation with Helium at a Swiss Right-to-Die Organisation*, 36 J. MED. ETHICS 174 (2010).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Criminal Law and Assisted Suicide in Switzerland, Hearing with the Select Committee on the Assisted Dying for the Terminally Ill Bill, Before the House of Lords (Feb. 3, 2005).

³⁴ Appel, *supra* note 2, at 1.

³⁵ Stephen J. Ziegler, *Collaborated Death: An Exploration of the Swiss Model of Assisted Suicide for Its Potential to Enhance Oversight and Demedicalize the Dying Process*, 37.2 J.L. MED & ETHICS 318 (2009).

³⁶ Adorno, *supra* note 15, at 2.

³⁷ *Id.*

³⁸ SCHWEIZERISCHES STRAFGESETZBUCH [STGB] [CRIMINAL CODE], Dec. 21, 1937, art. 114 (Switz.).

insistent request shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.

Article 115 – Inciting and assisting suicide³⁹

Any person who for selfish motives incites or assists another to commit or attempt to commit suicide shall, if that other person thereafter commits or attempts to commit suicide, be liable to a custodial sentence not exceeding five years or to a monetary penalty.

These provisions clearly aim to criminalize certain practices of dying with assistance but the boundaries created are not always clearly discernable.⁴⁰ Article 114 makes killing on request punishable in every case.⁴¹ It seeks to limit the practice of active euthanasia by outright banning actively causing the death of any person irrespective of the motive.⁴² Article 115, however, treats assisted suicide differently, with less specificity.

The Swiss approach to who can use physician assisted suicide has developed in a very distinct manner than other States without any more specific legally binding regulation than Article 115.⁴³ Article 115 of the Swiss Penal Code only criminalizes conduct that meets a certain intent requirement: assistance with suicide with selfish motives.⁴⁴ This article is interpreted as meaning that assistance with suicide will be exempt from criminal prosecution when it practiced without any self-interest.⁴⁵ The intent requirement of Article 115 is clear; however, it remains unclear as to who can request assisted suicide and how assisted suicide should be performed.

³⁹ *Id.* at art. 115.

⁴⁰ Adorno, *supra* note 15, at 2.

⁴¹ Andreas Frei et. al., *Assisted Suicide as Conducted by a “Right-to-Die”-society in Switzerland: A Descriptive Analysis of 43 Consecutive Cases*, 131 SWISS MED. WKLY 375 (2001).

⁴² SCHWEIZERISCHES STRAFGESETZBUCH [STGB] [CRIMINAL CODE], 1937 art. 114 (Switz.).

⁴³ RUTH CHADWICK, *THE SAGE HANDBOOK OF HEALTHCARE ETHICS* 212 (2011).

⁴⁴ SCHWEIZERISCHES STRAFGESETZBUCH [STGB] [CRIMINAL CODE], 1937 art. 115 (Switz.).

⁴⁵ Adorno, *supra* note 15, at 2.

Article 115 of the Swiss Penal Code does not require any specific measures such that a physician is involved or that a patient must suffer from a terminal illness.⁴⁶ Thus, it creates a legal situation where it is possible for anyone to assist in suicide.⁴⁷ Additionally, Article 115 is silent as to who can be assisted in their suicide, specifically whether a chronically depressed/mentally ill individual can request assistance in suicide.⁴⁸

Article 115 creates fundamental differences that separate the Swiss approach to physician assisted suicide with other jurisdictions that allow for it.⁴⁹ In jurisdictions like the Netherlands⁵⁰ and Oregon⁵¹, physicians are integral to the assisted suicide process.⁵² Patients must request suicide assistance from a physician who would then determine the patient's eligibility.⁵³ Either terminal illness or unbearable suffering, dependent on the jurisdictional requirements, determines eligibility.⁵⁴ The Swiss model generally limits the role of physicians in suicide assistance to assessing competence and prescribing a lethal dose of sodium pentobarbital.⁵⁵ Instead of physicians, non-governmental right-to-die organizations are the foundation for the current Swiss model of physician assisted suicide.

In Switzerland, right-to-die organizations have become linked to the medical system and the care of the dying.⁵⁶ These organizations serve as a resource to assisted suicide applicants and

⁴⁶ Samia A. Hurst et al., *Assisted Suicide and Euthanasia in Switzerland: Allowing a Role for Non-Physicians*, 326 *BMJ* 271 (2003).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Ogden et al., *supra* note 4, at 174.

⁵⁰ Richard Fenigsen et al., *Chapter XX: Dutch government-ordered surveys of euthanasia*, 28.2 *ISSUES L. MED.* 237 (2012).

⁵¹ AMY D. SULLIVAN ET AL., *OREGON'S DEATH WITH DIGNITY ACT: THE SECOND YEAR'S EXPERIENCE* (2000).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Stephen J. Ziegler et al., *Role of Non-Governmental Organizations in Physician Assisted Suicide*, 334 *BMJ* 295.

help in facilitating the process.⁵⁷ In fact, in Switzerland, most assisted suicides are facilitated through these organizations.⁵⁸ Once the patient receives a prescription for sodium pentobarbital, a right-to-die organization typically will pick up the prescription, store it, and prepare the final mixture for the patient to self-administer and even facilitate the location.⁵⁹ Physicians are merely used for the prescription process.

In Switzerland, ingesting sodium pentobarbital is the most common method used in association with assisted suicide.⁶⁰ However, sodium pentobarbital is a narcotic which can only be prescribed by a licensed physician and is subject to the Swiss Law of Pharmaceutical Products that states:⁶¹

Article 26: Basic principal relating to prescribing and dispensing

1. The prescribing and dispensing of pharmaceutical products must be carried out in accordance with the acknowledged rules of medical and pharmaceutical science.
2. A pharmaceutical product may only be prescribed, if the same of health of the consumer or patient is known.

This requirement has created confusion as to whether prescribing a lethal drug to a person seeking to commit suicide conforms to medical practice and medical ethics.⁶² The Swiss Academy of Medical Sciences did state that physician assisted suicide existed outside of a physician's activity, but this was not a clear response as to whether assisted suicide conformed to medical practices.⁶³ Some understood this statement to mean that physicians should not assist in suicide while others understood this statement to mean that assisting with suicide was allowed be

⁵⁷ *Id.*

⁵⁸ Ziegler, *supra* note 35, at 320.

⁵⁹ *Id.*

⁶⁰ Adorno, *supra* note 15.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Hurst et al., *supra* note 46.

cause it fell outside the purview of professional oversight.⁶⁴ Eventually, the Swiss Academy for Medical Sciences Guidelines provided non-legally binding guidance on when a doctor should aid in the physician assisted suicide process. The relevant guidelines state:

Swiss Academy for Medical Sciences Guidelines:⁶⁵

It is the responsibility of the physician deciding to aid in the physician assisted suicide process to check the following:

- a. The patient's disease justifies the assumption that he is approaching end of life
- b. Alternative possibilities for providing assistance have been discussed and, if desired, have been implemented
- c. The patient is capable of making the decision, his wish has been well thought out, without external pressure, and he persists in this wish. This has been checked by a third party, who is not necessarily a physician.
- d. The final action in the process leading to death must always be taken by the patient himself.

Ultimately, Swiss health laws allow a physician to assist a terminally ill patient in suicide.⁶⁶ However, it is unclear whether Swiss health laws allow a physician to assist a non-terminally ill patient in suicide. Nevertheless, doctors have a duty to act with due care and document the patient's condition, decisional capacity, and justification when prescribing a lethal drug.⁶⁷ Furthermore, Swiss health laws remain unclear from a patient's perspective on requesting an assisted suicide.

While the medical guidelines are not legally binding, the prescription process has a specific legal framework. It is within the discretion of the treating physician to determine how closely the applicant's situations align with the physicians' personal medical opinion and the medical ethics guidelines. Thus whereas section (a) can be troublesome to reconcile a mental

⁶⁴ *Id.*

⁶⁵ SWISS ACADEMY FOR MEDICAL SCIENCES GUIDELINES, END OF LIFE CARE (2013).

⁶⁶ Ziegler et al., *supra* note 56, at 297.

⁶⁷ *Id.*

illness as causing a patient to approach end of life, it seems plausible that a physician may conclude that notwithstanding these guidelines an applicant is justified in his requested for an assisted suicide based on a totality of the conditions.

The continued practice of physician assisted suicide in Switzerland and its lack of clear legislative guidance has caused confusion for patients wondering if there is a right to die and the extent of that right.⁶⁸ Several applicants have looked to protected human rights from Swiss legislature and international conventions in order to clarify the circumstances in which physician assisted suicide is allowed in Switzerland.⁶⁹ Swiss legislature guarantees certain protected rights.⁷⁰ Furthermore, all Council of Europe States, which Switzerland is a party to, establishes inalienable protected human rights through the European Convention of Human Rights.⁷¹ European conventions have a great influence on individuals state's laws and reflect a means for addressing violations.⁷²

Part II: Case Law

A. European Convention of Human Rights

Perhaps the strongest piece of evidence used by advocates of dying with assistance comes from the European Convention of Human Rights ("The Convention").⁷³ The Convention, established on September 3, 1953, is "an international treaty to protect human rights and fundamental freedoms in Europe."⁷⁴ All Council of Europe States are party to The Convention.⁷⁵ Furthermore, the majority of party States have incorporated The Convention into their own legal

⁶⁸ Haas v. Switzerland, 2007 Eur. Ct. H.R. 1.

⁶⁹ *Id.*

⁷⁰ RHONA SMITH & CHRISTIEN VAN DER ANKER, THE ESSENTIALS OF HUMAN RIGHTS 116 (2005).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

system.⁷⁶ For example, Switzerland shares the fundamental right to life and liberty in Article 10 of the Swiss Federal Constitution which states:⁷⁷

Art. 10 Right to life and to personal freedom:

- a. Every person has the right to life. The death penalty is prohibited.
- b. Every person has the right to personal liberty and in particular to physical and mental integrity and to freedom of movement.
- c. Torture and any other form of cruel, inhuman or degrading treatment or punishment are prohibited.

Additionally, the Convention established the European Court of Human Rights, which has decided several cases of first impression on the right to an assisted suicide.⁷⁸ Plaintiffs can be individuals or groups and may bring a case in front of The Court if she believes that she has been the victim of a violation of the rights set forth by The Convention and all national court remedies have been exhausted.⁷⁹ Plaintiffs make allegations against states that are bound by The Convention.⁸⁰ The judgments of The Court finding a violation of The Convention are binding upon the state implicated.⁸¹ In resolving a case, The Court will often fine the violating state.⁸² Articles 8 and 2 of The Convention are most pertinent to arguments for physician-assisted suicide. They state:⁸³

Article 8

- a. Everyone has the right to respect for his private and family life, his home, and his correspondence.
- b. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime,

⁷⁶ *Id.* at 117.

⁷⁷ BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999 art. 10 (Switz.).

⁷⁸ Haas v. Switzerland, 2007 Eur. Ct. H.R. 1.

⁷⁹ Questions and Answers, European Court of Human Rights, *available at* http://www.echr.coe.int/Documents/Questions_Answers_ENG.pdf.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ Euro Convention for Human Rights Articles 8 and 2.

for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 2

- a. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
- b. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - a. In defense of any person from unlawful violence;
 - b. In order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - c. In action lawfully taken for the purpose of quelling a riot or insurrection.

Swiss case law and decisions from the European Court of Human Rights have interpreted the meaning of these articles.⁸⁴ While neither article specifically addresses death with assistance, they advocate for the autonomy of the individual as well as the right to protect life.⁸⁵ Article 8 advocates for the autonomy of an individual, but also allows for the state to act for the protection of morals or prevention of crime.⁸⁶ Article 2 addresses the ECHR's stance that life must be protected.⁸⁷

The following cases show how Switzerland balances these interests through its practice of assisted suicide. The decisions of the court ultimately support the idea that where physician assisted suicide is legal, that those without a terminal illness can possibly satisfy the requirements to use physician assisted suicide.⁸⁸ The following sections will explore these decisions and how they impact physician assisted suicide for the terminally ill/mentally competent in Switzerland.

⁸⁴ Haas v. Switzerland, 2007 Eur. Ct. H.R. 1.

⁸⁵ *Id.*

⁸⁶ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ.T.S. No. 5; 213 U.N.T.S. 221

⁸⁷ *Id.* at art. 2

⁸⁸ Haas v. Switzerland, 2007 Eur. Ct. H.R. 1.

B. In the Case of Haas v. Switzerland

It is clear from the history, the State legislature, and from current practice that there are only two certainties about physician assisted suicide: (1) Physician assisted suicide has been allowed in Switzerland legally since 1918 and (2) there is a distinct gap in the regulation of physician assisted suicide in Switzerland.⁸⁹ Evolving case law exists which interprets several assisted suicide situations in accordance with both the European Convention for Human Rights and Swiss law that aim to help clarify how and the extent to which physician assisted suicide should be performed in Switzerland. The case *Haas v. Switzerland* examines the right of a patient with mental illness to an assisted suicide and Switzerland's obligations to provide for this right.⁹⁰

Haas was an assisted suicide case brought before the Swiss National Court and then the European Court of Human Rights.⁹¹ Haas alleged that Switzerland violated Article 8 of The Convention because Switzerland did not provide Haas with the prescription drug that he sought to facilitate his suicide.⁹² In this case, Haas suffered from bipolar disorder, a chronic mental illness from which he suffered for over 20 years.⁹³ During this time, Haas attempted to commit suicide on two prior occasions.⁹⁴ He believed that his illness made it impossible for Haas to live a dignified life and thus he asked *Dignitas* to assist him in ending his life.⁹⁵ Haas then approached several psychiatrists to prescribe him the necessary amount of sodium pentobarbital

⁸⁹ *The Swiss Model*, EXIT INTERNATIONAL, <http://www.exitinternational.net/page/Switzerland> (last visited Dec. 4, 2013).

⁹⁰ *Haas v. Switzerland*, 2007 Eur. Ct. H.R. 1.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

to end his life; however, his attempts were unsuccessful.⁹⁶ Soon thereafter Haas contacted numerous official bodies seeking to obtain sodium pentobarbital from a pharmacy without a prescription.⁹⁷ All of the bodies refused to provide or grant a pharmacy permission to give Haas a dosage of sodium pentobarbital without a prescription.⁹⁸

Haas claimed that Article 8 of the European Convention on Human Rights afforded patients a right to self-determination.⁹⁹ Moreover, this right imposed a positive obligation for Switzerland to provide the means for the patient in the event the patient is unable to acquire such means. However, in this instance, providing Haas sodium pentobarbital would be in derogation of State law because only licensed physicians can prescribe prescription drugs.¹⁰⁰ As a result, according to Haas, Switzerland interfered with his right by refusing to give him the requested drug and that the State interference, which was in accordance with the law, was not proportionate to his case.¹⁰¹

Ultimately, both the Swiss National Court and the European Court of Human Rights found against Haas and concluded that there had not been a violation of Article 8 of the Convention.¹⁰² The court held that “the right to self-determination within the meaning of Article 8 §1 [of the Convention] includes the right of an individual to decide at what point and in what manner he or she will die, at least where he or she is capable of freely reaching a decision.”¹⁰³ However, the court also reasoned, that Haas’ rights did not include the right to compel the state to abrogate a law for his benefit and § 6.3.6 of the Swiss Federal Court opinion explains why.

⁹⁶ Haas v. Switzerland, 2007 Eur. Ct. H.R. 1.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Haas v. Switzerland, 2007 Eur. Ct. H.R. 1.

¹⁰³ *Id.*

This section explains that the state does not have a positive obligation to ensure that the individual has access to drugs such as sodium pentobarbital to facilitate suicide without a medical subscription.¹⁰⁴ Article 2 of The Convention allows the State to put procedures in place to ensure that the decision to commit suicide “corresponds to his or her free and considered will.”¹⁰⁵

Despite the failed suit, the *Haas* decision from the Swiss Federal Court acknowledged reasons for why mentally ill patients should be able to utilize physician assisted suicide.¹⁰⁶ The court reasoned that a “serious, incurable, and chronic mental illness may, in the same way as a somatic illness, cause suffering such that, over time, the patient concludes that his or her life is no longer worth living.”¹⁰⁷ Moreover, “where the wish to die is based on an autonomous and all-embracing decision, it is not prohibited to prescribe sodium pentobarbital to a person suffering from a psychiatric illness and, consequently, to assist him or her in committing suicide.” Thus Swiss courts do not prohibit physician assisted suicide from the mentally ill/chronically depressed in all instances provided that the “greatest restraint” is exercised in distinguishing between a “desire to die as the expression of a psychological disorder which can and must be treated, and a wish to die that is based on the considered and sustained decision of a person capable of discernment.”¹⁰⁸

According to court’s interpretation of the competing state interests and human rights afforded by the articles, a mentally ill patient is not precluded from assisted suicide by law.¹⁰⁹ No regulation exists precluding a mentally ill patient from an assisted suicide; however, a mentally

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 3.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Haas v. Switzerland*, 2007 Eur. Ct. H.R. 1.

¹⁰⁹ *Id.*

ill patient simply may not impose an obligation on the State to derogate procedures that protect the competing interest of the right to protect life. Thus patients with and without terminal illnesses both have a right to self-determination in ending one's life. However, a mentally ill patient may encounter issues relating to the methods available for ending one's life. The following case discusses whether a lack of clear legal guidelines for patients without a terminal illness seeking physician assisted suicide violates a protected human right.

C. In the Case of Gross v. Switzerland.

The next instructive case on the matter of assisted suicide in Switzerland is *Gross v. Switzerland*. *Gross* applies the principle of looking to State law for direction differently from the previous case and argues that in this instance the State's position on physician assisted suicide is incompatible with the Article 8 rights.¹¹⁰ Thus by offering a right, the opportunity to obtain a lethal dose of a prescription medication, and not defining how to assert that right can be contradictory to Article 8 ECHR rights.¹¹¹

In this particular case the applicant, Alda Gross, was an older woman who had sought to end her life for many years due to the deterioration of her physician condition attendant to aging.¹¹² Unlike, *Haas*, Alda Gross did not suffer from any mental or terminal illnesses.¹¹³ She went to psychiatrist to receive an examination and to obtain a prescription for a lethal dosage of sodium pentobarbital.¹¹⁴ Her initial physician concluded that Alda Gross was able to form her own judgment, had a persistent desire to terminate her life, and her decision to commit suicide

¹¹⁰ *Gross v. Switzerland*. 2013 Eur. Ct. H.R. 1.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

was well reasoned.¹¹⁵ However, the psychiatrist declined to prescribe the sodium pentobarbital.¹¹⁶ He did not want to confuse the roles of medical expert and treating physician.¹¹⁷

Then she appealed to other physicians to prescribe the legal medication, but all of the physicians declined.¹¹⁸ In response to her appeals, the doctors acknowledged that they were prevented from prescribing the medication because either they were prevented by the code of professional conduct regulating prescriptions or, upon advice of counsel, feared prosecution because Gross did not suffer from a terminal illness. Ultimately, the court found issue with Switzerland allowing a right to die with assistance but lacking clarity in application. The court opined that:

Swiss law, while providing the possibility of obtaining a lethal dose of sodium pentobarbital on medical prescription, does not provide sufficient guidelines ensuring clarity as to the extent of this right. There has accordingly been a violation of Article 8 of the Convention in this respect.¹¹⁹

The court noted that physicians are only permitted to prescribe the sodium pentobarbital when the situation of the applicant aligns with the medical ethics guidelines adopted by the Swiss Academy of Medical Sciences. In this instance, the applicant did not meet the terminal illness requirement. However, the Swiss government lacked clear legal guidelines, “which could serve as guidelines as to whether and under which circumstances a doctor is entitled to issue a prescription for sodium pentobarbital to a patient who, like the applicant, is not suffering from a terminal illness.”¹²⁰ The court concluded that:¹²¹

The applicant must have found herself in a state of anguish and uncertainty regarding the extent of her right to end her life which would not have occurred if there had been clear,

¹¹⁵ *Id.*

¹¹⁶ *Gross v. Switzerland*. 2013 Eur. Ct. H.R. 1.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

State-approved guidelines defining the circumstances under which medical practitioners are authorised to issue the requested prescription in cases where an individual has come to a serious decision, in the exercise of his or her free will, to end his or her life, but where death is not imminent as a result of a specific medical condition.

This lack of guidance created a gap in the application of assisted suicide.¹²² This is likely to have a “chilling effect on doctors who would otherwise be inclined to provide someone such as the applicant with the requested medical prescription.”¹²³ Moreover, to applicants who fall outside of the specifically described situations, the lack of guidance could create a considerable degree of agony for those not knowing how to effectuate their rights.¹²⁴ Thus, until specific legal guidelines are enacted to govern the process of physician assisted suicide, patients without terminal illnesses are at a disadvantage with regards to self-termination because of this uncertainty. In lieu of the disadvantages and uncertainties, the current Swiss model of utilizing right-to-die organizations best affords the even distribution of the right to die with assistance.

Part III: Why the Swiss Approach is Correct

The Swiss answer to the earlier question of who can who can request a suicide with assistance is anyone. Article 115 of the Swiss Criminal Code imposes criminal punishments only when suicide is assisted with selfish motives.¹²⁵ Again, this creates uncertainties about how a patient can terminate his or her life with physician assistance, where the physician will provide a prescription for sodium pentobarbital.¹²⁶ There are medical regulations associated with the prescription of drugs and medical guidelines for when prescriptions should be given; however,

¹²² *Gross v. Switzerland*. 2013 Eur. Ct. H.R. 1.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ SCHWEIZERISCHES STRAFGESETZBUCH [STGB] [CRIMINAL CODE], art. 115 (Switz.).

¹²⁶ Ziegler, *supra* note 35, at 320.

there is no explicit legislation that refers to assisted suicide other than Article 115 to guide a patient on his or her options.¹²⁷

For the past few years, the Swiss authorities have attempted to at least establish minimal rules regarding assisted suicide.¹²⁸ These attempts have been unsuccessful.¹²⁹ Ultimately, the Swiss Federal Council believed that the threats of misuse could be adequately addressed and prevented within the current framework.¹³⁰ Additionally, to further legislate would only reinforce the current requirements of Article 115 as well potentially bring forth several other drawbacks. Therefore, in the absence of explicit regulation, the current Swiss approach for allowing physician assisted suicide for the mentally ill/chronically depressed in addition to the terminally ill is correct because it adequately aims to prevent systemic abuses, is in line with current national and state legal frameworks, and addresses ethical concerns.

A: Preventing Systemic Abuses

It is clear from the *Haas* and *Gross* court opinions the Swiss government fear the abuses inherently associated with assisted suicide. In situations where a mentally ill patient requests an assisted suicide, the Court found “it is appropriate to refer, in the context of examining a possible violation of Article 8 to Article 2 of the Convention, which creates for the authorities a duty to protect vulnerable persons, even against actions by which they endanger their own lives.”¹³¹ Due to the complexity of mental illnesses and uneven development, the true motivation for assisted suicide cannot be **assessed** without a thorough evaluation.¹³² Thus it is “necessary to draw a distinction between the wish to commit suicide as an expression of illness and the wish to

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Robert Adorno, *supra* note 15, at 6.

¹³⁰ Press Release, Swiss Federal Council, The Federal Council Continues to Support Suicide Prevention and Palliative Care (June 29, 2011).

¹³¹ *Haas v. Switzerland*, 2007 Eur. Ct. H.R. 1.

¹³² *Id.*

commit suicide as an autonomous, considered, and sustained decision.”¹³³ However, the *Haas* decision should not be seen a deterrent for permitting the chronically depressed or mentally ill form using physician assisted suicide, but instead should be emphasized for the safeguards in place that prevent criminal activity and abuse of Switzerland's suicide provisions.

Currently, Swiss authorities and right-to-die organizations are heavily involved in ensuring the proper application of physician assisted suicide according to current Swiss laws.¹³⁴ All assisted suicides are notified as unnatural deaths in Switzerland.¹³⁵ The authorities, in conjunction with a forensic medical officer, investigate all suicides.¹³⁶ Moreover, upon finding information doubting the deceased's decision-making capacity, prosecution follows whoever assisted in the process.¹³⁷ These processes seem to adequately combat systemic abuses of physician assisted suicide in Switzerland.

Additionally the current role of right-to-die organizations in Switzerland actually increases the oversight on physician assisted suicide as compared to places like Oregon and the Netherlands.¹³⁸ In Oregon and the Netherlands, physicians must file paperwork to reporting agencies when physician assisted suicide occurs which may then decide to investigate the incident.¹³⁹ Conversely, in Switzerland, every case is investigated.¹⁴⁰ These right-to-die organizations also assess competency according to their own standards, document all of the steps in the assisted suicide process, and contact the police after expecting an investigation.¹⁴¹

¹³³ *Id.*

¹³⁴ Georg Bosshard et al., *748 cases of suicide assisted by a Swiss right-to-die organization*, 133 SWISS MED. WKLY 310 (2003).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Ziegler, *supra* note 35, at 324.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

Furthermore, in declining to legislate further on assisted suicide, the Swiss Federal Council found that current legal provisions could adequately handle the threats of systemic abuse, such as the assisted suicide of people that lack the mental capacity to consent.¹⁴² The Federal Council reasoned that the “Therapeutic Products Act, the Narcotics Act and conduct rules together provide the authorities with a suitable set of tools for imposing effective criminal, administrative or civil law sanctions.”¹⁴³ Moreover, The Federal Council believed that “these tools have the advantage of being flexible and practice-oriented as well as constituting a sensible balance between the State’s responsibility to protect the individual and to respect personal freedom.”¹⁴⁴ Thus, the current Swiss model, which allows the assisted suicide of mentally ill patients who have the mental capacity to consent, sufficiently addresses the fears of systemic abuse.

B: In line with current traditional and legal framework

The core argument for allowing assisted suicide is the twin goals of maximizing individual autonomy while minimizing patient suffering.¹⁴⁵ Advocates for assisted suicide believe that it is within a patient’s rights to decide to control the manner of how and when to end their lives and avoid unwanted suffering.¹⁴⁶ Accordingly, there is controversy as to the suffering of one with a mental illness.¹⁴⁷ For this reason it can be understandable as to why there is hesitation in extending assisted suicide rights to the mentally ill/chronically depressed individuals.

¹⁴² Press Release, Swiss Federal Council, The Federal Council Continues to Support Suicide Prevention and Palliative Care (June 29, 2011).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Appel, *supra* note 2, at 21.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

Arguably the diseases associated with a painful terminal illness can differ greatly from the distresses of a purely psychological disorder, such as chronic depression. One distinction is that death is commonly expected to follow a terminal disease, whereas, chronic depression can be treatable.¹⁴⁸ Therefore when a patient is weighing the possibility that a rapid cure will be found for his or her terminal illness against his other interests, suicide would perhaps be a more favorable option as compared to a patient suffering from a mental illness where, in theory, there is more time to discover a cure.¹⁴⁹ However, under the current legal framework and case law these distinctions do not need to be made because of the absence of legislature precluding an individual with mental illness from using physician assisted suicide provided that the patient has the mental capacity to make such a decision.

As explained above, the goals of the Swiss laws on assisted suicide are to prevent abuses such as profiting from assistance and preventing assisted suicide from those who lack the decisional capacity. In Switzerland, the general rule of legal capacity is that an individual is presumed to have capacity unless she suffers from a mental illness or similar condition.¹⁵⁰ If one lacks legal capacity then they cannot enter into any legal transactions.¹⁵¹ Yet, despite these codes, assisted suicide has continually been performed on patients with mental illnesses.¹⁵²

The fact that a patient suffers from a mental illness may detract from his or her ability to receive a lethal prescription of sodium pentobarbital; however, it does not effect his right terminate his own life specifically since not all mental illness precludes a patient from having

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC][CIVIL CODE] Dec. 10, 1907, SR 210, RS 210, art. 16 (Switz.).

¹⁵¹ *Id.* ar art. 18

¹⁵² Bosshard, *supra* note 134, at 314.

legal capacity according to physicians and Swiss case law.¹⁵³ The Swiss National Court has reasoned that individuals with severe, long-term mental illness could make rational and well-considered decisions to end their own lives.¹⁵⁴ If they can make such a decision, then they should be allowed to exercise their right to terminate their life.¹⁵⁵ While this section does not advocate that all persons with mental illness have legal capacity or in all instances should be able to use assisted suicide, it does state such person fit within current assisted suicide legislature.

C: Addresses ethical concerns.

One of the most compelling reasons to cause hesitancy in extending physician assisted suicide rights to the mentally ill is the imprecise role that physicians have in the process, especially in Switzerland, where a physician is not distinctly required in the assisting process.¹⁵⁶ The Swiss model only requires a physician to determine competency and to prescribe the life terminating drugs, contrary to countries like Belgium and the Netherlands where a physician's presence is required more heavily in the suicide process. Instead in Switzerland, non-physician organizations, such as Dignitas, often carry out the assisting process of securing a location and other administrative needs.¹⁵⁷ However, it is this lack of required physician involvement that best addresses the ethical concerns of physician involvement in the physician assisted suicide process.

Physician involvement in the Swiss model of physician assisted suicide creates an interesting interplay between personal morality and medical ethics. The medical profession has

¹⁵³ Appel, *supra* note 2, at 21.

¹⁵⁴ Haas v. Switzerland, 2007 Eur. Ct. H.R. 1.

¹⁵⁵ *Id.*

¹⁵⁶ Appel, *supra* note 2, at 21.

¹⁵⁷ DIGNITAS (Dec. 1, 20013), <http://Dignitas.ch>.

been split as to whether assisted suicide was within the purview of professional oversight.¹⁵⁸ Yet, the Swiss Academy of Medical Sciences set forth guidelines for assistance with suicide in the event the physician choose to partake in the process.¹⁵⁹ It does not state whether the physician should partake or abstain from assisted suicide, in general.¹⁶⁰

Furthermore, when the Federal Council decided against introducing additional provisions in criminal law on assisted suicide, it did so in part because the Federal Council believed that physicians would not welcome the changes.¹⁶¹ During the consultation period, a particular group of physicians “came out against making medical practice out of assisted suicide.”¹⁶² Instead, the medical association argued that the prescription of lethal substances should remain the personal responsibility of the individual doctor.¹⁶³ American physicians are just as split on the ethics of assisted suicide.¹⁶⁴ Thus, the decreased involvement of physicians in assisted suicide detracts from its strain on medical ethics as compared to places where physician involvement is higher.

Part IV. Conclusion

In Switzerland, the act of physician assisted suicide is not fundamentally different between a chronically depressed patient and one who suffers from a terminal illness; an applicant expresses a wish to die with assistance, the applicant is prescribed a drug, and the applicant self-administers the drug. However, Switzerland lacks clear legislation on the application of physician assisted suicide despite having allowed it for nearly a century. Many patients have

¹⁵⁸ Hurst et al., *supra* note 46.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Ziegler, *supra* note 35, at 324.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Linda Ganzini et al., *Evaluation of Competence to Consent to Assisted Suicide: Wivews of Forensic Psychiatrists*, 157 AM J. PSYCH 595 (2000)

become confused on how to utilize their guaranteed human right to self-determination because of his lack of clarity.

A patient's ability to exercise the right to self-determination and thus self-termination with assistance, where allowed, should depend on the patient's own volition and the ability to exercise sound judgment. It is not for the a courts or physicians to decide the weight of pain associated with differing chronic ailments, to deny access to death with assistance, as they should be treated the same for assisted dying purposes. Although extending the use of physician assisted suicide to the mentally ill/chronically depressed challenges many legal, ethical, and medical ideas, the wholesale ban of allowing chronically depressed patients from assisted suicide comes at the cost of personal autonomy. Thus in the absence of explicit regulation permitting or prohibiting assistance with suicide for the mentally ill/chronically depressed applicant, the current Swiss model of allowing for the mentally ill is correct because it best addresses these concerns.