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## Preserving Life and Facilitating Death: What Role for Government After *Haas v. Switzerland*?

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**Abstract:** In our ‘rights society’ we seek to vindicate and protect, through our legal and political institutions, those rights we view as fundamental to human flourishing. However, changing social mores and limitations in our ability to relieve (or cope with) certain health conditions have resulted in unanticipated demands being placed on those rights; patients rely on them in seeking death, which is not normally associated with flourishing and which is largely antithetical to rights and health regimes aimed at promoting or preserving human life. The recent European Court of Human Rights decision in *Affaire Haas v Suisse* demonstrates the challenge of relying on rights to achieve death. *Haas* is the most recent case aimed at articulating the scope of individual autonomy and the duties of government in assisted dying scenarios. Once again, the applicant has invoked rights to achieve ‘a good death’, and in doing so has called upon public authorities to take some action to assist him. This paper considers *Haas* in the context of its predecessor European case, *Pretty v United Kingdom*, offering some observations about how they differ and why *Haas* had little chance of success, and was correctly decided.

**Keywords:** assisted dying; assisted suicide; euthanasia; European Convention on Human Rights, Article 8; right to private and family life; *Pretty v United Kingdom*; horizontal effect

### 1. Introduction

Because we live in a ‘rights society’, we seek to vindicate and protect, through our legal and political institutions, those rights we view as fundamental to human flourishing and the maintenance of a just and civil society. In Europe, those fundamental rights are enumerated in the European Convention on Human Rights (ECHR),<sup>1</sup> the European Charter of Rights (Charter),<sup>2</sup> and a plethora of domestic constitutions and laws. However, changing social mores and limitations in our ability to relieve (or cope with) certain health conditions have resulted in unanticipated demands being placed on those rights. For example, when confronted with diseases

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<sup>1</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (1950), ETS No. 5, as amended, available at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>.

<sup>2</sup> The Charter of Fundamental Rights of the European Union, [2000] OJEC C364/01, available at [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf).

or injuries that are incurable, untreatable, or poorly managed, patients may seek release from their suffering; they may seek death, which is not normally associated with flourishing and which is largely antithetical to rights and health regimes aimed squarely at promoting and/or preserving, not extinguishing, human life (and human flourishing). There is an inherent and systemic resistance to choosing death, with the result that barriers exist to achieving death, and to receiving the support one might wish to receive (or indeed might need to receive) in the pursuit of a ‘good death’.

The recent case of *Affaire Haas v Suisse*,<sup>3</sup> decided by the European Court of Human Rights (ECtHR), demonstrates the challenge of relying on rights to achieve death (or to secure ‘assisted dying’). In that case, the applicant, Haas, a Swiss national suffering from severe bipolar affective disorder, determined that he could no longer live in a dignified manner. Having attempted suicide on two other occasions, he decided to use sodium pentobarbital (SPB) so as to end his life in a safe and dignified manner. However, SPB is only available on prescription. Upon consultation, he was unable to convince the psychiatrist to prescribe it so he sought permission (from various federal and cantonal authorities) to obtain SPB without a prescription, arguing that Article 8 of the ECHR imposed upon the state an obligation to create the conditions for suicide to be committed without pain or the risk of failure.

This brief article examines *Haas* in some detail, considering it in relation to its ECtHR predecessor, *Pretty v United Kingdom*,<sup>4</sup> and we argue that, whereas *Pretty* was partially successful, *Haas* constituted a complete failure for the applicant. While the instrumental outcome of both cases was the same (ie: neither applicant obtained the remedy they sought, and so neither secured the route to death that they desired), *Pretty* broke new legal ground. By contrast, *Haas* achieved little more than a comforting and common sense judicial recognition that government should, so far as possible, stay out of the business of death. We argue that their difference in (theoretical, intellectual, and legal) outcome is at least in part a result of their very different characteristics (and characterisations). In the following paragraphs we revisit *Pretty*, a landmark Article 8 case in the assisted dying setting, characterising it as ‘negative’ and ‘vertical’. We then explore *Haas*, which was ‘positive’ and ‘horizontal’ and therefore an altogether more ambitious and uncertain undertaking (and arguably even less likely to succeed than *Pretty* despite the above-noted evolution in social and legal mores relating to death, choice, and human rights). At the outset, however, a brief word about what is meant by ‘euthanasia’ and ‘assisted dying’ is warranted.

Euthanasia is the pursuit of a course of action where death is the intended outcome; it is the ‘medical management’ of death.<sup>5</sup> It can be ‘voluntary’ (ie: the action causing death is consented to by a competent and uncoerced patient), ‘non-voluntary’ (ie: the action causing death is neither consent nor objected to because the patient is unable to consent/object), or ‘involuntary’ (ie: the action causing death is not consented to by a competent patient). It can also be ‘active’ (ie: where the actor intentionally and deliberately takes an action the result of which is death) or ‘passive’

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<sup>3</sup> Application 31322/07, 20 January 2011, Grand Chamber, ECHR. For the original text of the decision, which is only available in French, see <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=880260&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

<sup>4</sup> (2002), 35 EHRR 1 (ECHR).

<sup>5</sup> We appreciate that the term ‘euthanasia’ comes with a lot of baggage and is widely negatively perceived. For present purposes, as noted above, we take it to mean the medical management of death, which is neutral, and which captures all of the different forms of that management as highlighted *infra*.

(ie: where the actor refrains from taking an action that might avoid or defer death).<sup>6</sup> So conceptualised, euthanasia captures the idea of ‘assisted dying’, which we accept as that practice whereby a competent individual seeks assistance to end his or her own life. That assistance can include facilitation (ie: provision of the means by a third party or parties) or active intervention (ie: performance of the act by the third party or parties). When such assistance is sought from a physician, it is ‘physician assisted suicide’ (or ‘physician accomplished suicide’, as the case may be).<sup>7</sup>

## 2. *Pretty* – Negative, Vertical, and Ground-Breaking

The many guises of ‘assisted dying’ have long been controversial, and have received significant judicial attention.<sup>8</sup> However, public concerns about and debates around assisted dying have increased in recent years, both in the UK and in Europe, due, in part, to a number of high profile cases. One of those, *Haas*, has wound its way to the ECtHR. As in the previous benchmark European case, *Pretty*, the applicant in *Haas* has invoked rights to achieve ‘a good death’, and in doing so has called upon public authorities (both regulatory and healthcare) to facilitate that perceived good death. However, before considering the details and merits of *Haas*’ claim, it is appropriate to ‘begin at the beginning’, and our story begins with *Pretty*.

In *Pretty*, the UK applicant suffered from motor neurone disease and was faced with the prospect of a what, in her view, was a distressing and humiliating death. She was unable to take her own life without assistance, so she sought an undertaking from the Director of Public Prosecutions (DPP) that, if her husband assisted her, he would not be prosecuted. The DPP refused, stating that it was not in a position to grant immunity for an act which had not yet occurred.<sup>9</sup> *Pretty* sought judicial review of the decision, advancing the following Convention-based arguments:

- Article 2 protected a right to self-determination entitling her to commit suicide with assistance.
- The DPP’s failure to offer an undertaking not to prosecute was a failure to alleviate her suffering and amounted to inhumane and degrading treatment proscribed by Article 3.
- Her Article 8 right to private family life was infringed without justification.

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<sup>6</sup> For more on these terms, see J.K. Mason & G. Laurie, *Mason and McCall Smith’s Law and Medical Ethics*, 8th ed. (Oxford: OUP, 2011), at ch. 18.

<sup>7</sup> Debate over whether there is any proper moral or legal difference between the active and the passive (ie: between act and omission) persists: see J.K. Mason & G. Laurie, *ibid.*

<sup>8</sup> For an early Canadian case, see *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519 (SCC). For a somewhat distinguishable US case, see *Re Guardianship of Schiavo* (2001), 780 So. 2D. 176 (Fla App, 2nd Dist). For important UK cases, see *Re Z (an adult: capacity)*, [2005] 1 FLR 740 (HC), and *R (on the application of Purdy) v DPP*, [2010] 1 AC 345 (HL). In short, *Haas* is just the most recent in a growing collection of cases aimed at articulating the scope of our so-called, or rather colloquially claimed, ‘right to die’.

<sup>9</sup> This reluctance to engage in, or make decisions on, hypotheticals is well entrenched in the law: see *R (on the application of Burke) v General Medical Council*, [2005] 3 FCR 169 (CA), wherein the Court refused to give a declaration, in part because the claim for same was based on a hypothetical which had not yet come to pass. The case also reiterates that there is no right to demand whatever treatment one wants.

- Her Article 9 right to freedom of conscience was infringed without justification.
- She suffered discrimination contrary to Article 14 because an able-bodied person could exercise the right to suicide whereas her incapacities prevented her from doing so without assistance.

The House of Lords (as it then was) dismissed her appeal, concluding that the right to self-determination contained in Article 2 did not confer a right to death or a right to obtain assistance in pursuing death. Additionally, since the Executive has no power to dispense with or suspend laws or their execution without Parliamentary consent, the DPP was correct in refusing the requested undertaking that it would not prosecute a hypothetical future crime.<sup>10</sup>

On appeal, the ECtHR held that the primary concern of Article 2 was the protection of life, which did not naturally include a ‘right to die’.<sup>11</sup> However, it considered that Lord Bingham’s narrow interpretation of self-determination under Article 8 – to the effect that it had nothing to do with choices around dying – was incorrect. The ECtHR held that Article 8’s right to private life was supported, at least in part, on autonomy, and it accepted that respecting autonomy does include respecting one’s decisions about dying. In short, autonomy supported a right to private life, and this right therefore included choices around the act of dying. Despite this move towards autonomy, the ECtHR concluded that the House of Lords was justified in its refusal under Article 8(2). It considered that the approach adopted by the UK was proportionate insofar as vulnerable individuals and groups needed protection and that the scheme in question provided that protection in a balanced way. In short, the expanded Article 8(1) right was justifiably limited in the present case under Article 8(2).<sup>12</sup> Ultimately, the preservation of life and the protection of the vulnerable were, and continue to be, dominant themes, and the sanctity of life remains a core value with which all regulatory actions must comply.

One can see from the above that Pretty was seeking a negative in the sense that she wanted formal confirmation that government authorities (in this case the DPP) would refrain from prosecuting her husband for assisting her in securing a ‘good death’. In essence, she wanted the state to stay out of her affairs, to commit to inaction. Further, Pretty was engaged in a garden variety, one-to-one, top-down/bottom-up, individual dispute with her government, which, it is universally accepted, owes to its citizens a range of duties under well entrenched international human rights law (and domestic constitutional rights frameworks). She was seeking something (a forbearance) from her government, which is arguably a relatively routine and uncontroversial thing to seek (and is just as routine a thing to fail to secure). In short, Pretty was concerned with the effect of government power (or governmental action) on the realisation of her claimed (and subsequently confirmed) human right to make decisions with respect to her death. Her claim was wholly

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<sup>10</sup> See *Pretty v DPP & Secretary of State for the Home Department*, [2002] 1 AC 800 (HL).

<sup>11</sup> In fact, it opined that none of the Articles had a sufficient foundation upon which to ground a ‘right to die’.

<sup>12</sup> A common criticism of *Pretty* is that, while the ECtHR appeared to acknowledge that the manner in which one chooses to end one’s life is an important aspect of the exercise of autonomy, itself a cherished and well entrenched value within the ECHR and member state constitutional frameworks, it limited that autonomy on the rather vague or diffuse grounds of public policy and the wider public interest: see J.K. Mason & G. Laurie, *supra*, note 6.

‘vertical’.<sup>13</sup>

### 3. *Haas* – Positive, Horizontal, and Futile

In *Haas*, the applicant alleged that Article 8 of the ECHR guaranteed him not just the decisional scope to end his life, but the right to end his life in a safe and dignified manner and to call upon the state to facilitate that right. He further alleged that this right had been violated by the conditions which Switzerland imposed in relation to obtaining SPB, conditions which, despite his best efforts, he had been unable to fulfil because of the actions or positions adopted by other citizens, namely physicians (or psychiatrists). His application was declared admissible on 20 May 2010. On 20 January 2011, the Grand Chamber of the ECtHR rendered its decision. It reiterated its view, enunciated in *Pretty*, that an individual’s right to decide the manner and moment of his or her death, so long as the decision is made voluntarily and without duress, is one aspect of the right to respect for private life contained in Article 8. However, it (correctly) distinguished *Haas* from *Pretty* on several grounds:

- Haas was not in the terminal stages of an incurable illness;
- Haas was not being denied the right to die (because he could still act); and
- Haas was not seeking immunity from prosecution for an assister.

The question before the ECtHR in *Haas*, therefore, was whether there exists a positive obligation on the state to take measures to facilitate a suicide that one considers to be the most dignified (in this case, the least painless and most likely to succeed). More particularly, in this case, the question was whether there exists an obligation on the state to take action to help a citizen realise his or her aim (and vindicate his or her rights) when a third party (in this case physicians exercising their professional judgment), refuse to act such that the citizen cannot pursue the most desired route.

The ECtHR reiterated that personal choices around the time and circumstances of dying are protected under Article 8. However, it stressed that the ECHR must be read as a whole. In cases where life is in the balance, such as here, Article 2, which enunciates the right to life and the state’s obligation to protect vulnerable individuals, must be considered and must colour the interpretation (or scope) of Article 8.<sup>14</sup> It also reiterated that each state enjoys a ‘margin of appreciation’ over such morally charged issues as assisted dying and related processes because diverse approaches toward the practice have been adopted across Europe. For example, Switzerland and the BeNeLux countries have adopted liberal approaches, but most other states ascribe much more weight to the protection of life than to the right to end it, and they are within their authority to do so.<sup>15</sup>

In determining that Article 8(1) was engaged but that the existing Swiss regime was justified and therefore preserved under Article 8(2), the ECtHR articulated the following points:

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<sup>13</sup> This idea of verticality is well entrenched and well understood. It emerges from the orthodox view that human rights law protects individuals and groups from rights violations committed by governments or those acting on behalf of governments: see T. Buergenthal et al., *International Human Rights in a Nutshell*, 4th ed. (Minnesota: West Publishing Co, 1988); C. Tomuschat, *Human Rights: Between Idealism and Realism*, 2d ed. (Oxford: OUP, 2008); others.

<sup>14</sup> *Haas*, para. 54.

<sup>15</sup> *Haas*, para. 55.

- It appreciated the applicant’s desire to commit suicide in a safe, painless and dignified manner, and acknowledged the high number of failed suicides which often have grave consequences for the individuals and their loved ones.<sup>16</sup>
- The current regime pursues a number of legitimate objectives, including protecting those making hasty decisions, avoiding dangerous substances (like SPB) from falling into the hands of incapacitated or vulnerable individuals, and preventing abuse.<sup>17</sup>
- On the latter point, abuse, the framework is designed to prevent actors from breaking the law or operating underground, where there is a considerable risk of abuse.<sup>18</sup> Indeed, in systems which permit assisted dying, there are additional risk-of-abuse concerns, and the requirement of a medical prescription for SPB serves to protect health and public safety, and to prevent crime.<sup>19</sup>
- As correctly noted by the Federal Tribunal, the Article 2 right to life obliges states to implement appropriate procedures to ensure that a decision to end one’s life corresponds to one’s free will.<sup>20</sup> The requirement of a psychiatric assessment and a medical prescription represents one way of satisfying the requirement upon states to implement these appropriate procedures. Such also corresponds with the spirit of the International Convention on Psychotropic Substances.<sup>21</sup>

The ECtHR concluded that Switzerland’s requirement of a medical prescription subsequent to a psychiatric assessment constitutes a proportionate and legitimate, indeed a necessary, safeguard which allows for the protection of health and public

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<sup>16</sup> *Haas*, para 56: “En ce qui concerne la pesée des intérêts en jeu, la Cour admet la volonté du requérant de se suicider de manière sûre, digne et sans douleur et souffrances superflues, compte tenu notamment du nombre élevé de tentatives de suicide qui échouent et qui ont souvent des conséquences graves pour les victimes et leurs proches.”

<sup>17</sup> *Haas*, para 56: “Toutefois, la Cour est d’avis que le régime mis en place par les autorités, à savoir l’exigence d’une ordonnance médicale afin de prévenir des abus, a pour objectif légitime de protéger notamment toute personne d’une prise de décision précipitée, ainsi que de prévenir des abus, notamment d’éviter qu’un patient incapable de discernement obtienne une dose mortelle de pentobarbital sodique.”

<sup>18</sup> *Haas*, para 57: “De telles mesures sont également indiquées dans un but d’éviter que ces organisations n’interviennent dans l’illégalité et la clandestinité, avec un risque d’abus considérable.”

<sup>19</sup> *Haas*, para 57: “Cela est d’autant plus vrai s’agissant d’un pays comme la Suisse, dont la législation et la pratique permettent assez facilement l’assistance au suicide. Lorsqu’un pays adopte une approche libérale, des mesures appropriées de mise en œuvre d’une telle législation libérale et des mesures de prévention des abus s’imposent.” *Haas*, para 58: “En particulier, la Cour considère que l’on ne saurait sous-estimer les risques d’abus inhérents à un système facilitant l’accès au suicide assisté. A l’instar du Gouvernement, elle est d’avis que la restriction d’accès au pentobarbital sodique sert la protection de la santé, la sûreté publique et la prévention d’infractions pénales.”

<sup>20</sup> *Haas*, para 58: “Elle partage à cet égard le point de vue du Tribunal fédéral, selon lequel le droit à la vie garanti par l’article 2 de la Convention oblige les Etats à mettre en place une procédure propre à assurer qu’une décision de mettre fin à sa vie corresponde bien à la libre volonté de l’intéressé.”

<sup>21</sup> *Haas*, para 58: “La Cour estime que l’exigence d’une ordonnance médicale, délivrée sur le fondement d’une expertise psychiatrique complète, est un moyen permettant de satisfaire à cette exigence. Cette solution correspond d’ailleurs à l’esprit de la Convention internationale sur les substances psychotropes et à celles adoptées dans certains Etats membres du Conseil de l’Europe.”



safety and the prevention of abuse (which was acknowledged as a very real possibility in permissive states like Switzerland), while at the same time allowing choices around death to be exercised.

Haas, contested (factually) the latter position (about allowing choices), claiming that he did not have appropriate access to medical expertise, and that this caused his failure to meet the legal requirements for obtaining SPB, and therefore rendered his confirmed decisional rights nugatory. He argued that, after his initial failure, he had written to some 170 psychiatrists but received no positive responses, which rendered his right to choose 'theoretical and illusory' (because negative responses from the psychiatrists rendered it impossible for him to proceed as he desired). To this argument the ECtHR noted that physicians may well be, and indeed are entitled to be, cautious/hesitant when asked to prescribe a fatal dose of medication. It also observed that Haas indicated in his letters that he would not consider alternative therapies which might be suggested; this likely had some bearing on the response rate, and the psychiatrists were well within their discretion not to engage under such patient-imposed conditions. In the result, the ECtHR was not convinced that Haas' right to choose how and when he died was rendered theoretical or illusory.

One can see from the above, that, unlike Pretty, Haas was seeking a positive in the sense that he wanted the state to act. He wanted the state to set aside established legal restrictions on obtaining a controlled substance; he wanted the state to positively abrogate its legislative provisions. The ECtHR opined that the existence of the right to make decisions concerning one's own death does not, and cannot, impose an obligation on the state to assist in that death by abrogating statutory rules relating to controlled substances like SPB which are supported by legitimate public health objectives. In short, the burdens of action that will be imposed on the state to facilitate the realisation of Article 8 rights in death-seeking situations are limited. Given the failure of Pretty to achieve the negative, it is perhaps unsurprising that Haas failed to achieve this more onerous positive (initially, on appeal to the Zurich Administrative Court, on further appeal to the Swiss Federal Court, and on final appeal to the ECtHR).

Further, while Haas may have been seeking a remedy from his government (ie: the abrogation of legislative restrictions on access to a dangerous substance), his complaint emanated in large part from the actions of the medicos who declined to consult with him on the terms he set, and who refused to provide him with his desired prescription. While an argument might be made that physicians are public (governmental) actors, this is by no means obvious, and there is no indication that Haas advanced such an argument. Thus, his dispute was largely 'horizontal', or at least it had strong horizontal elements insofar as his complaint was the result of his dissatisfaction with the decisions of physicians (at his initial consult and then his fruitless blanket search).<sup>22</sup> Given the contestation of the propriety of horizontality in international (or supra-national) human rights law (and indeed in constitutional law),<sup>23</sup> it is again unsurprising that Haas failed to achieve his desired end.

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<sup>22</sup> For more on horizontal effect, see O. Cinnéide, "Taking Horizontal Effect Seriously: Private Law, Constitutional Rights and the European Convention on Human Rights" (2003) 4 *Hibernian Law J* 77-108; J. Knox, "Horizontal Human Rights Law" (2008) 102 *Am J International Law* 1-47; others.

<sup>23</sup> For a useful survey of the literature on this, see J. Corrin, "From Horizontal and Vertical to lateral: Extending the Effect of Human Rights in Post Colonial Legal Systems of the South Pacific" (2009) 58 *Int Comparative Law Q* 31-71.

#### 4. Conclusion

Conceptualising *Pretty* and *Haas* according to these dichotomies – negative v. positive and vertical v. horizontal – lends support to the claim that *Pretty* sought less, or rather framed her claim within traditional parameters, and achieved more (eg: the recognition that rights-grounded autonomy undergirds decisional autonomy relating to the method and timing of death under Article 8). The finding did not help her in any instrumental way, but it set an important precedent that has changed the ‘good death’ landscape in Europe and has been relied on by numerous other rights claimants. *Haas* sought more and achieved almost nothing. He was much more ambitious in seeking positive state action in response to third party (citizen) conduct. Like *Pretty*, *Haas* also failed in achieving his instrumental end, but he also failed in securing any sort of declaration that might broaden the scope of patient action space in the future. Even if one assumes that states have some positive obligation to adopt measures which facilitate a dignified suicide (which was not the *ratio decidendi* of *Haas*), the Swiss authorities had done enough to allow people to exercise their will within reasonable and democratically sound limits which recognised the countervailing rights and public interests (including the needs of the vulnerable).

The human condition is one of life, fragility, uncertainty, and, ultimately, of death. Human flourishing, as it now is and ought to be understood, includes not only the need for life, social participation, and healthcare and minimum levels of health, but also the capability to choose when and how to die, particularly when faced with untreatable and/or degenerative conditions which reduce the quality of life so much as to make that life untenable. In other words, human flourishing must be viewed robustly throughout the cycle of life, and it must include decisional authority around the manner of one’s death. The European jurisprudence evinces a commitment to rights which support life, integrity and autonomy, and, despite its rhetorical affirmation of rights of choice around death, a general reluctance to define rights in such a way that permits the choice of death over life. This reluctance, which no doubt derives from strongly held views about the sanctity or value of life, has not caused courts to deny autonomy grounded rights around death. Rather it has manifested as a cautiousness around such rights, which persist even though social views about suicide and assisting in suicide, are (arguably) opening up and becoming more permissive.

This cautiousness becomes more pronounced when the state is called upon to assist directly in the act of suicide, as was the case in *Haas*. We argue that society should very rightly be very cautious about the extent to which we are prepared to recruit the state in this endeavour (by demanding positive action to help us end our lives or to facilitate others in doing so). So long as there are legal rights to choose death, and to obtain, perhaps with limitations, appropriate assistance when death cannot be managed on one’s own, it is perfectly correct not to impose too many obligations of positive action on the state in support thereof. There are just too many examples of states disregarding the value of life. In this light, *Haas* can be viewed as a sound and reassuring decision; one which strikes a reasonable balance between upholding the privacy-grounded right to make choices around death, on the one hand, and erecting strict controls around some of the means by which that can be accomplished, on the other. Ultimately, overmuch involvement of the state in the business of death is correctly to be discouraged.