AUTONOMY WITHOUT TERMINALITY: THE LEGAL THRESHOLD OF "UNBEARABLE SUFFERING" IN EU ASSISTED DYING FRAMEWORKS AFTER MORTIER v. BELGIUM

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Abstract: European assisted dying statutes diverge sharply on whether an applicant must be terminally ill, and the divergence has consequences that the literature has not adequately theorised. Where terminality is required, eligibility turns largely on a medically verifiable predicate about the applicant's condition. Where it is not required, as in Belgium, the Netherlands, and Luxembourg, and as an implication of the German Federal Constitutional Court's 2020 ruling, the whole weight of gatekeeping falls on a predicate that only the applicant can access: unbearable suffering. This article develops the concept of the epistemic gatekeeping load, defined as the share of an eligibility determination that rests on first-personally accessible predicates, and argues that it varies inversely with terminality requirements across the European regimes. From this I derive the article's central thesis, which I call procedural substitution: as the epistemic gatekeeping load rises, legal systems do not and cannot compensate by refining the substantive definition, and instead substitute procedural architecture for substantive review. Mortier v. Belgium is the moment at which the European Court of Human Rights made this substitution explicit at the supervisory level, holding that a permissive regime does not violate Article 2 in substance even for a non-terminal psychiatric applicant while locating a violation in the independence of the ex post control body and the length of the criminal investigation. Karsai v. Hungary confirms the pattern from the opposite direction through a wide margin of appreciation. The article's normative claim follows: the long-running complaint that "unbearable suffering" is unacceptably vague is misdirected, since the vagueness is not a drafting defect that better definition could cure but a structural entailment of abandoning terminality, and the appropriate locus of reform is therefore the design of review institutions. The analysis is doctrinal and comparative, draws on sixty verified sources, and offers legal analysis rather than legal advice.

Keywords: *assisted dying, unbearable suffering, terminality, Mortier v. Belgium, European Court of Human Rights, procedural review, euthanasia, autonomy.*

INTRODUCTION

Two propositions are simultaneously true of European assisted dying law, and their conjunction is the problem this article addresses. The first is that a growing number of jurisdictions have abandoned any requirement that the applicant be dying. Belgium and the Netherlands never imposed one; Luxembourg followed; the German Federal Constitutional Court in 2020 held that the right to a self-determined death extends to every stage of life and is not conditional on illness at all, a holding whose radicalism has been widely noted (Horn, 2020; Wiesing, 2021). The second

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proposition is that in every one of these regimes the substantive eligibility criterion that remains is some formulation of unbearable, constant, and unrelievable suffering — a predicate about the interior life of the applicant, which no examination can confirm and no third party can occupy. Put the two together and one obtains a legal architecture in which the sole substantive gate is one that cannot be inspected from outside.

The literature has noticed each proposition separately. Reed (2023) argues that terminalism — the restriction of assisted dying to the terminally ill — lacks principled justification, and Colburn (2019) and Braun (2022) develop autonomy-based accounts on which the applicant's own valuation is decisive. On the other side, Trachsel and Jox (2022) argue that suffering alone is insufficient as a criterion, Lyon (2024) traces the practical perils that the phrase intolerable suffering creates for providers, and Verhofstadt, Van Assche, and Pardon (2024) document how contested the eligibility criteria remain among those who apply them to psychiatric requests. What has not been done, so far as my searching established, is to connect the two propositions structurally — to show that the removal of terminality does not merely widen access but transfers the entire evidentiary burden onto a predicate of a categorically different kind, and to trace what legal systems do when confronted with that transfer.

That connection is the original contribution of this article. I introduce the concept of the epistemic gatekeeping load, defined as the proportion of an eligibility determination that rests on predicates accessible only in the first person, and I show that across the European regimes it varies inversely with the strictness of the terminality requirement. From the concept I derive the thesis of procedural substitution: where the epistemic gatekeeping load approaches unity, a legal system cannot secure the criterion by defining it more precisely, because precision does not create third-party access, and so it substitutes procedural architecture — who reviews, when, with what independence, under what timetable — for the substantive review it cannot perform. The thesis is doctrinal rather than merely conceptual, because it identifies in Mortier v. Belgium the moment at which the European Court of Human Rights performed exactly this substitution at the supervisory level (Walraet, 2023; Martin, 2023).

Three hypotheses organise the investigation. The first (H1) holds that terminality requirements and epistemic gatekeeping load stand in an inverse relation across the European regimes, so that the regimes commonly described as most permissive are also those in which the decisive criterion is least externally verifiable. The second (H2) holds that Mortier instantiates procedural substitution: that the Court's refusal to find a substantive violation combined with its finding of a procedural one is not an accident of the pleadings but the predictable response of a supervisory body facing an unreviewable substantive predicate, and that Karsai v. Hungary confirms the pattern by deferring through the margin of appreciation. The third (H3) is normative and follows from the first two: definitional reform of unbearable suffering cannot reduce the epistemic gatekeeping load, and reform effort should therefore concentrate on the independence, timing, and composition of review bodies.

Two clarifications are owed at the outset. The first concerns what this article is not. It is not an argument for or against the legalisation of assisted dying, and readers looking for one will be disappointed in both directions; the analysis proceeds from the fact of legalisation in several European states and asks what follows structurally from a particular drafting choice within it. Nor is it legal advice, and nothing in it should be relied upon as such by anyone facing a decision of this kind. The second clarification concerns method: this is a doctrinal and comparative study of statutes, judgments, and the peer-reviewed literature. I have not interviewed clinicians, reviewed commission files, or collected data on practice, and where the argument would benefit from such material I say so rather than substituting inference for evidence.

A word about the vantage point from which I write. I work from the Western Balkans, in a legal space where no assisted dying framework exists and where the question is not litigated, so I approach the European material as an outsider to every regime described. That position has costs — I lack the tacit familiarity a Belgian or Dutch lawyer brings — and one compensating advantage, which is that no national arrangement seems natural to me. In earlier work I argued that the translation of religious and secular vocabularies in this region's public sphere proceeds asymmetrically rather than reciprocally (Knežević, 2023), and something structurally similar appears in the material below: two vocabularies, the medical and the experiential, are asked to do the same legal work, and only one of them can be audited. The article proceeds through a review of the literature and a statement of method, a presentation of results, an analysis of the two-predicate anatomy of eligibility tests, a reading of Mortier and Karsai, an examination of what procedural substitution can and cannot deliver, and a conclusion returning to the hypotheses.

LITERATURE REVIEW AND METHODOLOGY

Literature Review

Four literatures bear on this problem. The first is the comparative legal scholarship on European assisted dying frameworks, which has grown rapidly since 2019. Krüger (2022) provides the most systematic comparison of decriminalisation pathways across European states, distinguishing legislative from judicial routes and mapping the resulting criteria. Jones, Palazzani, and Bormann (2022) analyse the constitutional challenges in Italy, Germany, and Austria, three jurisdictions in which courts rather than parliaments moved first; Montanari Vergallo (2019) examines the Italian Cappato litigation and its opening toward assisted suicide; Wiesing (2021) assesses whether the German Federal Constitutional Court's 2020 judgment can serve as a template for pluralistic states, and Horn (2020) reads the same judgment as an expression of the right to free development of personality. Braun (2022) examines the scope of a future German framework and the self-administration question. On the Belgian side, Nys (2021) analyses an amendment with unintended consequences, and Archer and Goffin (2025) assess the more recent amendments and their implications for practitioners and for the Federal Control and Evaluation Commission. Triviño-Caballero and colleagues (2025) study the Spanish law from the perspective of healthcare professionals, and Francés Vañó and colleagues (2026) offer a systematic comparative review of legal and bioethical perspectives.

The second literature concerns suffering as a legal and clinical predicate, and it is where the difficulty this article isolates is felt most acutely without being named. Lyon (2024) argues that the wording enduring intolerable suffering generates a distinctive peril for providers, who are asked to certify something they cannot observe. Trachsel and Jox (2022) contend that suffering is not enough as a criterion for people with mental illness. Ahlzen (2020) examines suffering, authenticity, and physician assisted suicide, raising the question whether a sufferer's own assessment can be authentically theirs under conditions of severe distress. Jølstad (2023) analyses adaptation and illness severity, showing that reported suffering is not a stable function of objective impairment. Streeck (2019) examines the taboo of suffering within palliative care itself. Pesut and colleagues (2021) present a qualitative study of what suffering has to do with requests for medical assistance in dying, and Gaignard and Hurst (2019) study existential suffering in the Swiss assisted suicide context. Bloomer and colleagues (2024) document the cultural and ethnic variability of what counts as unbearable, which bears directly on whether a shared legal standard is even coherent across a plural population.

The third literature concerns capacity, psychiatric eligibility, and the verification problem in its clinical form. Verhofstadt, Audenaert, and Van Assche (2019) set out the Ghent University

Hospital protocol for psychiatric euthanasia requests, an unusually explicit attempt to operationalise assessment; Verhofstadt, Van Assche, and Pardon (2024) survey perspectives on the eligibility criteria for mental suffering caused by psychiatric disorder; and Verhofstadt and Van Assche (2019) offer guidelines for sound clinical and ethical decision-making. Schweitser and Stuy (2020) analyse the assessment of decision-making capacity in voluntary euthanasia for psychiatric conditions, and Dembo and van Veen (2020) examine how cognitive distortions influence capacity for physician aid in dying — a finding with obvious implications for a regime whose gate is the applicant's own valuation. Sisti and Mann (2024) argue that suicidal behaviour is pathological with consequences for psychiatric euthanasia; Teo (2024) argues that the irremediability requirement is insufficient to exclude psychiatric applicants; Evenblij and colleagues (2019) survey public and physician support for euthanasia in psychiatric disorder; and Coers and colleagues (2024) study legal experts' views on requests grounded in advance directives, where the verification problem is compounded by the absence of a contemporaneous first-person report.

The fourth literature is normative and concerns autonomy itself. Colburn (2019) analyses autonomy and voluntariness in assisted dying; Braun (2022) develops an autonomy-based approach designed to avoid the expressivist objection, and defends it further in a subsequent exchange (Braun, 2023). Petersen and Dige (2022) criticise autonomy-based arguments against legalisation. Reed (2023) attacks terminalism directly, which makes his short intervention unusually important for the present argument. Lewis and Holm (2023) develop a concept of embodied autonomy in which the patient's body contributes to the determination of what the patient autonomously wants, a proposal that speaks to whether experiential predicates can be given any intersubjective purchase at all. Hempton and Mills (2021) analyse how Victorian legislation constitutes a category of the already dying, showing that terminality is itself a legal artefact rather than a natural fact. Jones (2025) examines how not to define assisted dying, and Hwang (2020) offers critical remarks on the margin of appreciation as an instrument of pluralism at the European Court, which is directly relevant to the Karsai reasoning.

Two further bodies of work supply context rather than doctrine. On the case law itself, Walraet (2023) analyses Mortier as a balancing of the right to life against the right to respect for private life; Martin (2023) provides a detailed note on the judgment's treatment of Article 2 at the end of life; and Papadopoulou and Wicks (2024) argue for taking the right to life seriously in the assisted dying context rather than treating it as a formality. On the wider theoretical setting, the regional literature on biopolitics is more relevant here than it may first appear: Gomez (2024) analyses the governed body through a Foucauldian framework; McDougall (2023) examines governmentality and technologies of the self and their post-pandemic residue; Chernov (2023) applies Mbembe's necropolitics to calculated abandonment along the central Mediterranean route, a study of how states distribute exposure to death; Mićunović (2023) analyses Esposito's immunisation paradigm in Western Balkan vaccination politics; Cvjetić (2025) develops a triadic model of the somatic inscription of ideology; and Vasconcelos (2025) offers a phenomenology of loneliness that bears on the existential component of suffering. Postolache (2025) and Radišić (2025) address, from different angles, the erosion of shared epistemic authority — a theme that returns whenever a legal system must decide whom to believe about something only one person can perceive.

A fifth strand concerns the definitional and taxonomic disputes that shadow the whole field, and it matters here because my argument is partly about what definition can accomplish. Riisfeldt (2023) proposes a value-neutral taxonomy of end-of-life practices designed to escape the definitional conflicts that have made comparison across jurisdictions unreliable; Jones (2025) argues that many current definitions of assisted dying build normative conclusions into their terms. Owen, Koniarz, and Ruck Keene (2026) ask whether assisted dying is a treatment at all, a

categorisation question with direct consequences for which legal framework governs assessment. Sarbey (2023) contests the claim that assisted dying programmes discriminate against the dying, and Panayiotou (2023) argues that beneficence cannot supply the justification that autonomy is often asked to share. These contributions are not peripheral to the present analysis. They show a field expending considerable effort on definitional precision, which is exactly the effort my third hypothesis contends is misallocated, and a reader who thinks definitional work can solve the problem I identify should engage with them rather than with me.

Finally, a group of studies documents how these frameworks behave in practice and how they travel across borders. Archer and colleagues (2025) explore qualitatively how regulation influences euthanasia practice in Belgium, which is the closest thing in the corpus to a direct empirical test of whether procedural design changes behaviour. Perreault and colleagues (2019) present a case series of euthanasia requests in a Canadian psychiatric outpatient clinic; Clarke, Cannon, and Skokauskas (2021) trace the Irish debate and its implications for psychiatry; de Keijzer, Widdershoven, and Brouwer (2022) report a Delphi study among Dutch paediatric experts on the age limit for euthanasia requests, a study of where a bright line should sit when the underlying criterion is graded. Gilbert and Schuklenk (2026) argue that people with mental illness who are capable and unbearably suffering are wrongly excluded, restating the permissive case in its strongest recent form. Dannecker and Szikszai (2026) compare the German and Austrian constitutional decisions directly. Together these supply the practice-facing counterpart to the doctrinal materials, and I draw on them mainly at the points where my argument makes a claim about how assessors actually behave.

Research Methodology

The study is doctrinal and comparative and proceeds in four steps. The first is the construction of a corpus. I assembled peer-reviewed journal literature published from 2019 onward addressing any of four topics: European assisted dying legislation and case law, suffering as a legal or clinical criterion, capacity and psychiatric eligibility, and the normative theory of autonomy in end-of-life decisions. Identification proceeded through Crossref queries restricted by journal ISSN and by keyword, with inclusion requiring peer review, direct topical relevance, and a resolvable digital object identifier verified by direct resolution rather than by citation in a secondary source. Primary legal materials — the judgments of the European Court of Human Rights and the national statutes — are cited as primary sources and are exempt from the date restriction applied to scholarship, since legal instruments retain force irrespective of their age.

The second step is the two-predicate decomposition of eligibility tests. For each regime I separate the conditions an applicant must satisfy into two classes. A medical predicate is one whose satisfaction is determinable, in principle, by third-party examination: the presence of a diagnosed condition, its incurability given current therapeutic options, a prognosis of death within a defined period. An experiential predicate is one whose satisfaction depends constitutively on the applicant's own report: that the suffering is unbearable, that it is unrelievable in terms the applicant accepts, that the wish is enduring. The classification is not always crisp — unrelievability has both a therapeutic and an evaluative face, and I flag the cases where I have had to make a judgment call — but it is determinate enough to sort the criteria in each statute.

The third step assigns each regime an epistemic gatekeeping load, understood qualitatively rather than numerically. I use three bands: low, where a terminal prognosis is required and the medical predicates therefore exclude the great majority of applicants before the experiential predicate is reached; intermediate, where a grave and incurable condition is required without terminality, so that medical predicates exclude some applicants but leave a large residual population sorted by the experiential predicate alone; and high, where no substantive medical predicate

operates at all and the experiential predicate does the entire work. I deliberately avoid assigning numbers. A numerical index would suggest a precision the underlying materials do not support, and the analysis needs only the ordering, not a metric.

The fourth step is doctrinal analysis of the two European judgments against the resulting map, asking in each case what the supervisory body did with the substantive criterion and what it did instead. Here I read the judgments as a lawyer reads them, attending to the operative holdings and to the structure of the reasoning rather than to obiter statements, and I have relied on the published analyses to check my reading against those of specialists in the field (Walraet, 2023; Martin, 2023; Papadopoulou & Wicks, 2024). One limitation should be stated plainly at this point rather than deferred to the conclusion: I read the judgments in English translation and the Belgian statutory materials in translation as well, which is a real constraint in a field where the wording of a single adjective carries doctrinal weight.

RESEARCH RESULTS

The analysis returns findings in four blocks. The first concerns the distribution of terminality requirements and bears on the first hypothesis. Applying the two-predicate decomposition to the European regimes yields three groups. The Belgian and Dutch statutes, together with the Luxembourg framework modelled on them, impose no terminal prognosis: the applicant must be in a medically futile condition of constant and unbearable physical or mental suffering that cannot be alleviated, resulting from a serious and incurable disorder caused by illness or accident, and the statutes expressly contemplate applicants who are not expected to die in the near future, imposing only additional procedural conditions in such cases (Nys, 2021; Archer & Goffin, 2025). The Spanish and Portuguese frameworks require a serious and incurable illness or a grave, chronic and disabling condition producing intolerable suffering, again without a strict terminal prognosis (Triviño-Caballero et al., 2025; Krüger, 2022). The Austrian arrangement, adopted after the constitutional ruling analysed by Jones, Palazzani, and Bormann (2022), conditions access on either a terminal illness or a permanent debilitating condition. The German position after the 2020 judgment is the outlier and the limiting case: the constitutional right recognised there attaches to the decision itself rather than to any medical state, so that no substantive medical predicate operates at the constitutional level at all (Horn, 2020; Wiesing, 2021; Braun, 2022).

The second block records the inverse relation the first hypothesis predicts, and it holds across the sample. Where a terminal prognosis is required, the medical predicates perform nearly all of the exclusionary work: an applicant who cannot establish the prognosis is excluded regardless of how severe the suffering, and among those who can establish it the experiential predicate is rarely the operative point of contention. Where terminality is dropped but incurability retained, the medical predicates still exclude — the applicant must have a diagnosed condition and it must be incurable — but the residual population is large and internally heterogeneous, and the experiential predicate becomes the operative sorting criterion within it. Where no medical predicate operates, as in the German constitutional position, the experiential predicate carries the entire load. The ordering is therefore: low load in terminal-prognosis regimes, intermediate in incurability-without-terminality regimes, high in the German case. The first hypothesis is supported, and the support is structural rather than statistical: it follows from the logic of the criteria rather than from any count of cases.

The third block records what happens to the verification problem as the load rises, and this is where the clinical literature becomes indispensable. In the intermediate and high bands, assessors are asked to certify a predicate they cannot observe, and the literature documents the strain in detail. Verhofstadt, Van Assche, and Pardon (2024) find substantial disagreement about the eligibility criteria among those applying them to psychiatric requests; the Ghent protocol

represents an attempt to discipline that disagreement through procedure rather than through definition (Verhofstadt, Audenaert, & Van Assche, 2019). Schweitser and Stuy (2020) show the difficulty of capacity assessment in psychiatric euthanasia, and Dembo and van Veen (2020) identify a mechanism by which the very condition grounding the request may distort the judgment that grounds it. Lyon (2024) documents the exposure this creates for providers asked to certify intolerability. Bloomer and colleagues (2024) show that what counts as unbearable varies with cultural and ethnic background, which means the standard is not merely hard to verify but plausibly non-uniform across the population it governs. Jølstad (2023) adds that suffering does not track objective severity in a stable way, because people adapt. Taken together these findings do not show that the experiential predicate is meaningless; they show that it is not the kind of thing external assessment can confirm.

The fourth block reports the doctrinal finding that bears on the second hypothesis, and it is the pivot of the article. In Mortier v. Belgium, the Court examined a euthanasia performed on a woman suffering from chronic depression who was not terminally ill, brought by her son who had not been informed. The Court declined to find that the Belgian framework violated Article 2 in substance, accepting that a permissive regime can satisfy the positive obligation to protect life provided it contains adequate safeguards; it did not undertake to review whether the applicant's suffering had in fact been unbearable within the meaning of the statute. It found a violation of Article 2 in its procedural limb on two grounds: the possible lack of independence of the Federal Control and Evaluation Commission, given that the physician who performed the euthanasia co-chaired the body reviewing it, and the excessive length of the ensuing criminal investigation (Walraet, 2023; Martin, 2023). The structure of that disposition is the finding: substantive deference paired with procedural scrutiny. In Karsai v. Hungary the Court again declined substantive review, this time of a refusal rather than a permission, holding by six votes to one that Article 8 was not violated and relying on the margin of appreciation to sustain the Hungarian prohibition even for an applicant with advanced amyotrophic lateral sclerosis.

A supplementary observation qualifies the reach of these results. My corpus is anglophone with a small number of exceptions, and the literature on the Spanish, Portuguese, and Austrian regimes is thinner in English than the Belgian, Dutch, and German material — which means that my characterisation of the intermediate band rests on fewer sources than my characterisation of the extremes. The three regimes at the centre of the analysis are also the three most studied, and there is a real risk that the ordering I report is partly an artefact of where scholarly attention has fallen. Francés Vañó and colleagues (2026), whose systematic review is the most recent comparative treatment in the corpus, would be the natural place to check this, and a reader with Spanish and Portuguese should treat my intermediate-band claims as provisional.

A further result concerns where the definitional effort in this field has gone and what it has produced, and it bears on the third hypothesis. Surveying the definitional literature, one finds sustained and skilled attention to terminological precision: Riisfeldt (2023) constructs a value-neutral taxonomy of end-of-life practices, Jones (2025) diagnoses the normative smuggling in current definitions of assisted dying, and Owen, Koniarz, and Ruck Keene (2026) raise the prior question whether assisted dying is a treatment. What this work has demonstrably improved is cross-jurisdictional comparability — one can now say with more confidence whether two regimes are describing the same practice. What it has not done, and on my analysis cannot do, is make any assessor better able to determine whether a particular applicant's suffering is unbearable. The distinction between improving the description of a practice and improving the verification of a criterion is easy to lose in the abstract and impossible to lose once stated concretely, and I take the gap between the two to be the strongest indirect support for the third hypothesis available from the literature alone.

TWO PREDICATES AND THE ANATOMY OF ELIGIBILITY

Consider what an assessing physician is actually asked to do. Under a terminal-prognosis regime, the questions are tractable: is there a diagnosis, is it of the specified kind, is death expected within the statutory window? These are hard clinical judgments, and prognostication is notoriously unreliable at the margins, but they are questions about a patient's body that another clinician could in principle answer the same way. The disagreements they generate are disagreements about evidence. Now remove the prognosis requirement. The physician must still confirm a diagnosis and its incurability, but those conditions are now satisfied by a very large population — everyone with an incurable chronic illness, everyone with a treatment-resistant psychiatric disorder — and the question that decides the case becomes whether this applicant's suffering is unbearable. That is not a question about the patient's body. It is a question about the patient's life as the patient experiences it.

The philosophical literature on suffering has been circling this distinction for some time without drawing the legal consequence. Ahlzen (2020) asks whether the suffering person's own assessment is authentically their own, which presupposes that the assessment is theirs to make and that its authenticity, not its accuracy, is the contested issue. Jølstad (2023) shows that adaptation decouples reported suffering from objective severity, so that two people with identical impairments may honestly report incomparable burdens. Streeck (2019) documents how palliative care itself has struggled with the ineliminability of suffering. Lewis and Holm (2023), in the most constructive contribution I found, propose that the patient's body contributes to the determination of what the patient autonomously wants, which is an attempt to give the experiential predicate some intersubjective purchase. Even on their account, though, what the body contributes is input to the patient's own determination rather than a substitute for it. The predicate remains first-personal at the point where the law needs it to be checkable.

One might respond that the law routinely relies on subjective states — intention in criminal law, distress in tort, sincerity in asylum determinations — and manages perfectly well. The response deserves an answer because it is the strongest objection to the framing, and I think it fails for a specific reason. In each of those examples the subjective state is inferred from conduct and circumstance against a background of shared behavioural expectations: we infer intention from what a person did, distress from how a person's life changed, sincerity from consistency and plausibility. The inference is defeasible but it is genuinely evidential, because the state in question has characteristic outward manifestations. Unbearability does not, or rather its outward manifestations are exactly what adaptation and cultural variation render unreliable (Jølstad, 2023; Bloomer et al., 2024). Two applicants presenting identically may honestly differ, and the law has no way to say that one of them is wrong. That is a different situation from an evidentially difficult inference, and conflating the two is what allows the vagueness complaint to look like a drafting problem.

The psychiatric case exposes the structure most clearly, which is why it has generated the sharpest literature. When the underlying condition is a mood disorder, the request's ground and the request's authority collapse into one another: the suffering that justifies the request is produced by the illness that may also be shaping the applicant's judgment about whether the suffering can be relieved. Dembo and van Veen (2020) identify cognitive distortion as a mechanism by which this occurs; Sisti and Mann (2024) push further, arguing that suicidal behaviour is itself pathological with direct implications for psychiatric euthanasia; Teo (2024) argues in the opposite direction that an irremediability requirement does not suffice to exclude psychiatric applicants, since irremediability is genuinely satisfied in some cases. Trachsel and Jox (2022) conclude that suffering is not enough. I do not attempt to adjudicate this dispute, which turns on clinical and

normative questions beyond my competence. My point is narrower and I think uncontroversial once stated: the dispute is not resolvable by improving the statutory wording, because every party to it accepts the same words and disagrees about their application to a state none of them can access directly.

Two boundary questions test the decomposition and are worth working through, because a framework that cannot handle its own hard cases is not much of a framework. The first is the age threshold. The Dutch Delphi study among paediatric experts reported by de Keijzer, Widdershoven, and Brouwer (2022) asks where an age limit should sit for euthanasia requests, and the interesting feature of that question for present purposes is that age is a purely third-personal predicate standing proxy for a first-personal one: it is not maturity that a birth date measures but eligibility to be believed about one's own suffering. Bright lines of this kind are epistemic prostheses, and they are honest ones precisely because nobody pretends the line tracks anything intrinsic. The second boundary question is the advance directive, studied by Coers and colleagues (2024) through the views of legal experts. Here the experiential predicate is not merely unverifiable but temporally displaced: the person who suffers is not the person who requested, or at least not straightforwardly so, and the report on which the law relies was made before the state it describes obtained. If my analysis is right, advance-directive cases represent the maximum of epistemic gatekeeping load, since even the first-personal channel is unavailable — and it is consistent with the analysis that they are also the cases in which legal systems have proved most reluctant and most procedurally elaborate.

The categorisation question raised by Owen, Koniarz, and Ruck Keene (2026) — whether assisted dying is a treatment — turns out to bear on the decomposition in a way I did not anticipate when I began. If assisted dying is a treatment, then its provision falls within a framework of clinical indication, and clinical indication is a third-personal notion: a treatment is indicated for a condition, and the condition is what the medical predicate identifies. If it is not a treatment but the exercise of a liberty, then clinical indication drops out and nothing but the applicant's own valuation determines whether the liberty should be exercised. The German constitutional position pushes decisively toward the second characterisation, which is why the load there is maximal (Horn, 2020; Wiesing, 2021; Dannecker & Szikszai, 2026). The Belgian and Dutch statutes sit uneasily between the two, retaining medical language and medical gatekeepers while having removed the prognosis that gave the medical framing its purchase. That intermediate position may be less a compromise than an instability, and I would offer that as a hypothesis for someone better placed than I am to test it.

It is worth noting that terminality itself is less natural a category than the debate assumes. Hempton and Mills (2021) show how Victorian legislation constitutes a class of the already dying through the drafting of a prognosis window, and the same is true of every jurisdiction that picks six months, or twelve, or a formulation about death in the foreseeable future. The number is a policy choice, and its function is not primarily epistemic. What the prognosis requirement does is act as a proxy: it narrows the eligible population to one in which the experiential predicate is least likely to be contested, because someone dying of metastatic disease within weeks is unlikely to face a serious dispute about whether their suffering is unbearable. Reed (2023) argues that terminalism is unprincipled as a normative matter, and I think he is right about that. My argument is compatible with his and adds a consideration he does not raise: whatever terminality's normative merits, its removal has an institutional cost, because it removes the proxy that was doing the verification work.

MORTIER, KARSAI, AND THE TURN TO PROCEDURE

The European Court of Human Rights had never before Mortier assessed a completed euthanasia against the Convention, and the manner of its first engagement is therefore doctrinally consequential. The applicant's mother, who suffered from chronic depression and was not terminally ill, was euthanised under the Belgian statute; her son learned of it afterwards. He complained under Article 2 both that the Belgian framework itself failed to protect life and that its application in his mother's case had been defective. The Court separated the two. On the framework, it held that the Convention does not preclude a permissive regime provided the state maintains safeguards ensuring that requests are free and informed and provides for a posteriori supervision of compliance. On the application, it found that the review had been inadequate: the Commission's independence was compromised because the physician who had performed the act participated in the body assessing it, and the criminal investigation that followed had taken an excessive time (Walraet, 2023; Martin, 2023).

Read alongside the two-predicate analysis, the disposition is not surprising but overdetermined. Consider what a substantive review would have required. The Court would have had to determine whether Godelieva De Troyer's suffering was in fact unbearable within the meaning of the Belgian statute — that is, to substitute its own assessment of a deceased person's interior state for that of the physicians who examined her. No supervisory court could do this, and no institutional design would enable it. Faced with an unreviewable substantive predicate, the Court did the only thing available: it reviewed the process by which the predicate had been certified, and located the Convention violation there. This is what I mean by procedural substitution, and Mortier is its clearest doctrinal instance because both halves appear in one judgment — the explicit refusal of substantive review and the explicit finding on procedure.

The finding on the Commission repays attention because it is not incidental. The Belgian ex post model entrusts review to a body composed substantially of practitioners in the field, and the Court's difficulty was structural rather than personal: a review mechanism in which the reviewed may sit among the reviewers cannot supply the independence that a substituted procedural guarantee must have if it is to bear the weight now placed on it (Walraet, 2023). Nys (2021) and Archer and Goffin (2025) trace the Belgian legislative response and the amendments affecting the Commission, and Archer's parallel qualitative work examines how regulation actually influences practice on the ground. The doctrinal point is that once procedure has been substituted for substance, defects in procedure become the whole of the Convention's grip on the practice. There is nothing else left to review.

Karsai v. Hungary tests the thesis from the other direction, and this is why I regard it as confirmation rather than as a separate development. Dániel Karsai, a human rights lawyer with advanced amyotrophic lateral sclerosis, challenged the Hungarian prohibition, arguing that it prevented him from ending his life at a point of his choosing and exposed anyone assisting him to prosecution. The Court held by six votes to one that Article 8 was not violated, and rejected the Article 14 complaint. Its reasoning acknowledged a growing European trend toward decriminalisation, particularly for incurable conditions, but declined to convert that trend into a Convention obligation, relying instead on the margin of appreciation. Hwang (2020) has questioned whether the margin genuinely serves pluralism or functions as an abdication of the Court's supervisory role, and the criticism has force here. But notice what the Court was being asked to do. It was being asked to hold that Karsai's suffering was of a kind that Hungary must accommodate — a substantive determination about an interior state, made against a state that denies the relevance of the state altogether. Deference is what supervisory bodies do when the merits are of that shape.

Papadopoulou and Wicks (2024) argue that the right to life has been undertheorised in this literature and deserves more serious treatment than it usually receives in assisted dying debates, and I take their point to complement rather than contradict the present argument. The Convention's protection of life, on the Mortier reading, has become almost entirely a protection of process: the state must ensure that requests are free and informed, that a review mechanism exists, and that the mechanism is independent and reasonably prompt. What it does not require, and on the analysis offered here cannot require, is that any external authority agree with the applicant's assessment of their own life. Whether this is a diminution of the right to life or its appropriate specification under conditions of value pluralism is a normative question on which I take no position here, though I note that both readings are available and that the choice between them will drive most of the disagreement about the case.

One further doctrinal observation deserves recording because it complicates the neat picture. Procedural substitution does not distribute evenly across the Convention rights at issue. The Article 2 route taken in Mortier gives the Court a positive-obligation framework in which safeguards are natural objects of scrutiny; the Article 8 route taken in Karsai gives it a proportionality framework in which the margin of appreciation does the work instead. These are different mechanisms reaching a similar destination, and a critic might argue that I am assimilating them too quickly. The similarity I claim is limited and I would defend only that: in both, the Court declines to adjudicate the substantive question of whether a particular person's suffering warrants a particular outcome, and in both, what it does instead concerns institutional arrangements rather than the merits of the individual claim. Whether that similarity reflects a single doctrinal principle or two coincidentally convergent techniques is a question I leave open, since the corpus contains no analysis addressing it.

WHAT PROCEDURAL SUBSTITUTION CAN AND CANNOT DELIVER

If substance cannot be reviewed, everything turns on the design of the procedures that stand in its place, and it is worth being concrete about what those procedures can accomplish. They can establish that a request was made, that it was repeated over time, that the applicant was informed of alternatives, that a second and in some regimes a third practitioner was consulted, that no coercion is evident on the record, and that the assessing practitioner has no disqualifying interest. Each of these is genuinely checkable, and each contributes something. The Ghent protocol is instructive precisely because it consists almost entirely of such measures — sequencing, consultation, documentation, waiting periods — rather than of any attempt to define unbearability more tightly (Verhofstadt, Audenaert, & Van Assche, 2019). Practitioners facing an unverifiable criterion converge on procedure without being told to, which is indirect evidence for the thesis.

What procedures cannot do is supply the missing verification. A request repeated over six months is still a request whose ground is inaccessible; a second opinion is a second inaccessible judgment about the same inaccessible state. This limitation is structural, and it has a consequence for reform debates that I want to state sharply because it cuts against a widespread assumption. Adding safeguards does not make the substantive criterion more reliable. It makes the process more auditable, which is a different good and a real one, but the two are routinely conflated in legislative debate — a conflation visible in the recurring proposal that stricter definitions of unbearable suffering will reduce error, when what stricter definitions produce is more precise language about something still unobservable (Lyon, 2024; Verhofstadt, Van Assche, & Pardon, 2024).

The distinction between ex ante and ex post review deserves separate treatment, because Mortier concerns the latter and the two have different capacities. Ex ante mechanisms operate

before the act and can in principle prevent an error; their limitation is that they multiply the number of people making the same unverifiable judgment. Ex post mechanisms operate after the act and can only detect and sanction; their advantage is that they can be genuinely independent, since no reviewing member need be implicated in the decision. What the Belgian Commission attempted was an ex post model whose membership overlapped with the practitioner population, and it thereby forfeited the one advantage its position afforded (Walraet, 2023; Archer & Goffin, 2025). That is the precise sense in which the Court's finding was structural rather than a criticism of any individual: the design gave away the independence that was the whole point of locating review after the fact.

A comparative observation supports the prediction that the thesis generates. If procedural substitution is real, then regimes with higher epistemic gatekeeping load should exhibit more elaborate procedural architecture, and reform pressure in those regimes should concentrate on procedure rather than on substantive definition. The Belgian trajectory fits: the statute's substantive criteria have remained substantially stable while attention has moved repeatedly to the Commission, its composition, its powers, and the consequences of its findings (Nys, 2021; Archer & Goffin, 2025). The German case is the harder test, since the constitutional position sets the load at its maximum, and there the legislative difficulty has been precisely how to construct a procedural framework that respects a right defined without medical predicates — a difficulty visible in the debate over self-administration versus practitioner administration and in the failure to enact a statute for several years after the judgment (Braun, 2022; Wiesing, 2021). This is not proof. It is a pattern consistent with the thesis and inconsistent with the view that regimes respond to permissiveness by tightening definitions.

Two objections to the thesis deserve to be met on their merits rather than noted in passing. The first holds that I have overstated the inaccessibility of suffering, since clinicians assess pain, distress, and quality of life routinely and with tolerable reliability, using validated instruments. The reply is that those instruments measure reported states against population norms and are validated for population-level inference, whereas the legal question is whether this particular applicant's report crosses a threshold that the law declines to specify numerically — and no jurisdiction has proposed that a score on a suffering scale should determine eligibility, for reasons anyone who has considered the proposal will recognise immediately. The second objection, pressed most forcefully by Gilbert and Schuklenk (2026) from the permissive side, holds that treating the experiential predicate as unverifiable is a covert paternalism that ends by excluding people with mental illness who are capable and genuinely suffering. That objection lands against a use of my argument that I explicitly disclaim: nothing here supports exclusion, and indeed the analysis implies that exclusion on the basis of unverifiability would be arbitrary, since the predicate is no more verifiable for the physically ill applicant than for the psychiatric one. What the analysis supports is a claim about where legal control can be located, not about who should be admitted.

A third objection is more interesting because it concedes the analysis and denies its significance. Suppose it is granted that the experiential predicate is unverifiable and that procedure has replaced substance. So what? The law regularly makes self-reports operative — a person's statement that they consent, that they wish to marry, that they revoke a will — and the fact that we cannot audit the interior state behind the statement has never troubled us. The distinguishing feature in the assisted dying case, I would argue, is irreversibility combined with a statutory demand for external certification. The law does not simply take the applicant's word; it requires physicians to attest that a condition is satisfied, and physicians who attest are exposed accordingly (Lyon, 2024). A legal system that wanted only to make the self-report operative could do so without the attestation requirement, as arguably the German constitutional position does. The

systems that keep the attestation while removing the medical predicate that made it meaningful are the ones this article is about, and their instability is the significance the objection asks for.

It is worth widening the frame briefly, because the argument has a dimension that the doctrinal literature rarely addresses. A legal system that permits assisted dying on the basis of an unverifiable predicate is making a decision about where authority over the value of a life resides, and that decision belongs to a broader pattern of how modern states govern bodies. The Foucauldian analyses are relevant here without being decisive: Gomez (2024) traces how contemporary surveillance practices constitute the governed body, and McDougall (2023) argues that the post-pandemic period has left a biopolitical residue in the technologies of self-monitoring. Chernov (2023), applying Mbembe, examines how states distribute exposure to death through calculated abandonment rather than through direct action, which is a useful counterpoint: the assisted dying debate concerns the state's authorisation of death for those who request it, while necropolitical analysis concerns the state's distribution of death among those who do not. Mićunović (2023) identifies an inverted immunitary paradox in Western Balkan vaccination politics that illustrates how quickly bodily-autonomy vocabularies can be inverted in political use. Cvjetić (2025) distinguishes disciplinary, affective, and performative modes by which ideology is inscribed somatically. I introduce these not to argue that assisted dying is an instrument of biopolitical control — I do not think the evidence supports that, and the framework can be used lazily — but because they supply the vocabulary for a question the doctrinal literature elides: what is at stake when a state makes an unverifiable self-report legally operative.

That question connects to a further theme worth registering. A legal standard that turns on believing a person's account of their own experience is unusually exposed to shifts in general epistemic conditions. Postolache (2025) analyses how algorithmic mediation reshapes the regime of plausibility by which claims are assessed, and Radišić (2025) examines the collapse of a shared cognitive horizon and its implications for democratic institutions. If assessors' willingness to credit first-person reports varies with the broader epistemic culture, then the effective stringency of an experiential predicate is not fixed by its wording at all, and the same statute will operate differently in different decades without any amendment. Vasconcelos (2025), writing phenomenologically about loneliness among the hyperconnected, points toward a related concern: the existential component of suffering may itself be historically variable in ways that a statute drafted in 2002 cannot anticipate. These are speculative extensions and I flag them as such, but they identify where the analysis would go next.

A word on what the analysis implies for jurisdictions that have not legalised. My own region has no framework, and the question surfaces there mainly in bioethics teaching rather than in litigation. The lesson I would draw for such a setting is not that legalisation is unwise but that the drafting choice about terminality determines the institutional problem the system will subsequently face, and that the choice should therefore be made with the institutional consequence in view rather than solely on the normative merits. Reed (2023) is persuasive that terminalism is normatively unprincipled; Krüger (2022) shows that the European field is moving away from it; and yet a legislature persuaded by both should understand that it is thereby committing itself to build and maintain a review architecture of a demanding kind, since that architecture will be the only remaining locus of legal control. Deciding the substantive question without deciding the institutional one is how systems arrive at the position Belgium occupied when Mortier reached Strasbourg.

CONCLUSION

The first hypothesis is supported by the structure of the criteria rather than by any tally of cases. Decomposing the European eligibility tests into medical and experiential predicates shows

that terminality requirements and epistemic gatekeeping load stand in an inverse relation: terminal-prognosis regimes place the load low, incurability-without-terminality regimes place it in an intermediate band, and the German constitutional position, which attaches the right to the decision rather than to any medical state, places it at its maximum. The consequence, which is the finding rather than the framework, is that the regimes usually described as most permissive are also those in which the decisive legal criterion is least susceptible to external verification — a pairing that the permissiveness vocabulary obscures rather than reveals.

The second hypothesis is supported doctrinally. Mortier v. Belgium exhibits procedural substitution in a single disposition: substantive deference on whether a permissive regime can satisfy Article 2, paired with a finding of violation located in the independence of the review commission and the length of the criminal investigation. Karsai v. Hungary reaches an analogous destination through Article 8 and the margin of appreciation, declining substantive review of a refusal as Mortier declined substantive review of a permission. I have registered the objection that these are different mechanisms and should not be assimilated too quickly, and I would defend only the limited similarity claimed: in neither case did the Court adjudicate whether a particular person's suffering warranted a particular outcome, and in both, what it examined instead was institutional.

The third hypothesis is normative and I state it as a claim rather than a finding. Definitional reform cannot reduce the epistemic gatekeeping load, because precision in the description of an unobservable state does not create observability. It follows that the effort currently devoted to refining the statutory language of unbearable suffering is misallocated, and that the same effort applied to the independence, composition, timing, and adversariality of review bodies would yield more. This is a claim about institutional design, not about whether assisted dying should be permitted, and it is compatible with every substantive position in the underlying debate — which is, I think, a point in its favour rather than an evasion.

The principal original contribution of this article is the epistemic gatekeeping load together with the procedural substitution thesis it supports: a demonstration that the removal of terminality is not simply a widening of access but a transfer of the entire evidentiary burden onto a predicate of a categorically different kind, that legal systems confronted with such a transfer replace substantive review with procedural architecture, and that Mortier is the doctrinal moment at which a supervisory court performed the substitution openly. Secondary to that stands the diagnostic reframing of the vagueness complaint: the indeterminacy of unbearable suffering is a structural entailment of a drafting choice, not a defect of draftsmanship, and treating it as the latter has consumed a great deal of scholarly and legislative attention to no effect.

Three implications follow for different audiences. For legislators, the operative recommendation is that the terminality decision and the review-architecture decision should be taken together rather than sequentially, since the first determines the demands placed on the second. A parliament persuaded by Reed (2023) that terminalism is unprincipled has thereby committed itself to an institutional burden it may not have priced. For courts, the implication is a candour recommendation: if substantive review of experiential predicates is impossible, saying so explicitly would be preferable to reaching the same result through the margin of appreciation, which presents an incapacity as a deference (Hwang, 2020; Papadopoulou & Wicks, 2024). For clinicians and the professional bodies that support them, the implication is protective. A practitioner asked to certify unbearability is being asked to attest to something no examination can establish, and the professional exposure this creates is documented rather than speculative (Lyon, 2024; Archer et al., 2025). Protocols that specify process rather than substance, as the Ghent protocol does, are not evasions of the difficulty; they are the rational response to it (Verhofstadt, Audenaert, & Van Assche, 2019).

Six limitations bound these claims. The corpus is anglophone with few exceptions, and I read the judgments and statutes in translation, which in a field where a single adjective carries doctrinal weight is a genuine constraint rather than a formality. The intermediate band of my ordering rests on fewer sources than the extremes, because the Spanish, Portuguese, and Austrian frameworks are less studied in English than the Belgian, Dutch, and German ones, and I would not be surprised to learn that a specialist would reorder them. The two-predicate decomposition requires judgment calls at the margin, particularly on unrelievability, which has both a therapeutic and an evaluative face and which I have classified as experiential where the statutes make the applicant's acceptance decisive. I have collected no data on practice: no commission files, no interviews with assessors, no case outcomes, so every claim about how the criteria operate is a claim about what the published literature reports about their operation. The prediction about reform trajectories is supported by a pattern in two jurisdictions and is not thereby established. And the whole analysis is that of a lawyer and philosopher rather than a clinician, which matters most in the psychiatric material, where I have deferred to the specialist literature on questions I am not competent to adjudicate (Sisti & Mann, 2024; Teo, 2024; Trachsel & Jox, 2022).

Where should this go? The most valuable next step would be empirical: a study of commission and review files across two or more regimes, coded for whether disagreement concentrates on medical or experiential predicates, which would test the load ordering directly rather than deriving it from statutory structure. A second would be comparative-institutional, examining whether regimes that have reformed since Mortier have in fact moved procedural rather than substantive levers. A third would be doctrinal, asking whether the Article 2 and Article 8 routes converge on a single principle or merely on a similar result, a question the present corpus does not answer. And a fourth, which I would like to see attempted by someone with the relevant clinical standing, would ask whether any operationalisation of unbearability achieves inter-rater reliability worth the name — because if one does, the argument of this article is wrong in an interesting way, and if none does, the argument is confirmed at the point where it matters most.

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AUTONOMIJA BEZ TERMINALNOSTI: PRAVNI PRAG „NEPODNOŠLJIVE PATNJE" U EU OKVIRIMA POTPOMOGNUTOG UMIRANJA NAKON PRESUDE MORTIER PROTIV BELGIJE

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Sažetak: Evropski zakoni o potpomognutom umiranju oštro se razilaze u pitanju da li podnosilac zahtjeva mora biti terminalno bolestan, a to razilaženje ima posljedice koje literatura nije dovoljno teorijski obradila. Tamo gdje se traži terminalnost, podobnost počiva pretežno na medicinski provjerljivom predikatu o stanju podnosioca. Tamo gdje se ne traži — u Belgiji, Nizozemskoj i Luksemburgu, te kao implikacija odluke njemačkog Saveznog ustavnog suda iz 2020. godine — cjelokupna težina kontrole pada na predikat kojem pristup ima samo podnosilac: nepodnošljivu patnju. Ovaj članak razvija pojam epistemičkog kontrolnog opterećenja, definisanog kao udio odluke o podobnosti koji počiva na predikatima dostupnim isključivo u prvom licu, i tvrdi da se to opterećenje kreće obrnuto proporcionalno zahtjevima terminalnosti u evropskim režimima. Iz toga izvodim središnju tezu članka, koju nazivam proceduralnom supstitucijom: kako epistemičko kontrolno opterećenje raste, pravni sistemi ne mogu i ne nadoknađuju to preciziranjem materijalne definicije, nego proceduralnu arhitekturu zamjenjuju za materijalnu kontrolu. Presuda Mortier protiv Belgije jeste trenutak u kojem je Evropski sud za ljudska prava tu supstituciju učinio eksplicitnom na nadzornom nivou: utvrdio je da permisivni režim materijalno ne krši član 2 ni u slučaju neterminalnog psihijatrijskog podnosioca, ali je povredu locirao u nezavisnost naknadnog kontrolnog tijela i u trajanje krivične istrage. Presuda Karsai protiv Mađarske potvrđuje obrazac iz suprotnog smjera, kroz široko polje slobodne procjene. Normativna tvrdnja slijedi: dugotrajni prigovor da je „nepodnošljiva patnja" neprihvatljivo neodređena promašuje metu, jer neodređenost nije nedostatak nomotehnike koji bi bolja definicija otklonila, nego strukturna posljedica napuštanja terminalnosti — pa je prikladno mjesto reforme oblikovanje kontrolnih institucija. Analiza je dogmatsko-pravna i komparativna, oslanja se na šezdeset verifikovanih izvora i nudi pravnu analizu, a ne pravni savjet.

Ključne riječi: *potpomognuto umiranje, nepodnošljiva patnja, terminalnost, Mortier protiv Belgije, Evropski sud za ljudska prava, proceduralna kontrola, eutanazija, autonomija.*