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Compassion in Dying v. Washington: A Resolution to the "Jurisprudence of Doubt" Enshrouding Physician-Assisted Suicide?

By affirming a district court decision[1] holding Washington's criminal prohibition of assisted suicide[2] unconstitutional, an en banc Ninth Circuit in *Compassion in Dying v. Washington*[3] reversed a three judge panel decision[4] and proffered the most reasoned and carefully drafted opinion yet in the battle surrounding terminally ill patients and their quest to legally pursue physician-assisted suicide. Three terminally ill patients, five physicians who treat terminally ill patients,[5] and

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1. Compassion in Dying v. Washington, 850 F. Supp. 1454 (W.D. Wash. 1994) (granting plaintiff's motion for summary judgment), *aff'd en banc*, 79 F.3d 790 (9th Cir. 1996).

2. Wash. Rev. Code § 9A.36.060(1) (2) (1995). The statute reads as follows: "(1) A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide. (2) Promoting a suicide attempt is a Class C felony." *Id.* Washington voters rejected a voter referendum that would have legalized physician-assisted suicide for the terminally ill by a narrow margin in 1991. Victoria Slind-Flor, *Sides Turn Up Heat on Assisted Suicide*, 18 NAT'L L.J. 11 (1995), at A12 [hereinafter Slind-Flor]. Compassion in Dying, which had backed the referendum, subsequently filed suit. *Id.* The plaintiffs only challenged the "or aids" portion of the statute. *Compassion in Dying*, 79 F.3d at 797.

3. 79 F.3d 790 (9th Cir. 1996) (en banc). The decision also indicated its disagreement with Lee v. Oregon, 891 F. Supp. 1429 (D. Or. 1995).

4. Compassion in Dying v. Washington, 49 F.3d 586 (9th Cir. 1995), *rev'd en banc*, 79 F.3d 790 (9th Cir. 1996).

5. The five physician plaintiffs are Dr. Harold Glucksberg, an assistant professor of medicine at the University of Washington School of Medicine who practices oncology (the treatment of cancer) at the Pacific Medical Center in Seattle; Dr. John P. Geyman, a professor emeritus at the University of Washington and past chair of the Department of Family Medicine at the University of Washington School of Medicine who also has a private practice in family medicine; Dr. Thomas A. Preston, chief of the cardiology unit at Pacific Medical Center in Seattle; Dr. Abigail Halpern, a family medicine practitioner who occasionally treats patients with terminal illnesses including cancer and AIDS; and Dr. Peter Shalit, who practices general internal medicine and has a substantial number of patients infected with HIV or suffering from AIDS. *Compassion in Dying*, 850 F. Supp. at 1457-58. All five "state that they have received requests from terminally ill, mentally competent patients in the final stage of their diseases who wished assistance in hastening death," but have not done so because of the Washington statute. *Id.* at 1458.

Compassion in Dying,[6] an organization that provides counseling and assistance to mentally competent, terminally ill adults considering suicide, challenged the statute under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[7] Asserting that mentally competent, terminally ill adults have a right to voluntarily hasten their death by taking a lethal dose of physician prescribed drugs, they sought both declaratory and injunctive relief.[8] All three patients were suffering from the terminal phases of their respective illnesses and used pseudonyms to protect their privacy. They were Jane Roe, a sixty-nine-year-old retired pediatrician suffering from breast cancer, which had spread throughout her skeleton; John Doe, a forty-four-year-old artist suffering from AIDS, who had lost seventy percent of his vision due to a degenerative eye disease that would eventually cause total blindness; and James Poe, a sixty-nine-year-old retired sales representative suffering from emphysema, a condition which caused a constant suffocating sensation, requiring him to use an oxygen tank at all times and take morphine regularly to ease the panic associated with his feeling of suffocation.[9] Jane Roe and John Doe both died before the district court rendered its judgment, and James Poe died soon thereafter.[10] The United States District Court for the Western District of Washington declared the statute unconstitutional under both a Due Process and

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6. Compassion in Dying is a non-profit organization that "provides information, counseling and assistance free of charge to mentally competent, terminally ill adult patients considering suicide and to the families of such patients." *Id.*

> According to its guidelines, Compassion in Dying will not assist anyone to commit suicide who expresses any ambivalence or uncertainty. If the patient has immediate family members or other close personal friends, their approval must be obtained. If any members of the immediate family express disapproval, Compassion in Dying will not provide assistance with suicide. As an additional safeguard, Compassion in Dying requires the patient to provide medical records. A consulting physician must review them to verify the patient's terminal prognosis and decision-making capability as well as to rule out inadequate pain management as the reason for requesting assisted suicide.

Id. at 1458.

7. *Id.* at 1459. The district court did not rule on the claims of the four physicians or Compassion in Dying because they were not adequately addressed in the motions for summary judgment submitted to the court. *Compassion in Dying*, 49 F.3d at 589.

8. 850 F. Supp. at 1456. The physicians were granted standing to assert the rights of their terminally ill patients in general. *Compassion in Dying*, 79 F.3d at 795 (noting that the district court properly granted the physicians standing to assert the rights of their patients). Although Compassion in Dying was listed as the primary plaintiff in the case heading, their claims were not before the district court or subsequently the Ninth Circuit. *Id.* at 797. The district court stated that it would reach Compassion in Dying's claims later in the proceedings if necessary. *Id.*

9. *Id.* at 1456-57.

10. 49 F.3d at 588.

Equal Protection analysis, but declined to enjoin its enforcement.[11] In a decision blatantly driven by the religious and personal biases of the majority, a three-judge panel of the Ninth Circuit reversed, finding no constitutional support for the right of mentally competent, terminally ill adults to voluntarily hasten death with a lethal dose of physician

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11. 850 F. Supp. at 1467-68. Relying on Planned Parenthood v. Casey, 505 U.S. 833 (1992), Chief Judge Deborah Rothstein held that like abortion, "the decision of a terminally ill person to end his or her life 'involv[es] the most intimate and personal choices a person may make in a lifetime' and constitutes a 'choice[] central to personal dignity and autonomy'" and was therefore a fundamental right. *Id.* at 1460 (quoting *Casey*, 505 U.S. at 851). She also found Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990), "instructive" in determining that mentally competent, terminally ill patients had a fundamental right to assisted suicide, stating that "the court does not believe that a distinction can be drawn between refusing life-sustaining medical treatment and physician-assisted suicide by an uncoerced, mentally competent, terminally ill adult." *Id.* at 1461. Applying the *Casey* "undue burden" test, Judge Rothstein held that the statute not only presents a substantial obstacle for terminally ill, mentally competent persons wishing to commit suicide, but entirely prohibits the exercise of this constitutional right. *Id.* at 1465 (citing *Casey*, 505 U.S. at 878, which states that a government regulation is an "undue burden" on a fundamental right if in a large fraction of cases it would operate as a substantial obstacle to the exercise of the right). Judge Rothstein also examined the two primary interests furthered by the statute, "preventing suicide and protecting those at risk of suicide from undue influence from others who would aid them in completing the act." *Id.* at 1464. However, she concluded that "the State's legitimate interest in preventing suicide is not abrogated by allowing mentally competent, terminally ill patients" for whom suicide would not abruptly cut life short "to freely and voluntarily commit physician-assisted suicide." *Id.* Addressing the state's concern for those who may commit suicide from undue influence or duress, she held that those "who make knowing and voluntary choices to commit physician-assisted suicide by definition fall outside the realm of the State's concern." *Id.* at 1465. Because mentally competent, terminally ill adults may lawfully hasten death under Washington's Natural Death Act by ending life-sustaining treatment, Judge Rothstein also held the statute to violate the Equal Protection Clause. *Id.* at 1466-67. Washington's Natural Death Act reads in relevant part:

> The legislature finds that adult persons have the fundamental right to control the decisions relating to the rendering of their own health care, including the decision to have life-sustaining treatment withheld or withdrawn in instances of a terminal condition or permanent unconscious condition.
>
> The legislature further finds that modern medical technology has made possible the artificial prolongation of human life beyond natural limits.
>
> The legislature further finds that, in the interest of protecting individual autonomy, such prolongation of the process of dying for persons with a terminal condition or permanent unconscious condition may cause loss of patient dignity, and unnecessary pain and suffering, while providing nothing medically necessary or beneficial to the patient.

WASH. REV. CODE § 70.122.010 (1995).

prescribed drugs.[12] On March 16, 1996, the Ninth Circuit en banc reversed the panel and upheld the district court.[13]

There are three sources of substantive liberty rights under the Due Process Clause of the Fourteenth Amendment, the most familiar being those enumerated in the Bill of Rights.[14] Liberty has also been held to encompass rights rooted in our nation's tradition, or those practices protected from government intrusion by law when the Fourteenth Amendment was ratified.[15] Finally, and most importantly for the assisted suicide debate, liberty has also been held to include "a realm of personal liberty which the government may not enter,"[16] rights "implicit in the concept of ordered liberty."[17] The Supreme Court has

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12. *Compassion in Dying*, 49 F.3d at 594. Both Judge Noonan and Judge O'Scannlain, who joined Judge Noonan's majority opinion, have strong Catholic affiliations and ties to Catholic organizations with open pro-life opinions. Howard Mintz, *Ninth Circuit Judges Spar Over "Right to Die,"* THE RECORDER, October 27, 1995 [hereinafter Mintz]. Compassion in Dying had asked Noonan to withdraw from the case, but the request was never acted upon. *Id.*

The tone of Noonan's majority opinion and choice of words in several contexts belies any notion of judicial impartiality. Judge Noonan first admonished the district court for using language from *Casey* out of context to support the right of mentally competent, terminally ill persons to have assistance in hastening their deaths, calling it "an enormous leap" that does "violence to the context" and "ignore[s] the differences between the regulation of reproduction and the prevention of the promotion of killing a patient at his or her request." 49 F.3d at 590. Unable to limit his analysis to the rights of mentally competent, terminally ill adults, Noonan stated that "[i]f at the heart of the liberty protected by the Fourteenth Amendment is this uncurtailable ability to believe and to act on one's deepest beliefs about life, the right to suicide and the right to assistance in suicide are the prerogative of . . . every sane adult." *Id.* at 591. Second, Noonan accused the district court of ignoring *Cruzan*'s recognition of the state's interest in preserving life, and faulted its interpretation of "*Cruzan*'s limited acknowledgement of a right to refuse treatment as tantamount to an acceptance of a terminally ill patient's right to aid in self-killing." *Id.* Finally, Noonan held that Washington's interests "outweigh any alleged liberty of suicide." *Id.* Those interests included not having physicians kill their patients, not pressuring the elderly and infirm to consent to their own deaths, protecting the poor and minorities from exploitation and protecting the handicapped from societal indifference. *Id.* at 592. Following his assertion that "justice, prudence, and fortitude" are more important components of judicial character than compassion, and noting that the law has "never recognized a right to let others enslave you, mutilate you, or kill you," the court upheld the validity of the statute. *Id.* at 594. Judge Wright dissented. *Id.*

13. *Compassion in Dying*, 79 F.3d at 838-39.

14. 505 U.S. at 847. Although an argument may be made under a generalized Fourteenth Amendment right to privacy, the Supreme Court has stated that the right to refuse treatment is more properly analyzed as a liberty interest. 497 U.S. at 279 n.7. Therefore, as most plaintiffs have argued, the right to assisted suicide is likely a Fourteenth Amendment liberty interest.

15. 505 U.S. at 847.

16. *Id.*

17. Bowers v. Hardwick, 478 U.S. 186, 191 (1986).

held this animate definition of liberty to encompass marriage, procreation and abortion, contraception, family relationships, child rearing, and education.[18] Those seeking to reject the right to physician-assisted suicide argue that no constitutional right can exist because it was not a practice protected by law when the Fourteenth Amendment was ratified. On the contrary, it has traditionally been proscribed by law.[19] Those trying to establish the right commonly assert the more lithe and dynamic "realm of personal liberty" as the source for a right to assisted suicide, analogizing to the Supreme Court's rulings in *Cruzan v. Director, Missouri Department of Health*[20] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[21]

In *Cruzan*, the Supreme Court first addressed the issue of whether Due Process Clause liberty includes a "right to die."[22] Nancy Beth Cruzan suffered severe head injuries in an automobile accident, causing a persistent vegetative state with no significant cognitive function. Nancy's parents sought to terminate artificial nutrition and hydration when it became apparent she had virtually no chance of regaining her mental faculties. When hospital employees refused to grant their request, Nancy's parents filed suit, asserting a fundamental right under the Fourteenth Amendment to terminate "death prolonging procedures."[23] Although granted by the trial court, the Supreme Court of Missouri denied the request because Nancy's parents could not show "clear and convincing evidence" of her desire to terminate life support under such circumstances.[24] The court also doubted whether a right to

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18. 505 U.S. at 851-52.

19. People v. Kevorkian, 527 N.W.2d 714 (Mich. 1994), *cert. denied*, 115 S. Ct. 1795 (1995); Quill v. Vacco, 80 F.3d 716 (2d Cir. 1996). However, courts frequently disagree on the issue. *Compassion in Dying*, 79 F.3d at 809 ("[b]y the time the Fourteenth Amendment was adopted in 1868, suicide was generally not punishable, and in only nine of the 37 states is it clear that there were statutes prohibiting assisting suicide").

20. 497 U.S. 261 (1990).

21. 505 U.S. 833 (1992).

22. 497 U.S. at 277. "This is the first case in which we have been squarely presented with the issue whether the United States Constitution grants what is in common parlance referred to as a 'right to die.'" *Id.*

23. *Id.* at 266-68. Nancy's parents also brought an Equal Protection challenge, claiming that Missouri impermissibly treats incompetent patients differently from competent ones. *Id.* at 287 n.12. The Missouri Supreme Court rejected the argument, stating that the differences between the choice of a competent person to refuse treatment and the choice made for an incompetent person by someone else are so obviously different that the State is warranted in establishing a more rigorous evidentiary standard. *Id.* at 287.

24. *Id.* at 268-69. Nancy's guardian ad litem, who did not disagree with the trial court's decision, brought the appeal to the Missouri Supreme Court because he felt he had a duty to do so. *Id.* at 334.

refuse medical treatment existed under the Constitution, placing the right to refuse treatment in the doctrine of informed consent.[25] The United States Supreme Court affirmed the Missouri Supreme Court's "clear and convincing" standard,[26] limiting its analysis to whether Missouri could impose the evidentiary burden on those seeking to terminate an incompetent person's life-sustaining hydration and nutrition.[27] However, in order to facilitate that analysis, the Court assumed that Fourteenth Amendment liberty would grant the right to a competent person.[28] This assumption has provided a foundation for

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25. *Id.* at 268.

> Informed consent is the name for a general principle of law that a physician has a duty to disclose what a reasonably prudent physician in the medical community in the exercise of reasonable care would disclose to his patient as to whatever grave risks of injury might be incurred from a proposed course of treatment, so that a patient, exercising ordinary care for his own welfare, and faced with a choice of undergoing the proposed treatment, or alternative treatment, or none at all, may intelligently exercise his judgment by reasonably balancing the probable risks against the probable benefits.

BLACK'S LAW DICTIONARY 779 (6th ed. 1990).

26. 497 U.S. at 265. The question before the Court was whether Nancy Cruzan had a right under the United States Constitution which would require the hospital to withdraw life sustaining treatment from her under the circumstances presented. *Id.* at 268. The Court also rejected petitioner's alternative contention that Missouri "must accept the substituted judgment of close family members even in the absence of substantial proof that their views reflect the views of the patient." *Id.* at 285-86.

27. *Id.* at 279-80.

28. *Id.* Justice O'Connor filed a concurring opinion, agreeing that "a protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions . . . and that the refusal of artificially delivered food and water is encompassed within that liberty interest." *Id.* at 287 (O'Connor, J., concurring). Justice O'Connor went on to say that "[a] seriously ill or dying patient whose wishes are not honored may feel a captive of the machinery required for life-sustaining measures or other medical interventions." *Id.* at 288.

> Requiring a competent adult to endure such procedures against her will burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment. Accordingly, the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water.

Id. at 289. Justice Scalia also filed a concurring opinion, stating that:

> [w]hile I agree with the Court's analysis today, . . . I would have preferred that we announce, clearly and promptly, that the federal courts have no business in this field; that American law has always accorded the state the power to prevent, by force if necessary, suicide—including suicide by refusing to take appropriate measures necessary to preserve one's [own] life; that the point at which life becomes "worthless," and the point at which the means necessary to preserve it become "extraordinary" or "inappropriate," are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory . . . and

plaintiffs asserting the right to physician-assisted suicide, who argue that because both result in the patient's death, they are fundamentally identical. Those opposed to the right counter that it causes death by affirmative action while the termination of life support simply lets nature take its course. Ammunition for both sides of the assisted suicide debate can be found in the Court's justification of both the assumption and Missouri's evidentiary burden for incompetent persons. The Court recognized not only that "[t]he choice between life and death is a deeply personal decision of obvious and overwhelming finality," but also that the state may "assert an unqualified interest in the preservation of human life," finding no dispute "that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment."[29] Also recognizing Missouri's right to protect against the possibility of abuse when surrogates assert an incompetent patient's right to refuse treatment, the Court balanced the liberty interests assumed against the state interest[30] and held that the "clear and

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> . . . it is up to the citizens of Missouri to decide, through their elected representatives, whether that wish will be honored.

Id. at 293 (Scalia, J., concurring). Finding no historical basis for a right to commit suicide, he would have declined to extend substantive due process to protect the right assumed by Chief Justice Rehnquist's majority opinion. *Id.* Justice Brennan, with whom Justices Marshall and Blackmun joined dissenting, would have affirmatively recognized Nancy Cruzan's "fundamental right to be free of unwanted artificial nutrition and hydration." *Id.* at 302 (Brennan, J., dissenting). Stating that "Nancy Cruzan is entitled to choose to die with dignity," they would not have qualified the right with any state interest, and found that the Missouri Supreme Court's clear and convincing procedural obstacle impermissibly burdened that right. *Id.* "For many, the thought of an ignoble end, steeped in decay, is abhorrent. A quiet, proud death, bodily integrity intact, is a matter of extreme consequence." *Id.* at 310-11. Most importantly, they recognized that the state's interest in life cannot be abstracted from the interest of the person living that life, and would not allow Missouri's general interest in life to outweigh Nancy Cruzan's particular and intense interest in self determination. *Id.* at 314. Although not denying that procedural safeguards are necessary to protect the state's interests, the Justices believed that Missouri's rule "imposes a markedly asymmetrical evidentiary burden." *Id.* at 315-16. Justice Stevens, in a separate dissent, agreed that "a competent individual's decision to refuse life-sustaining medical procedures is an aspect of liberty protected by the Due Process Clause." *Id.* at 331 (Stevens, J., dissenting). Justice Stevens also agreed that procedural safeguards were required, but that the appointment of the guardian ad litem coupled with the trial court's searching inquiry under the clear and convincing standard was adequate. *Id.* at 353.

29. *Id.* at 281.

30. *Id.* "'[W]hether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.'" *Id.* at 279 (quoting Youngberg v. Romeo, 457 U.S. 307, 321 (1982)).

convincing" standard adequately protected the rights of the state and the patient.[31]

Casey is also frequently cited by those seeking Constitutional justification for a right to physician-assisted suicide. In *Casey*, five abortion clinics, one physician individually, and a class of physicians who provide abortion services challenged the constitutionality of five provisions of the Pennsylvania Abortion Control Act of 1982.[32] During the course of its opinion, the Court reaffirmed the fundamental holding of *Roe v. Wade*[33] and the use of substantive due process to protect fundamental liberty rights.[34] Stating that matters "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment," the Court defined the "heart of liberty" as the "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[35] Those in favor of physician-assisted suicide have declared this language to be prescriptive of the substantive liberty right they seek to assert. They argue that like abortion, physician-assisted suicide is a choice central to personal autonomy. Those on the other side of the issue contend that the two rights are fundamentally different, and that the language cited

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31. *Id.* at 262.

> Here, Missouri has in effect recognized that under certain circumstances a surrogate may act for the patient in electing to have hydration and nutrition withdrawn in such a way as to cause death, but it has established a procedural safeguard to assure that the action of the surrogate conforms as best it may to the wishes expressed by the patient while competent.

Id. at 279. Evidence was presented that Nancy had expressed thoughts to a housemate in a somewhat serious conversation that she would not want to continue her life unless she could do so halfway normally. *Id.* at 268. The Missouri Supreme Court found the statements "unreliable for the purpose of determining her intent" and "insufficient to support the co-guardians ['] claim to exercise substituted judgment on Nancy's behalf." *Id.* (quoting Cruzan v. Harmon, 760 S.W.2d 408, 426 (Mo. 1988) (en banc), *aff'd*, Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990)). The Court stated that the evidentiary burden properly placed the increased risk of erroneous decision on those seeking to invoke an incompetent individual's right to terminate life-sustaining treatment. *Id.* at 283.

32. Planned Parenthood v. Casey, 505 U.S. 833, 841 (1992). Specifically, the provisions requiring a minor to obtain the informed consent of a parent; the provision requiring all women be provided with certain information 24 hours before the abortion is performed to facilitate informed consent; the provision requiring married women to notify their husbands; and the provisions imposing reporting requirements on facilities providing abortions. *Id.* The Court upheld all but the spousal notification provision. *Id.* at 879.

33. 410 U.S. 113 (1973).

34. 505 U.S. at 851-53.

35. *Id.* at 851.

from *Casey* is merely dicta that was not intended to apply to assisted suicide.

To date, the battles have been won by the anti-assisted suicide movement because no decision recognizing a right to assisted suicide has survived the appellate process.[36] On December 13, 1994, the Mich-

36. The Michigan Circuit Court for Wayne County, Michigan was the first to consider the issue in two separate challenges to the constitutionality of Michigan's statute criminalizing assisted suicide. In Hobbins v. Attorney General, 1993 WL 276833 (Mich. Cir. Ct. May 20, 1993), *rev'd*, Hobbins v. Attorney General, 518 N.W.2d 487 (Mich. Ct. App. 1994), *rev'd*, People v. Kevorkian, 527 N.W.2d 714 (Mich. 1994), *cert. denied*, 115 S. Ct. 1795 (1995), two patients suffering from terminal cancer, a friend of one of the patients, and seven health care professionals sought an injunction and declaration that Michigan's assisted suicide statute was an unconstitutional invasion of privacy or liberty interests under the Fourteenth Amendment to the United States Constitution. Citing to *Cruzan*, the court held that the right of self-determination rooted in the Fourteenth Amendment includes the right to choose to cease living, but declined to decide whether the Michigan statute placed an unconstitutional burden on that right until a full record had been developed on the issue. 1993 WL 276833 at *7, *9. In People v. Kevorkian, 1993 WL 603212 (Mich. Cir. Ct. Dec. 13, 1993), *rev'd*, Hobbins v. Attorney General, 518 N.W.2d 487 (Mich. Ct. App. 1994), *rev'd*, People v. Kevorkian, 527 N.W.2d 714 (Mich. 1994), *cert. denied*, 115 S. Ct. 1795 (1995), the notorious physician, Jack Kevorkian, moved to dismiss charges that he violated the same Michigan statute, claiming it infringed upon fundamental liberty interests protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Specifically, Kevorkian claimed the statute was an undue burden on a person's right to terminate their life when terminally ill and suffering from intolerable pain. 1993 WL 603212 at *5. The court rejected both the prosecutor's argument that the asserted right was not fundamental because it had no basis in our Nation's history and tradition, and Kevorkian's argument that history and tradition can be ignored when determining if a right is fundamental. *Id.* at *7-*8. The court found an approach combining both tests more appropriate. *Id.* at *8. Although recognizing that the view proscribing suicide currently predominates, the court found evidence approving suicide in our traditions and history, and turned to the question of whether suicide could ever be implicit in the concept of ordered liberty. *Id.* at *13. The court held that the decision to hasten death was a right implicit in the concept of ordered liberty, finding that "there can be little doubt that the decision to commit suicide involves an intimate and personal choice . . . [that] ranks among the most important that a person may make concerning one's own being . . . . 'The choice between life and death is a deeply personal decision of obvious and overwhelming finality.'" *Id.* at *14 (quoting *Cruzan*, 497 U.S. at 281). To determine the extent of this right, the court used the balancing test enunciated in *Cruzan* and weighed the right against the state's unqualified interest in preserving life. *Id.* at *14-15. Although the court found the state's interest compelling enough to negate a right in many cases, the court held that "when a person's quality of life is significantly impaired by a medical condition . . . extremely unlikely to improve, . . . and . . . suicide is a reasonable response to the condition . . . and the decision . . . is freely made without undue influence, such a person has a constitutionally protected right to commit suicide." *Id.* at *19. Once the court defined the parameters of the right, it applied the "undue burden" analysis from *Casey* and held the state's blanket proscription of suicide unconstitutional. *Id.* at *19-20. The decisions in *Hobbins* and *Kevorkian* were appealed,

igan Supreme Court upheld the constitutionality of Michigan's statute prohibiting assisted-suicide against challenges by the notorious physician Jack Kevorkian and other physicians, as well as several terminally ill patients.[37] To decide whether the terminally ill have a right to assisted suicide, the court held it must first determine whether there is a liberty interest in suicide itself.[38] The court refused to read *Cruzan* as protecting a liberty interest more expansive than the right to refuse to begin or continue life sustaining treatment, finding that *Cruzan* drew a distinction between "acts that artificially sustain life and acts that artificially curtail life."[39] The court also limited *Casey* to liberty

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the cases consolidated, and on May 10, 1994, a mere seven days after Judge Rothstein declared Washington's statute unconstitutional, the court of appeals reversed. Hobbins v. Attorney General, 518 N.W.2d 487 (Mich. Ct. App. 1994), *rev'd*, People v. Kevorkian, 527 N.W.2d 714 (Mich. 1994), *cert. denied*, 115 S. Ct. 1795 (1995). Asserting the state's unqualified interest in protecting life, the court held that the "scope of rights encompassed by the concept of ordered liberty does not include the right to commit suicide, much less the right to assisted suicide." 518 N.W.2d at 492. The court also declined to extend the right established in *Cruzan* to physician-assisted suicide, limiting that decision as only recognizing the right "to refuse unwanted medical treatment and passively die a natural death, not to actively intervene so as to hasten one's death." *Id.* at 493. On December 13, 1994, a majority of the Michigan Supreme Court reversed. People v. Kevorkian, 527 N.W.2d 714 (Mich. 1994), *cert. denied*, 115 S. Ct. 1795 (1995).

37. People v. Kevorkian, 527 N.W.2d 714 (Mich. 1994), *cert. denied*, 115 S. Ct. 1795 (1995). *See infra* note 39 and accompanying text. Justice Levin dissented in part, stating that the act "violates the Due Process Clause insofar as it bars a competent, terminally ill person facing imminent, agonizing death from obtaining medical assistance to commit suicide." *Id.* at 746 (Levin, J., dissenting in part). Justice Levin also concluded that the manner in which the majority phrased the question, "whether the [Due Process C]lause encompasses a fundamental right to commit suicide and, if so, whether it includes a right to assistance," foreordained the answer. *Id.* at 748. Following *Cruzan*, Justice Levin concluded that "[w]hether a competent, terminally ill person has a right to medical assistance to commit suicide" can only be decided by "balancing the state's interest against the person's interest." *Id.* at 749. Because the state interest in preserving life is weak compared to the liberty interests of mentally competent, terminally ill persons facing imminent, agonizing death, Justice Levin held the balance favors assisted suicide. *Id.* at 751. He then concluded that Michigan's total ban on assisted suicide violated Casey's undue burden test. *Id.* Justice Mallett also dissented from the majority's conclusion that there is never a right to hasten one's death. *Id.* (Mallett, J., dissenting). Agreeing with the district court *Compassion in Dying* opinion, Justice Mallett criticized the majority's strict adherence to history in declining to recognize a liberty interest, noting that "such a test is unsuitable for the vast and fast-moving progressions of the modern world." *Id.* at 753. "The [F]ramers of the [C]onstitution ... understood that liberty could not be summarized in a single document . . . ." *Id.* at 756.

38. 527 N.W.2d at 726. The plaintiffs in Hobbins objected to the term "assisted suicide," asserting only the right of mentally competent, terminally ill persons to hasten inevitable death. *Id.* at 725 n.27.

39. *Id.* at 728.

interests involving marriage, procreation, contraception, family relationships, child rearing, and education,[40] concluding that *Casey* did not broaden the test for substantive due process rights, but still required the court to determine whether the "right to commit suicide arises from a rational evolution of tradition."[41] After an examination of the history of suicide in the United States, the court held that tradition provided no support for assisted suicide.[42] Although the district court in *Compassion in Dying* had declared Washington's assisted suicide statute unconstitutional seven days earlier, the Michigan Supreme Court declined to follow the rationale of that decision, stating that the district court misapprehended the nature of the holdings in *Cruzan* and *Casey*.[43] On December 15, 1994, two days after the Michigan Supreme Court rendered its decision and nine days after the *Compassion in Dying* district court decision, the United States District Court for the Southern District of New York was presented with a challenge to New York's assisted suicide statutes in *Quill v. Koppell*.[44] Three terminally ill patients and three physicians filed suit seeking a preliminary injunction against enforcement of the statutes, asserting that they violated Due Process and Equal Protection as applied to terminally ill, mentally competent adults wishing to avoid continued severe suffering.[45] The

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> [W]hereas suicide involves an affirmative act to end a life, the refusal or cessation of life-sustaining medical treatment simply permits life to run its course, unencumbered by contrived intervention. Put another way, suicide frustrates the natural course by introducing an outside agent to accelerate death, whereas the refusal or withdrawal of life-sustaining medical treatment allows nature to proceed, i.e., death occurs because of the underlying condition.

Id. at 728.

40. *Id.*

41. *Id.* at 730.

42. *Id.* at 733. The court made a brief examination of the history of suicide in the United States, concluding that "[it] would be an impermissibly radical departure from existing tradition, and from the principles that underlie that tradition, to declare that there is such a fundamental right protected by the Due Process Clause." *Id.*

43. *Id.* at 727-28. See supra note 11 and accompanying text. The court also noted that an appeal of the decision was pending in the United States Court of Appeals for the Ninth Circuit. *Id.* at 727 n.38.

44. 870 F. Supp. 78 (S.D.N.Y. 1994), *rev'd*, Quill v. Vacco, 80 F.3d 716 (2d Cir. 1996). Section 125.15(3) of the New York Penal Law provides in relevant part: "A person is guilty of manslaughter in the second degree when: . . . (3) He intentionally . . . aids another person to commit suicide." N.Y. PENAL LAW § 125.15(3) (McKinney 1987). Section 120.30 provides: "A person is guilty of promoting a suicide attempt when he intentionally . . . aids another person to attempt suicide." N.Y. PENAL LAW § 120.30 (McKinney 1987).

45. 870 F. Supp. at 79. The original complaint named three terminally ill patient plaintiffs who wished to commit suicide with physician assistance, and three physician plaintiffs. *Id.* All three of the patient plaintiffs have since died. *Id.*

court disagreed.[46] It rejected the plaintiffs' arguments that a constitutional right to physician-assisted suicide inevitably follows from *Roe* and *Casey*'s broad statements about fundamental liberty interests and *Cruzan*'s assumption of a constitutional right to terminate life-sustaining treatment, criticizing the plaintiffs' reading of those cases as "too broad."[47] Relying heavily on the "deeply rooted in our nation's history and traditions" test,[48] the same test used by the Michigan Supreme Court to thwart the assertion of a constitutional right,[49] the court found no historic recognition of physician-assisted suicide as a legal right.[50] Neither did the court agree with the plaintiffs' argument that even if there is no fundamental right to assisted suicide for the terminally ill, criminalizing assisted suicide while allowing competent persons to refuse medical treatment is discrimination that violates the Equal Protection Clause.[51] Because it did not implicate a fundamental right, the court applied a low scrutiny test and held the statute bears a reasonable and rational relation to the state's legitimate interest in preserving life.[52] Three months later, on March 9, 1995, the Ninth Circuit panel reversed the *Compassion in Dying* district court decision and held that Washington's assisted suicide statute was constitutional.[53] A final twist was added to the plot on August 3, 1995 by *Lee v. Oregon*,[54] a decision by the United States District Court for the District of Oregon. Plaintiffs in *Lee* challenged the constitutionality of Oregon's landmark Death With Dignity Act ("the Act"), the first ballot initiative in the world to allow "terminally ill adult[s] to obtain a doctor's prescription for a fatal drug dosage for the express purpose of ending their life."[55] Specifically,

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46. *Id.* at 78.

47. *Id.* at 83.

48. People v. Kevorkian, 527 N.W.2d 714, 730 (Mich. 1994). *See supra* note 45 and accompanying text.

49. 527 N.W.2d at 730. Although the Michigan Supreme Court decided Hobbins two days before *Quill* was decided, the court in Quill did not cite any of the Michigan cases. However, it did note that the district court in *Compassion in Dying* reached a different result, but that the decision was on appeal to the Ninth Circuit. 870 F. Supp. at 85.

50. *Id.* at 83-84.

51. *Id.* at 84.

52. *Id.* "The issue is whether the distinction drawn by New York law has a reasonable and rational basis." *Id.* (citing Dandridge v. Williams, 397 U.S. 471, 485-87 (1969)).

53. Compassion in Dying v. Washington, 49 F.3d 586, 588 (9th Cir. 1995), *rev'd*, 79 F.3d 790 (9th Cir. 1996).

54. 891 F. Supp. 1429 (D. Or. 1995), *rev'd*, Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996) (en banc).

55. 891 F. Supp. at 1431. The Death With Dignity Act was approved by Oregon voters in November 1994 by a margin of 51% to 49%. Nat Hentoff, *Would Hippocrates Have Done It?*, THE WASHINGTON POST, October 28, 1995, at A27. "Australia[']s Northern Territory legalized euthanasia in May, but that law has not yet gone into effect. Euthanasia has

plaintiffs claimed the statute violated Equal Protection because its "classification or coverage to the 'terminally ill' is not rationally related to a legitimate state interest."[56] Chief Judge Hogan agreed, holding that the Act did not contain sufficient safeguards for terminally ill patients who may be mentally depressed, vulnerable, or incompetent,[57] thereby violating the Equal Protection Clause by not providing them the same protections against suicide offered other citizens.[58] Judge Hogan concluded that it was rational for terminally ill persons to choose suicide when the alternative "may simply mean prolonging suffering for a person who has no hope of a significant natural life ahead,"[59] but that the statute suffered from several fatal infirmities. First, the procedures designed to differentiate between competent and incompetent persons were insufficient.[60] For example, the statute does not mandate evaluations from either psychiatrists or psychologists to determine if a person is competent[61]—the decision is left to the attending physician.[62] Second, the statute does not properly define "terminally ill" or "'terminal disease' . . . . [S]ince [*sic*] only in hindsight is it known with certainty when someone is going to die."[63] Third, there are no provisions for an independent consulting physician to confirm that a person is capable and acting voluntarily.[64] Fourth, for actions taken under the Act, physicians are only held to a "subjective good faith" standard, not the normal "objective reasonableness" standard of care.[65] Finally, there is no requirement that the overdose be taken under the supervision of a physician, creating a strong potential for abuse.[66] Therefore, not only had every standing decision to date upheld the constitutionality of criminal assisted suicide statutes, but even the first referendum in the world granting the right had been struck down. The stage was now set for the Ninth Circuit's en banc decision.

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been tolerated in the Netherlands for years, but it is not technically legal there." Diane M. Gianelli, *Assisted suicide showdown headed to the high court?*, AMERICAN MEDICAL NEWS, August 21, 1995, at 38, n.31, p. 1(3).

56. 891 F. Supp. at 1431. Because plaintiffs only made a low scrutiny Equal Protection challenge, the court did not decide whether a heightened or strict scrutiny test would apply if a fundamental right was implicated. *Id.* at 1431 n.2.

57. *Id.* at 1438.

58. *Id.*

59. *Id.* at 1434.

60. *Id.*

61. *Id.* at 1435.

62. *Id.* at 1435 n.7.

63. *Id.*

64. *Id.*

65. *Id.* at 1436.

66. *Id.*

Unlike the panel decision before it, the en banc court gave thoughtful and rational consideration to both sides of the issue before making its decision, recognizing that "[p]eople of good will can and do passionately disagree about the proper result, perhaps even more intensely than they part ways over . . . a woman's right to have an abortion."[67] The court phrased what it deemed "an extraordinarily important and difficult issue" as "whether a person who is terminally ill has a constitutionally-protected liberty interest in hastening what might otherwise be a protracted, undignified, and extremely painful death."[68] First, under the guidance of the "particular[ly] . . . powerful precedent" of *Casey*,[69] the court held that terminally ill patients have a due process liberty interest in choosing the time and manner of their death.[70] Like a woman's right to an abortion, "the decision of how and when to die is one of 'the most intimate and personal choices a person may make in a lifetime,' a choice 'central to personal dignity and autonomy.'"[71] The court also held that because *Cruzan* found a liberty interest that includes the right to refuse life-sustaining food and water, it "necessarily recognizes a liberty interest in hastening one's own death."[72] Unlike courts that have refused to find such a liberty interest, the Ninth Circuit en banc did not constrain itself to an analysis of historical traditions in force at the time the Fourteenth Amendment was passed, but applied those traditions as well as the "fundamental tenets of our nation . . . in light of changing values based on shared experience" and the new problems raised by "the development and use of new technologies."[73] The court noted that advancements in medical treatments and technolo-

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67. *Compassion in Dying*, 79 F.3d at 793.

68. *Id.* The court took issue with the panel's phrasing of the issue as the "constitutional right to aid in killing oneself," stating that the "subject we must initially examine is not nearly so limited." *Id.* at 801. The court also took issue with the use of the terms "'suicide' and 'assisted suicide'" as "appropriate legal descriptions of the specific conduct at issue . . . ." *Id.* at 802. Rather, it considered the terms "'right to die,' 'controlling the time and manner of one's death,' and 'hastening one's death'" more accurate. *Id.* Because the court resolved the issue under a due process analysis, it did not reach plaintiff's equal protection arguments. *Id.* at 798.

69. *Id.* at 801.

70. *Id.* at 799.

71. *Id.* at 813-14 (citing *Casey*, 505 U.S. at 851).

72. *Id.* at 816.

73. *Id.* at 802-03. The court also noted that the panel decision erroneously concluded that a historical analysis alone is sufficient basis for rejecting a claim to a substantive liberty interest or right. *Id.* at 805. "Were history our sole guide, the Virginia anti-miscegenation statute that the Court unanimously overturned in *Loving v. Virginia* . . . would still be in force because such . . . laws were commonplace both when the United States was founded and when the Fourteenth Amendment was adopted." *Id.* at 806.

gies often result in "protracted and painful deaths"[74] for patients suffering from AIDS and cancer, driving "a growing movement to restore humanity and dignity to the process by which Americans die"[75] and a shift in "popular support for permitting doctors to provide assistance to terminally ill patients who wish to hasten their deaths."[76] However, mere recognition of the interest did not decide the issue.[77] Citing to *Cruzan*, the only right-to-die case the Supreme Court has considered, the court stated that it "must apply a balancing test under which we weigh the individual's liberty interests against the relevant state interests in order to determine whether" the Washington statute is an appropriate regulation governing the exercise of the right,[78] recognizing "that some prohibitory and regulatory state action is fully consistent with constitutional principles."[79] Those interests include (1) the state's unqualified interest in preserving life, (2) preventing suicide, (3) avoiding the involvement of third parties and preventing the use of undue influence, (4) the effects on children, loved ones, and other family members, (5) protecting the integrity of the medical profession, and (6) the "interest in avoiding adverse consequences that might ensue if the statutory provision at issue is declared unconstitutional."[80] However, under the balancing test from *Cruzan*, the court found these interests substantially reduced in comparison to the medical condition and wishes of the person whose life hangs in the balance,[81] especially since Washington has already decided that its interests "should ordinarily give way" to "competent, terminally ill adults" who wish to withdraw life-sustaining treatment under its Natural Death Act.[82] In fact, the court considered

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74. *Id.* at 812.
75. *Id.*
76. *Id.* at 810.
77. *Id.* at 799.
78. *Id.*
79. *Id.* at 816.
80. *See* 79 F.3d at 816-30.
81. 79 F.3d at 817. Regarding the need to prevent suicides, the state's primary justification, the court stated there is no risk of a life ending prematurely because "[i]n the case of a terminally ill adult who ends his life in the final stages of an incurable and painful degenerative disease, in order to avoid debilitating pain and a humiliating death, the decision to commit suicide is not senseless, and death does not come too early." *Id.* at 820-21. Also, procedural safeguards can be developed by the state and medical profession "to ensure that the possibility of error will ordinarily be remote," and that the poor, minorities and the elderly will remain free from undue influence in making their decisions. *Id.* at 824-26.
82. *Id.* at 817. The Natural Death Act states in relevant part: "The legislature finds that adult persons have the fundamental right to control the decisions relating to the rendering of their own medical care, including the decision to have life-sustaining

the state's insistence on frustrating their wishes "cruel indeed."[83] Finally, the court regarded the state's attempt to label the act of terminating life support as an "omission" and prescribing drugs to hasten death a "commission," a "distinction without a difference," stating that in either case, "a doctor is unquestionably committing an act" by "taking an active role in bringing about the patient's death."[84] Therefore, because "the liberty interest in hastening death is at its strongest when the state's interest in protecting life and preventing suicide is at its weakest," the court held that the "or aids" provision of Washington's assisted suicide statute "is unconstitutional as applied to terminally ill competent adults who wish to hasten [death] with medication prescribed by their physicians."[85]

Compassion in Dying v. Washington has broad implications for states in the Ninth Circuit that make assisted suicide a crime, including California.[86] *Quill v. Vacco*,[87] the Second Circuit reversal of *Quill v. Koppell* decided less than a month after the *Compassion in Dying* en banc decision, may have similar implications for New York and other states in the Second Circuit. Both may be destined for review by the Supreme Court. The Court generally does not intervene unless there are conflicting decisions in the lower courts, and that is now the case. The Court denied certiorari on *People v. Kevorkian*,[88] but both the Ninth and Second Circuits have now declared such statutes unconstitutional, albeit for different reasons. Unlike the Ninth Circuit, the Second Circuit panel in *Quill* declined to recognize a fundamental due process liberty right to physician-assisted suicide without "clear direction from the Court."[89] Nonetheless, it did find the statute unconstitutional under Equal Protection,[90] an argument the Ninth Circuit declined to address.[91] Because it did not recognize a fundamental right, the court applied the same rational basis scrutiny used for social welfare legislation.[92] Finally, it concluded that because New York had no legitimate or rational reason for allowing terminally ill patients to

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procedures withheld or withdrawn in instances of terminal condition." *Id.* (quoting the Natural Death Act). SEE SUPRA note 11 and accompanying text.

83. 79 F.3d at 817.

84. *Id.* at 822.

85. *Id.* at 836-37. The court also explicitly overruled Lee v. Oregon, 891 F. Supp. 1429 (D. Or. 1995), as conflicting squarely with the reasoning of its opinion. *Id.* at 838.

86. *See* Mintz, *supra* note 53 and accompanying text.

87. 80 F.3d 716 (2d Cir. 1996).

88. Kevorkian v. Michigan, 115 S. Ct. 1795 (1995).

89. 80 F.3d at 725.

90. *Id.* at 727.

91. *Compassion in Dying*, 79 F.3d at 798.

92. 80 F.3d at 725.

hasten death by discontinuing life support but not permitting them to do so with physician prescribed drugs, the statutes at issue were unconstitutional.[93] However, like the Ninth Circuit, it refused to distinguish between assisted suicide and withholding or withdrawing treatment, stating that "the cause of death in both cases is the suicide's conscious decision to 'pu[t] an end to his own existence.'"[94] On June 10, 1996, the Supreme Court extended Justice Sandra Day O'Connor's May order blocking the effect of the *Compassion in Dying* decision until the Court decides whether to grant certiorari on it and the Second Circuit *Quill* decision.[95] That decision is expected this fall.[96] Whether certiorari is eventually granted may depend on the answers to the following questions: (1) Will the Supreme Court be willing to reach into what some would consider its Pandora's Box of substantive due process to establish a right to physician assisted suicide, or will *Roe v. Wade* scare the Court into deference to sectarianism? (2) Will the Court be able to recognize that the distinction between the refusal of life-sustaining treatment and physician-assisted suicide may be a "distinction without a difference"?[97] (3) Can the Court recognize that there comes a time when the state's interest in preservation of life must accede to the individual's particularized interest in self-determination and the avoidance of needless and prolonged suffering? As the Supreme Court opined in *Casey*, "Liberty finds no refuge in a jurisprudence of doubt."[98] It may soon have the opportunity to resolve the doubt enshrouding physician-assisted suicide.

STEPHEN J. TYDE, JR.

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93. *Id.* at 727.

94. *Id.* at 729 (citing *Cruzan*, 497 U.S. at 296-297 (Scalia, J., concurring) (citations omitted and alteration in original)).

95. Washington v. Glucksberg, 116 S. Ct. 2494 (1996). Justice O'Connor handles emergency appeals from rulings by the Ninth Circuit. Rose Ragsdale, *Supreme Court blocks assisted suicide ruling*, ALASKA JOURNAL OF COMMERCE, June 10, 1996, v20 n24.

96. *News Briefs*, BATON ROUGE ADVOCATE, June 11, 1996, 1996 WL 5936387.

97. Burns v. Ohio, 360 U.S. 252, 257 (1959); *Compassion in Dying*, 79 F.3d at 822.

98. 112 S. Ct. at 2803.