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The Constitutional Litigation on Assisted Suicide: A Last Look Before the Supreme Court Decides (Keynote Address)

Michael S. Popkin

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**KEYNOTE ADDRESS:
THE CONSTITUTIONAL LITIGATION ON
ASSISTED SUICIDE: A LAST LOOK BEFORE
THE SUPREME COURT DECIDES**

MICHAEL S. POPKIN*

Thank you for the opportunity to address you here today. As you know, Attorney General Vacco has been personally involved in this matter, not only with a strong personal commitment to it as a matter of policy, but to the point of being willing to shut down his own schedule for three months to prepare for and to argue this case before the Supreme Court of the United States.¹

Currently, there are two physician-assisted suicide cases before the Supreme Court, *Quill v. Vacco*,² which we have defended from its inception,³ and *Washington v. Glucksberg*.⁴ For the law students in the audience, let me begin by saying that this was the case of a lifetime. It was a case of pure constitutional law involving issues of public policy divorced from issues of money.⁵ By contrast, there are major issues involved, for instance, in suing

* B.A., J.D., Boston University. Mr. Popkin has served as Assistant Attorney General for the State of New York since 1993. He also served as Assistant Attorney General for the State of Maine from 1989 until 1992, and was in private practice in that state from 1978-89. From its inception, Mr. Popkin has had primary responsibility for *Quill v. Vacco*, arguing the case before the United States District Court for the Southern District of New York and before the United States Court of Appeals for the Second Circuit. He was on the brief on the case before the United States Supreme Court.

¹ See Oral Argument, *Vacco v. Quill*, 117 S. Ct. 2293 (1997) (No. 95-1858) available in 1997 WL 13672, at 1. Before the U.S. Supreme Court on January 8, 1997, Attorney General Vacco argued that New York statutes prohibiting assisted suicide did not violate the Equal Protection Clause of the Fourteenth Amendment under the federal Constitution. *Id.* at *1.

² *Quill v. Vacco*, 80 F.3d 716, 716 (2d Cir. 1996), *rev'd*, 117 S. Ct. 2293 (1997).

³ *Quill v. Kopell*, 870 F. Supp. 78, 78 (S.D.N.Y. 1994).

⁴ 117 S. Ct. 2258 (1997).

⁵ Editorial Note: Subsequent to Mr. Popkin's speech, the Supreme Court found that although the line between refusing life saving medical treatment and assisted suicide could be unclear, the distinction between assisting suicide and the withdrawal of life-sustaining treatment was nonetheless permissible under New York law. *Vacco v. Quill*, 117 S. Ct. 2293, 2298 (1997).

the tobacco companies⁶ that revolve around public health as well.⁷ But money and politics are mixed up in them in such a way that the cases of assisted suicide have simply avoided.

This is constitutional law at its best. A career in government law, or at least part of a career in government law, is one of the few places you would ever get a chance to do this. You really cannot practice constitutional law in private practice. You might get a case once in a while. You might be able to teach it, and that is primarily where the plaintiff's bar comes from in these cases, and what they draw upon. But constitutional law is mainly government law. It is the law of the citizen vis-à-vis the government and what the limits of the law are. Practicing law in a public agency and representing a government is one of the places where you get to do it at its best.

Now, from the title of this particular presentation, you might gather that I think that this is a good moment to look back for the last time. This may really be the last chance we will have to examine these cases before the Court decides them.⁸ Once the Court decides them, I expect that the decisions themselves will be the focus of all future discussion, even to the point of overshadowing the down-to-earth issues and concerns of its litigants.⁹ People will look back on *Quill* in future years and talk about what the Court did with the case.¹⁰ I doubt, however, that anyone will be particularly interested with how it was viewed by the litigants and what their strategies were. Therefore, this is a good

⁶ See, e.g., *Kurzweil v. Philip Morris Co., Inc.*, Docket Nos. 94 Civ. 2373 & 94 Civ. 9546, 1997 WL 167043, at * 5 (S.D.N.Y. 1997) (noting President Clinton's characterization of nicotine as "addictive"); *Sackman v. Liggett Group, Inc.*, 920 F. Supp. 357, 360-62 (E.D.N.Y. 1996) (noting New York legislature's funding of research commission to investigate smoking issues).

⁷ See *Sackman*, 920 F. Supp. at 365 (holding that compelling need to protect public health justified disclosure of confidentially prepared legal documents).

⁸ *Quill*, 80 F.3d 716, 716 (2d Cir. 1996) (concluding New York's statute prohibiting assisted suicide violated Fourteenth Amendment's Equal Protection clause), *rev'd* 117 S. Ct. 2293 (1997); *Compassion in Dying v. Washington*, 79 F.3d 790, 790 (declaring Due Process clause of Fourteenth Amendment protects an individual's decision to hasten their death and that Washington's statute outlawing physician-assisted suicide violative of this protected liberty interest), *rev'd sub nom.*, *Washington v. Glucksberg*, 117 S.Ct. 2258 (1997).

⁹ See *Quill*, 80 F.3d at 718. Terminally-ill, mentally competent plaintiffs asserted they were unconstitutionally deterred from obtaining prescribed lethal medication. *Id.*; *Compassion*, 79 F.3d at 793. Plaintiffs claimed Washington's prohibition against causing or aiding another to commit suicide violated the Fourteenth Amendment. *Id.*

¹⁰ 117 S. Ct. 2293 (1997). *Quill* was decided on June 26, 1997, subsequent to Mr. Popkin's speech. *Id.* Rejecting plaintiff-respondents claims, the Supreme Court determined that New York's statutes prohibiting the assistance of another to commit suicide were not in violation of the Fourteenth Amendment's Due Process clause. *Id.* at 2296.

moment to look back, before the Court decides the case, to consider differing points of view. Also, for the lawyers involved, once the case is argued and submitted, it is for all practical purposes over. We will read the decision, but I do not expect that there will be much to do on this subject again. Justice Frankfurter, I think, once likened a lawyer's mind to a tub of water that is filled up with one case and then drained and then filled up again. If that is a good simile, then this may be a good moment to take one last look at that water before it drains away.

Now, a few basic things about the case occur to me. One is that, judicially, it proved almost impossible to handicap this case.¹¹ Cases about whether there is a right to assistance in suicide really cut across every spectrum that you can create to classify what points of view exist. Politically, you cannot say that there is a Republican or a Democratic point of view about whether there ought to be a constitutional right, or even a statutory right, to physician-assisted suicide.¹² One would have thought that Democrats would have been generally in favor of establishing this right. Then I read in the Village Voice that Nat Hentoff is bashing the assisted suicide movement,¹³ and I decided that that is really not true. Likewise, there is not really a liberal or a conservative point of view on this subject. There is a

11 See *Quill v. Kopell*, 870 F. Supp. 78, 79-80 (S.D.N.Y. 1994). Upon filing the complaint, plaintiffs moved to enjoin the operation of the relevant statutes barring the assistance of others to commit suicide. *Id.* Defendants promptly opposed the motion and cross-moved for a judgment on the pleadings to dismiss the action. *Id.* The Court denied plaintiffs' motion and dismissed the action on defendants' cross-motion, and plaintiffs appealed. *Id.* On appeal to the Second Circuit, defendants claimed that the action in question did not present a justiciable controversy, and that plaintiffs did not have standing as none of them was under any threat of prosecution. *Quill*, 80 F.3d at 722-23. The Second Circuit rejected these defendants' claims, and held that the distinction made by New York statutes, allowing for termination of life-support on one hand, yet depriving terminally-ill competent adults of the choice to be prescribed death-hastening drugs on the other, had no rational basis and therefore violated the Due Process Clause. *Id.* at 727.

12 See *House Votes to Bar Funding for Illegal Assisted Suicide*, PANTAGRAPH, Apr. 4, 1997, at A6, available in 1997 WL 2468530 (noting that rare and unlikely political unity was forged between Congressional Democrats and Republicans in passage of bar to federal funding for assisted suicides to pre-empt potential Supreme Court ruling declaring anti-assisted suicide legislation unconstitutional); see also *CMDS Doctors Available for Comment on Supreme Court's Physician-Assisted Suicide Landmark Ruling*, PR NEWSWIRE, June 25, 1997 (describing intense national debate surrounding physician-assisted suicide).

13 See Nat Hentoff, *We Hear the Death Train Coming: Every One of Us Faces this Issue—Young and Old, Male and Female*, VILLAGE VOICE, Feb. 4, 1997, at 12, available in 1997 WL 7917317 (drawing unsettling analogy between 1933 New York Times headline praising German Ministry of Justice for legalization of "mercy killings" implemented "in the interests of true humanity," and pending outcome of *Quill* and *Compassion in Dying* cases).

strong libertarian streak on the right of the policy spectrum that wants this right.¹⁴ People of all walks of life and all denominations are very ambivalent about it and very divided over it. And the same thing goes for constitutional scholars.¹⁵

One would have thought that strict constructionists or broad constructionists would have taken polarized positions, but that really was not true either. Rather, one can find scholars, as well as writers and judges, on either side of the spectrum with deeply divided views on this subject. All you have to look at is the fact that the Second Circuit's opinion affirming this right was authored by Judge Roger Miner,¹⁶ and Judge Steven Reinhardt authored the Ninth Circuit opinion.¹⁷ Indeed, this may be the only issue in the entire legal spectrum on which Judges Miner and Reinhardt would agree.

Another thing that strikes me, that immediately struck us all when we got the case, is that it really should have been, as a matter of constitutional law, a slam dunk winner for the states.¹⁸ These are not particularly complicated cases as a matter of law. First, looking at the issues, there are few precedents to work with. There was the *Cruzan*¹⁹ decision and the abortion juris-

14 See, e.g., Katherina E. Gonzalez, Letter, *Pro-Choice*, VILLAGE VOICE, Apr. 1, 1997, at 6, available in 1997 WL 7918024. Directly criticizing Nat Hentoff's article, *We Hear the Death Train Coming*, Gonzalez recounts her nineteen-year battle with terminal illness and the significance of mentally competent, terminally-ill individuals retaining the right to end their own suffering without the State's interference. *Id.*

15 See Nat Hentoff, *Death's Enemy: Yale Kamisar: Should a Permanently Bedridden, Cancerous Old Man Be Kept Alive?*, VILLAGE VOICE, May 28, 1996, at 10, available in 1996 WL 5616727. Hentoff criticizes Michigan constitutional law professor, Yale Kamisar—renowned as an expert in the areas of privacy, assisted suicide and euthanasia—for venerating the “seductive dangers of our national attraction to death as a form of medical treatment. . . .” *Id.*

16 *Quill*, 80 F.3d at 716.

17 *Compassion in Dying v. Washington*, 79 F.3d 790, 790 (9th Cir. 1996), *rev'd sub nom.*, *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997) (holding that statute prohibiting assisted suicide violated due process rights of terminally-ill patients).

18 See *Vacco v. Quill*, 117 S. Ct. 2293 (1997); *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997). Mr. Popkin's prediction was confirmed by the Supreme Court's reversal in *Vacco v. Quill*, and *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997), effectively leaving it to each individual state's discretion whether or not to prohibit acts of assisted suicide or physician-assisted suicide. *Id.*; *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994), *cert. den.*, *Kevorkian v. Michigan*, 514 U.S. 1083 (1995). Another indicator foreshadowing this result may be inferred by the Supreme Court's denial of certiorari in *People v. Kevorkian. Id.* By denying certiorari in *Kevorkian*, arguably, the Supreme Court sent the implied message to Michigan and other states that the *Kevorkian*/physician-assisted suicide issue was best left to the states to resolve in keeping with their respective public policies. See *id.*

19 *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 278 (1990) (holding that principle that competent person has constitutionally protected liberty interest in refusing unwanted medical treatment could be inferred from Court's prior decisions).

prudence.²⁰ *Cruzan* drew from a line of cases dealing with the right to refuse medical treatment,²¹ which arose in the State courts. But it was not a particularly complex area of the law, as compared to, for example, antitrust law, where you would have to go out and master huge areas of doctrine. Here, there were really only two or three major cases that you had to reason from and apply. It was not the sort of thing you had to spend weeks studying. The issues were fairly clear cut.

The same thing was true of the record in *Quill*,²² which was not a factually complex case. The plaintiffs filed some affidavits, and while the inferences that you could draw from the affidavits were disputed, the facts in the affidavits were never in dispute, so that the case was simple as a matter of record. Our Supreme Court record is an inch and a half thick, and it is something that you could read in a couple of hours.²³ Most of the pleadings just repeat themselves, and three or four are amended complaints. There is not much in there that you could not master in half a day. What is incredibly complex is the medical literature on the subject, the policy arguments, and the implications that everybody wants to draw one way or the other.²⁴ When you look at the Supreme Court briefs, you find that the parties are essentially relying on the same literature and the same facts.²⁵ However,

20 See *Roe v. Wade*, 410 U.S. 113, 163 (1973) (holding that right to privacy encompasses right to abortion, although right is not absolute); see also *Beal v. Doe*, 432 U.S. 438, 446 (1977) (reiterating that state interest in pregnancy becomes compelling at viability).

21 See, e.g., *Jacobsen v. Massachusetts*, 197 U.S. 11, 24-30 (1905) (balancing individual's liberty interest in refusing smallpox vaccine against state interest to prevent smallpox epidemic); *Gray v. Romeo*, 697 F. Supp. 580, 591 (D.R.I. 1988) (allowing for removal of feeding tube of woman in persistent vegetative state); *In re Gardner*, 534 A.2d 947, 947 (Me. 1987) (concluding that comatose patient who previously indicated his desire not be kept alive on life support, had a right to have life sustaining medical procedures discontinued); *In re Grant*, 747 P.2d 445, 445 (Wash. 1987) (holding that patient has right to remove or withhold life sustaining medical treatment).

22 See *Vacco*, 117 S. Ct. at 2293.

23 See Petitioners' Brief, *Vacco v. Quill*, 117 S. Ct. 2293 (1997) (No. 95-1858) available in 1996 WL 656345 (citing Attorney General's arguments for permitting ban on assisted suicide in New York).

24 See, e.g., James Bopp, Jr. & Richard E. Coleson, *A Critique of Family Members as Proxy Decisionmakers Without Legal Limits*, 12 ISSUES L. & MED. 133, 133, 165 (1996) (criticizing common practice of according family members "proxy decision-making rights without guidelines"). But see Susan D. Block & Andrew Billings, *Patient Requests for Euthanasia and Assisted Suicide in Terminal Illness*, 36 PSYCHOSOMATICS 445, 461 (1995) (contending that 10% of terminally ill patients express desire for early death and that in late stage of illness, depression and suicide increase significantly).

25 See, e.g., Respondents' Brief at *41-42, *Vacco v. Quill*, 117 S. Ct. 2293 (1997) (No. 95-1858) available in 1996 WL 708912, citing van der Maas, et al., *Euthanasia, Physician Assisted Suicide, and Other Medical Practices Involving the End of Life in the Netherlands*, 335 NEW ENG. J. MED. 1699 (1996), at *44, 48, citing *Plyler v. Doe*, 457 U.S. 202 (1982),

they spin their arguments in widely different directions from the same materials.²⁶ What I draw from that is the fact that you have an incredibly complex issue of policy, but not one that involves issues of disputed adjudicative fact. Instead, it is an issue that revolves around what, as a matter of public policy, one does in such situations.

Now, saying that it was a slam dunk winner, what I mean is that there was an issue of substantive due process²⁷ and another of equal protection.²⁸ The issue is best framed as a matter of substantive due process. Under the methodology embraced by every Supreme Court decision since and including *Roe v. Wade*,²⁹ in order for a substantive due process right to be recognized, the right in question must be firmly imbedded in our history and traditions, or fundamental to the concept of ordered liberty as we understand it.³⁰ It should have been a slam dunk winner because it is hard to see how any activity currently outlawed by forty-nine states,³¹ always outlawed by the common law,³² and offensive to

citing *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990). *But see, e.g.*, Petitioner's Brief at *24, *Quill* (No. 95-1858) *citing* *van der Maas, et al., Euthanasia and Other Medical Decisions Concerning the End of Life*, 338 LANCET 669 (1991), *citing* *Cruzan*, 497 U.S. 261, at *8, *citing* *Plyler*, 457 U.S. 202.

²⁶ See Petitioner's Reply Brief at *22, *Vacco v. Quill*, 117 S. Ct. 2293 (1997) (No. 95-1858) available in 1996 WL 739259. Two main components of petitioners' argument were that substantive due process did not encompass a fundamental right to physician-assisted suicide and that New York's prohibition of assisted suicide was a permissible means of effectuating a legitimate interest. *Id.* at *3. *But see* Petitioner's Brief at *22, *Quill* (No. 95-1858). Contrarily, the heart of respondents' argument was that in fact the Supreme Court had articulated "a principled approach for defining the liberty protected under the Fourteenth Amendment," and that the lines drawn by New York violated the Equal Protection Clause. *Id.*

²⁷ See *Vacco*, 117 S. Ct. at 2297 (holding that since New York's statutes prohibiting assisted suicide do not infringe upon fundamental rights nor involve suspect classifications, they were presumptively valid).

²⁸ *Id.* at 2298 (upholding distinction between assisting suicide and withdrawing life-sustaining treatment).

²⁹ 410 U.S. 113, 164 (1973) (declaring Texas criminal abortion statutes unconstitutional).

³⁰ *Id.* at 152. One such fundamental right, which is "imbedded in our history and traditions," and recognized by the Court as "implicit in the concept of ordered liberty," is the right of privacy. *Id.*

³¹ See ALA. CODE § 22-8A-10 (1990); ALASKA STAT. §§ 18.12.080(a), (f) (Michie 1996); ARIZ. REV. STAT. ANN. § 36-3210 (West 1996); ARK. CODE ANN. §§ 20-13-905(a), (f), 20-17-210(a), (g) (Michie 1991 and Supp. 1995); CAL. HEALTH & SAFETY CODE §§ 7191.5(a), (g) (West Supp. 1997); CAL. PROB. CODE ANN. § 4723 (West Supp. 1997); COLO. REV. STAT. §§ 15-14-504(4), 15-18-112(1), 15-18-5-101(3), 15-18.6-1008 (1987 and Supp. 1996); CONN. GEN. STAT. § 19a-575 (Supp. 1996); DEL. CODE ANN., Tit. 16, § 2512 (Supp. 1996); D.C. CODE ANN. §§ 6-2430, 21-2122 (1995 & Supp. 1996); FLA. STAT. §§ 765-309(1), (2) (Supp. 1996); GA. CODE ANN. §§ 31-32-11(b), 31-36-2(b) (1996); HAW. REV. STAT. § 327D-13 (1996); IDAHO CODE § 39-152 (Supp. 1996); ILL. COMP. STAT., ch. 755, §§ 35-9(f), 40/5, 40/50, 45/2-1 (West 1992); IND. CODE §§ 16-36-1-13, 16-36-4-19, 30-5-5-17 (1994 & Supp. 1996); IOWA CODE §§

the established ethics of the medical profession itself³³ could possibly meet the criteria for substantive due process. Of course, we were proven wrong.³⁴

At first blush, to us it seemed that, as a matter of equal protection, the plaintiffs' case had even less merit. Under the traditional equal protection analysis one need only establish that there is a reasonable basis for a legislature to distinguish between two activities.³⁵ That is the end of the inquiry. It is a relaxed analysis, and once you establish that, you win. There seemed to be fairly obvious differences historically and medically,³⁶ between declining medical treatment,³⁷ or allowing doc-

144A.11.1-144A.11.6, 144B.12.2 (1997); KAN. STAT. ANN. § 65-28-109 (1995); KY. REV. STAT. ANN. § 311.638 (Banks-Baldwin 1992); LA. REV. STAT. ANN. 40, §§ 1299.58.10(A), (B) (West 1996); MASS. GEN. LAWS 201D, § 12 (1997); MD. CODE HEALTH ANN. § 5-611(c) (1994); ME. REV. STAT. ANN., tit. 18-A, §§ 5-813(b), (c) (West Supp. 1996); MICH. COMP. LAWS ANN. § 700.496(2) (West 1995); MINN. STAT. §§ 145B.14, 145C.14 (Supp. 1997); MISS. CODE ANN. §§ 41-41-117(2), 41-41-119(1) (Supp. 1992); MO. REV. STAT. §§ 459.015.3, 459.044(5) (1992); MONT. CODE ANN. §§ 50-9-205(1), (7), 50-10-104(1), (6) (1995); NEB. REV. STAT. §§ 20-412(1), (7), 30-3401(3) (1995); NEV. REV. STAT. § 449.670 (2) (1996); N.H. REV. STAT. ANN. §§ 137-H:10; 137-H:13, 173-J:1 (1996); N.J. STAT. ANN. §§ 26:2H-54 (d), (e), 26:2H-77 (West 1996); N.M. STAT. ANN. §§ 24-7A-13B(1), (C) (Michie Supp. 1995); N.Y. PUB. HEALTH LAW § 2989 (McKinney 1997); N.C. GEN. STAT. §§ 90-320(b), 90-321(f) (1993); N.D. CENT. CODE §§ 23-06.4-01, 23-06.5.01 (1991); OHIO REV. CODE ANN. § 2133.12(A), (D) (Anderson Supp. 1996); OKLA. STAT. ANN., tit. 63, §§ 3101.2(C), 3101.12(a), (G) (West 1996); 20 PA. CONS. STAT. § 5402(b) (Supp. 1996); R.I. GEN. LAWS §§ 23-4.10-9(a), (f), 23-4.11-10(a), (f) (1996); S.C. CODE ANN. §§ 44-77-130, 44-78-50(A), (C), 62-5-504(0) (Law Co-op. Supp. 1996); S.D. CODIFIED LAWS §§ 34-12(D)-14, 34-12(D)-20 (Michie 1994); TENN. CODE ANN. §§ 32-11-110(a), 39-13-216 (Supp. 1995); TEX. HEALTH & SAFETY CODE ANN. §§ 672-017, 672-020, 672-021 (West 1997); UTAH CODE ANN. §§ 75-2-1116, 75-2-1118 (1997); VT. STAT. ANN., tit. 18, § 5260 (1997); VA. CODE ANN. §§ 54-1-2990 (Michie 1994); WASH. REV. CODE §§ 70.122.070(1), 70.122.100 (Supp. 1997); W. VA. CODE §§ 16-30-10, 16-30A-16(a), 16-30B-2(b), 16-30B-13, 16-30C-14 (1996); WIS. STAT. §§ 154.11(1), (6), 154-25(&), 155.70(7) (Supp. 1996); WYO. STAT. ANN. §§ 3-5-211, 35-22-109, 35-22-208 (Michie 1994 & Supp. 1996).

³² See Peter G. Daniels, *An Illinois Physician-Assisted Suicide Act: A Merciful End to a Terminally Ill Criminal Tradition*, 28 LOY. U. CHI. L.J. 763, 764 (1996) (tracing treatment of suicide as criminal act originating in medieval England, endured in American colonies, and now law of most states).

³³ See Janet Firshein, *U.S. Medics Oppose Physician Assisted Suicide*, 348 LANCET 1439, 1349 (Nov. 23, 1996) (noting AMA is likely to forever officially oppose physician-assisted suicide). But see Cheryl K. Smith, *What About Legalized Assisted Suicide?*, 8 ISSUES L. & MED. 503, 512 (1993) (wondering if Hippocratic Oath, directing physicians to eliminate suffering, justifies physician-assisted suicide as means of relieving extreme suffering); Thomas A. Preston, *Physician Involvement in Life-Ending Practices*, 18 PUGET SOUND L. REV. 531, 767 (1995) (noting "double effect" of prescribing lethal dose to alleviate pain has been justified when actor's intention was good).

³⁴ See generally *Quill v. Vacco*, 80 F.3d 716, 716 (2d Cir. 1996), *rev'd*, 117 S. Ct. 2293 (1997) (holding New York's prohibition on suicide assistance was constitutional).

³⁵ See *United States R.R. Bd. v. Fritz*, 449 U.S. 166, 174 (1981) (noting states do not violate Equal Protection Clause merely because classifications made by its laws are imperfect).

³⁶ See Daniels, *supra* note 33, at 764.

³⁷ See Firshein, *supra* note 34, at 1439; Preston, *supra* note 34, at 767.

tors to assist in the withdrawal of medical treatment,³⁸ or allowing them to actively inject death-causing agents into their patients.³⁹ As long as a reasonable person could view them differently, that should have ended it. So, that was the way we saw the case.

Also, to the degree that plaintiffs argument relied on the Supreme Court's abortion jurisprudence, using it as a springboard in seeking to establish this new constitutional right,⁴⁰ people viewed *Planned Parenthood v. Casey*,⁴¹ with its strong emphasis on stare decisis and on the institutional integrity of the Court, as intended to offer a springboard for a wide expansion of substantive due process rights. I do not think many legal scholars expected that was what *Quill*⁴² was all about. From all those points of view, we therefore believed we had a winner, and that was the way it proved in the district court.⁴³ We made legal arguments along the grounds I have just outlined. Plaintiffs put in a great many affidavits full of the most difficult to read stories of death and disease, and full of imagery of human suffering at its worst—at the end of life.⁴⁴ But Judge Griesa was willing to take the law and apply it.⁴⁵ He never got into their affidavits and, therefore,

38 See *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 261 (1990) (discussing right to terminate medical treatment).

39 See *People v. Kevorkian*, 534 N.W.2d 172, 172 (Mich. App. 1995) (holding that state can enjoin physician from assisting patient to commit suicide).

40 See *Roe v. Wade*, 410 U.S. 113, 113 (1973) (describing fundamental right of privacy); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 759 (1986) (holding that there exists a right to decide whether to terminate pregnancy), *overruled by* *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 833 (1992) (establishing parameters for which state may interfere in women's right to terminate pregnancy); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 419-420 (1983) (defining limits on state power to regulate abortion), *overruled by* *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992).

41 See *Casey*, 505 U.S. at 833. In a partial reversal, via the elimination of the trimester standard developed by Justice Blackmun under *Roe*, the *Casey* Court held that, as it relates to abortions, "the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy." *Id.* at 869.

42 *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996), *rev'd*, 117 S. Ct. 2293.

43 *Quill v. Koppell*, 870 F. Supp. 78, 79 (S.D.N.Y. 1994) (upholding statute prohibiting assisted suicide).

44 See, e.g., *Quill*, 870 F. Supp. at 84. The crux of plaintiffs' arguments on appeal before the Second Circuit was that they should prevail under the Equal Protection Clause. *Id.* The logic of plaintiffs' reasoning was drawn from New York precedent allowing for the refusal of life-sustaining treatment, even where that refusal would result in certain death. *Id.* Plaintiffs then made the next logical leap to argue that any such refusal is also legally analogous to having a doctor prescribe a fatal dose of medication to a person who is terminally ill, thus resulting in the death of that person. *Id.*

45 *Quill*, 870 F. Supp. at 85 (holding that plaintiffs had not demonstrated that New York laws barring physician-assisted suicide violated Fourteenth Amendment Equal Pro-

reaching the result was fairly simple.

This, however, immediately generates several questions. First, why these cases, won by the plaintiffs in both the Second and the Ninth Circuits,⁴⁶ were not slam dunk winners. By ending up before the Supreme Court, how had we been proven wrong? The answers, I think, in part, were that these actions represent legal cries for mercy on a case-by-case basis. What I found is that if you discussed this with people, they saw it not as a matter of legal methodology, nor as a matter of public policy, nor as a systemic medical or social issue. Rather, they would personalize it and, not surprisingly, take that image of horrible suffering, of a person crying out for relief, and identify with it. They then would very naturally want that same measure of decision-making autonomy for themselves.⁴⁷ They identify with it, in a "seat of the pants" kind of way, they think that this is something that ought to be enshrined in the law, and they find it quite irrelevant whether a court does it or it is accomplished through an electoral campaign. Those issues are more legal and, of course, have profound significance. A constitutional right, after all, is something for the ages. Contrastly, a legislature may well decide to enact a law permitting physician-assisted suicides, later repeal it, or get some feedback on it and later alter its approach to it. But the public is not terribly impressed by this distinction and I do not think that the person in the street is terribly wrong in this regard. It is a distinction that is not terribly important to them, although it has profound constitutional significance.

The genius, therefore, of plaintiffs' presentation of their cases, was in presenting those affidavits to the Court, quoting them in their briefs, and putting that image of the horribly suffering person at the end of their life directly before the judges. This did not do plaintiffs much good in the district court, but it worked well in the Second and Ninth Circuits. That is, the plaintiffs invited

tection Clause).

⁴⁶ See *Quill*, 80 F.3d at 716 (holding statute prohibiting assisted suicide unconstitutional); *Compassion in Dying v. Washington*, 79 F.3d 790, 790 (9th Cir. 1996) (finding statute prohibiting assisted suicide unconstitutional), *rev'd sub nom.*, *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

⁴⁷ See, e.g., *Schloendorff v. Society of N.Y. Hosp.*, 211 N.Y. 125, 130, 105 N.E. 92, 93 (1914) (reasoning that all competent adults have right to determine what shall be done with their own bodies); *c.f.* N.Y. PUBLIC HEALTH LAW § 2805-d (1) (defining lack of informed consent as failure of person providing professional treatment or diagnosis to disclose alternatives, reasonably foreseeable risks and benefits to patient).

judges who, after all, are people accustomed to exerting a lot of control over circumstances and over their own lives, to identify with them. Thus, they invited them to reach a result-oriented decision that would establish this as a matter of law. The affidavits filed by the plaintiffs were truly difficult to read. If any of us want to talk about this issue, or make this decision without looking squarely at the suffering involved, I think we are probably not going about it in the right way. But I do not believe, of course, that this approach justifies establishing what the plaintiffs urge as a constitutional right.⁴⁸

The equal protection argument that plaintiffs made, which ultimately succeeded in the Second Circuit,⁴⁹ was also logically sophisticated. The plaintiffs' approached the issue historically. Historically, the law has allowed physicians, their patients and the public at large, to decline medical treatment.⁵⁰ The common law basically established that a physician could not touch you without your consent, or it would be a battery.⁵¹ As a result, this line of cases was finally pushed to its extreme by the Supreme Court in *Cruzan*,⁵² drawing from the nearly unanimous precedent around the United States variously culled from the highest state courts. Such precedent meant that, even if declining medical treatment would result in your death, you still had the right to say "no" to that treatment.⁵³ Historically, this also tended to establish a certain amount of autonomy among individuals in the face of powerful and overwhelming medical therapies.⁵⁴ Importantly, that line of cases grew, not out of some desire to establish a right to die, but out of an ever-increasing desire for the law to

48 See *Quill v. Vacco*, 117 S. Ct. 2293, 2297 (1997) (finding that New York's statutes outlawing assisted suicide were valid as they did not infringe fundamental rights nor involve suspect classifications).

49 *Quill*, 80 F.3d at 727. The Second Circuit opinion, authored by Justice Miner, held that "to the extent that the statutes in question prohibit persons in the final stages of terminal illness from having assistance in ending their lives by use of self-administered, prescribed drugs, the statutes lack any rational basis and are violative of the Equal Protection Clause." *Id.*

50 See *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278 (1990) (inferring from prior Court decisions that competent person has constitutionally protected liberty interest to refuse unwanted medical treatment).

51 See, e.g., *Schloendorff*, 105 N.E. at 92 (holding doctor who operated without patient consent committed assault).

52 497 U.S. 261.

53 See *id.* at 262 (assuming that competent persons have constitutionally protected right to refuse lifesaving treatment).

54 See, e.g., *Compassion in Dying v. Washington*, 79 F.3d 790, 793 (9th Cir. 1996) (explaining need for autonomous decision-making with respect to medical treatment).

recognize that no one should be hooked up to a machine against their will.⁵⁵

Hence, as medical therapies became more and more overwhelming and intrusive, the need for a legal doctrine which would establish an individual's right to say "no" to those therapies was equally pressing.⁵⁶ An interesting aspect to these cases is that they do not necessarily pit the state against the individual with respect to those medical therapies. More often, these cases will involve a hospital and an individual fighting over whether the hospital can impose the therapy on the individual or whether it must respect the individual's or the surrogate's wishes to decline the treatment.⁵⁷

Plaintiffs sought to blur the line between saying "no" and the line between administering drugs actively to cause death.⁵⁸ They accomplished this by taking advantage of the fact that in some extreme cases, declining medical treatment is virtually indistinguishable from taking positive steps to end life.⁵⁹ You can posit a few difficult hypotheticals where someone is hooked up to a respirator and pulling the plug on that respirator would result in nearly instantaneous death. They pointed out that the act of pulling that plug could be equally well described as an act of killing the patient, an act of simply respecting the patient's wishes to decline medical treatment.⁶⁰ Intellectually and epistemologically, what they did in effect, was to get right on the line, right up close to it, in the same sense as if you were to get right up close to newsprint, the dots making up the letters would virtually disappear. All you would see at such close range would

⁵⁵ See, e.g., *Mills v. Rogers*, 457 U.S. 291 (1982) (providing basis for later decisions concerning rights of patients to refuse unwanted medical treatments).

⁵⁶ See, e.g., *Elbaum v. Grace Plaza of Great Neck*, 148 A.D.2d 244, 253, 544 N.Y.S. 2d 840, 846, (2d Dep't 1989) (granting permission to remove patient's life support after proving her clear intent to bind others to effectuate her desires in future).

⁵⁷ See, e.g., *In re Scott Matthews v. Mental Hygiene Legal Servs.*, 225 A.D.2d 142, 142, 650 N.Y.S.2d 373, 373 (3d Dep't 1996) (holding that "in cases where there is a division of medical opinion as to the appropriate treatment for a life-threatening condition, deference should be given to the decision of the parents as long as the chosen course of treatment is a reasonable one within medical standards").

⁵⁸ See Respondent's Brief at *45 (stating that distinction between refusing medical treatment and assisted suicide was unfounded).

⁵⁹ See *id.* (maintaining that legal distinction does not depend on any difference in actual intent between those patients whom doctors are permitted to assist to die and those whom they are not).

⁶⁰ See *id.* at *48-49 (further arguing that New York's distinction between those who are on life support and those who are not renders ban on physicians provision of simple, life-ending prescriptions to identically situated patients utterly irrational).

be a pattern of dots. Then you would say, as plaintiffs said: "Look, there is no line here. Because you are already permitting this activity, you have conceded that you have no interest in prohibiting it. There is nothing involved in this alleged distinction but hypocrisy."

It seems to us that the old famous aphorism of Learned Hand should have been sufficient to refute the foregoing reasoning, specifically that just because there is a moment when the sun rises, when one can not tell day from night, does not mean that there are no such things as darkness or light. The fact that there are a few difficult cases on the edge does not mean that the distinction is meaningless. Plaintiffs, however, presented that issue very well.⁶¹ In the Ninth Circuit, Judge Rheinhart agreed with their due process arguments.⁶² He saw the issue as a matter of personal autonomy and carved out a right to commit physician-assisted suicide out of the due process clause of the Fourteenth Amendment.⁶³

Judge Rheinhart, however, very candidly recognized that he could not limit the right in the way plaintiffs were presenting it. He thus recognized a general right to control the time and manner of one's own death.⁶⁴ Meanwhile, in the Second Circuit, in an opinion that I view as somewhat more intellectually dishonest, Judge Miner relied upon the same equal protection argument.⁶⁵ My view of why that happened was that Judge Calabresi was

61 See *Quill v. Vacco*, 80 F.3d 716, 718 (2d Cir. 1996) (arguing that New York statutes were invalid because they prohibited physicians from acceding to their terminally ill, mentally competent patients' requests for help in hastening death), *rev'd*, 117 S. Ct. 2293 (1997).

62 See *Compassion in Dying v. Washington*, 79 F.3d. 790, 837 (reasoning that Washington statute violated Due Process as it applied to terminally-ill persons wishing to hasten their deaths through prescriptions issued by their physicians), *rev'd sub nom.*, *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

63 See *Compassion*, 79 F.3d at 837 (holding that liberty interest of terminally-ill patient seeking to hasten death through prescribed medication, outweighed concurrent state interests to preserve person's life by preventing suicide).

64 See *id.* at 816 (recognizing that some prohibitory and regulatory state action is justified and fully consistent with constitutional principles).

65 See *Quill*, 80 F.3d at 727. The court concluded that: 1) the statutes in question fall within category of social welfare legislation and therefore are subject to rational basis scrutiny upon judicial review; 2) New York law does not treat equally all competent persons who are in final stages of fatal illness and wish to hasten their deaths; 3) distinctions made by New York law with regard to such persons do not further any legitimate state purpose; 4) accordingly, to extent that statutes in question prohibit persons in final stages of terminal illness from having assistance in ending their lives by use of self-administered, prescribed drugs, statutes lack any rational basis and are violative of Equal Protection Clause. *Id.*

basically off in one direction with his idea of a “constitutional remand,” which was something he had written about while he was Dean of Yale Law School.⁶⁶ Judging from the opinion he wrote and from his questions at oral argument, Judge Calabresi was committed for that position from the outset. The rest of the panel consisted of Judges Miner and Pollack. Of these two, Judge Miner came into the argument equally committed to the plaintiffs’ result. He wanted to recognize this right; he had, however, Judge Pollack to deal with. Judging from questions, Judge Pollack was skeptical of the plaintiffs’ case. The problem for Judge Miner, therefore, was that to achieve any majority one way or the other, he had to get Judge Pollack to sign his opinion, as Judge Calabresi was “stuck” on constitutional remand.⁶⁷

I thus believe that the Second Circuit’s opinion which first held that there was no substantive Due Process right to assisted suicide but when went “in the back door” by recognizing the right as a matter of Equal Protection, represents a compromise between Judges Miner and Pollack. For Judge Miner to get a majority, he had to make a deal with Judge Pollack. The holding that there was *no* Due Process right was the price Judge Miner may have paid to get Judge Pollack to sign onto his opinion. The interesting thing about the Second Circuit’s opinion, of course, is that there was no need to deal with the Due Process issue at all. The court could have simply made an Equal Protection holding. This is the kind of speculation that lawyers love, but ultimately is unanswerable. We will probably never know unless someone writes a memoir.

People have a very hard time with this issue. Even judges who are faced with it seem to need something more persuasive than just dry law before they give the results to one side or the other. If that is correct, it is also necessary to view the coming argument in the Supreme Court with this in mind to understand that our mistake below was leaving the policy debate completely up to the plaintiffs, and opposing it with purely legal arguments.

Therefore, when briefing those cases for the Supreme Court, it became necessary to join the policy issues, as the plaintiffs had done, with the hope that if we could at least fight it to a draw, we

⁶⁶ See *id.* at 742 (Calabresi, J., concurring) (explaining that “constitutional remand” is necessary to decide ultimate validity of statute).

⁶⁷ See *id.* at 738-39 (discussing constitutional remand).

would win the cases. If the Supreme Court were to end up in a position where there were equally good policy arguments and equally good consequentialist arguments on either side, they would not be institutionally in a position to resolve the physician-assisted suicide debate. Our mistake below was believing that by merely having the law on our side, and by merely being able to cite to persuasive existing Supreme Court doctrine, we would win the physician-assisted suicide cases. This was not just a legal tactic; it dovetailed with a fundamental truth about the cases. The problem with using the courts to resolve the physician-assisted suicide debate is that they have no particular institutional competence to resolve a debate involving the issue.⁶⁸

These physician-assisted suicide cases are not particularly complex factually or legally, but are incredibly complex as a matter of policy. Each side cited what is happening in the Netherlands, or quoted reports by critical care nurses and by physicians about what happens at the end of life.⁶⁹ But both sides spin completely different arguments and conclusions out of these "facts." Hence, what you are really asking the court to do is to resolve the debate, not with a legal lodestar to look at, but as a matter of policy. The point is that the choices involved are not truly legal issues. The choices involved in physician-assisted suicide are political ones, involving policy choices, as to which risks and consequences are more acceptable to society at large. Judges need to look to the law as a source of settled authority if they are to exercise legitimate power, which is Justice Cardozo's classic model of the judicial process.⁷⁰ They simply cannot decide cases based on their own preferences. Therefore, they are no more equipped to resolve this debate than are the rest of us.

Viewed from this perspective, the conclusion becomes nearly inescapable: The ultimate resolution of the physician-assisted suicide issue belongs in the legislative process and not in the courts. As it turns out, this was very well illustrated in the oral

⁶⁸ See Petitioner's Reply Brief at *1, *Quill* (No. 95-1858) (arguing that substantive component of Fourteenth Amendment Due Process Clause does not encompass fundamental right to obtain assistance of physician in committing suicide).

⁶⁹ *Quill v. Vacco*, 117 S. Ct. 2293, 2310 (1997) (Stevens, J., concurring) (suggesting that outcome of other cases will not necessarily be resolved by *Quill*, but may instead be decided on their specific facts).

⁷⁰ See *Snyder v. Massachusetts*, 291 U.S. 97, 104 (1934) (holding that Massachusetts was free to regulate its courts in accordance with its own conception of policy and fairness, unless it offends some principle of fundamental justice).

argument before the Supreme Court.⁷¹ There was an exchange between Laurence Tribe and Justice Kennedy⁷² where Laurence Tribe was indulging in this “trashing” of the line between active killing and the withdrawal of medical treatment⁷³ and made the comment that if the States are laboratories, as in Justice Brandeis’ famous formulation,⁷⁴ than those laboratories are operating with the lights out. Justice Scalia then interposed: “[Was] there any reason to believe that we have any more light?”⁷⁵

Now, if you read the Supreme Court briefs, you will see that this policy debate was well articulated by the State.⁷⁶ Our understanding was that if the Court was thinking about nothing but the horrible suffering of the individual plaintiffs, it was not thinking about what the State needed it to be thinking about in order to win the case.⁷⁷ In a case which depends on the legislative ability to draw competing lines in a policy area, you need to articulate the policy debate well and show how the lines are distinctly drawn. Also important to this end were the amicus briefs and submissions. These briefs demonstrated that the major medical associations, the American Suicide Foundation and other organizations favored maintenance of the line as it exists.⁷⁸ Viewed from this perspective, I am very satisfied with our briefing, and with Washington State’s briefing. We put forward our best case.

Interestingly, by the time it reached the Supreme Court, this approach seemed to highlight two very strong vulnerabilities in the plaintiffs’ cases, which I was surprised to see were not taken

71 See Respondent’s Brief at *42, *Quill* (No. 95-1858) (noting that Petitioners’ claims about Netherlands lack any evidence that physician-assisted suicide actually led to any increase in involuntary euthanasia by doctors); Petitioner’s Brief at *248, *Quill* (No. 95-1858) (claiming that some Dutch physicians practice nonvoluntary euthanasia, despite its illegality).

72 See generally Oral Argument at *1, *Quill* (No. 95-1858).

73 See *id.* at *40-42 (blurring distinctions between assisted suicide and dying from natural causes).

74 See *id.* At one point during Mr. Tribe’s argument, Justice Kennedy retorted:

Well, Mr. Tribe, if we go into this sort of intricate analysis of state law in order-in accepting [your fine line distinctions]-we won’t be deciding any case except New York’s here. We would have to make the same analysis [separately] for 49 other states.

Id.

75 See *id.* at *43 (asserting states are like 50 different laboratories).

76 See *id.* at *46 (asking rhetorically whether legislatures working in dark will take into account everyone’s interests).

77 See generally Petitioner’s Brief at *1, *Quill* (No. 95-1858).

78 See *id.* at *30 (arguing that forcing unwanted medical treatment on people is tantamount to enslaving them via tubes and invasive machinery).

up more forcefully below. As I have indicated, the strength of the plaintiff's case was the invitation for the judges to identify with the images of the horrific suffering of these patients, and their cry to the courts for mercy in these individual instances. Their weakness, however, always was the danger that any right to physician-assisted suicide, once recognized, would be abused.⁷⁹ The idea is that mercy killing can not be confined to just a few sympathetic cases, but will inevitably become widespread and institutionalized as to require administration by a bureaucracy.⁸⁰ Anyone who has dealt with the existing medical bureaucracy would not welcome such a development. This was the argument that I think eventually convinced the New York State Task Force to reject the entitlement to such a right,⁸¹ although, ethically, some of its members felt that the need for mercy in particular cases was very strong.

Nevertheless, plaintiffs tried to deal with this very artfully. They always argued that this was a very limited right that could be established only for people on their deathbed who were competent, and who were suffering horribly at the end stage of their life.⁸² This attempted to draw the sting out of the argument that there was a vast potential for abuse.

There was always, however, some intellectual dishonesty at the heart of this argument and this came back to haunt them before the Supreme Court because while you can successfully ar-

⁷⁹ See Brief Amici Curiae of Gary Lee, M.D. *et al.* in Support of Petitioners at *1, *Vacco v. Quill*, 117 S. Ct. 2293 (1997) (No. 95-1858) and *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997) (No. 96-110) available in 1996 WL 647921 (concluding that depression makes terminal patients highly susceptible to undue influence that their lives are not worth living); see also Brief Amici Curiae of Americans for Death with Dignity *et al.* in Support of Respondents at *1, *Vacco v. Quill*, 117 S. Ct. 2293 (1997) (No. 95-1858) and *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997) (No. 96-110) available in 1996 WL 709335 (expressing belief that that competent, terminally-ill adult has right to choose peaceful, pain-free, dignified death).

⁸⁰ See, e.g., Brief Amici Curiae of Agudath Israel of America *et al.* in Support of Petitioners, at *4 *Vacco v. Quill*, 117 S. Ct. 2293 (1997) (No. 95-1858) and *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997) (No. 96-110) available in 1996 WL 752720 (repeatedly noting similarity between arguments justifying "mass slaughter of millions of human beings deemed physically or racially 'inferior,'" and arguments justifying physician-assisted suicide).

⁸¹ See Daniel Callahan & Margot White, *The Legalization of Physician Assisted Suicide: Creating a Regulatory Potemkin Village*, 30 U. RICH. L. REV. 1, 2-3 (1996) (discussing why successful regulation of physician-assisted suicide would be impossible to implement, both in principle and in practice).

⁸² Linda C. Fentiman, *Law and Ethics at the End of Life: High Court Speaks*, N.Y.L.J., Aug. 25, 1997, at 5 (reporting it is unlikely that New York legislature will legalize physician-assisted suicide without endorsement from its Task Force on Life and the Law).

ticulate positions before the Supreme Court which might be politically unpopular,⁸³ you cannot be intellectually dishonest about your case before the Supreme Court. This was the problem with the plaintiffs' argument.⁸⁴

First, plaintiffs' argument that physician-assisted suicide could be limited to just a few people on their deathbed really is inconsistent with general, fundamental constitutional rights doctrine. The Supreme Court focused its questioning on one problem: "If this really is a fundamental right, if it is a liberty that everyone enjoys, how is it that there are only twelve people in the United States today who can really exercise it?"⁸⁵ On this point, Judge Rheinhart's opinion in the Ninth Circuit,⁸⁶ was much more candid. He saw that if he was to get there, he could only do so by means of establishing a general right of autonomy to control the "time and manner" of a person's death,⁸⁷ and then factor in a balancing of the various interests.⁸⁸ But Judge Rheinhart never acknowledged in his opinion that you could limit the right to physician-assisted suicide to the self-administration by the individual, suffering patient, or that you can limit physician-assisted suicide so that it stops at the line of surrogate decision-making.

The best way to illustrate this problem is through the Supreme Court argument itself.⁸⁹ Time and again, the plaintiffs could not get away from these questions. I would say that of the hour allotted for their oral argument, they spent a full forty-five minutes just trying to answer the question of how you can limit a physician-assisted suicide right just to the terminally ill at the end of life.⁹⁰ If "mercy" is really the driving motivation, why does

⁸³ See generally Respondent's Brief at *48-9, *Quill* (No. 95-1858) (arguing that distinction between terminal sedation and prescription of life-ending medication was irrational).

⁸⁴ See Oral Argument at *55-7, *Quill* (No. 95-1858) (argument of Laurence Tribe).

⁸⁵ See *id.* at *46 (Justice Scalia suggested that dilemma of physician-assisted suicide is not as widespread among United States population as magnitude of litigation before Court might otherwise suggest).

⁸⁶ See *Compassion in Dying v. Washington*, 79 F.3d 790, 790 (9th Cir. 1996) (holding that "[a] competent terminally ill adult, having lived near the full measure of his life, has a strong liberty interest in choosing a dignified and humane death"), *rev'd sub nom.*, *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

⁸⁷ See *id.* at 816 (recognizing that there is no absolute, unfettered, concomitant right to exercise liberty interest in all circumstances or completely free of state regulation).

⁸⁸ See *id.* (stating that court must weigh and balance competing interests before making determination).

⁸⁹ See generally Oral Argument at *3, *Quill* (No. 95-1858) (arguing that state should avoid action when one citizen helps another to commit suicide).

⁹⁰ See *id.* at *35 (asking Mr. Tribe whether young, healthy, despondent people also have constitutional right to suicide).

someone who has Lou Gehrig's disease and is going to spend the next five years lying in a bed, perhaps only being able to move an eyeball, and who wants to put an end to this, not have exactly the same rights to "autonomy" as the person who has perhaps a few hours or minutes to live?⁹¹ Doesn't the former person arguably have a better right to this, if we really consider physician-assisted suicide a fundamental liberty, than the person who is just on their deathbed? Again, how about self-administration? In her argument, Kathryn Tucker suggested that the only way to avoid any mistakes in physician-assisted suicide would be through "self-administration."⁹²

Suffice it to say that the Supreme Court was absolutely incredulous about this. Over and over they said asked "How can that be?"⁹³ Again, if someone is suffering so horribly, can the mere fact that they cannot take the pill, that they can not self-administer, limit it under the plaintiffs' own rationale?⁹⁴ Indeed, the same is true for surrogate decision-making. What if the person is incompetent and suffering horribly? What principled way is that to limit this right? I think plaintiffs thought it was necessary to try to narrow the scope of the right and the rights associated with it to make it palatable, but the Supreme Court would not have any of it. And that, I think, was a very vulnerable point in their argument. And in the greater debate which now proceeds, we would all do well to acknowledge the fact that if we are going to do this in a principled way, a purported right to physician-assisted suicide has to be much wider than the plaintiffs' in these cases have defined it. It cannot narrowly be drawn just from these few ideal cases outlined in the foregoing scenario. This also hurt plaintiffs because it added a certain air of disingenuousness to their argument.

I would like to briefly point out some of the pitfalls and dangers with some of the physician-assisted suicide statutes that have been proposed. The Oregon statute⁹⁵ which is now poised

91 See *id.* at *36 (arguing that it is agonizing suffering that gives people greater liberty interest in deciding when to die).

92 See, e.g., Respondents Brief at *13, *Quill* (No. 95-1858) (noting that when withdrawal of life-sustaining respiration, food or water is involved, New York Court of Appeals has recognized right of competent, terminally-ill patient to hasten his own death).

93 See Oral Argument at *55-6, *Quill* (No. 95-1858) (asking Mr. Tribe why liberty interest arrives only when death is imminent).

94 See *id.* at *35.

95 See OR. REV. STAT. § 127.800 et. seq. (1997) (passed by popular vote, November,

to go into effect, for instance, contains no notification provisions whatsoever for an assisted suicide.⁹⁶ Neither the physician nor the patient are required to notify anyone that a physician-assisted suicide is taking place.⁹⁷ The patient can opt for notification, but it is purely voluntary.⁹⁸ Nor is there a requirement that a guardian of a ward be notified that a physician-assisted suicide is taking place.

Second, the Oregon statute, and model statutes that have been proposed in other state legislatures,⁹⁹ afford a "good faith" criminal and civil immunity to the individual physicians who participate in physician-assisted suicides.¹⁰⁰ Normally, medical malpractice is an objective standard.¹⁰¹ There is a standard of care for physicians, and no matter what the doctor's intent, he can be sued if he engages in substandard care.¹⁰² These statutes, however, include an exception to this general rule.¹⁰³ In Oregon, a state with an objective standard of care, there will thus be a unique statute which makes physician-assisted suicide the one instance in which the physician will not be held to an objective standard of care.¹⁰⁴ There can be no civil liability or criminal prosecution as long as the doctor subjectively was acting in good faith.¹⁰⁵

I think it is very hard for plaintiffs and for physician assisted

1997).

⁹⁶ See *id.*

⁹⁷ See OR. REV. STAT. § 127.805 (1997) (proscribing who may initiate written request for life-ending medication). But see OR. REV. STAT. § 127.880 (1997) (providing that "nothing in O.R.S. 127.800 to 127.897 shall be construed to authorize physician or any other person to end patient's life by lethal injection, mercy killing or active euthanasia").

⁹⁸ OR. REV. STAT. § 127.897 (1997) (setting forth form of request for life-ending medication).

⁹⁹ See Julie Forster, *Legalizing Assisted-Suicide Still a Dead Issue, But Political 'Taboo' has Been Lifted*, WEST'S LEGAL NEWS, Mar. 5, 1996, available in 1996 WL 258752 (noting that sixteen states introduced bills to legalize assisted suicide during 1995 and 1996).

¹⁰⁰ See Giles R. Scofield, Symposium: Physician Assisted Suicide, *Natural Causes, Unnatural Results, and the Least Restrictive Alternative*, 19 W. NEW ENG. L. REV. 317, 344 (1997) (arguing that doctors are clearly empowered while patients remain presumably very vulnerable).

¹⁰¹ See, e.g., *Stanski v. Ezersky*, 228 A.D. 311, 312, 644 N.Y.S.2d 220, 221 (1st Dep't 1996) (enumerating those elements necessary for successful medical malpractice case).

¹⁰² See *id.*

¹⁰³ See OR. REV. STAT. §§ 127.800 to 127.897.

¹⁰⁴ See *id.* (providing wide berth of legal immunity to physicians who assist with suicide).

¹⁰⁵ See OR. REV. STAT. §§ 127.880 (1997) (stating that so long as physician complies with statute, there can be no charges of "suicide, assisted suicide, mercy killing or homicide").

suicide advocates to be arguing at one time that this right is going to be very carefully limited, while with the other hand advancing a legislative agenda of this sort. Again, the Supreme Court has this material in front of them, and I do not believe they will be blind to these issues.

Thank you very much.