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Foreword: Facing Death

Susan M. Wolf

Symposium

Physician-Assisted Suicide: Facing Death After *Glucksberg* and *Quill*

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Last term the U.S. Supreme Court finally considered the constitutional status of physician-assisted suicide.[1] Confronted with decisions from the Ninth and Second Circuits finding a constitutional right, the Court granted certiorari in October 1996.[2] That set off an explosion of debate. From the hospital bedside to the legislative hearing room and evening news, the country was riveted by an issue of clear and personal importance.

This debate was a long time coming. The ancient Hippocratic commitment to "give no deadly drug, even if asked"[3] has been challenged through the eons.[4] But a sharp upsurge in American discussion began in the late 1980s. *JAMA*'s 1988 publication of an anonymous account of a resident performing

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1. Washington v. Glucksberg, 117 S. Ct. 2258 (1997), *rev'g* Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996) (en banc), *rev'g* 49 F.3d 586 (9th Cir. 1995), *rev'g* 850 F. Supp. 1454 (W.D. Wash. 1994); Vacco v. Quill, 117 S. Ct. 2293 (1997), *rev'g* 80 F.3d 716 (2d Cir. 1996), *rev'g* Quill v. Koppel, 870 F. Supp. 78 (S.D.N.Y. 1994).

2. *Glucksberg, cert. granted*, 117 S. Ct. 37 (1996); *Quill, cert. granted*, 117 S. Ct. 36 (1996).

3. *See* Leon R. Kass, *Neither for Love nor Money: Why Doctors Must Not Kill*, PUB. INT., Winter 1989, at 25.

4. *See* Ezekiel J. Emanuel, *Euthanasia: Historical, Ethical, and Empiric Perspectives*, 154 ARCH. INTERNAL MED. 1890 (1994).

euthanasia,[5] Jack Kevorkian's defiant campaign of assisted suicides starting in 1990,[6] Derek Humphrey's 1991 issuance of *Final Exit*,[7] and Timothy Quill's 1991 recounting of an assisted suicide in the *New England Journal of Medicine*[8] all intensified the public dialogue.

Suddenly we were paying closer attention to the Netherlands, where a series of court decisions beginning in 1973 condoned assisted suicide and active voluntary euthanasia.[9] After formulating guidelines and then passing legislation to encourage physicians to report the practice, the Dutch practice was firmly established.[10] And to their great credit, they began rigorous empirical study of that practice in 1990.[11] The Northern Territory of Australia legitimated euthanasia, too, through legalization in 1995, but the federal parliament struck down the legislation in 1997.[12]

These developments emboldened assisted suicide supporters to seek legislative change. Though suicide had long been decriminalized, assistance in suicide had not.[13] The majority of

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5. Anonymous, *It's Over, Debbie*, 259 JAMA 272 (1988).

6. *See* Lisa Belkin, *Doctor Tells of First Death Using His Suicide Device*, N.Y. TIMES, June 6, 1990, at A1.

7. DEREK HUMPHREY, FINAL EXIT: THE PRACTICALITIES OF SELF-DELIVERANCE AND ASSISTED SUICIDE FOR THE DYING (1991).

8. Timothy E. Quill, *Death and Dignity—A Case of Individualized Decision Making*, 324 NEW ENG. J. MED. 691 (1991).

9. *See, e.g.*, Henk A.M.J. ten Have, *Euthanasia in the Netherlands: The Legal Context and the Cases*, 1 HEC FORUM 41 (1989); John Griffiths, *The Regulation of Euthanasia and Related Medical Procedures that Shorten Life in the Netherlands*, 1 MED. L. INT'L 137 (1994); Johan Legemaate, *Legal Aspects of Euthanasia and Assisted Suicide in the Netherlands, 1973-1994*, 4 CAMBRIDGE Q. HEALTHCARE ETHICS 112 (1995).

10. *See* MARGARET PABST BATTIN, *A Dozen Caveats Concerning the Discussion of Euthanasia in the Netherlands, in* THE LEAST WORST DEATH 130-32 (1994); John Griffiths, *Recent Developments in the Netherlands Concerning Euthanasia and Other Medical Behavior that Shortens Life*, 1 MED. L. INT'L 347 (1995).

11. *See, e.g.*, P.J. van der Maas et al., *Euthanasia and Other Medical Decisions Concerning the End of Life*, 22 HEALTH POL'Y 1 (1992); Gerrit van der Wal & Robert J.M. Dillman, *Euthanasia in the Netherlands*, 308 BRIT. MED. J. 1346 (1994).

12. *See* Christopher James Ryan & Miranda Kaye, *Euthanasia in Australia—The Northern Territory Rights of the Terminally Ill Act*, 334 NEW ENG. J. MED. 326 (1996); *Euthanasia Law Struck Down in Australia*, N.Y. TIMES, Mar. 27, 1997, at A15.

13. *See* Washington v. Glucksberg, 117 S. Ct. 2258, 2263-67 (1997); 2 ALAN MEISEL, THE RIGHT TO DIE 454-55 (2d ed. 1995).

states had retained criminal prohibitions.[14] But three western states soon became the site of campaigns to remove state bans through ballot initiatives. California voters rejected such initiatives in 1988 and 1992 and Washington State voters did the same in 1991.[15] Oregon voters, however, passed an initiative in 1994, making Oregon the first state formally to permit assisted suicide.[16] The new statute, permitting assistance by lethal prescription,[17] was immediately plunged into several years of litigation.[18]

It was in this atmosphere that two cases began making their way to the Supreme Court. *Compassion in Dying v. Washington* was filed in January 1994 by the named organization together with physicians and patients. They claimed that Washington State's ban on assisted suicide violated the Fourteenth Amendment's guarantees of liberty and equal protection insofar as that ban applied to competent, terminally ill adults. Across the country a group of physicians and terminal patients brought a parallel suit in July, challenging New York's statute prohibiting assisted suicide on the same grounds.

The federal district courts initially hearing these constitutional challenges came to opposing conclusions. In *Quill* the court granted summary judgment to defendants, dismissing the action.[19] But in *Compassion in Dying* the court ruled for plaintiffs, finding the state ban an unconstitutional deprivation of liberty.[20] The seriousness of these challenges to state bans became even clearer on appeal. Although a three-judge

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14. *See* MEISEL, *supra* note 13, at 78-79 (Supp. 1997).

15. *See* Judith F. Daar, *Direct Democracy and Bioethical Choices: Voting Life and Death at the Ballot Box*, 28 U. MICH. J.L. REF. 799, 802-04 & n.14 (1995).

16. *See id.* at 803-04.

17. OR. REV. STAT. §§ 127.810-.897 (Supp. 1996).

18. *See* Lee v. Oregon, 891 F. Supp. 1429 (D. Or. 1995), *vacated and remanded*, 107 F.3d 1382 (9th Cir.), *cert. denied sub nom.* Lee v. Harcleroad, 118 S. Ct. 328 (1997). Other obstacles to effectuating the statute were a legislative demand for a popular re-vote, resulting in a November 1997 reaffirmation of the original vote, and federal threats to prosecute physicians who issued lethal prescriptions under the statute. *See* William Claiborne & Thomas B. Edsall, *Affirmation of Oregon Suicide Law May Spur Movement*, WASH. POST, Nov. 6, 1997, at A19; Timothy Eagan, *Threat from Washington Has Chilling Effect on Oregon Law Allowing Assisted Suicide*, N.Y. TIMES, Nov. 19, 1997, at A18. *But see Justice Dept. Bars Punishing Oregon Doctors Aiding Suicides*, N.Y. TIMES, Jan. 24, 1998, at A7.

19. 870 F. Supp. 78.

20. 850 F. Supp. 1454.

panel of the Ninth Circuit first reversed the district court in the *Compassion* case,[21] the circuit court *en banc* then switched course. In a lengthy opinion, the court ruled that the state ban deprived patients of liberty in violation of the Fourteenth Amendment's liberty guarantee.[22] One month later the Second Circuit similarly found New York's ban unconstitutional, though on different grounds, embracing an equal protection rationale, rather than due process.[23] Thus by the summer of 1996 the two most populous states in the country[24] had seen their bans on assisted suicide struck down. The Supreme Court granted certiorari.

For the first time the Court was face-to-face with the question of whether individual citizens should be able deliberately to cause death. The capital punishment cases had involved state-inflicted death after lengthy and public process. The *Cruzan* case in 1990 had involved state refusal to terminate life-sustaining treatment.[25] Though some interpreted terminating treatment as deliberately causing death, many others and a majority of the Court itself saw it as honoring a patient's wish to be free of unwanted bodily invasion, allowing nature to take its course.[26] The two assisted suicide cases, on the other hand, were unmistakable. These were about physicians deliberately giving patients the means to kill themselves.

Debate was polarized. Proponents of assisted suicide claimed state bans condemned terminal patients to agony by depriving them of a deeply personal choice and irrationally distinguishing between hastening death by terminating treatment and hastening death by lethal prescription. Opponents replied that the states had rationally chosen to prohibit a practice that posed serious risk of abuse, could not be confined to the terminal, and would undermine physician ethics and trust. They maintained that assisted suicide had long been distinguished from other end-of-life practices such as terminating treatment and was far more dangerous.

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21. 49 F.3d 586.
22. 79 F.3d 790.
23. 80 F.3d 716.
24. *See* INFORMATION PLEASE ALMANAC 1997, at 831 (50th ed. 1997).
25. Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1990).
26. I have analyzed this feature of *Cruzan* in Susan M. Wolf, *Physician-Assisted Suicide in the Context of Managed Care*, 35 DUQ. L. REV. 455, 479 n.115 (1996). The Court reinforced this view in *Glucksberg*, 117 S. Ct. 2258, 2270 (1997), and *Quill*, 117 S. Ct. 2293, 2301 (1997).

After briefs by the parties and scores of amici, the Supreme Court issued its decisions last June. The Court unanimously reversed both circuit courts, rejecting both the substantive due process and equal protection challenges to the state bans. With Chief Justice Rehnquist writing for the Court,[27] the Justices returned the issue to the states, now free to legalize or prohibit the practice.

That much is clear. But much else is not. A number of the Justices explicitly left the door open to future constitutional challenges on narrower grounds,[28] inviting debate on what challenges might pass muster. Indeed, some Justices sounded quite sympathetic to assisted suicide, though they joined in the unanimous result.[29] At least one of the Justices suggested that if the legislatures now fail to deal with assisted suicide adequately, the Court may again become involved.[30] And two of the Justices' opinions suggested a new constitutional right to adequate pain relief and palliative care.[31]

The unanimity of result thus masked a diversity of view. The Justices were obviously troubled by this issue. They properly worried about current end-of-life practices, including termination of life-sustaining treatment, high-dose pain relief, palliative care, and sedation to unconsciousness. They were clearly concerned by the risks of error and abuse in

27. Chief Justice Rehnquist wrote the majority opinions in *Glucksberg* and *Quill* in which Justices O'Connor, Scalia, Kennedy, and Thomas joined; Justice O'Connor nonetheless wrote her own concurrence, in which Justice Ginsburg joined and Justice Breyer joined in part; and Justices Breyer, Stevens, and Souter wrote further concurring opinions.

28. *See* 117 S. Ct. at 2303 (O'Connor, J., concurring); *id.* at 2309 (Stevens, J., concurring); *id.* at 2312 (Breyer, J., concurring). Justice Souter similarly concluded, "I do not decide for all time that respondents' claim should not be recognized." *Id.* at 2293.

29. *See id.* at 2290 (Souter, J., concurring) ("There can be no stronger claim to a physician's assistance than . . . when death is imminent . . . . "); *id.* at 2305 (Stevens, J., concurring) ("there are situations in which an interest in hastening death is legitimate . . . . [and] entitled to constitutional protection"); *id.* at 2311 (Breyer, J., concurring) ("our legal tradition may provide greater support . . . . [for] a 'right to die with dignity' . . . . [including] control over the manner of death . . . [and] medical assistance"). Justice O'Connor's acknowledgment and postponement of "the narrower question whether a . . . person . . . experiencing great suffering has a constitutionally cognizable interest" may suggest her sympathies as well. *Id.* at 2303 (O'Connor, J., concurring).

30. *See id.* at 2293 (Souter, J., concurring).

31. *See id.* at 2303 (O'Connor, J., concurring); *id.* at 2311-12 (Breyer, J., concurring).

legitimizing assisted suicide, but also the risks of suffering and indignity without this option. Face-to-face with death, they struggled to maintain a steady gaze.

And now the issue returns to the people, to patients and physicians, nursing homes and hospices, voters and legislatures.[32] How all of us approach this issue will be deeply affected by what we have heard from our highest court. The issue is genuinely hard. The Court has faced it and returned to report.

This Symposium on physician-assisted suicide after *Glucksberg* and *Quill* attempts to interpret the Court's report. Beyond that it suggests where the state legislatures and the debate itself should go from here. Eight commentators of diverse expertise offer a rich set of perspectives.

Yale Kamisar's article continues a long history of writing on assisted suicide and euthanasia, which he began forty years ago in this law review.[33] He analyzes the impact of the Supreme Court decisions on the broader debate over assisted suicide. Kamisar considers arguments that the Court aided proponents of assisted suicide by encouraging state legislatures to legalize the practice and leaving the door open for future court challenges. He instead argues that the decisions are a genuine setback for those proponents. He reviews the status of the major arguments for assisted suicide post-*Glucksberg* and *Quill*, as well as the status of the principle of double effect permitting aggressive pain relief. He then focuses on Justice O'Connor's concurrence to clarify what the Court decided and did not. Finally, he ventures that the Justices will confront the assisted suicide issue again in the future, and predicts what they will do.

Kathryn Tucker, counsel to respondents in *Glucksberg* and co-counsel in *Quill*, takes a different perspective. She maintains that an underground practice of assisted suicide already occurs so that the choice is between covert, unregulated assisted suicide and a regulated version. She finds encouragement in the Justices' opinions, arguing that while the Court returned

32. Numerous bills have been introduced since the start of 1997, both for and against assisted suicide. *See, e.g.*, S.B. 105, 1st Spec. Sess. (Ala. 1997); H.B. 1669, 19th Leg., Reg. Sess. (Haw. 1997); H.B. 691, 90th Gen. Ass., 1997-98 Reg. Sess. (Ill. 1997); H.B. 2531, 77th Leg., 1997 Reg. Sess. (Kan. 1997); H.P. 663, 118th Leg., 1st Reg. Sess. (Me. 1997); H.B. 1543, 181st Gen. Ct., 1997 Reg. Sess. (Mass. 1997); H.B. 109, 64th Biennial Sess. (Vt. 1997); S.B. 5654, 55th 1st Reg. Sess. (Wash. 1997); A.B. 32, 93d Reg. Sess. (Wis. 1997).

33. *See* Yale Kamisar, *Some Non-Religious Views Against Proposed "Mercy-Killing" Legislation*, 42 MINN. L. REV. 969 (1958).

that choice to the states for now, five Justices also left the door open to future constitutional challenges. Moreover, litigation based on the state constitutions is another possible avenue to legalization. Tucker finally focuses on the importance of improving pain relief. She analyzes the suggestion by two Justices that patients may have a federal constitutional right to pain relief. She also considers whether disciplinary proceedings against physicians and medical malpractice litigation might be used to improve pain relief practices.

Howard Brody, a physician and philosopher, examines the impact of the Court decisions on moral argument over assisted suicide and on clinical practice. He critiques the circuit courts' and Supreme Court's handling of two arguments central to the assisted suicide debate—the moral equivalence argument that if termination of treatment is moral, assisted suicide must be as well, and the double effect argument that administering high-dose pain relief is moral even if it hastens death, as long as the drugs are given to relieve pain rather than to cause death deliberately. Brody interprets the Ninth and Second Circuit opinions to accept moral equivalence but reject double effect. He then finds that the majority opinion in *Glucksberg* avoided dealing with both arguments, but in *Quill* rejected moral equivalence, though with reasoning Brody finds unimpressive. Brody finally considers the implications for clinical practice. He argues that moral equivalence fails to provide adequate justification for assisted suicide and double effect is necessary for good care. Thus, the circuit court opinions were a setback. The Supreme Court at least "wiped the slate clean," though without providing a solid analysis.

Robert Burt takes a more psychological perspective on the Justices' opinions. Superficially they seem to make sense, unanimously reaffirming a traditional reluctance to impose a rule no state had yet implemented. But a deeper examination reveals complexities that belie the seeming unanimity. Burt finds "something disordered" in these opinions. He concludes that the emotional impact of assisted suicide and death itself has led to a degree of incoherence. He compares the death penalty jurisprudence, finding significant similarities. Those similarities predict that the Court, if it chooses to hear future cases on assisted suicide, will pretend to examine the practice rationally, while in fact refusing to look closely at how it works.

Ezekiel Emanuel, a physician and bioethicist, shifts the debate to the legislatures, arguing that the Supreme Court decisions

actually failed to leave the door open to future court challenges. He argues that the narrower challenges deferred to another day by some of the Justices are extremely unlikely, as states will not sadistically block pain relief and a dignified death does not require physician assistance with suicide. Focusing, then, on the policy question of whether states should permit assisted suicide, Emanuel challenges myths supporting legalization. He argues that the common assumption that patients in pain want this practice disregards the research showing little causal connection between pain and seeking assisted suicide. Instead, patients seek assisted suicide mainly because of depression and fear of being a burden. He further challenges the notion that one can legalize assisted suicide while maintaining the prohibition on euthanasia. Emanuel then proceeds to compare the projected benefits and harms of legalization, though he finds a need for more data. He concludes by urging empirical evaluation of Oregon's experience in legalizing asssisted suicide, to inform future debate.

Patricia King and Leslie Wolf also argue in favor of maintaining the prohibitions on assisted suicide and euthanasia. But they do so by illuminating the circumstances of African Americans. First, they find in *Glucksberg* and *Quill* affirmation that all patients should be protected, including those in stigmatized groups, in poverty, and without access to good care. Yet assisted suicide and euthanasia if legalized, they argue, will necessarily reflect broader social inequalities. Thus, African Americans are right to be particularly skeptical about legalization. King and Wolf trace a history of black lives devalued in the health care system, blacks disadvantaged, and their autonomy compromised. African Americans are entitled to have little confidence that their end-of-life preferences will be respected. Substantial changes in the health care system would thus be necessary before legalizing assisted suicide.

Sylvia Law takes a quite different view. She explores how patients can gain control of death and pain relief, searching for lessons in the history of patients gaining control of birth and reproduction in this century. Focusing first on childbirth, she examines the movement for patient control, how little help patients got from the courts, and the importance of the women's movement in changing practice. The similar trajectory from doctor control of sterilization to patient control, however, shows how professional standards and law can help under some circumstances. Lastly, medical schools' failure to train physicians

to perform abortions offers an analogy to the failure to train doctors for end-of-life care. Law suggests that all of these analogies show the importance of ensuring informed patient planning, transforming professional attitudes, and improving medical education. They also suggest that legal change may alter state policy, but have limited effect on professional practice.

Finally, my own piece examines both the constitutional litigation and the policy debate. I argue that we have yet to grapple adequately with a fundamental problem, the role of data and empiricism. Advocacy for assisted suicide too often rests on patients' supposed choice between unrelieved agony and death, plus the claim that physicians already deliberately cause death through other end-of-life practices. Yet we now have copious data on terminal care, challenging these arguments. Moreover, a fundamental shift toward pragmatism in recent thinking about patient care and the role of law should motivate serious attention to those data. I analyze the treatment of data in the circuit court opinions, the Supreme Court litigation, and the Justices' opinions. While all seem to concede at a general level that the data are important, particularly empirical information on Dutch practice, the data are used inconsistently and often ignored on key points. More importantly, none of the players acknowledges this problem. The debate thus drifts between data and abstraction, the real and the idealized case. I argue that this leaves the legislatures now with a tremendous problem. Though a deliberative resolution of the assisted suicide question would seem to demand attention to clinical realities, deeply entrenched myths may instead carry the day.

This Symposium thus offers a wide range of views, some disagreeing and some in accord. The richness of these articles testifies to the complexity of the assisted suicide problem. Asking how we should die is surely among the hardest questions. And deciding the role of law becomes taxing in the shadow of pain and loss. The Justices tried to face these issues. These articles now work to understand what they did and move forward. The Court ultimately failed to rescue us from confronting these questions. As assisted suicide returns to the state house, the ballot box, and the bedside, we all once again face death.