

Physician Aid in Dying: A Humane Option, a Constitutionally Protected Choice

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I. INTRODUCTION

A majority of states, including Washington and New York, have statutes that prohibit aiding suicide.¹ These statutes are understood to prohibit physicians from assisting their mentally competent, terminally-ill patients to hasten death. The assisted suicide statutes in Washington and New York have recently been challenged in federal court under the Fourteenth Amendment to the United States Constitution.² In *Compassion in Dying v. Washington*,³ the court granted

1. ALASKA STAT. § 11.41.120(2) (1989); ARIZ. REV. STAT. ANN. § 13-1103(A)(3) (1989); ARK. CODE ANN. § 5-10-104(a)(2) (Michie 1993); CAL. PENAL CODE § 401 (West 1988); COLO. REV. STAT. ANN. § 18-3-104(1)(b) (West 1990); CONN. GEN. STAT. ANN. § 53a-56(a)(2) (West 1994); DEL. CODE ANN. tit. 11, § 645 (Supp. 1992); FLA. STAT. ANN. § 782.08 (West 1992); ILL. ANN. STAT. ch. 720, para. 5/12-31 (Smith-Hurd Supp. 1994); IND. CODE ANN. § 35-42-1-2.5 (Burns 1994); KAN. STAT. ANN. § 21-3406 (1988); ME. REV. STAT. ANN. tit. 17-A, § 204 (West 1983); MICH. COMP. LAWS ANN. § 752.1027 (West 1994); MINN. STAT. ANN. § 609.215 (West Supp. 1995); MISS. CODE ANN. § 97-3-49 (1972); MONT. CODE ANN. § 45-5-105 (1992); NEB. REV. STAT. § 28-307 (1989); N.H. REV. STAT. ANN. § 630:4 (1986); N.J. STAT. ANN. § 2C:11-6 (West 1982); N.M. STAT. ANN. § 30-2-4 (Michie 1994); N.Y. PENAL LAW §§ 120.30, 125.15(3) (McKinney 1987); OKLA. STAT. ANN. tit. 21, §§ 813-818 (West 1983); OR. REV. STAT. § 163.125(1)(b) (1990); PA. STAT. ANN. tit. 18, § 2505 (1983); S.C. CODE ANN. § 16-1-10 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 22-16-37 (Law. Co-op. 1988); TEX. PENAL CODE ANN. § 22.08 (West 1994); WASH. REV. CODE § 9A.36.060 (1994); WIS. STAT. ANN. § 940.12 (West 1982).

2. *Compassion in Dying v. Washington*, 850 F. Supp. 1454 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir. 1995), *petition for rehearing en banc filed* March 22, 1995; *Quill v. Koppel*, 870 F. Supp. 78 (S.D.N.Y. 1994) (granting state's motion to dismiss; holding that physician assisted death is not constitutionally protected), *appeal docketed*, No. 95-7028 (2d Cir. 1995).

3. 850 F. Supp. 1454 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir. 1995), *petition for rehearing en banc filed* March 22, 1995.

summary judgment to the plaintiffs and held that competent, terminally-ill patients have a constitutionally protected right to choose to hasten death with physician assistance and that Washington's assisted suicide statute is unconstitutional under both the Liberty and Equal Protection Clauses of the 14th Amendment.⁴

Until November 1994, legislative efforts to establish the right to physician aid in dying had not succeeded. A number of states, including Washington (in 1991)⁵ and California (in 1992),⁶ considered, but narrowly failed to approve, initiative measures permitting physician aid in dying. Oregon passed such a measure in November 1994.⁷ A lawsuit attempting to prohibit the Oregon law from taking effect was immediately filed by anti-choice activists.⁸ Several states have appointed "Blue Ribbon" task forces to analyze the issue and make recommendations to the state legislatures. The task forces have split on the issue: New York's recommended against legislative reform; Michigan's favored legislative reform.⁹

Michigan State courts have confronted similar issues in various challenges to Michigan laws prohibiting assisted suicide. In December 1994, the highest Michigan State court ruled that the federal constitution provides no right to physician-assisted death.¹⁰

Plaintiffs in these cases maintain that the United States Constitution protects the right of a mentally competent, terminally-ill person to choose to hasten his or her death in a manner that is sure to result in death, is nonviolent, and preserves dignity by self-administering drugs prescribed by a doctor for that purpose.¹¹ This Article presents

4. *Id.*

5. See Beverly Merz, *Despite Defeat of State's Suicide Initiative, Issue Still Unsettled: Washington State Vote on Physician-Assisted Suicide*, AM. MED. NEWS, November 18, 1991, at 1.

6. See Lou Cannon et al., *The 1992 Elections: State By State; The Pacific*, WASH. POST, November 5, 1992, at A41.

7. See *The Oregon Death with Dignity Act (1994)*, reprinted in *Kane v. Kulongaski*, 871 P.2d 993, 1001-06 (Or. 1994); Diane M. Gianelli, *Assisted-Suicide Measure Fails in New Mexico; AMA Opposed It*, AM. MED. NEWS, March 20, 1995, at 3.

8. *Lee v. Oregon*, 869 F. Supp. 1491 (D. Or. 1994).

9. See Ronald Sullivan, *Suit Challenges New York's Law Banning Doctor-Assisted Suicide*, N.Y. TIMES, July 22, 1994, at B2; Edward Walsh, *Michigan Commission Favors Legal Physician-Assisted Suicide*, L.A. TIMES, Apr. 26, 1994, at A14.

10. *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994) (deciding several cases relating to assisted suicide), *cert. denied sub nom.*, *Hobbins v. Kelley*, 131 L. Ed. 2d 723 (1995). The Michigan cases assert only a federal constitutional liberty claim; they do not assert an equal protection claim. *Id.*

11. The need for physician involvement is most readily apparent to the medically and/or pharmacologically educated. Terminally-ill persons are generally consuming a variety of drugs to manage their condition. Determining the correct drug(s) to effect a humane death, and the amount and manner of consumption, is a complex medical pharmacological task. See RUSSEL D.

the argument that the Fourteenth Amendment protects the individual decision to hasten death with physician-prescribed medication and that statutes prohibiting physician-assisted suicide deny equal protection, guaranteed by the Fourteenth Amendment, to competent, terminally-ill adults who are not on life support.

II. SUMMARY OF THE CONSTITUTIONAL CHALLENGE

A. *The Fourteenth Amendment Protects Individual Liberty*

The United States Supreme Court has consistently recognized that the Fourteenth Amendment's protection of liberty extends to important personal decisions that individuals make about their lives and how they will live them.¹² The challenged statutes,¹³ which make aiding a suicide a criminal act, prevent mentally competent, dying citizens from choosing to shorten the period of suffering before death by self-administering drugs prescribed for the purpose of hastening death. The state thus intrudes into and controls a profoundly and uniquely personal decision, one that is properly reserved to the individual, to be made in consultation with his or her doctor. These statutes thereby abridge the liberty guaranteed by the Fourteenth Amendment.

B. *The Fourteenth Amendment Guarantees Equal Protection*

A somewhat unusual aspect of the challenged laws is that they do not seek to punish suicide, or attempted suicide, itself; citizens have the right to refuse, or direct the withdrawal of, life-sustaining treatment with the intent to hasten death.¹⁴ Physicians who comply with such requests are immune from prosecution under the challenged statutes.¹⁵ Some terminally-ill patients, thus, are able to choose to hasten their

OGDEN, EUTHANASIA, ASSISTED SUICIDE AND AIDS 89 (1994). Physicians' attitudes about assisting death have been surveyed in some states. See, e.g., Jonathan S. Cohen et al., *Attitudes Toward Assisted Suicide and Euthanasia Among Physicians in Washington State*, 331 NEW ENG. J. MED. 89, 90-91 (1994) (reflecting that fifty-three percent of Washington physicians support the legalization of assisted suicide).

12. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (procreation); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (family relationships); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (child rearing and education); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception); *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990) (refusing unwanted medical treatment).

13. For examples of various state statutes dealing with physician-assisted suicide, see *supra* note 1.

14. See, e.g., WASH. REV. CODE § 9A.36.060 (1994) (punishing a person for aiding another in the attempt of suicide).

15. See, e.g., *id.* § 70.122.100 (prohibiting mercy-killing but allowing one to "permit the natural process of dying").

inevitable deaths with medical assistance. This distinction, between a terminally-ill patient whose condition involves life-sustaining treatment and a dying patient whose condition does not involve life-sustaining treatment, violates the Equal Protection Clause of the Fourteenth Amendment.

III. ANALYSIS

A. *The Fourteenth Amendment Protects the Right of Competent, Terminally-Ill Adults to Choose to Hasten Inevitable Death With Physician-Prescribed Medications*

1. Competent, Terminally-Ill Adults Have a Liberty Interest in Making End-of-Life-Decisions Free of Undue Government Interference

The Fourteenth Amendment provides that the State may not "deprive any person of life, liberty, or property, without due process of law."¹⁶ In *Planned Parenthood v. Casey*,¹⁷ the Supreme Court recognized:

the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure.¹⁸

The Court stated:

Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall "deprive any person of life, liberty, or property, without due process of law." The controlling word in the case before us is "liberty."¹⁹

Casey reiterated that the liberty protected by the Due Process Clause encompasses more than the rights guaranteed by the express provisions of the first eight amendments.²⁰ *Casey* stated resoundingly: "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."²¹

16. U.S. CONST. amend. XIV.

17. 112 S. Ct. 2791 (1992), *aff'g* *Roe v. Wade*, 410 U.S. 113 (1973).

18. *Id.* at 2804.

19. *Id.*

20. *Id.* at 2805.

21. *Id.*

Plaintiffs challenging assisted suicide statutes assert that end-of-life decisions for competent, terminally-ill adults occur within that realm.²² The district court in Washington agreed.²³ The district court in New York rejected this argument.²⁴

Casey recognizes that "[o]ur law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."²⁵ *Casey* noted that, "[i]t is settled now, as it was when the Court heard arguments in *Roe v. Wade*, that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, as well as bodily integrity."²⁶ The protection of basic personal decisions from state intrusion limits the state's power to interfere with end-of-life decision-making, the doctor-patient relationship, and the joint selection and implementation of appropriate treatment.

No sound reason exists for excluding end-of-life decisions from the scope of the protection defined by *Casey*. Indeed, the Court's discussion of why decisions in these situations are protected applies with full force to end-of-life decisions:

These 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. At the heart of liberty is the right to define one's own

22. See, e.g., Jed Rubenfeld, *The Right to Privacy*, 102 HARV. L. REV. 737, 788, 795 (1989). Rubenfeld reasons that the right to privacy should be found to apply where the challenged law would subject the person claiming the right to "totalitarian burdens" in his or her daily life. *Id.* at 788. In the case of terminally-ill persons seeking to hasten inevitable death, "being forced to live is in fact to be forced into a particular, all consuming, totally dependent and indeed rigidly standardized life It is a life almost totally occupied." *Id.* at 795. Thus, a right of liberty or privacy must protect the decision of a competent, terminally-ill adult to hasten inevitable death. The statute is defective under either a recognition of a sphere of personal decision-making safe from government intrusion or a recognition that laws that operate to "occupy" lives or confine them into a painful and dependent condition are invalid.

23. *Compassion in Dying*, 850 F. Supp. at 1460.

24. *Quill v. Koppel*, 870 F. Supp. 78, 83 (S.D.N.Y. 1994), appeal docketed, No. 95-7028 (2d Cir. 1995).

The court in *Quill* held that plaintiffs' reading of the reproductive rights cases was "too broad." The court, finding no historical support for assisted suicide, held that no guaranteed right existed. *Id.* at 83-84. The court fundamentally misunderstood the conduct at issue, describing it as "self destruction." *Id.* at 84 (citing MODEL PENAL CODE § 210.5(2), cmt. 100 (1980), which refers to assisted suicide as "self-destruction").

Certainly the state has a legitimate interest in preventing "self destruction;" however, the destruction of life at issue in these cases is wrought by disease. The choice to hasten death and exit life in a humane fashion cannot properly be characterized as "self destruction."

25. *Casey*, 112 S. Ct. at 2807.

26. *Id.* at 2806 (citations omitted).

concept of existence, of meaning, of the universe, and of the mystery of human life.²⁷

As noted in *Casey*, “[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”²⁸ Further, *Casey* recognizes that where the suffering of an individual is involved, a state’s ability to insist that the individual endure the suffering is limited.²⁹

Recognizing the right of competent, terminally-ill persons to hasten death unquestionably raises religious implications. These same implications are raised by the right to abortion; yet, as recognized by *Casey*, “that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter”³⁰

In the case of dying, competent patients, the question is whether a state can resolve the philosophical questions relating to the end of life in such a definitive way that competent, terminally-ill adults lack all choice in the matter. The answer, consistent with *Casey*, must be no. To hold otherwise would necessarily mean that the State’s religious or philosophic preference outweighs the competent individual’s control over his or her own suffering and method of dying.

The Court in *Casey* observed the doctrinal affinity between *Roe*’s rule of personal autonomy and bodily integrity and cases recognizing limits on governmental power to mandate medical treatment or bar its rejection. Indeed, the Court noted that cases since *Roe* accord with *Roe*’s view that “a [s]tate’s interest in the protection of life falls short of justifying any plenary override of individual liberty claims.”³¹

Casey permits a state to enact rules governing abortion so long as they do not impose an undue burden on the woman’s ability to make her decision.³² An undue burden exists where regulation “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”³³ The undue-

27. *Id.*

28. *Id.*

29. *Id.* (“Her suffering is too intimate and personal for the state to insist, without more, upon its own vision of the women’s role”).

30. *Id.*

31. *Id.* at 2810 (citing *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278 (1990)).

32. *Id.* at 2818-20.

33. *Id.* at 2820.

burden/substantial-obstacle rule of *Casey* adequately protects any state interests in physician-assisted death as well.³⁴ For example, a state's interest in protecting against the ability of mentally-disturbed or depressed patients to choose physician-assisted death could be accommodated by regulation requiring a psychological evaluation of each patient.

2. The Liberty Interest in Choosing to Hasten Inevitable Death With Medical Assistance Is Indistinguishable from Refusing Unwanted Medical Treatment in Order to Hasten Death

In *Cruzan v. Director, Missouri Department of Health*,³⁵ the Supreme Court acknowledged that competent persons have the constitutional right to direct the removal of life-sustaining medical treatment and thus hasten death,³⁶ and that the liberty to make this end-of-life decision is uniquely and "deeply personal."³⁷ *Cruzan* addressed the question of the level of evidence Missouri could require as to the wishes of a presently incompetent person that life-sustaining treatment be withdrawn. The Court made it clear that a state's interest in this area is in ensuring a voluntary decision, not in interfering with one.

The dissents in *Cruzan* differed as to the limitations that a state could impose to ensure voluntariness, but emphasized the personal nature of end-of-life decisions and the limited state interest in such decisions:

34. See, e.g., *Compassion in Dying*, 850 F. Supp. at 1466.

35. 497 U.S. 261 (1990).

36. *Id.* at 278 ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."); see also *id.* at 267-68 ("All agree that such a removal [of life support] would cause her death.").

37. *Id.* at 281.

Dying is personal. And it is profound. 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 .

...

.....

Although the right to be free of unwanted medical intervention, like other constitutionally protected interests, may not be absolute, no state interest could outweigh the rights of an individual in Nancy Cruzan's position. Whatever a [s]tate's possible interests in mandating life-support treatment under other circumstances, there is no good to be obtained here by Missouri's insistence that Nancy Cruzan remain on life-support systems if it is indeed her wish not to do so. Missouri does not claim, nor could it, that society as a whole would be benefited by Nancy's receiving medical treatment.³⁸

Justice Stevens' separate dissent states his view:

Choices about death touch the core of liberty. Our duty, and the concomitant freedom, to come to terms with the conditions of our own mortality are undoubtedly "so rooted in the traditions and conscience of our people as to be ranked as fundamental"

The more precise constitutional significance of death is difficult to describe; not much may be said with confidence about death unless it is said from faith, and that alone is reason enough to protect the freedom to conform choices about death to individual conscience.³⁹

Where the patient is competent, as in both the Washington and New York challenges to assisted-suicide statutes, *Cruzan's* recognition of the extremely personal nature of the decision to refuse medical treatment, even where that refusal will cause death, strongly supports plaintiffs' position.⁴⁰ Once the decision to refuse treatment and thus hasten death is recognized as protected and uniquely personal, it cannot reasonably be distinguished from the decision to seek medical assistance in hastening death.⁴¹ Indeed, from the patient's perspec-

38. *Cruzan*, 497 U.S. at 310-12 (Brennan, J., dissenting).

39. *Id.* at 343 (Stevens, J., dissenting).

40. See *Compassion in Dying*, 850 F. Supp. at 1461-62. But see *Quill*, 870 F. Supp. at 82-83.

41. *Compassion in Dying*, 850 F. Supp. at 1467. Anti-choice commentators recognize as much: "Arguably, the distinction between passive and active euthanasia already has become dangerously blurred, if not altogether obliterated, by court decisions that permit the removal of feeding tubes." Thomas Mayo, *Constitutionalizing the "Right to Die,"* 49 MD. L. REV. 103, 139

tive, the decision to refuse artificial nutrition and hydration is different in no material respect from the decision to choose to otherwise hasten death. "Patients request physician-assisted suicide for the same reasons that they refuse life-saving treatment: [T]hey want control over when they die, where they die, and their physical and mental state at the time of their death."⁴² Thus, the constitutional principle behind recognizing a right to refuse artificial life support applies equally to the choice to hasten inevitable death by other means.⁴³

Thus, forced continuation of a life ravaged by pain and suffering for a competent, terminally-ill adult who has a voluntary and informed desire to hasten his or her own death is a cruel and demeaning invasion into basic rights of liberty, privacy, and self-determination.

B. *The Challenged Statutes Deny Equal Protection to Competent, Terminally-Ill Adults Who Are Not on Life Support*

Even before *Cruzan*, both Washington and New York courts (as have many other state courts nationwide) recognized the right of a competent, terminally-ill adult to hasten death by directing that life-sustaining medical treatment be suspended.⁴⁴ The courts effectively exclude from the facial coverage of the assisted suicide statutes those who assist in such decisions.

The Washington Natural Death Act, enacted in 1979 and amended in 1992, explicitly recognizes the patient's interest in avoiding

n.198 (1990); see also Yale Kamisar, *When Is There a Constitutional "Right to Die"? When Is There No Constitutional "Right to Live"?*, 25 GA. L. REV. 1203, 1227 (1991); accord *Cruzan*, 497 U.S. at 296 (Scalia, J., concurring) (noting that starving oneself to death through refusal of life-sustaining artificial nutrition and hydration "is no different from putting a gun to one's temple as far as the common-law definition of suicide is concerned.").

42. Note, *Physician-Assisted Suicide and the Right to Die With Assistance*, 105 HARV. L. REV. 2021, 2026 (1992); see also Joel R. Cornwell, *Wrongful Life and the Problem of Euthanasia*, 23 GONZ. L. REV. 573, 583 (1988) (concluding that the distinction between "hastening death" and "not prolonging dying" or between "killing" and "letting die" is meaningless from a volitional standpoint); Hilary Hughes Young, *Assisted Suicide and Physician Liability*, 11 REV. LITIG. 623, 633 (1992).

The decision to refuse treatment is seen from the medical profession's perspective as "assisting in a patient's wish to die." See Steven I. Adlestone, *Liability for Improper Maintenance of Life Support: Balancing Patient and Physician Authority*, 46 VAND. L. REV. 1255, 1262 (1993).

43. See Young, *supra* note 38, at 632-33, 638-39, 650-51. This right includes necessary medical assistance. Medical assistance is involved when treatment is refused, for example, in removing a feeding tube, ventilator, or dialysis machine. Similarly, medical assistance in hastening death for persons not on life support is necessary to permit implementation of this choice. In this case, assistance would consist of the doctor prescribing appropriate medications.

44. *In re Guardianship of Grant*, 109 Wash. 2d 545, 747 P.2d 445 (1987), corrected, 757 P.2d 534 (1988); *In re Guardianship of Hamlin*, 102 Wash. 2d 810, 689 P.2d 1372 (1984); *Grace Plaza, Inc. v. Elbaum*, 623 N.E.2d 513 (N.Y. 1993); *Fosmire v. Nicoleau*, 551 N.E.2d 77 (N.Y. 1990); *Rivers v. Katz*, 495 N.E.2d 337 (N.Y. 1986).

“loss of patient dignity, and unnecessary pain and suffering.”⁴⁵ The statute protects “the fundamental right to control the decisions relating to the rendering of [adult persons’] own health care,” “individual autonomy,” and “dignity and privacy.”⁴⁶ These interests and rights apply equally to all terminally-ill adults. The statute, however, specifically allows only those terminally-ill adults⁴⁷ who are on life-sustaining treatment to direct their doctors to withdraw such treatment,⁴⁸ and it protects such doctors from criminal prosecution.⁴⁹

Thus, many states, including Washington, recognize a significant liberty interest in the right to control the decisions relating to the rendering of health care and then distinguish between those competent, terminally-ill adults whose condition involves life-sustaining treatment and those whose condition does not. The first group has the right to direct the course of treatment with the specific purpose and result of hastening inevitable death. The second group does not, and must suffer the very same pain and suffering and loss of dignity and privacy from which the statute protects the first class. As discussed above, the decision to request termination of life-sustaining treatment is different in no material respect from requesting other means of hastening inevitable death. This fact, and the equal protection implications, has been recognized:

In essence, the distinction between physician-assisted suicide and the withdrawal or refusal of treatment is grounded in the policy-based categorization of suicide by withdrawing treatment as legal and suicide with physician assistance as illegal. Despite claims to the contrary, courts created exceptions to laws against “aiding suicide” when they permitted patients to demand withdrawal of life-sustaining treatment.⁵⁰

Another commentator observed:

If the decision to live or die is said to be so fundamental to a person that the state may not make it for him, then it is difficult to see on what plausible ground the right to make this decision could be

45. WASH. REV. CODE § 70.122.010 (1994).

46. *Id.*

47. While excluding the terminally-ill adult whose condition does not involve life-sustaining treatment, the statute extends its protection to a group not terminally ill: those who are permanently unconscious. WASH. REV. CODE § 70.122.030 (1994).

48. *Id.*

49. *Id.* § 70.122.051 (1994).

50. Note, *Physician-Assisted Suicide and the Right to Die with Assistance*, 105 HARV. L. REV. 2021, 2030 (1992).

granted to those on life-support but denied to all other individuals.⁵¹

The right of competent, terminally-ill adults to choose to hasten inevitable death with physician-prescribed medications is a choice protected by the Liberty Clause of the Fourteenth Amendment and is a fundamental right. Where government action burdens the fundamental rights of some more than those of others, the disparity is subject to strict scrutiny.⁵² In *Skinner v. Oklahoma*,⁵³ for example, the Court recognized that personal autonomy in reproductive matters is a fundamental right and that a law requiring sterilization of all felons except white collar felons was subject to strict scrutiny and violated the Equal Protection Clause. *Skinner* establishes that classifications that unequally distribute access to fundamental choices are presumptively invalid under the Equal Protection Clause. In *Eisenstadt v. Baird*,⁵⁴ the Court examined a state law that prohibited the sale of contraceptives to single persons, but granted access for married persons. The Court found that, "[i]n each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious."⁵⁵

Prohibiting competent, terminally-ill adults whose treatment does not include life support from exercising the right to choose to hasten death, a right that is recognized in *Cruzan* and Washington and New York law, distributes access to this choice unequally. The choice made by such persons to hasten inevitable death is different in no material respect from the choice of terminally-ill persons on life support to request its termination for the purpose of hastening death. No compelling state interest supports such a discriminatory classification.⁵⁶

51. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 794-95 (1989).

52. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-6, 16-12 (2d ed. 1988).

53. 316 U.S. 535 (1942).

54. 405 U.S. 438 (1972).

55. *Id.* at 454.

56. The district court in *Quill*, having rejected the claim that a fundamental right was involved, applied a rational basis test and upheld New York's discriminatory classification. *Quill*, 870 F. Supp. at 84-85.

IV. THE PRACTICAL IMPLICATIONS OF JUDICIAL RECOGNITION OF A CONSTITUTIONALLY PROTECTED RIGHT TO CHOOSE TO HASTEN DEATH WITH PHYSICIAN ASSISTANCE

This Section anticipates some of the medical and legal repercussions of a right to physician-assisted death. Part A of this Section addresses the impact of physician-assisted death on physicians. Part B anticipates the regulatory control, and limits of control, of the practice of physician-assisted death.

A. *Physicians Can Prescribe for the Purpose of Hastening Death*

If a constitutionally protected right to choose to hasten death with physician assistance is ultimately established, physicians will be able to prescribe drugs for the purpose of hastening death to their competent, dying patients, consistent with their professional judgment. Of course, physicians will be responsible for assuring that such patients are competent and acting voluntarily. In light of the severity of the result in the event of a mistake, doctors and hospitals will need to develop protocols to ensure that these standards are met and that the patient's privacy is protected.

B. *State Regulation of Assisted Dying*

It is likely that a court recognizing the patient's right to choose to hasten death will also recognize that the state may regulate the practice.⁵⁷ Physicians, physician organizations, and others involved in providing health care services can and should play an active role in the development of regulations in this area. Clinical criteria will need to be established.⁵⁸ Regulations might require a waiting period; the provision of information regarding alternative care options (e.g., hospice); a treating relationship between doctor and patient; reporting by facilities where assistance occurs; and various other measures.

C. *Challenges to State Regulation Can Be Anticipated*

Regulation by the state will be subject to scrutiny under the *Casey* undue burden standard.⁵⁹ It can be anticipated that regulation of this practice will be controversial and may result in litigation challenging

57. See *Compassion in Dying*, 850 F. Supp. at 1466.

58. See, e.g., F. G. Miller et al., *Regulating Physician-Assisted Death*, 331 NEW ENG. J. MED. 119 (1994); Timothy Quill, *Care of the Hopelessly Ill: Proposed Clinical Criteria for Physician-Assisted Suicide*, 327 NEW ENG. J. MED. 1380 (1992).

59. See *supra* note 17 and accompanying text; *Compassion in Dying*, 850 F. Supp. at 1466.

the provisions, akin to the reproductive rights cases, as the issue of what regulation is permissible (i.e., does not unduly burden) versus what is not (i.e., constitutes an undue burden) is resolved. Interestingly, it would appear that the Oregon Death with Dignity Act is vulnerable to an undue burden challenge. That law requires, for example, a 15-day waiting period. Such a lengthy waiting period may well constitute an undue burden.

V. CONCLUSION

The Supreme Court has recognized that the constitutional right of liberty stands as a barrier against laws that deny individuals the right to make the most fundamental choices affecting their values and lives. The Fourteenth Amendment protects the liberty to choose between a tortured, hideous death and a less painful, more dignified one, and it protects the equality of all who seek to make that fundamental, personal choice.

There can be little doubt that the question of whether dying patients have a constitutionally protected right to choose to hasten inevitable death with physician assistance will ultimately reach the United States Supreme Court. Should that court determine that such a right exists, the effect will be similar to that of *Roe v. Wade* in the reproductive rights context. States will be permitted to regulate but not prohibit physician-assisted death. Alternatively, if a federal constitutional right is not recognized, litigation may move to state courts under state constitutions, which are often more protective than the federal constitution. Another means to afford patients the right to choose physician-assisted death is through the legislature. Should judicial relief prove elusive, the pressure for legislative reform will likely increase.