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Note

The Debate on Physician-Assisted Suicide Reaches the Federal Courts. A Discussion of the Decisions of the District and Circuit Courts in *Compassion in Dying v. Washington State*.¹

I. Introduction

In *Compassion in Dying v. Washington State*,² the issue of whether a mentally competent, terminally ill person has a constitutional right to commit physician-assisted suicide was before a federal court for the first time.³ The plaintiffs challenged the Washington State statute that prohibited assisted suicide as violative of the Due Process⁴ and Equal Protection⁵ Clauses of the Fourteenth Amendment, as the statute applied to mentally competent, terminally ill patients within the context of physician-assisted suicide.⁶ The United States District Court for the Western District of Washington held that a mentally competent, terminally ill person has a constitutionally protected liberty interest in the right to commit physician-assisted suicide, under the Due Process Clause of the Fourteenth

1. 850 F. Supp. 1454 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir. 1995), *reh'g en banc granted*, 62 F.3d 299 (9th Cir. 1995).

2. *Id.*

3. *Id.* at 1455.

4. "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

5. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

6. *Compassion in Dying*, 850 F. Supp. at 1455. "A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide." WASH. REV. CODE ANN. 9A.36.060(1) (West 1988).

Amendment.⁷ Additionally, the district court held that the Washington statute prohibiting physician-assisted suicide violated the Equal Protection Clause of the Fourteenth Amendment by permitting patients dependent on life-sustaining medical equipment to seek physician aid in ending their lives through removal of the equipment, but prohibiting similarly situated mentally competent, terminally ill patients from seeking physician aid in ending their lives through other means which amount to physician-assisted suicide.⁸

On appeal, the Court of Appeals for the Ninth Circuit considered the issue as one of first impression in a federal appellate court,⁹ and that court reversed the judgment of the district court.¹⁰ The circuit court held that the Washington statute totally proscribing assisted suicide did not violate the constitutional rights of mentally competent, terminally ill patients.¹¹

The issue in *Compassion in Dying* was the constitutionality of physician-assisted suicide, not euthanasia.¹² Physician-assisted suicide is distinguishable from euthanasia.¹³ The primary distinction is the level of participation by the physician in the death of the patient.¹⁴ Euthanasia results when the physician actually administers a lethal agent to a patient,¹⁵ while

7. *Compassion in Dying*, 850 F. Supp. at 1462.

8. *Id.* at 1467. Washington State has, through case law and statutory law, recognized the rights of mentally competent, terminally ill patients, and permanently unconscious patients, whether or not terminally ill, to refuse life-sustaining medical treatment, or to have the treatment withdrawn. *Id.* at 1465-66 (citing *In re Grant*, 747 P.2d 445 (Wash. 1987)(en banc); *In re Hamlin*, 689 P.2d 1372 (Wash. 1984)(en banc). See also *id.* at 1466, n.11 (citing *In re Bowman*, 617 P.2d 731 (Wash. 1980); *In re Colyer*, 660 P.2d 738 (Wash. 1983)); WASH. REV. CODE ANN. 70.122.010 (West 1992 & West Supp. 1996).

9. *Compassion in Dying v. Washington*, 49 F.3d 586 (9th Cir. 1995), *reh'g en banc granted*, 62 F.3d 299 (9th Cir. 1995).

10. *Id.* at 588.

11. *Id.*

12. See generally *id.*; see generally also *Compassion in Dying*, 850 F. Supp. 1454.

13. See John Glasson, M.D., *Report of the Council on Ethical and Judicial Affairs of the American Medical Association; Transcript*, 10 ISSUES LAW AND MED. 91, 92 (1994).

14. *E.g.*, David Orentlicher, M.D., JD, *Physician Participation in Assisted Suicide*, 262 JAMA 1844, 1844 (1989).

15. Glasson, *supra* note 13, at 92. Euthanasia may be further described as voluntary, involuntary and nonvoluntary euthanasia. Council Report of the Council on Ethical and Judicial Affairs, American Medical Association, *Decisions Near the End of Life*, 267 JAMA 2229, 2229 (1992) [hereinafter *Council Report*]. Volun-

physician-assisted suicide results when the physician merely supplies a patient with sufficient means or information to commit suicide, and the patient administers the drug or performs the death-causing act herself.¹⁶ Euthanasia and physician-assisted suicide are further distinguishable from the acts of withholding or withdrawing life sustaining medical treatment.¹⁷ The act of withholding medical treatment occurs when the physician, at the request of the patient or a surrogate decisionmaker, refrains from administering the treatment; and the act of withdrawing medical treatment occurs when the physician, at the request of the patient or a surrogate decisionmaker, discontinues administration of the treatment.¹⁸ Unlike physician-assisted suicide and euthanasia, the acts of withholding and withdrawing life-sustaining medical treatment from competent patients, and in some instances incompetent patients, are accepted and considered ethical by the American Medical Association,¹⁹ and have been approved by many courts.²⁰

This casenote examines the decisions of both the district and circuit courts in *Compassion in Dying v. Washington* to determine whether either of the decisions is a logical extension of current law, whether either of the decisions provides a sound argument for other courts to follow, and whether, based on these determinations, the circuit court was correct in overruling the decision of the district court. Section II provides an explanation of the current state of the law regarding physician-assisted suicide. It also provides a background of the current

tary euthanasia occurs when a physician administers a lethal drug to a competent patient, at the patient's request. *Id.* Involuntary euthanasia occurs when a physician administers a lethal drug to an incompetent patient, without the consent of the patient. *Id.* Nonvoluntary euthanasia occurs when a physician administers a lethal drug to an incompetent patient, at the direction of a surrogate decisionmaker. *Id.*

16. Glasson, *supra* note 13, at 92.

17. *Id.*

18. *Council Report*, *supra* note 15, at 2230-31. Life-sustaining medical treatment is defined as "any medical treatment that serves to prolong life without reversing the underlying medical condition. [It] may include, but is not limited to, mechanical ventilation, renal dialysis, chemotherapy, antibiotics, and artificial nutrition and hydration." *Id.* at 2229.

19. *Id.* at 2230-31.

20. See *Cruzan v. Harmon*, 760 S.W.2d 408, 412-13 n.4 (Mo. 1988) (en banc), *aff'd*, *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990). See also *infra* notes 132-90 and accompanying text.

medical, societal, and legal attitudes about, and trends relevant to, physician-assisted suicide. Finally, section II discusses the relevant constitutional jurisprudence surrounding the issue of physician-assisted suicide, including cases dealing with the right to privacy and cases dealing with equal protection. Section III provides a summary of the facts and the decisions of both the district and circuit courts in *Compassion in Dying*. Section IV provides an analysis of the decisions of both the district and circuit courts in *Compassion in Dying*. Section V concludes that the decision of the district court in *Compassion in Dying* is a sound decision that is a logical extension of current law, and that is bound to lead the nation's courts in finding that physician-assisted suicide is constitutionally protected for mentally competent, terminally ill patients. Section V further concludes that the circuit court should not have overruled the decision of the district court, and that the decision of the circuit court, although currently the prevailing law in the Ninth Circuit, is short sighted and grounded in the moral attitudes of the prevailing majority judges. The decision of the circuit court does not thoroughly or accurately consider the relevant constitutional jurisprudence surrounding the issue of physician-assisted suicide, and thus, the circuit court did not arrive at a just and logical decision.

II. Background

A. *Current State of the Law Regarding Physician-Assisted Suicide*

The district court's decision in *Compassion in Dying* is significant because it opened a door, although briefly, to a right that was previously not legally recognized in this country.²¹ Although the circuit court closed this door, by reversing the dis-

21. *Compassion in Dying*, 850 F. Supp. at 1459, 1467. Although the Michigan Circuit Court previously held that a statute prohibiting assisted suicide violated the Due Process Clause of the Fourteenth Amendment, that holding was overruled on appeal. *People v. Kevorkian*, No. 93-11482, 1993 WL 603212 (Mich. Cir. Ct., Dec. 13, 1993), *rev'd sub nom.*, *Hobbins v. Attorney General*, 518 N.W.2d 487 (Mich. App. 1994), *aff'd in part, rev'd in part*, *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994), *cert. denied*, 115 S. Ct. 1795 (1995); *see also infra* note 24.

trict court,²² the decision of the district court demonstrated a willingness, by some members of the judiciary, to recognize the right to commit physician-assisted suicide as a constitutionally protected right.²³ Prior to the district court's decision in *Compassion in Dying*, the right to commit physician-assisted suicide was not recognized in this country by any legislative body or level of the judiciary.²⁴ In fact, physician-assisted suicide is statutorily prohibited in a majority of states.²⁵ Several states

22. *Compassion in Dying v. Washington*, 49 F.3d 586, 588 (9th Cir. 1995), *reh'g en banc granted*, 62 F.3d 299 (9th Cir. 1995).

23. See generally *Compassion in Dying*, 850 F. Supp. 1454.

24. Prior to the district court's decision in *Compassion in Dying* there were no federal court cases addressing the issue of physician-assisted suicide. However, there were several state court decisions addressing the issue. See *Donaldson v. Lundgren*, 4 Cal. Rptr. 2d 59 (2d Dist. 1992) (holding that a man suffering from a terminal brain disease did not have a constitutional right to commit assisted suicide). See also *People v. Kevorkian*, No. 93-11482, 1993 WL 603212 (Mich. Cir. Ct., Dec. 13, 1993), *rev'd sub nom. Hobbins v. Attorney General*, 518 N.W.2d 487 (Mich. Ct. App. 1994), *aff'd in part, rev'd in part*, *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994), *cert. denied*, 115 S.Ct. 1795 (1995) (holding that a Michigan statute prohibiting assisted suicide violated the Due Process Clause of the Fourteenth Amendment, by infringing on an individual's right to commit "rational suicide." *Id.* at *20. The court defined rational suicide as follows: "when a person's quality of life is significantly impaired by a medical condition and the medical condition is extremely unlikely to improve, and that person's decision to commit suicide is a reasonable response to the condition causing the quality of life to be significantly impaired, and the decision to end one's life is freely made without undue influence" *Id.* at *19. On appeal, this case was reversed on this point. *Hobbins v. Attorney General*, 518 N.W.2d 487 (Mich. Ct. App. 1994), *aff'd in part, rev'd in part*, *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994) (holding that there is no constitutional right to commit physician-assisted suicide). Subsequent to the district court's decision in *Compassion in Dying*, the issue of physician-assisted suicide came before the District Court for the Southern District of New York. *Quill v. Koppell*, 870 F.Supp. 78, 84-85 (S.D.N.Y. 1994) (holding that mentally competent, terminally ill patients do not have a constitutional right, under either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment, to commit physician-assisted suicide).

25. Timothy Egan, *Federal Judge Says Ban on Suicide Aid is Unconstitutional*, N.Y. TIMES, May 4, 1994, at A1, A24. See also Brief for Appellee at 1, 15 n.1 *Compassion in Dying v. Washington*, 49 F.3d 586 (9th Cir. 1995). See also ALASKA STAT. § 11.41.120 (1989); ARIZ. REV. STAT. ANN. § 13-1103(A)(3)(1989); ARK. CODE ANN. § 5-10-104 (Michie 1987); CAL. PENAL CODE § 401 (West 1988); COLO. REV. STAT. ANN. § 18-3-104(1)(b) (West 1988); CONN. GEN. STAT. ANN. §§ 53a-56 (West 1985); DEL. CODE ANN. tit. 11, § 645 (1987 & Supp. 1990); FLA. STAT. ANN. § 782.08 (West 1976); ILL. ANN. STAT. ch. 38, para. 12-31 (Smith-Hurd Supp. 1992); IND. CODE ANN. § 35-42-1-2.5 (Burns 1993); KAN. STAT. ANN. § 21-3406 (1988); ME. REV. STAT. ANN. tit. 17-A, § 204 (West 1983); 1992 MICH. PUB. ACTS 270 (West); MINN. STAT. ANN. § 609.215 (West 1987); MINN. STAT. ANN. § 147.091(W) (West Supp. 1993); MISS. CODE ANN. § 97-3-49 (1972); MONT. CODE ANN. § 45-5-105

have considered legalizing it, however.²⁶ To date, Oregon is the only state that has passed a statute legalizing physician-assisted suicide.²⁷ However, the Oregon law, which was passed in the latter part of 1994 by public referendum, is yet to be tested.²⁸ Within weeks of the passage of the law, the United States District Court for the District of Oregon issued a preliminary injunction, forbidding action under the law, until the constitutional arguments surrounding the law and the issue of physician-assisted suicide were heard and decided by that court.²⁹ After hearing the constitutional arguments and considering the issue, the court determined that the Oregon statute violated the Equal Protection Clause of the Fourteenth Amendment, and that the statute was, therefore, unconstitutional.³⁰

(1989); 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 1978); N.Y. PENAL LAW §§ 120.30, 125.15(3), 125.25(1)(b) (McKinney 1987); N.D. CENT. CODE § 12.1-16-04 (Supp. 1991); OKLA. STAT. ANN. tit. 21, §§ 813-818 (West 1983); PA. STAT. ANN. tit. 18, § 2505 (1983); S.D. CODIFIED LAWS ANN. § 22-16-37 (1988); TEX. PENAL CODE ANN. § 22.08 (West 1989); WASH. REV. CODE ANN. § 9A.36.060 (West 1988); WIS. STAT. ANN. § 940.12 (West 1982).

26. Dick Lehr, *Physicians Face Wrenching Choices. Requests for Help in Dying Produce a Professional Crisis. Death and the Doctor's Hand*, BOSTON GLOBE, Apr. 27, 1993, Metro, at 1, 6. Referendums to legalize physician-assisted suicide have been narrowly defeated in California and Washington. *Id.* The state legislatures in New Hampshire, Maine, and Iowa have considered passing bills legalizing physician-assisted suicide, but have not yet done so. *Id.* Additionally, Connecticut and Wisconsin are currently drafting legislation to legalize physician-assisted suicide. *Id.* Studies were conducted by commissions set up in New York in 1985, and in Michigan in 1992, to consider whether the laws on assisted suicide in each of those respective states should be changed. *Compassion in Dying*, 49 F.3d at 591-92 (citing WHEN DEATH IS SOUGHT. ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT (1994); MICHIGAN COMMISSION ON DEATH AND DYING, FINAL REPORT (1994).) Neither state's commission opted to legalize assisted suicide. *Id.* (citing WHEN DEATH IS SOUGHT. ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT (1994); MICHIGAN COMMISSION ON DEATH AND DYING, FINAL REPORT (1994)).

27. Death With Dignity Act, 1995 Or. Laws Ch. 3 I.M. No. 16. See also David Brown, *Medical Community Still Divided on Oregon's Assisted Suicide Act*, WASH. POST, Nov. 13, 1994, at A20 (stating that the enactment of Oregon's "Death with Dignity Act," Measure 16, which legalizes assisted suicide in Oregon, is unprecedented in this country).

28. See *Lee v. State*, 869 F. Supp. 1491 (D. Or. 1994).

29. *Id.* at 1491, 1493, 1502-03.

30. *Lee v. State*, 891 F. Supp. 1429, 1437 (D. Or. 1995). The court stated that, with respect to the Equal Protection Clause, "[l]egislation is presumed valid if a classification drawn by a statute is rationally related to a legitimate state interest." *Id.* at 1432 (citing *Schweiker v. Wilson*, 450 U.S. 221 (1981)). The court ex-

To date, the pioneering efforts of the district court in *Compassion in Dying*, and of the Oregon citizens who voted to legalize physician-assisted suicide in Oregon, have had no direct impact on the state of the law.³¹

B. Trends Relevant to and Attitudes About Physician-Assisted Suicide

The legalization of physician-assisted suicide in the United States is in accordance with current trends in the medical community.³² Although the American Medical Association has rejected the notion of physician-assisted suicide,³³ and the Hippocratic Oath forbids it,³⁴ the fact is that many physicians,

plained that “[a] classification rationally furthers a state interest when there is some fit between the disparate treatment and the legislative purpose.” *Id.* (citing *Katzenbach v. Morgan*, 384 U.S. 641 (1966)). The court then listed the relevant state interests connected with the statute legalizing physician-assisted suicide and found that, the way the statute was drawn, it did not provide for adequate safeguards to both protect the class of persons falling within the statute and to satisfy the relevant state interests. *Id.* The court concluded that “Measure 16 withholds from terminally ill citizens the same protections from suicide that the majority enjoys,” and it “provides a means to commit suicide to a severely overinclusive class. . . . The state interest and the disparate treatment are not rationally related and Measure 16, therefore, violates the Constitution of the United States.” *Id.* at 1438, 1437.

31. See generally *Compassion in Dying v. Washington*, 49 F.3d 586 (9th Cir. 1995), *reh'g en banc granted*, 62 F.3d 299 (9th Cir. 1995); see generally *Lee*, 891 F. Supp. at 1429.

32. See Sidney H. Wanzer, M.D. et al., *The Physician's Responsibility Toward Hopelessly Ill Patients*, 320 NEW ENG. J. MED. 844, 844, 847-48 (1989).

33. Glasson, *supra* note 13, at 91. “[T]he Council on Ethical and Judicial Affairs [of the American Medical Association] has a long-standing policy opposing euthanasia” *Id.* The June 1977 report of the Council on Ethical and Judicial Affairs of the American Medical Association, stated that “mercy killing or euthanasia — is contrary to public policy, medical tradition, and the most fundamental measures of human value and worth.” *Id.* (quoting REPORT OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS OF THE AMERICAN MEDICAL ASSOCIATION (1977)). In June 1988, the Council reaffirmed “its strong opposition to mercy killing.” *Id.* (quoting REPORT OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS OF THE AMERICAN MEDICAL ASSOCIATION (1988)). The June 1991 report, *Decisions near the End of Life*, was the first to specifically address the issue of physician-assisted suicide. The 1991 report stated that physicians “must not . . . participate in assisted suicide” because physician-assisted suicide is contrary to the role of a physician. *Id.* (quoting REPORT OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS OF THE AMERICAN MEDICAL ASSOCIATION, DECISIONS NEAR THE END OF LIFE, (1991)).

34. See *id.* at 93. “[P]hysicians shall ‘give no deadly drug to any, though it be asked of them, nor will they counsel such.’” *Id.* (quoting the Hippocratic Oath). *But see*, *Bouvia v. Superior Court*, 225 Cal. Rptr. 297 (1986) (Roth, P.J., concurring)

at least to some degree, are in favor of physician-assisted suicide.³⁵ The recent reaffirmation by the American Medical Association of its policy against physician-assisted suicide was met with strong dissent.³⁶ In a 1993 survey conducted by the American Journal of Public Health, 89% of physicians and nurses surveyed responded that they believed in prescribing medication to ease the pain of a terminally ill patient, even if the medication would also have the effect of hastening death.³⁷ According to surveys conducted by a Rollins College law professor, approximately 50% of American physicians admit to having helped a terminally ill patient hasten death.³⁸ Another survey, conducted in Washington State, revealed that 53% of physicians believe that physician-assisted suicide should be legal in certain situations, and that 40% of physicians would be willing to aid a patient in hastening death.³⁹ Finally, it is considered ethically acceptable in the medical community for a physician to administer increasing quantities of medication to a terminally ill patient, knowing that the medication may cause the death of the patient.⁴⁰ It is common practice for a physician to administer a palliative treatment, such as a morphine drip,⁴¹ to a dying pa-

"[T]he original [Hippocratic] Oath also contained the phrase 'I will not give to a woman an instrument to produce abortion. . . .' Obviously, the [medical] profession has already accommodated a deviation from that part of the oath." *Id.* at 308 (quoting the original Hippocratic Oath); TIMOTHY E. QUILL, M.D., DEATH AND DIGNITY, MAKING CHOICES AND TAKING CHARGE (1993) "Two overriding directives of the [Hippocratic] Oath are to prolong the lives of patients and to minimize their suffering. . . . These . . . principles often find themselves in conflict with one another in the treatment of the severely ill and the dying." *Id.* at 43 (emphasis added).

35. See, e.g., Larry Richardson, *Dying With a Doctor's Help*, WASH. POST, Mar. 1, 1994, Health, at 4.

36. *Id.*

37. *Id.*

38. Patty Shillington, *The Kevorkian Factor Two Views of Assisted Suicide A Way to Help the Terminally Ill, or a 'Quick Fix' for an Intolerant Society?*, MIAMI HERALD, June 8, 1994, at 1E, 2E (citing the results of surveys conducted by Marvin Newman, a legal ethics professor at Rollins College in Central Florida).

39. Brown, *supra* note 27, at A20.

40. Glasson, *supra* note 13, at 92; see also Thomas A. Preston, *Killing Pain, Ending Life*, N.Y. TIMES, Nov. 1, 1994, at A27. This is termed the "double effect." *Id.*

41. Preston, *supra* note 40, at A27. A morphine drip is a "slow, continuous injection of the painkiller into a vein [that] kill[s] the patient by slowly curtailing her breathing." *Id.*

tient.⁴² Some experts believe that “the morphine drip is . . . euthanasia, hidden by the cosmetics of professional tradition and language.”⁴³

The legalization of physician-assisted suicide is also gaining support in the public arena.⁴⁴ “Opinion polls in . . . America find consistent majorities in support of assisted suicide. . . .”⁴⁵ According to one study, conducted by the Boston Globe and the Harvard School of Public Health, 64% of Americans believe that a physician should be permitted to assist a terminally ill patient in hastening death by administering a lethal injection.⁴⁶ A similar study indicated that 68% of Americans believe that “people dying of an incurable painful disease should be allowed to end their lives before the disease runs its course.”⁴⁷ Society’s growing acceptance of physician-assisted suicide is also evidenced by law enforcement trends.⁴⁸ “In every situation where a physician has compassionately assisted a terminally ill person to commit suicide, criminal charges have been dismissed or a ver-

42. *Id.*; see also *Council Report*, *supra* note 15, at 2229, 2231. “Approximately 6,000 deaths per day are in some way planned or indirectly assisted in the United States, probably confined to the ‘double effect’ or pain-relieving medications, and to discontinuing or not starting potentially life-prolonging treatments.” *QUILL*, *supra* note 34, at 159.

43. *E.g.*, Preston, *supra* note 40, at A27. While the morphine drip is given under the guise of wanting to alleviate pain, the real purpose for the drip is to hasten death. This, however, is unspoken by physicians. “If I administer morphine to a suffering and dying patient to relieve pain, I am legal and ethical; if I say it is to end her life, I am illegal and unethical.” *Id. Contra*, Glasson, *supra* note 13, at 92 (differentiating both physician-assisted suicide and euthanasia from “the provision of a palliative treatment that may hasten the patients death (‘double effect’)” and stating that the intent of the physician in administering the medication is to ease pain, although the medication may cause the side effect of depressing the patient’s breathing and eventually causing the patient’s death).

44. Wanzer, *supra* note 32, at 844.

45. *The Right to Die*, *THE ECONOMIST*, Sept. 17, 1994, at 14. “Every public opinion survey taken over the past forty years asking questions about physician-assisted dying for the terminally ill has shown that a majority or Americans support the idea.” *QUILL*, *supra* note 34, at 159.

46. Ezekiel J. Emanuel, *Euthanasia: Historical, Ethical, and Empiric Perspectives*, 154 *ARCHIVES INTERNAL MED.* 1890, 1898 (1994). This study went a step beyond physician-assisted suicide to euthanasia, by inquiring about the desirability of letting a physician actually administer the injection, instead of merely supplying the death causing agent. *Id.*

47. *Council Report*, *supra* note 15, at 2229 (quoting Associated Press/Media General. *Poll No. 4*. Richmond, VA: Media General; Feb. 1985).

48. Orentlicher, *supra* note 14, at 1844.

dict of not guilty found.”⁴⁹ While physician-assisted suicide is statutorily prohibited in a majority of states, there have been inordinately few cases where a physician has been prosecuted for aiding a patient in committing suicide.⁵⁰ In one such case, Dr. Jack Kevorkian was tried for violating a Michigan statute that makes assisted suicide a criminal offense, after he assisted twenty patients in committing suicide.⁵¹ However, the jury refused to convict Dr. Kevorkian under the newly enacted law.⁵²

In addition to following the general medical and societal trends, the legalization of assisted suicide is a logical extension of legal trends.⁵³ First, most states have repealed statutes that made it a criminal offense to commit suicide or to attempt to commit suicide.⁵⁴ Second, there has been a significant increase in cases involving a patient’s right to refuse life-sustaining medical treatment in recent years, due to advances in medical technology and the ability of health care providers to keep people alive longer with different forms of medical equipment.⁵⁵ Third, a majority of states now have laws legitimizing advance direc-

49. QUILL, *supra* note 34, at 150.

50. Orentlicher, *supra* note 14, at 1844. A grand jury refused to issue an indictment against Dr. Quill for charges of physician-assisted suicide. *To Cease upon the Midnight*, THE ECONOMIST, Sept. 17, 1994 at 21, 22; QUILL, *supra* note 34, at 22. Dr. Quill was one of the first physicians in the United States to candidly admit that he aided a dying patient in committing suicide by providing her with barbiturates and advising her about the amount that would be necessary to commit suicide. *To Cease upon the Midnight*, THE ECONOMIST, Sept. 17, 1994 at 21, 22; see also Timothy E. Quill, M.D., *A Case of Individualized Decision Making*, 324 NEW ENG. J. MED. 691, 691-94 (1991) reprinted in QUILL, *supra* note 34, at 9-16.

51. David Margolick, *Jurors Acquit Dr. Kevorkian in Suicide Case*, N.Y. TIMES May 3, 1994 at A1. See also 1992 MICH. PUB. ACT 270 (West).

52. Margolick, *supra* note 51, at A1. “Dr. Kevorkian’s acquittal sends a message to prosecutors that juries in Michigan are not willing to convict a doctor who helps a terminally ill person implement a decision to hasten inevitable death.” *Id.* (quoting Robert Sedler, professor of constitutional law, Wayne State University).

53. See Wanzer, *supra* note 32, at 844.

54. *E.g.*, W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 74, at 568-69 (1972). “In America today . . . no penalty attaches to a successful suicide; but some states which retain common law crimes nevertheless speak of suicide as a “criminal” or “unlawful” act though . . . not strictly-speaking a crime. . . . No state has a statute making successful suicide a crime.” *Id.*

55. See *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 270 (1990) (citing *Cruzan v. Harmon*, 760 S.W.2d 408, 412 n.4 (Mo. 1988) (en banc), *aff’d sub nom. Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261 (1990) (collecting 54 reported decisions from 1976 through 1988)); see also Wanzer, *supra* note 32, at 844 (citing *Adult Right to Die Case Citations*. New York: Society for the Right to

tives, such as living wills,⁵⁶ and many states are considering passing health care proxy laws.⁵⁷ Finally, the courts have slowly recognized a greater number of rights as being protected as part of the right to privacy under the Due Process Clause of the Fourteenth Amendment,⁵⁸ and some courts have found that the right to refuse life sustaining medical treatment is one of these protected privacy rights.⁵⁹

Outside of the United States, the atmosphere surrounding the issues of physician-assisted suicide and euthanasia is substantially similar to that in the United States.⁶⁰ Although the practices of euthanasia and assisted suicide are not yet legal in any country, there is currently a great amount of debate surrounding these issues across the Western World, due to advances in medical technology.⁶¹ Public opinion polls in many western countries have revealed that the citizens of those countries favor both euthanasia and assisted suicide in some circumstances.⁶² A recent ruling by Germany's constitutional court permitted physicians to allow a terminally ill, comatose patient to die, by withdrawal of her life support.⁶³ Last year the Canadian Medical Association voted by a narrow margin to maintain its ban on both active euthanasia by physicians and physician-assisted suicide.⁶⁴ In the Netherlands, physician-assisted suicide is practiced openly,⁶⁵ although both euthanasia and physi-

Die (1988) (stating that the courts have consistently upheld patients' rights to refuse unwanted medical treatment in over 80 cases).

56. Wanzer, *supra* note 32, at 844. A living will is defined as "[a] document which governs the withholding or withdrawal of life-sustaining treatment from an individual in the event of an incurable or irreversible condition that will cause death within a relatively short time, and when such person is no longer able to make decisions regarding his or her medical treatment." BLACK'S LAW DICTIONARY 1599 (6th ed. 1990).

57. QUILL, *supra* note 34, at 194.

58. See Elizabeth Gleicher, *Legalized Physician-assisted Suicide*, 73 MICH. B.J. 184, 186 (1994); see also *infra* notes 72-131 and accompanying text.

59. *E.g.*, *In re Quinlan*, 355 A.2d 647 (N.J. 1976), *cert. denied*, *Garger v. New Jersey*, 429 U.S. 922 (1976).

60. See *To Cease upon the Midnight*, *supra* note 50, at 21.

61. *Id.*

62. *Id.* at 23.

63. *Id.* at 21; see also *The Right to Die*, *supra* note 45, at 14.

64. *To Cease upon the Midnight*, *supra* note 50, at 23.

65. *E.g.*, Richard W. Carlson, M.D., PhD & Mohammed S. Anwar M.D., *Wisconsin Physicians and Euthanasia*, 154 ARCHIVES INTERNAL MED. 501, 501 (Mar. 1994).

cian-assisted suicide are technically illegal.⁶⁶ “[T]here has been tacit agreement for nearly two decades not to prosecute physicians who assist their patients to die under certain conditions of guidelines.”⁶⁷ In early 1993 these guidelines⁶⁸ were approved by one chamber of the Dutch Parliament, and if they are approved by the other chamber, they will become law.⁶⁹ Of course, there are arguments both for and against the Dutch system, some claiming that too many old, sick, unwanted people are euthanized against their will,⁷⁰ and some claiming that people are allowed to avoid unendurable suffering and to maintain their dignity by having the right to choose to die before they lose control of their physical capabilities and their mental faculties.⁷¹

66. Lonnie R. Bristow, M.D., *Report of the Board of Trustees of the American Medical Association; Transcript*, 10 ISSUES LAW & MED. 81, 83 (1994) (citing Articles 293 and 294 of the Dutch Penal Code).

67. *Id.*

68. *Id.* at 83-84. A summary of the substantive and procedural guidelines which must be followed by physicians in the Netherlands before assisting a patient in committing suicide are as follows:

Substantive Guidelines (a) Euthanasia must be voluntary; the patient's request must be seriously considered and enduring. (b) The patient must have adequate information about his or her medical condition, the prognosis, and alternative methods of treatment (though it is not required that the patient be terminally ill). (c) The patient's suffering must be intolerable, in the patient's view, and must also be irreversible. (d) There must be no reasonable alternatives for relieving the patient's suffering that are acceptable to the patient. Procedural Guidelines (e) Euthanasia may be performed only by a physician (though a nurse may assist the physician). (f) The physician *must* consult with a second physician whose judgment can be expected to be independent. (g) The physician *must* exercise due care in reviewing and verifying the patient's condition as well as in performing the euthanasia procedure itself. (h) The relatives *must* be informed unless the patient does not wish this. (i) There *should* be a written record of the case. (j) The case may not be reported as a natural death.

Id. (quoting M.P. Battin, *A Dozen Caveats Concerning the Discussion of Euthanasia in the Netherlands*, in *THE LEAST WORST DEATH* 130 (1994)).

69. *Id.* at 84.

70. Stephen Chapman, *Where the Road to Assisted Suicide is Bound to Lead Us*, CHI. TRIB., Apr. 24, 1994, Perspective, at 3.

71. See Gerrit van der Was & Robert J.M. Dillman, *Euthanasia in the Netherlands*, 308 BRIT. MED. J. 1364, 1364 (1994).

C. *Privacy Cases*

There is no right of privacy explicitly stated in the Constitution.⁷² However, the United States Supreme Court has recognized a right of personal privacy, which protects the individual's right to self-determination, as implicit in the Constitution.⁷³ The Court, or individual justices, have found, at various times and in various circumstances, that the right of privacy may be derived from the First Amendment,⁷⁴ the Fourth and Fifth Amendments,⁷⁵ the Bill of Rights,⁷⁶ the Ninth Amendment,⁷⁷ and the Fourteenth Amendment.⁷⁸ The Court has slowly and continuously taken an expansive view of which rights it recognizes as being privacy rights embraced by constitutional protection.⁷⁹ In order for a right to come within the realm of protected

72. See, e.g., *Roe v. Wade*, 410 U.S. 113, 152 (1973).

73. *Id.*

74. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); U.S. CONST. amend. I states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

75. *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968); *Katz v. United States*, 389 U.S. 347, 350 (1967); *Boyd v. United States*, 116 U.S. 616, 630 (1886); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); U.S. CONST. amend. IV states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." *Id.*; U.S. CONST. amend. V states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id.

76. *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965). See *infra* notes 66-79 and accompanying text. See also U.S. CONST. amend. I-X.

77. *Griswold*, 381 U.S. at 486 (Goldberg, J., concurring); U.S. CONST. amend. IX states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." *Id.*

78. *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); U.S. CONST. amend. XIV states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." *Id.* (emphasis added).

79. Gleicher, *supra* note 58, at 186.

personal privacy, it must be a right that the Supreme Court deems "fundamental" or "implicit in the concept of ordered liberty."⁸⁰ Various rights which the Court has deemed "fundamental," and has therefore held to fall under constitutional protection as personal privacy rights, are the right to use contraceptives,⁸¹ the right of a woman to obtain an abortion,⁸² the right to make decisions about bodily integrity,⁸³ and the right to make decisions in many areas concerning the family, such as marital relations,⁸⁴ family relations,⁸⁵ procreation,⁸⁶ and child rearing and education.⁸⁷

1. *Right to use contraceptives*

In 1965 the Supreme Court held, in *Griswold v. Connecticut*,⁸⁸ that the right to use contraceptives was a constitutionally protected privacy right that inheres in a married couple.⁸⁹ In *Griswold*, the defendants, directors of Planned Parenthood, gave information to married couples about birth control, examined the wives, and prescribed a method of birth control for the wives to use.⁹⁰ The defendants were prosecuted and convicted under two Connecticut statutes.⁹¹ The first made it illegal for any person to use a contraceptive to prevent conception,⁹² and the other made it illegal for any person to as-

80. *Roe*, 410 U.S. at 152 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

81. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). See *infra* notes 88-102 and accompanying text for a discussion of the *Griswold* decision. See also *Carey v. Population Serv. Int'l*, 431 U.S. 678 at 685-86 (1977).

82. *Roe*, 410 U.S. at 153.

83. *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (holding that inmates had a privacy interest in being free from involuntary administration of psychotropic drugs).

84. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). See *infra* notes 222-37 and accompanying text for a discussion of the *Loving* decision.

85. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

86. *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942).

87. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1922).

88. 381 U.S. 479 (1965).

89. *Id.* at 485-86.

90. *Id.* at 480.

91. *Id.*

92. *Id.* "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined . . ." *Id.* (quoting CONN. GEN. STAT. § 53-32 (1958)).

sist, counsel, or cause another to commit any offense.⁹³ The defendants appealed, challenging the constitutionality of both statutes.⁹⁴

The Court held that the statute forbidding the use of contraceptives to prevent conception unconstitutionally intruded upon the right of marital privacy.⁹⁵ In reaching this decision, the Court explained that certain guarantees of the Bill of Rights have penumbras emanating from the guarantees and helping to give them substance.⁹⁶ The Court reasoned that these constitutional guarantees create particular "zones of privacy,"⁹⁷ which protect an individual within them from being subjected to overly intrusive government intervention.⁹⁸ The government may regulate an activity that falls within these "zones of privacy," but it may not invade so much as to obstruct a protected freedom.⁹⁹ The Court held that marriage falls within these "zones of privacy," and therefore, the government must respect the rights of married individuals to make marital decisions, such as using contraceptives to avoid conception.¹⁰⁰

A majority of the Court in *Griswold* held that the right of privacy stemmed from the penumbras of the Bill of Rights,¹⁰¹

93. *Griswold*, 381 U.S. at 480 "Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principle offender." *Id.* (quoting CONN. GEN. STAT. § 54-196 (1958)).

94. *Id.* at 480-81.

95. *Id.* at 485-86.

96. *Id.*

97. *Id.*

The right of association contained in the penumbra of the First Amendment is [a zone of privacy]. . . . The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'

Id. at 484.

98. *Griswold*, 381 U.S. at 485.

99. *Id.*

100. *Id.* at 485-86.

101. *Id.* at 484-85.

and not from the Fourteenth Amendment. Several justices concurred in the opinion, agreeing that marriage fell within the right of privacy, which was constitutionally protected, but arguing that the right of privacy stemmed from different individual constitutional amendments.¹⁰²

In 1972, the United States Supreme Court decided *Eisenstadt v. Baird*.¹⁰³ *Eisenstadt* extended the right to use contraceptives, as stated in *Griswold*, from married couples to all individuals, on the basis of equal protection.¹⁰⁴ In addition to its equal protection analysis in *Eisenstadt*, the Court also noted that “[i]f the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”¹⁰⁵

2. Right to obtain an abortion

In *Roe v. Wade*,¹⁰⁶ the United States Supreme Court held that a woman has a constitutionally protected privacy right to obtain an abortion.¹⁰⁷ The Court has consistently reaffirmed that holding in later cases.¹⁰⁸ The most recent Supreme Court

102. *Id.* at 486-500 (Goldberg, J., concurring)(arguing that the right to privacy at issue in the case stemmed from the Ninth Amendment); *id.* at 500-02 (Harlan, J., concurring) (arguing that the right to privacy at issue in the case stemmed from the Due Process Clause of the Fourteenth Amendment).

103. 405 U.S. 438 (1972).

104. *Id.* at 443.

105. *Id.* at 453-54 (citing *Stanley v. Georgia*, 394 U.S. 557 (1969); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)). See *infra* notes 196-221 and accompanying text for a discussion of the *Eisenstadt* decision.

106. 410 U.S. 113 (1973).

107. *Id.* at 153.

108. *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 420 (1983) *overruled in part by Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2816-17, 2823 (1992); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 759 (1986) *overruled in part by Casey*, 112 S. Ct. at 2816-17, 2823. *Casey* overruled *Akron I* and *Thornburgh* only to the extent that those cases were inconsistent with the statement in *Roe* that the State has legitimate interests in the potential life of the fetus. *Casey*, 112 S. Ct. at 2816-17. The *Casey* Court held constitutional certain pre-viability measures taken by the State to further its interests in fetal life, which *Akron I* and *Thornburgh* deemed unconstitutional. *Id.* at 2823. The *Casey* Court noted, however, that the “central premise of those cases represents an unbroken commitment by [the] Court to the essential holding of *Roe*.” *Id.*; *Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989) (where a majority of the court reaffirmed or did not address the basic holding in *Roe v. Wade*).

decision to reaffirm the essential holding of *Roe v. Wade* was *Planned Parenthood v. Casey*.¹⁰⁹

In *Casey*, the Court was asked to overrule *Roe*.¹¹⁰ In declining to do so, the Court held that a woman has a protected liberty interest in obtaining an abortion, before the fetus is viable, without undue interference from the state.¹¹¹ The Court determined that this right “derives from the Due Process Clause of the Fourteenth Amendment.”¹¹² The Court realized that abortion is an emotionally-charged issue about which many people disagree, due to differences in moral and religious ideals.¹¹³ The Court refused to mandate its own moral agenda, however, stating that “[its] obligation is to define the liberty of all, not to mandate [its] own moral code.”¹¹⁴

The Court explained that there is a “realm of personal liberty”¹¹⁵ inherent in the United States Constitution that limits the states’ interference in the lives and decisions of individuals.¹¹⁶ The outer limits of this protected “realm of personal liberty” have not yet been defined.¹¹⁷ The Court has thus far held that this “realm of personal liberty” protects “personal decisions ‘relating to marriage, procreation, contraception, family relationships, and child rearing and education.’”¹¹⁸ Additionally, the state may not unduly interfere with personal decisions about bodily integrity.¹¹⁹ These personal decisions are constitutionally protected because:

[t]hese 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 de-

109. 112 S. Ct. 2791, 2804 (1992).

110. *Id.* at 2803.

111. *Id.* at 2804.

112. *Id.*

113. *Id.* at 2806.

114. *Casey*, 112 S. Ct. at 2806.

115. *Id.* at 2805.

116. *Id.* at 2805-06.

117. *Id.* at 2811 (citing *Carey v. Population Serv. Int'l*, 431 U.S. 678, 684-85 (1977)).

118. *Id.* (quoting *Carey*, 431 U.S. at 684-85 (citations omitted)).

119. *Casey*, 112 S. Ct. at 2806 (citing *Washington v. Harper*, 494 U.S. 210, 221-22 (1990); *Winston v. Lee*, 470 U.S. 753 (1985); *Rochin v. California*, 342 U.S. 165 (1952)).

fine one's own concept of existence, of meaning, of the universe, and of the mystery of human life.¹²⁰

These liberties could not be attained by individuals if they were forced to suffer undue interference from the state.¹²¹

In the context of abortion, "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. . . . Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role" ¹²² "Roe . . . may be seen . . . as a rule . . . of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection."¹²³ In order for a woman to remain autonomous, and to prevent her from suffering undue interference from the state, the Court refused to overrule the basic holding of *Roe v. Wade*.¹²⁴

The *Casey* Court explained that the right of a woman to obtain an abortion is not an absolute right.¹²⁵ The court stated that this concept holds true with all liberty interests, and "not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right."¹²⁶ The court noted that the state interest in protecting the potential life of the fetus and the life of the mother must be considered along with the interests of the mother.¹²⁷ "The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted."¹²⁸ Consequently, a statute which serves a valid purpose but has the incidental effect of limiting the right to obtain an abortion will stand, unless it imposes an undue burden on a woman's ability to exercise the right.¹²⁹ The Court explained that a statute which creates an "undue burden" is one which "plac[es] a substantial obstacle in

120. *Id.* at 2807.

121. *Id.*

122. *Id.*

123. *Id.* at 2810.

124. *Casey*, 112 S. Ct. at 2816-17.

125. *Id.* at 2819.

126. *Id.* at 2818 (citing as examples *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Norman v. Reed*, 502 U.S. 279 (1992) (holding that every limitation on access to voting ballots is not an infringement on the right to vote)).

127. *Id.* at 2820 (citing *Roe v. Wade*, 410 U.S. 113, 162 (1973)).

128. *Id.*

129. *Casey*, 112 S. Ct. at 2819.

the path of a woman seeking an abortion of a nonviable fetus."¹³⁰ The Court concluded that the undue burden standard is the correct standard to apply in order to balance the interests of the state with the constitutional rights of the woman.¹³¹

3. *Right to refuse or withdraw life-sustaining medical treatment*

In recent years, the courts have been confronted with a growing number of cases which require a determination of whether a patient has the right to have life-sustaining medical treatment withdrawn.¹³² Courts that have faced the issue of a patient's right to refuse medical treatment have dealt with the issue differently, though most courts have reached the same conclusion.¹³³ "Nearly unanimously, those courts have found a way to allow persons wishing to die, or those who seek the death of a ward, to meet the end sought."¹³⁴ Consistent with the expansion of constitutionally protected privacy rights in other personal areas, some courts have held that the Fourteenth Amendment gives a patient a constitutionally protected privacy right to refuse or discontinue medical treatment.¹³⁵ However, other courts have held that a patient's right to refuse medical treatment is derived from the common law doctrine of informed consent.¹³⁶ Still other courts have held that the right to refuse

130. *Id.* at 2820.

131. *Id.*

132. *Cruzan v. Harmon*, 760 S.W. 2d 408, 412 n.4 (Mo. 1988) (en banc), *aff'd sub nom.*, *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990) (listing state court cases from 1979 to 1988 that dealt with the issue of removal of life-sustaining machinery).

133. *Id.* at 413.

134. *Id.*

135. *In re Quinlan*, 355 A.2d 647 (N.J. 1976), *cert. denied*, *Garger v. New Jersey*, 429 U.S. 922 (1976) (holding that a patient in a vegetative state with no hope of recovery had a privacy right to discontinue life-sustaining medical equipment, which was protected by the Fourteenth Amendment). See *infra* notes 142-167 and accompanying text for a discussion of the *Quinlan* decision; See also, *Bouvia v. Superior Court*, 225 Cal. Rptr. 297 (1986) (discussing both the right of privacy and the doctrine of informed consent, but holding that a patient who was mentally competent and not terminally ill could elect to have life-sustaining medical equipment removed based solely on the constitutional right of privacy).

136. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 269 (1990). The doctrine of informed consent was described by Justice Cardozo as follows: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his

medical treatment is derived from both the protected privacy right of the Fourteenth Amendment and the common law doctrine of informed consent.¹³⁷ A majority of courts have based the right to refuse medical treatment on either the common law doctrine of informed consent or both the doctrine of informed consent and a right to personal privacy.¹³⁸ The United States Supreme Court confronted the issue in *Cruzan v. Director, Missouri Department of Health*, where it stated that guardians of an incompetent person could require discontinuation of life-sustaining medical treatment if they could prove, by evidence sufficient to satisfy the state, that the incompetent person would have required the treatment to be withdrawn, had she been competent to make the decision.¹³⁹ In reaching this holding, the Court briefly addressed the rights of mentally competent persons to remove life-sustaining medical treatment.¹⁴⁰ It assumed, for the purposes of *Cruzan*, that a mentally competent person has a liberty interest under the Due Process Clause of the Fourteenth Amendment to refuse or withdraw unwanted medical treatment.¹⁴¹

In the seminal case *In re Quinlan*,¹⁴² the New Jersey Supreme Court held that a person has a constitutionally protected right to discontinue medical treatment under certain conditions, stemming from the constitutional right to privacy.¹⁴³ In that case, Karen Ann Quinlan stopped breathing for two 15

patient's consent commits an assault, for which he is liable in damages." *Id.* (quoting *Schloendorff v. Society of N.Y. Hospital*, 211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914)); see *infra* notes 168-190 and accompanying text for a discussion of the *Cruzan* decision.

137. *E.g.*, *Superintendent of Belchertown State Schs. v. Saikewicz*, 370 N.E.2d 417 (Mass. 1977) (holding that the right of an elderly man to refuse chemotherapy was grounded in the constitutional right to privacy and the common law right of informed consent).

138. *Cruzan*, 497 U.S. at 271 (citing LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-11, 1365 (2d ed. 1988)).

139. *Id.* at 284.

140. *Id.* at 279.

141. *Id.* In *Cruzan*, the patient plaintiff was not mentally competent, *id.* at 265, and the question before the Court was whether a person who was not mentally competent had a constitutional right to have medical treatment withdrawn. *Id.* at 269; see *infra* notes 168-190 and accompanying text for a discussion of the *Cruzan* decision.

142. 355 A.2d 647 (N.J. 1976), *cert. denied*, *Garger v. New Jersey*, 429 U.S. 922 (1976).

143. *Id.* at 663.

minute intervals, as a result of which she entered a "chronic persistent vegetative state"¹⁴⁴ and was unable to breathe without a respirator.¹⁴⁵ When there was no longer any hope that Karen Ann would recover,¹⁴⁶ her father sought court approval to have her life-sustaining medical treatment removed.¹⁴⁷ The lower court denied the father's pleas and he appealed, claiming that his daughter had a constitutional right to withdraw medical treatment.¹⁴⁸

The New Jersey Supreme Court held that a person has a constitutionally protected right to withdraw life-sustaining medical treatment.¹⁴⁹ In reaching the determination that this right to withdraw medical treatment not only existed, but that it was a constitutionally protected right, the court examined the right to religious freedom, the right to protection against cruel and unusual punishment, and the right of privacy.¹⁵⁰

The court first determined that the First Amendment right to free exercise of religion did not mandate granting the relief the plaintiff requested under the circumstances.¹⁵¹ "[T]he right to religious beliefs is absolute but conduct in pursuance thereof is not wholly immune from governmental restraint."¹⁵² At least under the circumstances of this case, where the religious belief sought to be protected was truly religious "neutrality,"¹⁵³ the State's interest in preserving life must take precedence over

144. *Id.* at 654; *Cruzan*, 497 U.S. at 266-67 n.1. The *Cruzan* Court recognized the definition of "vegetative state," as earlier stated by Dr. Fred Plum, who created the term "persistent vegetative state," as follows:

Vegetative state describes a body which is functioning entirely in terms of its internal controls. It maintains temperature. It maintains heart beat and pulmonary ventilation. It maintains digestive activity. It maintains reflex activity of muscles and nerves for low level conditioned responses. But there is no behavioral evidence of either self-awareness or awareness of the surroundings in a learned manner.

Id. (quoting *In re Jobes*, 529 A.2d 434, 438 (1987)).

145. *Quinlan*, 355 A.2d at 653-54.

146. *Id.* at 655.

147. *Id.* at 653.

148. *Id.* at 651, 653.

149. *Id.* at 664.

150. *Quinlan*, 355 A.2d at 661-64.

151. *Id.* at 661.

152. *Id.* (citing *John F. Kennedy Memorial Hosp. v. Heston*, 279 A.2d 670 (N.J. 1971)).

153. *Id.*

freedom of religion.¹⁵⁴ The court then determined that the Eighth Amendment guarantee of protection against cruel and unusual punishment was inapplicable because that guarantee only applies to cases in which penal sanctions are imposed.¹⁵⁵ Finally, the court examined the right to privacy.¹⁵⁶ The court reasoned that this right, which is not explicitly stated in the Constitution, but which the United States Supreme Court has found to be implicit in the Constitution,¹⁵⁷ is “[p]resumably . . . broad enough to encompass a patient’s decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman’s decision to terminate pregnancy under certain circumstances.”¹⁵⁸

The court, having found a right to privacy implicated by the administration of unwanted medical treatment, determined that a patient would normally have to be competent in order to exercise this right to discontinue medical treatment.¹⁵⁹ However, the court allowed a guardian to assert the right of privacy on behalf of the incompetent patient under the circumstances of the case.¹⁶⁰ The court opined that allowing the guardian and family to determine whether the incompetent patient would want the life support removed under the circumstances, was the “only practical way to prevent destruction of the right”¹⁶¹

The *Quinlan* court additionally addressed the aspects of the physician’s involvement in withdrawal of life-sustaining medical treatment.¹⁶² The court determined that a physician could not be held criminally liable for withdrawing life-sustaining medical treatment in circumstances similar to those in *Quinlan*.¹⁶³ The court so held, in part, because there is a difference between homicide and the termination of life support.¹⁶⁴ Where life support is terminated, death results from “natural

154. *Id.*

155. *Quinlan*, 355 A.2d at 662.

156. *Id.* at 662-64.

157. *Id.* at 663. (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969)).

158. *Id.* (citing *Roe v. Wade*, 410 U.S. 113, 153 (1973)).

159. *Id.* at 664.

160. *Quinlan*, 355 A.2d at 664.

161. *Id.*

162. *Id.* at 664-70.

163. *Id.* at 669.

164. *Id.* at 670.

causes."¹⁶⁵ Additionally, "the exercise of a constitutional right . . . is protected from criminal prosecution."¹⁶⁶ This protection extends to third parties aiding a person in exercising her constitutional rights.¹⁶⁷

In *Cruzan v. Director, Missouri Department of Health*,¹⁶⁸ petitioner Nancy Cruzan was in a persistent vegetative state¹⁶⁹ as a result of an automobile accident.¹⁷⁰ When it became clear that there was no hope of Nancy recovering or regaining her mental faculties, co-petitioners, her parents as guardians, repeatedly requested that her physicians remove her feeding and hydration tubes.¹⁷¹ When Nancy Cruzan's physicians refused to do so without court approval, co-petitioners sought court approval to have the tubes removed.¹⁷² The Missouri Supreme Court refused to approve the removal of Nancy's life-sustaining medical equipment.¹⁷³ That court held that the co-petitioners did not sufficiently prove that the patient would have removed the medical equipment had she been competent to make the choice.¹⁷⁴ The United States Supreme Court affirmed the judgment of the Missouri Supreme Court,¹⁷⁵ holding that a state may mandate, as a requirement for removal of life-sustaining medical equipment, that the guardians of an incompetent person prove, by clear and convincing evidence, that the incompetent person would have wanted life support removed.¹⁷⁶

165. *Quinlan*, 355 A.2d at 670.

166. *Id.* (citing *Stanley v. Georgia*, 394 U.S. 557, 559 (1969)).

167. *Id.* (citing *Eisenstadt v. Baird*, 405 U.S. 438, 445-46 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965)).

168. 497 U.S. 261 (1990).

169. *Id.* at 266 n.1 The Court reiterated the findings of the trial court, that were adopted by the state Supreme Court, which stated in part: "Nancy is diagnosed as in a persistent vegetative state. She is not dead. She is not terminally ill. Medical experts testified that she could live another thirty years." *Id.* (quoting *Cruzan v. Harmon*, 760 S.W. 2d 408, 411 (Mo. 1988) (en banc), *aff'd*, *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990) (quotations omitted; footnote omitted)). See *supra* note 144 for the definition of "vegetative state."

170. *Cruzan*, 497 U.S. at 266.

171. *Id.* at 267.

172. *Id.* at 268.

173. *Id.* (citing *Cruzan v. Harmon*, 760 S.W.2d 408).

174. *Id.* (citing *Cruzan v. Harmon*, 760 S.W.2d at 424, 426).

175. *Cruzan*, 497 U.S. at 287.

176. *Id.* at 284.

The United States Supreme Court assumed, for purposes of this case, that a competent person has a liberty interest, under the Due Process Clause of the Fourteenth Amendment, to refuse unwanted medical treatment.¹⁷⁷ The Court stated that “[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from [the Court’s] prior decisions.”¹⁷⁸ The Court rejected the petitioners’ contention that the incompetent person should have the same right as the competent person in refusing life sustaining medical treatment, stating that this claim “begs the question.”¹⁷⁹ The Court recognized that an incompetent person is not capable of making “an informed and voluntary choice to exercise a hypothetical right to refuse treatment. . . . Such a ‘right’ must be exercised for her, if at all, by some sort of surrogate.”¹⁸⁰ The Court noted that Missouri had merely implemented a procedural safeguard to ensure protection of the incompetent person’s rights,¹⁸¹ and after considering whether such a safeguard was constitutional, the Court determined that it was in accordance with the Constitution.¹⁸²

Once the Court has determined that a person has a constitutionally protected liberty interest, it must consider further “whether [his] constitutional rights have been violated . . . by balancing his liberty interests against the relevant state interests.”¹⁸³ The State interests asserted in *Cruzan* were the interests in protecting and preserving life.¹⁸⁴ Because of the significant State interests implicated in dealing with the withdrawal of the life support of an incompetent person, the Court held that a State may adopt a clear and convincing evidence standard of proof in order to protect these interests.¹⁸⁵ The Court stated that “[i]t cannot be disputed that the Due Process

177. *Id.* at 279.

178. *Id.* at 278.

179. *Cruzan*, 497 U.S. at 279-80.

180. *Id.* at 280.

181. *Id.*

182. *Id.*

183. *Id.* at 279 (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982)).

184. *Cruzan*, 497 U.S. at 280.

185. *Id.* at 280-84.

Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment."¹⁸⁶

Proceeding on the assumption made by the Court that a competent person has a protected liberty interest in removing life support, Nancy Cruzan would have been legally permitted to request removal of her feeding tubes if she were competent.¹⁸⁷ However, because Nancy Cruzan was incompetent, her guardians could be required by the State to prove by clear and convincing evidence that she would have made the decision to disconnect the life support, had she been competent to make such a decision.¹⁸⁸ This, the guardians failed to do.¹⁸⁹ Therefore, the State was permitted to refuse to grant her guardians permission to request removal of life support on her behalf.¹⁹⁰

D. Equal Protection Cases

The United States Supreme Court has repeatedly held that the Equal Protection Clause of the Fourteenth Amendment¹⁹¹ does not disallow states from treating different classes of persons differently, or from devising classifications of persons when drafting legislation.¹⁹² However, the Equal Protection Clause does require that all persons similarly situated be treated the same.¹⁹³ "[A] classification [drawn by a state] must be reasonable, not arbitrary, and must rest upon some ground of differ-

186. *Id.* at 281.

187. *See id.* at 278-79.

188. *Id.* at 284.

189. *Cruzan*, 497 U.S. at 285.

190. *Id.* After the decision of the United States Supreme Court was handed down in *Cruzan*, Nancy Cruzan's parents requested a new hearing in the Jasper County Probate Court. Malcolm Gladwell, *Court Rules Woman has Right to Die; Cruzan Case Leaves Unresolved Issues, Legal Experts Say*, WASH. POST, Dec. 15, 1990, at A1, A10. That court granted the new hearing and, after conclusion of the hearing, the court granted Nancy Cruzan's parents the right to require that her feeding tube be removed. *Anger in Hospital at a Death Order*, N.Y. TIMES, Dec. 16, 1990, at 29. Cruzan's feeding tube was removed by her physician later that day. *Id.*

191. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

192. *Reed v. Reed*, 404 U.S. 71, 75 (1971); *Barbier v. Connolly*, 113 U.S. 27, 31-32 (1885); *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 808-09 (1969); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

193. *Eisenstadt v. Baird*, 405 U.S. 438, 446-47 (1972) (citing *Reed v. Reed*, 404 U.S. 71, 75-76 (1971)).

ence having a fair and substantial relation to the object of legislation"¹⁹⁴ The Equal Protection Clause of the Fourteenth Amendment

undoubtedly intended . . . that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; . . . that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; [and] that no greater burdens should be laid upon one than are laid upon others in the same calling and condition¹⁹⁵

In *Eisenstadt v. Baird*,¹⁹⁶ appellee Baird gave lectures at various colleges, at which he displayed different kinds of contraceptives.¹⁹⁷ During the course of one such lecture at Boston College, Baird exhibited contraceptives to his audience of college students, and at the end of the lecture, he gave out a sample of contraceptive foam to an unmarried woman.¹⁹⁸ He was convicted by the trial court for violating Massachusetts law, both by displaying the articles, and by giving out the sample of contraceptive foam.¹⁹⁹ The statute under which he was convicted made it unlawful for any person to "give[] away . . . any drug, medicine, instrument, or article whatever for the prevention of conception"²⁰⁰ except that a physician, or a pharmacist with a prescription from a physician, may give these things to a married person.²⁰¹ The statute clearly distinguished between three classes of persons: "*first*, married persons may obtain contraceptives to prevent pregnancy, but only from doctors or druggists on prescription; *second*, single persons may not obtain contraceptives from anyone to prevent pregnancy; and, *third*, married or single persons may obtain contraceptives from anyone to prevent, not pregnancy, but the spread of disease."²⁰² The Supreme Court of Massachusetts upheld Baird's conviction

194. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

195. *Barbier v. Connolly*, 113 U.S. 27, 31 (1885).

196. 405 U.S. 438 (1972).

197. *Id.* at 440.

198. *Id.*

199. *Id.*

200. *Id.* at 440-41 (citing MASS. GEN. LAWS ANN. ch. 272, § 21 (West 1990)).

201. *Eisenstadt*, 405 U.S. at 441 (citing MASS. GEN. LAWS ANN. ch. 272, § 21A (West 1990)).

202. *Id.* at 442.

based solely on his action of giving out a sample of contraceptive foam.²⁰³ Baird later filed an action in the district court for a writ of habeas corpus, which that court dismissed,²⁰⁴ but the First Circuit subsequently ordered that the writ be granted.²⁰⁵

The United States Supreme Court granted certiorari to determine whether there was a rational basis for maintaining a distinction between married and unmarried persons that would justify the different treatment afforded to each group under Massachusetts law.²⁰⁶ The Court explained that the Equal Protection Clause does not forbid the government from treating people differently when those people are not similarly situated.²⁰⁷ However, the Equal Protection Clause does forbid the government from treating different classes of people differently when the disparate treatment is based solely on arbitrary distinctions.²⁰⁸ "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'"²⁰⁹

In determining whether there was a rational basis for the distinctions made under the Massachusetts statute, the Court first examined the purported state interests in enforcing the statute.²¹⁰ The Court determined that, contrary to the claims of the State, the purpose of the statute was not to discourage premarital sex, because the overall effect of the statute would be to punish the act of premarital sex with pregnancy.²¹¹ The Court also refused to accept the state court's determination that the statute was a health measure intended to protect the health and safety of Massachusetts citizens, because it was shown that

203. *Id.* at 440 (citing *Commonwealth v. Baird*, 247 N.E.2d 574 (Mass. 1969)).

204. *Id.* (citing *Baird v. Eisenstadt*, 310 F. Supp. 951 (D. Mass. 1970)).

205. *Id.* (citing *Baird v. Eisenstadt*, 429 F.2d 1398 (1st Cir. 1970)).

206. *Eisenstadt*, 405 U.S. at 447.

207. *Id.* at 446-47 (citing *Reed v. Reed*, 404 U.S. 71, 75-76 (1971); *Barbier v. Connolly*, 113 U.S. 27 (1885); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); *Railway Express Agency v. New York*, 336 U.S. 106 (1949); *McDonald v. Board of Election Comm'rs*, 394 U.S. 802 (1969)).

208. *Id.* at 447 (citing *Reed v. Reed*, 404 U.S. 71, 75-6 (1971)).

209. *Id.* (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

210. *Id.* at 448.

211. *Eisenstadt*, 405 U.S. at 448.

the State did not have this purpose in mind when the statute was enacted.²¹²

The Court determined that there was no rational difference between married persons and unmarried persons that would justify the different treatment given to them under the statute.²¹³ It stated that "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike."²¹⁴ The Court declined to determine whether the statute could be upheld solely as a prohibition of contraceptives.²¹⁵ This question rested on the determination of whether *Griswold v. Connecticut*²¹⁶ prohibited a ban on the distribution of contraceptives to married persons.²¹⁷ The Court determined that whether or not *Griswold* prohibited a ban on the distribution of contraceptives to married persons, the Equal Protection Clause requires that married persons and single persons be treated alike.²¹⁸ To allow one group (either married or single) access to contraceptives to prevent conception, while not allowing the other group that same right, would violate the Equal Protection Clause because, "[i]n each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious."²¹⁹ Finally, the *Eisenstadt* Court quoted Mr. Justice Jackson, stating that his comments made in *Railway Express Agency v. New York*,²²⁰ although made

212. *Id.* at 450.

213. *Id.* at 447. The requirement that the statutory classification be merely rationally related to a valid state interest for the statute to be valid is the equal protection standard. *Id.* at 447 n.7. If the Court had concluded that the statute infringed on a fundamental right, then it would have applied a more stringent standard, requiring a compelling state interest for the classification to pass scrutiny. *Id.* (citing *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Loving v. Virginia*, 388 U.S. 1 (1967)). However, the Court determined that application of the stricter standard was not required in this case because the statute failed to meet even this more lenient equal protection standard. *Id.* (citing *Reed v. Reed*, 404 U.S. 71 (1971)).

214. *Id.* at 453.

215. *Id.* at 452-53.

216. 381 U.S. 479 (1965). See *supra* notes 88-102 and accompanying text for a discussion of the *Griswold* decision.

217. *Eisenstadt*, 405 U.S. at 452-53.

218. *Id.* at 453-54.

219. *Id.* at 454.

220. 336 U.S. 106 (1949).

in the context of administrative regulations, equally applied to the context of contraception:

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.²²¹

In *Loving v. Virginia*,²²² the Supreme Court considered whether a Virginia statutory scheme implemented to prevent marriages between persons on the basis of racial classifications was a violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.²²³ Defendants, an interracial couple who were Virginia residents, were married in Washington D.C.²²⁴ Subsequent to their marriage, defendants returned to Virginia to live, violating Virginia law, and were convicted under two statutes.²²⁵ These statutes made it a crime for “any white person and colored person”²²⁶ to marry outside the state and return to Virginia to live as husband and wife.²²⁷ The punishment for violating the statutes was the same for any person, regardless of race.²²⁸

The United States Supreme Court struck down the Virginia statutory scheme as a violation of the Equal Protection Clause of the Fourteenth Amendment.²²⁹ The Court recognized that marriage was a social institution subject to the state’s police power, but explained that the State was nonetheless limited by the Fourteenth Amendment in its power to regulate mar-

221. *Eisenstadt*, 405 U.S. at 454 (quoting *Railway Express Agency v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring)).

222. 388 U.S. 1 (1967).

223. *Id.* at 2.

224. *Id.*

225. *Id.* at 2-4.

226. *Id.* at 4.

227. *Loving*, 388 U.S. at 4.

228. *Id.*

229. *Id.* at 2.

riage.²³⁰ The State did not argue with this limitation.²³¹ Instead, the main argument of the State was that the statutory scheme did not violate the Equal Protection Clause of the Fourteenth Amendment because it punished both whites and blacks equally under the statutes.²³² The State argued that the statutes should therefore be upheld, as long as they served a rational basis.²³³ The Court answered this argument by stating:

[b]ecause we reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose.²³⁴

The Court determined that the challenged miscegenation statutes were drawn solely on racial distinctions, and that therefore, strict scrutiny must be applied to the statutes.²³⁵ Therefore, the statutes could only stand if there was a permissible state interest served by the classification other than racial discrimination.²³⁶ The Court found no such permissible interest served by the statutes, and thus, it held the statutes to be a violation of the Equal Protection Clause of the Fourteenth Amendment.²³⁷

230. *Id.* at 7.

231. *Id.*

232. *Loving*, 388 U.S. at 7-8.

233. *Id.* at 8.

234. *Id.*

235. *Id.* at 11.

236. *Id.*

237. *Loving*, 388 U.S. at 11-12.

III. Compassion in Dying v. Washington

A. *Facts*

Jane Roe is dying of cancer.²³⁸ She is an elderly, retired physician who has suffered with cancer for the past six years.²³⁹ She is in constant pain, she is bedridden and weak, her legs are swollen, and she can no longer eat without feeling nauseous or vomiting.²⁴⁰ She has been treated with chemotherapy and radiation, but there is no longer any hope that she will recover.²⁴¹ She is terminally ill and her constant pain can no longer be effectively alleviated with drugs.²⁴²

John Doe is dying of AIDS.²⁴³ His illness was diagnosed in 1991 and he is now terminally ill.²⁴⁴ He suffers tremendously with symptoms of AIDS, including seizures, pneumonia, sinus and skin infections, and loss of eyesight.²⁴⁵

James Poe is dying of emphysema.²⁴⁶ Mr. Poe is an elderly man who constantly suffers from a feeling of suffocation which causes him to panic.²⁴⁷ He is continuously administered oxygen to aid his breathing and morphine to calm his sense of panic.²⁴⁸ His disease has caused him to experience heart failure and extreme pain in his legs.²⁴⁹

These three patients are all mentally competent and terminally ill, and they all wish to hasten their deaths through the

238. *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1456 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir. 1995), *reh'g en banc granted*, 62 F.3d 299 (9th Cir. 1995). All plaintiff patients utilized pseudonyms in connection with the case to preserve their privacy. *Id.* at 1456 n.2. Jane Roe died before judgment was rendered by the district court in *Compassion in Dying*. *Compassion in Dying v. Washington*, 49 F.3d 586, 593 (9th Cir. 1995), *reh'g en banc granted*, 62 F.3d 299 (9th Cir. 1995).

239. *Compassion in Dying*, 850 F.Supp. at 1456.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* John Doe died before judgment was rendered by the district court in *Compassion in Dying*. *Compassion in Dying*, 49 F.3d at 593.

244. *Compassion in Dying*, 850 F. Supp. at 1456.

245. *Id.*

246. *Id.* at 1457. James Poe died after the district court's judgment was rendered in *Compassion in Dying*, while the case was pending appeal. *Compassion in Dying*, 49 F.3d at 593.

247. *Compassion in Dying*, 850 F. Supp. at 1457.

248. *Id.*

249. *Id.*

use of prescription drugs.²⁵⁰ All three want their physicians to assist them in dying by prescribing the drugs necessary to hasten their deaths.²⁵¹ Jane Roe also wishes to enlist the help of plaintiff Compassion in Dying.²⁵²

250. *Id.* at 1456-57.

251. *Id.*

252. *Compassion in Dying*, 850 F. Supp. at 1456. Compassion in Dying is an organization which provides assistance and counseling to terminally ill, mentally competent adults who wish to commit physician-assisted suicide. *Id.* Compassion in Dying adheres to strict guidelines and safeguards in providing assistance to patients. The following is a list of the guideline areas and specific requirements that must be met in each area in order for the patient to receive assistance from Compassion in Dying. 1) Eligibility: a patient must be an adult who is mentally competent and terminally ill, her condition must cause severe, intolerable suffering, she must understand her condition, her prognosis, and the different alternatives available to her, and a second physician must examine the patient and consult with the patient's primary physician to verify eligibility; 2) quality of care: a request for hastened death must not arise from inadequate comfort care, economic concerns, or lack of health care; 3) process of requesting assistance: requests for assistance must be confidential and arise from the patient, any indication of uncertainty by the patient making the request results in cancellation of the process, and requests must be made at the time assistance is desired, and not through advance directives; 4) mental health considerations: the patient may be required to undergo an evaluation of a professional in order to rule out emotional distress and the patient must understand the decision to hasten death and take responsibility for the decision; and 5) family and religious considerations: the family of the patient must give approval and spiritual or emotional counseling may be arranged for the family. Compassion and Dying Executive Director's Report at 4 (on file with author).

In addition to these guidelines, Compassion also has specific standards that serve as safeguards. The safeguards include:

- * Patient must provide three signed written requests.
- * There must be a 48-hour waiting period between the second and third requests.
- * COMPASSION representatives meet in-person with patient and family.
- * Terminal prognosis and patient's decision-making capacity are verified by an independent physician.
- * Physician may call for evaluation by a qualified mental health professional.
- * Physician ascertains that request for assistance does not result from inadequate care or pain management.
- * Any sign of indecision on the part of the patient, or opposition by the immediate family, cancels the process.
- * Lead contact person is appointed as part of the team to review case and alternatives.
- * Review team meets regularly to confirm eligibility and if assistance is warranted.
- * The patient may request that COMPASSION be present at the time of death.
- * Actual means of hastening death is prescribed by patient's physician and varies according to underlying condition.

B. Procedure

Jane Roe, John Doe, and James Poe commenced action in the United States District Court for the Western District of Washington, along with five physicians and Compassion in Dying,²⁵³ to challenge the constitutionality of a Washington State statute²⁵⁴ which made physician-assisted suicide a criminal offense.²⁵⁵ All plaintiffs claimed that the statute violated the due process rights and equal protection rights of mentally competent, terminally ill patients to commit physician-assisted suicide.²⁵⁶ The plaintiffs challenged the constitutionality of the statute only as it applied to mentally competent, terminally ill adults.²⁵⁷

In addition to the general claim asserted by all plaintiffs, each group of plaintiffs promulgated their individual arguments based on their particular situations.²⁵⁸ The plaintiff patients asserted that they, as mentally competent, terminally ill patients, had the constitutional right to commit physician-assisted suicide.²⁵⁹ The plaintiff physicians, in addition to asserting the constitutional right to commit physician-assisted suicide on behalf of their patients, also argued that they, as physicians, had the constitutional right to "practice medicine consistent with their best professional judgment."²⁶⁰ Plaintiff Compassion in Dying asserted that mentally competent, terminally ill patients, such as the patient plaintiffs in this case, had a constitutional right to seek the aid of Compassion in Dying in committing physician-assisted suicide.²⁶¹ Compassion in Dying feared that it

* If requested, ongoing emotional support will be provided for survivors.

* To maintain dignity, patient's identity will not be disclosed.

Id.

253. *Compassion in Dying*, 850 F. Supp. at 1456-57.

254. WASH. REV. CODE ANN § 9A.36.060(1) provides: "A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide." WASH. REV. CODE ANN § 9A.36.060(2) provides: "Promoting a suicide attempt is a class C felony." WASH. REV. CODE ANN § 9A.36.060 (West 1988).

255. *Compassion in Dying*, 850 F. Supp. at 1455-56.

256. *Id.* at 1456.

257. *Id.*

258. *Id.* at 1459.

259. *Id.*

260. *Compassion In Dying*, 850 F. Supp. at 1459.

261. *Id.*

might be criminally prosecuted for assisting such persons in committing physician-assisted suicide.²⁶²

The district court held that the Washington statute violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.²⁶³ The State of Washington appealed from the decision of the district court.²⁶⁴

C. *The Decision of the United States District Court for the Western District of Washington*

The District Court for the Western District of Washington held that the Washington statute prohibiting physician-assisted suicide infringed on a constitutionally protected right of mentally competent, terminally ill persons to commit physician-assisted suicide, and was therefore unconstitutional.²⁶⁵ The court further held that this right derives from both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.²⁶⁶ The court did not address the additional claims asserted by plaintiff physicians or *Compassion in Dying*.²⁶⁷

The court relied on *Planned Parenthood v. Casey*²⁶⁸ and *Cruzan v. Director, Missouri Department of Health*²⁶⁹ in holding that a mentally competent, terminally ill adult has a protected liberty interest under the Due Process Clause of the Fourteenth Amendment in committing physician-assisted suicide.²⁷⁰ The court first examined the reasoning in *Casey*, which it stated was "highly instructive and almost prescriptive . . ." ²⁷¹ The court reiterated much of what the Supreme Court said in *Casey* and it extended the reasoning of that case, which dealt with the issue of abortion, to *Compassion in Dying* and physician-assisted suicide.²⁷² The court noted that, like abortion, the issue of physi-

262. *Id.*

263. *Id.* at 1462, 1467.

264. *Compassion in Dying v. Washington*, 49 F.3d 586, 590 (9th Cir. 1995), *reh'g en banc granted*, 62 F.3d 299 (9th Cir. 1995).

265. *Compassion in Dying*, 850 F.Supp. at 1467.

266. *Id.*

267. *Id.*

268. 112 S. Ct. 2791 (1992).

269. 497 U.S. 261 (1990).

270. *Compassion in Dying*, 850 F. Supp. at 1462.

271. *Id.* at 1459. See *supra* notes 109-131 and accompanying text for a discussion of the *Casey* decision.

272. *Compassion in Dying*, 850 F.Supp. at 1459-61.

cian-assisted suicide is a controversial one, based on moral and religious judgments.²⁷³ However, the district court followed the guidance of the *Casey* Court in realizing that a court's duty in deciding cases dealing with these morally-charged issues "is not to impose a particular moral standard."²⁷⁴ Refusing to mandate its own moral code, the court held that the decision to commit physician-assisted suicide is a constitutionally protected liberty interest under the Fourteenth Amendment because "the suffering of a terminally ill person cannot be deemed any less intimate or personal, or any less deserving of protection from unwarranted governmental interference, than that of a pregnant woman."²⁷⁵

The court declined to abdicate its duty, in order to allow the Washington State Legislature to decide the issue, because it determined that the decision to commit physician-assisted suicide is a constitutional right.²⁷⁶ The court also declined to recognize any of the State's four arguments that *Casey* was inapposite to the issue of physician-assisted suicide.²⁷⁷ First, the State argued that the level of personal autonomy involved is greater in the case of abortion than in the case of physician-assisted suicide because people have traditionally had more control over the beginning of life than the end of life.²⁷⁸ The court rejected this argument, because it is not a distinction significant enough to overcome the Equal Protection argument.²⁷⁹ Second, the State argued that "the competing interests differ in cases involving abortion versus cases involving" assisted suicide.²⁸⁰ The court agreed that the interests are different, but it determined that the conflicting interests that are present when dealing with abortion raise more difficult issues than do the conflicting interests that are present when dealing with assisted suicide.²⁸¹ The court determined that this was true, because, in dealing with abortion there are two lives involved — the life of the mother

273. *Id.* at 1460.

274. *Id.*

275. *Id.*

276. *Id.*

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

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

and the potential life of the fetus — and only the mother can voice her desires; whereas, in dealing with assisted suicide, there is only one life involved, and that person is able to express her desires.²⁸² Third, the court discounted as unpersuasive the State's argument that there is a "potential for abuse and undue influence" present in recognizing a right to physician-assisted suicide that is not present in the right to abortion.²⁸³ Finally, the State argued that there is a lack of medical knowledge available about assisted suicide, but not about abortion, because more is known about the beginning of life than the end of life.²⁸⁴ The court discounted this argument as irrelevant.²⁸⁵

The court in *Compassion in Dying* further based its holding on *Cruzan v. Director, Missouri Department of Health*.²⁸⁶ The court reasoned that if the United States Supreme Court was directly faced with the issue of whether a competent person has a protected liberty interest in withdrawing life-sustaining medical treatment, the Court would reaffirm the tentative holding stated in *Cruzan* that such an interest is constitutionally protected.²⁸⁷ Proceeding on this assumption, the *Compassion in Dying* court determined that the only pertinent question is "whether a constitutional distinction can be drawn between refusal or withdrawal of medical treatment which results in death, and the situation in this case, involving mentally competent, terminally ill individuals who wish to hasten death by self-administering drugs prescribed by a physician."²⁸⁸ The court then held that "[f]rom a constitutional perspective, . . . [no] distinction can be drawn between refusing life-sustaining medical treatment and physician-assisted suicide by an uncoerced, mentally competent, terminally ill adult."²⁸⁹

The court, in applying the undue burden standard of review which was set forth in *Planned Parenthood v. Casey*,²⁹⁰ ex-

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

283. *Id.* at 1461.

284. *Id.*

285. *Id.*

286. *Id.* at 1461-62; *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990); see *supra* notes 168-90 and accompanying text for a discussion of the *Cruzan* decision.

287. *Compassion in Dying*, 850 F. Supp. at 1461.

288. *Id.*

289. *Id.*

290. 112 S. Ct. at 2830.

amined the State's purported interests in maintaining the challenged statute.²⁹¹ The State asserted that two State interests were furthered by the Washington statute prohibiting assisted suicide.²⁹² The interests claimed by the State were the interest in preventing suicide and the interest in protecting those persons who might become eligible to commit physician-assisted suicide from undue influence.²⁹³

As to the State's purported interest in preventing suicide, the State argued that its greatest concern was in preventing the suicides of young people who were not terminally ill.²⁹⁴ The State maintained that allowing the exception advanced by the plaintiffs in this case would create a "slippery slope" by which societal attitudes about suicide would become more permissive.²⁹⁵ The State argued that as a result, a greater number of healthy young people would cut short their lives by committing suicide, people would be more ready to convince others to commit suicide, and more individuals who were temporarily depressed or mentally disturbed would commit suicide.²⁹⁶

In addressing the State's arguments regarding its purported interest in preventing suicide, the court recognized that the patient plaintiffs were terminally ill, not young, healthy persons.²⁹⁷ The State, in attempting to prolong the lives of persons in plaintiffs' positions, was not furthering the interest of preventing suicide, but instead, was simply prolonging the suffering of individuals in the last stages of life, which could not possibly be a legitimate state interest.²⁹⁸ The court recognized that the State's concern was a valid one, but declined to allow the slippery slope argument to prevail.²⁹⁹ The court stated that the difficulty in drawing appropriate boundaries to safeguard against suicide by persons not terminally ill "[was] not a sufficient excuse for precluding *entirely* the exercise of a constitu-

291. *Compassion in Dying*, 850 F. Supp. at 1462-65.

292. *Id.* at 1464-65.

293. *Id.* at 1464.

294. *Id.*

295. *Id.*

296. *Compassion in Dying*, 850 F. Supp. at 1464.

297. *Id.*

298. *Id.*

299. *Id.* at 1465.

tional right.³⁰⁰ The court then expressed confidence that the legislature was capable of drafting appropriate legislation to alleviate the potential slippery slope problems.³⁰¹

As to the State's purported interest in protecting persons from committing suicide due to the undue influence of others, the court recognized the legitimacy of the State's concern, but again, refused to allow the State's concern to prevail over the constitutional right of the patient plaintiffs and other persons who are mentally competent and terminally ill.³⁰² A variety of factors led the court to this decision. First, the court stated that patient plaintiffs and others like them who made a voluntary choice to commit physician-assisted suicide fell outside of the State's interest.³⁰³ Second, the court noted that the State of Washington allowed mentally competent, terminally ill patients, or representatives of incompetent patients in some instances, to disconnect life support.³⁰⁴ The court noted that "[t]he potential risk of abuse and undue influence is often just as great and may be greater in certain cases for a patient who requests to be disconnected from a life support system,"³⁰⁵ especially when the request is made by a surrogate on behalf of an incompetent person.³⁰⁶

In addition to holding the Washington statute prohibiting assisted suicide unconstitutional as a violation of a person's liberty interest under the Due Process Clause of the Fourteenth Amendment, the court in *Compassion in Dying* further held the statute unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment.³⁰⁷ Under Washington State law, similarly situated, mentally competent, terminally ill adults have a legal right to refuse life-sustaining medical treatment to hasten death.³⁰⁸ The court explained that the Equal

300. *Compassion in Dying*, 850 F. Supp. at 1465.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Compassion in Dying*, 850 F. Supp. at 1465.

306. *Id.*

307. *Id.* at 1467.

308. *Id.* at 1466-67 (citing *In re Grant*, 747 P.2d 445 (Wash. 1987)(en banc); *In re Hamlin*, 689 P.2d 1372 (Wash. 1984)(en banc); *In re Bowman*, 617 P.2d 731 (Wash. 1980); *In re Colyer*, 660 P.2d 738 (Wash. 1983)); WASH. REV. CODE ANN. 70.122.010 (West 1992 & West Supp. 1996)); see also WASH. REV. CODE ANN. 70.122.

Protection Clause "is essentially a direction that all persons similarly situated should be treated alike."³⁰⁹ The court noted that when a state law infringes upon the constitutionally protected personal rights of some individuals and not other individuals who are similarly situated,³¹⁰ or the fundamental rights of one group more than another, similarly situated group,³¹¹ the law is subject to strict scrutiny, in which case it will only be upheld if the classifications are narrowly tailored to serve a compelling state interest.³¹² The court then analyzed whether there was enough of a distinction between these two groups of terminally ill, mentally competent persons to treat members of each particular group differently when one of the members made the choice to die.³¹³ The court found that the only distinction between the two groups is that members of one group are connected to life support and members of the other group are not.³¹⁴

The State argued that this distinction alone warrants the disparate treatment because, when a person dies due to removal of life-sustaining equipment, the death is "natural,"³¹⁵ but when a person dies due to physician-assisted suicide, the death is "artificial."³¹⁶ The State argued that this distinction between "natural" and "artificial" death creates a need for different treatment of the two groups because, while the State's interest in deterring suicide is implicated in assisted suicide, it

010 (West 1992 & West Supp. 1996). Washington State's Natural Death Act states that "adult persons have the fundamental right to control the decisions relating to the rendering of their own health care, including the decision to have life-sustaining treatment withheld or withdrawn, in instances of a terminal condition or permanent unconscious condition." *Id.*

309. *Compassion in Dying*, 850 F. Supp. at 1466 (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982))).

310. *Id.* (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969)).

311. *Id.* (citing *Loving v. Virginia*, 388 U.S. 1 (1967); *Eisenstadt v. Baird*, 405 U.S. 438 (1972)).

312. *Id.*

313. *Id.* at 1466-67.

314. *Compassion in Dying*, 850 F.Supp. at 1466.

315. *Id.* at 1467.

316. *Id.*

is not implicated in the removal of life support.³¹⁷ The court rejected the defendant's purported justification for the distinction between the two groups in holding that the groups are similarly situated.³¹⁸ The court acknowledged that the State had an interest in preventing suicide, but the court also stated that the State previously recognized that its interest is not absolute when it created an exception by allowing a terminally ill person to refuse life sustaining medical treatment.³¹⁹

The district court stated that Washington State law, in creating an exception that allowed terminally ill, mentally competent persons to discontinue life sustaining medical treatment to hasten death, while not allowing terminally ill, mentally competent persons not on life support to enlist the aid of a physician in hastening death, burdened the fundamental rights of one group while not burdening the fundamental rights of another, similarly situated group.³²⁰ Therefore, the court held that the Washington statute prohibiting assisted suicide violates the Equal Protection Clause of the Fourteenth Amendment.³²¹

D. *The Decision of the United States Court of Appeals, Ninth Circuit*

1. *The Majority Opinion*

The State of Washington appealed from the decision of the district court in *Compassion in Dying*.³²² The United States Court of Appeals for the Ninth Circuit reversed the decision of the district court, holding that a mentally competent, terminally ill person does not have a constitutional right to commit physician-assisted suicide.³²³ The court enumerated seven grounds for holding that the judgment of the district court could not be sustained.³²⁴

317. *Id.*

318. *Id.*

319. *Compassion in Dying*, 850 F.Supp. at 1467.

320. *Id.*

321. *Id.*

322. *Compassion in Dying v. Washington*, 49 F.3d 586, 590 (9th Cir. 1995), *reh'g en banc granted*, 62 F.3d 299 (9th Cir. 1995).

323. *Id.* at 588.

324. *Id.*

First, the circuit court stated that the district court's reliance on *Planned Parenthood v. Casey*³²⁵ was misplaced.³²⁶ The court reasoned that the language from *Casey*, upon which the district court relied,³²⁷ could not be accurately applied to assisted suicide because

[t]o take three sentences out of an opinion . . . dealing with . . . abortion and to find these sentences 'almost prescriptive' in ruling on a statute proscribing the promotion of suicide is to make an enormous leap, to do violence to the context, and to ignore the differences between the regulation of reproduction and the prevention of the promotion of killing a patient at his or her request.³²⁸

The court further justified its finding that the district court's reliance on *Casey* was misplaced by explaining that the category that would be created from such reliance is "inherently unstable."³²⁹ The court held that if the decision to choose death was held to involve "personal dignity and autonomy"³³⁰ and "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life,"³³¹ then that right could not be limited to terminally ill, mentally competent patients, but instead, it would necessarily extend to "[t]he depressed twenty-one year old, the romantically-devastated twenty-eight year old, [and] the alcoholic forty-year old . . ."³³² The court stated that if this right exists, then "every man and woman in the United States must enjoy it,"³³³ and any attempt to restrict the right is "illusory."³³⁴

Second, the circuit court stated that the decision of the district court could not be sustained because the district court's reliance on *Cruzan v. Director, Missouri Department of Health*³³⁵

325. 112 S.Ct. 2791.

326. *Compassion in Dying*, 49 F.3d at 590.

327. See *supra* notes 120, 270-71 and accompanying text.

328. *Compassion in Dying*, 49 F.3d at 590.

329. *Id.* at 590.

330. *Id.* (quoting *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2807 (1992)).

331. *Id.* (quoting *Casey*, 112 S.Ct. at 2807).

332. *Id.* at 590-91.

333. *Compassion in Dying*, 49 F.3d at 591 (citing Yale Kamisar, *Are the Laws Against Assisted Suicide Unconstitutional?* 23 HASTINGS CENTER REP. 32, 36-37 (May-June 1993)).

334. *Id.*

335. 497 U.S. 261.

was misguided. The court stated that the district court's comparison of the assisted suicide issue to the termination of life issue, which was the focus of *Cruzan*, was ill-informed, and that the two issues were clearly distinguishable.³³⁶

Third, the circuit court stated that there was no recent precedent to support the holding of the district court.³³⁷ "In the two hundred and five years of our existence no constitutional right to aid in killing oneself has ever been asserted and upheld by a court of final jurisdiction."³³⁸ The court reasoned that a federal court should not "invent" a constitutional right, where the right did not exist in the past, especially when the right is contrary to a main responsibility of the government.³³⁹

Fourth, the circuit court argued that the district court erred in holding the Washington statute invalid on its face.³⁴⁰ The court stated that the "normal rule — the rule that governs here — is that a facial challenge to a statute 'must establish that no set of circumstances exists under which the Act would be valid.'"³⁴¹ The court argued that there were situations where the Washington statute could operate constitutionally.³⁴² The court stated that, unlike the statute at issue in *Casey*, which the United States Supreme Court found would operate unconstitutionally in a large percentage of cases, the Washington statute involved in this case would operate effectively in numerous cases.³⁴³ The court supported this finding by relying on statements given by the physician plaintiffs in the case that these physicians "occasionally" encountered patients whom the statute affected detrimentally.³⁴⁴

Fifth, the circuit court stated that the district court did not adequately consider the relevant state interests, which, in the opinion of the circuit court, outweighed any purported liberty

336. *Compassion in Dying*, 49 F.3d at 591.

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Compassion in Dying*, 49 F.3d at 591 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

342. *Id.* at 591-92.

343. *Id.*

344. *Id.*

interest in committing assisted suicide.³⁴⁵ The court held that the State, at a minimum, had five relevant interests.³⁴⁶ First, the court stated that the State had an interest in preventing physicians from performing as killers.³⁴⁷ Second, the State had an interest in preventing the elderly and infirm from experiencing, and succumbing to, pressures to end their lives.³⁴⁸ Third, the State had an interest in protecting the poor and minorities from being manipulated into committing assisted suicide.³⁴⁹ The court found that the poor and minorities would be particularly vulnerable to this sort of manipulation because these groups "are notoriously less provided for in the alleviation of pain,"³⁵⁰ and because the public bears the bulk of the cost of medical treatment to these patients, and there is, undoubtedly, a desire to reduce the cost of public assistance.³⁵¹ Fourth, the state had an interest in protecting the handicapped from pressures to commit physician-assisted suicide.³⁵² The court found that, similar to the poor and minorities, handicapped people would be particularly vulnerable to manipulation to end their lives, because of discrimination toward these people, and a desire to reduce public costs.³⁵³ The fifth and final state interest cited by the circuit court was the interest in preventing abuse of laws regulating assisted suicide, such as the abuses which have reportedly transpired in the Netherlands.³⁵⁴

The sixth reason given by the circuit court, as to why the judgment of the district court could not stand, was that judgment was too indefinite.³⁵⁵ The circuit court stated that it was unclear on whose behalf the judgment of the district court was

345. *Id.* The court considered two state studies in its analysis of state's interests in prohibiting assisted suicide. *Id.* at 591-92 (citing WHEN DEATH IS SOUGHT. ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT (1994) and MICHIGAN COMMISSION ON DEATH AND DYING, FINAL REPORT (1994)).

346. *Compassion in Dying*, 49 F.3d at 592.

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.* at 591-92 (citing WHEN DEATH IS SOUGHT. ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT at 100).

351. *Compassion in Dying*, 49 F.3d at 591-92 (citing WHEN DEATH IS SOUGHT. ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT at 129).

352. *Id.* at 592.

353. *Id.* at 592-93.

354. *Id.* at 593.

355. *Id.*

entered.³⁵⁶ The circuit court stated that the judgment rendered by the district court must have been entered on behalf of future terminally ill patients of the plaintiff physicians, and not on behalf of the plaintiff patients, since two of the patient plaintiffs died before the judgment was entered, and the third plaintiff patient died while the case was pending appeal.³⁵⁷ However, the circuit court argued that the judgment of the district court could not stand effectively in favor of future terminally ill patients of the plaintiff physicians because the district court failed to define the term "terminally ill," and therefore, failed to establish a class of persons who would be protected by the judgment.³⁵⁸ The circuit court argued that there is a great deal of disagreement about the definition of the term "terminally ill" among the states.³⁵⁹ Therefore, in order for the district court to have entered its judgment in favor of a class of persons, it was necessary for the court to first define the term "terminally ill," so that the persons within the class could be identified.³⁶⁰

Finally, the circuit court stated that the judgment of the district court could not stand because the Washington statute did not violate the Equal Protection Clause of the Fourteenth Amendment.³⁶¹ The circuit court stated that, contrary to the holding of the district court, there exists a logical distinction between "actions taking life and actions by which life is not supported or ceases to be supported."³⁶² The court further explained that, because "[t]he distinction . . . drawn by the legislature [was] not [drawn] on the basis of race, gender or religion or membership in any protected class and [was] not infringing any fundamental constitutional right, [the distinction] must be upheld unless the plaintiffs can show that the legislature's actions were irrational."³⁶³ In other words, the applicable standard of review, when determining whether the statute violates

356. *Compassion in Dying*, 49 F.3d at 593.

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.* at 592.

361. *Compassion in Dying*, 49 F.3d at 592.

362. *Id.*

363. *Id.* (quoting *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458 (1988)).

the Equal Protection Clause of the Fourteenth Amendment, is rationality, and not strict scrutiny.³⁶⁴

The court applied the rationality standard and determined that the distinction drawn by the legislature, between a physician withdrawing or withholding life support, and a physician assisting in a suicide, is rational.³⁶⁵ The court explained that privacy means “the right to be let alone,”³⁶⁶ and that it does not go so far as to allow one person to enlist the aid of another in hastening death.³⁶⁷ The court further reasoned that, in order to protect the relevant state interests,³⁶⁸ the distinction drawn by the legislature was reasonable.³⁶⁹ The court concluded that since the plaintiff’s failed to show that the distinction drawn by the legislature was irrational, the statute did not violate the Equal Protection Clause.³⁷⁰

2. *The Dissenting Opinion*

In a dissenting opinion, Judge Wright asserted that terminally ill, mentally competent individuals have a guaranteed privacy right to commit physician-assisted suicide, and that the Washington statute proscribing that right was unconstitutional.³⁷¹ First, the dissent addressed the premise of the majority that, if there is a right to commit physician-assisted suicide, that right depends on the definition of “terminally ill.”³⁷² In the opinion of the dissent, it was the duty of the court to decide the issue before it, as it applied to the parties before the court, and not to define the parameters of the right to commit physician-assisted suicide.³⁷³ From this perspective, the court needed only to consider the potential right to commit physician-assisted suicide as it applied to mentally competent, terminally ill adults.³⁷⁴ It did not need to concern itself with the “depressed twenty-one

364. *See id.* at 593.

365. *Id.* at 593.

366. *Compassion in Dying*, 49 F.3d at 593 (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

367. *Id.* at 594.

368. *See supra* notes 345-54 and accompanying text.

369. *Compassion in Dying*, 49 F.3d at 594.

370. *Id.*

371. *Id.* at 594, 597 (Wright, J., dissenting).

372. *Id.* at 594.

373. *Id.*

374. *Compassion in Dying*, 49 F.3d at 594-95.

year old," because none of the parties before the court fit that description.³⁷⁵ The dissent noted that the "[p]laintiffs [were] . . . suggesting a limited form of physician-assisted suicide."³⁷⁶ The dissent then addressed the aspects of the Due Process and Equal Protection Clauses significant to the issue of physician-assisted suicide.³⁷⁷

In examining the relevant aspects of the Due Process Clause, the dissent discussed the right to privacy, the applicable standard of review, and the validity of the application of the Washington statute prohibiting assisted suicide.³⁷⁸ The dissent first noted that the United States Supreme Court, in *Planned Parenthood v. Casey*,³⁷⁹ defined the scope of liberty interests protected by the Due Process Clause.³⁸⁰ The language used in this definition was the same language relied on by the district court in the case at bar, and the same language the majority said was inapplicable to the issue of physician-assisted suicide.³⁸¹ The dissent urged that, contrary to the finding of the majority, the Supreme Court did not limit this definition to abortion, but instead stated that it was "general language . . . derived from well-established Supreme Court precedent," applicable to all liberty interests protected by the Due Process Clause of the Fourteenth Amendment.³⁸² This contention is evidenced by other language used by the Court in the same paragraph citing other rights, in addition to abortion, that have been held to be protected liberty interests.³⁸³ The dissent concluded that the language is, therefore, equally applicable in the context of physician-assisted suicide,³⁸⁴ and that "[t]he right to die with dignity falls squarely within the privacy right recognized by the Supreme Court."³⁸⁵

375. *Id.* at 594.

376. *Id.* at 594-95 n.2 (quoting *Quill v. Koppell*, 870 F.Supp. 78, 84 (S.D.N.Y. 1994)).

377. *Id.* at 595 (Wright, J., dissenting).

378. *Id.* at 595-97.

379. 112 U.S. 2791.

380. *Compassion in Dying*, at 595 (quoting *Casey*, 112 S. Ct. at 2807). See *supra* note 120 and accompanying text.

381. *Compassion in Dying*, 49 F.3d at 596 (Wright, J., dissenting).

382. *Id.*

383. *Id.* (quoting *Casey*, 112 S. Ct. at 2807).

384. *Id.* at 595 (Wright, J., dissenting).

385. *Id.*

The dissent then looked to *Cruzan v. Director, Missouri Department of Health*³⁸⁶ to further support the conclusion that the right to die with dignity is a protected liberty interest.³⁸⁷ It noted that the *Cruzan* Court recognized that “[t]he choice between life and death is a deeply personal decision,” and that the “principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.”³⁸⁸ The dissent then concluded that “[a] constitutional distinction cannot be drawn between refusing life-sustaining medical treatment and accepting physician assistance in hastening death.”³⁸⁹ The dissent stated that, were this distinction drawn, the consequences would be “patently unjust.”³⁹⁰

The dissent argued that, contrary to the opinion of the majority, the right to commit physician-assisted suicide is supported by traditional American values.³⁹¹ This dissent stated that American values strongly embrace the concepts of autonomy and self-determination, and these values are reflected in American history.³⁹² “No right is held more sacred, or is more carefully guarded, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others unless by clear and unquestioned authority of law.”³⁹³ While it is true that the right to commit physician-assisted suicide is not reflected in American history in the traditional sense, a lack of precedent cannot always control the courts.³⁹⁴ Rapid advancement of medical technology makes it impossible for a court to determine whether the right to commit physician-assisted suicide is supported by American values by

386. 497 U.S. 261 (1990).

387. *Compassion in Dying*, 49 F.3d at 595 (Wright, J., dissenting).

388. *Id.* (quoting *Cruzan*, 497 U.S. at 281, 278).

389. *Id.*

390. *Id.*

391. *Id.* at 596.

392. *Compassion in Dying*, 49 F.3d at 596 (Wright, J., dissenting).

393. *Id.* (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250 (1891)).

394. *Id.* (citing *Loving v. Virginia*, 388 U.S. 1 (1967) (where the United States Supreme Court ignored American tradition and the lack of precedent and based its holding on the “rights essential to the orderly pursuit of happiness of free men.”))

simply looking to precedent.³⁹⁵ The essence of the right is strongly supported by American values.³⁹⁶

Having found that the right to commit physician-assisted suicide is a constitutional right, the dissent determined that the applicable standard of review is strict scrutiny.³⁹⁷ The dissent rejected the undue burden standard in this case because it concluded that the Supreme Court formulated that standard solely for cases dealing with the issue of abortion.³⁹⁸

The dissent determined that the Washington statute was unconstitutional as applied to mentally competent, terminally ill individuals.³⁹⁹ It recognized the state's interest in protecting life, but it agreed with the *Quinlan* court that "the state's interest weakens and the individual's right to privacy grows as natural death approaches."⁴⁰⁰ It concluded that, since the Washington legislature is capable of drafting legislation that protects the constitutional rights of mentally competent, terminally ill individuals, the statute does not pass strict scrutiny, and is therefore unconstitutional.⁴⁰¹

Finally, the dissent considered whether the Washington statute proscribing physician-assisted suicide violated the Equal Protection Clause of the Fourteenth Amendment.⁴⁰² The court recognized that Washington state law allows terminally ill, mentally competent patients to enlist the aid of a physician in withdrawing life-sustaining medical treatment,⁴⁰³ but prohibits terminally ill, mentally competent patients from enlisting the aid of a physician to aid them in committing suicide.⁴⁰⁴ Having decided that there is a constitutionally protected right to commit physician-assisted suicide, the dissent determined that "Washington's laws abrogate the fundamental rights of one

395. *Compassion in Dying*, 49 F.3d at 596 (Wright, J., dissenting).

396. *Id.*

397. *Id.* (citing *Shapiro v. Thompson*, 394 U.S. 618 (1969)).

398. *Id.*

399. *Id.* at 597.

400. *Compassion in Dying*, 49 F.3d at 596 (Wright, J., dissenting) (quoting *In re Quinlan*, 355 A.2d 647, 663 (N.J. 1976), *cert. denied*, *Garger v. New Jersey*, 429 U.S. 922 (1976)).

401. *Id.* at 597.

402. *Id.*

403. *Id.* (citing *In re Grant*, 747 P.2d 445 (1987)(en banc); WASH. REV. CODE ANN. 70.122.010 (West 1992 & West Supp. 1996)).

404. *Id.*

group, but not those of a similarly situated group, [and therefore,] they must be subjected to strict scrutiny and upheld only if the classifications are suitably tailored to serve a compelling state interest."⁴⁰⁵ The dissent explained that, in its view, the two groups were similarly situated because they both include mentally competent, terminally ill adults.⁴⁰⁶ The only difference between the two groups is that one is receiving life-sustaining medical treatment and the other is not.⁴⁰⁷ The dissent believed that disparate treatment afforded individuals within the two groups, based solely on this distinction, "is not suitably tailored to serve a compelling state interest."⁴⁰⁸

The dissent stated that terminally ill, mentally competent patients have a fundamental right to commit physician-assisted suicide.⁴⁰⁹ Therefore, the dissent concluded, the Washington statute proscribing these individuals from making that choice violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.⁴¹⁰

IV. Analysis

The decision of the district court in *Compassion in Dying*⁴¹¹ reflects the growing acceptance of assisted suicide among Americans.⁴¹² It also reflects a growing desire of many Americans to be able to make their own decisions about personal issues involving their lives and deaths, without undue interference from the government.⁴¹³ Because of technological advances in medicine, including the development of sophisticated life-sustaining machines, people are living longer, and they are dying

405. *Compassion in Dying*, 49 F.3d at 597 (Wright, J., dissenting).

406. *Id.*

407. *Id.*

408. *Id.*

409. *Id.*

410. *Compassion in Dying*, 49 F.3d at 597 (Wright, J., dissenting).

411. 850 F. Supp. 1454 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir. 1995), *reh'g en banc granted*, 62 F.3d 299 (9th Cir. 1995).

412. Gilbert Meilaender, *Human Equality and Assistance in Suicide*, 19 SECOND OPINION 16 (1994).

413. Gleicher, *supra* note 58 at 184. See also, Burton C. Einspruch, MD, *Euthanasia*, 269 JAMA 1568-69 (1993) (reviewing DAVID CUNDIFF, *EUTHANASIA IS NOT THE ANSWER: A HOSPICE PHYSICIAN'S VIEW* (1992)). The rate of suicide among the elderly has dramatically increased in recent years. *Id.* at 1568.

from illnesses that are degenerative and drawn out.⁴¹⁴ "An inadvertent and unintended side effect of medicine's growing effectiveness is that the dying process has been elongated. . . . Through transfusions, antibiotics, and artificial feeding, dying can be unthinkingly extended well beyond the point where living has any meaning to either the individual or the family."⁴¹⁵ The development of these sophisticated life-sustaining technologies and their effects of prolonging life, coupled with the shift in places where people die, from homes to hospitals and institutions, has greatly increased public concern and awareness of medical choices of individuals near the end of life.⁴¹⁶ Many people fear dying a degenerative and painful death, and they want to be assured that they will be able to die in peace, and with dignity.⁴¹⁷ "[F]or many the most frightening aspect of death is . . . the prospect of losing control and independence, and dying in an undignified, unesthetic, absurd, and existentially unacceptable condition."⁴¹⁸ An increasingly growing sentiment in this country, shared by many individuals including people who are needlessly suffering from terminal illnesses and people who have watched loved ones suffer from these illnesses, is this: "Life is precious. But life without dignity, life with unremitting pain, life with no hope of recovery, is utter hell. . . . [E]nding the enormous pain of individuals under limited circumstances isn't a denigration of life, but rather a celebration."⁴¹⁹

A. *Privacy Analysis*

It is firmly established, through a long line of Supreme Court cases, that every individual possesses a right to personal

414. *The Right to Die*, *supra* note 45, at 14. "The Office of Technology Assessment Task Force estimated in 1988 that, 3775 to 6575 persons were dependent on mechanical ventilation and 1,404,500 persons were receiving artificial nutritional support." *Council Report*, *supra* note 15, at 2229.

415. *QUILL*, *supra* note 34, at 50.

416. *Council Report*, *supra* note 15, at 2229.

417. *Id.* This is evidenced by the tremendous public reaction to Derek Humphrey's book *Final Exit*, which is a "manual for suicide." See Dennis L. Breo, *MD-aided Suicide Voted Down; Both Sides Say Debate to Continue*, 266 *JAMA* 2895, 2899 (1991). *Final Exit* is on the best-seller list and has sold over a half a million copies. *Id.*

418. *QUILL*, *supra* note 34, at 166.

419. Ed Koch, *Assisted Suicides — A Personal Perspective*, *N.Y. Post*, Dec. 2, 1994, at 27.

autonomy and self-determination that is protected by the Due Process Clause of the Fourteenth Amendment.⁴²⁰ This right, deemed a privacy or liberty right, encompasses smaller rights which are considered fundamental to human beings, because the choices associated with the rights affect a person so deeply, and are so intimate and personal, that they should be made by individuals without undue interference from the government.⁴²¹

The district court in *Compassion in Dying*⁴²² was correct in holding that a terminally ill, mentally competent adult has a constitutionally protected privacy right to commit physician-assisted suicide. The right to commit physician-assisted suicide, like other protected privacy rights, concerns an intimate and personal decision that a human being should have the privilege to make without undue governmental interference.⁴²³ The fact that there is no controlling precedent directly on point, to inform the courts that the right to commit physician-assisted suicide falls within the protected privacy rights of the Fourteenth Amendment, is not, in itself, dispositive.⁴²⁴ As the dissent to the circuit court opinion in *Compassion in Dying* pointed out, the right to commit physician-assisted suicide is supported by the traditional American values.⁴²⁵ Americans jealously guard the rights to autonomy and self-determination, which are so intricately entangled with the right to commit physician-assisted suicide, and the courts must consider this, instead of simply considering that there is no precedent supporting a right to commit physician-assisted suicide, in a situation such as this, where advances in medical technology have changed the landscape of the right so dramatically from that which it was histor-

420. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

421. *E.g.*, *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2805-07, 11 (1992).

422. 850 F. Supp. 1454 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir. 1995), *reh'g en banc granted*, 62 F.3d 299 (9th Cir. 1995).

423. Gleicher, *supra* note 58, at 184. "A noble, dignified death is exalted in great literature, poetry, art, and music, and its meaning is deeply personal and unique." QUILL, *supra* note 34, at 158.

424. Gleicher, *supra* note 58, at 184. *See also*, *Compassion in Dying*, 49 F.3d at 596 (Wright, J., dissenting)(citing *Loving v. Virginia*, 388 U.S. 1 (1967)(where the United States Supreme Court ignored American tradition and lack of precedent and based its holding on the "rights essential to the orderly pursuit of happiness of free men."))

425. *Compassion in Dying*, 49 F.3d at 596 (Wright, J., dissenting).

ically.⁴²⁶ In applying the Constitution, the courts must look not only to the past, but also to the future.⁴²⁷ "Constitutional law evolves as cases, and social issues, arise, and right-to-die litigation is still in its infancy."⁴²⁸ The personal decision of a terminally ill person to end her life in order to terminate unbearable pain and suffering and to preserve dignity is no less significant to her personal autonomy than the choice to obtain an abortion or to use contraceptives, and it certainly cannot be realistically differentiated from a person's choice to terminate life support.⁴²⁹ The right of a terminally ill, mentally competent person to commit physician-assisted suicide is a logical extension of existing jurisprudence dealing with privacy rights. "The case for physician assisted suicide builds on the line of opinions clothing private choices with constitutional dimension, and takes it a further, logical step."⁴³⁰

Contrary to the circuit court's opinion in *Compassion in Dying*, the district court's reliance on *Planned Parenthood v. Casey*⁴³¹ was well-founded. The United States Supreme Court has upheld the basic holding of *Roe v. Wade*⁴³² consistently for over two decades, so that it is now firmly established that a woman has a constitutional right to obtain an abortion, and that this right is part of the greater right of privacy which derives from the Due Process Clause of the Fourteenth Amendment.⁴³³ The analogy drawn by the district court in *Compassion in Dying* between abortion and physician-assisted suicide was logical and unmistakably accurate, and since the Supreme Court has left little doubt that the right to obtain an abortion is a fundamental privacy right,⁴³⁴ it must follow that the right to physician-assisted suicide is also a protected privacy right. A thorough comparison of the two issues, abortion and physician-assisted

426. *Id.*

427. *Id.* (citing *Olmstead v. United States*, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting)).

428. Gleicher, *supra* note 58, at 186.

429. *Id.* at 186-87.

430. *Id.* at 186.

431. 112 S. Ct. 2791 (1992).

432. 410 U.S. 113 (1973).

433. *Casey*, 112 S. Ct. at 2804.

434. *Id.*

suicide, can lead to no other conclusion but that, if the former is a protected liberty interest, the latter must be as well.

The issues surrounding the rights to abortion and physician-assisted suicide have many significant parallels that should be considered when determining whether each of the rights should be afforded the same constitutional protection. Both a decision to obtain an abortion and a decision to commit physician-assisted suicide are extremely personal decisions dealing with issues concerning each person's unique definition of his or her own sense of self.⁴³⁵ They both deal with quality of life, and the relevant question, "What quality of life is worth maintaining?" It may be argued that a person is entitled to define her own being without enlisting the help of others, and that, if she feels that the quality of life she is living is too poor to continue, she may, without legal repercussion, end her own life. While this is all true, the right to end one's own life cannot stop there. For if the right to abortion stopped at a parallel position, at this do-it-yourself level, where would that leave a woman in need of an abortion? Just as the right to obtain an abortion necessarily expands, to enable an individual seeking to exercise the right to enlist the help of a doctor in getting the abortion,⁴³⁶ so must the right to end one's own life expand, so that a person who is mentally competent and terminally ill may enlist the help of a doctor in ending life. This extension to a third person is the only way that a mentally competent, terminally ill individual may fully exercise the right to end her own life.⁴³⁷

There have traditionally been the same end-of-life concerns surrounding both abortion and assisted suicide. Assisted suicide is considered a criminal act and is illegal in every country in the world, including the United States.⁴³⁸ Similarly, although it is now firmly established that abortion is legal,⁴³⁹ right-to-life advocates contend that abortion is murder.⁴⁴⁰ The

435. Gleicher, *supra* note 58 (citing *Casey*, 112 S. Ct. at 2805-07).

436. *Roe*, 410 U.S. at 163.

437. See *In re Quinlan*, 355 A.2d 647, 670 (N.J. 1976), *cert. denied*, *Garger v. New Jersey*, 429 U.S. 922 (1976) (citing *Eisenstadt v. Baird*, 405 U.S. 438, 445-46 (1972); *Griswold v. Connecticut*, 381 U.S. 497, 481 (1965)).

438. See *supra* notes 24-31, 61 and accompanying text.

439. See, e.g., *Roe*, 410 U.S. 113.

440. David Gibson, *A Pro-Choice Morality?; Supporters of Abortion Rights Try to Recast the Debate While Opponents Prepare to Protest Tomorrow on the 23rd*

courts have evaded the legal problems produced by this contention by creating the legal fiction that a fetus is not a person.⁴⁴¹ Therefore, the termination of a pregnancy cannot be murder because, since there is no person, there is no taking of a life.⁴⁴² A similar legal fiction may be used by the courts in order to remove physician-assisted suicide from the definition of homicide. Where the terminally ill patient is experiencing intolerable pain and suffering, the interest of the state in preserving life vanishes.⁴⁴³ At that point, the only thing that is being preserved is the intolerable pain and suffering that must be endured by a person who is no longer living life, but is simply waiting to die so that the suffering will end.⁴⁴⁴ How can it be said that it is criminal to help an individual in this condition to hasten death? How can a state successfully prosecute the aider for assisting in ending a life when the state no longer has an interest in the life?

Physician-assisted suicide and abortion are each sensitive issues that lead to emotionally-charged debates fraught with moral and religious opinions.⁴⁴⁵ But as the Supreme Court has stated, "[its] obligation is to define the liberty of all, not to mandate [its] own moral code."⁴⁴⁶ The Supreme Court has successfully managed to extricate the issue of abortion from the religious and moral judgments which emanate from it, and has thus consistently held that a woman has a constitutionally protected privacy right to obtain an abortion.⁴⁴⁷ The Court must react with the same restraint and integrity when and if the issue of physician-assisted suicide is before it.

The district court further held, in *Compassion in Dying*, that a protected privacy right to commit physician-assisted suicide could be inferred from *Cruzan v. Director, Missouri Depart-*

Anniversary of Roe v. Wade, THE RECORD (New Jersey), Jan. 21, 1996, Review & Outlook at 001.

441. See *Roe*, 410 U.S. 113.

442. *Id.*

443. Gleicher, *supra* note 58, at 187.

444. *In re Quinlan*, 355 A.2d 647, 664 (N.J. 1976), cert. denied, Garger v. New Jersey, 429 U.S. 922 (1976).

445. See Ronald Dworkin, *When is it Right to Die?*, BALTIMORE SUN, May 18, 1994 at 13A.

446. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2806 (1992).

447. See *id.*, 112 S. Ct. at 2804, 2806.

ment of Health,⁴⁴⁸ and the circuit court criticized this holding, stating that the district court's reliance on *Cruzan* in reaching this holding was misguided.⁴⁴⁹ This reliance was based almost entirely upon two statements made by the *Cruzan* Court.⁴⁵⁰ First, the district court relied on the assumption made by the *Cruzan* Court that, for the purposes of *Cruzan*, a mentally competent, terminally ill patient had a constitutional right, under the Due Process Clause of the Fourteenth Amendment, to discontinue life-sustaining medical treatment.⁴⁵¹ Second, the district court relied on the statement made by the *Cruzan* Court that the right to refuse life-sustaining medical treatment could be inferred from prior Supreme Court decisions.⁴⁵² The district court in *Compassion in Dying* assumed that if the United States Supreme Court were squarely faced with the issue in the future, it would extend this tentative holding to all mentally competent, terminally individuals.⁴⁵³

It may be a viable argument that *if* the Supreme Court holds that there is a constitutionally protected privacy right to discontinue life-sustaining medical treatment, then it should follow that there is also a constitutionally protected privacy right to commit physician-assisted suicide. However, there is a huge leap between the United States Supreme Court assuming for the purposes of one case that a right exists, and the Court actually holding that the right exists for all persons in a particular class or in all cases brought by those persons. The statement in *Cruzan* that the Court would assume, for the purposes of *Cruzan*, that a mentally competent, terminally ill person has a constitutional right to discontinue life support, was tentative at best. It was not a sufficient ground for a district court to rely on in holding that mentally competent, terminally ill patients have a constitutional right to commit physician-assisted suicide.

448. *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1461-62 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir. 1995), *reh'g en banc granted*, 62 F.3d 299 (9th Cir. 1995); *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990).

449. *Compassion in Dying*, 49 F.3d at 591.

450. *Compassion in Dying*, 850 F. Supp. at 1461-62.

451. *Id.* at 1461.

452. *Id.*

453. *Id.*

B. *Equal Protection Analysis*

The argument that a mentally competent, terminally ill patient has a constitutional right to commit physician-assisted suicide under the Equal Protection Clause of the Fourteenth Amendment is a particularly valid one. Most states have recognized the right of patients to refuse or withdraw medical treatment, even if that treatment is life-sustaining.⁴⁵⁴ Additionally, the United States Supreme Court has indicated, at least perfunctorily, that the right to refuse or discontinue life-sustaining medical treatment may be considered a constitutional right, by assuming for the purposes of *Cruzan* that the right existed,⁴⁵⁵ and by stating the principle "that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."⁴⁵⁶ However, the court is yet to rule on this issue.⁴⁵⁷ Although it is slightly presumptuous at this point for a lower court to rely on the assumption that the Court will clothe the right to refuse or discontinue life-sustaining medical treatment with constitutional significance, there is some indication that this will be the case. Considering, however, that the Court has not yet held that mentally competent, terminally ill patients have a constitutional right to discontinue life-sustaining medical treatment,⁴⁵⁸ relying on the Court's tentative statements about one case is not the best avenue for a federal district court to take in holding that a constitutional right exists.

In holding that there is a right to commit physician-assisted suicide protected by the Equal Protection Clause of the Fourteenth Amendment, the district court in *Compassion in Dying* relied on the determination that there is a constitutional right, under the Due Process Clause of the Fourteenth Amendment, to commit physician-assisted suicide.⁴⁵⁹ In essence, the court built its equal protection argument squarely on top of its due process argument.⁴⁶⁰ It was not necessary for the court to

454. See *Cruzan v. Harmon*, 760 S.W. 2d 408 at 412 n.4. (Mo. 1988) (en banc), *aff'd*, *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990).

455. *Cruzan*, 497 U.S. at 279.

456. *Id.* at 278.

457. See generally *id.*

458. See *id.*, at 278-79.

459. *Compassion in Dying*, 850 F. Supp. at 270.

460. See *id.*

do this.⁴⁶¹ Whether or not there is a constitutionally protected liberty interest in committing physician-assisted suicide has little relevance in the context of equal protection.⁴⁶² Within that context, it is immaterial whether a state holds that the right to refuse or withdraw life-sustaining medical treatment is a constitutional liberty interest or is, instead, a common law right.⁴⁶³ If the state recognizes the right of one group of mentally competent, terminally ill patients to refuse or withdraw life-sustaining medical treatment, it must also recognize the right of the other group of mentally competent, terminally ill patients to commit physician-assisted suicide, because there is no rational, constitutional basis for discriminating between these two classes of persons.⁴⁶⁴

In some instances, a terminally ill person may be kept alive solely by sophisticated life-sustaining treatments, such as mechanical ventilation.⁴⁶⁵ In these instances, a physician may, ethically and legally withhold or withdraw the life-sustaining treatment at the request of the patient, if that patient is competent.⁴⁶⁶ In some of these cases, the physician may also withhold or withdraw the treatment from an incompetent patient, at the request of a surrogate decisionmaker.⁴⁶⁷ In other instances, a terminally ill patient may be kept alive through the use of artificial nutrition or hydration.⁴⁶⁸ In these instances, the patient is afforded the same rights as a patient who is kept alive by

461. See *Eisenstadt v. Baird*, 405 U.S. 438, 447 n.7 (1972).

462. See *id.* It is significant in the context of equal protection whether a right is deemed "fundamental." See *Reno v. Flores*, 507 U.S. 292, 301-02 (1993). This is because if the right is deemed to be a fundamental right, then a court, in examining a statute which allegedly infringes on that right, will use strict scrutiny. *Id.* If the right is not deemed "fundamental," then the court will use mere rationality. See *Eisenstadt*, 405 The statute will be more likely struck down under the strict scrutiny standard of review, but it will also be struck down under the mere rationality standard where the state had no rational basis for drawing the distinction that imposes different treatment on different persons. See *id.*

463. See *Eisenstadt*, 405 U.S. at 447.

464. See *id.*

465. See *In re Quinlan*, 355 A.2d 647, 653-54 (N.J. 1976), *cert. denied*, *Garger v. New Jersey*, 429 U.S. 922 (1976).

466. *Council Report*, *supra* note 15, at 2230-31.

467. *Quinlan*, 355 A.2d at 647, 669-70.

468. See *Council Report*, *supra* note 15, at 2231.

other forms of life-sustaining treatment.⁴⁶⁹ A comparison of the rights afforded to a mentally competent, terminally ill patient who is sustained by artificial nutrition or hydration, and the rights afforded to a mentally competent, terminally ill patient who is not sustained by any artificial means, shows the starkest picture of the blatant inequity in the law as it now stands.

A comparison of the two situations shows that it is the source of nourishment of the terminally ill patient that is the determinative factor in whether or not the terminally ill person may obtain aid in dying from a physician.⁴⁷⁰ One of these terminally ill, mentally competent individuals obtains nourishment through a feeding or hydration tube, while the other either eats normally, or attempts to eat normally, but can no longer maintain a normal diet because of her illness. The first person, who obtains nourishment through a feeding or hydration tube, has the right to enlist the help of a physician in hastening death through removal of the feeding tube.⁴⁷¹ The other person, who is not aided in obtaining nourishment, is not afforded such a choice.⁴⁷² Without the aid of a physician to help end her suffering, the terminally ill patient, who is free from life-sustaining medical equipment, has limited choices. The only equality in the above situation, as the law now stands, is that either one of these terminally ill patients may elect to starve themselves to death. That is where the parallel ends. Because one patient is connected to a feeding tube, her election to enlist the aid of a physician to remove the feeding tube is considered a "natural" way to die,⁴⁷³ while the other patient's choice to starve to death is considered suicide which, while not illegal,⁴⁷⁴ is poorly regarded by many people in society.

The disparity in treatment of mentally competent, terminally ill patients based solely on source of nourishment illus-

469. *Id.* See also Wanzer, *supra* note 32, at 844 (stating that it is a common belief among physicians and ethicists that there is little difference between feeding or hydration tubes and other life-sustaining medical treatment, and, therefore, withdrawing feeding or hydration tubes is an accepted practice by most physicians, ethicists, and even most courts).

470. See *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990).

471. *Council Report, supra* note 15, at 2231.

472. *E.g., id.*, at 2233.

473. *In re Quinlan*, 355 A.2d 647, 669-70 (N.J. 1976), *cert. denied*, *Garger v. New Jersey*, 429 U.S. 922 (1976).

474. LAFAVE, *supra* note 54, at 568-69.

trates the most blatant example of the similarity of the situations of these two individuals. But, just as this difference in source of nourishment is not a rational basis for allowing one patient to enlist the help of a physician when she chooses to end her life, and not allowing the other patient the same right, neither is the most extreme situation on the opposite end of the spectrum a rational basis for the disparate treatment of the two individuals.

C. *Asserted Dangers and Concerns Associated with the Legalization of Physician-Assisted Suicide*

Opponents of assisted suicide argue that there are numerous dangers inherent in legalizing assisted suicide for terminally ill, mentally competent persons.⁴⁷⁵ One frequently stated argument is that legalizing assisted suicide will lead to the “slippery slope.”⁴⁷⁶ There are several versions of the “slippery slope” argument.⁴⁷⁷ One version is that a rule such as the one laid down by the district court in *Compassion in Dying*, which recognizes physician-assisted suicide as a constitutional right of mentally competent, terminally ill patients, will not remain so narrow.⁴⁷⁸ Opponents argue that a rule legalizing physician-assisted suicide in any degree will eventually be extended by the courts to include people other than mentally competent, terminally ill adults.⁴⁷⁹ It may eventually be extended to allow physicians to administer the lethal substance, therefore extending the legalization of physician-assisted suicide to legalized euthanasia.⁴⁸⁰ A second version of the “slippery slope” argument is that there is a danger that physicians will execute sick, unwanted, elderly people who do not wish to die.⁴⁸¹ Yet another version of the “slippery slope” argument is that individuals who do not wish to commit suicide may nonetheless elect to commit physician-assisted suicide because of the financial strain that their illnesses are placing on their families.⁴⁸² Along the same

475. *E.g.*, Glasson, *supra* note 13, at 92-96.

476. *Id.* at 96.

477. *See, e.g.*, Dworkin, *supra* note 445, at 13A.

478. Glasson, *supra* note 13, at 96.

479. *See id.*

480. *Id.*

481. Dworkin, *supra* note 445, at 13A.

482. *Id.*

lines, individuals who do not wish to hasten death may be coaxed or persuaded to commit physician-assisted suicide by family members who have financial concerns.⁴⁸³ Opponents of assisted suicide also argue that physicians are healers, and should not be thrust into the role of killer by legislatures and courts.⁴⁸⁴ This argument is easily countered by proponents of physician-assisted suicide.⁴⁸⁵ "The argument that euthanasia violates the physician's role as healer is utter hypocrisy. Death is a part of life and a big part of medicine. Every physician knows this."⁴⁸⁶ These statements are equally applicable to physician-assisted suicide. Additionally, it is relevant to note that the American Medical Association regards physicians as having three roles: "[p]hysicians are healers of disease and injury, preservers of life, and *relievers of suffering*."⁴⁸⁷ While opponents of physician-assisted suicide argue that the practice of physicians assisting terminally ill patients to die is contrary to the role of the physician as healer, proponents of physician-assisted suicide argue that the practice of physicians refusing to aid terminally ill patients in dying is against the role of "reliever of suffering," and when that terminally ill patient is racked with excruciating pain that can no longer be relieved, the only role left open for a physician to perform is "reliever of suffering."⁴⁸⁸ "When treating a dying person, the role of the Hippocratic Oath usually shifts. . . . The primary goal usually shifts away from extending life toward lessening physical, emotional, and spiritual suffering."⁴⁸⁹

D. *Dangers Are Not Controlling*

Unquestionably, there are dangers that go along with legalizing physician-assisted suicide, just as there are dangers that accompany other constitutional rights.⁴⁹⁰ Fortunately, competent legislators have found, and are finding, ways to deal with

483. *Id.*

484. QUILL, *supra* note 34, at 166.

485. Breo, *supra* note 417, at 2900.

486. *Id.*

487. *Council Report*, *supra* note 15, at 2230 (emphasis added).

488. See QUILL, *supra* note 34, at 43-44.

489. *Id.* at 44.

490. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

many problems inherent in other legally protected rights.⁴⁹¹ The fact that there are dangers inherent in a constitutional right is not a reason for lawmakers to ignore it. The legislature can regulate physician-assisted suicide and find solutions to alleviate the dangers involved.⁴⁹²

In *Compassion in Dying*, the district court did not specifically address a solution to the problems that will inevitably arise from the dangers of recognizing physician-assisted suicide as a constitutionally protected right.⁴⁹³ Although the court failed to propose a proper solution to be used in order to avoid these dangers, and although this omission may be viewed as a flaw in the district court's decision, the omission should not be viewed as an indicator that there are no solutions to the dangers that attach to this constitutional right. The potential dangers do not necessarily have to become realities.⁴⁹⁴ The state legislatures and appeals courts have the power and the resources to assure that the potential dangers that are inherent in assisted suicide are effectively avoided. Several attempts have already been made by physicians, organizations, and lawmakers in this country to set out appropriate guidelines under which physician-assisted suicide can be practiced with minimal risks.⁴⁹⁵ Using these guidelines as a starting point, acceptable effective laws may be drafted in dealing with physician-assisted suicide. "[Terminally ill patients facing intolerable suffering] should not be held hostage to our reluctance or inability to forge policies in this difficult terrain."⁴⁹⁶

V. Conclusion

The district court's reliance, in *Compassion in Dying*, on *Planned Parenthood v. Casey* was well-founded and in compliance with the attitudes of many Americans today, and the circuit court in *Compassion in Dying* was short sighted and

491. Lehr, *supra* note 26, at 6.

492. *Id.*

493. 850 F. Supp. 1454, 1465 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir. 1995), *reh'g en banc granted*, 62 F.3d 299 (9th Cir. 1995).

494. See *The Right to Die*, *supra* note 45, at 14.

495. See QUILL, *supra* note 34, at 159-64; *Compassion in Dying* Executive Director's Report at 4 (on file with author); *Death With Dignity Act*, 1995 Or. Laws Ch. 3 I.M. No. 16.

496. QUILL, *supra* note 34, at 161.

incorrect in holding that the district court's reliance on *Casey* was misplaced. There are many significant parallels between abortion and physician-assisted suicide that ultimately must lead to the conclusion that these two rights should be afforded the same constitutional protection. The analogy made by the district court in *Compassion in Dying* to the termination of life-sustaining medical treatment is also feasible, but the fact remains that the *Cruzan* Court did not hold that an individual has a constitutional right to remove life-sustaining medical treatment. Until the Supreme Court hands down such a holding, analogising physician-assisted suicide to the removal of life-sustaining medical treatment, for the purpose of extending the right of privacy to physician-assisted suicide, is futile.

The argument by the district court in *Compassion in Dying* that the right to commit physician-assisted suicide is protected under the Equal Protection Clause of the Fourteenth Amendment is a valid argument, but the argument is not necessarily dependent upon the right of privacy. Because there is no rational basis for treating the two groups of mentally competent, terminally ill patients differently, the right to commit physician-assisted suicide exists under the Equal Protection Clause, even if the United States Supreme Court finds that the right to commit physician-assisted suicide is not a protected privacy interest under the Due Process Clause of the Fourteenth Amendment.

The basic holding of the district court in *Compassion in Dying* is sound, and it is the path that many individuals in this country are urging the law to take. Conversely, the basic holding of the circuit court is short-sighted and colored by the moral attitudes of the majority judges. The decision of the district court will inevitably lead the way to the recognition of a new constitutional right in the United States. If and when the United States Supreme Court grants certiorari to determine whether there is a constitutional right to commit physician-assisted suicide, the Court should follow the lead of the district court in *Compassion in Dying* in holding that there is a constitutional right to commit physician-assisted suicide under both

the Due Process and the Equal Protection Clauses of the Fourteenth Amendment.

*Elizabeth Gmyrek England**

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