Land & Water Law Review

Volume 31 | Issue 2 Article 16

1996

Health Law - Physician Assisted Suicide - Due Process, the Right to Die, Equal Protection and Slippery Slopes - Compassion in Dying v. Washington

Kevin M. Stansbury

Casenotes

HEALTH LAW—Physician Assisted Suicide—Due Process, The Right to Die, Equal Protection and Slippery Slopes. *Compassion in Dying v. Washington,* 1996 WL 94848 (9th Cir. March 6, 1996) (*en banc*).

Medical technology has made dramatic strides in eliminating a majority of acute diseases which lead to certain death. Today's patient often deals with a host of long-term chronic illnesses which sometimes lead to "extended life under poor circumstances."[1] The desire to avoid this result, combined with an increased sensitivity toward individual rights, has ignited the euthanasia[2] debate across the country. As part of this debate, "Compassion in Dying," a Washington nonprofit corporation,[3] brought suit against the State of Washington arguing that a Washington statute,[4] outlawing physician assisted suicide, was unconstitutional.[5]

United States District Court Judge Barbara J. Rothstein found the Washington statute unconstitutional. In her opinion she ruled "competent, terminally ill adult[s]" have a constitutional right under the Fourteenth Amendment to commit physician assisted suicide.[6] Upon appeal, a three judge panel of the United States Court of Appeals for the Ninth Circuit reversed the district court.[7] Writing for a two to one majority, Circuit

---

1. Jim Persels, *Forcing the Issue of Physician-Assisted Suicide: Impact of the Kevorkian Case on the Euthanasia Debate,* 14 J. LEGAL MED. 93, 112 (1993).

2. *Euthanasia* is a term used to cover a variety of circumstances that hasten death. HENRY R. GLICK, THE RIGHT TO DIE 10 (1992). Euthanasia is typically characterized as *passive, active, voluntary* and *involuntary*. *Id.* Active euthanasia occurs when others act directly to end an individual's life. *Id.* This is contrasted with passive euthanasia which generally refers to the withdrawal of extraordinary care allowing the disease process to end the patient's life. *Id.* Voluntary and involuntary refer to the patient's consent or non-consent to these acts. *Id.*

Unless otherwise indicated, the terms *euthanasia, physician assisted suicide, and assisted suicide* will be used interchangeably in this casenote and refer to *active, voluntary euthanasia.*

3. Compassion in Dying is "an organization which provides support, counseling and assistance to mentally competent, terminally ill adults considering suicide." Compassion in Dying v. Washington, 850 F. Supp. 1454, 1456 (W.D.Wash. 1994). Also listed as plaintiffs were three terminally ill individuals and four physicians. *Id.*

4. WASH. REV. CODE ANN. § 9A.36.060 (West 1988).

5. *Compassion in Dying*, 850 F. Supp. at 1454.

6. *Id.* at 1462.

7. Compassion in Dying v. Washington, 49 F.3d. 586 (9th Cir. 1995).

Judge John T. Noonan Jr. found the statute constitutional.[8] On rehearing *en banc*, an eleven judge panel, in an eight to three decision written by Judge Stephen Reinhardt, found the Washington statute "unconstitutional as applied to terminally ill competent adults who wish to hasten their deaths with medication prescribed by their physicians."[9]

This casenote briefly examines the development of the right of privacy under the Constitution, how that right of privacy is extended to the right to refuse medical treatment, and how some states have sought to extend the right of privacy to assisted suicide. Finally, the casenote reviews the legal issues identified and the rationale used by the Ninth Circuit Court of Appeals in finding a constitutional right to die.

BACKGROUND

The Constitutional Right to Privacy

The recent advance in medical technology has led to a fear, sometimes irrational, of many patients that death will be out of their control. This potential technological nightmare has resulted in the argument that the choice to die should be considered a right of privacy, similar to a woman's right to an abortion.

The Constitutional right of privacy was first discussed by the United States Supreme Court in *Griswold v. Connecticut*.[10] Justice Douglas wrote in the majority opinion that the Bill of Rights "has a penumbra where privacy is protected from governmental intrusion."[11] This penumbra allowed the Court to discover unstated rights in the Constitution implied by the general character of other express rights.[12] The Court characterized the right of privacy as a "fundamental right" defined as "a value . . . essential to individual liberty."[13] Government attempts to limit fundamental rights are subject to strict review by the Court.[14]

---

8. *Id.*

9. Compassion in Dying v. Washington, 1996 WL 94848, at *37 (9th Cir. March 6, 1996).

10. 381 U.S. 479 (1965). In *Griswold* the Court overturned the Supreme Court of Connecticut when it held that a Connecticut law outlawing the use of contraceptives was unconstitutional since it intruded upon the right of marital privacy. *Id.* at 486.

11. *Id.* at 483.

12. *Id.*

13. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.7 at 388 (4th ed. 1991).

14. When reviewing state action under this form of review, the Supreme Court will examine the contested action to determine if it is narrowly tailored to promote a compelling interest of the government. *Id.*

The Supreme Court expanded on the fundamental right of privacy in the landmark abortion decision *Roe v. Wade*.[15] In the majority opinion Justice Blackmun held: "The Constitution does not explicitly mention any right of privacy . . . [however] the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[16] Justice Blackmun went on to say that the right of privacy was a personal right, "deemed 'fundamental' or 'implicit in the concept of ordered liberty.'"[17] Justice Blackmun noted these "fundamental" rights could be regulated only when a "compelling state interest" existed.[18]

Despite *Griswold* and *Roe*, new fundamental rights are difficult to discover. In *Bowers v. Hardwick* the Supreme Court said it was "[dis]inclined to take a more expansive view of [its] authority to discover new fundamental rights imbedded in the [Constitution]."[19] The Court also provided: "There should be . . . great resistance to expand the substantive reach of [the Due Process Clause], particularly if it requires redefining the category of rights deemed to be fundamental."[20] At the center of the Court's finding was the fact that homosexual sodomy did not have roots "implicit in the concept of ordered liberty such that neither liberty nor justice would exist if [it] were sacrificed."[21] Further the Court ruled that the liberty asserted was not "deeply rooted in this Nation's history and tradition."[22]

When fundamental rights are discovered imbedded in the Constitution, they are not necessarily unlimited. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[23] the Court held that even though a

---

government. *Id.*

15. 410 U.S. 113 (1973). In *Roe*, the Court found that a state could not arbitrarily regulate abortion, thus, the Court established a "trimester" system. *Id.* at 160, 163. This system prohibited state regulation of abortion in the first trimester, regulation in the second trimester only to the extent that the regulations were related to maternal health, and the state could regulate and even prohibit abortion after the fetus was determined to be viable. *Id.*

16. *Id.* at 152.

17. *Id.*

18. *Id.* at 155.

19. 478 U.S. 186 (1986). The Court upheld a Georgia statute which made sodomy illegal. *Id.* at 189. The plaintiff in the case was a practicing homosexual. *Id.* at 188. The Court decided the narrow question that homosexuals did not have a fundamental right to engage in sodomy. *Id.* at 190.

20. *Id.* at 195.

21. *Id.* at 191 (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

22. *Id.* at 192 (citing Moore v. East Cleveland, 431 U.S. 494, 503 (1977)). The Court cited the fact that until 1961 all 50 states had statutes outlawing sodomy. *Id.* at 193. In 1986 when the case was decided 24 states had laws outlawing sodomy. *Id.*

A similar argument could be made about assisted suicide since thirty-three states have statutes on the books outlawing assisted suicide. *See infra* note 132 and accompanying text.

23. 505 U.S. 833 (1992). In *Casey* the Court reconsidered the issue of abortion when it upheld

woman's right to an abortion was within the fundamental right of privacy, the state could regulate abortion as long as it did not place substantial obstacles in the paths of women seeking abortions.[24] There is no question that the right of privacy is fundamental. In *Casey* the Supreme Court declared that the rights under the Due Process Clause are "a promise of the Constitution that there is a realm of personal liberty which the Government may not enter."[25] The Court noted that the "Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood . . . as well as bodily integrity."[26]

The Right to Privacy and The Right to Die

The question of whether assisted suicide is a fundamental right has never been directly addressed by the United States Supreme Court. In *Cruzan v. Director, Missouri Department of Health* the Court did, however, establish that a competent person has a right to refuse lifesaving medical intervention.[27] Based on the long standing doctrine of informed consent, the Court held, "the logical corollary [of informed consent] is that the patient generally possesses the right not to consent, that is, to refuse treatment."[28]

The California Court of Appeals, in *Bouvia v. Superior Court,*[29] found that "a desire to terminate one's life is probably the ultimate exercise of one's right to privacy."[30] In *Bouvia*, a twenty-eight year old quadriplegic woman, suffering from severe cerebral palsy, brought suit to force her care-givers to remove a feeding tube so that she could starve to death.[31] The California court found that Ms. Bouvia did have a right to refuse treatment, even if the withdrawal would result in her death.[32] *Bouvia* is similar to *Cruzan* in that the patient was seeking the withdrawal of medical treatment rather than an active intervention designed to cause death.

Pennsylvania's right to limit abortion. *Id.* at 846.

24. *Id.* at 878. These regulations required: that information be given to women contemplating abortion about alternatives to abortion and the consequences to the fetus, *id.* at 884; a 24-hour waiting period between the request for an abortion and the actual procedure, *id.*; and parental notification for minor women requesting an abortion, *Id.* at 899.

25. *Id.* at 847.

26. *Id.* at 849.

27. 497 U.S. 261, 268 (1990). Regarding an incompetent patient, the Court ruled that the state could require "clear and convincing evidence" that the patient could refuse lifesaving care. *Id.* at 282.

28. *Id.* at 270.

29. 225 Cal. Rptr. 297 (Cal. App. 2d 1986).

30. *Id.* at 306.

31. *Id.* at 300.

32. *Id.* at 305.

When patients have requested an active intervention, courts have been less likely to grant their requests. In *Quill v. Koppell*[33] three physicians[34] brought an action challenging the constitutionality of two New York statutes outlawing assisted suicide.[35] One physician, Quill, provided a patient with enough barbiturates to cause an overdose leading to death.[36] The patient had previously told Quill she would commit suicide with or without his assistance.[37] Quill met with the patient and discussed alternatives to suicide.[38] The patient however, was adamant about her desire to die.[39] Quill later wrote an article about his experience in the *New England Journal of Medicine*.[40] After the article appeared, Quill was investigated for violation of New York law,[41] although he was never indicted for his actions.[42] The district court ruled that New York's statute forbidding assisted suicide did not violate the Equal Protection Clause of the Fourteenth Amendment.[43]

The most notorious recent cases of physician assisted suicide involve those surrounding Dr. Jack Kevorkian.[44] In *People v. Kevorkian*[45] the Michigan Supreme Court stated "There is . . . no significant support for the proposition that a right to commit suicide is rooted at all in our nation's history."[46]

---

33. 870 F. Supp. 78 (S.D.N.Y. 1994).

34. The *Quill* case was funded by Compassion in Dying. Deborah Pines, *Ban on Physician-Assisted Suicide Upheld, No Fundamental Right Under Constitution*, N.Y.L.J., Dec. 16, 1994, at 1.

35. *Quill*, 870 F. Supp at 78. N.Y. PENAL LAW §§ 120.30 (promoting a suicide attempt) and 125.15(3) (manslaughter in the second degree when intentionally causing or aiding another person in a suicide attempt) (McKinney 1995).

36. *Quill*, 870 F. Supp. at 80.

37. *Id.*

38. *Id.*

39. *Id.*

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

41. N.Y. PENAL LAW, *supra* note 35.

42. *Quill*, 870 F. Supp. at 80.

43. *Id.* at 85. Quill v. Koppel is now under appeal in the Second Circuit. The appeal was heard on September 1, 1995 under the name Quill v. Vacco, No. 95-7028. *Compassion in Dying*, 1996 WL 94848, at *43 n.5 (9th Cir. March 6, 1996).

44. Willard C. Shih, *Assisted Suicide, The Due Process Clause and "Fidelity in Translation,"* 63 FORDHAM L. REV. 1245 (1995).

45. 518 N.W.2d 487 (Mich. Ct. App. 1994). The Michigan court decided the consolidated appeals of dismissal of criminal charges against Dr. Kevorkian for violating a Michigan statute prohibiting "criminal assistance to suicide." *Id.* at 489 (citing MICH. COMP. LAWS § 752.1027(1)(a) (1992)). The court found no right to commit suicide protected by the due process clause of the United States Constitution. *Id.* at 493. The statute outlawing assisted suicide was ruled unconstitutional on other grounds. *Id.* at 491.

46. *Id.* at 493. Dr. Kevorkian was subsequently tried again after witnessing the suicides of additional patients. Donald W. Nauss, *Kevorkian Found Not Guilty of Aiding 2 Suicides*, LOS ANGELES TIMES, Mar. 9, 1996, at 1. He was acquitted after the jury found Dr. Kevorkian's intent was to relieve suffering, not kill the patients. *Id.*

Although not as notorious as the *Kevorkian* cases, the recent *Compassion in Dying v. Washington* opinion wrestled with many of the same issues.[47] The State of Washington appealed a United States District Court decision which found unconstitutional a state statute classifying assisted suicide a felony.[48]

The three judge Ninth Circuit panel specifically rejected the district court's finding that the statute deprived the plaintiffs of a "liberty interest" under the Fourteenth Amendment.[49] The court reasoned:

> If at the heart of the liberty [of privacy] protected by the Fourteenth Amendment is this uncurtailable [sic] ability to believe and to act on one's deepest beliefs about life, the right to suicide and the right to assistance in suicide are the prerogative of at least every sane adult. The attempt to restrict such rights to the terminally ill is illusory. If such liberty exists in this context . . . every man and woman in the United States must enjoy it. The conclusion is a *reductio ad absurdum*.[50]

Initiatives on Active Euthanasia

Legislatures in several states have made recent efforts[51] to legalize assisted suicide. Washington, California, Oregon, and Colorado have debated the issue with only Oregon's "Death with Dignity Act" being approved.

In 1991 the voters of Washington considered Measure 119, allowing mentally competent adults, with a certified terminal condition, the right to an assisted suicide after executing a voluntary written directive.[52] Washington voters rejected the measure by a narrow 54 to 46 percent margin.[53]

---

47. The Ninth Circuit is the highest federal court to have ruled on the issue of assisted suicide. *Right to Die: Ban on Assisted Suicide Upheld,* A.B.A. J., June 1995, at 56.

48. *Compassion in Dying*, 850 F. Supp. at 1454.

49. Compassion in Dying v. Washington, 49 F.3d 586, 590 (9th Cir. 1995).

50. *Id.* at 591. *Reductio ad absurdum* is defined as "the method of disproving an argument by showing that it leads to an absurd consequence." BLACK'S LAW DICTIONARY 1279 (6th ed. 1990).

51. An early euthanasia initiative was introduced in the Ohio legislature in January, 1906. Persels, *supra* note 1, at 101-07. The bill provided for physician assisted suicide for the terminally ill. *Id.* The bill was rejected by the Ohio legislature's Committee on Medical Jurisprudence by a vote of 78 to 22. *Id.* In addition to the four states discussed in the casenote, legislatures and voters in Nebraska, Idaho, Maine, Montana, New York and Michigan have considered and rejected laws authorizing euthanasia in one form or another within the last five years. *Id.* Other state legislatures have also considered assisted suicide this year. *See infra* note 132.

52. Jody B. Gabel, *Release From Terminal Suffering?: The Impact of AIDS on Medically Assisted Suicide Legislation,* 22 FLA. ST. U. L. REV. 369, 411 (1994).

53. *Id.* at 412.

California Proposition 161 used many of the same provisions as the Washington proposal. It was defeated by the same margin one year later[54] despite additional safeguards such as clarifying the physician's role in the suicide and witnessing the patient's request by a qualified third party.[55]

After the defeat of these measures, a group of assisted suicide proponents in Oregon drafted The "Oregon Death With Dignity Act" (Measure 16).[56] On November 8, 1994 Measure 16 passed by a narrow majority of Oregon voters.[57] Under Measure 16, Oregon would have become the first jurisdiction in the United States to allow legal, assisted suicide.[58]

Measure 16 legalized the prescription to a patient, by a physician, of enough medication to cause death.[59] The law specifically excluded lethal injections, mercy killing or active euthanasia.[60] The law required patients to make two oral requests for assisted suicide to their attending physician[61] fifteen days apart.[62] After the oral requests, the patient would have to submit a written request witnessed by two other individuals.[63] Once the attending physician made a terminal diagnosis,[64] confirmed by a consulting physician, the physician could write a prescription for the desired drugs.[65] The prescription would be effective two days following the re-

---

54. *Id.* at 413.

55. *Id.*

56. Arthur A. Povelones, Jr., *When the Majority Says You May Die: Aid-In-Dying Initiatives*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 537, 554 (1995).

The Oregon Measure was drafted and promoted by the "Oregon Right to Die Committee" headed by physician Peter Goodwin. David Brown, *Medical Community Still Divided on Oregon's Assisted Suicide Act*, WASH. POST, Nov. 13, 1994, at A20.

57. Votes cast 1,223,998 votes in the Oregon election and Measure 16 passed by a narrow 32,000 vote margin. Warren Wolfe, *Oregon May Rule Today on Assisted Suicide; Doctors Unsure of What They'll Do*, MINNEAPOLIS STAR TRIB., Dec. 19, 1994, at 1A.

58. NEWSLINE (National Hospice Organization, Washington, D.C.), Dec. 1, 1994, at 2. Euthanasia is regularly practiced in The Netherlands after a Dutch Supreme Court decision in 1984 held that a physician may invoke a "necessity" defense when the physician feels such acts are necessary to relieve a patient's suffering. John Keown, *Euthanasia in The Netherlands: Sliding Down the Slippery Slope?*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 407, 410 (1995).

The Northern Territory of Australia also recently legalized euthanasia. Diane M. Gianelli, *Australian State OKs Euthanasia; Rest of Country Objects; Northern Territory*, AM. MED. ASS'N AM. MED. NEWS, June 26, 1995, at 23.

59. The Oregon Death With Dignity Act (1994), Oregon Ballot Measure No. 16, *reprinted in* Kane v. Kulongoski, 871 P.2d 993, 1001-06 (Or. 1994). MEASURE 16, DEATH WITH DIGNITY ACT, § 2.01.

60. *Id.* § 3.14.

61. *Id.* § 1.01(2).

62. *Id.* § 3.06.

63. *Id.* § 6.01.

64. *Id.* § 1.01(12).

65. *Id.* §§ 3.01, 3.02.

ceipt of the written request.[66] Before providing the prescription, the attending physician is required to discuss with the patient alternatives to suicide such as comfort care, hospice and pain control.[67]

The constitutionality of Measure 16 was challenged in *Lee v. Oregon*.[68] The United States District Court found that Measure 16 violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[69]

Specifically, the court found that Measure 16 excluded the terminally ill from the protection of Oregon laws outlawing assisted suicide.[70] The court also found the standard of care by physicians extended to other Oregon citizens did not exist under the Act.[71] Finally, the court found no rational relationship between Measure 16's indifference to monitoring the patient at the time of death and a legitimate state interest.[72] Because of these findings, the court issued a permanent injunction preventing the state and its officials from carrying out the provisions of Measure 16.[73]

A more recent effort occurred when the "Colorado Dignity in Death Act" was introduced to the Colorado House on January 12, 1996.[74] The proposal allowed terminally ill patients to request a prescription that

---

66. *Id.*

67. *Id.* § 1.01(7)(e).

68. 891 F. Supp. 1429 (D.Or. 1995).

69. *Id.* at 1437.

70. *Id.* at 1438.

71. *Id.* at 1437. The District Judge was particularly concerned that it was feasible a physician would be able to negligently misdiagnose the patient's terminal condition, negligently prescribe a drug overdose and be held to a "good faith" standard enumerated in the act. *Id.* This standard was different than the reasonable care standard owed to non-terminally ill patients. *Id.*

72. Measure 16, while providing for a prescription of a lethal dose, did not require any supervision of the administration of the dose. *Id.* While it might be argued that adequate protections existed up to the writing of the prescription, the court was concerned about abuse and undue influence toward the patient at the time of death. *Id.*

73. Lee v. Oregon, 891 F. Supp. 1439 (D.Or. 1995).

In *Compassion in Dying*, the majority opinion criticized Judge Hogan's decision in *Lee*. The court correctly noted that Judge Hogan found Measure 16 unconstitutional on Equal Protection grounds, however it erred in its description of the rationale Judge Hogan used in making his decision. "The benefit that the Oregon District Court thought the terminally ill were being deprived of is an Oregon *statutory prohibition* making it a crime for anyone, including doctors, to assist any person, including terminally ill patients, to end their lives, by providing medical assistance or otherwise." 1996 WL 94848 at *38 (*emphasis added*).

Judge Hogan did not base his finding on such an Oregon Statute as there is no statute in Oregon proscribing assisted suicide. Oregon does have a law which references assisted suicide, but instead of outlawing assisted suicide OR. REV. STAT. §163.117 (1989) provides for "a defense to a charge of murder [when] the defendant's conduct consist[s] of causing or aiding, . . . another person to commit suicide." *Id.* This section of Oregon law does not provide the same defense for manslaughter "or any other crime." *Id.*

74. H.B. 1185, 60th Gen. Assemb., 2d Reg. Sess., 1996 Colo.

would enable them to take their own life.[75] The patient was required to make two oral and one written request prior to the administration of the prescription.[76] The physician was required to inform the patient of her medical diagnosis, prognosis, risks associated with taking the desired medication, probable result of taking the medication, and alternatives to the requested prescription.[77] Finally, a second opinion was required to verify the patient's condition.[78] If the physician thought appropriate, a counseling referral could be made.[79]

The bill was defeated in the Health, Environment, Welfare and Institutions Committee of the Colorado House by a seven to four vote margin.[80] Although the bill did not make it out of committee, the Rocky Mountain News endorsed the bill.[81]

PRINCIPAL CASE

In *Compassion in Dying*, the Ninth Circuit, in an eight to three *en banc* decision written by Judge Stephen Reinhardt, reversed its own three Judge panel which had found the Washington statute constitutional.[82] The court characterized the liberty interest in question as the right to determine the time and manner of one's own death.[83] Describing the lower court's reliance on history and tradition as "misguided," the court stated, "historical evidence alone is not a sufficient basis for rejecting a claimed liberty interest."[84] Citing *Casey*, and drawing the analogy between abortion and assisted suicide, the court said both issues involve "suffering too intimate and personal for the State to

---

75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. Tillie Fong, *Committee Shelves Right-To-Die Bill*, ROCKY MOUNTAIN NEWS, Feb. 6, 1996, at 8A.
81. Bill St. John, *Editorial*, ROCKY MOUNTAIN NEWS, Feb. 12, 1996, at 30A.
82. *See supra* notes 47-50 and accompanying text.
83. *Compassion in Dying*, 1996 WL 94848 at *8.
84. *Id.* at *11. The court did however discuss the comparison between the Washington statute and the Virginia miscegenation statutes that were struck down in *Loving v. Virginia*, 388 U.S. 1 (1967):

> Were history our sole guide, the Virginia anti-miscegenation statute that the Court unanimously overturned in *Loving v. Virginia* . . . would still be in force because such . . . laws were commonplace both when the United States was founded and when the Fourteenth Amendment was adopted. *Id.* at *12.

insist . . . upon its vision . . . however dominant that vision has been in the course of our history and culture."[85]

The opinion argued "terminally ill" adults have a "strong liberty interest in choosing a dignified and humane death."[86] The court felt Justice O'Connor's opinion in *Casey*[87] was particularly persuasive when discussing "matters involving the most intimate and personal choices" and "choices central to personal dignity and autonomy" being "central to the liberty protected by the Fourteenth Amendment."[88] The court felt that these sentiments inferred a liberty interest which allows an individual to hasten their own death.[89] The court held that "patients wracked in pain" who are subject to the state's ban on assisted suicide were condemned "to unrelieved misery or torture."[90] In order to avoid this result, the Ninth Circuit argued that the choice to hasten one's death was "one of the most, if not the most, intimate and personal choices" made in a lifetime.[91]

Examining the asserted liberty interest under *Cruzan*,[92] the Ninth Circuit cited Chief Justice Rehnquist's opinion: "The choice between life and death is a deeply personal decision of obvious and overwhelming finality . . . It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment."[93]

The *Casey* liberty interest, combined with *Cruzan's* sanctioning the withdrawal of unwanted medical treatment, provided the court with "persuasive evidence" that a "liberty interest in hastening one's own death exists under the Constitution."[94]

Recognizing that even fundamental liberty interests could be limited in light of compelling state interests,[95] the court then turned to a balancing test to determine whether the Washington statute violated the Due Process Clause.[96]

---

85. *Id.*
86. *Id.* at *19.
87. *See supra* notes 22-26 and accompanying text.
88. *Compassion in Dying*, 1996 WL 94848 at *18.
89. *Id.* at *20.
90. *Id.* at *19.
91. *Id.*
92. *See supra* notes 27-28 and accompanying text.
93. *Compassion in Dying*, 1996 WL 94848 at *20 (citing *Cruzan*, 497 U.S. at 281).
94. *Id.* at *20.
95. *See supra* notes 23-24 and accompanying text.
96. *Compassion in Dying*, 1996 WL 94848 at *21 includes a balancing test which examines: 1) the importance of the various state interests, both in general and in the factual context of the case; 2) the manner in which those interests are furthered by the state law or regula-

The first prong of the balancing test involved reviewing Washington's interests in prohibiting assisted suicide.[97] Although recognizing the state's right to preserve life without consideration of the quality of that life,[98] the court nonetheless did not find this interest compelling since Washington had enacted an advanced directives law.[99] Citing the legislative findings of the law,[100] the court found the state's interest in preserving life of the terminally ill not compelling. The opinion also ruled that the state's interest in preventing suicide was not compelling using a similar analysis. The court stated that since Washington already allows patients to hasten their death by withholding or withdrawing treatment, the state interest in preventing the suicide of the terminally ill was diminished.[101] The court went on to dispute that such an act could even be legitimately considered suicide, arguing "that a decision by a terminally ill patient to hasten by medical means a death that is already in process, should not be classified as suicide."[102]

---

tion; 3) the importance of the liberty interest, both in itself and in the context in which it is being exercised; 4) the extent to which that interest is burdened by the challenged state action; and, 5) the consequences of upholding or overturning the statute or regulation.

97. *Id.* Six state interests were analyzed:

1) the state's general interest in preserving life; 2) the state's more specific interest in preventing suicide; 3) the state's interest in avoiding the involvement of third parties and in precluding the use of arbitrary, unfair, or undue influence; 4) the state's interest in protecting family members and loved ones; 5) the state's interest in protecting the integrity of the medical profession; and, 6) the state's interest in avoiding adverse consequences that might ensue if the statutory provision at issue is declared unconstitutional.

98. *Id.*

99. Anticipating some concerns raised in the right to die cases, Congress enacted the "Patient Self Determination Act" in 1991. This Act requires health care providers to: "provide written information [regarding] an individual's rights under State Law . . . to make decisions concerning . . . the right to accept or refuse medical or surgical treatment and the right to formulate advance directives." 42 U.S.C. § 1395cc(f)(1) (1995). The Act defines "advance directive" as: "a written instruction, such as a living will or durable power of attorney for health care, recognized under State law . . . and relating to the provision of such care when the individual is incapacitated." *Id.*

100. *Compassion in Dying*, 1996 WL 94848 at *22. The court quoted directly from WASH. REV. CODE § 70.122.010 (West 1988) which provides: "[I]n the interest of protecting individual autonomy, . . . prolongation of life for persons with a terminal condition may cause loss of patient dignity, and unnecessary pain and suffering, while providing nothing medically necessary or beneficial to the patient." *Id.*

101. *Id.* at *26. Despite the legislative findings noted by the court, the Washington Legislature also stated: "Nothing in this chapter shall be construed to condone, authorize, or approve mercy killing, or to permit any affirmative or deliberate act or omission to end life other than to permit the natural process of dying." WASH. REV. CODE § 70.122.100 (1988). The court did not acknowledge this section of Washington's statute.

102. *Compassion in Dying*, 1996 WL 94848 at *26. In the event the patient had been misdiagnosed the court argued that such errors do not raise the state's interest in preventing suicide to a compelling interest. *Id.* The court stated: "[S]hould an error occur it is likely to benefit the individual by permitting a victim of unmanageable pain and suffering to end his life peacefully and with dignity at the time he deems most desirable." *Id. But see infra* note 142.

The court then turned to the state's interest in avoiding the involvement of third parties and precluding the use of arbitrary, unfair or undue influence. Focusing first on the issue of potential undue influence on the poor or disadvantaged, the court rejected arguments that these individuals would be subject to pressure to end their lives prematurely.[103] Calling such arguments "ludicrous,"[104] the court simply stated that "adequate safeguards" would need to be developed to avoid abuses.[105]

Addressing possible undue influence for financial reasons, the court stated that since the "person will die shortly in any event," the temptation for undue influence is "tempered."[106] The majority argued that the involvement of the physician will "likely provide an important safeguard" against abuses.[107] Regarding the issue of patients' feeling concerned about being a financial burden to their families, the court responded: "[W]e are reluctant to say that, in a society in which the costs of protracted health care can be so exorbitant, it is improper for competent, terminally ill adults to take the economic welfare of their families and loved ones into consideration."[108] The court recognized that undue influence could not be completely eliminated; however, it felt that "steps could be taken to minimize the danger substantially."[109]

The court also discussed the issue of physician incentives to properly care for the terminally ill. The court argued that "most, if not all doctors would not assist a terminally ill patient to hasten his death as long as there were a reasonable chance of alleviating the patient's suffering or enabling him to live under tolerable conditions."[110]

The state's interest in the effect on children, other family members and loved ones was only briefly discussed. The court held the state could not insist that its interest is compelling since it desires to force a "protracted, painful death" upon the patient, creating additional burdens for the patient's loved ones.[111]

---

103. *Compassion in Dying*, 1996 WL 94848 at *27.

104. *Id.* at *28.

105. *Id. See also infra* note 168.

106. *Compassion in Dying*, 1996 WL 94848 at *27.

107. *Id.* at *28.

108. *Id. See also infra* notes 147 and 163.

109. *Compassion in Dying*, 1996 WL 94848 at *28.

110. *Id.* at *29.

111. *Id.* Interestingly, during this part of the opinion the court focused its language more on care for the elderly than for the terminally ill. The opinion reads:

> Doctors like the rest of society face constantly increasing pressures, and may not always have the patience to deal with the *elderly*, some of whom can be both difficult and troublesome. Nevertheless, there are many doctors who specialize in *geriatric* care and there are many more who are not specialists but who treat *elderly* patients with great compassion and sensitivity.

Id. (emphasis added).

Protecting the integrity of the medical profession was also dismissed by the court as a compelling state interest. The court felt that the integrity of the profession was damaged more by the existence of the ban on assisted suicide as such a ban "creates conflicts with the doctor's professional obligations and make[s] covert criminals out of honorable, dedicated and compassionate individuals."[112] The court went on to say that the Hippocratic Oath must adapt to a changing legal climate as it did after the abortion decisions.[113] Finally, the court stressed the fact that physicians who find the practice of assisted suicide immoral have a choice not to engage in its practice.[114]

The last state interest examined in the opinion was fear of adverse consequences. The court focused on the slippery slope arguments and dismissed them, arguing that the same fears had been expressed about the right to an abortion and implementation of advanced directives legislation.[115] The court held that sufficient statutory definitions (i.e. terminally ill)[116] exist to prevent a slide down the slippery slope.[117]

Applying the second prong of the balancing test, the court ruled that since none of the state's interests were compelling the liberty interest could not be prohibited.[118] The liberty interest could however be regulated. The court said that "appropriate, reasonable, and properly drawn safeguards" could be developed to ensure that patients who choose assisted suicide are competent.[119] The court gave examples of regulations a state may enact that are not unduly burdensome on the liberty interest. These included: witnesses, waiting periods, second medical opinions, psychological examinations, and reporting procedures.[120]

Addressing the third prong of the balancing test, the strength of the liberty interest, the court found that the liberty interest in hastening death is dynamic. For example, the court said that the liberty interest is at its "low point" for a young and healthy individual and at its highest point for a mentally competent adult who is terminally ill and wishes to hasten his death.[121]

---

112. *Id.*
113. *Id.* at *31. *See also infra* note 139.
114. *Compassion in Dying*, 1996 WL 94848 at *31.
115. *Id.* at *32. *See infra* note 137.
116. *See infra* note 143 and accompanying text.
117. *Compassion in Dying*, 1996 WL 94848 at *32.
118. *Id.* at *34.
119. *Id.*
120. *Id.*
121. *Id.* at *35.

Fourth, the court found the burden the state placed upon the liberty interest was to "effectively prohibit its exercise" by the terminally ill.[122] The court also found the statute placed a burden upon the families and loved ones of the terminally ill since they were often enlisted to assist in an "endeavor criminalized by the state" or be forced to watch a loved one endure "unnecessary and protracted agony."[123]

The court gave only cursory attention to element five of the balancing test by briefly studying the consequences of upholding or overturning the statutory provision. Stating that a "host of painful and agonizing issues" surrounding the right to die will confront society,[124] the court encouraged "thorough, careful and objective attention" to address these issues.[125] Summarizing, Judge Reinhardt wrote that the decision to hasten one's death was so "painful, delicate, personal, important, [and] final" that "broad state policies" could not be imposed upon the terminally ill to prohibit the exercise of the decision to hasten death.[126]

ANALYSIS

In its decision, the Ninth Circuit relied upon the standard that liberties must be "implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed."[127] The court analyzed the Supreme Court's decisions in *Casey* and *Cruzan* and decided that the right to die was also included within the realm of the fundamental right of privacy.[128] Judge Reinhardt's opinion specifically rejected the equally important standard that such fundamental rights must also be analyzed in the light of history and tradition.[129]

---

122. *Id.* at *36.
123. *Id.* at *37.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at *10.
128. In Griswold v. Connecticut, the Supreme Court discovered unstated rights in the Constitution implied by the general character of other *express* rights. *See supra* note 12 and accompanying text. Here the Ninth Circuit finds unstated rights by the general character of other *unstated* rights.
129. In Bowers v. Hardwick, the Court stressed the need to "assure itself and the public" that finding rights not within the text of the Constitution involved more than "the imposition of the Justices' own choice of values." 478 U.S. 186, 191 (1986). In *Bowers* the Court addressed both the "implicit in the concept of ordered liberty" and the "deeply rooted in this Nation's history and tradition" tests. *Id.* The *Bowers* decision relied in large part upon the history and tradition test. *Id. See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 778 (1988). Professor Tribe states in § 11-4 n.5 "Both the historical inquiry and the functional analysis . . . must proceed at a level general enough to avoid the trap of sanctifying the conventional and preventing moral and cultural change."

Traditionally, assisted suicide has not enjoyed the sanction of law.[130] Throughout the history of the United States and England, assisted suicide has been considered criminal.[131] An examination of state statutes today reveals that thirty-three states have specific statutes outlawing assisted suicide.[132]

---

130. *See supra* note 58 and accompanying text.

131. Shih, *supra* note 44, at 1274.

132. ALASKA STAT. § 11.41.100(a)(1)(B) (1994) (murder in the first degree); ARIZ. REV. STAT. ANN. § 13-1103(3) (1989) (manslaughter); ARK. CODE ANN. § 5-10-104(a)(2) (Michie 1993) (manslaughter); CAL. PENAL CODE § 401 (West 1993) (separate crime, felony); COLO. REV. STAT. ANN. § 18-3-104(1)(b) (West 1986) (manslaughter); CONN. GEN. STAT. ANN. § 53a-56(a)(2) (West 1994) (manslaughter in the second degree); DEL. CODE ANN. tit. 11 § 645 (1994) (separate crime, felony); FLA. STAT. ANN. § 782.08 (West 1992) (separate crime, felony); GA. CODE ANN. § 16-5-5 (1995) (separate crime, felony); HAW. REV. STAT. § 707-702(1)(b) (1993) (manslaughter); ILL. REV. STAT. ch. 720, para. 5/12-31 (1995) (separate crime, felony if the suicide is successful, misdemeanor if the suicide is unsuccessful); IND. CODE ANN. § 35-42-1-2.5 (Burns 1994) (separate crime, felony); KAN. STAT. ANN. § 21-3406 (1992) (separate crime, felony); ME. REV. STAT. ANN. tit. 17-A, § 204 (West 1993) (separate crime, felony); MD. CODE ANN., CRIM. LAW §120 (1995) (reckless endangerment, citing 78 Op. Att'y Gen. (1993) "Assisted suicide . . . is probably a common law crime in Maryland . . . but the question is not at all free from doubt . . . [a person] who supplied the means for another's suicide might be guilty of the statutory misdemeanor of reckless endangerment."); MINN. STAT. ANN. § 609.215 (West 1994) (separate crime, felony); MO. REV. STAT. § 565.023(2) (1992) (voluntary manslaughter); MISS. CODE ANN. § 97-3-49 (1994) (separate crime, felony); MONT. CODE ANN. § 45-5-105 (1993) (separate crime, felony); NEB. REV. STAT. § 28-307 (1989) (separate crime, felony); N.H. REV. STAT. ANN. § 630:4 (1994) (separate crime, felony "if the actor's conduct causes such suicide or an attempted suicide. Otherwise it is a misdemeanor."); N.J. STAT. ANN. § 2C:11-6 (West 1994) (separate crime, felony); N.M. STAT. ANN. § 30-2-4 (Michie 1994) (separate crime, felony); N.Y. PENAL LAW § 120.30 (McKinney 1987) (separate crime, felony); N.D. CENT. CODE § 12.1-16-04 (1993) (separate crime, felony); OKLA. STAT. ANN. tit. 21, § 813 (West 1993) (separate crime, felony); 18 PA. CONS. STAT. § 2505 (1993) (separate crime, felony if suicide is successful, misdemeanor if suicide is unsuccessful); S.D. CODIFIED LAWS ANN. § 22-16-37 (1993) (separate crime, felony); TENN. CODE ANN. § 39-13-216 (1995) (separate crime, felony); TEX. PENAL CODE ANN. § 22.08 (West 1994) (separate crime, felony if suicide is successful, misdemeanor if suicide is unsuccessful); WASH. REV. CODE ANN. § 9A.36.060 (West 1988) (separate crime, felony); WIS. STAT. ANN. § 940.12 (West 1982) (separate crime, felony).

Additionally, Puerto Rico (P.R. LAWS ANN. tit. 33, § 4409 (1983)) and The Virgin Islands (V.I. CODE ANN. tit. 14, § 2141 (1964)) have criminal statutes specifically prohibiting assisted suicide.

Of the aforementioned statutes five (Georgia, Illinois, Mich., North Dakota, and Tennessee) were enacted in the past five years. Iowa recently passed legislation outlawing assisted suicide. The crime is classified as a felony. S.F. 2066, 76th Gen. Assemb., 2d Sess., 1995 Iowa.

A survey of recent legislative activity showed six other states (Mich., Nevada, New Hampshire Oregon, Rhode Island, and Virginia) considering assisted suicide initiatives. Mich. is considering several bills, some outlawing assisted suicide, others allowing it under certain circumstances. H.B. 4134, 88th Legis. Reg. Sess., 1995 Mich.; H.B. 4889, 88th Legis. Reg. Sess., 1995 Mich.. H.B. 5015, 88th Legis. Reg. Sess., 1995 Mich.. S.B. 502, 88th Legis. Reg. Sess., 1995 Mich.. S.B. 556, 88th Legis. Reg. Sess., 1995 Mich.. S.B. 640, 88th Legis. Reg. Sess., 1995 Mich.. Nevada amended its advance directives statute to explicitly exclude assisted suicide. S.B. 234, 68th Legis. Reg. Sess., 1995 Nevada. New Hampshire's "Death with Dignity Act" was passed the Judiciary and Family Law Committee with a "ought to pass" recommendation. The Bill however was defeated in the full House. H.B. 339 Reg. Sess., 1996 New Hampshire. Oregon considered amendments to Measure 16. I.M. No. 16 68th Legis. Assem. Reg. Sess., 1995 Oregon. Rhode Island was considering three bills "relating to assisted suicide". H.B. 8244 Leg. Sess., 1996 Rhode Island. S.B. 2558 Leg. Sess., 1996 Rhode Island. S.B. 2847 Leg. Sess., 1996 Rhode Island. Virginia's bill would outlaw assisted suicide classifying the act as a felony. H.B. 311 Leg. Sess., 1996 Virginia.

Some commentators argue that since few prosecutions are sought under these statutes,[133] modern society does not truly want to punish individuals who assist others to commit suicide.[134] Countering this argument is the fact that the laws are valuable as they give prosecutors leeway to investigate suspicious cases.[135]

In addition to the strong history against assisted suicide, commentators opposing assisted suicide have also advanced the arguments of: sanctity of human life;[136] avoiding a "slippery slope";[137] modern medicine's ability to control pain;[138] physicians assisting suicide would violate the Hippocratic Oath;[139] difficulty in ascertaining voluntary consent,[140] or ensuring a patient's choice to die is freely given;[141]

---

133. Shih, *supra* note 44, at 1277.

134. *Id.* at 1278.

135. *Id.*

136. *See e.g., Cruzan*, 497 U.S. at 282, where Chief Justice Rehnquist in the majority opinion wrote: "[A] State may properly decline to make judgments about the "quality" of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual."

137. Donald L. Beschle, *The Role of Courts in the Debate on Assisted Suicide: A Communitarian Approach*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367, 386 (1995). This objection is also known as the "thin edge of the wedge" argument. Yale Kamisar, *Some Non-Religious Views Against Proposed "Mercy-Killing" Legislation*, 42 MINN. L. REV. 969, 1030 (1958). In this classic work on the subject of euthanasia, Professor Kamisar wrote: "Some are proposing what is called euthanasia; at present only a proposal for killing those who are a nuisance to themselves; but soon to be applied to those who are a nuisance to other people." *Id.* at 1031 (citing Chesterton, *Euthanasia and Murder*, 8 AM. REV. 486, 490 (1937)).

138. Arthur J. Dyck, *Beyond Theological Conflict in the Courts: The Issue of Assisted Suicide*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 503, 535 (1995).

See also NATIONAL HOSPICE ORGANIZATION, STATEMENT OF THE NATIONAL HOSPICE ORGANIZATION OPPOSING THE LEGALIZATION OF EUTHANASIA AND ASSISTED SUICIDE, 1995. The National Hospice Organization has taken the position that "[n]o patient need die in pain." *Id.* Admitting that pain control in some patients is difficult and requires heavy doses of medication which often hastens death, The National Hospice Organization says:

> This type of intensive symptom control is ethically acceptable and distinctly different from the administration of a drug whose primary intent is to end life. Achievement of comfort through intensive symptom control prior to death is less of a burden to the family and the caregivers than having to directly cause death as the only way to relieve the patient's suffering. *Id.*

139. THOMAS MAPPES & JANE S. ZEMBATY, BIOMEDICAL ETHICS 49 (1981). The pertinent section of the Hippocratic Oath reads "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect." *Id.* However this argument seems hollow in light of the fact that the very next line reads: "Similarly I will not give to a woman an abortive remedy." *Id.*

140. *Id.* at 367 (citing Yale Kamisar, *Some Non-Religious Views Against Proposed "Mercy Killing" Legislation*, 42 MINN. L. REV. 969 (1958)).

141. This issue has been addressed by Elisabeth Kubler-Ross in her landmark work "On Death and Dying." ALAN D. LIEBERSON, ADVANCED MEDICAL DIRECTIVES § 23:3 (1992). Dr. Kubler-Ross has identified five distinct stages which terminally ill patients experience before death: (1) denial; (2) anger; (3) bargaining; (4) depression; and (5) acceptance. *Id.* Only in the acceptance stage is the "patient ready to receive the act of mercy which she has requested." *Id.*

possible misdiagnosis of the "terminal condition";[142] and difficulty in defining "terminal illness."[143] Conversely, proponents of assisted suicide argue bodily integrity and personal autonomy;[144] dignity of the terminal patient;[145] ineffective pain management;[146] and a desire to avoid suffering of the terminal patient's family[147] are compelling arguments for a finding that the right of privacy includes assisted suicide. The cornerstone of these arguments is the idea of personal autonomy. As noted by the *Compassion in Dying* decision, this issue is prevalent in past Supreme Court right of privacy cases.[148]

In *Compassion in Dying*, the Ninth Circuit used a complicated bal-

---

142. Professor Kamisar refers to this argument as the "hopelessly incurable" patient and the fallible doctor argument. *Id.* at 993. Professor Kamisar argues that, as in all professions, there are physicians who are only minimally competent. *Id.* at 996. He goes on to argue that "the minimally competent physician is hardly the man to be given the responsibility for ending another's life." *Id.*

143. Mark E. Chopko & Michael F. Moses, *Assisted Suicide: Still a Wonderful Life?*, 70 NOTRE DAME L. REV 519, 542 (1995). Chopko and Moses argue that the majority of assisted suicide initiatives are flawed due to their dependance on time parameters. *Id.* They state "a person with an indefinite or high life expectancy *with* medical treatment . . . but with less than six months life expectancy *without* such treatment would presumably qualify." *Id.* (emphasis added).

The issue of whether patients who are not terminally ill, yet suffer from long term chronic illness involving uncontrollable pain must be addressed as well. By considering circumstances involving chronic pain in addition to terminal illness the analogy with a patient's right to decline treatment knowing that action may result in the patient's death is weakened. *See infra* note 154. If the parameters for allowing assisted suicide are expanded to include physical pain, it is difficult to exclude emotional pain as well. Thus the slide down the slippery slope begins. *See supra* note 137 and accompanying text.

144. G. Steven Neeley, *Chaos in the "'Laboratory' of the States": The Mounting Urgency in the Call for Judicial Recognition of a Constitutional Right to Self-Directed Death*, 26 U. TOL. L. REV. 81, 88 (1994). *See also* Gabel, *supra* note 52, at 116; Robert L. Risley, *Ethical and Legal Issues in the Individual's Right to Die*, 20 OHIO N.U. L. REV. 597, 599 (1994).

145. Lori D. Pritchard Clark, Comment, *Rx: Dosage of Legislative Reform to Accommodate Legalized Physician-Assisted Suicide*, 23 CAP. U. L. REV. 689 (1994). In her introduction Ms. Pritchard Clark quotes the story of a wife who watched her husband die of melanoma: "[A] terrible thought occurred to me, 'If Jack were a dog, . . . what would be done to him?' The answer was obvious: the pound, and chloroform. No human being with a spark of pity could let a living thing suffer so, to no good end." *Id.*

146. Contrary to the assertion of the National Hospice Organization, supra note 138, others contend that effective pain control is not possible. *See e.g.*, Stephen A. Newman, *Euthanasia: Orchestrating "The Last Syllable of . . . Time,"* 53 U. PITT. L. REV. 153, 185 (1991). Professor Newman points out that Dr. Timothy Quill (*see supra* notes 33-43 and accompanying text) is a former hospice director who could not "relieve the reality of pain for many patients." *Id.*

147. Newman, *supra* note 146 at 180. Professor Newman argues:

> The wish to avoid depletion of family resources may motivate some to seek a quicker than slower death. Few mothers and fathers would want to leave behind an impoverished family. Many would also not want to feel responsible for ruining the quality of life of a family member who would have to serve as a caretaker during an arduous, chronic fatal illness.

Id. at 181-82. *But see infra* note 163 and accompanying text.

148. *See supra* notes 10-26 and accompanying text.

ancing test[149] to find that Washington's interests in controlling or prohibiting physician assisted suicide were not compelling. The court with seeming ease dismissed the arguments against assisted suicide with little substantive justification. It appears the Ninth Circuit would establish a right without giving the political process sufficient opportunity to debate the merits of the issue.[150]

If the United States Supreme Court were to find assisted suicide a fundamental right, it is almost certain it would be supported by the doctrine of personal autonomy. The Supreme Court has suggested a desire to place limits on the privacy right. Justice Scalia in his concurring opinion in *Cruzan* wrote: "There is no significant support for the claim that a right to suicide is so rooted in our tradition that it may be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'"[151] Justice Scalia's assertion that assisted suicide is not "rooted in our tradition" is correct. However, our respect for the dignity and autonomy of individuals is deeply rooted in the traditions of the United States.[152]

Individuals have a recognized right to request the withholding or withdrawal of lifesaving treatment.[153] Allowing a terminally ill patient to request suicide before death is imminent is not significantly different from the withdrawal of life support that results in death.[154]

If the Supreme Court were to find that the right of privacy includes assisted suicide, states would have a right to regulate its practice. Under *Casey*, the Court established that states may regulate fundamental rights as long as "substantial obstacles" were not placed in the way of individu-

---

149. *See supra* note 96 and accompanying text.

150. *See* Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 293 (1990) (Scalia, J., concurring).

> [T]he point at which life becomes "worthless," and the point at which the means necessary to preserve it . . . are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory; . . . even when it is demonstrated by clear and convincing evidence that a patient no longer wishes . . . to preserve his or her life, it is up to the citizens . . . through their elected representatives, whether that wish will be honored.

Id.

151. *Id.* at 295 (citing Marzen, O'Dowd, Crone, & Balch, *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1, 76-77 (1985)).

152. *See supra* notes 10-22 and accompanying text.

153. *See supra* notes 27-32 and accompanying text.

154. *See supra* note 28 and accompanying text. The statement made by the Supreme Court in *Cruzan* regarding informed consent is very important: "The logical corollary [of informed consent] is that the patient generally possesses the right not to consent, that is, to refuse treatment." *Cruzan*, 497 U.S. at 270. If that is so, it seems logical that another corollary of informed consent is also to consent to treatment of the patient's choosing. Such "treatment" may in certain appropriate circumstances include assisted suicide.

als practicing that right.[155]

Given the possibility that assisted suicide is not part of the right of privacy, states should consider the issue of whether they are "constitutionally prohibited from exempting [the terminally ill] from the usual protections that citizens enjoy against their suicidal wishes."[156] Citing Justice Scalia's concurring opinion in *Cruzan*, one commentator noted:

> in the context of refusal of treatment, and certainly in the context of an assisted suicide, it is up to the citizens of the state to decide . . . whether that wish will be honored. In light of a history of government disapproval . . . of suicide and assisted suicide . . . it is the equal protection clause which will set reasonable and humane limits.[157]

States' interests in regulating or prohibiting assisted suicide for the most part seem legitimate. In *Compassion in Dying,* Washington asserted its interests as: preserving life, preventing suicide, avoiding undue influence, protecting family members and loved ones, protecting the integrity of the medical profession, and avoiding adverse consequences that might occur if a right to assisted suicide were established.[158] It is difficult to doubt the importance of these interests. Each of these interests have been upheld in other contexts.[159]

If states were to sanction physician assisted suicide, the statutory protections against abuses should be at least equal to, and arguably greater than, the protections afforded to other individuals with suicidal ideation. Terminally ill patients are especially susceptible to suicidal thoughts.[160] Protection should exist so that suicide assistance is only given

---

155. *See supra* note 23.

156. Chopko, *supra* note 143, at 579.

157. Beschle, *supra* note 137, at 383.

158. *See supra* note 104 and accompanying text.

159. Preserving life, preserving the right of competent adults to make their own health decisions, protecting family members and loved ones, and protecting the integrity of the medical profession are all interests given serious consideration in the *Cruzan* and *Bouvia* decisions. *See supra* notes 27-32 and accompanying text.

The interest of preventing suicide is directly supported by the interests supporting statutes outlawing assisted suicide. *See supra* note 132.

Protecting family members and loved ones is difficult to address. As noted in the opinion, the court found that part of that interest was met by not forcing families to endure a protracted death of a loved one. Additionally the court felt that a family's financial burden could be considered. *See supra* note 108. Family considerations and financial hardship should not be considered as it places financial considerations above the sanctity of human life. *See infra* note 163. *But see supra* note 147.

160. *See supra* note 141 and accompanying text.

to those patients who have rationally made an informed decision to end their lives.[161] Since terminally ill patients are often considered rational when making a host of other decisions, with appropriate protections like mandatory counseling, waiting periods, and family consultations, it is reasonable to believe they can make this decision as well.[162]

A clear assessment is necessary to determine the patient's motives for choosing assisted suicide. To prevent the slide down the slippery slope, it is important that the reasons stated are the patient's own, and not those of family members or society in general. Concern by family or friends that the patient is draining resources should not be considered. Additionally, society should ensure that sufficient incentives remain for continued research into new technologies to provide adequate care for patients who do not choose active euthanasia.[163]

Patients should also be fully aware of appropriate alternatives to assisted suicide. Increasingly, hospice care has successfully addressed patients' concerns about loss of control and undue pain.[164] Hospice care focuses on relieving the patient's pain while providing support for the family during the dying process.[165] Emphasis is placed upon symptom control, patient and family education and support, and provider-patient communication.[166] These programs are now widely accepted throughout the United States.[167]

If a patient, in consultation with a physician, decides that the best course of treatment to pursue is assisted suicide, an appropriate level of care should be available. Again, this level should be at least equal to that received by any other patient within the health care system.[168] An important part of that care is adequate supervision at the time of death. This

---

161. *See infra* note 169 and accompanying text.

162. *See supra* note 141 and accompanying text.

163. Donald E. Spencer, Ed.D., *Practical Implications for Health Care Providers in a Physician-Assisted Suicide Environment*, 18 SEATTLE U. L. REV., 545, 551 (1995).

This concern is especially significant in light of the recent growth in "Managed Care" plans which focus on reducing the cost of care. Although outside the scope of this casenote, this issue could potentially create disincentives to continue care and create an extra incentive for patients to consider assisted suicide.

164. Katie Baer, *The Final Chapter*, 20 HARV. HEALTH LETTER 1 (1995).

165. *Id.*

166. *Id.*

167. *Id.*

168. The three judge panel of the Ninth Circuit in *Compassion in Dying* specifically identified concerns about providing physicians with appropriate incentives to combat disease, and converting a patient's right to die into a duty to die. *Compassion in Dying*, 49 F.3d at 592.

A similar concern was raised by the "New York State Task Force on Life and the Law." This panel recommended against the legalization of physician assisted suicide in part because "some physicians might refrain from relieving the pain and improving the care of people who were dying, in severe pain, or badly depressed." Spencer, *supra* note 163, at 549.

supervision might take the form of physician (or designee) attendance at the death, appropriate last minute counseling, and until the initiation of the procedure, an opportunity for the patient to reverse his decision.[169]

CONCLUSION

Compassion in Dying v. Washington was decided under a substantive due process analysis. The court in *Compassion in Dying* found a fundamental right to die by comparing the privacy rights found in *Casey* and *Cruzan*. As part of its analysis, the court specifically rejected the tradition and history analysis to determine whether this asserted liberty interest is indeed fundamental.

Although there is no question that a fundamental right of privacy exists under the Due Process Clause of the Fourteenth Amendment, it is uncertain whether the Supreme Court will find that the right of privacy includes a right to die. If the Supreme Court of the United States were to decide this question under a theory of personal autonomy it is conceivable such a right might exist. Justice Louis Brandeis may have said it best when he stated:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.[170]

However, it is unlikely the United States Supreme Court will find a "right to be let alone" when it comes to assisted suicide.

Assisted suicide does not fit within the definition of fundamental rights. Consistently throughout history it has been deemed criminal. Currently, thirty-three states either explicitly outlaw assisted suicide or include it under other homicide statutes. If there is no fundamental right

---

169. One study cites 13,511 cases in the Netherlands of "intentional inducements of death . . . done without the consent of the patients" involved. Dyck, *supra* note 138, at 533. Conversely, in the United States one study has shown that only 47% of physicians who care for critically ill patients knew about these patients' wishes to avoid extraordinary care that prolongs life. Alfred F. Connors, Jr. et al., *A Controlled Trial to Improve Care for Seriously Ill Hospitalized Patients*, 274 JAMA 1591 (1995).

170. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

to assisted suicide, states should be free to debate the issue and allow assisted suicide with appropriate regulation.

There is no question the debate about euthanasia will continue. As with the abortion debate, conflicting emotions on both sides of the argument are very strong. Despite these differences it should be possible to establish a tightly regulated mechanism to allow assisted suicide for patients whose death is imminent, pain is unmanageable, and the patient has made a true informed consent free from any undue influence.

By adopting such criteria the focus is placed upon the unique characteristics of the patient, not the interests of others. Society should be wary of adopting interests that involve cost savings or burdens to family. If such interests are adopted the danger of starting down the slippery slope increases and the right to die may be converted to a duty to die for some.

KEVIN M. STANSBURY