THE RIGHT TO ASSISTED SUICIDE IN WASHINGTON AND OREGON: THE COURTS WON'T ALLOW A NORTHWEST PASSAGE

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I. INTRODUCTION

Choice versus life is an argument we have heard a great deal about in the past twenty-three years. The rallying cries of the abortion debate are now being heard in the assisted suicide controversy. As with abortion, reasonable people are disagreeing vehemently over whether a right to assisted suicide exists and the parameters of such a right. The district court[1] and court of appeals[2] opinions in *Compassion in Dying v. Washington* are prime examples of jurists reaching diametrically opposed viewpoints given the same plaintiffs, facts and state statutes. The federal district court struck down Washington's ban on assisted suicide and laid out the arguments made by supporters of such a right.[3] The Court of Appeals for the Ninth Circuit reversed and outlined the reasoning generally given by the opponents of assisted suicide.[4] These two opinions are among the most articulate and representative statements of the two sides of this discussion.[5]

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[1] Compassion in Dying v. Washington, 850 F. Supp. 1454 (W.D. Wash. 1994).

[2] Compassion in Dying v. Washington, 49 F.3d 586 (9th Cir. 1995), *reh'g granted*, 62 F.3d 299 (Aug. 1, 1995).

[3] *Compassion in Dying*, 850 F. Supp. 1454.

[4] *Compassion in Dying*, 49 F.3d 586.

[5] Other recent court decisions in this area have held that no fundamental right to assisted suicide exists. The Michigan Supreme Court, in a criminal law context, held that "the United States Constitution does not prohibit a state from imposing criminal penalties on one who assists another in committing suicide." Kevorkian v. Michigan, 527 N.W.2d 714, 717 (Mich. 1995). Dr. Jack Kevorkian had assisted in 23 suicides in Michigan since 1990. *See* Justine R. Young, *Dead Wrong: The Problems with Assisted Suicide Statutes and Prosecutions*, 6 STAN. L. & POL'Y REV. 123, 126 (1995). His defense of asserting the constitutional rights of his patient/victim (depending on one's viewpoint) was not allowed. *Kevorkian*, 527 N.W.2d at 733. In New York, one court dismissed a suit by three physicians challenging a statute criminalizing assisted suicide. Koppell v. Quill, 870 F. Supp. 78 (S.D.N.Y. 1994). The court found the statute constitutional even in the limited circumstances of assisting a terminally ill competent adult to commit suicide. *Id.* at 82-85. The court found assisted suicide was not a fundamental right and that the statute advanced a legitimate state interest. *Id.* at 84-85.

In addition, in *Lee v. Oregon*,[6] a federal district court, following the Ninth Circuit's decision in *Compassion in Dying*, recently held that a law permitting assisted suicide violated the Constitution's Equal Protection Clause. The court found no rational basis for a statute that potentially allowed mentally incompetent individuals access to physician-assisted suicide.[7]

This article examines these decisions and criticizes the *Lee* court's interference with the Oregon statute and the *Compassion in Dying* court's failure to interfere with the Washington statute. This critique is appropriate because different levels of scrutiny should be applied to the individual statutes. In *Lee*, there was no equal protection claim of a fundamental right or suspect classification which would have required heightened scrutiny. The *Lee* court properly chose to apply the lowest level of scrutiny, but then improperly imposed its view of what is rational. In *Compassion in Dying*, a liberty interest was at stake, demanding a heightened level of scrutiny. The court of appeals mistakenly chose to apply the lowest level of scrutiny, and thereby abandoned its duty to closely examine the state's imposition of its view of morality upon the issue.

This article will also discuss the proposition that a constitutional right to assisted suicide applies to all members of society, but that a state may limit that right to terminally ill individuals by asserting a compelling government interest in the preservation of life and then narrowly tailoring a statute to vindicate that interest. All citizens initially have the right to assisted suicide, but the state may limit the exercise of that right in almost all cases.[8] The state's interest begins to recede as natural death approaches, so the exception would apply to those individuals near the end of their lives.

II. Constitutional Rights Underlying the Right to Assisted Suicide

The right to physician-assisted suicide is generally premised on two different constitutional rights. The first is a privacy right referred to as "decisional privacy" — the right to make decisions of a highly personal nature without interference from the state.[9] Decisional privacy includes the right to make personal decisions related to the following: marriage;[10] procreation;[11] family relation-

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[6] Lee v. Oregon, 891 F. Supp. 1439 (D. Or. 1995).

[7] *Id.* at 1443.

[8] Robert A. Sedler, *Constitutional Challenges to Bans on "Assisted Suicide": The View from Without and Within*, 21 Hastings Const. L.Q. 777 (1994). *But see* Thomas J. Marzen, *"Out, out Brief Candle": Constitutionally Prescribed Suicide for the Terminally Ill*, 21 Hastings Const. L.Q. 799, 802-03 (1994) ("It would be a constitutional oddity were the courts to acknowledge a liberty interest so compelling as to warrant striking down an interfering state statute, but so narrow in scope that it can only be freely exercised in such limited circumstances.").

[9] Bowers v. Hardwick, 478 U.S. 186, 204 (1986) (Blackmun, J., dissenting).

[10] Loving v. Virginia, 388 U.S. 1 (1967).

[11] Skinner v. Oklahoma, 316 U.S. 535 (1942).

ships;[12] child rearing and education;[13] contraception;[14] and whether to bear or beget a child.[15] Advocates for the right to assisted suicide argue that a terminally ill, competent individual's decision regarding the manner of his or her death is this type of personal decision and worthy of constitutional protection.[16]

In *Roe v. Wade*, a pregnant woman challenged a Texas statute criminalizing abortion.[17] The Supreme Court of the United States declared the statute unconstitutional as an interference with a woman's right to choose whether to carry her pregnancy to term.[18] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court reaffirmed its position regarding a woman's right to privacy when making a decision to terminate her pregnancy.[19] Yet in *Casey*, the Court was much more willing to accommodate the state's interest in the potential life of the fetus and gave the state great latitude in regulating the abortion process.[20] The state's interference prior to the viability of the fetus was limited if it placed an undue burden on a woman's ability to obtain an abortion.[21] However, these cases unquestionably demonstrate that the decision whether to terminate a pregnancy is included within the zone of decisional privacy.[22]

A second constitutional basis for establishing the right to physician-assisted suicide is found in cases addressing medical decision-making regarding bodily integrity, autonomy and liberty.[23] These decisions evolved from common law battery concepts that required physicians to obtain their patient's consent prior to non-emergency medical care.[24] Without consent, the medical procedure would constitute an unconsented to touching, i.e., a battery.[25] The corollary to this rule is that a patient may refuse to consent to medical treatment,[26] even if this decision results in the patient's death.[27]

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[12] Prince v. Massachusetts, 321 U.S. 158 (1944).

[13] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[14] Griswold v. Connecticut, 381 U.S. 479 (1965).

[15] Eisenstadt v. Baird, 405 U.S. 438 (1972).

[16] Sedler, *supra* note 8, at 777.

[17] Roe v. Wade, 410 U.S. 113 (1973).

[18] *Id.*

[19] Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833 (1992) (plurality opinion).

[20] *Id.*

[21] *Id.* at 874-79 ("A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.").

[22] *Id.* at 846-53.

[23] Cruzan v. Director, Mo. Dep't. of Health, 497 U.S. 261 (1990).

[24] *Id.* at 278.

[25] *Id.*

[26] *Id.* at 270.

[27] *Id.* at 279; *see also In re* Storar, 420 N.E.2d 64 (N.Y. 1981); Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417 (Mass. 1977); *In re* Quinlan,

In *Cruzan v. Director, Missouri Department of Health*, the Supreme Court recognized this interest in the case of a young woman who, as a result of a car accident, was in a persistent vegetative state.[28] The Court held that the state could require "clear and convincing evidence" of a mentally incompetent patient's desire to be removed from life sustaining medical equipment.[29] If such evidence was produced, the Court was willing to allow "medical treatment" as basic as tubes supplying food and water to be removed, even though the acknowledged result would be the patient's death.[30] Advocates of physician-assisted suicide argue that it would be a violation of the Fourteenth Amendment's Equal Protection Clause to allow terminally ill individuals who rely on modern machinery for survival to hasten their deaths by removing their machines, but to deny the same opportunity to terminally ill individuals who do not rely on such devices.[31] They urge that the nature of the illness should not determine whether a terminally ill person has the right to hasten his or her approaching death.

These two approaches to the justification of physician-assisted suicide are the focus of the recent federal cases in Washington and Oregon.

III. *COMPASSION IN DYING V. WASHINGTON*

For ease of discussion, this section is organized along the lines of the Ninth Circuit's opinion in *Compassion in Dying v. Washington*.[32] That opinion addressed seven points which the court deemed reversible error committed by the district court. For each of the seven points, this Article will present the position of the district court and the court of appeals along with an analysis of the two competing viewpoints. The opinions of both courts are representative of the arguments set forth by the different groups advocating for and against the right to assisted suicide.

A. *Facts of* Compassion in Dying

In *Compassion in Dying* the plaintiffs were terminally ill individuals with less than six months to live, physicians who treated the terminally ill, and Compassion in Dying, a non-profit group offering assistance to the terminally ill.[33] The following facts were uncontested by the State of Washington.[34] The three patient-plaintiffs had all been diagnosed as terminally ill and suffered

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355 A.2d 647, 662-64 (N.J. 1976).

[28] *Cruzan*, 497 U.S. at 266-68.

[29] *Id.* at 282.

[30] *Id.*; *see also id.* at 289 (O'Connor, J., concurring).

[31] *See* Sedler, *supra* note 8, at 777.

[32] Compassion in Dying v. Washington, 49 F.3d 586 (9th Cir. 1995), *reh'g granted*, 62 F.3d 299 (Aug. 1, 1995).

[33] Compassion in Dying v. Washington, 850 F. Supp. 1454, 1456-58 (W.D. Wash. 1994).

[34] *Id.* at 1458.

from advanced stages of cancer, AIDS or emphysema.[35] They were all competent adults who requested physician assistance in prescribing drugs to hasten their deaths.[36]

Jane Roe, suffering from cancer, was in "constant pain," and "suffer[ed] from swollen legs, bed sores, poor appetite, nausea and vomiting, impaired vision, incontinence of bowel, and general weakness."[37] She made repeated requests to Compassion in Dying for "counseling, emotional support" and other necessary aid to achieve her goal of hastening her death.[38]

John Doe was an artist and AIDS patient whose growing blindness (he had lost 70% of his vision at the time the complaint was filed) made painting nearly impossible.[39] He also "experienced two bouts of pneumonia, chronic, severe skin and sinus infections, grand mal seizures and extreme fatigue."[40] He had been the "primary caregiver for his long-term companion who died of AIDS in June 1991 . . . [and] was aware that further physical deprivations awaited him."[41]

At the time of filing the complaint, James Poe's emphysema "cause[d] him a constant sensation of suffocating. He [was] connected to an oxygen tank at all times, and [took] morphine regularly to calm the panic reaction associated with his feelings of suffocation."[42] He suffered from heart failure, pulmonary disease, and severe leg pain.[43]

The physician-plaintiffs were five eminent Washington doctors, four of whom were professors or instructors at the University of Washington School of Medicine, and the fifth was the Chief of the cardiology unit at Pacific Medical Center in Seattle.[44] At least three of these plaintiffs had been recognized for publications in their fields of medicine.[45] All had treated or were currently treating terminally ill patients (other than the patient-plaintiffs) for diseases including cancer, AIDS and cardiopulmonary disease.[46] One physician averred that

> [n]ear the end, the cancer patient is usually bedridden, rapidly losing mental and physical functions, often in excruciating, unrelenting pain. Pain management at this stage often requires the patient to choose between enduring unrelenting pain or surrendering an alert mental state because the dose of drugs adequate to alleviate the pain will impair con-

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[35] *Id.* at 1456-57.
[36] *Id.*
[37] *Id.* at 1456.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.* at 1457.
[43] *Id.*
[44] *Id.* at 1457-58.
[45] *Id.* at 1457.
[46] *Id.*

> sciousness. . . . For some patients, pain cannot be managed even with the aggressive use of drugs.[47]

Compassion in Dying is a non-profit organization providing information, counseling and assistance to mentally competent, terminally ill adults considering suicide.[48] The organization serves the limited constituency of those individuals who meet the above criteria.[49] Requests for assistance from individuals suffering from depression, emotional distress or mental illness are not honored.[50] Lack of access to adequate pain reduction treatment or insufficient health insurance, likewise, will not gain the organization's assistance.[51] The request must be unequivocal, must be made directly by the patient three times, and must include a forty-eight hour waiting period between the second and third requests.[52] The approval of immediate family members or close personal friends must be obtained for Compassion in Dying to assist.[53] An independent doctor affiliated with Compassion in Dying will review the patient's medical records to "verify the patient's terminal prognosis and decision-making capability" and determine if the request is based on inadequate pain reduction management.[54]

B. *The District Court and Court of Appeals Opinions*

The district court found in favor of all of the plaintiffs' claims. It recognized the existence of a protected liberty interest in assisted suicide for mentally competent, terminally ill individuals. Applying the undue burden standard derived in *Casey*, the district court found that the state infringed upon that liberty interest and violated equal protection as between similarly situated terminally ill individuals.[55] The court of appeals reversed and found each portion of the district court's opinion lacking.[56] This section of the article will address the seven points raised by the court of appeals and examine the competing approaches of advocates both in favor of and against assisted suicide as elaborated in the two court opinions.

1. The Origins of Liberty

In the past, the Supreme Court defined the parameters of the substantive due process rights found in the Fourteenth Amendment by looking to those

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[47] *Id.*
[48] *Id.* at 1458.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] Compassion in Dying v. Washington, 49 F.3d 586 (9th Cir. 1995), *reh'g granted*, 62 F.3d 299 (Aug. 1, 1995).

interests "implicit in the concept of ordered liberty" and recognized in the history or traditions of our country.[57] In *Casey*, the Court took a more expansive view of the origins of a constitutionally protected liberty interest in the abortion context.[58] The district court focused on the language in *Casey* describing the privacy right as

> involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [and] central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[59]

The district court analogized the recognized autonomy and liberty interest underlying a woman's right to end her pregnancy to an individual's right to end his or her life when burdened by a terminal illness.[60] When faced with "spiritual and moral questions" of this nature, the court found that the government may not, by totally foreclosing all available options, enforce its moral vision.[61]

The court of appeals found the district court's heavy reliance on the language from *Casey* inappropriate because it was "removed from the context in which it was uttered."[62] The court of appeals determined that *Casey's* focus on "personal dignity and autonomy" and "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" was uniquely applicable to the abortion rights setting.[63]

> To take three sentences out of an opinion over thirty pages in length dealing with the highly charged subject of 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.[64]

With respect to the district court's finding of a liberty interest in determining the manner in which one ends his or her life, the court of appeals stated

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[57] Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (plurality opinion); Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled on other grounds*, 395 U.S. 784 (1969); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[58] Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833, 869 (1992) (plurality opinion).

[59] Compassion in Dying v. Washington, 850 F. Supp. 1454, 1459 (quoting *Casey*, 505 U.S. at 851).

[60] *Id.* at 1459, 1460.

[61] *Id.* at 1460.

[62] Compassion in Dying v. Washington, 49 F.3d 586, 590 (9th Cir. 1995), *reh'g granted*, 62 F.3d 299 (Aug. 1, 1995).

[63] *Id.* (quoting *Casey*, 505 U.S. at 851).

[64] *Id.*

that no meaningful line could be drawn to distinguish between those who are in pain as a result of their terminal illness, and those who are suffering other types of pain such as middle-aged alcoholics and lovelorn teens.[65] If all individuals were left to determine the manner of their deaths, based upon their personal views of existence, the state could not prevent suicide by those individuals who are not terminally ill.[66] The court of appeals held that it was absurd on its face to state that every adult could procure suicide on demand.[67] While the district court held that *Casey* defined a general liberty interest, the court of appeals limited the *Casey* rationale to the abortion context. The court of appeals sought to prevent libertarian anarchy in pursuit of an "*uncurtailable* ability to believe and to act on one's deepest beliefs about life."[68]

The key difference in approach between the two opinions involves whether the right to assisted suicide is capable of being limited in a practical fashion. The district court, along with Judge Wright's dissent on appeal, resolved this issue by focusing exclusively upon the actual parties to the dispute rather than looking ahead to the next potential round of challenges. In contrast, the court of appeals saw a doppelgänger effect created by new plaintiffs merging into an unrelenting series of lawsuits pursuing a limitless right beyond the horizon of imagination. However, a middle ground exists between these opposing positions. As discussed *infra* Section V, the courts should recognize that a liberty interest in physician-assisted suicide exists, but that the state's interest in preserving life overcomes that liberty interest in almost all cases. *Roe* and *Casey*, by analogy, illustrate that the state may vindicate its interest in preserving life by placing an almost absolute ban on the exercise of physician-assisted suicide as to some individuals. A state may deny the fundamental right to choose to have an abortion to women in the later stages of pregnancy unless the pregnancy threatens their lives or health. Similarly, the state may deny the right to assisted suicide to most individuals except those who are terminally ill. The state's ability to place an almost blanket prohibition on the exercise of a fundamental right or liberty interest is consistent with *Roe* and *Casey*'s approach to balancing state and individual interests in the abortion context.

2. Hastening Death and *Cruzan*

The court of appeals' second rationale for reversing the district court in *Compassion in Dying* was that "the district court found itself unable to distinguish between a patient refusing life support and a patient seeking medical help to bring about death."[69] The court of appeals concluded that the district court inappropriately expanded *Cruzan*'s recognition of a right to refuse medi-

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[65] *Id.* at 590-91.
[66] *Id.* at 591.
[67] *Id.*
[68] *Id.* (emphasis added).
[69] *Id.*

cal treatment.[70] "Whatever difficulty the district court experienced in distinguishing one situation from the other, it was not experienced by the majority in *Cruzan*."[71] The court of appeals focused on *Cruzan*'s discussion that " 'there can be no gainsaying' a state's interest 'in the protection and preservation of human life.' "[72] However, the court of appeals failed to consider the next paragraph in *Cruzan* where the Supreme Court noted that

> the choice between life and death is a deeply personal decision of obvious and overwhelming finality. We believe Missouri may legitimately seek to *safeguard the personal element of this choice* through the imposition of heightened evidentiary standards. 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.[73]

The district court echoed the Supreme Court, stating that "[t]here is no more profoundly personal decision, nor one which is closer to the heart of liberty, than the choice which a terminally ill person makes to end his or her suffering and hasten an inevitable death."[74]

The court of appeals' discussion of this point does not respond to the reasoning of the district court. The district court does not dispute the state's compelling interest nor the existence of statutes criminalizing assisted suicide. Rather, the district court interprets *Cruzan* to mean that the right to self-determination at the end of one's life is great enough to justify the right to refuse medical treatment even if death will be the acknowledged and anticipated result.[75] The district court also found no distinction between the personal decision a person on life support makes to withdraw such treatment and the personal decision a terminally ill individual makes when he or she requests a doctor's assistance to receive "treatment." Both result in the patient's death.[76]

Cruzan does not directly address the distinctions between withdrawing treatment and assisted suicide, despite the court of appeals' reliance on this point. Instead, it focuses on the standard of proof a state may require in determining the wishes of an incompetent patient to withdraw life-sustaining treatment.[77] One reason the *Cruzan* Court did not experience difficulty in distinguishing the two situations is because Chief Justice Rehnquist's opinion did not directly address assisted suicide. The closest the Chief Justice came to the subsequent position of the court of appeals was the Court's statement that "[w]e do not think a State is required to remain neutral in the face of an

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[70] Cruzan v. Director, Mo. Dep't. of Health, 497 U.S. 261, 280 (1990).

[71] *Compassion in Dying*, 49 F.3d at 591.

[72] *Id.* (quoting *Cruzan*, 497 U.S. at 280).

[73] *Cruzan*, 497 U.S. at 281 (emphasis added).

[74] Compassion in Dying v. Washington, 850 F. Supp. 1454, 1461 (W.D. Wash. 1994).

[75] *Id.*

[76] *Id.*

[77] *Cruzan*, 497 U.S. at 282-84.

informed and voluntary decision by a *physically able adult* to starve to death."[78] Yet the opinion does not address what the state may do where the individual is not "physically able" and has less than six months to live.

Furthermore, Justice Scalia, in his concurring opinion, found no possible distinction between withdrawing treatment and assisted suicide.[79] Justice O'Connor's concurrence did not address the issue.[80] The four dissenting Justices also found no difficulty in allowing the individual to make decisions in these matters as death approached.[81] The court of appeals in *Compassion in Dying* relied on language in *Cruzan* which was taken out of context and did not sufficiently distinguish between the withdrawal of life-sustaining treatment and the assisted suicide of a terminally ill adult.

3. Level of Generality in Framing the Issue

The court of appeals' third rationale for reversing the district court's ruling was that the district court practiced a brand of judicial activism that threatened to turn courts into a "floating constitutional convention."[82] The difference in perspective arises from the approach each court takes in determining constitutional norms. The level of generality utilized by a court in framing the issue will yield very different results. If one follows Justice Scalia's prescription of looking through a microscope at the most specific level of detail,[83] the issue would be framed as, Has Anglo-American history and tradition permitted and encouraged state sponsored suicide? Alternatively, on a broader level, Justice Brennan advocates looking through a telescope to ask, Does the State have the power to intrude on the liberty and autonomy of competent individuals to determine their destiny in highly personal matters of life and death?[84] While Justice Scalia would find solid ground to avoid the floating convention, Justice Brennan's view would shift as society evolved to prevent the Constitution's vision from sinking into the past.[85]

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[78] *Id.* at 280 (emphasis added).

[79] *Id.* at 294 (Scalia, J., concurring).

[80] *Id.* at 287 (O'Connor, J., concurring).

[81] *Id.* at 301 (Brennan, J., dissenting); *id.* at 330 (Stevens, J., dissenting). Justices Blackmun and Marshall concurred with Justice Brennan's dissent.

[82] Compassion in Dying v. Washington, 49 F.3d 586, 591 (9th Cir. 1995), *reh'g granted*, 62 F.3d 299 (Aug. 1, 1995).

[83] Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (plurality opinion).

[84] *Id.* at 139 (Brennan, J., dissenting).

[85] Justice Scalia's plurality opinion in *Michael H.* only garnered the support of one other Justice on the issue of the proper level of generality to use in determining whether an interest is protected as a liberty interest under the Fourteenth Amendment. *Id.* at 136 (Brennan, J., dissenting). Justice O'Connor, joined by Justice Kennedy, specifically excludes from her concurrence Justice Scalia's footnote 6 in *Michael H.* and characterizes his approach as "somewhat inconsistent with our past decisions in this area. On occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available." *Id.* at

Both the joint opinion in *Casey* and the court of appeals dissent in *Compassion in Dying* cite *Loving v. Virginia*[86] to illustrate why the Constitution cannot be solely defined in terms of tradition.[87] Choosing one's spouse without state interference seems to be a self-evident right. But before 1967 states placed barriers in the path of interracial couples who wanted to marry.[88] A reliance on history and tradition alone in *Loving* would have allowed the barriers to stand.[89] The joint opinion in *Casey* did not limit its definition of liberty to the state's version of tradition, "however dominant that vision has been in the course of our history and our culture."[90] The joint opinion in *Casey* favored the Brennan approach.

> It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter . . . Neither the Bill of Rights nor the specific practices of states at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects . . . The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment.[91]

As technology progresses, medical advances are both a miracle and a burden.[92] Each year new biomedical and legal issues arise that were unanticipated in the late eighteenth century.[93] A court cannot be tied too literally to the Founding Fathers' understanding of a state's right to interfere with an individual's autonomy where the Founders could not have anticipated the technological and societal changes that have occurred in the past generation alone. The broad language of the Constitution demands a more abstract approach.

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132 (O'Connor, J., concurring) (citations omitted).

[86] 388 U.S. 1 (1967).

[87] Compassion in Dying v. Washington, 49 F.3d 586, 596 (9th Cir. 1995) (Wright, J., dissenting), *reh'g granted*, 62 F.3d 299 (Aug. 1, 1995).

[88] *Loving*, 381 U.S. at 7.

[89] Commentators point out that the state may prevent marriages between siblings. *See, e.g.*, Mark E. Chopko & Michael F. Moses, *Assisted Suicide: Still a Wonderful Life?*, 70 NOTRE DAME L. REV. 519, 555-56 (1995). *Loving* did not claim an absolute right for all marriages, but left open the state's ability to regulate where it had a compelling interest. The understanding in the United States of what was compelling had shifted by 1967 to exclude state interference in interracial marriage.

[90] Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833, 852 (1992) (plurality opinion).

[91] *Id.* at 847-49.

[92] Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 292 (1990) (Scalia, J., concurring) ("The various opinions in this case portray quite clearly the difficult, indeed agonizing, questions that are presented by the constantly increasing power of science to keep the human body alive for longer than any reasonable person would want to inhabit it.").

[93] E.g., frozen sperm, cross species transplants and gene therapy.

4. As Applied vs. Facial Challenge to the Statute

The court of appeals criticized the district court's invalidation of the statute on its face as a misapplication of the new rule regarding facial invalidation of statutes as stated in *Casey*.[94] The court of appeals correctly relied on *United States v. Salerno*, which held that a facial challenge must demonstrate that "no set of circumstances exists under which the Act would be valid."[95] The court of appeals found that the district court tried to extend the *Casey* approach to facial challenges from its limited setting of abortion rights.[96] Indeed, the district court supported its reasoning only with discussions of post-*Casey* abortion cases.[97] Both the plaintiffs and the dissent in the court of appeals opinion retreated to a safer position of declaring the statute invalid only "as applied" rather than on its face.[98] Most supporters of limited assisted suicide rights do not advocate a universal suicide on demand approach and therefore apparently do not support facial challenges.[99] The state has a compelling interest in preventing most suicides and preserving life, but the state's interest is less compelling where life is near its natural end.[100] Therefore, an "as applied" challenge, brought on behalf of terminally ill competent adults, would avoid the problems presented by *Salerno*.

5. The State Interests

The court of appeals asserted several state interests which, "individually and convergently, outweigh any alleged liberty" interest in assisted suicide.[101] The court sought to uphold the integrity of the medical profession and to protect the elderly, infirm, poor, minority groups and handicapped individuals from overt and subtle pressures to commit suicide.[102] The court of appeals posited that once suicide becomes an option, those of limited health or resources will feel impelled to take their own lives.[103] In a world of shrinking budgets and difficult access to medical treatment by the uninsured, some individuals would be under pressure to conserve family and societal resources by "nobly" committing suicide.[104] This argument overlooks the fact that the decision to opt for

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[94] Compassion in Dying v. Washington, 49 F.3d 586, 591 (9th Cir. 1995) (reversing district court), *reh'g granted*, 62 F.3d 299 (Aug. 1, 1995).

[95] United States v. Salerno, 481 U.S. 739, 745 (1987).

[96] *Compassion in Dying*, 49 F.3d at 591.

[97] Compassion in Dying v. Washington, 850 F. Supp. 1454, 1463 (W.D. Wash. 1994).

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

[99] *See, e.g.*, Sedler, *supra* note 8. *But see* DEREK HUMPHREY, LAWFUL EXIT: THE LIMITS OF FREEDOM FOR HELP IN DYING (1993).

[100] Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417, 426 (Mass. 1977).

[101] *Compassion in Dying*, 49 F.3d at 591.

[102] *Id.* at 591-93.

[103] *Id.* at 592-93.

[104] *Id.* at 592.

assisted suicide is entirely voluntary. As an added precaution, several physicians will question the patient to assure voluntariness.[105] Moreover, *Casey* describes further methods that may address the court of appeals' concerns. In the abortion context, the state may require the distribution of literature, waiting periods and other measures without imposing an undue burden on the exercise of the constitutional right to an abortion.[106] Similar methods could be employed in the assisted suicide setting.

In order to defuse the potential subtle pressure the uninsured, poor or handicapped may feel, the state could require physicians to distribute literature to requesting individuals describing the process and setting forth the state's perspective.[107] The literature could explicitly address the pressures the individual seeking assistance may be facing so as to give voice to any inner doubts regarding the request. The state could also require a waiting period between the request and the performance to give individuals adequate time for reflection.[108]

In addition, the state may require physicians to inform the individual "of the availability of printed materials published by the State . . . providing information about medical assistance . . . and a list of agencies which provide . . . services as alternatives . . . ."[109] Furthermore, the services would "not be performed unless [the individual] certifies in writing that she has been informed of the availability of these printed materials and has been provided them if she chooses to view them."[110] Thus, the state could relieve some of the potential pressure exerted on the uninsured, poor, or handicapped persons by giving each individual requesting assistance the information necessary to assure a mature and informed decision.[111] At the same time, the state would be expressing its preferred viewpoint — promoting continued life over assisted suicide.[112] Other measures include urging informed consent, providing alternatives and convincing individuals that society does not want to impel them to end their lives. The court of appeals painted a picture of societal pressures, including the doctor's power of suggestion, which may lead a patient to request suicide.[113] If such an extreme case is true, then the state should reassure the patient that there are alternatives and that coerced suicide is not the

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[105] OR. REV. STAT. 127.815 §§ 3.01, 3.02 (1995).

[106] Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833, 881 (1992) (plurality opinion).

[107] *Id.* at 881-84.

[108] *Id.* at 884-85. All legislative proposals to date have included such a waiting period.

[109] *Id.* at 881.

[110] *Id.*

[111] *Id.*

[112] *Id.* at 883. An undue burden on a constitutional right to assisted suicide would not exist where a state expresses a preference for continuing life over assisted suicide.

[113] Compassion in Dying v. Washington, 49 F.3d 586, 592 (9th Cir. 1995), *reh'g granted*, 62 F.3d 299 (Aug. 1, 1995).

state's objective, thus relieving the pressure upon the patient. The solution is not to deny truly voluntary decision-making on an issue of personal autonomy.

The court of appeals also stated that the poor and minorities would be disproportionately compelled to ask for assisted suicide because of insufficient resources available to them for treatment and pain reduction.[114] The lack of available treatment would accelerate the development of the terminal illness, and the scarcity of pain reduction alternatives would likely cause these groups to seek out assisted suicide. This objection to assisted suicide centers on our health care system's failure to provide for low income or uninsured individuals,[115] a factor the court of appeals did not address. Instead, the court eliminated assisted suicide as an option, thereby abandoning the poor and minorities to their fate. The state should not deny access to a constitutional right simply because these groups may not have access to reasonable health care resources.

The district court addressed Washington's two asserted state interests: preventing suicide and preventing undue influence and abuse.[116] Society has always viewed suicide as an irrational act that could be avoided "with timely and appropriate counseling."[117] Yet in this case the state acknowledged that the plaintiffs, and those to whom the ruling would apply, are competent, informed individuals.[118] Thus, the plaintiffs did not implicate the state's interest in preventing suicide because there was no "irrational act" to prevent. Similarly, the plaintiffs' request for assisted suicide did not undermine the state's interest in avoiding undue influence and abuse because the plaintiffs voluntarily decided to end their lives.[119] Under these circumstances there was neither an irrational act nor undue influence or abuse. Therefore, the state's policy goals were not in conflict with the plaintiffs' wishes.

The district court discounted the state's fear of creating a "slippery slope" if it permitted assisted suicide.[120] The court noted that "[i]t may be difficult to define the kinds of assistance which are necessary and should be permitted in order to honor terminally ill patients' protected liberty interest in hastening their death."[121] Yet the plaintiffs should not lose their constitutional rights simply because the state would find it difficult to define the types of assistance

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[114] *Id.*

[115] Keith Bradsher, *Rise in Uninsured Becomes an Issue in Medicaid Fight*, N.Y. TIMES, Aug. 27, 1995, at A1.

[116] Compassion in Dying v. Washington, 850 F. Supp. 1454, 1465 (W.D. Wash. 1994).

[117] *Id. See also* NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, WHEN DEATH IS SOUGHT, ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT 10-13 (May 1994) [hereinafter NEW YORK STATE TASK FORCE].

[118] *Compassion in Dying*, 850 F. Supp. at 1465.

[119] *Id.*

[120] *Id.*

[121] *Id.*

needed by terminally ill patients.[122] While the state's interest in preventing undue influence and abuse does not affect the plaintiff's in this case, the state could ensure informed, voluntary decisions in the future by looking to other areas of law that have already established such standards, such as contractual capacity, waiver of parental rights in adoption, and waiver of rights in the criminal law setting.

The court of appeals aimed to protect parties who were not before the court. Yet the state, in an attempt at preventing subtle pressure on hypothetical plaintiffs not before a court, should not deny an individual's constitutional rights. Overt pressure on a patient is already a crime and should remain so; subtle pressure to act where a hypothetical individual opposes such action should not cause the state to deny constitutional rights to a party currently before the court.

In addition, the court of appeals set forth the state's interest in not placing physicians in the role of their patients' killers.[123] The court's description here is melodramatic because it fails to acknowledge the reality that exists in hospitals and doctor's offices across the country.[124] Patients want to be honest with their physicians and to explore all possible approaches to treating their illnesses. Imposing a ban upon a possible resolution to a patients' condition will inhibit the free flow of communication between doctor and patient, thereby inhibiting the patient-doctor relationship.[125] The Hippocratic Oath provides that the doctor may "do no harm,"[126] yet it also directs the doctor to "relieve suffering."[127] If a doctor relieves suffering by assisting a competent, terminally ill person to make an informed, voluntary decision to end her life, has the patient suffered any harm? In fact, prolonging life-sustaining treatment may merely prolong the patient's suffering.[128] Furthermore, in balancing the indi-

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[122] *Id.*

[123] Compassion in Dying v. Washington, 49 F.3d 586, 592 (9th Cir. 1995), *reh'g granted*, 62 F.3d 299 (Aug. 1, 1995).

[124] Robert L. Risley, *Ethical and Legal Issues in the Individual's Right to Die*, 20 OHIO N.U. L. REV. 597, 608 (1994) (citing a 1988 Hemlock Society survey of California physicians finding that "twenty-seven percent of doctors surveyed said that, when asked, they had helped terminal patients die"); James K. Rogers, *Punishing Assisted Suicide: Where Legislators Should Fear to Tread*, 20 OHIO N.U. L. REV. 647, 654 (1994) (discussing lists of physicians who openly support "certain forms of regulated assisted suicide"); Julia Pugliese, Note, *Don't Ask, Don't Tell — The Secret Practice of Physician Assisted Suicide*, 44 HASTINGS L.J. 1291, 1305 (1993) (citing various studies showing as many as 40% of doctors had indirectly assisted in causing a patient's death and that nearly 10% "took actions that directly caused death").

[125] *See* NEW YORK STATE TASK FORCE, *supra* note 117, at 178 ("[T]he failure of health care professionals to create an environment in which patients feel comfortable talking about suicide can increase the patient's suffering and sense of isolation, making suicide more likely in some cases.").

[126] STEADMAN'S MEDICAL DICTIONARY 650 (5th Unabridged Lawyers' ed. 1982).

[127] *Id.*

[128] *See* NEW YORK STATE TASK FORCE, *supra* note 117, at 92 (stating that those

vidual and the state interests, "[i]t is not necessary to deny a right of self-determination to a patient in order to recognize the interests of doctors, hospitals and medical personnel in attendance on the patient."[129]

While the state interests examined by the court of appeals are legitimate, they are not compelling. A total ban on a constitutionally protected activity is clearly an undue burden, and demands reconsideration.

6. Mootness

The court of appeals implied that it found a mootness problem with the plaintiffs' case. All of the terminally ill plaintiffs had died by the time the case reached the court, and the physician plaintiffs only described experiences with other patients who had also already died.[130] The court of appeals noted the difficulty of defining possible future terminally ill patients as a class. "There is a good deal of uncertainty on whose behalf the judgment was entered."[131] Physician-assisted suicide, however, is the classic exception to the mootness doctrine. It is capable of repetition, yet evading review.[132] The terminally ill plaintiffs, the patients treated by the physician plaintiffs, and the individuals serviced by Compassion in Dying all had less than six months to live. There are almost no circumstances where plaintiffs may present a case, have it tried, receive a trial court opinion, appeal, present oral arguments, and receive an appellate opinion within six months. All terminally ill individuals seeking the benefit of a court ruling will have died by the time a court could issue a decision. A mootness objection is not appropriate where a violation of a right will never receive judicial review because of the nature of the right itself.

7. Equal Protection

The district court chose not to distinguish between active and passive suicide, which caused reversal by the court of appeals.[133] The district court found

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who support euthanasia and/or physician-assisted suicide believe that such actions are the most effective way to help some patients experiencing intractable pain).

[129] Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417, 427 (Mass. 1977).

[130] Compassion in Dying v. Washington, 49 F.3d 586, 593 (9th Cir. 1995), *reh'g granted*, 62 F.3d 299 (Aug. 1, 1995).

[131] *Id.*

[132] Roe v. Wade, 410 U.S. 113, 124-25 (1973). This exception to the mootness doctrine cannot directly apply to the terminally ill patients. The exception only applies "if two elements are combined: the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and there was a reasonable expectation that *the same complaining party would be subjected to the same action again.*" CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 63 (5th ed. 1994). Naturally, deceased plaintiffs could not have their constitutional rights violated again. Physicians and Compassion in Dying as an organization could, however, participate in the same action again.

[133] *Compassion in Dying*, 49 F.3d at 593.

that

> those terminally ill persons whose condition involves the use of life-sustaining equipment may lawfully obtain medical assistance in terminating such treatment, including food and water, and thereby hasten death, while those who also suffer from terminal illnesses, but whose treatment does not involve the use of life support systems, are denied the option of hastening death with medical assistance . . . Both patients may be terminally ill, suffering pain and loss of dignity and subjected to a more extended dying process without some medical intervention, be it removal of life support systems or the prescription of medication to be self-administered.[134]

Indeed, the state may have a greater interest in preserving the life of an individual who requires life support systems, but is not terminally ill, than someone who requires no life support but has only a limited amount of time to live. Nancy Cruzan might have lived for another thirty years if her life support system had remained in place,[135] yet Chief Justice Rehnquist would allow the hastening of her death upon the showing of adequate evidence of her intent on remand.[136] Thus it would seem the state has a greater interest in preserving the life of an individual who has thirty years left to live than someone who has only six months.

A court acknowledges the existence of exceptions to the state's interest in the preservation of life when it allows individuals on life support to hasten their deaths by removing their apparatus.[137] The court of appeals found that removal of life support merely allows nature to take its course.[138] Yet "nature taking its course" here means the removal of nutrition and hydration tubes, leaving the patient to die of thirst or starvation.[139] Because the preservation of life does not include the state's ability to prevent a painful, self-imposed death, a limited form of assisted suicide already exists. The Equal Protection Clause of the Fourteenth Amendment is thereby violated because two similarly situated individuals enjoy different rights in these circumstances.

As discussed above, the *Cruzan* Court, with the notable exception of Justice

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[134] Compassion in Dying v. Washington, 850 F. Supp. 1454, 1466-67 (W.D. Wash. 1994).

[135] Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 302 (1990) (Brennan, J., dissenting).

[136] *Id.* at 284 (plurality opinion).

[137] *See Compassion in Dying*, 850 F. Supp. at 1466 n.11 (noting that the Washington State Supreme Court and Legislature recognize a right of terminally ill competent adults to refuse medical treatment even if result will be death of the patient).

[138] Compassion in Dying v. Washington, 49 F.3d 586, 594 (9th Cir. 1995), *reh'g granted*, 62 F.3d 299 (Aug. 1, 1995).

[139] *Cruzan*, 497 U.S. at 289 (O'Connor, J., concurring) ("[T]he liberty guaranteed by the due process clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water.").

Scalia, did not address whether there is a constitutional distinction between active and passive suicide. Chief Justice Rehnquist set forth the circumstances allowing passive suicide, but acknowledged active suicide merely by noting that most states outlaw assisted suicide.[140] Justice Scalia's concurrence condemned both the plurality and dissenting opinions for allowing any passive euthanasia because, he stated, there is no difference between passive and active suicide. "It would not make much sense to say that one may not kill oneself by walking into the sea, but may sit on the beach until submerged by the incoming tide."[141] In Scalia's view

> the action-inaction distinction [is irrelevant]. . . . Starving oneself to death is no different from putting a gun to one's temple as far as the common law definition of suicide is concerned; the cause of death in both cases is the suicide's conscious decision to pu[t] an end to his own existence.[142]

The patient's desire for death is the paramount factor in these cases. His or her wish for the removal of life support equipment is indistinguishable from a request for assistance in ending a terminal illness. The court of appeals unfairly criticized the district court for its inability to distinguish passive and active suicide, even though the sole member of the *Cruzan* Court who addressed the issue clearly stated that no legal distinction existed.

The court of appeals and the district court disagreed on every major issue in the case, particularly substantive due process, equal protection, and the proper level of scrutiny to apply to the statutes before them. The Ninth Circuit has recently granted a request for a rehearing en banc. That ruling will resolve which of the competing approaches the Ninth Circuit will adopt, but it will not resolve the other relevant issues on which there is great disagreement across the country within both the courts and the general public.

IV. *LEE V. OREGON*

Oregon and Washington are geographically adjacent, but worlds apart in their approaches to assisted suicide. Statutes in the two states provide terminally ill citizens dramatically different options for ending their struggles against disease.[143] In November, 1994, Oregon voters passed a referendum allowing mentally competent, terminally ill individuals with less than six months to live to receive a fatal prescription for medication from a doctor. This statute was recently held unconstitutional by a federal district court in Oregon.[144]

The underlying facts of the Washington and Oregon cases were observably different. In *Compassion in Dying*, the plaintiffs sought recognition of a fun-

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[140] *Id.* at 280 (plurality opinion).

[141] *Id.* at 296 (Scalia, J., concurring).

[142] *Id.* at 296-97 (Scalia, J., concurring).

[143] OR. REV. STAT. 127.815 § 3 (1995); WASH. REV. CODE § 9A.36.060 (1994).

[144] Lee v. Oregon, 891 F. Supp. 1429 (D. Or. 1995).

damental right or liberty interest to overcome the state's interest in preserving life.[145] In *Lee*, the plaintiffs alleged an equal protection violation and sought to show that neither a legitimate interest nor rational relation between means and ends existed to uphold a statute which permitted assisted suicide in limited circumstances.[146] The court, having found an equal protection violation, did not address alleged violations of the Due Process Clause of the Fourteenth Amendment, Free Exercise Clause of the First Amendment or the Americans with Disabilities Act.[147]

Since the plaintiffs could neither claim a fundamental right to prevent others from committing suicide, nor could they show a suspect class of nonconsenting terminally ill persons compelled to commit suicide, they attacked the referendum as having no rational basis.[148] Although most courts defeat this method of attack by deferring to legislative prerogative or by finding a rational basis for most statutes, the *Lee* court agreed with the plaintiffs,[149] stating that the statute failed to safeguard against suicides by mentally incompetent patients.[150]

Initially, the court sought to determine "whether the safeguards provided in [the statute] are sufficient to justify treating terminally ill patients differently than others."[151] The court noted that the statute allowed assisted suicide for competent, terminally ill individuals, but did not allow assisted suicide for terminally ill individuals who were depressed or otherwise incompetent. The court observed that the procedures designed to differentiate between competent and incompetent patients were insufficient.[152] The court found that the procedures included no provisions for psychiatric evaluation by professionals with sufficient expertise, no second opinions regarding the individual's prognosis, too short a waiting time to provide for relief from conditions of impaired judgment, no probate court review, too much leeway for negligence provided by the physician's "good faith" exception, and no assurance of the individual's competency at the time of ingestion of the drugs, as opposed to the time of pre-

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[145] Compassion in Dying v. Washington, 850 F. Supp. 1454, 1459 (W.D. Wash. 1994).

[146] *Lee*, 891 F. Supp. at 1431.

[147] *Id.* at 1437.

[148] *Id.* at 1432.

[149] The State claimed the following interests:

> (1) avoiding unnecessary pain and suffering; (2) preserving and enhancing the right of competent adults to make their own critical health care decisions; (3) avoiding tragic cases of attempted or successful suicides in a less humane and dignified manner; (4) protecting the terminally ill and their loved ones from financial hardships they wish to avoid; and (5) protecting the terminally ill and their loved ones from unwanted intrusions into their personal affairs by law enforcement officers and others.

Id. at 1434.

[150] *Id.*

[151] *Id.* at 1433.

[152] *Id.* at 1434.

scription.[153] The court emphasized these examples of the state's failure to adequately safeguard the mentally incompetent to conclude that the statute did not pass the rational basis test. The Court stated:

> There is no set of facts under which it would be rational to conclude that a state may sanction providing people the means to commit suicide without consideration of their circumstances at the time of the suicide. . . . Given the imprecision and inadequacy of protections leading to the prescription of drugs, the relationship between [the statute's] classification and the goal of permitting assisted suicide is too attenuated without some protection at the time of taking the fatal drug dosage.[154]

The statute "provides a means to commit suicide to a severely overinclusive class who may be competent, incompetent, unduly influenced, or abused by others."[155]

Presumably the court would allow assisted suicide if the statute included the aforementioned safeguards. The referendum's drafters, however, included in the statute what Oregonians deemed adequate safeguards to prevent the problems perceived by the court. The question then becomes, under the rational basis test, whose understanding of the adequacy of statutory safeguards is controlling. Safeguards were considered and included in the statute at its inception. They included requirements that the physician inform the patient of the medical diagnosis,[156] prognosis,[157] the potential risks,[158] probable result[159] and feasible alternatives.[160] The attending physician must then refer the individual to a consulting physician for a second opinion and refer the patient to counseling when appropriate.[161] The physician should also request that the patient notify his or her next of kin.[162] Presumably this was not a stronger imprecation because the statute's drafters wished to avoid the notification requirement problems set forth in *Casey*. The patient must make two oral requests fifteen days apart and a written request forty-eight hours prior to the prescription.[163] The patient always has the opportunity to rescind up to the last moment.[164] Both the referendum's drafters and the supporters of the measure deemed these safeguards adequate. Under the rational basis test the court must defer to the judgment of the enacters of the statute as long as some rational basis for their decision exists. One cannot say that drawing the line at

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[153] *Id.* at 1434-37.
[154] *Id.* at 1437.
[155] *Id.* at 1429.
[156] OR. REV. STAT. 127.815 § 3.01(2)(a) (1995).
[157] *Id.* § 3.01(2)(b).
[158] *Id.* § 3.01(2)(c).
[159] *Id.* § 3.01(2)(d).
[160] *Id.* § 3.01(2)(e).
[161] *Id.* § 3.01(3).
[162] *Id.* § 3.01(5).
[163] *Id.* § 3.06.
[164] *Id.* § 3.01(6).

this precautionary level is irrational. Thus the court should not substitute its judgment as to where the line should be drawn.[165]

When addressing the power of the states in the present debate, the district court quoted *Cruzan*: "We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death."[166] Read in conjunction with Justice O'Connor's concurrence,[167] this language emphasized the state's ability to experiment with different approaches to this issue. The Court deferred to the state's legislative discretion in cases where a rational basis for legislation existed. Oregon, taking the Supreme Court at its word, has not been neutral. It chose to facilitate informed and voluntary decisions to obtain assisted suicide.

V. CLIMBING BACK UP THE "SLIPPERY SLOPE"

The prospect of abandoning a bright line test in favor of an uncertain descent into "suicide on demand" led the court of appeals in *Compassion in Dying* and the district court in *Lee* to step back from the edge of the slippery slope. Those opposed to assisted suicide statutes often argue that once this first step is taken over the present bright line of prohibition there will be no constitutionally meaningful stopping point.[168] The result would be a "suicide permissive" society that grants all citizens (not just the terminally ill) the right to commit suicide.[169] Opponents argue that the present test cases involving sympathetic terminally ill plaintiffs, if successful, will open the door enough to allow in the equal protection claims of healthy individuals seeking suicide assistance. They believe that no court will be able to shut the door on that next set of plaintiffs.

The state is not left powerless, however, if the slippery slope fear materializes, i.e. if assisted suicide becomes recognized as a fundamental right. A fundamental right may be restricted by a compelling state interest and a provision narrowly tailored to advance that interest. Where the state's interest is not compelling, the state may not interfere with the constitutional right.[170] There is widespread agreement that the preservation of life is a compelling state interest.[171] Yet as a person's life wanes, the state's interest becomes less

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[165] In contrast, the district court in *Compassion in Dying* had a greater ability to draw lines other than those chosen by the legislature because the court was upholding what it saw as a fundamental right/liberty interest.

[166] Lee v. Oregon, 891 F. Supp 1429, 1434 (D. Or. 1995).

[167] Cruzan v. Director, Mo. Dep't. of Health, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring) ("[C]rafting appropriate procedures for safeguarding incompetents' liberty interests is entrusted to the 'laboratory' of the [s]tates.").

[168] Chopko & Moses, *supra* note 89, at 542-45.

[169] *Id.*

[170] *Id.*

[171] *Cruzan*, 497 U.S. at 280; Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417 (Mass. 1977).

compelling.[172]

Terminally ill individuals should be allowed the option of assisted suicide because the state's interest is no longer compelling when a person has less than six months to live. The state interest in the preservation of life where that life is not currently approaching its end is different from "the state interest where . . . the issue is not whether but when, for how long, and at what cost to the individual that life may be briefly extended."[173] If the government does not have a compelling interest, the statute will fail the strict scrutiny test.

It is counter-intuitive to view a statute as narrowly tailored if it limits the exercise of a fundamental right to a small fraction of the population. But determining whether a statute is narrowly tailored is not a quantitative question; a court determines if the means chosen to achieve the government interest are closely related to that interest.[174] Thus, even if the slippery slope concerns become reality and assisted suicide is recognized as a fundamental right or liberty interest for all people, a state could still dramatically restrict the exercise of that right with a narrowly tailored means of protection because of the state's compelling interest in the preservation of life.

This is the approach of both *Roe v. Wade*[175] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[176] In *Roe*, the Court recognized that the fundamental right of privacy includes a woman's right to choose to terminate a pregnancy.[177] Yet, in the third trimester, the state could prohibit the exercise of that fundamental right, unless the pregnancy endangered the life or health of the mother.[178] The vast majority of pregnancies in the final trimester do not endanger the life or health of the mother. Thus in the final trimester the state could completely prohibit almost all pregnant women from exercising a fundamental right. The fundamental right did not diminish, but the state's interest in potential life during the third trimester became compelling.[179] An almost total prohibition on abortion for women nearing the end of their pregnancy qualified as narrowly tailored to the state's compelling interest of preserving the potential life of the fetus.[180]

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[172] *Saikewicz*, 370 N.E.2d at 425-26.

[173] *Id.* at 426.

[174] JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.3, at 579 (4th ed. 1991).

[175] 410 U.S. 113 (1973).

[176] 505 U.S. 833 (1992) (plurality opinion).

[177] *Roe*, 410 U.S. 113.

[178] *Id.* at 164-66.

[179] *Id.*

[180] Although *Casey* abandoned aspects of *Roe*, the approach to the interplay between individual liberty and state restrictions of that liberty remains. "*Roe* is clearly in no jeopardy, since subsequent constitutional developments have neither disturbed, nor do they threaten to diminish, the scope of recognized protection accorded to the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child." *Casey*, 505 U.S. at 857. The Court is less certain about the application of liberty to the present subject, but the *ability* to regulate liberty is

In *Casey*, the Court stated that a woman's fundamental right or liberty interest also exists throughout pregnancy and the state may not place an undue burden on its exercise.[181] Yet post-viability, the state may place an almost total prohibition on the exercise of the woman's right.[182] The Court "reaffirm[ed] *Roe*'s holding that 'subsequent to viability, the state in promoting its interest in the potentiality of human life may, if it chooses, regulate, *and even proscribe*, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.' "[183] The state may place a crushing burden on the exercise of a right by almost all of the population at issue — pregnant women carrying a viable fetus. The Court did not consider this an "undue burden" because of the state's compelling interest in potential life and the narrow tailoring of the statute.[184] Thus, a statute could be narrowly tailored despite being an almost complete prohibition on abortion.

A woman's liberty interest, recognized in *Casey*, does not disappear the day the fetus becomes viable, yet most women cannot exercise the liberty interest after viability. The liberty interest does not fall by the wayside; it is merely overtaken by the state's interest in preserving potential life. Similarly, in the case of assisted suicide, the individual's liberty interest outweighs the state interest as death approaches. The proper respect is shown for the state interest, but as it wanes, it no longer eclipses the individual's liberty interest.

The government's interest in the preservation of life diminishes when life is near its end.[185] While each person contributes to society, that contribution is limited in time when a person has only six months to live. The dividing line in the assisted suicide debate should not be drawn according to the value of an individual's potential "contribution" to society because it would place "less desirable" people (however defined) in danger. Preserving life is a societal good; preserving life when little life remains is less compelling because the societal good to be preserved is limited — not in value, but in time. By allowing a terminally ill individual to make the decision to end his or her life, the government avoids making a value judgment, and merely acknowledges that the good it seeks to preserve is limited by imminent death.

VI. CONCLUSION

Justice O'Connor wrote in *Cruzan* that the appropriate method for resolving issues regarding hastening death was through experimentation in the "labora-

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similar.

[181] *Id.* at 874-79.

[182] *Id.*

[183] *Id.* at 879 (quoting Roe v. Wade, 410 U.S. 113, 164-65 (1973)) (emphasis added).

[184] *Id.*

[185] Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417, 425-26 (Mass. 1977).

tory of the states."[186] Oregon and Washington chose to experiment at opposite ends of the spectrum. The Court of Appeals for the Ninth Circuit found that there was no fundamental right or liberty interest in assisted suicide and that the Washington state statute passed the rational basis test. The federal district court in Oregon decided there was no fundamental right or suspect classification at issue, but found the Oregon statute failed the rational basis test.[187] The results should be just the opposite.

In Washington, the statute interferes with liberty in the broadest sense. Using the *Casey* approach to define liberty, the statute also interferes with liberty in its constitutional sense. Personal decisions regarding "one's own concept of existence, of meaning, of the universe, and of the mystery of human life"[188] should be left to the individual. The decision regarding the manner of a terminally ill individual's death is more appropriately left to the individual than the state. This approach will not lead to a carte blanche endorsement of suicide, which would allow any individual to procure physician-assisted suicide on demand. The state interest in the preservation of life permits the states to draw a line preventing those not terminally ill from committing suicide. However, the state's interest in the preservation of life fades as the individual's life draws to a close. At this point, the liberty interest is no longer subordinate to the state interest. In determining at what point the liberty interest or the state interest is paramount, *Roe* and *Casey* used a reasonably ascertainable time period approach based on the viability of the potential life. In the assisted suicide context, courts should use the reasonably ascertainable time period of six months to live, based on physicians' judgments of the competent individual's remaining time to live. *Roe* and *Casey* prohibit the exercise of the right or interest in choosing to terminate a post-viability pregnancy by most of the population of pregnant women. Likewise, a state could prohibit the exercise of the liberty interest in assisted suicide by most of the population without creating an undue burden.

In Oregon, the court applied a rational basis test to the equal protection claim of individuals who were concerned that they might someday be impelled to commit suicide if the statute's recognition of a liberty interest in assisted suicide remained in place. The court feared that there were inadequate safeguards in the statute to protect the mentally incompetent from such a fate. Yet, under a rational basis review, the court should accept the decision of the Oregon electorate as to what amounts to adequate safeguards and not impose the court's judgment. Instead, the court in *Lee* chose not to allow the state to experiment to find the proper approach.

On the continuum of state regulation of constitutionally protected liberty no right is absolute, but the exercise of liberty can not be banned unless the state

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[186] Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 292 (1990).

[187] Normally, statutes will pass the rational basis test because of the minimal scrutiny the court exercises.

[188] Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833, 851 (1992) (plurality opinion).

has a compelling interest. The state has no interest in forcing competent, terminally ill individuals to endure the final months of life against their will. By giving competent, terminally ill individuals with less than six months to live the right to obtain a physician's assistance in ending their lives, given adequate safeguards, the courts may responsibly protect and further the interests of both the state and affected individuals in this deeply personal and emotional debate.