Sentenced to Life? An Analysis of the United States Supreme Court’s Decision in Washington v. Glucksberg

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Abstract

In the recent landmark decision of Washington v. Glucksberg, the United States Supreme Court upheld a Washington statute criminalizing assisted suicide for terminally ill patients.

KEYWORDS: patients, physicians, test
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I. INTRODUCTION

In the recent landmark decision of Washington v. Glucksberg,¹ the United States Supreme Court upheld a Washington statute criminalizing assisted suicide for terminally ill patients.² The Supreme Court declined to find a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment and further found that the prohibition on assisted suicide survived a rational basis test.³ In examining the Supreme Court's decision, Part II of this case comment sets forth the factual and procedural history of the case. The parties' arguments and an analysis of the Supreme Court decision are explored in Part III of this comment. Part IV discusses a recent Supreme Court of Florida case. Part V suggests that there are several conflicts with this recent decision which require resolution. Finally, the conclusion suggests possible recommendations to the legislature.

II. HISTORY OF WASHINGTON V. GLUCKSBERG

A. Facts of the Case

1. Defendant State of Washington

Despite the fact that the State of Washington does not have any law prohibiting suicide, the legislature enacted a statute which prohibits aiding or causing the suicide of another person and provides that a violation of the statute will result in imprisonment for a maximum of five years and a fine not to exceed $10,000.⁴ Furthermore, existing law in Washington, such as the Natural Death Act, immunizes a physician from liability for carrying out a directive from a competent, terminally ill patient to withdraw hydration and nutrition.⁵ In the case at hand, the plaintiffs consisted of three patients, five

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¹ 117 S. Ct. 2258 (1997) [hereinafter Glucksberg].
² Id. at 2261.
³ Id. at 2261-62.
⁴ WASH. REV. CODE § 9A.20.021(1)(c) (1994). See section 9A.36.060 of the Washington Revised Code on assisted suicide, which provides that: "(1) [a] person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide[, and] (2) [p]romoting a suicide attempt is a class C felony." Id. § 9A.36.060. In 1854, the State of Washington prohibited "'assisting another in the commission of self-murder.'" Glucksberg, 117 S. Ct. at 2261 n.1 (citation omitted).
⁵ Brief for Respondent at 1, Glucksberg (No. 96-110); see also WASH. REV. CODE § 70.122.010 (1994) (providing that "adult persons have the fundamental right to control the decisions relating to the rendering of their own medical care, including the decision to have life-sustaining procedures withheld or withdrawn in instances of a terminal condition").
physicians, and a nonprofit organization that assists and counsels terminally ill patients and family members.6

2. Plaintiff Patients

After enduring procedures such as chemotherapy, radiation, and surgery, Dr. Jane Roe, a retired pediatrician, was losing her life to breast cancer at the age of sixty-nine.7 During this time, Dr. Roe experienced extreme pain and suffering, which she tried unsuccessfully to relieve with massive doses of morphine.8 After several counseling sessions, and with the knowledge that there was no chance for recovery, Dr. Roe decided that she wanted to use medication prescribed by her physician for the purpose of hastening her impending death.9

John Doe, a forty-four-year-old painter who was diagnosed with Acquired Immune Deficiency Syndrome ("AIDS") in 1991, was losing his battle and was advised by his doctors that he was in the terminal stage of his sickness.10 Mr. Doe had sustained pneumonia, excessive fatigue, seizures, skin and sinus infections, seventy-percent blindness, and a decreased ability to care for himself.11 However, he was mentally competent and aware of the pain he would have to endure since he had cared for his companion who had died from AIDS.12 Mr. Doe, understanding that the virus was incurable, wished to take drugs prescribed by his doctor to hasten his death.13

James Poe, a sixty-nine-year-old retired sales representative who was in the terminal phase of chronic obstructive pulmonary disease, experienced constant suffocation, which required a permanent connection to an oxygen

6. Compassion in Dying v. Washington, 850 F. Supp. 1454, 1456 (W.D. Wash. 1994), aff'd en banc, 79 F.3d 790 (9th Cir. 1996), rev'd sub nom. Washington v. Glucksberg, 117 S. Ct. 2258 (1997) [hereinafter Compassion]. The following parties were the plaintiffs: Jane Roe, John Doe, James Poe, Dr. Harold Glucksberg, Dr. John Geyman, Dr. Thomas Preston, Dr. Abigail Halperin, Dr. Peter Shalit, and Compassion in Dying. Id. at 1456–58.
7. Id. at 1456.
8. Id.
9. Id.
11. Id.; see also Brief for Respondent at 3, Glucksberg (No. 96-110) (explaining that Mr. Doe was susceptible "to all manner of infection" and was expected to experience total blindness).
12. Compassion, 850 F. Supp. at 1456; see also Brief for Respondent at 3, Glucksberg (No. 96-110) (illustrating that Mr. Doe had observed the "pain, suffering, and loss of bodily function, integrity, and personal dignity" typically caused by Acquired Immune Deficiency Syndrome ("AIDS").
tank. He endured extreme leg pain, painful swelling, and immobility due to a lack of blood flow, which resulted in the administering of morphine on a regular basis. Because the suffering was intolerable and the illness incurable, Mr. Poe, a mentally competent patient, wished to accelerate his impending death with the assistance of his physician. Prior to the Supreme Court's decision, all three of the plaintiffs died from their terminal illnesses.

3. Plaintiff Physicians

Dr. Harold Glucksberg practices oncology at the Pacific Medical Center in Seattle and is an assistant professor at the University of Washington School of Medicine. He has published several articles in various medical journals concerning cancer. In his declaration to the United States District Court for the Ninth Circuit, Dr. Glucksberg stated that cancer patients experience "excruciating, unrelenting pain" and that the massive dosage of medication, which is administered to alleviate pain, impairs consciousness. Dr. Glucksberg declined the request, in accordance with the criminal statute, to prescribe lethal medication for one of his terminally ill, though competent, suffering patients who wished to self-administer the drugs to hasten his death. After this refusal, the patient, wishing to commit suicide by jumping from a bridge, recruited a family member to help him do so.

Dr. John Geyman, a professor emeritus at the University of Washington and a practitioner of family medicine, has written numerous articles and

14. *Id.* at 1457; *see also* Brief for Respondent at 3, *Glucksberg* (No. 96-110) (describing that Mr. Poe was fearful due to his "constant sensation of suffocation" and that he had trouble sleeping for more than two or three hours).

15. *Compassion*, 850 F. Supp. at 1457; *see also* Brief for Respondent at 3, *Glucksberg* (No. 96-110) (describing that Mr. Poe took these medications to "calm his 'terror'").


19. *Id.*

20. *Id.* (citation omitted).


22. *Id.*
books in the field of family medicine.\textsuperscript{23} He has declared that his patients experience unnecessary extended deaths filled with suffering and humiliation, and that they attempt unsuccessful suicides, which often worsen their mental and physical conditions.\textsuperscript{24}

In addition, the following doctors were plaintiff physicians in the matter of \textit{Washington v. Glucksberg}: Dr. Thomas Preston, Dr. Abigail Halperin, and Dr. Peter Shalit. Dr. Thomas Preston is the chief of cardiology at Pacific Medical Center and has written numerous articles and books in the field of cardiology.\textsuperscript{25} On a regular basis, Dr. Preston treats patients who are in the terminal phase of cardiopulmonary diseases.\textsuperscript{26} Dr. Abigail Halperin occasionally treats AIDS and cancer patients.\textsuperscript{27} On one occasion, a mentally competent breast cancer patient requested that Dr. Halperin provide assistance in hastening her death so that she could die with dignity.\textsuperscript{28} After the rejection of this request, the patient used a plastic bag to suffocate herself.\textsuperscript{29} Dr. Peter Shalit, who practices internal medicine, was forced to decline a similar request for lethal medication.\textsuperscript{30} This patient was suffering from pain as a result of “[o]ozing lesions,” causing immobility and inability to urinate and was further forced to endure gangrenous fingers.\textsuperscript{31} As a result of these horrific sights, family members refused to visit because they could not tolerate observing their loved one’s “physical torture.”\textsuperscript{32}

\section*{4. Plaintiff Compassion in Dying}

Compassion in Dying is a nonprofit organization located in Washington, which provides information, counseling, and emotional support for terminally ill patients and their families, but does not provide lethal medication.\textsuperscript{33} The organization has stringent requirements for eligibility which include the following: 1) a determination by the patient’s physician that the patient is terminally ill; 2) a mental health evaluation indicating that

\begin{itemize}
\item \textsuperscript{23} \textit{Compassion}, 850 F. Supp. at 1457. A professor emeritus is one who is “retired or honorably discharged from active duty because of age, infirmity, or long service, but retained on the rolls.” \textsc{The Random House College Dictionary} 432 (rev. ed. 1984).
\item \textsuperscript{24} \textit{Compassion}, 850 F. Supp. at 1457.
\item \textsuperscript{25} \textit{Id.} at 1458.
\item \textsuperscript{26} \textit{Id.}
\item \textsuperscript{27} \textit{Id.}
\item \textsuperscript{28} Brief for Respondent at 5, \textit{Glucksberg} (No. 96-110).
\item \textsuperscript{29} \textit{Id.}
\item \textsuperscript{30} \textit{Id.}
\item \textsuperscript{31} \textit{Id.}
\item \textsuperscript{32} \textit{Id.}
\item \textsuperscript{33} \textit{Compassion}, 850 F. Supp. at 1458; \textit{see also Compassion in Dying}, 49 F.3d at 588.
\end{itemize}
the patient is not suffering from mental abnormalities; 3) a finding that the demand for assisted suicide does not result from inadequate medical care or economic concerns; 4) a finding that the request must originate from the patient either in writing or by videotape; and 5) a finding that the request has been repeated three times with at least forty-eight hours between the second and third requests. The organization has implemented other safeguards, which include the denial of services for uncertainty, family member disapproval, and a showing that the patient is not terminally ill, or has inadequate pain management. Compassion in Dying, although a plaintiff in the federal district court and appellee in the appellate court, was not a party in the Supreme Court case.

B. Procedural History

The issue in this case was whether the State of Washington’s statute prohibiting physician-assisted suicide was constitutional. The plaintiffs sought a declaratory judgment declaring the statute to be unconstitutional and an injunction preventing enforcement of the statute. In Compassion in Dying v. Washington, the United States District Court for the Western District of Washington held that the statute was unconstitutional. The State thereafter appealed, and the Court of Appeals for the Ninth Circuit reversed the lower court. When the Ninth Circuit reversed on rehearing en banc, the plaintiff physicians petitioned the Supreme Court for a writ of certiorari, and the Supreme Court, in Washington v. Glucksberg, reversed, holding the statute to be constitutional.

In the plaintiffs' initial brief to the Supreme Court, the following challenges were made: 1) Whether “The Clear Line Between Permitting Refusal Of Treatment And Prohibiting Action Intended

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34. Compassion, 850 F. Supp. at 1458.
35. Id.
36. Id. at 1455–56. The issue is whether “Washington’s prohibition against ‘caus[ing]’ or ‘aid[ing]’ a suicide offends the Fourteenth Amendment to the United States Constitution.” Glucksberg, 117 S. Ct. at 2261.
38. Id. at 1454.
39. Id. at 1467. Compassion in Dying v. Washington was brought in the United States District Court for the Western District of Washington. The decision was appealed to the United States Court of Appeals for the Ninth Circuit in Compassion in Dying v. Washington. The Ninth Circuit reheard the case en banc. Finally, the case was appealed to the United States Supreme Court.
40. Compassion in Dying, 49 F.3d at 588.
41. 117 S. Ct. at 2258.

C. Analysis of the Western District of Washington Decision

1. Due Process/Liberty Interests

The Western District of Washington examined liberty interests under Planned Parenthood v. Casey and Cruzan v. Director, Missouri Department of Health. In Casey, the Supreme Court explained that a terminally ill person's decision to terminate his or her life "involv[es] the most intimate and personal choices a person may make in a lifetime" and constitutes a "choice[] central to personal dignity and autonomy." In Compassion, the federal district court held the suffering of a terminally ill patient to be as important and worthy of protection from governmental intrusion as that of a pregnant woman. The federal district court distinguished Casey by determining that the life interests of the pregnant woman and the potential life "which cannot speak for itself" are at risk concerning an abortion, whereas there is only one life at stake, which can "voice his or her wishes," in the present case. Therefore, according to the

42. Brief for Petitioner at 10, Glucksberg (No. 96-110).
43. Id.
44. Id.
45. Id. at 16.
46. Id.
47. 505 U.S. 833, 846 (1992) (upholding a woman's right to terminate her pregnancy pre-viability without undue influence from the government, establishing the state's authority to restrict abortions post-viability, and acknowledging the state's interest in protecting both the health of the fetus and woman).
48. Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 279 (1990) (recognizing that a mentally competent, terminally ill adult has the right to refuse unwanted life-sustaining medical treatment).
50. Id.
51. Id.
federal district court, because it was decided that there is a liberty interest with respect to a woman’s right to terminate her pregnancy, a dilemma which brings about more complex issues concerning governmental competing interests than does physician-assisted suicide, there should be a fundamental liberty interest in assisted suicide.52

The federal district court next focused on *Cruzan*, where the Supreme Court assumed that a mentally competent individual has a constitutionally protected liberty interest in declining “‘the artificial delivery of food and water.’”53 The federal district court reasoned that liberty interests which warrant protection by the Fourteenth Amendment concern matters “which are essential to personal autonomy and basic human dignity” and that “[t]here is no more profoundly personal decision, nor one which is closer to the heart of personal liberty, than the choice which a terminally ill person makes to end his or her suffering and hasten an inevitable death.”54 The federal district court noted Justice O’Connor’s concurring opinion in *Cruzan* which explained that requiring a mentally competent adult to sustain unwanted procedures burdens his or her “‘liberty, dignity, and freedom to determine the course of her own treatment’” and that the liberty protected under the Due Process Clause must at least guarantee a patient’s right to reject medical treatment.55 The federal district court could not find a differentiation between the refusal of life-saving treatment and the request for assisted suicide by a voluntary, mentally competent adult.56

2. Undue Burden Test

The Western District of Washington used the standard set forth in *Casey*, in which the court must determine whether the questionable statute would operate as “a substantial obstacle” for an individual who is seeking to commit physician-assisted suicide.57 The federal district court reasoned that the Washington statute “not only places a substantial obstacle in the path of a terminally ill, mentally competent person wishing to commit physician-assisted suicide, but entirely prohibits it,” thus placing an undue burden on the individual’s constitutionally protected liberty interest.58 The federal district court responded to the State’s argument, that there are legitimate state

52. *Id.*
53. *Id.* at 1461 n.4 (quoting *Cruzan v. Director*, Mo. Dep’t of Health, 497 U.S. 261, 289 (1990) (O’Connor, J., concurring)).
55. *Id.* at 1461 n.4 (citation omitted).
56. *Id.* at 1461.
57. *Id.* at 1465 (citation omitted).
58. *Id.*
interests in preventing suicide and protecting vulnerable individuals at risk for suicide from undue influence, by holding that the legislature can formulate safeguards and define the limitations of physician-assisted suicide. These regulations would provide a mechanism which would guarantee that individuals are not acting according to "abuse, coercion or undue influence from third parties." The federal district court pointed out that the Supreme Court of Washington and Washington law have not only acknowledged the right of a mentally competent, terminally ill patient to withhold life-sustaining treatment, but have further recognized the authority of a surrogate or representative to withhold treatment, acting on behalf of the patient's interests. The federal district court reasoned that the potential abuse for disconnection from a life support system might be even greater than that suspected of physician-assisted suicide when the patient is competent and a surrogate is acting on his or her behalf.

3. Equal Protection

In the federal district court, the plaintiffs argued that the Washington statute denied two similarly situated groups of terminally ill adults equal protection of the law as guaranteed under the Fourteenth Amendment of the United States Constitution. The defendants argued that there is no distinction because death resulting from the withdrawal of life-sustaining systems is natural, whereas death resulting from other means is artificial. The federal district court found, according to Washington case law and the Washington Natural Death Act, that the state has taken the first step in acknowledging that "its interest in preventing suicide does not require an absolute ban."

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60. Id. at 1465 n.10.
61. Id. at 1466 n.11 (citing In Re Guardianship of Grant, 747 P.2d 445, 446 (Wash. 1987), amended by 757 P.2d 534 (Wash. 1988) (holding that the legal guardian of an incompetent patient suffering from Batten's disease had the right to terminate life supporting medical procedures)); see also In Re Guardianship of Hamlin, 689 P.2d 1372, 1376 (Wash. 1984) (holding that an incompetent, terminally ill patient may be withdrawn from life support by an immediate family member or an appointed guardian ad litem); Natural Death Act, WASH. REV. CODE § 70.122.010 (1994) (describing the legal prerequisites a person must fulfill for carrying out a written request for refusal of life-supporting procedures).
63. Id. at 1459.
64. Id. at 1467.
65. Id.
treatment" among the two groups in that both individuals are terminally ill, both individuals are enduring pain and humiliation, and both individuals would be exposed to a prolonged death process without medical interference. The federal district court concluded that the Washington statute violated the Equal Protection Clause of the Fourteenth Amendment by allowing the withdrawal of life-support systems, but prohibiting physician-assisted suicide for mentally competent, terminally ill adults. The federal district court subsequently entered final judgment declaring the Washington statute unconstitutional and the court declined to grant injunctive relief.

D. Analysis of the Ninth Circuit

1. Majority Opinion

On appeal, the Ninth Circuit reversed the federal district court’s decision and held the Washington statute, which prohibits assisted-suicide, to be constitutional. First, the Ninth Circuit explained that the federal district court relied on language from the Casey opinion and applied this out of the context for which these principles were originally intended within the meaning of abortion. The court reasoned that “[i]t is commonly accounted an error to lift sentences or even paragraphs out of one context and insert the abstracted thought into a wholly different context.” Second, Cruzan did involve the cessation of life; however, the Ninth Circuit noted that the federal district court improperly declined to differentiate between those individuals withdrawing life support and those seeking medical assistance to assist in self-killing. Third, the Ninth Circuit accused the federal district court of “invent[ing] a constitutional right unknown to the past and antithetical to the defense of human life.” Fourth, with respect to the federal district court’s undue burden analysis, the Ninth Circuit found that the quotation from Casey regarding the abortion issue was again extended to a field where it has no

66. Id.
67. Compassion, 850 F. Supp. at 1467.
68. Id. at 1467–68.
69. Compassion in Dying, 49 F.3d at 588.
70. Id. at 590.
71. Id.
72. Id. at 591.
73. Id. The Ninth Circuit stated that the lower court’s decision was groundless in the history and traditions of the United States. Compassion in Dying, 49 F.3d at 591. According to the Ninth Circuit: “In the two hundred and five years of our existence no constitutional right to aid in killing oneself has ever been asserted and upheld by a court of final jurisdiction.” Id.
application and that the conclusion that the statute was facially invalid was unfounded.\textsuperscript{74}

Next, the Ninth Circuit focused its examination on the interests of the State of Washington and concluded that these interests outbalanced any asserted liberty interest.\textsuperscript{75} The Ninth Circuit reasoned that preserving the integrity of the medical profession and preventing physicians from participating in the suicide of their patients was an important state interest, which if ignored, could result in impeding the physician's continual quest for cures.\textsuperscript{76} The Ninth Circuit claimed that patients will be unduly influenced by their physicians because of "pressure to consent to their own deaths."\textsuperscript{77} The Ninth Circuit further alleged that the poor, handicapped, and underprivileged will suffer exploitation and abuse if there are laws permitting physician-assisted suicide.\textsuperscript{78}

Finally, the Ninth Circuit explained that there exists disagreement among the states as to the definition of "terminally ill" and that the federal district court, in not certifying a class, failed to identify the persons for which judgment was entered.\textsuperscript{79} The Ninth Circuit stated that the plaintiffs did not meet the burden of proving "that the legislature's actions were irrational" in enacting the statute and that there was no foundation in criminal or tort law that supported the federal district court's decision.\textsuperscript{80} The Ninth Circuit further explained that a license does not grant a physician the right to expose a patient to unwanted medical procedures and that an individual has "the right to be let alone" if he or she desires.\textsuperscript{81} According to the Ninth Circuit, the distinction between the patient who directs that lifesaving treatment be terminated and a patient who seeks assisted suicide is rooted in the common law and tradition of the United States; more specifically, there has not existed an acknowledged right to have another "enslave you, mutilate you, or kill you."\textsuperscript{82} The court characterized assisted suicide as having the right to seek out another individual to cooperate in one's self-killing as opposed to seeking

\textsuperscript{74} Id.

\textsuperscript{75} Id.

\textsuperscript{76} Id. at 592.

\textsuperscript{77} Compassion in Dying, 49 F.3d at 592.

\textsuperscript{78} Id.

\textsuperscript{79} Id. at 593. The district court had entered judgment for Jane Roe and John Doe even though they had already died. The judgment of James Poe lapsed upon his death; thus, the judgment was entered on behalf of the respondents' future terminally ill patients. Id.

\textsuperscript{80} Id. (quoting Kadramus v. Dickinson Pub. Sch., 487 U.S. 450, 463 (1988)).

\textsuperscript{81} Compassion in Dying, 49 F.3d at 594 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

\textsuperscript{82} Id.
the termination of unwanted medical treatment. The Ninth Circuit did not decide the question of whether the Washington statute violated equal protection.

2. Dissenting Opinion

In the Ninth Circuit Court of Appeals, Judge Eugene Wright dissented, finding that the Washington statute violated the “plaintiffs’ privacy and equal protection rights.” Judge Wright explained that the federal district court’s application of *Casey* was entirely appropriate and not limited only to abortion cases, but originates from Supreme Court precedent and involves matters concerning intimate decisions which deal with “‘marriage, procreation, contraception, family relationships, child rearing, and education.’” Judge Wright further agreed with the federal district court that there cannot be a distinction between refusing unwanted treatment and seeking physician-assisted suicide.

3. En Banc Opinion

A limited en banc Ninth Circuit Court of Appeals reversed the three-judge panel’s decision and affirmed the federal district court. The court focused on *Casey* and *Cruzan*, holding that there is a constitutionally recognized right to die. Upon a petition, the United States Supreme Court granted certiorari. In *Compassion in Dying II*, Judge Beezer dissented, finding that mentally competent, terminally ill individuals do not have a

83. Id.
84. *Glucksberg*, 117 S. Ct. at 2262 (citing *Compassion in Dying v. Washington*, 79 F.3d 790, 838 (9th Cir. 1996)) [hereinafter *Compassion in Dying II*].
85. *Compassion in Dying*, 49 F.3d at 594 (Wright, J., dissenting).
86. Id. at 595 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)). Judge Wright explained that an individual’s right to privacy consists of “‘the interest in independence in making certain kinds of important decisions.’” Id. (quoting *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977)).
87. Id. Judge Wright commented that “[s]uch a distinction yields patently unjust results.” Id. at 596. According to the majority view, if an individual is dependent on a respirator and the suffering is intolerable, that person may direct the physicians to withdraw life-support. *Compassion in Dying*, 49 F.3d at 596. However, a similarly situated patient who does not depend on life-sustaining medical treatment, does not have that same right. Id.
88. *Compassion in Dying II*, 79 F.3d at 839.
89. Id. at 799–801.

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fundamental liberty interest, and that the state’s interests “are sufficiently strong to sustain the constitutionality” of the statute.

III. THE SUPREME COURT DECISION

A. Plaintiffs’ Argument before the Supreme Court

The plaintiffs argued that the Ninth Circuit ignored the Supreme Court’s analytical approach to substantive due process claims and invented a liberty interest which has no foundation in our nation’s tradition, characterizing it as a “radical departure.” The plaintiffs further argued that there is a distinct difference between allowing the withdrawal of medical treatment and disallowing conduct which brings about death, and that this distinction is rooted in “well-settled legal doctrines.” This argument is based on the fact that, at common law and in most states today, treatment without informed consent is considered a battery, whereas an individual who causes another’s death would be criminally liable. Additionally, there are existing statutes in the majority of states which criminalize assisted suicide. The plaintiffs argued that *Cruzan* stands for the proposition that one has a constitutionally recognized right to refuse unwanted life-sustaining medical treatment, which allows the illness to “follow a natural course to death.”

B. Defendants’ Argument before the Supreme Court

The defendants argued that the Supreme Court has, on prior occasions, acknowledged that an individual has a liberty interest in making personal decisions regarding the manner of one’s death. They claimed that the individual has a right to decide this matter according to his or her beliefs and values and that he or she should have the option of declining to endure suffering and loss of dignity. The defendants argued that there is discrimination between mentally competent, terminally ill patients requiring life-sustaining medical treatment and those patients who do not necessitate

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91. *Compassion in Dying II*, 79 F.3d at 857 (Beezer, J., dissenting).
92. Brief for Petitioner at 9, *Glucksberg* (No. 96-110).
93. Id.
94. Id. at 11.
95. Id. (citing *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 280 (1990)).
96. Id. at 12.
98. Id. In permitting this right, the State argued that safeguards may be enacted to prevent abuse and undue influence. Id.
They alleged that there is a violation of equal protection because those individuals who are dependent upon constant medical procedures to sustain life are presented with the option of directing a physician to withdraw or withhold this support, whereas those terminally ill patients who do not require such care may not exercise the same option.

C. Majority Opinion

The Supreme Court heard oral arguments on January 8, 1997. William L. Williams presented on behalf of the defendants, Walter Dellinger as amicus curiae on behalf of the United States supporting Defendants, and Kathryn Tucker on behalf of the plaintiffs. For the Supreme Court's review, amicus curiae briefs were filed on behalf of several organizations. Chief Justice Rehnquist wrote the opinion, holding that the

99. Id. at 8.
100. Id.
102. Id. at 2261.
Washington statute, which prohibits the act of causing or aiding a suicide, does not violate the Fourteenth Amendment of the United States Constitution. The opinion begins by examining a history of suicide law in the State of Washington, including section 9A.36.060 of the Revised Code of Washington, enacted in 1975, and Washington’s Natural Death Act, enacted in 1979. After Washington voters had declined an initiative which would have allowed a form of physician-assisted suicide, the legislature amended the Natural Death Act to specifically exclude it. The Court, in Part I of the opinion, explored the historical and legal doctrines of the United States, noting that in forty-four states, the District of Columbia, and the two territories, it is a crime to assist in suicide. The Court commented that these laws reflect the commitment of the states in preserving and protecting life and that the Anglo-American common law for over 700 years has either


105. *Id.*

106. *Id.* at 2266. Initiative 119 provided for an amendment to Washington’s Natural Death Act and allowed for “aid in dying.” *Id.* at 2266 n.13. “Aid in dying” is:

[A]id in the form of a medical service provided in person by a physician that will end the life of a conscious and mentally competent qualified patient in a dignified, painless and humane manner, when requested voluntarily by the patient through a written directive in accordance with this chapter at the time the medical service is to be provided.

*Id.* (citation omitted).

107. *Glucksberg*, 117 S. Ct. at 2263 n.8 (quoting *Compassion in Dying II*, 79 F.3d at 847).

http://nsuworks.nova.edu/nlr/vol22/iss3/10
penalized or objected to suicide and assisted-suicide. In fact, the Court points out that the first state to prohibit assistance in suicide was New York in 1828, which was followed by many other states enacting similar laws. The Court noted that each state has submitted numerous proposals to permit physician-assisted suicide, but they are continually rejected by the state legislatures. As evidenced by the New York State's Task Force, some states are actively involved in studies regarding physician-assisted suicide. In conclusion, the Supreme Court was unconvinced that it should depart from centuries of well settled legal tradition. The Court then focused its attention toward the due process claim.

The Court explained that not only does the Due Process Clause "protect[] individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them,'" but it also affords protection against intervention with fundamental liberty interests. These interests have been defined through an extensive series of United States Supreme Court cases and include the right to marry, the right to procreate, the right to bodily integrity, the right to control the education and upbringing of one's children, the right of privacy during one's marriage, the right to use contraception, and the right to terminate one's

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108. *Id.* at 2263 (citing Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 294–95 (1990) (Scalia, J., concurring)).
109. *Id.* at 2265 (citations omitted).
110. *Id.* at 2266 n.15. The following states have submitted proposals: Alaska, Arizona, California, Colorado, Connecticut, Illinois, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New Mexico, New York, Nebraska, Rhode Island, Vermont, Washington, and Wisconsin. *Id.*
111. *Glucksberg*, 117 S. Ct. at 2267. The New York State's Task Force on Life and the Law is "an ongoing, blue-ribbon commission" which consists of attorneys, physicians, ethicists, religious leaders, and other interested individuals and was convened in 1984. *Id.* It was created to make public policy recommendations on questions of medical technological developments. *Id.* It has determined that the potential risks of permitting physician-assisted suicide would outweigh any benefits, thus exposing vulnerable individuals to a tremendous amount of abuse. *Id.*
112. *Id.*
113. *Glucksberg*, 117 S. Ct. at 2267 (citations omitted).
114. *Id.* (citing Loving v. Virginia, 388 U.S. 1, 12 (1967)).
115. *Id.* (citing Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942)).
116. *Id.* (citing Rochin v. California, 342 U.S. 165, 172 (1952)).
117. *Id.* (citing Meyer v. Nebraska, 262 U.S. 390, 401, 403 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925)).
119. *Id.* (citing Eisenstadt v. Baird, 405 U.S. 438, 443 (1972)).
pregnancy. Particularly relevant to the case at hand, the Supreme Court has strongly implied that one has the right to refuse "unwanted life-saving medical treatment." The Supreme Court explained that it must "exercise the utmost care" when examining liberty interests afforded protection by the Due Process Clause and turned its discussion to *Casey* and *Cruzan*. The liberty interest inferred from *Cruzan*, to refuse unwanted medical treatment, was grounded in the nation's historical and legal doctrines in that coerced treatment was traditionally considered a battery; however, the Supreme Court distinguished the instant case because states have always declined to permit assisted suicides. The Court replied to the plaintiffs' argument, explaining that not all personal and intimate decisions are sheltered by the Due Process Clause just by virtue of the fact that most liberties and rights have their basis in personal autonomy. Finally, the Supreme Court concluded that the right to die is not a fundamental liberty interest protected by the Fourteenth Amendment and turned its attention to whether the Washington statute could nonetheless pass a rational basis test.

The Supreme Court next explained that the Washington statute must be rationally related to legitimate government interests and then referred to the federal district court's decision identifying these interests. The Court commented that the state has a legitimate interest in preserving life and preventing suicide, as illustrated by laws protecting human life, and that permitting physician-assisted suicide would subject especially vulnerable people to suicidal deaths. The Court suggested that legalization of assisted suicide would complicate the treatment of depressed, mentally unstable, or

120. *Id.* (citing Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)).
121. *Id.* (citing Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 278–79 (1990)). However, the Supreme Court held that the State of Missouri could require clear and convincing evidence of an incompetent patient's wishes regarding the termination of life support. *Cruzan* v. Director, Mo. Dep't of Health, 497 U.S. 261, 280–81 (1990).
122. *Glucksberg*, 117 S. Ct. at 2268 (citation omitted).
123. *Id.* at 2270.
124. *Id.* at 2271 (citation omitted).
125. *Id.*
126. *Id.* at 2271–72 (citing *Compassion in Dying II*, 79 F.3d at 816–17). The interests are as follows: 1) preservation of life; 2) prevention of suicide; 3) avoiding undue influence from third parties; 4) protecting the family members of terminally ill patients; 5) preserving the righteousness of the medical profession; and 6) avoiding trends towards euthanasia and abuse. *Glucksberg*, 117 S. Ct. at 2271 n.20.
127. *Id.* at 2273. The Supreme Court notes that research has suggested that depression and inadequate pain management highly contribute to requests for physician-assisted suicide. *Id.* (citations omitted).
suicidal individuals. Furthermore, the Court reasoned that the state has an obligation in preserving the integrity of the medical profession and that permitting physician-assisted suicide is completely contradictory to a physician's interests in healing their patients. The trust between a patient and the patient's doctor, the Supreme Court claimed, may be greatly jeopardized as a result of legalizing physician-assisted suicide. The State argued that it had interests "in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes." Although the Ninth Circuit rejected this argument, the Supreme Court focused on this interest, stating that terminally ill and disabled individuals need protection from the abuse associated with the right to assisted suicide. With respect to the final state interest, the Court noted that extending a constitutional right for mentally competent, terminally ill patients to direct physicians to assist in their suicides may prove to be a "much broader license" which would be an impossibility for the state to control. In addition, the Supreme Court examined various studies that were conducted in the Netherlands and in New York, and commented that there is a great potential for abuse and undue influence, and that the Washington statute banning assisted suicide is, at a minimum, rationally related to the state's legitimate interests. Thus, the Supreme Court reversed the decision of the Ninth Circuit Court of Appeals and remanded for further proceedings.

128. Id.
129. Id. (citing AMERICAN MEDICAL ASSOCIATION, CODE OF ETHICS, § 2.211 (1994)).
130. Glucksberg, 117 S. Ct. at 2273 (quoting Assisted Suicide in the United States: Hearing before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 104th Cong., 2d Sess. 355–56 (1996)). The hearing before the Subcommittee explained that "[t]he patient's trust in the doctor's whole-hearted devotion to his best interests will be hard to sustain." Id.
131. Id. at 2273.
132. Id. (citing Compassion in Dying, 49 F.3d at 592–93); see also Physician-Assisted Suicide and Euthanasia in the Netherlands: A Report of Chairman Charles T. Canady, at 9, 20 (discussing biases towards disabled individuals and negative messages resulting from assisted suicide). Specifically, the Supreme Court reasoned that it is necessary to prevent actions based on financial incentives to decrease "end-of-life health-care costs" and to avoid the danger of adopting policies which may favor the "young and healthy." Glucksberg, 117 S. Ct. at 2273.
133. Id. at 2274.
134. Id. at 2274–75.
135. Id. at 2275.
D. Concurring Opinions

1. Justice O'Connor: State Interests Outweigh Individual Liberty

Justice O'Connor framed the question before the Court as whether "the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so."\(^{(136)}\) Although sympathetic to the idea that death may be painful and humiliating, Justice O'Connor explained that there is great difficulty in determining the boundaries of terminal illness and that some decisions to hasten death may result from mistake or pressure.\(^{(137)}\) Justice O'Connor concluded that Washington's interests in protecting vulnerable individuals from hastening death "are sufficiently weighty" to warrant the state's banning of assisted suicide.\(^{(138)}\) Justice Ginsburg also concurred in the Court's judgment for the foregoing reasons.\(^{(139)}\)

2. Justice Stevens: Placing Values on Human Life

In his concurring opinion, Justice Stevens analogized those cases in which courts have concluded that a state has the authority to allocate lesser values on certain lives, specifically referring to capital punishment cases.\(^{(140)}\) According to these decisions, "there is no absolute requirement that a state treat all human life as having an equal right to preservation."\(^{(141)}\) Although the state was engaged in the valuation of human life, the state legislatures "had sufficiently narrowed the category of lives" deserving termination by establishing safeguards to ensure that the defendants actually "belonged in that limited category."\(^{(142)}\) Although the Supreme Court has found that the statute is not facially invalid, Justice Stevens did not restrict the prospect that some operations of the statute may

\(^{136}.\) Id. at 2303 (O'Connor, J., concurring). Concurring opinions were filed at 117 S. Ct. 2302 by Justices O'Connor, Ginsburg, and Breyer for both Washington v. Glucksberg and Vacco v. Quill.

\(^{137}.\) Glucksberg, 117 S. Ct. at 2303.

\(^{138}.\) Id.

\(^{139}.\) Id. at 2310 (Ginsburg, J., concurring).


\(^{141}.\) Id.

\(^{142}.\) Id.
prove to be unconstitutional. In authorizing punishment of the death penalty, the State of Washington has determined that "the sanctity of human life does not require that it always be preserved," and it must recognize that there will be circumstances where accelerating death will be justifiable.

Justice Stevens next focused on *Cruzan*, referring to the freedom which encompasses an individual's "interest in dignity" and deciding "the character of the memories that will survive long after her death." Although in *Cruzan* the Court did not decide the issue at hand, it acknowledged a liberty interest in deciding the manner in facing an impending death. Justice Stevens brilliantly explained that the deceased plaintiffs in the present case "may in fact have had a liberty interest even stronger than Nancy Cruzan's because, not only were they terminally ill, they were suffering constant and severe pain." Justice Stevens further opined that eluding unbearable pain and loss of dignity is undoubtedly "'[at] the heart of [the] liberty ... to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.'"

Next, the state's interests are discussed and Justice Stevens pointed out that the prevention of abuse is not applicable, as in the case at hand, to a mentally competent person who makes a voluntary choice. Confusion will surely arise as a result of permitting physician-assisted suicide with respect to the physician's traditional healing role. However, Justice Stevens noted that there is already a significant amount of friction between the established role and present practice because physicians are already engaged in withholding life-sustaining medical treatment, and, more relevant to the present case, administering "terminal sedation." Justice Stevens concluded that it "is not itself sufficient to outweigh the interest in liberty that may

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143. *Id.* Justice Stevens comments that the Ninth Circuit en banc court did not have to decide the case based on a particular plaintiff who had violated the statute for assisting a patient's suicide; thus, the court's finding was not confined to "a particular set of plaintiffs before it." *Id.*

144. *Glucksberg*, 117 S. Ct. at 2305.

145. *Id.* at 2306.

146. *Id.* at 2305.

147. *Id.* at 2307.

148. *Id.* (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)).

149. *Glucksberg*, 117 S. Ct. at 2308.

150. *Id.*

151. *Id.* at 2309. Terminal sedation is the "administration of sufficient dosages of pain-killing medication to terminally ill patients to protect them from excruciating pain" even though this will bring about a hastened death. *Id.* at 2310. The argument is that the "intent and causation" are both identical to the circumstances addressed in the case at bar; that is, both deal with the advancement of death in efforts to mitigate pain. *Id.*
justify the only possible means of preserving a dying patient's dignity and alleviating her intolerable suffering." 152

3. Justice Souter: Physician's Role in Ministering Patient

Justice Souter agreed that there was no showing that the statute was unconstitutional, but he first examined the history of the United States Supreme Court in deciding due process claims from the *Slaughter House Cases* 153 through the *Lochner* 154 era, to *Griswold* 155 and *Casey*. 156 Focusing much on the notion of "'ordered liberty,' comprising a continuum of rights to be free from 'arbitrary impositions and purposeless restraints,'" Justice Souter analyzed the due process claim accordingly. 157 Acknowledging that there is no precise formula with which one may use in examining liberty interests, Justice Souter commented that due process involves a balancing test between the individual's liberty and that of "'organized society.'" 158 The boundaries of substantive due process are derived from "'careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.'" 159 Next, Justice Souter examined the state's interests and stated that "'[i]t is only when the legislation's justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied that the statute must give way.'" 160 The fate of determining if an individual has a protected liberty interest demands "'explicit analysis'" when that asserted right could be portrayed as "'belonging to different strands of our legal tradition requiring different degrees of constitutional scrutiny.'" 161 For example, the abortion debate could have been considered according to a woman's freedom of reproduction, requiring a "'substantial burden of justification on the [s]tate,'"

153. 83 U.S. 36 (1873).
156. *Glucksberg*, 117 S. Ct. at 2275–80 (Souter, J., concurring); see also *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (holding that the Fourteenth Amendment includes the "right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will . . . [and] to enter into all contracts which may be proper, necessary, and essential").
158. Id. at 2282 (citing *Poe v. Ullman*, 367 U.S. 497, 542 (1961)).
159. Id. (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring) (citation omitted)).
160. Id. at 2283.
161. Id. at 2285 n.11.
or according to laws prohibiting feticide except by the mother, requiring rationality on the state’s part.162

In his analysis, Justice Souter explored the legal doctrines which have “long condemned” suicide and its assistance, noting that the deceased’s survivors were once punished by forfeiture of property to the state.163 Most states today have enacted statutes which are similar to the Washington statute, namely criminalizing assistance in the suicide of another person.164 Justice Souter brilliantly explained that a physician’s assistance is encompassed in the recognized role not as “a mechanic of the human body whose services have no bearing on a person’s moral choices, but one who does more than treat symptoms, one who ministers to the patient.”165 The Casey Court determined that “physicians are fit assistants” with respect to the decision to abort potential life, which includes the abuses associated with assisted suicide; specifically, there exists the possibility of irresponsibility and influence from others.166 Without the assistance of a physician, “the woman’s right would have too often amounted to nothing more than a right to self-mutilation,” and similarly, without the assistance of a physician in the

162. Glucksberg, 117 S. Ct. at 2285 n.11 (citing Lawrence H. Tribe & Michael C. Dorf, Levels of Generality in the Definition of Rights, 57 U. Chi. L. Rev. 1057, 1091 (1990) (suggesting that “reasoned judgment” is necessary in determining which principle suits the specific claim)).

163. Id. at 2286 (citations omitted). This was abolished because it was unfair to expose the innocent survivors to such penalties. Id. (citation omitted).


165. Glucksberg, 117 S. Ct. at 2288 (citing Roe v. Wade, 410 U.S. 113, 153 (1973)).

166. Id.
suicide of a terminally ill individual, the dying patient’s privilege will also be
restricted “to crude methods of causing death, most shocking and painful to
the decedent’s survivors.” As set forth in the plaintiffs’ case, for example,
the physicians’ patients were compelled to self-kill in crude manners,
sometimes enlisting the assistance of their loved ones to commit
suicide. Justice Souter further illustrated that physicians are generally
allowed to provide terminal sedation to their patients even though this
“medication is so powerful as to hasten death.” Justice Souter concluded
that the State of Washington’s interests are “sufficiently serious” to
overpower the assertion that the statute is “arbitrary or purposeless” but also
acknowledged that the legislative process is “preferred” to handle these types
of claims.

4. Justice Breyer: Right to Die with Dignity

Justice Breyer joined the concurring opinion of Justice O’Connor,
excepting the parts which join the majority, and chose to call this asserted
right the “right to die with dignity.” Justice Breyer explained that it is not
necessary to decide whether there is a recognized fundamental liberty interest
because “the avoidance of severe physical pain (connected with death) would
have to comprise an essential part of any successful claim.” New York
and Washington have enacted laws which allow physicians to administer
pain-alleviating medication “despite the risk that those drugs themselves will
kill.” Justice Breyer concludes by stating that the Court may find the need
to “revisit its conclusions in these cases.”

167. Id.
169. Glucksberg, 117 S. Ct. at 2289. The following states have authorized pain
treatment which hastens death: Indiana, Iowa, Kentucky, Maine, Michigan, Minnesota, New
Mexico, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, and Virginia. Id. at
2289 n.15.
170. Id. at 2290–93.
171. Id. at 2311 (Breyer, J., concurring).
172. Id. Justice Breyer, in expressing Justice O’Connor’s ideas, states that the “laws
before us do not force a dying person to undergo that kind of pain.” Glucksberg, 117 S. Ct. at
2311 (emphasis omitted). Justice Breyer further explains that the statutes under review do not
ban physicians from administering such medication which alleviates pain, but, at the same
time, which hastens death. Id.
173. Id. (citation omitted).
174. Id. at 2312 (expressing Justice O’Connor’s opinion).
IV. ANALYSIS OF A RECENT SUPREME COURT OF FLORIDA CASE

On July 17, 1997, the Supreme Court of Florida upheld the constitutionality of a Florida statute that prohibits assisted suicide. Charles E. Hall and his physician, Cecil McIver, M.D., sought a declaratory judgment that section 782.08 of the Florida Statutes offended the Fourteenth Amendment of the United States Constitution as well as the Privacy Clause of the Florida Constitution. The plaintiffs brought the action for injunctive relief against the prosecution of a physician for providing assistance to a patient in committing suicide. Mr. Hall was a mentally competent, thirty-five-year-old who had contracted AIDS from a blood transfusion. The trial court determined that Dr. McIver found, in his professional judgment, that "it was medically appropriate and ethical to provide Mr. Hall" with assistance in committing suicide. The trial court further determined that the statute could not be "constitutionally enforced" against the physicians and that the prosecutor was enjoined from enforcement of the statute. The trial court set forth guidelines to ensure that any fatal medication was to be administered only upon a showing that: 1) Mr. Hall was competent; 2) he was "imminently dying;" and 3) he was "prepared to die." The State Attorney appealed the decision of the trial court and the Supreme Court of Florida accepted jurisdiction.

The Supreme Court of Florida focused on the recent United States Supreme Court cases of Vacco v. Quill and Washington v. Glucksberg. In Vacco, the Supreme Court had distinguished Cruzan by...

176. Krischer, 697 So. 2d at 99.
177. Id.
178. Id.
179. Id.
180. Id. The trial court grounded its decision upon the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the Privacy Clause of the Florida Constitution. Krischer, 697 So. 2d at 99. The trial court, in accordance with the Supreme Court’s decision in Washington v. Glucksberg, did not find a federal liberty interest protected by the Due Process Clause. Id.
181. Id. at 100 (quoting McIver v. Krischer, No. CL-96-1504-A.F., 1997 WL 225878, at *11 (Fla. Cir. Ct. Jan. 31, 1997), rev’d, 697 So. 2d 97 (Fla. 1997)).
182. Id.
184. Glucksberg, 117 S. Ct. at 2262 (reversing the United States Court of Appeals for the Ninth Circuit and upholding Washington’s ban on assisted suicide).
finding that there was a significant distinction between the right to have assistance in committing suicide and the right to refuse life-sustaining medical procedures. The Supreme Court of Florida then reasoned in *Krischer* that the assistance which Mr. Hall requested was not “treatment in the traditional sense of that term;” rather, the administration of lethal medication is equivalent to “an affirmative act designed to cause death.” Thus, the court explained that its prior decisions concerned only the rejection of medical procedures, whereas the present case involved medical interference which will bring about death in a manner other than the “natural course of events.”

The court next focused its attention to whether Mr. Hall had a right to assisted suicide under the Privacy Clause of the Florida Constitution. It is evident that the public policy of the State of Florida looks upon assisted suicide with disfavor. The court then concentrated on *Donaldson v. Van de Kamp* and explained that there are state interests in preserving the lives of those persons who desire to live, and in protecting members of society

186. *Krischer*, 697 So. 2d at 102.
187. See *In re Dubreuil*, 629 So. 2d 819, 828 (Fla. 1993); *In re Guardianship of Browning*, 568 So. 2d 4, 7–8 (Fla. 1990) (recognizing surrogate asserted right of woman who was vegetative but not terminally ill to remove nasogastric feeding tube); *Public Health Trust v. Wons*, 541 So. 2d 96, 97 (Fla. 1989) (holding that a mentally competent individual may refuse blood transfusions for religious reasons); *Satz v. Perlmutter*, 379 So. 2d 359, 360 (Fla. 1980) (recognizing that a patient may withdraw life-sustaining medical treatment).
188. *Krischer*, 697 So. 2d at 102. The American Medical Association described the distinction by stating:

When a life-sustaining treatment is declined, the patient dies primarily because of an underlying disease. The illness is simply allowed to take its natural course. With assisted suicide, however, death is hastened by the taking of a lethal drug or other agent. Although a physician cannot force a patient to accept a treatment against the patient’s will, even if the treatment is life-sustaining, it does not follow that a physician ought to provide a lethal agent to the patient. The inability of physicians to prevent death does not imply that physicians are free to help cause death.

*Id.* at 102–03 (quoting AMA Council on Ethical and Judicial Affairs, Report I-93-8, at 2).
189. *Id.* at 100. See FLA. STAT. ch. 782.08 (1995) (banning assisted suicide); see also FLA. STAT. ch. 458.326 (1995) (allowing pain treatment but barring euthanasia and mercy killing).
190. *Krischer*, 697 So. 2d at 100.
from abuse. Several Florida organizations which are highly opposed to assisted suicide filed *amicus* briefs in regard to this matter. There is the concern that persons with physical and mental disabilities will be exposed to undue influence as well as mistake. The court mentioned the New York State Task Force on Life and the Law, which had framed the risks associated with the legalization of assisted suicide. The court concluded that the State of Florida’s interests “clearly outweigh” any benefit which would arise from permitting assisted suicide. First, because the state has “an unqualified interest in the preservation of life,” the state must prevent the “affirmative destructive act” of allowing a physician to administer a “death producing agent” with the intent of causing certain death. Second, the state has “a compelling interest in preventing suicide,” and must protect those individuals who may be affected by mistake or pressure to commit suicide. Moreover, research has demonstrated that there are a great deal of individuals who have requested assisted suicide, but who would retract their requests if they received adequate pain management and treatment for depression. Finally, the state has an interest in preserving the integrity of the medical profession

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192. Krischer, 697 So. 2d at 101 (quoting Donaldson v. Van de Kamp, 4 Cal. Rptr. 2d 59, 63 (Cal. Ct. App. 1992) (holding that “the nature of Donaldson’s right of privacy” cannot be extended to “provide a protective shield for third persons who end his life”)).

193. Id. at 102. The following organizations strongly object to assisted suicide: the Advocacy Center for Persons with Disabilities, Inc.; the American Disabled for Attendant Programs Today; Not Dead Yet; and the National Legal Center for the Medically Dependent and Disabled, Inc. Id. The Advocacy Center, in its *amicus curiae* brief, stated that “[i]f assisted suicide is permitted in Florida, Floridians will be put on the so-called slippery slope of determining the relative value of life.” Id.

194. Id.

195. Krischer, 697 So. 2d at 101. The task force grouped the following risks:

(1) undiagnosed or untreated mental illness; (2) improperly managed physical symptoms; (3) insufficient attention to the suffering and fears of dying patients; (4) vulnerability of socially marginalized groups; (5) devaluation of the lives of the disabled; (6) sense of obligation; (7) patient deference to physician recommendations; (8) increasing financial incentives to limit care; (9) arbitrariness of proposed limits; and (10) impossibility of developing effective regulation.

Id. (citation omitted).

196. Id. at 103.

197. Id. In *Perlmuter*, the Supreme Court of Florida distinguished the removal of a respirator from an “unnatural death by means of a ‘death producing agent.’” Id. (quoting Satz v. Perlmuter, 362 So. 2d 160, 162 (Fla. 4th Dist. Ct. App. 1978)).

198. Krischer, 697 So. 2d at 103.

199. Id. (citations omitted).
The court explained that principal healthcare associations are unified in objecting to physician-assisted suicide and posed the question: "Who would have more knowledge of the dangers of legalizing assisted suicide than those intimately charged with maintaining the patient's well-being?" Furthermore, the court reasoned that the "Hippocratic Oath" itself illustrates that physician-assisted suicide is completely incompatible with a physician's purpose. The oath states that a physician "will neither give a deadly drug to anybody if asked for it, nor... make a suggestion to this effect." The court concluded that it does "not hold that a carefully crafted statute authorizing assisted suicide would be unconstitutional," and explained that if the court viewed the Privacy Amendment of the Florida Constitution to include a right to assisted suicide, it "would run the risk of arrogating to [themselves] those powers to make social policy that as a constitutional matter belong only to the legislature."

V. CONFLICTS WHICH REQUIRE RESOLUTION

A. Liberty Interest According to History and Tradition

1. Distinguishing Casey

In Washington v. Glucksberg, the majority opinion examined the nation's legal history and tradition and found that because suicide and assisted suicide have always been looked upon with disfavor, as evidenced by prohibition laws, there was no liberty interest in the right to die by the hand of a physician. It is interesting to note that many states outlawed abortion until the decision of Roe v. Wade, but yet a liberty interest was found with respect to a woman's right to terminate her pregnancy.

200. Id.
201. Id. at 104. These organizations include: the American Medical Association, the Florida Medical Association, the Florida Society of Internal Medicine, the Florida Society of Thoracic and Cardiovascular Surgeons, the Florida Osteopathic Medical Association, the Florida Hospices, Inc., and the Florida Nurses Association. Id.
202. Krischer, 697 So. 2d at 104.
203. Id. (citation omitted).
204. Id. (citation omitted).
205. Glucksberg, 117 S. Ct. at 2263 (citation omitted).
The decision of a woman to have an abortion affects not only the life of the mother but also the life of the fetus. In that situation, there is more than one interest at stake and yet the Supreme Court has still declined to protect the liberty interest of the fetus which appears to be stronger than a mother's right to seek an abortion. In the case of assisted suicide there is one life involved which can "voice his or her wishes," as opposed to abortion where there is the unspoken voice of potential life. It seems unreasonable and illogical to conclude that the right to determine one's own fate is not afforded that same protection. These terminally ill individuals are making decisions which affect their own lives and there is the absence of other interests; that is, the fetus or potential life. As the United States District Court for the Western District of Washington pointed out in *Compassion in Dying*, there is surely a stronger argument with respect to the right to die issue.

Furthermore, the *Casey* Court found that "physicians are fit assistants" concerning the decision to abort potential life. It is interesting to note that the abuses associated with assisted suicide are similar to those associated with abortion; that is, irresponsibility and undue influence from others. The *Roe* Court found that the liberty interest in terminating a woman's pregnancy would have resulted in "self-mutilation" if a woman were not permitted to enlist the assistance of a physician. Following this reasoning, terminally ill patients who are denied the assistance of a physician will surely resort to other "crude methods" of dying, as exemplified in the plaintiffs' case where a physician's terminally ill patient, who was denied assistance, requested a loved one to help him in jumping from a bridge. It is enough that family members have to watch their loved ones both suffer and lose all sense of dignity; however, it is even more appalling that these family members are now forced into awkward and difficult situations in providing assistance.

To further illustrate this point, it is disturbing to note that a Florida company is offering something called an "Exit Bag" kit to assist in

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208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
213. *Glucksberg*, 117 S. Ct. at 2288 (citation omitted).
214. *Id.*
215. *Id.*
For thirty dollars, terminally ill individuals can purchase a durable plastic bag with a soft elastic neckband and Velcro clasps. For an additional ten dollars, these individuals can purchase a book which describes exactly how to commit suicide. Even for right to die organizations such as Washington's Compassion in Dying, this concept is horrifying. Denying terminally ill patients the right to assisted suicide forces these individuals to consider hideous measures such as the “Exit Bag.”

There comes a time when a physician has exhausted all possibilities to cure his patient. The doctor’s role should then transform into that of making the patient more comfortable. Physicians are more qualified and better able to comfortably treat their patients during these excruciatingly painful periods of terminal disease. If treatment should include complying with a mentally competent person’s desire to die, then that individual should have the right to control his own life.

2. Distinguishing Cruzan

In Cruzan, the United States Supreme Court recognized a liberty interest to refuse unwanted medical treatment protected by the Fourteenth Amendment of the United States Constitution. In that case, the legal history and tradition was grounded in the fact that coerced medical treatment was always considered a battery. Likewise, in Compassion in Dying, the majority in the Ninth Circuit explained that there has never existed a right to have another “enslave you, mutilate you, or kill you.” What physicians would actually do is prevent harm by respecting the wishes of their patients when both the physician and patient have faced the reality that there is absolutely no chance for recovery. Physicians are looking out for their patients’ best interests in relieving their agonizing pain and loss of dignity. As Justice Souter eloquently explained in Glucksberg, a physician is not simply “a mechanic of the human body,” but he is “one who ministers to the patient.” The physician provides comfort and support for the patient even when all hope is lost with respect to a chance for recovery. The “Hippocratic Oath,” which states that a physician will not administer a

218. Id. at 12A.
219. Id.
220. Id.
222. Glucksberg, 117 S. Ct. at 2770.
223. Compassion in Dying, 49 F.3d at 594.
224. Glucksberg, 117 S. Ct. at 2288 (citations omitted).
deadly drug, was written on the basis of outdated medicine and not on the medical technological advancements which have occurred to date. Consequently, patients are able to live longer than they would have absent this technology. Thus, to argue that there is a distinction between the refusal of life-sustaining measures which allow the natural progression of death and the affirmative act of intending to cause death by lethal medication is groundless in common sense. Absent these technological breakthroughs, patients would be able to let their diseases take a natural course. However, due to medications which prolong life, terminally ill patients are living longer, thereby suffering miserably. Although there has been a great deal of discussion concerning this distinction, both acts produce the same result. In both cases, medical personnel are intending to bring about death. In the case of the withdrawal of medical treatment, the physician is certain that artificial means are the only sustenance for their patient and that if these medical procedures are terminated, the patient will surely die. In the case of physician-assisted suicide, doctors are carrying out their patients’ wishes by providing medication which will bring about their death. There is no doubt about the intended result. In both cases, the physician is carrying out the directive of the patient and causing that patient’s death.

Another troubling aspect of the right to die issue is that terminal sedation is already permitted in New York and Washington; that is, physicians are empowered to provide dosages of medication which alleviate pain, but at the same time cause the patients’ death to occur prematurely. Most of the time, the levels of painkilling medication which will mitigate the dying patient’s pain will result in unconsciousness and ultimately, a shortened death. It is ludicrous that physicians are able to provide these medications while fully aware of the consequences of a hastened death, yet the Supreme Court declines to recognize a right to avoid the agonizing and humiliating period which patients must endure before their impending death arrives.


226. Id.


228. Brief for Petitioner at 12, Glucksberg (No. 96-110).

229. Krischer v. McLver, 697 So. 2d 97, 102-03 (Fla. 1997).

230. Glucksberg, 117 S. Ct. at 2311 (Breyer, J., concurring) (citation omitted).

231. Id.

232. Id.
B. State Interests are Insufficient to Outweigh Individual Liberty

Several state interests have been found to outweigh any individual notion of liberty with respect to physician-assisted suicide. The first argument which asserts that the state has an unqualified interest in preserving life, is carelessly flawed. As Justice Stevens explained in his concurring opinion in Glucksberg, the state already has the power to place different values on human lives in the context of criminals facing the death penalty. The state cannot claim that there is an "absolute requirement that a State treat all human life as having an equal right to preservation" because it has already devalued the lives of a certain group of persons by allowing the death penalty. Furthermore, just as there are limitations and safeguards imposed in capital punishment cases, there should be no concern for assigning lesser values on terminally ill persons who wish to end their own lives. By authorizing capital punishment, the State of Washington has in essence already conceded that there will be times when the state will assign lesser values on human life. It is utterly absurd to believe that a state has an absolute obligation to treat all life on an equal playing field.

Second, preserving both the integrity of the medical profession and the physician's traditional role as a healer were found to be significant state interests. The "Hippocratic Oath" states that the physician "will prescribe regimen for the good of [his] patients according to [his] ability and [his] judgment and never do harm to anyone. To please no one will [he] prescribe a deadly drug, nor give advice which may cause his death." Although it may appear that this solves the dilemma of whether a physician would be contradicting his oath, it is not so simple. If one were to read on, he or she would find that the "Hippocratic Oath" further states that "[n]or will [he] give a woman a pessary to procure abortion." It seems that the "Hippocratic Oath" is inapplicable to the current law in that physicians may perform abortions and not face criminal liability. Furthermore, the "Hippocratic Oath" specifically states that a physician will use his judgment in determining the best treatment for his patient and that the physician "will

233. Id. at 2272–74.
234. Id. at 2272–73.
235. Glucksberg, 117 S. Ct. at 2304 (Stevens, J., concurring).
236. Id.
237. Id.
238. Id. at 2305.
239. Id. at 2273.
240. Konner, supra note 225, at viii.
241. Id.
enter [houses] only for the good of [his] patients." It hardly benefits a mentally competent incurable person who is experiencing excruciating pain, loss of dignity, and humiliation, to deny them the right to assisted suicide. To deny this right to dying persons is to strip them of their autonomy and thwart their ability to make decisions which affect "intimate and personal" matters.

Third, to address the concern that vulnerable persons, including the elderly, handicapped, and economically disadvantaged, will be subject to mistake, abuse, or pressure, the legislature must carefully formulate a statute which provides limitations and safeguards for assistance with suicide in the case of mentally competent, terminally ill individuals. Justice Souter's concurring opinion in Glucksberg, properly suggests that the legislature should deal with these situations because it is not a matter for the judiciary.

VI. CONCLUSION

Nothing could be more devastating than to endure the suffering and humiliation which accompanies a terminal illness. The ultimate fate of these patients' lives are put in hands other than their own and they are left without recourse.

The solution is for state legislatures to formulate detailed statutes which outline the procedures a terminally ill patient must undergo in order to have assistance from a physician in committing suicide. State legislatures should use the following seven criteria as a guideline in formulating a statute:

1) the decision must be a voluntary one that the patient repeatedly initiates;
2) the patient must be competent and capacitated;
3) the patient must be suffering from an incurable disease;
4) the physician must know that the patient is not suffering from inadequate comfort care;
5) there must be a meaningful relationship between the doctor and the patient;

242. Id.
244. Compassion, 850 F. Supp. at 1465.
245. Glucksberg, 117 S. Ct. at 2293.
246. Id.
6) second opinions are necessary prior to the assistance in suicide; and

7) clear documentation that the above criteria have been satisfied is both prudent and ethically mandatory. 247

Carefully constructed statutes, which incorporate the above procedures and further require clear and convincing evidence that terminally ill individuals have satisfied these requirements, are the only answer. State legislatures must devise safeguards to ensure that abuse is prevented and that only those individuals who satisfy the prerequisites receive assistance in ending their pain and suffering. The State has a significant interest in protecting vulnerable individuals, and these cautiously formulated statutes will provide the necessary protection.

Nicole Testa

247. BRENDAN MINOGUE, BIOETHICS: A COMMITTEE APPROACH 81 (1996) (citation omitted); see also Compassion, 850 F. Supp. at 1458 (explaining the organization Compassion in Dying's stringent eligibility requirements).