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LIVE AND LET DIE?: PHYSICIAN-ASSISTED SUICIDE AND THE RIGHT TO DIE

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I. INTRODUCTION

The plight of the terminally ill is an issue defined by the ongoing struggle between technology and the law. As medical technology has become more advanced, it has achieved the capability both to prolong human life beyond its natural endpoint and to better define when that endpoint will occur. In many ways, this has proven to be a social benefit, as breakthroughs in organ transplants and the treatment of disease allow many to lead longer, healthier lives. But to a growing number of Americans suffering from terminal illness, medical technology can do no more than extend an already painful existence. In many cases, technology can do nothing for the terminally ill except predict when their deaths will occur.

State prohibitions of physician-assisted suicide force many terminally ill patients to make a difficult choice: either live out their remaining days in excruciating pain and indignity or seek out clandestine means of hastening death. More and more Americans will face this choice as lifespans increase and health benefits are limited by managed care organizations and the ever-increasing costs of health care.

Physician-assisted suicide is not a novel phenomenon. For years, doctors have quietly prescribed powerful pain-killing drugs for terminally ill patients with the implicit understanding that their patients would take them in a life-ending overdose.[1] According to a survey conducted by the American Society of Internal Medicine, one of five doctors reported assisting in a patient's suicide.[2] What was once medicine's little secret has been brought to the forefront of the public consciousness through the work of Dr. Jack Kevorkian and other doctors committed to the legalization of physician-assisted suicide. The actions of these physicians are motivated by a desire to ease their patients' suffering and by a belief in the individual's right to self-determination, specifically in choosing to end her life with dignity.

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1. *See* Julia Pugliese, Note, *Don't Ask — Don't Tell: The Secret Practices of Physician-Assisted Suicide*, 44 HASTINGS L.J. 1291, 1295 (1993).

2. *See* Note, *Physician-Assisted Suicide and the Right to Die with Assistance*, 105 HARV. L. REV. 2021, 2021 n.7 (1992) (citing Richard A. Knox, *One in Five Doctors Say They Assisted in a Patient's Death, Survey Finds*, BOSTON GLOBE, Feb. 28, 1992, at 5).

But the individual's right to self-determination clashes with the state's obligation to safeguard the lives of its citizens. Three states — New York, Washington, and Oregon — took different approaches to this problem. Legislators in New York and Washington passed statutes criminalizing assisted suicide, while Oregon voters passed a ballot initiative allowing doctors to prescribe a fatal drug dosage to end the life of a terminally ill, mentally competent adult. These approaches were subsequently challenged in the Second and Ninth Circuits.

This Note will examine the development of three significant assisted suicide cases in the Second and Ninth Circuits, *Compassion in Dying v. Washington*,[3] *Lee v. Oregon*,[4] and *Quill v. Vacco*.[5] Of these cases, *Compassion in Dying* is emphasized because of its controversial development of a broad new substantive due process right to die. First, I will analyze *Compassion in Dying*, paying particular attention to the District Court decision ("*Compassion in Dying I*"),[6] which lays the structural due process framework for the first Ninth Circuit panel ("*Compassion in Dying II*")[7] and the Ninth Circuit's groundbreaking en banc opinion ("*Compassion in Dying III*").[8] Second, I will introduce the Oregon District Court's decision in *Lee*, which has largely gone unnoticed, yet presents a formidable equal protection barrier to the statutory legalization of assisted suicide. Third, I will focus on the Ninth Circuit's en banc decision in *Compassion in Dying III*, which creates a "right to die" under the aegis of substantive due process doctrine. Fourth, I will discuss the alternative equal protection approach to the right to die offered by the Second Circuit in *Quill*. Finally, I will discuss issues left unresolved by both circuits and the potential for Supreme Court resolution of the question.

My central argument is that the Second and Ninth Circuits have overextended their judicial roles in attempting to eliminate legislative barriers to assisted suicide. Consequently, several logical flaws are apparent in their opinions. The Ninth Circuit, for example, attempts to create a substantive due process liberty interest in assisted suicide by creating inappropriate analogies to previous Supreme Court precedents on abortion (*Planned Parenthood v. Casey*[9]) and termination of life

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3. 850 F. Supp. 1454 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir. 1995), *rev'd*, 79 F.3d 790 (9th Cir. 1996) (en banc).

4. 891 F. Supp. 1429 (D. Or. 1995).

5. 80 F.3d 716 (2d Cir. 1996).

6. 850 F. Supp. 1454 (W.D. Wash. 1994) [hereinafter *Compassion in Dying I*], *rev'd*, 49 F.3d 586 (9th Cir. 1995), *rev'd*, 79 F.3d 790 (9th Cir. 1996) (en banc).

7. 49 F.3d 586 (9th Cir. 1995) [hereinafter *Compassion in Dying II*], *rev'd*, 79 F.3d 790 (9th Cir. 1996) (en banc).

8. 79 F.3d 790 (9th Cir. 1996) (en banc) [hereinafter *Compassion in Dying III*].

9. 505 U.S. 833 (1992).

support (*Cruzan v. Director, Missouri Department of Health*[10]), while ignoring a significant precedent limiting the further expansion of substantive due process (*Bowers v. Hardwick*[11]). The Second Circuit, on the other hand, says that no such liberty interest exists, yet in effect bases its equal protection clause analysis on the existence of just such an interest.

It is difficult to deny the emotional impulse to permit a limited amount of assisted suicide. It is dangerous, however, for the courts to create such permission through the manipulation of the Fourteenth Amendment, as this manipulation creates the potential for a limitless expansion of due process rights. Given that state legislatures are already moving toward a legalization of physician-assisted suicide, and that no person has ever been successfully prosecuted for assisted suicide in this country, there is no injustice present to warrant judicial intervention.[12]

II. *COMPASSION IN DYING*

Compassion in Dying is a Washington nonprofit organization that provides information, counseling, and emotional support to mentally competent, terminally ill adults who are contemplating suicide and to the families of these adults. The organization brought suit to challenge the constitutionality of the Washington statute proscribing assisted suicide,[13] and was joined by a group of three terminally ill patients and five physicians who regularly treat terminally ill patients.[14]

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10. 497 U.S. 261 (1990).

11. 478 U.S. 186 (1986).

12. *See* Timothy E. Quill, *Risk Taking by Physicians in Legally Gray Areas*, 57 ALB. L. REV. 693, 698 (1994); *see also* Catherine D. Shaffer, Note, *Criminal Liability for Assisting Suicide*, 86 COLUM. L. REV. 348, 358 (1986) (stating that from 1930 to 1985, no state court decisions on actual prosecution for assisted suicide appeared in any of the official state reporters); H. Tristram Engelhardt, Jr. & Michele Malloy, *Suicide and Assisting Suicide: A Critique of Legal Sanctions*, 36 SW. L.J. 1003, 1029 (1982) (stating that as of 1982, "no published American opinions . . . reported convictions of physicians for aiding, abetting, or assisting suicide").

13. The statute provides:

> (1) A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide.
>
> (2) Promoting a suicide attempt is a class C felony.

WASH. REV. CODE § 9A.36.060 (1995).

14. The district court's characterization of the individual plaintiffs, as of the time they brought the suit, is worth reproducing:

> Jane Roe is a 69-year-old retired pediatrician who had suffered since 1988 from cancer which has now metastasized throughout her skeleton. Although she tried and benefitted temporarily from various treatments including chemotherapy and radiation, she is now in the terminal phase of her disease. In November of 1993, her doctor referred her to hospice care.

A. Conflict: Compassion in Dying I *and* II

1. *Compassion in Dying I*: The Western District of Washington

Compassion in Dying was first heard in the Western District of Washington by Chief Judge Barbara Rothstein, who ultimately ruled in favor of the plaintiffs on summary judgment. Rothstein holds the Washington statute to be unconstitutional on two grounds: one, the statute constitutes an undue burden on the exercise of a constitutionally

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> Only patients with a life expectancy of less than six months are eligible for such care.
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> Jane Roe has been almost completely bedridden sice June of 1993 and experiences constant pain, which eventually becomes sharp and severe when she moves. The only medical treatment available to her at this time is medication, which cannot completely alleviate her pain. In addition, she suffers from swollen legs, bed sores, poor appetite, nausea and vomiting, impaired vision, incontinence of bowel, and general weakness.
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> . . . .
>
> John Doe is a 44-year-old artist dying of AIDS. Since his diagnosis in 1991, he experienced two bouts of pneumonia, chronic, severe skin and sinus infections, grand mal seizures and extreme fatigue. He has already lost 70% of his vision to cytomegalovirus retinitis, a degenerative disease which will result in blindness and rob him of his ability to paint. His doctor has indicated that he is in the terminal phase of the illness.
>
> John Doe is especially cognizant of the suffering imposed by a lingering terminal illness because he was the primary caregiver for his long-term companion who died of AIDS in June of 1991. He also observed his grandfather's death from diabetes preceded by multiple amputations as well as loss of vision and hearing. . . .
>
> James Poe is a 69-year-old retired sales representative who suffers from emphysema, which causes him a constant sensation of suffocating. He is connected to an oxygen tank at all times, and takes morphine regularly to calm the panic reaction associated with his feeling of suffocation. Mr. Poe also suffers from heart failure related to his pulmonary disease which obstructs the flow of blood to his extremities and causes severe leg pain. There are no cures for his pulmonary and cardiac conditions, and he is in the terminal phase of his illness.

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

All three patients died after the case began, two by the time of the *Compassion in Dying I* decision, the other prior to the date of the *Compassion in Dying II* decision. *See Compassion in Dying III*, 79 F.3d at 795.

Five physicians joined in the action, Dr. Harold Glucksberg, Dr. John P. Geyman, Dr. Thomas A. Preston, Dr. Abigail Halperin, and Dr. Peter Shalit. All regularly treat terminally ill patients and have received numerous requests from terminally ill, mentally competent patients in the final stages of their illnesses for assistance in hastening their deaths. *See id.*

protected liberty interest; and two, the statute violates the Equal Protection Clause of the Fourteenth Amendment.[15]

Rothstein's opinion can be divided into four parts: first, she identifies a constitutionally protected liberty interest in the right of the terminally ill to choose assisted suicide; second, she determines that the *Casey* "undue burden" standard, rather than the more stringent test of *United States v. Salerno*,[16] is the appropriate standard of review for the Washington statute; third, she applies the undue burden standard of analysis to determine that the statute unconstitutionally places a "substantial obstacle in the path of individuals seeking to exercise a constitutionally protected right";[17] and fourth, Rothstein finds an equal protection violation in the disparate treatment accorded to two groups of mentally competent, terminally ill adults, one group allowed to die from the removal of life support systems, and the other prohibited from dying other means.[18]

Rothstein begins her opinion by establishing an analogy between the Supreme Court's holding in *Planned Parenthood v. Casey*,[19] which identifies a constitutionally protected liberty interest in a woman's right to choose abortion, and the existence of a similarly protected liberty interest in the terminally ill person's right to choose suicide. She finds three sentences of the *Casey* opinion "highly instructive and almost prescriptive" and uses them to isolate the characteristics shared by both abortion and assisted suicide, noting that:

> "[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to 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

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15. *Compassion in Dying I*, 850 F. Supp. at 1467. Rothstein only chose to consider the claims briefed by the patient plaintiffs on summary judgment, as claims asserted by the physician plaintiffs and Compassion in Dying were not discussed in the plaintiffs' briefs on the parties' summary judgment motions. *Id.* at 1467.

16. 481 U.S. 739, 745 (1987) (holding that to prevail on a facial challenge to a statute, a plaintiff must establish that "no set of circumstances exists under which the Act would be valid").

17. *Id.* at 1464.

18. *Id.* at 1467.

19. 505 U.S. 833 (1992).

> attributes of personhood were they formed under compulsion of the State."[20]

Rothstein argues: "Like the abortion decision, the decision of a terminally ill person to end 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.'"[21] Therefore, the terminally ill possess a liberty interest in physician-assisted suicide just as pregnant women possess a liberty interest in abortion.

While this analogy between abortion and assisted suicide appears logical at first, it raises a dilemma upon further review. According to Rothstein's analogy, because assisted suicide involves a choice that satisfies the "personal dignity and autonomy" language in *Casey*, it should be accorded liberty interest protection. By extension of this rule, if any activity involves a choice central to personal dignity and autonomy, then it should be accorded liberty interest protection. There is no objective standard for determining what is central to personal dignity and autonomy, however, and we are therefore left with a purely subjective one. Rothstein's approach fails to limit the potential for extending a liberty interest to anything that could arguably involve a choice central to personal dignity and autonomy.

Rothstein provides another analogue for this claimed liberty interest in *Cruzan v. Director, Missouri Department of Health*,[22] which identifies a constitutionally protected liberty interest in a terminally ill patient's refusal of life-sustaining medical treatment.[23] She attempts to facilitate this analogy by eliminating the act/omission distinction between the affirmative act of assisted suicide by an "uncoerced, mentally competent, terminally ill adult" and the refusal or withdrawal of life-sustaining medical treatment at issue in *Cruzan*.[24] Both situations involve the "profoundly personal decision" made by a terminally ill person to end her suffering and "hasten an inevitable death" that Rothstein believes is central to the liberty interest protected by the Fourteenth Amendment.[25] Rothstein identifies this profoundly personal decision as a shared characteristic sufficient to infer a constitutionally protected liberty

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20. *Compassion in Dying I*, 850 F. Supp. at 1459 (quoting *Casey*, 505 U.S. at 851) (alteration in original).

21. *Id.* at 1459-60 (quoting *Casey*, 505 U.S. at 851).

22. 497 U.S. 261 (1990).

23. *Id.* at 278-79.

24. *Compassion in Dying I*, 850 F. Supp. at 1461.

25. *Id.* at 1461. Similarly, Justice O'Connor speaks of the patient's "deeply personal decision to reject medical treatment." *Cruzan*, 497 U.S. at 289 (O'Connor, J., concurring).

interest on behalf of mentally competent, terminally ill adults contemplating assisted suicide.[26]

Rothstein's elimination of the act/omission distinction is a highly disputable analytical move. A terminally ill patient has a constitutionally protected liberty interest in the refusal of life-sustaining medical treatment, even when the omission of such treatment would necessarily hasten death. The lethal dosage causes the patient's death, not the natural process of disease running its course. The artifical nature of medical treatment has been considered the touchstone for the patient's right to refuse.[27] Physician-assisted suicide has historically been distinguished, therefore, because there is no artificial life-sustaining medical treatment to refuse and the physician must take the active step of prescribing medication to hasten death. Critics of this reasoning argue that this act/omission distinction is irrelevant by expanding the time frame of both physician-assisted suicide and life support termination to look at the end result: the hastened death of terminally ill patients. Further, these critics argue that even termination of life support is an affirmative act, rather than an omission, as it requires the physician to actively disconnect the life-sustaining equipment. For example, no one would dispute that if an individual intentionally disconnected a patient's life support without authorization and the patient died, that individual could be tried for homicide.

Rothstein follows these two arguments, but is careful to couch them in the language of *Cruzan*. Assuming that such a liberty interest exists through the *Cruzan* analogy, Rothstein fails to limit its application. The "deeply personal decision" of *Cruzan* is as subjective as the choice "central to personal dignity and autonomy" in *Casey*; thus, as a sufficient condition for the application of a liberty interest, it is just as susceptible of being applied to anything remotely resembling an important life decision.

In the second and third parts of her opinion, Rothstein determines that the *Casey* "undue burden" standard of review should be applied,[28]

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26. *Id.* at 1462.

27. *Cruzan*, 497 U.S. at 269.

28. Rothstein concludes that "the *Casey* 'undue burden' standard controls in this case," focusing on the fact that "five of the Justices in *Casey* found the 'undue burden' standard to be appropriate." *Compassion in Dying I*, 850 F. Supp. at 1462.

The Supreme Court has offered two competing standards of review for state statutes facially challenged by a plaintiff in liberty interest cases. United States v. Salerno, 481 U.S. 739 (1987), holds that to successfully bring a facial challenge, plaintiffs must show that "no set of circumstances exists under which the [law] would be valid." *Id.* at 745 (1987). Five years after *Salerno*, however, Planned Parenthood v. Casey, 505 U.S. 833 (1992), created an undue burden standard for state statutes restricting a woman's right to abortion, holding that plaintiffs may successfully challenge the constitutionality of a statute by showing that it would "operate as a substantial obstacle" to the exercise of a constitutional right, thus

then applies an undue burden analysis to determine two issues: first, the state's interests in maintaining a statute prohibiting all assisted suicides; and second, whether such a prohibition "places a substantial obstacle in the path of individuals seeking to exercise a constitutionally protected right."[29] During the course of the litigation, Washington identified two interests furthered by its statute: the prevention of suicide and the protection of those at risk of suicide from undue influence by others who would aid them in the completion of the act.[30] Rothstein argues that the first interest, the prevention of suicide, has as its ultimate goal the continuance of life. Therefore, the statute is more appropriate for citizens for whom "suicide would abruptly cut life short" and cannot be furthered by prohibiting those already terminally ill from committing suicide.

Washington presented an interesting argument to support this first interest. The State argued that any exception to a total prohibition on assisted suicide would result in a "slippery slope," as societal attitudes toward suicide would gradually become more permissive, eliminating societal constraints on suicide and resulting in more suicides by the "temporarily depressed, distraught, or mentally disturbed."[31] Rather than address this argument directly, Rothstein attempts to bypass it, accepting "the general validity of the State's concern," but holding that the State's difficulty in defining necessary and permissible assistance "to honor terminally ill patients' protected liberty interest in hastening their death" is an insufficient excuse to completely proscribe the exercise of the constitutional right.[32]

Rothstein's response to the slippery slope argument is too cursory to sufficiently address the significance of the state's concern. Ultimately, the question of assisted suicide comes down to the desirability of life for

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constituting an "undue burden." *Id.* at 877.

Three circuits are split as to whether to apply the *Casey* standard to facial challenges to abortion statutes. The Fifth Circuit applied the *Salerno* standard in Barnes v. Moore, 970 F.2d 12 (5th Cir.), *cert. denied*, 506 U.S. 1013(1992), which involved a facial challenge to a Mississippi statute regulating abortion. The Third Circuit followed the *Casey* undue burden standard in Casey v. Planned Parenthood ("Casey II"), 14 F.3d 848 (3d Cir. 1994). The Eighth Circuit applied *both* the *Casey* and *Salerno* standards to the North Dakota Abortion Control Act (deeming it facially constitutional under both) but exhibited reservations about doing so: "[T]he continuing vitality of *Salerno* is at least an open question.... [However, we] do not see our role as attempting to divine the Court's present or future posture on this issue. It is enough that we simply wait further rulings of the Supreme Court to instruct us on the viability of the *Salerno* rule." Fargo Women's Health Org. v. Schafer, 18 F.3d 526, 529-30 (8th Cir. 1994).

29. *Compassion in Dying I*, 850 F. Supp. at 1464.

30. *Id.*

31. *Id.*

32. *Id.* at 1465.

the terminally ill, given their pain and loss of dignity in the final days and weeks of life. Ronald Dworkin, for example, argues that ability to define one's own meaning and manner of death is the prerogative of the sovereign individual. According to Dworkin, the argument that the state can impose its own view of when death is appropriate "assumes that a state has a detached interest in preserving human life, whatever the patient's own interests might be; it assumes that a state may require that people be kept alive out of respect for the intrinsic value or sanctity of life."[33] But by creating a right to assisted suicide, Rothstein is validating the choice to end one's life when it becomes too painful or undignified to continue. While she can restrict the judicial effect of such a validation to the terminally ill, it is impossible to limit the philosophical effect of such a validation to the rest of society. For anyone who wishes to infer it — the depressed adolescent, the cuckolded husband, the drug addict — there is a message that life may be ended once it seems too painful or undignified to continue. The ultimate extension of this inference is that once society deems that your life is not worth living, you may die.

Rothstein proceeds to address the second state interest, the prevention of undue influence and abuse. She attempts to evade this general concern by focusing on the particular facts in this case. While she finds the state's broad interest in preventing the coercion of the terminally ill by physicians, family members, and others "unquestionably" legitimate, she notes that the plaintiffs in this case are "mentally competent individuals," who have reached their decisions "free from any undue influence," thus falling "outside the realm of the State's concern."[34] Rothstein also attempts to bypass this argument by arguing that the risk of external influence and abuse is as great for a terminally ill patient requesting to be disconnected from a life support system — a decision permitted under Washington law — and could be even greater for incompetent patients for whom a surrogate is making the decision.[35]

Rothstein's focus on the particular facts of this case is illogical, considering the effect of the right granted in this case to the broad class

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33. RONALD DWORKIN, LIFE'S DOMINION 198 (Vintage Books 1994) (1993). Dworkin distinguishes this "detached" interest in human life from that state's "derivative" interest in ensuring that the individual's best interests are protected. *Id.* at 11-13. The derivative interest is so termed because it derives from the patient's own interests. Thus, Washington's assertion that its statute protects individuals from undue coercion is properly seen as embodying the state's derviative interest in preserving human life.

34. *Id.*

35. *Id. See* The Natural Death Act, WASH. REV. CODE §§ 70.122.010 *et seq.* (1995) (listing the legal requirements for executing a written directive refusing all life-sustaining medical treatment in the event of terminal illness or permanent unconscious condition); *see also In re* Guardianship of Grant, 747 P.2d 445 (Wash. 1987); *In re* Guardianship of Hamlin, 689 P.2d 1372 (Wash. 1984) (recognizing the right of a competent, terminally ill adult to refuse life-sustaining medical treatment).

of terminally ill adults. It is reasonable to assume that many terminally ill patients experience pressure from physicians, friends, and family members to end their lives through assisted suicide, given the extraordinary financial and emotional costs of treatment (not to mention the more venal economic motives of such parties). Such pressures would be amplified for those patients in a managed care setting, or for destitute patients unable to pay for pain-reducing treatments at all. With the aging of the American population,[36] the costs of caring for elderly patients lingering with terminal illness will undoubtedly increase, further increasing financial pressures on health care and government. Rothstein's approach fails to address these personal and social effects, instead choosing once again to rely on the *Cruzan* analogy. The logic of her ultimate argument is puzzling: Is she concluding that it is acceptable to have a potential for abuse in assisted suicide just because there is a potential for abuse in termination of life support cases?

Ultimately, Rothstein holds that the challenged statute operates as an unconstitional undue burden upon the liberty interests of the terminally ill: "[T]he challenged 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.[37] This prohibition is not justified by either of the state's two interests, as neither "would be impeded by allowing physician-assisted suicide for mentally competent, terminally ill adult patients."[38]

In the final part of her opinion, Rothstein determines that Washington's statute violates the Equal Protection Clause of the Fourteenth Amendment by denying some terminally ill patients the option of hastening death with medical assistance, when Washington state law permits other terminally ill patients — those requiring life-sustaining medical treatment — to obtain medical assistance in the termination of such treatment.[39] The state argues that no violation exists because death caused by the removal of life support is "natural," while death caused by the prescription and ingestion of lethal medication is "artificial," thus implicating the state's interests in preventing suicide.[40] However, Rothstein holds that such an artificial/natural distinction "is not a narrowly drawn classification tailored to serve a compelling state interest," and that both groups are similarly situated, focusing on elements shared by the two groups: "[Both] may be terminally ill,

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36. U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL BRIEF, SIXTY-FIVE PLUS IN THE UNITED STATES, SB/95-8 (1995).

37. *Compassion in Dying I*, 850 F. Supp. at 1465.

38. *Id.*

39. *Id.* at 1466.

40. *Id.*

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."[41] By imposing disparate treatment on groups similarly situated, the Washington law presents an equal protection violation.

There are two points worth mentioning about this final section of the opinion. First, the equal protection argument merely supplements Rothstein's primary due process argument. As the court noted in *Compassion in Dying III*, one constitutional violation is enough to strike down the statute.[42] If Rothstein intends this argument to support the court's judgment on appeal, in light of her controversial liberty interest argument, it is unclear how the two issues can be divorced. Second, the logical result of the first observation is that the strict scrutiny standard Rothstein is applying appears to arise from the fundamental rights aspect of equal protection doctrine, rather than application of the more traditional suspect-class doctrine to impose strict scrutiny.

From a technological standpoint, there *is* an artificial/natural distinction between those terminally ill patients who require life-sustaining treatment and those who do not. Life support equipment is intended to extend life beyond its natural endpoint; without it, the patient's body is incapable of sustaining itself and dies. Death is hastened only because it would have occurred naturally, were it not for the treatment. For terminally ill patients who do not require life-sustaining equipment, however, life has not reached its natural endpoint. While the period before death can be excruciatingly painful, medical technology in such cases can only serve to provide an *artificial* end to life. Death is hastened in this case through the introduction of a lethal dose of medication.

Rothstein's analysis dismisses this distinction by focusing on the ultimate end of both acts: the hastened death of the patient. For the terminally ill patient who depends on feeding and breathing tubes for survival, death is inevitably hastened once such life-sustaining treatment is terminated. Death is also hastened for the terminally ill patient who takes a fatal dose of medication. What Chief Judge Rothstein fails to recognize, however, is that the former patient's death would otherwise have occurred had there been no such treatment; the latter patient's death, however, would not have immediately occurred without the expediting medication.

Even assuming that no such artificial-natural distinction exists, Rothstein's argument begs the question of whether the two groups of terminally ill patients are indeed similarly situated. If Rothstein's earlier

41. *Id.*
42. *Compassion in Dying III*, 79 F.3d at 838.

Due Process analysis is correct, and all terminally ill patients enjoy a liberty interest in physician-assisted suicide, as they do in terminating unwanted life support, then the two groups appear to be similarly situated. But if Rothstein is incorrect in her analysis, and terminally ill patients do not possess a liberty interest in physician-assisted suicide, then regardless of the absence of an artificial/natural (or act/omission) distinction, the groups are not similarly situated with respect to the Due Process Clause. Therefore, both groups may not be entitled to equal treatment under the laws of Washington.

Finally, the question must be raised whether *Cruzan* should be read as broadly as Rothstein argues it should. Justice O'Connor's concurring opinion in *Cruzan*, on which Rothstein relies, does mention the constitutionally protected liberty interest in the individual's "deeply personal decision to reject medical treatment."[43] But the context of her opinion appears to be focusing on the freedom of the individual to resist the "State's imposition of medical treatment on an unwilling competent adult."[44] The cases cited by O'Connor in her opinion all involve affirmative, state-authorized medical invasions of unwilling individuals.[45] Washington's prohibition on assisted suicide is not an affirmative invasion of an unwilling individual's body of the kind described by O'Connor in *Cruzan*. And if Rothstein's analogy to *Cruzan*, which is based on the "deeply personal decision" concept, breaks down, then so does much of her argument in *Compassion in Dying I*.

2. *Compassion in Dying II*: The Ninth Circuit Panel

Seven months later, a three-judge Ninth Circuit panel heard oral arguments in the appeal of *Compassion in Dying I*. In a 2-1 decision, the Ninth Circuit reversed the lower court's decision.[46] Circuit Judge Noonan's majority opinion found fault with the District Court's analysis on seven grounds: first, Rothstein used the "personal dignity and autonomy" and "right to define one's own concept of existence" language in *Casey* out of context by applying it to assisted suicide;[47] second, Rothstein ignored language in *Cruzan* identifying the existence of statutory prohibitions on assisted suicide as evidence of a state's

43. Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 289 (1990) (O'Connor, J., concurring).

44. *Id.* at 288.

45. Two such cases stand out in particular. Rochin v. California, 342 U.S. 165 (1952), involved the forced stomach-pumping of someone suspected of ingesting drugs directly prior to the police's entry into his home. Winston v. Lee, 470 U.S. 753 (1985), involved a compelled surgical procedure into the individual's body to obtain evidence.

46. *Compasssion in Dying II*, 49 F.3d 586.

47. *Id.* at 590.

interest in the protection of human life;[48] third, Rothstein inappropriately created a constitutional right that has no historical precedence in any court of final jurisdiction;[49] fourth, Rothstein mistakenly applied the *Casey* undue burden test, when the *Salerno* rule should govern facial challenges to statutes;[50] fifth, Rothstein did not adequately consider Washington's interests, which individually and convergently outweigh any alleged liberty of suicide;[51] sixth, Rothstein's judgment was unnecessarily broad as it was rendered in favor of two dead plaintiffs and by depending on the uncertain meaning of the "terminally ill" category;[52] seventh, Washington's act/omission distinction between assisted suicide and termination of life support, criticized by Rothstein, should have been upheld because plaintiffs did not show that the legislature's distinction was irrational for purposes of equal protection.[53]

Noonan's opinion is quite cursory, given the controversial nature of this issue and the detail provided by Rothstein in *Compassion in Dying I* to support each of her points. Very little argument was given to support many of the seven grounds for reversal, and as a result, the opinion lacks substance. Noonan does, however, raise two arguments that merit further discussion.

Noonan's primary argument is that by linking the right of the terminally ill to commit assisted suicide to the "personal dignity and autonomy" and "right to define one's own concept of existence" language in *Casey*, the district court created an "inherently unstable" category of rights.[54] Any person who chooses suicide, whether terminally ill or healthy but depressed, could arguably be asserting their own concept of existence, personal dignity, and autonomy and would therefore, according to the district court's reasoning, possess a liberty interest in assisted suicide: "[I]f such liberty exists in this context . . . every man and woman in the United States must enjoy it. The conclusion is a *reductio ad absurdum*."[55]

Compassion in Dying I limited the liberty interest in assisted suicide to the terminally ill. Rothstein's abortion/assisted-suicide analogy concludes that the questions of personal dignity and autonomy involved in both abortion and assisted suicide are sufficient to identify a liberty interest in assisted suicide. Personal dignity and autonomy, therefore, is seen as the sufficient characteristic for the application of the liberty

48. *Id.* at 591.
49. *Id.*
50. *Id.*
51. *Id.* at 591-3.
52. *Id.* at 593.
53. *Id.* at 593-94.
54. *Id.* at 590-91.
55. *Id.* at 591.

interest. But because such a concept is so ambiguous, there is no objective standard with which to limit the application of the doctrine. Therefore, Noonan argues, if there is a liberty interest in assisted suicide, every person must possess it.

What Noonan fails to consider, however, is that the state's interest in the prevention of suicide might conceivably act as a more objective standard with which to limit the enjoyment of the liberty interest to the terminally ill; every person in the United States may possess the liberty interest, but only the terminally ill may use it to commit assisted suicide. This argument is raised later in *Compassion in Dying III* and will be discussed more critically later in this paper.

Noonan's final argument raises another relevant issue. The distinction between assisted suicide and termination of life support, he argues, arises from the "background of the law of torts and the law of criminal offenses against the person."[56] While tort law recognizes the right to be let alone — refusal of medical treatment falls under this right — neither tort nor criminal law have recognized a right to allow another to kill you. This distinction, he argues, is both right and reasonable.[57]

Noonan's support for this distinction conflicts not only with *Compassion in Dying I* and *III*, but also with Justice Scalia's concurrence in *Cruzan*. Scalia finds this type of distinction irrelevant to the constitutional question: "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.'"[58]

Noonan's cursory, normative approach limits the effectiveness of his argument. While some, like Noonan, would frame the refusal of medical treatment as part of a right to be left alone, others would frame it as allowing another, the physician, to kill you by disconnecting life support. *Cruzan* arguably creates a limited right to allow the physician to kill you, limited in that he or she may only kill you as a secondary but inevitable result of their removal of your life-sustaining treatment. By focusing on the instant act of terminating unwanted medical treatment, Noonan neglects to mention the broader, inevitable result of such an action: the patient's death.

Circuit Judge Eugene A. Wright's dissent begins by addressing the majority's contention that the asserted right to assisted suicide is "illimitable because it depends on the meaning of 'terminally ill.'"[59]

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56. *Id.* at 594.

57. *Id.*

58. Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 296-97 (1992) (Scalia, J., concurring) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *189).

59. *Compassion in Dying III*, 49 F.3d at 594 (Wright, J., dissenting).

Wright criticizes this argument because the majority is focusing on specifying the parameters of the right, rather than on the facts of this case: "The majority's 'depressed twenty-one year old' is not a party before us. The deceased plaintiff patients were terminally ill, mentally competent adults, entitled to be free from unwarranted state interference in their last days."[60] As in *Compassion in Dying I*, Wright attempts to ignore the broader ramifications of a right to assisted suicide by focusing on the particular facts of this case. But if the right asserted in *Compassion in Dying I* is based on such a subjective standard of "profoundly personal decisions" involving notions of "personal dignity and autonomy," then Wright might have better considered the grander implication of such a standard rather than simply disregard it.

Wright proceeds to follow the general structure of Rothstein's earlier opinion, while answering the attacks made upon it by the majority. He argues that the application of the "personal dignity and autonomy" language in *Casey* to assisted suicide "hardly amounts to 'an enormous leap' that does 'violence to the context,'" based on additional language contained in the same paragraph of *Casey*: "'Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.'"[61] Like Rothstein, he finds the act/omission distinction between assisted suicide and the refusal of life support to be illusory and supports the extension of a substantive due process right to assisted suicide.[62] Finally, Wright follows Rothstein's earlier opinion in finding an equal protection violation in the assisted suicide-refusal of life support distinction as applied to terminally ill, mentally competent adults.[63]

B. Confusion: Lee v. Oregon

While the Ninth Circuit appeared to have definitively ruled on the constitutionality of state statutes proscribing assisted suicide in *Compassion in Dying II*, *Lee v. Oregon*[64] raises a novel question: Can a state statute *permitting* assisted suicide be held constitutional? Oregon voters approved Measure 16, the Oregon Death With Dignity Act, in November, 1994. Measure 16 was a ballot initiative permitting a terminally ill adult to obtain a physician's prescription for a fatal drug dosage for the purpose of ending her life. Bringing suit in the District Court for the District of Oregon, an AIDS patient, a cancer patient, a nursing home,

60. *Id.* at 594-95.
61. *Id.* at 595 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)).
62. *See id.* at 596.
63. *See id.* at 597.
64. 891 F.Supp. 1429 (D. Or. 1995).

and a residential care facility challenged the constitutionality of Measure 16 on several grounds, including violations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[65]

In his opinion, Chief Judge Hogan applies an equal protection analysis to Measure 16, in contrast to the due process analysis adopted in *Compassion in Dying I* and *II*. Hogan's central argument is that Measure 16 creates a "severely overinclusive class" by failing to provide adequate safeguards to distinguish eligible, competent patients from ineligible, incompetent, or unduly influenced ones.[66] The statute neglects to provide safeguards recognized in other situations like "substituted judgment" (in termination of life support cases) or independently-chosen "qualified examiners" (in civil commitment procedures) to determine the competence of the patient. The attending physician has the sole responsibility to judge the patient's state of mind, yet is only held to a subjective "good faith" standard of care, rather than the objective "ordinary care" standard of the medical community.[67] Hogan fears that, in the absence of additional procedural safeguards and an objective standard of care for physicians, the terminally ill are at risk: "The physician is allowed to negligently misdiagnose a person's condition and competency and negligently prescribe a drug overdose, so long as those actions are in "good faith."[68] Given the difficulties inherent in diagnosing an illness as "terminal" and the potential for abuse and undue influence on the terminally ill, Hogan concludes that Measure 16 imposes disparate treatment on the terminally ill that is unrelated to any legitimate state interest and is therefore unconstitutional.

In spite of the different legal theory applied in this case, much of Hogan's opinion appears influenced by *Compassion in Dying II*. The concept of the "severely overinclusive class," for example, has its foundations in *Compassion in Dying II*, in Noonan's "*reductio ad absurdum*" argument.[69] Like Noonan, Hogan also fears that the legalization of assisted suicide would result in abuse and undue influence on the terminally ill.

It is unclear, however, whether *Lee* is meant to be a complete bar to state-sanctioned assisted suicide in Oregon, or whether it is simply a message to the state that a new measure, one that includes appropriate and adequate safeguards, would be acceptable under Hogan's equal protection analysis. The introduction to *Lee* appears to support the latter intention:

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65. *Id.* at 1431.
66. *Id.* at 1437.
67. *Id.* at 1436.
68. *Id.* at 1437.
69. *See supra* note 54 and accompanying text.

> Requiring that issues relating to physician-assisted suicide be addressed within constitutional limits does not frustrate the authority of citizens to govern themselves. To the contrary, it ensures the integrity of the voting process by recognizing the deeply imbedded constitutional principle that certain fundamental rights may not be dispensed with by a majority vote.[70]

Hogan is mindful of the potentially abusive effects of an assisted suicide law, especially one drafted as loosely as the Oregon one. But he also concedes the authority of the legislature to draft legislation that reflects the will of the people of Oregon. While some may read *Lee* as an outright ban on assisted suicide, a closer reading suggests that the case serves to warn legislatures of the pitfalls of loosely-drafted legislation in such a significant area.

While this introductory passage is highly instructive, Hogan is somewhat unclear as to what he means by "fundamental rights." Perhaps he means that the fundamental right to life is being dispensed with because of the lack of such safeguards? In addition, Hogan is unclear as to the standard of review that his test should apply to these fundamental rights. He purports to apply rational basis scrutiny to the Oregon statute,[71] but fundamental rights generally demand a strict scrutiny analysis. Finally, Hogan is unclear as to the scope of his holding. What would prevent Oregon from passing a new law permitting anyone to commit assisted suicide? Such a statute would not create disparate treatment among similarly situated groups, since the problems of over- and under-inclusion are eliminated. If Hogan intended *Lee* to warn legislatures to include safeguards in assisted suicide legislation, he should have been more clear about this point and should not have clouded it in the vagaries of this equal protection argument.

C. The En Banc Rehearing: Compassion in Dying III

The Ninth Circuit, convinced of the importance and divisiveness of the assisted suicide issue, decided to rehear *Compassion in Dying* en banc. In an 8-3 decision, the court affirmed Chief Judge Rothstein's decision in *Compassion in Dying I*. The majority opinion, written by Circuit Judge Stephen Reinhardt, can be divided into four sections: first, Reinhardt identifies a constitutionally protected liberty interest "in controlling the time and manner of one's death";[72] second, he identifies

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70. *Lee*, 891 F. Supp. at 1431.
71. *Id.* at 1432.
72. 79 F.3d 790, 816 (1996) (en banc).

the state's interests in preventing assisted suicide and their impact on the individual's liberty interest;[73] third, he applies a due process balancing test to determine that the Washington statute is unconstitutional "as applied to terminally ill competent adults who wish to hasten their deaths with medication prescribed by their physicians";[74] finally, he holds that Judge Hogan clearly erred in the *Lee* opinion, so *Lee* does not present a legal obstacle to the Court's holiding.[75]

Reinhardt's first section, which determines whether a liberty interest exists, begins by citing several guiding precepts. The choice of these precepts is telling because they provide the analytical foundation for Reinhardt's opinion. The first is taken from *Roe v. Wade*,[76] and invokes its creation of another substantive due process right. The second, from Justice Harlan's dissent in *Poe v. Ullman*, identifies "the full scope of the liberty guaranteed by the Due Process Clause" as "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."[77] The third, from Justice Brandeis' classic dissent in *Olmstead v. United States*, argues that the framers of the Constitution "conferred, as against the government, the right to be let alone — the most comprehensive of rights, and the right most valued by civilized men."[78] Reinhardt's clear message is that this "new" right to die is not new at all, rather a natural progression of Harlan's rational continuum, as in *Roe*, one which sustains Brandeis' vision of the framers' intent by creating a right to be let alone.

Reinhardt then attempts to provide a definition of the liberty interest at issue here. Unlike *Compassion in Dying I* and *II*, Reinhardt chooses to broaden the scope of this liberty interest beyond assisted suicide:

> While some people refer to the liberty interest implicated in right-to-die cases as a liberty interest in committing suicide, we do not describe it that way. We use the broader and more accurate terms, "the right to die," "determining the time and manner of one's death," and "hastening one's death" for an important reason. The liberty interest we examine encompasses a whole range of acts that are generally not considered to constitute "suicide." Included within the liberty interest we examine, is for example, the act of refusing or terminating unwanted medical treatment.

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73. *Id.* at 816-32.
74. *Id.* at 837.
75. *Id.* at 838.
76. 410 U.S. 113 (1973).
77. 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).
78. 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

> . . . Moreover, as we discuss later, we have serious doubts that the terms "suicide" and "assisted suicide" are appropriate legal definitions of the specific conduct at issue here.[79]

Rather than analogize the *Cruzan* liberty interest in termination of life support to assisted suicide, as the District Court did in *Compassion in Dying I*, Reinhardt chooses to expand the concept of the liberty interest to encompass both types of conduct. This avoids some of the dangers of a subjectively-based analogy described earlier, but is it true to the holding in *Cruzan*?

Unlike *Compassion in Dying I* and *II*, which focused on the asserted existence of a constitutionally protected liberty interest in physician-assisted suicide, Reinhardt argues that the liberty interest is in the individual's right to determine the time and manner of their death — a truly comprehensive right to die. This would therefore extend protection to the individual's choice of assisted suicide as a means of causing death. Such an approach would inevitably draw criticism, as the interest recognized in *Cruzan* was framed as an individual's right to refuse life-sustaining measures, rather than as this broader right to die.[80] In addition, such a right to die, left unrestricted, would arguably lend greater credence to the slippery slope argument discussed in *Compassion in Dying II*. Reinhardt's dilemma is that he must extend the liberty interest to encompass a broader right to die, but has to limit such an interest to prevent abuse and to reject the idea that the right will be all-encompassing.

To resolve this dilemma, Reinhardt begins by framing this liberty interest as a substantive due process interest. This is important for several reasons. First, substantive due process interests are protected by a heightened standard of review: for some interests, a strict scrutiny analysis; for others, like abortion, the "undue burden" analysis identified in *Casey*. Therefore, such interests may be statutorily restricted by a compelling governmental interest, helping to prevent the overexpansion of a right to die.

Second, by classifying this new and controversial right to die as a substantive due process right, Reinhardt attempts to remain consistent with the Supreme Court, which he believes has adopted a due process approach similar to Justice Harlan's rational continuum of liberty.[81] This continuum approach was supported by the Court in *Casey*,[82] but had been previously rejected by some members of the court in favor of the

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79. *Compassion in Dying III*, 79 F.3d at 802.
80. *See* Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990).
81. *Compassion in Dying III*, 79 F.3d at 803-04.
82. 505 U.S. at 848-50.

specific approach articulated by Justice Scalia in *Michael H. et al. v. Gerald D.*:[83]

> We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult and (if possible) reason from, the traditions regarding natural fathers in general.[84]

Support for Harlan's continuum approach is not as clear as Reinhardt would believe.

Finally, because there are no definitive criteria for deciding whether or not a substantive due process interest exists under the Due Process Clause,[85] Reinhardt does not have to show that a right to die existed at the time the Fourteenth Amendment was enacted. To support this latter contention, he cites *Casey* and *Loving v. Virginia*,[86] cases creating substantive due process liberty interests in abortion and marriage, as examples of cases that would have been decided differently "[w]ere history our sole guide,"[87] given that abortion and miscegenation were not permitted in 1868 when the Fourteenth Amendment was adopted.

After providing support for this substantive due process interest, Reinhardt attempts to provide historical support for a right to die. He chronicles historical attitudes toward suicide from the Greek and Roman civilizations to the turn of the twentieth century. This chronology suggests that our society's aversion to suicide is an anomaly, largely a product of the early Christian Church's attempt to end the self-martyrdom of its members and the effect of this crusade on English common law.[88] And even while suicide remains a societal taboo in America, the "majority of states have not criminalized suicide or attempted suicide since the turn of the century."[89]

This chronology is too similar to the historical analysis contained in *Roe v. Wade*[90] to be coincidental. The *Roe* court used a historical analysis to show that laws "proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant

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83. 491 U.S. 110 (1989) (opinion of Scalia, J.)
84. *Id.* at 127-28 n. 6.
85. *Id.*
86. 388 U.S. 1 (1967).
87. *Compassion in Dying III*, 79 F.3d at 805.
88. *See id.* at 806-09.
89. *Id.* at 809.
90. 410 U.S. 113 (1972).

woman's life, are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century."[91] Reinhardt's opinion once again clings close to the fabric of *Roe*, seeking strength in its emulation of the established precedent. But how established is the *Roe* precedent, considering the changes in the Court's view of abortion in *Casey* and its predecessors?

This chronology might also be an attempt at an Establishment Clause argument that the prohibition of assisted suicide is the result of the institutionalization of Christian religion. Reinhardt does not press this point further, but his clear implication is that our society has been influenced by a prohibition on suicide that was originally intended to prevent martyrdom over fifteen hundred years ago.

Reinhardt then moves to address America's current attitude toward assisted suicide. To support his argument that there is popular support for permitting physicians to aid patients in their deaths, Reinhardt cites several polls which report that a majority of Americans support physician-assisted suicide for the terminally ill,[92] and then proceeds to mention the victory of Oregon's Measure 16 in the voter referendum and the narrow defeats of similar measures in Washington and California.[93] He then argues that advances in medical technology have conquered and controlled illness and disease to the point where Americans live longer, "and when they finally succumb to illness, [they] linger[] longer, either in great pain or in a stuporous, semi-comatose condition that results from the infusion of vast amounts of pain killing medications."[94] Reinhardt concludes that the right to die is an "inevitable" consequence of improvements in medical technology.[95]

Reinhardt's use of polling data in his argument is highly disturbing. Are we to assume that courts faced with such complex constitutional issues should look to the polls for answers? We have generally come to assume that the role of the Bill of Rights is to make up for the flaws of representative government and provide a charter of fundamental rights

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91. *Id.* at 129.

92. *Compassion in Dying III*, 79 F.3d at 810. *See generally* David Cannella, *Physician-Assisted Suicide, Fight Rages in Several States: Issue Expected to Go to the Supreme Court*, ARIZ. REPUBLIC, May 13, 1995; Sanford H. Kadish, *Letting Patients Die, Legal and Moral Reflections*, 80 CAL. L. REV. 857, 860 n.16 (collecting sources), 861 n. 22 (citing *Euthanasia Favored in Poll*, N.Y. TIMES, Nov. 4, 1991, at A16); Robert L. Risley, *Voluntary Active Euthanasia: The Next Frontier, Impact on the Indigent*, 8 ISSUES IN L. & MED. 361, 365 (1992).

93. *Compassion in Dying III*, 79 F.3d at 810. Both the Washington and California measures drew 46% of the vote. *See id.*

94. *Id.* at 812.

95. *Id.*

that individual citizens should have against the state in any society.[96] Looking to polling statistics for a majority opinion makes the court into a supra-legislative body, using its own conception of the majority will to affirm or reverse acts of the legislature. This accomplishes neither of the goals of the Bill of Rights, as the court itself both assumes the role of legislature and fails to maintain the Bill of Rights as a tool of the individual to protect against abuses of power by a majority-supported government.

Reinhardt's discussion of medical improvements as a basis for the right to die is equally disturbing. He seems to argue that prior to the advent of today's medical technology, terminally ill patients did not linger in great pain or in a semi-comatose condition. Just because the average life expectancy has increased over time does not mean that the final stages of terminal illness have become more painful. Even though many of the "fast-killing" diseases like scarlet fever have been eradicated in the United States, leaving behind the "slower-killing" ones, is that an argument for a right to die that would apply to any terminally ill patient, whether suffering from a "fast-killing" disease or a slow one?

In the final part of this first section, Reinhardt argues that prior Supreme Court decisions delineating the boundaries of due process lend general support for this right to die. These cases are all similar in that "they involve decisions that are highly personal and intimate, as well as of great importance to the individual. Certainly, few decisions are more personal, intimate or important than the decision to end one's life, especially when the reason for doing so is to avoid excessive and protracted pain."[97]

As in the district court opinion, Reinhardt finds additional analogous support for a constitutionally-protected right to die in *Casey* and *Cruzan*. He cites the same "personal dignity and autonomy" passage in *Casey* relied upon by Judge Rothstein to conclude that a terminally ill patient's decision to "endure or avoid" such a painful and pleasureless existence surely "implicates a most vital liberty interest."[98] In addition, Reinhardt agrees with *Compassion in Dying I* that the recognition of a liberty interest in *Cruzan* that "includes the refusal of artificial provision of life-sustaining food and water" necessarily leads to the recognition of a liberty interest in hastening one's own death.[99]

The second section of Reinhardt's opinion addresses the relevant factors included in a due process analysis. He identifies five such

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96. *See* David A. Strauss, *The Role of a Bill of Rights*, 59 U. CHI. L. REV. 539, 548, 554 (1992).

97. *Compassion in Dying III*, 79 F.3d at 813.

98. *Id.* at 814 (citing Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)).

99. *Id.* at 816

factors: one, the "importance of the various state interests"; two, "the manner in which those interests are furthered by the state law or regulation"; three, "the importance of the liberty interest"; four, "the extent to which the interest is burdened by the challenged state action"; and five, "the consequences of upholding or overturning the statute or regulation."[100]

In discussing the first factor, the importance of the various state interests, Reinhardt identifies six such interests: the state's general interest in preserving life; its more specific interest in preventing suicide; its interest in avoiding the involvement of third parties and in precluding undue influence; its interest in protecting family members and loved ones; its interest in protecting the integrity of the medical profession; and its interest in avoiding adverse consequences that might ensue if the statute is declared unconstitutional.[101]

Reinhardt concludes that the state's interest in preserving life is "dramatically diminished" when the person it seeks to protect is terminally ill; in support of this, he notes that Washington law already places the rights of the terminally ill above the state's interest in preserving life by allowing terminally ill patients to refuse life-sustaining treatment.[102] Likewise, the state's interest in preventing suicide is diminished in the case of competent terminally ill adults, for whom the "decision to commit suicide is not senseless, and death does not come too early."[103] Reinhardt, like Rothstein and Wright before him, breaks down the act/omission distinction of assisted suicide and termination of life support, arguing that Nancy Cruzan "did not die of an underlying disease. Rather, she was allowed to starve to death."[104] The state's interest in preventing abuse and undue influence presents some "legitimate concerns," and Reinhardt holds that these concerns must be treated "seriously" when balancing the competing interests.[105] The state's interest in protecting family members and loved ones degenerates when applied to the terminally ill, as the "state cannot help . . . by forcing a terminally ill patient to die a more protracted and painful death."[106]

The state's interest in maintaining the integrity of the medical profession is not defeated by the recognition of a right to assisted suicide, given the numbers of assisted suicides already performed by physicians and the fact that a physician would maintain the ability to follow the

100. *Id.*
101. *Id.* at 816-17.
102. *Id.* at 817-18; *see also* WASH. REV. CODE § 70.122.010 (1995) (Washington statute permitting withdrawal of life-sustaining treatment).
103. *Id.* at 821.
104. *Id.* at 822.
105. *Id.* at 827.
106. *Id.*

"dictates of his conscience."[107] Finally, the state's interest in preventing adverse consequences that would follow the recognition of a right to die — the "slippery slope" argument — is an argument that "can be offered against any constitutionally-protected right or interest," but it has never been sufficient to defeat the recognition of a substantive due process right.[108] Similarly, while the question of defining the term "terminally ill" has its problems — as raised in *Compassion in Dying II* — it is "neither indefinable nor undefined."[109] Indeed, the Uniform Rights of the Terminally Ill Act and forty state natural death statutes either classify the term without reference to a fixed time period or define "terminal" to mean that death is likely to occur within six months.[110]

Reinhardt is attempting to use the state interest in preserving life as a more objective standard with which to control the application of this liberty interest. In *Compassion in Dying I*, such an objective standard was lacking, leading to the question of how to control the potentially abusive effects of recognizing such a liberty interest. Reinhardt appears to be implying that this state interest follows a sliding scale, strongest when the individual is young and healthy, weakest when the individual is closest to death. This would serve to allow states to enact legislation preventing suicide by the young.

Such an approach, however, remains dangerously subjective. In essence, the court is determining the value of the individual life, and allowing the state to do the same. Today, the Ninth Circuit has determined that the lives of the terminally ill are not sufficiently valuable for the state to prevent their suicide. But will a future court or state legislature determine that the lives of Americans over a certain age are also not sufficiently valuable, because of the costs endured by citizens of that age and by the state in supporting them? Reinhardt does not answer, perhaps because the rational continuum he depends on has not reached this stage yet. Then again, Justice Harlan may never have envisioned a right to die when drafting his dissent in *Poe*.

The remaining relevant factors are briefly addressed by Reinhardt. He concludes that Washington's current statute effectively prohibits the exercise of the right to die — forcing many terminally ill patients to attempt suicide without medical assistance and with potentially even more painful results — but that less stringent state regulation is a necessary and desirable means to ensure against errors and abuse.[111] The strength of the individual's liberty interest is at its peak when that person

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107. *Id.* at 830.
108. *Id.* at 830-31.
109. *Id.* at 831.
110. *Id.*
111. *Id.* at 832-33.

is terminally ill; therefore the statute's burden on that liberty interest is extreme, especially given the lingering deaths and suicide attempts of terminally ill patients.[112] Finally, Reinhardt warns that the right to die issue will continue to plague the courts, "[w]hatever the outcome here."[113] Given this earlier analysis, it is no surprise that after his balancing test, Reinhardt holds that the Washington statute is "unconstitutional as applied to terminally ill competent adults who wish to hasten their deaths with medication prescribed by their physicians."[114]

What is surprising is Reinhardt's treatment of *Lee*. In a one-paragraph statement, he states that:

> The Oregon District Court's reasoning conflicts squarely with the reasoning of this opinion and with the legal conclusions we have reached. . . . The benefit we conclude the terminally ill are entitled to receive in this case — the right to physician-assisted suicide — is precisely what Judge Hogan determined to be a burden and thus unlawful. In short, *Lee* treats a burden as a benefit and a benefit as a burden. In doing so, Judge Hogan clearly erred. *Lee* not only does not aid us in reaching our decision, it is directly contrary to our holding.[115]

Reinhardt apparently intends to reverse *Lee* with this opinion. But since he fails to provide a substantial analysis of *Lee* — and actually misreads the holding of *Lee* — he leaves several questions unanswered, as I will address in the next section.

Of the three dissents, Circuit Judge Kleinfeld's stands out for its reasoned discussion of substantive due process. Kleinfeld seeks to limit the expansion of due process rights to the popular issues of the day. Just because an issue is important, he argues, "does not imply that it is constitutional."[116] Kleinfeld recognizes the dangers of the subjective basis for the abortion-assisted suicide analogy, stating that the majority has used the language of *Casey* addressing "intimate and personal" choices "as a basis for constitutionalizing any really important personal decision."[117] The effect of such an approach — vesting such power in the courts — would be contrary to the intent of the Founding Fathers, who "did not establish the United States as a democratic republic so that

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112. *Id.* at 834-36.
113. *Id.* at 836.
114. *Id.* at 837.
115. *Id.* at 838.
116. *Id.* at 858 (Kleinfeld, J., dissenting).
117. *Id.*

elected officials would decide trivia, while all great questions would be decided by the judiciary."[118]

Kleinfeld follows Justice Scalia's concurring opinion in *Cruzan*,[119] arguing that a substantive due process claim can only be maintained when it involves a right traditionally or historically protected against state interference — suicide has neither traditionally nor historically been protected as such a right.[120] Kleinfeld, however, fails to address the majority's contention that other significant decisions, like *Loving v. Virginia*, would never have occurred had the Supreme Court followed an exclusively traditional approach, inexplicably failing to recognize that *Casey* emphatically the idea that historical analysis alone could define the contours of due process. The assisted suicide issue, Kleinfeld concludes, should properly be left to legislators, for even if it were a constitutionally protected right, "the State of Washington has a rational basis for preventing assisted suicide."[121] Kleinfeld's approach sufficiently addresses some of the problems of subjectivity and judicial legislation created by *Compassion in Dying I* and *III*.

III. *QUILL V. VACCO*

As in *Compassion in Dying*, *Quill v. Vacco*[122] involves a challenge to two state statutes that proscribed assisted suicide. *Quill*, however, uses an equal protection argument rather than a substantive due process argument in holding both statutes to be unconstitutional.

Circuit Judge Miner, writing for the unanimous court, rejects the substantive due process argument of *Compassion in Dying III* altogether, placing his primary emphasis on the Equal Protection Clause in holding New York's statutory proscriptions against assisted suicide unconstitutional. Echoing Rothstein's equal protection argument in *Compassion in Dying I*, Miner creates an analogy between those terminally ill patients on life support and those not on life support by eliminating the act/omission (or artificial/natural) distinction.[123]

In creating this analogy, Miner argues that both groups of terminally ill patients are similarly situated, yet New York chooses not to treat such similarly situated groups alike by permitting the termination of life support but prohibiting assisted suicide. Miner concludes that this

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118. *Id.*

119. Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 294 (1990) (Scalia, J., concurring).

120. *Compassion in Dying III*, 79 F.3d at 857 (Kleinfeld, C.J., concurring).

121. *Id.* at 858.

122. 80 F.3d 716 (2d Cir. 1996).

123. *Id.* at 729.

inequality of treatment is not rationally related to any legitimate state interest and holds the statutory prohibitions of assisted suicide unconstitutional.[124]

There is a serious logical flaw in Miner's reasoning in *Quill*. In the first part of his opinion, Miner argues that there is no substantive due process liberty interest in assisted suicide; yet, in the next section, he argues that both types of terminally ill patients are similarly situated. *Cruzan* holds that terminally ill patients on life support have a substantive due process liberty interest in terminating such life support. *Quill* holds that terminally ill patients who are not on life support do not have such a liberty interest. Therefore, the two groups of terminally ill patients are not similarly situated. One has a liberty interest in hastening death, the other does not. If there is no substantive due process liberty interest in assisted suicide, then a statute proscribing assisted suicide cannot violate the Equal Protection Clause. *Compassion in Dying I* does not make this same error, as Rothstein first found a substantive due process liberty interest in assisted suicide, then found the Equal Protection Clause violation.

IV. UNRESOLVED ISSUES

Where does *Compassion in Dying* leave us, especially given the Second Circuit's decision in *Quill* to follow an equal protection argument rather than a substantive due process argument? There appear to be three significant questions that have not yet been satisfactorily resolved. First, what is the effect of *Compassion in Dying* on substantive due process rights in general? Second, what is the role of the Equal Protection Clause in the assisted suicide debate, given its central role in *Quill* and *Lee*? Third, under what circumstances would the Supreme Court hear *Compassion in Dying* and *Quill*, and how might the Court hold?

A. Substantive Due Process

The effect of *Compassion in Dying III* on substantive due process rights has not been properly identified and limited. The Ninth Circuit holds that a right to die exists because it falls along a rational continuum of due process liberty interests, but it is unclear as to what characteristics are sufficient to warrant the creation of a substantive right and what factors exist to limit such a right. The Ninth Circuit does specifically state that "there is no litmus test for courts to apply when deciding

124. *Id.* at 730-31.

whether or not a liberty interest exists under the Due Process Clause,"[125] but that arguably makes the process entirely subjective, with no objective safeguards to protect against a veritable explosion in substantive due process rights. Since the Ninth Circuit admits that it is guided by the Court's approach to abortion cases in deciding right-to-die cases, must a potential substantive right involve "intimate and personal choices . . . central to personal dignity and autonomy" (as *Casey* and *Compassion in Dying I* would argue)?[126] As *Compassion in Dying II* and Kleinfeld's dissent in *Compassion in Dying III* revealed, that classification leads to a potentially explosive category of rights that need only fit under the rubric of personal dignity and autonomy.

In addition, the *Compassion in Dying III* majority failed to adequately address *Bowers v. Hardwick*,[127] in which the Supreme Court appears to restrict the expansion of substantive due process altogether:

> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.[128]

Hardwick would appear to directly challenge the Ninth Circuit's subjective approach to the creation of the right to die as exactly the kind of "judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution" the Court intended to repudiate.[129]

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125. *Compassion in Dying III*, 79 F.3d at 802.
126. *Id.* at 801 (citing *Casey*, 505 U.S. at 851).
127. 478 U.S. 186 (1986).
128. *Id.* at 194-95.
129. *Id.* at 194.

Indeed, the Second Circuit in *Quill* pays particular attention to the language of *Bowers* in deciding not to find a substantive due process right to die.[130] Miner states that a substantive due process right to assisted suicide would be antithetical to the Supreme Court's elucidation of the role of substantive due process in both *Hardwick* and *Palko v. Connecticut*[131]: "As in [*Hardwick*], the [substantive due process] right contended for here cannot be considered so implicit in our understanding of ordered liberty that neither justice nor liberty would exist if it were sacrificed."[132] There is a clear split between the Second and Ninth Circuits as to the current role of *Hardwick* in the creation of new substantive due process rights.

Has *Hardwick* been overruled by cases like *Cruzan* and *Casey*, as commentators have argued?[133] It depends upon how one interprets the two cases. If one interprets *Cruzan*, for example, as applying a liberty interest to all "deeply personal" decisions, then such an interpretation appears to contradict *Hardwick* because such a subjective standard is not embodied in the Constitution. If one interprets *Cruzan* as applying a liberty interest to the individual's right to reject intrusive, state-authorized medical procedures, however, then such a reading appears to follow the holding of *Hardwick* because such an interest is rooted in traditional conceptions of substantive due process — "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed."[134]

The danger of maintaining the subjective test of *Compassion in Dying III*, especially given its emphasis on Harlan's "rational continuum" of rights, can be stated as follows. Courts following the *Casey* and *Cruzan* analogies used in *Compassion in Dying I* and *III* would apply a liberty interest to any "deeply personal decision" reflecting notions of "personal dignity and autonomy," subject to the state's interest in regulating or proscribing such a decision. This test is inherently subjective, because it relies on the courts to determine the boundaries of the terms "deeply personal," "personal dignity," and "autonomy," as well as what constitutes a compelling state interest. Thus, courts have virtually unlimited power to determine which decisions fall within these subjective boundaries.

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130. *Quill*, 80 F.3d at 724-25.

131. 302 U.S. 319 (1937).

132. *Quill*, 80 F.3d at 724 (paraphrasing *Palko*, 302 U.S. 319, 325-26).

133. *See, e.g.*, David M. Smolin, Essay, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 MARQ. L. REV. 975, 979 (1992). *Cf.* CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION — A FIRSTHAND ACCOUNT 71-88 (1991) (arguing that the Court should overrule *Hardwick* on due process grounds).

134. *See Palko*, 302 U.S. at 325-26. *Quill*, 80 F.3d at 723-24.

What follows is a chicken and egg dilemma. Are certain acts accorded a liberty interest because society views them as deeply personal and the state has no interest in regulating them? Or does this initial judicial approval serve to increase the permissibility of similar acts in society and decrease the state's interest in regulating them, thus "watering down" social mores to allow the future application of liberty interests to such acts? At what point on this "rational continuum" would we realize that we were instead on an irrational "slippery slope," uncontrollably expanding due process rights?

B. The Equal Protection Dilemma

What role should the Equal Protection Clause play, if any, in the assisted suicide debate? The Second and Ninth Circuits are split on this issue in their assisted suicide opinions. While the Second Circuit places its primary emphasis on equal protection, the Ninth Circuit places its emphasis on substantive due process, choosing not to determine whether a positive right to assisted suicide could be crafted using the Equal Protection Clause. "One constitutional violation is enough," Reinhardt argues, "to support the judgment that we reach here."[135]

In overruling *Lee*, however, the Ninth Circuit does implicitly discuss the Equal Protection Clause, holding that it cannot be used to strike down a statute *permitting* assisted suicide. But the problems raised by *Lee* were not adequately addressed by the Ninth Circuit, which actually misinterprets the *Lee* opinion. Reinhardt states that "[t]he benefit that the Oregon District Court thought the terminally ill were being deprived of is an Oregon statutory prohibition making it a crime for anyone, including doctors, to assist any person, including terminally ill patients, to end their lives."[136] He concludes on the basis of this statement that the Oregon District Court's reasoning directly conflicts with that of the Ninth Circuit because the lower court sees the benefit, the right to physician-assisted suicide, as a burden.[137]

This analysis is incorrect and does injustice to the *Lee* opinion. The *Lee* plaintiffs argued that they were being deprived of several statutory protections, only one of which was the criminal prohibition against assisted suicide.[138] In its opinion, the Oregon District Court actually chose to focus on the deprivation of the *non-criminal* protections, including the "qualified examiners" used in civil commitment and the objective ordinary care standard of conduct applied to physicians, in

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135. *Compassion in Dying III*, 79 F.3d at 838.
136. *Id.* at 837-38.
137. *Id.* at 838.
138. *Lee*, 891 F. Supp. at 1433-34 n. 4.

striking down the Oregon Death With Dignity Act. *Lee* is not a prohibition of the right to die, instead it is an attempt to regulate the assertion of that right to the proper group — mentally competent, terminally ill adults. Oregon's law, however, failed to provide adequate safeguards so as to limit the assertion of the right to die to that group, instead making it all-too-possible for the mentally incompetent and the unduly influenced to obtain assisted suicide. The question of *Lee* is not a question of whether those terminally ill patients on life support are similarly situated to those not on life support; it is a question of *how* to ensure that only mentally competent, terminally ill, uncoerced adults are able to commit assisted suicide.

So the problem of *Lee* remains. What measures constitute sufficient safeguards so as to pass a *Lee*-type equal protection analysis? How does one determine mental competency? Is an independent qualified examiner sufficient, or must the attending physician also be held to an objective standard of care? Can "terminally ill" be defined in terms of specific physical condititons, or in terms of a patient's life expectancy? Despite the Ninth Circuit's language, *Lee* is not dead yet.

The Second Circuit also fails to adequately resolve the equal protection issue. By crafting an equal protection argument without finding a substantive due process right to assisted suicide, the Second Circuit begs the question of whether the two groups of terminally ill patients, those who are on life support and those who are not, are actually similarly situated. Logically, since *Cruzan* finds a liberty interest in those on life support and the Second Circuit does not find a similar interest in those not on life support, the two groups cannot be similarly situated for an equal protection analysis. In attempting to avoid the more difficult questions raised by a substantive due process right to die, the Second Circuit makes a critical error in its opinion.

Without finding a liberty interest in assisted suicide, courts cannot use the Equal Protection Clause alone to strike down statutory proscriptions against assisted suicide, because this falls into the trap of *Quill*. But finding a substantive due process liberty interest in assisted suicide does not make an equal protection analysis unnecessary, as *Compassion in Dying III* would argue. Only by providing the safeguards proposed by *Lee* can states ensure that assisted suicide is only offered to the appropriate class of terminally ill patients and not to others for whom the assisted suicide liberty interest is outweighed by the state's interest in protecting their lives. If the Equal Protection Clause has a role in assisted suicide, it is in prohibiting assisted suicide until procedures can be established to ensure its proper and orderly application.

C. The Supreme Court and Assisted Suicide: A Question of "How," Not "When"

The potential for a Supreme Court hearing of *Compassion in Dying* is very real. The national debate over the existence of a constitutionally protected right to die will continue to be divisive. The possibility of circuit splits has already become a reality. The gap between the approach of the Ninth Circuit and that of Second Circuit is just one example of the origins of circuit splits. Future splits may include Michigan's approach in the common law prosecution of assisted suicide.[139] Even within the Ninth Circuit, there will be room for debate, as demonstrated by the gap between the Ninth Circuit's due process approach in *Compassion in Dying III* and the Oregon District Court's equal protection approach in *Lee*. The Court will eventually have to step in to prevent this division from occurring.

The Ninth Circuit, in creating a new substantive due process right, makes some bold predictions about how the Court would rule on this issue based on its treatment of similar precedents, especially *Cruzan* and *Casey*. The Ninth Circuit, however, heavily discounts the precedential value of *Hardwick* in determining whether courts may create new substantive due process rights.[140] But the composition of the Supreme Court has changed in the years since these cases were decided, and how it would hold on this issue is unclear. Justice White, who joined in the *Cruzon* majority (but dissented in *Casey*), has since retired, as have Justices Blackmun, Brennan, and Marshall, who joined in the *Cruzan* and *Hardwick* dissents. The recent addition of Justices Breyer and Ginsburg makes prediction even more difficult. Finally, the *Casey* court, upon which so much of the weight of *Compassion in Dying* was placed, did not have the composition that inspires confident prediction, as six justices both concurred and dissented in part.

The Court may choose to extend a substantive due process liberty interest to assisted suicide. In doing so, however, the Court must address some of the problems that this approach raises. There needs to be a more objective standard than the "profoundly personal decision" or "personal

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139. *See* Michigan v. Kevorkian, 527 N.W.2d 714 (Mich. 1995).

140. The court dismissed *Hardwick* in a footnote:

> In this respect, [*Hardwick*] would appear to be aberrant and to turn on the specific sexual act at issue. . . . We do not believe that the [*Hardwick*] holding controls the outcome here or is in any way inconsistent with our conclusion that there is a liberty interest in dying peacefully and with dignity. We also note, without surprise, that in the decade since [*Hardwick*] was handed down the Court has never cited its central holding approvingly.

Compassion in Dying III, 79 F.3d at 813 n.65.

dignity and autonomy" standards cited in *Compassion in Dying I* and *III*. Such subjective standards, especially when applied along a "rational continuum" of substantive due process interests as in *Compassion in Dying III*, create the potential for a slippery slope of due process expansion. Reinhardt attempts to find such an objective standard in the compelling state interest in protecting the lives of its citizens, strongest when a citizen is young and healthy and weakest when the citizen is terminally ill. The problem with such a standard is that initial judicial approval of certain acts, like assisted suicide, increases the societal permissibility of similar acts, like euthanasia for the depressed, thus decreasing the state's interest in regulating them and "watering down" social mores to allow the future application of liberty interests to such acts. The continuum, therefore, becomes the slippery slope of tenuous liberty interest expansion.

While the Supreme Court appears poised to consider this issue in the near future, it should not create a substantive due process right to die by affirming *Compassion in Dying III*. This does not mean that assisted suicide should be prohibited. The plight of the terminally ill is truly heart-wrenching, and on an emotional level, it requires swift and immediate action to alleviate the excruciating pain and indignity felt by so many. But state legislatures are already moving toward a limited legalization of assisted suicide, as evidenced by the Oregon Death With Dignity Act and similar statutes being drafted in other states.[141] Once the Oregon legislature establishes the necessary protocols to safeguard the assisted suicide process from abuse — thus withstanding a *Lee* challenge — other states are likely to follow suit. In addition, current legislation banning assisted suicide is not being enforced. Despite the perpetual prosecution of Dr. Kervorkian in Michigan,[142] no one has ever been successfully prosecuted for assisting in a suicide in this country.[143] The Supreme Court should allow current legislative trends to continue so that we can move toward a safer, more appropriately constrained right to die.

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141. Since 1990, at least seven states — California, Iowa, Maine, Michigan, New Hampshire, Oregon, and Washington — have attempted to legalize medically assisted suicide for terminally ill patients. *See* Jody B. Gabel, *Release from Terminal Suffering?: The Impact of AIDS on Medically Assisted Suicide Legislation*, 22 FLA. ST. U. L. REV. 369, 372 (1994). *See also* Dick Lehr, *Physicians Face Wrenching Choices, Requests for Help in Dying Produce a Professional Crisis*, BOSTON GLOBE, Apr. 27, 1993, at 1 (reporting that the legislatures in Connecticut and Wisconsin were drafting similar proposals but none had been introduced as of Apr. 27, 1993).

142. *See* Jack Lessenberry, *Jury Acquits Kevorkian in Common-Law Case*, N.Y. TIMES, May 15, 1996, at A14.

143. *See supra* note 12.