COMPASSION IN DYING V. STATE OF WASHINGTON: PHYSICIAN-ASSISTED SUICIDE -- THE STRUGGLE TO RECONCILE "QUALITY OF LIFE" AND "SANCTITY OF LIFE"

> If your existence is hateful to you, die; if you are overwhelmed by fate, drink the hemlock. If you are bowed with grief, abandon life. Let the unhappy man recount his misfortune, let the magistrate supply him with the remedy, and his wretchedness will come to an end.[1]

> [W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.[2]

Suicide is the eighth leading cause of death in the United States.[3] While it touches various segments of the population in different ways,[4] its effects are felt throughout society.[5] In this context, a social

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1. EMILE DURKHEIM, SUICIDE: A STUDY IN SOCIOLOGY 330 (John A. Spaulding & George Simpson trans., Freedom Press 1950). The author cites Libanus, a Greek statesman from an early period in Greek history. The quotation comes from a law which was enforced during his lifetime in the capital city of Athens. *Id.*

2. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 621 (1856) (Curtis, J., dissenting).

3. George Winokur & Donald W. Black, "*Suicide - What Can Be Done*," 327 NEW ENG. J. MED. 490-91 (1992).

4. Suicide is most prevalent among the young (third leading cause of death for individuals, 15 to 24 years of age) and the elderly, who have the highest rate of suicide. *See* NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *When Death Is Sought, Assisted Suicide and Euthanasia in the Medical Context* 10 (1994) [hereinafter TASK FORCE].

5. *Id.*

movement fostering suicide has arisen.[6] Challenging some of society's most deeply rooted beliefs, many philosophers and legal commentators now regard suicide as "neither tragic nor wrong, but as a basic human right."[7]

Recently, in *Compassion in Dying v. Washington*,[8] the United States Court of Appeals for the Ninth Circuit considered the constitutionality of a statute which prohibited physicians from aiding another person to commit suicide.[9] The pertinent portion of the challenged statute reads: "A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide."[10] The plaintiffs in *Compassion in Dying* contended that the United States Constitution provides a right to determine the time and manner of one's death.[11] Therefore, they argued, the Washington statute infringed on their protected right by preventing them from obtaining physician assistance in ending their lives.[12] The issue before the court was whether a terminally ill person has a constitutionally-protected liberty interest in hastening his or her own death.[13]

After determining that such a liberty interest existed,[14] the court weighed the individual's right against the State's legitimate and

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6. *See* Thomas J. Marzen et al., *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1, 4 (1985); *see also* Yale Kamisar, *The Reasons So Many People Support Physician-Assisted Suicide -- and Why These Reasons Are Not Convincing*, 12 ISSUES L. & MED. 113 (1996).

7. Marzen, *supra* note 6, at 4.

8. 79 F.3d 790 (9th Cir. 1996).

9. Marcia Coyle, *What's Liberty's Scope? Assisted Suicide was Court's Focus, Abortion on Subtext*, NAT'L L. J., Jan. 20, 1997, at A1. The United States Supreme Court granted certiorari and heard arguments on January 8, 1997. The case was argued under the name Washington v. Glucksberg and was heard together with Vacco v. Quill, a physician-assisted suicide case from the Second Circuit Court of Appeals. The Court is expected to hand down a decision by June, 1997. *Id.*

10. WA. CODE. ANN. § 9A.36.060 (West 1975).

11. The plaintiff's complaint states: "The Fourteenth Amendment protects the rights of terminally ill adults with no chance of recovery to make decisions about the end of their lives, including the right to choose to hasten inevitable death with suitable physician-prescribed drugs and thereby avoid pain and suffering." *Compassion in Dying*, 79 F.3d at 797.

12. *Id.*

13. *Id.* at 793.

14. *Id.* at 816.

countervailing interests.[15] The court concluded that, insofar as the statute prohibits physicians from prescribing life-ending medication for use by terminally ill, competent adults who wish to hasten their own deaths, it violates the Due Process Clause of the Fourteenth Amendment.[16]

The majority in *Compassion in Dying* incorrectly identified a right for individuals to secure physician assistance in suicide. Moreover, even if such a right exists, it is outweighed by society's interest in preserving life and protecting severely ill patients. This casenote will first examine the development of legal precedents in the United States as they relate to the Due Process Clause and the rights of the dying and their physicians. Second, the majority and dissenting opinions in *Compassion in Dying* will be reviewed and analyzed, focusing on the court's method of constitutional analysis, its synopsis of historical attitudes toward suicide, the application of its balancing test evaluation, and the unworkable nature of the court's eventual holding.

I. BACKGROUND

Compassion in Dying was the first right-to-die case heard by any federal court of appeals.[17] The Court of Appeals for the Ninth Circuit attempted to identify whether a constitutional liberty interest exists for individuals to obtain assistance in ending their lives. The court looked for the answer in applicable United States Supreme Court doctrine and precedent.

The Supreme Court has classified individual rights into two general categories, namely, fundamental rights[18] and non-fundamental

15. *Id.* at 836.

16. *Compassion in Dying*, 79 F.3d at 837.

17. The Second Circuit considered a similar case, Quill v. Vacco, 80 F.3d 716 (2d Cir. 1996), concurrently with this one. While the district court in *Quill* held that a New York statute prohibiting assisted-suicide did not violate the Due Process Clause as applied to terminally ill, competent adult patients, the Second Circuit Court of Appeals reversed in part, holding that the statute violated the Equal Protection Clause of the United States Constitution. *Id.* at 727.

18. *See, e.g.*, Moore v. East Cleveland, 431 U.S. 494, 513 (1977) (Brennan, J., concurring); Loving v. Virginia, 388 U.S. 1, 12 (1967); Palko v. Connecticut, 302 U.S. 319, 325 (1937); *cf.* Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925).

liberty interests.[19] If a law infringes upon a right which the court has deemed fundamental, the law is subjected to "strict scrutiny" and will be upheld only if it is narrowly tailored to achieve a compelling governmental interest.[20] However, if a law impedes the exercise of a right which does not rise to the level of fundamental right, but is nevertheless recognized as a non-fundamental liberty interest, the law is subjected to a balancing test under which the court must weigh the "individual's interest in liberty against the state's asserted reasons for restraining individual liberty."[21] Ordinarily, state restrictions on non-fundamental liberties are upheld if the restriction is rationally related to a legitimate government objective.[22]

The Fourteenth Amendment guarantees that "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."[23] The Supreme Court has frequently interpreted this provision. In *Roe v. Wade*,[24] the Court held that a woman's right to privacy is part of the "liberty" guaranteed by the Fourteenth Amendment and that such liberty is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[25] Moreover, the Court found that a woman's right to make that decision is a "fundamental"[26] right which could be outweighed only by a compelling state interest.[27] Furthermore, any statute which limited the exercise of this fundamental right had to be narrowly drawn to advance that interest.[28] The Court concluded that the state's interest

19. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 320 (1982); Concrete Pipe, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602 (1993).

20. *See* Reno v. Flores, 507 U.S. 292, 301-303 (1993).

21. *Youngberg*, 457 U.S. at 320.

22. *Id.*

23. U.S. CONST. amend. XIV, § 1.

24. 410 U.S. 113 (1973).

25. *Id.* at 153.

26. After determining that the Constitution created a certain "zone of privacy" and that only personal rights which are "fundamental" are included in this guarantee of personal privacy, the Court announced that a woman's decision whether to terminate her pregnancy falls within the zone of privacy. *Id.* at 152-53.

27. *Id.* at 155.

28. *Id.*

in protecting the viability of the fetus was not sufficient to ban abortion.[29]

The issue in *Roe* was revisited in 1992 when the Supreme Court decided *Planned Parenthood v. Casey.*[30] In that case, the Court emphasized the breadth of Fourteenth Amendment liberty protection by stating, "[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."[31] Referring to decisions relating to "marriage, procreation, contraception, family relationships, child rearing, and education,"[32] the Court added 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."[33] However, the Court discussed neither "fundamental rights" nor "strict scrutiny" and, in fact, refused to apply strict scrutiny to a Pennsylvania statute which placed a number of significant restrictions on abortion.[34]

Any discussion of the breadth of the liberty protection set out in *Roe* and *Casey* is incomplete without examining other decisions which serve to reduce the potential for its expansion.[35] For example, in *Bowers v. Hardwick,*[36] the plaintiff petitioned the Court to strike down a Georgia sodomy statute as unconstitutional. Refusing to identify consensual sodomy within the privacy of the plaintiff's home as a

29. The *Roe* Court divided pregnancy into three trimesters and prescribed a different rule for each. During the first trimester, the State could not ban or even regulate abortion. During the second trimester, the State could regulate abortion for purposes "reasonably related" to the mother's health. Finally, the Court held that a fetus was viable during the third trimester and, therefore, the State could regulate, or even ban, abortion since it had a "compelling interest" in protecting the fetus. *Id.* at 164-65.

30. 505 U.S. 833 (1992).

31. *Id.* at 848.

32. *Id.* at 851.

33. *Id.*

34. *Id.* at 878-79. The *Casey* Court partially overruled *Roe*, though the Court retained the essential holding of *Roe* that a woman has a constitutionally protected right to abort a fetus before it becomes viable. *Id.*

35. Yale Kamisar, *Against Assisted Suicide -- Even a Very Limited Form*, 72 U. DET. MERCY L. REV. 735, 763 (1995).

36. 478 U.S. 186 (1986).

fundamental right protected by the Due Process Clause, *Bowers* held that "[t]he 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."[37] Emphasizing the danger of exercising authority not granted by the Constitution, the Court added: "There should be, therefore, great resistance to expand the substantive reach of [the Due Process Clause], particularly if it requires redefining the category of rights deemed to be fundamental."[38] Exemplifying which rights may be deemed fundamental, the Court quoted language in *Moore v. East Cleveland*,[39] describing such liberties as those which are "deeply rooted in this Nation's history and tradition."[40]

Consideration of these principles has been rare in the context of right-to-die cases.[41] In *Cruzan v. Director, Missouri Department of Health*,[42] the Court considered the Due Process rights of a patient who was in a persistent vegetative state as a result of severe injuries suffered in an automobile accident. Nancy Cruzan was kept alive only by feeding and hydration tubes.[43] Medical authorities agreed that her chances of ever regaining consciousness were virtually non-existent.[44] The Court held that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment."[45] The Court also pointed to the many state court cases[46] which invoked

37. *Id.* at 194.

38. *Id.* at 195.

39. 431 U.S. 494 (1977).

40. *Bowers*, 478 U.S. at 194 (quoting *Moore*, 431 U.S. at 503).

41. While *Compassion in Dying* is the first time a Federal Court of Appeals has considered a constitutional "right to die," several state courts have contemplated the issue of a constitutional right to refuse life-sustaining medical treatment. *See, e.g., In re* Quinlan, 355 A.2d 647 (N.J. 1976), *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976). Such cases mostly involved patients who refused medical treatment forbidden by their religious beliefs. *See* Marguerite Anne Chapman, *The Uniform Rights of the Terminally Ill Act: Too Little, Too Late?*, 42 ARK. L. REV. 319, 324 n.15 (1989).

42. 497 U.S. 261 (1990).

43. *Id.* at 266-268.

44. *Id.*

45. *Id.* at 278.

46. *See, e.g., In re* Quinlan, 348 A.2d 801 (N.J. Super. Ct. Ch. Div., 1975); Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417 (Mass. 1977); *In*

the common law doctrine of informed consent[47] to find a right to refuse medical treatment. Ultimately, the Court based its holding on prior Supreme Court decisions where non-terminal individuals were held to have a liberty interest in refusing various kinds of medical treatment.[48] In addition, the Court held that in order for the right to be exercised on behalf of a patient who is not competent, there must be "clear and convincing evidence"[49] that the patient would have wanted the medical measures to be discontinued.[50]

Perhaps as a result of principles like those enunciated in *Palko v. Connecticut*[51] and *Moore v. East Cleveland*,[52] the Court avoided identifying this right to refuse life-sustaining medical treatment as a "fundamental" right. Rather, the Court referred to the right as a "liberty interest."[53] Therefore, the substantive due process inquiry has not ended when it has been determined that a person has a "liberty

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re Storar, 420 N.E.2d 64 (N.Y. 1981), *cert. denied* 454 U.S. 858 (1981); *In re* Conroy, 486 A.2d 1209 (N.J. 1985); *In re* Westchester County Medical Ctr., 531 N.E.2d 607 (N.Y. 1988); *In re* Conservatorship of Torres, 357 N.W.2d 332 (Minn. 1984); *In re* Estate of Longeway, 549 N.E.2d 292 (Ill. 1989); McConnell v. Beverly Enterprises-Connecticut, Inc., 553 A.2d 596 (Conn. 1989).

47. At common law, it was considered a battery to touch another person without that person's consent. That notion of bodily integrity has translated into a requirement for the patient's informed consent prior to medical treatment. Cruzan v. Director, Missouri Dep't. of Health, 497 U.S. 261, 269 (1989).

48. *Id.* at 278. *See also* Washington v. Harper, 494 U.S. 210, 229 (1990) ("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty."); Vitek v. Jones, 445 U.S. 480 (1980) (transfer to mental hospital coupled with mandatory behavior modification treatment implicated liberty interests); Breithaupt v. Abram, 352 U.S. 432, 439 (1957) ("As against the right of an individual that his person be held inviolable . . . must be set the interests of society."); Jacobson v. Massachusetts, 197 U.S. 11, 24-30 (1905) (Court balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease).

49. *Cruzan*, 497 U.S. at 284.

50. The "clear and convincing" evidentiary standard was not met. *Id.* at 285.

51. 302 U.S. 319 (1937). Fundamental liberties are those which are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." *Id.* at 325.

52. 431 U.S. 494 (1977). Fundamental liberties are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." *Id.* at 503.

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

interest."[54] Determining whether an individual's constitutional rights have been violated further requires the court to balance the individual's liberty interest against the relevant state interests.[55]

For example, in *Cruzan*, the Court recognized Missouri's interest in the protection and preservation of human life, and it held that the State is not required to remain neutral "in the face of an informed and voluntary decision by a physically able adult to starve to death."[56] However, Nancy Cruzan, the patient whose liberty was at stake, was incompetent, and it was her guardian who was seeking to exercise the right on her behalf. As a result, the Court never did balance Cruzan's interest in ending her life against the general interest in preserving human life. Instead, the focus of the Court's balancing test was Cruzan's interest in ending her life versus the State's interest in prohibiting *surrogate decision-making* in right-to-die cases. The Court pointed to the deeply personal nature of a decision to withdraw treatment and said that in order to protect the personal element of the decision, "[a] State is entitled to guard against potential abuses in [situations where a surrogate is making the ultimate decision]."[57] Accordingly, notwithstanding the Court's holding that an individual has a constitutionally protected liberty interest in refusing unwanted medical treatment, the Court never expressly reached the conclusion that Cruzan's liberty interest outweighed the State's interests.

54. *Id.*

55. Youngberg v. Romeo, 457 U.S. 307, 321 (1982).

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

57. *Id.* "Not all incompetent patients will have loved ones available to serve as surrogate decision-makers. And even where family members are present, '[t]here will, of course, be some unfortunate situations in which family members will not act to protect a patient.'" *Id.* at 281 (quoting *In re* Jobes, 108 N.J. 394, 419 (1987)).

II. EXPOSITION

Three terminally ill patients,[58] four physicians,[59] and Compassion in Dying,[60] brought suit against the state of Washington seeking a declaration that a statute which prohibited aiding[61] another person to commit suicide violated the United States Constitution. The United States District Court for the Western District of Washington[62] granted plaintiff's motion for summary judgment, and the State appealed. The Ninth Circuit reversed,[63] holding that the statute did not deprive persons seeking physician-assisted suicide of a constitutionally protected liberty interest.[64] On rehearing *en banc*, the Court of Appeals held that the provision of the statute prohibiting aiding another person in attempting suicide violated the Due Process Clause.[65] The scope of the holding was limited to competent,

58. *See Compassion in Dying*, 79 F.3d 790, 794 (9th Cir. 1996). All three patients died after the case began. *Id.* at 795. Jane Roe, age 69, had suffered from cancer since 1988. She underwent various treatments, including chemotherapy, before her doctor referred her to hospice care. She had been bedridden since 1993, and the only treatment available at the time of trial was pain medication. She desired to commit suicide with the help of the plaintiff, Compassion in Dying. John Doe, age 44, was diagnosed with AIDS in 1991. Since that time, he experienced bouts with pneumonia, severe sinus and skin infections, grand mal seizures and 70% loss of vision. He understood that there was no cure for AIDS and wanted his physician to prescribe drugs which he could use to commit suicide. James Poe, age 69, suffered from emphysema. He was connected to an oxygen tank at all times and received dosages of morphine regularly. In addition, he was in the terminal stages of heart disease. He wanted to commit suicide by taking physician-prescribed drugs. *Id.* at 794-795.

59. The four physicians declared that they periodically treat terminally ill patients who wish to commit suicide with their doctor's help. The physicians further stated that they would like to provide such assistance, but are deterred from doing so by the Washington statute that makes it a felony to knowingly aid another person to commit suicide. *Id.*

60. Compassion in Dying is a non-profit organization which provides information, counseling, and assistance to terminally ill people who are considering suicide and to their families. *Id.* at 794 n.2.

61. Plaintiffs did not object to the portion of the statute that makes it unlawful for a person to knowingly cause another person to commit suicide. They only challenged the portion of the statute which prohibits *aiding* another to commit suicide. *Id.* at 797.

62. Compassion in Dying v. Washington, 850 F. Supp. 1454, 1458 (W.D. Wash. 1994).

63. Compassion in Dying v. Washington, 49 F.3d 586, 594 (9th Cir. 1995).

64. *Id.* at 590.

65. Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996) (*en banc*).

terminally-ill patients who wished to hasten their deaths with physician-prescribed medication.[66]

A. Majority Opinion

Judge Reinhardt began the majority opinion by framing the two-part issue as "whether a person who is terminally ill has a constitutionally-protected liberty interest in hastening what might otherwise be a protracted, undignified, and extremely painful death"[67] and, if such a liberty interest exists, "whether or not the state of Washington may constitutionally restrict its exercise by banning a form of medical assistance that is frequently requested by terminally ill people who wish to die."[68]

After describing the procedural history of the case, the court provided an overview of the requirements necessary to find an unconstitutional infringement of a liberty interest. The court explained that "[t]he mere recognition of a liberty interest" does not render unconstitutional a statute which restricts that interest in some way. "Rather, in cases like the one before us, the courts must apply a balancing test under which we weigh the individual's liberty interests against the relevant state interests . . . ."[69] Therefore, the ultimate question is "whether sufficient justification exists for the intrusion by the government into the realm of a person's 'liberty, dignity, and freedom.'"[70]

1. Identifying a Liberty Interest

The court began its analysis with a "cautionary note" framed after a similar one used in *Roe*.[71] Recognizing the topic of assisted-suicide

66. *Id.* at 838. Judge Reinhardt authored the majority opinion, with separate dissenting opinions written by Circuit Judges Beezer, Fernandez, and Kleinfeld.

67. *Id.* at 793.

68. *Id.*

69. *Id.* at 799.

70. *Compassion in Dying*, 79 F.3d at 799 (quoting Cruzan v. Director, Missouri Dep't. of Health, 497 U.S. 261, 287 (1989) (O'Connor, J., concurring)).

71. The *Roe* Court wrote:

as an "emotionally charged" issue, Judge Reinhardt expressed the court's intent to conduct an objective analysis.[72] This cautionary note was not the last time the court borrowed from the Supreme Court's abortion decisions. The majority continued its analysis with what it called "compelling similarities between right-to-die cases and abortion cases."[73] In the abortion cases,[74] the Supreme Court found that a state's interest in restricting abortion strengthens as the fetus developed and could actually overcome a woman's liberty interest in reproductive choice once the fetus became viable. In other words, "the permissibility of restrictive state legislation may vary with the progression of the pregnancy."[75] Similarly, in right-to-die cases, "the outcome of the balancing test may differ at different points along the life cycle as a person's physical or medical condition deteriorates."[76]

The appeals court had defined the relevant liberty interest as a "constitutional right to aid in killing oneself."[77] Finding that interest too narrow, the court *en banc* rephrased the relevant interest as "a liberty interest in determining the time and manner of one's death."[78] Notably, the ideology driving this distinction was borrowed from the abortion cases, specifically *Roe*.[79] In that case, the Court did not search for a liberty interest in obtaining medical assistance for the

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> We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. . . . Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predeliction.

Roe, 410 U.S. at 116.

72. *Compassion in Dying*, 79 F.3d at 800.

73. *Id.*

74. The abortion cases to which the majority repeatedly referred are Roe v. Wade, 410 U.S. 113 (1973) and Planned Parenthood v. Casey, 505 U.S. 833 (1992).

75. *Compassion in Dying*, 79 F.3d at 800.

76. *Id.*

77. Compassion in Dying v. Washington, 49 F.3d 586, 591 (9th Cir. 1995).

78. *Compassion in Dying*, 79 F.3d 790, 801 (9th Cir. 1996). The court *en banc* determined the appeals court's language to be too limited "because such a narrow interest could not exist in the absence of a broader and more important underlying interest -- the right to die." *Id.*

79. *Id.* at 802.

purpose of an abortion, but simply examined whether a woman had "a liberty interest in securing an abortion."[80]

In determining whether such a liberty interest in fact exists under the Due Process Clause, the *Compassion in Dying* court was careful to point out that no litmus test has ever been expressly laid down to make such a determination.[81] Additionally, since decisions like this one regard "the conscience, traditions, and fundamental tenets of our nation,"[82] the determination must be made "in light of changing values based on shared experience."[83]

The majority explained that the Supreme Court has historically classified certain rights as "fundamental," namely those which are "implicit in the concept of ordered liberty."[84] However, recently the Court "has spoken more frequently of substantive due process *interests* than of *fundamental* due process *rights*."[85] The Ninth Circuit posited that such an evolving doctrinal approach is consistent with the Supreme Court's due process analysis and, in support, quotes from Justice Harlan's dissenting opinion in *Poe v. Ullman*:[86] "[T]he full scope of the liberty guaranteed by the Due Process Clause is a 'rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . '"[87]

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80. *Id.* at 801. The majority in *Compassion in Dying* explained:

> 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.

Id. at 801.

81. *Id.* at 802.

82. *Id.*

83. *Compassion in Dying*, 79 F.3d at 802-03.

84. *Id.* at 803 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

85. *Id.*

86. 367 U.S. 497 (1961).

87. *Compassion in Dying*, 79 F.3d at 803 (quoting Poe v. Ullman, 367 U.S. at 543 (Harlan, J., dissenting)).

Further, the court suggested that the Supreme Court may be "headed towards the formal adoption of the continuum approach."[88] If such an approach is adopted, the application of the balancing test would no longer depend on whether a right is categorized as fundamental or non-fundamental. Instead, there would be only one application whereby "the more important the individual's right or interest, the more persuasive the justifications for infringement would have to be."[89] Such an approach would allow courts to make determinations relying heavily upon their perception of "changing values based on shared experience"[90] rather than on a historical analysis which has been traditionally necessary to categorize claimed rights. Therefore, while the court acknowledged the useful role of historical analysis in determining the existence of a claimed right or liberty interest, it maintained that such historical analysis "is not a *sine qua non*."[91]

Based on this reasoning, the full court concluded that the original panel erred when it held that a historical analysis alone was sufficient basis for rejecting the right-to-die claim.[92] In support of its conclusion, the court pointed to language from *Casey*, in which the court said that the suffering involved in pregnancy is so intimate and personal that the state cannot impose "its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture."[93]

88. *Id.* at 804.
89. *Id.*
90. *Id.* at 803.
91. *Id.* at 805.
92. *Compassion in Dying*, 79 F.3d at 805.
93. *Casey*, 505 U.S. at 852.

2. Historical Attitudes Toward Suicide

Despite the court's lengthy explanation of the reduced significance of history's role in due process analysis, it proceeded to embark on its own historical survey of society's attitudes toward suicide.[94] Again, it is apparent that the court did so in order to emulate the analysis of the *Roe* Court, which conducted a similar retrospection.[95]

The survey began with ancient Greek and Roman times and noted that suicide was not universally prohibited, but was actually considered commendable in literature, mythology, and practice.[96] Proceeding to the era of Christianity, the court found that even the early Christians did not always frown upon suicide.[97] Meanwhile, the court's review of the English common law era emphasized that while suicide was a crime, it was only punishable in limited circumstances.[98] Finally, the

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94. *Compassion in Dying*, 79 F.3d at 806.

95. *Roe*, 410 U.S. at 129-41.

96. The court noted that Homer recorded suicide as praiseworthy and heroic. In Athens, as well as various Greek colonies, the magistrate kept a supply of hemlock on hand in order to provide a means of suicide for those wishing to end their lives, and while Socrates counseled against suicide, he willingly drank hemlock when he was condemned to do so. Meanwhile, his most distinguished student, Plato, "suggested that if life itself became immoderate, then suicide became a rational, justifiable act." According to the court, the Stoics, who glorified suicide as an act of pure rational will, celebrated the suicide of Cato as courageous. Similarly, the Romans often considered suicide to be acceptable. "According to Justinian's *Digest*, suicide of a private citizen was not punishable if it was caused by 'impatience of pain or sickness . . .' or by 'weariness of life . . . or fear of dishonor.'" *Compassion in Dying*, 79 F.3d at 807.

97. The majority explained that while Augustine condemned suicide as "detestable and damnable," many Christians "saw death as an escape from the tribulations of a fallen existence and as the doorway to heaven." The Donatists were eventually declared to be heretics because their respect for martyrs often caused some of them to commit suicide in a misguided pursuit of martyrdom. *Id.* at 808.

98. Bracton adopted Roman Law as set forth in Justinian's *Digest*, which provided for the confiscation of all personal and real property of certain suicides. However, he introduced a key innovation: "'If a man slays himself in weariness of life or because he is unwilling to endure further bodily pain . . . he may have a successor, but his movable goods are confiscated . . . .'" Thomas J. Marzen, et al., *Suicide: A Constitutional Right?* 24 DUQ. L. REV. 1, 58, 59 (1985). The court attached importance to this innovation because it displayed compassion and understanding toward individuals who commit suicide because of an inability to "endure further bodily pain." *Compassion in Dying*, 79 F.3d at 809.

Later, Sir Edward Coke, in his *Third Institute*, held that while suicide was a crime punishable by forfeiture of personal property, there is an exception when someone kills

court's survey reached early America, noting that by 1798, six of the thirteen original colonies had abolished penalties imposed on suicides.[99]

The court concluded the historical portion of its analysis with a survey of current societal attitudes toward suicide.[100] While recognizing that there is no evidence that Americans approve of suicide in general, the court suggested that, in recent years, "there has been increasingly widespread support for allowing the terminally ill to hasten their deaths and avoid painful, undignified, and inhumane endings to their lives."[101] The court cited a host of polls and reports[102] intended to bolster the claim. Additionally, the court explained that modern medical technology has transformed certain diseases which at one time killed quickly, into diseases which can be controlled for years, even after their victims have been long since reduced to a stuporous semi-comatose condition.[103] Thus, the advancement of medical science has caused the very nature of death to change. As a result, "[b]oth the need and the capability to assist individuals end their lives in peace and dignity have increased exponentially."[104] Apparently, the court had concluded that whatever history had to say about physician-assisted suicide, times and attitudes are ever-changing and, accordingly, the issue should be examined on the basis of contemporary perceptions.

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himself "while he is not *compos mentia*." The court noted that, because of this exception, suicide was rarely punished because juries usually reasoned that anyone who committed suicide was necessarily not of sound mind. *Id.*

99. The court stressed that there is no evidence that any suicide or attempted suicide was ever punished in post-revolutionary America. In fact, the majority of states have not criminalized suicide or attempted suicide since the turn of the century and, today, no statute prohibiting suicide or attempted suicide has existed for at least ten years. *Id.*

100. *Id.* at 810-12.

101. *Compassion in Dying*, 79 F.3d at 810.

102. In April, 1990, the *Roper Report* found that 64% of Americans believed that the terminally ill should have the right to request and receive physician aid in dying; a 1991 N.Y. TIMES poll showed that "nearly two out of three Americans favor doctor-assisted suicide and euthanasia for terminally ill patients who request it"; a 1994 *Harris* poll found 73% of Americans favor legalizing physician assisted suicide. *Id.*

103. The court listed examples including diabetes, muscular dystrophy, Parkinson's disease, cardiovascular disease, and certain types of cancer. *Id.* at 812.

104. *Id.*

3. The Liberty Interest Under Current Case Law

The majority proceeded to examine current Supreme Court decisions which have delineated the boundaries of substantive due process, concluding that "there is a strong liberty interest in determining how and when one's life shall end."[105] The court pointed to a long line of cases in which the Supreme Court has "carved out certain key moments and decisions in individuals' lives and placed them beyond the general prohibitory authority of the state,"[106] including decisions relating to marriage,[107] procreation,[108] and family relationships.[109] The court explained that the common denominator in all of these cases is that they involve "decisions that are highly personal and intimate, as well as of great importance to the individual."[110] Certainly, according to the majority, a decision to end one's life must be considered personal, intimate and important, particularly if it is made in order to avoid excessive and protracted pain.[111]

More importantly, the court discussed two recent Supreme Court decisions, *Planned Parenthood v. Casey*[112] and *Cruzan v. Director, Missouri Dep't of Health*,[113] which it believed "are fully persuasive, and leave little doubt as to the proper result."[114] First, the court examined *Casey* and found its reasoning to be "almost prescriptive for determining what liberty interest may inhere in a terminally ill person's choice to commit suicide."[115] In that case, the Supreme Court stated:

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105. *Id.*
106. Compassion in Dying v. Washington, 79 F.3d 790, 812 (9th Cir. 1996) (*en banc*).
107. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967).
108. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942).
109. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944).
110. *Compassion in Dying*, 79 F.3d at 813.
111. *Id.*
112. 505 U.S. 833 (1992).
113. 497 U.S. 261 (1989).
114. *Compassion in Dying*, 79 F.3d at 813.
115. *Id.*

> These 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 attributes of personhood were they formed under compulsion of the State.[116]

The liberty interest evaluated in *Casey* was a woman's right to have an abortion. According to the majority in *Compassion in Dying*, the decision whether to end one's own life "may have an even more profound impact on that person's life than forcing a woman to carry a pregnancy to term."[117] To illustrate this point, the court described the death of a patient who had been under the care of one of the physician plaintiffs. The depiction was a graphic account of a man whose final days were so gruesome that his loved ones could not bear to visit any longer.[118] For patients like the one described, a state-enforced prohibition on physician-assisted suicide condemns them to unrelieved misery.[119] The court reasoned that the very personal decision "whether to endure or avoid such an existence constitutes one of the most, if not the most, 'intimate and personal choices a person can make in a life-time,' a choice that is 'central to personal dignity and autonomy.'"[120]

The issue considered in *Cruzan* was whether a liberty interest exists in terminating unwanted medical treatment.[121] In that case, the Supreme Court found that such a liberty interest must be inferred from the Court's prior decisions[122] which held that patients have a liberty

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116. *Casey*, 505 U.S. at 851.
117. *Compassion in Dying*, 79 F.3d at 814.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *See* Jacobson v. Massachusetts, 197 U.S. 11 (1905) (Court balanced an individual's liberty interest in declining an unwanted small pox vaccine against the state's

interest in refusing to submit to specific medical procedures.[123] The *Compassion in Dying* court placed special emphasis on Chief Justice Renquist's language in *Cruzan*: "The choice between life and death is a deeply personal decision of obvious and overwhelming finality. . . . It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment."[124] The court reasoned that since the majority in *Cruzan* recognized that granting the request to remove life-sustaining treatment would lead inexorably to the patient's death, the court "necessarily recognizes a liberty interest in hastening one's own death."[125] Equipped with this broad liberty interest, the court was ready to weigh it against any relevant state interests.

4. Applying the Balancing Test

Before the court could actually apply the balancing test, it had to identify all of the relevant interests which it intended to balance. As such, it proceeded to "identify the factors[126] relevant to the case at hand, assess the state's interests . . . in light of those factors, and then weigh and balance the competing interests."[127]

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interest in preventing disease); Washington v. Harper, 494 U.S. 210, 229 (1990) ("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty."); Parham v. J.R., 442 U.S. 584, 600 (1979) ("[A] child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment. . . .").

123. *Compassion in Dying*, 79 F.3d at 814.

124. *Cruzan*, 497 U.S. at 281.

125. *Compassion in Dying*, 79 F.3d at 816.

126. The relevant factors include:

> 1) the importance of the various state interests, both in general and in the factual context of the case; 2) the manner in which those interests are furthered by the state law or regulation; 3) the importance of the liberty interest, both in itself and in the context in which it is being exercised; 4) the extent to which that interest is burdened by the challenged state action; and, 5) the consequence of upholding or overturning the statute or regulation.

Id.

127. *Id.*

> We identify six related state interests involved in the controversy before us: 1) the state's general interest in preserving life; 2) the state's more specific interest in preventing suicide; 3) the state's interest in avoiding the involvement of third parties and in precluding the use of arbitrary, unfair, or undue influence; 4) the state's interest in protecting family members and loved ones; 5) the state's interest in protecting the integrity of the medical profession; and, 6) the state's interest in avoiding adverse consequences . . . if the statutory provision at issue is declared unconstitutional.[128]

Examining the first interest, the court addressed language in *Cruzan* describing the nature of the State's interest in preserving human life: "[W]e think a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life . . . ."[129] The *Compassion in Dying* court avoided the implications of this language by asserting that while "the state's interest in preserving human life may be unqualified . . ., that interest is not always controlling."[130] The court once again explained that the state's interest is not always the same strength: "To the contrary, its *strength* is dependent on relevant circumstances, including the medical condition and the wishes of the person whose life is at stake."[131]

The court noted that the state of Washington had already decided in several ways that its interest in preserving life should give way to the wishes of the patient in certain situations.[132] To begin with, it pointed to Washington's Natural Death Act[133] which permits adults to have "life-sustaining treatment withheld or withdrawn in instances of a terminal condition or permanent unconscious condition."[134] The Act

128. *Id.* at 816-17.
129. *Cruzan*, 497 U.S. at 282.
130. *Compassion in Dying*, 79 F.3d at 817.
131. *Id.*
132. *Id.*
133. WASH. REV. CODE § 70.122 (1979).
134. *Id.*

not only acknowledges "that terminally ill and permanently unconscious adults have a right to refuse life-sustaining treatment, [but also] includes specific legislative findings[135] that appear to recognize that a due process liberty interest underlies the right."[136]

Next, the court examined the state's interest in preventing suicide. While acknowledging that the state has a legitimate and compelling interest in preventing individuals from taking their own lives in a fit of desperation, depression, or loneliness, the court pointed out that "[t]he state has explicitly recognized that its interests are frequently insufficient to override the wishes of competent, terminally ill adult patients who desire to bring their lives to an end with the assistance of a physician."[137] Noting that terminally ill patients are now permitted to reject life-sustaining medical treatment, the court required the state to "explain precisely what it is about the physician's conduct in assisted suicide cases that distinguishes it from the conduct that the state has explicitly authorized."[138]

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135. The legislative findings read as follows:

> The legislature finds that adult persons have the fundamental right to control the decisions relating to the rendering of their own medical care, including the decision to have life-sustaining procedures withheld or withdrawn in instances of terminal condition.
>
> The legislature further finds that modern medical technology has made possible the artificial prolongation of human life beyond natural limits.
>
> The legislature further finds that, in the interest of protecting individual autonomy, such prolongation of life for persons with a terminal condition may cause loss of patient dignity, and unnecessary pain and suffering, while providing nothing medically necessary or beneficial to the patient.

Id.

136. *Compassion in Dying*, 79 F.3d at 817. Additionally, the court pointed to living wills and durable powers of attorney as further evidence that the state's so-called "unqualified" interest in preserving human life does not always outweigh an individual's liberty interest in hastening death. *Id.* at 818.

137. *Id.* at 821.

138. *Id.* at 822. In response, the state advanced three distinctions. First, physician-assisted suicide requires doctors to play an active role in the patient's death. The court dismissed this argument, explaining that patients are not only permitted to decline all medical treatment, but also to instruct their doctors to *terminate* treatment and, in effect, causing the physician to play an active role. Second, the state urged that physician-assisted suicide causes deaths that would not otherwise result from the patient's underlying disease.

The court then considered the state's interest in avoiding unfair and undue influence. One of the state's main arguments was that the statute is necessary to protect "the poor and minorities from exploitation."[139] The court was not persuaded, reasoning that there is far more reason to raise the opposite concern, "that the poor and the minorities, who have historically received the least adequate health care, will not be afforded a fair opportunity to obtain . . . the assistance that would allow them to end their lives with a measure of dignity."[140] The court opined that it is ludicrous to suggest that disadvantaged persons will receive *more* medical services in only one area -- assisted suicide.[141]

The majority was much more concerned by the contention that infirm elderly persons may come under considerable pressure "from callous, financially burdened, or self-interested relatives, or others who have influence over them."[142] While acknowledging a desire not to minimize the concern, the court dismissed it for two reasons. First, "the temptation to exert undue pressure is ordinarily tempered to a substantial degree in the case of the terminally ill by the knowledge that the person will die shortly in any event."[143] Second, while some terminally ill patients will inevitably feel pressured to hasten their deaths out of concern for the economic welfare of their loved ones, the court is "reluctant to say that . . . it is improper for competent, terminally ill adults to take the economic welfare of their families and loved ones into consideration."[144]

The court noted that such a distinction may not be universally applied. For example in *Cruzan*, there was no underlying disease. The patient had a life expectancy of 30 years and was essentially starved to death when her feeding tubes were disconnected. Finally, the state urged that physician-assisted suicide is distinguishable because it requires doctors to provide the causal agent of patients' deaths. However, the court maintained that such a distinction is not possible since doctors have been supplying the causal agent of patients' deaths for decades through medication which has a "double-effect." *Id.* at 822-23. Double effect refers to the provision of pain killing medication for the purpose of relieving pain, knowing that it will, at some dosage, cause death. *Id.* at 823.

139. *Id.* at 825.
140. *Id.*
141. *Compassion in Dying*, 79 F.3d at 825.
142. *Id.* at 826.
143. *Id.*
144. *Id.*

After briefly considering the state's interest in protecting family members,[145] the court evaluated what effect the practice of physician-assisted suicide would have on the integrity of the medical profession.[146] It was the majority's belief that the profession's integrity would not suffer at all. "Rather, it is the existence of a statute that criminalizes the provision of medical assistance to patients in need that could create conflicts with the doctors' professional obligations and make covert criminals out of honorable, dedicated, and compassionate individuals."[147] In addition, the court expressed its view that the aftermath of legalized abortion is instructive in this regard. After doctors began to perform legalized abortions routinely, "the ethical integrity of the medical profession remained undiminished."[148]

Finally, the court addressed the concern that permitting physician-assisted suicide would inevitably lead to other, more controversial practices until eventually, practices such as state sanctioned euthanasia would be commonplace.[149] This argument is known as the "slippery slope" theory and, according to this court, carries no weight.[150] The court asserts that such an argument can be offered against any constitutionally-protected right or interest.[151] "In fact, the Court has *never* refused to recognize a substantive due process liberty right or interest merely because there were difficulties in determining when and how to limit its exercise or because others might someday attempt to use it improperly."[152]

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145. The court examined the effect that the practice of physician-assisted suicide may have on family members and loved ones. While acknowledging the existence of such a state interest, the court found that it is of negligible weight when a patient is terminally ill and death is imminent. *Id.* at 826-27. "The state cannot help a minor child or any other innocent third party by forcing a terminally ill patient to die a more protracted and painful death." *Id.* at 827.

146. *Compassion in Dying*, 79 F.3d at 827-30.

147. *Id.* at 827.

148. *Id.* at 830.

149. *Id.* at 830-32.

150. *Id.* at 830-31.

151. *Compassion in Dying*, 79 F.3d at 831.

152. *Id.*

After identifying, and for the most part discounting, each relevant state interest in preventing physician-assisted suicide, the court finally applied the balancing test. Once again, the court explained that neither the individual's liberty interest in hastening death nor the state's countervailing interests are static. "The magnitude of each depends on objective circumstances and generally varies inversely with the other. The liberty interest in hastening death is at its strongest when the state's interest in protecting life and preventing suicide is at its weakest, and vice-versa."[153]

The majority concluded its opinion by holding that "a liberty interest exists in the choice of how and when one dies, and that the provision of the Washington statute banning assisted suicide, as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors, violates the Due Process Clause."[154]

153. *Id.* at 836-37.

154. *Id.* at 838. Additionally, the court considered the state's interest in preventing assisted suicide to be different only in degree, rather than in kind, from its interest in prohibiting other medical practices, like disconnecting feeding tubes, which lead to a terminally ill patient's death. Notably, the court explained that the result of the balancing test would not change even if the interests were different in kind, not just degree. *Id.* at 837. This is because no matter how weighty the state's interest in preventing suicide, "that weight, when combined with the weight [of the other state interests] is insufficient to outweigh the terminally ill individual's interest in deciding whether to end his agony and suffering by hastening the time of his death. . . ." *Id.* While the state interests may have been weighty enough to allow state *regulation* of physician-assisted suicide, it is not sufficient to permit the state to *ban* the exercise of the liberty interest. *Id.*

B. The Dissenting Opinions

In a vigorous dissent, Judge Beezer agreed that mentally competent, terminally ill adults have a constitutionally protected liberty interest in securing physician-assisted suicide. However, he maintained that it is an ordinary non-fundamental right and, therefore, may be regulated by a statute which rationally advances some legitimate governmental purpose.[155] He asserted that the Washington statute "rationally advances four legitimate governmental purposes: preserving life, protecting the interests of innocent third parties, preventing suicide and maintaining the ethical integrity of the medical profession."[156]

Beezer placed great emphasis on the Supreme Court's repeated unwillingness to expand the list of rights deemed fundamental.[157] He explained that the Court's language in *Casey*[158] refers to the protection of rights which are not fundamental and suggested that the Court's reaffirmation of an abortion right in that case relied heavily on *stare decisis*.[159] Further, he wrote that a right is fundamental if it is deeply rooted in the nation's history.[160] "The mere novelty of [a claimed right to physician-assisted suicide] is reason enough to doubt that 'substantive due process' sustains it."[161] Based on his own brief

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155. The majority said:

> To succeed in arguing that a statute violates substantive due process, the party challenging the statute must show either: (1) that the statute violates a fundamental right and is not narrowly tailored to serve a compelling state interest, or (2) that the statute violates an ordinary, nonfundamental, liberty interest and does not rationally advance some legitimate governmental purpose.

Id. at 839.

156. *Id.*

157. *Compassion in Dying*, 79 F.3d at 848 (Beezer, J., dissenting).

158. The *Casey* Court wrote: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the state." *Casey*, 505 U.S. at 851.

159. *Compassion in Dying*, 79 F.3d at 849.

160. *Id.*

161. *Id.* at 848 (quoting Reno v. Flores, 507 U.S. 292, 303 (1993)).

survey of historical attitudes toward suicide, he concluded that there is no deeply rooted right to suicide in any form.[162]

Beezer closed his dissent with a word of caution. He revealed the majority's failure to adequately distinguish physician-assisted suicide as a unique category and warned that if physician-assisted suicide for competent, terminally ill adults is made a constitutional right, then rights to other related practices, such as voluntary euthanasia will soon follow.[163] Eventually, the path will lead to "substituted judgment," or involuntary euthanasia, and the United States will experience what the Dutch have been experiencing for years.[164] "It is not a path I would start down."[165]

Finally, Judge Kleinfeld joined in Judge Beezer's dissent[166] with two qualifications. First, he disagreed that even a non-fundamental right to physician-assisted suicide exists.[167] He rejected the majority's reliance on *Casey*, which stated that at the heart of liberty is the right to define one's own concept of existence, and suggested that the majority treats that language as a basis for constitutionally protecting

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162. *Id.* at 850.

163. *Id.* at 857.

164. The Dutch experience with assisted death is commonly recounted to exemplify the dangers of allowing physician-assisted suicide and the "slippery slope" on which it places a society. In 1993, the Netherlands' lower parliamentary house voted to allow euthanasia in certain circumstances. Euthanasia is now regularly tolerated in the Netherlands when certain guidelines are followed (where the patient repeatedly asks for his life to be ended; where the patient and physician agree that the suffering is intolerable; etc.). However, while euthanasia was initially allowable only in cases of terminally ill patients, it has since been provided, with impunity, in cases of non-terminal patients who are only mentally ill. The Dutch slipped yet further down the slope in a recent case where parents were allowed to give consent on behalf of their deformed baby to be euthanized. In other words, a surrogate's decision may now be sufficient to terminate a human being who is not terminally ill. *See* Randall E. Otto, *Bottom of the Slope (Euthanasia in the Netherlands)*, COMMONWEAL, Vol. 122, No. 10 (May 19, 1995).

165. *Compassion in Dying*, 79 F.3d at 857.

166. Judge Fernandez also joined Beezer's dissent, adding one paragraph of his own. He expressed his view that physician-assisted suicide is not even a non-fundamental right. He reasoned that since even our most well trained moral philosophers cannot agree on the nature and morality of the practice, it is an issue best left for the people to decide. "Our Constitution leaves it to them; it is they and their representatives who must grapple with the riddle and solve it." *Id.*

167. *Id.*

any important personal decision.[168] "The Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while all great questions would be decided by the judiciary."[169]

Second, Kleinfeld took special issue with the majority's suggestion that there is no legal or ethical difference between providing "double effect" medication, which relieves pain while eventually causing death at higher dosages, and providing medication for the sole purpose of causing death. He analogized "double effect" medication to General Eisenhower's deployment of troops onto the beaches at Normandy.[170] Though he knew American soldiers would certainly die, his purpose was to liberate Europe from the Nazis. "The majority's theory of ethics would imply that this purpose was legally and ethically indistinguishable from a purpose of killing American soldiers. Knowledge of an undesired consequence does not imply that the actor intends the consequence."[171]

III. ANALYSIS

A. The Abandonment of Traditional Due Process Analysis

The majority in *Compassion in Dying* seems all too inclined to abandon the Supreme Court's traditional due process analysis in favor of an existentialist notion of liberty. Clinging to the Supreme Court's willingness to invent a due process right to abortion, the majority insisted that the substantive reach of the Due Process Clause is ever capable of further extension and is never frozen at any point in time.[172] This propensity to expand the outer limits of due process liberty is a

168. *Id.* at 858.
169. *Id.*
170. *Compassion in Dying*, 79 F.3d at 858 (Kleinfeld, J., dissenting).
171. *Id.*
172. *Id.* at 804.

frightening display of the jurisprudence of judge-made law which the Supreme Court warned of in *Bowers v. Hardwick*.[173]

In order to circumscribe the proliferation of judge-made rights, the Supreme Court has displayed a general reluctance to expand the concept of substantive due process.[174] The Court has demonstrated this reluctance by consistently categorizing most due process liberty infringements as invasions of non-fundamental rights.[175] In such instances, the state's authority to limit an individual's liberty is constitutional if the statute or regulation rationally serves a legitimate state interest.[176] It cannot be reasonably argued that a statute prohibiting physician-assisted suicide does not rationally serve the legitimate state interest of preserving human life and, wisely, the *Compassion in Dying* court did not attempt such an argument.

At times, the Supreme Court has granted heightened constitutional protection to rights which are not expressly within the text of the Constitution.[177] Usually, such rights are deemed fundamental and may be impinged by the state only if the statute is necessary to serve a compelling state interest.[178] To qualify for such strict scrutiny, a right must be "'implicit in the concept of ordered liberty' such that 'neither liberty not justice would exist if [they] were sacrificed.'"[179] A right is "implicit in the concept of ordered liberty" if it is "deeply rooted in this nation's history and traditions."[180]

The *Compassion in Dying* court opined that the current classification system is artificial and refused to label the right to

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173. 478 U.S. 186 (1986). "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." *Id.* at 194.

174. *See, e.g.*, Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).

175. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 196 (1986); Williams v. Lee Optical Co., 348 U.S. 483 (1955); Nebbia v. New York, 291 U.S. 502 (1934).

176. *See Reno*, 507 U.S. at 301-06.

177. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception); Prince v. Massachusetts, 321 U.S. 158 (1944) (family relationships); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation).

178. *Reno*, 507 U.S. at 301-303.

179. *Bowers*, 478 U.S. at 191-92 (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937) (brackets in original)).

180. *Id.* at 192 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

physician-assisted suicide as either fundamental or non-fundamental.[181] Instead, the majority posited that in *Casey*, the Supreme Court demonstrated a shift away from traditional due process analysis towards a sort of "continuum approach" in which any governmental restraint must be put to a balancing test.[182] The majority seized on the language from *Casey* which stated that the right to define one's own concept of existence and of the mystery of human life lies at the heart of liberty.[183]

If taken at face value, *Casey's* definition of liberty probably does include a right to obtain physician-assisted suicide.[184] For that matter, according to *Casey's* definition of liberty, any deeply personal decision, including voluntary euthanasia, polygamy, and adult incest, must be free from the reach of state prohibition.[185] However, in light of the Supreme Court's established classification system, which *Casey* did not expressly purport to dismantle, it is doubtful that the *Casey* Court intended to create such a dangerously broad existentialist concept of liberty.[186] Few would argue that *Casey* intended to grant

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181. *See Compassion in Dying v. Washington*, 79 F.3d 790, 803 (9th Cir. 1996) (*en banc*).

182. *Id.* at 804.

183. The *Casey* Court wrote:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the right to bear or beget a child." Our precedents "have respected the private realm of family life which the state cannot enter." These 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 attributes of personhood were they formed under compulsion of the State.

Casey, 505 U.S. at 851 (internal citations omitted).

184. Kamisar, *supra* note 35, at 766.

185. *See id.*

186. *See* Brief of the American Center for Law & Justice as Amicus Curiae in Support of Petitioners at 9-11, State of Washington v. Glucksberg, No. 95-1858 (1997) [hereinafter ACLJ Brief].

constitutional protection to individuals who choose to engage in bestiality, but a reading of *Casey* which is broad enough to encompass physician-assisted suicide must necessarily include a great many other things,[187] including bestiality.

The majority holding in *Compassion in Dying* clings all too eagerly to the plurality opinion in *Casey* and, in the end, relies too heavily upon it. The majority's analysis discards our Nation's history and traditions from the equation and simply asks whether the relevant decision is a personal one.[188] This bold departure from traditional analysis leads to one of two results: either states will be required to approve of conduct which the people, through their elected representatives, may reasonably desire to prohibit as harmful; or the courts will become superlegislatures, arbitrarily picking and choosing which activities states may prohibit, and which activities states must allow.[189]

B. The Historical Survey is Unnecessary and Misguided

A significant portion of the majority's opinion is devoted to a historical survey of attitudes toward suicide from ancient Greek and Roman times to the present. This examination is unnecessary for two reasons: First, because the majority chose to ignore the traditional due process analysis, and second, because under any method of analyzing due process, attitudes in ancient societies add nothing to the analysis. Moreover, even if it were necessary, the majority presented an incomplete historical view.

In *Griswold v. Connecticut*,[190] the first Supreme Court case to enunciate explicitly a "right to privacy," the Court stated that in determining which rights are fundamental, "judges must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted . . . as to be ranked as

187. *See* Kamisar, *supra* note 35, at 767.
188. *See Compassion in Dying*, 79 F.3d at 858 (Kleinfeld, J., dissenting).
189. ACLJ Brief, *supra* note 186, at 3.
190. 381 U.S. 479 (1965).

fundamental.'"[191] In *Moore v. City of East Cleveland*,[192] liberties are ranked as fundamental if they are "deeply rooted in this Nation's history and tradition."[193]

Presumably, it is these passages, as well as others like them, which compel the Court to venture through time on its historical journey. However, the majority devoted five pages of its opinion to its explanation that courts are no longer required to rank due process rights as fundamental, important, or marginal before submitting them to a balancing test.[194] Why then, does the court still find it necessary to review history? The above quoted passages from *Griswold* and *Moore* apply only to rights which are fundamental. If the court rejects the categorization, it need not fulfill the requirements of the categorization, and any attempt to do so is superfluous. Perhaps the court felt that, even in its "continuum approach,"[195] an endorsement from history could only bolster its decision. It is more likely, however, that the court did so because that is what the Supreme Court did in its abortion cases which this court desired to emulate. In *Roe*, for example, the court devoted nearly half of its opinion to a survey of societal attitudes toward abortion from antiquity to contemporary times.[196] But in that case, the Court did so in order to set up its discussion of fundamental rights.[197] The majority in *Compassion in Dying* did not even attempt to call a right to physician-assisted suicide "fundamental."

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191. *Id.* at 487 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (Goldberg, J., concurring)).

192. 431 U.S. 494 (1977).

193. *Id.* at 503.

194. *Compassion in Dying*, 79 F.3d at 802-06.

195. The majority explains that recent cases like *Casey* and *Cruzan* suggest that the Court is close to a formal adoption of the "continuum approach." The majority was referring to the Supreme Court's notable omission of classifying the rights as fundamental or non-fundamental. Based on that omission, the majority believes that the traditional classification of rights will be supplanted by an approach which would not classify rights at all. Rather, the more important the individual's right or interest in the eyes of the court, the more persuasive the justification for infringement would have to be. *Id.* at 804.

196. *See* Marzen, *supra* note 6, at 16.

197. *See Roe*, 410 U.S at 133-156.

Even assuming that such a historical survey is an important part of the continuum approach, which the majority claims is close to formal adoption,[198] a survey of such ancient times can hardly be instructive. Is it necessary or even helpful to trace societal attitudes about suicide all the way back to Socrates? Do the beliefs held by the Romans or the Stoics really have any bearing on whether the United States Constitution protects a supposed liberty interest in physician-assisted suicide? It is more probable that the admonitions in *Griswold* and *Moore* to look to the "traditions . . . of our people"[199] and the beliefs "rooted in this Nation's history and tradition"[200] were intended to encompass a more narrow assessment. After all, *Griswold* does refer to the traditions of *our* people, and *Moore* to beliefs rooted in *this* Nation's history.

Assuming further that a historical survey of even *ancient* times is important to a proper application of the court's continuum approach, the majority's presentation is incomplete and sometimes inaccurate. For example, the court uses two paragraphs asserting that Plato thought that suicide was acceptable in certain situations.[201] The proposition would seem to lend support to the court's argument that history has not universally condemned the practice of suicide. It is curious, however, that the court neglected to explain in which 'certain situations' Plato condoned the practice. In fact, the only situation in which Plato thought suicide was not reprehensible was when it was committed in the heat of passion.[202] Moreover, he considered suicide most reprehensible when it was committed as a "reasoned and deliberate decision."[203] Therefore, this historical example, which the court offered as evidence of a societal acceptance of suicide, is repugnant to the court's holding that a patient may access physician

198. *Compassion in Dying*, 79 F.3d at 804.
199. *Griswold*, 381 U.S. at 487.
200. *Moore*, 431 U.S. at 503.
201. *Compassion in Dying*, 79 F.3d at 807.
202. *See* Marzen, *supra* note 6, at 23-24.
203. *Id.* at 24.

assistance in committing suicide *only* if he is competent to make a rational decision.[204]

Examining the era of the English common law, the court placed significance on Bracton's creation of an exception to the standard penalty for suicide whereby the suicide's land and chattels were confiscated.[205] Under the exception, only the chattels, and not the land, were confiscated if the suicide killed himself out of an unwillingness to endure further bodily pain. According to the majority, this exception displayed great compassion for those who commit suicide under such circumstances.[206] However, how great could their compassion have been if they still confiscated the suicide's chattels? It is more plausible that any compassion was directed not at the suicide, but at his heirs.

Moreover, the court neglects to consider another Bracton innovation under which neither lands nor chattels were confiscated.[207] Bracton wrote that a "madman bereft of reason[,] . . . the deranged [and] the delirious" do not commit a felony "nor do such persons forfeit their inheritance or their chattels . . . ."[208] One can only wonder why the majority would not present an example of suicide where neither lands nor chattels are confiscated to bolster its contention that suicide was not universally disfavored. Perhaps because, once again, it is directly contrary to the court's final holding that assisted suicide is only allowable for a competent person making a rational and reasoned decision.[209]

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204. *Compassion in Dying*, 79 F.3d at 838. In fairness, it should be pointed out that the court was only trying to survey history's attitude toward suicide in general, not physician-assisted suicide and that, regardless of the contradiction to the holding, Plato's attitude does support the contention that suicide has not been universally viewed as wrong in *all* situations. Nevertheless, if the court is going to present an example which is directly contrary to its holding, it should be careful to explain the contradiction.

205. *Id.* at 808-09.

206. *Id.* at 809.

207. *See* Marzen, *supra* note 6, at 59.

208. *Id.* ("[and]" included).

209. *Compassion in Dying*, 79 F.3d at 838.

C. *The Incorrect Application of the Balancing Test*

Several times in the majority opinion, the court explained that neither the liberty interest in hastening one's own death nor the state's countervailing interests are static.[210] Rather, each varies inversely with the other. As the quality of an individual's life lessens, the individual's interest in hastening death increases. Meanwhile, the state's interest in preserving that particular life weakens. The majority bases this application on the Court's balancing test in *Roe* and *Casey*: "[T]he outcome of the balancing test may differ at different points along the life cycle as a person's physical . . . condition deteriorates, just as in abortion cases the permissibility of restrictive state legislation may vary with the progression of the pregnancy."[211]

The respective balancing tests in abortion and right-to-die cases are distinguishable and, in the case of the latter, restricted by the Court's language in *Cruzan*. In applying the balancing test in that case, the Court expressly stated that a State's interest in preserving human life is "unqualified," notwithstanding the quality of the particular life in question.[212] The *Cruzan* Court said, "we think a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life . . . ."[213] This language clearly undermines the majority's use of a non-static balancing test. The reason a non-static test was allowed in *Roe* and *Casey* was because in the abortion context there could be no interest in preserving human life since the Court determined that an unborn fetus is not a "person" for the purposes of constitutional analysis.[214]

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210. *Id.* at 800, 817, 836-837.

211. *Id.* at 800.

212. *Cruzan*, 497 U.S. at 282.

213. *Id.*

214. *Roe*, 410 U.S. at 158. "All this . . . persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Id.* Of course, an unborn fetus is a person and, accordingly, use of a non-static balancing test was inappropriate in *Casey* as well. Justice Scalia explained as much in his dissenting opinion in *Casey*:

> [The *Roe* Court assumed] that what the State is protecting is the mere 'potentiality of human life.' . . . Thus, whatever answer Roe came up with after conducting its

The Court's language in *Cruzan* does not mean that all individual liberties are automatically trumped by the state's unqualified interest in preserving life. However, on its face, it expressly allows states to remove "quality of life" from the equation. Therefore, courts cannot make a determination that one person's life is less valuable or has less weight in a balancing test, based on the quality or expected duration of a person's life. The language in *Cruzan* clearly rejects the application of a non-static balancing test in cases like this one and makes clear that all life is equally valuable in the eyes of the law, regardless of the accompanying circumstances.[215]

The majority acknowledges the language in *Cruzan*, but its interpretation is not logical. The court suggests that while the state's interest in preserving life may be unqualified, "that interest is not always controlling. Nor is it of the same strength in each case. To the contrary, its *strength* is dependent on relevant circumstances, including the medical condition and the wishes of the person whose life is at stake."[216] It is difficult to understand how an "unqualified" interest must be qualified based on a patient's medical condition. Apparently, the court interprets the language in *Cruzan* to mean that "unqualified" means only that the State may always assert *some* interest in preserving life, but that the strength of the interest is variable. Even if this were true, the *Cruzan* Court, in recognizing an unqualified

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'balancing' is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human.

Casey, 505 U.S. at 982 (Scalia, J., dissenting).

However one classifies the life of the unborn, the principal subjects of *Compassion in Dying* were living persons by anyone's definition. Furthermore, in *Roe* and *Casey*, the Court determined that it is when a fetus becomes viable that it has indeed become a person for the purposes of constitutional analysis. At that point, the interest in preserving human life actually overcomes the mother's right to have an abortion. Therefore, if an analogy is made to the analysis in *Roe* and *Casey*, it should be to emphasize the *value* of human life and its effect on the balancing test.

215. *See* Edward R. Grand & Paul Benjamin Linton, *Relief or Reproach?: Euthanasia Rights in the Wake of Measure 16*, 74 OR. L. REV. 449, 505-06 (1995). *But see* Jonathan R. McBride, *A Death Without Dignity: How the Lower Courts Have Refused to Recognize that the Right of Privacy and the Fourteenth Amendment Liberty Interest Protect an Individual's Choice of Physician Assisted Suicide*, 68 TEMP. L. REV. 775, 807 (1995).

216. *Compassion in Dying*, 79 F.3d at 817 (italics in original).

interest, made it clear that "a State may properly decline to make judgments about the 'quality' of life."[217] Therefore, even if the majority may properly assign a variable strength to the State's interest in preserving life, it may not do so based on the *quality* of a patient's life, which is exactly what the *Compassion in Dying* court has done.

In support of its position, the majority explained that the state's interest in preserving life is not unqualified in all cases because if it were, "no state could administer capital punishment; similarly, the draft, as well as the defense budget, would be unconstitutional."[218] In addition, the court pointed to Washington's Natural Death Act[219] as evidence that the state has already decided that its interest in preserving life should give way in the case of terminally ill patients who are dependent on medical treatment.[220] However, this argument would only carry weight if the Supreme Court had said that a State *must* decline to make judgments about quality of life and *must* assert an unqualified interest in preserving life. To the contrary, the Court has held that a state "*may* assert an unqualified interest in the preservation of human life."[221] Therefore, the "strength" of the interest in preserving life is left to state legislatures, and the fact that the Washington State legislature has chosen to assign less weight to terminal patients who are sustained only by medication is not inconsistent with the Court's language in *Cruzan*. Similarly, regardless of what interest in preserving life the State chooses to assert in the case of capital punishment, it still remains that it *may* assert an *unqualified* interest in preserving life in other cases.

Stripped of its non-static application, the court would be at a loss to explain how an individual's interest in ending his own life could possibly outweigh the State's unqualified interest in the preservation of human life. Since an "unqualified" interest in preserving human life necessarily means that the life of a terminally ill 95-year-old patient is just as inherently valuable as that of a healthy 25-year-old, the court

217. *Cruzan*, 497 U.S. at 282.
218. *Compassion in Dying*, 79 F.3d at 817.
219. WASH. REV. CODE § 70.122.010 (1979).
220. *Compassion in Dying*, 79 F.3d at 818.
221. *Cruzan*, 497 U.S. at 282.

must find a new rationale to explain why a healthy young person should not also be afforded a right to secure physician assistance in ending his own life.[222]

D. The Unworkable Nature of the Court's Holding

It is important to remember that the majority did not find an absolute right for individuals to obtain assisted suicide. Specifically, the court held that "the 'or aids'[223] provision of the Washington statute . . . is unconstitutional as applied to terminally ill competent adults who wish to hasten their deaths with medication prescribed by their physicians."[224] This seemingly narrow holding is limited by two prerequisites: the patient must be *terminal* and must be *competent*. These limitations will soon prove to be illusory and unworkable.

1. Terminal

The court dismissed concerns that "terminal condition" cannot be effectively defined, asserting that it is already defined in numerous state natural death statutes.[225] The court surmised that any number of current definitions would suffice to properly limit the practice. For example, the state could define "terminal" to mean that death is likely to ensue within six months.[226]

However, the court did not suggest what would happen if a state did not use such a proper definition. Any state could effectively undermine this court's holding by defining terminal so narrowly that almost no patient could qualify. For example, a state legislature could find that "terminal," for the purposes of physician-assisted suicide, means that death is certain to ensue within twenty-four hours. This would be an absurd definition, but nothing in the majority opinion prevents it. It would require further litigation to bring the court to

222. *See* Kamisar, *supra* note 35, at 766.

223. WA. CODE. ANN. § 9A.36.060 (West 1975) ("A person is guilty of promoting a suicide attempt when knowingly causes or aids another person to attempt suicide.").

224. *Compassion in Dying*, 79 F.3d at 798 (emphasis added).

225. *Id.* at 831.

226. *Id.*

hold that such a definition is an unconstitutional infringement on an individual's liberty interest in hastening one's own death. But then one is still faced with the problem: What definition is *not* an unconstitutional infringement on that interest? Forty-eight hours? One week? One month? Eventually, the court itself will have to define "terminal" and, thereby, further usurp the state's legislative authority.[227] Of course, even the court will find the term nearly impossible to define equitably since any definition is sure to invade *someone's* liberty interest in hastening death.[228] No matter what the definition is, there will be countless sympathetic testimonials like those given by the majority[229] which fall outside of the proposed definition.

Limiting physician-assisted suicide to those who are terminal arbitrarily excludes patients suffering from incurable conditions, who are nevertheless not imminently terminal.[230] "If there *is* some

227. *See id.* at 857 (Beezer, J., dissenting).

228. *See* Kamisar, *supra* note 35, at 743.

229. At one point, the court argued that prohibiting a terminally ill patient from hastening death may affect the patient more profoundly than forcing a woman to carry a pregnancy to full term. To illustrate its assertion, the court gave a graphic account of a terminal AIDS patient. The patient was described as follows:

> [H]is lower body so swollen from oozing . . . lesions that he could not walk, his genitals so swollen that he required a catheter to drain his bladder. . . . [His] friends stopped visiting him because it gave them nightmares. . . . [He] begged for assistance in hastening his death.

Compassion in Dying, 79 F.3d at 814.

The majority recounts the patient's doctor's testimony that, in his professional opinion, he should have accommodated the patient's request but was prevented from doing so by the statute. *Id.* Certainly it is possible, and even probable, that there will arise a case equally as sympathetic where the patient is not "terminal" according to the relevant definition.

230. Professor Kamisar wrote:

> If personal autonomy and the termination of suffering are supposed to be the touchstones for physician-assisted suicide, why exclude those with non-terminal illnesses or disabilities who might have to endure greater pain and suffering *for much longer periods of time* than those who are expected to die in the next few weeks or months? If the terminally ill do have a right to assisted suicide, doesn't someone who must continue to live what *she considers* an intolerable or unacceptable existence *for many years* have an equal -- or even greater -- right to assisted suicide?

constitutionally protected right or liberty to decide whether . . . 'to determine the timing of [one's] death,' surely it would or should apply to [those who are incurable but not imminently terminal]."[231] Does the Fourteenth Amendment protection of "the right to define one's own concept of existence"[232] apply to everyone or only a few fortunate individuals? The majority answers this question with its balancing test, asserting that it is not until an individual is terminal, as well as incurable, that the individual's interest in dying is sufficient to outweigh the state's interest in preserving life. This judicially subjective test will inevitably lead to vast inconsistencies.[233] Surely there will arise, and almost certainly has already arisen, a case where the balancing test will determine that the individual's interest in hastening death outweighs the state's interests, but it will arise in a case where the patient is neither competent nor terminal as defined by statute.[234] If there really is a right to define one's own concept of existence and determine the timing of one's own death, perhaps the court should eliminate its strictures and simply apply the balancing test.

Furthermore, it seems clear that if a right to physician-assisted suicide is established, it will not be limited to terminally ill patients for very long since the court based its finding of a liberty interest on *Cruzan* and its recognition of a right to refuse life-sustaining medical treatment.[235] The majority contended that the State's interest in preventing physician-assisted suicide is different only in degree, and not in kind, from the State's interest in prohibiting the practice of allowing patients to refuse life-sustaining treatment.[236] If this is true, then once established, "the right to assisted suicide would not be

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Kamisar, *supra* note 35, at 740-41.

231. *Id.* at 740 (internal citations omitted).
232. *Casey*, 505 U.S. at 851.
233. *Cf.* Kamisar, *supra* note 35, at 743.
234. *Id.*
235. Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261 (1989).
236. *Compassion in Dying*, 79 F.3d at 837.

limited to the terminally ill. For the right of a person to reject life-sustaining medical treatment *has not been so limited.*"[237]

2. Competent

Determining who is "competent" will be equally troubling. The court did not recognize the potential difficulties involved in determining whether a patient has the requisite state of mind to make such a critical decision as to end one's own life. The majority's best assurance was that "physicians would not assist a patient to end his life if there were any significant doubt about the patient's true wishes. To do so would be contrary to the physicians' fundamental training, their conservative nature, and the ethics of their profession."[238]

Setting aside the fact that the entire notion of physician-assisted suicide is contrary to a physician's fundamental training, conservative nature, and the ethics of the profession,[239] two concerns remain. First, physicians' conservative nature and the ethics of the profession may very well change as requests to die become frequent and routine.[240] Moreover, the court's assurance is based on the false premise that physicians will be able to recognize competence.[241]

Whether a patient is competent may be difficult to discern in the presence of depression.[242] Implicit in the court's requirement that a patient be competent is a desire to make certain that those receiving physician-assistance in committing suicide have made a clear and rational decision. But a common symptom of clinical depression[243] is a

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237. Kamisar, *supra* note 35, at 741 (italics in original). In Bouvia v. Superior Court, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986), Elizabeth Bouvia was "a young woman afflicted with severe cerebral palsy [and] had a long life expectancy. [She was not] unconscious or mentally impaired. Indeed, the court described her as both 'intelligent' and 'alert.' Nevertheless, she was granted the relief she sought -- the right to remove a nasogastric tube keeping her alive against her wishes." *Id.* at 742.

238. *Compassion in Dying*, 79 F.3d at 827.

239. *See generally*, TASK FORCE, *supra* note 4, at 105-09.

240. *See id.* at 132.

241. *Id.* at 126-28.

242. *Id.*

243. Depressive disorders should be clearly distinguished from realistically depressed or sad moods that may accompany specific losses or disappointments in life.

loss of insight and a feeling of hopelessness.[244] "Depression can impair a patient's ability to understand information, to weigh alternatives, and to make a judgment that is stable over time and consistent with the patient's values."[245] Significantly, most individuals who commit suicide suffer from depression which is *treatable* with appropriate clinical care.[246] This is a grave concern considering the prevalence of depression among those who commit suicide,[247] particularly among the elderly.[248]

Clearly, a serious problem exists in determining which patients are "competent." If a terminal patient seems to be making a rational decision and manifests an express desire to end his life, does the fact that he is suffering from clinical depression and, thereby, making a decision he would not make if his depression were treated, mean that he is not competent? Is the majority prepared to assume that all physicians will consistently recognize and diagnose clinical depression? To the contrary, most physicians are not adequately trained to diagnose depression among patients who are terminally ill.[249]

Clinical depression is a syndrome described as an abnormal reaction to life's difficulties. *Id.* at 14.

244. TASK FORCE, *supra* note 4, at 126.

245. *Id.*

246. *Id.*

247. Depression, including major depression and depressive symptoms, is a critical risk factor for completed suicides. Depression is present in 50 percent of all suicides, and those suffering from depression are at 25 percent greater risk for suicide than the general population. *Id.* at 13-14.

248. A majority of elderly persons who commit suicide suffer from depressive episodes. The elderly are most at risk of being misdiagnosed as "competent" because clinical depression is difficult to recognize among elderly individuals. Typical symptoms of depression may be difficult to discern in the presence of other medical problems which cause symptoms associated with depression, such as sleeplessness or loss of appetite. Physicians often mistake depressive symptoms for normal signs of aging. *Id.* at 32.

> Because of the many physical illnesses and social and economic problems of the elderly, individual health care providers often conclude that depression is a normal consequence of these problems, an attitude often shared by the patients themselves. All of these factors conspire to make the illness underdiagnosed and, more important, under-treated.

Id.

249. TASK FORCE, *supra* note 4, at 127.

Finally, there is a danger that some patients may make a decision which seems rational based only on the facts and options known to them. However, had additional information been presented or if the information had been delivered in a different manner, their decision might be different. In making such a crucial decision, patients will rely on their doctors for information relevant to the decision. However, a doctor's description of the prognosis, symptoms, and treatment alternatives may have varying effects on the patient's ultimate decision depending on the tone or encouragement with which the information is provided or withheld.[250] From this perspective, it may well be the physician, not the patient, who is making the choice. "A 25 percent chance of survival, with good supportive care, sounds quite different from a 75 percent chance of failure, with significant disability and pain."[251]

The majority dismissed these concerns, surmising that the recognition of a substantive due process right should not depend on "difficulties in determining when and how to limit its exercise or because others might someday attempt to use it improperly."[252] Instead, the court resolved to step off the precipice of reason onto the steep and slippery slope of assisted death. Worse, it insisted upon wearing a blindfold.[253]

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250. *Id.* at 121.

251. *Id.* at 122.

252. *Compassion in Dying*, 79 F.3d at 831.

253. The majority chose to close its eyes completely to both the potential and unavoidable consequences of a decision to recognize a constitutional right to physician-assisted suicide. The court reasoned that difficulties in limiting the exercise of a right should not prevent the recognition of a right. *Id.* However, as the court itself explained, the very existence of the right is based on the result of a balancing test in which the state's interests are highly relevant. *Id.* at 816-32. Therefore, insofar as they affect the interests of the state, any difficulties in determining when and how to limit the exercise of a liberty interest are an indispensable element of the balancing test. Justice Frankfurter acknowledged as much:

> [While it is true that a court must decide the case before it and not some other one], that does not mean that a case is dissociated from the past and unrelated to the future. We must decide this case with due regard for what went before and no less regard for what may come after.

IV. CONCLUSION

Compassion in Dying essentially invents a constitutional right for competent, terminally ill adults to obtain physician assistance in committing suicide. Based on the Supreme Court's recognition of a constitutional right to refuse or withdraw life sustaining medical treatment, the majority inductively reasoned that a more general right to hasten death must exist. Armed with this broad liberty interest, the majority then incorrectly applied a non-static balancing test to determine that a terminally ill individual's interest in committing suicide outweighs any and all State interests in prohibiting physician-assisted suicide.

This new right is not expressly recognized anywhere within the text of the United States Constitution and is not rooted in this Nation's history and traditions. Therefore, if any liberty interest exists, it is a non-fundamental right which is easily outweighed by the State's unqualified interest in the preservation of human life. The majority's incorrect identification of a constitutional right is further complicated by its confinement to terminally ill, competent adults; a complication which will ultimately render the court's holding unworkable.

DAVID T. BURNETT

West Virginia State Bd. v. Barnette, 319 U.S. 624, 660-61 (1943) (Frankfurter, J., dissenting).