Suffering Against Their Will: The Terminally Ill and Physician Assisted Suicide--a Constitutional Analysis

Helene Brodowski

Marybeth Malloy

Follow this and additional works at: https://scholarship.law.stjohns.edu/jcred
SUFFERING AGAINST THEIR WILL: THE TERMINALLY ILL AND PHYSICIAN ASSISTED SUICIDE — A CONSTITUTIONAL ANALYSIS

All individuals are afforded due process and equal protection of the law by the United States Constitution\(^1\) absent overriding state interests.\(^2\) The Due Process Clause of the Fourteenth Amendment\(^3\) ensures that persons will not be denied life, liberty, or property without due process of law.\(^4\) The Equal Protection Clause of the Fourteenth Amendment\(^5\) guarantees that all individuals of one class will be treated equally under the law.\(^6\) These constitu-

---


3 U.S. CONST. amend. XIV, § 1. "No state... shall... deprive any person of life, liberty or property, without due process of law." Id.


5 U.S. CONST. amend. XIV, § 1. “No state shall... deny to any person within its jurisdiction the equal protection of laws.” Id.

6 See ROTUNDA, supra note 1, at 317 (explaining Equal Protection Clause guarantees similarly situated people be treated in same manner and requires any governmental classification not be based on impermissible criteria or arbitrarily be used to burden certain groups of individuals); Kathy T. Graham, Last Rights: Oregon's New Death With Dignity Act, 31 WILLAMETTE L. REV. 601, 626-630 (1995) (explaining that Equal Protection Clause requires states treat similarly situated people equally); Kenneth W. Simmon, Overinclusion and Underinclusion: A New Model, 36 UCLA L. REV. 447, 456 (1989) (discussing that equal protection of law requires all similarly situated people be treated equally and laws creating such classifications be reasonable in light of its purpose); Mark Strasser, Family Definitions and the Constitution: On the Antimiscegenation Analogy, 25 SUFFOLK U. L. REV. 981, 1018 (1991) [hereinafter Family Definitions] (discussing equal protection).
tional issues are present with regard to physician assisted suicide.\textsuperscript{7}

Currently, a physician's removal of life sustaining apparatus from a terminal patient is a permissible alternative to a prolonged, vegetative life.\textsuperscript{8} Under certain circumstances, the removal of life sustaining treatment from a patient does not give rise to either criminal or civil responsibility.\textsuperscript{9} A terminal patient, not dependent on life support, however, may not legally have a health care provider assist in their suicide.\textsuperscript{10}

Unlike assisted suicide, it has been established that the removal of life support is not "killing"\textsuperscript{11} and is a constitutional right


\textsuperscript{9} See \textit{ALAN MEISEL, THE RIGHT TO DIE} 450 (2d ed. 1995) (noting responsibility under law does not attach for doctor's proper removal of life support from patient); see also Cruzan, 497 U.S. at 279 (recognizing Constitution grants competent adult right to refuse life sustaining medical treatment); \textit{In re Conroy}, 486 A.2d 1209, 1242 (N.J. 1985) (stating that in absence of bad faith, participant in decision to remove life support will not be held liable for such action); \textit{In re Quinlan}, 355 A.2d at 669 (stating removal of life sustaining treatment did not constitute homicide); \textit{In re Storar} 420 N.E.2d 64, 73 (N.Y. 1981) (holding removal of life support from willing patient does not constitute crime); Thomas A. Raffin, \textit{Withholding and Withdrawing Life Support: Medical Aspects in LEGAL ASPECTS OF MEDICINE} (James R. Vevaina et al. eds., 1989) (noting that there is no liability for removal of life support).

\textsuperscript{10} See T. Howard Stone & William J. Winslade, \textit{Physician-Assisted Suicide and Euthanasia in the United States}, 16 J. LEGAL MED. 481, 482 (1995) (noting physician-assisted suicide is not permitted in majority of states). But see Quill, 80 F.3d at 716 (declaring state prohibition on assisted suicide unconstitutional); Compassion, 79 F.3d at 790 (holding state statutory ban on assisted suicide unconstitutional).

protected by the Due Process Clause.\textsuperscript{12} That is, a recognized liberty interest exists which permits physicians to remove life sustaining medical treatment.\textsuperscript{13} There is, however, no acknowledged constitutional right that allows a terminally ill individual to end their life with assistance.\textsuperscript{14}

Courts have traditionally differentiated between removal of life support and physician assisted suicide, creating two separate classes: those on life support and those not on life support.\textsuperscript{15} Courts have found that these terminal individuals are not similarly situated and thus similar treatment under law is unwarranted.\textsuperscript{16}

\textsuperscript{12} See Cruzan, 497 U.S. at 278 (holding competent person has constitutionally protected liberty interest in refusing unwanted medical treatment); Bouvia v. Superior Court, 225 Cal. Rptr. 297, 297 (Cal. Ct. App. 1986) (stating right to refuse medical treatment is part of fundamental right of privacy protected by state and federal constitutions); McKay v. Bergstedt, 801 P.2d 617, 621 (Nev. 1990) (noting individual's decision to refuse unwanted medical treatment is constitutionally protected); In re Quinlan, 355 A.2d at 663 (holding right of privacy is broad enough to encompass individual's decision to decline medical treatment in certain situations); In re Coyler, 660 P.2d 738, 742 (Wash. 1983) (recognizing competent patient who is terminally ill has constitutional right of privacy to refuse medical treatment when no countervailing state interest exists); see also Lawrence Tribe, American Constitutional Law \textsection{} 15-11 (1988) (analyzing constitutional issues implicated in individual's decision to terminate or refuse life sustaining medical treatment).

\textsuperscript{13} See Cruzan, 497 U.S. at 278 (holding competent person has constitutionally protected liberty interest in refusing medical treatment); Quill, 80 F.3d at 716 (recognizing settled right of individual to reject and remove life sustaining apparatus in New York); see also Michael Schuster, Health-Care Decision Making Training Module, 324 (PLI Tax Law and Estate Planning and Administration Course Handbook No. 246 1996) (discussing liberty interest and right to remove life support); Gabel, supra note 11, at 389 (describing liberty interest implicated in termination of life support); Mark D. Frederick, Comment, Physician Assisted Suicide: A Personal Right? 21 S.U. L. Rev. 59, 83 (1994) (detailing history of termination of life support cases).

\textsuperscript{14} See Kevorkian v. Thompson, 947 F. Supp. 1152, 1170-1171 (E.D. Mich. 1997) (concluding that liberty interest of Fourteenth Amendment's Due Process Clause does not grant right to physician's aid-in-dying); People v. Kevorkian, 527 N.W.2d 714, 732 (Mich. 1994) (holding there is no constitutional right to commit suicide); Jonathan R. Macbride, Comment, 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. 755, 792 (1995) (arguing that terminally ill adult's "right to die" with physician assistance is logical extension of right of privacy announced in Roe v. Wade and liberty interest announced in Planned Parenthood of Southeastern Pa. v. Casey and Cruzan v. Director, Missouri Dept of Health).

\textsuperscript{15} See People v. Kevorkian, 527 N.W.2d at 728 (distinguishing between removal of life support and assisted suicide); In re Quinlan, 355 A.2d at 665 (differentiating between life support and assisted suicide); McKay, 801 P.2d at 626 (contrasting life support removal and assisted death).

\textsuperscript{16} See Vacco v. Quill, 117 S. Ct. 2293, 2293 (1997) (holding there exists no constitutional right to assisted suicide because it is distinguishable from removal of life support); see also Kevorkian v. Thompson, 947 F. Supp. at 1179 (holding terminally ill patients are not similarly situated to life support dependent individuals); People v. Kevorkian, 527 N.W.2d at
The distinction between removal of life support and physician assisted suicide is blurring in the public eye. The Court of Appeals of the Second and Ninth Circuits declared state statutes banning assisted suicide unconstitutional. Both courts focused on differing aspects of the Fourteenth Amendment when concluding that the respective state prohibitions on physician assisted suicide were unconstitutional. The United States Supreme Court, however, reversed these Court of Appeal decisions, holding that the state statutes banning assisted suicide were constitutional.

The Supreme Court, in Vacco v. Quill, reversed the Second Circuit decision, declaring that a New York ban on physician assisted suicide was not unconstitutional. No equal protection violation was found as patients on and off of life support were not similarly situated. Furthermore, the Court stated that distinctions made between removal of life support and physician assisted suicide comport with legal principles of causation and intent.

In a companion decision, the Supreme Court overruled the Ninth Circuit opinion and declared Washington's statute prohibit-

732 n.57 (concluding life dependent patients are not similarly situated with terminal non-dependent patients).

17 Quill, 80 F.3d at 716. In Quill, the Second Circuit explained that permitting terminal patients on life-saving devices to terminate their lives while denying this right to terminal patients not dependent on life support violated the Equal Protection Clause. Id. The court declared that only one class of persons existed and therefore the Equal Protection Clause was violated. Id.


19 See Quill, 80 F.3d at 716 (declaring statutory ban on assisted suicide violated Equal Protection Clause of Fourteenth Amendment); Compassion, 79 F.3d at 790 (holding state ban on assisted suicide impinged upon liberty interests protected by Due Process Clause).

20 See Quill, 80 F.3d at 716 (focusing on equal protection violation regarding banning physician assisted suicide); cf. Compassion, 79 F.3d at 790 (stating statute prohibiting physician assisted suicide violate Due Process Clause).


22 117 S. Ct. at 2293.

23 See id. (upholding New York statute banning physician assisted suicide).

24 See id. (concluding that different treatment of those terminally ill individuals not dependent on life support and those who are dependent on life support did not violate Equal Protection Clause).

25 See id. (finding patients on and off life support not similarly situated).

26 See Glucksberg, 117 S. Ct. at 2258 (stating distinctions made between removal of life support and physician assisted suicide are based in principles of causation and intent).
PHYSICIAN ASSISTED SUICIDE

The Court rejected the Ninth Circuit's conclusion that there is a liberty interest in determining the time and manner of one's death by physician assisted suicide. Using a historical approach, the Court concluded that assisted suicide was not deeply rooted in our nation's traditions so as to warrant protection as a liberty interest. Moreover, the Court rejected the Ninth Circuit's conclusion that Casey v. Planned Parenthood of Southeastern Pa. and Cruzan v. Director, Missouri Dep't of Health lead to a recognition that highly personal decisions, such as the right to hasten one's death, is a protected liberty interest.

This Note argues that bans on physician assisted suicide are at odds with current constitutional jurisprudence and should be invalidated. Part One discusses both historical and present attitudes towards suicide. Part Two addresses equal protection ramifications of denying the terminally ill the right to physician assisted suicide. Part Three explores an individual's liberty interest in seeking physician assisted suicide and asserts that the right to assisted suicide is subsumed within one's protected liberty interest. Part Four analyzes the implicated state interests that have traditionally been offered to support an individual's right to physician assisted suicide. Balancing the relevant state interests reveals that a ban on assisted suicide does not effectuate state aims.

I. HISTORICAL AND PRESENT ATTITUDES TOWARDS SUICIDE

The issue of how to treat suicide is not unique to modern day society. The historical roots of the acceptability of suicide date

27 See id. at 2261 (declaring that Washington's statute which prohibits physician's aid-in-dying does not violated Fourteenth Amendment).
28 See id. at 2258. The Court's substantive due process analysis had two prongs. Id. at 2268. First it examined whether the interest or fundamental right at issue was deeply rooted in our nations history or tradition. Id. Second, the Court required that the right or interest be carefully defined. Id.
29 See id. at 2263 (rejecting assisted suicide as protected liberty interest).
32 See id. at 2269-2271 (recognizing liberty interest exists to permit one to hasten death).
back to ancient Greece and Rome, where the practice was deemed an appropriate response in situations involving painful, incurable disease. This partial acceptance of suicide, however, was not embraced by early American law, which followed the English common law tradition by criminalizing the act. American views on suicide also are rooted in its Judeo-Christian tradition. Suicide continues to be an affront to the teachings of Christianity which regards every life as valuable, regardless of the


35 See Compassion, 79 F. 3d at 806 (noting that Romans believed that to live noble life included dying nobly); see also Barry, supra note 33, at 462 (recounting that Romans committed suicide to preserve honor and escape shame); Cara Elkin, Renewed Compassion for the Dying in Compassion in Dying v. State of Washington, 26 GOLDEN GATE U. L. REV. 1, 8 (1996) (noting euthanasia was accepted practice in Rome); Michael J. Roth, A Failed Statute, Geoffrey Feiger, and the Phrenetic Physician: Physician-Assisted Suicide in Michigan and a Patient Oriented Alternative, 28 VAL. U. L. REV. 1415, 1421 (1994) (noting Romans viewed absolute ban on suicide as unreasonable). But see Neeley, supra note 34, at 39 (noting Roman law never included prohibition against suicide) (citing GLANVILLE WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 253 (1972)).

36 See Roth, supra note 35, at 1420 (discussing Greek and Roman view that absolute ban on suicide was unreasonable).


38 See Compassion, 79 F.3d at 808. In early American history, suicide was criminalized. Id.; Mary Margaret Penrose, Assisted Suicide: A Tough Bill to Swallow, 20 PEPP. L. REV. 689, 697 (1993). English common law viewed suicide as a felony. Id.; Marzen, supra note 33, at 57. There is legal authority dating back to the thirteenth century prohibiting suicide. Id.; Stone & Winslade, supra note 10, at 483. England abandoned the criminalization of suicide in 1961. Id.

quality of that life.\textsuperscript{40} By the end of the eighteenth century, however, six of the original colonies abolished all penalties for suicide.\textsuperscript{41} Currently, no state imposes criminal penalties for suicide.\textsuperscript{42} Conversely, assisted suicide is banned in forty-nine of the fifty states\textsuperscript{43} even though current public attitudes are more “ac-

\textsuperscript{40} See Marzen et al., \textit{supra} note 33, at 26 (detailing effect of Christianity in Roman Empire); Thomas Josef Messinger, \textit{A Gentle and Easy Death: From Ancient Greece Beyond Cruzen Toward a Reasoned Legal Response to the Societal Dilemma of Euthanasia}, 71 \textit{Denver U. L. Rev.} 175, 185 (1993) (commenting on distinction between early Christians value of all life and Greeks and Romans focus on quality of life); see also Compassion, 790 F.3d at 807 (noting that Sir Thomas Moore, canonized by Roman Catholic Church, strongly advocated permitting terminally ill patient to commit suicide with or without assistance of others); \textit{Jasper}, \textit{supra} note 33, at 2 (noting in Christian culture, suicide was denounced, and person who committed suicide was denied proper burial).

\textsuperscript{41} See Compassion, 79 F.3d at 806 (stating early colonies did not penalize suicide); see also Marzen et al., \textit{supra} note 33, at 68 (explaining rationale for abolishing penalties for suicide) (citing S.F.C. MILLON, \textit{HISTORICAL FOUNDATION OF THE COMMON LAW} (1981)).


cepting" of the practice. Moreover, the public seems to be increasingly more accepting of the idea of physician assisted suicide. A recent study by the New England Journal of Medicine surveying San Francisco physicians who treat AIDS patients revealed that fifty-three percent of physicians responding to the survey would aid patients, in this circumstance, to take their own lives.

This trend was evinced by Oregon’s Death With Dignity Act which enabled competent terminally ill adults to obtain a doctor’s prescription for a fatal drug dosage. A federal district court, however, declared this act unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment. The court concluded that the statute was over inclusive, as it provided a means of suicide for both competent and incompetent patients. It was found that such unequal protection of certain individuals violated the Equal Protection Clause. This opinion, however,
was vacated by the Ninth Circuit Court of Appeals, citing that the plaintiffs lacked standing to litigate this matter.\textsuperscript{51}

The most well-known advocate of physician assisted suicide is Dr. Jack Kevorkian who has assisted in the death over fifty individuals.\textsuperscript{52} Confronted with the acts of Kevorkian, the Michigan Legislature passed a law which established assisted suicide as a felony.\textsuperscript{53} Kevorkian has been prosecuted repeatedly by Michigan authorities under this statute, but has yet to be convicted of a crime.\textsuperscript{54} Proponents of assisted suicide have challenged the constitutionality of the Michigan statute.\textsuperscript{55} The Michigan Supreme Court, in \textit{People v. Kevorkian},\textsuperscript{56} declared that the statute which criminalized assisted suicide was constitutional,\textsuperscript{57} refusing to find that any liberty interest was implicated in committing suicide with assistance.\textsuperscript{58}

In \textit{Compassion in Dying v. Washington},\textsuperscript{59} the Ninth Circuit declared that the state statute which prohibited physician assisted suicide violated the Due Process Clause of the Fourteenth Amendment.\textsuperscript{60} The court analyzed previous jurisprudence regarding

\textsuperscript{51} Lee v. Oregon, 107 F.3d 1382, 1392 (9th Cir. 1997) (remanding and vacating district court decision on jurisdictional grounds).

\textsuperscript{52} See Herbert Hendin, \textit{Seduced By Death: Doctors, Patients, and The Dutch Cure}, 10 ISSUES L. & MED. 123, 130 (1994) (acknowledging numerous accounts of Kevorkian aiding death); Weingand, \textit{supra} note 37, at 331 (discussing various accounts of Kevorkian assisting suicide); see also Clark, \textit{supra} note 44, at 66-76 (discussing issues surrounding Dr. Jack Kevorkian).

\textsuperscript{53} See \textit{MICH. COMP. LAWS} § 752.1027 (1) (1996). The statute provides criminal sanctions to an individual who knows an individual intends to commit suicide and: "(a) Provides the physical means by which the other person attempts or commits suicide; (b) participates in a physical act by which the other person attempts or commits suicide." \textit{Id.}; see also MacBride, \textit{supra} note 14, at 764 (discussing Michigan's response to Kevorkian's actions).


\textsuperscript{56} \textit{Id.} at 724.

\textsuperscript{57} \textit{See id.} at 724 (declaring Michigan statute prohibiting assisted suicide constitutional).

\textsuperscript{58} \textit{See id.} at 728 (concluding there is no liberty interest implicated in issue of physician assisted suicide).

\textsuperscript{59} \textit{Compassion in Dying v. Washington}, 79 F. 3d 790, 790 (9th Cir. 1996), rev'd sub nom., \textit{Washington v. Glucksberg}, 117 S. Ct. 2258 (1997). This litigation was brought by three terminally ill patients, four physicians and a non-profit organization. \textit{Id.} at 793.

\textsuperscript{60} \textit{See id.} at 838 (holding Washington's statute violated Due Process Clause of Fourteenth Amendment); see also \textit{WASH. REV. CODE} § 9A.36.060 (1996) (criminalizing assisted suicide).
highly personal matters such as abortion and the right to die. The court concluded that the right of physician assisted suicide was subsumed within the liberty interest protected by the Due Process Clause. The court never reached an equal protection analysis, for it concluded that the statute violated the Due Process Clause.

The Second Circuit, in Quill v. Vacco, declared that the New York statute which criminalized assisted suicide violated the Equal Protection Clause of the Fourteenth Amendment. The court reasoned that an equal protection violation existed because terminally ill patients on life support were allowed to die by removal of life support, while terminal patients not on life support were not granted any legal assistance in dying. The court concluded that these two groups were similarly situated and were denied equal application of the law and therefore the statute prohibiting assisted suicide violated the Equal Protection Clause of the Fourteenth Amendment. The court, however, declined to find that there was any liberty interest implicated by the right to die with assistance. Both decisions, however, have been reversed by the Supreme Court.

---

61 See Compassion, 79 F.3d at 816 (discussing Supreme Court holdings regarding right to privacy).
62 See id. at 838 (holding that right of terminally ill patient to hasten death is subsumed within liberty interest protected by Due Process Clause).
63 See id. at 838 (stating that since statute violated due process, there was no need for equal protection analysis).
64 Quill v. Vacco, 80 F.3d 716, 716 (2d Cir. 1996), rev'd, 117 S. Ct. 2293 (1997). The plaintiffs in this litigation were three terminally ill patients and three physicians who sought a declaration that the state statute prohibiting assisted suicide was unconstitutional. Id. at 718; see also N.Y. PENAL LAW § 125.15 (McKinney 1997). The statute states that "[a] person is guilty of manslaughter in the second degree when: . . . [h]e intentionally . . . aids another person to commit suicide." Id.; N.Y. PENAL LAW § 120. 30 (McKinney 1991). "A person is guilty of promoting a suicide attempt when he intentionally . . . aids another person to attempt suicide." Id.
65 See Quill, 80 F.3d at 731 (holding statutes criminalizing assisted suicide violate Equal Protection Clause).
66 See id. at 729 (noting differing treatment of terminal patients on life support and those not life support dependent).
67 See id. at 729 (finding statutory ban on assisted suicide as violation of Equal Protection Clause).
68 See id. at 724 (concluding no liberty interest is implicated in physician assisted suicide).
II. REMOVAL OF LIFE SUPPORT AND PHYSICIAN ASSISTED SUICIDE ARE INDISTINGUISHABLE

The "lower Quill court" undoubtedly would agree that because the decision to live or die on life support is so fundamental it is impossible to find plausible grounds on which the right to make the decision to die could be afforded to those on life support but denied to all others. Nevertheless, most courts have held that removal from life-sustaining medical treatment, unlike physician assisted suicide, does not amount to suicide and triggers no criminal culpability for the acting health care provider.

Despite the underlying similarity between removal of life support and physician assisted suicide, courts have traditionally held that the two procedures are qualitatively dissimilar. Even though the Equal Protection Clause ensures equal application of law to members of the same "class", these courts have found that

70 See Elkin, supra note 35, at 36 (suggesting there is no practical distinction between active and passive death); Tucker & Burman, supra note 11, at 504 (discussing argument that similarity between physician assisted suicide and removal of life support warrants equal treatment of law); Right to Die With Assistance, supra note 11, at 2030 (questioning denying right to assistance in dying for non life-support dependent patients).


72 See In re Quinlan, 355 A.2d 647, 647 (N.J. 1976) (acknowledging removal of life support has no criminal liability for health care provider); In re Storar, 420 N.E.2d 64, 73 (N.Y. 1981) (holding removal of life support under proper circumstances did not constitute crime); see also Meisel, supra note 9, at 450 (recognizing settled right to removal of life sustaining treatment).

73 See Right to Die With Assistance, supra note 11, at 2021-30 (stating two methods cannot be distinguished on basis of causation); Sloss, supra note 42, at 956-957 (asserting procedures can not be differentiated). But see Yale Kamisar, The Reason So Many People Support Physician Assisted Suicide and Why These Reasons Are Not Convincing, 12 Issues L. & Med. 113, 129 (1996) (discussing distinctions between refusal of medical treatment and physician assisted suicide).

74 See, e.g., Vacco, 117 S. Ct. at 2293 (recognizing distinctions between two procedures); see also Jennifer L. Hoehne, Note, Physician Responsibility and the Right to Death Care: The Call for Physician Assisted Suicide, 42 Drake L. Rev. 225, 225 (1993) (highlighting disparate judicial and legislative treatment of physician assisted suicide and removal of life support); Jeremey A. Sticoff, Note, Death With Dignity: Aids and a Call for Legislation Securing the Right to Assisted Suicide, 29 J. Marshall L. Rev. 677, 691 (1996) (acknowledging that courts have excluded physician assisted suicide from general acceptance of life support removal).

two distinct classes exist—those on life support and those not on life support.\textsuperscript{76} Prior to the Second Circuit’s decision in \textit{Quill}, therefore, no equal protection violation had been found to exist.\textsuperscript{77}

\section{The Basis of the Distinction: Active v. Passive}

The distinctions that have been made between life support removal and physician assisted suicide stem largely from the asserted disparity between letting die (removal of life support) and killing (assisted death).\textsuperscript{78} That is, life support is deemed a passive event, and assisted suicide is dubbed an active measure.\textsuperscript{79}

\subsection{Omission Theory}

Active as opposed to passive measures are distinguished based on the omission of treatment.\textsuperscript{80} The standard rationale asserts that whereas a patient’s death results subsequent to foregoing continued medical care, the death is not caused by the actual discontinuation of medical care, but by the underlying condition.\textsuperscript{81}

\textsuperscript{76} See Kevorkian v. Thompson, 947 F. Supp. 1152, 1179 (E.D. Mich. 1997) (holding no equal protection violation because patients not similarly situated); People v. Kevorkian, 527 N.W.2d 714, 732 n.57 (Mich. 1994) (concluding no equal protection violation existed as life support dependent patients are not similarly situated with terminal non dependent individuals).

\textsuperscript{77} See Rachel D. Kleinberg & Toshiro M. Mochizuki, The Final Freedom: Maintaining Autonomy and Valuing Life in Physician Assisted Suicide Cases, 32 Harv. C.R.-C.L. L. Rev. 197, 197 (1997) (acknowledging that \textit{Quill} was first case holding ban on physician assisted suicide constituted equal protection violation); Marc Spindelman, \textit{Are the Similarities Between a Woman’s Right to Choose an Abortion and the Alleged Right to Assisted Suicide Really Compelling?}, 29 U. Mich. J.L. Rev. 775, 846 (1996) (recognizing \textit{Quill} marked shift in legal battle regarding constitutionality of physician assisted suicide); see also Devlin, supra note 50, at 65 (discussing impact of \textit{Quill}).

\textsuperscript{78} See Meisel, supra note 9, at 497-498 (noting that distinction was between “ordinary” and “extraordinary” means); see also Barber v. Superior Court, 195 Cal. Rptr. 484, 484 (Cal. Dist. Ct. App. 1983) (ruling that removing life support is not killing, but merely allowing natural death); Thomas A. Preston, \textit{Physician Involvement in Life Ending Practices}, 18 Seattle U. L. Rev. 531, 540 (1995) (noting opposing views on suicide).

\textsuperscript{79} See Daniel Callahan & Margo White, Legalization of Physician Assisted Suicide Creating a Regulatory Potemkin Village, 30 U. Rich. L. Rev. 1, 73 (1996) (recognizing active—passive distinctions between procedures); Kamisar, supra note 73, at 124 (recognizing life support removal categorized as passive and physician assisted suicide as active).

\textsuperscript{80} See Meisel, supra note 9, at 451 (acknowledging action—omission distinction between removal of life support and physician aided death for death occurring from removal of life support). See generally Massachusetts v. Golston, 366 N.E.2d 744, 744 (Mass. 1977) (relieving doctor of criminal liability for removing life support).

For example, in *In re Bouvia,* a non-terminally ill patient with severe cerebral palsy was permitted to refuse the use of a feeding tube. The underlying rationale of the court was that the patient was deemed to have accepted a death which was brought on by the omission to treat.

It can not be maintained, however, that when a physician withdraws life support, he does not play an active role in bringing about the death of the patient. No court has held that the removal of life-sustaining apparatus from a dependent patient constitutes suicide, or a crime, despite the fact that when a physician removes life-support, it is done so by active measures and the consequence is a likely death.

2. Causation

The active—passive distinction used to differentiate between removal of life support and physician assisted suicide has been rooted in terms of causation where it has been offered that the underlying disease, not the acts of the physician, cause the patient’s death.
A causation analysis demonstrates that the doctor's act of removing life support meets the but-for test of causation, as were it not for the acts of the doctor, the patient would not have died when he did. Furthermore, the removal of life support also prove to be the proximate cause of death even if it is incorrectly categorized as an omission. Where in fact death may be of underlying disease, the on-set of death by disease may be characterized as an independent intervening cause, not superseding the doctor's responsibility. That is, death is a foreseeable and probable result of life support removal.

Furthermore, if a health care provider were to accidentally remove the ventilator from a willingly dependent patient, it would be said that the doctor's actions killed the patient, not that the individual died of natural causes. The act of the physician is causally no different than the acts of a stranger who walked into the hospital and removed the patient's life-line.

It is inappropriate to say that removal of life support in the form of feeding and hydration tubes results in natural death with no causal link between death and acts of a physician. Withdrawal

90 See Right To Die With Assistance, supra note 11, at 2029 (asserting removal of life support may be cause in fact of death); see also Sloss, supra note 42, at 56 (noting doctor's removal of life support without permission is proximate cause of death).
92 See id. (reasoning life support removal is actual cause of death, not underlying disease). But see Nebraska v. Meints, 322 N.W.2d 809, 814 (Neb. 1982) (finding removal of life support was not intervening cause so to relieve accused of homicide).
93 See Edward R. Grant & Clark D. Forsythe, The Right of the Last Friends: Legal Issues for Physicians and Nurses in Providing Nutrition and Hydration, 2 ISSUES L. & MED. 277, 280 (1987) (stating it is questionable to find no causation exists when withdrawing certain forms of life support); Marni J. Lerner, Note, State National Death Acts: Illusory Protection of Individuals' Life Sustaining Treatment Decisions, 29 HARV. J. ON LEGIS. 175, 201 (1992) (finding causal nexus between death and removal of life support under certain circumstances); see also RESTATEMENT (SECOND) OF TORTS § 441 (stating intervening act takes effect after another action and which contributes to causing injury).
94 See Beauchamp, supra note 85, at 106-107 (exploring situations where actor deemed to have killed patient); Sloss, supra note 42, at 56 (noting doctor's act against will of life support dependent patient is cause of death).
95 See Beauchamp, supra note 85, at 107 (arguing that all termination of life is criminal); see also Sloss, supra note 42, at 956-57 (stating physician's act in removal of life support and assisted suicide can not distinguished). See generally Washington v. Yates, 824 P.2d 519 (Wash. Ct. App. 1992) (holding removal of life support by third party was proximate cause of death).
96 See Grant & Forsythe, supra note 93, at 277 (recognizing causal link may exist between act and death when feeding and hydration tubes is removed); see also Quill v. Vacco, 80 F.3d 716 (2d Cir. 1996) (questioning no causation finding when removal of life support is in form of hydration and nutrition tube), rev'd, 117 S. Ct. 2293 (1997); Lerner, supra note
of this form of support is frequently an independent cause of death by starvation and dehydration\textsuperscript{97} and not from the underlying disease.\textsuperscript{98} Where removal of feeding and hydration tubes is sought, there is a "death by gradual starvation and dehydration."\textsuperscript{99}

Holding that no causation exists between a doctor's acts and death when removal of life support occurs is a policy based, ethical distinction made to exempt a physician, morally and legally, for the death of a patient.\textsuperscript{100} It is, therefore, improper to distinguish between the two procedures on the basis of causation.\textsuperscript{101}

3. Duty Provides Causal Link Between Death and "Omission" When Removing Life Support

As has been asserted, a doctor removing life support may escape criminal liability by the inappropriate categorization of such removal as an omission where no causal link is found to exist between the procedure and the patient's death. This was based on a finding that a health care provider was under no duty to continue medical treatment once it had been undertaken.\textsuperscript{102} The physi-
cian's duty to a patient includes an obligation to provide the patient with "benefits" if possible so long as the "benefits" outweighs the "burdens" of such healthcare. A duty of a physician to continue treatment is thus measured by a test of proportionality of benefit and burden.

By finding no causal link between death and the removal of support, it is implicit that the doctor had no duty to continue to treat the patient. When the duties of the physician are analyzed, however, it seems that relieving a doctor of such duty can not be justified. It is offered that even though removal of life support is often inappropriately categorized as an omission, a causal link never the less exists between the "omission" and death because the doctor should have a duty to provide treatment after undertaking to do so. Therefore, it is asserted that the removal of certain types of life support and physician assisted suicide can not be distinguished upon a finding that a causal link exists in the former but not the latter.

The duty of a physician includes an obligation to provide reasonable, ordinary care. In Barber v. Superior Court of the State of California, the court concluded that removal of feeding and hydration tubes was legally sanctioned, finding no duty to treat the patient. Feeding and hydration, however, are to be included as the most basic sustenance of life and as ordinary, basic types of

James L. Walsh, The House of Lords and the Discontinuation of Artificial Nutrition and Hydration: An Ethical Analysis of Tony Bland Case, 35 Cath. Law. 363, 369 (1994) (discussing "duty of care" analysis of Bland case where court found omission of doctor to treat triggered culpability only when duty to continue to treat existed).

103 See Tom L. Beauchamp, The Justification of Physician Assisted Deaths, 29 Ind. L. Rev. 1173, 1181 (1996) (discussing balance between burdens and benefits in deciding to end treatment); Clark, supra note 44, at 128-131 (discussing seven proposed criteria for assisted suicide and describing subjectivity of best interests standard); see also Roth, supra note 35, at 1420-1421 (tracing requirement that physician benefit patient to ancient Greece's Hippocratic oath).

104 See Barber, 195 Cal. Rptr. at 490. Factors under this standard include relief of suffering, restoration of quality of life and preservation of life. Id. at 493; Norman Cantor, The Real Ethic of Death and Dying, 94 Mich. L. Rev. 1718, 1730-33 (1996). When treating a patient, this test should be controlling, and respecting the autonomy of the patient should be the major factor in the analysis. Id. at 1730.

105 See Bopp, supra note 101, at 14 (acknowledging general duties of physician include obligation to provide ordinary, not extraordinary medical care); Grant & Forsythe, supra note 93, at 285 (stating doctor is not obliged to provide extraordinary care).

106 195 Cal. Rptr. at 490.

107 See id. at 484 (recognizing no duty existed for doctor to provide life support); see also Grant & Forsythe, supra note 93, at 283 (discussing Barber); Hoehne, supra note 74, at 243 (explaining Barber holding).
treatment. Furthermore, where a physician's duty, when a cure cannot be found, is the alleviation of pain, it can not be said that a physician fulfills his contractual obligations to a patient if he does not provide a service that can appease pain.

Due to the fact that a physician may be relieved of the duty to continue to provide life support, it is implicit that the burdens of a prolonged life outweigh the benefits of such a life. It does not logically flow, however, that a terminal patient not dependent on such devices, reaps greater benefits than burdens by being kept alive when compared to a life-support dependent patient. An alert terminal patient suffers great pain, while the vegetative patient on life support experiences no negative sensations. Both patients are terminally ill and thus by definition receive no tangible medical benefits by being kept alive.

Based on the foregoing, it is asserted that a physician provides greater benefits than burdens to a terminal, non-dependent patient by assisting in death. Therefore, relieving a doctor of the duty to continue to provide treatment in the former but not the latter scenario can not be justified by this circular ideology.

B. Intent

It has been proffered that a support dependent patient who wishes to forego or discontinue life support has no specific intent

108 See Grant & Forsythe, supra note 93, at 288 (stating feeding and hydration are most elemental types of treatment); see also Bopp, supra note 101, at 314 (describing feeding and hydration as ordinary care); Donald C. Wintersheimer, The Role of the Court in Terminating Nutrition and Hydration for Incompetent Patients, 10 Issues L. & Med. 453, 460 (1995) (stating nutrition and hydration are ordinary aspects of care and are not treatment); Hoehne, supra note 74, at 245 (noting physicians' reluctance to terminate feeding and hydration).


111 See Hurley v. Eddingfield, 59 N.E. 1058, 1058 (Ind. 1900) (noting duty may arise in doctor—patient relationship); see also Restatement (Second) of Torts §§ 323, 324A (1965) (stating positive duty to act exists when intended beneficiary relies on voluntary undertaking). See generally Alan Meisel, Right to Die, Medico Library 76 (1989) (asserting that there may be duty to act in doctor—patient context); Reitman, supra note 109, at 303 (claiming that physician's contractual obligation is to provide patient with autonomously chosen services).
to die. This argument confuses intent and motive, as intent includes the desire to bring about physical consequences, while motive includes the purpose that precipitates. Both a request for assistance in dying and a decision to terminate life support include one's intent to bring about death. Both patients intend to bring about their own death but the motives for death will vary. It has been observed that "there may be little distinction between the intent of a terminally-ill patient who decides to remove her life support and one who seeks the assistance of a doctor in ending her life. . .[as in] both situations, the patient is seeking to hasten a certain, impending death."

III. SUBSTANTIVE DUE PROCESS ANALYSIS DEMONSTRATES THE EXISTENCE OF A LIBERTY INTEREST FOR PHYSICIAN ASSISTED SUICIDE

The Fourteenth Amendment's Due Process Clause states that no state shall "deprive any person of life, liberty, or property without due process of the law." Constitutional jurisprudence recognizes that there are both procedural and substantive aspects of the Due Process Clause. Procedural due process analysis exam-

112 See McKay v. Bergstedt, 801 P.2d 617, 620 (Nev. 1990) (stating that removal of life support is removal of natural barrier to death); Fosmire v. Nicoleau, 551 N.E.2d 77, 82 n.2 (N.Y. 1990) (contending patient seeking life support removal did not want to die); see also In re Hall Hosp., 455 N.Y.S.2d 706, 711 (N.Y. Sup. Ct. 1982) (asserting patient's opting for removal of life support because of pain was not suicide); Vicki L. Gilbreath, The Right of the Terminally Ill to Die with Assistance if Necessary, 8 CRIM. JUST. J. 403, 414 n.74 (1986) (noting patient on life support is not seeking self-destructive behavior, while patient not on life support is said to have specific intent to die).

113 See supra note 9, at 243 (discussing motive and intent).

114 See id. at 462-63. When life support is removed, the intended consequence is obvious to both patient and doctor. Id.

115 See id. at 463 (noting argument stating life support removal patient lacks specific intent to die confuses intent and motive); Tucker & Burman, supra note 11, at 504 (stating request for removal of life support and physician assisted suicide are made for same reasons); see also Joel R. Cornel, Wrongful Life and the Problem of Euthanasia, 23 GONZ. L. REV. 573, 583 (1988) (discussing intent regarding removal of support and assisted suicide).


117 U.S. CONST. amend. XIV.

118 See Rotunda, supra note 1, § 17.1 (explaining substantive and procedure due process analysis); Juliene C. Scocca, Comment, Society's Ban on Same-Sex Marriages: A Reevaluation of This So-Called "Fundamental Right" of Marriage, 2 SETON HALL CONST. L.J. 719, 769 n.26 (1992) (discussing difference between substantive and procedural due process); see also Kelly v. Johnson, 425 U.S. 238, 244 (1976) (discussing procedural and substantive components of Due Process Clause); Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 HARV. L. REV. 1221, 1303 n.247 (1995) (explaining distinctions between procedural and substantive due process and historical roots of both doctrines); James R. May, Fashioning Procedural and
ines the process in which the law is made and applied, while substantive due process analyzes whether the substance of the law is compatible with the Constitution.\(^\text{119}\) Physician aid in dying implicates substantive due process because the issue involves the constitutionality of laws prohibiting an exercise of a liberty interest.\(^\text{120}\) Under substantive due process analysis, a court first determines whether a liberty interest exists,\(^\text{121}\) and then examines whether the challenged statute unconstitutionally impinges upon the exercise of that liberty interest.\(^\text{122}\)

Under a substantive due process analysis, it seems that laws that prohibit terminally ill patients from choosing the time and

---

**Substantive Due Process Arguments in Toxic and Other Tort Actions Involving Punitive Damages After Pacific Mutual Life Insurance Co. v. Haslip, 22 ENVTL. L. 573, 588 (1992)**

(noting that Due Process Clause contains both substantive and procedural components).


\(^{122}\) See Cruzan v. Director, Missouri Dept’ of Health, 497 U.S. 261, 279 (1990) (stating that once court has determined that liberty interest exists, court must balance exercise of liberty interest against relevant state interests); Youngberg v. Romero, 457 U.S. 301, 321 (1982) (explaining that once liberty interest is recognized, exercise of this interest must be balanced against relevant state interests to ascertain whether challenged laws constitutionally infringe upon exercise of this interest); *Compassion*, F.3d at 799 (explaining substantive due process analysis); Bopp & Coleson, supra note 121, at 252 (noting that constitutionally protected interest may be trumped by exercise of compelling state interest).
manner of death violate the liberty interest guaranteed by the Due Process Clause.\textsuperscript{123} The choice of a terminally ill patient to hasten death with physician assistance does not implicate any new right or liberty interest,\textsuperscript{124} but rather is subsumed within the right to privacy.\textsuperscript{125} This right is an extension of the individual’s existing right to terminate life sustaining medical treatment.\textsuperscript{126} A competent terminally ill patient’s liberty interests are threatened when he or she is unable to make this personal decision without interference by the state.\textsuperscript{127}

The right of the terminally ill to end suffering by hastening inevitable death\textsuperscript{128} is deeply rooted in this nation’s history and tra-


\textsuperscript{124} See Gabel, supra note 11, at 387 (arguing that right to assisted suicide follows from previous Supreme Court decisions which have recognized right to refuse medical treatment and cases involving personal autonomy); Julia Pugliese, Note, \textit{Don’t Ask, Don’t Tell: The Secret Practice of Physician-Assisted Suicide}, 44 Hastings L.J. 1291, 1310 (1993) (contending that distinguishing withdrawal of life support and physician’s aid in dying is illusory because result is same in each case); Sitcoff, supra note 74, at 690 (asserting that right to die with assistance is logical extension of right to terminate life support).

\textsuperscript{125} See Neeley, supra note 34, at 79 (arguing that right of individual to hasten one’s death with assistance is subsumed within right to privacy); Frederick, supra note 113, at 59 (discussing constitutional reasons why physician assisted suicide should be permitted); John A. Powell & Adam Cohen, \textit{The Right To Die}, 10 Issues L. & Med. 169, 170 (1994) (arguing that right to die with assistance is constitutionally protected based on personal autonomy, right of privacy and due process liberty interest); Steven J. Wolhander, \textit{Voluntary Active Euthanasia for the Terminally Ill and the Constitutional Right To Privacy}, 69 Cornell L. Rev. 363, 363 (1984) (contending competent terminally ill person has constitutionally protected right to determine time and manner of their own death).

\textsuperscript{126} See \textit{The Right to Die With Assistance}, supra note 11, at 204-28 (stating right to die with assistance is part of broader right to die and thus constitutionally protected); Mac-Bride, supra note 14, at 793 (arguing that right to die with assistance is logical extension of right of privacy and liberty interest announced in previous Supreme Court decisions); see also Brian C. Goebel, \textit{Who Decides If There is “Triumph in the Ultimate Agony?” Constitutional Theory and the Emerging Right to Die With Dignity}, 37 WM. & Mary L. Rev. 827, 864 (1996) (contending that right to die with dignity falls squarely within liberty protected by Fourteenth Amendment).

\textsuperscript{127} See Frederick, supra note 113, at 107 (arguing that any prohibition against assisted suicide of terminally ill patient can only be justified by compelling state interest); Christopher N. Manning, Note, \textit{Live and Let Die?: Physician-Assisted Suicide and the Right To Die}, 9 Harv. J.L. & Tech. 513, 535 (1996) (contending state’s interest in refusing to recognize “right to die” is not “slippery slope” argument).

\textsuperscript{128} See Mark Strasser, \textit{Assisted Suicide and the Competent Terminally Ill: On Ordinary Treatment and Extraordinary Policies}, 74 Or. L. Rev. 539, 545 (1995) [hereinafter \textit{Assisted Suicide}] (arguing that decision of terminal patient to hasten death with assistance of
The decision of a terminally ill individual to hasten death and die with dignity was, in certain circumstances, praised while states have relevant interests in preventing suicide and preserving life; these interests must be balanced against the liberty interest implicated by the right of a terminally ill, competent patient to hasten death with a physician's assistance.

A. Substantive Due Process And Liberty Interests

The substantive due process doctrine acknowledges that the states' ability to intrude into the personal matters of the individual is limited. Constitutional jurisprudence recognizes that certain others is personal one and should be protected by liberty interest under due process; Todd D. Robichaud, Note, Toward a More Perfect Union: A Federal Case For Physician Aid-In-Dying, 27 U. Mich. J.L. Reform. 521, 536 (1994) (asserting that decision of terminal patient to seek assistance in dying is highly personal right to be protected under due process).


See Compassion, 79 F.3d at 806 (discussing Plato's belief that suicide was justifiable for individuals suffering from painful diseases); The Republic of Plato Book III 406a-409 (Alan Bloom ed., 1968) (stating "[i]f any man labor of an incurable disease, he may dispatch himself if it be to his own good").

See Compassion, 79 F.3d at 820 (detailing prevention of suicide as relevant state interest); Edward J. Larson, Prescription for Death: A Second Opinion, 44 DePaul L. Rev. 461, 469 (1995) (discussing state interest in preventing suicide); Right to Die With Assistance, supra note 11, at 2033 (noting state interest in preventing suicide); Assisted Suicide, supra note 128, at 556 (contending that those states which do not criminalize suicide should be stopped from using states' interest in prevention of suicide to justify ban on physician assisted suicide); Previn, supra note 39, at 591 (describing states' interest in preventing suicide as part of general state interest in preserving life).

See Compassion, 79 F.3d at 817 (stating that in general, preservation of life is "unqualified" state interest); Kate E. Bloch, Note, The Role of Law in Suicide Prevention: Beyond Civil Commitment-A Bystander Duty to Report Suicide Threats, 39 Stan. L. Rev. 929, 935 (1987) (noting that states' interest in preserving life reflects societal value of life); Previn, supra note 39, at 591 (discussing state interest in preserving life). But see Spindelman, supra note 77, at 775 (arguing that state interest in preserving life justifies prohibition on physician assisted suicide).

See Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 279 (1990) (detailing how in cases involving liberty interest, courts must balance relevant state interests against individual's interest); Compassion, 79 F.3d at 816 (discussing how court must balance relevant state interest against individual's liberty interest in physician aid in dying); see also Spindelman, supra note 77, at 850 (discussing balancing test); Paul J. Zwier, Looking For a Nonlegal Process: Physician-Assisted Suicide and the Care Perspective, 30 U. Rich. L. Rev. 199, 224 (1996) (noting that states' interest in preservation of life and prevention of suicide must be balanced against terminally ill individual's liberty interest in hastening death).

See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992) (acknowledging state's ability to intrude into matters involving personal choices); Hobbies v. Attorney General, 518 N.W.2d 487, 495 (Mich. 1994) (stating that Due Process Clause limits government interference in personal decisions); Spindelman, supra note 77, at 814 (indicating that Due Process Clause limits power of states interfering in individual's personal decisions).
tain “key moments and decisions” in a person’s life are impene-
trable by the state. The Supreme Court has held that the Due 
Process Clause of the Fourteenth Amendment protects personal 
decisions concerning marriage, family relationships, abortion, 
contraceptives, and most recently, the right to marry.

135 Compassion, 79 F.3d at 912.
136 See Webster v. Reproductive Health Services, 492 U.S. 490, 549 (1989) (Blackmun, 
J., concurring in part and dissenting in part) (discussing constitutional protections of deci-
sions of individuals); Thournburgh v. American College of Obstetricians & Gynecologists, 
476 U.S. 747, 772 (1986) (acknowledging that highly personal decisions affecting personal 
liberties of individual should be free from unwarranted government interference). But see 
Glucksberg v. Washington, 117 S. Ct. 2258, 2260 (1997) (stating that not all personal deci-
sions are protected from governmental interference).

137 See Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (declaring that marriage is funda-
mental liberty protected by Due Process Clause); Loving v. Virginia, 388 U.S. 1, 12 (1967) 
(acknowledging that right of marriage is protected by Due Process Clause); see also Skinner 
v. Oklahoma, 316 U.S. 535, 541 (1942) (describing marriage as “basic civil right of man”); 
Maynard v. Hill, 125 U.S. 190, 205 (1888) (describing marriage as “most important relation 
in life”); Family Definitions, supra note 6, at 1000 (stating that Due Process Clause protects 
right to marry); Jodi M. Solovy, Comment, Civil Enforcement of Jewish Marriage and Di-
vorce: Constitutional Accommodation of a Religious Mandate, 45 DePaul L. Rev. 493, 513 
(1996) (discussing marriage as fundamental right protected by Due Process Clause).

138 See Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (acknowledging that decisions 
regarding family relationships are private matters into which state may not interfere); 
Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (noting that liberty interest protects 
parental decisions regarding upbringing and education of children); Meyer v. Nebraska, 
262 U.S. 390, 398 (1923) (recognizing that decisions relating to home, family and raising of 
children are protected by Due Process Clause); see also Stephen G. Gilles, On Educating 
Children: A Parentalist Manifesto, 63 U. Chi. L. Rev. 937, 1003 (1996) (discussing that family 
relationships are protected by Due Process Clause); The Right to Die With Assist-
ance, supra note 11, at 2024 (stating that family relationships are protected by due 
process).

139 See Albright v. Oliver, 510 U.S. 266, 271 (1994) (noting that substantive due process 
protection extends to procreation); Planned Parenthood of Southeastern Pa. v. Casey, 505 
U.S. 833, 926 (1992) (stating that right of privacy protects individuals from governmental 
intrusion into certain personal matters such as procreation); Skinner, 316 U.S. at 541 (not-
ing that right of procreation is protected liberty interest); see also Philip S. Welt, Adoption 
Surv. Am. L. 165, 165 (1995) (discussing how due process protects personal decisions such 
as procreation); Jeanne L. Vance, Note, Womb for Rent: Norplant and the Undoing of Poor 
Women, 21 Hastings Const. L.Q. 827, 835 (1994) (noting that right to procreate is implicit 
in Due Process Clause).

140 See Casey, 505 U.S. at 839 (holding that personal matters such as abortion are pro-
tected by liberty interest of Due Process Clause); Thornburgh, 476 U.S. at 772 (concluding 
that abortion is protected by “private sphere of individual liberty”); Roe v. Wade, 410 U.S. 
113, 152 (1973) (holding that right of privacy and personal liberty interest protect woman’s 
decision to terminate her pregnancy); see also Taunya Lovell Banks, The American With 
Disabilities Act and the Reproductive Rights of HIV-Infected Women, 3 Tex. J. Women & L. 
57, 71 (1994) (stating that abortion is protected liberty interest); Rachel K. Firner & Laurie 
(notating that right to abortion is protected liberty interest).

contraceptives to minors); Eisenstadt v. Baird, 405 U.S. 438, 452 (1972) (holding that both 
married and single individuals have privacy rights which permits them to obtain contracep-
tives); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (declaring that right of pri-
vacy exists and extends to married couple’s choices regarding contraceptives); see also
to refuse life sustaining medical treatment. The precise boundaries of the liberty interest protected by the Due Process Clause have been tested on numerous occasions. In Planned Parenthood of Southeastern Pa. v. Casey, the Court adopted an “evolving doctrinal approach to substantive due process” matters. This approach recognizes that the Constitution does not operate in a vacuum but rather in a society that is evolving. Justice Harlan, dissenting in Poe v. Ullman, argued that the liberty interest protected by the Due Process Clause is a “rational continuum” which encompasses freedom from arbitrary imposition and purposeful restraints.


Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977). Since the boundaries of the Due Process Clause are not clear, it is argued by some that before any rights or interests are recognized, they must be analyzed based upon the historic teachings of our nation. Thus, an interest must be “deeply rooted in our nation's history and traditions” before it is granted constitutional protection. Id.; Casey, 505 U. S. at 849. The Court in Casey rejected the historical pedigree analysis, stating: what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to survive. Id. at 850 (quoting Poe v. Ullman, 347 U.S. 497, 542 (1961)) (Harlan, J., dissenting from dismissal on jurisdictional grounds).

See Moore, 431 U.S. at 502 (noting that substantive due process analysis was difficult because boundaries of liberties protected were unclear); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (noting exact boundaries of liberty interest have not been defined); Manning, supra note 127, at 540 (arguing that because exact boundaries of liberty interest protected by Due Process Clause were unknown, test used to ascertain whether it exists is highly subjective); Miranda Perry, Comment, Kids and Condoms: Parental Involvement in School Condom Distribution, 63 U. CHI. L. REV. 727, 736 (1996) (stating that existing case law does not define boundaries of liberty interest protected by Due Process Clause).


See Casey, 505 U.S. at 848 (describing liberty interest as part of “rational continuum”).


See id. (Harlan, J., dissenting).

See id. (Harlan, J., dissenting) (stating that “full scope of the liberty interest guaranteed by the Due Process Clause is a rational continuum which, broadly speaking includes a freedom from all substantial arbitrary impositions and purposeful restraints”); Anthony C.
It seems that physician assisted suicide, when analyzed under this “rationale continuum”, implicates a liberty interest which is protected by the Due Process Clause. The choice to die with assistance is a natural and logical extension of previously recognized liberty interests such as abortion, personal autonomy, termination of life support.

Ciccia, Note, A Wolf in Sheep's Clothing?: A Critical Analysis of Justice Harlan's Substantive Due Process, 64 Fordham L. Rev. 2241, 2241 (1996) (discussing Justice Harlan's approach to substantive due process analysis); Goebel, supra note 126, at 845 (describing Justice Harlan's approach as more flexible because it examines how constitutional jurisprudence has developed).

151 See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 848 (1992). The Court held “[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.” Id. The evolution of Supreme Court jurisprudence in the arena of contraceptive rights is an example of the rationale continuum. Id.; Poe, 367 U.S. at 509. In Poe, the Supreme Court denied certiorari in an action which challenged the constitutionality of Connecticut's statutes prohibiting the use of contraceptives. Id. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965). A short time later, in Griswold, however, the court held that prohibition of distribution of contraceptives under Connecticut law violated a couple's right to privacy. Id. at 485-86. Eisenstadt v. Baird, 405 U.S. 438, 444 (1972). Eight years later, the Court in Eisenstadt, the Court recognized that the right of privacy concerning contraceptive applied to married as well as single individuals. Id. at 444. Carey v. Population Servs. Int'l, 431 U.S. 678, 698-99 (1977). Finally, Carey extended this right to obtain contraceptives to minors. Id. at 698-99.

152 See Clark, supra note 44, at 78 (discussing “rational continuum” and physician assisted suicide); see also Amicus Curiae Brief of 36 Religious Organizations, Leaders, and Scholars in Support of Respondents at 16, Vacco v. Quill, 117 S. Ct. 2293 (1997) (No. 95-1858) (arguing that rational continuum approach to liberty interest demonstrates that physician assisted suicide is protected by Due Process Clause).

153 See, e.g., Eisenstadt, 405 U.S. at 444 (addressing fundamental right to privacy for all people); Loving v. Virginia, 388 U.S. 1, 12 (1967) (recognizing marriage as fundamental right); Griswold, 381 U.S. at 485-486 (addressing fundamental right to privacy); Maynard v. Hill, 125 U.S. 190, 205-06 (1888) (describing marriage as fundamental right).

154 See Casey, 505 U.S. at 839 (concluding right to abortion is protected by liberty interest of Due Process Clause); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 772 (1986) (holding that decision to have children is protected by “private sphere of individual liberty”); Roe v. Wade, 410 U.S. 113, 152 (1973) (declaring that right of privacy and personal liberty interests protect woman's right to abortion); see also Pirner & Williams, supra note 140, at 189 (stating that Due Process Clause's liberty interest protects woman's right to abortion).

155 See Compassion in Dying v. Washington, 79 F.3d 790, 813 (9th Cir. 1996) (stating that decision of terminally ill to hasten death is central to personal dignity and autonomy of individual), rev'd sub nom., Washington v. Glucksberg, 117 S. Ct. 2258 (1997); Janet M. Branigan, Note, Michigan's Struggle With Assisted Suicide and Related Issues As Illuminated by Current Case Law: An Overview of People v. Kevorkian, 72 U. Det. Mercy L. Rev. 959, 970 (1995) (stating that personal autonomy is encompassed within Due Process Clause and that right to assisted suicide is implicitly protected by Fourteenth Amendment); see also Brief of Respondents at 189, Glucksberg v. Washington, 117 S. Ct. 2258 (1997) (No. 96-110) (arguing constitutional jurisprudence recognizes individual's right of personal autonomy supports premise of liberty interest for terminally ill for assistance in dying). But see Spindelman, supra note 77, at 847 (rejecting argument that right to self-determination or personal dignity can be extended to support right of physician assisted suicide).

156 See Cruzan v. Director, Missouri Dept'of Health, 497 U.S. 261, 278 (1990) (holding that liberty interest of Due Process Clause grants competent persons right to refuse lifesav-
B. Comparison of the Liberty Interest Implicated Abortion and Physician Assisted Suicide

The Supreme Court rejected the Ninth Circuit's conclusion that 

Casey 

suggests that all personal and intimate decisions of an individual are protected by the Due Process Clause. In Case,

the Court addressed the issue of a woman's right to obtain an abortion and examined the liberty interests implicit in this right. The Court relied on previous opinions concerning personal decisions relating to marriage, contraception, family relationships, and education. The Casey Court reaffirmed that the Fourteenth Amendment protects an individual's personal and intimate decisions involving those choices which are central to

ing hydration and nutrition); In re Quinlan, 355 A.2d 647, 662-64 (N.J. 1976) (holding that individual's decision to terminate life support is protected by right of privacy); see also Alan J. Parker, Recent Development in Estate Planning and Federal and Gift Tax, 200 (PLI Tax Law and Estate Planning Course Handbook Series No. 228 1992) (noting liberty interest in refusing unwanted medical treatment); Schuster, supra note 13, at 324 (discussing Cruzan and existing liberty interest in refusing life sustaining medical treatment); Christina Von Cannon Burdette, Comment, Constitutional Law-Cruzan v. Director, Missouri Dept' of Health: The Supreme Court Reposes the Right-to Die Issue with the Individual States, 20 MEM. ST. U. L. REV. 655, 655 (1990) (analyzing Cruzan and discussing constitutional issues implicated in right to die cases).


See Casey, 505 U.S. at 833 (challenging Pennsylvania abortions statutes).

See id. at 844-45 (discussing facts of case).

See, e.g., Loving v. Virginia, 388 U.S. 1, 12 (1967) (discussing constitutional protection of right to marry); Skinner v. Oklahoma, 316 U.S. 535, 536 (1942) (discussing how right to privacy protects decisions regarding procreation).


See Bellotti v. Baird, 443 U.S. 622, 638 n.18 (1979) (stating that Supreme Court decisions in Prince and Pierce suggest constitutionally protected right to raise children without undue interference by state); Prince, 321 U.S. at 164 (discussing child-rearing); Pierce, 268 U.S. at 535 (noting that liberty interest protects parental decisions concerning education of children); Meyer, 262 U.S. at 399 (discussing right to raise children); see also Mark Strasser, Legislative Presumptions and Judicial Assumptions: On Parenting, Adoption, and the Best Interest of the Child, 46 U. KAN. L. REV. 49, 50 (1986) (discussing Casey analysis regarding personal decisions).

See, e.g., Pierce, 268 U.S. at 534-35 (setting forth right to direct upbringing of children); Meyer, 262 U.S. at 399 (addressing fundamental right to raise children); Gilles, supra note 138, at 1004 (discussing parental rights regarding educating children).
personal dignity and autonomy. It is asserted that included among highly personal decisions is the right of a competent terminally ill patient to hasten death with a physician’s assistance.

The decision of a terminally ill individual to seek assistance in hastening death is an innately personal one. This decision is analogous to the decision of a woman deciding to terminate her pregnancy. Only the individual suffering from a terminal illness fully understands the depth of the pain and suffering experienced. Similarly, during her pregnancy, a woman is subject to physical constraints, pain and anxieties that are deeply personal. The state has no right to force this level of suffering upon the woman who would prefer to terminate the pregnancy by an abortion. Similarly, in the case of physician assisted suicide, it is only the terminally ill individual who can measure their pain

165 See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992) (stating that decisions such as terminating pregnancy is intimate and personal, and is central to personal dignity and autonomy of individual); Compassion in Dying v. Washington, 79 F.3d 790, 801 (9th Cir. 1996) (discussing Casey and stating that issue of physician assisted suicide is innately personal), rev’d sub nom., Washington v. Glucksberg, 117 S. Ct. 2258 (1997); see also George J. Annas, “The Right to Die” in America Sloganeering From Quinlan and Cruzan to Quill & Kevorkian, 34 Duq. L. Rev. 875, 893 (1996) (discussing liberty interest protecting individual’s personal decisions); Clark, supra note 44, at 73 (noting that certain personal decisions are protected by liberty interest of Due Process Clause).

166 See Compassion, 79 F.3d at 813 (comparing woman’s decision whether to terminate pregnancy with that of terminally ill who wishes to hasten death); Annas, supra note 165, at 892 (describing physician assisted suicide as personal issue); England, supra note 45, at 410 (contending that decision of terminally ill person to terminate their pain and suffering is personal one and should be protected by liberty interest of Due Process Clause); Robert L. Kline, The Right to Assisted Suicide in Washington and Oregon: The Courts Won’t Allow a Northwest Passage, 5 B.U. PUB. INT. L.J. 213, 214 (1996) (noting that advocates of physician assisted suicide argue that terminal patient’s decision to seek physician’s aid in dying is deeply personal deserving constitutional protection); Tucker & Burman, supra note 11, at 508 (concluding that liberty interest of Fourteenth Amendment protects individual’s right to choose between suffering and less painful dignified death).

167 See Kline, supra note 166, at 220 (discussing comparisons between abortion and assisted suicide); MacBride, supra note 14, at 777-78 (contending liberty interest delineated in abortion cases encompass terminally ill patient’s right to assisted suicide); Manning, supra note 127, at 525 (addressing conclusions that personal dignity questions are involved in both physician assisted suicide and abortion); see also Law, supra note 123, at 322 (comparing time factors involved in abortion cases and physician assisted suicide cases as important factor for standing).


169 See Casey, 500 U.S. at 852 (discussing pains of pregnancy).

170 See id.

The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she bear... Her suffering is too intimate and personal for the
and suffering, and determine the proper course of action for themselves. Since a woman's decision to terminate her pregnancy and end her "suffering" is a constitutionally protected liberty interest, such a liberty interest should also be extended to the terminally ill individual. Therefore, the Supreme Court should have affirmed the Ninth Circuit opinion, in Compassion in Dying v. Washington, which correctly noted the similarities between a woman suffering from an unwanted pregnancy and a terminal patient suffering in the last stages of life. The court reasoned that the impact of prohibiting a terminally ill patient from hastening death and ending their suffering is more significant than when forcing a woman to continue her pregnancy. Thus, the court concluded a terminal individual should have rights similar to that which is granted to a woman coping with an unwanted pregnancy.

Abortion, like physician assisted suicide, is an emotionally charged issue with significant moral and spiritual implica-

State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and culture.

171 See Compassion, 79 F.3d at 794-95 (detailing pain and suffering of plaintiffs); Sitcoff, supra note 74, at 677 (discussing suffering of 34 year old AIDS patient and his wishes to end his suffering with assistance of others).

172 See Casey, 505 U.S. at 852 (addressing suffering of pregnant woman); see also Clark, supra note 44, at 74 (comparing suffering of pregnant woman who wishes to terminate pregnancy with that of terminal patient who seeks physician's assistance in dying); Donald P. Judges, Taking Care Seriously: Relational Feminism, Sexual Difference, and Abortion, 73 N.C. L. Rev. 1323, 1403 (1995) (detailing suffering of woman who suffers unwanted pregnancy); Jay A. Sekulow & John Tushey, The "Center" is in the Eye of the Beholder, 40 N.Y.L. Sch. L. Rev. 945, 955 (1996) (describing emotional, psychological or familial suffering of pregnant woman forced to carry unwanted pregnancy); Spindelman, supra note 77, at 823 (discussing Casey and pregnant woman's suffering and abortion rights).

173 See Bopp & Coleson, supra note 121, at 245-46 (noting that physician's failure in pain management causes terminal patients to choose death); Elkin, supra note 35, at 40 (discussing Dr. Quill's guidelines for assisting patient's suicide); Alison C. Hall, To Die With Dignity: Comparing Physician Assisted Suicide in the United States, Japan and the Netherlands, 74 Wash. U. L.Q. 803, 837-38 (1996) (noting that guidelines for physician assisted suicide should include suffering extreme pain that cannot be alleviated).

174 See Compassion, 79 F.3d at 814 (noting similarities of "suffering" between abortion and patient in last stages of terminal illness).

175 See id. (stating "[p]rohibiting a terminally ill patient from hastening death would have an even more profound impact on that person's life than forcing a woman to carry a pregnancy to term").

176 See England, supra note 45, at 412 (stating that physician assisted suicide and abortion are sensitive issues that lead to emotionally charged debates involving religion); Leslie L. Mangin, Note, To Help or Not to Help: Assisted Suicide and its Moral, Ethical and Legal Ramifications, 18 Seton Hall Legis. J. 728, 729-30 (1994) (noting that physician assisted suicide is emotional issue); Sloss, supra note 42, at 937 (describing issue of physician's aid in dying as emotionally charged).
In Casey, the Court recognized that its role was "to define the liberty of all, not to mandate [its] own moral code." While abortion is contrary to many religious teachings, it remains a legally recognized alternative for those who choose it. Physician assisted suicide should attain this same recognition.

C. The Liberty Interest Implicated by Right to Die Compatible With a Terminally Ill Patient's Right to Physician Assisted Suicide

The Supreme Court first addressed the right to die in Cruzan v. Director, Missouri Dep't of Health where it held that there is a constitutionally protected liberty interest which allows an individual to refuse life-sustaining medical treatment. The Court relied on prior decisions implicating individual autonomy and the ability to refuse unwanted medical treatment. Although a constitutionally protected liberty interest existed to permit the refusal of life-support, the Court concluded that the interest was not absolute. The Court employed a balancing test between Nancy Cruzan's liberty interest in terminating life sustaining medical treatment and the state's interest in preserving Cruzan's life.

177 See Casey, 505 U.S. at 850 (characterizing abortion as offensive to basic principles of morality of some); Daniel O. Conkle, Religious Purpose, Inerrancy and the Establishment Clause, 67 IND. L.J. 1, 17 (1991) (noting regulation of abortion was religiously motivated); Elizabeth Mensche & Alan Freeman, The Politics of Virtue: Animals, Theology and Abortion, 25 GA. L. REV. 923, 1083 (1991) (discussing Catholic concern for spiritual well-being of mother seeking abortion).

178 See Casey, 505 U.S. at 833 (challenging Pennsylvania abortion statutes).

179 See id. at 850 (discussing moral implications of abortion).

180 See Kathleen M. Boozang, Deciding the Fate of Religious Hospitals in the Emerging Health Care Market, 31 HOUS. L. REV. 1429, 1463 (1995) (noting that tension between patient choice and institutional religious beliefs were more acute in physician assisted suicide context); Graham, supra note 6, at 605-06 (noting many believe physician assisted suicide repugnant because of religious belief); Previn, supra note 39, at 608 (noting justification for laws prohibiting physician assisted suicide based solely on religious belief); Tom Stacy, Euthanasia and the Supreme Court's Competing Conceptions of Religious Liberty, 10 ISSUES L. & MED. 55, 59-59 (1994) (addressing that resistance to physician assisted suicide has strong religious element, but not exclusive reason behind prohibition).


182 See id. at 278 (holding prior decisions compel recognition of constitutionally protected liberty interest in refusing unwanted medical treatment).

183 See, e.g., Union Pacific R.R. Co. v. Botsford, 141 U.S. 250, 251 (1891) (addressing issue of individual's right "to be let alone"); Schoendoerff v. Society of New York Hosp., 105 N.E. 92, 93 (N.Y. 1914) (considering one's right to decide what will be done to one's own body).

184 See Cruzan, 497 U.S. at 281 (noting that state has important interest in preserving life).

185 See id. at 271. The Cruzan Court acknowledged that there were four important areas of relevant state interests implicated in that case. Id. These interests included the prese-
The state's restriction requiring "clear and convincing" evidence of the patient's wishes for the removal of life support was constitutionally permissible. The Supreme Court found the exercise of the right to refuse life support was permissible.

Justice O'Connor, in her concurrence, acknowledged that a liberty interest protected physical freedom and self-determination in refusing unwanted medical treatment. A dying patient who is forced to remain on life sustaining apparatus is likely to feel like a prisoner of machinery and that burdens the patient's liberty interests.

The terminally ill patient is a "captive" as this individual is captive in a dying body often suffering constant pain. This increases the "benefit" received by dying in the benefit—burden balancing analysis. Comparatively, a patient on life support is often unconscious and unaware of their pain.

_Cruzan_ focused on the personal autonomy of the individual and the protection case law provides for individual autonomy.
In Washington v. Glucksberg, the Supreme Court declared that the rationale which supported Cruzan's right to refuse unwanted medical treatment was grounded in the common law rule that to forcibly medicate an individual was a battery. Justice Stevens, however, in his concurring opinion in Vacco v. Quill, argued that the right of Cruzan to refuse medical treatment was part of a wider concept of freedom. This freedom embraces an individual's right to refuse unwanted medical treatment as well as an interest in dignity and determining the character of the memories that will last long after an individual has died. Cruzan illustrates that an individual has an interest in making decisions concerning how they will confront their own deaths.

These authors believe that by extending the reasoning of previous Supreme Court decisions regarding abortion and right to die to the physician assisted suicide context, there seems to be a clear liberty interest protecting a terminally ill patient's decision to hasten their death. Laws prohibiting these individuals from obtaining such assistance infringes upon their liberty interests.

Jennifer E. Bennett Overton, Note, Unanswered Implication-The Clouded Rights of the Incompetent Patient Under Cruzan v. Director, Missouri Department of Health, 69 N.C. L. Rev. 1293, 1294 (1991) (commenting that right to die is often linked with individual's right to self determination). But see Tsarouhas, supra note 34, at 800 (rejecting proponents of assisted suicide argument that right of personal autonomy and self-determination support terminal patient's right to physician's aid-in-dying).


Id. at 2269 (Stevens, J., concurring) (discussing common law approach to individual's personal autonomy and Cruzan).


See id. (Stevens, J., concurring) (contending that right to die recognized in Cruzan is broader than common law right to refuse medical treatment but encompasses right of dying individual to control aspect of their inevitable death).

See id. (Stevens, J., concurring) (discussing dying individual's interest in controlling how they will be remembered after their deaths).

See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 839 (1992) (holding that personal matters such as abortion are protected by liberty interest of Due Process Clause); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 772 (1986) (concluding that abortion is protected by "private sphere of individual liberty"); Roe v. Wade, 410 U.S. 113, 152 (1973) (holding that right of privacy and personal liberty interest protect woman's decision to terminate her pregnancy); see also Banks, supra note 140, at 71 (discussing that abortion is protected liberty interest); Pirner & Williams, supra note 140, at 187 (1993) (noting that right to abortion is protected liberty interest).

See Cruzan v. Director, Missouri Dept' of Health, 497 U.S. 261, 279 (1990) (holding that decision to remove life sustaining medical treatment is protected by liberty interest of Due Process Clause); see also Kline, supra note 142, at 69 (discussing Cruzan and removal of life sustaining medical treatment).

See Gabel, supra note 11, at 369 (discussing that prohibition of physician assisted suicide in Washington was found to infringe on liberty interest); Previn, supra note 39, at 616 (asserting prohibition of physician assisted suicide violates patients' autonomy). But
The government may place restrictions on an individual's liberty, but such restrictions must not be so burdensome as to completely restrict the ability to exercise the interest.204

IV. STATE INTERESTS DO NOT SUPPORT STATE BANS ON PHYSICIAN ASSISTED SUICIDE FOR TERMINALLY ILL COMPETENT ADULTS

The existence of a compelling state interest overrides a patient's right to determine the course of his or her own medical treatment.205 Such state interests include the preservation of life,206 prevention of suicide,207 deterrence of undue influence,208 protection see Mark E. Chopko & Michael J. Moses, Assisted Suicide: Still a Wonderful Life?, 70 Notre Dame L. Rev. 519, 526 (1995) (arguing if autonomy is only criteria, then patient's condition and motives are irrelevant).

204 See Casey, 505 U.S. at 874 (discussing undue burden on protected liberty interest); Compassion in Dying v. Washington, 79 F.3d 790, 802 (9th Cir. 1996) (discussing undue burden test), rev'd sub nom., Washington v. Glucksberg, 117 S. Ct. 2258 (1997); see also Gillian E. Metzger, Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence, 94 Colum. L. Rev. 2025, 2025 (1994) (explaining undue burden test in which governmental restrictions placed upon exercise of constitutionally protected interest will be analyzed based on whether such restrictions are unduly burdensome on individual).

205 See generally In re Storar, 420 N.E.2d 64, 71 (N.Y. 1981) (discussing how state interests sometimes trump individual interests regarding medical treatment); Joan-Margaret Kun, Rejecting the Adage "Children Should Be Seen and Not Heard": The Mature Minor Doctrine, 16 Pace L. Rev. 423, 445 (1996) (contending that prevention of suicide as among compelling state interests may prevent competent patients from refusing extraordinary treatment); Adam Marshall, Choices For a Child: An Ethical and Legal Analysis of a Failed Surrogate Birth Contract, 30 U. Rich. L. Rev. 275, 296 (1996) (pointing out that compelling state interests include maintaining ethical integrity of medical profession); Robichaud, supra note 128, at 536 (asserting that state interests must be balanced against individual's interests).

206 See Cruzan, 497 U.S. at 280 (noting state interests in preserving life); Kline, supra note 166, at 236 (noting state interests in preservation of life); Schuster, supra note 13, at 413 (noting state interests in preserving life); Previn, supra note 39, at 413 (noting that state has interest in preserving life).

207 See Cruzan, 497 U.S. at 271 (stating state has interest in preventing suicide); Compassion, 79 F.3d at 820 (describing state interest in preventing suicide as part of broader interest in preserving life); People v. Kevorkian, 527 N.W.2d 714, 758 (Mich. 1994) (Mallet, J., concurring) (noting strong state interest in preventing suicide).

tion of third parties, and the maintenance of the integrity of the medical profession.

While preservation of life is frequently considered the most significant state interest, the rights of patients are not, per se, trumped. Balancing these competing interests includes an examination of what benefit the patient is receiving from current treatment and whether patient autonomy is being sacrificed. Burdens to a terminal patient in pain are far greater than the benefits received by being kept alive against one's will.

In conjunction with the preservation of life, the state has an interest in preventing suicide. It should be noted that despite this

---

209 See Compassion, 79 F.3d at 824 (detailing state interest in protection of third parties); Gumpel, supra note 88, at 371 (arguing physician assisted suicide actually protects innocent third parties); Martha A. Matthews, Suicidal Incompetence and the Patient's Rights to Refuse Lifesaving Treatment, 75 CAL. L. REV. 707, 745 (1987) (arguing protection of third parties was not compelling state concern).

210 Compassion, 79 F.3d at 816-817 (describing relevant state interest in maintaining integrity of medical profession); Gray v. Romeo, 697 F. Supp. 580, 581-91 (D.R.I. 1988) (noting integrity of medical profession as state interest); Clark, supra note 44, at 81 (discussing that state interest in protecting integrity of medical profession is often used as support for ban on physician assisted suicide).

211 See Quill v. Vacco, 117 S. Ct. 2302, 2304-05 (1997) (Steven, J., concurring). Justice Stevens noted in his concurring opinion that the states interest in preservation of human life has at times given way to other interests. Id. For example, the Supreme Court has concluded that capital punishment is not per se unconstitutional. Id. Thus, in those instances in which the statute which permits capital punishment meets the necessary constitutional requirements, the state's interest in the sanctity of human life is subordinate to other interests. Id.

212 In re Conroy, 486 A.2d 1209, 1223-24 (N.J. 1985). It has been noted that in cases involving a patient's decision regarding their own individual fate, the "state's indirect and abstract interest in preserving the life of the patient" is eclipsed by the patient's personal interest in directing the course of their own lives. Id. at 1223-24. The court concluded that denying the individual patient the right to choose to end life would actually decrease the value of that person's life. Id. at 1209.


214 See Compassion, 79 F.3d at 817 (noting that state interest in preserving life is not always controlling); McKay v. Bergstedt, 801 P.2d 617, 620 (Nev. 1990) (applying balancing test and finding that non-terminal patient could not seek assisted suicide); In re Grant, 747 P.2d 445, 451 (Wash. 1987) (noting that states interests significantly decrease if treatment only postpones death for terminal individual); In re Coyler, 660 P.2d 738, 743 (Wash. 1983) (holding that state interests weaken in cases in which treatment only prolongs terminal patient's life); see also Anthony J. Dangelantonio, McKay v. Bergstedt, 7 ISSUES L. & MED. 351, 352 (1991) (noting that well being of patient must be balanced against state's interest).

215 See Kline, supra note 166, at 227 (opining that total ban on assisted suicide does not properly effectuate state interests).

216 See Conroy, 486 A.2d at 1224 (contending that in conjunction with general interest in preserving life, states have valid interest in preventing suicide); In re Storar, 420 N.E.2d 64, 71 (N.Y. 1981) (asserting state has legitimate interest in protecting lives of citizens);
interest, suicide is no longer criminalized by states.\textsuperscript{217} While state interests in the sanctity of life and the prevention of suicide are valid, a ban on assisted death does not effectuate these interests.\textsuperscript{218}

Another limitation on the right of a patient regarding medical treatment is the interest that a state may have in safeguarding the integrity of the medical profession.\textsuperscript{219} When a physician follows the choice of a competent adult patient he can not be deemed to have violated his professional responsibilities.\textsuperscript{220}

The remedy to prevent any possible abuse would not be to prohibit either means by which life is terminated, but to install adequate safeguards to prevent such abuse.\textsuperscript{221} State interests are not properly effectuated by prohibitions on assisted death.\textsuperscript{222}

**CONCLUSION**

The Supreme Court has recognized that there are certain innately personal decisions that are free from governmental intrusion. The decision of a terminally ill, competent patient to end life by assisted suicide should be included among those highly personal decisions protected by the Due Process Clause. Furthermore, distinctions made between removal of life support and physician assisted suicide are specious and policy based. Therefore, avoidance of equal protection analysis and a justification of a ban on physician assisted suicide can not be founded upon such a basis.


\textsuperscript{217} See *Compassion*, 79 F.3d at 820 (noting no state prohibits suicide); LaFave & Scott, *supra* note 42, § 74 (noting no penalty for acts of suicide).

\textsuperscript{218} See *Compassion*, 79 F.3d at 821 (asserting state interests in prevention of suicide in cases of terminal patient are not compelling and may pose different situation where otherwise situated individuals are involved).


\textsuperscript{220} See *Delio*, 156 N.Y.S.2d at 693 (noting that doctor who effectuated individual's wishes did not demean medical profession).

\textsuperscript{221} See Meisel, *supra* note 9, at 503 (proposing that safeguards are needed to successfully implement aid in dying procedures).

\textsuperscript{222} See id. at 503. Statutes banning such procedures are "overbroad," for they are not tailored to achieve the desired state results while they intrude on the interests and rights of the individual. *Id.*
While the Supreme Court has declared that the New York and Washington statutory bans on assisted suicide are not unconstitutional per se, the Court recognized that it dealt with a facial challenge to the statute. Therefore, the Court has not foreclosed the possibility of an unconstitutional application of such a statute to a particular set of plaintiffs. Perhaps jurisprudence in this area is best left to small steps.

Helene Brodowski & Marybeth Malloy