Is There a Constitutional Right to Die? (Introductory Remarks of Panel I)

Michael Bryce
INTRODUCTORY REMARKS OF PANEL I: IS THERE A CONSTITUTIONAL RIGHT TO DIE?

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I come to this Symposium as someone who is involved with legal issues affecting the elderly. I work with the Elder Law Clinic here at St. John's. The clinic represents low and moderate income seniors in areas of vulnerability, including consumer fraud cases, public benefit denials, and improper or illegal debt collection.

These issues clearly have a significant impact on senior citizens. The issue which the panel will be discussing today, physician-assisted suicide, has the potential for greater impact not only upon senior citizens but every one of us. After all, if you go

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to a card store it is not surprising to see cards for people who are eighty, cards for people who are ninety, and a significant number of cards for people who have turned one-hundred. We are a society that is living longer.¹ We have the benefit of ever increasing advanced medical techniques that keep us alive longer.²

Most of us have known a relative, a friend or friend’s relative who is terminally ill and possibly in great pain, on a respirator or in a coma. As we go through the two panel discussions today, I would ask you to remember your thoughts about that person’s condition and their future. What were your thoughts concerning issues about the sanctity of life? What were your thoughts about that person choosing not to have continued medication, nutrition or hydration? What were your thoughts about the person possibly asking their doctor to help them end their life? Could you imagine yourself in that person’s position, dealing with those issues?

This morning’s discussion will, in part, address whether a competent person, who is terminally ill, has a constitutional right to determine the time and place of their death through physician-assisted suicide.³ The Supreme Court of the United States faced this same question in the form of two cases,⁴ one from the Ninth Circuit and one from the Second Circuit.⁵

¹ See Paul Steven Miller, The Impact of Assisted Suicide on Persons with Disabilities—Is it a Right Without a Freedom, 9 ISSUES L. & MED. 47, 52 (1993) (providing facts of life-span increase due to science); see also Jan Ellen Rein, Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform, 60 GEO. WASH. L. REV. 1818, 1862 (1992) (claiming that reasons elderly have hard choice is because of longer life-span).


⁵ See Quill v. Koppe, 80 F.3d 716, 718, 720-25 (2d Cir. 1996) (noting that case was first time issue had been addressed by that court); Compassion in Dying v. Washington, 79 F.3d 790, 793 (9th Cir. 1995) (recognizing this as first assisted suicide case at this
we should know the Supreme Court's answer to this question.6

In the first of these two cases, *Compassion in Dying v. Washington*,7 the Ninth Circuit held that any statute which prohibits aiding another to commit suicide is contrary to the Due Process Clause of the Fourteenth Amendment.8

In deciding whether there was a constitutional right to physician-assisted suicide, the Ninth Circuit found that a liberty right existed to determine the time and manner of one's death.9 The existence of such a liberty interest, however, did not mean that the State of Washington could not regulate that liberty.10 The court balanced the competing interests of the State of Washington's power to regulate with the liberty of the terminally ill plaintiffs' right to die.11 The court determined that while the State of Washington had legitimate interests in protecting life, preventing suicide, and in regulating doctors, those interests were substantially reduced in the case of a terminally ill adult who wished to end his life in the final stages of an incurable and painful degenerative disease.12

In making its ruling, the Ninth Circuit did not distinguish between physician-assisted suicide and the decision to cut off medical treatment.13 Apparently they found a liberty interest in both cases.

The other case argued before the Supreme Court was *Quill v. Vacco*.14 Dr. Quill and two colleagues brought this action to

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6 See *Vacco*, 117 S. Ct. at 2296 (holding that New York law did not violate Equal Protection Clause of Fourteenth Amendment); *Compassion*, 117 S. Ct. at 2259-60 (ruling that Washington law did not violate Constitution).

7 79 F.3d 790 (9th Cir. 1995).

8 See id. at 793 (finding that Washington statute, which prohibited physician-assisted suicide by medication for competent terminally ill patients who want to hasten death, violated Due Process Clause of Fourteenth Amendment).

9 See id. at 816 (recognizing that individuals have due process liberty interest in hastening their deaths, which is at its peak when person is mentally competent terminally ill adult who freely consents).

10 See id. (upholding state's right to regulate liberty interest to certain degree).

11 See id. at 816-37 (examining and balancing liberty interest against state's reasons for regulating practice of assisted suicide).

12 See id. at 837 (reasoning that terminally ill individual's liberty interest outweigh state's interest because it is most "painful, delicate, personal, important, and final" decision of one's life).

13 See id. at 816 (citing *Cruzan v. Director Missouri Dept. of Health*, 497 U.S. 261, 267-68 (1990)) (extending liberty interest of refusing medical treatment to that of assisting one in hastening their own death).

14 80 F.3d 716 (2d Cir. 1996).
challenge the constitutionality of New York statutes\footnote{See N.Y. PENAL LAW § 125.15 (McKinney 1994) (stating that person is guilty of second degree manslaughter by intentionally aiding another person to commit suicide); see also N.Y. PENAL LAW § 120.30 (McKinney 1994) (defining promoting suicide attempt as crime in which one person intentionally aids another in committing suicide).} that were very similar to those in Washington.\footnote{See Quill, 80 F.3d at 719. The plaintiffs alleged that portions of New York's Penal Law prohibiting physician-assisted suicide violated the United States Constitution. Id.}

The district court ruled against both a due process argument and an equal protection argument.\footnote{See Quill v. Koppel, 870 F. Supp. 78, 83 (S.D.N.Y. 1994). The court ruled that since there is no historic legal right to physician-assisted suicide, there cannot be a fundamental right under the Due Process Clause of the Fourteenth Amendment. Id. On the equal protection claim, the court found that the state had a rational basis for preserving the life of vulnerable persons. Id.} The Second Circuit agreed with the district court, finding there was no liberty interest, unlike the Ninth Circuit had found.\footnote{See Quill, 80 F.3d at 722-25 (ruling that there is no liberty interest in assisted suicide).} They also determined that there was no fundamental right and no suspect classification involved.\footnote{See id. at 724. The court, in declaring that there was no fundamental right to physician-assisted suicide, noted that there is no tradition deeply rooted in our culture allowing such action. Id. Likewise, the court stated that the New York law does not discriminate based on suspect classes of race, alienage, or national origin. Id. at 726 (citing Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1980)).}

The court, however, did find that the New York statutes did not meet the rational basis test, because they did not treat all competent persons who were in the final stages of terminal illness equally.\footnote{See Quill, 80 F.3d at 727 (finding that classifications made by New York law had no rational basis).} The disparity is that the New York statutes prohibited persons in the final stages of terminal illness from having assistance in ending their lives, but those same statutes allowed patients who were similarly situated to refuse medical treatment.\footnote{See id. at 731 (finding statutes violative of Equal Protection Clause to extent that it forbids physicians from prescribing medications to help mentally competent, terminally ill persons hasten their deaths).} The statutes were found to be violative of the Equal Protection Clause for this reason.\footnote{See Oral Argument, State of Washington v. Glucksberg, No. 96-110 (U.S. Oral Arg.)

I had the opportunity to watch both arguments before the Supreme Court. The questions that were put to the attorneys, by the Justices, seemed to reflect strong doubt on the Court's part about the existence of a liberty interest.\footnote{See id. at 729 (asserting that there is no difference between assisted suicide and withdrawal of treatment from terminally ill).} It also appeared by
questions from Justice Souter and Justice Kennedy that the Court doubted there was any violation of the Equal Protection Clause.\textsuperscript{24}

Interestingly enough Professor Tribe, arguing for Dr. Quill, highlighted what appeared to be an appendage to the equal protection argument.\textsuperscript{25} He stated that many terminal patients receive terminal sedation from doctors, resulting in their death.\textsuperscript{26} Terminal sedation is defined as the administration of a significant level of the sedative, which results in a fairly quick death.

I have discovered that this concept actually was referred to in an earlier point, because it is quoted in one of the amicus briefs by one of our panelists,\textsuperscript{27} yet it had not been published in the newspapers or discussed extensively until Professor Tribe identified this idea of terminal sedation.\textsuperscript{28}

Earlier this year a state judge in Florida ruled that a terminally ill patient had the constitutional right to terminate his suffering and to determine the time and manner of his death.\textsuperscript{29} The state judge recognized, for the first time in any state court, a constitutional right to die.\textsuperscript{30}

These legal developments leave us today with questions: Is there a constitutional liberty to physician-assisted suicide? Is

\textsuperscript{24} See Oral Argument, Quill v. Vacco, No. 95-1858 (U.S.Oral Arg. 1997), available in 1997 WL 13671 (demonstrating that Justices spent most of their time on liberty interest argument).

\textsuperscript{25} See id. at *37. Professor Tribe described sedation as a process that combined the withdrawal of life support and the prescription of drugs and stated that it occurs across the country. Id.

\textsuperscript{26} See id. (describing terminal sedation as slow euthanasia).

\textsuperscript{27} See Amicus Curie Brief of Law Professors in Support of Respondents, State of Washington v. Glucksberg, Quill v. Vacco, (No. 95-1858, 96-110), available in 1996 WL 709330 at *9-10 (depicting terminal sedation as, "[p]atients who are not in persistent vegetative state—who are conscious and competent but suffering from a terminal illness—are offered the option of being sedated to complete unconsciousness and being allowed to die of dehydration, starvation, or some intervening complication").

\textsuperscript{28} See The Court's Critical Decision, SALT LAKE TRIB., Jan. 12, 1997, at A1 (stating that terminal sedation is equivalent of "winks and nods" to get around ban on assisted suicide); Leonard John Deftos, Is There a Constitutional Right to Die?, SAN DIEGO UNION & TRIB., Jan. 10, 1997, at B9, B11 (arguing that terminal sedation is what allows Dr. Kevorkian to escape criminal liability); Frank J. Murray, A High Court Wrestles with Assisted Suicide. Many Views Aired on 'Choice' Issue, WASH. TIMES, Jan. 9, 1997, at A1 (asserting that terminal sedation is widely practiced).

\textsuperscript{29} See McIver v. Kirscher, No. CL-96-1504-AF, 1997 WL 225878, at *9-12 (Fla. Cir. Ct., Jan 31, 1997) (holding that there is recognized right to physician-assisted suicide).

\textsuperscript{30} Id. (stating that this is first state court to recognize this right).
there a distinction between passive and active deaths for terminally ill patients who are similarly situated? Should the courts and, in particular, the Supreme Court, be addressing these issues at this time, or should these issues be left to the state legislatures? If the Supreme Court does affirm either of the circuit court decisions, could physician-assisted suicide be regulated and, if so, how will it be regulated?