THE RIGHT TO DIE: DEATH WITH DIGNITY IN AMERICA

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This article will focus almost exclusively upon the law and the politics of assisted suicide, or "death with dignity," and not upon the medical or religious aspects of the subject. The first thing that has to be emphasized in talking about this subject is that the labels, language and terminology one chooses to use are of the utmost importance. Like many people, I colloquially refer to this subject as "the right to die." In the last two to three years, the most widespread public label for this issue has become "assisted suicide." Among proponents of this issue, any use of the "S" word, as insiders sometimes refer to it, is almost always avoided. The preferred "term of art," if you will, among those proponents is "physician-assisted-dying," which is more substantively meaningful than the somewhat more vague phrases "death with dignity" or "compassion in dying," which are utilized by two of the most important "interest group" organizations.[1] To complete the set of most-commonly used labels, "euthanasia" is a term which virtually all

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[1] These organizations are the Death With Dignity National Center, Charlotte P. Ross, Executive Director, San Mateo, CA, and the Compassion in Dying Federation, Barbara Coombs Lee, Executive Director, Portland, OR. On the terminology, see generally Leslie Joan Harris, *Semantics and Policy in Physician-Assisted Death: Piercing the Verbal Veil*, 5 ELDER L.J. 251 (1997), and Victor Wooddell and Kalman J. Kaplan, *An Expanded Typology of Suicide, Assisted Suicide, and Euthanasia*, 36 OMEGA 219 (1997-98).

of the public activists in favor of this issue both avoid and reject. Most active participants in this public debate distinguish euthanasia from "assisted suicide" by virtue of the fact that assisted suicide means self-administration of whatever intentionally ends one's life, while "euthanasia" is almost universally understood as actively involving some second party in the final administration of whatever "terminal agent" might be employed to hasten a terminally ill person's death.

I underscore the importance of these labels and language because whenever you look at any public opinion polling on this set of issues, the numbers vary quite dramatically depending upon precisely what labels and language you choose to employ in asking any particular question. If one speaks of "death with dignity" or "compassion in dying," which are indeed very much *the* favored labels of movement activists, you receive an affirmative public opinion polling endorsement from average Americans that can range as high as even seventy or seventy-five percent.[2] However, at the opposite extreme, if any form of the "S" word, suicide, or the verb "kill" is employed, the percentage of affirmative responses generally declines by a good fifteen to twenty percent, depending upon the particular question involved.[3]

The crux of this issue politically—and to my mind this is perhaps the number one fact for anyone to appreciate concerning how this political debate is going to develop and evolve in the future—is that there is a tremendous divergence between popular opinion about what should be available for terminally ill patients and what "elite" opinion, especially within both the medical profession and among legislators and other elected officials, presently is willing to publicly or explicitly support.

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[2] *See* Jane Meredith Adams, *Assisted Suicide Gains in Propriety*, BOSTON GLOBE, Nov. 9, 1997, at D3; William Claiborne, *Doctor-Aided Suicide is Backed in Poll*, WASH. POST, July 30, 1998, at A3; *see also* Robert J. Blendon et al., *Should Physicians Aid Their Patients in Dying? The Public Perspective*, 267 JAMA 2658 (1992); Peter A. Singer et al., *Public Opinion Regarding End-of-Life Decisions*, 41 SOC. SCI. & MED. 1517 (1995); Gary Liebow, *Poll Finds Tentative, Conditional Support for Assisted Suicide*, HARTFORD COURANT, Apr. 12, 1998, at B5.

[3] Claiborne, *supra* note 2, at A3.

While in most public opinion polling, one can get affirmative endorsements of physician-assisted-dying that go as high as seventy-five percent, at the same present point in time, any small lecture hall with about one hundred seats would be more than sufficient to accommodate every state legislator or state elected official from anywhere in America who is willing to publicly endorse liberalization or reform in this area. The fact that this divergence between public opinion and elite opinion is so great, something on the scale of sixty-five or seventy percent popular versus perhaps five to ten percent elected or elite, is an inescapable guarantee that this issue (a) will not go away in the decade or two ahead, and (b) will almost certainly expand and explode as a subject of increased public and political debate.

Over the past seven or eight years, this issue has evolved in terms of both law and politics. The legal debate in some ways culminated in June 1997, with two United States Supreme Court decisions—one from Washington state[4] and the other from New York[5]—that were brought forward by the small network of activists centered around Compassion in Dying. The political aspect, however, is in many ways probably more important for the future. Particularly momentous have been developments in the state of Oregon. In November 1997, by the overwhelming margin of sixty to forty percent, Oregon voters reaffirmed the legalization of physician-assisted-dying for terminally ill patients that voters had first enacted in 1994 by the much narrower margin of fifty-one to forty-nine percent.[6] That popular vote tally, coming after two intensely competitive and heavily-publicized statewide campaigns within three years, not only legalized physician-assisted-dying for terminally ill Oregonians, but also represented far and away the most momentous political development on the issue to date.[7] Oregon already is becoming both the medi-

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[4] Washington v. Glucksberg, 117 S. Ct. 2258 (1997).

[5] Vacco v. Quill, 521 U.S. 793 (1997).

[6] *See* Gail Kinsey Hill, *Suicide Law Stands*, PORTLAND OREGONIAN, Nov. 5, 1997, at A1.

[7] See David J. Garrow, *A New View of Death*, PORTLAND OREGONIAN, Nov. 6,

cal and the political laboratory for how this issue is going to play out for the rest of America in the years ahead. To date, Oregon's track record of quiet and low-key professional success has given "death with dignity" proponents a further boost over and above their November 1997 political triumph.[8]

Discussions concerning how to legally permit hastened deaths for the terminally ill go back a good sixty years in this country. In the early years, those discussions were almost exclusively limited to small and publicly invisible elite groups, such as the Euthanasia Society of America, founded in 1938.[9] Any wider public perception or appreciation of the issue dates largely from the Karen Ann Quinlan case in New Jersey in the mid and late 1970s,[10] and then, a few years later, from the early activities of the Hemlock Society, founded in 1980 by a former English journalist named Derek Humphry.[11] The subsequent Missouri case involving Nancy Cruzan,[12] which

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1997, at D11, and David J. Garrow, *The Oregon Trail*, N.Y. TIMES, Nov. 6, 1997, at 31 for a discussion of the Oregon vote's significance. *See also* William Claiborne & Thomas B. Edsall, *Affirmation of Oregon Suicide Law May Spur Movement*, WASH. POST, Nov. 6, 1997, at A19.

[8] William Claiborne, *In Oregon, Suicide Option Brings a Kinder Care*, WASH. POST, Apr. 29, 1998, at A1; V. Dion Haynes, *Suicide Law Improving Doctor-Patient Relationship*, CHI. TRIB., June 6, 1998, at 1; Erin Hoover Barnett, *10 Get Drugs Under Oregon Suicide Law*, PORTLAND OREGONIAN, Aug. 19, 1998, at A1; Sam Howe Verhovek, *Legal Suicide Has Killed 8, Oregon Says*, N.Y. TIMES, Aug. 19, 1998, at A16.

[9] *See* PETER G. FILENE, IN THE ARMS OF OTHERS: A CULTURAL HISTORY OF THE RIGHT-TO-DIE IN AMERICA 5-10 (1998); *see also* Stephen L. Kuepper, *Euthanasia in America, 1890-1960: The Controversy, the Movement, and the Law* (1981) (unpublished Ph.D. Dissertation, Rutgers U.); CHARLES F. MCKHANN, A TIME TO DIE: THE PLACE FOR PHYSICIAN ASSISTANCE (1999).

[10] *See* FILENE, *supra* note 9, at 11-46, 76-95, 125-133, 161-164; *see also Matter of Quinlan*, 355 A.2d 647 (N.J. 1976), *cert. denied sub nom.*, Garger v. New Jersey, 429 U.S. 922 (1976).

[11] *See* DONALD W. COX, HEMLOCK'S CUP: THE STRUGGLE FOR DEATH WITH DIGNITY 44-55 (1993); JAMES M. HOEFLER, DEATHRIGHT: CULTURE, MEDICINE, POLITICS, AND THE RIGHT TO DIE 139-40 (1994); DEREK HUMPHRY & MARY CLEMENT, FREEDOM TO DIE: PEOPLE, POLITICS AND THE RIGHT-TO-DIE MOVEMENT 100-16 (1998); *see also* DEREK HUMPHRY, JEAN'S WAY (1978); DEREK HUMPHRY, LET ME DIE BEFORE I WAKE: HEMLOCK'S BOOK OF SELF-DELIVERANCE FOR THE DYING (1984).

[12] Cruzan v. Harmon, 760 S.W.2d 408 (Mo. 1988).

went to the United States Supreme Court,[13] and the publication of Humphry's how-to-do-it book, *Final Exit*, a run-away best-seller in the early 1990s, gave the issue far greater visibility.[14]

The Hemlock Society may remain for many people the most identifiable organization involved in this issue, but Hemlock's importance today, and for the past six or seven years, has become quite modest relative to the roles being played by Compassion in Dying and the Oregon activists, who engineered both the 1994 electoral victory and the 1997 reendorsement.[15] Many of the Oregon and Washington state activists are themselves Hemlock "alumni," but the beginnings of their shift towards greater political activism began in 1990-1991 when several Hemlock activists in the Seattle area, including Unitarian minister Ralph Mero, decided to pursue a statewide popular vote on an initiative measure[16] which would legalize physician-assisted-dying.

The precise goal the Washington state right-to-die activists hoped to attain through a popular vote victory was to allow for physician prescription of a sufficiently powerful dose of a lethal drug so that terminally ill patients who wanted to end their lives could self-administer the necessary prescrip-

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[13] Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1990). *See also* FILENE, *supra* note 9, at 168-83.

[14] DEREK HUMPHRY, FINAL EXIT: THE PRACTICALITIES OF SELF-DELIVERANCE AND ASSISTED SUICIDE FOR THE DYING (1991). *See also* COX, *supra* note 11, at 27-43.

[15] On new 1998-99 efforts by the Hemlock Society to extend its own patient-outreach efforts in a manner quite similar to those pioneered by Compassion in Dying, see Diane C. Lade, *Helping Death: In Florida and Other States Where Physician-Assisted Suicide Has Little or No Political Support, the Hemlock Society and Others Are Stepping In*, FT. LAUDERDALE SUN-SENTINEL, Feb. 21, 1999, at G1.

[16] *See* Judith F. Daar, *Direct Democracy and Bioethical Choices: Voting Life and Death at the Ballot Box*, 28 U. MICH. J.L. REFORM. 799, 817-21 (1995); Jeffrey T. Even, *Direct Democracy in Washington: A Discourse on the Peoples' Powers of Initiative and Referendum*, 32 GONZ. L. REV. 247 (1996/97). Regarding how initiative and referenda procedures are disproportionately present in western states, see Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11 (1997).

tion. But in November 1991, the Washington initiative effort was defeated by a margin of fifty-four to forty-six percent, in large part due to the energetic and well-funded opposition campaign mounted by organizations affiliated with the Roman Catholic Church.[17] That Washington state defeat was mirrored exactly one year later when a second very similar measure was defeated in California in November 1992 by an identical fifty-four to forty-six percent tally.[18]

In the wake of the Washington state defeat, Ralph Mero took the lead in establishing an organization which in many respects was very much like the early "clergy consultation services" that played a leading role in helping to provide medically safe abortion services in the pre-1970 era, when abortion was still illegal. During the years 1967-1970, a large number of liberal clergy offered women with unwanted pregnancies face-to-face individual counseling and private medical referrals to cooperative physicians who could provide safe, if nonetheless illegal, abortions.[19] Similarly, Ralph Mero's idea was to essentially ignore the fact that Washington state still formally prohibited assisted suicide or aid-in-dying. Mero's view was that even though the law against assisted suicide was still on the books, private one-on-one counseling no doubt could probably take place without prosecutors actually pursuing or investigating the people involved.[20] When Mero publicly announced that he and others were going to begin offering this

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[17] *See* Warren King, *Decisive Loss for "Aid in Dying,"* SEATTLE TIMES, Nov. 6, 1991, at D1.

[18] George de Lama, *States Take Pulse on Morality*, CHI. TRIB., Nov. 5, 1992, at A7; Virginia Ellis & Paul Jacobs, *California Elections*, L.A. TIMES, Nov. 5, 1992, at A3.

[19] *See* DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE 318, 333-34, 345-51 (1994); *see also* ARLENE CARMEN & HOWARD MOODY, ABORTION COUNSELING AND SOCIAL CHANGE 23-31 (1973).

[20] On Mero, see Ralph Kastenbaum, *Ralph Mero: An Omega Interview*, 29 OMEGA 1 (1994); Thomas A. Preston & Ralph Mero, *Observations Concerning Terminally Ill Patients Who Choose Suicide*, *in* DRUG USE IN ASSISTED SUICIDE AND EUTHANASIA (Margaret P. Battin & Arthur G. Lipman, eds. 1996), at 183-92. *See also* Lisa Belkin, *There's No Simple Suicide*, N.Y. TIMES MAG., Nov. 14, 1993, at 48-55, 63, 74-75.

sort of direct person-to-person assistance under the new organizational rubric of "Compassion in Dying,"[21] a young Seattle lawyer named Kathryn Tucker read one of the resulting newspaper stories and was stimulated to telephone Mero. Tucker suggested that if Mero's group was going to expose itself to potential prosecution, would it not be better to go ahead and challenge the constitutionality of Washington state's anti-assisted suicide statute rather than simply remain vulnerable to a potential prosecutorial inquiry?

Thus at the same time that this small group of activists in Seattle began offering one-on-one counseling to terminally ill patients who were interested in considering the possibility of hastened death, Kathryn Tucker began preparing a constitutional challenge against the Washington state assisted suicide statute which she filed in federal district court. It took a year for that case to come to its initial fruition, but in May 1994, Tucker, Mero, and Compassion in Dying won a quietly dramatic victory when Federal District Judge Barbara Rothstein ruled that, in light of the constitutional protection afforded to basic personal liberty choices pursuant to the landmark Supreme Court abortion decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[22] there necessarily was constitutional protection for choice at the end of life for terminally ill people as well.[23]

Legally and analytically, Judge Rothstein's ruling was a major breakthrough with regard to the question of whether the constitutional "liberty" analysis that had developed in abortion cases as far back as *Roe v. Wade*[24] and *Doe v. Bolton*[25] (and before that, in the famous birth control case of

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[21] *See* Warren King, *Group Forms to Help the Dying Commit Suicide*, SEATTLE TIMES, May 4, 1993, at D1.

[22] 505 U.S. 833 (1992).

[23] Compassion in Dying v. State of Washington, 850 F. Supp. 1454, 1467 (W.D. Wash. 1994). *See* Kathryn L. Tucker & David J. Burman, *Physician Aid in Dying: A Humane Option, A Constitutionally Protected Choice*, 18 SEATTLE U. L. REV. 495 (1995).

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

[25] 410 U.S. 179 (1973).

Griswold v. Connecticut[26]), was potentially "portable" to cases challenging state restrictions on personal choice and liberty at the end of life.[27] That the constitutional liberty analysis that had been developed in abortion cases over the preceding twenty years was now applicable or "portable" to end of life choice was an exciting potential breakthrough. However, one year later, in the spring of 1995, when Washington state's appeal of Judge Rothstein's ruling was considered by a three-judge panel of the United States Circuit Court of Appeals for the Ninth Circuit, her holding was brusquely reversed.[28] The entire court of appeals agreed to reconsider that reversal,[29] and then in the spring of 1996, by an eight to three majority, the en banc appellate panel reendorsed and reinstated the affirmative constitutional ruling first made by Judge Rothstein.[30]

Just four weeks after that encouraging turn of events, the United States Court of Appeals for the Second Circuit ruled in a second, very similar parallel case which Kathryn Tucker (with the assistance of her father's law firm, Hughes Hubbard and Reed)[31] had filed against New York state's anti-assistance statute on behalf of several physicians. That challenge initially had been dismissed by a federal trial judge,[32] but the appellate panel's reversal gave Tucker her second major constitutional triumph in less than a month.[33]

Those two back-to-back federal appellate court victories generated a tremendous amount of journalistic curiosity as to whether the Supreme Court would review, and either endorse

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[26] 381 U.S. 479 (1965).

[27] *See* Brian C. Goebel, *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, 843-44, 853, 871-72 (1996).

[28] Compassion in Dying v. State of Washington, 49 F.3d 586, 588 (9th Cir. 1995).

[29] Compassion in Dying v. State of Washington, 62 F.3d 299, 299 (9th Cir. 1995).

[30] Compassion in Dying v. State of Washington, 79 F.3d 790, 798, 838 (9th Cir. 1996).

[31] *See* David J. Garrow, *Nine Justices and a Funeral*, GEORGE, June 1997, at 56.

[32] Quill v. Koppell, 870 F. Supp. 78, 79 (S.D.N.Y. 1994).

[33] Quill v. Vacco, 80 F.3d 716, 718 (2d Cir. 1996).

or reject, the extension of the abortion-based liberty analysis to end-of-life choice for the terminally ill.[34] Similarly, once the Court announced in October 1996 that it *would* review both cases[35] and scheduled argument for January 1997, there was a tremendous increase in the amount of news coverage devoted to end-of-life care and end-of-life decision-making. Prior to these two cases, there had been a very active, visible debate about these issues in medical journals, and particularly in the *New England Journal of Medicine*. However, it was very much a debate and discussion within a fairly limited network of medical professionals and ethicists, which in some part had grown out of a 1991 article in the *New England Journal* by Dr. Timothy Quill of Rochester, New York (who later became Kathryn Tucker's lead plaintiff in the New York test case), detailing how he had aided a patient in hastening her death in 1990.[36]

Once the day of the Supreme Court arguments in the two cases actually arrived (January 8, 1997), it became almost immediately apparent, within literally the first fifteen or twenty minutes, to virtually everyone of us who was watching the exchanges between the attorneys and the justices in the courtroom that morning, that the nine justices, perhaps even unanimously, had absolutely no appetite or interest whatsoever in extending the liberty analysis of the abortion cases to end-of-life decision-making.[37] Indeed, the justices were quite

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[34] *See, e.g.*, David J. Garrow, *The Justices' Life-or-Death Choices*, N.Y. TIMES, Apr. 7, 1996, §§ 4, 6.

[35] Vacco v. Quill, 518 U.S. 1055 (1996); Washington v. Glucksberg, 518 U.S. 1057 (1996); Linda Greenhouse, *High Court to Decide if the Dying Have a Right to Assisted Suicide*, N.Y. TIMES, Oct. 2 1996, at A1.

[36] *See* Timothy E. Quill, *Death and Dignity: A Case of Individualized Decision-Making*, 324 N. ENG. J. MED. 691 (1991); Lawrence K. Altman, *Doctor Says He Gave Patient Drug to Help Her Commit Suicide*, N.Y. TIMES, Mar. 7, 1991, at A1; Tim Friend, *When Death Is Patient's Preference*, USA TODAY, Mar. 12, 1991, at D1; Diane M. Gianelli, *N.Y. Case Reopens Debate on Doctor-Assisted Suicide*, AM. MED. NEWS, Mar. 25, 1991, at 1; *see also* TIMOTHY E. QUILL, DEATH AND DIGNITY: MAKING CHOICES AND TAKING CHARGE (1993); TIMOTHY E. QUILL, A MIDWIFE THROUGH THE DYING PROCESS: STORIES OF HEALING AND HARD CHOICES AT THE END OF LIFE (1996).

[37] *See* Garrow, *supra* note 31, at 57, 59.

aggressive in reminding Kathryn Tucker that the one previous Supreme Court ruling on this subject, the 1990 *Cruzan* case,[38] did not even begin to reach as far as Tucker and a number of the other activists had somewhat optimistically thought it might.[39] After the barrage of less-than-receptive questions with which the justices greeted Tucker, the argument of the New York case underscored the degree to which there was little or no mystery to the negative outcome that would be ratified when the Court publicly issued its decisions several months later.

When those two ostensibly unanimous, nine-to-nothing rulings were handed down on June 29, 1997, the ensuing media coverage generally conveyed the apparent news that there was no federal constitutional right to physician-hastened death for terminally ill patients.[40] While of course it was numerically correct that both of Kathryn Tucker's appellate court victories had indeed been reversed by nine-to-nothing margins, the banner headlines were nonetheless somewhat misleading, in that five of the nine justices—Justices Stevens, Breyer, Souter, O'Connor and Ginsburg—had also made it either explicitly or implicitly clear, in different separate or concurring opinions,[41] that they were not in any way closing

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[38] Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1990).

[39] After Tucker stated that with regard to the prospective removal of a comatose patient's feeding tube, the *Cruzan* Court "found that to be a very significant liberty interest," Justice Anthony M. Kennedy declared that "I disagree with that characterization. I think the Court was very, very careful to assume a liberty interest." Tucker agreed, but Kennedy emphasized, "That's a rather critical point, is it not?" Transcript of Oral Argument at 45, Washington v. Glucksberg, 521 U.S. 702 (1997) (No. 96-110).

[40] *See, e.g.*, Lyle Denniston, *No Right to Assisted Suicide; Supreme Court Is Unanimous in Historic Ruling*, BALTIMORE SUN, June 27, 1997, at A1; Muriel Dobbin, *Justices Find No Right to Doctor-Assisted Suicide*, NEWS AND OBSERVER (Raleigh), June 27, 1997, at A1; Thomas Maier, *Supreme Court Sees No Right to MD-Aided Suicide*, NEWSDAY, June 27, 1997, at A3; Basil Talbott, *No Right to Suicide Help; Supreme Court Upholds State Bans*, CHI. SUN-TIMES, June 27, 1997, at 1; Sharon Voas, *Justices Rule No Right to Die*, PITTSBURGH POST-GAZETTE, June 27, 1997, at A1; *No 'Right to Die' for Terminally Ill in Constitution*, PORTLAND (Maine) PRESS HERALD, June 27, 1997, at A1.

[41] Washington v. Glucksberg, 117 S. Ct. 2258, 2275 (Souter, J., concurring in the judgment); 2303 (O'Connor, J., concurring); 2304 (Stevens, J., concurring in

off two different issues for the future.

First, those five justices made it quite visibly clear that even though there was no constitutionally protected "right to assisted suicide," there might very well be a constitutionally protected interest in adequate pain control for terminally ill patients at the end of life.[42] In other words, the Court appeared to be saying that no dying American should be forced by any state laws to endure a death that encompasses potentially controllable or sedatable pain.

Secondly, those same five justices appeared also to be saying that the door to the basic underlying constitutional question about physician-hastened death for the terminally ill was still in some ways open for the future.[43] Indeed, since those two decisions were handed down, a striking consensus, particularly within the medical community, has emerged

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the judgments); 2310 (Breyer & Ginsberg, J.J., concurring in the judgments).

[42] *Glucksberg*, 117 S. Ct. at 2290-93 (Souter, J., concurring in the judgment); 2303 (O'Connor, J., concurring); 2307 (Stevens, J., concurring in the judgments) (stating that "[a]voiding intolerable pain and the indignity of living one's final days incapacitated and in agony is certainly '[a]t the heart of [the] liberty . . . to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life'") (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)); 2312 (Breyer, J., concurring in the judgments) (stating that "[w]ere the legal circumstances different—for example, were state law to prevent the provision of palliative care, including the administration of drugs as needed to avoid pain at the end of life—then the law's impact upon serious and otherwise unavoidable physical pain (accompanying death) would be more directly at issue. And as Justice O'Connor suggests, the Court might have to revisit its conclusions in these cases").

[43] *See* David J. Garrow, *Letting the Public Decide About Assisted Suicide*, N.Y. TIMES, June, 29, 1997, § 4, at 4; Ronald Dworkin, *Assisted Suicide: What the Court Really Said*, N.Y. REV. OF BOOKS, Sept. 25, 1997, at 40; *see also* John A. Robertson, *Respect for Life in Bioethical Dilemmas: The Case of Physician-Assisted Suicide*, 45 CLEVELAND ST. L. REV. 329, 338-42 (1997); Adam J. Cohen, *The Open Door: Will the Right to Die Survive* Washington v. Glucksberg *and* Vacco v. Quill, 16 IN THE PUBLIC INTEREST 79 (1997-98); Robert M. Hardaway et al., *The Right to Die and the Ninth Amendment: Compassion and Dying After* Glucksberg *and* Vacco, 7 GEO. MASON L. REV. 313 (1999). *But see* Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665 (1997); Yale Kamisar, *On the Meaning and Impact of the Physician Assisted Suicide Cases*, 82 MINN. L. REV. 895 (1998); Yale Kamisar, *Physician-Assisted Suicide: The Problems Presented by the Compelling, Heartwrenching Case*, 88 J. CRIM. L. & CRIMINOLOGY 1121 (1998).

among people who had been on opposing sides when the cases themselves were being litigated.[44] At the core of this newly-emerging consensus are the medical underpinnings of what often is called the "principle of the double effect," a concept which originally grew out of Roman Catholic theology, but which now is also widely accepted within the medical profession. The crux of that principle is that if a physician's primary intent in administering morphine or any other heavy-duty pain control medication at the end of life is to alleviate the patient's suffering, then the attendant fact that that pain control medication may also additionally and secondarily have the further effect of hastening the terminally ill patient's death is wholly acceptable. So long as that hastened death is not the physician's primary intent, it is not—pursuant to this almost universally accepted "double effect" principle—a violation of any existing anti-assisted suicide statute. To many people this may very well sound like a rather obscure and extremely fine distinction, but many if not most medical professionals appear to accept that this principle embodies an acceptable distinction rather than an inescapable contradiction.[45]

Closely related to the "double effect" distinction is a second concept—labeled "terminal sedation"—which again is much more widely employed within the medical profession than by most of us on the outside. That concept speaks to a circumstance where heavy-duty medication is administered to minimize the pronounced physical discomforts—such as agitated delirium or intolerable shortness of breath—of an unconscious, terminally ill patient near the end of life. Given what was stated and suggested by the five justices in June 1997,

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[44] *See* Robert A. Burt, *The Supreme Court Speaks—Not Assisted Suicide But A Constitutional Right to Palliative Care*, 337 NEW ENG. J. MED. 1234 (1997); *see also* Robert A. Burt, *Disorder in the Court: Physician-Assisted Suicide and the Constitution*, 82 MINN. L. REV. 965 (1998); Timothy E. Quill et al., *The Debate Over Physician-Assisted Suicide: Empirical Data and Convergent Views*, 128 ANNALS OF INTERNAL MED. 552 (1998).

[45] *See* Timothy E. Quill et al., *The Rule of Double Effect—A Critique of Its Role in End-of-Life Decision Making*, 337 N. ENG. J. MED. 1768 (1997).

both the medical profession and many legal observers have concluded that both a very expansive application of the "double effect" principle and a very aggressive approach to terminal sedation (or what nowadays sometimes is being called "palliative sedation") have received a clear, if nonetheless indirect, blessing from a majority of the Court. That piecemeal majority clearly suggested that access to extremely aggressive pain control which would mitigate unnecessary suffering at the end of life is indeed a constitutionally protected liberty interest, even if that treatment also nonetheless hastens the terminally ill patient's death. The crucial if ineffable requirement here is one of intent: Is indeed the primary intent to alleviate pain and suffering rather than to "merely" hasten death? As thus understood, the apparently "small" opening provided by the "double effect" principle can in practice be so significantly enlarged as to provide a major step toward "assisted suicide" in some—though far from all—cases where terminally ill patients do seek to hasten their own deaths.[46]

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[46] *See* David Orentlicher, *The Supreme Court and Physician-Assisted Suicide: Rejecting Assisted Suicide But Embracing Euthanasia*, 337 NEW ENG. J. MED. 1236 (1997); David Orentlicher, *The Supreme Court and Terminal Sedation: Rejecting Assisted Suicide, Embracing Euthanasia*, 24 HASTINGS CONST. L.Q. 947, 954-960 (1997); Timothy E. Quill et al., *Palliative Options of Last Resort: A Comparison of Voluntarily Stopping Eating and Drinking, Terminal Sedation, Physician-Assisted Suicide, and Voluntary Active Euthanasia*, 278 JAMA 2099 (1997); Thomas A. Preston, *The Case for Privacy in Dying: A Solution from the Supreme Court*, 76 KING COUNTY MED. SOC'Y BULL. Nov. 1997, at 9; Carol M. Ostrom, *What If Medications Used for Pain Control Speed Patients' Death?*, SEATTLE TIMES, Jan. 14, 1998, at A1; *see also* Howard Brody, *Physician-Assisted Suicide in the Courts: Moral Equivalence, Double Effect, and Clinical Practice*, 82 MINN. L. REV. 939 (1998); Diane E. Meier et al., *A National Survey of Physician Assisted Suicide and Euthanasia in the United States*, 338 NEW ENG. J. MED. 1193 (1998); Timothy E. Quill, *Physician-Assisted Death: After the U.S. Supreme Court Ruling*, 75 U. DET. MERCY L. REV. 481 (1998).

Orentlicher correctly observes that in cases of terminal sedation where the comatose terminally ill patient is not conscious, the decision to administer aggressive pain control under the rubric of the "double effect" principle is a decision made by a physician, perhaps in consultation with the patient's family, rather than by the patient. *See* Orentlicher, *The Supreme Court and Physician-Assisted Suicide, supra*; Orentlicher, *The Supreme Court and Terminal Sedation, supra*. Orentlicher thus contends that terminal sedation is in effect euthanasia, and that it is far less ethically defensible than self-administered assisted suicide where, as

In addition to this medico-legal evolution which has been taking place since the summer of 1997, the other equally important development has been the political evolution of this issue in the state of Oregon. In November 1994, three years after the popular vote defeat in Washington state, and two years after the popular vote loss in California, Oregon voters, by a very narrow margin of fifty-one to forty-nine percent, passed "The Oregon Death With Dignity Act."[47] The Act authorized physicians to provide lethal prescriptions to terminally ill patients who had initiated and completed a complicated, multi-stage approval process requiring confirmation of a late-stage terminal illness and successive, independently-witnessed requests for physician-assisted-dying.[48]

Soon after the voters of Oregon approved that statute in November 1994, the National Right to Life Committee (NRLC), which also functions as America's primary anti-abortion litigation group, filed suit in the carefully chosen venue of Eugene, Oregon—where only a single, predictably conservative federal district judge had chambers—seeking a temporary restraining order to preclude the measure from taking effect. Just as the NRLC attorneys had hoped, on December 7, 1994, Judge Michael R. Hogan issued such an order, followed three weeks later by a preliminary injunction[49] and eight months later by a permanent injunction, thereby preventing the voter-approved initiative from becoming effective.[50] Only in late February 1997, more than two years after Judge Hogan had first placed the Oregon measure in legal limbo, did a three-

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in Oregon, the physician simply provides the terminally ill patient with a prescription for a legal dose of medication which the patient, in the end, may or may not choose to utilize. *See* Orentlicher, *The Supreme Court and Physician-Assisted Suicide, supra*; Orentlicher, *The Supreme Court and Terminal Sedation, supra*; *see also* David Orentlicher, *The Legalization of Physician Assisted Suicide: A Very Modest Revolution*, 38 B.C. L. REV. 443 (1997).

[47] OR. REV. STAT. §§ 127.800 to 127.897 (1998).

[48] *Id.*

[49] Lee v. State of Oregon, 869 F. Supp. 1491 (D.Or. 1994).

[50] Lee v. State of Oregon, 891 F. Supp. 1421, 1429, 1439 (D.Or. 1995). *See also* Michael A. Cohen, *Plaintiffs' Standing in* Lee v. Oregon*: The Judicially Assisted Demise of the Oregon Death With Dignity Act*, 74 ORE. L. REV. 741 (1995).

judge panel of the United States Court of Appeals for the Ninth Circuit reverse Hogan's rulings and hold that the National Right to Life Committee's plaintiffs had no standing to mount any federal court challenge to the Oregon Death With Dignity Act.[51]

Once that appeals court ruling was handed down, Roman Catholic and right to life forces in Oregon realized that the legal clock was once again ticking, and that the Oregon Death With Dignity Act would in all great likelihood go into effect as soon as the Supreme Court declined to hear the National Right to Life Committee's appeal of the Ninth Circuit's decision.[52] Thus, in the early spring of 1997, conservative Roman Catholic allies in the Oregon legislature mobilized in order to place the "Death With Dignity Act," which had been approved by voters two and a half years earlier, back on the ballot for another state-wide vote that coming fall. That action marked the first time that Oregon voters had been forced to reconsider an initiative affirmation in almost ninety years; the last time that occurred was in 1908 after voters had enacted a statute prohibiting legislators from accepting free train tickets from railroads.[53]

Once the Legislature put the issue back on the ballot for a November re-vote, two developments ensued. First, Roman Catholic and right to life groups from all across the nation began to pump large amounts of money into the Oregon campaign in the "finger in the dike" belief that if they again lost

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[51] Lee v. State of Oregon, 107 F.3d 1382 (9th Cir. 1997), *cert. denied*, Lee v. Harcleroad, 118 S. Ct. 328 (1997). *See also* Amy Goldstein, *"Pro-Life" Activists Take on Death*, WASH. POST, Nov. 10, 1998, at A1.

[52] That refusal to review the Ninth Circuit's decision came in mid-October. *See* Lee v. Harcleroad, 118 S. Ct. 328 (1997); *see also* Linda Greenhouse, *Assisted Suicide Clears A Hurdle in Highest Court*, N.Y. TIMES, Oct. 15, 1997, at A1.

[53] Mark O'Keefe, *House Approves Asking for Repeal of Suicide Law*, PORTLAND OREGONIAN, May 14, 1997, at A1; *see also* Hamilton v. Myers, 943 P.2d 214 (Or. 1997); David Smigelski, *To Lie For*, WILLAMETTE WEEK, Sept. 17, 1997, at 22. Opponents had to press for another statewide vote, a move not subject to gubernatorial veto, rather than simple repeal, which Oregon Governor John Kitzhaber could have vetoed. *See* Ashbel S. Green, *Suicide Law Returns to Voters*, PORTLAND OREGONIAN, June 10, 1997, at A1.

and the Oregon measure took effect, the door could well be opened to the adoption of similar new laws in other states as well. Second, the Roman Catholic groups, apparently as a result of their own public opinion polling in Oregon, decided that they would be better off not to contest the election on the abstract or philosophical issue of individual choice at the end of life, but instead to contest it on the much narrower issue of whether lethal prescriptions actually would result in peaceful and relatively quick deaths for those terminally ill patients who chose hastened dying. Thus, the 1997 Oregon political campaign, rather than focusing on moral issues about choice at the end of life, instead devolved almost completely into an argument about the dependability or undependability of lethal doses of medication, with some Roman Catholic-sponsored television ads featuring nightmarish warnings about patients choking on their own vomit.[54]

When the Oregon re-vote took place on November 4, 1997, the pro-physician-assisted-dying forces triumphed not by the previous narrow margin of fifty-one to forty-nine, but by the almost landslide margin of sixty to forty percent. That sizable margin was the result not only of voters' preference for individual choice at the end of life, but also a reaction against the Oregon Legislature's placing back on the ballot a measure which the electorate already had approved just three years earlier.[55] The Oregon measure thus finally took effect in No-

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[54] *See* Gail Kinsey Hill, *Oregon Could Set Course on Suicide Debate in U.S.*, PORTLAND OREGONIAN, Sept. 25, 1997, at A1; Mark O'Keefe, *Question of Drugs' Effectiveness is Divisive*, PORTLAND OREGONIAN, Oct. 5, 1997, at A1; Gail Kinsey Hill, *Millions Raised for Measure 51*, PORTLAND OREGONIAN, Oct. 7, 1997, at A1; Gail Kinsey Hill, *TV Ads Supporting Measure 51 Criticized*, PORTLAND OREGONIAN, Oct. 8, 1997, at A1; Gail Kinsey Hill, *More Stations Reject Measure 51 Ad*, PORTLAND OREGONIAN, Oct. 9, 1997, at D6; Timothy Egan, *Assisted Suicide Comes Full Circle to Oregon*, N.Y. TIMES, Oct. 26, 1997, at 1; Lynda Gorov, *Campaign to Repeal Assisted Suicide Law Rivets Oregon Voters*, BOSTON GLOBE, Oct. 27, 1997, at A1; John Ritter, *Right-to-Die Initiative Bitterly Contested in Ore.*, USA TODAY, Oct. 29, 1997, at A6; William Claiborne, *A Harsh Look at Assisted Suicide*, WASH. POST, Nov. 1, 1997, at A1; Gail Kinsey Hill, *Messages Same as Vote Nears End*, PORTLAND OREGONIAN, Nov. 3, 1997, at A1; Jeff Mapes, *Measure 51 Gathered Late Cash Infusion*, PORTLAND OREGONIAN, Dec. 5, 1997, at B1.

[55] Timothy Egan, *In Oregon, Opening a New Front in the World of Medicine,*

vember 1997.[56]

After having been in effect for over a year now,[57] three clear lessons appear to have emerged from the statute's existence. First, relatively few Oregonians, rather than some huge number of the terminally ill, have actually gone through the entire approval process and made use of the Death With Dignity Act.[58] Second, all of those citizens who have both ob-

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N.Y. TIMES, Nov. 6, 1997, at A26.

[56] The Ninth Circuit officially issued its mandate lifting Judge Hogan's injunction on October 27, 1997, but no one in Oregon took note of this fact until the very day of the re-vote, November 4. *See* Mark O'Keefe & Ashbel S. Green, *Court Lifts Injunction, Suicide Law In Effect*, PORTLAND OREGONIAN, Nov. 5, 1997, at A1. Judge Hogan finally dismissed the case only ten months later. *See* Ashbel S. Green, *Challenge to Suicide Law Is Dismissed*, PORTLAND OREGONIAN, Sept. 23, 1998, at A1.

[57] Opponents' efforts to further obstruct implementation of the Oregon law by persuading the federal Drug Enforcement Administration (DEA) to impose sanctions on physicians who wrote patient prescriptions pursuant to the Death With Dignity Act were turned aside by United States Attorney General Janet Reno. *See* Neil A. Lewis, *Reno Lifts Barrier to Oregon's Law on Aided Suicide*, N.Y. TIMES, June 6, 1998, at A1. Subsequent efforts by opponents to upset Reno's ruling by act of Congress so far have failed to bear fruit. *See* Dave Hogan, *Sen. Hatch Seeks Help in Blocking Suicide Law*, PORTLAND OREGONIAN, Aug 1, 1998, at D1; Nicole Tsong, *Bill to Stop Assisted Suicide Draws Criticism*, PORTLAND OREGONIAN, Aug. 21, 1998, at A10; Alissa J. Rubin, *Fight Ensues to Block Undoing of Doctor-Assisted Suicide Law*, L.A. TIMES, Sept. 15, 1998, at A5; Jim Barnett & Dave Hogan, *Bill to Block Assisted Suicide Falters*, PORTLAND OREGONIAN, Oct. 7, 1998, at A1; Jim Barnett & Dave Hogan, *Senator Drops Effort to Block Suicide Law*, PORTLAND OREGONIAN, Oct. 15, 1998, at A1. Opponents may renew such efforts in 1999. *See* Dave Hogan, *Assisted-Suicide Debate Plans Made*, PORTLAND OREGONIAN, Feb. 7, 1999, at C8. Opponents may also seek to tinker with the Death With Dignity Act in the 1999 Oregon legislature. *See* Erin Hoover Barnett & Lisa Grace Lednicer, *Assisted Suicide Remains a Hot Issue in Legislature*, PORTLAND OREGONIAN, Feb. 7, 1999, at C8.

[58] *See* Arthur E. Chin et al., *Oregon's Death With Dignity Act: The First Year's Experience*, Feb. 17, 1999 (Oregon Health Division 1998 Annual Report available at www.ohd.hr.state.or.us); Arthur E. Chin et al., *Legalized Physician-Assisted Suicide in Oregon—The First Year's Experience*, 340 NEW ENG. J. MED. 577 (1999); Erin Hoover Barnett, *15 Oregonians Chose Assisted Suicide in '98, Report Says*, PORTLAND OREGONIAN, Feb. 18, 1999, at A1; Sam Howe Verhovek, *Oregon Reporting 15 Deaths in Year Under Suicide Law*, N.Y. TIMES, Feb. 18, 1999, at A1; *see also* Timothy Egan, *No One Rushing in Oregon to Use a New Suicide Law*, N.Y. TIMES, Mar. 15, 1998, at 14; Timothy Egan, *First Death Under an Assisted-Suicide Law*, N.Y. TIMES, Mar. 26, 1998, at A14; Susan W. Tolle, *Care of the Dying: Clinical and Financial Lessons From the Oregon Experience*,

tained and used lethal doses of medication have experienced peaceful and relatively quick hastened deaths, thus disproving the 1997 opposition's claims that physician-assisted-dying would result in increased rather than decreased suffering among the terminally ill.[59] Third, and perhaps most importantly, although any quantitative measurement is probably impossible, the greatest value of a statute such as Oregon's lies simply in the reassurance that it offers to terminally ill people who fear dying in tremendous pain, but who in the end do not encounter such serious pain that they actually utilize the Death With Dignity Act. That reassurance factor is actually a larger piece of the Oregon story than the very modest number of people who actually have obtained and used lethal prescriptions to date.[60]

What is now slowly and rather quietly occurring in Oregon is but the first chapter in a story that may well, in the longer run, play out somewhat similarly to how abortion law liberalization took place in the United States. That change began six years before the Supreme Court's 1973 decisions in *Roe v. Wade*[61] and *Doe v. Bolton*,[62] and the initial liberaliza-

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128 ANNALS OF INTERNAL MED. 567 (1998); Barbara Coombs Lee & James L. Werth, Jr., *Observations on the First Year of Oregon's Death With Dignity Act*, 5 PSYCHOL. PUB. POL'Y & LAW (forthcoming 1999).

[59] *See supra* note 54 and accompanying text.

[60] For good journalistic coverage of first-year anniversary developments under the Oregon Death With Dignity Act, see Charlie Cain, *Suicide Debate Remains Unsettled in Oregon*, DETROIT NEWS, Oct. 13, 1998, at B1; Erin Hoover Barnett, *Assisted Suicide, One Year Later*, PORTLAND OREGONIAN, Oct. 27, 1998, at A1; Thomas Maier, *Suicide Law—Year 1—Few in Oregon Have Asked for Help in Dying*, NEWSDAY, Nov. 3, 1998, at C3; Erin Hoover Barnett, *Suicide Law Still Draws Emotional Responses*, PORTLAND OREGONIAN, Dec. 29, 1998, at B1. Also especially note Erin Hoover Barnett's superbly impressive and emotionally powerful four-part series of articles on the death of cancer patient Brian Lovell: *Brian's Journey*, PORTLAND OREGONIAN, Nov. 22-25, 1998, at A1. *See also* Patrick McMahon, *Law Has Changed How Oregonians Die*, USA TODAY, July 14, 1998, at A3, and Erin Hoover Barnett's similar articles on patient Pat Matheny: *Waiting for the Day When He'll be Glad to Die*, PORTLAND OREGONIAN, Oct. 27, 1998, at A8; *Dilemma of Assisted Suicide: When?*, PORTLAND OREGONIAN, Jan. 17, 1999, at A1.

[61] 410 U.S. 113 (1973).

[62] 410 U.S. 179 (1973).

tion statutes adopted in states such as Colorado, North Carolina, and California helped generate a nationwide political ferment that in turn helped stimulate the filing of several dozen constitutional challenges to different states' anti-abortion laws, including *Roe* and *Doe*.[63]

What will happen in the future as a result of Oregon's legal and political breakthrough will probably take place along some or all of four different avenues. First, the West Coast activists are working to build Compassion in Dying into a national federation modeled upon what the Planned Parenthood Federation of America (PPFA) has become for reproductive health issues.[64] Compassion's number one hope is to convince state medical boards, which oversee doctors and set the standards for adequate medical care, to make it clear to physicians that they are just as vulnerable to professional discipline for *underprescribing* pain control medication at the end of life as they believe they are for overprescribing narcotic medicines for patients. There is a widespread consensus among end-of-life specialists that far too many patients suffer needlessly from undermedicated pain, and that if doctors were better attuned to aggressive treatment of pain, such end-of-life suffering could be significantly reduced. Early in 1998, Compassion wrote to the fifty state medical boards requesting that they implement rules and regulations mandating that physicians treat end-of-life pain as intensively as possible, and establish aggressive pain control as the accepted standard of care.[65] Thus, if a physician fails to treat end-of-life pain, the

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[63] *See* Garrow, *supra* note 19, at 335-88.

[64] As of early 1999, six Compassion affiliates existed (Oregon, Washington, northern California, southern California, New York City and Connecticut). *See 1998 Annual Report—Compassion in Dying Federation* (1999), at 8-9.

[65] For example, New York Governor George Pataki in August 1998 signed into law a reform measure highly similar to one he had vetoed a year earlier. *See* Brian Lewis, *Bill Aims to Make It Easier for Doctors to Prescribe Pain Medication,* BUFFALO NEWS, Aug. 7, 1998, at A14. Compassion in Dying stated in its 1998 Annual Report that it had targeted New York for legal challenge, and "we are told Gov. Pataki signed the bill this time only because of the knowledge that the State would face a lawsuit from Compassion in Dying if no reform were undertaken." *1998 Annual Report* at 13-14. Compassion intends to mount such a

physician will be violating the state's expected standard of care and a potential test case could be mounted against such a physician who failed to treat end-of-life pain aggressively.[66]

Compassion in Dying's second hope for the immediate future grows out of the fact that both popular understanding and the amount of news coverage of this issue are still significantly larger on the West Coast than anywhere else in the United States. The second avenue which the West Coast activists hope will develop, especially in light of the very striking public opinion polling results noted earlier,[67] is that at least a few state legislatures will begin to consider affirmative liberalization measures.[68] In February 1998, both houses of the Maine legislature debated a bill modeled upon Oregon's Death With Dignity Act before voting it down; however, the forty-two

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suit against some other state. *Id.*

[66] *See* Heather Gordon, *Compassion in Dying Expands Its Influential Reach, Adds Law Center*, WASH. J., Apr. 13, 1998, at 1; Kathryn L. Tucker, *The Death With Dignity Movement: Protecting Rights and Expanding Options After* Glucksberg *and* Quill, 82 MINN. L. REV. 923, 936-37 (1998) [hereinafter Tucker, *The Death With Dignity Movement*]; *see also* Kathryn L. Tucker, *Surrogate End of Life Decision Making: The Importance of Providing Procedural Due Process, A Case Review*, 72 WASH. L. REV. 859 (1997).

In mid-1998 Compassion made just such a complaint to the Medical Board of California on behalf of Beverly Bergman regarding the under-medicated death of her father William Bergman, but the Board rejected the complaint. *See* Sheryl Gay Stolberg, *Amid New Calls for Pain Relief, New Calls for Caution*, N.Y. TIMES, Oct. 13, 1998, at D8; *Dateline NBC: Easing the Pain*, (NBC television broadcast, Jan. 17, 1999), *available in* 1999 WL 6207654; *see also* Erin Hoover Barnett, *Oregon Study Finds Increase in Pain Among the Dying*, PORTLAND OREGONIAN, Oct. 7, 1998, at C4; Dan McGillvray, *Advocates Seek Pain Treatment Rule Changes*, KENNEBEC J., Nov. 9, 1998, at A1; John Hughes, *Relief in Sight for Millions as VA Attacks Pain Systemwide*, SEATTLE POST-INTELLIGENCER, Feb. 1, 1999, at A3.

[67] *See supra* note 2 and accompanying text.

[68] *See, e.g.*, Maureen West, *Sponsor Says Bill Aimed at Ending Pain, Not Life*, ARIZ. REPUBLIC, Nov. 14, 1997, at B1; Paul Hefner, *Backing Sought for Right-to-Die Bill*, L.A. DAILY NEWS, Nov. 15, 1997, at N4 (reporting that two California assembly members considered sponsoring right-to-die bill); Maureen West, *Bill for the Dying Conks Out in House*, ARIZ. REPUBLIC, Apr. 30, 1998, at B1 (reporting that HB 2001 failed to obtain floor vote in Arizona House despite having forty sponsors). *See also* Christine Neylon O'Brien & Gerald A. Madek, *Physician-Assisted Suicide: New Protocol for a Rightful Death*, 77 NEB. L. REV. 229, 260-65, 272-78 (1998).

affirmative votes that the measure received in the Maine House ought to be viewed as a highly positive sign of political progress rather than as simply a defeated numerical minority.[69] While no one anticipates any state legislature adopting such a law in the immediate future, Hawaii's governor has announced that he will ask his state's legislature to give the subject careful consideration in the spring of 1999.[70]

Third, and most directly in the political footsteps of Oregon's success, is the possibility that additional states could adopt some model of a "Death With Dignity" statute by popular vote initiative or referendum. Michigan's statewide electorate voted on exactly such a measure, "Proposal B," on November 3, 1998, and the measure went down to an overwhelming defeat by a margin of 71% to 29%.[71] Outside observers were not optimistic about the political expertise and resources of

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[69] Frank Fisher, *House Votes Down Assisted-Suicide Measure*, PORTLAND (Maine) PRESS HERALD, Feb. 12, 1998, at B1 (reporting vote of 99 to 42); *Maine Bill On Suicide Is Rejected*, N.Y. TIMES, Feb. 12, 1998, at A16; *Senate Rejects Assisted Suicide*, PORTLAND (Maine) PRESS HERALD, Feb. 13, 1998, at B3 (reporting vote of 25 to 5); *see also* Paul Carrier, *Legislators Say 'No' to Assisted Suicide*, PORTLAND (Maine) PRESS HERALD, Jan. 29, 1998, at B1 (contrasting twelve to one legislative committee vote against measure with statewide public opinion poll result showing that seventy-one percent of Maine voters favored such law, while only twenty-two percent were opposed).

[70] *Hawaii Governor to Put Euthanasia Before Legislature*, CONGRESS DAILY A.M., June 15, 1998. On February 6, 1999, however, the Committee on Health of the Hawaii House of Representatives voted to "hold" *H.B. 1155, An Act Relating to Physician Assisted Death with Dignity*. On February 19, the Senate Committee handling an identical companion bill, S.B. 1037, voted to do likewise. *See* http://www.capitol.hawaii.gov/session1999/status; *see also* Kathryn L. Braun, *Do Hawaii Residents Support Physician-Assisted Death?*, 57 HAWAII MED. J. 529 (1998); Norman Goldstein, *Governor's Blue-Ribbon Panel on Living and Dying with Dignity*, 57 HAWAII MED. J. 525 (1998); A.A. Smyser, *Doctor-Assisted Death With Dignity*, 57 HAWAII MED. J. 371 (1998); Paul S. Kawai, *Should the Right to Die Be Protected? Physician Assisted Suicide and Its Potential Effect on Hawaii*, 19 U. HAW. L. REV. 783 (1997); Norman Goldstein, *Doctor Assisted Death With Dignity*, 56 HAWAII MED. J. 52 (1997); Lorene K. Siaw & S.Y. Tan, *How Hawaii's Doctors Feel About Physician-Assisted Suicide and Euthanasia: An Overview*, 55 HAWAII MED. J. 296 (1996); A.A. Smyser, *Hawaii Needs a Policy on Assisted Suicide*, 55 HAWAII MED. J. 230 (1996).

[71] *See* George Bullard, *Religious Unity Key to B's Defeat*, DETROIT NEWS, Nov. 5, 1998, at D1; *see also* Yale Kamisar, *Details Doom Assisted-Suicide Measures*, N.Y. TIMES, Nov. 4, 1998, at A27.

the measure's proponents even before Geoffrey Fieger, the outrageously provocative attorney for the well-known Dr. Jack Kevorkian, managed to win Michigan's Democratic gubernatorial primary.[72] Fieger's long-shot candidacy against incumbent Republican Governor John Engler did nothing to improve Proposal B's difficult chances.[73] Similarly, but on a different calendar, the Maine activists who fell short of prevailing in their state legislature in early 1998 publicly announced plans to mount an initiative drive to place a "Death With Dignity" measure on the ballot there in either 1999 or 2000.[74]

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[72] Even though many grass-roots right-to-die activists do feel positively about Kevorkian's efforts, physician-assisted-dying political leaders almost unanimously wish that both Kevorkian and Fieger would just evaporate or otherwise disappear because of their perception that both men have given the issue the worst sort of public image it imaginably could receive. The best-informed study of Kevorkian is MICHAEL BETZOLD, APPOINTMENT WITH DOCTOR DEATH (1993). *See also* Michael Betzold, *The Selling of Doctor Death*, THE NEW REPUBLIC, May 26, 1997, at 22; Marvin Zalman et al., *Michigan's Assisted Suicide Three Ring Circus—An Intersection of Law and Politics*, 23 OHIO N.U. L. REV. 863 (1997).

The November 1998 television broadcast of a videotape depicting the death of yet another Kevorkian "patient" led to another upsurge in news media attention and to Kevorkian's indictment for first degree murder. *See* Tim Kiska & Ron French, *Kevorkian Admits He Killed Patient*, DETROIT NEWS, Nov. 20, 1998, at A1; Brian Harmon, *"Mercy Killing" Goes Public: Tonight's Televised Euthanasia Reflects A Lifelong Crusade by Jack Kevorkian*, DETROIT NEWS, Nov. 22, 1998, at A1; *60 Minutes, Death By Doctor*, (CBS television broadcast, Nov. 22, 1998), *available in* 1998 WL 8973914; Janet Naylor, *Kevorkian: They Must Charge Me*, DETROIT NEWS, Nov. 23, 1998, at A1; Brian Harmon, *CBS News Turns Over Death Tape*, DETROIT NEWS, Nov. 25, 1998, at A1; Dirk Johnson, *Kevorkian Faces A Murder Charge in Death of Man*, N.Y. TIMES, Nov. 26, 1998, at A1; Brian Harmon et al., *Kevorkian Faces Tougher Case*, DETROIT NEWS, Dec. 2, 1998, at D1; Ron French et al., *Zealot of the TV Age, Kevorkian Goes It Alone*, DETROIT NEWS, Dec. 9, 1998, at A1; Brian Harmon, *Kevorkian Ordered to Stand Trial*, DETROIT NEWS, Dec. 10, 1998, at D1; James A. McClear, *Kevorkian Faces March 1 Trial Date*, DETROIT NEWS, Dec. 17, 1998, at D4; *see also* State v. Naramore, 965 P.2d 211 (Kan. Ct. App. 1998); Yale Kamisar, *Line Blurs Between Assisted Suicide, Euthanasia*, DETROIT NEWS, Nov. 25, 1998, at A11.

[73] *See* Charlie Cain, *Officials Approve Vote for Legalized Suicide*, DETROIT NEWS, July 21, 1998, at D1; Gary Heinlein, *Assisted Suicide Finally Before Voters*, DETROIT NEWS, Aug. 31, 1998, at D1; *Ex-Reagan Adviser Urges Fight Against Assisted Suicide*, DETROIT NEWS, Sept. 3, 1998, at C11; David S. Broder, *Choice on Physician-Assisted Suicide Comes Home*, WASH. POST, Oct. 8, 1998, at A20; Charlie Cain, *State's Assisted Suicide Vote Attracts Spotlight*, DETROIT NEWS, Oct. 12, 1998, at A1.

[74] *Suicide Bill Backers to Seek Referendum*, PORTLAND (Maine) PRESS HERALD,

Fourth, "death with dignity" activists appreciate that one or more individual state supreme courts could, on independent state constitutional grounds, decide that language in state constitutions gives fundamental liberty protection to end-of-life choice. In mid-1997, the Florida Supreme Court rejected just such a state constitutional claim,[75] but right-to-die attorneys such as Kathryn Tucker[76] understandably have their eyes on other states where state supreme courts have in recent years rendered strong fundamental individual liberty rulings in cases involving abortion rights claims[77] and/or constitutional challenges to anti-sodomy statutes.[78] Tucker filed her first such case in Alaska in late 1998,[79] and the state constitutional avenue may hold significant promise if "death with dignity" litigators are able to locate interested potential plaintiffs in states whose supreme courts may be receptive to constitutional claims similar to those that persuaded first Judge Rothstein and then a majority of the Ninth Circuit,

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July 23, 1998, at B4; Susan Kinzie, *Low Turnout Makes Initiatives Easier*, BANGER DAILY NEWS, Nov. 7, 1998.

[75] Krischer v. McIver, 697 So. 2d 97, 100-02 (Fla. 1997). *See also* Cecil McIver, *Physician Assistance in Dying: Is It An Ethical Concept?*, ON CALL: THE J. OF THE PALM BEACH COUNTY MED. SOC'Y, Dec. 1996, at 13-15; Shannon Brewer, Comment, *Constitutional Law: Ending the Expansion of the Florida Privacy Amendment*, 49 FLA. L. REV. 821 (1997).

[76] *See* Tucker, *The Death With Dignity Movement*, *supra* note 66, at 933-35; *see also* Charles H. Baron, *Pleading for Physician-Assisted Suicide in the Courts*, 19 W. NEW ENG. L. REV. 371 (1997). *But see* Alan Meisel, *Physician-Assisted Suicide: A Common Law Roadmap for State Courts*, 24 FORDHAM URB. L.J. 817 (1997).

[77] Valley Hosp. Ass'n v. Mat-Su Coalition for Choice, 948 P.2d 963, 969-71 (Alaska 1997).

[78] Gryczan v. State, 942 P.2d 112 (Mont. 1997). *See also* Scott A. Fisk, *The Last Best Place to Die: Physician-Assisted Suicide and Montana's Constitutional Right to Personal Autonomy Privacy*, 59 MONT. L. REV. 301, 339-41 (1998). *But see* William C. Rava, *Toward a Historical Understanding of Montana's Privacy Provision*, 61 ALBANY L. REV. 1681, 1714-16 (1998).

[79] Liz Ruskin, *2 Alaskans Challenge Suicide Law*, ANCHORAGE DAILY NEWS, Dec. 16, 1998, at A1 (reporting that *Sampson v. State* had been filed on December 15 in Third Judicial District Superior Court). Compassion in Dying stated in the 1998 Annual Report that "[l]ocating suitable plaintiffs proved more difficult" than expected, and expressed regret that "we were unable to add a physician plaintiff to the case." *1998 Annual Report* at 10-11.

prior to the Supreme Court's reversal in *Glucksberg*.[80]

If there is one lesson which the history of the birth control litigation which finally culminated in *Griswold*[81] ought to teach us, it is that whether the time line turns out to be five years or eight years or eleven years, the overriding federal constitutional question concerning end-of-life choice will very likely work its way back to the United States Supreme Court. Journalists and historians who write about the Court sometimes are fortunate enough to have a very clear sense of what the members of the Court think the future might bring, and as some members of the implicit five vote majority in *Glucksberg* and *Quill* made quite clear, there is little doubt that one or more of the constitutional questions involving end-of-life care and physician-assisted-dying will again confront the Court.

Politically as well as legally, the issue of physician-assisted-dying will only loom larger and larger in this country in the decade ahead. What makes that most inescapable is the number and proportion of Americans who believe that the terminally ill *should* be able to make their own most fundamental choices at the end of life, existing statutes notwithstanding. Indeed, the safest prediction of all that one can make about "the right to die" is that this is an issue which American political activists, and American courts, will debate with increasing intensity as we enter the twenty-first century, and for many years thereafter as well.

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[80] Washington v. Glucksberg, 117 S. Ct. 2258, 2274-75 (1997).

[81] 381 U.S. 479, 485-86 (1965).