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Introduction

Two of the final decisions of the US Supreme Court in its 1996/97 term considered the 'right to die', or, more specifically, the right of a terminally-ill patient to commit physician-assisted suicide. In *Washington v. Glucksberg*[1] and *Vacco v. Quill*,[2] a unanimous Supreme Court, in separate opinions written by Chief Justice Rehnquist, upheld laws of the States of Washington[3] and New York[4] that made it a crime to assist a suicide. These laws prevented physicians from prescribing drugs for terminally-ill patients to self administer to commit suicide. The Supreme Court rulings reversed decisions of two lower federal courts, including an *en banc* decision of the United States Court of Appeals for the Ninth Circuit.[5]

The Parties

The plaintiffs in the US cases included terminally-ill patients and physicians who routinely treated the terminally ill. All of the patients testified that they were in the final stages of terminal illnesses and wanted their doctors' help in ending their lives.

The plaintiff physicians testified that, in certain circumstances, it would be consistent with the standards of their medical practice to prescribe drugs in order to hasten the death of a mentally-competent, terminally-ill patient. The state laws prevented them from providing such assistance.

The Claims and Outcomes in US District Court

The plaintiffs brought separate lawsuits in the federal district courts of Washington and New York. They sought to enjoin the enforcement of the criminal laws against assisted suicide. They alleged that these laws violated the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the US Constitution.[6]

The plaintiffs achieved mixed results in the district courts. The federal district court in Washington (opinion by Chief District Judge Barbara Rothstein), held that 'a competent, terminally ill adult has a constitutionally guaranteed right under the Fourteenth Amendment to commit physician-assisted suicide.'[7] She struck down the Washington statute on the grounds that it violated both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.

By contrast, the federal district court in New York, in an opinion by Chief District Judge Griesa, dismissed the plaintiffs' complaints.[8] The plaintiffs argued that New York law violated the Equal Protection Clause because it irrationally distinguished between terminally-ill patients depending upon whether they were on life-sustaining medical treatment. Terminally-ill patients who were receiving life-sustaining medical treatment were allowed, with physician assistance, to hasten their deaths by turning off life-support equipment or surgically removing feeding and hydration tubes. On the other hand, terminally-ill patients who were not on life-sustaining medical treatment were prohibited from hastening death by taking drugs prescribed by their doctors. Chief Judge Griesa rejected this. He wrote,

> '. . . it is hardly unreasonable or irrational for the State to recognise a difference between allowing nature to take its course, even in the most severe situations, and intentionally using an artificial death producing device.'[8]

United States Circuit Court Opinions

Second Circuit: Withdrawal of Life Support Equals Assisted Suicide

A three-judge panel of the US Circuit Court for the Second Circuit, in an opinion by Judge Miner, partially reversed the decision of the New York federal district.[9] It struck down the New York law because it violated the Equal Protection Clause of the Fourteenth Amendment.[10] The court concluded there was no dif-

ference between withdrawing life-sustaining medical treatment and physician-assisted suicide.

The Second Circuit wrote:

> '[T]here is nothing 'natural' about causing death by means other than the original illness or its complications. The withdrawal of nutrition brings on death by starvation, the withdrawal of hydration brings on death by dehydration, and the withdrawal of ventilation brings about respiratory failure. By ordering the discontinuance of these artificial life-sustaining processes or refusing to accept them in the first place, a patient hastens his death by means that are not natural in any sense. It certainly cannot be said that the death that immediately ensues is the natural result of the progression of the disease or condition from which the patient suffers.'[11]

The Second Circuit also noted that 'the writing of a prescription to hasten death, after consultation with a patient, involves a far less active role for the physician than is required in bringing about death through asphyxiation, starvation and/or dehydration.'[11] The Second Circuit concluded, 'The ending of life by these means is nothing more nor less than assisted suicide.'[11] It therefore struck down the New York law.

Ninth Circuit: A Constitutional Right to Die

A three-judge panel of the United States Circuit Court for the Ninth Circuit originally voted two-to-one to reverse the decision of the federal district court.[12] The entire Ninth Circuit voted to rehear the case *en banc*.[13] By a vote of eight to three, the majority held that there was a constitutionally protected right to choose the time and manner or one's death, and struck down the Washington law as a violation of the Due Process Clause of the US Constitution.[14] The Ninth Circuit majority opinion did not reach the issue of whether the Washington law violated the Equal Protection Clause.

Circuit Judge Rheinhardt delivered the opinion for the majority of the Ninth Circuit. He argued that historical attitudes to suicide were more ambiguous than generally recognised. He wrote, 'In Greek and Roman times, far from being universally prohibited, suicide was often considered commendable in literature, mythology and practice'.[14] In Athens, magistrates were empowered to supply hemlock to those who could demonstrate sufficient justification for ending their lives. Although the Romans sometimes punished suicide, Judge Rheinhardt argued that this was limited to individuals accused of crimes who committed suicide to prevent their property from going to the state; in those instances, the punishment for suicide was forfeiture of their property as if they had been convicted.

Early Christians saw death as the doorway to heaven, and some pursued martyrdom with especial vigour. 'They sometimes forced their way into courts of justice and compelled the affrighted judge to give orders for their execution. They frequently stopped travellers on the public highways and obliged them to inflict the stroke of martyrdom by promise of a reward, if they consented – and by the threat of death, if they refused. . .'[14] Judge Rheinhardt saw in the early Christian condemnation of suicide a pragmatic concern about depleting the ranks of the faithful rather than outright condemnation of suicide itself. He noted that, 'Sir Thomas More, who was later canonised by the Roman Catholic Church, strongly supported the right of the terminally ill to commit suicide and also expressed approval of the practice of assisting those who wished to hasten their deaths.'[14]

Judge Rheinhardt detected a similar ambiguity in more recent times. Early English common law punished suicide as a crime, resulting in forfeiture; however, if suicide resulted from mental illness or bodily pain then the person forfeited only moveable goods and not his real property. Some time later, Sir Edward Coke, in his third Institute published in 1644, held that killing oneself was an offence and that a suicide should forfeit moveable property; however, one who committed suicide while demented would not suffer forfeiture. Judge Rheinhardt observed that, by the eighteenth Century, English juries routinely found that the person who had committed suicide had been of unsound mind and effectively nullified the remaining penalties for suicide.

American law originally incorporated English attitudes to suicide. However, American law subsequently underwent a transformation. 'By 1798', Rheinhardt wrote, 'six of the original 13 colonies had abolished penalties for suicide either by statute or state constitution.'[14] By the time of the adoption of the Fourteenth Amendment in 1868, suicide generally was not punishable and only nine out of thirty seven states had laws which prohibited assisted suicide. Rheinhardt noted that, at present, no state has a statute prohibiting suicide, although a majority prohibited assisting a

suicide.

Judge Rheinhardt cited opinion polls that showed a large majority of Americans supported the right of the terminally ill and their families to refuse unwanted medical treatment. He cited other recent survey data that showed a majority of Americans favoured legalising physician-assisted suicide. He cited an Oregon referendum which had amended state law to permit physician-assisted suicide.

Against this backdrop, Judge Rheinhardt reviewed prior US Supreme Court decisions, particularly the abortion case of *Planned Parenthood v. Casey*,[15] and *Cruzan v. Director, Missouri Department of Health*.[16] He concluded that '*Casey* and *Cruzan* provide persuasive evidence that the Constitution encompasses a due process liberty interest in controlling the time and manner of one's death — that there is, in short, a constitutionally recognised "right to die".'[17]

Judge Rheinhardt balanced the constitutional right to die against the interests asserted by the State of Washington. These interests included a general interest in protecting life, a concern about undue influence being brought on vulnerable individuals to hasten their deaths, and a concern for the integrity of the medical profession. Judge Rheinhardt gave primary weight to the threat which physician-assisted suicide posed to the elderly and infirm. Against this he balanced the burdens that an outright ban on assisted suicide placed on the constitutional right to die; he gave examples of terminally-ill patients who, denied physician assistance, had resorted to gruesome alternatives.

Judge Rheinhardt's balancing of Washington's interests and the burdens imposed on the right to die led him to conclude that an outright ban on assisted suicide violated the Due Process Clause of the Fourteenth Amendment. He held that 'a liberty interest exists in the choice and how and when one dies, and. . . the provision of the Washington statute banning assisted suicide, as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors, violates the Due Process Clause.'

Supreme Court Opinions

Ninth Circuit and *Washington v. Glucksberg*

The State of Washington appealed from the *en banc* Ninth Circuit decision. In *Washington v. Glucksberg*[18] the US Supreme Court reversed Judge Rheinhardt's decision and upheld the Washington state law. Chief Justice Rehnquist wrote the majority opinion for a unanimous court. He interpreted historical attitudes to suicide completely differently from Judge Rheinhardt.

Justice Rehnquist argued that, historically, suicide had been condemned. In the 13th Century, Henry de Bracton observed that the penalty for suicide was forfeiture of all goods, at least where the suicide had been committed to avoid conviction of a crime. If suicide were due to weariness of life, then only moveables were forfeited. Where Rheinhardt might have seen this as a liberal attitude towards suicide when not undertaken to avoid the force of law, Rehnquist interpreted it as the introduction of the notion into English common law that suicide was a felony.

Justice Rehnquist quoted from the commentaries of Sir William Blackstone that suicide was 'self murder.' He noted that the earliest laws of the American colonies adopted harsh common law penalties, although most eventually followed the lead of William Penn and the Pennsylvania legislature and abandoned the criminal forfeiture sanction. The lessening of penalties for suicide sprang from a desire to avoid punishing innocent relatives of the person who had committed suicide and did not reflect a softening attitude towards suicide.

Justice Rehnquist pointed out that 'colonial and early state legislatures and courts did not retreat from prohibiting assisted suicide'.[18] Nor did the prohibition against assisted suicide contain an exception for the terminally ill. As early as 1828, New York had adopted laws which outlawed assisted suicide. 'By the time the Fourteenth Amendment was ratified, it was a crime in most States to assist a suicide', Justice Rehnquist wrote.[18] The American Law Institute's Model Penal Code prohibits aiding suicide, even with the consent of the suicide victim.[19] Justice Rehnquist interpreted the mixed results of recent State referenda to permit physician-assisted suicide (California voters had defeated such a proposal) as indicating continued societal opposition to physician-assisted suicide.

Justice Rehnquist rejected Judge Rheinhardt's conclusion that *Cruzan* established a general right to die; 'we were, in fact, more precise: we assumed that the Constitution granted competent persons a "constitutionally protected right to refuse lifesaving hydration

and nutrition"'.[19] The right to refuse hydration and nutrition rested on historically recognised rights of bodily integrity and freedom from unwanted touching, not on the more controversial right to die. Justice Rehnquist concluded that there was no constitutional right to assistance in committing suicide. He reversed the judgement of the Ninth Circuit and upheld the Washington statute.

Second Circuit and *Vacco v. Quill*

The Supreme Court, in a separate opinion by Chief Justice Rehnquist, also reversed the decision of the Second Circuit that the New York statute violated the Equal Protection clause.[20] Justice Rehnquist drew a bright-line distinction between withdrawal of life-sustaining medical treatment and physician-assisted suicide and concluded that New York had ample justification for treating the two differently and gave a number of reasons for distinguishing between withdrawal of life support and physician-assisted suicide.

First, he argued that when life support is withdrawn the patient dies of the underlying malady. If a patient ingests lethal medication prescribed by a physician, he is killed by that medication.

Second, a doctor who withdraws life support is only honouring his patient's wishes to cease futile treatment. When a doctor administers high doses of pain relief his intent may be only to ease his patient's pain. Death may not be intended in either case. A doctor who assists a suicide, however, intends to end the patient's life. Justice Rehnquist noted that the law often differentiates between similar acts based on the actors' intent.

Finally, states which had enacted 'living will' statutes, pursuant to which patients may forego invasive life-prolonging medical treatment, distinguished between foregoing medical treatment and assisted suicide. The Supreme Court recognised such a distinction, according to Justice Rehnquist, in the *Cruzan* decision.

Thus, Justice Rehnquist rejected the Second Circuit's conclusion that withdrawal of medical treatment was nothing more nor less than assisted suicide. He also concluded that New York's reasons for distinguishing between the two – which included preserving life, preventing suicide and maintaining the integrity of the medical profession – was entirely rational. He therefore concluded that the New York statute did not violate the Equal Protection Clause and reversed the decision of the Second Circuit. He strongly implied, however, that states would be free to change the law through the democratic process.

Conclusion

The US Supreme Court's decisions on physician-assisted suicide are not the end of the matter in the United States. A challenge to the Oregon referendum permitting physician-assisted suicide is pending in the federal courts. More referenda, and court challenges, are likely. Proponents of the right to physician-assisted suicide will bring challenges in state courts, relying on state constitutions. The US Supreme Court decision has been followed by a decision of the Florida Supreme Court, which ruled on July 17 that there is no right to physician-assisted suicide under the Florida state constitution.[21] The Florida Supreme Court voted five-to-one to reject the challenge to Florida's criminal statute, brought by a patient dying of Aids and his doctor; the Florida court endorsed the bright-line distinction between the patient's right to refuse unwanted medical treatment versus the physician's administration of a drug to hasten death. Further decisions of this type are likely as the issue continues to play itself out in the US state courts.

References

1. S.Ct., Slip Op., No 96-110, June 26, 1997.
2. S.Ct., Slip Op., No 95-1858, June 26, 1997.
3. Washington law provides, 'A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide.' Wash. Rev. Code 9A.36.060(1) (1994). 'Promoting a suicide attempt is a felony, punishable by up to five years' imprisonment and up to a $10,000 fine.' Sec. 9A.36.060(2) and 9A.20.021(1)(c).
4. N Y Penal Law Sec. 125.15 (McKinney 1987) ('Manslaughter in the second degree') provides, 'A person is guilty of manslaughter in the second degree when ... (3) He intentionally causes or aids another person to commit suicide. Manslaughter in the second degree is a class C felony.' Section 120.30 ('promoting a suicide attempt') states, 'A person is guilty of promoting a suicide attempt when he intentionally causes or aids another person to attempt suicide. Promoting a suicide is a class E felony.'
5. The full cite of the New York case is *Quill v. Koppell* (SDNY 1994) 870 F. Supp. 78, *rev'd* (2d Cir. 1996) 80

F.3d 716, *rev'd sub nom Vacco v. Quill* (S. Ct. June 26, 1997) Slip Op. No. 95-1858. The full cite of the Washington case is *Compassion in Dying v. Washington* (WD Wash. 1994) 850 F. Supp. 1454, *rev'd* (9th Cir. 1995) 49 F.3d 586, *rev'd en banc* (9th Cir. 1996) 79 F.3d 790, *rev'd sub. nom* (S. Ct. June 26, 1997) *Washington v. Glucksberg* (Slip Op. No. 96-110). [Compassion in Dying is a non-profit groups that assists terminally-ill people who wish to hasten their death; it was dismissed for lack of standing and did not proceed to the US Supreme Court.]

6. The Fourteenth Amendment to the US Constitution, adopted in 1868, provides, in relevant part: 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or Property, without due Process of law; nor deny to any person within its jurisdiction the equal Protection of the laws.'
7. *Compassion in Dying v. Washington* (W.D. Wash. 1994) 850 F.Supp. 1454.
8. *Quill v. Koppell* (SDNY 1994) 870 F.Supp. 78.
9. *Quill v. Koppell* (2d Cir. 1996) 80 F.3d 716.
10. The Second Circuit agreed with the New York district court that there was no substantive right to assisted suicide under the Due Process Clause. The Second Circuit wrote, 'The right to assisted suicide finds no cognizable basis in the Constitution's language or design, even in the very limited cases of those competent persons who, in the final stages of a terminal illness, seek the right to hasten death. We therefore decline the plaintiffs' invitation to identify a new fundamental right, in the absence of a clear direction from the Court whose precedents we are bound to follow.' Id.
11. *Quill v. Koppell* (2d Cir. 1996) 80 F.3d 716.
12. *Compassion in Dying v. Washington* (9th Cir. 1995) 49 F.3d 586.
13. *Compassion in Dying v. Washington* (9th Cir. 1995) 62 F.3d 299.
14. *Compassion in Dying v. Washington* (9th Cir. 1996) 79 F.3d 790.
15. (S.Ct. 1992) 505 U.S. 833. *Casey* upheld a woman's right to have an abortion in language that supported a right to autonomy in highly personal decisions.
16. (S.Ct. 190) 497 U.S. 261. In *Cruzan*, the parents of a woman in a persistent vegetative state obtained a court order to withdraw artificial nutrition and hydration. The US Supreme Court ruled that, 'The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.' Id. at 278.
17. *Compassion in Dying v. Washington* (9th Cir. 1996) 79 F.3d 790.
18. S.Ct. Slip Op., No. 96-110, June 26, 1997.
19. American Law Institute, Model Penal Code, Section 210.5, Comment 5, p 100 (Official Draft and Revised Comments 1980).
20. S.Ct., Slip Op., No. 95-1858, June 26, 1997.
21. *Krischer v. McIver* (Fla. S.Ct. July 17, 1997 Case no. 89,837).