7-2004

Death with Dignity in Montana

James E. Dallner  
*Student, University of Montana School of Law*

D. Scott Manning

Follow this and additional works at: https://scholarship.law.umt.edu/mlr

Part of the [Law Commons](https://scholarship.law.umt.edu/mlr)

**Recommended Citation**


Available at: https://scholarship.law.umt.edu/mlr/vol65/iss2/4

This Article is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized editor of The Scholarly Forum @ Montana Law.
I. INTRODUCTION

A. Do Montanans have a right to medical assistance in dying?

Under Montana’s constitution, a terminally ill Montanan may have a right to medical assistance in intentionally hastening death. Such a right has not been found under the United States Constitution, but may arise under state law. The right in Montana may arise under two separate sections of Article II of the Montana Constitution: section 10, right of privacy and section 4, individual dignity. The argument that such a right arises under the right of privacy has been thoroughly discussed by Scott A. Fisk in his article The Last Best Place to Die: Physician-Assisted Suicide and Montana’s Constitutional Right to

1. B.S. University of Montana, School of Business, 2002; expected J.D. University of Montana, School of Law, 2005.
A fundamental right is implicated under either the individual dignity or right to privacy sections of the Montana Constitution which requires that legislation regulating the right must be justified by a compelling state interest and narrowly tailored to effectuate only that interest. It is unlikely that current Montana statutes regulating medical assistance in hastening death would pass this strict scrutiny test. Thus, the current laws may be vulnerable to challenge.

This article will discuss the right of a terminally ill Montanan to medical assistance in hastening death by first providing a general background. Second, this article will review the right to medical assistance in hastening death under the United States Constitution. Third, it will review the argument that this right arises under the right to privacy section of the Montana Constitution. Finally, it will discuss the argument that the right also arises under the individual dignity section of the Montana Constitution.

B. Background and Significance

During the past century, advances in public health and medicine have led to dramatic changes in the health, life expectancy and death processes of Americans. Social and legal conventions from earlier times have strained to respond to unprecedented and unforeseen developments. Since 1900, the average life span of an American has increased by more than thirty years. On average, a 65-year-old person in 2000 could expect to live to be nearly 83.1 years old; an 85-year-old in 2000 could expect to live to be over 90.

This increase in longevity has been accompanied by the emergence of long-term, chronic disease as the major pattern of death. At the beginning of the century communicable diseases

were the leading causes of death; death was typically a relatively rapid process and could occur at any age.\textsuperscript{10} Now 80\% of deaths result from a chronic, non-communicable illness.\textsuperscript{11} Unlike earlier times, most of us will die slowly.

Society and the legal system have struggled to respond to this shifting paradigm of dying. The case of Karen Ann Quinlan\textsuperscript{12} drew attention to the issue of the withdrawal of life support from a person in a persistent vegetative state. The New Jersey Supreme Court consented to Quinlan's father's request that her respirator be turned off.\textsuperscript{13} \textit{In re Quinlan} was the first in a series of cases defining the rights of terminally ill patients and their families.\textsuperscript{14}

In \textit{Cruzan v. Director, Missouri Department of Health},\textsuperscript{15} the United States Supreme Court discussed the right to withdraw life support. Nancy Cruzan sustained brain injuries resulting in a persistent vegetative state.\textsuperscript{16} After it had become apparent that Cruzan had virtually no chance of regaining her mental faculties, her parents asked the hospital to terminate the artificial nutrition which sustained her.\textsuperscript{17} Medical personnel refused to remove the artificial nutrition without a court order.\textsuperscript{18} The state trial court found that there was a right under the state and federal constitutions to refuse or to withdraw "death prolonging procedures."\textsuperscript{19} The Supreme Court of Missouri reversed.\textsuperscript{20}

In \textit{Cruzan}, the United States Supreme Court held that, under the Fourteenth Amendment, a competent person has a constitutionally protected liberty interest in the right to refuse treatment.\textsuperscript{21} The Court noted that whether an individual's right had been infringed by state action could only be determined by considering competing state interests.\textsuperscript{22} The Court found that a

\textsuperscript{10.} Id.
\textsuperscript{11.} Id.
\textsuperscript{12.} \textit{In re Quinlan}, 355 A.2d 647 (N.J. 1976).
\textsuperscript{13.} Id.
\textsuperscript{14.} See \textsc{Lawrence A. Frolik & Richard L. Kaplan, Elder Law in a Nutshell} § 3 (2d. ed. 1999), for a discussion of important state and federal cases.
\textsuperscript{15.} \textit{Cruzan v. Director, Mo. Dep't of Health}, 497 U.S. 261 (1990).
\textsuperscript{16.} Id. at 266.
\textsuperscript{17.} Id. at 267.
\textsuperscript{18.} Id. at 268.
\textsuperscript{19.} Id.
\textsuperscript{20.} Id.
\textsuperscript{21.} Id. at 278. See also infra text accompanying notes 44-45, regarding the common-law right under the informed consent doctrine.
\textsuperscript{22.} Id. at 280.
state has legitimate interest in the protection and preservation of human life and is not required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death.\textsuperscript{23}

The Court held that under the Due Process Clause, a state may require that an incompetent person’s wish to have life-support withdrawn be proven by clear and convincing evidence.\textsuperscript{24} In dicta, the Court indicated that in determining an incompetent person’s right to withdrawal of life-sustaining medical treatment, “a State may properly decline to make judgments about the ‘quality’ of life that a particular person may enjoy, and may simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interest of the individual.”\textsuperscript{25}

The Court held that a state was not required to accept the “substituted judgment” of close family members of a patient absent substantial proof that their views reflected the views of the patient.\textsuperscript{26} Thus, a competent person has a right to refuse life-sustaining medical treatment, but a state can restrict the ability of others to exercise that right on behalf of an incompetent person.

The 	extit{Cruzan} decision has led to an increase in the use of advanced directives, in which a person, while still competent, provides documentation that would fulfill the “clear and convincing evidence” standard for proving his or her intent to refuse treatment should he or she later become incompetent.\textsuperscript{27} Many states, including Montana,\textsuperscript{28} now have statutes providing for the use of advance directives.

The 	extit{Cruzan} decision is a milestone in the evolution of legal and social responses to changing patterns in the process of dying. In earlier times, sustaining life through the use of technology was simply not an issue because the technology did not exist. Over time we have witnessed dramatic advances in science and medicine that have prolonged life and altered the process of dying, resulting in unprecedented ethical and legal questions. While 	extit{Cruzan} and subsequent cases have begun to address

\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id. at 282.
\textsuperscript{26} Id. at 286.
\textsuperscript{27} See Frolik & Kaplan, supra note 14, at 51. See also Roger W. Anderson et al., FUNDAMENTALS OF TRUSTS AND ESTATES § 7 (1996), for discussions of advance directives.
\textsuperscript{28} Mont. Code Ann. § 50-9-205(1) (2003); see also infra text accompanying note 211.
these questions, others remain unanswered.

It is likely, however, that the need to address legal and social questions presented by a protracted dying process will become increasingly acute. In this new century, we will be faced with an increasingly aged population. Economics provides one measure of the significance of an aging population dying through a prolonged process. The new patterns in dying are not only more prolonged, they are also far more costly. Presently, about twenty-seven percent of all Medicare expenditures are used for the five to six percent of the beneficiaries who die each year and about forty percent of these funds are spent in the last month of life.\(^{29}\) In this last month, Medicare expenditures are twenty times higher than average monthly expenditures for beneficiaries who are not in the last month of their life.\(^{30}\) We can reasonably expect that over the coming decades a continually increasing proportion of individual and societal resources will be spent on prolonging the last days of those who are terminally ill. While economics should not be the deciding factor in determining the rights of the dying, the significance of changes in the process of dying are clearly underscored by their economic impact.

C. Terminology

Discussions of the rights of the dying are often dominated by the use of catch phrases and slogans such as “right to die,” “death with dignity” and “physician-assisted suicide.” While these phrases serve as convenient short-hand for complex and difficult concepts, they can be counter-productive. They have the potential for conveying unintended connotations and creating unnecessary ambiguity. This section attempts to provide a precise definition of these terms as used in this article, and to alert the reader to the potential ambiguity in the use of these terms by the courts and others.

In this article, “right to die” is broadly defined as all the rights a terminally ill person may have in controlling the circumstances of death. Thus, the “right to die” includes, but is not limited to, the right of a competent terminally ill person to refuse life-sustaining medical treatment as set forth in Cruzan.

\(^{29}\) Wilkinson, \textit{supra} note 9, at 12-13.

The "right to die" may also include a right of a competent terminally ill person to hasten his or her death with medical assistance.

As defined for the purposes of this article, the "right to die" is only a right that vests in a terminally ill person—any right that a healthy person might have to take his or her own life is outweighed by the state's compelling interest in the preservation of life. Thus, any legitimate rights encompassed by the "right to die" would arise because of the reduced state interest in preserving the remaining life of a terminally ill person and the increased justification of the terminally ill person to exercise the right in order to avoid further suffering and indignity. Healthy people can, and do, commit suicide without regard to whether there is a right to do so. Thus, the existence of a right to take one's life may be irrelevant to the outcome for a healthy individual. Often terminally ill individuals do not have access to the instrumentalities required to hasten their own death and must have assistance to do so. If assistance is required for the terminally ill person who wishes to hasten his or her death, the existence of a "right to die" is crucial to the realization of that wish.

The meaning of "death with dignity" in the context of the Montana Constitution's individual dignity provision will be taken up later in this article. For the purposes of initial discussion, "death with dignity" is broadly defined as a right to die in as dignified a manner as the dying individual sees fit. Webster defines dignity as being "the quality or state of being worthy, honored or esteemed." 31 This dictionary definition fails to capture the meaning of dignity used here because it refers to how others perceive or value a person, rather than how a person perceives him or herself in relation to others and his or her circumstances. In the context of this article, dignity is what the dying individual defines it to be. Dignity arises from the individual's sense of self. Both dignity and "death with dignity" are highly personal, individual and situational.

This article uses the phrase "medically hastened dying" 32 in place of the more familiar phrase—"physician-assisted suicide"—for two reasons. First, the word "suicide" is well suited to the description of a distraught individual with his whole life ahead of him, who in a moment of despair, commits a completely senseless and utterly tragic act. In contrast, "suicide" is not well

32. Similar language has occasionally been used by the courts. See, e.g., infra p. 16.
suited to describe an elderly cancer patient who in the final days of a horrible and agonizing struggle simply wishes to avoid more needless suffering and indignity. The first individual’s act destroys what could be a long and productive life. The elderly cancer patient does not extinguish the hope of a bright future, but rather avoids the last uncharacteristically painful and undignified moments of a life already fully lived. From a constitutional perspective, the state has a clear compelling interest in maintaining the productive life of the first individual, but it is less clear that the state has a compelling interest in the last dying days of the elderly cancer patient. Use of the word “suicide” is avoided in this discussion because it arouses the images of tragic loss of life in a situation where the tragedy may be the continuation of life.

The second reason for abandoning the phrase “physician-assisted suicide” is that it directs the focus towards the physician’s action and away from the terminally ill individual’s decision. This article focuses on the right of a terminally ill individual to hasten death. Medicine is only the most desirable of a variety of methods that a terminally ill person might use to hasten death. The physician’s dominant role in dispensing medicine is tangential to the central issue of the rights of the terminally ill individual. To frame the issue in the context of the physician’s role runs the risk of clouding the analysis of the terminally ill person’s fundamental rights with ancillary issues of whether a physician’s assistance might offend traditional notions of medical ethics or a particular physician’s religious or philosophical sensibilities. The physician’s professional or individual ethics are irrelevant since the terminally ill person could simply opt to use a non-medical method to hasten his or her death. While this article avoids the term “physician-assisted suicide,” the use of this term by the courts will be preserved in the following discussion.

II. LEGAL RIGHTS TO DIGNIFIED DEATH

A. The Common Law and Suicide

Although the debate about the scope of the “right to die” often hinges on constitutional considerations, state laws addressing suicide derive from common law that predates the United
States Constitution and the various state constitutions. In English common law, the motivation for a suicide determined the legal consequences. A person who committed suicide to avoid criminal punishment forfeited all lands and chattels to the king, leaving his heirs with nothing. If the suicide was committed out of despair, the penalty was the forfeiture of chattels, but not land. In colonial America, English common law punishments for suicide were considered ineffective and were abandoned. However, assisting suicide was not legal in common law and has never been legal in this country. Currently, forty-four states and the District of Columbia prohibit or condemn assisted suicide. Six states regard assisted suicide as manslaughter; eighteen states regard suicide as a felony. In Montana "aiding or soliciting" an attempted suicide is a felony punishable by up to ten years in prison and a $50,000 fine, and assisting in a successful suicide may result in homicide charges. Oregon is the only state with a statute clearly affirming and regulating the right to medical assistance in dying.

Conversely, the right of an individual to refuse life-sustaining medical treatment has been found to derive from the common law doctrine of informed consent in addition to having a constitutional basis. As Justice Cardozo articulated in 1914:

33. See Fisk, supra note 5, at 310-12. See also Glucksberg, 521 U.S. at 710-17, for general discussions of the common law of suicide.
34. Fisk, supra note 5, at 310.
35. Id. (citing Dwight G. Duncan & Peter Lubin, The Use and Abuse of History in Compassion and Dying, 20 HARV. J.L. & PUB. POL’Y 175, 177 (1996)).
36. Id. at 311.
37. Id.
38. Id. at 312 (citing Compassion in Dying v. Washington, 49 F.3d 586 (1995) [hereinafter Compassion 2]).
39. Id. (citing Laura Trenaman-Molin, Physician-Assisted Suicide: Should Texas be Different?, 33 HOUS. L. REV. 1475, 1492-93 (1997)).
41. See id. Criminal Law Commission Comments state that “[i]f the conduct of the offender made him the agent of the death, the offense is criminal homicide notwithstanding the consent or even the solicitations of the victim.” Id.
42. OR. REV. STAT. § 127.880-897 (1996); see also infra text accompanying notes 209-12.
43. See FROLIK & KAPLAN, supra note 14, at 19-20.
44. See generally Cruzan, 497 U.S. 261.
[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault. Thus, under common law, a patient can consent to, or, conversely, refuse medical treatment. Since the patient can refuse treatment at any time, the patient can have treatment withdrawn even after it has been initiated.

While common law doctrines addressing aspects of the "right to die" have survived the test of time, these doctrines may now fail to adequately encompass the unprecedented issues arising out of medicine's increasing ability to delay and prolong the dying process. To the extent that the common law, and the statutes arising out of it, fail to adequately address emerging aspects of the "right to die," society and the courts will have to analyze these issues in light of fundamental rights provided by the United States Constitution and the constitutions of the various states.

B. Rights under the United States Constitution

The United States Supreme Court's decision in Cruzan marked an evolution in the rights of the dying in the United States. Cruzan clearly established the right of a competent terminally ill patient to refuse or demand withdrawal of life-sustaining treatment. On June 16, 1997, the Court decided two cases, Washington v. Glucksberg, and Vacco v. Quill, both of which addressed whether a competent, terminally ill patient had a right to affirmative medical assistance in hastening death. In Glucksberg, the arguments primarily revolved around an analysis of liberty interests and in Vacco the focus was on an equal protection analysis. In each case, the Court found that states could prohibit a terminally ill person from obtaining medical assistance in hastening death.

1. Glucksberg


45. Id. at 269 (citing Shloendorf v. Soc'y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914)).
46. See generally Glucksberg, 521 U.S. 702.
47. See generally Vacco, 521 U.S. 793.
sion in Dying, brought suit against the state of Washington seeking a declaration that a Washington statute prohibiting assisted suicide\(^{49}\) violated the United States Constitution. The United States District Court for the Western District of Washington declared that the statute violated the Constitution;\(^{50}\) a panel of the United States Court of Appeals, Ninth Circuit reversed the Federal District Court;\(^{51}\) and the Ninth Circuit sitting en banc reversed the Ninth Circuit panel and affirmed the district court\(^{52}\). The United States Supreme Court ultimately reversed the Ninth Circuit en banc decision and held that "Washington's prohibition against 'causing' or 'aiding' a suicide" did not offend the Fourteenth Amendment.\(^{53}\) The tortuous route of the *Compassion in Dying* case through the courts illustrates the difficulty in addressing the rights of terminally ill individuals to assistance in hastening death. A brief review of these cases provides a summary of the legal arguments that have been applied to this issue.

In *Compassion 1*, the district court held that the Washington statute violated the Fourteenth Amendment guarantee against deprivation of rights by a state.\(^{54}\) The court relied on cases protecting "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education," and in particular relied on *Planned Parenthood v. Casey*.\(^{55}\) The court quoted *Casey*, an abortion rights case, for the proposition that there is a fundamental liberty interest in the right to make deeply personal decisions:

> [T]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed

\(^{49}\) WASH. REV. CODE § 9A.36.060 (2004) ("(1) A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide, (2) Promoting a suicide attempt is a Class C felony.").

\(^{50}\) *Compassion 1*, 850 F. Supp. at 1467.

\(^{51}\) See *Compassion 2*, 49 F.3d 586.

\(^{52}\) See *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) [hereinafter *Compassion 3*].

\(^{53}\) *Glucksberg*, 521 U.S. at 705-06.

\(^{54}\) *Compassion 1*, 850 F. Supp. at 1467.

\(^{55}\) *Id.* at 1459 (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).
under compulsion of the State.\textsuperscript{56}

The district court found the "terminally ill person's choice to commit suicide" was analogous to the right of a woman to abortion as protected by \textit{Casey} in that it was one of the most intimate and personal choices that could be made in a lifetime and a choice central to personal autonomy and dignity.\textsuperscript{57}

The district court highlighted the liberty interest in the refusal of medical treatment found in \textit{Cruzan} and indicated it did not believe that a significant constitutional distinction could be drawn "between refusing life-sustaining medical treatment and physician-assisted suicide by an uncoerced, mentally competent, terminally ill adult."\textsuperscript{58} Thus, relying on both \textit{Casey} and \textit{Cruzan}, the district court concluded that a terminally ill person had a protected liberty interest in the availability of assistance in hastening death and that the Washington statute created an undue burden on the terminally ill person's liberty interest.

The district court also held the statute violated the Equal Protection Clause of the Fourteenth Amendment, requiring that all similarly situated persons be treated alike.\textsuperscript{59} The court based this holding on a Washington statute\textsuperscript{60} creating immunity for a physician who withheld or withdrew treatment in accord with a terminally ill patient's directives.\textsuperscript{61} The district court saw no constitutional distinction between a directive to withdraw or withhold life support, and a request for affirmative assistance in hastening death.\textsuperscript{62} Accordingly, it found that protecting a physician withdrawing life support, but not protecting a physician providing affirmative assistance with a similar result, was an unequal application of the laws to similarly situated persons.\textsuperscript{63}

On appeal, the Ninth Circuit found no basis for the district court's conclusion that the Washington statute was unconstitutional.\textsuperscript{64} The Ninth Circuit panel found the application of \textit{Casey} inappropriate.\textsuperscript{65} It also found the district court erred in its inability to distinguish between affirmatively hastening the death

\textsuperscript{56} Id. (quoting \textit{Casey}, 505 U.S. at 851).
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 1461.
\textsuperscript{59} Id. at 1467.
\textsuperscript{60} See \textit{WASH. REV. CODE} § 70.122 (1994).
\textsuperscript{61} \textit{Compassion 1}, 850 F. Supp. at 1467.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} \textit{Compassion 2}, 49 F.3d at 590-94.
\textsuperscript{65} Id. at 590-91.
of the terminally ill and the withdrawal or refusal of life support. The court noted that the right to refuse medical treatment as set out in *Cruzan* derived from the more basic "right to be let alone" and that the right to assistance in hastening death was qualitatively different in that it required that an affirmative act—an act that would result in the patient's death—rather than simply removing technology that prolonged the natural process of dying. The court's decision relied heavily on a historical perspective and emphasized the scope of the state's interest in preserving life.

In a dissenting opinion, Judge Wright agreed with the district court that the liberty interest found in *Casey* was also implicated in the right of a terminally ill person to have assistance in "hastening death." Wright analyzed the issue as a right to privacy and concluded that the "right to die with dignity falls squarely within the privacy rights recognized by the Supreme Court." Wright also found that a "constitutional distinction cannot be drawn between refusing life-sustaining medical treatment and accepting physician assistance in hastening death." Wright noted that the state's interest in preserving life declines and the individual's right to privacy grows as natural death approaches.

The Ninth Circuit reheard the case en banc, and Judge Reinhart wrote the majority opinion. In his eloquent introductory comments, Judge Reinhart noted the difficulty and significance of the issue before the court:

This case raises an extraordinarily important and difficult issue. It compels us to address questions to which there are no easy or

66. *Id.* at 593-94.
67. *Id.* at 595 (Wright, J., dissenting).
68. *Id.* at 595-96.
69. *Id.* at 595.
70. *Compassion 2*, 49 F.3d at 595 n.4. Judge Wright notes Justice Scalia's concurring opinion in *Cruzan*:

Starving oneself to death is no different from putting a gun to one's temple as far as the common-law definition of suicide is concerned; the cause of death in both cases is the suicide's conscious decision to put an end to his own existence. Of course the common law rejected the action-inaction distinction in other contexts involving the taking of human life as well . . . . A physician . . . could be criminally liable for failure to provide care that could have extended the patient's life, even if death was immediately caused by the underlying disease that the physician failed to treat.

*Id.* (quoting *Cruzan*, 497 U.S. at 296-97 (Scalia, J., concurring)).
71. *Id.* at 596.
72. See generally *Compassion 3*, 79 F.3d 790.
simple answers, at law or otherwise. It requires us to confront the most basic of human concerns—the mortality of self and loved ones—and to balance the interest in preserving human life against the desire to die peacefully and with dignity. People of good will can and do passionately disagree about the proper result, perhaps even more intensely than they part ways over the constitutionality of restricting a woman's right to have an abortion. Heated though the debate may be, we must determine whether and how the United States Constitution applies to the controversy before us, a controversy that may touch more people more profoundly than any other issue the courts will face in the foreseeable future. 73

Judge Reinhart went on to concisely summarize the issue before the court and the court's conclusions and holding:

Today, we are required to decide whether a person who is terminally ill has a constitutionally-protected liberty interest in hastening what might otherwise be a protracted, undignified, and extremely painful death. If such an interest exists, we must next decide whether or not the state of Washington may constitutionally restrict its exercise by banning a form of medical assistance that is frequently requested by terminally ill people who wish to die. We first conclude that there is a constitutionally-protected liberty interest in determining the time and manner of one's own death, an interest that must be weighed against the state's legitimate and countervailing interests, especially those that relate to the preservation of human life. After balancing the competing interests, we conclude by answering the narrow question before us: We hold that insofar as the Washington statute prohibits physicians from prescribing life-ending medication for use by terminally ill, competent adults who wish to hasten their own deaths, it violates the Due Process Clause of the Fourteenth Amendment. 74

In reversing the Ninth Circuit panel, the court specifically rejected the panel's heavy reliance on historical analysis. 75 The court concluded that "historical evidence alone is not a sufficient basis for rejecting a claimed liberty interest," noting that if such arguments were sufficient, statutes barring interracial marriages would still stand. 76

By the time the Ninth Circuit reheard the case, the three terminally ill plaintiffs had died from their illnesses. 77 The court determined, however, that the physician-plaintiffs had standing to challenge the statute. 78 The issue of standing was

73. Id. at 793.
74. Id. at 793-94.
75. Id. at 805.
76. Id. at 805-06.
77. Id. at 796.
78. Compassion 3, 79 F.3d at 795-96.
significant in that it highlighted one of the procedural barriers to appellate review of cases dealing with the rights of the dying. In these cases the person has often died before appeal, thus raising the question of whether the issue is moot and not justiciable. By establishing the standing of the physicians, the court avoided questions of mootness and, in effect, paved the way for review by the United States Supreme Court.

The United States Supreme Court reversed the Ninth Circuit, holding that a right to assistance in committing suicide was not a fundamental liberty interest protected by the Due Process Clause, and that Washington's ban on assisted suicide was rationally related to legitimate government interests. The opinion of the Court was lengthy, and while there was not a dissenting opinion, concurring opinions provided widely varied analyses. Moreover, the concurring opinions discussed both Glucksberg and the simultaneous decision in Vacco.

Chief Justice Rehnquist's majority opinion was based on the Court's "established method of substantive-due-process analysis" with two primary features: 1) specially protecting those "fundamental rights and liberties which are, objectively, deeply rooted in nation's history and tradition," and 2) providing careful description of asserted fundamental liberty interests. The majority's analysis began with an examination of "our Nation's history, legal traditions, and practices" which demonstrates that Anglo-American common law has punished or otherwise disapproved of assisting suicide for over 700 years. Against this historical backdrop, Rehnquist noted the Court has "always been reluctant to expand the concept of substantive due process because the guide posts for responsible decision-making in this uncharted area are scarce and open-ended." To expand due process rights in this context would "reverse centuries of legal doctrine and practice, and strike down the considered policy of choice of almost every State." After reviewing the Court's holdings in Casey and Cruzan, Rehnquist found the Court's previous holding "[t]hat many of the rights and liberties protected by the

79. See generally Glucksberg, 521 U.S. 702.
81. See generally Vacco, 521 U.S. 793.
83. Id. at 710-19.
84. Id. at 720.
85. Id. at 723.
Due Process Clause sound in personal autonomy [did] not warrant the sweeping conclusion that any and all important, intimate and personal decisions are so protected."\textsuperscript{86} After concluding that "committing suicide is not a fundamental liberty interest protected by the Due Process Clause,"\textsuperscript{87} the majority went on to conclude that the Washington ban on assisted suicide was rationally related to legitimate state interests in preservation of human life, preventing suicide, maintaining integrity and ethics of the medical profession, protecting vulnerable persons who might be pressured into physician-assisted suicide, and protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes and societal indifference.\textsuperscript{88} Thus, the statute did not violate the Due Process Clause.\textsuperscript{89}

Justice Souter began his concurring opinion with an extensive review of the Court's methods of substantive due process analysis.\textsuperscript{90} Applying a carefully considered analysis, Justice Souter judged "the importance of the individual interest here, as within that class of 'certain interests' demanding careful scrutiny of the State's contrary claim."\textsuperscript{91} Justice Souter stopped short, however, of addressing whether there was a "fundamental" right of the terminally ill to medical assistance in hastening death.\textsuperscript{92} Souter acknowledged that the patients and doctors were asserting a more narrow and limited right than the majority had based its opinion on,\textsuperscript{93} and that they had proposed regulatory schemes that would ostensibly mitigate many of the asserted state interests.\textsuperscript{94} Souter found that legislatures, rather than courts, were best suited to address the emerging issue of the rights of the dying.\textsuperscript{95} He suggested that a proper solution may involve some experimentation which was improper for the courts, but appropriate and desirable for the legislative branch.\textsuperscript{96} Souter concluded his concurring opinion by stating, "[w]hile I do not decide for all time that respondents' claim

\textsuperscript{86} Id. at 724-28.
\textsuperscript{87} Id. at 728.
\textsuperscript{88} Glucksberg, 521 U.S. at 728-35.
\textsuperscript{89} Id. at 735.
\textsuperscript{90} Glucksberg, 521 U.S. at 752 (Souter, J., concurring).
\textsuperscript{91} Id. at 752 (citing Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).
\textsuperscript{92} Id.
\textsuperscript{93} Id. at 773.
\textsuperscript{94} Id. at 785.
\textsuperscript{95} Id. at 788-89.
\textsuperscript{96} Glucksberg, 521 U.S. at 789.
should not be recognized, I acknowledge the legislative institutional competence as the better one to deal with that claim at this time." 97

Justice O'Connor agreed with the majority that there was no generalized right to commit suicide, but noted that the patients and doctors were asserting the narrower right of a competent person experiencing great suffering to control the circumstances of death. 98 Justice O'Connor concluded that the court need not address the issue of whether a constitutional right was implicated. The patients were not prevented from obtaining palliative care and the state's interest in safeguarding against involuntarily hastened death was sufficient to justify the Washington statute. 99

Justice Breyer, in a separate concurring opinion, agreed with Justice O'Connor's views. 100 Breyer indicated that he would reject the majority's formulation of the claimed liberty interest as a "right to commit suicide with assistance" and would instead adopt a "formulation [that] would use words roughly like 'a right to die with dignity.'" 101 At the "core" of this conception "would lie personal control over the manner of death, professional medical assistance, and the avoidance of unnecessary and severe physical suffering—combined." 102 Like Justice O'Connor, Justice Breyer indicated it was not necessary to determine if this was a fundamental right in this case because the severe physical suffering required to implicate the right could be alleviated with appropriate palliative care. 103 Justice Breyer made it clear that under different circumstances, particularly those in which state action limited palliative care, the court might have to revisit the issue and establish the nature of the right. 104

Justice Stevens, in his concurring opinion, analyzed the right of a terminally ill person to medical assistance in hastening death in the context of the Court's holdings on the use of capital punishment by some states. 105 Stevens found that states, like Washington, which had authorized the death penalty

97. Id.
98. Glucksberg, 521 U.S. at 736 (O'Connor, J., concurring).
99. Id. at 737-38.
100. Glucksberg, 521 U.S. at 789 (Breyer, J., concurring).
101. Id. at 790.
102. Id.
103. Id. at 791
104. Id. at 792.
105. Glucksberg, 521 U.S. at 738 (Stevens, J., concurring).
had done so on the premise that the sanctity of human life does not always require that it be preserved and thus, the state "must acknowledge that there are situations in which an interest in hastening death is legitimate."\textsuperscript{106}

2. \textit{Vacco}

In \textit{Vacco} the Court considered whether a New York statute banning physician-assisted suicide violated the Fourteenth Amendment's Equal Protection Clause.\textsuperscript{107} Like \textit{Glucksburg}, \textit{Vacco} was brought by terminally ill patients, who had died of their illnesses by the time certiorari was granted, and by their physicians.\textsuperscript{108} The doctors and patients asserted that the New York statute violated the Equal Protection Clause "because New York permits a competent person to refuse life-sustaining medical treatment, and because the refusal of such treatment is 'essentially the same thing' as physician-assisted suicide."\textsuperscript{109}

The United States District Court disagreed with the petitioners, stating, "it is hardly unreasonable or irrational for the State to recognize a difference between allowing nature to take its course, even in the most severe situations, and intentionally using an artificial death-producing device."\textsuperscript{110}

The Court of Appeals for the Second Circuit reversed, stating:

\begin{quote}
New York law does not treat equally all competent persons who are in the final stages of fatal illness and wish to hasten their deaths,' because 'those in the final stages of terminal illness who are on life-support systems are allowed to hasten their deaths by directing the removal of such systems; but those who are similarly situated, except for previous attachment of life-sustaining equipment, are not allowed to hasten death by self-administering prescribed drugs.\textsuperscript{111}
\end{quote}

The United States Supreme Court reversed the Second Circuit.\textsuperscript{112} The Court found that the distinction between assisting suicide and withdrawing life-sustaining treatment was important, logical and rational.\textsuperscript{113} The Court noted that the distinc-

\begin{itemize}
\item \textsuperscript{106} \textit{Id.} at 741-42.
\item \textsuperscript{107} \textit{Vacco}, 521 U.S. at 797.
\item \textsuperscript{108} \textit{Id.}
\item \textsuperscript{109} \textit{Id.} at 798.
\item \textsuperscript{110} \textit{Id.} (citing Quill v. Koppel, 870 F.Supp. 78, 84 (S.D.N.Y. 1994)).
\item \textsuperscript{111} \textit{Id.} (citing Quill v. Koppel, 80 F.3d 716 (1996)).
\item \textsuperscript{112} \textit{Id.} at 799.
\item \textsuperscript{113} \textit{Id.} at 800-01.
\end{itemize}
tion was "widely recognized and endorsed in the medical profession" and comported with "fundamental legal principles of causation and intent." With regard to causation, the Court pointed out that "when a patient refuses life sustaining medical treatment, he dies of an underlying fatal disease," but "if a patient ingests lethal medication prescribed by a physician, he is killed by that medication." With regard to intent, the Court noted that a physician who removes life-support at a patient's request is not doing so with the intent of killing the patient, while the intent in physician-assisted suicide is to end the patient's life.

The Court discussed the significance of a physician's intent with regard to what has become known as the "double effect." The "double effect" occurs when a physician provides pain-killing drugs that "may hasten a patient's death, but the physician's purpose and intent is, or may be, only to ease his patient's pain." The "double effect" situation is substantially different from a doctor who assists a suicide and "must necessarily and indubitably, intend primarily that the patient be made dead."

The Court concluded that the state's reasons for recognizing and acting on the distinctions between withdrawal of life-support and affirmative acts that hasten death were "valid and important public interests" which easily satisfied "the constitutional requirement that a legislative classification bear a rational relation to some legitimate end."

3. Conclusions Regarding Federal Rights

Glucksberg and Vacco were significant as much for what they did not do as for what they did. In these cases, the Court found no right under the United States Constitution to commit suicide. The Court, however, left open the possibility that in the future a more narrow right might be recognized under the

114. Id.
115. Id.
116. Id. at 801-02.
117. Id.
118. Id. at 802.
119. Id. (citing Assisted Suicide in the United States, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 2d Sess. 368 (1996)).
120. Id. at 808-09.
United States Constitution.\textsuperscript{122} The Court also made it clear that while there was no protected right to commit suicide under the United States Constitution, states were free to legislate such a right.\textsuperscript{123} Moreover, the Court’s decision did not preclude the possibility that the terminally ill person may have a right to medical assistance in hastening death which arises under a state’s constitution.\textsuperscript{124}

\textbf{C. Rights Under the Montana Constitution}

A state cannot abridge the rights afforded by the United States Constitution.\textsuperscript{125} A state is free, however, to expand those rights.\textsuperscript{126} The expansion of rights was the clear intent and effect of the 1972 Montana Constitution.\textsuperscript{127} Since the United States Supreme Court has not, as yet, found that a terminally ill person has a right to assistance in hastening death, the question arises as to whether such a right might exist within the more expansive rights provided by the Montana Constitution. The Montana Supreme Court has held that it “is not bound by decisions of the United States Supreme Court where independent grounds exist for reaching a contrary result.”\textsuperscript{128}

The Montana Supreme Court has already eluded to the fact that the right to privacy under the Montana Constitution may have implications for the “right to die.” In \textit{Gryczan v. State}, a case addressing same-gender sexual conduct, Chief Justice Tורג, in a concurring and dissenting opinion, noted that the court should “not be surprised if one of the first challenges under the theory espoused by the majority in this case will be to § 45-5-105, MCA, which provides severe criminal sanctions for a person

\begin{itemize}
\item \textsuperscript{122} \textit{Glucksberg}, 521 U.S. at 720.
\item \textsuperscript{123} \textit{Id}.
\item \textsuperscript{124} \textit{Id} at 735 n.24.
\item \textsuperscript{125} U.S. CONST. art VI, cl. 2. The Supremacy Clause of the United States Constitution places federal law above state law. “This Constitution, and the Laws of the United States which shall be made, and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land . . . .”
\item \textsuperscript{126} The Tenth Amendment of the United States Constitution states that “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.
\item \textsuperscript{128} State v. Solis, 214 Mont. 310, 314, 693 P.2d 518, 521 (1984).
\end{itemize}
who purposely aids or solicits another to commit suicide." 129

1. The Montana Constitution

The Montana Constitution, ratified in 1972, is one of the most modern and innovate of constitutions. 130 It was created to replace the outdated 1889 constitution and arose from a constitutional convention which was truly a convention of the people and not the government. 131

All of the convention's deliberations were open to the public and there was little influence from lobbyists. 132 The delegates obtained information from a staff of hired researchers, many of whom were recent college graduates. 133 There were slightly more Democratic delegates than Republican, but the convention was notably nonpartisan. 134 Seating on the convention floor was alphabetical rather than by party and committees were chaired by members of both parties. 135

The proceedings of the convention are documented nearly verbatim in the Montana Constitutional Convention Transcripts ("Transcripts") and Delegate Proposals. Although the Montana Constitution follows the general pattern of the United States Constitution, the Transcripts make it clear that the delegates intended to expand on the rights of individuals provided under the United States Constitution. 136 Commentators have noted that seventeen of the provisions of the Montana Constitution's article II, declaration of rights have no parallel in the Bill of

130. See ELISON & SNYDER, supra note 127, for a detailed discussion of the Montana Constitution.
131. Id. at 9-40. During the legislative authorization of the Constitutional Convention, a question arose as to the meaning of article V, section 7, of the 1889 Constitution which said: "No senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office under the state . . . ." The Montana Supreme Court interpreted this section as preventing current members of the legislature from serving as delegates to the convention. Consequently, nearly all prominent state politicians were prevented from participating. Montana voters elected 100 convention delegates from diverse walks of life. Among the delegates were nineteen women, twenty farmers or ranchers, twenty-four lawyers, thirteen educators including three professors, a retired FBI agent, a Methodist minister, an architect, and a beekeeper. Id.
132. Id. at 22.
133. Id. at 19, 22.
134. Id. at 18.
135. Id. at 18, 20.
136. See, e.g., TRANSCRIPTS, supra note 127, at 3026-27.
Rights of the United States Constitution. At least two of these, the right of privacy and individual dignity have implications for the right of the terminally ill to medical assistance in hastening death.

As a new constitution with unprecedented explicit individual rights, the Montana Constitution is in many ways a mere framework on which these new enumerated rights will be constructed. Many of the unique provisions, especially the individual dignity section, will be filled with meaning by legislation and court decisions. At this moment we can only speculate as to how expansive the rights provided by the Montana Constitution shall become. It is possible, however, that the Montana Constitution could provide the terminally ill in Montana rights to control death that have not been found under the United States Constitution.

2. Right to Privacy, Scott Fisk's Analysis

There is no explicit right to privacy in the United States Constitution. The right to privacy first arose as a principle of common law. By the 1960’s a right to “observational” privacy had been firmly established as a fundamental, if not explicitly enumerated, constitutional right. In *Griswold v. Connecticut* and *Planned Parenthood v. Casey*, the United States Supreme Court found that there was a right to personal-autonomy privacy encompassing a right to personal choice.

Delegates of the Montana Constitutional convention felt that the right of privacy was so important that it should be a

---

137. *Elison & Snyder*, *supra* not 127, at 35. See also volume 64 of the Montana Law Review for a general discussion of the scope of the Montana Constitution.


140. *Id.*

141. Fisk, *supra* note 5, provides a thorough discussion of the right of privacy under the Montana Constitution and its implications for terminally ill Montanans seeking assistance in hastening death. This section is primarily a brief summary of Fisk's arguments.

142. *Id.* at 319. Fisk notes that the right of privacy was first articulated in 1890 in an article authored by Samuel Warren and Louis Brandeis.


144. *Id.* at 320-21 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965) (a statute forbidding the sale of contraceptives impermissibly limited the privacy right of married persons), and *Planned Parenthood of S.E. Penn. V. Casey*, 505 U.S. 833, 851 (1992) (an abortion rights case)).
right explicitly enumerated in the new constitution. Since ratification of the Montana Constitution containing an explicit right to privacy section, the Montana Supreme Court has routinely distinguished the right to privacy under the Montana Constitution from that found under the United States Constitution. The Montana Supreme Court has stated: "We have chosen not to 'march lock-step' with the United States Supreme Court. . . . In addition, we have held that Montana's unique constitutional language affords citizens [of Montana] a greater right to privacy." In *Gryczan*, the Montana Supreme Court found a fundamental right to personal-autonomy privacy in the consensual non-profit sexual conduct of adults. Although the Montana Supreme Court's decision in *Gryczan* made it clear that personal-autonomy privacy is a fundamental right under the Montana Constitution, the court did not define the scope of personal-autonomy privacy.

To determine if an activity is covered by the right to privacy the court applies the *Katz* test, which requires that "(1) a person have an actual expectation of privacy; and (2) the expectation must be one society is willing to recognize as reasonable." Fisk argues that the Montana Supreme Court could include the privacy of the dying process within personal-autonomy privacy. "In Montana, the right to privacy, in the personal autonomy sense, seems intricately woven into the fabric of this state's cultural heritage." As District Judge Jeffrey M. Sherlock wrote in his summary judgment order in the *Gryczan* case, "Montanans generally mind their own business and do not wish to restrict other people in their freedoms unless the exercise of those freedoms interferes with other members of society." Fisk rea-

---

145. *Id.* at 321 (citing Larry M. Elison & Dennis NettickSimmons, *Right of Privacy*, 48 MONT. L. REV. 1 (1987)). Elison and NettickSimmons discussed the delegates unanimous agreement with Delegate Campbell's assessment that times had changed sufficiently that the right to privacy should be explicitly recognized.

146. *Id.* at 322.

147. *Fisk*, *supra* note 5, at 322. (citing State v. Bullock, 272 Mont. 361, 384, 901 P.2d 61, 75 (1995) (the court found an expectation of privacy in a private driveway outside the curtilage of defendants cabin)).

148. *Id.* at 323-324 (citing *Gryczan*, 283 Mont. 433, 942 P.2d 112).

149. *Id.* at 323 (citing *Katz* v. United States, 389 U.S. 347, 361 (1967)).

150. *Id.* at 327.

151. *Id.* at 328.

152. *Id.* (citing *Gryczan* v. State, No. BVD-93-1869 (D. Mont. Feb. 16, 1996) (order on motions for summary judgment)).
sons that, given Montana’s traditions and culture, the Montana Supreme Court could apply the Katz test and find that a terminally-ill person, who is suffering and near death, has an actual expectation of privacy which is reasonably recognized by other Montanans.153

In Montana, legislation limiting an individual’s right to privacy must be justified by a compelling state interest and narrowly tailored to effectuate only that interest.154 Fisk argues that if the court found a right to personal-autonomy privacy in dying, the current laws prohibiting assistance in hastening death would be too broad and restrictive to withstand constitutional scrutiny.155 As noted earlier, in Montana, “aiding or soliciting” an attempted suicide is a felony punishable by up to ten years in prison and a $50,000 fine156 and assisting in a successful suicide may result in homicide charges.157

Fisk concludes his argument by noting that, unlike the situation of personal-autonomy privacy in the Gyczan case, a recognition of a right of the terminally-ill to medical assistance in hastening death will require more than simply “striking a bad law” from the books.158 Even supporters of the right of the terminally ill to assistance in hastening death agree that such a right would be subject to reasonable regulation narrowly tailored to address the state’s compelling interests.159 Fisk suggests that Montana’s Rights of the Terminally Ill Act160 and Oregon’s Death With Dignity Act161 provide models for workable legislation.

3. Individual Dignity

The right of a terminally ill person to hasten death is often referred to as the right to “death with dignity.” The United States Constitution does not mention dignity, nor has the United States Supreme Court found that there is a right to dig-

153. Id.
154. Id. at 322. (citing State v. Siegal, 281 Mont. 250, 363, 934 P.2d 199, 202 (1997)).
155. Id.
156. MONT. CODE. ANN. § 45-5-105 (2003).
158. Fisk, supra note 5, at 335.
159. Id.
160. MONT. CODE ANN. § 50-9-205(1) (2003); see also infra text accompanying note 211.
161. OR. REV. STAT. § 127.880-897 (2001); see also infra text accompanying note 212.
nity or “death with dignity.”\textsuperscript{162}

While there is apparently no right to dignity under the United States Constitution, there is unquestionably one under article II, section 4 of the Montana Constitution:

Individual Dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious idea.\textsuperscript{163}

Article II, section 4 of the Montana Constitution (“Individual Dignity”) is distinguished from equal protection under the Fourteenth Amendment of the United States Constitution in that it explicitly expands equal protection by both extending the protection to additional classes and by protecting against discrimination in private as well as public actions. More important for the present discussion, it implies that the right to equal protection arises under a fundamental and “inviolable” right to “Individual Dignity.” While it is clear that section 4 is intended to expand on rights provided by the United States Constitution, it is less clear what exactly is meant by a right to Individual Dignity.

What does individual dignity mean under the Montana Constitution? The Montana Supreme Court recently interpreted the literal meaning of the Individual Dignity Clause in \textit{Walker v. Montana}.\textsuperscript{164} Additionally, Montana Constitutional Convention Transcripts provide some insight into the framers’ intent. The following analysis of the meaning of Individual Dignity relies on \textit{Walker}, convention transcripts, usage in other legal contexts, and usage within the context of article II, section 4.

In \textit{Walker}, the Montana Supreme Court took the opportunity to give meaning to the Individual Dignity Clause.\textsuperscript{165} The court applied the dignity clause and the Cruel and Unusual Punishment Clause of the Montana Constitution in a situation

\textsuperscript{162} Justice Breyer in his concurring opinion in \textit{Glucksberg} noted that the issue was not a right to suicide as analyzed by the majority, but rather a “right to die with dignity.” \textit{Glucksberg}, 521 U.S. at 789. \textit{See also}, Vicki C. Jackson, \textit{Constitutional Dialogue and Human Dignity: States and the Local in Transnational Constitutional Discourse}, 66 \textit{MONT. L. REV.} 15 (2004).

\textsuperscript{163} \textit{MONT. CONST.} art. II, § 4.

\textsuperscript{164} 2003 MT 134, 316 Mont. 103, 68 P.3d 872. \textit{See also}, Albinger v. Harris, 2002 MT 118, 310 Mont 27, 48 P.3d 711.

\textsuperscript{165} 2003 MT 134, 316 Mont. 103, 68 P.3d 872.
assessing standards of prisoner treatment. Despite Walker's initial failure to cite to article II, section 4 in his argument to the district court, the Montana Supreme Court applied the provision and interpreted the meaning of Individual Dignity. The majority recognized the right to individual dignity as a "fundamental" right, which requires the "highest levels of scrutiny" and the "highest levels of protection from the courts." Under this standard of review, the court stated that the "plain meaning of the dignity clause commands that the intrinsic worth and the basic humanity of persons may not be violated," indicating the right to dignity is a free standing, separate right equally protected for each individual. However, the court did not indicate whether the separate, fundamental right to dignity is defined pursuant to individual perception or by a societal standard reflecting state interests. Absent a judicial resolution, this issue requires further analysis.

To some extent, the intent of the Montana Constitutional Convention can be traced through the process followed by the delegates. The drafting process began with the delegates' submission of proposals to the various committees. There were at least six delegate proposals dealing with dignity or equal protection submitted to the Bill of Rights Committee. The language of Delegate Proposal No. 61 is very close to that finally adopted as article II, section 4 and begins with the sentence: "The dignity of the human being is inviolable."

Delegate Proposal No. 33 also addresses dignity but does not do so in the context of equal protection. It states: "The rights of individual dignity, privacy and free expression being essential to a well-being of a free society, the state shall not infringe upon these rights without the showing of a compelling state interest." While Delegate Proposal No. 33 was not adopted, it suggests that some delegates regarded individual dignity as a right independent of equal protection.

While there was considerable discussion in the Convention

166. Id. ¶ 72-74.
167. Id. ¶ 96 (Grey, J., dissenting).
168. Id. ¶ 74.
169. Id. ¶ 82.
171. I TRANSCRIPTS, supra note 127, at 161.
172. Id. at 127.
173. Id.
of the scope of the equal protection provisions of article II, section 4, the significance of the dignity language was mentioned only briefly. In a discussion of the inclusion of private action within the scope of equal protection, Delegate Dahood stated that "[t]he intent of Section 4 is simply to provide that every individual in the State of Montana, as a citizen of this state, may pursue his inalienable rights without having any shadows cast upon his dignity through unwarranted discrimination." While not defining dignity, Delegate Dahood's comment suggests that a variety of "inalienable rights" may be implicated in protecting the dignity of an individual and that "discrimination" is one way, but perhaps not the only way, that the rights and, consequently, the dignity of an individual could be violated. Despite supporting the Montana Supreme Court's determination that dignity is a free-standing right, Delegate Dahood's comment and the progression of the Montana Constitutional Convention Transcripts do not indicate whether dignity is defined on an individual basis or according to societal standards.

Further interpretation of the legal meaning of dignity can be gleaned from the use of the word in other legal contexts. Many of the federal cases addressing the Right to Die have associated dignity with personal-autonomy liberty. In Glucksberg, Justice Breyer indicated he would formulate the issue before the Court in terms of "a right to die with dignity." Citing Casey, the Ninth Circuit sitting en banc stated in Compassion in Dying that "the decision of how and when to die is one of 'the most intimate and personal choices a person may make in a lifetime,' a choice 'central to personal dignity and autonomy.'" Referring to the fundamental liberty interest in the right to make deeply personal decisions, the Court in Casey said that "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Justice O'Connor explained in Cruzan, that the ultimate question is whether sufficient justification exists for the intrusion by

174. V TRANSCRIPTS, supra note 127, at 1643.
175. Id.; see also Walker v. Montana, 2003 MT 134, ¶ 99, 316 Mont. 103, ¶ 99, 68 P.3d 872, ¶ 99 (Gray, J., dissenting) (asserting that Delegates Mansfield and Dahood's comments indicate the intent behind article II, section 4 was to "prohibit intrusion on a person's dignity through discrimination," and not to create a free-standing, separate dignity right).
176. Glucksberg, 521 U.S. at 790.
177. Compassion 3, 79 F.3d at 813-14 (quoting Casey, 505 U.S. at 851).
178. Casey, 505 U.S. at 851.
the government into the realm of a person's "liberty, dignity, and freedom." Thus, in federal cases dignity is linked to autonomy and liberty and is often referenced in extremely individualized contexts. Legal scholars have examined both sides of the coin, analyzing the meaning of the Individual Dignity Clause consistent with both individual and societal contexts.

Prior to Walker, legal scholars interpreted the meaning of article II, section 4 as a right defined by both a societal standard and by an individual standard. Matthew Clifford and Thomas Huff examined individual dignity in a societal context, consistent with Western political traditions, and concluded that the scope of the dignity clause should be limited to serious violations that "appeal to the shared public meaning of dignity." Conversely, Heinz Klug prefaced his interpretation of the Individual Dignity Clause with the assumption that human dignity is a purely individual trait with the potential to take constitutional form in multiple ways.

Our analysis of the meaning of dignity in the context of article II, section 4 of the Montana Constitution starts with three contextual observations: (i) dignity is individual; (ii) dignity is related to the need for equal protection; and (iii) dignity is inviolable.

i. Dignity is individual.

The title of article II, section 4—Individual Dignity—has important implications. That dignity is individual suggests each individual may have his or her own definition of dignity and that recognizing individual dignity requires a recognition of the each person’s uniqueness. This is consistent with Heinz Klug’s assumption that human dignity is a purely individual trait. Clifford and Huff may not disagree that dignity is an individual trait, but they would only give dignity constitutional meaning if it is consistent with a shared public meaning. According to

183. *Id.* at 137.
Klug, dignity as a classic individual right is subject to societal interests, however individual dignity can also take constitutional form as a “separate constitutionally protected right.” In Montana, individual dignity is recognized as a separate, free-standing right by the Montana Supreme Court. Defining dignity in accordance with the Montana Supreme Court and Klug’s analysis indicates Montana may define dignity pursuant to an individual standard.

Defining individual dignity according to each individual’s personal definition has implications for the meaning of death with dignity in Montana. For a death to be dignified it would require a recognition of the dying person’s individual conception of dignity, respecting the individual’s “intrinsic worth and basic humanity.” For some, a dignified death may involve struggling against death for as long as possible and at all costs. For others, a dignified death may involve affirmatively hastening death to avoid suffering or simply to avoid the loss of functions required to enjoy life. If the definition of dignity is individual, then a collective or consensus standard of dignity may not be possible. Government, society, medicine, philosophy and religion may be equally unable to provide a one-size-fits-all standard for individual dignity in dying.

**ii. Dignity is related to the need for equal protection.**

The titling and introduction of an equal protection provision with a right to dignity suggests that there is an intimate relationship between dignity and equal protection. According to Clifford and Huff, denying equal protection of the law based on arbitrary classifications is one type of violation of human dignity. Delegate Dahood’s comment indicates that equal protection is necessary so “that every individual... may pursue his inalienable rights without having any shadows cast upon his dignity.” The equal protection provision of section 4 is unique among the provisions in article II, the declaration of rights, because in addition to the free-standing right of dignity, it assures that all the rights afforded one individual are provided equally

---

186. *Walker*, ¶ 82.
187. *Id*.
190. *V TRANSCRIPTS, supra* note 127, at 1643.
to all other individuals. Consequently, it is an umbrella provi-
sion that encompasses the other rights. Delegate Dahood's com-
ment suggests that discrimination against a person in any of
their unalienable rights "cast[s] a shadow" on their dignity. Clif-
ford and Huff expand on this notion, stating: "Presumably any-
one could experience such a violation of dignity, not just persons
who are members of protected classes."\(^{191}\)

Thus, it appears that dignity is a quality of individual hu-
man beings that is protected by their unalienable rights, and
that the dignity of each individual should be equally protected.
Consistent with Walker, the fundamental right may underlie a
variety of other substantive rights such as the rights of privacy
or freedom of expression.

iii. Dignity is inviolable.

Article II, section 4 starts by stating that the "dignity of the
human being is inviolable." Classification of a right as inviola-
ble is unprecedented in the constitutions of both Montana and
the United States. No other right is characterized as inviolable.
Webster defines inviolable as: "secure from violation, assault, or
trespass, unassailable."\(^ {192}\) Under both the Montana Constitution
and the United States Constitution, even fundamental rights
are assailable and must be weighed against compelling state in-
terests.\(^ {193}\) The language of article II, section 4 suggests that
human dignity need not yield even to a compelling state inter-
est. The Montana Supreme Court recognizes individual dignity
as a free-standing right, but the court has yet to determine if
this right is subject to compelling state interest.

It is likely that the Montana Supreme Court would take a
different approach than the United States Supreme Court in
analyzing the right of a terminally ill person to assistance in
hastening their death. The analysis of the majority in Glucks-
berg was based largely on a recognition of time-honored social
and legal conventions.\(^ {194}\) The Montana Constitution was drafted
with explicit acknowledgment of the changes which have oc-
curred in the past century and with the clear intention to re-
place obsolete legal concepts.\(^ {195}\) While the United States Su-

\(^{191}\) Clifford & Huff, supra note 180, at 306-7.
\(^{192}\) MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1995).
\(^{194}\) Glucksberg, 521 U.S. at 720-21.
\(^{195}\) See generally Elison & NetickSimmons, supra note 145.
preme Court in *Glucksberg* looked to the past for its analysis, the Montana Supreme Court, addressing the same issue, will be basing its decisions on a constitution which exists because the ways of the past were found to have become outmoded and inadequate. Thus, the historical analysis used by the majority in *Glucksberg* would likely be rejected by a Montana Supreme Court analyzing the right of a terminally ill Montanan to receive assistance in hastening death.

In *Cruzan*, the United States Supreme Court noted that "a state may properly decline to make judgments about the quality of life that a particular person may enjoy and may simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the person."196 In Montana, the existence of an inviolable right to dignity would likely mean that the state is obligated to consider an individual’s quality of life to the extent it affects the individual’s dignity. Thus, the state’s interest in preservation of life in Montana is not unqualified, but rather must recognize individual dignity.

In their concurring opinions in *Glucksberg*, both Justice O’Connor197 and Justice Breyer198 indicated it was not necessary to determine if a fundamental right was implicated in the right of a terminally ill person to obtain assistance in hastening death because the severe physical suffering required to implicate the right could be alleviated with appropriate palliative care. Thus, at least some members of the United States Supreme Court have found that the terminally ill have no fundamental right to assistance in hastening death because medication is able to ameliorate their pain.199 It is likely a similar analysis would fail in Montana because of the inviolable right to human dignity under the Montana Constitution. If dignity is individual, dignity for some may be more than the mere absence of pain. Thus, a Montana court could not dismiss the implication of a fundamental right simply because pain relief is available. It is easy to imagine a dying person whose pain has been relieved, but who has lost control of the most basic of bodily functions and feels that prolonging life in that state is profoundly undignified.

Despite the uncertainty about the precise meaning of the

198. *Id.* at 791.
199. *Id.*
right to individual dignity in Montana, it may be as important as the right to privacy in supporting the right of a terminally ill person to medical assistance in hastening death. In several ways the right to privacy may be more vulnerable to attack than the right to individual dignity. As Fisk noted, privacy interests are subject to the two part Katz test. Under the Katz test an individual must have an actual expectation of privacy and the expectation must be one society is willing to recognize as reasonable. Many Montanans might find that the use of medical assistance to hasten the death of the terminally ill person is unreasonable. If the right to medical assistance in hastening death arose under a right to individual dignity, it would likely be based on an individual standard, rather than on a societal reasonableness standard. The disapproval of a segment of society would probably not be relevant if the analysis was based on a right to individual dignity.

If the right of a terminally ill person to medical assistance in hastening death arose under the right to privacy, that right might still be outweighed by compelling state interests. The description of individual dignity as inviolable makes it less likely it would be outweighed by a competing state interest. Thus, a terminally ill person's assertion of a right to assistance in hastening death may be more likely to succeed under the right to individual dignity than under the right to privacy.

While the right of a terminally ill Montanan to medical assistance in hastening death remains speculative, it is likely that the issue will be brought before Montana courts. Our increasingly aging population and evolving legal and social perspectives on dying make it highly likely that a terminally ill Montanan will eventually assert his or her right to assistance in hastening death. If such an assertion arises under the right to individual dignity, the court likely will find current laws too broad and too restrictive to withstand constitutional scrutiny. However, as Fisk noted in his analysis under the right to privacy, even those who support the right of the terminally ill to assistance in hastening death agree that such a right would be subject to reasonable regulation narrowly tailored to address the state's compelling interests.

201. Id.
202. Id. at 335.
III. Conclusion

The United States has an increasingly aging population. The deaths of aging Americans will typically be characterized by prolonged chronic illness. Many Americans will likely seek assistance in hastening their deaths by either the removal of life-supporting technologies or by the administration of drugs intended to hasten death. In *Cruzan*, the United States Supreme Court found that the terminally ill have a right to hasten death by the removal of life-support.\(^{203}\) In *Glucksberg*\(^{204}\) and *Vacco*,\(^{205}\) the Court found that under the United States Constitution, there was no fundamental right to "commit suicide." However, the Supreme Court did not preclude the possibility that the terminally ill may have a right to medical assistance in hastening death under state law.

The Montana Constitution provides Montanans with rights beyond those provided by the United States Constitution. Two of these rights, individual dignity and the right to privacy, could potentially provide terminally ill Montanans a right to medical assistance in hastening death. If this proves to be the case, existing Montana laws, which criminalize assisted suicide, may be found to be too broad and restrictive to pass the strict scrutiny test of constitutionality.

As Fisk noted in his analysis of the right to privacy, both opponents and proponents agree that any right to medical assistance in hastening death should be carefully regulated. Fisk proposed that Montana's Rights of the Terminally Ill Act\(^{206}\) and Oregon's Death with Dignity Act\(^{207}\) provide models for legislation that would allow Montanans to exercise rights to control the circumstances of their death and at the same time address the state's compelling interest. Often discussed are the state's interests in prevention of hastening the death of persons who are not fully competent, who are depressed, or who have been pressured by others into the decision to hasten death.\(^{208}\) It is worth noting that not only are these situations in which the state has a valid interest, they are also situations in which, arguably, the terminally ill person is unable to competently choose to exercise his or

\(^{203}\) See generally *Cruzan*, 497 U.S. 261.
\(^{204}\) See generally *Glucksberg*, 521 U.S. 702.
\(^{205}\) See generally *Vacco*, 521 U.S. 793.
\(^{208}\) See, e.g., *Glucksberg*, 521 U.S. at 728-35.
Montana’s Rights of the Terminally Ill Act assures that withdrawal of life-support occurs only as the result of the terminally ill person making a considered and documented decision: (1) the individual must be of sound mind; (2) at least 18 years-old; (3) have a diagnosed incurable condition; (4) will in the opinion of an attending physician die without the administration of life-sustaining treatment; and (5) the declaration may be revoked at any time.209

Oregon’s Death with Dignity Act provides for the hastening of death with prescribed medication under carefully circumscribed conditions by requiring: (1) the person must be at least 18 years-old; (2) the request for life-ending medication must be voluntary; (3) a 15-day waiting period between a patient’s first request for a lethal prescription and the time the pills can be obtained from a pharmacist; (4) before the prescription can be written, two doctors reasonably determine that the patient has less than six months to live; and (6) no medication to end a patient’s life may be prescribed until it is determined that the patient is not suffering from a psychiatric or psychological disorder, or depression causing impaired judgment.210

Given the possibility that Montana’s current laws restricting assisted suicide may be challenged and fail to survive constitutional scrutiny, it may be prudent for the people of Montana to consider legislation that would provide reasonable and constitutionally acceptable regulation of a terminally ill Montanan’s right to medical assistance in hastening death. Montana could accomplish this by expanding the Montana Rights of the Terminally Ill Act with provisions similar to those of Oregon’s Death with Dignity Act.
