

## Disorder in the Court: Physician-Assisted Suicide and the Constitution

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Justice Robert Jackson once described a Supreme Court decision, from which he was dissenting, as “more interesting to students of psychology and of the judicial processes than to students of constitutional law.”<sup>1</sup> His observation might equally apply to the Court’s recent rulings about physician-assisted suicide.<sup>2</sup> Whatever their explanation—psychologically or jurisprudentially—the Justices’ conduct in this matter was surely unusual.

On the surface, the Court’s action might appear straightforward. The Justices voted unanimously to reverse the Second and Ninth Circuit decisions that had overturned, on differing constitutional grounds, state laws prohibiting physician-assisted suicide for terminally ill patients.<sup>3</sup> The circuit court decisions had seemed, to me, at least, as extraordinarily abrupt and even reckless invocations of judicial authority, if only because there was no practical experience anywhere in this country to gauge the impact of legalized physician-assisted suicide but there were many reasons to believe that this practice would fundamentally and harmfully transform medical and social treatment of people with serious illnesses.<sup>4</sup> In adjudicating the existence of constitutional rights, courts are of course not obliged to follow election returns; but though we can find examples of judicial boldness in striking down popular legislative enactments, the Supreme Court had never in its history consti-

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1. *Zorach v. Clauson*, 343 U.S. 306, 325 (1952) (Jackson, J., dissenting).

2. See *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997); *Vacco v. Quill*, 117 S. Ct. 2293 (1997).

3. See *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (en banc); *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996).

4. See Robert A. Burt, *Constitutionalizing Physician-Assisted Suicide: Will Lightning Strike Thrice?*, 35 DUQ. L. REV. 159 (1996).

tutionally imposed a rule on all states where no state had ever implemented such a rule. When the Court had overturned state abortion laws<sup>5</sup> or death penalty laws<sup>6</sup> or race segregation laws<sup>7</sup> or minimum wage laws,<sup>8</sup> there were considerable numbers of states that had already adopted these results;<sup>9</sup> but not so for physician-assisted suicide, which had been legally recognized only in Oregon in a 1994 popular referendum, and even this law had not yet been put into actual effect. Accordingly, the Supreme Court's unanimous reversal of the circuit courts' rulings could be seen as a sober reassertion of the traditional judicial caution that has usually been the framework for constitutional adjudication.

There were, however, many oddities about this Supreme Court ruling that belie its apparent sobriety and suggest that the Court's apparent rejection of a constitutional right to physician-assisted suicide is not as firmly grounded as the Justices' unanimous vote might appear. There is, one might say, less than meets the eye in this unanimous result.

Consider, first of all, Chief Justice William Rehnquist's opinions, denominated as "the opinions of the Court."<sup>10</sup> For almost their entirety, these two opinions adopt the narrow, unambitious approach to constitutional adjudication that has been the particular hallmark of Rehnquist's jurisprudence. The Ninth Circuit's finding of a "liberty-based" or implicitly "privacy-based" constitutional right to physician-assisted suicide is wrong, Rehnquist opined, because there is neither explicit textual support nor historical support in actual predominant state practice for such a right.<sup>11</sup> As for the Second Circuit's ruling that New York law cannot rationally distinguish between its approval of patient choice in refusing life-prolonging medical treatment and its prohibition of patient choice for medical treatment that would hasten death, Rehnquist essentially concluded that the distinction is rational enough for constitutional purposes because lots of people think

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5. See *Roe v. Wade*, 410 U.S. 113 (1973).

6. See *Furman v. Georgia*, 408 U.S. 238 (1972).

7. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

8. See *Lochner v. New York*, 198 U.S. 45 (1905).

9. See *Burt*, *supra* note 4, at 159-62.

10. See *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997); *Vacco v. Quill*, 117 S. Ct. 2293 (1997).

11. See *Glucksberg*, 117 S. Ct. at 2261-75.

it's rational.<sup>12</sup> In both cases, Rehnquist invoked his bootstrapping version of constitutional adjudication: the best (and perhaps even the only necessary) evidence for the constitutional validity of a state law is its existence. No novelty here—until, however, the final footnote in each of his two opinions.

At the end of his opinion in the Ninth Circuit case, Rehnquist quoted Justice Stevens' observation in his concurring opinion that he "would not 'foreclose the possibility that an individual plaintiff seeking to hasten her death, or a doctor whose assistance was sought, could prevail in a more particularized challenge.'" <sup>13</sup> Rehnquist then continued, "Our opinion does not absolutely foreclose such a claim. However, given our holding that the Due Process Clause of the Fourteenth Amendment does not provide heightened protection to the asserted liberty interest in ending one's life with a physician's assistance, such a claim would have to be quite different from the ones advanced by respondents here."<sup>14</sup> Similarly, at the end of his opinion in the Second Circuit case, Rehnquist again quoted Stevens: "Justice Stevens observes that our holding today 'does not foreclose the possibility that some applications of the New York statute may impose an intolerable intrusion on the patient's freedom'; and Rehnquist again added, "This is true, but . . . a particular plaintiff hoping to show that New York's assisted-suicide ban was unconstitutional in his particular case would need to present different and considerably stronger arguments than those advanced by respondents here."<sup>15</sup>

What different arguments, what stronger arguments might Rehnquist have had in mind in these two footnotes? The plaintiffs in the two cases, by all appearances, tossed in every plausible constitutional claim they could imagine to overturn the state bans. If the Chief Justice really did mean that his opinion, on behalf of the Court, did not foreclose some future constitutional challenge to these laws, it was at the least ungenerous of him to withhold any guidance for future plaintiffs. Socratic-style law teachers often "hide the ball" from their students, but this kind of teasing pedagogy is hardly typical for judicial opinions. The most plausible explanation for Rehnquist's failure

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12. See *Quill*, 117 S. Ct. at 2296-2302.

13. *Glucksberg*, 117 S. Ct. at 2275 n.24 (citation omitted).

14. *Id.*

15. *Quill*, 117 S. Ct. at 2302 n.13 (citations omitted).

to offer even a hint about the specific content of the “different and considerably stronger” constitutional arguments is that, in the light of his sweeping dismissal of the plaintiffs’ claims in the pending cases, he could not imagine what those arguments might be.

Why, then, did Rehnquist’s opinions end with these teasing but apparently empty footnotes? The most plausible explanation appears to be in the realm of judicial politics; these footnotes have the markings of a price paid by Rehnquist to attract enough votes to convert his opinions into the “opinions of the Court.” Though the Court was unanimous in rejecting the constitutional challenges, only five Justices joined Rehnquist’s opinions; and one of those five, Justice Sandra Day O’Connor, also wrote a separate concurring opinion which strongly suggested that Rehnquist’s final footnotes were aimed toward her.<sup>16</sup> O’Connor drew a distinction in her separate opinion that Rehnquist did not explicitly address; she distinguished between “facial challenges” to the state prohibitions on assisted suicide and a “narrower question whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death.” O’Connor claimed that there was “no need to address” this narrower question because “the parties and amici agree that in these [two defendant] States a patient who is suffering from a terminal illness and who is experiencing great pain has no legal barriers to obtaining medication, from qualified physicians, to alleviate that suffering, even to the point of causing unconsciousness and hastening death.”<sup>17</sup> O’Connor accordingly stated that she joined Rehnquist’s opinion because it rejected a “generalized right to ‘commit suicide,’” but did not and did not “need to address” the more particularized constitutional claim of a terminally ill, unrelievedly suffering person.<sup>18</sup>

This is a very odd construction of the issues raised in the two cases. What was all the fuss about, one might ask, if O’Connor was correct that all of the parties and amici agreed that physicians faced no legal barriers in providing medication to hasten death for suffering, terminally ill patients? There was in fact no such agreement among the parties and amici;

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16. See *Glucksberg*, 117 S. Ct. at 2303 (O’Connor, J., concurring).

17. *Id.*

18. *Id.*

there could not be because Justice O'Connor was simply wrong in her assertion about the absence of legal barriers. They exist in at least two contexts. First, there are sharp restrictions on the availability of narcotics in both federal and state laws which are aimed at controlling street drug uses but have the practical consequence of impeding physicians' ability to provide drugs to their suffering patients. These impediments affect not simply drug dosages that might carry some risk of hastened death for patients but more generally obstruct physicians' ability to prescribe safe and effective medications to control pain.<sup>19</sup> Second, in circumstances where there is some foreseeably heightened risk of death from pain-relieving narcotics provision, it is true that no state or federal law directly prohibits such provision—but only if the physician's sole intent is to relieve pain. If it could be proven that the prescribing physician's "true" intent was to hasten death or even if her intention was "mixed" in wishing for both pain relief and hastened death, then this legal exemption would, as a formal matter, not apply.<sup>20</sup> There is an Alice-in-Wonderland quality about this kind of legalistic reasoning: when an intensely suffering patient appears close to death, and his physician is inclined to increase narcotics dosages with clear knowledge that this increase is likely to hasten death, how can the physician or anyone else be confident that her motive is only single-mindedly intended to relieve pain? And if the physician fears prosecution or adverse publicity of any sort, even if this fear is wholly unrealistic, the physician's knowledge of her own mixed motives or her anticipation that if challenged she could not prove the "purity" of her pain-relieving motives to others clearly would act as an inhibition. The narrowness of existing legal permission to prescribe pain-relieving narcotics thus surely amounts—contrary to Justice O'Connor's assertion—to a "legal barrier[]" to obtaining medication, from qualified physicians, to alleviate that suffering, even to the point of causing unconsciousness and hastening death."<sup>21</sup>

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19. See COMMITTEE ON CARE AT THE END OF LIFE, INSTITUTE OF MEDICINE, *APPROACHING DEATH: IMPROVING CARE AT THE END OF LIFE* 190-98 (Marilyn J. Field & Christine K. Cassel eds., 1997); Sandra Johnson, *Disciplinary Acts and Pain Relief: Analysis of the Pain Relief Act*, 24 J.L. MED. & ETHICS 319 (1996).

20. See Howard Brody, *Physician-Assisted Suicide in the Courts: Moral Equivalence, Double Effect, and Clinical Practice*, 82 MINN. L. REV. 939 (1998) [this Symposium].

21. *Glucksberg*, 117 S. Ct. at 2303.

Justice O'Connor did not acknowledge the fictitious basis for her concurrence in the Court's opinions. But another Justice, in a separate concurring opinion, was almost explicit in identifying this falsehood as such—and yet he also relied on this falsehood as the basis for his willingness to uphold the constitutionality of state laws prohibiting physician-assisted suicide.<sup>22</sup> Justice Stephen Breyer agreed with O'Connor that the Court was not required to adjudicate the existence of a constitutional right to assisted suicide on the ground that “the avoidance of severe physical pain (connected with death) would have to comprise an essential part” of any claimed constitutional right and that “the laws before us do not *force* a dying person to undergo that kind of pain . . . [because] they do not prohibit doctors from providing patients with drugs sufficient to control pain despite the risk that those drugs themselves will kill.”<sup>23</sup> Unlike Justice O'Connor, however, Justice Breyer did cite amicus briefs that pointed to inhibitions on physicians' willingness to prescribe adequate pain-relieving drugs.<sup>24</sup> “We are . . . told,” he said, “that there are many instances in which patients do not receive the palliative care that, in principle, is available”; but, he continued, “that is so for institutional reasons or inadequacies or obstacles, which would seem possible to overcome, and which do not include a *prohibitive set of laws*.”<sup>25</sup>

There is an old saw among litigators that if the law is against you, argue the facts; if the facts are against you, argue the law; and if the law and the facts are against you, pound the table. Justice Breyer's resort to italicized expression strikes me as a table-pounding maneuver. At the very end of his concurring opinion, moreover, Breyer came close to admitting the shakiness of his assertion:

Were the legal circumstances different—for example, were state law to prevent the provision of palliative care, including the administration of drugs as needed to avoid pain at the end of life—then the law's impact upon serious and otherwise unavoidable physical pain (accompanying death) would be more directly at issue. And as Justice O'Connor suggests, the Court might have to revisit its conclusions in these cases.<sup>26</sup>

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22. *See id.* at 2310 (Breyer, J., concurring).

23. *Id.* at 2311.

24. *See id.*

25. *Id.* at 2312.

26. *Id.*

Justice Breyer thus provided a clear road-map for future litigative challenge to state laws banning assisted suicide—a mapping that Chief Justice Rehnquist had withheld in his delphically obscure final footnotes and that Justice O'Connor did not admit in her concurring opinion that gave Rehnquist his fifth vote to constitute an opinion for the Court. Breyer was, moreover, virtually transparent in acknowledging the unsettling implications of his road-map. He joined Justice O'Connor's concurring opinion "except insofar as it joins the majority" and he pointedly observed that O'Connor's "views, which I share, have greater legal significance than the Court's opinion suggests."<sup>27</sup>

Three other Justices concurred in the result but not in the Court's opinion. Justice Ruth Bader Ginsburg seemed to follow Breyer's path, though without his explicit transparency. She simply said, "I concur in the Court's judgments in these cases substantially for the reasons stated by Justice O'Connor in her concurring opinion."<sup>28</sup> Justice John Paul Stevens filed an extended concurring opinion which in many ways was the most puzzling of all the opinions in the case. Stevens was openly explicit in concluding that individuals' interest in hastening their death "is entitled to constitutional protection."<sup>29</sup> Stevens devoted almost all of his opinion to refuting the arguments against the existence of such a constitutional right; but he chose to construe the plaintiffs' claims as nothing more than "facial challenges" to the state statutes which he was unwilling to endorse as such. Stevens thus ignored the existence of specific named plaintiffs in the case who had given vivid details of their dying, their unrelieved physical and emotional pain, their explicit wishes to hasten death and the inhibitory impact on those wishes of the state laws prohibiting physician-assisted suicide. In overturning the Washington state law, the Ninth Circuit Court of Appeals had explicitly denied that it was addressing the "facial validity" of the challenged state act,<sup>30</sup> and though all of the originally named plaintiffs had died by the time the case reached the Supreme Court, this—like constitutional challenges to abortion laws where the specific plaintiff's claim for an abortion has been mooted before appellate adjudi-

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27. *Id.* at 2310.

28. *Id.* (Ginsburg, J., concurring).

29. *Id.* at 2305 (Stevens, J., concurring).

30. *See* *Compassion in Dying v. Washington*, 79 F.3d 790, 797-98 (9th Cir. 1996) (en banc).

ation<sup>31</sup>—is not an adequate reason for an appellate court to ignore their claims against the specific applications of a state law prohibiting physician-assisted suicide. The very circumstances that Justice Stevens described in his concurring opinion as justifying a constitutional right to hastened death were in fact presented in the pleadings of one or another of the specific named plaintiffs in the two cases. If Justices O'Connor, Breyer, and Ginsburg refused to overturn state laws by misconstruing or even falsifying their actual inhibitory effects on physician conduct, it appears that Justice Stevens followed a similar course by misreading plaintiffs' specific claims about the inhibitory effects on their conduct. It is virtually impossible to understand from Stevens' opinion what more he would have wanted from the plaintiffs in the two cases in order to proclaim the existence of a constitutional right that he appeared to endorse.

Justice David Souter also filed a lengthy concurring opinion and, like Stevens, openly expressed a strong inclination to find a constitutional right to physician-assisted suicide but nonetheless voted to uphold the state statutory prohibitions.<sup>32</sup> Unlike Stevens, however, Souter did not conceal the reasons for his hesitancy by invoking opaque pleading formalities. Souter was quite clear that notwithstanding the strength he saw in the constitutional principles supporting individual privacy and autonomy and the breach of those principles involved in statutory prohibitions on physician-assisted suicide, he was not yet prepared to endorse a constitutional right because there were still too many uncertainties about the practical applications and the social and individual costs involved in implementing such a right. Souter's opinion was the most straightforward of all—unlike Rehnquist who appeared obviously disingenuous in refusing to foreclose any future argument for a constitutional right, unlike O'Connor, Breyer and Ginsburg who misrepresented the palliative measures for dying people permitted by existing state laws, unlike Stevens who promised to find a constitutional right in some future cases that seemed indistinguishable from the current cases.

Souter's honesty did, however, entail some cost; it was not clear what jurisprudential principle he could offer to justify his position. There was, moreover, one unusual aspect of Souter's

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31. See *Roe v. Wade*, 410 U.S. 113, 123-25 (1973).

32. See *Glucksberg*, 117 S. Ct. at 2275 (Souter, J., concurring).

position that virtually begged for an explicit jurisprudential justification. At the end of his opinion, Souter concluded that "legislatures . . . have superior opportunities to obtain the facts necessary for a judgment about the present controversy . . . [including] the power to experiment, moving forward and pulling back as facts emerge within their own jurisdictions."<sup>33</sup> But Souter was not prepared simply to defer to the legislative process, as Rehnquist's opinion had done; Souter appeared to conclude that legislatures had not simply an opportunity but, more importantly, an obligation to engage in serious, sustained factfinding so that the practical concerns about recognizing a right to assisted suicide would either be "confirmed or discredited."<sup>34</sup> He implied the existence of this obligation with this statement: "I do not decide here what the significance might be of legislative foot-dragging in ascertaining the facts going to the State's argument that the right in question could not be confined as claimed."<sup>35</sup>

Souter did not, however, clearly specify the kind of investigative obligation he would impose on legislatures. He surely did not mean that all state legislatures, or even a random few, were obliged to enact legislation authorizing physician-assisted suicide so that its merits could be "confirmed or discredited"; given his refusal to endorse a constitutional right to physician-assisted suicide, he could not require any legislature to approve it, even on an "experimental" basis. What then did he mean by "legislative foot-dragging"? The short answer is that he was not clear—and perhaps even purposefully unclear. Immediately following this vaguely stated obligation, however, he was willing to issue a somewhat less vaguely stated threat: "Sometimes a court may be bound to act regardless of the institutional preferability of the political branches as forums for addressing constitutional claims. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497 (1954)."<sup>36</sup>

This is an intriguing citation. *Bolling* was, of course, the companion case to *Brown v. Board of Education*<sup>37</sup> regarding segregation in the District of Columbia schools; Souter's linkage between *Bolling* and "legislative foot-dragging" appears to

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33. *Id.* at 2293.

34. *Id.*

35. *Id.*

36. *Id.*

37. 347 U.S. 483 (1954).

be a reference not simply to the Southern states' failure to eradicate school segregation before they were constitutionally required to do so in 1954 but also to their massive resistance thereafter. Regarding physician-assisted suicide, Souter appears to invoke not only *Brown I* but also *Brown II* and its indistinct injunction about "foot-dragging"—that is, its requirement that states must act "with all deliberate speed."<sup>38</sup> To paraphrase Souter's reasoning, he seems to be saying, "I see a constitutional basis for requiring state approval of physician-assisted suicide, but I am troubled by the practical consequences of such a ruling; I am willing to defer for now, but not forever, to legislatures so that they can have time to use their superior investigative resources to 'confirm or discredit' the substantiality of these practical concerns." This position is directly reminiscent of the Warren Court's endorsement in *Brown I* of the constitutional claim but its refusal in *Brown II*, because of practical concerns about implementation, to require immediate enforcement of individual students' rights against race segregation in public schools.

*Brown II* is not a popular decision these days. It is thus not surprising that Souter would be reluctant to directly invoke its precedential force. If, moreover, *Brown II* were literally his guide, this would mean that Souter was prepared to give states thirteen years but not a minute longer—the time lapse, that is, between the Court's promulgation of the "deliberate speed" formula in 1955 and its repudiation in 1968<sup>39</sup>—to investigate and experiment regarding the problems raised by the prospect of physician-assisted suicide in the treatment of dying people. It seems unlikely that Souter would want to give such explicit license to legislatures. He was, however, clearly looking for some temporizing resolution, some jurisprudential formula that would give impetus to a constitutional right to physician-assisted suicide but without imposing it, at least not immediately. I find much to commend in this course—not only as a judicial response to the claims for constitutionalizing physician-assisted suicide, but more generally as a jurisprudential technique for promoting a sustained, focused, empirically informed, and mutually respectful interchange between courts and legislatures about constitutional principle and practice.<sup>40</sup>

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38. *Brown v. Board of Education*, 349 U.S. 294, 301 (1955).

39. *Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

40. Regarding the constitutional claims for physician-assisted suicide, I

It seems most plausible that this same temporizing impulse lay behind the odd maneuverings of the other Justices who concurred in the Court's disposition. Stevens explicitly invited future litigation and Breyer was almost as explicit, in effect inviting a constitutional challenge to state laws that do in fact obstruct the provision of adequate pain palliation for terminally ill people.<sup>41</sup> Even Chief Justice Rehnquist's final footnotes appeared to promise that the constitutional claims were not foreclosed in perpetuity (though these assurances were so much at odds with this rest of his reasoning as to appear disingenuous at best).

From the five concurring opinions in the two cases, it is thus possible to compile a single attitude—a true opinion for the Court, as it were—that the controversy about the existence of a constitutional right to physician-assisted suicide was not yet ripe for definitive resolution but must await future developments in state legislatures and in repeated, particularized litigation. Although it is possible to refract all of these opinions through this single lens, to view all of the concurrences as if they reflected the calm rhetoric that Justice Souter displayed, this measured reading would miss something dissonant that can be detected in all of these opinions, Souter's included. There are odd, discordant notes in all of the Justices' opinions—the incoherence of Stevens' assertion that the statutes were not challenged as applied and his correspondingly puzzling effort to present his dissent as a concurrence; the blatant factual errors about legal barriers to pain palliation in O'Connor's opinion, which Breyer virtually acknowledged as he joined with her; the muffled, cryptic character of Ginsburg's short concurrence “substantially” agreeing with O'Connor, but not enough to join her opinion or follow her in joining Rehnquist; the misleading designation of Rehnquist's opinion as speaking for a Court majority though O'Connor's fifth vote was significantly at odds with the other four; and even Souter's indecipherable directives for future legislative actions. There

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urged a similar course (though more clearly neutral toward any ultimate holding for a right to assisted suicide) in an amicus curiae brief, arguing that the controversy was not ripe for definitive constitutional resolution. See Brief of the Project on Death in America, Open Society Institute, as Amicus Curiae, for Reversal of the Judgments Below, *Quill* (No. 95-1858) & *Glucksberg* (No. 96-110). Regarding the general jurisprudence underlying this kind of approach, see ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* (1992).

41. See Robert A. Burt, *The Supreme Court Speaks: Not Assisted Suicide but a Constitutional Right to Palliative Care*, 337 *NEW ENG. J. MED.* 1234 (1997).

was, in short, something disordered about each of the Justices' opinions—and something equally disordered about the isolation of each of them from one another, about their inability or unwillingness to find a common approach or vocabulary.

This incoherence was demonstrated most graphically by Chief Justice Rehnquist's appendage of his final footnotes claiming that constitutional issues remained open notwithstanding the patent intent in the text of his opinion to close off every conceivable constitutional claim. This contradiction was only the most visible expression of the central difficulty evident in all of the opinions—that the Justices could not bring themselves to resolve the issues but, with the signal exception of Souter, they could not forthrightly admit their irresolution. This reticence may simply have arisen from the Justices' conception of the conventional imperatives of the judicial role, that judges are supposed to decide controversies and decisively so. Or their reticence may reflect something more, something about the underlying character of this controversy.

I believe there are especially disturbing elements in the assisted suicide controversy that substantially explain the oddities evident in the Justices' conduct. I come to this conclusion, in part, by reflecting on the close similarities between the assisted suicide cases and the behavior of the Justices in the death penalty cases beginning in the 1970s. Especially in the initial death penalty cases, there is an erratic and almost willfully incoherent quality to the Justices' conduct, which, I believe, is best understood as a response to the emotional impact of the subject-matter, to the disturbing quality of the confrontation with death. In the subsequent history of the death penalty jurisprudence, the Justices grapple with this disturbance and come to terms with it in ways that offer some suggestive predictions for the future developments in the jurisprudence of assisted suicide.

One similarity between the current assisted suicide cases and the early death penalty cases is apparent on the face of the Court's dramatic decision in 1971 effectively overturning every extant state capital punishment statute. In *Furman v. Georgia*,<sup>42</sup> the Court arrayed itself in the same pattern as in the assisted suicide cases—with a bloc of four solidly opposed to finding any constitutional problems in the state statutes and five Justices comprising the majority, each of whom found

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42. 408 U.S. 238 (1972).

faults but could neither identify common ground among themselves nor provide a clearly coherent explanation for their own individual positions. In one sense, *Furman* had more in common with the circuit court rulings than the Supreme Court decision in the assisted suicide cases—that is, in its utterly unexpected and sweepingly ambitious scope. *Furman* itself is best described in the way that Justice Potter Stewart characterized the death penalty, as being “struck by lightning”<sup>43</sup> that appears startlingly and unpredictably as if from nowhere; and this would also characterize the rulings of the two courts of appeals—one en banc by an eight-to-three majority, the other by a unanimous panel decision—invoking constitutional authority to impose results at odds with long-established practice in essentially every state.<sup>44</sup> But notwithstanding the apparent sobriety of the Supreme Court’s reversals of these rulings, there is an equally unpredictable and startling quality to the oddities I have identified in the Justices’ opinions, a similar lightening-like quality in their brief outbursts.

The important similarity between the death penalty and assisted suicide cases is in their common subject-matter—not simply death, but the claim that state law was responsible for imposing deaths of terrible suffering and that the core injustice was the irrationality and unfairness of the states’ impositions. The central litigative claim shared by the two sets of cases was that courts should intervene to alleviate the suffering, to rationalize and thereby to tame the imposition of death. A quick tour of the Supreme Court’s tortuous response to this claim since the 1970s will identify some possible parallels for future responses to assisted suicide, some impulses that the Justices may find equally hard to resist.

The Court’s dramatic ruling in *Furman* was especially unexpected because it came just one year after the Court had decided, in *McGautha v. California*,<sup>45</sup> that states were not constitutionally obliged to formulate rationalizing standards to guide jury deliberation in death penalty cases and, indeed, that the “infinite variety of cases and facets to each case”<sup>46</sup> rendered any standardizing effort “beyond present human ability.”<sup>47</sup> Stitching

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43. *Id.* at 309-10 (Stewart, J., concurring).

44. *See* Burt, *supra* note 4, at 162.

45. 402 U.S. 183 (1971).

46. *Id.* at 208.

47. *Id.* at 204.

together the five separate opinions of the Justices in *Furman* one year later, the majority seemed to conclude that capital punishment was unconstitutional because it was applied unpredictably and thus without rational standards. Thirty-five states quickly responded to this ruling by reenacting death penalty statutes in various versions, and just four years later the Supreme Court again abruptly reversed course, in *Gregg v. Georgia*,<sup>48</sup> ruling that some of these renewed statutes were sufficiently rationalized so as to solve whatever problems the majority had seen in *Furman*. In other words, in 1976 the Court held that some states had accomplished what the Court had found in 1971 to be "beyond present human ability." It might seem between 1971 and 1976 that the Court had observed a stunningly rapid evolutionary advance; or, more likely, during this time a majority of the Justices had been ambivalent and erratic in their approach to the death penalty.

Justice Thurgood Marshall identified one reason for this inconstancy in his concurring opinion in *Furman*. As recently as the preceding year in the conference deliberations on *McGautha*, Marshall had held the view that capital punishment was not inherently unconstitutional;<sup>49</sup> in *Furman*, however, he dramatically shifted ground to this absolutist position. Explaining himself in *Furman*, Marshall stated, "Candor compels me to confess that I am not oblivious to the fact that . . . [this case] [n]ot only . . . involve[s] the lives of these three petitioners, but those of the almost 600 other condemned men and women in this country currently awaiting execution."<sup>50</sup> When *Furman* reached the Supreme Court a nationwide moratorium had been in effect since 1967, effectively pieced together from the procedural rulings of several lower courts obtained by abolitionist litigators challenging all aspects of the administration of the death penalty.<sup>51</sup> By 1972, all of these various challenges had been judicially rebuffed except for the last-ditch, unprecedented and seemingly implausible claim that the Court addressed in *Furman*, whether capital punishment was inherently "cruel and unusual punishment" under the Eighth

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48. 428 U.S. 153 (1976).

49. See William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 317-18 (1986).

50. 408 U.S. 238, 316 (Marshall, J., concurring).

51. See MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 107-09, 126-48 (1973).

Amendment.<sup>52</sup> Accordingly, as Marshall observed, the lives not just of the three petitioners in *Furman* but 600 others immediately hung on the Justices' disposition; and Marshall was not alone among the Justices in this realization.

The imminent prospect of death may, as Samuel Johnson observed, "wonderfully concentrate" the mind;<sup>53</sup> but it does not necessarily promote clear thinking. Though Justices Brennan and Marshall never strayed during their remaining tenure on the Court from the conclusion each expressed in *Furman* regarding the inherent unconstitutionality of capital punishment, two of the other majority Justices in *Furman*—Potter Stewart and Byron White—virtually immediately reversed themselves in *Gregg*.<sup>54</sup> White was ready to validate all of the re-enacted death penalty statutes while Stewart only approved of some; but the distinctions between any of these statutes and those invalidated in *Furman* were difficult to discern.<sup>55</sup>

If we view the Court's jurisprudence on the death penalty overall from 1971 until today, a clear logic becomes apparent: the Court today has worked its way back to the position it took in *McGautha*, that state administration of capital punishment is essentially not subject to question on federal constitutional grounds. The Court has travelled this circular route without, however, acknowledging that it had overruled *Furman* in order to return to *McGautha*; the Court instead has claimed that states have succeeded in rationalizing the administration of the death penalty while at the same time the Court has virtually eliminated, by various procedural maneuvers, the possibility of federal court oversight to assure that rationality prevails in any individual application.<sup>56</sup> The Court's path to this conclusion has not been straightforward; it has, as Justice Brennan observed, been a "path . . . [that] weaves and winds."<sup>57</sup>

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52. For the implausibility of this constitutional argument based on the available precedents, see Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1755-58 (1987).

53. Samuel Johnson, Letter to James Boswell (Sept. 19, 1777).

54. Justice William Douglas, the fifth member of the *Furman* majority, had left the Court in 1975, the year before *Gregg* was decided.

55. See Burt, *supra* note 41, at 1774-79.

56. See, e.g., Stephen B. Bright, *Is Fairness Irrelevant? The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1 (1997); Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 CAL. L. REV. 485 (1995).

57. Brennan, *supra* note 49, at 316.

Though by 1990 the Court had settled into a consistent regime of turning aside from any constitutional scrutiny, the most salient aspect of the Court's jurisprudence for the preceding two decades had been its erratic character. It was as if, for some unknown reason, the death penalty had suddenly burst into judicial and general public visibility around 1970, and though a Court majority tried to avoid this acknowledgment in *McGautha*, nagging doubts about the fairness of capital punishment would not disappear; and so the Court did not embrace the issue,<sup>58</sup> but rather found itself unable to shake loose from it for some considerable stretch of time. After its unintelligible eruption in *Furman*, the Court then settled back to achieve what it had already announced in *McGautha* to be "beyond present human ability"—that is, to rationalize the application of the death penalty; and after more "weaving and winding" the Court has effectively proclaimed that it has attained this goal and will hold on to this heroic accomplishment by refusing ever again to look the administration of the death penalty. The death penalty burst into visibility and, after much struggle, has now been reburied.

We are, of course, only at the earliest moments of the Supreme Court's attention to assisted suicide; and it may be that, notwithstanding the odd invitations for future litigation in the five concurring Justices' opinions, the Court will resist any future engagement and quickly rebury this issue. The experience of the death penalty jurisprudence may indeed serve as an implicit warning to the Justices against grabbing hold of this tar baby too. But then again the Justices have many reasons to share the underlying concerns about the irrationality, indignity, and suffering of death that have become increasingly vocal in our general public discourse. The Justices may be tempted, as prior Courts were drawn regarding the death penalty, to appease this public concern by trying to ameliorate these evils of death for which the legal system at least might be held directly responsible.

The sobering lesson of the death penalty jurisprudence is that the Court has abandoned this effort while refusing to admit its failure to achieve its much-proclaimed ameliorating goals. It is not clear whether a more sustained judicial effort

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58. The Court acted similarly in *Brown v. Board of Education* in 1954 after more than a decade of hesitation and equivocation. See BURT, *supra* note 41, at 271-85.

could have achieved these goals or whether they are intrinsically inconsistent with the existence of the death penalty.<sup>59</sup> Abolition of the death penalty was a possible judicial alternative for vindicating the values of rationality and alleviation of suffering; but the abolitionist alternative is not even theoretically available to the Justices in addressing the indignities of death itself. The course actually chosen by the Court regarding the death penalty is, however, possible—that is, the construction of a patina of rationality and fairness, a pretense maintained by an adamant refusal to attend to actual practices in implementation. By taking this route for capital punishment, the Court appeased vocal public concerns and the administration of death was shrouded once again, routinized and bureaucratized in a kind of covertly acknowledged but resolutely unexamined secrecy. Twenty years from now will we see that this same path has been followed by a constitutionalized or otherwise legitimized practice of physician-assisted suicide? Stay tuned.

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59. Justice Harry Blackmun at the end of his tenure on the Court concluded that the rationalizing effort for the death penalty had been "futile." He had originally dissented in *Furman* and during the succeeding twenty years had, as he put it, "endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor." *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting). Nonetheless, he observed, "[R]ather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed." *Id.*

