NINE JUSTICES & A FUNERAL

By David J. Garrow
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Anthony Kennedy was peeved. The oral arguments in the Supreme Court's two right-to-die cases, *Washington v. Glucksberg* and *Vacco v. Quill*, were not even half over, but already Kennedy and his colleagues had made it plain to Kathryn Tucker, the proponents' 37-year-old lead lawyer—and to everyone else in the high court's hushed but absolutely packed courtroom—that the justices were downright annoyed at having to rule on the pair of controversial landmark cases that Tucker had brought before them.

Bill Williams, a Washington state senior assistant attorney general, spoke first, defending his state's criminal prohibition of physician assistance in hastening the death of terminally ill patients. Dating from 1854, the Washington statute typifies how states outlaw such intentional aid. Williams encountered no hostile questions from the nine-justice bench, nor did Walter Dellinger, the Clinton administration's acting solicitor general, who was adding the executive branch's voice in support of the state.

Indeed, Justice David H. Souter, one of the Court's more influential members, signaled his colleagues' explicit disinterest in endorsing Tucker's claims by telling Dellinger that "maybe, in fact, you might argue the Court should wait until it can know more before it passes ultimate judgment." Even worse, Justice Ruth Bader Ginsburg, another member of the Court's less conservative wing, followed Souter's comment by asking, "Is it simply a question of waiting" or "is this ever a proper question for courts as opposed to legislatures to decide?"

Some courtroom observers thus felt that Tucker had lost even before she began to speak, but not Tucker. She had filed the first of the two cases in Seattle in 1994 and won an impressive victory from U.S. district judge Barbara Rothstein before Rothstein's ruling was overturned on appeal. Hoping to get more than one case all the way to the Supreme Court, Tucker recruited an impressive and well-known lead plaintiff, Dr. Timothy Quill, for a similar case in New York state. Several years earlier, Quill's frank admission, in an article he penned for the *New England Journal of Medicine*, that he had helped a terminally ill patient hasten her death led to inquiries by a local prosecutor, but Quill's federal suit was initially rejected by a Manhattan judge.

A year later, in a ruling that made headlines across the country, Tucker's earlier Seattle victory was reinstated. An extraordinary panel of 11 federal appellate judges ruled that the fundamental personal liberties protected by the Fourteenth Amendment include the right of a terminally ill but mentally competent adult to seek a doctor's prescription for a lethal dose of medication and then to ingest it.

That unprecedented triumph was echoed four weeks later when three appellate judges in New Yolk unanimously reversed the earlier dismissal of Quill's suit. Bypassing the "liberty" grounds utilized out West, the federal appeals court ruled that New York's prohibition of lethal prescriptions for the terminally ill violated the Constitution's guarantee of equal protection because state law did allow other terminally ill patients to order the removal of life-sustaining machinery and feeding tubes. Momentum was building.

Those back-to-back appellate court endorsements of Tucker's novel constitutional claims catapulted right-to-die law-reform efforts to a level of national respectability that far outstretched any thing that Michigan's notorious Jack Kevorkian—whose name is anathema to most assisted-death advocates—could ever hope to attain. Despite protests from Catholics and right-to-life proponents, no one on either side of the controversy was surprised when the U.S. Supreme Court announced, in October 1996, that come early 1997 it would review the two appellate court rulings.

Kathryn Tucker got further faster than almost any lawyer could ever expect. A New York–area native (her father is chairman of the well-known Manhattan law firm of Hughes, Hubbard & Reed, which lent a major hand in the Quill case) and a 1981 graduate of Massachusetts's some-what offbeat Hampshire College, Tucker devoted more time to kayaking than to course work during her three years of law school at Georgetown University. A member of both the U.S. Olympic flatwater kayak and the U.S. national whitewater slalom teams during the mid-1980s, Tucker carried her interest in the outdoors over into her legal work once she joined Seattle's big Perkins Coie law firm in 1989.

Intense and self-confident, Tucker was searching for additional opportunities, and the following year she volunteered to help the sponsors of a statewide Death With Dignity initiative. The initiative had been put forward by the Washington state chapter of the Hemlock Society, the nationwide right-to-die group founded in 1980 by English-born author Derek Humphry. After a hard-fought 1991 campaign in which Roman Catholic opponents sponsored television ads featuring nurses who declared they didn't want to have to kill their patients, Washington voters defeated the measure by a 54 percent to 46 percent margin.

In the wake of the defeat, Hemlock's top Washington state activist, Unitarian minister Ralph Mero, took the lead in establishing Compassion in Dying—a group that provides counseling to terminally ill patients who want to end their lives with dignity. Mero realized that providing such counseling might make the group vulnerable to prosecution under Washington's assisted-suicide statute. So when Kathryn Tucker learned of Mero's efforts, she called with advice: Actively challenge the constitutionality of the law rather than wait to defend against a possible prosecution. Out of Tucker's offer to Mero came the first of the two cases that were troubling the nine justices of the Supreme Court this Wednesday morning in January 1997.

Once she stood before the Court, Tucker was able to utter just the first sentence of her argument—"This case presents the question whether dying citizens in full possession of their mental faculties at the threshold of death due to terminal illness have the liberty to choose to cross that threshold in a humane and dignified manner"—before Chief Justice William H. Rehnquist began what soon became a Court-wide barrage of challenging and sometimes antagonistic questions. Tucker stressed that the cases sought protection for physician-assisted death only for those people "whose dying process has begun,' but Justice Antonin Scalia drew

courtroom laughter by sarcastically responding that "I hate to tell you, but the dying process of all of us has begun and is under way."

Ruth Ginsburg joined in, criticizing the application of Tucker's liberty argument, and Scalia peppered Tucker with acerbic contentions about how that argument could not be meaningfully restricted to only the terminally ill. Anthony Kennedy and David Sauter each suggested likewise, and it rapidly became clear that a decisive majority of the Rehnquist court had no appetite whatsoever for the constitutional argument Tucker was giving them. First Rehnquist and then Justice Sandra Day O'Connor voiced additional worries about how an endless slew of additional cases would follow from even partial vindication of Tucker's claims. The atmosphere within the august but always intimate courtroom rook on an increasingly chilly air.

But only when Anthony Kennedy got angry did the situation turn ugly. Kennedy had already complained that Tucker was "asking us, in effect, to declare unconstitutional the law of 50 states," but when Tucker began to describe how in *Cruzan v. Director*, a well-known 1990 case involving the prospective removal of a comatose patient's feeding tube, "the Court there found that to be a very significant liberty interest," Kennedy pounced hard. "I disagree with that characterization. I think the Court was very, very careful to assume a liberty interest."

Tucker parried apologetically. "Yes. Yes. Thank you, Justice Kennedy." Rather than allowing her to move on, though, Kennedy came back hard.

"That's a rather critical point, is it not?"

Tucker apologized again. "Yes, it is correct."

But Kennedy smelled blood. "This first precedent you cite was *Cruzan*, and that was just an assumption contrary to your description."

Tucker was reeling. "I went straight to *Cruzan* because it's most factually similar, and I appreciate the correction that of course it was just an assumption by the Court."

To the uninitiated, the exchange sounded abstruse and arcane, but inside the courtroom, it was a knockout punch. Not only did the Court not find Tucker's legal argument persuasive, but one crucial justice was trumpeting how he'd caught her playing fast and loose with the facts. Then Ruth Ginsburg pointedly added that Tucker's case was "worlds different from *Cruzan*," and a sinking feeling among right-to-die partisans inside the courtroom began to spread. This Court was not buying, and anyone counting votes was left looking at the prospect of perhaps a 7-to-2—or even a 9-to-0—reversal of the Seattle appellate victory Tucker had won but a year earlier.

The second hour's argument of Dr. Quill's case featured New York's scrappy attorney general, Dennis Vacco, against renowned Harvard law professor Laurence H. Tribe, whom Tucker had brought in to add some reputational heft to her duo of cases. One of the country's most respected Supreme Court advocates, Tribe months earlier had called Tucker to volunteer his help, but Tucker's willingness to offer Tribe the argument in one of her two cases reflected a selflessness rarely seen among lawyers with cases in the high court. Tribe and his young associate Peter J. Rubin had submitted what most students of the cases thought was far and away the best of the principal written briefs which the justices receive—and hopefully read—in

advance of oral arguments. But by the time it was Tribe's turn to speak, most observers—including some of the counsel—realized that he had nothing to gain by voicing Tucker's liberty argument, which the justices already had rebuffed.

"When Larry got up, he realized it was all over," explained University of Michigan law professor Yale Kamisar, an outspoken right-to-die opponent. Tribe gamely attempted to defend, and improve upon, the appellate court's conclusion that the distinctions New York's laws imposed upon similarly terminal patients were irrational, but justices weren't buying that argument either. As Tribe's 30 minutes slowly expired, what little sense of high drama still remained quickly evaporated from the courtroom.

After court adjourned, the right-to-die advocates and their lawyers drifted across the street to a lunchtime party in the old mansion that houses the Washington national office of the American Civil Liberties Union. The atmosphere was understandably subdued. The lawyers, already aware of the news media's swift consensus that their cases were losers, tried to put the best possible spin on the morning's debacle. Philanthropist Tom Layton, whose San Francisco-based Wallace Alexander Gerbode Foundation had taken the lead in financing both the litigation and the embryonic network-building efforts of right-to-die activists, assured the others that he was in it for the long haul. Compassion's president, Susan Dunshee, an AIDS counselor who had always advocated a patient-focus rather than a court-focus, and Tom Preston, the most outspoken of Compassion's doctors, were unperturbed.

But if the activists responded to their dramatically painful setback with impressive grace, some parceling out of blame was almost unavoidable. That evening's newscasts, and the next morning's papers, all underscored how unreceptive the justices had been to Tucker's and Tribe's arguments, but only when Tony Mauro's *Legal Times* column hit the streets did serious blood begin to flow.

Mauro, who covers the Court for both *USA Today* and *Legal Times*, can bring a sharply critical edge to Court-world developments that his colleagues in the Court's small press corps generally avoid. Even by Mauro's standards, though, his dissection of Larry Tribe's "bad day" really set tongues a-wagging.

Contrasting Tribe's "testy" and "off-putting" style with what he called Tucker's "straightforward and powerful" approach, Mauro claimed that Wednesday's arguments had been "historic and memorable" in part because they marked "the day when Laurence Tribe failed to charm the justices." Not only had the Court seemed "downright annoyed" with Tribe, but Mauro chided how Tribe had "managed to embarrass himself" by committing the number-one sin of male lawyers who argue before the Court: addressing Justice Ginsburg as "Justice O'Connor," or vice versa. "All in all, Tribe might just as well have stayed in bed," Mauro sniffed.

Among Tribe partisans, reactions to Mauro's column—which is widely reprinted in regional legal weeklies—were uncharacteristically bitter. One called Mauro "fairly stupid," and another dismissed him as "the biggest moron who ever walked the planet." Yale Kamisar, acknowledging that Tribe had had a "very difficult" argument, nonetheless stressed that he didn't agree with Mauro's characterizations and volunteered that it was Tucker who had had the "bad day." She got caught in a bad mistake," he said, "that was just devastating. She got clobbered.'"

However varied the reviews of Tribe's and Tucker's performances, there is little if any doubt about what the justices themselves will do with Tucker's two cases: off the record, even a majority of the proponents' lawyers willingly concede that Tucker's two hard-earned victories will be reversed without much ado. A 9-to-0 loss is possible, but some observers are inclined to count either John Paul Stevens—who was surprisingly quiescent during the arguments—or perhaps Stephen Breyer as siding with Tucker. Based on their courtroom questions, Souter and O'Connor seemed to favor letting the issue percolate, and neither appear likely to endorse any Rehnquist, Kennedy, or Scalia opinion that would reject for all time any liberty-interest protection for end-of-life choices. Hence even an 8-to-1 or a 9-to-0 reversal probably will feature a divided majority in which the hard-line conservatives—Rehnquist, Scalia, Kennedy, and the often-silent Clarence Thomas—will be unable to attract five or more votes for an opinion denying any constitutional stature to Tucker's claims. The decisions—and the probably fractured opinions—ought to be announced sometime this June.

Regardless of the Supreme Court's rulings, these cases represent not the end but rather only the beginning of right-to-die advocates' legal efforts. In fact, the heavy publicity given the New York and Washington state cases—plus Jack Kevorkian's doings in Michigan—unfortunately has misled many people as to where right-to-die legal hopes now stand. The real answer is not with the U.S. Supreme Court but instead with some tremendously underpublicized but potentially landmark developments that are taking place—and changing week-by-week—in Oregon and Florida.

Oregon has long represented right-to-die advocates' greatest success story. In November 1994, voters there approved by a narrow margin a measure allowing physician assistance in dying similar to the one that Washington state voters rejected in 1991. The Oregon proponents—funded in part by an arm of the national Hemlock Society, which was then headquartered in Eugene before a recent move to Denver—mounted an impressive grassroots effort. They overcame vociferous opposition from both the Oregon Catholic Conference and the state's most influential newspaper, the Portland *Oregonian*.

As approved by the voters, the Oregon Death With Dignity Act allows mentally competent, terminally ill adult residents to obtain an Oregon physician's prescription (no outsiders!) for lethal medication. The patient has to make such a request on three different occasions, separated by at least one 15-day waiting period. One of the requests must be in writing and endorsed by two witnesses, at least one of whom cannot be a relative or an heir. A second physician must confirm both the terminal diagnosis and the voluntariness of the patient's request; in any case involving possible depression, a psychologist or psychiatrist must certify that the patient is not suffering from any mental disorder before a prescription can be provided. Most important, just as Kathryn Tucker argued in the Supreme Court, the Oregon measure would apply only to terminally ill patients who can self-administer such life-ending drugs; no lethal injections by physicians or any other forms of "active" euthanasia would be allowed.

The Oregon measure was scheduled to take effect on December 8, 1994, 30 days after voter approval. In late November, however, nationally prominent antiabortion lawyer James Bopp, Jr., of Terre Haute, Indiana, filed suit in federal court in Eugene on behalf of several terminally ill individuals and a half dozen Oregon health care providers who professed that implementation of the new law would make them and their patients vulnerable to undue coercion. On

December 7, U.S. district judge Michael Hogan blocked implementation. Hogan dismissed right-to-die proponents' claim that Bopp's clients lacked legal standing to challenge the measure. He instead ruled that the new law was unconstitutional because it failed to ensure that terminally ill patients who might seek a physician's aid in dying would indeed be mentally competent.

The ruling left the Oregon advocates deeply frustrated. Barbara Coombs Lee, an attorney and former nurse who serves as chief spokesperson for the Oregon proponents, said she was especially sad for those terminally ill Oregonians whose newly won "right to a peaceful, dignified death" had been suddenly snatched away. Lead attorney Eli Stutsman, a primary architect of the measure, joined with lawyers from the state attorney general's office to appeal Judge Hogan's order to the federal circuit court.

This January's Supreme Court oral arguments, as disastrous as they may have been for Tribe and Tucker, nonetheless contained an exceptionally bright silver lining for the Oregon activists. Both New York's attorney general and Washington state's Bill Williams, speaking in defense of their states' anti-assistance criminal statutes, readily conceded, as Williams put it, that "a state may legitimately create an exception to its homicide laws for physician-assisted suicide"—just as the voters of Oregon already had created. No justice disagreed and the implicit message was clear: Oregon's measure would pass muster with anyone other than right-to-life activists.

Seven weeks later, on February 27, 1997, the Oregon right-to-die measure was reborn when a three-judge panel of the West Coast appeals court handed down a unanimous opinion vacating Judge Hogan's 1994 ruling and ordering him to dismiss Bopp's challenge. Bopp's plaintiffs had failed to show that they were exposed to any risk of harm from the Oregon measure and, in the court's words, had alleged nothing more than a "chain of speculative contingencies."

Bopp and his allies will ask both the appeals court and then the Supreme Court to review the February ruling, but any further judicial intervention is unlikely. Actual implementation of the Oregon measure may be delayed until the Supreme Court denies Bopp's final petitions sometime this fall, but the judicial battle is almost over, and the "pro-life" community knows it.

Hence, when the state legislature convened this spring, Oregon Catholic Conference executive director Robert Castagna began pushing for legislative repeal of the measure Oregon's voters had adopted in 1994. Castagna opted for a legislative strategy since the Oregon initiative is *statutory* rather than *constitutional*, and thus could be legislatively reversed. Barbara Coombs Lee and other Oregon proponents reacted with fury: "They lost the election. They are losing in court. This is a last-ditch effort to thwart the will of the people."

Some legislators agree with Castagna and find it ominous that Oregon will be the first state in the Union where physician-assisted dying is legal. But with polls showing that over 75 percent of Oregon voters oppose revocation of the popularly enacted measure, Castagna's legislative allies simply do not have the votes to rescind the 1994 measure. The best that right-to-die opponents can hope for from the legislative session is some modest amendments, and it now appears virtually certain that physician-assisted dying will become legal in Oregon sometime this fall.

But the Oregon maneuverings are not assisted-death advocates' only good chance for a breakthrough, thanks to even more fast-moving developments in Florida. In 1994, Florida Hemlock Society members, taking their cue from Kathryn Tucker, began discussing how to

mount a case of their own. The executive director of the state ACLU put them in touch with attorney Robert Rivas. In early.1996, Rivas filed suit in state circuit court on behalf of Dr. Cecil McIver and three terminally ill patients, all of whom claimed that access to lethal medication from Dr. McIver could save them from painful and protracted deaths.

Since the case was filed, two of the three patients have died, leaving only Charles Hall and Dr. McIver as plaintiffs. This past January, trial court judge S. Joseph Davis ruled that, pursuant to some unique language in the Florida *state* constitution, Hall does indeed have a right to receive a lethal prescription from Dr. McIver. A court "must leave the final determination of when to die to the privacy of the physician-patient relationship, where it belongs," he wrote.

The Florida attorney general's office immediately obtained a stay, thwarting Judge Davis's order, and after a fast-paced game of legal chicken, Hall's case jumped all the way up to the Florida Supreme Court, where it awaits final disposition.

The state will try to "moot" the case should Hall die before a final decision, but Rivas is unflinching: "I'd file the next lawsuit as quickly as possible." So is McIver, despite threats to lift his medical license should he help end Hall's life. "All we're trying to do," McIver explains, is to offer patients like Hall "the option of terminating suffering if it becomes unbearable. It is not an option any of us wants to exercise, but we all want to have that fallback position."

That goal of legally guaranteed choice for all terminally ill patients—regardless of what state they live in—is the ultimate goal of all the right-to-die groups. Washington state's Compassion in Dying—now headed by Oregon's Barbara Coombs Lee—aims to transform itself from a band of local activists into a nationwide federation pursuing the sort of hands-on counseling for the terminally ill that it pioneered in Seattle. Other activists, like Oregon's Eli Stutsman, see no need for any such national organization, and argue convincingly that future change will depend on the political dynamics of each individual state.

Two issues loom on the horizon, no matter what the Supreme Court says this June. First is the question of resources. The modest but crucial grants that right-to-die activists receive from San Francisco foundation executive Tom Layton and his allies cannot finance a truly nationwide movement, Billionaire philanthropist George Soros, whose interest in end-of-life issues has so far been restricted by the conservative professionals who head up his Project on Death in America, may now realize that his dollars have been supporting only the opponents and not the proponents of legal change. If Soros does indeed make a major new commitment, the death-with-dignity movement will receive the most important private-sector boost it could ever obtain.

But even more crucial are the political strategy choices that right-to-die advocates must make. Some of the movement's most experienced activists, such as Charlotte P. Ross of California's Death With Dignity Education Center, appreciate how the movement must take full advantage of the intense public interest that has bloomed from all the press coverage generated by the two pending Supreme Court cases. On the West Coast, and now in Florida, long-term momentum will continue to grow even if reversals in the Supreme Court are coupled with additional setbacks or delays in Tallahassee or in Oregon.

But a national agenda remains elusive. Though Hemlock Society executive director Faye Girsh emphasizes the importance of winning support from state legislators, such support is scarce indeed. Public opinion polls consistently show that upwards of 60 percent of Americans favor some degree of legalization for competent, terminally ill citizens, but on this issue the political elite—just like the medical elite—lags far behind popular sentiment.

As long as the vast majority of American elected officials refuse to follow the sentiments of their constituents, right-to-die proponents' best course of action will remain the one that's brought them to the cusp of triumph in Oregon: the popular vote.

Twenty-three states—including all of the far West—allow for one or another form of citizens' initiative. California, Nevada, and Washington, as well as Colorado, Alaska, and Arizona, might all be feasible targets for the same sort of grassroots campaign that Oregon saw in 1994. East of the Mississippi River, Florida, Maine, and Massachusetts may also be credible possibilities. In the very few states which, like Florida, offer unusually attractive *state* constitutional language, new court cases may also make sense. But with the Supreme Court now poised to close off the federal judicial route for at least the immediate future, activists can no longer postpone an all-out return to the political arena. The money needed for mounting any such campaign may well be awesome, but-if Soros-scale educational resources do indeed start to come their way, assisted-death proponents will need to focus on the two or three states that offer the best chance of success.

Legalization of physician-assisted dying in Oregon and/or Florida will hasten a transformation that may be inevitable regardless of what the Supreme Court rules. American public opinion strongly and decisively favors fundamental legal reform, and in time courts or legislatures will bring it about, even if it happens one state at a time. The legalization of contraception, even for married couples, wasn't complete until as late as 1965, and liberalization of abortion laws likewise would have dragged on for decades had not the Supreme Court ruled so decisively in 1973.

In time, the U.S. Supreme Court very well may accept and endorse the liberty and equality arguments Kathryn Tucker and Laurence Tribe put to the justices in January, but until that day comes, the right-to-die activists—perhaps America's next *big* movement—will have to joust in the arena of politics. Keep your eyes peeled, for eventually they're going to win.