OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: DENNIS C. VACCO, ATTORNEY GENERAL OF NEW YORK ET AL., V TIMOTHY E. QUILL, ET AL.

CASE NO: No. 95-1858

PLACE: Washington, D.C.

DATE: Wednesday, January 8, 1997

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IN THE SUPREME COURT OF THE UNITED STATES

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DENNIS C. VACCO, :

ATTORNEY GENERAL OF NEW YORK, :

ET AL., :

Petitioners : No. 95-1858

v. :

TIMOTHY E. QUILL, ET AL. :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Wednesday, January 8, 1997

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

GENERAL DENNIS C. VACCO, Attorney General of New York, Albany, New York; on behalf of the Petitioners.

GENERAL WALTER DELLINGER, Acting Solicitor General, Department of Justice, Washington, D. C.; on behalf of the United States, as amicus curiae.

MR. LAURENCE H. TRIBE ESQ., Cambridge, Massachusetts; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear next in No. 95-1858, Dennis C. Vacco, Attorney General of New York, versus Timothy E. Quill.

ORAL ARGUMENT OF DENNIS C. VACCO

ON BEHALF OF THE PETITIONERS

GENERAL VACCO: Mr. Chief Justice and may it please The Court.

The question in this case is whether the state must remain neutral in the face of a decision of one of its citizens to help another kill herself. The Second Circuit below said yes, as a matter of equal protection. It is New York's view, however, that the Constitution does not require this to be the case.

Indeed, equal protection is not implicated at all in this case. Patients who withdraw from life support are not similarly situated to terminally ill people who are seeking physician-assisted suicide.

QUESTION: Well, perhaps a more accurate way of putting your point of view, if I understand, would be that the Equal Protection Clause is not offended by treating those two

differently, not that it's not implicated?

GENERAL VACCO: The Equal Protection Clause is indeed not offended, Mr. Chief Justice. In any event we also believe that these, these two acts are similarly not situated and there are six primary reasons why we believe so.

QUESTION: Mr. Vacco, instead of going down the list of six, if we could focus on what was of concern to the Second Circuit so we're not talking about a right to withdraw treatment from age 16 to age 96. The distinction that the Second Circuit fastened on was the terminally ill person who says no more life supports, I want to die, and the person who wants a pill that will achieve the same end. So let's narrow it to what that court was dealing with and tell us why that court was wrong.

GENERAL VACCO: Justice Ginsburg, simply put, the people that you describe, or that the Second Circuit described, are not similarly situated. In the first context the individual who is at the, in terminal illness, at the end stages of their life as the Second Circuit defined it, are exercising their right, which in

New York state is recognized by not only the common law, but by our New York State Constitution, their right to refuse treatment. That right which has been recognized for centuries as springing from the common law, the right of being free from bodily interference, the right to be free from battery. In the context of saying that they are refusing treatment, individuals, terminally ill or otherwise, are merely asserting that right to be let alone.

On the contrary, and in contrast, are those individuals who are not asserting a right, that is, a bodily defensive right, their rights to bodily integrity, but instead attempting to assert, as the Plaintiff Respondents in this case are claiming, that there is some right to have a third party, in this instance physicians, help kill themselves. And we believe that these two acts are clearly distinguishable.

QUESTION: But, if we had just those two neat categories, this might be an easier case; that is, of pulling the plug, that's the patient's choice, anything affirmative. But we're told in this wealth of briefs that there are things in between that go on, like sedation

for pain that can be controlled. And that is not rationally distinguished from the pill that the physician -- increasing, say, the morphine is not rationally distinguishable from giving a person a pill.

QUESTION: Justice Ginsburg, in all due respect, I disagree. The notion of sedation, and by the way, we happen to believe that the Respondents have misstated it factually and legally in their brief, but the notion of sedation as recognized by the vast majority of the medical professionals, is a notion of sedation in the imminently dying. When individuals are actually in the last hours of death, sedation is for the purpose of treating four distinct symptoms, nausea, shortness of breath, delirium, and excruciating pain. And only when these symptoms are intractable --

QUESTION: Is that really a correct use of the word sedation? It seems to me you're talking about analgesics, painkillers, whereas sedation is just to kind of make you feel better, not mind things so much, isn't it.

GENERAL VACCO: Mr. Chief Justice, as the medical professionals have written in their

briefs and even the articles that are alluded to in the various briefs will indicate, the medication that is provided in these limited circumstances is provided only for the very limited effort to control those four symptoms that I articulated.

QUESTION: Yes, my only question is whether it's properly called sedation or not, or perhaps something else.

GENERAL VACCO: I am taking that terminology and that phraseology from the medical professionals. The correct phrase in a medical context is sedation in the imminently dying, not terminal sedation as referred to in the Respondents' brief.

QUESTION: General Vacco, may I ask you, then, to train your attention on what has been described as the worst case, it's been called the barbiturate coma or whatever, that is not in the last hour or hours, what you've just been addressing, but you render a person unconscious, you withdraw nutrition, and water, and it goes on for days and days and the person finally shrivels up and dies, and that that, we're told, is permissible and goes on in

hospitals in New York?

GENERAL VACCO: Justice Ginsburg, again I believe that the description of this by the Plaintiff Respondents is simply incorrect. What really transpires -- again the medication which is designed to deal with four specific symptoms is only administered to the extent that it will deal with those symptoms. And the suggestion that the death is brought upon by virtue of a coma coupled with the termination of nutrition and hydration is simply wrong.

Most medical professionals will agree that the death from the underlying illness or, if the drugs are going to suppress respiration so critically, that death will come from those two reasons long before it comes from starvation as a result of the withdrawal of nutrition and hydration.

QUESTION: But the question I'm asking you is, you say you've distinguished the drugs at the last hour or hours of life. But we're told that this treatment, whatever you want to call it, that inevitably will lead to death, will do so in a matter of days, not hours. And that that goes on. And how is that rationally

distinguishable from a pill that will work --

GENERAL VACCO: Justice Ginsburg, it's rationally distinguishable because it is consistent medical practice. It has never been -- the concept of providing drugs specifically and solely for the purpose of killing someone has never been embraced by the medical profession.

QUESTION: But, when you say it's consistent medical practice, I take it you mean, but if I'm wrong, tell me, I take it you mean that, once you accept the right of a patient to withdraw all life support including hydration and feeding, then the only way to prevent excruciating pain as the person nears death is with these extraordinarily high dosages of painkiller that induce coma. So that your justification for the painkiller and the coma is essentially your justification for preventing excruciating pain which is caused by a decision which the individual has a right to make. Is that your argument?

GENERAL VACCO: Yes, essentially, Justice Souter. And the concept of --

QUESTION: So it's not merely that the

doctors have been doing this. The argument is that it's justifiable essentially on the ground that the right to withdraw life support is recognized and the right to ameliorate pain is recognized.

GENERAL VACCO: Yes. And indeed the subsequent administration of the palliative care drugs is consistent with the long-standing notion of the double effect, that the drugs in that instance are not being administered for the purpose of causing the death, they are administered in the context of the post refusal or post withdrawal of treatment palliative care of the patient. And those -- that is indeed distinguishable from the act of purposely and intentionally providing a drug to kill the patient.

And the State -- besides the fact that the State believes that these two acts are indeed not similar, the State also believes that there are several legitimate interests that we have in regulating the process of physician-assisted suicide in New York State as we have, which is by virtue of an outright ban. New York has chosen to draw its line in a rational and indeed in the

same rational place that virtually every state in the nation has drawn that line. This line that we have drawn in New York State is vigorously supported by professionals, particularly those --

QUESTION: But Mr. Vacco, you don't dispute that a legislature in New York or elsewhere could come to the rational judgment that a legislature in Australia or in Oregon or -- I don't know how it came about in the Netherlands, but a rational decision could be made the other way, couldn't it?

GENERAL VACCO: Yes, Justice Ginsberg, indeed we do assert that the State of New York's legislature, if it so chose, could indeed make a judgment in the opposite direction. What we are here today to say is that from New York's position, they should not be constitutionally compelled or constitutionally required to make those judgments or to change the line which is indeed a rational and principled line. New York has made this judgment, and in some fashion that judgment has been based upon the widely quoted New York State Task Force on Life and the Law, which over a nine-year period conducted an exhaustive study on health care in New York

State.

And, while this study recognizes that there is needs for advancement in treating pain and recognizing symptoms of depression that lead to suicidal ideation, this task force report, which has been embraced by the New York State Legislature, quite succinctly and specifically says we should not embrace the concept of physician-assisted suicide because of the fear that it leads to euthanasia. And most of this report deals with the risks of physician-assisted suicide.

QUESTION: May I ask you, General Vacco, kind of a basic question? Many of the arguments are that there are the same risks involved in pulling the plug and physician-assisted suicide, both in terms of making sure what the patient wants and making sure there are no abuses.

In your view, could the New York legislature have decided in the cases of terminating life support equipment, to totally forbid it for the same reasons that they totally forbid the assisted suicide?

GENERAL VACCO: Justice Stevens, I

believe that, if the New York State legislature or for that matter the New York State Court of Appeals had decided differently on the issue of refusal of treatment than they have already, that we would be back here in another context discussing the right of an individual to have the ability to refuse treatment.

QUESTION: I'm curious to know what your answer is to the question.

GENERAL VACCO: I don't believe that the legislature of the State of New York could constitutionally prohibit the ability of a patient in the end stages of their life to refuse treatment.

QUESTION: Just a patient in the end stages of their life. Can the state, if someone goes on a hunger strike and wants to die to protest something or other, can the state force-feed that person.

GENERAL VACCO: Yes, Justice Scalia.

QUESTION: I see. So you're drawing the same line that was drawn in the last argument, that there's something special about the last hours of death that creates a liberty interest, but before that there's no liberty

interest.

GENERAL VACCO: No, I'm not drawing the same line, Justice Scalia.

QUESTION: I don't know why you want to limit the discretion of the New York legislature that way.

GENERAL VACCO: The -- indeed the discretion of the New York State legislature would only be limited to the, to an individual's right to refuse -- right to refuse treatment. I don't believe that --

QUESTION: That's what I'm talking about, an individual who says I'm on a hunger strike, I do not want to be force-fed.

GENERAL VACCO: That's a different circumstance than an individual who is by virtue of medical treatment being force-fed, by virtue of some tubes that are implanted into his person. That person, his bodily integrity has been violated, and that is distinguishable from the individual who is otherwise healthy and merely says that I am not going to eat for the purposes of killing myself. Indeed, in New York State, we have said that it would be appropriate for the state to intervene and prevent that

person from killing himself. And indeed in --

QUESTION: It seems odd that your bodily integrity is violated by sticking a needle in your arm but not by sticking a spoon in your mouth. I mean, how would you force-feed these people in a way not to violate their bodily integrity?

GENERAL VACCO: Your Honor, Mr. Chief Justice, indeed this Court said in Cruzan that, in the context of an individual who is otherwise healthy, that the State need not stand by neutrally in the face of somebody who is attempting to commit suicide.

In New York State, where we have an individual -- an individual, for instance, who is incarcerated in our correctional facility and goes on a hunger strike is otherwise healthy, competent, and goes on a hunger strike asserting his interest in suicide, the state indeed in our estimation has the ability to say we are not going to stand by quietly to allow you to kill yourself. And that's not inconsistent with the tradition of the law in New York State and indeed the tradition of law in terms of suicide going back to the time of Blackstone. Where we have

said in New York State, while we haven't criminalized suicide, and we have long not criminalized attempted suicide, we still have put barriers, social and societal and legal barriers to signal our interest in people not performing suicide.

QUESTION: General Vacco, if you could be more precise about who is the we that you are talking about. You have asserted that the State of New York could use its authority to force-feed a person who doesn't want to be fed. Does that go for -- well, first, is that a legislative decision, did the courts make that decision, did the police make the decision? And what people are affected by it?

GENERAL VACCO: The decision that I speak to in the context of the example that I posed is a decision of the New York State Court of Appeals, but it's not inconsistent, for instance, with legislation --

QUESTION: What was that decision and who did it affect?

GENERAL VACCO: That decision affected a prisoner in the state correctional facility who was indeed on a hunger strike, announced a hunger

strike for the purposes of committing suicide and tried to starve himself.

QUESTION: Well, how about a person with terminal kidney disease and says I'm not going on dialysis. I know what the result will be, I'm not doing it. New York can force that treatment; is that right?

GENERAL VACCO: No, Justice O'Connor, New York cannot. In the context of refusing treatment, whether it's terminally ill or otherwise, whether it's the 16-year-old who has been told to go home and take two aspirin or the 97-year-old who is plugged into various medical devices, we respect in New York state that person's right to refuse treatment.

QUESTION: We're not talking about what you do, I'm talking about what you may do. Are you equating sensible results with what the Constitution requires?

I agree the line you've drawn is a very sensible one. But you're coming here and saying that is the line that the Constitution imposes. That, had you tried to do the other, you would be reversed because it is unconstitutional. Isn't that what you're telling us?

GENERAL VACCO: I am suggesting --

QUESTION: The Consititution says what is sensible and good; is that right? And New York state may not err and do something that is foolish.

GENERAL VACCO: Justice Scalia, in the context of equal protection, the Constitution says that the state may do what is rational. And we believe that the line that we have drawn here in this case is indeed rational. And it's based upon some very serious and compelling state interests. And among those interests is probably primarily the interest in avoiding abuse here. We already know in the context of our --

QUESTION: Is that the reason you draw the line ultimately between ending the life support and the affirmative act of giving the pill, is it essentially a line that depends on the argument for risk of abuse?

GENERAL VACCO: Justice Souter, in all due respect, I believe that the line was drawn much
longer ago than the time that the notion of assisted suicide --

QUESTION: I grant you that it was.

But we're being asked to justify that line today. And my question is, is your principal justification for that line the risk of abuse argument?

GENERAL VACCO: The principal -- yes, the principal justification indeed, one of the most compelling reasons, state interest, is the risk of abuse. And that abuse is going to manifest itself in a variety --

QUESTION: Well, why isn't there a risk of abuse that those who might stand to profit or at least themselves risk further discomfort by an early death for a person on life support will try to coerce or persuade that person to end life support when it really isn't a voluntary decision, why isn't that a risk?

GENERAL VACCO: Justice Souter, there is no question that in certain instances there is an overlapping of the risk of abuse. But we believe in the context of physician-assisted suicide. The risk of abuse is far greater. Simply put, when you terminate --

QUESTION: Is it far greater with respect to those who, in fact, are truly

terminally ill? Or is it far greater because it affects a broader class than the terminally ill?

GENERAL VACCO: It's for both reasons, in our estimation. In the context of the terminally ill, now we move into the area of risk of error which leads to abuse. Who is to define terminally ill, how do we define it with such certainty?

QUESTION: What about the risks on the other side, that even the American Medical Association recognizes; that is, this gray area in between makes doctors fearful of putting people out of pain because they don't know whether that's going to constitute physician-assisted suicide or accepted relief of pain? Isn't that a real risk?

GENERAL VACCO: It's a minimal risk, Justice Ginsburg, because we can indeed treat virtually all forms of pain. The medical professionalism from the amicus briefs that have been filed point out the fact that pain is indeed manageable. And as my colleague from the State of Washington indicated, unfortunately we just don't do a good enough job in America of treating the pain.

QUESTION: What if what's given is some form of sedation and the person has asked to be relieved of life support systems and so the sure consequence of sedation will be an earlier death?

GENERAL VACCO: Then, Justice O'Connor, if the purposes of that sedation is to bring about the death as opposed to treating the symptoms of the pain --

QUESTION: It's to alleviate pain but with the certain knowledge that it will hasten the death?

GENERAL VACCO: In the context of treating the pain, even though there is a risk of death, pursuant to the principle of double effect, that is not criminal conduct in the State of New York.

CHIEF JUSTICE REHNQUIST: Thank you, General Vacco.

GENERAL VACCO: Thank you.

CHIEF JUSTICE REHNQUIST: General Dellinger, we'll hear from you.

ORAL ARGUMENT OF WALTER DELLINGER

ON BEHALF OF THE UNITED STATES, AMICUS,

SUPPORTING PETITIONERS

GENERAL DELLINGER: Mr. Chief Justice, may it please The Court, the issue that is raised with more saliency in New York is that even if the state may, as a general matter, legitimately prohibit the granting of lethal medication, the fact that these state permit practices that are in the Respondents' view medically, ethically, and morally indistinguishable from lethal medication requires that these states also do that.

We do not agree that the states' interest in prohibiting lethal medication is lessened by the fact that the state permits competent terminally ill adults to refuse unwanted medical treatment. There is an important common sense distinction between withdrawing artificial support so that a disease will progress to its inevitable end and providing chemicals to be used to kill someone.

QUESTION: So I take it the example or the hypothetical, taken either way, that we're considering, is a person -- consider that the asset, is a terminally ill person on a life support system. And that person makes the choice to have the life support system withdrawn. Let's

assume that death will take 10 to 20 days and that there will be considerable pain.

The State of New York would prevent that person from receiving a lethal injection; is that not correct?

GENERAL DELLINGER: That is correct.

QUESTION: And you support that distinction based on these other factors; namely, the long-standing tradition against permitting suicide?

GENERAL DELLINGER: Yes, Justice Kennedy, yes, Justice Kennedy. First of all, the interest in refusing -- the strength of the interest in refusing the state's forcible imposition of medical treatment is so historically great.

QUESTION: Well, could we put this in the framework of the position, General Dellinger, that you have taken here, which is that there is some recognizable liberty interest, and how does that affect the analysis under an equal protection approach? Does it mean that rational basis just won't suffice, we have something else that we have to apply here?

GENERAL DELLINGER: I think it does,

even in an equal protection context, ask for something more than a merely plausible explanation. I think here the states have --

QUESTION: More than a rational basis, I think that's the term.

GENERAL DELLINGER: More than a rational basis, yes, and by that I meant -- yes, more than a rational basis, and by that I meant that sometimes the rational basis test seems to be a little tougher than others. I meant merely to exclude --

QUESTION: So what test is it that you say this Court should apply in the equal protection context?

GENERAL DELLINGER: In the equal protection context, I think at most this Court should apply something on the order of an intermediate scrutiny. But it is not at all clear to me that the state -- that would assume, Justice O'Connor, I wanted to answer your question, but that assumes that the state has even drawn a classification here.

When, in fact, what the state has done is to allow to every citizen of New York a number of steps that the state and the medical

profession have taken to alleviate pain and suffering in the end.

QUESTION: Well, what about the hypothetical that I put, patient A is going to have 10 to 20-day lingering, painful death; patient B in exactly the same position wants to unhook the life system and have the lethal dose?

In light of your position that there is a liberty interest in obtaining medication to prevent pain, how is this distinction between these two people compatible with a heightened scrutiny?

GENERAL DELLINGER: Justice Kennedy, the historic distinction between killing someone and letting them die is so powerful that we believe that it fully suffices here.

QUESTION: I could agree with that. But I don't think you need heightened scrutiny for that.

GENERAL DELLINGER: I agree.

QUESTION: But doesn't the strong historical distinction which you mentioned, aren't you suggesting that if you did need heightened scrutiny, that would help the thing pass it?

GENERAL DELLINGER: Yes, of course.

QUESTION: Do you agree with your cocounsel in this case that, in fact, it also reflects a difference in risk assessment?

GENERAL DELLINGER: That is true. I think that, and the briefs of the medical professions will indicate that a legislature could reasonably conclude that the risk of those who would seek lethal medication, being depressed or undertreated from pain, are not as competent --

QUESTION: They're greater than they are with respect to someone who is declining unwanted medical treatment --

GENERAL DELLINGER: Yes, Justice Breyer.

QUESTION: So then what happens under your analysis? I take it your analysis is you find some kind of basic right or liberty interest in the avoidance of the most serious pain and suffering and, moreover, we've been submitted -- we've had submitted what I think of as a gigantic Brandeis'ed brief, which presents all kinds of empirically-based judgment by those who know, though they don't always agree, about what the

conditions are in which you find justification, few people seriously need undergo terrible pain.

And the risks of killing people who shouldn't be killed are great. On that analysis, what happens if three years passes and it turns out that, instead of more people actually getting the hospice treatment, instead of people being able to go to hospices and have opiates to relieve pain, what happens is instead of 25 percent not getting that treatment, 50 percent don't get it?

Suppose for doctors being afraid or people changing their mind about the double effect or any of those conditions change so that people really don't get the pain-relieving medication that is possible, then what happens to the law under your theory?

GENERAL DELLINGER: Justice Breyer, I believe that that would strengthen a state's concern about introducing lethal medication into such a medical system, that is, that they -- if the need of the medical system is to further the process that the medical associations contend is ongoing of enhancing palliative care, enhancing --

QUESTION: Suppose they don't, suppose they just don't do it, you have 25 percent now, suppose that number keeps going up, then suppose New York changes its law about the double effect?

GENERAL DELLINGER: The state in our view is entitled to think that introducing lethal medication into a system is -- puts an even greater risk on those who are -- particularly those who are poor and those who are handicapped, an even greater risk if that system is decreasing the amount of palliatives.

If a person supposedly is making a voluntary choice to choose lethal medication but they're in a system, in an institution in which their pain is not being controlled, and perhaps the insurance adjuster is saying we're not -- this is expensive, this team of professionals is too expensive, but you do have an alternative to your suffering.

Remember, that to some uncertain extent, if you recognize a Constitutionally based right to have lethal medication in the system, I do not know to what extent physicians would be required to present it as a treatment option, I

mean that is the general requirement.

We don't know that, we don't know to what extent insurance companies as they have indicated in Oregon would quickly say of course we will pay for this treatment while they are not paying for a hospitalization for palliative treatment.

QUESTION: General Dillinger, if you could deal with the argument that's been made about winks and nods, that all of this is really a great sham because physician-assisted suicide goes on for anybody who is sophisticated enough to want it.

GENERAL DELLINGER: Judge Ginsburg, I simply -- we looked and we don't know what the evidentiary basis is for that. That is, that the counsel for the Respondents in New York says that in New York there is this process called terminal -- the state permits terminal sedation. We found nothing in New York's statutory law, nothing in the regulations. Your question goes also to the practice.

I think there may be some confusion. We agree that state law may, without crossing this important line, not only allow withdrawal of

medical treatment but also allow physicians to prescribe medication in sufficient doses to relieve pain even when the necessary dose will hasten death, so long as the physician's intent is to relieve pain and not cause death.

We do not know any basis for the conclusion that pain medication's being deliberately offered in excess of what is necessary to relieve pain in order to cause death.

CHIEF JUSTICE REHNQUIST: Thank you, General Dellinger.

Mr. Tribe, we'll hear from you.

ORAL ARGUMENT OF LAURENCE H. TRIBE

ON BEHALF OF RESPONDENTS

MR. TRIBE: Mr. Chief Justice, and may it please The Court. Perhaps I would begin with Justice Ginsburg's question to the Solicitor General about winks and nods.

I don't think the issue really is whether there are some people who violate existing laws like the law in New York which, as I hope to explain in a minute, really makes it legal to do what is described in a rather powerful article in the bioethics brief in

support of Respondents as slow euthanasia.

I don't think so much the issue is how many people violate the law. Charlatans, doctors of death, just by the nature of it they operate in the dark and we don't know. The winks and nods I think affect the capacity of the system to respond humanely and rationally to what is actually going on rather than just to bright line hypotheticals.

The winks and nods really relate to things that we all accept, the principle of double effect. Just as Justice Souter asked the question, take one of our patient plaintiffs, the Jane Doe. She had a tumor that wrapped itself around her esophagus. As a result, she couldn't eat. So she had the choice, she could have said no, don't give me a feeding tube. She acceded to having a feeding tube implanted. It had to be surgically implanted because it couldn't be done nasogastrically because Jane Doe really didn't have an esophagus left.

As she neared death, and indeed only nine days passed between the filing of her declaration and her demise, as she neared death, she was, as are many patients in the modern world

who die not rapidly of an infection but at the end of a long, degenerative process, she was the recipient of all sorts of medical interventions that she could have said no to. Some of them really weren't life-saving; they just prevented even greater torment, agony, disintegration, and then she did have a choice, she could have chosen on the theory I suppose that, even though her rabbi said you can't step in the same river twice, she could have turned back the clock, she could have said no to tube, she could now say take out the tube, I don't want it here anymore.

And as the law of New York is now structured, because she is terminally ill, there is no inquiry into her intent. Even if it were undisputed that the only reason she wanted the tube out was that that would enable her to die a little bit sooner, that would be irrelevant.

It's not irrelevant when you force-feed someone, however, that is in the context of Mark Chapman, the guy who was force-fed in the New York case, the murderer of Beatle John Lennon, it was decisive, that the reason he didn't want food was not that he just didn't like it, he was anorexic or something, it was that that was his

way of trying to kill himself. And so his bodily integrity had to give way. So his bodily integrity had to give way. That is, he could be force-fed under New York law.

But, being terminally ill, Jane Doe couldn't be force-fed. And I don't think much should turn on the label of whether you call a tube a treatment or, as the Chief Justice asked, what in the world difference does it make if it's a tube or a spoon, it's an invasion of your bodily integrity which is where this principle supposedly comes from.

So to begin with, we have this question: Jane Doe has the right to have the tube removed because she's dying anyway. Mark Chapman didn't have a right not to be force-fed.

QUESTION: That wasn't the basis of the Second Circuit's ruling, was it, that Mark Chapman could be force-fed?

QUESTION: Well, the Second Circuit, Mr. Chief Justice, did base its ruling on the equal protection principle that Mark Chapman, I think, helps me illustrate. They didn't talk about John Lennon or Mark Chapman.

QUESTION: They didn't talk about that

particular provision, they said you can't distinguish between -- as I understand their opinion, you can't distinguish between a removal at the patient's instance of life support mechanisms and asking for a lethal dose? Because I didn't think it had anything to do with Mark Chapman.

MR. TRIBE: Well, Mr. Chief Justice, it's true it had nothing to do with that particular fellow. But it was the arbitrariness of the following scheme in New York law, which I think you can give you a quick picture of, the scheme that the Second Circuit thought was irrational.

The scheme was that, despite your interest in bodily integrity, if you're not terminally ill, the state allows an invasion of the body in those cases where you're trying to kill yourself.

So that if the woman in the Fosmire case, which was referred to in the briefs, I think it's page 11 or 12 of our brief, if the woman in the Fosmire case, instead of saying no to blood transfusions after a cesarean section for religious reasons had slashed her wrists and

said, I don't want blood transfusions, bodily integrity, no question under New York law, as The Court made clear in footnote 2, that could be overridden.

But what now happens when someone is terminally ill and dying, even if it is undisputed that the reason the person says, no blood transfusions, take out the tube, is to commit suicide. At that point the state says, we don't care about your reason, the technology is what makes the difference.

QUESTION: So you disagree, Mr. Tribe, if I understand it, with counsel for Respondent in the prior case, who asserted that it was not only rational but that there is a Constitutional line between suicide of those who are at the threshold of death and the suicide of the young and healthy but despondent.

MR. TRIBE: No, Justice Scalia, I did not say --

QUESTION: That's what I thought you were saying --

MR. TRIBE: Well, can I --

QUESTION: -- that it's irrational, but it can make an exception between --

MR. TRIBE: No, Justice Scalia, it's not irrational --

QUESTION: Tell me why. You're not --

MR. TRIBE: Because for purposes of defining a particular liberty, recognizing a greater freedom to decide this amount of agony is enough, it may make a difference whether someone is dying or healthy and just temporarily disabled. But for purposes of drawing a distinction among technologies, saying we don't care when you're young and healthy whether the way you're trying kill yourself is by saying unplug that respirator or give me a lethal medication. And, however, drawing that very line for the terminally ill, for the terminally ill they say we do care. That is, Jane Doe didn't want the surgical removal of the tube because that would have left her in starving and dehydration -- not just discomfort but according to Dr. Grossman agony for a couple of weeks and she didn't want to be turned into a zombie, she wouldn't have accepted terminal sedation.

But she had the right, that is, whether she could end her life because she was in that small group that the Solicitor General describes

as having really no choice between agony and unconsciousness, even with the best palliative care, whether she could do that, terms under New York law, when she's in this terminal phase, not on her intent but just on the particular technique involved. Now if the New York legislature --

QUESTION: Excuse me. Is it a technique or is it the distinction between action and inaction? The state allows someone to not provide medical assistance but forbids someone from injecting something that will cause death? Surely you don't assert that the distinction between action and inaction is irrational?

MR. TRIBE: No. I suggest, Justice Scalia, that even though the action/inaction distinction that you criticized in Cruzan isn't quite irrational, the distinction between these two different kinds of action, the action that is requested of someone, operate on me to take out the tube, and the action, please give me a lethal prescription, that operates irrationally.

QUESTION: I see, you just object to the taking out of the tube. If the issue were simply I don't want a tube put in in the first

place --

MR. TRIBE: -- in the first place.

QUESTION: -- you would have no problem with that?

MR. TRIBE: I think there I --

QUESTION: -- you would have no problem with that?

MR. TRIBE: I think that's right. I would be an action/inaction advocate, although I do think, if it were demonstrable, as I think it's true in New York, that someone who, for example, slashed her wrists and said, no action has been taken yet, don't put the IV in me, if New York says to her, sorry, we're going do it anyway and overrides her bodily integrity in order to prevent what it calls suicide, but then tells someone else who is in the process of dying and is 10 or 11 days from death, for you we are not going to worry about the intent that you have --

QUESTION: But, Mr. Tribe, the whole solution now you've given us, I think, in your answer to Justice Scalia, New York could say and be perfectly compatible with equal protection, as you've just described it, person who is

terminally ill, you've got to make the choice now before we give you the life support, you have a right to refuse it, but once you've accepted it, you have no right to have it taken out. So understand that, and New York does that, then these -- this equal protection problem disappears; is that right?

MR. TRIBE: No, I don't think so, Justice Ginsburg. A liberty problem of a different sort might become even more severe. But the point is -- and again, I'm sorry to go back to a certain kind of reality -- you don't suddenly become terminally ill at midnight on a given day.

QUESTION: That's one of the problems, isn't it? One of the problems of defining --

MR. TRIBE: If I can get to it, I'll try to discuss how one might deal with that, but if I might just stick with equal protection for a moment. What happens to people as they degenerate is that they are given all kinds of treatments and they accept them, and this idea that at the end you're either in this closed class of people who luckily have a plug that can be pulled, or you're in some other group, is a

fantasy. Every case, or virtually every case --

QUESTION: Well, I suppose it's based on the distinction between allowing events to take their own course and third-person intervention, which the law has recognized in the law of torts and in most of its other substantive areas for centuries.

MR. TRIBE: Justice Kennedy, none of these patients is in a state of nature. They're in a hospital or a hospice. And they're receiving chemotherapy, radiation, bone marrow transplants --

QUESTION: Yes. But when a person on a life support system wants the systems discontinued, she is not committing suicide, which is what you said earlier. She is not doing that, she's allowing nature to take its course.

MR. TRIBE: If I could explore nature just for a moment. Of course, it's up to the State of New York how to characterize whether she's committing suicide. But as you've said in your Colorado opinion, the government's characterization can't control the constitutional analysis. New York says that if a person -- suppose there's a car accident, and my wife and

I -- no, I won't be personal. Suppose it's a car accident and two people are in the car. One of them is so badly injured that the person is bound to die within a few weeks. The other person is not quite that badly injured at all but needs a respirator for a while. And is in a coma. The respirator is put on, so we don't have Justice Ginsburg's problems of -- well, you've signed up, now you're stuck -- the person is in a coma, the respirator is put on, wakes up and is delighted to learn that he's going to be fine in a couple of weeks, unless the respirator is taken off, in which case he will asphyxiate.

So he has no objection to the respirator. He learns that his spouse, his wife, is dying and she's not going to make it no matter what. She as it happens is not on a respirator, she's on all kinds of stuff but none of them have a detachable plug.

New York says to him when -- he says, well, now that I know what's happened to my wife, I want to die, take the respirator out. I think under footnote 2 of Fosmire, he wouldn't be entitled to that, he would be using --

QUESTION: Well, Mr. Tribe, if we go

into this sort of intricate analysis of state law in order -- in accepting -- we won't be deciding any case except New York's here. We would have to make the same analysis for 49 other states. If we do the sort of intricate analysis that you talk about, where we talk about someone being force-fed in a prison --

MR. TRIBE: Well, The Court did say that in that case that the prison context did not determine the outcome. And I do suggest that, given the complexity and difficulty of the area, the desire to have an easy answer for the whole country mightn't work, that's not what I would propose.

QUESTION: How then do you react? I would be very interested in getting your reaction. Because however you define the liberty interest, there are tremendously difficult procedural questions of what would be the safeguards of voluntariness, a much more difficult question on -- when you go into it than what you might think. And how do you decide terminal condition. And what about the relationship of laws like double effect and all of that area.

Why -- what's your response to the proposition that these different groups, interacting with the legislature, are far more suited, that legislature, to come up with an answer than a court writing a Constitutional provision.

MR. TRIBE: Well, Justice Breyer, my answer is in part equal protection and in part Judge Calabrese. Because it seems to me that what we have here, setting aside the issue of liberty for the moment, and I don't understand frankly the Solicitor General's position it can be a "now you see it, now you don't" liberty. It's liberty, but --

QUESTION: I would be interested in your definition of the liberty interest as well.

MR. TRIBE: I'll try. But I think, if I could pursue your question for a moment as to, sort of, how does one deal with this. I mean, in a sense there are 50 laboratories out there. The famous state laboratories of Justice Brandeis, although I guess it wasn't in the Brandeis brief, but he talked about them. These laboratories, however, are now operating largely with the lights out. They're operating with the lights

out because it's not just New York. What I've described is as far as I've been able to determine through research of the law of at least 35 or maybe 40 states -- and I know maybe I shouldn't admit that because that means that an equal protection ruling would require lots of states to reexamine where the lines should be drawn -- but in all of these states what they do, and it's a logic that collapses on itself, is they combine two understandable principles.

One principle is you can medicate someone to make them comfortable, to reduce their pain even when you are pretty sure -- or even when you know, as long as that's not your real intent, that it will hasten their death.

The other principle is that a person has the right to say, no, don't give me that feeding tube. Once I've got it, it may be hard to take it out, and anyway, leave me alone. You combine these two and the logic so remarkably collapses in the case of terminal sedation, which is overwhelmingly documented everywhere in the country, it's not some sneaky practice, although it's called slow euthanasia in this latest article, that what you wonder is where did this

all this come from? Did a --

QUESTION: What do you mean -- do you mean nothing more by terminal sedation than the sedation of those who are terminal?

MR. TRIBE: Oh, much more, yes, Justice Scalia. It's described in the AMA's brief and the Geriatrics brief. What I mean is, after having discovered that opioids are not going to work to get rid of the person's agony, physical and -- physical pain and deterioration and dyspnea and other symptoms, after you learn that, then you have the option of using barbiturates or benzodiazepines to put the person into a comatose state.

And you can do that hopefully with their consent. But sadly there are almost no safeguards on the existing legal practice to assure that consent is given. You sedate them either before taking them off a respirator because we are told that asphyxiation is one of the most terrifying and excruciating deaths, or you keep them sedated as they starve and dehydrate and their families see them disintegrate. Because that's all that's available to them. It is the Kafkaesque but

entirely logical result of the principles that the states haven't really adopted but have fallen into.

QUESTION: Well, Mr. Tribe, you say they've fallen into it and you referred in answering Justice Breyer a moment ago to the state laboratories operating with the lights out. Isn't it fair to say that the issue that we are dealing with is a really serious legislative issue, is fairly recent. 20 years ago we weren't even reading about this. So that the fact may be and the metaphor may be right, that the lights have been out, but the effort to put the lights on is fairly recent. And doesn't -- doesn't that sort of put some punch behind Justice Breyer's question?

MR. TRIBE: Well, I thought it had a lot of punch to begin with. But I guess the problem is, you know, most of us -- these legislatures are operating in the dark and we hope that they will take into account everyone's interests as they work.

QUESTION: But do they have less light than we do?

MR. TRIBE: No, not at all. I think

they have -- the lights are bright here. When I say the dark, I mean this: Doctors, like Dr. Quill, who, when he explained what he was doing in the case of someone who thought it would be dehumanizing to be terminally sedated, so he publicly explained in an article called Diane, that he was actually going to leave her with some lethal medications, he was investigated by the grand jury.

When doctors do a lot of what they do in upping the level of the morphine and actually using more benzodiazepine than is needed to make sure the person is comfortable but to make sure the person dies sooner, they're not going to talk to others about it because they might be prosecuted because of the lines that are drawn.

QUESTION: But the New York report, and perhaps this will get you to the autonomy interest and it bridges what Justice Breyer and Justice Souter suggested, that we're just beginning to get a public awareness and to find out much more about these things.

The New York report, it seems to me, is a Brandeis brief for the proposition that the autonomy that you suggest, that you wish to

protect, or that you wish to create, is illusory, it's chimerical, that there will be less autonomy, less autonomy, by the unanimous judgment of the members of that task force, if you allow the option that you choose.

In fact, you will be introducing fear into medical care facilities. You will diminish, diminish the choices, not increase them. That's what I get from the New York report. And I would appreciate your comment on that.

QUESTION: Justice Kennedy, I think as I read the report, the premise of that proposition was that people would be fearful that doctors would be making decisions in the end that would terminate their lives. What I'm saying is that the -- if anyone reads that report as you have, as I have, and thinks about what happens in the hospital wards when terminal sedation is given, when the morphine drip is increased, when the person is asleep and it's said that they wanted the respirator disconnected but there are no required witnesses, that's pretty scary.

And what I suggest is that the New York legislature, which initially outlawed all physician-assisted suicide, not by identifying

physicians, but by just saying if A helps B commit suicide, it's a crime, now confronts a rather different regime, a regime that says near the end of life, whether or not the intent of somebody is deliberately to die, if certain techniques are used, combination of morphine and barbiturates, a surgical removal of something implanted, we don't call that suicide and actually we don't regulate it very much.

But, on the other side, if the patient is prescribed, at the patient's request, a lethal drug, we make that absolutely forbidden.

That combination which has not been chosen by the legislature, when Mr. Vacco held up that report and said, this is the choice of people of New York and I wondered what his answer was to Justice Ginsburg's question, who is the we, New York in its legislature did nothing in response that to that report. That is, they didn't change the law, but that was inaction.

The line, it's like Thompson v. Oklahoma. When Oklahoma passed some laws that had the unfortunate consequence of exposing 15-year-olds to execution and, Justice O'Connor, you concluded that you didn't have to reach the

ultimate merits of whether that was unconstitutional, because that was really a question that didn't have to be decided. It was at least Constitutionally dubious as I suggest the rationality of this line is at least Constitutionally dubious.

That was a concurring both that in the end sent the thing back to Oklahoma and said if you really need to execute 15-year-olds, tell us that.

QUESTION: Mr. Tribe, that's a discrete situation. This is the question I'd like to ask you: You have said, or at least many of your amici have said, protocols and criteria are the watchword, because you have to be very careful. This is a dangerous authority that you would be giving to the medical profession.

MR. TRIBE: They already have it unfortunately.

QUESTION: But the moment this Court says, liberty interest is broad enough to cover the terminally ill, we don't define what that is, there is no law. And by your very argument and very excellent brief, one can see a lawyer criticizing any line that the legislature would

come up with.

MR. TRIBE: It seems to me, Justice O'Connor -- Justice Ginsburg, that the methodology of equal protection -- sorry -- that the methodology of equal protection does mean that any line would be subject to meaningful scrutiny. But I suggest to you that the defensability of a line of the kind we have here would never reach this Court because no legislature would actually draw a line that says you can sedate somebody to death as long as you meet the criteria of double effect, but you can't do much of what is now --

QUESTION: But that is what -- how many legislatures have. I mean, you're not singling out New York as being different from New Jersey or anyplace else in that regard, are you?

MR. TRIBE: No. But that's the residual of what's happening in these states --

QUESTION: Yeah, but they recommended that. I mean, the report as I read it, the English report, recommends this as a line various -- and one of the things that impressed me about looking at that is they said, in Holland, where they have the different line,

there were three centers to deal with palliative care, pain removal. And in England, where they have the New York law, there were 185. Do you see the conclusion that they're drawing?

MR. TRIBE: Well, but that's --

QUESTION: And suppose the legislature comes to us and says, hey, that's what we want and that's the reason we're more interested in people dying without suffering, we've looked at this information, we think this is the way to do it, just the way they recommended in the report. What are we supposed to say to that?

MR. TRIBE: Well, I think, if one were a legislator, one might look at that report and say, you know, there is no better line, we're going to stick with it. And if, after a careful look, the legislature came up with a line that looks very much like the existing one, the issue that would face this Court, either as a matter of liberty or as a matter of equal protection, would be a bit different.

QUESTION: Well, why on earth would it be any different unless you would buy Justice -- Judge Calabrese's idea?

MR. TRIBE: Well, by the tone of your

question, I guess I'm supposed to say I thought it was a crazy idea, but I didn't. I didn't. I think it's very much like -- what does this Court do when it says something is a suspect classification, as in Croson?

It says if there were different findings and if the legislature or other governing body really went through the process with care of doing it it might pass muster. Now, being Constitutionally dubious --

QUESTION: That's traditional equal protection jurisprudence though, but this idea of can I send it back for a second look, do you really want to do this? I think that's quite different.

MR. TRIBE: Well, it looks different, I grant you, Mr. Chief Justice. But the meaning really of -- I think, of deciding that something is either Constitutionally too dubious to pass muster given the haphazard way in which it came about, or that it's suspect, is that the very same thing might be upheld otherwise. In Egglehoff --

QUESTION: Sort of a legislative process requirement in the Constitution,

legislative due process? I thought we had specifically disclaimed the existence of any such thing. I mean, the law is either good or bad. You're telling us if the legislature goes about doing it one way, it's okay; if it goes about doing it another way, it's not okay.

MR. TRIBE: I thought you joined Justice O'Connor's opinion in Croson.

QUESTION: I didn't mean to do that, that was a mistake.

(Laughter.)

MR. TRIBE: I think that it does make -- I think that, when one concludes -- in an area as profoundly difficult as this, when one concludes that something is Constitutionally doubtful, and when it came about by kind of inadvertence, that is, various things being subtracted from an existing piece of legislation, it's a little bit like a law that looks suspect and that doesn't have behind it the kinds of findings by the government that could satisfy --

QUESTION: Legislative due process, there have to be particular findings before we will sustain -- do you know any case where we've held such a thing?

MR. TRIBE: I submit that in Croson you held such a thing.

QUESTION: I don't think we held such a thing in Croson.

QUESTION: Croson, we held the statute was invalid.

MR. TRIBE: Well, that's what I'm suggesting here. That it should be in -- that it's invalid -- in Croson you said it was invalid because it was a suspect classification and the governing body responsible for it hadn't actually provided the kind of defense justification assurance, that they did it thoughtfully and not kind of out of some knee jerk --

QUESTION: Well, it wasn't -- the test wasn't thoughtfully, it had to meet certain criteria.

MR. TRIBE: That's right. And I think that it may be that in this area one could specify some kind of --

QUESTION: Mr. Tribe, before your time expires, would you tell us what you think the liberty interest is.

MR. TRIBE: Well, I think the liberty interest in this case is the liberty, when facing

imminent and inevitable death, not to be forced by the government to endure a degree of pain and suffering that one can relieve only by being completely unconscious. Not to be forced into that choice, that the liberty is the freedom, at this threshold at the end of life, not to be a creature of the state but to have some voice in the question of how much pain one is really going through.

QUESTION: Why does the voice just arrive when death is imminent?

MR. TRIBE: The Court's jurisprudence has identified, I think for good reason, that life, though it feels continuous to many of us, has certain critical thresholds: Birth, marriage, child-bearing. I think death is one of those thresholds. That is, it is the last chapter of one's life after all. I don't think you have to say, I have a right to make any --

QUESTION: All of this is in the Constitution?

MR. TRIBE: Well, the substantive due process.

QUESTION: You see, this is lovely philosophy. But you want us to frame a

Constitutional rule on the basis of that? Life has various stages, birth, death --

MR. TRIBE: Well, Casey said as much. And unless Casey -- unless Casey is to be isolated --

QUESTION: You're going back -- you have several parts to it. And the parts each have precedental effect, and you're putting the several parts together. One of parts is pain and suffering. What in the history, what in the history of the decisions shows something -- a personal right against enduring pain and suffering, if you go back into the law.

MR. TRIBE: That is prior to Casey, which did emphasize --

QUESTION: Yeah. I mean, but -- I'm not saying it would be in certain contexts only. But what is there --

MR. TRIBE: Well, actually, Justice Breyer, it seems to me that it is the confluence of several things. I mean, the general interest in --

CHIEF JUSTICE REHNQUIST: You can answer the question.

MR. TRIBE: Thanks. I'll do it

briefly. The general interest in avoiding suffering is a bit too nebulous for me. I think when it's combined with shaping your life and with the ultimate avoidance of being subjected to the state's control, then it's a special liberty.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Tribe. The case is submitted.

(Whereupon, at 12:06 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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DENNIS C. VACCO, ATTORNEY GENERAL OF NEW YORK ET AL., V TIMOTHY E. QUILL, ET AL.
CASE NO. 95-1858

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BY Ann Marie Federico

(REPORTER)