

# Physician-Assisted Suicide and Euthanasia in the United States: A Current Legal Perspective

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**ABSTRACT:** This paper offers a brief review of the legal status of physician-assisted suicide and euthanasia in the United States. In the mid-1990s, it appeared that the Supreme Court might recognize a fundamental right to physician-assisted suicide. But in 1997, the Court rejected constitutional challenges to laws banning assisted suicide. Since then, the battle over assisted suicide has largely shifted to a state-by-state debate that has largely been conducted outside the federal courts. A few states have legalized physician-assisted suicide and public opinion has moved in favor of assisted suicide in the last few years but the overall situation has been relatively stable. There are, however, some worrisome trends. International developments and the increasing acceptance of a quality-of-life ethic create cause for concern. Fortunately, the Court's 1997 decisions have created an opportunity for those who support the sanctity of life ethic to advance their views and to resist the "right to die" movement.

**T**HIS PAPER<sup>1</sup> offers a brief review of the current legal status of physician-assisted suicide and euthanasia in the United States. In the mid-1990s, it appeared that the Supreme Court might recognize a fundamental right to physician-assisted suicide. But in 1997 the Supreme Court rejected constitutional challenges to laws banning assisted suicide. This was an exercise of judicial humility that the Court has not followed in the areas of abortion or in same-sex marriage. The

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<sup>1</sup> An earlier version of this paper was presented at the University Faculty for Life annual conference on June 7, 2014. In certain places, this paper draws from previously published papers of mine. To avoid multiplying the footnotes in this paper, I will not provide a citation in every instance when I draw from my earlier work.

1997 Court decisions stalled the momentum in favor of physician-assisted suicide. The battle has largely shifted to a state-by-state debate that has largely been conducted outside the federal courts. A few states have recognized physician-assisted suicide but the overall situation has been relatively stable since the mid-1990s. There are, however, worrisome trends. In 2015, California, which accounts for over 12% of the population of the United States, legalized assisted suicide. Moreover, public opinion has moved in favor of assisted suicide in the last two years. International developments (particularly in Belgium) and the acceptance of the withdrawal of treatment and terminal sedation illustrate the increasing acceptance of a quality-of-life ethic. Fortunately, the Supreme Court's 1997 decisions have created an opportunity for those who support the sanctity-of-life ethic to advance their views and to resist the movement supporting a right to assisted suicide and euthanasia.

Let me begin this paper with the good news. It is easy to forget that in the mid-1990s the momentum seemed to be all in favor of legalizing the "right to die," either by legislative action or by judicial decisions striking down laws banning assisted suicide.<sup>2</sup> A key support for this momentum was the U.S. Supreme Court's 1992 decision in *Planned Parenthood v. Casey*.<sup>3</sup> In *Casey*, the joint opinion infamously declared that "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, of the mystery of human life."<sup>4</sup> This passage has been read – with some justification – as supporting the idea that moral relativism is a constitutional command.<sup>5</sup> In the mid-1990s, some lower courts cited this expansive language in *Casey* in support of a fundamental right to assisted suicide.<sup>6</sup> These opinions

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<sup>2</sup> See Richard S. Myers, "Physician-Assisted Suicide: A Current Legal Perspective," *National Catholic Bioethics Quarterly* 1 (2001): 346.

<sup>3</sup> 505 U.S. 833 (1992).

<sup>4</sup> 505 U.S. at 851.

<sup>5</sup> See Steven G. Gey, "Is Moral Relativism a Constitutional Command?" in *Indiana Law Journal* 70 (1995): 331. For a rejection of Professor Gey's approach, see Richard S. Myers, "Pope John Paul II, Freedom, and Constitutional Law," *Ave Maria Law Review* 6 (2007): 61.

<sup>6</sup> See e.g., Richard S. Myers, "An Analysis of the Constitutionality of Laws Banning Assisted Suicide from the Perspective of Catholic Moral

ignored the opposition to assisted suicide in our history and tradition and appealed to *Casey*'s abstract rhetoric. These opinions regarded the broad language as "highly instructive"<sup>7</sup> and "almost prescriptive"<sup>8</sup> in resolving the assisted suicide issue. According to this view, "the right to die with dignity accords with American values of self-determination and privacy regarding personal decisions."<sup>9</sup>

Some lower courts in the mid-1990s also relied on an equal protection argument. In the course of invalidating New York's ban on assisted suicide, the Second Circuit described the equal protection argument in this fashion: "New York does not treat similarly circumstanced persons alike: those in the final stages of terminal illness who are on life-support systems are allowed to hasten their deaths by directing the removal of such systems; but those who are similarly situated, except for the previous attachment of life sustaining equipment, are not allowed to hasten death by self-administering prescribed drugs."<sup>10</sup> The Second Circuit rejected the argument that there is a constitutionally significant difference between letting someone die (by withholding life-sustaining medical treatment, including food and water) and taking affirmative steps to kill a person (by providing assistance for that person to take their own life).<sup>11</sup>

In 1997, in *Washington v. Glucksberg*<sup>12</sup> and *Vacco v. Quill*,<sup>13</sup> however, the Supreme Court rejected the constitutional challenges to laws banning assisted suicide. The Court rejected the idea that there is a fundamental right to assisted suicide. In so doing, the Court refused to rely on the broad, abstract language from *Casey* and instead inquired whether there was any support for the view that a right to assisted

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Teaching," *University of Detroit-Mercy Law Review* 72 (1995): 778-79, discussing judicial opinions accepting the expansive approach in *Casey*.

<sup>7</sup> *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1459 (W.D. Wash. 1994).

<sup>8</sup> *Ibid.*

<sup>9</sup> *Compassion in Dying v. Washington*, 49 F. 3d 586, 596 (9th Cir. 1995)(Wright, J., dissenting).

<sup>10</sup> *Quill v. Vacco*, 80 F. 3d 716, 729 (2d Cir. 1996).

<sup>11</sup> *Ibid.* at 729-731.

<sup>12</sup> 521 U. S. 702 (1997).

<sup>13</sup> 521 U.S. 793 (1997).

suicide was deeply rooted in our nation's history and tradition.<sup>14</sup> The Court carefully reviewed the relevant history and stated: "We are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State."<sup>15</sup> In *Glucksberg*, unlike in *Roe v. Wade*<sup>16</sup> or in *United States v. Windsor*<sup>17</sup> or in *Obergefell v. Hodges*,<sup>18</sup> the Court was unwilling to take that step.

The Court also rejected the equal protection argument. The Court agreed with the view that there is a difference between letting a patient die (by refusing life-saving medical treatment) and killing a patient (by assisting in the patient's suicide). According to the Court, "[l]ogic and contemporary practice support New York's judgment that the two acts are different, and New York may therefore, consistent with the Constitution, treat them differently. By permitting everyone to refuse unwanted medical treatment, while prohibiting anyone from assisting a suicide, New York law follows a longstanding and rational distinction."<sup>19</sup>

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<sup>14</sup> For discussion of the methodology in *Glucksberg*, see Myers, *supra* note 5, at 66-67; Michael W. McConnell, "The Right to Die and the Jurisprudence of Tradition," *Utah Law Review* (1997) 665.

<sup>15</sup> 521 U. S. at 723.

<sup>16</sup> 410 U.S. 113 (1973). For recent reflection on *Roe v. Wade*, 410 U. S. 113 (1973), see Richard S. Myers, "Re-Reading *Roe v. Wade*," *Washington & Lee Law Review* 71 (2014): 1025.

<sup>17</sup> 133 S. Ct. 2675 (2013). For commentary on *Windsor*, see Richard S. Myers, "The Implications of Justice Kennedy's Opinion in *United States v. Windsor*," *Elon Law Review* 6 (2014): 323.

<sup>18</sup> 135 S. Ct. 2584 (2015). For commentary on the impact of *Obergefell*, see Richard S. Myers, "*Obergefell* and the Future of Substantive Due Process," *Ave Maria Law Review* 14 (forthcoming); Richard S. Myers, "*Obergefell*, Substantive Due Process, and the Constitutionality of Laws Banning Assisted Suicide" in *Life and Learning XXVI: Proceedings of the Twenty-Sixth University Faculty for Life Conference*, ed. Joseph W. Koterski, S.J. (Bronx NY: UFL, 2016), pp. 75-93.

<sup>19</sup> *Vacco v. Quill*, 521 U. S. at 808.

*Glucksberg* and *Vacco v. Quill* were enormously important decisions. The Court's decisions largely moved the issue of assisted suicide out of the federal courts and left the issue largely to a state-by-state battle through the democratic process. In fact, the Court made that point explicitly. The Court stated: "[t]hroughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."<sup>20</sup> In an era when we are accustomed to the federal courts assuming a dominant role on important social issues (abortion and same-sex marriage are two issues that immediately spring to mind), that approach seems almost quaint.

The 1997 Supreme Court decisions brought a halt to the momentum in favor of a right to assisted suicide and undermined the moral case in favor of assisted suicide.<sup>21</sup> The U.S. Supreme Court decisions, which were of course limited to federal constitutional arguments, were greatly influential when state Supreme Courts in Florida and Alaska rejected arguments that there was a fundamental right to assisted suicide under the Florida and Alaska constitutions.<sup>22</sup>

One striking feature that this brief history reveals is the impact of the Supreme Court's exercise of judicial restraint. Since *Glucksberg*, the federal courts have not played a dominant role in this debate. In contrast, in *Roe v. Wade*,<sup>23</sup> the Court effectively struck down the abortion laws of every state in the Union. This, of course, did not "resolve" the abortion controversy, as the *Casey* joint opinion claimed,<sup>24</sup> but the Court's

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<sup>20</sup> *Glucksberg*, 521 U. S. at 735.

<sup>21</sup> See Richard S. Myers, "Physician-Assisted Suicide and Euthanasia: A Current Legal Perspective" in *Life & Learning XI: Proceedings of the Eleventh University Faculty for Life Conference*, ed. Joseph W. Koterski, S.J. (Washington, D.C.: UFL, 2002), p. 8.

<sup>22</sup> *Krischer v. McIver*, 697 So. 2d 97 (Fla. 1997); *Sampson v. Alaska*, 31 P. 3d 88 (Alaska 2001). For a brief discussion, see Myers, supra n21, at 9.

<sup>23</sup> 410 U. S. 113 (1973).

<sup>24</sup> *Planned Parenthood v. Casey*, 505 U. S. 833, 866 (1992)(joint opinion). For commentary on *Casey*, see Richard S. Myers, "Reflections on the Twentieth Anniversary of *Planned Parenthood v. Casey*" in *Life & Learning XXII: Proceedings of the Twenty-Second University Faculty for Life Conference*, ed.

decision in *Roe* fundamentally altered the political landscape through the creation of a fundamental constitutional right to abortion. The Court's 2013 decision in *United States v. Windsor* is also instructive.<sup>25</sup> In *Windsor*, the Court held unconstitutional section 3 of the Defense of Marriage Act (DOMA), which defined "marriage" and "spouse" for purposes of federal law. The *Windsor* Court seemed keen to avoid a sweeping ruling,<sup>26</sup> but the Court strongly influenced the subsequent debate in a way that a deferential ruling upholding DOMA would not have done. And Justice Scalia seems to have accurately predicted that the Court had effectively decided the constitutionality of state laws limiting marriage to heterosexual couples.<sup>27</sup> Justice Scalia's assessment was borne out by the Court's 2015 ruling in *Obergefell v. Hodges*, in which the Court found that it was unconstitutional for states to define marriage as the union between one man and one woman.<sup>28</sup> In contrast, with its decisions in *Glucksberg* and *Quill*, the Court left the issue to the democratic process. The debate has continued without the distorting effect of the Supreme Court's intervention.<sup>29</sup> Defenders of the traditional sanctity-of-life ethic have been able to advance their views without having to counteract the Supreme Court's view, as Justice Scalia noted in his *Windsor* dissent, that they are "enemies of the human race."<sup>30</sup>

There is, unfortunately, some reason to think that the federal courts may intervene in this area. *Obergefell v. Hodges*<sup>31</sup> suggests that the U.S. Supreme Court might assume a more significant role in the assisted suicide debate. The principal basis for the Court's holding that laws

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Joseph W. Koterski, S.J. (Bronx NY: University Faculty for Life, forthcoming); Michael Stokes Paulsen, "The Worst Constitutional Decision of All Time," *Notre Dame Law Review* 78 (2003): 995.

<sup>25</sup> 133 S. Ct. 2675 (2013).

<sup>26</sup> Myers, *supra* note 17, at 332.

<sup>27</sup> See *Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting): "In my opinion, however, the view that this Court will take of state prohibitions of same-sex marriage is indicated beyond mistaking by today's opinion."

<sup>28</sup> 135 S. Ct. 2584 (2015).

<sup>29</sup> See generally Richard S. Myers, "The Virtue of Judicial Humility," *Ave Maria Law Review* 13 (2015): 212-14, making this point.

<sup>30</sup> *Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting).

<sup>31</sup> 135 S. Ct. 2584 (2015).

defining marriage as the union between one man and one woman are unconstitutional was the controversial doctrine of substantive due process. The Court's reliance on substantive due process breathed new life into a doctrine that had fallen into disfavor and opens the prospect that the doctrine might be used to invalidate laws banning assisted suicide.<sup>32</sup>

Since *Obergefell*, there have been two noteworthy state court decisions considering the constitutionality of laws banning assisted suicide. Those challenging these laws relied heavily on *Obergefell*. In *Morris v. Brandenburg*<sup>33</sup> and *Myers v. Schneiderman*,<sup>34</sup> however, courts in New Mexico and New York rejected challenges to state laws banning assisted suicide. Both courts rejected arguments that *Obergefell* had implicitly overturned *Glucksberg* and *Quill*. These courts' cautious, humble approach to the exercise of judicial review allows the democratic debate in those states to continue. These courts seem to be waiting for the U.S. Supreme Court to extend the reasoning of *Obergefell* to the assisted suicide situation. Unfortunately, I think the Court will do just that when it is next faced with that opportunity.<sup>35</sup>

Since *Glucksberg* and *Vacco v. Quill*, the effort has largely shifted to a legislative battle. Here, supporters of assisted suicide have met with some success. Oregon's Death with Dignity Act was passed in 1994 and went into effect in 1997.<sup>36</sup> Similar laws have been adopted in Washington<sup>37</sup> and Vermont<sup>38</sup> and, most importantly, California,<sup>39</sup> which

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<sup>32</sup> For discussion of this possibility, see Richard S. Myers, "Obergefell and the Future of Substantive Due Process," *Ave Maria Law Review* 14 (forthcoming); Richard S. Myers, "Obergefell, Substantive Due Process, and the Constitutionality of Laws Banning Assisted Suicide" in *Life & Learning XXVI: Proceedings of the Twenty-Sixth University Faculty for Life Conference*, ed. Joseph W. Koterski, S.J. (Bronx NY: UFL, forthcoming).

<sup>33</sup> 2016 N. M. Lexis 151 (June 30, 2016).

<sup>34</sup> 2016 N. Y. App. Div. Lexis 3319 (May 3, 2016).

<sup>35</sup> See note 32 supra.

<sup>36</sup> For Oregon's law, see <http://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/index.aspx>.

<sup>37</sup> For information on Washington's law, which was passed in 2008 and went into effect in 2009, see <http://www.doh.wa.gov/YouandYourFamily/IllnessandDisease/DeathwithDignityAct.aspx>.

<sup>38</sup> For information on Vermont's law, which went into effect in 2013,

legalized assisted suicide as of June 9, 2016. A court decision in Montana has also opened the door to physician-assisted suicide in Montana.<sup>40</sup> Other recent efforts to legalize assisted suicide have not, however, met with success.<sup>41</sup>

Despite a few victories for the “right to die” movement, the situation in the United States has been relatively stable for the last two decades.<sup>42</sup> There are now (as of July 2016) only five states where physician-assisted suicide is legal, although the recent legalization of assisted suicide in California (which accounts for more than 12% of the country’s population) is quite significant. Public opinion on assisted suicide has been relatively stable since *Glucksberg*, although public opinion has moved in favor of assisted suicide in the last two years.<sup>43</sup> The situation would be vastly different if *Glucksberg* and *Quill* had come out the other way.

There are, however, worrisome trends. There is a slow but discernible trend towards the legalization of assisted suicide, which includes the enormously important legalization of assisted suicide in California. Developments in the Netherlands and Belgium, in particular,

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see [http://healthvermont.gov/family/end\\_of\\_life\\_care/patient\\_choice.aspx](http://healthvermont.gov/family/end_of_life_care/patient_choice.aspx).

<sup>39</sup> [http://www.nytimes.com/2016/06/10/us/assisted-suicide-california-patients-and-doctors.html?rref=collection%2Ftimestopic%2FAssisted%20Suicide&action=click&contentCollection=timestopics&region=stream&module=stream\\_unit&version=latest&contentPlacement=1&pgtype=collection&\\_r=0](http://www.nytimes.com/2016/06/10/us/assisted-suicide-california-patients-and-doctors.html?rref=collection%2Ftimestopic%2FAssisted%20Suicide&action=click&contentCollection=timestopics&region=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection&_r=0)

<sup>40</sup> In *Baxter v. State*, 224 P. 3d 1211 (Mont. 2009), the Supreme Court of Montana held that a doctor who assisted in the death of a terminally ill, mentally competent patient would be immune from a homicide prosecution. The Court did not reach the broader state constitutional issue of whether there was a constitutional “right to die with dignity” (ibid. at 1214).

<sup>41</sup> See, for example, this recent news story about the situation in Massachusetts: Evan Lips, “Physician-assisted suicide bill fails to advance in Massachusetts” (June 30, 2016), [http://www.nationalrighttolifeneeds.org/news/2016/06/physician-assisted-suicide-bill-fails-to-advance-in-massachusetts/#.V3\\_FnUn6vIU](http://www.nationalrighttolifeneeds.org/news/2016/06/physician-assisted-suicide-bill-fails-to-advance-in-massachusetts/#.V3_FnUn6vIU)

<sup>42</sup> See Richard S. Myers, “The Virtue of Judicial Humility,” *Ave Maria Law Review* 13 (2015): 210-11.

<sup>43</sup> Michael Lipka, “California legalizes assisted suicide amid growing support for such laws,” Pew Research (Oct. 2015), <http://www.pewresearch.org/fact-tank/2015/10/05/california-legalizes-assisted-suicide-amid-growing-support-for-such-laws/>



give one great cause for concern.<sup>44</sup> Belgium's recent extension of its euthanasia law to children is a cause of particular concern.<sup>45</sup> Moreover, physician-assisted suicide is now also legal in Canada.<sup>46</sup> These international developments are some indication of broader cultural trends in the West about assisted suicide. It is interesting that these countries were also among the earliest countries to legalize same-sex marriage, which the U.S. Supreme Court held was constitutionally required in 2015.

Beyond the international developments,<sup>47</sup> the most significant concerns are some very worrisome cultural trends, particularly the collapse of the sanctity-of-life ethic. Until quite recently, the Western tradition has reflected a clear position – that one cannot intend to take the life of an innocent human person.<sup>48</sup> The basis for this view is that

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<sup>44</sup> For discussion of the situation in the Netherlands, see John Keown, "A Right to Voluntary Euthanasia? Confusion in Canada in Carter," *Notre Dame Journal of Law, Ethics & Public Policy*, 28 (2014): 29-32; Ryan T. Anderson, "Always Care, Never Kill: How Physician-Assisted Suicide Endangers the Weak, Corrupts Medicine, Compromises the Family, and Violates Human Dignity and Equality" at *Heritage Foundation Backgrounder* (March 24, 2015), pp. 8-10, discussing international developments, [http://thf\\_media.s3.amazonaws.com/2015/pdf/BG3004.pdf](http://thf_media.s3.amazonaws.com/2015/pdf/BG3004.pdf).

<sup>45</sup> For a discussion of the situation in Belgium, see Robert Carle, "Give Me Liberty and Gave Me Death: Belgium's Brave New Euthanasia Regime," *Public Discourse* (Sept. 8, 2015), <http://www.thepublicdiscourse.com/2015/09/15355/>.

<sup>46</sup> Merrit Kennedy, "Canada Legalizes Physician-Assisted Suicide," <http://www.npr.org/sections/thetwo-way/2016/06/18/482599089/canada-legalizes-physician-assisted-dying>.

<sup>47</sup> On occasion, the Court has referred to international developments in defining the meaning of provisions of the U.S. Constitution. See *Lawrence*, 539 U. S. at 576-577, noting that other countries have protected the right to sexual autonomy; but see *ibid.* at 598 (Scalia, J., dissenting), critiquing the Court's use of foreign views. The Court has not, however, done so in a consistent manner and this usage is highly controversial. See generally Stephen G. Calabresi, "A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law," *Brigham Young University Law Review* 86 (2006): 1335.

<sup>48</sup> For discussions of the principle of sanctity or inviolability of life, see Keown, *supra* note 45, at 4-5; John Keown, "The Legal Revolution From 'Sanctity of Life' to 'Quality of Life' and 'Autonomy'" in *Issues for a Catholic*

human life has been regarded as a basic human good and that one cannot act against a basic human good. The basic idea is that one cannot do evil that good might come from it. So, it has never been regarded as permissible to kill an innocent human person for some good reason (to see their suffering and that of their loved ones come to an end, for research purposes, or to prevent their sizeable estate from being squandered on futile medical expenses). The acceptance of exceptions, even supposedly narrow ones, is devastating. As John Finnis stated: “If appropriate circumstances and good intention can sometimes justify choosing to kill an innocent, the lives of each of us depend on everyone judging, at every moment, that in the circumstances no greater good would be achieved, or greater evil avoided, by killing us.... Once it is allowed that a ‘proportionate reason’ can justify choosing to kill an innocent person, the genie is out of the bottle and exceptions cannot be contained.”<sup>49</sup>

Tragically, this bridge has already been crossed in the United States, and not just in the states that allow physician-assisted suicide. We have seen this, although I do not think this has been adequately recognized, in the withdrawal of treatment situations. Most of these cases have involved patients who were diagnosed as being in a persistent vegetative state.<sup>50</sup> In many of these cases, the withdrawal of food and water has been done in situations that historically would have been regarded as homicides or suicides.<sup>51</sup> The basic choice in these cases is a conscious choice to end a human life because the life of such a patient is not regarded as worth living. In fact, some of the opinions refer to such patients as “non-persons” – that is, because they lack certain

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*Bioethic*, ed. Luke Gormally (London UK: Linnacre Centre, 1999), pp. 233-60.

<sup>49</sup> See John Finnis, “Beyond the Encyclical,” *The Tablet* (January 8, 1994) at 9, <http://archive.thetablet.co.uk/article/8th-january-1994/9/veritatis-splendor-in-focus-10>.

<sup>50</sup> For discussion of some of the leading cases in this area, see Richard S. Myers, “Reflections on the Terri Schindler-Schiavo Controversy” in *Life & Learning XIV: Proceedings of the 14<sup>th</sup> University Faculty for Life Conference*, ed. Joseph W. Koterski, S.J. (Washington, D.C.: UFL, 2004), pp. 27-49.

<sup>51</sup> See John Finnis, “The ‘Value of Human Life’ and ‘The Right to Death’: Some Reflections on *Cruzan* and Ronald Dworkin,” *Southern Illinois University Law Journal* 17 (2003): 570.

abilities, they are already considered dead. Justice Stevens took this approach in *Cruzan* when he stated: “Nancy Cruzan is obviously ‘alive’ in a physiological sense. But for patients like Nancy Cruzan, who have no consciousness and no chance of recovery, there is a serious question as to whether the mere persistence of their bodies is ‘life’ as that word is commonly understood, or as it is used in both the Constitution and the Declaration of Independence.”<sup>52</sup>

Many of these opinions quite candidly adopt a quality-of-life ethic. An opinion from a Michigan court stated that “the state’s interest in the preservation of life relates to meaningful life.”<sup>53</sup> These opinions have an eerie echo of the passages in Justice Blackmun’s opinion in *Roe v. Wade* in which he noted that the state only had a compelling interest in “meaningful life outside the mother’s womb[,]”<sup>54</sup> and his conclusion that “the unborn have never been recognized in the law as persons in the whole sense.”<sup>55</sup> It is this idea – that we can define some human beings as non-persons, as not worthy of the same degree of protection and care as the rest of us – that is so alarming. One court referred to the lives of the patients involved in the withdrawal of treatment cases as involving “bare existence.”<sup>56</sup> Another described these human lives as involving “mere corporeal existence”<sup>57</sup> and noted that the “burden of maintaining the corporeal existence degrades the very humanity it was meant to serve.”<sup>58</sup> In such instances, the patient might well, the court concluded, consider such an existence “to be degrading and without human

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<sup>52</sup> *Cruzan v. Director, Missouri Dep’t of Health*, 497 U. S. 261, 345 (1990)(Stevens, J., dissenting).

<sup>53</sup> *Hobbins v. Attorney General*, 518 N. W. 2d 487, 496 n. 2 (Mich. Ct. App.)(Shelton, J., concurring in part and dissenting in part), quoting *McKay v. Bergstedt*, 801 P. 2d 617, 626 (Nev. 1990), *aff’d in part and rev’d in part*, 527 N. W. 2d 714 (Mich. 1994), *cert. denied*, 115 S. Ct. 1795 (1995).

<sup>54</sup> *Roe v. Wade*, 410 U. S. at 163.

<sup>55</sup> 410 U. S. at 162. See Richard S. Myers, “Re-Reading *Roe v. Wade*,” *Washington & Lee Law Review* 71 (2014): 1033-36, commenting on the eugenics aspects of *Roe v. Wade*.

<sup>56</sup> *In re Guardianship of Browning*, 568 So. 2d 4, 15 Fla. 1990).

<sup>57</sup> *Brophy v. New England Sinai Hosp.* 398 Mass. 417, 434 (Mass. 1986).

<sup>58</sup> *Ibid.*

dignity.”<sup>59</sup> The dissent in that case rightly commented: “By its very nature, every human life, without reference to its condition, has a value that no one can rightfully deny or measure. Recognition of that truth is the cornerstone on which American law is built. Society’s acceptance of that fundamental principle explains why, from time immemorial, society through law has extended its protection to all, including, especially, its weakest and most vulnerable members. The court’s implicit, if not explicit, declaration that not every human life has sufficient value to be worthy of the State’s protection denies the dignity of all human life, and undermines the very principle on which American law is constructed.”<sup>60</sup> The logic of these cases, although I do not think this has been adequately appreciated, is that there are some lives that are not worth living. Or put another way, the logic is that some persons would be better off dead.<sup>61</sup>

That position – one that is deeply ingrained in the law – is quite supportive of the move towards legalizing physician-assisted suicide or euthanasia. Thus far, with the exception of the states noted above, the law has clung to the practical (if not always logical) distinction between active and passive steps to end a life.<sup>62</sup> The Supreme Court in part relied on this distinction in rejecting the constitutional attacks on state laws

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<sup>59</sup> Ibid.

<sup>60</sup> Ibid. at 453 (O’Connor, J., dissenting). In commenting on the leading English case involving the withdrawal of food and water from a patient in a persistent vegetative state, John Finnis stated that the judges’ opinions reflect the view that “Bland’s continued existence was not merely no benefit but actually a harm to him, a source of indignity,[a] violation of his wish to be remembered well, [a] humiliation.” John Finnis. “Bland: Crossing the Rubicon,” *Law Quarterly Review* 109 (1993): 336.

<sup>61</sup> See Myers, *supra* note 6, at 782. See also William E. May, *Catholic Bioethics and the Gift of Human Life*, 2d ed. (Huntingdon IN: Our Sunday Visitor Institute, 2008), p. 264. One leading academic proponent of physician-assisted suicide states that “many treatment withdrawals reflect an intent to die. Patients often refuse life-sustaining treatment because they perceive their life as burdensome and therefore want to die.” David Orentlicher, *Matters of Life and Death: Making Moral Theory Work in Medical Ethics and the Law* (Princeton NJ: Princeton Univ. Press, 2001), p. 35. According to this scholar, these choices to die are morally justified because “when life becomes sufficiently miserable, a person can reasonably believe that continued life is worse than death” (ibid. at pp. 65-66).

<sup>62</sup> Myers, *supra* note 21, at 15.

banning assisted suicide.<sup>63</sup> Yet, the passive-active, the omission-commission line is unstable and in fact has never been regarded as dispositive by the criminal law.<sup>64</sup> In many instances, there is a real equivalence between treatment withdrawals and instances of physician-assisted suicide and euthanasia.<sup>65</sup>

There are some cases when there is rational distinction between killing and letting die,<sup>66</sup> but this does not apply to many of the treatment withdrawal cases. In many of these cases, the lives of the patients are regarded as a burden, as a disvalue, or as not a good and thus the treatment withdrawal constitutes a choice to kill rather than the removal of a burdensome treatment.<sup>67</sup> The cases claim to reject the permissibility of lethal choices, yet many of the cases plainly do endorse such choices.<sup>68</sup> The cases reject the permissibility of active killing but accept the permissibility of intentional killing by omission.<sup>69</sup> The lethal choice is being endorsed because of the view that the lives of these patients are not worth living. The widespread acceptance of that principle is laying the groundwork for the eventual legal acceptance of physician-assisted suicide. So, too are the frequent instances of euthanasia practiced under the cover of palliative sedation.<sup>70</sup> This misuse of palliative sedation is sometimes referred to as “covert” or “stealth” euthanasia.<sup>71</sup> This use of palliative or terminal sedation is a way, one scholar noted, of “pulling

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<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid. at 16.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid. at 17.

<sup>69</sup> Ibid.

<sup>70</sup> For a good discussion of palliative sedation, see Joseph J. Piccione, “Palliative Sedation” in *Encyclopedia of Catholic Social Thought, Social Science, and Social Policy*, Vol. 3: *Supplement*, ed. Michael L. Coulter, Richard S. Myers & Joseph A. Varacalli (Lanham MD: Scarecrow Press, 2012), p. 255-58. See also Patrick T. Smith, “Distinguishing Terminal Sedation from Euthanasia,” *National Catholic Bioethics Quarterly* 15 (2015): 287-301.

<sup>71</sup> See Ralph A. Capone, Kenneth R. Stevens Jr., Julie Grimstad & Ron Panzer, “The Rise of Stealth Euthanasia: Imposed Death Disguised as Pain Relief,” *Ethics & Medics* 38/6 (June 2013).

the sheet over our eyes.”<sup>72</sup>

In sum, there is a mix of good and bad news. The good news is that the movement in favor of assisted suicide and euthanasia that seemed to be in the ascendancy in the mid-1990s seems to have stalled. The situation has been relatively stable for the last two decades, although recent developments (since 2014) reflect a slow but discernible trend in favor of assisted suicide. The Supreme Court’s 1997 decisions left the issue to the democratic process and those who oppose physician-assisted suicide and euthanasia have had the opportunity to advance their views without the distorting effect of the Court’s “help.”<sup>73</sup>

Yet, there are some disturbing signs. The international developments in the Netherlands and Belgium (which were also the first two nations to legalize same-sex marriage)<sup>74</sup> are cause for serious concern,<sup>75</sup> as is the recent legalization of assisted suicide in Canada.<sup>76</sup> Moreover, here in the United States, we have seen a collapse of the sanctity-of-life ethic in the withdrawal of treatment cases and with the common use of palliative sedation as a means of “slow euthanasia.”<sup>77</sup> The law in the United States still, though, largely rejects the idea that active steps to end a life are permissible.

There is, then, still an opportunity for those who support the sanctity-of-life ethic to advance their views. We should avoid the temptation to think that there is some inevitable movement in favor of

<sup>72</sup> Margaret P. Battin, “Terminal Sedation: Pulling the Sheet over Our Eyes,” *Hastings Center Report* 38/5 (2008): 27-30.

<sup>73</sup> The debate about same-sex marriage, in contrast, was largely driven by judicial decisions. Justice Scalia commented that the effect of the *Windsor* decision “will be a judicial distortion of our society’s debate over marriage -- a debate that can seem in need of our clumsy ‘help’ only to a member of this institution.” *Windsor*, 133 S. Ct. at 2710 (Scalia, J., dissenting).

<sup>74</sup> See Lynn D. Wardle, “The Future of the Family: The Social and Legal Impacts of Legalizing Same-Sex Marriage,” *Ave Maria Law Review* 13 (2015): 271.

<sup>75</sup> See supra notes 44-45.

<sup>76</sup> See supra note 46.

<sup>77</sup> Professor Orentlicher notes that “terminal sedation is at times essentially ‘slow euthanasia.’” David Orentlicher, “The Supreme Court and Terminal Sedation: Rejecting Assisted Suicide, Embracing Euthanasia,” *Hastings Constitutional Law Quarterly* 24 (1997): 955.

physician-assisted suicide and euthanasia. Although that seemed to be the case with regard to abortion, the pro-life movement (even with *Roe v. Wade* and *Casey*) has continued to make progress in moving the law and popular opinion in a pro-life direction.<sup>78</sup> We need to build a reverence for life on many issues. We need to oppose the culture of death on many fronts and to work unceasingly to build the culture of life and love and truth.

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<sup>78</sup> See Myers, *supra* note 16, at 1040-41.