

# The Boundaries of Identity: Will Justice Neil Gorsuch Vote “Pro-Life” on Abortion Issues?

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ABSTRACT: This paper reviews *The Future of Assisted Suicide and Euthanasia* (2006) by Neil Gorsuch to ascertain whether it is likely that Justice Gorsuch will vote to uphold well-drafted restrictions of abortion. The book reveals that Justice Gorsuch is a very thoughtful, philosophical thinker. He was mentored by Professor John Finnis, a world-renowned pro-life scholar. Gorsuch clearly advocates for the inviolability of human life and sees that life is intrinsically valuable, but he does not address abortion. While it is not possible to predict with certainty how Justice Gorsuch will vote, his belief in the inherent value of human life is encouraging. We all must do our part.

**W**E LIVE IN AN AGE OF LABELS. This can be helpful when one is in a hurry to get a general impression about a person or thing. But labels also can be rather unhelpful, even misleading, when one is trying to make an accurate and correct assessment. This paper tries to provide an accurate label for Justice Neil Gorsuch, newly confirmed to the Supreme Court of the United States. The question that I address here is whether Justice Gorsuch is “pro-life,” i.e., whether he is likely to vote “pro-life” on abortion issues that may come before the Supreme Court.

My primary source of information about Gorsuch’s views is his own book: *The Future of Assisted Suicide and Euthanasia*, published by Princeton

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University Press in 2006, eleven years ago. The book is 311 pages long, with 226 pages of text and another 85 pages of notes, appendices and index. It is an eminently readable book – short enough to not be intimidating or off-putting, but long enough to provide a very thorough and focused examination of the subject – i.e., whether assisted suicide and euthanasia should be legalized by repealing criminal prohibitions of both practices.

The author has impeccable credentials, including an impressive academic record.<sup>1</sup> He graduated in 1988 from Columbia University with a degree in Political Science, where he wrote for the college newspaper and helped found a conservative alternative-voice student newspaper. He attended Harvard Law School, where he was an editor on the *Harvard Journal of Law and Public Policy*, which is affiliated with the respected conservative Federalist Society. Former President Barack Obama was a classmate of Justice Gorsuch at Harvard Law School.

About a dozen years after law school, Gorsuch received a Marshall Scholarship to Oxford University where he studied under the world-renowned philosophy professor John Finnis. Professor Finnis is the author of several publications that present powerful philosophical reasons for rejecting the legalization of assisted suicide and euthanasia.<sup>2</sup> “Finnis supervised Gorsuch’s doctoral studies at Oxford and directed Gorsuch’s dissertation on the moral and legal implications of assisted suicide and euthanasia. [That] eventually [became] Gorsuch’s authoritative book on the topic...”<sup>3</sup> In some ways, the book by Gorsuch elaborates and expands upon the arguments made in the

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<sup>1</sup> Joseph P. Williams, “Gorsuch Tops Trump in Public Opinion Polls,” *U.S. News & World Report*, 13 Feb. 2017 (seen 7 June 2017).

<sup>2</sup> See, e.g., John Finnis, “Economic, Justice, and the Value of Life” in *John Finnis, Human Rights & Common Good, Collected Essays*, Vol. III, (New York NY: Oxford Univ. Press, 2011), pp. 242-50; John M. Finnis, “Public Reason, Abortion, and Cloning,” *Valparaiso University Law Review* 32 (1997-1998): 361; John Finnis, “The Rights and Wrongs of Abortion: A Reply to Judith Thomson,” *Philosophy & Public Affairs* 2 (1973): 117.

<sup>3</sup> Daniel Maria Klimek, “Meet the Heavyweight Moral Philosopher Who Mentored Neil Gorsuch,” *The Federalist*, February 22, 2017 at <http://thefederalist.com/2017/02/22/meet-heavyweight-moral-philosopher-mentored-neil-gorsuch/> (seen 7 June 2017).

article by Professor Finnis.<sup>4</sup> Gorsuch received his D.Phil. degree in law from Oxford in 2004.

*The Future of Assisted Suicide and Euthanasia* presents a philosophical analysis that carefully examines, thoroughly considers, and persuasively rejects the leading arguments made for the legalization of assisted suicide and euthanasia. I found it to be a very enjoyable, readable, thoughtful book, and I highly recommend it.

The core premise of *Assisted Suicide and Euthanasia* is that human life is intrinsically valuable, of inherent worth in and of itself, regardless of condition, age, stage, or circumstances, and that legalization of assisted suicide and euthanasia devalues human life by making it a matter of instrumental worth. Doing so would make human life much more vulnerable. Thus, the legalization of assisted suicide and euthanasia would pose immediate threats to persons on the margins of human society, including the dying, the sick, and the aged, as well as the unpopular, many immigrants, racial-ethnic-religious-social and other minorities, and so on.

The threat that legalizing assisted suicide and euthanasia poses to persons who are marginalized in society is not insignificant. That may be why minority communities<sup>5</sup> and disability groups<sup>6</sup> express very high rates of opposition to legalizing assisted suicide and euthanasia (much higher rates of opposition than found in majority races, certain religions, and able-bodied communities).

Gorsuch's book is one of several recent philosophical discussions that defend the normative claim that "it is always a serious moral wrong to intentionally kill an innocent human person, whether self or another, notwith-

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<sup>4</sup> John Finnis, "Economic, Justice, and the Value of Life" in *John Finnis, Human Rights & Common Good, Collected Essays*, Vol. III (New York NY: Oxford Univ. Press, 2011), pp. 242-50.

<sup>5</sup> Eric Metaxas, "Why Are African-Americans Strongly Opposed to Assisted Suicide?" in *The Christian Post*, 31 October 2016 at <http://www.christianpost.com/news/why-are-african-americans-strongly-opposed-to-assisted-suicide-171143/> (seen 15 June 2017): "According to a 2013 Pew survey, while only 42 percent of American whites opposed physician-assisted suicide, 65 percent of African Americans and Latinos did. By way of underscoring the gap between the races on this issue, since Oregon legalized physician-assisted suicide in 1997, only one African-American has availed himself of its provisions. That's one out of 991 people."

<sup>6</sup> See "Not Dead Yet: Disability Activists Oppose Assisted Suicide as a Deadly Form of Discrimination" at <http://notdeadyet.org/assisted-suicide-talking-points> (seen 15 June 2017).

standing any further appeal to consequence or motive.”<sup>7</sup> But in *The Future of Assisted Suicide and Euthanasia* Gorsuch does not address abortion at all – neither directly nor by specific inference. Yet, the arguments that he presents to bar assisted suicide and euthanasia would seem to apply very directly and logically to support opposition to elective abortion – and, arguably, to support opposition to so-called therapeutic abortions as well. Of course, that does not guarantee that as a Justice on the Supreme Court he would uphold abortion restrictions any more than opposition to capital punishment means that one would oppose abortion. Still, abortion is significantly linked to assisted suicide and euthanasia inasmuch as all three practices involve killing a living human being, all three practices are controversial, and traditional laws prohibiting all three practices are now changing in some countries and regions of the world.

The Center for Bioethics and Culture Network has nicely summarized the concerns about legalizing assisted suicide and euthanasia as follows:

The drive to legalize assisted suicide and euthanasia presents a profound challenge to the integrity of medical ethics and the sanctity/equality of human life. As a consequence, the CBC believes that legalizing mercy killing and suicide assistance by doctors (or anyone else) would corrupt medicine, undermine the viability of suicide prevention efforts by sending a mixed societal message, and threaten the lives and equal societal status of the weakest and most vulnerable among us.

This conclusion isn’t conjectural. The history of the last forty years shows unequivocally that a society which permits or legalizes euthanasia and assisted suicide for the few, embarks on a path leading inexorably to permissive mercy killing of the many. For example, in the Netherlands, not only may the terminally ill be euthanized on request, but so also may people with serious chronic illnesses and serious disabilities. Strong political advocacy now exists there to permit senior citizens who are “tired of life” to receive suicide as the remedy.

Worse, according to several government studies, hundreds of patients who haven’t asked for euthanasia are lethally injected or intentionally overdosed with pain medication each year by Dutch doctors. A Dutch Supreme Court ruled that a psychiatrist, who assisted the suicide of a woman in grief over her dead children, had not acted wrongly because suffering is suffering, and it doesn’t matter whether it is physical or emotional. The “Groningen Protocol,” an infanticide checklist, has been published by doctors who admit euthanizing dying and disabled infants, and even though such killings are murder under Dutch law, nothing is done about it.<sup>8</sup>

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<sup>7</sup> See generally Craig Paterson, “Assisted Suicide and Euthanasia, A Natural Law Ethics Approach,” (2008); see also Book Depository, <https://www.bookdepository.com/Assisted-Suicide-Euthanasia-Mr-Craig-Paterson/9780754692959> (seen 7 June 2017).

<sup>8</sup> Center for Bioethics and Culture Network, “Assisted Suicide and Euthanasia”

So, the deadly risks to the weak and vulnerable of legalizing assisted suicide and euthanasia are not merely speculative. It is easy to see how persons who are concerned about power imbalances or who hold strong views about the inviolability (or sanctity) of human life would be very concerned. But *must* one be opposed to legalizing assisted suicide and euthanasia and abortion in order to be pro-life?

What is the test for being pro-life? How pro-life must one be on how many issues to merit the label “pro-life?” If opposition to legalizing assisted suicide and euthanasia is the test, then Neil Gorsuch passes the test with flying colors. His article and book have articulated arguments against legalizing euthanasia and assisted suicide that are among the best that I have ever read. However, if opposition to legal abortion (to all abortions, or to abortion-on-demand) also is necessary, then the jury is still out on whether Justice Neil Gorsuch is truly and fully pro-life.

One commentary puts it: “Gorsuch’s views on abortion are not well defined. In fact, one pro-life activist accused him of not being pro-life enough.”<sup>9</sup> Gorsuch’s book about assisted suicide and euthanasia briefly suggests in passing that there is no “constitutional basis” for putting the life of the mother ahead of the life of the child – if the child is deemed a legal person.<sup>10</sup> Of course, that does not mean that he does not believe that there are no reasons of legal precedent and public policy for keeping or even expanding the *Roe v. Wade* rule that provides full legal access by women to unrestricted abortion-on-demand during most or all of at least pre-viability period, if not the entire period, of pregnancy.<sup>11</sup> An article by A CNN Supreme Court Reporter notes:

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at <http://www.cbc-network.org/issues/taking-life/assisted-suicide-and-euthanasia/> (seen 7 June 2017).

<sup>9</sup> “Neil Gorsuch & Abortion: 5 Fast Facts You Need to Know,” 31 Jan. 2017, updated 20 March, 2017, at <http://heavy.com/news/2017/01/neil-gorsuch-abortion-pro-life-anti-donald-trump-supreme-court-quotes-views-planned-parenthood/> (seen 7 June 2017).

<sup>10</sup> *Ibid.*

<sup>11</sup> 410 U.S. 113 (1973).

Gorsuch has never ruled directly on *Roe v. Wade*, the landmark opinion legalizing abortion. But conservatives take comfort from some of the language in a book he has penned on assisted suicide.

“The idea that all human beings are intrinsically valuable and the intentional taking of human life by private persons is always wrong,” Gorsuch wrote in *The Future of Assisted Suicide and Euthanasia*.

They also point to his fidelity to originalism and believe it will lead him to what they believe is the right conclusion, which is that the Constitution does not protect a right to abortion.<sup>12</sup>

Others, however, read the tea leaves differently. *The New York Times* published an opinion piece by Neal K. Katyal entitled *Why Liberals Should Back Neil Gorsuch*.<sup>13</sup> That *The New York Times* would publish that view might be cause for some serious concern for some conservatives. At the least, it underscores that on the issue of abortion, Gorsuch’s views of the constitutional and policy balance are simply not known. The conservative writer Andy Schlafly, “the pro-life activist and son of the late Phyllis Schlafly, put Gorsuch on his list of Supreme Court nominees who probably wouldn’t overturn *Roe v. Wade* or be pro-life on the Supreme Court.”<sup>14</sup>

On the other hand, we can sometimes judge people by the company they keep. In addition to being mentored by Professor John Finnis, Neil Gorsuch is befriended by Professor Robert P. George, whose strong pro-life values and outstanding defense-of-life work are beyond doubt. Professor George is the editor of the series at Princeton University Press that published Gorsuch’s book about *The Future of Assisted Suicide and Euthanasia*.

Moreover, during his tenure on the Tenth Circuit Judge Gorsuch voted with the court in *Hobby Lobby Stores, Inc. v. Sebelius*,<sup>15</sup> holding that closely held family businesses were likely to prevail on their claim that the contraceptive and abortifacient mandate in President Obama’s Affordable Care Act

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<sup>12</sup> Ariane de Vogue, “Neil Gorsuch on the issues,” CNN politics, at <http://www.cnn.com/2017/03/20/politics/neil-gorsuch-abortion-religious-liberty-environment-gun-control/index.html> (seen 7 June 2017). See also Daniel Maria Klimek, supra n4: “[T]he fact that Gorsuch is a protégé of Finnis should bring much hope....”

<sup>13</sup> Neal K. Katyal, “Why Liberals Should Back Neil Gorsuch,” *The New York Times*, 31 Jan. 2017 at [https://www.nytimes.com/2017/01/31/opinion/why-liberals-should-back-neil-gorsuch.html?\\_r=0](https://www.nytimes.com/2017/01/31/opinion/why-liberals-should-back-neil-gorsuch.html?_r=0) (seen 7 June 2017).

<sup>14</sup> “Neil Gorsuch & Abortion,” supra n10.

<sup>15</sup> 723 F.3d 1114 (10th Cir. 2013), aff’d sub nom. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014) (Gorsuch concurred in decision).

substantially burdened their exercise of their religious beliefs. Judge Gorsuch would have held that the individual business owners also were entitled to relief, for “it is their personal involvement in facilitating access to devices and drugs that can have the effect of destroying a fertilized human egg that their religious faith holds impermissible.”<sup>16</sup> Furthermore, he added, “it is not for secular courts to rewrite the religious complaint of a faithful adherent.”<sup>17</sup>

Likewise, in *Little Sisters of the Poor Home for the Aged v. Burwell*,<sup>18</sup> Judge Gorsuch dissented from a denial of rehearing *en banc*. His position was later at least partially vindicated when the Supreme Court vacated the Tenth Circuit and remanded the panel’s decision.

In his book, *The Future of Assisted Suicide and Euthanasia* Gorsuch argues that assisted suicide and euthanasia should be barred because “human life is fundamentally and inherently valuable, and that intentional taking of human life by private persons is always wrong.”<sup>19</sup> He makes a strong case in his book for the inviolability of human life. He argues in chapter nine of his book that human life is a basic good understood and felt to be intrinsically worthwhile. The existence of such basic goods and the moral imperative to respect them dates back at least to Aristotle. Our Declaration of Independence echoes the belief that the right to life is a self-evident truth and inalienable. Gorsuch argues that the good of life is not instrumental or dependent on any other condition of reason. The Fourteenth Amendment to our Constitution clearly guarantees a right to life. Thus, Gorsuch challenges the positions that have been taken by other well-known legal philosophers such as Posner, Dworkin, Epstein, and Singer that human life is valuable only when accompanied by certain instrumental capacities.<sup>20</sup>

But Gorsuch does not argue that we need to preserve life at all costs and in all circumstances. In his view, the inviolability of life rules out absolutist all-or-nothing positions. For example, he would justify discontinuation of basic life-sustaining care when imminent death is foreseen. Such individuals should be able to reject care and accept death under this principle. Nor would Gorsuch

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<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> 799 F.3d 1315 (10th Cir. 2015) (dissenting from denial of rehearing *en banc*).

<sup>19</sup> Neil Gorsuch, *The Future of Assisted Suicide and Euthanasia* (Princeton NJ: Princeton Univ. Press, 2006), p. 157.

<sup>20</sup> Ibid. at pp. 157-63.

require care when it imposes a grave burden. So, if a patient wants to stop difficult life-prolonging treatment, a doctor/nurse morally can accede to the wishes of the patient without violating Gorsuch's inviolability of life rule if he or she is doing so to respect the wishes and the autonomy of the patient.<sup>21</sup> Thus, Gorsuch avoids taking a purist position and advocates instead a practical, balanced, principled approach to resolving issues involving human lives. Certainly, euthanasia and assisted suicide are very complex issues.<sup>22</sup>

Another factor that must be considered is Gorsuch's criticism of "activist" judges who judicially legislate from the bench. In a famous 2005 *National Review* article he criticized liberals for having "become addicted to the courtroom, relying on judges and lawyers rather than elected leaders and the ballot box, as the primary means of effecting their social agenda on everything from gay marriage to assisted suicide to the use of vouchers for private-school education."<sup>23</sup> In that article Gorsuch declared: "This overweening addiction to the courtroom as the place to debate social policy is bad for the country and bad for the judiciary.... As a society, we lose the benefit of the give-and-take of the political process...that only elected branches can provide."<sup>24</sup>

That position suggests that he is not in favor of expanding court-created abortion rights. It might even hint at a willingness to repudiate *Roe* and its judicial progeny (but that is very optimistic and unlikely). So, for Gorsuch to vote to uphold abortion restrictions would make sense as a matter of his basic inviolability-of-life principles, his originalist principles, and as a matter of his deference to legislative policy-making.

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<sup>21</sup> *Ibid.* at 163-166.

<sup>22</sup> John Harris, "Life and Death" in *Routledge Encyclopaedia of Philosophy*, ed. Edward Craig (New York NY: Routledge, 1998) at <https://www.rep.routledge.com/articles/thematic/life-and-death/v-1/sections/contraception-and-infanticide> (seen 16 June 2017); Robert Young, "Voluntary Euthanasia," *Stanford Encyclopedia of Philosophy*, at <https://plato.stanford.edu/entries/euthanasia-voluntary/> (2014); "Euthanasia and the Value of Life, and Other Essays" by John Harris and John Finnis in *Euthanasia Examined: Ethical, Clinical, and Legal Perspectives*, ed. John Keown (Baker & Taylor, 1995), pp. 6-71.

<sup>23</sup> Neil Gorsuch, "Liberals 'N' Lawsuits," *National Review Online*, 7 Feb. 2005, available at <http://www.nationalreview.com/article/213590/liberalsnlawsuits-joseph-6> (seen 8 June 2017).

<sup>24</sup> *Ibid.*



## Conclusion

How Justice Gorsuch will vote on abortion issues will clearly be influenced by the text of the law under review and the context of the case in which the issues arise. He will approach the underlying legal policy and legal morality issues in light of his strong inviolability-of-life belief.

In conclusion, it is worth putting the matter in context. First, abortion still is an act of horrific, heinous violence. It always results in the death of a living, vulnerable, defenseless, innocent human being.

Second, our challenge – our task – as pro-life advocates is to work to touch the hearts of our fellow citizens, to call them to a higher standard of compassionate care for the weak, the vulnerable, the dependent, the sick, the injured, and the dying. As Margaret Thatcher so eloquently noted, “there is little hope for democracy if the hearts of men and women in democratic societies cannot be touched by a call to something greater than themselves.”<sup>25</sup>

Third, we do not know whether Justice Neil Gorsuch will vote pro-life on abortion issues that come before the Supreme Court. But, ultimately, that does not matter to us or for our responsibilities. We should try to exercise appropriate influence as citizens and individuals to persuade Justice Gorsuch and all others to respect human life, but we are not responsible for their decisions and acts.

Finally, we must not be weary in well-doing. Let us continue diligently, patiently, respectfully, and tirelessly to work to end the tragic and corrupt regime of legalized elective abortion-on-demand in the USA and throughout the rest of the world.

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<sup>25</sup> Margaret Thatcher, quoted by Elder M. Russell Ballard, “A Light on a Hill” (August 27, 1996) JRCLSoc Email 160922.