

LINKING ASSISTED SUICIDE AND ABORTION: LIFE, DEATH, AND CHOICE

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Assisted suicide is a politically controversial issue that particularly affects the elderly. Many of the legal and ethical concerns raised in the context of abortion are also raised in the assisted suicide debate, yet there has been little use of the precedents set by abortion law in the debates surrounding assisted suicide. Tensions between the values advocated by assisted suicide proponents, such as Jack Keivorkian and Compassion & Choices, and the value of human life, reflected in the Hippocratic Oath and by religious faiths, are addressed in court decisions on abortion. This Note compares the treatment of the inherent value of life and the state's interest in protecting life in decisions regarding abortion and assisted suicide. The author proposes that the state's unqualified interest in the value of life necessarily leads to the conclusion that once life begins, the state may preserve it, even against the wishes of the individual.

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I. Introduction

Jack Kevorkian, also known as Doctor Death, claimed to have assisted in the death of at least one hundred and thirty people in the 1990s.¹ He rose to the national spotlight as an outspoken supporter of assisted suicide and euthanasia, attracting media attention with his theatrical antics and outright disregard for state orders.² Dr. Kevorkian wore a wig and costume to court once, burned state orders ordering him to stop assisting suicides, and sent *60 Minutes* a tape of himself administering a lethal injection to a fifty-two year old man with Lou Gehrig's disease.³ He was tried and convicted for second degree murder in 1999.⁴ In four previous trials, prosecutors had charged Dr. Kevorkian with illegally causing the death of other seriously ill people, but none of those trials resulted in a conviction.⁵ Even after serving time in prison and being prohibited from advising people about how to commit assisted suicide, Dr. Kevorkian called the government a tyrant and the American people sheep for continuing to prohibit assisted suicide.⁶

Assisted Suicide and Elder Law

Assisted suicide is an issue that primarily affects the elderly. As people near the end of their lives, they often face difficult, painful, or terminal diseases that significantly decrease their quality of life. Although no states have legalized euthanasia, in which a physician administers a treatment that intentionally causes death, a small number of states have legalized assisted suicide, in which the physician assists the patient in causing the patient's own death.⁷ In Oregon, the state in which assisted suicide has been legal for the longest time, reports indicate that nearly seventy percent of people who terminated their lives through assisted suicide pursuant to Oregon's Death with

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1. Monica Davey, *Kevorkian Speaks After His Release From Prison*, N.Y. TIMES (June 4, 2007), http://www.nytimes.com/2007/06/04/us/04kevorkian.html?ref=jack_kevorkian.

2. *Id.*

3. *Id.*

4. Fred Charatan, *Dr Kevorkian found guilty of second degree murder*, 318 BRIT. MED. J. 962, 962 (1999), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1174693/>.

5. *Id.*

6. Monica Davey, *Kevorkian Speaks After His Release From Prison*, N.Y. TIMES (June 4, 2007), http://www.nytimes.com/2007/06/04/us/04kevorkian.html?ref=jack_kevorkian.

7. *State-by-State Guide to Physician-Assisted Suicide*, PROCON.ORG, <http://euthanasia.procon.org/view.resource.php?resourceID=000132> (last updated Apr. 17, 2014).

Dignity Act were age sixty-five and older.⁸ A report on assisted suicide in Switzerland included statistical data from assisted suicide occurrences demonstrating that ninety percent of people who terminated their lives through assisted suicide between 1998 and 2009 were age fifty-five and older.⁹

It should come as no surprise that assisted suicide predominantly affects the elderly. According to data from the 2010 United States census, life expectancy at birth in America is 78.7 years.¹⁰ Furthermore, thirteen of the top fifteen leading causes of death were conditions more prevalent in older people, such as heart disease, cancer, and stroke.¹¹ With most people in America living into old age, and thus dying in old age, it follows that most end-of-life decisions, including those involving assisted suicide, will predominantly affect elderly people. One statistical example to support this assumption is that over the past fifteen years that the state of Oregon has allowed physician-assisted suicide, the median age of patients choosing to commit physician-assisted suicide was seventy-one years old.¹²

The Connection between Assisted Suicide and Abortion

Many of the issues and points of tension in the debate about the legalization of assisted suicide are also present in the abortion debate. Both include debates about the value of life, whether potential or continuing; the quality of life; a physician's role in taking life, especially relating to the Hippocratic Oath; and important personal liberty interests often in conflict with well-established state interests.¹³ In fact,

8. *State-by-State Guide to Physician-Assisted Suicide*, PROCON.ORG, <http://euthanasia.procon.org/view.resource.php?resourceID=000132> (last updated Apr. 17, 2014).

9. FED. STAT. OFFICE, CAUSE OF DEATH STATISTICS 2009: ASSISTED SUICIDE AND SUICIDE IN SWITZERLAND (2012), available at <http://www.bfs.admin.ch/bfs/portal/en/index/themen/14/22/publ.html?publicationID=4732>.

10. NATIONAL VITAL STATISTICS REPORTS, DEATHS: FINAL DATA FOR 2010 (2013), available at http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_04.pdf.

11. *Id.*

12. OR. PUB. HEALTH DIV., OREGON'S DEATH WITH DIGNITY ACT ANNUAL REPORT (2013), <http://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Documents/year16.pdf>.

13. See, e.g., Ami Naramor, *Supporting Doctors With Ethical Objections*, SCI & THEOLOGY NEWS, June 2004, available at <http://www.beliefnet.com/News/Science-Religion/2004/06/Supporting-Doctors-With-Ethical-Objections.aspx> (discussing ethical objections of doctors to perform abortions or to assist in suicide as similar issues); David Beasley, *The Associated Press, Georgia Abortion Bill, Assisted Suicide Ban Signed By Governor Nathan Deal*, HUFFINGTON POST (May 2012), http://www.huffingtonpost.com/2012/05/02/georgia-abortion-bill-assisted-suicide_n_1469544.html (reporting on the state of Georgia's passage of two laws at the same time, one limiting abortion, and the other banning assisted suicide); William Saletan, *Assisted Feticide: Is abortion like assisted suicide? A reply to Ross Douhat*, SLATE (Jun. 13, 2011, 8:49

the classical version of the Hippocratic Oath specifically addresses both abortion and assisted suicide in the same breath.¹⁴ The translated text connects abortion and assisted suicide:

I will apply dietetic measures for the benefit of the sick according to my ability and judgment; I will keep them from harm and injustice.

I will neither give a deadly drug to anybody who asked for it, nor will I make a suggestion to this effect. Similarly I will not give to a woman an abortive remedy. In purity and holiness I will guard my life and my art.¹⁵

Particularly key in noting the connection between assisted suicide and abortion in the Hippocratic Oath is the word “similarly” that is used to connect the sentence about assisted suicide and the sentence about abortion. Even over two thousand years ago, the two issues were considered to be connected. Although many modern-day versions of the Hippocratic Oath have removed prohibitions on abortion and assisted suicide or euthanasia,¹⁶ the spirit of the Oath by which a physician is expected to help, not harm, lives on, even if not generally applied in reference to abortion or assisted suicide.

It is interesting, then, that there seems to be minimal correlation or discussion of abortion law when it comes to the legality of assisted suicide. That is not to say that the connection has not been made. Proponents of assisted suicide argued before the United States Supreme Court that the personal liberty interests used to support the right of a woman to have an abortion should be similarly applied to the right of a person to commit assisted suicide.¹⁷ Justice Souter of the United States Supreme Court stated that “[t]he analogies between the abortion cases and this [assisted suicide case] are several.”¹⁸ However, when courts have connected abortion cases to assisted suicide cases,

AM), http://www.slate.com/articles/health_and_science/human_nature/2011/06/assisted_feticide.html (drawing parallels between abortion and assisted suicide as well as responding to arguments for their dissimilarity).

14. Peter Tyson, *The Hippocratic Oath Today*, NOVA (Mar. 27, 2001), <http://www.pbs.org/wgbh/nova/body/hippocratic-oath-today.html> (quoting translation from LUDWIG EDELSTEIN, *THE HIPPOCRATIC OATH: TEXT, TRANSLATION, AND INTERPRETATION* (Johns Hopkins Press, 1943)).

15. *Id.*

16. Peter Tyson, *The Hippocratic Oath Today*, NOVA (Mar. 27, 2001), <http://www.pbs.org/wgbh/nova/body/hippocratic-oath-today.html>.

17. *Washington v. Glucksberg*, 521 U.S. 702, 726-27 (1997).

18. *Id.* at 778-79 (Souter, J. concurring).

they have focused predominantly on how the issue of assisted suicide relates to the issue of abortion with regard to personal liberty interests.¹⁹ Courts and others do not seem as interested in considering the connection between the state's interest in the potential life in the abortion cases and the state's interest in potential suicide victim's life in the assisted suicide cases.

Roadmap

This Note will argue that the issues involved in assisted suicide and in abortion are far more intertwined and interrelated than legislatures or courts have made them out to be. It will assert that both issues are based in the same fundamental tension: individual choice in what is done to one's body, even if that involves terminating a life, versus state interest in preserving life or potential life. This Note will then go on to argue that courts and legislatures should recognize the connection between abortion law and assisted suicide law and make sure their decisions reflect that connection rather than treating them as two separate and unrelated issues. Finally, this Note will argue that assisted suicide should stay illegal where it is already illegal and be banned in the places it is currently allowed, by applying a personal liberty versus state interest analysis informed by abortion law.

II. Background

The norm among Western democracies is a blanket prohibition on assisted suicide.²⁰ This norm against suicide and assisted suicide has deep historical roots. American common-law tradition, based in English common-law tradition, "has punished or otherwise disapproved of both suicide and assisting suicide" for over seven hundred years.²¹ As early as the year 673, England adopted a prohibition on suicide, which was periodically reaffirmed and continued in common law.²² The English common law's disapproval of suicide carried over into American law. Sir William Blackstone's *Commentaries*, on which much of early American common law was based, described in no un-

19. See generally *Compassion in Dying v. State of Wash.*, 79 F.3d 790, 813-14 (9th Cir. 1996) *rev'd sub nom. Glucksberg*, 521 U.S. at 702; *Kevorkian v. Thompson*, 947 F. Supp. 1152, 1170 (E.D. Mich. 1997).

20. *Rodriguez v. B.C. (Att'y General)*, [1993] 3 S.C.R. 519, 601-04 (Can. 1993) (discussing assisted-suicide provisions in Austria, Spain, Italy, the United Kingdom, the Netherlands, Denmark, Switzerland, and France).

21. *Glucksberg*, 521 U.S. at 711.

22. *Id.* at n.9.

certain terms the illegality of suicide, or the “felonious homicide” of “self-murder”:

SELF-MURDER, the pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure, though the attempting it seems to be countenanced by the civil law, yet was punished by the Athenian law with cutting off the hand, which committed the desperate deed. And also the law of England wisely and religiously considers, that no man has a power to destroy life, but by commission from God, the author of it: and, as the suicide is guilty of a double offense; one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who has an interest in the preservation of all his subjects; the law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on oneself.

Blackstone’s influence on American common law is hard to understate. Most jurists for at least the first century of American legal development learned the law from Blackstone,²⁴ and thus would have been influenced by his legal framework for a broad range of issues, including suicide. As shown in the above quotation, suicide was not only considered as wrong as murder, but worse, as a “double offense.”²⁵ The crime of suicide was both spiritual and temporal, against God and against king, and even against oneself.²⁶

Many of those same attitudes toward suicide continued into the modern era. Though work done in the fields of psychology and mental health have brought more light into some of the main causes of suicide, suicide continues to be seen by most people as a tragedy.²⁷

23. 4 WILLIAM BLACKSTONE, COMMENTARIES *189–90, available at <http://ebooks.adelaide.edu.au/b/blackstone/william/comment/book4.14.html>.

24. Greg Bailey, *Blackstone in America: Lectures by An English Lawyer Become The Blueprint for a New Nation’s Laws and Leaders*, THE EARLY AMERICA REVIEW (Spring 1997), <http://www.earlyamerica.com/review/spring97/blackstone.html> (“American lawyers in the early republic relied on Blackstone as the primary and often only source of the common law . . . Blackstone was the unseen teacher for uncounted numbers of American lawyers, first among them Abraham Lincoln.”).

25. 4 WILLIAM BLACKSTONE, COMMENTARIES *189–90, available at <http://ebooks.adelaide.edu.au/b/blackstone/william/comment/book4.14.html>.

26. *Id.*

27. See, e.g., Peter Schworm and Ellen Ishkanian, *Communities taking frank approach after teen suicides*, THE BOSTON GLOBE, Feb. 15, 2014, available at <http://www.bostonglobe.com/metro/2014/02/15/amid-tragedy-teen-suicide-schools-try-confront-issue-squarely/rKakxdFBGGkAvAevjBdoI/story.html> (referring to teen suicide as a tragedy); Vivienne Walt,

For example, the Surgeon General in the past has issued a call to action to prevent suicide.²⁸ In addition, although the Catholic Church no longer teaches that those who commit suicide cannot be saved, it still considers suicide a grave sin.²⁹ As the conviction of Dr. Kevorkian demonstrates, assisting someone in committing suicide is known by another name under the law: homicide.³⁰ Videotaping oneself killing someone, as Kevorkian did, even if it is done with that person's consent, and then sending the video to be broadcast on national television results in a pretty easy case for the prosecutor.³¹ Of course, challenging the government to bring charges immediately after showing oneself killing someone on camera almost guarantees prosecution.

Current Status of Assisted Suicide in the United States

Assisted suicide continues to be a divisive and hotly contested political issue. Dr. Kevorkian helped bring national attention to the issue of assisted suicide, and groups such as the Hemlock Society (now part of a larger organization named Compassion & Choices) continue to argue for the legalization of assisted suicide in America.³² Similarly, a number of groups, especially disability rights groups, actively oppose the legalization of assisted suicide.³³

Forty-six states and the District of Columbia prohibit assisted suicide. Methods for prohibiting or prosecuting assisted suicide, however, vary from state to state. In most states, assisted suicide falls under statutory or common law rules prohibiting causing the death of another person, and states generally pursue felony charges, some-

Tragedy in Switzerland: What drove two top executives to suicide?, CNN MONEY (Sept. 23, 2013), <http://management.fortune.cnn.com/2013/09/23/tragedy-in-switzerland-what-drove-two-top-executives-to-suicide/> (referring to suicide of two executives as a tragedy); Anita Gurian, *Suicide: The Teenage and Young Adult Tragedy*, NYU LANGONE MEDICAL CENTER, http://www.aboutourkids.org/families/suicide_teenage_young_adult_tragedy (again referring to suicide as a tragedy) (last visited Oct. 27, 2014).

28. THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT SUICIDE, DEP'T OF HEALTH AND HUMAN SERVS., U.S. PUB. HEALTH SERV. (1999), available at <http://profiles.nlm.nih.gov/ps/access/NNBBBH.pdf>.

29. Fr. William Saunders, *The Sin of Suicide*, CATHOLIC EDUC. RES. CTR. (2003), <http://www.catholiceducation.org/en/culture/catholic-contributions/the-sin-of-suicide.html> (last visited Oct. 27, 2014).

30. Monica Davey, *Kevorkian Speaks After His Release From Prison*, N.Y. TIMES, June 4, 2007, available at http://www.nytimes.com/2007/06/04/us/04kevorkian.html?ref=jack_kevorkian.

31. *Id.*

32. See, e.g., COMPASSION & CHOICES, <http://www.compassionandchoices.org/> (last visited Oct. 27, 2014).

33. See, e.g., Marilyn Golden, *Why Assisted Suicide Must Not Be Legalized*, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, http://dredf.org/assisted_suicide/assisted-suicide.html.

times of manslaughter or murder, against those who commit assisted suicide.³⁴ Illinois, for example, prohibits “[i]nducement to commit suicide,” which can include offering and providing the physical means by which another person commits or attempts to commit suicide.³⁵ A small number of states’ laws do not specifically address assisted suicide but nonetheless are understood to prohibit assisted suicide.³⁶

Assisted suicide is currently legal in four states: Montana, Oregon, Vermont, and Washington.³⁷ Oregon legalized assisted suicide in 1994.³⁸ The other three states have done so within the past five years.³⁹ Oregon’s Death with Dignity Act made Oregon the first state in America to legalize assisted suicide.⁴⁰ Oregon voters approved the legalization of assisted suicide in a ballot measure in 1994, by voting fifty-one percent in favor of adopting the Death with Dignity Act.⁴¹ Three years later, Oregon voters affirmed this prior decision by voting “no” on a ballot measure attempting to repeal the law.⁴² That was not, however, the final attempt to revoke the law. The federal government, through the Attorney General, issued an interpretive rule in 2001 that interpreted the Controlled Substances Act in such a way that physicians could lose their license for assisting a patient in suicide.⁴³ However, in 2006, the Supreme Court of the United States found that the interpretive rule was invalid and, therefore, the Death with Dignity Act prevailed, continuing to allow physicians to assist their patients in committing suicide.⁴⁴

The Death with Dignity Act was the first law of its kind and the model from which other states have created their own similar leg-

34. *State-by-State Guide to Physician-Assisted Suicide*, PROCON.ORG, <http://euthanasia.procon.org/view.resource.php?resourceID=000132> (last updated Apr. 17, 2014).

35. 720 ILL. COMP. STAT. 5 / 12-34.5 (2013).

36. *State-by-State Guide to Physician-Assisted Suicide*, PROCON.ORG, <http://euthanasia.procon.org/view.resource.php?resourceID=000132> (last updated Apr. 17, 2014).

37. *Id.*

38. *Id.*

39. *Id.*

40. Eli Stutsman, *Twenty Years of Living with the Oregon Death with Dignity Act*, 30 GPSOLO 4 (2013), available at http://www.americanbar.org/publications/gp_solo/2013/july_august/twenty_years_living_the_oregon_death_dignity_act.html (stating that the ballot measure that created the Oregon Death with Dignity Act was the first of its kind).

41. *State-by-State Guide to Physician-Assisted Suicide*, PROCON.ORG, <http://euthanasia.procon.org/view.resource.php?resourceID=000132> (last updated Apr. 17, 2014).

42. *Id.*

43. *Gonzales v. Oregon*, 546 U.S. 243, 249 (2006).

44. *Id.* at 268.

islation to legalize assisted suicide,⁴⁵ so it deserves further explanation. The Death with Dignity Act was not written as a wholesale approval of people helping other people kill themselves.⁴⁶ It does not simply say that anyone can help anyone else commit suicide—it places strict boundaries on the act of assisted suicide.⁴⁷ It restricts legal assisted suicide to the bounds of a physician-patient relationship through the use of death-causing prescription medicine.⁴⁸ If its various protocols are not followed, a suicide-assister can face disciplinary action at best,⁴⁹ or murder charges at worst.⁵⁰

The Death with Dignity Act contains a substantial number of strict requirements that must be met in the process of committing a legal assisted suicide, both for the patient and for the attending physician. Requirements for the patient are, amongst others, that the patient must be at least eighteen years of age, a resident of Oregon, capable of making and communicating health care decisions for himself or herself, and diagnosed with a terminal disease that will lead to death within six months.⁵¹ Requirements for the physician are even more numerous. One of the attending physician's requirements is that he or she must diagnose the patient with six months or less to live; this diagnosis must be certified by a consulting physician who also must certify that the patient is mentally competent to make and communicate health care decisions.⁵² If either one of the physicians involved decides that the patient's judgment is impaired, the patient

45. See, e.g., *Vermont Gov. Signs First Death-with-Dignity Law Passed by Legislature in Nation*, COMPASSION & CHOICES (May 20, 2013, 6:03 PM), <https://www.compassionandchoices.org/2013/05/20/vermont-gov-signs-first-death-with-dignity-law-passed-by-legislature-in-nation/> (stating that the Death with Dignity Act served as a model for the Vermont legislation legalizing assisted suicide).

46. OR. REV. STAT. § 127.800-995 (2013), available at <http://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/ors.aspx>; see also OREGON'S DEATH WITH DIGNITY LAW AND EUTHANASIA IN THE NETHERLANDS: FACTUAL DISPUTES, VT LEG. REPORT, available at http://www.leg.state.vt.us/reports/04death/death_with_dignity_report.htm (stating that the "Oregon Death with Dignity Act (the Act) is narrowly drawn and encompasses a number of procedural safeguards.").

47. OR. REV. STAT. § 127.800-995 (2013), available at <http://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/ors.aspx>.

48. *Id.*

49. OR. PUB. HEALTH DIV., FAQs ABOUT THE DEATH WITH DIGNITY ACT, available at <https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Documents/faqs.pdf>.

50. See, e.g., Fred Charatan, *Dr Kevorkian found guilty of second degree murder*, 318 BRIT. MED. J. 962, 962 (1999), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1174693/>.

51. OR. REV. STAT. § 127.800-127.995 (2013), available at <http://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/ors.aspx>.

52. *Id.*

must undergo psychological examination.⁵³ The attending physician must also inform the patient of various types of alternatives available to him or her, and must recommend that the patient notify his or her next-of-kin about the assisted suicide request.⁵⁴

Oregon's Death with Dignity Act also includes some strict time restrictions. Before the lethal medication may be prescribed, the patient must make at least two oral requests for such medication, at least fifteen days apart.⁵⁵ The patient must also submit a written request for the prescription of medication for the purpose of committing suicide, even after the written and oral requests have been made; after a subsequent forty-eight hour waiting period, the attending physician must then ask the patient if he or she wants to rescind his or her request.⁵⁶ If all of the above requirements are met, as well as compliance with some required reporting, then under the Death with Dignity Act, the physician prescribing the medication to commit suicide is immune from state prosecution for homicide or suicide.⁵⁷ Additionally, the patient should suffer no negative effects in relation to insurance policies or other things that may have exceptions or special provisions in the case of suicide.⁵⁸

In 2008, the state of Washington approved the Washington Death with Dignity Act, Initiative 1000, by ballot measure popular vote.⁵⁹ As its name suggests, Washington's legalization of assisted suicide closely mirrored Oregon's Death with Dignity Act and is essentially the same as Oregon's law that was further explained above.⁶⁰ Similarly, in 2013, the Vermont legislature passed the Patient Choice and Control at the End of Life Act.⁶¹ Vermont's legalization of assisted suicide came through the action of the state legislature rather than

53. *Id.*

54. *Id.*

55. *Id.*

56. OR. REV. STAT. §§ 127.845, 127.850 (2013), available at <http://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/ors.aspx>.

57. *State-by-State Guide to Physician-Assisted Suicide*, PROCON.ORG, <http://euthanasia.procon.org/view.resource.php?resourceID=000132> (last updated Apr. 17, 2014).

58. *Id.*

59. Janet I. Tu, "Death with dignity" act passes, SEATTLE TIMES, Nov. 5, 2008, available at http://seattletimes.com/html/nationworld/2008352350_assistedsuicide05m.html.

60. WASH. REV. CODE § 70.245 (2013), available at <http://apps.leg.wa.gov/RWCW/default.aspx?cite=70.245>; see also OR. REV. STAT. §§ 127.845, 127.850 (2013), available at <http://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/ors.aspx>.

61. VT. DEPT OF HEALTH, PATIENT CHOICE AND CONTROL AT END OF LIFE, http://healthvermont.gov/family/end_of_life_care/patient_choice.aspx#law.

through a ballot measure as in Oregon and Washington.⁶² The resulting text of the Vermont assisted suicide law, even though not named a “Death with Dignity” act, still substantially mirrors the Oregon and Washington provisions for legal assisted suicide.⁶³ Both Vermont and Washington’s measures contain requirements similar or identical to the requirements of the Oregon Death with Dignity Act, such as the fifteen day waiting period and the reporting requirements.⁶⁴ Although the law legalizing physician-assisted suicide in Vermont was passed in May 2013, some provisions of the law do not go into effect until 2016.⁶⁵

Montana is the other state to have legalized assisted suicide thus far.⁶⁶ However, Montana is unique in that assisted suicide was not legalized through ballot measure or legislative action, but rather through a ruling of the Supreme Court of Montana.⁶⁷ In *Baxter v. State*, the Supreme Court of Montana interpreted a state statute about consent as providing a defense against homicide charges directed at a physician assisting a patient in suicide.⁶⁸ However, there has been little to no further guidance as to the ramifications of that decision, and there is even dispute about whether *Baxter* actually legalized assisted suicide in Montana or not. Legislation was introduced in the Montana legislature to allow and regulate, and, alternatively, to prohibit, assisted suicide, but both measures failed.⁶⁹ It is likely that more cases will enter Montana courts that seek to clarify or challenge aspects of Mon-

62. *Id.*

63. VT. STAT. ANN. tit. 18, § 5281-5292 (2013), available at <http://www.leg.state.vt.us/docs/2014/Acts/ACT039.pdf>.

64. See *id.*; WASH. REV. CODE § 70.245 (2013), available at <http://apps.leg.wa.gov/RCW/default.aspx?cite=70.245>; OR. REV. STAT. §§ 127.845, 127.850 (2013), available at <http://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/ors.aspx>; see also Courtney S. Campbell, *Ten Years of “Death with Dignity,”* THE NEW ATLANTIS 33 (2008), available at <http://www.thenewatlantis.com/publications/ten-years-of-death-with-dignity> (comparing the Washington and Oregon legalizations of assisted suicide and referring to them as “essentially the same”).

65. VT. STAT. ANN. tit. 18, §§ 5281-5292 (2013), available at <http://www.leg.state.vt.us/docs/2014/Acts/ACT039.pdf>.

66. *Baxter v. State*, 2009 MT 449 (Mont. 2009); Kevin B. O’Reilly, *Physician-assisted suicide legal in Montana, court rules*, AMEDNEWS.COM (Jan. 2010), <http://www.amednews.com/article/20100118/profession/301189939/6/>.

67. *Baxter v. State*, 2009 MT 449 (Mont. 2009); Kevin B. O’Reilly, *Physician-assisted suicide legal in Montana, court rules*, AMEDNEWS.COM (Jan. 2010), <http://www.amednews.com/article/20100118/profession/301189939/6/>.

68. *Id.*

69. *Montana*, PATIENT’S RIGHTS COUNCIL, <http://www.patientsrightscouncil.org/site/montana/> (last visited Oct. 27, 2014).

tana's treatment of assisted suicide, but, as of now, there are far more questions than answers.

Finally, the federal government has also addressed assisted suicide. The United States Supreme Court has held that it is constitutional for states to ban assisted suicide, as it is not a fundamental right.⁷⁰ In addition, in 1997, Congress passed The Assisted Suicide Funding Restriction Act of 1997, which states that it is illegal to use federal funds to support assisted suicide or euthanasia.⁷¹ This means that programs that receive federal funding may not participate in assisted suicide or euthanasia, or advocate assisted suicide or euthanasia in any way.⁷² This prohibition includes programs like Medicare, Medicaid, military health care programs, and programs for people with disabilities.⁷³ The Act is directed specifically at assisted suicide and euthanasia; the committee report for the Act stated, "the bill is intended only to encompass the use of active means of causing death such as by lethal injection or the provision of a lethal oral drug overdose. It is not intended to encompass decisions not to provide . . . treatment or care even if, in some circumstances, some might deem such decisions as a form of passive euthanasia or mercy killing."⁷⁴

Defining Assisted Suicide

In discussions about assisted suicide, it is important to define what assisted suicide is and what it is not. It may be difficult to see the difference between assisted suicide and a "Do Not Resuscitate" or other similar order declining potentially life-saving care. For example, the court of appeals that considered *Vacco v. Quill* found that ending or refusing life-saving medical treatment "is nothing more nor less than assisted suicide."⁷⁵ The United States Supreme Court, however, found that "the distinction between assisting suicide and withdrawing life-sustaining treatment, a distinction widely recognized and en-

70. See generally *Glucksberg*, 521 U.S. at 702.

71. 42 U.S.C. §§ 14401-14408 (2012).

72. See *id.*; *The Assisted Suicide Funding Restriction Act of 1997*, NIGHTINGALE ALLIANCE, available at <https://web.archive.org/web/20070617051526/http://www.nightingalealliance.org/cgi-bin/home.pl?article=85> (last visited Oct. 27, 2014).

73. See 42 U.S.C. §§ 14401-14408; *The Assisted Suicide Funding Restriction Act of 1997*, NIGHTINGALE ALLIANCE, available at <https://web.archive.org/web/20070617051526/http://www.nightingalealliance.org/cgi-bin/home.pl?article=85> (last visited Oct. 27, 2014).

74. H.R. REP. 105-46, 14, 1997 U.S.C.C.A.N. 30, 43; *The Assisted Suicide Funding Restriction Act of 1997*, NIGHTINGALE ALLIANCE, available at <https://web.archive.org/web/20070617051526/http://www.nightingalealliance.org/cgi-bin/home.pl?article=85> (last visited Oct. 27, 2014).

75. *Quill v. Vacco*, 80 F.3d 716, 729 (2d Cir. 1996).

dorsed in the medical profession and in our legal traditions, is both important and logical.”⁷⁶

The Supreme Court in *Vacco* distinguished between assisted suicide and ending or refusing life-saving medical treatment based on fundamental legal principles of causation and intent.⁷⁷ It pointed out that when a patient refuses life-sustaining medical treatment, the patient dies from an underlying fatal disease or pathology, whereas, if a patient takes lethal medication prescribed by a physician, the patient is killed by the medication.⁷⁸ The American Medical Association also considers the actual cause of death in distinguishing between assisted suicide and ending or refusing life-saving medical treatment.⁷⁹ A physician who ceases, or honors a patient’s refusal to begin, life-sustaining medical treatment purposefully intends only to respect his patient’s wishes and to avoid or stop doing useless and futile or degrading things to the patient when the patient no longer stands to benefit from them.⁸⁰ In the same way, a doctor that provides aggressive palliative care through painkilling drugs may hasten a patient’s death, but the underlying purpose of the treatment is to ease the patient’s pain; the hastening of death is an undesired side-effect.⁸¹ However, a doctor who assists a suicide “must, necessarily and indubitably, intend primarily that the patient be made dead,” and “a patient who commits suicide with a doctor’s aid necessarily has the specific intent to end his or her own life.”⁸² The issue really comes down to the “distinction between letting a patient die and making that patient die.”⁸³ Assisted suicide, then, can only be classified as such if both the doctor and the patient have the underlying intent that the medication or treatment hasten or cause death of the patient through something other than the underlying disease or condition of the patient.⁸⁴

76. *Vacco v. Quill*, 521 U.S. 793, 800-01 (1997); see also AMERICAN MEDICAL ASSOCIATION, CEJA REPORT B – A-91: DECISIONS NEAR THE END OF LIFE (1992), available at <http://www.ama-assn.org/resources/doc/code-medical-ethics/2211a.pdf> (explaining the importance of intent in distinguishing between different types of end of life care).

77. *Vacco*, 521 U.S. at 801 (1997).

78. *Id.*

79. American Medical Association, *Council on Ethical and Judicial Affairs, Physician-Assisted Suicide*, 10 ISSUES IN L. & MED. 91, 92 (1994).

80. *Vacco*, 521 U.S. at 801 (1997).

81. *Id.* at 802.

82. *Id.*

83. *Id.* at 807.

84. *Id.* at 802, 807.

Similarly, assisted suicide must be distinguished from euthanasia and other more aggressive forms of hastening a patient's death. Some argue that there is no practical or moral difference between assisted suicide and euthanasia.⁸⁵ However, there is a qualitative and basic difference between assisted suicide and euthanasia: for assisted suicide, the patient "pulls the trigger," taking the pill or whatever action that causes their death. For euthanasia, a person other than the patient "pulls the trigger," injecting the patient with the fatal medication or doing whatever other action meant to cause the patient's death.⁸⁶ Even the construction of the Death with Dignity Acts bears out the significance of this distinction in that they all only allow assisted suicide, not euthanasia.⁸⁷ No states have allowed the legalization of euthanasia, and it is prosecuted under general homicide laws.⁸⁸ The American Medical Association, although condoning neither assisted suicide nor euthanasia, recognizes the ethical difference between the two practices:

There is an ethically relevant distinction between euthanasia and assisted suicide which makes assisted suicide a more attractive option. Physician-assisted suicide affords a patient a more autonomous way of ending his or her life than does euthanasia; if patients were to perform the life-ending act themselves, they would have the added protection of being able to change their minds and stop their suicides up until the last moment.⁸⁹

In addition to the patient being able to decide up until the last minute whether to commit suicide, assisted suicide also reserves a small, but important, distinction: the distinction between helping a death occur and actually killing another person. With euthanasia, the additional step is taken in that the physician kills the patient.⁹⁰

85. See, e.g., Nicolas Dixon, *On the Difference between Physician Assisted Suicide and Active Euthanasia*, 28 THE HASTINGS CTR. REPORT 25, (1998), available at <http://www.jstor.org.proxy2.library.illinois.edu/stable/3528229>.

86. *Euthanasia and Assisted Suicide*, NHS CHOICES, <http://www.nhs.uk/conditions/euthanasiaandassistedsuicide/Pages/Introduction.aspx>.

87. OR. REV. STAT. § 127.800-995 (2009), available at <http://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/ors.aspx>.

88. *State-by-State Guide to Physician-Assisted Suicide*, PROCON.ORG, <http://euthanasia.procon.org/view.resource.php?resourceID=000132> (last updated May 28, 2013).

89. AMERICAN MEDICAL ASSOCIATION, CEJA REPORT B – A-91: DECISIONS NEAR THE END OF LIFE (1992), available at <http://www.ama-assn.org/resources/doc/code-medical-ethics/2211a.pdf>.

90. *Id.*

Though the act of killing the patient in euthanasia is intended to be done only with the patient's express consent, the fact remains that it is the doctor who actively killed the patient. It is a distinction without a difference for some advocates of both assisted suicide and euthanasia and for some opponents of both practices.⁹¹ However, under the law as it currently stands, that distinction in some states means the difference between performing an acceptable medical procedure and being charged with homicide.⁹²

Helped by Dr. Kevorkian's actions and outspoken statements, in the 1990s, physician-assisted suicide and euthanasia rose to be nationally recognized issues. Many attempts were made around the country, especially beginning in the 1990s, to legalize assisted suicide and often also euthanasia.⁹³ Voters in the states of Washington, California, Oregon, Michigan, and Maine all considered initiatives to legalize physician-assisted suicide.⁹⁴ Groups such as the Hemlock Society, the Final Exit Network, the Death with Dignity National Center, and Compassion & Choices mobilized in support of end of life measures such as assisted suicide and euthanasia, and many of them continue to do so to this day.⁹⁵ Similarly, groups such as the American Medical Association, the Committee Against Physician Assisted Suicide, and the Disability Rights Education and Defense Fund actively oppose efforts to legalize assisted suicide.⁹⁶

91. See, e.g., Alex Schadenberg, *Swiss Assisted Suicide Leader Says: Almost No Difference Between Euthanasia and Assisted Suicide*, LIFE SITE NEWS (Jul. 26, 2013), <http://www.lifesitenews.com/blog/swiss-assisted-suicide-leader-says-almost-no-difference-between-euthanasia-physician-assisted-suicide>, ROMAN CATHOLIC DIOCESE OF BURLINGTON, http://www.vermontcatholic.org/index.php?sid=5&pid=476&subnav_id=119 (stating in part that "An act or omission which, of itself or by intention, causes death in order to eliminate suffering constitutes a murder").

92. Lawrence O. Gostin, *Drawing a Line Between Killing and Letting Die: The Law, and Law Reform, on Medically Assisted Dying*, 21 J. L. MED. & ETHICS 94, 94-101 (1993), available at <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1757&context=facpub>.

93. *History of Euthanasia and Physician-Assisted Suicide*, PROCON.ORG, <http://euthanasia.procon.org/view.timeline.php?timelineID=000022> (last updated July 23, 2013).

94. *Id.*

95. See, e.g., FINAL EXIT NETWORK, <http://www.finalexitnetwork.org/new/about/> (last visited Oct. 27, 2014); COMPASSION AND CHOICES, <http://www.compassionandchoices.org/> (last visited Oct. 27, 2014); DEATH WITH DIGNITY NATIONAL CENTER, <http://www.deathwithdignity.org/aboutus> (last visited Oct. 27, 2014).

96. See, e.g., Marilyn Golden, *Why Assisted Suicide Must Not Be Legalized*, DISABILITY RIGHTS EDUC. & DEF. FUND, http://dredf.org/assisted_suicide/assisted-suicide.html; *What is this About?*, COMM. AGAINST PHYSICIAN ASSISTED SUICIDE, <http://www.stopassistedsuicide.beta-sandbox.com/About/What-is-this-about> (last visited Oct. 27, 2014); *Opinion 2.211 - Physician-Assisted Suicide*, AM. MED. ASS'N, <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion2211.page> (last updated June 1996).

III. Analysis

Current Relevance

Assisted suicide is still an important issue today. It may be tempting to think of legalizing assisted suicide as an issue that was relevant a couple decades in the past. Groundbreaking state legislation, controlling United States Supreme Court opinions on the issue, and activities and trial of Dr. Kevorkian all took place in the 1990s.⁹⁷ However, the debate about the legalization of assisted suicide is alive and well today. As mentioned above, Vermont's legalization of assisted suicide was passed so recently that not all parts of the law have gone into effect.⁹⁸ Even more recently, on January 13, 2014, a state district judge in New Mexico ruled that New Mexico's law prohibiting assisted suicide violates the New Mexico Constitution.⁹⁹ Though it is unclear if this opinion is binding for most of the state, it could be appealed and bring the issue of assisted suicide into the spotlight for the state of New Mexico going forward.¹⁰⁰ As the Court stated in *Glucksberg*, "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide."¹⁰¹

The Value of Life in American Law

Any serious discussion of the merits of the legalization of assisted suicide must include discussion of how American law treats the value of a person's life. The importance and value of life as a basic, fundamental, and universal right is rarely disputed in the United States or anywhere else. The U.S. Declaration of Independence famously holds "these truths to be self-evident, that all men are created

97. See *Glucksberg*, 521 U.S. at 702; *Vacco*, 521 U.S. at 793; OR. REV. STAT. § 127.800-995 (2013), available at <http://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/ors.aspx>; Monica Davey, *Kevorkian Speaks After His Release From Prison*, N.Y. TIMES, (June 4, 2007), available at http://www.nytimes.com/2007/06/04/us/04kevorkian.html?ref=jack_kevorkian.

98. VT. STAT. ANN. tit. 18, § 5281-5292 (2013), available at <http://www.leg.state.vt.us/docs/2014/Acts/ACT039.pdf>; WASH. REV. CODE § 70.245 (2013), available at <http://apps.leg.wa.gov/RCW/default.aspx?cite=70.245>.

99. *Morris v. Brandenburg*, D-202-CV-2012-02909, Second Judicial District Court, Bernalillo County, State of New Mexico (Albuquerque); Erik Eckholm, *New Mexico Judge Affirms Right to 'Aid in Dying'*, N.Y. TIMES, Jan. 13, 2014, at A16, available at <http://www.nytimes.com/2014/01/14/us/new-mexico-judge-affirms-right-to-aid-in-dying.html>.

100. Erik Eckholm, *New Mexico Judge Affirms Right to 'Aid in Dying'*, N.Y. TIMES, Jan. 13, 2014, at A16, available at <http://www.nytimes.com/2014/01/14/us/new-mexico-judge-affirms-right-to-aid-in-dying.html>.

101. *Glucksberg*, 521 U.S. at 735 (1997).

equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”¹⁰² Not only do all people have the right to life, but the truth of that right is “self-evident.”¹⁰³ In the same way, the United Nations Universal Declaration of Human Rights declares that “everyone has the right to life” before it mentions any other right.¹⁰⁴ Because the right to life is something that Americans consider to be the most fundamental of rights, it makes sense that issues dealing with life and death, such as abortion and assisted suicide, would be some of the most hotly contested issues in America.¹⁰⁵

According to a 2011 Gallup Poll, assisted suicide and abortion are the two most divisive moral issues in America.¹⁰⁶ For doctor-assisted suicide, 45% of Americans found the practice morally acceptable, while 48% of Americans found the practice morally wrong, a difference of only three percentage points.¹⁰⁷ For abortion, 39% of Americans found the practice morally acceptable, while 51% of Americans found the practice morally wrong, a difference of twelve percentage points.¹⁰⁸ These three point and twelve point differences emphasize the divisive nature of moral issues in America dealing with the beginning and ending of life, as well as in what situations taking or preventing a life is appropriate.

The criminal law also reflects the great importance that the American people place on life, both through the common law and statutory requirements and punishments. Wrongfully causing the death of another person continues to be one of the most serious crimes that a person can commit. “The States—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime.”¹⁰⁹ Considerations and issues at play with assisted suicide do not just involve *a* crime, they involve *the* crime: homicide. Bans on assisted suicide are expressions of the States’ commitment to the pro-

102. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), available at http://www.archives.gov/exhibits/charters/declaration_transcript.html.

103. *Id.*

104. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/#atop>.

105. Lydia Saad, Doctor-Assisted Suicide Is Moral Issue Dividing Americans Most, GALLOPPOLITICS (May 31, 2011), <http://www.gallup.com/poll/147842/Doctor-Assisted-Suicide-Moral-Issue-Dividing-Americans.aspx>.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Glucksberg*, 521 U.S. at 710.

tection and preservation of all human life.¹¹⁰ “The life of those to whom life had become a burden—of those who [were] hopelessly diseased or fatally wounded—nay, even the lives of criminals condemned to death, [were] under the protection of law, equally as the lives of those who [were] in the full tide of life’s enjoyment, and anxious to continue to live.”¹¹¹ The drafters of the Model Penal Code observed that “the interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another, even though the act may be accomplished with the consent, or at the request, of the suicide victim.”¹¹² Being willing to take the life of another, even with that other person’s consent, is still the act of taking the life of another person, which is one of the cardinal prohibitions of any criminal code.

United States Supreme Court Precedent of Assisted Suicide

In the Supreme Court’s decision in *Washington v. Glucksberg*, the Court unanimously held that assisted suicide was not protected as a fundamental right under the Due Process Clause.¹¹³ The question presented to the court in *Glucksberg* was whether the state of Washington’s prohibition against causing or aiding a suicide violated the Fourteenth Amendment of the United States Constitution.¹¹⁴ The Court found that it did not.¹¹⁵ In so finding, the Court relied upon tradition and history as much as any textual reading of Washington’s statute and the Fourteenth Amendment, beginning its analysis by stating, “[i]t has always been a crime to assist a suicide in the State of Washington.”¹¹⁶ This becomes significant when determining whether the Fourteenth Amendment should be considered to protect assisted suicide as a right when it was punished as a crime when the Fourteenth Amendment was actually passed.¹¹⁷ The Court stated that “opposition to and condemnation of suicide—and, therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages.”¹¹⁸

110. *Id.* at 710 (citing *Cruzan v. Dir. Mo. Dep’t of Health*, 497 U.S. 261, 280 (1990)).

111. *Id.* (citing *Blackburn v. State*, 23 Ohio St. 146, 163 (1872)).

112. MODEL PENAL CODE § 210.5, cmt. 5 (Official Draft and Revised Comments 1980).

113. *Glucksberg*, 521 U.S. at 702.

114. *Id.* at 705-06.

115. *Id.* at 706.

116. *Id.*

117. *Id.* at 711.

118. *Id.*

Interestingly, the New Mexico State District Court in its recent opinion considered arguments that were essentially identical to those present to the United States Supreme Court, but it reached a different result.¹¹⁹ The New Mexico constitution appears to be modeled after the federal constitution; although it is not identical to the federal constitution, it contains a due process clause that is similar to the federal Due Process Clause. Stating that “this Court cannot envision a right more fundamental, more private or more integral to the liberty, safety and happiness of a New Mexican than the right of a competent, terminally ill patient to choose aid in dying,”¹²⁰ the Court declared “that the liberty, safety and happiness interest of a competent, terminally ill patient to choose aid in dying is a fundamental right under our New Mexico Constitution.”¹²¹ Though it remains to be seen whether this decision will stand,¹²² it is interesting to see this state judge apply essentially the same rule to essentially the same facts and reach the opposite conclusion from that of the United States Supreme Court.

Distinguishing Assisted Suicide from Refusing Unwanted Treatment

The United States Supreme Court has been careful to distinguish assisted suicide from the right to refuse unwanted medical treatment, even if that treatment could or would be lifesaving. As mentioned above, in *Vacco v. Quill* the Court stated that “the distinction between assisting suicide and withdrawing life-sustaining treatment, a distinction widely recognized and endorsed in the medical profession and in our legal traditions, is both important and logical; it is certainly rational.”¹²³ Many courts around the country have carefully distinguished refusing life-sustaining treatment from suicide.¹²⁴ In *Cruzan v. Dir., Missouri Dep’t of Health*, the Court stated “[t]he principle that a competent person has a constitutionally protected liberty interest in

119. *Morris v. Brandenburg*, D-202-CV-2012-02909, Second Judicial District Court, Bernalillo County, State of New Mexico (Albuquerque); Erik Eckholm, *New Mexico Judge Affirms Right to ‘Aid in Dying’*, N.Y. TIMES, Jan. 13, 2014, at A16, available at <http://www.nytimes.com/2014/01/14/us/new-mexico-judge-affirms-right-to-aid-in-dying.html>.

120. *Morris v. Brandenburg*, D-202-CV-2012-02909, Paragraph HH, Second Judicial District Court, Bernalillo County, State of New Mexico (Albuquerque).

121. *Id.*

122. Erik Eckholm, *New Mexico Judge Affirms Right to ‘Aid in Dying’*, N.Y. TIMES, Jan. 13, 2014, at A16, available at <http://www.nytimes.com/2014/01/14/us/new-mexico-judge-affirms-right-to-aid-in-dying.html> (stating “the attorney general’s office said it was studying the decision and whether to appeal to the State Supreme Court”).

123. *Vacco*, 521 U.S. at 800-01.

124. *Id.* at 803; see, e.g., *Fosmire v. Nicoleau*, 75 N.Y. 2d 218, 227, and n.2, 551 N.E. 2d 77, 82, and n.2 (1990) (“Merely declining medical . . . care is not considered a suicidal act”).

refusing unwanted medical treatment may be inferred from our prior decisions."¹²⁵ In *Glucksberg*, the Court reaffirms the protection of that same liberty interest, stating "[w]e have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment."¹²⁶

Thus, the Court is toeing a thin line with seemingly opposite rules on either side. On one side of the line, the Court identifies a "constitutionally protected liberty interest in refusing unwanted medical treatment,"¹²⁷ an interest upon which the State is not allowed to infringe on. On the other side of the line, the Court specifically holds that assisted suicide is *not* a constitutionally protected liberty interest.¹²⁸ That distinction, and which side of the line a person falls on, makes all the difference.

The Unqualified Interest in the Preservation of Human Life

The Court places significant weight on the state's interest in a person's life, even a person who no longer wants to live.¹²⁹ The Court says that the state has an "unqualified interest in the preservation of human life."¹³⁰ In fact, the state may properly decline to make any sort of judgment about the quality of life that a particular individual may enjoy; the State's strong interest is the same regardless of the quality of life.¹³¹ Banning assisted suicide "reflects and reinforces its policy that the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy, and that a seriously disabled person's suicidal impulses should be interpreted and treated the same way as anyone else's."¹³²

These declarations by the Court do not leave much room for nuance—referring to a state's interest in the preservation of human life as "unqualified" clearly grants the State its maximum power in that regard.¹³³ However, as has been discussed above, the Court has established a bright line rule by which that unqualified state interest must abide. As far as the cessation or removal of life-prolonging care, the

125. *Cruzan*, 497 U.S. at 278.

126. *Glucksberg*, 521 U.S. at 720 (citing *Cruzan*, 497 U.S. at 278).

127. *Cruzan*, 497 U.S. at 278.

128. *Glucksberg*, 521 U.S. at 702.

129. *Cruzan*, 497 U.S. at 282.

130. *Id.*

131. *Id.*

132. *Glucksberg*, 521 U.S. at 732.

133. *Cruzan*, 497 U.S. at 282.

State's interest, even though unqualified, must bow to the "constitutionally protected liberty interest in refusing unwanted medical treatment."¹³⁴ However, where assisted suicide is concerned, that same unqualified interest in the preservation of human life trumps whatever personal liberty interest may be present in a person's desire to commit assisted suicide.¹³⁵

Concepts in Abortion Law as Applied to the Law of Assisted Suicide

In *Glucksberg*, the Court tentatively connects the issue of assisted suicide to the issue of abortion, but only by reference to the issue of personal liberty interests. The Court distinguishes the liberty interests at play in assisted suicide from the interests at play in abortion, especially in relation to the following quote from *Planned Parenthood v. Casey*: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."¹³⁶ Proponents who identify assisted suicide as a fundamental right argued that the above quote should be read to apply to assisted suicide as well as to abortion. In fact, the 9th Circuit Court of Appeals in *Compassion in Dying v. State of Wash.* applied the liberty interest quote from *Casey* to the issue of assisted suicide, stating that "like the decision of whether or not to have an abortion, the decision how and when to die is one of the most intimate and personal choices a person may make in a lifetime, a choice 'central to personal dignity and autonomy.'"¹³⁷ However, the United States Supreme Court responded by stating: "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . . and *Casey* did not suggest otherwise."¹³⁸

Interestingly, that is where the Court in *Glucksberg* left the issue as far as connecting the issue of abortion to the issue of assisted suicide. It is almost as though the Court did not see the need to discuss the issue any further. The Court upheld Washington's ban on assisted suicide by applying *Cruzan's* state's right of "unqualified interest in

134. *Id.* at 274.

135. *Glucksberg*, 521 U.S. at 702.

136. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

137. *Compassion in Dying v. State of Wash.*, 79 F.3d 790, 813-14 (9th Cir. 1996) *rev'd sub nom. Glucksberg*, 521 U.S. at 702.

138. *Glucksberg*, 521 U.S. at 727-28.

the preservation of human life. . . .”¹³⁹ However, Justice Souter in his concurrence, recognized that abortion and assisted suicide were more interrelated than the Court seemed willing to admit.

As previously mentioned, Justice Souter stated that “[t]he analogies between the abortion cases and this [assisted suicide case] are several.”¹⁴⁰ He identified the “abortion cases” as being the cases in which “the most telling recognitions of the importance of bodily integrity and the concomitant tradition of medical assistance have occurred.”¹⁴¹ He further explained that

Like the decision to commit suicide, the decision to abort potential life can be made irresponsibly and under the influence of others, and yet the Court has held in the abortion cases that physicians are fit assistants. The woman’s right would have too often amounted to nothing more than a right to self-mutilation, without physician assistance in abortion, and the patient’s right will often be confined to crude methods of causing death, most shocking and painful to the decedent’s survivors, without a physician to assist in the suicide of dying.¹⁴²

Justice Souter goes on to argue that in the same way abortion falls within the accepted tradition of medical care in our society, so too can physician assisted suicide.¹⁴³

In the trial at which Dr. Kevorkian was finally found guilty of murder, his defense also tried to connect the liberty interests present in abortion to assisted suicide. The court there identified an important distinction between how the competing liberty and state’s interests could be weighed for two issues:

This Court agrees that attempting to equate abortion rights and their constitutional status with a right to have someone assist in a suicide confuses constitutional analysis with individual or moral notions of “human dignity.” In the case of abortion rights, the Supreme Court balanced society’s interest in protecting an inchoate life against the liberty interests of a woman to determine how she will live her life. Whether the Supreme Court has appropriately struck this delicate balance is not for this Court to say. But, the dis-

139. *Id.*; *Cruzan*, 497 U.S. at 282.

140. *Glucksberg*, 521 U.S. at 778.

141. *Id.* at 778-79 (Souter, J. concurring).

142. *Id.*

143. *Id.*

inction between this fulcrum of constitutional analysis seems clearly different and separate from that presented in cases such as this in which there is claimed a constitutional right to have assistance in killing oneself.¹⁴⁴

Here again, the court was willing to identify some connection between the issues of abortion and assisted suicide, but it decided that the liberty interests at stake involved different rights and different considerations. However, it seems that none of these courts expounded on the similarities or differences between the state's interest in the preservation and protection of life in the issue of abortion as compared to the issue of assisted suicide.

It is important to consider what the law truly values when the state has an interest in "life," and what that life actually includes. In *Glucksberg*, the proponents of assisted suicide conceded that "the State has a real interest in preserving the lives of those who can still contribute to society and enjoy life,"¹⁴⁵ yet argued that the State did not have a robust interest preserving the lives of patients who wished to commit assisted suicide. The implication seems to be that a person who is terminally ill, or even who just is interested in committing assisted suicide, cannot still contribute to society and cannot enjoy life. As previously mentioned, the Court stated in *Cruzan* and reaffirmed in *Glucksberg* that the states have an "unqualified interest in the preservation of human life."¹⁴⁶ The basis of that unqualified interest, however, does not seem particularly clear and was not linked by the Court to the valuation of life or potential life present in the abortion cases.

Impacts on the Elderly from Legalization of Assisted Suicide

It is important to remember that assisted suicide is an issue that primarily affects elderly people.¹⁴⁷ There are a number of concerns that have been expressed about the impact that the legalization of assisted suicide does or can have on the vulnerable elderly population. The Court in *Glucksberg* raises the concern that if physician-assisted suicide were made legal, many elderly patients could pursue assisted suicide as a method to spare their families the substantial financial

144. *Kevorkian v. Thompson*, 947 F. Supp. 1152, 1170 (E.D. Mich. 1997).

145. *Glucksberg*, 521 U.S. at 729-30 (quoting petitioner's brief).

146. *Glucksberg*, 521 U.S. at 746 (1997); *Cruzan*, 497 U.S. at 282.

147. See FED. STAT. OFFICE, CAUSE OF DEATH STATISTICS 2009: ASSISTED SUICIDE AND SUICIDE IN SWITZERLAND 2 (2012).

burden of end-of-life health-care costs.¹⁴⁸ Banning assisted suicide also serves state interests in “prohibiting intentional killing and preserving life; preventing suicide; maintaining physicians’ role as their patients’ healers; protecting vulnerable people from indifference, prejudice, and psychological and financial pressure to end their lives; and avoiding a possible slide towards euthanasia.”¹⁴⁹ The Court mentions all of these different factors as reasons that a state could choose to ban assisted suicide, and in doing so, demonstrates a belief that all of these factors could in fact result from the legalization of assisted suicide.¹⁵⁰

IV. Resolution and Recommendation

The connection exists between abortion and assisted suicide, recognized since classical times in the Hippocratic Oath: “I will neither give a deadly drug to anybody who asked for it, nor will I make a suggestion to this effect. Similarly I will not give to a woman an abortive remedy. In purity and holiness I will guard my life and my art.”¹⁵¹ This connection is not lost on the United States Supreme Court, and especially not lost on Justice Souter: “The analogies between the abortion cases and this [assisted suicide case] are several.”¹⁵² However, as the law currently stands, the Court has only really connected abortion and assisted suicide through its discussion of the personal liberty interest at stake and has seemingly ignored any meaningful connection in regards to the life, or potential life, at stake.¹⁵³

In *Roe v. Wade*, the United States Supreme Court famously identified a State interest in prenatal life, or potential life, strong enough to ban abortion at certain times:

“The State’s interest and general obligation to protect life then extends, it is argued, to prenatal life . . . [A] legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to life birth. In assessing the State’s interest, recognition may be given to the less rigid claim

148. *Glucksberg*, 521 U.S. at 732.

149. *Vacco*, 521 U.S. at 808-809.

150. *Id.*

151. Peter Tyson, *The Hippocratic Oath Today*, NOVA (Mar. 27, 2001), <http://www.pbs.org/wgbh/nova/body/hippocratic-oath-today.html> (quoting translation from LUDWIG EDELSTEIN, *THE HIPPOCRATIC OATH: TEXT, TRANSLATION, AND INTERPRETATION* (Johns Hopkins Press, 1943)).

152. *Glucksberg*, 521 U.S. 702, 778 (1997) (Souter, J. concurring).

153. See generally *Glucksberg*, 521 U.S. 702 (1997); *Cruzan*, 497 U.S. at 261.

that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone.”¹⁵⁴

Similarly, the Court referred to the “State’s important and legitimate interest in potential life,”¹⁵⁵ and stated that “State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion.”¹⁵⁶ The only interest identified as capable of superseding the State’s interest in that viable fetal life was the life and health of the mother, which is not only a competing interest of the mother, but an interest in which the State also has a stake. Though the holding in *Roe* has been modified by *Casey*, the State’s interest in the potential life of prenatal life still stands.¹⁵⁷

The question that needs to be asked, then, is that if the State has such a strong interest in protecting and preserving prenatal life, what does that say about the “unqualified interest in the preservation of human life”¹⁵⁸ that the Court has applied to its analysis of assisted suicide? Should, in fact, the State’s interest be so strong that it *cannot* be outweighed by personal liberty interests, even if a state has legalized assisted suicide? That is the conclusion the author would draw.

There certainly seems to be a disconnect between the legal treatment of abortion and the legal treatment of assisted suicide. As previously mentioned, forty-five percent of Americans found doctor-assisted suicide morally acceptable, while forty-eight percent of Americans found the practice morally wrong. As also previously mentioned, thirty-nine percent of Americans found abortion morally acceptable, while fifty-one percent of Americans found the practice morally wrong.¹⁵⁹ One would think by those numbers that abortion would be less available in the United States than assisted suicide.

154. *Roe v. Wade*, 410 U.S. 113, 150 (1973), *modified by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

155. *Id.*

156. *Id.*

157. *Casey*, 505 U.S. at 846 (stating that “the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.”).

158. *Cruzan*, 497 U.S. at 282.

159. Lydia Saad, *Doctor-Assisted Suicide Is Moral Issue Dividing Americans Most*, GALLOP POLITICS (May 31, 2011), <http://www.gallup.com/poll/147842/Doct-or-Assisted-Suicide-Moral-Issue-Dividing-Americans.aspx>.

However, assisted suicide is legal in four states,¹⁶⁰ while abortion is legal in all fifty states.¹⁶¹

States should recognize the importance and value of life, even the lives of terminally ill patients who do not want to live, and make or keep assisted suicide illegal. In doing so, the states can recognize their unqualified interest in the preservation of life, as well as the extensive historical backdrop onto which they approach the issue. Studies have shown that over ninety percent of people who die by suicide have clinical depression or another diagnosable mental disorder.¹⁶² The risk of assisting mentally ill patients in committing suicide is too great to be worth the preservation of any liberty interest a person may have as it relates to committing suicide.

In addition, states should recognize the robust power that the Court has told states that they have in protecting potential life, and argue that then the power states have in protecting actual life, including even those who want to die, is greater still. This is not a groundbreaking recommendation; the Court, in fact, already has stated that states have an unqualified interest in the protection of human life, based on general homicide law.¹⁶³ As previously mentioned, the Court's decisions on assisted suicide have mentioned the abortion cases in relation to the personal liberty issue. However, if states have compelling interests in protecting the potential life of a viable fetus, then the states' interests in protecting adult human life must be substantially greater still, even strong enough to supersede the desires of a person himself.

Of course, the Court already identified that States have an "unqualified interest in the preservation of human life,"¹⁶⁴ and, for that reason, found that states are fully within their rights to completely ban assisted suicide.¹⁶⁵ However, the Court should have in *Glucksberg*, and should in the future, connect the value of life arguments present in both issues of abortion and of assisted suicide. Both issues garner a large amount of public attention, and both issues can be polarizing, so it makes sense that the Court would prefer to keep the issues separate.

160. *State-by-State Guide to Physician-Assisted Suicide*, PROCON.ORG, <http://euthanasia.procon.org/view.resource.php?resourceID=000132> (last updated Apr. 27, 2014).

161. *See Casey*, 505 U.S. at 833.

162. *Recognizing the Warning Signs of Suicide*, WEBMD (July 22, 2012), <http://www.webmd.com/depression/guide/depression-recognizing-signs-of-suicide>.

163. *Cruzan*, 497 U.S. at 282.

164. *Id.*

165. *See generally* *Washington v. Glucksberg*, 521 U.S. 702 (1997).

However, in the interests of clarity, consistency, and valuable legal precedent, courts should more strongly connect the value of life considerations present in both issues of abortion and of assisted suicide.

V. Conclusion

Americans certainly are “engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide.”¹⁶⁶ That statement is as true today as when the Supreme Court said it fifteen years ago. That debate, though, is missing something. The public discourse about assisted suicide should be supplemented by the work that courts have already done in identifying states’ interests in preserving and protecting life as it relates to abortion.¹⁶⁷ This norm against suicide and assisted suicide has deep historical roots. American common law tradition, based in English common law tradition, has punished or otherwise disapproved of both suicide and assisting suicide for over seven hundred years.¹⁶⁸ There is no compelling reason to depart from this tradition. Again, assisted suicide is an issue that primarily affects the elderly,¹⁶⁹ which is often considered to be a particularly vulnerable demographic. States have such a strong interest in protecting life that they can protect a person’s life, even against his or her own will.¹⁷⁰ This interest, while supported by history, tradition, and general homicide law, is also a natural extension of the states’ interests in the protection of life identified in abortion law.¹⁷¹ As such, courts should more strongly connect the issues of a state’s interest in protecting and preserving life found in abortion with the same considerations in assisted suicide, even if that does not result in a different outcome with relation to the legality of assisted suicide.

166. *Id.* at 735.

167. *See generally Casey*, 505 U.S. at 833.

168. *Glucksberg*, 521 U.S. at 711.

169. FED’L STAT. OFFICE, CAUSE OF DEATH STATISTICS 2009: ASSISTED SUICIDE AND SUICIDE IN SWITZERLAND 2 (2012).

170. *Cruzan*, 497 U.S. at 321.

171. *See Casey*, 505 U.S. at 833.

