

## PHYSICIAN-ASSISTED SUICIDE AS A CONSTITUTIONAL RIGHT:

### GLUCKSBERG REVISITED

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**ABSTRACT:** “*Glucksberg*” is celebrating its 25<sup>th</sup> anniversary. In 1997, the Supreme Court held that a right to (physician) assisted suicide was not protected by the Due Process Clause of the Fourteenth Amendment. However, the Court was wrong – back then and today. This is not only because of US case-law and US states legislation, but also because of international developments all pointing towards legalizing assisted suicide.

**KEYWORDS:** Right to die; Suicide; Assisted suicide; Due process; USA; Germany.

#### INTRODUCTION

*“If one were serious about individual sovereignty, suicide, no matter what kind, should not be a crime. And if we care about our loved ones, it should not be a crime to help an individual who freely expresses the desire to take his or her own life (regardless of the reason, mistaken or otherwise).”<sup>2</sup>*

Mary, a fictitious name, is one of those individuals. She suffered from Lou Gehrig’s disease, a neurodegenerative condition without a cure. As the illness progressed, she was in constant pain and “felt trapped in a torture chamber of her own deteriorating body”,<sup>3</sup> from which she wanted to be freed. Meanwhile Brittany Maynard, who then became known as an advocate for the “right to die”, chose “to pass away with dignity in the face of [her] terminal illness, this terrible brain cancer that has taken so much from [her] ... but would have taken so much more”.<sup>4</sup> Last but not least, consider AIDS patient Smith, who, contrary to his request, and just as Mary, ultimately did not receive assistance: “[He] lingered in the hospital for weeks, his lower body so swollen from oozing Kaposi’s lesions that he could not

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<sup>2</sup> GIZA LOPES, DYING WITH DIGNITY – A LEGAL APPROACH TO ASSISTED DEATH XI-XII (2014).

<sup>3</sup> Myers v. Schneiderman, 85 N.E.3d 57, 67 (N.Y. 2017) (Rivera, J., concurring).

<sup>4</sup> HOWARD BALL, THE RIGHT TO DIE – A REFERENCE HANDBOOK 203 (2017).



walk, his genitals so swollen that he required a catheter to drain his bladder, his fingers gangrenous from clotted arteries.”<sup>5</sup>

### 1.1. THE ISSUE(S)

Whether to permit assisted suicide is, as Neil Gorsuch put it, “among the most contentious legal and public policy questions in America today.”<sup>6</sup> The Supreme Court answered the legal questions in the negative: Neither Washington’s prohibition against “caus[ing]” or “aid[ing]” a suicide<sup>7</sup> nor New York’s ban on assisting suicide<sup>8</sup> violated the Fourteenth Amendment of the United States Constitution. However, the Court stated: “Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.”<sup>9</sup> In fact, *Glucksberg* and *Vacco* were “only the beginning”.<sup>10</sup> As Antonin Scalia once said: “We have rejected, *for the time being*, a constitutional right to assisted suicide, but have reserved the right to revisit that issue.”<sup>11</sup> So, let us take some steps to push that forward.

### 1.2. OTHER FACETS OF A “RIGHT TO DIE”

Conceptually, the so-called “right to die”<sup>12</sup> encompasses at least four different rights: first the right to refuse unwanted medical (life-sustaining) treatment (passive euthanasia), second the right to voluntary active euthanasia, meaning intentional and direct killing upon someone’s request, third the right to commit

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<sup>5</sup> *Compassion in Dying v. State of Wash.*, 79 F.3d 790, 814 (9th Cir. 1996).

<sup>6</sup> NEIL M. GORSUCH, *THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA* 1 (2009). See also *Compassion in Dying v. State of Wash.*, 79 F.3d 790, 793 (9th Cir. 1996): This “controversy ... may touch more people more profoundly than any other issue the courts will face in the foreseeable future.” GIZA LOPES, *DYING WITH DIGNITY – A LEGAL APPROACH TO ASSISTED DEATH XIII* (2014): “problem of all problems”.

<sup>7</sup> *Washington v. Glucksberg*, 521 U.S. 702 (1997): on due process grounds.

<sup>8</sup> *Vacco v. Quill*, 521 U.S. 793 (1997): on equal protection grounds.

<sup>9</sup> *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

<sup>10</sup> MELVIN I. UROFSKY, *LETHAL JUDGMENTS – ASSISTED SUICIDE AND AMERICAN LAW* 5 (2000).

<sup>11</sup> ANTONIN SCALIA, *SCALIA SPEAKS – REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED* 265 (2017) (emphasis added).

<sup>12</sup> The name seems strange, indeed, LISA YOUNT, *RIGHT TO DIE AND EUTHANASIA* 3 (2007). “Death is the destiny of everything that lives. Nothing ever escapes it.” (JOHN SHELBY SPONG, *ETERNAL LIFE: A NEW VISION* 73 (2009)). Therefore, it would be far more accurate to call it e.g. the right to “determin[e] the time and manner of one’s death” (*Compassion in Dying v. State of Wash.*, 79 F.3d 790, 801 (9th Cir. 1996)).

suicide and fourth the right to assistance in doing so.<sup>13</sup> This paper focuses on the latter two. One question, however, also arises with regard to voluntary active euthanasia: Suppose somebody is neither able to provide the means of death nor to carry out the final death-causing act by him or herself, why should he or she not be able to leave this to a third person?

### 1.3. COURSE OF THIS STUDY

First, I turn to the terminology (2.). Subsequently, this paper deals with the legal status quo and how we got there (3.) – followed by a critical – mostly doctrinal – review of the case-law (4.). Section 5., then, leads us to the present: What has changed since *Glucksberg* and *Vacco* were decided – in the United States and beyond? This section employs the so-called comparative method by contrasting, inter alia, the US with the Canadian and the German status quo. Finally, this study ends with a conclusion (6.).

## 2. TERMINOLOGY: ASSISTED SUICIDE OR AID-IN-DYING?

“Assisted suicide” as a term, which has been used here, faces criticism. While some people argue that – based on its ordinary meaning – “suicide is still really suicide”,<sup>14</sup> others would rather call it “[medical] aid-in-dying”<sup>15</sup>. And, to be sure, there is some truth to that suggestion. As Justice Nelson has said, the term “suicide” is “pejorative in our society” and “suggests an act of self-destruction that historically has been condemned as sinful, immoral, or damning by many religions.”<sup>16</sup> Nevertheless, I prefer to speak of “assisted suicide”. First, this term is generally accepted and more widely used. Second it is more precise, since “medical aid-in-dying”, terminologically speaking, might not only include the prescribing of (life-ending) drugs but also their administration by the physician<sup>17</sup> – commonly known as voluntary active euthanasia.

## 3. STATUS QUO: GLUCKSBERG AND VACCO

This section asks what the law is. Whereas in *Cruzan v. Director* the Supreme Court had “assume[d] that the [US] Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition” (1.),<sup>18</sup>

<sup>13</sup> Cf. Yale Kamisar, *Can Glucksberg Survive Lawrence? Another Look at the End of Life and Personal Autonomy*, 106 Mich. L. Rev. 1453, 1475 (2008).

<sup>14</sup> Edward T. Mechmann & Alexis N. Carra, *Physician-Assisted Suicide and the New York State Constitution*, 81 Alb. L. Rev. 1337, 1342 (2017/2018).

<sup>15</sup> See e.g. *Myers v. Schneiderman*, 85 N.E.3d 57, 60 (N.Y. 2017).

<sup>16</sup> *Baxter v. State*, 224 P.3d 1211, 1226 (Mont. 2009) (Nelson, J., specially concurring).

<sup>17</sup> Cf. *Compassion in Dying v. State of Wash.*, 79 F.3d 790, 802 (9th Cir. 1996).

<sup>18</sup> *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 110 S. Ct. 2841, 2852 (1990).

the Court in *Glucksberg*<sup>19</sup> (2.) and *Vacco*<sup>20</sup> (3.) refused to take the same step for assisted suicide and, instead, invited the states to address it, which has not changed yet (4.).

### 3.1. BEFORE GLUCKSBERG

It all started with Karen Ann Quinlan, a 21-year-old New Jersey woman, who went into a coma after consuming a mixture of drugs and alcohol at a party in April 1975. Due to severe brain damage, she was in a persistent vegetative state shortly after – she would never regain consciousness; only the respirator, feeding tubes, etc. kept her alive.<sup>21</sup> This is why Karen’s parents asked the hospital where she was being treated to remove the respirator, but the hospital refused to do so. The Trial Court did not authorize the father to order the removal, the New Jersey Supreme Court on appeal, however, agreed with Karen’s father: “[The right of privacy, which the US Supreme Court found in *Griswold v. Connecticut*<sup>22</sup> is [presumably] broad enough to encompass a patient’s decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman’s decision to terminate pregnancy under certain conditions [as in *Roe v. Wade*<sup>23</sup>].”<sup>24</sup> This right “should not be discarded solely on the basis that her condition prevents her conscious exercise of the choice.” Instead, it would be up to her father “to render [his] best judgment ... as to whether she would exercise it in these circumstances.”<sup>25</sup>

In contrast to *Quinlan*, the US Supreme Court showed more restraint in *Cruzan*. Nancy Beth Cruzan was involved in an automobile accident which, similar to Karen Ann Quinlan, left her in a persistent vegetative state. She was sustained for several weeks by artificial feedings through an implanted gastronomy tube. When her parents attempted to terminate the life-support system, state hospital officials refused to do this, so that they had to take matters to court – eventually without success. In *Cruzan*, the majority merely *assumed* that “a competent person [has a liberty interest in refusing] ... lifesaving hydration and nutrition.”<sup>26</sup> Instead of a “generalized constitutional right of privacy” this issue is, according to the Court, “more properly analyzed in terms of a Fourteenth Amendment interest”.<sup>27</sup> The

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<sup>19</sup> *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>20</sup> *Vacco v. Quill*, 521 U.S. 793 (1997).

<sup>21</sup> See e.g. LISA YOUNT, *RIGHT TO DIE AND EUTHANASIA* 13 (2007).

<sup>22</sup> *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

<sup>23</sup> *Roe v. Wade*, 410 U.S. 113, 153 (1973).

<sup>24</sup> *Matter of Quinlan*, 355 A.2d 647, 663 (N.J. 1976).

<sup>25</sup> *Matter of Quinlan*, 355 A.2d 647, 664 (N.J. 1976).

<sup>26</sup> *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 110 S. Ct. 2841, 2852 (1990) (emphasis added).

<sup>27</sup> *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 110 S. Ct. 2841, 2851 (1990).

Court's statement is also limited to life-sustaining medical treatment to competent persons, since "[a]n incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment".<sup>28</sup> A surrogate's decision for a patient may, therefore, be made subject to a procedural safeguard (here: Missouri's clear and convincing evidence standard), which is more stringent than the (objective) best interest standard in *Quinlan*.

Justice Brennan, with whom Justices Marshall and Blackmun joined, disagreed: "Because I believe that Nancy Cruzan has a fundamental right to be free of unwanted artificial nutrition and hydration, which right is not outweighed by any interests of the State, and because I find that the improperly biased procedural obstacles imposed by the Missouri Supreme Court impermissibly burden that right, I respectfully dissent. Nancy Cruzan is entitled to choose to die with dignity."<sup>29</sup> Although Justice O'Connor, concurring, did not reach the conclusion that it cannot be a State's role to make the decision for an incompetent patient (instead of a surrogate like a family member),<sup>30</sup> she admitted that "the liberty guaranteed by the Due Process Clause must protect, *if it protects anything*, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water"<sup>31</sup>. Justice Stevens added: "Choices about death touch the core of liberty ... and indeed are essential incidents of the unalienable rights to life and liberty endowed us by our Creator."<sup>32</sup>

### 3.2. *GLUCKSBERG V. WASHINGTON*

Whereas the Supreme Court – following its own counsel that it may be wiser "not to attempt, by any general statement, to cover every possible phase of the

<sup>28</sup> Cruzan by Cruzan v. Dir., Missouri Dep't of Health, 110 S. Ct. 2841, 2852 (1990).

<sup>29</sup> Cruzan by Cruzan v. Dir., Missouri Dep't of Health, 110 S. Ct. 2841, 2864 (1990) (Brennan, J., dissenting).

<sup>30</sup> Cruzan by Cruzan v. Dir., Missouri Dep't of Health, 110 S. Ct. 2841, 2877 (1990) (Brennan, J., dissenting). See also Cruzan by Cruzan v. Dir., Missouri Dep't of Health, 110 S. Ct. 2841, 2889 (1990) (Stevens, J., dissenting), who disagrees with the majority in giving "great deference to the policy choice made by the state legislature". He also quotes Judge Blackmar's dissenting opinion for the Missouri Supreme Court by saying: "My disagreement with the principal opinion lies fundamentally in its emphasis on the interest of and the role of the state ..." (Cruzan by Cruzan v. Dir., Missouri Dep't of Health, 110 S. Ct. 2841, 2881 (1990) (Stevens, J., dissenting)).

<sup>31</sup> Cruzan by Cruzan v. Dir., Missouri Dep't of Health, 110 S. Ct. 2841, 2857 (1990) (O'Connor, J., concurring) (emphasis added). She went on by saying that a duty to give effect to the decisions of a surrogate decisionmaker "may well be constitutionally required to protect the patient's liberty interest".

<sup>32</sup> Cruzan by Cruzan v. Dir., Missouri Dep't of Health, 110 S. Ct. 2841, 2885 (1990) (Stevens, J., dissenting). See also Cruzan by Cruzan v. Dir., Missouri Dep't of Health, 110 S. Ct. 2841, 2868 (1990) (Brennan, J., dissenting): "Dying is personal. And it is profound."



subject”<sup>33</sup> (here: the “right to die”) – initially only dealt with the right to refuse unwanted medical treatment, the Court finally had to address suicide and assisted suicide in *Glucksberg*.

A) OPINION OF THE COURT

The Supreme Court in 1997 held that Washington’s prohibition against assisted-suicide<sup>34</sup> did not violate the Fourteenth Amendment’s Due Process Clause. In light of the Nation’s history, which, according to the Court, has generally disapproved of both suicide and assisted suicide,<sup>35</sup> the right to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. In this respect, *Cruzan v. Director* is, in the Court’s view, different: The right to refuse unwanted medical treatment is deeply rooted in the Nation’s history and tradition. “The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection.”<sup>36</sup> Respondents could not rely on *Casey*<sup>37</sup> either: “That many of the rights and liberties protected by the Due Process Clause [inter alia, relating to marriage, procreation, contraception, family relationships, child bearing, and education<sup>38</sup>] sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected.”<sup>39</sup>

In the absence of a fundamental liberty interest protected by the Due Process Clause the Supreme Court applied the rational basis test requiring that legislation be only rationally related to a legitimate governmental interest. In the Court’s view, this requirement is met here. These interests include the preservation of human life; preventing suicide as a serious public-health problem, especially among the young, the elderly, and those suffering from mental disorders; protecting the integrity and ethics of the medical profession; protecting vulnerable groups, including the poor, the elderly, and disabled persons from abuse, neglect, and mistakes; and avoiding

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<sup>33</sup> *Cruzan by Cruzan v. Dir., Missouri Dep’t of Health*, 110 S. Ct. 2841, 2851 (1990).

<sup>34</sup> At that time, Washington Law provided: “A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide.” Wash. Rev. Code § 9A.36.060(1) (1994). “Promoting a suicide attempt” is a felony, punishable by up to five years’ imprisonment and up to a \$10,000 fine. §§ 9A.36.060(2) and 9A.20.021(1)(c).

<sup>35</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 711-718 (1997) for the common law and American States’ statutes prohibiting assisted suicide.

<sup>36</sup> *Washington v. Glucksberg*, 521 U.S. 702, 725 (1997).

<sup>37</sup> *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833 (1992).

<sup>38</sup> *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992).

<sup>39</sup> *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997).

a future movement toward voluntary and perhaps even involuntary euthanasia.<sup>40</sup> The Court further stated: “We need not weigh exactly the relative strengths of these various interests. They are unquestionably important and legitimate, and Washington’s ban on assisted suicide is at least reasonably related to their promotion and protection.”<sup>41</sup>

B) *CONCURRING OPINIONS*

Although the Supreme Court’s decision was unanimous, its ruling brought out areas of agreement and disagreement among the justices. First, they all agreed that there is no generalized “right to commit suicide with another’s assistance”<sup>42, 43</sup> Justice Breyer, however, disagreed with this formulation from the outset. He would rather speak of “a right to die with dignity” – a formulation “for which our legal tradition may provide greater support”.<sup>44</sup> Furthermore, there is disagreement on how to employ the substantive-due-process analysis.<sup>45</sup> Pointing to *Cruzan v. Director*, Justice Stevens emphasized that the right to refuse treatment was not just a common-law rule. “Rather, this right is an aspect of a far broader and more basic concept of freedom ... Whatever the outer limits of the [substantive sphere of liberty that supported the Cruzan family’s decision to hasten Nancy’s death] may be, it definitely includes protection for matters ‘central to personal dignity and autonomy’.”<sup>46</sup>

Second, all Justices recognized that there are countervailing interests in play. As Justice Stevens, quoting John Donne, put it: “No man is an island”.<sup>47</sup> What differs are the characterizations of these interests and their significance. Justice Stevens, for instance, reflected upon the physician’s role as follows: “[F]or some patients, it would be a physician’s refusal to dispense medication to ease their suffering and make their death tolerable and dignified that would be inconsistent with the

<sup>40</sup> Cf. *Washington v. Glucksberg*, 521 U.S. 702, 728-735 (1997).

<sup>41</sup> *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

<sup>42</sup> *Washington v. Glucksberg*, 521 U.S. 702, 724 (1997).

<sup>43</sup> *Washington v. Glucksberg*, 521 U.S. 702, 740 (1997) (Stevens, J., concurring in judgments): “History and tradition provide ample support for refusing to recognize an open-ended constitutional right to commit suicide.”; *Washington v. Glucksberg*, 521 U.S. 702, 736 (1997) (O’Connor, J., concurring): “I join the Court’s opinions because I agree that there is no generalized right to ‘commit suicide’.”

<sup>44</sup> *Washington v. Glucksberg*, 521 U.S. 702, 790 (1997) (Breyer, J., concurring in judgment).

<sup>45</sup> *Washington v. Glucksberg*, 521 U.S. 702, 752 (1997) (Souter, J., concurring in judgment) would ask “whether [Washington’s] statute sets up one of those ‘arbitrary impositions’ or ‘purposeless restraints’ at odds with the Due Process Clause of the Fourteenth Amendment.”

<sup>46</sup> *Washington v. Glucksberg*, 521 U.S. 702, 743-744 (1997) (Stevens, J., concurring in judgments).

<sup>47</sup> *Washington v. Glucksberg*, 521 U.S. 702, 741 (1997) (Stevens, J., concurring in judgments).

healing role.”<sup>48</sup> A line could also be drawn between people who are terminally ill and suffer constant and severe pain, and those who are not: “[S]ome individuals who no longer have the option of deciding whether to live or to die because they are already on the threshold of death have a constitutionally protected interest that may outweigh the State’s interest in preserving life at all costs.”<sup>49</sup> To be sure, even the opinion of the Court did not absolutely foreclose the possibility that applications of Washington’s statute in such cases might be unconstitutional. However, the bar for that would be higher than Stevens’: Since there is no fundamental liberty interest protected by the Due Process Clause, “such a claim would have to be quite different from the ones advanced by respondents here.”<sup>50</sup> According to Justice Souter, timing is a critical factor: “The day may come when we can say with some assurance which side is right, but for now it is the substantiality of the factual disagreement [for instance, on whether there is a future movement toward euthanasia], and the alternatives for resolving it, that matter. They are, for me, dispositive of the due process claim at this time.”<sup>51</sup> This is, essentially, about judicial restraint: “[F]acts necessary to resolve the controversy are not readily ascertainable through the judicial process; but they are more readily subject to discovery through legislative factfinding and experimentation.”<sup>52</sup> Therefore, all Justices agreed that it is the state legislatures turn to address assisted suicide and its legality.<sup>53</sup>

### 3.3. *VACCO v. QUILL*

In *Vacco v. Quill* (1997) the Supreme Court held that New York’s prohibition on assisting suicide<sup>54</sup> did not violate the Fourteenth Amendment’s Equal Protection Clause. Facially, neither the prohibition against assisted-suicide nor the law permitting patients to reject medical treatment treats anyone differently from anyone else. “Everyone, regardless of physical condition, is entitled, if competent, to refuse unwanted lifesaving medical treatment; no one is permitted to assist a

<sup>48</sup> *Washington v. Glucksberg*, 521 U.S. 702, 748 (1997) (Stevens, J., concurring in judgments).

<sup>49</sup> *Washington v. Glucksberg*, 521 U.S. 702, 745 (1997) (Stevens, J., concurring in judgments).

<sup>50</sup> *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

<sup>51</sup> *Washington v. Glucksberg*, 521 U.S. 702, 786 (1997) (Souter, J., concurring in judgment).

<sup>52</sup> *Washington v. Glucksberg*, 521 U.S. 702, 786-787 (1997) (Souter, J., concurring in judgment).

<sup>53</sup> See e.g. *Washington v. Glucksberg*, 521 U.S. 702, 735-736 (1997); *Washington v. Glucksberg*, 521 U.S. 702, 737 (1997) (O’Connor, J., concurring); *Washington v. Glucksberg*, 521 U.S. 702, 789 (1997) (Souter, J., concurring in judgment).

<sup>54</sup> New York Penal Law § 125.15 (McKinney 1987) provides: “A person is guilty of manslaughter in the second degree when . . . (3) He intentionally causes or aids another person to commit suicide. Manslaughter in the second degree is a class C felony.”



suicide.”<sup>55</sup> In particular, the refusal of life-sustaining medical treatment is not “essentially the same thing” as physician-assisted suicide as respondents claim. The distinction between “letting a patient die” and “making that patient die”<sup>56</sup>, “a distinction widely recognized and endorsed in the medical profession and in our legal traditions, is both important and logical”.<sup>57</sup> It also meets the basic legal principles of causation and intent. “The line between the two may not [always] be clear, but certainty is not required, even were it possible. Logic and contemporary practice support New York’s judgment that the two acts are different, and New York may therefore ... treat them differently.”<sup>58</sup> Justice Stevens, however, was not convinced that there will be a significant difference between the two situations *in all cases*: “A doctor who fails to administer medical treatment to one who is dying from a disease could be doing so with an intent to harm or kill that patient. Conversely, a doctor who prescribes lethal medication does not necessarily intend the patient’s death – rather that doctor may seek simply to ease the patient’s suffering and to comply with her wishes.”<sup>59</sup> Although the differences in causation and intent would still support the Court’s rejection of the respondents’ facial challenge, these distinctions may still not be applicable to particular patients and their doctors.<sup>60</sup>

### 3.4. THE AFTERMATH

The consequence of the Supreme Court’s rulings in *Glucksberg v. Washington* and *Vacco v. Quill* was to return the issue of assistance in committing suicide to the states and their political processes.<sup>61</sup> Thus, on the one hand, states have the (constitutional) power to prohibit physician-assisted suicide. On the other hand, they can legitimize it through new legislation.<sup>62</sup> The State of Oregon was the first to do so with its “Death With Dignity Act”<sup>63</sup>, which went into effect in October 1997 after it was challenged in court. In 2001, then-U.S. Attorney General John Ashcroft issued an interpretive rule<sup>64</sup> to prevent the “Death With Dignity Act” from being implemented; in particular, it determined that assisting suicide is not a “legitimate medical purpose”, and that prescribing, dispensing, or administering federally controlled substances to assist suicide violates the Controlled Substances Act.

<sup>55</sup> *Vacco v. Quill*, 521 U.S. 793, 800 (1997) (emphasis removed).

<sup>56</sup> *Vacco v. Quill*, 521 U.S. 793, 807 (1997).

<sup>57</sup> *Vacco v. Quill*, 521 U.S. 793, 800-801 (1997).

<sup>58</sup> *Vacco v. Quill*, 521 U.S. 793, 808 (1997).

<sup>59</sup> *Washington v. Glucksberg*, 521 U.S. 702, 750-751 (1997) (Stevens, J., concurring in judgments).

<sup>60</sup> *Washington v. Glucksberg*, 521 U.S. 702, 751 (1997) (Stevens, J., concurring in judgments).

<sup>61</sup> Neil M. Gorsuch, *The Future of Assisted Suicide and Euthanasia* 17 (2009).

<sup>62</sup> Howard Ball, *At Liberty to Die* 109 (2012).

<sup>63</sup> ORS 127.800–995. For other state laws see below 5.2. A.

<sup>64</sup> 66 Fed. Reg. 56,607.

Eventually, however, the Supreme Court allowed the “Death With Dignity Act” to continue. In *Gonzales v. Oregon* (2006) it held that the Controlled Substances Act did not authorize the Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, as authorized by Oregon’s “Death With Dignity Act”.<sup>65</sup> “The importance of the issue of physician-assisted suicide, which has been the subject of an ‘earnest and profound debate’ across the country, makes the oblique form of the claimed delegation all the more suspect ... This would occur ... despite the statute’s express limitation of the Attorney General’s authority to registration and control ... and despite the statutory purposes to combat drug abuse and prevent illicit drug trafficking.”<sup>66</sup> In addition to that, the principles of our federal system “belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States’ police power [protecting the ‘lives, limbs, health, comfort and quiet of all persons’<sup>67</sup>].”<sup>68</sup>

#### 4. WHY THE US SUPREME COURT WAS (PARTLY) WRONG IN 1997

*Glucksberg v. Washington* and *Vacco v. Quill* “w[ere] not correct when [they were] decided, and [they are] not correct today”<sup>69</sup>. This section is about the legal situation in 1997: Even then, the Court’s substantive-due-process analysis had its weaknesses (1.); the same is true of the equal protection inquiry (2.). Although there are state interests that oppose assisted suicide (3.), they “do not have the same force in all cases”<sup>70</sup>.

##### 4.1. SUBSTANTIVE DUE PROCESS

For now, let us assume that *Glucksberg’s* method of substantive-due-process analysis, was, in principle, correct: “First, ... the Due Process Clause specially protects those fundamental rights and liberties which are, objectively ‘deeply rooted in this Nation’s history and tradition’ ... and ‘implicit in the concept of ordered liberty’ such that ‘neither liberty nor justice would exist if they were sacrificed’ ... Second, we have required ... a ‘careful description’ of the asserted fundamental liberty interest.”<sup>71</sup> The latter, however, does not require the issue to be extremely narrow. *Glucksberg* was, contrary to Chief Justice Rehnquist, not merely about assisted suicide but more generally about the “right to die”. As Kathryn Tucker put it during the oral arguments: “These ... patients want a peaceful death,

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<sup>65</sup> *Gonzales v. Oregon*, 126 S. Ct. 904 (2006).

<sup>66</sup> *Gonzales v. Oregon*, 126 S. Ct. 904, 921-922 (2006).

<sup>67</sup> *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996).

<sup>68</sup> *Gonzales v. Oregon*, 126 S. Ct. 904, 925 (2006).

<sup>69</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) with regard to *Bowers v. Hardwick*.

<sup>70</sup> *Washington v. Glucksberg*, 521 U.S. 702, 745-746 (1997) (Stevens, J., concurring in judgments).

<sup>71</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997).

... and they want a dignified death. And, *in order to access that kind of death* they need the assistance of their physician.”<sup>72</sup> The starting point of this inquiry is, therefore, whether the Court’s case-law (A), the Nation’s history and tradition (B) and/or the significance of a “right to die” by itself (C) lead to the conclusion that it has to be protected as a fundamental liberty interest.

#### A) PRECEDENTS

*Glucksberg* would have been along the same lines as *Cruzan*. There, the Court assumed, and – as Chief Justice Rehnquist admitted – “strongly suggested” that the Due Process Clause protects the right to refuse unwanted (lifesaving) medical treatment and thus hasten death.<sup>73</sup> It is true that there is a long legal tradition protecting the decision to refuse unwanted medical treatment, and that this may be less evident for assisted suicide<sup>74</sup>. This argument, nonetheless, fails to recognize that both phenomena are two sides of the same coin – the right to a self-determined death. Yes, the right in *Cruzan* “was not simply deduced from abstract concepts of personal autonomy”,<sup>75</sup> yet it cannot be detached from it. That is why the *Cruzan* majority emphasized the “personal element” of an individual’s choice between life and death<sup>76</sup> without limiting it to the decision to refuse unwanted medical treatment. And, as the right to refuse medical treatment is a consequence of a person’s right to resist unwanted bodily invasions (*Cruzan*), the right to assisted suicide (*Glucksberg*) has notions of bodily integrity<sup>77</sup>.

Furthermore, *Glucksberg* was very much like *Casey*. The Court of Appeals got it right: “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.’”<sup>78</sup> *Yale Kamisar* agreed, arguing that the decision to end one’s life (with another’s

<sup>72</sup> See Howard Ball, *The Supreme Court in the Intimate Lives of Americans* 190 (2002) (emphasis added).

<sup>73</sup> Howard Ball, *The Supreme Court in the Intimate Lives of Americans* 171 (2002): “triumph of self-determination”. Neil M. Gorsuch, *The Future of Assisted Suicide and Euthanasia* 83 (2009) disagrees with that premise: “The Supreme Court [in *Cruzan*] simply did not discuss or endorse any generic constitutional interest in hastening death ... .”

<sup>74</sup> See below 4.1. B.

<sup>75</sup> *Washington v. Glucksberg*, 521 U.S. 702, 725 (1997).

<sup>76</sup> *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 110 S. Ct. 2841, 2852-2853 (1990).

<sup>77</sup> See only Howard Ball, *At Liberty to Die* 92 (2012).

<sup>78</sup> *Compassion in Dying v. State of Wash.*, 79 F.3d 790, 813-814 (9th Cir. 1996). See also *Compassion in Dying v. State of Wash.*, 850 F. Supp. 1454, 1460 (W.D. Wash. 1994): “This court concludes that the suffering of a terminally ill person cannot be deemed any less intimate or personal, or any less deserving of protection from unwarranted governmental interference, than that of a pregnant woman.”

assistance) “would seem to fit some of the [*Casey*-]wording ... better than any decision one can imagine”.<sup>79</sup> *Casey* did, indeed, suggest that “all important intimate, and personal decisions” are protected by the Due Process Clause: “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.”<sup>80</sup> It does not matter that the State has a legitimate interest in discouraging abortion, as it might have with respect to committing suicide<sup>81</sup>. As Justice Souter said: Both decisions – the one to commit suicide, and the one to abort potential life – can be made irresponsibly and under the influence of others. Nevertheless, the Court held that physicians are appropriate abortion-assistants. And, he added: “Without physician assistance in abortion, the woman’s right would have too often amounted to nothing more than a right to self-mutilation, and without a physician to assist in the suicide of the dying, the patient’s right will often be confined to crude methods of causing death ...”<sup>82</sup>

B) ANALYSIS OF HISTORY AND TRADITION

What about the Nation’s history and tradition? Yes, self-determination on matters of life and death has in fact a long history. As Justice Breyer put it: One might find “a ‘right to die with dignity’ by examining the protection the law has provided for related, but not identical, interests relating to personal dignity, medical treatment, and freedom from state-inflicted pain.”<sup>83</sup> The right to refuse unwanted medical treatment is just one example: Just shortly after the enactment of the Fourteenth Amendment of the US Constitution the Supreme Court made the following observation: “No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”<sup>84</sup>

Even if one puts the focus on suicide and assisted suicide, the situation is far less from clear than *Glucksberg* suggested. It is true that in English common law<sup>85</sup> –

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<sup>79</sup> Yale Kamisar, *Can Glucksberg Survive Lawrence? Another Look at the End of Life and Personal Autonomy*, 106 Mich. L. Rev. 1453, 1459 (2008).

<sup>80</sup> *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992). Critical e.g. ANTONIN SCALIA, *SCALIA SPEAKS – REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED* 236 (2017).

<sup>81</sup> See below 4.3.

<sup>82</sup> *Washington v. Glucksberg*, 521 U.S. 702, 778 (1997) (Souter, J., concurring in judgments).

<sup>83</sup> *Washington v. Glucksberg*, 521 U.S. 702, 791 (1997) (Breyer, J., concurring in judgments).

<sup>84</sup> *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (emphasis added).

<sup>85</sup> See for ancient (Greek and Roman) attitudes: *Compassion in Dying v. State of Wash.*, 79 F.3d 790, 806-807 (9th Cir. 1996); Melvin I. Urofsky, *Lethal Judgments – Assisted Suicide and American Law* 7-8 (2000).

influenced by early Christian history – suicide was a crime.<sup>86</sup> Though Henry de Bracton stated a lesser penalty for the ones who deliberately kill themselves “in weariness of life or because [they are] unwilling to endure further bodily pain”, all acts of intentional self-destruction were condemned.<sup>87</sup> Initially, most, but not all, of the American colonies followed the common law approach. American courts, however, usually did not (if at all!) impose these harsh penalties,<sup>88</sup> before they were, starting with the 18<sup>th</sup> century, completely abolished<sup>89</sup>. Assisted suicide on the other hand was punishable under English common law only under certain conditions. A so-called “aider” had to be at the scene of the suicide to be criminally prosecuted, whereas an “accessory before the fact” could only be punished if the “principal” – the person who committed the suicide – had been convicted.<sup>90</sup> Some US states, notwithstanding the abolition of suicides as crimes, took this as an opportunity to enact statutes penalizing assisted suicide; nine of them had done so by 1868<sup>91</sup>. Of course, assisted suicides still occurred. But again, there is very limited evidence of court convictions throughout the 19<sup>th</sup> and 20<sup>th</sup> century<sup>92</sup>.

### C) CONCEPT OF ORDERED LIBERTY

Irrespective of whether historic recognition as a legal right is the main point of substantive-due-process analysis, *Glucksberg* also acknowledged that rights and liberties, which are “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed,” might be considered

<sup>86</sup> See William E. Mikell, *Is Suicide Murder*, 3 Colum. L. Rev. 379 (1903); *Quill v. Vacco*, 80 F.3d 716, 732-733 (2d Cir. 1996). For Christian history see Neil M. Gorsuch, *The Future of Assisted Suicide and Euthanasia* 25-28 (2009).

<sup>87</sup> Neil M. Gorsuch, *The Future of Assisted Suicide and Euthanasia* 28-29 (2009) with reference to George E. Woodbine, *Bracton On the Laws and Customs of England* 424 (1968).

<sup>88</sup> See only *Hill v. Nicodemus*, 755 F. Supp. 692 (W.D. Va. 1991).

<sup>89</sup> Cf. *Washington v. Glucksberg*, 521 U.S. 702, 712-713 (1997) pointing out that this “movement ... did not represent an acceptance of suicide; [it] rather... reflected the growing consensus that it was unfair to punish the suicide’s family for his wrongdoing.” Others, however, argue that “decriminalization [of suicide] was a recognition that the principle of self-determination should in that case prevail over the sanctity of life.” (*Airedale N.H.S. Trust v. Bland*, [1993] A.C. 789, 827).

<sup>90</sup> Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, 23 Harv. J. L. & Pub. Pol’y 599, 636 f. (2000).

<sup>91</sup> *Compassion in Dying v. State of Wash.*, 79 F.3d 790, 809 (9th Cir. 1996). Unclear is how many of the other states prohibited assisted suicide based on common law – see only Thomas J. Marzen, Mary K. O’Dowd, Daniel Crone & Thomas J. Balch, *Suicide: A Constitutional Right?*, 24 Duq. L. Rev. 1, 75-76 (1985).

<sup>92</sup> See e.g. *Commonwealth v. Bowen*, 13 Mass. 356, 360-361 (Mass. 1816); *Commonwealth v. Hicks*, 118 Ky. 637, 82 So. 265 (Ky. 1904).



fundamental<sup>93</sup>. Unfortunately, the Supreme Court left it at that and did not engage in this discussion any further; as *Casey* came up the Court instead relied on history and tradition once more<sup>94</sup>. In doing so, the Court ignored the interest in dignity: “Aid in dying ... is most fundamentally and quintessentially a matter of human dignity.”<sup>95</sup> *Prima facie*, each person’s life belongs to that person alone; so, this is about a person’s decisional autonomy. In addition to that, this is about the freedom “not to be a creature of the state but to have some voice in the question of how much pain one is really going through.”<sup>96</sup> Dying patients can, of course, obtain palliative care but this, as Justice Stevens put it, “cannot alleviate all pain and suffering”<sup>97</sup>. Especially for people like these, committing suicide – and assistance in doing so – can be a last resort. Not to grant them a corresponding right, and force them “to endure the humiliation and degradation of an agonizing death from an incurable illness”<sup>98</sup>, therefore, violates basic human values, which are, in the Supreme Court’s words, “implicit in the concept of ordered liberty”.

This is also why the Court cannot rely on judicial restraint. Chief Justice Rehnquist correctly emphasized that there is an ongoing political debate on whether to legalize assisted suicide – in the States and internationally.<sup>99</sup> And, again, he closed by stating: “Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.”<sup>100</sup> At the heart of this seems to be the concern that history could repeat itself: “Many scholars and judges believe that the Court in *Roe* fomented such a backlash by intervening so aggressively on the abortion issue in 1973.”<sup>101</sup> Notions of judicial self-restraint can also be found elsewhere in *Glucksberg*. Justice Souter, for instance, pointed out that there is a factual controversy about progression from assisted suicide to euthanasia, which “is not open to a judicial resolution with any substantial degree of assurance at this time.”<sup>102</sup> Instead, it would be up to the legislatures to obtain the facts necessary for a judgment about

<sup>93</sup> *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) with reference to *Palko v. State of Connecticut*, 302 U.S. 319, 325-326 (1937).

<sup>94</sup> Cf. *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997).

<sup>95</sup> *Baxter v. State*, 224 P.3d 1211, 1224 (Mont. 2009) (Nelson, J., specially concurring).

<sup>96</sup> Melvin I. Urofsky, *Lethal Judgments – Assisted Suicide and American Law* 138 (2000) with reference to Laurence H. Tribe.

<sup>97</sup> *Washington v. Glucksberg*, 521 U.S. 702, 747 (1997) (Stevens, J., concurring in judgments).

<sup>98</sup> *Baxter v. State*, 224 P.3d 1211, 1231 (Mont. 2009) (Nelson, J., specially concurring).

<sup>99</sup> Cf. *Washington v. Glucksberg*, 521 U.S. 702, 716-718 (1997).

<sup>100</sup> *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

<sup>101</sup> Michael J. Klarman, *Windsor and Brown: Marriage Equality and Racial Equality*, 127 Harv. L. Rev. 127, 148 (2013).

<sup>102</sup> *Washington v. Glucksberg*, 521 U.S. 702, 787 (1997) (Souter, J., concurring in judgments).



the present controversy.<sup>103</sup> Justice O'Connor, eventually, saw "no reason to think the democratic process will not strike the proper balance between the interests of [those] who seek to end their suffering and the State's interests in protecting [life either]." And, if the Court acknowledged a fundamental liberty interest, she went on, the federal courts would face "a flow of cases through the court system for heaven knows how long [since death] affects all of us."<sup>104</sup> All of this is hardly convincing, however. Leaving aside that conservative Justices usually put less emphasis on the democratic dialogue with regard to issues they feel strongly about (like race-based affirmative action<sup>105</sup>, gun control<sup>106</sup>, campaign finance reform<sup>107</sup>, etc.), the Supreme Court "ha[d] never left to the legislative process the protection of vital liberties"<sup>108</sup> as the one at issue here arising from the interest in human dignity. When there is a violation of those rights, "the Constitution requires redress by the courts," notwithstanding the importance of the democratic principle.<sup>109</sup> This is true "even when protecting individual rights affects issues of the utmost importance and sensitivity."<sup>110</sup> Yes, the controversy before us requires us to be careful when considering a ("new") constitutional right to assistance in committing suicide.<sup>111</sup> Yet, and again, it cannot be the proper role of the state to make impossible the exercise of an important liberty interest like the one at stake here.<sup>112</sup>

<sup>103</sup> *Washington v. Glucksberg*, 521 U.S. 702, 788 (1997) (Souter, J., concurring in judgments).

<sup>104</sup> See Howard Ball, *At Liberty to Die* 92 (2012) quoting Justice O'Connor during oral proceedings.

<sup>105</sup> See <https://wskg.org/supreme-court-and-education/>, Nov. 16, 2022, 9:33 PM regarding two pending cases: *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (Docket 20-1199) and *Students for Fair Admissions, Inc. v. University of North Carolina* (Docket 21-707).

<sup>106</sup> Cf. *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. \_\_\_\_ (2022).

<sup>107</sup> Cf. *Citizens United, Appellant v. Federal Election Commission*, 558 U.S. 310 (2010).

<sup>108</sup> Howard Ball, *At Liberty to Die* 92 (2012) quoting Laurence H. Tribe during oral proceedings.

<sup>109</sup> *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN)*, 134 S.Ct. 1623, 1637 (2014). See also *Myers v. Schneiderman*, 85 N.E.3d 57, 77 (N.Y. 2017) (Rivera, J., concurring); *Morris v. Brandenburg*, 356 P.3d 564, 616 (N.M. App. 2015) (Vanzi, J., dissenting): "A ruling that [the New Mexico statute making 'assisting suicide' a fourth degree felony] is unconstitutional as applied to aid in dying reflects neither ignorance nor disregard of a quintessential legislative function. It would not violate the separation of powers. It would simply be an exercise of judicial authority and responsibility that is a founding principle of our system of government. This is what courts do."

<sup>110</sup> *Obergefell v. Hodges*, 135 S.Ct. 2584, 2605 (2015). See also 5.1. A. AA.

<sup>111</sup> Cf. only *Morris v. Brandenburg*, 356 P.3d 564, 576 (N.M. App. 2015).

<sup>112</sup> Cf. *Compassion in Dying v. State of Wash.*, 79 F.3d 790, 800, 833 (9th Cir. 1996) (for the right to obtain an abortion).

#### 4.2. EQUAL PROTECTION

*Vacco v. Quill* is, in my opinion, based on at least two misconceptions. First, the Supreme Court read the Equal Protection Clause of the Fourteenth Amendment too narrowly. To be sure, neither the prohibition against assisted-suicide nor the law permitting patients to reject medical treatment treats anyone differently from anyone else.<sup>113</sup> This formalist conception, however, would utterly annihilate the equal protection clause's force at all. The question should, therefore, have rather been whether the application of the law results in a legal disadvantage for a certain group of persons. Here, New York law distinguishes within the group of all competent but terminally ill patients as to the manner in which they wish to hasten their death. That leads us to the second point: The distinction between "letting a patient die" and "making that patient die", cannot be made only on the basis of the legal principles of causation and intent. In passive euthanasia, death does not always occur because of the patient's "natural" illness, but is often artificially induced, for instance by terminating an artificial respiration.<sup>114</sup> "In other words, the patient's decision and the doctor's cooperative action are but-for causes of death in both cases: but for those actions, death would not have occurred when it did."<sup>115</sup> Even now-Justice Gorsuch admits that the distinction can neither be based on act (assisted suicide) v. omission (refusal of medical care) nor causation.<sup>116</sup> His distinction is only based on intent: "... [A]n intention [to kill] may be present in a decision to refuse treatment, but, I suggest, it need not be."<sup>117</sup> I do not find that distinction convincing. In both cases, physicians, essentially, intend to ensure a humane and less painful death for their patients. As Steven D. Smith has put it: "[I]n the broad run of cases in which a patient has decided to terminate life-sustaining treatment, it seems ... likely that the patient acts with an intent to bring about death – not as an end in itself, perhaps, but as a means of relieving suffering."<sup>118</sup>

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<sup>113</sup> *Vacco v. Quill*, 521 U.S. 793, 800 (1997).

<sup>114</sup> Cf. *Vacco v. Quill*, Brief of Respondents, WL 708912, para. 46.

<sup>115</sup> Steven D. Smith, *De-moralized: Glucksberg in the malaise*, 106 Mich. L. Rev. 1571, 1577 (2008).

<sup>116</sup> Cf. Neil M. Gorsuch, *The Future of Assisted Suicide and Euthanasia* 49-53 (2009), who points out that even though the act/omission distinction "seems to comport generally with our instincts" it is easily manipulable: "Refusing to eat can be cast either as omitting food or actively starving oneself. Removing tubes that supply life-sustaining food and water can be painted as actively pulling the plug or omitting the provision of medical care."

<sup>117</sup> NEIL M. GORSUCH, *THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA* 49 (2009).

<sup>118</sup> Steven D. Smith, *De-moralized: Glucksberg in the malaise*, 106 Mich. L. Rev. 1571, 1579 (2008).

### 4.3. STATE INTERESTS

The *Glucksberg* Court identified a number of state interests that might plead against the legalization of physician-assisted suicide, including the preservation of human life and prevention of suicide; protecting vulnerable groups from abuse, neglect, and mistakes; protecting the integrity and ethics of the medical profession, and, finally, avoiding a future movement toward euthanasia. However, due to a fundamental liberty interest in physician-assisted suicide<sup>119</sup>, we must – contrary to *Glucksberg's* assertion – “weigh exactly the relative strengths of these various interests”<sup>120</sup> in this section of the study.

#### A) PRESERVING LIFE

Preservation of human life means two intertwined aspects: On the one hand the state's interest to protect life as a collective value and on the other the interest to protect the life of an individual person. Undoubtedly, the government has a substantial interest in preserving human life as a collective value. This principle, however, is not absolute. US law, for instance, provides an exception for death penalty cases. The interest to protect the life of an individual also varies from person to person.<sup>121</sup> Consider, in particular, a competent but terminally-ill patient in the final stage of life, suffering from inadequate pain management. What interest should the states have in preventing such a person from ending his or her life humanely, if he or she wishes to do so? As the States' own policies for palliative sedation demonstrate, “[they have] accepted that [their] interest in preserving life should cede to the rights of a [competent] patient in this condition.”<sup>122</sup> In this respect, physician-assisted suicide does not make any difference.

#### B) PREVENTING SUICIDE

Yes, the state has an interest in preventing suicides. However, there are suicides and suicides. There is, in particular, no actual choice between life and death for terminally-ill patients in the final stage of life, they rather decide between death and an artificially prolonged, often agonizing existence.<sup>123</sup> To be sure, the number

<sup>119</sup> See 4.1.

<sup>120</sup> *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

<sup>121</sup> *Washington v. Glucksberg*, 521 U.S. 702, 746 (1997) (Stevens, J., concurring in judgments) also pointed out that the interest in the preservation of life “is not a collective interest that should always outweigh the interests of a person who because of pain, incapacity, or sedation finds her life intolerable, but rather, an aspect of individual freedom.”

<sup>122</sup> *Myers v. Schneiderman*, 85 N.E.3d 57, 74 (N.Y. 2017) (Rivera, J., concurring).

<sup>123</sup> See also *Morris v. Brandenburg*, 356 P.3d 564, 606 (N.M. App. 2015) (Vanzi, J., dissenting): “Patients who request aid in dying do so because they are suffering from a terminal and incurable physical condition, rather than from a temporary, treatable mental pathology, as is typical of suicide.”

of suicides had already been relatively high before *Glucksberg*. Yet, a causal link between the greater number of suicides and the legalization of assisted suicide needs to be established. And, even if evidence existed, these suicides could still be freely chosen. That is why Justice Stevens correctly emphasized that the state's interest in preventing suicides "does not apply to an individual who is not victimized by abuse, ... and who makes a rational and voluntary decision to seek assistance in dying."<sup>124</sup> In addition to that, allowing assisted suicide might – as contradictory as this may sound at first sight – even prevent suicides: Instead of feeling forced to end one's life in a degrading manner, life may be prolonged, as the respective person would still have the possibility of ending his or her life at a later point in time with a third party's assistance. "The direct involvement of an impartial and professional person third party ... would more likely provide an important safeguard against ... abuse [like arbitrary, unfair, or undue influence]."<sup>125</sup>

C) AVOIDING ARBITRARY, UNFAIR, OR UNDUE INFLUENCE

Preventing suicides that are not based on the patient's free will is, in fact, a legitimate, even compelling, state interest. But that does not yet mean that assisted suicide should be generally prohibited. We cannot deny the right to some because others might abuse it.<sup>126</sup> Apart from that, as will be shown below, there is no evidence of heightened risk for vulnerable groups such as those who are poor or elderly.<sup>127</sup> And, there is already a potential for abuse when it comes to the right to refuse medical treatment. As Chemerinsky put it: "A person could choose to terminate treatment because of pressure from family members or to reduce their emotional or financial burdens. Notwithstanding this concern, the [*Cruzan*] Court recognized a right to refuse medical care ... ."<sup>128</sup> And he went on by stating that the state's concern should instead be to lessen the risk of pressure. This would, in particular, require access to health care including adequate pain treatment for all

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<sup>124</sup> *Washington v. Glucksberg*, 521 U.S. 702, 747 (1997) (Stevens, J., concurring in judgments).

<sup>125</sup> *Compassion in Dying v. State of Wash.*, 79 F.3d 790, 826 (9th Cir. 1996).

<sup>126</sup> Cf. Erwin Chemerinsky, *Washington v. Glucksberg was tragically wrong*, 106 Mich. L. Rev. 1501, 1513 (2008).

<sup>127</sup> See below 5.2. B. (for Oregon).

<sup>128</sup> Erwin Chemerinsky, *Washington v. Glucksberg was tragically wrong*, 106 Mich. L. Rev. 1501, 1512 (2008). See also Konstantin Tretyakov, *The Right to Die in the United States, Canada, and China: Legal Fictions and their Utility in a Comparative Perspective*, 21 Univ. of Pennsylvania J. of Law and Social Science 79, 103 (2018): "... it is unreasonable to erect procedural safeguards protecting the autonomy of the patients refusing life-saving medical treatment while claiming that those safeguards cannot be put in place (or will be ineffective) in the case of [assisted suicide]."



citizens.<sup>129</sup> And, without any doubt, “government should ensure that the costs of [that] care are adequately covered.”<sup>130</sup>

D) *PROTECTING THE INTEGRITY OF THE MEDICAL PROFESSION*

Medical ethics is, in fact, based on the fundamental duty to preserve life, as expressed, for instance, in the Hippocratic Oath. However, it is already reasonable to doubt whether the interest in protecting the integrity of the medical profession could, as a general matter, ever override a patient’s individual right to die. But even if that were true, the question whether it is “fundamentally incompatible with the physician’s role as a healer”<sup>131</sup> to offer assistance in committing suicide needed to be answered in the negative. “[F]or some patients, it would [instead] be a physician’s refusal to dispense medication to ease their suffering and make their death tolerable and dignified that would be inconsistent with the healing role.”<sup>132</sup> If all options were on the table, it would also strengthen – instead of weaken – the doctor-patient relationship by allowing “better dialogues between physicians and their terminally ill patients about ... care and wishes [at the end of their lives].”<sup>133</sup> Finally, doctors have, at all times, including the time of origin of the Hippocratic Oath,<sup>134</sup> either openly or secretly helped patients to end their lives. Doctors do this, consistent with their “traditional” role (!?!), by ending medical care according to their patients’ wishes. And, “when doctors terminally sedate patients, they know that they are ‘hastening that moment at which that death will occur.’”<sup>135</sup>

E) *AVOIDING FUTURE MOVEMENT TOWARD EUTHANASIA*

Critics claim, once acknowledged, “[t]he ... right to die ... will become a duty to die.”<sup>136</sup> This argument, however, is, in my opinion, flawed in its very approach. It is a matter of logic: “If the first step [recognizing a right to assisted suicide] is

<sup>129</sup> Cf. only Lisa Yount, *Right to Die and Euthanasia* 49-50 (2007) (comparing the United States to the Netherlands).

<sup>130</sup> Erwin Chemerinsky, *Washington v. Glucksberg was tragically wrong*, 106 Mich. L. Rev. 1501, 1512 (2008).

<sup>131</sup> American Medical Association, Code of Ethics § 2.211 (1994). Note that this view changed after *Glucksberg* was decided, see e.g. *Myers v. Schneiderman*, 85 N.E.3d 57, 75-77 (N.Y. 2017) (Rivera, J., concurring); *Morris v. Brandenburg*, 356 P.3d 564, 607-608 (N.M. App. 2015) (Vanzi, J., dissenting).

<sup>132</sup> *Washington v. Glucksberg*, 521 U.S. 702, 748 (1997) (Stevens, J., concurring in judgments).

<sup>133</sup> See *Morris v. Brandenburg*, 356 P.3d 570 (N.M. App. 2015) for the District Court’s judgment.

<sup>134</sup> David C. Thomasma, *When Physicians Choose to Participate in the Death of Their Patients: Ethics and Physician-Assisted Suicide*, 24 J. L., Med. & Ethics 183, 190 (1996); *Compassion in Dying v. State of Wash.*, 79 F.3d 790, 829 (9th Cir. 1996).

<sup>135</sup> *Morris v. Brandenburg*, 356 P.3d 564, 608 (N.M. App. 2015) (Vanzi, J., dissenting).

<sup>136</sup> See Lisa Yount, *Right to Die and Euthanasia* 4 (2007).

right, it is right even though the second step [ – allowing euthanasia – might be] wrong. If the second step is wrong, then it simply should not be taken.”<sup>137</sup> In addition to that, the same argument could be made against any constitutionally-protected right such as the right to have an abortion; yet this is not enough to deny someone’s individual rights.<sup>138</sup> It is, of course, necessary to draw a line between step one and two but this does not seem much more complicated than in other cases. In particular, assisted suicide and euthanasia can easily be distinguished based upon who commits the act: the person who wants to die or a third party. And, this distinction needs to be reflected in the law and its safeguards.<sup>139</sup> Apart from that, one could argue that “Pandora’s Box” has already been opened by allowing patients to refuse life-sustaining medical treatment, notwithstanding the fact that this is truly difficult to distinguish from assisted suicide<sup>140</sup>. Would it, hence, make much of a difference to allow physician-assisted suicide as well?

## 5. WHAT ABOUT TWENTY-FIVE YEARS LATER?

*Glucksberg v. Washington* and *Vacco v. Quill* are even less correct today than when they were decided. With the exception of *Dobbs v. Jackson Women’s Health Organization*, recent US legal developments suggest a broader approach to substantive due process analysis generally (1. A.). Specifically, they point to a wider recognition of a right to assisted suicide in some US states – either through court decisions (1. B.) or through legislation (2.) – especially in Oregon. Moreover, this study touches upon international developments. While some countries have taken the step to legalize assisted suicide by statute (3. A.), courts felt compelled to take action in others (3. B.).

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### 5.1. US case-law

#### A) US SUPREME COURT

##### AA) ON THE ONE HAND: LAWRENCE, WINDSOR AND OBERGEFELL

Since *Glucksberg v. Washington* substantive due process analysis had changed significantly. It all began with *Lawrence v. Texas*: Initially, the Court reminded us

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<sup>137</sup> Carl E. Schneider, *Law at the End of Life – The Supreme Court and Assisted Suicide* 19 (2000).

<sup>138</sup> Cf. *Compassion in Dying v. State of Wash.*, 79 F.3d 790, 830-831 (9th Cir. 1996); *Morris v. Brandenburg*, 356 P.3d 564, 611 (N.M. App. 2015) (Vanzi, J., dissenting). For *Dobbs v. Jackson Women’s Health Organization* see V. 1. a) bb).

<sup>139</sup> Critical e.g. Yale Kamisar, *Can Glucksberg Survive Lawrence? Another Look at the End of Life and Personal Autonomy*, 106 Mich. L. Rev. 1453, 1473-1475 (2008). See also *Washington v. Glucksberg*, 521 U.S. 702, 785 (1997) (Souter, J., concurring in judgments): “[A]t least at this moment there are reasons for caution in predicting the effectiveness of the [state regulation with] teeth proposed.” See for the Dutch experience below 5.3. A. AA.

<sup>140</sup> See above 4.2.



that the extent of the liberty at stake should not be too narrowly conceived or understood. While *Bowers v. Hardwick*<sup>141</sup> was not merely about the right to engage in certain sexual conduct but – more generally – about the right to have a personal relationship with another person of one’s choice,<sup>142</sup> *Glucksberg*’s liberty interest, as shown above, went much further than the Court admitted<sup>143</sup>. To be sure, *Lawrence* gives a nod to laws and traditions but, nevertheless, concluded with regard to criminal prosecution of same-sex relations that “[t]heir historical premises are not without doubt and, at the very least, are overstated.”<sup>144</sup> The Court then added: “History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”<sup>145</sup> The same can be said about the right to a self-determined death; framed like that, its history has proven to be more complex than the *Glucksberg* majority indicated.<sup>146</sup> And, most importantly, dignity interests, be it in *Lawrence*<sup>147</sup> or here, prevail, in my opinion, over history and tradition. *United States v. Windsor* also took that position. Here, for the first time, the Court explicitly applied its concept of “equal dignity”<sup>148</sup>: Authorizing same-sex marriages “is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages.”<sup>149</sup> *Obergefell v. Hodges*, eventually, took a closer look: The fundamental liberties protected by the Due Process Clause of the Fourteenth Amendment “extend to certain personal choices central to individual dignity and

<sup>141</sup> *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986).

<sup>142</sup> *Lawrence v. Texas*, 123 S.Ct. 2472, 2478 (2003).

<sup>143</sup> See above 4.1. C.

<sup>144</sup> *Lawrence v. Texas*, 123 S.Ct. 2472, 2480 (2003).

<sup>145</sup> *Lawrence v. Texas*, 123 S.Ct. 2472, 2480 (2003) with reference to *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring). See also *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992): “It is ... tempting ... to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified ... [but] such a view would be inconsistent with our law.” Later the *Casey* Court stated that pregnancy involves “suffering [that] is too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture.” (*Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833, 852 (1992)).

<sup>146</sup> See above 4.1. B.

<sup>147</sup> See only *Lawrence v. Texas*, 123 S.Ct. 2472, 2478 (2003): “dignity as free persons”.

<sup>148</sup> *U.S. v. Windsor*, 133 S.Ct. 2675, 2693 (2013). With regard to physician-assisted suicide, this concept could be triggered, in particular, because of a possible subordination issue (cf. *Equal Dignity – Heeding Its Call*, 132 Harv. L. Rev. 1323, 1334-1335 (2019): “subordination of the disabled and infirm”).

<sup>149</sup> *U.S. v. Windsor*, 133 S.Ct. 2675, 2692 (2013).



autonomy, including intimate choices that define personal identity and beliefs.”<sup>150</sup> “History and tradition guide and discipline this inquiry but do not set its outer boundaries.”<sup>151</sup> The fact that the right to marry had always been limited to opposite-sex partners, did, therefore, not preclude to extend it to same-sex couples: “Choices about marriage [no matter the sexual orientation] shape an individual’s destiny.”<sup>152</sup> That applies *a fortiori* to the right to a self-determined death; dying does not only shape one’s destiny, it is our destiny. The Court then, indeed, and as opposed to *Lawrence*, referred to *Glucksberg* and its narrow framing of the issue: “Yet while that approach *may* have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.”<sup>153</sup> That is a far cry from a convincing defense of *Glucksberg*! It is no wonder that Chief Justice Roberts, in his dissent, saw *Glucksberg* “effectively overruled” through *Obergefell*.<sup>154</sup>

BB) ON THE OTHER HAND: *DOBBS V. JACKSON WOMEN’S HEALTH ORGANIZATION*

However, things turned out differently: Recently, *Glucksberg* saw its revival in *Dobbs v. Jackson Women’s Health Organization*. “[The Due Process Clause of the Fourteenth Amendment] has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must – using the *Glucksberg* test – be ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’”, which is not the case of the right to abortion.<sup>155</sup> “The Court in *Roe* could have said of abortion exactly what *Glucksberg* said of assisted suicide: ‘Attitudes toward [abortion] have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, [that practice].’”<sup>156</sup> The Court, however, emphasized “that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”<sup>157</sup> According to the Court,

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<sup>150</sup> *Obergefell v. Hodges*, 135 S.Ct. 2584, 2597 (2015).

<sup>151</sup> *Obergefell v. Hodges*, 135 S.Ct. 2584, 2598 (2015). See also: „The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.” (*Obergefell v. Hodges*, 135 S.Ct. 2584, 2602 (2015)).

<sup>152</sup> *Obergefell v. Hodges*, 135 S.Ct. 2584, 2599 (2015).

<sup>153</sup> *Obergefell v. Hodges*, 135 S.Ct. 2584, 2602 (2015) (emphasis added).

<sup>154</sup> *Obergefell v. Hodges*, 135 S.Ct. 2584, 2621 (2015) (Roberts, J., dissenting).

<sup>155</sup> *Dobbs v. Jackson Women’s Health Organization*, 597 U. S. \_\_\_\_ (2022) (slip op., at 5).

<sup>156</sup> *Dobbs v. Jackson Women’s Health Organization*, 597 U. S. \_\_\_\_ (2022) (slip op., at 25).

<sup>157</sup> *Dobbs v. Jackson Women’s Health Organization*, 597 U. S. \_\_\_\_ (2022) (slip op., at 66). See also *Dobbs v. Jackson Women’s Health Organization*, 597 U. S. \_\_\_\_ (2022) (Kavanaugh, J., concurring)

rights regarding contraception (*Griswold*) and same-sex relationships (*Lawrence*, *Obergefell*) are inherently different from the right to abortion because abortion terminates “life or potential life.”<sup>158</sup> It is true that physician-assisted suicide also ends life, but “only” for the person who chooses it, not for a “third party”.

#### B) STATE COURT DECISIONS

To be sure, assisted suicide has nowhere yet been deemed a fundamental right by a high court in the United States. Indications, however, are growing that *Glucksberg* and *Vacco* did not end the matter. The best example of this is *Baxter v. Montana*. Without reaching the constitutional questions, the Supreme Court of the State of Montana found – on statutory grounds – no indication in Montana law that physician aid in dying is against public policy:<sup>159</sup> “[T]he act of a physician handing medicine to a terminally ill patient, and the patient’s subsequent peaceful and private act of taking the medicine, are not comparable to the violent, peace-breaching conduct that this Court and others have found to violate public policy.”<sup>160</sup> In support of its argument, the Court also referred to the Montana “Rights of the Terminally Ill Act”<sup>161</sup> that exempts physicians from criminal and civil liability for following a patient’s directions to withhold or withdraw life-sustaining treatment. Somewhat in conflict with *Vacco*, the Court put assisted suicide on an equal footing with the refusal of medical treatment: “The Terminally Ill Act ... confers on terminally ill patients a right to have their end-of-life wishes followed, even if it requires *direct* participation by a physician through withdrawing or withholding treatment. [Therefore, it cannot be] against public policy to honor those same wishes when the patient is conscious and able to vocalize and carry out the decision himself with self-administered medicine and no immediate or direct physician assistance.”<sup>162</sup> Justice Nelson, concurring, went further in concluding that physician aid in dying is protected by the Montana Constitution as a matter of privacy (Article II, Section 10) and as a matter of individual dignity (Article II,

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(slip op., at 10): “Overruling *Roe* does not mean the overruling of those precedents, and does not threaten or cast doubt on those precedents.” Justice Thomas agreed but then added: “[I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is ‘demonstrably erroneous,’ ... we have a duty to ‘correct the error’ established in those precedents.” *Dobbs v. Jackson Women’s Health Organization*, 597 U. S. \_\_\_\_ (2022) (Thomas, J., concurring) (slip op., at 3).

<sup>158</sup> *Dobbs v. Jackson Women’s Health Organization*, 597 U. S. \_\_\_\_ (2022) (slip op., at 66, 71).

<sup>159</sup> *Baxter v. State*, 224 P.3d 1211, 1217 (Mont. 2009).

<sup>160</sup> *Baxter v. State*, 224 P.3d 1211, 1216 (Mont. 2009).

<sup>161</sup> Section 50-9-204, MCA.

<sup>162</sup> *Baxter v. State*, 224 P.3d 1211, 1218 (Mont. 2009).





Section 4).<sup>163</sup> He also rejected the state's argument that palliative care is a reasonable alternative to physician aid in dying since it would deprive the patients of their personal autonomy. Quoting one of the plaintiffs, he said: "I feel strongly that my privacy, dignity and sense of self-autonomy will be forfeit if my life has to end in a state of terminal sedation."<sup>164</sup>

On the other hand, the New Mexico Supreme Court held in *Morris v. Brandenburg* that physician's aid in dying does not constitute an absolute and fundamental constitutional right within the meaning of the New Mexico Constitution (Article II, Section 18; Article II, Section 4).<sup>165</sup> The Court relied largely on *Glucksberg*; there are, however, differences in the reasoning: First, the New Mexico Supreme Court briefly expressed reservations with regard to the "emphasis placed on history and tradition by the *Glucksberg* Court in defining the right"<sup>166</sup>, and, second, the Court acknowledged that there is no state interest "in preserving a painful and debilitating life that will end imminently."<sup>167</sup> Judge Garcia, writing for the Court of Appeals majority, went further: While not a fundamental liberty interest under the New Mexico Constitution, physician aid in dying *might* qualify as an important right subject to intermediate scrutiny, but that would – on remand – be up for the District Court to decide.<sup>168</sup> Not content with the majority relying on *Glucksberg*, Judge Vanzi, dissenting, made clear: "Even if *Glucksberg* remains good law, as a matter of federal due process analysis, I would reject it as unpersuasive, flawed, and inadequate to protect the rights of New Mexicans."<sup>169</sup>

Judge Rivera's concurrence in *Myers v. Schneiderman* was along the same lines. Following *Casey*, *Lawrence* and *Obergefell*, he pointed out that both the New York State as well as the US Constitution guarantee "heightened due process protections against unjustified government interference with the liberty of all persons to make certain deeply personal choices."<sup>170</sup> For her, this does not mean that there is an unrestricted state constitutional right to physician-prescribed medications that hasten death. The State, however, "may not unduly burden a *terminally-ill* patient's access to physician prescribed medication that allows the patient *in the last painful stage of life* to achieve a peaceful death *as the end draws near*."<sup>171</sup> In support of her argument, Judge Rivera also brings up the State's sanctioning of terminal sedation: "If terminally-ill patients may exercise their liberty interest by choosing to be

<sup>163</sup> *Baxter v. State*, 224 P.3d 1211, 1223 (Mont. 2009) (Nelson, J., specially concurring).

<sup>164</sup> *Baxter v. State*, 224 P.3d 1211, 1232 (Mont. 2009) (Nelson, J., specially concurring).

<sup>165</sup> *Morris v. Brandenburg*, 376 P.3d 836, 839 (N.M. 2016).

<sup>166</sup> *Morris v. Brandenburg*, 376 P.3d 836, 848 (N.M. 2016).

<sup>167</sup> *Morris v. Brandenburg*, 376 P.3d 836, 855 (N.M. 2016).

<sup>168</sup> *Morris v. Brandenburg*, 356 P.3d 564, 585 (N.M. App. 2015).

<sup>169</sup> *Morris v. Brandenburg*, 356 P.3d 564, 601 (N.M. App. 2015) (Vanzi, J., dissenting).

<sup>170</sup> *Myers v. Schneiderman*, 85 N.E.3d 57, 65 (N.Y. 2017) (Rivera, J., concurring).

<sup>171</sup> *Myers v. Schneiderman*, 85 N.E.3d 57, 66 (N.Y. 2017) (Rivera, J., concurring) (emphasis added).



terminally sedated, the State has no compelling rationale ... in refusing a mentally-competent, terminally-ill patient who is in the final stage of life the choice of a less intrusive option – access to aid-in-dying – which may better comport with the patient’s autonomy and dignity.”<sup>172</sup>

## 5.2. US STATES LEGISLATION

When *Glucksberg* and *Vacco* were decided it was a crime to assist a suicide in almost every State.<sup>173</sup> Oregon had been the exception, where the people, as opposed to the States of Washington and California, voted in favor of physician-assisted suicide. And, as the Court further explained, “[s]ince the Oregon vote, many proposals to legalize assisted-suicide have been and continue to be introduced in the States’ legislatures, but none has been enacted.”<sup>174</sup> This, however, is no longer true. There is, driven by an increase in public support,<sup>175</sup> a small but fast-growing trend among States to recognize physician-assisted suicide (A.), which also affects the due process analysis<sup>176</sup>. Oregon, and its “Death With Dignity Act”, still serves as a model though. Its history dates back almost 30 years, which makes it possible for us to draw up (practical) assessments (B.).

### A) TREND TOWARDS DECRIMINALIZATION

It all began with Oregon’s “Death With Dignity Act” which allows patients to end their lives through the self-administration of lethal medications, prescribed by physicians for that purpose. The law provides for material and procedural safeguards: it covers *capable adults* only, who are *residents of Oregon*, who have been determined by the attending physician *and* consulting physician to be suffering from a *terminal disease*, and who have *voluntarily* expressed their respective wishes to die.<sup>177</sup> But what is a “terminal disease” in that sense? It “means an incurable and irreversible disease that has been medically confirmed and will, within reasonable

<sup>172</sup> *Myers v. Schneiderman*, 85 N.E.3d 57, 74 (N.Y. 2017) (Rivera, J., concurring).

<sup>173</sup> See only *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997).

<sup>174</sup> *Washington v. Glucksberg*, 521 U.S. 702, 717 (1997).

<sup>175</sup> *Compassion in Dying v. State of Wash.*, 79 F.3d 790, 810-811 (9th Cir. 1996) shows that public support was already great before *Glucksberg*; 2018 poll by Gallup displayed a solid majority of Americans, with 72 percent in favor (<https://news.gallup.com/poll/235145/americans-strong-support-euthanasia-persists.aspx>, Nov. 15, 2022, 9:13 PM); a Harris poll conducted in 2014 had 74% outcome in favor of assisted suicide (<https://www.cbsnews.com/news/brittany-maynard-poll-right-to-die-laws/>, Nov. 15, 2022, 9:15 PM).

<sup>176</sup> *U.S. v. Windsor*, 133 S.Ct. 2675, 2689-2690 (2013) recognized state level developments as much as *Lawrence v. Texas*, 123 S.Ct. 2472, 2480-2483 (2003) did compared to *Bowers v. Hardwick*.

<sup>177</sup> Or. Rev. Stat. § 127.805 s. 2.01 (1) (2019). Note that Oregon recently stopped enforcing the in-state residency requirement, see <https://www.npr.org/2022/03/30/1089647368/oregon-physician-assisted-death-state-residents>, Nov. 15, 2022, 9:18 PM.

medical judgment, produce death within six months.”<sup>178</sup> Procedurally, in order to receive a prescription for medication, a qualified patient has to make an oral request and a written request, and reiterate the oral request no less than 15 days after making the initial oral request.<sup>179</sup>

Oregon was followed by Washington, whose “Death With Dignity Act”<sup>180</sup> is substantially in line with Oregon’s. A few years later, the Vermont Legislature passed the “Patient Choice and Control at End of Life Act”. It is, again, based on the Oregon model, but is less restrictive. Among other things, the definition of a “capable” person is not, expressly, linked to the opinion of a physician.<sup>181</sup> California’s “End of Life Option Act” was also modeled on Oregon’s law; it authorizes an adult who meets certain qualifications, and who is suffering from a terminal disease, to make a request for a drug prescribed pursuant to the Act’s provisions for the purpose of ending his or her life.<sup>182</sup> This also applies to Colorado’s “End of Life Options Act”<sup>183</sup>, Washington D.C.’s “Death With Dignity Act”<sup>184</sup>, Hawai’i’s “Our Care, Our Choice Act”<sup>185</sup>, New Jersey’s “Medical Aid in Dying for the Terminally Ill Act”<sup>186</sup>, Maine’s “Death With Dignity Act”<sup>187</sup>, and, eventually, New Mexico’s “Elizabeth Whitefield End-of-Life Options Act”<sup>188</sup>, making New Mexico the 11<sup>th</sup> jurisdiction – compared to one when *Glucksberg* was decided – to legalize assisted suicide in the United States through either legislation, ballot or – as in Montana – through a court ruling<sup>189</sup>.

B) *THE PRACTICE: EXPERIENCE IN OREGON*

The *Glucksberg* Court was convinced: assisted suicide might put vulnerable groups – including the poor, the elderly, and disabled, depressed or mentally ill persons – at risk. Moreover, it could not only conflict with the integrity and ethics of the medical profession but also lead to a future movement toward euthanasia.<sup>190</sup> On all of these points reservations have been made, the Court, notably Justice

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<sup>178</sup> Or. Rev. Stat. § 127.800 s. 1.01 (12) (2019).

<sup>179</sup> Or. Rev. Stat. § 127.840 s. 3.06 (2019).

<sup>180</sup> RCW 70.245.

<sup>181</sup> Title 18: Health Chapter 113: Patient Choice At End Of Life § 5281 (2).

<sup>182</sup> Assembly Bill No. 15.

<sup>183</sup> Article 48 of Title 25, C.R.S.

<sup>184</sup> D.C. Law 21-182.

<sup>185</sup> HB2739 HD1.

<sup>186</sup> P.L. 2019, c. 59.

<sup>187</sup> LD 1313 (HP 948).

<sup>188</sup> HB 90.

<sup>189</sup> See above 5.1. B.

<sup>190</sup> See above 4.3.

Souter, however, could at least point to the factual situation at that time. Since Oregon's "Death With Dignity Act" had only been approved by the voters but not yet implemented, hard facts were hard to come by. Now, 25 years later, "we can say with some assurance which side is right"<sup>191</sup>: To begin with, evidence with assisted suicide in Oregon proves that the medical profession has not become corrupted or compromised in any respect.<sup>192</sup> Even before *Glucksberg* was decided, 60% of doctors in Oregon supported legalizing assisted suicide for terminally ill patients.<sup>193</sup> Meanwhile, the Oregon Medical Association, a long-time opponent of physician-assisted suicide,<sup>194</sup> also changed its position from "opposed" to "neutral".<sup>195</sup> Although the number of patients who die as a result of assisted suicide has been steadily increasing (1998: 16; 2021: 238), it is currently still less than 0.6 % of all annual deaths in Oregon.<sup>196</sup> It is also striking that not all patients used the medication to commit suicide (15 %).<sup>197</sup>

In particular, vulnerable groups do not seem to be pressured by Oregon's "Death With Dignity Act"<sup>198</sup>: As the current report demonstrates, the patients who died in 2021 from the ingestion of prescribed medications were predominantly white (95 %), well-educated (46 % with at least a bachelor's degree), and insured in any way (99 %).<sup>199</sup> It is therefore not surprising that the most frequently reported end-of-life concerns were loss of autonomy (93%) and decreasing ability to participate in activities that made life enjoyable (92%), while only 8 % indicated financial implications of their treatment. To be sure, most of the patients were sixty-five years of age or older (81 %). This, however, makes total sense because terminal

<sup>191</sup> *Washington v. Glucksberg*, 521 U.S. 702, 786 (1997) (Souter, J., concurring in judgments).

<sup>192</sup> *Morris v. Brandenburg*, 356 P.3d 564, 608 (N.M. App. 2015) (Vanzi, J., dissenting).

<sup>193</sup> See Melinda A. Lee et al., *Legalizing Assisted Suicide – Views of Physicians in Oregon*, 334 *New England J. Med.* 310-315 (1996).

<sup>194</sup> <https://www.bmj.com/rapid-response/2011/10/31/oregon-medical-association-opposed-oregons-dwd-law>, Nov. 15, 2022, 9:20 PM.

<sup>195</sup> <https://compassionandchoices.org/resource/medical-associations-medical-aid-dying/>, Nov. 15, 2022, 9:20 PM.

<sup>196</sup> <https://www.oregon.gov/oha/PH/PROVIDERPARTNERRESOURCES/EVALUATIONRESEARCH/DEATHWITHDIGNITYACT/Documents/year24.pdf>, p. 5, 15, Nov. 15, 2022, 9:22 PM.

<sup>197</sup> <https://www.oregon.gov/oha/PH/PROVIDERPARTNERRESOURCES/EVALUATIONRESEARCH/DEATHWITHDIGNITYACT/Documents/year24.pdf>, p. 5, Nov. 15, 2022, 9:23 PM.

<sup>198</sup> Cf. e.g. *Morris v. Brandenburg*, 356 P.3d 564, 610 (N.M. App. 2015) (Vanzi, J., dissenting); Kathryn L. Tucker, *In the Laboratory of the States: The Progress of Glucksberg's Invitation to States to Address End of Life Choice*, 106 *Mich. L. Rev.* 1593 (2008); Erwin Chemerinsky, *Washington v. Glucksberg was tragically wrong*, 106 *Mich. L. Rev.* 1501, 1513-1515 (2008). Critical e.g. Herbert Hendin & Kathleen Foley, *Physician-Assisted Suicide in Oregon: A Medical Perspective*, 106 *Mich. L. Rev.* 1613 (2008).

<sup>199</sup> <https://www.oregon.gov/oha/PH/PROVIDERPARTNERRESOURCES/EVALUATIONRESEARCH/DEATHWITHDIGNITYACT/Documents/year24.pdf>, p. 7, Nov. 15, 2022, 9:24 PM.

illnesses occur far more frequently at an advanced age.<sup>200</sup> For all these reasons, even critics admit that “fears of non-voluntary euthanasia of the vulnerable have not yet come to pass.” Oregon’s “Death With Dignity Act” might still be considered “young”,<sup>201</sup> but that does not change the available data. This is not to say that Oregon’s experience renders a “perfect picture”. First, the data comes from the subsequent self-reporting performed by the attending physicians, not a more objective source.<sup>202</sup> And, the data is still limited, particularly with regard to the role depression plays in patient decisions.<sup>203</sup> The current report e.g. only reveals that in 2021 two patients (out of 238) were referred for psychological or psychiatric evaluation.<sup>204</sup>

### 5.3. INTERNATIONAL DEVELOPMENTS

Finally, international developments are relevant for the substantive due process analysis.<sup>205</sup> The *Glucksberg* Court, for instance, pointed out that other countries (also) prohibited assisted suicide, including Canada, New Zealand and Australia.<sup>206</sup> For the first two, however, the contrary is now true; the same applies to parts of Australia. This study will, of course, not only cover countries like Canada, where courts took steps to protect those willing to die, but also those with a reasonably long history of legalization by law, like the Netherlands, to which the *Glucksberg* Court paid attention as well.<sup>207</sup>

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<sup>200</sup> Cf. also Konstantin Tretyakov, *The Right to Die in the United States, Canada, and China: Legal Fictions and their Utility in a Comparative Perspective*, 21 Univ. of Pennsylvania J. of Law and Social Science 79, 103 (2018).

<sup>201</sup> *Myers v. Schneiderman*, 85 N.E.3d 57, 84 (N.Y. 2017) (Fahey, J., concurring).

<sup>202</sup> See NEIL M. GORSUCH, *THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA* 119, 122 (2009).

<sup>203</sup> Cf. NEIL M. GORSUCH, *THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA* 121, 125 (2009).

<sup>204</sup> <https://www.oregon.gov/oha/PH/PROVIDERPARTNERRESOURCES/EVALUATIONRESEARCH/DEATHWITHDIGNITYACT/Documents/year24.pdf>, p. 12, Nov. 15, 2022, 9:30 PM.

<sup>205</sup> See e.g. *Lawrence v. Texas*, 123 S.Ct. 2472, 2481 (2003); *Obergefell v. Hodges*, 135 S.Ct. 2584, 2594, 2596 (2015). To be sure, recently, the Justices of the Supreme Court have been more divided over whether it is appropriate to look at foreign law in US Constitutional Law. Justice Scalia, in particular, was against that practice (see e.g. *Roper v. Simmons*, 125 S. Ct. 1183, 1225-1229 (2005) (Scalia, J., dissenting); ANTONIN SCALIA, *SCALIA SPEAKS – REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED* 250-259 (2017)).

<sup>206</sup> *Washington v. Glucksberg*, 521 U.S. 702, 718 (1997).

<sup>207</sup> *Washington v. Glucksberg*, 521 U.S. 702, 734 (1997).



## A) LEGISLATION

## AA) THE NETHERLANDS

In the Netherlands, both active euthanasia and assistance in committing suicide are punishable offences (Art. 293 sec. 1 and Art. 294 sec. 2 of the Criminal Code). Yet, physicians can be exempt from punishment, if they comply with certain duties of care under Art. 2 sec. 1 of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act<sup>208</sup>. That means that the physician: 1. holds the conviction that the request by the patient was voluntary and well-considered, 2. holds the conviction that the patient's suffering was lasting and unbearable (but not necessarily due to terminal illness), 3. has informed the patient about the situation he or she was in and about his or her prognosis, 4. holds the conviction that there was no other reasonable solution for the situation he or she was in, 5. has consulted at least one other, independent physician (but not necessarily a psychiatrist) who has seen the patient and has given his or her written opinion on the requirements of due care listed in the four points above, and, finally, 6. exercises due medical care in terminating the patient's life or assisting in his or her suicide. Under certain conditions set out in Art. 2 sec. 2-4 of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act, minors who are at least twelve years old can also receive assistance in dying: To the extent that a minor can still express his or her will, the parents or guardian must be consulted in the decision-making process when a 16- to 17-year-old wishes to die; consent, however, is only required when a 12- to 15-year-old minor wishes to die.

Statistically, it is a mixed bag: between the early 2000s and 2009 the number of suicides remained more or less the same; since then numbers have been increasing slowly but steadily from 1500 in 2000 to 1823 in 2020 (16 %).<sup>209</sup> At the same time, euthanasia rates have tripled, reaching 6361 in 2019;<sup>210</sup> it should be noted, however, that the number of unreported cases has fallen from 46 % in 2001 to, for example, 20 % in 2005<sup>211</sup>. The euthanasia rate also includes only a small number of assisted suicides compared to active euthanasia (2015: 208 vs. 5277).<sup>212</sup> Moreover, assisted suicide rates remained relatively stable over the years. But why do people opt for euthanasia? Most of them are in the terminal stage of their illness, in particular cancer; in 2010, approx. 78% of the patients had a life expectancy of less than one

<sup>208</sup> Stb. 2001, nr. 194 (Neth.).

<sup>209</sup> <https://opendata.cbs.nl/statline/#/CBS/en/dataset/7022eng/table?ts=1650233342432>, Nov. 15, 2022, 9:33 PM.

<sup>210</sup> <https://healthcare-in-europe.com/en/news/a-critical-look-at-the-rising-euthanasia-rates-in-the-netherlands.html>, Nov. 15, 2022, 9:35 PM.

<sup>211</sup> BREGJE ONWUTEAKA-PHILIPSEN, JOHAN LEGEMAATE ET AL., WET TOETSING LEVENSBEEÏNDIGING OP VERZOEK EN HULP BIJ ZELFDODING 182 (2017).

<sup>212</sup> <https://academic.oup.com/bmb/article/125/1/145/4850942>, Nov. 15, 2022, 9:35 PM.



month, while the percentage of patients with a life expectancy of more than six months was less than 10%.<sup>213</sup>

So, what the US Supreme Court noted with regard to the practice in the Netherlands<sup>214</sup> has to be taken with caution. Due to the statutory regulation enacted after *Glucksberg* was decided, this country succeeded in decreasing the cases of euthanasia without explicit request by almost two thirds<sup>215</sup>. There is no indication that assisted suicide would unavoidably lead to active euthanasia; both assisted suicide and active euthanasia have a long tradition in the Netherlands. It is up to the respective legislature to decide what to legalize and what not (especially regarding minors!). In any event, we must act with caution when drawing comparisons to the US: "The Netherlands is a small country, prosperous, technologically advanced, ... with a well-educated citizenry."<sup>216</sup> In particular, the Netherlands have an extensive welfare system with trusting relationships between doctor and patient which is in no way comparable to the US.<sup>217</sup>

#### BB) SWITZERLAND

In contrast to the Netherlands, Switzerland penalizes active euthanasia exercised by physicians (Art. 114 of the Criminal Code). However, to assist someone in committing suicide is, in principle, not punishable. There is only one exception that also applies to physicians; Art. 115 of the Criminal Code provides: "Any person who *for selfish motives* incites or assists another to commit or attempt to commit suicide is, if that other person thereafter commits or attempts to commit suicide, liable to a custodial sentence not exceeding five years or to a monetary penalty." "Selfish motives" are those aimed at a personal benefit (of a material or ideal nature); to accept fees for nonprofit organizations like "Exit" or "Dignitas", who provide direct assistance to those who want to die, does, in particular, not fulfill this requirement.<sup>218</sup>

Statistically, on the one hand, the total number of assisted suicides in Switzerland increased from 297 in 2009 to 1196 in 2019; for 2019, however, there was an increase of only 2,0 % compared to the previous year. Meanwhile, women

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<sup>213</sup> Anne Ruth Mackor, *Sterbehilfe in den Niederlanden*, ZStW 24, 28 (2016); BREGJE ONWUTEAKA-PHILIPSEN, JOHAN LEGEMAATE ET AL., WET TOETSING LEVENSBEEÏNDIGING OP VERZOEK EN HULP BIJ ZELFDODING 21-22 (2017).

<sup>214</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 734 (1997).

<sup>215</sup> Cf. BREGJE ONWUTEAKA-PHILIPSEN, JOHAN LEGEMAATE ET AL., WET TOETSING LEVENSBEEÏNDIGING OP VERZOEK EN HULP BIJ ZELFDODING 119 (2017).

<sup>216</sup> MELVIN I. UROFSKY, *LETHAL JUDGMENTS – ASSISTED SUICIDE AND AMERICAN LAW* 95 (2000).

<sup>217</sup> MELVIN I. UROFSKY, *LETHAL JUDGMENTS – ASSISTED SUICIDE AND AMERICAN LAW* 96 (2000).

<sup>218</sup> Cf. Brigitte Tag, *Strafrecht am Ende des Lebens – Sterbehilfe und Hilfe zum Suizid in der Schweiz*, ZStW 2016, 73, 79-80 with further references.

seek more often for assistance in committing suicide (713 in 2019), but the age structure is rather similar: no matter whether men or women, approximately 88 % of the cases in 2019 concerned people 65 years or older.<sup>219</sup> On the other hand, the overall trend regarding suicides is positive: while in the early 2000s more than 1400 people committed suicide annually, the number for 2019 is close to 1000.<sup>220</sup> If we look at both developments together, the increase in assisted suicides and the decrease in suicides between 1998 and 2009, for instance, almost balanced each other out. This might no longer be true due to the recent increase of assisted suicides. However, this does not yet indicate any misdevelopments; assisted suicide, as shown above, usually goes hand in hand with serious incurable diseases that would otherwise, and in particular, be treated with palliative measures.

#### B) CASE-LAW

Since *Glucksberg* was decided, courts all over the world have been increasingly supportive of a right to die.<sup>221</sup> It all started in 1997 when Colombia's Constitutional Court legalized active voluntary euthanasia for terminally ill people,<sup>222</sup> which was recently expanded to patients who "suffer intense physical or mental suffering, stemming from bodily injury or serious and incurable disease."<sup>223</sup> Similarly, in 2021, a Peruvian Superior Court recognized a right "to die with dignity" under certain circumstances.<sup>224</sup> While active euthanasia and assisted suicide remain illegal, the Supreme Court of India, furthermore, legalized the withdrawal of life

<sup>219</sup> <https://www.bfs.admin.ch/bfs/de/home/statistiken/gesundheit/gesundheitszustand/sterblichkeit-todesursachen/spezifische.assetdetail.19444412.html>, Nov. 15, 2022, 9:23 PM.

<sup>220</sup> <https://www.bfs.admin.ch/bfs/de/home/statistiken/gesundheit/gesundheitszustand/sterblichkeit-todesursachen/spezifische.assetdetail.19444410.html>, Nov. 15, 2022, 9:34 PM.

<sup>221</sup> On the other hand, both the Irish Supreme Court (*Fleming v. Ireland*, [2013] IEHC 2) as well as South Africa's Supreme Court (*Minister of Justice and Correctional Services and Others v. Estate Late James Stransham-Ford and Others*, [2016] ZASCA 197) declined to find a (constitutional) right to physician-assisted suicide. To be sure, Italy's Constitutional Court blocked a referendum on physician-assisted suicide in March 2022 (<https://www.reuters.com/world/europe/italys-constitutional-court-blocks-right-to-die-referendum-2022-02-15/>, Nov. 15, 2022, 9:25 PM.). The same court, however, had allowed assisted suicide for terminally ill patients suffering from "unbearable" pain (<https://www.euronews.com/2019/09/25/italy-s-constitutional-court-to-clarify-law-on-assisted-suicide>, Nov. 15, 2022, 9:19 PM).

<sup>222</sup> Corte Constitucional, Sentencia C-239/97 de Mayo 20, 1997.

<sup>223</sup> <https://www.nbcnews.com/news/latino/woman-wanted-die-was-euthanasia-canceled-rcna3231>, Nov. 15, 2022, 9:27 PM. See, in particular, for assisted suicide and the ruling C-164/22 of the Colombian Constitutional Court, <https://wfrtds.org/colombian-court-decision-released-and-explained/>, Nov. 15, 2022, 9:40 PM.

<sup>224</sup> [https://wfrtds.org/wp-content/uploads/2021/03/2021-02-25-D\\_Sentencia\\_Ana\\_Estrada\\_250221.pdf](https://wfrtds.org/wp-content/uploads/2021/03/2021-02-25-D_Sentencia_Ana_Estrada_250221.pdf), Nov. 15, 2022, 9:28 PM.

support to patients who are either terminally ill or in a permanent vegetative state.<sup>225</sup> In what follows, the focus is yet on three countries: Canada, Germany and Austria. All of these prohibited assisted suicide either completely or in part, until their courts stepped in.

AA) CANADA

In *Carter v. Canada* the Supreme Court of Canada held, by overruling *Rodriguez v. British Columbia*<sup>226</sup>, that the prohibition against physician-assisted suicide violated the Canadian Charter of Rights and Freedoms. It infringed the right to liberty and security (Section 7) of competent adults who suffer intolerably and enduringly: “An individual’s response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy.”<sup>227</sup> The right to life, on the other hand, does not require an absolute prohibition on assisted suicide: “This would create a ‘duty to live’, rather than a ‘right to life’, and would ... question the legality of any consent to the ... refusal of ... life-sustaining treatment. [Since Section 7] also encompasses life, liberty and security of the person during the passage to death ... the sanctity of life ‘is no longer seen to require that all human life be preserved at all costs’.”<sup>228</sup>

The Court then, convincingly, concluded that the prohibition is overbroad and thus not in accordance with the principles of fundamental justice (Section 7): “The object of the law ... is to protect vulnerable persons from being induced to commit suicide at a moment of weakness.”<sup>229</sup> The law, however, caught people outside this class – persons who are competent, fully informed, and free from coercion or duress. Furthermore, the infringement is not justified under Section 1 of the Charter. In particular, the absolute prohibition on assisted suicide failed the requirement of minimal impairment. “A theoretical or speculative fear cannot justify an absolute prohibition.”<sup>230</sup> The Court, instead, and in contrast to *Glucksberg*,

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<sup>225</sup> <https://www.reuters.com/article/us-india-court-euthanasia/indias-top-court-upholds-passive-euthanasia-allows-living-wills-in-landmark-judgment-idUSKCN1GL0MF>, Nov. 15, 2022, 9:20 PM.

<sup>226</sup> *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 SCR 519.

<sup>227</sup> *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 para. 66. “[T]he prohibition is severe: it imposes unnecessary suffering on affected individuals, deprives them of the ability to determine what to do with their bodies and how those bodies will be treated, and may cause those affected to take their own lives sooner than they would were they able to obtain a physician’s assistance in dying.” (*Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 para. 90).

<sup>228</sup> *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 para. 63.

<sup>229</sup> *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 para. 86.

<sup>230</sup> *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 para. 119.

agreed “that a permissive regime with properly designed and administered safeguards was capable of protecting vulnerable people from abuse and error.”<sup>231</sup> To be sure, concerns about vulnerability arise in all end-of-life medical decision-making: “Logically speaking, [however] there is no reason to think that the injured, ill, and disabled who have the [legal] option to refuse ... life-sustaining treatment, or who seek palliative sedation, are less vulnerable or less susceptible to biased decision-making than those who might seek more active assistance in dying.”<sup>232</sup> The Supreme Court of Canada, therefore, declared the law void “insofar as [it] prohibit[s] physician-assisted death for a competent adult person who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering ... intolerable to the individual in the circumstances of his or her condition.”<sup>233</sup>

BB) GERMANY

The Federal Constitutional Court held with Judgment of 26<sup>th</sup> February 2020 that the prohibition of assisted suicide set out in § 217 of the Criminal Code violates the Basic Law and is therefore void. This provision imposed criminal punishment on “anyone who, with the intention of assisting another person to commit suicide, provides, procures or arranges the opportunity for that person to do so *and whose actions are intended as a recurring pursuit*”. According to the Court, the general right of personality (Art. 2 sec. 1 in conjunction with Art. 1 sec. 1 of the Basic Law), which is unknown to US constitutional law, encompasses a right to a self-determined death. With echoes of *Carter v. Canada* the Court noted: “Respect for and protection of human dignity and freedom are fundamental principles of the constitutional order, informed by the central notion that human beings are capable of self-determination and personal responsibility.”<sup>234</sup> For the individual, the meaning of life and the question of whether and for what reasons to consider ending one’s own life is a matter of highly personal beliefs and convictions. “The decision to commit suicide concerns fundamental questions of human existence and has a bearing on one’s identity and individuality like no other decision.”<sup>235</sup> Therefore, the Court went on, “the general right of personality in its manifestation as the right to a self-

<sup>231</sup> *Carter v. Canada* (Attorney General), 2015 SCC 5, [2015] 1 S.C.R. 331 para. 105. See also para. 117.

<sup>232</sup> *Carter v. Canada* (Attorney General), 2015 SCC 5, [2015] 1 S.C.R. 331 para. 115. The Court also rejected the argument that such a regulatory regime would initiate a descent down a slippery slope into homicide: “Anecdotal examples of controversial cases abroad were cited in support of this argument, only to be countered by anecdotal examples of systems that work well.” (*Carter v. Canada* (Attorney General), 2015 SCC 5, [2015] 1 S.C.R. 331 para. 120).

<sup>233</sup> *Carter v. Canada* (Attorney General), 2015 SCC 5, [2015] 1 S.C.R. 331 para. 127.

<sup>234</sup> BVerfG, Judgment of the Second Senate of 26 February 2020 - 2 BvR 2347/15 -, para. 205.

<sup>235</sup> BVerfG, Judgment of the Second Senate of 26 February 2020 - 2 BvR 2347/15 -, para. 209.



determined death is not limited to the right to refuse life-sustaining treatments”<sup>236</sup> but extends to cases where the individual decides to actively take one’s own life, regardless of whether this decision is motivated by serious or incurable illness. Instead, and worthy of particular attention compared to *Carter v. Canada*, the right to determine one’s own life “is guaranteed in all stages of life”.<sup>237</sup> “Where an individual decides to end their own life, having reached this decision based on how they personally define quality of life and a meaningful existence, their decision must, in principle, be respected by state and society as an act of autonomous self-determination.”<sup>238</sup> This conclusion cannot be called into question on the grounds that a person who commits suicide forfeits their dignity, since in ending their life, they also give up the basis of self-determination. “Rather, the self-determined act of ending one’s life is a direct, albeit final, expression of the pursuit of personal autonomy inherent in human dignity.”<sup>239</sup> The Federal Constitutional Court then added: the right to take one’s own life also protects the freedom to seek and, if offered voluntarily (!), make use of assistance provided by third parties for this purpose: “Where the exercise of a fundamental right depends on the involvement of others, and the free development of one’s personality hinges on the participation of another person, the general right of personality also provides protection from restrictions that take the form of prohibiting this other person from offering such assistance in the exercise of their own freedom.”<sup>240</sup>

§ 217 of the Criminal Code interferes with the general right of personality of persons wishing to die. It “reduces the possibilities for assisted suicide to such an extent that, regarding this aspect of self-determination, there is *de facto* no scope for the individual to exercise their constitutionally protected freedom.”<sup>241</sup> The Court further noted that this interference is particularly serious because of the vital significance that self-determination over one’s own life has for personal identity, individuality and integrity.<sup>242</sup> Against this background, the prohibition of assisted suicide services in § 217 of the Criminal Code is not justified; it does not satisfy the requirements arising from the principle of “strict proportionality”<sup>243</sup>. To be sure, the prohibition has – as much as the ones in the US states have – a legitimate purpose: to protect the autonomy of the individual in deciding whether to end their own life and hereby to protect life as such.<sup>244</sup> Moreover, the legislature’s assessment is

<sup>236</sup> BVerfG, Judgment of the Second Senate of 26 February 2020 - 2 BvR 2347/15 -, para. 209.

<sup>237</sup> BVerfG, Judgment of the Second Senate of 26 February 2020 - 2 BvR 2347/15 -, para. 210.

<sup>238</sup> BVerfG, Judgment of the Second Senate of 26 February 2020 - 2 BvR 2347/15 -, para. 210.

<sup>239</sup> BVerfG, Judgment of the Second Senate of 26 February 2020 - 2 BvR 2347/15 -, para. 211.

<sup>240</sup> BVerfG, Judgment of the Second Senate of 26 February 2020 - 2 BvR 2347/15 -, para. 213.

<sup>241</sup> BVerfG, Judgment of the Second Senate of 26 February 2020 - 2 BvR 2347/15 -, para. 267.

<sup>242</sup> BVerfG, Judgment of the Second Senate of 26 February 2020 - 2 BvR 2347/15 -, para. 218.

<sup>243</sup> BVerfG, Judgment of the Second Senate of 26 February 2020 - 2 BvR 2347/15 -, para. 223.

<sup>244</sup> BVerfG, Judgment of the Second Senate of 26 February 2020 - 2 BvR 2347/15 -, para. 232.



comprehensible in that assisted suicide could lead to a “societal normalisation” of it and that assisted suicide could become recognized as a normal way of ending life; this is particularly the case for the elderly and ill, which might create social expectations and pressure threatening personal autonomy.<sup>245</sup> The restriction of the right to a self-determined death is, however, not appropriate: “[Criminal law] exceeds the limits of what constitutes a legitimate means for protecting personal autonomy in the decision on ending one’s life [where it] no longer protects free decisions of the individual but renders such decisions impossible.”<sup>246</sup> In particular, the state’s duty to protect self-determination and life can only take precedence over the freedom of the individual where the individual is exposed to influences that endanger the self-determination of their own life. “It is true that the prohibition set out in § 217 [of the Criminal Code] is limited to ... a very specific form of suicide assistance. However, the resulting loss of autonomy is disproportionate to the extent that ... the remaining options available to the individual provide only a theoretical but no actual prospect of self-determination.”<sup>247</sup> So far physicians’ willingness to provide suicide assistance has been low, and they cannot be required to do so; to the contrary, laws and codes governing the medical profession often prohibit physicians to assist.<sup>248</sup> Last but not least, improving palliative care is also not suitable to compensate for the disproportionate restriction of individual self-determination. Unlike *Glucksberg*, the Federal Constitutional Court noted that no one is obliged to make use of palliative care: “The decision to end one’s own life ... also encompasses the decision against existing alternatives [, which] must be accepted as an act of autonomous self-determination in that negative dimension, too.”<sup>249</sup>

#### CC) AUSTRIA

Subsequently, the Austrian Constitutional Court held the phrase “anyone who ... assists [another person in killing themselves]” in section 78 of the Criminal Code unconstitutional. The Court – as much as its German counterpart – pointed out that the “right to free self-determination comprises the right to order one’s life as well as the right to die in dignity.”<sup>250</sup> The rationale, however, is different: the Court

<sup>245</sup> BVerfG, Judgment of the Second Senate of 26 February 2020 - 2 BvR 2347/15 -, para. 250.

<sup>246</sup> BVerfG, Judgment of the Second Senate of 26 February 2020 - 2 BvR 2347/15 -, para. 273.

Therefore, and as opposed to the Supreme Court of Canada (minimal impairment requirement), the Federal Constitutional Court did not reach the question whether § 217 of the Criminal Code is “necessary” to achieve the legislator’s legitimate aim of ensuring protection (BVerfG, Judgment of the Second Senate of 26 February 2020 - 2 BvR 2347/15 -, para. 263).

<sup>247</sup> BVerfG, Judgment of the Second Senate of 26 February 2020 - 2 BvR 2347/15 -, para. 280.

<sup>248</sup> BVerfG, Judgment of the Second Senate of 26 February 2020 - 2 BvR 2347/15 -, para. 290.

<sup>249</sup> BVerfG, Judgment of the Second Senate of 26 February 2020 - 2 BvR 2347/15 -, para. 299.

<sup>250</sup> VfGH, Decision G 139/2019 of 11 December 2020, para. 65.

relied on the right to private life pursuant to Art. 8 of the European Convention on Human Rights (ECHR), the right to life (Art. 2 of the ECHR), and the principle of equality of the Constitution of Austria. The first comes as no surprise: the European Court of Human Rights has consistently ruled “that an individual’s right to decide by what means and at what point his or her life will end, provided he or she is capable of freely reaching a decision on this question and acting in consequence, is one of the aspects of the right to respect for private life”.<sup>251</sup> But what about Art. 2 of the ECHR? Does it not rather oblige the State to protect life, notably persons at risk of committing suicide? And, what about the principle of equality? Unlike its past rulings, the Austrian Constitutional Court seems to derive substantive rights from it: “Given its elementary message that all people are equal before the law, the principle of equality postulates that every human being, as an individual, is different from all other human beings, from which the specific personality and individuality of a person can be inferred.”<sup>252</sup> But the Court did not leave it at that: following the “traditional” approach of equal protection, it, strikingly, but convincingly, reached a different outcome than *Vacco v. Quill*: “[F]rom a fundamental rights perspective it makes no difference if a patient ... exercising his or her right to self-determination ... refuses ... life-maintaining medical measures, or if a person willing to commit suicide wants to end his or her life with another person’s assistance by exercising his or her right to self-determination in order to die in dignity ... .”<sup>253</sup>

The right to free self-determination, in accordance with the German and the Canadian judgments, covers not only the decision by and the action of the person willing to commit suicide, but also the right of that person to seek the assistance of a third party who is willing to provide such assistance: “The person willing to commit suicide may, in various ways, be dependent on another person’s assistance in order to actually implement his or her self-determined decision to end his or her life by the means chosen.”<sup>254</sup> Again, it does not matter whether this decision is motivated by serious or incurable illness: the right to free self-determination includes, in the view of the Austrian Constitutional Court, on the one hand, the decision “for what reasons” an individual wants to end their life, and, on the other hand, on “the point in time”.<sup>255</sup>

The Court then concluded that section 78 of the Criminal Code – as did its German counterpart – interferes intensively with the right of the individual: As it “prohibits assisted suicide without exception, this provision may, under certain circumstances, induce the individual to end his or her life in a degrading manner if

<sup>251</sup> See e.g. *Haas v. Switzerland*, Application no. 31322/07, Judgment of 20 January 2011, para. 51.

<sup>252</sup> VfGH, Decision G 139/2019 of 11 December 2020, para. 72.

<sup>253</sup> VfGH, Decision G 139/2019 of 11 December 2020, para. 92.

<sup>254</sup> VfGH, Decision G 139/2019 of 11 December 2020, para. 74.

<sup>255</sup> VfGH, Decision G 139/2019 of 11 December 2020, paras. 72-73.

he or she freely decides that a self-determined life in personal integrity and identity and, hence, human dignity is no longer guaranteed in the current situation.”<sup>256</sup> Therefore, the legislature’s margin of appreciation is very limited. As much as in *Carter v. Canada*, the legislature is not allowed to weigh the protection of life against the right to self-determination of the individual willing to commit suicide: “If it is beyond doubt that the decision to commit suicide is based on free self-determination, it must be respected by the legislator. ... it is *a priori* wrong to infer a duty to live from the right to the protection of life [(Art. 2 of the ECHR)] and thus make the subject of this fundamental right an addressee of the State’s duty of protection.”<sup>257</sup> The legislature is, of course, free to provide for safeguards to prevent abuse and ensure that the individual does not decide to end his or her life under the influence of third parties. “Regardless thereof, the freedom of the individual to decide on their life in conditions of integrity and personal identity and, consequently, decide to end life with third-party assistance, must not be denied as such.”<sup>258</sup> And that is precisely what has happened: “As section 78 [of the Criminal Code] absolutely prohibits any form of assistance to suicide, which makes it impossible for the person willing to commit suicide to die in dignity, as desired, this provision violates the right to self-determination ... .”<sup>259</sup>

## 6. CONCLUSION

*Glucksberg’s* 25<sup>th</sup> anniversary is no cause for joy. The US Supreme Court was wrong for several reasons. Notably, by narrowing down the question to whether there is a constitutional right to physician-assisted suicide, the Court lost sight of the actual issue: the people who are suffering and their interest in dignity which had been the centerpiece both in *Cruzan* as well as in *Casey*. To be sure, the Court had every reason to believe that there are countervailing state interests. That, however, does not justify a total ban on assisted suicide, in particular, since we must not weigh the (general) protection of life against the right to self-determination of the individual willing to commit suicide.

That is all the more true today: Substantive due process analysis, for instance, is not only focused on the past but also has to take the here and now into account. In light of this, it can only be a matter of time before a high court in the United States is going to recognize assistance in dying as a fundamental right. The states are already further along with this. Physician-assisted death is now legal in eleven jurisdictions: California, Colorado, District of Columbia, Hawaii, Montana, Maine, New Jersey, New Mexico, Oregon, Vermont, and Washington. Internationally, these developments did not go unrecognized. Courts in Canada, Germany and Austria, again, pointed out that the “right to die” is essentially a matter of human

<sup>256</sup> VfGH, Decision G 139/2019 of 11 December 2020, para. 80.

<sup>257</sup> VfGH, Decision G 139/2019 of 11 December 2020, para. 84.

<sup>258</sup> VfGH, Decision G 139/2019 of 11 December 2020, para. 102.

<sup>259</sup> VfGH, Decision G 139/2019 of 11 December 2020, para. 104.



dignity and autonomy. It might be an entirely different story to ask 1. whether physician-assisted suicide should be limited to the terminally ill or 2. even whether there might be situations in which the physician had to carry out the final death-causing act by him or herself instead of the patient who is willing to die. Whether we like it or not, we have to face up to these hard questions.

With regard to the US Supreme Court, however, there is little reason to hope only for the slightest change. All three Trump appointees to the Roberts Court made their position clear: the latest, Amy Coney Barrett, indicated during her confirmation hearing that she would still vote no on a “right to die”.<sup>260</sup> The same is probably true for Brett Kavanaugh: While he seemed less worried about the sanctity of life than Barrett, he raised – years before *Dobbs* – concerns about the “general tide of freewheeling judicial creation of unenumerated rights that were not rooted in the nation’s history and tradition”. By contrasting *Glucksberg* with *Roe* and *Casey*, he pointed out that *Glucksberg* was important in “limiting the Court’s role in the realm of social policy and helping to ensure that the Court operates more as a court of law and less as an institution of social policy.”<sup>261</sup> Finally, it is Neil Gorsuch, whose views on this issue are well-known: He has developed a moral theory that rests on the notion that the intentional taking of human life by private persons is always wrong.<sup>262</sup> It goes without saying that legalizing physician-assisted suicide would hardly be compatible with a theory like this.

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<sup>260</sup> [https://www.washingtonpost.com/opinions/judge-amy-coney-barrett-and-the-future-of-physician-assisted-suicide/2020/10/19/9a1516ce-1230-11eb-bc10-40b25382f1be\\_story.html](https://www.washingtonpost.com/opinions/judge-amy-coney-barrett-and-the-future-of-physician-assisted-suicide/2020/10/19/9a1516ce-1230-11eb-bc10-40b25382f1be_story.html), Nov. 15, 2022, 9:43 PM.

<sup>261</sup> See <https://rollcall.com/2018/07/23/supreme-court-nominee-kavanaughs-responses-reveal-views/>, Nov. 15, 2022, 9:44 PM.

<sup>262</sup> See only NEIL M. GORSUCH, *THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA* 157 (2009).



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