

Physician-Assisted Suicide and Euthanasia: A Current Legal Perspectiveⁱ

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In this article, I will discuss the legal developments with regard to physician-assisted suicide and euthanasia.ⁱⁱ I think there is much good news. With the exception of Oregon, where physician-assisted suicide has been legal since 1997,ⁱⁱⁱ the organized effort to legalize assisted suicide through the courts and state legislation has met with no success since 1997, at least not in the United States.

Yet, developments abroad—and here I am thinking primarily about the Netherlands and Belgium—and broader cultural trends create grave cause for concern. Moreover, recent court cases involving the refusal of medical treatment confirm and extend the trend in the courts over the last twenty years that rejects the idea that the state has a compelling interest in protecting human life in its weakest and most vulnerable state. Or, put another way, the courts increasingly take the view that there are certain lives that are not worth living. We have thus far largely resisted the move to justify *affirmative* acts to end these lives, but the principle that the courts have accepted—that omitting life-saving medical treatments is permissible—is frequently based on the idea that the life of such a patient is not a good and that idea is ultimately quite supportive of the assisted suicide and euthanasia positions—even if the logic of this position has not been fully appreciated. The long-term cultural battle is to restore the sanctity of life ethic.

From our vantage point in 2002, it is easy to forget that in the mid-1990s the momentum seemed to be all in favor of legalizing the “right to die,” either by legislative action or by judicial decisions striking down state bans on assisted suicide. A key event that supported this momentum was the United State

Supreme Court's 1992 decision in *Planned Parenthood v. Casey*.^{iv} In *Casey* the plurality infamously noted that "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."^v This passage has been read—with some justification—as supporting the idea that moral relativism is a constitutional command.^{vi} Under the view expressed here, morality is purely private, purely subjective.^{vii} The state must remain neutral about the content of the individual's choice. In the abortion context presented in *Casey*, the state must be indifferent whether the pregnant mother chooses life or death. As John Finnis has noted in commenting on the abortion cases, the Court's decisions adopt an "implicit assumption of neutrality: since it is obvious that the state could not constitutionally force a woman to end a pregnancy against her will by obliging her to terminate the life within her, it must obviously and necessarily follow that the state cannot oblige her not to end that life. Symmetry. Since you must be permitted to choose life, you must be permitted to choose death."^{viii}

There is also in this philosophical liberalism a distinct tendency towards the privatization of religion.^{ix} Thus, the Court's abortion decisions quite candidly take one of two related views: "First, religiously influenced moral judgments are not taken into account in support of the constitutionality of legislation because such judgments do not constitute 'secular' interests that the government may advance. Second, religiously influenced moral judgments are viewed as dispositive of the case against the constitutionality of legislation because it violates the Establishment Clause for 'religious' views to be embodied in secular legislation."^x

In the mid-1990s, some lower courts dealing with the constitutionality of laws banning assisted suicide cited the broad language in *Casey* in support of the argument that there is a fundamental right to assisted suicide.^{xi} These opinions ignored the opposition to assisted suicide in our history and tradition and appealed to *Casey*'s abstract rhetoric. These opinions regarded the broad language as "highly instructive" and "almost

prescriptive” in resolving the assisted suicide issue.^{xii} According to this view, “the right to die with dignity accords with American values of self-determination and privacy regarding personal decisions.”^{xiii} The key here is the fact of choice, not the content of the choice. For example, Professor Sedler described the argument in this fashion thus: “What is protected by the Constitution is *choice* in matters of personal autonomy. The Constitution protects the choice of a pregnant woman to terminate a pregnancy by a pre-viability abortion. The same Constitution protects the choice of a pregnant woman to continue her pregnancy, and precludes the state from forcing her to have an abortion for any reason whatsoever. By the same token, the same Constitution that protects the right of the terminally ill to make the choice to hasten inevitable death equally protects the right of the terminally ill to make the choice *not* to hasten inevitable death.”^{xiv} That lethal choices have always been looked upon with disfavor by the law,^{xv} does not matter at all under this understanding. Under this view, the state must remain neutral about the choice of life or death.

These lower court opinions also relied on the privatization concept noted above. The Ninth Circuit opinion invalidating the State of Washington’s ban on assisted suicide was based in part on the idea that a law prohibiting assisted suicide is an effort to impose religious convictions. Judge Reinhardt’s opinion concluded: “Those who believe strongly that death must come without physician assistance are free to follow that creed, be they doctors or patients. They are not free, however, to force their views, their religious convictions, or their philosophies on all the other members of a democratic society, and to compel those whose values differ with theirs to die painful, protracted, and agonizing deaths.”^{xvi} Interestingly, when the assisted suicide cases were before the Supreme Court, one amicus brief argued that laws banning assisted suicide violated the Establishment Clause because the laws endorsed one supposedly religious viewpoint to the exclusion of others.^{xvii}

Another argument that was pressed in the lower courts in the

mid-1990s was an equal protection argument. Here is how the Second Circuit characterized the argument (in the course of invalidating New York's ban on assisted suicide): "New York does not treat similarly circumstanced persons alike: those in the final stages of terminal illness who are on life-support systems are allowed to hasten their deaths by directing the removal of such systems; but those who are similarly situated, except for the previous attachment of life sustaining equipment, are not allowed to hasten death by self-administering prescribed drugs."^{xviii} The Second Circuit rejected the argument that there is a constitutionally significant difference between letting someone die (by withdrawing life sustaining medical treatment, including food and water) and taking affirmative steps to kill a person (by providing assistance for that person to take their own life).

In 1997, of course, in *Washington v. Glucksberg*^{xix} and *Vacco v. Quill*,^{xx} the United States Supreme Court rejected the constitutional challenges to laws banning assisted suicide. The Court rejected the idea that there is a fundamental right to assisted suicide. In so doing, the Court refused to rely on the broad, abstract language from *Casey* and instead inquired whether there was any support for the view that a right to assisted suicide was deeply rooted in our Nation's history and tradition. The Court carefully reviewed the relevant history and stated: "we are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State."^{xxi} In this case (unlike in *Roe v. Wade*^{xxii} and *Stenberg v. Carhart*^{xxiii}), the Court was unwilling to take that step. The Court's opinion also implicitly rejected the privatization view—which holds that religiously informed moral judgments are not legitimate bases for governmental decision-making. The Court was quite respectful of the long tradition of laws prohibiting assisted suicide, a tradition that had religious antecedents.^{xxiv} The Court's most recent opinions establish that it

is generally permissible for the state to act on the basis of moral judgments, even though some might regard that position as having been religiously influenced in some sense.^{xxv}

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

The 1997 Supreme Court decisions were significant victories. The *Glucksberg* Court's approach to judicial review is far sounder than that exemplified by *Roe* and *Casey*. This more restrained approach avoids the whole problem of the judicial usurpation of politics that characterizes the more expansive approaches found in some cases.^{xxvii} And, incidentally—although this is really the topic for another article—the approach used in the assisted suicide cases makes *Roe* and *Casey* increasingly suspect. It is quite clear that if it had used the approach it used in *Glucksberg* when it first addressed the abortion issue the Court would have reached a different result. If the Court examined the historical record with any care and honesty, there is no way it could conclude that the right to abortion is deeply rooted in this country's history and tradition.^{xxviii}

Moreover, the Court's implicit rejection of the privatization idea is also good news. There is a lot of cultural pressure in favor of the privatization idea. Much of what one reads in bioethics debates involves an effort to discount pro-life views because of their "religious" origins. Here is one example from an article by Howard Brody, a prominent advocate of physician-assisted suicide: "The political power and will of those who would impose their religiously grounded right-to-life perspective upon society through force of law do not seem to have diminished [following the

1997 decisions].^{xxix} Significantly, this is not part of an effort to argue that a “religiously grounded” perspective is inappropriate because of its source. Brody mentions this as almost a throw-away line, perhaps to signal his view that such perspectives are not “rational” or perhaps to subtly discount this perspective without having to confront it on its merits.^{xxx}

The privatization argument is a staple in debates on most controversial moral issues. For example, some argue that the opposition to same-sex marriage is necessarily based on religious intolerance (or, put another way, that there are no secular arguments against recognizing such unions as marriages) and, therefore, that it violates the Establishment Clause for the state to act on this basis.^{xxxi} This argument depends on the conviction that laws must be supported by a certain form of secular rationality. Fortunately, the Supreme Court has rejected this view. “The Court continually reaffirms the idea that a moral position should not be regarded as religious simply because it happens to coincide with the tenets of some religious organizations.”^{xxxii} Or, put another way, the Court does not require that laws be “rational,” at least not if “rationality” is defined in narrow, partisan terms. The Court has adopted a wide understanding that permits the inclusion of a range of comprehensive moral perspectives, even if some might regard these comprehensive moral perspectives as religious in some sense. *Glucksberg* makes it clear that religious people, and their moral perspectives, ought to be afforded an equal opportunity to participate in the political process.^{xxxiii}

In addition, while I think some overstate the importance of judicial decisions,^{xxxiv} the law has a teaching function that must be appreciated. This aspect was noted by Justice Scalia in his *Casey* dissent: “*Roe* created a vast new class of abortion consumers and abortion proponents by eliminating the moral opprobrium that had attached to the act.”^{xxxv} As Justice Scalia went on to note, many might take the natural but inaccurate view that “[i]f the Constitution *guarantees* abortion, how can it be bad?”^{xxxvi} If the 1997 Supreme Court decisions had come out the other way, the moral case for assisted suicide would have been

given an enormous boost. The Court's rejection of the constitutional attacks on laws banning assisted suicide, or put another way, the Court's seeming validation or endorsement of these laws—for this is how the Court's decisions are read—gives defenders of the traditional ethic an important victory.^{xxxvii}

There is, however, reason to be concerned. First, although the Court was unanimous in upholding the bans on assisted suicide, there were a number of concurring opinions that left the door open for a majority of the Court to find a right to assisted suicide in a subsequent case. Justice O'Connor's concurrence, for example, stated that she joined the majority because she agreed "that there is no generalized right to 'commit suicide.'"^{xxxviii} She reserved the question of whether there might be a limited right in some circumstances—in her phrasing, "whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death."^{xxxix} To the extent that the Court left the door open to a more limited right of assisted suicide, I think that that opening is exceedingly small.^{xl} At the most, I agree with those who contend that a majority of the Court may have endorsed a right to adequate palliative care.^{xli}

This might not be a cause for concern except that some argue that pain relief, which is certainly permissible under the doctrine of double effect even when it foreseeably hastens death, is already being used as a cover for euthanasia.^{xlii} I do not think, however, that the Court clearly endorses such an "aggressive," that is intentionally lethal, use of palliative care, or perhaps more narrowly, that the Court does not clearly endorse that there is any sort of constitutional right to such "aggressive" palliative care. There is, however, enough ambiguity in the opinions to make such an analysis plausible.

Second, the opinions in this area are weak on the state's interest in life. Chief Justice Rehnquist's opinion in *Glucksberg* did state that "Washington has an 'unqualified interest in the preservation of human life.'"^{xlili} His opinion, however, never clearly stated the weight of this state interest,^{xliv} and the opinion clearly

contemplated that the decision about how to address assisted suicide would be left to the democratic process.^{xlv} There does not seem to be, in short, any obligation on the part of the state to prohibit assisted suicide, as the Oregon situation (where assisted suicide is legal) makes clear.^{xlvi}

Since the 1997 Supreme Court decisions, the fight has largely shifted to a state-by-state battle. Here, the Court's decisions have slowed the momentum of the fight for a judicial recognition of a constitutional "right to die." For example, the Florida Supreme Court,^{xlvii} in *Krischer v. McIver*,^{xlviii} rejected the argument that there was a fundamental right to assisted suicide under the Florida State Constitution. In so doing, the Florida Court was greatly influenced by the United States Supreme Court decisions rejecting the federal constitutional arguments.^{xlix} Similarly, in *Sampson v. Alaska*,^l the Supreme Court of Alaska rejected state constitutional arguments against Alaska's ban on assisted suicide.^{li} Here, too, the United States Supreme Court's opinions had a significant influence on the state court.^{lii}

The state battles on whether to legalize assisted suicide have increasingly moved to efforts to try to legalize assisted suicide through state legislatures or through the initiative or referendum process. Here, again, with the exception of Oregon, the legalization effort has met with defeat. The recent experiences in Michigan and Maine are illustrative. In November 1998, Michigan voters overwhelmingly (71%-29%) rejected a proposal to legalize assisted suicide.^{liii} In November 2000, Maine voters by a narrow (51%-49%) margin rejected a measure to legalize assisted suicide.^{liv}

I think these Michigan and Maine votes were indeed major victories. Yet, I think it is a mistake to read too much into these votes. In Michigan (and of these 2 states I have much more familiarity with the Michigan situation), the proponents of legalizing assisted suicide were tremendously underfunded. The battle, particularly the TV advertising, was tremendously one-sided. More troubling, the debate in Michigan was not on the basic moral point—that it is wrong or immoral to assist in a suicide. The debate

was far more on pragmatic grounds. It was not forthrightly a moral fight.^{lv} Some of the prominent people opposing legalizing assisted suicide acknowledged that it might be morally appropriate in certain hard cases.^{lvi} As I will discuss in more detail below, there is a tremendous danger in admitting exceptions in this area. In sum, while the Michigan and Maine votes were certainly to be commended, I think it is a mistake to view these votes as somehow rejecting the basic direction of the culture on these issues, which is—as I will discuss below – favorable to the acceptance of assisted suicide and euthanasia.

So, with the exception of Oregon, the legalization effort has stalled and there may even be some success in changing the Oregon situation by action at the federal level. The major development involves the Bush administration's efforts to prevent physicians from using federally controlled drugs for assisted suicide.^{lvii} In June 1998, Attorney General Janet Reno's legal opinion permitted Oregon physicians to use federally controlled drugs for assisted suicide. On November 6, 2001, Attorney General Ashcroft overturned Reno's interpretation and restored the view that assisting a suicide is not a legitimate medical purpose. Under Ashcroft's interpretation, doctors who prescribed federally controlled substances for assisted suicide would be subject to possible suspension or revocation of their federal registration. On April 17, 2002, a federal district court judge issued a permanent injunction barring the federal government from taking enforcement action against doctors who prescribe federally controlled substances for assisted suicide. The Department of Justice has indicated that it will appeal this ruling.^{lviii}

This is all certainly good news. But there are some disturbing trends. First, internationally, the recent developments in the Netherlands are a cause for great concern. For some time now, euthanasia has not been technically legal in the Netherlands, but it has been widely practiced and officially condoned, at least in theory when a set of supposedly "strict" guidelines were followed. The initial justification for euthanasia came in situations involving the free and explicit request of the patient. Yet, studies indicated

that there were many cases each year when doctors took active steps to kill their patients without the explicit request of the patient. And, in a significant percentage of these cases the patient who was killed (without request) was competent. As a Cambridge scholar noted (and again this was well before the recent votes to legalize euthanasia): “The hard evidence...indicates that, within a remarkably short period of time, the Dutch have proceeded from voluntary to non-voluntary euthanasia. This is partly because the underlying justification for euthanasia in Holland is not now, if it ever has been, patient self-determination, but rather acceptance of the principle that certain lives are not worth living, and that it is right to terminate them...”^{lix}

This is likely to accelerate since euthanasia has been legal since April 1, 2002.^{lx} Importantly, this law does not require that the patient be terminally ill. Patients who are between 16 and 18 can make this choice to have themselves killed without the consent of their parents. And patients who are no longer competent may be killed if they have expressed a prior intent for “termination of life.” And, even this legalization did not go far enough for some. The Dutch Health Minister recently stated that elderly people who are tired of life should be able to kill themselves with a suicide pill. She said, reassuringly, that this would be limited to very old people who have had enough of living.^{lxi}

On May 16, 2002, Belgium became the second country in the world to legalize euthanasia. The law enables doctors to end a patient’s life without fear of prosecution if a series of conditions are met. Notably, the patient must be older than 18, the request for euthanasia must be voluntary, and the patient must be in a hopeless clinical situation and enduring constant and unbearable suffering. There are separate provisions in the law for patients in a persistent vegetative state.^{lxii}

An interesting feature of these recent developments is that both in the United States and abroad the courts have not been the leaders in promoting the legalization of assisted suicide. The recent case involving Diane Pretty is illustrative. On April 29, 2002, the European Court of Human Rights rejected the argument that

Diane Pretty had a right to assisted suicide.^{lxiii} This ruling affirmed an earlier ruling by the House of Lords.^{lxiv} The House of Lords cited the 1997 U.S. Supreme Court opinions.^{lxv}

There continue, however, to be moves on the legislative front. The movement in favor of assisted suicide seems to have been slowed, but the recent events in Belgium and Hawaii indicate that there are ongoing efforts to extend the legalization of assisted suicide.

We see here the working out of the logic that says that there are certain lives that are not worth living. In general, the Western tradition has reflected a clear position—that one cannot intend to take the life of an innocent human person.^{lxvi} The basis for this view is that human life has been regarded as a basic human good—and that one cannot act against a basic human good. This position held even if the actor had a good motive. The basic idea is that one cannot do evil that good might come from it. So, it has never been regarded as permissible to kill an innocent human person for some good reason (to see their suffering—and that of their loved ones—come to an end; for research purposes; or to prevent their sizeable estate from being squandered on futile medical expenses). The acceptance of exceptions—even supposedly narrow ones is devastating. As John Finnis has stated: “If appropriate circumstances and good intention can sometimes justify choosing to kill an innocent, the lives of each of us depend on everyone judging, at every moment, that in the circumstances no greater good would be achieved, or greater evil avoided, by killing us....Once it is allowed that a ‘proportionate reason’ can justify choosing to kill an innocent person, the genie is out of the bottle and exceptions cannot be contained.”^{lxvii}

Tragically, this bridge has already been crossed in the United States, and not just in Oregon. We have seen this—although I do not think that this has been adequately recognized—in the withdrawal of treatment situations. Here, I am thinking about the withdrawal of food and water cases, such as *Cruzan*.^{lxviii} Most of these cases have involved patients in a persistent vegetative state.^{lxix} In many of these cases, the omission of food and water

has been done in situations that historically would have been regarded as homicides or suicides.^{lxx} The basic choice in these cases is a conscious choice to end a human life because the life of such a patient is not regarded as worth living.^{lxxi}

In fact, some of the opinions refer to such patients as non-persons—because they lack certain abilities they are already dead. Justice Stevens took this approach in *Cruzan* when he stated: “Nancy Cruzan is obviously ‘alive’ in a physiological sense. But for patients like Nancy Cruzan, who have no consciousness and no chance of recovery, there is a serious question as to whether the mere persistence of their bodies is ‘life’ as that word is commonly understood, or as it is used in both the Constitution and the Declaration of Independence.”^{lxxii}

Perhaps surprisingly, a similar view is endorsed by some prominent Catholic moral theologians.^{lxxiii} One legal scholar states this view more candidly than most: “But there can be no valid interest in preserving life when there is no life left to preserve. A ban on the use of physician-prescribed medications by a terminally ill person to hasten that person’s inevitable death does not advance any conceivable interest in preserving life.”^{lxxiv} In discussing a patient debilitated with multiple sclerosis who might live for some additional years, this scholar stated that the State’s interest in preserving her life “turns out to be no more than a symbolic interest....”^{lxxv}

Many of these opinions quite candidly adopt a quality of life ethic. An opinion from Michigan stated that “the state’s interest in the preservation of life relates to meaningful life.”^{lxxvi} Another opinion from Michigan invoked—with approval—*Buck v. Bell*.^{lxxvii} The Michigan court concluded that if Virginia could take account of the reduced quality of life of the mentally retarded in order to justify their sterilization, then it must be appropriate to take the reduced quality of life of one seeking suicide assistance into account in deciding whether such individuals have the right to kill themselves.^{lxxviii} These opinions have an eerie echo of Justice Blackmun’s opinion in *Roe* noting that the state only had a compelling interest in “meaningful life outside the mother’s

womb[,...]^{lxxix} and his conclusion that “the unborn have never been recognized in the law as persons in the whole sense.”^{lxxx} It is this idea—that we can define some human beings as non-persons, as not worthy of the same degree of protection and care as the rest of us—that is so alarming.

As Cardinal Ratzinger stated a few years back: “A state which arrogates to itself the prerogative of defining which human beings are or are not the subject of rights and which consequently grants to some the power to violate others’ fundamental right to life, contradicts the democratic ideal to which it continues to appeal and undermines the very foundations on which it is built. By allowing the rights of the weakest to be violated, the State allows the law of force to prevail over the force of law. One sees, then, that the idea of absolute tolerance of freedom of choice for some destroys the very foundation of a just life together. The separation of politics from any natural content of right, which is the inalienable patrimony of everyone’s moral conscience, deprives social life of its ethical substance and leaves it defenseless before the will of the strongest.”^{lxxxi}

As I mentioned earlier, the older cases typically involved patients who were diagnosed as being in a persistent vegetative state. The more recent cases, such as the *Wendland*^{lxxxii} case, are pushing the envelope. The intermediate appellate court described Robert Wendland in this fashion: “[he is] severely brain damaged and cognitively impaired. He is conscious and sometimes able to respond to simple commands, but [the court went on to note ominously] he is totally dependent on others for his care and is unable to speak or otherwise communicate consistently.”^{lxxxiii} At the time of the lower court decision, Wendland had the ability to operate a motorized wheelchair, to move himself in a manual wheelchair, to balance momentarily in a balance frame, to sometimes indicate ‘yes’ or ‘no’ on a communication board, and to draw the letter ‘R.’ He was, however, unable to make his own medical treatment decisions and required tube feeding and hydration to survive.^{lxxxiv}

Yet, the California Court of Appeals said that it was open to

his wife (who is his guardian) to show that she had decided in good faith that the removal of his feeding tube, which provides life-sustaining food and water, was in his best interests.^{lxxxv} The California court stated that withdrawing Robert Wendland's food and water would not amount to assisting a suicide because the cause of death would be considered to be his underlying disease or medical condition.^{lxxxvi} Although the appellate court did not acknowledge this point with any clarity, Robert Wendland's "underlying disease or medical condition" is his dependency—he is not sick, much less terminally ill. His fatal pathology is his inability to chew and swallow on his own.^{lxxxvii}

Fortunately, on August 9, 2001, the California Supreme Court reversed this decision.^{lxxxviii} The Court held that "a conservator may not withhold artificial nutrition and hydration from such a person absent clear and convincing evidence that the conservator's decision is in accordance with either the conservatee's own wishes or best interest."^{lxxxix}

Some try to distinguish cases such as *Wendland* or *Cruzan* from what is going on in Oregon or the Netherlands by emphasizing that the withdrawal of food and water is passive (it only involves an omission) and that assisted suicide or euthanasia involves an active step to terminate life. The Supreme Court in part relied on this distinction in rejecting the constitutional attacks on the bans on assisted suicide. Yet, the passive-active, the omission-commission line is unstable—and in fact has never been regarded as dispositive by the criminal law, or by Catholic moral teaching for that matter.^{xc}

I do not think the 1997 United States Supreme Court opinion in *Vacco v. Quill* adequately comes to grips with the fact that the basic choice in these cases is that the patient's life is not a good. The Court didn't really acknowledge how strong the equal protection argument is. Or put another way, the Court did not really fully come to grips with the argument that there is moral equivalence between many withdrawal of treatment cases and instances of physician-assisted suicide and euthanasia.^{xc}

For example, in *Wendland*, the California Court of Appeals

quoted with approval the following statement from the lower court: “To bring about the death of an innocent person who still finds meaning and enjoyment in life would be barbaric. It would be equally cruel, however, to force someone who has lost all dignity and faces only an existence of constant pain or suffering and who would fervently seek death as a release to go on living merely on the presumption that life is always preferable to death.”^{xcii} We see here the view that “mere biological life” is not always a good.

In the *Bland*^{xciii} case from England, where the House of Lords found that it was lawful to stop providing food and water to Tony Bland who was in a persistent vegetative state on the grounds that feeding him served no useful purpose, the Lords made comments such as “His spirit has left him and all that remains is the shell of his body... [which is] kept functioning as a biological unit[,]...^{xciv} and “His body is alive, but he has no life in the sense that even the most pitifully handicapped but conscious human being has a life.”^{xcv} As John Finnis has stated, the judgments of the Court in *Bland* reflect the view that “Bland’s continued existence was not merely no benefit but actually a harm to him, a source of indignity, [a] violation of his wish to be remembered well, [a] humiliation.”^{xcvi} *Bland* involved a patient in a persistent vegetative state but as John Finnis presciently noted, “epithets of indignity and humiliation could easily be applied (as in recent history) to various classes of severely handicapped people, many of whom, moreover, cannot exercise the distinctively human or ‘personal’ forms of understanding and response.”^{xcvii} That description captures the *Wendland* case precisely.

The idea here is that there are some living human beings who would be better off dead.^{xcviii} One leading academic proponent of physician-assisted suicide states, “many treatment withdrawals reflect an intent to die. Patients often refuse life-sustaining treatment because they perceive their life as burdensome and therefore want to die.”^{xcix} According to this scholar, these choices to die are morally justified because “when life becomes sufficiently miserable, a person can reasonably believe that continued life is worse than death.”^c This is, as this scholar quite candidly notes,

an acceptance of the view that the lives of such patients are “no longer worth living”^{ci} and that they “would be better off dead...”^{cii}

That position is obviously quite supportive of the move towards legalizing physician-assisted suicide or euthanasia, even if many of us in these cases have thus far clung to the practical but illogical distinction between active and passive steps to end a life.

I hasten to say that there are some cases where there is a rational distinction between killing and letting die; my position is that this distinction does not apply to many of the withdrawal of food and water cases. In certain cases, the life-sustaining *treatment* itself could be regarded as burdensome or useless, and the death brought about by foregoing such treatment would not be regarded as suicidal. The withdrawal cases to which I am referring involve, on the contrary, choices to regard the patient’s life as a burden, as a disvalue, or not a good, and thus the withdrawal of treatment constitutes a choice to kill rather than the removal of burdensome treatment. I do not think that there has been adequate recognition—although there has certainly been some—of just how significant these withdrawal of treatment cases truly are. Peter Singer, in commenting on the *Bland* case, has commented that the case (and there are many such cases in the United States) marks the collapse of the traditional Western ethic—the principle of the sanctity of human life.^{ciii} I wish these cases were always taken with such seriousness.

There is, then, a disjunction in the law. The cases claim to reject the permissibility of lethal choices, yet many of the withdrawal of treatment cases plainly do endorse such choices. The cases reject the permissibility of active killing but accept the permissibility of intentional killing by omission. The lethal choice being endorsed is the result of the conviction that the lives of these patients are not worth living. The widespread acceptance of that principle is laying the groundwork for the eventual legal acceptance of physician-assisted suicide and euthanasia. We see that principle already being worked out in Oregon, and on a much larger scale in the Netherlands.

What we need to do is to reject in principle and refuse to accept in the law the idea that it is a good to kill an innocent human person, even if that person is suffering from serious physical illness or depression. The solution to suffering and depression is not to kill the patient. We do a poor job of providing adequate health care and pain relief to a large number of people. And that situation would undoubtedly worsen if euthanasia were legalized, as the situation in the Netherlands with regards to pain relief demonstrates.^{civ} The lack of adequate pain relief is particularly acute for those who are disadvantaged in some way—the poor, particularly minorities, the handicapped, and so on. The solution for their suffering is not to kill them. Death is not what the patients want—the noble ideal of a rational suicide is a myth.^{cv} The request for suicide is a cry for help. It is not the compassionate thing to do to respond to that cry for help with an offer to kill.

The key here is to reject the idea that there is such a thing as a life not worth living. We should (to protect the security of us all) affirm the dignity and goodness of all human life. This battle is obviously cultural and ultimately religious, and not strictly legal. The broader effort needed is to fight the “culture of death” and to work unceasingly to build the culture of life and love and truth.

NOTES

i. An earlier version of this article was published in the *National Catholic Bioethics Quarterly* 1 (2001) 345-61. It is reprinted here with permission. The Quarterly is published by the National Catholic Bioethics Center. See www.ncbcenter.org.

ii. In certain places, this article draws from earlier writing of mine on this topic. See Richard S. Myers, “An Analysis of the Constitutionality of Laws banning Assisted Suicide from the Perspective of Catholic Moral

Teaching,” 72 *University of Detroit-Mercy Law Review* 771 (1995).

iii. The Oregon statute is entitled the Death with Dignity Act. Or. Rev. Stat. sections 127.800-897. The Oregon statute was passed in 1994 but did not go into effect until 1997. Official information from the state of Oregon is available from <http://www.ohd.hr.state.or.us/chs/pas/ors.htm>, the website of the Oregon Health Division. For critical commentary on the Oregon law, see the website of the International Task Force on Euthanasia and Assisted Suicide, <http://www.iaetf.org/sptlt2htm>.

iv. 505 U.S. 833 (1992).

v. 505 U.S. at 851.

vi. Some commentators argue that moral relativism is commanded by the Constitution. See Stephen G. Gey, “Is Moral Relativism a Constitutional Command?” 70 *Indiana Law Journal* 331 (1995).

vii. This view is perhaps most clearly expressed in Justice Blackmun’s dissent in *Bowers v. Hardwick*, 478 U.S. 186 (1986), the case in which the Court upheld laws prohibiting homosexual sodomy. For example, Justice Blackmun stated: “Petitioner and the Court fail to see the difference between laws that protect public sensibilities and those that enforce private morality.” *Id.* at 212 (Blackmun, J., dissenting). For an extended critique of Justice Blackmun’s dissent, see Gerard V. Bradley, “Remaking the Constitution: A Critical Reexamination of the *Bowers v. Hardwick* Dissent” 25 *Wake Forest Law Review* 501 (1990).

viii. John Finnis, “The ‘Value of Human Life’ and ‘The right to Death’: Some Reflections on Cruzan and Ronald Dworkin” 17 *Southern Illinois University Law Journal* 559, 562 (1993).

ix. See generally Richard S. Myers, “The Supreme Court and the Privatization of Religion” 41 *Catholic University Law Review* 19 (1991).

x. Myers, *supra* note 9, at 23. See also Richard S. Myers, “The United States Supreme Court and the Privatization of Religion,” 6 *Catholic Science Review* 223-36 (2001).

xi. See Myers, *supra* note 2, at 778-779 (discussing these cases).

xii. *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1459 (W. D.

Wash. 1994).

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

xiv. Robert A. Sedler, “Are Absolute Bans on Assisted Suicide Constitutional? I Say No” 72 *University of Detroit-Mercy Law Review* 725, 731 (1995).

xv. Gerard V. Bradley, “Does Autonomy Require Informed and Specific Refusal of Life-Sustaining Medical Treatment?” 5 *Issues in Law and Medicine* 301 (1989).

xvi. *Compassion in Dying v. Washington*, 79 F. 3d 790, 839 (9th Cir. 1996)(en banc), rev’d sub nom. *Washington v. Glucksberg*, 521 U. S. 702 (1997).

xvii. Brief of Religious Organizations, Leaders and Scholars as Amici Curiae in support of Respondents at 32, *Washington v. Glucksberg*, 521 U. S. 702 (1997)(No. 96-110).

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

xix. 521 U.S. 702 (1997).

xx. 521 U.S. 793 (1997).

xxi. 521 U.S. at 723.

xxii. 410 U.S. 113 (1973).

xxiii. 530 U.S. 914 (2000).

xxiv. See *Washington v. Glucksberg*, 521 U. S. at 710-719 (surveying the relevant history).

xxv. Richard S. Myers, “Same-Sex ‘Marriage’ and the Public Policy Doctrine” 32 *Creighton Law Review* 45, 64-65 (1998).

xxvi. 521 U. S. at 808.

xxvii. See generally Michael W. McConnell, “The Right to Die and the Jurisprudence of Tradition” 1997 *Utah Law Review* 665.

xxviii. See Richard S. Myers, “The End of Substantive Due Process?” 45

Washington & Lee Law Review 557, 595-96 (1988).

xxix. Howard Brody, "Physician-Assisted Suicide in the Courts: Moral Equivalence, Double Effect, and Clinical Practice" 82 *Minnesota Law Review* 939, 960 (1998).

xxx. See Myers, *supra* note 25, at 64.

xxxi. See Myers, *supra* note 25, at 62-65 (discussing and critiquing this argument). Interestingly, Professor Michael Perry, whose views are criticized in my Creighton article, has now abandoned his position. See Michael J. Perry, "Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause" 42 *William & Mary Law Review* 663 (2001). I do not claim any credit for his conversion.

xxxii. Richard S. Myers, "Reflections on the Teaching of Civic Virtue in the Public Schools" 74 *University of Detroit-Mercy Law Review* 63, 81 (1996).

xxxiii. A recent article by Michael McConnell provides a good summary of the position set forth in the text. Professor McConnell concluded: "One false view of separation is the view that religious ideas must not serve as rationales for public policy. This view, called the 'principle of secular rationale,' is put forward as a means of protecting the public sphere from divisive, absolutist, intolerant impulses and from arguments that cannot be supported on the basis of accessible public reasons. But in fact, it rests on inaccurate stereotypes and questionable epistemological premises, and it would disenfranchise religious persons as full participating members of the political community. The United States has never adhered to the principle of secular rationale. Indeed, our political history is rife with religious political activists and religious political arguments....[T]here is no good democratic argument for excluding them. But more than this: to exclude them would be inconsistent with the very ideals of democratic equality that the principle of secular rationale ostensibly seeks to protect. It is time to stop challenging our fellow citizens' right to be part of democratic dialogue, and time to engage their arguments on the merits." Michael W. McConnell, "Five Reasons to Reject the Claim That Religious Arguments Should be Excluded from Democratic Deliberation" 1999 *Utah Law Review* 639, 656-57.

xxxiv. The Justices do not act in isolation. In many ways, the Justices' decisions are simply a product of our culture and predominantly the elite culture. It is the deficiencies in that culture that have largely influenced the legal developments, e.g., abortion on demand, that are properly the subject of criticism. Richard S. Myers, "Law, Culture and Catholicism," Society of Catholic Social Scientists Speech at Franciscan University of Steubenville (March 23, 2002).

xxxv. 505 U.S. at 995 (Scalia, J., dissenting).

xxxvi. *Id.* (Scalia, J., dissenting).

xxxvii. As Michael McConnell stated, "the Court made a significant contribution to stopping what had appeared to be an ideological juggernaut...." McConnell, *supra* note 27, at 702. See also Yale Kamisar, "On the Meaning and Impact of the Physician-Assisted Suicide Cases" 82 *Minnesota Law Review* 895, 900-901 (1998)(footnote omitted)("Now that the Supreme Court has rejected their main constitutional arguments, at least for the near future, I believe that proponents of PAS are in a weaker position than they were before these lawsuits ever commenced. For the constitutional arguments they made without success in the Supreme Court and the policy arguments they have been making, and will continue to make, in the state legislatures or state courts or on the op-ed pages of hundreds of newspapers greatly overlap...[I]t will be a good deal harder to engage in any kind of 'rights talk' after the Supreme Court decisions than before. There are only so many arguments in favor of a 'right' to PAS—and almost all of them were addressed by the Supreme Court in the *Glucksberg* and *Quill* cases. The Court, I think it fair to say, did not find any of them convincing. Thus those arguments have lost a considerable amount of credibility and will be easier to rebuff when made again, albeit in a different setting").

xxxviii. 521 U. S. at 736 (O'Connor, J., concurring).

xxxix. 521 U. S. at 736 (O'Connor, J., concurring).

xl. See Kamisar, *supra* note 37, at 910. As Michael McConnell has concluded: "Despite the optimistic face that some pro-assisted suicide commentators have put upon [the concurring opinions]..., they offer

virtually no support for the constitutional protection of physician-assisted suicide.” McConnell, *supra* note 27, at 677.

xli. Kamisar, *supra* note 37, at 908-909. Michael McConnell has stated: “It is thus apparent that Justice O’Connor was not disagreeing with the majority over its rejection of the putative right of competent, terminally ill patients to commit assisted suicide, but was signaling her belief that it might be unconstitutional for a state to erect ‘legal barriers’ that would restrict the ability of such a patient to obtain adequate pain relief.” McConnell, *supra* note 27, at 679. See also James Bopp Jr. & Richard E. Coleson, “Three Strikes: Is An Assisted Suicide Right Out?” 15 *Issues in Law & Medicine* 3 (1999).

xlii. For example, Professor David Orentlicher argues that the Court has already recognized a right to euthanasia by the emphasis of a majority of the Court on the need for pain relief (which he says that some physicians use to justify sedating the patient into a coma). Then, according to his analysis, the combination of “terminal sedation” and the recognized right to refuse life-sustaining medical treatment, which the courts extend to include food and water, results in the patient’s death through euthanasia. See David Orentlicher, “The Alleged Distinction between Euthanasia and the Withdrawal of Life-Sustaining Treatment: Conceptually Incoherent and Impossible to Maintain” 1998 *University of Illinois Law Review* 837, 855-858. See generally David Orentlicher, *Matters of Life and Death: Making Moral Theory Work in Medical Ethics and the Law* (2001). My review of this book is forthcoming in the *National Catholic Bioethics Quarterly*.

xliii. 521 U. S. at 728 (quoting *Cruzan v. Director, Missouri Dep’t of Health*, 497 U. S. 261, 282 (1990)).

xliv. Chief Justice Rehnquist’s opinion 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.” 521 U. S. at 735.

xlv. “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.” 521 U. S. at 735.

xlvi. There are of course some arguments that the failure to prohibit assisted suicide in the case of the terminally ill itself violates the Constitution. See Daniel Avila, “Assisted Suicide and the Inalienable Right to Life” 16 *Issues in Law & Medicine* 111 (2000); James Bopp Jr. & Richard Coleson, “The Constitutional Case against Permitting Physician-Assisted Suicide for Competent Adults with ‘Terminal Conditions’” 11 *Issues in Law & Medicine* 239 (1995); Edward R. Grant & Paul Benjamin Linton, “Relief or Reproach? Euthanasia Rights in the Wake of Measure 16” 74 *Oregon Law Review* 499 (1995). In *Lee v. Oregon*, 891 F.Supp. 1429 (D. Ore. 1995), the court held that Oregon’s Death with Dignity Act violated the Equal Protection Clause because the Act did not provide sufficient protection for the terminally ill. That holding was vacated by the Ninth Circuit on standing grounds. 107 F.3d 1382 (9th Cir. 1997). The assumption of the United States Supreme Court, however, seemed to be that the choice whether to legalize assisted suicide is left entirely to the political process. This is also clearly the assumption in the abortion context where even the judicial critics of *Roe* and *Casey* conclude that states are free to permit abortion. For example, Justice Scalia has stated: “The States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.” 505 U.S. at 979 (Scalia, J., concurring in the judgment in part and dissenting in part). In his dissent in *Stenberg v. Carhart*, Justice Scalia stated: “the Court should return this matter to the people—where the Constitution, by its silence on the subject, left it—and let *them* decide, State by State, whether this practice should be allowed.” 120 S.Ct. at 2623 (Scalia, J., dissenting).

xlvii. The Florida Supreme Court is not known for judicial restraint. As one article notes, “Florida is a bellwether state with an explicit, sometimes-broadly-interpreted, privacy right” in its State Constitution. Bopp & Coleson, *supra* note 41, at 34.

xlviii. 697 So. 2d 97 (Fla. 1997). *Krischer* was decided just three weeks after the United States Supreme Court’s decisions.

xlix. See Bopp & Coleson, *supra* note 41, at 34 (“[The Florida] court

accepted the rationale of the United States Supreme Court and went beyond it....”).

i. 31 P.3d 88 (Alaska 2001).

li. *Id.* at 94 & nn. 48-49, 96 nn. 56-58 (citing the assisted suicide cases decided by the United States Supreme Court).

lii. A legislative effort to legalize suicide in Hawaii was defeated on May 2, 2002, but only after three state senators changed their votes. See Cristal Kua, “Senate Kills death-with-dignity bill,” *Honolulu Star-Bulletin*, May 2, 2002.

liii. See Yale Kamisar, “Why the Proposal to Legalize Physician-Assisted Suicide in Michigan Failed” 25 *Human Life Review* 102 (Winter 1999). See also <http://www.internationaltaskforce.org/mich1.htm>.

liv. See “Come-from-Behind Victory Against Maine Assisting Suicide Referendum Elates Anti-Euthanasia Forces,” *National Right to Life News*, December 2000, at 10. See also <http://www.internationaltaskforce.org/maine.htm>. See also Juliana L’Heureux, “Victory in Maine on Physician-assisted Suicide,” 1 *National Catholic Bioethics Quarterly* 299-305 (2001).

lv. Yale Kamisar’s article notes, “But the idea of assisted suicide was no longer the central issue. The main debate had shifted—it was now about how the complex measure would actually work in a state where more than a million residents have no health insurance.” Kamisar, *supra* note 53, at 103. Juliana L’Heureux’s article on the Maine vote notes that the opponents of legalizing physician-assisted suicide intentionally downplayed religious or moral arguments. L’Heureux, *supra* note 54, at 301.

lvi. See Yale Kamisar, “Against Assisted Suicide—Even a Very Limited Form” 72 *University of Detroit-Mercy Law Review* 735, 737 (1995).

lvii. For the complete background on this issue, see *Oregon v. Ashcroft*, 192 F.Supp.2d 1077 (D. Ore. 2002). This case is described in the text following this note.

lviii. “Agency Won’t Back Off Assisted Suicide Rulings,” *L.A. Times*, May

25, 2002, p. A17. Another federal effort that would change the situation in Oregon is the Pain Relief Promotion Act. This Act passed the House twice. The Act would prevent the use of federally controlled substances for assisted suicide and in addition would authorize new programs for pain management and palliative care. See H.R. Rep No. 106-299 (2000). This 89 page report provides detailed information about former Attorney General Reno's action and about how the Pain Relief Promotion Act would deal with these issues. This Act never came up for a vote in the 107th Congress, and most of the developments in this area have involved Attorney General Ashcroft's actions described above.

lix. John Keown, "Further Reflections on Euthanasia in the Netherlands in the Light of the Rummelink Report and the Van Der Maas Survey" in *Euthanasia, Clinical Practice and the Law*, ed. Luke Gormally (1994), p.239.

lx. For a summary and commentary on the law, see Henk Jochemsen, "Legalization of Euthanasia in the Netherlands" 16 *Issues in Law & Medicine* 285 (2001). See also Jenny Nolan, "Dutch Legalize Euthanasia and Assisted Suicide," *National Right to Life News*, May 2001, at 24; <http://www.internationaltaskforce.org/holland.htm>.

lxi. "Dutch Health Minister Els Borst, who sponsored the law, now is urging the government to allow doctors to prescribe suicide pills for old people who are simply tired of life, even if they are healthy." "Dutch Way of Death," *San Francisco Chronicle*, April 20, 2001, at page A-22.

lxii. "Euthanasia Law Approved," *The New York Times*, May 17, 2002, p. A6.

lxiii. *Pretty v. United Kingdom* (Application no. 2346/02) Eur. Ct. H.R. (2002). See <http://hudoc.echr.coe.int> for the European Court of Human Rights.

lxiv. *Regina (on the application of Pretty) v. Director of Public Prosecutions*, [2002] 1 A.C. 800.

lxv. *Id.* at 802, 807, 832.

lxvi. John Keown, "The Legal Revolution: From 'Sanctity of Life' to 'Quality of Life' and 'Autonomy'" in *Issues for a Catholic Bioethic*, ed. Luke Gormally (1999) pp. 233, 236-37.

lxvii. John Finnis, "Beyond the Encyclical," *The Tablet*, Jan. 8, 1994, at 9.

lxviii. *Cruzan v. Director, Missouri Dep't of Health*, 497 U. S. 261 (1990).

lxix. I should note that this term, with its dehumanizing effect, is highly objectionable. I will use it, sparingly, in this article because the term figures so prominently in the relevant cases.

lxx. See generally Gerard V. Bradley, "Does Autonomy Require Informed and Specific Refusal of Life-Sustaining Medical Treatment?" 5 *Issues in Law & Medicine* 301 (1989).

lxxi. Myers, *supra* note 2, at 782.

lxxii. 497 U.S. at 345 (Stevens, J, dissenting).

lxxiii. See John Finnis, "The 'Value of Human Life' and 'The Right to Death': Some Reflections on *Cruzan* and Ronald Dworkin" 17 *Southern Illinois University Law Journal* 559, 567 (1993)(discussing the views of Richard McCormick). See also William E. May, *Catholic Bioethics and the Gift of Human Life* (2000), pp. 267-68 (critiquing the view of Kevin O'Rourke). O'Rourke has stated: "Thus, when the potential for spiritual function is no longer present, then it seems that all treatment or care efforts which would sustain physiological function are ineffective." Kevin O'Rourke, "Should Nutrition and Hydration Be Provided to Permanently Unconscious and Other Mentally Disabled Persons?" 5 *Issues in Law & Medicine* 181, 188 (1989). But, as May notes, providing food and water to such patients preserves the life of the patients, and their lives must be regarded as a good. May, *supra*, at 268.

lxxiv. Robert A. Sedler, "Constitutional Challenges to Bans on 'Assisted Suicide': The View From Without and Within" 21 *Hastings Constitutional Law Quarterly* 777, 790 (1994).

lxxv. *Id.* at 793.

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

1795 (1995).

lxxvii. 274 U. S. 200 (1927). This is the opinion in which the Supreme Court (per an opinion by Justice Holmes—an enthusiastic advocate of eugenics) upheld Virginia’s right to involuntarily sterilize the mentally retarded. This is the case in which Holmes uttered the infamous line “Three generations of imbeciles are enough.” *Id.* at 207.

lxxviii. *People v. Kevorkian*, No. 93-11482, slip op at 27-28 (Wayne County Circuit Court Dec. 13, 1993), *aff’d*, 518 N.W.2d 487 (Mich. Ct. App.), *rev’d*, 527 N.W.2d 714 (Mich. 1994), *cert. denied*, 514 U. S. 1083 (1995). See Myers, *supra* note 2, at 785.

lxxix. *Roe v. Wade*, 410 U.S. at 163.

lxxx. 410 U.S. at 162.

lxxxi. Cardinal Joseph Ratzinger, “Doctrinal Document on Threats to Life Proposed” 20 *Origins* 755, 757 (1991).

lxxxii. *In re Conservatorship of Wendland*, 93 Cal. Rptr. 2d 550 (Cal. Ct. App. 2000), *rev’d*, 28 P.3d 151 (Cal.2001).

lxxxiii. 93 Cal. Rptr.2d at 553.

lxxxiv. *Id.* at 553-554.

lxxxv. *Id.* at 567.

lxxxvi. *Id.* at 560.

lxxxvii. See May, *supra* note 73, at 268 (critiquing this view). As May states, patients in a persistent vegetative state are “not in fact dying of any fatal pathology. They are simply persons seriously impaired.” *Id.* See also Adam J. Hildebrand, “Masked Intentions: The Masquerade of Killing Thoughts Used to Justify Dehydrating and Starving People in a ‘Persistent Vegetative State’ and People with Other Profound Neurological Impairments” 16 *Issues in Law & Medicine* 143, 159-61 (2000).

lxxxviii. 28 P.3d 151 (Cal.2001).

lxxxix. *Id.* at 154. For commentary on the California Supreme Court’s decision, see Rita L. Marker, “Mental Disability and Death by

Dehydration,” 2 *National Catholic Bioethics Quarterly* 25 (2002).

xc. See Myers, *supra* note 2, at 784. See also Keown, *supra* note 66.

xc. The Court did state: “Granted, in some cases, the line between ... [refusing lifesaving medical treatment and assisted suicide] may not be clear, but certainty is not required, even were it possible.” *Vacco v. Quill*, 521 U. S. at 807-808. The Court, then, seemed to be relying on the point that it had made earlier—“a patient who commits suicide with a doctor’s aid necessarily has the specific intent to end his or her own life, while a patient who refuses or discontinues treatment might not.” *Id.* at 802. I do not think that the point that the intent in these two situations is not in each and every case the same adequately deals with the many cases where the intent is precisely the same, and where the intent is to make a lethal choice.

xcii. 93 Cal. Rptr. 2d at 556. See generally Wesley J. Smith, “The Dehumanization of Robert Wendland” 26 *Human Life Review* 55 (Fall 2000).

xciii. *Airedale N. H. S. Trust v. Bland*, [1993] A.C. 789.

xciv. *Id.* at 804.

xcv. *Id.* at 863. See generally Keown, *supra* note 66, at 248.

xcvi. John Finnis, “Bland: Crossing the Rubicon?” 109 *Law Quarterly Review* 329, 336 (1993).

xcvii. *Id.* at 336.

xcviii. May, *supra* note 73, at 262.

xcix. Orentlicher, *supra* note 42, at 846.

c. Orentlicher, *supra* note 42, at 851-852.

ci. David Orentlicher, “The Legalization of Physician-assisted Suicide: A Very Modest Revolution” 38 *Boston College Law Review* 443, 465 (1997).

cii. Orentlicher, *supra* note 42, at 852.

ciii. Peter Singer, *Rethinking Life and Death: The Collapse of Our Traditional Ethics* (1994), p. 1.

civ. “In the Netherlands, the easy solution of euthanasia or assisted suicide has led to a third kind of slippage: a diminution in the quality of and pressure for palliative care, which became one of the first casualties of euthanasia. Hospice care has indeed been virtually non-existent in the Netherlands.” Herbert Hendin, “The Slippery Slope: The Dutch Example” 35 *Duquesne Law Review* 427, 430 (1996)(footnotes omitted).

cv. “Those who attempt suicide—terminally ill or not—often suffer from depression or other mental disorders.” *Washington v. Glucksberg*, 521 U.S. at 730. “Significant doubt must be cast on the concept of rational suicide in patients with terminal illness and on efforts to normalize suicide and suicide ideation in this group.” Francis T. Varghese & Brian Kelly, “Countertransference and Assisted Suicide” 16 *Issues in Law & Medicine* 235, 238 (2001)(footnote omitted).