

2019

Death With Dignity: A Right to Death?

Emily Knox

Follow this and additional works at: <https://lawecommons.luc.edu/pilr>



Part of the [Civil Rights and Discrimination Commons](#), [Criminal Procedure Commons](#), [Environmental Law Commons](#), and the [Human Rights Law Commons](#)

Recommended Citation

Emily Knox, *Death With Dignity: A Right to Death?*, 24 Pub. Interest L. Rptr. 109 (2019).

Available at: <https://lawecommons.luc.edu/pilr/vol24/iss2/2>

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Public Interest Law Reporter by an authorized editor of LAW eCommons. For more information, please contact law-library@luc.edu.

Death With Dignity: A Right to Death?

Emily Knox

INTRODUCTION

The U.S. Constitution affords a federal right to life to all citizens under the Fifth Amendment.¹ Furthermore, through the Fourteenth Amendment, it promises the federal Fifth Amendment protection of life, liberty, and property under state law.² This right to life has driven many political movements and beliefs; the abortion debate and the capital punishment debate both have arguments under the right to life.³ This right, however, is not absolute.⁴ So, it seems appropriate to ask where our rights and our laws converge on the obverse side of our right to life — our right to death.

Despite the constitutional guarantee of a right to life, there is no federal law that expressly prohibits or protects the physician aid-in-dying legislation that multiple states have implemented.⁵ This matter is instead left to the states to decide if and how to address this legal dilemma.⁶ According to lawyers in this area of law, there will likely be no federal action implemented to address physician aid-in-dying.⁷ As of April 1, 2019, seven states and the District of Columbia⁸ have enacted, either through legislation, voter proposition, or judicial determination, some allowance for legalized physician aid-in-dying: Cali-

¹ U.S. Const. amend. V.

² U.S. Const. amend. XIV.

³ See Marlee Townsend, *The Death Penalty: Violation of the Right to Life*, UNIVERSITY OF ALABAMA INSTITUTE FOR HUMAN RIGHTS (Mar. 1, 2017), <https://cas.uab.edu/humanrights/2017/03/01/death-penalty-violation-right-life/>; see also *Whose Right to Life?*, CENTER FOR REPRODUCTIVE RIGHTS (July 14, 2014), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/RTL_3%2014%2012.pdf.

⁴ Specifically, the Fifth and Fourteenth Amendments prohibit the taking of this right without due process. If due process is awarded to, for example, a criminal defendant, who receives a fair trial, the taking of life, liberty, or property is permissible. See U.S. Const. amend. V.

⁵ *'Death With Dignity' Laws by State*, FINDLAW, <https://healthcare.findlaw.com/patient-rights/death-with-dignity-laws-by-state.html>, (last visited Mar. 1, 2019).

⁶ See *Washington v. Glucksberg*, 521 U.S. 702, 718 (1997).

⁷ Phone interview with Robert Rivas, General Counsel, Final Exit Network, (Apr. 3, 2019).

⁸ D.C. Law 21-182.

fornia;⁹ Colorado;¹⁰ Hawaii;¹¹ Montana;¹² Oregon;¹³ Vermont;¹⁴ and Washington.¹⁵

A HISTORY OF THE PHYSICIAN AID-IN-DYING MOVEMENT

Gaining momentum in the 1980s with the medicalization of death, a movement emerged among the public with advocates holding both affirmative and negative views on whether we have a right to die.¹⁶ After helping his wife commit suicide in the face of breast cancer and a terminal prognosis, a Californian named Derek Humphry founded the Hemlock Society.¹⁷ Although this foundation dissolved in 2003, it was the first of its kind and grew to 80 national chapters by 1992.¹⁸ Mr. Humphry advocated for terminally ill patients' right to die peacefully.¹⁹ Many groups followed his lead, including the Compassion in Dying organization, founded in Washington State in 1993.²⁰ In an attempt to minimize violent suicides, the Compassion in Dying organization focused on informing terminally ill patients of their many options for dying peacefully.²¹

Into the 1990s, the movement continued to gain traction but also continued to face opposition.²² In Oregon in 1990, Dr. Jack Kevorkian, known infamously as "Dr. Death," began an eight-year path of assisting approximately 130 people in taking their own lives before he was convicted of second-degree murder in 1999.²³ Some advocates claim that his shocking methods of gaining

⁹ S.B. No. 148 § 443.

¹⁰ C.R.S. tit. 25 art. 48 §1.

¹¹ H.B. No. 2739 "Our Care, Our Choice Act."

¹² *Baxter v. State*, 354 Mont. 234, 251 (2009) (Although the state of Montana does not provide a specific legislative right to physician-assisted deaths, this case expanded Montana's Rights of the Terminally Ill Act to include physician-assisted suicides).

¹³ 127 O.R.S. tit. 800.

¹⁴ 18 V.S.A. 113.

¹⁵ 70 R.C.W. 245

¹⁶ Sarah Childress, *The Evolution of America's Right-to-Die Movement*, PBS (Nov. 13, 2012), <https://www.pbs.org/wgbh/frontline/article/the-evolution-of-americas-right-to-die-movement/>; Rivas Interview, *supra* note 7.

¹⁷ *Id.*

¹⁸ *History of Final Exit Network*, FINAL EXIT NETWORK, (Mar. 2, 2019), <http://www.finalexitnetwork.org/About-Us.html>; Childress, *supra* note 16.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

awareness for physician-assisted deaths, the most well-known of which involved broadcasting a video of himself lethally injecting a patient with amyotrophic lateral sclerosis (ALS) disease, hindered the movement's progress.²⁴ The next year, Dr. Timothy Quill, while working in palliative care, prescribed a lethal dose of medication to a terminally ill patient with leukemia who wished to die.²⁵ Despite the Kevorkian outrage around this time, Quill was not indicted by a grand jury for this act.²⁶ Advocates in Oregon and California proposed legislation in 1991 and 1992, both of which failed.²⁷ In 1993, Michigan affirmatively banned assisted suicides with legislation that was upheld by Michigan's Supreme Court in 1994.²⁸

Significantly, just three years after its initial failure at the committee level, Oregon voters passed the Death with Dignity Act, the first of its kind.²⁹ Despite opposition and a three-year delay in becoming law, the act has continuously been upheld and remains in effect today.³⁰ In 1997, a ballot measure attempted to repeal the act, but was rejected by 60 percent of voters.³¹ In *Gonzalez v. Oregon* the act was addressed by the Supreme Court in a 6-3 decision holding that it did not violate the federal Controlled Substance Act, and reserved medical practice authorization to the states.³² Conversely, the Court, in a 1997 case, held that state laws which banned physician assisted suicides did not violate the Constitution.³³ The holdings in *Glucksberg* and *Gonzalez* deemed physician aid-in-dying a state issue.³⁴

²⁴ *Id.*; Dominic Rushe, 'Dr. Death' Jack Kevorkian, advocate of assisted suicide, dies in hospital, THE GUARDIAN (Jun. 3 2011), <https://www.theguardian.com/world/2011/jun/04/dr-death-jack-kevorkian-suicide>.

²⁵ Childress, *supra* note 16; *What are Palliative Care and Hospice Care?*, NATIONAL INSTITUTE ON AGING, <https://www.nia.nih.gov/health/what-are-palliative-care-and-hospice-care>. Palliative care involves treatment to improve the quality of life for a seriously ill patient, while also receiving medical care for their illnesses.

²⁶ Childress, *supra* note 16.

²⁷ *Id.*

²⁸ *Id.*; *See People v. Kevorkian*, 447 Mich. 436, 495 (1994).

²⁹ Childress, *supra* note 16.

³⁰ *Physician Assisted Suicide Fast Facts*, CNN (Jan. 3, 2019), <https://www.cnn.com/2014/11/26/us/physician-assisted-suicide-fast-facts/index.html>.

³¹ Childress, *supra* note 16.

³² *Gonzales v. Oregon*, 546 U.S. 243, 275 (2006).

³³ *Glucksberg*, *supra* note 6 at 705.

³⁴ *See id.*; *see also Gonzalez*, *supra* note 32.

By the new millennium, the movement continued to grow.³⁵ Maine narrowly rejected its own initiative for physician-assisted suicides.³⁶ The at-the-time president of a new organization, the Final Exit Network, claimed that the right to take one's own life when suffering, regardless of whether someone was terminally ill, was "an individual rights issue, that they should have the right to determine how they live and how they die."³⁷

In 2008, Washington State became the second state to legalize physician aid-in-dying, modeling its legislation after Oregon's Death with Dignity Act.³⁸ The next year, in 2009, the Montana Supreme Court held that doctors could not be prosecuted for helping terminally ill patients die more quickly but did not address whether the right to die was affirmatively protected by the state's constitution.³⁹ Illustrative of the uncertainty that often surrounds the public with regard to this issue, in 2011, a jury in Arizona could not reach a verdict in a trial that involved a man assisting a woman in dying, resulting in a hung jury.⁴⁰ In 2012, the Georgia Supreme Court, in a 7-0 ruling, determined that the state's ban on assisted suicides violated the First Amendment.⁴¹ The same year, a Massachusetts initiative was barely voted out, with 51 percent of voters voting against it.⁴²

In the years that followed, many other states followed Oregon, Montana, and Washington: Vermont signed into law its Patient Choice and Control at End of Life Act; a New Mexico district judge ruled that an individual has a right to die; California signed into law the End of Life Option Act, modeled after Oregon's Death with Dignity Act; Colorado's End of Life Options Act took effect; the District of Columbia's own Death with Dignity Act became law; and Hawaii signed into law the Our Care, Our Choice Act.⁴³

Clearly, the last ten years have been ripe with legislative action and advocacy which has advanced the physician aid-in-dying legalization movement.⁴⁴ Understanding this movement's history and how the current status of end-of-

³⁵ See Childress, *supra* note 16.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*; *Physician Assisted Suicide Fast Facts*, *supra* note 30.

⁴³ *Id.*

⁴⁴ See *id.*

life laws came about can help in analyzing the efficacy of these laws and the future they have in the United States.

THE CURRENT STATUS OF PHYSICIAN AID-IN-DYING LAWS

Currently, seven states in the United States and the District of Columbia have established legislation or adjudicative precedent permitting deaths with dignity.⁴⁵ Although only seven states have such protection, one of every six Americans lives in a state where physician aid-in-dying is an end-of-life option, indicating the impact these laws have on much of the population.⁴⁶ Through an understanding of the current status of physician aid-in-dying laws, Americans can better anticipate the future of such laws in the other forty-three states of the United States.

Oregon was the first state to pass a physician-assisted death law, preceding the second state, Washington, by more than ten years.⁴⁷ Oregon's Death with Dignity Act, passed into law in 1994, served as a guide for other states, as they introduced their own end-of-life legislation modeled after the Oregon legislation.⁴⁸

Oregon law permits terminally ill patients to seek and receive prescriptions for self-administered medications that will provide a dignified death.⁴⁹ In Oregon, an adult deemed capable may make a written request for this medication if he is suffering from a terminal illness with a prognosis of death within six or fewer months, is a resident of the state, and has voluntarily made this request.⁵⁰ In order to receive the prescription, a written request must be made in the presence of at least two witnesses who can attest to the capability, voluntariness, and lack of coercion involved in the patient's request.⁵¹ As a safeguard, at least one of the witnesses cannot be a relative, entitled to any portion of the patient's estate, an employee of the healthcare facility, or the physician himself.⁵² Furthermore, the written request for the medication must be made

⁴⁵ *Death with Dignity' Laws by State*, *supra* note 5.

⁴⁶ *Death with Dignity: Two Decades of Progress in the US*, DEATH WITH DIGNITY (Dec. 2, 2015), <https://www.deathwithdignity.org/news/2015/12/death-with-dignity-progress/>.

⁴⁷ 127 O.R.S., *supra* note 13.

⁴⁸ *Id.*

⁴⁹ *Id.* at § 2.01.

⁵⁰ *Id.* at tit. 805 § 2.01; *Frequently Asked Questions about the Death with Dignity Act*, OREGON HEALTH AUTHORITY (revised Feb. 27, 2019), <https://www.oregon.gov/oha/PH/PROVIDERPARTNERRESOURCES/EVALUATIONRESEARCH/DEATHWITHDIGNITYACT/Documents/faqs.pdf>.

⁵¹ 127 O.R.S., *supra* note 13 at tit. 810 § 2.02.

⁵² *Id.*

along with an initial oral request, as well as a second oral request made at least fifteen days following the first oral request for the medication.⁵³ As an additional safeguard, the physician must receive confirmation from a consulting physician, and must wait at least forty-eight hours following the written request before writing the prescription.⁵⁴ If either physician believes that the patient might be suffering from a psychological disorder that could impair his judgment, the physician must make a referral for counseling and refrain from writing the prescription.⁵⁵ Before writing the prescription, the doctor must confirm with the patient that he is making an informed decision through his requests.⁵⁶ An informed decision includes being informed of the medical diagnosis, the prognosis, the risks and likely result associated with taking the medication, and other alternatives, including hospice and palliative care.⁵⁷ At the time of the patient's second oral request, the physician must offer the patient the opportunity to rescind this request.⁵⁸ The right to rescind the request for the medication is in place at all times, and can be exercised in any manner.⁵⁹

Washington State, passing the Washington Death with Dignity Act through a ballot initiative in 2008, was the second state to acknowledge a right to physician aid-in-dying.⁶⁰ The Washington Death with Dignity Act follows the guidelines of the Oregon legislation but specifies that the prescriptions must be self-administered.⁶¹ It also emphasizes voluntary participation by both physicians and patients, and, while the medication may be prescribed, patients have the right to choose whether to take it.⁶²

Although not through legislation, Montana became the next state to legally address physician aid-in-dying. In *Baxter v. State*, the Montana Supreme Court addressed whether the privacy and dignity provisions of the Montana Constitution established a right to physician aid-in-dying.⁶³ Already in effect

⁵³ *Id.* at tit. 840 § 3.06.

⁵⁴ *Id.* at 850 § 3.08, 820 § 3.02.

⁵⁵ *See id.* at tit. 825 § 3.03.

⁵⁶ *Id.* at tit. 830 § 3.04.

⁵⁷ *See id.* at tit. 800 § 1.01.

⁵⁸ *Id.* at tit. 860 § 3.10.

⁵⁹ *Id.* at tit. 845 § 3.07.

⁶⁰ *Death with Dignity Act*, WASHINGTON STATE DEPARTMENT OF HEALTH, (Mar. 2, 2019), <https://www.doh.wa.gov/YouandYourFamily/IllnessandDisease/DeathwithDignityAct>.

⁶¹ *See* Ch. 70.245 R.C.W.; *see also* Ch. 70.245.020 R.C.W.

⁶² *Frequently Asked Questions*, WASHINGTON STATE DEPARTMENT OF HEALTH, (Mar. 2, 2019), <https://www.doh.wa.gov/YouandYourFamily/IllnessandDisease/DeathwithDignityAct/FrequentlyAskedQuestions>.

⁶³ *Baxter*, *supra* note 12 at 238.

was the Montana Terminally Ill Act, which permitted adults “of sound mind” to withdraw or withhold life-sustaining treatment.⁶⁴ Demonstrating the intersection between physician aid-in-dying and homicide laws, the court held that physicians are protected by the state’s consent statute pertaining to homicide defenses.⁶⁵ It further held that physician assistance through prescribing terminally ill patients lethal doses of medications under the Terminally Ill Act did not violate the public policy exception to this defense.⁶⁶ This allowed physicians to assist competent patients in making their own end of life decisions.⁶⁷

As the movement towards legalizing physician aid-in-dying gained traction, Vermont passed its own 2013 legislation, the Patient Choice At End Of Life Act.⁶⁸ Like other states, this legislation specifically protects physicians from civil or criminal liability, or professional discipline, when prescribing lethal doses of medications to terminally ill patients.⁶⁹ California followed suit in 2015, when it passed its End of Life Option Act, an act also similar to the Oregon legislation.⁷⁰ Physicians in California must provide various disclaimers, including a warning against ingesting the medication in a public setting, along with the options of other alternative treatments.⁷¹ Further, the request can be withdrawn or rescinded at any time during the process, and the patient has the option to not take the medication.⁷² Colorado quickly followed with its own End-of-Life Options Act in 2016.⁷³ That same year, Washington D.C. passed the Death with Dignity Act which mandates similar witness requirements, and uses similar language as Oregon’s 1995 legislation.⁷⁴

Finally, and most recently, Hawaii passed its Our Care, Our Choice Act in 2018.⁷⁵ This Act significantly and comprehensively follows the Oregon legisla-

⁶⁴ Mont. C. Ann. tit. 50 § 9-103 (2015), available at <https://leg.mt.gov/bills/mca/50/9/50-9-103.htm>.

⁶⁵ *Baxter*, *supra* note 12 at 240.

⁶⁶ *Id.*

⁶⁷ *United States: Montana Supreme Court Holds State Law Permits Physician Assistance of Suicides by Terminally Ill Patients*, LIBRARY OF CONGRESS (Jan. 26, 2010), <http://loc.gov/law/foreign-news/article/united-states-montana-supreme-court-holds-state-law-permits-physician-assistance-of-suicides-by-terminally-ill-patients/>.

⁶⁸ See 18 V.S.A. 113.

⁶⁹ 18 V.S.A. 113 § 5283.

⁷⁰ S.B. 128, 2015-2016 Leg., Reg. Sess. (Cal. 2015).

⁷¹ *Id.* at § 443.5.

⁷² *Id.* at § 443.4

⁷³ See 48 C.R.S. tit. 25.

⁷⁴ *Id.*

⁷⁵ See H.B. No. 2739, (Haw. 2018).

tion in many ways.⁷⁶ One distinction, however, is the requirement of a counseling referral upon the patient's request for the medication, regardless of whether there is a suspicion of mental or psychological illness.⁷⁷ The Act expressly prohibits the prescription of a medication to end the patient's life without approval from a counselor.⁷⁸

WHO CHOOSES TO USE PHYSICIAN AID-IN-DYING LAWS?

Trends of those who use the physician aid-in-dying laws remain fairly constant as is depicted in yearly statistical reports from the states with such laws.⁷⁹ Many states mandate such reports in their legislation.⁸⁰ The state reports provide further insight into the demographics of those choosing to participate in physician aid-in-dying, and could provide information on how to further educate people on end-of-life options.⁸¹

The median age of participants across states with physician aid-in-dying laws is around 74 and 75 years old.⁸² In all states, predominantly white patients are participating in death with dignity, with 88.9 percent of participants in California in 2017 and 96.4 percent of participants in Colorado in 2017 being white.⁸³ Additionally, the majority of participants in all reporting states

⁷⁶ *Id.*

⁷⁷ *Id.* at § 6.

⁷⁸ *Id.*

⁷⁹ See PUBLIC HEALTH DIVISION: CENTER FOR HEALTH STATISTICS, *Oregon Death with Dignity Act 2018 Data Summary*, OREGON HEALTH AUTHORITY (Feb. 15, 2019), <https://www.oregon.gov/oha/PH/PROVIDERPARTNERRESOURCES/EVALUATIONRESEARCH/DEATHWITHDIGNITYACT/Documents/year21.pdf>; see also *California End of Life Option Act 2017 Data Report*, CALIFORNIA DEPARTMENT OF PUBLIC HEALTH (June 2018), <https://www.cdph.ca.gov/Programs/CHSI/CDPH%20Document%20Library/2017EOLADataReport.pdf>; see also CENTER FOR HEALTH AND ENVIRONMENTAL DATA, *Colorado End-of-Life Options Act, Year Two 2018 Data Summary, With Updates to 2017 Data*, COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT (2019), available at <https://drive.google.com/file/d/1FmoyCcL2gHopDO9rCJ2IGFEMUye8FQei/view>; see also *Washington State Department of Health 2017 Death with Dignity Act Report*, WASHINGTON STATE DEPARTMENT OF HEALTH (Mar. 2018), <https://www.doh.wa.gov/Portals/1/Documents/Pubs/422-109-DeathWithDignityAct2017.pdf>. [hereinafter collectively referred to as *Reports*].

⁸⁰ *Id.*

⁸¹ See e.g. 127 O.R.S., *supra* note 13.

⁸² See *Reports*, *supra* note 79.

⁸³ *California End of Life Option Act 2017 Data Report*, *supra* note 79; CENTER FOR HEALTH AND ENVIRONMENTAL DATA, *supra* note 79.

had at least some college education.⁸⁴ The vast majority of participants in most states used insurance, with less than 1 percent not using insurance.⁸⁵

In Oregon, a report is published each year addressing the demographics, use, and other statistics of the Death with Dignity Act.⁸⁶ In its most recently published 2018 report, the majority of underlying illnesses were some form of cancer.⁸⁷ The majority of patients, 94 percent, informed family members of their decisions, with 88.6 percent dying at their own homes or the homes of family or friends.⁸⁸ When asked about end-of-life concerns, the three highest included losing autonomy, decreased ability to engage in enjoyable activities, and the loss of dignity.⁸⁹

At the time of death, health care providers typically were not present in Oregon, which could indicate the desire to dissociate end-of-life decisions from the medical field.⁹⁰ Oregon's Death with Dignity Act has been in effect for more than 20 years, providing significant data indicating an increasing trend of deaths from Death with Dignity Act participation.⁹¹ Despite this increase, the number of patients who actually take the medication has stayed constant, with about two-thirds of those who receive prescriptions actually taking them.⁹²

Other states have published similar reports.⁹³ In Washington State's 2017 report, there were 212 death with dignity participants and 164 deaths from the ingestion of medication.⁹⁴ Most of the participants who ingested the medication prescribed to them under Washington's act did so at home.⁹⁵ The major concerns of some of these patients included loss of autonomy, decreased ability to partake in enjoyable activities, and loss of dignity.⁹⁶ None of the participants called for emergency medical intervention after ingesting the medication, a possible indication of certainty in the decision.⁹⁷ Colorado's 2018 report shows that, in the Act's second year in effect, 125 patients were prescribed aid-

⁸⁴ *See Reports, supra* note 79.

⁸⁵ *Id.*

⁸⁶ 127 O.R.S., *supra* note 13, at tit. 865 § 3.11.

⁸⁷ PUBLIC HEALTH DIVISION: CENTER FOR HEALTH STATISTICS, *supra* note 79 at 9.

⁸⁸ PUBLIC HEALTH DIVISION: CENTER FOR HEALTH STATISTICS, *supra* note 79 at 11.

⁸⁹ *Id.* at 12.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *See Reports, supra* note 79.

⁹⁴ *Washington State Department of Health 2017 Death with Dignity Act Report, supra* note 79 at 1.

⁹⁵ *Id.* at 2.

⁹⁶ *Id.* at 8.

⁹⁷ *Id.* at 10.

in-dying medications, with a 74 percent increase from its first year.⁹⁸ Of the 125 patients, the medication was actually dispensed to 86 patients,⁹⁹ indicating the importance of having the option of receiving the prescription, regardless of whether a patient actually chooses to use the medication. In California's 2017 report, 577 patients received prescriptions, with 363 patients, about 70 percent, ingesting the medications and dying as a result.¹⁰⁰

ACCESSIBILITY OF MEDICATIONS

These statistics can give lawmakers and advocates insight into the needs of those facing end-of-life decisions.¹⁰¹ However, they also raise the issue of the accessibility of aid-in-dying medication.¹⁰² The most commonly used drug, secobarbital,¹⁰³ allows patients to fall asleep and pass quickly and peacefully, with no complications.¹⁰⁴ It is the most accessible drug.¹⁰⁵ However, between 2009 and 2016, the cost of the drug rose from less than \$200 to \$3,000.¹⁰⁶ Although many private insurance companies and some states' Medicaid programs choose to cover the cost of the prescription for end-of-life medications, insurance coverage of these medications remains optional in some states.¹⁰⁷ While there are other, less costly options for drugs, they are not as readily available from pharmacies.¹⁰⁸ One less costly option includes a combination of three drugs, mixed by a pharmacist, costing around \$400.¹⁰⁹ Although this drug works as well as secobarbital, it is more difficult to obtain.¹¹⁰

As a silver lining, the Final Exit Network organization provides volunteers ("exit guides") to accompany those who choose to partake in a dignified death

⁹⁸ CENTER FOR HEALTH AND ENVIRONMENTAL DATA, *supra* note 79 at 2.

⁹⁹ *Id.* at 3.

¹⁰⁰ *California End of Life Option Act 2017 Data Report*, *supra* note 79 at 4.

¹⁰¹ *See Reports*, *supra* note 79.

¹⁰² *See generally* PUBLIC HEALTH DIVISION: CENTER FOR HEALTH STATISTICS, *supra* note 79.

¹⁰³ *See Washington State Department of Health 2017 Death with Dignity Act Report*, *supra* note 79 at 9.

¹⁰⁴ April Dembosky, *Drug Company Jacks Up Cost Of Aid-In-Dying Medication*, NPR (Mar. 23, 2016), <https://www.npr.org/sections/health-shots/2016/03/23/471595323/drug-company-jacks-up-cost-of-aid-in-dying-medication>.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

free of charge.¹¹¹ These guides do not physically assist those who wish to end their lives peacefully, but instead talk with people about the means in which they can do so.¹¹²

An additional obstacle towards accessibility of physician aid-in-dying is the arbitrary six-month prognosis.¹¹³ For patients with diseases such as ALS, at the point of a six-month prognosis, the ability to self-administer can be diminished.¹¹⁴ This holds true for dementia patients who voluntarily and competently express the wish to participate before their dementia progresses but, at the time of a six-month prognosis, are deemed incompetent.¹¹⁵

INTERSECTION BETWEEN PHYSICIAN AID-IN-DYING LAWS, CRIMINAL LAWS, AND THE CONSTITUTION

While this legal issue has been left to the states, and does affect state criminal laws, it is critical to explore how states reconcile state criminal codes with physician aid-in-dying laws.¹¹⁶ It is also important to address the various constitutional implications of physician aid-in-dying laws, as the Fourteenth Amendment extends these implications to the states.¹¹⁷

Recently, the actions of a 17-year-old girl in Massachusetts sparked outrage across the nation when she vehemently encouraged her boyfriend to commit suicide.¹¹⁸ In June 2017, Michelle Carter was convicted of involuntary manslaughter after it was determined that her actions caused Conrad Roy III to end his life, and the conviction was upheld by the Massachusetts Supreme Court in February 2019.¹¹⁹ Carter's attorneys argued that her speech was protected and that words alone cannot be enough for an involuntary manslaughter

¹¹¹ Interview with a Director, Final Exit Network (Feb. 25, 2018). The director wished to remain anonymous.

¹¹² Rivas Interview, *supra* note 7.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See Glucksberg, *supra* note 6 at 718; see also Gonzales, *supra* note 32 at 275; see also Baxter, *supra* note 12 at 251.

¹¹⁷ See U.S. Const. XIV, *supra* note 2.

¹¹⁸ Kristine Phillips, *Her texts pushed him to suicide, prosecutors say. But does that mean she killed him?*, WASH. POST (June 6, 2017), available at https://www.washingtonpost.com/news/morning-mix/wp/2017/06/06/just-do-it-babe-woman-accused-of-pushing-her-boyfriend-to-kill-himself-is-on-trial-this-week/?utm_term=.f1459bd598f2.

¹¹⁹ Emanuella Grinberg, *Michelle Carter is going to jail nearly five years after she convinced her boyfriend via text to kill himself*, CNN (Feb. 13, 2019), <https://www.cnn.com/2019/02/11/us/michelle-carter-texting-suicide-case-sentence/index.html>.

conviction.¹²⁰ The causation element is especially critical to prove in a state such as Massachusetts, where assisted suicide through coercion is not considered a crime.¹²¹

This distinction is importantly contrasted with Minnesota, where the Final Exit Network, mentioned above, has faced an uphill legal battle.¹²² Typically, in states that criminalize assisting a person in committing or attempting to commit suicide, an act is required for conviction.¹²³ This act can be through providing means or through physically assisting at the scene.¹²⁴ It is important to reiterate that Final Exit Network's "exit guides" do not physically assist the person in committing suicide, but instead talk the person through the act so that they perform the act themselves.¹²⁵ Robert Rivas, the General Counsel for Final Exit Network, argues that this is protected under the First Amendment, which protects the freedom of speech.¹²⁶ However, in Minnesota, the Supreme Court extended assistance to include a third act, providing mere "words that enable a suicide."¹²⁷

Furthermore, the Fourteenth Amendment has been used to both challenge and support physician aid-in-dying legislation.¹²⁸ In *Lee v. Oregon*, Oregon's Death with Dignity Act was challenged, in part, on the basis of the Equal Protection Clause of the Fourteenth Amendment.¹²⁹ The plaintiffs in *Lee* argued that the Act's classification of "terminally ill" stripped such patients of their right to life and did not rationally relate to a legitimate state interest, a requirement of any legislation that discriminates in the basic sense of the word.¹³⁰ While the district court initially agreed, enjoining the enforcement of Oregon's Death with Dignity Act, this decision was ultimately reversed on appeal in 1997 due to a lack of standing.¹³¹

¹²⁰ *Id.*

¹²¹ See *Commonwealth v. Carter*, 474 Mass. 624, 625 (2016).

¹²² Rivas Interview, *supra* note 7.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*; see U.S. Const. amend. I.

¹²⁷ Rivas Interview, *supra* note 7.

¹²⁸ See *Lee v. Oregon*, 107 F.3d 1382, 1386 (1997); see also *Compassion in Dying v. Washington*, 79 F.3d 790, 793 (1996).

¹²⁹ Simon Canick, *Constitutional Aspects of Physician-Assisted Suicide After Lee v. Oregon*, 23 *Amer. J. of L. & Med.* 69, 71 (1997).

¹³⁰ *Id.*

¹³¹ *Id.*; *Lee v. Oregon*, COMPASSION & CHOICES, <https://compassionandchoices.org/legal-advocacy/past-cases/lee-v-oregon/>.

Compassion in Dying v. Washington addressed Washington State's physician aid-in-dying legislation, focusing only on the Due Process Clause of the Fourteenth Amendment.¹³² In this case, a group of physicians and terminally ill patients, along with the Washington non-profit organization Compassion in Dying, asserted a right to receive and provide medical assistance.¹³³ They argued that competent, terminally ill adult patients should be permitted to receive medications to aid in a peaceful death.¹³⁴ The appellate court affirmed the district court decision, holding that the provision of the Washington homicide statute that criminalized "aid" in suicide violated the Due Process Clause of the Fourteenth Amendment when applied to prescribing end-of-life medication.¹³⁵ However, the next year, the Supreme Court of the United States reversed *Compassion in Dying v. Washington* in *Washington v. Glucksberg*.¹³⁶ In *Glucksberg*, the Court explained that the Due Process Clause protects "against government interference with certain fundamental rights and liberty interests," including liberties not expressly outlined in the Constitution.¹³⁷ However, while the rights to refuse lifesaving medical treatment and to withdraw artificial life sustaining treatment has been previously included in these liberties, the right to hasten death has not.¹³⁸ The Court in *Glucksberg* refused to extend federal protection to a right to death.¹³⁹

The 1997 *Glucksberg* case raised the issue of a state's criminal statute and how it interacted with physician assisted deaths.¹⁴⁰ The language of Washington State's criminal code still includes the "aid in" another's attempted suicide language in its statute, which criminalizes promoting a suicide attempt as a class C felony.¹⁴¹ As mentioned previously in this article, the state passed its own Death with Dignity Act in 2008.¹⁴² The act included an immunities clause protecting anyone who acts in good faith compliance with the Death with Dignity Act from civil or criminal liabilities.¹⁴³ The clause does not ex-

¹³² *Compassion in Dying*, *supra* note 128 at 798.

¹³³ *Id.* at 794.

¹³⁴ *Id.*

¹³⁵ *Id.* at 798.

¹³⁶ See *Glucksberg*, *supra* note 6 at 718.

¹³⁷ *Id.* at 720.

¹³⁸ *Id.*

¹³⁹ *Id.* at 735.

¹⁴⁰ *Id.*

¹⁴¹ See Wash. Rev. Code Ann. § 9A.36.060.

¹⁴² See 70 R.C.W. tit. 245.

¹⁴³ 70 R.C.W. tit. 245 § 190.

tend to instances of assisting suicides that do not adhere to the act.¹⁴⁴ Furthermore, actions under the act do not even constitute “suicide, assisted suicide, mercy killing, or homicide, under the law.”¹⁴⁵ Therefore, the actions, previously upheld in *Glucksberg* as criminal, were decriminalized under Washington State’s police power.¹⁴⁶

The Montana Supreme Court in *Baxter v. State* addressed the public policy concerns with physician aid in dying.¹⁴⁷ In Montana’s criminal code, there is a consent defense permitted so long as one of four codified exceptions are not met.¹⁴⁸ One of these exceptions is that public policy prevents permitting the conduct despite consent.¹⁴⁹ The court determined that public peace and safety is not affected by a physician’s “handing medicine to a terminally ill patient” and the patient’s “peaceful and private act of taking medicine.”¹⁵⁰ Through the reasoning of the court, therefore, consent is a valid defense for criminally accused physicians administering medications.¹⁵¹

The intersection of physician aid-in-dying legislation with criminal laws and the Constitution is important to keep in mind when analyzing their legality. Through an understanding of these intersections, advocates and opponents of such laws can anticipate the direction in which the future of physician aid-in-dying is heading.

CONCLUSION: THE FUTURE OF PHYSICIAN AID-IN-DYING LAWS

In a 2017 poll, 73 percent of Americans supported physician aid-in-dying of terminally ill patients.¹⁵² This increase in support could be linked to increasing awareness, which, in turn, might lead to more acceptance and legislative action.¹⁵³ Additionally, along with this discussion around the legal changes, the growing cohort of baby boomers who are approaching end-of-life

¹⁴⁴ Rivas Interview, *supra* note 7.

¹⁴⁵ *Id.* at § 180.

¹⁴⁶ See *Glucksberg*, *supra* note 6 at 718.

¹⁴⁷ *Baxter*, *supra* note 12 at 243.

¹⁴⁸ *Id.* at P13.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at P14.

¹⁵¹ See *Id.*

¹⁵² Jade Wood & Justin McCarthy, *Majority of Americans Remain Supportive of Euthanasia*, GALLUP (June 12, 2017), <https://news.gallup.com/poll/211928/majority-americans-remain-supportive-euthanasia.aspx>.

¹⁵³ *Id.*

decisions could increase the need for additional legal changes.¹⁵⁴ However, with only seven states and the District of Columbia permitting physician aid-in-dying since 1994, and with some states specifically criminalizing such acts, physician aid-in-dying legislation is being enacted slowly.¹⁵⁵ Furthermore, the legislation will continue to face opposition from states' criminal codes and through constitutional interpretation.¹⁵⁶ Therefore, although these laws continue to gain traction and attraction, advocates of end-of-life laws still face an uphill battle going forward.

¹⁵⁴ *Director*, *supra* note 109.

¹⁵⁵ *See Kevorkian*, *supra* note 28 at 495.

¹⁵⁶ *State v. Final Exit Network, Inc.*, 889 N.W.2d 296, 308 (Minn. Ct. App. 2016).