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## Legal History of Medical Aid in Dying: Physician Assisted Death in U.S. Courts and Legislatures

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# LEGAL HISTORY OF MEDICAL AID IN DYING: PHYSICIAN ASSISTED DEATH IN U.S. COURTS AND LEGISLATURES

Thaddeus Mason Pope\*

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## I. INTRODUCTION

Terminally ill patients in the United States have four medical options for controlling the time and manner of their death.<sup>1</sup> Three of these are legally available to certain clinically qualified patients. First, all patients may withhold or withdraw life-sustaining treatment. Second, all patients may voluntarily stop eating and drinking. Third, patients with intractable suffering may receive palliative sedation to unconsciousness.<sup>2</sup> In contrast, the fourth option is available in only seven U.S. jurisdictions.<sup>3</sup> Only there may patients legally obtain a prescription for a lethal medication that they can later self-ingest.

Medical aid in dying (MAID) is not yet legally available in 49 of 56 U.S. jurisdictions.<sup>4</sup> But its legal status has been in a state of rapid change across the country over the past ten years.<sup>5</sup> Before 2008, MAID was legal only in Oregon. Today, it is explicitly lawful in seven U.S. jurisdictions. Moreover, the rate and pace of legalization has been accelerating. Three of the now seven MAID jurisdictions enacted their statutes within only the past two years.<sup>6</sup> Moreover, there are widespread and ongoing legislative and judicial efforts to legalize MAID in more than thirty other states.<sup>7</sup>

I have designed this Article to help inform and guide these expanding law reform efforts. Because a “page of history is worth a volume of logic,”<sup>8</sup> it summarizes earlier efforts (both successful and unsuccessful) to legalize MAID in the United States.<sup>9</sup> In other words, this Article provides a descriptive legal history. It does not normatively assess either whether any efforts to legalize MAID were good public policy. Nor does it assess whether advocates grounded their arguments on

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1. There are also non-medical options of hastening death. *See generally, e.g.*, PHILIP NITSCHKE & FIONA STEWART, *PEACEFUL PILL HANDBOOK* (Exit International, 2017); Michael Majchrowicz, *The Volunteers Who Help People End Their Own Lives*, THE ATLANTIC (July 6, 2016), <https://www.theatlantic.com/health/archive/2016/07/the-volunteers-who-help-people-end-their-own-lives/489602>.

2. *See, e.g.*, Thaddeus M. Pope & Lindsey Anderson, *Voluntarily Stopping Eating and Drinking: A Legal Treatment Option at the End of Life*, 17 WIDENER L. REV. 363 (2011).

3. *See infra* Sections IV.C, IV.D, and VII.A.

4. MAID is legal in California, Colorado, District of Columbia, Montana, Oregon, Vermont, and Washington. *See infra* Sections IV and VII.A.

5. Other writers have described the same exit option with other terms. These terms include “physician assisted suicide,” “physician assisted death,” “death with dignity,” “aid in dying,” and “physician aid in dying.” I use “MAID,” because that term seems to have the most currency in the primary literature. *See, e.g.*, *Compassion & Choices, Understanding Medical Aid in Dying*, <https://www.compassionandchoices.org/understanding-medical-aid-in-dying> (last visited Jan. 31, 2017).

6. California legalized MAID in October 2015. Colorado legalized MAID in November 2016. Washington DC legalized MAID in 2017. *See infra* Sections IV.B and IV.C.

7. *See infra* Section IV.E.

8. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.).

9. *Cf.* Jocelyn Downie, *Permitting Voluntary Euthanasia and Assisted Suicide: Law Reform Pathways for Common Law Jurisdictions*, 16 QUT L. REV. 84 (2016) (discussing exploratory approach in addressing relevant legal pathways).

solid legal analysis. Instead, this Article offers an objective, systematic, and thorough account of what those efforts were.<sup>10</sup>

In Section One, I describe MAID. We must first understand what MAID is before examining attempts to legalize it. Once we grasp the nature of MAID, it starts to become clear why law reformers have concluded that they must affirmatively legalize it. In Section Two, I explain that MAID falls within the prohibitory scope of criminal assisted suicide statutes in almost every state. In other words, MAID is “assisted suicide.” Assisted suicide is a crime. Therefore, MAID is a crime. Moreover, in addition to its actual legal status, MAID is widely perceived to be illegal.<sup>11</sup> Therefore, both patients who want to access MAID and physicians who want to provide MAID have strong incentives to change (or at least clarify) its legal status.

In the remainder of the Article, I examine five different paths that reformers have taken to legalize MAID. In Section Three, I start with the most successful approach, statutory enactment. Six states have enacted MAID statutes: three through ballot initiatives and three through legislation. I discuss these six states. I also briefly discuss a few more states that have come close to enacting MAID statutes. Furthermore, more than one-half of the remaining states have recently considered legislation. They are likely to continue this deliberation and debate throughout the 2020s.

In Section Four, I examine attempts to legalize MAID through federal constitutional litigation. Because the U.S. Supreme Court definitively rejected such arguments in 1997, advocates have since refocused their litigation arguments using state law theories. In Section Five, I review cases seeking to legalize MAID through state constitutional litigation. Unfortunately, like federal constitutional claims, state constitutional claims have also been uniformly unsuccessful.

In Section Six, I discuss attempts to legalize MAID through state statutory interpretation litigation. These lawsuits argue that MAID does not even constitute “assisted suicide” in existing criminal statutes. Finally, in Section Seven, I examine two final paths toward “legalizing” MAID: constraining prosecutorial discretion and jury nullification. Unlike other approaches, these do not change the legal status of MAID. Yet, they do change whether prosecutors will or can penalize patient or physician participants.

In sum, the expanded legalization of MAID seems inevitable. Surveys consistently show that more than 70 percent of the American public supports

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10. This Article focuses on only affirmative efforts to legalize MAID. It does not address state efforts to criminalize MAID. *See, e.g.*, SB 202, 64th Leg., Reg. Sess. (Mont. 2015); SB 220, 63d Leg. Reg. Sess. (Mont. (2013); S.B. 167, 62d Leg., Reg. Sess. (Mont. 2011). Nor does it address federal efforts to challenge the legitimacy of state MAID statutes. *See, e.g.*, Assisted Suicide Funding Restriction Act, 42 U.S.C. § 14401 (2012); *Gonzales v. Oregon*, 546 U.S. 243 (2006); Assisted Suicide Prevention Act, S. 3788, 109th Cong. (2006); Pain Relief Promotion Act, H.R. 2260 & S. 1272, 106th Cong. (1999); Lethal Drug Abuse Prevention Act, H.R. 4006 & S. 2151 105th Cong. (1998).

11. *But cf.* Kathryn L. Tucker, *Aid in Dying: An End-of-Life Option Governed by Best Practices*, 8 J. HEALTH & BIOMEDICAL L. 9 (2012); Scott Foster, *Expert Panel Concurs: Hawaii Physicians Can Provide Aid in Dying*, HAWAII REPORTER (Oct. 5, 2011), <http://www.hawaiireporter.com/expert-panel-concurs-hawaii-physicians-can-provide-aid-in-dying>.

MAID.<sup>12</sup> But the battle will be fought bill-by-bill and lawsuit-by-lawsuit in each state. I hope to inform these efforts with lessons from the legal history of MAID described below.

## II. WHAT IS MEDICAL AID IN DYING?

There are many circumstances under which a longer life is not a better life. When quality of life diminishes, some individuals would prefer to hasten death (or at least not prolong dying) rather than endure the perils of what, at least to them, is an exceedingly poor quality of life.<sup>13</sup> What exactly comprises a “poor quality of life” covers a broad spectrum that varies significantly from person to person.

For some, loss of independence might diminish quality of life to the point where they would request a hastened death. For others, it may be extreme physical suffering. For these and other reasons, requests to hasten death are common throughout the United States and the world. As Justice Brennan observed, “[f]or many, the thought of an ignoble end, steeped in decay, is abhorrent.”<sup>14</sup>

Many seriously ill patients find their lives marked with extreme suffering and both physical and mental deterioration. Unfortunately, many do not have access to a medically supervised, peaceful death. Too many patients commit suicide through violent means such as shooting, hanging, or various other forms of self-deliverance.<sup>15</sup> Moreover, being uncertain about their future options and being worried about future loss of dignity, comfort, and control, many patients hasten their deaths prematurely. Medical aid in dying (MAID) provides an alternative: the assurance that terminally ill patients can die when they want based on their own criteria and can enjoy life for a longer time.<sup>16</sup>

Certainly, life is valuable; and societal values reinforce attempting to extend life indefinitely. But death is unavoidable. People suffering from the diseases that cause most deaths in this country will often experience significant suffering and loss

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12. *Polling on Voter Support for Medical Aid in Dying for Terminally Ill Adults*, COMPASSION & CHOICES, <https://www.compassionandchoices.org/wp-content/uploads/2016/07/FS-Medical-Aid-in-Dying-Survey-Results-FINAL-7.21.16-Approved-for-Public-Distribution.pdf> (last visited Feb. 23, 2017).

13. See Janet L. Abraham, *Patient and Family Requests for Hastened Death*, HEMATOLOGY 475, 457 (2008) (“Patient and family requests for hastened death are not uncommon among patients with advanced malignancies.”); Linda Ganzini et al., *Oregonians’ Reasons for Requesting Physician Aid in Dying*, 169 ARCHIVES INTERNAL MED. 489, 489 (2009) (“One in 10 dying patients will, at some point, wish to hasten death.”); Jean-Jacques Georges et al., *Requests to Forgo Potentially Life-Prolonging Treatment and to Hasten Death in Terminally Ill Cancer Patients: A Prospective Study*, 31 J. PAIN & SYMPTOM MGMT. 100, 104 (2006); J. McCarthy et al., *Irish Views on Death and Dying: A National Survey*, 36 J. MED. ETHICS 454, 456 (2010) (finding that a majority of individuals strongly agreed with the statement, “If I were severely ill with no hope of recovery, the quality of my life would be more important than how long it lasted.”); Diane E. Meier et al., *A National Survey of Physician-Assisted Suicide and Euthanasia in the United States*, 338 NEW ENG. J. MED. 1193, 1195 (1998).

14. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 310 (1990) (Brennan, J., dissenting).

15. Peter M. Marzuk, *Suicide and Terminal Illness*, 18 DEATH STUDIES 497, 500 (1994); Matthew Miller et al., *Cancer and the Risk of Suicide in Older Americans*, 26 J. CLINICAL ONCOLOGY 4720, 4722 (2008).

16. See STANLEY A. TERMAN, *THE BEST WAY TO SAY GOODBYE: A LEGAL PEACEFUL CHOICE AT THE END OF LIFE* 326–27 (2007).

of independence.<sup>17</sup> In this situation, the preference, for some, may be to hasten death so that death can be on an individual's terms and with some predictability, rather than risking the unknown and potential loss of comfort and dignity.

MAID is one key "exit option."<sup>18</sup> With MAID, a physician writes a prescription for life-ending medication for a terminally ill and mentally capacitated adult.<sup>19</sup> The practice has long-standing and well-defined conditions regarding patient eligibility, the role of physicians, and the role of the patient. All six statutes have nearly identical conditions and safeguards.<sup>20</sup> Regarding eligibility, the patient must: (1) be over 18 years of age, (2) have decision making capacity, (3) be able to self-ingest the medication, and (4) be terminally ill, meaning that they have a prognosis of six months or less.<sup>21</sup>

Regarding physician practice, both the treating physician and a consulting physician must: (1) confirm that the patient satisfies all the eligibility conditions; (2) inform the patient about risks, benefits, and alternatives; and (3) confirm the patient's request for the medication is a settled and voluntary decision. If either the treating or consulting physician suspects that the patient's judgement is impaired, then they must refer the patient for a mental health assessment.<sup>22</sup>

Once the physician writes the prescription, the patient may obtain the medication. Traditionally, the medication has been secobarbital or pentobarbital, a barbiturate originally developed as a sleeping pill.<sup>23</sup> However, price increases have led physicians to prescribe other drugs including compounded ones.<sup>24</sup> Importantly, the patient must ingest the drugs herself.<sup>25</sup> The patient alone takes the final overt act that causes her death.

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17. Judith K. Schwarz, *Stopping Eating and Drinking*, AM. J. NURSING, Sept. 2009, at 53, 54.

18. See Timothy E. Quill et al., *Palliative Options of Last Resort: A Comparison of Voluntarily Stopping Eating and Drinking, Terminal Sedation, Physician-Assisted Suicide, and Voluntary Active Euthanasia*, in GIVING DEATH A HELPING HAND: PHYSICIAN-ASSISTED SUICIDE AND PUBLIC POLICY: AN INTERNATIONAL PERSPECTIVE 49 (Dieter Birnbacher & Edgar Dahl eds., 2008).

19. David Orentlicher, Thaddeus M. Pope & Ben A. Rich, *Clinical Criteria for Physician Aid in Dying*, 19 J. PALLIATIVE MED. 259, 259 (2016).

20. Thaddeus M. Pope, *Medical Aid in Dying: When Legal Safeguards Become Burdensome Obstacles*, THE ASCO POST (Dec. 25, 2017), <http://www.ascopost.com/issues/december-25-2017/medical-aid-in-dying-when-legal-safeguards-become-burdensome-obstacles/>; National Academies of Science, Engineering, and Medicine, *Physician Assisted Death: Current Landscape: Implementation and Practice*, YOUTUBE (Feb. 12, 2018), <https://www.youtube.com/watch?v=y158KsPI-HM> (presentation by Thaddeus M. Pope). While Montana has no statute, the conditions and safeguards are similar.

21. ALAN MEISEL, KATHY L. CERMINARA & THADDEUS M. POPE, THE RIGHT TO DIE: THE LAW OF END-OF-LIFE DECISIONMAKING § 12.04[C] (3d ed. 2017 Supp.) [hereinafter THE RIGHT TO DIE].

22. *Id.*

23. 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>.

24. Catherine Offord, *Accessing Drugs for Medical Aid-in-Dying*, THE SCIENTIST (Aug. 17, 2017), <https://www.the-scientist.com/?articles.view/articleNo/49879/title/Accessing-Drugs-for-Medical-Aid-in-Dying/>.

25. Amanda M. Thyden, *Death with Dignity and Assistance: A Critique of the Self-Administration Requirement in California's End of Life Option Act*, 20 CHAPMAN L. REV. 421, 421 (2017).

### III. MOST STATES CRIMINALLY PROHIBIT ASSISTED SUICIDE, AND THEREFORE MAID

Almost every U.S. jurisdiction criminally prohibits assisting another person to commit suicide.<sup>26</sup> Moreover, as the Supreme Court has observed, these assisted suicide prohibitions are deeply rooted in our nation's legal history.<sup>27</sup> In fact, those roots date back 150 years. As early as 1868, most states held that assisting suicide was a criminal offense. The criminal status of assisted suicide has persisted ever since. Nearly one hundred years later, the American Law Institute included the crime in its 1962 Modern Penal Code, the seminal work on substantive criminal law.<sup>28</sup> Most recently, many states have reexamined and reaffirmed their bans on assisted suicide.<sup>29</sup>

Assisted suicide statutes typically include plain yet broad language. For example, the New Mexico statute provides: "Assisting suicide consists of deliberately aiding another in the taking of his own life. Whoever commits assisting suicide is guilty of a fourth-degree felony."<sup>30</sup> Similarly, the California Penal Code states: "Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony."<sup>31</sup> Penalties for violation include felony probation, up to three years in state prison, and/or a fine up to \$10,000.<sup>32</sup>

In addition, for physicians, assisted suicide also constitutes "unprofessional conduct" that may result in state medical board discipline up to and including

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26. ALASKA STAT. § 11.41.120 (2006); ARIZ. REV. STAT. ANN. § 13-1103 (2014); ARK. CODE ANN. § 5-10-104 (2007); CAL. PENAL CODE § 401 (1995); COLO. REV. STAT. § 18-3-104 (2012); CONN. GEN. STAT. § 53a-56 (1971); DEL. CODE ANN., tit. 11, § 645 (1995); FLA. STAT. ANN. § 782.08 (1971); GA. CODE ANN. § 16-5-5 (2015); HAWAII REV. STAT. § 707-702 (2006); IDAHO CODE § 18-4017 (2011); 720 III. COMP. STAT. ANN., § 5/12-34.5 (2012); IND. CODE ANN. § 35-42-1-2.5 (2014); IOWA CODE ANN. § 707A.2 (1996); KAN. STAT. ANN. § 21-3406 (2011); KY. REV. STAT. ANN. § 216.302 (1994); LA. STAT. ANN. § 14:32.12 (1995); MD. CODE, CRIM. LAW, § 3-102 (2002); ME. REV. STAT. ANN. tit. 17-A, § 204 (1977); MICH. COMP. LAWS ANN. § 750.329A (1998); MINN. STAT. ANN. § 609.215 (1998); MISS. CODE ANN. § 97-3-49 (2013); MO. ANN. STAT. § 565.021(2017); MONT. CODE ANN. § 45-5-105 (1981); NEB. REV. STAT. § 28-307 (1977); N.H. REV. STAT. ANN. § 630:4 (1973); N.J. STAT. ANN. § 2C:11-6 (1979); N.M. STAT. ANN. § 30-2-4 (1963); N.Y. PENAL LAW § 120.30 (1965); N.D. CENT. CODE § 12.1-16-04 (1991); OHIO REV. CODE § 3795.02 (2003); OKLA. STAT. ANN., tit. 21, § 813 (1910); OR. REV. STAT. § 163.125 (1999); 18 PA. CONSOL. STAT. ANN. § 2505 (1973); P.R. LAWS ANN., tit. 33, § 4738 (2005); R.I. GEN. LAWS § 11-60-3 (1996); S.C. CODE ANN. § 16-3-1090 (1998); S.D. CODIFIED LAWS § 22-16-37 (2005); TENN. CODE ANN. § 39-13-216 (1993); TEX. PENAL CODE ANN. § 22.08 (1994); VA. CODE § 8.01-622.1 (2015); V.I. CODE, tit. 14, § 2141 (1993); WASH. REV. CODE ANN. § 9A.36.060 (2011); WIS. STAT. ANN. § 940.12 (2001). Statutes in other states imply criminal prohibition of assisted suicide. *See, e.g.*, ALA. CODE § 22-8A-10 (1997); D.C. CODE § 7-651.13 (2016); NEV. REV. STAT. § 449.670 (1995); W. VA. CODE § 16-30-15 (2000); WYO. STAT. § 6-2-107 (1985).

27. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 294-95 (1990) (Scalia, J., concurring).

28. MODEL PENAL CODE § 210.5 (AM. LAW INST., Proposed Official Draft 1962).

29. *Washington v. Glucksberg*, 521 U.S. 702, 716 (1997) ("Though deeply rooted, the States' assisted-suicide bans have in recent years been reexamined and, generally, reaffirmed.").

30. N.M. STAT. ANN. § 30-2-4.

31. CAL. PENAL CODE § 401.

32. CAL. PENAL CODE § 18(a) (2011); CAL. PENAL CODE § 672 (1983).

revocation of the license.<sup>33</sup> For example, in Minnesota “aiding suicide or aiding attempted suicide” is “prohibited and is grounds for disciplinary action” even without a criminal conviction, guilty plea, or other judgment under the assisted suicide statute.<sup>34</sup>

While most states have only a “general” assisted suicide statute, six states have enacted statutes that target MAID specifically. Alabama, Arkansas, Georgia, Idaho, Ohio, and Rhode Island do not just outlaw assisted suicide. They expressly outlaw MAID specifically.<sup>35</sup> For example, Arkansas provides that “it is unlawful for any physician or health care provider to commit the offense of physician-assisted suicide by . . . prescribing any drug, compound, or substance to a patient with the express purpose of assisting the patient to intentionally end the patient’s life.”<sup>36</sup>

Specifically targeting MAID in a penal statute eliminates any residual uncertainty. It sends a clear, strong message to both patients and clinicians. Yet, this degree of precision is probably unnecessary. Even broad, general assisted suicide statutes probably also cover MAID.<sup>37</sup> First, courts have specifically held that criminal assisted suicide statutes cover MAID.<sup>38</sup> Second, almost all legislative and litigation efforts to legalize MAID have assumed that MAID is illegal. Moreover, advocates imply (though certainly do not concede) MAID’s illegality by their efforts to legalize it affirmatively. If the penal code does not now prohibit MAID, then why do we need legislation to permit it?

Notably, during the 1980s and 1990s, clinicians were concerned that even long-accepted treatment decisions like Do-Not-Resuscitate (DNR) orders and withholding or withdrawing life-sustaining treatment might fall within the scope of assisted suicide prohibitions.<sup>39</sup> This fear of criminal liability is logical. “[W]hen life-sustaining treatment is withheld or withdrawn, the patient’s death results from the acts or omissions of those who have withheld or withdrawn treatment and those who have authorized this conduct.”<sup>40</sup> The Washington Supreme Court summed up the reasoning this way:

Under Washington’s criminal code, homicide is “the killing of a human being by the act, procurement or omission of another” and it is murder in the first degree when, “with a premeditated intent to cause the death of another person, [one] causes the death of such person.” Thus, the potential for criminal liability for withdrawing life-sustaining mechanisms appears to exist.<sup>41</sup>

33. THE RIGHT TO DIE, *supra* note 21, § 12.04[C]; *see, e.g.*, VA. CODE ANN. § 8.01-622.1(D) (2015); *In re Egbert*, No. 2011-0870 (Md. State Bd. Physicians Dec. 12, 2014) (revoking physician license for assisted suicide).

34. MINN. STAT. § 147.091(1)(w) (2017).

35. Assisted Suicide Ban Act, Ala. H.B. 96 (2017); ARK. CODE ANN. § 5-10-106(b) (2007); GA. CODE ANN. § 16-5-5(b) (2015); IDAHO CODE § 18-4017(1) (2011); N.D. CENT. CODE ANN. § 12.1-16-04(1) (1991); OHIO REV. CODE § 3795.04 (2003); 11 R.I. GEN. LAWS § 11-60-3 (1996).

36. ARK. CODE ANN. § 5-10-106(b)(1) (2007).

37. In addition, many states have enacted civil legislation that provides for the issuance of an injunction, an award of damages, and attorneys’ fees. THE RIGHT TO DIE, *supra* note 21, § 12.04[B].

38. *See infra* Part VII.

39. *Cf. Satz v. Perlmutter*, 362 So. 2d 160, 162 (Fla. Dist. Ct. App. 1978); *In re Farrell*, 529 A.2d 404, 411 (N.J. 1987); *In re Requena*, 517 A.2d 886, 887 (N.J. Super. Ct. Ch. Div. 1986).

40. THE RIGHT TO DIE, *supra* note 21, § 12.01.

41. *In re Colyer*, 660 P.2d 738, 751 (Wash. 1983) (en banc) (internal citations omitted).



To eliminate uncertainty or fear of criminal liability, many state legislatures amended their healthcare decision-making acts to exclude such acts.<sup>42</sup> For example, the Virginia Code provides: “This section shall not apply to a . . . health care [professional] who . . . withholds or withdraws life-prolonging procedures.”<sup>43</sup>

MAID statutes are designed to offer this same type of clear exemption. For example, a 2017 New Mexico bill redefined “assisted suicide” to exclude “an attending health care provider who provides medical aid in dying, in accordance with the provisions of the End of Life Options Act, to an adult patient who has capacity and who has a terminal illness.”<sup>44</sup>

#### IV. LEGALIZING MAID THROUGH STATUTE

Before 1990, there were few serious efforts to legalize MAID.<sup>45</sup> After all, policymakers were focusing their attention on other end-of-life medical decision-making issues. Specifically, during the 1970s and 1980s, courts and legislatures across the country were still struggling with defining a right to die. They were articulating a right to refuse 1960s medical technology such as CPR, mechanical ventilation, and dialysis. By 1990, the patient’s “right to die” through passive refusal was substantially settled.<sup>46</sup> Therefore, policymakers turned their attention to active means of hastening death like MAID.

Since the early 1990s, the most successful strategy for legalizing MAID has been through enacting a statute. Six states have enacted nearly identical statutes. These statutes have two types of distinctive features. First, they specify detailed procedures for accessing life-ending medication. Second, they offer civil, criminal, and disciplinary immunity for compliance.

Three key events accelerated the public policy discussion of MAID by drawing massive academic and community attention to the issue. First, in January 1988, the *Journal of the American Medical Association* published a provocative op-ed. In *It’s Over, Debbie*, the anonymous physician author described administering a lethal dose of morphine to a terminally ill patient.<sup>47</sup> The article stimulated “substantial reaction from the medical profession, the public, the media, and legal authorities.”<sup>48</sup>

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42. THE RIGHT TO DIE, *supra* note 21, § 12.02[C][5].

43. VA. CODE ANN. § 8.01-622.1(E) (2015); *see also* N.M. STAT. ANN. § 24-7A-13(B)(1) (1997) (“Death resulting from the withholding or withdrawal of health care in accordance with the Uniform Health-Care Decisions Act does not for any purpose . . . constitute a suicide, a homicide or other crime.”).

44. H.B. 171, 53d Leg., 1st Sess., § 10 (N.M. 2017).

45. *But cf.* DEATH WITH DIGNITY An Inquiry into Related Public Issues: Hearing Before the Special Committee on Aging: Hearings Before the Special Committee on Aging, 92d Cong. 2d Sess. (1972).

46. The Supreme Court issued its decision in *Cruzan decided on June 25, 1990. Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990).

47. *Name Withheld by Request, It’s Over, Debbie*, 259(2) JAMA 272, 272 (1988).

48. George D. Lundberg, *‘It’s Over, Debbie’ and the Euthanasia Debate*, 259(14) JAMA 2142, 2142 (1988).

Second, in June 1990, Jack Kevorkian received enormous media attention when he helped Janet Adkins commit suicide.<sup>49</sup> Over the following three and a half years, Kevorkian was present at the deaths of 20 other individuals.<sup>50</sup> Michigan state attorneys prosecuted him (unsuccessfully) four times.<sup>51</sup> Through these and other newsworthy events, Kevorkian received “international attention” and “provoked a national discussion.”<sup>52</sup> MAID pervaded the public consciousness.

Third, in 1991, Derek Humphry published *Final Exit: The Practicalities of Self-Deliverance and Assisted Suicide for the Dying*. This how-to guide for terminally ill people who wish to kill themselves remained on the *New York Times* bestseller list for 18 weeks.<sup>53</sup> In short, both through high-profile publications and through high profile, colorful advocates, the issue of MAID was placed squarely on the public policy table by the early 1990s.

### A. Very Early Efforts in the 1900s

Long before and wholly unconnected with contemporary efforts to legalize MAID were several bills in the early 20<sup>th</sup> century.<sup>54</sup> In 1906, the Ohio legislature considered a bill titled “An Act Concerning Administration of Drugs etc. to Mortally Injured and Diseased Persons.”<sup>55</sup> The bill applied to “any person of lawful age and of sound mind” who is “so ill of disease that recovery is impossible or who is suffering great pain or torture.”<sup>56</sup> If “three reputable physicians” concurred with the patient’s request to “be put to death,” then clinicians could administer an anesthetic until death ensues.<sup>57</sup>

That same year, Iowa considered a similar bill titled “A Bill for An Act Requiring Physician to Take Human Life.”<sup>58</sup> In 1937, Nebraska considered an even

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49. See, e.g., Lisa Belkin, *Doctor Tells of First Death Using His Suicide Device*, N.Y. TIMES (June 6, 1990), <http://www.nytimes.com/1990/06/06/us/doctor-tells-of-first-death-using-his-suicide-device.html>.

50. Silvia Sara Canetto & Janet D. Hollenshead, *Gender and Physician-Assisted Suicide: An Analysis of the Kevorkian Cases, 1990–1997*, 40(1) OMEGA - J. DEATH & DYING 165, 170–71 (2000).

51. Charles H. Baron, *Assisted Dying: As the Population Ages, Assisted Suicide—With the Help of a Physician or Loved One—Will Continue to be Controversial*, 35-JUL TRIAL 44, 50 (1999). Kevorkian was eventually convicted for active euthanasia, not MAID. See *infra* Section VIII.

52. *Jack Kevorkian: How He Made Controversial History*, BBC NEWS (June 3, 2011), <http://www.bbc.com/news/world-us-canada-13649381>.

53. MICHAEL R. LEMING & GEORGE E. DICKINSON, UNDERSTANDING DYING, DEATH, AND BEREAVEMENT 273 (Wadsworth Cengage Learning, 7th ed.).

54. These bills extended an earlier debate about the ethics of euthanasia. The most notable contribution to that debate was Samuel Williams’ widely printed proposal in 1870. See Ezekiel J. Emanuel, *Whose Right to Die?*, THE ATLANTIC (Mar. 1997); see also Ezekiel J. Emanuel, *The History of Euthanasia Debates in the United States and Britain*, 121(10) ANNALS INTERNAL MED. 793, 794 (1994).

55. See GIZA LOPES, DYING WITH DIGNITY: A LEGAL APPROACH TO ASSISTED DEATH 20 (2015) (citing H.B. 145 (Ohio 1906)); *Euthanasia*, 8 ST. LOUIS MED. REV. 66, 66 (1906).

56. See *id.*

57. Jacob M. Appel, *A Duty to Kill? A Duty to Die? Rethinking the Euthanasia Controversy of 1906*, 78(3) BULLETIN HIST. MED. 610, 618 (2004).

58. See LOPES, *supra* note 55, at 21 (citing H.F. 367 (Iowa 1906)); see also DEMETRA M. PAPPAS, THE EUTHANASIA/ASSISTED-SUICIDE DEBATE 444 (2012).

broader MAID bill.<sup>59</sup> All three of these Midwestern state bills were soundly defeated. MAID legislation then entered a nearly fifty-year dormancy. Expectedly, interest in this type of legislation waned after World War II.<sup>60</sup> Euthanasia had become too closely associated with Nazi eugenics and involuntary killing.

### B. Early Efforts in the 1980s and 1990s

Interest in MAID reemerged in the late 1980s and early 1990s as a logical extension of the then newly established right to refuse life-sustaining treatment. Initially, efforts to enact MAID statutes focused on the ballot initiative process. Available in half the states, this process allows a public vote on a proposed statute based on a petition signed by a certain minimum number of registered voters.<sup>61</sup> Between 1988 and 1994, advocates proposed MAID ballot initiatives in California, Washington, and Michigan.<sup>62</sup>

In 1988, California organizers did not get enough signatures to place the “Humane and Dignified Death Act” on the ballot.<sup>63</sup> Apparently, the inclusion of both euthanasia and MAID dissuaded voters. Therefore, organizers later removed “mercy killing” from the ballot language and required the patient to take the final overt act causing death. They obtained enough signatures, and placed Proposition 161 on the 1992 ballot. Still, the initiative was defeated 54% to 46 percent.<sup>64</sup> In 1991, Washington placed Initiative 119 on the ballot. Like the California initiative, it was also defeated 54 to 46 percent.<sup>65</sup>

In January 1994, Jack Kevorkian launched a petition drive to place MAID on the November ballot in Michigan. Kevorkian’s petition offered an amendment to the state constitution that read: “The right of competent adults, who are incapacitated by incurable medical conditions, to voluntarily request and receive medical assistance with respect to whether or not their lives continue, shall not be restrained or abridged.”<sup>66</sup> Like the 1988 California ballot initiative that similarly included both MAID and euthanasia, Kevorkian’s effort did not obtain enough signatures.<sup>67</sup>

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59. See IAN DOWBIGGIN, A CONCISE HISTORY OF EUTHANASIA: LIFE, DEATH, GOD, AND MEDICINE 85 (2005); LOPES, *supra* note 55, at 48 n.14 (2015).

60. *But cf.* Morton L. Yanow, Letter to the Editor, *Continue the Debate* N.Y. TIMES (July 25, 1997), <http://www.nytimes.com/1997/07/27/opinion/l-continue-the-debate-335681.html> (noting the Connecticut Act to Legalize Euthanasia in 1959, the Idaho Voluntary Euthanasia Act in 1969 and the Oregon Voluntary Euthanasia Act and the Montana Euthanasia Act in 1973). See also JOEL FEINBERG, HARM TO SELF 367 (1986).

61. *Initiative Process 101*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/initiative-process-101.aspx> (last visited Jan. 25, 2018).

62. See *infra* notes 64–68 and accompanying text.

63. SUSAN STEFAN, RATIONAL SUICIDE, IRRATIONAL LAWS: EXAMINING CURRENT APPROACHES TO SUICIDE IN POLICY AND LAW 138 (2016).

64. *The California Propositions in Brief*, LONG BEACH PRESS- TELEGRAM, Nov. 5, 1992, 1992 WLNR 1033302.

65. See Jane Gross, *Voters Turn Down Mercy Killing Idea*, N.Y. TIMES, Nov. 7, 1991, at A10.

66. *Kevorkian Begins Ballot Drive for Suicide Measure*, N.Y. TIMES, Jan. 31, 1994, <http://www.nytimes.com/1994/01/31/us/kevorkian-begins-ballot-drive-for-suicide-measure.html>.

67. *Kevorkian’s Ballot Drive on Suicide Aid Stumbles*, N.Y. TIMES, July 6, 1994, <http://www.nytimes.com/1994/07/06/us/kevorkian-s-ballot-drive-on-suicide-aid-stumbles.html>.

### C. Three Successful Ballot Initiatives

The earliest ballot initiative efforts in California, Washington, and Michigan failed. Yet, three other ballot initiatives successfully passed. Oregon, Washington, and Colorado all legalized MAID through the ballot initiative process. Furthermore, other states have come very close, and more states are still trying to emulate Oregon, Washington, and Colorado.

#### 1. Oregon 1994 Ballot Initiative

Building off the earlier experience in California and Washington, Oregon placed a ballot measure in the November 1994 election. In contrast to the earlier ballot initiatives, the citizens of Oregon approved Measure 16 by a vote of 51 to 49 percent.<sup>68</sup> Two factors leading to success included avoiding the term “mercy killing” and reframing the legislation as the “Death with Dignity Act.”<sup>69</sup>

Before the Death with Dignity Act became effective, litigation delayed its implementation for three years.<sup>70</sup> Nevertheless, the delay did not dampen enthusiasm. In November 1997, the margin of approval grew even wider when Oregon citizens rejected a ballot measure to repeal the law 60 to 40 percent.<sup>71</sup> Subsequently, while the Oregon Death with Dignity Act was the subject of several (ultimately unsuccessful) federal challenges for years, it has remained in effect since 1998.<sup>72</sup> Notably, once those federal challenges stopped in 2006, remaining “clouds” of legal uncertainty lifted. Other states began more seriously to consider copying the Oregon model.

The Oregon Death with Dignity Act is so carefully crafted, so narrowly drawn, and so laden with procedural safeguards, that it may well demand more energy and fortitude to comply with it than some terminally ill people are likely to have.<sup>73</sup> To qualify for “death with dignity,” a person must be a resident of the state,<sup>74</sup> over age 18,<sup>75</sup> “capable”<sup>76</sup> (that is, in possession of decision-making capacity),<sup>77</sup> and suffering from a terminal disease that will lead to death within six months.<sup>78</sup>

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68. DEPARTMENT OF HUMAN RESOURCES, OREGON HEALTH DIVISION, CENTER FOR DISEASE PREVENTION AND EPIDEMIOLOGY, OREGON’S DEATH WITH DIGNITY ACT: THE FIRST YEAR’S EXPERIENCE I (Feb. 18, 1999).

69. Kathryn L. Tucker, *In the Laboratory of the States: The Progress of Glucksberg’s Invitation to States to Address End-of-Life Choice*, 106 MICH. L. REV. 1593, 1594 (2008).

70. *Lee v. Oregon*, 869 F. Supp. 1491 (D. Or. Dec. 27, 1994) (issuing preliminary injunction), 891 F. Supp. 1429 (D. Or. Aug. 3, 1995) (issuing permanent injunction), *vacated and remanded*, 107 F.3d 1382 (9th Cir. Feb. 17, 1997) (lack of federal jurisdiction), *cert. denied sub nom. Lee v. Harclerod*, 522 U.S. 927 (Oct. 14, 1997).

71. William Claiborne & Thomas B. Edsall, *Oregon Suicide Law May Spur Movement*, WASH. POST, Nov. 6, 1999, <http://www.washingtonpost.com/wp-srv/politics/daily/nov99/suicide6.htm>.

72. THE RIGHT TO DIE, *supra* note 21, § 12.06[A][1] (citing federal cases).

73. *See* OR. REV. STAT. §§ 127.800 to .897 (1995). *See also* OR. ADMIN. R. 333-009-0000 to -0030 (2001).

74. OR. REV. STAT. §§ 127.805, .860.

75. *Id.* §§ 127.800, .805.

76. *Id.* § 127.805.

77. *Id.* § 127.800.

78. *Id.* § 127.805, .800.

The patient must make one written<sup>79</sup> and two oral requests<sup>80</sup> for medication to end his life. The written request must be “substantially in the form” provided in the Act, signed, dated, witnessed by two persons, in the presence of the patient, who attest that the patient is “capable, acting voluntarily, and not being coerced to sign the request.”<sup>81</sup> There are stringent qualifications as to who may act as a witness.<sup>82</sup>

The patient’s decision must be an “informed” one.<sup>83</sup> Therefore, the attending physician is obligated to provide the patient with information about the diagnosis, prognosis, potential risks and probable consequences of taking the medication to be prescribed, and alternatives, “including but not limited to, comfort care, hospice care and pain control.”<sup>84</sup> Another physician must confirm the diagnosis, the patient’s decision-making capacity, and voluntariness of the patient’s decision.<sup>85</sup> There are requirements for counseling, if either the attending or consulting physician thinks the patient is further suffering from a mental disorder.<sup>86</sup> There are requirements for documentation in the patient’s medical record,<sup>87</sup> for a waiting period,<sup>88</sup> for notification of the patient’s next of kin,<sup>89</sup> and for reporting to state authorities.<sup>90</sup> The patient has a right to rescind the request for medication to end his life at any time.<sup>91</sup>

Having complied with these requirements, the patient is entitled only to a prescription for medication. The Act does not “authorize a physician or any other person to end a patient’s life by lethal injection, mercy killing or active euthanasia.”<sup>92</sup> In other words, the statute accepts MAID but rejects what the law calls active euthanasia.

The Oregon legislature amended the Death with Dignity Act in 1999.<sup>93</sup> The definitional sections clarified that an “adult” is a person 18 years of age or older<sup>94</sup> and that pharmacists fall within the definition of “health care provider.”<sup>95</sup> The amendments expanded and clarified the responsibilities of attending physicians. One important added responsibility is to counsel patients “about the importance of having another person present when the patient takes the medication . . . and of not taking the medication in a public place. . . .”<sup>96</sup> Some pharmacists have wished to refrain

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79. *Id.* § 127.805, .840.

80. *Id.* § 127.840, .897.

81. *Id.* § 127.810.

82. *Id.*

83. *Id.* § 127.815, .830.

84. *Id.* § 127.815.

85. *Id.* § 127.820.

86. *Id.* § 127.825.

87. *Id.* § 127.855.

88. *Id.* § 127.850.

89. *Id.* § 127.835.

90. *Id.* § 127.865.

91. *Id.* § 127.845.

92. *Id.* § 127.880.

93. 1999 Or. Laws 1098.

94. OR. REV. STAT. § 127.800(1).

95. *Id.* § 127.800(6).

96. *Id.* § 127.815.

from dispensing lethal prescriptions.<sup>97</sup> In recognition of this, the legislation included a provision in the Act expressly authorizing physicians to dispense the lethal medications rather than having pharmacists do so.<sup>98</sup>

To address the concerns that have been raised that people will be motivated by depression to seek a physician's assistance in ending their lives, the 1999 amendments to the Act added "depression causing impaired judgment" to the generic "psychiatric or psychological disorder" that the attending physician must determine the patient does not have before medications may be prescribed.<sup>99</sup>

A concern about the original statute was that although its provisions were limited to Oregon residents, there was no definition of "residence." Thus, the 1999 amendments specified factors demonstrating Oregon residence.<sup>100</sup> The amendments also added an important new reporting requirement: any health care provider who dispenses medication under the statute must file a copy of the dispensing record with the state health division.<sup>101</sup>

Finally, the 1999 amendments included several provisions expanding immunities. The Act now permits a health care provider to prohibit another health care provider from participating in "death with dignity" on the premises of the first health care provider if they gave prior notice of such prohibition.<sup>102</sup> This is probably the most far-reaching aspect of the amended legislation.

If a health care provider violates this prohibition, the provider issuing the prohibition may impose sanctions including loss of medical staff privileges, termination of a lease or other property contract, and termination of employment contract.<sup>103</sup> However, even if prohibited from doing so under one of the preceding provisions, a health care provider may provide assistance under the statute if he does so outside the course of employment.<sup>104</sup>

The Death with Dignity Act requires the state health division to issue an annual report summarizing the experience with the statute.<sup>105</sup> The statistics summarized in these reports do not seem to bear out the fears of the opponents of "death with dignity." Individuals availing themselves of this statute were insured, were disproportionately white rather than racial minorities, were better educated than the general population, and were not disproportionately female.<sup>106</sup> Individuals who requested lethal prescriptions were concerned with loss of autonomy, their

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97. See Jennifer Fass & Andrea Fass, *Physician-assisted Suicide: Ongoing Challenges for Pharmacists*, 68(9) AM. J. HEALTH SYS. PHARMACISTS 846, 848 (2011).

98. See OR. REV. STAT. §127.815.

99. See *id.* §127.825.

100. *Id.* §127.860.

101. See *id.* §127.865; see also Or. Admin. R. 333-009-0000 to -0030 (2011) (regulations implementing the reporting requirements).

102. OR. REV. STAT. §127.885; see also 49 Or. Op. Att'y Gen. 161, No. 8264 (1999) (interpreting OR. REV. STAT. §127.885).

103. OR. REV. STAT. §127.885.

104. *Id.*

105. See *id.* §127.865(3).

106. PUB. HEALTH DIV., OREGON HEALTH AUTH., OREGON DEATH WITH DIGNITY ACT DATA SUMMARY 2017 (Feb. 9, 2018); see also Barbara Coombs Lee, *Oregon's Experience with Aid in Dying: Findings from the Death with Dignity Laboratory*, ANN. N.Y. ACAD. SCI. 94, 96 (2014).

decreasing ability to participate in activities that made their lives enjoyable, and loss of bodily functions.<sup>107</sup>

### 2. *Washington 2008 Ballot Initiative*

Based on the thorough and virtually unblemished record from Oregon, other states have followed. The first state to copy Oregon was its northern neighbor, Washington. In November 2008, Washington State voters approved an initiative modeled closely on Oregon's law. Initiative 1000 passed by a 58 to 42 percent margin.<sup>108</sup> The Washington Death with Dignity Act became effective in early 2009.<sup>109</sup> Data from Washington State's annual published reports show operation and usage very similar to that in Oregon.<sup>110</sup>

### 3. *Colorado 2016 Ballot Initiative*

In 2016, Colorado voters approved an initiative modeled closely on Oregon's law by a 65 to 35 percent margin.<sup>111</sup> The Colorado End of Life Options Act went into effect on December 16, 2016.<sup>112</sup> Data from Colorado's first annual report is consistent with Oregon and Washington data.<sup>113</sup>

## D. Three Successful Legislative Enactments

After Oregon and Washington legalized MAID through ballot initiatives in 1994 and 2008, many commentators thought that direct democracy voting was the only viable path.<sup>114</sup> They determined that the issue was just too controversial for the political process. It turned out that this assessment was too pessimistic. Since 2013, three states have legalized MAID through a legislative process: Vermont, California, and Washington, DC. Furthermore, several other states have come close.

### 1. *Vermont 2013 Legislation*

In 2013, Vermont joined the list of states affirmatively approving the practice of MAID, this time through legislation rather than a ballot initiative

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107. *Id.*

108. Robert Steinbrook, *Physician-Assisted Death — From Oregon to Washington State*, 359 *NEW ENG. J. MED.* 2513, 2513 (2008).

109. WASH. REV. CODE §§ 70.245.010 to .220, 70.245.901 to .903 (effective Mar. 5, 2009); WASH. ADMIN. CODE §§ 246-978-001 to -040 (2009). *See generally* Linda Ganzini & Anthony L. Back, *The Challenge of New Legislation on Physician-Assisted Death*, 176 *JAMA INTERNAL MED.* 427 (2016).

110. *See* WASH. STATE DEP'T OF HEALTH, WASHINGTON STATE 2016 DEATH WITH DIGNITY ACT REPORT (Sept. 2017).

111. Jennifer Brown, *Colorado Passes Medical Aid in Dying, Joining Five Other States*, *DENVER POST* (Nov. 8, 2016), <https://www.denverpost.com/2016/11/08/colorado-aid-in-dying-proposition-106-election-results>.

112. COLO. REV. STAT. §§ 25-48-101 to -123 (effective Dec. 16, 2016); 6 COLO. CODE REGS. § 1009-4 (effective June 14, 2017).

113. *See Medical Aid in Dying*, COLO. DEP'T OF PUB. HEALTH AND ENV'T, <https://www.colorado.gov/pacific/cdphe/medical-aid-dying> (last visited Jan. 31, 2018).

114. *But see* GUENTER LEWY, *ASSISTED DEATH IN EUROPE AND AMERICA: FOUR REGIMES AND THEIR LESSONS* 127 (Oxford Univ. Press) (2011) (Oregon State Senator Frank Roberts introduced legislation in 1987, 1989, and 1991).

process.<sup>115</sup> Uniquely, as originally enacted, the Vermont MAID law would have diverged from those in California, Oregon, and Washington after July 1, 2016. As originally enacted, on that day, the section of the Vermont statute imposing stringent procedural safeguards would sunset.<sup>116</sup> In 2015, the Vermont legislature repealed that sunset provision.<sup>117</sup> Like the Oregon Death with Dignity Act, opponents attacked the Vermont law in court.<sup>118</sup> Those challenges have been unsuccessful.

### 2. California 2015 Legislation

On October 5, 2015, California became the fourth state to enact a statute allowing physicians to prescribe terminally ill patients medication to end their lives.<sup>119</sup> The California End of Life Option Act is virtually identical to MAID statutes in Oregon, Washington, and Vermont.<sup>120</sup> Still, unlike the other MAID statutes, the California law will sunset on January 1, 2026.<sup>121</sup> The first published report from California shows operation and usage very similar to that in Oregon and Washington.<sup>122</sup>

Finally, reminiscent of the post-statute litigation in Oregon and Vermont, physicians and advocacy groups filed suit to enjoin the operation of the California statute, arguing that the law was unconstitutional for a variety of reasons.<sup>123</sup> The court refused to enjoin operation of the law, but also refused to dismiss the case.<sup>124</sup>

### 3. Washington, DC 2017 Legislation

In 2017, the District of Columbia enacted a statute also modeled closely on Oregon's law.<sup>125</sup> Just as there was federal interference with the Oregon legislation, there has also been federal interference with the D.C. legislation. Given the District of Columbia's unique status in the federal system, Congress sought to exert its authority to disapprove the law. Nevertheless, the D.C. law became effective in February 2017, after Congress failed to pass a "resolution of disapproval."<sup>126</sup> In

115. VT. STAT. ANN. tit. 18, §§ 5281–5293 (effective May 20, 2013). See Kathryn L. Tucker, *Vermont's Patient Choice at End of Life Act: A Historic "Next Generation" Law Governing Aid in Dying*, 38 VT. L. REV. 687, 687 (2014).

116. 2013 Vt. Acts & Resolves 292, 296.

117. 2015 Vt. Acts & Resolves 296.

118. Vt. All. for Ethical Healthcare, Inc., v. Hoser, 2017 WL 1284815 (D. Vt. Apr. 5, 2017); see also Vt. All. for Ethical Healthcare, Inc., v. Hoser, 2016 WL 7015717 (D. Vt. Dec. 1, 2016).

119. *Assemb. B 15, Stats. 2015, Ch.1 (2015)*.

120. See CAL. HEALTH & SAFETY CODE §§ 443.1 to 443.22 (effective June 9, 2016).

121. See CAL. HEALTH & SAFETY CODE § 443.215 (2016) ("This part shall remain in effect only until January 1, 2026, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2026, deletes or extends that date.").

122. See CAL. DEP'T OF PUB. HEALTH, CALIFORNIA END OF LIFE OPTION ACT 2016 DATA REPORT (2017).

123. Ahn v. Hestrin, No. RIC-1607135 (Riverside Cnty. Sup. Ct., Cal. June 8, 2016) (Complaint).

124. Ahn v. Kestrich, No. RIC-1607135 (Riverside Cnty. Sup. Ct., Cal. June 9, 2017) (Order denying preliminary injunction but allowing lawsuit to proceed).

125. D.C. Act 21-577 (Dec. 19, 2016).

126. H.R.J. Res. 27, 115th Cong. (2017). The law went into effect in February 2017 after Congress failed to pass resolution of disapproval within 30 legislative days after the city government passed the law.



September 2017, the House of Representatives passed a bill that would repeal the D.C. Death with Dignity Act.<sup>127</sup>

### E. Other Notable Efforts to Enact MAID Statutes

By the end of 2017, only Oregon, Colorado, and Washington have successfully passed ballot initiatives. Yet, other states have come very close. For example, a 2012 Massachusetts ballot initiative failed on a 49 to 51 percent vote.<sup>128</sup> Similarly, a 2000 Maine ballot initiative also failed on a 49 to 51 percent vote.<sup>129</sup> A 1998 Michigan ballot initiative did not do as well, failing on a 71 to 29 percent vote.<sup>130</sup> Additional states are continuing to explore the ballot initiative process to legalize MAID.<sup>131</sup>

By the end of 2017, only California, Vermont, and Washington, DC have enacted legislation. Yet, other states have come very close. For example, in 2017, the Hawaii Senate passed a MAID bill on a vote of 22 to 3. The Hawaii House later deferred the bill.<sup>132</sup> Also in 2017, the Maine Senate passed a MAID bill that died in the House.<sup>133</sup> Likewise, in 2015 the Maine Senate passed a bill that died in the House.<sup>134</sup> In 2016, the New Jersey Assembly passed a MAID bill on a vote of 41 to 28. That bill even then passed a key Senate committee.<sup>135</sup> As in Maine, this was not the first time that legislation advanced in New Jersey. In 2014, the Assembly passed a bill by a vote of 41 to 31.<sup>136</sup>

Recent near successes in Hawaii and Maine are not the only reason to expect more states to legalize MAID. First, nearly half of the states considered MAID legislation in 2016 and 2017.<sup>137</sup> Second, proponents are introducing more and more bills in more and more states. Third, today, there is more support from the public, healthcare professionals, medical societies and medical associations.<sup>138</sup>

127. H.R. 3354, 115th Cong. § 818 (2017); J. Portnoy, *House Votes to Repeal D.C.'s Death with Dignity Law; Senate Has Yet to Act*, WASH. POST, Sept. 14, 2017.

128. See Carolyn Johnson, *Assisted Suicide Measure Narrowly Defeated; Supporters Concede Defeat*, BOSTON GLOBE, Nov. 7, 2012.

129. Michael Moore, *Suicide Opponents Claim Win*, BANGOR DAILY NEWS (Nov. 8, 2000).

130. *1998 Michigan Election Results*, MICH. DEP'T OF ST., <http://miboecfr.nictusa.com/election/results/98gen/> (last visited Mar. 12, 2018).

131. See, e.g., *Voters May See Cannabis, Tobacco Tax on South Dakota Ballot*, ARGUS LEADER, Nov. 6, 2017. Some states have considered ballot initiatives not only to enact a MAID statute but also to amend the state constitution.

132. See S.B. 1129, 29th Leg. (Haw. 2017).

133. See Legis. Doc. 347, 128th Leg., 1st Sess. (Me. 2017).

134. See Legis. Doc. 1270, 127th Leg., 1st Sess. (Me. 2015).

135. Assemb. B. 2451, 217th Leg. (N.J. 2016).

136. Assemb. B. 2270, 216th Leg. (N.J. 2014).

137. Two public websites appear to collect state-by-state legislation comprehensively and accurately. DEATH WITH DIGNITY NATIONAL CENTER, <https://www.deathwithdignity.org/take-action/> (last visited Jan. 31, 2018); PATIENT RIGHTS COUNCIL, <http://www.patientsrightscouncil.org/site/laws-issues-by-state/> (last visited Jan. 31, 2018).

138. See COMPASSION & CHOICES, *supra* note 12; Michael Ollove, *Aid in Dying Gains Momentum as Erstwhile Opponents Change their Minds*, STATELINE, (Mar. 9, 2018), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/03/09/aid-in-dying-gains-momentum-as-erstwhile-opponents-change-their-minds>.

## V. LEGALIZING MAID THROUGH FEDERAL CONSTITUTIONAL LITIGATION

While the most successful method of legalizing MAID has been by enacting statutes, the most prominent early method was by seeking a right under the U.S. Constitution. During the 1990s, physician and patient plaintiffs brought several cases in state and federal courts. Several even sought certiorari from the U.S. Supreme Court. That court ultimately agreed to adjudicate the issue. In 1997, the Court ruled that state criminalization of MAID does not violate constitutional due process or equal protection rights.<sup>139</sup>

### A. Early Efforts before 1997

Before the U.S. Supreme Court issued its decisions in June 1997, four other courts had already ruled that there was no federal constitutional right to MAID.

#### 1. *Donaldson v. Lundgren (Cal. App. 1992)*

The earliest case was not a typical MAID case. Indeed, it was so unusual that it was not really a MAID case at all. Mathematician and computer software scientist, Thomas Donaldson, suffered from an incurable brain disease. He wanted to cryogenically preserve his body in hopes that sometime in the future, when a cure for his disease is found, his body may be brought “back to life.”<sup>140</sup> Since the process would require Donaldson’s death, the court interpreted the request for declaratory and injunctive relief for “pre-mortem cryogenic suspension” as seeking a right to assisted suicide. The trial court dismissed the action and the court of appeals affirmed.<sup>141</sup>

#### 2. *State v. Kevorkian (Mich. 1994)*

Jack Kevorkian was one of the most prolific litigants in the MAID movement. Most of his lawsuits were criminal prosecutions and not actions for declaratory and injunctive relief like most other cases discussed in this article. Yet, in at least one of these cases, Kevorkian raised constitutional arguments before the Michigan Supreme Court.

In February 1993, the Michigan legislature enacted a ban on assisted suicide. Kevorkian challenged that statute both in defense to criminal prosecutions

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139. *Washington v. Glucksberg*, 521 U.S. 702 (1997). Coincidentally, the same year that the U.S. Supreme Court found no constitutional right to MAID, the Constitutional Court in Colombia found there was such a right. Mariana Parreiras Reis de Castro et al., *Euthanasia and Assisted Suicide in Western Countries: A Systematic Review*, 24(2) REV. BIOETHICS 355 (2016); see also *Carter v. Canada*, [2015] S.C.R. 331 (Can.).

140. *Donaldson v. Lungren*, 4 Cal. Rptr. 2d 59, 60 (Ct. App. 1992). The television series, *LA Law*, dramatized the case. *LA Law: The Good Human Bar*, YOUTUBE (Jan. 31, 2018), <https://www.youtube.com/watch?v=Rzpd6cpYQU>.

141. *Donaldson*, 4 Cal. Rptr. 2d 59. The court rejected claims under both the U.S. Constitution and the California Constitution. *Id.*

and in an action for declaratory relief.<sup>142</sup> Kevorkian met with some success at the trial level. In 1994, the Court of Appeals consolidated those several cases. The appellate court then overturned the new statute outlawing assisted suicide. While the court did not hold that there was a constitutional right to assisted suicide, it held that the statute violated a provision in the Michigan Constitution that “no law shall embrace more than one object.”<sup>143</sup>

The Michigan Supreme Court reversed, upholding the assisted suicide statute. It held that the act was not constitutionally defective for having more than one object. Like the court of appeals, the state supreme court denied that the Fourteenth Amendment included a constitutional right to die.<sup>144</sup> The court held that there was a valid distinction between the right to refuse life-continuing treatment and the right to insist on life-ending treatment.

### 3. *Kevorkian v. Arnett (C.D. Cal. 1996)*

While most of Kevorkian’s cases were in Michigan state courts, he had two in federal court. He filed one in Los Angeles.<sup>145</sup> There, he asserted claims under the Fourteenth Amendment Due Process clause and the Equal Protection clause. He also asserted privacy and equal protection claims under the California Constitution. Notably, the U.S. District Court for the Central District of California decided the case after the favorable federal appellate decisions in *Glucksberg* and *Quill*.<sup>146</sup> Nevertheless, the court still denied all of Kevorkian’s claims.<sup>147</sup> The Ninth Circuit dismissed the appeal because by then the U.S. Supreme Court had already adjudicated the issues in other cases.<sup>148</sup>

### 4. *Kevorkian v. Thompson (E.D. Mich. 1997)*

Kevorkian filed his second federal action in Michigan with Janet Good, a patient with terminal pancreatic cancer.<sup>149</sup> Like the California federal court, the U.S. District Court for the Eastern District of Michigan declined to follow the still-standing federal appellate decisions in *Glucksberg* and *Quill*.<sup>150</sup> The court held that a mentally competent, terminally ill or intractably suffering adult does not have a liberty interest protected by the Fourteenth Amendment’s Due Process Clause in MAID. The court further held that the Equal Protection Clause of the Fourteenth Amendment is not violated by denying a mentally competent, terminally ill or intractably suffering adult not on life support the right to MAID.

142. See Janet M. Branigan, *Michigan’s Struggle with Assisted Suicide and Related Issues as Illuminated by Current Case Law: An Overview of People v. Kevorkian*, 72 U. DET. MERCY L. REV. 959 (1995).

143. *Hobbins v. Attorney General*, 518 N.W.2d 487, 489 (Mich. App. 1994).

144. *People v. Kevorkian*, 527 N.W.2d 714, 728 (Mich. 1994), *cert denied*, 514 U.S. 1083 (1995).

145. *Kevorkian v. Arnett*, 939 F. Supp. 725 (C.D. Cal. Sept. 11, 1996).

146. See *infra* Sections V.B & V.C.

147. See *Kevorkian*, 939 F. Supp., at 731–732. *The court also rejected an asserted right under the California constitution, citing Donaldson v. Lungren*, 4 Cal. Rptr. 2d 59 (Ct. App. 1992). *Id.*

148. *Kevorkian v. Arnett*, 136 F.3d 1360 (9th Cir. Mar. 31, 1998) (vacating judgment and dismissing appeal).

149. *Kevorkian v. Thompson*, 947 F. Supp. 1152 (E.D. Mich. Jan. 6, 1997).

150. See *infra* Sections V.B & V.C.

## B. SCOTUS 1: *Quill v. Vacco*

During the early 1990s, several cases in California and Michigan had sought a federal constitutional right to MAID. Still, the most notable constitutional rights cases were out of Washington and New York. In 1994, advocates filed two federal lawsuits challenging the constitutionality of Washington and New York statutes criminalizing aiding suicide.

The Washington and New York lawsuits claimed that criminal assisted suicide statutes constituted denials of due process and equal protection as applied to terminally ill, competent persons voluntarily requesting assistance from licensed physicians. These claims met some success. In both cases, federal courts of appeals upheld the claims and held the statutes unconstitutional. Nevertheless, the U.S. Supreme Court reversed, holding that there is no constitutional barrier to states criminalizing MAID.

The specific question presented in the Second Circuit case was whether New York's ban on MAID violated the Fourteenth Amendment's Equal Protection Clause.<sup>151</sup> The plaintiffs alleged that the law treats similarly situated terminally ill patients disparately. On the one hand, New York law (like laws in almost every state) allows competent terminally ill adults to hasten their death by withholding or withdrawing their own lifesaving treatment. On the other hand, New York law denies the same right to patients who could not withdraw their own treatment even if they are terminally ill or in great pain.

The District Court rejected these claims and ruled for the State of New York.<sup>152</sup> The Second Circuit reversed, holding that New York's ban was unconstitutional.<sup>153</sup> The court of appeals held that the statute treated similarly situated terminally ill patients differently. On the one hand, those who required life-sustaining treatment were entitled under New York law to die by having that treatment withheld or withdrawn. On the other hand, patients whose suffering might be equal or greater, but who did not require life-sustaining treatment, were denied the same right to die because New York statutory law made it a crime to provide them with the assistance necessary to die.

The U.S. Supreme Court reversed, holding that there was no fundamental liberty interest and that New York's distinction between active and passive means of death was legitimate. Having determined that there was no fundamental right at stake, the Court needed only to apply a minimal scrutiny test and was able to accord the statute a strong presumption of validity. Thus, the Court would uphold the law so long as it bore a rational relation to some legitimate end.

Employing a rationality test to examine the guarantees of the Equal Protection Clause, the Court held that New York's ban bore a rational relationship to the state's legitimate interest in protecting medical ethics, preventing euthanasia, shielding the disabled and terminally ill from prejudice that might encourage them to end their lives, and, above all, the preservation of human life. Moreover, while acknowledging the difficulty of its task, the Court distinguished between the refusal of lifesaving treatment and assisted suicide, by noting that the latter involves the

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151. *Quill v. Vacco*, 521 U.S. 793 (1997).

152. *Quill v. Vacco*, 870 F. Supp. 78 (S.D.N.Y. 1994).

153. *Quill v. Vacco*, 80 F.3d 716, 718 (2d Cir. 1996).

criminal elements of causation and intent. It found the distinction between assisting suicide and withdrawing life-sustaining treatment to be a rational one because it is “a distinction widely recognized and endorsed in the medical profession and in our legal traditions.”<sup>154</sup>

### C. SCOTUS 2: *Washington v. Glucksberg*

While the New York case presented an equal protection question, a parallel case from Washington State presented the question whether Washington State’s ban on MAID violated the Fourteenth Amendment’s Due Process Clause. The plaintiffs alleged that the same principle that grounded the right to refuse treatment also encompassed a right to choose the time and manner of one’s death. Therefore, they argued, Washington’s law denied competent terminally ill adults this fundamental liberty.

The District Court ruled for the plaintiffs.<sup>155</sup> While a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit reversed,<sup>156</sup> a rare en banc Ninth Circuit affirmed the district court.<sup>157</sup> The U.S. Supreme Court granted certiorari to the state of Washington, and upheld the constitutionality of the state law.<sup>158</sup>

The Supreme Court concluded that no fundamental right was at stake. It further concluded that the state’s interests were legitimate and that the statute bore a rational relationship to furthering those interests. Accordingly, the Court held that the Washington statute making assisted suicide a crime “does not violate the Fourteenth Amendment, either on its face or as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors.”<sup>159</sup>

### D. Later Efforts after 1997

By June 1997, the U.S. Supreme Court had rejected both due process and equal protection arguments. Nevertheless, some litigants continued to press such claims in federal courts. Predictably, those courts denied the claims.

#### 1. *Mahorner v. Florida (M.D. Fla. 1998)*

Unlike the patient plaintiffs in most other MAID lawsuits, James Mahorner was not terminally ill. Instead, the seventy-six-year-old former practicing attorney was suffering increasing “diminished mental capacity.”<sup>160</sup> Mahorner sought judicial approval to “hire a physician to inject him with ‘a lethal pain-relieving’ drug to hasten his demise.”<sup>161</sup> The court expectedly held that to the extent that the complaint

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154. *Quill*, 521 U.S. at 800.

155. *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1467 (W.D. Wash. May 3, 1994).

156. *Compassion in Dying v. Washington*, 49 F.3d 556 (9th Cir. Mar. 9, 1995).

157. *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. Mar. 8, 1996) (en banc).

158. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

159. *Id.* at 732.

160. *See Mahorner v. Florida*, No. 3:08-cv-300-J-33TEM, 2008 WL 2756481 (M.D. Fla. July 14, 2008).

161. *See id.* Technically, the plaintiff was seeking active euthanasia and not MAID.

sought relief under the Fourteenth Amendment, it was subject to dismissal under *Glucksberg, Vacco, and Krischer*.<sup>162</sup>

## 2. *Calon v. United States (D. Kan. 2009)*

In 1999, John Calon asserted a constitutional right to MAID in a claim for benefits before the U.S. Court of Appeals for the Tenth Circuit.<sup>163</sup> That court held that Calon could not state a cognizable claim that state laws prohibiting MAID violated the First Amendment, the Due Process Clause, or the Equal Protection Clause. The court further ruled that any other constitutional claim challenging state laws regarding assisted suicide was too vague to confer federal question jurisdiction.

Nearly ten years later, Calon made similar claims in the U.S. District Court for the District of Kansas.<sup>164</sup> He asserted various violations of federal law, including the First, Eighth, Ninth, Thirteenth, and Fourteenth Amendments to the United States Constitution. Yet, Calon did not assert any such claims in his complaint. Nor did he allege sufficient facts to allege a real and immediate threat of injury to support any claim for prospective relief.

## VI. LEGALIZING MAID THROUGH STATE CONSTITUTIONAL LITIGATION

Because the U.S. Supreme Court decided that there is no constitutional right to MAID, litigation efforts after June 1997 have focused elsewhere.<sup>165</sup> Specifically, they have focused either on grounding the right in state constitutions or on establishing that MAID falls outside the scope of assisted suicide statutes. This section examines cases asserting state constitutional claims. The next section examines cases asserting statutory interpretation claims.

Initially, advocates identified the most promising theories to be state constitutional privacy claims. After all, some state supreme courts had previously given rather expansive readings to the privacy clauses in their state constitutions. Nonetheless, the courts have proved unwilling to strike down criminal prohibitions on assisted suicide as a violation of a terminally ill person's right to privacy.

Admittedly, some plaintiffs have obtained favorable state constitutional judgments from trial courts.<sup>166</sup> Yet, no plaintiff has ever obtained an appellate court ruling that the prohibition of MAID violates a right afforded by state constitution. Indeed, "not a single plaintiff has asserted a successful constitutional challenge to an assisted suicide ban."<sup>167</sup>

162. See *supra* Sections V.B-C & *infra* Section VI.A.2.

163. *Calon v. Apfel*, No. 98-3190, 1999 WL 415340, at \*1 (10th Cir. Apr. 26, 1999).

164. *Calon v. United States*, No. 08-2608-JWL, 2009 WL 248430 (D. Kan. Feb 3, 2009) (dismissing for lack of jurisdiction).

165. Litigation has appeared an attractive pathway, because ballot initiatives are cumbersome and legislation is controversial. See Alan Meisel, *Physician-Assisted Suicide: A Common Law Roadmap for State Courts*, 24 *FORDHAM URBAN L.J.* 817, 819 (1997).

166. See discussion of the state constitutional litigation in Florida, Montana, and New Mexico *infra* Section VI.A.2, 4, 5

167. *Myers v. Schneiderman*, 85 N.E.3d 57, 92 (N.Y. Ct. App. 2017) (Garcia, J., concurring).

## A. State Supreme Court Rulings

Six constitutional rights cases have reached the state supreme courts in Michigan, Florida, Alaska, Montana, New Mexico, and New York. I discuss those six cases immediately below. In the next section, I discuss constitutional rights cases decided by trial courts or intermediate appellate courts.

### 1. Michigan v. Kevorkian (*Mich.* 1994)

In February 1993, the Michigan legislature enacted a ban on assisted suicide. Kevorkian challenged that statute both in defense to criminal prosecutions and in an action for declaratory relief.<sup>168</sup> Several circuit court judges held that MAID was a constitutional right.<sup>169</sup> As discussed above, neither the intermediate court of appeals nor the Michigan Supreme Court found there was a federal constitutional right.<sup>170</sup>

Nevertheless, the Court of Appeals overturned the new statute outlawing assisted suicide on state constitutional grounds. While the court did not hold that there was a constitutional right to assisted suicide, it held that the statute violated a provision in the Michigan Constitution that “no law shall embrace more than one object.”<sup>171</sup> The Michigan Supreme Court reversed, upholding the assisted suicide statute. It held that the act was not constitutionally defective for having more than one object. Like the court of appeals, the state supreme court denied that the Fourteenth Amendment included a constitutional right to die.<sup>172</sup>

### 2. Krischer v. McIver (*Fla.* 1997)

Charlie Hall was terminally ill with AIDS. Along with his physician, Hall sought a declaratory judgment that Florida’s assisted suicide statute was unconstitutional as applied to MAID. Hall contended that Florida’s statutory prohibition on assisted suicide violated the state constitutional right of privacy.<sup>173</sup> The trial court rejected the fundamental liberty interest but accepted the equal protection argument and enjoined the attorney general.<sup>174</sup>

The Florida Supreme Court reversed.<sup>175</sup> The court held there was no fundamental right and that there were compelling state interests in any case. The court’s analysis was a straightforward rejection of the application of the

168. See Janet M. Branigan, *Michigan’s Struggle with Assisted Suicide and Related Issues as Illuminated by Current Case Law: An Overview of People v. Kevorkian*, 72 U. DET. MERCY L. REV. 959, 962 (1995).

169. See, e.g., *Hobbins v. Attorney General*, No. 93-306-178CZ, 1993 WL 276833 (Mich. Cir. Ct. May 20, 1993), *aff’d in part, rev’d in part*, 518 N.W.2d 487 (Mich. Ct. App. May 10, 1994), *rev’d sub nom. People v. Kevorkian*, 527 N.W.2d 714 (Mich. December 13, 1994).

170. See discussion *supra* Section V.A.2.

171. *Hobbins v. Attorney General*, 518 N.W.2d 487, 489 (Mich. Ct. App. 1994) (quoting MICH. CONST. art. 4, §24) *rev’d sub nom. People v. Kevorkian*, 527 N.W.2d 714 (Mich. Dec. 13, 1994).

172. See *People v. Kevorkian*, 527 N.W.2d 714, 728 (Mich. 1994), *cert denied sub nom. Hobbins v. Kelley*, 514 U.S. 1083 (1995).

173. FLA. CONST. art. I, §23; see also Eryn R. Ace, *Krischer v. Mciver: Avoiding the Dangers of Assisted Suicide*, 32 AKRON L. REV. 723, 724 (1999).

174. See *McIver v. Kirscher*, No. CL-96-1504-AF, 1997 WL 225878 (Fla. Cir. Ct. Jan. 31, 1997).

175. See *Krischer v. McIver*, 697 So. 2d 97 (Fla. 1997).

constitutional privacy provision to permit terminally ill patients to obtain the aid of physicians in actively ending their lives. Central to the holding was the court's acceptance of the conventional distinction between passive and active means of dying, reaffirming its commitment to the former while rejecting the latter.

The Florida Supreme Court followed the U.S. Supreme Court's analysis in *Glucksberg* in finding that important state interests justify the differential treatment of actively and passively hastening death. Specifically, the court held that "three of the four recognized state interests are so compelling as to clearly outweigh Mr. Hall's desire for assistance in committing suicide"<sup>176</sup> These interests are preserving life,<sup>177</sup> preventing suicide,<sup>178</sup> and protecting the ethical integrity of the medical profession.<sup>179</sup>

### 3. Sampson v. Alaska (*Alaska 2001*)

In 1998, a patient with breast cancer and a patient with AIDS sought a declaratory judgment that Alaska's assisted suicide statute was unconstitutional as applied to MAID. The trial court rejected the plaintiffs' claims. The Alaska Supreme Court affirmed. The court held there was no fundamental right and that the state had a rational basis for prohibiting MAID. The court also denied the equal protection claim holding that the active passive distinction was valid. Furthermore, the court concluded that this was a "quintessentially legislative matter" and it would not make social policy.<sup>180</sup>

The Alaska Supreme Court found that, "[t]o the extent that the . . . statute's general prohibition of assisted suicide prevents terminally ill patients from seeking a physician's help in ending their lives, . . . the provision substantially interferes with [patients'] general privacy and liberty interests, as guaranteed by the Alaska Constitution."<sup>181</sup> Nevertheless, the court determined that the state's ban on such assistance, through its manslaughter statute, was constitutional because it both served a legitimate governmental purpose and bore a substantial relationship to that purpose.<sup>182</sup>

The court also expressed concern that permitting assisted suicide in cases involving competent, terminally ill patients would put courts in difficult positions in terms of determining competency and terminal condition.<sup>183</sup> Finally, the court seemed concerned that permitting assisted suicide in the case of competent patients would open the door to assisted suicide by advance directive.<sup>184</sup>

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176. *McIver*, 697 So. 2d at 103.

177. *Id.* (citing *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990)).

178. *Id.* ("[L]egal physician-assisted suicide could make it more difficult for the State to protect depressed or mentally ill persons, or those who are suffering from untreated pain, from suicidal impulses.").

179. *Id.* at 104.

180. *Sampson v. State*, 31 P.3d 88, 98 (Alaska Sept. 21, 2001).

181. *Id.* at 95.

182. *Id.* at 95–96.

183. *Id.* at 97–98.

184. *Id.* at 97.



#### 4. *Baxter v. State (Mont. 2009)*

In December 2008, a Montana trial court ruled that the Montana Constitution protected MAID.<sup>185</sup> While the trial court rejected the equal protection argument, it accepted the privacy and dignity argument. The court also found there were no compelling state interests requiring the state to treat MAID as homicide. As discussed below, the Montana Supreme Court resolved the right to MAID at the statutory level, obviating the need to resolve the constitutional question.<sup>186</sup>

#### 5. *Morris v. Brandenburg (N.M. 2016)*

In early 2014, a trial court in New Mexico invalidated that state's statutory prohibition on MAID, ruling that it violated the provision of the New Mexico constitution guaranteeing not only "the rights of enjoying life and liberty" but also "the right to seek and obtain happiness."<sup>187</sup>

In 2015, the intermediate court of appeals reversed that judgment.<sup>188</sup> In 2016, the New Mexico Supreme Court affirmed the appellate court's reversal of the trial court ruling.<sup>189</sup> While agreeing that New Mexico could grant its citizens more constitutional rights than those guaranteed by the federal Constitution, the court followed the reasoning of *Glucksberg*. The court held there was no "special characteristic of New Mexico law that makes physician aid in dying a fundamental right in this state."<sup>190</sup> In doing so, it refused to hold that United States Supreme Court jurisprudence had moved beyond "the careful substantive due process approach announced in *Glucksberg*, effectively overruling it."<sup>191</sup>

Finally, the court interpreted Article II, Section 4 (the Inherent Rights Clause) of the New Mexico Constitution as creating no judicially enforceable rights but instead guaranteeing New Mexicans an expansive view of rights otherwise existing in its constitution. While the portion of New Mexico's Constitution that refers to "seeking and obtaining . . . happiness" might, under other circumstances, ensure greater due process protections than those of the federal government, "the Inherent Rights Clause has never been interpreted to be the exclusive source for a fundamental or important constitutional right, and on its own has always been subject to reasonable regulation."<sup>192</sup>

The court ruled that the New Mexico statute bore a rational relationship to the legitimate governmental interest in "providing positive protection to ensure that a terminally ill patient's end-of-life decision is informed, independent, and procedurally safe." Setting forth such procedures is a job for the legislature, not the judiciary. The New Mexico legislature can and should draw the line between the

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185. *Baxter v. State*, No. ADV-2007-787, 2008 Mont. Dist. LEXIS 482 (Mont. Dist. Ct. Dec. 5, 2008), *aff'd in part, rev'd in part*, 224 P.3d 1211 (Mont. 2009).

186. *Baxter v. State*, 224 P.3d 1211, 1220 (Mont. 2009).

187. *Morris v. Brandenburg*, No. D-202-CV 2012-02909, 2014 WL 10672986, at \*6-7 (2d Jud. D. Ct. N.M., Jan. 13, 2014) (citing to N.M. CONST. art. II, §4) *rev'd* *Morris v. Brandenburg*, 2015-NMCA-100, 356 P.3d 564, *aff'd*, *Morris v. Brandenburg*, 2016-NMSC-027, 376 P.3d 836.

188. *See Morris*, 2015-NMCA-100 (decided Aug. 11, 2015).

189. *See Morris*, 2016-NMSC-027 (decided June 30, 2016).

190. *Id.* ¶ 36.

191. *Id.* ¶ 23 (citing *Obergefell v. Hodges*, 135 S.Ct. 2584, 2620-21 (2015) (Roberts, C.J., dissenting)).

192. *Id.* ¶ 51.

state's legitimate interest and the state's conceded lack of "interest in preserving a painful and debilitating life that will end imminently."<sup>193</sup>

#### 6. Myers v. Schneiderman (N.Y. 2017)

Constitutional litigation in New York turned out no better than in New Mexico. The Appellate Division dismissed plaintiffs' state equal protection claim quickly, saying that the right to equal protection under the New York Constitution was coextensive with the right under the United States Constitution, and the Supreme Court in *Vacco v. Quill* had already decided that issue. The Appellate Division also rejected arguments that a strong liberty interest existed for due process purposes. The court refused to alter its constitutional analysis based on evidence amassed over the two decades since *Vacco* and *Glucksberg*. "We are not persuaded . . . aid-in-dying is an issue where a legitimate consensus has formed. . . . we defer to the political branches of government. . . ."<sup>194</sup>

The Court of Appeals affirmed, holding that applying New York's statutes criminalizing assisted suicide to MAID violated neither due process nor equal protection rights under the New York state constitution. "Although New York has long recognized a competent adult's right to forgo life-saving medical care, we reject plaintiffs' argument that an individual has a fundamental constitutional right to aid-in-dying as they define it. We also reject plaintiffs' assertion that the State's prohibition on assisted suicide is not rationally related to legitimate state interests."<sup>195</sup>

#### **B. Baxter v. Montana (1st Jud. Dist. Ct. 2008)**

As with lower courts in Florida and New Mexico, Montana plaintiffs were able to obtain a trial court judgment that Montana's prohibition of MAID violated patients' privacy, and dignity rights under the state constitution.<sup>196</sup> In December 2008, the Montana First Judicial District Court ruled that the state constitution protected MAID.<sup>197</sup> Yet, as discussed below, the Montana Supreme Court vacated the judgment.<sup>198</sup> That court found a right to MAID at the statutory level, obviating the need to resolve the constitutional question.<sup>199</sup>

The plaintiff argued that the statute was unconstitutional under the Montana Constitution's equal protection clause, individual dignity clause, and express right of privacy. The trial court ruled that the statute did not violate the state constitution's equal protection clause for the same reasons the United States Supreme Court had ruled to that effect with respect to the U.S. Constitution's Equal Protection Clause.

193. *Id.*

194. *Myers v. Schneiderman*, 140 A.D. 3d 51, 65 (N.Y. App. Div. 2016).

195. *Myers v. Schneiderman*, 85 N.E.3d 57, 65 (N.Y. Ct. App. 2017) (decided Sept. 7, 2017).

196. *See Baxter v. State*, No. ADV-2007-787, 2008 Mont. Dist. LEXIS 482 (Mont. Dist. Ct. Dec. 5, 2008), *aff'd in part, rev'd in part*, 224 P.3d 1211 (Mont. 2009) (holding that the prohibition violated MONT. CONST. art. II, §§ 4, 10).

197. *Id.*

198. *See infra* Section VII.A.

199. *Baxter v. State*, 224 P.3d 1211, 1220 (Mont. 2009). One Justice wrote separately to express agreement with the trial court's reasoning on the constitutional issue. *Id.* at 1223.

Nevertheless, the trial court ruled that the statute was unconstitutional, holding that the state constitution's individual dignity clause and right of privacy combined to "mandate that a competent terminally ill person has the right to choose to end his or her life."<sup>200</sup>

Moreover, the right necessarily includes a right to have the assistance of a physician, for if a patient were forced to proceed without physician assistance he might end his life "sooner rather than later . . . and the manner of the patient's death would more likely occur in a manner that violates his dignity and peace of mind."<sup>201</sup>

The trial court then considered the state interests that Montana had advanced to convince the court that the statute was constitutional. The state asserted an interest in the preservation of life. The court ruled that such an interest is compelling in general, but "diminishes in the delicate balance against the individual's constitutional rights of privacy and individual dignity" when a patient is terminally ill.<sup>202</sup>

The court ruled that the state did have compelling state interests in "protecting vulnerable groups from potential abuses" and "protecting the integrity and ethics of the medical profession." Yet the court held the statute unconstitutional despite the existence of these compelling state interests because it was overbroad. The court suggested that the state of Montana should seek to serve these compelling state interests by enacting statutory protections such as those contained within Oregon's Death with Dignity Act rather than by prohibiting suicide assistance as a blanket matter, sweeping within the reach of its statutes decisions of competent, terminally ill patients choosing to end their own lives with the assistance of physicians.<sup>203</sup>

### C. Other Court Rulings

While only six state supreme courts have analyzed the constitutionality of MAID under state constitutions, seven other trial and intermediate appellate have also adjudicated state constitutional claims. Trial courts in Florida, Montana, and New Mexico ruled that prohibition of MAID violated state constitutional rights. Yet, no appellate court sustained those judgments. Nearly fifteen other trial and appellate courts to reach the issue all found that there was no state constitutional right to MAID.

Two California cases asserted both federal and state constitutional claims. The adjudication of the federal claims is discussed above.<sup>204</sup> The state claims fared no better. First, Thomas Donaldson brought claims under both the U.S. Constitution and the California Constitution. Both the Superior Court and the Court of Appeal denied the states claims just as they denied the federal claims.<sup>205</sup> Second, Jack Kevorkian brought claims under both the U.S. Constitution and the California

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200. *Baxter*, 2008 Mont. Dist. LEXIS 482, at \*26. The court recognized that the state may want to erect some safeguards but could do so afterwards. *Id.* at \*29.

201. *Id.* at \*29.

202. *Id.* at \*30.

203. *See id.* at \*15.

204. *See supra* Section V.A.

205. *See Donaldson v. Lungren*, 4 Cal.Rptr.2d 59, 60 (Cal. Ct. App. Jan. 29, 1992).

Constitution. The U.S. District Court denied the states claims just as it denied the federal claims.<sup>206</sup>

*I. Sanderson v. Colorado (Colo. App. 2000)*

The MAID issue in Sanderson differed significantly from that in other cases. Robert Sanderson was an 81-year-old former judge. Although in good health, Sanderson wanted to execute an advance directive authorizing his wife “to end his life by euthanasia, provided that two physicians agree his medical condition is hopeless.”<sup>207</sup> He sought a declaratory judgment to assure himself that neither his wife nor the physician who actually engaged in the euthanasia would be subject to criminal liability.

Sanderson asserted claims under several federal constitutional provisions, but on appeal after dismissal of the complaint, he pursued only a claim under the free exercise clause of the First Amendment. Sanderson described his personal religious beliefs as including beliefs that the free will of man included an ability to direct euthanasia, and that man could delegate to another to authorize euthanasia.

The Colorado Court of Appeals ruled that the free exercise clause did not exempt the plaintiffs from the state law criminalizing their conduct, in large part because the law was an “‘across-the-board’ criminal prohibition on a particular form of conduct.” Because Colorado’s prohibition of assisted suicide fell into this category, the court ruled, it constituted a “valid, religiously-neutral, and generally-applicable criminal statute that prohibits conduct a state is free to regulate.”<sup>208</sup>

In addition to its unique First Amendment argument, *Sanderson* is interesting, and differs from the other cases, in that the plaintiff was asserting a right to choose death through an advance directive rather than a right to commit suicide with assistance. Thus, the plaintiff was arguing that, while competent, he could direct others to euthanize him later, when he was incompetent. Rather than asserting his own right to take action, Sanderson sought to authorize others to take action, and he wanted to ensure that the state would not prosecute those who acted at his request.

The court noted the incongruity by describing his claim as weak, because he does not just seek a limited exemption from the assisted suicide statute for himself so that he may freely practice his religion without fear of criminal prosecution. He also seeks exemptions for third parties—his wife and his physician—based on his personal religious beliefs, which they may not share. Even assuming Sanderson had standing to raise such claims on behalf of third persons, the court found “no precedent for such a broad application of the Free Exercise Clause in First

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206. See *Kevorkian v. Arnett*, 939 F. Supp. 725, 731–32 (C.D. Cal. 1996), *vacated, appeal dismissed*, *Kevorkian v. Arnett*, 136 F.3d 1360 (9th Cir. 1998).

207. See *Sanderson v. People*, 12 P.3d 851 (Colo. App. June 8, 2000); see also Allison Sherry, *Ex-Judge Seeks Right to Die*, DENVER POST (June 9, 2000), [www.extras.denverpost.com/news/news0609.htm](http://www.extras.denverpost.com/news/news0609.htm) (explaining that Sanderson was in good health despite his interest in the medical aid in dying cause).

208. *Sanderson*, 12 P.3d at 854.

Amendment jurisprudence.”<sup>209</sup> The Colorado Supreme Court declined to hear the case.<sup>210</sup>

## 2. *People v. Kevorkian (Mich. App. 2001)*

In 1999, a Michigan jury convicted Jack Kevorkian of second-degree murder and unlawful delivery of a controlled substance.<sup>211</sup> Kevorkian appealed.<sup>212</sup> He contended that his conviction was unlawful under the Ninth and the Fourteenth Amendments of the U.S. Constitution, as well as under their counterparts in the Michigan Constitution.<sup>213</sup>

The Ninth Amendment provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>214</sup> Dr. Kevorkian claimed that the “right to be free from inexorable pain and suffering must be among” the rights so protected.<sup>215</sup> The court summarily rejected this argument because of Kevorkian’s failure to pursue it beyond its mere assertion.

The court dealt far more extensively, however, with Dr. Kevorkian’s Fourteenth Amendment liberty interests argument. Using the U.S. Supreme Court’s assisted-suicide jurisprudence as a base, Kevorkian argued that the “necessary and direct corollary” of the concern expressed in *Quill* about patients dying in pain was “that a person should not be forced to suffer unbearably.”<sup>216</sup> While acknowledging the Supreme Court’s concerns about pain, the court refused to rule that it was unconstitutional to apply Michigan’s murder statute to active euthanasia based on those concerns.

The court articulated three bases for its ruling. First, the court expressed a concern that “expanding the right to privacy would begin, as the steps in the progression of defendant’s argument supporting voluntary euthanasia clearly indicate, the slide down the slippery slope toward euthanasia.”<sup>217</sup> Second, the court hesitated to take such a step because it believed that “[i]f society is to recognize a right to be free from intolerable and irremediable suffering, it should do so through the action of the majority of the legislature, whose role it is to set social policy, or by action of the people through ballot initiative.”<sup>218</sup>

209. *Id.*

210. *See id.* (indicating that certiorari was denied on October 23, 2000 due to an unsuccessful attempt at making a first amendment challenge); *cf.* *Final Exit Network, Inc. v. Georgia*, 722 S.E. 2d 722, 725 (Ga. 2012) (making a successful first amendment challenge); *see also* *State v. Melchert-Dinkel*, 844 N.W.2d 13, 18 (Minn. 2014), *rev’g* 816 N.W.2d 703 (Minn. Ct. App. 2012) (succeeding on first amendment grounds).

211. *See* Dirk Johnson, *Kevorkian Sentenced to 10 to 25 Years in Prison*, N.Y. Times, (Apr. 14, 1999) <http://www.nytimes.com/1999/04/14/us/kevorkian-sentenced-to-10-to-25-years-in-prison.html>.

212. *People v. Kevorkian*, 639 N.W.2d 291, 296 (Mich. App. 2001).

213. *See id.* at 300–303; *see also* Monica Davey, *Kevorkian Speaks After His Release From Prison*, N.Y. TIMES, (June 4, 2007), <http://www.nytimes.com/2007/06/04/us/04kevorkian.html> (indicating that even after eight years of imprisonment, Dr. Kevorkian still felt strongly about MAID).

214. U.S. CONST. amend. IX.

215. *Kevorkian*, 639 N.W.2d at 303.

216. *Id.* at 304 (citing *Vacco v. Quill*, 521 U.S. 793 (1997)).

217. *Id.* at 306.

218. *Id.*

Finally, the court expressed concern about judging quality of life. “Expanding the right of privacy to include a right to commit euthanasia . . . to end intolerable and irremediable suffering we would inevitably involve the judiciary in deciding questions that are simply beyond its capacity.”<sup>219</sup>

### 3. Hooker v. Slatery (*Davidson County, Tenn. 2016*)

In May 2015, John Jay Hooker filed a lawsuit asserting a right to MAID under the Tennessee Constitution. In September 2015, the trial court held that Hooker had no right to MAID under the Tennessee Constitution.<sup>220</sup> In any case, the state had compelling state interests to prohibit MAID. Hooker unsuccessfully sought review directly from Supreme Court of Tennessee.<sup>221</sup> Hooker then voluntarily dismissed the appeal before a ruling from the intermediate appellate court.<sup>222</sup>

### 4. Donorovich-O’Donnell v. Harris (*Cal. App. 2015*)

Before California enacted the End of Life Options Act in October 2015, two separate sets of plaintiffs filed separate lawsuits seeking to establish a state constitutional right to MAID. In May 2015, Christy Lynne Donorovich-O’Donnell with other terminally ill patients and a physician filed in San Diego Superior Court.<sup>223</sup> In July 2015, the court sustained the defendants’ demurrers, holding that no state constitutional right to privacy, free speech, or equal protection extended to MAID.<sup>224</sup>

By the time the California Court of Appeal issued its opinion, the legislature had already enacted the End of Life Options Act. Yet, that did not moot the case because the law was not yet in effect.<sup>225</sup> In October 2015, the Court of Appeal affirmed the Superior Court.<sup>226</sup> The California Supreme Court declined to hear the case.<sup>227</sup>

The plaintiffs in *Donorovich-Odonnell* argued that, as applied to competent, terminally ill persons seeking lethal medication to end their lives, the application of the criminal assisted suicide law to MAID deprived citizens of “autonomy privacy.”<sup>228</sup> The California Constitution’s explicit grant of a right to privacy could indeed protect more than the federal Constitution does, but the court refused to so hold because the plaintiffs had not “parse[d] out why the reasoning of *Glucksberg* or *Vacco* is ostensibly inapplicable.”<sup>229</sup> It also cited *Donaldson* as holding that the state

219. *Id.* at 307 (emphasis in original).

220. *See* Hooker v. Slatery, No. 15061511 (Davidson Cty. Ch. Ct., Tenn. Sept. 29, 2015).

221. *See* Hooker v. Slatery, No. M2015-01982-SC-RDM-CV (Tenn. Nov. 9, 2015).

222. *See* Hooker v. Slatery, No. M2015-01982-COA-R3-CV (Tenn. Ct. App. May 20, 2016).

223. *See* Complaint at 1, Donorovich-O’Donnell v. Harris, No. 37-2015-00016404-CU-CR-CTL (San Diego Sup. Ct. May 15, 2015).

224. *See* Ruling on Demurrer, Donorovich-O’Donnell v. Harris, No. 37-2015-00016404-CU-CR-CTL (San Diego Sup. Ct. July 24, 2015).

225. In addition, it is worth ruling on the constitutionality of MAID, because the California End of Life Options Act is scheduled to sunset in 2026.

226. *See* Donorovich-O’Donnell v. Harris, 194 Cal. Rptr. 3d 579, 582 (Ct. App. Oct 29, 2015).

227. *Donorovich-Odonnell v. Harris*, No. S230918, 2016 Cal. LEXIS 646 (Feb. 3, 2016).

228. *See* *Donorovich-O’Donnell*, 194 Cal. Rptr. 3d at 590.

229. *Id.* at 594.

constitution could not shield a third person from criminal liability for assisting a person in committing suicide.<sup>230</sup>

In sum, the court ruled that the plaintiff's asserted right to obtain "assistance of a third party in committing suicide" was not fundamental. Even if it were, the state had compelling interests in enforcing its statutory prohibition of suicide assistance in cases of MAID. Specifically, the state has an interest in ensuring that people are not influenced to kill themselves, and interests in preserving life, maintaining the ethics of the medical profession, protecting vulnerable groups, and guarding against a slippery slope toward involuntary euthanasia.

Overridingly, however, the court opined that the matter was one for the legislature rather than the courts. In doing so, it focused on the legislative imposition of many safeguards on the process of MAID in California's End of Life Options Act. "If the law were changed by judicial opinion, these extensive safeguards would not be in place."<sup>231</sup>

#### 5. Brody v. Harris (*San Francisco Sup. Ct. 2016*)

In February 2015, another set of California plaintiffs filed in San Francisco Superior Court. They also made state constitutional claims. In February 2016, the court sustained the defendants' demurrers.<sup>232</sup> The trial court ruled that the right to privacy did not include MAID.<sup>233</sup> It also ruled that disallowing MAID did not violate equal protection.<sup>234</sup> Moreover, the court observed that the legislature had recently acted. The plaintiffs appealed but later voluntarily dismissed.<sup>235</sup>

### D. Ongoing Litigation in 2018

While plaintiffs have been unable to establish a state constitutional right to MAID in any jurisdiction, they keep trying. There are two active cases: one in Hawaii and one in Massachusetts.

#### 1. Radcliffe v. Hawaii (*1st Cir. Ct., Haw. 2016*)

In January 2017, John Radcliffe filed a lawsuit seeking declaratory and injunctive relief. But in July 2017, the trial court refused to address the merits of Radcliffe's challenge to the Hawaii assisted suicide statute, deferring the questions to the political branches of government.<sup>236</sup> First, the court held that plaintiffs cannot challenge a criminal statute through declaratory judgment. Second, the court held that it would not interfere with the state medical board and declare that MAID was

230. *See id.* at 592–93 (citing *Donaldson v. Lungren*, 4 Cal. Rptr. 2d 59 (Ct. App. 1992)).

231. *Id.* at 595.

232. Order Sustaining Demurrers at \*4–5, *Brody v. Harris*, 2016 Cal. Super. LEXIS 1564 (No. CGC-15-544086) (San Francisco Sup. Ct. Feb. 16, 2016).

233. *See id.* at 3 (citing *Donorovich-O'Donnell*, 194 Cal. Rptr. 3d 579 and *Donaldson*, 4 Cal. Rptr. 2d 59).

234. *See id.* at 3–4 (citing *Vacco v. Quill*, 521 U.S. 793 (1997)).

235. *Brody v. Harris*, No. A148572 (Cal. Ct. App. Oct. 14, 2016).

236. *Radcliffe v. Hawai'i*, No. 17-1-0053-1-KKH, slip op. at 12–13 (1st Cir., Haw. July 14, 2017).

legitimate medical practice. Third, the court refused to issue an injunction, because the statute was presumed valid. The case is now on appeal.<sup>237</sup>

## 2. Kligler v. Healy (*Suffolk County Sup. Ct., Mass. 2017*)

In October 2016, two physicians filed a lawsuit in Suffolk County, Massachusetts court seeking a declaration that the state attorney general and a district attorney could not prosecute them for engaging in MAID.<sup>238</sup> One of the plaintiff physicians was terminally ill and seeking the option, while the other was willing to write the prescription if he would not be criminally punished for doing so. The plaintiffs asserted that the state's prohibition of MAID violated the Massachusetts constitution. Specifically, the plaintiffs alleged that MAID was protected by the state constitutional rights to privacy, liberty, free speech, and equal protection.

In May 2017, the trial court denied the defendants' motions to dismiss.<sup>239</sup> The court ruled that the case could proceed in the face of arguments that the court lacked jurisdiction over it and that the court should dismiss it either because any judicial decision would not completely resolve the dispute or because the matter of MAID is best left to the legislature. The court noted several times that it was not opining on the merits of the case, merely ruling that it had jurisdiction and would retain the case on the docket.

## VII. LEGALIZING MAID THROUGH STATUTORY LITIGATION

In addition to making claims under the U.S. Constitution and under state constitutions, advocates have also brought statutory interpretation claims. They argue that MAID is not encompassed within the criminal prohibition of "assisted suicide." Advocates maintain that MAID and assisted suicide are such different acts that the prohibition of one does not entail the prohibition of the other.

The argument maintains that the choice of a competent dying patient for a peaceful death through MAID is not "suicide." MAID involves the rational choice of a competent, terminally ill patient who finds herself trapped in an unbearable dying process to precipitate death in order to avoid further suffering and preserve her personal dignity. Suicide, by contrast, is a person's choice to prematurely cut short a viable life, usually for reasons of a transient nature and often involving depression or other mental health impairments, recovery from which may be possible with counseling, support, and/or medication. Because MAID is not suicide, it is not covered by the assisted suicide statutes.

Indeed, a growing consensus of medical, mental health and health policy professionals recognize that the choice of a dying patient for a peaceful death through aid in dying is not "suicide." For example, the American Psychological Association

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237. See *Radcliffe v. State*, No. CAAP-17-000594, ECOURT KOKUA, [http://www.courts.state.hi.us/legal\\_references/records/jims\\_system\\_availability](http://www.courts.state.hi.us/legal_references/records/jims_system_availability) (follow "Click Here to Enter eCourt\* Kokua"; then follow "Search for case details by case ID or citation number," and search with case ID: "CAAP-17-0000594") (last visited Jan. 31, 2018).

238. See *Kligler v. Healy*, 34 Mass. L. Rptr. 239 (Super. Ct. 2017). See generally Roger Kligler, *The Death I Want*, BOS. MAG. (Jan. 15, 2017, 6:05 am), <http://www.bostonmagazine.com/health/2017/01/15/the-death-i-want-roger-kligler/>.

239. See *id.*



recognizes that “the reasoning on which a terminally ill person (whose judgments are not impaired by mental disorders) bases a decision to end his or her life is fundamentally different from the reasoning a clinically depressed person uses to justify suicide.”<sup>240</sup> Even more recently, the American Association of Suicidology concluded that “suicide and physician aid in dying are conceptually, medically, and legally different phenomena.”<sup>241</sup>

Yet, despite the semantic and logical cogency of the argument differentiating “suicide” and “MAID,” no court has ever accepted it. On the other hand, the Supreme Court of Montana did accept a statutory interpretation argument based on the unique consent defense in its statute.

### A. *Baxter v. Montana* (Mont. 2009)

As discussed above, the Montana trial court in *Baxter* found a state constitutional right to MAID.<sup>242</sup> The Montana Supreme Court neither affirmed nor reversed that holding, but vacated it. Because the court found a statutory ground for MAID, it did not need to reach the constitutional issue. The Montana Supreme Court ruled that physicians may legally assist competent, terminally ill patients in dying by writing prescriptions for lethal medications at their request.<sup>243</sup>

Suicide is not a crime in Montana, and aiding or soliciting a suicide is only a crime if the victim does not die. Instead, the crime that applies to aiding or soliciting a successful suicide is homicide.<sup>244</sup> Yet, the Montana legislature provides that consent is generally a defense to criminal charges, except in four enumerated situations.

The issue for the Montana Supreme Court was whether the consent that a competent, terminally ill patient would be giving for MAID was against public policy.<sup>245</sup> The court ruled that it was not, in part based on statutory interpretation and in part based on the “legislative respect for the wishes of a patient facing incurable illness” that appeared throughout Montana’s statutes authorizing withholding and withdrawal of treatment.<sup>246</sup> Significantly, the Montana Supreme Court noted: “In light of the long-standing, evolving and unequivocal recognition of the terminally ill patient’s right to self-determination at the end of life in [the Montana statutes], it would be incongruous to conclude that a physician’s indirect aid in dying is contrary to public policy.”<sup>247</sup>

240. *Patients’ Rights to Self-Determination at the End of Life*, AM. PSYCHOL. ASS’N (Oct. 28 2008), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/29/13/28/patients-rights-to-self-determination-at-the-end-of-life>.

241. AM. ASS’N OF SUICIDOLOGY, STATEMENT OF THE AMERICAN ASSOCIATION OF SUICIDOLOGY: “SUICIDE” IS NOT THE SAME AS “PHYSICIAN AID IN DYING” 4 (2017), <http://www.suicidology.org/Portals/14/docs/Press%20Release/AAS%20PAD%20Statement%20Approved%2010.30.17%20ed%2010-30-17.pdf>.

242. *See supra* Section VI.B.

243. *See Baxter v. State*, 2009 MT 449, ¶ 50, 224 P.3d 1211 (2009).

244. *See id.* ¶ 11.

245. *See id.* ¶ 13 (“Consent is ineffective if: . . . it is against public policy to permit the conduct or the resulting harm, even though consented to.”) (quoting MONT. CODE ANN. § 45-2-211(2)).

246. *Id.* ¶ 38.

247. *Id.*

Unlike the six states that enacted MAID statutes, Montana has no legal requirements concerning eligibility criteria or request and prescription procedures. Consequently, the practice of MAID in Montana is presumably governed by the professional standard of care and regulatory process.<sup>248</sup>

### **B. *Blick v. Connecticut* (Hartford Jud. Dist., Conn. 2010)**

In October 2009, Gary Blick brought a lawsuit seeking a declaratory judgment that the Connecticut assisted suicide statute did not cover MAID. The court rejected the argument, observing that the statute's application to MAID is amply demonstrated by multiple legislative attempts to amend the assisted suicide law to permit MAID.<sup>249</sup> The court declined to usurp a legislative function. Furthermore, because the attorney general would not exceed its authority by prosecuting MAID, the lawsuit was barred by sovereign immunity.<sup>250</sup>

### **C. Other Cases**

Almost every recent case asserting state constitutional claims has also made statutory interpretation claims.<sup>251</sup> Yet, not a single court has accepted the statutory interpretation argument. As in *Blick*, every court agreed that MAID was encompassed within the state's prohibition of suicide assistance, as a matter of statutory interpretation.

For example, in *Morris*, the New Mexico Supreme Court found that MAID constitutes "deliberately aiding another in the taking of his own life," and thus constitutes suicide assistance under the statute.<sup>252</sup> The court found "compelling" evidence indicating that medical and psychological professionals do not consider MAID to be suicide and that the deaths in cases of MAID are considered to result from the underlying disease, not the taking of the medication. Nevertheless, the legislature had explicitly distinguished "assisted suicide" from withholding and withdrawal elsewhere in New Mexico's statutory scheme. The court held that the practice came within the statutory definition of suicide assistance.<sup>253</sup>

## **VIII. OTHER MEANS OF LEGALIZING MAID**

While only a statute or appellate judgment provides patients and clinicians with clear sufficient ex ante permission to engage in MAID, there are two other means of "legalizing" the practice. First, lawmakers can limit prosecutorial discretion, thus making it unlikely that MAID participants will be arrested or

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248. Cf. Kathryn L. Tucker, *Aid in Dying*, 142 CHEST. 218, 220 (2012) (noting that MAID is protected in Montana and that "absent a prohibition, the practice . . . can proceed subject to the best practices and an emerging standard of care").

249. See *Blick v. Office of the Div. of Criminal Justice*, No. CV095033392, 2010 Conn. Super. LEXIS 1412, at \*21 (2010).

250. See *id.* at \*42.

251. See *supra* Sections VI.A & VI.C (including *Morris*, *Myers*, *O'Donnell*, and *Brody*).

252. *Morris v. Brandenburg*, 2016-NMSC-027, ¶ 15, 376 P.3d 836 (2016) (quoting N.M. STAT. ANN. § 30-2-4).

253. See *id.*

prosecuted. Second, even if MAID participants are prosecuted, juries can refuse to convict.

### A. Prosecutorial Discretion

The eminent Canadian health law scholar Jocelyn Downie observes that “guidelines for how prosecutorial discretion should be exercised . . . may also be a pathway to a more permissive legal regime.”<sup>254</sup> Prosecutors already exercise significant discretion as to which cases to pursue.<sup>255</sup> Downie argues that while MAID would remain illegal, prosecutors could publish guidelines indicating the factors and circumstances under which they would prosecute.

There is substantial track record for this approach outside the United States. For example, before affirmative legalization in 2002, MAID was tolerated for decades in the Netherlands.<sup>256</sup> In Switzerland, MAID is widely practiced, yet still not affirmatively regulated.<sup>257</sup> In the UK, MAID is clearly prohibited by the Suicide Act of 1961.<sup>258</sup> Nevertheless, in 2010, the Crown Prosecution Service introduced guidelines.<sup>259</sup> At least one U.S. jurisdiction has taken a similar approach.<sup>260</sup>

Surprisingly, physicians provide MAID with significant frequency even in those jurisdictions where it remains illegal. Still, there have been few prosecutions. The paucity of reported legal cases is probably attributable primarily to the failure by law enforcement authorities to detect their occurrence. Yet, even when these cases “come to the attention of the authorities, by dint of pervasive discretion in the criminal justice system,” prosecutors do not bring indictments.<sup>261</sup> If prosecutors

254. Jocelyn Downie, *Permitting Voluntary Euthanasia and Assisted Suicide: Law Reform Pathways for Common Law Jurisdictions*, 16 QUT L. REV. 84, 91 (2016); see also Ben White & Jocelyn Downie, *Prosecutorial Guidelines for Voluntary Euthanasia and Assisted Suicide: Autonomy, Public Confidence and High Quality Decision-Making*, 36 MELB. U. L. REV. 656 (2012).

255. See generally ANGELA J. DAVIS, *ARBITRARY JUSTICE* (2007).

256. See Agnes van der Heide et al., *End-of-Life Decisions in the Netherlands over 25 Years*, 377 NEW ENG. J. MED. 492 (2017).

257. See Samia A. Hurst & Alex Mauron, *Assisted Suicide in Switzerland: Clarifying Liberties and Claims*, 31 BIOETHICS 199, 199 (2017).

258. See *R (In re Purdy) v. Dir. of Pub. Prosecutions* [2009] UKHL 45, [2010] 1 AC (HL) 345 (appeal taken from Eng.).

259. THE DIR. OF PUB. PROSECUTIONS, *POLICY FOR PROSECUTORS IN RESPECT OF CASES OF ENCOURAGING OR ASSISTING SUICIDE* (2010); see also *R (Nicklinson) v. Ministry of Justice* [2013] EWCA (Civ) 961, [2015] AC 657 (Eng.) (involving prosecution after the guidelines were created), *rev'd*, [2014] UKSC 38; Alexandra Mullock, *Compromising on Assisted Suicide: is ‘Turning a Blind Eye’ Ethical?*, 7 CLINICAL ETHICS 17 (2012) (discussing the effects of the guidelines); *Assisted Suicide*, CROWN PROSECUTION SERV. (Jan. 31, 2018), <https://www.cps.gov.uk/publication/assisted-suicide> (providing the latest assisted suicide figures).

260. See *Bisbee Taking a Stance on Assisted Suicide*, KVOA.COM (Sept. 4, 2015), <http://www.kvoa.com/story/29964343/bisbee-taking-a-stance-on-assisted-suicide> (reporting a city council resolution asking the Cochise County Attorney to “deprioritize” prosecuting anyone involved in MAID).

261. See THE RIGHT TO DIE, *supra* note 21, § 12.04[D]; see also Kenneth A. De Ville, *Physician Assisted Suicide and the States: Short, Medium, and Long Term*, in *PHYSICIAN ASSISTED SUICIDE: WHAT ARE THE ISSUES?* 171, 173–75 (Loretta M. Kopelman & Kenneth A. De Ville eds., 2001). For example, Dr. Rodney Syme was never prosecuted after admitting to assisting the suicide of Steve Guest. See Jeff Turnbull, *‘Benign Conspiracy’ over a Death*, SYDNEY MORNING HERALD (April 21, 2009),

provide ex ante guidance in when they will bring charges, then patients and physicians might have sufficient comfort and clarity to engage in MAID despite its illegality.

## B. Jury Nullification

Closely related to prosecutorial discretion is jury nullification. Just as prosecutors can decline to prosecute illegal activity, jurors can decline to convict when there is prosecution. Even when evidence of factual guilt is clear, and the jury believes beyond a reasonable doubt that the defendant engaged in MAID, the jury can still vote the defendant “not guilty.”<sup>262</sup> Juries can and do refuse to convict when they think the underlying law is unjust.

Jury nullification is common in MAID cases.<sup>263</sup> For example, Tim Quill wrote in the *New England Journal of Medicine* that he participated in MAID.<sup>264</sup> This was a very public confession. And MAID is criminally prohibited in New York.<sup>265</sup> Nevertheless, a Rochester grand jury refused to indict Dr. Quill.<sup>266</sup> Similarly, Michigan juries repeatedly refused to convict Jack Kevorkian despite his clear violation of laws in that state.<sup>267</sup> In short, while not the same as decriminalization, jury nullification, like prosecutorial discretion, could help pave a pathway to MAID.<sup>268</sup>

## IX. CONCLUSION

The legalization of MAID in the United States is a train that has left the station. It will eventually reach most of the other forty-nine U.S. jurisdictions where it is not yet legal. Yet, policymakers must then grapple with next-generation issues such as the appropriate eligibility criteria and process requirements. The safeguards built into the existing six statutes may unduly restrict access to MAID.<sup>269</sup>

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<http://www.smh.com.au/breaking-news-national/benign-conspiracy-over-assisted-death-20090421-adie.html>.

262. See *Morissette v. United States*, 342 U.S. 246, 276 (1952) (“[J]uries are not bound by what seems inescapable logic to judges.”). See generally JEFFREY ABRAMSON, *WE, THE JURY* 57–97 (1994); CLAY S. CONRAD, *JURY NULLIFICATION* (Cato Inst. Press 2014).

263. See generally Liana C Peter-Hagene & Bette L Bottoms, *Attitudes, Anger, and Nullification Instructions Influence Jurors’ Verdicts in Euthanasia Cases*, 23 *PSYCHOL., CRIME & L.* 983 (2017) (researching the potential for nullification due to MAID attitudes).

264. See De Ville, *supra* note 261, at 173.

265. See *Myers v. Schneiderman*, 85 N.E.3d 57 (N.Y. Ct. App. 2017).

266. See Lawrence K. Altman, *Jury Declines to Indict a Doctor Who Said He Aided in a Suicide*, *N.Y. TIMES* (July 27, 1991), <http://www.nytimes.com/1991/07/27/nyregion/jury-declines-to-indict-a-doctor-who-said-he-aided-in-a-suicide.html>.

267. Michigan juries repeatedly acquitted Jack Kevorkian, in trials over the suicide of: Thomas Hyde (May 1994), Ali Khalil and Merian Frederick (March 1996), and Sherry Miller and Marjorie Wantz (May 1996). See NEAL NICOL & HARRY WYLIE, *BETWEEN THE DYING AND THE DEAD* 185–187 (Univ. of Wis. 2006) (2006). Only when Kevorkian moved from assisted suicide to active euthanasia was he convicted of second degree murder in the killing of Thomas Youk. See *Jail Time for Dr. Kevorkian*, *N.Y. TIMES* (April 15, 1999), <http://www.nytimes.com/1999/04/15/opinion/jail-time-for-dr-kevorkian.html>.

268. In addition, even when there are convictions, the sentences are often very light.

269. See Pope, *supra* note 20.