SEX AND DEATH: *LAWRENCE*'S LIBERTY AND PHYSICIAN-ASSISTED SUICIDE

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I. INTRODUCTION

In *Lawrence v. Texas*, the United States Supreme Court defined the scope of individual liberty broadly enough to prevent Texas from criminalizing homosexual sodomy.[1] While this decision clearly invalidated state laws proscribing gay or straight sodomy, and perhaps similarly limited state power to criminalize other adult consensual sexual behavior, such as fornication,[2] *Lawrence's* implications in areas other than private adult sexual conduct remain unclear and subject to much speculation.[3]

This Article explores the doctrinal and political links between the liberty interest defined in *Lawrence* and the not yet established right to control the manner and timing of one's death. Examining the similarity between these two legal issues, as well as the political dynamics surrounding them, can yield insights into the future development of substantive due process law. In *Washington v. Glucksberg*, the Court held that the terminally ill have no fundamental right to

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[1] 539 U.S. 558, 578–79 (2003).

[2] *See* Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103, 1112–13 (2004) (listing fornication as an example of sexual activity that cannot be criminalized on morality grounds as proof that *Lawrence* expands the realm in which consenting adults can make private sexual choices).

[3] *See, e.g.*, Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2003 CATO S. CT. REV. 21, 41 (predicting that *Lawrence*'s shift from privacy to liberty will affect the medical marijuana cases); Mary Anne Case, *Of "This" and "That" in* Lawrence v. Texas, 2003 SUP. CT. REV. 75, 137 (exploring *Lawrence*'s potential impact on gay marriage); Hunter, *supra* note 2, at 1132 (suggesting that courts analyzing the gay marriage issue will have to confront the *Lawrence* standard that morality cannot be the sole rationale for banning same-sex marriages); Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1934–35 (2004) (arguing that *Lawrence* is vague by design and will therefore have longevity in substantive due process jurisprudence); Note, *Assessing the Viability of a Substantive Due Process Right to In Vitro Fertilization*, 118 HARV. L. REV. 2792, 2798–99 (2005) (arguing that *Lawrence* opened the door for framing other fundamental rights cases in more general terms).

obtain assistance in ending their lives.[4] In the nine years since that decision, political debate on the right to die and assisted suicide has altered the framework for this issue, and the doctrinal landscape has also changed with the Court's rejection of *Bowers v. Hardwick*[5] and expansion of liberty rights in *Lawrence*.

The parallels between the right asserted by the plaintiffs in *Lawrence*, to be free from state interference in arranging and acting on intimate sexual and emotional commitments to other adults, and the right asserted in *Glucksberg* by the terminally ill, to control the manner and timing of the most intimate and private of all moments, death, are remarkable. In *Glucksberg*, that right was rejected. In *Bowers* the right to form a relationship that includes sodomy was also rejected. *Bowers* has now been overturned. This Article asks whether *Glucksberg* is next.

The parallels between the political debate about the criminalization of sodomy and gay rights generally and the debate about the right to die are also remarkable. Both issues are obvious hot zones in the nation's culture wars. This Article considers how the broad political turmoil arising out of the current American zeitgeist may result in a similar legal framework for both issues. *Lawrence* was decided in an atmosphere of growing tolerance and acceptance of gay rights, but has also spurred anxiety and backlash on the issue of gay marriage. Restrictions on assisted suicide are, in some spheres, currently loosening with the emergence of a broad belief that government should not interfere with personal decisions in this area. In other political spheres, however, there is fear that this trend undermines a "culture of life" that needs to be preserved and promoted. In both gay rights and assisted suicide, Supreme Court rulings take place in a politically charged context certain to create controversy.

Part Two of this Article examines the scope of the liberty right defined in *Lawrence* and explore its applicability to the claim that competent, terminally ill adults have a right to control the circumstances of their deaths. Part Three looks at the larger socio-political debate surrounding the two issues and consider how that debate has influenced the Court's treatment. Part Four attempts, in light of that analysis, to discern the future course of the claimed right to physician-assisted suicide.

II. *LAWRENCE*'S LIBERTY INTEREST AND *GLUCKSBERG*'S LIMITS

The conclusion that Texas's sodomy law violated due process in *Lawrence* was based on the Court's determination that

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[4] 521 U.S. 702, 735 (1997).

[5] 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

> [l]iberty protects the person from unwarranted government intrusions into a dwelling or other private places. . . . and there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.[6]

The limit and contours of spheres that are protected from government intrusion have been the subject of extensive debate since the decision was issued in 2003. Whether *Lawrence* applies to anything other than intimate sexual conduct between consenting adults is unclear. However, the manner in which the Court delineated and explained the liberty interest that protected the defendants in *Lawrence* suggests that the Court has significantly changed its perspective on the nature and extent of due process protection.

The reason, according to the Court, that Texas could not prohibit sodomy was that individuals, such as the defendants in *Lawrence*, have the right to define the meaning of their lives at its most intimate core. To prohibit the sexual expression chosen by the defendants would be to deny them autonomy in this most personal choice, autonomy that is guaranteed by the Fourteenth Amendment. Moving away from the emphasis on privacy established in earlier due process cases,[7] *Lawrence* focuses on liberty and the illegitimacy of government actions against the defendants that "demean their existence or control their destiny by making their private sexual conduct a crime."[8]

Eschewing the version of history that the Court relied upon in *Bowers*[9] to reject a due process challenge to the criminalization of sodomy,[10] the Court in *Lawrence* acknowledged the "emerging aware-

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[6] *Lawrence*, 539 U.S. at 562.

[7] *See* Roe v. Wade, 410 U.S. 113, 153 (1973) ("[The] right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (explaining the "zone of privacy" created by the Constitution).

[8] *Lawrence*, 539 U.S. at 578. In reaching this conclusion, Justice Kennedy relied on *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), which had been decided after *Bowers* and which "confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education . . . 'involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy . . . .'" *Lawrence*, 539 U.S. at 573–74 (quoting *Casey*, 505 U.S. at 851); *see also* Barnett, *supra* note 3, at 36 (suggesting that Justice Kennedy employed a "presumption of liberty," requiring the government to justify its restriction on liberty rather than requiring the litigant to establish the fundamentality of the interest).

[9] 478 U.S. at 192–94.

[10] "[T]here is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. . . . [E]arly American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally." *Lawrence*, 539 U.S. at 568. What the *Bowers* Court did in its long recitation of anti-sodomy laws is fail to acknowledge that these laws had little to do with homosexuality. Instead, it linked the long-

ness" that adults should be free to conduct their private sexual lives without interference from the state.[11] The Court relied upon changing state sodomy laws,[12] as well as developments in European law, including the European Court of Human Rights, and concluded that "[t]he right that petitioners seek in this case has been accepted as an integral part of human freedom in many other countries."[13] Justice Kennedy's citation to foreign law as relevant to the determination of the requirements of due process is a rare, and quite controversial, use of foreign law by the Supreme Court.[14] Since the treatment of sodomy in the United States was similar to, and in part drawn from, the traditions elsewhere, particularly in Western Europe, comparison of the current law in the United States to the law of other jurisdictions was considered relevant by the Court.

What emerges from *Lawrence* is a definition of liberty linked to self-definition and freedom from government interference with respect to central and intimate decisions about one's existence. Rather than limiting the protections of the Due Process Clause to "funda-

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standing condemnation of non-procreative sex to a condemnation of homosexuality. *See* Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 TEX. L. REV. 813, 820–21 (2001) (examining the link between the criminalization of sodomy and homosexual sexual behavior).

[11] *Lawrence*, 539 U.S. at 572.

[12] *Id.* at 570–71, 576.

> The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of non-enforcement with respect to consenting adults acting in private.

Id. at 573; *see, e.g.*, Jegley v. Picado, 80 S.W.3d 332, 350 (Ark. 2002) (declaring that there is a state constitutional right to privacy that protects private, consensual, noncommercial acts of sexual intimacy); Powell v. State, 510 S.E.2d 18, 24–25 (Ga. 1998) (finding a law criminalizing sodomy inconsistent with the right of privacy guaranteed by the state constitution); Commonwealth v. Wasson, 842 S.W.2d 487, 496–500 (Ky. 1992) (finding consensual sodomy beyond the reach of the state, based on guarantees in the state constitution); Gryczan v. State, 942 P.2d 112, 123 (Mont. 1997) (holding that the state constitutional right to privacy prevents criminal prohibition of sodomy); Campbell v. Sundquist, 926 S.W.2d 250, 262–63 (Tenn. Ct. App. 1996) (finding that criminalization of consensual sodomy is inconsistent with the state constitutional right to privacy).

[13] *Lawrence*, 539 U.S. at 577. In 1981, the European Court of Human Rights struck down laws in Northern Ireland prohibiting sexual activity between men because the laws violated the European Convention on Human Rights. Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1981). The European Court's decision is binding on the forty-four member states of the Council of Europe.

[14] Justice Scalia vehemently objected to the use of foreign law: "The Court's discussion of . . . foreign views . . . is . . . meaningless dicta. Dangerous dicta, however, since 'this Court . . . should not impose foreign moods, fads, or fashions on Americans.'" *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting); *see* Antonin Scalia & Stephen Breyer, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519, 522–41 (2005) (explaining the contrasting opinions of the two Justices in their approach to incorporating foreign law into Supreme Court opinions).

mental rights," the government must justify its restriction on liberty.[15] This more flexible approach to due process marked a departure from an earlier methodology that emphasized narrowly defining the scope of a fundamental right.[16] The Court did not define conducting an intimate sexual relationship as a fundamental right, which would presumably invoke strict scrutiny, but analyzed the right using a more ambiguous, nominally rational basis, standard.[17]

Of course, this liberty interest must be balanced against the harm caused in exercising the right.[18] In *Lawrence*, the reason articulated for the prohibition of sodomy by the state was that the majority of citizens of Texas considered the practice immoral.[19] The Court considered moral disapproval an insufficient justification for the law; the state thus had no legitimate interest in passing the law.[20] The state's reasons for outlawing sodomy failed to meet even a rational basis standard.

When faced with the question of whether terminally ill patients had a right to physician-assisted suicide, the Court, in *Glucksberg*, approached the due process analysis quite differently than it did in *Lawrence*.[21] The plaintiffs in *Glucksberg* were terminally ill people who

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[15] *See* Barnett, *supra* note 3, at 41 (arguing that the *Lawrence* approach to liberty has implications in areas other than sexual conduct, such as the medical use of marijuana).

[16] Hunter, *supra* note 2, at 1112–13 (explaining the departure from narrow fundamental rights analysis).

[17] *See* Case, *supra* note 3, at 118–22 (referring to Justice Kennedy's "habit of . . . disregarding the carefully erected tiers of scrutiny and three-part tests of constitutional common law"); Tribe, *supra* note 3, at 1934–35 ("[A]ny such exercise in enumeration [of fundamental rights] is a fool's errand that misconceives the structure of liberty and of the constitutional doctrines that provide its contents.").

The standard of review used by the Court in *Lawrence* seems to draw upon the "rational basis with bite" approach used in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), and *Romer v. Evans*, 517 U.S. 620 (1996). *See* Miranda Oshige McGowan, *From Outlaws to Ingroup:* Romer, Lawrence, *and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312, 1329–32 (2004) (analogizing the reasoning behind the Court's inquiry into the rationality of a restriction against the mentally disabled in *Cleburne* and homosexuals in *Lawrence*).

[18] "[D]etermining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether [the individual's] constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.'" Washington v. Glucksberg, 521 U.S. 702, 768 (1997).

[19] *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring).

[20] *Id.* at 577–78. The state interests asserted by Texas for the sodomy statute were: "the continued expression of the State's long-standing moral disapproval of homosexual conduct, and the deterrence of such immoral sexual activity, particularly with regard to the contemplated conduct of heterosexuals and bisexuals." Brief of Respondents at 41, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

[21] *See Glucksberg*, 521 U.S. at 710–11 ("We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices. . . . [O]pposition to and condemnation of suicide—and, therefore, of assisted suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages." (footnote & citations omitted)).

While the Court unanimously upheld the state law criminalizing assisted suicide, several different opinions were written. Chief Justice Rehnquist wrote the opinion of the Court. In addi-

claimed that Washington's prohibition against assisted suicide violated their constitutional rights.[22] They argued that their due process rights would be violated if their physicians were prosecuted for granting their request for a drug that would hasten an already imminent death.[23]

The plaintiffs argued that there is a "liberty interest in determining the time and manner of one's death."[24] In *Cruzan v. Director, Missouri Department of Health*, the Court had earlier presumed that the liberty rights established by the Due Process Clause allowed a competent person to refuse medical treatment, including life-saving hydration and nutrition.[25] While a right to speed one's death by refusing food and water seemed established, *Glucksberg* raised the question whether hastening death through assistance from physician prescribed medication was also a protected liberty interest. The Court outlined a two prong test for determining whether the Due Process Clause encompassed the liberty interest asserted by the petitioners. The first requirement was that the claimed liberty right be "deeply rooted in this Nation's history and tradition," and secondly, that the right be carefully described.[26] Thus, the scope of the due process protections must be "carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition."[27]

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tion, five concurring opinions were filed by Justices O'Connor, Ginsburg, Breyer, Souter, and Stevens.

[22] The Washington statute made it a crime to "knowingly cause[] or aid[] another person to attempt suicide." WASH. REV. CODE ANN. § 9A.36.060 (West 1997). The Ninth Circuit Court of Appeals initially upheld the law by holding that there was no constitutional right to aid in killing oneself. Compassion in Dying v. Washington, 49 F.3d 586, 591 (9th Cir. 1995). In a rehearing en banc, however, the court determined that "insofar as the Washington statute prohibits physicians from prescribing life-ending medication for use by terminally ill, competent adults who wish to hasten their own deaths, it violates the Due Process Clause . . . ." Compassion in Dying v. Washington, 79 F.3d 790, 793–94 (9th Cir. 1996), *rev'd sub nom*, Washington v. Glucksberg, 521 U.S. 702 (1997). *See generally* SUSAN M. BEHUNIAK & ARTHUR G. SVENSON, PHYSICIAN-ASSISTED SUICIDE: THE ANATOMY OF A CONSTITUTIONAL LAW ISSUE (Rowman & Littlefielf 2003) (tracing the issue of physician-assisted suicide in constitutional law).

[23] *See Glucksberg*, 521 U.S. at 754 (Souter, J., concurring) (discussing the plaintiff's claim of a liberty interest in assisted suicide).

[24] *Id.* at 722 (quoting *Compassion*, 79 F.3d at 801).

[25] 497 U.S. 261, 279 (1990). The Court went on to determine that, notwithstanding this liberty interest, Missouri could require that a competent decision to refuse life-sustaining treatment must be established by clear and convincing evidence. *Id.* at 284. In a dissenting opinion, joined by Justices Marshall and Blackmun, Justice Brennan argued that "Nancy Cruzan has a fundamental right to be free of unwanted artificial nutrition and hydration, which right is not out-weighed by any interests of the State, and . . . the improperly biased procedural obstacles imposed by the Missouri Supreme Court impermissibly burden that right . . . ." *Id.* at 302 (Brennan, J., dissenting). Justice Stevens similarly dissented, determining that Missouri's law impermissibly disregarded Nancy Cruzan's best interests. *Id.* at 356 (Stevens, J., dissenting).

[26] *Id.* at 720–21 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

[27] *See id.* at 722.

This analysis led the Court in *Glucksberg* to examine the historical prohibition of suicide, as well as assisted suicide, and to deemphasize recent, less restrictive, approaches to this issue by some states and by foreign governments.[28] The Court concluded that, notwithstanding some re-examination and change in the law, the prohibition of assisted suicide is consistent with "history, tradition, and practice."[29] The Court rejected the argument that physician-assisted suicide was mandated by the tradition of "self-sovereignty," determining that the fact "[t]hat many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . . ."[30]

Taking a different approach and relying on Justice Harlan's dissent in *Poe v. Ullman*, Justice Souter in his concurrence maintained that the Court was obligated to review state action to determine if its prohibitions are consistent with "a concept of 'ordered liberty,' comprising a continuum of rights to be free from 'arbitrary impositions and purposeless restraints.'"[31] This review is accomplished by weighing the value of the individual right asserted against the state's interests.[32] Important to the Court's task is assessing the level of generality at which the individual's and the state's interests are articulated. In analyzing the issues raised in *Glucksberg*, according to Justice Souter, the Court was faced with a claim "not to a right on the part of just anyone to help anyone else commit suicide under any circumstances,

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[28] *Id.* at 718–19.

[29] *Id.* at 719.

[30] *Id.* at 727. Chief Justice Rehnquist distinguished the right to refuse medical treatment set forth in *Cruzan* from the right to assisted suicide, emphasizing the long standing common law rule underlying the right to refuse treatment. No similar common law right existed with respect to assisted suicide. *Id.* at 725. The right to personal autonomy articulated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), was distinguished from the decision to hasten one's death by noting that the right set forth in *Casey* concerned "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education." *Glucksberg*, 521 U.S. at 726 (quoting *Casey*, 505 U.S. at 851). This same distinction was made in *Bowers* when the Court concluded that there was "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other . . . ." Bowers v. Hardwick, 478 U.S. 186, 191 (1986).

In spite of his rejection of the claim that physician-assisted suicide was a fundamental right, Justice Rehnquist maintained that the Court's opinion did not foreclose the possibility that a more particularized claim for assisted suicide might succeed. *Glucksberg*, 521 U.S. at 735 n.24.

[31] *Glucksberg*, 521 U.S. at 765 (Souter, J., concurring) (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

[32] *See id.* at 767.

> This approach calls for a court to assess the relative "weights" or dignities of the contending interests . . . . [S]uch a court is bound to confine the values that it recognizes to those truly deserving constitutional stature, either to those expressed in constitutional text, or those exemplified by "the traditions from which [the Nation] developed," or revealed by contrast with "the traditions from which it broke."

Id. (quoting *Poe*, 367 U.S. at 542 (Harlan, J., dissenting)).

but to the right of a narrow class to help others also in a narrow class under a set of limited circumstances."[33] Given this framework for the question, Justice Souter emphasized a different history: the decriminalization of suicide, the recognition in the law of a right to bodily integrity, and the tradition of a right to medical care and counsel.[34] In light of that history, Justice Souter concluded that "the importance of the individual interest here, [is] within that class of 'certain interests' demanding careful scrutiny of the State's contrary claim . . . ."[35]

Similarly, Justice Stevens concurred in the rejection of a facial challenge to the prohibition on assisted suicide, but concluded that in some circumstances denying a person access to medical assistance in ending life might violate the guarantees of the Due Process Clause.[36] Linking the ability to control the manner of one's death with the protection provided by the Due Process Clause from state intrusion into "matters 'central to personal dignity and autonomy,'"[37] Justice Stevens concluded that: "Avoiding intolerable pain and the indignity of living one's final days incapacitated and in agony is certainly '[a]t the heart of [the] liberty . . . to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.'"[38] Cruzan, maintained Justice Stevens, had already established that some individuals on the verge of death have a constitu-

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[33] *Id.* at 773. Similarly, in *Vacco v. Quill*, Justice Souter maintained that the right to physician assistance in hastening death should be accorded "a high degree of importance, requiring a commensurate justification" when the state sought to limit it. Vacco v. Quill, 521 U.S. 793, 809 (1997) (Souter, J., concurring).

[34] *Glucksberg*, 521 U.S. at 779–80 (Souter, J., concurring). Justice Souter compares a physician's role in assisted suicide to the role of a physician in abortion. In the abortion context, the Court has recognized the key role of physicians and the importance of the relationship between physician and patient:

> Its value is surely as apparent here as in the abortion cases, for just as the decision about abortion is not directed to correcting some pathology, so the decision in which a dying patient seeks help is not so limited. The patients here sought not only an end to pain . . . but an end to their short remaining lives with . . . dignity . . . .

Id. at 779.

[35] *Id.* at 782. Justice O'Connor, similarly, would leave open the "question whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death." *Id.* at 736 (O'Connor, J., concurring). She concluded, however, that the Due Process Clause does not protect a generalized right to assistance in committing suicide. *Id.* at 738.

[36] *Id.* at 741 (Stevens, J., concurring). "I do not . . . foreclose the possibility that an individual plaintiff seeking to hasten her death, or a doctor whose assistance was sought, could prevail in a more particularized challenge. Future cases will determine whether such a challenge may succeed." *Id.* at 750.

[37] *Id.* at 744 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

[38] *Id.* at 745 (quoting *Casey*, 505 U.S. at 851). Justice Stevens argued that *Cruzan*'s determination that a person such as Nancy Cruzan, who suffered from an irreversible and progressive illness, had the right to refuse life-saving medical treatment was based not solely on the common law tradition, but also on her "interest in controlling the manner and timing of her death." *Id.* at 742.

tional interest in controlling the manner of their death that outweighs the state's interests.[39]

While disagreeing about whether the right to control the end of one's life might constitute a constitutionally protected liberty interest, the Justices in *Glucksberg* agreed that the state had legitimate and important interests that justified the prohibition, at least in some circumstances, of assisted suicide.[40] Those interests include: preserving life generally; preventing suicide by those who suffer from mental illness; protecting the integrity of the medical profession; protecting vulnerable groups from neglect or coercion; and preventing a movement toward euthanasia.[41] These interests certainly met the rational basis standard that the majority opinion applied, and may in some circumstances meet the higher scrutiny the concurring opinions suggest may be necessary.

In a linked case, *Vacco v. Quill*,[42] the Court rejected an equal protection challenge to the criminalization of physician-assisted suicide given that patients may legally refuse life-sustaining medical treatment. The physicians challenging the New York ban on assisted suicide argued that allowing a competent person to refuse life-sustaining medical treatment was "essentially the same thing" as assisted suicide.[43] Patients who were receiving life-sustaining treatment were therefore given a choice to hasten their deaths that those who were similarly in the final stages of a fatal illness but not receiving life-sustaining treatment did not have. The Court determined that "the distinction between assisting suicide and withdrawing life-sustaining treatment, a distinction widely recognized and endorsed in the medical profession and in our legal traditions, is both important and logical; it is certainly rational."[44] The distinction between "killing" and "letting die" was considered a profound one by the Court. When a patient refuses treatment, the underlying disease is the cause of death; when a physician administers lethal medication, the medication is the cause of death.[45] In withdrawing medical treatment, the physician intends to honor the wishes of the patient; in administering lethal medication, the physician intends to kill the patient.[46] Accord-

[39] *See id.* at 745.
[40] *Id.* at 728–35.
[41] *See id.*
[42] 521 U.S. 793 (1997).
[43] *Id.* at 798.
[44] *Id.* at 800–01 (footnote omitted).
[45] *Id.* at 801.
[46] *Id.* at 802.

ingly, New York acted reasonably when it outlawed physician-assisted suicide but permitted a patient to refuse treatment.[47]

The majority opinion's approach to due process in *Glucksberg* is quite similar to the majority opinion in *Bowers*,[48] the decision overruled in *Lawrence*. In both cases the perspective from which the Court viewed the right determined the particular history that was deemed relevant. In *Glucksberg*, viewing the issue as assisted suicide generally, as opposed to the assisted suicide of competent, terminally ill persons, meant that the Court could review the history of society's condemnation of suicide in general, and easily conclude that no such right existed.[49] Likewise, asking whether homosexual sodomy was a specifically recognized right meant that the Court in *Bowers* could find no evidence of such a specific right being historically protected and could cite, as support, historical condemnation of sodomy.[50] Just as in the *Glucksberg* treatment of the prohibition of assisted suicide, *Bowers* presented an unambiguous story of condemnation of sodomy.[51] The focus on merely the act of sodomy in *Bowers* was criticized in *Lawrence* when the Court concluded that the Court in *Bowers* failed "to appreciate the extent of the liberty at stake."[52] Rather than concerning merely a specific sex act, the prohibition against sodomy touches upon "the most private human conduct . . . in the most private of places, the home."[53] Even given its crabbed construction of

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[47] In *Vacco*, the Court emphasized, as it had in *Glucksberg*, that *Cruzan* did not establish that "patients have a general and abstract 'right to hasten death'"; rather, the right to refuse medical treatment was grounded in the traditional right to be free from unwanted touching. *Vacco*, 521 U.S. at 807 (quoting Quill v. Vacco, 80 F.3d 716, 728 (2d Cir. 1996)).

[48] Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

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> In almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide. . . . Indeed, opposition to and condemnation of suicide—and, therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages.
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> More specifically, for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide.

Washington v. Glucksberg, 521 U.S. 702, 710–11 (1997) (footnotes & citations omitted).

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> Proscriptions against [sodomy] have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

Bowers, 478 U.S. at 192–94 (footnotes & citations omitted).

[51] *Id.*

[52] Lawrence v. Texas, 539 U.S. 558, 567 (2003).

[53] *Id.*

the issue before it, the *Bowers* Court was found to have presented an unnuanced and simplistic version of the historical condemnation of sodomy.[54]

In *Glucksberg* as in *Bowers*, the definition of the right asserted controlled the history that was considered relevant to the determination of whether the right would be recognized. The context in which the right was asserted—that of terminally ill, mentally competent adults who have requested assistance in dying—was inherently limiting; however, this narrow context was ignored. Instead, because of the way the Court in *Glucksberg* described the scope of the claim—whether Washington's prohibition of assisted suicide violates the Due Process Clause—the Court inevitably rejected the claim.[55] In *Glucksberg* the history presented by the majority opinion omits the decriminalization of suicide and the resulting expansion of personal autonomy,[56] and the tradition of patient care by physicians in the relief of suffering.[57] Just as in *Bowers*, the conclusion the Court came to in determining the legitimacy of the purported liberty interest was greatly influenced by the scope of the history it chose to emphasize.

In *Lawrence*, the Court adopted an approach more similar to the concurrences in *Glucksberg* than to the Court's opinion. The historical progression of social and legal standards was emphasized as well as the placement of the claimed right in a broad context.[58] Rather than attempting to determine whether a fundamental right existed, both the majority in *Lawrence* and the concurrences in *Glucksberg* balanced the weight of the liberty interest asserted against the interests of the state, resulting in a more flexible and variable answer to the question of what due process protects.[59] These similarities suggest that if the issues in *Glucksberg* were reexamined today, the approach taken by the Court to frame the issue might well alter the outcome.

III. POLITICAL AND CULTURAL DEBATE CONCERNING GAY RIGHTS AND THE RIGHT TO DIE

The transformation of the law regarding gay rights that took place between *Bowers* and *Lawrence* was the result of doctrinal and political changes that made the narrow approach taken toward sodomy in *Bowers* no longer tenable. We may well be in the midst of a similar political and doctrinal alteration as to the question of the right to die,

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[54] *Id.* at 567–70.

[55] *Glucksberg*, 521 U.S. at 705–06.

[56] *Id.* at 775–76.

[57] *Id.* at 779.

[58] *Lawrence*, 539 U.S. at 571–78.

[59] *Id.* at 578; *Glucksberg*, 521 U.S. at 764–82 (Souter, J., concurring); *id.* at 745–46 (Stevens, J., concurring); *id.* at 792 (Breyer, J., concurring).

and specifically the right to physician-assisted suicide. The same doctrinal, statutory, and political changes that cleared the way for the *Lawrence* decision may work to bring about a move away from the Court's approach in *Glucksberg*. Examining the parallels in these two areas illuminates significant similarities and also critical differences.

A. *The Road to* Lawrence

Lawrence represented, among other things, the resolution of a tension created between the 1986 *Bowers* opinion and the Court's approach to gay rights in the 1996 decision, *Romer v. Evans*.[60] In *Romer*, the Court, in an opinion written by Justice Kennedy, determined that a state could not, consistently with the Equal Protection Clause, treat lesbians and gay men differently from other citizens based merely on public disapproval of homosexuality.[61] This limitation of a state's ability to discriminate against gays and lesbians was hard to square with the approach in *Bowers* that allowed the criminalization of homosexual sodomy in part because of the historical disapproval of gays and lesbians.[62] Indeed, in upholding the sodomy law in *Bowers*, the Court maintained that law "is constantly based on notions of morality."[63] By 2003, when *Lawrence* was decided, the tension between these two approaches was resolved by a repudiation of the approach in *Bowers*,[64] and, on the part of Justice O'Connor, an application of the *Romer* equal protection principles to the Texas sodomy law.[65]

Another development cited by Justice Kennedy that influenced the outcome in *Lawrence* was the change in state law and in foreign law relating to sodomy that had taken place since *Bowers* was decided seventeen years earlier.[66] A more expansive look at the history of sod-

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[60] 517 U.S. 620 (1996); *see* Diana Hassel, Lawrence v. Texas*: Evolution of Constitutional Doctrine*, 9 ROGER WILLIAMS U. L. REV. 565 (2004) (arguing that inconsistencies between *Bowers*, *Romer*, and *Lawrence* reflect changes in Court personnel and in social attitudes on homosexuals and sexuality in general).

[61] *Romer*, 517 U.S. at 634–36. In *Romer*, the Court found unconstitutional an amendment to the Colorado Constitution that repealed state and local anti-discrimination laws based on sexual orientation and which also prohibited government action protecting lesbians and gay men from discrimination. *Id.* at 623.

[62] *See Bowers*, 478 U.S. at 196 (holding that the sodomy laws of twenty-five states will not be invalidated based on respondents' claim that "majority sentiments about the morality of homosexuality should be declared inadequate"). In his dissent in *Romer*, Justice Scalia noted, "[i]f it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexuals." *Romer*, 517 U.S. at 641 (Scalia, J., dissenting).

[63] *Bowers*, 478 U.S. at 196.

[64] *See Lawrence*, 539 U.S. at 566–67 (invalidating *Bowers* and rejecting its flawed reasoning).

[65] *See id.* at 579–85 (O'Connor, J., concurring) ("Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause . . . .").

[66] *Id.* at 570–73.

omy laws, combined with more recent reevaluations of that law by state and foreign jurisdictions, led the Court in *Lawrence* to conclude that the liberty interest claimed by the petitioners was protected by the Due Process Clause.[67] Justice Kennedy maintained that "our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[68]

Several commentators have suggested that by 2003 the marginalization of gays and lesbians by the sodomy laws was politically unacceptable.[69] Because gays and lesbians had become a recognized social group and because there was no longer a consensus belief that the group was dangerous or harmful, the Court in *Lawrence*, responding to these conditions, limited the government's ability to harm gays and lesbians.[70] Others have suggested that in striking down the sodomy laws in Texas, the Court was acting to lower the acrimony created by the *Bowers* decision, and thus diffusing a source of tension in the ongoing culture wars.[71] Because of the development of the lesbian and gay civil rights movement, gays would no longer accept the discrimination embodied in the sodomy laws. Given this political reality, the Court acted to set a new requirement of neutrality toward gays.[72] Both state law and political attitudes meant that the kind of dismissive treatment of the rights of gays reflected in *Bowers* was no longer an approach the majority of the Court could take.

While in some ways *Lawrence* may be a reflection of the shift in gays' and lesbians' social acceptance, fear of the possible effect of the decision on issues such as gay marriage resulted in a cultural firestorm.[73] In *Goodridge v. Department of Public Health*, the Supreme Judicial Court of Massachusetts held that the state's ban on same-sex mar-

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[67] *Id.* at 577–78.

[68] *Id.* at 571–72.

[69] *See, e.g.*, McGowan, *supra* note 17.

[70] *See id.* at 1314 ("Once the Court has recognized a group, it requires the government to articulate reasons beyond moral distaste for regulating that group.").

[71] *See, e.g.*, William N. Eskridge, Jr., Lawrence's *Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021 (2004) (asserting that the Court forcefully struck down the *Bowers* decision for demonstrative purposes).

[72] *See id.* at 1040 ("Read together, *Romer* and *Lawrence* represent a regime shift for gay people analogous to the regime shift that *Brown* and *Loving* represented for people of color and that *Roe* and *Craig* represented for women. In all three sets of cases, the Court announced a new constitutional baseline that was substantially closer to the norms espoused by an identity-based social movement . . . ."). *But see* Note, *Unfixing* Lawrence, 118 HARV. L. REV. 2858 (2005) (emphasizing the limits of *Lawrence* in establishing freedom for sexual minorities).

[73] *See* Jeffrey Rosen, *How to Reignite the Culture Wars*, N.Y. TIMES MAG., Sept. 7, 2003, at 49 (arguing that, as with the abortion issue in *Roe*, the Court's entry into the culture wars actually created resistance to the rights the Court was attempting to protect).

riage violated the state constitution.[74] In reaching its conclusion that discrimination against gays and lesbians was inconsistent with the Massachusetts Constitution, the Supreme Judicial Court relied to some extent upon *Lawrence*.[75] The *Goodridge* decision met with fierce resistance in Massachusetts, and around the country many states have recently enacted anti-gay marriage laws.[76] A constitutional amendment banning same-sex marriage has also been introduced in the U.S. Congress.[77] Some commentators have suggested that disapproval of same-sex marriage mobilized many voters and led to Republican victories in the 2004 elections.[78]

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[74] 798 N.E.2d 941, 969 (Mass. 2003).

[75] *Id.* at 958–59. Laurence Tribe argues that the recognition of same-sex marriage rights is an inevitable consequence of the *Lawrence* decision. He notes, however, in the context of the Court's decision in *Loving*, that "there is only so far an institution famously lacking both the sword and the purse can push without incurring either lawful defiance in the form of a campaign to amend the Constitution or unlawful defiance in the form of violent resistance." Tribe, *supra* note 3, at 1947. Similarly, Katherine Franke argues that *Lawrence*'s emphasis on protection of the intimate domestic sphere has led inevitably to political pressure to validate same-sex marriages. However, she notes that state control and licensing of gay and lesbian sex comes with the cost of marginalizing those who do not conform to the heterosexually-based model of marriage. Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399 (2004). In New Jersey, the supreme court recently held that the New Jersey Constitution's guarantee of equal protection required that the benefits of marriage enjoyed by heterosexual couples be available to same-sex couples. Lewis v. Harris, 908 A.2d 196, 220–21 (N.J. 2006). It determined, however, that *Lawrence* did not establish a fundamental due process right to marriage. *Id.* at 210 ("The *Lawrence* Court, however, pointedly noted that the case did 'not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.'" (quoting Lawrence v. Texas, 539 U.S. 558, 578 (2003))).

[76] Judicial application of *Lawrence* to same-sex marriage has not always resulted in an extension of the right to marriage. In *Wilson v. Ake*, the court rejected the argument that *Lawrence* created a right to same-sex marriage. 354 F. Supp. 2d 1298, 1307 (M.D. Fla. 2005). A similar conclusion was reached by the Arizona Court of Appeals in *Standhardt v. Superior Court*, 77 P.3d 451, 457 (Ariz. Ct. App. 2003), which explained that "because other language in *Lawrence* indicates that the Court did not consider sexual conduct between same-sex partners a fundamental right, it would be illogical to interpret the quoted language as recognizing a fundamental right to enter a same-sex marriage." *See also* Hernandez v. Robles, 855 N.E.2d 1, 16–17, 32 (N.Y. 2006) (holding that New York's Domestic Relations Law prohibiting same-sex marriage does not violate either the due process or equal protection clause of the New York Constitution because recognition of same-sex marriage would promote neither the State's interest in marital procreation nor its interest in dual-gender parenting).

[77] Efforts to pass a constitutional amendment to ban same-sex marriage have thus far been unsuccessful. In June 2006, the Senate defeated a constitutional amendment to ban same-sex marriage. Shailagh Murray, *Gay Marriage Amendment Fails in Senate*, WASH. POST, June 8, 2006, at A1.

[78] *See, e.g.*, Alan Cooperman, *Same-Sex Bans Fuel Conservative Agenda*, WASH. POST, Nov. 4, 2004, at A39, *available at* http://www.washingtonpost.com/wp-dyn/articles/A23672-2004Nov3.html ("[S]ome social conservatives contended that a desire to defend the traditional definition of marriage drew millions of evangelical Christians to the polls and provided President Bush's margin of victory."). In 2006, referenda banning same-sex marriage passed in Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin. Only Arizona rejected a ban on same-sex marriage. America Votes 2006, CNN.COM, http://www.cnn.com/ELECTION/2006/pages/results/ballot.measures/.

The fear that a wide range of state laws related to morality, in areas other than sodomy, would be altered by the *Lawrence* decision has largely been unrealized. In his dissent, Justice Scalia included state laws prohibiting "bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality and obscenity" as those likely to be found invalid.[79] In decisions since *Lawrence*, however, state laws against adult incest,[80] adult sexual activity with minors,[81] prostitution,[82] sale of sex aids,[83] child pornography,[84] and adoption by lesbians and gays,[85] have all been upheld. *Lawrence* has had some effect, however, on the disparate treatment of same-sex and different-sex underage sexual activities.[86] In *State v. Limon*, the Supreme Court of Kansas found the criminal sanctions against a male minor who had sex with a younger male minor violated the Equal Protection Clause because much more lenient treatment would have been given to the same conduct if the participants were of different sexes.[87] Relying on *Lawrence*, the court concluded that treating same-sex and different-sex offenders differently "bears no rational relationship to legitimate State interests."[88] Because "the promotion of majoritarian sexual morality" is not a legitimate state interest, the Kansas law cannot survive a rational basis review.[89]

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[79] Lawrence v. Texas, 539 U.S. 578, 590 (2003) (Scalia, J., dissenting).

[80] *See* State v. Freeman, 801 N.E.2d 906, 910 (Ohio Ct. App. 2003) (holding that the right to privacy does not extend to incest).

[81] *See* State v. Oakley, 605 S.E.2d 215, 218 (N.C. Ct. App. 2004) ("*Lawrence*'s recognition of autonomy and personal choice within consensual adult relationships does not offer constitutional protection to evidence presented in a charge of criminally prohibited activity with minors . . . .").

[82] *See* People v. Williams, 811 N.E.2d 1197, 1199 (Ill. App. Ct. 2004) (holding that commercial sex is not included within the scope of *Lawrence*); State v. Thomas, 891 So. 2d 1233, 1236 (La. 2005) (holding that state laws concerning public sexual conduct and prostitution are undisturbed by *Lawrence*).

[83] *See* Williams v. Alabama, 378 F.3d 1232, 1233 (11th Cir. 2004) (holding that *Lawrence* does not establish a fundamental right to sexual intimacy; consequently a state law banning the sale of "sex toys" does not impermissibly burden such a right).

[84] *See* United States v. Bach, 400 F.3d 622, 629 (8th Cir. 2005) (holding that taking sexually explicit photos of children is not protected activity under *Lawrence*).

[85] *See* Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 817 (11th Cir. 2004) (holding that *Lawrence* does not create a right for homosexual persons to adopt).

[86] *See* State v. Limon, 122 P.3d 22, 28–29 (Kan. 2005) (explaining that *Lawrence*'s commentary on the stigma created by the criminalization of homosexual conduct has informed factually distinct cases).

[87] *See id.* at 24. The Kansas "Romeo and Juliet" law provides for a certain level of punishment when there is voluntary sexual conduct between members of the opposite sex and when the offender is less than nineteen years old and the victim is less than four years younger. *Id.* The statute does not apply to sexual conduct between two minors of the same sex. In that case, the offender can be punished much more severely, under the general rape, sodomy, and lewd touching statutes. *Id.*

[88] *Id.* at 38.

[89] *Id.*

The central holding of *Lawrence*, that homosexual sex cannot be criminalized, has not been met with significant opposition. The controversy over *Lawrence* is whether its reasoning will apply to other areas of gay rights, such as same-sex marriage and adoption, or to other areas of sexual morality, such as incest and prostitution.

B. *The Road Away from* Glucksberg

1. *Reaction to* Glucksberg

Following the Court's decisions in *Glucksberg* and the related *Vacco*, commentators expressed disappointment that the Court had not done more to establish a clear standard with respect to assisted suicide.[90] While declining to find a constitutional right to assisted suicide, some of the Justices in *Glucksberg* left open the possibility that under some narrow circumstances, such a right might exist.[91] Noting that the question of whether physician-assisted suicide should be allowed was a topic of debate in state governments, the Court seemed to encourage democratic resolution of the proper limitations on assisted suicide, but perhaps anticipated the return of the issue to the Court.[92] Commentators suggested that the Court had ducked important questions by refusing to focus narrowly on the specific right as-

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[90] *See* Donald H.J. Hermann, *The Question Remains: Are There Terminally Ill Patients Who Have a Constitutional Right to Physician Assistance in Hastening the Dying Process*, 1 DEPAUL J. HEALTH CARE L. 445, 445–46 (1997) (commenting broadly on the Supreme Court's avoidance of constitutional pronouncements, using physician-assisted suicide as a clear example); Martha Minow, *Which Question, Which Lie?*, 1997 SUP. CT. REV. 1, 2 (1997) (identifying confusing and divergent Supreme Court opinions that fail to present a coherent standard).

[91] *See* Washington v. Glucksberg, 521 U.S. 702, 789 (1997) (Souter, J., concurring) ("While I do not decide for all time that respondents' claim [of a right to assisted suicide] should not be recognized, I acknowledge the legislative institutional competence as the better one to deal with that claim at this time."); *id.* at 741–42 (Stevens, J., concurring) ("[T]here are situations in which an interest in hastening death is legitimate. Indeed, not only is that interest sometimes legitimate, I am also convinced that there are times when it is entitled to constitutional protection."); *id.* at 792 (Breyer, J., concurring) ("[T]he state laws before us [prohibiting assisted suicide] do not infringe directly upon the (assumed) central interest (what I have called the core of the interest in dying with dignity) . . . . Were the legal circumstances different—for example, were state law to prevent the provision of palliative care, including the administration of drugs as needed to avoid the pain at the end of life—then the law's impact upon serious and otherwise unavoidable physical pain (accompanying death) would be more directly at issue.").

[92] *See* Hermann, *supra* note 90, at 488–89 (noting Justices Souter and O'Connor's preference that legislatures develop schemes to accommodate the interests of dying patients, but recognizing that the Court may again be faced with the issue).

Since *Glucksberg*, a few state courts have grappled with the constitutional issues related to physician-assisted suicide. *E.g.*, Sampson v. State, 31 P.3d 88, 95 (Alaska 2001) (recognizing no fundamental right to physician-assisted suicide for terminally ill competent patients); Sanderson v. People, 12 P.3d 851, 854 (Colo. Ct. App. 2000) (recognizing no First Amendment free exercise defense to physician-assisted suicide); People v. Kevorkian, 639 N.W.2d 291, 297 (Mich. Ct. App. 2001) (recognizing no fundamental right to physician-assisted suicide or euthanasia).

serted: physician-assisted suicide for the terminally ill competent person.[93] Instead, the Court avoided the difficult issue by answering a broader and easier question of whether there is a generalized right to assistance in suicide.[94]

Martha Minow suggests that the Court failed to confront the twin difficulties inherent in the issue of physician-assisted suicide: that such assisted suicides currently take place and that the public, but unenforced, prohibition of assisted suicide prevents abuse.[95] By refusing to address the reality that physician-assisted suicide currently exists, Minow argues that the Court simplifies the conflict inherent in the issue.[96] If the current practice of physician-assisted suicide were acknowledged, questions such as inequality of access, abuse of the disabled, and appropriate regulation would have to be confronted.[97] While the Court did articulate some of the threats to vulnerable people that would accompany the legalization of assisted suicide, as Minow explains, "the problem is not merely risks of abuse; the problem arises from the inauguration of a regime in which people would have to justify continuing to live."[98] The Court's lack of candor in addressing both the risks of legalization and the reality of current practice led to discordance between the "law" and reality and thus failed to grapple with the difficulties inherent in the issue.[99]

The current widespread ban on assisted suicide, affirmed by *Glucksberg*, retains a symbolic, but perhaps not practical importance. At least one commentator has estimated that between three and five percent of American physicians have assisted suicide and asserted that an active "euthanasia underground" is currently part of the medical profession.[100] This unregulated and secret practice of assisting suicide may well result in abuse, mistake, and a general lack of

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[93] *See, e.g.*, Robert A. Burt, *Disorder in the Court: Physician-Assisted Suicide and the Constitution*, 82 MINN. L. REV. 965 (1998). Comparing the *Glucksberg* decision to death penalty doctrine, Burt suggested that part of the Court's failure to develop a coherent approach to the issues presented in *Glucksberg* can be seen as "a response to the emotional impact of the subject-matter, to the disturbing quality of the confrontation with death." *Id.* at 976.

[94] *Glucksberg*, 521 U.S. at 705–06.

[95] *See* Minow, *supra* note 90, at 20–22. (discussing these two "lies" that are presented in the physician-assisted suicide debate).

[96] *See id.* at 20 (noting that, to Minow's knowledge, physicians have assisted and continue to assist in suicide).

[97] *Id.* at 27.

[98] *Id.* at 21.

[99] *See id.* at 26 (describing the Court's approach as "incomplete" in light of the complex issues presented).

[100] Roger S. Magnusson, *"Underground Euthanasia" and the Harm Minimization Debate*, 32 J.L. MED. & ETHICS 486, 486 (2004) ("A national survey of 1,902 American physicians found that 3.3 percent had written at least one 'lethal prescription,' while 4.7 percent had provided at least one lethal injection. A survey of American oncologists found that 3.7 percent had performed euthanasia, while 10.8 percent had assisted suicide.").

quality assurance.[101] The practice of physician-assisted suicide also seems to be largely approved by the American public. According to public polls, as early as 1996, there was "increasingly widespread support for allowing the terminal ill to hasten their deaths and avoid painful, undignified, and inhumane endings to their lives."[102]

The prohibition of assisted suicide is particularly disingenuous given that the same result, hastening death during a terminal illness, can be accomplished by legal means.[103] Under current legal standards, a terminal patient may refuse life sustaining medical treatment, may voluntarily stop eating and drinking, or may be deeply sedated, thus hastening death, to alleviate suffering.[104] Of course a dying person's access to any of these approaches will depend on the willingness and knowledge of the treating physician. As Ronald Dworkin has noted, "[t]he current two-tier system—a chosen death and an end of pain outside the law for those with connections and stony refusals for most other people—is one of the greatest scandals of contemporary medical practice."[105] Legally sanctioned physician-assisted suicide might well make assistance in hastening death more consistently available as well as make the process more transparent and less subject to abuse.[106]

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[101] *Id.* at 487–88 (enumerating the dangers inherent in unregulated physician-assisted suicide).

[102] Compassion in Dying v. Washington, 79 F.3d 790, 810 (9th Cir. 1996), *rev'd sub nom*, Washington v. Glucksberg, 521 U.S. 702 (1997). In 2006, Gallup's Annual Survey found that "the vast majority of Americans continue to support 'right-to-die' laws for terminally ill patients, whether that involves a doctor ending a patient's life by some painless means, or a doctor assisting a terminally ill patient to commit suicide." Joseph Carroll, *Public Continues to Support Right-to-Die for Terminally Ill Patients*, GALLUP NEWS SERVICE, June 19, 2006, at 62.

[103] *See* Norman L. Cantor, *On Kamisar, Killing, and the Future of Physician-Assisted Death*, 102 MICH. L. REV. 1793, 1798 (2004) (noting that a patient can legally refuse treatment but cannot legally request means to hasten death).

[104] *See id.* at 1834–37; *see also* Norman L. Cantor, *On Hastening Death Without Violating Legal or Moral Prohibitions*, 37 LOY. U. CHI. L.J. 407 (2006) [hereinafter Cantor, *Hastening Death*] (discussing legal means of hastening death). Lawful forms of hastening death include: a physician who, at a competent patient's behest, pulls the plug on a life-sustaining medical invention while sharing the patient's wish to end a torturous dying process; a physician who cooperates with a gravely afflicted person's fatal decision to voluntarily stop eating and drinking; a physician who administers deep sedation to a preservable but suffering patient, knowing that the patient has already declined artificial nutrition and hydration and, hence, will soon die; and a physician who administers pain relief in a known lethal dosage (even with the primary intention to relieve intractable suffering). *Id.*

[105] Ronald Dworkin et al., *Assisted Suicide: The Philosopher's Brief*, N.Y. REV. OF BOOKS, Mar. 27, 1997, *available at* http://www.nybooks.com/articles/1237.

[106] *See* Cantor, *Hastening Death*, *supra* note 104, at 430–31 (noting that current legal means of hastening death are not widely available and finding a physician to participate in such practices is purely fortuitous and capricious). The ability to access legal physician-assisted suicide might well result in fewer assisted suicides. Knowing that the option for physician-assisted suicide exists may relieve anxiety and result in a decision not to hasten death. *See* RICHARD A. POSNER, AGING AND OLD AGE 239–40 (1995) ("A right to seek assistance in committing suicide has value

2. *Legalization of Physician-Assisted Suicide*

Oregon, unique among the states, chose to permit and regulate the practice of assisted suicide.[107] In 1994, Oregon enacted the Death With Dignity Act, which authorizes a physician to prescribe a lethal dose of medication to a terminally ill patient.[108] After originally approving the Act in 1994, Oregon reaffirmed its commitment to the Death With Dignity Act in 1997 when it defeated a ballot measure seeking to repeal the Act.[109] The Death With Dignity Act permits a terminally ill adult to obtain a prescription from his or her physician "for the purpose of ending his or her life in a humane and dignified manner."[110] The Death With Dignity Act does not authorize euthana-

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to the holder even if he never exercises it. . . . Knowing that if life becomes unbearable one can end it creates peace of mind and so makes life more bearable.").

[107] In Hawaii, a physician-assisted suicide bill was first introduced in 1999. Since then it has repeatedly been introduced but has failed to pass. In 2002, a physician-assisted suicide bill introduced in the Hawaiian legislature did pass the House but was narrowly defeated in the Senate. Mary Vorsino, *Doctor-Assisted Suicide Bill Fades at Legislature*, HONOLULU STAR-BULLETIN NEWS, Feb. 6, 2005, *available at* http://starbulletin.com/2005/02/06/news/story2.html.

In Rhode Island, a bill patterned after the Oregon Death With Dignity Act was introduced in 2006. Valerie J. Vollmar, *Recent Developments in Physician-Assisted Suicide* (July 2006), http://www.willamette.edu/wucl/pas/2006_reports/072006.pdf.

In Vermont, a Death With Dignity Act was introduced in 2005 but failed to pass. KATHI HAMLON, INTERNATIONAL TASK FORCE ON EUTHANASIA AND ASSISTED SUICIDE, EUTHANASIA AND ASSISTED-SUICIDE MEASURES IN THE UNITED STATES (1988–2005) (2005), *available at* http://internationaltaskforce.org/usa.htm.

In Arizona, a Death With Dignity Act was introduced in 2005, but failed to pass. *Id.*

In Wisconsin, a Death With Dignity Act has been repeatedly introduced, most recently in 2005. *Id.*

In California, an assisted suicide bill passed two Assembly committees in 2005 but was not scheduled for a full vote. A hearing on assisted suicide was scheduled for March 2006 before the Senate's Judiciary Committee. Jim Puzzanghera, *State Suicide Bill Back in Play: Assisted Death May Get California's OK After Oregon Law Upheld*, MERCURY NEWS, Jan. 18, 2006, at 1A.

In Maine, several assisted suicide bills have been considered, beginning in 1991. A public referendum for a Death With Dignity Act was narrowly defeated in 2000. HAMLON, *supra.*

In Michigan a voter petition for assisted suicide was rejected in 1998. *Id.*

In Washington, an initiative that would have allowed physician-assisted suicide and euthanasia was defeated in 1991. *Id.*

[108] OR. REV. STAT. § 127.800-897 (2005); *see also* DANIEL HILLYARD & JOHN DOMBRINK, DYING RIGHT: THE DEATH WITH DIGNITY MOVEMENT 69–98 (2001) (discussing passage of the Oregon Death With Dignity Act).

[109] In 1994 Oregon voters approved Measure 16, the Oregon Death With Dignity Act, by fifty-one percent to forty-nine percent. In 1997, Oregon legislators voted to return the Act to the voters for repeal. The attempted repeal, Measure 51, was rejected by sixty percent to forty percent. *See* DEATH WITH DIGNITY NAT'L CTR., LEGAL AND POLITICAL TIMELINE IN OREGON, *available at* http://www.deathwithdignity.org/historyfacts/oregontimeline.asp (last visited Jan. 28, 2007).

[110] OR. REV. STAT. § 127.805. A written request must be signed and dated by the patient and witnessed by two others who, in the presence of the patient, attest that the patient is "capable, acting voluntarily, and is not being coerced to sign the request." OR. REV. STAT. § 127.810. Upon receiving the request, a physician must determine that the patient is terminally ill, is capable of, and has made the request voluntarily. The physician must also inform the patient of her diagnosis, her prognosis, the risks of the requested medication and the alternatives to as-

sia, and assisted suicide is only available to adult residents of Oregon.[111] While the number of deaths as a result of assisted suicide in Oregon are few, the number of people requesting and using assisted suicide has steadily increased in the years since legalization. In 1998, twenty-four prescriptions for lethal doses of medication were written and sixteen were used; in 1999, thirty-three prescriptions were written and twenty-seven were used; in 2000, thirty-nine prescriptions were written and twenty-seven were used; in 2001, forty-four prescriptions were written and twenty-one were used; in 2002, fifty-eight prescriptions were written and thirty-eight were used; in 2003, sixty-eight prescriptions were written and forty-two were used; in 2004, sixty prescriptions were written and thirty-seven were used; and in 2005, sixty-four prescriptions were written and thirty-two were used.[112]

As a backlash against the Oregon statute, Attorney General John Ashcroft issued a directive in 2001 proclaiming that the use of controlled substances for assisted suicide violated the Controlled Substances Act ("CSA") and instructed the DEA to enforce the CSA against physicians in Oregon.[113] The CSA allows the Attorney General to revoke a physician's ability to prescribe controlled substances if the physician's conduct in prescribing medication is inconsistent with the public interest.[114] Attorney General Ashcroft exercised this authority by determining that physician-assisted suicide served no legitimate medical purpose and was inconsistent with the public interest.[115] However, the Court of Appeals for the Ninth Circuit determined that Attorney General Ashcroft's directive concerning assisted suicide exceeded the authority granted to him by the CSA.[116] Congress's intent

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sisted suicide. The physician must refer the patient for counseling if she may be suffering from a psychiatric disorder. OR. REV. STAT. §§ 127.815–127.825.

[111] OR. REV. STAT. § 127.860; § 127.995.

[112] DEP'T OF HUMAN SERVS., OFF. OF DISEASE & EPIDEMIOLOGY, EIGHTH ANNUAL REPORT ON OREGON'S DEATH WITH DIGNITY ACT 11 (2006). Some demographic patterns have emerged over the last several years. Terminally ill young people were significantly more likely to use assisted suicide. Divorced and never-married people are also more likely to use assisted suicide, and those with a college degree or higher education were much more likely to use assisted suicide than those without a high school diploma. *Id.* at 12.

[113] Dispensing of Controlled Substances to Assist Suicide, 66 Fed. Reg. 56,607 (Nov. 9, 2001) (to be codified at 21 C.F.R. pt. 1306).

[114] Oregon v. Ashcroft, 368 F.3d 1118, 1122–23 (9th Cir. 2004), *aff'd*, Gonzales v. Oregon, 126 S. Ct. 904 (2006).

[115] *Id.* at 1123. Notably, Attorney General Janet Reno had earlier declined to issue a directive concerning the use of controlled substances in physician-assisted suicide. She determined that "the CSA does not authorize [the DEA] to prosecute, or to revoke DEA registration of, a physician who has assisted in a suicide in compliance with Oregon law." *Id.*

[116] *Id.* at 1125. The Court of Appeals held that Attorney General Ashcroft's directive was contradicted by the plain language of the Controlled Substances Act and contravened the intent of Congress. Because the directive interferes with Oregon's ability to regulate medical care, Congress would have had to give clear authorization to allow it. The court determined that Con-

was to limit the scope of the CSA to drug abuse, not to interfere with state regulation of the medical profession.[117] The Supreme Court recently affirmed the judgment of the Court of Appeals.[118] In an opinion by Justice Kennedy, the Court noted that "Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide."[119] The Court further concluded that the CSA was meant by Congress to combat drug abuse and did not authorize the Attorney General to "effect a radical shift of authority from the States to the Federal Government to define general standards for medical practice in every locality."[120]

Perhaps the most studied regulation of assisted suicide has occurred in the Netherlands.[121] Assisted suicide and euthanasia became legal in the Netherlands in 1994 when the Dutch Supreme Court recognized that the necessity defense to criminal prosecution for a killing could be asserted by a physician who had assisted suicide.[122] In 2002, the Termination of Life on Request and Assisted Suicide Act (Act) went into effect.[123] This Act exempts a physician from criminal

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gress gave no such authorization and that the Attorney General's authority under the CSA is limited to the field of drug abuse. *Id.* at 1125–29.

[117] *Id.* at 1125.

[118] Gonzales v. Oregon, 126 S. Ct. 904 (2006). Argument was held in the case on October 5, 2005. At the argument, Justice Ginsburg noted the inconsistency of the government's position with the assumption of the Court in *Washington v. Glucksberg* that policy concerning assisted suicide was left for the states to decide. Transcript of Oral Argument at 18–20, Gonzales v. Oregon, 126 S. Ct. 904 (2006), 2005 WL 2659027.

[119] *Gonzales*, 126 S. Ct. at 911 (quoting Washington v. Glucksberg, 521 U.S. 702, 735 (1997)).

[120] *Id.* at 925. Justices Scalia, Roberts, and Thomas dissented, arguing that the Attorney General could properly limit the used of controlled substances for assisted suicide because such use did not constitute a legitimate medical purpose as required by the CSA:

> Virtually every relevant source of authoritative meaning confirms that the phrase "legitimate medical purpose" does not include intentionally assisting suicide. "Medicine" refers to "the science and art dealing with the prevention, cure, or alleviation of disease." . . . [V]irtually every medical authority from Hippocrates to the current American Medical Association (AMA) confirms that assisting suicide has seldom or never been viewed as a form of "prevention, cure, or alleviation of disease," and (even more so) that assisting suicide is not a "legitimate" branch of that "science and art." . . . Indeed, the AMA has determined that "physician-assisted suicide is fundamentally incompatible with the physician's role as healer."

Id. at 11 (Scalia, J., dissenting).

[121] *See generally* JOHN GRIFFITHS ET AL., EUTHANASIA AND THE LAW IN THE NETHERLANDS (Amsterdam Univ. Press 1998); Margaret Pabst Battin, *Should We Copy the Dutch? The Netherlands' Practice of Voluntary Euthanasia as a Model for the United States, in* EUTHANASIA: THE GOOD PATIENT, THE GOOD SOCIETY (Univ. Publ'g Group 1992); Jocelyn Downie, *The Contested Lessons of Euthanasia in the Netherlands*, 8 HEALTH L.J. 119 (2000); Neil M. Gorsuch, *The Legalization of Assisted Suicide and the Law of Unintended Consequences: A Review of the Dutch and Oregon Experiments and Leading Utilitarian Arguments for Legal Change*, 2004 WIS. L. REV 1347 (2004).

[122] GRIFFITHS ET AL., *supra* note 121, at 229–38.

[123] The Dutch Ministry of Health, Welfare and Sport and the Ministry of Justice, Termination of Life on Request and Assisted Suicide (Review Procedures) Act, Stb. 2001, nr. 137, ch. 2, art. 2, § 1 (Neth.).

prosecution if she terminates a life at the person's request and, if 1) the request is voluntary and well considered; 2) the patient's suffering is lasting and unbearable; 3) the patient has been informed of her diagnosis and prognosis and the patient holds the conviction that there is no other reasonable solution; and 4) an independent physician has been consulted who has seen the patient and who gives a written opinion that the requirements of the Act have been followed.[124] Approximately five percent of the deaths in any given year in the Netherlands are the result of euthanasia or physician-assisted suicide.[125]

While the practice seems to be widely accepted in the Netherlands, some controversies have arisen concerning the assisted suicide and euthanasia regime. There is evidence that some physicians are administering euthanasia without an explicit request from the patient.[126] There has also been debate in the Netherlands about euthanasia performed on children. The current law allows euthanasia on children ages twelve to sixteen with the parents' consent; however, new guidelines will allow euthanasia on terminally ill newborns with the parents' consent.[127]

In Belgium, euthanasia was legalized in 2002.[128] Similar to the Dutch law, the Belgian regulation allows "termination of life by request" for a competent adult who makes a voluntary, considered and repeated request and who is in a "medically hopeless situation characterised by persistent and unbearable physical or mental suffering . . . ."[129] As of 2004, 259 terminally ill patients in Belgium had elected termination of life.[130] Assisted suicide has also long been le-

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[124] *Id.*

[125] *See* Richard Renigsen, *Dutch Euthanasia: The New Government Ordered Study*, 20 ISSUES L. & MED. 73, 74 (2004) (giving figures for "active" euthanasias, physician-assisted suicides, and total deaths in the Netherlands in 2001).

[126] *See* Susan M. Wolf, *Assessing Physician Compliance With the Rules for Euthanasia and Assisted Suicide*, 165 ARCHIVES OF INTERNAL MED. 1677 (2005) ("Data gathered from the first major empirical research documented a substantial incidence of what the researchers called "LAWER," life-terminating acts without explicit request, a clear violation of the Dutch rules."); *see also* Renigsen, *supra* note 125, at 75 (noting that the number of cases of involuntary active euthanasia remains high).

[127] *See* Gregory Crouch, *A Crusade Born of a Suffering Infant's Cry*, N.Y. TIMES, Mar. 19, 2005, at A4 (reporting on a Dutch doctor proposing "a team of physicians, together with the baby's parents, to decide openly in very rare, extraordinary cases whether or not to end a child's life."); Jim Holt, *Euthanasia for Babies?*, N.Y. TIMES MAG., July 10, 2005, at sec. 6, col. 3 (remarking that two Dutch physicians have published guidelines for infant euthanasia in the *New England Journal of Medicine*).

[128] Maurice Adams, *Comparative Reflections on the Belgian Euthanasia Act of 2002*, 11 MED. L. REV. 353, 353 (2003). An English translation of the Belgian Act is available at http://www.kuleuven.ac.be/cbmer/viewpic.php?LAN=E&TABLE=DOCS&ID=23.

[129] *Id.* at 365–66.

[130] VALERIE J. VOLLMAR, RECENT DEVELOPMENTS IN PHYSICIAN-ASSISTED SUICIDE (Oct. 2004), http://www.willamette.edu/law/pas/2004_reports/102004.html.

galized in Switzerland, which has become a destination for "death tourism."[131]

In 2005, a bill entitled Assisted Dying for the Terminally Ill was introduced in Parliament in the United Kingdom.[132] The bill would legalize physician-assisted suicide and, in appropriate cases, allow physicians to administer lethal drugs.[133] And in Canada, a "Right to Die With Dignity" bill has been proposed which would amend the Criminal Code "to allow any person, under certain conditions, to aid a person close to death or suffering from a debilitating illness to die with dignity if the person has expressed the free and informed wish to die."[134] Recently in Italy, a controversy erupted when Piergiorgio Welby, a poet, publicly lobbied the government for legal permission to have a physician sedate him and remove his respirator. Mr. Welby had been suffering for many years with muscular dystrophy. His appeal received widespread coverage and created political controversy. Even though he was denied the legal authority he sought, Mr. Welby ended his life after a doctor sedated him and removed his respirator.[135]

While certainly authorized in only a minority of jurisdictions, a growing acceptance of the legalization of physician-assisted suicide is evident. As Richard Posner suggested twenty years ago:

> In cases of terminally ill, pain-wracked, or severely impaired people who are or anticipate shortly becoming physically incapable of committing suicide, Mill's theory of the proper limits of government suggest, although does not prove, that a right of physician-assisted suicide should be recognized (subject to appropriate safeguards. . .) and that therefore the law forbidding the practice should be repealed. The fear that under such a regime physicians will hustle their patients to a premature and undesired death seems greatly exaggerated; indeed, the suicide rate might actually fall if physician-assisted suicide were permitted.[136]

This understanding of the limited role of government in controlling end of life decisions has led some legislatures to focus on the proper limitations and conditions of physician-assisted suicide, rather than maintaining possibly futile, criminal prohibitions.

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[131] Hilary White, *Switzerland Refuses to Alter Assisted Suicide Law to Nix Death Tourism*, LIFESITENEWS.COM, June 2, 2006, *available at* http://www.lifesite.net/ldn/2006/jun/06060210.html.

[132] Assisted Dying for the Terminally Ill Bill, 2004, H.L. Bill [17] (Gr. Brit.).

[133] *Id.* In May 2006, the House of Lords effectively killed the bill by voting, 148 to 140, to delay consideration of the bill. Philippe Naughton, *Lords Block Mercy Killings Bill*, TIMES ONLINE, May 12, 2006, *available at* http://www.timesonline.co.uk/tol/news/uk/health/article716892.ece.

[134] Act to Amend the Criminal Code (Right to Die with Dignity), 2005, H.C. Bill [C-407] (Can.).

[135] Ian Fisher, *Italian Poet Dies With Help from a Doctor*, N.Y. TIMES, Dec. 22, 2006, at A3.

[136] POSNER, *supra* note 106, at 260.

3. *Culture Wars*

While the acceptance of assisted suicide for the terminally ill has grown,[137] that acceptance has in turn created a backlash against hastening of the dying process.[138] As part of advocating a "culture of life," some have linked opposition to abortion, stem cell research, and physician-assisted suicide as similar assaults on the value of life.[139]

The two sides of this cultural debate were dramatically exposed by the circumstances surrounding the death of Terri Schiavo.[140] The issue was not direct physician-assisted suicide, but rather the legally permissible withdrawal of life sustaining treatment. Nonetheless, this controversy brought into sharp relief the cultural divide on issues surrounding assisted suicide. Ms. Schiavo suffered cardiac arrest in 1990 and because of the resulting lack of oxygen to her brain, remained, until her death in 2005, in a coma and then later a "persistent vegetative state."[141] Unable to eat or drink on her own, Ms. Schiavo was fed and hydrated through a feeding tube.[142] Controversy surrounding her condition arose when her husband, Michael

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[137] *See, e.g.*, Jerry Fensterman, *I See Why Others Choose to Die*, BOSTON GLOBE, Jan. 31, 2006, at A11 (describing why the author supports assisted suicide); Sam Lister & David Charter, *BMA Drops Its Opposition to Doctor-Assisted Suicide*, LONDON TIMES ONLINE, July 1, 2005, *available at* http://www.timesonline.co.uk/tol/news/uk/article539179.ece (reporting that the British Medical Association has dropped its opposition to physician-assisted suicide); Peter Singer, *The Sanctity of Life*, FOREIGN POL'Y, Sept.–Oct., 2005, at 40 (stating that during the next thirty-five years, the traditional view of the sanctity of life will collapse under pressure from scientific, technological, and demographic developments); Peter Steinfels, *Beliefs: In the Right-to-Die Debate, the Public Reveals Strong Views, but Also the Ability to Make Distinctions*, N.Y. TIMES, Feb. 11, 2006, at A12 (noting that the public has the ability to make distinctions in the assisted suicide debate); William Yardley, *For Role in Suicide, a Friend to the End Is Now Facing Jail*, N.Y. TIMES, Mar. 4, 2005, at A1 ("It seems no one in [Corwall, Conn.] believes a crime was committed on the morning last June when Huntington Williams cleaned a revolver and advised his old friend John T. Welles where to aim. Mr. Welles, 66, was dying of cancer and, according to a police report, wanted to make sure he killed himself with one clean shot."); *The Art of Dying*, ECONOMIST, Oct. 15–21, 2005, at 59 (reporting on three countries and one American State where euthanasia is permitted).

[138] *E.g.*, Brief for Not Dead Yet et al. as Amici Curiae Supporting Petitioners at 1–2, Gonzales v. Oregon, 546 U.S. 243 (2006) (No. 04-623) (noting the position of Not Dead Yet, a group composed of several disability rights organizations, that physician-assisted suicide "encourages, rather than discourages, certain people to die solely because of their disability. . . . Oregon's assisted suicide law implicitly states that some people's lives are worth saving and others are not").

[139] The 2004 Republican Party Platform contained several paragraphs on the "culture of life" and urged opposition to abortion, stem cell research and same-sex marriage. David D. Kirkpatrick, *Draft G.O.P. Platform Backs Bush on Security, Gay Marriage and Immigration*, N.Y. TIMES, Aug. 25, 2004, at A20.

[140] *See* Sheryl Gay Stolberg, *The Schiavo Case: The Legacy; A Collision of Disparate Forces May Be Reshaping American Law*, N.Y. TIMES, Apr. 1, 2005, at A18 (stating that Schiavo's case "has become a touchstone in American culture").

[141] *In re* Guardianship of Schiavo, 780 So. 2d 176, 177 (Fla. Dist. Ct. App. 2001).

[142] *Id.*

Schiavo, sought to have her feeding tube removed and thus allow her to die.[143] Ms. Schiavo's parents strongly objected to this decision and sought to overrule Mr. Schiavo's request.[144]

Many disputes swirled around Ms. Schiavo's situation: whether she was in a "persistent vegetative state" or in a higher functioning "minimally conscious state";[145] whether Ms. Schiavo had clearly made known, when she was well, that she would not want to live in her brain damaged condition;[146] whether her husband, Mr. Schiavo, had a financial conflict of interest that made him an inappropriate guardian;[147] what standard of proof the Florida courts should apply when attempting to determine Ms. Schiavo's wishes;[148] what the appropriate

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[143] *See* Joan Didion, *The Case of Theresa Schiavo*, N.Y. REV. OF BOOKS, June 9, 2005 (telling the life story of Theresa Schiavo), *available at* http://www.nybooks.com/articles/18050.

[144] In 1998, eight years after Ms. Schiavo's cardiac arrest and resulting brain damage, Michael Schiavo, her husband and guardian, petitioned the Florida courts to authorize termination of life-sustaining treatment. Michael Schiavo presented evidence to the court to support his contention that Terri Schiavo would have wished to have life-sustaining treatment terminated. Mr. and Mrs. Schindler, Terri Schiavo's parents, opposed the petition. However, the court granted the petition. *In re* Guardianship of Schiavo, No. 90-2908, 2000 WL 34546715, at *1, *7 (Fla. Cir. Ct. Feb. 11, 2000), *aff'd*, 780 So. 2d 176 (Fla. Dist. Ct. App. 2001). Subsequently, Mr. and Mrs. Schindler made numerous attempts in the Florida courts to have the decision vacated. Following the denial of the Schindlers' last appeal, Terri Schiavo's feeding tube was removed on October 15, 2003.

The Florida legislature then acted by granting Governor Jeb Bush authority to prevent the withholding of nutrition and hydration from a patient if the patient had no living will, the patient was in a persistent vegetative state, nutrition and hydration had been withheld from the patient, and a member of the patient's family challenged the withholding of nutrition and hydration. H. 35-E, 2003 Leg., 418th Sess. (Fla. 2003). The Governor issued an order requiring that Ms. Schiavo's feeding tube be reinserted. The validity of the Florida law was challenged in Florida court and found to be an unconstitutional use of legislative power and a violation of Ms. Schiavo's rights. Bush v. Schiavo, 885 So. 2d 321, 337 (Fla. 2004), *cert. denied*, 543 U.S. 1121 (2005). On March 18, 2005, Ms. Schiavo's feeding tube was again removed.

At this point, the U.S. Congress enacted legislation ordering the U.S. District Court for the Middle District of Florida to conduct a de novo review of any claims of a violation of Ms. Schiavo's constitutional rights. Act of Mar. 21, 2005, Pub. L. No. 109-3, 119 Stat. 15 (providing relief for the parents of Theresa Marie Schiavo). The district court denied any injunctive relief because the necessary showing of constitutional or statutory violations was not made. Schiavo *ex rel.* Schindler v. Schiavo, 357 F. Supp. 2d 1378, 1384–88 (M.D. Fla. 2005), *aff'd*, 404 F.3d 1270 (11th Cir. 2005).

Terri Schiavo died on March 31, 2005.

[145] *See* Ronald Cranford, *Facts, Lies, and Videotapes: The Permanent Vegetative State and the Sad Case of Terri Schiavo*, 33 J.L. MED. & ETHICS 363, 366 (2005) (noting the importance of understanding and appreciating: "1) the current diagnosis . . . and 2) the potential for neurological recovery and potential response to treatment or rehabilitation").

[146] Didion, *supra* note 143, at 62 (discussing whether there was any "directive" from Ms. Schiavo to be followed).

[147] *In re* Guardianship of Schiavo, 780 So. 2d at 178 (discussing the money Mr. Schiavo would inherit upon the death of Ms. Schiavo).

[148] Darren P. Mareiniss, *A Comparison of* Cruzan *and* Schiavo*: The Burden of Proof, Due Process, and Autonomy in the Persistently Vegetative Patient*, 26 J. LEGAL MED. 233, 243 (2005) (explaining that Mr. Schiavo had the burden of proving, by clear and convincing evidence, that Ms. Schiavo would want to end her life).

roles of the legislative, judicial, and executive branches were in this type of dispute;[149] and whether the federal government should intervene.[150] At its most simple and compelling level, however, the conflict was between "the right to die" and the interference with this right by state and federal officials. Although a passionate minority regarded the Florida courts' decisions allowing the removal of the feeding tube as an affront to the sanctity of life,[151] most Americans seemed to view the attempts by the Florida legislature, the governor, and the U.S. Congress to interfere with the death of Ms. Schiavo as unwarranted invasions of personal autonomy and privacy.[152]

The vehemence of the public's rejection of the government's efforts to interfere with the Florida courts' handling of Ms. Schiavo's condition was surprising to many.[153] The public largely rejected the invocation of "the culture of life" and focused instead on the governmental assault on the control over decisions concerning death. The common belief seemed to be that decisions in this area should be made by the individual and the family, not by state or federal officials. The strongly held views on both sides of this issue led to wide, and perhaps unanticipated, polarization.[154] What was exposed was a debate about an individual's control of her death and a belief that decisions in this context are not simple and not susceptible to broad governmental proscriptions. What may have seemed self-evident to the Supreme Court in 1997—that hastening death of the terminally

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[149] *See, e.g.*, Terri D. Keville & Jon B. Eisenberg, Bush v. Schiavo *and the Separation of Powers: Why a State Legislature Cannot Empower a Governor to Order Medical Treatment When There Is a Final Court Judgment that the Patient Would Not Want It*, 7 J.L. & SOC. CHALLENGES 81, 97–103 (2005) (examining the complex separation of power issues in the *Schiavo* case).

[150] *See, e.g.*, David L. Hudson, Jr., *Schiavo Law Prompts Constitutional Questions*, 12 A.B.A. J. E-REP. 1, 2 (Mar. 25, 2005) (summarizing concerns about federalism raised by the case).

[151] In a few states, legislation has been enacted that limits the ability to withdraw food and hydration or restricts whom may act as a guardian for an incapacitated person. *See* Stolberg, *supra* note 140.

[152] *See* Didion, *supra* note 143, at 64 ("A majority of Americans . . . saw a gross example of legislative opportunism, a clear demonstration of the power of the religious right to influence legislation, a threat most specifically to pro-choice protections in the matter of abortion and more generally to the privacy rights embodied in the Constitution itself.").

[153] Sidney Blumenthal, *The Year In Politics*, SALON, Dec. 29, 2005, http://dir.salon.com/story/news/feature/2005/12/29/year_in_politics/index.html ("An ABC News poll found that 63 to 28 percent backed the removal of Schiavos [sic] feeding tube and 67 to 19 percent believed that politicians urging that she be kept alive were demagogic and unprincipled.").

[154] *See* Didion, *supra* note 143, at 69 ("Old polarizations took over. Differences became intolerances. Before the end of the first news cycle, those who believed the removal of the feeding tube to be a morally correct decision were being referred to as 'murderers,' and those troubled by the decision, even those of no perceptible religiosity, as 'fundamentalist freaks,' 'evangelical mullahs.'").

ill was not consistent with our cultural tradition[155]—was no longer so certain.

IV. REEXAMINATION OF ASSISTED SUICIDE

If laws against physician-assisted suicide for the terminally ill have become, like sodomy laws before *Lawrence*, mostly of symbolic value, will the Court find that the liberty interest in controlling one's death overrides any state interest in making a generalized moral statement about the value of life? If faced with a case in which palliative care cannot relieve the suffering of a dying person or a situation where physicians feel constrained from giving effective levels of pain relief because of its possibly fatal effect, the concurring opinions in *Glucksberg* suggest that the issue should be reexamined.[156] The Court could turn to the liberty interest articulated in *Lawrence* that "presumes autonomy of self"[157] and invalidate state laws criminalizing physician-assisted suicide. The groundwork for such an outcome has been laid: a doctrinal expansion of due process; increased state and foreign revision of assisted suicide laws; popular rejection of government interference with end of life decisions; and a growing willingness to face the reality of current end of life practices.

Lawrence marked a significant step away from the "stranglehold of *Glucksberg*" in its approach to due process. Rather than focusing on whether an action is encompassed in a fundamental right, the *Lawrence* Court balanced the importance of the action to individual autonomy against the state's interests in prohibiting it.[158] In contrast to searching through history to determine whether the specific right asserted is "deeply rooted in this Nation's history and tradition,"[159] the *Lawrence* approach looks at both past history and emerging trends to determine the content of liberty protected by the Due Process Clause.[160] Both of these aspects of the due process analysis set forth in

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[155] *See* Washington v. Glucksberg, 521 U.S. 702, 728 (1997) ("The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it.").

[156] *See id.* at 736 (O'Connor, J., concurring) (declining to address the narrower question of whether a person who is suffering great pain has a constitutionally cognizable interest in controlling the circumstances of his or her death); *id.* at 750–51 (Stevens, J., concurring) (noting similar intent of doctors to ease a patient's suffering in cases where doctors provide pain-killing medication that hastens death and those where the doctor complies with a patient's request for lethal medication); *id.* at 792 (Breyer, J., concurring) (commenting that it would be a different issue if the state prohibited palliative care or withheld pain medications).

[157] Lawrence v. Texas, 539 U.S. 558, 562 (2003).

[158] *Id.* at 567 (noting that "absent injury to a person or abuse of an institution the law protects[,]" the State should not seek to control private sexual conduct).

[159] *Glucksberg*, 521 U.S. at 721.

[160] *Lawrence*, 539 U.S. at 571–72. One commentator has suggested that condemnation of same-sex sodomy does not have the same longstanding history as condemnation of assisted sui-

Lawrence have significant implications for a reexamination of physician-assisted suicide.

In determining that a liberty interest exists in "controlling the time and manner of one's death," Judge Reinhardt in *Compassion in Dying v. Washington* emphasized the protection in the Due Process Clause for the "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" as set forth in *Casey*.[161] Judge Reinhardt concluded that "[a] competent terminally ill adult, having lived nearly the full measure of his life, has a strong liberty interest in choosing a dignified and humane death . . . ."[162] This analysis is echoed in the concurring opinions of Justices Souter and O'Connor in *Glucksberg* and is similar to the approach taken in *Lawrence* when the Court determined that state prohibition of homosexual sodomy was an affront to the dignity and autonomy of those choosing to enter into intimate same-sex relationships.

Just as the *Lawrence* decision was issued at a time when sodomy laws had begun to be repealed or found unconstitutional under state law, and when international norms rejected anti-sodomy laws, so does the current political and cultural background reveal a time of transition with respect to restrictions on physician-assisted suicide.[163] At the same time, there seems to be a growing conviction that individual choices with respect to end of life decisions should be respected, and hostility to government interference with those choices. This political and cultural shift makes the recognition of a liberty interest by the Court less surprising than it may have been in 1997 when *Glucksberg* was decided. Just as *Lawrence* represented a "regime shift for gay

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cide and thus *Lawrence* and *Glucksberg* can be reconciled. Dale Carpenter, *Is* Lawrence *Libertarian?*, 88 MINN. L. REV. 1140, 1163 (2004); *see also* Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337, 341 (2004) (noting the Court's consideration in *Lawrence* of the modern trend of decriminalizing homosexual sodomy rather than just considering historical treatment of such acts as suggested in *Glucksberg*).

[161] 79 F.3d 790, 813 (9th Cir. 1996), *rev'd sub nom,* Glucksberg, 521 U.S. 702 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

[162] *Id.* at 814; *see also id.* ("For [some] patients, wracked by pain and deprived of all pleasure, a state-enforced prohibition on hastening their deaths condemns them to unrelieved misery or torture.").

[163] At the time *Glucksberg* was decided, even the law in Oregon was not yet in effect. Explaining that decision, Robert Burt noted that "the Supreme Court had never in its history constitutionally imposed a rule on all states where no state had ever implemented such a rule. When the Court had overturned state abortion laws or death penalty laws . . . there were considerable numbers of states that had already adopted these results . . . ." Burt, *supra* note 93, at 965–66. Burt believes the Court's collective response in *Glucksberg* can be understood as a signal that the issue "was not yet ripe for definitive resolution but must await future developments in state legislatures and in repeated, particularized litigation." *Id.* at 975.

people"[164] that was in a sense mandated by the strength of the gay rights movement, so too might the social support for autonomy in end of life decisions mandate a change in the Court's approach to physician-assisted suicide.

Of course a decision lessening a state's ability to criminalize physician-assisted suicide would likely create an outcry by those who promote a "culture of life." The outcry would primarily be concerned with what might come next: involuntary euthanasia; adverse judgments about the "quality of life" of the severely disabled; or coercion of the vulnerable into assisted suicide. Much like *Lawrence*, the debate would center not on the specific holding of the case but on the possible outcome of subsequent cases. While few see the decriminalizing of homosexual sodomy as particularly significant, many fear the further expansion of the rights of sexual minorities and the relaxation of standards of sexual morality. Similarly, while many might acknowledge the legitimacy of physician-assisted suicide for the suffering terminally ill competent adult, the expansion of assisted suicide to any other context will be greatly feared.

If the Court recognized a liberty interest that limited the state's ability to interfere with end of life decisions, it would likely narrowly define that interest to give the state broad discretion in fashioning appropriate regulation. States would be free to develop appropriate guidelines and protocols to ensure that only the terminally ill who make a voluntary and well-informed decision may receive physician-assisted suicide.[165] The liberty interest articulated by the Court would not interfere with states' abilities to regulate medical practice and establish guidelines and protocols but would prevent state usurpation of individual decision making concerning the timing and manner of death. Because of the significant interests the state has in protecting the vulnerable from a hastened death, the scope of a liberty interest in controlling one's death could not be as expansive as one's interest in autonomy concerning intimate sexual behavior. The difficulty in delineating the liberty interest while still allowing the state to advance significant interests might well be an additional reason the Court would hesitate to reopen the question, hoping instead, that the issue is resolved by state legislatures.

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[164] Eskridge, *supra* note 71, at 1040. The same dynamics that expand rights based on an identity-based social movement may result in the expansion of rights to those seeking to control end of life decisions. *See* McGowan, *supra* note 17, at 1333 (discussing identity-based social movements).

[165] State restrictions on physician-assisted suicide could be viewed analogously to restrictions in the abortion context. States can fashion limitations and conditions on abortion so long as they do not place an "undue burden" on a woman's decision, prior to the viability of the fetus, to terminate her pregnancy. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992).

V. CONCLUSION

The liberty interest espoused in *Lawrence* encourages, if not demands, a new look at government restraints on the "autonomy of self." How far it lifts those restraints has been left undefined. But because the Due Process Clause methodology in *Glucksberg* and *Bowers* has been discredited, there is ample room to contemplate an iteration of the liberty interest that includes the right to hasten one's own death. Still, the *Lawrence* Court's approach to due process—its balancing of personal autonomy and state interests—begs the question of whether it would continue that approach or retreat to a less expansive standard in ruling on the constitutionality of that right.

What appears clear enough is that physician-assisted suicide for the terminally ill competent adult bears many of the same claims for recognition as those asserted in *Lawrence* for adult sexual relations. Both claims go to the core of individual identity, both have historical roots and growing social acceptance, and in both cases state prohibitions may be more symbolic of moral disapproval than any real attempt to regulate the prohibited behavior. Of course, there are also significant differences. The potential for abuse in assisted suicide may be greater than the Court would sanction. But the logic of the newly established due process doctrine, and burgeoning tolerance of the practice, point toward expansion of liberty in its favor.