

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

University of New Mexico  
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# Thank you

## ~~AARP~~ **Bulletin today**

### MEDICAL FUTILITY Practice of treating patients with little hope is debated

September 18, 2008 - Albuquerque Journal

Winthrop Quigley

Opposite issue  
Pleasure to be back

# My job

Provide context & landscape



No legal arguments  
No policy arguments  
Just **legal history**

Objective in *Morris*:

**Clarify legality** of  
MAID in New Mexico

Who **else**?  
Where?  
How?

# Roadmap

Assisted suicide  
criminal statutes

Right to refuse  
treatment

**Paths** to MAID  
legalization

7

**Statutory Approaches**

Ballot initiatives

Legislation

**Litigation Approaches**

Federal constitution

State constitution

Statutory interp.

**Other Approaches**

Limit prosecutorial  
discretion

Jury nullification

**Not** covering “all”  
law re MAID

Only **affirmative**  
efforts to permit




Advocate  
&  
innovator  
>20 years

**Criminal  
Assisted  
Suicide**



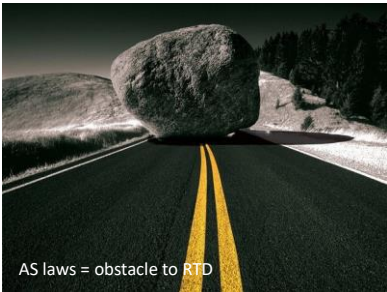
Across USA, since 1800s, helping someone commit suicide is a **crime**



“assisted suicide prohibitions are **deeply rooted** in our nation’s legal history”



**NMSA § 30-2-4**  
“Assisting suicide consists of . . . **aiding another in the taking of his own life . . . .** fourth degree felony.”



**Right to die**



## 1950s & 1960s

- Mechanical ventilators
- Dialysis
- Feeding tubes



Karen Quinlan 1976

# >100

appellate cases

Right to refuse treatment even if life-sustaining

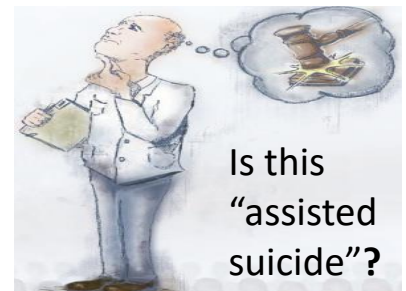


Nancy Cruzan 1990



1977 RTDA

1995 UHCDA



Is this "assisted suicide"?

**Chill** from

NMSA § 30-2-4

NMSA § 24-7A-13(B)(1)

“Death resulting from the withholding or withdrawal of health care . . . **does not . . . constitute a suicide . . .**”



**No** such clarity re MAID

MAID = AS

AS = felony

MAID = felony



**Pathway 1**

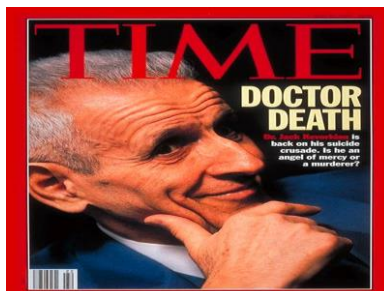
**Litigation**

**US Constitution**

Due process

Equal protection

1<sup>st</sup> Amendment





D. Ore. (1994)	Y
9th Cir. (1995)	N
9th Cir. EB (1996)	Y
SCOTUS (1997)	N



NDNY (1994)	N
2d Cir. (1996)	Y
SCOTUS (1997)	N

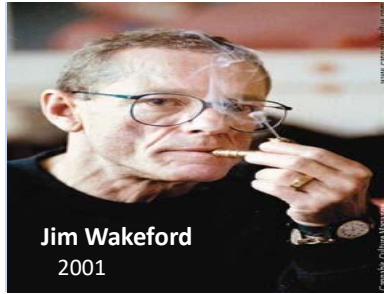
>15  
appellate judges

2d Cir + 9th en banc + 9th panel dissent + SCOTUS dissents + other



Federal constitutional rights in **other** countries





EOL in Canada – MAID

- First 9 months...
- 1324/195,000 = 0.68%
- Numbers increasing in Ontario
  - July-Dec 2016- 31/month
  - Jan-Jun 2017- 60/month
- Highly variable by region

Medically assisted deaths in Canada

Province	Count	Period
QUEBEC	449	MAY 16, 2017 - JUN 15, 2017
ONTARIO	348	JUNE 16, 2016 - MAY 15, 2017
B.C.	285	JUNE 16, 2016 - MAY 15, 2017
ALBERTA	100	JUNE 16, 2016 - MAY 15, 2017
MANITOBA	27	JUNE 16, 2016 - MAY 15, 2017
N.S.	31	JUNE 16, 2016 - MAY 15, 2017
SASK.	21	JUNE 16, 2016 - MAY 15, 2017
N.B.	9	JUNE 16, 2016 - MAY 15, 2017
N.L.	7	JUNE 16, 2016 - MAY 15, 2017
P.E.I.	0	JUNE 16, 2016 - MAY 15, 2017
N.W.T.	0	JUNE 16, 2016 - MAY 15, 2017
NUNAVUT	0	JUNE 16, 2016 - MAY 15, 2017
YUKON	*	JUNE 16, 2016 - MAY 15, 2017



MINSALUD TODOS POR UN NUEVO PAIS

Fecha actual: Domingo, 17 de septiembre de 2017

Inicio Ministerio Salud Protección social Normativa Servicio al ciudadano Transparencia

Centro de comunicaciones Normativa Resoluciones

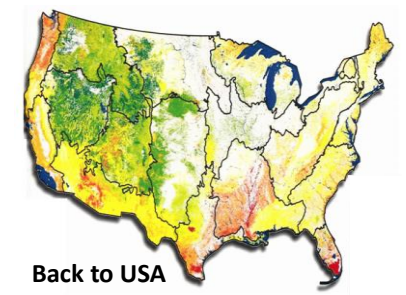
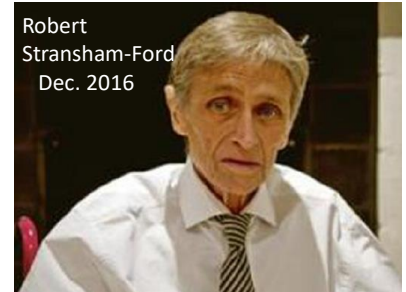
Tipo de Norma

Año	Nombre	Descripción
Año : 2017 (60)		
Año : 2016 (143)		
Año : 2015 (150)		
2015	Resolución	Por la cual se d... No. 5406

April  
2015



**BUT**



No federal constitutional right  
↓  
Focus to **states**

**Pathways 2 & 3**  
**State**  
**statutes**

**Ballot initiatives**  
**Legislation**



# Ballot initiatives

STATES THAT ALLOW THE INITIATIVE PROCESS



## Early failures

- 1988 California
- 1991 Washington
- 1992 California
- 1994 Michigan

## Problem

Legalize **both** euthanasia **and** medical aid in dying

## MAID

**Self** ingestion

**Patient** takes the final overt act



U.S. DISTRICT COURT  
DISTRICT OF OREGON

Injunction 1994 to 1997

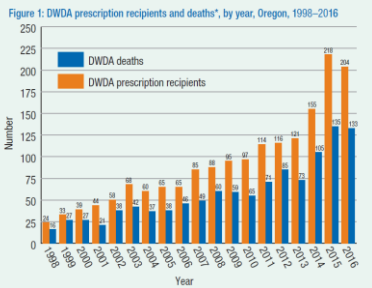


2016

>> Oregon Death with Dignity Act

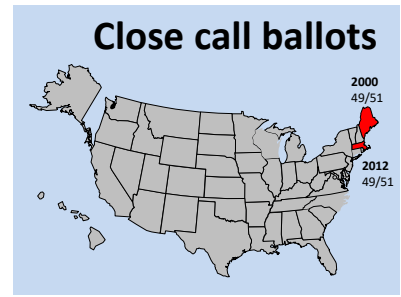
Data summary 2016

Oregon Health Authority  
PUBLIC HEALTH DIVISION



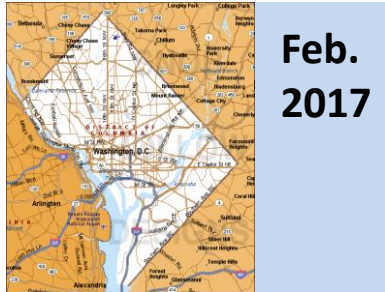
Characteristics	2016	1998–2015	Total
	(N=133)	(N=994)	(N=1,127)
<b>Lethal medication</b>			
Secobarbital (%)	86 (64.7)	582 (58.6)	668 (59.3)
Pentobarbital (%)	0 (0.0)	386 (38.8)	386 (34.3)
Phenobarbital (%)	39 (29.3)	17 (1.7)	56 (5.0)
Other (combination of above and/or morphine) (%)	8 (6.0)	9 (0.9)	17 (1.5)
<b>End of life concerns<sup>d</sup></b>	<b>(N=133)</b>	<b>(N=994)</b>	<b>(N=991)</b>
Losing autonomy (%)	119 (89.5)	906 (91.6)	1,025 (91.4)
Less able to engage in activities making life enjoyable (%)	119 (89.5)	888 (89.7)	1,007 (89.7)
Loss of dignity (%) <sup>e</sup>	87 (65.4)	680 (78.8)	767 (77.0)
Losing control of bodily functions (%)	49 (36.8)	475 (48.1)	524 (46.8)
Burden on family, friends/caregivers (%)	65 (48.9)	408 (41.3)	473 (42.2)
Inadequate pain control or concern about it (%)	47 (35.3)	249 (25.2)	296 (26.4)

**Track record**  
**Documented**  
**Solid**



**Legislation**

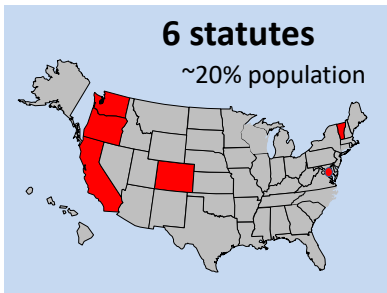




**Enacted**

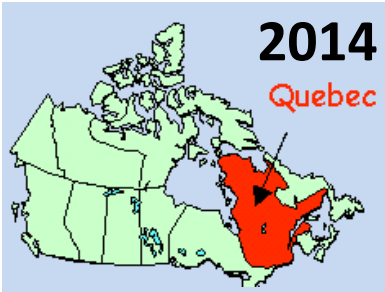
3 initiatives

3 bills

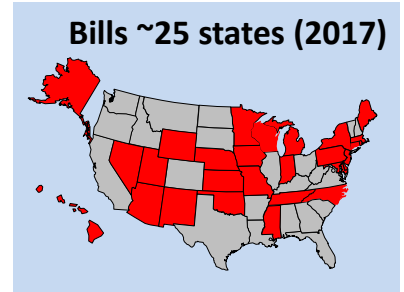


Statutes in **other** countries





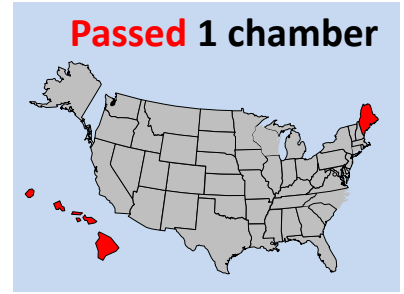
**Ongoing**



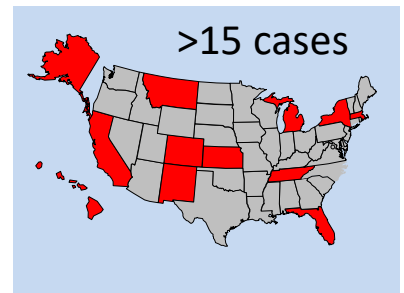
HOUSE BILL 171  
53RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2017  
INTRODUCED BY  
Deborah A. Armstrong and Bill McCamley  
and Elizabeth "Liz" Stefanics

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SENATE BILL 252  
53RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2017  
INTRODUCED BY  
Elizabeth "Liz" Stefanics and Deborah A. Armstrong



**Pathway 4**  
Litigation  
state constitution



No "lasting"  
success

Trial court win  
Appellate loss

3



McIver  
wins FL DCT  
  
Reversed  
FL SCT

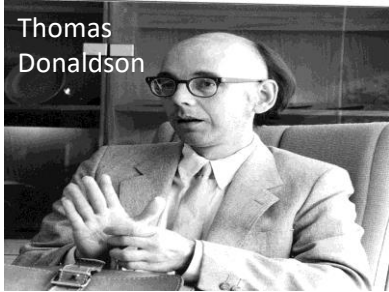


Baxter  
wins MT  
DCT  
  
Not  
reached  
MT SCT

Trial court loss  
Appellate loss

>10

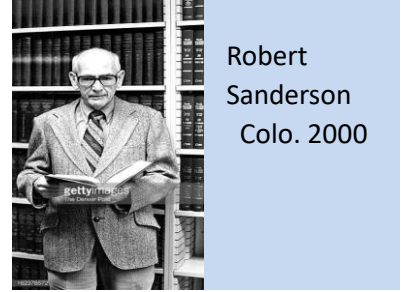
1992



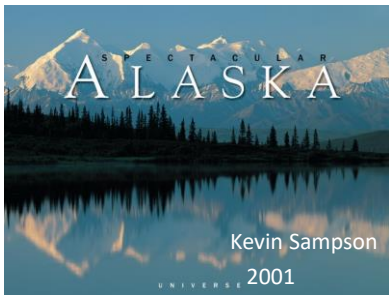
Thomas Donaldson



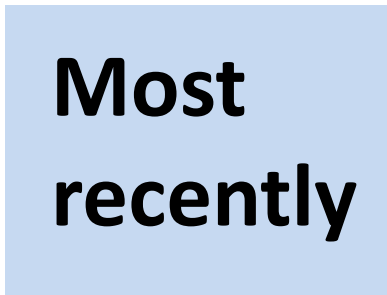
No CA right



Robert Sanderson  
Colo. 2000



Kevin Sampson  
2001



Most recently



Christie White



Christie O'Donnell



John Jay Hooker



Sara Myers

State constitutional right

App. courts **0**

Trial courts **3**

App. JS = 1 FL + 1 NM App + 2 MI + others

# Active cases



John Radcliffe  
HI

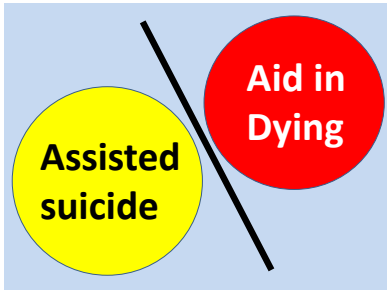


Roger Kligler  
MA



Jennifer Holm  
Iowa

## Pathway 5 Litigation State statute



George Bailey



Aja Riggs

MAID is **different**

But **still** legally  
“assisted suicide”



Often included with  
state con. law claims  
(e.g. NM, NY)

But **never** accepted



**BUT**



~~MAID = AS~~

Mont. Code Ann. 45-2-211  
“**consent** of the victim  
to conduct charged . . .  
is a **defense**”



AS statute not apply

Trial court 0

Appellate 1

## Pathway 6

Limit  
prosecutorial  
discretion

**Not** decriminalized

But **guidance** on  
MAID without penalty

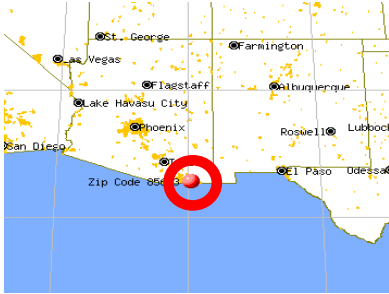


Debbie  
Purdy



**factors** that will  
influence whether  
or not someone is  
prosecuted for  
assisting suicide



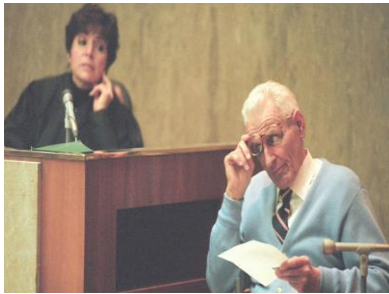


“urges **prosecutorial discretion** by the Cochise County Attorney in **de-prioritizing** cases . . . imminent death . . . intolerable suffering.”

# Pathway 7 Jury nullification

Not decriminalized  
But *de facto* immunity

The NEW ENGLAND JOURNAL of MEDICINE  
SOUNDING BOARD  
Death and Dignity — A Case of Individualized Decision Making  
Timothy E. Quill, M.D.  
N Engl J Med 1991; 324:691-694 | March 7, 1991 | DOI: 10.1056/NEJM199103073241010



# Conclusion

# 7 pathways

Set aside  
3 pathways

### No *ex ante* guidance

Prosecutorial  
discretion

Jury nullification



	Succeed	Fail
Ballot	3	>7
Bill	3	>200
AS not apply	1	>5
State const.	0	15

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