

# Medical Aid in Dying in Minnesota: Legal Landscape and Ethical Justifiability

Hennepin County Medical Center  
December 8, 2017

Thaddeus M. Pope, JD, PhD  
Mitchell Hamline School of Law

# Thank you

Death is  
**not** always  
bad

Life is  
**not** always  
good

For many, the  
alternative to  
death is **worse**

**Control**  
time & manner  
of death

**MAID**

End-of-life  
option

For **small**  
number of  
patients

**Who**

Adults  
Terminally ill  
with capacity

**How**

Ask & receive

prescription **drug**

- To self-administer
- To hasten death

# Disclosures

# Op-eds

The New York Times

The Opinion Pages  
ROOM for DEBATE

## Oregon Shows That Assisted Suicide Can Work Sensibly and Fairly



Thaddeus Mason Pope is the director of the Health Law Institute at Hamline University, and a frequent legal commentator and blogger on end-of-life medical issues.

UPDATED OCTOBER 7, 2014, 12:39 PM

VIEWPOINT

## The Changing Legal Climate for Physician Aid in Dying

David Orentlicher, MD, JD  
Hall Center for Law and Health, Indiana University Robert H. McKinney School of Law, Indianapolis.

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School of Medicine, University of California Davis School of Medicine, Sacramento.

While once widely rejected as a health care option, physician aid in dying is receiving increased recognition as a response to the suffering of patients at the end of life. With aid in dying, a physician writes a prescription for life-ending medication for an eligible patient. Following the recommendation of the American Public Health Association, the term *aid in dying* rather than “assisted suicide” is used to describe the practice.<sup>1</sup> In this Viewpoint, we describe the changing legal climate for physician aid in dying occurring in several states (Table).

Voters in Oregon and Washington have legalized aid in dying by public referendum, legislators in Vermont have done so by statutory enactment, and courts in Montana and New Mexico have done so by judicial rulings. Support for aid in dying is increasing, and it would not be surprising to see voters, legislators, or courts in

an advance directive statute in California.<sup>2</sup> courts islatures concluded that patients may reject ticians’ treatment recommendations even wh ment is necessary to prolong life.

Recognition of the right to refuse life-sustain reflected a societal consensus that people shoul to decline treatment when they are suffering from irreversible and severe illness. In such c burdens of continued treatment may easily out benefits, and people should not be forced to prolonged and undignified dying process.<sup>6</sup> Wh cal about the right is the desire to protect ser people from intolerable suffering.

How is it possible to decide when some ness is serious enough that treatment can be The Quinlan case concluded that the right to re sustaining treatment should exist when the 1

# CPG



# Testimony



# Balanced Circumspect

# Roadmap

# 4

MAID in  
Oregon

MAID in  
Minnesota

Paths to  
legalization

Access  
obstacles

**MAID in  
Oregon**

20 years  
1997 to 2017



PROVEN TRACK  
RECORD



Model emulated by  
legislatures around  
the world

# Who

uses it

- 97% white
- 99% insured
- 90% hospice
- 70% college
- 75% cancer

# How

use it

## Numerous safeguards

**Multiple** requests

**Multiple** counseling

Prescribing MD

Consulting MD

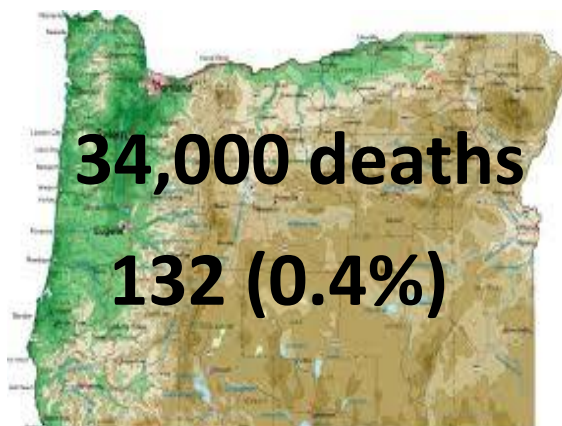
Mental health MD



Voluntary  
Informed  
Enduring

choice

**MAID in  
Minnesota**





41,000 / year

Total MN deaths

CDC National Center for Health Statistics, *Deaths: Final Data for 2013*, 64(2) NATIONAL VITAL STATISTICS REPORTS (Feb. 16, 2016), [http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64\\_02.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_02.pdf)

182 / year

MN MAID deaths

99.6%

MN deaths  
unaffected

41,000

182

---

40,818

Most **also** make  
a deliberate  
decision to  
hasten death



Those dependent  
on dialysis, vents,  
CANH can hasten  
their deaths

Not only  
withholding &  
withdrawing  
LSMT



Palliative sedation to unconsciousness



**Equal  
protection**

Persons similarly  
situated should  
be treated alike

**Every day**, terminally ill patients in Minnesota hasten their deaths by withholding or withdrawing treatment

**Every 30 minutes**

But some patients have no treatment to turn off or refuse

MAID gives these terminally ill, competent, adults the **same freedom**

**Legalization  
in MN**

**2017**

02/09/17 REVISOR SGS/CC 17-1700 as introduced

SENATE  
STATE OF MINNESOTA  
NINETIETH SESSION  
S.F. No. 1572

(SENATE AUTHORS: EATON, Klein, Marty, Dibble and Latz)

DATE D-PG OFFICIAL STATUS  
02/27/2017 806 Introduction and first reading  
Referred to Health and Human Services, Finance and Policy



Like almost all  
US bills, **closely**  
modeled on  
ODWDA

Politically safe  
**But** ethically  
questionable  
Return at end

02/09/17 REVISOR SGS/CC 17-1700

This Document can be made available  
in alternative formats upon request

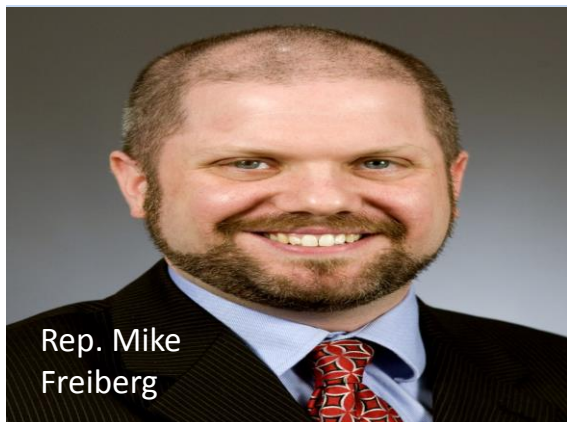
State of Minnesota

HOUSE OF REPRESENTATIVES

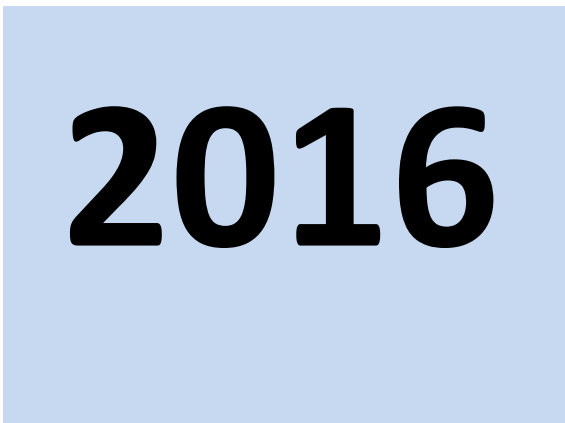
NINETIETH SESSION

H. F. No. 1885

03/01/2017 Authored by Freiberg, Liebking, Lesch, Schultz, Swanson and others  
The bill was read for the first time and referred to the Committee on Health and Human Services Reform



Liebling	Hornstein	Hansen
Lesch	Dehn, R.	Lee
Schultz	Kunesh-	Loeffler
Sundin	Podein	Ward
Considine	Thissen	Bly
Slocum	Clark	Moran
Allen	Nelson	



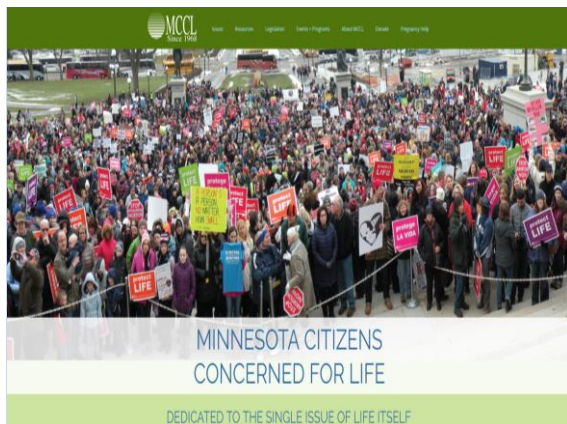
02/17/15 REVISOR SG5/NB 15-2790 as introduced

SENATE  
STATE OF MINNESOTA  
EIGHTY-NINTH SESSION  
S.F. No. 1880

(SENATE AUTHORS: EATON, Pappas, Dibble, Marty and Goodwin)

DATE	D-PG	OFFICIAL STATUS
03/18/2015	972	Introduction and first reading Referred to Health, Human Services and Housing
03/25/2015	1338	Author added Goodwin





## Doctor-assisted suicide proposal tabled after emotional hearing

Sen. Chris Eaton abruptly withdrew the measure in a hearing that drew hundreds of people and hours of wrenching testimony.

By Maya Rao Star Tribune | MARCH 17, 2016 -- 10:26AM



POLITICS & POLICY

## Historic election puts Republicans in control of Minnesota House and Senate

By Briana Bierschbach and Greta Kaul | 11/09/16 [Email](#) [Share](#) [Tweet](#) [Print](#)



**Better**  
prospects

**1**



Drops  
opposition

**1991**

Follow AMA

“Physicians **must not** . . .  
. . . participate in  
assisted suicide. The  
societal risks . . . is too  
great to condone . . . .”

June 2016  
to  
April 2017



**MMA BOARD OF TRUSTEES  
PHYSICIAN-AID-IN-DYING  
TASK FORCE  
REPORT AND RECOMMENDATIONS**

# May 2017

MMA will **not**  
oppose aid-in-  
dying legislation

“**unless** fails to  
adequately safeguard  
. . . patients or  
physicians.”

- Must not compel physicians or patients to participate . . . against their will
- Must require patient self-administration
- Must not permit patients lacking decisional capacity to utilize . . .
- Must require mental health referral of patients with a suspected psychological or psychiatric condition
- Must provide sufficient legal protection for physicians who choose to participate.

**Included**  
in MN bills

2

Track record  
even **longer**

OR 1998 → (20)  
WA 2008 → (10)  
VT 2013 → (5)  
CA 2016 → (2)

3

**More**  
public  
support

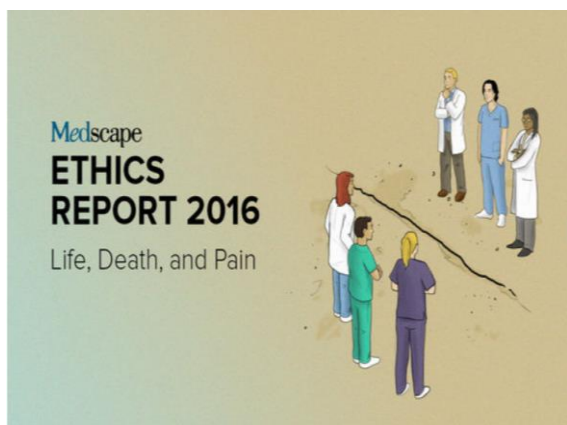
73%

Gallup (June 2017)



4

**More**  
physician  
support



57%

Medscape (Dec. 2016)

5

**More**  
professional  
associations



Why do we **need** a statute

**Need to legalize**

# “Assisted Suicide” Laws

109



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



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



Minnesota Statutes  
Chapter 609  
**Criminal Code**

# Minn. Stat. 609.215

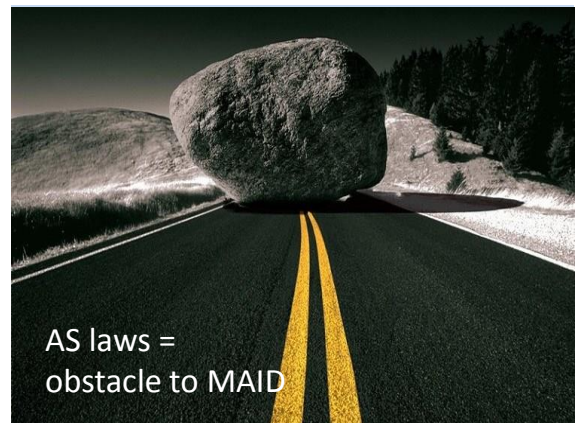
“Whoever . . . **assists** another in taking the other’s life may be **sentenced** to . . . 15 years . . . \$30,000”

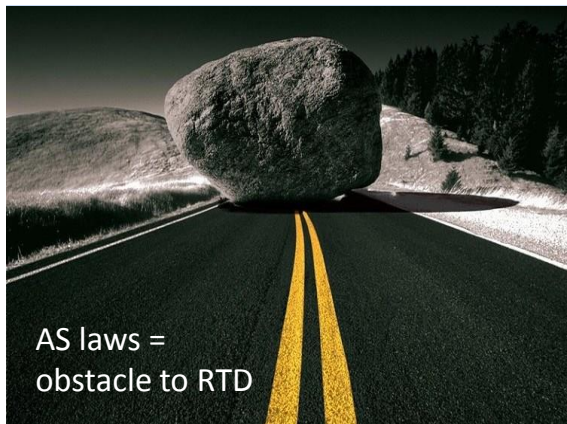
# Medical Practice Act

117

# Minn. Stat. 147.091(1)(w)

“aiding suicide . . . is **prohibited** and is grounds for **disciplinary** action”





# Right to die

122



## 1950s & 1960s

- Mechanical ventilators
- Dialysis
- Feeding tubes



**>100**  
 appellate  
 cases

Right to refuse  
 treatment

even if  
 life-sustaining



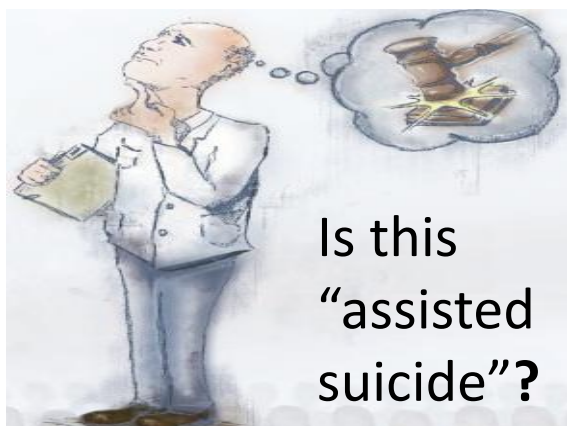
**1993**

MINNESOTA STATUTES 2012

145C.01

CHAPTER 145C  
 HEALTH CARE DIRECTIVES

145C.01	DEFINITIONS.	145C.09	REVOCATION OF HEALTH CARE DIRECTIVE.
145C.02	HEALTH CARE DIRECTIVE.	145C.10	PRESUMPTIONS.
145C.03	REQUIREMENTS.	145C.11	INDICITIES.
145C.04	EXECUTED IN ANOTHER STATE.	145C.12	PROHIBITED PRACTICES.
145C.05	SUGGESTED FORM; PROVISIONS THAT MAY BE INCLUDED.	145C.13	PENALTIES.
145C.06	WHEN EFFECTIVE.	145C.14	CERTAIN PRACTICES NOT CONDONED.
145C.07	AUTHORITY AND DUTIES OF HEALTH CARE AGENT.	145C.15	DUTY TO PROVIDE LIFE-SUSTAINING HEALTH CARE.
145C.08	AUTHORITY TO REVIEW MEDICAL RECORDS.	145C.16	SUGGESTED FORM.



**Chill** from  
609.215

**609.215(3)**  
“provider . . . who  
withholds or withdraws  
a life-sustaining  
procedure . . . does **not**  
**violate** this section”



MAID = AS  
AS = felony  
MAID = felony

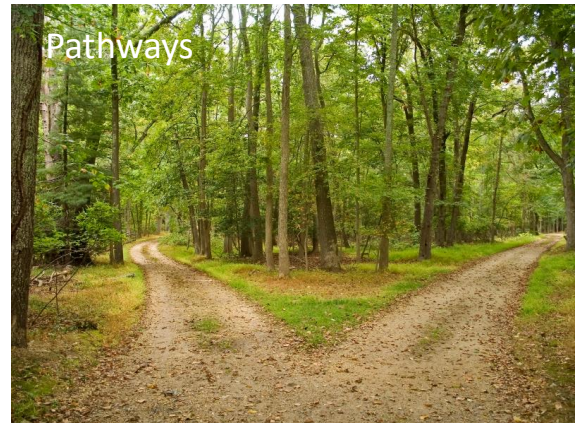


Need to  
legalize

139

Attempts  
to legalize

Who **else**?  
Where?  
How?



## Path 1

Litigation

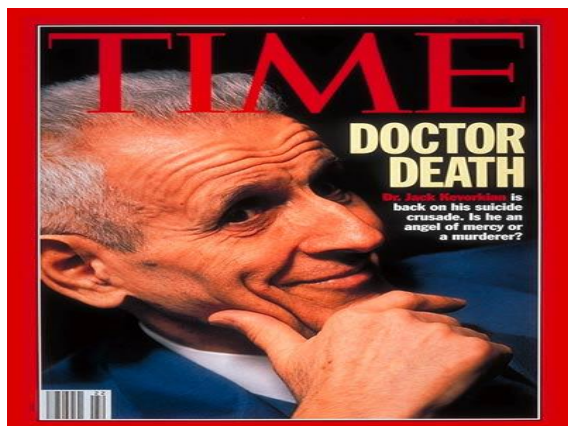
US Constitution

Due process

Equal protection

1<sup>st</sup> Amendment





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



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

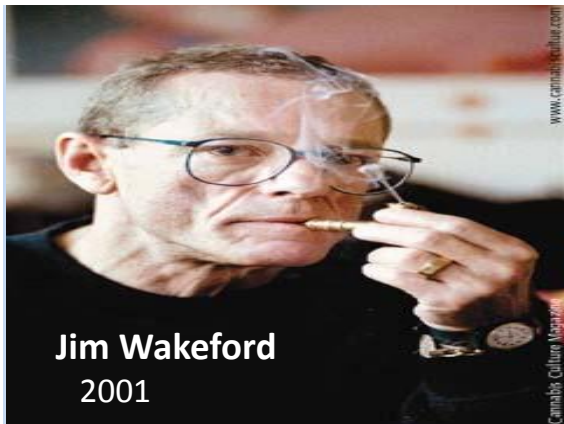
>15  
appellate judges

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

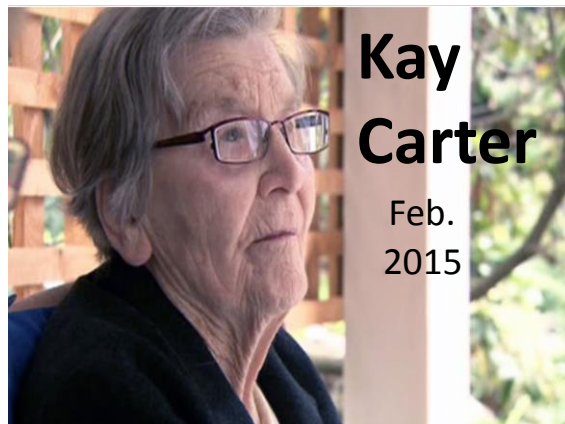


Federal  
constitutional  
rights in **other**  
countries





**Jim Wakeford**  
2001

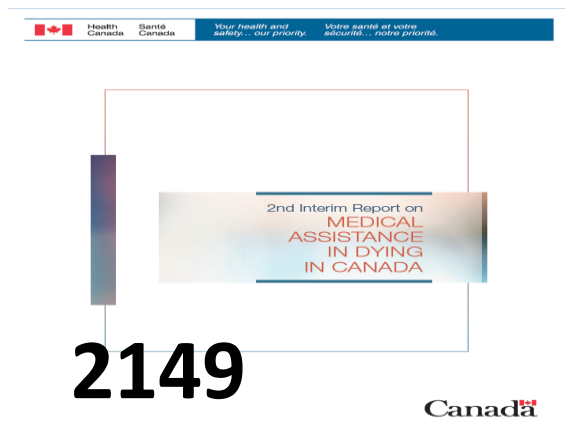


**Kay Carter**

Feb.  
2015



**June  
2016**



**Julia Lamb**



MINSALUD **TODOS POR UN NUEVO PAÍS** PAZ. EQUIDAD. EDUCACIÓN

Fecha actual: Domingo, 17 de septiembre de 2017 | Sign In

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Inicio Ministerio Salud Protección social Normativa Servicios al ciudadano Transparencia

Centro de comunicaciones Normativa Resoluciones

Ministerio de Salud y Protección Social > Normativa Resoluciones

Tipo de Norma

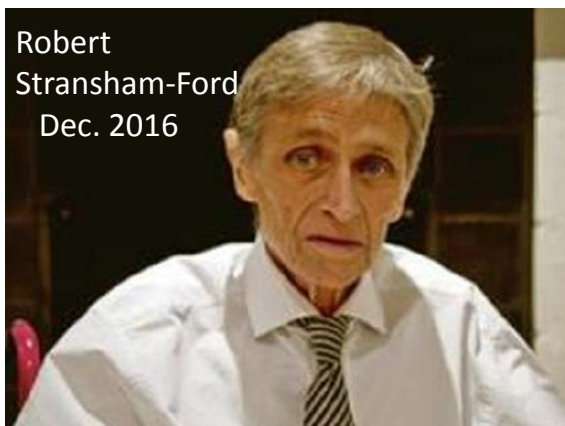
- Boletines jurídicos
- Actos administrativos
- Decretos
- Resoluciones**
- Circulares
- Notas externas
- Acuerdos

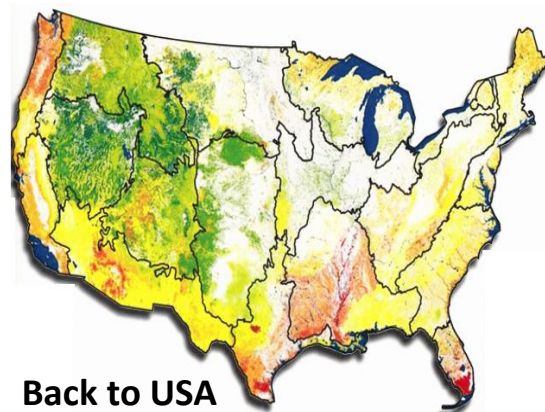
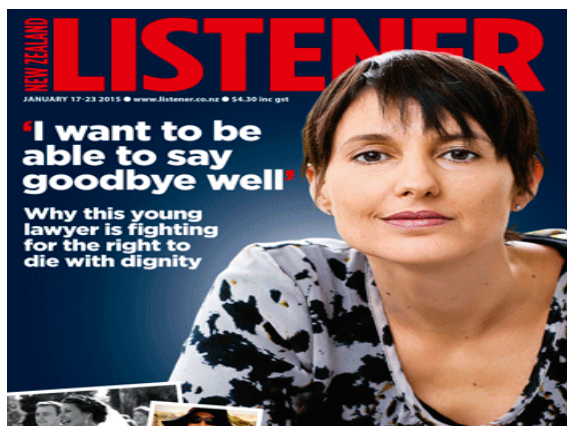
Año	Name	Descripción
Año : 2017 (60)		
Año : 2016 (143)		
Año : 2015 (150)		
2015	Resolución No. 5406	Por la cual se d lineamientos té

**April  
2015**

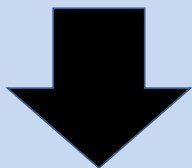


**BUT**





No federal  
constitutional right



Focus to **states**



“crafting appropriate  
procedures for . . .  
liberty interests is  
entrusted to the  
**laboratory of the  
states . . .**”

“**States . . .**  
undertaking  
extensive  
and serious  
evaluation . . . .”

## Path 2

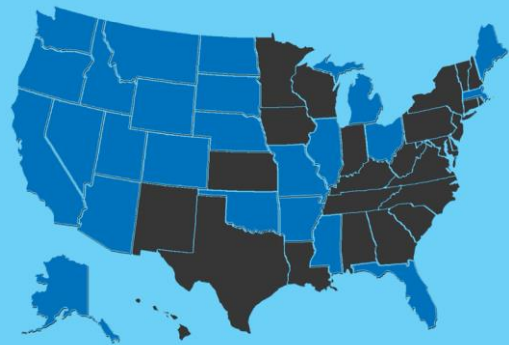
State  
statutes

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

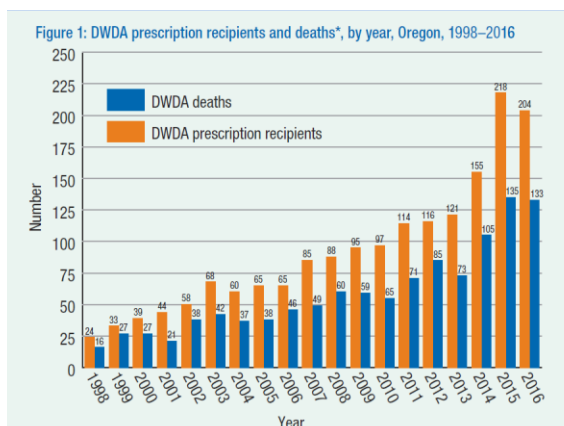
Injunction 1994 to 1997



2016

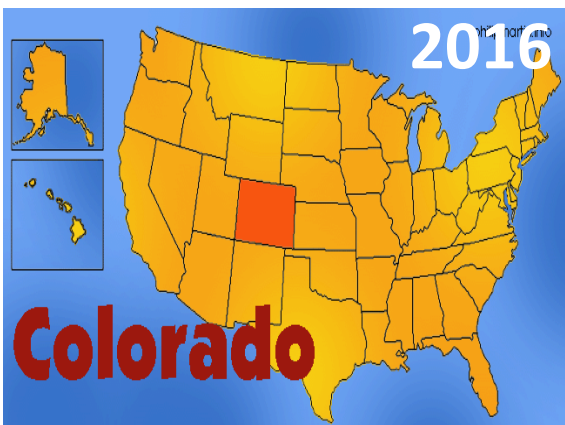
» Oregon Death with Dignity Act

Data summary 2016

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>†</sup></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>‡</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**



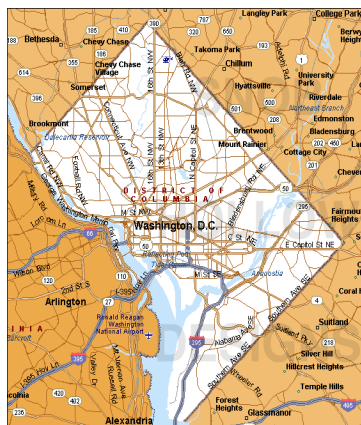


# Legislation

## May 2013



## Oct. 2015



## Feb. 2017

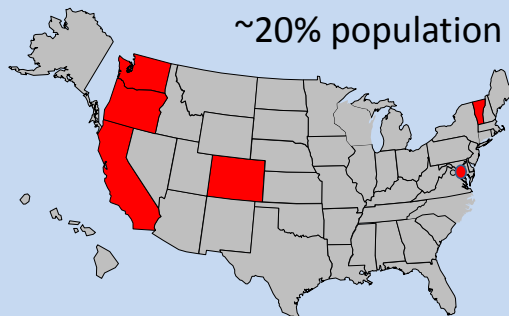
# Enacted

3 initiatives

3 bills

6 statutes

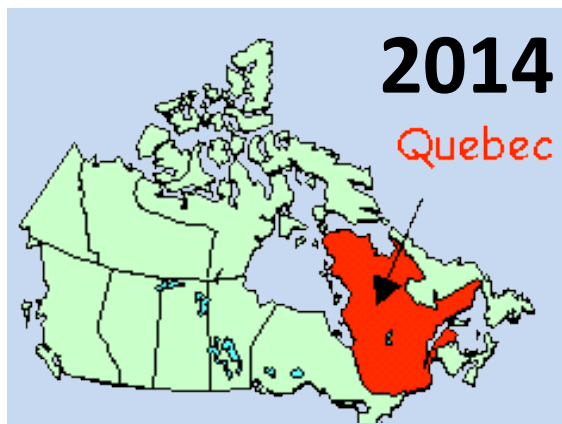
~20% population



# Statutes in **other** countries

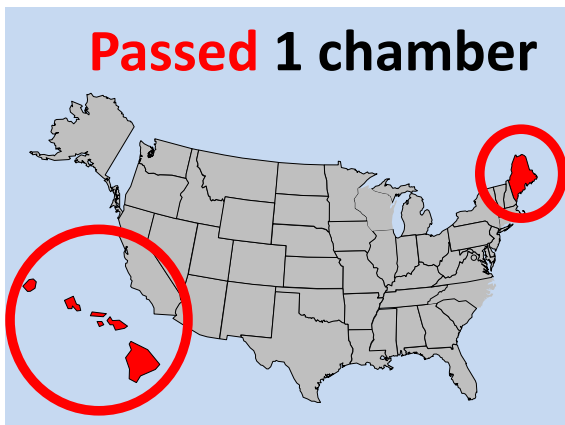
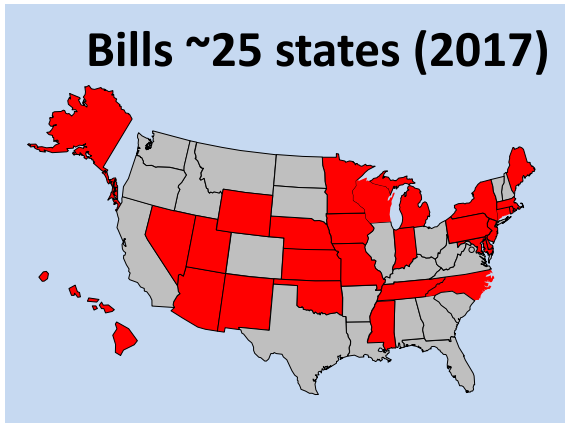


## Australian Government



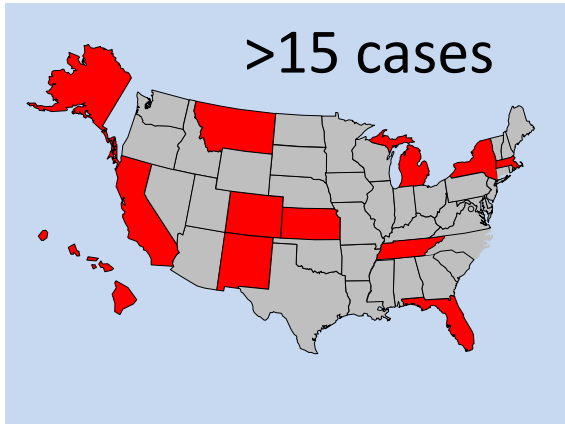


# Ongoing



**Path 4**

Litigation  
state constitution



No “lasting”  
success

Trial court win  
Appellate loss

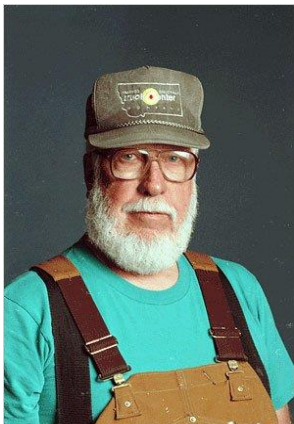
3



Morris win  
NM DCT  
  
Reversed  
NM SCT



Mclver  
wins FL DCT  
  
Reversed  
FL SCT



Baxter  
wins MT  
DCT

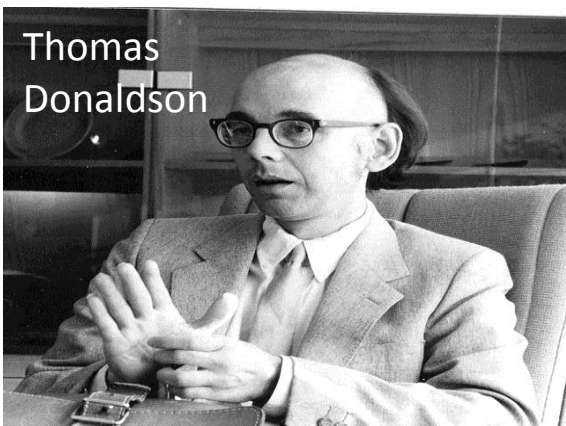
Not  
reached  
MT SCT

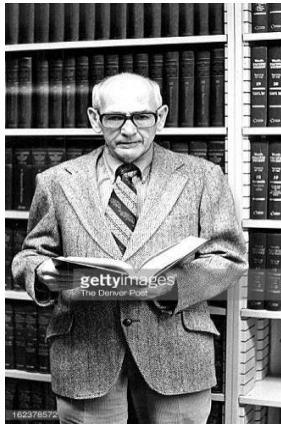
Trial court loss

Appellate loss

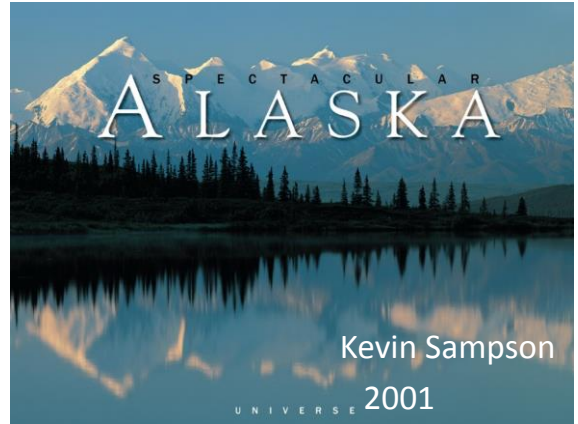
> 10

1992



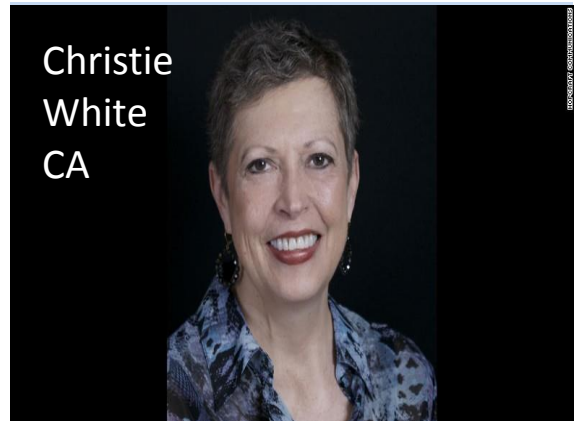


Robert Sanderson  
Colo. 2000

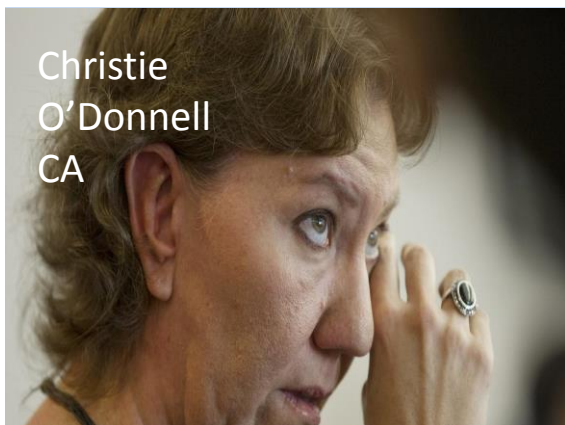


Kevin Sampson  
2001

# Most recently



Christie White  
CA



Christie O'Donnell  
CA



John Jay Hooker  
TN



Sara  
Myers  
NY

No right under  
**US** constitution

No right under  
**state** constitutions

**Active  
cases**



John  
Radcliffe  
HI

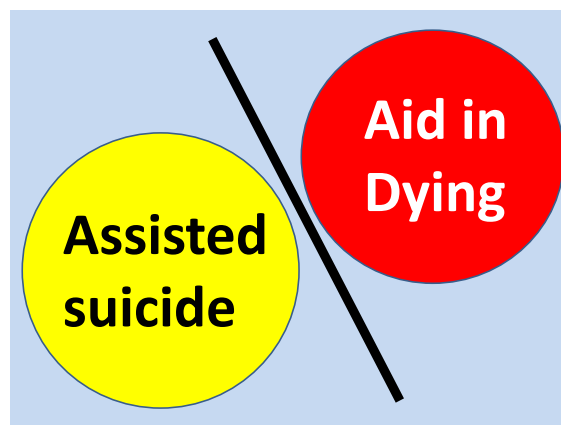


Roger  
Kligler  
MA



**Path 5**  
**Litigation**  
**State statute**

Assisted suicide = Felony



“suicide and MAID are conceptually, medically, and legally **different** phenomena”

(November 2, 2017)







MAID is  
**different**

Still **legally**  
"assisted suicide"



Quasi  
success



MAID = AS

But MAID  
**not** prohibited

Mont. Code Ann. 45-2-211

“**consent** of the victim  
to conduct charged . . .  
is a **defense**”

## Main paths

Legislation

Litigation

## Path 6

Prosecutorial  
discretion

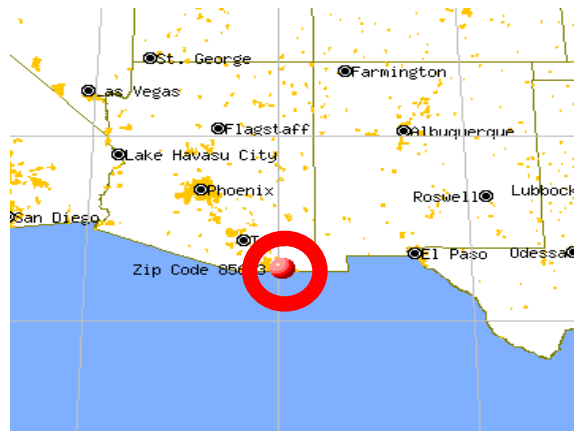
**Not** decriminalized

But **guidance** on  
MAID without penalty





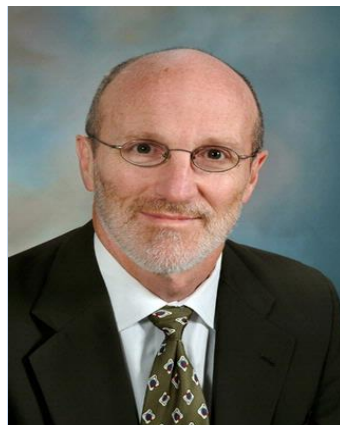
**factors** that will influence whether or not someone is prosecuted for assisting suicide



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

**Path 7  
Jury  
nullification**

Not decriminalized  
But *de facto* immunity



Tim  
Quill



The NEW ENGLAND  
JOURNAL of MEDICINE

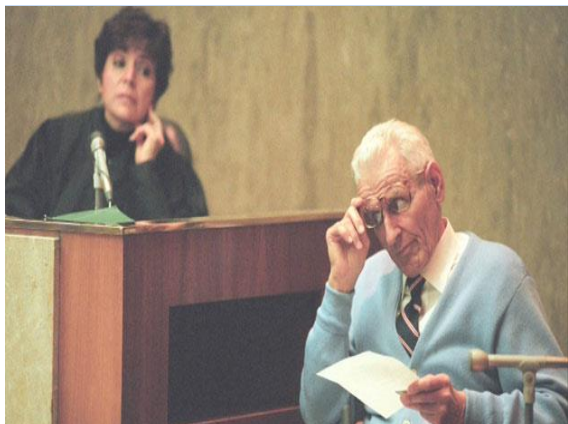
SOUNDING BOARD

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



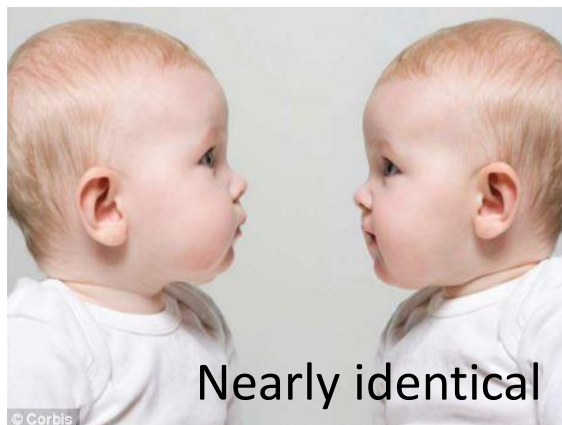


# Recap

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

# Access

6 statutes



02/09/17 REVISOR SGS/CC 17-1700 as introduced

SENATE  
STATE OF MINNESOTA  
NINETIETH SESSION  
S.F. No. 1572

(SENATE AUTHORS: EATON, Klein, Marty, Dibble and Latz)

DATE D-PG OFFICIAL STATUS  
02/27/2017 806 Introduction and first reading  
Referred to Health and Human Services Finance and Policy

**Protect**

Vulnerable  
Uninsured  
Minorities

Successful

**No** evidence  
of abuse

**BUT**

**Too** protective

Restricts access

Eligibility  
criteria

---

Process  
requirements

Eligibility  
criteria

Adult  
Terminally ill  
Capacity

**1**

**Adult**

**18+**

Assure  
voluntary  
& informed



# BUT

**Allow** minors  
to make **other**  
healthcare  
decisions



# 2

Terminal  
illness

## “Terminal illness”

final stage of an incurable and irreversible medical condition . . . death within **six months.**”

Matches  
hospice  
eligibility

# BUT

Temporally  
**strict**

unbearable  
suffering  
(not necessarily  
“terminal”)



3

Capacity



Minnesota Compassionate Care Act

Learn about the bill  
 Ask Questions  
 Show your support  
 Wear YELLOW

### LISTENING SESSION

with Senator Chris Eaton

SATURDAY, JANUARY 30, 2016  
1:00 - 3:00 P.M.

MINNESOTA SENATE BUILDING  
(ROOM 1200)  
95 UNIVERSITY AVE. W., ST. PAUL

MPRnews

Sections ▾ Members ▾ More ▾

## Forums set on Minnesota bill to give terminally ill right to die

 Jon Collins · Jan 29, 2016

Politic

Most **common**  
question – by  
far?



Terminal →  
no capacity

Capacity →  
not terminal



Advance  
directive

**Expand**  
eligibility  
criteria

**Relax** process  
requirements

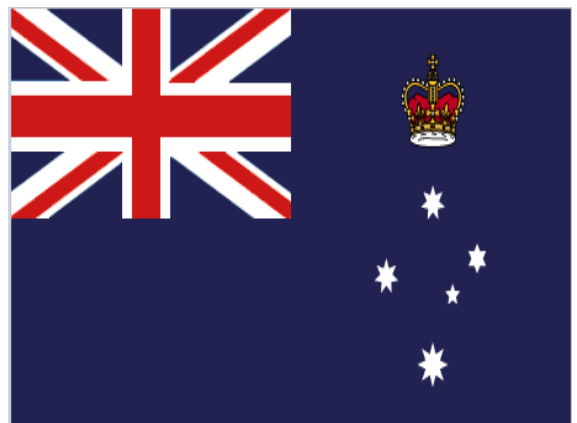
1

15 day  
**waiting**  
period

Assure  
request  
**enduring**

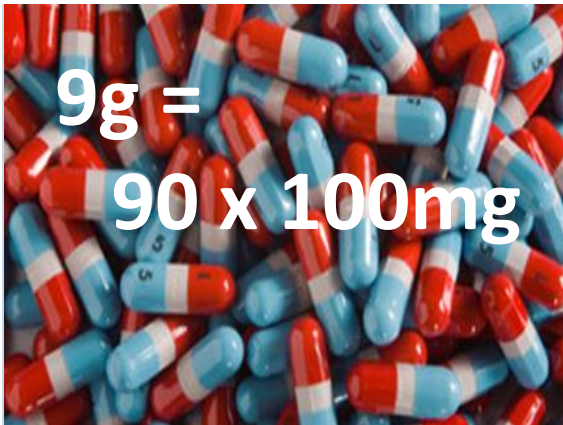
**BUT**

Undue  
burden



2

Self  
ingest



Helps  
assure  
**voluntary**

**BUT**

Lose  
ability

## Some complications

## » Oregon Death with Dignity Act

Data summary 2016

Complications <sup>6</sup>	(N=133)	(N=994)	(N=1,127)
Difficulty ingesting/regurgitated	3	27	30
None	24	530	554
Unknown	106	437	543
<b>Other outcomes</b>			
Regained consciousness after ingesting DWDA medications <sup>7</sup>	0	6	6

Complications may **rise**



TREATMENTS

**Drug Company Jacks Up Cost Of Aid-In-Dying Medication**

March 23, 2016 · 3:24 PM ET

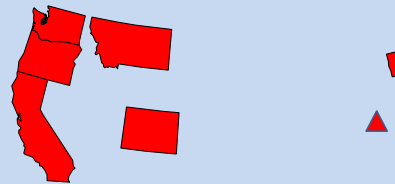


Avoid with  
clinician  
administration

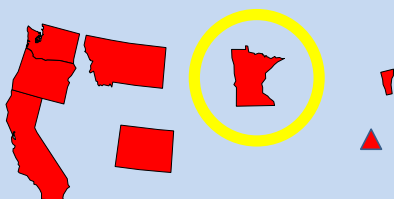


# Conclusion

Today



Tomorrow



Politically,  
**follow** OR  
model



But must discuss  
& debate  
**amendments** to  
that pattern

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338