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# Physician Assisted Suicide

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## CASE BRIEF:

### PHYSICIAN ASSISTED SUICIDE

*Amy Vandenbroucke*

While the beginnings of euthanasia started almost two centuries ago, the “death with dignity” and “right to die” movements have placed renewed emphasis on the debate. The debate concerning physician assisted suicide (PAS) concerns a patient’s right to decide when to end his/her life (active PAS) or to refuse treatment resulting in proactive steps taken to end the patient’s suffering (passive PAS).<sup>1</sup> In 2005, the U.S. Supreme Court granted certiorari for *Gonzales v. Oregon*, a case about the legality of Oregon’s *Death With Dignity Act* (DWDA), which allows PAS in specific circumstances.

### OREGON’S LAW

#### **Background**

In 1994, Oregon enacted the DWDA. The DWDA condones active PAS and provides a detailed procedure by which, upon a patient's request, physicians may prescribe, but not administer, lethal doses of a controlled substance to competent, terminally ill adult patients who, according to reasonable medical judgment, are within six months of dying.<sup>2</sup> After three years of various legal challenges and appeals, the law was implemented on October 27, 1997.<sup>3</sup> Immediately after implementation, the state legislature attacked the law by putting forward a bill to repeal it.<sup>4</sup> The Oregon voters defeated the repeal effort by 60-40% in Ballot Measure 51 in November 1997.<sup>5</sup>

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<sup>1</sup> Lawren Olenchak, *End of Life Issues*, Issue Brief for the Health Policy Tracking Service, Oct. 10, 2005.

<sup>2</sup> Legal Information Institute, *Gonzales v. Oregon*, <http://www.law.cornell.edu/supct/cert/04-623.html> (last accessed on Oct. 8, 2005). See also *Oral Arguments Begin in Supreme Court Case Over Oregon’s Physician Assisted Suicide Law*, The Henry J. Kaiser Family Foundation, Oct. 6, 2006. [www.kaisernetwork.org](http://www.kaisernetwork.org) (last accessed Oct. 6, 2005)

<sup>3</sup> Death With Dignity National Center, *Death with Dignity: From Act to Law*, <http://www.deathwithdignity.org/historyfacts/briefhistory.asp> (last accessed Oct. 8, 2005).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

The federal government was the next to attack the DWDA, using the Federal *Controlled Substances Act* (CSA) as a basis to invalidate Oregon's law. The CSA, passed in 1970 as part of a comprehensive federal scheme to regulate and control certain drugs and other substances, required physicians ("practitioners") prescribing ("dispensing") controlled substances to register with the Attorney General and obtain a Drug Enforcement Agency (DEA) certificate of registration.<sup>6</sup> The CSA was later amended to authorize the U.S. Attorney General to prohibit medical practitioners' use of a controlled substance if that use was "inconsistent with the public interest."<sup>7</sup> In July 1997, several members of Congress sent letters to the Administrator of the DEA, Thomas Constantine, urging him to adopt an interpretation of the CSA that would render assisted suicide, and by implication PAS, illegal.<sup>8</sup> Although Constantine announced a few months later that PAS was not a "legitimate medical purpose" under the CSA and, therefore, the DEA had the authority to prosecute physicians who wrote prescriptions facilitating suicide, U.S. Attorney General Janet Reno disagreed.<sup>9</sup> In June 1998, Reno's Department of Justice (DOJ) stopped the DEA's attempt to repeal the DWDA by announcing that the DOJ had found the DWDA fell beyond the scope of the CSA and therefore, it would *not* prosecute physicians who had assisted their patients' deaths in full compliance with Oregon's law.<sup>10</sup> Furthermore, she specifically noted that the CSA had been designed to prevent the trafficking and distribution of substances for unauthorized purposes and was not intended to replace individual states as the regulators of medical practice.<sup>11</sup>

In response to Reno's decision, the U.S. Congress then introduced the *Lethal Drug Abuse Prevention Act*, which attacked Oregon's law as well as pain management and palliative care nationwide.<sup>12</sup> The proposed bill was pulled from the floor after national negative attention.<sup>13</sup> In 1999, Congress again tried to overturn Oregon's law by introducing the *Pain Relief Promotion Act*.<sup>14</sup> Although this bill also received national negative attention, it passed

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<sup>6</sup> Institute, *supra*, note 2. Specifically 21 USC §802(1) and (21).

<sup>7</sup> *Id.* Specifically 21 USC §823(f) and 21 USC §824(a)(1)(4).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* See also From Act to Law, *supra*, note 3.

<sup>10</sup> *Id.*

<sup>11</sup> From Act to Law, *supra*, note 3.

<sup>12</sup> *Id.* The Act was H.R. 4006/S.2151. *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* This Act was H.R.2260/S.1272. *Id.*

the House of Representatives in October 1999 but died when it failed to reach the Senate floor for a full vote before the end of the 2000 Congressional session.<sup>15</sup>

In November 2001, the new U.S. Attorney General, John Ashcroft, reversed Reno's decision and announced that the CSA *did* prohibit the use of federally controlled drugs, including the lethal barbiturates used in Oregon, for PAS because assisting suicide is not a legitimate medical practice.<sup>16</sup> In 2002, a U.S. District judge ruled against Ashcroft, holding that the law concerns the regulation of medical practices and that individual states have the right to determine "what constitutes a legitimate medical practice or purpose."<sup>17</sup> Ashcroft appealed to the Ninth U.S. Circuit Court of Appeals.<sup>18</sup> On May 26, 2004, in a 2-1 decision, the Ninth Circuit affirmed the District Court's ruling by holding that the Attorney General cannot penalize Oregon physicians who assist suicides by prescribing deadly doses of controlled substances.<sup>19</sup> The majority held that Ashcroft's directive to punish physicians exceeded the limits of the Attorney General's statutory authority and violated the plain language of the CSA, which expressly limits federal authority under the act to drug abuse and prevention, not medical practices.<sup>20</sup> On July 12, 2004, Ashcroft requested a rehearing in the Ninth Circuit; his request was denied on August 11, 2004.<sup>21</sup> He then asked the U.S. Supreme Court to grant a writ of certiorari for the case, which it granted on February 22, 2005.<sup>22</sup> Arguments in the Supreme Court began October 5, 2005, although the Court's decision is not expected until July 2006.<sup>23</sup>

### Arguments

The U.S. Supreme Court heard the arguments about whether Ashcroft exercised a legitimate federal power when he made the determination that Oregon's DWDA was invalid because it was a violation of the

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<sup>15</sup> *Id.*

<sup>16</sup> Human Life Alliance, *Euthanasia: Imposed Death*, 9, (2004), available at [www.humanlife.org/eid.php](http://www.humanlife.org/eid.php) (last accessed Oct. 8, 2005).

<sup>17</sup> International Task Force on Euthanasia and Assisted Suicide, *Ninth Circuit Appeals Court Sides with Oregon Over Ashcroft Directive*, v. 18, no. 2, (2004).

<sup>18</sup> Institute, *supra*, note 2.

<sup>19</sup> Human Life Alliance, *supra*, note 16.

<sup>20</sup> International Task Force, *supra* note 17.

<sup>21</sup> From Act to Law, *supra*, note 3.

<sup>22</sup> *Id.*

<sup>23</sup> Stephen Henderson, *Court Split On Assisted Suicide Law*, THE BRADENTON HERALD, Oct. 6, 2005, at 1.

federal CSA.<sup>24</sup> Specifically, the issue is whether the federal government, through the Attorney General under the CSA, has the power to reinterpret and enforce U.S. drug laws and if that power trumps the power of the states to regulate the practice of medicine in ways supported by elected state officials and twice approved by Oregon voters.<sup>25</sup> In deciding, the Court must examine two issues. First, the Court must determine whether the Oregon law is primarily about drugs or about regulating physicians and medical standards.<sup>26</sup> If it is the latter, the Court will likely side with Oregon because the regulation of medical practice has been left to the individual states for 200 years.<sup>27</sup> If it is the former, the Court must determine the Congressional intent behind the CSA and whether it was meant to preempt state regulations.<sup>28</sup> U.S. Solicitor General Paul Clement, who is arguing the case before the court, insists that 90 years of federal drug regulation should trump any state's law that uses federally regulated drugs to assist suicide.<sup>29</sup> Finally, if the Court decides that the Oregon law does regulate medical practice and that the CSA was meant to preempt state regulations, then the Court will then have to determine whether Congress has the power to intrude into an area, specifically the regulation of medicine, typically left up to the states.<sup>30</sup>

Additionally, the Court must examine *stare decisis*. In 1997, the Supreme Court addressed PAS indirectly in 1997 through two cases, *Vacco vs. Quill* and *Washington vs. Glucksberg*. In these cases, the court upheld both New York's and Washington's ban on PAS and held that PAS was not a fundamental liberty interest protected by the due process clause.<sup>31</sup> But, while the court ruled that Americans do not have a constitutional right to PAS, the justices said that Americans do have a right to refuse treatment. Additionally, the justices implied that there is no constitutional bar to prevent any state from passing a law permitting PAS.

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<sup>24</sup> Warren Richey, *High Court Takes Up Physician-Assisted Suicide*, THE CHRISTIAN SCIENCE MONITOR, Oct. 5, 2005, [www.christiansciencemonitor.com](http://www.christiansciencemonitor.com)

<sup>25</sup> *Id.*

<sup>26</sup> Henderson, *supra*, note 23.

<sup>27</sup> *Id.*

<sup>28</sup> Richey, *supra*, note 24.

<sup>29</sup> Henderson, *supra*, note 23.

<sup>30</sup> Jane Roh, *Supreme Court May Surprise on Assisted Suicide*, FOX NEWS, Oct. 5, 2005, [www.foxnews.com](http://www.foxnews.com)

<sup>31</sup> *Vacco v. Quill*, 521 U.S. 793, 117 S.Ct. 2293 (1997) and *Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258 (1997).

Specifically, in *Washington vs. Glucksberg*, the Court said “state legislatures undoubtedly have the authority to create the kind of exception to assisted suicide fashioned by the court of appeals. There is every reason to believe that State legislatures will address the urgent issues involved in this case in a fair and impartial way.”<sup>32</sup> Clement distinguished both *Vacco* and *Glucksberg* by saying that they focused on whether there was a constitutional right to PAS, rather than the right of the state to pass such legislation.<sup>33</sup>

In *Oregon*, the DOJ has argued that PAS is not within the “accepted limits of medical practice.”<sup>34</sup> Oregon’s attorney, Robert Atkinson, countered by pointing out that the federal government has let the states regulate medicine for over 200 years and that nothing in the CSA gave Ashcroft the authority to determine what is a “legitimate medical practice.”<sup>35</sup> Justice O’Connor, in questioning Clement about the scope of the federal government’s authority to regulate physician prescriptions, distinguished between disallowing drugs generally and disallowing drugs for a specific purpose by saying “It’s a different thing to regulate by saying ‘No one can prescribe this substance. It’s so lethal, we won’t let anyone prescribe it at all.’ And it’s quite different to say... ‘If a physician follows the Oregon law, it’s not a legitimate practice of medicine.’”<sup>36</sup> Atkinson argued that using controlled substances to assist suicide is a legitimate medical use because the drugs allow physicians to control pain.<sup>37</sup> However, Clement argued that PAS is not a legitimate medical purpose, so using the controlled substances does violate the CSA.<sup>38</sup> The Court’s determination of whether or not PAS is a “legitimate medical practice” is the crux of the case and will impact their application of the CSA to the Oregon law.

In addition to determining “legitimate medical practice” the Court needs to examine the CSA’s language. Clement argued that the application of the CSA turns partially on what “the public interest”

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<sup>32</sup> Justice Ginsburg, Oral Argument Transcript at 9, *Gonzales v. Oregon*, 2005 WL 2659027 (Oct. 5, 2005) (No. 04-623).

<sup>33</sup> General Clement, Oral Argument Transcript at 10, *Gonzales v. Oregon*, 2005 WL 2659027 (Oct. 5, 2005) (No. 04-623).

<sup>34</sup> Roh, *supra*, note 30.

<sup>35</sup> Tim Christie, *Supreme Court Still Must Decide Oregon Assisted- Suicide Case*, THE REGISTER-GUARD, Oct. 28, 2005, [www.registerguard.com](http://www.registerguard.com)

<sup>36</sup> *Id.* See also, Justice O’Connor, Oral Argument Transcript at 19-20, *Gonzales v. Oregon*, 2005 WL 2659027 (Oct. 5, 2005) (No. 04-623).

<sup>37</sup> Roh, *supra*, note 30.

<sup>38</sup> *Id.*

means to the Court.<sup>39</sup> The plain language of the CSA gives the attorney general the power to deny or revoke the physician's registration when the physician is determined to have acted inconsistently "with the public interest."<sup>40</sup> Justice Stevens suggested that this factor appeared to be a grant of authority to go beyond state law.<sup>41</sup> Although PAS may end a patient's suffering and provide a quick, painless and peaceful death, arguing that the patient's death serves the public interest is more difficult.<sup>42</sup> However, as Justice Kennedy commented during oral argument, the CSA would be an odd statutory scheme if it would allow the Attorney General to find the a physician violated the CSA by prescribing a drug that that the State of Oregon has specifically told its physicians that they may prescribe, under special procedures in defined circumstances.<sup>43</sup> This appears to allow the Attorney General to override the will of Oregon citizens.<sup>44</sup> Justice Souter agreed and questioned Clement's argument that there is statutory history allowing for the Attorney General to have the sole authority to determine if a State may or may not authorize PAS, and to write the statute in such a way that Attorney Generals may reverse their predecessors' opinions, as has been seen with the DWDA.<sup>45</sup> Atkinson argued this as well by stating that there were no other cases in which the Attorney General ever attempted to de-register or prosecute a physician who was acting in accordance with state law.<sup>46</sup> Additionally, Atkinson points out that, in *United States v. Moore*, the Court said that registration of a physician was a matter of whether the physician was in good standing with the state medical authorities only.<sup>47</sup> Finally, Justice Breyer points out that the CSA does not specifically address PAS, which means that there was no specific legislative intent to forbid it.<sup>48</sup>

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Justice Stevens, Oral Argument Transcript at 41, *Gonzales v. Oregon*, 2005 WL 2659027 (Oct. 5, 2005) (No. 04-623).

<sup>42</sup> Roh, *supra*, note 30.

<sup>43</sup> Justice Kennedy, Oral Argument Transcript at 15, *Gonzales v. Oregon*, 2005 WL 2659027 (Oct. 5, 2005) (No. 04-623).

<sup>44</sup> Institute, *supra*, note 2.

<sup>45</sup> Justice Souter, Oral Argument Transcript at 21-22, *Gonzales v. Oregon*, 2005 WL 2659027 (Oct. 5, 2005) (No. 04-623).

<sup>46</sup> Atkinson, Oral Argument Transcript at 40-41, *Gonzales v. Oregon*, 2005 WL 2659027 (Oct. 5, 2005) (No. 04-623).

<sup>47</sup> *Id.* at 43.

<sup>48</sup> Justice Breyer, Oral Argument Transcript at 8, *Gonzales v. Oregon*, 2005 WL 2659027 (Oct. 5, 2005) (No. 04-623).

Both sides cited *Gonzales v. Raich*, a case the Court decided last term that found California's law permitting the possession of marijuana for medicinal purposes in violation of the CSA, in their arguments before the Court.<sup>49</sup> In *Raich*, the Court decided in a 6-3 decision that federal government may enforce the CSA's ban on marijuana that clearly banned any and all use of the substance in the country.<sup>50</sup> As Clement pointed out, *Raich*, like *Oregon*, is concerned with federal uniformity and state sovereignty.<sup>51</sup> Clement wants the Court to extend *Raich* to allow the federal government to enforce the CSA over contrary state laws that allow physicians to use controlled substances for PAS.<sup>52</sup> Clement portrayed the CSA as a paternalistic piece of legislation not designed to let people, or states, make their own judgments about certain health risks.<sup>53</sup> One argument was that since the marijuana was only for symptom relief and not for a controlled substance with the potential to kill as in Oregon's DWDA, that the Court should follow *Raich* and ban Oregon's law.<sup>54</sup> Some medical practitioners argue this holding is necessary because a uniform federal regulation of medical practice is necessary to curb abuses of pharmaceutical drugs.<sup>55</sup> Others argue that the medical field can self-regulate and point to statistics showing a growing consensus among medical professionals, legal professionals and Americans that PAS is appropriate in some circumstances.<sup>56</sup> Atkinson, in the oral arguments, pointed out that states differ on ideas of palliative care, and that PAS is an extension of these state decisions.<sup>57</sup> Additionally, in *Raich* the issue was marijuana and the arguments involved the impact of California's law on interstate commerce.<sup>58</sup> Here, Atkinson distinguished it by arguing that there is no evidence of a market for the drugs used under the DWDA.<sup>59</sup> Atkinson suggested, unlike marijuana, which has no recognized medical use by the DEA, the controlled substances used

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<sup>49</sup> Roh, *supra*, note 30.

<sup>50</sup> *Id.* See also Wesley J. Smith, *False Federalism*, International Task Force Update, v. 19, n. 2 (2005).

<sup>51</sup> Roh, *supra*, note 30. See also Institute, *supra*, note 2.

<sup>52</sup> Wesley, *supra*, note 50.

<sup>53</sup> Clement, Oral Argument Transcript at 28, *Gonzales v. Oregon*, 2005 WL 2659027 (Oct. 5, 2005) (No. 04-623).

<sup>54</sup> Wesley, *supra*, note 50.

<sup>55</sup> Institute, *supra*, note 2.

<sup>56</sup> *Id.*

<sup>57</sup> Atkinson, *supra*, note 46 at 39.

<sup>58</sup> Justice Stevens, *supra*, note 41 at 24.

<sup>59</sup> Atkinson, *supra*, note 57 at 45.



under Oregon's DWDA do have recognized medical uses by the DEA, but this case is about the federal government disliking the application of the controlled substances in Oregon.<sup>60</sup>

Although it was not mentioned during oral argument, legal experts have discussed Justice O'Connor's dissent in *Raich* that likened states to "laboratories" for social policy because it seems to be an argument the Court can make in this case.<sup>61</sup> Under this theory, Oregon's decision to legalize PAS would be allowed to continue without interference by a contrary federal public policy.<sup>62</sup> Opponents believe that the federal government should be able to mandate public policy, and that Congress sanctioned it with respect to controlled substances through the CSA.<sup>63</sup>

### Conclusion

The outcome is difficult to predict for several reasons.<sup>64</sup> First, Justice Sandra Day O'Connor announced her retirement and has said that she will remain on the bench until a successor is confirmed.<sup>65</sup> Justice O'Connor participated in the oral arguments and, if she is still on the court when a decision is made, may cast a potentially decisive vote, most likely in favor of Oregon's law.<sup>66</sup> It is unknown when the Court will render an opinion, although the current term ends in June.<sup>67</sup> If Justice O'Connor is still on the bench when the opinion is debated and written, then her vote will count, and if she is not, then neither her nor her replacement's vote will count.<sup>68</sup> As a result of Harriet Miers' withdrawal as a nominee for the U.S. Supreme Court in October, Justice O'Connor's retirement will be postponed another few months.<sup>69</sup> Additionally, if Justice O'Connor's leaving the bench will result in a tie decision, the case may be reheard next term when her replacement is seated.<sup>70</sup> If Justice O'Connor cannot vote on the case, a 4-4 decision is expected because, in *Vacco v. Quill* and *Washington v. Glucksberg*, two

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<sup>60</sup> Roh, *supra*, note 30.

<sup>61</sup> Wesley, *supra*, note 50.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Gina Holland, *High Court Clashes Over Assisted Suicide*, CHI. TRIB., Oct. 6, 2005, [www.chicagotribune.com](http://www.chicagotribune.com)

<sup>65</sup> Christie, *supra*, note 35.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Christie, *supra*, note 35.

cases in which the Court indirectly addressed PAS, she was the deciding vote and it is predicted that new Chief Justice John Roberts, as a conservative, will vote as former Chief Justice Rehnquist did, against PAS.<sup>71</sup> The Court may also decide to wait for the new justice to be seated and have the case reheard next term, rather than having an outgoing justice vote on a major case.<sup>72</sup> If current nominee Samuel Alito has the opportunity to vote on Oregon's law, he claims he would try to respect the wishes of state voters, but he has a reputation as a conservative, leading many experts to believe he would vote against Oregon.<sup>73</sup> Finally, if there is a tie decision, the Court may decide to leave it as a tie until another case involving PAS is granted certiorari.<sup>74</sup>

Second, the court itself has personal experience with terminal illness.<sup>75</sup> Most recently, former Chief Justice William Rehnquist died of an untreatable cancer.<sup>76</sup> Three of the other nine justices, including Justice O'Connor who is a former breast cancer patient, have had cancer and a fourth has a wife who counsels dying young cancer patients.<sup>77</sup> It is unknown whether these personal experiences will impact the justices' decision.

No matter what decision the Supreme Court reaches in this case, PAS will remain legal in Oregon because the DWDA does not specify that physicians must use the federally controlled substances for PAS.<sup>78</sup> A defeat for Oregon would mean that physicians would need to find new ways to hasten their patients' deaths than by prescribing controlled substances.<sup>79</sup> However, some physicians feel that a defeat for Oregon would effectively render the law ineffective because "the most effective and human means of easing death" would be eliminated.<sup>80</sup> Such a decision would also send a message to the other 49 states that PAS is not a "legitimate medical practice" and give precedence to prosecuting

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<sup>71</sup> Holland, *supra*, note 64.

<sup>72</sup> Christie, *supra*, note 35.

<sup>73</sup> Jim Barnett, *Alito's Reputation Fits Conservative Mold*, The Oregonian, Nov. 1, 2005, [www.oregonlive.com](http://www.oregonlive.com)

<sup>74</sup> Informal Interview with Stephen Siegel, Professor, DePaul University College of Law (Nov. 2005).

<sup>75</sup> *Euthanasia Test for Supreme Court*, BBC News, Oct. 6, 2005, [www.newsvote.bbc.co.uk](http://www.newsvote.bbc.co.uk)

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> L.A. Williams, *Supreme Court Plunges into Assisted Suicide Issue*, Christian Examiner, Nov. 2005, [www.christianexaminer.com](http://www.christianexaminer.com). See also Institute, *supra*, note 2.

<sup>79</sup> Wesley, *supra*, note 50.

<sup>80</sup> Institute, *supra*, note 2.

physicians who prescribe controlled substances for the purpose of PAS.<sup>81</sup>

## OTHER STATES

Oregon is not alone in having PAS legislation, although it is the only state condoning it.<sup>82</sup> PAS is an important end-of-life issue addressed by all the states; most of the state legislation and court cases followed the *Vacco* and *Glucksberg* decisions by the Court.<sup>83</sup> Six states criminalize PAS through common law, 35 states explicitly criminalize PAS by statute and three states do it through both.<sup>84</sup> Three states, North Carolina, Utah and Wyoming, have no legal position on the issue, having abolished the common law of crimes and not criminalizing PAS by statute.<sup>85</sup> While the Ohio Supreme Court has ruled, in 1996, that PAS is not a crime and while PAS is not specifically illegal in Ohio, the state's "do not resuscitate" regulations do not condone PAS.<sup>86</sup> Virginia does not have any clear case law or statute criminalizing PAS but does have a statute imposing civil sanctions on persons assisting a terminally ill patient in ending their own lives.<sup>87</sup> Terminal sedation and dehydration, passive forms of PAS, is a legal way to end a life in all 50 states.<sup>88</sup>

Over the past few years several state legislatures have tried to reconsider PAS legislation. In 1991, Washington voters rejected a ballot initiative for PAS.<sup>89</sup> Californians rejected a PAS initiative in

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<sup>81</sup> Williams, *supra*, note 78.

<sup>82</sup> Olenchak, *supra*, note 1.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* The six states are: Alabama, Idaho, Maryland, Massachusetts, Michigan, Nevada, South Carolina, Vermont and West Virginia. The 35 states are: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Washington, and Wisconsin. Maryland, Michigan and South Carolina criminalize PAS through both statute and common law. *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Olenchak, *supra*, note 1.

<sup>88</sup> Death with Dignity, *Fact and Fiction*, [www.deathwithdignity.org/fss/facts.asp](http://www.deathwithdignity.org/fss/facts.asp) (last accessed Oct. 29, 2005). In this situation, the patient stops eating and drinking and the physician provides sedation so that the patient does not feel the effects of starvation and dehydration and is unconscious throughout the process. *Id.*

<sup>89</sup> Human Life Alliance, *supra*, note 16.

1992 and the legislature failed to pass a PAS act in 2005.<sup>90</sup> The bill sponsors have announced that the PAS measure will be revisited in January 2006 and, in the meantime, will continue to educate their peers about PAS.<sup>91</sup> In 1998, Michigan voters defeated a PAS measure 71% to 29%.<sup>92</sup> Hawaiian legislators have been trying to pass pro-PAS legislation since 1999, when the House passed the Hawaii Death with Dignity Act only to have it blocked in the Senate, but have been continuously unsuccessful.<sup>93</sup> In 2005, the PAS measure did not even make it out of the House Health Committee.<sup>94</sup> In 2005, both Vermont and Arizona legislatures considered a law similar to Oregon's DWDA, but both of these failed.<sup>95</sup> Vermont's bill had majority support within the House Human Services Committee, but opponents were able to block the vote for the measure in 2005.<sup>96</sup>

### AMERICANS' VIEWS ON PAS

If recent polls are accurate, large majorities of Americans want the federal government at "arm's length" on highly personal issues, such as end-of-life-care and PAS.<sup>97</sup> In a poll by HCD Research, 64% of the public and 62% of physicians claimed that "physicians should be given the right to dispense prescriptions to patients to end their life."<sup>98</sup> A Gallup poll agreed with these results, showing 54% of physicians and 70% of the public agreed that physicians should be allowed to "help the patient end his or her life" with an overdose of medication.<sup>99</sup> Additionally, many Americans are willing to make a distinction

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<sup>90</sup> *Id.* See also *California's Assisted Suicide Bill Down for the Count in 2005; Authors Say They will Resurrect it in 2006*, International Task Force Update, v. 19, n. 2 (2005).

<sup>91</sup> California, *supra*, note 89.

<sup>92</sup> Human Life Alliance, *supra*, note 16.

<sup>93</sup> Olenchak, *supra*, note 1. See also *California, Hawaii & Vermont say "NO" to Assisted-Suicide Bills This Year*, International Task Force Update, v. 19, n.1 (2005).

<sup>94</sup> Say NO, *supra*, note 92.

<sup>95</sup> Olenchak, *supra*, note 1. The bills were: Vermont H.B. 168 and Arizona H.B. 2313. Both died when the state legislatures adjourned. *Id.*

<sup>96</sup> Say NO, *supra*, note 93.

<sup>97</sup> Brad Knickerbocker, *Why Oregon is at the Forefront of Change on End-of-Life Care*, The Christian Science Monitor, March 30, 2005, [www.christiansciencemonitor.com](http://www.christiansciencemonitor.com)

<sup>98</sup> Bill Theobald, *Poll Finds Support of Assisted Dying*, STATESMAN JOURNAL, Oct. 17, 2005, [www.statesmanjournal.com](http://www.statesmanjournal.com) The survey was conducted on Oct. 6-9, 2005 and asked of 677 physicians and 1057 people nationwide. *Id.*

<sup>99</sup> *Id.*

between actively helping someone die and passively letting someone die.<sup>100</sup> Surveys of practicing physicians show that about one in five will receive a request for PAS sometime in his/her career; between 5-20% of those requests are eventually honored.<sup>101</sup>

Opponents of Oregon's DWDA had predicted that a "wave of suicides" would follow its passage.<sup>102</sup> This never happened.<sup>103</sup> In fact, since 1997, only 208 people, of the 64,706 Oregonians dying, have used the law.<sup>104</sup> Additionally, it appears that Oregonians are able to die in a manner that most Americans want. In a recent Gallup poll, 90% of Americans claim they would want to die at home, if faced with the end stages of a terminal illness.<sup>105</sup> Oregon leads the US with the highest home death rates and the lowest hospital death rate.<sup>106</sup> Other recent surveys have shown that most Americans would support the removal of life support for themselves, their spouse or a child when it appears that there is no chance of recovery.<sup>107</sup> Although all 50 states have some type of advance directive (living will, durable power of attorney for healthcare) to allow people to state this wish legally, more Oregonians than any other state have living wills and/or medical directives on file to ensure medical treatments are declined in certain circumstances.<sup>108</sup>

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<sup>100</sup> Ethics in Medicine, University of Washington School of Medicine, *FAQs Physician-Assisted Suicide*.  
<http://eduserv.hscer.washington.edu/bioethics/topics/pas.html> (last accessed Oct. 29, 2005).

<sup>101</sup> *Id.*

<sup>102</sup> Knickerbocker, *supra*, note 97.

<sup>103</sup> *Id.*

<sup>104</sup> Oregon Department of Human Services, *Seventh Annual Report on Oregon's Death with Dignity Act*, 5, March 10, 2005.

<http://egov.oregon.gov/DHS/ph/pas/docs/year7.pdf> (last accessed Oct. 29, 2005)

<sup>105</sup> Knickerbocker, *supra*, note 97.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Human Life Alliance, *supra*, note 16. Knickerbocker, *supra*, note 97. Living wills are documents in which a person may ask not to be kept alive by artificial means if recovery seems improbable. *Id.*