






REFLECTIONS
ON DEATH AND DYING
Creating space for end-of-life
conversations



**ASSISTED DYING IN
THE UNITED STATES**

Part of Dying With Dignity Canada's First Annual Conference



 Thaddeus Pope
 January 27, 2022
 3:00 PM EST

1

**Assisted Dying in
the United States**

Thaddeus Mason Pope, JD, PhD, HEC-C
Death with Dignity Canada
January 27, 2022

2



3



4

Contrast
Canadian &
U.S. MAID

5

Roadmap

6

5

7

When

8

Where

9

Who

10

How

11

Next

12

When

13



14

Carter v. Canada
Feb. 6, 2015

15

Bill C-14
June 17, 2016

16



17

much
Earlier

18

>20 years

19

No U.S.
"Carter"

20

U.S. has
"Rodriguez"

21

1994

22



23



24



25



26

Right to MAID
under the
U.S. constitution

27



28



29

Right to refuse
treatment - **even**
life-sustaining

30

Equal
protection

31

Persons similarly
situated should
be treated **alike**

32

Terminally ill patients on MV may
withdraw MV



Terminally ill **not** on MV should
also have right to hasten death

33

>15
appellate judges
agreed

34

BUT

35



36

“no”

37



38

No federal right
↓
Turn to **states**

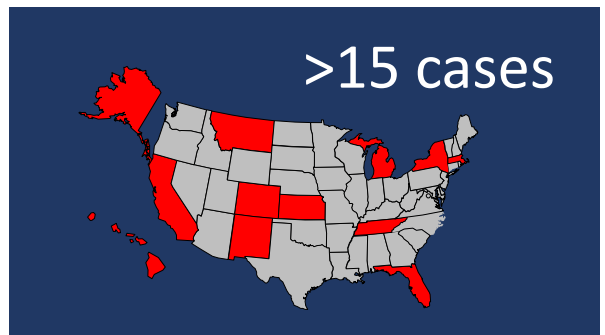
39

Litigation seeking
right to MAID in
state constitutions

40

State constitutions
broader stronger
individual rights

41



42

No success

43

Trial court win
Appellate loss

44



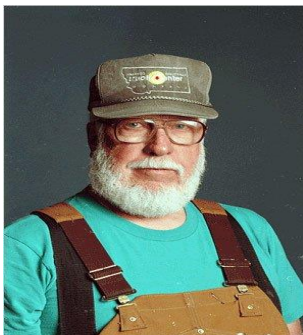
McIver
wins FL DCT

Reversed
FL SCT

45



46



Baxter
wins MT
DCT

Not
reached
MT SCT

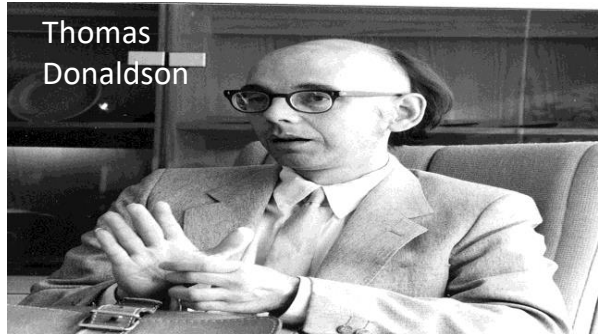
47

Trial court loss
Appellate loss

48



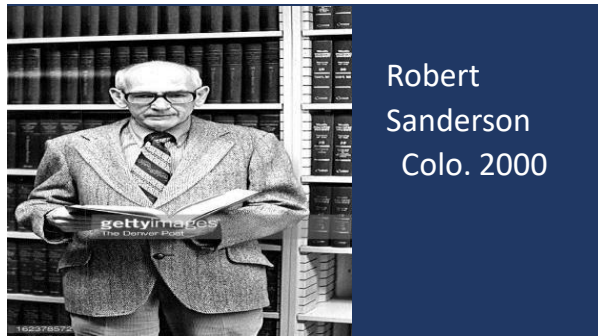
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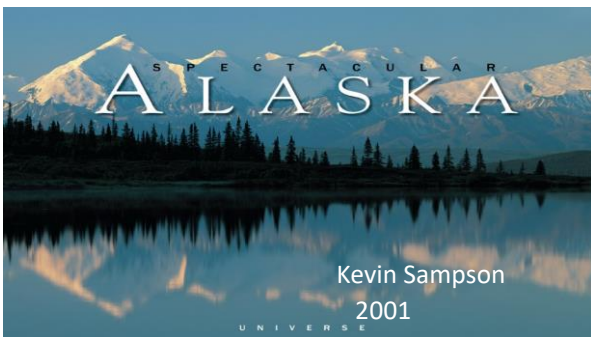
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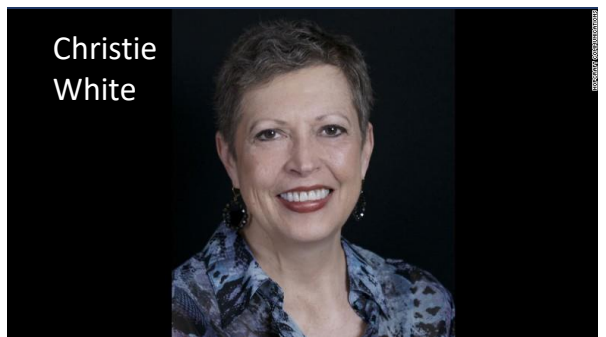
51



52



53

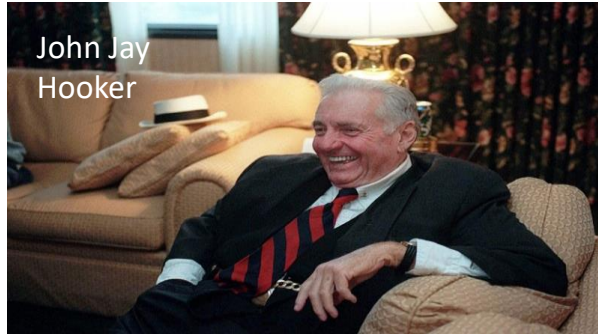


54



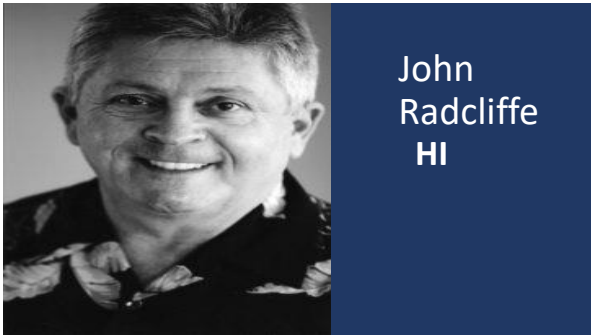
Christie
O'Donnell

55



John Jay
Hooker

56



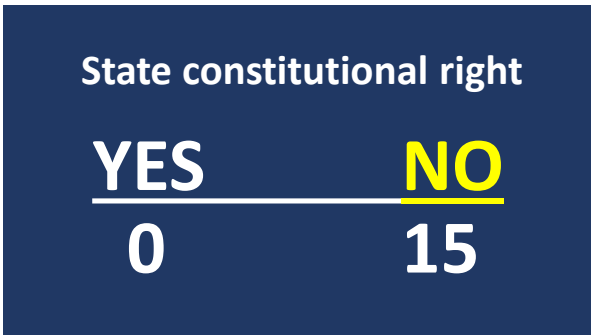
John
Radcliffe
HI

57



Sara
Myers

58



59

A dark blue rectangular box containing the text "Active case" in large, white, sans-serif font.

Active
case

60



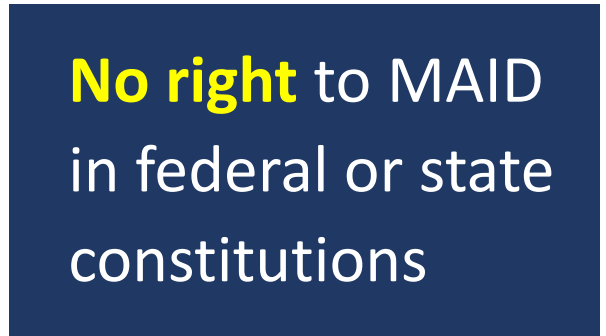
61



62



63



64



65



66

Why is that
necessary?

67

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

68



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

69

“Assisting suicide ...
aiding another in the
taking of his own life ...
fourth degree **felony.**”

NMSA § 30-2-4

70

MAID = AS
AS = felony

MAID = felony

71



72

“**consent** of
the victim ...
is a **defense**”

Mont. Code Ann. 45-2-211

73

Everywhere
else

74

Must **exclude**
MAID from AS

75

A diagram consisting of two circles on a dark blue background. The left circle is yellow and contains the text 'Assisted suicide'. The right circle is red and contains the text 'Aid in Dying'. A white diagonal line runs from the top-left to the bottom-right, separating the two circles.

76

State
statute

77

2 ways to
enact

78

Ballot
initiatives

Legislation

79

Ballot
initiatives

80



81

1988 California
1991 Washington
1992 California
1994 Michigan

82

FAIL

83

problem

84

BOTH
physician **and** patient
administered MAID

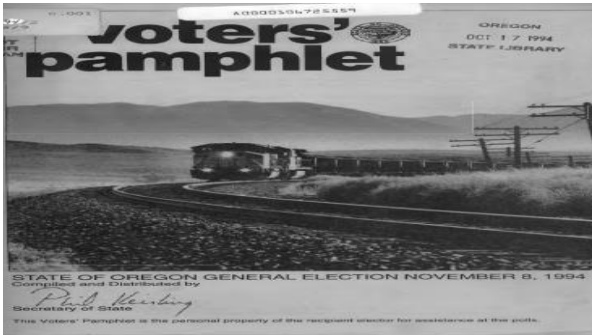
85

1994

86



87



88

Limited to patient
administered
(self ingestion)

89



90



91



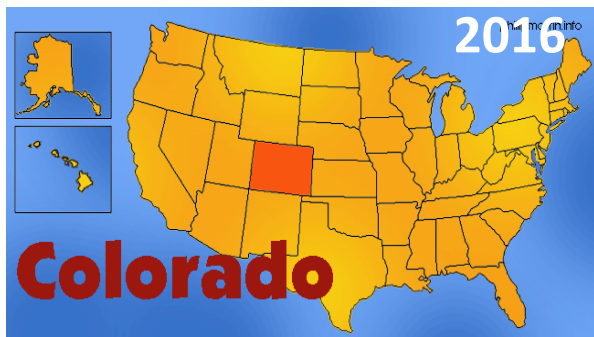
92

Ballot initiatives

93



94



95



96



97



98

Legislation

99



100



101



102



103



104



105



106



107



108



109

Recap

110

Started
1994

111

22 years
before C-14

112

BUT

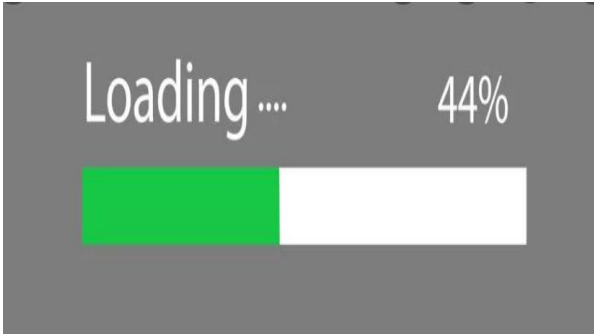
113

State by
state

114

1 at a time

115



116

Where

117



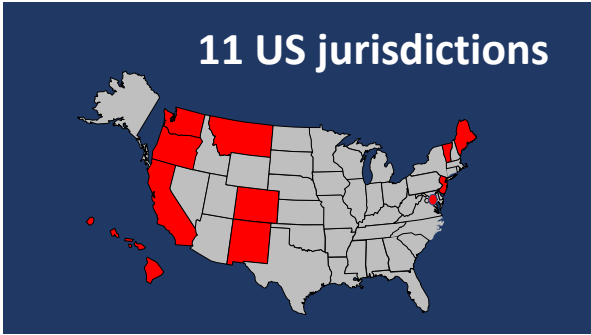
118



119



120



121

MAID criminally
illegal in 45/56
U.S. jurisdictions

122

BUT

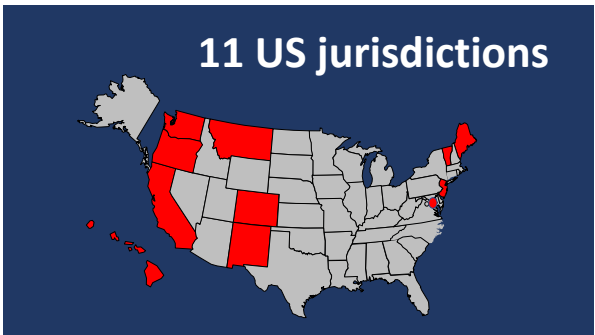
123

population

124



125



126

74,000,000

127

74m
330m



128

“1 in 5
Americans”

129

ongoing

130

>½ other states
consider bills
every year

131

2022

132

Connecticut
Delaware
Massachusetts
Minnesota
New York

133



134

More
states

135

More
accessible

136

BUT

137

Lawsuits
CA, NJ

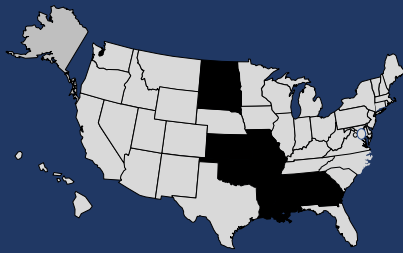
138

Repeal bills
NJ, MT, DC

139

unsuccessful

140



141

One more point on

Where

142

Residency

143



144

eligible for publicly
funded health care
services

145



146

MAID law at state
level → residency
at **state level**

147

“resident
of ___”

148



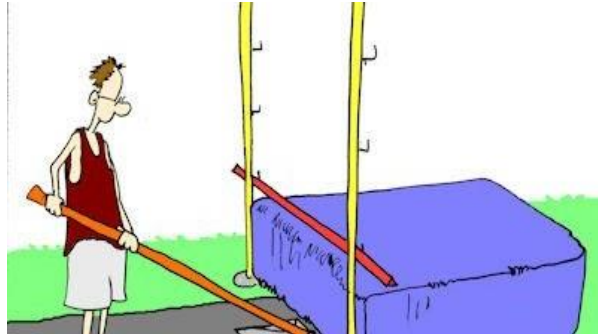
149

Confirmed
by attending
physician

150

Driver license
 Voter registration
 Tax return
 Own or **lease property**

151



152

BUT

153



154



155



156

WA patients
unwilling or unable
to become
OR residents

157

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

NICHOLAS GIDEONSE, M.D.,

Plaintiff,

Case No. 3:21-cv-1568

v.

KATE BROWN, in her official capacity as
Governor of Oregon; ELLEN BOENBILIM

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

158

Oregon **may not**
limit MAID to
Oregonians

159



160

“citizens of each state
shall be entitled to **all**
privileges ... of citizens
in [other] states.”

161

If plaintiffs
win lawsuit

162



163



164

When
Where

165

Who

166



167

Adult
Capacity
Informed consent

168

grievous & irremediable
medical condition

169

2016 - 2021
natural death be
reasonably foreseeable

170

Not a strict
temporal measure

171

Predictable **trajectory**
toward death

172

March 2021

RFND eliminated
altogether

173



174

Strict temporal
measure

175

Patient must be
terminally ill

176

“incurable and
irreversible disease that
... will ... result in death
within **six months**”

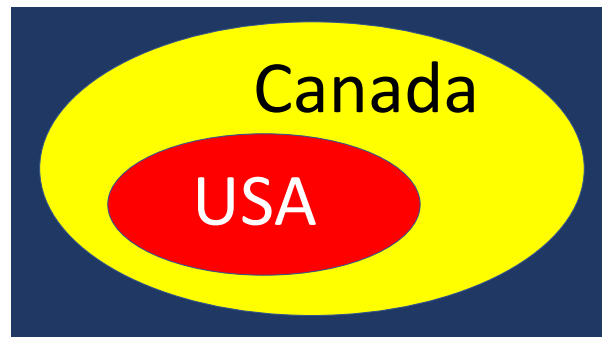
177

6 months

178



179



180

Reflected
in usage

181



182

2.5%

183



184



185

Varies
state to state

186



187



188



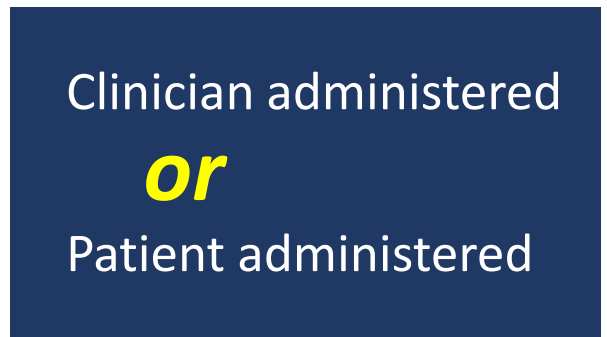
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190



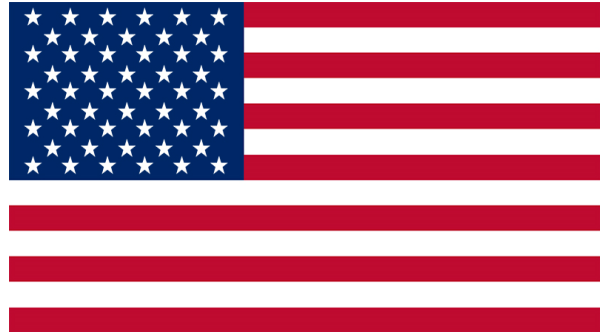
191



192

99.9%
clinician administered

193



194



195

Only & always
patient administered

196



197

Ask & receive
prescription
drug

198

Self-administer
to hasten death

199



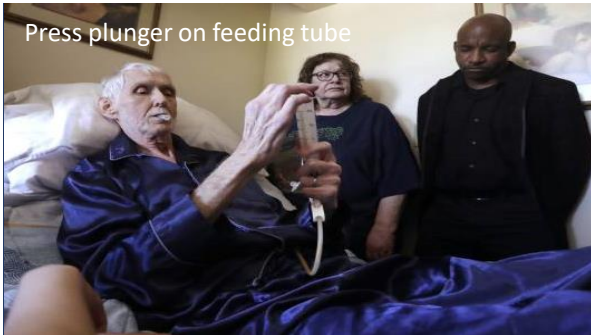
200

3

201



202



203



204

Others may help
prepare meds

205

May not help
administer meds

206

Patient alone
takes final overt act

207



208

Clinician
administers
medication

209

Present
100%

210



211

Clinician
prescribes
medication

212

Patient
administers
medication

213

Present
<50%

214

When Who
Where How

215

Next

216



217



218



219



220



221



222

MAID 1.0

223

2019 →

224



225

Access

226



227

Can patients
get it?

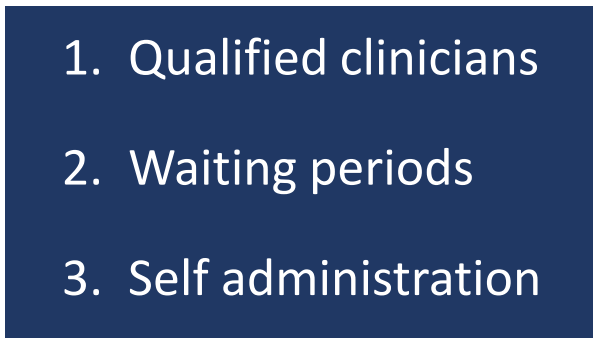
228



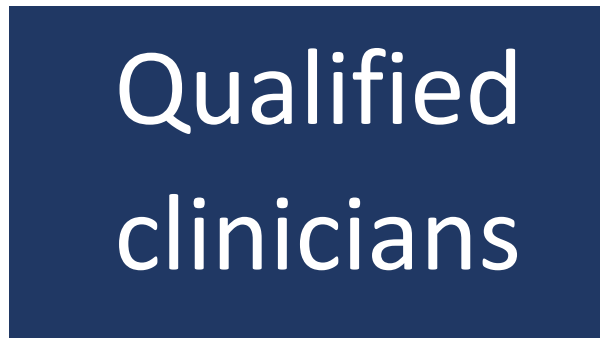
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230



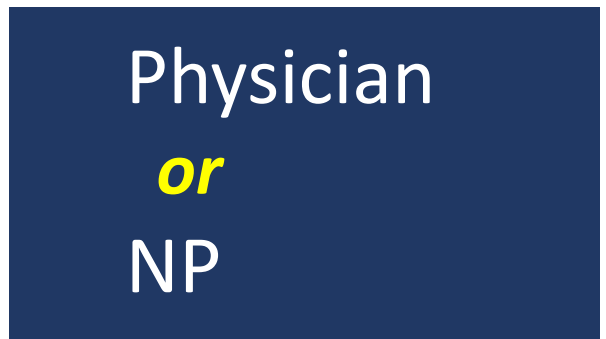
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232



233



234



235

Traditional rule

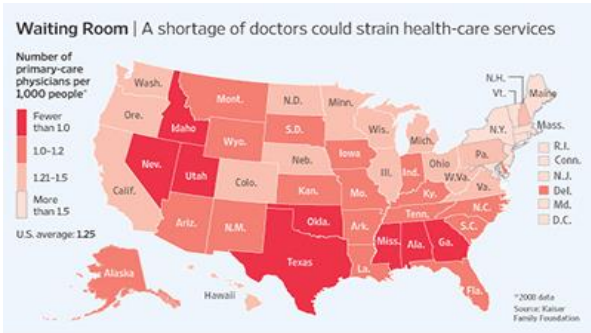
236

Eligibility confirmed by **both** attending **and** consulting physician

237

Attending + consulting clinician
MD or DO

238



239

Extend to
NP PA

240

| ENACTED | BILLS |
|---------|----------------------|
| NM | HI VA WA IN DE |

241

Waiting period

242



243

2016-2021
10-day wait period

244

Mar. 2021 →
No wait period

245



246

Traditional
rule

247

15 day
wait period

between requests

248



249

Assure
request
enduring

250

BUT

251

Undue
burden

cannot wait that long

252

During the process

Lost capacity 35%
Died 19%

To cite: Seller L,
Southillier M-E, Fraser V.
J Med Ethics
2019;45:106-111.

253

Response

254

Waive or
shorten
wait period

255

ENACTED

OR CA
NM

BILLS

HI WA
NC PA
AZ VT

256

Medication administration

257



258

Clinician administered
or
Patient administered

259

99.9%
clinician administered

260



261

Self-
administration

262

Patient alone
takes final overt act

263



264



265



266

BUT

267

| | | |
|---|---|--|
| <p>Early Stages of ALS</p> <ul style="list-style-type: none"> ▶ Muscle weakness ▶ Muscle twitching (fasciculation) ▶ Muscle cramping ▶ Fatigue ▶ Poor balance ▶ Slurred speech | <p>Middle Stages of ALS</p> <ul style="list-style-type: none"> ▶ More severe muscle weakness ▶ Paralysis in some muscles ▶ Difficulty in swallowing ▶ Difficulty in eating/chewing ▶ Breathing issues ▶ Bouts of uncontrollable laughter or crying (pseudobulbar affect) | <p>Late Stages of ALS</p> <ul style="list-style-type: none"> ▶ Paralysis in most muscles ▶ Extremely limited mobility ▶ Inability to speak ▶ Inability to breath without assistance ▶ Inability to eat without assistance ▶ Inability to drink without assistance |
|---|---|--|

268



269

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LONNY SHAVELSON, M.D., et al.,
Plaintiffs,
v.
CALIFORNIA DEPARTMENT OF
HEALTH CARE SERVICES, et al.,
Defendants.

Case No. [21-cv-06654-VC](#)

**ORDER DENYING MOTION FOR
PRELIMINARY INJUNCTION**

Re: Dkt. No. 15

270



271

EOLOA violates **Americans with Disabilities Act** because it discriminates against those physically unable to administer

272

Recap

273

3 moves to expand access

274

Expand qualified clinicians
Shorten waiting period
Permit assistance

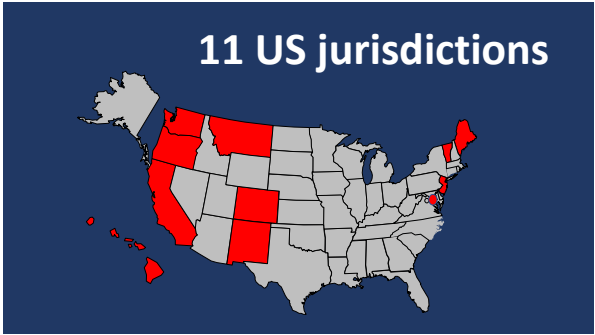
275

Conclusion

276

January 27
2022

277



278

2022

279

Additional
jurisdictions
NY MA MD DE

280

More **accessible**
Eligibility
Procedures

281

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W www.thaddeuspope.com
B medicalfutility.blogspot.com

282

References

283

Materials discussed in this presentation are available at

<http://thaddeuspope.com>

284

Neurologic Diseases and Medical Aid in Dying: Aid-in-Dying Laws Create an Underclass of Patients Based on Disability (with others).

THE RIGHT TO DIE: THE LAW OF END-OF-LIFE DECISIONMAKING (Wolters Kluwer Law & Business) (with Alan Meisel & Kathy L. Cerminara) (2022).

Medical Aid in Dying and Dementia Directives, 4(2) CANADIAN JOURNAL OF BIOETHICS 82-86 (2021).

285

Physician Assisted Dying. In: UpToDate, Post TW (Ed), UpToDate, Waltham, MA (2021) (with Tim Quill and Peggy Battin) (updated May 2021).

International Perspectives on Reforming End-of-Life Law, in INTERNATIONAL PERSPECTIVES ON END OF LIFE REFORM: POLITICS, PERSUASION, AND PERSISTENCE (Cambridge Univ Press 2021) (with others)

286

Medical Aid in Dying: Key Variations among U.S. State Laws, 14(1) JOURNAL OF HEALTH & LIFE SCIENCES LAW 25-59 (Oct. 2020).

Legal History of Medical Aid in Dying: Physician Assisted Death in U.S. Courts and Legislatures, 48(2) NEW MEXICO LAW REVIEW 267-301 (2018).

Medical Aid in Dying in Hawaii: Appropriate Safeguards or Unmanageable Obstacles? HEALTH AFFAIRS BLOG (August 2018) (with Mara Buchbinder).

287

Safeguards, in PHYSICIAN-ASSISTED DEATH: SCANNING THE LANDSCAPE 5-2 to 5-4 (National Academies of Science Engineering & Medicine 2018).

Medical Aid in Dying: When Legal Safeguards Become Burdensome Obstacles, ASCO POST (Dec. 25, 2017).

Oregon Shows that Assisted Suicide Can Work Sensibly and Fairly, 15(2) FINAL EXIT NETWORK NEWSLETTER 7 (May 2016).

288

Clinical Criteria for Physician Aid-in-Dying, 19(3) JOURNAL OF PALLIATIVE MEDICINE 259-262 (2016) (with David Orentlicher & Ben Rich).

The Changing Legal Climate for Physician Aid-in-Dying, 311(11) JAMA 1107-08 (2014) (with David Orentlicher and Ben A. Rich).

Oregon Shows that Assisted Suicide Can Work Sensibly and Fairly, NEW YORK TIMES - ROOM FOR DEBATE, Oct. 7, 2014.

Legal Briefing: Medical Futility and Assisted Suicide, 20(3) J. CLINICAL ETHICS 274-86 (2009).

289

Medical Futility Blog

Since 2007, I have been blogging, almost daily, to medicalfutility.blogspot.com. This blog focuses on reporting and discussing legislative, judicial, regulatory, medical, and other developments concerning end-of-life medical treatment conflicts. The blog has received **over 4 million** direct visits. Plus, it is redistributed through WestlawNext and other outlets.

290

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291