This paper offers a brief review of the current legal status of physician-assisted suicide and euthanasia in the United States. In the mid-1990s, it appeared that the Supreme Court might recognize a fundamental right to physician-assisted suicide. But, in 1997 the Supreme Court rejected constitutional challenges to laws banning assisted suicide. This was an exercise of judicial humility that the Court has not followed in the areas of abortion or in same-sex marriage. The 1997 Court decisions stalled the momentum in favor of physician-assisted suicide. The battle has largely shifted to a state-by-state debate that has largely been conducted outside the federal courts. A few states have recognized physician-assisted suicide but the overall situation has been relatively stable since the mid-1990s. There are, however, worrisome trends. In 2015, California, which accounts for over 12% of the population of the United States, legalized assisted suicide. Moreover, public opinion has moved in favor of assisted suicide in the last two years. International developments (particularly in Belgium) and the acceptance of withdrawal of treatment and terminal sedation illustrate the increasing acceptance of a quality of life ethic. Fortunately, the Supreme Court’s 1997 decisions have created an opportunity for those who support the sanctity of life ethic to advance their views and to resist the movement supporting a right to assisted suicide and euthanasia.

It is easy to forget that in the mid-1990s the momentum seemed to be all in favor of legalizing the “right to die,” either by legislative action or by judicial decisions striking down laws banning assisted suicide. A key support for this momentum was the United States Supreme Court’s 1992 decision in Planned Parenthood v. Casey. In Casey, the joint opinion infamously declared that “at the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, of the mystery of human life.” In the mid-1990s, some lower courts cited this expansive language in Casey in support of a fundamental right to assisted suicide. These opinions ignored the opposition to assisted suicide in our
history and tradition and appealed to Casey’s abstract rhetoric. These opinions regarded the broad language as “highly instructive” and “almost prescriptive” in resolving the assisted suicide issue. According to this view, “the right to die with dignity accords with American values of self-determination and privacy regarding personal decisions.”

Some lower courts in the mid-1990s also relied on an equal protection argument. In the course of invalidating New York’s ban on assisted suicide, the Second Circuit rejected the argument that there is a constitutionally significant difference between letting someone die (by withholding life sustaining medical treatment, including food and water) and taking affirmative steps to kill a person (by providing assistance for that person to take their own life).

In 1997, in Washington v. Glucksberg and Vacco v. Quill, however, the Supreme Court rejected the constitutional challenges to laws banning assisted suicide. The Court rejected the idea that there is a fundamental right to assisted suicide. In so doing, the Court refused to rely on the broad, abstract language from Casey and instead inquired whether there was any support for the view that a right to assisted suicide was deeply rooted in our Nation’s history and tradition. The Court carefully reviewed the relevant history and stated: “we are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State.” In Glucksberg, unlike in Roe v. Wade or in United States v. Windsor or in Obergefell v. Hodges, the Court was unwilling to take that step.

The Court also rejected the equal protection argument. The Court agreed with the view that there is a difference between letting a patient die (by refusing life-saving medical treatment) and killing a patient (by assisting in the patient’s suicide).
Glucksberg and Vacco v. Quill were enormously important decisions. The Court’s decisions largely moved the issue of assisted suicide out of the federal courts and left the issue largely to a state-by-state battle through the democratic process. In an era when we are accustomed to the federal courts assuming a dominant role on important social issues (abortion and same-sex marriage are two issues that immediately spring to mind), that approach seems almost quaint.

The 1997 Supreme Court decisions brought a halt to the momentum in favor of a right to assisted suicide and undermined the moral case in favor of assisted suicide. The United States Supreme Court decisions, which were of course limited to federal constitutional arguments, were greatly influential when state Supreme Courts in Florida and Alaska rejected arguments that there was a fundamental right to assisted suicide under the Florida and Alaska constitutions.

Since Glucksberg and Vacco v. Quill, the effort has largely shifted to a legislative battle. Here, supporters of assisted suicide have met with some success. Oregon’s Death with Dignity Act was passed in 1994 and went into effect in 1997; similar laws have been adopted in Washington and Vermont and, most importantly, California, which legalized assisted suicide as of June 9, 2016. A court decision in Montana has also opened the door to physician-assisted suicide in Montana. Other recent efforts to legalize assisted suicide have not, however, met with success.

Despite a few victories for the “right to die” movement, the situation in the United States has been relatively stable for the last two decades. There are now (as of July 2016) only five states where physician-assisted suicide is legal, although the recent legalization of assisted suicide in California (which accounts for more than 12% of the country’s population) is quite significant. Public opinion on assisted suicide has been relatively stable since Glucksberg, although public opinion has moved in favor of assisted suicide in the last two years. The situation would be vastly different if Glucksberg and Quill had come out the other way.
There are, however, worrisome trends. There is a slow but discernible trend towards the legalization of assisted suicide, which includes the enormously important legalization of assisted suicide in California. Developments in the Netherlands and Belgium, in particular, give one great cause for concern. Belgium’s recent extension of its euthanasia law to children is a cause of particular concern. Moreover, physician assisted suicide is now also legal in Canada. These international developments are some indication of broader cultural trends in the West about assisted suicide. It is interesting that these countries were also among the earliest countries to legalize same-sex marriage, which the United States Supreme Court held was constitutionally required in 2015.

Beyond the international developments, the most significant concerns are some very worrisome cultural trends, particularly the collapse of the sanctity of life ethic. Until quite recently, the Western tradition has reflected a clear position—that one cannot intend to take the life of an innocent human person. The basis for this view is that human life has been regarded as a basic human good—and that one cannot act against a basic human good. The basic idea is that one cannot do evil that good might come from it. So, it has never been regarded as permissible to kill an innocent human person for some good reason (to see their suffering and that of their loved ones come to an end; for research purposes; or to prevent their sizeable estate from being squandered on futile medical expenses). The acceptance of exceptions, even supposedly narrow ones, is devastating.

Tragically, this bridge has already been crossed in the United States, and not just in the states that allow physician-assisted suicide. We have seen this, although I don’t think this has been adequately recognized, in the withdrawal of treatment situations. Most of these cases have involved patients who were diagnosed as being in a persistent vegetative state. In many of these cases, the withdrawal of food and water has been done in situations that historically would have been regarded as homicides or suicides. The basic choice in these cases is a conscious choice to end a human life because the life of
such a patient is not regarded as worth living. In fact, some of the opinions refer to such patients as “non-persons”—because they lack certain abilities they are already dead.

Many of these opinions quite candidly adopt a quality of life ethic. An opinion from a Michigan court stated that “the state’s interest in the preservation of life relates to meaningful life.” These opinions have an eerie echo of the passages in Justice Blackmun’s opinion in Roe v. Wade in which he noted that the state only had a compelling interest in “meaningful life outside the mother’s womb[,]” and his conclusion that “the unborn have never been recognized in the law as persons in the whole sense.” It is this idea—that we can define some human beings as non-persons, as not worthy of the same degree of protection and care as the rest of us—that is so alarming. One court referred to the lives of the patients involved in the withdrawal of treatment cases as involving “bare existence.” Another described these human lives as involving “mere corporeal existence” and noted that the “burden of maintaining the corporeal existence degrades the very humanity it was meant to serve.” In such instances, the patient might well, the court concluded, consider such an existence “to be degrading and without human dignity.” The dissent in that case rightly commented: “By its very nature, every human life, without reference to its condition, has a value that no one can rightfully deny or measure. Recognition of that truth is the cornerstone on which American law is built. Society’s acceptance of that fundamental principle explains why, from time immemorial, society through law has extended its protection to all, including, especially, its weakest and most vulnerable members. The court’s implicit, if not explicit, declaration that not every human life has sufficient value to be worthy of the State’s protection denies the dignity of all human life, and undermines the very principle on which American law is constructed.” The logic of these cases, although I don’t think this has been adequately appreciated, is that there are some lives that are not worth living. Or put another way, the logic is that some persons would be better off dead.
This position leads to the invocation of a false idea of mercy in support of assisted suicide. If a person would be better off dead, then it is thought that it is act of mercy to kill them. But, this is really a false sense of mercy or a false sense of compassion, as Pope Francis has stated. When we recognize the dignity and value of every human life, we recognize that the appropriate response is a true sense of compassion—of suffering with not abandoning that person.

The position that some people are better off dead though is deeply ingrained in the law, and it is in fact quite supportive of the move towards legalizing physician-assisted suicide or euthanasia. Thus far, with the exception of the states noted above, the law has clung to the practical if not always logical distinction between active and passive steps to end a life. The Supreme Court in part relied on this distinction in rejecting the constitutional attacks on state laws banning assisted suicide. Yet, the passive-active, the omission-commission line is unstable and in fact has never been regarded as dispositive by the criminal law. In many instances, there is a real equivalence between treatment withdrawals and instances of physician-assisted suicide and euthanasia.

There are some cases when there is rational distinction between killing and letting die, but this doesn’t apply to many of the treatment withdrawal cases. In many of these cases, the lives of the patients are regarded as a burden, and thus the treatment withdrawal constitutes a choice to kill rather than the removal of a burdensome treatment. The cases claim to reject the permissibility of lethal choices, yet many of the cases plainly do endorse such choices. The cases reject the permissibility of active killing but accept the permissibility of intentional killing by omission. The lethal choice is being endorsed because of the view that the lives of these patients are not worth living. The widespread acceptance of that principle is laying the groundwork for the eventual legal acceptance of physician-assisted suicide. So, too are the frequent instances of euthanasia practiced under the cover of palliative sedation. This misuse of palliative sedation is sometimes referred to as “covert” or “stealth” euthanasia.
This use of palliative or terminal sedation is a way, one scholar noted, of “pulling the sheet over our eyes.”

Moreover, trends in decisions from the US Supreme Court are quite troubling. Obergefell v. Hodges suggests that the United States Supreme Court might assume a more significant role in the assisted suicide debate. The principal basis for the Court’s holding that laws defining marriage as the union between one man and one woman are unconstitutional was the controversial doctrine of substantive due process. The Court reaffirmed its commitment to the autonomy perspective and disavowed Glucksberg’s cautious methodology. Obergefell opens the prospect that the doctrine might be used to invalidate laws banning assisted suicide.

Since Obergefell, there have been two noteworthy state court decisions considering the constitutionality of laws banning assisted suicide. Those challenging these laws relied heavily on Obergefell. In Morris v. Brandenburg and Myers v. Schneiderman, however, courts in New Mexico and New York rejected challenges to state laws banning assisted suicide. Both courts rejected arguments that Obergefell had implicitly overturned Glucksberg and Quill. These courts’ cautious, humble approach to the exercise of judicial review allows the democratic debate in those states to continue. These courts seem to be waiting for the United States Supreme Court to extend the reasoning of Obergefell to the assisted suicide situation. Unfortunately, I think the Court will do just that when it is next faced with that opportunity. This is by no means inevitable. The Court is greatly influenced by developing trends and it is still an open question where the trends will go on this issue.

In sum, there is a mix of good and bad news. The good news is that the movement in favor of assisted suicide and euthanasia that seemed to be in the ascendancy in the mid-1990s seems to have stalled. The situation has been relatively stable for the last two decades, although recent developments (since 2014) reflect a slow but discernible trend in favor of assisted suicide. The Supreme Court’s 1997
decisions left the issue to the democratic process and those who oppose physician-assisted suicide and euthanasia have had the opportunity to advance their views without the distorting effect of the Court’s “help.”

Yet, there are some disturbing signs. The international developments in the Netherlands and Belgium (which were also the first two nations to legalize same-sex marriage) are cause for serious concern, as is the recent legalization of assisted suicide in Canada. Moreover, here in the United States, we have seen a collapse of the sanctity of life ethic in the withdrawal of treatment cases and with the common use of palliative sedation as a means of “slow euthanasia.” The law in the United States still, though, largely rejects the idea that active steps to end a life are permissible.

There is, then, still an opportunity for those who support the sanctity of life ethic to advance their views. We should avoid the temptation to think that there is some inevitable movement in favor of physician-assisted suicide and euthanasia. Although that seemed to be the case with regard to abortion, the pro-life movement (even with Roe v. Wade and Casey) has continued to make progress in moving the law and popular opinion in a pro-life direction. We need to build a reverence for life on many issues. We need to oppose the culture of death on many fronts, and work unceasingly to build the culture of life and love and truth.