

# EUTHANASIA, ETHICS AND PUBLIC POLICY BY JOHN KEOWN

*Reviewed by Richard S. Myers*<sup>†1</sup>

## PART I. INTRODUCTION

The publication of the second edition of John Keown's study of euthanasia is an important development.<sup>2</sup> *Euthanasia, Ethics and Public Policy: An Argument Against Legalisation* was first published in 2002.<sup>3</sup> Much has happened since that time. In the new edition, Keown does an admirable job of updating the earlier work. The second edition provides a wealth of information and critical analysis of the issues involved. The work is marked by a sophisticated analysis of the legal issues and by an acute understanding of the actual practice of assisted suicide and euthanasia in those jurisdictions that have legalized these practices. His analysis should inform the ongoing debate about these practices. In this reviewer's estimation, Keown makes a compelling case against their legalization. This second edition deserves a wide readership.

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<sup>†</sup> Professor of Law, Ave Maria School of Law.

1. This article draws from several previously published articles of mine. See Richard S. Myers, *The Constitutionality of Laws Banning Physician Assisted Suicide*, 31 BYU J. PUB. L. 395 (2017) [hereinafter Myers, *Constitutionality*]; Richard S. Myers, *Obergefell and the Future of Substantive Due Process*, 14 AVE MARIA L. REV. 54 (2016) [hereinafter Myers, *Obergefell*]; Richard S. Myers, *Re-Reading Roe v. Wade*, 71 WASH. & LEE L. REV. 1025 (2014) [hereinafter Myers, *Re-Reading*]; Richard S. Myers, *Pope John Paul II, Freedom, and Constitutional Law*, 6 AVE MARIA L. REV. 61 (2007) [hereinafter Myers, *Freedom*]; Richard S. Myers, *An Analysis of the Constitutionality of Laws Banning Assisted Suicide from the Perspective of Catholic Moral Teaching*, 72 U. DET. MERCY L. REV. 771 (1995) [hereinafter Myers, *Catholic Moral Teaching*]. To avoid multiplying footnotes, I will not always indicate where I have drawn from these articles.

2. JOHN KEOWN, *EUTHANASIA, ETHICS AND PUBLIC POLICY: AN ARGUMENT AGAINST LEGALISATION* (2d ed. 2018).

3. JOHN KEOWN, *EUTHANASIA, ETHICS AND PUBLIC POLICY: AN ARGUMENT AGAINST LEGALISATION* (2002).

## PART II. LEGAL BACKGROUND

Assisted suicide and euthanasia are increasingly important issues.<sup>4</sup> The movement to legalize PAS and VAE has been met with increasing success in recent years.<sup>5</sup> When the United States Supreme Court first addressed the constitutionality of laws banning assisted suicide in 1997,<sup>6</sup> assisted suicide had not been legalized in any state.<sup>7</sup> PAS is now legal in California,<sup>8</sup> Colorado,<sup>9</sup> Hawaii,<sup>10</sup> Maine,<sup>11</sup> Montana,<sup>12</sup> New Jersey,<sup>13</sup> Oregon,<sup>14</sup> Vermont,<sup>15</sup> Washington,<sup>16</sup> and the District of Columbia.<sup>17</sup> International trends have also moved in favor of PAS and VAE.<sup>18</sup> I should note, however, that these developments have not moved in a straight line. Some states have recently rejected proposals to legalize assisted suicide or have strengthened laws banning assisted suicide.<sup>19</sup> And certain countries have rejected efforts to

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4. Many of the key terms dealing with assisted suicide and euthanasia are used in different ways. Here is how Keown defines key terms: Physician assisted suicide (PAS) is the intentional active assistance by a physician in a patient's suicide; physician or nurse practitioner-assisted suicide (PNAS) is when the suicide is assisted by a physician or a nurse practitioner. Voluntary active euthanasia (VAE) is euthanasia (the intentional termination of life by an act of a doctor who thinks that death is a benefit for the patient) at the request of the patient. Non-voluntary active euthanasia (NVAE) is euthanasia of those who do not have ability to request euthanasia. Involuntary active euthanasia (IVAE) is euthanasia against the wishes of a competent patient.

5. See Nicola Davis, *Euthanasia and Assisted Dying Rates Are Soaring. But Where Are They Legal?*, GUARDIAN (July 15, 2019), <https://www.theguardian.com/news/2019/jul/15/euthanasia-and-assisted-dying-rates-are-soaring-but-where-are-they-legal>.

6. See *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997).

7. Oregon had legalized PAS in 1994, but the law did not go into effect until late in 1997, which was several months after the Supreme Court's decisions. Stephanie Villiers, *25 Years Ago, Voters Passed Oregon's Death with Dignity Act*, KGW8 (Nov. 8, 2019), <https://www.kgw.com/article/news/health/death-with-dignity-25-years/283-baf7fc2a-988f-4c3e-8213-7562c878e3b8>.

8. End of Life Option Act, CAL. HEALTH & SAFETY CODE § 443 (West 2019).

9. Colorado End-of-Life Options Act, COLO. REV. STAT. § 25-48-101 (2019).

10. Our Care, Our Choice Act, HAW. REV. STAT. ANN. § 327L-1 (LexisNexis 2019).

11. Maine Death with Dignity Act, ME. STAT. tit. 22, § 2140 (2019).

12. See *Baxter v. State*, 224 P.3d 1211, 1217, 1220–22 (Mont. 2009). In *Baxter*, the Supreme Court of Montana held that a doctor who assisted in the death of a terminally ill, mentally competent patient would be immune from a homicide prosecution. The Court did not reach the broader state constitutional issue of whether there was a constitutional “right to die with dignity.” *Id.* at 1214, 1222.

13. Medical Aid in Dying for the Terminally Ill Act, N.J. STAT. ANN. § 26:16-1 (West 2019).

14. Oregon's Death with Dignity Act, OR. REV. STAT. § 127.800 (2019).

15. Patient Choice at End of Life, VT. STAT. ANN. tit. 18, § 5281–93 (2019).

16. Washington Death with Dignity Act, WASH. REV. CODE § 70.245 (West 2019).

17. D.C. CODE § 7-661.01–7.661.17 (2019).

18. See Davis, *supra* note 5 (noting Australian state of Victoria recently legalized assisted suicide).

19. See KEOWN, *supra* note 2, at 464; see also Richard S. Myers, *Ohio Makes Assisted Suicide a Felony*, U. FAC. FOR LIFE WEBLOG & NEWS (Dec. 13, 2016), <http://www.uffl.org/blog/2016/12/13/ohio>

legalize assisted suicide.<sup>20</sup> There is, though, a slow, discernible trend in favor of legalization. Moreover, public opinion seems to be moving in favor of assisted suicide in the last few years, after a long period of relative stability on the issue.<sup>21</sup>

In the United States, though, this change towards legalization has not been due to court decisions. Unlike other areas of intense social controversy, such as abortion and same-sex marriage, the courts have not been the prime movers in bringing about social change.<sup>22</sup>

In dealing with assisted suicide, the courts in the United States have largely been models of judicial restraint. In the mid-1990s, some lower courts did strike down laws banning assisted suicide.<sup>23</sup> These courts relied on the infamous mystery passage from *Planned Parenthood v. Casey*<sup>24</sup> in which the joint opinion stated: “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>25</sup> These lower courts 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.<sup>26</sup> According to this view, “[t]he right to die with dignity accords with the American values of self-determination and privacy regarding personal decisions.”<sup>27</sup>

But when the issue reached the United States Supreme Court in 1997, the Court in *Washington v. Glucksberg* and *Vacco v. Quill* rejected constitutional challenges to state laws banning assisted suicide. In so doing, the Court rejected the idea that there is a fundamental constitutional right to assisted suicide. The Court refused to rely on the broad, abstract language from *Casey* and instead asked whether there was any support for the view that a right to

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makes-assisted-suicide-a-felony/ (citing Wesley J. Smith, *Ohio Making Assisted Suicide a Felony*, NAT’L REV. (Dec. 12, 2016), <https://www.nationalreview.com/corner/ohio-making-assisted-suicide-felony/>).

20. KEOWN, *supra* note 2, at 465–66.

21. See Richard S. Myers, *Physician-Assisted Suicide and Euthanasia in the United States: A Current Legal Perspective*, in LIFE & LEARNING XXIV: THE PROCEEDINGS OF THE TWENTY-FOURTH UNIVERSITY FACULTY FOR LIFE CONFERENCE 27, 34 (Joseph W. Koterski ed., 2017) (noting trend in favor of assisted suicide).

22. See Richard S. Myers, *The Virtue of Judicial Humility*, 13 AVE MARIA L. REV. 207 (2015) [hereinafter Myers, *Judicial Humility*].

23. See Myers, *Catholic Moral Teaching*, *supra* note 1, at 778–79 (discussing lower court opinions).

24. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

25. *Id.* at 851. For critical commentary on this understanding of freedom, see Myers, *Freedom*, *supra* note 1.

26. *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1459 (W.D. Wash. 1994).

27. *Compassion in Dying v. Washington*, 49 F.3d 586, 596 (9th Cir. 1995) (Wright, J., dissenting).

assisted suicide was deeply rooted in our Nation's history and tradition. The Court carefully reviewed the relevant history and concluded:

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.<sup>28</sup>

In this context, unlike in *Roe v. Wade*<sup>29</sup> and *Obergefell v. Hodges*,<sup>30</sup> the Court was unwilling to take that step. The Court noted that “[t]hroughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.”<sup>31</sup>

Since *Glucksberg*, the effort to legalize assisted suicide has moved outside of the federal courts. There have been some efforts made in state courts, but the state courts have largely followed *Glucksberg*'s lead and exercised judicial restraint. This was true in decisions soon after *Glucksberg*. For example, in *Krischer v. McIver*, the Florida Supreme Court rejected the argument that there was a fundamental right to assisted suicide under the Florida State Constitution.<sup>32</sup> The Court was greatly influenced by the United States Supreme Court decisions rejecting the federal constitutional arguments against the constitutionality of laws banning assisted suicide.<sup>33</sup> Similarly, in *Sampson v. State*, the Supreme Court of Alaska rejected state constitutional arguments against Alaska's ban on assisted suicide.<sup>34</sup> Here, too, the United States Supreme Court's opinions had a significant influence on the state court.<sup>35</sup>

More recently, the highest courts in New Mexico and New York rejected constitutional challenges to state laws banning assisted suicide. In 2016, in

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28. *Washington v. Glucksberg*, 521 U.S. 702, 723 (1997).

29. *Roe v. Wade*, 410 U.S. 113 (1973). For commentary on *Roe v. Wade*, see Myers, *Re-Reading*, *supra* note 1.

30. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). For discussion of the possible impact of *Obergefell* on the constitutionality of laws banning assisted suicide, see Myers, *Constitutionality*, *supra* note 1 and Myers, *Obergefell*, *supra* note 1.

31. *Glucksberg*, 521 U.S. at 735.

32. *Krischer v. McIver*, 697 So. 2d 97, 104 (Fla. 1997).

33. See Richard S. Myers, *Physician-Assisted Suicide and Euthanasia: A Current Legal Perspective*, in *LIFE & LEARNING XI: THE PROCEEDINGS OF THE ELEVENTH UNIVERSITY FACULTY FOR LIFE CONFERENCE 3*, 10 n.49 (Joseph W. Koterski ed., 2002) [hereinafter Myers, *Physician-Assisted Suicide*].

34. *Sampson v. State*, 31 P.3d 88, 95 (Alaska 2001).

35. Myers, *Physician-Assisted Suicide*, *supra* note 33, at 10 n.52.

*Morris v. Brandenburg*, the New Mexico Supreme Court unanimously upheld New Mexico's ban on assisted suicide.<sup>36</sup> The Court principally relied on *Glucksberg*.<sup>37</sup> The New Mexico Court seemed influenced by the longstanding and still largely persisting tradition in the law opposing assisted suicide.<sup>38</sup> The Court also emphasized the complexity of the issues involved and took the view that such matters were better left to the legislative and executive branches.<sup>39</sup> In 2017, in *Myers v. Schneiderman*, the New York Court of Appeals unanimously reached the same result.<sup>40</sup> In *Myers*, the New York justices were also heavily influenced by *Glucksberg* and *Vacco*.<sup>41</sup>

One benefit of this exercise of judicial humility is that the ongoing debate can be informed by the experience in jurisdictions where assisted suicide has been legalized.<sup>42</sup> States are serving as laboratories of experiment.<sup>43</sup> And the experience in other jurisdictions has proven to be extremely important when the legalization of assisted suicide is considered. Yet, there are wildly divergent interpretations of what the evidence demonstrates and what those lessons are. For example, several courts have considered the argument that laws banning assisted suicide are necessary because of the risks of abuse that might result if assisted suicide were legalized in what purported to be a limited form. A number of courts have relied on this concern and rejected constitutional challenges to laws banning assisted suicide. *Glucksberg* is a good example. There, the Court specifically relied on evidence about the Dutch experience and concluded that "the case for a slippery slope has been made out . . . ."<sup>44</sup> The same concern was also expressed by the Supreme Court of Ireland, the United Kingdom Supreme Court, and the European Court of Human Rights.<sup>45</sup>

More recently, an important ruling from the highest court in New York evaluated the empirical evidence in the same way. Judge Fahey's concurring opinion in the New York case was particularly strong on this point. In fact, he

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36. *Morris v. Brandenburg*, 376 P.3d 836 (N.M. 2016).

37. *Id.* at 844–49.

38. *Id.* at 848–49.

39. *Id.* at 855–57.

40. *Myers v. Schneiderman*, 85 N.E.3d 57 (N.Y. 2017).

41. *Id.* at 63–65.

42. *Myers*, *Judicial Humility*, *supra* note 22, at 213–14 (making this point).

43. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

44. *Washington v. Glucksberg*, 521 U.S. 702, 733 n.23 (1997).

45. *See KEOWN*, *supra* note 2, at 418–22, 465–67, 476–81.

wrote “separately to expand on certain risks that would be associated with legalizing PAS in New York and that justify its prohibition.”<sup>46</sup> Judge Fahey explained that “[t]he practice of physician-assisted suicide and euthanasia in the Netherlands provides us with a disturbing preview of what it would be rational to expect upon legalization.”<sup>47</sup> In the end, after a very careful review, Judge Fahey concluded:

The evidence from other countries is that legitimating physician-assisted suicide can lead to the acceptance of non-voluntary euthanasia and to the extension of physician-assisted suicide to patients, such as those suffering from depression, who are not terminally ill. Such developments, valuing the avoidance of suffering above all virtues of endurance and hope for the future, should be intensely disturbing to all of us. The risk of facilitating such a bleak prospect is a rational justification for New York’s prohibition of assisted suicide.<sup>48</sup>

In contrast, the Supreme Court of Canada in its 2015 decision in *Carter v. Canada*<sup>49</sup> departed from this line of cases.<sup>50</sup> In so doing, the *Carter* Court relied significantly on the trial court judge’s findings. The trial judge “concluded . . . that ‘a permissive regime with properly designed and administered safeguards was capable of protecting vulnerable people from abuse and error.’”<sup>51</sup> In so finding, the trial judge rejected the argument that the experiences in other jurisdictions ought to provide a basis for judicial caution. As Keown commented: “the fate of Canada’s law on this monumentally important moral and social issue turned on a finding of fact by a single trial court judge, a finding which was, moreover, erroneous.”<sup>52</sup> Although the Supreme Court of Canada relied on this finding in its 2015 decision,<sup>53</sup> the *Carter* ruling is largely an aberration, at least so far as judicial opinions reflect.<sup>54</sup>

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46. *Myers v. Schneiderman*, 85 N.E.3d 57, 78 (N.Y. 2017) (Fahey, J., concurring).

47. *Id.* at 80 (Fahey, J., concurring).

48. *Id.* at 87 (Fahey, J., concurring).

49. *Carter v. Canada*, [2015] 1 S.C.R. 331 (Can.).

50. For a critique of the *Carter* case, see Richard S. Myers, *A Critique of Carter v. Canada* (May 22, 2015) (copy on file with author) [hereinafter Myers, *Critique*].

51. KEOWN, *supra* note 2, at 415 (quoting *Carter v. Canada*, [2015] 1 S.C.R. 331, para. 105 (Can.)).

52. *Id.*

53. *Id.* at 464–65.

54. Justice Rivera’s concurring opinion in *Myers v. Schneiderman*, 85 N.E.3d 57, 65–78 (N.Y. 2017) (Rivera, J., concurring) also claimed that there is no evidence of abuse. Judge Rivera’s concurring opinion rejected the slippery slope concerns. *Id.* at 75 n.10 (Rivera, J., concurring). Judge Rivera’s opinion sounded at times like a dissent, *see* Richard M. Doerflinger, *New York Courts Rule Against “Aid in Dying” and*

## PART III. KEOWN'S CONTRIBUTION TO THE ONGOING DEBATE

There is, it is clear, a pressing need for sound scholarship evaluating the experience in jurisdictions that have legalized assisted suicide or euthanasia. The issue involved—about how to deal with what are sometimes called “legislative” as opposed to “adjudicative” facts—is quite complex.<sup>55</sup> Scholarship addressing these issues must be informed by an understanding of the legal and philosophical issues and by a careful study of the actual practice of assisted suicide and euthanasia.

That is precisely what Keown offers. The first edition (which was published in 2002) focused largely on the experience in the Netherlands. The second edition (sixteen years later) updates the analysis of the situation in the Netherlands and provides new chapters dealing with the situations in other jurisdictions (e.g., Belgium, Canada, and Oregon) that have legalized assisted suicide. Keown's careful scholarship will provide judges and other decisionmakers with an accurate picture of the experiences in these jurisdictions.

*Euthanasia, Ethics and Public Policy* is styled as an argument against the legalization of assisted suicide and euthanasia. Keown notes that there are a variety of arguments against legalization of PAS and VAE. He mentions two main types of arguments. First, there is the basic moral case against legalization. This argument rests on the state interest in prohibiting assisted suicide to protect human life. The idea here is that human life is intrinsically valuable, even if the quality of the life is diminished in some way. This argument seems less and less persuasive in our society, which increasingly emphasizes quality of life notions.

Keown has (principally in other writing) made the basic moral case against assisted suicide and euthanasia.<sup>56</sup> In so doing, he has emphasized the importance of the inviolability (or the sanctity) of life principle, and its corollary—the prohibition against intentionally taking the life of an innocent

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*Warn of Its Dangers*, PUB. DISCOURSE (Sept. 29, 2017), <https://www.thepublicdiscourse.com/2017/09/20144/>, but in any event did not reflect the views of the majority of the New York Court of Appeals. Judge Rivera relied in part on an old article by Margaret Battin. See *Schneiderman*, 85 N.E.3d at 75 n.10 (Rivera, J., concurring). Judge Fahey also conceded the points made in Battin's article that rejected some of the slippery slope concerns, *id.* at 84 (Fahey, J., concurring), although Judge Fahey was most likely wrong to do so. See Doerflinger, *supra*; KEOWN, *supra* note 2, at 418–20.

55. See Myers, *Critique*, *supra* note 50.

56. KEOWN, *supra* note 2, at 35–89 *passim*. See also NEIL M. GORSUCH, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA 157–180 (2006) (setting forth a moral argument against the legalization of assisted suicide and euthanasia).

human person.<sup>57</sup> As the House of Lords Select Committee on Medical Ethics stated in the mid-1990s: “the prohibition on intentional killing is the ‘cornerstone of law and of social relationships’ that ‘protects each one of us impartially, embodying the belief that all are equal.’”<sup>58</sup>

Second, there are various prudential arguments against legalization. The idea is that it is necessary to prohibit these practices to avoid risks of abuse, particularly to vulnerable groups such as the poor, elderly, and disabled. Even if these practices might be warranted in certain narrow cases, retaining the prohibition is necessary to avoid the logical and practical slippery slopes. The limited scope of the right to die that was initially sought by the right to die movement would not be maintained, and these practices would greatly expand beyond the narrow situations that have more widespread support.

In *Euthanasia, Ethics and Public Policy*, Keown primarily addresses the slippery slope arguments.<sup>59</sup> He discusses the logical slippery slope by which he means the idea that quality of life exceptions to the prohibition against intentional killing cannot logically be contained. Advocates for assisted suicide typically argue that the right they seek is limited to narrow categories—the terminally ill, those facing unbearable pain, etc. Keown demonstrates that the narrow, limited form of the right cannot be maintained, and that those entitled to assistance in their suicide will inevitably (logically) expand. Moreover, once a doctor is prepared to make a judgment that the life of a patient who has requested assistance in dying is not worth living, this will logically be extended to those who cannot make such a request (i.e., the incompetent).<sup>60</sup> He also discusses the empirical (or practical) slippery slope argument. The idea here is that the procedural safeguards in legal regimes allowing assisted suicide or euthanasia cannot, or do not, effectively control the practice.<sup>61</sup>

In *Euthanasia, Ethics and Public Policy*, Keown focuses principally on whether the legalization of assisted suicide can be effectively controlled. In considering the “effective control” issue, Keown (in the first edition; 2002) focused primarily on the experience in the Netherlands, the jurisdiction with the longest experience with PAS and VAE. His careful review of the evidence led him to three conclusions: (1) VAE is far from a rarity “and it was being increasingly performed. Rather than being truly a last resort, it had bec[o]me

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57. KEOWN, *supra* note 2, at 38–40.

58. *Id.* at 39 (quoting SELECT COMMITTEE ON MEDICAL ETHICS, REPORT, 1994-5, HL 21, ¶ 237 (UK)).

59. *Id.* at 67–89.

60. *Id.* at 82–88 (describing the logical slippery slope argument).

61. *Id.* at 71–82 (describing the empirical or practical slippery slope argument).

an established part of mainstream Dutch medical practice to which doctors [have] resorted even when palliative care could have offered an alternative”;<sup>62</sup> (2) the Dutch regulatory controls are ineffective; in the words of one ethicist, “[t]he Dutch situation is a regulatory Potemkin village, a great facade hiding non-enforcement”;<sup>63</sup> and (3) “the guidelines were not only often ignored in practice but were diluted in theory.”<sup>64</sup> Keown’s evaluation of the evidence through 2002 led him conclude that “the Dutch experience from 1984 to 2002 illustrated the force of both the empirical and logical slippery slope arguments. VAE and PAS were poorly controlled and the original criteria had expanded, not least to embrace infanticide.”<sup>65</sup>

There have, of course, been significant developments in the Netherlands since the publication of the first edition of *Euthanasia, Ethics and Public Policy*. The second edition of this book covers many of these developments. Keown effectively critiques the work of Professor John Griffiths<sup>66</sup> and Dr. Gerrit Kimsma,<sup>67</sup> both of whom defend the Dutch regime. Keown also reviews the concerns about the Dutch system that have been expressed by the United Nations Human Rights Committee,<sup>68</sup> and by scholars such as Cohen-Almager,<sup>69</sup> Gorsuch,<sup>70</sup> and Boer.<sup>71</sup> The review of the work of Boer is particularly revealing. Boer had long been a defender of the Dutch regime, but his experience caused him to change his view. By 2014, Boer warned the English not to support assisted suicide. Boer wrote: “he had been ‘wrong – terribly wrong’ and after 12 years’ experience of the Euthanasia Act, involving an ‘explosive increase’, he concluded: ‘Some slopes truly are slippery.’”<sup>72</sup> The experience in the Netherlands since 2002 supports the conclusion “that the Dutch system has failed to ensure effective control. It could [in fact,] claim to be a textbook illustration of euthanasia’s empirical and logical slippery slopes.”<sup>73</sup>

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62. *Id.* at 154.

63. *Id.* (quoting DANIEL CALLAHAN, *THE TROUBLED DREAM OF LIFE* 115 (1993)).

64. *Id.*

65. *Id.* at 156.

66. *Id.* at 180–210.

67. *Id.* at 215–28.

68. *Id.* at 211–13.

69. *Id.* at 213–14.

70. *Id.* at 214–15.

71. *Id.* at 228–37.

72. *Id.* at 229 (quoting Theo Boer, *Assisted Dying: Don’t Go There: Dutch Ethicist Theo Boer’s Thoughts on Euthanasia in Full*, *DAILY MAIL* (July 10, 2014)).

73. *Id.* at 461.

This second edition also provides detailed treatment of the experience in other jurisdictions that have legalized assisted suicide or euthanasia. Keown explores the situations in Belgium, Canada, and Oregon. His conclusion is that the slippery slope arguments are real, and that the experiences in these other jurisdictions support the case against legalization of assisted suicide and euthanasia.

Keown's treatment of the situation in Belgium is illuminating.<sup>74</sup> Belgium legalized VAE in 2002. Keown demonstrates that the Belgian statute "is far from either precise or strict, which raises serious concerns about its ability to ensure effective control of euthanasia. Those concerns [Keown shows] have only been heightened by the practice of euthanasia since the Act was passed."<sup>75</sup> Keown's chapter on the lack of effective control in Belgium makes clear that euthanasia has expanded significantly since 2002. For example, in 2014, the Act was extended to minors. Keown's conclusions mirror those of a recent study of the lessons of the Belgium experience, which indicates "that Belgium offers clear lessons for other jurisdictions which are considering the legalization of assisted suicide or euthanasia. One of these is that legislation that was promoted as giving greater clarity, transparency and control to end-of-life practices has not fulfilled its expectations."<sup>76</sup>

Keown also addresses developments in Canada.<sup>77</sup> The second edition includes a devastating critique of the Supreme Court of Canada's decision in the *Carter* case, which held unconstitutional Canada's ban on assisted suicide.<sup>78</sup> A subsequent chapter contains a careful and highly critical analysis of the new Canadian legislation that implemented *Carter*.<sup>79</sup> Keown's analysis makes it clear that Canadian legislators "learned little from relaxed laws and practice abroad. [As he explains, the law's] . . . regulatory framework is even laxer than that in the Netherlands or Belgium."<sup>80</sup> Keown also explains that the Canadian law will likely be extended considerably. As he states:

There is, then, good reason to believe that the already wide exception created by the Act will be expanded, and for the same reasons it was enacted: respect for autonomy and beneficence; the similarity between VAE and PNAS and

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74. *See id.* at 281–325.

75. *Id.* at 297.

76. *Id.* at 325.

77. *See id.* at 395–457.

78. *See id.* at 397–431.

79. *See id.* at 432–57.

80. *Id.* at 465.

other end-of-life practices, and the supposed feasibility of “robust safeguards” against mistake, abuse and slippage.<sup>81</sup>

The second edition contains a lengthy chapter on the experience in Oregon, the state with the longest experience with assisted suicide.<sup>82</sup> His detailed analysis of Oregon’s Death with Dignity Act leads him to conclude that the law “is in important respects no less vague than the Dutch or Belgian legislation.”<sup>83</sup> Moreover, the Oregon law “falls short of being able effectively to control PAS.”<sup>84</sup> There is no real review or oversight under the Oregon regime. Supporters of the Oregon law claim that there has been no evidence of abuse. But as Keown explains,

The data from the annual reports is insufficient to substantiate the argument that the Act is effectively controlling PAS, not least because . . . the Act is incapable of so doing. It relies on self-reporting, and not only is self-reported data of questionable validity, it tells us nothing about cases which are not reported. Absence of evidence of abuse is not evidence of absence of abuse.<sup>85</sup>

In the end, Keown concludes that PAS in Oregon, even more so than in the Netherlands or Belgium, is “more a matter of the largely unaccountable exercise of medical discretion than the transparent exercise of patients’ rights.”<sup>86</sup>

Keown also explores the dangers of some developments on the immediate horizon. The second edition contains an extensive chapter on the Dutch government’s proposal to allow assisted suicide for the elderly with existential suffering who have “completed lives.”<sup>87</sup> This chapter is particularly valuable because it demonstrates where the logic of the Dutch system is leading.

In October 2016, the Dutch government announced its proposal to permit assisted suicide for elderly people with a “completed life”—that is, those “for whom life has lost its meaning and become too great a burden for them to continue living.”<sup>88</sup> This approach was thought necessary to respect autonomy

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81. *Id.* at 456.

82. *See id.* at 345–76.

83. *Id.* at 351.

84. *Id.* at 356.

85. *Id.* at 363.

86. *Id.* at 376.

87. *See id.* at 261–79.

88. *Id.* at 268–69 (quoting Letter from the Minister of Health, Welfare and Sport and the Minister of Sec. and Justice to the House of Representatives on the gov’t Position on “completed life” (Oct. 12, 2016) [hereinafter Letter]).

and to “allow people to shape their own lives, and that includes their deaths.”<sup>89</sup> The proposal would make assisted suicide available to those who, according to objective criteria, established their decisional competency and that their wish to die is voluntary, well-considered and persistent, that they are suffering unbearably from life, without prospect of improvement. This proposal is outside the existing assisted suicide/euthanasia regime in the Netherlands. The proposal would extend immunity from criminal liability to anyone (not just doctors) who assisted a suicide on the basis of the right to autonomy.<sup>90</sup>

In a careful analysis of the proposal,<sup>91</sup> Keown demonstrates just how significant this proposal would be. The old line in the Netherlands between medical and non-medical suffering would be crossed. This would likely greatly increase the numbers of people eligible for this assistance. It would be highly unlikely that the proposal would be subject to effective legal controls. This proposal, like the earlier Dutch model, would likely be evaluated based on self-reporting by the end-of-life counselors and so would be “intrinsically ineffective.”<sup>92</sup> Moreover, the proposed criteria would make assessment impossible since the justification for assisted suicide ultimately turns on subjective judgments that are largely determined by the patient’s subjective desires. The proposal would, in addition, raise significant questions about the worth of the elderly, despite the proposal’s efforts to deny this. Keown asks how the elderly’s sense of worth will “be promoted by changing the law to make it easier for them to kill themselves.”<sup>93</sup> Keown quotes researchers who suggest that “perhaps a way to address the absence of meaning in the lives of [the elderly] would be by changing their social circumstances and relationships, rather than by assisting their suicide.”<sup>94</sup> Keown notes the signal that this proposal would clearly send to the elderly—“because you are over a certain age, it is entirely reasonable for you to consider whether your life is any longer worth living and, if you decide it is not, to apply for the state’s help in ending it.”<sup>95</sup>

The Dutch ministers suggested that this option would be limited to those above a certain age (perhaps seventy, which was the age in a citizen’s initiative

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89. *Id.* at 270 (quoting Letter 9).

90. *Id.* at 271.

91. *Id.* at 272–79.

92. *Id.* at 274.

93. *Id.* at 277.

94. *Id.* at 276.

95. *Id.* at 277.

that failed) but Keown points out that there is no basis for limiting autonomy by such an arbitrary cut-off.<sup>96</sup>

Keown concludes his analysis by stating:

The Dutch Government's proposal to permit assisted suicide for the elderly with a "completed life" is of major importance. It represents an open break with the medical model that has characterized the Dutch euthanasia regime since 1984. . . . [I]t would significantly expand access to assisted suicide and could result in a considerable increase in its incidence, an increase that could make even the rising number of VAE and PAS cases look modest. This further step down euthanasia's slippery slope would illustrate yet again the force of both the empirical and the logical arguments against taking the first step [away from the standard legal model].<sup>97</sup>

This chapter on the "completed life" proposal is typical of Keown's work. He provides a careful analysis of the situation in the Netherlands that is based on his keen understanding of both the legal developments and the actual practice of PAS/VAE. As noted above, decision-makers increasingly attempt to understand the lessons of the Netherlands and of other places where assisted suicide or VAE are legal. Keown's work is exceedingly valuable in this regard and it is to be hoped that his work will influence the ongoing debates on these issues.

#### PART IV. CONCLUSION

The second edition of *Euthanasia, Ethics and Public Policy* is an indispensable work that should inform the debate about legalization in the years to come. Keown's work deserves careful consideration and a wide readership. Even those who disagree with him will need to consider his arguments. His compelling analysis should do much to support the case against the legalization of assisted suicide and euthanasia.

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96. *Id.* at 278.

97. *Id.* at 278–79 (footnote omitted).