Academic Treatment of Abortion and Euthanasia in Leading Constitutional Law Textbooks

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In order to "identify, catalog, and respond to current academic coverage of abortion, infanticide, and euthanasia in law school teaching materials," the six leading textbooks for Bioethics Law courses were analyzed. These texts include: *Health Law and Bioethics* by Sandra H. Johnson, Joan H. Krause, Richard S. Saver, and Robin Fretwell Wilson; *Bioethics and the Law* by Janet L. Dolgin and Lois L. Shepherd; *Bioethics: Health Care, Human Rights, and the Law* by Arthur B. LaFrance; *Bioethics: Health Care Law and Ethics* by Barry R. Furrow, Thomas L. Greaney, Sandra H. Johnson, Timothy S. Jost, and Robert L. Schwartz; *Bioethics and Public Health Law* by David Orentlicher, Mary Anne Bobinski, and Mark A. Hall; and *Law, Medicine, and Medical Technology* by Lars Noah and Barbara A. Noah.

The bioethics texts differ markedly from the constitutional law and family law texts analyzed in the large amount of text devoted to the topic of euthanasia. While the treatment of abortion in the bioethics texts is relatively similar in length to the discussion of abortion in family law and constitutional law texts surveyed, the discussion of euthanasia in most bioethics textbooks is almost disproportionately high, usually including over one hundred pages of cases and notes. This report will first analyze the textbooks' treatment of euthanasia, followed by an analysis of the treatment of abortion. Because the textbooks surveyed do not include a separate

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discussion of infanticide, this report does not include a specific summary of the textbooks' approaches to that issue but rather includes the discussion of any related cases within the broader topic of euthanasia. Furthermore, because \textit{Law, Medicine, and Medical Technology: Cases and Materials} does not contain a separate discussion of abortion, infanticide or euthanasia, it will not be analyzed in this report.\textsuperscript{3}

\section*{EUTHANASIA}

\textbf{HEALTH LAW AND BIOETHICS BY JOHNSON, KRAUSE, SAVER, WILSON}

The coverage of euthanasia in this text is notably distinct from that included in other texts surveyed. The relevant discussion occurs in Part II of the book, in a chapter entitled "Quinlan and Cruzan: Beyond the Symbols."\textsuperscript{4} The text attributes the chapter to the work of Sandra H. Johnson\textsuperscript{5} and provides several endnotes at the end of the chapter for support and more information.\textsuperscript{6} The chapter begins by introducing Karen Ann Quinlan, Nancy Beth Cruzan, and Terri Marie Schiavo as three young women with promising futures but diagnosed with persistent vegetative state, leaving their families with difficult decisions regarding life-sustaining treatment.\textsuperscript{7} This brief introduction cites the relevant cases, includes a summary of each woman's outcome, and provides a photograph of each woman.\textsuperscript{8} The next section offers a short biography of each patient,\textsuperscript{9} followed by a description of the tragedies each woman faced,\textsuperscript{10} the relevant medical diagnoses and prognoses,\textsuperscript{11} and the decisions regarding life-sustaining treatment made by the women's family members.\textsuperscript{12} The text then shifts its focus to the more public issues relating to each case, summarizing the road to litigation for each family\textsuperscript{13} and the media and protests that surrounded the

\begin{footnotesize}
\begin{enumerate}
\item NOAH, supra note 2, at 128, 186, 934–35 (briefly mentioning landmark decisions, such as \textit{Roe v. Wade}, 410 U.S. 113 (1973), \textit{Planned Parenthood v. Casey}, 505 U.S. 833 (1992), and \textit{Cruzan v. Director, Missouri Department of Health}, 497 U.S. 261 (1990) in relation to privacy rights, FDA regulations, and technology but does not offer any discussion of the cases, nor the abortion and euthanasia issues).\textsuperscript{3}
\item JOHNSON, supra note 2, at 53–75.\textsuperscript{4}
\item \textit{Id.} at 53.\textsuperscript{5}
\item \textit{Id.} at 72–75.\textsuperscript{6}
\item \textit{Id.} at 53–55.\textsuperscript{7}
\item \textit{Id.}\textsuperscript{8}
\item \textit{Id.} at 55–56.\textsuperscript{9}
\item JOHNSON, supra note 2, at 56–58.\textsuperscript{10}
\item \textit{Id.} at 58–59.\textsuperscript{11}
\item \textit{Id.} at 56–60.\textsuperscript{12}
\item \textit{Id.} at 61–63.\textsuperscript{13}
\end{enumerate}
\end{footnotesize}
circumstances. After this background information, the text provides short summaries of the procedural history and outcome of each opinion.

The text also includes a summary of how Catholic Church leaders influenced the three decisions. Another brief note discusses the role that changing medical standards and practices played in the Quinlan decision; the strong, united voice of medical organizations in Cruzan; and the absence of the organizations’ unified voice in Schiavo. The text then discusses the reality of withdrawing treatment from each individual, portraying the “resistance and conflict” amongst family members, despite the courts’ clear orders as well as the difficulty that each family faced in life after the tragic events. The text then concludes the discussion stating that the decisions “established a highly individualized inquiry for end-of-life decision making” and that the Cruzan and Quinlan cases “reaffirm the intuition that families should decide such matters, just as much as Terri Schiavo’s story reminds us that this will not always be possible.”

The text also provides a related chapter entitled In re T.A.C.P. and In re Baby K: Anencephaly and Slippery Slopes. This chapter is attributed to Mary Crossley and also includes a list of endnotes providing support and further information after the substantive material. The introduction to this chapter discusses the medical condition of anencephaly, provides background facts for the two relevant cases, and offers a summary history of the issue, including the progression of the controversy and the emergence of futility. The text then summarizes the story of Stephanie Keene’s life, followed by a discussion of the effect that the cases discussed in this section may have on parents. The next note discusses a few resulting issues from cases involving anencephaly: organs from anencephalic infants, the provision of futile care, and the notion of a “disability-blind” medical treatment. The discussion concludes with a paragraph describing the uncertain nature of the ongoing controversy.

14. Id. at 63–64.
15. Id. at 64–66.
16. JOHNSON, supra note 2, at 66–68.
17. Id. at 68.
18. Id. at 69–70.
19. Id. at 70–71.
20. Id. at 71.
21. Id. at 72.
22. JOHNSON, supra note 2, at 123–41.
23. Id. at 123.
24. Id. at 140–41.
25. Id. at 123–30.
26. Id. at 130–35.
27. Id. at 135–36.
29. Id. at 139.
BIOETHICS AND THE LAW BY DOLGIN AND SHEPHERD

The euthanasia issue is discussed in a chapter entitled "Dying." The introduction contains a brief discussion of society's differing views of death. The text then provides an excerpt from The Role of the Physician in End-of-Life Care: What More Can We Do? by Dr. DeWitt Baldwin. The first large substantive topic covered in this section is the withholding or withdrawing of life-sustaining treatment. The text first focuses on this issue as it relates to patients without competency and provides excerpts of Cruzan v. Director, Missouri Department of Health to illustrate the "Constitutional and Common Law Right to Refuse Treatment." The edited version contains approximately four pages of the majority opinion, one-half page of Justice O'Connor's concurrence, one-half page of Justice Scalia's concurrence, and one page of Justice Brennan's dissent. The first note following the case questions the "precedential value" of Cruzan by inquiring whether it established a "right to die" or a "right to refuse treatment" and suggesting that the answer be found in Washington v. Glucksberg. The next note discusses the standards of decision making, using excerpts and summaries from Alan Miesel to describe the substituted judgment standard, the subjective standard, and the best interests standard. The following note provides more detail on one of the standards by summarizing the distinction between best interests and dignitary interests, including arguments by Norman Cantor. Another note examines the clear and convincing evidence standard and gives a brief introduction to the Terri Schiavo case.

The next case provided with relative length is Schiavo ex rel. Schindler v. Schiavo. The first two notes following the opinion provide subsequent history to Schiavo as well as a brief analysis of claims made

30. DOLGIN & SHEPHERD, supra note 2, at 735–836.
31. Id. at 735–36.
32. Id. at 737 (citing DeWitt C. Baldwin, Jr., The Role of the Physician in End-of-Life Care: What More Can We Do?, 2 J. HEALTH CARE L. & POL'Y 258 (1999)).
33. DOLGIN & SHEPHERD, supra note 2, at 738.
34. Id. at 738–45.
35. Id. at 739–45.
36. Id. at 745.
37. Id. at 745–46 (citing Alan Meisel, Suppose the Schindlers Had Won the Schiavo Case, 61 U. MIAMI L. REV. 733, 744–45 (2007)).
38. DOLGIN & SHEPHERD, supra note 2, at 746–47 (citing Norman Cantor, The Permanently Unconscious Patient, Non-Feeding and Euthanasia, 15 AM. J.L. MED. 381 (1989)).
40. Id. at 748–53.
41. Id. at 753.
by Schindler but not included in the edited opinion.\textsuperscript{42} The next note gives a more detailed discussion of the permanent or persistent vegetative state, providing definitions of the condition and describing normal behavior for patients in such a state.\textsuperscript{43} Another note describes "the minimally conscious state," offering examples of the cognitive function of these patients, arguments from Joseph T. Giacino regarding the need for a continuum in analyzing brain function,\textsuperscript{44} a summary of Jerome Groopman's \textit{Silent Minds},\textsuperscript{45} an explanation of brain recovery from Joseph Fins,\textsuperscript{46} and ethical questions arising from potential misdiagnoses, with support from an article by Dan Larriviere and Richard Bonnie.\textsuperscript{47}

The next issue the text focuses on is withdrawing or withholding life-sustaining treatment from patients who are never competent.\textsuperscript{48} The first case included in this discussion is \textit{Superintendent of Belchertown State School v. Saikewicz}.\textsuperscript{49} The notes following the case inquire as to the standard of decision making applied by the court\textsuperscript{50} and provide a summary of a contrasting New York case, \textit{Blouin v. Spitzer}.\textsuperscript{51}

The text also includes a summary and analysis of advance directives, introducing the topic with brief definitions of health care surrogates and a living will, as well as statistics from the New England Journal of Medicine.\textsuperscript{52} The discussion continues with excerpts that offer two different critiques of advance directives: \textit{Why I Don't Have a Living Will} by Joanne Lynn\textsuperscript{53} and \textit{Precommitment: A Misguided Strategy for Securing Death with Dignity} by Rebecca Dresser.\textsuperscript{54} The series of notes following these two excerpts explores the topic more by including a discussion of

\begin{thebibliography}{54}
\bibitem{42} DOLGIN & SHEPHERD, supra note 2, at 753–54.
\bibitem{43} DOLGIN & SHEPHERD, supra note 2, at 754–55.
\bibitem{44} DOLGIN & SHEPHERD, supra note 2, at 755 (citing Joseph T. Giacino, \textit{The Minimally Conscious State: Defining the Borders of Consciousness}, 150 PROGRESS IN BRAIN RES. 381 (2005)).
\bibitem{46} DOLGIN & SHEPHERD, supra note 2, at 755–56 (citing Joseph J. Fins, \textit{The Minimally Conscious State: Ethics and Diagnostic Nosology}, LAHEY CLINIC MED. ETHICS, Fall 2007, at 1, 1).
\bibitem{47} DOLGIN & SHEPHERD, supra note 2, at 756 (citing Dan Larriviere & Richard Bonnie, \textit{Terminating Artificial Nutrition and Hydration in Persistent Vegetative State Patients}, 66 NEUROLOGY 1624 (2006)).
\bibitem{48} DOLGIN & SHEPHERD, supra note 2, at 760.
\bibitem{49} Id. at 760–63.
\bibitem{50} Id. at 763.
\bibitem{51} Id. at 764–65.
\bibitem{52} DOLGIN & SHEPHERD, supra note 2, at 765 (citing Muriel R. Gillick, \textit{Advance Care Planning}, 350 NEW ENG. J. MED. 7, 7–8 (2004)).
\bibitem{53} DOLGIN & SHEPHERD, supra note 2, at 766–67 (citing Joanne Lynn, \textit{Why I Don't Have a Living Will}, 19 MED. & HEALTH CARE 101, 101–04 (1991)).
\bibitem{54} DOLGIN & SHEPHERD, supra note 2, at 768–70 (citing Rebecca Dresser, \textit{Precommitment: A Misguided Strategy for Securing Death with Dignity}, 81 TEX. L. REV. 1823 (2003)).
\end{thebibliography}
family members’ knowledge of patient preferences and physician preferences, with both notes providing arguments from David Orentlicher, and a further argument from Rebecca Dresser based on a review of empirical research regarding why few people execute living wills.

To analyze the legal issues surrounding the use of advance directives, the casebook includes excerpts from Scheible v. Joseph L. Morse Geriatric Center, Inc. The first note after this case discusses the “gap between living wills and doctors’ orders,” highlighting the difficulty that can arise in attempting to understand and follow a patient’s advance directives in an emergency situation. The next pair of notes briefly summarizes the potential tort claim of “wrongful living,” providing a number of citations to articles discussing the issue and stating that courts are reluctant to impose liability on doctors that ignore patient choices regarding treatment refusal, and also indicates that “even if a common law cause of action for wrongful living were recognized, states’ advance directive statutes generally contain a provision for immunity of health care providers acting in good faith.” Another note mentions the topic of living wills as it relates specifically to pregnant women and cites an article by Radhika Roa that criticizes these laws. The last note briefly summarizes the Patient Self-Determination Act.

The text next examines the issue of competent patients refusing life-sustaining treatment. After a brief introduction to the topic, the text includes an excerpt from Paul K. Longmore’s article, Elizabeth Bouvia, Assisted Suicide and Social Prejudice, followed by the edited opinion of Bouvia v. Superior Court. The notes after the opinion mention the issue of distinguishing between withdrawing treatment and assisting in suicide.

55. DOLGIN & SHEPHERD, supra note 2, at 770–71.
56. Id. at 771.
57. Id. at 770–71 (citing David Orentlicher, The Limitations of Legislation, 53 Md. L. Rev. 1255, 1278 (1994)).
59. DOLGIN & SHEPHERD, supra note 2, at 772–73; 988 So. 2d 1130 (Fla. Dist. Ct. App. 2008).
60. Id. at 774 (emphasis omitted).
61. Id. at 774–75.
62. Id. at 775.
63. Id. (citing Radhika Rao, Property, Privacy, and the Human Body, 80 B.U. L. Rev. 359, 409–14 (2000)).
64. DOLGIN & SHEPHERD, supra note 2, at 775.
65. Id. at 776.
66. Id. at 777–81 (citing Paul K. Longmore, Elizabeth Bouvia, Assisted Suicide and Social Prejudice, 3 Issues L. & Med. 141 (1987)).
68. Id. at 785.
inquire as to whether the terminally ill and the permanently disabled should be viewed differently when the question of withdrawing life-sustaining treatment arises; mention Ms. Bouvia’s changed mind after the decision; and provide a list of cases, along with parentheticals, of other well-known “cases of a competent individual’s successful claim for refusing treatment.”

The next case included in the text is the British opinion of Ms. B v. An NHS Hospital Trust, illustrating a different approach to the same result, as the court “positively affirm[s] the value of Ms. B’s life.” The text then includes a number of notes that relate specifically to the facts in Ms. B’s case, including mentioning the emphasis on mental capacity in the decision; the proposed one-day weaning program; the apparent sympathy the court offers for Ms. B’s caregivers; and the role of Ms. B’s religious views in the court’s opinion.

Next, the opinion of Causey v. St. Francis Medical Center is provided. Directly after the edited version of Causey, the text then includes excerpts from an article by Thaddeus Mason Pope. The relatively brief notes that follow explore a broad range of topics. One note summarizes the differing views of ethics boards and committees while another suggests that the Texas statute’s focus on process makes it a “superior” statute when compared to those that use a standard of “medically inappropriate” treatment. Yet another note points the reader back to Pope’s article for questions regarding the “preemption and constitutionality of futility statutes.”

The next major issue the text addresses in the euthanasia topic is “Physician Aid in Hastening Death.” The text first summarizes arguments from those who advocate physician-assisted suicide and then includes excerpts from Timothy Quill’s article, Death and Dignity—A Case of

69. Id.
70. Id.
71. Id.
72. Id at 786–93.
73. DOLGIN & SHEPHERD, supra note 2, at 793.
74. Id.
75. Id.
76. Id.
77. Id at 793–96; 719 So. 2d 1072 (La. Ct. App. 1998).
78. Id at 796–99 (citing Thaddeus Mason Pope, Medical Futility Statutes: No Safe Harbor to Unilaterally Refuse Life-Sustaining Treatment, 75 TENN. L. REV. 1 (2007)).
79. DOLGIN & SHEPHERD, supra note 2, at 799.
80. Id.
81. Id at 799–800.
82. Id at 800.
83. Id.
Individualized Decision Making,\textsuperscript{84} and from Patricia Wesely’s Dying Safely.\textsuperscript{85} Two notes following these excerpts ask questions about critiquing the respective articles.\textsuperscript{86} Another note provides more information about Dr. Quill, including a short summary of Vacco v. Quill, in which the textbook states, “the Supreme Court rejected an equal protection challenge to state bans against physician-assisted suicide.”\textsuperscript{87} A final note, introducing the rest of the chapter, discusses the emphasis on dignity for those who advocate the right to physician-assisted suicide.\textsuperscript{88}

The text then includes an excerpt from Lois Shepherd’s article, Dignity and Autonomy after Washington v. Glucksberg.\textsuperscript{89} An analysis of the “Legal Approaches” to physician-assisted death follows, beginning with a brief summary of Washington v. Glucksberg and Vacco v. Quill.\textsuperscript{90} After the introduction, the text includes edited versions of Compassion in Dying v. Washington\textsuperscript{91} and Washington v. Glucksberg\textsuperscript{92} because the two cases “represent such different viewpoints in the highly volatile debate over physician-assisted suicide in the United States.”\textsuperscript{93} Directly after these opinions, the text provides excerpts from the majority in Vacco v. Quill.\textsuperscript{94} Some notes after this series of cases ask the reader to compare the two Washington opinions;\textsuperscript{95} to consider whether the Supreme Court’s reasoning that legalized physician-assisted suicide could make it more difficult to protect against suicidal impulses within those who are depressed or mentally ill;\textsuperscript{96} to inquire as to the reason why advocate groups for those with disabilities oppose physician-assisted suicide;\textsuperscript{97} to contemplate which groups of patients the opinion could apply to;\textsuperscript{98} to compare the differences and similarities between physician-assisted suicide and abortion;\textsuperscript{99} to think about how the court distinguishes between assisted suicide and withdrawal

\begin{thebibliography}{99}
\bibitem{84} Id. at 800-05 (citing Timothy E. Quill, \textit{Death and Dignity—A Case of Individualized Decision Making}, 324 NEW ENG. J. MED. 691 (1991)).
\bibitem{85} DOLGIN \& SHEPHERD, supra note 2, at 805-08 (citing Patricia Wesley, \textit{Dying Safely}, 8 ISSUES L. \& MED. 467 (1993)).
\bibitem{86} DOLGIN \& SHEPHERD, supra note 2, at 808.
\bibitem{87} Id.
\bibitem{88} Id. at 808-09.
\bibitem{89} Id. at 809-12 (citing Lois Shepherd, \textit{Dignity and Autonomy After Washington v. Glucksberg}, 7 CORNELL J.L. \& PUB. POL’Y 431 (1998)).
\bibitem{90} DOLGIN \& SHEPHERD, supra note 2, at 812-13.
\bibitem{91} Id. at 813-20.
\bibitem{92} Id. at 820-25 (including only excerpts from the majority opinion).
\bibitem{93} Id. at 813.
\bibitem{94} Id. at 825-27.
\bibitem{95} Id. at 827.
\bibitem{96} DOLGIN \& SHEPHERD, supra note 2, at 827.
\bibitem{97} Id.
\bibitem{98} Id. at 827-28.
\bibitem{99} Id. at 828.
\end{thebibliography}
of life support, and to draw a relationship between the discussed jurisprudence and ethics of care. Another note discusses whether Washington reaffirmed the distinction between physician-assisted suicide and withdrawal of life-sustaining treatment by including excerpts from David Orentlicher’s article, The Supreme Court and Terminal Sedation: Rejecting Assisted Suicide, Embracing Euthanasia and from George P. Smith, III’s, Intractable Pain, Palliative Management and the Principle of Medical Futility. Yet another note briefly summarizes Justice O’Connor’s concurrence and Justice Breyer’s concurrence regarding the right to palliative care.

To conclude the discussion of euthanasia, the text includes excerpts from the Oregon Death with Dignity Act and statistics from the Summary of Oregon’s Death with Dignity Act. One pair of notes that follows these excerpts summarizes the extent of physician involvement allowed in the Oregon Act, along with statistics indicating that in a vast minority of cases, the prescribing physician was present when the medication was ingested. Another note questions whether the acceptance of the Oregon Act was spurred by a cultural desire to continue being independent until death. The last two notes briefly summarize Lee v. Oregon and Gonzales v. Oregon to illustrate the challenges asserted against the Oregon Act.

BIOETHICS: HEALTH CARE, HUMAN RIGHTS, AND THE LAW BY LAFRANCE

The first prolonged discussion of this issue occurs in a section of the book entitled “Nonpersons” and classifies the relevant group of persons as “The Undead.” The text first provides a lengthy analysis into the history of defining death and the issues behind the topic. Following this introduction, the text examines brain death, specifically as it applies to

100. Id. at 829.
101. Id.
102. DOLGIN & SHEPHERD, supra note 2, at 828 (citing David Orentlicher, The Supreme Court and Terminal Sedation: Rejecting Assisted Suicide, Embracing Euthanasia, 24 HASTINGS CONST. L.Q. 947 (1997)).
103. DOLGIN & SHEPHERD, supra note 2, at 828–29 (citation omitted).
104. Id. at 829.
105. Id. at 830–33.
106. Id. at 833–34 (citation omitted).
107. Id. at 834.
108. Id.
109. DOLGIN & SHEPHERD, supra note 2, at 834.
110. Id. at 834–35.
111. Id. at 835.
112. LAFRANCE, supra note 2, at 275.
113. Id. at 275–92 (including excerpts from Neman v. Sathyavagiswaran, 287 F.3d 786 (9th Cir. 2002) and People v. Eulo, 472 N.E.2d 286 (N.Y. 1984)).
anencephalic and conjoint babies.\textsuperscript{114} Within this section, LaFrance includes excerpts from \textit{In re Baby K},\textsuperscript{115} along with additional background facts surrounding the case,\textsuperscript{116} \textit{In re T.A.C.P.},\textsuperscript{117} articles and short questions related to \textit{In re T.A.C.P.},\textsuperscript{118} and \textit{Brittell v. United States}.\textsuperscript{119}

The text continues by examining brain death as a persistent vegetative state and the level of care that is "appropriate" to such patients.\textsuperscript{120} The discussion of this topic begins with excerpts from \textit{In re Karen Quinlan}.\textsuperscript{121} The notes following the case provide a series of questions regarding the parents' interest, potential physician rights, the proper emphasis on Catholic beliefs in the decision, the patient's interests, and the weight given to a prognosis.\textsuperscript{122} The text next provides excerpts from \textit{Cruzan v. Director, Missouri Department of Health}, including approximately three pages of the majority opinion, one page of Justice O'Connor's concurrence, two pages from Justice Scalia's concurrence, and over five pages from Justice Brennan's dissent.\textsuperscript{123} The notes following the \textit{Cruzan} decision give information of the trial court's decision upon remand;\textsuperscript{124} inquires into why a patient in a persistent vegetative state would want to continue treatment and states that "although it may be assumed that most us would not want to be maintained in a persistent vegetative state, the Missouri approach is likely to enforce such maintenance on us. A procedure which maximizes the margin for error ordinarily is thought to violate due process of laws";\textsuperscript{125} mentions the "clear and convincing" evidence standard\textsuperscript{126} and the rejected "substituted judgment" standard,\textsuperscript{127} and asks if it would make sense to declare a person who is in a persistent vegetative state to be dead.\textsuperscript{128}

The text then includes a long discussion of the Terri Schiavo case. After giving the background of the Terri Schiavo,\textsuperscript{129} the text continues by providing excerpts from \textit{Schindler v. Schiavo (I)},\textsuperscript{130} notes that mention self-interest of the husband and parents, a "best interest" analysis, and the

\textsuperscript{114} LaFrance, supra note 2, at 292.
\textsuperscript{115} Id. at 292–98 (citing \textit{In re Baby K}, 16 F.3d 590 (4th Cir. 1994)).
\textsuperscript{116} Id. at 298–99.
\textsuperscript{117} Id. at 299–303 (citing \textit{In re T.A.C.P.}, 609 So. 2d 588 (Fla. 1992)).
\textsuperscript{118} LaFrance, supra note 2, at 303–04.
\textsuperscript{119} Id. at 304–10 (this case is more relevant to the abortion issue and will be mentioned again in that analysis).
\textsuperscript{120} LaFrance, supra note 2, at 312.
\textsuperscript{121} Id. at 312–19 (citing \textit{In re Karen Quinlan}, 355 A.2d 647 (N.J. 1976)).
\textsuperscript{122} Id. at 319–20.
\textsuperscript{123} Id. at 320–31 (citing \textit{Cruzan}, 497 U.S. 261 (1990)).
\textsuperscript{124} Id. at 331.
\textsuperscript{125} Id. at 332.
\textsuperscript{126} LaFrance, supra note 2, at 331.
\textsuperscript{127} Id. at 332.
\textsuperscript{128} Id.
\textsuperscript{129} Id. at 333.
\textsuperscript{130} Id. at 333–36 (citing \textit{Schindler v. Schiavo (I)}, 780 So. 2d 176 (Fla. 2d DCA 2001)).
“extraordinary maneuvering of the parents, challenging past witnesses and offering new evidence”\textsuperscript{131} excerpts from \textit{Schindler v. Schiavo (III)}\textsuperscript{132} and excerpts from \textit{Bush v. Schiavo}\textsuperscript{133} The notes following this series from the Schiavo case discuss the “hasty” amendment to the United States Judicial Code, as Congress tried to “confer jurisdiction on the federal courts to interfere.”\textsuperscript{134} The final portion of this section includes excerpts from \textit{Wendland v. Wendland}\textsuperscript{35} and a series of notes discussing the unprecedented nature of the \textit{Wendland} case, the issue at hand, the difference between “attorney” and “conservator,” and the proper interests for the conservator to take account of.\textsuperscript{136}

Euthanasia is also discussed in the text’s chapter entitled “Ethics, Choices, and Bioethical Contexts.”\textsuperscript{137} The topic is introduced with a discussion of death and a statement that because of “treatment procedures, machines, and personnel . . . [f]or many, the fear is no longer the fact of death but the awful process.”\textsuperscript{138} The first issue considered after this introduction is “do not resuscitate orders and medical futility.”\textsuperscript{139} The text provides excerpts from \textit{In re Interest of Riley, State of Nebraska v. D’Etta H.}\textsuperscript{140} followed by notes that discuss the process of ordering or reversing a DNR order,\textsuperscript{141} who the proper representative may be,\textsuperscript{142} and the seemingly converse relationship between this case and the \textit{Quinlan} and \textit{Cruzan} decisions.\textsuperscript{143} The text then includes excerpts from \textit{Estate of Lucille Austwick v. Murphy, Cook County Public Guardian}.

The notes after this edited opinion discuss who should assist the patient, along with the interests the courts should consider,\textsuperscript{145} and the paradox that the Public Guardian needs to argue that a patient is both competent, and thus her decision should stand, and incompetent, and thus needs the Guardian to act for her.\textsuperscript{146} The text also contains excerpts from \textit{First Healthcare Corporation v. Rettinger}.

The notes after this decision explore the subsequent procedural history,\textsuperscript{148} briefly

\textsuperscript{131.} Id. at 336–37, 340.
\textsuperscript{132.} LAFRANCE, supra note 2, at 337–39.
\textsuperscript{133.} Id. at 340–46.
\textsuperscript{134.} Id. at 346.
\textsuperscript{135.} Id. at 348–55.
\textsuperscript{136.} Id. at 355.
\textsuperscript{137.} Id. at Chapter 4.
\textsuperscript{138.} LAFRANCE, supra note 2, at 1203.
\textsuperscript{139.} Id. at 1204.
\textsuperscript{140.} Id. at 1205–06.
\textsuperscript{141.} Id. at 1206–07.
\textsuperscript{142.} Id. at 1206.
\textsuperscript{143.} Id.
\textsuperscript{144.} LAFRANCE, supra note 2, at 1207–09.
\textsuperscript{145.} Id. at 1209–10.
\textsuperscript{146.} Id. at 1210.
\textsuperscript{147.} Id. at 1210–14 (including Judge Walker’s dissent).
\textsuperscript{148.} Id. at 1214.
mention the options of a living will and durable power of attorney, and touch upon the relationship between Do Not Resuscitate orders and the rights of patients and families to demand that such orders be entered.

The next topic in this section is the issue of physician-assisted suicide. The text introduces the topic by providing a brief description of the difference between active and passive euthanasia. The text then includes excerpts from Bouvia v. Superior Court. The notes after the edited opinion include a short biographical description of Elizabeth Bouvia; state that the Bouvia case is within the uniformity of allowing people the right to refuse treatment; mention the issue of ethics and scruples of healthcare providers emphasized in Bouvia; touch upon the potential right to die, grounded in the reality that everyone dies eventually; further explore the principle of “double effect”; and delineate a difference between refusing treatment and seeking assistance in dying. The text then provides excerpts from In re Christopher I., as a case that addresses the issue of seeking assistance in dying. The notes that follow the decision pose questions regarding several issues including, among others, whether there should have been a guardian ad litem present; possible factors to consider in discontinuing care; and the applicability of the Indian Child Welfare Act. Excerpts from Washington v. Glucksberg are included next in the text, with portions from: Parts I and II, Justice O’Connor’s concurrence, Justice Stevens’ concurrence (with portions from Parts I–III), Justice Souter’s concurrence (with portions from Parts II–IV), Justice Ginsburg’s concurrence, and Justice Breyer’s concurrence. Portions of the Vacco v. Quill decision are also provided, including an excerpt from Justice Souter’s concurrence. One set of notes after the opinions explore the differences and similarities between a due process rationale and an equal protection

149. Id.
150. LAFRANCE, supra note 2, at 1214–15.
151. Id. at 1217.
152. Id.
153. Id. at 1217–23.
154. Id. at 1223.
155. Id.
156. LAFRANCE, supra note 2, at 1224.
157. Id.
158. Id.
159. Id.
160. Id. at 1224–35.
161. Id. at 1235.
162. LAFRANCE, supra note 2, at 1235.
163. Id.
164. Id. at 1236–50.
165. Id. at 1250–53.
analysis. One note mentions that there are “three or four state interests in preventing assisted death.”

Another note looks at the decision to challenge the statutes on their faces, as well as the potential for an “as applied” challenge. Another pair of notes briefly explores the differences in style and analyses between Chief Justice Rehnquist and Justice Souter. Yet another note provides summaries indicating that “[p]hysicians are rarely prosecuted” even with the “nearly universal criminal prohibition on assisting suicide.”

The textbook then provides an edited version of Lee v. State of Oregon. The first note after the decision states that Lee v. Oregon was vacated, remanded, and then dismissed, and then provides statistics regarding the number of people given prescriptions to assist them in dying under the Oregon statute. The next note provides information on Oregon voters’ rejection of repealing the law in 1997 and on the prohibition of federal funds for medications assisting death. Another note mentions that the plaintiffs in the Lee case advanced multiple theories (including those based on Due Process, Equal Protection, the First Amendment, and the Americans with Disabilities Act). Yet another note briefly discusses approaches taken in other countries. The final notes after this case provide several citations for articles that discuss euthanasia in other countries, assisted suicide in general, and Oregon assisted suicide.

The opinion of Gonzales v. Oregon follows, including portions of: Parts I–IV of the majority opinion, Parts I–III of Justice Scalia’s dissent, and Justice Thomas’ dissent. The notes after the opinion provide several very brief questions relating to powers of the Attorney General and the legislature in assisted death issues, whether insurance should cover the cost of death, and other related topics. The text then concludes its discussion of the topic with excerpts from the Oregon Death With Dignity Act.

166. Id. at 1253.
167. Id.
168. LAFRANCE, supra note 2, at 1253.
169. Id. at 1254.
170. Id.
171. Id. at 1254–60.
172. Id. at 1260 (citation omitted).
173. LAFRANCE, supra note 2, at 1260.
174. Id.
175. Id. at 1260–61.
176. Id. at 1261–62.
177. Id. at 1262–77.
178. Id. at 1278.
179. LAFRANCE, supra note 2, at 1278.
180. Id.
181. Id. at 1278–83.
The text’s treatment of euthanasia occurs in the “Life and Death Decisions” chapter. The introduction to this topic mentions a broad range of issues, such as: classifying a terminally ill patient, a list of terms used in the field, and the increasingly political nature of the topic. The text first approaches the right to die from a constitutional perspective, and includes excerpts from Cruzan v. Director, Department of Health, providing approximately four pages from the majority opinion, one page from Justice O’Connor’s concurrence, one page from Justice Scalia’s concurrence, two pages from Justice Brennan’s dissent, and two pages from Justice Stevens’ dissent.

The notes following the case explore a wide range of topics. One note discusses the outcome of Nancy Cruzan after remanding the issue to the trial court. Another note cites Principles of Biomedical Ethics and examines the ethical principles that operate in health care decisions: “autonomy, beneficence, and social justice.” Another note examines whether the Cruzan decision establishes a constitutionally protected right to die. One note also examines the issue of surrogate decision making, with yet another note examining the classification of this right as a liberty interest.

Two longer notes summarize both Washington v. Glucksberg and Abigail Alliance v. von Eschenbach. The note following these summaries discusses the issue of the cost of providing care to patients, mentioning the abortion case of Harris v. McRae. The next trio of notes discuss the reality that most law regarding health care decision making is established on a state-by-state basis and that Cruzan did not provide much constitutional guidance to limit state laws; the potential result of differing state laws; and a summary of the related Matter of Busalacchi case; as well as a brief note that New York, Michigan, Missouri, and arguably California,
have adopted a strict standard in relation to these cases. The final note in
this first section briefly mentions the “excellent symposium” from the
September/October 1990 Hastings Center Report.

The next section in the text discusses the issue of “patients deciding
for themselves” and begins with excerpts from Bouvia v. Superior Court, as
an illustration of the general rule. The first two notes following this edited
opinion include summaries of Bartling v. Superior Court, Brophy v. New
England Sinai Hospital, Inc., In re Jobes, information that many state
statutes include provisions for when physicians object to decisions of
patients, and a string citation that explores the moral and ethical issues
raised in this topic. The next note provides an excerpt from Margaret
Battin’s The Least Worst Death. Another pair of notes discusses more
details surrounding Ms. Bouvia’s case, including that after earning the right
to die by court decision, she changed her mind and accepted medical care to
keep her alive, and the fact that the court described Ms. Bouvia’s
condition in “startling terms.” Yet another note mentions that the
fundamental principle that competent adults can make all of their own
health care decisions has made it into the statutes of few states. The final
note provides an excerpt from Understanding the Treatment Preferences of
Seriously Ill Patients to illustrate the kind of information that is significant
to patients making decisions about removing life-sustaining medical care.

The text then includes excerpts from Belchertown State School v.
Saikewicz and the four state interests it explores, for the proposition that
“the right to choose to forgo life-sustaining treatment is not absolute, even
for competent adults.” After this discussion, the text includes a note
entitled “State Law Bases for a ‘Right to Die’” which examines how state
courts have been “encouraged” to find other bases for the right to die by
looking in “state common law, state statutes, or state constitutions.”

194. Id.
195. Id. at 261–65
196. Id. at 266.
197. Id. at 266.
198. Id. at 266–67.
199. Furrow et al., supra note 2, at 267.
200. Id. at 267–68 (Margaret Battin, The Least Worst Death, 13 Hastings Ctr. Rep. 13–16
(April 1983)).
201. Furrow et al., supra note 2, at 268.
202. Id. at 268–69.
203. Id. at 269.
204. Id. (citing Terri R. Fried et al., Understanding the Treatment Preferences of Seriously Ill
Patients, 346 N. Eng. J. Med. 1061 (2002)).
205. Furrow et al., supra note 2, at 269–72.
206. Id. at 272–73.
The next topic the text addresses examines refusing medical treatment for religious reasons.\textsuperscript{207} In this section, the text provides excerpts from *Application of the President and Directors of Georgetown College, Inc.*,\textsuperscript{208} followed by notes summarizing the beliefs of Jehovah’s Witnesses and Christian Scientists\textsuperscript{209} and providing a string citation of other cases dealing with similar issues.\textsuperscript{210} The text also includes excerpts from *Public Health Trust of Dade County v. Wons*,\textsuperscript{211} with subsequent notes summarizing the concurring opinion,\textsuperscript{212} the dissent,\textsuperscript{213} and examining “the rule allowing patients to adhere to their religious faiths, even if that means that the choice to forgo life-sustaining treatment is different for children.”\textsuperscript{214}

The text then examines decisional capacity and evaluates different variables in competency.\textsuperscript{215} Within this section, the text includes excerpts from *Tests of Competency to Consent to Treatment*\textsuperscript{216} and the *President’s Commission on Decisionmaking Capacity*.\textsuperscript{217} The notes following these excerpts discuss that “Roth, Meisel, and Lidz suggest that each of their tests is influenced by the evaluator’s analysis of whether the treatment would succeed”;\textsuperscript{218} that the question of whether a patient is sufficiently “competent to forgo life-sustaining treatment has arisen on many occasions,” including the illustration of *In re Quackenbush*;\textsuperscript{219} that stereotypes may enter into decisions, including Steven Miles and Allison August’s argument that gender may be an important factor;\textsuperscript{220} the role of depression, including Mark Sullivan and Stuart Youngner’s argument that patients in a medical-psychiatric unit should not necessarily “lose their right to refuse medical...

\textsuperscript{207} Id. at 273–79.
\textsuperscript{208} Id. at 274–75.
\textsuperscript{209} Id. at 275–77.
\textsuperscript{210} Id. at 276–77.
\textsuperscript{211} Furrow et al., supra note 2, 277–78.
\textsuperscript{212} Id. at 278.
\textsuperscript{213} Id.
\textsuperscript{214} Id. at 278–79.
\textsuperscript{215} Id. at 280–87.
\textsuperscript{216} Id. at 281–83 (citing Loren H. Roth, Alan Meisel & Charles W. Lidz, *Tests of Competency to Consent to Treatment*, 134 AM. J. PSYCHIATRY 279, 279–283 (1977)).
\textsuperscript{217} Furrow et al., supra note 2, at 283–84 (citing President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Decisionmaking Capacity*, 1 MAKING HEALTH CARE DECISIONS 57–60 (1980)).
\textsuperscript{218} Furrow et al., supra note 2, at 284–85.
\textsuperscript{219} Id. at 285–86.
\textsuperscript{220} Id. at 286 (citing Steven H. Miles & Allison August, *Courts, Gender and “The Right to Die”* 18 LAW MED. & HEALTH CARE 85, 85–93 (1990)).
treatment," and one final note provides a string cite of other relevant articles.

The next issue discussed is “Determining the Patient’s Choice” and begins with excerpts from the Uniform Health-Care Decisions Act of 1993. The note directly following this excerpt discusses the history of advance directives by examining: living wills; durable powers of attorney for health care; the development of the Uniform Health-Care Decisions Act; the values history and the “five wishes” form; family consent laws (including five reasons for deference to family members from the President’s Commission); physicians’ orders regarding end-of-life care; religious objections to some provisions of advance directives provisions; and The Patient Self-Determination Act and advance directives. The text then includes excerpts from In re Eichner to show an example of making decisions for incompetent patients in the absence of a statute. After the edited opinion, the text discusses the principle of substituted judgment, providing brief summaries of In re Estate of Longeway and Brophy v. New England Sinai Hosp. Inc. along with citations to a number of other cases and articles surrounding the issue.

Following these notes, the text includes a brief excerpt from In re Conroy. The notes following Conroy provide excerpts from In re Martin, as that case offers “the most substantial criticism” of the ‘subjective,’ ‘limited-objective,’ and ‘pure objective’ classifications. The notes also discuss the reality of a vegetative state, and Conroy’s influence on In re Jobes and In re Peter. They go on to analyze the distinction between withholding and withdrawing life-sustaining treatment, as described in Conroy. Another note examines the difference between ordinary and extraordinary treatment, as also discussed in Conroy. A final note draws attention to the “special status of nutrition and hydration,” providing

221. FURROW ET AL., supra note 2, at 286–87 (citing Mark D. Sullivan & Stuart J. Youngner, Depression, Competence, and the Right to Refuse Lifesaving Medical Treatment, 151 AM. J. PSYCHIATRY 971, 977 (1994)).

222. FURROW ET AL., supra note 2, at 287.

223. Id. at 287–94.

224. Id. at 299 (citing President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Deciding to Forego Life-Sustaining Treatment 127 (1983)).

225. FURROW ET AL., supra note 2, at 294–301.

226. Id. at 301–02.

227. Id. at 302–03.

228. Id. at 303.

229. Id. at 303–04.

230. Id. at 304–05.

231. FURROW ET AL., supra note 2, 305–06.

232. Id. at 306–07.

233. Id. at 307.

234. Id. at 307–08.
excerpts from Conroy and Cruzan, and summarizing McConnell v. Beverly Enterprises-Connecticut. The text then provides an excerpt from a Vatican document regarding the moral and religious significance of providing artificial nutrition and hydration.

The next related topic discusses the role of courts and the burden of proof in cases that involve forgoing life-sustaining treatment. Within this section, the text first provides excerpts from Conservatorship of Wendland. The notes that follow this case explore several aspects of Wendland's "clear and convincing evidence" standard and provide excerpts from In re Westchester County Medical Ctr.

The text then discusses issues from disputes arising between family members who are acting as decision makers, providing excerpts from the case of Guardianship of Schiavo. After the edited opinion, the text includes a lengthy note on both the legal and political history of the Schiavo case. Several shorter notes follow, questioning the appropriateness of the court's involvement, the procedures the courts should employ if resort to a court is necessary, two possible options of judicial involvement laid out in In re Guardianship of Hamlin, the question of the judicial process as an adversary process that Justice Stevens discussed in Cruzan, and the applicability of 42 U.S.C.A §1983 in right to die cases seeking damages.

The text then includes excerpts from Superintendent of Belchertown State School v. Saikewicz and In re Storar as illustrations of cases requiring decisions for patients who have never been competent. Following the two edited opinions, Furrow provides excerpts from Health Care Decisions for Mentally Retarded Persons. The notes after this excerpt summarize and explain: one justice's disagreement with the Saikewicz case, as articulated in Care and Protection of Beth, a description of In re

235. Id. at 308–10.
236. Id. at 310–11 (citing Congregation for the Doctrine of the Faith, Responses to Certain Questions of the United States Conference of Catholic Bishops Concerning Artificial Nutrition and Hydration (2007)).
237. FURROW ET AL., supra note 2, at 311.
238. Id. at 312–20.
239. Id. at 320–24.
240. Id. at 320–22.
241. Id. at 325–28.
242. Id. at 328–31.
243. FURROW ET AL., supra note 2, at 331.
244. Id. at 331–32.
245. Id. at 331–32.
246. Id. at 332–33.
247. Id. at 333.
248. Id. at 334–36.
249. FURROW ET AL., supra note 2, at 336–38.
250. Id. at 338–40 (citing N.Y. SURR. CT. PROC. ACT § 1750-b (McKinney 2007)).
251. FURROW ET AL., supra note 2, at 340–41.
Guardianship of Chantel Nicole R. and the case’s relationship to the Health Care Decisions Act for Persons with Mental Retardation; other portions of the Health Care Decisions Act and the scope of this statute. Finally the notes provide a list of articles that describe issues arising specifically with those who are “mentally retarded” and “developmentally disabled.”

The next discussion in the text surrounds the issue of deciding for children. The text contains excerpts from Newmark v. Williams, which provides a pattern for most courts’ “encounters with parents’ rights to refuse medical treatment for their children,” except for those cases where the “conditions of the state’s child protective services statute are met.”

One note following discusses the general “best interests” test and the more rare “substituted judgment” theory, and provides brief summaries of the opinions of Matter of AB and In re D.H. The next note provides factors from the American Medical Association and In re Christopher I. to consider when determining “if the removal of life sustaining medical care is in the best interest of a child.” The next pair of notes explores the exceptions to the general rule: emancipated minors and those with the “capacity sufficient to understand the nature of” their medical decisions. Another pair of notes examines potential issues arising from a conflict between parents’ religious beliefs and the medical treatment of their children. Yet another note describes the reverse situation, where a hospital may refuse to provide treatment against a parent’s wishes, as in In re K.I, B.I. and D.M. The final note in this section briefly mentions that decisions regarding medical treatment for infants generally presents a different question than similar decisions regarding older children.

Another topic covered in this chapter is “Futile Treatment.” The text begins this discussion by including a futility policy excerpt and a portion of the Texas futility statute. One note following these excerpts summarizes the “scientific” and “ethical” definitions of futility, and also

252. Id. at 341.
253. Id.
254. Id. at 341–42.
255. Id. at 342–48.
256. Id. at 349–50.
257. FURROW ET AL., supra note 2, at 350.
258. Id. at 350–51.
259. Id. at 351.
260. Id. at 351–53.
261. Id. at 352.
262. Id. at 353.
263. FURROW ET AL., supra note 2, at 353–61.
265. FURROW ET AL., supra note 2, at 355–58 (citing TEX. HEALTH & SAFETY CODE ANN. §§ 166.046, 166.052, 166.053 (2003)).
includes the AMA’s definition of futility to convey the variety of interpretations. Another note mentions that some “statutes modeled on the Uniform Health-Care Decisions Act also have statutory provisions that provide that physicians need not provide futile care”; it also summarizes an argument from Thaddeus Pope arguing for the benefits of an “authoritative and conclusive endpoint for disputes.” The final two notes provide citations to several articles further discussing the issue of futility.

The text next examines decision-making for newborns by providing a lengthy introduction to the topic, including a summary of the Baby Doe cases. After the introduction, the text offers excerpts from Miller v. HCA. The notes following the edited opinion contain several lists of questions to provoke further inquiry into the topic, and also include a portion of a dissent from the court of appeals regarding the lower court’s decision. They also include a string citation of articles that further discuss the topic of decision-making for newborns.

The final topic the text discusses is Physician-Assisted Death. In order to establish the constitutional framework of the issue, this section contains an edited version of Washington v. Glucksberg, including portions from: Parts I and II, Justice O’Connor’s concurrence, Justice Souter’s concurrence, and Justice Breyer’s concurrence. Directly following the Washington opinion, the text includes excerpts from Vacco v. Quill. The notes following these cases briefly mention the highly emotional responses to these decisions, summarize Judge Calabresi’s Second Circuit concurrence in Quill, include a statement from Daniel Callahan regarding the passion behind physician-assisted death; provide a brief history of Dr. Jack Kevorkian; discuss the ambiguity of prohibited behavior in statutes; include an excerpt from Susan Wolf regarding woman’s requests in the health care system; discuss organized medical

266. Furrow et al., supra note 2, at 358–59.
267. Id. at 360 (Thaddeus Pope, Medical Futility Statutes: No Safe Harbor to Unilaterally Refuse Life-Sustaining Treatment, 75 Tenn. L. Rev. 1 (2007)).
268. Furrow et al., supra note 2, at 360–61.
269. Id. at 362–64.
270. Id. at 365–71.
271. Id. at 372.
272. Id. at 373.
273. Id. at 374–404.
274. Furrow et al., supra note 2, at 374–85.
275. Id. at 385–88.
276. Id. at 388–89.
277. Id. at 389.
278. Id. at 389–90 (citing Daniel Callahan, Can We Return Death to Disease?, 19 The Hastings Ctr. Report 4 (Supp. 1989)).
279. Furrow et al., supra note 2, at 390–91.
280. Id. at 391.
281. Id. at 392 (citing Susan M. Wolf, Gender, Feminism, and Death: Physician-Assisted
groups opposing medical participation in euthanasia or assisted death and offer a criticism of this stance from Christine Cassel and Diane Meier, point to the issue of terminal sedation as mentioned in Justice Rehnquist’s footnote; and touch upon the reality that “litigation seeking a right to physician-assisted death under state constitutional law has also failed thus far,” with a summary of Krischer v. McIver as an example.

Following these notes, the text includes excerpts from The Oregon Death with Dignity Act and the summary of Oregon’s Death with Dignity Act from 2006. After these excerpts, the text provides a series of notes which more succinctly summarize the Oregon Death with Dignity Act; compare a portion of Oregon’s Second Annual Report from 2000 with the excerpt previously provided; summarize the arguments surrounding Lee v. Oregon; discuss the federal government’s response of enacting several laws, and briefly summarize the resulting opinion of Gonzalez v. Oregon; touch upon more recent amendments to the Oregon statute; mention the trend of other states to follow Oregon’s “success”; discuss potential similarities between those who desire to permit physician-assisted death and those who desire to outlaw physician-assisted death, drawing support from Oregon’s Firth Annual Report in 2003, and mentioning the promulgation of pain relief acts; and lastly, briefly compare the issue in the United States to the laws in other countries.

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The text’s treatment of the euthanasia issue is included in a chapter entitled “The Right and ‘Duty’ to Die.” The text introduces the topic explaining that in ordinary circumstances, the “right to refuse treatment is not controversial” but that when this refusal results in the patient’s death

Suicide and Euthanasia, in FEMINISM & BIOETHICS: BEYOND REPRODUCTION 282, 308 (1996)).

282. FURROW ET AL., supra note 2, at 392 (citing Christine K. Cassel & Diane E. Meier, Morals and Moralism in the Debate Over Euthanasia and Assisted Suicide, 323 NEW ENG. J. MED. 750, 751 (1990)).

283. FURROW ET AL., supra note 2, at 392–93.

284. Id. at 393.

285. Id. at 393–98 (citing Oregon Death with Dignity Act, OR. REV. STAT. §§ 127.800–127.897 (2007)).

286. FURROW ET AL., supra note 2, at 398–400 (citing OREGON DEPARTMENT OF HUMAN SERVICES, Summary of Oregon’s Death with Dignity Act -2006 (2007)).

287. FURROW ET AL., supra note 2, at 400.

288. Id. at 400–01.

289. Id. at 401.

290. Id. at 401–02.

291. Id. at 402.

292. Id.

293. FURROW ET AL., supra note 2, at 402–03.

294. Id. at 404.

295. DAVID ORENTLICHER ET AL., supra note 2, at 229.
there is a necessity to balance the individual’s right to refuse treatment “with the state’s or other persons’ interest in preserving the patient’s life.” The text then discusses several factors which led to the social recognition of a “right to die” and provides a string citation of literature regarding the refusal of life-sustaining treatment.

The first section within this chapter discusses the refusal of life-sustaining treatment by “The Competent Patient”, defining this type of patient as one who has a decision-making capacity and can make “informed and voluntary decisions about medical care.” Within this section, the text provides excerpts of In re Karen Quinlan; In re Conroy; and Cruzan v. Director, Missouri Department of Health. The first notes following these cases discuss “The Individual Interest in Refusing Treatment.” The text provides the rest of Karen Quinlan’s story, as told in Gregory E. Pence’s Classic Cases in Medical Ethics, and discusses the reality that physicians can incorrectly believe that a patient will be permanently dependent on a medical treatment. The text continues by discussing the difference in brain function, patient responses, and the duration between a persistent vegetative state, a coma, and brain death, according to information in Medical Aspects of the Persistent Vegetative State (Second of Two Parts).

The next note discusses the sources of the right to refuse life-sustaining treatment, mentioning both the “common law right to be free of nonconsensual bodily invasion” and “the substantive due process right to make decisions of critical importance to one’s destiny” and mentions the trend for courts and commentators to read the Cruzan case as establishing the right to die as a liberty interest protected by the Constitution. Ultimately, the textbook asserts that the Cruzan decision collapsed the two original rights into one liberty interest. Another note examines state law, commenting that “state action has not been viewed as an issue in treatment withdrawal cases both because state common law grounds are available to

296. Id.
297. Id. at 230.
298. Id. at 230–57.
299. Id. at 231–34.
300. Id. at 234–37.
301. DAVID ORENTLICHER ET AL., supra note 2, at 237–41 (including approximately two pages of Justice Scalia’s dissent).
302. Id. at 241–46.
303. Id. at 241–42 (citing GREGORY E. PENCE, CLASSIC CASES IN MEDICAL ETHICS 39 (4th ed. 2004)).
304. DAVID ORENTLICHER ET AL., supra note 2, at 242–43 (citing The Multi-Society Task Force on PVS, Medical Aspects of the Persistent Vegetative State (Second of Two Parts), 330 NEW ENG. J. MED. 1572 (1994)).
305. ORENTLICHER ET AL., supra note 2, at 243.
306. Id. at 243.
justify withdrawal and because the courts recognize that the state is doing more than refusing to intervene but is also using the threat of criminal liability to effectively force the physician or hospital to treat.\textsuperscript{307} Another note discusses that while the difference between withdrawing life-sustaining treatment and withholding life-sustaining treatment has been rejected in ethics and law, some health care providers have very different feelings about the two acts—it thus includes an excerpt from Miles J. Edwards and Susan W. Tolle’s \textit{Disconnecting a Ventilator at the Request of a Patient Who Knows He Will Then Die: The Doctor’s Anguish}.\textsuperscript{308} The next note again discusses that physicians are ”slow to withdraw feeding tubes because of their personal moral concerns” even though the \textit{Cruzan} decision provided for the wide acceptance of patients’ decisions to refuse any medical treatment.\textsuperscript{309} The note then mentions that do-not-resuscitate and do-not-attempt-resuscitation orders are less controversial and only spark controversy when the question of whether physicians can override a patient or patient’s family’s desire to resuscitate.\textsuperscript{310} The final note in this section explores the costs of care and states that the right to refuse treatment coincides with concerns of the high cost of medical care, providing statistics about the health care costs “consumed in the last six or twelve months of people’s lives” from \textit{Medical Expenditures During the Last Year of Life: Findings from the 1992–1996 Medicare Current Beneficiary Study} by Donald R. Hoover et al.;\textsuperscript{311} \textit{The Economics of Dying: The Illusion of Cost Savings at the End of Life} by Ezekiel J. Emanuel and Linda L. Emanuel;\textsuperscript{312} \textit{Medical Care in the Last Twelve Months of Life: The Relation between Age, Functional Status, and Medical Care Expenditures} by Anne A. Scitovsky.\textsuperscript{313}

The text then goes on to explore the state’s interest in preserving life, providing another series of notes.\textsuperscript{314} The first of these notes briefly...
summarizes David Blake’s argument that viewing the state’s interest to preserve patients’ lives as sufficient to justify the imposition of medical treatment only when patients want their lives preserved, “conflates the value of life with the ability to exercise individual autonomy” and “there is an intrinsic value to a person’s life above and beyond the value recognized by that person.” The note continues by listing a number of other concerns related to preserving life from David Orentlicher’s Physician-Assisted Dying: The Conflict with Fundamental Principles of American Law. The next note discusses a variety of issues related to the balancing of individual and state interests, briefly summarizing Bouvia v. Superior Court, McKay v. Bergstedt, Fosmire v. Nicoleau, Stamford Hospital v. Vega, a string citation of articles relating to issues unique to the Jehovah Witness religion, and a summary of In re Caulk as an illustration of the courts’ tendency to require continuation of treatment in prisoner cases. The text then provides a note discussing the difference between burdensome treatment and burdensome life, stating that courts have not differentiated between patients who refuse treatment because the treatment is not desired, and those who refuse treatment because their life is not desired. Another note discusses the reality that while the appellate courts have laid down a clear law regarding the right of competent patients to refuse life-sustaining treatments, “actual practices by physicians and lower court judges retain some of the Quinlan kind of balancing and provides an excerpt from Clinical Ethics: A Practical Approach to Ethical Decisions to Clinical Medicine.

315. Id. at 247 (citing David Blake, State Interests in Terminating Medical Treatment, 19(3) HASTING CENTER REP. 5 (1989)).
317. ORENTLICHER ET AL., supra note 2, at 247–51.
318. Id. at 248–49.
319. Id. at 249.
320. Id. at 250.
321. Id.
322. Id.
323. ORENTLICHER ET AL., supra note 2, at 250–51. The text also provides a separate string cite of cases dealing specifically with medical care for prisoners.
324. Id. at 251.
325. Id. at 251.
326. Id. at 251–52 (citing ALBERT R. JONSEN, MARK SIEGLER & WILLIAM J. WINSLADE, CLINICAL ETHICS: A PRACTICAL APPROACH TO ETHICAL DECISIONS IN CLINICAL MEDICINE 15, 47, 62 (3d ed. 1992)).
The next series of notes examines the state’s interest in preventing suicide. Within these notes, the text briefly summarizes the Belchertown State School v. Saitkewicz as an example of the courts’ tendency to dismiss the state’s interest in preventing suicide as an objection to the withdrawal of life-sustaining treatment. The following note discusses Justice Scalia’s dissent in Cruzan for the proposition that there is not a distinction between refusing life-sustaining treatment and suicide. This note also mentions John A. Robertson’s article, Involuntary Euthanasia of Defective Newborns.

Another series of notes explores the ethical integrity of the medical profession. The first note in this series introduces the topic with the statement: “The state’s interest in preserving the ethical integrity of the medical profession has rarely been invoked to prevent the withdrawal of life-sustaining treatment.” The note then provides brief summaries from Brophy v. New England Sinai Hospital; Gray v. Romeo; In re Jobes; and In re Requena as examples of how courts respond to doctors who refuse to withdraw medical treatment. This note also discusses advance directive statutes and the issue of transferring a patient’s care if conflicting views of withdrawing life-sustaining treatment arise, and lastly, provides a string citation of relevant articles discussing this topic further. The second note in this series examines the legal liability that attaches to this issue by summarizing Barber v. Superior Court and citing Decisions Near the End of Life: Professional Views on Life-Sustaining Treatments by Mildred Z. Solomon et al., for the reality that “[a]lthough no physician has suffered civil or criminal liability for withdrawing life-sustaining treatment at the request of a patient or the patient’s family, physicians often express concerns about the risks of legal liability when faced with a request to withdraw treatment.”

A further series of notes discusses the protection of innocent third parties. The first note states that “[c]ourts regularly cite the state’s interest in protecting the interests of innocent third parties when a patient wants to refuse life-sustaining treatment” and provides a summary of Application of

327. ORENTLICHER ET AL., supra note 2, at 252–53.
328. Id.
329. Id. at 253.
330. Id. (citing John A. Robertson, Involuntary Euthanasia of Defective Newborns, 27 STAN. L. REV. 213, 214–15 & n.16 (1975)).
331. ORENTLICHER ET AL., supra note 2, at 253–55.
332. Id. at 253.
333. Id. at 253–54.
334. Id. at 254.
335. Id. at 255 (citing Mildred Z. Solomon et al., Decisions Near the End of Life: Professional Views on Life-Sustaining Treatment, 83 AM. J. PUB. HEALTH 14, 19 (1993)).
The President and Directors of Georgetown College as an example. The note continues by stating that more recently courts recognize a parent’s right to refuse life-sustaining treatment, despite the parent having young children and providing summaries of In re Debreuil; Fosmire v. Nicoleau; and Stamford Hospital v. Vega as examples. The second note of the series is entitled “Law on the Books vs. Law in Practice” and again mentions the Debreuil case, as well as providing a short summary of Wons v. Public Health Trust.

The next topic in this refusal of life-sustaining treatment section explores the law surrounding patients “whose competence is uncertain.” The text introduces the topic by stating that in the “vast majority” of cases, it is not clear whether the patient is competent and gives a list of four tests used to determine competence from Tests of Competency to Consent to Treatment. The text then continues this discussion by including excerpts from Lane v. Candura and Department of Human Services v. Northern. Following these cases, Orentlicher offers a series of notes surrounding the issue of assessing competence. The notes discuss applying the tests for competence as the issue arose in Northern; competence as it applies specifically to adolescents, summarizing Caldwell v. Bechtol; Belcher v. Charleston Area Medical Center, In re Swan; In re E.G., and giving a string citation of articles exploring the mature minor doctrine and other related issues in the competence of minors; and the reliability of patient decisions, citing Advance Directives: Stability of Patients’ Treatment Choices; and Relationship of General Advance Directive Instructions to Specific Life-Sustaining Treatment Preferences in Patients with Serious Illness for the proposition that in the course of the year, treatment preferences are generally stable amongst patients studied whose health remained the same, and Prospective Study of Health Status Preferences and

337. Id. at 255.
338. Id. at 255–56.
339. Id. at 256–57.
340. Id. at 257–63.
341. Id. at 257 (citing Loren H. Roth, Alan Meisel, & Charles W. Lidz, Tests of Competency to Consent to Treatment, 134 AM. J. PSYCHIATRY 279 (1977); and offering a string citation of articles providing more information).
342. ORENTLICHER ET AL., supra note 2, at 257–58.
343. ORENTLICHER ET AL., supra note 2, at 258–59.
344. Id. at 259–63.
345. Id. at 259 (citing Adrienne M. Martin, Tales Publicly Allowed: Competence, Capacity, and Religious Beliefs, 37(1) HASTINGS CENTER REP. 33 (2007)).
346. ORENTLICHER ET AL., supra note 2, at 259–62.
347. Id. at 262 (citing Linda L. Emanuel et al., Advance Directives: Stability of Patients’ Treatment Choices, 154 ARCH. INTERN. MED. 209 (1994)).
348. ORENTLICHER ET AL., supra note 2, at 262 (citing Lawrence J. Schneiderman et al., Relationship of General Advance Directive Instructions to Specific Life-Sustaining Treatment Preferences in Patients with Serious Illness, 152 ARCH. INTERN. MED. 2114 (1992)).
Changes in Preferences Over Time in Older Adults for changes in health care views when adults’ health status worsens.  

The text next examines issues related to the incompetent patient and the refusal of life-sustaining treatment. The text first summarizes In re Farrell, and then provides excerpts from In re Conroy and In re Jobes. Following these two opinions, the text includes an edited version of Cruzan v. Director, Missouri Department of Health, providing approximately three pages of the majority opinion, a summary of Justice O’Connor’s concurrence, and about three pages of Justice Brennan’s dissent. The text then provides a summary of the real life events following the decision in Cruzan, as told in Gregory E. Pence’s Classic Cases in Medical Ethics. In a note following the decision, the text further explores the rights of incompetent patients, by giving three potential explanations for a right to refuse life-sustaining treatment for incompetent people. The text next examines the issue of implementing this right of incompetent patients by offering brief summaries of Jobes and Conroy, In re Westchester County (O’Connor), and In re Tavel. The note then continues by summarizing the Health Care Surrogate Act of Illinois and providing string cites to a number of other similar statutes and articles discussing the relevant issue. In the same note, the text provides a summary of the best interests standard from Superintendent of Belchertown State School v. Saikewicz. Following this topic, the next note discusses general trends in procedural rules, using Conroy, Conservatorship of Wendland, and In re Martin as examples of courts adopting stricter standards for incompetent patients who are “neither terminally ill nor permanently unconscious.” The text then includes a note examining the argument of making decisions reflecting the “best interests of the patients” by including an excerpt from Quality of Life and Non-Treatment Decisions for Incompetent Patients: a Critique of the Orthodox Approach by Rebecca

349. ORENTLICHER ET AL., supra note 2, at 262–63 (citing Terri R. Fried et al., Prospective Study of Health Status Preferences and Changes in Preferences Over Time in Older Adults, 166 ARCH. INTERN. MED. 890 (2006)).  
350. ORENTLICHER ET AL., supra note 2., at 263–308.  
351. Id. at 263–64.  
352. Id. at 264–69.  
353. Id. at 269–74.  
354. Id. at 274–79.  
355. Id. at 279 (citing GREGORY E. PENCE, CLASSIC CASES IN MEDICAL ETHICS 43 (4th ed. 2004)).  
357. Id. at 280–82.  
359. ORENTLICHER ET AL., supra note 2, at 282–83.  
360. Id. at 283–85.  
361. Id. at 285–86.
Dresser and John Robertson, as well as summaries of two arguments provided by David Orentlicher’s *Destructuring Disability: Rationing of Health Care and Unfair Discrimination Against the Sick* and by Norman F. Boyd’s *Whose Utilities for Decision Analysis?* The note also provides statistics from *How Strictly Do Dialysis Patients Want Their Advance Directive Followed*, a study of patients undergoing kidney dialysis and the hypothetical situation presented to them of developing advanced Alzheimer’s disease, and from *Patients Who Want Their Family and Physician to Make Resuscitation Decisions for Them: Observations from SUPPORT and HELP*, a study of patients who were seriously ill regarding their wishes for CPR in the hypothetical event of cardiac arrest.

Another note in this section discusses family decision making and includes excerpts from Nancy K. Rhoden’s *Litigating Life and Death*, David Orentlicher’s *The Limitations of Legislation*, a summary of Dresser and Robertson’s view, and a string citation to other articles providing further discussion. This note summarizes statutes that establish a hierarchy of surrogate decision makers, and the reality that courts are “reluctant to permit withdrawal of treatment in the presence of a disagreement among family members” as evidenced in *In re Martin*, *Courture v. Courture*, and *In re Schiavo*. The next note provides information on ethics committees and consultants, citing Committee on Bioethics findings. The final note in this

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362. Id. at 286–87 (citing Rebecca S. Dresser & John A. Robertson, *Quality of Life and Non-Treatment Decisions for Incompetent Patients: A Critique of the Orthodox Approach*, 17 MED. L. & HEALTH CARE 234 (1989)).


364. ORENTLICHER ET AL., supra note 2, at 287 (citing Norman F. Boyd et al., *Whose Utilities for Decision Analysis?*, 10 MED. DECIS. MAKING 58 (1990)).


370. ORENTLICHER ET AL., supra note 2, at 289.

371. ORENTLICHER ET AL., supra note 2, at 289–91.

372. Id. (citations omitted).

373. Id. at 291–92 (citing Committee on Bioethics, *Institutional Ethics Committees*, 107
series evaluates the court’s discouragement of judicial intervention in end-of-life cases.\textsuperscript{374}

The text then provides a series of notes regarding advance planning specifically.\textsuperscript{375} Introducing the topic with a statement that “people can avoid many of the problems with end-of-life decision making by executing a living will, durable power of attorney for health care, or other advance directive while competent,” derived from \textit{The Right to Die}.\textsuperscript{376} The text then provides a series of notes regarding advance planning specifically.\textsuperscript{377} The text then provides a series of notes regarding advance planning specifically.\textsuperscript{378} The next note offers information regarding the related topic of the Patient Self-Determination Act, briefly summarizing findings from \textit{Advance Directives on Admission: Clinical Implications and Analysis of the Patient Self-Determination Act of 1990; Sources of Concern About the Patient Self-Determination Act; Patient Advance Directives: Facility and Patient Responses}; and several other sources.\textsuperscript{384} Yet another note discusses the

\begin{footnotes}
\footnotetext{374}{ORENTLICHER \textit{et al.}, supra note 2, at 292–93.}
\footnotetext{375}{Id. at 293–99.}
\footnotetext{376}{Id. at 293 (citing ALAN MEISEL & KATHY L. CERMINARA, \textit{THE RIGHT TO DIE}, §§7.01, 7.13 (3d ed. Supp. 2007)).}
\footnotetext{377}{ORENTLICHER \textit{et al.}, supra at 293–94 (citing David Orentlicher, \textit{Advance Medical Directives}, 263 JAMA 2365 (1990)).}
\footnotetext{378}{ORENTLICHER \textit{et al.}, supra note 2, at 294.}
\footnotetext{379}{Id. at 295.}
\footnotetext{380}{Id. (citing David Orentlicher, \textit{The Limitations of Legislation}, 53 MD. L. REV. 1255, 1280–1288 (1994)).}
\footnotetext{381}{ORENTLICHER \textit{et al.}, supra note 2, at 295 (citing Marion Danis et al., \textit{A Prospective Study of Advance Directives for Life-Sustaining Care}, 324 NEW ENG. J. MED. 882 (1991)).}
\footnotetext{382}{Id. at 295 (citing David Orentlicher, \textit{The Illusion of Patient Choice in End-of-Life Decisions}, 267 JAMA 2101, 2101–2102 (1992)).}
\footnotetext{383}{ORENTLICHER \textit{et al.}, supra note 2, at 296 (citing Carol E. Sieger et al., \textit{Refusing Artificial Nutrition and Hydration: Does Statutory Law Send the Wrong Message?}, 50 J. AM. GERIATRICS SOC’Y 544 (2002)).}
\footnotetext{384}{ORENTLICHER \textit{et al.}, supra note 2, at 296.}
\end{footnotes}
enforcement of the legal standards and the potential for individuals or families to sue providers for "administering unwanted life-sustaining treatments" though "courts have generally refused to impose liability."

The text provides summaries of Anderson v. St. Francis-St. George Hospital and Wright v. John Hopkins Health Systems Corp., as examples of cases in which courts rejected claims based on "wrongful administration of life-sustaining care." The note also provides citations of several cases in which courts recognize a cause of action, and conversely, cases in which courts have required families to pay hospital bills that accrued during the "unwanted treatment" and also offers a string citation at the end of the note for articles that discuss the topic further.

The next series of notes is devoted to issues arising from young children and adolescents. The series begins by describing the proposition in The Right to Die, that generally, parents have authority to make medical decisions for their children, and that typically, there is a best interests standard for children. The note continues with an excerpt from Prince v. Massachusetts that the "courts typically cite" when ordering treatment for a child. The next note further explores the best interests standard in relation to children by citing decisions in which courts easily order a child to be treated if the child can "readily be restored to good health or when treatment poses little risk." The note also provides summaries of several cases in which the courts' decisions included treatments with more substantial risks or a low likelihood of success and thus, created differing outcomes, such as Newmark v. Williams, In re Hamilton, In re Hofbauer, Custody of a Minor, and In re Phillip B.

The text then includes a series of notes discussing severely disabled newborns. The first note in this series discusses the historical background
of the issue, by summarizing Bowen v. American Hospital Association and the Child Abuse Amendments of 1984. The note further explores the issue by offering an interpretation of one key feature from Forgoing Medically Provided Nutrition and Hydration in Pediatric Patients. The note then evaluates the reach of regulations in the issue and the reality that "parental wishes may be frustrated by the unwillingness of physicians to withdraw or withhold care, either out of personal conviction or because of a belief that the federal regulations mandate care." Another note in this series provides a brief summary of the applicability of the Rehabilitation Act and the Americans with Disabilities Act to children with severe disabilities, using a summary of United States v. University Hospital as an illustration. The next note discusses the role of physicians and the general trend for them to aggressively recommend treatment, citing Sarah Glazer, and Betty Wolder Levin, John M. Driscoll, Jr. and Alan R. Fleischman. The final note in this series offers a string citation of articles "for further discussion."

The next section in "The Right and ‘Duty’ to Die" chapter is entitled “Physician Aid in Dying” and begins with excerpts from Washington v. Glucksberg and Vacco v. Quill, in which the text includes a portion of Justice O’Connor’s concurrence and a portion of Justice Stevens’ concurrence. Following the excerpted opinion the first note describes the factual background behind the physician aid in dying issue, describing the stories of Dr. Jack Kevorkian and Dr. Timothy Quill from several different sources, and explaining that "juries are generally unwilling

400. Id. at 304 (citing 42 U.S.C.A. § 5106a(b)(1)).
401. ORENTLICHER ET AL., supra note 2, at 305 (citing Lawrence J. Nelson et al., Forgoing Medically Provided Nutrition and Hydration in Pediatric Patients, 23 J.L. MED. & ETHICS 33, 40–41 (1995)).
402. ORENTLICHER ET AL., supra note 2, at 305–06 (citing Mary A. Crossley, Of Diagnoses and Discrimination: Discriminatory Nontreatment of Infants with HIV Infection, 93 COLUM. L. REV. 1581, 1613–14 n.134 (1993); Carol R. Leicher & Francis J. DiMario, Termination of Nutrition and Hydration in a Child with Vegetative State, 148 ARCH. PEDIAT. & ADOLESCENT MED. 87 (1994)).
404. ORENTLICHER ET AL., supra note 2, at 306–07.
405. Id. at 307 (citing Sarah Glazer, Born Too Soon, Too Small, Too Sick: Whatever Happened to Baby Doe, WASH. POST, Apr. 2 1991 at z8)).
406. ORENTLICHER ET AL., supra note 2, at 307 (citing Betty Wolder Levin, John M. Driscoll, Jr., & Alan R. Fleischman, Treatment Choice for Infants in the Neonatal Intensive Care Unit at Risk for AIDS, 265 JAMA 2976, 2978 Table 3 (1991)).
407. ORENTLICHER ET AL., supra note 2, at 307–08.
408. Id. at 308–14.
409. Id. at 314–19.
to convict physicians who help dying patients self-administer a lethal dose of drugs."\textsuperscript{410}

The next note discusses the Oregon Death with Dignity Act, providing statistics of voter results, statistics of deaths under the Death with Dignity Act,\textsuperscript{411} and possible reasons that patients desire aid in dying, stating that "[d]epression was not a significant factor."\textsuperscript{412} The note also includes a citation to a study that shows that "[d]ata from the Netherlands suggest that physicians there are more likely to grant a patient's request for physician aid in dying or euthanasia."\textsuperscript{413} The notes continue in a similar vein, by next discussing states' rights and the right to die,\textsuperscript{414} giving very brief summaries of Oregon v. Ashcroft and Gonzales v. Oregon,\textsuperscript{415} and offering a description of a national survey performed by Diane E. Meier and others.\textsuperscript{416}

Another note provides further information about the plaintiffs in Glucksberg,\textsuperscript{417} followed by a note examining the right to refuse treatment under substantive due process.\textsuperscript{418} This note provides excerpts from several court decisions and articles including: In re Conroy,\textsuperscript{419} Superintendent of Belchertown v. Saikewicz,\textsuperscript{420} Doctors Must Not Kill by Willard Gaylin and others;\textsuperscript{421} Neither for Love nor Money: Why Doctors Must Not Kill by Leon


\textsuperscript{412.} ORENTLICHER ET AL., supra note 2, at 322 (citing Linda Ganzini et al., Experiences of Oregon Nurses and Social Workers with Hospice Patients who Requested Assistance with Suicide, 347 NEW ENG. J. MED. 582 (2002); Robert A. Pearlman et al., Motivations for Physician-Assisted Suicide, 20 J. GEN. INTERN. MED. 234 (2005)).

\textsuperscript{413.} ORENTLICHER ET AL., supra note 2, at 322 (citing Jansen-can der Weide et al., Granted, Undecided, Withdrawn, and Refused Requests for Euthanasia and Physician-Assisted Suicide, 165 ARCH. INTERN. MED. 1698 (2005)).

\textsuperscript{414.} ORENTLICHER ET AL., supra note 2, at 323–34.

\textsuperscript{415.} Id. at 323.

\textsuperscript{416.} Id. at 324 (citing Diane E. Meier et al., Characteristics of Patients Requesting and Receiving Physician-Assisted Death, 163 ARCH. INTERN. MED. 1537 (2003)).

\textsuperscript{417.} ORENTLICHER ET AL., supra note 2, at 324–25.

\textsuperscript{418.} Id. at 325–28.

\textsuperscript{419.} Id. at 325.

\textsuperscript{420.} Id.

\textsuperscript{421.} Id. (citing Willard Gaylin et al., Doctors Must Not Kill, 259 JAMA 2140, 2141 (1988)).
Kass; 422 Perceptions by Family Members of the Dying Experience of Older and Seriously Ill Patients by Joanne Lynn and others; 423 Managed Care and Managed Death by Daniel P. Sulmasy; 424 Some Non-Religious Views Against Proposed “Mercy-killing” Legislation by Yale Kamisar; 425 Rational Suicide and the Right to Die: Reality and Myth by Yeates Conwell and Eric D. Caine; 426 and When Self-Determination Runs Amok by Daniel Callahan. 427 The next note describes that while “courts permit withdrawal of treatment regardless of the patient’s condition [they] are generally unwilling to recognize a right to aid in dying (or euthanasia), also regardless of the patient’s condition” and provides an excerpt from David Orentlicher’s argument in The Legalization of Physician-Assisted Suicide: A Very Modest Revolution. 428 The text then includes a note that provokes an inquiry into the applicability of the Equal Protection Clause, 429 and another note discussing limiting the right to aid in dying, in which an excerpt from Yale Kamisar’s Against Assisted Suicide – Even a Very Limited Form is provided. 430 Another note discusses the issue of palliative sedation, providing information from the Netherlands from Judith A. C. Rietjens’ Terminal Sedation and Euthanasia, a brief summary of Abigail Alliance v. Eschenbach, and a string citation of articles that offer more information about palliative sedation. 431 Yet another note examines the predictability of patient outcome, providing information from Evaluation of Prognostic Criteria for Determining Hospice Eligibility in Patients with Advanced Lung, Heart, or Liver Disease; Defining the “Terminally Ill”: Insights from SUPPORT; and Survival of Medicare Patients After Enrollment in Hospice Programs, which indicates that, while certainty varies from patient to

422. ORENTLICHER ET AL., supra note 2, at 325–26 (citing Leon Kass, Neither for Love nor Money: Why Doctors Must Not Kill, 94 PUB. INT. 25, 35 (Winter 1989)).

423. ORENTLICHER ET AL., supra note 2, at 326 (citing Joanne Lynn et al., Perceptions by Family Members of the Dying Experience of Older and Seriously Ill Patients, 126 ANNALS INTERN. MED. 97 (1997)).

424. ORENTLICHER ET AL., supra note 2, at 326 (citing Daniel P. Sulmasy, Managed Care and Managed Death, 155 ARCH. INTERN. MED. 133, 133 (1995)).

425. ORENTLICHER ET AL., supra note 2, at 326 (citing Yale Kamisar, Some Non-Religious Views Against Proposed “Mercy-killing” Legislation, 42 MINN. L. REV. 669, 690 (1958)).

426. ORENTLICHER ET AL., supra note 2, at 326–27 (citing Yeates Conwell and Eric D. Caine, Rational Suicide and the Right to Die: Reality and Myth, 325 NEW ENG. J. MED. 1100, 1101–02 (1991)).

427. ORENTLICHER ET AL., supra note 2, at 327 (citing Daniel Callahan, When Self-Determination Runs Amok, 22(2) HASTINGS CENTER REP. 52, 52, 55 (1992)).


429. ORENTLICHER ET AL., supra note 2, at 329.

430. Id. at 329–30 (citing Yale Kamisar, Against Assisted Suicide—Even a Very Limited Form, 72 U. DET. MERCY L. REV. 735, 740–41 (1995)).

431. ORENTLICHER ET AL., supra note 2, at 330–31 (citing Judith A. C. Rietjens, Terminal Sedation and Euthanasia, 166 ARCH. INTERN. MED. 749 (2006)).
patient, 85% of the patients certified as likely to die within six months, died within six months.432

The text then includes three notes briefly discussing the issue of refusing food and water and provides citations to several articles further examining the topic,433 the ability of a doctor to withdraw from a particular patient’s case due to a conscientious objection,434 and the reality that some statutory proposals are seeking a right to euthanasia.435 Another lengthy note follows with a comparative study of the issue in other countries such as Australia, the Netherlands, Belgium, Germany, and Switzerland, providing information from Robert L. Schwartz, Reuters, Maurice A. M. Wachter, Paul J. van der Maas, M. Simons, Bregje D. Onwuteaka-Philipsen, Agnes van der Heide, Mette L. Rurup, Margaret P. Battin, and Samia A. Hurst and Alex Mauron.436 The text then provides a lengthy excerpt from David Orentlicher’s The Legalization of Physician-Assisted Suicide for an example of another argument regarding the issue.437 The final substantive note provides statistics on state laws regarding physician aided dying,438 followed by a note which provides a string citation of articles for further discussion on the issue.439

432. ORENTLICHER ET AL., supra note 2, at 331–32 (citing Ellen Fox et al., Evaluation of Prognostic Criteria for Determining Hospice Eligibility in Patients with Advanced Lung, Heart, or Liver Disease, 282 JAMA 1638 (1999); Joanne Lynn et al., Defining the “Terminal Ill”: Insights from SUPPORT, 35 DUQ. L. REV. 311 (1996); and Nicholas A. Christakis & Jose J. Escarce, Survival of Medicare Patients After Enrollment in Hospice Programs, 335 NEW ENG. J. MED. 172, 174 (1996)).

433. ORENTLICHER ET AL., supra note 2, at 332.

434. Id.

435. Id. at 332–33.


438. ORENTLICHER ET AL., supra note 2, at 335–36.

439. Id. at 336.
The final section in the euthanasia discussion is entitled "Futility", in which the physician wants to stop providing medical care. In this section, the text includes excerpts from *In re Baby K* and *Causey v. St. Francis Medical Center*. The first note following these excerpts provides more background about the Baby K case, followed by a note providing several article citations that discuss futility. The next note discusses the definition of futility, under both a qualitative and quantitative analysis, providing arguments from *Medical Futility: Its Meaning and Ethical Implications* and *Use of the Medical Futility Rationale in Do-Not-Attempt-Resuscitation Orders*. The text then provides a short summary of a number of futility cases including *In re Wanglie*, *In re Jane Doe*, *In re Ryan N. Nguyen*, *Gilgann v. Massachusetts General Hospital*, *In re Barbara Howe*. The text also provides a summary of the Texas statute addressing futility and questions regarding putting the law surrounding futility into practice. Another lengthy note in this series provides additional perspectives on futility by including excerpts from *Guidelines on the Termination of Life-Sustaining Treatment and the Care of the Dying: A Report of the Hastings Center* and *Futility and the Ethics of Resuscitation*. The last series of notes relating to the euthanasia topic as a whole surrounds the issue of brain death. The text first provides a medical background to brain death with information from Gustavo Saposnik, D. Alan Shewmon, and the Ad Hoc Committee at Harvard Medical
School. The next pair of notes then examine the meaning of using brain criteria for the standard of death, by citing a report from the President’s Commission on the Determination of Death and information from Alexander Capron and Leon Kass, as well as problems with accepting integrative capacity as the basis for life, citing arguments by Robert D. Truog and Stuart J. Youngner. The next notes also relate to this issue by providing a string citation of articles that discuss choosing a definition of death, stating that “when a person has been declared dead, that person’s legal representative... cannot insist that the patient be maintained on a ventilator.” The note continues by discussing the implications of having single versus multiple definitions of death and providing a string citation on discussing criteria for brain death.

ABORTION

HEALTH LAW AND BIOETHICS BY JOHNSON, KRAUSE, SAVER, AND WILSON

Although there is a section in the book entitled “Reproductive Rights”, there is no separate discussion of abortion in this chapter or within any other part of the book.

BIOETHICS AND THE LAW BY DOLGIN AND SHEPHERD

The textbook first mentions the abortion issue in a section of the “Life” chapter entitled “The Beginning of Life: Fetuses and Embryos.” The topic is introduced by excerpts from Mary Ann Warren’s On the

457. ORENTLICHER ET AL., supra note 2, at 349 (citing Report of the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death, A Definition of Irreversible Coma, 205 JAMA 85, 85 (1968)).


459. ORENTLICHER ET AL., supra note 2, at 351 (citing Robert D. Truog, Is it Time to Abandon Brain Death?, 27(1) HASTINGS CENTER REP. 29, 29–30 (1997)).

460. ORENTLICHER ET AL., supra note 2, at 351 (citing Stuart J. Youngner, Defining Death: A Superficial and Fragile Consensus, 49 ARCH. NEUROL. 570, 571 (1992)).

461. ORENTLICHER ET AL., supra note 2, at 352.

462. Id.

463. Id. at 352–53.

464. Id. at 353–54.

465. JOHNSON, supra note 2, at 79–93 (Chapter 4).

466. DOLGIN & SHEPHERD, supra note 2, at Ch. 3.

467. Id. at 112.
Moral and Legal Status of Abortion, James J. McCartney’s Embryonic Stem Cell Research and Respect for Human Life: Philosophical and Legal Reflections, and an encyclical letter of John Paul II entitled, Evangelium Vitae (The Gospel of Life). The notes following these excerpts highlight Mary Ann Warren’s technique of considering personality traits in the beginning of her article, highlight the focus on individuality by Pope John Paul II and Professor James McCartney, provide a summary and an excerpt from Robin West’s Jurisprudence and Gender, discuss the concept of abortion as self-defense by including excerpts from Judith Jarvis Thomson’s A Defense of Abortion.

The text then includes portions of Part IX of Roe v. Wade to establish the legal rights of fetuses. One note after the opinion discusses the role of fetal development on the trimester framework of Roe. Another note cites the relevant precedent for the privacy right established in Roe. Another note summarizes Webster v. Reproductive Health Services, stating that the Court “declined to pass on the constitutionality of the preamble to Missouri’s statute regulating abortion . . . [explaining] that it could be read simply to express a value judgment favoring childbirth over abortion, which states are permitted to do.” The next note discusses the emergence of recognized fetal rights in law, summarizing the federal Unborn Victims of Violence Act, and providing information from American Law Reports and Kathleen Murphy. A similar note explores the more recent research and resulting legislation surrounding fetal pain, citing one article by Susan J. Lee and others, and another by Annie Murphy Paul. Another note

468. Id. at 112–14 (citing Mary Ann Warren, On the Moral and Legal Status of Abortion, 57 THE MONIST 43–61 (1973)).
469. DOLGIN & SHEPHERD, supra note 2, at 114–16 (citing James J. McCartney, Embryonic Stem Cell Research and Respect for Human Life: Philosophical and Legal Reflections, 65 ALB. L. REV. 597 (2002)).
471. Id.
472. Id. at 119 (citing Robin West, Jurisprudence and Gender, 55 U. CHI. L. REV. 1 (1998)).
473. DOLGIN & SHEPHERD, supra note 2, at 119–20 (citing Judith Jarvis Thomson, A Defense of Abortion, 1 PHIL. AND PUB. AFF. 47 (1971)).
474. DOLGIN & SHEPHERD, supra note 2, at 121–23.
475. Id. at 123.
476. Id.
477. Id. at 124.
478. Id. at 124–25 (citing Annotation, Right to Maintain Action or to Recover Damages for Death of Unborn Child, 84 A.L.R.3d 411 (1978); and KATHLEEN MURPHY, CONN. L. TRIB. (June 2, 2003)).
mentions that states have considered legislation requiring doctors to offer ultrasounds before an abortion, specifically touching on Oklahoma's statute and citing an article by Ron Jenkins that summarizes the argument of those challenging the statute. The final note summarizes fetal tissue research, describes the uses that medical researchers see in fetal research, and the political history surrounding the issue.

After this series of notes, the text provides a short excerpt from the Partial-Birth Abortion Ban Act of 2003. An edited version of Gonzalez v. Carhart appears next, followed by notes briefly summarizing the difference between D&E and intact D&E procedures and provoking an inquiry into the relevant state interest in banning intact D&E procedures.

The main discussion of abortion takes place in a section of the textbook entitled “Consensual Avoidance of Reproduction” and begins with a short historical introduction to the issue that has become “an ideological battlefield in the United States.” The text then includes excerpts from popular commentaries such as John Hart Ely’s The Wages of Crying Wolf: A Comment on Roe v. Wade, Reva Siegel’s Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, and Teresa Godwin Phelps’ The Sound of Silence Breaking: Catholic Women, Abortion, and the Law. One note following these texts cites Thomas H. Murray’s proposition that “participants in the debate are generally not open to logical persuasion” and questions whether the debate will ever be mediated. Another note discusses how the understanding and beliefs of embryos change over time. Yet another note discusses statistics...
regarding the rate of abortions from a report by Dr. Vinciguerra.\textsuperscript{493} The final note discusses the fact that the abortion right cannot be surrendered through contract.\textsuperscript{494}

The text next includes a relatively short version of \textit{Roe v. Wade}, only providing portions of Parts VIII, X, and XI.\textsuperscript{495} One note that follows briefly discusses the right to privacy and its limitations, by mentioning the precedent drawn on by the Court and inquiring as to the relationship between \textit{Roe} and previous cases.\textsuperscript{496} The next note discusses abortion and the views of family, noting that the word “family” or “familial” is used seven times in the \textit{Roe} decision, and the note includes an excerpt from Kristin Luker’s \textit{Abortion and the Politics of Motherhood}.\textsuperscript{497} Another note highlights \textit{Roe}’s explanation that abortion is influenced by a person’s philosophy, religion, and experiences, among other things, and provides citations to several articles that explore these topics further.\textsuperscript{498} Another note discusses Justice Ginsburg’s opinions on \textit{Roe}, gives an excerpt from her article \textit{Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade}, and includes a portion of Justice Blackmun’s response to Justice Ginsburg’s article.\textsuperscript{499} The final note regarding the \textit{Roe} decision mentions that Jane Roe became a prolife advocate, and filed a motion asking for a relief from judgment, which was ultimately rejected.\textsuperscript{500}

After a brief note introduction,\textsuperscript{501} the text then includes an edited version of \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}, including approximately five and one-half pages of the majority opinion and one page of Justice Scalia’s concurrence in judgment in part and dissent in part.\textsuperscript{502} One note following the opinion describes the undue burden test and provides a summary of Part V of the opinion.\textsuperscript{503} One note also highlights the difference between the trimester framework that \textit{Roe} had established, and the viability timeline that \textit{Casey} adopts.\textsuperscript{504} Another pair of
notes briefly summarizes Justice Rehnquist’s concurrence in part and dissent in part\(^{505}\) and highlights Justice Scalia’s belief that abortion “should not be resolved by the judiciary.”\(^{506}\) The subsequent opinion of *Stenberg v. Carhart* is summarized in one of the notes,\(^{507}\) followed by a brief description of the statute that banned partial birth abortions.\(^{508}\)

To conclude its discussion of abortion, the text provides excerpts from the *Gonzales v. Carhart* decision, including portions of Parts I–V from the majority opinion and Parts I–IV of Justice Ginsburg’s dissent.\(^{509}\) The first note following the edited version of *Gonzales* discusses the distinctions between *Carhart I* and *Carhart II*.\(^{510}\) The final two notes are significantly shorter, mentioning that in *Carhart II* “the Supreme Court provided for a physician’s judgment to be displaced by congressional judgment”\(^{511}\) and that although “abortions have now been legal for over three decades . . . a majority of women queried by clinics in Washington state did not realize that abortion had not always been legal.”\(^{512}\)

**BIOETHICS: HEALTH CARE, HUMAN RIGHTS, AND THE LAW BY LAFRANCE**

The majority of the abortion topic is discussed in a section of the text entitled “Nonpersons.”\(^{513}\) The text introduces abortion with *Roe v. Wade*, stating that *Roe* and *Casey* “hold only that fetuses are not ‘persons’ under the Constitution’s political definitions. They do *not* say a community may *not* consider the interests of a fetus for ethical or public health purposes.”\(^{514}\) The text then includes excerpts from *Roe*, including portions: of Parts I and V–X, Justice Douglas’ concurrence, Justice Stewart’s concurrence, Justice White’s dissent, and Justice Rehnquist’s dissent.\(^{515}\) The first note following the edited opinion compares *Roe* to the landmark cases of *Brown v. Board of Education* and *Miranda v. Arizona*, classifying it as “one of the most controversial opinions by the United States Supreme Court in the latter half of the 20\(^{th}\) century.”\(^{516}\) The next notes more closely examine two sources of criticism for the *Roe* opinion: the trimester

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505. Id. at 387–88.
506. DOLGIN & SHEPHERD, supra note 2, at 388.
507. Id.
508. Id.
509. Id. at 388–97.
510. Id. at 397.
511. Id.
512. DOLGIN & SHEPHERD, supra note 2, at 398.
513. LAFRANCE, supra note 2, at 214. The related topic of prenatal screening and wrongful birth is discussed in Chapter 4 (971–1003) but it is not analyzed in this report because that portion of the text does not discuss abortion in specific detail.
514. Id. at 215.
515. Id. at 215–26.
516. Id. at 226–27.
framework and the constitutional grounding. The next note discusses Chief Justice Douglas’ invocation of ethical principles in his concurrence. Another pair of notes draw a relationship between the fetus involved in Roe v. Wade and those involved in the Baby M and In re A.C. cases and the protection that fetus may deserve.

The text then includes excerpts from Casey, including portions from: Parts I, II, IV, V (C and D), Chief Justice Rehnquist’s concurrence in judgment in part and dissent in part, and Justice Scalia’s concurrence in judgment in part and dissent in part. The first note following the opinion discusses the political history behind Casey and the decision’s “proof” that Roe would not be overturned, even if it could be seen “as a very lukewarm affirmation of Roe.” The next series of notes analyzes the provision of the Pennsylvania statute that was invalidated, and then contrasts this spousal notification provision with other provisions in the statute. Another note inquires as to the correct status of the fetus after Casey. Yet another note mentions the other issues Casey has an effect on, such as procreative rights, physician-assisted death, and others. The final notes provide several citations to articles that discuss the topic in more depth, and introduce the topic of late-term abortion.

Following these notes, the text provides an edited version of Stenberg v. Carhart, including excerpts from Parts I and II, Justice Stevens’ concurrence, Justice O’Connor’s concurrence, Justice Ginsburg’s concurrence, Chief Justice Rehnquist’s dissent, Justice Scalia’s dissent, Justice Kennedy’s dissent, and Justice Thomas’ dissent. After this opinion, the text first questions the motives behind the “shocking, graphic descriptions” of D & E and D & X. The next pair of notes points out two novel issues in the Stenberg decision: the Supreme Court addressing the method of abortion, and the fact that Nebraska’s statute had no health exception for the health of the mother. In the next series of notes the text

517. Id. at 227.
518. Id.
519. LAFRANCE, supra note 2, at 227.
520. Id.
521. Id. at 227–28.
522. Id. at 228–39.
523. Id. at 239.
524. Id. at 239–40.
525. LAFRANCE, supra note 2, at 240.
526. Id.
527. Id.
528. Id.
529. Id. at 241–57.
530. Id. at 257–58.
531. LAFRANCE, supra note 2, at 258.
532. Id.
inquires into several of the Justices’ statements or the majority’s analysis, including whether Justice O’Connor would prefer a more narrow statute, what the proper state interests are at play, questioning if and when the fetus dies, along with others. Another note briefly mentions the Partial-Birth Abortion Act of 2003 and the resulting Carhart v. Gonzales. The final note discusses the importance of a health exception for the life of the mother, the issue of medications such as RU-486, and the scarcity of those seeking abortions in rural areas, as reported in Roe versus Reality.

The text also includes a very brief discussion of abortion within the section focused on brain death. This discussion includes excerpts from Brittell v. United States and a series of notes and questions following the edited opinion. The first note discusses the condition of anencephaly, explaining that the infants “cannot develop into ‘persons’ or have a future or life we would recognize as worth living.” A series of notes mentions the issue of abortion funding and cites to Harris v. McRae. Another note inquires as to the correct classification of an anencephalic fetus.

BIOETHICS: HEALTH CARE LAW AND ETHICS BY FURROW, GREANEY, JOHNSON, JOST, SCHWARTZ

The topic of abortion is introduced at the end of the text’s discussion of contraception in a note entitled “The Blurry Distinction Between Contraception and Abortion—Plan B (The ‘Morning After’ Pill) and Mifepristone (RU-86)” which briefly summarizes the difficulty in determining when a pregnancy begins and analyzes the implications of that difficulty. The majority of the text’s treatment of abortion then begins with excerpts from Roe v. Wade, including portions of Parts I, VI–VIII, X, and XI. The first note following the edited opinion explores Justice Douglas’ concurrence, which relied on the Ninth Amendment as a foundation for abortion, as another way that the Court could have reached the same result. The next note states that Roe was “vigorously criticized,”

533. Id.
534. Id.
535. Id.
536. Id.
537. LAFRANCE, supra note 2, at 258–59.
538. Id. at 259 (citing Roe verses Reality, New Eng. J. Med., 1 (2006)).
539. LAFRANCE, supra note 2, 304–10.
540. Id. at 310–11.
541. Id. at 310.
542. Id. at 310–11.
543. Id. at 311.
544. FURROW ET AL., supra note 2, at 42–43.
545. Id. at 47–50. Chapter 2 of the text discusses the related topic of issues surrounding when life begins it will not be analyzed here because the abortion issue is not discussed in great detail.
546. Id. at 51.
"stirred into action political forces opposed to abortion," and further explains that Roe was "reaffirmed more than a dozen times in its first decade, by 1986 the 7-2 majority was down to 5-4." A later note explores these criticisms more by summarizing two lines of attack against the decision: the notion that the Court was using substantive due process to make social policy without regard to legal or constitutional restrictions and an unclear scientific foundation. Another note discusses government funding for abortions, summarizing that the funding has been limited and that generally, restrictions on the use of government funds for abortions have been upheld.

Following these notes, the text provides an edited version of Casey, including portions from Parts I–VI and from Chief Justice Renquist’s concurrence in judgment in part and dissent in part. Directly following the Casey opinion, the text offers excerpts from Gonzales v. Carhart, including sections from Parts I–V, Justice Thomas’ concurrence, and Justice Ginsburg’s dissent. The first two notes after the opinion inquire into the extent that Casey reaffirmed Roe, as well as the proper application for the undue burden test. The next note discusses the increase in abortion restrictions between 1973 and 1992. A pair of notes focus more on the Gonzales opinion, asking what the difference was between the Gonzales and Stenberg decisions, as well as mentioning that there is not a holding as to whether “Congress had authority to promulgate the Partial-Birth Abortion Ban of 2003 because that issue was neither raised nor argued.” Another note discusses the open possibility of an “as applied” attack on the Partial-Birth Abortion Act.

The text also includes a series of notes focused specifically on regulation of abortions. One note examines consent and notification requirements, providing information pertaining to parental consent, bypass provisions, debates about familial makeup in contemporary life, and citations to several cases that inform these issues. Other notes discuss

547. Id. (providing a string citation of subsequent abortion jurisprudence).
548. Id. at 52–53 (also providing citations to precedent and subsequent abortion cases).
549. FURROW ET AL., supra note 2, at 51–52 (providing a string citation of abortion cases related to funding questions).
550. Id. at 53–62.
551. Id. at 62–72.
552. Id. at 72.
553. Id. at 72–76.
554. Id. at 76–77.
555. FURROW ET AL., supra note 2, at 77–78.
556. Id. at 78.
557. Id.
558. Id. at 78–81.
559. Id. at 78–79.
regulation of medical procedures,\textsuperscript{560} waiting period (or "two-trip") requirements,\textsuperscript{561} and other informed consent requirements.\textsuperscript{562} Following this series of notes, the text includes brief notes that provoke inquiries into a number of other miscellaneous topics regarding abortion such as the possibility for a state to ban abortions,\textsuperscript{563} the potential to remove abortion training techniques from medical school programs,\textsuperscript{564} the implications of neighboring states having differing abortion laws,\textsuperscript{565} and a summary of "basic value issues" on both the prolife and pro-choice sides.\textsuperscript{566}

The text then includes a note about the Freedom of Access to Clinic Entrances Act of 1994 and abortion protests generally.\textsuperscript{567} Within this note, the text provides an excerpt from the FACE Act, as well as a summary of other relevant provisions, and brief statements of the holdings in \textit{National Organization for Women, Inc. v. Scheidler}, \textit{Schenck v. Pro-Choice Network}, and \textit{Hill v. Colorado}.\textsuperscript{568} Furrow concludes its discussion of abortion by including a string cite of articles discussing the issues surrounding abortion law.\textsuperscript{569}

\textbf{BIOETHICS AND PUBLIC HEALTH LAW BY ORENTLICHER, BOBINSKI, HALL}

Orentlicher introduces the topic of abortion in "The Right and 'Duty' to Die" chapter, and more specifically within the "Physician Aid in Dying" section, as the book offers a comparison between the two controversial issues.\textsuperscript{570} After discussing several issues surrounding euthanasia, the text proposes that:

In some ways, a right to aid in dying seems more defensible than a right to abortion. The life being ended is the life of the person making the decision rather than the life of a third party. Moreover, what is being taken away is a short period of great suffering rather than a potential for a full span of a healthy and productive life. In other ways, the right to aid in

\textsuperscript{560} \textit{Id. at} 80.
\textsuperscript{561} \textit{Furrow et al., supra} note 2, at 80.
\textsuperscript{562} \textit{Id. at} 81.
\textsuperscript{563} \textit{Id.}
\textsuperscript{564} \textit{Id.}
\textsuperscript{565} \textit{Id.}
\textsuperscript{566} \textit{Id. at} 81–82.
\textsuperscript{567} \textit{Furrow et al., supra} note 2, at 82–83.
\textsuperscript{568} \textit{Id.}
\textsuperscript{569} \textit{Id. at} 83.
\textsuperscript{570} \textit{Orentlicher et al., supra} note 2, at 327–28.
dying is the harder case. In particular, the life of a person rather than a pre-viable fetus is being taken.\textsuperscript{571}

Following this argument, the text offers quotations from three different sources illustrating arguments for a right to abortion including a quotation from \textit{Casey},\textsuperscript{572} Donald H. Regan's \textit{Rewriting Roe v. Wade},\textsuperscript{573} and Jed Rubenfeld's \textit{The Right of Privacy}.\textsuperscript{574}

The main treatment of abortion is found in the "Reproductive Rights and Genetic Technologies" chapter in which the text explores the legal recognition of fetal interests as distinguishable from, and sometimes conflicting with, those of parents and considers whether "states have the power to control or to influence personal reproductive decisions."\textsuperscript{575} The text then includes approximately two pages of excerpts from the majority opinion of \textit{Roe}, as well as one page of excerpts from Justice Rehnquist's dissent.\textsuperscript{576}

The first note that follows the edited \textit{Roe} opinion states "abortion is a relatively common medical procedure in the United States" and offers statistics from Lilo T. Strauss's \textit{Abortion Surveillance—United States, 2003}.\textsuperscript{577} A second note discusses the personhood of a fetus, stating that the subject is "an area of significant religious and philosophical debate."\textsuperscript{578} In the note discussing fetal personhood, the text discusses \textit{DeShaney v. Winnebago County Dept. of Social Services}, summarizing that it held that "the state did not owe any affirmative duty to protect a child from private violence inflicted by his father."\textsuperscript{579}

Another note discusses sources of authority in constitutional interpretation, mentioning Justice Blackmun's engagement with historical, legal, medical, and religious analysis.\textsuperscript{580} The notes continues by discussing the right to privacy, stating that the right is founded in Fourteenth

\textsuperscript{571.} \textit{Id.} at 327.

\textsuperscript{572.} \textit{Id.} (citing \textit{Casey}, 505 U.S. at 851, in which the majority discusses "the most intimate and personal choices a person may make in a lifetime" which are protected by the Fourteenth Amendment).

\textsuperscript{573.} \textit{ORENTLICHER ET AL., supra note 2, at 327–28} (citing Donald H. Regan, \textit{Rewriting Roe v. Wade}, 77 Mich. L. Rev. 1569, 1569 (1979)).

\textsuperscript{574.} \textit{ORENTLICHER ET AL., supra note 2, at 328} (citing Jed Rubenfeld, \textit{The Right of Privacy}, 102 Harv. L. Rev. 737, 784, 788 (1989)).

\textsuperscript{575.} \textit{ORENTLICHER ET AL., supra note 2, at 423}, introduction to Chapter 5.

\textsuperscript{576.} \textit{Id.} at 444–46.

\textsuperscript{577.} \textit{Id.} at 447 (citing Lilo T. Strauss et al., \textit{Abortion Surveillance—United States 2003}, 55 MMWR 1, 6 (Nov. 24, 2006)).

\textsuperscript{578.} \textit{ORENTLICHER ET AL., supra note 2, at 447}.


\textsuperscript{580.} \textit{ORENTLICHER ET AL., supra note 2, at 447}. 
Amendment liberty and questions whether Justice Rehnquist’s “‘Lochner-ism’” is valid.\textsuperscript{581} Yet another note Briefly discusses the state’s interest, summarizing Justice Blackmun’s opinion that “the interests of the pregnant woman and the state can be weighed and evaluated through the use of the trimester framework.”\textsuperscript{582}

The text then includes a lengthy note discussing “additional ethical or moral aspects of abortion.”\textsuperscript{583} In this note, the text questions what “appropriate” reasons for abortion are, such as after-the-fact birth control, eliminating multiple births, avoiding the birth of a child with birth defects, or deselecting particular characteristics in a child.\textsuperscript{584} A last note briefly discusses abortion politics, alluding to the reality that “the abortion debate produced a new ‘litmus test’ for potential state and federal judicial nominees.”\textsuperscript{585}

Orentlicher then provides excerpts from \textit{Casey}, including portions of Parts I, II, IV–VI, approximately a one-half page of Justice Blackmun’s concurrence in part, concurrence in judgment in part, and dissent in part, and approximately one page of Chief Justice Rehnquist’s concurrence in judgment in part and dissent in part.\textsuperscript{586} Directly following the \textit{Casey} opinion, the text includes \textit{Gonzales v. Carhart}, providing excerpts from Parts I, II, and IV, and approximately two pages of Justice Ginsburg’s dissent.\textsuperscript{587}

The first note after \textit{Gonzales} examines the role of stare decisis at work in the \textit{Casey} and \textit{Gonzales} opinions.\textsuperscript{588} A second note provokes an inquiry into whether abortion is now classified as a “fundamental right” or a “liberty interest” and the appropriateness of the undue burden test.\textsuperscript{589} The text continues this second note by explaining that at least four Justices are unclear as to what their views regarding the undue burden standard are.\textsuperscript{590} A later note states that \textit{Casey} has been cited nearly 1,000 times, specifically for the undue burden standard, to both uphold and strike down state abortion regulations.\textsuperscript{591} Another note briefly mentions that changes in the political climate and the Court have resulted in state legislation being
enacted that challenges Roe. The text also mentions that "some commentators have argued that restrictions on abortion ought to be challenged under equal protection grounds" and cites Samuel R. Bagenstos's Disability, Life, Death, and Choice, as well as Charles I. Lugosi, Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence for differing equal protection arguments. A last note provides statistics regarding second-trimester abortions, stating that they are "relatively rare" and that a "majority of states have enacted severe restrictions on 'intact D & E' abortions or related procedures."

The textbook next provides a section comprised of a series of notes entitled "Notes: Thirty-Five Years of Abortion Jurisprudence." In these notes, the text examines regulations regarding states requiring abortions to be performed by physicians and states requiring reporting and inspecting of abortion providers. The text also offers a relatively lengthy note about government funding for abortions, briefly summarizing Maher v. Roe, Harris v. McRae, and Rust v. Sullivan, commenting that regarding Title X funding issues, "[t]he gag rule was rescinded during the Clinton administration." The issue of minors and abortion is also discussed, with differing arguments briefly summarized, at one point stating that "[a]s a policy matter, many minors have the maturity to make these decisions free from parental interference. Further, a minor’s right to make these decisions free from parental interference may be an important issue in abusive or incestuous homes." Within this note, the text also cites Ohio v. Akron

592. ORENTLICHER ET AL., supra note 2, at 468. (citing Monica Davey, South Dakotans Reject Sweeping Abortion Ban, N.Y. TIMES, Nov. 8, 2006, at P8; and Jereny Alford, Louisiana’s Governor Plans to Sign Anti-Abortion Law, N.Y. TIMES, June 7, 2006, at A18.


594. ORENTLICHER ET AL., supra note 2, at 468 (citing Charles I. Lugosi, Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence, 22 ISSUES L. & MED. 119 (2006)).

595. ORENTLICHER ET AL., supra note 2, at 468-69 (following this note, the final note provides a string citation of recent articles reflecting the abortion debate in scholarship. Because the articles are not discussed in any detail, this report does not include any analysis of the string citation).

596. ORENTLICHER ET AL., supra note 2, at 468-69 (citing Lilo T. Strauss et al., Abortion Surveillance—United States, 2003, 655 MMWR 1, 15 (Nov. 24, 2006 (SS-11)).

597. ORENTLICHER ET AL., supra note 2, at 469-75.

598. Id. at 469.

599. Id. (stating that "[a]lthough many regulations will be upheld given the Supreme Court’s explicit authorization of certain forms of state provider regulation, providers and activists have successfully challenged some of those new regulatory provisions").

600. ORENTLICHER ET AL., supra note 2, at 469-71.

601. Id. at 471-72.

602. Id. at 471.
Center for Reproductive Health and Hodgson v. Minnesota\textsuperscript{603} and concludes by suggesting Carol Sanger’s *Regulating Teenage Abortion in the United States: Politics and Police* and the National Conference of State Legislatures *Parental Consent or Notification for Abortion* for “a summary of the law involving minors and abortion.”\textsuperscript{604} Orentlicher also provides information regarding informed consent and waiting periods\textsuperscript{605} by providing sentence summaries of the relevant provisions in *Akron v. Akron Center for Reproductive Health* and *Casey*, and stating that “[t]he Gonzales decision is likely to reinforce the trend toward permitting states to impose significant message-oriented informed consent provisions.”\textsuperscript{606} This particular note continues by providing a string citation of the “few reported decisions in which patients have brought informed consent claims against their physicians” and parentheticals summarizing the holding after each citation.\textsuperscript{607} The note then finishes its discussion of informed consent by inquiring as to the proper relationship between informed consent and the argument that some have posited regarding women experiencing “significant emotional reactions to the procedure.”\textsuperscript{608}

The next note included in this series briefly summarizes *Planned Parenthood of Central Missouri v. Danforth* for an example of how courts treat spousal notification and consent requirements. It also mentions that the *Casey* plurality used the undue burden standard to strike down a spousal notification requirement, and that courts “generally refuse to give genetic fathers any right to prevent an abortion.”\textsuperscript{609} The text then provides a note entitled “conscience provisions” exploring the concept that “private facilities and actors are not required to participate in abortions,” as Congress and state legislatures have enacted “conscience clause statutes” to protect medical personnel from “retaliatory measures for refusing to participate in abortions,” as Justice Kennedy’s opinion in *Gonzales* expresses that states may regulate abortion “to protect the integrity and

\textsuperscript{603} Id. at 471–72.
\textsuperscript{604} Id. at 472.
\textsuperscript{606} ORENTLICHER ET AL., supra note 2, at 472.
\textsuperscript{607} Id. at 473 n.4 (including *Humes v. Clinton*; *Boes v. Deschu*; *Acuna v. Turkish*; *Rodriguez v. Epstein*; and *Spencer v. Seikel*).
ethics of the medical profession. The note also mentions that with the FDA’s approval of RU-486, there have been claims generated that pharmacists should have a similar right to conscience provisions. The final note in this series discusses “anti-abortion protestors” whose numbers and commitment have seemed to overwhelm state and local officials. The book discusses abortion supporters’ attempt to use RICO against the protestors, as well as Congress’s response by enacting the FACE Act in 1994. The text finishes its main discussion of abortion by providing a hypothetical regarding late-trimester abortions, specifically in the case of severely disabled children.

CONCLUSION

The coverage of the euthanasia and abortion issues in the bioethics textbooks is the inverse of the treatment of these issues in the family law and constitutional law textbooks. In every bioethics text surveyed, the issue of euthanasia is addressed in much greater detail than abortion, with nearly a disproportionate amount of focus on the topic.

While the bias is still present with the abortion issue through the articles cited and the notes included, there are clear prolife arguments included in the texts that are notably absent in other subjects surveyed. The bioethics textbooks briefly discussed the issue of fetal pain, included moral arguments against abortion from Pope John Paul II, provided the graphic descriptions of partial-birth abortion procedures from Stenberg, and described the eventual change in Jane Roe’s beliefs regarding abortion, among a small amount of other discussions illuminating a prolife mindset. While these articles present a prolife view and should be included in the other texts and topics surveyed thus far, the overall amount of discussion provided them is still notably small compared to the pro-choice bias that permeates the texts.

The treatment of the euthanasia issue in the bioethics textbooks is large, comprising a major component of each of the texts. Despite this great amount of information regarding standards of evidence, surrogate decision making, advanced directives, and physician conscience provisions that

610. ORENTLICHER ET AL., supra note 2, at 474.
611. Id. at 474 (also provides a string citation for cases and articles further discussing this issue).
612. Id. at 474–75.
613. Id.
614. Id. at 476. Abortion is again mentioned in the section regarding the state’s protection of fetal interests. Roe, Casey, and Gonzales are all mentioned as an illustration for how abortion cases do not clearly delineate the scope of governmental power in protecting fetal life outside of abortion jurisprudence.
615. Id. at 474–75.
provided the reader with a larger working knowledge of the issue, the pro-choice bias is present. An instance of this bias occurs early in LaFrance’s text, in which he categorizes those facing the euthanasia decision as non-persons, and more specifically categorizes them as the “undead.” While many of the texts try to offer a more neutral approach by posing several hypothetical and theoretical questions in the notes that follow the cases, many of these notes emphasize the privacy of the patients, the desire of the patients to remain dignified, and the fear of the process of dying. However, this bias is not completely absolute as many arguments are also presented that highlight possible moral and ethical dilemmas in the field, including the slippery slope for persons with disabilities that would likely be involved, as well as notions of a physician postulating an incorrect prognosis, the patient changing his or her mind, and those who are mentally ill making a poorly-influenced decision. Although there appears to be an overall bias in the euthanasia issue, the information included in the texts is significantly more informative and educational than in other subjects, and should be included in much larger degree in all texts that address the topic.

For those texts that discussed both abortion and euthanasia in detail, there was significantly more information provided about euthanasia than in any other field surveyed thus far. Notwithstanding this wealth of information, however, many textbooks seemed to convey uniformly two views asserted explicitly in two separate texts: first, that families should decide such matters and second, that it is a fundamental principle that competent adults have the right to make their own healthcare decisions.

616. JOHNSON, supra note 2, at 71–72.
617. FURROW ET AL., supra note 2, at 269.