The Future of Assisted Suicide and Euthanasia
by Neil M. Gorsuch

Princeton University Press, 2006, paperback, $29.95
320 pages, bibliography and index, ISBN 978-0-691-14097-1

The successful appointment, confirmation, and investiture of Neil Gorsuch as a Supreme Court Justice this year presents an excellent reason to examine his 2006 contribution to the bioethics literature, *The Future of Assisted Suicide and Euthanasia*. Justice Gorsuch's first published monograph is a philosophically informed argument for the inherent dignity of human life. His prose is clear, his insight powerful. They demonstrate a prescient understanding of the direction the law may go in the end-of-life debate—a debate he will be able to powerfully influence in the near future.

Why did Gorsuch publish this book? It is actually the product of his time at Oxford where, as a Marshall Scholar, he earned a doctorate in philosophy, met his wife Louise, and received an intellectual formation in the coal-heated classroom of Catholic legal philosopher John Finnis. Not bad for a few years' work!

The academic explanation for Gorsuch's book on assisted suicide and euthanasia is that the Supreme Court's lead case on the subject, *Washington v. Glucksberg* (1997), is a crucially important case for the interpretation of the Constitution, which also left questions unanswered. As Gorsuch points out in the introduction, "Few noticed that critical concurring justices [in *Glucksberg*] addressed only the question whether the laws banning assisted suicide are *facially* unconstitutional—that is, unconstitutional in all possible applications—and specifically reserved for a later case the question whether those laws are unconstitutional *as applied* to terminally ill adults seeking death" (3, original emphasis). As of the 2017 term, we are still waiting to hear whether the Supreme Court will use this reasoning to strike down laws against assisted suicide.

The majority opinion in *Glucksberg* written by Chief Justice Rehnquist is also important, since it is the lead case for a historical interpretation of substantive due process rights in the Fourteenth Amendment. Substantive due process is an extremely contentious issue in the world of constitutional law, and a Supreme Court Justice's stance on it tells a great deal about his or her judicial philosophy. Since Gorsuch is now on the Court, his comments about the interpretation of the Fourteenth amendment in this book are particularly valuable if one wants to see what makes the judge tick.

Gorsuch does not explicitly reveal his stance on substantive due process in this book, but from several approving statements, it seems likely that he favors the position of the late Justice Antonin Scalia, in whose seat he now sits—that is, he probably rejects unwritten substantive due process rights as legislation from the bench, while affirming the procedural rights actually written in the first eight amendments to the Constitution. In this he differs from the historical standard of Chief Justice Rehnquist, who argued in *Glucksberg* that the Court may create or defend substantive rights not found in the text of the Constitution as long as they are "deeply rooted in this Nation's history and tradition." Rehnquist's position can be thought of as a halfway point between no substantive due process rights (favored by originalists like Justice Scalia) and whatever substantive due process rights judges want according to their "reasoned judgment" (favored by living-Constitutionalists like Justice Kennedy, Justice O'Connor, and most especially Justice Ginsberg). Gorsuch points out the problems that judges like Rehnquist run into when they adopt a moderate, historical limit on substantive due process. One main problem is that numerous substantive rights with no legal history at all have been enshrined as precedent. Most explicitly, the famous "mystery clause" in *Planned Parenthood v. Casey* (1992) must be interpreted as pure dicta for

any limitations on due process to be correct (80). If a substantive right to "define one's own concept … of the universe and of the mystery of human life" or some other form of radical autonomy truly were enshrined in the Constitution, the historical interpretation ought never to have been advanced in *Glucksberg* (1997) or, at least, should have been overturned when the mystery clause was repeated later in *Lawrence v. Texas* (2003).

Libertarian and liberal calls for autonomy from all law and morality, after all, are the main impetus behind the movement to legalize assisted suicide. It is "at least in part the result of a culture increasingly influenced by strict neutralist conceptions of autonomy, itself perhaps the byproduct of the baby boomer generation heading into old age" writes Gorsuch in his conclusion (225). In other words, they believe people should be able to commit suicide with whatever assistance they desire, if they so will it. The late political scientist Peter Lawler astutely called such people "autonomy freaks," a play on "control freaks." Justice Gorsuch charitably makes an appeal to the autonomy freaks in this book; he claims that banning assisted suicide actually ensures more autonomy, since the risks of abuse and mistakes are so high in places where assisted suicide has been legalized, such as Oregon and the Netherlands. The worst and most common abuse occurs when assistants go through with a suicide despite the fact that the suicide requestor may be clinically depressed and consequently may have lost the capacity to make health care decisions. Plus, "ruling out assisted suicide and euthanasia, while surely nonneutral, does not remotely leave us in a world with insufficient options for individual self-creation" (167). So autonomy freaks really do not have grounds to complain about laws against assisted suicide and especially about euthanasia. The noticeable place where Gorsuch's judicial philosophy diverges from Justice Scalia's has to do with the equal protection clause of the Fourteenth Amendment; what he says about that clause is the most intriguing aspect of the book from a constitutional perspective. His interpretation, which is unique among legal scholars, is that equal protection safeguards, among other things, a citizen's life. Therefore, it would be suitable to invoke that constitutional clause against statutes shielding assistants to suicide who act with the intent to kill.

Now, technically there is no right-to-life amendment in the Bill of Rights, although it is mentioned in an indirect way in the Fifth Amendment: "No person shall … be deprived of *life*, liberty, or property, without due process of law" (emphasis added). Gorsuch seems to argue, however, that a fundamental right to life is implied by the equal protection clause, and facial violations of that right ought to receive strict scrutiny: "Perhaps the most profound indicium of the innate value of human life, however, lies in our respect for the idea of human equality. The Fourteenth Amendment to the U.S. Constitution guarantees equal protection of the laws to all persons" (159). Therefore, "while the so-called rational basis tests controls most equal protection disputes, laws that either embody certain suspect classifications (such as those based on race or national origin) or impinge on fundamental rights receive 'strict scrutiny.' … Oregon's decision to make a legal discrimination based on physical health (the terminally ill versus everyone else) seems a candidate or heightened review. This is especially so given that Oregon's law expressly implicates a fundamental right—that is, the scope of the right to life" (178).

Other originalists, such as Justice Clarence Thomas, wish to completely do away with equal protection tests involving levels of scrutiny—see his dissent in *Whole Women's Health v. Hellerstedt* (2016) —but apparently not Gorsuch. He would provide even more safeguards through the equal protection clause. If he seriously means what he says about the right to life in this book, Justice Gorsuch's equal protection jurisprudence would be completely novel for the court—novel, but perhaps more in keeping with the original intent of the Constitution than the approaches that have been tried so far.

Given the fact that this book is drawn from material Gorsuch wrote for a dissertation under the direction of John Finnis, several

philosophical questions also come to mind: How much does new natural law philosophy affect Gorsuch's thinking? Does it distinguish him greatly from a legal thinker who adheres to traditional natural law?

Practically speaking, the answer to the latter question is, not that much. New natural law is most evident in Gorsuch's book when he discusses why a patient's right to refuse treatment, which may lead to his death, is distinct from a right to assisted suicide. What distinguishes the two cases is the intention to kill in assisted suicide as opposed to death as a merely foreseen consequence of withdrawing treatment. Other distinctions, such as the act–omission distinction or a distinction between death by natural causes and death by artificial ones, simply will not do, since both are manipulable. Intention, on the other hand, is quite specific and has been the implicit basis for prohibiting assisted suicide and euthanasia throughout history. The logic of intention was actually to grant more liberty, for example, prosecuting fewer doctors whose actions produced unintentional deaths that might have been mistakenly prosecuted as assisted suicides. Although advocates of euthanasia have tried to eschew it, intention should be an accepted concept in American law, especially given its role in other legal notions like *mens rea* and premeditated murder. Traditional natural law adherents have nothing to disagree with so far.

However, readers of recent issues of *The National Catholic Bioethics Quarterly*, particularly the Spring 2013 symposium, "Critiques of the New Natural Law Theory," might be aware that adherents of new natural law see intention differently than their brother Thomists. Craniotomy, where a fetus's scull is reduced to save the life of a mother, is not viewed as abortion by new natural lawyers like John Finnis, since they judge the unwished for death of the fetus to be unintentional. Elizabeth Anscombe and traditional Thomists judge craniotomy to be an abortion, since all foreseen direct consequences of an action are in fact intended; the death of a fetus by the reduction of its scull is such a consequence. One of Finnis's responses to Anscombe on this score is that intention must be judged in a first-person perspective, but she views the description of the situation from the third-person. In several paragraphs of his book, Gorsuch clearly sides with his teacher Finnis on intention as a philosophical matter, directing criticisms against Anscombe's methodology and examples:

> Some have argued that intended means versus side-effect problems can be resolved with a counterfactual hypothetical, asking whether, if the questionable result at issue could have been avoided (e.g., the fat man could have lived; the fetus need not have been destroyed), but all other positive events also occurred (e.g., the party of spelunkers and the pregnant woman lived), would the actor still have chosen to act as he or she did? Because the *death* of the fat man or fetus is not required to achieve the wished-for results, the reasoning goes, they are not intended means but only unintended side effects.
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> While the counterfactual hypothetical technique may often prove useful in drawing out and isolating an agent's intention, it is an incomplete answer. It does not, after all, focus directly on the actor's actual intentions and state of mind but replaces the inquiry with a hypothetical construct. (71, original emphasis)

Gorsuch is a new natural law theorist when it comes to intention as a philosophical matter. However, when it comes to legal application, old and new natural law interpretations of intention would amount to the same thing in his opinion: judges and juries must look at evidence to determine intent from the third person, which is how traditional natural law approaches intention. He writes that "to be sure, determining whether *other* persons did or did not intend particular results may require inference based on an examination of the facts, but the absence of any significant metatheory for distinguishing between means and side effects cannot obscure the fact that what was and was not within the scope of the actor's intentions is precisely the sort of question of fact that judges and juries are accustomed to and charged with sorting every day in our legal system" (72, original emphasis).

So, practically speaking, traditional natural lawyers will see no difference in the courtroom between their conclusions about intent and the conclusions of a new natural lawyer like Justice Gorsuch. In the classroom, it is another matter. If *Roe v. Wade* were overturned one day, new natural lawyers and traditional natural lawyers would presumably disagree in state legislatures about which procedures are abortions.

Of course, these points about substantive due process and new natural law were never discussed during the Gorsuch confirmation hearings. Instead, the American people were treated to ignorant pontification from senators like Al Franken and shoddy hit-job articles like the one in *Politico* that baselessly accused Justice Gorsuch of plagiarizing a page in this very book. Since the savage treatment of court nominee Robert Bork in 1987, everyone involved has come to expect this sort of thing during Senate confirmation hearings. Thankfully, however, all attempts failed to derail this intellectually promising and ethically principled American justice. Time will tell if Gorsuch can sway more colleagues on the Court to embrace his arguments against assisted suicide and a host of other evil practices on the political horizon, some currently illegal and others legal.

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Dreamland: The True Tale of America's Opiate Epidemic

by Sam Quinones

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Many of us are puzzled, confused, and stunned by the wave of addiction to pain-killing medicines that has swept across America in the twenty-first century. According to the Centers for Disease Control and Prevention, "In 2015, more than 15,000 people died from overdoses involving prescription opioids."[1] We always thought that drug addiction was limited to big-city ghettos and Hollywood celebrities; heroin was virtually unknown across the heartland of America. Yet in reality, many small and mid-sized towns contain substantial populations who came to their addiction through entirely legal pain-killing medicines. How could that have happened?

Sam Quinones answers that question with this gripping presentation of the intertwined pathways of prescription drugs and Mexican heroin. The subheading, *True Tale*, indicates that the narrative is accurate, even if names and details were changed. To assemble the information underlying this book, Quinones conducted many interviews across different segments of the population, including prisoners, between 2009 and 2014. Short chapters skip from a Mexican mountain village to medical conferences to American cities, each providing one more piece of the puzzle. *Dreamland* is a fascinating page-turner, and each chapter leaves the reader anxious to find out what happens next.

In 1980, a one-paragraph letter in the *New England Journal of Medicine* reported that oxycodone provided nonaddictive pain relief to closely supervised patients in hospitals. Doctors had been searching for such a drug for a very long time and desperately wanted to believe the reports. Consequently, many of them were easily convinced by the inflated claims of an unscrupulous pharmaceutical company, Purdue Pharma.

By coating oxycodone with a time-delaying shell, Purdue invented a continuous-release version of oxycodone, named OxyContin. Purdue began a very aggressive marketing campaign, bringing doctors to conferences at fancy resorts to tell them how great OxyContin was. Extrapolating from very scant medical