

A VOICE AGAINST PHYSICIAN-ASSISTED SUICIDE

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In the early hours of November 14, 1996, Card. Joseph Bernardin died of pancreatic cancer. The archbishop of Chicago approached death not in fear but as a "transition from earthly life to life eternal."

One of his last public acts was writing a letter to the U.S. Supreme Court. He asked the justices to reject arguments that the dying have a right to physician-assisted suicide. In two powerful and poignant pages, the cardinal concisely summarizes the legal and policy arguments against legitimizing the purposeful facilitation of death by healthcare providers.

*CHA attached his letter to the amicus curiae brief it filed with the U.S. Supreme Court in *Vacco v. Quill* and *Washington v. Glucksberg*, the two physician-assisted suicide cases to be decided by the Court this term (see "CHA Amicus Curiae Brief on Physician-Assisted Suicide," p. 36). In this article we provide context for the thoughts expressed in Card. Bernardin's letter, excerpted below, and describe how his letter makes a persuasive legal argument against physician-assisted suicide.*

"THERE IS MUCH THAT I HAVE CONTEMPLATED THESE LAST FEW MONTHS OF MY ILLNESS, BUT AS ONE WHO IS DYING I HAVE ESPECIALLY COME TO APPRECIATE THE GIFT OF LIFE. I KNOW FROM MY OWN EXPERIENCE THAT

PATIENTS OFTEN FACE DIFFICULT AND DEEPLY PERSONAL DECISIONS ABOUT THEIR CARE. HOWEVER, I ALSO KNOW THAT EVEN A PERSON WHO DECIDES TO FORGO TREATMENT DOES NOT NECESSARILY CHOOSE DEATH. RATHER, HE CHOOSES LIFE WITHOUT THE BURDEN OF DISPROPORTIONATE MEDICAL INTERVENTION."

In this opening paragraph of his letter, Card. Bernardin not only describes his own personal struggle, but also effectively challenges the holding of *Vacco* and a key finding in *Glucksberg*. In *Vacco*, the Second Circuit struck down a state statute criminalizing assisted suicide as it applies to competent terminally ill individuals. The court held that the statute violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution because the state treats competent terminally ill individuals requesting physician-assisted suicide differently than it treats similar people seeking to forgo life-sustaining treatment. The court could find no meaningful difference between these two requests. Since New York permits competent terminally ill individuals to forgo life-sustaining treatment, the court found that the Constitution requires it to permit assisted suicide for such people as well.

In *Glucksberg*, the Ninth Circuit found that competent terminally ill individuals have a constitutionally protected liberty interest in "determining the time and manner of their death." In striking down the criminal statute at issue, the Ninth Circuit mirrored the reasoning of the New York appeals court, deciding that requesting assisted suicide is effectively the same as forgoing life-sustaining treatment.

The cardinal, speaking from personal experience, exposes the fallacious reasoning of both courts. The difference between requesting physician-assisted suicide, on one hand, and forgoing life-sustaining treatment, on the other, is clear. Unlike those seeking assisted suicide, his intention in forgoing futile treat-

ment was not to die. Instead, he was choosing to no longer subject himself to useless and excessively burdensome medical intervention, letting nature take its course in the process. In contrast, a person seeking physician-assisted suicide is asking the physician to do something to cause death. The two acts differ both in intention and in the means used to carry them out. The cardinal's simple, personal testimony is more persuasive than volumes of legal or ethical theory.

ASSISTED SUICIDE IS NOT SOLELY A PERSONAL MATTER

"IN THIS CASE, THE COURT FACES ONE OF THE MOST IMPORTANT ISSUES OF OUR TIMES. PHYSICIAN-ASSISTED SUICIDE IS DECIDEDLY A PUBLIC MATTER. IT IS NOT SIMPLY A DECISION MADE BETWEEN PATIENT AND PHYSICIAN. BECAUSE LIFE AFFECTS EVERY PERSON, IT IS OF PRIMARY PUBLIC CONCERN."

The Ninth Circuit described a person's decision to end his or her life through physician-assisted suicide as a "deeply personal decision" that goes to the heart of the physician-patient relationship. *Glucksberg* locates the source of this constitutional right in the autonomy of the individual, stating that "the decision how to die is one of the most intimate and personal choices a person may make in a lifetime," a choice "central to personal dignity and autonomy."

But the above passage from Card. Bernardin's letter directly undercuts the court's argument that the patient's decision to commit suicide and the physician's decision to help that death occur are simply a private agreement between two competent adults. We live in community, and a decision by a community to allow one individual to help another take his or her life sends a dangerous message to vulnerable people. Through such a message, the community would be saying that physician-assisted suicide is a legitimate and proper way to care for individuals at the end of life—thus reshaping the attitudes of a society already deficient in providing the compassionate, supportive care that such people need. Such a message would effectively strip away an important layer of assurance society maintains for all its citizens, especially its most vulnerable—namely, that it values and cares for them and will not allow those more powerful than they to take away their lives.

People do not exist in a vacuum; individual actions affect society as a whole. For this reason, society often outlaws actions which can be labeled as "private," such as self-mutilation, prostitution, bigamy, and dueling. These apparently "personal" actions are

banned because the community values the dignity and life of each of its citizens. These kinds of destructive actions denigrate the inherent dignity and worth of individuals and also adversely affect other members of the community. The community and each individual in it would suffer if these "private" activities were to be legitimized.

ASSISTED SUICIDE VIOLATES OUR TRADITIONS

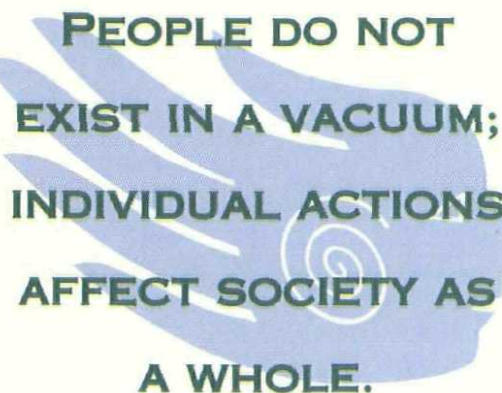
"OUR LEGAL AND ETHICAL TRADITION HAS HELD CONSISTENTLY THAT SUICIDE, ASSISTED SUICIDE, AND EUTHANASIA ARE WRONG BECAUSE THEY INVOLVE A DIRECT ATTACK ON INNOCENT HUMAN LIFE."

In *Glucksberg*, the Ninth Circuit struggled with the historical underpinnings of assisted suicide. The eight-judge majority claimed that many events in history show that suicide has at times been accepted—even embraced—by Western civilization, from the ancient Greeks right up to modern-day America. Though not so bold as to claim consistent societal support for assisted suicide, the majority argued that the historical record was at least ambiguous. The court used this lack of historical

clarity, and its own strong bias in favor of human autonomy, to locate a "liberty interest" in assisted suicide.

Card. Bernardin's accurate statement regarding our ethical and legal tradition not only corrects the Ninth Circuit's obfuscation of the historical record but also has import for the Supreme Court's constitutional analysis of the issue. The Court is reluctant to identify "liberty interests" unless they can be anchored either in the text of the Constitution or in the accepted cultural tradition of our country. Knowing that, the Ninth Circuit obscured our culture's clear historical rejection of physician-assisted suicide for a purpose—to remove a significant barrier to its constitutional protection.

Card. Bernardin's statement thus clearly identifies a significant weakness in the Ninth Circuit's "liberty interest" argument. Not only has assisted suicide been rejected by almost all elements of Western civilization for many centuries, it is also currently rejected by more than 40 states in our nation. Moreover, suicide and aiding and abetting suicide were forbidden in the original American colonies both before and after independence, and in the new states both before and after the Constitution was ratified in 1789. There can be no credible argument that, as the Ninth Circuit said, such a liberty interest is "deeply rooted in this Nation's history and tradition."



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NEW 'RIGHT' WOULD ENDANGER SOCIETY

"THERE CAN BE NO SUCH THING AS A 'RIGHT TO ASSISTED SUICIDE' BECAUSE THERE CAN BE NO LEGAL AND MORAL ORDER WHICH TOLERATES THE KILLING OF INNOCENT HUMAN LIFE, EVEN IF THE AGENT OF DEATH IS SELF-ADMINISTERED. CREATING A NEW 'RIGHT' TO ASSISTED SUICIDE WILL ENDANGER SOCIETY AND SEND A FALSE SIGNAL THAT A LESS THAN 'PERFECT' LIFE IS NOT WORTH LIVING."

This poignant passage expresses one of the greatest fears of opponents of assisted suicide. If we were to legitimize the practice for competent terminally ill people, it would be only a matter of time before it was applied to incompetent people and people who were not terminally ill ("terminally ill" is, incidentally, a term difficult to define from a legal as well as a medical perspective). Society would put a subtle pressure on those who were deemed "less than perfect"—for example, the elderly, the impoverished, people with disabilities—to relieve both themselves and the world of their "burden." The evidence from Holland indicates that this scenario might not be far-fetched.

Both the Ninth Circuit and the Second Circuit attempted to limit their newly recognized liberty interest in assisted suicide to "competent, terminally ill" individuals. But Card. Bernardin's simple statement reveals the naive and unprincipled nature of this effort. Neither court located the source of authority for the "right" to assisted suicide in a constitutional recognition of terminal illness or competence. Instead, the Ninth Circuit based this interest on the much broader ground that an individual has an inherent right to "control the time and manner of [his or her] own death."

If individuals were to have the right to control the time and manner of their death, how could society in any principled way prevent an incompetent person from exercising this right through a properly designated surrogate? Should not incompetent people have the same rights as competent ones? As the Supreme Court's decision in *Cruzan v. Director, Missouri Department of Health* makes clear, an incompetent person does not lose the right to be free from unwanted medical intervention simply because of incompetency. If a hospital were to refuse an incompetent patient the right to kill himself or herself with a physician's assistance, it might easily be accused of performing a discriminatory action based on the patient's disability. And if this accusation were to be upheld by a court, the artificial barrier to physi-

cian-assisted suicide for incompetent people would come crashing down.

In a similar way, those who support assisted suicide attempt to limit its use to people in "unrelenting pain." Exactly what level of pain must be involved to merit constitutional protection for assisted suicide was not made clear by either court (nor could it ever feasibly be made clear), but that did not keep the courts from taking this factor into account. So, if pain, rather than terminal illness, is the trigger for constitutional protection, then people with painful *nonterminal* illnesses would be next in line to exercise the right to physician-assisted suicide.

As Justice Antonin Scalia intimated in the questions he asked during oral argument, why should the Constitution favor terminally ill people in unrelenting pain over nonterminally ill people in unrelenting pain? Why should the Constitution be less understanding of

those who (because their illnesses are *not* terminal) face years, rather than months, of unending distress? If the Constitution is understood to prevent a state from outlawing physician-assisted suicide for competent terminally ill individuals, how could it permit a state to deny requests for such assistance from severely disabled persons who did not have a terminal illness but whose suffering met an *undefinable standard*

AN INCOMPETENT PERSON DOES NOT LOSE THE RIGHT TO BE FREE FROM UNWANTED MEDICAL INTERVENTION SIMPLY BECAUSE OF INCOMPETENCY.

of "painfulness" or "unbearableness"?

In the event a right to physician-assisted suicide is established, it would seem to be only a matter of time before this "benefit" was foisted on persons in situations that were not truly voluntary. And, in fact, this point has already been reached in the Netherlands, where assisted suicide has been available for 15 years.

Between 1981 and 1991, the Dutch, who had heavily regulated the practice of physician-assisted suicide for competent adults, began to permit nonvoluntary euthanasia on some people, including infants. The Rummelink Commission Report, issued by the Dutch attorney general in 1991, said that in the previous year the country had had 2,300 cases of voluntary euthanasia, 400 cases of physician-assisted suicide, and more than 1,000 cases of nonvoluntary euthanasia. The commission tried to justify the nonvoluntary euthanasia by arguing that it relieved the patients' "unbearable suffering." Because of this suffering, the commission claimed, there was from a medical standpoint "little difference" between nonvoluntary and voluntary euthanasia cases.

Card. Bernardin saw the inevitable result of legitimizing physician-assisted suicide and, for good reason, he feared its impact on the most vulnerable people, the kind of people he had served all his life. Since all of us are "less than perfect," we owe the cardinal a great debt of gratitude.

PHYSICIAN-PATIENT RELATIONSHIP WOULD BE THREATENED

"PHYSICIAN-ASSISTED SUICIDE ALSO DIRECTLY AFFECTS THE PHYSICIAN-PATIENT RELATIONSHIP AND, THROUGH THAT, THE WIDER ROLE OF PHYSICIANS IN OUR SOCIETY. AS HAS BEEN NOTED BY OTHERS, IT INTRODUCES A DEEP AMBIGUITY INTO THE VERY DEFINITION OF MEDICAL CARE, IF CARE COMES TO INVOLVE KILLING."

One of the cardinal's final points is that a right to physician-assisted suicide could cause a deep rift between physician and patient. The integrity of the medical profession has always been based on the physician's role as healer. We already hear allegations that the financial incentives involved in managed care undermine the physician's fiduciary responsibility to patients. When a physician is at financial risk in patient care, fiscal considerations can become more central to the physician-patient relationship. The legitimization of physician-assisted suicide could only undermine the trust necessary to this relationship. Physicians who assist in killing patients, even for supposedly sympathetic reasons, would ultimately undermine their rightful position as healers.

These observations regarding the relationship between physician and patient are relevant to the Court

because of the state's traditional role as the primary regulator of the professions. If the state believed that it was necessary to outlaw a practice that could undermine the trust between physician and patient—namely, physician-assisted suicide—a court might well find that this state interest justifies a criminal ban on the practice. Neither the Ninth Circuit nor the Second Circuit believed that this state interest justified the application of the criminal statutes at issue in the context of physician-assisted suicide for competent terminally ill patients.

CARDINAL LEFT A MESSAGE OF HOPE

It is certain that we will all eventually face the same journey our brother Joseph traveled. We know we must die. But, because of the cardinal's openness and pastoral guidance, we may better understand the inevitability that confronts us. As the authors of this article have tried to show, Card. Bernardin's appeal to the Supreme Court states the legal argument against assisted suicide well. But it does more. The cardinal's observations, derived from his experience as a religious leader and policymaker, offer us hope that we too can confront death without fear, in the assurance that we will be cared for by competent and compassionate caregivers. The authors hope, moreover, that the Court will consider the cardinal's teachings and experience and reject constitutional protection for assisted suicide. □

CHA AMICUS CURIAE BRIEF

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NOTES


1. "Disproportionate means are those that in the patient's judgement do not offer a reasonable hope of benefit or entail an excessive burden . . ." (*Directives*, pp. 22-23).
2. Catholic teaching has historically been a major force in the development of Western thought (R. J. Araujo, "Thomas Aquinas: Prudence, Justice and the Law," 40 *Loy. L. Rev.* 897, 913-915, 921 [1995]; G. N. Herlitz, "The Meaning of the Term 'Prima Facie,'" 55 *La. L. Rev.*, 391, n.5 [1994]). On end-of-life issues, courts have referred freely to historical Catholic teachings in their examination of this society's moral traditions (e.g., *Wash. Pet. App. A-131 to A-134* [Beezer, J., dissenting]; *In re Quinlan*, 355 A.2d 647, 659-60 [N.J.], cert. denied, 429 U.S. 922 [1976]).
3. E.g., the Council of Arles (452), the Council of Braga (563), the Antisidor Council (590) and the Synod of Nimes (1274) (T. Marzen, M. O'Dowd, D. Crone, and T. Balch, "Suicide: A Constitutional Right?" 24 *Duquesne L. Rev.* 1, 57, 60 [1985]).
4. The Court's decision in *Casey* was heavily influenced by the doctrine of *stare decisis*, leading certain members of the Court to recognize a liberty interest in having abortion in deference to *Roe v. Wade*, 410 U.S. 113 (1973), even if they might not have done so in the first instance (505 U.S., p. 853). Thus, the Court set the case apart: "Abortion is a unique act. . . . [T]he liberty of the woman is at

stake in a sense unique to the human condition and so unique to the law." *Id.* "[O]ne could classify *Roe v. Wade* as *sui generis*." *Id.*, p. 857 [plurality]. *Accord id.*, p. 952 [Rehnquist, C.J., concurring and dissenting]. Indeed, "because *Roe's* scope is confined by the fact of its concern with postconception potential life, . . . any error in *Roe* is unlikely to have serious ramifications in future cases." *Id.*, p. 859 (emphasis added). The abortion precedents are simply not applicable in other contexts, and cannot provide a basis for extending "privacy" or "liberty" to assisted suicide.

5. E.g., *Cruzan*, 497 U.S., p. 279, n.7: Although many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional, right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest. See *Bowers v. Hardwick*, 478 U.S. 186, 194-195 (1986).
6. The assertion that different courses of conduct are equivalent simply because they cause the same result is absurd. Accidents, self-defense, and murder all cause deaths. Abortion and feticide both kill fetuses. Illegal drugs and alcohol both cause intoxication. The law treats all of these matters differently because they all involve different conduct. Of course, the source of the Ninth Circuit's confusion is that it improperly identifies the effect (i.e., causing death) as the right assumed in *Cruzan* instead of the means (i.e., with-

drawal of life-sustaining treatment). Cf. *Bernardin, App.*, *infra*, 1a-2a.

7. Of course, this Court's entire abortion discussion proceeds from the assumption that the fetus is something less than a "person" recognized at law. See *Casey*, 505 U.S., p. 982 (Scalia, J., concurring and dissenting). The CHA does not agree with the Court's conclusion, nor with its approach to statutes restricting or prohibiting abortion, but the Court's devaluation of the life of the fetus in abortion cases is still distinguishable from this case, involving other living persons.
8. Of course, everyone who attempts suicide claims to "want" to die. However, as the Ninth Circuit admits, "[S]tudies show that many suicides are committed by people who are suffering from treatable mental disorders." *Wash. Pet. App. A-73*.
9. The physician's Hippocratic oath states "[I will] abstain from whatever is deleterious and mischievous. I will give no deadly medicine to anyone if asked, nor suggest any such counsel." *AMA, The Health Care Almanac* 120 (1995).
10. The Ninth Circuit acknowledges the risk of these pressures, but appears unconcerned: "We are reluctant to say that, in a society in which the costs of protracted health care can be so exorbitant, it is improper for competent, terminally ill adults to take the economic welfare of their families and loved ones into consideration [in requesting assistance in committing suicide]." *Wash. Pet. App. A-87*.

 For more information about CHA's amicus curiae brief, call Charles Gilham at 314-427-2500.