

ASSISTED SUICIDE RULING IS FLAWED

*A Federal Court Decision Has Potentially
Grave Implications for All Healthcare Workers*

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On May 3, 1994, a federal judge sitting in Seattle handed down a fundamentally flawed decision that has potentially grave implications for patients, healthcare providers, and society as a whole.

The judge, in *Compassion in Dying v. Washington*, struck down Washington State's criminal ban on assisted suicide, finding that the law infringed on the right of mentally competent, terminally ill adults to a physician's aid in committing suicide.¹ The U.S. Constitution, the court concluded, does not nullify the state's legitimate interest in deterring the suicide of "young people and others with a significant natural life span ahead of them,"² but it does require the state to permit competent, terminally ill adults to obtain a

physician's "assistance" in committing the lethal act. No other federal court in the nation has ever endowed *any* class of patients with a "right" to another person's aid in committing suicide.

While crafting new distinctions based on a person's anticipated "life span," the court had little hesitation in collapsing other distinctions long recognized in the medical and legal communities. The court, for example, saw no relevant constitutional distinction "between refusing life-sustaining medical treatment and physician-assisted suicide by an uncoerced, mentally competent, terminally ill adult,"³ notwithstanding nearly universal recognition of such a distinction in case law. Moreover, the court concluded that because the decision to end one's life is as intimate and personal a decision as abortion, assisted suicide, like

Summary Last May a federal judge struck down Washington State's law against assisted suicide on the grounds that it violated the U.S. Constitution. The judge ruled that just as a citizen has a right to refuse life-sustaining medical treatment, so does he or she have a right to request a physician's assistance in committing suicide. The court also concluded that because the decision to end one's life is as intimate and personal as a decision to have an abortion, assisted suicide must also be constitutionally protected.

The court is mistaken. A "right" to assisted suicide is described nowhere in the text of the Constitution. Assisted suicide, furthermore, does not occupy a fundamental place in American history and traditions, and therefore cannot be deemed implicit in the constitutional guarantee of due process. Indeed, just the opposite is true: Our history and traditions actively discourage and prohibit assisted suicide.

The asserted right to assisted suicide finds no

support in cases involving either abortion or termination of medical treatment. Two terms ago, the Supreme Court relied heavily on *stare decisis* in upholding the abortion right, but there is no line of precedent for a right to assisted suicide. Not all "personal" decisions are constitutionally protected, so the personal nature of suicide does not dispose of the question of its constitutional status. Finally, in equating refusal of medical treatment with suicide, the federal court in Washington State ignores a long line of authority that recognizes a fundamental difference between the two.

The Constitution does not require states to permit persons to "assist" others in relinquishing their rights, including the one right that underlies all others. Singling out the terminally ill as a class of persons who deserve to have their suicidal impulses honored would create a glaring anomaly in the law. Moreover, there is no reason to believe that a claimed right to assisted suicide can or will stop with the terminally ill.

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The *Compassion in Dying* decision, currently on appeal to the Ninth Circuit, comes at a time when advocates of assisted suicide elsewhere appear to be losing ground. A week after the decision was handed down, the Michigan Court of Appeals, in four consolidated cases, held that Michigan's ban on assisted suicide, though procedurally defective,

passes constitutional muster.⁴ The same month, a 25-member New York task force concluded unanimously that the dangers of recent proposals to legalize assisted suicide "far outweigh any possible benefits."⁵ Great Britain and Canada have recently refused to recognize a right to assisted suicide. Efforts to legalize assisted suicide have thus far been defeated in every state where the issue has arisen, including California, Washington, Maine, New Hampshire, Connecticut, and Texas. And new laws against assisted suicide have been enacted in several states in recent years.⁶ About the time this article goes to press, voters in Oregon will be deciding whether to approve an assisted-suicide ballot initiative in that state.

The *Compassion in Dying* case suggests an increased aggressiveness on the part of assisted-suicide advocates in attempting to secure from the courts what they have so far been unable to obtain at the polls or from legislatures. Within a little over two months of the Seattle ruling, lawyers representing the prevailing parties filed another suit in federal court in Manhattan, challenging New York's ban on assisted suicide.⁷

ASSISTED SUICIDE: A CONSTITUTIONAL RIGHT?

The Supreme Court has recognized that certain personal relationships are so critical to society that they are entitled to constitutional protection despite the absence of an explicit constitutional guarantee. For example, unlike free speech and free exercise of religion, which are guaranteed explicitly in the Constitution, no provision speaks expressly of parents' right to raise their children. However, in recognition of this right, early in this century the Supreme Court struck down laws that forbade parents to send their children to private schools⁸ or to

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have them taught a foreign language.⁹ The Court held that because the parent-child relationship occupies a fundamental place in our history and traditions, it is protected from unjustifiable government interference under the due process clause of the Constitution, a provision that protects life, liberty, and property. In the 1960s the Supreme Court relied on the historic sanctity of the marital relationship to

overturn the conviction of a physician who had given a married couple information and advice about contraceptives,¹⁰ and to invalidate a law that forbade interracial marriage.¹¹

To keep the justices from simply "discovering" nontextual constitutional interests—in other words, to ensure rule by law—the Court has consistently acknowledged that it must be guided by history and tradition. The Court has observed time and again that, to be constitutionally protected, an interest must be so fundamental as to lie at the very foundation of our civil and political institutions, so basic that ordered liberty could scarcely be imagined without it. Marriage and family relationships meet that test. Even when the Court has misread history, its continued reliance on history is evident. Half of the majority opinion in *Roe v. Wade*¹² is devoted to a review of ancient, medieval, and modern attitudes about abortion, an historical analysis that has since been largely repudiated by scholars.¹³

Applying these principles to the Seattle decision immediately reveals where the court went wrong. Unlike marriage and child rearing, suicide does *not* occupy a fundamental place in American history and traditions. No national tradition supports committing or assisting suicide. In fact, our history and traditions actively discourage and proscribe such conduct. When a court elevates to the status of a constitutional right conduct that has long been condemned under our laws, it inevitably invites the charge of decision making by personal predilection rather than constitutional principle.

SUICIDE VERSUS ABORTION

In its latest pronouncement on abortion, *Planned Parenthood v. Casey*, the Supreme

Court characterized abortion as an "intimate and personal choice," one that is "central to personal dignity and autonomy."¹⁴ The judge in the *Compassion in Dying* case, reasoning that suicide, like abortion, is "intimate," "personal," and "central to personal dignity and autonomy," concluded that assisted suicide is also entitled to constitutional protection.

The comparison is flawed. In the first place, uncritical reference to an abortion right is no longer possible in light of *Casey*. Four justices in the case explicitly condemned *Roe*. Three others refused to justify constitutional protection for abortion solely on *Roe*'s merits; they ruled that principles of *stare decisis* (the notion that courts should stand by their earlier decisions, in part so as not to upset settled expectations) compelled them not to overrule *Roe*'s "central holding." Thus *Roe* may now lack precedential force in identifying other constitutionally protected interests. The *stare decisis* considerations that led the Court to reaffirm the "central holding" of *Roe* are entirely absent—and, indeed, tilt in the opposite direction—when one turns to assisted suicide.

A second, more serious flaw in the Seattle court's comparison of abortion and suicide is the court's misguided focus on "personal and intimate" conduct. If a decision need only be "personal and intimate" to qualify for constitutional protection, then the number of constitutionally protected interests would increase exponentially. A decision to use hallucinogenic drugs for recreation, engage in prostitution, or any number of other equally "personal" activities currently subject to state prohibition would be beyond the state's power to regulate. Yet few would question the constitutionality of such laws. The "personal" nature of suicide proves nothing because it proves too much.

SUICIDE VERSUS REFUSAL OF TREATMENT

The federal court's conclusion in *Compassion in Dying* that there is no constitutionally relevant distinction between committing suicide and refusing medical treatment ignores a long line of authority that recognizes a fundamental differ-

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ence between the two, factually and legally. Factually, assisted suicide "involves not *letting* the patient die, but *making* the patient die."¹⁵ Legally, the right to refuse medical treatment is rooted in the common law and grows out of the interest in being free from unwanted bodily contact. On the other hand, the common law has never recognized a right to deliberately take one's own life or

to have one's life taken by others.

Historically, the Constitution has not been read to require states to permit persons to "assist" others who wish to relinquish their rights. Our courts, for example, will not enforce a voluntary agreement to sell oneself into servitude or engage in a consensual duel. A host of lesser interests, such as the right to be paid a minimum wage, cannot be waived. Since the law can prevent waiver of these interests, it follows that it can likewise prevent individuals from renouncing the one interest—their very existence—that makes all others possible.

THE SLIPPERY SLOPE

The Washington court extends only to terminally ill adults the "freedom" to have assistance in committing suicide. Singling out the terminally ill as a class of persons who deserve to have their suicidal impulses honored is logically incoherent, unless one first assumes they are better off dead than alive. A civilized society makes no such assumption with respect to *any* person. A rule permitting a person "to assist the suicide of another because the person killed has a certain condition or status," such as terminal illness, would "create a glaring anomaly in the law."¹⁶ It would mean that persons with terminal illnesses are *not* entitled to protection from their suicidal impulses, *even though other people are*.

Moreover, there is no reason to believe, in this litigious society, that a claimed right to assisted suicide can or will stop with the terminally ill. Any legal principle tends "to expand itself to the limit of its logic."¹⁷ Once a right to assisted suicide is conceded for any class of persons, it will be difficult or impossible to confine the right to that class. Since medical conditions and personal pro-

files can be placed on a continuum, those differences will likely be challenged as arbitrary. What criteria, for example, will be used to distinguish the 80-year-old person dying of cancer from the 70-year-old with Alzheimer's disease, or the 60-year-old with severe depression and advanced leukemia, or the 50-year-old depressed over an unsuccessful business venture or the loss of a spouse? Anyone doubting the reality of the slippery slope need only consider the Netherlands, where more than 1,000 people a year are *involuntarily* euthanized.¹⁸

A HOST OF IMPLICATIONS

What are the implications for the public and the healthcare community of an enforceable right to physician-assisted suicide? Consider the possible scenarios:

- Hospitals are required either to comply with a patient's request for assistance in committing suicide, or to transfer the patient to a facility that will honor the request.

- Physicians who fail to advise their patients of a right to assisted suicide are sued for malpractice.

- A national accrediting entity requires teaching hospitals to train their residents in giving lethal injections or to refer them to institutions that will provide such training.

- Congress enacts a law permitting Medicaid to pay for lethal injections in certain cases.

- Hospitals are required to advise patients on admission of their right to complete an advance directive requesting assistance in committing suicide.

- A court holds that a minor may obtain a lethal injection without parental notification; an adult may obtain the same injection without spousal notification.

- A court holds that a state may not impose a mandatory waiting period before persons obtain assistance in committing suicide.

- Suicide advocates challenge in court the refusal of states to fund lethal injections even though they fund other procedures for dying patients.

Anyone familiar with the consequences of judicially enforced rights to abortion will recognize at once that these scenarios are not fantasy. It is certainly foreseeable that if physician-assisted suicide were to become ensconced in the Constitution as a right, the law would impose a corresponding duty on physicians, nurses, and healthcare facilities to inform their patients of the procedure and, ultimately, to perform it or facilitate its performance. Then, of course, any indi-

vidual or institutional resistance to suicide would pit the provider's conscience against the patient's constitutional right.

Now is the time for healthcare professionals and providers to oppose actively efforts to win public and governmental acceptance of physician-assisted suicide. Next to those patients who might themselves be persuaded to request assistance in committing suicide, members of the healthcare community stand to be most immediately and directly affected by its legalization. □

NOTES

1. *Compassion in Dying v. Washington*, 850 F. Supp. 1454 (W.D. Wash., 1994), on appeal, No. 94-35534 (9th Cir.). The announced right only applies to those competent, terminally ill adults who act knowingly, voluntarily, and without undue influence.
2. Several Catholic organizations and bishops, among them the Catholic Health Association, U.S. Catholic Conference, and the state Catholic conferences and metropolitan archbishops of Washington, Oregon, and California, have filed friend-of-the-court briefs in the U.S. Court of Appeals for the Ninth Circuit, urging reversal of the ruling.
3. *Compassion in Dying*, 850 F. Supp. at 1464.
4. *Hobbins v. Attorney General*, 205 Mich. App. 194, 518 N.W.2d 487 (1994).
5. New York State Task Force on Life and the Law, *When Death Is Sought: Assisted Suicide and Euthanasia in the Medical Context*, May 1994 (executive summary), p. ix.
6. See, e.g., Tenn. Code Ann. Section 39-13-216; Ga. Code Section 16-5-5; Ind. Code Section 35-42-1-2.5.
7. *Quill v. Kopell*, 94 Civ. 5321 (S.D.N.Y.) (complaint filed July 20, 1994).
8. *Meyer v. Nebraska*, 262 U.S. 390 (1923).
9. *Pierce v. Society of Sister*, 268 U.S. 510 (1925).
10. *Griswold v. Connecticut*, 381 U.S. 479 (1965).
11. *Loving v. Commonwealth of Virginia*, 388 U.S. 1 (1967).
12. *Roe v. Wade*, 410 U.S. 113 (1973).
13. See the collection of articles in D. Horan, E. Grant, and P. Cunningham, eds., *Abortion and the Constitution: Reversing Roe v. Wade through the Constitution*, Georgetown University Press, Washington, DC, 1987.
14. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807 (1992).
15. S. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*, Harper Collins, San Francisco, 1993, p. 236. See New York State Task Force on Life and the Law, p. 71.
16. J. Bopp, "Is Assisted Suicide Constitutionally Protected?" *Issues in Law and Medicine*, Fall 1987, pp. 113, 116.
17. B. Cardozo, *Nature of the Judicial Process*, Yale University Press, Fredericksburg, VA, 1949.
18. R. Fenigsen, "The Report of the Dutch Governmental Committee on Euthanasia," *Issues in Law and Medicine*, Winter 1991, pp. 339, 340.