Opposing Moral Error in Society

Assisted Suicide Bill Illustrates Need to Respect Various Viewpoints

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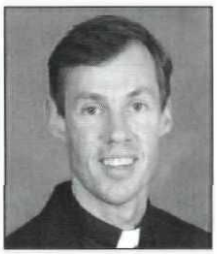

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One of the many things the 105th Congress did not accomplish before it adjourned for midterm elections was the undoing of Oregon's Measure 16. Also known as the Death with Dignity Act, Measure 16 allows a physician to prescribe a lethal dose of a controlled substance to a patient with a terminal illness who has a life expectancy of six months or less. The measure also requires that the patient be mentally competent and physically capable of orally self-administering the drug. Had it been enacted, the Lethal Drug Abuse Prevention Act of 1998 (LDAPA) would have undone Measure 16 and made sure that other states did not follow Oregon's example.

In light of the Catholic tradition's position on life issues, one might have expected a strong outpouring of support for LDAPA by Catholic healthcare organizations. But in spite of support for the legislation by the National Conference of Catholic Bishops (NCCB) and the Catholic Health Association (CHA), several Catholic healthcare organizations, along with other groups opposed to assisted suicide, offered different opinions. These ranged from outright opposition to the bill to the offering of amendments. Disagreements such as these among Catholics regarding the undoing of assisted suicide legislation are an inevitable reality in our tradition. They need not undermine our common commitment to safeguarding the sanctity of all human life.

Lethal Drug Abuse Prevention Act

In November 1997 an administrative opinion from the Drug Enforcement Agency (DEA) stated that dispensing or distributing any substance covered by the Controlled Substance Act (CSA) for the purpose of assisting in suicide was a violation of federal law. The rationale for this ruling was that the CSA restricts the use of controlled substances to "legitimate medical purposes," and that assisting in suicide is not a legitimate medical purpose under federal law. As a result, the DEA would have the authority to take action against a physician who assisted in a suicide regardless of state law.

On June 5, 1998, however, Attorney General Janet Reno offered a differing opinion. She wrote that a medical practice deemed legitimate by a state could not at the same time be deemed illegitimate under the CSA. This opinion was based in part on the fact that, historically, the expression "legitimate medical purpose" in the CSA was understood to prohibit the dispensing of controlled substances to drug addicts and abusers. Therefore, if the use of controlled substances to assist in a terminally ill patient's suicide were determined to be a legitimate medical purpose on the state level, the only way to make that use illegitimate at the federal level would be for Congress to pass legislation explicitly stating that assisted suicide did not constitute a legitimate medical purpose under the CSA. This is precisely what the LDAPA sought to do.

The LDAPA sought to amend the CSA to require the denial, revocation, or suspension of a license to dispense controlled substances if those drugs were dispensed or distributed with the intention of causing or assisting in causing the suicide of, performing euthanasia on, or the mercy killing of another person. The original legislation went on to explicitly state that such use did not apply to the use of controlled substances for pain management, even if the hastening of the person's death was foreseen as an unintended effect. In addition, a Medical Advisory Board on Pain Relief was to be established within the DEA. This panel would hear the appeal of any physician who was found by the DEA to have violated the

CSA. This board, however, would have only advisory authority, and could not overturn a DEA finding.

To Support or Not to Support

Rather than discuss the merits and weaknesses of the LDAPA, I wish to use this legislation as an opportunity to explore issues that emerge when Catholic organizations or groups must decide whether they have a duty to support legislation that seeks to prevent or stop a moral wrong, and if so how. There is no question that the issue of medically assisted suicide is a moral issue of critical importance. It threatens the very dignity of the human person (*Gaudium et Spes*, no. 27) and the sacredness of (*Catechism of the Catholic Church*, no. 2258) and God's dominion over human life (*Catechism of the Catholic Church*, no. 2280; *Donum Vitae*, intro. 5). Is it possible that one can fail to support or even oppose legislation that will protect human life from this threat? Despite any possible shortcomings, is the legislation's end, the undoing of a grave moral wrong, sufficient to require support?

Balancing Norms An excellent place to begin any discussion of legislation aimed at addressing a moral issue of this gravity is with the words of Pope Pius XII: "The duty of repressing moral and religious error cannot be an ultimate norm of action. It must be subordinated to higher and more general norms, which in some cases permit, and even seem to indicate as the better policy, the toleration of evil in order to promote a greater good" (*Ci Riesce*, 1953). In deciding whether and how to oppose moral error, one must find a balance between the gravity of the error or wrong and the impact this opposition will have on higher norms.

This notion is, of course, not new to Pope Pius XII. Augustine made a similar point (*De Ordine* 2.4.12), as did Thomas Aquinas (ST 2-2.10.11; *De Regimine Principum* 4.14). Cajetan went so far as to suggest that not opposing such error can be "morally good as something in accord with reason" (*Commentaria Cardinalis Caietani* 2-2.10.11). It is an established part of our tradition that the fact of moral wrong is not in itself sufficient to warrant public opposition. A higher norm must be taken into account. Most recently, Pope John Paul II called for a rediscovering "of a vision of the relationship between civil law and moral law" (*Evangelium Viae*, no. 71). In this vision the pope makes clear that the purpose of civil law is different and more limited in scope. For that reason, appeal to civil law to confirm the moral law will be limited. Such an approach is legitimate, the pope goes on to say, as long as the civil law does not "take the place of conscience or dictate moral norms concerning things which are outside its competence" (*Evangelium Vitae*, no. 71). Whereas one may never appeal to civil law as justification for committing a moral wrong, one need not always appeal to civil law to prevent or undo a moral wrong (*Evangelium Vitae*, no. 73).

> We must be faithful to the tradition as we confront moral wrong.

Public Order Among the higher and more general norms of which Pope Pius XII spoke is that of public order in society. Public order is understood in the tradition to be a part of the universal moral order. The requirements of public order are themselves rooted in the moral law. Without exaggerating its importance, consideration of the impact on the public order of a public policy stance related to a grave moral wrong is an a priori part of the formulation of that public policy stance (*Catechism of the Catholic Church*, nos. 1897-1912). The fact that legislation will undo or prevent moral error is not sufficient by itself. It must be shown that the error is of such gravity that the good of ending that wrong is proportionate to any negative impact that opposition may have on the public order. Furthermore, the *manner* in which opposition is made must reflect this same sensitivity to a proportionate balance between the good to be achieved and the disruption of public order that opposition may bring about. In short, it is not enough for us as Catholics to be effective in preventing moral wrong. We must be faithful to the tradition as we confront moral wrong.

This point is well illustrated in the documents of the Second Vatican Council. There, the Church maintains its right to preach, teach, and pass moral judgement, even on matters pertaining to the political order. However, it also recognizes that it may use "only those helps which accord with the gospel *and with the general welfare* as it changes according to time and cir-

cumstance" (*Gaudium et Spes*, no. 76, emphasis added). In its public policy positions the Church, like its individual members, holds itself accountable to the universal moral norm of public order (*Gaudium et Spes*, no. 74; *Catechism of the Catholic Church*, nos. 2238-2240). So, too, in deciding whether to support legislation preventing assisted suicide, it is not enough to determine that a grave moral wrong will be prevented. It must be determined that the legislation itself also conforms to the requirements of the universal moral norm of public order.

Public order is understood to consist of three elements: juridical, political, and moral.

- *Juridical order* refers to the preservation of the rights of all parties and the peaceful and effective means of resolving conflicts of rights.
- *Political order* refers to the public peace, which in the Christian tradition has to do with the establishment of justice, not simply the absence of conflict. Preserving the public peace entails meeting the demands of justice and ensuring orderly and fair processes for settling grievances.
- *Moral order* has to do with a common level of human decency that must be established and preserved.

Prudent consideration of the impact opposition will have on the juridical, political, and moral order of society must inform any decision to oppose moral error. An illustration of the importance and place of these elements in the tradition is the Church teaching that they can, in some circumstances, constitute a reasonable juridical justification for the government to limit or restrict personal and religious freedoms (*Dignitatis Humanae*, esp. nos. 7 and 8). In the same way, the Church as a community, and individuals and institutions on their own, must make appeal to these elements in determining a response to such legislation as the LDAPA.

Instructive Examples There are numerous examples of this approach. One is that of abortion. Abortion poses a direct threat to human life and is a clear moral wrong. By its nature, it entails the termination of an innocent human being's life by one person acting over another. The NCCB judges that the gravity of abortion is such that toleration cannot be viewed as the "better policy." In the words of Pope John Paul II, abortion is "radically opposed not only to the good of the individual but also the common good" and therefore "completely lacking in authentic juridical validity" (*Evangelium Vitae*, no. 72). In determining how to respond to this moral wrong, the NCCB has demonstrated a prudent concern for public order. From a juridical, political, and moral perspective it has taken a public policy position clearly aimed at stopping the practice, but not with "any means necessary." It has repeatedly condemned violence against abortion clinics or those who perform abortions. Such acts, even though directed at the ending of a grave moral wrong, do not conform to the demands of public order with regard to abortion. Instead, because abortion is said to be justified on constitutional grounds of privacy, the Church's public policy stance is one of support for an amendment to the Constitution. In this way, the public order is maintained even as the threat to human life constituted by a moral wrong is sought to be resolved. The process is cumbersome and slow. Some are impatient and seek more radical ways of preserving life. Still, within the context of the public order, the constitutional approach is the one most faithful to the tradition, even if seemingly more effective means might be available.

It should also be noted that the bishops do not understand opposition to abortion as merely having to do with making it illegal. They have adopted a strategy aimed at reducing the incentives for a person to seek an abortion. To do this, the bishops have pledged to make available the supports a woman might need to give birth to her child. In this way, they oppose the wrong in a way that builds up the public order through opposition. To the extent that one is not inclined to choose abortion, the legality of abortion becomes less relevant.

This approach is in clear contrast to the moral wrong of contraception. In 1919, in their first joint pastoral since 1884, the American bishops spoke out against artificial methods of birth control. They issued a still stronger letter on the topic in 1922 and again in 1954 as a follow-up to Pope Pius XI's 1930 encyclical *Casti Connubbii*. Yet, since the U.S. Supreme Court held in *Griswold* that contraception was protected under a constitutional right to privacy, the bishops have made no effort to seek a constitutional amendment to ban it, although they have in some limited instances sought to restrict access. The reasons are clear: Although morally grave, contraception is not so grave as to put the public order at risk in opposing it. Impact on the public order, as well as the chances for success, seem to indicate that it is "the better policy" to tolerate the presence of this moral error within society.

In the same way, to determine whether or not and how to support legislation aimed at stopping assisted suicide, it is not sufficient to point out that assisted suicide is a moral wrong and that the legislation will stop it. It must first be shown that assisted suicide is sufficiently grave to justify threats to the public order that opposing it might

pose, and that the legislation itself is defensible under that same moral norm.

The Case of Assisted Suicide

Before entering into a discussion of a proportionate balance between assisted suicide and the public order, it is necessary to come to a consensus on the gravity of assisted suicide and to discuss the relationship of that gravity to the potential impact opposition may have on public order.

> Abortion and assisted suicide pose different moral and political threats.

Of particular concern here will be the impact on the social good of healthcare. One of the great concerns in all debates over medically assisted suicide is safeguards. In Oregon's Measure 16, safeguards include the requirement that the patient be suffering from a terminal illness and expected to die within six months. These safeguards, which in no way diminish moral gravity, make assisted suicide different from other morally grave acts such as voluntary or involuntary euthanasia, homicide, abortion, or contraception. True, these acts all entail an intention against the value of life. But in assisted suicide, unlike abortion or euthanasia, the threat to human life is limited—not less grave—to those who are mentally competent and are physically capable of acting on that wish. Abortion entails few restrictions and virtually no safeguards for the innocent human being whose life is at risk. Thousands of abortions have been performed throughout the country since Measure 16 became law on October 27, 1997, but few people received, and fewer still used, lethal prescriptions in Oregon during this same period. Statistics from both the State of Oregon and Compassion in Dying, a group supportive of assisted suicide, suggest that the number of those who make use of Measure 16 in Oregon is lower than the incidents of illegal mercy killing and assisted suicide which are believed to take place nationally.

Having said that, it must also be noted that even if assisted suicide is *limited* to some terminally ill patients, it is *directed toward* the terminally ill. That is, assisted suicide is made available to them as a way of ensuring "death with dignity." The option of assisted suicide is directed toward a vulnerable population, a population toward which the Church holds society has a particular obligation. Assisted suicide may also be said to contribute to a lessening of respect for life in general and of the protection of every innocent life. Like abortion and euthanasia, assisted suicide is directed toward vulnerable human life. It would be difficult, it seems to me, to argue from within the tradition that assisted suicide ought to be tolerated in the same way contraception is.

As with abortion, then, some level of opposition seems required (*Evangelium Vitae*, no. 72). Abortion and assisted suicide are equally morally grave, but each poses different moral and political threats to society. Thus efforts to oppose each will necessarily have different public order and therefore moral considerations. For that reason some may think that opposition to assisted suicide should be less strident than opposition to abortion. Because abortion entails an act against an innocent human being, greater public order risks may be justified in opposing it than may be justified in opposing the act of assisting in a free and self-acted suicide. The moral obligation to protect others from harming themselves is less binding than the obligation to protect those who cannot protect themselves from others.

Questions to Be Addressed

It is not my purpose to argue for or against the LDAPA. If the issue comes up in the 106th Congress, new legislation may differ from the original form. The LDAPA and its approach to assisted suicide through an expansion of the CSA, however, are useful to illustrate the kinds of legitimate public order concerns in this issue.

Federalism Any federal restrictions on the use of controlled substances will in effect undo the will of the people of such states as Oregon. Federal restrictions have the potential of being viewed as an unwarranted extension of federal authority into state affairs and may be seen as going counter to the founding principle of federalism. How important this issue is will always be a matter of debate whenever the federal government acts, as it sometimes does, to override state action. In the present case, it has been suggested that the decision to address this issue by extending CSA jurisdiction rather than simply passing a federal ban may have been made out of respect

for the principle of federalism. Although some may doubt that such a governmental principle has anything to do with the Catholic tradition, the principle is part of the juridical order. This is demonstrated by its use in the Pro-Life Committee's opposition to legislation to extend reciprocity between states with differing advance directive statutes. It is therefore of moral as well as political concern. Questions that the tradition requires be addressed are whether assisted suicide is a sufficiently grave wrong to oppose, and what strategy for doing so can be justified in light of the impact on the public order of undermining a fundamental principle of American democracy.

Pain Management Some have argued that any legislation aimed at stopping assisted suicide has the potential to inhibit pain management efforts. Evidence to support this concern is the drop in morphine use in Oregon to manage pain since the publication of the November 1997 DEA opinion noted earlier. Also, a rise in the incidence of moderate to severe pain has been reported for the same period among the terminally ill of Oregon. However, it may be difficult to prove that this is connected to the publication of the opinion.

Others have argued that this risk of inhibiting pain management is low and, in any event, unintended. For those who accept a relatively low public order standard, the impact of legislation on pain management, especially if unintended, will be judged as of secondary importance to stopping assisted suicide. If, on the other hand, one supports a high public order standard, a small risk of negatively affecting pain management will be legitimately viewed as a possibly indefensible disruption of public order. Rev. Michael D. Place, STD, president and CEO of the Catholic Health Association (CHA), seemed to make this point in a CHA press release: "Even as CHA endorses this critical legislation, we call on Congress *to ensure* that DEA enforcement . . . be implemented in such a fashion that it *does not have* the unintended effect of discouraging physicians from dispensing appropriate and effective pain medication" (emphasis added).

Rule of Law In another example, it should be pointed out that legislation to expand the CSA to specifically include assisted suicide, as the LDAPA sought to do, does not actually make assisted suicide illegal. It would still be legal in Oregon according to the standard of the Death with Dignity Act. The LDAPA merely stated that the DEA could not recognize assisted suicide as a legitimate medical use of a substance controlled under the CSA. The practical effect would be to stop the practice of assisted suicide.

However, what impact would such a circuitous attempt to stop a moral wrong have on the public order? The DEA would be preventing physicians from engaging in a legal action. True, the action is morally wrong. It is, nevertheless, legal. Efforts to make it impossible to act in a legal way rather than making the act itself illegal could have a detrimental effect on respect for the rule of law. To the extent that respect for the rule of law is undermined, any effort to make assisted suicide or any other moral wrong illegal will likewise be undermined. This will be especially true if the approach taken to stop assisted suicide is governed by a desire to avoid court challenges to the law or by the fact that some juries have not convicted physicians and spouses who have participated in some form of mercy killing. Public order considerations caution us not to be so concerned about efficiency in stopping a moral wrong that overall respect for the law is undermined.

Enforcement Another public order issue concerns by whom and by what criteria the law is enforced. By expanding the authority of the CSA, the LDAPA located this authority within the DEA. At present, restrictions on the use of narcotics for legitimate medical purposes relate to their being made available to addicts and abusers. To prove this, the DEA need only document *practice* by a physician—the fact of writing the prescription. To suspend a physician's license under the LDAPA, the DEA would have to make an internal finding that the physician had *intent* to assist in the suicide of the patient. The DEA may not be the best party to make such a finding. There may even be a conflict of interest in a law enforcement agency that must prove intent in a court of law in some cases being responsible for finding intent through its own internal mechanisms in other cases. While the Internal Revenue Service is empowered to act as prosecutor, judge, and jury with regard to taxes, the impact on the public order of the DEA acting in a similar fashion is far more profound. A physician losing her license to prescribe adequate pain medication has deeper public ramifications than a person receiving a tax bill. Recall that the Medical Advisory Board on Pain Relief would have been established under the LDAPA only for physician appeal of a DEA finding of intent. It would not make that finding itself, nor possess the authority to overrule it.

Furthermore, the U.S. judicial system generally reserves the finding of intent to a jury of one's peers who must find this intent "beyond a reasonable doubt." Under the LDAPA, the DEA's standard for proof of intent would have been "clear and convincing evidence." Although this is

a higher standard than the DEA must meet under the CSA for other cases, it is a lower standard of proof than is required in the criminal courts. It would therefore be possible for a physician to be acquitted because of reasonable doubt of intent in a court where assisted suicide is illegal, yet still lose his license to prescribe narcotics because the DEA found clear and convincing evidence that intent did exist. What are the public order considerations of such a scenario?

Finally, with regard to enforcement, healthcare professionals commonly accept that inadequately managed chronic, severe pain is one of the most important reasons that people seek assisted suicide. Most healthcare professionals also believe that DEA oversight of the narcotics used to manage pain is a key disincentive for physicians to prescribe medications that adequately relieve pain. Professionals believe that some regulations, created in response to drug abuse, inhibit the appropriate use of drugs in healthcare. For example, the need to document the use of narcotics in triplicate and the limiting of the number of pharmacies that may dispense Class 2 drugs work against adequate access to and use of necessary pain medication.

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A Final Thought

These questions illustrate the public order concerns that can cause tension in decisions on whether and how to oppose moral error in society.

But choosing a method of opposition to a moral wrong is not only a question of interpreting public order concerns. An organization's views on how to oppose a moral wrong will necessarily be influenced by the effect opposition will have on the very nature of its ministry. Catholic healthcare's ministry is, stated most simply, patient care. An important component of that care is pain management. A concern to do nothing to impact negatively on pain management will necessarily inform the ministry's method in opposing assisted suicide. Catholic healthcare organizations cannot be expected to support a form of opposition to a moral wrong that makes it more difficult to pursue their ministry. Instead, the healthcare ministry will be more attracted to measures that remove incentives to assisted suicide. Such measures include research to document "best practices," as well as regulatory and funding reform. They might also include advocacy for expanding hospice care to the uninsured, a population that is especially vulnerable to assisted suicide. To expect enthusiastic support for a form of opposition that, however effective, will make the healthcare ministry to the dying more difficult is to expect too much.

The bishops, on the other hand, are not healthcare practitioners. The bishop has the task of ensuring that all the ministries of the Church, of which healthcare is one, are pursued. In ensuring that the ministry of the Church continues, the bishop's fundamental task is to give moral guidance. He must promote all ministries and ensure that each is pursued in a way that is faithful to Catholic tradition.

As a moral teacher, a bishop is more likely to want to stop a grave moral error in a direct manner than is the healthcare provider, although the bishop is equally concerned about patient care. In the same way, the health ministry cares deeply about opposing moral error. Differences in points of view and priorities that flow from ministry, in addition to different public order insights, must be noted and respected.

In discerning what to do about issues like assisted suicide, then, it is inevitable that tensions will arise. Even as we agree that some conduct is morally wrong and must be opposed, we must search for consensus as we navigate complex public order issues. These tensions need not spill over into conflict. We must work together in a spirit of respect of each other's commitment to moral integrity, and of humility before each other's insights.

As Fr. Place has said, we may disagree on strategy without giving those who do not share our perspective an opportunity to mute the effectiveness of our overall message. We can continue to seek a resolution to strategic differences only by forging common ground ("Faith and Public Policy," Inaugural Cardinal Bernardin Lecture, October 1998; "How Faith and Public Policy Intersect," *Health Progress*, January-February 1999, pp. 10-13). □