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PRACTICAL REASONS FOR LIFTING BANS ON PHYSICIAN-ASSISTED SUICIDE

MICHAEL ALAN SCHWARTZ*

Today we look at an issue which has been brought to the forefront primarily because of my client Dr. Jack Kevorkian.1 If it were not for Dr. Kevorkian we might not be here today.2 This issue might not be discussed and we might remain where we were in this country for decades.

It has been brought to the forefront because the questions that have been raised have not been answered satisfactorily for the majority of Americans. This has resulted in lawsuits, two of which are now sitting in front of the Supreme Court of the United States.3

Today we are aware that most Americans believe that there should be physician-assisted suicide.4 The Harris poll in 1994 indicated that 73 percent of Americans approve of legalizing physician-assisted suicide in some form.5 In reality, however,

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1 See David Orentlicher, The Legalization of Physician-Assisted Suicide: A Very Modest Revolution, 38 B.C. L. Rev. 443, 443 (1997). Dr. Jack Kevorkian has assisted in the suicide of over 100 terminally ill patients. Id. In response to Dr. Kevorkian's actions, the State of Michigan passed legislation criminalizing assisted suicide. Id. Michigan has attempted to convict Dr. Kevorkian of assisting in the suicide of four of his patients. Id. These efforts have resulted in acquittals and no other charges have been brought. Id. See generally Kevorkian v. Thompson, 947 F. Supp. 1152 (E.D. Mich. 1997); People v. Kevorkian, 527 N.W.2d 714 (Mich. 1994), cert. denied, 115 S. Ct. 1795 (1995).

2 See Christopher N. Manning, Live and Let Die?: Physician-Assisted Suicide and the Right to Die, 9 Harv. J.L. & Tech. 513, 513 (1996) (stating that physician-assisted has been brought to public consciousness through actions of Dr. Kevorkian and others).


5 See id. at 357 (providing results of statistical survey); Paul J. Zwier, Looking for a
most states completely ban the ability of people to have assistance in ending their suffering.\textsuperscript{6}

Now this question is before the Supreme Court. Although Professor Gostin referred to it as liberty interest and the right to die,\textsuperscript{7} and although I do not think there is any question about that, I do not think it is the real issue. The issue is not whether you have a liberty interest in the right to die but whether you have a liberty interest in the right to avoid intolerable suffering.\textsuperscript{8} That is where the liberty interest lies and that is what this question is all about.

In \textit{Compassion in Dying},\textsuperscript{9} the Ninth Circuit set forth a certain scenario, which I will read to you because I think it sets forth a clearer situation of what we are talking about.

The court refers to Dr. Peter Shalit, who gave a deposition or affidavit, which has been referred to as his declaration, in the trial court in Washington.\textsuperscript{10} Dr. Shalit stated:

One patient of mine whom I will call Smith, a fictitious name, lingered in the hospital for weeks. His lower body so swollen from oozing carpocies lesions that he could not walk. His genitals so swollen that he required a catheter to drain his bladder. His finger gangrenous from clotted arteries. Patient Smith's friends stopped visiting him because it gave them nightmares. Patient Smith's agonies could not be relieved by medication or by the excellent nursing care he received.


\textsuperscript{7} See \textit{Compassion}, 79 F.3d at 801-02 (defining liberty interest in right to die cases as "the right to die" and "determining the time and manner of one’s death" and "hastening one’s death for an important reason"); see also Rachel D. Kleinberg & Toshiro M. Mochizuki, \textit{The Final Freedom: Maintaining Autonomy and Valuing Life in Physician-Assisted Suicide Cases}, 32 HARV. C.R.-C.L. L. REV. 197, 200 (1997) (discussing liberty interest in right to die cases).

\textsuperscript{8} See David L. Sloss, \textit{The Right to Choose How to Die: A Constitutional Analysis of State Laws Prohibiting Physician-Assisted Suicide}, 48 STAN. L. REV. 937, 953 (1996) (noting liberty interest regarding one's right to die is also related to "death with dignity").

\textsuperscript{9} 79 F.3d 790.

\textsuperscript{10} Id. at 814.
Patient Smith begged for assistance in hastening his death. As his treating doctor it was my professional opinion that Patient Smith was mentally competent to make a choice with respect to shortening his period of suffering before inevitable death. I felt I should accommodate his request. However, because of the statute I was unable to assist him and he died after having been tortured for weeks by the end phase of his disease.\textsuperscript{11}

There are programs called hospice which provide care for the terminally ill\textsuperscript{12} and in about 95 percent of these cases, pain can be relieved so that existence is tolerable.\textsuperscript{13} It may not be great, but it is tolerable.

Then we have the other five percent. What do you do for the other five percent? This is the question that goes to the heart of our basic fundamental liberties.\textsuperscript{14} Fortunately, in this country, we have the freedom to discuss this question. One of the things that we prize and makes our country different from many places in the world is our ability to determine our own individual destinies.\textsuperscript{15} We also believe, whether it is true or not, that any man or woman can rise to become president of this country and no matter how you start out in life you can end wherever you choose through hard work, effort, and luck.

We all grew up with this concept but some may feel it is not true because of the factors in our society that sometimes repress individuals.\textsuperscript{16} Many people have been repressed in this country for reasons that have nothing to do with merit. Sometimes it has to do with racial patterns and sometimes it has to do with relig-

\textsuperscript{11} See id.


\textsuperscript{13} See id. at 517 (noting hospices give terminal patients hope that their suffering will be relieved).

\textsuperscript{14} See id. at 517 (commenting that personal choices which are central to one's autonomy should be given liberty interest protection under Fourteenth Amendment).

\textsuperscript{15} See Andrew Benton, Personal Autonomy and Physician-Assisted Suicide: The Appropriate Response to a Modern Ethical Dilemma, 20 OHIO N.U. L. REV. 769, 785 (1994) (stating "the right to die is an integral part of our right to control our own destinies").

ious matters. It may also be related to one's country of origin. We have seen this type of behavior, which our society has labeled as discrimination.

We are dealing with what is probably the last of the great civil rights issues that has not been properly addressed. That is, the right of people who are suffering to be free from discrimination and from repression by government entities.

Now, what do I mean by that? For example, Mr. Smith was suffering not from some form of depression but from a genuine disease that was well documented. He was treated using all possible means available but nothing could be done to ameliorate his suffering. He had no way of looking forward to life. Most of us get up in the morning, look outside and see that today is a beautiful day. This lifts our spirits and we go on with our lives feeling a little better. Mr. Smith had nothing to look forward to except more pain and suffering.

There are some people who even in light of that, will say that it is okay. They want to continue to live, they do not want their lives ended and nobody should be able to force them to end their lives. Nobody should tell them to end their lives. It is not an obligation to end your life, it is an individual choice. They have the right to choose to continue to live. There are others, however, who feel differently. They simply say, "I can not take it anymore." It may be months, weeks, or years of horrible agony, misery and torture. At some point, they finally realize that this is it and all of their doctors tell them there is nothing that can be done.

18 See, e.g., Alison C. Hall, To Die with Dignity: Comparing Physician-Assisted Suicide in the United States, Japan and the Netherlands, 74 WASH. U. L.Q. 803, 810 (1996) (stating terminally ill patients are free to choose physician-assisted suicide and "that choice should not be made by the government or any court").
19 See Benton, supra note 15, at 788 (asserting that many terminally ill patients want to live to enjoy last embraces of relatives or hear headlines from "tomorrow's newspapers").
20 See id. at 786 (noting competent, terminally-ill patients should be able to "enlist the aid of a physician in exiting life"); see also Hall, supra note 18, at 810 (stating terminally ill patients who wish to end their lives should have ability to do so).
21 See Benton, supra note 15, at 788 (commenting that there are terminally-ill patients who want to die because "they don't feel that life for its own sake is important").
22 See Hall, supra note 18, at 805 (noting terminally-ill patient in United States would be denied request to end their life).
Of course it is possible that some miracle cure may materialize one day. But those who are suffering real, genuine pain are not banking on a miracle cure that may or may not come. They deal with it the way that they are able. Those who want to go on, go on, but there are some who do not want to go on. The question then becomes, should the government force an individual who is in horrible pain and suffering to continue to suffer? That is what the law does now.

Does that person who is suffering have a right, a liberty interest under the United States Constitution to end his or her suffering? Although it appears that a person can go out and commit suicide on his or her own, that is not necessarily true. Many people who are terminally ill do not have the ability to move about, and can not obtain the substances that would be necessary to commit suicide. Moreover, even if they could obtain these substances, they may take them incorrectly. They may take some pills, regurgitate them, and get a partial dose, ending up worse off than they were before they started.

I have seen people who have attempted to shoot themselves. I remember an unfortunate case when I was the Grievance Administrator in Michigan where a lawyer attempted to commit suicide. He shot himself in the head. He blew out one of his eyes, but he lived. There is no guaranteed result. There are many ways to commit suicide; sometimes you will be successful and sometimes you will not.

Another area we need to explore involves morals and ethics.

23 See id. at 806 (commenting that despite medical advances "medicine cannot turn life into an ever lasting state of happiness and it should not strive to do so") (quoting Johannes J.M. van Delden et al., The Remmelink Study: Two Tears Later, 23 HASTINGS CTR. REP. 24, 28 (1993)).


25 See Glucksberg, 117 S. Ct. at 2271 (holding that Fourteenth Amendment's liberty interest does not include right to physician-assisted suicide).

26 See Pugliese, supra note 6, at 1306 (noting that patients will take their own lives through use of do-it-yourself suicide manuals which provide steps necessary to commit suicide).

27 See id. at 1307 (discussing organized groups which provide names of deadly drugs to terminally-ill patients but will not assist in administering drugs).

28 See id. at 1307 (commenting that patients who take an overdose of drugs may end up vomiting or falling into deep sleep).

29 See, e.g., Leslie L. Mangini, To Help or Not to Help: Assisted Suicide and its Moral, Ethical, and Legal Ramifications, 18 SETON HALL LEGIS. J. 728, 747-48 (1994). The Hip-
because you can not divorce anything from morals and ethics. They are the cornerstones of what we do. Is it moral and ethical to force somebody to be tortured against his or her will? Mrs. Marker and I have discussed this idea before, because we go around to different places and we meet each other at weird hours and days and different places in this country. We meet again here today, and she will be speaking later this afternoon.

I remember on one occasion discussing something called the slippery slope. I think it was on a television program hosted by John Chancellor. We were on TV. I do not hear that phrase much anymore but I would like to tell you about the slippery slope. If something was subject to the potential for abuse and you knew from statistical facts that it had caused over one million deaths in this country over the last twenty years, should it be totally banned? I wonder how many people would say yes, how many people would say no, and how many people would be afraid to say.

With something like that, I would say the reason it caused a million deaths is because it has the potential for abuse and we have seen it being abused. Do you know what it is called? It is called the automobile. I know about these things because I live in Michigan. However, although we know that this is a dangerous instrumentality, can be subject to abuse, and has historically been shown to cause over a million deaths in the last twenty years, no one wants automobiles to be banned.

Let's look at another situation. There are ways to alleviate pain and suffering. One way is through the use of morphine or other controlled substances. The average person cannot go out

pocratic Oath is an ethical code of medical conduct which requires physician's to prescribe only beneficial treatment and to refrain from causing hurt or harm. Id.

30 See Tom Beauchamp, The Justification of Physician-Assisted Deaths, 29 IND. L. REV. 1173, 1196 (1996) (noting that there is resistance to legalize physician-assisted suicide because of slippery slope argument which reasons "that practices that are acceptable in one type of circumstance will, inevitably be extended to similar circumstances in which the practices are morally unacceptable").

31 See Zwier, supra note 5, at 203 (explaining that slippery slope analysis looks into how society can decide who is "reasonable" when requesting physician-assisted suicide).

32 See Manning, supra note 2, at 520 (noting argument that "any exception to a total prohibition on assisted suicide would result in a 'slippery slope,' society's attitude would become more permissive toward suicide").

and obtain these substances. Only physicians who are permitted by the Drug Enforcement Administration to have licensing can properly obtain and prescribe morphine. Morphine is administered through drips that can alleviate pain for some terminally ill patients. They receive morphine drips, and these patients quite often die from these drips.

I learned of this phenomenon when I was an Assistant District Attorney in Brooklyn. Perhaps some of you also have law enforcement experience, and are aware that this is taking place. There have been cases where physicians have abused their licenses by selling or improperly prescribing controlled substances, like morphine, to individuals who have no medical necessity for them. Therefore an illicit drug trade has been made.

The answer to this problem, if we take the view that is suggested regarding this, is that there is a slippery slope. Once you give the physician the right to prescribe it, and allow it to be given to patients, that physician may abuse that right just as that physician may abuse assisted suicide. Therefore, we would have to eliminate the ability of physicians to prescribe controlled substances.

What would the net result be of the slippery slope? A lot of

(commenting on physicians' use of morphine to control pain).


36 See Danuta Mendelson, Historical Evolution & Modern Implications of Concepts of Consent to and Refusal of Medical Treatment in the Law of Trespass, 17 J. LEGAL MED. 1, 31 (1996) (discussing various methods healthcare providers employ to alleviate pain, including use of morphine).

37 See Yale Kamisar, The "Right to Die": On Drawing (and Erasing) Lines, 35 DUQ. L. REV. 481, 496 (1996) (noting use of morphine drip will alleviate pain but will also hasten patients' death).

38 See Manning, supra note 2, at 513 (observing that physicians have been prescribing pain-killing drugs for patients with terminal illnesses for years); see also Christopher Vaeth, State Law Criminal Liability of Licensed Physician for Prescribing or dispensing Drug or Similar controlled Substance, 13 A.L.R.5th 1 (1994) (asserting that "physicians have been prosecuted, and convicted, for unlawfully possessing, prescribing, dispensing, selling, distributing, delivering, obtaining, administering, and transporting controlled substances").

people would be in pain and would suffer. But what is the net result if you prohibit physicians from assisting people in pain from ending their lives if that is the only reasonable alternative that that person has? A lot of pain and suffering. Apparently pain and suffering can be tolerated by society.

My understanding of the conservative philosophy in this country is that conservatives believe we should attempt to limit government intrusion into our personal lives. However, many conservatives seek to promulgate and perpetrate government intrusion into the most personal aspects of our decision making. These decisions include whether or not to continue living or whether or not to end living as the lesser of the two evils between that and suffering.

If a patient wants to die, it does not necessarily mean that he or she is depressed or incompetent. It may well mean that the patient knows what the situation is, and has rationally decided after considering all the alternatives.

Who among us can say that it is wrong? Is it the Almighty who is telling us that we cannot do it? If the Almighty says that then why does the Almighty not speak to the person who is in pain and tell him or her, I give you freedom of choice.

What we are left with is two extremes: Either we ban physician-assisted suicide or allow the patient to do what they want, when they want, for any reason. There is another alternative, a middle course: We can allow the patient to decide. In conclusion, if physician-assisted suicide is regulated, it may not be the perfect situation, but at least it is a humane situation.


41 See Jane Nestlerode, Re"Righting" the Right to Privacy: The Supreme Court and the Constitutional Right to Privacy in Criminal Law, 41 CLEV. ST. L. REV. 59, 92 (1993) (noting conservative agenda is served when scales tip in favor of "further governmental intrusions rather than individual privacy rights").

42 See Sitcoff, supra note 6, at 682 (asserting that a "common psychological factor in nearly all suicides is depression and hopelessness").

43 See Benton, supra note 15, at 784 (noting that if an individual is competent to decide whether they want to live or die, they must be informed of all alternatives before a decision can be made).