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ASSISTED SUICIDE: LEGAL, MEDICAL & ETHICAL CONSIDERATIONS FOR THE FUTURE

RITA L. MARKER*

In all of the public controversies that have been addressed in recent years, there is perhaps none with the degree of misunderstanding as that surrounding assisted suicide. For example, one often hears it called the "right to die." Yet it has nothing to do with letting someone die. Neither the law nor medical ethics requires that a person be kept alive by being subjected to unwanted medical treatment.

Rather, current debate is about whether the laws and public policy should be changed to permit the direct and intentional ending of a life with a poisonous overdose or lethal injection. In essence, the outcome of the current public debate will determine whether what is now (and always has been) called a crime will be transformed into a "medical treatment."

Some proponents of legalizing and legitimizing assisted suicide attempt to portray all who oppose it as religious or right-to-life fanatics who want to force others to suffer.¹ Yet neither religious beliefs nor views on other controversies of the day are predictors of the stance one takes regarding assisted suicide.

Most assuredly, laws against assisted suicide are not in place to force others to suffer. Such a claim is as groundless as saying that laws against selling tainted food are intended to force people to starve.

This debate is about public policy. It is specifically a debate

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¹ Such claims are made by Geoffrey Fieger in virtually every post-mortem press conference following assisted suicides presided over by Dr. Jack Kevorkian. See, e.g., David Canella, *Lawyer Defends 'Caring' Kevorkian*, ARIZ. REPUB., Feb. 24, 1993, at B2 (quoting Fieger as saying "[w]hat we have here is a religious war going on"); Joe Heaney, *Kevorkian's Lawyer Blasts Doc's Critics*, BOSTON HERALD, Sept. 30, 1996, at OO7 (citing Fieger as singling out religion as "chief opponent" of physician-assisted suicide).

about whether intentionally poisonous drug overdoses or drug injections should be considered medical treatment. It is a debate whose outcome will affect each and every person.

Legalized assisted suicide would not mean, as some say, a change in the way we view dying. Rather, it would mean a complete alteration of the way society views a person who is dying, disabled or dependent.

In addition to the assisted suicide advocates who attempt to portray their opponents as fanatics who want others to suffer, there are many more who seriously and sincerely believe that what they are proposing is a compassionate choice that should be available. Despite the sincerity and good intent, the content of the policies and laws that they espouse on the basis of compassion ultimately will be carried out for the purpose of convenience and cost containment. What may be a choice for the rich would become the only "medical treatment" available to the poor.

II. LAST RESORT

Individuals who favor assisted suicide assure us that it would only be used as a "last resort" after all medical options have been offered and a person has received counseling. They further claim that death by intentional drug overdose would always be the free choice of the person who dies.

This assertion represents the height of naiveté, if not disingenuousness. It is the type of presumption made by those relatively few people who have the luxury of a personal family physician, who may also be a golfing or bridge partner. Having a physician friend who would talk over a planned assisted suicide before prescribing a lethal dose is nothing more than a fantasy for the vast majority of Americans.

The reality is that most people are finding it difficult to get even basic healthcare. Millions of people lack health insurance. Many of them are working parents with small children. They are in that "fall-through-the-cracks" category where they earn too much to be eligible for government health coverage, yet do not earn enough to pay several hundred dollars a month for medical coverage.

If assisted suicide becomes an accepted "option," the face of this new "treatment" will not only be that of the elderly, immi-

nently dying patient who is often portrayed as the likely recipient of assisted suicide. Those who die will also include those like the young father of two children who has recently become unemployed because his company downsized. The only family income is that of his wife, whose job carries no medical insurance. And now he has been diagnosed with a disabling condition. How long do we suppose it would be before he has to decide between paying for medication and paying the mortgage? Do we really think that he would receive "all medical options" before being provided with the oh-so-affordable "choice" of assisted suicide? Do we really believe that he would not feel pressured to make this choice for the good of his wife and children? How long would it be before the public at large would consider it self-centered and thoughtless if a person in his position did not opt for assisted suicide?

II. FOR THE ENHANCEMENT OF PUBLIC HEALTH AND WELFARE

People with disabilities are perhaps the most aware of the personal dangers of permissive assisted suicide. Such individuals are very much aware of the discrimination against them which pervades society. Sometimes this discrimination is in the form of ignoring people with disabilities. For example, how many disabled speakers do we see included on programs to discuss assisted suicide? More often we see a paternalistic discussion about people with disabilities, as though the attorneys, psychologists, educators, and other professionals who are disabled cannot speak for themselves on issues of medicine, law and public policy. In fact, many leaders of the disability rights movement have now joined together to form Not Dead Yet, an organization dedicated to opposing assisted suicide.²

Far more blatant is the type of discrimination expressed by Jack Kevorkian, who has specifically stated that if disabled people would kill themselves, it would benefit society. In 1990, Kevorkian wrote, "[t]he voluntary self-elimination of individual and mortally diseased or crippled lives taken collectively can only *enhance* public health and welfare."³ Given the subtle and

² For more information regarding disability rights, see the website of Not Dead Yet <<http://www.acils.com/notdeadyet/>>.

³ Jack Kevorkian, Written Statement to Oakland County Circuit Court in Response

blatant discrimination which exists, people with disabilities rightfully fear the coercion which would pose grave danger if assisted suicide were legalized.

III. OFFERING "ASSISTANCE"

Its proponents claim that the issue of assisted suicide would always be raised by the patient, not offered by the doctor. This is not true. During recent legislative hearings in Oregon, physicians preparing for the implementation of that state's assisted suicide law testified that assisted suicide will be mentioned to patients as one of their available options.⁴

Ironically, if lethal drugs can be prescribed, they will be among the least expensive types of prescription available at the local pharmacy. In the event that one is unable to afford the \$30.00 or so for a poisonous dose, at least one state is prepared to pick up the tab by categorizing lethal drugs as "comfort care."⁵ Where government funding is not available, assisted suicide advocates have suggested that a foundation be formed "to fund needy cases"⁶ so that no one will lack poison.

But it is not only the uninsured who will be at risk. It is a mistake, and a deadly one at that, to think that one who has medical insurance will have the chance to receive or refuse all available medical intervention before being offered assisted sui-

to Complaint for Injunctive Relief and Motion for Temporary Restraining Order 11 (Aug. 17, 1990) (unpublished manuscript on file with author) (emphasis in original).

⁴ See Hearings Before the Oregon House Judiciary Committee, Subcommittee on Family Law (Mar. 11, 1997) (statements of Peter Rasmussen, M.D.) (on file with author).

⁵ See Dan Postrel, *State Could Cover Assisted Suicide*, STATESMAN J. (SALEM, OR), Dec. 6, 1994, at 1A (stating that immediately following passage of Oregon's Measure 16, Oregon's Medicaid Director announced that assisted suicide would be paid for as "comfort care" under the Oregon Health Plan which provides coverage for poor Oregonians); Harry Estede, *Suicide: Delays Buy Time for Opponents*, EUGENE REG.-GUARD, Mar. 14, 1997, at 5A (stating that this position recently was reiterated when Barney Spreight, Oregon Health Plan Administrator, said that the poisonous overdose would probably be covered along with other medications).

⁶ See Message from Derek Humphry to Right-to-Die E-mail Mailing List, July 25, 1996 (on file with author). Commenting on the fact that Congress may prevent federal funds from being used to pay for assisted suicide, Derek Humphry, the co-founder of Hemlock Society and now the director of E.R.G.O., explained:

Sixty Seconals don't cost more than \$30 U.S. and a doctor is only likely to charge about \$50 for a half-hour visit when writing the prescription, and that may be met by a health plan. Should it turn out to be the case the indigent people can not get this form of lawful hastened death, then a foundation should be formed to fund needy cases.

Id.

cide. That is because healthcare is largely dominated by managed care programs and HMOs, with stockholder benefit, not patient well-being, as the bottom line.

No longer do doctors or hospitals get paid for all they do for a patient. Instead, their incomes often depend upon how little they provide. Some managed care programs require that doctors limit patient visits to twenty minutes for new patients, and ten minutes for returning patients. Moreover, if a program has a "gag rule," doctors may not be permitted to tell patients that those physicians who save money by withholding care receive cash bonuses.⁷

A recent study has shown that doctors who are the most "thrifty" when it comes to cutting back on medical care are also the ones who say they are in favor of assisted suicide.⁸ These same doctors would be diagnosing, screening and counseling patients, as well as prescribing lethal drugs.

IV. ASSISTED SUICIDE AS COST CONTAINMENT

During his argument against assisted suicide before the United States Supreme Court, Acting Solicitor General Walter Dellinger said, "[t]he least costly treatment for any illness is lethal medication."⁹ He was, of course, correct.

Recognizing this, do we really believe that if assisted suicide is transformed from a crime into "medical treatment" within a healthcare system which forced drive-through deliveries and is still mandating drive-through mastectomies, that current healthcare programs will suddenly begin to provide all options for suicidal patients? Do we really believe that managed care corporations that now limit doctors' time to ten minutes per patient will let doctors spend hours discussing the pros and cons of assisted suicide before prescribing the fatal overdose? Do we truly rec-

⁷ See Amicus Brief of the International Anti-Euthanasia Task Force for Petitioners, *Vacco v. Quill*, *Washington v. Glucksberg* (Nos. 95-1858, 96-110) (Nov. 12, 1996), available in 1996 WL 656322, at <<http://www.iaetf.org/scot1.htm>>.

⁸ See Mark O'Keefe & Tom Bates, *Oregon Revisits Assisted Suicide*, OREGONIAN, Mar. 2, 1997, at A1. Dr. Daniel Sulmasy, Director of the Center for Clinical Bioethics at Georgetown University Medical Center, has surveyed physicians about their attitudes to providing assisted suicide. *Id.* According to Dr. Sulmasy, "[t]he more thrifty they are, the more willing they are to do it." *Id.*

⁹ Oral Argument by Walter Dellinger Before United States Supreme Court in *Washington v. Glucksberg* (No. 96-110), 1997 U.S. TRANS LEXIS 19, *20, Jan. 8, 1997.

ognize the pressure that would be placed on both patients and care givers?

A new get-tough policy, ironically known as "Operation Restore Trust," is now going after hospice programs that provide too much care. For years, the criteria for hospice care eligibility has been a life expectancy of six months. Yet, 14.9 percent of hospice patients live longer than the predicted half year.¹⁰ As one article summarized it, "[p]eople in hospice programs are not dying fast enough to satisfy federal government auditors."¹¹ Can we fail to wonder what sort of pressure would be on patients and care givers if assisted suicide were an "option" that could be offered? What kind of a society will we become if poison becomes a remedy for cost over-runs?

There will be force exerted. But it will not be of the type where the vulnerable are herded into vans to be taken to their deaths. Instead, it will be couched in soft tones. It will come in the form of the whispers of strangers who ask: "Have you thought of leaving early?" It will be heard in the murmurs of loved ones who say: "If you decide to do this, I will help you." It will be found in the subtle suggestion that assisted suicide, for those who are ill *as well as for the loved ones*, is appropriate.

V. GOING TOGETHER

We have all read and heard of the recent mass suicide in San Diego. There is a tendency to dismiss that California tragedy as an isolated act and to assume it has little or nothing to do with the current assisted suicide debate. Yet, these suicides were accomplished by the combination drug-alcohol-plastic bag-method (a method Faye Girsch of the Hemlock Society has described as "the most advanced technology" currently available to help people end their lives),¹² taught at workshops, and described in "how to" pamphlets of an euthanasia organization.¹³

10 Nicholas Christakis & Jose Escarce, *Survival of Medicare Patients After Enrollment in Hospice Programs*, 335 NEW ENG. J. MED. 172, 172 (1996).

11 Robert Rosenblatt, *Government Auditors Question Medicare Payments for Long-Term Hospice Care*, WASH. POST, Mar. 16, 1997, at 17.

12 Faye Girsch, *Letters to the Editor*, SAN DIEGO UNION TRIB., June 3, 1993, at B11.

13 Derek Humphry's *Self-Deliverance from End-State Terminal Illness by Use of a Plastic Bag* is available from E.R.G.O. to anyone who mails in \$5 plus postage and handling. E.R.G.O. is headed by Humphry, author of FINAL EXIT, and the Hemlock Society's Executive Director, Faye Girsch, serves on the organization's board of directors.

An example of such a suggestion can be found in the suicide manual, *Final Exit*, which has a chapter entitled "Going Together."¹⁴ This chapter explains that "[some] couples choose to die together, regardless of whether both are in poor health, or only one." According to the author, such a death is a "tribute to the strength of a loving relationship."¹⁵

Surely, he was not implying that a loving relationship can only occur between spouses. If double or multiple suicide is a sign of a loving relationship, it is undeniable that some relationships, such as those within a cult, are strong enough to act as the siren beckoning to the grave.

It now appears, at least according to some news reports, that the mass suicide in San Diego may have been precipitated because the cult leader said he was terminally ill. As one member said, in a suicide message left behind: "Once he [cult leader Marshall Appelwhite] is gone, there's nothing left here on the face of the Earth for me, no reason to stay a moment longer."¹⁶ His followers' decisions to die with him may be classic, although larger scale illustrations of "going together" are described in the suicide manual.

It is not only the co-founder of the Hemlock Society who has recognized "going together" as a circumstance in which assisted suicide could be warranted. Jack Kevorkian has indicated that this could take place on a far grander scale than a double suicide or a thirty-nine member group in a California mansion.

In his book, *Prescription Medicine*, Kevorkian listed situations for which he felt that the "merciful option" of euthanasia should be available.¹⁷ These included a category he called "Obligatory Suicide," referring to people who are "irrevocably condemned to kill themselves."¹⁸ Kevorkian included cult members in this category, such as the followers of Jim Jones who died Guyana.¹⁹

¹⁴ DEREK HUMPHRY, *FINAL EXIT* 101 (1991).

¹⁵ *Id.*

¹⁶ *Were Cult Members Misled?*, CNN Interactive (Mar. 30, 1997) <<http://www.cnn.com/US/9703/30/mass/suicide/index.html>>.

¹⁷ See JACK KEVORKIAN, *PRESCRIPTION MEDICINE* 195 (1991). In addition to proposing euthanasia for "condemned criminals and hopelessly ill or incapacitated patients," Kevorkian states that it should be available to others whom he acknowledges are arbitrarily categorized. *Id.*

¹⁸ *Id.* at 197.

¹⁹ See *id.* at 198.

VI. SETTING THE STAGE

The gentle nudge from hope to hopelessness can come in many forms. The premature good-bye can send a brutal message. For example, at a Hemlock Society conference held in Denver in November 1991, a table held a display of greeting cards intended for people who were ill. Their messages were not the expected statements of concern or well-wishing. Designed by a Hemlock member and endorsed on the conference program as cards to be given to the terminally ill, one card in particular exemplified the way in which the last shred of remaining hope can be taken from a person faced with a life-threatening illness. The greeting card was of heavy cream-colored bond, embossed with tiny blossoms. Its edges elegantly ragged in the style of an invitation, it carried the message: "I learned you'll be leaving us soon."²⁰

Yes, there does come a time when enough is enough, a time when care, not attempts to cure, is the compassionate thing to do. But a printed message which arrives by mail, pronouncing "I learned you'll be leaving us soon" bears the degree of sensitivity generally used by mail order hustlers. Perhaps that is what this is. Rather than selling a new product, this markets hopelessness.

Attorneys have long recognized how setting the stage can lead to disastrous results. In a recent mock trial, the argument was won when a lawyer forcefully made the point that a death occurred because those responsible "ran into a fragile personality. . . . They set him off. They lit a fuse, and then they watched it explode."²¹ It is ironic that Geoffrey Fieger, the attorney who appropriately used this persuasive argument against talk show producers, fails to recognize that his client, Jack Kevorkian, also takes fragile personalities, sets them up, feeds their despair and hopelessness, and then watches as the last spark of life drains away.

²⁰ The greeting card for a person with life-threatening illness was from "Grief Songs" Greeting Cards. It was described on the program and purchased at "Reforming the Law: The 5th National Conference on Voluntary Euthanasia." The conference, held on November 15-16, 1991, in Denver, Colorado, was sponsored by the National Hemlock Society and the Metro Denver Hemlock Society (program on file with author).

²¹ Brian Harmon, *In Oakland County: Fieger Sways Mock Jurist Against Show, Producers*, DETROIT NEWS, Mar. 13, 1997, at E7. The mock trial dealt with liability for the murder following the taping of the "Jenny Jones Show". *Id.*

VII. GUIDELINES

Still, there are those who favor assisted suicide but reject the bizarre machinations of Jack Kevorkian.²² They argue that assisted suicide should be legalized to bring a degree of regulation to it. They claim that this would shed light on what is now taking place in the shadows. This was one argument used by Laurence Tribe when he argued for assisted suicide before the United States Supreme Court in January.²³ But once some light is shed, it is the pro-assisted suicide argument itself that falls apart.

Consider the following situation: In one Ohio town, the evening twilight is often broken, not by the sounds of children playing, but by the sound of gunshots. Drive-by shootings are the norm, not the exception. The town's residents are rightfully concerned. They are also realistic. They know something must be done or the danger will increase.

Suppose the following proposal were made at a city council meeting: Regulate drive-by shootings. Set guidelines. Make rules about where and when they may take place. Establish conditions under which one may take part in them.

Do we really believe that regulating a practice that is now illegal would make it safer? Do we really believe that those who are currently breaking the law would suddenly become law abiding citizens and conduct their drive-by shootings according to the guidelines? Or, would those who are now breaking the law be joined in their activities by persons who would not ordinarily advocate or participate in such activity but for its illegality. Just as such regulations would be considered ludicrous in the drive-by shooting situation, it is equally absurd in the case of assisted suicide.

VIII. A FINAL QUESTION

The current debate over assisted suicide is not about the tragic personal act of suicide. Nor is it about attempted suicide. Neither suicide nor attempted suicide is considered a criminal act.

²² See *Standard Set Aside*, DETROIT FREE PRESS (Mar. 4, 1997) <[http://www/freep.com/suicide/kevo claims.html](http://www/freep.com/suicide/kevo%20claims.html)>.

²³ Oral Argument by Laurence Tribe Before United States Supreme Court in *Vacco v. Quill* (No. 95-1858), 1997 U.S. TRANS LEXIS 11, *38-*40 (Jan. 8, 1997).

There are more than 30,000 suicides every year in the United States (that is one every eighteen minutes, eighty-two every day).²⁴ Suicides far outnumber homicides, with three suicides for every two homicides.²⁵

Further, it is estimated that there is an attempted suicide every forty-five seconds.²⁶ If only ten percent of these attempts were completed through legalized "assistance," the number of annual suicides would increase by more than 70,000.

Can we really believe that increasing these horrifying numbers by legalizing assisted suicide would make good public policy?

²⁴ See Janice Perrone, *Depression Research Strides May Help Prevent Suicides*, AM. MED. NEWS, Mar. 11, 1997, at 11 (explaining that suicide is eighth leading cause of death in U.S.).

²⁵ WORLD ALMANAC AND BOOK OF FACTS 836 (1991).

²⁶ Perrone, *supra* note 24, at 11.