

RECENT DEVELOPMENTS IN PHYSICIAN-ASSISTED SUICIDE

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LITIGATION

Gonzales v. Oregon, 126 S.Ct. 904, 163 L.Ed.2d 748, 74 U.S.L.W. 4068 (2006)

U.S. Supreme Court. On 11/7/01, in response to Attorney General John Ashcroft's directive that prescribing lethal medication was not a legitimate medical purpose under the federal Controlled Substances Act (CSA), the State of Oregon filed a complaint in the U.S. District Court for the District of Oregon seeking a declaratory judgment and injunctive relief. On 1/17/06, by a vote of 6 to 3, the U.S. Supreme Court affirmed the decisions of the lower federal courts in favor of the plaintiff and patient-intervenors. Justice Kennedy, who wrote the majority opinion, was joined by Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer. Chief Justice Roberts and Justices Scalia and Thomas dissented. The majority and dissenting justices agreed that the question was whether the CSA allowed the Attorney General to prohibit physicians from prescribing controlled substances for use in physician-assisted suicide, notwithstanding a state law permitting the practice. The majority concluded that Ashcroft was not entitled to any level of deference in his decision to issue the directive; moreover, the CSA did not give Ashcroft authority to regulate the practice of medicine generally. In contrast, the dissent concluded that the directive was valid under both *Auer* and *Chevron* deference standards, was supported by the language of the CSA itself, and reflected the "overwhelming weight of authority" that physician-assisted suicide is not within the boundaries of medical practice.

Discussion of opinion. The Supreme Court's decision in *Gonzalez v. Oregon* is discussed in an article by George J. Annas, *Congress, Controlled Substances, and Physician-Assisted Suicide—Elephants in Mouseholes*, 354 New Eng. J. Med. 1079 (2006).

LEGISLATION

California

Bill introduced. On 2/17/05, Assemblywoman Patty Berg and Assemblyman Lloyd Levine introduced a bill in the California legislature, AB 654 (the California Compassionate Choices Act), which was patterned after the Oregon Death with Dignity Act.

Assembly. After lengthy and contentious hearings, AB 654 was approved by the Assembly's Judiciary Committee by a vote of 5-4 and by the Assembly's Appropriations Committee by a vote of 11-6. Because of uncertainty about whether AB 654 would pass on the Assembly floor, Assemblywoman Berg moved on 6/2/05 that the bill be placed on inactive status in the Assembly. However, the provisions of AB 654 were substituted into

a different bill, AB 651, already pending before the Senate. Ultimately, backers of the California Compassionate Choices Act decided in July 2005 to abandon their efforts for the time being and to carry the proposed legislation over to the second year of the 2005-06 legislative session.

Field poll. On 3/15/06, Field Research released the results of a telephone poll of 500 California adults, including 337 registered voters, conducted during 2/12-2/26/06. On the first question (whether incurably ill patients should have the right to ask for and get life-ending medication), 70% said yes, 23% said no, and 7% were undecided; a majority of all demographic groups answered yes to this question. On the second question (whether the person would want his or her doctor to be able to assist in the person's dying if terminally ill and a request was made), 62% said yes, 33% said no, and 5% were undecided; a majority of all demographic groups except born-again Christians answered yes to this question. On the third question (opinion about a proposed law to allow terminally ill patients to request a lethal prescription which they could administer to end their own lives), supporters outnumbered opponents by a 57% to 34% margin among all those polled, and by a 63% to 28% margin among registered voters; a majority of most demographic groups favored such a law, but somewhat less than half of Republicans, Latinos, and born-again Christians did. Eight separate Field polls since 1979 show that support for physician-assisted suicide has consistently ranged between 64% and 75%.

Supporters of legislation. Before a hearing was conducted in the Senate on AB 651, a number of individuals and groups publicly declared their support. Supporters included Attorney General Bill Lockyer, the Mexican American Legal Defense and Educational Fund (MALDEF), the Congress of California Seniors, the California Commission on Aging, the Older Women's League of California, the Gray Panthers, the California Seniors Coalition, and Physicians for Compassionate Choices (a group representing 1,500 California physicians).

Senate. Supporters of AB 651 were optimistic that it would pass in the California legislature in 2006. On 6/27/06, hundreds of witnesses testified in a hearing before the Senate Judiciary Committee. At the conclusion of the hearing, the bill failed to pass when the committee's chair, Democratic Senator Joe Dunn, voted against it. Dunn said that he was voting "with a heavy heart" but voted no because "I think the inquiry needs to go deeper."

Colorado. On 4/10/06, Colorado's governor signed SB 102 into law. The bill, which became effective on 7/1/06, protects physicians, nurses, nurse practitioners, and physician assistants from being prosecuted for manslaughter if they prescribe or administer medication for palliative care to a terminally ill patient with the consent of the patient or the patient's agent. The bill was introduced at the urging of Compassion & Choices, which was concerned that medical practitioners might be reluctant to provide adequate pain relief due to fear of criminal prosecution. The new law expressly provides that it shall not be interpreted to permit assisted suicide.

Hawaii. The proposed Hawaii Death with Dignity Act, patterned after the Oregon Death with Dignity Act, was narrowly defeated in the 2002 legislative session. The bill was introduced a second time in 2003 and carried over to the 2004 session, but died in committee. On 1/27/05, the

by patients to their physicians were inability to participate in activities that make life enjoyable (89%), loss of dignity (89%), loss of autonomy (79%), loss of control of bodily functions (45%), and being a burden on family, friends, or caregivers (42%). Nine patients cited concerns about pain control, and one patient voiced concerns about the financial implications of treatment.

Mental health evaluations. Two of the 38 patients (5%) received a psychiatric or psychological consultation. (However, a psycho-social evaluation by a clinical social worker is standard practice when a patient enrolls in an Oregon hospice.)

Medical information. During 2005, all lethal medications prescribed were barbiturates. The physician was present when the medication was ingested in 23% of cases, with other health care providers present in 51%. Median time from taking the medication to unconsciousness was five minutes (individual times ranged from 2 to 15 minutes). Median time from taking the medication to death was 26 minutes (individual times ranged from 5 minutes to 9.5 hours). One patient regained consciousness 65 hours after taking the medication and died of his underlying illness 14 days later; the Oregon Board of Pharmacy investigated this case but was unable to determine why the patient regained consciousness. Two patients vomited some of the medication, with one dying 15 minutes and the other dying 90 minutes after taking the medication. Four cases were referred to the Oregon Board of Medical Examiners, one involving witnessing of signatures and three others for failure to file required documentation in a timely manner.

Physician characteristics. A total of 39 physicians prescribed lethal medications to 64 persons. The physicians' median years in practice was 26.

Oregon Health Division statistics for 2005 generally were consistent with statistics for 1998-2004, although referral to a specialist for a psychiatric or psychological consultation has declined, falling from 31% in 1998 to 5% in 2003-2005. Rates of participation in physician-assisted suicide decrease with age, but are higher among those patients who are divorced or never married, those with more years of education, and those with amyotrophic lateral sclerosis (Lou Gehrig's disease), HIV/AIDS, or cancer.

Conscientious objection to participation. Oregon Health & Science University has approved a policy manual dealing with medical "conscientious objectors." The policy provides that OHSU employees will not be required to participate in procedures that come in conflict with their own beliefs. However, even conscientious objectors cannot refuse "indirect involvement," which can include necessary care and comfort that patients may require and referral of patients to other practitioners. Despite the policy, OHSU family medicine physician Dr. Bill Toffler has refused to re

Hepatitis C and diabetes, and would not live for another year.

Euthanasia cruises. News media earlier reported that a group of Florida businessmen had created a company to provide “euthanasia cruises” for passengers, even those who were not terminally ill. Since then, however, the website www.snopes.com has reported that the claim was false and came from a satirical column by prankster Alan Abel that was published in the Fairfield County Weekly on 2/16/06.

Final Exit Network. Ted Goodwin, who is not a physician, left the board of End-of-Life Choices when that group merged with Compassion in Dying to form Compassion & Choices. Goodwin then formed his own organization named the Final Exit Network. Goodwin’s organization now has volunteers across the country who have had some training from physicians. Unlike Compassion & Choices, the Final Exit Network often provides support to individuals who are not terminally ill but want to die.

Maryland guidebook on surrogate health care decisionmaking. The Maryland Attorney General’s office and the American Bar Association’s Commission on Law and Aging have collaborated to develop a 24-page guidebook called *Making Medical Decisions for Someone Else: A Maryland Handbook*, which is web-based and also appears in a shorter pamphlet highlighting key points. The handbook gives advice on how to talk to physicians, make health care decisions for another person, resolve disputes, and cope with grief. The authors hope that the guidebook will become a model for other states.

Dr. Harold Luke. On 8/4/05, the California state medical board approved an administrative law judge’s recommendation to revoke the medical license of Dr. Harold Luke, a Redlands physician,

Facilities: Findings From a Survey of Directors of Care, 22 J. Palliative Care 18 (2006) [a survey of 426 directors of care in licensed long-term care facilities in the province of Ontario, Canada conducted in 2003-04 revealed that problems existed in communication between service providers and families, inadequate staffing levels to provide quality care to dying residents, and lack of training to improve staff skills in providing end-of-life care]

Julie Uma Vohra et al., *The Last Word: Family Members' Descriptions of End-of-Life Care in Long-Term Care Facilities*, 22 J. Palliative Care 33 (2006) [postal survey used to collect data from family members of deceased residents of six long-term care facilities in the province of Ontario, Canada showed concerns about end-of-life care indicating a need for improvement in end-of-life care skills among staff and attending physicians]

Kris Naudts et al., *Euthanasia: The Role of the Psychiatrist*, 188 Brit. J. Psychiatry 405 (2006) [discusses Belgium's unique law permitting euthanasia requests on the basis of mental suffering alone, comparing that law with the law of the Netherlands and recommending that professional guidelines be formulated]

B. Dierckx de Casterlé, *Nurses' Views on Their Involvement in Euthanasia: A Qualitative Study in Flanders (Belgium)*, 32 J. Med. Ethics 187 (2006) [semistructured interviews with 12 nurses working in a palliative care setting in the province of Vlaams-Brabant in Belgium revealed that the nurses unanimously believed that they have an important role in the process of caring for a patient who requests euthanasia]

Carlo Leget, *Boundaries, Borders, and Limits: A Phenomenological Reflection on Ethics and Euthanasia*, 32 J. Med. Ethics 256 (2006) [analyzes the arguments for and against euthanasia, departing from a phenomenology of boundaries]

O.D. Duncan & L.F. Parmelee, *Trends in Public Approval of Euthanasia and Suicide in the US, 1947-2003*, 32 J. Med. Ethics 266 (2006) [authors compare data from the General Social Survey with Harris and Gallup poll results]

Terri R. Fried et al., *Prospective Study of Health Status Preferences and Changes in Preferences Over Time in Older Adults*, 166 Arch. Internal Med. 890 (2006) [in-home interviews of 226 older adults with advanced chronic illnesses conducted at least once every four months for up to two years showed that over time patients became significantly more likely to rate mild and severe physical disability as acceptable outcomes of treatment; cognitive impairment was unacceptable to 75% of participants at all interviews; pain was unacceptable to 37% of patients throughout the study, although patients who already had moderate to severe pain were more likely to rate pain as acceptable]

Sonia A. Duffy, *Racial/Ethnic Preferences, Sex Preferences, and Perceived Discrimination Related to End-of-Life Care*, 54 J. Am. Geriatrics Soc'y 150 (2006) [study investigated end-of-life preferences across five racial/ethnic groups in Michigan stratified by sex]

Elizabeth R. Goy et al., *Determinants of Oregon Hospice Chaplains' Views on Physician-Assisted Suicide*, 22 J. Palliative Care 83 (2006) [in a survey of all chaplains affiliated with

“frivolous and vexatious” on the ground that Marshall acted in a personal rather than a professional capacity. The complaints committee noted that a Barrie police officer had closed the case after concluding that Marshall went to Switzerland to “provide moral support for a life-long friend at her request” and that Swiss police found nothing of a suspicious nature. On 5/17/06, the Ontario Health Professions Appeal and Review Board heard arguments on McKay’s appeal but reserved its decision.

Chile

Euthanasia bill. In May 2006, two Socialist members of the lower house of Congress, Fulvio Rossi and Juan Bustos, introduced a bill to legalize euthanasia. The move threw the Concertación, a coalition of leftist parties and Christian Democrats (DC) that has been in power for 17 years, into crisis. Deputies from the right-wing party UDI immediately responded that the proposed bill was illegal because it “violated the right to life sanctified in the constitution” and demanded a legal motion to dissolve the center-left PPD presidency of the lower house. Ultimately, the presidents of the DC and the Socialist party reached a compromise by agreeing not to support the euthanasia bill. Reportedly, Socialist senator Carlos Ominami and PPD senator Guido Girardi intend to introduce a euthanasia bill in the upper house after the first 100 days of President Michelle Bachelet’s presidency are over.

Public opinion poll. A poll published on 5/16/06 by La Tercera showed that 55% of Chileans support the legalization of euthanasia, even though Chile is a predominately Catholic country.

China

Wang Xuan

Czech Republic

Proposed legislation. Euthanasia is considered to be murder under current Czech law, with lengthy prison sentences. Although new legislation has been proposed that would make assistance in a suicide out of compassion punishable by up to six years in prison, with no minimum sentence specified, the only party that has included a proposal to legalize euthanasia in its platform is the Freedom Union - Democratic Union (US-DEU), which has not reached the threshold size required to earn seats.

Public opinion poll. A poll by SC&C published in Mlada fronta Dnes in May 2006 showed that 50% of respondents believed that patients who are ill should be able to decide whether they want to end their lives.

Finland. A telephone poll of 1,000 Finns conducted in April 2006 and published in Aamulehti showed that 60% supported and 33% opposed euthanasia, while 7% were unsure. Support was down since a 2004 poll showing 65% supported and 25% opposed, while 10% were unsure.

France

Vincent Humbert. A national debate about euthanasia was provoked in France by the death of 22-year-old Vincent Humbert, who had been unable to speak, move, or see following injuries suffered in an automobile accident in 2000. Humbert had repeatedly asked to die, including a request made to President Jacques Chirac in November 2002. Humbert's mother Marie allegedly injected his intravenous line with barbiturates in September 2003, leading to his death two days later. Criminal charges were lodged against both Marie Humbert and Humbert's physician, Frederic Chaussoy, who allegedly injected Humbert with a lethal dose of drugs and switched off his life support system. In January 2006, state prosecutor Gerald Lesigne said he had decided to drop charges against both of them after considering the "moral aspects" of the offense rather than the "material and legal aspects," and the court in the northern town of Boulogne-sur-Mer agreed in February 2006 that the charges should be dropped. Marie Humbert expressed her disappointment that she would not be able to campaign in court for a law allowing assisted suicide.

Public opinion poll. Face-to-face interviews of 1,000 French adults on 3/8-3/9/06 conducted by TNS-Sofres for ADMD (a right-to-die organization) showed that 86% favored and 10% opposed amending existing laws in order to allow a person in an advanced or final stage of an incurable disease to obtain medical assistance to die; another 4% were unsure. If the person is placed in a situation of dependence which he or she considers incompatible with his or her dignity, 77% favored amending existing laws, 18% were opposed, and 5% were unsure.

Great Britain

Assisted Dying for the Terminally Ill Bill

House of Lords

written report on the issues raised by Lord Joffe's Assisted Dying for the Terminally Ill Bill, in which the committee unanimously agreed that the bill should proceed to a joint committee of both houses of parliament. After the report was issued, the House of Lords engaged in an eight-hour debate about it, with 75 peers testifying. Lord Joffe re-introduced his bill on 11/9/05 for its first reading in the House of Lords. On 5/12/06, the House of Lords again debated the bill, this time with 90 peers testifying over seven hours. During the debate, Lord Joffe pointed out that the bill in its current form did not permit euthanasia and further announced that he would propose an amendment explicitly prohibiting ending a patient's life by lethal injection or act of euthanasia. Although normal procedure does not lead to a vote after the second reading of a private member's bill, opponents forced the bill to a vote and it was defeated 148 to 100. The result is that the bill cannot be raised again for at least six months. Lord Joffe vowed to bring his bill "again and again."

Religious opposition. The Catholic church's political campaign in opposition to the bill was the largest the church had ever waged in Great Britain. Catholic archbishops sent nearly half a million anti-euthanasia leaflets and DVDs to every parish in England and Wales and asked priests to organize meetings of parishioners. The Church of England also mobilized opposition to the bill, and the members of both churches sent thousands of letters and emails to members of parliament. The leaders of these churches joined with the Chief Rabbi in opposing the bill in a letter published in the Times of London.

Opposition from physicians. The Royal College of Physicians (RCP) and the Royal College of General Practitioners (RCGP), both of which earlier had taken a neutral stance on the bill, reversed their positions and came out in opposition. Two surveys of RCP Fellows and members showed that more than 70% of those responding believed that no change in the law was needed: in the first, 73.2% of the 5,111 physicians who responded said that no new legislation was needed; in the second, which worded the question somewhat differently, 71.3% of 2,144 respondents said that no change in legislation was needed. No ballot was sent to general practitioners, but the council of the RCGP issued a statement opposing any change in legislation. The Royal College of Psychiatrists also issued a statement concluding that it was "deeply worried about the likely effects" the bill would cause if enacted. A comprehensive study by Cardiff University also found that a majority of general practitioners in Wales opposed the bill.

Public opinion. On 5/11/06, Dignity in Dying released the results of a YouGov survey of 1,770 people in which 76% supported the bill, 13% were opposed, and 11% were unsure.

Survey on "double effect." In a survey conducted by Dignity in Dying and published on 3/7/06, 62% of over 200 general practitioners said they believed that physicians sometimes administer pain relief to a terminally ill patient knowing that it may hasten death under the principle of "double effect."

Survey on end-of-life care for the elderly. On 4/12/06, Help the Aged published its survey of 800 health workers, including nurses, National Health Service managers, physicians, consultants, and healthcare assistants, regarding the quality of end-of-life care provided to the elderly. Half of those surveyed said there were no end-of-life policies and procedures where they worked. Staff also said that they felt policies would be more effective if there was better education (38%), better communication (30%), greater empowerment of front line staff (23%), better interdisciplinary cooperation (21%), and better leadership (15%). Only 45% of staff had received specific training to work with older, dying patients, but 57% said they would benefit from more guidance and education. Sixty-nine percent said that conditions such as arthritis, sensory loss, and dementia often went untreated, and 40% said the pressures of their jobs meant they did not have time to spend reassuring older dying patients. Eighty-four percent disagreed with the idea that only health professionals should make decisions about end-of-life care, and 95% agreed that older people should be given the opportunity to express views about their own care. Forty-eight percent said the care given to older dying patients was worse than that given to younger dying patients.

British Medical Association. In 2005, the British Medical Association decided to take a neutral stance on the question of physician-assisted suicide and voluntary euthanasia. However, at the organization's June 2006 conference attended by more than 200 physicians, those attending voted 65% to 35% against legalization. In addition, 82% voted that, if euthanasia were legalized, there should be a "clear demarcation" between those physicians who end-of-life (How would not, they said) and those who would not. Fifty-two percent of those who end-of-life (How would not, they said) voted, the 6% said, "no effect"

Secretary of the State government asking for a reply on the question.

Euthanasia proposal. A number of residents of India have requested that courts grant permission to die by euthanasia, but so far all the requests have been denied. However, the Law Commission of India recently recommended legislation that would permit a terminally ill patient or the patient's family to request a physician's assistance in euthanasia. If the physician agrees, the request would be considered by a government-appointed committee of three expert physicians, who would have to concur before euthanasia would be allowed.

Japan

was being investigated for administering lethal drugs to a 69-year-old German woman who provided a false report from her general practitioner in Augsburg, indicating that she was terminally ill with cirrhosis of the liver. The director of Dignitas, Ludwig Minelli, subsequently commented that: (1) the woman had a case report from the university clinic in Augsburg showing that she had liver damage typical of cirrhosis, disease involving the gall-bladder duct, and multiple sclerosis; (2) the woman weighed only 96 pounds and her physical condition was consistent with advanced illness and significant suffering; and (3) the death of a Swiss physician who assisted with the woman's death and whose death occurred shortly afterward was not in response to the woman's death but because the physician had an aggressive brain tumor that was not treatable.

Assistance for more patients. Minelli has also said that he wants to open a chain of high street-style centers to make assisted suicide available to people with nonterminal illnesses or mental illnesses who are capable of choosing to die.

Pending lawsuit. A man who is a member of Dignitas and suffers from manic depression is fighting a case in the Supreme Court of Switzerland, asking for an assisted suicide with Dignitas. Minelli has indicated that the case will be taken to the European Court of Human Rights in Strasbourg if the Supreme Court's ruling is adverse.

Neighbors object to activities. Dignitas has its "death rooms" in a residential apartment block in Zurich, and the bodies of individuals who have died by assisted suicide are transported in body bags in the communal lift because coffins will not fit. Families in the building now have complained to their council and asked that Dignitas be evicted.

Cabinet decides against legislation. The Swiss parliament previously had called on the government to examine existing law prohibiting euthanasia but permitting assisted suicide. On 5/31/06, Justice Minister Christoph Blocher announced that the Swiss cabinet had come to the conclusion that new legislation on assisted suicide was not necessary. A report by the justice ministry had concluded that overarching rules relating to assisted suicide were not practical since each case is different, and that the guidelines of the Swiss Academy of Medical Sciences were more suited to dealing with the practice. The cabinet refused to criminalize assisted suicide and indicated that it would not act to rein in organizations such as Dignitas and Exit because monitoring their activities would lead to too much bureaucracy and would have the effect of legitimizing such groups. The cabinet did say that by the end of 2006 it would consider whether to make it more difficult to obtain drugs used in assisted suicide. Three of four political parties in government criticized the cabinet's decision, and the center-right Radical Party said it intends to file a parliamentary initiative in the summer session to force the issue to be revisited.

*Some information obtained from media reports has not been independently verified.