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Is There a Right to Die?

by John S. Hoff

The Supreme Court of the United States recently heard arguments on whether laws that prohibit physicians from assisting the suicide of terminally ill patients violate the United States Constitution. The case before the Supreme Court involves laws passed by the states of Washington and New York, which prohibit physicians from assisting their patients to commit suicide, even if these patients are terminally ill and in great pain. Both statutes were declared unconstitutional by lower federal courts for different reasons.

One Court of Appeals knocked out the New York statute on the ground that it violated the requirement of the Constitution that the people enjoy the "equal protection of the laws." The court found that since terminally ill people have the constitutional right to bring about their own death by refusing treatment or by requiring their care givers to withdraw treatment, there is no rational basis for denying them the right to obtain the assistance of their physician to produce death by an affirmative action. The court concluded that the distinction between affirmative action and nonaction is irrelevant.

The Washington statute was found to be unconstitutional on a different ground. The court concluded that the ability to determine the manner and time of one's death is a basic liberty and held that the statute denied people this right without due process of law. Just as the New York court noted, the court in Washington said that terminally ill patients may refuse treatment or sustenance and that doctors are permitted to give pain-relieving medicine even if it will hasten death. The court concluded that assisting the suicide of terminally ill patients is not substantially different from carrying out patients' requests to terminate treatment. Since physicians are permitted to help patients by withdrawing treatment, the court found no state interest that would justify a different rule with respect to assisting a patient in taking affirmative actions to cause death.

The Supreme Court is reviewing these decisions. The oral argument at the Court revealed the Court's reluctance to treat assisted suicide in the same way as a patient's refusal of treatment, but at the same time also demonstrated the difficulty of developing a reasoned basis for treating the two situations differently under the Constitution.

The Court faces the question of whether there is a constitutionally recognized distinction between action and nonaction. Since it already has held that there is a constitutional right for a patient to bring about his or her own death by requesting the physician to withdraw treatment, the question is whether the Court can explain why requesting a physician to write a prescription for a lethal medication is constitutionally different from asking the physician to turn off a respirator. If the purpose is the same in either case—the hastening of death—does the difference in method have a moral or legal relevance? And should there be a distinction between a case in which the physician prescribes a medication that is administered by the patient himself and one in which the physician actually administers the drug to hasten death at the request of the patient?

Another pivotal issue is whether assisted suicide presents a slippery slope and, if so, to what extent it is constitutionally steeper than the slippery slope already presented by the right to refuse treatment. The right to refuse treatment allows the underlying disease (or in some cases the lack of nourishment) to cause death. But assisted suicide could result in the death of people who would not die naturally (in the foreseeable future). It may, therefore, present a greater danger of abuse. If the Court found that there was a right to die, a variety of questions still remain to be answered:

- Would that right be limited to those who are in pain and terminally ill?
- Would physicians also be constitutionally entitled to help people who are not terminally ill to kill themselves?
- Is a right to die absolute or does it arise only in certain circumstances?
- If pain is an essential precondition for the right, does this mean only physical pain or does it include mental?
- If mental anguish were qualifying, would that also mean the right to die would be available to those who may least be able to make an informed choice?
- If others are permitted to act as surrogates for those who cannot choose, is there a danger of involuntary euthanasia?
- Is there more risk of abuse if the process is covert and informal or if it is accepted overtly and regulated?

LIKELY OUTCOMES

Predictions about what the Supreme Court will do are always risky. But it is more likely than not that the Court will reverse the two lower courts and uphold the effectiveness of the statutes prohibiting assisted suicide. I believe the Court will do

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so for a number of reasons. I also believe the result of such a decision may be different from what many people will assume.

Most fundamentally, the Court will have difficulty concluding that the Constitution grants Americans a right to die. The potential, and unexplored, scope of such a broad new right will deter the Court from finding it in the Constitution. Even if the Court were inclined to read such a right into the Constitution, it would be most unlikely to do so now. The issues have only begun to be considered in the country. And the Court may well believe that there is less consensus in the country about the appropriateness of assisted suicide than there is about the refusal of treatment, even if it is difficult to locate any conceptual line between the two methods of death.

The Court has learned from hard experience not to get too far ahead of public opinion. Therefore, it probably will say that the issue is not appropriate for decision by judges and will leave the issue to the people through their legislatures to work out.

The question of physician-assisted suicide is best left to physicians and patients. In the absence of proven abuse for which other remedies are not already available, it is not clear why government action, such as the laws passed by Washington and New York, is necessary or appropriate. But even if one disagrees with the policy embodied in those laws, it may be better over the long run for the courts to leave the issue to the legislatures than to try to overturn those laws and take control of the issue.

At first blush, freedom for patients to choose how to die, and for physicians who wish to assist them, would appear to be advanced if the Court held that there is a constitutional right to die and overturned the statutes that outlawed personal decisions. The surface wisdom is that this would keep the government out of the issue and leave patients and their physicians the autonomy to make these decisions themselves. That may be true, but the question has another facet. The right to die actually may be enhanced if the Court declined to find a right to die in the Constitution and left it to the legislatures to work out.

A constitutional right to die would not be available to everyone in all circumstances. To avoid the effect of the slippery slope, the Court would recognize that lines for eligibility would have to be drawn and that the manner in which the right was exercised would have to be regulated. This would turn each limitation into a constitutional question. A legislature's decision as to who would be eligible to exercise the right or a regulation relating to the procedures for consent and waiting periods, for instance, could be challenged on the ground they imposed an impermissible burden on the exercise of the constitutional right. Each of these qualifications and restrictions would have to be reviewed by the courts to determine constitutionality.

A decision by the Court to find a constitutional right, therefore, would change the locus of the debate from the legislatures to the courts. Such a decision would rigidify the process and restrict legislatures' ability to work out compromises acceptable to the people. It would also divorce the decision from the political process, reduce citizen participation, and cause resentment and backlash.

On the other hand, if the Court declines to find there is a constitutional right, legislatures would find it easier to impose regulations; there would be no argument that the regulation unreasonably burdened the constitutional right. Knowing that they could delineate the scope of who could exercise the right and regulate its practice, legislatures might be more willing to permit assisted suicide on the conditions and under the regulatory structure they thought was appropriate. A legislature left free to act without being burdened by constitutional concerns at every turn could adapt more quickly to the issues that will arise. The freedom of action that would be allowed if the Court does not declare a constitutional right may leave room for the states to permit the practice in more circumstances, and to do so more flexibly, than would be possible if the question were under the control of constitutional doctrine applied by the courts.

The Court's refusal to find a constitutional right would also enable a state that was adamantly opposed to physician-assisted suicide to ban it in all circumstances. The real-world effect of the Supreme Court's decision, therefore, will depend on the popular will. To the extent the people in a state are divided or ambivalent about the issue, a legislature would be free to reflect that ambivalence by permitting the practice in certain circumstances if the Court does not intervene. However, states that were clearly and adamantly opposed to the practice would be permitted to prohibit it. Thus, one who supports physician-assisted suicide and believes there is popular support for it should not be disheartened if the Court refuses to find a right to die in the Constitution. The exercise of the practice may be restricted by the Court's refusal only if there is weak popular support for it. But in that case, a ruling by the Court would not be sufficient to protect physician-assisted suicide over the long run. In those circumstances a ruling by the Supreme Court that the right to die is constitutional would be met by resistance.

The Supreme Court will issue its decision sometime in the spring. Whichever way it decides, the ruling will stimulate, not end, the debate over physician-assisted suicide. The actual consequences of its decision may be different from what first may be assumed.