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Collective Rights vs Individual Rights? Examining the "Right to Die."

Introduction

Properly understood, there is no conflict between "collective rights" and "individual rights." Part of the reason a conflict is assumed to exist is that a sound understanding of what constitutes a "right" has been lost. This is because often, and falsely, mere "wishes" are conflated with "rights." Harvard Professor Mary Ann Glendon helpfully analyzed this in her book Rights Talk.[1] True "collective rights" and true "individual rights" buttress each other and are better understood as aspects of "human rights."

Since human persons live in community, an aspect of human rights concerns communities (or societies or cultures) in which human beings live. However, those communities are not obligated to indulge every individual's whim or purported "right." Wishes and desires, even if deeply felt, do not constitute "rights." Rather, rights properly understood are reflections of what is good for the human person. Society has an obligation to respect and promote the good of the human person, not an individual's subjective desires.

Recognizing and respecting legitimate individual human rights promotes the common good, and vice versa. Thus, a proper understanding of human rights reconciles alleged conflicts between "collective" and "individual" rights. However, false "rights" threaten the good of both the individual and society.

A purported new "right," the "right to die," illustrates these points. The first section of this paper will define what is meant by the "right to die." The second section will show there is no foundation in the law for a "right to die." The third section will explain why creating a new "right to die" is detrimental to society, particularly the medical profession, the elderly, the depressed, and the disabled. The fourth section will look at the experience of the Netherlands to show that where a "right to die" has been created it is uncontainable and has transformed into a "right to kill."

The very individuals who most need the protection of human rights law are assaulted when a "right to die" is advanced as a human right. Rather than enabling them to act consistently with their inherent dignity, a false "right to die" makes them more vulnerable and the victims of greater indignities.

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1 Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse (Free Press 1991).

The False "Right to Die"

A "right to die" is not synonymous with an individual's right to refuse medical treatment. A patient may always choose to die from an underlying condition. This understanding reflects, in part, a legal tradition, at least in the West, that unwanted medical intervention is a form of battery.[2] (It is not, as the United States Supreme Court noted, "simply deduced from abstract concepts of personal autonomy."[3]) Similarly, medical treatment once begun may be discontinued if it becomes overly burdensome. However, a "right to die" is usually meant by its advocates to include physician assisted suicide or euthanasia.

Euthanasia, for the purpose of this paper, means the intentional killing of a patient by a doctor because death is thought to be a benefit to the patient.[4] Euthanasia requires intentional killing.[5] It is not euthanasia when a doctor only foresees that his patient's life will be shortened (for example, when treatment is removed because it has become too burdensome for the patient, though with the knowledge this will shorten the patient's life).[6] This is an important distinction: foreseeing death and intending death are not the same. It is euthanasia when the doctor's aim is to end the life of the patient. However, advocates of euthanasia argue such intentional killing is distinguishable from homicide because of the motive.[7] Euthanasia, as opposed to homicide/murder, is claimed by these advocates to be a benefit to the patient – certain persons are better off dead.[8]

In physician assisted suicide, it is the patient, not the doctor, who performs the final act which causes his death. The physician's role is one of intentional assistance to the patient to commit suicide, by providing the means, advice or encouragement for the suicide. In both assisted suicide and euthanasia, what is promoted as a "right to die" is killing a patient by means other than his underlying condition. For purposes of the argument herein, any distinction between the two is unimportant.

An important distinction that is often overlooked is that euthanasia can be "voluntary," "non-voluntary," or "involuntary."[9] The difference hinges on the capacity and the will of the patient who is euthanized. Voluntary euthanasia is when a competent patient (a patient with sufficient understanding) requests to be euthanized.[10] Euthanasia is non-voluntary when performed on a patient who cannot request it – such as a baby, a person in a coma, or someone with dementia.[11]

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2 In the case, Cruzan v. Director, Missiouri Dept. of Health, the United States Supreme Court held "refusing life-sustaining medical treatment" was a protected interest. 497 U.S. 261 (1990). The Court in Washington v. Glucksberg emphasized the "traditional right refuse unwanted lifesaving medical treatment" upheld in Cruzan was "grounded in the common-law rule that forced medication was battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment." 521 U.S. 702, 725 (1997).

3 Washington v.Glucksberg, 521 U.S. 702, 725 (1997).

4 John Keown, Euthanasia, Ethics And Public Policy: An Argument Against Legalisation, (Cambridge: Cambridge UP, 2002) 10. Keown says "'euthanasia' involves doctors making decisions which have the effect of shortening a patient's life and that these decisions are based on the belief that the patient would be better off dead." Euthanasia, in its broadest definition, could be performed by anyone. You do not need a medical degree to kill someone. However, advocates of legal euthanasia generally restrict their arguments to allowing doctors to kill patients.

5 Keown, at 11.

6 Id.

7 Id. 10-12. Keown cites "When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context," (Report of the New York State Task Force of Life and the Law, 1994); "Decision of the Professional Conduct Committee in the Case of Dr. Nigel Cox," General Medical Counsel News Review (Supplement), December 1992

8 Id. at 10.

9 Id. at 9. See also, Robert Young, "Voluntary Euthanasia," Stanford Encyclopedia of Philosophy, March 29, 2010, available at http://plato.stanford.edu/entries/euthanasia-voluntary/.

10 Id.

11 Id.

Involuntary euthanasia is when a competent person who does not want to be is euthanized.[12] Advocates for legalized euthanasia generally promise only voluntary euthanasia will take place. However, as will be discussed below, even where the law purports to require voluntariness, non-voluntary and involuntary euthanasia are common.

No Origin in Law for this So-called "Right to Die"

If a "right to die" exists, where is it to be found?
No "right to die" is found in human rights documents. Rather, what is consistently guaranteed inhuman rights documents is a right to life. For example, the Universal Declaration of Human Rights states, "Everyone has the right to life…"[13] The Universal Islamic Declaration of Human Rights declares, "Human life is sacred and inviolable and every effort shall be made to protect it."[14] And the International Covenant on Civil and Political Rights proclaims, "Every human being has the inherent right to life."[15]

The right to life includes a right not to be arbitrarily killed.[16] Life is a good – a good which society values, even when the individual does not. It has intrinsic value. Thus, it harms society, as it does the individual, to condone killing. Therefore, human rights documents protect a right to life, which is the foundation of all other rights.
No "right to die" exists in customary international law either. Customary international law is the custom of nations, which, over time, gain the consent of all the nations of the world.[17] A "right to die" cannot be a custom between nations when it is a relatively new "right" and recognized in only a few states.[18]

Neither can a "right to die" be implied from "privacy" or "dignity" or "liberty" where such rights are recognized in fundamental law. Consider for example the situation of the U.S.
In 1997, the United States Supreme Court in Washington v. Glucksberg[19] was asked whether "liberty," specially protected by the United States Constitution, included a "right" to assisted suicide. The Supreme Court found no such right, but rather a "consistent and almost universal tradition that has long rejected the asserted right and continues to explicitly reject it today, even for terminally ill, mentally competent adults."[20] The Court said finding a "right" to assisted suicide would "reverse centuries of legal doctrine and practice, and strike down the considered

12 Id.

13 Universal Declaration of Human Rights, art. 3, Dec. 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 (1948).

14 Universal Islamic Declaration of Human Rights, art. 1,Sept. 19, 1981.

15 International Covenant on Civil and Political Rights, art. 6, 999 U.N.T.S. 171. (Hereinafter ICCPR)

16 ICCPR, art. 6 "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

17 See Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815 (1997). See also Sosa v. Alvarez-Machain, 542 U.S. 692, 733 (2004). "Thus, Alvarez' detention claim must be gauged against sources we have long, albeit cautiously, recognized. '[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.' The Paquete Habana, 175 U.S., at 700"

18 In 1984, the Netherlands was the first nation to legalize assisted suicide. (See note 35) Assisted suicide/euthanasia is also currently legal in Switzerland, Belgium and Luxembourg. In the United States, Oregon and Washington states have laws allowing assisted suicide. On December 31, 2009, the Montana state supreme court held physician assisted suicide was not subject to criminal liability under the "consent" defense to homicide in Montana. Baxter v. Montana, 354 Mont. 234 (2009).

19 521 U.S. 702, 723 (1997).

20 Glucksberg, 521 U.S. 702 at723.

policy choice of almost every State."[21]

Advocates of assisted suicide and euthanasia often argue for their legalization, or even "constitutionalization," because they are "deeply personal" choices.[22] However, as the Supreme Court wrote in Glucksberg, "the decision to commit suicide may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection. Indeed, the two acts are widely and reasonably regarded as quite distinct."[23]
Autonomy – our capacity to make choices – is important. But autonomy is, as the Court noted, not a "right" that must always be honored.[24] Thus, a right to be killed cannot be implied from a right to personal freedom.

Reason Counsels Against Creating a "Right to Die."
Not only did the Supreme Court in Glucksberg note there was no basis in history for creating a "right to die," it also identified several state interests against creating such a right. First and foremost, the state has an interest in protecting life.[25] Society is not possible if persons live in fear of being arbitrarily killed. A fundamental purpose of society is mutual protection.
Another reason the Court offered to prohibit assisted suicide is "protecting the integrity and ethics of the medical profession."[26] A "right to die" converts the medical profession from one of healing to one of killing. As the Supreme Court observed, the policies of multiple medical organizations confirmed the view that assisted suicide threatens to undermine the fundamental ethical healing directive of the medical profession itself.[27]

A "right" to die also violates the conscience rights of doctors and nurses. If an individual's desire to be killed by his doctor rises to the level of a right, it will be very difficult to secure legal protection for those doctors that do not want to participate.

Moreover, physician assisted suicide and euthanasia do not respond to the physical suffering of the patient. They do not address, much less heal, underlying conditions. These practices view the patient, not the pain, as the problem to be eliminated.

Yet, the idea that death is "compassion" is a concept that resonates with many people who have known someone who suffered from an illness at the end of his life. Consider, for example, the case of Ann Watkins.

In the state of Washington, where a physician assisted suicide law took effect in March 2009, Ann Watkins is one resident who obtained a lethal prescription. About her decision Ann said, "My mother had cancer. She was in pain. My brother had cancer. He was in pain. I said, 'I'm not going to put myself through that."[28]

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21 Id at 723.

22 Advocates also often claim that assisted suicide and euthanasia only affect the patient. Even assuming, arguendo, the truth of that claim the law does not forbid only behavior that causes harm to others. Strictly self-destructive behaviors are prohibited. Even alone, in the privacy of your own home, it is a crime to use an illegal substance, such as cocaine, for example. Likewise, laws require wearing a seatbelt in your own car. Prostitution is criminalized.

23 Glucksberg, 521 U.S. 702 at 725.

24 The entire system of criminal law is based on this premise- human beings make bad choices and certain bad choices are not to be tolerated. Our voluntary actions can be crimes. Intent and motive may elevate the level of a crime.

25 Glucksberg at 728. (Washington has an "unqualified interest in the preservation of human life.")

26 Id. at 731

27 Id.

28 Maureen O'Hagan, 28 have sought life-ending prescriptions, The Seattle Times, September 9, 2009

Ann's fear of pain is human, and sympathetic. But, assisted suicide advocates view the solution as getting rid of the patient, not the pain. Compassion is not the elimination of Ann. Compassion is the elimination of her suffering through available and effective palliative care, care that, when properly administered by trained medical personnel, is superior to what her mother and brother were offered.

Ironically, the campaign for a "right to die" comes at a time when palliative (that is pain-ameliorating) care is more widely available and more effective than ever before. Doctors affirm that palliative care is a fully effective and ethical alternative to assisted suicide. For example, in 2006 over 90 percent of those members of the Royal College of Physicians in the specialty of palliative medicine noted:

[We] believe that with improvements in palliative care, good clinical care can be provided … and that patients can die with dignity. A change in legislation [to legalize assisted suicide] is not needed.[29]

The international growth of the "hospice movement" has been one of the most striking success stories in modern medicine and nursing. However, it is known that the quality of palliative care deteriorates if physician assisted suicide is legalized, as shown, for example, by a study conducted by Health and Science University researchers in Oregon.[30]

The researchers compared patients before and after Oregon legalized assisted suicide. The difference was dramatic. After accounting for medical and demographic differences between the two groups, the study found that patients dying after legalization of physician assisted suicide were about twice as likely to experience pain.[31]

Of course, pain is not solely physical. It often is emotional as well. In fact, studies show that persons requesting suicide are often suffering from a treatable mental illness. The Royal College of Psychiatrists in England observed in 2006 that systematic studies have "clearly shown" the wish for assisted suicide among terminally ill patients is "strongly associated with depression."[32] It concluded that most physicians cannot diagnose (and are, thus, unable to treat) depression and that 98-99% of those patients would subsequently change their minds about wanting to die once their depression had been treated. Patients whose requests for assisted suicide are attributable to untreated clinical depression are not exercising the "autonomous" choice which advocates frequently offer as justification for legalization of physician assisted suicide.

It is not cynical to think that when assisted suicide is legalized it will be advocated as a cost-effective alternative to costly medical treatment – there is, in fact, evidence that it is already happening. An example from the state of Oregon is Barbara Wagner who in 2008 was denied coverage for a new life-prolonging drug by Oregon's state-run health care plan.[33] It sent her a letter that offered, however, to pay for her to die.

This illustrates an important fact. Assisted suicide does not involve treating the hurting patient.

29 Royal College of Physicians, "RCP cannot support legal change on assisted dying – survey results" (May 9, 2006)

30 Don Colburn, "Oregon Palliative Care Study Article," The Oregonian, July 23, 2004, available at http://www.oregonlive.com/news/oregonian/index.ssf?/base/news/1090584252164360.xml

31 Id.

32 Royal College of Psychiatrists, Statement on Physician-Assisted Suicide (Apr. 24, 2006) available at http://www.rcpsych.ac.uk/pressparliament/collegeresponses/physicianassistedsuicide.aspx

33 Susan Donaldson James, "Death Drugs Cause Uproar in Oregon," ABCNews, August 6, 2008, available at http://abcnews.go.com/Health/story?id=5517492&page=1

Instead, it ignores the patient's pain and introduces the view that some lives, like Barbara Wagner's, are not worth living, and, thus, not worth saving. A letter like that sent to Barbara if sent to someone suffering with depression, suggesting it would be better if they were dead and offering to pay for their death, approaches coercion.
Baroness Finlay, a professor of palliative care fighting against the legalization of assisted suicide in Great Britain notes,

"You have to ask why is it that so many people working in palliative medicine in this country see what is going on in places such as Oregon as being so fundamentally dangerous. The reason is that we are looking after terminally-ill patients day in and day out – and we know how frightened they are."[34]

Recognizing such a "right" to die will result in fraying the bonds of solidarity in society and undermines the common good. It makes members of society afraid of one another. It seems to assume there is a "collective right" to be rid of the weak, and/or an "individual right" to do what you want even if that puts vulnerable others at risk.

In 1994, the New York State Task Force on Life and the Law, in conclusions echoed in many other countries, recommended that existing law should not be changed to permit assisted suicide or euthanasia. "Legalizing assisted suicide and euthanasia would pose profound risks to many individuals who are ill and vulnerable." The task force found "the risk of harm is greatest for the many individuals in our society whose autonomy and well-being are already compromised by poverty, lack of access to good medical care, advanced age, or membership in a stigmatized social group."[35]

The Uncontainable "Right to Die"
The Netherlands legalized assisted suicide in 1984.[36] Twenty-six years later, the Dutch experiment shows legalizing assisted suicide is the top of a slippery (perhaps certain) slope that leads to involuntary euthanasia.

The Dutch purport to allow euthanasia and assisted suicide only at the "explicit request" of the patient to put an end to "unbearable suffering." But evidence shows the guidelines and limitations have been widely flouted.[37] Sick patients are now urged to let a doctor know if they do not

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34 Tom Rawstorne, "The chilling truth about the city where they pay people to die," Daily Mail Online, August 10, 2009, available at http://www.dailymail.co.uk/debate/article-1205138/The-chilling-truth-city-pay-people-die.html

35 New York State Task Force Report, "When Death is Sought," New York State Department of Health, available at http://www.health.state.ny.us/nysdoh/consumer/patient/aboutsui.htm The opinion of the Supreme Court in Glucksberg emphasized this point made by the Task Force. The Court identified suicide as a serious public-health problem, especially among persons in otherwise vulnerable groups. And the state, said the Court, has an interest in protecting vulnerable groups – including the poor, the elderly, and disabled persons – from abuse, neglect, and mistakes. Glucksberg, 521 U.S. 702 at

36 The Netherlands was the first nation to lift legal penalties for euthanasia and assisted suicide in 1984, by a decision of the Dutch Supreme Court which was quickly followed by guidelines of the Royal Dutch Medical Association. Schoonheim, Sup. Ct., Alkmaar, 27 November 1984, NJ 106:451; Central Committee of the Royal Dutch Medical Association, Vision on Euthanasia (Utrecht: KNMG, 1986); cited and discussed in John Keown, Euthanasia, Ethics and Public Policy: An Argument Against Legalisation 83 n.2 and accompanying text (Cambridge U. Press, 2002).

37 Dutch law has expanded to encompass mental suffering, and authorities have proposed to accept "tired of life" as an indication for euthanasia. Quoted in John Keown, Considering Physician-Assisted Suicide: An Evaluation of Lord Joffe's Assisted Dying for the Terminally Ill Bill 6 (Care Not Killing Alliance 2006), available at http://www.carenotkilling.org.uk/pdf/Keown_report.pdf; see also Tony Sheldon, "Dutch Euthanasia Law Should Apply to Patients 'Suffering through Living' Report Says" 330 BRITISH MEDICAL JOURNAL 61 (2005). The Dutch Supreme Court declared that a woman's suffering from grief at the death of her two sons qualified her for euthanasia or assisted suicide. Discussed in Euthanasia, Ethics and Public Policy, supra note 23, at 87, 109, 131.

wish to be euthanized when they become incompetent.[38]
In 1990, a government sponsored survey granting immunity and anonymity to participating physicians revealed no fewer than 1000 patients were given a lethal injection without having made an explicit request.[39] In 2005, a similar study documents at least 500 patients as known to have been involuntarily euthanized.[40] While defenders of euthanasia had stressed that killings not made by explicit request would be prosecuted as murder, the government has instead condoned these killings and described them as "care for the dying."[41]

Over twenty-five years and thousands of lives later,[42] Dr. Els Borst, the former Health Minister and Deputy Prime Minister who pushed the law through the Dutch Parliament has said, "In the Netherlands, we first listened to the political and societal demand in favor of euthanasia, obviously this was not in the proper order."[43]

The Dutch are not alone in recognizing problems with their euthanasia laws. In October 2009, Switzerland announced plans to crackdown on "suicide tourism."[44] Of the 400 assisted suicide patients in 2007, 132 of them came from abroad. The Swiss "Dignitas" clinic has not only been criticized for allowing suicide tourism. There are accusations that some patients that have been assisted to their death were not terminally ill, were depressed, or were not of sound mind.[45]

Conclusion

The human rights movement was based upon solidarity with the weak.[46] The whole human rights project was about protecting vulnerable human beings. Recognizing such a "right" to die

38 John Keown, Considering Physician-Assisted Suicide: An Evaluation of Lord Joffe's Assisted Dying for the Terminally Ill Bill 6 (Care Not Killing Alliance 2006), available at http://www.carenotkilling.org.uk/pdf/Keown_report.pdf

39 P.J. van der Maas, J.M.M. van Delden, L. Pijnenborg, Medische beslissingen rond het levenseinde. Het onderzoek voor de Commissie onderzoek medische praktijk inzake euthanasia (The Hague, SDU Uitgeverij Plantijnstraat 1991) ("1990 Survey"); and G. van der Wal, P.J. van der Maas, Euthanasie en andere medische beslissingen rond het levenseinde. De praktijk en de meldingsprocedure (The Hague, SDU Uitgevers 1996) ("1995 Survey"). For an analysis of these surveys, see Euthanasia, Ethics and Public Policy, supra note 24, chs. 9-12.

40 For a summary of the survey, see A. van der Heide, et al, "End-of-Life Practices in the Netherlands under the Euthanasia Act," 356 NEW ENGLAND JOURNAL OF MEDICINE 1957 (2007) ("2005 Survey").

41 See 1990 Survey supra note 27.

42 With known abuse, the number of reported cases of euthanasia in the Netherlands continues to rise. In 2003, there were 1,626 reported cases. In 2008, 2,331 reported cases. The number reported for 2009: over 2,500.

43 Dr. Borst's remarks were made in an interview with researcher Dr Anne-Marie The, who has studied euthanasia for 15 years, for a book on the history of euthanasia called Redeemer Under God

44 Roger Boyes, "Swiss crackdown on 'suicide tourism' could spell end of Dignitas clinic," Times Online, October 29, 2009, available at http://www.timesonline.co.uk/tol/life_and_style/health/article6894726.ece

45 Id. See also, David Brown, "Dignitas founder plans assisted suicide of healthy woman," TimesOnline, April 3, 2009, available at http://www.timesonline.co.uk/tol/news/world/europe/article6021947.ece, Patrick Sawer, "Dignitas founder accused of profiting from assisted suicides," Telegraph, January 10, 2009, available at http://www.telegraph.co.uk/health/healthnews/4215059/Dignitas-founder-accused-of-profiting-from-assisted-suicides.html, Olinka Koster, "Swiss Suicide clinic like a backstreet abortionist's," DailyMailOnline, January 26, 2007, available at http://www.dailymail.co.uk/news/article-431793/Swiss-suicide-clinic-like-backstreet-abortionists.html

46 See, e.g., The Preamble of the Universal Declaration of Human Rights, "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind,… The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction." Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 (1948).

would contradict fundamental human rights principles.

Human rights do include a right to life but, properly understood, does not include a right to death. Rather members of society are obligated to care for individuals who suffer. Doing so strengthens societal bonds and contributes to the common good.

If we need guidance when confronted with claims to new "rights", we should recall the foundational human rights that have world-wide acceptance. In particular, I would refer you to the report of the Doha international conference on the family in 2004, which was accepted at the UN with 150 co-sponsors, and which, while referencing the basic human rights documents, resoundingly affirmed our commitment to them.[47] This is a sound framework and understanding of "collective" and "individual" rights upon which we should continue to rely.

47 Doha Declaration, U.N. GAOR, 59th Sess. at annex, U.N. Doc. A/59/592 (Dec. 3, 2004). available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/634/18/PDF/N0463418.pdf?OpenElement