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Death, Dying, and the Right of Privacy

THE "RIGHT TO DIE": A CATCHY BUT CONFUSING SLOGAN

By Yale Kamisar

Some 30 years ago an eminent constitutional law scholar, Charles L. Black, Jr., spoke of "toiling uphill against that heaviest of all argumental weights—the weight of a slogan."¹ I am reminded of that observation when I confront the slogan the "right to die."

Few rallying cries or slogans are more appealing and seductive than the "right to die." But few are more fuzzy, more misleading, and more misunderstood. The term has been used loosely by many people to embrace at least four different rights:

- The right to reject or to terminate unwanted medical procedures, including life-saving treatment;
- The right to commit suicide or, as it is sometimes called, the right to "rational" suicide;
- The right to assisted suicide, that is, the right to obtain another's help in committing suicide; and
- The right to active voluntary euthanasia, that is, the right to authorize another to kill you intentionally and directly.

Each of these four "rights" should be kept separate and distinct. Unfortunately, many times they are not. For example, it is often said that since there is a "right" to commit suicide it follows that there is a right to assisted suicide as well. But I do not think it follows at all.

Although one usually has the *capacity* to commit suicide, one does not have the *right* to do so. The fact that we no longer punish suicide or attempted suicide does not mean that we *approve* of these acts or that we *recognize* that "self-determination" or "personal autonomy" extends this far.

The decriminalization of both suicide and attempted suicide did not come about because suicide was deemed a "human right" or even because it was no longer considered objectionable. These changes occurred, rather, because punishment was seen as unfair to innocent relatives of the suicide and because those who committed or attempted to commit the act were thought to be prompted by mental illness.²

However, the judgment that there is no form of criminal punishment that is acceptable for a completed suicide and that criminal punishment is singularly inefficacious to deter attempts to commit suicide does not mean that there is a "right" to commit the act. Nor does it mean that one has a justified claim that others must or should provide assistance in committing the act.³

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Society *can* do something about those who aid *another* to commit suicide—and it has. Throughout our history we have directed the force of the criminal law against aiding or assisting suicide or soliciting another to do so.

Another example of confusion generated by "right to die" talk is the decision handed down by Wayne county circuit Judge Cynthia Stephens this past May in *Hobbins v Attorney General of Michigan*. Judge Stephens equated the right to assisted suicide with the right to terminate life-sustaining medical treatment—under the rubric "self-determination," "right to die," and the like—and struck down Michigan's newly enacted ban against assisted suicide. (In June, the Michigan Court of Appeals stayed her order, thus reinstating the anti-assisted suicide law until it decides the case on the merits.)

Judge Stephens invalidated the anti-assisted suicide law on the basis of two rather technical Michigan constitutional provisions. But in what some would call an advisory opinion and others an alternative holding, she made it clear that if she had not been able to strike down the law on a procedural ground she would have blocked its enforcement on the basis of what she called a due process right to assisted suicide. So far as I know, this is the first time any American court has recognized such a constitutional right.

Several years ago Thomas Donaldson, a California resident suffering from a malignant brain tumor, argued that he had a constitutional right to commit suicide with the assistance of others. In the course of rejecting his claim, the California Court of Appeal observed:

No . . . judicial opinion countenances Donaldson's decision to be murdered or to commit suicide with the assistance of others . . . We cannot expand the nature of Donaldson's right of privacy to provide a protective shield for third parties who end his life.⁴

Although one unfamiliar with the precedents in this area would never know it from the opinion in the *Hobbins* case, none of the so-called "right to die" cases establishes an absolute or general right to die—a right to end one's life in any manner one sees fit. The only right or liberty these cases have established is the right under certain circumstances to be disconnected from artificial life support systems or, as many have called it, the right to die a *natural death*. Indeed, the *Quinlan* case explicitly distinguished between letting die, on the one hand, and both direct killing and assisted suicide on the other.⁵

Nor does the *Cruzan* case provide any support for a right to assisted suicide. In the course of upholding a state's power to keep Nancy Cruzan alive over her family's objections, because Ms. Cruzan had not left clear instructions for ending life-sustaining treatment, Chief Justice William Rehnquist, who spoke for five members of the Court, pointed out that a state has an undeniable interest in the protection and preservation of human life—even the life of a person in a persistent vegetative condition. He supported this assertion in part by noting that "the majority of states in this country have laws imposing criminal penalties on one who assists another to commit suicide."⁶ (If, as the judge in the *Hobbins* case seems to think, the Supreme Court meant to suggest that laws against assisted suicide are constitutionally suspect, it chose a strange way of doing so.)

Although Michigan's new anti-assisted suicide law has been disparaged as an overreaction to one person, Dr. Jack Kevorkian, the Michigan law is hardly aberrational. Approximately 30 states criminalize assisted suicide (most by specific legislation, a few by making it a form of murder or manslaughter).⁷

The fact that there is no form of punishment appropriate for a completed suicide, nor any punishment likely to deter attempts to commit suicide, does not mean that the criminal law is powerless to influence the behavior of those who *assist another* to die by suicide. This, at least, is the judgment of the eminent scholars who drafted the American Law Institute's Model Penal Code in the 1950s and '60s. The model code is widely regarded as the greatest criminal law reform project of this century. It criminalizes neither suicide nor attempted suicide, but it does make *aiding or soliciting another* to commit suicide a crime.⁸

Many proponents of the "right to die" are quick to point out that the "sanctity of life" is not an absolute or unqualified value. But they are slow to realize that the same is true of the "right to die."

Postscript

I wrote the above article some time before Wayne County Circuit Judge Richard Kaufman issued his 41-page opinion in *State v Kevorkian* on December 13, 1993. But I stand by what I said in my article.

In the course of his opinion invalidating the new Michigan law insofar as its "blanket proscription" of assisted suicide "unduly burdens a person's right to commit rational suicide," Judge Kaufman drew a line between "irrational suicide," which a state may prevent, and "rational suicide," which it may not. According to Kaufman: "[S]ince any form of rational suicide that did not include the presence of an objective medical condition would be too close to irrational suicide . . . a state may proscribe attempted suicide by competent adults where no objective medical condition is present." However, "when a person's quality of life is sufficiently impaired by a medical condition and [that] condition is extremely unlikely to improve," and certain other factors are present, "such a person has a constitutionally protected right to commit suicide."

Judge Kaufman's opinion is well-written and well-researched, but I disagree with his conclusions and, if the case goes all the way to the top, I venture to say that the U.S. Supreme Court will disagree, too. If the 1990 *Cruzan* case (the only case on death, dying and the "right of privacy" ever decided by the U.S. Supreme Court) demonstrates anything, I think it signals the reluctance of the High Court to "constitutionalize" an area marked by divisive social and legal debate and its inclination to defer instead to the state legislators' judgments in this difficult field. ■



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Footnotes

1. Charles Black, *The People and the Court* 88 (1960).
2. See Thomas Marzen *et al.*, *Suicide: A Constitutional Right?* 24 *Duquesne Law Rev.* 1, 68-100 (1985).
3. See American Law Institute, *Model Penal Code and Commentaries, Part 1*, section 210.5 at 94, 100 (1985); American Law Institute, *Model Penal Code* 56-57 (Tent. Draft No. 9, 1959); Leon Kass, *Is There a Right to Die?* 23 *Hastings Center Rep.* 34, 35 (No. 1, 1993).
4. *Donaldson v Van de Kamp*, 2 Cal. App. 4th 1614, 1622, 4 Cal. Rep. 2d 59, 63 (1992).
5. See *In re Quinlan*, 70 N.J. 10, 355 A2d 647, 645, 670 & n. 9 (1976).
6. *Cruzan v Director, Missouri Dept of Health*, 497 U.S. 261, 280 (1990).
7. According to an eloquent proponent of the right to assisted suicide, the laws of 36 states prohibit this practice. See Timothy Quill, *Death and Dignity: Making Choices and Taking Charge* 141 (1993).
8. See note 3 *supra*.