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Why the Proposal to Legalize Physician-Assisted Suicide in Michigan Failed

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APPENDIX D

[*Yale Kamisar is the Clarence Darrow Distinguished University Professor at the University of Michigan Law School. The following article is a composite he kindly prepared—at our request—of two op-ed pieces which originally appeared elsewhere; one in the New York* Times *(November 4, 1998), the other in the Detroit* News *(November 5, 1998).*]

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Yale Kamisar

Some commentators and participants in the national debate over physician-assisted suicide (PAS) made much of the fact that in 1997 Oregon voters reaffirmed their support for assisted suicide by a much larger margin than the initial 1994 vote. The state legislature had put the initiative (which had initially passed by a 51-49% vote) back on the ballot for an unprecedented second vote. This time the initiative was reaffirmed overwhelmingly, 60-40%.

Barbara Coombs Lee, Executive Director of Compassion in Dying (an organization that counsels people considering PAS and one of the plaintiffs in *Washington* v. *Glucksberg,* 1997), hailed the second Oregon vote as "a turning point for the death with dignity movement." David Garrow, a frequent writer on the subject, called the landslide vote "a good indicator of where America may be headed." Still another commentator (Winifred Gallagher, writing in the *New York Times Book Review*) viewed the lopsided vote as a demonstration of "[h]ow far, and how fast, public opinion is moving on this issue."

But the overwhelming defeat, last November, of Proposal B, the Michigan initiative to legalize physician-assisted suicide, has stopped the idea for now. Combined with the failure of Washington state and California ballot measures for "aid in dying" in the early 1990s, proponents of assisted suicide have done quite poorly in the public arena. Their records look especially anemic when one considers none of the bills proposing the legalization of the practice in more than 20 states have gone anywhere.

Oregon appears to be a striking exception to this trend. The most plausible explanation for the large margin by which Oregon voters supported assisted suicide the second time around was their resentment that the state Legislature had forced them to vote on the issue again after it was narrowly approved 51-49 percent initially. This was the first time in state history the Legislature had tried to repeal a voter-passed initiative.

Several months before the Michigan vote, polls indicated that Proposal B would pass by a comfortable margin. The same thing happened in Washington and California. What changed the tide of public opinion in these situations?

Proponents of Proposal B complain that they were overwhelmed by the TV ads of their much better-funded adversaries. This explanation would seem to make sense. The initiative was opposed by 30 groups, including the Catholic Conference, Right to Life, the state medical society, the state hospice association and a disability rights group.

Money, though, is not the whole story.The Michigan experience—where the proposal to legalize PAS failed by more than 40 percentage points—shows that it is much easier to sell the basic notion of assisted suicide than to sell a complex statute making the idea law.

The wrenching case where a dying person is suffering unavoidable pain is the main reason there is so much support for the concept of assisted suicide in this country (as opposed to support for specific laws). All too often, a reporter thinks the way to treat the issue in depth is to give a detailed account of someone who is begging for help in committing suicide. But such cases—which are relatively rare—blot out what might be called societal or public policy considerations, like how to tell if the patient actually has treatable but hard-to-detect depression.

When pollsters ask about the issue, most people, I suspect, focus on the poignant case. But when people are asked to approve a complex 12,000-word initiative, as in Michigan, the focus shifts.

Now people start worrying about whether the measure provides too few procedural safeguards, or too many. They worry about whether it would impose too many burdensome requirements on dying patients and their loved ones, or whether, on the other hand, it would permit too much abuse.

When Ed Pierce, the retired Ann Arbor physician who led the group that got Proposal B on the ballot, realized a few weeks before the election that support for the measure was eroding, he tried to explain why his cause had lost momentum. He argued that opponents' "attack ads" were "ignoring the central issue"—whether a terminally ill person should have the right to physician-assisted suicide.

But the idea of assisted suicide was no longer the central issue. The main debate had shifted—it was now about how the complex measure would actually work in a state where more than a million residents have no health insurance. Another concern became whether and how the proposal would change the way seriously ill patients and their loved ones view their lives—and the "hastening" of their deaths.

Many Michigan voters seemed disturbed that the proposal included no requirement that family members be notified of a patient's decision to seek assisted suicide. Critics argued that a daughter might go to visit her father in a nursing home, only to discover that he had committed suicide the previous day. But if the proposal had required that all members of the immediate family be informed, that provision, too, would have been criticized as unduly burdening a person's right to assisted suicide.

Perhaps a few opponents of the measure acted in bad faith. But not all.

The Detroit *Free Press* and the Ann Arbor *News* have consistently supported the basic idea of physician-assisted suicide. But alarmed by various provisions in the measure, both newspapers urged their readers to reject it. Newspapers all over the state especially disliked exempting the committee that would oversee the procedures from the state's Open Meetings and Freedom of Information acts, exemptions which would promote secrecy and a lack of accountability to the public.

Other states likewise have had difficulty creating what they believe is a "workable" assisted suicide law. Although some members of the New York Task Force on Life and the Law regarded assisted suicide as ethically acceptable in exceptional cases, all 24 members concluded that "constructing an ideal or 'good' case is not sufficient for public policy if it bears little relation to prevalent medical practice." Many task force members were deeply moved by the sufferings of some patients, but ultimately were convinced these patients could not be provided publicly sanctioned assistance in committing suicide without endangering a much larger number of vulnerable patients.

Proponents can discuss compelling cases and talk majestically about the rights to define one's own concept of existence. But as Michigan shows again, the debate changes significantly when those favoring assisted suicide propose specific statutes to cover everyday situations. As the eminent ethicist Sissela Bok recently observed:

"No society has yet worked out the hardest questions of how to help those patients who desire to die, without endangering others who do not. There is a long way to go before we arrive at a social resolution of those questions that does not do damage to our institutions."