A Nadir of State Constitutional Jurisprudence: Failing to Protect Terminally Ill Patients' Choice for a More Peaceful Death in New Mexico

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Establishing New Rights: A Look at Aid in Dying

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Dying in America in Modern Times

For all but our most recent history, dying was typically a brief process . . . These days, swift catastrophic illness is the exception; for most people, death comes only after long medical struggle with an incurable condition.

-A. Gwande, *The New Yorker*, Annals of Medicine, "*Letting Go: What should medicine do when it can't save your life*?" (August 2, 2010)

The “Long Medical Struggle” Can be Brutal

- ALS: trapped in a body with progressive and inexorable deterioration of bodily integrity and function; losing use of legs, arms, hands, torso; loss of ability to breathe on own; death is certain, growing suffering is certain.
- Cancer: surgeries/radiation/chemo; open wounds, pain, extreme fatigue, nausea, loss of ability to engage in meaningful activities
- AIDS: cancers, surgeries/radiation/chemo; open wounds, pain, extreme fatigue, nausea, seizures, blindness, loss of ability to engage in meaningful activities, neuropathy, diabetes, amputations.
- COPD: loss of ability to breath, extreme air hunger, suffocation
  - See eg. Brief Amicus Curiae “survivors” *Myers v NY*

Choice at the End of Life:

Why it Matters

We live our whole lives in the shadow of death, we die in the shadow of our whole lives. . . . we worry about the effect of life's last stage on the character of life as a whole, as we might worry about the effect of a play's last scene or a poem's last stanza on the entire creative work.

- Ronald Dworkin, *Life's Dominion*

Choices That Change the Trajectory to Death

Life-prolonging interventions can be refused or discontinued in all 50 states:

- Ventilator
- Feeding tube
- Medication
- Cardiac devices
  - Anticipatory supportive palliative care
    = standard of care

Choices That Change the Trajectory to Death

Aggressive Pain/Symptom Management

- Attentive pain and symptom management for terminally ill patients = standard of care
- SCOTUS supports, even if advances time of death. *Glucksberg v WA*
- Failure to meet standard of care in this domain = grounds for discipline and/or lawsuit.

Choices That Change the Trajectory to Death

Voluntarily Stopping Eating & Drinking (VSED)

- Recognized in law and medicine in all states
- Requires medical or hospice support
- May take weeks, depending on condition of patient

Choices That Change the Trajectory to Death

Palliative Sedation(Terminal Sedation)

- Medication administered to induce unconsciousness in patient w/ refractory pain/symptoms; nutrition /hydration withheld until death arrives (may take days or weeks)
- Recognized in law(*Glucksberg*) and medicine
- Failure to inform or provide may be grounds for action.

Choices That Change the Trajectory to Death

Aid in Dying

- Physician Rx for a mentally competent, terminally ill patient who may ingest to achieve a more peaceful death
- Ancient vague state statutes prohibit “assisted suicide”, creating uncertainty

Aid in Dying: Evolving Law

Federal Constitutional Litigation:

Glucksberg v WA/Quill v NY (1993-1997)

Challenging 'assisted suicide' provisions

- Liberty Claim
  - Profoundly personal decision about one's own body, medical treatment, life course
- Equal Pro claim
  - Patients invite medical behavior that precipitates death in many other contexts

States Opposed

Focus on speculated risks:

- Disproportionate impact on vulnerable populations
- Undermine dr/pt r'ship
- Undermine palliative care

At the time, no data/no open practice

Glucksberg CA9(en banc)

(affirming district court)

"There is a constitutionally-protected liberty interest in determining the time and manner of one's own death, that must be weighed against the state's legitimate and countervailing interests, … We hold that insofar as the Washington statute prohibits physicians from prescribing life-ending medication for use by terminally ill, competent adults who wish to hasten their own deaths, it violates the Due Process Clause of the Fourteenth Amendment."

Glucksberg CA9(en banc)

“The Constitution and the courts stand as a bulwark between individual freedom and arbitrary and intrusive governmental power. Under our constitutional system, neither the state nor the majority can impose its will upon the individual in a matter so highly "central to personal dignity and autonomy.” Those who believe that death must come without physician assistance are free to follow that creed. They are not free, however, to force their views, religious convictions, or philosophies on all other members of a democratic society, and to compel those whose values differ with theirs to die painful, protracted, and agonizing deaths.”

Quill CA 2
Equal Protection Requires Allowing Aid in Dying

"[I]t seems clear that New York does not treat similarly circumstanced persons alike: those in the final stages of terminal illness who are on life-support systems are allowed to hasten their deaths by directing the removal of such systems; but those who are similarly situated, except for the previous attachment of life-sustaining equipment, are not allowed to hasten death by self- administering prescribed drugs."

Quill CA 2

"The writing of a prescription to hasten death involves a far less active role for the physician than is required in bringing about death through asphyxiation, starvation and/or dehydration. Withdrawal of life support requires physicians or those acting at their direction physically to remove equipment and, often, to administer palliative drugs which may themselves contribute to death. …It simply cannot be said that those mentally competent, terminally-ill persons who seek to hasten death but whose treatment does not include life support are treated equally".

Quill CA 2

"What interest can the state possibly have in requiring the prolongation of a life that is all but ended?"

SCOTUS

Declined to find federal constit'l right at the time

- Rigid historical analysis, since rejected by SCOTUS
- Absence of data re risk/harm
  - At time, no open practice anywhere in US = Dearth of data.
  - Substantiality of factual dispute at time dispositive
- Reserved possibility it might in future
- Invited "experimentation in laboratory of states"
- Recognized right to aggressive pain mngmt/palliative sedation

Laboratory of the States
20 Years Following *Glucksberg*

- Oregon 'lab' opened almost immediately pursuant to aid in dying statute (enacted 1994; effective 1998-present)
- Washington (2008)(initiative)
- Vermont (2013)(trad'l leg process)
- California(2015)(trad'l leg process)
- Colorado (2016)(trad'l leg process)

- Rich body of data, carefully scrutinized, extensive analysis/commentary

Statutory Permissions

All impose significant limitations

on eligibility and complex procedures:

- Mentally competent
- Terminally ill
- Resident of state
- Specified forms of request (multiple: oral and written),
- Documentation
- Witnessing
- Mandatory waiting period
- Collection/reporting of data
- Opting out

Aid in Dying:

Data Emerges

- Use limited: aid in dying deaths1998-2015: 991(1,545 rx)
- 77% dying of cancer
- 8% dying w/ALS
- 45.5% college educated
- 90.5% enrolled in hospice

*Oregon Department of Human Services, March 2015

What the Data Show

- Patients are comforted to have Rx; many do not ingest,
- Floor is raised for good EOL care for all:
  - More training in pain/symptom management,
  - Increase Rx for pain meds,
  - Increase (and earlier) in hospice referrals,
  - Improved communication between doctor/patient.

Data re: Vulnerable Populations

- No disproportionate impact on "vulnerable populations," e.g. disabled, elderly, minority;
- No harm to persons in vulnerable populations.

Impact on Families

- Families of patients who are able to choose aid in dying are positively impacted:
  - Felt they honored/supported loved one,
  - Felt loved one's final wishes respected,
  - More prepared for, and resolved about, the death.
- Stark contrast to families who experience a family member "suicide" with adverse impact

Broad Support for Aid in Dying Among Medical & Health Policy Organizations Emerges

- American Public Health Association
- American Medical Women's Association
- American Medical Students Association
- American College of Legal Medicine

State Court Litigation to Expand EOL Liberty

Baxter v Montana (2009: MT Sup Ct)

Statutory & constitutional claims

- Resolved in plaintiffs' favor on constitutional grounds in lower court;
- MT Supreme Court: constitutional avoidance, resolved on statutory grounds
  - One Judge wrote concurrence addressing constitutional issue favorably

Morris v NM: Statutory & State Constitutional Challenge

Statutory Claim: state law criminalizing "assisting suicide" does not reach Aid in Dying

- Choice of competent, terminally ill patient for a peaceful death is not suicide.

Aid in Dying is not "Suicide"

Mental health professionals recognize a clear difference between "suicide" and the choice of a competent, terminally ill patient for a peaceful death.

-NM Psychological Association amicus

State Constitutional Protection

- NM constitution's provisions guaranteeing liberty, happiness and due process more protective of individual rights than US
- Jurisprudence under state constitution is independent of federal and robustly protective.

Procedural Aspects in Morris

- Trial before judge
  - Witnesses testify to:
    - ✓Patient interests,
    - ✓Standard of care,
    - ✓Lack of evidence of harm in permissive jurisdictions.
- Judge made **extensive factual findings**

Morris v Brandenburg
Trial Court

"This Court cannot envision a right more fundamental, more private or more integral to the liberty, safety and happiness than the right of a competent, terminally ill patient to choose aid in dying. If decisions made in the shadow of one's imminent death regarding how they and their loved ones will face that death are not fundamental and at the core of these constitutional guarantees, then what decisions are? "

Morris v Brandenburg
NMSC

- NMSC ostensibly defers to SCOTUS/Glucksberg:
  - "We conclude that *Glucksberg* controls"
  - "We choose not to deviate from the ultimate holding in *Glucksberg"*
  - "the *Glucksberg* approach with respect to physician aid in dying is not flawed"
- Failing to appreciate that G*lucksberg* neither requires, or even supports, this outcome
- Failing to serve as "bulwark"

NMSC points to state interest articulated in *Glucksberg* in protecting vulnerable populations

- The uncontroverted record in *Morris* established that there was no adverse impact on vulnerable populations when aid in dying was available.
- Such evidence was not available to the *Glucksberg* court because at that time there was no open practice.
- to suggest it was following *Glucksberg* in part because it shared the concern about possible harm to vulnerable populations made no sense in light of the record, which established this concern had no foundation.

New York
Aid in Dying Litigation
Myers et al v NY

- Pre-answer motion to dismiss granted, affirmed on appeal.
- Plaintiffs not allowed to put on evidence, no record allowed to be developed.
- Ostensibly based on *Glucksberg/Quill*

Timid State Courts Seriously Err

Decisions of the SCOTUS "are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges …seriously err if they so treat them."

-William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 502 (1977).

State Law Protections Disparaged by Decisions like *Morris*

"Whatever protections [state law] does confer are surely disparaged when [a state court] refuses to adjudicate their very existence because of the enumeration of certain rights in the Constitution of the United States."

Massachusetts v. Upton, 466 U.S. 727, 736–38 (1984) (Stevens, J., concurring)

What are State High Court's Failing to Recognize?

- *Glucksberg/Quill* SCOTUS = no barrier to state high court recognition of a state constitutional right
  - Door left open to fed'l constit'l protection
- *Glucksberg* urged that states find their own way on the issue:

"Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."

- 521 U.S. 702, 735 (1997).

What are State High Court's Failing to Recognize?

- 2 Key Developments since *Glucksberg*:
  - Development of rich body of data bearing on state interests, showing no risk/harm to any asserted state interests
  - Change in federal jurisprudential analysis: Glucksberg's rigid historical analysis rejected, developments in modern society considered

Glucksberg approach superceded: *Lawrence* and *Obergefell*

- *Obergefell* (same-sex marriage) rejects rigid historical approach: "[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution." Courts must "exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect." History does "not set outer boundaries," allowing us to learn from it without the past dictating the present.

Obergefell

Drafters of the constitution "did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."

Lawrence v TX

"In all events we think that our laws and traditions in the past half century are of most relevance here."

539 U.S. at 571- 72

Justice Powell acknowledges mistake in *Bowers*

- Powell told a group of law students he regrets his vote upholding Georgia statute that made homosexual sodomy a criminal offense: "I think I probably made a mistake in that one”
- Provided fifth vote to uphold the law and reject arguments that the constitutional right to privacy covers homosexual conduct. Powell later acknowledged that he had initially voted to strike down the statute but then switched his vote to join with four conservative justices in upholding it.

Benefit of Acknowledging Error

Powell's second thoughts could undercut the moral force of the opinion:

"The fact that a respected jurist who is indispensable to the majority conceded that on sober second thought he was probably wrong certainly will affect the way that future generations look at the decision,"

– Laurence H. Tribe, Harvard Law School

End of Life Liberty Project

www.cascadianow.org/end-of-life-liberty-project/

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