

Why We Shouldn't Legalize Assisting Suicide, Part IV:

The Need for Civil Remedies to Prevent Assisting Suicide

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On May 2, 1994, a Michigan jury acquitted Jack Kevorkian of charges related to his publicly proclaimed assistance in the suicide of Thomas Hyde. The verdict points up the way in which the pathos of individual cases often leads criminal case juries to react emotionally, failing to give considerate attention to the general effects on older people and people with disabilities of signalling societal acceptance of death as the solution to human problems.

As this article will show, there are strong reasons why more states should follow the lead of Minnesota, Tennessee, and North Dakota, all of which have recently enacted "civil remedy" statutes that, entirely apart from criminal remedies, allow private parties to obtain injunctions against those who assist suicides. Injunctions are granted by judges, without juries, and a judge can punish violators with sanctions for contempt of court.

Regrettably, the Kevorkian acquittal is not an isolated case of jury nullification of laws protecting suicide victims. Recent history demonstrates that no physicians, and few non-physicians, have been successfully prosecuted for assisting suicide. The emotional tug of individual cases makes prosecutors reluctant to seek punishment and juries reluctant to impose it.

An article in the November 5, 1992 issue of the *New England Journal of Medicine* co-authored by Dr. Timothy Quill (who himself escaped penalty when a grand jury refused to indict him for his openly announced participation in assisting a suicide¹) notes, "In every situation in which a physician has compassionately helped a terminally ill person to commit suicide, criminal charges have been dismissed or a verdict of not

guilty has been brought."² Other studies confirm this conclusion, which in fact is not limited to circumstances of "terminal illness" or "compassion."³

While there have been a few successful criminal prosecutions of non-doctors, they have been extremely rare. A 1986 article in the *Columbia Law Review* concluded:

[A]ll indications are that assistance statutes are rarely, if ever, used. ... [D]espite the thousands of suicides each year, only about fifty news reports regarding some form of prosecution in the past decade for some type of assistance to suicide have been located. ... No post-1930 decision appears to exist in any state reporter of an appeal from a prosecution for the specific offense of assisting or causing a suicide. Surely, many more cases of suicide assistance are occurring than are prosecuted.

....

Police and prosecutors appear to be reluctant to bring charges for suicide assistance. A British study found only one-sixth of all reported cases of suicide assistance were prosecuted. ... It seems plain that police and prosecutors are exercising their discretion to turn a blind eye to acts of assistance to suicide, which means that legislative enactments are not being enforced.⁴

What happens when criminal prosecutions are actually brought? Leonard Glantz accumulated reports on 20 prosecutions from 1939 through 1983. Only in three of them is there a record of jail sentences for the accused, and in each of those three cases there were unusual factors that cast doubt on how "merciful" were the defendants' motives.

A few of the others resulted in suspended sentences, but the great majority resulted either in

grand jury refusals to indict or acquittals. Glantz concluded, "[A]s a practical matter, the laws of homicide may not offer much protection to very sick, elderly patients."⁵

Why Are Criminal Penalties So Frequently Evaded?

Most of those involved in assisting suicide seem more sympathetic characters to a jury than the typical street criminal. They are often doctors or family members and friends of the suicide victim.

Even when prosecutors or juries are convinced that what these people have done or are doing is **objectively** wrong, it is hard for them to regard such people--who often **subjectively** have convinced themselves they are doing the right thing--as hardened criminals worthy of punishment. Indeed, this is an area in which almost all--including those of us pushing most strongly for laws to protect potential suicide victims from "assistance"--are more interested in preventing the act than in seeking retribution against the actor.

Thus, one law review article quotes a local prosecutor as saying "the District Attorney's office [does] not seek out such cases and would prosecute only those in which one of the people involved complained" and another as saying "that the law-enforcement authorities should stay out of them as much as possible."⁶ It must be

remembered that in our system there is absolute "prosecutorial discretion" and there is no legal duty on the part of any prosecutor to investigate or to take to court someone who even admittedly has violated the law.

If a prosecution does in fact come to trial, and against the odds a conviction is secured, a dilemma occurs. If a stiff jail sentence is given, the defendant may well come to be seen as a martyr; if a lenient one, the deterrent value of the law will be greatly undermined. In either case, respect for the law is diminished, and pressure for its repeal--as either "draconian" or "ineffective"--is likely to grow.

What can be done to make more effective the laws already on the books against assisting suicide? After all, the pro-life objective is **actually** to protect potential suicide victims from those who would "assist" their suicides, not just to have the law symbolically condemn the act.

There is reason to believe that if those otherwise inclined to assist suicides knew they could be sued for substantial sums by family members or others given "standing" (the legal right to sue), they might view that prospect as a more realistic deterrent than the unlikely chance they will be convicted under the criminal law. Even if the person planning to aid the suicide first secured the consent of family members (as Jack Kevorkian is apparently careful to do), he or she could never be sure that one of them

might not later sue--either because of a change of mind, or simply because there would be a financial incentive. And if the law provided an easy way to get an injunction against a serial assister like Kevorkian, then the ability of the court to impose ever-increasing fines for contempt of court if the injunction was violated would be likely to deter all but the most resolute of euthanasia advocates.

How and Why Civil Remedies Work

Under a civil remedies approach, private individuals (such as family members of the suicide victim) are given "standing"--the ability to sue the suicide assister. This means that the prosecutorial discretion of public officials can no longer completely thwart the taking of steps against the assister. It also emphasizes that assisting suicide is not a "victimless" crime--that apart from the suicide victim himself or herself, those close to the one who dies are harmed, a point that may be important to juries.

There are two types of civil remedies: injunctions and civil damages. An injunction has a number of advantages. It allows action to prevent a death before it happens. It permits a case to be brought promptly before a judge who can directly order the would-be assister not to violate the law. That person then knows that if he or she violates the court order, the judge will order heavy

finer for contempt of court. For most doctors, in particular, this is likely to be a far more realistic deterrent than the unlikely prospect of serving time in jail.

As the doctors' fear of malpractice liability demonstrates, sanctions that hit the pocketbook are extremely effective. They can be enforced through the garnishment of income and the seizure of assets.

Civil damages are monies awarded after the fact, as in traditional malpractice cases. Insurers are likely to exercise strong pressure on doctors to avoid actions that could subject them to such suits.

Kevorkian, who apparently enjoys posing as an iconoclastic martyr for the death crusade, might shrug off bankruptcy. But individuals like him are few, and the greatest danger is that more and more "respectable" doctors will come out of the woodwork to publicly assist suicides, if convinced the odds of criminal conviction are low. It is these whom civil remedies would be likely to deter.

If the legislation provides that relatives may bring suit for civil damages *even if they consented* to the killing, those who assist in a suicide will know they cannot ensure a cover-up even by involving family members in the conspiracy, since those who know will not be prevented from suing and will have a strong financial incentive to do so.

Civil remedies have another advantage from the perspective of taxpayers. The criminal law is enforced by prosecutors who are

paid with tax dollars and by using jails constructed and run with tax dollars. But civil remedies are largely financed from the pockets of the wrongdoers, not only through fines but also through the awarding of reasonable attorney's fees to the lawyers for the plaintiffs if their suit is successful.

But Won't Civil Remedies Lead to Groundless, Harassing Suits?

If a suit is brought frivolously, or in bad faith, the plaintiff may be penalized by the awarding of reasonable attorney's fees to the defendant. This not only recompenses someone who is recklessly and wrongly accused, but also deters plaintiffs from filing suits unless they have clear evidence to back up their allegations.

Is There Any Precedent for the Use of Civil Remedies?

Much of the enforcement of civil rights statutes has come not through the criminal statutes but through the use of injunctions, sometimes issued in suits brought by government officials, but more frequently in those initiated by private citizens represented by public interest lawyers.

Suits for injunctions against discrimination in schools, public accommodations and the like frequently resulted in giving the plaintiffs the authority to monitor the future activities of the defendants, to check to see whether they were violating the injunctions.

It is these civil remedies that, even today, provide the principal means of preventing racial discrimination.

Now is the time to work to add effective civil remedies to the existing protections against assisting suicide. We must be pro-active in the fight to protect vulnerable people from those who, instead of offering them help and counseling, will so very readily agree that they are better off dead.

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NOTES

1. Lawrence K. Altman, "Jury Declines to Indict a Doctor Who Said He Aided in a Suicide," *New York Times*, July 27, 1991, p. A1.
2. Timothy Quill and Christine Cassel, "Care of the Hopelessly Ill[:] Proposed Clinical Criteria for Physician-Assisted Suicide," *New England Journal of Medicine*, Vol. 327 (Nov. 5, 1992): pp. 1380, 1381.
3. Leonard H. Glantz, "Withholding and Withdrawing Treatment: The Role of the Criminal Law," *Law, Medicine & Health Care*, Vol. 15 (Winter 1987/1988):pp. 231, 232; H. Tristram Engelhardt, Jr. and Michele Malloy, "Suicide and Assisting Suicide: A Critique of Legal Sanctions," *Southwestern Law Journal*, Vol. 36 (Nov. 1982): pp. 1003, 1029.

4. Catherine D. Shaffer, "Criminal Liability for Assisting Suicide," *Columbia Law Review*, Vol. 86 (March 1986): pp.348, 369-71 (footnotes omitted).
5. Glantz, "Withholding," pp. 232-35.
6. Shaffer, "Assisting Suicide," pp. 370-71 n. 137.