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Carter Snead lecture "Physician Assisted Suicide: Objections in Principle and in Prudence"

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Physician Assisted Suicide: Objections in Principle and in Prudence

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Structure of Talk

- Terminology
- History/Law
- Arguments for Assisted Suicide
- Arguments against Assisted Suicide
  - In Principle
  - In Prudence

Terminology

- Euthanasia/Mercy Killing
  - Active, voluntary euthanasia
  - Nonvoluntary euthanasia
  - Involuntary euthanasia
- Physician-Assisted Suicide
- Right to Refuse Life Sustaining Medical Treatment

Cultural and Legal History

Cultural and Legal History

- Common Law: Confiscated movable goods (though not real property, as required by Roman Law) of suicides.
- Early American Experience:
  - Pre-revolution: Penalties included forfeiture and dishonoring suicide's corpse
  - Gradually gave way to decriminalization, in interests of innocent heirs and survivors, and based on view that suicide was largely a result of mental illness.
  - Assistance in suicide, however, was not decriminalized, but remained unlawful (e.g., Field Codes)

Current U.S. Legal Landscape

- Suicide decriminalized in all states (**but** involuntary civil commitment available to prevent suicide)
- Assisted suicide illegal in most states
  - 38 states expressly ban PAS;
  - Remaining states treat PAS as common law crime and/or have health care directive statutes expressly disavowing approval of assisted suicide;
  - Expressly legal (by referendum) in Oregon and Washington; Montana Supreme Court concluded that assisted suicide "not against Montana public policy," based on its reading of extant Montana laws; legalized in Vermont.
- Euthanasia illegal in all states
- Right to refuse or withdraw unwanted medical treatment legal in all states (cf. *Cruzan*).
- Right to aggressive palliative therapies that carry risk of death.

The Euthanasia Movement

- Progressive Movement/Social Darwinism (1900-40)
  - "In its social application the purpose of euthanasia is **to remove from society** living creatures so monstrous, so deficient, so hopelessly insane that continued existence [has] for them no satisfactions and entails a heavy burden on society." -- Dr. Inez Philbrick
  - "**Chloroform unfit children**. Show them the same mercy that is shown beasts that are **no longer fit to live**." -- Clarence Darrow

Euthanasia Movement (cont'd)

- Progressive Movement/Social Darwinism (cont'd)
  - "Life is sacred when it is pleasant, when it is wanted, when it is bearable. But a life of pain, agony, and anguish is not sacred, no more than a life of crime, shame, disgrace, and humiliation." --William J. Robinson

Euthanasia Movement

- <u>WWII – 1960</u>
  - Backlash towards euthanasia advocacy in light of Nazi eugenic program and crimes against humanity.
  - [Note, however, that Nazi eugenic program taken from Alfred Hoche and Karl Binding's work in the 1920s (*Permitting the Destruction of Unworthy Life*).]
  - In response to reports of Nazis killing mentally disabled Polish children, eugenicist and pro-euthanasia advocate Ann Mitchell replied: "Of course this is a great blessing, but it is too bad that it had to come about just this way."

Euthanasia Movement

- Contemporary Movement
  - Rhetorical shift from eugenic grounds to autonomy/self-determination
  - Note, however, residual eugenic rationales:
    - Invocation of rising medical costs, burden of elderly on society, elimination of unwanted infants (Margaret Battin, former Colorado Governor Richard Lamm)
  - Euthanasia advocates worry about "helpless newborns or minors still to young to make any input into decisions about when to stop life-prolonging treatment" (Joseph Fletcher).
  - Incremental political strategy- focus on PAS for terminally ill at first; later argue for euthanasia (voluntary and non).

Arguments for Assisted Suicide

Arguments for Assisted Suicide

- Autonomy/Self Determination
- State Neutrality and Pluralism
- Fairness
- Compassion for Suffering/Radical Dependence
- Efficiency/Utility

Autonomy/Self Determination

- Argument:
  - People have a right to self-determination in existential matters affecting only themselves, especially the question of when and how to die.
- Objection:
  - PAS is not a harmless, solely self-regarding act; **human beings live situated in families and communities with chosen and *unchosen* relationships and obligations:**
    - Impact on survivors and community;
    - Impact on the practice of medicine;
    - Impact on individual health care providers, pharmacists, etc.
    - Impact on society more broadly

Autonomy/Self-Determination (cont'd)

- Objections (cont'd)
  - Autonomy is often (nearly always?) illusory in this context
    - Suicidal ideation highly correlated with mental illness (e.g., treatable depression);
    - Suicidal desires often alleviated with effective pain management;
    - Suicidal wishes often emerge from internal or extrinsic pressures (financial and emotional) regarding burdens to others (real or perceived).

Autonomy/Self-Determination (cont'd)

- Objections (cont'd)
  - No non-arbitrary limiting principle of autonomy justification
    - Cannot be limited by procedure – (e.g., PAS vs. euthanasia, mutual/consensual homicide, etc.)
    - Cannot be limited to a particular *kind* of patient (terminally ill, emotional vs. physical suffering, etc.)
      - **Attempts to limit PAS to certain kinds of requests require appeals to *paternalistic* arguments about when it is *reasonable* to commit suicide. Such arguments are anathema to a robust principle of self-determination. They also require determining *which lives* are unworthy of life.**
    - Unsustainable limits illustrated by proposal to liberalize Dutch laws to include nonterminal, nonsuffering patients (e.g., persons over 70 "who consider their lives complete")

Illusion of Autonomy

"Given the absence of any real choice, death by assisted suicide becomes not an act of personal autonomy, but an act of desperation. It is fictional freedom; it is phony autonomy."

-- Paul Longmore, Disability Rights Activist and Scholar

State Neutrality and Pluralism

- Argument:
  - State should not *impose* one conception of morality/justice/the good over competing approaches;
  - State should not impose *religious* morality through its laws

State Neutrality and Pluralism

- Objections
  - Law does not simply reflect the prevailing normative commitments of a people, it *shapes* them.
  - *Every* law is grounded ultimately in a normative framework – focusing on a particular good to be pursued or harm to be avoided (see, e.g., speed limits).
  - The basic good of human life is not an exclusively "religious" concept; it is a familiar axiom in American law and culture that the government's most fundamental obligation is to protect human life.
  - **State can and should, in prudence, prevent practices that risk grave attendant harms or side-effects, such as fraud, mistake, and abuse of the most vulnerable** (see, discussion, *infra*).

Fairness

- Argument
  - If right to refuse unwanted life sustaining treatment, why not PAS? What about patients who are not imminently dying who wish to end their lives? What about individuals who simply wish to die?

Fairness (cont'd)

- Objection
  - Right to refuse treatment is **distinguishable** from PAS, in that the former does not necessarily entail an *intention* to kill the patient
    - Declining treatment that is either burdensome or futile is not the same choice as self-annihilation.
    - Declining treatment can (and most often is) a choice to live a different kind of (perhaps shorter) life – e.g., at home with loved ones, free from debilitating side effects of medical interventions.
    - However, decisions to terminate life sustaining care *can be* tantamount to euthanasia/PAS if aimed at terminating a life deemed to be not worth living. Thus far, the law does not treat these practices as PAS/euthanasia.

Fairness (cont'd)

- Objection
  - No coherent limiting principle to fairness argument:
    - Entails direct, voluntary euthanasia (for those who cannot self-administer lethal agents);
    - Entails direct, *nonvoluntary* euthanasia for those who cannot or failed to express their wishes (e.g., those suffering from cognitive impairments, or children), but whose "best interests" are to die;
    - Entails direct, *involuntary* euthanasia for those whose lives are no longer worth living.

Compassion for Suffering or Radical Dependence

- Argument: PAS is a compassionate response to suffering and/or radical dependence.
- Objection
  - Difficult to coherently define "suffering" for these purposes (Physical? Psychological? Reversible?)
    - Note: in US jurisdictions "suffering" not a requirement for PAS eligibility; very slippery concept in the Netherlands
    - Netherlands: euthanasia for mother depressed over death of her two sons.
  - Pain is not primary reason patients seek suicide.

Compassion for Suffering or Radical Dependence (cont'd)

- Objections (cont'd)
  - Studies show that increased emphasis on PAS results in **diminished efforts to explore and pursue effective pain management/palliative care, and long term care**.
    - Dutch doctor: "**Usually I solve this kind of problem [bowel obstruction in cancer patient] by euthanasia**," but this patient did not accept it.
  - Doctors providing PAS typically have known patients for only a very brief time – too short to fairly determine what their interests require.
    - In Oregon, 97% of doctors administering PAS worked for "Compassion and Choices" (formerly "The Hemlock Society").

Compassion for Suffering and Dependence (cont'd)

- Opens the door to **eugenic judgments about quality of life** by able-bodied decisionmakers (a source of great concern for the disability rights community)
- Creates pressure towards **nonvoluntary and involuntary euthanasia:**
  - **Dutch nun euthanized against her wishes; her doctor believed that her religion irrationally prevented her from ending her life, "so he felt both justified and compassionate in [killing her] without telling her he was doing so." (Herbert Hendin).**
  - **Groningen Protocol – lethal injections for newborns (most commonly with spina bifida); 59% of infants had "long life expectancy" (treated as a factor counseling euthanasia)**

Utility/Efficiency

- Argument:
  - Legalizing PAS creates the greatest good for the greatest number by allowing those who wish to die to receive assistance in doing so, and alleviates burden on society to care for them.
- Objection
  - *Problem of incommensurability*: how to weigh the "good" consequences against the bad (e.g, abuse, fraud, mistake, and other social pathologies discussed *supra* and *infra*)?
  - Do benefits really outweigh harms? How many cases of involuntary euthanasia are acceptable?

Arguments Against Assisted Suicide

Arguments against Assisted Suicide in Principle

- PAS is contrary to the basic good of human life;
- PAS is contrary to the good of the fundamental equality of all human beings;
- PAS is contrary to the purposes of medicine

PAS: Contrary to the Good of Human Life

- Human life is a basic, foundational good recognized in American law and culture.
- Essential obligation of government to protect human life.
- The state has an important interest in every human life.

PAS: Contrary to Fundamental Human Equality

- Every person is an irreplaceable and infinitely valuable *someone*, with intrinsic, equal dignity.
- To act in a manner intended to facilitate another person's death is a radical act of discrimination.
- To promote a public program of assisted suicide or euthanasia invites the judgment that some lives are not worth living, and the lethal actions that follow from it.

PAS: Contrary to the Purpose of Medicine

- “I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect . . .” (Hippocratic Oath)
- “Physician-assisted suicide is fundamentally incompatible with the physician’s role as healer.” (American Medical Association)

Arguments Against Assisted Suicide in Prudence

Prudential Arguments Against Assisted Suicide

- Lethal forms of discrimination against the disabled, elderly, poor, and minorities;
- Grave and deadly risks of fraud, mistake and abuse;
- New, deadly forms of coercion by insurers or family members;
- Corrosion of doctor-patient relationship;
- Difficulty in diagnosing “terminal illness”;
- Failure to diagnosis and treat mental illness;
- Neglect of effective palliative treatments;
- Eventual shift from PAS to voluntary, non-voluntary, and perhaps involuntary euthanasia (see, e.g., the Netherlands).

Lethal Forms of Discrimination against Disabled, Elderly, Poor, and Minorities

"We believe that the practices [of assisted suicide and euthanasia] would be **profoundly dangerous** for large segments of the population, especially in light of the widespread failure of American medicine to treat pain adequately or to diagnose and treat depression in many cases. The risks would extend to all individuals who are ill. **They would be most severe for those whose autonomy and well-being are already compromised by poverty, lack of access to good medical care, or membership in a stigmatized social group.** The risks of legalizing assisted suicide and euthanasia for these individuals, in a health care system and society that cannot effectively protect against the impact of inadequate resources and ingrained social disadvantage, are likely to be extraordinary." (*NY Task Force on Life and the Law, 1994*).

Fraud, Mistake and Abuse: Killing without Consent in the Netherlands

- "In all, it appears that for every three or four acts of voluntary euthanasia, the Dutch regime generates one case of a patient being killed without consent." (Judge Neil Gorsuch in *The Future of Assisted Suicide and Euthanasia, 2006*).
- [No reliable data from Oregon – entirely self-reported, no meaningful regulatory oversight/enforcement, and doctors not required to be present at ingestion of lethal drugs.]

Nonconsensual Killing Too Grave a Risk

"If euthanasia were practiced in a comparable percentage of cases in the United States, voluntary euthanasia would account for about 36,000 deaths each year, and **euthanasia without the patient's consent would occur in an additional 16,000 deaths.** The Task Force members regard this risk as unacceptable. They also believe that **the risk of such abuse is neither speculative nor distant, but an inevitable byproduct of the transition from policy to practice in the diverse circumstances in which the practices would be employed**." (New York Task Force on Life and the Law, 1994)

Risks of Abuse Realized

"The Netherlands studies fail to demonstrate that permitting physician-assisted suicide and euthanasia will not lead to the nonvoluntary euthanasia of children, the demented, the mentally ill, the old, and others. Indeed, the persistence of abuse and the violation of safeguards, despite publicity and condemnation, suggest that **the feared consequences of legalization are exactly its inherent consequences**." (Dr. Ezekiel Emanuel)

New, Deadly Forms of Coercion by Insurers/Managed Care

- “The least costly treatment for any illness is lethal medication.” (Acting Solicitor General of the U.S., Walter Dellinger)
- "It was horrible," [Barbara] Wagner told ABCNews.com. "I got a letter in the mail that basically said if you want to take the pills, we will help you get that from the doctor and we will stand there and watch you die. But we won't give you the medication to live."

New, Deadly Forms of Coercion by Family Members (cont'd)

"A wife, who no longer wished to care for her sick, elderly husband, gave him a choice between euthanasia and admission to a home for the chronically ill. The man, afraid of being left to the mercy of strangers in an unfamiliar place, chose to have his life ended; the doctor although aware of the coercion, ended the man's life." (H. Hendin)

Corrosion of Doctor-Patient Relationship

- “Licensing doctors to kill will damage the doctor/patient relationship, as patient will no longer be able to trust in the doctor’s devotion to the patient’s best interests.” (Leon R. Kass)
- “Death offers a dangerous sense of mastery for the health care professional who is frustrated at not finding a cure.” (American Medical Association)
- Recall, Dutch physician: “Usually I solve this kind of problem [i.e., treatable bowel obstruction in cancer patient] by euthanasia.”

Difficulty in Diagnosing “Terminal” Illness

From the authors of the United States’ most extensive study of prognosis and treatment in terminal illness: “Deciding who should be counted as ‘terminally ill’ will pose such severe difficulties that it seems untenable as a criterion for permitting physician-assisted suicide.”

-- J. Lynn, et al., “Defining the ‘Terminally Ill’: Insights from SUPPORT,” 35.1 *Duquesne Law Review* 311-336 (1996).

“Terminally Ill”

“Among those predicted to have less than six months to live, who do *not* hasten their deaths by lethal overdose, a significant percentage may live for years. In one study, among 900 patients found eligible for hospice care because they were expected to die in less than 6 months, 70% lived longer.”

-- N. Shapiro, “Terminal Uncertainty,” *Seattle Weekly*, January 14, 2009.

Failure to Diagnosis *Treatable* Mental Illness

- Nearly 95% of those who kill themselves have been shown to have a diagnosable psychiatric illness in the months preceding suicide. The majority suffer from depression that can be treated. (H. Hendin).
- Studies have also shown that non-psychiatric physicians are not reliably able to diagnose depression, let alone to determine whether the depression is impairing judgment. (Id.)
- In Oregon in 2011, only 1.4% (1 out of 71) of patients seeking PAS were referred for counseling.

Neglect of Effective Pain Management

- In Oregon, when a terminally ill patient makes a request for assisted suicide, physicians are required to point out that palliative care and hospice care are feasible alternatives. They are not required, however, to be knowledgeable about how to relieve either physical or emotional suffering in terminally ill patients. **Without such knowledge, the physician cannot present feasible alternatives**.
- In only 13% of cases was a palliative care consultation recommended, and we do not know how many of these recommendations were actually implemented.

Shift Towards Euthanasia, Voluntary and *Involuntary,* for Any Reason

"Over the past two decades, the Netherlands has moved from assisted suicide to euthanasia, from euthanasia for the terminally ill to euthanasia for the chronically ill, from euthanasia for physical illness to euthanasia for psychological distress and from voluntary euthanasia to nonvoluntary and involuntary euthanasia.

Once the Dutch accepted assisted suicide it was not possible legally or morally to deny more active medical [assistance to die], i.e. euthanasia, to those who could not effect their own deaths. Nor could they deny assisted suicide or euthanasia to the chronically ill who have longer to suffer than the terminally ill or to those who have psychological pain not associated with physical disease.

To do so would be a form of discrimination. Involuntary euthanasia has been justified as necessitated by the need to make decisions for patients not [medically] competent to choose for themselves.“

(Herbert Hendin, Congressional Testimony)

Opponents of Assisted Suicide

- American Medical Association
- World Health Organization
- American Nurses Association
- American Association of Critical-Care Nurses
- Hospice Nurses Association
- Oncology Nurses Society
- American Osteopathic Association
- American Psychiatric Association
- American Academy of Hospice and Palliative Medicine
- American Academy of Pain Management
- American Academy of Pain Medicine

Opponents of PAS (cont'd)

- American Academy of Orthopaedic Surgeons
- American Academy of Physical Medicine
- Society of Critical Care Medicine
- American Academy of Neurology
- American Neurological Association
- American Society of Anesthesiologists
- American Society of Clinical Pathologists
- College of American Pathologists
- American Society of Abdominal Surgeons
- American Association of Clinical Endocrinologists
- Society of Medical Consultants to the Armed Forces
- American Institute of Life Threatening Illness and Loss
- Massachusetts Medical Society

Opponents of PAS (cont'd)

- Disability Rights Education and Defense Fund
- American Disabled for Attendant Programs Today
- American Association of People with Disabilities
- Association of Programs for Rural Independent Living
- Justice for All
- National Council on Disability
- National Council on Independent Living
- National Spinal Cord Injury Association
- Not Dead Yet
- TASH
- World Association of Persons with Disabilities
- World Institute on Disability