



Recent Developments in Physician-Assisted Suicide

July 2004

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LITIGATION

1. Oregon v. Ashcroft, 368 F.3d 1118 (9th Cir. 2004), aff'd 192 F.Supp.2d 1077 (D.Or. 2002)
 - a. Case filed. On 11/7/01, in response to Attorney General John Ashcroft's directive that prescribing lethal medication was not a legitimate medical purpose under the Controlled Substances Act (CSA), the State of Oregon filed a complaint in the U.S. District Court for the District of Oregon seeking a declaratory judgment and injunctive relief. The court allowed several individual patients, a physician, and a pharmacist to intervene as plaintiffs supporting the position of the state of Oregon.
 - b. U.S. District Court decision. On 4/17/02, Judge Robert E. Jones issued his written decision in favor of plaintiff and plaintiff-intervenors. *Oregon v. Ashcroft*, 192 F.Supp.2d 1077 (D.Or. 2002). Judge Jones permanently enjoined defendants from "enforcing, applying, or otherwise giving any legal effect to" Ashcroft's directive and ordered that health care providers in Oregon "shall not be subject to criminal prosecution, professional disciplinary action or other administrative proceedings for any actions taken in compliance with the Oregon Death with Dignity Act." Although plaintiff and plaintiff-intervenors had made statutory, administrative, and constitutional arguments, Judge Jones based his decision on statutory grounds exclusively, holding that neither the plain language of the CSA, its legislative history, nor the cases cited supported defendants' argument that Congress intended to delegate to the Attorney General the authority to override a state's determination as to the "legitimacy" of a medical practice.
 - c. Appeal to Ninth Circuit. On 5/24/02, defendants filed a notice of appeal to the Ninth Circuit Court of Appeals. The case was argued on 5/7/03 before a three-judge panel, which issued its decision on 5/26/04. *Oregon v. Ashcroft*, 368 F.3d 1118 (9th Cir. 2004).
 - d. Ninth Circuit decision. The three-judge Court of Appeals panel affirmed the U.S. District Court by a vote of 2 to 1, holding that the Ashcroft directive was "unlawful and unenforceable" and ordering that the injunction of the U.S. District Court be "continued in full force and effect."
 - (1) Jurisdiction. All three judges agreed that original jurisdiction was in the Court of Appeals, rather than in the District Court, but found that Judge Jones' order properly transferred jurisdiction.
 - (2) Majority opinion. Judge Tallman wrote the majority opinion, with which Judge Lay concurred. The majority held that Congress did not authorize the Attorney General to determine that physician-assisted suicide violates the CSA. Specifically, (1) Congress did not clearly authorize the Attorney General to exercise control over regulation of medical care, which is an area traditionally reserved for state authority; (2) the Ashcroft directive contradicted the plain language of the CSA; and (3) the directive contravened the express intent of Congress. The majority opinion criticizes the Attorney General for failing to solicit input from the State of Oregon, imposing a sweeping and unpersuasive interpretation of the CSA despite lack of medical expertise, and interfering with the democratic debate about physician-assisted suicide.
 - (3) Dissenting opinion. Judge Wallace dissented on the ground that the Attorney General's directive was an interpretive rule entitled to substantial deference.

- e. Further review. The Attorney General has 45 days to request a rehearing from the three-judge panel or an en banc review from an 11-judge panel. Any active judge can request en banc review, which is granted only by majority vote of all active judges. In lieu of seeking review in the Ninth Circuit, the Attorney General may appeal to the U.S. Supreme Court within 90 days.
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LEGISLATION

1. Arizona. On 1/19/04, H.B. 2172 (known as the Patient Comfort and Control Act) was introduced in the 2004 session of the legislature. The bill would amend Arizona's advance directive statutes so that a person could indicate a desire to control suffering in the event of terminal illness by obtaining a prescription for lethal medication. The advance directive would have to be executed at least three months before the person requests a prescription. Except for the requirement for execution of an advance directive, the provisions of the Arizona bill are similar to the Oregon Death with Dignity Act. The bill was assigned to committees on 2/9/04 and had its second reading on 2/10/04, but no further action was taken.
 2. Hawaii. On 3/7/02, the Hawaii House passed by a vote of 30-20 the Hawaii Death with Dignity Act, patterned after the Oregon Death with Dignity Act. The Senate initially voted 13-12 in favor of the bill but finally rejected it by a vote of 11-14. On 1/17/03, Senator Colleen Hanabusa again introduced the bill in the Senate as S.B. 391; a companion bill was introduced in the House as H.B. 862. The bills were referred to committee and did not reach a vote, but they were carried over to the 2004 Regular Session of the legislature. On 3/4/04, an emotional four-hour hearing before the House Judiciary Committee was held on H.B. 862, with over 150 witnesses testifying. The committee voted 10-5 in favor of the bill after amending its residency provisions, and sent the bill to the House of Representatives. However, House Democrats sent the bill back to the committee on 3/9/04. The bill's supporters indicated they would try again in the 2005 legislature.
 3. Oregon
 - a. Reported abuse. At the American Psychiatric Association meeting in May 2004, psychiatrist N. Gregory Hamilton (a vocal opponent of the Oregon Death with Dignity Act) and his wife Catherine presented a paper claiming that the case of Michael Freeland illustrated the potential for serious abuse under the Act.
 - b. Prevention of elderly suicides. Oregon is launching a new program aimed at preventing elderly suicide. The Department of Human Services is holding a series of community meetings around Oregon focusing on the issue and seeking to increase awareness of the problem. Program administrators emphasize the difference between elderly suicide and physician-assisted suicide, which is legal in Oregon.
 4. Vermont
 - a. Two bills introduced. Two bills relating to assisted suicide were introduced in the Vermont General Assembly in February 2003. H. 275 would criminalize assisted suicide. H. 318 was patterned after the Oregon Death with Dignity Act. After considerable public debate, both bills were carried over to the 2004 legislative session.
 - b. Current status. In light of the controversy over H. 318, Vermont Senator James Leddy and Representative Thomas Koch, chairs of the Senate and House Health and Welfare Committees, announced in January 2004 that their committees would not take up the bill this year. However, supporters of H. 318 are expected to introduce it again next year.
 - c. Hearings held. Legislative hearings were held during February 2004 on H. 318 and on ways to improve end-of-life care. In response, the legislature agreed to support an effort by Attorney General William Sorrell to draft a comprehensive end-of-life policy for Vermont. The legislature asked Sorrell to finish his report by 11/15/04.
 - d. Legislative research. A letter signed by 78 members of the Vermont House has asked the Legislative Council's office to analyze Oregon's experience with physician-assisted suicide, but to refrain from making any policy recommendations on the matter. William Russell, who heads the Legislative Council, said that his staff would go forward with the analysis despite orders to the contrary from the House Health and Welfare Committee.
 - e. Poll. In the 36th annual Doyle Survey, filled out by voters at town meetings during March 2004, 52% said that the state should legalize physician-assisted suicide.
 5. Wisconsin. On 4/21/04, Wisconsin Governor Jim Doyle vetoed Assembly Bill 67, which would have extended Wisconsin's "conscience clause" legislation to permit health care providers to decline to provide euthanasia and other medical procedures, in addition to abortion and sterilization, on religious or moral grounds.
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OTHER NATIONAL DEVELOPMENTS

1. Organizations to merge. The boards of the Compassion in Dying Federation and End-of-Life Choices (formerly the Hemlock Society) voted in June 2004 to continue negotiating a formal merger, which probably will take place early in 2005. An initial board was formed with equal representation from both organizations. The working name for the new organization is Compassion and Choices. End-of-Life Choices brings 30,000 members and national legislative expertise to the merged organization, while Compassion in Dying brings Oregon's experience with the Oregon Death with Dignity Act and other approaches to good palliative care. One of the goals of the merged group will be to lobby state legislatures to consider proposals for legalizing physician-assisted suicide.
 2. New publication. Derek Humphry, the founder of the Hemlock Society, has authored a new book, *Good Euthanasia Guide 2004*, which points people towards the countries and organizations that will assist a death. The guide contains information on organizations in 22 countries, from Australia to Zimbabwe. Humphry hopes that the book will become an annual, updated publication. The book can be obtained through www.finalexit.org or on Amazon.com.
 3. Catholic health care providers. On 3/20/04, Pope John Paul II reversed prior Catholic doctrine by announcing that Catholics are "morally obligated" to continue artificial feeding and hydration for patients in a persistent vegetative state, even if they remain so for years. The pope declared that removing feeding tubes is "euthanasia by omission." The decree could affect more than 565 Catholic hospitals, as well as Catholic health care professionals. It is not clear whether Catholic hospitals and health care professionals will be willing to respect patients' advance directives.
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MEDICAL DEVELOPMENTS

1. Recent articles
 - a. Ho Mun Chan, *Sharing Death and Dying: Advance Directives, Autonomy and the Family*, 18 Bioethics 87 (2004) [compares the "liberal" model of decisionmaking for the terminally ill used in Western countries, which is patient-centered and emphasizes individual autonomy, with the "familial" model of decisionmaking used in some Asian cultures, and concludes that the familial model generally is preferable].
 - b. Christopher Meyers, *Cruel Choices: Autonomy and Critical Care Decision-Making*, 18 Bioethics 104 (2004) [argues that decisions about routine care are based on patient assent to physician recommendations rather than on informed exercise of patient autonomy, and that patients' inability to exercise autonomy becomes especially problematical when critical care decisions are necessary; suggests several steps that could be taken to improve the decisionmaking process].
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INTERNATIONAL DEVELOPMENTS

1. Australia
 - a. South Australia. On 6/2/04, the South Australian parliament's Legislative Council voted 13-8 against the Dignity in Dying Bill, which would have allowed voluntary euthanasia. The bill was introduced by Australian Democrats leader Sandra Kanck and supported by the Australian Democrats.
 - b. Proposed repeal of Euthanasia Law Act 1997. On 6/3/04, Australian Democrats deputy leader Lyn Allison gave notice in the federal parliament of a private member's bill to repeal the Euthanasia Law Act 1997. This federal law, which prohibits Australian territories from enacting legislation permitting voluntary euthanasia, was intended to overturn existing legislation in the Northern Territory. Northern Territory Chief Minister Clare Martin attacked the Democrats for not consulting the territory parliament before introducing the bill.
 - c. Proposed federal legislation. The federal Attorney General's department has introduced the Telecommunications Offences and Other Matters Bill 2004, which would make it an offence to use the Internet, e-mail, or other online service to transmit, publish, or distribute material intended to promote suicide. Fines for violating the law could go up to \$110,000 for an individual and \$550,000 for an organization. Critics argue that the bill is aimed primarily at child pornography and could affect the work of voluntary euthanasia organizations and perhaps even limit discussion in parliament about proposed legislation legalizing euthanasia. Dr. Philip Nitschke reports that he will move his Internet euthanasia service, Exit Australia, out of the country if the legislation passes.
 - d. The "peaceful pill." Dr. Philip Nitschke is working on another suicide device, which he calls the "peaceful pill." The pill could be cooked up at home using legally obtainable ingredients, so that no law would be violated. Nitschke claims that one large pill costing less than \$200 could be produced and then stored indefinitely in a refrigerator. A film called *Mademoiselle and the Doctor*, which premiered in June 2004, describes the development of the pill by tracing the last weeks of Lisette Nigot, a French academic living in Western Australia who was not terminally ill but

wanted to die before she turned 80.

2. Bulgaria. On 6/2/04, after a week of intense debate, 93 of the 107 members of the Bulgarian parliament voted to maintain the law prohibiting euthanasia.
3. Canada. At a conference of 450 Reform rabbis held in Toronto during June 2004, a resolution opposing physician-assisted suicide was tabled by a vote of 68 to 62. The vast majority of the rabbis were American, with a handful of Europeans and about a dozen Israelis.
4. China
 - a. Proposed legislation. Wang Zhongcheng, the oldest delegate to China's parliament at age 77, is pushing for legalization of euthanasia. However, his effort is considered very unlikely to succeed.
 - b. Debate over request to die. Tang Siu-pun (also known as Ah Pun), a 34-year-old Hong Kong man who is a quadriplegic, contacted Hong Kong legislators in early 2004 seeking help to end his life. Health authorities replied that there were no plans to amend the law to permit euthanasia and that anyone caught assisting in the death of another would be charged with murder. Ah Pun's case has provoked a public debate over euthanasia.
 - c. Survey of public attitudes. In 1999, Fok Shiu-yeu, senior lecturer in the division of social studies at Hong Kong's City University, and two colleagues reported the results of a survey of 680 people about their attitudes towards euthanasia. The respondents were asked a series of questions, with marks from one to five indicating a response of strongly agree to strongly disagree. On the issue of whether euthanasia for the terminally ill should be introduced, the result was 2.4, indicating mild agreement.
5. Czech Republic. The government has approved the draft of a new criminal code that would introduce profound legal changes to existing laws as of 2006. The bill specifies new kinds of crimes, including euthanasia. One of the issues being debated is whether the sentence for compassionate euthanasia should be less than the sentence for murder and other violent crimes.
6. France. On 6/30/04, France's Health Minister Philippe Douste-Blazy spoke after a parliamentary report was issued calling for new laws to assure patients a dignified and painless death. The report was commissioned after the highly publicized death of 22-year-old Vincent Lambert, whose mother allegedly gave him a lethal injection after President Jacques Chirac denied his request to die. The report said that France should not legalize voluntary euthanasia as Belgium and the Netherlands had done, but instead should allow patients or their families to choose to end treatments that simply delay death.
7. Germany. On 6/10/04, the federal government introduced a bill that would strengthen advance medical directives and give physicians and relatives more legal protection when carrying out a patient's wishes. Social Democratic Justice Minister Brigitte Zypries emphasized that the bill would not allow physician-assisted suicide or active euthanasia, but some opponents argued that the bill would be a first step toward legalizing physician-assisted suicide.
8. Great Britain
 - a. Proposed assisted suicide legislation. A select committee of the House of Lords is considering the issues raised by the Patient (Assisted Dying) Bill (HL 37) introduced on 2/20/03 by Lord Joffe. On 3/20/04, the Liberal Democrats voted three-to-one at the party's spring conference in favor of making legalization of euthanasia part of its official policy.
 - b. Guernsey. On 9/26/02, the States of Deliberation, the governing body for the Channel Island of Guernsey, voted 38 to 17 in favor of an investigation into the desirability of legislation legalizing voluntary euthanasia. The vote followed introduction of a private member's bill by Deputy Pat Mellor, who is helping in the SpeakUpForGuernsey campaign to get the bill passed. The working party appointed by the States of Deliberation is expected to present its report soon, with details of nearly 300 submissions. The States of Deliberation is responsible for making Guernsey's laws in areas other than defense, foreign policy, and broadcasting, but the British Privy Council must approve any such legislation. In February 2004, Deputy Mellor reported that a telephone poll of 500 Guernsey residents commissioned by the campaign and conducted by the NOP World Research Company showed that 77% of those surveyed believed that people suffering unbearably from a terminal disease should be allowed to receive medical help to die if they wished. Further, a recent survey of Guernsey physicians showed that 21 had received requests for treatment to be withdrawn, 14 had received requests for voluntary euthanasia, and six had received requests for physician-assisted suicide.
 - c. Scotland. Former Tory Member Lyndsay McIntosh has called on the Scottish parliament to legalize euthanasia. McIntosh, who served as a Conservative member of parliament between 1999 and 2003, wrote an impassioned piece in Holyrood magazine describing her father's death from thoracic cancer in graphic detail and admitting that she would have done something to help him die if she could have. A spokesman for the Scottish Executive said, however, that there were no plans to change existing law making euthanasia a crime.
 - d. Mental Capacity Bill. On 6/18/04, Constitutional Affairs Minister Lord Filkin published the Mental Capacity Bill, which for the first time would set forth laws governing medical decisionmaking for persons who lack mental capacity. The bill has been subject to scrutiny by a Joint Parliamentary Committee, and its recommendations have been taken into account in revising the bill. Among other things, the bill would allow appointment of an agent to

make medical decisions and execution of a living will. The bill, which would come into force in 2007, continues the law's prohibition against euthanasia. However, some groups have expressed opposition to the bill because of concern that it might promote euthanasia.

9. Italy

- a. Poll by La Sapienza University. On 2/26/04, researchers at Rome's La Sapienza University released the results of a poll of 500 people between the ages of 26 and 65. The poll showed that 78.6% supported euthanasia for a terminally ill patient, although only 37% thought that Italy should introduce laws on the issue.
- b. Poll by research agency Eures. On 5/14/04, the research agency Eures released the results of a poll of 2,000 Italians over age 14 conducted between December 2003 and February 2004. The poll showed that 61.6% were in favor of making euthanasia legal for terminally ill patients, with 21.3% categorically opposed and 11.5% undecided. The views of men and women were virtually the same, although northern Italians were more in favor (70.3%) than those in the south (53.3%) and people with center-left political sympathies were more in favor (67.2%) than centrist voters (47.8%).

10. Japan. An advisory panel to the Health, Labor and Welfare Ministry chaired by Sophia University Professor Saku Machino has issued a draft report recommending that clear rules be set regarding termination of life support and respect for patients' wishes. The report finds that the lack of rules has led to several instances in which lethal medication has been given to patients to expedite their deaths and release them from pain. The panel said that uncertainty over the difference between active euthanasia, which is banned, and the withdrawal of medical treatment has led to problems and that the medical community needed to hold public discussions on the issue and physicians needed to improve their ability to communicate with patients and family members. The ministry plans to ask medical experts to develop guidelines covering procedures for the withdrawal of life support.

11. The Netherlands

- a. Survey on terminal sedation. In an interview conducted in May 2004 by the Dutch Evangelical Broadcasting Network, Nijmegen University pain control professor Bernardus Crul reported preliminary findings from his survey of 1,500 physicians on terminal sedation, which induces an unconscious state in a terminal patient. Crul indicated that most physicians no longer see euthanasia as a necessity because terminal sedation provides adequate end-of-life care, and he called for a debate on the alternative of terminal sedation. The results of Crul's survey will be presented in January 2005.
- b. Euthanasia for dementia patients. Dutch Justice Minister Piet Hein Donner has backed a decision by the Procurators-General Council that dementia can-if accompanied by unbearable and hopeless suffering-be a valid reason for euthanasia. The council decided on 10/8/03 that a physician who acceded to an Alzheimer patient's request for help to kill him or herself should not be prosecuted under such circumstances.

12. New Zealand

- a. Lesley Martin. In September 2002, Lesley Martin, a euthanasia campaigner, published the book *To Die Like a Dog*. The book describes how Martin, an intensive care nurse, gave her mother a morphine injection in May 1999 as Joy Martin was dying of cancer. On 3/6/03, Wanganui police arrested Lesley Martin on attempted murder charges. She was convicted after a two-week trial and sentenced to 15 months in prison. Martin is expected to appeal the conviction but refused to apply for home detention.
- b. Renewed legislative proposal. Following Lesley Martin's conviction, First MP Peter Brown announced his intention to resubmit a refined version of his Death with Dignity Bill to the New Zealand Parliament. The bill was defeated by a vote of 60-57 on its first reading in the prior parliamentary session. A group of MPs met in April to discuss issues relating to end-of-life decisions, including voluntary euthanasia.
- c. Survey of physicians. In June 2004, the New Zealand Medical Journal reported on the results of a survey sent to 2,602 general practitioners, of whom 1,255 responded. According to the New Zealand Herald, 693 of the physicians indicated that they had helped someone to die during a one-year period. Of the 693, 39 had performed "some kind of action which would conform to everyday concepts of physician-assisted suicide or euthanasia." The remaining 654 probably withdrew treatment that would cause unnecessary suffering or provided pain relief that had the secondary effect of hastening the patient's death. In 380 cases, the physician acted without any discussion with the patient, making the action "legally dubious" according to the survey's authors, Dr. Kay Mitchell and Professor Glynn Owens. The main reason given for not discussing the decision with the patient was that the patient was too ill, but in 88 cases where the patient was judged competent no discussion occurred.

13. Switzerland. Switzerland's new Justice Minister Christoph Blocher has removed the issue of regulating assisted suicide from his priorities for the current parliament which runs until 2007. The canton of Zurich, however, is considering introducing a law in the regional parliament that would limit assisted suicide in that canton to Swiss residents, require patients to see two physicians rather than one and get a certificate of mental fitness, mandate testing of staff at suicide clinics, and require organizations assisting in a suicide to contribute towards the forensic medical costs incurred. A debate on the issue is expected in the regional parliament before the end of 2004.

14. Council of Europe. On 4/27/04, Swiss parliamentarian Dick Marty, drafter of the so-called Marty Report, presented the

report to the Parliamentary Assembly of the Council of Europe, calling on European countries to study and eventually decriminalize euthanasia. Marty said that, although only Belgium and the Netherlands officially permit euthanasia, studies have shown that this practice is widespread in several other European countries with authorities purposely ignoring the situation.

* Some information obtained from media reports has not been independently verified.