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Are Absolute Bans on Assisted Suicide Constitutional? I Say No

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I am going to divide the question into two parts. Are government bans on assisted suicide constitutional? The answer is yes. Is it constitutional for the government to absolutely prohibit terminally ill persons in the end stages of their terminal illness from making the choice to hasten inevitable death by the use of physician-prescribed medications? Here I submit that the answer is no. I will be presenting to you the arguments that I have presented in my writings,¹ and that have formed the basis of the ACLU's constitutional challenge to Michigan's ban on assisted suicide.²

Michigan's ban on assisted suicide is absolute and clearly prohibits the terminally ill in the end stages of their terminal illness from making the choice to hasten inevitable death by the use of physician-prescribed medications. Make no mistake about it, Michigan's ban on assisted suicide is specifically directed against the terminally ill. Prior to the entry of Dr. Kevorkian on the scene, Michigan did not have a law against assisted suicide, although one was hastily crafted in reaction to his activities.³ While many states did have such a law, these laws were never enforced; it is virtually impossible to find a prosecution under an assisted suicide law for helping someone blow his brains out or jump off a bridge.⁴ It was only when terminally ill people began to assert their right to hasten inevitable death with the assistance of a physician that American society began to debate the matter of assisted suicide. The Supreme Court has said that "the proper focus

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1. See Robert A. Sedler, *Constitutional Challenges to Bans on "Assisted Suicide": The View from Without and Within*, 21 HASTINGS CONST. L.Q. 777 (1994); Robert A. Sedler, *The Constitution and Hastening Inevitable Death*, HASTINGS CENTER REP., Sept.-Oct. 1993, at 20.

2. The ACLU's challenge, *Hobbins v. Attorney General*, was consolidated before the Michigan Supreme Court with two cases involving "assisted suicide's" most visible practitioner, Dr. Jack Kevorkian. On December 13, 1994, the Michigan Supreme Court, in a 5-2 decision, rejected those constitutional arguments and upheld the constitutionality of the challenged Michigan law. *People v. Kevorkian; Hobbins v. Attorney General*, 527 N.W.2d 714 (Mich. 1994), *cert. denied*, 115 S. Ct. 714 (1995).

3. See MICH. COMP. LAWS. ANN. § 752.1027 (West 1993).

4. Research has disclosed only one reported case involving such a prosecution. In *State v. Bauer*, 471 N.W.2d 363 (Minn. Ct. App. 1991), a 17-year-old defendant was convicted of aiding a suicide and fetal homicide, when his 18-year-old girlfriend, who was pregnant with his child, killed herself as part of a purported "suicide pact" between them. He furnished the gun that she used to kill herself, but claimed that he tried to talk her out of it, and that she killed herself as he walked away.

of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."⁵ So, the focus of our constitutional inquiry will not be on the people, if there are such, who want help in jumping off a bridge or in blowing their brains out—the law is irrelevant for them. The focus of our constitutional inquiry will be on the terminally ill for whom the law is indeed a restriction—the people who are denied the choice in the end stages of their terminal illness to make the choice to hasten inevitable death by the use of physician-prescribed medications.

Because the question that I will be addressing is one of constitutional law, I will be approaching it as a lawyer must approach a constitutional question—with reference to applicable constitutional doctrine and precedents of the United States Supreme Court. The question then is not whether allowing the terminally ill to have the choice to hasten inevitable death by the use of physician-prescribed medications is desirable social policy. The question is not whether this will have ramifications for our views about death and dying or the sanctity of human life. The question is whether, *under applicable Supreme Court doctrine and precedent*, an absolute ban on terminally ill persons having the choice to hasten inevitable death by the use of physician-prescribed medications is constitutional. Only the United States Supreme Court, of course, can give the definitive answer to this question. In this sense, I cannot say that such a ban is unconstitutional, and Professor Kamisar, my opponent in this debate, cannot say that such a ban is constitutional. I am not on the Supreme Court, and neither is Professor Kamisar; although, there are many who would say that Professor Kamisar, who is one of the Nation's most distinguished constitutional scholars, should be. But he isn't, at least not yet. So, what I will do is to present the arguments, based on applicable Supreme Court doctrine and precedent, as to why I think the Supreme Court *should* hold that such a ban is unconstitutional. I would hope that Professor Kamisar will limit his opposing arguments to applicable Supreme Court doctrine and precedent as well—although if his writings on the subject are any indication, he will make arguments that go rather far afield from applicable Supreme Court doctrine and precedent.⁶

First, as to assisted suicide, of course the state can constitutionally prohibit assisting a suicide in the ordinary sense of the term—that is, providing assistance in ending a life that is otherwise of indefinite duration, such as by jumping off a bridge or blowing one's brains out. There is no constitutional right to commit suicide. Regardless of what some may think, the law does not recognize any notion of a "rational

5. *Planned Parenthood of Pennsylvania v. Casey*, 505 U.S. 833, 837-38 (1992).

6. See, e.g., Yale Kamisar, *Are Laws Against Assisted Suicide Unconstitutional?*, *HASTINGS CENTER REP.*, May/June 1993, at 32.

suicide." The legal view is that someone who attempts suicide may be suffering from a form of mental illness at that time, so that the attempt at suicide is considered to be pathological and irrational. It is well-settled that the government may, consistent with due process, impose restrictions on a person's freedom in order to prevent that person from doing something that the legislature reasonably considers harmful to that person's health or safety.⁷ This principle—that the government has the power to protect us from ourselves—is relied on to sustain a host of restrictions on individual freedom, such as substance abuse laws, cyclist helmet laws, and seatbelt laws. It is also relied on to sustain the involuntary commitment of a person who is a "danger to [himself]."⁸ Likewise, the principle would be relied on by the courts to sustain a ban on assisted suicide in the ordinary sense of the term. So, as a constitutional matter, we need not worry about a "slippery slope." A Supreme Court holding that terminally ill persons in the end stages of their terminal illness have a constitutional right to make the choice to hasten inevitable death by the use of physician-prescribed medications will not be the first step in establishing what Professor Kamisar calls a "suicide permissive" society.⁹ It will simply be a holding about the terminally ill and their right to choose to hasten inevitable death.

We now come back to the constitutional right of the terminally ill to make this choice. Professor Kamisar and other opponents of "assisted suicide" are reluctant to talk directly about the terminally ill. They only say that if the terminally ill choose to die one moment before they breathe their last agonizing breath, they are committing suicide, and since there is no right to commit suicide, the state can force the terminally ill to endure unbearable pain and suffering until death comes "naturally."¹⁰ This kind of syllogistic reasoning has no place in constitutional analysis. Again, the question is whether, under applicable constitutional doctrine and precedent, the Constitution protects the right of the terminally ill to make the choice to hasten inevitable death, and if so, whether the state can assert any conceivably valid interest in denying them assistance in implementing that choice. It is that question to which we will now turn.

7. This principle is recognized in early cases sustaining against due process challenges the constitutionality of laws limiting the hours that an employee could work on the ground that the laws were necessary to protect employee health. *See, e.g.*, *Bunting v. Oregon*, 243 U.S. 426 (1917) (manufacturing); *Muller v. Oregon*, 208 U.S. 412 (1908) (hours of work for women); *Holden v. Hardy*, 169 U.S. 366 (1898) (underground mining).

8. *See, e.g.*, *Heller v. Doe*, 113 S. Ct. 2637, 2644-47 (1993).

9. Kamisar, *supra* note 6, at 39.

10. Professor Kamisar contends that for constitutional purposes, there is no principled way to distinguish between terminally ill persons seeking to hasten their inevitable death and anybody else desiring "death by suicide." *Id.* at 36.

It may be asked first, what do I mean by the terminally ill? The constitutional answer to that question, like the constitutional answer to the question of "when is a fetus viable," so that the physician may not perform an abortion, is that it is to be determined by the reasonable medical judgment of the physician.¹¹ It is my understanding that physicians consider a person to be terminally ill when that person will die from a specific disease within a relatively short period of time. There is no medical treatment that can arrest the path of the disease toward inevitable death, and medical treatment is limited to alleviating the pain. The only thing that is not certain is the precise time when death will occur. In practice, there is no difficulty at all in determining who is terminally ill. Obviously, the terminally ill person will not seek to hasten inevitable death until the end stage of the terminal illness has been reached. At that point in time, the question is whether that person will have the choice to hasten inevitable death—to determine the timing of death—or whether that person must continue to suffer until she breathes her last agonizing breath.

The constitutional answer to that question, as I have said, must be found in applicable Supreme Court doctrine and precedent. Here the doctrine and precedent applicable to the concept of personal autonomy that is embodied in the "liberty" protected by the Fourteenth Amendment's Due Process Clause. In its 1992 decision in *Planned Parenthood v. Casey*,¹² where the Court reaffirmed a woman's constitutional right to a pre-viability abortion, the Court authoritatively set forth the constitutional doctrine applicable to the protection of the right of personal autonomy. The Court stated as follows:

It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter It is settled now that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, as well as bodily integrity At the heart of liberty is the right to define one's own concept of existence, of meaning of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the state.¹³

Applying this doctrine, I submit that the right to define one's own concept of existence and to make the most basic decisions about bodily integrity surely must include the right of terminally ill persons to make the choice whether to hasten inevitable death or whether to go on living until death comes naturally.

11. See *Colautti v. Franklin*, 439 U.S. 379 (1979).

12. 505 U.S. 833 (1992).

13. *Id.* at 847-52.

We now turn to the precedents. A person's entitlement to bodily integrity and control over that person's own body protects the person's right to refuse unwanted medical treatment, including the right of a competent adult person to make the personal decision to discontinue life-saving medical treatment.¹⁴ It protects the right of men and women to use contraception and to have themselves sterilized.¹⁵ And above all, it protects the right of a woman to choose to have a pre-viability abortion, even though this will destroy the potential human life of the fetus that she is carrying.¹⁶ Surely, if a woman's right to control over her own body includes the right to have an abortion, when that same woman at a later stage of her life becomes terminally ill, her right to control her own body must include her right to make decisions about the voluntary termination of her own life during the end stages of her terminal illness.

Professor Kamisar has said that there is a difference between withholding or withdrawing life-sustaining medical treatment and what he calls "affirmatively committing suicide," by which he means terminally ill persons making the choice to hasten inevitable death by the use of physician-prescribed medications.¹⁷

This is true. There is also a difference between contraception and abortion, but both abortion and contraception are protected by the constitutional right of personal autonomy. Professor Kamisar cannot explicate any principled difference, *in terms of constitutional doctrine and precedent*, between the right of a competent terminally ill person to hasten inevitable death by refusing life-sustaining medical treatment and the right of the same competent terminally ill person to hasten inevitable death by the use of physician-prescribed medications. I challenge him to do so. I likewise challenge him to explain why—in terms of constitutional doctrine and precedent—a woman has a constitutional right to terminate her pregnancy by a pre-viability abortion, but does not have the same right when, in a later stage of her life, she becomes terminally ill, to make the choice to hasten inevitable death by the use of physician-prescribed medications.

I submit, therefore, that in light of applicable Supreme Court doctrine and precedent, the right of the terminally ill to make the choice to hasten inevitable death is a fundamental right, protected by the Fourteenth Amendment's Due Process Clause against improper governmental interference.

The government cannot assert any conceivably valid interest in denying the terminally ill person the right to make the choice to hasten inevitable death and hence require that person to undergo un-

14. *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).

15. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

16. *Casey*, 505 U.S. 833; *Roe v. Wade*, 410 U.S. 113 (1973).

17. *Kamisar, supra* note 6, at 33-35.

bearable pain and suffering until death comes naturally. The government typically tries to justify a ban on "assisted suicide" on the ground that it has an interest in "preserving life." *But for the terminally ill there is no life left to preserve.* The terminally ill person is dying. The body has lost its struggle with disease. There is no medical treatment that can arrest the path of the disease toward inevitable death. The only question is whether the terminally ill person must undergo unbearable suffering until death comes naturally or whether that person can end the unbearable suffering by the use of physician-prescribed medications. The government can have no valid interest whatsoever in prolonging dying, and in forcing terminally ill people to go on suffering until they have breathed their last agonizing breath.

In *Casey*, the Supreme Court held that the government may not impose an *undue burden* on the exercise of a person's fundamental right to bodily integrity.¹⁸ In that case, the Court held that the government may not prohibit a woman from having a pre-viability abortion.¹⁹ It also held that the government may not require notification to a married woman's husband of her intention to have an abortion, since the threat that her husband may commit an act of violence against her would effectively deter a small number of women from making the decision to have an abortion.²⁰

An absolute ban on a terminally ill person's receiving any assistance from a physician, or any other person, in implementing her choice to hasten inevitable death is obviously an undue burden on her fundamental right of bodily integrity. It would prevent the terminally ill person from making use of physician-prescribed medications to hasten inevitable death by consuming a sufficient quantity of those medications. There is no question, of course, that the government, in the exercise of its power to impose reasonable regulations on the practice of medicine, could constitutionally *regulate* physician participation in assisting the hastening of inevitable death. For example, the government might limit physician participation in hastening inevitable death to practicing clinical physicians and/or to clinical physicians who have been directly involved in the care of the terminally ill patient. Such regulations would be constitutional so long as they did not impose an undue burden on the choice of the terminally ill person to hasten inevitable death. But an absolute ban on the use of physician-prescribed medications to enable the terminally ill person to make the choice to hasten inevitable death is, to say the least, an undue burden on the exercise of that person's fundamental right. Indeed, a more extreme burden on the exercise of a fundamental right cannot be imagined.

18. *Casey*, 505 U.S. at 879-81.

19. *Id.*

20. *Id.*

It is for these reasons, applying applicable Supreme Court doctrine and precedent, that I would submit that an absolute ban on terminally ill persons making the choice to hasten inevitable death by the use of physician-prescribed medications is unconstitutional.

A final point. We are talking about a constitutional right of *choice*, the right to make the choice whether or not to hasten inevitable death. What is protected by the Constitution is *choice* in matters of personal autonomy. The Constitution protects the choice of a pregnant woman to terminate a pregnancy by a pre-viability abortion. The same Constitution protects the choice of a pregnant woman to continue her pregnancy, and precludes the state from forcing her to have an abortion for any reason whatsoever. By the same token, the same Constitution that protects the right of the terminally ill to make the choice to hasten inevitable death equally protects the right of the terminally ill to make the choice *not* to hasten inevitable death. Professor Kamisar and other proponents of sweeping bans on "assisted suicide" posit the horror of the slippery slope. They say that if we allow terminally ill people to make the choice to hasten inevitable death, we are but one step away from putting all old and sick people on the modern equivalent of an "ice floe going out to sea" in an attempt to rid ourselves of the "inconvenience" of having to take care of them.²¹ From a constitutional standpoint, the "slippery slope" argument is complete nonsense. As I have said, the same Constitution that protects the right of the terminally ill to make the choice to hasten inevitable death also protects the right of the terminally ill to make the choice not to hasten inevitable death and to go on living until death comes naturally. Thus, I would submit that their constitutional right of choice would preclude the government from denying them the medical treatment that is necessary to enable them to go on living.²²

In the final analysis, it is the choice principle that provides a reasoned basis for resolving the controversy over the right of terminally ill people to hasten inevitable death. And this, I submit, is the resolution that is required by *our* Constitution.

Other constitutional commentators, such as Professor Kamisar, have made exactly the opposite submission. What Professor Kamisar and I are both doing, in effect, is presenting our conflicting views as to how we think this very important issue should be resolved by the Supreme Court. As with laws denying women the choice whether or not to have an abortion, it is the Supreme Court that will ultimately have to determine the constitutionality of laws that deny terminally ill

21. This is my "argumentative summary" of Professor Kamisar's position. See Kamisar, *supra* note 6, at 39.

22. See the discussion in Sedler, *Constitutional Challenges to Bans on "Assisted Suicide": The View from Without and Within*, *supra* note 1, at 795-97.

persons the choice to hasten inevitable death by the use of physician-prescribed medications.

In resolving this issue, as in resolving the issue of constitutional protection of abortion choice, the Court as an institution—and the individual Justices who comprise it—will be engaging in constitutional balancing and will make value judgments about the *relative constitutional importance* of the conflicting individual and governmental interests.²³ I see *Roe v. Wade*²⁴ as a case where the Court clearly was engaged in constitutional balancing and where the Court made the value judgment that prior to viability, the women's interest in reproductive freedom was constitutionally more important than the state's asserted interest in protecting potential human life by means of prohibiting abortion.²⁵ My argument for the constitutional protection of the choice to hasten inevitable death asks the Court likewise to engage in constitutional balancing and to hold that the terminally ill person's interest in making the choice to hasten inevitable death is constitutionally more important than any interest that the state can assert to compel the person to "go on living."²⁶ I also think that the constitutional result—whether the Constitution will be held to protect the choice to hasten inevitable death—depends on whether a majority of the Justices will conclude that the rationale for the constitutional protection of abortion choice that was recognized in *Roe* and *Casey*²⁷ applies in equal measure to the constitutional protection of the choice to hasten inevitable death.²⁸ It is my submission that it does, and it is on this basis that I assert that the Constitution protects the

23. It is my submission that constitutional balancing and "non-interpretive review" is a necessary postulate for constitutional adjudication in the American constitutional system. See Robert A. Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective*, 44 OHIO ST. L.J. 93, 120-36 (1983).

24. 410 U.S. 113 (1973).

25. See Robert A. Sedler, *The Constitution and Personal Autonomy: The Lawyering Perspective*, 11 COOLEY L. REV. 773, 787-92 (1994).

26. See *supra* notes 12-20 and accompanying text.

27. 505 U.S. 833 (1992).

28. The results in the two cases presenting this question that have become before appellate courts indicate that judges who disagree with the holding and rationale of *Roe v. Wade* will not be disposed to extend that holding and rationale to provide constitutional protection to the choice to hasten inevitable death. The United States Court of Appeals for the Ninth Circuit, in a 2-1 decision, upheld the constitutionality of Washington's ban on "assisted suicide." see *Compassion in Dying v. Washington*, 49 F.3d 586, *reh'g granted*, 62 F.3d 299 (9th Cir. 1995) (en banc). The majority opinion was written by Judge John Noonan, who has been a relentless critic of *Roe v. Wade*. See e.g., John Noonan, *The Root and Branch of Roe v. Wade*, 63 NEB. L. REV. 668 (1984). In the *Compassion in Dying* opinion, Judge Noonan referred to the "abortion jurisprudence" of *Roe* and *Casey* as being "unique" and so it could not be "extrapolat[ed] to a very different field." 49 F.3d at 591. Of the 5 Michigan Supreme Court Justices joining in that court's holding in *People v. Kevorkian*; *Hobbins v. Attorney General*, 527 N.W.2d 714 (Mich. 1994), *cert. denied*, 115 S. Ct. 714 (1995), at least 3 and possibly 4 have been critical of *Roe*. In the principal opinion for the Court, Chief Justice

right of the terminally ill to make the choice to hasten inevitable death.

Michael Cavanagh gave little consideration to *Roe*, and said that in *Casey*, the Supreme court had “emphasized that abortion cases are unique.” *Id.* at 729.

