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Contemporary Moral Issues

Give Me Liberty (And Give Me Death!)

In recent decades, concerns over the legality and morality of physician assisted suicide, the act of a doctor providing a patient (typically one who is terminally ill) the means to end their own life, have begun to see popular debate. The typical argument in favor of physician assisted suicide, also referred to as PAS, revolves around some unassailable right to choose life or death. Though the liberty based argument offers a sort of romantic appeal, I will show that it is impossible to accept a fundamental “right to die” in cases of terminal illness without also permitting almost any competent adult to seek death.

In the case *Washington v. Glucksberg*, a group supporting legalization of physician assisted suicide argued that suicide is a fundamental right protected by the Due Process clause of the constitution.[[1]](#footnote-1) Laws found to violate such fundamental rights must pass strict scrutiny, a rigorous standard requiring “compelling government interest” and the narrowest possible scope.[[2]](#footnote-2) This means that the law must restrict the right as little as possible while still fulfilling the government’s interest. The standard has been described as “fatal in practice” to laws seeking to restrict fundamental rights.[[3]](#footnote-3) These efforts to show that we have a fundamental right to die aim to set a dangerous precedent. If the courts accept that a fundamental right to choose life or death exists, any law seeking to restrict it must pass strict scrutiny – including laws which limit this right to those with terminal illness, and restrict access from the “romantically-devastated twenty eight year old,” as Judge John Noonan put it in his decision for Compassion in Dying v. State of Washington.[[4]](#footnote-4) I will show later that laws restricting PAS in this way are fated to fail strict scrutiny, which is the purported theoretical slippery slope argument which Bonnie Steinbock cites as a major problem with legalizing PAS in her paper.[[5]](#footnote-5)

In a supporting brief in favor of physician assisted suicide for *Washington v. Glucksberg*, a group of philosophers attempt to address the issue. Their proposed solution is that states would be justified in intervening to prevent assisted suicide in cases where the patient might “later be grateful if they were prevented from dying.”[[6]](#footnote-6) This presents troubling – and I believe insurmountable – difficulties for the legal system.

If such an important moral determination is left up to the states, each state will inevitably develop different laws regulating PAS. In this instance of suicide as a right, managed by the states, there is no framework preventing any one state from riding a platform of individual liberty to a situation without laws restricting assisted suicide to the terminally ill. Just as Oregon rejected the status quo and began to allow PAS (albeit restricted to the terminally ill), a state could decide that limitations on PAS infringe on the people’s rights. Meanwhile, even states which agreed in general terms could set radically different lines for which individuals could seek PAS. This would lead to a similar dynamic to the one which exists today – a chaotic patchwork of different laws and regulations across the United States.

The idea of taking this right to death away from those who a state views as potentially later regretting their choice only adds ambiguity to laws which already suffer from it. The philosopher’s brief offers no concrete guidelines for how states should interpret this, instead thrusting the challenge into the hands of the legal system and trusting the courts to hash out the answer. In current assisted suicide legislation, the vital question of how to define legal competency is similarly unclear. In the case of Kate Cheney, a terminally ill resident of Oregon who sought to end her own life, two different doctors came to different conclusions about her competency and ability to independently choose death due to Oregon’s failure to outline what competency meant in the law.[[7]](#footnote-7) Though such scenarios lead to confusion and controversy, at least in that scenario medical professionals make a medical determination of a patient’s competency (in the doctor’s best judgement of what that may mean). Here, the states will be left with the monumental task of determining which patients may, if left alive, one day appreciate the state’s denial of their right to die. But states hold no crystal balls to gaze into a patient’s future, and attempting to do so could justify blocking almost any form of physician assisted suicide. If so inclined, a court could point to data on the inaccuracy of physician prognoses for a terminally ill patient to say that it is indeed plausible that the patient will live longer than expected and thus be happy to have not chosen death.[[8]](#footnote-8) Such a requirement could be manipulated to permit whichever forms of physician assisted suicide a state wants to permit, defying the point of a fundamental right.

Finally, the brief justifies prevention as stopping those who may make impulsive or ill-informed decisions.[[9]](#footnote-9) But I see such concerns as being easily alleviated by mandatory waiting periods such as already those in place in Oregon and other PAS states and the addition of mandatory counselling sessions so that the patient an informed choice while in a mentally sound state. A blanket ban would prevent competent adults who legitimately do not want to continue life from exercising this theoretical fundamental right– clearly an unacceptable imposition on such a person’s constitutional rights.

I will now show that it would be legally impossible to restrict such a right as the states want to restrict it. If some right to death was found to exist, states would hold the burden of showing that any restrictions on that right were justified. States which decided to keep PAS on a tight leash under similar justifications as those the Philosopher’s Brief proposes may be ripe for legal challenge due to the impossibility of setting a justifiable boundary. As of now, with no federal acceptance of PAS, states can set an arbitrary boundary – for example, permitting only terminally ill patients with a life expectancy of six months or less to request death. But if death is accepted as a right, there is no reasonable justification for saying that someone with seven months to live is much likelier to regret a decision to die than someone with six months to live. Similarly, it would be impossible to claim that someone with chronic pain or debilitating injury is at all likely to regret a decision to leave their pain behind. And due to these inherently lines designating who should and should not be permitted to seek a doctor’s assistance in ending their life, strict scrutiny’s requirement that a law have the narrowest possible scope to achieve its aim is impossible to fulfil. As Judge Noonan points out, “The attempt to restrict such rights to the terminally ill is illusory.”[[10]](#footnote-10) The legal impossibility of fulfilling strict scrutiny’s narrowest possible scope requirement on a right which by nature can only have an arbitrary bound means that almost no restrictions could survive a competent legal challenge.

Though the philosophers’ answer to Steinbock’s slippery slope challenge is an ideal solution on the surface, delving deeper reveals its impracticality. If there was such a way to look into the future and perfectly predict which patients truly wish to die, there would be little need for debate. Unfortunately for the legal system, there is not. I view the debate over physician assisted suicide to have two approaches – the current state by state basis, which divides states by morals and may taunt the terminally ill who cannot uproot themselves and move to a new state to die, and an “all or nothing” approach in which we either acknowledge a fundamental right to individual choice over life and death or we deny any right to death altogether. Legally, anything else would present an insurmountable challenge.

Bibliography

B Steinbock, “The case for physician assisted suicide: not (yet) proven,” *Journal of Medical Ethics,* 2005.

Compassion in Dying v. State of Washington, 49 F.3d 586 (9th Cir. 1995).

Jules Montague, “Why doctors get it wrong about when you will die,” *The* Guardian, June 2,

2015, <https://www.theguardian.com/lifeandstyle/2015/jun/02/doctors-predict-patient-die-prognosis-wrong>.

Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, and Judith Jarvis Thomson, et al.,

“Assisted Suicide: The Philosophers’ Brief,” March 27, 1997.

“Strict Scrutiny,” *Cornell University Law School*, <https://www.law.cornell.edu/wex/strict_scrutiny>.

Washington v. Glucksberg, 521 U.S. 702 (1997).

1. Washington v. Glucksberg, 521 U.S. 702 (1997). [↑](#footnote-ref-1)
2. “Strict Scrutiny,” *Cornell University Law School*, https://www.law.cornell.edu/wex/strict\_scrutiny [↑](#footnote-ref-2)
3. Supra, note 2. [↑](#footnote-ref-3)
4. Compassion in Dying v. State of Washington, 49 F.3d 586 (9th Cir. 1995). [↑](#footnote-ref-4)
5. B Steinbock, “The case for physician assisted suicide: not (yet) proven,” *Journal of Medical Ethics,* 2005. [↑](#footnote-ref-5)
6. Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, and Judith Jarvis Thomson, et al., “Assisted Suicide: The Philosophers’ Brief,” March 27, 1997. [↑](#footnote-ref-6)
7. Supra, note 5. [↑](#footnote-ref-7)
8. Jules Montague, “Why doctors get it wrong about when you will die,” *The* Guardian, June 2, 2015, https://www.theguardian.com/lifeandstyle/2015/jun/02/doctors-predict-patient-die-prognosis-wrong. [↑](#footnote-ref-8)
9. Supra, note 6. [↑](#footnote-ref-9)
10. Supra, note 4. [↑](#footnote-ref-10)