"Aid in Dying" in the Courts

BY STEPHEN R. LATHAM

Three states—Oregon, Washington, and Vermont—have used straightforwardly democratic means to legalize the practice formerly known as "physician-assisted suicide" but now termed "aid-in-dying." In Oregon and Washington, statewide referenda created statutes permitting "Death with Dignity." In Vermont, the elected members of the state legislature passed a law. This is democracy as usual; referenda on the issue have failed in a number of states (Massachusetts, California), and a dozen or so states are entertaining bills on the subject. Indeed, bills have been introduced in several jurisdictions, including New York, California, and Washington, D.C., since the death of Brittany Maynard last fall.

But in two states—Montana and New Mexico—aid-in-dying has been declared legal neither by directly democratic action by citizens nor by representatively democratic action by the legislature but by court rulings in cases brought by aid-in-dying activists. Similarly framed lawsuits have recently been filed in New York and California. What are the advantages and disadvantages of attempting to secure a right to aid-in-dying through the courts? We can begin to address the question by taking a closer look at the opinions in Montana and New Mexico.

In Montana, the state Supreme Court declined to determine whether there was any state constitutional right to aid-in-dying. It instead held (in *Baxter v. Montana*, 2009) that a physician who prescribes a lethal medication for a patient who wants to die has not violated the state's homicide law. (The state has no separate law on suicide.) The key question was whether a person's consent could ever be a defense against murder. The court held that it was not against public policy for the consent of a competent terminally ill patient to count as a defense to the charge of murder brought against a physician who aids that patient in dying. This effectively left aid-in-dying legal in the state. But it also left the practice unregulated by the state. In the five years since the decision, bills responsive to the court holding—one that would regulate the practice of aid-in-dying and another that would declare it illegal—have stalled in the legislature.

The court case in New Mexico (*Morris v. New Mexico*, 2014[1]) is undoubtedly of greater significance to the rest of the states. In that case, a state trial judge has held that the state constitution protects a fundamental right to aid-in-dying and that the state's assisted suicide law is therefore unconstitutional when applied to aid-in-dying. The holding is based on the state constitution's due process clause, which echoes the U.S. constitution's protection of "life, liberty and property," and also on a separate section of the New Mexico constitution that guarantees certain "inherent rights," including "safety and happiness." The case is currently on appeal.

The *Morris* opinion is as interesting for what it declined to hold as for what it held. Plaintiffs (a cancer patient and two physicians, represented by lawyers from the American Civil Liberties Union of New Mexico and Compassion and Choices) advanced several theories in addition to those that prevailed.[2] The first of these was that aid-in-dying cannot be prosecuted under the state law against assisted suicide because it is not, in fact, a form of suicide. Plaintiffs argued that aid-in-dying is a reasonable medical choice made by a patient already facing inevitable death and that it is therefore not the sort of action contemplated by the drafters of the assisted-suicide statute. A related count argued that the term "suicide" is sufficiently vague that it would be an unconstitutional denial of due process to apply it to an aid-in-dying case. The court's opinion explicitly rejects these claims, holding that aid-in-dying clearly falls within the definition of assisted suicide under New Mexico law.

Plaintiffs had also alleged that the state prohibition on aid-in-dying violated the state's constitutional guarantee of equal protection of the laws. Some terminally ill patients, the plaintiffs argued, legally receive physician assistance in dying when a physician withdraws life-sustaining treatment at their request. Others legally receive terminal sedation. To permit these kinds of physician assistance for some terminally ill patients while prohibiting aid-in-dying via lethal medication is to treat similarly situated classes of terminally ill patients differently without justification. But the trial court simply did not address this equal protection claim since it found a due process–inherent rights constitutional right to aid-in-dying. Nor did it address the plaintiffs' free-speech claim, which was to the effect that the law against aid-in-dying effectively prevents physicians from speaking truthfully to their patients about legitimate medical end-of-life options.

Unsurprisingly, given that they are being brought by some of the same attorneys, the cases recently filed in New York and California include pretty much the same claims as were made in *Morris*: statutory interpretation claims about whether aid-in-dying is "suicide," state constitutional claims of a fundamental right to aid-in-dying, equal protection

claims, and free-speech claims.[3] What are we to think of these cases?

First, the *Morris* case may signal which of the counts are apt to succeed in other states. Of course, much depends upon state-specific history of the development of due-process law and upon the other guarantees made in different states' constitutions. But *Morris* strikes me as a fairly clear signal that statutory-interpretation claims are not apt to succeed in states that have existing laws against assisted suicide. It is difficult to imagine a judge holding that a patient who ingests a lethal medication with the intention of ending her life is not committing suicide, as that term is commonly defined in state statutes. Of course, a person who chooses suicide over a painful and inevitable death from cancer is not making the kind of choice legislators had in mind when they passed laws against assisted suicide, but they are still committing suicide. And the "aid-in-dying isn't suicide" claim clearly cannot be brought in states where legislators have recently and explicitly banned "physician-assisted suicide" under that name. (There is a further objection to the aid-in-dying terminology, namely, that if it is read as an ordinary English phrase, then it is broad enough to include euthanasia, and that may scare some people off.)

Next, it may well be that state courts follow *Morris* in finding a "fundamental right" analysis preferable to an equal-protection analysis. It may be tough for a court to make the case that a terminally ill patient who needs a prescription for lethal medication to die is "similarly situated" to one who can die merely by withdrawing consent to continued life-sustaining treatment. It may be more attractive for courts to build on existing state and federal judicial language stressing the importance and privacy of making end-of-life decisions in consultation with a physician.

What should we make of filing cases as an activist tactic?

From a purely pragmatic point of view, if one supports (as I do) a legal right for the terminally ill to choose to end their suffering by using lethal medication supplied by a physician, then the cases have one obvious sort of merit: they have the potential to bring relief to the suffering more swiftly than legislation. Moreover, there is little pragmatic downside, from the advocacy point of view, to bringing the suits: if plaintiffs are victorious, then the right is established that much sooner; if plaintiffs lose, it is still open to them to advocate for change via referenda and legislation. Better still, the court case and legislative tactics can be run in tandem—as indeed they currently are. Both the New York and the California legislatures, after all, are looking at recently filed Oregon-style Death with Dignity bills.

But bringing such cases has a different sort of pragmatic downside and also some political downsides. Consider the current situation in Montana: aid-in-dying is legal, but legislative paralysis has left the state with no safeguards or standards in place for its exercise and no formal mechanism for gathering information about the practice.

If the *Morris* case is affirmed, then New Mexico may soon face a similar situation, or possibly a worse one. Because the Montana case was decided on the basis of state statutes only, the Montana legislature can, eventually, either regulate the practice of aid-in-dying or declare it illegal. But the *Morris* case is decided under the state constitution. If it is affirmed on those grounds, then it is possible that the members of the New Mexico legislature will be faced with the need to regulate a constitutionally protected right of which they collectively disapprove (if they do). Anyone familiar with state law efforts to cabin and constrain the U.S. Constitutional right to an abortion understands how that might work out. The abortion parallel ought, also, to remind us of the resentment that can be caused when a new legal right is read into a constitution by (what opponents call) "activist judges."

The legislative process is slow and painful and is apt to produce a national patchwork of different state approaches to end-of-life care—but there will surely be legislative progress on Death with Dignity in many states. The baby boomers are aging; they have faced their own parents' deaths and are determined, now, to manage their own with every available tool. The court system has the potential to short-circuit the debate and to offer swift comfort to some of those who need it most. But appeal to it has downsides of which we ought to be aware.

1. The *Morris* opinion is online at http://agoodgoodbye.com/wp-content/uploads/2014/01/199446010-Physician-aid-in-dying-Ruling.pdf.

2. See the *Morris* amended complaint at https://www.compassionandchoices.org/user-files/Morris-v.-New-Mexico-Amended-Complaint.pdf.

3. The California complaint can be found at http://www.disabilityrightslegalcenter.org/sites/www.disabilityrightslegalcenter.org/files/2015-02-11%20CA%20Aid%20in%20Dying%20Complaint.pdf, and the New York complaint at https://disabilityrightslegalcenter.org/sites/www.disabilityrightslegalcenter.org/files/Aid-in-Dying%20Complaint%20FINAL.pdf.

DOI: 10.1002/hast.443

This column appears by arrangement with the American Society for Bioethics and Humanities.