Ideas & Trends

The Justices' Life-or-Death Choices

By DAVID J. GARROW

LAST week's decision by a Federal appeals court striking down a 19th century New York criminal law against aiding or abetting suicide has thrust a new question to the top of the nation's legal agenda: Do terminally ill patients have a constitutionally protected right to choose physician-accelerated death?

New York's law was actually not the first to fall; just four weeks earlier, another Federal appeals court held a similar Washington State statute unconstitutional. And now the Supreme Court, which both states will petition for review, will have two fundamental choices to make.

First, will the Justices choose to address a legal and political debate that bears remarkable similarities to the battles over abortion that preceded the Court's 1973 decision in Roe v. Wade? Second, if the Justices do hear either or both cases, which of at least three possible avenues of decision outlined by the lower courts might they follow?

The Liberty Theory

In the Washington case, an 8-to-3 majority of the United States Court of Appeals for the Ninth Circuit relied on the constitutional "liberty" reasoning articulated in *Planned Parenthood v. Casey*, the Supreme Court's 1992 reaffirmation of a woman's right to choose abortion. That freedom, the appeals court held, also applies to a terminally ill, mentally competent adult's right to physician-assisted suicide.

In New York, two judges of the United States Court of Appeals for the Second Circuit ruled that under the Fourteenth Amendment's equal protection clause, the state should not be allowed to ban physician assistance to terminally ill patients seeking to self-administer lethal doses of prescription drugs while other terminally ill patients are allowed to hasten their deaths by ordering life-support systems removed. The third member of the panel, Judge Guido Calabresi, concurred separately, arguing that the 19th century law was unconstitutional but could be upheld if the legislature chose to re-enact its main provisions in light of modern medical, legal and ethical standards.

Judge Calabresi's analysis points toward a "right to die" decision that would vitiate existing statutes while inviting the states to enact new laws concerning terminal illness. Such an outcome would mirror the High Court's initial resolution of constitutional challenges to the death penalty in 1972, when it voided all the existing statutes; four years later, the Court upheld a raft of newly enacted death penalty statutes.

But it is the pre-Roe abortion controversy that the present-day constitutional debate over a "right to die" most closely resembles.

In 1969, two court decisions, one in California and one by a respected Federal district judge in Washington, D.C., Gerhard Gesell, suddenly raised the novel possibility that women's access to abortion, which had been debated only in terms of "therapeutic reform" laws allowing case-by-case medical approval, could instead be envisioned as a constitutional right.

Within six months, abortion laws were under constitutional attack in cases across the country; one of these, in Texas, was Roe v. Wade. Legislatures in Hawaii, New York and Alaska repealed criminal penalties, and voters in Washington State approved a referendum legalizing abortion. In 1971, with a long train of abortion law cases headed toward its docket, the Supreme Court agreed to hear the Roe case and Doe v. Bolton, a similar case from Georgia. Waiting on the sidelines, in the event that another tack would be necessary, were abortion doctors appealing criminal convictions.

Now, the New York and Washington cases may mark the onset of a similar struggle. Constitutional challenges to similar statutes already have been filed in other states, including Florida, and legislative debates are under way in many state capitols. Meanwhile, Dr. Jack Kevorkian again is standing trial on criminal charges in Michigan, where prosecutors may stand their best chance yet of winning a conviction.

Either the Ninth Circuit ruling or Judge Calabresi's analysis in the New York case, Quill v. Vacco, may prove attractive to the High Court.

Mystery of Life

Writing for seven of his Ninth Circuit colleagues, Judge Stephen Reinhardt said the Washington law could not pass muster under the Supreme Court's 1992 decision in Casey, which had stated: "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." Judge Reinhardt stressed that "the compelling similarities between right-to-die cases and abortion cases" made Casey "a powerful precedent" for physician-assisted suicide. The three dissenters contended that the abortion right "is sui generis" and disparaged the broadly phrased definition of "liberty" as "almost comical in its rhetorical flourish."

The Second Circuit decision relied not on the abortion-rights precedent but on an equal protection argument. "New York does not treat similarly circumstanced persons alike," Judge Roger Miner wrote. "Those in the final stages of terminal illness who are on life-support systems are allowed to hasten their deaths by directing the removal of such systems," while others "are not allowed to hasten death by self-administering prescribed drugs." He added: "Physicians do not fulfill the role of 'killer' by prescribing drugs any more than they do by disconnecting life-support systems."

Judge Calabresi took a different approach: "In extremely difficult cases in which neither the Supreme Court, nor constitutional language or tradition, gives clear guidance, ... no court need or ought to make ultimate and immensely difficult constitutional decisions unless it knows that the state's elected representatives ... assert through their action ... that they really want and are prepared to defend laws that are constitutionally suspect."

If the Supreme Court wants to address the right-to-die issue without invoking its abortion precedents, Judge Calabresi's analysis shows the way. Even if the Justices decide not to take these two cases, the issue is certain to come back to them — again and again.

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The Supreme Court may yet face an appeal by Dr. Jack Kevorkian. Above, a supporter in Detroit.

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