

Federal judge says Oregon euthanasia law may violate Constitution

by Linda Everett

On Dec. 8, a U.S. District Court blocked the state of Oregon from enforcing its "assisted suicide" law, which passed as Ballot Measure 16 in the November election. Just as the law was about to take effect, U.S. District Court Judge Michael R. Hogan issued a temporary restraining order in response to a lawsuit that claimed that terminally ill patients, under the new law, face imminent and irreparable loss of their constitutional rights, including their right to life.

On Dec. 27, to the consternation of the Oregon Attorney General, who is named as a defendant in the suit, among other state officials; the Hemlock Society and the Oregon Right to Die Committee, which sponsored Ballot Measure 16; and the American Civil Liberties Union (ACLU), all of whom have either countersued or joined as intervenors with motions to dismiss it, Judge Hogan issued a 27-page preliminary injunction barring the state Attorney General, the State Board of Medical Examiners, and a state medical center from enforcing Measure 16. "This law, for the first time in the history of this country, authorizes physician-assisted suicide for the terminally ill. The law invokes profound questions of constitutional dimension. The narrow issue presented at this juncture is whether those questions justify a brief delay in the implementation of this law," Hogan said. "I find that the balancing of the important factors in this case merits a postponement of the implementation of the legislation until the constitutional concerns are fully heard and analyzed." He set Feb. 14 as a trial date.

The ruling holds promise that a scrutiny, not simply of the Oregon law, but of some of the rulings that are rocking this country from coast to coast with endorsements of the Nazi crime of euthanasia, may be forthcoming.

Because a terminally ill person allegedly "requests" suicide help, there is a general willingness on the part of the public to diminish the culpability of those involved, and to diminish the gravity of the crime itself. Instead of levying charges of murder, or genocide, the crime of providing the lethal means to exterminate a human life is known in today's parlance as "assisted suicide."

With that label, the onus of the crime is wittingly shifted away from those who provide the means of murder (physicians, hospitals, nursing home staff), away from state authorities who heretofore enforced laws and policies to prevent

murder, and away from the established infrastructure that encourage euthanasia (economic and industrial collapse, health insurer-controlled health care delivery systems, malthusian bioethics), onto the individual who "wants" to die. Such a philosophy fits neatly within the New Age holistic health care of "personal responsibility," and is a dangerous corollary of the "Conservative Revolution" ideology of Newt Gingrich and Alvin Toffler that there should be less government obligation in safeguarding the welfare of the nation.

There is no 'right' to die

Assisted suicide advocates argue the individual's "right" to be murdered as "constitutional" (as do the Oregon Right to Die Committee and the ACLU in their briefs in this case); would forfeit the individual's constitutionally guaranteed protections of the inalienable right to life; and would dismiss any federal, state, or local government responsibility to provide basic economic infrastructure, including health care delivery systems, to ensure that right to life.

In this case, defendant State of Oregon argues that the patients and doctors who challenge the suicide law, "claim that because they have a constitutional interest in life, they are constitutionally *entitled* to state protection against conduct—assisting in a suicide—that impairs that right" (emphasis in original). The euthanasia lobby claims that Measure 16 has all the adequate safeguards needed to protect patients. But the state argues, "[T]he Constitution does not require a state to protect an individual from possible—or even likely— injury or death by another, let alone harm to an individual who knowingly and willingly chooses death."

The plaintiffs (two physicians, terminally ill patients, a residential care facility, and the operators of a residential care facility) said, "Measure 16 violates the Equal Protection and Due Process Clause of the Fourteenth Amendment, the First Amendment rights of freedom to exercise religion and to associate, and the Americans with Disabilities Act." Judge Hogan said that these claims would be examined at trial.

Patients face 'imminent injury'

Judge Hogan established that the terminally ill patients and physician plaintiffs have "standing" in "invoking federal

court jurisdiction,” a position bitterly contested by the state and the intervenors. The terminally ill plaintiffs oppose suicide, but claim “that they may, at some future time, request physician-assisted suicide due to undue influence caused by judgment-impairing depression, or other inappropriate influence,” Hogan said. They meet the minimum constitutional mandate for standing, since the patients face an “imminent” injury under Measure 16. “If a terminal patient does not have standing, who does?” Hogan asked.

Judge Hogan also found that the physician plaintiffs, oncologist Gary Lee and William Petty, whose specialty is gynecologic oncology, have met several criteria for third-party standing. Lee and Petty state, for the purposes of standing only, that if their patients commit suicide, they face direct financial impact on their practices and “injury in fact” if Measure 16 goes into effect. The judge found that “the physicians demonstrated sufficiently close relationship with their patients,” the majority of whom are cancer patients expected to die shortly.

Dr. Lee’s affidavit states that “some of his patients fall into such severe depression that they become dysfunctional. Several have approached him requesting assistance in ending their lives.” He said almost no one chooses suicide if his or her physical, emotional, social, and spiritual needs are met, but that he does not have specialized training in identifying debilitating depression or suicidal tendencies. Both doctors believe that “[s]ignificant numbers of their patients will seek physician assistance in ending their lives prematurely due to severe depression or undue influence, if Measure 16 takes effect.” Judge Hogan found that they have standing “to protect constitutional rights of their patients.”

Measure 16 allegedly does not obligate any health care provider to participate in providing suicide, but the facility opposing suicide cannot discipline or deny privileges to doctors who perform it. Doctors or facilities opposed to suicide must refer patients to hospitals or doctors who will provide it. But, this makes doctors and residential care providers who oppose suicide, *complicit* in carrying out a suicide, and violates their First Amendment rights to free exercise of religion and to free association. Judge Hogan found “serious questions regarding an infringement on religious beliefs,” and that “the loss of First Amendment freedoms even for minimal periods of time may constitute an irreparable injury.”

Equal protection under the law

Plaintiffs allege that Measure 16 denies the terminally ill equal protection under the law. Under Oregon law, a person may be convicted of manslaughter for intentionally causing or aiding another to commit suicide, and provides commitment proceedings for anyone with a mental disorder who is “dangerous to self.” But Measure 16 creates exceptions, such that terminally ill patients are not covered by that law, and prohibits criminal liability for anyone who aids in a suicide

under its terms. The Equal Protection Clause of the Fourteenth Amendment states that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.”

The judge raises several due process questions: If Measure 16 deprives those who have the disability or a terminal illness of protections of their right to live, because it does not guarantee that the choice to end life will be both informed and voluntary, “does Measure 16 deprive a person of constitutional rights? Before a state can allow an individual to waive a federal constitutional right, must it also ensure the waiver is *voluntary and informed*?” Judge Hogan cited research showing that “95% of persons who wish to commit suicide are suffering from depression or emotional disorders that could be eliminated with support, therapy, or medication.” Another study showed that 94% of suicides had a psychiatric illness at death; 25% had seen a doctor within 24 hours of their death, 41% within one week of death, and 70% within one month of death. The doctors failed to diagnose depression.

Hogan found “interesting” the claim that under Measure 16, disabled terminally ill individuals are unlawfully deprived of protections afforded other citizens, violating the Americans with Disabilities Act.

Irreparable harm

In his complaint, Dr. Lee says that depression is generally undertreated, and alleges that depression and the debilitating effects of terminal illness make his patients “highly susceptible to the suggestion that their lives are not worth living.” Contrary to the state’s claim that such patients will “suffer absolutely no harm whatsoever,” Hogan found that the state and the euthanasia lobby fail to address the issue of persons pressured into suicide by depression or undue influence. In fact, the state claims that the right to “protections afforded by criminal homicide and civil commitment law—is not a fundamental constitutional right.”

Judge Hogan wrote, “Death is overwhelmingly final and not subject to reversal, mitigation, or correction. Although death may be viewed as a release from suffering, it is nevertheless the end of life. . . . Death constitutes an irreparable injury and I find that the possibility of unnecessary death by assisted suicide has been sufficiently raised to satisfy the irreparable harm request for a preliminary injunction.” Citing *Cruzan* (1990), he said, “An erroneous decision to withdraw life-sustaining treatment . . . is not susceptible of correction.”

Judge Hogan concluded his decision: “Although the status quo will be regarded as a hardship for some terminally ill patients who want the option of physician-assisted suicide to be immediately available, the public interest in protecting vulnerable citizens from the irreparable harm of death is greater. Surely, the first assisted suicide law in this country deserves a considered, thoughtful constitutional analysis.”