Will the Supreme Court ban physician-assisted suicide?

by Nancy Spannaus

At the conclusion of the two hours of oral argument on the question of physician-assisted suicide, held before the U.S. Supreme Court on Jan. 8, 1997, there was near unanimous conjecture by observers that the nation's highest court would *not* affirm a Constitutional right to that mode of murder. That is what the court is being asked to do by right-to-die crusaders from Washington State and New York State, who won rulings overturning state bans on assisted suicide in the Ninth and Second Circuit Courts of Appeals, respectively. Bringing the matter to the court, in defense of bans on assisted suicide, were the states of Washington and New York, which sought to overturn the Circuit Court rulings.

Unfortunately, most of the argument missed the critical point. No one among the Justices or the lawyers before the bar, raised the real issue: whether the U.S. Supreme Court was going to allow the violation of the Nuremberg standard, according to which Nazi doctors were condemned for crimes against humanity, by permitting Nazi euthanasia to go ahead under U.S. law.

It would be a hideous travesty if the court were to rule in favor of the euthanasia advocates, thereby declaring a "right" to physician-assisted suicide. But it would also be a grave abdication of responsibility if the court simply "left it to the states" to do whatever they want in this matter of international, and Constitutional, law. Such a procedural ruling—which is, indeed, what the Justices seemed to be leaning toward—would fail to *protect* U.S. citizens, as they should be protected, from practices that can only be honestly described as "crimes against humanity."

'Lives not worthy to be lived'

The issue of Nazi euthanasia was only raised in one friend of the court brief submitted to the highest court. This was by the Schiller Institute, the think-tank headed by Helga Zepp LaRouche, with a long record of fighting the revival of the Nazi practices (see *EIR*, Nov. 22, 1996, "Will the U.S. Supreme Court Allow Nuremberg Crimes?" which includes excerpts from the brief). While other *amicus* briefs opposing physician-assisted suicide made strong arguments against the practice, many of those arguments, such as those of New York State and Washington State, ceded considerable ground to the idea of condoning "mercy deaths," itself a very slippery slope, as the Netherlands example has shown.

For example, the state of New York based its appeal, in both written and oral argument, on the distinction between a terminally ill person deciding to starve or dehydrate himself to death (okay), and that same person having the right to demand a lethal injection (physician-assisted suicide, not okay).

Of course, as the first lawyer to address the court, Assistant Washington State Attorney General William L. Williams, said, the intent of the right-to-die advocates is by no means to confine the practice of "mercy killing" to a small group of people who are somehow agreed to be "terminally ill." Williams cited particularly the situation in Oregon, where a right-to-kill referendum was voted up, and is now being held up in the courts. Those arguing for the right to kill, Williams said, admit that they will seek to expand the class of people to whom it's "offered," once it is approved.

It was this comment that led Justice David Souter to ask a critical question. (Because note-taking was not permitted in the section where this author was observing, the following quotes are mostly from the transcript by the *Washington Post.*) Souter said: ". . . the argument runs [that] . . . the practice of assistance . . . is going to sort of gravitate down to those who are not terminally ill, to those, in fact, who have not made a truly voluntary or knowing choice. And ultimately it's going to gravitate out of physician-assisted suicide into euthanasia. . . . I'm not sure how I should weight or value that risk or those risks. . . . What empirical basis do I have for evaluating that argument?"

Now, you wouldn't think that Justice Souter would need an "empirical basis." In fact, the argument for physician-assisted suicide assumes the existence of, or creation of, a category of lives "not worthy to be lived." Such a category is precisely what participants in the Nazi doctor trials under the Nuremberg Tribunal warned against, as the "small beginnings" from which the hideous atrocities flowed. It is a question of *law,* not empirics, that should presumably concern a Supreme Court Justice.

But, Assistant Attorney General Williams attempted to answer him. After saying that there was no public experience in the United States, given that all states ban assisted suicide, Williams cited the Netherlands, and then the crucial issue—"Germany in the 1930s, of course."

A group of people with disabilities, calling themselves Not Dead Yet, demonstrates outside the U.S. Supreme Court on Jan. 8, while the court heard arguments over physician-assisted suicide. The real issue facing the court is whether the United States will allow the violation of the Nuremberg standard, which condemned Nazi doctors for crimes against humanity.

Justice Souter, and Justice Ruth Bader Ginsburg, who was also pursuing this "pragmatic" line of questioning, both failed to take up this highly accurate allusion to the history of Nazi euthanasia.

'The systemic dangers are dramatic'

The only other instances in which the argument touched on the crucial issue of Nazi killing, came indirectly during the argument by U.S. Solicitor General Walter Dellinger, who was given permission to speak on behalf of both Washington State and New York State. Dellinger noted several times, that if the court were to give a right to physician-assisted suicide, it would likely become the "treatment of choice" for many elderly people. Dellinger said:

"States have long had laws that affirm the value of life by prohibiting anyone from promoting or assisting a suicide and I believe that no one disputes the constitutionality of those laws as a general matter. The actual question before the court is whether the Constitution compels an exception to those laws here. In our view it does not. . . . While the individual stories are heartrending . . . it's important for this court to recognize that, if you were to affirm the judgments below, lethal medication could be proposed as a treatment, not just to those in severe pain, but to every competent terminally ill person in the country."

And later: "I would refer you [to] the New York State task force address. . . . [T]hey note that one can posit ideal cases in which all recommended safeguards would be satisfied; patients would be screened for depression and offered treatment; effective pain medication would be available; and all patients would have a supportive, committed family and doctor. Yet the reality of existing medical practice in doctors' offices and hospitals cannot generally meet these expectations. . . . The systemic dangers are dramatic. The least costly treatment for any illness is lethal medication. And the medical profession tells you in briefs . . . that we have a system in which we are struggling to try to provide proper treatment for pain and for depression."

And later: "The fact that 25% unnecessarily die in pain shows the task awaiting the medical profession, but it's not a task that calls for the cheap and easy expedient of lethal medication rather than the more expensive pain palliative."

'Not Dead Yet'

Underscoring the point of the systemic danger, was a demonstration being held outside the Supreme Court by the activist right-to-life group, Not Dead Yet. Arriving in wheelchairs, hundreds of these handicapped people were vocal in their opposition to physician-assisted suicide, and sported signs reading: "Hitler would be proud," and "We need assistance in living, not dying."

Speaking against euthanasia were New York's Cardinal Bernard Law, former Surgeon General Everett Koop, and others; speaking in favor of it, were the Hemlock Society and smooth-talkers including New York right-to-die advocate Dr. Timothy Quill, and the lawyer who spoke for him before the court, Lawrence Tribe.

A ruling is not expected until summer.