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Proposition 119

by
Peter J. Riga

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It is extremely important for every state in the Union to observe the results of a popular referendum in Washington State known as Proposition 119, on November 5, 1991. (*Editor's note: This article was written several months prior to the referendum election. The referendum was defeated.*) If it passes there, I believe that within the next decade, similar measures will be passed in almost every jurisdiction of the U.S.

Proposition 119 is fairly straightforward: A patient who is determined by two doctors to have less than 6 months to live and who is in an otherwise terminal or irreversible condition and who freely and competently asks in writing witnessed by two disinterested people, for aid in dying, has the right to have a doctor help him/her die. Such a doctor will not be criminally or civilly liable for such aid in dying.

There are confusions and details to be ironed out: What is an "irreversible condition?" How can the six month period be determined? Is there no difference between "let die" and "help die?" Is the legal liability (or lack of) for the doctor the same for taking away sustaining instruments in a PVS (permanent vegetative state) as it is for actively helping the patient to die? We should remember that just as in Holland where doctor assisted euthanasia is permitted but not legal (it is best to say that in Holland such doctors will not be prosecuted), that by a sleight of hand both letting die and active euthanasia are both called by one term: euthanasia; that this telling confusion is also present in Washington's Proposition 119. "To let die" means taking away machines, IV's, artificial feeding (except those necessary to make the patient comfortable) when it is determined that none of these will help the patient recover; "to assist in dying" means to administer a deadly potion or drug to the patient to kill him/her. Only the latter is properly euthanasia but Proposition 119 calls them both "euthanasia."

Aside from these problems, there are deeper questions which should be asked before citizens approve similar measures in their jurisdictions. Consider the following three points:

1. *Changed Function and Image of the Doctor.* No matter how much we invoke the rubric of privacy and self determination, when the patient enlists

the help of a doctor, it becomes a social act. Besides each doctor determining his own conscience — since what he does is not a medical act (with all its technical expertise to determine the kind and amount of lethal substance) but a moral one. To kill is never a technical act; it is always and essentially a moral act.

Traditionally every modern society has tightly bound a doctor's duty by a Hippocratic oath in the following ways: 1) to guard the confidentiality of the patient; 2) to have no sex with the patient and 3) to never give or offer, even when asked to do so, any lethal potion or drug to the patient. While all ancient societies (except Israel) practiced private euthanasia, no society ever has permitted its doctors to privately kill. Doctors were seen as healers of patients, not executioners. All these societies severely restricted the agents of death: soldiers under orders of the state, the state's execution in capital punishment and self-defense (private suicide was also permitted in ancient societies to avoid dishonor). These societies *never* confused the role of healer and the role of executioner.

Proposition 119 will radically change the nature of the doctor's function, thereby introducing profound confusion into the doctor's role. It was precisely because the doctor was dealing with life and death matters by his ministrations, that all ancient societies forbade him absolutely from being executioner. Proposition 119 will add the doctor as an instrument of private killing and expand what for 200 years, societies have been trying to restrict (vengeance, duels, lynching, private wars, honor killing, etc.). The reason? Killing is a contagious disease not easily stopped once put in motion.

This contagion of killing can easily be seen in our day in Germany from 1936-1945. The gas chambers started with the mentally incompetent, then the orphans, then the aged in homes, then wounded veterans (about 370,000 altogether). Only after that, were the ovens sent to the East to do their work on Jews, Gypsies, Poles, dissidents, etc. All these ministrations as well as construction of the gas chambers themselves were created and administered by the finest doctors in Germany who were in their day the finest doctors in the world.

The doctor's image will therefore correspondingly change from exclusively healer (exclusive up till now) to healer-executioner and all the confusion and ambiguity that that concept will bring with it. The doctor's role henceforth will be ambiguous and feared since he is no longer bound by any Hippocratic absolute not to kill or aid in killing.

More profoundly, the doctor's image as healer was always seen as an image of hope, no matter how slim the chances of the patient and then as comforter. Now that image will also be one of despair, darkness and instrument of nothingness which he will bring about. How can there be health when there no longer is a patient? How can there be healer when the doctor brings about nothingness?

2. *Self Determination, Privacy and the 14th Amendment:* These rights have been vindicated by courts over the past decade: A person has autonomy over his body and has the right to refuse any and all medical treatment in the name of privacy. He can do this personally, by a written instrument ("living will") or by a durable power of attorney. If the patient has left no writing, the next of kin may show this will of the patient to be removed from machines by preponderance of

evidence (or as in the *Cruzan* case) by clear and convincing evidence — a more stringent standard.

But courts have gone beyond this personally expressed desire. In PVS states where the patient has left no directive or expressed no desire, courts have appointed guardians or next of kin — sometimes even without direct court approval — to make a substituted judgement for the patient. (What the patient would have done had he/she been competent to do so.) This is particularly dangerous for the incompetent, the retarded or feeble aged. Such substituted judgements have been permitted by Courts (*In re Saikowitz* in Massachusetts and *In re Conway* in New Jersey). This is extremely dangerous and fraught with danger.

There is little question that just as courts in function of the Equal Protection Clause of the 14th Amendment have gone from written directives by patients to substituted judgement for the removal of machines and nutrition; so too there is grave danger of euthanasia for the incompetent and the aged-feeble which is also starting out as a freely consented document signed by a competent person with a terminal disease where death will come about in six months. How can we be sure that the same “slippery slope” will not happen in euthanasia as happened in the case of machine-tube-nutrition removal in PVS cases? Why can't we make a case under Equal Protection for the incompetent and the feeble aged who have never agreed to be euthanized? The answer is that we very easily can so that no one will be safe as happened in Nazi Germany.

Secondly, self determination in euthanasia cases is never that. Patients need the help of doctors to kill themselves so that not only have we changed the concept of murder; we have enlisted another in our thanatonic act which is now both social and not just self determinative. I have given my autonomy over to another — for whatever reason — when, ironically, at the very moment of my self determination act in bringing about death, it is another to whom I have given my “self determination” and who then kills me. This is self contradictory.

3. *What Should We Do To Avoid Misguided Law Concerning Euthanasia?*
Most people fear dying, not death. That is, they fear that they will be needlessly hooked up to machines, forced to endure humiliating procedures which are generally useless and will inevitably deplete whatever resources they have saved for their family. What can be done?

a) We must learn more about being with and comforting the dying. Most people do not want to die but they want to live well while dying. When they can't, they in fact are tempted to choose euthanasia. Such movements as Hospice can teach us much in this regard. To feel comforted by ones who are close, by comforting the dying, by controlling pain and by being esteemed as a valued person to the end. Such care is critical if people are not to choose the despair of euthanasia. They must *feel* that their end will be without pain and in the dignity of human care and concern.

b) We must educate people about directives, living wills, durable power of attorney, etc., so that there be no prolongation of dying, of useless medical care, of letting people go when the time has come to die. This requires education at every social, educational, ecclesial and legal level. The New Federal Law directed at

hospital admissions is a step in the right direction.

c) "Inhumane" is a term used for animals who make nothing of their lives, who have no future, who do not know that they are dying. Neither can they give their lives and death meaning. People are distinguished from this because they are *human*, that is, they can give meaning and significance to their lives. It is we, the not-immediately dying, who can help the presently dying in this respect by our care and concern, by our presence and our love. By helping the dying live well while dying. The despair of death is thereby removed and the hope of life remains in the dying till the very end. It is the human spirit fighting against the despair of death for which we all have a responsibility to and for the dying. Such concern and such presence helps us all realize how vulnerable and how human we all are. Above all, it helps us realize just how deeply a human family we really are.
