Laplante, Anik

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À: Commission spéciale sur la question de mourir dans la dignité - Commissions
Objet: Dying With Dignity, Select Committee, Brief on Consultative Paper

Date: 24 June 2010
From: Christopher B. Gray, Dept.of Philosophy, Concordia University, Montreal.
To: Select Committee on Dying With Dignity
c/o Anik Laplante, Committee Clerk, Parliament Bldg, 1035 rue des Parlementaires, Quebec G1A 1AA3, csmd@assnat.qc.ca

Re: Brief on Consultation Paper ¨C Substantive issues

Executive Summary:
¡ñOnly part of this consultation is appropriate for our government to undertake. ¡ñEuthanasia and assisted suicide must remain criminalized conduct. ¡ðEach is an assault upon third parties other than the patients. ¡ðEach is an assault upon the patient, beyond one¡¯s capacity to waive protections against assault: there is no separate body; there is no property in body. ¡ñIntention needs re-appreciation to support terminal sedation. ¡ñMaximum stringency is required to control these offences in case of their decriminalization, with attention to unintended reverse effects of stringency.

To die with dignity is a hoped for consummation to all our lives, although not as important as living them that way. To attempt to facilitate that is a worthy project.

¡ñWhether it is a proper project for governments is worth investigating. Surely, putting obstacles in the way of each individual¡¯s achievement of this is impermissible, such as governmental action that interferes with Charter or Civil Code entitlements. Such are not the ones envisaged by this consultation, however.

The policies that our provincial government can address regarding dying with dignity fall within the law of persons, and especially health law. There can be no provincial intrusions upon the federal law¡¯s criminalization of euthanasia and assisted suicide. Advice may be given to our Parliament on criminal law, but not the same determinative advice that this committee is mandated to provide to our National Assembly on health law.

My remarks, stimulated by the question and the consultation paper, fall into two dimensions of your mandate: first, the desirable normative action to take; and, failing that, the protections to surround the less desirable alternatives.

¡ñFirst, euthanasia and assistance to suicide must remain criminal conduct as they now are.

¡ðEach of these offences affects badly the dignity of our deaths. Each of our deaths, painful and peaceful, is one of the important acts which we perform. No one else can undertake that act for us, whatever be the violence which one may impose upon us to require us to perform it. Taking away life does not happen, even when forced to perform that act of dying; we must do that ourselves, and any intervention purporting to do it instead of us must remain a wrongful assault, whether medicalized or street violence.

This is not to say that our dying is solitary and private. As with other important acts of life¡ªbirthing, wedding, reproducing¡ªthe action occurs with impact upon others, even when not done among others. Even a corpse discovered long after its demise evokes awe and respectful restraint.

This imposes upon persons performing their death a set of obligations towards others, as well as an analogous set upon the people related to it. The obligation of the person dying is to perform that act in a way that it does not undermine survivors¡¯ will to endure the pains and trials of their own living. Escaping from one¡¯s endurance takes away the courage everyone needs for his or her own challenges.

Even J. S. Mill, the most influential theorist upon our liberal legal system, found the limit upon his well-known ¡°harm principle¡± for limiting autonomy in the instance of suicide, and its cognate actions, recognizing that, for all of its apparent compassion, this in fact a cowardice that disables our own capacity to endure ¡°outraged fortune.¡±

¡ðI realize that this is an argument for the criminalization of suicide, contrary to our current law and outside your mandate. Be that as it may, it certainly is an argument against aiding and abetting the suicide. For that help imports a will to harm the victim. Alleviating caregivers¡¯ feelings of pity and horror, as well as their impotence and guilt at doing nothing to bring relief, not to mention the burdens that care lays upon them, is not a sufficient motive to subject another person¡¯s life to their own needs, which is the reverse of respecting the dying person. As the patient¡¯s pain and fear are contributions to the dignity of his dying, so the stalwartness of the carer is part of his or her achievement of dignity at living.

Assisting suicide, and all the more so substituting oneself in suicide by euthanizing a victim, are harms to their victim in ways that no notion of an ultimate control over one¡¯s own body can defend. First, there is no body distinct from the person that is to be controlled; what we control is our person, not some abstracted body. But no person has full control of himself at law. The autonomy of persons, quoted in the consultation paper from the start of the Charter and Code, is banded about with all the limits and circumstances which make up the rest of the Code.

Again, were there any distinction between person and body which autonomy involves, it is not the sort of distinction that one has over her property; there is no property in one¡¯s own body. The relation to body is not the relation one has to property, for few of the disposition that can be done with property can be done with body. One seldom has the fruit of one¡¯s body, natural or civil, for the offspring is its own person, and one¡¯s work usually belongs to someone else. One has no use of her body, for one¡¯s relation to body is not using it, but being it; we do things, we do not cause things to happen by using a tool, our body. And least of all have we the abusus of our body, by selling or enslaving it nor, as in the present question, by destroying it. The distinction between patrimonial and extrapatrimonial rights penetrates our law (see my ¡°Patrimony,¡± Cahiers de droit 22 (1981) 81-157, and ¡°Notion of Person for Medical Law,¡± RDUS 11 (1981) 341-415)); but the project suggested by the consultation paper overturns that framework.

¡ñThe distinction between terminal sedation and euthanasia is firmly maintained in the consultation paper. And that is as it should be. Terminal sedation is part of medical treatment; euthanasia is not, but is an intrusion upon the role of medical care. With terminal sedation, there is no need for euthanasia, nor assisted suicide.

This important distinction is jeopardized, however, by the consultative paper¡¯s dismissal of distinctions like voluntary and involuntary, as outmoded, in note 2 on page 4. This is because the distinction is based upon the reality and real impact of intention. The knowledge of likely outcomes is no different between the two; their difference rests on the intention in each action, euthanasia or terminal sedation.

This is why the conceptual paraphenalia for appreciating intention is so important to maintain. It is also why its jeopardy above is so important to resist. The naturalist dismissal of intention as a relevant contribution to the normativity of actions lies ready at hand. It is both a professional and a popular dismissal to say ¡°Get real, be practical; it comes down to the same thing.¡± That commonplace must be resisted.

That should be easy to do, once one recalls the central role of intention throughout the law, both criminal and civil. The evidentiary arrangements for showing intention are just as widespread. Intention is no more an unsupportable difference, than it is in the other domains where intent is relevant.

Until now I have urged that it is both possible and necessary for euthanasia and assisted suicide to remain as criminal conduct, and that permission for terminal sedation be retained.

¡ñIf the ill decision is made at the federal level, however, to decriminalize one or both, and to permit them, then it is essential to minimize the ills which follow from that decision. As the consultation paper recognizes, these ills include: misuse of this permission in order to help one take his own life; abuse of the permission to take another¡¯s life; diminishment of the respect for the dignity of life across the spectrum

of contexts; lessening of support for research and practice of palliative care, including pain medication.

The ill-advised decriminalization because of respect for the dignity of dying occurs only ironically in the course of diminished support for the dignity of living.

To handle the issues of palliative care, a financial award to palliative practice and research must be ensured, not only as a standard part of the provincial budget, but also from both the public and the parties' resources for their support, upon the occasion of any instance of mandatorily reported euthanasia or assistance to suicide.

Reducing the possibility for abuse of these permissions also lies within provincial jurisdiction. The suggestions for controlling abuse in the consultation paper are all useful. The level and quantity of each remedy should be set at the maximum and most demanding, in order not simply to limit abuse, but to reduce even legitimated occurances. The only limitation upon this maximization will be for those instances where is has been shown demonstratively that increased degrees of protection will have the unintended effect of increasing the number of abuses and uses of euthanasia and assisted suicide. As well, care must be taken so that increasingly stringent protocols for the practice and reporting of terminal sedations not dissuade practitioners from engaging in or reporting its incidence.

Respectfully submitted, by
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