A CALL FOR HONESTY ABOUT THE MERCY-KILLING INITIATIVE

by Elliot L. Bien ([*])

An initiative campaign is underway in California to legalize mercy killing. But the organizers dislike the blunt clarity of that term. They prefer such euphemisms as "death with dignity" or "aid in dying." Even their corporate name is a euphemism: "Californians Against Human Suffering" (an affiliate of the Hemlock Society). Nonetheless, they are not exactly calling for better treatment or more dignified care for the terminally ill, many of whom are medically indigent. Quite the contrary. The initiative calls for the legalized killing of the terminally ill, if they request it "voluntarily."

Californians need and deserve more honesty about this life- and-death subject. If the issue is clearly understood, I believe the prohibition of mercy killing will and should continue in California for the same reason it is uniformly prohibited in the civilized world. Legalized mercy killing poses too much danger for the weak and vulnerable in society, and ultimately for civilized society itself.

Let opponents be honest, too. There are some cases in which a compelling argument can be made for a legalized mercy killing. We can all imagine a fully competent and mentally healthy adult — a Socrates, say — who is completely free of any financial or personal pressures to terminate his life; for whom there is no question about the availability of excellent care no matter how long he might live; and who nonetheless wishes to be put to death by his well known and well trusted personal physician. One can well argue that accommodating such a request should not be unlawful.

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The problem, however, is that this scenario is a fiction for the great majority of Americans. For everyone but a Socrates, the voluntariness of mercy killing would be suspect at best. How "voluntary" would it be, for example, if a call for the death doctor came from an indigent elderly woman in an underfunded, understaffed, and undercaring hospital or nursing home? And what if this woman was experiencing strong pressures to die, not merely by reason of her illness, but out of her deep sense of isolation, the lack of humane conditions for continued living, and possibly an undiagnosed and untreated clinical depression? Even if the woman in this paragraph signed a multi-page document spelling out her rights, that would not make her request for mercy killing "voluntary" in any meaningful and acceptable sense of that word.

We must not become blinded to cold reality by warm images of Socrates. Assured voluntariness is the sine qua non for any serious consideration of legalized mercy killing. If a "death with dignity" or "aid in dying" were not completely voluntary, it would be nothing short of murder.

Accordingly, the real question in this debate is whether the asserted benefits of legalized mercy killing would be outweighed by the danger of pressured and involuntary killings under the aegis of the new law. I firmly believe that, once we see through the haze of euphemisms and Socrates fantasies, it is clear that the dangers of legalized mercy killing far outweigh the additional option it would provide in those few cases which might feel acceptable — that is, when voluntariness could be assured.

At the outset, it is crucial to appreciate how small a difference it would make to a Socrates if mercy killing were legalized. California law already gives competent adults virtually absolute autonomy and control when it comes to the scope and duration of their health care. Californians already have an explicit right to refuse or withdraw life-prolonging

treatment, and by a surrogate if need be. The new Natural Death Act (Health & Safety Code § 7185(g) authorizes patients to sign binding and permanent instructions "to withhold or withdraw treatment, including artificially administered nutrition and hydration, that only prolongs the process of dying or the irreversible coma or persistent vegetative state and is not necessary for my comfort or to alleviate pain." (§ 7186.5(b)) Such instructions can also be assured in advance by designating a surrogate under the Durable Power of Attorney for Health Care Act. (Civil Code § 2430)

In sum, the terminally ill already have a broadly protected "right to die" in the proper sense of that term -- the right not to be forced to live. Legalizing affirmative acts of killing would give the terminally ill precious little additional autonomy. Death will come quickly enough to those who desire it by stopping their treatment and/or life support.

By contrast, legalizing mercy killing would represent a significant danger to civilized society. It is one thing to control one's own medical treatment. It is quite another thing to legalize killing -- notwithstanding the concerted efforts by the advocates of mercy killing to erase this important distinction.

Let's be as clear as possible about this. Suppose one patient in a hospital says to his physician, "Let me die." Another patient, however, says "Make me die." The first patient is requesting autonomy: freedom from coerced treatment. The second patient is requesting that another person commit a deliberate act of killing, an act that would violate a fundamental norm of civilized society. And for physicians, it would also violate their Hippocratic Oath and the public's trust in their profession's commitment to preserve life. The Oath provides, in pertinent part: "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to that effect." As a leading commentator explained, "[T]he very soul of medicine is on trial with the euthanasia issue. . . . [I]f physicians become

licensed executioners, the profession will never again be worthy of trust and respect as healer, comforter and protector of life in all its frailty." (Stephen 3. Walsh, M.D., "The Honor Is Too Great," San Francisco Medicine (May 1988), at page 11)

Society might safely honor the wish of a terminally ill patient to be allowed to die. But it hardly follows, as the advocates of mercy killing claim, that society can just as safely compromise its firm ethical, medical, and legal prohibition against deliberately taking the life of another.

The prohibition against killing is not only designed to deter violent murders. It also stands as a bulwark against those quieter threats to the sanctity of life: coercion and abuse. Yet even with the prohibition against killing intact today, our society does a shockingly poor job of protecting the lives and dignity of those among us who are especially vulnerable — women, the elderly, children, the indigent, and the mentally ill and developmentally disabled. The sanctity of life for such people is not what it is for a Socrates.

This is no time, therefore, to be thinking about legalizing mercy killing. It would add a new and insidious threat to the most vulnerable groups in society. Those groups tend to have the poorest medical care and the fewest resources for a dignified life when illness strikes. It is those people, therefore, who will be especially vulnerable to pressures to call in the death doctor . . . "voluntarily," of course.

The risk of such pressures under a "death with dignity" law is intolerable. Yes, the current law does restrict the options of a Socrates. But that restriction is not nearly so weighty that society should risk the moral abyss of involuntary killing.

California law should therefore continue to draw the line on this issue where it is drawn universally today. The Natural Death Act carefully codifies the right to refuse unwanted treatment. But the statute just as carefully states that it "does not condone, authorize, or approve mercy killing or assisted suicide or permit any affirmative or deliberate act or omission to end life other than to permit the natural process of dying." (Health & Safety Code § 7191.5) That same line is drawn in the Durable Power of Attorney for Health Care Act (Civil Code § 2443) and, as a matter of constitutional law, in the recent opinion of a highly regarded California Court of Appeal. (*Donaldson v. Lungren* (1992) 2 Cal.App.4th 1614)

Elsewhere, that same line is drawn in the Uniform Rights of the Terminally Ill Act (See 9B Uniform Law Annotated, § 11(g)) and it has been supported by the American Bar Association (House of Delegates vote on February 3, 1992); the ABA's Commission on Legal Problems of the Elderly (unanimous recommendation on January 17, 1992); the Hastings Center in New York ("Guidelines on the Termination of Life-Sustaining Treatment and the Care of the Dying," Sept. 1987) and the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research (March 1983).

We must not blur this line between dying and killing. There is too little to gain, and far too much to lose.