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Death with dignity in New York

A recent Newsweek cover story caused much public consternation and distress.

The cover's headline, "The Case for Killing Granny," was accompanied by an illustration of a plug being disconnected. The subhead read, "Curbing Excessive End of Life Care is Good for America."

Evan Thomas's article deals first with the political impossibility of passing a bill that would in any way suggest rationing health care to seniors. A legislator who would sponsor such a bill, Thomas claims, would be signing his or her own political suicide note.

Yet, the reality is that a third of the money spent by Medicare, which provides health insurance to those aged 65 and older, goes to chronically ill patients in the last two years of life. That amount adds up to \$66.8 billion.

It is the "elephant in the room" when it comes to the health care reform debate: The problem everyone sees, but no one wants to touch.

"Americans," as Thomas writes, "are afraid not just of dying, but talking about and thinking about death."

He concludes that "until Americans learn to contemplate death as more than a scientific challenge to overcome, our health care system will remain unfixable."

As if to prove Thomas's point, the debate this summer became embroiled in the claim that President Obama's health reform plan would pave the way for government-run "death panels." The basis for the argument is a clause found on page 425 of a proposed legislative package, which would authorize Medicare to pay doctors for their time if a patient wanted to discuss end-of-life issues with his or her physician. Such a consultation would cover advance planning, including living wills, appointing a health care proxy and receiving information about hospice care. Medicare would pay for such consultations once every five years. Dispensing the information would be done only at the request of the patient. The allegation that the elderly would be required to have the sessions with their physicians was, and is, completely false.

The AARP described the efforts to twist the language of the provision and claim that it would allow the government to set up death panels as "rife with gross and even cruel distortion of legislation that would not only help seniors make the best decisions for themselves on end-of-life care, but also ensure that their wishes are followed."

Regrettably, the widespread, but wholly unfounded, threat of government-appointed death panels appears to be enough to persuade legislators to remove the consultation provision from the bill. An NBC poll released in early September showed that 45 percent of the public thought it likely the government would decide when to stop care for the elderly. House Republican

leader John Boehner, among others, proclaimed that end-of-life counseling "may lead us down a treacherous path toward government-encouraged euthanasia."

His argument ignores the fact that the proposed health care bill prohibits counseling that presents suicide or assisted suicide as an option. Yet, according to a joint study published by the University of Cincinnati, Ohio State University and Case Western Reserve University, the highest suicide rates of any age group occur among persons aged 65 or older. The study indicates that, in that age group, a successful suicide attempt happens once every 90 minutes. Further, experts in the field suggest the rate of failed suicide attempts among the elderly is even higher.

Despite such findings, at present only Oregon and the State of Washington have "death with dignity" laws permitting physician-assisted suicide. Both states passed the legislation after public approval by referendum vote. The laws do not permit Dr. Kervorkian-type assisted suicides, where the physician plays an active role in administering a lethal dose of drugs intravenously. The Oregon law, passed in 1994, survived numerous legal challenges. Another referendum on the Oregon ballot to revoke and rescind the 1994 law was defeated by an overwhelming margin (60 percent o 40 percent).

An attempt by the Bush administration to circumvent the law by prosecuting doctors legally acting under the Oregon law as being in violation of federal drug laws was struck down by the U.S. Supreme Court's decision in *Gonzales v. Oregon*. The Oregon "death with dignity" law provided that Oregon residents, certified by two doctors to be terminally ill, could request a prescription that would hasten death. The request must be in a written affidavit form, and the physicians involved must affirm that the patient was of clear and sound mind. The decision when, and if, to take the lethal dosage is left completely up to the patient.

The Oregon Department of Human Services annual report detailing the use of the "death with dignity" statute shows that in 2008, 88 people applied and 60 people died under the terms of the act. The typical participant was 72 years old, college-educated and suffering from cancer. The principal reasons cited for making the decision to speed the process of dying were the inability to participate in activities that make life enjoyable, loss of dignity, loss of autonomy and the desire to control his or her own destiny. As in all previous years, there was not a single report of coercion, abuse or misuse of the law.

In Washington state, a similar death with dignity law was enacted



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in 2008 after approval by public referendum. On May 22, a 66-year-old woman with pancreatic cancer became the first there to die by means of a drug overdose prescribed by a physician.

"The pain became unbearable and it was important to me to be clear-minded and alert at the time of my death," the woman wrote prior to taking the lethal dose of barbiturates.

The only other state that gives terminal patients the right to die is Montana, where a judge ruled that the right to die is implied under the privacy provisions of the Montana State Constitution. That case is now on appeal to the Montana Supreme Court.

In New York, the current law prohibiting death with dignity is strict. Section 120.30 of the Penal Code of the State of New York states a "person is guilty of promoting a suicide attempt when he intentionally causes or aids another person to attempt suicide."

The crime is a Class E felony, punishable by a sentence of five to 15 years in a state correctional facility.

The law was challenged in the case of *Vacco v. Quill*, which ultimately was decided by the U.S. Supreme Court. The case arose here in Rochester when Dr. Timothy Quill, a respected physician in the community, wrote an article for the *New England Journal of Medicine* that revealed he had prescribed enough barbiturates to enable his patient, a 45-year-old woman suffering from terminal leukemia, to die. The patient had discussed her wishes fully with her long-time physician, Dr. Quill, as well as with her family. She expressed her clear and unequivocal choice not to undergo the harsh chemotherapy, full body radiation and bone marrow transplant necessary to give her even a minimal chance of survival.

The Monroe County District Attorney's Office sought an indictment, under the provisions of Penal Law Sect. 120.30, when the identity of the patient was made known.

The case was presented to a grand jury, which in addition to the evidence presented by the DA heard three hours of testimony from Dr. Quill. The grand jury, which consisted of 24 jurors, refused to indict.

In a recent interview with me, former District Attorney Howard Relin said the grand jury "obviously ... reflected the sense of the

community that this was not a criminal act, but rather an act of compassion. I had no quarrel with the grand jury's decision then, and I have no quarrel with it now."

Thereafter, an action started by Dr. Quill and several other physicians sought to have Sect. 120.30 declared unconstitutional. The U.S. Supreme Court ruled there was no "right to die" under the U.S. Constitution, but Justice Sandra Day O'Connor did point out that "because everyone will fact suffering of this kind (be it to themselves or a loved one)," she had faith in the democratic process to strike an appropriate balance.

Put simply, each state had the right to decide on its own whether a death with dignity law should be adopted.

The New York State Court of Appeals has taken a strong anti-death with dignity stance. New York is the only state beside Missouri to rule that even in the most extreme circumstances, absent clear and convincing evidence of a patient not having the ability to articulate his or her wishes, the only alternative family members have is to give a "do not resuscitate" order. Realistically, that means family members stand powerless to act and physicians must provide all life-sustaining measures, no matter how burdensome, futile and painful. Attempts to nullify the ruling through legislation have failed consistently. Absent an outcry by citizens, this will remain the law of New York.

The important lesson for New Yorkers is that they must have a health care proxy, a legal document in which an individual designates to another the right to make health care decisions when he or she becomes incapable of making their wishes known. There also needs to be a living will, a legal document detailing a person's wishes regarding medical treatment to sustain or prolong life. These two documents should be filed with the person's physician. Specifying end-of-life wishes is absolutely essential in New York in order for those wishes to be valid and binding.

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