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Books in Review

Regulating Death: Euthanasia and the Case of the Netherlands

Death in the Netherlands

Regulating Death: Euthanasia and the Case of the Netherlands. By Carlos Gomez, M.D. Foreword by Leon R. Kass, M.D. *Free Press. 172 pp. $19.95.*

Reviewed by Russell Hittinger

As Carlos Gomez notes in this important book, the statute law of the Netherlands clearly prohibits euthanasia. Article 293 of the Netherlands Penal Code (enacted in 1886) stipulates: "He who robs another of life at his express and serious wish is punished with a prison sentence of at most twelve years or a fine. . . ." To date, there has been no political will by the Dutch to either eliminate or amend Article 293. Nevertheless, over the past two decades the Dutch judiciary, legislature, and the Royal Dutch Society for the Promotion of Medicine (KNMG) have reinterpreted Article 293 so as to either positively permit, overlook, or remove punishments from physician–assisted suicide.

No one has precise figures on how many patients are euthanized in the Netherlands. The Ministry of Justice claims that there are fewer than 200 cases per year; pro–euthanasia groups contend that the number reaches 20,000–which, if true, would mean that 16.5 percent of the mortality rate in the Netherlands is due to medical euthanasia. The lack of precise figures stems from the fact that physicians and other health–care workers do not report these killings as euthantic acts, but rather register the deaths as the result of cardiac or respiratory arrest. Carlos Gomez's research finds that in less than 2 percent of the cases is euthanasia brought to the attention of prosecutors, and these cases are almost never litigated. In the absence of precise statistics, the evidence on euthanasia in the Netherlands remains anecdotal, which means among other things that the practice cannot be accountable to public scrutiny.

Friends and foes of medical euthanasia in the Netherlands admit that its legal status is unclear. Court opinions since 1973 have created a patchwork of case law on what can count as an exception to Article 293. These judicial opinions have run the gamut from rather straightforward efforts to distinguish between murder and assisted–suicide for the purpose of criminal sentencing, to creating bureaucratic criteria for what can count as legally acceptable killing, to outright admitting a right to self–determination that includes the right to assisted suicide–and for the purpose of alleviating not merely pain but "potential disfigurement of personality."

And yet Article 293 stands as what lawyers call blackletter law. Recent efforts to frame a consistent body of statutory law have not been successful. Gomez speculates that the Dutch want to have it both ways: holding to blackletter law that prohibits homicide while at the same time allowing decentralized and officially deregulated decision–making by physicians when mercy or benevolence seems to call for euthanasia. In any event, prosecutors and health–care practitioners are not entirely certain whether the status of euthanasia is to be described as extra–legal, legal at the discretionary margins of the law, or in fact allowed for under a legally recognized right to privacy–somewhat along the lines of the American concept. As a prominent Dutch ethicist has described the situation, court opinions, governmental commission statements, and hospital protocols have evolved in a way that creates an interstitial "private space" for medical euthanasia.

Given the murky legal standing of euthanasia, the medical establishment is left to police itself. Efforts by the KNMG to set in–house guidelines have not proved very successful. Its criteria have included: the necessity defense, in which both patient and physician find themselves under such duress that Article 293 must be overridden; the so–called *ultimum refugium*, or last resort; voluntariness on the patient's part (which would seem to undercut the first two criteria); and provisions that only physicians may decide and administer death and that such decisions should be made in the context of collegial consultation. There are no provisions regarding the means of bringing about death, nor about how the patient's demise is to be officially recorded. Although the KNMG insists that euthanasia must be professionally and ethically limited in order to prevent indiscriminate killing, its own guidelines have not ensured any effective way either to make or enforce the relevant distinctions.

Carlos Gomez, a medical resident at the University of Virginia Hospital, went to the Netherlands in order to investigate, describe, and analyze the actual practice of med–

ical killing. In lieu of any well–formulated law or administrative policy on the matter, Gomez figured that prevailing practices furnish the best entry into the situation. While he has some interesting things to say about the philosophical and ethical facets of the issue, Gomez devotes himself primarily to description and analysis. His goal is to clarify the evolving Dutch experience so that we can determine whether or not this is a model that we should emulate in the United States.

The centerpiece of the book is a study of twenty–six cases of medical euthanasia reported by nine different health–care workers–mostly physicians–who have been involved. Although the Dutch are not very interested in distinguishing between active and passive euthanasia, it is important to note that all of these cases involve the direct taking of life through the administration of a lethal dose of drugs. Interestingly, in most of the cases, the patients elected to have the medical practitioner administer the drug rather than take it orally by their own hand.

Gomez does not disguise the fact that his data are not drawn from first–hand observations. He is also properly reticent about what can be inferred from these interviews. He argues, nonetheless, that the interviews should arouse our suspicion as to whether the Netherlands has any intelligent or effective grip on the problem of distinguishing between medical and non–medical reasons for physician–assisted killing.

Examples of that abound in his cases. We find, for instance, that of a 67–year–old divorced, childless alcoholic, who after only one round of chemotherapy for liver cancer chooses to forgo further treatment. After requesting death, the patient is euthanized with a fatal dose of pentobarital. The prosecutor is not notified, and the death is recorded as heart failure. In a similar case, a 28–year–old woman with leukemia, which had been in remission for one year, decides to stop treatment after a relapse. Despite the fact that a relapse is the norm in such cases, the physicians accede to her demand to be euthanized. In this case, the prosecutor is notified, but drops charges. A 72–year–old woman with lung cancer is diagnosed as clinically depressed. The physicians decide to go ahead with her request for a fatal injection even though an alternative anti–depressant has not been tried. The prosecutor is not notified, and the cause of death is recorded as respiratory arrest. A 32–year–old AIDS patient announces his intention to die rather than receive any treatment. Over the objections of his homosexual lover, the physicians administer the euthantic in compliance with the patient's wishes. Here, the prosecutor is notified, but he refers the case back to the hospital administrator. A 62–year–old man, diagnosed as having lung cancer, announces his intention to be euthanized unless the physicians can guarantee that all pain will disappear. Unable to give such assurances, the physicians kill him at his request, and the death is registered as cardiac arrest. The prosecutor is not notified. A neonate with down's syndrome is discovered to have duodenal blockage. The mother confesses that caring for such a child is beyond her competence, and she refuses to give permission for surgery. The physicians then accede to her request to euthanize the child in order to alleviate the suffering caused by starvation.

What seems most disturbing about these and other of the cases reported by Gomez is that there are apparently as many acceptable reasons to kill patients as there are private reasons to commit suicide. That is to say, Gomez found little or no basis in these practices for distinguishing between the canons of medical diagnosis and the merely private desire to be killed. Moreover, physicians arrogated to themselves the authority to interpret nonmedical facts, not only facts that could be described in terms of a so–called quality of life, but also what are ordinarily the facts crucial to law–not the least of which is the context in which the patient gave his or her consent to be killed. Indeed, in some of these cases, consent was ascertained merely on the basis of a remark inscribed in the patient's chart. In other words, a patient who is heard to utter "I'd rather be dead" upon learning that he has inoperable brain cancer could have implicitly signed his own death warrant.

According to Gomez's research, there are relatively few cases that would satisfy either the necessity or the last–resort criteria. Indeed, in virtually all of the cases reported in the book, additional treatments and pain–protocols were readily available. Patients were killed simply on the grounds (themselves often inexpertly ascertained) that they so desired. Gomez suggests that some Dutch physicians pay little or no heed to when they cross the threshold that separates (i) professional advice and assurance about medical treatments, and (ii) explicit discussion of euthanasia as one option among others. Inasmuch as the latter is still (in Dutch law) illegal, the medical profession is caught in a terrible sort of problem. For the physician who recommends that euthanasia be considered as an option can easily substitute a nonmedical judgment regarding an illegal act for a medical judgment that concerns perfectly legal and therapeutically sound treatments. We can agree with Gomez that no medical professional worth his salt would (willingly) allow himself to be drawn into that situation.

The case of the neonate with Down's syndrome raises yet another disturbing problem. That was certainly not an instance of necessity. Nor would it qualify as a last resort–unless last resort includes killing someone in order to alleviate pain caused by a refusal to treat the patient in the first place. Nor, for obvious reasons, would it come under the principle of individual autonomy, since that principle requires rational consent. Nor, finally, does it seem to fall in a quality–of–life category. Rather, as reported to Gomez, the decision to kill the infant was made because the mother said she was not up to caring for a disabled child. As Gomez points out, the neonate case raises the specter of the medical killing of the vulnerable, the demented, the retarded, the severely handicapped, the indigent, and the elderly–anyone, basically, who is not sufficiently alert or verbal to claim a right against someone else's inconvenience.

IF GOMEZ'S data turn out to reflect general practice–which only further investigation can determine one way or the other–it will be fair to say that the practice of euthanasia in the Netherlands stands indicted at the bar of reason. On his limited evidence, even those distinctions and procedural safeguards routinely urged by ethicists on the "progressive" side of the euthanasia issue would appear not to be observed in Dutch practice. The data are, in any case, sufficiently distressing to warrant additional research. Gomez's information may be wrong or distorted, but the burden is on the pro–euthanasia side to challenge his work on grounds beyond an abstract refutation of his second–hand method. There can be no substitute for an extensive, first–hand examination of the practice of medical killing in the Netherlands. Even on the basis of the little we know, it is fair to suggest, as Gomez reasonably puts it, that "the Dutch experience might better serve as a cautionary tale than as a paradigm worthy of emulation." That medical killing could gain entry into our culture via the interstices of case law, statute, and vague professional guidelines does not strain the imagination. It is precisely the analogy between the Netherlands and our own culture that makes this book alarming reading.

The proponent of liberalized euthanasia laws might respond that, even conceding the accuracy of Gomez's data, the problem can be fixed. It might be argued, for instance, that the problem is due in part to the fact that the Dutch have not had the political courage to eliminate or amend Article 293 of the Penal Code. The inconsistencies, contradictions, and furtive practices now in place might bespeak a problem more in law than in any inherent moral difficulty in regulating and setting limits to euthanasia. It might also be argued that the apparent breakdown of reasonable procedures for medical decisions and reports regarding euthanasia can be fixed by competent administrative boards. The need for more careful bureaucratic regulation can be cheerfully conceded, and even urged, by the proponents of euthanasia without seriously calling into question the morality of such acts. Finally, to take a lesson from the pages of American constitutional history, it could be argued that the Dutch need to recognize more explicitly a right of privacy. As in the abortion issue, a right to die in consultation with one's physician would not elimi–nate moral controversy, but it would help to establish a rights–based criterion for most of the cases reported by Gomez.

Gomez does not develop philosophical answers to these questions. He does, however, raise solid and serious moral criticisms about prevailing practices: (i) the potential, if not probable, corruption of the medical profession; (ii) the untenable sacrifice of a public good to protect merely private preferences; and (iii) the failure to protect the vulnerable. On each score, Gomez clearly states the moral nature of the problem, and why it involves an issue that is properly public and political. And on all three grounds, he has a strong case. I am also convinced that this criticism can be sustained even if one believes that the administrative facets of the Dutch experiment can be fixed.

It is true that Gomez's moral criticism is only broadly sketched rather than relentlessly argued in *Regulating Death.* Yet Gomez only promised to describe and analyze the case of the Netherlands. Measuring the book against that goal, the author succeeds. Responsible ethicists and framers of public policy will not be able to brush aside this book.

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