COMMENTARY

The Final Countdown to Medical Aid in Dying in New York

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Health Care Law

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Two bills—A995A and S2445A—have been awaiting final action in the New York Legislature since their introduction this past January. The New York Medical Aid in Dying Act would provide terminally ill patients with access to prescription medications they can take to hasten their death. If the law is enacted, New York would join 10 other states and the District of Columbia in making this option available.

New York has a complicated history with medical aid in dying (MAiD). In the 1997 case *Vacco v. Quill*, the Supreme Court found that a New York state ban on MAiD (the court uses the term "physician assisted suicide" to refer to MAiD, which is now considered a distinct concept) was constitutional. This does not mean, however, that permitting it is unconstitutional, and in 2016 the New York State Assembly Health Committee approved the Medical Aid in Dying Act. It was reintroduced in 2017 when a newly elected Legislature convened and has been reintroduced every year since then. In total, the act has been introduced eight times in as many years.

This year is different. In August, a lawsuit was filed against New Jersey arguing that the state's residency requirement for patients seeking MAiD violates the Constitution's privileges and immunities clause and its equal protection clause. Of the 11 US jurisdictions that permit

MAiD, Oregon and Vermont are the only two that do not currently require patients to be residents of the state, removing their residency requirement in 2022 and 2023, respectively.

The lawsuit in New Jersey may act as a catalyst for the state to follow Oregon and Vermont in removing its own residency requirement, which would have a major impact on MAiD legislation in New York. Given the ease of movement and proximity to New Jersey, terminally ill New Yorkers would flock to the neighboring state to avail themselves of MAiD. New York's financial incentive to keep its residents from using out-of-state services when they could be provided in-state may be enough to spark a sense of urgency to pass the New York Medical Aid in Dying Act.

What should be more effective than financial incentives are ethical reasons to pass the act. Proponents of MAiD would argue that as death is part of life, the pursuit of a good life should include the ability to pursue a good death. However, one likely cause of the historical reluctance to pass MAiD legislation is the worry that MAiD undermines health care by incentivizing physicians and health care systems to push patients toward MAiD instead of the more expensive and time-intensive medical and social supports that some patients need.

In these instances, however, MAiD is not the issue. Where a health care provider coaxes a patient to pursue MAiD to avoid financial or familial burdens, or where a physician promotes MAiD over what would be adequate traditional health care, the health care provider is misusing MAiD. When patients seek health care, cannot find or afford it and turn to MAiD as a result, it is a sign of a greater issue within the health care system. Such misuse or overuse of MAiD must not be permitted to poison the ethical analysis of its proper use in determining whether to pass the pending legislation.

Even if the New York Medical Aid in Dying Act is adopted, not everyone will be able to benefit from it. Jurisdictions that offer MAiD require that patients meet certain basic qualifications, such as being terminally ill with a prognosis of six months or less, having the capacity to consent and having the ability to self-administer the necessary medications. However, each of these requirements presents both ethical and practical issues for patients.

First, the requirement that a patient be within six months of death does not consider the distinction that patients regularly draw between "living" and "being alive." Individuals who wish to avail themselves of MAiD often suffer tremendously from chronic illness, with no relief, cure, or effective treatment. With the advancement of medical knowledge and technology, physicians have been able to keep patients biologically alive for longer, but they have not found a way to preserve or extend their quality of life.

Second, where chronic physical suffering is not the issue, but cognitive decline, patients have a difficult time qualifying for MAiD because by the time they are within six months of death they have lost the mental capacity to consent to medical aid in dying; while they do still have the capacity to consent, it is too early in their illness to be considered terminal.

Death is often thought of as brain death or physical death, not identity death. When considering the appropriate time for patients in cognitive decline to have access to MAiD, the question that must be answered is: If there is a death of the self, what is left to keep alive? To some—particularly those whose illness affects their memory and identity—ending their own life is not an act of self-destruction, but self-preservation.

If the concern is that physicians took an oath to “do no harm,” then the question is whether harm may not only be physical, but mental and spiritual as well, and whether refusing patients the opportunity to have a good death in accordance with the ethical principle “first do no harm” actually brings about a different kind of existential harm.

Finally, the requirement that patients have the ability to self-administer may be discriminatory to those with disabilities that physically prevent them from doing so. Even if a patient is not physically disabled, a terminally ill individual may be too weak to properly self-administer the medication; if he physically cannot complete the process, he may end up in a coma or suffer other serious complications.

The New York legislature should not only consider the ethical implications of passing the New York Medical Aid in Dying Act, but it should take steps to ensure that the qualification requirements are not overly exclusionary or discriminatory. After eight years, it must start acting quickly—and it likely will; if New Jersey removes its residency requirement for MAiD, New York will need to make its move or risk New York residents making theirs.

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