Protecting Suicide and Hurting Women

The states' rights rationale underlying Oregon v. Ashcroft could jeopardize reproductive and equality rights.

BY MARC SPINDELMAN

Last month in Oregon v. Ashcroft, a federal district court rebuffed U.S. Attorney General John Ashcroft's attempt to use the federal Controlled Substances Act to override Oregon's decision to legalize physician-assisted suicide. The court announced that nothing in the text or history of that law indicates that Congress intended to give the attorney general the authority to set national policy on assisted suicide.

Many in the academy (including me) have been deeply concerned about Ashcroft's conservative political maneuverings. It is thus not surprising that the District Court's opinion—viewed as a paradigmatic matter of statutory interpretation and a slap on an overreaching attorney general's wrist—drew a good deal of applause.

But at least some defenders of Oregon's assisted suicide law refused to let it go at that. Instead, they applauded and praised the ruling for what they saw as its deeper shades of meaning. The court's opinion, they declared, confirmed that it is the responsibility of the states, and not the federal government, to regulate the practice of medicine, including physician-assisted suicide. According to Compassion in Dying, a national pro-assisted suicide advocacy organization, the federal court's opinion in Oregon v. Ashcroft "confirms that the regulation of medical practice is the states' job." Sadly, in their rush to celebrate this latest affirmation of states' rights, these proponents of legalized assisted suicide appear to have lost their liberal bearings, and missed an important truth about the opinion: It is a threat to women, women's equality, and equality rights generally.

To be sure, it may be easy to acclimate to the maintenance, as advocates of assisted suicide have, that it is the plenary responsibility of the states to regulate medical practice. If credited, this suggestion presumably would protect Oregon's physician-assisted suicide experiment against a federal mandate that it be shut down.

HURTING WOMEN

But that is not all. Should it really be the state's job to regulate the practice of medicine, as a line of judicial thinking about states' rights that is eminently capable of supplanting and overturning the constitutional sex equality rights the Court may be said to have promised women in Casey (and, read in light of Casey, Roe v. Wade (1973)). In this way, at least, a state's rights victory for Oregon's assisted suicide law in Oregon v. Ashcroft may actually help the attorney general to launch the frontal assault on women's reproductive equality rights that many of us have been expecting (and preparing for) for some time.

These concerns about a state's rights ruling for Oregon in Oregon v. Ashcroft are concrete and urgent, not hypothetical.

By Marc Spindelman, Page 53
Equality vs. Suicide

SPECELMAN, FROM PAGE 51

Underlining their importance in the current litigation is the willingness that defenders of Oregon’s law have shown to offer up women’s equality rights in life in order to secure ostensibly gender-neutral rights to “dignity” in death. In papers submitted to the District Court, for instance, guardians of Oregon’s assisted suicide law chose to stake their case, in part, on the Supreme Court’s recent decision in United States v. Morrison (2000). That decision, drawing on ideas about states’ rights, dealt a staggering blow to the federal government’s ability to address the national problem of gender-based sexual violence. These guardians of Oregon’s pro-choice assisted suicide law have branded Morrison as a weapon to beat back the attorney general’s attempts to deliver the law’s coup de grâce.

As a mode of legal strategy, there is nothing wrong with using Morrison in this fashion. Oregon’s legal team uses this strategy to help make a more compelling case for a sexual-orientation-based right to self-defense and self-control. While both strategies are compelling, neither one is prepared to accept and capitalize on the constitutional protections Morrison effectively accords to gender-based sexual violence (violence that regularly results in women’s deaths)—as a predicate for the “right” to end one’s life. Not everyone is.

A FOUL PEDIGREE

To those familiar with the political lineage of states’ rights, it should come as no shock that defending Oregon’s assisted suicide law in the name of the states’ authority to control medical practice may set back the movement for women’s equality. States’ rights have a foul pedigree. Both over the years and recently, they have provided a safe-harbor for a range of unjust social practices and conditions. Among other things, defense of states’ rights, including the right to regulate the practice of medicine, has kept women in fear of physical and sexual violence in both the so-called public and private spheres. In reality, states’ rights have been much more of an impediment to women’s equality than a tool to achieve it. To strengthen them in order to safeguard Oregon’s assisted suicide law does not change that. And it moves in the wrong direction.

What states’ rights have generally meant for women and women’s equality is emblematic of what states’ rights have generally meant for members of socially subordinated groups. States’ rights have been used to uphold, and later, in some cases, undermine. Whether they have operated to allow enforcement of local sodomy laws to the detriment of the gay male community (a community that, at least so far, has been quite supportive of efforts to legalize assisted suicide). Moreover, states’ rights have been a roadblock to federal efforts designed to address age and disability discrimination. As a matter of practice, if not necessity, states’ rights have been an instrument of social subordination. In light of this history, it is not hard to see why invoking “states’ rights” to defend Oregon’s assisted suicide law is likely to undermine the federal government’s ability to promote equality and end violence.

Understood as a defeat for the attorney general, the District Court’s opinion in Oregon v. Ashcroft may not be a cause for celebration. Understood as a pro-states’ rights decision, it most certainly is.

To the editor:

Stuart Taylor’s essay on the Michigan affirmative action case (“Don’t Two-Track Race,” May 20, 2002, Page 62) omits so much that it is seriously misleading.

1. First trying out the dissenters’ charge that Chief Judge Royce Martin Jr. had “manipulated the handling of the appeal . . . to force the court to striking down the Michigan program,” Mr. Taylor then purports to set forth Judge Karen Nelson Moore’s response to the charge. Instead of reporting the substance of what she wrote, however, he merely quotes the few phrases in which she attacks the dissenters for a “shameful” breach of confidentiality that would “seriously undermine public confidence in this court” and “irremediably damage the already strained working relationship among the judges.” From this one would never know that Judge Moore had challenged the dissenters’ account as “inaccurate and misleading,” and wrote a lengthy fact-filled opinion devoted to an almost day-by-day record of the procedural events; the phrases quoted by Mr. Taylor appear only in the introductory and concluding paragraphs of her nearly 4,000 word opinion.

2. Mr. Taylor also states that “the law school’s idea of a critical mass [necessary to achieve meaningful diversity]—47 to 52—under-represented minority students out of 341 enrolled in 1998, 46 out of 339 in 1997, 54 out of 319 in 1996, and 46 out of 349 in 1995—looked like a quota to the dissenters.” But even the dissenters noted—in fact only in a footnote (n.29)—that “these percentages did deviate a bit from this tight grouping in some areas before 1995.” Mr. Taylor does not mention this concession. In fact, as Chief Judge Martin reported, “from 1987 through 1994, under-represented minority enrollment was 12.5 percent, 13.6 percent, 14.2 percent, 13.4 percent, 19.1 percent, 19.8 percent, 14.5 percent, 20.1 percent, respectively.” (From 1993 until 1998, the Law School’s under-represented minority enrollment ranged from 13.5 percent to 20.1 percent.) In 1999 to 2001, the percentages were 15 percent, 15 percent and 12 percent, respectively.

3. For some reason, Mr. Taylor does not mention that the key issues in the case revolved around diversity: whether the Baile case stands for the proposition that achieving social and ethnic diversity is a compelling state interest, and whether such diversity should be compelling. The dissenters argued extensively in the negative and as to both. As to the first, it should be noted that even Justice Sandra Day O’Connor, no friend to affirmative action, wrote in Wygant v. Jackson Board of Education, 476 U.S. 267, 286 (1986) that “although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently compelling at least in the context of higher education, to support the use of racial considerations in furthering that interest,” citing Justice Lewis Powell Jr. and Justice Thurgood Marshall in Bailes. As to the second, the courts are split. Mr. Taylor clearly agrees with the 6th Circuit dissenters.

4. Mr. Taylor also claims that universities have been able to recruit “substantial numbers of well-qualified minority applicants” despite bans on racial preferences in Texas and California. That depends on what is meant by “universities” and by “substantial.” The law schools at Berkeley, UCLA, and the University of Texas at Austin have all suffered sharp drops in black, Native American, Mexican, and American, and Hispanic enrollments. For 1995, the figures were Berkeley 173, UCLA 262, and Texas 278. For 2000, the numbers were 38, 35, and 94, respectively.

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Points of View

Misreading the University of Michigan Case

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Letters

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