Justice Talking
Radio Transcript

The Challenge to Assisted Suicide in Oregon – Airdate Oct. 10, 2005

Whether you call it assisted suicide, assisted death, or physician-assisted dying, it is illegal for a doctor to willingly help someone die by prescribing them a lethal dose of drugs—except in Oregon. But now the U.S. Attorney General has threatened to prosecute Oregon doctors under federal laws if the doctor prescribes drugs allowed by that state's Death with Dignity Act. The case was argued before the Supreme Court on October 5. How will our nation grapple with the societal, political and social implications?

MARGOT ADLER: From NPR, this is Justice Talking.

MALE SPEAKER: Those of us of a moderate stripe are really angry that the Feds would choose to take time to punish Oregon doctors who might help us die with a measure of dignity.

MALE SPEAKER: We have national standards for health protection in this country. I think Oregon's attempting to seize authority that is really a federal authority and not a state authority.

MALE SPEAKER: The worst thing that could happen to me was everybody is in control of me; that I couldn't control any of my own life at all.

MARGOT ADLER: Coming up, Oregon's Death with Dignity Act is being challenged by the federal government. I'm Margot Adler. This week on NPR's Justice Talking: physician-assisted suicide.

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MARGOT ADLER: This is Justice Talking. I'm Margot Adler. Assisted suicide and Oregon's Death with Dignity Act is being considered by the Supreme Court. The federal government is challenging the law which gives Oregon doctors the right to prescribe lethal doses of medication to terminally ill patients who want to end their lives. This issue raises many questions about life, death and the rights of patients and doctors. Joining me to talk about some of these questions is Art Caplan. He is the Director of the Center for Bioethics at the University of Pennsylvania. Art, thanks for joining me to talk about this on Justice Talking.

ART CAPLAN: Thanks for having me.

MARGOT ADLER: I want to ask you first about the language that we're using to talk about our topic today. What do you call it when you're talking about dying with the assistance of another person? Do you call it assisted suicide? Is it assisted dying? Is it murder? Every way that there is to describe it sounds loaded.

ART CAPLAN: I think all the terms are loaded. My terminology I have to confess is assisted suicide. It's a situation where someone has made a request, a competent person by the way, has made a request, for assistance in dying. I wouldn't call it euthanasia because that refers to involuntary killing. That's what sometimes we hear about nurses and doctors getting arrested for when they go in a nursing home and inject someone. There's been no request or there's been no choice. So I call it assisted suicide. But even there, it's a loaded term.

MARGOT ADLER: Now, let's talk a little bit about the history of assisted suicide and assisted dying in America. I mean, we're talking about this as if this is new—ten, fifteen years. But hasn't this been going on as long as people have been alive? Doesn't it happen undercover all the time?

ART CAPLAN: It does. We had a study at Penn conducted with nurses, more than ten years ago now, in which we asked nurses how many of them felt they had hastened the death of a person in an intensive care unit setting. And probably 40 percent of the nurses reported that they felt they had done something that had hastened a person's death. We know from other studies, and there are numerous studies, that doctors and nurses who work around the terminally ill report that they have withheld things or sometimes given things that have caused people to die faster.

So in that sense, assisted suicide has been an underground practice in American medicine, I would say at least since the advent of the technologies that help keep people alive—dialysis, intensive care units, heart lung machines, ventilators, feeding tubes. That's probably since World War II. The Hemlock Society, probably back in the '60s, began to agitate around the country, in chapters, in groups, to get laws put on the books that allowed for assisted suicide

MARGOT ADLER: Tell us a little bit about the Hemlock Society. What kind of an organization is it, for people who don't know?

ART CAPLAN: The Hemlock Society is a group that was formed by a fellow named Derek Humphrey. He had a wife suffering from I believe it was cancer. He had taken steps, it is alleged, to hasten his own wife's death, and he felt that this was just an unacceptable, an undignified kind of practice. He wanted it aboveboard. There was a break from this grassroots movement and probably the most influential person in the active assisted suicide legalization movement was Jack Kevorkian.

Kevorkian began to agitate and say, look, this isn't a consumer movement, assisted dying, this is a doctor's responsibility. And in the early '90s, as many listeners will recall, he began to engage in the practice of assisted suicide out in the open. Probably a total of more than fifty people were assisted by Jack Kevorkian in dying in the State of Michigan. There were indictments. There were trials. Juries kept throwing out these cases saying it isn't clear that Michigan has a law that really prohibits assisted suicide.

Ultimately what happened was Jack Kevorkian helped a man to die on TV. He basically taped it knowing it would be shown, and "60 Minutes" put it on TV, and that was enough evidence that he had been involved in an active killing to get him convicted. So he was put in prison in Michigan. He's still there. He's appealed a number of times. The appeals have all been turned down. Jack Kevorkian probably played the biggest role in the history of assisted suicide in the United States in moving this issue from one of grassroots communities trying to say that individuals should know what to do, to turning it into an issue of doctors should be able to do this.

MARGOT ADLER: In situations where it's unclear what the wishes of a terminally ill patient are, do you think that doctors and family members should be able to make end-of-life decisions for them?

ART CAPLAN: What you're talking about now is the hardest problem of all. It's clear that when somebody lets their values be known and writes them down and talks to their loved ones about what they want, I think that has to be respected. I believe that that's what took place with Terri Schiavo. I think she told her husband, friends and others what she wanted. The family on the other side disputed it, but I think that after the court listened to all of the evidence, they were persuaded that she had communicated what she would want. And even though she couldn't communicate anymore, that had to be respected.

But we have case after case in Pennsylvania, it happens in every state around the country, where older people are abandoned by their families and no one knows what they want. People who don't write down their wishes and advanced directives or living wills, whose relatives show up at the last minute—they're not sure what they want. Those are very, very tough cases. My view is this: you have to presume that life is better than death. But if the medical treatments cannot do anything more than prolong biological existence, if a person can no longer think or feel or if they're in terrible suffering that we can't control, then I would give some discretion to doctors to decide to pull back on treatments.

But in general, it's our responsibility to make sure that those situations don't happen. You've got to talk to your loved ones, family members and relatives about what you want. And better still, write it down.

MARGOT ADLER: Art Caplan, thank you so much.

ART CAPLAN: My pleasure.

MARGOT ADLER: Art Caplan is Director of the Center for Bioethics at the University of Pennsylvania. Thank you again for joining us.

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MARGOT ADLER: The U.S. Supreme Court recently heard oral arguments on the Bush Administration's challenge to Oregon's physician-assisted suicide law. It argues that the state law contradicts the federal Controlled Substances Act. The State of Oregon disagrees. Colin Fogerty reports from Oregon Public Broadcasting.

COLIN FOGERTY: Seventy-nine year old Don James has become a lead spokesman for the right-to-die movement in Oregon. He's one of the terminally ill patients suing U.S. Attorney General Alberto Gonzalez. James has prostate cancer that has spread to his bones. He says he doesn't even know whether or not to end his life by taking a lethal dose of barbiturates. But he says he simply wants the option.

DON JAMES: I'd fight for it. But I don't know. I don't know right now. I received my prescription. That is I have the piece of paper. I don't have the medicine. I haven't gone that far.

COLIN FOGERTY: But under a policy directive first issued in 2001 by former Attorney General John Ashcroft, that deadly prescription would be illegal under federal law. James is a lifelong Republican, and he believes the Bush Administration is trying to meddle with his end-of-life decisions.

DON JAMES: Those of us of a moderate stripe are really angry that the Feds would choose to take time to punish Oregon doctors who might help us with a measure of dignity.

COLIN FOGERTY: James has found support in his lawsuit from right-to-die groups and Oregon State Attorney General Hardy Myers, who is a Democrat. Myers opposes the practice of assisted suicide, but he says that's not what this case is about. He says Oregon voters twice decided to legalize physician-assisted suicide. And he argues nothing in federal law gives the U.S. Attorney General authority to overrule those votes.

HARDY MYERS: And it is a very direct attack on, in a sense, the sovereignty of our people and of our state. That's the question of the relative authority of the federal government versus the state in the regulation of the practice of medicine.

COLIN FOGERTY: But the U.S. Department of Justice argues that it has more than 2,000 years of the Hippocratic Oath and the laws of 49 other states on its side, by saying

physician-assisted suicide is not a legitimate medical practice. Dr. Ken Stevens, with the anti-assisted suicide group Physicians for Compassionate Care, says federal law doesn't allow states to make such a radical departure from what medicine has traditionally considered ethical.

KEN STEVENS: Is suicide a medical practice? I don't think that society considers suicide to be a medical practice. We have national standards for health protection in this country. I think Oregon's attempting to seize authority that is really a federal authority and not a state authority.

COLIN FOGERTY: That federal authority could result in physicians in Oregon losing their federal registration to prescribe controlled substances. That would effectively end oncologist Dr. Peter Rasmussen's practice treating cancer patients. He says that would set a dangerous precedent for medicine.

PETER RASMUSSEN: It becomes far too susceptible to the ebbs and flows of culture wars and things like that, that could make decisions not for medical reasons for the patient, but for more philosophical reasons.

COLIN FOGERTY: Rasmussen and other supporters of the law won their case in two lower courts. Now as the case comes before the U.S. Supreme Court, Oregon's experiment with legalized physician-assisted suicide is getting national scrutiny. Dr. Susan Tolle has been monitoring the practice as head of the Center for Ethics at Oregon Science and Health University. She says after eight years and 208 suicides, there have been some surprises.

SUSAN TOLLE: One of the projections had been that it would be the poor and the uninsured and the vulnerable. And it has proved to be the highly educated, more often white, insured cancer patient.

MARGOT ADLER: But Tolle says one of the least surprising things is that the Oregon law is still the subject of intense debate nationally and among Oregon's health professionals.

SUSAN TOLLE: And I think some mistakenly think at a national level that because it's been the law and in effect for nearly eight years, that the medical community is at peace with this law.

COLIN FOGERTY: As the case takes center stage, the lead plaintiff, Don James, is enjoying the limelight. He says he's a political animal and says the debate over his right-to-die has given new meaning to his life.

DON JAMES: Oh, this is a brand new experience. I have been so blessed. It's just amazing. This dignity includes living, not just preparing to die.

COLIN FOGERTY: Don James says he's just hoping to live long enough to hear how the Supreme Court decides what will happen to Oregon's law. For Justice Talking, I'm Colin Fogerty in Portland.

MARGOT ADLER: Coming up, we'll hear from two advocates who strongly disagree about whether the government should sanction the assisted suicide of a terminally ill patient. Stay with us.

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MARGOT ADLER: This is Justice Talking. I'm Margot Adler. The issue of physician-assisted dying is again before the Supreme Court. In a case out of Oregon, the Court will be looking at the conflict between the federal Controlled Substances Act and the state's Death with Dignity Act, a law that allows physicians to prescribe medication to end the life of a terminally ill patient.

We'll talk about this case in particular, and I'll talk with two people who have spent a lot of time thinking about the intersections between law and policy and who disagree about what that means for our society. Joining me is Wesley Smith. He's the author of many books on life and death. His most recent is *Culture of Death: The Assault on Medical Ethics in America*. He is an attorney for the International Task Force on Euthanasia. Welcome, Wesley.

WESLEY SMITH: Thank you very much.

MARGOT ADLER: Also joining me is Kathryn Tucker. She is director of legal affairs for Compassion and Choices, an organization dedicated to improving end of life care and protecting the rights of the terminally ill. She also teaches law at the University of Washington's School of Law. Kathryn represented the patients in the current Oregon case before the Supreme Court. Thanks for joining us, Kathryn.

KATHRYN TUCKER: Thanks for having me.

MARGOT ADLER: We've just heard a little bit about the history of assisted suicide or assisted dying. But before we get into our debate, I want to ask you the same question I asked bioethicist Art Caplan. What words do each of you use when you talk about this issue? Is it assisted suicide, assisted death, physician-assisted dying? Let's start with you, Kathryn.

KATHRYN TUCKER: Well, I love that you ask that question, because I think it's so important to use the proper language. What we're talking about here is the choice of a dying patient who is having a dying experience that that individual patient finds intolerable. For that patient to be able to choose to self-administer medications to bring about a peaceful death—that should not in anyone's lexicon be thought of as assisted suicide. It's the choice of a patient to have a peaceful death when death is impending.

And the reality is that it's enormously offensive to patients when they are facing this choice, where they have pursued every possible curative therapy. They may have had surgery, they may have had chemotherapy, radiation, good pain and symptom management. But they've simply come to the place where the ravages of their illness

have brought them to determine that coming to death now is better than lingering a bit longer. That's not suicide. That's the choice of a patient for peaceful, humane death.

MARGOT ADLER: Wesley, what language would you use?

WESLEY SMITH: I use accurate and descriptive language. Assisted suicide is precisely what we're talking about. The advocates of this agenda always like to use gooey euphemisms to try to hide and mask what we're talking about. So, for example, they've recently issued a press release begging, in essence, the media to not use assisted suicide, which was their original term in the first place. Instead, they used things like death with dignity or aid in dying or choice in dying. All of these are cover-up masking terms, so that we will not actually address what may be the harshness, at least from my perspective, of intentionally overdosing people with what is poison, that is, an overdose of drugs to kill them, and deciding that that should become a legal medical act. I think in public policy, we have to be descriptive so that people can know what it is that we are seeking to either legalize or prohibit.

MARGOT ADLER: Now before I let you go at each other, I want to bring another related question of language into this discussion. What language have the courts and the law used when talking about this? I'll start with you, Wesley.

WESLEY SMITH: They often use assisted suicide. Sometimes they use aid in dying. I think it depends on the court decision. But in terms of the drafting of legislation, you will often see things like death with dignity or aid in dying. The idea again is to try to make that the spoonful of sugar to make the hemlock go down.

MARGOT ADLER: Kathryn.

KATHRYN TUCKER: Yeah, in the case that's now pending before the Supreme Court, the question before the Court has to do with the Oregon Death with Dignity Act. And so that's how the court in this case is discussing the law. Oregon does not permit assisted suicide. Oregon has a statute, as a number of states do, which makes assisting in a suicide a crime. So the Oregon law that permits dying patients to choose a humane and peaceful death is known as the Oregon Death with Dignity Act.

MARGOT ADLER: Since this is not the first time that assisted suicide has come before the Supreme Court, and not the first time the Court has heard a case about this from Oregon, Wesley, can you tell us briefly how the Court has ruled on assisted suicide previously?

WESLEY SMITH: Kathryn Tucker, who is a very able lawyer, brought two cases to the United States Supreme Court. I believe it was in 1997. One was out of Washington and one was out of New York. And in two nine to zero decisions, the Court ruled that there was not a constitutional right to assisted suicide. Moreover, it also ruled that refusing unwanted life-sustaining treatment is not the same thing as hastening death through, for example, the overdose of drugs. So there is no constitutional right. Whether or not there is a right of a state to pass a law such as Oregon has done has not been litigated in the

United States Supreme Court and has not been litigated in the current case which was argued just a little while ago in the United States Supreme Court. There are no current challenges to the Oregon Death with Dignity Law.

MARGOT ADLER: Kathryn.

KATHRYN TUCKER: In the cases that I was involved with in the mid-90s, we were claiming the right of a dying patient to have physician assistance in empowering the patient to bring about a peaceful and humane death. What the Supreme Court said in 1997 was, we don't know enough today about whether risks or hazards would present if this were permitted. And the lack of that information was very important to the justices. It jumps off the pages of the opinion, and it was present in the courtroom the day that I argued that case.

So what the court did was a classic move that the Supreme Court does from time to time. It invited experimentation in the states. The court said we have 50 states. This is a divisive, controversial issue of social policy. Let's have the states grapple with it in the first instance and let the other states learn. And so, of course, that was exactly what happened in Oregon. Much has been learned, a tremendous amount has been learned from the experience in Oregon. And what it has shown is that none of the risks that were speculated as likely or possible have in fact been realized. Now, I should also say...

WESLEY SMITH: That's just simply not true by the way.

KATHRYN TUCKER: ...that the court left the door very much open to a future finding of a federal constitutional right. It just simply wasn't ready to go there in 1997.

WESLEY SMITH: Well, that's just pure spin. Nine to zero, there is no constitutional right to assisted suicide. And whether or not the states can or cannot enact laws was specifically not argued. It was not briefed. In a footnote in the Rehnquist opinion, it was specifically stated that no opinion was being expressed on whether or not such laws would be constitutional. That's the current status of the law. And the current case that is pending now in the United States Supreme Court, we're waiting for a decision, does not seek to invalidate the Oregon law. It seeks to establish the right of the federal government to have its own public policy with regard to the Controlled Substances Act and state in federal law that assisted suicide is not a legitimate medical use of controlled substances such as barbiturates.

MARGOT ADLER: Wesley Smith, author of *Culture of Death*. And Kathryn, what about that? The Court isn't really looking at the core issue of assisted dying. The case seems to be about the conflict over drug regulation between the states and the federal government.

KATHRYN TUCKER: Yes, that's exactly right. The question for the Court in the first instance is whether the Controlled Substances Act, which is a statute designed to prevent the diversion and trafficking of strong mediation into the black market, into elicit channels, could possibly have application to the Oregon law which permits a dying patient to obtain medication to self-administer for a peaceful death.

Now, what both lower courts found was that this federal statute certainly did not reach that conduct. There was simply no language in the federal statute. There was no legislative history. And there was no precedent that would suggest that the scope of this federal statute had anywhere near the broad reach that the attorney general has claimed. And we expect that the Supreme Court will uphold that.

MARGOT ADLER: Kathryn Tucker of Compassion and Choices. Where do the two of you draw the line? For example, is there a difference between the following: terminal sedation, stopping the administration of food and water, pulling the plug on life support, administering a lethal dose of medicine? I'd like to ask each of you to sort of talk about where you think the line is. Let's start with you, Wesley.

WESLEY SMITH: Yeah, sure. Terminal sedation I think is a bad term. It's palliative sedation. And this is something that is a legitimate pain control and palliative procedure where somebody who is at the very end of life, either in pain that cannot be controlled, which is rare, or, for example, severe agitation, they can be put into an unconscious situation until they die naturally from their disease. I certainly support that. And I believe very strongly in aggressive pain control. Removing food and water, a feeding tube such as in the Terri Schiavo case—that is removing medical treatment. And it is not the same thing as assisted suicide and euthanasia. And in fact the courts have ruled, and I support this, that people have the right to refuse unwanted life sustaining treatment.

You talked about pulling the plug such as pulling a respirator. I think that's the same issue. It is interesting to note that other than food and water, if you, for example, take away a respirator, death may or may not occur. Karen Ann Quinlan, who was the first person to win a court ruling in the New Jersey Supreme Court—her parents did—saying they could remove her respirator, didn't die for ten years after that respirator was removed. Administering lethal drugs to cause somebody to die is not a medical act and should not be permitted.

MARGOT ADLER: Now, I want to turn to Kathryn, but I want to ask you one follow-up, Wesley. Do you believe that someone has the right to end his or her own life—just not that a doctor has the right to assist him or her?

WESLEY SMITH: Sure. Somebody has the—I think power is the better term rather than the right, because a right implies legal enforceability. But everybody has the power to end their own lives. And the issue in public policy it seems to me is what should a compassionate and loving society do in response to that desire? It seems to me, and hospice is certainly about this, suicide prevention is the answer, whether the desire to die is caused by cancer or because of an ended marriage or because a business has collapsed. The idea that we should facilitate death is an extraordinarily dangerous one, it seems to me, because it sends a very insidious message that ending life is a legitimate response to the problems associated with human suffering.

MARGOT ADLER: Kathryn, I assume you'd like to respond to much of this.

KATHRYN TUCKER: Yes. And I'm happy to respond to all three of that series of questions. On the question where do you draw the line, I think we always have to come back to recognizing that choice on this question should repose with the patient. For each individual, the question on where to draw the line, what to accept or reject by way of medical treatment at the end of life, should repose with the individual.

Now, on some of these other questions, you know, you do sometimes get confused as to whether the physician is trying to relieve pain and suffering or hasten death… Unfortunately, because there can be a cloud of suspicion around the bedside of a dying patient, we see that physicians are reluctant to treat pain aggressively. This is an area that I practice in actively. I have many cases that involve dying patients who did not get adequate pain management. And part of the reason is there is fearfulness in the physician community that prescribing aggressively will bring investigation and possibly punishment. And so we need to remove that cloud. We need to make sure physicians feel safe treating pain and symptoms aggressively. And we need to empower patients to choose the kind of death that is most consistent with their values and beliefs.

WESLEY SMITH: I'm sorry, the ironic issue about the aggressive treatment of pain and law enforcement is that when the United States government tried to pass the Pain Relief Promotion Act, which would have explicitly stated that aggressive pain control treatment would not be subject to DEA enforcement, and also stated that using those drugs to intentionally cause death was not appropriate, the assisted suicide advocacy groups all opposed that measure. We do need to get the DEA off doctors' backs, and the Pain Relief Promotion Act would be a good way to do that.

KATHRYN TUCKER: And that's simply nonsense. I just have a minute to respond. The law that Wesley's referring to was not defeated by my organization. It was defeated by every mainstream medical society and health policy group across the country coming forward and saying increasing the scrutiny of physicians at the bedside of dying patients is a very bad idea. We already know physicians are reluctant to treat pain adequately. Additional scrutiny from the federal government will exacerbate that serious public health problem.

WESLEY SMITH: No, it was defeated by a filibuster by Senator Wyden, and the point of the bill was to remove that scrutiny. So we can argue what didn't...

KATHRYN TUCKER: The record does not bear that out.

WESLEY SMITH: Yeah, well...

MARGOT ADLER: Kathryn, how many people total at this point have chosen this option in Oregon?

KATHRYN TUCKER: There have been 208 patients over the seven years that have been reported through 2004. And that number of patients is very small. So this notion that it's going to be a practice that, as Mr. Smith refers to it, will "take off" is just nonsense.

MARGOT ADLER: Kathryn Tucker of Compassion and Choices.

MARGOT ADLER: Later in the show, emergency room doctor Lonnie Shavelson talks about his own father's death.

LONNIE SHAVELSON: When the Supreme Court justices listen to the best arguments from all sides of this aid in dying debate, they might do well to turn their heads towards one more voice, that of my dad, as they decide whether to rule that dying patients can receive medical assistance, if needed, to end their lives.

MARGOT ADLER: Stay with us.

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MARGOT ADLER: This is Justice Talking. I'm Margot Adler. We're talking about the difficult choices people must make when it comes to terminal illness and death. I'm joined by Kathryn Tucker. She's Director of Legal Affairs for Compassion and Choices in Oregon. Also with us is Wesley Smith, an attorney for the International Task Force on Euthanasia.

I spoke with Carol Gill who is a clinical psychologist and the Director of Graduate Studies in Disabilities at the University of Illinois in Chicago. She told me as a psychologist and as a woman who uses a wheelchair that she has learned that the ability to control certain aspects of one's life is not always available to disabled people.

CAROL GILL: The truth is that what I've learned, both from working with people with disabilities and working even with dying people—I've been a hospital psychologist, keeping vigil at the bedsides of people who were dying from terminal illness—I've learned that what we all have in common is that the messages from others are extremely important in making life meaningful or not meaningful. And so it's of great concern to me that there is a certain category of people who are going to get the message not that your life is valuable and we want to help you find a way to make it worth living, but instead are going to get a lethal prescription.

MARGOT ADLER: So you think there's a double standard in the way that society views suicide for healthy people in comparison with suicide for the disabled?

CAROL GILL: Yeah, absolutely I think there is, and for me and many people with disabilities and many people that I've worked with who had terminal conditions, I think what we are impressed with is the continuity in humanity that really people have very similar needs whether they are physically healthy or whether they are dying. And that's the need to feel valued.

MARGOT ADLER: Carol Gill. I want to ask both of you something that that statement brought up for me. There's a real ethic in America about being in control. Many people who have chosen assisted suicide have talked not about pain as the biggest issue but that losing control and feeling that loss of control means losing dignity. And the disabled have argued that we're often not in control and our lives are worth living. So I'd like to ask you Kathryn, is this desire for autonomy, is it good? Or would our society be

better—would it be a better one with an ethic that caring for others and being cared for is dignified?

KATHRYN TUCKER: Well, certainly it should be the choice of the individual, and so for some to progressively lose bodily function and integrity in the final stages of terminal illness, that maybe entirely dignified, and they may want to cling to every moment of life. And they should be empowered and supported in doing that. Others may find that that progressive loss of bodily integrity and function, which by the way is very different from someone with a static disability in a wheelchair, for those people in that progression to death, they may find that combination the cumulative burden of all of their symptoms, whether it's loss of mobility and function, whether it's pain, inability to interact meaningfully with others, all of those things will cumulate and they may find at some point that their best option is to shorten their protracted dying process. And I think that the message we send when we support and empower those patients is that we respect their choice.

MARGOT ADLER: Well, let me then ask a sort of larger question to both of you which is the question of class. You know, there's been a widespread controversy over whether physician-assisted dying will become a class issue. So people who are against physician-assisted dying say they're speaking for the poor and the vulnerable. And people in favor of physician-assisted suicide often say that people should have choice which often seems a very middle class position. And opponents of physician-assisted suicide claim that the health care system will use this measure to cut costs, which given our health care system might really be true. But studies have shown so far, and Kathryn mentioned this, that the people least likely to use the option are the poor. So I want to throw up this question to both of you. Is this something, physician-assisted suicide, where the poorest members of our society will be taken advantage of, or one in which they will not have the privilege of choosing to end their suffering in a way that the more well off can? Who wants to take that first? Wesley.

WESLEY SMITH: Sure. I'd be happy to. You know, it's interesting that the people you don't see pushing for assisted suicide in this country are poor people; you don't see minorities pushing for assisted suicide in this country. They're saying give me proper medical care. And the HMO issue is really crucial. It takes 50 to 100 dollars maybe for the drugs for an assisted suicide. It may take 10,000, 50,000 or 100,000 dollars to give people the kind of care and intervention so they don't want assisted suicide. If we legalize this, it could easily become a way of moving towards abandoning people who do not have the resources. And it is also notable that the people who do tend to support this most strongly happen to be upper-middle class people who are probably never going to be pushed out of the lifeboat against their will. So I do think class is an important issue in this debate.

MARGOT ADLER: Of course, it makes one think that if we lived in a different kind of society with a different kind of health care system, maybe you two wouldn't be arguing in the same way.

WESLEY SMITH: It's interesting. I ...

KATHRYN TUCKER: Again, in Oregon, every patient has advantage of health insurance and is—the patients choosing the Oregon option have been enrolled overwhelmingly in hospice. So I think we've seen they've had the benefit of excellent care and some small number go onto make this choice.

MARGOT ADLER: Wesley, would we have the same discussion in Canada?

WESLEY SMITH: Well, you know, I think they're about to have that discussion in Canada. And their proposed law would not limit this agenda to the terminally ill. The whole idea that this will remain limited to the terminally ill is laughable if you take a look at the reasons why supposedly assisted suicide should be permitted.

I was in the Netherlands when I was researching my book *Forced Exit*. And I talked to a lot of pro-euthanasia doctors and advocates over there. And they all to a person said, you know, if you guys allow this agenda into the United States based on your health care system, it will be a disaster. Frankly, if we legalize assisted suicide throughout this country, investors in HMOs will be dancing in the streets.

MARGOT ADLER: So maybe the answer is socialized medicine and not anything else. We're going to have to end this conversation. Unfortunately, we've run out of time.

KATHRYN TUCKER: Can I make one comment that you might get the chance to use on this notion that it would expand? It just hasn't happened in Oregon. No expansion whatsoever. We're into the eighth year. It hasn't happened. The sky isn't falling. End of story.

MARGOT ADLER: This is our end of story. Unfortunately, our time is up. Thank you so much. Wesley Smith is the author of many books on life and death. His most recent is *Culture of Death: The Assault on Medical Ethics in America*. Thank you so much for being with us, Wesley.

WESLEY SMITH: Thank you. I enjoyed it.

MARGOT ADLER: Kathryn Tucker is director of legal affairs for Compassion and Choices. She also teaches law at the University of Washington School of Law. Thank you so much, Kathryn.

KATHRYN TUCKER: Thank you, Margot. It was my pleasure.

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MARGOT ADLER: We've been talking about the legal, political and societal issues surrounding end-of-life choices. But none of these things can prepare you for the reality when you have to personally face the death of a loved one. Here is physician and journalist Lonnie Shavelson.

LONNIE SHAVELSON: As the Supreme Court considers arguments for and against allowing dying patients to get help in hastening their death, the justices could benefit from the testimony of my father. He was a soft spoken man who grew up poor in Brooklyn. He moved to Florida at 75 after a lifetime working in New York's garment district. And because he had his first of three heart attacks when he was 65, my dad spent years thinking about death. Soon after my mother died, he stopped sleeping well. For years, he'd be awake into the early morning hours playing Guy Lombardo records and talking to me and my sister through a tape recorder. But he never told us he was doing it. And we only accidentally discovered the tape while cleaning out his desk after he died.

SHAVELSON'S FATHER: A lot of sleepless nights I spend lately, little problems that keep me up. And I talk to you guys. I feel like I want to get you to know me a little. You know me plenty, both of you, but… [singing] abide with me, the darkness deepens, abide with me. I guess you're laughing at my singing. But through some of the roughest times I've had, I've been able to find something funny and something to laugh about. And that's what life is more than anything else to me.

LONNIE SHAVELSON: But though my dad sang and laughed on the tape, he relived the more difficult memories as well.

SHAVELSON'S FATHER: Remember a number of years back, I was in the hospital. I had my bypass done. And you came in from California. The operation was over. As I opened my eyes, the first one I saw was you. And you were consoling me. Okay, dad, everything's fine, everything went through well. And I recall how I felt when I was in the hospital. The worst thing that could happen to me was everybody is in control of me; that I couldn't control any of my own life at all.

LONNIE SHAVELSON: Later that year, my dad lapsed into unconsciousness from a sudden heart attack. His brain died. His body did not. I rushed to the hospital and he was deep in a coma, kept alive by a breathing machine. I knew what my dad would want. We had discussed how he might die and under what circumstances he would not want to live. I showed the doctors his living will that specifically expressed his wishes not to be kept alive by machinery and the durable power of attorney that gave me the right to make decisions for him. Now his physicians and I stood by my father's unconscious body and turned off the machines. We intended for him to die. And listening to his tapes today, I'm sure that was also his wish.

SHAVELSON'S FATHER: I don't know when you'll be hearing this or what. But dying is dying. You've got to die sometime.

LONNIE SHAVELSON: When we turned off the ventilator, what was left of my dad's brain took over. Just enough to keep him barely breathing. The rush of adrenaline as his body still argued for life drenched him in sweat, whipped at his heart. For hours, he laid gasping for breath, but not dying. Please, I asked his doctor, can we give him more sedation to stop the agony of this prolonged suffocation? We can't do that, she said, it's

illegal. Although we had turned off the machinery meaning for my father to die, his continued breathing changed the rules.

There was a fine legal distinction between withdrawing life support and administering medication that would slow or stop his breathing, a practice forbidden by law. I wiped at my father's soaking forehead. I told him over and over how much I loved him. And then I could abandon him no longer. Excuse me, I said to the nurse. I need to be alone with my dad. Behind the closed doors I held my father in my arms and faced my own decision. Moments later, the shrill alarms of the ICU monitors announced that my father's breathing and heartbeat had stopped. I cradled my dad, the two of us alone, finally in peace.

When the Supreme Court justices listen to the best arguments from all sides of this aid in dying debate, they might do well to turn their heads towards one more voice, that of my dad, as they decide whether to rule that dying patients can receive medical assistance if needed to end their lives.

MARGOT ADLER: Lonnie Shavelson is an emergency room physician in San Francisco.

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MARGOT ADLER: President Bush has nominated White House Counsel Harriet Miers to fill Justice Sandra Day O'Connor's Supreme Court seat. To learn more about the nominee and what Harriet Miers is going to be up against, I spoke with Lee Epstein, a law professor at Washington University and author of *Advice and Consent: the Politics of Judicial Appointments*. Welcome, Lee.

LEE EPSTEIN: Hi.

MARGOT ADLER: Lee, since President Bush made this announcement, some on both the right and the left are mobilizing to oppose her nomination. What do you see happening and will their efforts cancel each other out?

LEE EPSTEIN: Possibly. At the moment it's hard to imagine, I think, a coalition that would emerge in the senate to be able to defeat her. I think the big issue is going to be really in the public. It seems to me that there are two things that are now coming together that may spell some bad news for her. One is the qualifications issue, and you know, from the minute this nomination has been announced that has been under discussion—and now sort of the charges of cronyism. Those two things coming together I think are serious and they make this a little bit distinct from nominations in recent times.

MARGOT ADLER: Well we know that much like President Bush she had a faith conversion, and changed her views on abortion and her party.

LEE EPSTEIN: And you know people are going to sit and talk about her beliefs, her religious beliefs and how those affect in particular her views on abortion…

MARGOT ADLER: Now, Harriet Myers has never been a judge, in fact there's not much of a paper trail on her. Her works consist mainly of her interactions with and advice to the President. Now, when confirmation hearings begin, what information and documents will be off limits for her to discuss?

LEE EPSTEIN: Well, I think they're trying to make the case right now that any of her White House work would be off limits. I believe the Administration—actually, I feel certain that the Administration is not going to release those documents.

MARGOT ADLER: Now might she ever have to recuse herself from cases that come before the Supreme Court because of her past involvement with some issues?

LEE EPSTEIN: I think that's a very interesting question and certainly one that the senators will ask. There's some precedent for this in the past both ways. You can go back to William Rehnquist who had been assistant attorney general and did recuse himself from the Watergate tape case, but did not recuse himself from others. And that's really, as you know, it's up to the justice to determine.

MARGOT ADLER: Now one of the things we do know about Harriet Myers is her incredible loyalty to George Bush. Do you think she could ever be objective in making decisions involving the White House and President Bush if she were named to the court?

LEE EPSTEIN: Well she's certainly going to say that. She's very oriented toward case facts, very lawyerly in her approach, or that's at least what we know about her. And how she'll approach issues concerning executive power, which are going to be important issues in the next decade, remains to be seen.

MARGOT ADLER: So what else do you expect to see in the weeks to come?

LEE EPSTEIN: More digging. And you know, apparently there's going to be some probing into these quote pro-life dinners she attended, her church attendance, her beliefs, so that we're going to be looking more at her behavior I think rather than her written record and more of this will come out. You know, she's sixty years old, she's led a life, and there are behavioral trails there that I think people will be following.

MARGOT ADLER: Lee, thank you so much for talking with me.

LEE EPSTEIN: Okay.

MARGOT ADLER: Lee Epstein is a law professor at Washington University and is author of *Advice and Consent: The Politics of Judicial Appointments*. In the weeks ahead, we'll follow the Supreme Court nomination of Harriet Miers and continue to look at cases that come before the court this term. I'm Margot Adler. This is NPR's Justice Talking. I hope you'll join us next week.