Spring 2018

Honing the Emerging Right to Stop Eating and Drinking (Mod).pdf

Norman L Cantor, *Rutgers Law School - Newark*

Honing the Emerging Right to Stop Eating and Drinking

Norman L. Cantor

A stricken medical patient has a well-established right to reject life-extending medical interventions. A person afflicted with pulmonary disease is entitled to reject a respirator, a person with kidney dysfunction can reject dialysis, and a person with a swallowing disorder can reject artificial nutrition and hydration (ANH). State and federal courts uniformly invoke competent patients' interests in self-determination and bodily integrity to uphold a patient's prerogative to shape their own medical course. The patient's right extends not just to intrusive machinery, but also to simplistic, non-burdensome medical intrusions like an I.V. tube or a blood transfusion.

Some patients facing fatal or seriously degenerative conditions seek to hasten their demise by voluntarily stopping eating and drinking (VSED) before the stage of decline when they are dependent on life-sustaining medical intervention. They see SED as a way to shorten their ordeal by precipitating death by dehydration within 14 days while receiving mild palliative intervention to foreclose distress before slipping into a terminal coma. The SED process entails days of lingering incapacity and is a distasteful prospect for some patients. But it is regarded by other patients as a relatively quick, peaceful, and humane way of ending a mortal struggle now deemed to be intolerably arduous.

Numerous medico-legal commentators, myself included,[1] have asserted that a stricken patient has "a right" to VSED. These commentators associate a patient's

[1] See N. Cantor, "On Hastening Death without Violating Legal or Moral Prohibitions," 37 Loyola Chi. L. Rev. 407 (2005); N.Cantor & G.Thomas, "The Legal Bounds of Physician Conduct Hastening Death," 48 Buffalo L. Rev. 83, 95-110 (2000). Other supportive commentators include Thaddeus Pope, Timothy Quill, and Robert Truog.

decision to cease nutrition and hydration with the established constitutional right to reject life-sustaining medical intervention. They note that the fasting person is invoking bodily integrity – precluding any feeding spoon from penetrating their mouth or nutritional tube from being inserted into their body – as well as autonomy in shaping a response to a serious affliction. They also observe that the proffered succor (in the form of forced feeding or artificial nutrition) demands medically skilled intervention generally subject to a competent patient's control.

The formal legal authority is thin. Commentators point to several lower court decisions where judges refused to authorize medical override of a fasting patient. No high level judicial body has spoken to the precise issue.

The main hangup in asserting a fundamental right to VSED is the spectre of suicide in the scenario. Overtones of suicide exist if, for example, a gradually deteriorating ALS patient stops eating and drinking despite months or years of salvageable life. A person in distress is initiating a deviant course of conduct (cessation of eating and drinking) with the intention of hastening death. In contrast to a cancer patient rejecting chemotherapy who dies from metasteses, the proximate cause of death is self-initiated dehydration rather than the underlying pathology. While suicide is no longer criminal, it is still widely disapproved. State statutes punish assistance to suicide and even authorize physical intervention to frustrate attempts at suicide. At first blush, it may seem incongruous to associate what appears to be a form of suicide with a fundamental liberty interest. (The U.S. Supreme Court previously rejected the notion that physician-assisted dying might be deemed a fundamental aspect of constitutional liberty).

Keep in mind, though, that courts have often made fine distinctions and refused to apply the label or taint of suicide in the context of stricken patients managing medical responses to the patients' natural afflictions. Consider the case of Elizabeth Bouvia, a 28 year-old quadriplegic suffering from severe cerebral palsy and arthritis. Because Ms. Bouvia could not retain solid foods, she was being spoon fed soft foods supplemented by artificial nutrition via a naso-gastric tube. When Ms. Bouvia sought discontinuation of the feeding tube, the hospital sought judicial authorization to override her wishes and to maintain the artificial feeding. The hospital contended that Ms. Bouvia could live another 15 or 20 years, so that her discontinuation would constitute impermissible suicide. The California appellate court refused to label the disputed conduct as suicide despite the patient's deviation from customary conduct and despite an intention to hasten death. Rather, the court deemed Ms. Bouvia's cessation of a life-preserving feeding tube to be within her fundamental liberty right, under state and federal constitutions, to control medical interventions. The court upheld this medical patient's entitlement to decide that her current or prospective quality of life was so dismal as to be personally intolerable.

Cases like Bouvia signal the likely judicial response to VSED. In the context of stricken patients facing fatal or severe degenerative conditions, a patient's considered choice to SED will be upheld despite the overtones of suicide discerned. Two elements account for this permissive response to a patient's rejection of nutrition and hydration. The first is sympathy for the plight of a person whose affliction has rendered quality of life personally intolerable. It is easy to empathize with the frustrations, burdens, and anxiety of people facing fatal or chronic degenerative disease. The second element is judicial revulsion at the prospect of overcoming the patient's will and restraining an afflicted and distressed person. As in the case of

tethering someone to an unwanted respirator or dialysis machine, forced feeding seems highly inhumane. Where a fasting patient refuses to cooperate with hand feeding, intervention entails physical or chemical restraints particularly repulsive when directed to a seriously stricken, weakened patient. The older and frailer the person terminally fasting, the more certain the court is to treat SED as protected rejection of medical intervention.

While the protected legal status of VSED is thus secure in the context of stricken patients, the status of SED is uncertain as to otherwise healthy individuals rejecting food, water, and ANH. The context in which several state courts have considered the tension between a healthy person's SED and suicide is that of hunger striking prisoners.

A variety of motives might prompt a prison inmate to launch a terminal fast. A prisoner may be dispirited by the dismal prison lifestyle and prefer death. A prisoner may be fasting in protest over dismal conditions with the hope of extracting changes in the challenged conditions. A prisoner may be fasting as a protest over some perceived world injustice – thus making a symbolic statement to the world. When a prisoner's rejection of food and water poses a mortal danger, prison authorities seek to impose ANH and the affected prisoners commonly invoke their constitutional claim to bodily integrity and self-determination.

Courts in at least 6 states have confronted this clash between prisoners and prison officials over a prisoner's asserted right to SED. The judicial response has been varied. In 3 states (Florida, Georgia, and California), courts endorsed the prisoner's claim, viewing the rejection of tendered feeding tubes as tantamount to the recognized constitutional prerogative to reject life-sustaining medical intervention. These courts

focused on the bodily integrity of the prisoner rather than the officials' asserted interest in preventing self-destruction. In 3 other states (New York, New Hampshire, and Rhode Island), the courts ruled against the prisoners seeking to assert a constitutional right to SED. These courts upheld prison authorities' interests in maintaining prison routine and in preserving healthy lives of people assigned to state custody. They saw a healthy prisoner's fast more as unprotected suicide than as invocation of a fundamental liberty interest.

It shouldn't matter much that the legal prerogative to stop eating and drinking might not be universally applied to healthy individuals interested in terminal fasting. A relatively small number of people are so disconsolate over social or economic circumstances that they would seek to use SED to precipitate death by dehydration. And some of those disconsolate individuals reside in states where their considered determination to terminally fast would be legally upheld (including Florida, Georgia, and California) or where forced feeding would be deemed too repulsive and inhumane to implement. In any event, there should be more societal empathy, understanding, and concern for the far larger number of people facing fatal afflictions whose struggle to subsist has become intolerably burdensome.

The very good news is that law will uphold a right to SED in the context of persons stricken with fatal or serious degenerative maladies. VSED thus becomes another tool in the pursuit of death with a modicum of dignity for people who determine that the struggle with a degenerative affliction has become intolerably exhausting or arduous. And this SED prerogative is available under the currently prevailing legal framework without need for legislative intervention. The challenge now is to promote awareness of this option and the modest measures needed for its implementation (assistance in mouth hygiene, lip moisture, and sedatives as needed).