SCHULTZ, FROM PAGE 50

macy of the ongoing debate in the states about assisted suicide. How can that debate continue if Ashcroft locks up the drugstore? The Office of Legal Counsel's contention—that the "Attorney General's interpretation forecloses one, but only one, method of assisting suicide in a manner consistent with Oregon law"—simply ignores reality.

Ashcroft's mistake, then, wasn't arguing that federal law permits him to do what he did. His mistake was going ahead and doing it. He could have looked the other way.

A CHOICE TO MAKE

That's exactly what Janet Reno did when she was the attorney general. She stated (according to Judge Jones' opinion) that "the federal government's pursuit of adverse actions against Oregon physicians who fully comply with that state's Death with Dignity Act would be beyond the purpose of the CSA." Maybe it was, maybe it wasn't. But it was her call to make.

When it comes to such administrative decisions not to enforce a law, the Supreme Court has made clear that courts should not step in to second-guess. In *Heckler v. Chaney* (1985), the Supreme Court held, "This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."

The facts of that case are instructive. Prison inmates on death row sued to compel the federal government to enforce the Food, Drug, and Cosmetic Act against states using regulated drugs for executions by lethal injection—not a purpose anticipated by the Food and Drug Administration when it cleared those drugs for medical use under the statute. The result? All nine justices voted against the prisoners.

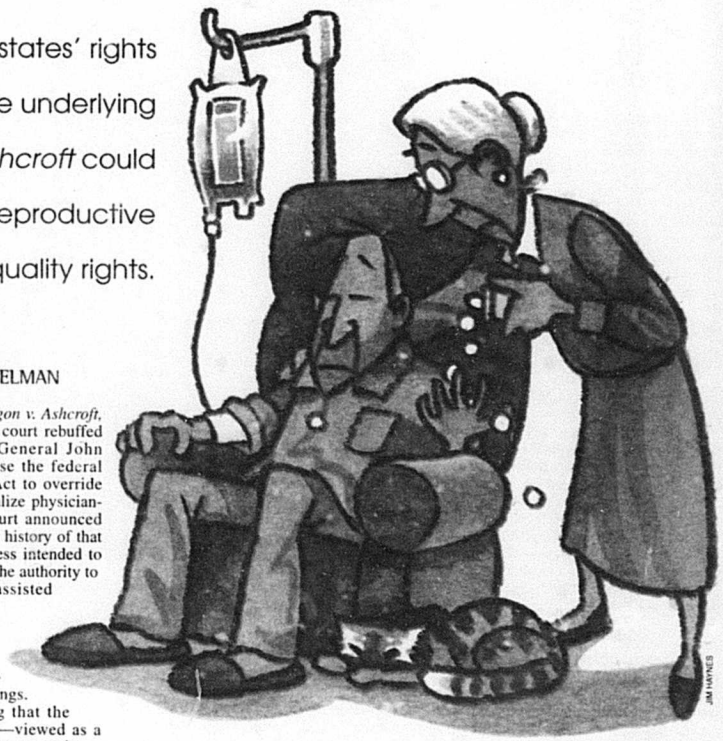
There's no doubt that our attorney general today understands how to exercise prosecutorial discretion. He hasn't applied the Controlled Substances Act to prison personnel involved in using regulated drugs for executions that probably do not constitute a "legitimate medical purpose." I haven't heard any reports that Ashcroft is wielding the Food, Drug, and Cosmetic Act to hinder executions by lethal injection. In the wake of Sept. 11, he decided not to interpret a federal gun control law in a way that would have let FBI agents check whether suspected terrorists had tried to buy handguns. And, also in the wake of Sept. 11, he has used novel interpretations of a federal law allowing detention of material witnesses—a practice that just the other week was successfully challenged in a federal court in New York.

Ashcroft generally has the law on his side to attack practices he abhors, and to permit those he favors. He used that discretionary power to make it harder for people in Oregon to die with dignity. Judge Jones wrote a tenuous legal decision to stop the attorney general, which supporters of assisted suicide have rallied around. But those who think that Ashcroft has exercised his discretion deplorably can do better. They can remember that the judiciary is only one of three branches of government—and that elections for the other two are coming.

Evan P. Schultz is associate opinion editor at Legal Times. *His column, "Controversies & Cases," appears every other week. He can be reached at eschultz@legaltimes.com.*

Protecting Suicide and Hurting Women

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



JIM HAYNES

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 straightforward 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 plumbed 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 state's 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 savvy lawyering to maintain, 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.

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HURTING WOMEN

But that is not all. Should it really be the state's job to regulate the practice of medicine, it is difficult to see why, for example, a state should not be allowed to regulate or even prohibit abortion, which is a medical practice, after all. The same holds true for a range of reproductive choices, which require medical intervention, that women make for themselves as women. Taken seriously, the idea that medical practice falls within the states' regulatory purview implies that states should ultimately decide how to handle women's medically mediated reproductive choices.

Of course, one might object that there is something special about abortion and other physician-assisted reproductive choices that women make. Building on Justice Ruth Bader Ginsburg's observation that *Planned Parenthood v. Casey* (1992) "acknowledged the intimate connection between a woman's 'ability to control her reproductive life' and her 'ability . . . to participate equally in the economic and social life of the Nation[.]' " one might reasonably maintain that women's reproductive choices are constitutionally guaranteed as sex equality rights. If so, one might conclude that states are not at liberty to limit women's reproductive choices too much and that they certainly cannot regulate those choices away.

This objection makes a good deal of sense, and has much to commend it. But it misses the point.

To stand behind state authority over the practice of medicine, as assisted suicide advocates now do, draws into question whether women's medically assisted reproductive choices should be constitutionally protected against sexually discriminatory regulation of them—*at all*. If *Oregon v. Ashcroft* does, indeed, affirm that medical practice rules are within the states' purview, it strengthens—even calcifies—a line of judicial thinking about states' rights that is eminently capable of uprooting 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 states' 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 states' rights ruling for Oregon in *Oregon v. Ashcroft* are concrete and urgent, not hypothetical.

SEE SPINDELMAN, PAGE 53

Equality vs. Suicide

SPINDELMAN, 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. Protectors of Oregon's permissive assisted suicide law have brandished *Morrison* as a weapon to beat back the attorney general's attempt to deliver the law its *coup de grâce*.

As a mode of legal strategy, there is nothing wrong with using *Morrison* in this fashion. Doing so violates no existing rule of professional ethics of which I am aware. But that does not mean this is how *Morrison* should be used. And it should not be—unless one is prepared to accept and capitalize on the constitutional protections *Morrison* effectively accorded to 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, deference to states' rights, including the right to regulate the practice of medicine, has kept women in fear of physical and sexual violation 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 slavery and, later, racial segregation. 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 equality rights.

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

Letters

Misreading the University of Michigan Case

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 laying out the dissenters' charge that Chief Judge Boyce Martin Jr. had "manipulated the handling of the appeal to . . . prevent the court from 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 "severely undermine public confidence in this court" and "irreparably damage the already strained working relationships among the judges." From this one would never know that Judge Moore had challenged the dissent's 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 'under-represented minority' students out of 341 enrolled in 1998, 46 out of 339 in 1997, 44 out of 319 in 1996, and 46 out of 340 in 1995—looked like a quota" to the dissenters. But even the dissenters noted—albeit only in a footnote (n.29)—that "these percentages did deviate a bit from this tight grouping in some years 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 12.3 percent, 13.6 percent, 14.2 percent, 13.4 percent, 19.1 percent, 19.8 percent, 14.5 percent, 20.1 percent, respectively. . . . [F]rom 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 *Bakke* 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 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 *Bakke*. 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-American, and Hispanic enrollments. For 1995, the figures were Berkeley 173, UCLA 202, and Texas 278. For 2000, the numbers were 38, 35, and 94, respectively.

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