

## THE JUSTICE OF, AND THE MORAL CASE FOR, ASSISTED DYING.

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**There is only one thing wrong with dying... and that is doing it when you don't want to!** Dying painfully is a problem about pain not about dying. It follows that there is nothing wrong with dying when you do want to.<sup>1</sup> I do not believe there is any rational person who would not take the bargain that they would only die when they wanted to, and never when they didn't want to.

We humans are used to putting up with pain to avoid death, when that is what we wish, but being forced to live when we wish to die adds insult to injury. This in essence is the argument from autonomy, bearing in mind choosing the place time and manner my own death is no more in principal damaging to others than is anything else I, or you, do that others don't like or would prefer we had not done.

Respect for persons requires us to acknowledge the dignity and value of other persons and their choices, and to treat them as ends in themselves and not merely instrumentally, as means to ends or objectives chosen by others. This means respecting their autonomy.

As Oscar Wilde famously suggested:

*“Selfishness is not living as one wishes to live, it is asking others to live as one wishes to live. And unselfishness is letting other people's lives alone, not interfering with them. Selfishness always aims at creating around it an absolute uniformity of type. Unselfishness recognizes infinite variety of type as a delightful thing, accepts it, acquiesces in it, enjoys it. It is not selfish to think for oneself. A man who does not think for himself does not think at all. It is grossly selfish to require of one's neighbor that he should think in the same way, and hold the same opinions. Why should he? If he can think, he will probably think differently. If he cannot think, it is monstrous to require thought of any kind from him. A red rose is not selfish because it wants to be a red rose. It would be horribly selfish if it wanted all the other flowers in the garden to be both red and roses.”<sup>2</sup>*

Autonomy, is the ability to choose and the freedom to choose between competing conceptions of the good and of how to live. It is only by the exercise of autonomy that

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<sup>1</sup> Drawing on the Evidence of John Harris to The Select Committee On The Assisted Dying For the Terminally Ill Bill. U.K. Parliament 9<sup>th</sup> September 2004. <https://publications.parliament.uk/pa/ld200405/ldselect/ldasdy/86/4090903.htm>. Accessed 2nd November 2017.

<sup>2</sup> Oxford World's Classics: *The Soul of Man and Prison Writings*, Oxford University Press, Oxford, 1999. [Oscar Wilde](#) (Author), [Isobel Murray](#) (Editor)

our lives become in any real sense our own. We are shaped by the decisions we make, and without the freedom to choose what we do and how we live we cannot have any personal identity at all. If we cannot choose our path through life, including its destination and, as far as it is within our control, the nature and manner of our life's end we are nothing!

The ending of our lives often determines life's final shape and meaning, both for ourselves and in the eyes of others. When we are denied control of the end of our lives we are denied the capacity to give our lives its ultimate meaning.

As Ronald Dworkin memorably put it:

*“Making someone die in a way that others approve, but he believes a horrifying contradiction of his life, is a devastating, odious form of tyranny”.*<sup>3</sup>

Autonomy is the underlying rationale of laws allowing patients to refuse life sustaining medication which our law does allow. To permit this and to deny medically assisted death is inconsistent.

### **Assisted Dying as Liberation**

It is so often assumed in contemporary debate that the only problem about being denied the right to choose the time and the manner of our own death is the problem of ensuring that continued life is physically comfortable and pain free (or more realistically in most cases, involves the best available control of pain).

But there is a long tradition of conceiving of the problem of dying in quite different terms. Shakespeare as always gives one version of such terms most eloquent expression – here in the words of Cassius in *Julius Caesar*, making a strong case for death on his own terms. For Cassius the power and liberty to die on one's own terms is a matter of freedom and the defeat of tyranny:

*...Cassius from bondage will deliver Cassius:  
Therein, ye gods, you make the weak most  
Strong;  
Therein ye gods, you tyrants do defeat:  
Nor stony tower, nor walls of beaten brass,  
Nor airless dungeon, nor strong links of iron,  
Can be retentive to the strength of spirit;  
But life, being weary of those worldly bars,  
Never lacks power to dismiss itself.*

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<sup>3</sup> Ronald Dworkin, *Life's Dominion*, An Argument about Abortion and Euthanasia, by. Ronald Dworkin. London: Harper Collins, 1993. at page 217.

See also John

Harris: [https://books.google.co.uk/books?id=1KcVOUhGDkoC&pg=PA15&lpg=PA15&dq=Making+someone+die+in+a+way+that+others+approve,+but+he+believes+a+horrifying+contradiction+of+his+life,+is+a+devastating,+odious+form+of+tyranny.&source=bl&ots=XsA\\_Y6jjz&sig=D1iy30m1em35DGnO0FTZ1xljteA&hl=en&sa=X&ved=0ahUKEwj9nL7yyp\\_XAhUFCMAKHWWSs06AEIJAA#v=onepage&q=Making%20someone%20die%20in%20a%20way%20that%20others%20approve%2C%20but%20he%20believes%20a%20horrifying%20contradiction%20of%20his%20life%2C%20is%20a%20devastating%2C%20odious%20form%20of%20tyranny.&f=false](https://books.google.co.uk/books?id=1KcVOUhGDkoC&pg=PA15&lpg=PA15&dq=Making+someone+die+in+a+way+that+others+approve,+but+he+believes+a+horrifying+contradiction+of+his+life,+is+a+devastating,+odious+form+of+tyranny.&source=bl&ots=XsA_Y6jjz&sig=D1iy30m1em35DGnO0FTZ1xljteA&hl=en&sa=X&ved=0ahUKEwj9nL7yyp_XAhUFCMAKHWWSs06AEIJAA#v=onepage&q=Making%20someone%20die%20in%20a%20way%20that%20others%20approve%2C%20but%20he%20believes%20a%20horrifying%20contradiction%20of%20his%20life%2C%20is%20a%20devastating%2C%20odious%20form%20of%20tyranny.&f=false). Accessed 2<sup>nd</sup> November 2017.

*If I know this, know all the world besides,  
That part of tyranny that I do bear  
I can shake off at pleasure.  
Casca. So can I:  
So every bondman in his own hand bears  
The power to cancel his captivity.*<sup>4</sup>

Later in this Affidavit we will recall Hamlet's famous take on this liberty and its conclusion, to "take arms against a sea of troubles and by opposing end them".<sup>5</sup>

## **Vulnerability**

Many objectors to medically assisted death emphasise their concern to protect the vulnerable. I yield to none in my concern for the vulnerable. But there are two groups of vulnerable people to whom we owe concern, respect and protection. One consists of those who might be unduly pressured into requesting death. The others are those who are cruelly, denied the death they seek. We are surely not entitled to abandon one group of vulnerable people in favour of another. We have somehow to protect both.

**However, those seeking medically assisted death are the more vulnerable because they are truly coerced, absolutely prevented from obtaining the remedy they seek. Those who might be encouraged to die, are and remain, free to refuse. They are not victims unless they make themselves victims. Those who seek and are denied death, are genuinely coerced and are certainly the victims of tyranny.**

Concern for the vulnerable does not, as so many falsely believe, tell us we should forbid medically assisted dying. On the contrary it tells us we should permit it, with safeguards thereby protecting both groups of vulnerable people to whom we have responsibilities.

## **Slippery Slopes**

Slippery slopes are invoked, only by the feeble-minded: "skis or crampons" is the only and always available choice! We can always decide to go further up or further down any slope - its just a question of appropriate footwear, or the intellectual equivalent. And that is the readiness to act autonomously- "the readiness is all"<sup>6</sup>. We have to ensure as far as is possible that citizens are equipped with that readiness and protected in its exercise. This a free society does: through public education, public information and freedom of speech, expression and action (compatible as John Stuart Mill insisted, with "a like freedom for all". What is not permissible in a free society is the denial of the vital choice as to whether to be, or not to be.

## **Palliative Care**

Palliative care would be a tempting alternative **only** if the only horror of facing one's own death is the pain involved. But for many, the real horror involves the terror of being forced to go on living when one wishes, for whatever reason, not to go on

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<sup>4</sup> William Shakespeare, *Julius Caesar Act I. Sc. III.*

<sup>5</sup> William Shakespeare, *Hamlet, Act III, Scene 1.*

<sup>6</sup> William Shakespeare, *Hamlet, Act V. Scene 2.*

living. Palliative care cannot meet the needs of all dying patients, for the simply and sufficient reason that those needs are not palliation, they are the need for the freedom to decide their own fate. We also need to bear in mind that palliative care is often the refuge of religious bigots who piously condemn people to suffering and an unwanted life.

### **Saving Life Is Just Postponing Death With A Positive Spin**

1. It is right to save life when the subject is in immediate danger (The rule of Rescue) then:
2. It is right to save life when the subject is in danger at some future time (Preventive Medicine/ Public Health) and:
3. It is right to save life when the threat is at a relatively similar future time through senescence or the diseases of old age (Life Extension or Human Enhancement).

**Of course the power of this obligation presupposes that the life is worth saving to the person whose life it is – that they do want extended life (or, if incompetent or too young to decide or not conscious, that the period of life extension is likely to be in their interests).**

My own account of the wrongness of killing and of dying depends upon a theory of personhood which I do not have space to develop now. It is developed at length in my book *the Value of Life*<sup>7</sup> and elsewhere<sup>8</sup>, however I can here just indicate the lines of such a theory.

Most current accounts of the criteria for personhood follow John Locke in identifying self-consciousness coupled with fairly rudimentary intelligence as the most important features. My own account<sup>9</sup> uses these, but argues that they are important *because* they permit the individual to value her own existence. The important feature of this account of what it takes to be a person, namely that *a person is a creature capable of valuing its own existence*, is that it also makes plausible an explanation of the nature of the wrong done to such a being when it is deprived of existence, or of the choice to determine the scope and limits of their own existence.

Persons who want to live are wronged by being killed because they are thereby deprived of something they value. Persons who do not want to live are not on this account harmed by having their wish to die granted, through voluntary euthanasia for example.

Non-persons or potential persons cannot be wronged in this way because death does not deprive them of anything they can value. If they cannot wish to live, they cannot have that wish frustrated by the ending of their lives. Creatures other than persons can of course, be harmed in other ways, by being caused gratuitous suffering for example, but not by being painlessly killed. And it may be wrong to end the lives even of non-

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<sup>7</sup>See *The Value of Life*, Routledge & Kegan Paul, London, 1985 and 1992. Chapter 1.

<sup>8</sup> John Harris "The concept of the Person and the value of life" in *Kennedy Institute of Ethics Journal* Vol.9.No.4. December 1999. 293-308.

<sup>9</sup>Ibid.

persons for many reasons, for example because doing so will make others unhappy and there are no countervailing powerful reasons not to end the lives in question.

The life-cycle of a given individual passes through a number of stages of different moral significance. The individual can be said to have come into existence when the egg is first differentiated or the sperm that will fertilise that egg is first formed.<sup>10</sup> This individual will gradually move from being a potential or a pre-person into an actual person when she becomes capable of valuing her own existence. And if, eventually, she permanently loses this capacity, she will have ceased to be a person, which is what justified the (then) House of Lords decision in Bland (see below).

### **The morality of killing persons.**

The harm you do in taking a life is the harm of depriving someone of something that they can and do value. But you may also wrong those who care about them and those who value life intrinsically or for what Ronald Dworkin for example, has termed its 'investment' value.<sup>11</sup> The crucial issues are autonomy and integrity and we will be returning to these in a moment.

The distinction between persons and other sorts of creatures explains the difference between abortion, infanticide and murder and allows us to account for how we might have benefited persons by having saved the lives of the human potential persons they once were, but at the same time shows why we do not harm the potential person by ending that life, whether it be the life of an unfertilised egg or a new-born infant.<sup>12</sup>

This account, very starkly presented, yields a difference in the morality of ending the lives of persons and that of ending the lives of all other creatures including human non- persons. If the harm of ending a life is principally a harm to the individual whose life it is and if this harm must in turn be understood principally as the harm of depriving that individual of something that they value and want, then voluntary euthanasia will not be wrong on this account.

### **Persistent Vegetative State**

To see what this means in practice, we can consider the case of persistent or permanent vegetative state and the landmark House of Lords judgement in the case of Tony Bland. Tony Bland's parents, who accepted that their son had ceased to exist in any real, biographical, sense although his body remained alive, were prevented from obtaining the solace of grief. In desperation they asked the English courts to declare that it would be lawful for medical staff to withdraw feeding and other life sustaining measures so that their son would die. It is not clear why there was any necessity to take the Bland case to the courts since it was already well established that there was no obligation to sustain a baby by feeding. [ *Re C* [1989] 2 All ER 782 and *Re J* [1990] 3 All ER 930.] Eventually the House of Lords ruled unanimously that such a

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<sup>10</sup>See my *Wonderwoman and Superman*, Oxford University Press, 1992. Chapter.3.

<sup>11</sup>Ronald Dworkin *Life's Dominion* Harper Collins, London 1993. See for example Chapter 3.

<sup>12</sup>See my *The Value of Life* Routledge & Kegan Paul, 1985 & 1992.

course of action would be lawful [ *Airedale NHS Trust v. Bland*, [1993] 1 All England Rep. 821 H.L.]

The problem was of course that although Tony Bland had permanently ceased to have “a life” in any meaningful sense of that term, he was not dead and would not die unless the courts permitted doctors to take steps to that end.

It seems difficult to resist the view that in many circumstances, for example abortion and indeed other instances of legally bringing about the death of human individuals, can be justified and is *justifiable*. Indeed such courses of action have often been explicitly permitted by the courts in the United Kingdom and indeed by The European Court of Human Rights (ECHR). **I mention this not by way of attempting to introduce a legal submission or assert legal precedents for my arguments here; but rather to demonstrate the truth of my claim that the necessity, sometimes of ending lives not only in the interest of those whose lives they are but also to protect vital interests of others, is well recognised as evidenced, inter alia, by the United Kingdom courts and by The European Court of Human Rights.**

For example when the Court of Appeal in the so called “Manchester Conjoined Twins case” [Re A (children) (conjoined twins: surgical separation) [2000] 4 All ER 961] allowed one twin to be killed to save the life of the other they accepted that morally, as well as legally, killing, even an infant was sometimes both justified and justifiable

When Josephine Quintavalle went to the High Court to attempt to obtain a ruling that the Hashmi Family should not be allowed to create a new child by Assisted Reproduction in order to save the life of an existing child, Quintavalle, (a staunch pro life activist) presumably, took the view that the avoidable death of the existing child was justifiable if its life could only be saved by creating a “saviour child”. [R(on the application of Quintavalle) v HFEA [2003] 3 All ER 257, CA] .

In the recent case of Charlie Gard, on which I wrote and commented extensively at the time, three successive different and independent English courts considered the evidence, (medical, legal and moral) and, culminating in a decision of the Supreme Court, decided that the medical team at Great Ormond Street Hospital were right, and that Charlie should not be subjected to further treatment and should be allowed, in his own interests, to “die with dignity”. The basis of all these decisions was that Charlie had suffered irreversible brain damage, that there was no evidence that this could be reversed by any existing treatments and that to subject Charlie to further treatment which was causing him uncertain but probable distress, suffering and pain to no purpose (that is with no possibility of amelioration of his condition nor of his ultimate survival) that continued life was not in his interests, agreeing with his medical team at GOSH that regrettably it was time to permit Charlie to die with dignity.

Chris Gard and Connie Yates then took the case to the European Court of Human Rights, which confirmed the judgement of the UK Supreme Court, remarking that the decision of the Supreme Court “was meticulous”. The ECHR determined, “it was most likely Charlie was being exposed to continued pain, suffering and distress and that undergoing experimental treatment with no prospects of success would offer no benefit, and continue to cause him significant harm.” ((BBC News. (2017). *Charlie*

*Gard parents lose European court appeal - BBC News.* [online] Available at: <http://www.bbc.co.uk/news/uk-england-40423371>. [Accessed 9 Aug. 2017].

The present case shares many of the features of the Charlie Gard case, the serious and irremediable condition affecting the individual in question, the real and present suffering, and of course the clear expression by the individual concerned that their suffering is unbearable and unacceptable in a civilised society.

*I emphasize that I mention these cases not by way of any legal submission (I am not a lawyer) but to point out that both the European and UK courts have accepted, and even endorsed, the ending of the lives of embryos, fetuses (and indeed the lives of human persons) when such deaths are in their own interests or in what are judged in the circumstances to be, the overriding interests of others.*

If the court were to apply the “meticulous reasoning” of the Gard case, in the case of someone facing a dying process he fears, and which he regards as “*a horrifying contradiction of his life, is a devastating, odious form of tyranny*”, what would be the consequence? In doing so, the court would be continuing a series of morally informed decisions, and culturally imbedded history, recognising a right to end one’s own life, and acknowledging the many urgent cases where this is justifiable in principle and justified in fact. And to have such assistance in doing so as is needful. Our cultural history is literally replete with edifying examples of the thoughtful consideration and/or implementation of acts of self destruction and assisted self destruction.<sup>13</sup> We have already mentioned Cassius and Hamlet, we might have mentioned Brutus, Cleopatra and Antigone, and more recently Virginia Woolf and Margaux Hemingway. I will conclude with a jurisprudentially famous example of assisted dying.

### **The Policeman’s Dilemma:**

*Consider the policeman’s dilemma: A lorry driver is trapped in the blazing cab of his vehicle following an accident. An armed policeman is on the scene and sees that the driver cannot be extracted before the flames get to him and he is burned alive. The policeman can let him be burned alive or can give him a quick and relatively painless end by shooting him in the head. The driver says “please shoot me, don’t let me be burned alive!”<sup>14</sup>*

**All decent people will know the policeman would not only have been justified to accede to the request of the lorry driver, for a merciful death, but that this shows that no one is against euthanasia in principle. Everything else concerns adequate safeguards.**

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<sup>13</sup> The Romans, by and large, favoured assistance.

<sup>14</sup> Adapted from Herbert Hart’s famous (true?) example in his “Intention and Punishment” in *Punishment and Responsibility* Oxford University Press, Oxford 1968.

