

Choosing Life, Choosing Death

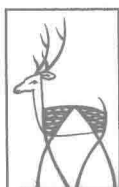
The Tyranny of Autonomy
in Medical Ethics and Law

Charles Foster

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CHOOSING LIFE, CHOOSING DEATH

Autonomy is a vital principle in medical law and ethics. It occupies a prominent place in all medico-legal and ethical debate. But there is a dangerous presumption that it should have the only vote, or at least the casting vote. This book is an assault on that presumption, and an audit of autonomy's extraordinary status.

The fightback against the hegemony of autonomy began long ago, but the original papers setting out the dissenters' contentions still have the feel of *samizdat* tracts. A lot of the modern academic literature does take a more moderate position. But that literature is not an accurate barometer of the *zeitgeist*. For that you need to hear speakers' tones at conferences, read the medical and legal broadsheets, trawl through the dictates of the GMC and the guidelines of the BMA and note the presumptions in the heads of (particularly young) doctors when they talk about their patients.

This book surveys the main issues in medical law, noting in relation to each issue the power wielded by autonomy, asking whether that power can be justified and suggesting how other principles can and should contribute to the law. Its structure is broadly chronological. It starts before birth (with questions relating to reproductive technology and the ownership of gametes) and ends after death (with the issues relating to the ownership of body parts). On the way it deals with the status of the early embryo and the fetus, the law of abortion, confidentiality, consent, medical litigation, medical research and end-of-life decision-making.

It concludes that autonomy's status cannot be intellectually or ethically justified, and that positive discrimination in favour of the other balancing principles is urgently needed in order to avoid some sinister results.

To my mother and father, who respected my own autonomy
when that respect required superhuman restraint.

And to Aharon Barak, whose belief in what the law can be and do
has been an abiding inspiration.

‘[T]here is no morally correct solution which can be deduced from a single ethical principle like the sanctity of life or the right of self-determination. There must be an accommodation between principles, both of which seem rational and good, but which have come into conflict with each other.’

Airedale NHS Trust v Bland [1993] AC 789, 827 (Hoffmann LJ)

‘[B]eing out of fashion is not the same as being philosophically disreputable.’

Joseph Boyle (2004) ‘An Absolute Rule Approach’
in *A Companion to Bioethics* Kuhse H and Singer P (Oxford, Blackwells) 78

PREFACE

This is an assault on the presumption that autonomy ought to be the only voice heard in medical ethics and law. The fightback against the extraordinary hegemony of autonomy began long ago, but the original papers setting out the dissenters' contentions still have the feel of *samizdat* tracts. A lot of the modern academic literature, of course, does take a more moderate position. But that literature isn't a very accurate barometer of the *zeitgeist*. For that you need to hear speakers' tones at conferences, read the medical and legal broadsheets, trawl through the dictates of the GMC and the guidelines of the BMA, and note the presumptions in the heads of (particularly young) doctors when they talk about their patients.

The book is laced with ironies, but perhaps the greatest is that autonomy, which loves the rhetoric of free speech, is ruthless in its suppression of any other contenders for a voice in medical ethics debates. The reasons for this are partly historical. Autonomy grew up as a street fighter, and was blooded in some genuinely noble battles against medical paternalism. But like so many rulers with this sort of pedigree, it has quickly forgotten its democratic roots, and grown fat and brutal in power.

Of course there are many things wrong with this book, but three main criticisms should be answered pre-emptively.

The first is that I speak anthropomorphically about autonomy, as if it were a person with a character and an agenda. This anthropomorphism is mainly a literary device. It dramatises the debate. But there is a deeper truth in it. There is a remarkable homogeneity in autonomy's contentions, uttered through its high priests. The high priests, marinated in each others' papers and academic culture, do sound strangely similar. I ought to say, though, that I number some of these turbulent priests amongst my dearest friends. If the debate sounds as if it is getting personal, it's not.

The second is a related point. I could be accused of setting up straw men and then knocking them gleefully down. It might be said that I have caricatured 'autonomy' (perhaps by describing it in my anthropomorphic way), and that a properly nuanced view of autonomy would be able to respond more convincingly to me than the intellectually emasculated version that I have allowed to speak.

There are four responses to this.

First: it is perfectly true that I do not give a systematic account, with duly voluminous footnotes, of the origins and nature of the philosophical doctrine of autonomy. There are plenty of splendid books that do. I have read quite a lot of them. But this isn't that sort of book. I am well aware that there are lots of things

to be said about autonomy which aren't said here, but none of them seems to me to be relevant to the argument I'm embroiled in. I have tried to simplify things that are too often thought of as so encrusted with venerable complexity as to be incapable of straightforward description. The wrong perception of complexity has often conferred an entirely unwarranted immunity to straightforward criticism. If I have oversimplified, I hope I haven't done so in a cowardly attempt to diminish the force of a difficult opposing contention.

My determination to simplify will go too far for some people. In particular the feminists will feel short-changed and under- and misrepresented. I took a deliberate decision in the abortion chapter, for instance, not to present the case as a fusillade against pro-abortion feminists (yes, I know that there are some anti-abortion feminists too). The relationship between feminism and autonomy is complex and close, but not hugely interesting from a medico-legal point of view. Feminism tends to conduct its business at high emotional temperatures. In both philosophy and chemistry, high temperatures often generate interesting novelties. And indeed feminism has produced some remarkable and valuable philosophic novelties, but (apart from its contribution to the idea of relational autonomy, which I do discuss) not in the territory covered by this book. Although feminism has drafted a powerful new language in which autonomy often articulates its claims, it has not fashioned entirely new claims. Or at least its claims are not sufficiently different from autonomy's generic claims to demand specific attention. I didn't want to open a can of worms for fear that their wriggling might distract from the main thesis.

Second: I only have a problem with the caricature—the icy self-determinist who talks about people's life plans as if they are demonstrable documents.

Third: the caricature is alive, well, tenured and to be heard on every conference platform, apparently intolerant of the saving nuances.

Fourth: when the nuances are invoked, they generally seem to me to call seriously into question many of the fundamentals of the autonomist creed: they are not subtle variations on the theme, but contradictions of it. Even if that is not right, a vast number of 'nuances' need to be invoked to retain autonomy's credibility as the sole arbiter of ethically acceptable action. 'Autonomy', when it is encrusted with all those 'nuances', doesn't look like autonomy at all. It looks just like a structure designed by all the desirable principles working together, and it is far more sensible to see it that way. You have to do tremendous violence to common and philosophical sense to see autonomy as the sole author of a decent textbook of medical ethics or law. So why do people bother? The only reason for bothering is a depressing lack of humility on the part of autonomy.

And fifth: this is primarily a book about the law, and even if the nuances are real, and even if they are genuinely held by the mainstream autonomists, they are not heard or considered by the judges—for reasons I consider in chapter 1.

Although medical ethics have been responsible for some of the most important and exciting intellectual experiences of my life, I have to admit to a deep suspicion of the discipline. I am embarrassed by the suspicion, because it is grounded in a sanctimonious and profoundly unattractive conviction that of the two disci-

Preface

plines—ethics and law—my own discipline of law is the senior partner. This is only because the law is forced to *decide* things, and decision seems to me to deserve a respect that mere discourse does not. Lying awake at night having decided that conjoined twins should be separated is a different and more laudable form of insomnia than the insomnia caused by worrying about how one's lecture has gone down. But *decision* is valuable not only because of the responsibility that is its concomitant, but also (and here is the really repellent sanctimony) because it produces better thinking. The judges themselves know this. If they comment in a judgment on a point that does not strictly fall to be decided, they acknowledge that the *obiter dictum* does not have the authority of the really necessary observations. This is not a piece of pointless tradition. Practical necessity transforms thought. It is the alchemy of necessity, rather than any magic mantle, that transmutes the meanderings of Mr X, (deserving only weary, patient, dinner-party politeness) into the coruscating judgment of Mr Justice X (worthy of a long, respectful piece in the *Law Quarterly Review*). And there is something intellectually and ethically antiseptic about the light of a courtroom: it deals very effectively with the viruses that persist happily in even (and possibly particularly) the most rigorously refereed journals.

That is not to say that the law is perfect. Very far from it. Much of this book is concerned with pointing out its radical deformities and its blemishes. Its practitioners, too (of which I am one), have an enormous amount to learn from the colossal creative energy and sheer cleverness of academics in the realm of medical ethics. It is a great pity that the close but estranged cousins, medical law and ethics, talk so little to each other. The estrangement is dangerous for both of them. There are real problems of language, but the hybrid vigour that would result from genuine cross-fertilisation could produce some really thrilling new syntheses.

I hope that I have stated the law correctly as of July 2008.

Charles Foster
Oxford
July 2008

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