

Euthanasia, Ethics and Public Policy

An Argument Against Legalisation

John Keown

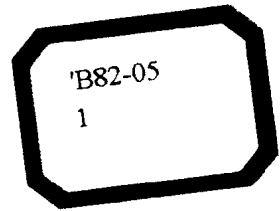


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An Argument against Legalisation

JOHN KEOWN
University of Cambridge



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PREFACE

There are few more momentous and controversial questions facing contemporary society than the legalisation of voluntary, active euthanasia (VAE) and active physician-assisted suicide (PAS). The campaign for their legalisation shows little sign of abating. In January 1997, campaigners for PAS argued their case before the United States Supreme Court. They had persuaded two Federal Appeal Courts that the US Constitution recognised a right of mentally competent, terminally ill patients to PAS. Unanimously, the Supreme Court reversed both decisions.¹

As the Supreme Court's decisions illustrate, despite the popular support the campaign for legalisation seems to enjoy and the considerable media attention it has generated, the campaign has as yet enjoyed surprisingly little success in changing laws around the world. This is largely because opposition to change remains strong. That opposition is partly based on the view that it is always morally wrong for one person, doctor or not, intentionally to kill another innocent person, even at their request. But it is also rooted in the concern that if VAE/PAS² were permitted they would not remain voluntary for long, and that patients who did not really want to die, or who were not suffering severely, or whose suffering could be alleviated by palliative medicine, would nevertheless have their lives terminated. Indeed, fear of this 'slippery slope' is proving to be *the* major obstacle to reform. But is this fear justified or illusory? This is the question which has taken centre-stage in the current political debate, and it is the question which forms the centre-piece of this book.

Many people favour the legalisation of VAE. Their reasons are typically twofold: compassion and autonomy. They think VAE is right because it

¹ *Washington v. Glucksberg* 138 L Ed 2d 772 (1997); *Vacco, Attorney-General of New York et al. v. Quill et al.*, 138 L Ed 2d 834 (1997).

² Henceforth, to avoid repetition, 'VAE' will be used to include PAS, unless the contrary is apparent from the context.

puts an end to human suffering and because people have a right to decide for themselves when and how to die. Yet how many of those who favour legalisation have seriously explored the counter-arguments? In particular, how many have examined the argument that, whatever the rights and wrongs of VAE, legalising it would be bad public policy, not least because it could not be controlled? How many, for example, have read (or are even aware of) expert reports which have carefully evaluated this major objection?

This book aims to give the general reader, who need have no expertise in philosophy, law or medicine, a lucid introduction to this central issue in the debate. It will be of interest to all those, in any country, who wish to ensure that their opinions, whether currently for or against legalisation, are better informed.

FOREWORD

Forewords do not usually begin with a disclaimer, but there is a reason here, for *Euthanasia, Ethics and Public Policy* uncompromisingly addresses themes which colleagues of the present writer, and occasionally he himself, have tackled in the past, and may have to tackle together in the future. Comity and courtesy make it necessary to avoid the implication that the opinions expressed in this valuable work are necessarily shared in full. This being said, it is a pleasure to welcome a contribution to what is, at present, the most intellectually demanding, the most ethically challenging, and the most important for its contingent effects as well as for its immediate practical impact, of all the points on the line where law, medicine, belief and reason intersect.

The image of the slippery slope is often called up as a warning to those who take an easy step without looking to see where the next may lead, but it also reminds us that in this area the concepts themselves are slippery, escaping sideways from the effort to grasp them. The overlapping problems of accelerated death demand intellectual honesty rather than unfocussed right-thinking, and an emphasis on duties as well as individual rights.

The steepness of the slope, and its treacherous footing, are often concealed by an emollient vocabulary. Thus, the expression 'best interests' conveys an upbeat meaning, at odds with its more chilling implications. So also, the contemporary watchword 'personal autonomy' distracts attention from the duties of those implicated in the rights-based choice of the principal actor. Indeed, so deceptive is the terminology that these two antithetical concepts, authoritarian and libertarian, are quite frequently deployed at the same time: an important example of the need to know what words mean before employing them in debate. The present work uncompromisingly takes this stance, and is right to do so. Equally, it exposes the interchangeable usage of concepts which are not the same: intend/foresee,

cause/assist, and so on. This is nothing new in itself, but the emphasis in the present context is a valuable corrective. Again, the sceptical eye cast on expressions which mean different things to different people, such as 'the sanctity of life', will help to discourage their use as common coin.

On the purely jurisprudential side of the debate there is also much to repay study. The unconvincing shifts and expedients in which the courts have taken refuge are clearly exposed. If this makes uncomfortable reading for the professionals, so much the better, so far as the future is concerned.

The book is also an important contribution to the polemic about the feasibility of protection against the abuse of assisted death. Nothing can make up for the paucity of the available data, but the careful analysis of such hard facts as exist will be of value to decision-makers (including the judges) who have to shape policies by reference to pragmatic as well as purely ethical and logical considerations. The debate will continue, but we shall all be better informed.

In sum, we find here a work which displays a consistent and deeply felt ethical purpose, and yet is able to do so in a moderate and scholarly tone. The subject, which requires us to think so deeply about what our lives in society are really about, badly needs contributions of this kind. No doubt it will not persuade everybody, but it is hard to believe that everybody will ever be of the same mind. Rather than try to broker an unattainable unanimity, what we badly need is for our minds to be informed and alert. For this reason I am glad to welcome the book, and to express the hope that many, outside as well as inside the professions whose preoccupations it treats, will take the trouble to read it carefully, and reflect upon what it has to say.

Lord Mustill

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I would like gratefully to acknowledge the assistance I have received from several colleagues in writing this book. Professor Luke Gormally, Dr Helen Watt, Wendy Hiscox and Bobbie Sidhu read the whole book in draft; Professor John Finnis, Wesley Smith and Karin Clark read parts. All made helpful suggestions. Wendy Hiscox also checked the references.

Thanks also go to the editors and publishers of several academic books and journals who gave permission to reproduce the following material and thereby bring it to a wider readership. Chapter 4 was published in Donna Dickenson and Mike Parker (eds.), *The Cambridge Medical Ethics Workbook* (2001) 27, and chapters 6 and 19 appeared in the *Law Quarterly Review* ((1997) 113 *LQR* 481). Much of Part III was published as two chapters in Luke Gormally (ed.), *Euthanasia, Clinical Practice and the Law* (1994), a paper in the *Law Quarterly Review* ((1992) 108 *LQR* 51), a paper in (1994) 6(1) *Bioethics Research Notes* 1, and a paper in the *Journal of Medical Ethics* ((1999) 25(1) *J Med Ethics* 16). I should also like to thank the co-author of this paper, Professor Henk Jochemsen, for permission to reproduce it in this book, where it appears as chapter 12. Chapter 20 first appeared in *Legal Studies* ((2000) 20(1) *Legal Stud* 66).

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Despite the help I have received from colleagues, I remain solely responsible for the book's argument and accuracy.

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ABBREVIATIONS

| | |
|------------------------------|--|
| A 2d | Atlantic Reporter, 2nd Series |
| AC | Appeal Cases |
| All ER | All England Law Reports |
| <i>Am J Hosp Pall Care</i> | <i>American Journal of Hospice and Palliative Care</i> |
| <i>Am J Law Med</i> | <i>American Journal of Law and Medicine</i> |
| <i>Am J Psychiatry</i> | <i>American Journal of Psychiatry</i> |
| <i>Ann Intern Med</i> | <i>Annals of Internal Medicine</i> |
| BMJ | <i>British Medical Journal</i> |
| BMLR | Butterworths Medico-Legal Reports |
| Cal Rptr | California Reporter |
| <i>Camb LJ</i> | <i>Cambridge Law Journal</i> |
| <i>Camb Q Healthc Ethics</i> | <i>Cambridge Quarterly of Healthcare Ethics</i> |
| <i>Cath Med Q</i> | <i>Catholic Medical Quarterly</i> |
| Cm | Command Paper |
| Cr App R | Criminal Appeal Reports |
| <i>Crim LR</i> | <i>Criminal Law Review</i> |
| DLR | Dominion Law Reports |
| <i>Duq L Rev</i> | <i>Duquesne Law Review</i> |
| EHRR | European Human Rights Reports |
| Fam LR | Family Law Reports |
| <i>Fam Pract</i> | <i>Family Practice</i> |
| Fitzpatrick | F. J. Fitzpatrick, <i>Ethics in Nursing Practice</i> |
| Gomez | Carlos F. Gomez, <i>Regulating Death: Euthanasia and the Case of the Netherlands</i> |
| Gormally | Luke Gormally, <i>Euthanasia, Clinical Practice and the Law</i> |
| Griffiths | John Griffiths et al., <i>Euthanasia and Law in the Netherlands</i> |

| | |
|------------------------------------|--|
| Guidance | BMA, <i>Withholding and Withdrawing Life-Prolonging Medical Treatment. Guidance for Decision Making</i> |
| Guidelines | KNMG, 'Guidelines for Euthanasia' |
| <i>Hastings Cent Rep</i> | <i>Hastings Center Report</i> |
| HC | House of Commons |
| Hendin | Herbert Hendin, <i>Seduced by Death: Doctors, Patients and Assisted Suicide</i> |
| HL | House of Lords |
| ILRM | Irish Law Reports Monthly |
| <i>Issues Law Med</i> | <i>Issues in Law & Medicine</i> |
| <i>J Contemp Health Law Policy</i> | <i>Journal of Contemporary Health Law and Policy</i> |
| <i>J Med Ethics</i> | <i>Journal of Medical Ethics</i> |
| <i>J Med Philos</i> | <i>Journal of Medicine and Philosophy</i> |
| <i>J Pall Care</i> | <i>Journal of Palliative Care</i> |
| <i>J R Soc Health</i> | <i>Journal of the Royal Society of Health</i> |
| <i>J R Coll Physicians Lond</i> | <i>Journal of the Royal College of Physicians of London</i> |
| Keown | J. Keown, <i>Euthanasia Examined: Ethical, Clinical and Legal Perspectives</i> |
| L Ed | Lawyers' Edition, United States Supreme Court Reporter |
| <i>L Med & Health Care</i> | <i>Law, Medicine and Health Care</i> |
| <i>Legal Stud</i> | <i>Legal Studies</i> |
| Lloyd's Rep Med | Lloyd's Law Reports: Medical |
| Lords' Report | <i>Report of the Select Committee on Medical Ethics</i> |
| LQR | <i>Law Quarterly Review</i> |
| <i>Med J Aust</i> | <i>Medical Journal of Australia</i> |
| <i>Med L Rev</i> | <i>Medical Law Review</i> |
| <i>Med Law</i> | <i>Medicine and Law</i> |
| <i>Minn L Rev</i> | <i>Minnesota Law Review</i> |
| <i>N Engl J Med</i> | <i>New England Journal of Medicine</i> |
| <i>New LJ</i> | <i>New Law Journal</i> |
| NJ | Nederlandse Jurisprudentie |
| Outline | Ministry of Justice, <i>Outlines Report Commission Inquiry into Medical Practice with Regard to Euthanasia [sic]</i> |

| | |
|-------------------------------|---|
| Parl. Deb. | Parliamentary Debates |
| QB | Queen's Bench (Law Reports) |
| QBD | Queen's Bench Division (Law Reports) |
| Report | <i>Medische beslissingen rond het levenseinde.</i> <i>Rapport van de Commissie onderzoek</i> <i>medische praktijk inzake euthanasie</i> |
| <i>Singapore J Legal Stud</i> | <i>Singapore Journal of Legal Studies</i> |
| Survey | <i>Medische beslissingen rond het levenseinde.</i> <i>Het onderzoek voor de Commissie</i> <i>Onderzoek Medische Praktijk inzake</i> <i>Euthanasie</i> |
| Survey 2 | G. van der Wal and P. J. van der Maas, <i>Euthanasie en andere medische beslissingen</i> <i>rond het levenseinde. De praktijk en de</i> <i>meldingsprocedure</i> |
| Task Force | <i>When Death is Sought: Assisted Suicide and</i> <i>Euthanasia in the Medical Context</i> (Report of the New York State Task Force on Life and the Law) |
| <i>U Rich L Rev</i> | <i>University of Richmond Law Review</i> |
| WLR | Weekly Law Reports |

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Introduction

Despite the major advances in medicine and palliative care witnessed by the last century, many patients, even in affluent Western nations, still die in pain and distress. Some entreat their doctors to put an end to their suffering either by killing them or by helping them to kill themselves. In almost every country in the world, a doctor who complies with such a request commits the offence of murder or assisted suicide and faces a lengthy term of imprisonment and professional disgrace.

Yet many people think it should be lawful for a doctor to end a suffering patient's life on request, either by administering a lethal injection or by assisting the patient to commit suicide.¹ Organisations campaigning for legal reform, such as the Hemlock Society in the USA or the Voluntary Euthanasia Society (VES) in the UK, are not proposing that a doctor should be allowed to kill² patients whenever

¹ Lord Goff, the former Senior Law Lord, has quoted a poll, conducted on behalf of the Voluntary Euthanasia Society in England, which contained the following proposition: 'Some people say that the law should allow adults to receive medical help to a peaceful death if they suffer from an incurable physical illness that is intolerable to them, provided they have previously requested such help in writing.' His Lordship pointed out that when this was first put to the public in the early 1960s, 50% of those approached agreed with it, but that in 1993 the figure had risen to 79% ('A Matter of Life and Death' (1995) 3 *Med L Rev* 1, 11). His Lordship also pointed out, however, that the proposition raised a number of fundamental questions which cannot be expressed in a simple question suitable for an opinion poll, and that the proposition was ambiguous. What, for example, did those polled understand by 'medical help'?

² Some advocates of VAE object to the use of the word 'kill' in this context. They argue that 'killing' is a word which, like 'rape', connotes a lack of consent, and that in discussions of VAE the word 'kill' is misleading and emotive. See Jean Davies, 'Raping and Making Love Are Different Concepts: So Are Killing and Voluntary Euthanasia' (1988) 14 *J Med Ethics* 148. A counter-argument is that the normal definition of 'rape' is sexual intercourse without consent, but that the normal definition of 'kill' is simply 'put to death; cause the death of, deprive of life' (*The New Shorter Oxford English Dictionary* (1993) I, 1487). One can, therefore, kill with or without consent. It makes perfect sense, for example, for a soldier to say, 'My wounded comrade on the battlefield asked me to put him out of his misery, and so I killed him.' And, although it