On the Criminalization of Assisted Suicide

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For: Nathan Harron
No person is entitled to consent to have death inflicted on him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted on the person by whom consent is given.

*The Criminal Code of Canada, Section 14*

Every one who:

a. Counsels a person to commit suicide
b. Or aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

*The Criminal Code of Canada, Section 241*

Assisted Suicide: a Contentious Question

The above two provisions of the *Criminal Code* have remained intact despite strong challenges to their content which have been brought before the Courts. However, as the amount of case law on the matter increases, the question of whether the state should unconditionally criminalize assisted suicide grows no less salient or contentious.

Assisted suicide is the act of suicide committed with another’s aid or abetting. As I will soon demonstrate, the criminalization of this act leads to severe restrictions on the liberty of some individuals. It is the social consensus that such restrictions must be justified in order to be part of law. It has been suggested that criminalizing assisted suicide can be justified on the grounds of paternalism, moralism, or Mill’s harm principle. I will argue, however, that the unconditional criminalization of assisted suicide is not defensible on either of these grounds, as:

1. the act of assisted suicide involves mature individuals whose conduct does not harm others;
2. paternalistic interferences are not warranted in the case of assisted suicide, and
3. moralism is a weak argument in itself, with further complications arising from the difficulty of determining whether assisted suicide is actually immoral in the eyes of society. Given that there isn’t convincing justification for criminalization, I suggest that the role of the state in regulating assisted suicide is not to prohibit the act, but only to ensure that it is indeed suicide, not murder.
Outlining the Restrictions on Liberty

Prior to beginning our analysis, we must determine which liberties the criminalization of assisted suicide restricts, and who is impacted by these restrictions. In a practical sense, the law affects predominantly the liberty of those looking to end their lives with another’s assistance. If an individual is prohibited from providing consent to being killed (i.e. cannot request assistance in committing suicide), then the question of whether another individual is permitted to provide such assistance is largely irrelevant. Further, suicidal persons in general are not greatly impacted —after all, suicide is not a crime, and it can be carried out independently by any number of other means. The impact falls most severely on those individuals who are physically disabled and cannot end their own lives. Prohibiting assistance to these individuals in committing suicide is equivalent to restricting their liberty to choose between life and death. It is this restriction that must be justified in order to make criminalization of assisted suicide defensible, because it is this restriction that is most strict. It will be with this restriction that the present essay is concerned.

In the present discussion, I will refer to the case of Rodriguez v. Attorney-General of B.C (1992). The case outlines the efforts of Ms. Rodriguez to be granted the liberty to commit suicide with assistance. Ms. Rodriguez suffered from Lou Gherig’s disease: an incurable, degenerative disease of the brain and spine. She made express her wish that before she entered a state of complete paralysis, resulting in slow and painful death, she should receive the assistance of a physician in ending her life, as she would no longer be physically able to do so on her own. The matter reached the Supreme Court of Canada, which ruled that Ms. Rodriguez may not choose to die by means of assisted suicide. The Court upheld the Criminal Code’s prohibition of assisted suicide on the grounds that it “reflected a legitimate state interest in protecting the vulnerable and
was fully consistent with a social consensus that human life must be respected and that care must be taken not to undermine the institutions that protect it” (Bickenbach 171).

*Argument from the Harm Principle: Preventing Harm to Others*

John Stuart Mill posited the harm principle, which states that: “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant” (Mill 306), because “with respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by anyone else” (Mill 309). Any party that wants to interfere with a person’s behavior for his own good is sure to do great damage, because it can only interfere on the basis of “general presumptions” of what is best for another person, and these presumptions may be “altogether wrong,” or “misapplied to individual cases” by virtue of poor appreciation of another’s circumstances (Mill 309). Since interference has such a high probability of being extremely harmful, “all errors which [an individual] is likely to commit against advice and warning are far outweighed by the evil of allowing others to constrain him to what they deem his good” (Mill 310). The only persons whose liberty Mill feels could justifiably be restricted by others are human beings who are not “in the maturity of their faculties” (Mill 306). Therefore, to apply Mill’s harm principle to the matter of assisted suicide, we must determine whether (a) assisted suicide harms others, and (b) whether those whose liberty is restricted by the law are mature individuals as defined by Mill.

To the first point, I suggest that assisted suicide does not harm others who are directly or indirectly involved in the act. Assisted suicide directly involves only the person committing suicide, and the person assisting in suicide. We may say that these persons are harmed by each
other’s actions, the former person may be harmed by loss of life, and the latter may be harmed emotionally by the experience of taking a life. However, the definition of assisted suicide implies a consensual relationship between the two actors: the person being killed consents to the act by definition of “suicide,” and consent of the assistant would need to be obtained for the act to take place at all. These persons provide consent after some analysis of their circumstances, of which they have the best appreciation. Overriding this consent would mean overriding the prior analysis in favour of another’s presumptions about the situation, which, as discussed above, would lead to more evil than good. At the same time, we must also take note that there may arise cases where the act of assisted suicide takes place without the consent of one of the parties. Most dangerously, the legalization of assisted suicide may be abused to commit murder. I suggest, however, that the law can guard against such situations without criminalizing assisted suicide, by requiring the active, written, sworn consent of the suicidal individual, or an advanced proxy directive in case of loss of consciousness. The law can and should also safeguard the individual’s right to withdraw his or her consent to have death inflicted on him or her at any time.

While there are two active actors involved in assisted suicide, indirectly, the act can be said to also involve the “near connections” of the suicidal person, and society at large. However, while the near connections may be emotionally harmed by the decision of their loved one to commit suicide, the action does not “go the length of violating any of their constituted rights” (Mill 309). As such, “the offender may then be justly punished by opinion, though not by law” (Mill 309). His or her actions may be deserving of moral disapprobation, but restrictions on liberty are nonetheless not justified. It is equally not permissible for society to interfere on the basis that its members are being harmed by the example of the suicidal individual’s, for even if a
negative example is portrayed, the situation also exhibits all the consequences of the individual’s actions, thus “the example, on the whole, must be more salutary than hurtful” (Mill 314).

Having addressed the presence of harm, we must further address the consideration of maturity raised by Mill. In order to qualify as mature in accordance with Mill, the individual looking to commit suicide must be a cognitively developed person who has reached the age of majority. Assisted suicide should then be permitted for disabled adults. In the case of minors or cognitively incapacitated individuals, the decision on whether the individual should stay alive or not would fall to the parent(s) or guardian(s).

This is the core of what would be Mill’s view on the issue. However, the paternalist Gerald Dworkin elaborated on some parts of Mill’s work, suggesting that paternalistic interferences can be justified by an extension of Mill’s considerations of the intrinsic value of freedom and an individual’s maturity— an extension which Mill should have, but did not, make. I will now address these considerations.

*Argument from Paternalistic Grounds: “Protecting the Vulnerable”*

I do not intend to dispute that some paternalistic interferences may be justified, or that protection of the vulnerable is a “legitimate state interest” (Bickenbach 171). However, does Ms. Rodriguez, or another in her situation, qualify as a “vulnerable” person requiring protection from the state? I suggest that this is not the case. Paternalistic interferences are justified in a fairly narrow set of circumstances, to which, I suggest, situations such as Ms. Rodriguez’s do not belong. The prominent paternalist Gerald Dworkin makes the case that paternalistic interference can be justified in two events: (1) where the interference “preserve[s] a wider range of freedom” for the individual whose freedom is being restricted (Dworkin 329), and (2) where the individual being coerced by the state actively or hypothetically consents to the restrictions being imposed.
With respect to the first claim, Dworkin observes that even Mill, who opposed paternalism, concedes that interference to preserve future freedom is acceptable because “the principle of freedom cannot require that [an individual] should be free not to be free” (Dworkin 329). To use Mill’s example, a man should be forbidden by the state from selling himself into slavery, as the evil resulting from interfering with the liberty of conducting the sale is lesser than the evil resulting from the man foregoing all future freedom as a slave. Such thinking can be extrapolated to include the matter of suicide: the choice to commit suicide irreversibly takes away an individual’s future freedom to make any other choices. In the case of assisted suicide, however, I suggest that we must consider that the future freedoms of the individual are already severely restricted by disability. These are individuals who have extremely limited mobility, like Ms. Rodriguez, individuals who may not even be able to express themselves. What “range of freedoms” must be available to the individual in the future to warrant preservation of life via restriction on suicide? Is it the freedom to move or to self-express? I suggest that the human experience is complex and we cannot point to a single freedom or set of freedoms and say that this freedom(s) alone are valuable enough to outweigh the lack of all other freedoms, and justify forcing someone to stay alive. In attempting to identify such “sufficient” freedoms, we can be guided only by the presumptions which Mill warned against. We can presume, for example, that having the ability to communicate is such a substantial freedom that it outweighs the lack of all others, but we may well be wrong in the case of a particular individual’s experience, or even altogether. After all, we have no experience of life with such extensive physical limitations. In the absence of reliable ways to identify which liberties are sufficient to make life worthwhile, I believe that we cannot justify paternalistic interferences on the grounds that they will protect
future liberties. We must leave the judgment of the value of future liberties to persons who are personally experiencing their own physical limitations.

With respect to the second claim, Dworkin begins with observing Mill’s allowance for minors to be restricted in their freedoms for their own good, because “they lack some of the emotional and cognitive capabilities required in order to make fully rational decisions” (Dworkin 329). Dworkin argues that this is morally acceptable because the child will “eventually come to see the correctness of his parent’s interventions,” thus providing “what could be called future-oriented consent” (Dworkin 330). Dworkin then notes that even as “chronologically mature individuals,” we all have “our irrational propensities, deficiencies in cognitive and emotional capacities, and avoidable and unavoidable ignorance” of which we are aware (Dworkin 330). Given our awareness of these deficiencies, we may actively or hypothetically consent to have others justifiably “force [us] to act in ways, which, at the time of action, [we] may not see as desirable” (Dworkin 330). Interferences based on active consent are always justified. As such, if Ms. Rodriguez had given her active consent to be kept alive despite future circumstances, the law would be obliged to prevent assisted suicide. Hypothetical consent, on the other hand, is provided when the agent that is restricting another’s freedom does not know, but can plausibly assume that reasonable men would agree to have their liberties restricted in the situation at hand. For example, hypothetical consent to being coerced into wearing seatbelts can be assumed because if the driver were “involved in an accident and severely injured he would look back and admit that the inconvenience wasn’t as bad as all that” (Dworkin 332). Recognizing that there are “great difficulties in deciding what rational individuals would or would not accept” (Dworkin 331), Dworkin suggests that paternalistic interferences may be justified where they protect some “goods” (Dworkin 331), such as health, which a rational person would hypothetically agree to
preserve by any means, even restriction of liberty. Hypothetical consent may thus be obtained in situations where, for example, the person being coerced is liable to irrationally make “far reaching, potentially dangerous, and irreversible decisions” (Dworkin 332) which will take away such goods. Given that all humans value life, it may be possible to then assume that the individual would be agreeable to restrictions to preserve life under all circumstances. To then implement the justification of hypothetical consent, we must answer the question: *would a fully rational person hypothetically consent to being restrained from committing suicide with another’s assistance?* If yes, then assisted suicide should be prohibited, but if no, it should be decriminalized. Dworkin himself is of the view that there is no reason for reasonable men to “consent to an absolute prohibition” (Dworkin 332) of suicide, though it would be reasonable for them to allow themselves to be subjected to other restrictions, such as an enforced waiting period intended to ensure that the desire to commit suicide was not a momentary impulse. I suggest that, Ms. Rodriguez, or any other fully reasonable healthy or disabled person when faced with circumstances like Ms. Rodriguez, conceivably *can* weigh all outcomes of the decision to end his or her life, and provide fully rational active consent to have a swift and painless death through suicide. Hypothetical consent to prohibition from assisted suicide cannot, therefore, be plausibly assumed, and criminalization is not defensible. At the same time, while the decision can be fully rational, it can *also* be misguided and based on irrational premises or pressures, in which case a person’s hypothetical consent to restriction of liberty *can* be plausibly assumed and a restriction justified. Therefore, the question is, how do we differentiate between rational decision makers and irrational ones? We may believe that this may be achievable by way of psychiatric assessments. However, there is usually room for reasonable doubt that these are wrong. Further, such assessments may also be fraught with gender, racial, and other biases, leading to further
inaccuracies. Finally, the practice of requiring a disabled individual to prove that the decision to commit suicide is rational appears to me to be highly discriminatory. A physically able individual may choose to, at any time, end his or her own life for any reason, by any means, in any state of mind. Why can disabled individuals not do the same? It does not seem reasonable to conclude that unlike a healthy person, a disabled individual, by virtue of being disabled, has the obligation to prove to society that his or her choice is rational. Further, apart from being discriminatory, I find that such an obligation is also damaging to the individual’s dignity. Placing the burden on proving rationality on the individual implies that society automatically assumes that every disabled individual is irrational, if not insane. Being viewed this way is further anguish caused to the already suffering person. As such, I believe that in cases where assisted suicide is sought out, we cannot make proof of rationality a condition for permission to commit suicide, because our methods for verifying rationality are not only unreliable, but the practice of requiring such proof would be discriminatory and undignified.

*Argument from Moralistic Grounds: Protecting the Sanctity of Human Life*

With the second consideration in its decision, the reasoning of the Supreme Court appears to be that assisted suicide should be prohibited because since the act destroys life, it runs contrary to the “social consensus” (Bickenbach 171) on what is valuable or moral, which in this case is the preservation of human life. This argument is akin to the argument of the moralist Lord Devlin, who contends that society can justifiably impose the evils of coercion and punishment on individuals to force conformity to its positive morality, i.e. to prevent any and all acts which society considers immoral, be it private acts (e.g. homosexuality) or public ones (e.g. theft). We can verify what it is that society considers immoral by asking the “reasonable man” (Devlin 345) – anything that he finds immoral, disgusting, or otherwise deplorable is immoral in the eyes of
society. Presumably, the prohibition on assisted suicide could then be justified if it is the belief of a reasonable man that assisted suicide is immoral. I suggest, however, that unconditional criminalization of assisted suicide cannot be justified on moralistic grounds, for two reasons. Firstly, Devlin’s moralist argument is in itself weak. Secondly, even if we accept the argument, the application of the reasonable man standard is highly problematic in this situation.

Devlin’s argument begins with the assumption that a society is “a community of ideas” (Devlin 342) on morality, ethics, and politics. From this, it presumably follows that if the morality of any segment of society deviates from the accepted morality (i.e. the morality is no longer shared by all members of society), then the “community” will fall apart; society will disintegrate. Preservation of the shared morality is, then, required for the preservation of society. All acts which society considers immoral (including private immoral acts) deviate from, and thus undermine, shared morality, eventually leading to social disintegration. Assuming that a society has the right to protect itself using the law, and that preservation of morality is integral to this protection, society has a “prima facie right to legislate against immorality as such” (Devlin 343).

To support his position empirically, Devlin contends that historically, society consistently exercised this right through the criminal law, which has always been concerned with enforcement of moral principles, rather than protecting the individual. He argues that the only reason for the existence of provisions that a victim cannot provide consent to be harmed or withdraw charges against the offender is that a crime is an offence against society at large because it undermines morality. As such, society can neither tolerate crime even with the victim’s consent, nor forego punishing offenders.

To demonstrate the faults with Devlin’s argument I will turn to the criticisms of his work that were raised by H.L.A. Hart. Hart begins with suggesting that given that we value individual
liberty, we must justify restrictions on it. As such, we must determine that enforcement of morality is morally permissible. Such a determination can come only from the application of critical morality, i.e. an objective assessment of the moral value of enforcing morality. In our society, utilitarianism is the critical morality that is generally applied. As such, we must show that the evils of coercion and punishment are offset by some good that is achieved by the enforcement of morality. It can be said that Devlin attempts to show that this “good” is the preservation of society. However, his argument is fraught with problems. Firstly, Devlin makes two unsupported assumptions that: (1) society is inseparable from its morality and (2) enforcement of morality is intrinsically, not instrumentally, valuable (since even completely private, “harmless” immorality must be legislated against). Secondly, Devlin provides no empirical evidence for his claims that (a) those who privately deviate from positive morality are dangerous to society, and that (b) society disintegrates when individuals deviate from positive morality. Thirdly, the existence of provisions in the criminal law which Devlin regards as empirically supporting the claim that the law is concerned with moral principles can be explained also by the state’s paternalistic concern for the victim, not its concern with morality. His empirical evidence is thus not reliable. Finally, Devlin’s argument results in two implications. Absurdly, the claim that society disintegrates as a result of moral deviation implies that when a society’s morality changes the society is destroyed and a new one arises. Dangerously, Devlin’s argument implies that positive morality alone should be the determinant of what is law. This would mean that the majority of society has the right to, without limitation, decide how all shall live, even if the society’s positive morality is unjustifiable from the point of view of critical morality – for example if positive morality encourages the persecution of religious minorities. Giving society unlimited power to legislate at will is not democratic. Democratic principles
suggest only that the majority may elect the political power of the day, but not that this power is
to be unlimited, or that decisions of the majority should not be evaluated using some form of
critical morality. Devlin’s argument paves the way for the “tyranny of the majority” (Mill 306).

The second problem that arises from attempting justification of criminalization on
moralistic grounds is the difficulty of applying the “reasonable man” standard. In courts, this
standard is useful and highly applicable. In courts, however, the standard is used to respond to
cognitive, reason-related inquiries, to which each “reasonable” person will give an answer that is
more or less the same. For example, if the question is “would a reasonable man have driven at
the speed of 160 km/hr on an icy road?” then almost all (if not all) people would say, “no.” The
application of the standard is much more problematic in reference to moral inquiries, particularly
in diverse, multi-cultural societies like Canada, where cognitively developed, reasonable
individuals operate on vastly different religious and cultural constructs. Where the positive
morality of a society is not as unanimously agreed upon as Devlin implies, who is the
“reasonable man” to whose morality we must refer? If the “reasonable man” is merely the
representative of a majority then the reasonable man standard is not very reliable on its own, as it
must also be evaluated against critical morality, since as discussed above, the majority hasn’t a
license to unlimited power even in a democracy.

To conclude, based on the above analysis, I suggest that unconditional criminalization of
assisted suicide is not justifiable on the grounds of the harm principle, paternalism, or moralism.
In the absence of justification, the law should not be upheld. The role of the state in regulating
the act of assisted suicide is thus only to ensure that legal provisions are not abused to commit
murder. Primarily, the state must ensure that the individual provides clear, active, sworn, consent
to have death inflicted upon him or her, and which he or she can withdraw at any time.
Works Cited


