The Contribution of Natural Law Theory to Moral and Legal Debate Concerning Suicide, Assisted Suicide, and Voluntary Euthanasia

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For My Parents

Digest

In chapter one, I argue for the important contribution that a natural law based framework can make towards an analysis and assessment of key controversies surrounding the practices of suicide, assisted suicide, and voluntary euthanasia. In the second chapter, I consider a number of historical contributions to the debate. The third chapter takes up the modern context of ideas that have increasingly come to the fore in shaping the 'push' for reform. Particular areas focused upon include the value of human life, the value of personal autonomy, and the rejection of double effect reasoning.

In chapter four, I engage in the task of pointing out structural weakness in utilitarianism and deontology. I argue that major systemic weaknesses in both approaches can be overcome by a teleology of basic human goods. John Finnis' work becomes the underpinning of subsequent applied natural law analysis.

In chapter five, I proceed to argue for the defence of the intrinsic good of human life from direct attack. I hold out for the proposition "that it is always a serious moral wrong to intentionally kill a human person, whether self or another, regardless of a further appeal to consequences or motive." In support of this, I defend the validity of double effect reasoning as an indispensable part of applied moral decision making.

In chapter six, I critically assess the arguments of anti-perfectionists that it is not the business of the state to enforce deep or substantive conceptions of the

'good life'. The chapter moves on to argue that the natural law conception of the person in society, centred on the common good, provides a solid framework for assessing both the justification for, as well as the limits on, the role of the state to use its power to legally impose certain moral standards.

In the final chapter, I address the concrete relationship between natural law and legal policy by exploring the issue of assisted suicide in the constitutional context of the United States.

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Chapter One

Introduction

Questions concerning the moral and legal justifications for the practices of suicide, assisted suicide, and voluntary euthanasia are undergoing renewed debate in contemporary Western society. In the United States, the activities of Jack Kevorkian, and pressure groups such as *Exit* and *Compassion in Dying*, ensure that the question will continue to be the object of intense debate. Of course, such pressure groups would be marginalised if there were uniform rejection of the legitimacy of such practices. There is not. There are historical precedents for their viewpoints, and these are fuelled by the realities of pluralism in contemporary life.

Respect for persons, John Rawls claims, must take the 'fact of pluralism' seriously. I agree with this, if it is taken to mean that respectful consideration of persons cannot be demonstrated by imposition of the will, but rather, must seek to provide reasoned and publicly accessible grounds for justifying conclusions reached. No society can justify or tolerate all practices that individuals happen to want to pursue. That much is clear. What really becomes the object of intense debate, however, is the nature of the justifications posed for placing limits on acceptable human conduct, justifications that will themselves be coloured by the

view taken of the human person, and what is found fulfilling. As the philosopher Thomas Nagel puts it, there is no "view from nowhere," and we must stand somewhere on key foundational questions concerning our understanding of the human person.[1]

Natural Law Ethics

This book seeks to make a constructive contribution to the current debate concerning the moral and legal status of suicide, assisted suicide, and voluntary euthanasia from the perspective of 'natural law ethics'. This is a perspective that has become marginalised in the eyes of many, due to its perceived dependency on the 'privileged truths' of revealed religion, a source of justification that cannot function as the grounds for morality or law in modern secular society. As this book unfolds, however, it will become clear why I think that such an assessment is unwarranted. Not because I think that religion, whether Christian, or any other, can provide the shared foundational premises for civil life together. Rather, it is because natural law ethics itself (*natural distinguished from super-natural*) presents a body of accessible knowledge for scrutiny, that is derived from nothing other than the operation of reason itself (open, and in principle, accessible to all), that it can indeed justify its claim to give rise to common premises for the co-ordination of respectful life in society with one another.

By my use of the phrase 'natural law ethics', I am referring to a basic theme in ethical theory, that there is a corpus of accessible principles that can be

comprehended by the power of human reason to effectively guide the making of personal and societal choices in reasonable, fruitful, and fulfilling ways. It is an 'objectivist' approach that holds on to the basic tenet that there is discernible truth in morality that can be accounted for by the teleological appeal of humanly fulfilling goods. Such goods provide the intelligible starting points for the subsequent operation of human reason, to work out questions of the good and the right in human conduct.

Whilst the phrase 'natural law' may evoke the ready assumption that natural law is necessarily a form of *ethical naturalism* (a form of analysis that seeks to derive ethical 'norms' from 'factual' or 'theoretical' statements about human nature), an assumption supported by ample precedent in much of the tradition of natural law inquiry, it need not be construed as such. In the body of the work, I will argue for an appropriately 'qualified' version of natural law that is 'natural' in the sense that our nature is the ultimate parameter setter for what is considered humanly fulfilling, but that seeks to explain how normativity in relation to our nature is necessarily dependent on the mediating structure of our capacity to *reason practically* about an array of basic human goods. I draw, in particular, on the work of John M. Finnis. His work provides the main normative framework for the approach to natural law ethics adopted in this book. An emphasis on the work of Finnis is especially useful within the parameters of this book because he is recognised as a philosopher who is widely discussed in 'secular' circles, thus

cutting across conventional classificatory boundaries. Secondly, his analytical mode of approaching philosophy, with its emphasis on the use of unaided practical reason, is very helpful in promoting the understanding and engagement of a natural law based ethics across different traditions of inquiry. Crucially, he does not lose sight of the important task of positively working towards establishing the 'public reasonableness' of a natural law based ethics beyond the seemingly interminable interstices of metaphysical controversy.

Lastly, in terms of what is meant by the use of the phrase 'natural law' in this work, I also take it to mean a form of 'perfectionism' in political as well as in personal life. Morality, politics, and law are ultimately concerned with the promotion of good persons, making goods choices. Contra the idea of anti-perfectionism, that governments must eschew promoting controversial or contested ideas of goodness, natural law holds on to the idea that promoting intelligible goods (even if contested) is central to the rationale and justification for legitimate government. Natural law is not simply about the promotion of human flourishing in 'our own lives' or in the lives of our 'moral friends'. There are no 'moral strangers'. Its understanding of persons and what fulfils them is socially mediated, through and through. Its understanding of the role of society in fostering and promoting the flourishing of persons mitigates against any radical severance between 'individuals' and their basic interconnectedness to one another in the 'common good'. For natural law ethics, the state, and other instruments of

governance, have a positive role to play in promoting social conditions that in fact foster and promote, rather than undermine, the authentic flourishing of the person in society. Natural law, therefore, holds out for the proposition that that the function of government is to help promote the conditions of human flourishing by its co-ordination of amicable life together.

Yet, if natural ethics is perfectionist, an important caveat is in order. It need not be monistic in its understanding of what constitutes an array of worthwhile plans and forms of living compatible with its understanding of what constitutes human flourishing. In short, perfectionism need not be thought of as opposed to an array of worthwhile plurality, and therefore, in conjunction with this array of plurality, it is not an oxymoron to meaningfully talk in terms of 'pluralistic perfectionism' rather than 'monistic perfectionism', when we think of the pursuit of human perfectibility.

Having made a few clarificatory remarks on what is meant by the natural law, the remainder of this introduction will be devoted to the twin tasks of (a) presenting a brief conspectus as to how the chapters of the book will unfold, and (b) engaging in additional definitional analysis concerning the use of terms—suicide, assisted suicide, and voluntary euthanasia.

Arrangement of Chapters

In chapter two, *A History of Ideas Concerning the Morality of Suicide, Assisted Suicide, and Voluntary Euthanasia*, I consider a number of historical contributions to the debate concerning the morality of those practices. I have tried to concentrate on the leading protagonists in the history of ideas. The chapter makes no pretence to being complete or exhaustive. Rather, its key purpose is to set the contemporary debate in context. It concludes with a summary of the main historical ideas for and against the morality of suicide and euthanasia.

Chapter three, *Contemporary Justifications for the Practices of Suicide, Assisted Suicide, and Voluntary Euthanasia*, takes up the modern context of ideas that have increasingly come to the fore in shaping the 'push' for reform in our traditional ethical and legal prohibition of these acts. Particular areas focused upon concern the value and status of human life, especially the quality of personal life rather than mere biological life; self-determination and the value of personal autonomy; the rejection of concrete moral absolutes; the rejection of double effect reasoning; and the rejection of perfectionist accounts concerning the use of the state's legal apparatus to enforce 'morals law'.

In chapter four, *Natural Law Ethics: Re-establishing Foundations*, I engage in the negative task of pointing out structural weakness in the two leading ethical theories of modern times: Utilitarianism and Kantianism. I argue that major systemic weaknesses in these ethical approaches can be overcome by a teleology

of basic goods, rooted in the natural law work of John Finnis. I then turn to the positive task of analysing and explaining this approach to natural law ethics. As the chapter title indicates, Finnis's work becomes the underpinning of subsequent applied natural law analysis concerning the morality of self-directed intentional death.

In chapter five, *Natural Law and the Ethics of Self-Killing*, I proceed to argue for the defence of the intrinsic good of human life from direct attack, whether in self or another. I hold out for a defence of the proposition "that it is always a serious moral wrong to intentionally kill a human person, whether self or another, regardless of a further appeal to consequences or motive." Secondly, I turn to an assessment of the idea of personal autonomy, and seek to place it within a framework of value that does not attempt to exalt the worth of that significant but instrumental (or facilitative) good above its own warranted status. Thirdly, I defend the validity and importance of the criteria of double effect reasoning as an indispensable part of moral decision making concerning the clash resulting from conflicts between obligations. Finally, the chapter briefly concludes with a defence of the need for natural law ethics to promote a consistent ethic of intentional killing across the gamut of life-taking situations, including self-defence and capital punishment.

In chapter six, *Natural Law, State Intervention, and the Common Good*, I proceed with a critical assessment of the arguments of anti-perfectionists (H. Tristram Engelhardt; John Rawls) that it is not the business of the state to enforce

upon its citizens, deep or substantive conceptions of what constitutes the 'moral life'. A related anti-perfectionist notion, put forward by Ronald Dworkin, is then addressed, concerning the requirement that the state treat its citizens with equal concern and respect.

The chapter then turns to an assessment of the idea that liberal notions of the state need not be founded on an anti-perfectionism, but rather, can seek to defend liberal goals on the basis of its own thicker notion of human flourishing, constituted by key liberal values—nothing less than a liberal perfectionism upon which to ground limits on the authority of the state to enforce certain kinds of norms on its citizens (Joseph Raz; William A. Galston).

The next part of the chapter then proceeds to argue that the natural law conception of the person in society, centred on the common good, provides a solid framework for assessing both the justification for, as well as the limits on, the role of the state to use its power to legally enforce certain (appropriately qualified) forms of moral standards. The concluding part examines the relevance of slippery slope reasoning to understanding the impact that the legalisation of assisted suicide or euthanasia may have on the common good of society.

In the final chapter, *Natural Law, Judicial Review, and the Legalisation of Assisted Suicide in the United States*, I proceed to concretise the relationship between natural law and legal policy by exploring the issue of assisted suicide in the constitutional context of the United States. Turning initially to clarify some questions concerning the relationship between natural law and the positive law of

a state, I then move to explore some questions of judicial interpretation relevant to understanding the meaning and scope of the 14th Amendment, especially that amendment's Due Process Clause pertaining to liberty rights. The analysis culminates in a review and analysis of two significant constitutional judgements of the Supreme Court, decided in 1997, that directly centre on the legal status of assisted suicide in the United States—*Washington v. Glucksberg* and *Vacco v. Quill*.

Usage of Other Key Terms

Before turning to the task of historical review and analysis, in chapter one, it is necessary to make some remarks concerning the use of our other key terms in this book—suicide, assisted suicide, and euthanasia, in order to help guide subsequent analysis and discussion. The criteria of specificity, non-arbitrariness, consistency (between various terms), and the avoidance of *strong pejorative* presuppositions, will supply the main standards guiding the usages employed. However, a word of initial caution is necessary. Definitional analysis is inherently problematic when major assumptions are themselves the subject of much debate. Any attempt at defining terms risks exposure to the charge of engaging in the practice of 'sophistry with words'.[2] This is particularly the case when, on the face of it, different actions may have 'identical exterior appearances' but may differ significantly in terms of what can be labelled the 'interior action elements' of 'knowledge', 'intent', and 'motive'.[3]

Wary of such a possible charge, I will state at the outset that questions of definition cannot be viewed independently from an examination of the various components that go into the analysis of an action.[4] Definitional neutrality, in my view, is not possible when faced with differing and competing accounts of action theory, accounts that differ not simply in incidentals but in fundamentals—especially the validity and significance of distinctions drawn between intention and foresight, intention and motive, act and omission, act and consequence, etc.[5] Here I can only state that the reader will need to accept 'on faith,' for the time being, some of those initial problematics. A promissory note is issued to the effect that the burden of substantiating those assumptions will be discharged in chapters four and five of the book.[6]

Suicide. Turning, firstly, to the word 'suicide', the initial use of the word is recorded in the Oxford English Dictionary as occurring in 1651. However, Alfred Alvarez has discovered an earlier use of the word that dates from 1635.[7] The definition that occurs from historical usage is "one who dies by his [or her] own hand; one who commits self-murder." Subsequent usage of the word has reflected, in part, the strong pejorative meaning of earlier phrases used to connote the wrongful killing of oneself, e.g., self-murder and self-slaughter.

There are, however, severe problems with the adoption of any such definition, for it lacks clarity and discrimination with reference to some of the important elements that go into the creation of an act-description. Firstly, too many acts that

cannot properly be described as the 'intentional killing of self' would be incorporated under such a description. Yet, in my view, the element of intent, and its scope, is a crucially important element to the process of determining any act-signification. Whether a consequence of an act was intended, or not, is no minor matter, and cuts at the heart of subsequent analysis and interpretation. The question of intention therefore must play an important part in the description of the scope of the act designated by the word suicide. Fundamentally, we are interested in assessing the deeds that a person can be held accountable for. The feasibility of that task crucially depends upon placing intentional behaviour at the forefront of an analysis of human acts.

Secondly, the Oxford definition is unsatisfactory because it seems to arbitrarily exclude the possibility of an omission being the attributable means of intentionally killing oneself—in short, "by his [or her] own hand"—seems too predisposed towards the actual performance of a positive extensional act.[8] It should, therefore, remain an open question for subsequent moral assessment as to whether or not an agent actually intended to kill himself or herself by means of such an omission. It should not be settled by definitional exclusion that a person could not intentionally self-kill by means of, say, refusing life sustaining treatment.

Thirdly, the overly pejorative connotations of the Oxford usage should be avoided so that we can move beyond any ready appeal to rhetoric.[9] It is

important, therefore, to avoid the use of strong value loaded terminology of an unduly biased nature—terminology that in an *a priori* fashion settles the question, such as 'self-murder', since the word necessarily connotes wrongfulness. When the word suicide is used in this work, it will not definitionally rule out the possibility that arguments can be made such that the notion of a morally acceptable suicide, is not rendered linguistically absurd.[10]

Following from the above discussion, I would argue that any satisfactory usage of suicide would need to clearly incorporate into a classification both the key elements of intent and omission. The Oxford definition, then is at once too broad and too narrow—too broad since it does not focus upon the necessary action component of intent that would further clarify the definition—too narrow since it seems to inadequately recognise the need to incorporate into the definition of suicide the possibility of bringing about the intended death of self by means of an omission.

Turning to the usage of the French sociologist Émile Durkheim, his influential usage, whatever its merits for sociological investigation, also lacks precision for the purposes of subsequent moral and legal analysis (concerned as they both are with the attribution of responsibility and the apportionment of blame).[11] Durkheim applies the term suicide to "… all cases of death resulting directly or indirectly from a positive or negative act of the victim himself [or herself] which he [or she] knows will produce this result …."[12]

On a positive note, Durkheim's definition at least gives weight to the idea that omissions as well as actions can be suicidal in nature. It avoids such an exclusion. However, the essential problem with Durkheim's definition is that it is still far too vague in its characterisation of basic act-descriptions. For example, all forms of self-sacrifice would automatically be included as part of the very definition of suicide. Thus, say, Jesus would necessarily be said to have committed suicide since he 'knew' of the impending certainty of his own earthly death and yet chose not to avert it in any way. Death acceptance thus becomes suicide in one bold definitional step. However, such an interpretation will not do, since it again fails to give sufficient scope to the importance of intentions in determining the objective of a person's action.

Moving on to consider the definition of suicide offered by Richard Brandt, a philosopher who has written a significant article on rational suicide, his definition has greater specification attached to it since he defines suicide as "… doing something which results in one's death, either from the intention of ending one's life or the intention to bring about some other state of affairs (such as relief from pain) which one thinks it certain or highly probable can be achieved only by means of death …."[13]

Notwithstanding that precision, however, his definition will still not suffice either, for it introduces by his secondary use of the word intention the claim that intention should be read as an equivalent to 'foresight with probability'. Such a

definition, however, lacks discrimination in terms of an 'anatomy of the will'. It can be said to confuse an *epistemic* distinction with one based on *volition*. At this stage I can only state that for an intentional behaviour to be brought under the act-description of suicide, it should require more than mere knowledge or belief that an action may (even certainly) result in the death of oneself for it to be identified as such. Certainly knowledge is an important prerequisite to the subsequent analysis of action, but it should not rule out the possibility that a consequence of an action can be known, yet not be, as such, intended.

Finally, before moving to a consideration of the term assisted suicide, I will briefly consider an aspect of Tom Beauchamp's definition of suicide. He seeks to build into his definition the idea of non-coercion. Thus, "… an act is a suicide if a person brings about his or her own death in circumstances where others do not coerce him or her to action."[14]

It is understandable that Beauchamp may seek to protect under this aegis, certain acts that are not always conventionally classified as suicides, e.g., certain forms of altruistic self-sacrifice. Yet, tempting as it is to write into the very definition of an action—freedom from coercion—this seems unduly narrow and restrictive. Coercion is most usually taken into account as an important circumstance pertaining to the degree of responsibility born by the agent for intentionally acting the way he or she did. Certainly it is possible to envisage circumstances in which responsibility can be diminished significantly (even to the