BOOK REVIEW

Matters of Life and Death

D. Orentlicher. Princeton University Press, 2001, US\$45.00 (hb) US \$19.95 (pb), pp 234. ISBN 0-691-08946-9 (hb) ISBN 0-691-08947-7 (pb)

Discrepancies between our moral theories and our practice, particularly as embodied in the law, are not infrequent. The main theme of this book is that this situation is not necessarily a matter for regret and may even be desirable. What scholars have tended to ignore or underplay (though surely at least since Bentham they are aware of it) is the process of translating theory into practice, which is itself something subject to moral evaluation. Orentlicher examines the process in relation to three life and death issues; first euthanasia, then abortion, and finally the withholding of futile treatment.

With reference to euthanasia the problem is that the law draws a distinction between withdrawal of treatment (passive euthanasia) which is legal, and assisted suicide (active euthanasia) which is almost everywhere illegal. But the distinction seems to lack a moral basis. Orentlicher examines in detail attempts to defend the distinction (natural versus unnatural deaths, acts versus omissions, proper pain management removes the need for assisted suicide etc) and does a good job in demolishing them all, concluding at the end of chapter 3 that there is no morally relevant difference.

In chapter 4, however, he argues that a legal distinction between the two is still justified. How can this be? The answer is that there is a real moral distinction to be made between justified and unjustified deaths. By way of illustration he describes the deaths of four different patients. The first patient is a young man of 24 who refuses life saving antibiotics without giving a reason; the second an elderly patient who requires ventilation for the rest of his life as a result of infant polio and requests withdrawal of the ventilator; the third a 47 year old depressed patient who shoots himself, and the fourth a 69 year old patient with terminal cancer who asks for a lethal dose of drugs. The deaths of the second and fourth patients would, Orentlicher claims, be justified but that of the first and third would not be justified.

Given that this is a valid distinction how is it best embodied in law? We have the choice between examining every single case to see whether the death is justified or we can opt for what Orentlicher calls "categorical bright line rules". The former way, as well as being time consuming, is liable to bias and subjectivity on

the part of the decision makers and if they should be physicians would most probably be an unwelcome task. Better to have clear cut rules then. The virtue of the rule that allows treatment withdrawal and forbids assisted suicide is that it corresponds in a rough and ready way to the moral distinction we want to preserve. On the whole, the deaths permitted by treatment withdrawal will be justifiable ones and those forbidden by the ban on assisted suicide will be unjustified.

Even if we agree that we need a categorical rule, it by no means follows that the one we have is the best one, and Orentlicher looks with interest at a rule in Oregon which allows assisted suicide but only for terminally ill patients. Though he has reservations about this—and even more about a rule which replaced "terminal illness" with "irremediable suffering"—he says we must expect attempts at new formulations to continue and should remain open minded about their merits.

My fundamental worry about this treatment of euthanasia (which does not apply to the other examples) is that I simply do not share the intuitions that supposedly underpin the distinction between justified and unjustified deaths. The death of a young, generally healthy person is unjustified, we are told, while that of an elderly terminally sick person might not be. Since "justified" means "morally justified" the claim must be that a person of the first sort who attempts suicide whether assisted or not is acting immorally. Talk of justified and unjustified deaths is too simple since there are two decisions involved: that of the person requesting assistance and that of the physician accepting or rejecting the request, and the morality might be different. It might well be morally wrong for the physician to accede to the request without the request being immoral. The author overlooks the one type of case where suicide could plausibly be held to be immoral, namely where it has seriously adverse consequences for the person's dependents. The grounds he cites for immorality, that suicide threatens the "moral worth of society" or that "there is a moral obligation to take good care of oneself and to avoid actions which would result in poor health or death" seem feeble. Decisions to commit or request suicide might well be stupid and irrational and it might well be morally right to resist these decisions in the interests of the patient but we would be saving the person from imprudence and stupidity rather than immorality.

The second topic concerns what the law should say about the rights of pregnant women to control their own bodies and whether it can sometimes be right to force unwanted treatment on them for the benefit of the fetus. Orentlicher thinks the moral issue is clear. Parents have a moral obligation

to look after their children both for the sake of the children and parents themselves and for the sake of society, which might not be able to bear the burden of uncared for children. But the obligations towards children extend downwards into obligations towards fetuses, since what happens to the fetus affects for good or ill what will happen to the child. Pregnant women therefore have an obligation not to abuse alcohol or refuse vaccination against rubella, to mention just two examples. The issue now is how should these moral obligations be put into practice and become legal obligations? Orentlicher surveys a number of objections to compulsory treatment (it infringes our right to determine what happens to our bodies, it threatens civil liberties, it imposes unfair obligations on pregnant women as opposed to everyone else) which though serious he does not see as decisive.

What then should the law be? If the law were to impose an obligation to treatment, fetuses would be saved from damage and possible death. On the other hand there arises the problem of "perverse incentives". This would take the form of pregnant women, knowing the possibility of compulsory treatment, staying away altogether or withdrawing from prenatal care, the consequences of which might be even worse. Empirical research will decide the issue and we must be open minded until we get firm results.

The third issue concerns judgments of futility, which are invoked in order to deny treatments to patients that they may want. The claim is that many cases described as being futile are not strictly speaking so; there is often something further that can be done. The problem is that it would be unacceptably expensive to do it and it would be at the expense of other patients who could benefit more from the treatment. It is in other words a rationing decision masquerading as one of futility. Orentlicher accepts that rationing decisions have to be made and that it is better that they be made using rules rather than on a case by case basis. Disguising them as futility decisions involves a breach of the principle of being honest to patients. It may be, however, that society is so unwilling to accept honesty in these "tragic choice" cases that dishonesty may be morally justified. The extent to which this is true is again an empirical matter. What about translating moral principles into law? This part of the book is disappointingly short because there are as yet few legal judgments in this area. The author predicts that the law is likely to follow what physicians decide, and if they hold that the subterfuge of disguising rationing issues as futility ones is acceptable, then the law is likely to underwrite that.

C McKnight

c.mcknight@qub.ac.uk