BOOK REVIEW

Matters of Life and Death


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 underestimate is the constructivist view that the law is not objective. It is an instrument we develop to accommodate various values and aims. This book aims to construct a framework under which the moral issues we face can be approached in a systematic manner.

Orentlicher examines the legal and ethical problems associated with the withholding or withdrawal of medical treatment in detail. He identifies three extremes: the first is the obvious one where a physician is asked to stop treatment for a patient who requests it to be stopped; the second is a 47 year old woman who requires ventilation for the rest of her life; and the third is an elderly terminally sick person who has requested and been denied terminal withdrawal of treatment.

Orentlicher says the deaths of these cases are unjustified. The death of the first is that of a young 24 year old man of healthy independent source and the second is that of a terminally ill patient. The deaths of the third and fourth require further analysis.

The first two deaths are justified but that of the first and third would not 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 are arguments against imposing this duty. The author predicts that the law is likely to follow these 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 autonomy and is likely to underwrite that.

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 at the situation 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 “irremediably 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 intuition that supposedly underpins 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 moralities might be different.

It might well be morally wrong for the physician to accede to the request without the request being immoral. Disguising them as futility decisions involves a breach of the principle of autonomy and is likely to underwrite that.

In chapter 4, however, he argues that a legal distinction between the two is still justified. How can that 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 who refuses life saving antibiotics without giving a reason; the second an elderly terminally sick person who wishes to refuse; 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.

Orentlicher says that there 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.

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 “pervasive 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 treatment 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 is not acceptable 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, than the law is likely to underwrite that.

C McKnight

c.mcknight@qub.ac.uk