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Death rites: assisted suicide and existential rights

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'Time, for me, must never blossom more'[1]

Abstract

Modern life presents us with new, as well as perennial perspectives upon death. This essay explores how we might articulate an apposite conception of rights in relation to death, in a time of a declared respect for individual autonomy and waning adherence to religious belief, and considers these questions with particular reference to the challenges to law and state made by Dianne Pretty in the months leading up to her death. To such an applicant, with a 'lay' experience and apprehension of the role and meaning of law, the prognostications of the court regarding the status of the claim must have seemed surreal indeed – especially where disputable, patchwork value-systems are called upon to lend authority to the decision. The essay concludes that such peregrinations have implications not only for the individual claimant, but for the credibility of law and associated ethics and that the writings of existential philosophers on the subject of death can assist in modelling a more consistent, secular notion of ethics in relation to assisted suicide.

Death is a status to be neither courted[2] nor overly avoided – it is a condition of life, imperious in its finality and though mysterious in its essence, a 'fact' of life as much as any other. The landscape of permissible conceptions of our relation to death is altering as our global cultures and technologies demonstrate established, as well as prospective, needs for intervention in human conundrums formerly treated as fields of taboo.

Such fundamental life-and-death, life-versus-death questions of human existence have become most dramatically exemplified in the 'euthanasia debate' concerned with assisted suicide, perhaps none more instructively that the case of Dianne Pretty, where the life and death issues are tested against the substrate of 'rights' claims.[3] The Dianne Pretty case was exceptional in the forthright competence of the claimant. Pretty knew what awaited her and knew precisely how she wished to deal with it. Failing in the domestic courts, she might yet have drawn upon the enshrinement of the rights and autonomy culture hailed in the Convention and the European Court of Human Rights. But rights are a disputed territory, their boundaries contested by disparate groups.[4] Such disputes

1 From the poem 'Death' by Emily Brontë

2 For a range of views on the relationship between the law and death, see Manderson (1999).

3 *Pretty v. United Kingdom* (2002) 35 EHRR 1 provided – at least in mortal terms – the final court of appeal in establishing juridical interpretation of how Articles 2 (right to life), 3 (right not to suffer inhuman and degrading treatment), 8 (right to private life), 9 (freedom of thought) and 14 (right not to suffer discrimination) might relate to a request that assisted suicide, specifically the assistant *of* suicide, be rendered free from the threat of prosecution.

4 In *Pretty*, major issues were at stake – the relationship between judicial powers and the proper role of the legislature in relation to those powers, the relationship between the individual and the state, the viability of the suggestion that the Director of Public Prosecutions could grant pre-emptive immunity to an assistant to

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highlight the fluidity of our understanding of rights and demonstrate that the identification of a right, even to the point of law, is culture- as much as logic-driven. The discussion of how the various 'human rights' relate to the request to die are most instructive, however, for they reveal a juridical rationale built from disparate forms of ideological bricolage. In the course of discussion, the claim draws analogies from cases on deportation, transsexuality, conjoined twins and sado-masochism as well as suicide cases simpliciter. From Dr Johnson ('Laws are not made for particular cases but for men in general')[5] to the representations of the Voluntary Euthanasia Society and the views of the Catholic Bishops' Conference of England and Wales,[6] sources are found to support the status quo which yet claim to be representative of a sound ideological position.[7] The case still invites commentary regarding broad philosophical elements of the *ratio*, since fundamental assertions concerning normative evaluations may be called into question.

The applicant founded her claim upon several elements of human rights jurisprudence, as enshrined in the European Convention of Human Rights. First, she attempted to claim that Article

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suicide (especially where the assistant is a spousal, rather than medical agent). 'Pro-life' scholars would argue that any such assistance is morally indefensible, for example Fisher (1995, 327–328) argues:

> 'A problem with a one-sided stress on autonomy is that it is radically asocial, even anti-social: all that matters is that I get my own way. But we are social creatures and human freedom is always exercised within a web of relations . . . if we want to be 'put out of our misery' someone else must be involved: so someone else's 'autonomy' is unavoidably affected.'

This argument is specious in relation to those who are willing to give assistance to a competent, voluntary candidate as a free expression of compassion for the suffering – this would permit the expression of their autonomy as well as that of the terminally ill patient. The dispute crystallises in the academic opinions put forward by Keown and Pedain respectively. In his casenote on the judgments, Keown (2002a, p. 9) endorses the approach taken by the courts and re-iterates Lord Bingham's assertion that Article 8, protecting the right to respect for private and family life,

> 'was expressed in terms directed to the protection of personal autonomy while individuals are living and there was nothing to suggest that it protected the choice to live no longer . . . Indeed, the risks of the slippery slope were evident in the logic of the central argument deployed by Mrs Pretty's own counsel. If she had a "right to self-determination in relation to issues of life and death" then, as Lord Bingham noted, this would extend to voluntary euthanasia for those too disabled to commit suicide. Indeed, why would the claimed right not extend to those who were neither disabled, dying nor suffering?'

Pedain, (2003, pp. 189–190) suggests that the conception of autonomy derives from that of private life:

> '. . . a broad term not susceptible of exhaustive definition. It protects a right to personal development, and the right to establish and develop relationships with other human beings. It also recognises an inviolable sphere of privacy . . . The period of dying forms part of life. To deny that a provision which prohibits interference with the way in which an individual leads his life relates to the manner in which he wishes to die seems to involve a fundamental misunderstanding of the conceptual connection between the right to personal autonomy and respect for human dignity, the preservation of which is the underlying objective of all human rights law . . . '

5 Quoted by Lord Bingham of Cornhill at para. 29, p. 13.

6 Both bodies were permitted to make *amicus* submissions.

7 The range of examples are the product of the system of precedent which of course exists to deliver the most internally consistent and conceptually refined response to the claim. Nevertheless, for the lay claimant, such examples must appear disturbingly perverse and indeed lead one to wonder whether such halting and tangential trails to the issue can contribute to meaningful adjudication. It is not the purpose of this article to undertake an exhaustive account of the *ratio decidendi* in the case of *Pretty* but the *ratio* may be declared consistent with the parameters of existing law in strict formal and substantive terms. To the extent that the *ratio* demonstrates synthesis with existing law, this may underline the fact that a new legislative framework would provide the most appropriate means, if at all, of affording support for such claims, though Pedain also detects elements of the *ratio* antithetical to existing law. The central plank of the argument put forward by Pedain is that the House of Lords in *Pretty* failed to exercise the discretion open to them within the 'margin of appreciation' doctrine, which would, contrary to their assertion, have enabled them to scrutinise and declare incompatible, domestic law at variance with the spirit of the Convention, even pending more regularised change in the form of legislation (Pedain, 2003, pp. 205–206).

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2 – the 'right to life' – carried within it an implicit right to die; that 'the right to die is not the antithesis of the right to life, but the corollary of it.' The Court responded that:

> 'Article 2 cannot, without a distortion of the language, be interpreted as conferring the diametrically opposed right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.'[8]

It is true that the predominant spirit borne by the Convention at its inception, when the 'right to life' was asserted, no doubt focused upon the notion of preservation of life; a historically situated bastion against individual and collective ideologies and atrocities which had demonstrated patent disregard for human life and values.[9] Yet a more global, or inclusive, notion of the right to life might very well include some idea of a right to die, a right *correlative* to life because the preservation of life as enshrined by the Convention must encapsulate an idea of life beyond the bare sustaining of physical existence. Just as any meaningful notion of a right to *life* encapsulates something beyond a bare entrapment somewhere on the margins of physical viability, so too, this indicative *right* to life may correspond to something akin to a right to die when that potential viability has become empty of meaning.[10] Nor does the supporting jurisprudence, referring to sanctity and inviolability and force-fed, hunger striking and mentally vulnerable suicidal prisoners alongside the acts and omissions distinction, seem forensically of appropriate sensitivity and relevance to the case, though clearly consistent with the halting and fettered internal peregrination of existing law. As the extension of analogy indicated, such prisoners bore poor parallel to the case in hand,[11] as did the notions of sanctity and inviolability when examined against the context of the case of *Bland*. Residual concerns as to the meaning of sanctity were allayed by representations from the Catholic Bishops' Conference of England and Wales, asserting:

> '. . . a fundamental tenet of the Catholic faith that human life was a gift from God received in trust. Actions with the purpose of killing oneself or another, even with consent, reflected a damaging misunderstanding of the human worth. Suicide and euthanasia were therefore outside the range of morally acceptable options in dealing with human suffering and dying . . .'[12]

The treatment of such a source as one of fundamental normative evidence demonstrates the mercurial ideological chemistry suffusing European jurisprudence, where allegedly secular law still informs its normative evaluations by reference to Catholic pronouncements.[13] For many

8 H7, p. 1.

9 Referring, of course, to the short-term history preceding the instantiation of the Convention. The extensive history of the development of the phenomenon of human rights discourse and jurisprudence can be found in Henkin (2000).

10 The notion of life 'emptied' of meaning may have regard to the removal of meaning in a sense which can be collectively understood in terms of broadly shared values, as well as in the more personal accretion of values for the legal subject herself.

11 See, e.g., Lord Bingham of Cornhill at para. 7, p. 6 '*To the extent that there is any relevant authority* it is adverse to [the claimant]' (emphasis added).

12 Para. 29, p. 18.

13 Though views were admitted both from the Catholic Bishops of England and Wales *and* the Voluntary Euthanasia Society, creating balance on the face of the record, the 'distance' needed to travel towards the understanding held by the VES seemed greater. This was not necessarily because the views of the VES were less representative than those of the Catholic Bishops, but reflected the lack of existing material available as ideological *substrate* in relation to suicide as an expression of autonomy. In the wider public domain, the influence of writers antagonistic to legalisation of assisted suicide is strong, with a frequent emphasis, as was reflected in the judgment in *Pretty* upon the threat to other vulnerable individuals if assisted suicide should

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individual subjects within the European Union, the notion of life as a gift from God received in trust – the importation of a deity, of notions of 'gift', when actual life points strongly to the notion of incidental existence, of 'a trust' imposed upon the subject with no opportunity for negotiation – all such elements could have parlous and, for some, offensive implications. Legal decisions resting upon normative evaluations themselves derived from what for many amounts to a shady and totemic image of an unproven deity seems an atavistic basis for legal decision-making when the subject in question (who clearly, especially given their declared choice in issue, may not share such beliefs) is faced with unavoidable suffering. This same belief system would outlaw abortion and suicide itself, threatening banishment for those tainted with such canonical offence to the territory of unconsecrated ground – a little less forgiving, if truth be told, than the apparently mild territory indicated by their description of suicide and euthanasia as 'outside the range of morally acceptable options'. Indeed, the notion of sanctity is not devoid of meaning in the absence of religious belief. Granted, conveying some sense of individual uniqueness and integrity *without* the promise of immortality, the focus alters to a perhaps more pragmatic notion of sanctity which is none the less valuable for that.[14]

The third[15] 'rights' claim, that of the right to private life, with its implicit logic of self-determination and conception of autonomy, comes much closer to an expression of the claimant's fundamental plea.[16] In addition, the Court appreciates the fundamental link between the exercise of private life and

be supported in law. Keown (2002b) cites the comment from Lord Bingham to the effect that if Mrs Pretty had a right to self determination in relation to issues of life and death, this would extend to voluntary euthanasia for those too disabled to commit suicide. 'Indeed, why would the claimed right not extend to those who were neither disabled, dying nor suffering?' notes Keown. Yet surely it can be argued that the spectre of the 'slippery slope' is more effectively resisted through considered legislation which defines the parameters of permissible assistance in relation to the clearly competent and voluntary applicant, thereby excluding duress, undue influence and incapacity.

14 Indeed, the court's reference to the case of *Airedale NHS Trust v. Bland* [1993] AC 789 – cited as authority for the notion of 'inviolability even with consent' – seems nonsensical. Pretty is already violated by her illness and inability to intervene: claiming to preserve her inviolate by non-intervention despite her pleas is analogous to claiming that a plea of *habeas corpus* is met by the existence of key-making implements beyond the door of a bound man.

15 The second basis of the claim was a 'weaker' ground. Founded upon Article 3: the right not to suffer inhuman or degrading treatment – 'imposes a primarily negative obligation on states to refrain from inflicting serious harm on persons within their jurisdiction' [H10(b) [50]]. The Court rejected this plea on the basis that, with this negative focus, the word 'treatment' did not yield any failing on the part of the state. Again, the lack of ideological substrate capable of sustaining an alternative conclusion, is revealed in the assertion that the 'dynamic and flexible' process of interpretation is tempered by the understanding of the Convention –

> '. . . as a system of human rights protection. Article 3 must be construed in harmony with Article 2, which hitherto has been *associated with it as reflecting basic values respected by democratic societies*.'
>
> (emphasis added.)

Such summation not only hints at lack of a supportive ideology on behalf of the claimant, but implicitly signals the departure of the claim from such 'basic' values, arguably prejudicing proper investigation of the issue. Nevertheless, this does look to be a particularly weak basis for the claim since it would impose an impossibly elastic obligation upon the state and potential incursion into private life. Though there are here possible inroads for argument based upon the doctrine of 'necessity', the analogy with 'treatment' is extremely weak unless the concept of treatment can come to encompass the notion of state inaction in the face of such a plea as amounting to cruel complacency – a kind of failure to assist in rescue from a worse fate when there is an obligation to do so. This would involve a radical re-thinking of individual and state relations, dispensing with the stasis created by acts and omissions doctrines as well as that created by the non-interventionist stance of the 'rescue' doctrine; an instance of humane action extended at the evening of their lives to animals whose eyes plead their misery outruns endurance. The human ability fully to comprehend a cruel prognosis sharpens this mode.

16 Self-determination is perhaps profoundly expressed in the reasoned desire to terminate the self: in the absence of a physical self capable of exercising that act, the incorporation of a willing agent forms a logical step.

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the expression of selfhood and personal identity.[17] In philosophical terms this is indeed a most profound footing for the claim, as will be discussed hereafter.

The fourth form of rights claim in the case was based upon Article 9 – the right to freedom of thought. It may indeed be a radical step for jurisprudence to accommodate the notion of suicide and assisted suicide as an expression of freedom of thought. (The understanding of 'thought' – and point of view – is so intimately tied to the notion of belief as *systematic* belief tied to an explicit ontology, divinity and *faith* that a seemingly spontaneous, situationally invoked declaration of belief will not suffice.) Yet it might be argued[18] that situationally crystallised decisions of a somewhat pragmatic, phlegmatic character (and clearly not motivated by a tangible outcome which does harm to others) are a rational and genuine expression of a belief in the value *in* life than a more formulaic adherence to a belief system of pre-ordained rules.[19] To the non-believer such a system is derived from an illusive supra-natural faith order which claims hazy miracles, nebulous rewards and unforgiving punishments and brooks little mitigational account of the vicious indifference of contingent physical life.

Equality rites

In broadly philosophical terms, (that is, beyond the particular philosophical bricolage which comprises the jurisprudence of rights), the claims based upon Article 2 (right to life) and Article 8 (right to private life) might present the most cogent bases for the claim, but for potential consistency with existing legal frameworks *and* with the underlying philosophical triggers to action already discoverable in law, Article 14 – the right not to suffer discrimination – might well prove the most internally consistent source of challenge to be deployed on behalf of such a claimant. For anti-discrimination law is a potent, and politically and ideologically significant, example of law which actively intervenes, modifying environments, demanding the exception be permitted to mould the rule. Where notions of privacy and autonomy, of right to life itself, might still prove ideologically thin within the existing mechanism of law (in the absence of the supporting cast of theological roots and indeed arguably somewhat aetiolated *because* of the overweening dominance *of* those roots),[20] anti-discrimination laws are a most visible product of a process of liberal rationality stemming from Enlightenment thinking. Here, any vestige of the mindset producing links between incidental personal characteristics, of personal disaster and normative fatalism, prove unacceptable.[21]

17 H18[65], p. 2.

18 See, e.g., Iris Murdoch (1970, p. 26):

> 'the idea of "objective reality" undergoes important modifications when it is to be understood, not in relation to 'the world described by science' but in relation to the progressing life of a person . . . We have to learn the meaning [of moral words]; and since we are human historical individuals the movement of understanding is onward . . . and not back towards a genesis in the rulings of an impersonal public language . . . '

19 The 'non-believer' perspective of pragmatism is, of course, often associated with the heartless sadism of eugenics and Nazism etc., or with the nihilism of Nietzsche. Indeed, existential theory – a theory of pragmatic realism – has often been mis/understood as a mere licence to amorality, an *absence* of belief. This is largely because, in exploring the 'facing up' to a reality stripped of upholstered belief systems, the world *does* – at first glance – seem dark, a small step to the nihilistic aspects of Nietzsche. Yet close attention to existential writings reveals the view that a world so stripped of seemings, though unsettling, is a world of new personal responsibility where integrity in autonomy is all. 'Classic' existentialists, who have grappled with this idea, certainly do little to undermine such a view, since the major exponents – Sartre, Camus, Kafka – present through their writings an inevitably vertiginous dark and contingent world.

20 W. H. Auden speaks of 'the basic weakness of the democracies is the failure to realise that if you give up Catholicism – and I think we must – one has to discover one's base again and that is a very long and very exhausting job . . . ' – quoted in Bucknall and Jenkins (1990, p. 73).

21 Within this incidental framework we may separate decisions relating to factors providing a modicum of cultural choice – such as claims that certain clothing is necessary to the exercise of faith.

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The major examples of such laws are of course those associated with race, gender and disability. Where religious accounts embraced such differences as part of a larger plan sometimes consistent with notions of hierarchical order and fates of exemplification and perfection through suffering, the education and politicisation of these formerly marginalised groups creates the most potent challenge to such stasis.[22]

Political and legal commitment to anti-discrimination law forms a direct touchstone in the revelation of meaningful links between rights and freedoms made by Western democracy. In a sense, there is no more profound expression of rights attaching to a pragmatic notion of existence – we might say an 'existential' notion – than those pertaining to equality and resistance to discrimination.[23] Equality and anti-discrimination jurisprudence and political theory are central to the early expression of an ethics based upon a practical appreciation of a material civic existence which celebrates individual autonomy.[24] Here the contingent characteristics imposed by 'nature' form the elements of discourse between jurisprudential and political as well as economic theorists; importing visibly arbitrary aspects of difference and inviting pro-active intervention where such difference creates clear inequalities between persons. Whilst the basis of the decriminalisation of suicide may have been more pragmatically than ideologically driven (and this in itself is a less solid ground for extenuation), its existence within the legal frame is significant. Without the assistance of the law, disabled and chronically ill persons incapable of exercising the choice to commit suicide are effectively consigned to an earthly limbo – in a chilly and ironic echo of the ancient plea of *habeas corpus* – the 'body' is no longer 'given up' to them, but becomes their prison.[25] This philosophical and ethical point must be understood as exhibiting a direct link between civic existence and individual normative formation.[26] The strong 'pro-life' lobby often draws upon disabled persons as examples of a potential 'slippery slope' wherein assisted suicide would draw inexorably towards an involuntary killing – indeed this proved a central concern in the *ratio* of the Pretty case.[27] A broad conflation of differing *types* of cases occurs in law as much as in the wider polemics of debate. Pedain points out

22 For a discussion of the link between the politics, aesthetics and epistemology creating such marginalisation, see Williams (2002, Ch. 6).

23 The vestiges of fatalism which pervade religious belief (and were a necessary salve in an old world order where intervention, in either physical or social conditions, was limited – both by lack of expertise and by lack of legislative and political and social fabric) are clearly inappropriate in a world where medical treatments can extend life and also extend suffering.

24 Enlightenment conceptions of equalities often referred back to religious origins whilst more recent notions of equality and rights are grounded in a 'second generation' notion of civic entitlement where the claims of material existence surmount this earlier metaphysics.

25 Pedain (2003) emphasises that, ultimately, this constraint is imposed not by nature but by law.

26 A certain irrationality attaches to the plea that legislation permitting lawful structures for the assistance of suicide would justify incremental assaults upon the disabled in general – arguably the structure created by legislation creates the possibility of more effective regulation.

27 The recent assertion that the medical profession must be forced to re-affirm the commitment to a presumption in favour of sustaining life – in the case of R. *(on the application of Burke) v. General Medical Council* [2004] 2 FLR 1121 – reflects that this fear extends not only to legislative provision for *active* assistance, but also to the withdrawal of medical treatment in cases where treatment is no longer regarded as beneficial. Whilst such a case is a timely reminder that too ready a move towards acceptance of a broad notion of euthanasia may create another type of victim, from another point of view, Pretty and Burke have ground *in common*. Both applicants plead legal endorsement of their rights (through notions enshrined in the European Convention) to express their autonomy in directing what should happen to their bodies at the advent of total incapacity and perhaps incipient death. Together, the factual background to the cases of Pretty and Burke clarify how the territory might operate. Both claimants have a sustainable claim to 'right'. Persons like Dianne Pretty, competent, knowledgeable and facing appalling conditions, should be allowed to re-claim the power to end her life in more reasonable circumstances than those allowed by nature. Such alteration need not herald a change in our cultural reverence for life, nor threaten vulnerable individuals

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that the House of Lords reasoning (which was largely followed in the European Court) in *Pretty* amounts to something like:

> 'It is true that Mrs Pretty and others in a similar physical condition are effectively prevented from committing suicide at all, whereas other persons are not. This does not amount to discrimination, because she is treated like everybody else. Such reasoning betrays a fundamental misunderstanding of the concept of discrimination. As has been widely recognised, discrimination can lie both in treating essentially alike cases differently and in treating essentially different cases alike . . . '[28]

– Dianne Pretty suffers discrimination as a very direct *result* of being treated 'just like everyone else' when she is patently different.[29] But how are we to characterise the adjudication of a case embodying a dilemma so *unlike* most others? Being a terminally ill potential suicide is relatively unusual – the subject is afflicted with foreknowledge of their end. Few of us are placed in that position and even fewer have the courage to confront it – many tend to adopt a position of hopeful denial. Indeed historical events supply us with few cases from which to draw analogy – Captain Oates of the Antarctic, confronted with slow and certain death, chose to walk out into the blizzard famously commenting 'I may be some time' – never once has our culture suggested that this, deliberate acceleration of death by elective suicide, was anything less than heroic. The state agent, caught by the enemy, is supplied with cyanide and recognised as courageously calm if in the event he chooses self-effected death rather than the dishonour of disclosing information. In moving to the realm occupied by law and ethics analogies in the fields of human rights, medical law and criminal law however, the concentration upon the preservation of life places irrevocable distance between the terminally ill suicide applicant and meaningful engagement with their plight.[30] Though parallels

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unable to give full expression to their desires, nor those fearful of a knock-on change in attitude towards the disabled. Les Burke's case flags a means of charting such territory – that the presumption in all circumstances, unless there is evidence little short of overwhelming to displace it – should favour life.

28 Pedain (2003, p. 198).

29 An additional and complex factor appropriate for jurisprudential consideration, as many feminist theorists appreciate, is that of the gender of the applicant. As Biggs (1998, p. 279) argues, 'the role women play as primary carers for the dying, impacts upon their experience and perceptions of death and dying'. A recent study funded by the Nuffield Foundation also suggests that men are more likely than women to wish to be kept alive artificially – reported by Chittenden (2005). Whilst such evidence suggests that female applicants should be treated with caution given the possibility that they may seek assisted suicide to avoid causing inconvenience to others, it is crucial to avoid thereby discriminating against female applicants purely because such evidence suggests that their sex needs protecting against themselves. The value that women, as a result of their experience, place upon the retention of control and dignity at the end of their lives, need not be regarded as negative, or as a vulnerability to be guarded against in all cases.

30 The debate is also affected by disputes over the effectiveness of palliative care. The BMA discussion paper 'Euthanasia and physician assisted suicide – do the moral arguments differ?' notes that 'emotive arguments about pain are often, unfortunately, overplayed in the public consciousness. It acknowledges, however, that for a small minority of terminally ill patients, symptom control represents a significant and as yet unresolved problem'. This is a rather indirect mode of expressing the fact that some patients cannot be given effective palliative care. Whilst it is no doubt the case that fears about uncontrollable pain loom unnecessarily large in the public consciousness, claims about the success of palliative care may also have some political significance. For example, 'pro-life' activists may argue that pain can always be effectively controlled and that the natural process of dying holds incalculable opportunities for spiritual growth. The hospice movement provides excellent services to the terminally ill, where conventional hospitals are poorly adapted to the needs of the dying. Nevertheless, the movement has historical and current associations with religious values, where it is possible that the patient's view of suffering may be 'glossed' by a spiritual perspective not of their making (see 'Supporting the Hospice Movement', Conservative Christian Fellowship, at http://ccfwebsite.com/world_display.php?ID=108type=briefing). Even where palliative care is successful in terms of pain relief, there may still be a divergence of values concerning other aspects of the indignities attendant upon terminal illness, requiring high dependency care.

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with cases of necessity[31] and general images of pre-emptive action in self-defence may be drawn, their focus is still life-preserving. For example, ethical models concerning 'rights' claims frequently refer to images of the 'house' as inalienable place of territorial occupation in order to strengthen understanding of the role of personal physical integrity in preserving autonomy. Thus Thomson refers to the body as 'house' when exploring claims to 'rights' in relation to conflict over occupation of the maternal body in abortion,[32] whilst Oberdiek refers us to Feinberg's 'Cabin Case', where an intruder may partially justify breaking into an unoccupied cabin in order to preserve his own life.[33] The dilemma confronting Pretty would turn such analogy on its head – something akin to seeking shelter by breaking into the warmth of oblivion rather than sustaining the chill of existence.

Existential rights

The very fact that the Court was forced to draw upon such disparate sources, conceptions and rationales, hints at the transitional cultural landscape that the law is obliged to engage with. That the 'right to life' does not entail a 'right to die', whether various of the rights are 'engaged' are questions barely referable to the provenance of juridical knowledge and authority. Nevertheless, as already indicated, Article 8 – the right to private life – provides the most tangible link to the themes of autonomy and integrity of self at the heart of the claimant's plea.[34] Only faintly discoverable as

31 The case of *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147 was mentioned only tangentially in relation to the link between Art. 8 and the principle of self-determination. Discussion of the doctrine of necessity was little explored, though implicit to the general enquiry.

32 Thomson (1971).

33 Oberdiek (2004). Both Feinberg (1978) and Oberdiek consider the status of rights from an analytical perspective, whereas the present essay is more concerned to explore the link between practical ethics analogies and ideological perspectives. Feinberg's use of the 'cabin case' – in order to explore the relationship between infringement and violation of a property right – exemplifies the arguments which qualify absolute moral imperatives where the *preservation* of life is at issue, yet the essay itself concentrates upon the issue of euthanasia and the notion of a 'right' to die:

> 'The right to die is simply the other side of the coin of the right to live. The basic right underlying each is the right to be one's own master, to dispose of one's own lot as one chooses, subject of course to the limits imposed by the like rights of others. Just as my right to live imposes a duty on others not to kill me, so my right to die, which it entails, imposes a duty on others not to prevent me from implementing my choice of death, except for the purpose of determining whether that choice is genuinely voluntary, hence truly mine. When I choose to die by my own hand, I insist upon my claim to the non-interference of others. When I am unable to terminate my own life, I *waive* my right to live in exercising my right to die, which is one and the same thing as releasing at least one other person from his duty not to kill me. In exercising my own choice in these matters, I am not renouncing, abjuring, forswearing, resigning, or relinquishing my right to life; quite the contrary, I am *acting* on that right by exercising it one way or the other.'
>
> (Feinberg, 1978, p. 121.)

Oberdiek objects that the 'moral space conception of rights that provides a home to the infringing/violating distinction . . . is itself conceptually confused' (Oberdiek, 2004, p. 343). Feinberg's linkage of the right to live and the right to die with the waiver of such rights, may encounter corresponding difficulty, depending upon whether Oberdiek's account is accepted.

34 Analogies between sexual privacy and suicidal privacy are less than satisfactory – in relation to compliance with Article 8(2), the Court –

> '. . . recalls that the margin of appreciation has been found to be narrow as regards interferences in the intimate area of an individual's sexual life. Though the applicant has argued that there must therefore be particularly compelling reasons for the interference in her case, the Court does not find that the matter under consideration in this case can be regarded as of the same nature or as attracting the same reasoning.' (p. 26, para. 71)

This was somewhat predictable: with the finding in *Brown (Laskey, Jaggard and Brown v. United Kingdom* (1997) 24 EHRR 39) that sado-masochists, even as consenting adults in the privacy of their own homes, should not be excused the scrutiny of the criminal law of assault when a broad public policy concern remained in relation to the impact upon the moral fabric of the community, how much more extreme might

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normative frameworks of any semantic stability, such 'rights' in relation to these fundamental questions of existence and non-existence are at very least a disputable territory. Furthermore, the findings in relation to the specific 'rights', whilst arguably sustainable in terms of their own internal juridical logic, are equally vulnerable to criticism, not least because they fail to engage with the principle underlying the very notion of human existence and human 'right' – that is, individual freedom.

Whilst it is true that many foundational normative ideas drawn upon by the law are traceable to their Judaeo-Christian origins, whether the values they assert are *representative* of modern conceptions of deeply held values and beliefs is in grave doubt. The prevailing culture is one of self-expression, with a premium on individual autonomy, recognising as it does that such autonomy reflects the great value we now place upon the dignity and independence afforded by a democratic and pluralistic environment. Attendance at Church and adherence to firm religious principles and ideas is a minority activity. Proponents of 'pro-life' arguments argue that the autonomy culture and drift away from fundamental religious principles signals a derogation of crucial values, a derogation which must be actively resisted. This suggests both that the said principles carry an intrinsically unimpeachable inheritance for all, and that, by implication the drift is inevitably downward, sullied by association with notions of dereliction and infidelity.

This essay seeks to argue that, on the contrary, the prevailing culture of autonomy is a more realistic, potentially humane foundation for any understanding of rights in the context of law – 'catholic' in the true sense of inclusive and non-discriminatory.[35] Free of the constraints and values imposed by religious tenets, secular life and values afford flexibility of thought, independent rationalism and respect for the individual. To be sure, the fluidity of the unfolding culture is open to abuse and colonisation by questionable forces, as those who warn of the historical lessons of degraded ideologies, with their disrespect for life, dignity and the very notion of values, are quick to point out. But the historical – and present – reputation of religious systems, though claiming a moral high ground, is at least equally dubious.[36] Nor (again an implication carried by the religious rhetorician) is the agnostic a person of no values, a vehicle for amorality, a person in whose mouth 'faith', 'hope' and 'charity', as well as 'sanctity' – have little power or meaning.[37] For aside from the clear alternative sources of normative reasoning in classical philosophy, modern life provides a constant referent to

be the impact of state indulgence of assisted killing in the home. Yet to some extent sexual activity may be regarded as a category of lifestyle choice utterly incomparable to the 'choice' confronting *Pretty*, each capable of variable characterisations in a notional register of 'harms'.

35 The jurisprudence exploring the concept of 'autonomy' and its relation to 'rights' is extensive. Feminist and Communitarian theorists recognise the somewhat artificial foundation of entirely fragmented notions of autonomy and all such foundational concepts are of course vulnerable to colonisation. For example, the BMA recognise that 'the arguments concerning "beneficence" or "autonomy" sometimes used to justify changing the law, may appear theoretically convincing but fail to reflect the real flaws and weaknesses inherent in our society and in our system of healthcare' – 'Euthanasia and physician assisted suicide – do the moral arguments differ?' (discussion paper from the BMA's Medical Ethics Department April 1998), at http://www.bma.org.uk/ap.nsf/Content/Euthanasiaphysicanassistedsuicide. Nevertheless, most current conceptions of rights in relation to the integrity of the person draw upon strong notions of autonomy in the independent citizen whose decisions and wishes should be respected as integral to their personal values. This is currently reflected in common law decisions in relation to the withdrawal of treatment, for example in the case of *Re B* [2002] 1 FLR 1090.

36 Indeed, aside from passive withdrawal and non-attendance as a symptom of mere apathy, *rejection* of religious accounts is an aspect of the reduction in adherence to faith systems. The tendency for 'reformed sinners' to bring their religious message to the rest of us with the zeal of the born again can be ironic to say the least, when many non-religious persons from the outset strive to live a morally correct life with no such excesses. When the reformed sinner has the power of President Bush, or citizen bin Laden, the irony has tragic consequences.

37 For a discussion of this point, see Williams (1999).

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the *materiality* of existence which in turn provides the opportunity for an entirely ethical notion of rights and values in relation to life and death. Dianne Pretty exemplified this evaluation.[38]

For those of us who do not share, or at very least are sceptical of, a religious understanding of existence, how are we to understand the nature and meaning of life and of death? We are left to deal with the joys and brute facts of existence.[39] From infancy we quickly come to consciousness, a consciousness which situates us very firmly on *terra firma*. We are mortal creatures, *homo sapiens*,[40] live on a planet with finite resources, are dependent upon certain chemical constants – air, water and nutrients, relatively stable temperatures and so on – to sustain life. We share the planet with others of our kind as well as with creatures related to us in varying degrees. We have the ability to nurture and destroy, to create and to vegetate. We have intellectual capacities and emotional needs and vulnerabilities. We are capable of will-driven action which can exert some influence over the pattern of our lives, though some of us are born with many more chances than others; the distribution of such chances being fairly arbitrary. No matter what beliefs we hold, what compacts we enter into, suffering and pain as well as pleasure are absolute conditions and death an unavoidable certainty.[41] For Dianne Pretty and others like her, this unavoidable certainty is coupled with other certainties, about the particular form that her death will take, the impact that form of death – and her impotence in relation to it – will have on the unique meaning she has forged for her life.

Death is a sentence to be served; denied a religious significance to death, for the theo-sceptic any remaining *meaning* in the phenomenon of death must be drawn from the only available evidence and value-giving experience, that of life. Jaspers refers to death as 'throwing us back upon the fulfilment of *Existenz*'.[42] Without slavish adherence to its declarations, existential philosophy may at this point provide a meaningful account of the secular view. As Cooper (1999, p. 134) explains

> 'In a special sense it does turn out that, for the Existentialist, death or finitude is responsible for existence having meaning . . . The Existentialist thinks the phenomenon of death – death as a prospect for each of us – reinforces and elaborates the testimony of *Angst*[43] to the free,

38 To reject a religious account of existence is not necessarily to reject the significance of the human spirit. Rejection of religion may, however, reflect a realistic and pragmatic evaluation of the *evidence* for divine explanations offered by our mortal, lived experience. Religious belief requires a 'leap of faith'. Religious individuals may display an impressive piety, saintliness, tolerance, understanding; they may also display bigotry, self-satisfaction and a terrible retributive appetite. There is no denying that religious figures have contributed acts of great virtue in the world. Nevertheless, some acts of apparent altruism may satisfy deep motives and needs, not least in storing up a currency of virtue. Such faith may chime readily with evident personal weaknesses and insecurities, may provide ready explanations for personal tragedies and failures, most significantly gloating accounts of an eventual path to salvation and immortality with little backward glance to the unfortunate doomed unbeliever. In all conscience and good faith, such individuals may draw upon their belief systems as a bulwark against the threats of mortal life and death. Further questions are raised by the research of V. S. Ramachandran at the University of California, San Diego, who has found evidence of brain circuitry in the temporal lobe that has given rise to religious experience – see Ramachandran and Blakeslee (1998).

39 As Jaspers has argued (Blackham, 1983, p. 52):

> '. . . Ingredient in the concrete particular situation of very self are the inescapable limitations inherent in the human situation, such as death, suffering, conflict, fault. Human life in the world is riddled with the dreadful insecurity and irremediability of these universal limits.'

40 Such rhetoric, evoking scientific nomenclature, is helpful in promoting a material as opposed to theological image of antecedence, signalling an alternative semiotic base.

41 Such a 'bare' list of material conditions reflects the *characterisation* of certain basic conditions identified by Finnis, Fuller and others.

42 Cooper (1999, p. 134).

43 As the free, individualised character of existence – religious, moral and political commentators may of course object to this characterisation of life, its emphasis upon the individual as being counter to the location of the individual within a community context, but the existential point is simply to emphasise that, at an unavoidable level each of us must live life from within the capsule of our individual bodies and minds.

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> individualized character of existence. [Sartre] has, I think, three points, the last of which is the most important one . . . The first point is that a person's finitude is at least a necessary condition of his freedom and individuality. Sartre puts it unequivocally: "Death is the limit, but also a constituent of freedom . . . If a being were endowed with temporal infinity, he could realize all his possibilities . . . he would disappear with respect both to individuality (the realization of some possibilities to the exclusion of others) and to freedom" . . . If we lived for ever, each of us would eventually taste everything on offer, so no real weight would attach to choosing this now rather than later . . . The second of The Existentialist's points is that attention to a particular aspect of a person's fate after death throws into sharper relief how things stand with him when alive . . . The last of The Existentialist's claims is encapsulated in Heidegger's remark that "anticipation [of death] utterly individualizes *Dasein*." . . . A person is individualized to the extent, first, that he withdraws from immersion in the world of the "they" and, second, that he lends a wholeness and integrity to his life.'

Taking these points in turn, we can apprehend some ethical perspectives upon death. First, the fact of death, the fact that our very existence carries the unavoidable certainty of death, highlights the relationship between finitude and choice, the focus upon whether to sanction *action* confronting the court. We are *obliged* to make choices, as well as claiming 'rights' to do so; indeed our 'right' to choose certain actions may be construed as flowing from an ethical quid pro quo wherein obligation to choose is forced upon us by the brute fact of existence. Indeed, theological and philosophical assertions about free will and the extent of choice can be misleading: though it is true that choosing *not* to do something is effectively 'making a choice', it is not entirely volitional in the sense of 'chosen', since it is forced upon us by the material conditions of existence. Real choice would reside in a much greater range of possibilities than are afforded to us.[44] Furthermore, the obligation to choose relates not only to the maintenance of mortal existence (to choose to eat, to wear adequate clothing, to defend ourselves against attack, etc.) but to the carving of an individual expression upon existence. Some are born to such awful brute physical privation that from the outset, such individual expressionism is nugatory; a starving child in the desert has little opportunity to impact upon his world.[45]

Secondly, death provides a sharpening perspective upon the ethical standing of our actions and our assertions in life. Whilst a religious person may assert that the ethical standing of our actions refers to a normative register discoverable in religious values, non-religious persons may form a different understanding of how death *itself* is a determining factor in this calibration of ethics – of how actions and assertions acquire a particular register of value, of ethical standing, *in the light of* the fact of death. The understanding will differ where not underpinned by a belief in divinity, an afterlife and salvation. Third, death as inescapable fact sharpens the brute aloneness of each individual in their physical capsule (though community existence must register as concomitant fact), whilst at the same time sharpening the fact of uniqueness of that lived experience – the integrity of the individual.[46]

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44 This takes us beyond Sartre (1974, p. 48) for whom: 'In one sense choice is possible, but what is not possible is not to choose, I can always choose, but I must know that if I do not choose, that is still a choice.' Furthermore, fatalistic passivity is not only alien to human nature and endeavour, it is literally 'fatal' to worldly existence – however, it may be claimed that certain decisions are not ours to make, we are sure to make efforts to survive and seek sustenance.

45 See Williams (1999, p. 216): 'the individual capacity to 'learn' or be receptive . . . is affected not only by contingent, historical externalities, but also be innate personal potential for moral growth . . . '

46 There is an interesting conflation of ideas in the word 'integrity', denoting the maintenance of bodily 'wholeness' without invasion by assault from outside, at the same time as indicating the 'holding together' of the individual *spiritual* self as a site of dignity, autonomy and individual organising conceptions.

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From this perspective, many factors relevant to the debate alter. Notions such as 'sanctity' as well as conceptions of 'rights' may be re-inscribed with a sense of this immediacy, the unavailability of a higher, divine place of judgment, a place beyond, where suffering is to be reconstituted as a kind of virtuous capital. Though some within the community of mortals may hold to religious understandings of the mortal predicament, the continued latitude afforded to them in relation to the imposition of their world view upon those who do not share it is at least discriminatory, at worst, obscene; totalitarianism clothed as piety. Canvassing the views of the Catholic Bishops' Conference of England and Wales in relation to Dianne Pretty's plea to be allowed assisted suicide may be a necessary inscription of the range of normative sources to be found in the community, but for her may also correspond to allowing a caucus of the Nazi faithful to declare on the admissibility of a claim placed by a Jewish refugee – the very associations of the belief system drawn upon diametrically opposed to those of the applicant. The diminution in empathy displayed by the theological position is indicative of this alienation from the individual's clearly agonised dilemma – it is regrettable, unfortunate, even tragic, but petrified in the stone heart of an immovable belief system. The regretted indifference of the religious view to the current dilemma is justified by reference to the invisible and divine source of judgment and belief in an ultimate source of reparation and cure. But this pietistic position seems disturbingly heartless, even pathological in its certainty, its refusal to identify with the fact of suffering and the resultant negation of individual will.

Without the divine account of mortal life, the legal and ethical subject is obliged to carve meaning in life and death from the paradoxical remnants that are existence. Such meaning derives from the life and values nurtured in the breast of the utter uniqueness that is the individual character and experience. Maintaining some control over the unfolding narrative of that individual life is crucial to the sense of identity.[47] As Murdoch (1970, p. 26) explains:

> 'Once the historical individual is "let in" a number of things have to be said with a difference. The idea of "objective reality", for instance, undergoes important modifications when it is to be understood, not in relation to "the world described by science", but in relation to the progressing life of a person. The active "reassessing" and 'redefining' which is a main characteristic of live personality often suggests and demands a checking procedure which is a function of an individual history.'

This also affects the inculcation of apparently objective normative values – Murdoch continues:

> 'Knowledge of a value concept is something to be understood, as it were, in depth, and not in terms of switching on to some given impersonal network. Moreover, if morality is essentially connected with change and progress, we cannot be as democratic about it as some philosophers would like to think. We do not simply, through being rational and knowing ordinary language, 'know' the meaning of all necessary moral words. We may have to learn the meaning; and since we are human historical individuals the movement of understanding is onward into increasing privacy, in the direction of the ideal limit, and not back towards a genesis in the rulings of an impersonal public language . . . '[48]

The law is, of course, obliged to generate the rulings of an impersonal public language, but the claim to representative objectivity – 'objective reality' – and detachment can clearly be challenged: law cannot 'know' the meaning of all moral words either. Once the margin for challenge is sufficiently large, the pronouncement of law *against* the autonomous exercise of individual integrity – even through the offices of an agent – is disturbing indeed. Murdoch's comment points up the crucial role

47 See Williams (1999).

48 Ibid.

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of individual consciousness and the intimate relation of the individual to his lived dilemma in formulating a more refined sense of ethical complexities and claims. It also reinstitutes the individual centre stage. This centralised location of individual agency is crucial to understanding normative evaluations outwith the religious context; the individual *is* a central source of normativity. Moreover, in processing life, and death challenges, the individual must be the final arbiter of his own belief system.[49] In so being, the linkage between life choices, normative values and death itself becomes vital; failure to create a meaningful axis is ultimately a failure in the rule of law as well as ethics. As Christine Korsgaard (1996) explains, a normative moral theory – and, we may add, an inclusive system of law – must address the person upon whom it will impact *as agent*;[50] it must display transparency both as to its moral basis and justification, it must appeal to deep *identity*. For Korsgaard, the normative moral theory –

> '. . . allows us to act in the full light of knowledge of what morality is and why we are susceptible to its influences, and at the same time to believe that our actions are justified and make sense. Finally . . . the answer must appeal in a deep way to our sense of who we are, to our sense of our identity . . . This places a demanding condition on a successful answer to the normative question: it must show that sometimes doing the wrong thing is as bad or worse than death. And for most human beings on most occasions, the only thing that could be as bad or worse than death is something that for us amounts to death – not being ourselves anymore . . . '[51]

The focus upon individual sensitisation to the lived dilemma outlined by Murdoch, alongside the focus upon the link to deep identity and contingent identity flagged by Korsgaard, encapsulates a positive theoretical synthesis of the fragmentary insights provided by early existential philosophy. Whilst circumstances in life may change radically, persons are sustained by the more reliable continuing integration that is identity in our possession. The community cannot in fairness judge or direct the response to the fate which impacts so dramatically upon the individual, it can only provide mechanisms of support to prevent abuse of the individual will.

We are used to tales of heroism where the agent is confronted with a choice between torture or death and capitulation of the secrets or values he holds most dear. We recognise that such heroism is frequently undertaken in the protection of others, in the protection of a principle. Yet we recognise less readily a concomitant fact of such stoicism – that it also accords with the values which will continue to inscribe the individual agent with the identity he holds most dear of *himself* – where 'doing the wrong thing is as bad [as] or worse than death'.[52] We build a narrative account of our identity throughout life and such narrative identity is composed not only of our reactions and responses to life's vicissitudes and events, but our inscription of certain normative ideals *in* those responses. When confronted with a final event which perhaps promises not only incalculable physical suffering but also a fundamental denial of the individual narrative – say, of one who cultivates control and dignity in the face of the most unpromising conditions, who laughs in the face of adversity, produces a final act of defiance to the hand of the great adversary death – failure to support efforts to subvert this denial, subverts the entire narrative project of that life.

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49 Clearly there are strong community interests in limiting the expression of individual belief systems where overt harm to others ensues.

50 In relation to assisted suicide, 'the agent' may refer both to the subject of suicide and their proxy, though, of course, each must be recognised as equally significant human actors in the moral balance.

51 Korsgaard (1996, pp. 17–18).

52 As Korsgaard expresses it.

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Conclusion

The judgment in *Pretty* reflects a justifiable reserve in relation to the specific request for pre-emptive exemptions from prosecution of spousal actors, and a crystallisation of the arguments supporting the need for a statutory framework for assisted suicide. Whilst the jurisprudence of rights deriving from the European Convention permit a glimpse of those elements integral to individual civic autonomy, the European context – with its continuing Catholic influences, and rights derived from a shield of largely negative enforcements, is an unwieldy stem. As other jurisdictions have shown, any legalisation of assisted suicide requires a strong legislative foundation, not only to avoid the risk of abuses, but also to mark the civic realm of the properly autonomous subject.[53]

Whilst current juristic methods of normative evaluation are demonstrably piecemeal, they are naturally conservative and tend to draw their fragments from those institutional sources of greatest *traditional* influence, howsoever such traditions may have ceased to be representative in any real sense. Moreover, the language of humanist and existential philosophies remains marginalised; unless some further ideological territory can be gained, they are unlikely to hold great sway in such debates. This may derive from difficulties of canon and conception and is not necessarily because they fail to capture a sense of representative modern values, albeit that modern society indulges in materialist concerns which fail to confront the dilemma of death. Nevertheless, the notion of *equality* is a powerful central theme in the drives of political and legal liberalism. Law and policy developments, and the rhetorics surrounding them, focus upon making provision for those suffering an inequality of ability such that differences are minimised for them as players on the stage of life. As a result, Dianne Pretty, and others like her, suffer a fundamental form of discrimination because her disability – not to be able to commit suicide unaided – cannot be equalised by a result which speaks to this life-enhancing vision. This entrenched vision concentrates upon equality in a strongly *materialist* sense, yet main objections to providing for claimants such as Pretty rest upon often nebulous *spiritual* considerations – especially ironic when claimants demonstrate their profoundly spiritual insight into the redundancy of any remaining quality in materialist evaluations of life. The angst-ridden

53 As previously indicated, the ambit of the present essay is the exploration of possible *ideological* modelling of the notion of a 'right to die' in the secular realm; examination of legislative frameworks is not the focus. Discussion of current legislation around the world is highly charged, with fears expressed about legislation leading to lax attitudes towards the value of life. It could be argued, however, that those countries which have successfully legislated for assisted suicide have a more honest approach to the issue and to practices carried out in good faith, but necessarily covertly – at the boundary of the 'doctrine of double effect', for example, and that legislation can create effective safeguards against exploitation of vulnerable individuals. In discussing the Termination of Life on Request and Assisted Suicide (Review Procedures) Act, which came into force in April 2002, the website for the Permanent Mission of the Kingdom of the Netherlands to the United Nations, at http://pvnewyork.org/about_the/policy_on_drugs/euthanasia_policy, explains: 'In the Netherlands, euthanasia is understood to mean termination of life by a doctor at the request of a patient. The Dutch government does not turn a blind eye to the fact that euthanasia happens. The question of whether – and how – criminal liability for euthanasia should be restricted has been the subject of broad political and public debate for the past thirty years.' In Oregon, Colburn (2005) reports that fewer turn to assisted suicide: 'Thirty seven Oregonians died by doctor-assisted suicide last year, five fewer than the year before . . . The seven year total of 208 cases remains lower than proponents expected and opponents feared in 1997, when Oregon became the only state to legalize doctor-assisted suicide.' In the U.K., the House of Lords Committee reporting on the Assisted Dying for the Terminally Ill Bill published its report on 4 April 2005. The Committee emphasised the need for any future bill to 'distinguish clearly between assisted suicide and voluntary euthanasia in order to give the House the opportunity to consider them separately', and the need for 'qualifying conditions to be set for assisted suicide or voluntary euthanasia which reflect the realities of clinical practice as regards the prognosis of terminal illness and which define a patient's suffering in as objective a manner as possible – e.g. "unrelievable" rather than "unbearable" suffering': http://www.parliament.uk/parliamentary_committees/lords_press_notices/pn040405a . . . Though such criteria could create a manageable degree of ethical disinterest for the medical team involved, it is possible that recourse to such constructions of objectivity may preclude many 'hard' cases from the relief available through such legislation.

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middle way attempted by the liberal democratic jurists and polity – with its Judaeo-Christian roots – culminating in a declared regret that the law has no grounds to alter the status quo, helps to crystallise the polarities in this debate. Whilst those of a religious persuasion may be satisfied with nothing less that such fatalistic acceptance on behalf of another, for others this outcome is nothing short of an obscenity. It is meet that the law should continue to look to its roots in order to retain a stability of values in the midst of change. Yet, over time, law may alter its position markedly as representative cultural change permits fresh insight into the dilemma of human existence. It is not so very long ago that slaveholding was upheld by law, or that a man could beat his wife with a stick no thicker than his thumb, or that suicide was outlawed – a singular crime fulfilled by failure to succeed. Though prescriptive pronouncement is an inevitable by-product of religious belief, it is disturbing that religious ethicists are willing to impose their will on others not only in direct oppression of individual will but in disregard of the individual plight: thus has history taught us over the centuries that religion is not only an opium, but also a cruel oppressor. Though Papal declarations must remain relatively inflexible in the face of the individual case, the strength of the law is meant to reside in that very capacity to temper the stability of the rule of law with the flexibility of justice. A large proportion of people do not share a firm belief in God, though many hope and suspect that there may be 'something'. Given the moulding of myth, debatable historical account and implausible physical assertion that forms the basis of religious belief – not to mention the contested *versions* of belief and their contribution to current world conflict – it may be argued that a normative system sceptical of religious foundation is not only justified, but the only fully rational position. What then is left to human existence – that play of earthly features to which, for the most part, mankind seems wilfully blind. Most notably, for the purposes of this essay, we are mortal, with only a fleeting span of years available to us and with death an absolute certainty. In the absence of religious belief we cannot know *why* we are here or whether our existence – our life, death and suffering – has meaning: we must be free to construct that meaning.

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