

FALCONER'S REVOLUTIONARY IMPRUDENCE

By Nigel Biggar

1. The heart of the problem

Life is often very hard. For many, especially outside of wealthy, healthy social circles, life is usually hard; but even for those of us who are more or less well heeled it is sometimes so. I imagine that many people in this room have flirted with suicide at some point in their lives, or that they will do so. I imagine that some have done more than just flirt.

I want to live in a society where people in adversity are generally encouraged and supported to live, not to die. Even where death is a relief, it is still an absolute loss. The death of an individual, in my view, is never *simply* a cause for celebration. So I want my society to be one where support *to live* is the norm.

I think it is possible to waste a life. I remember chatting to someone after running a memorial service for a young man in his twenties, who had committed suicide because of shame over his sexual orientation. The person I was speaking to, after lamenting his loss, said, "But we have to respect his decision". I said nothing, but I remember thinking to myself, "Well, yes and no. Yes, I sympathise with his feeling trapped, feeling that the only way out was to kill himself. But, no, I think that in his case appearances deceived—as they often do. I think that there was a better way out. I think that he made a mistake and, tragically, wasted his life. He also left a trail of emotional devastation behind him".

Life is often hard; suicide is often attractive—and it is often a waste. So I want to live in a society where the bullied and the jilted and the ashamed and the frustrated and the bereaved and the lonely and the unproductive are generally discouraged from killing themselves.

Nevertheless, there are rare cases where suicide, though still ambiguous and tragic, seems not unreasonable—where the quality and prospects of life are so very poor that to end it is not obviously a waste. I think here of the case of Henning von Tresckow who, after learning of the failure of von Stauffenberg's bomb to kill Hitler, and fearing that he would betray his comrades under torture, took himself out into no-man's land on the Eastern front and blew himself up with a hand grenade.

That's an extreme case, of course, and it falls outside the normal circumstances of civil social life; so there might be good reasons not to try and fashion civil law around it. Hard cases, it is true, don't make good law. Nevertheless, hard or exceptional cases do illuminate certain truths, and the truth illuminated here, I think, is that suicide is not always and everywhere morally wrong.

So, this, as I see it, is the heart of the problem that we're considering: how to foster a society whose members are trained to support each other in adversity *to live*, while dealing appropriately with these difficult, exceptional cases.

As I see it, there is no perfect solution. Every practicable solution involves inconsistencies and trails loose ends. Every one involves risks. None can guarantee the prevention of abuse or neglect. So any proposal that purports to be perfect shouldn't be trusted.

2. Lord Falconer's imprudent perfectionism

Here lies my most basic objection to Lord Falconer's current bill (as to Lord Joffe's before him): that it is the dummy of the contemporary *Zeitgeist*, which infects so much public and professional life by deluding us into thinking that failures of human finitude and weakness and malice can be secured against by institutional and procedural reform. My point is not that institutions and procedures and laws can't be improved upon. No, my point is rather that improvements often entail undesired side-effects; that in deciding upon improvements, therefore, we ought to be franker about those side-effects; and that when we are franker about them, we might be led to wonder just how improving, *all things considered*, the proposed improvement really is.

I'm beginning to recognise myself as a Burkean conservative in a culture that thinks that change is the only sign of life. I'm not against change; I'm just against the pretence that secular perfection is possible and that change doesn't cost. My basic problem with Lord Falconer, then, is that he's a starry-eyed revolutionary—replete with good intentions, but myopically imprudent.

3. The status quo and the Falconer reforms

As they now stand, our legal arrangements for handling cases of assisted suicide are as follows. Assistance in suicide remains illegal, expressing the social norm that our usual response to neighbours in distress should *not* be to help them kill themselves. However, in recognition of the hard cases, the Director of Public Prosecutions retains the discretion not to prosecute every case of assisted suicide. And he has published the criteria he uses to judge. Among the features of cases that would disincline him to prosecute are: the suspect's motivation was "wholly compassionate"; the suspect had sought to dissuade the victim; and his assistance was both "reluctant" and "minor".

Late 2011 saw the publication of the report by the Demos Commission on Assisted Dying, which Lord Falconer chaired, and which was part-funded by Terry Pratchett and facilitated by Dignity in Dying. The report's most cogent objections to the current arrangements were these. First, because assisted suicide remains a crime, those who would commit suicide must either travel to Switzerland or risk an amateur—and perhaps botched—attempt. Second, those who assist a suicide must endure the threat of prosecution. And third, the arrangements involve only checks after the fact of suicide, not safeguards against abuse beforehand.

Instead, Lord Falconer's report recommends that assisted suicide be made legal where the suicide is terminally ill and his choice is voluntary and informed.

Before assisted suicide is made legal, some "essential" conditions must be fulfilled. These include: first, the institution of "robust" and "carefully applied" safeguards "to ensure that the choice of an assisted death could never become an obligation and that a person could not experience pressure from another person to choose an assisted death without the abuse being detected";¹ and second, the provision of "the best end of life care available",² including "compassionate staff with time to investigate fully the circumstances and motivations of any person seeking an assisted death and the potential for alternative options for treatment and care".³

The Falconer report's recommendations are reflected in the draft Assisted Dying Bill currently proposed by some MPs in partnership with Dignity in Dying.

4. Assessing the proposals: (i) the restriction's fragility

What should we make of the Demos commission's recommendations? First, note that legality would be restricted to cases of the terminally ill. It would remain illegal to assist in the suicide of the chronically ill, the severely handicapped, and the bereaved. This means that the commission's proposals and the draft bill would make *no difference at all* to most of the cases recently publicised by the media—not to Alzheimer's patients such as Terry Pratchett, or multiple sclerosis sufferers such as Debbie Purdy, or quadriplegics like Daniel James, or those subject to locked-in syndrome like Tony Nicklinson, or those unwilling to endure bereavement such as Sir Edward Downes.

What are the reasons for restricting eligibility to the terminally ill? First, the need to avoid implying that a disabled life is not worth living; and second, the fact that 'unbearable suffering' is too subjective for doctors to assess.

Those seem to me to be good reasons. I'd strengthen the last one by adding that if 'unbearable suffering' or 'individual autonomy' were substituted for the criterion of terminal illness, there would be no rational way of preventing assisted suicide on demand and excluding the bereaved, the jilted, the philosophically gloomy, the adolescently morbid—or even those serving life-long sentences in prison. (I mention this last species, because I have received correspondence from a life-prisoner, who assured me that, if it became legal to assist in the suicide of the unbearably suffering, he and many of his peers would be the first in the queue.)

So if we're going to legalise assistance in suicide, then confining it to cases of terminal illness seems prudent. Nevertheless, this seems to me a very fragile restriction and I doubt whether it could be maintained for very long.

I doubt it because some of the shakers and movers in the campaign to legalise assistance in suicide in cases of terminal illness have made it quite clear that they regard this merely as the first, politically tactful step. Once legality has been extended to assistance in suicide for the terminally ill, they will then start to lobby for the restriction to be progressively relaxed, and eventually for an extension of legality from assistance in suicide to voluntary euthanasia.

I have sat ten feet away from Lord Joffe when he said as much. And I would be extremely surprised if Dignity in Dying were to rest with Lord Falconer's proposed arrangements. Certainly, its sister organisation in the Netherlands is now clamouring for the extension of voluntary euthanasia way beyond the terminally ill, not only to those suffering unbearably, but also to those who are (quote) "tired of life".

So while the restriction of legality to the terminally ill is more prudent than some alternatives, I doubt it will survive long. Lord Falconer can assure us that he would resist to his dying breath any extension of eligibility, and he might be absolutely sincere in so doing; but he knows perfectly well that behind him stand rank upon rank of 'progressive' liberalisers, who are making no such commitment.

That's my first point.

5. Assessing the proposals: (ii) unmet conditions

My second is this. The Demos Commission prescribes as "essential" conditions of legalising assistance in suicide the institution of "robust" and "carefully applied" safeguards against undue influence by others and indirect societal pressures. These safeguards should involve optimal end-of-life care including staff with time on their hands to conduct thorough investigations of the motivations of those seeking assistance to kill themselves.

On the one hand, I applaud the requirements: they are humane and prudent. On the other hand, if they're deemed essential, then legalising assistance in suicide will not be prudent for many, many years to come—if ever.

Why do I say this? Many vulnerable people in this country live, make their choices, and exercise their 'autonomy' in a hostile environment. In 2008—before the full implications of the current financial and economic crisis had dawned on us—Julia Neuberger, writing in her book about the treatment of the elderly, *Not Dead Yet*, reported that at any one time in the UK 500,000 elderly people are being abused, two-thirds of them at home by someone in a position of trust.⁴ Judging by the current homepage of “Action on Elder Abuse”, which cites the same data, nothing much has changed since.⁵ Moreover, in 2009 the Mid-Staffordshire Healthcare Trust scandal revealed that abuse of vulnerable patients is not limited to amateurs, but extends to healthcare professionals.

Even if we had all the healthcare resources we could dream of, I do not believe that there are any practicable ways of identifying with sufficient certainty 'autonomous' choices formed—indirectly and subtly—in a context of abuse. This is not least because an individual's 'autonomy' is bound to be informed by his social context. As Emmanuel Hirsch puts it:

[i]n the field of the choice between life and death, therefore, resort to the notion of individual autonomy is in part an illusion. [A] patient [whose physical and mental faculties are deteriorating] may truly want to die, but this desire is not the fruit of his freedom alone. It may be—and most often is—the translation of the attitude of those around him, if not of society as a whole which no longer believes in the value of his life and signals this to him in all sorts of ways. Here we have a supreme paradox: someone is cast out of the land of the living and then thinks that he, personally, wants to die.⁶

We do not have the best end-of-life care available. Healthcare staff do not have time to spare. And some instances, at least, of the nursing profession have recently been found wanting in compassion. That's now. Even if optimal end-of-life care were simply a matter of money (which it isn't), there is no reason to expect dramatic improvement in this country for years to come, maybe decades, maybe longer. Therefore, the implication of the conditions laid down by Lord Falconer's report is that assistance in suicide should *not* be made legal in the foreseeable future.

I made this point to Lord Falconer himself at a debate in late 2012. If my memory serves me correctly, his response was to deny that his report says what I claim—namely that the legalisation of assisted suicide should be conditional, first, on the institution of “robust” and “carefully applied” safeguards against undue influence by others and indirect societal pressures; and, second, on the provision of “the best end of life care available”, including “compassionate staff with time to investigate fully the circumstances and motivations of any person seeking an assisted death and the potential for alternative options for treatment and care”. If you follow Lord Falconer in doubting my reportage, the best I can do is to invite you to read pages 24 and 299.

6. Assessing the proposals: (iii) what suffices for the non-dying should suffice for the dying

My third and final response to the Falconer Commission is this. It proposes to extend legality to assistance in suicide in cases of the terminally ill. At the same time, it recommends that those who assist suicide in cases of the chronically ill or seriously

disabled should continue to be treated according to the published guidelines of the DPP. But if those guidelines are good *enough* for those who are not dying, why are they not good *enough* for those who are?

7. Conclusion, and responses to objections

What, then, is my conclusion? Should we stick with the current arrangements? On balance, I think we should. However, if so, how do I respond to the Falconer report's main objections?

First, take the issue of having to travel abroad or risk amateur suicide. My response is threefold. To begin with, in the vast majority of cases palliative medicine and care are sufficient to ease the physical suffering of patients. In extreme cases, palliative sedation can render suffering patients unconscious. Next, I don't think that it is the responsibility of healthcare professionals to relieve us of non-physical, existential suffering; and judging by anecdotal reports from the Netherlands, it seems that Dutch doctors are increasingly of that view. Further, those for whom relief from physical suffering is not enough, must take responsibility for the costs or risks they incur in trying to end their non-physical distress

Second, the issue of the threat of prosecution. For sure, this is a burden for those who assist in suicide, but it's a burden than anyone *must* bear who does something deliberate that results in someone else's death. The police *have* to investigate, and those investigated *have* to wait for their conclusions. Why? Because some deliberate killings *are* wrongful, and the authorities have to be allowed to find out which kind this instance is. Insofar as the assistance given was suitably reluctant and well intentioned, it is unfortunate—indeed, somewhat tragic—that the assistant must suffer fear of prosecution. But some suffering may be—tragically—necessary. Sometimes, it can be imprudent to relieve suffering.

Third, and finally, comes the complaint that current arrangements involve checks only *after* suicide and no *prospective* safeguards against abuse. I confess to being puzzled by this objection and I am not entirely confident that I fully understand it.

On the one hand, Lord Falconer proposes a legal system for discriminating between legal and illegal assistance in suicide, with a view to permitting it in certain cases. This has the benefit of giving an assistant relief of the fear of prosecution *in advance* of the act, provided that the case meets the criteria. Of course, until it becomes clear that the case *does* meet the criteria, a would-be assistant is still going to have to suffer the anxiety of uncertainty. Maybe that suffering would be less than that of the after-the-fact fear of prosecution; but is it so much less as to justify a risk-laden change in the law?

On the other hand, the current arrangements surely *do* provide prospective safeguards against abuse. After all, they make assistance in suicide *illegal* and subject to the threat of prosecution and, perhaps, punishment. For sure, the current system no doubt fails to prevent all law-breaking, including some cases of malevolent abuse. But then so will any system, including Lord Falconer's. There is no foolproof set of legal arrangements available. Our very need of law implies that humans, being sinful, are inclined to do what it prohibits. And the fact that humans are finite creatures means that even well intentioned law-enforcers will not succeed always and everywhere. Only a starry-eyed child of the Enlightenment could suppose otherwise.

NOTES

¹ “The current legal status of assisted dying is inadequate and incoherent”, the report of the Commission on Assisted Dying (London: Demos, 2011), p. 300.

² Ibid., p. 24.

³ Ibid., p. 299.

⁴ Julia Neuberger, *Not Dead Yet* (London: Harper, 2008), p. 229.

⁵ <http://www.elderabuse.org.uk> (as at 15 November 2013)

⁶ My translation of “Le recours à la notion de liberté individuelle est donc, en ce domaine du choix entre la vie et la mort, en partie illusoire. Tel malade désire vraiment mourir, mais ce désir n’est pas le fruit de sa seule liberté: il peut être—il est le plus souvent—la traduction de l’attitude de l’entourage, sinon même de la société tout entière qui ne croit plus à la valeur de sa vie et le lui signifie par toutes sortes de messages. Suprême paradoxe: on rejette quelqu’un de la communauté des vivants et il pense vouloir, personnellement, la mort” (*Partir: l’accompagnement des mourants*, Entretiens avec Emmanuel Hirsch [Paris, 1986], p. 95; quoted by Michel Maret in *L’euthanasie: Alternative sociale et enjeux pour l’éthique chrétienne* [Saint-Maurice: Editions Saint-Augustin, 2000], p. 175n.83).