ANTAL SZERLETICS

# *Paternalism and Euthanasia: The Case of Diane Pretty before the European Court of Human Rights*

ABSTRACT:
The aim of this article is to examine the moral justifiability of paternalism in the case of active voluntary euthanasia (assisted suicide) as represented in the Pretty v UK decision of the European Court of Human Rights. There are three approaches towards the justification of paternalism, corresponding to the three main trends of normative ethics. Deontological theories place personal autonomy in the centre of paternalism and focus on the voluntariness of self-harming decisions. The utilitarian approach determines justifiability by aggregating the positive and negative consequences of paternalistic interventions. Virtue ethics shifts the emphasis from the subject of paternalism to the paternalistic actor and requires him or her to act out of moral character, as virtuous people would do. Thus, the justifiability of paternalism depends on the question whether paternalism exhibits some form of virtuous practice or not. Overall, I argue that the kind of paternalistic prohibition involved in the Pretty case qualifies as unjustified paternalism under any of the three normative ethical theories.

KEYWORDS:
Euthanasia; physician assisted suicide; paternalism; Pretty v UK; harm principle; John Stuart Mill; voluntariness; personal autonomy; virtue ethics; care.

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## 1. *Introduction*

The European Court of Human Rights discussed the problem of voluntary euthanasia in the Pretty v United Kingdom case[1]. The applicant of the case, Mrs. Pretty suffered from "motor neuron disease" (MND) which affected the control of her muscle activity including speaking, walking, breathing and swallowing. In its terminal phase, the illness completely paralyzed Mrs. Pretty who eventually died of suffocation.

In the case of MND, death inevitably occurs as a result of the weakness of breathing muscles but the patient's intellect and capacity to make decisions remains unimpaired during the illness. Intending that she might commit suicide with the assistance of her husband, Mrs. Pretty asked the Director of Public Prosecutions to give an undertaking not to prosecute her husband should he assist her to commit suicide in accordance with her wishes. The UK authorities refused to give this undertaking. The applicant brought the case before the European Court, claiming that the refusal violated her right to life (which, according to the applicant, also includes the right to terminate one's life), human dignity, right to privacy, freedom of conscience and the principle of non-discrimination (as opposed to those ill persons, who are able to end their life without assistance)[2]. The Court held that there has been no violation of any of these rights and rejected the petition. "Fortunately", Ms. Pretty

[1] *Pretty v United Kingdom*, Judgment of 29 April 2002, application no. 2346/02.

[2] Articles 2, 3, 8, 9 and 14 of the European Convention on Human Rights, respectively.

acquired the reassuring sympathy of the judges: "[t]he Court cannot but be sympathetic to the applicant's apprehension that without the possibility of ending her life she faces the prospect of a distressing death"[3].

The core of Mrs. Pretty's complaint involves Article 3 of the Convention. She submitted that the suffering which she faced qualifies as degrading treatment and violates human dignity. She suffered from a terrible, irreversible disease and she would die in an exceedingly distressing and undignified manner. Two "absolute" rights clash here: the right to life and human dignity. The Court gives preference to the right to life because it observes that human dignity does not demand positive action from the state. Member States have an obligation under the European Convention to refrain from inhuman and degrading treatment but should not actively assist in suicides. Such claim would place a new and extended construction on the concept of inhuman and degrading treatment, which goes beyond the ordinary meaning of the word "treatment"[4].

## 2. *Euthanasia and Paternalism*

From a legal viewpoint, the Pretty case can be interpreted as the collision of two non-qualifiable human rights: the right to life and the right to human dignity. From an ethical perspective, the case raises a different but not less interesting question about the limits of state intervention to protect individuals from their own self-harming conducts. Paternalism, in its crudest form, can be defined as coercive intervention to the behavior of a person in order to prevent the individual from causing harm to himself or herself[5]. The prohibition in the Pretty case seems to be an archetypical

[3] *Pretty v United Kingdom*, para. 55.

[4] Ibid. para. 54.

[5] E. GARZÓN VALDÉS, *On Justifying Legal Paternalism*, in Ratio Juris 3, 1990, p. 173. Feinberg's definition is more precise because it includes both harm-preventing and benefit-promoting forms of paternalism. Legal paternalism is "[t]he principle that justifies state coercion to protect individuals from self-inflicted harm or […] to guide them, whether they like it or not, toward their own good". J. FEINBERG, *Legal Paternalism*, in Canadian Journal of Philosophy 1, 1971, p. 105. Paternalistic conduct is not always coercive and does not always interfere with the explicit will of the subject. Consider, for example, the cases of paternalistic deception or misinformation (e.g. lying to someone for his or her own best interest). In my opinion, there are two definitional elements of paternalism. Paternalism (1) interferes with the *autonomy* of the subject (be it coercive or non-coercive form of interference) and (2) it *aims to* prevent harm or promote the benefit of the subject.

example of paternalism. Before accepting this statement as valid, some clarifications must be made concerning the concept of euthanasia.

It is possible to distinguish between voluntary, nonvoluntary and involuntary forms of euthanasia[6]. Involuntary euthanasia is imposed on the subject against his will or without his consent. It qualifies as murder and it is rarely discussed, let alone defended by anyone. In the case of nonvoluntary euthanasia, the patient is not mentally competent to make an informed choice (e.g. being an infant, insane or comatose). The term "passive euthanasia" refers to the refusal of medical treatment by terminally ill patients, while voluntary active euthanasia involves someone's (mostly a physician's) direct contribution to the patient's death, upon the patient's request[7]. Physician assisted suicide (PAS) differs from active euthanasia in that here the patient is the "final link" in the causal chain and the doctor "only" assists in the process (e.g. by providing the necessary drugs)[8]. If we compare these categories with the definition of paternalism, we can establish that it is only the prohibition of voluntary euthanasia and PAS that qualify as paternalism since in the other cases there is no interference with the subject's autonomy[9]. Mrs. Pretty's request can be qualified either as a request for assisted suicide or active voluntary euthanasia (depending on who would have actually performed

[6] See, e.g. J. FEINBERG, *Harm to Self - The Moral Limits of the Criminal Law*, vol. 3. (New York: Oxford University Press, 1986) p. 345; P. SINGER, *Practical Ethics*, (Cambridge: Cambridge University Press, 1979) p. 128.

[7] Concerning the subject of euthanasia, it is an open question whether only terminally ill patients should have the right to ask for euthanasia or it should be extended to people with other (chronic) illnesses, elderly people or to prisoners. Feinberg rules out euthanasia requests on behalf of prisoners but not for moral reasons. He thinks that it would be impossible to verify the voluntariness of the prisoner's request. Prisons are coercive institutions and no matter how authentic the request of the prisoner seems, the possibility of manipulation or intimidation would always be present. J. Feinberg (1986) p. 352. I will only consider euthanasia in the case of terminally ill patients.

[8] From the viewpoint of criminal law, assistance in suicide is generally separately criminalized while active euthanasia qualifies as homicide. Cf. e.g. Article 168 of the Hungarian Criminal Code (Complicity in Suicide).

[9] Provided that we accept that the interference with personal autonomy is a necessary element in the definition of paternalism. Although most definitions refer to the violation of personal autonomy somehow ("interference with a person's liberty of action"; "against one's will"; "coercion"; "overriding of one person's known preferences or actions"), a few authors define paternalism solely by its aim: "An action is paternalistic if and only if the agent believes it will benefit the subject and performs it for this purpose, *independently* of his wishes." This seems to open the scope of definition overly wide. J. KULTGEN, *Autonomy and Intervention – Parentalism in the Caring Life*, (New York: Oxford University Press, 1995) p. 72. Cf. also fn. 5.

the "murder"). Thus, the prohibition of the UK authorities qualifies as paternalism: following the established distinctions in the literature, it is an *indirect*, *harm-preventive*, *passive* and *coercive* form of paternalism[10].

The aim of this article is to examine the moral justifiability of paternalism in the case of active voluntary euthanasia. There are three approaches towards the justification of paternalism, corresponding to the three main trends of normative ethics. Deontological theories place personal autonomy in the centre of paternalism and focus on the voluntariness of self-harming decisions. The utilitarian approach determines justifiability by aggregating the positive and negative consequences of paternalistic interventions. Virtue ethics (put it very simply) shifts the emphasis from the subject of paternalism to the paternalistic actor and requires him or her to act out of moral character, as virtuous people would do. Thus, the justifiability of paternalism depends on the question whether paternalism exhibits some form of virtuous practice or not. I contend that the underlying virtue behind paternalism is the virtue of care. However, care does not always demand us to refrain from euthanasia. It might well be that performing euthanasia in some cases exhibits more caring than keeping the patient alive at all costs. Overall, I am going to argue that the kind of prohibition involved in the Pretty case qualifies as *unjustified* paternalism under any of the three normative ethical theories.

For the past two centuries, the discourse on paternalism has been dominated by the harm principle of John Stuart Mill. In his essay *On Liberty*, Mill writes that:

"The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. […] *That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.* His own good, either physical or moral, is not a sufficient warrant"[11].

Mill's aim is to provide an overarching and clear-cut principle that specifies the sphere of legitimate state interventions. The harm principle

[10] Euthanasia is indirect paternalism because it involves the restriction of other persons' liberty (i.e. the person who executes euthanasia or assists in the procedure) besides the subject (i.e. the patient). It is passive because it requires refraining from a certain type of action and it is coercive because it employs the means of criminal law. For the distinctions, see e.g. J. KLEINIG, *Paternalism*, (Manchester: Manchester University Press, 1983) p. 12; J. FEINBERG (1986) p. 9; G. DWORKIN (ed.), *Mill's On Liberty: Critical Essays*, (Lanham: Rowman & Littlefield, 1997) p. 65.

[11] J.S. MILL, *On Liberty*, (New York: Norton, 1975) p. 10. Emphasis added.

sets a blanket prohibition to legal paternalism and moralism, justifying the limitation of individual liberty only if it is necessary to prevent harm to others. The principle, in its pure form, seems untenable in modern societies. Despite its central status in the liberal tradition, most "modern" liberals regard it as exaggerated. Hart, for instance, writes that "Mill carried his protests against paternalism to lengths that may now appear to us fantastic"[12].

Consequently, there is a process of gradual "softening" of the harm principle. Even Mill acknowledges that people lacking the ability to make voluntary choices (minors, drunks, mentally ill, etc.) can be restricted in their decisions if these would cause them serious harm/risk of harm. Mill also permits the state to protect people from their own ignorance in cases where an uninformed or misinformed choice would be likely to lead to unintended harmful consequences[13]. Although Mill initially defends the harm principle on utilitarian grounds, these examples already show that he is more concerned with autonomy than utility in *On Liberty*[14]. Nigel Warburton remarks that "[...] many readers of *On Liberty* have been left with the suspicion that, in his tenacious adherence to the harm principle, Mill unintentionally comes closer to advocating an absolute right to personal freedom than his professed utilitarianism would consistently allow" [15].

This tension in Mill's essay provides a basis for the changing interpretation of the harm principle. There is a gradual shift from the utilitarian to the deontological (i.e. autonomy-based) interpretation of the harm principle during its historical development, which affects the

[12] H.L.A. HART, *Law, Liberty and Morality*, (London: Oxford University Press, 1963) p. 32.

[13] An often cited example can be found in Chapter V of *On Liberty*: "If either a public officer or anyone else saw a person attempting to cross a bridge which had been ascertained to be unsafe, and there were no time to warn him of his danger, they might seize him and turn him back, without any real infringement of his liberty; for liberty consists in doing what one desires, and he does not desire to fall into the river." MILL (1975) p. 89.

[14] Mill, in certain parts of *On Liberty*, argues for liberty on a rule-utilitarian basis. Even if the utility of each act is not maximized by the rule of the harm principle, Mill implies that following this rule will maximize "utility in the largest sense". His reasoning is similar to the reasoning he follows in the case of freedom of speech. The same reasons that justify an "exceptionless" policy of free speech (i.e. freedom of speech always leads to maximal social utility, even if the articulated opinion is false or morally wrong) also justify an absolute anti-paternalistic policy. He is convinced that autonomous decision-making always leads to better consequences than restrictions in the long run. However, this just does not seem to be true: paternalistic policies sometimes yield better results than liberty (cf. the prohibition of slavery contracts in *On Liberty*).

[15] N. WARBURTON, J. PIKE, D. MATRAVERS, *Reading Political Philosophy – Machiavelli to Mill*, (London: Routledge, 2000) p. 317.

justification of paternalism as well. This transformation is already implicit in *On Liberty*, which provides a good starting-point for later, rights-based liberal theorists. Taking into account this interpretational change, a strange paradox appears. While the absolute character of prohibition is gradually abandoned through different methods of "softening" of the harm principle, the utilitarian justification is replaced by a deontological background that is more suitable for justifying categorical prohibitions. This short excursion now brings us to the first "justificatory model" of paternalism: deontological ethics.

## 3. *Justificatory Models of Paternalism*

### 3.1. *Deontological Ethics*

The deontological approach to paternalism gives absolute priority to autonomy over other considerations:

> «For if the essence of men is that they are autonomous beings – authors of values, of ends in themselves, the ultimate authority of which consists precisely in the fact that they are willed freely – then nothing is worse than to treat them as if they were not-autonomous, but natural objects»[16].

Paternalism seems to deny individual autonomy. The main question is what kind of paternalistic interferences violate autonomy. Generally, a voluntariness-based distinction is made between soft (weak) and hard (strong) forms of paternalism[17]. Hard paternalism advocates coercion to protect competent adults against their voluntary self-harming decisions (e.g. the criminal prohibition of drug use or active voluntary euthanasia, the obligation to fasten seat-belts during driving or to wear crash-helmets on motorbikes). Soft paternalism allows protection from self-regarding

[16] I. BERLIN, *Two Concepts of Liberty*, in I. Berlin, *Four Essays on Liberty*, (Oxford: Oxford University Press, 1969) p. 136.

[17] Some argue that soft paternalism is not even paternalism because the harm is not self-inflicted but comes from external factors to the subject's will (incapacity, lack of information, etc.). As Beauchamp notes "[…] weak paternalism is not paternalism in any interesting sense since it is not a liberty-limiting principle independent of the harm-to-others principle".[17] This approach implies that soft paternalistic interventions do not interfere with the liberty/autonomy of non-competent subjects because non-competent subjects are non-autonomous. T. BEAUCHAMP, *Paternalism and Bio-Behavioral Control*, in *The Monist*, 60, 1976, p. 67. See also J. KLEINIG (1983) p. 8; J. FEINBERG (1986) p. 13.

harmful conduct, if "the conduct is substantially nonvoluntary, or when temporary intervention is necessary to establish if it is voluntary or not" (e.g. coercion of drunken or mentally ill persons)[18].

Since voluntariness is a matter of degrees, the question is how to determine the standard of involuntariness that is sufficient to justify paternalistic interventions. Take, for example, the case of *akrasia* (weakness of will). Is a heroin-addict a competent or non-competent person? Is addiction a sufficient reason to restrict drug-users' liberty and if yes, what kind of restrictions can be applied? Feinberg treats voluntariness on a sliding scale, meaning that some choices require higher standards of voluntariness than others[19]. For example, if a conduct is more risky or causes more damage, a greater degree of voluntariness is required. If we see someone putting salt instead of sugar into his coffee, we do not have a moral obligation to intervene (though a warning would definitely be nice). On the other hand, if someone puts poison in his coffee, we must stop him (at least to verify if he or she is acting substantially voluntarily)[20]. Also, the more irrevocable the harm, the greater degree of voluntariness is required. Euthanasia, examined on this sliding scale, requires a very high degree of voluntariness ("full voluntariness", if it is possible to speak about such thing)[21] because it causes direct, serious and irrevocable harm.

Self-harm is often labeled as irrational or unreasonable. Voluntariness is clearly ruled out by irrationality (e.g. mental derangement, childhood, etc.) but unreasonableness does not necessarily imply involuntariness. I

[18] J. FEINBERG, *Legal Paternalism*, in Canadian Journal of Philosophy 1, 1971, p. 110.

[19] In his early article, *Legal Paternalism*, Feinberg required full voluntariness to justify self-harming choices. In *Harm to Self*, he sets some rules that determine the "sliding-scale" of voluntariness but it is a non-exhaustive list. Feinberg often tries to justify hard paternalism by disguising it as soft paternalism. He calls this "the soft paternalistic strategy" and uses it to reconcile cases of inevitable hard paternalism with his autonomy-based theory. For critics, it is nothing else than "ad hoc tinkering to ensure that all justified paternalism can be seen as restraining only involuntary actions". T.M. POPE, *Balancing Public Health Against Individual Liberty: The Ethics of Smoking Regulations*, in University of Pittsburgh Law Review 61, 2000, p. 489.

[20] J. FEINBERG (1986) p. 118.

[21] Feinberg tries to establish the model of perfectly voluntary choice. There are five main elements of the model: (1) the chooser is competent (not infant, not insane, not retarded, etc.); (2) he does not choose under coercion or duress; (3) he does not choose because of more subtle manipulation (subliminal or post-hypnotic suggestion); (4) he does not choose because of ignorance or mistaken belief; (5) he does not choose in circumstances that are temporarily distorting (not while fatigued, not while excessively nervous, not under the influence of a powerful passion, not in pain, not under the influence of drugs or alcohol, etc.). Ibid. 115.

agree with Feinberg that there are some manifestly unreasonable decisions. "It is certainly unreasonable to cut off one's arm with a power saw, and risk bleeding to death, in order to cure an infected finger"[22]. However, I am unsure (1) if unreasonableness can simply be equated with involuntariness, even in the case of manifestly unreasonable decisions and (2) if unreasonableness is an objective standard of evaluation at all. The reasonableness of a decision (among others) depends on the "magnitude of the desired goal"[23], which is a question of personal preferences and subjective evaluation. There are conducts that are fully voluntary, yet seem unreasonable to most people because they reflect different value preferences from the majority. Consider, for instance, the refusal of blood transfusion for religious reasons by the Jehova's Witnesses.

This brings us to a different level of discourse, namely to the issue of state neutrality and the separation of the "good" and the "right". Since citizens in modern pluralistic societies hold different views about what constitutes a valuable life, it is a common liberal claim that the state should be neutral towards competing conceptions of the "good". The state must limit its interference to the sphere of the "right" to ensure peaceful social co-existence. Self-harm, being predominantly self-regarding belongs to the sphere of the "good". This means that hard paternalistic interventions (at least in a liberal political framework) are discredited because they impose certain conceptions of good life on autonomous subjects. Of course, adopting a communitarian or perfectionist approach would relativize the "good" – "right" distinction and allow the state to take a stricter position on paternalism.

Our approach towards euthanasia – besides being dependent on the specific political and moral philosophy one adopts – is also determined by the values of autonomy and human life. Both of these values are contingent on external factors. (1) Proponents of euthanasia must confront a deeply embedded socio-cultural "prejudice" of the sanctity of human life. However, sanctity of human life is not as imperative as it seems. Is it desirable to keep people alive under all circumstances? Philippa Foot suggests that it is only "ordinary" human life that is intrinsically valuable:

[22] Ibid. 103.

[23] Feinberg lists five factors that determine the reasonability of risk-taking: (1) the probability of self-harm, (2) the probability of the desired goal, (3) the magnitude of the harm, (4) the magnitude of the desired goal ("the value or importance of achieving the goal") and (5) the existence or absence of an alternative, less risky means to the desired goal. The first, second, third and fifth considerations are more or less objective, but the fourth one is not. We can attribute different preferences to different desires and it is, at least, unsure if we can measure preferences by a common understanding of reasonableness. In my view, Feinberg's theory seems unable to handle these "evaluative" decisions. Ibid. 102.

> "It seems, therefore, that merely being alive even without suffering is not a good. The idea we need seems to be that of life which is ordinary in human life in the following respect – that it contains a minimum of basic human goods. What is ordinary in human life […] is that a man is not driven to work far beyond his capacity; that he has the support of a family or community; that he can more or less satisfy his hunger; that he has hopes for the future; that he can lie down to rest at night. […] Disease too can so take over a man's life that the normal human goods disappear"[24].

(2) Besides the value of human life, autonomy is also contingent on "external" factors. "Autonomous" decisions are strongly influenced by external circumstances. (A) The number of available options, for instance, places an objective limit on personal autonomy. Even if someone is fully competent, but does not have a set of substantive options to choose from, he or she will not be able to lead an autonomous life[25]. A person who is closed to a room and can do nothing but eating, drinking or sleeping can hardly be called autonomous. The decision about euthanasia is also determined by the available set of options. Someone may choose euthanasia due to the extreme pain he or she experiences during the terminal phase of the illness. Yet, it is possible that the disease is only painful because the patient does not have access to good medical care in his or her country. Under these circumstances, the choice of euthanasia is dependent on the reigning economic regime and moral luck[26]. (B) Moreover, having additional options does not necessarily increase autonomy. Offering the possibility of euthanasia, as an additional choice, may "compel patients to think about the justifiability of their continued existence"[27]. Many, who suffer from painful but not necessarily terminal illnesses, would only think about euthanasia because it is readily accessible. There is an additional cultural element here, namely that our modern culture does not tolerate sickness, idleness or dependence on others. "Establishing a right to die in our culture may thus be like establishing a right to duel in a culture obsessed with honor"[28]. This

[24] P. FOOT, *Euthanasia*, in Philosophy and Public Affairs 6, 1977, p.85.

[25] Cf. J. RAZ, *The Morality of Freedom*, (Oxford, Clarendon Press, 1986) p. 374. This external condition of personal autonomy corresponds to the notion of positive liberty in a certain sense. The availability of options presupposes not only freedom from coercion (i.e. negative liberty) but also positive liberty (e.g. adequate financial means).

[26] H. LAFOLLETTE (ed.), *Ethics in Practice: an Anthology*, (Malden, Mass.: Blackwell, 2002) p. 20.

[27] R. DWORKIN *Life's Dominion*, (London: Harper-Collins, 1993) p. 192.

[28] J.D. VELLEMAN, *Against the Right to Die*, in H. LAFOLLETTE (2002) p. 36.

example shows how voluntary choice is manipulated by social and cultural presuppositions (traditions, religious convictions, etc.).

For the deontological approach, the most important practical question is how to verify the voluntariness of the patient's decision (i.e. how to ensure the patient's "informed consent"). Since euthanasia is irrevocable, a very high degree of voluntariness is needed. Severe depression, for example, may invalidate voluntariness. Although a certain level of depression is "expectable" on the part of sick persons, clinical depression must be cured before a request for euthanasia can be validly accepted[29]. Alternating moods should also be taken into consideration. In most cases, voluntariness is generally sought to be verified by special committees (composed of doctors, psychiatrists, lawyers, etc.) and by prescribing "cooling off" periods before the final decision is made. There are different legislative solutions as to how this is exactly done[30]. The importance of autonomy and voluntary choice appears in the effort of the legislator to "transform" situations of nonvoluntary euthanasia (e.g. comatose patients) to voluntary, through the introduction of living wills and health-care proxies (i.e. documents stipulating the refusal of certain medical treatments or appointing someone else to make the decision on euthanasia)[31].

### 3.2. *Consequentialism*

Consequentialist justifications focus on the outcome of paternalistic intervention. Simply put, paternalism is morally justifiable if it leads to "good" or "desirable" consequences. The question is what we consider as "good" consequence. Classical utilitarianism, for example, had a hedonistic character: pleasure was the ultimate good that determined the morality of all actions. Since Bentham, there has been a lot of different approaches as to how the concept of "good" shall be established (e.g.

[29] J. FEINBERG (1986) p. 354.

[30] Cf. R. YOUNG, *Medically Assisted Death*, (Cambridge: Cambridge University Press, 2007) pp. 137-155. It is important that the procedure should not be too demanding for the patient. The Hungarian regulation of passive euthanasia has been challenged before the Constitutional Court, because - according to the petitioners - the requirements of the Health Care Act (e.g. that the patient has to express his wish to reject the treatment three times during the whole procedure) were unnecessary, disproportional and violated the human dignity of the patients. Decision 22/2003 (IV.28) AB, accessible at the homepage of the Hungarian Constitutional Court (www.mkab.hu).

[31] R. DWORKIN (1993) p. 180.

quantitative and qualitative hedonism, preference utilitarianism, etc.)[32]. For the sake of simplicity, I will take the "simple hedonistic" approach here and presume that it is possible to aggregate the different types of positive and negative consequences of euthanasia (physical pain, emotional suffering, financial gains and losses, etc.).

From a utilitarian perspective, the first benefit of permitting active euthanasia is that it can prevent unnecessary suffering. Even though modern medical science provides effective painkilling methods, some kinds of pain cannot be eliminated with drugs (or the drugs have serious side-effects) and only a small minority of patients has access to such treatments. Euthanasia also allows a better resource allocation: the money and expertise that is devoted to keeping alive terminally ill patients – often in agonizing pain – could be better spent to cure other people[33]. Furthermore, the medical treatment might place a great financial burden on the relatives of the patient, often "leaving family members without resources important to the pursuit of their own happiness"[34].

The possibility of a mistaken diagnosis and the possible appearance of future cures, on the other hand, are good reasons against legalization[35]. A practical argument against euthanasia is the "slippery slope" argument: the fear is that the legalization of voluntary euthanasia, if not controlled sufficiently, may lead to involuntary euthanasia. People who have a financial interest in the death of the patient (e.g. those who have to pay for the medical treatment, the heirs) might intentionally try to abuse euthanasia regulations. However, it is possible to take precautions to eliminate these negative consequences (e.g. by giving authority in the decision-making process only to people who have no interest in the death of the patient). Even if not all negative consequences are eliminated, the "good" thing about utilitarianism is that it allows for mistakes as long as they are kept on a low level in the aggregate result. Thus, if sufficient guarantees are provided, it seems that utilitarianism does not have a

[32] For an overview, see, e.g. W. KYMLICKA, *Contemporary Political Philosophy: An Introduction*, (Oxford: Oxford University Press, 1992); J. HAMPTON, *Political Philosophy*, (Boulder, Colorado: Westview Press, 1997) pp. 121-33.

[33] B. HOOKER, *Rule Utilitarianism and Euthanasia*, in H. LAFOLLETTE (2002) p. 26.

[34] C.A. LAABS, *What does Justice say about Euthanasia? A Nursing Perspective*, in The National Catholic Bioethics Quarterly, 9, 2009.

[35] The risk of mistaken diagnosis can be decreased by prescribing compulsory consultation for the therapist with other doctors. However, we have to acknowledge that the legalization of voluntary euthanasia would inevitably mean the deaths of some people who would have otherwise recovered. Nevertheless, on a utilitarian basis, this is counterbalanced by the large amount of suffering eliminated by euthanasia. P. Singer (1979) p. 143.

principled objection against euthanasia. On the other hand, it is possible to object to utilitarianism on the basis that it justifies "too much" in relation to euthanasia. It allows for mistakes on the individual level as long as the aggregate utility remains positive, neglecting the rights and interests of individuals. Interpreted radically, it may even prescribe a "duty to die" for those who are becoming a burden to their family or to the society[36].

While active euthanasia is mostly forbidden, passive euthanasia (the rejection of treatment) is legalized in plenty jurisdictions. Physician assisted suicide is also becoming more and more accepted[37]. The distinction between killing and letting someone die seems to have moral significance in deontological ethics, which demands the agent to refrain from violating specified moral duties (i.e. "do not kill"). Utilitarianism does not place specific moral weight on this distinction since the consequences of an act and an omission are (often) the same. The deontological approach certainly has a point: "[…] most people think that while killing Bengali children would be morally heinous, refusing to provide these same children with food, medical, and economic assistance is not immoral"[38]. On the other hand, there does not seem to be much difference between stopping feeding a comatose patient and actually giving him or her a lethal injection[39]. The doctrine of double effect is often invoked to go around the constraints of deontology ("*primum non nocere*"). It means that administering large doses of pain-killers (i.e. morphine) with the primary intention to relieve pain is morally acceptable, even if it causes the death of the patient as a foreseen but unintended side effect[40].

[36] Cf. J. HARDWIG, *Dying at the Right Time: Reflections on (Un)Assisted Suicide*, in H. LAFOLLETTE (ed.) (2002) pp. 48-59.

[37] As to date, physician assisted suicide is legalized in the following countries: Albania, Belgium, The Netherlands, Switzerland and some states of the USA (Oregon, Montana and Washington).

[38] H. LAFOLLETTE (ed.) (2002) p. 21.

[39] Contrary to this, Bernard Williams claims that there is a fundamental difference between killing someone, and someone else killing someone as a result of something I have done (cf. Williams' well-known parable about Jim and the Indians). The point of Williams is that moral decisions help to preserve our psychological integrity while "impersonal" utilitarianism loses this distinction: it requires the agent to abandon his own projects and his own personal integrity for the "impartiality" of maximizing general welfare. J.J.C. SMART, B. WILLIAMS, *Utilitarianism: For and Against*, (Cambridge: Cambridge University Press, 1973) pp. 98-117.

[40] See, e.g. DAN BROCK, *Voluntary Active Euthanasia*, in M.P. BATTIN, L. FRANCIS, B.L. Landesman (eds.), *Death, Dying and the Ending of Life*, (Aldershot: Ashgate, 2007) p. 231.

### 3.3. *Virtue Ethics*

How does virtue ethics relate to paternalism? One common objection to virtue ethics is that it is too "vague" to actually tell us what to do. If we approach paternalism from this perspective, we need to stop interpreting the harm principle as an absolute rule and adopt a more casuistic approach. Instead of the "subject" of paternalism, we must focus on the virtuous traits of the paternalistic actor. If paternalism promotes true virtue, it becomes morally justifiable because it develops individual character both on the actor's and subject's side. The main challenge is to identify the underlying virtue behind paternalism.

In my opinion, paternalism motivated by genuine benevolence exhibits the virtue of care[41]. It is hard to deny that care qualifies as a virtue.[42] It does not only increase the autonomy of the person who is being cared for, but also the autonomy of the one who cares (provided that care is given in moderation). In other words, caring makes people autonomous. Additionally, it improves human character in general. It seems that care has a source in universal human feelings (e.g. empathy) but it develops only by exercising it. Everyone has an innate capacity to care and it can be developed by practice (or suppressed if not practiced). Just like other virtues, it has two negative extremes: "over-caring" and "neglect" (cf. courage – rashness – cowardice in Aristotle's *Nicomachean Ethics*). Kultgen argues that care is an essential element of human life:

"Care is not only an essential structure of the way we exist, it is at the core of the way we should exist. […] To be human, is to be able to care, to want to care, and to care deeply and widely. […] When we endure a lifetime of care, we become careworn. But we also become human. The crow's-feet of care are marks of humanity"[43].

If we accept that care is a virtue and it is the underlying virtue behind paternalism, the next step is to examine how a genuinely caring person would relate to the issue of euthanasia. As Engster points out, "[w]hen we cannot cure or heal an individual, help him or her to gain or regain some measure of health and functioning, or relieve his or her pain and suffering, then our ability

[41] At this point, I deviate from the "traditional" virtue ethics perspective which rejects euthanasia on the basis of the long-standing *tradition* beginning from Hippocrates that categorically rejects euthanasia. See C.A. LAABS (2009). Admittedly, I try to amalgamate here virtue ethics with another recent ethical trend, the ethics of care.

[42] It is disputed whether the ethics of care is part of virtue ethics or it is separate from it. Some care-ethicists deny that care is a virtue in itself. Nel Noddings, for instance, understands care as a framework that gives rise to the development of virtues. N. Noddings, *Caring*, in V. HELD (ed.), *Justice and Care: Essential Readings in Feminist Ethics*, (Boulder, Colorado: Westview Press, 1995) p. 23.

[43] J. KULTGEN (1995) p. 7.

to care for a person is severely limited"[44]. The most we can do is to attend to the patient's physical and psychological needs, trying to alleviate the pain and suffering the illness causes. However, if these caring efforts result in an "uncaring outcome", in the sense that despite our best efforts, we merely prolong the person's suffering, euthanasia seems to remain the most caring option. After all, do we really care about the terminally ill and agonizing patient when prolonging his life against his or her explicit wishes? Isn't it rather that we care more about ourselves (our own moral convictions, our own conceptions of "good" life, etc.) in such cases? As I mentioned, care stems from empathy and empathy brings along a certain respect for autonomy. Empathetic caring means that the actor can place himself in the "shoes" of the subject, which ensures that the subject of paternalism will not be handled as an instrument or as a means to an end. Emphatic caring does not only require focusing on a particular individual but also requires *engrossment* in the other person[45]. Someone who cares deeply and genuinely about someone else is open and receptive to the thoughts, desires and fears of the other human being. This ensures that the paternalistic actor does not simply impose his own ideas about the good on the subject. I agree with Engster that "[c]aring for a person does not necessarily mean 'never causing death,' but rather meeting needs, fostering capabilities, and relieving pain and suffering to the best of our abilities in *whatever* ways possible"[46]. Of course, euthanasia shall be applied only as a "last resort", when conventional forms of caring fail (i.e. if the person suffers from an incurable and terminal illness, experiences significant pain that cannot be alleviated by medication and explicitly requests the termination of his or her life)[47].

## 4. *Euthanasia and Harm to Others*

In practice, paternalistic regulations are not exclusively motivated by protection from self-harm. Other considerations, such as the protection of others, public order, morals, etc. are also taken into account. Actually, there are very few "unmixed" cases of paternalism. Even in seemingly "pure" cases (e.g. prescribing motorcyclists to wear crash helmets), one can refer to the indirect harm caused to society by additional social security expenses in case of accidents.

[44] D. ENGSTER, *Care Ethics and Euthanasia*, p. 7, available at www.allacademic.com (29.03.2010).

[45] M. Slote, *The Ethics of Care and Empathy*, (London: Routledge, 2007) p. 12.

[46] D. Engster, *Care Ethics and Euthanasia*, p. 16.

[47] For these three conditions, see ibid. p. 16.

In this section, I will examine if the prohibition of euthanasia can be brought under other liberty-limiting principles than paternalism. Liberals – as it is apparent from the harm principle – do not oppose prohibition if it is aimed at preventing harm to others. But does euthanasia harm other people? Euthanasia is not entirely self-regarding: according to some, it may indirectly harm other individuals and society in general as well. (1) Euthanasia can cause harm to third parties. The loss of a beloved family member, for instance, leads to the mental suffering of relatives and friends. But is it really euthanasia that causes harm in this case? The death of the patient occurs with or without euthanasia; euthanasia only hastens the inevitable consequences. Moreover, the knowledge that the patient did not suffer but passed away in a dignified and painless way may provide comfort and consolation to relatives[48]. Thus, there is no point in the limitation from this perspective. (2) It is possible to argue that euthanasia threatens the preservation of society. The idea here is similar to Feinberg's "garrison threshold" concept[49]. Suicide is primarily a self-regarding conduct. However, if we imagine a small garrison of settlers under continuous attacks from Indians, anyone who does not help in defending the settlement causes harm to the others through his or her negligence. It is true that the decision to withdraw and commit suicide in the middle of a battle indirectly harms fellow soldiers. However, it is hard to imagine how the relatively few cases of euthanasia could bring society close to Feinberg's "garrison threshold". What is more, terminally ill patients are unable to actively contribute to the life of society, so their death does not affect negatively its survival. (3) Finally, euthanasia may violate social norms related to health care (i.e. the social expectation put on sick people to devote themselves fully to recovery; the social expectation on doctors to cure and not to harm patients)[50].

## 5. *Summary*

If we return to the case of Ms. Pretty, it seems a relatively easy case to judge in the light of the aforementioned moral arguments. I argued that the prohibition of voluntary active euthanasia qualifies as unjustified hard paternalism under all of the three normative ethical theories. Allowing voluntary euthanasia – provided that sufficient guarantees are

[48] Except, of course, if family members oppose euthanasia on religious or moral grounds and the patient decides to undergo euthanasia against their wishes.

[49] J. FEINBERG (1986) p. 22.

[50] J.D. VELLEMAN, *Against the Right to Die*, in H. LAFOLLETTE (2002) p. 36.

implemented – neither violates personal autonomy, nor leads to undesirable consequences or exhibits negative character traits because it is the manifestation of the virtue of care in the case of those terminally ill patients whose pain cannot be alleviated by any other means and would otherwise be condemned to long and inhuman suffering. Naturally, there are some built-in presuppositions we need to be aware of when applying the mentioned ethical theories to the issue of euthanasia (i.e. the contingent value attributed to personal autonomy and human life; the acceptance of utility as the "ultimate appeal" on all questions of morality; care as the underlying virtue behind paternalism). Apart from the issue of paternalism, I also argued that euthanasia does not come under the scope of the harm-to-others principle because it is primarily a self-regarding action. The only "liberty-limiting principle" left is the principle of moralism: in fact, it seems to me that the relatively hostile approach of the legislator and the judiciary towards voluntary euthanasia is merely the result of covert moralistic value-judgments.

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