

The Right to Be Protected from Committing Suicide by Jonathan Herring, Hart Publishing, Oxford, 2022, pp xvii+265, £42.99, pbk

In this book, Jonathan Herring, Professor of Medical Law at Oxford University, defends the thesis that the right to life, a fundamental right owed to all human beings, includes the right to be protected from suicide. ‘Our starting point should be that a suicide involves a breach of Article 2 of the European Convention on Human Rights (ECHR). The state has an obligation to protect citizens from breaches of their human rights’ (p. 135). This right implies concomitant duties on individuals and institutions, and not least on the state, to do what is reasonable to prevent suicide.

The book contains useful discussions of the definition of suicide (chapter 2), diverse individual and societal factors that increase vulnerability to suicide (chapter 3 and 4), and, most valuable of all, means that have been shown effective in helping to prevent suicide (chapter 8). The book also contains a nuanced account of autonomy according to which a decision may be autonomous, in the sense of being under immediate control by the person, but may not be ‘richly autonomous’ in that it contradicts a person’s character, deeper commitments, and better judgements. On this account, preventing someone from dying by suicide not only protects their life but may well protect their autonomy, in that they may live through a time of crisis and regain a stronger sense of self.

Herring applies this ‘scalar’ (Thomists may say, analogical) conception of autonomy in an analysis of some key differences between the Mental Health Act 1983 and the Mental Capacity Act 2005. The former law allows people to be detained for their own protection and allows compulsory treatment. The latter prohibits all treatment that is refused by someone with capacity and assumes capacity in adults unless shown otherwise. It has been argued that the Mental Health Act discriminates against mentally ill people, and that it should be repealed in favour of the model of decision making provided by the Mental Capacity Act. Herring agrees that people with mental illness should not be treated less favourably in relation to their human rights. However, he argues that the model of autonomy implicit in the Mental Capacity Act is too thin to deal adequately with suicide (irrespective of whether one has a mental illness). ‘Where a person whose life could readily be saved is to be denied medical treatment on the basis of their autonomy, we need to be confident we have a completely reliable assessment of their autonomy and for that decision to be richly autonomous’ (p. 132).

This book is not primarily about assisted suicide or euthanasia but it touches on these issues in a number of ways. In the first place, Herring seeks to recentre the debate over legalising assisted suicide so that the starting point is suicide prevention. He laments that in a legal context, and increasingly in the public debate, discussion of suicide and human rights is dominated by ‘hard cases’ of people with terminal or degenerative illnesses who have a clear and a settled wish to die, ‘But most suicides are not sought by people in such a situation. They are middle-aged men suffering the end of a relationship; students struggling with the pressures of exams; or teenagers bullied online’ (p. 1). Herring urges instead that we start

in horror and shock at a person's wish to die. What have we done to our fellow humans that they feel this way? Is this the product of the way we have denied them the appropriate pain relief, the appropriate social provision, the appropriate affection? Instead, the proposal of many is to accept their wish to die and kill them, reinforcing the very messages [of exclusion or of feeling a burden to others] that created those wishes in the first place. (p. 221)

If the context were transformed in this way then the focus would shift towards the concerns that lead people to seek death, rather than a purported 'right to die'. Herring provides a helpful critique of the language of a 'right to die' which he argues is a misleading term. At most there is a 'liberty to die', concomitant on the existence of other liberties (such as those related to private life), but this does not imply any duty on others to bring death about. There is no human right to assistance in suicide or to be killed on request.

The main thesis of the book is thus both important and well argued and the main implication for the debate over assisted suicide and euthanasia is also helpful. If people started where Herring starts then this would shift the focus from the possibility of changing the law to the reasons that prompt people to seek their own death. However, Herring does not limit himself to altering the context for the discussing of 'assisted dying' but allows himself to be drawn into the question itself. Regrettably this discussion is cursory and inadequate both in relation to the law and in relation to the philosophical understanding of intentional killing.

In relation to the law on assisted suicide, it is striking that while there are more than fifty references in the index to the Mental Health Act 1983 and more than fifty references to the Mental Capacity Act 2005 there is not one reference to the Suicide Act 1961. Furthermore, when the book does discuss the criminal law on assisting suicide (pp. 137–142) it fails to set out the text of that Act. The book does set out the guidance provided by the Director of Public Prosecutions (DPP) on prosecution of encouraging or assisting suicide. However, there is no discussion of the interim guidance first proposed by the DPP nor how the guidance changed. The final guidance removed reference to the victim having 'a terminal illness; a severe and incurable physical disability; or a severe degenerative physical condition' as a reason against prosecution and added that 'the suspect was acting in his or her capacity as a medical doctor, nurse, other healthcare professional' as a reason in favour of prosecution. These two changes, urged by disability groups and by others, prevented the guidance becoming a covert means to legal toleration of physician assisted suicide for terminally or chronically ill people.

The benefit of relying on the prosecutors' discretion, on the outcome of juries, and on discretionary sentences, to resolve 'hard cases' is that such mechanisms apply after the fact, without endorsement in advance. This approach maintains the legal and ethical principle and discourages assistance in suicide and mercy killing, thus preventing expansion of the practice, while allowing a certain amount of flexibility. For those who support the present law it is misleading to state, that 'at least some cases of assisted suicide should be a criminal offence and some should not' (p. 203). It is rather that assisting suicide is and should be a criminal offence but some cases of assisted suicide are not and should not be prosecuted.

Herring argues in favour of a 'defence of necessity' such that some exceptional cases would not only be 'a wrong to be overlooked' but would be positive, good, and justified actions. He overtly cites the case of Tony Nicklinson as one he has in mind, which makes it clear that this legal change would apply not only to assisted suicide but also to euthanasia (that is, mercy killing) and would apply not only to the terminally ill but also to chronically sick and disabled people.

There are two problems with this. In the first place, the experience of countries such as the Netherlands, Belgium, and Canada is that such laws rapidly expand beyond the few 'exceptional cases'. In the second place, in characterising euthanasia or assisted suicide as 'a positive good' at least in some cases, Herring abandons the deep rooted ethical prohibition of intentional killing of the innocent and of intentional self-killing. This move is reflective of what is the greatest weakness of the book, which is the mis-characterisation and rejection of what Herring terms 'the principle of the sanctity of life'.

In sum, the key argument of this book is cogent in itself and is also helpful for providing a richer, more humane context for discussion of assisted suicide and euthanasia. However, the book falters when it attempts to move from this central argument to overt discussion of the legalisation of euthanasia and assisted suicide. The last chapter in particular detracts from what is otherwise an impressive and important work.

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