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Equality, Justice, and Paternalism: Recentreing Debate about Physician-Assisted Suicide

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ABSTRACT *Debate about physician-assisted suicide has typically focused on the values of autonomy and patient wellbeing. This is understandable, even reasonable, given the importance of these values in bioethics. However, these are not the only moral values there are. The purpose of this paper is to examine physician-assisted suicide on the basis of the values of equality and justice. In particular, I will evaluate two arguments that invoke equality, one in favour of physician-assisted suicide, one against it, and I will eventually argue that a convincing equality-based argument in support of physician-assisted suicide is available. I will conclude by showing how an equality-based perspective transforms some secondary features of debate about this issue.*

Introduction

Debate about physician-assisted suicide has typically focused on the values of autonomy and patient wellbeing.[1] Margaret Battin, Rosamond Rhodes and Anita Silvers note that both those in favour of legalizing physician-assisted suicide and those who want this activity to be legally prohibited claim these values in support of their case.[2] This is understandable, even reasonable, given the importance of these values in bioethics. However, these are not the only moral values there are. The purpose of this paper is to examine physician-assisted suicide on the basis of the values of equality and justice. In particular, I will evaluate two arguments that invoke equality, one in favour of physician-assisted suicide, one against it, and I will eventually argue that a convincing equality-based argument in support of physician-assisted suicide is available. I will conclude by showing how an equality-based perspective transforms some secondary features of debate about this issue.[3]

Preliminary Distinctions

I will address two questions in what follows:

(1) Should physician-assisted suicide be legalized?
(2) Is physician-assisted suicide justifiable on the basis of the moral values of equality and justice?

It is important to separate these since the question of whether or not a given practice should be legal depends upon more than whether or not it is morally justified. However, *prima facie*, practices should not be legal if moral objections to them outweigh the

moral case for them. Accordingly, after presenting the two equality-based arguments about physician-assisted suicide, I will first present a *prima facie* case for the legalization of this practice on the basis of considerations of equality. Then I will show that equality-based moral objections to physician-assisted suicide do not outweigh the case for it. The result will be a two-pronged case in support of the legalization of physician-assisted suicide.

Equality: The Case for Physician-Assisted Suicide

The most familiar appeal to equality in considerations of assisted suicide is the following case in support of such activity.[4] However, this argument has not been explicitly weighed against equality-based arguments against assisted suicide.[5] Accordingly, I will present the familiar argument in detail to facilitate clear comparison.

Sue Rodriguez was a woman in British Columbia, Canada, who suffered from amyotrophic lateral sclerosis (ALS), also known as Lou Gehrig's disease. This is a degenerative condition for which there is currently no cure. People with this condition slowly lose the ability to walk, talk, indeed to move their bodies at all without assistance. Eventually even breathing and eating are impossible without invasive technological intervention. Such patients do not lose their mental capacities; they remain aware of their deterioration. Rodriguez wanted to remain alive so long as she was capable of enjoying life. She realized, in advance, that when she had lost this capacity, she would no longer be able take her own life. Assistance in suicide is illegal in Canada — Sec. 241(*b*) of the Criminal Code prohibits it. Consequently, Rodriguez went to the courts to request official permission for such assistance. She was turned down, and has since died.

The courts did not reject Rodriguez's case unanimously. In a dissenting opinion, Justice Lamer presented the following equality-based argument in favour of legalizing assisted suicide.[6] Lamer notes that the law allows people great freedom in making medical decisions about their own persons.[7] This includes the freedom to take their own lives — suicide is not illegal in Canada. However, some people, such as Sue Rodriguez once her disease had progressed sufficiently, are not physically capable of committing suicide. Moreover, the law prohibits assistance of any kind in suicide. This means that Canadian law puts an obstacle in the way of a deep and important decision regarding one's person for physically disabled people that the physically able do not face. As Lamer put it:

> I conclude that s. 241(*b*) of the Criminal Code infringes the right to equality guaranteed in s. 15(1) of the Charter. This provision has a discriminatory effect on persons who are or will become incapable of committing suicide themselves, even assuming that all the usual means are available to them, because due to an irrelevant personal characteristic such persons are subject to limitations on their ability to take fundamental decisions regarding their lives and persons that are not imposed on other members of Canadian society.[8]

Section 15(1) of the Canadian Charter of Rights and Freedoms reads, 'Every individual is equal before and under the law and has the right to equal protection and

benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'.

We can generalize this point — it is not specific to Canada. Wherever suicide is legal but assistance in suicide is illegal, then the physically disabled are prevented by law from doing something that the physically able are legally permitted to do. In effect, such a legal arrangement divides persons into two groups, the able and the disabled. The members of these two groups do not have equal standing in the eyes of the law. In order to serve the value of equality, the law should be changed so that there are no legal barriers to this sort of fundamental personal decision that pertain to some persons but not to others. Since criminalizing suicide is an unpalatable change to the law, the value of equality demands the legalization of assisted suicide.[9]

Equality: The Case against Physician-Assisted Suicide

Jerome Bickenbach argues that the value of equality supports the continuing legal prohibition against assistance in suicide. The reason is that the current social context is characterized by 'inequality of autonomy'.[10] What this means is that able and disabled persons face the issue of whether to take their own lives in different ways. Bickenbach argues that, unlike able-bodied persons, for the disabled, '. . . it is more likely than not . . . (that) the decision to kill oneself, or to seek assistance to do so, is a coerced, manipulated, or forced decision'.[11] That is, able and disabled do not face the issue of suicide with the same free ability to choose. According to Bickenbach, the value of equality calls for prohibition against assistance in suicide because when the choice is made by disabled people, we have good reason to think that it is not made autonomously, but is in fact coerced. A prohibition against assistance in suicide thus helps the disabled retain control over their persons and lives.

Bickenbach identifies two sorts of coercion that the disabled face. The first is psychological. Psychological coercion stems from pressures experienced by the disabled person as a direct result of their disability. To determine whether a choice has been made under conditions of psychological coercion, case-by-case examination is required. The goal of such examination is to assess whether the will of the decision-maker is unduly over-powered by the contingencies of their condition.[12]

The second sort of coercion is moral.[13] Bickenbach thinks this is much more important than psychological coercion. Moral coercion occurs when the issue of whether to end one's life arises in a context where one's sort of life is devalued and where one's options for how to continue are limited by the choices of others. Bickenbach argues that both of these are the case for disabled people. The prevailing social attitude is that the lives of people with disabilities are devalued. Bickenbach argues that this attitude *itself* devalues life. It certainly reduces its quality. For example, when this attitude affects policy decisions, it can translate into a 'justification' of limitations on resources available to persons with disabilities.[14] Moreover, the choice to die is made against a background of other options. These options are themselves determined by prevailing social attitudes and policy decisions informed by these attitudes. Such attitudes and decisions can, and often do, limit the alternatives available to people dealing with disabilities. These limitations are far different from those imposed by nature — they are

neither inevitable nor the effect of our natural allotment of talents, physical conditions, *etc*. Instead they are produced or maintained through human decisions and activities, both of which could be conducted in other ways as a matter of human choice.[15]

The implication of these reflections is the following: there is inequality of autonomy with regard to decisions about suicide. In contexts where the lives of people with disabilities are systemically devalued, the choice to die is coerced by the attitudes and decisions of others. The same choice made by the able-bodied is not subject to such coercion. This is unfair. To combat unequal ability to choose for oneself on such a fundamental matter, Bickenbach thinks (continuing) state prohibition against assistance in suicide is warranted.

Reflections on Equality: Should Assisted Suicide be Legalized?

At first glance, it seems that the value of equality is being used both to support and to argue against the legalization of assisted suicide in the positions from Rodriguez-Lamer and Bickenbach. At second glance, it is clear that different notions of 'equality' are at work. Equality of standing with regard to the law is not the same as equality of autonomy. To assess the relative weight of these positions, we must clarify these notions of 'equality'.

Let's call the sort of equality invoked in the Rodriguez-Lamer position *formal equality*. It is formal because it provides a constraint on how the law applies to people, and hence on the form a legal system can be allowed to take, rather than a substantive goal to be promoted or protected by the law. Formal equality gives leverage to a formal notion of legal fairness or justice: laws are *prima facie* unfair/unjust if they apply to people differently without there being a relevant difference between those people to justify such different treatment. In particular, laws are formally unjust if they constrain people's actions differently, such that some are legally prohibited from doing what is legally permitted for others. The argument in Lamer's dissenting opinion can thus be recast as claiming that s. 241(*b*) of the Canadian Criminal Code is formally unjust because, in effect, it legally prohibits the disabled from ending their lives while the able face no such legal prohibition.

By contrast, Bickenbach invokes one variety of what I shall call *substantive equality*. Instead of a formal constraint on the law, to invoke substantive equality is to indicate a value that one thinks the law should promote or protect. Bickenbach in particular casts equal ability to choose regarding such fundamental personal decisions as whether to continue living as such a substantive value. This gives leverage to a substantive notion of legal fairness or justice: laws are *prima facie* substantively unfair/unjust if they fail to promote/protect substantive equality. Bickenbach's case can thus be recast as claiming that the legalization of assisted suicide would be unfair/unjust because it would fail to provide the extra protection of autonomy that the disabled need due to the social context in which end-of-life decisions are currently made.

The question now is which sort of equality, formal or substantive, should be given more weight when designing laws. Presumably some of the time there is no conflict between formal and substantive equality, so no choice need be made between them. However, the arguments from Lamer and Bickenbach indicate that formal and substantive equality *prima facie* conflict on the matter of assistance in suicide. In this

particular case, a choice must be made between these values. Is legal equality to be understood, first and foremost, as a constraint on how the law applies to people, or should it be seen instead as a particular goal to be promoted/protected by law?

We have good reason to think that generally, when they conflict, we should choose formal equality over the substantive variety. The Canadian Charter of Rights and Freedoms represents equality in the eyes of the law as a fundamental requirement of justice. This is reasonable: a legal system in which laws function to prohibit some from doing what others are legally permitted to do, *ceteris paribus*, is *prima facie* unfair. We would reasonably consider such a legal system unjust. That is, when laws fail to apply to people equally, then the system in which such laws have a role loses an important aspect of the claim to represent the dictates of justice. By contrast, substantive equality does not structure the law in such a deep way. A legal system in which laws apply to everyone equally but fail to provide for substantive equality may well be inadequate, but it is formally fair. A legal system in which substantive equality is chosen instead of formal equality is, by contrast, structurally unfair.

There is another way of putting this point. It is reasonable to think of the equal applicability of the law as a *minimal* requirement of justice. Promoting a substantive conception of the good, however, is not such a minimal requirement. Instead, to promote/protect particular substantive values is to go beyond the minimum and to design the regulations encoded in law in the light of some chosen value(s). A legal system that omits its minimum requirements is deeply unjust. A legal system that lives up to these minimum requirements alone might well be inadequate, insofar as it fails to promote/protect certain values that perhaps should be promoted or protected, but it would not be structurally unfair.

These points apply directly to the legal status of assisted suicide. Since current prohibitions of assistance in self-killing put a legal barrier in the way of a fundamental personal decision for the disabled but not for people without disabilities, such prohibitions fail by the standards of formal equality. These laws might serve the substantive goal of equality of autonomy, but this comes at the cost of being formally unfair. Since formal equality has a special role in ensuring that laws are just, a role that substantive equality does not have, laws prohibiting assisted suicide should be changed to serve formal equality instead of substantive equality.[16]

Reflections on Equality: Is Assisted Suicide Morally Justifiable?

If we ensure that laws apply to people equally (*ceteris paribus*), then we ensure that such laws are, in a certain sense, fair. Using the old Aristotelian standard, such laws treat equals equally (and perhaps unequals unequally). However, the content of these laws might be independently undesirable. They might fail to promote/protect important values that our considered judgments suggest should be promoted or protected. That is, to ensure that laws are formally fair, because they serve formal equality, is not necessarily to ensure that these laws are morally justified. In principle, harmful laws could be formally just so long as they applied to everyone equally. We would have good grounds to want such laws changed despite their formal fairness.[17] The question of the substantive moral justification of laws regarding assisted suicide must be addressed directly to supplement the previous reflections on formal and substantive

equality. If substantive moral objections to the legalization of assisted suicide are strong enough, we would have some reason to reconsider legalization of this practice.

Let's examine this issue in terms of the value of equality. I have reconstructed Bickenbach's argument as claiming that legal prohibitions against assistance in suicide serve substantial equality. They purportedly do this by promoting equality of autonomy — the equal ability to choose regarding fundamental personal decisions. Such equality of ability is compromised for disabled persons by psychological and, especially, moral coercion. This coercion provides good reason to think that end-of-life decisions are not really made autonomously by disabled persons. Hence assistance in suicide should be legally prohibited in order to protect the disabled against the coercive effects of prevailing social attitudes.

To evaluate this case, we must look more closely at two topics. First, since Bickenbach emphasizes equality of autonomy, it is important to examine autonomy directly. Second, since Bickenbach supports the continued legal prohibition against assisted suicide, it is important to examine this type of restriction on our actions. Since a restriction on gaining aid in killing ourselves is a restriction of free choice and action ostensibly for our own good, but presumably against the wishes of those who seek such aid, it is clear that legal prohibition of assistance in killing oneself is a paternalistic measure. Accordingly, I will examine the justification of paternalism directly. As we shall see, autonomy and paternalism are deeply interwoven.

i) Autonomy:

Autonomy is frequently glossed as 'self-rule'. Bickenbach's emphasis on the ability to choose regarding fundamental personal decisions strikes me as an apt way of understanding the core of self-rule. However, a distinction is warranted here, one that is useful for understanding self-rule. We can differentiate two connotations of autonomy — deep and shallow. These have different relations both to self-rule and to practical policy decisions about how to serve autonomy. Using this distinction will give us a useful perspective for evaluating Bickenbach's claim that assistance in suicide should be prohibited to serve equality of autonomy.

The difference between shallow and deep autonomy is the difference between:

(A) Making autonomous choices/decisions
(B) Being an autonomous person

(A) is 'shallow' autonomy and (B) is 'deep' autonomy. A concern with autonomy of decisions alone is relatively shallow because it seems that this issue can concern matters that remain, as it were, on the surface of people's lives. I have elsewhere cast autonomy of choices in the familiar terms of the relation between 1st and 2nd order desires.[18] It is useful to think of such desires in terms of relations to propositions. Here is the form of a 1st order desire:

(1) I want that *X*

X, the content of the proposition in question, could take many specific forms. Common ones are states of affairs involving an object or action. Here are examples of each:

(1a) I want that I have a beer.
(1b) I want that I go to a hockey game.

Here are more colloquial expressions of the 1st order desires in 1a and 1b:

(1a′) I want a beer.
(1b′) I want to go to a hockey game.

Whereas the class of possible propositional contents of 1st order desires is fairly open-ended, 2nd order desires have a very specific form of propositional content. 2nd order desires always have 1st order desires as their content; this is the source of the labelling of these desires as '1st' and '2nd' order. Here is the form of a 2nd order desire:

(2) I want that [I want that *X*].[19]

Any 1st order desire can, in principle, be the content of a second order desire. So:

(2a) I want that [I want that I have a beer].
(2b) I want that [I want that I go to a hockey game].

Here are the more familiar versions:

(2a′) I want to want a beer.
(2b′) I want to want to go to a hockey game.

When one has a 2nd order desire about a particular 1st order desire, one, in effect, *endorses* having the 1st order desire. One is, to some extent, happy about feeling this way. Imagine someone declaring, 'Not only do I want a drink, but I'm glad that I do!'. This can reasonably be taken as an expression of a 1st order desire backed up by a 2nd order one.

Acting on the basis of a 1st order desire that is endorsed by a 2nd order one can be a superficial matter. Obviously such desires can be about trivial things, but this is not relevant to the present discussion. The important thing to note is that even when such choice concerns an important topic, the sort of autonomy in question is shallow because of the way the person is engaged in the decision. As we shall see, merely acting from 1st order desires that are the content of 2nd ones barely scratches the surface of the depths of human psychology, and hence of the scope of autonomy. In general, when I speak of autonomous choice and action, or of shallow autonomy, I mean choice and action yielded by this combination of 1st and 2nd order desires.[20]

Let's turn to deep autonomy. In contrast with autonomous choice, a concern with being an autonomous person is relatively deep because it concerns the overall structure of one's life. The exercise of deep autonomy consists in reflection on the values by which one's life will be structured. This is a much more important aspect of self-rule than, e.g. the issue of whether a choice regarding a particular purchase was made autonomously or not. The issues that arise with deep autonomy cut much more closely to the identity of persons. Central to self-rule understood as deep autonomy is having and exercising control over one's life. This certainly seems to be a value worth respecting. More pertinent to present purposes, having and exercising control over one's life seems to be at the moral heart of medical practices of attaining consent. To have control over one's life is, at least in part, to have a life-plan. Having some sort of plan for one's life requires reflection, foresight, self-assessment, sensitivity to values that

might structure a life, knowledge of the kinds of life one might pursue, and perhaps other cognitive operations. Forming a life-plan — central to self-rule — is a matter of performing certain sorts of thought; choices are a distinct matter.

Two sorts of thought are central to deep autonomy:

(A) Thought about whether the desires we have, either 1st or 2nd order, are worth having.
(B) Thought about what values one should be committed to.

The performance of (A) type deep autonomy requires measuring one's desires against standards of value. Since one can have 2nd order desires about 1st order desires without performing such reflection, (A) type deep autonomy is not required to make autonomous choices. (A) type autonomy is deeper than such choices because it requires more reflection, and the exercise of more control, over one's motivations than shallow autonomy does. (B) type deep autonomy is even deeper because it requires reflection about the standards of value used in (A) type deep autonomy. Performance of this sort of thought is at the core of developing a life-plan. It requires one to pay attention to whether possible kinds of lives are worth living, and to whether possible standards of value are worth adhering to.[21]

Crucially, deep and shallow autonomy can come apart:

(1) One can be an autonomous person, yet make occasional choices non-autonomously. As an example, take a person who reflects deeply about how to live his/her life, yet turns control over a particular course of medical treatment over to medical experts. Particular choices about how the treatment will proceed are not made autonomously by this person, yet the person generally exercises self-rule, and is hence deeply autonomous.
(2) In principle, one's choices could be made autonomously even though one was not an autonomous person. Let's return to hockey for an example. Someone who wants to want to attend a hockey game, but who has not reflected on the place of such activities or desires in the kinds of lives that are worth living, is making an autonomous choice but is arguably not an autonomous person.

A couple of practical implications follow from the distinction between deep and shallow autonomy. First, since they can come apart, to serve one is not necessarily to serve the other. I have elsewhere emphasized the relation between freedom and autonomy on this point.[22] Policies designed to respect autonomy are often aimed at ensuring that decisions can be made freely. This sort of emphasis addresses shallow autonomy — autonomy of choice — but not necessarily deep autonomy. Instead of freedom, deep autonomy requires measures that promote the ability to think about the structure of one's life. Freedom can be quite beside the point for this; information and education might be much more important.

The second practical implication is directly relevant to paternalism, so let's turn to this topic.

ii) Paternalism:

In brief, paternalistic policies purportedly serve one's wellbeing but without one's explicit consent, and perhaps even against one's wishes. Stop signs, fluoride in public

drinking supplies, and seatbelt laws are all examples of paternalistic measures. Exceedingly few of us have explicitly consented to these practices. Since they are in place to serve our wellbeing, many of us don't mind these practices. However, some people object to such interference in their lives, either particularly or in general. In such cases, paternalistic policies purportedly serve these people's wellbeing, but against their wishes. Such cases make the moral problem of paternalism clear. The consequentialist rationale of achieving good ends collides with the deontological value of respecting freedom and autonomy.

Laws that prohibit assistance in dying are paternalistic in that they are meant to serve wellbeing by restricting free choice and action. The effect of such laws is felt particularly by those who wish to acquire help in ending their lives. Thus legal prohibition against assisted suicide clearly exemplifies the moral conflict at the heart of paternalism. Since we have no generally agreed upon way of adjudicating conflict between consequentialist and deontological values, paternalism turns out to be a resilient problem. Since the problematic aspect is the restriction of autonomy (assuming that no one really objects in principle to the pursuit of good ends per se), the most promising route for articulating a compelling justification of paternalism is to turn away from consequences to autonomy itself. An autonomy-based rationale for paternalistic measures would cut off autonomy-based objections to paternalism at the root.[23]

The distinction between deep and shallow autonomy provides the tools for constructing autonomy-based justifications of paternalism. This is the second practical implication of the distinction between deep and shallow autonomy. Since deep and shallow autonomy can come apart, then, at least for practical purposes, they can also conflict. Conflict poses the practical question of which type of autonomy we should privilege. In general, I'm inclined to think that deep autonomy is the more important value, not shallow autonomy. In other words, autonomy of persons should be chosen over autonomy of choices (when the two conflict with each other). My intuition can be put in terms of the value of self-rule: deep autonomy gives a more compelling account of what is important about self-rule than merely shallow autonomy. As for paternalism: paternalistic policies restrict freedom of choice, which I have called shallow autonomy. If one focuses only on shallow autonomy, then the prospect of finding an autonomy-based rationale for paternalism appears bleak. However, including deep autonomy opens up a new line of inquiry. Since deep and shallow autonomy can come apart and conflict, it is formally possible that limitation of one's autonomy in one respect could be justified by one's own autonomy in another respect. I have argued elsewhere that some paternalistic policies can be justified with regard to deep autonomy.[24] My present plan is to develop this account of the justification of paternalism and then apply it to assisted suicide.

First, it is desirable to sharpen our understanding of the forms paternalism can take. We should distinguish between what I here call *positive* and *negative* paternalism. Positive paternalism occurs when one's freedom of choice is limited by an action or policy that introduces something into one's life for one's own good, but without one's consent and perhaps despite one's wishes to the contrary. Actions/policies that introduce something into one's life without restricting the range of choices one faces are not paternalistic. An example of positive paternalism is the addition of fluoride to public water supplies. Such a policy does something for the good of the people who use the public water supply, but in a way that restricts their freedom of choice.[25]

Negative paternalism is merely the restriction of one's behavior by some action or policy, but without one's consent and perhaps despite one's wishes to the contrary. An example is the law that prohibits selling oneself into slavery. This restricts one's freedom of choice for one's own good, but the restriction is direct; nothing is added to one's life that indirectly limits one's choices, as in the case of the addition of fluoride to drinking water.

At base, negative paternalism is merely the restriction of one's freedom of choice for one's own good. This implies that all positive paternalism is simultaneously negative, in that it restricts choice. By contrast, not all negative paternalism is also positive: there can be purely negative paternalism, such as the law prohibiting selling oneself into slavery. Such complications do not matter for present purposes. Our topic is whether assisted suicide should be prohibited by law. Such prohibition restricts one's freedom of choice *directly*, i.e. without introducing anything positive into one's life which functions to narrow the range of options open to one. That is, the issue is whether a particular form of *negative* paternalism is justified.

Another distinction is needed before we address the question of how paternalism might be justified. Negative paternalism takes what I shall call *weak* and *strong* forms. Weak negative paternalism occurs when some policy or action puts an obstacle in the way of one's free choice without absolutely prohibiting one from doing otherwise. An example is the erection of a stop sign at a junction where one was free to pass through before. This restricts one's range of choice: one is obliged, by law, to stop at this place or face legal consequences. Strictly speaking however, one is not absolutely constrained to reckon with this stop sign. One is free to take other routes, to walk instead of driving, etc. Such paternalism can be more or less restrictive; the less restrictive it is, the less justification it needs.

By contrast, strong negative paternalism limits one's freedom of choice by absolutely prohibiting one from doing otherwise than the policy or action indicates. Under strong negative paternalism, it is in some sense impossible to do otherwise. Some forms of strong negative paternalism are *physical*, and hence they make it *physically impossible* to do otherwise. An example would be forced medical treatment.[26] If one is forced to take some medicine or to undergo an operation against one's will, then it is literally physically impossible to do otherwise. Once the injection is given, there is no going back. Other forms of strong negative paternalism make it *legally* impossible to do otherwise. The law against selling oneself into slavery is strongly paternalistic in this sense: it makes it legally impossible to sell oneself into slavery in Canada.

Since the restriction of one's freedom of choice under strong negative paternalism is stricter than that under weak negative paternalism, my intuition is that the former must pass a stiffer test that the latter for it to be justified. Nevertheless, both can be justified in reference to deep autonomy. I'll start with weak negative paternalism. For this to be justified, my suggestion is that the measure in question must serve deep autonomy, either by promoting it or, which is more likely, by preserving it. Stop signs at intersections pass this test. They do this by reducing accidents and thereby increasing our health. Besides the fact that healthy people face more options than unhealthy ones — i.e., they have a greater range of *shallow* autonomy — avoiding accidents also preserves their ability to consider what sorts of things are worth having, what sorts of lives are worth leading, and related questions. The erection of stop signs at intersections does this very directly, by reducing the number of head injuries.

Although this test is put in terms of autonomy, it is strictly a consequentialist test for paternalism. Deep autonomy is here treated as a good that ought to be promoted or protected from diminution. This satisfies the search for an autonomy-based rationale for weak negative paternalism; it also happens to preserve some of the appeal of the sort of value that gives rise to considerations of paternalism in the first place. At first glance, it seems that paternalistic policies ought to be justified in terms of the end they serve: i.e. in terms of the good that is done for the person whose freedom of choice is limited. The test for weak negative paternalism construes deep autonomy as the relevant good by which particular paternalistic policies are to be measured. This way of framing the value of autonomy invites the rough-and-ready use of balancing considerations (and metaphors): the good to be gained by paternalism, in the sense of the contribution to deep autonomy, is to be weighed against the disvalue that comes from the limitation of freedom of choice. Some paternalistic measures that serve deep autonomy will not serve it enough to be justified: an example might be the erection of stop signs every 20 feet along a roadway. Here there is great inconvenience in the form of limitation of choices, but the added protection of deep autonomy is very minimal.

Strong negative paternalism is different. Here the issue is the justification of *absolute* prohibition of some sort activity for the good of the very same person whose conduct is limited. Weakly negative paternalistic policies put an obstacle in the way of some choice without limiting it absolutely. Whereas construing deep autonomy as a goal provides a promising foundation for the justification of weak negative autonomy, such a strategy is much less promising for strong negative paternalism. The reason is that, due to the complexity of the forms which meaningful human living can take, the apparent disvalue that attaches to the direct destruction of deep autonomy can be part of a life-plan, autonomously considered and chosen. To put up a single stop sign is to take a step that preserves autonomy at that intersection, but it does not absolutely prevent people from deliberately and autonomously structuring their lives in part around activities involving very fast cars and the associated increase in risk of head injury. It is rational to think that the mere avoidance of bad consequences will not suffice to ground the absolute prohibition of some activity. In the face of this sort of risk, caution and safeguards are warranted, not prohibition. Instead, a stronger sort of justification is needed. To my mind, the most convincing reason to absolutely prevent someone from doing something is not that there is a possible bad effect of the action, but that the course of action is *wrong*. *Prima facie*, it is justifiable to absolutely prohibit people from doing things that are demonstrably wrong. So far I have put this merely in terms of prohibiting people from doing things, but paternalism is narrower in scope than this. Paternalistic measures interfere with freedom of choice for one's own sake. So, for strong negative paternalism to be justified, it must prevent one from doing something that is wrong with regard to oneself; if one is prevented from doing wrong to others, then one's conduct is limited primarily for the sake of those others, not for one's own sake.

For this to be an autonomy-based rationale for strong negative paternalism, the wrong in question must be put in terms of deep autonomy. To see how this might work, let's consider the legal prohibition against selling ourselves into slavery.[27] Since this is an absolute prohibition, it is an example of strong negative paternalism. Regardless of the bad effects that typically stem from slavery, I'm inclined to think that the fundamental problem with it is that it is unjust. It is unjust because, following Aristotle

again, it fails to treat people who are equal in important ways as equals. The relevant non-moral facts to consider here are those associated with deep autonomy: the ability to reflect on a life-plan and to live in accordance with this reflection. Both slaves and slave-owners, insofar as they are normal, healthy, mature adults, have the brain structures that realize the cognitive capacities by virtue of which we are deeply autonomous. If there is any moral value to autonomy at all, it supervenes upon these structures and capacities.[28] But a state that countenances slavery divides people who are non-morally equal in this respect into different moral groups: some deserve respect in virtue of their ability to form and enact a life-plan — the slave owners — and others deserve no such respect, despite having the same abilities — the slaves. Put another way, slave owners are acknowledged as having a right to self-rule, based upon their capacities for it, but no such right is acknowledged for slaves, in spite of the fact that they have the same capacities. Since such a social arrangement treats equals unequally in a certain respect, it is correspondingly unjust. Since the matter in connection with which equals are treated unequally is an important one, states that countenance slavery are unjust in an important way.

Laws against slavery are paternalistic only when the issue of selling oneself into slavery arises. The same pattern of unequal treatment of equals arises with regard to selling oneself into slavery. Such a sale presupposes that one has the right to direct the course of one's life *before* the sale is made. This is the very right that is given up by entering slavery. One has this right in virtue of the capacities and structures that realize the sorts of thought characteristic of deep autonomy. When one becomes a slave, one loses the right (socially speaking) to direct the course of one's life but not the capacities in virtue of which one had this right. A person before entering slavery is *non-morally* equal to his/her future self after entering slavery, but *morally* unequal. A state that countenances such a possibility is one that, *through time*, treats equals unequally, which is unjust in the way that we have already seen. To try to do this to oneself is to treat one's present and future selves as morally unequal when one's present and future selves are equal with regard to the non-moral facts that ground this moral status. To sell oneself into slavery is to commit an unjust act with regard to oneself. The paternalistic law that prohibits this is justified because it prohibits such injustice. This law limits one's shallow autonomy, but out of respect for the moral value of deep autonomy — i.e. for the value attached to the capacity to frame and pursue a plan for one's life.[29]

To return to the general case: strongly negative paternalism is justified when it prevents one from doing something wrong with regard to oneself *qua* deeply autonomous. The injustice attached to selling oneself into slavery is an example of such a wrongful act.[30] This test for justifiable paternalism is deontological in spirit: instead of a goal to be promoted, deep autonomy is here construed as a limit on behaviour. The kind of wrong that arises in the slavery case is to be prevented even if, e.g. somewhat more happiness would result from the performance of such injustice. This is, to my mind, the appropriate sort of value for an absolute prohibition, unlike consequentialist values.

We can now apply this schema to assisted suicide. Laws against assisted suicide restrict freedom of choice without introducing further goods into one's life. That is, they are purely negatively paternalistic. I shall not decide whether they are strong or weak versions of such paternalism; instead, I shall evaluate these laws by both tests.

Strong Negative Paternalism Test and Assisted Suicide

Suppose that such laws absolutely prohibit this sort of conduct. This means that such laws exemplify strong negative paternalism. Since these laws limit freedom of choice, they limit shallow autonomy. Accordingly, an autonomy-based rationale for paternalistic legal prohibition of assisted suicide should be put in terms of what is here called deep autonomy. More specifically, the law should prohibit people from doing something wrong with regard to themselves *qua* deeply autonomous. In general, it seems to me that such laws will fail this test: so far as I can tell, there is nothing *a priori* wrong, in connection with deep autonomy, with killing oneself. Suicide is certainly not unjust in the way that selling oneself into slavery is. When one sells oneself into slavery, one treats one's present and future selves as having different moral statuses despite non-moral equality. But when one kills oneself, one destroys the non-moral capacities that realize our deep autonomy. Insofar as one's future moral status is implicitly treated as different from one's current moral status, it is accompanied by a more fundamental change in the non-moral properties that ground such moral status. One's present, living, autonomous self and one's future, dead, non-autonomous self are non-morally unequal, so no injustice is done if they are also implicitly treated as morally unequal. Unless a different deep autonomy-based rationale for prohibiting assisted suicide is forthcoming, we have reason to think that this sort of paternalistic policy is not morally justified.

Let's return to Bickenbach's discussion of autonomy and assisted suicide. The value that he wants protected is equality of autonomy, understood as the ability to choose for oneself with regard to fundamental personal decisions. This is clearly part (at least) of deep autonomy. To serve equality of autonomy, Bickenbach thinks legal prohibitions against assistance in suicide are called for. Such policies limit the kinds of choices that people make. That is, these policies limit shallow autonomy. Since Bickenbach appeals to (what is here called) deep autonomy in support of such a limitation of freedom of choice, this example fits the general model for justified paternalism provided above. However, Bickenbach does not argue that such paternalism prevents oneself from doing something wrong to oneself in connection with deep autonomy. This implies that his case cannot demonstrate that legal prohibition of assisted suicide passes the test for strong negative paternalism.

Weak Negative Paternalism Test and Assisted Suicide

It is reasonable to see Bickenbach as arguing that laws against assisted suicide *serve* or *protect* deep autonomy. This is what must be demonstrated to justify weak negative paternalism. Accordingly, it is worth examining Bickenbach's position to determine whether such laws pass this weaker test, on the offhand chance that I am wrong that such laws exemplify strong negative paternalism.

We have good reason to think that this is not the case. Recall that the problems Bickenbach identifies for disabled persons' abilities for self-rule regarding end-of-life decisions concern, in particular, the attitudes of others that devalue the lives of the disabled, limit resources available to the disabled, and artificially constrain the options for the disabled. These are all problems for self-rule, but they call for more direct

redress than that provided by prohibition against assistance in suicide. Two more direct responses are obvious:

(I) Education is needed to counter the prevailing social attitudes about the value of the lives of the disabled.
(II) Resources are needed, especially to counter the artificial limitation of options for how to live that are available to the disabled.

If prohibiting people from getting assistance in suicide accomplished either (I) or (II), then we would have some reason to think that self-rule was well served by legal prohibitions against assisted suicide. But this is not the case. In particular, we have no reason to think that prevailing attitudes would be *changed* by *continuing* legal prohibition against assisted suicide. Of course not — in Canada, these attitudes exist in a context in which such assistance is *already* officially prohibited; there is no reason to think that leaving the law the same would bring about any changes of attitude at all. The same goes for resources: we have no reason to think that the disabled would receive more resources than they currently do on the basis of *continuing* legal prohibition against assisted suicide. Since the problems faced by the disabled with regard to decisions about whether to continue living call directly for *new* education and resources, and since the legal prohibition against assisted suicide indirectly provides neither of these, we can confidently claim that the value of deep autonomy does not justify the curtailing of shallow autonomy that is the effect of laws against assisted suicide.

Perhaps these results come as no surprise. When we reflect on deep autonomy and suicide directly, it is clear that there is no *a priori* reason that prevents suicide from having a place in the considered structure of one's life. As such, it is consistent with deep autonomy. If this is the case, then our *prima facie* assumption should be that assistance with suicide is also generally consistent with self-rule.

Let's put this back in terms of equality. Bickenbach claimed that, in the current social context, the disabled are faced with an unfair inequality of autonomy regarding decisions about continuation of life. He recommended legal prohibitions against assistance in self-killing to address this inequality. However, we have good reason to think that this inequality is poorly addressed with a limitation on autonomous choices. Instead, more direct measures to improve self-rule, such as education and resources, are called for. These would directly address the inequality that is Bickenbach's concern. The *most* that a prohibition against assisted suicide could do would be to ensure that one barrier to the provision of such education and resources is removed. But this is at best a very small benefit. We require much more of a moral objection than this to justify the pursuit of this sort of substantive equality by giving up the important legal value of formal equality.

On the basis of these reflections on the relations between deep autonomy, disability and assisted suicide, I have three practical recommendations:

(A) That public education programs be developed to change attitudes about life with disabilities.
(B) That resources be provided to ensure that the disabled face a range of choices for living comparable to that of able-bodied people.
(C) That the law prohibiting assisted suicide be changed to allow assistance to those who are physically unable to take their own lives.

In order to ensure that deep autonomy is thoroughly respected, I recommend that (A) and (B) be in place before the law prohibiting assisted suicide is changed.

Concluding Reflections on Equality and Assisted Suicide

This consideration of an equality-based case for and against assisted suicide has appealed to such other values as autonomy. This is clearly legitimate insofar as I have been following Bickenbach's case against assisted suicide, which cites the problem as being inequality of autonomy. Perhaps the lesson here can be generalized. There is no naked value of equality, but rather myriad indexed values: 'equality-of'. Recentreing the debate about assisted suicide in terms of equality has here been put in terms of equality of standing in the eyes of the law and equality of autonomy. Given the required connection of equality to other ideas, perhaps especially to other values that are already used in debate about assisted suicide, we should not expect equality to revolutionize or finish this issue on its own.

The argument from formal equality for the legalization of assisted suicide is pitched primarily at the level of law and policy. Instead of considerations of patient welfare and autonomy, the values invoked in this argument pertain primarily to the general structure of just laws. Dan Brock has remarked that while the most important arguments in favour of assisted suicide cite the individual case-based values of welfare and autonomy, the most compelling objections are made at the level of policy.[31] Such policy level objections invoke slippery slope concerns, the possibility of weakening patient care or eroding progress made in securing patients' rights, values having to do with the overall practice of medicine, and the like.[32] The present argument thus complements Brock's individual case-based arguments for assisted suicide and adds a very important policy-level consideration for assisted suicide to the policy-based objections to this practice. Since we also have reason to think that the policy-based objections have limited weight,[33] the result of the combination of the present argument with extant autonomy and welfare-based cases is a two-pronged position in favour of assisted suicide. Recentreing this debate to focus on equality delivers a more multi-faceted view of both the problems with legalizing assisted suicide, and, especially, the rationale for such a policy.

However, there is a sense in which the equality-based argument for legalization of assisted suicide is more conservative than autonomy and welfare-based positions. Some have worried that if the rationale for assisting people in killing themselves is to prevent suffering or to respect autonomy, then we have no principled reason to restrict this practice to those, such as Sue Rodriguez, who cannot take their own lives.[34] Once the practice is legalized, medical professionals will have to offer help in dying to anyone who wants it, regardless of their reasons, or to anyone suffering sufficiently, regardless of their wishes. The fear is that this is both an illegitimate and unfortunate addition to medical practice. However, the argument from equality for legalization of assistance in self-killing provides a principled reason to restrict such help to those who cannot take their lives without it. The reason is equality: the rationale for changing the law is to remove a legal barrier that effectively puts suicide out of reach for the disabled. It does not have this effect for people without disabilities. On the basis of considerations of equality, people with disabilities are entitled to aid in taking their lives due to their physical limitations. People without disabilities that prevent them from taking their

own lives are not entitled to this help because they do not suffer from the current legally caused inequalities. Generally, those who are concerned about who should be entitled to medical assistance in dying should welcome redirection of debate to include the present equality-based considerations.

Interestingly, there is a more subtle implication of the present argument for assisted suicide. Daniel Callahan has objected to autonomy-based arguments on the basis that assisted suicide requires *joint* decision-making. Since assisted suicide happens between two or more people, considerations of *individual* autonomy will not suffice to justify it. The issue is no longer one person's right to die or to end their own life, but another person's right to kill.[35] Callahan thinks arguments that translate one person's right to die into another person's right to kill have not been provided.[36] The present considerations provide such an argument. The disabled face an obstacle regarding taking their own lives that people without disabilities do not face. If suicide in general is going to be legally permitted, then equality calls for extra measures to be available to the disabled to ensure that they have equal access to a legally permitted option concerning the continuance of their lives. The extra measure that is needed is help in dying from others. If the law prohibits such aid, then the disabled and people without disabilities are not equal in the eyes of the law. In other words, considerations of equality provide a principled rationale for translating one person's right to die, even by taking one's own life, into someone else's right to kill that person. This is clear evidence that equality has deep and heretofore under-appreciated implications for debate about the permissibility of assisted suicide.

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NOTES

1 See, e.g. (1) D. W. Brock, 'Voluntary active euthanasia', *The Hastings Center Report*, 22, 2 (1992): 11; (2) D. Callahan, 'When self-determination runs amok', *The Hastings Center Report*, 22, 2 (1992): 52–4.

2 M. Battin, R. Rhodes & A Silvers 'Introduction' in M. Battin, R. Rhodes & A Silvers (eds.) *Physician-Assisted Suicide: Expanding the Debate* (London: Routledge, 1998), pp. 3–4.

3 My point is not to eliminate wellbeing and autonomy — I will have plenty to say about autonomy — but instead to focus on justice and equality, bringing in other values as necessary.

In a secondary vein, it is worth noting that the distinction between voluntary active euthanasia and physician-assisted suicide is sometimes practically irrelevant. This seems to me to be true of the case of Sue Rodriguez, discussed below. It is not unprecedented for philosophers to address these phenomena together, under the heading of just one or the other. Dan Brock (op. cit.) is a case in point. For present purposes, physician-assisted suicide should be taken very broadly as including some forms of voluntary active euthanasia.

One more note before proceeding: there is a particular argument in favour of active euthanasia that appeals to justice but that is different from present concerns (See, e.g. M. Battin, 'Euthanasia: the

fundamental issues', in D. VandeVeer & T. Regan (eds.) *Healthcare Ethics: An Introduction* (Philadelphia, Temple University Press, 1987). This argument uses concerns about the just distribution of medical resources as the central issue. Medical resources are finite; more good can be done with them if they are channeled to people whose lives can be significantly improved, or even saved, with them than can be done using them to preserve the lives of people who cannot be helped, and who perhaps do not want to be helped. The present argument is not about the just distribution of resources.

4 For example, see E-H. W. Kluge, 'Assisted suicide, ethics and the law: the implications of autonomy and respect for persons, equality and justice, and beneficence', in C. G. Prado (ed.) *Assisted Suicide: Canadian Perspectives* (Ottawa, University of Ottawa Press, 2000).

5 Jerome Bickenbach notes the Rodriguez-Lamer argument from equality (J. Bickenbach, 'Disability and life-ending decisions', in M. Battin, R. Rhodes & A Silvers (eds.) *Physician-Assisted Suicide: Expanding the Debate* (London, Routledge, 1998), p. 124), but he does not explicitly assess it, despite the fact that he presents an equality-based argument against physician-assisted suicide (see the next section of the present paper). One of my purposes here is to assess the force of Bickenbach's appeal to equality against the force of the Rodriguez-Lamer argument, to see on which side the balance of reasons lies.

6 Kluge (2000, pp. 85-8) claims that this argument is the heart of Rodriguez's own case.

7 Rodriguez v. British Columbia, 1999; reprinted in E-H. W. Kluge (ed.) *Readings in Biomedical Ethics: A Canadian Focus*, 2nd edn. (Scarborough, Ontario: Prentice Hall Allyn and Bacon Canada). Lamer's argument is on p. 367.

8 1999, p. 367.

9 That it is not desirable to criminalize suicide is, I admit, an undefended assumption here. In a roundabout sort of defense, let me note that philosophical opposition to physician-assisted suicide and euthanasia does not usually take the form of arguments for the general prohibition of suicide. That is, the state of the debate seems to countenance the legalization of suicide without much unease.

10 Bickenbach op. cit., p. 126.

11 Bickenbach op. cit., p. 127.

12 Bickenbach op. cit., p. 127.

13 Bickenbach op. cit., p. 128.

14 Bickenbach op. cit., pp. 127–8.

15 Bickenbach op. cit., p. 128.

16 It has been objected to me (in conversation) that formal justice is achieved only through substantive justice. I hope that the present case shows that this is not in fact true. It might be that people's autonomy is given equal protection by legal prohibitions against active euthanasia, but there is an important sense in which this is accomplished by giving people differential status in the eyes of the law. That is, the physically handicapped are prevented by law from acting on a decision that the physically able are legally free to act on. This is formal injustice.

17 Of course, we should also want the laws that replace them to be formally fair.

18 (1) A. Sneddon, 'Advertising and deep autonomy', *Journal of Business Ethics*, 33.1 (2001a): 15–28. (2) A. Sneddon, 'What's wrong with selling yourself into slavery? Paternalism and deep autonomy', *Critica*, 33.98 (2001b): 97–121. For the theoretical antecedents of this distinction, see (1) H. Frankfurt, 'Freedom of the will and the concept of a person, *Journal of Philosophy* 68 (1971); (2) R. L. Arrington, 'Advertising and behavior control', *Journal of Business Ethics* 1 (1982); (3) R. Crisp, 'Persuasive advertising, autonomy, and the creation of desire', *Journal of Business Ethics* 6 (1987); (4) G. Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988).

19 The square brackets serve merely to emphasize the 1st order content of the overall 2nd order desire.

20 For discussion, see Crisp op. cit., pp. 413–8.

21 In my 2001a, the kinds of thought necessary for deep autonomy are developed in terms of Charles Taylor's idea of strong evaluation. The details of this discussion are not necessary for present purposes. See (1) C. Taylor, 'Self-interpreting animals', in *Human Agency and Language: Philosophical Papers 1* (Cambridge, Cambridge University Press, 1985a); (2)) C. Taylor, 'What is human agency?' in *Human Agency and Language: Philosophical Papers 1* (Cambridge, Cambridge University Press, 1985a); (3) C. Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, MA: Harvard University Press, 1989). for this idea. The present conception of autonomy goes 'deeper' than those that stop at the level of 2nd order reflection on desires. For example, Gerald Dworkin's account of autonomy casts it as a second-order capacity (Dworkin op. cit., p. 20). By the standards of the present account, this is the deep end of shallow autonomy only.

22 Sneddon 2001b op. cit.
23 On this matter, see (1) D. Cowart & R. Burt, 'Confronting death: who chooses, who controls? A dialogue', in R. Munson (ed.), *Intervention and Reflection: Basic Issues in Medical Ethics*, 6th edn. (Belmont, CA: Wadsworth Thomson Learning, 2000); and (2) G. Dworkin, 'Paternalism', in R. Munson (ed.), *Intervention and Reflection: Basic Issues in Medical Ethics*, 6th edn. (Belmont, CA: Wadsworth Thomson Learning, 2000).
24 Sneddon 2001b op. cit.
25 Specifically, before this step was taken, people had the following two options: drink from the public water supply and not consume fluoride, or drink from the public water supply and consume fluoride (from some other source). After fluoride is added to the public water supply, the first option is no longer open to people.
26 Note: this is simultaneously an example of positive paternalism.
27 See Sneddon 2001b op. cit. for extended discussion. Incidentally, in this paper I criticize the argument made by Gerald Dworkin that restriction of present freedom of choice is justified when it ensures a greater range of future choices. I will not recapitulate that argument here, except to note that I think that it misconstrues some of what is at stake in slavery and its legal prohibition.
28 Here I rely upon the widely accepted idea that moral facts supervene upon non-moral ones. I am not going to defend this explicitly.
29 Put another way: deep autonomy serves as a rational constraint on the pursuit of ends.
30 If such injustice is the only way that one can do the relevant sort of wrong to oneself, then the test for justifiable strong negative paternalism can be modified: it is justified when it prevents one from doing unjust acts towards oneself.
31 Brock op. cit., p. 14.
32 Brock op. cit., pp. 16–21.
33 Brock op. cit., pp. 16–21.
34 Besides Callahan op. cit., p. 54, see (1) J. D. Arras, 'Physician-assisted suicide: a tragic view', in M. Battin, R. Rhodes & A Silvers (eds.) *Physician-Assisted Suicide: Expanding the Debate* (London: Routledge, 1998), pp. 283–4, and (2) D. Marquis, 'The weakness of the case for legalizing physician-assisted suicide', in M. Battin, R. Rhodes & A Silvers (eds.) *Physician-Assisted Suicide: Expanding the Debate* (London: Routledge, 1998), pp. 272–4.
35 This exemplifies how deeply assisted suicide and active euthanasia are related.
36 Callahan op. cit., p. 52.