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PHILOSOPHICAL CONSIDERATIONS

'To whom does my body belong?'

À qui appartient mon corps ?

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Summary In debates over whether a society should recognize the right of an individual person to end his or her own life (and to enlist the services of a physician to do so), the question is often formulated in terms of ownership: Who owns my body? Those who advocate for self-ownership of their body see the reason for the public enforcement of this right to be ''autonomy.'' Those who advocate for societal ownership of anyone's body see the reason for the public recognition of this right to be ''heteronomy.'' And those who advocate for God's ownership of anybody see the reason for the public enforcement of this right to be ''theonomy.'' Advocates of autonomy, though, have difficulty in justifying a right of self-ownership, since humans are far more dependent on others than they are on themselves. Self-ownership implies a largely fictitious self-sufficiency. Advocates of heteronomy, though, have difficulty in justifying a right of public ownership, since this has been the justification of totalitarian regimes to eliminate persons arbitrarily deemed dangerous or even useless to them. And advocates of theonomy, though, have difficulty in justifying the killing of any living being that is a creature of God. This paper will argue that the whole ownership model is morally flawed. Instead, a model of mutual care is morally more adequate. In this model, we are all both the subjects and objects of care, and that we couldn't survive were this not so. We come into the world as infants totally dependent on the care of others. As we grow into adulthood, we become the subjects of the claims of others to care for them and for ourselves along with them. Society's task is to coordinate our mutual roles as care-receivers and caregivers. No functioning adult is only a caregiver or only a care-receiver. As caregivers we have duties; as care-receivers we have rights. Autonomy should only be invoked when society claims ownership of any of its members. Heteronomy should only be invoked when an individual person acts as if his or her decision to live or die involves nobody else, and nobody else should be concerned. And theonomy should be invoked whenever an individual person or a society claims to have created himself or itself and to have the right to do with themselves whatever they please. Therefore, individual persons have the right to call for

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their society to care for them when they cannot help themselves, instead of the right to call for society to help them eliminate themselves from society even when they want to do so. A society has the right to call for individuals to care for themselves and others when they can do so, instead of the right of a society to eliminate individual persons it no longer wants to care for. And religious believers can affirm both the duty of individuals to care themselves, and the societal duty to care for its individual members, are to be exercised in imitation of the God who cares for creation and who commands human creatures to act accordingly. God's unique ownership of creation, however, is another matter and, as such, it is inimitable.

MOTS CLÉS
Autonomie ;
Corps ;
Hétéronomie ;
Propriété ;
Théonomie

Résumé Lors de débats s'interrogeant à savoir si la société devrait reconnaître le droit d'une personne de terminer sa vie (et de solliciter l'aide d'un médecin pour le faire), la question est souvent abordée sous l'angle de la propriété : à qui mon corps appartient-il ? Ceux qui militent pour que leur corps leur appartiennent perçoivent l'application publique de ce droit comme de l'« autonomie ». Ceux qui militent pour que les corps appartient à la société considèrent la reconnaissance publique de ce droit comme de l'« hétéronomie ». Et ceux qui militent pour que l'appartenance du corps de quiconque appartienne à Dieu perçoivent l'application publique de ce droit comme d'une « théonomie ». Or, les défenseurs de l'autonomie éprouvent des difficultés à justifier la propriété d'une personne à l'égard de son corps, car les humains dépendent bien plus des autres que d'eux-mêmes. La propriété de soi sous-entend une autosuffisance qui demeure largement fictive. Les défenseurs de l'hétéronomie, quant à eux, ont de la difficulté à justifier que le corps relève de la propriété publique, un concept qui a été employé par les régimes totalitaires pour faire disparaître les gens arbitrairement jugés dangereux ou même, qui leur étaient inutiles. Enfin, les défenseurs de la théonomie peuvent difficilement se justifier de tuer n'importe quel être vivant qui est une créature de Dieu. Cet article soutient que le modèle de propriété en entier est moralement erroné. Ainsi, un modèle basé sur le soin mutuel est plus adéquat. Dans ce modèle, nous sommes tant les sujets et les objets du soin et nous ne pourrions survivre si ce n'était pas le cas. Nous venons au monde en tant qu'enfants dépendant entièrement des soins des autres. En passant à l'âge adulte, nous devenons les sujets des demandes faites par les autres pour que nous prenions soin d'eux et de nous-mêmes. Le rôle de la société est de coordonner nos rôles mutuels en tant que receveurs ainsi que prêteurs de soin. Aucun adulte fonctionnel est uniquement prêteur ou receveur de soin. En tant que prêteurs de soins, nous avons des devoirs ; en tant que receveurs, nous avons des droits. Le concept d'autonomie devrait être uniquement invoqué lorsque la société revendique la possession d'un de ses membres. L'hétéronomie devrait être uniquement invoquée lorsqu'un individu agit comme si sa décision de vivre ou de mourir n'implique personne d'autre et que personne ne devrait s'en soucier. La théonomie devrait être invoquée lorsqu'une personne ou une société affirme s'être créée elle-même et donc qu'elle a le droit de faire ce qu'elle entend. Par conséquent, les individus ont le droit de demander de leur société qu'elles s'occupent d'eux lorsqu'ils ne peuvent le faire, plutôt que le droit de demander à une société de les aider à disparaître de celle-ci même lorsqu'ils le veulent. Une société a le droit de demander aux individus de s'occuper d'eux-mêmes et des autres lorsqu'ils peuvent le faire, plutôt que le droit de faire disparaître les individus dont elle ne veut plus s'occuper. Les personnes croyantes peuvent affirmer tant le devoir qu'ont les individus de s'occuper d'eux-mêmes que le devoir qu'a la société de prendre soin de ses individus ; devoirs qui doivent être exercés à l'image de Dieu qui s'occupe de la création et qui dicte aux créatures humaines d'agir en fonction de celle-ci. La propriété unique de Dieu en la création, cependant, est une autre affaire, laquelle est, en soi, inimitable.

The public success of bioethics might well be due to the fact that the questions bioethicists deal with are very often questions that quickly become matters of litigation in courts of law. In societies as litigious as our own, there is great public interest in litigation. That interest is due to the emphasis on individual or private rights in western democracies, where people look to the courts as the public institution best equipped to protect their rights. Of course, one's rights only

become an issue in a court of law when they are being challenged by someone else's rights. In as much as ''possession is nine tenths of the law,'' it is most likely that disputes over rights are most often disputes over property rights.

Now, as most of us are most immediately and most persistently concerned with our own bodies, it is obvious why in societies as property-oriented as our own, disputes over what to do and what is to be done with our bodies inevitably become property disputes. That explains the great interest today in the perennial questions dealt with in bioethics: they are matters of both private and public concern And, since these questions almost always are questions of not just physical health, but of mental health, it is most appropriate that I raise my question today to the members of the International Academy of Law and Mental Health, namely, ''To Whom Does My Body Belong?'' That is, whose property is anyone's body? To whom does it belong?

Furthermore, the success of bioethics as a subject of public discussion in the media and other public forums might well be due to the fact that bioethics is so case-oriented. Since these cases involve questions pertaining to our bodies with which we are so concerned, it is easy for non-experts in either philosophical ethics (dealing as it does with ''foundations'' or principles) or physiology (dealing as it does with bodily facts) to see these questions arising in their own experience. Bioethical reflection begins with a story that most of us can readily see as a story about ourselves. So, let me now tell you a story in which I have been recently involved, and in which you can easily see yourselves as being involved too.

In December 2016, I was approached by a friend, who is an orthodox Jewish woman and a psychiatrist, to file an affidavit in the Ontario Superior Court of Justice on behalf of herself as a member of a group of Christian and Jewish physicians, protesting a recent ruling of the College of Physicians and Surgeons of Ontario [1]. That ruling requires physicians to accommodate patients who want to kill themselves, that is, who are patients judged by competent professionals to be *compos mentis*, that is, having sound reasons (such as ''unbearable suffering'') for wanting their physicians to assist them fulfill what is considered to be their rightful request. That ruling quickly followed upon the recent decision of the Supreme Court of Canada permitting what is called ''physician-assisted suicide'' [2]. Moreover, respecting the right of physicians not to actually ''assist'' — that is, facilitate — a suicide when this conflicts with their conscientiously held beliefs (which almost always turn out to be religious), the College of Physicians and Surgeons, nevertheless, ruled that even conscientiously-objecting physicians are required to explicitly recommend colleagues who will comply with a valid request for medical assistance in effecting a suicide. That is what my friend and her Christian and Jewish colleagues protest. Yet we need to look at the history of the legal treatment of suicide in order to better understand how my friend's dilemma has arisen at this moment in history.

Now let it be recalled that in Common Law suicide itself has been a crime, although almost never prosecuted inasmuch as the perpetrator of the criminal act is the victim and the victim is the perpetrator; also, when the ''crime'' actually succeeds, there is no longer to be found in this world a living perpetrator to be brought to trial, plus no victim to be vindicated. Even most religious traditions that regard suicide to be a sin have long stopped posthumously punishing suicides, such as not burying them inside consecrated cemeteries. That is why in most jurisdictions, suicide is no longer a crime. Not itself being a crime anymore, assisting a person to kill himself or herself is not, therefore, ''aiding and abetting a crime.'' So, the question now is: what are the rights and the duties of patients in relation to their physicians in such cases? And, what are the rights and duties of physicians in relation to these suicide-seeking patients?

What are the rights and duties of suicide-seeking patients? Generally speaking, if an act is not legally deemed a crime, its permission by the law makes its exercise the right of anyone who wants to do it, and which they may do with impunity. A ''right'' can be defined as a ''justified claim'' of a person or persons on other persons [3]. This right then entails the duty of a legally constituted society or state to protect the free exercise of this right. It would seem that all rights have correlative duties insofar as my justified claim is a claim on you to respond appropriately to me. To be legitimate, your duty must correlate with my right. The protection of rights is the business of the state, usually delegated to the courts. Therefore, one must petition a court to exercise its duty of rights-protection.

Now there are two kinds of rights. Minimally, a right is, in the famous words of the U.S. Supreme Court Justice, Louis D. Brandeis, ''the right to be let alone'' [4]. So, in our case at hand, if a person now has the right to kill himself or herself, the courts now have the duty to protect his or her free exercise of that right by not interfering, or preventing others from interfering, with the exercise of that right. That exercise of one's right could be considered to be minimal ''autonomy'' or self-rule. Aristotle called the enforcement of this right, ''corrective justice'' [5]. The 17th century English philosopher, John Locke, saw this minimal rights-protection to be the *raison d'être* of the state [6]. The 20th century British philosopher, Isaiah Berlin, called the exercise of this right ''negative freedom'' [7]. Contemporary libertarians consider that to be the only legitimate function of government in general and the courts especially. Maximally, though, a right is a justified request for others to actually assist me in the exercise of my right. That exercise of one's right could be considered to be a stronger sense of ''autonomy'' or self-rule.

In the case at hand, suicide-seeking patients are not only claiming noninterference in an act they could do by themselves to themselves, they are claiming something more positive, namely, the active, dutiful compliance of a specific ''other'' in fulfilling what is now considered to be a valid or justified claim. Clearly, they are exercising autonomy in the stronger sense. The justification of that claim, though, comes from the state acting as more than just a mediating or rectifying party in a rights dispute between two autonomous individuals, commanding one party to dutifully fulfill the claim of the other party. The state is commanding in its own name in its own interest. Thus, a physician is somebody who can only function in this capacity when he or she is licensed or authorized by the state, hence this request can only be justly or legally made to a state-licensed physician. So, it would seem that a physician's autonomy is trumped by a patient's autonomy, but not because a physician is the agent of the patient. Agents have the right to refuse to carry

out any act they don't want to do, even if commanded to do so by those who have hired them. But, when physicians are functioning under the *heteronomous* or ''alien'' authority of the state, they have no such right of refusal. In other words, it would seem that by voluntarily becoming a physician, physicians have forfeited their *autonomous* right to refuse to perform a state-mandated procedure. Therefore, it is the state that heteronomously determines whose autonomy takes precedence over that of the other. Nevertheless, without some higher criterion to guide the state's decision to side with one party rather than the other in a rights-dispute, as in the dispute between patients seeking aid in their suicide and physicians refusing to do so, it would seem that the heteronomous decision of the state to uphold the policy of the Ontario College of Physician and Surgeons would be, in fact, capricious and biased.

Whatever one thinks of the morality of suicide, very few if any of us want to return to the time when deeming suicide to be a crime entailed the corresponding duty of the state to prevent it, and to punish those who successfully committed this crime, or punish those who aided and abetted this crime. At this point, my friend, an orthodox Jewish psychiatrist, and her colleagues, both Jewish and Christian, have no problem. They are not asking the Ontario College of Physicians and Surgeons to advocate recriminalizing suicide (however much they might regard truly voluntary suicide to be a sin), nor are they asking the state to interfere with the right of individuals to kill themselves (however much they might wish that to be so). They are only asking to exercise their right not to participate in any way in a practice they regard to be immoral. It seems their claim is, in fact, a claim to be exempted from the policy of the state they cannot, in good faith, comply with [8]. Indeed, how different are they from Mennonites who claim exemption from contributing in any way to the facilitation of military practices?

However, a philosophical problem arises when the exercise of a private right is seen to entail the exercise of a positive public duty. But how is this public duty really a logically necessary entailment of a private right? Rights only entail negative duties, what the Talmud calls ''sit and do nothing'' [9]. Autonomy itself only claims noninterference, that is, as long as exercising my right doesn't harm you, you have no right to interfere with me. Positing the protection of individuals' autonomy to be the sufficient cause of the state's authority only grants the state that minimal policing function. The state is established to be its members' protector, not their provider. Therefore, if society is expected to actually facilitate the exercise of an individual right, then we are no longer dealing with autonomy, but with ''heteronomy.'' That is, we are no longer just dealing with self-rule (which is the literal meaning of the Greek based term ''autonomy''), but rather with the rule of one party by another (which is the literal meaning of the Greek based term ''heteronomy''). Also, it could be said that many suicidal persons would rather believe they are obeying the order of a legitimate authority than that they are exercising their own autonomy [10]. Surely, one has to take less personal responsibility for complying with a public duty than when exercising a private or individual right.

In our case, a governing body (the Ontario College of Physicians and Surgeons, hoping to be supported by a court ruling in their favour) has not only recognized the right of individuals to kill themselves, but it has also created by itself for itself — in the person of its members — a duty to positively facilitate that now legitimately claimed act. This creation of a duty entails the corresponding right of individuals to claim the exercise of this duty by those who have created it. In other words, this right is no longer something one brings to society to dutifully protect through noninterference; it is now something one receives from society as an entitlement. Aristotle called this state-positing of duties to be performed for persons whom the state deems or entitles to be deserving of them ''distributive justice'' [11].

Of course, this isn't the only such entitlement from the state. For example, in Canada like almost every other modern state, universal health care is such an entitlement. To assume it is a prior right ignores the historical fact that for a very long time there was no such individual or private right recognized, and that nobody claimed otherwise. So, what is the reason for such entitlements? Why does the state create them, and thus bind its members to enforce them? Well, here is where the question of ownership comes in. That is, just as autonomy means I own my own body and nobody else ought to interfere with my exercising my property right as long as it doesn't infringe on somebody else's property right, so does heteronomy mean that the state owns the bodies of its members. As such, society can also require its individual members or citizens to do its bidding by treating this bodily public property as the state sees fit. That is because it is seen to be in the public interest that they do so. For example, government licensed physicians can be required to treat patients they have not chosen to treat privately; and that is because the leaders of society believe that their property must be taken care of now, so that these sick persons not become a bigger public burden later when untreated now. In fact, when dealing with the question of why suicide is wrong, Aristotle argued that suicide is depriving the state of its property, that is, one of its members whom the state owns [12]. However, what if the state wants to relieve itself of ownership of somebody who is more trouble than benefit to the state? It would seem, following Aristotle's logic that suicide could become a public duty in such cases.

All this might well be called ''heteronomous self-interest.'' Patients who comply with this public policy are freely claiming this entitlement as their public right. Patients who do not comply with this public policy could then be required to comply with it as their public duty. The same is required of physicians as civil servants. Finally, this legally mandated state of affairs presupposes that the collective, heteronomous rights of society are original, and the secondary rights/entitlements of individuals are derivative. Hence, in a conflict between a public duty and a private right, the public duty trumps the private right. That is what the Ontario College of Physicians and Surgeons in arguing against my friend and her colleagues.

Conversely, the religious physicians seem to be arguing that their religious duty, coming from God, trumps their duty to obey a government mandate, that is, when the two duties conflict with one another. As the Bible states, ''There is no wisdom, there is no understanding, there is no counsel, to counter the Lord'' (Proverbs 21:30) [13]. At this point, though, we do not see a conflict between autonomy and heteronomy over who owns the body of the would-be suicide. Instead, we see (or we should see) a conflict between the

right of society and the right of God, or between heteronomy and theonomy, as to what may or may not be done to or for any human body, whether my own body or somebody else's body. In both views, autonomy is trumped, either by society's law or by God's law. Thus, one can be commanded to live or die by society. For example, one is required by society to do everything possible to survive when serving in a battle mandated by the society; and one is required to die when convicted of a capital crime. And, one is required by God's law to survive when faced with religious persecution; and one is required to die when faced with apostasy as the only alternative [14]. As Thomas More told King Henry VIII when faced with this alternative of obeying God's law or a law of a human state that contradicts it, ''I am the King's good servant, but God's first'' [15].

To return to the Canadian context of the case we have been discussing (although the conflict this case involves is by no means unique to Canada), the plaintiffs are not attempting a religious *coup d'état*, so that they could be charged with ''shoving your religion down our throats.'' They are not advocating that something like *Sharia* law become the law of the state, whether in this case or in any other case. Moreover, they are not even advocating that the state abandon its seeming mandate that physicians are obliged to comply with justified or legitimate suicide requests from patients. And that, despite the fact that a religiously inspired position that neither an individual nor the state has total rights over anyone's body can be argued for rationally. What postulating God's rights over all creation and all bodies therein does is to prevent private autonomy from totally trumping public heteronomy thus turning into anarchy; and it prevents public heteronomy from trumping private autonomy thus turning into tyranny. In fact, one can see this kind of postulation of God's rightful authority — as distinct from an actual profession of faith in God — in the first words of the Preamble of the Canadian Charter of Rights and Freedoms: ''Whereas Canada is founded on principles that recognize the supremacy of God and the rule of law.'' In my view these words are to be read as phrases in apposition, that is, the authority of law is best seen as rooted in God's supremacy. That recognition best balances all finite authorities, whether public or private, so that none of them can claim total supremacy in the polity.

Even though these religious physicians could make this more maximal argument, they are prudent enough to make a more minimal argument. They are only asking to be exempted from a state-mandated duty they consider to be in violation of their religiously formed conscience. It can be well argued that this right is guaranteed by the Canadian Charter of Rights and Freedoms by its designation of ''freedom of conscience'' and ''freedom of religion'' (which seems to be two sides of the same coin) to be ''fundamental freedoms.'' Nevertheless, even though this argument claiming an exemption from a public duty is quite minimal, I strongly suspect that it is being so vociferously opposed because it challenges the moral hegemony of the secular state so directly; and that this challenge is coming from physicians who are far closer to the seat of state power than are the members of more politically marginal religious communities.

Finally, in the abstract of this paper, submitted on May 3rd of this year, I did state that ''the whole ownership model is morally flawed.'' In light of what has been argued up until now, that statement is, if not contradicting what has just been said here now, clearly hyperbole. So, rather than saying as I did, ''[i]stead, a model of mutual care is morally more adequate,'' let me emend that statement to now say, ''a model of mutual care is morally more adequate *to the situation of the religious physicians refusing to participate in any way in physician-assisted suicide*.'' For, following the divine ownership model, one does not get the mandate to resist doing what these physicians regard as evil, namely, assisting in the killing of any innocent human being. The 18th century Scottish philosopher, David Hume, has been followed by most subsequent thinkers in his insistence that no ''ought'' is derived from an ''is,'' or no description entails a prescription [16]. In our case, it could be said that even if God's owns everyone's body, that in no way mandates how we are to treat anyone's body. Moreover, it could be said that if God's owns everyone's body, then let God exercise His ownership power. Why do we humans have to exercise God's power for Him [17].

However, to say that we humans are commanded by God ''not to stand idly by your neighbour's blood'' (Leviticus 19:16) can be interpreted to mean: maximally, do everything you can to save anyone's life; minimally, do not be a party to ending anyone's life. In other words, maximally, *care*; minimally *do no harm*. Here an ''ought'' is not derived from an ''is;'' instead, what ''is-to-be-done'' is derived from what ''ought-to-be-done.'' Although it is difficult to translate this ''ought,'' this seemingly religious imperative, into public law in a secular state, it can certainly be seen as the morally valid, personal reason of those who believe God has commanded them ''to turn from evil and do good'' (Psalms 37:27). Not to respect this morally valid, personal reason is to presume that the state is the final authority in all moral questions. Some would call this ''totalitarian.'' Others would call it ''idolatry.'' By whatever name you call it, this is certainly an issue involving the philosophical foundations of bioethics, which is the title of today's IALMH pre-conference.

Disclosure of interest

The author declares that he has no competing interest.

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