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Robert & Tracy Latimer

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Robert Latimer and Paul Bernardo each committed acts of premeditated homicide. In the eyes of the law, there is no difference between what they did. Some think this is exactly right; others, that one must be morally blind to fail to see a difference. I will argue that compassionate homicide ideally should not be criminally proscribed, and until this ideal is realized, the laws prohibiting it should not be rigidly enforced.

Let us take the need for law reform first. The Canadian Paediatric Society holds that decision-makers must always act in the best interest of children; that sometimes death is preferable to life; and that when it is, life-support may be terminated.1 All this seems right, and is in accordance with common medical practice and the law. But to draw the line of when death can be brought about here discriminates against those who are living lives which are more burdensome than beneficial and do not require life-preserving interventions. For instance, if a child's quality of life failed to meet the Canadian Paediatric Society's criteria of a life worth living, and the child were on a ventilator, the ventilator could be removed; if the child required surgery to preserve her life, the surgery could be withheld; but if the child did not require anything, she would have to endure. Since the need for life-support is not a morally relevant difference, that is discrimination, and we thus have a case for changing the law to allow for active euthanasia.

This suggestion immediately provokes objections; two in particular deserve consideration. First, one may argue that there is a morally relevant difference between withholding or withdrawing life support, on the one hand, and injecting a lethal dose on the other. But why one should think this is not clear. Withdrawing life-support and injecting a lethal dose both cause death. The only difference is that the former does so by taking away something, the latter by putting in something, and that does not seem morally relevant. Withholding life-sustaining treatment is different from both in that it does not cause death. But it is not obvious why a deliberate omission should be treated as morally different from a deliberate deed when the outcomes are forseen to be the same.

Second, one may argue that liberalising the law opens the door to error and abuse. There will be mistakes; deaths will be brought about to relieve burdens to

families rather than children; persons who are disabled will be disvalued and put at risk. If opening the door to these possibilities is the worry, then the law allowing forgoing life-support should likewise be found objectionable, for that poses the same risks. It is not clear why the safeguards in place to protect against wrongful forgoing of treatment would not be sufficient to protect against wrongful active euthanasia. And to rest opposition to law reform on the ground that this will adversely affect the interests of the disabled sins against the Canadian Paediatric Society's claim that we must always act in the interest of the patient. For that view entails that the interest of the patient can never be sacrificed, as the slippery slope argument sacrifices it, to the interest of a class of persons.

I now turn to the injustice of applying the current law to Mr. Latimer. Let us begin by trying to see the matter as he presumably did. Tracy was a quadriplegic with cerebral palsy and the mental capacity of a 4 month old baby. Tracy enjoyed things such as music, bonfires, being with her family, and the circus. She could recognize family members, and loved being rocked gently by her parents. On the other hand, she was believed to suffer serious and constant pain, which everyone agreed could not be left untreated. Palliation could not be achieved by way of medication because that conflicted with her anti-seizure drugs, despite which she suffered 5-6 seizures daily. A feeding tube may have allowed for more effective medication, but surgical palliation was the chief hope. Tracy had undergone numerous surgeries in her lifetime, including two to cut stronger muscles and tendons to balance weaker ones, and another to implant rods to support her spine, all of which imposed painful recoveries. One left her in a cast from chest to toes for 6 months. The surgery now contemplated involved removing her upper thigh bone, which would leave her lower leg loose. The anticipated recovery time was one year; the procedure would cause pain; there was no guarantee that the surgery would succeed in controlling the pain; the doctors suggested that further surgery would be required in the future to relieve the pain emanating from various joints in Tracy's body.2 The Latimers perceived the proposed surgeries as torture and mutilation, and Mr. Latimer formed the opinion that it was not in Tracy's interest to face that future. Given this opinion, it is understandable that a loving parent would take matters firmly in his own hands rather than pursue medical treatment.

But there was no shortage of critics. Those who pointed to cases where parents persevered and disabled children flourished, or to Stephen Hawking or lesser lights who live eminently worthwhile lives, missed the point, for there is no parity between these persons and Tracy Latimer. Likewise missing the mark are critics from the disability community who contend that any mercy shown Mr. Latimer strikes at them. Disability was only contingently connected to the condition that rendered Tracy's life intolerable. She could have just as easily been in an unacceptable condition because of an accident or acute illness. Exempting Mr. Latimer from the full force of law gives one no more grounds for thinking less of the disabled than for thinking less of persons with failing kidneys. One may

suggest that people nonetheless will draw that conclusion. Even so, Mr. Latimer and his family should not be penalized for the public's bad logic. To insist that Tracy be kept alive in an unacceptable state so others will not be harmed is unfair to her, and to insist that Mr. Latimer be punished for the same reason is unfair to him.

A more interesting line of criticism is that the decision to end Tracy's life was premature. Some physicians weighed in with suggestions of treatments they thought should have been tried; some challenged Mr. Latimer's opinion of Tracy's quality of life and prospects. This criticism provokes two difficult questions. The first is: When can we say that a child's quality of life is so low as to make the life not worth preserving? One response is that life is so precious that as long as there is any possibility of a worthwhile quality of life emerging, the life must be preserved. This standard would be defensible if treatment never had adverse consequences. But treatment that may achieve the best outcome may also incur the worst, and this makes the standard implausible. A reasonable person may choose to forgo the best to avoid the worst when those outcomes are equally probable and of equal but opposite value. It could not therefore be wrong to choose this for those who cannot decide for themselves. And if, as Mr. Latimer and others saw it, the odds are greatly against a good outcome, and the worst outcome is far more evil than the best is good, to try for the best is an unethical gamble.

But others disagreed with how Mr. Latimer saw it, and this raises the second question: How are such disagreements over quality of life to be resolved? Sometimes closer inspection of the evidence and logic can get at the truth. But sometimes it cannot, and opinion remains divided. It is unacceptable to mechanically proceed on the most optimistic opinion, for (as we have just seen) that may be an unethical gamble. It is likewise unacceptable to act on whatever the majority thinks, for it is unfair to give everyone an equal say in a decision when not everyone will be equally acquainted with or interested in it, or have to equally bear its consequences. The President's Commission's3 answer is that when opinion is divided, the family, in recognition of its special knowledge and concern, should be allowed to make the decision. It is hard to see what answer could be better. But if we accept it, then, in the absence of a more objective resolution than the courts offered, it is Mr. Latimer's judgement that should carry the day.

There is thus reason to think Mr. Latimer acted reasonably in an unjust legal situation. What then justifies punishing him? He does not deserve punishment or stand in need of reformation. To punish him beyond what he deserves to deter others is unjust. Fear of undergoing a judicial ordeal similar to Mr. Latimer's is arguably as effective a deterrent as fear of imprisonment. The claim that murder must be denounced is undermined by the fact that analogous cases of euthanasia have resulted in probation or a suspended sentence.4 Punishment would be apt only if either Mr. Latimer acted negligently in forming his opinion

that Tracy's life was not worth living, i.e., did not carefully consider or weigh the facts and options, or he knew that Tracy's life was worth living and acted from other than altruistic motives. But there is no coercive evidence in any of the trial transcripts in favour of either of these. Everything in the appeal court's trial transcripts points to Mr. Latimer acting on the basis of a conscientiously formed belief and out of concern for Tracy. If this were the basis of his action, then, even if the facts were other than he believed, or he erred in forming his opinion that Tracy's life was not worth living, it is hard to find a clear rationale for any punishment, let alone punishment to the full extent of the law.

One who is sympathetic to the forgoing may nonetheless argue that the law is the law, and nothing to save Mr. Latimer could have been, or now can be, done. But this is not so. Prosecution is at the discretion of the attorney-general, and Mr. Latimer need not have been charged; a lesser charge could have been laid, as it has been in other similar cases of euthanasia5 ; juries have a common law right (and arguably moral duty even absent that) to bring in a not guilty verdict if they think applying the law would lead to an unjust result; a Royal Prerogative could now free Mr. Latimer. These expedients seem fashioned exactly for this kind of case. But they all also call for courage and compassion, and so far the only principal who has shown those qualities is Mr. Latimer.

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References

1. Canadian Paediatric Society, Bioethics Committee. Treatment decisions for infants and children. Canadian Medical Association Journal 1986;135:447-448.

2. As described in R. v. Latimer, (1997-12-01) SKQB QB97497, and R. v. Latimer, 2001 SCC1, File No. 26980.

3. President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research. Deciding to Forego Life-sustaining Treatment. Washington, DC: US Government Printing Office, 1983:214-223 esp.

4. R. v. Mataya; R. v. de la Roche; R. v. Myers; R. v. Brush. Cited and described in R. v. Latimer, (1977-12-01) SKQB QB97497.

5. See note 4 above.