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# Assisted Dying and the Law: The Duo that Works Better as an Ensemble

Surekha Sujith

*Leicester Student Law Review*  
*Autumn 2017*

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*This piece argues for the legalisation of assisted dying in the United Kingdom by analysing the state of affairs as they exist and the legal complexities and complications that surround it. It discusses the struggles faced by those who desperately require assistance in dying, and their alternatives. It critiques the legislative body for its attitude toward assisted dying. Finally, it suggests a workable solution to implement and legalise assisted dying in the United Kingdom.*

My life is miserable, demeaning and undignified...I cannot scratch if I itch, I cannot pick my nose if it is blocked and I can only eat if I am fed like a baby - only I won't grow out of it, unlike the baby. I have no privacy or dignity left.<sup>1</sup>

These were the words delivered by Tony Nicklinson (now deceased), then 58, while his High Court case for a 'right-to-die' was being heard back in 2012.

Nicklinson was a victim of lock-in syndrome, which paralysed him from his neck down. He was unable to do the simplest of everyday acts by himself, and needed caregivers to feed, bathe and look after him. He had been living with this paralysis for 7 years, before he decided that this was no way for him to live, and wanted to end his life. Unfortunately for Nicklinson, and many others in his situation, assisted suicide is illegal in England & Wales.<sup>2</sup>

## **The current law**

The Suicide Act 1961 decriminalised the act of suicide itself,<sup>3</sup> but criminalised the act of encouraging or assisting another to commit suicide.<sup>4</sup> This however, does not mean that one has a right to commit suicide. A person who assists another in suicide can be liable to a term of up to 14 years' imprisonment. While euthanasia refers to a doctor's act resulting in a patient's death, assisted suicide refers to the case of a patient causing his or her own death, with the assistance of someone else (e.g. prescription of lethal drugs). In England & Wales, there is a blanket ban on both of these types of assisted dying. However, it is

noteworthy that not everyone who assists in the suicide of another will be prosecuted. Section 2(4) of the Suicide Act provides that all prosecutions have to be consented to by the Director of Public Prosecutions (DPP).<sup>5</sup> In most cases, the person assisting in the suicide was not prosecuted simply because it was not in the public interest to do so.

Anyone who kills another – whatever the reason – is guilty of murder, as long as his or her conduct was a 'substantial cause' of the victim's death. By this logic, a doctor who prescribes a fatal dose of sedatives to alleviate a patient's suffering might be guilty of attempted murder, especially if the patient is terminally ill and it is impossible to isolate the cause of death. Clearly, this is flawed. This is where the doctrine of double effect operates to protect the medical professionals. The doctrine provides that it is morally permissible to perform an act which is intrinsically good but comes with an inevitable unfavourable consequence.<sup>6</sup> To elucidate this principle, if a doctor caring for a patient that is terminally ill lawfully administers a large dose of painkillers knowing that it also incidentally hastens the patient's death, he or she will not be guilty of murder, because it was performed so as to relieve the patient of suffering. In the same vein, while it is unlawful to euthanise a patient in a permanent vegetative state (PVS) with a lethal injection, it is lawful to cease the provision of artificial nutrition to the patient or remove the mechanical ventilator that is supporting their life, and let death - the concomitant - take its course. This then raises the question of whether the patient has to first be subject to the tremendous pain that comes with

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<sup>1</sup> *Tony Nicklinson v Ministry of Justice and Others* [2012] EWHC 304 (QB) (Charles J).

<sup>2</sup> Suicide Act 1961.

<sup>3</sup> *ibid*, s 1.

<sup>4</sup> *ibid*, s 2.

<sup>5</sup> *ibid*, s 2(4).

<sup>6</sup> *R v Adams* [1957] Crim LR 365 (Devlin J).

the illness, or be reduced to a state of helplessness before the lethal amount of analgesics is administered. Is it not more humane to offer recourse; and in this case, a peaceful death at a time and place convenient to the patient? In fact, in the famous case of *Airedale NHS Trust v Bland*, Lord Browne-Wilkinson was perturbed with this particular absurdity in law.<sup>7</sup>

How can it be lawful to allow a patient to die slowly, though painlessly, over a period of weeks from lack of food but unlawful to produce his immediate death by a lethal injection, thereby saving his family from yet another ordeal to add to the tragedy that has already struck them? I find it difficult to find a moral answer to that question. But it is undoubtedly the law and nothing I have said casts doubt on the proposition that the doing of a positive act with the intention of ending life remains murder.<sup>8</sup>

One of the main arguments for the law as it stands is that it is a safeguard protecting the weak and vulnerable, especially those who are not in a condition to take informed decisions against acts intended to end life or assist in ending life.<sup>9</sup> However, is it then justified to take such a stance and prevent everyone, even the competent and sound-minded, from choosing to end their lives when they have a valid reason to do so, i.e. the case of Tony Nicklinson? Nicklinson even raised this argument in court:

By all means protect the vulnerable. By vulnerable I mean those who cannot make decisions for themselves, just don't include me. I am not vulnerable, I don't need help or protection from death or those who would help me.<sup>10</sup>

However, the judges were steadfast and unanimous in their decision to maintain the status quo:

There is no self-evident reason why the [sanctity of life] should give way to the values of autonomy or dignity and there are cogent reasons why sensible people might properly think that it should not.<sup>11</sup>

With all due respect to Lord Dyson MR, I then pose the question, what sanctity is being protected if there is nothing valuable left in a person's life to be protected? There is a fundamental difference between living and existing. In Nicklinson's case, it was the latter, as it lacked any real enjoyment or quality as he himself admitted.

After his death, Nicklinson's case was pursued by his widow, who raised a different argument – that the illegality of assisted suicide was a contravention of their Article 8 right of the European Convention on Human Rights (ECHR), namely, a right to respect for one's private and family life. Out of the nine Justices that gave the verdict for that case, five were of the view that a

declaration of incompatibility should be granted but they would not in that particular instance, while the remaining four were of the view that it was a matter better dealt with by Parliament. Lord Neuberger mentioned the following:

Parliament now has the opportunity to address the issue of whether section 2 should be relaxed or modified, and if so how, in the knowledge that, if it is not satisfactorily addressed, there is a real prospect that a further, and successful, application for a declaration of incompatibility may be made.<sup>12</sup>

Lord Neuberger was one of the five who opined that a declaration of incompatibility should be granted. He also warned Parliament that should such a case be brought in the future, a declaration might well be made. Lady Hale in the same vein, stated the following:

Why then is the present law incompatible? Not because it contains a general prohibition on assisting or encouraging suicide, but because it fails to admit of any exceptions... it goes much further than is necessary to fulfil its stated aim of protecting the vulnerable. It fails to strike a fair balance between the rights of those who have freely chosen to commit suicide but are unable to do so without some assistance and the interests of the community as a whole.<sup>13</sup>

Although a declaration was not expressly granted, it is evident that all nine believed the law to be flawed in some way in this regard.

### **Another wasted opportunity for change**

The Supreme Court had the opportunity to deal with this in the recent case of Noel Conway. Conway challenged the law on assisted dying by arguing - like Nicklinson - that the Suicide Act 1961 was incompatible with Article 8 of the ECHR.<sup>14</sup> His was the first such case to be brought to the High Court since Nicklinson's in 2014. The obiter of the judges in Nicklinson seemed to suggest that the courts would issue a declaration of incompatibility in a future similar case, should Parliament refuse to alter its stance on assisted dying. One would therefore assume this to be the exact set of circumstances the Supreme Court envisaged back in 2014.

However, a declaration was once again refused. Burnett LJ, who delivered the leading judgment in Conway, acknowledged the obiter in Nicklinson, but refused the declaration in light of the Assisted Dying Bill that was rejected in mid-2017. He said that since Nicklinson, there have been 3 private members' bills on assisted dying that have been rejected, which is conclusive of the unwavering view of Parliament to maintain the blanket ban on euthanasia and assisted suicide.<sup>15</sup> This reasoning is far from satisfactory.

<sup>7</sup> [1993] AC 789

<sup>8</sup> *ibid* (Lord Browne-Wilkinson).

<sup>9</sup> *Pretty v United Kingdom* [2002] 35 EHRR 1.

<sup>10</sup> *Tony Nicklinson v Ministry of Justice and Others* (n 1).

<sup>11</sup> *R (on the application of Nicklinson and Lamb) v Ministry of Justice* [2013] Civ 961 (Lord Dyson).

<sup>12</sup> *R (on the application of Fitzroy George) v Secretary of State for the Home Department* [2014] UKSC 28 (Lord Neuberger).

<sup>13</sup> *ibid* (Lady Hale).

<sup>14</sup> Press Association, 'Entombed' Man to Hear UK High Court Rule on Assisted Dying' *The Guardian* (London, 5 October 2017)

<<https://www.theguardian.com/society/2017/oct/05/entombed-man-to-hear-uk-high-court-ruling-on-assisted-dying>>.

<sup>15</sup> *R (on the application of Noel Conway) v SS for Justice* [2017] EWHC 640, 22.

Whilst one of the functions of the judiciary is to uphold Parliament's intention when it comes to interpreting laws, they also have an underlying duty to deliver justice independently.<sup>16</sup> This is why the power to grant a declaration of incompatibility even exists - so that in cases, where it is clear that the law infringes a right in the convention, there can be pressure placed on the government to reconsider the legitimacy of the law. This is still *intra vires*. The judiciary, in this regard, has been hesitant to grant such a declaration, in fear of stepping on the toes of Parliament, and in the process, impeding justice to society. Parliament is not facing enough pressure to alter the status quo on assisted dying. The judges, on the other hand, are feeding this complacency by refusing to make an official declaration.

Had Parliament done nothing after the Nicklinson case the claimant's case that permission should be granted would be unanswerable, however it might fare on further investigation. As a result of continuing parliamentary attention, and renewed recent determination of the underlying issue, in my opinion the claim is unarguable and I would refuse permission... Whatever the position in the courts, any change in the law seems unlikely in the foreseeable future.<sup>17</sup>

Burnett LJ opined the above in his judgment, supporting his refusal for permission. Charles J, who held the minority view that a declaration should in fact be granted, stated that even if such a declaration were made, Parliament could choose to do nothing about the situation.<sup>18</sup> While this statement carries a great amount of truth, it must be acknowledged that the refusal to declare this law as incompatible, on the assumption that Parliament would refuse to change the law anyway, fails to create an opportunity for the law to be reconsidered, as it has been done over the last few years; but this time, with official judicial backing.

### **The 'victims' of the law and Dignitas**

After having lost his case to grant immunity from prosecution to a doctor that would assist him in dying, Nicklinson refused food and drink and starved himself. Six days later he died.

Conway, a 67-year-old retired lecturer, is a victim of motor neurone disease, a degenerative disease for which his prognosis for survival was 12 months, out of which he spent 7 months fighting for the law to be overturned.<sup>19</sup> Like Nicklinson, he wanted to choose when to die instead of letting his disease consume him and dictate his death.

More recently, in a case that caused many Britons to err on the side of legalising assisted suicide, a 95-year-old man hammered his 88-year-old wife in an attempt to kill her out of mercy. Mrs Beddows was suffering from a severe mental disorder and believed that she would spend the last of her days in a care home or hospital. She did not want such a fate for herself and on numerous occasions, begged Mr Beddows to kill her, which he eventually attempted to do in order to end her misery.<sup>20</sup> He was convicted of attempted murder, but granted clemency in light of his plight and age.

There are many others like Conway and Nicklinson who are unable to die in a dignified manner and forced to wither away because of the stringent laws in this country. What Parliament fails to realise is that because of this, every fortnight, one Briton travels to Dignitas for help to die.<sup>21</sup> The United Kingdom (UK) is not protecting the sanctity of life by refusing to legalise assisted dying; it is simply exporting it.

Dignitas has become a word synonymous with assisted suicide. It is an organisation in Switzerland – where assisted dying, not euthanasia, is legal – that assists the terminally ill and those suffering with severe physical and/or mental illnesses in attaining the peaceful death that they yearn for. The patient wishing to die has to voluntarily consume a prescribed lethal drug, in the form of a pill, which they swallow with water. In cases where the patient is unable to consume the drug himself, there is a machine that administers this drug once they push a button. The organisation places a great emphasis on the fact that the patient administers the drug himself because Swiss law that only permits assisted suicide, not euthanasia. The staff of Dignitas constantly reassure patients that they are free to go home at any time should they change their minds.

However, just the decision to die will not guarantee an appointment to die at Dignitas. There is a process that patients who want to terminate their lives have to follow. Firstly, they have to get a membership for £148 and subscribe to Dignitas for an annual fee of £59.<sup>22</sup> They then have to undergo counselling and be deemed by a doctor as having the capacity to make such a decision. Only after the doctor has declared this, can a patient successfully undergo a treatment to end his or her life.<sup>23</sup> This is an expensive process. Just the assisted death alone costs around £7,700.<sup>24</sup> For patients outside of Switzerland, they have to factor in the cost of travel and accommodation.

Suicide tourism – the phenomenon where a person travels to a country where assisted suicide is legal for the sake of dying - is growing rapidly in Britain, and there is nothing to blame except the current law. Fearing

<sup>16</sup> Courts and Tribunals Judiciary, 'The Justice System and the constitution'.

<<https://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/justice-sys-and-constitution/>> accessed 18 October 2017.

<sup>17</sup> *R (on the application of Noel Conway) v SS for Justice* (n 14) (Lord Burnett).

<sup>18</sup> *ibid* (Justice Charles).

<sup>19</sup> Kevin Rawlinson, 'Terminally Ill Man Loses High Court Fight to End His Life' *The Guardian* (London, 5 October 2017)

<<https://www.theguardian.com/society/2017/oct/05/entombed-man-noel-conway-loses-high-court-fight-end-life>>.

<sup>20</sup> Samuel Osborne, 'Elderly Man Who Killed Wife with Hammer So She Could Avoid Care Home Spared Jail After She Forgives Him' *The Independent* (Liverpool, 25 April

2017) <<http://www.independent.co.uk/news/uk/crime/man-hammered-wife-to-kill-spared-jail-after-she-forgives-him-denver-beddows-olive-a7702076.html>>.

<sup>21</sup> Jamie Doward, 'One Person a Fortnight' Travels to Dignitas from Britain to End Their Lives' *The Guardian* (London, 15 August 2015)

<<https://www.theguardian.com/society/2015/aug/15/assisted-dying-britons-dignitas-rises-campaigners-change-law>>.

<sup>22</sup> Dignitas, 'Our Services'

<[http://dignitas.ch/index.php?option=com\\_content&view=article&id=6&Itemid=47&lang=en](http://dignitas.ch/index.php?option=com_content&view=article&id=6&Itemid=47&lang=en)> accessed 18 October 2017.

<sup>23</sup> *ibid*.

<sup>24</sup> Emily Jackson, *Medical Law: Text, Cases, and Materials* (4<sup>th</sup> edition, OUP 2016).

the progression of their disease or inability to request to end their lives at a later time, the terminally ill are forced to make the decision to travel to countries like Switzerland in order to terminate their lives. They have to bid farewell to their family and friends prematurely and travel at a time when they are not exactly in a state of despair; when they still have the potential to live, but fear that loss of capacity in the future would render them unable to travel. For those that can afford suicide tourism, their manner of death is not half as bad as it is for those who cannot. The current law discriminates against the poor, for the only other option available to those wishing to end their lives but cannot afford to do so in a dignified manner, is suicide.

### **Suicide as an alternative to assisted dying**

A study has found that at least one person a day in the UK takes their life while suffering from a chronic or terminal illness, because the law leaves them no other choice.<sup>25</sup> Is Parliament therefore turning a blind eye to the current state of events in this country, or is it simply refusing to budge from its current mantra of upholding the 'sanctity of life' for the sake of being difficult? Parliament essentially has the blood of these suicide victims on their hands because they fail to provide a safer alternative for a dignified death. How is it that in a time when medical care is the most patient-centred it has ever been, the law is adopting a wholly paternalistic stance – intentionally overriding a competent individual's autonomous choice – in refusing to allow terminally ill patients to choose the moment of their inevitable fate?<sup>26</sup>

### **Is Parliament just choosing to be difficult?**

There is something fundamentally wrong with our Parliament, when even religious organisations in the UK, who are the prime advocates of the sanctity of life argument, are of the view that assisted dying is warranted in certain cases. The Inter-Faith Dignity in Dying's (IFDiD) chair, Rabbi Dr. Jonathan Romain said:

We hold that being religious is not just about respecting life, but also knowing when to let go. A religious perspective includes the right to die as well as possible, rather than be forced to endure unnecessary suffering.<sup>27</sup>

The Assisted Dying Bill, as mentioned above, has been debated in Parliament thrice since Nicklinson. There are no concrete arguments that justify the repeated refusal of this Bill, apart from those that argue for the 'sanctity of life', 'protection of the weak and vulnerable in society' and it being 'ethically totally unacceptable'.<sup>28</sup>

<sup>25</sup> Randeep Ramesh, 'One in 10 suicides linked to chronic illness, study finds' *The Guardian* (London, 23 August 2011) <  
<https://www.theguardian.com/society/2011/aug/23/suicide-chronic-illness-study>>.

<sup>26</sup> Tom L. Beauchamp and James F. Childress, *Principles of biomedical Ethics* (7<sup>th</sup> Edn, OUP 2013).

<sup>27</sup> Owen Bowcott and Harriet Sherwood, 'Terminally ill UK man launches legal challenge for right to die' *The Guardian* (London, 6 January 2017) <  
<https://www.theguardian.com/society/2017/jan/06/terminally-ill-uk-man-launches-legal-challenge-for-right-to-die>>.

<sup>28</sup> Rowena Mason, 'Assisted dying bill overwhelmingly rejected by MPs' *The Guardian* (London, 12 September 2015) <

These arguments evidently lack merit because of their lack of legal basis, the disproportionate measure to protect the minority in society and the failure to consider even dire situations when an assistance in dying can be permitted.

It is easy to argue for or against a cause when one is not placed in the situation themselves. How many Members of Parliament (MPs), if placed in the shoes of Nicklinson or Conway, would be agreeable to living the rest of their lives 'entombed in their own body'?<sup>29</sup> How many MPs would be able to live with watching a close relative deteriorate until death finally takes its course when, the entire time, they were conscious and competent that they had been begging to die a dignified death? Parliament clearly lacks the empathy that judges seem to show when adjudicating.

### **The double standard in our system**

The English law is clear when it comes to the euthanising of animals. Euthanasia for the sake of alleviating the pain and suffering of an animal is legal. Moreover, it does not have to be carried out by a vet in order to be legal.<sup>30</sup> Somehow, the sanctity of life argument and ethical dilemma that were present when debating the same situation for humans, does not exist. 98% of vets have been asked to euthanise healthy pets and 98% of these people cite bad behaviour as a reason for euthanasia.<sup>31</sup> Vets are encouraged to protect the lives of animals to the best of their ability but not legally obliged to do so.

The double standards that we have for animals and humans is an outright declaration that the government prescribes to the theory of speciesism - the belief that human life is more sacred than that of other species. If it is justified for an animal to be put out of its misery on the judgment of a compassionate vet or owner, bearing in mind that the animal has no concept of euthanasia, why is it not the case when it comes to euthanising humans who voluntarily ask for it? On the flip side, it is argued that animals lack the reasoning abilities that humans possess, and therefore should be mercifully killed for they know of no alternative. Why then should humans of sound mind, with the ability and capacity to reason with themselves and others, and who are aware of such an alternative, be deprived of the chance to die in a time and manner they deem fit?

### **The way forward**

Judges have the power to compel Parliament to reconsider this issue. If legalising euthanasia places an overtly onerous burden on physicians, then at least

<https://www.theguardian.com/society/2015/sep/11/mps-begin-debate-assisted-dying-bill>>.

<sup>29</sup> Press Association (n 13).

<sup>30</sup> RCVS, 'Euthanasia of animals', (5 November 2012) <

<https://www.rcvs.org.uk/setting-standards/advice-and-guidance/code-of-professional-conduct-for-veterinary-surgeons/supporting-guidance/euthanasia-of-animals/>> accessed 18 October 2017.

<sup>31</sup> Pete Wedderburn, 'A Vet's Most Difficult Task: Euthanising Healthy Pets', *The Telegraph*, (15 August 2016) <  
<http://www.telegraph.co.uk/pets/news-features/a-vets-most-difficult-task-euthanising-healthy-pets/>>.

assisted suicide should be made legal. This can be kick-started with a declaration of incompatibility, as it appears that Parliament will not sway from its current stance otherwise.

The slippery slope argument frequently raised by opponents of assisted dying - that legalising one form of assisted dying will result in legalisation of the other, along with involuntary assisted dying<sup>32</sup> - is disproved by the statistics in countries that have already legalised assisted dying. There is no evidence to show that in the Netherlands, where both euthanasia and assisted suicide is legal, there is a higher rate of non-voluntary or involuntary euthanasia.<sup>33</sup> The commonly cited 'Dutch experience' figures from Netherlands regarding abuse of the procedure is not actual proof of the abuse of euthanasia in the Netherlands. In fact, the incidence of assisted dying remains the same before and after the enactment of the law.<sup>34</sup> In Switzerland, 94% of persons resorting to assisted suicide were aged 55 and over, a vast majority of whom were suffering from a serious, fatal illness.<sup>35</sup>

The lower house of Parliament in the state of Victoria in Australia recently passed the assisted dying bill, and is currently awaiting approval from the upper house.<sup>36</sup> Each clause in the Bill was debated and eventually, the Bill was approved without any amendments and this is expected to pass as law. It has extreme sanctions in place for anyone that conducts voluntary euthanasia outside of the stipulations of the Bill.<sup>37</sup> The UK should look to its commonwealth neighbour in trying to model an assisted dying Bill which is satisfactory to all MPs, and gets rejected for arguments beyond 'protecting the weak and vulnerable in society' or 'ethically unjustified'. This is especially important since the UK has a public healthcare system, with finite resources and manpower. 'Refraining from treatment or withdrawing treatment does not compromise the principle of the sanctity of life; it merely recognises that illness ends life and that our intervention in that process must, of necessity, be a selective one'.<sup>38</sup> Trying in vain to protect such a life takes these finite resources away from the protection of another life and says nothing about the parliamentary attitude toward the sanctity of life.<sup>39</sup>

The safeguards proposed in the prorogued assisted dying bill should be amended to include counselling as a mandatory aspect before a patient is allowed to die, instead of leaving it to the patient's discretion. 'Terminal illness' as a qualifying condition is an artificial restriction upon assisted dying, which should be amended to those suffering unbearably without

prospect of improvement,<sup>40</sup> so that it includes patients with chronic conditions and progressive diseases.

Assisted dying should not be a service provided by the National Healthcare System; instead, it should be one provided by private health care so that it is not open to abuse and does not result in 'euthanasia or assisted suicide 'on demand'. This will ensure that only those who truly want it seek assistance. Furthermore, there should be governmental guidelines on costs as to assisted dying so that the law does not discriminate against the poor. This can include safety nets such as optional medical insurance that can be bought upon reaching the age of 21 that is calculated based on the average income of an individual.

## Conclusion

Death's finality is unparalleled. Man knows more about life on Mars than life after death. It is unlikely, with the proper safeguards in place, that this system will be open to abuse. The decision to embrace death prematurely and fade into oblivion is not an easy one to make and the counselling sessions that such patients will have to go for will be structured in such a way that it errs on the side of encouraging the patient to choose life. 'Whereas a prolonged life is not necessarily better, a prolonged death is necessarily worse'.<sup>41</sup>

Furthermore, as Lady Hale mentioned '[i]t would not be beyond the wit of a legal system to devise a process for identifying those people, those few people, who should be allowed to help to end their own lives'.<sup>42</sup> In a day and age where paternalism is anathema in the context of medical decisions, the law is still playing an active role in stipulating when it is legally permissible to allow one to die. The blanket ban on assisted dying is disproportionate, unjust, and lacks any merit in even existing.

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<sup>32</sup> Penney Lewis, 'The Empirical Slippery Slope from Voluntary to Non-Voluntary Euthanasia' (2007) *Journal of Law, Medicine & Ethics* 35.

<sup>33</sup> *ibid.*

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<sup>37</sup> *ibid.*

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<sup>39</sup> *ibid.*

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<sup>41</sup> Margaret Pabst Battin, 'Ending Life: Ethics and the Way We Die' (OUP 2005).

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