

***TO EVERY THING THERE IS A SEASON AND A
TIME TO EVERY PURPOSE UNDER THE
HEAVEN – A TIME TO BE BORN AND A TIME TO
DIE.¹ NATURAL LAW, EMOTION AND THE
RIGHT TO DIE.***

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INTRODUCTION

Here we will discuss the ‘right to die’; should a person, in certain circumstances, lawfully be able to call upon the assistance of another to bring their life to an end? The proposal is that the answer should be ‘yes’, but the novelty of this essay is in its argument that such an answer can be provided by a ‘natural lawyer’ - which is to say a person who believes that law has some minimal, inescapable, moral content. This answer is quite contrary to that proposed by Professor John Finnis, the leading modern exponent of natural law theory. The matter is of particular relevance because of the recent death of Tony Nicklinson who unsuccessfully sought a Declaration that a doctor would not face prosecution for giving him a lethal injection. The High Court declined to issue such an order saying that Parliament would need to give specific statutory authority for such a step.² A draft statute is provided near the end of the article in order to stimulate supply of the High Court’s request. The practical argument herein is therefore addressed, at least in part, to Parliament, but the criticism of John Finnis’ theory will, it is hoped, appeal to an academic audience. This article aims to restore emotion to its proper place

¹ Ecclesiastes 3:1. Ecclesiastes (Hebrew - *Qoheleth*), which must not be confused with Ecclesiasticus (*Sirach*), is an ancient book of philosophy of disputed authorship and provenance included in the Christian Bible. The burden of the text is that life is bounded by birth and death, there being no after-life, and life has no extrinsic meaning; these views are incompatible with the generally understood doctrines of Christianity and are those held by the author.

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² [2012] EWHC 2381.

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as a tool for evaluating human practice,³ and thus claim that emotion has a place alongside reason as a basis for law as an institution, the drafting of particular laws, and adjudication. Reference to poetry, music, and myth are used in order to illustrate the claim that humans are uniquely emotional beings and to illustrate the argument being made.. These are not idiosyncratic ‘add-ons’; in an ideal world all of the music and poetry would have been embedded in the text of the article because they communicate some of the ideas herein more effectively than discursive argument.⁴ The reader is urged to listen to all the music and to read the poems and myth in their entirety. Furthermore lawyers and philosophers are trained to analyse words; the words of the poetry and music are not of paramount importance. The reader is asked instead to consider the affect raised.

There is an essential preliminary point. Some readers may be surprised to find that this article does not contain a detailed analysis of the *Nicklinson* decision. This must be explained. Tony Nicklinson was obliged to bring this matter to court because he was anxious to avoid prosecution of any physician for bringing his life to a swift, peaceful, and painless end in accordance with his wishes. The courts, however, are creatures of reason and precedent and are unable to consider questions of emotion.⁵ Since Tony Nicklinson’s argument was founded upon matters which judges *qua* judges are precluded from considering,⁶ it is unsurprising that the decision is little more than a recitation of the law as it presently stands. The novelty is in the referral to parliament and this is addressed below.

³ A project also undertaken by Michael Stocker who, with Elizabeth Hegeman, is “concerned to normalize and rescue emotions, and to show that they enjoy secure and respectable connections with value, in part because of their important cognitive, evaluative and desiderative content.” See *Valuing Emotions* (Cambridge: CUP, 1996). Henceforth VE. The quotation is from p 6.

⁴ Stocker VE above n 3, p 6 makes a similar stylistic point.

⁵ See the strong statement expressing this view in another context by Atkin LJ in *Balfour v Balfour* [1919] 2KB 571 at 579 “The common law does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts.”

⁶ As they were precluded from commenting upon behaviour in *Re Agar-Ellis* (1883) 24 Ch D 317, see Bowen LJ at 335: “This is a case in which, if we were not in a Court of Law, but in a court of critics capable of being moved by feelings of favour or disfavour, we might be tempted to comment, with more or less severity, upon the way in which, so far as we have heard the story, the father has exercised his parental rights.”

THE ONE DIMENSIONAL (HU)MAN – A KIND OF DESICCATED CALCULATING MACHINE⁷

John Finnis,⁸ whether consciously or not, concedes John Mackie’s central claim⁹ that there are no objective moral values “out there”. It would be very queer,¹⁰ if, whilst running through the Buckinghamshire countryside, we were to come upon a ‘good’ or an ‘evil’ in the same way as we might come upon a sheep or even, as at Maids Moreton, an alpaca. Surely no one now thinks that there are Forms awaiting discovery somewhere outside our present shadowy cave.¹¹ We can take it that Finnis has a true aim when he writes that there are “human goods” and one cannot produce an adequate theory of law unless one “participates in the work of evaluation, of understanding what is really good for human persons”.¹² “Goods” – things to be desired and actively sought - and “evils” – things to be shunned - exist only in the human mind as abstract concepts against which we evaluate our “actions, practices, habits, dispositions and ... discourse”¹³ and thus, at some time, our ancestors must have invented them or they must have evolved in our ascent from lowlier forms of life. This is not to claim that they engaged in some definite act of creation from nothing, or that they sat down on some dank afternoon and exhaustively defined good and evil. Law, as a uniquely human institution, must depend to some extent upon our nature. Hence part of the claim is that, and here Finnis would agree, there are identifiable human goods which stem from our nature as human persons.¹⁴ The quarrel with Finnis stems from the fact that he seems to have ducked an important second order question. He has

⁷ The remark is attributed to Aneurin Bevan and is alleged to have been directed at Hugh Gaitskell.

⁸ In J Finnis *Natural Law and Natural Rights* (Oxford: Clarendon, 1980) (Henceforth NLNR). There is a famous comment made by John Mackie in *Ethics: inventing right and wrong* in which he praises those with whom he disagrees; see p.10 and the Obituary Notice in *The University College Record*. May I echo that remark, and say that my comments on others’ work, which I trust are not barbed, are offered in a spirit of respectful, scholarly dispute?

⁹ See J L Mackie *Ethics; inventing right and wrong* (Harmondsworth: Penguin, 1990). (Henceforth EIRW).

¹⁰ Mackie EIRW above n 9, pp 38-42, section headed “The argument from queerness”.

¹¹ The influence of Platonic thought on the development of modern natural law theory will be considered below. It will be argued that Plato and Aristotle have cast a long shadow. Stocker, VE above n4, at p 7 takes a different view of Aristotle arguing that his work places “affectful emotions” and “psychological concerns” at the centre of his ethical views.

¹² Finnis NLNR above n 8, p 4.

¹³ Finnis NLNR above n 8, p 4.

¹⁴ See his discussion in NLNR above n 8, p 34.

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identified “goods”, but on the basis of a thin, or one dimensional, conception of humanity; he has failed adequately to address the question of humanity. This is a fatal omission: how can one possibly expound a doctrine of natural law - that which is good for humankind - unless one explores the nature of humankind? The central reason for Finnis’s reluctance so to do is his exclusive (or better – exclusionary) adherence to a neo-Stoic conception of humankind in which the good life is recognised by reason.¹⁵ Cicero’s adage “True law is right reason in accordance with nature” would provide a fitting epigraph to Finnis’ book when one notices that in the following passage it is clear that Cicero sees reason as the mechanism whereby humankind discerns the order, or way of life, which God put into the universe.¹⁶ If one rejects Cicero’s and Finnis’ theism one is obliged to seek value in some other source. Here emotion is seen as the source of value.

(a) Natural law – some analytical preliminaries.

There are some important, preliminary points to be made. The concept of ‘natural law’ is used in the sense that law must, in order to serve the purposes of mortal (the word is of vital importance) humankind,¹⁷ contain definite substantive principles, “the truth of which is contingent on human beings and the world they live retaining the salient characteristics which they have.”¹⁸ By natural law is meant, the law by which humans ought to live so that, in accordance with their own nature as human, they may thrive as individuals and as the ζῷον πολιτικόν, the animal which lives in society. It is our job, whether as legislators, lawyers, academics or ordinary citizens and voters, to participate in the debate about making law.¹⁹

Second, the practice of law in its widest sense has two distinct components which are relevant to this article – legislating and judging. Regarding legislation, analytical jurists have explained that law (legislation or quasi-legislation) is a system of norms (ought statements) whose function is to provide pre-emptive and exclusionary advice as to how we should behave in

¹⁵ Finnis NLNR above n 8, pp 371-410, especially pp 374-379.

¹⁶ Cicero *De Republica* III. 22

¹⁷ See *A Local Authority v E and Others* [2012] EWHC 1639, para 137 per Jackson J “We only live once – we are born once and we die once – and the difference between life and death is the biggest difference we know.”

¹⁸ H L A Hart *The Concept of Law* (Oxford: Clarendon, 1961) p 195.

¹⁹ See the discussion in NLNR above n 8, pp 371-378, and the alternative reasoning set out below. It will be argued that H L A Hart’s discussion in *The Concept of Law* above n 11, *The Minimum Content of Natural Law*, pp 189-195, is a useful, although incomplete, starting point.

order, primarily, to avoid a sanction.²⁰ It is important to note that law as a system of norms is directed to governing behaviour; those statements aimed at involuntary status (such as the apartheid “laws” of the Republic of South Africa or the Nazi Nuremburg “laws”) may have been contained in legislation, but they were not “laws”. They are a species of command - ‘kill Jews’ is repugnant shorthand for the Nuremburg commands. No matter what a black person or a Jew did, s/he would still be subjected to tyranny. It seems that norms (or laws properly so-called) may logically fall into one of six categories.

- 1) A norm may be properly drafted such that it may reliably guide human behaviour into performing action which is consistent with human ends. (A perfect norm.)
- 2) A norm may be intended to guide human behaviour into performing action which is consistent with human ends, but is poorly drafted. (A faulty norm.)
- 3) A norm may be intended to guide human behaviour into performing action which is inconsistent with human ends and is properly drafted. (A false norm.)
- 4) A norm may be intended to guide human behaviour into performing action which is inconsistent with human ends and is poorly drafted. (A faulty false norm.)
- 5) A norm may have no effect on human ends and is properly drafted (For example – a norm which requires potatoes to be sold by the kilogram or pound; - a regulatory norm.)
- 6) A norm may have no effect on human ends and is poorly drafted. (A faulty regulatory norm.)

In this article we are only concerned with the relationship between 1) Perfect norms and 3) False norms. All faulty norms (numbers 2), 4), 6)) may be repaired, and the regulatory norms 5) and 6) may fall completely outside the scope of the analysis but, in any event, they will not concern us here.

We have no reason to doubt that both perfect norms and false norms are both amenable and subject to the ordinary processes of the courts; the processes of judgment. If we select that which Professor Finnis would undoubtedly claim to be, a false norm,²¹ the Abortion Act 1976, we can see that the Act can be explored and analysed by the courts. The latest case being *Mary Teresa Doogan & Concepta Wood, Petitioners for Judicial Review of a*

²⁰ Joseph Raz “The Authority of Law” in *The Morality of Freedom* (Oxford: OUP, 1988).

²¹ There is no comment on this claim in this article. It will be fully explored in subsequent articles.

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*decision of Greater Glasgow and Clyde Health Board.*²² This case explores the extent or definition of part of a norm contained in the Act. An earlier case which explores the application of another of the constituent norms is *Re SS (An Adult: Medical treatment)*.²³ These cases demonstrate that the handling of potentially false norms by courts does not necessarily differ from the treatment of perfect norms at the level of judgment. A judge's duty is, of course, to give judgment according to the law. The same judge may, *qua* private citizen, believe that the law is wrong. The judge as citizen may think that permitting abortion under the 1967 Act is a false norm, but it is by no means certain that s/he does so on rational grounds, any more than it is certain that those opposed to abortion who rely upon s4 (1) – the conscience clause – of the 1967 Act are opposed to it on rational grounds; they may simply feel revolted by the idea of, as they see it, participating in the death of a child. In plain words, the falsity of a norm is judged by applying standards which include the rational, but which may include other standards. Judges are bound to apply the law which is *prima facie* a coherent system of reason, but the law itself may be judged. In the case of abortion the law allows potential participants to recuse themselves in certain cases,²⁴ by means of their emotional judgement. Parliament recognised in passing the 1967 Act that it could not rightly force people to behave against their own feelings in such a sensitive matter. Parliament as legislator acknowledged that people behave as whole beings in both acting and judging. It seems strange to do otherwise.

Thirdly, and this point flows from the second, the serious question of moral philosophy is, as Benn and Peters point out, the question of the rightness of rules.²⁵ Benn and Peters assert that we can measure the rightness or otherwise of a rule by the effect upon the interests of others. However, people do not just consider the *interests* of others when they act. They consider their own interests and, more importantly, they consider themselves and others *simpliciter*. They do not act to benefit another or themselves in any

²² [2012] CSOH 32.

²³ [2001] All ER(D) 220.

²⁴ A justification of the circumstances in which they cannot recuse themselves, as set out in s 4(2) of the 1967 Act is supposedly provided by the doctrine of 'double effect' in which the unwilling abortionist is said to think "I am not killing the baby because I do not desire to kill the baby; I am saving the life of the mother." The present author does not accept that this is a *rational* doctrine (although it is a very powerful emotional one and, accordingly, both valuable and acceptable). It is a doctrine akin to that which leads to the apocryphal story that members of a firing squad are issued with one blank bullet so that those who wish so to do may convince themselves that they did not participate in the killing. The doctrine of double effect is further explored below.

²⁵ S I Benn and R S Peters *Social Principles and the Democratic State* (London: George Allen and Unwin, 1959) p 32.

specific way; in the best of circumstances they act out of love for another, in the worst, out of hatred.

(b) *Emotion*

The aim of this article is to use a richer and more accurate conception of humanity in order to explore one of Finnis' goods; that of life.²⁶ There is no question that, in the sunny daylight, life is anything less than a good; however as the shadows lengthen (for whatever reason) life may become an evil.²⁷ In accordance with Finnis' powerful statements, this can only be understood by those who participate in the work of evaluation; but this evaluation needs to be undertaken by a whole person.

To start this task of rehabilitating emotion a setting of poetry to music will be used as an example of the way in which continued life may be seen as an evil rather than a good. The device of "lengthening shadows" in the earlier paragraph was chosen because of its resonance with "At Gloaming", *Im Abendrot*, in the setting of Joseph von Eichendorff's poem to the last of Richard Strauss' *Four Last Songs*.²⁸

We have gone through sorrow and joy hand in hand.
Now we can rest from our wandering above the quiet land.

Around us, the valleys bow; the air is growing darker.

²⁶ Subsequent works will explore some of Finnis' other goods and, indeed, his other arguments as to the nature of a good. These essays will, as in this case, produce some conclusions which differ radically from those which he reaches.

²⁷ The almost poetic quality of Justice Steffen's words in *McKay v Bergstedt* (1990) 801 P ed 617 (Nevada Supreme Ct.) 2 at p 5 are worthy of note: "One of the verities of human experience is that all life will eventually end in death. As the seasons of life progress through spring, summer and fall, to the winter of our years, the expression unknown to youth is often heard evincing the wish to one night pass away in the midst of a peaceful sleep. It would appear, however, that as the scientific community continues to increase human longevity and promote "the greying of America" prospects for slipping away during peaceful slumber are decreasing. And for significant numbers of citizens like Kenneth, misfortune may rob life of much of its quality long before the onset of winter." This passage is quoted quite poignantly by Dame Elizabeth Butler-Sloss P at para [29] of *Ms B v An NHS Trust* [2002] EWHC 429. We will return to this theme at the end of the article with a quotation from Rupert Brooke's *Choriambics I*.

²⁸ For ease of listening view <http://www.youtube.com/watch?v=ppoqUVIKkBU> . In order fully to appreciate the point the reader is urged to listen to Herbert von Karajan's recording with Gundula Janowitz and the *Berliner Philharmoniker*. *Deutsche Grammophon* 447 422-2.

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Just two skylarks soar upwards dreamily into the fragrant air.
Come close to me, and let them flutter. Soon it will be time for sleep.
Let us not lose our way in this solitude.

O vast, tranquil peace, so deep at sunset! How weary we are of
wandering --- Is this perhaps death?

Arguably the third of the Songs, a setting of Hermann Hesse's "Going to Sleep", *Beim Schlafengehen* provides a stronger text, but it lacks the power of the final dusky chords on the strings lifted by the trills on the flute.²⁹ The point is important because it demonstrates that words, often the vehicle of reason, lack the communicative power of music which appeals to us upon an emotional level. This is the point made in the introduction to this essay. It is not to say that music lacks reason; indeed it has its own internal logic demonstrated by the art of the great composers. The rational or technical art of composition is the conveyance of emotion, but it is the emotion which affects the ordinary listener.

The charge is that John Finnis elevates the place of reason as the driving force of human action, which to say practical reason, to a position far beyond that which it does occupy and that which it should occupy. Despite the fact that he is well aware of the fact that reason may be perverted, in, for example, the schemes of mass-murderers;³⁰ he seems to insist that one can grasp "(f)rom one's capacity to grasp intelligently the basic forms of good as 'to-be-pursued'" and amongst these forms of basic good is "Life".³¹ The argument against him is that it is not at all clear that the good of life is either to be "grasped intelligently" in all circumstances, and, indeed, whether "intelligence" is the best or even the most appropriate way of ascertaining the good of life. The point is that it has been appreciated, at least since the time of Plato, that human perception and action is not solely based upon reason. Whilst Plato and many of those following him elevated reason to the highest position in human understanding, the most appropriate basis for action, and the foundation of judgement, it is not clear that this is invariably correct.

²⁹ The idea of approaching death approaching is first raised in the second of the Songs 'September', but the present author finds that particular song unnecessarily miserable. If we need a song about September, Kurt Weill and Maxwell Anderson's *September Song* recorded by Ella Fitzgerald and Paul Smith on Verve Jazz 'Round Midnight 511 035-2 is much to be preferred. We are not considering the September of a person's life in this article; we are considering the cold, bleak end of December after all joy has departed.

³⁰ Finnis NLNR above n 8, p 134.

³¹ Finnis NLNR above n 8, pp 85-86.

Humankind is not composed of desiccated calculating machines, and it would be much the poorer if that were to be the case.

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Herbert Hart has rightly recognised that men are neither devils nor angels;³² clearly too they are neither calculating machines, nor beasts ruled solely by instincts and passions. Plato pointed out in *The Republic*³³ that one might think that the human soul was divided into two parts - the rational and the appetitive – but closer examination led one to further divide the appetitive soul into the spirited soul, in which were located the emotions, and the (true) appetitive in which were located the basic desires. Plato uses the person and the city state as mutual similes or models and claims that the state should be ruled by the wise, the rational Guardians, supported by the spirited technocrats, and they should keep the base workers in check. Rationality or reason is seen as the philosopher –king at the level of both the individual and the *polis*.

The problem with reason is, as we have seen Finnis points out,³⁴ that the most highly rational operations such as the drafting of complex train timetables by, eg, Adolf Eichmann, to send people to extermination camps mask the most hideous evils. We do not blame such people for being irrational, for we can see the perverse rationality of their actions. We are sickened by them at a visceral level; we view them as cruel and ‘heartless’. The notion that the heart is the seat of emotions is not due to the purveyors of modern Valentine cards, but is of ancient origin. We can weigh emotions almost instinctively, because emotionality – the capacity to feel emotion- is one that all people save the psychopath share.

It is thus suggested that the proper tool for weighing emotion is itself emotion. Attempts have been made to weigh emotion by means of reason, but this has produced some grotesque answers. Aristotle tries to claim that sex, as an example of the licentious pleasure of touch, is part of our low, brutish, animal nature.³⁵ This is simply silly, for a reason pointed out by Jacob Bronowski in his brilliant *The Ascent of Man*. Bronowski writes:³⁶

³² Hart above n 13, p 191.

³³ Plato *The Republic*, University of Pennsylvania e-publication <http://www2.hn.psu.edu/faculty/jmanis/plato/republic.pdf>

Ed J Manis. See Book 4, the Dialogue between Plato and Glaucon pp 84-85

³⁴ Above n 15.

³⁵ Aristotle *Ethics* (London: Penguin, trans. Thompson rev. 1976) III8b.

³⁶ And in the sense that a picture paints a thousand words, he illustrates his point with pictures of the great rationalists James Watson, Marie Curie, Louis Pasteur, Albert Einstein, Ludwig Boltzmann, Max Born, Niels Bohr and John Von Neumann with

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Most of the world's literature, most of the world's art, is preoccupied with the theme of boy meets girl. We tend to think of this as a sexual preoccupation that needs no explanation. But I think that is a mistake. ...Sex was invented as a biological instrument by (say) the green algae. But as an instrument in the ascent of man which is basic to his cultural evolution, it was invented by man himself.

Spiritual and carnal love are inseparable. A poem by John Donne says that: he called it *The Extasie*, ...³⁷

Following this we can easily say, for example, "Death was invented as a biological instrument by (say) the sponges or the jellyfish. But as an instrument in the ascent of man which is basic to his cultural evolution, it was invented by man himself." Death is not only a physical and a cultural phenomenon, it is also an emotional one which is not reducible to reason. Emotion is immediately affective and is not mediated or reducible to reason.³⁸ We have seen above the words to *Im Abendrot*, which we may take as an example of the cultural significance of death. Amoebae, which divide by binary fission and thus cannot be said to undergo a normal death would have no grasp of the significance of the 'vast tranquil peace' of sunset and would not (if they were able to) bother to write the poem or compose the music.³⁹ Indeed it might be that as much of our culture would disappear if we abolished death as if we had abolished sex. More importantly for our present purposes, imagine the effect upon our inner world if we abolished sex and death; we would have no need and no place for the emotions of love or grief. Human 'death behaviour' is as far removed from animal 'death behaviour' as human lovemaking is from animal rutting.

The fundamentally simple claim is that we can only understand death as a human phenomenon by means of its emotional significance. We certainly do not fully understand it by means of reason, although much of our mythology

their (intended) spouses. See below n 37, p 406 ff Perhaps the present author is a sentimentalist, but the song *If* written by Paul Heaton, Scott Shields and Martin Slattery expresses the emotion more clearly than argument. <http://www.youtube.com/watch?v=1jHeW8nPbCA&feature=related> .

³⁷ Jacob Bronowski *The Ascent of Man* (London: BCA/BBC; 1977) p 406. There is insufficient space to quote the 500 words of Donne's poem here. Readers are recommended to read it at <http://www.luminarium.org/sevenlit/donne/ecstasy.htm> .

³⁸ Stocker V E see pp 38-51. Argument in favour of this assertion is set out below.

³⁹ A similar point is made by Ludwig Wittgenstein when he observed that "If a lion could speak, we would not be able to understand it". Duncan Richter in his essay entitled "Ludwig Wittgenstein 1889-1951" <http://www.iep.utm.edu/wittgens/> draws attention to the fact that emotionality is an important element in the formation of values.

is devoted to attempting just that impossible feat. We can certainly understand death as a biological process, as a social process with legal consequences, and we can reliably predict the emotional consequences and their physical results; but we do not cry any the less at the death of a loved one. The interesting point is that the overwhelming majority of readers understand the point exactly. We mourn because we understand, at an emotional level, the sadness of death; we can understand and weigh emotions because we share them. Our understandings of *The Extasie* and *Im Abendrot* grow as we experience love (with its physical and emotional faces) and the death of, for example, our parents. The bringing together of love and death in *Im Abendrot*, which Richard Strauss wrote for himself and his long-time wife, the soprano Pauline de Ahna; or Ovid's story of *Baucis and Philemon*⁴⁰ allow us to contemplate, or emotionally rehearse, our own death and that of our spouse. Humankind can, and does, communicate its emotional life within its membership and the overwhelming majority of humanity has stories which allow us to share these feelings. Arthur Schopenhauer in his work on religion points out that religion purports to provide an explanation and, where necessary, consolation for the vicissitudes of life; most importantly an understanding of death.⁴¹ Humankind, perhaps uniquely amongst the animals, communicates and feels the emotion of our fellows. We have no evidence that any other creature is empathic, and we are certain that no other creature is empathic in the same way. To admit Plato's claim that such humanity is a feature of our more primitive, appetitive, soul is erroneous.

Even Marxist theoreticians, for all their insistence upon rational scientific laws of human history and conduct acknowledge the importance of human emotion. Cornforth writes:⁴²

Men are not divided into a degraded material and a higher spiritual part, and need no supernatural help or guidance. Yet their needs are not confined to material needs in the sense of requirements for the biological functioning of human bodies and the continuation of the species. The characteristic human need is for personal relations with other people. People need human companionship, sympathy, assistance and co-operation first of all to produce together the material means of life and then, on that basis to develop and enjoy the activities and fruits of human culture. While none of this is possible unless elementary material needs are satisfied (so that to preach that material

⁴⁰ Ovid, *Metamorphoses* VIII.

⁴¹ See, generally, Arthur Schopenhauer *Religion: a Dialogue*, <http://www.gutenberg.org/ebooks/10833>

⁴² M Cornforth *Communism and Human Values* (London: Lawrence & Wishart, 1972) p 35.

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satisfactions are worthless in comparison with “spiritual” ones is utterly repugnant to the development of human needs and human personality), the material needs of men are themselves humanised and transformed into specifically human as distinct from animal needs. Thus people do not simply need food but need it artfully prepared and served, they do not simply need clothing and shelter but fashions and architecture, and they do not simply need sexual intercourse, but the art of love and human relations between the sexes.

Let us now consider the relation between reason and emotion. Some writers take the view that emotions are reasons. Indeed they are, but of a very special sort. This is best elucidated by examining Joseph Raz’s view of emotion at the beginning of his *Practical reason and norms* where he writes:⁴³

As well as reasons for action there are reasons for beliefs, for desires and emotions, for attitudes, for norms and institutions and many others. Of these reasons for action and for belief are the most fundamental types of reasons, the others being derived from or dependent upon them.

Reasons are referred to in explaining, in evaluating and guiding people’s behaviour. The concept of a reason is used for various other purposes as well, but these three are primary and the rest are derived from or dependent on them. For example, we say on the appropriate occasion that John married Mary for her money, that people should marry for love only and that therefore since John acted for the wrong reasons he behaved badly and Derek should not do the same.

The first disagreement with this text is with the sentence “Of these reasons for action and belief are the most fundamental types of reasons, the others being derived from or dependent upon them.” If this text is understood correctly, it seems that Raz’s own example contradicts his text; and reflects, instead, the position being taken here. The act of marrying is acting for a reason; marrying for love is acting on the reason of an emotion, and we judge it differently from acting upon another emotion – greed. One could plausibly argue that greed is a more complicated emotion than love because greed requires calculation rather than merely acceptance. However, at base we have love and greed and these emotions are plainly fundamental to reasons for action; reasons for action depend upon them.

⁴³ Joseph Raz *Practical Reason and Norms* (New Jersey: Princetown UP, 1990) pp 15-16. It is necessary to quote two sections of the text in full because there are fundamental disagreements with Professor Raz’s argument. See the comment at n 8 above.

The second disagreement with Raz is that whilst it is true that a *reason* is used in evaluating John's behaviour, it is somewhat of an understatement to say that it is merely "referred to". If John married Mary because he is a grasping gold digger rather than a lover, we are making an emotional evaluation of John. John, if he were – however unlikely this may be - open and honest about his veniality, is a corrupt and rotten person from whom we would instinctively recoil. "I only married Mary for her money, she means nothing to me, you can buy me if you pay Mary off and give me more" is hardly likely to endear him to us; whilst if Mary were to acquiesce in this behaviour saying "Yes, I know John doesn't love me. I just keep him on so I can use him for sex and chores; he's worth every penny", it would lead most of us to shun them and reflect that perhaps they were just right for each other.

No doubt some readers will now say - "but you are making a moral judgement about John and Mary's behaviour; if they wish to behave like whores, they should be free so to do; apart from which how do you know that their behaviour is wrong?" The simple answer to the question is because of my emotions which concur with the emotions of mature people. Here, plainly, the argument comes very close to that advanced by John Finnis,⁴⁴ the difference between my argument and that advanced by Finnis is that he wrongly grounds his argument in reason rather than emotion. The first sentence of the imaginary critique must also be answered. No doubt people should be free to act as they wish in their private lives and I might well take the tolerant view that, even though I find their behaviour sickening and wish to have nothing to do with John and Mary, they ought to be allowed to get on with their behaviour. Private lives of private people are personal matters and prying into them is no more than prurience.⁴⁵ We think of John and Mary as emotionally abnormal, as deficient or crippled, and, if we are charitable or convinced that they got into this state because of some illness or accident, we might seek for ways to help them, but in the last analysis we should recognise, along with John Stuart Mill, that they are the best judges of their own lives.

The most sophisticated and persuasive account of the relationship between the emotions and reason is that provided by David Hume.⁴⁶ After showing that reason (properly so called) does not provide motivation or impetus for any action, but that it purely serves to provide the means to do that which we have already chosen to do and later describing reason as 'the slave of the passions', he goes on to show how the 'quiet passions' are easily confused with reason

⁴⁴ See NLNR above n 8, pp 31-32, pp 102-103 and p 128 in his discussion of the *spoudios* where he refers to the root of his argument in Aristotle's Nichomachean Ethics in Bk Iiii.

⁴⁵ This is no more than a restatement of JS Mill's harm principle.

⁴⁶ See David Hume *A Treatise of Human Nature* Part 3 Sec III "Of the Influencing Motives of the Will" <http://www.gutenberg.org/files/4705/4705-h/4705-h.htm>

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but that the passions are fundamental. A simple thought experiment is helpful – ask yourself why you love your ‘real love’.⁴⁷ The question is unanswerable. John may have married Mary for her money and could only truthfully answer to that effect; he would be unable to explain why he loves, for example, Jane. He cannot go back further than ‘love’. He can use it to explain his practical reason – why he has bought her jewellery – but he cannot resolve love further. He may be able to describe love more accurately in terms of mental, physical, physiological or biochemical effects, but he still cannot go beyond the emotion.

Another example may be useful. In recent years the phrase “inappropriate touching” has gained currency. It is most often used to describe the wrongful touching by adults of children’s sexual organs. It is suggested that the bland adjective “inappropriate” is wholly inappropriate. Whilst the preceding sentence is – to say the least – inelegant it is accurate. The second use of the word “inappropriate” identifies the first use as inaccurate or incorrect – it does not connote emotional evaluation. It is more natural to describe such abuse as “revolting”, “disgusting” or, in the sense that it *ought* to give rise to shame on the part of the toucher, “shameful”. The coldness or lack of affect introduced by the phrase “inappropriate touching” reduces the wrongdoing to the level of a grammatical slip or minor traffic violation. One might almost think that the act was rendered less wrongful by the description than a breach of good manners because the judgement of manners involves the judgement of character. Hume asserts that certain passions or emotions are ‘implanted’ into human nature and, whilst the use of that particular past participle is contested – ‘have evolved’ is preferred – there is no reason to doubt that Hume is, in essence, correct.

These emotions are basic and cannot be reduced to reason. Plainly such emotions have their ‘dark’ mirror images – hate and so forth, but most of us can distinguish between the virtuous and the vicious emotions and can judge ourselves and others by them even in the face of confusion introduced by reason. Uniquely in the animal kingdom we enjoy recognisable emotional attachments to members of our own species, other species (our keeping of pets, our love of wildlife), inanimate objects (either as symbols, when we invest, eg, a wedding ring with sentimental value, or in themselves – “I love the countryside”) or countries and nations (such as in patriotism). Human beings do not only identify themselves as members of a species⁴⁸, they identify themselves (at least in part) by means of their emotional relationships to animate and inanimate objects in the world.

It is now time to pull the threads together:

⁴⁷ Spouse, partner and so forth.

⁴⁸ See for a clear account of the elusive concept of species being, Jacob Held *Marx via Feuerbach: Species-being Revisited* (2009) 39 *Idealistic Studies* 137-148

1. Humans are not only rational beings, but also emotional beings. Our emotions are not some primitive element of our nature “left over” (as it were) from our animal past, but are a distinct and valuable facet of our human nature.
2. Our emotions are at the root of our engagement with the world; they not only facilitate our understanding, interpretation, explanation and evaluation of ourselves, the human world and the world in general, they provide some ultimate and particularly powerful and inexplicable reasons for action.
3. Emotions are ‘shared’; we can understand another person’s emotion; sometimes to the extent that powerful emotions such as love and our response to, or understanding of, death are fundamental to our culture.

John Finnis points out that the whole point of law is to give effect to practical right-mindedness and to establish good and proper order amongst people and in individual conduct.⁴⁹ Law can only have this effect where it takes account of our emotional nature. To a great extent it does so; demonstration of this fact extends to areas beyond the scope of the present work. The problem is then to show how it ought to deal with emotion in cases of euthanasia.

ASSISTED SUICIDE

Suppose that someone comes to a mature emotional decision to bring their life to an end and acts upon it. Albert Camus claims that suicide is the only important philosophical question;⁵⁰ whilst one reading of this view and the arguments which led Camus to it, are strongly disputed below, it does imply one essential truth. Deliberate suicide is a uniquely human action. The implications of this are considered below.

John Finnis seems to suggest that suicides should be resuscitated *tout court*; the author has even heard it suggested (by a very junior doctor) that the correct medical response would be to resuscitate a suicide and then apply for an order under s2 of the Mental Health Act 1983 since the person clearly constituted a danger to themselves. These are the responses of totalitarians if they are really advocating compulsion, or people afflicted with the worst kind of moral nosiness if they are simply interfering. The courts, thankfully, take from time to time a much more realistic and humane view. Firstly, we need to eliminate those cases in which a person is not able to come to a mature

⁴⁹ See NLNR above n 8, p 18.

⁵⁰ Albert Camus *The myth of Sisyphus and Other Essays* (trans Justin O’Brien, 1955) <http://www.josephkenny.joyeurs.com/PhilTexts/Camus/Myth%20of%20Sisyphus-.pdf>

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decision. In the difficult case of *A Local Authority v E and Others*⁵¹ the High Court held, on the evidence that Ms E should be subjected to compulsory feeding because she had lost the capacity under the Mental Capacity Act 2005, because she had become so incapacitated by her lack of nutrition and dependency upon alcohol and opiates, to make a proper decision for herself.

On the other hand in *Ms B v An NHS Hospital Trust*⁵² the High Court held that Ms B had the capacity to require that her artificial ventilation be discontinued and that she had been treated unlawfully during the time in which artificial ventilation had been imposed upon her.

Ms B's case is possibly the most valuable in this area. Ms B was 43, well educated, and before her illness held a very senior position in a profession ancillary to medicine. She suffered two haemorrhages in her neck as a result of the malformation of some important blood vessels and was left with catastrophic injuries. Despite excellent medical care she was left in the condition set out in paragraph 38 of the judgment:⁵³

Her present situation is that she is paralysed from the neck down. She is conscious and capable of speech with the assistance of a speaking valve. She can move her head and use some of her neck muscles, but cannot move her torso, arms or legs at all. She is able to eat and drink. She is totally dependent on her carers, who feed, clothe and wash her and assist with her bodily functions. Her life is supported by artificial ventilation through a tracheostomy, a tube in her windpipe. Without the help of artificial ventilation, according to the medical evidence, she would have a less than 1% chance of independent ventilation, and death would almost certainly follow.

Ms B wanted the ventilator switched off. She sought a declaration that the use of the ventilator keeping her alive constituted an unlawful trespass and sought (nominal) damages for trespass to the person. The Court accepted without serious question, though with a careful examination of the authorities, that a person has:

an absolute right to refuse to consent to medical treatment for any reason, rational or irrational, or for no reason at all, even where that decision may lead to his or her own death⁵⁴

⁵¹ [2012] EWCA 1639.

⁵² [2002] EWHC 429 (Fam).

⁵³ [2002] EWHC 429 paragraph 38.

⁵⁴ See para 20 of the judgment referring to *In re MB (Medical Treatment)* [1997] 2FLR 426, *Sidaway v Board of Governors of the Bethlehem Royal Hospital and the Maudsley Hospital* [1985] AC 871 and *Re T (Adult: Refusal of Treatment)* [1993]

The only qualification placed on ‘person’, and the point is crucial, is that such a person must be mentally competent. Most of the argument in Ms B’s case concerned her mental competence, and once she had been held to be competent, the decision to allow her to terminate the trespass flowed naturally.⁵⁵

The most interesting point in Ms B’s case is that death would follow rapidly upon switching off the ventilator. Brain damage occurs after three or four minutes of anoxia; this becomes permanent after about five minutes, and is invariably fatal within one quarter of an hour. One might reasonably expect that Ms B would be sedated whilst the machine was switched off and she died, rather than leave her body gasping automatically for breath whilst she was fully conscious. Whilst this would be briefly distressing for Ms B, although she would have no abiding memory of the pain, it would, undoubtedly be very distressing for the medical staff. The President averted to this fact when she said at paragraph 100 viii) that if the doctors concerned in the procedure to end Ms B’s life had objections to it that it was the duty of the hospital to find other doctors.⁵⁶

(a) *Act/omission and Double Effect.*

There are three angles from which one could view the act of euthanasia: from that of the “victim”, that of the victim’s loved ones and those who love him or her, and from the point of view of the “killers”.⁵⁷ The President’s last point above addresses the viewpoint of the “killers”. It has been suggested that there is a further dimension which ought to be taken into account – that of society at large. The reasons for this are not clear. In cases of euthanasia the only people directly affected are those listed above. It is quite different from

Fam 95. Further reference was made to a similar decision in *Cruzan v Director, Missouri Department of Health* (1990) 180 S. Ct .2841

⁵⁵ Those who wish to examine the legal principles set out in the case are referred to the useful guidance set out in paragraph 100.

⁵⁶ See paragraph 100 viii)

⁵⁷ The word “killers” and “kills” are used neutrally and provisionally. This accords with Michael Oakshott’s notion of “adverbial descriptions”. he points out that there is nothing wrong with killing per se – the fault lies in “killing murderously” It is accepted that some people may believe that ‘murder’ is the more appropriate word in some of these instances, whilst others may prefer ‘ finally relieve their suffering’. It is accepted that this use is controversial, but there is no other convenient term. If the reader thinks that emotive language is being used, the authors point is thereby conceded - valuation is a matter of emotion rather than reason. Oakshott explains the use of “adverbial descriptions” in his *On Human Conduct* (Oxford: Clarendon, 1975). See the first essay “On the theoretical understanding of human conduct”.

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abortion where there is the interest of another party -the foetus - to be considered and, as Blackmun J points out in *Roe v Wade*,⁵⁸ the state does have a legitimate interest in speaking up for a party which cannot speak. Here, the state seems to be pushing its nose into a personal affair against the expressed wish of a party who is the only possible loser in the situation. The reason why some seek to invoke the public interest seems to be a 'slippery slope' argument. If a person who *really* wants to die can be given, say, a lethal injection, what is to stop the next person who only *nearly* wants to die from being dispatched in the same way, and so on down the slope until we are killing those who do not want to die at all? The way out of this problem is, it is suggested, simple. The draft Act set out below provides that the person who wishes to die is the only person who may bring the action. It is difficult to conceive of a situation in which a person who does not want to die brings an action and convinces a court that he desires his death does precisely that. As we shall see below the evidence from Ms B's case is that the slope runs quite the other way; some seek to prevent those who wish to die from having their wishes fulfilled by proposing quite extraordinary solutions.

If the person who wishes to die is indeed gravely ill, is competent, is aware of the alternatives, and is of a settled mind, there seems to be nothing more to be said. These are matters which a court is admirably suited to judge, as evidenced by the Ms B case. One presumes that the person wishing to die has spoken to their family and friends and has taken some account of their views.⁵⁹ This raises issues of competency and undue influence. Any court would want to be assured that there was no evidence that a person was being persuaded to die by, for example, avaricious relatives.

The real issue arises with the state of mind or emotion of the killer. Clearly doctors do 'kill' people from time to time. The abortionist 'kills' an unborn child even where the treatment is designed to save the mother's life, and the doctor who obeys a 'do not resuscitate' notice, or who decides to use the Liverpool Care Pathway as opposed to continuing with more aggressive treatments to keep the patient alive 'kills' the patient in some sense. Furthermore the doctor who switches off the life-support machine having determined that the patient is -for all practical purposes⁶⁰ - dead, is much more closely implicated in the person's death. All of these examples fall short of the deliberate killing of a patient by the administration of an overdose of hypnotic or pain relieving drugs. The question is how and why?

⁵⁸ 410 US 113 (1973), see VII and XI.

⁵⁹ Tony Nicklinson certainly discussed the matter with his family, so did Diane Pretty, and press reports indicate that the other anonymous applicant in Nicklinson's case discussed the matter with his wife.

⁶⁰ Such people are unable to speak, engage in voluntary movement, eat or drink, control their excretory functions, or breathe without support.

There are two alternative explanations which are normally used. The first explanation is the ‘doctrine of double effect’. This doctrine is judged unsatisfactory. The classical example of the doctrine arises in the case of an abortion performed to save the life of the mother who will die if the abortion is not performed. Clearly abortion will kill the unborn child.⁶¹ The doctrine of ‘double effect’ seems to be given a wholly inappropriate name; it seems to be a doctrine of ‘half-think’ or perhaps it is ‘think-too-much’. This term (‘half-think’ or ‘think-too-much’) needs to be explored. It has been suggested that the term ‘half-think’ is unnecessarily pejorative – someone who half-thinks is, by implication, a half-wit. Stocker points out that “many contemporary ethicists, along with other contemporary philosophers, have lost sight of the evaluative importance of emotions and perhaps of emotions themselves.” If ‘half-thinkers’ arrive at their position by neglecting their emotions, and it is not thought that they do, they would indeed be ‘half-thinkers’. It seems that they ‘think-too-much’ or reason-away their emotional repugnance by cleverness; a sophistication of thinking which enables the person to explain away, or justify, their performance of an action which they find repugnant.

The destruction of a baby in order to save the life of the mother cannot be regarded as two effects from a single action - one desirable (the deliberate saving of the life of the mother) and one undesirable (the deliberate killing of the baby). The saving of the mother’s life requires the death of the baby, even though such a death is the very last thing that the physicians and the mother desired; they would go to nearly any lengths to save the baby’s life. The so-called doctrine of double-effect requires a sleight-of-mind. The performer of the act is required to convince themselves that simply because it was the last thing that s/he would have desired to do that s/he did not, in fact, do it in any morally relevant sense. However this is simply ‘half-think’ - the mother is alive, the baby is dead, the abortion was performed, but the abortionist was somehow missing. It is suggested that this only makes sense in two situations. The first situation is very familiar to those of religious faith. If God is waiting

⁶¹ There is another kind of double-think going on in the matter of abortion. It is unclear whether it is the pro- or anti- abortion lobby (or both) which engage in this behaviour. Those who oppose abortion often refer to the foetus (I am here using the correct scientific term in a neutral way) as a “baby” or “an unborn child”, whilst those who support abortion refer to the unborn child as a “foetus” or “the product of conception”. The point is to either encourage emotional warmth - for we are revolted at the killing of a baby - or to produce emotional distance - “it is only a bundle of cells, not a real child”. For a more detailed treatment of this issue in wider circumstances, see Jonathan Glover *Humanity: a Moral History of the Twentieth Century* (London: Pimlico, 2001) chapter 35. Arguably one could explain a great deal of Glover’s work by adopting the theory set out here and in *Valuing Emotions* by simply pointing out the Glover’s 20th century monsters (Hitler, Stalin and the rest) simply suppressed their emotions in a Nietzschean way.

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beyond our physical life to judge the conscience of the abortionist and s/he is to be called upon to confess to murder in breach of, eg, the Biblical Commandment 'Thou shalt not kill' s/he needs a convincing reason to absolve her from responsibility. Since those of faith believe that God is the final judge, and the author of absolute standards in this matter, they cannot quarrel with the rule, and we cannot convince them otherwise. The only route of escape is by saying that one should only be judged according to that which one desired to do and, since one did not desire to kill the baby, one is innocent.

The second situation which may have more appeal for those without religious faith, and may well be adopted by those who judge the position from the perspective of the whole person as set out above is much more complex. It needs to be distinguished from the classical utilitarian position. A classical utilitarian would refer to 'the greatest good of the greatest number' and would presumably decide to sacrifice the baby in most circumstances. Let us presume, for the sake of simplicity, in that case that the woman has a loving husband and other small children. If we add in the emotional nature of the abortionist-agent, we might not end up in the same position. Our designated abortionist might feel that s/he could not perform the operation because s/he would be so revolted by it. S/he might well say "I cannot kill an innocent baby." The doctrine of half-think (think-too-much), or double-effect, then comes into play to save the abortionist from themselves.

The same arguments apply with the act/omission doctrine. A physician might say, when faced with the decision to switch off a life-support machine, when without the support of the device the patient will inevitably die: a) "I will be damned if I kill the patient", or b) "I cannot bear to kill the patient". They would then 'reach' for the act/omission doctrine and characterise their action as an omission. This, too, is half-think or think-too-much.

The doctrines of double-effect or act/omission as they have been read in writing this essay depend crucially upon a rigid Humean approach to events caused by human action or inaction.⁶² Hume defines a cause as 'an object precedent and contiguous to another and so united with it in the imagination, that the idea of the one determines the mind to form the idea of the other and the impression of the one to form a more lively idea of the other.'⁶³ Both an 'act' (such as injecting a person with a fatal dose of morphine) and an 'omission' (switching off a life-support machine) qualify using this definition as the cause of a person's death, but we often draw a distinction between them calling one a (currently) culpable act and the other a (usually) non-culpable omission. This essay contains an implicit claim that the difference between

⁶² Nothing is said here about other instances of causation.

⁶³ See J L Mackie *The Cement of the Universe; a Study of Causation* (Oxford: Clarendon, 1974) p 3.

the 'act' and the 'omission' is very much less than is commonly supposed and is best explained, in circumstances of assisted suicide at least (as opposed to the murder of an unwilling victim) as simply addressing the mental and moral hygiene of the killer. It is emotionally unpalatable to think of oneself as a murderer. One can avoid this shame by evaluating oneself as an 'omitter' or as a 'mercy-killer'.

There is another way out of the problem. It is to recognise that occasionally we are called upon to perform acts which are morally and emotionally unacceptable. Life is, from time to time, nasty; it is seldom, if ever, fair. One can simply take the view that one simply has to take the least unacceptable way forward; we have to muddle through somehow.⁶⁴

Perhaps one way of doing this is in the case of the critically ill patient in the situation of Mr Nicklinson and listens to the patient saying "I am going to die soon, I cannot bear to continue with this miserable existence" one could take the view of the merciful gods in the story of Baucis and Philemon.⁶⁵ Baucis and Philemon could not bear the thought of one living beyond the life of the other – for such would be a miserable existence beyond their emotional capacity - and asked the gods as a reward for their kindness to be allowed to die together.⁶⁶ Here we are dealing with a single death, not a suicide pact, but we can just the same recognise that death - like everything else - has its season. Suppose that one has had a hitherto happy and active life and this has been blighted with a disease such that one cannot do all that makes life worth living and one is reduced to dependence upon others for even the simplest or most intimate of tasks. One might then, in a mature emotional way, seek oblivion rather than endure further pain, distress, and, it has to be said, shame.

It is not doubted that some people, for example, those who work in hospices, derive great satisfaction from caring for the terminally ill. Indeed some of these people speak as if their emotional commitment to the dying

⁶⁴ This point is made in the poignant wartime song from *Meet Me in St Louis* (MGM, 1943), "Have Yourself a Merry Little Christmas" (Hugh Martin & Ralph Blane) as sung by Judy Garland. The exact lines are "Someday soon we all will be together, if the fates allow. Until then we'll have to muddle through somehow."

<http://www.youtube.com/watch?v=yudgy30Dd68>. Rather than focusing upon the (rather mawkish) story of the film; readers are invited to consider the effect of the song upon the wartime servicemen and women and their families. These particular words were found to be so powerful that they were rewritten for later renditions of the song. Sometimes we are faced with impossible situations and all we can do is "muddle through somehow".

⁶⁵ See above n 40.

⁶⁶ In the case of our dying patient we can now recognise that the 'gods' in the story of Baucis and Philemon were wholly mythical; they were supernatural representations of that which seems like a natural and normal human response to many people.

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amounts to a vocation. It is as if the other side of the emotional coin to refusing to kill is a commitment to keep someone alive for as long as possible. There is no shortage of suffering people and some of them may well wish to live out every last moment of their lives tended by hospice workers. However, those who wish to die are surely under no obligation to provide them with patients. Do those who work in hospices or intensive therapy units actively seek people for whom to care? To answer this question in the positive sounds almost absurd; could anyone really want to care for someone living a life which they want to lose? In *Ms B v An NHS Hospital Trust*, one of the witnesses, Mr G (a consultant in spinal medicine) argued that Ms B should not be allowed to bring her life to an end with assistance because she lacked the capacity to form a judgement.⁶⁷

Mr G argued that Ms B did not realise just how good life could be for a person who was in the state described above. If he was able to persuade her to enter a specialist therapy unit and live there for a period of two years, his experience was that many people came to recognise that they were, in fact, living a worthwhile life. Mr G wanted the Court to declare that Ms B was not competent to decide the issue of her own life because she had not had the benefit of this two years of experience. It is argued that Mr G was seeking to impose the sentence of the gods upon Sisyphus upon the unfortunate Ms B. As Camus helpfully summarises:⁶⁸ “The gods had condemned Sisyphus to ceaselessly rolling a rock to the top of a mountain, whence the stone would fall back of its own weight.” In Sisyphus’ case the gods had thought that there could be “no more dreadful punishment than futile and hopeless labour”. This point needs exploration in depth but there is a preliminary point concerning Ms B’s autonomy. Ms B was a highly qualified, highly experienced, senior social worker in the NHS with an excellent understanding of her condition and her prognosis, she had received the offer of Mr G’s care and had decided to reject it. For it to be claimed that she was thereby incompetent to decide upon her life is quite extraordinary and represents that which it is tempting to describe as a totalitarian attitude – “you do not agree with that which I think is best for you, therefore you must be incompetent”.⁶⁹

⁶⁷ See paragraphs 59-63 of the judgment.

⁶⁸ The opening sentence of the final part of the essay, above n 5.

⁶⁹ If it is thought that this is hyperbole, see Robert van Voren “Political abuse of psychiatry - an historical overview”, *Schizophrenia Bulletin* 36(1) 33-35. Van Voren writes “The political abuse of psychiatry in the Soviet Union originated from the concept that persons who opposed the Soviet regime were mentally ill because there was no other logical explanation why one would oppose the best sociopolitical system in the world.” By this reasoning, if wishing to die is incapable of logical explanation anyone who wishes to die is clearly incompetent. That is a totalitarian attitude.

There may be more reputable ways to justify a decision to refuse to allow treatment to be withdrawn from Ms B and thus killing her.⁷⁰ The first such argument is rejected in its entirety. It is of the form – “god judges us by our reaction to trying events such as strokes and major illnesses” – since the author rejects the notion of an external judge of our lives, this makes no sense. The second such argument is that advanced by Camus. Camus suggests that Sisyphus is made happy by enduring the struggle in an absurd world. Camus might have Sisyphus say: “Pushing the rock up the hill requires effort and by performing this meaningless task I can take pride in my strength and fortitude. I am happy.” This is, of course, a wholly emotional reaction and one could understand Ms B, or any other person, taking the view that their own strength would carry them through.⁷¹ This would suggest that a person who decided to bring their life to an end in Ms B’s situation is no more than a coward. Before jumping to such a conclusion we should, of course, be thankful that we are not ourselves in such an unhappy situation having to face the hourly indignity of having to be given nutrient (not tasty, life-enhancing, emotionally satisfying, food or drink), having our noses wiped, and having to be cleaned after soiling ourselves. Would we be surprised if our pride and courage in existence was overcome by shame?

However there is a much more positive argument to be made. It may be thought that the person wants to die in order to bring their shame to an end or because they are a coward, but suppose, in the alternative, that the person wants to die because they are so warmly and passionately attached to life that they cannot bear to be reduced to the status of a spectator. To a limited extent one can see Sisyphus’ pride in carrying on because he is, at least, doing something. However, one essential element of living is making a contribution to the lives of others, and Ms B would be prevented from doing that. She would lose the emotional satisfaction which comes from all the ‘jobs well done’ for others. Another essential element of living is the ability to plan one’s own life; a person in Ms B’s situation would be unable to make even the simplest plan for herself. Suppose that Ms B had, shortly before her second, disabling bleed planted a hyacinth bulb in her garden. For the rest of us we could, at the prompting of a stray thought, wonder at the progress of this flower and, opening the door, slip down the steps to examine it. “Here it is, bright blue and sweetly scented in the spring sunshine ... and the leaf buds are breaking on the bushes, ... and a robin is singing ... Look! There he is ... on

⁷⁰ Recall that the arguments set out above are that 1. She would need to be sedated before the life-support machine was switched off, and 2. The difference between act and omission is illusory in fact and can only be understood from the emotional standpoint of the ‘killer’.

⁷¹ The clearest musical example of such an emotion is Frank Sinatra’s rendition of the famous song written by Jacques Revaux and Paul Anka *My Way*.

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the lilac... which is coming back to life. We might say “I planted that, and in the autumn I will plant another.” These plans and these happened-upon sights, smells, and sounds are now beyond Ms B. We might well call our partner to look and then caress and share in the spring morning. This is not for Ms B, she has only the life-support machine. If this story were told by some more skilled story-teller and thus the imagination of the reader was provoked and an affect raised, the reader’s eyes would have moistened with tears. That is life and the key to understanding it is emotion. Can we really be surprised if some people would rather bring their diminished, life-supported, existence to a close?

The explanations of why Camus is wrong, why the atheist is not a nihilist, and why it is right in the circumstances faced by Ms B, Nicklinson, and others to bring their existence to a peaceful and speedy end at their request now come together. Camus is wrong, because life is not absurd or meaningless, it has value when experienced from the inside; our emotions give it value. Value is ‘in here’ because we feel it. Camus gives his argument away when he acknowledges the final pride and joy of Sisyphus in spitting in the eye of the condemnatory gods. “Here is the worst you could do and I can beat you.” There is no need of any external source of value such as a god if we can judge things internally by our emotion. Finally, if (and Tony Nicklinson, Diane Pretty and Ms B had clearly reached that stage) our emotional fires have burnt so low that all value has drained from our lives; it is argued that it cannot be wrong for someone just to douse the guttering flame.

How can we bring this about in legal form? How can we allow a person to bring about their death in the circumstances which they choose, free from the worry that they will be coerced into death, and such that physicians may decline to kill patients. The following Draft Act is proposed. It is argued that it is a true norm because it reflects the realities of the human condition.

THE DRAFT ACT

It is proposed that Parliament should enact a short Act in the following form. This is intended to address the point made at the end of *Nicklinson* where the Court felt constrained from issuing a Declaration in the absence of an Act permitting authorising such an action.

1. It shall be lawful for a medical practitioner to administer an approved fatal injection of suitable drugs to a person (“the patient”) in the following circumstances
 - 1) Where the patient concerned is suffering from:
 - a) A scheduled disease or medical condition, or,

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- b) Any other condition such that their capacity to breath, eat, drink, or voluntarily retain or void bodily waste can only be maintained by artificial means or constant care and intervention, and is unlikely to improve, and the High Court has issued a Declaration to the appropriate Health Authority that the administration of such an injection will be lawful.
1. The High Court may issue such a Declaration upon the application of a patient suffering from a disease or medical condition set out in section 1 where
 - a) The patient has suffered from such a disease for a period of twelve months preceding the date of such Application, and
 - b) That the Court is satisfied that the patient has the capacity to make such an application and understands its import, and
 - c) The court is satisfied that the patient's decision is made of their own free will and is not subject to duress or the undue influence of another in coming to the decision to seek a Declaration, and
 - d) The Court is satisfied that the alternatives to an immediate death have been explained to the patient.
 1. The patient may represent themselves or be represented by Counsel. The Secretary of State shall appoint the Official Solicitor to represent the interests of the Respondent Health Authority in ensuring that the criteria set out in Section 2 are fulfilled. Argument shall be limited to those matters contained in Section 2. above. No interventions in such proceedings will be permitted
 2. If such Declaration is issued it will be the duty of the Respondent Health Authority to provide a doctor willing to administer the injection.
 - 1) No doctor may be obliged to administer such an injection against their will or conscience and any doctor shall have an absolute and unquestionable discretion to refuse to administer such an injection.
 - 2) The identity of the doctor shall be protected from publication by Injunction and shall only be disclosed to the patient and their immediate family.
 1. Schedules to this Act shall contain
 - 1) The formulations of such drugs as are approved to constitute the fatal injection.
 - 2) The list of scheduled diseases.

RIGHT TO DIE

A short explanation of this Act is required. Firstly it is intended that the Act is only intended for use where a person is disabled by a serious disease where there is no reasonable hope of recovery. It would be unconscionable for the state to provide facilities for, or co-operate in, the suicide of a person who was able to act for themselves because the opportunities for abuse are too great. This further explains why, at section 2, it is necessary for the person who wishes to die to bring their own application. In part this rule is intended to prevent opponents of the Act from bringing applications designed to bring the matter into disrepute. The issue of capacity must be introduced to prevent those whose illness is such that they lack capacity (such as the unfortunate Ms E) are unable to use the Act.

The requirement that the person make the application of their own free will is designed both to preclude the applicant being pressured to bring their life to an end against their will and to ensure that the person has themselves determined that their will to live is at an end.

It is clear, for the reasons set out above, that some doctors may have an objection to bringing another's life to a close. Perhaps they are religious, perhaps their emotions inhibit them, perhaps they are unconvinced by the arguments for euthanasia. It should be their absolute right to refuse. However there are doctors who are willing to provide the necessary expertise.

The rule against interventions is designed to protect the person who wishes to die from the attentions of zealots who understand the world in a quite different way. Similarly the injunction to protect the identity of the doctor is designed to free him or her from the threat of lawsuits or even, rather ironically, unlawful violence. Most acts of domestic, as opposed to international, terrorism in the USA are aimed at facilities which provide lawful abortions.⁷²

CONCLUSION

This article contains the argument that we only make sense of our lives and our deaths by means of emotion. We are not wholly rational creatures and indeed our lives would be much the poorer if we were only actuated by reason. The author of this paper currently enjoys the best of health and wishes such to continue for as long as possible. However, he knows that sooner or later his health will decline and he will die - to every thing there is a season ... a time to be born and a time to die. Such is the nature of human life. There were countless ages before he was born and there will be countless ages after he dies. The writing of philosophy always serves some purpose. It is not an

⁷² M Jacobson and H Royer "Aftershocks: The Impact of Clinic Violence on Abortion Services" [2011] 3 (1) *American Economic Journal: Applied Economics* 189–223.

