

What We Owe to TIPD Patients: Contractualism & PAS

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- An **TI.P.D. (TIPD)** patient is one who:
 - (1) is **Terminally Ill;**
 - (2) suffers Excruciating **Pain;**
 - (3) desperately wants to **Die.**

- Mainly concerned with
- Contractualism & Physician-assisted Suicide (PAS)
- Can be extended to Voluntary Euthanasia

Contractualism

- Contractualism is the meta-ethical or second-order theory that:
- Explains the **permissibility** of an act in terms of its **justifiability**.

- An act is **permissible** if and only if it is **justifiable** to **everyone** affected by it.
- By extension:
- A **law** or **policy** is permissible if and only if it is justifiable to everyone affected by it.

T. M. Scanlon

- An act is wrong if it is disallowed by a principle which no one could reasonably reject.

- (1) an act is wrong if it is disallowed by a valid principle;
- (2) a valid principle = a principle which no one could reasonably reject

The Contractualist Thesis

- An act is permissible if and only if it can be justified to everyone affected by it.
- Different contractualists have tried to get more normative mileage from the contractualist thesis, but without success.

John Rawls

- A famous contractualist:
- His theory is a political theory.
- His theory cannot be applied to morality because it is not clear that there is “moral primary goods.”

- In Rawls's Original Position:
- An imaginary place where a group of people with different background, class-interests, genders, talents (smart or not), moral & religious beliefs, etc. will choose principles which they would govern themselves with.
- But they do not know who they are.

- Rawls's claim:
- (1) The principles to be chosen would be principles of justice.
- (2) One principle is the Difference Principle (see below).

- Rawls assumes that although people in the Original Position would prefer different things, there are goods which are helpful to everyone regardless of their conceptions of good life.
- These are “primary social goods”: such as basic rights and liberties, power and opportunities, wealth and money, and self-respect.
- He reasons that because there is no probability in the Original Position, people would care more about the minimum “primary goods” that they can secure, rather than trying to maximize the amount.

- Therefore he arrives at the Difference Principle: that inequality must be so arranged as to the benefit of the worst-off group,
- That is, we must help the group of least-advantaged first.

- Rawls's Original Position owes much to Harsanyi's theory.
- Harsanyi's veil:

The arrangement that is justifiable to all is what would be chosen in order to maximize utility when we do not know who we are in society, but we have $1/n$ probability of being anyone in society.

- Scanlon persuasively criticizes Rawls's (and Harsanyi's) view that impartiality could be understood as the condition in which everyone behind the veil of ignorance would maximize self-interest.

- Rawls believes that he could get normative principles if self-interested parties in ignorance of whom they are would adopt the same principles in an attempt to maximize their own self-interest.

- In trying to obtain normative principles, both Rawls and Harsanyi would need to adopt some interpretation of ethical impartiality.
- Harsanyi interprets this condition as the one in which **all parties would have an equal chance of being anyone in society.**
- Harsanyi arrives at the Principle of Average Utility.

- Rawls, on the other hand, interprets this condition as the one under which self-interested parties are deprived of particular information, including any objective basis for estimating probabilities.
- Rawls arrives at the Difference Principle.

Scanlon points out:

- The assumption shared by Rawls and Harsanyi – that we could obtain normative principles from self-interested parties under conditions of ignorance trying to maximize their self-interest -- is mistaken.

- Why?
- The short answer is that we cannot justify the situation to those who lose out in society (“the losers”) on the grounds that the average utility is high.
- Scanlon rightly points out that the fact that one option promotes higher average utility than another one does not settle the matter as to which option is morally justified.

A more detailed answer...

- A more detailed answer is that the kind of impartiality required by contractualism must ensure that a course of action be justified to every individual affected, no matter who he or she is.
- But Harsanyi interprets this condition as the one under which all parties would have an equal chance of being anyone in society.

- This interpretation, Scanlon rightly points out, is mistaken.
- For the losers can reasonably reject any principle which purports to justify their much worse condition by reference to the fact that others are better off (and hence average utility is higher).

- Scanlon thinks that the problem lies in the possibility that a much worse condition suffered by a few can be justified by the fact that many people enjoyed a somewhat higher level of well-being.
- [One implication: If contractualism is correct, then we cannot justify to TIPD patients that they should put up with there being no PAS, because this would be better for everyone in society – collectively considered.]

- Scanlonian contractualism can avoid this problem of aggregation.
- The origin of the problem is the supposition common to Harsanyi and Rawls mentioned above.

- In addition, Rawls seems to have no strong justification for suppressing people's moral views in the Original Position.

- In contrast, in Scanlon's theory those contracting hypothetically to reach an agreement have access to moral reasons.
- These moral reasons are not just what the contracting parties' moral beliefs happen to be; rather, these are moral reasons as they objectively are.
- Thus, the "veil of ignorance" is unnecessary in Scanlon's theory.

- Unfortunately, for Scanlon, he goes on to argue for the “Individualist Restriction,” which is also mistaken.

Objections & Replies

- **Objection #1:**
- Scanlon's contractualism is sometimes criticized as follows:
- Objection #1: It is wrongness that explains unjustifiability. Not the other way round.
- Reply: For Scanlon,
Wrongness (impermissibility) = unjustifiability

Objection #2

- “What makes torturing babies wrong, for instance, is not the act being reasonably rejectable, but rather that it is a cruel act.”
- My reply: This objection mistook the theory to be a first-order (or normative) theory, where it is in fact a second-order theory.

Objection #3

- Scanlon does not have a clear notion of how to derive “principles.” Rawls has derived his “two principles of justice” rather tightly.

Reply

- At the level of deliberation, Scanlon's theory is quite similar to some version of Virtue Ethics.
- There is no algorithm (or mechanical procedure).
- We just have to use our practical wisdom to search for the principles.

Consequentialism

- Conceivably, someone who is against PAS for TIPD patients would say that allowing this would cause much greater negative utility.
- So conceivably, it may be easier to justify banning PAS if one is a utilitarian or consequentialist.
- This is because the worsening-off of a TIPD patient can be “compensated” by others who would otherwise want to have PAS as well.

- But consequentialism (which includes utilitarianism) is not a plausible theory.
- Everyone agrees that consequences are relevant in moral deliberation.
- It does not follow from the fact that consequences are relevant that we are consequentialists.

- Consequentialism is **not** the theory that consequences are relevant and significant.
- Otherwise: we would all be consequentialists.
- Who would not want to buy a mobile phone, or a car, that has good consequences?

Consequentialism:

Consequences are the **only** relevant considerations.

- This makes consequences to be a very strong claim, because it would follow from consequentialism that:

- (1) Either fairness, justice, desert, equality are not important at all; (**act-consequentialism**), or alternatively
- (2) Fairness, justice, desert, equality are reducible into consequences (**rule-consequentialism**).

Neither of these claims are obvious.

I think that both claims are false.

Contractualism

- Although Scanlonian contractualism is a second-order theory, it has implications on first-order ethical questions.

- One important mission of contractualism is to undermine utilitarianism.
- Scanlon: Utilitarians hold on to Normative Utilitarianism not because it is plausible, but because it is supported by its second-order theory, Philosophical Utilitarianism.

- Philosophical utilitarianism:
the subject matter of morality is **nothing but**
individual well-being.

- As long as one subscribes to Philosophical Utilitarianism, the remaining question would seem to be which version of Normative Utilitarianism to adopt.
- Contractualism is a plausible alternative to Philosophical Utilitarianism.

- The first-order theory that coheres with contractualism would be nonconsequentialism.
- Nonconsequentialism:

Both consequences and deontological notions (such as fairness, justice, desert, equality) are relevant moral considerations to take into account in moral deliberation.

- Contractualism:
- “An act is permissible if and only if it is justifiable to everyone affected by it.”
- Question: Is PAS justifiable for everyone affected by it in society?

- Contractualism does not solve our problem immediately or directly.
- For it does not have an algorithm. (But what is, apart from act-utilitarianism?)

Contractualism directs our focus to the worst-off, or alternatively the group most-affected by the act or policy in question, however.

I shall argue:

- A legal ban on Physician-Assisted Suicide (PAS) cannot be justified to T1PD patients.

- Contractualism directs us to focus on those who are most adversely affected by a practice (such as PAS):
- In this case, we should focus on the predicament faced by TIPD patients.
- Can we justify to them that they cannot receive PAS, even if there are people (e.g., physicians, nurses, or relatives) who are willing to assist them to die?

- I shall argue that the answer is no.
- Because the case for PAS for TIPD patients is so strong, it is difficult to argue for it except by refuting counter-arguments.

Slippery-slope arguments

- **(A) Theoretical version:**
- If IPT patients can permissibly receive PAS, what about patients who are just paralyzed?
- If paralyzed patients can permissibly receive PAS, what about those who have a chronic disease and are tired of life? (since the minute difference does not matter)
- If these patients can permissibly receive PAS, what about those who are getting old, or have a minor ailment, but are tired of life?
- ...
- If ..., what about a seventeen-year old whose love was unrequited?

- This is essentially the Sorites Paradox – or Paradox of the Heap.
- It goes like this:

(1) One grain of sand does not make a heap.

(2) One extra grain would not turn a non-heap into a heap.

Therefore, two grains do not make a heap.

(2) One extra grain would not turn a non-heap into a heap.

(3) Three grains do not make a heap.

- ...
- (4) Four grains do not make a heap.
- ...
- (One million) **A million grains do not make a heap.**
- This last conclusion (in red color) is manifestly false.

Another version: Baldness

- Suppose the King dislikes bald men, and wants to kill all men who are bald.
- (1) The King kills a man without any strand of hair whatsoever.
- (2) Having one strand of hair would not turn a bald man into a non-bald man.
- (3) The King kills a man with two strands of hair.
- ...

- (n) The King kills a man with n strands of hair.
- This conclusion, with a large n , is manifestly false.
- Then what follows?
- (a) This kind of argument is fallacious.
- (b) Because the concept of baldness is vague.
- (c) However, it is ok to be confident about the two ends of a spectrum.

In the case of PAS

- (1) It is justified to think that it is permissible to allow an TIPD patient to have PAS.
- (2) It is not justified to allow a 17-year old whose love was unrequited to receive PAS (because her condition is temporary).

The Practical Version:

- If there is PAS for TIPD patients, the particularly vulnerable patients (especially those dying in overcrowded hospitals that had scarce resources) might be pressured into a decision for death, which they would not otherwise make.
- They might be pressured by the thought that they are burdening their family and children both in terms of time and finance.

- This argument is an empirical one.
- It might even be true in a particular community C1.
- But this would require empirical evidence to establish.

- Two caveats:

(1) Even if this argument holds in community C1, it may not hold in another community (C2).

- Just as we cannot say that this sort of scenario does not hold in our community, we also cannot say that it holds.
- More empirical study is necessary.

- On the other hand, we can rely on preliminary data available in other countries, such as the Netherlands, Belgium, as well as USA (the States of Oregon & Washington) – with the awareness that these data may not automatically apply in our community.

- (2) Even if the Practical Slippery holds in a community, what follows?
- Does it follow that TIPD patients cannot permissibly receive PAS?
- I don't think so.

Reasons:

- (a) TIPD patients are the worst-off group among all patients.
- How PAS would affect them should be given priority.

- (b) (i) The other groups – who are better-off – should be educated as to how to not face the pressure to die (if they do not want to die).
- (ii) Other means might include legal prosecution against those who put pressure on their elderly to “exit” from the scene.
- (iii) Dworkin *et al* also mention the need for two independent physicians to sign certification before a TIPD patient can receive PAS.

Another objection: “It is always wrong to kill.”

- (1) It is wrong to kill.
- (2) Assisted killing is also wrong.
- (3) PAS is assisted killing.
- ----
- (4) PAS is also wrong.

- The first premise “It is wrong to kill” does not always hold.
- Reason: It is not wrong to kill in self-defense.
- Many types of act, e.g., killing, lying, are not always wrong.
- Whether a particular act is permissible or not would depend on the context.

Killing in law

- Thus, the law says that although killing is usually wrong, killing in self-defense is not a crime because self-defense is a “legal justification” to killing.

Lying

- Lying is not a crime in many contexts, though perjury in court, obtaining property by deception, and tax evasion (for instance) are illegal.
- Lying in various contexts is morally permissible.
- E.g.: Your aunt asks you whether her new hat looks good on her. Your affirmative answer may be a lie. But it is morally permissible.

- A Nazi soldier knocks on your door and asks you whether you know where your Jewish friend (Cohen) is.
- You believe that if you told him the truth, Cohen will end up in the gas chamber.
- Is it permissible for you to lie?
- Is it mandatory that you lie?
- Yes to both questions.

- Even though PAS in some context (e.g., the 17-year old) is impermissible, it is permissible in many contexts.
- The most obvious case is the IPT patients.

- Other arguments:
- The Sanctity of Life
- Hippocratic Oath



Thank you !

