

# Assisted Dying—Happiness of the Many vs Happiness of the Few

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## INTRODUCTION

Death and happiness are not natural twins. Death to us often means the loss of a loved one and the end of something we value highly namely, life. And yet, death and happiness are not as far apart as we might think. Death can be a relief after suffering, can be a blessing if it is the peaceful ending of a long and fulfilled life. If you ever find yourself in a morgue, witnessing a post-mortem—as I did just the other week—you will notice that some corpses actually look happy, at ease. But apart from those of us for whom life has become unbearable, and for whom death sounds like relief, life tends to hold more promise of happiness than death.

In Europe, assisted dying has only been legalised in four countries, Belgium, Luxembourg, the Netherlands and Switzerland. In many other jurisdictions, like England and Wales, legal change is being discussed, without any debates coming to fruition. In the academic literature and in the debates on a possible legalisation of assisted dying, a main counter-argument is the threat it would pose to the vulnerable, especially the old and the disabled. As such, the prohibition of assisted dying fulfils the safeguarding obligation the State has under Article 2 of the European Convention on Human Right (ECHR), the right to life. However, this condemns a small number of individuals, who are wishing to die but are unable or unwilling to commit suicide unaided, to continue with what to them is an unbearable life. Further arguments blocking a possible legalisation of assisted dying are the sanctity of life and the fear of a slippery slope. While these arguments certainly have validity, this should not lead to the prohibition of a practice that could end unbearable suffering of a few –in this case assisted dying.

First, Epicureanism and Stoicism will briefly be introduced to set the scene regarding happiness. Based on Epicurus' theory that happiness is the absence of bodily pain and freedom from fear, it can be argued that the prohibition of assisted dying is protecting the happiness of the many by protecting the vulnerable, while condemning the few who wish to die to endure their suffering.

Next, the arguments used in the English Parliament in debates around the legalisation of assisted dying will be introduced to show the conflict between the many and the few, before bringing the two together to see whether it is true that only one can be achieved, the happiness of the many or the happiness of the few. This article argues

that with careful safeguards in place happiness can in fact be attained for everyone. This argument will lean on the experiences of Belgium, Luxembourg, the Netherlands and Switzerland where assisted dying is legal, without there being an actual threat to the vulnerable. It should therefore be possible to further the happiness of the few through the legalisation of assisted dying, without an inevitable loss of happiness of the many.

## HAPPINESS

Happiness is an elusive concept. Some would argue that being happy means being content, others would say being happy is an elated feeling, or that happiness is the absence of negative feelings.<sup>1</sup> For the purpose of this argument, the ideas on happiness propagated by Epicureanism and Stoicism will be followed.

### **Epicureanism**

Epicurus, a Greek philosopher living around 300 BC, promoted the idea that achieving happiness is the goal in life. According to Epicurus, the highest pleasure is the absence of pain. The main aim in life is to achieve tranquillity, called "Ataraxia", 'a state in which you are not hindered by pain or anything upsetting. You are functioning normally and nothing unpleasant is interfering'.<sup>2</sup>

Epicureanism promotes a philosophy based on Hedonism: good is what is pleasant. But not all pleasures should be chosen. Those that bring an increase in further pains should be avoided. Also, 'we prefer present pains to present pleasures if this brings an increase in future pleasures'.<sup>3</sup> Epicureanism is not as selfish as it sounds, everyone should chose to be virtuous, not for its own sake, but for the pleasure that brings.

According to Epicure, if one is leading a pleasurable life in the right way, there is no need to be anxious about whether death might rob one of time. The length of life does not impact on the value of life. 'According to Epicurus and his followers, the sole good is pleasure. They considered pleasure to be noncumulative, so that, once made "pleasant", life as a whole is as good as it can be, and death is innocuous'.<sup>4</sup> A longer perfect life is no better than a shorter perfect life,<sup>5</sup> so dying does not take anything of value away.

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<sup>1</sup> For a starting point on the answer of what happiness is see Kesebir, P and Diener, E (2008) 'In Pursuit of Happiness. Empirical Answers to Philosophical Questions' (3) *Perspectives on Psychological Science* 117.

<sup>2</sup> Annas, J (1987) 'Epicurus on Pleasure and Happiness' (15) *Philosophical Topics* 5 at 8.

<sup>3</sup> Ibid at 5.

<sup>4</sup> Luper, S (2013) 'Exhausting Life' (17) *Journal of Ethics* 99 at 113.

<sup>5</sup> See also Mitsis, P (2015) 'When Death is There, We are Not: Epicurus on Pleasure and Death' in Bradley, B et al (eds) (2015) *The Oxford Handbook of Philosophy of Death* Oxford University Press 200.

Since something that does not cause pain causes no harm to us, death is harmless, as without pain.

More powerful than physical pain is mental suffering. According to Epicureanism, the primary mental pain burdening human pleasure is fear, especially fear of death. Epicurus wrote in Letter to Menoeceus, 'Therefore, that most frightful of evils, death, is nothing to us, seeing that when we exit, death is not present, and when death is present, we do not exist. Thus it is nothing either to the living nor the dead, seeing that the former do not have it, and the latter no longer exist'.<sup>6</sup> Furthermore, according to Epicureans, a short happy life is preferable to a longer painful one,<sup>7</sup> which we shall keep in mind for the question of a legalisation of assisted dying considered below.

## **Stoicism**

Another philosophical stream important to my argument about assisted dying is Stoicism. Stoicism is a school of Hellenistic philosophy which promotes the idea that only virtue is good. Being virtuous is enough for being happy. Happiness is the fulfilment of our rational human nature. Like Epicureanism, Stoicism does not believe that a good life becomes better by being lived for longer. 'Stoics argue that a perfected life (a perfectly virtuous life) will be exhausted despite its persistent goodness, so continuing life does not better it'.<sup>8</sup>

Stoics believe that a perfect person knows no fear. Stoicism promotes the idea that emotions result in errors of judgment which are destructive. 'The Stoics did, in fact, hold that emotions like fear or envy (or impassioned sexual attachments, or passionate love of anything whatsoever) either were, or arose from, false judgements and that the sage—a person who had attained moral and intellectual perfection—would not undergo them'.<sup>9</sup>

## **ASSISTED DYING**

In England, a number of Assisted Dying Bills have been introduced to Parliament, however, none have made it past a second reading. The following sections will look at the arguments commonly brought forward in debates. For reasons of brevity, examples will be taken from three debates, namely the ones on the Patient (Assisted Dying) Bill 2003, the Assisted Dying for the Terminally Ill Bill 2005 and the Assisted Dying Bill 2014.

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<sup>6</sup> As quoted *ibid* at 207.

<sup>7</sup> See *ibid* at 212.

<sup>8</sup> Luper 'Exhausting Life' *supra* note 4 at 115.

<sup>9</sup> Stanford Encyclopaedia of Philosophy, available at: <<https://plato.stanford.edu/entries/stoicism/>>.

## Happiness of the Many

Prohibiting assisted dying serves the protection of the happiness of the many. This can be seen from the arguments that are used in debates on assisted dying. The three strongest arguments against assisted dying are the danger of a slippery slope—a legalisation on a small scale quickly growing and possibly leading to non-voluntary deaths—the needed protection of the vulnerable and the sanctity of life.

### Slippery Slope

According to the slippery slope argument, in order to prevent cases of involuntary assisted dying, all sorts of active assistance in dying are to be prevented. The danger in permitting assisted suicide was for example stressed by Pedain who claimed that 'the prohibition [of assisted suicide] is meant to protect vulnerable persons from acting upon a death wish which might be merely transitory in nature, induced by third parties, or related to personal conditions affecting the validity of individual judgments'.<sup>10</sup> Slippery slope arguments are not totally unjustified, as legalisation can lead to abuse. However, the argument should not be used to prevent desirable and progressive change but to make sure relevant safeguards are put in place to prevent abuse.

In 2003, Lord Alton claimed that in Holland, where assisted dying was already legal, many cases of involuntary assisted dying occurred.<sup>11</sup> He concluded that '[w]e decriminalise; we move to voluntary euthanasia; we move on to involuntary euthanasia; and then, because it becomes so routine, we move on to non-reporting in some 50 per cent of cases'.<sup>12</sup> In 2006, Lord Tombs argued that 'it would be all too easy for a right to opt for a deliberate death to become a duty to do so for the sake of others. The exception would then become normal, irrespective of the real wishes and welfare of the patient'.<sup>13</sup> This point was also made by the Lord Bishop of Portsmouth, Stevenson, who claimed that a possibility quickly can become a duty.<sup>14</sup> In a similar vein were Baroness Finlay's claims that 'In letting this Bill proceed, we would be giving a message to the rest of the world that we will abandon the vulnerable and treat suffering by ending the sufferer's life. Let us get on with working for patients to live as well as possible until a natural dignified death and teaching others how to do it, not be taken up in becoming complicit in suicide'.<sup>15</sup>

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<sup>10</sup> Pedain, A (2002) 'Case Comment. Assisted suicide and Personal Autonomy' (61) *Cambridge Law Journal* 511 at 512.

<sup>11</sup> See Hansard Vol 648, Friday 6 June 2003, col 1617.

<sup>12</sup> Ibid at col 1617.

<sup>13</sup> Hansard Vol 681, Friday 12 May 2006, col 1212.

<sup>14</sup> See ibid at col 1227.

<sup>15</sup> Ibid at col 1203.

The risk of a slippery slope was also stressed by Lord Hayhoe who stated 'The Netherlands experience is relevant here, and I recall [...] how our abortion law gradually slipped, without change to the legislation, away from a restricted right into, effectively, abortion on demand'.<sup>16</sup>

The slippery slope fear can only be addressed by highlighting the absence of the laws and practices in countries where assisted dying has been legalised already. As the experiences in Belgium, Luxembourg, the Netherlands and Switzerland show, there is no automatic 'slipping down a slope'.<sup>17</sup> In order to prevent the slippery slope, tight safeguards have to be in place when legalising assisted dying, together with trust in the reasonableness of lawmakers and the morality of practitioners.

### **Protection of the Vulnerable**

In combination with the slippery slope argument, the most widely used argument against the legalisation of active assisted dying is the threat it would pose to the vulnerable, especially the old and sick.<sup>18</sup> It is argued that once active assisted dying was a legal option, people would be coerced into requesting it without truly wanting it themselves. The fear is that greedy family members, or those burdened with the duty to care—whether in a private setting or State health agencies facing growing demand and declining budgets—would take the option of active assisted dying as an easy way out of their responsibility, and by persuading the old or sick person into asking for death could get rid of the unwanted obligation.

Lord Turnberg for example saw the legalisation of assisted dying as a threat to vulnerable people, arguing that, 'The probability of a risk to the aged, the disabled and the depressed, who will feel a burden to others despite the safeguards in the Bill, seem to me too high. The finality of that risk, the termination of a person's life, is too severe'.<sup>19</sup> Lord Elton showed practical concerns stemming from his experience as a former Minister of Health: Decisions on policies are always connected to funding. Therefore, since palliative care is more expensive than assisted suicide, the legalisation of assisted dying would be a threat to the vulnerable.<sup>20</sup>

In 2014, Baroness O'Cathain claimed that 'there is a grave danger that if the [assisted dying] Bill were to be enacted, the vulnerable would be the most negatively affected. We are talking about the vulnerable as if they are the subject and object of the

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<sup>16</sup> Ibid at col 1246.

<sup>17</sup> See for example Francis, N 'Assisted Dying Practice in Benelux: Whitepaper 1' *Dying for choice* 13<sup>th</sup> November 2016.

<sup>18</sup> This view is for example held by John Keown. To him the wish of the majority to continue living and be protected from threats should trump the wish of a minority to have the freedom to ask for death. See Jackson and Keown (2011) *Debating Euthanasia* Hart at 97.

<sup>19</sup> Hansard Vol 681 supra note 13 at col 1208.

<sup>20</sup> See ibid at col 1213-14.

Bill, but we are not going through the effect on the individuals'.<sup>21</sup> It would be too easy to simply dismiss this concern. Liberties always carry the danger of being used against someone by a stronger party hoping to profit from that in some way. It is not only imaginable but also likely that someone will try to coerce someone else into requesting assisted dying, or that an individual feels herself or himself to be a burden and therefore requests assistance in dying without actually desiring to be dead. However, a prohibition of active assisted dying is not the solution to draw from this fear. It should be possible to introduce safeguards that will make sure that most deaths are truly voluntary. Abuse can never be wholly prevented, but that should not stop the introduction of a much needed right to die.

Also a robust counterargument to the fear of a slippery slope which poses a danger to the vulnerable, is that we still retain our moral values. It is not evident why the possibility of an assisted death for someone willing to die should then lead to society tolerating people being killed who do not wish to die.<sup>22</sup> Legal dangers do not automatically lead to moral acceptance.

While some fear of the old and vulnerable is understandable, a Bill introduced should have working safeguards in place that enable suffering individuals to receive help, while protecting those who wish to live.

## **Sanctity of Life**

Lastly, the sanctity of life is usually used as an argument against active assisted dying—or any other life-shortening measure for that matter. The claim is that life is sacred—either due to religious reasoning, i.e. because it is given by God, or because of its intrinsic value. According to Dworkin, 'a premature death is bad in itself, even when it is not bad for any particular person'.<sup>23</sup> It is true that life is something special, with a worth above other things. But we cannot condemn people to suffer because we view their life as being sacred, if they themselves do not wish to live that life anymore. There should be a way to waive one's right to life, even if it is seen as something special or indeed sacred. A way to accommodate both the idea that life is sacred but also the idea that one can want to give it up would be to approach the value of life in the manner that Dworkin does in *Life's Dominion*. He differentiates between intrinsic value and personal value. While the intrinsic value applies to every human life—regardless of age, health, personal situation, etc—personal value gets attributed by the person living the life in question. This view entails that intrinsic value cannot be done away with, it is part of

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<sup>21</sup> See Hansard Vol 755, Friday 18 July 2014, col 801.

<sup>22</sup> See for example Brassington, I (2008) 'Five Words for Assisted Dying', (27) *Law and Philosophy* 415 at 430.

<sup>23</sup> Dworkin, R (1993) *Life's Dominion. An Argument about Abortion and Euthanasia* HarperCollins at 69. Prematurity of course depends on the viewpoint, the person wishing to die would probably not see their death as being premature.

being human and seems to be linked to dignity. Personal value, however, is highly subjective and can change. It grows with the development of personality and can diminish due to personal losses and tragedies, illnesses or just age. While the intrinsic value therefore remains, the personal one varies and can even be completely lost. While accepting the intrinsic value, the loss of the personal value should then allow for the person to seek death. The intrinsic value should consequently not weigh more heavily than the personal one.

The sanctity of life claim—when based on religious views—implies that life is given by God and can therefore only be taken away by God.<sup>24</sup> While living one's life, one always 'belonged' to God;<sup>25</sup> one was only the custodian but not the owner of one's life.<sup>26</sup> To Harries, the gift of life remained precious even in suffering, and in his view a Christian should not seek an earlier than naturally caused death.<sup>27</sup> A religious person may hold a view on life and death based on their religion. Therefore, if a God prohibits a certain way of dying, it must be avoided by that individual (if possible and not harming anyone else). However, a religious view should not be used to create a law in a secular society so that a religious belief can prevent an individual from acting on their informed wish to die.<sup>28</sup> So while MPs are of course influenced by their own personal beliefs and religious values, the decisions they make must be applicable to society as a whole.<sup>29</sup> As Jackson has claimed, the sanctity of life argument preventing any form of suicide should only apply to people whose religious views endorse this understanding.<sup>30</sup> According to Jackson, the monopoly on life and death now rests with the medical profession rather than with God.<sup>31</sup> Furthermore, what seems tolerable for one individual might not be tolerable to another,<sup>32</sup> so there should not be one prohibition valid for everyone, no matter their individual belief. According to Hoerster, the religious rejection of assisted dying was illogical in that it would mean that God approved of (legal) death penalty or killings in war, but not of assisted dying.<sup>33</sup> A religious rejection could only be a weak one in a modern, secular society.<sup>34</sup>

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<sup>24</sup> See for example Harries, R (2010) *Questions of Life and Death. Christian Faith and Medical Intervention* Society for Promoting Christian Knowledge at 99.

<sup>25</sup> See for example Kreß, H (2012) *Ärztlich Assistierter Suizid. Das Grundrecht von Patienten auf Selbstbestimmung und die Sicht von Religionen und Kirchen – ein Unaufhebbarer Gegensatz?* [Physician Assisted Suicide. The Fundamental Right to Self-Determination of Patients and the View Held by Religion and Church – an Irresolvable Conflict?] Zentrum für Medizinische Ethik at 6.

<sup>26</sup> See *ibid* at 9.

<sup>27</sup> See Harries *Questions of Life and Death* *supra* note 24 at 119.

<sup>28</sup> This view is for example held by McLean, S (2007) *Assisted Dying: Reflections on the Need for Law Reform* Routledge at 30.

<sup>29</sup> See Wicks, E (2009) 'Religion, Law and Medicine: Legislating on Birth and Death in a Christian State' (17) *Medical Law Review* 410 at 431. Of course this claim has some difficulties to it when it comes to religious peers in the House of Lords, appointed for their status as bishop or chief rabbi.

<sup>30</sup> See Jackson and Keown *Debating Euthanasia* *supra* note 18 at 37.

<sup>31</sup> See *ibid* at 38.

<sup>32</sup> See *ibid* at 41.

<sup>33</sup> Hoerster, N (1998) *Sterbehilfe im Säkularen Staat* [Assisted Dying in a Secular State] Suhrkamp at 20.

<sup>34</sup> *Ibid*.

In the debates, legalising assisted dying is specifically opposed by individuals holding strong religious beliefs. Baroness Masham, for example, used the Biblical commandment 'Thou shalt not kill' as an argument against the Bill.<sup>35</sup> Likewise, Lord Ahmed relied on his religious beliefs in making his argument. 'As Muslims, we believe that life is sacred and that only God, the creator of all, is the owner of life. Like all other Abrahamic faiths, we believe that only almighty God will decide about the life end of each one of us'.<sup>36</sup> The Lord Bishop of St Albans, Herbert, also condemned the Bill due to his religious values. 'I believe, as a Christian, in the profound and inalienable sanctity of human life. I recognise that that is a view shared by some humanists and members of other faiths. I believe that our life is God-given and that the purpose of our lives is not terminated by death'.<sup>37</sup>

Lord St John again employed a highly religious argumentation in the debate of 2006. He claimed that 'the end of life, the last period of life, is not a wasteland necessarily. It can be a wonderful period of renewal, reconciliation and acceptance'.<sup>38</sup> The sanctity of life argument is generally used as a counter-argument to that of personal autonomy. As Lord Alton stated, "Autonomy" is one of the buzz words of the pro-euthanasia lobby and can clearly be seen in the wording of the Bill. However, autonomy is not an absolute right that each of us, as individuals, can exercise while living in our own little bubbles'.<sup>39</sup>

These examples from debates on Bills to legalise assisted dying in the English parliament demonstrate how the happiness of the many is being used as an argument against the legalisation. However, equally, in every debate, arguments in favour of the happiness of the few are being made.

## **Happiness of the Few**

Legalising assisted dying would give happiness to a small group of suffering individuals, by allowing for them to put an end to their pain and suffering. The main arguments in favour of assisted dying are the dignity and autonomy of the suffering individual as well as equality in being able to set an end to life at a chosen time.

## **Dignity**

One of the strongest arguments in favour of active assisted dying is the right to a dignified life. If taken seriously, this should also include a dignified dying process, since dying is part of life. While it can be argued that death is the antithesis to life, it should really be seen as being part of it. Dignity should translate to a respect for life not in the

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<sup>35</sup> See Hansard Vol 648 supra note 11 at col 1634.

<sup>36</sup> Ibid at col 1641.

<sup>37</sup> Ibid at col 1654.

<sup>38</sup> Hansard Vol 681 supra note 13 at col 1196.

<sup>39</sup> Hansard Vol 648 supra note 11 at col 1617.



abstract but connected to the individual personality. Consequently, dignity should not be used as a prohibition of practices leading to death. The dignity of the individual asks for their choice to be respected. What a person understands under a dignified death is as individual as a dignified life. The argument of dignity is therefore tightly linked to that of autonomy.<sup>40</sup>

This common argument in favour of assisted dying was, for example, stressed by Lord Gray in his support for the Bill, 'Dignity in death is something to which everyone is entitled, but there is precious little dignity in having to continue to suffer the pain, mental agony and the indignity of the loss of control of one's bodily functions, sometimes for a period of months or even years'.<sup>41</sup>

For Baroness Flather, the 2003 Bill was about being able to choose a way of dying, 'I do fear what is known as a bad death. I think that that is what we are talking about today. We are not talking about getting rid of vulnerable people'.<sup>42</sup> She also brought up the need to rethink the current stance on assisted dying based on the fact that changes in medicine have prolonged the average lifespan. 'In the past few years life has been prolonged enormously, but the quality of life and the control of some diseases has not improved with that'.<sup>43</sup>

Lord Taverne claimed, 'I support the Bill because, if it were passed, it would make this country a more compassionate and civilised society'.<sup>44</sup> This can be seen as an argument based on dignity, as the compassion is needed to bring about a dignified death. Lord Russell-Johnston referred to *Pretty*<sup>45</sup> in arguing for a right to a dignified, autonomous end, 'I cannot understand the attitude of those who for ideological or theological reasons are prepared to deny people such as Diane Pretty the right to end their misery by their own choice. They should have that right. Those who oppose the Bill are also denying choice'.<sup>46</sup>

Lord Laing would want that possibility of choice for everyone, including himself, 'To deny me the legal benefit of a painless and dignified death, putting an end to terminal indignities would seem to me to be a high degree of bureaucratic arrogance and morally questionable'.<sup>47</sup> In 2014, Lord Brit stated that '[a] civilised society must offer, too, expert advice and support to ensure that the individuals who have made that choice can

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<sup>40</sup> See for example Biggs, H (2001) *Euthanasia, Death with Dignity and the Law* Hart, who claimed that autonomy and self-determination were 'key factors in conflating euthanasia and dignity', at 149.

<sup>41</sup> Hansard Vol 648 supra note 11 at col 1649.

<sup>42</sup> Ibid at col 1663.

<sup>43</sup> Ibid at col 1664.

<sup>44</sup> Ibid at col 1624.

<sup>45</sup> [2001] EWHC Admin 705, 31 August 2001, [2001] EWHC Admin 788, 18 October 2001, [2001] UKHL 61, 29 November 2001, and ECtHR application no. 2346/02, 29 April 2002. Dianne Pretty had asked the Director of Public Prosecutions (DPP) to grant her husband immunity from prosecution should he accompany her to Switzerland in order to be able to commit suicide with the help of Dignitas. This kind of assistance is prohibited under section 2 of the Suicide Act 1961. The DPP refused, which was upheld by the courts, as no immunity can be given before an act has been carried out.

<sup>46</sup> Hansard Vol 648 supra note 11 at col 1633-4.

<sup>47</sup> Ibid at col 1638.

reach the last and gravest of life's milestones with dignity and certainty'.<sup>48</sup> Or as Baroness Royall of Blaisdon put it, 'For me, the goal must be to allow people who are suffering at the end of their life to choose to die. This, I believe, is a matter of compassion and human dignity'.<sup>49</sup> What should be added here, is that people should be allowed to choose for themselves when that end of their life shall be.

Dignity can be seen as looming large in the dying-debate since it is a powerful foundation to the general idea of human rights. If it is seen as being part of being human and the basis for human rights then it can be taken to condemn assisted dying—because dignity is a foundation for the right to life and the protection of each person's life—and at the same time as favouring assisted dying to help end a dignified life in a dignified manner.

## **Autonomy**

Another strong argument in favour of active assisted dying is that of autonomy. We seem to aspire to live our lives as autonomously as possible. We see it as part of our human nature to be able to decide freely how to live our lives. Being limited by duties and obligations seems frustrating, especially when young, and only becomes acceptable with maturing. However, being fully dependent on others is something most of us would despise. And yet, it can happen to all of us. Illnesses and disabilities are something nobody is safe from. But even when dependent on others, we want to be in control of ourselves as much as possible. This can lead to the wish to also be in control of how and when to die. Most of us probably wish for a natural death of old age after a long and fulfilled life. And most people do not want to actively end their lives even when severely ill or suffering. But for some the wish exists to decide freely when and how to end their life.

What is problematic with the autonomy argument in the assisted dying debate is, that, if taken seriously, it would have to mean that assisted dying had to be available to everyone who is wishing to die but being unable to kill themselves, regardless of whether they were terminally ill or not.<sup>50</sup> Limiting the offer to those terminally ill is meant to refute slippery slope claims. However, based on autonomy (and likewise dignity and equality), assisted dying would have to be available to everyone incapable of committing suicide unaided.<sup>51</sup>

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<sup>48</sup> Hansard Vol 755 supra note 21 at col 803.

<sup>49</sup> Ibid at col 833.

<sup>50</sup> See for example Price, D (2009) 'What Shape to Euthanasia after Bland? Historical, Contemporary and Futuristic Paradigms' (125) *Law Quarterly Review* 142 at 163.

<sup>51</sup> It could even be argued that it should then be available to everyone, whether able to commit suicide unaided or not, in order to provide everyone with the same option of a dignified death.

Very rarely is autonomy used in opposition to assisted dying. The claim then would be that acknowledging the free will of a free individual cannot lead to its extinction.<sup>52</sup> A more logical view of autonomy would allow for the free individual to will his/her own extinction. According to Antoine, asking for assistance in dying did not mean giving up one's autonomy but was an act of self-determination.<sup>53</sup> After all, an individual is allowed to make decisions even if they harm that individual. The harm should be accepted to go as far as death.

Lord Lester stressed both the main arguments in favour of assisted dying, autonomy and dignity, 'Patients have the right to life. They also have the right to personal autonomy and to live and die with dignity'.<sup>54</sup> Supporting the Bill to him did not mean ignoring the sanctity of life. 'This brave Bill does not deny the inevitability of death. It affirms the sanctity of life while acknowledging that there are other fundamental values that deserve our respect and compassion'.<sup>55</sup> For Lord Plant of Highfield the individual should be free to decide on the time of death since 'we do not have the moral or empirical certainty to make it reasonable to deny assistance with dying for those who clearly want to end their lives because of the level of unrelievable suffering they endure'.<sup>56</sup> To him, the counter-argument of the intrinsic value and sanctity of life had little value since they would also have to forbid war and capital punishment.<sup>57</sup> But most importantly to him, the value of a specific life could only be determined by the individual living it.<sup>58</sup> 'I think, therefore, that we do not have the moral certainty to deny this option [i.e. death] to people whose strong belief is that they need it'.<sup>59</sup> His view was shared by Lord Alexander who stated that 'an essential, fundamental issue in the Bill is the right to choice; or, as the noble Lord, Lord Joffe, put it so well in his opening address in words which I do not shrink to accept, the loss of personal autonomy'.<sup>60</sup>

For Baroness Greengross, assisted dying did not devalue any form of life. Instead, letting someone choose on his own behalf, granting him autonomy over his life, meant valuing that life.<sup>61</sup> Furthermore, against Lady Howells' claim that assisted dying would lead to discrimination, Baroness Greengross stated the opposite, that not allowing assisted suicide was a way of discriminating against the disabled.<sup>62</sup>

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<sup>52</sup> See for example Lillie, H (2010) 'Sterbehilfe. Medizinethisch' [Assisted Dying. Medical Ethics] in Wittwer, H et al (eds) *Sterben und Tod. Geschichte – Theorie – Ethik* [Dying and Death. History – Theory – Ethics] Metzler at 231.

<sup>53</sup> Antoine, J (2004) *Aktive Sterbehilfe in der Grundrechtsordnung* [Active Assisted Dying under Basic Law] Duncker und Humblot at 262.

<sup>54</sup> Hansard Vol 648 supra note 11 at col 1596.

<sup>55</sup> Ibid at col 1597.

<sup>56</sup> Ibid at col 1619.

<sup>57</sup> See ibid at col 1619.

<sup>58</sup> See ibid at col 1620.

<sup>59</sup> Ibid at col 1622.

<sup>60</sup> Ibid at col 1622.

<sup>61</sup> Ibid at col 1650.

<sup>62</sup> Ibid at col 1651.

In 2006, Lord Desai, who declared himself to be an atheist, claimed that 'Religion relies on fear and the religious love suffering. I am an atheist and I have no fear, certainly no fear of God or the afterlife. I value my life, but I value it for the pleasure it gives me, and as soon as I cannot derive any pleasure, I want to be rid of it'.<sup>63</sup>

This sort of freedom, which is an aspect of autonomy, was also mentioned by Lord Birt in 2014, 'In a free, secular society, my Lords, the presumption should be that adults are free to do what they wish, subject only to not impinging on the rights of others'.<sup>64</sup> In a similar vein spoke Lord Alli: 'I believe that I am the guardian of my own life; I believe that my behaviour is my responsibility; and I believe that, in the end, I should have the right to decide whether I wish to bring my life to an early close'.<sup>65</sup> When talking about the value of life, Baroness Warnock claimed that there was no universal value, 'I do not think there is such a thing, such a stuff, as life that is abstract and common to everybody. Everybody has his own life and values, each for himself'.<sup>66</sup> Baroness Young of Old Scone stated that '[t]he Bill is not about pity; it is about power – the power of being in control of one's own death'.<sup>67</sup>

If we accept the idea of the human being as autonomous and free, then he or she should also be free to make decisions about his or her own life, even if they are detrimental to health and even life. This idea has been accepted in so far as patients are allowed to refuse treatment even if that is endangering or ending their lives. The logical next step would, therefore, have to be to accept a voluntary death wish and help people who are unable to do so unaided to end their lives in the way they desire.

## **Equality**

Another argument in favour of active assisted dying is to stop the discrimination brought about by the current legal situation. It can be seen as discrimination that able-bodied individuals can commit suicide freely without facing sanctions if failing, while those incapable to commit suicide unaided cannot legally end their lives. This brings about legal problems for those willing to assist, be it doctors, family members, friends, or other assistants. According to Nietzsche for example, we have the freedom to want to die at the right time.<sup>68</sup> Suicide therefore is an option of human autonomy.<sup>69</sup> Taking that

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<sup>63</sup> Hansard Vol 681 supra note 13 at col 1258.

<sup>64</sup> Hansard Vol 755 supra note 21 at col 803.

<sup>65</sup> Ibid at col 808.

<sup>66</sup> Ibid at col 831.

<sup>67</sup> Ibid at col 870.

<sup>68</sup> See Nietzsche, F *Vom Vernünftigen Tode* [About Sensible Death] referred to by Baumann, U (2001) *Vom Recht auf den Eignen Tod. Die Geschichte des Suizids vom 18. bis zum 20. Jahrhundert in Deutschland* [About the Right to a Self-Determined Death. The History of Suicide in Germany from the 18<sup>th</sup> to the 20<sup>th</sup> Century] H. Böhlhaus Nachfolger at 293-4.

<sup>69</sup> Ibid at 294.

thought further, if autonomy meant we were allowed to commit suicide, then for equality reasons it should also be available to those requiring assistance. As Battin put it, 'control of one's own death as far as possible is a matter of fundamental human rights'.<sup>70</sup>

Often held against the discrimination-claim is that there is no express right to commit suicide, it is only no longer criminal. Since there is no right to commit suicide,<sup>71</sup> there is no discrimination in not making assistance available to those unable to do it without help. This is the reason why a right to die is needed. The actual discrimination would then have a legal basis for claims to be brought forward.<sup>72</sup>

Baroness David claimed in 2006 that the Bill was about providing for an option,<sup>73</sup> 'As a 92 year-old, [...] I think it is patronising for opponents of the Bill to suggest that elderly people are unable to make informed decisions about their lives. If I were terminally ill, I believe that I would be the only person with the right to decide how I died and whether I preferred palliative care to assisted dying'.<sup>74</sup>

Baroness Hayman also claimed that the Bill would give terminally ill patients an option since 'at the end of life we need to show people love and respect as well as giving them physical and medical care. For some people [...] that love and respect would be given and devoted by the implementation of the Bill'.<sup>75</sup> The Earl of Glasgow even claimed that having that option should be a human right.<sup>76</sup> 'The sincere and considered desire of a terminally ill patient to be allowed to die should be a human right. Surely, and I address this to the right reverend Prelates in particular, God gave us free will. Why does God deny us that free will when it comes to the approach of death?'<sup>77</sup>

Lord Gilmour, in 2014, pointed out the discrimination caused by the illegality of assisted suicide when he advised, 'Suicide is legal and now the Bill's opponents have to explain why those who want to kill themselves because they are terminally ill and in agony, but are unable to do so because of their illness, should not be put in a position to do so, like all the rest of us. No amount of talk about palliative care will alter that position'.<sup>78</sup> A similar argument was made by Baroness Warnock who stated that assisted dying was never intended to be or become a substitute for palliative care. However, 'the law should be changed in such a way that they [a small minority who wish for assisted suicide], in their extreme circumstances, should be allowed to follow the morality in

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<sup>70</sup> Battin, M (1994) *The Least Worst Death* Oxford University Press at 165.

<sup>71</sup> An argument as to why there is no express right to commit suicide can be seen to be that it is damaging to family and friends. It therefore ceases to be a liberty right. See *ibid* at 278.

<sup>72</sup> Article 5.3 of the Convention on the Rights of Persons with Disabilities (CRPD) for example puts an obligation on States to tackle discrimination by making reasonable accommodations.

<sup>73</sup> See Hansard Vol 681 *supra* note 13 at col 1203.

<sup>74</sup> *Ibid* at col 1203.

<sup>75</sup> *Ibid* at col 1213.

<sup>76</sup> The right to choose was also stressed by Baroness Flather in 2014 who told the House about her disabled husband who 'says that disabled people should always have exactly the same rights as able-bodied people and it will be their choice'. Hansard Vol 755 *supra* note 21 at col 899.

<sup>77</sup> Hansard Vol 681 *supra* note 13 at col 1240.

<sup>78</sup> *Ibid* at col 1204.

which they do believe, not another which would compel them to live against their wish'.<sup>79</sup> This view was also held by Baroness Greengross, 'Most people do not suffer if they receive good, comprehensive palliative care. That is why I support it so strongly. However, we know that a minority do not. For them, this Bill, were it an Act, would bring a sense of security [...] It is a form of insurance policy'.<sup>80</sup>

These last quotes highlight very well how the legalisation of assisted dying would strengthen the happiness of the few, by addressing their suffering and offering them a way out of what for them has become an unbearable existence.

## CAN'T WE ALL BE HAPPY

So why can we not all be happy? Currently, assisted dying is being prohibited in most European countries. Legalisation has taken place in Belgium and the Netherlands in 2002,<sup>81</sup> and in Luxembourg in 2009.<sup>82</sup> In Switzerland it had not been a criminal offence since the introduction of the Swiss Criminal Code in 1942.<sup>83</sup> Apart from those four jurisdictions, active assistance in dying is not legally available in Europe. This promotes the happiness of the many, by answering to our fear of a slippery slope and of dangers posed to the vulnerable while not allowing the few to be happy, who seek to end their suffering and thus reach tranquillity and peace.

To appease this conflict we have to go back to the beginning of this article and the thoughts on happiness promoted by Epicureanism and Stoicism. What we can take from Stoicism and Epicureanism is that for one, the length of life does not impact on the happiness of said life and also that we should let fear dictate our decisions. Both these aspects directly impact on the legalisation of assisted dying.

With a careful legalisation of assisted dying, happiness—in the form of relief of suffering—can be given to the few, while maintaining that of the many with the use of stringent safeguards. With coherent safeguards in place, no actual threat will come of a Bill legalising assisted dying. To enable the happiness of the few, as well as the many, England and Wales should pass a Bill that legalises assisted dying based on unbearable mental or physical suffering, as has been the case in Belgium, Luxembourg and the Netherlands.

It can be argued that allowing assisted dying based on mental suffering introduces the problem of mental capacity. However, Halliday, for example, reports that statistics

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<sup>79</sup> Ibid at col 1221.

<sup>80</sup> Ibid at col 1240.

<sup>81</sup> The Belgian Act on Euthanasia of 28th May 2002 and Termination of Life on Request and Assisted Suicide (Review Procedures) Act, 1 April 2002.

<sup>82</sup> Loi du 16 mars 2009 sur l'euthanasie et l'assistance au suicide [Law on Euthanasia and Assisted Suicide of 16 March 2009].

<sup>83</sup> Swiss Criminal Code 1942, article 115.

show that only few cases in Belgium and the Netherlands are based on mental suffering and that for safety reasons 'it should be subject to a mandatory second opinion by a psychiatrist'.<sup>84</sup> Similarly, focussing on Belgium, Van Wesemael et al report that 'euthanasia was granted less often when depression, weariness of life, or not wanting to be a burden on the family were indicated as one of the reasons'.<sup>85</sup> So while capacity has to be treated carefully, there is no reason to exclude mental suffering from the outset.

Admittedly, if the suffering individual is not believed to be in the last stages of his or her life, an argument can be made that their situation could change in the future. However, this should only be taken into consideration to some degree. If the suffering has reached an –for the individual– unbearable degree, then that is the only issue of concern. Furthermore, as a response to this argument it could be suggested that the Dutch and Belgian law be followed which 'require that suffering to be unrelievable, an objective assessment and thus dependent upon medical opinion'.<sup>86</sup>

A necessary safeguard is time. It should not be permitted to request assistance in dying and then go through with it almost instantly. In order to avoid, for example, cases of young people requesting to die because they feel that the pain of their broken-heart has made their life unbearable, a certain amount of time has to pass between the suffering individual making the request and it being granted. In the Netherlands, for example, a verbal request as to be followed by a written one, both have to be repeated, a second, independent physician will consult with the person wishing to die, before the assisted death will be scheduled. 'Only rarely does euthanasia talk actually end in a euthanasia death'.<sup>87</sup>

A vital question is what kind of age limit should be introduced. The two most logical variants are either having the age limit at 18 years, or alternatively not having an age limit at all. If one looks at figures from Belgium, where assisted dying is available to children, as well as adults, it can be concluded that there is no grave danger to the vulnerable in making assisted dying available to everyone. In the years 2014 and 2015, no one below the age of 18 has received assistance in dying in Belgium,<sup>88</sup> the vast majority was between 70 and 90 years old, and the majority suffering of physical illnesses like cancer.<sup>89</sup> In a study in the Netherlands, the rate of minors receiving assisted dying at the hands of a physician 'were too low to be statistically valid'.<sup>90</sup>

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<sup>84</sup> Halliday, S (2013) 'Comparative reflections upon the Assisted Dying Bill 2013: a plea for a more European Approach' (13) *Medical Law International* 135 at 150.

<sup>85</sup> Van Wesemael, Y et al (2011) 'Process and Outcomes of Euthanasia Requests Under the Belgian Act on Euthanasia: A Nationwide Survey' (42) *Journal of Pain and Symptom Management* 721 at 726.

<sup>86</sup> Halliday, S 'Comparative reflections upon the Assisted Dying Bill 2013' supra n 84 at 151.

<sup>87</sup> Norwood, F et al (2009) 'Vulnerability and the 'slippery slope' at the end-of-life: a qualitative study of euthanasia, general practice and home death in The Netherlands' (26) *Family Practice* 472 at 477.

<sup>88</sup> The first request by a minor that was granted was in 2016, see 'Belgium minor first to be granted euthanasia' available at: <<https://www.bbc.co.uk/news/world-europe-37395286>>.

<sup>89</sup> See Van Wesemael, Y et al 'Process and Outcomes of Euthanasia Requests' supra note 85 at 721.

<sup>90</sup> Battin, M et al (2007) 'Legal physician-assisted dying in Oregon and the Netherlands: evidence concerning the impact on patients in "vulnerable" groups' (33) *Journal of Medical Ethics* 591 at 597.

Consequently, a broad legalisation of assisted dying based on unrelievable, unbearable physical or mental suffering should be an aim for the UK, as well.

## CONCLUSION

Following the Epicurean and Stoics view that happiness is the absence from fear and pain, the legalisation of assisted dying would bring happiness to the few who are suffering unbearably. However, the current laws focus on the happiness of the many as the vulnerable are protected, thus addressing their fears.

The debates around assisted dying must go on. However, the current arguments are too emotional. What is needed is a more rational approach to our fears. Looking at Belgium, Luxembourg, the Netherlands and Switzerland helps to address worries surrounding the legalisation of assisted dying, as the experience of the countries show that assisted dying can be legalised without posing a threat to the vulnerable or leading down a slippery slope. With enough safeguards in place, the legalisation of assisted dying will bring happiness to the few without diminishing the happiness of the many.