2. 'A rights-based approach is the best way forward for medical law'.

Do you agree? Justify your position in the context of two topics.

Introduction

The sheer superlativeness of the claim renders it implausible. To clarify the claim, Part 1 provides a thin account of a rights-based approach. However, it will not give 'the best way forward' a more specific meaning in order to avoid artificially restricting the range of relevant desiderata.

Drawing upon issues surrounding foetal status and voluntary euthanasia, this essay will argue that a rights-based approach to medical law is not a panacea. Part 2 argues that a rights-based approach sidesteps basic questions concerning moral rights. Part 3 queries a rights-based approach's capacity to consider the larger context, balance between rights, and make sense of certain moral objections. Part 4 argues that the analytical work done by a rights-based approach in the 'right to die' case law is modest at best and is liable to mislead at worst. Part 5 uses the relational approach to juxtapose the strengths and weaknesses of a rights-based approach. The conclusion is predictable but true: medico-legal issues are far too complex to insist upon any monolithic approach; rather, we should remain open to insights accruing from a range of perspectives.

1. *Outlining a Rights-based Approach*

This Part shall outline a rights-based approach by elaborating on the analytical structure of rights and the distinction between legal and moral rights, while minimising any theoretical commitment to maintain its generality.

First, this essay confines right-holders to individuals; the far more contentious concept of group rights will not be considered.

Second, an essential feature of rights is their peremptory quality. This has been famously and pithily expressed as *inter alia* 'rights as trumps' (by Dworkin) and 'side-constraints' (by Nozick). Rights to X erect a 'jurisdictional frontier' that excludes considerations relating to the desirability or goodness of X and looks only to those relating to the entitlement to X.[1] This rough-and-ready account intentionally leaves many issues underspecified. In principle, a rights-based approach could provide a basis for common action without deeper agreement. For instance, a contemporary Kantian might believe 'the right to commit suicide' track the fundamental distinction between 'the right' and 'the good' (this is

[1] N Simmonds, *Central Issues in Jurisprudence* (Sweet & Maxwell 2013), 279.

ironic, given Kant's actual beliefs), whereas a rule-utilitarian might believe the same 'right' exists because, on a weighing up of the relevant welfare considerations, having this right promotes utility. As we shall see, in practice these theoretical disagreements unsurprisingly come back to haunt us.

Third, we should be wary of conflating legal and moral rights; this essay will discuss both and make clear which is being discussed. For one, legal rights are much easier to ascertain than moral rights, for the prosaic reason that legal systems invariably incorporate the analytical structure of rights, whereas meta-ethical theories are and will continue to be essentially contested.[2] There is also no need to assume that each moral right must be given effect by a correlative legal right. For example, even if abortion is justified because of, say, a woman's moral right to privacy, the Abortion Act 1967 arguably gives effect to this *moral* right in England, Wales and Scotland by creating wide *legal defences* to earlier laws criminalising abortions.[3]

As such, the claim that a rights-based approach is the best way forward for medical law will be thus reformulated: medico-legal issues are best understood, analysed and resolved by considering the moral and legal rights at stake.

2. *Who has rights and which rights?*

Whether and which moral rights exist is a thorny meta-ethical question that plagues the rights-based approach. We might refer to, say, the Universal Declaration of Human Rights as an expression of the moral rights we have by dint of common humanity.[4] But these highly abstract statements are inadequate for dealing with concrete medico-legal controversies.

Suppose, *arguendo*, that all persons possess the moral right to life. The vexed debate on foetal status, for instance, reveals deep disagreement over personhood. The need to interpret rights attaching to personhood consistently – an inherent feature of a rights-based approach that may prove useful in other areas – leads us to difficult conclusions. For example, if we insist that personhood of a human foetus begins at conception, we must defend the charge of speciesism and explain why personhood is not extended to unborn kittens, or, indeed, to animals in general.[5] On the other hand, if we insist on some minimum cognitive threshold, we

2 Simmonds (n 1) 287.
3 Cf *Roe v Wade*, 410 US 113 (1973), which held that a woman's *legal* right to privacy under the 14th Amendment trumped many state and federal restrictions on abortion in the US.
4 The preamble refers to 'the inherent dignity and of the equal and inalienable rights of all members of the human family'.
5 M Tooley, 'Abortion and Infanticide' (1972) 2 *Philosophy and Public Affairs* 37, 51.

have to explain why infants and the severely disabled enjoy the same right to life as the average person.[6] Most would not bite the bullet and embrace the implications of a vastly expanded personhood or deny the personhood of infants and the severely disabled.

By taking a leaf from Chau and Herring's approach to the definition of death,[7] I believe linking personhood to the right to life is a mistake, as far as medical *law* is concerned. The law could simply provide answers to a range of questions (When can a foetus be aborted? Does killing a foetus count as killing a person in criminal law? Is a pregnant woman free to imbibe alcohol? When can a foetus sue for civil compensation?) without referring to foetal status. Each of these questions is by no means easier to answer than that of foetal status, but this approach clarifies the specific issues at stake and avoids the Procrustean bed of providing a uniform answer. After all, it is possible both for non-persons to have rights or interests protected by the law (e.g. laws prohibiting animal cruelty), and for persons to have rights which are trumped by competing rights or other considerations (see Part 3). Indeed, this is the best justification for the law's piecemeal treatment of foetuses.[8]

Returning to the earlier point, a rights-based approach could thus be criticised for sidestepping rather than resolving the thorny meta-ethical issues surrounding moral rights. That the foetal status debate provokes uncertainty over whether personhood is a prerequisite for a right to life (or moral rights in general) highlights the difficulties for a rights-based approach in tricky situations without consensus, situations which medical law does not lack.

3. *Rights, Context and Other Rights*

This Part examines the difficulties with a rights-based approach even if we agree that certain rights exist.

Suppose there is consensus that the moral right to die exists; there may still be difficulties in operationalising this right in law. As Herring emphasises, the facts in a typical suicide diverge significantly from those in appellate cases.[9] Instead of taking their lives after 'calm, rational thinking', most suicidal individuals are 'plagued by mental health problems, drug and alcohol misuse, and relationship difficulties'.[10] This is compounded by institutional

6 J Finnis, 'The Other F-word' (2010) *Public Discourse: Ethics, Law and the Common Good*, at: <http://www.thepublicdiscourse.com/2010/10/1849/>.

7 J Herring and P-L Chau, 'The Meaning of Death' in J Herring et al (eds), *Death Rights and Rites* (Hart 2007).

8 For a description of the law, see J Herring, 'The Loneliness Of Status: The Legal And Moral Significance Of Birth' in F Ebtehaj et al (eds), *Birth Rites and Rights* (Hart 2011), 98-101.

9 For a different view, see Lord Neuberger, who suggests that such extenuating circumstances are typically present, in *R(Nicklinson) v Ministry of Justice* [2014] UKSC 38 [133].

10 J Herring, 'Ending the Shackles at the End of Life' (2013) 21 Medical Law Review 487, 492.

problems like ineffective suicide prevention policy and inadequacies in mental healthcare and eldercare. As such, legally recognising this right without first solving these institutional problems perpetuates the real risk of sending vulnerable individuals the misguided message that 'you have a right to kill yourself if you want', rather than offering much-needed care and comfort aimed at dissuading them from committing suicide. A possible criticism of a rights-based approach is its failure to capture such broader considerations. But this is overstated: a nuanced rights-based approach can be alive to the possibility that the ostensible peremptoriness of a right might be displaced by sufficiently weighty considerations. Rights theorists like Nozick and Dworkin have certainly done so.[11] Given the facts in the UK, the right to die is probably thus outweighed: not only are 'rational' suicidal individuals in the minority among suicidal individuals, they can also lawfully avail themselves of voluntary palliated starvation.[12]

Returning to the earlier discussion on foetal status, suppose we accept that a foetus is a person with a right to life. Does the peremptoriness of this right resolve the abortion debate? Far from it, as Thomson famously argued.[13] She articulated a woman's right to abort by arguing that, firstly, the right to life does not include a right to use another person's body; secondly, abortion in certain circumstances is analogous to self-defence, a widely-accepted right that justifies killing another person; and, thirdly, aborting an unwanted foetus caused by voluntary intercourse may be permissible. Thomson's arguments both affirms and diminishes a right-based approach. To pro-choicers, the peremptoriness of a *right to abort* properly captures the force of a woman's reasons to abort. To pro-lifers, that these reasons can acquire peremptory force illustrates the imprecision of rights-based reasoning. An ideologically neutral criticism focuses on the analytical structure of rights: how does one resolve two conflicting rights, assuming both a foetus' right to life and a woman's right to abort exist? Furthermore, it is another vexed meta-ethical question whether values can conflict.

Furthermore, difficult facts might lead us to reconsider whether the jurisdictional frontier erected by rights is really defensible. Suppose the moral rights to die and to abort exist. Consider Keown's heartbroken teenager who wants to commit suicide or Dworkin's woman who wants to abort to avoid rescheduling a holiday. If you think (as I do) that their rights should be limited, can this be justified using a rights-based approach? I am sceptical that our objection

[11] Simmonds (n 1) 283.
[12] J Savulescu, 'A simple solution to the puzzles of end of life? Voluntary palliated starvation' (2014) 40 *Journal of Medical Ethics* 110.
[13] JJ Thomson, 'A Defense of Abortion' (1971) 1 *Philosophy and Public Affairs* 1.

to either scenario could be properly articulated without looking beyond entitlement, thus demonstrating the limits of a rights-based vocabulary.

4. *Interpreting Legal Rights*

The problems detailed in Parts 2 and 3 similarly exist vis-à-vis *legal* rights, as exemplified by the case law adopting a rights-based approach to voluntary euthanasia. When Parliament abolished the crime of suicide in the Suicide Act 1961, the minister clarified that it was not intended to condone suicide, much less establish a 'right to die'.[14] This explained why the s 2(1) crime of assisting another's suicide was retained. But the legal discourse quickly became dominated by rights-based reasoning as a result of human rights litigations concerning s 2(1).

The ECtHR fired the opening salvo in *Pretty v UK*,[15] holding that the Article 8 right to private family life of the European Convention of Human Rights (ECHR) included the right not to be 'forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity'.[16] The House of Lords in *R (Purdy) v Director of Public Prosecutions*[17] accepted *Pretty* and by the time of *R (Nicklinson) v Ministry of Justice*,[18] within the Supreme Court there was a '(hidden) five–four majority that is willing to make a declaration of incompatibility [under s 4 of the Human Rights Act] unless exceptions to the [s 2(1) offence] are introduced'.[19]

This sits uneasily alongside *Rabone v Penine NHS Care Trust*,[20] which held that a positive obligation to protect from suicide under Article 2 ECHR was owed to a *voluntary* mentally health patient. If, according to *Nicklinson*, the State violates a capacitous person's Article 8 right by preventing another person from assisting her with acting upon settled decision to take her own life, how can the State concurrently have a positive obligation to take reasonable steps to preserve life under Article 2? Whether the two legal rights can be reconciled is unclear and the Supreme Court's jurisprudence in this area is unhelpfully ambiguous.[21]

The foregoing illustrates the limitations of a rights-based approach. By extending abstractly formulated legal rights beyond their core textual meaning, the courts have leeway to

14 J Keown and E Jackson, Debating Euthanasia (Hart 2012), 111.
15 (2002) 35 EHRR 1. This overruled an earlier House of Lords case, *R (Pretty) v DPP* [2001] UKHL 61.
16 *Pretty v UK* (n 13) [36].
17 [2009] UKHL 45.
18 [2014] UKSC 38.
19 E Wicks, 'The supreme court judgment in *Nicklinson*: one step forward on assisted dying; two steps back on human rights' (2015) 23 Medical Law Review 144, 155.
20 [2012] UKSC 2.
21 E Wicks, *The State and the Body: Legal Regulation of Bodily Autonomy* (Hart 2016), 66-67.

fudge the law using the façade of *interpreting* legal rights. Even if this is not constitutionally illegitimate, it risks producing inconsistencies with *other* legal rights. This leeway allows the courts to choose *which right* has been violated: that s 2(1) was found to violate Article 8, instead of Article 2 or 3, suggests that the courts are rightly wary of imposing a positive duty on the State to facilitate voluntary euthanasia,[22] probably in order to respect the constitutional separation of powers (instead of rights-based considerations). Taken together, the analytical work done by a rights-based approach is modest at best and at the expense of a hidden danger: if Herring is right about the broader contextual considerations bearing upon the right to die,[23] such considerations are ill-suited to the judicial process and the focus on particular litigants' legal right to die may produce a distorted view of the issues at stake.

5. *Relational critique of rights*

The weaknesses of a rights-based approach are thrown in sharp relief by contrast to the relational approach: the essentially individualistic outlook of rights fails to capture our relational nature and, consequently, the language of rights runs counter to the lived realities of those pondering medico-legal decisions. Herring, a champion of the relational approach, has pointed this out in respect of both voluntary euthanasia and foetal status.

As regards voluntary euthanasia, he convincingly argues that a rights-based approach to end of life issues is inappropriate: those at death's doorsteps do not speak in terms of 'choice' or 'rights', but rather in terms of 'pain, guilt, misery, confusion, compulsion, despair, darkness, and light', and that a case for assisted dying built on the latter is more persuasive.[24] We have seen how this approach limits the excesses of the rights-based approach and emphasises the lexical priority of tackling larger institutional problems over tailoring the correct legal response.

As regards foetal status, however, he is less convincing. Herring relies on the premises that legal and moral rights generally flow from *relationships* instead of *status* and that the relationship between the foetus and the woman and the biological realities of pregnancy together justify abortion but not infanticide.[25]

We can challenge the first premise by modifying Finnis' thought-experiment: suppose a socially-isolated vagabond suffers from a rare disease and loses all his memories, language,

[22] This goes to the heart of an ambiguity within analytical structure of a rights-based approach. A Hohfeldian might eradicate this ambiguity by classifying a 'right' as a liberty, claim, power or immunity. But just as one need not be a Hohfeldian, perhaps one advantage of a rights-based approach is that it can fudge the precise form of a right.
[23] See n 10 and accompanying text.
[24] Herring (n 10), 497.
[25] Herring (n 8), 102-103.

skills, etc.[26] But after nine months of treatment, during which he will be unconscious, he will regain his cognitive capacities. Does his social isolation extinguish rights he might otherwise have? I suspect any 'relationship-based' argument for the vagabond's right to life ('we share a relationship with him as a member of society/humanity/persons') inevitably shades into status-based arguments.

An alleged advantage of the relational approach is it can justify different legal and ethical responses that reflect pregnant women's wide-ranging understandings of their relationship with the foetus. But is there a limit to this? For instance, would Herring's regime allow late-term abortions of unwanted but viable foetuses, if the abortion is no safer than a C-section? Under such fact patterns, foetal status probably re-enters our calculus. Finnis would challenge the desirability of reflecting laypersons' understandings and experiences in the first place: 'the very idea of human rights and status is of someone who matters whether we like it or not, and even when no one is thinking about them.'[27]

The stakes are heightened once we realise the *very realities of giving birth* might change with technology. Scientists have already created an artificial uterus that gave birth to endangered baby sharks. Human embryos were grown *in vitro* for up to 14 days to aid research on developmental disorders occurring in the post-implantation stage of pregnancy.[28] Indeed, just as epidurals have become commonly used today, raising foetuses in an artificial uterus could be framed as the next step in safeguarding the health of both women and foetuses and furthering reproductive equality.[29] If technology enables foetuses to grow outside a biological womb, not only would Herring's relational approach be upended, at least vis-à-vis *such* foetuses, but the need to settle the rights and interests of foetuses *qua* foetuses would become pressing. Our hypothetical vagabond thought-experiment may become an actual moral dilemma. Such complex philosophical questions would not be readily soluble on any approach. But a rights-based approach, unlike its relational counterpart, is at least asking the right questions.

[26] Finnis (n 6).
[27] ibid.
[28] Indeed, the 14-day limit on growing embryos this way is a legal limit, not a technical one.
[29] Zoltan Isvan, 'Artificial Wombs Are Coming, but the Controversy Is Already Here' at <https://motherboard.vice.com/en_us/article/artificial-wombs-are-coming-and-the-controversys-already-here>.

Conclusion

Provoked by the claim's superlativeness, much of this essay has been devoted to criticising the rights-based approach, perhaps unduly so. As such, it bears mentioning that our moral and legal discourse, within and without medical law, has surely been enriched by the language of rights. Alas, life, medicine and morality – the bread and butter of medical law – are far too complex to sustain the claim that a rights-based approach is *the best way* forward. An open mind and a sharp eye may prove to be far more rewarding.