

THE (CONTINGENT) VALUE OF AUTONOMY AND THE REFLEXIVITY OF (SOME) BASIC GOODS

ADAM J. MACLEOD*

I INTRODUCTION

Many of the legal and policy issues about which people today get most exercised turn on a little-understood relationship between two fundamental principles. On one hand is the principle of autonomy, which, for reasons explored in this article, is often employed in defence of greater freedom and less government intervention in matters of morals and self-harmful conduct. On the other hand is respect for basic goods, those ends and purposes that constitute ultimate, underived, and intelligible reasons for rational action, and which include knowledge, human life, and community, among others. Basic goods provide *reasons* for human purposing and action (as opposed to desires, emotions, and other sub-rational motivations for action), and are valuable in and of themselves. Thus states act rationally, though not always fully reasonably, when they prohibit injury to basic goods, even by coercive laws and policies.

Renewed debates in the United Kingdom and the United States over decriminalisation of physician assisted suicide have in recent months¹ brought into sharper focus foundational disagreements about the relationship between autonomy and basic goods, such as human life. Careful attention to this relationship might enable productive discussion of this and other issues, such as the nature of marriage, the justness of abortion, and controversial uses of tax revenues. This paper attempts to reconcile respect for autonomy with respect for basic human goods. There exists reason to believe that this is not a futile project. Though consensus is certainly too much to hope for in the near future, recognizing and exploring the complexity of the relationship between autonomy and basic goods arguably supplies a way to think about controversial issues while avoiding the polemics that so often attend public debate.

However, if a way forward can be found, its discovery must follow a candid examination of the limits of the principles at play. Arguments in favour of a legal right to assisted suicide and abortion, and for recognizing same-sex marriage, share an essential proposition: that by her un-coerced and autonomous choice the individual person determines the value of certain human goods, such as life and marriage.² I shall argue that

* Associate Professor, Faulkner University, Jones School of Law. I am indebted to Andy Olree for his comments and clarifications, and to Rob McFarland and Jeff Hammond for their editorial comments. The errors are all my own.

¹ Legalisation of assisted suicide in Washington State (by popular referendum) and Montana (by judicial decision) has once again drawn attention to a public debate that previously appeared to have been largely resolved, or at least to have reached a stalemate, in the United States. Proponents of assisted suicide have in the last couple of years made a renewed effort at legalisation also in the United Kingdom.

² It is thus no accident that these arguments often invoke Justice Kennedy's now well-worn claim from *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833 (1992).

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. ... These matters, involving the most

this position is unreasonable, but that one *can* respect the significant value of autonomy without going so far. On the other hand, many who oppose assisted suicide and abortion and defend conjugal marriage invoke traditions about human goods, morals, and human flourishing. Arguments from tradition alone are not productive in dialogues between persons from different traditions, who do not share common assumptions about the good.

This article begins by reviewing the efforts of two legal philosophers, Joseph Raz and Robert George, to reconcile the value of autonomy with the intrinsic value of other human goods. Raz and George provide reason to believe that understanding, at least, is possible. The article next considers some bold claims about the value of autonomous choice by two scholars who favour legalization of assisted suicide, Andy Olree and Ronald Dworkin. Though Olree's and Dworkin's treatments of autonomy and basic goods both fail to account for the full value of many basic goods, such as human life, their arguments suggest a reason why the argument over assisted suicide has become intractable. The article concludes by fashioning a framework for thinking about contested legal issues in a productive manner.

II BEGINNINGS

The course of this argument begins at a helpful exchange between two legal philosophers, which occurred two decades ago. Joseph Raz in his work *The Morality of Freedom*, set out an argument for 'perfectionist liberalism', in which Raz asserted that moral neutrality by government is impossible and attempts to remain neutral are undesirable.³ In other words, governments cannot, and should not attempt to, make laws apart from consideration of the good. Raz nevertheless maintained, consistent with his liberal commitments, that government should not criminalize 'victimless' immoralities, which harm only the actor. Robert George, a natural lawyer, in a thoughtful criticism of Raz's work affirmed the importance of protecting liberty and autonomy in certain policy areas, such as laws pertaining to speech and religion, but disagreed with Raz about which harms governments may coercively deflect. The work of these two thinkers provides a blueprint for understanding the relationship between autonomy and basic goods that obsolesces much of the trench warfare so prevalent in discussions about controversial issues. I will attempt to set out a very crude summary of their thoughtful contributions in this area.

In rejecting the possibility of moral neutrality by governments, Raz set himself against influential non-perfectionist liberals, such as John Rawls. An individuals in Rawls'

intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State: at 851.

³ Loosely, perfectionist theories hold that the law can and should take into consideration human flourishing and moral harms. Raz explains, "Perfectionism" is merely a term used to indicate that there is no fundamental principled inhibition on governments acting for any valid moral reason, though there are many strategic inhibitions on doing so in certain classes of cases.' Joseph Raz, 'Facing Up: A Reply' (1989) 62 *Southern California Law Review* 1153, 1230. Raz contrasts perfectionist liberalism with 'liberal doctrines of moral neutrality.' Joseph Raz, 'Liberalism, Skepticism, and Democracy' (1989) 74 *Iowa Law Review* 761, 782.

hypothetical original position, who is ignorant of the conception of the good that he will adopt once he enters society, is not, as Rawls supposed, capable of endorsing neutral principles of equal liberty.⁴ Like Thomas Nagel before him, Raz observed that ‘there is no way of justifying the conditions of choice in the original position except from the point of view of a certain conception of the good.’⁵ In other words, Rawls’ argument for neutrality is not neutral but instead biased.⁶

Contemporary contests over controversial political questions have confirmed Raz’s scepticism of state neutrality. As states have in the last few decades adopted putatively neutral positions on abortion, assisted suicide, the definition of marriage, and other issues that implicate competing conceptions of the good, they have invariably affirmed a partisan, liberal conception of the good and rejected rival conceptions. Rancour and controversy in the United States over abortion (for example) has increased, rather than decreased, since the Supreme Court’s decision in *Roe v Wade*,⁷ which discerned a constitutional right to abortion. By adopting an ostensibly neutral posture toward the question, the Court in fact injected itself into the inherently partisan debate; to legalize abortion is to adopt the partisan proposition that unborn human lives are not as valuable as other human lives.⁸

Raz lauded liberalism’s concern for the ‘dignity and integrity of individuals’,⁹ but he suggested that this concern militates not against moral ideals and reliance upon

⁴ Joseph Raz, *The Morality of Freedom* (1986) 117-18.

⁵ Ibid 118.

⁶ Ibid 118-20. George offered a similar criticism of Rawls:

Rawls’s use of the original position as a device for choosing principles of justice may be criticized on two related grounds. First, by depriving persons in the original position of any commitments and allegiances beyond the commitment of each to his ‘own ends,’ whatever they turn out to be, Rawls smuggles strong liberal individualist presuppositions into the apparently weak and uncontroversial premises of his argument. Secondly, while Rawls’s construction of the original position succeeds in eliminating bias as between persons, it does not itself escape bias as between competing conceptions of the person, and, thus, between rival conceptions of the good.

Robert George, *Making Men Moral: Civil Liberties and Public Morality* (1993) 133. George observes that persons in the original position would choose Rawls’ liberal principles only if they are persons in the form that Rawls’ liberalism conceives them: at 133. And Rawls’ conception of persons is at least as controversial as those conceptions of persons and the good that Rawls’ neutrality principle would exclude from consideration in political debate: at 133.

⁷ 410 US 113 (1973).

⁸ Similarly, as I have explained elsewhere, courts creating same-sex marriage have committed themselves to partisan conceptions of the good, despite their claims to neutrality. Adam J MacLeod, ‘The Search for Moral Neutrality in Same-Sex Marriage Decisions’ (2008) 23 *BYU Journal of Public Law* 1. To create same-sex marriage is not to adopt a position of neutrality but rather to endorse the partisan proposition that same-sex intimacy is equally as valuable (morally and/or socially) as conjugal monogamy and more valuable than other social arrangements, such as polygamy, polyandry, and non-intimate mutually-supportive relationships. The only way for courts to avoid this partisanship is to defer to legislative judgments. And legislatures, which make laws, cannot avoid partisanship at all. In other words, either the courts or the lawmakers (or both) must be partisan between rival conceptions of the good. Neutrality is simply impossible. Even silence on the definition of marriage, as where a state abolishes marriage altogether, entails the state adopting a position about the value of the institution of marriage.

⁹ Raz, ‘The Morality of Freedom’, above n 4, 162.

conceptions of the good, but rather in favour of a form of moral pluralism.¹⁰ Raz's moral pluralism would recognize a wide variety of forms of human flourishing, but would also acknowledge that certain choices are simply bad, lacking in all objective value. Thus, while autonomy in Raz's view is intrinsically valuable, respect for autonomy does not entail that individuals should be free to make immoral choices, that is, choices lacking in all objective value. According to Raz, 'Autonomy is valuable only if exercised in pursuit of the good. The ideal of autonomy requires only the availability of morally acceptable options.'¹¹

For Raz then, there is nothing inherently wrong with moral laws, those laws the purpose of which is to promote the moral well-being of, and to prevent serious moral harm to, citizens. The state may, for example, officially sanction and privilege institutions—marriage, universities—that protect the good and promote human flourishing. However, when government uses coercion to prevent people from harming themselves, it often goes too far, by deflecting autonomous choice.

George agreed with Raz that the value of autonomy is not absolute but rather 'conditional upon whether or not one uses one's autonomy for good or ill'.¹² However, George disagreed with Raz's claim that autonomy is intrinsically valuable. George observed, as Donald Regan did before him, that to claim that autonomy is intrinsically valuable entails concluding 'either that something intrinsically valuable is realized in autonomous but wicked choices, namely, the intrinsic value of autonomy as such, or that wicked choices are, by definition, never autonomous.'¹³ George thought the best resolution of this quandary was to reject the claim that autonomy is intrinsically valuable. Instead, autonomy is *instrumentally* valuable for the realization of certain extrinsic ends.¹⁴

Among the more fundamental, extrinsic ends for which autonomy is instrumentally valuable are reflexive goods, 'objects of choice whose value is dependent upon their being freely chosen'.¹⁵ Coerced friendship and religious adherence, for example, lack all intelligible value. Only if autonomously chosen does a friendship (even, or especially, with God) make sense as a reason for action.¹⁶ So if friendship and religion are basic goods, they are reflexive in nature.

One basic good that is reflexive in important respects is the basic good of morally upright choosing, what George, following other natural lawyers (including Thomas Aquinas and John Finnis), called 'practical reasonableness'.¹⁷ This is the good that one realizes when one chooses well between alternative courses of action, in a morally upright manner and

¹⁰ Ibid 111-33.

¹¹ Raz, above n 4, 381.

¹² George, above n 6, 177.

¹³ Ibid 175.

¹⁴ Ibid 180. 'If one's desire for autonomy is rationally grounded, its ground must be some good other than autonomy itself whose (fuller) realization is made possible or, at least, facilitated, by the possession of a requisite degree of autonomy': at 180.

¹⁵ Ibid 221 n 15.

¹⁶ Ibid 221.

¹⁷ Ibid 177.

consistent with one's own integrity. Practical reasonableness might be described as the practice of making moral decisions well. Practical reasonableness is 'a complex good whose central aspects include personal integrity and authenticity',¹⁸ which are central concerns of contemporary liberalism.¹⁹ It is a reflexive good because deliberation and choice enter into its very definition;²⁰ one can choose well only if one has the freedom to choose. As George noted, practical reasonableness 'can only be realized in choosing and... consequently requires the effective *freedom* to choose'.²¹

Though George defended moral laws in principle and in general, he asserted that any particular moral law might be inadvisable where the good that the state seeks to protect is reflexive. In such a case, any coercive attempt to protect the good (such as a law requiring observance of a particular religion) would necessarily prevent realization of that good; the coercion destroys the very good that the state seeks to promote. On this point, George set himself against any traditionalists who might advocate for an unlimited moral paternalism.

III AUTONOMY, ASSISTED SUICIDE, AND THE CHRISTIAN TRADITION

One of the most obviously-reflexive human goods is religious adherence. If, as George and others claim, religion is a basic human good, it is good only if autonomously chosen. Therefore, that much, though by no means all, of the thinking about the relationship between autonomy and religion is done by religious people should not surprise us. For the sake of simplicity and brevity (and because I am insufficiently versed in other religious traditions to comment on them with any authority), this part of the article will employ the perspective of the Christian religious tradition. And to give some additional shape to the discussion, it will examine the relationship between the Christian tradition and assisted suicide, an issue in which autonomy-based arguments play a prominent role. Indeed, because arguments over legalisation of suicide often bring autonomy and a basic human good—life—into direct conflict, assisted suicide will be a recurring case study in this article.

Christians have prominently influenced and advanced the opposition to decriminalisation of assisted suicide, but they have not been unanimous. Evangelical legal scholar William Stuntz has suggested that Christians ought to take an 'agnostic' posture toward criminalisation of assisted suicide.²² Another evangelical scholar, Andy Olree, has argued that, though committing or assisting voluntary suicides 'may be sinful', Christians ought not to seek to have those acts outlawed.²³ What do these claims teach us about the relationship between autonomy and basic goods, including religion and human life?

¹⁸ Ibid.

¹⁹ Indeed, integrity and authenticity figure prominently in the arguments of Ronald Dworkin, considered *infra*.

²⁰ George, above n 6,177.

²¹ Ibid 168.

²² William J Stuntz, 'Christian Legal Theory' (2000) 116 *Harvard Law Review* 1707, 1740.

²³ Andy G Olree, *The Choice Principle: The Biblical Case for Legal Toleration* (2006) 206.

Other Christians have gone farther, expressly endorsing the practice of assisted suicide. John Shelby Spong, an Episcopal bishop, has endorsed euthanasia and physician assisted suicide as consistent with 'Christian

A Christianity and Suicide

The orthodox Christian tradition has long condemned suicide.²⁴ From very early in church history, Christians have understood the Decalogue's prohibition of homicide²⁵ to include self-killing. Saint Augustine, reasoning that the commandment not to kill does not specify 'your neighbour' as its object, as other commandments do, concluded that suicide was murder.²⁶ This tradition remains unbroken in most, though not all, Christian denominations.²⁷

Thomas Aquinas also concluded that it is unlawful to kill oneself.²⁸ Aquinas and many Christian thinkers since him have reasoned to this conclusion on the foundation of both Christian dogma and secular, Aristotelian practical reasoning. The prohibition against killing is a moral rule which can be derived in practical reasoning from two self-evident principles, recognized by many Christians and non-Christians throughout history. First, human life is a basic good, meaning that it has intrinsic worth and it is categorically a

ethics.' John Shelby Spong, 'Death: A Friend to be Welcomed, Not an Enemy to be Defeated' in Timothy E Quill and Margaret P Battin (eds), *Physician-Assisted Dying: The Case for Palliative Care and Patient Choice* (2004) 150, 151. However, the basis for this endorsement is Spong's claim that changes in the times and in our 'developed consciousness,' at 157, particularly scientific and medical knowledge not available to the authors of Scripture, renders Christianity's central text, the Bible, obsolete: at 157-58. Humans in Spong's view have evolved to a point at which we should accept and embrace 'Godlike responsibilities': at 158. This is, to say the least, not a serious attempt to reconcile assisted suicide with the Christian tradition.

²⁴ The Bible, the central and foundational source of Christian doctrine, teaches that human beings are unique, that unlike the animals humans are created in the image and likeness of God, *Genesis* 1:26, and that taking the life of a human is fundamentally different than the act of killing an animal. When Cain committed the first murder by killing his brother Abel, God told Cain that Abel's blood called out from the ground and He placed Cain under a curse as punishment for his act. *Genesis* 4:10-12. The Bible claims that God alone has authority to give and take human life. *Deuteronomy* 32:39.

²⁵ *Exodus* 20:13.

²⁶ Augustine, *The City of God* Book I, Chapter 20.

²⁷ The National Association of Evangelicals, which speaks for dozens of Protestant denominations, condemns assistance in dying. See *Termination of Medical Treatment* (1994) <<http://www.euthanasia.com/evangel.html>> at 20 January 2009. The Catholic and Anglican churches, two of the three largest communities of Christians in the world, both continue to affirm the intrinsic value of human life and to condemn physician-assisted suicide and euthanasia. In a joint statement released in the fall of 2006, Pope Benedict XVI and Rowan Williams, the Archbishop of Canterbury, called for the promotion 'of respect for life from conception until natural death.' *Joint Declaration of Benedict XVI and Rowan Williams: Many Areas of Witness and Service in Which We Can Stand Together* (23 November 2006) <<http://www.anglicansforlife.org/resources/readarticle.asp?number=221&topic=&display=>> at 20 January 2009). Williams opposes the legalization of assisted suicide on the ground that legalization entails the claim 'that certain kinds of human life are not worth living.' John Keown and David Jones, 'Surveying the Foundations of Medical Law: A Reassessment of Glanville Williams's The Sanctity of Life and the Criminal Law' (2008) 16 *Medical Law Review* 85, 125 n 229. The Catholic Church teaches that an act or omission that of itself or by intention causes death in order to eliminate suffering constitutes a murder contrary to the dignity of the human person, *Catechism of the Catholic Church* #2277, and that suicide is an offense against self, neighbor, and God. Ibid 2281. And in his encyclical *Evangelium Vitae*, the late Pope John Paul II condemned legal recognition of so-called 'rights' to attack human life, including 'hastening death so that it occurs at the moment considered most suitable.' John Paul II, *The Gospel of Life* (1995) 24-33.

²⁸ Thomas Aquinas, *Summa Theologica* (1271) Part II, Q64, A5.

reason in and of itself for action, choice, and decision.²⁹ Its value does not derive merely from its instrumental usefulness for securing or enjoying other goods, such as health, aesthetic experience, or relationships (though in most cases it does have value for those extrinsic ends), and even where it ceases to be enjoyable or useful, it is ‘fulfilling in its own right’.³⁰

Second, one should never intentionally choose to do any act that does nothing but destroy a basic good, such as human life. Though one’s reason for choosing life might be defeated by some other reason, as where a fireman or a soldier risks his own life to save another, knowing that his death might result, but not intending it, one never has a reason deliberately to destroy innocent human life, even one’s own life. On the basis of these two premises and the biblical text that confirms them, Christian tradition affirms the ‘dignity of the human person’ and the teaching that, even where other goods may be considered ‘more precious’, the basic good of human life is ‘fundamental—the condition of all others’.³¹

Judge Neil Gorsuch has explored the implications of these principles for the problem of assisted suicide.³² If human life is a basic good, ‘it follows that we can and should refrain from actions intended to do it harm.’³³ This maxim Gorsuch calls the ‘inviolability-of-life’ principle.³⁴ ‘To act intentionally against life is to suggest that its value rests only on its transient instrumental usefulness for other ends.’³⁵ The inviolability-of-life principle thus rules out assisted suicide and euthanasia, though, as explained below, it would not require that measures must always be taken to keep human beings alive.³⁶

B *The Choice Principle*

²⁹ Neil M Gorsuch, *The Future of Assisted Suicide and Euthanasia* (2006) 157; John Finnis, *Natural Law and Natural Rights* (1980) 85-87.

³⁰ Gorsuch, above n 29, 157-58. Judge Gorsuch observes:

To claim that human life qualifies as a basic good is to claim that its value is not instrumental, not dependent on any other condition or reason, but something intrinsically good in and of itself. That this is true is suggested in part by the fact that people every day and in countless ways do something to protect human life (one’s own or another’s) without thinking about any good beyond life itself.

Ibid 158.

³¹ John M. Breen, ‘Modesty and Moralism: Justice, Prudence, and Abortion – A Reply to Skeel & Stuntz’ (2008) 31 *Harvard Journal of Law & Public Policy* 219, 245. These are not the only principles of practical reasoning that forbid acts of homicide, abortion, and euthanasia. Gerard Bradley has demonstrated that the prohibition against abortion, for example, can be derived from the Golden Rule: do unto others as you would have them do unto you. Gerard V Bradley, ‘When Is It Acceptable for a “Pro-Life” Voter to Vote for a “Pro-Choice” Candidate?’ in *Public Discourse* (October 21, 2008), available at <http://www.thepublicdiscourse.com/viewarticle.php?selectedarticle=2008.10.21.001.pdart>. For obvious reasons, the Golden Rule does not resolve the moral and jurisprudential problems posed by suicide or assisted suicide.

³² Gorsuch, above n 29, 158.

³³ Ibid 164.

³⁴ Ibid 167.

³⁵ Ibid 164.

³⁶ Ibid 218.

Andy Olree's opposition to assisted suicide prohibitions follows from what he calls 'the Choice Principle', his 'attempt to capture the essence of God's will for governors'.³⁷ The Choice Principle holds, 'In the absence of explicit New Testament instruction regarding the type of law being considered, a Christian should favour only those criminal laws which restrict acts directly victimizing others³⁸ and which are necessary to increase overall human Choice.'³⁹ The Choice Principle permits Christians to support only criminal prohibitions against acts that directly harm others and reduce overall choice.⁴⁰ Assisted suicide, Olree asserts, neither harms another nor reduces overall choice.⁴¹ Indeed, prohibiting the practice restricts the choices available to both the suicide victim and the one who would otherwise provide assistance.⁴² For these reasons, Christians should not seek to outlaw assistance in suicide.⁴³

Olree does not in his analysis take account of jurisprudential justifications for criminalising assisted suicide, such as the claim that human life is a basic good.⁴⁴ However, a careful reading of Olree's work uncovers challenging claims about the nature of basic goods and the value of autonomous choice.

³⁷ Olree, above n 23, 147.

³⁸ Readers will here recognize in Olree's Choice Principle a gesture toward the well-known harm principle espoused by John Stuart Mill, Joseph Raz, and others in the liberal tradition. Though a complete examination of Olree's use of the harm principle is beyond the scope of this article, a few words will serve as a place-holder. From within the orthodox, Christian tradition, the harm principle is arbitrary. Olree concedes that 'God has ordained governments' to punish wrongdoers. Olree, above n 23, 107. Harm is thus a legitimate concern of the lawmaker. And Olree provides no reasons to believe that the law ought to disfavor harm to self any less than it disfavors harm to others.

Indeed, Christians have long affirmed that self-harm and harm to others both harm the common good. Olree can make his case only by rejecting the notion of a common good; the good of each individual must be considered independently, in his view. However, neither the Bible nor reason compels this rejection. The assumption that there exists such a thing as a harm not inflicted on others is, in fact, dubious. Steven Calabresi has observed that so-called 'victimless' crimes 'are not, in fact, totally victimless.' Steven G Calabresi, 'Render Unto Ceasar That Which is Ceasar's and Unto God That Which is God's' (2008) 31 *Harvard Journal of Law & Public Policy* 495, 501.

The most common victims of so-called victimless behavior are the children and other family of the perpetrator. When people abuse alcohol, tobacco, or drugs, commit suicide, or behave in other self-destructive ways, they hurt their children, spouse, parents, siblings, and friends. The victimless crime is to some extent a fiction. Self-destructive behavior often harms others: at 501.

This is particularly clear in the context of suicide. Suicide harms those with whom the suicide perpetrator-victim shares community. The child rendered fatherless, the mother rendered childless, the community that loses one of its citizens, friends who are deprived of the suicide's company and cooperation, business and charitable organizations that lose a valuable contributor, all these and others suffer harm as a result of suicide.

³⁹ Olree, above n 23, 147.

⁴⁰ Ibid 206.

⁴¹ Ibid.

⁴² Ibid 206.

⁴³ Ibid.

⁴⁴ Nor does Olree account for considerations that militate against assisted suicide in particular circumstances, such as where there is reason to doubt the victim's desire to die or where the victim is incapable, by reason of youth, incompetence, or trauma, of expressing fully-informed consent. Ibid. In these cases one would have reason to doubt that the victim has freely chosen assisted suicide, so perhaps the practice may be prohibited without conflict with the Choice Principle: at 206.

1 *The Value of Choice*

In Olree's scheme, choice is a necessary but not sufficient condition for morally valuable decisions. On his view, only the choice to commit a righteous act for the right reasons counts as morally valuable; behaving rightly for the wrong reasons has no more moral value than behaving badly, and immoral conduct⁴⁵ is no more harmful than good behaviour motivated by bad purposes.⁴⁶ Olree adds one more premise, that the positive law cannot be demonstrated to have any affect upon internal motivations.⁴⁷ From the combination of these premises, it follows that coercive positive law has no role to play in preventing immoral acts that do not impair overall choice.

Olree is careful to claim that autonomous choice is not intrinsically valuable but rather instrumentally valuable.⁴⁸ He argues 'that freedom to choose, even freedom to choose wrongly, is an instrumental good which produces virtue, and since Choice is essential to all virtue, it is an instrumental good that ought to be maximized by law.'⁴⁹

Like Raz, Olree concedes that choice is sometimes exercised for valueless ends.⁵⁰ This concession, that choice is not a sufficient condition for morally valuable decision-making, puts him in a bind. If autonomous choice is instrumentally valuable because and insofar as it facilitates virtuous decision-making, and if, as Olree concedes, choice does not always produce virtuous decisions, then the value of choice is not absolute but merely contingent. To the extent that choice facilitates harmful decisions it is not valuable, and thus not a valid basis on which to curtail the reach of positive law. For this reason, the Choice Principle is not a principle of universal application at all, but rather a generalization.

This problem is best illustrated in the context of suicide, the quintessential case of an autonomous human choice that is completely devoid of moral value. Not only does suicide consist of a deliberate destruction of a basic human good (life) for the realization of no other intelligible good,⁵¹ it also prevents the perpetrator-victim from making any

⁴⁵ Olree uses the term 'sinful.' Recognizing that some sinful decisions might be rationally underdetermined and thus morally permissible for non-Christians, I treat 'sinful' and 'immoral' as synonyms here because I am dealing with the issue of assisted suicide, which if immoral is also sinful, and vice versa.

⁴⁶ Olree, above n 23, 136-38.

⁴⁷ See, eg, *ibid* 132 ('Since law can only regulate outward acts and not the heart, law cannot control that which influences righteousness.')

⁴⁸ *Ibid*

⁴⁹ *Ibid* 187.

⁵⁰ *Ibid* 136.

⁵¹ Some claim that a suicide performed to avoid extreme suffering does serve an intelligible end, namely the avoidance of suffering. However, avoidance of suffering is not intelligible as a *reason* for action, though it is certainly understandable as a sub-rational motivation. A moment's reflection reveals that avoiding some suffering actually causes harm, as where one refuses to go to the dentist to have a rotten tooth removed. Indeed, the realization of many good ends entails suffering. I cannot remain healthy without exercising, which is usually uncomfortable. I cannot establish a friendship without taking an interest in another person, which entails setting aside my own vanity and self-importance, disciplines that I, a particularly vain and self-important person, naturally experience as sacrifices. On the other hand, suffering is not an intelligible end; one who chooses suffering for its own sake acts irrationally. Suffering and avoidance of suffering, then, are morally neutral. One cannot discern whether the

future pursuits of human goods. By its very operation, the act of suicide ensures that the actor will not choose the good, will not act virtuously or pursue any valuable ends.⁵²

What then is Olree claiming? One interpretation of Olree's claim is that freedom of choice creates the possibility of pursuing a valuable end where that possibility would not exist in the absence of choice. In other words, in Olree's conception of virtue and the good, nothing valuable comes of pursuing an otherwise-good end unless that end is freely chosen for the right reasons. If, as Olree assumes, a coerced decision to pursue a good end has no value whatsoever, then nothing valuable comes of coercing a suicidal woman (for example) to continue living. The options are either (1) giving her the freedom to choose, which might or might not produce a valuable decision, or (2) coercing her to live, which can never have any intelligible value. If this dichotomy is true, it resolves itself.

However, I will argue that this dichotomy is false. Olree's premise here is that all human goods are reflexive, that is, that they are valuable only insofar as they are freely chosen for their own sake. This premise is much more controversial than Olree acknowledges. This article turns now to examine it.

2 Religion and Human Life as Reflexive Goods

Olree joins Robert George and many other Christians (including me) in affirming that religious adherence⁵³ (Olree uses the term 'righteousness'⁵⁴) is a reflexive good.⁵⁵

sub-rational desire to avoid this or that particular instance of suffering is consistent with reason until one considers whether the suffering in this or that particular case will accrue to the sufferer's benefit or harm. In order to answer *that* question, one must look beyond suffering for intelligible reasons for action. And because a reason for action, such as human life, can never be defeated by a sub-rational motivation, such as the desire to avoid suffering, one's reason for choosing life can never be defeated by a desire to avoid pain or suffering.

⁵² Olree might respond that he is claiming a far less ambitious role for choice, that though commitment to the Choice Principle will not serve the common good in every case, it will on balance facilitate virtuous decision-making more often than not, and on this ground ought to be obeyed. The claim that maximization of choice will maximize virtue, if this indeed is Olree's claim, is at least as questionable as the claim of Olree's interlocutors, especially Robert George, that positive laws prohibiting immoral conduct promote a moral ecology conducive to the common good and hostile to vice. Olree has not attempted a proof for this claim in his book, and it would be surprising, to say the least, to discover that laws permitting immoral acts tend to make citizens *less* likely to engage in those acts.

Regardless, such a generalization cannot serve as an adequate ground on which to oppose prohibitions of assisted suicide. Even if maximization of choice generally promotes virtue and the pursuit of valuable ends, it never serves this purpose when the choice is to end one's own life. Indeed, maximization of the choice to commit suicide does nothing but harm, thereby undermining the very purpose for increasing overall choice.

⁵³ A better term might be 'relationship with God.' Though this term perhaps fails to account for those persons who do not acknowledge the existence of an uncaused Cause, it has the virtue of describing the internal perspective of the religious practitioner, who sees herself not as being religious but rather as cultivating a relationship with the Supreme Being. However, as I intend to compare and contrast Olree's treatment of the human goods with natural lawyers' treatment of them, I will use the terms those persons use. Natural law thinker John Finnis uses the term 'religion' to refer to 'the establishment and maintenance of proper relationships between oneself (and the orders one can create and maintain) and the divine.' Finnis, above n 29, 89. See also George, above n 6, 219-28.

⁵⁴ See, eg, Olree, above n 23, 132-33. Olree's term, 'righteousness,' tends to obscure more than it clarifies. It captures one aspect of religious practice, that is, seeking to do God's will for the right reasons. However,

Though Olree does not expressly state it, a substantial portion of his book is devoted to the demonstration of the thesis that religious practice is a reflexive good and that positive laws that impair the freedom to pursue righteousness damage that good.⁵⁶ For this reason, freedom from laws coercing religious belief and practice has appreciable instrumental value.⁵⁷

This is not an insignificant insight. If religion (or righteousness) is a human good, its value is contingent on its being freely pursued. Just as friendship with another person cannot be coerced, genuine relationship with God is of no value unless it is voluntary.⁵⁸ It follows that laws coercing religious adherence serve no intelligible end. Olree states, ‘No one is made righteous by observing behavioural rules, and thus no Christian should feel bound by any in order to please God. And certainly no Christian should try to bind such rules on anyone else to bring those others closer to God.’⁵⁹

However, Olree goes on to claim that all other human goods are valuable only if they promote religious righteousness. Olree disparages the notion that an action could be valuable in itself, ‘regardless of individual motives’.⁶⁰ He suggests that marriage (used as an example) is not good ‘in itself’.⁶¹ Indeed, he asserts, ‘No act is good, no thought is good, unless freely chosen.’⁶² This treatment of all human goods as reflexive seems to be closely tied to Olree’s astonishing claim, ‘A legal change is only desirable to the extent that it advances real spiritual ends, like personal conversion or spiritual growth.’⁶³ Olree appears to believe that religious exercise is the only principled purpose of law and that all other human purposes are subsumed within this end. What counts as good is only the accomplishment of God’s will.⁶⁴ No realization of a human good—no enjoyment of a symphony, no keeping of marriage vows, no acquisition of knowledge—is valuable unless and insofar as it leads the actor toward conversion to Christianity and/or spiritual growth.

On this account, one who participates in a seemingly good act or experience without freely choosing that act or experience is not in fact participating in anything good. Arranged marriages, family sing-alongs, chores, compulsory education and homework assignments are accorded exactly no moral value. Furthermore, goods must not merely be freely chosen, they must be freely chosen for righteous reasons. One who chooses well

Olree seems to use the term at times to refer to a basic good other than religion, namely, choosing uprightly, or what natural lawyers call ‘practical reasonableness.’ See Finnis, above n 29, 88-89. As discussed supra, practical reasonableness is in one important sense also a reflexive good. George, above n 6, 25-26. Thus Olree’s elision is not fatal to our discussion here.

⁵⁵ George, above n 6, 221-22.

⁵⁶ Olree, above n 23, 130-47.

⁵⁷ Ibid 133-37; George, above n 6, 221-26.

⁵⁸ George, above n 6, 220-21.

⁵⁹ Olree, above n 23, 133.

⁶⁰ Ibid 147.

⁶¹ Ibid 136.

⁶² Ibid 138.

⁶³ Ibid 35.

⁶⁴ Ibid 138.

for the wrong reason suffers the same harm, if any, as one who chooses badly.⁶⁵ This claim creates significant problems.⁶⁶

For one thing, to treat all human goods like religion, or to treat religion as if it were the only basic human good, is to miss the variety and richness of human experience.⁶⁷ There are valid reasons to believe that the basic goods are numerous and varied, that people act uprightly and for the common good when they study algebra or theology, practise hitting a curveball, and perform Bach's Mass in B Minor, even when they do so for non-religious reasons. One can reasonably recognize that basic goods such as life, health, and knowledge are not derivatives of religious exercise but rather reasons for action independent of any religious commitment; that is, a person who does not understand herself to be cultivating a relationship with the Supreme Being still chooses rationally and well when she pursues basic goods such as life, health, and knowledge.⁶⁸

Furthermore, there are good reasons to believe that coerced pursuit of some basic goods has intelligible value. Olree must of course deny that coerced pursuit of knowledge is an intelligible reason for action and public policy judgments. In order to be consistent he must therefore oppose compulsory education laws. This he does not do, but he makes no satisfactory explanation for his inconsistency. It is no answer to say that children are different than adults. Some relevant difference between children and adults might be a reason for not coercing adults to attend school, but it cannot justify coercing children to attend school. If knowledge is not a basic good, or if it is reflexive and its value is contingent on its being freely chosen for righteous reasons, there exists no intelligible reason to force children to acquire it.

⁶⁵ For example, Olree disputes that there is any moral difference between one who sleeps with a prostitute and one who merely desires to do so. Ibid 182. He does not identify the grounds for this doubt, but claims that the putative negative effect upon one's character of following through on the desire to copulate with a prostitute, instead of abstaining, is 'an empirical question whose answer is not immediately obvious': at 182.

⁶⁶ In addition to the general problems with it, this position poses special problems for Olree, who purports to be operating within the *Christian* tradition. Olree's view is at home in a particular strain of evangelical, Christian thought, which affirms the Enlightenment view that humans are naturally free and independent from community, law, and obligation. Indeed, Olree draws heavily on Enlightenment thought in his exposition of his biblical case for the Choice Principle. Ibid 128-30. His argument for 'Freedom From Law' begins with a discussion of Hobbes and Locke: at 128-30.

The claims of those two thinkers about man and law in the state of nature are, to say the least, in tension with the Christian tradition and the Bible, which in its opening chapter describes man in his natural state as being in community with the Creator, and in its second chapter as being in community with woman. While still in this natural, pre-fall state, man receives from God the first limitation upon his freedom: 'You are free to eat from any tree in the garden; but you must not eat from the tree of the knowledge of good and evil, for when you eat of it you will surely die.' *Genesis* 2:16-17 (New International Version 1984). The state of nature on the Christian conception thus turns out not to be nearly as free-wheeling as Locke, (especially) Hobbes, and Olree have envisioned.

⁶⁷ This is especially true of the Christian experience, in which one understands God's delight in the pursuit of those good ends that He has appointed for us to pursue.

⁶⁸ John Finnis' insights on the relationship between religious practice and the other basic goods are helpful. Finnis, above n 29, 92-95, 100-27.

Olree's view entails denying the value of, among other actions, remaining in an arranged marriage and exercising for the sake of looking good on the beach. The husband in the marriage arranged by his parents did not freely choose his wife, and he might not stay in the marriage for reasons that evangelicals such as Olree would consider pure. He might stay in the marriage for the sake of his children, or in order to obtain tax benefits or social prestige. And the gym rat did not choose health for health's sake. His motives are mixed, at best, perhaps wholly tainted by vanity.

However, the ends pursued and attained in these cases are intelligible reasons for action, apart from the intelligibility of the extrinsic ends that the actors intended to pursue, such as tax benefits and personal appearance, precisely because marriage and health are non-reflexive, intrinsic goods.⁶⁹ The husband would realize a human good simply by choosing to remain married, even if he received no tax benefits. The gym rat realizes the basic good of health, simply because his workouts improve his health, even though he did not choose health for health's sake, and even if he never has the opportunity to strut on the beach.

Similarly, and contra Olree, the suicidal woman deterred from destroying herself realizes a basic good simply because she lives. Indeed, the treatment of life as a reflexive good fails spectacularly in the case of suicide. The freedom to commit suicide enables the irrational destruction of human life, which causes demonstrable harm. The individual who takes her own life suffers irreparable harm. The community also suffers the loss of life. And because the community understands this loss to be the loss of something valuable, it rationally prohibits third parties from assisting in the suicide.

Furthermore, one acts rationally when one overcomes the will of a suicidal person, and most states recognize in law a privilege to intervene in a suicide attempt.⁷⁰ Significantly, these laws do not make any provision for weighing the instrumental value to the community of the life saved by the coercive interference. The privilege covers any interference in self-destruction or self-injury. This reflects the recognition that suicide harms the community simply because it causes the loss of a human life, apart from the value of any extrinsic ends that a particular life might serve.

Olree might respond that the community's sense that it has suffered a loss is nothing more than mere sentiment or emotion. It does not indicate real damage to the common good and does not provide a reason to deter the suicide. However, one might more

⁶⁹ Robert George does not share Olree's assumptions on this point, as Olree supposes. Olree, at 182-86. George claims that morality—practical reasonableness, or what Olree calls 'righteousness' or 'doing God's will'—is a reflexive good but that other goods, such as knowledge and beauty, are not. George at 25. And George affirms that basic goods remain reasons for action 'even when people are deflected (as all of us sometimes are) from appreciating fully their value.' George at 106.

⁷⁰ See Gorsuch, above n 29, 32. New York's statute is illustrative.

The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances: . . . A person acting under a reasonable belief that another person is about to commit suicide or to inflict serious physical injury upon himself may use physical force upon such person to the extent that he reasonably believes it necessary to thwart such result.

NY PENAL LAW §35.10 (2009).

reasonably infer that it is the sentiment of the suicidal woman that fails to reflect reality. Is not one who is despondent or discouraged likely to undervalue both the intrinsic value of her own life and the extrinsic ends that her life serves? And if the community recognizes some value in her life, and for that reason chooses to deter coercively those who would otherwise assist her self-destruction, is that collective judgment not entitled to some deference?

Olree might also protest that, whether or not the community correctly discerns value in the suicide's continued life, to coerce the suicidal woman to continue living destroys any possibility of her becoming righteous because it denies to her the freedom to choose good ends for the right reasons. However, imagine a suicidal person whose will to destroy herself is overcome, for example by fear of public humiliation or shaming her family, where crowds and television media have gathered at the scene. By refraining she chooses well in an intelligible sense even though she does not at the time of her decision recognize the value of her life or ground her choice on that value. She and her community benefit from her continued existence, and that benefit can be grasped by rational minds.

So, one may agree with the premise that no Christian should try to bind others to behavioural rules in order to please God and disagree with the conclusion that Christians should support the legalization of assisted suicide and all other self-regarding harms. Though relationship with God cannot be coerced, because true relationship with God does not consist of mere obedience to rules, persons do nevertheless act rationally when they obey rules that are effective to prevent moral harm, especially the destruction of basic human goods such as life.

Olree faces additional, particular difficulties because he purports to be operating within the Christian tradition. Imagine a Christian doctor practicing in a rural area in Oregon, whose patient comes to her seeking assistance in suicide. Under Oregon law the patient must obtain the fatal prescription from an attending physician, with the assent of a second, consulting physician.⁷¹ Let us suppose that the patient is destitute and does not have the means to travel great distances, that the Christian doctor is one of only two licensed physicians in the region, and that the other physician is qualified to serve as a consulting physician but not as the attending physician. Further suppose that the patient is mentally competent, suffers from a debilitating terminal illness, and in every other way meets the requirements of Oregon's assisted suicide statute.⁷²

On Olree's account, the Christian physician has no reason not to assist in the suicide. The patient's life is not a reason in itself to refuse assistance. The patient's life can provide a reason to refuse only if either: (1) the life instrumentally serves the extrinsic end of the patient's righteousness (defined in Olree's paradigm as freely choosing good ends for the right reasons) or (2) the patient chooses to continue living. Neither condition is met here. Olree thus leaves the Christian doctor with no option but to perform an act—assisting a suicide—that the Christian tradition forbids.

⁷¹ OR REV STAT §§ 127.805, 127.815, 127.820 (2003).

⁷² OR REV STAT § 127.805 (2003).

Or consider a young adolescent being raised by wealthy, racist, isolationist, neo-Nazis, who excel at indoctrination. Imagine that this adolescent, who is certain to mature into the very opposite of Olree's conception of a righteous person, finds himself drowning in a retention pond. A would-be rescuer who knows the adolescent, knows the adolescent's parents, and knows that the adolescent will grow up to be a racist neo-Nazi and energetic oppressor of minorities, has no reason, on Olree's account, to rescue the adolescent. If the adolescent's life were to have any value, it would be contingent upon the realization of something that the adolescent's life will never realize, namely righteousness. The adolescent's life provides no reason for choice and action.⁷³

Olree might respond that one should abstain from assisting in suicide and should rescue the adolescent because God commands us to do so. However, this is to claim that God tells us to do things for no reason, that God is irrational. If one is to avoid fundamentalism, that is, insisting on religious dogmas against all reason, as Olree and I both desire to do, this answer is not available to us. Clearly, one cannot adhere both to Olree's claim that the value of human life is contingent⁷⁴ and to the orthodox Christian teaching about human life. And Olree's claim that all basic goods are reflexive is simply untenable.

C RESPECTING BOTH CHOICE AND LIFE

Nevertheless, one need not ignore or reject Olree's important observations about the instrumental value of autonomous choice. Indeed, Judge Gorsuch's inviolability-of-life principle reconciles a respect for human life with Olree's concern for choice and autonomy. Gorsuch observes, 'While laws against assisted suicide plainly restrict *some* choice, consistent with the inviolability-of-life principle, they restrict only a limited arena of human actions—those *intended* to kill.'⁷⁵ The inviolability-of-life principle does not entail that the government should prohibit or prosecute every act by which human life is foreseeably taken. The principle preserves 'significant liberty to patient and doctor alike to discontinue or apply palliative treatment even in circumstances where death is foreseen as a certainty'.⁷⁶ In these cases, and in other cases where death is a foreseeable but unintended, secondary consequence of reasonable actions, the state should not trample upon autonomous choices.

⁷³ Note that the question here, unlike in consequentialist philosopher Peter Singer's famous drowning-child hypothetical, is not whether one has a duty to rescue a drowning child but rather, and merely, whether one has a *reason* to do so. Cf Peter Singer, 'Famine, Affluence, and Morality' (1972) 1 *Philosophy & Public Affairs* 229, 231. Nevertheless, it is illuminating to observe that Olree's account of the instrumental value of human life invites—indeed requires—a consequentialist inquiry into the extrinsic ends that the adolescent's life is likely to serve. If the adolescent's life will not serve the extrinsic end of righteousness then the adolescent's life does not provide a reason for action.

⁷⁴ As noted above, Olree is not alone in contesting the intrinsic, unconditional value of human life. Many jurisprudence scholars have posited that human life is valuable only when accompanied by certain instrumental capacities. Judge Gorsuch reviews several such arguments. Gorsuch, above n 29, 86-101, 143-156, 160-63. Gorsuch notes that these scholars 'differ markedly' on which lives qualify for protection: at 161-62. However, in all of their paradigms, 'some persons' lives are simply worth more than others': at 162.

⁷⁵ *Ibid* 167 (emphasis in original).

⁷⁶ *Ibid* 168.

To see why this is so, let us consider three end-of-life cases. First, imagine a newborn infant afflicted with spina bifida, who is likely to lead a life of considerable suffering, and might, but is not certain to, die before reaching adulthood. Doctors in the Netherlands are currently immune from prosecution for killing such children, on the condition that they follow a procedure called the Groningen Protocol.⁷⁷ Is this practice just? Let us answer this question, no.

Second, imagine a man in his late 60's, diagnosed with cancer. The only treatment available is painful and not likely to cure the cancer, but might prolong his life by a few months. Should the government coerce this man to submit to the treatment? Let us answer this question, no.

Finally, imagine another man in his late 60's who is diagnosed with Alzheimer's Disease and who lives in Oregon. While still in his right mind, dreading the dementia that is sure to overtake him, he asks his physician to assist in his suicide. The State of Oregon permits this assistance. Should it? Let us reserve judgment on this question for the moment.

Olree is unlikely to object to our resolution of the first two cases in conformity with Judge Gorsuch's inviolability of life principle. Indeed, I suspect that the first and second questions are easy questions for most people who are informed by the liberal and natural law traditions, and for those people (probably the vast majority of Westerners) who are, in varying degrees and without being aware of it, influenced by both of those traditions. Most of us object to infanticide, and we also find distasteful government interference in the autonomous decision-making of competent adults concerning whether to submit to medical treatment.

Opposition both to legalized infanticide and to coerced cancer treatment can be squared with respect for the instrumental value of autonomy and the intrinsic value of human life. Far from infringing the autonomy of newborn humans, criminal prohibitions against infanticide actually respect the infant as a human being, who will, if enabled and allowed to mature, become an agent of practical reasonableness. And the state does not disrespect the life of the adult cancer patient by permitting him to decline treatment; the man is not deliberately destroying his life, though he refuses to prolong it.

The disagreement over legalisation of assisted suicide results from the apparent collision between autonomy, a condition of practical reasonableness, and human life, an ultimate reason for choice and action. I suggest that this apparent conflict is illusory, for two reasons. First, prohibitions against assisted suicide often actually serve the instrumental value of autonomous choice.⁷⁸ Just as autonomous choice is a precondition of meaningful

⁷⁷ For some details on this practice, the jurisprudential justifications offered for it, particularly those offered by Peter Singer, and why I think those justifications fail on their own terms, see Adam MacLeod, 'The Groningen Protocol: Legalized Infanticide in the Netherlands and Why It Should Not Be Done in the United States' (2006) 10 Michigan State Journal of Medicine and Law 557.

⁷⁸ This is especially clear in cases where some doubt persists about the autonomous nature of the choice to commit suicide. '[T]he prohibition against the intentional taking of human life also serves to protect against

moral deliberation, human life is a precondition of autonomous choice. To recognize that human life has intrinsic worth is not to deny that it also often has instrumental worth as a means to recognizing extrinsic ends, such as free and meaningful moral deliberation, religious adherence, and righteousness. Protecting human life for its own sake also serves to protect those extrinsic ends, including autonomy.

Second, Olree's objection to coercive deterrence of assisted suicide insufficiently accounts for the value of human life because he treats human life as a reflexive good. But this is not how most common law nations treat human life in their positive laws, and it is not consistent with common sense judgments about the value of actual human lives, both our own lives and the lives of others. Therefore, we have insufficient reason to resist the implication of Gorsuch's principle in the context of the assisted suicide debate, namely that the practice should be coercively prohibited.

IV LIFE'S DOMINION

At this point in the article, the sceptic is unlikely to be much impressed. After all, Olree and I both identify ourselves as Christians, so reconciling our concerns and views (if, in fact, I have accomplished that) is no great feat. If our mutual commitment to orthodox Christianity is to mean anything, it must mean at least that none of us can wander too deeply into the woods of either liberalism or fundamentalism. There are, of course, many formidable defenders of autonomy, on one side, and moral paternalism, on the other, who are unconstrained by such fetters. To one of these thinkers this article now turns.

A Ronald Dworkin's Account of the Value of Human Life

Ronald Dworkin is arguably the legal philosopher who has most influenced the arguments for de-criminalising self-regarding harms. One often hears in contemporary debates arguments that Dworkin first articulated. It is thus helpful to reconsider some of those arguments.

Because Dworkin's central work on life issues, *Life's Dominion*, is an argument for legalising abortion, assisted suicide, and euthanasia, it is an unlikely place to find recognition of the intrinsic value of human life. But Dworkin makes that recognition early and often in the book, and not merely about life. Dworkin defends the idea that there really are objectively valuable, good ends, which humans do and *should* choose and pursue. He in some places calls these ends intrinsic values, at other places 'critical interests'.⁷⁹ Dworkin perceives that some human goods, such as life, are valuable for their own sake and not merely instrumentally valuable for the realization of extrinsic ends.⁸⁰

the coercive, mistaken, and abusive taking of human life and thus serves as a guardian of human liberty and equality.' Gorsuch, above n 29, 168.

⁷⁹ Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (1993) 201-03.

⁸⁰ *Ibid* 71-72. Dworkin observes that some people, at the moment of their death, feel regret that they did not pursue more meaningful ends during their lives. 'They want, suddenly, to have made something, or contributed to something, or helped someone, or been closer to more people, not just because these were

Furthermore, he concedes that government can legitimately use coercion to protect some of these basic goods, as where it taxes its citizens to subsidize museums, or limits property rights to conserve endangered species.⁸¹

Despite these promising acknowledgements, Dworkin ultimately reduces all claims about the value of some human ends, like life, to the status of subjective sentiments, what he calls ‘quasi-religious’ convictions.⁸² This, in the end, renders his observations less edifying than they might otherwise be. He observes the widespread consensus that ‘it is a terrible form of tyranny, destructive of moral responsibility, for the community to impose tenets of spiritual faith or conviction on individuals.’⁸³ So, though Dworkin assents to the claim of natural lawyers that ‘it is intrinsically wrong deliberately to end a human life,’⁸⁴ he further claims,

[i]t is perfectly consistent to hold that view, even in an extreme form, and yet believe that a decision whether to end human life in early pregnancy [for example] must nevertheless be left to the pregnant woman, the person whose conscience is most directly connected to the choice and who has the greatest stake in it.⁸⁵

This conception of the value of life leaves Dworkin defending the following puzzling argument: one ought not to deliberately destroy intrinsically-valuable ends; human life is an intrinsically-valuable end;⁸⁶ but one may nevertheless deliberately destroy human lives in voluntary acts, such as assisted suicide, and sometimes in involuntary acts, such as abortion and euthanasia. In Dworkin’s view, because the state should tolerate religious differences, the value of human life is not fixed, but rather is relative and contingent. It is contingent upon its subjective valuation by relevant choosers, whoever they may be: the terminally ill patient, the mother of the unborn baby, the family of the patient in the persistent vegetative or minimally conscious state.

In attempting to solve this puzzle, one receives no assistance from Dworkin’s ostensible distinction between ‘incremental’ goods—goods that we should always hope will increase in quantity and instantiations—and ‘sacred’ goods—goods that we seek to protect only once they have been instantiated in a particular being or object.⁸⁷ Dworkin has not here identified a distinction between goods but rather has conflated two very different moral questions: (1) whether and in what circumstances one might choose not to pursue the creation or realization of an otherwise-intelligible basic human good and (2) whether it is permissible deliberately to destroy a basic human good. Either or both of these questions can be asked about any basic good. Depending upon which question is

missed opportunities for more pleasure but because they are *important in themselves*.’ Ibid 204 (emphasis added).

⁸¹ Ibid 154. Curiously, punishing murder to protect innocent human life did not make his list.

⁸² Ibid 15.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid 81-84.

⁸⁷ Ibid 73-74.

asked, any basic good can be made to appear to be either incremental or sacred on Dworkin's criteria.

For example, according to Dworkin, knowledge is an 'incremental' good because no matter how much of it we have, we always want more.⁸⁸ However, knowledge also meets Dworkin's definition of a 'sacred' good, both because it is often morally permissible (fully reasonable) not to create more knowledge, even when given the opportunity, and because it is always wrong deliberately to destroy knowledge. A college graduate considering a career in scientific research might very reasonably pursue a career in finance instead. The graduate acts reasonably (that is, consistent with practical reason) even though he has not chosen to devote his professional career to creating more scientific knowledge.⁸⁹ And one can discern the irrationality, and thus immorality, of intentionally destroying scientific knowledge, as where a scientist intentionally misleads his colleagues, or where someone destroys data from scientific experiments. So the same basic good—scientific knowledge—can be classified as either an 'incremental' or 'sacred' good, depending upon *what moral question is at issue*.

What can be said of knowledge can be said of any basic good, including the subject of Dworkin's book: human life. Often the choice to create new instantiations of a basic good—a new human baby, an additional work of art—will be rationally under-determined, meaning that it is often equally reasonable, and therefore equally morally upright, to choose to have another child or not, to create an additional painting or not. In any given circumstance there may be more than one right answer to the question, *Should we pursue more instantiations of this basic good?*, because it might be equally or more reasonable to pursue an instantiation of a *different* basic good. However, if Dworkin's interlocutors are right, there is only one right answer, a negative, to the question, *Is it reasonable deliberately to destroy this basic good?* It is only this second question that bears upon the contested policy issues that Dworkin discusses.

So, to understand Dworkin's claim, one must look more deeply into his statements about the value of basic goods. Dworkin asserts that our shared understanding of the intrinsic value of human life 'also deeply and consistently divides us, because each person[] [has his] own conception of what that idea *means*.'⁹⁰ He asserts that people judge the relative value of sacred, intrinsically-valuable goods, such as human lives, according to how much investment has been made in those lives (by the liver and by others, such as parents) and whether the investment has been compensated in realized potential.⁹¹ This, he claims, explains why people feel a greater sense of frustration or loss when a teenager dies than when a foetus or an old person dies. Human lives are intrinsically valuable only insofar as value has been created in them by human efforts: 'personal choice, training, commitment,

⁸⁸ Ibid 73.

⁸⁹ Of course, the graduate could also have been said to have acted reasonably if he had chosen a career in research over a career in finance. The decision was rationally under-determined.

⁹⁰ Dworkin, above n 79, 28.

⁹¹ Ibid 84-94.

and decision'.⁹² Thus, 'the value of human life to Dworkin turns on the ability of persons to express themselves autonomously.'⁹³

There occur to the thoughtful reader two reasonable interpretations of Dworkin's claim about the value of life. If Dworkin means to say that this is what people subjectively when and if they claim that human life has intrinsic value, then his description is simply incomplete, at best. Many who affirm the intrinsic value of human life do not mean anything like this at all. Furthermore, if Dworkin means to make only a description of the internal beliefs of those who affirm the intrinsic value of human life then he offers nothing but confusion to the person who asks the very question Dworkin begs, namely, *Is my life valuable qua human life, regardless of its instrumental worth or its subjective worth to me, and is that a sufficient reason for the state to prevent me from deliberately destroying it?*

If, on the other hand, Dworkin is attempting to provide an objective, *external* account of the value of human life⁹⁴ then his account is nonsensical. If the 'intrinsic' value of a human life is contingent upon some quality or characteristic of the liver of the life, then its value is not intrinsic but rather extrinsic to the life itself. Intrinsically-valuable goods are reasons for choice and action in and of themselves and regardless of any extrinsic considerations, such as the degree of investment made in them. And all this confusion appears before one gets to more difficult jurisprudential questions, such as whether the state should protect the life of a suicidal person by force of law.

B *An Argument for Autonomy*

Dworkin's argument for autonomy in decision-making provides some clues to understanding what he has gotten right and where his theory stands in need of improvement. Dworkin states, 'If we aim at responsibility, we must leave citizens free, in the end, to decide as they think right, because that is what moral responsibility entails.'⁹⁵ Here Dworkin echoes Raz's and George's important observations about practical reasoning, what Dworkin calls moral responsibility. If one is to act reasonably or responsibly—that is, consistent with practical reasonableness—then one must be to some extent free to act unreasonably or irresponsibly.⁹⁶

This is a fairly uncontroversial premise.⁹⁷ However, Dworkin believes that this premise entails the rather controversial conclusion that states should have no power to coerce

⁹² Ibid 93.

⁹³ Gorsuch, above n 29, 160.

⁹⁴ This seems to be the better interpretation, as Dworkin expressly distinguishes his account of the value of life from subjectively-valued goods. Dworkin, above n 79, 73-74.

⁹⁵ Dworkin, above n 79, 150.

⁹⁶ See George, above n 6, 226-27. Finnis observes that negatively, practical reasonableness 'involves that one has a measure of effective freedom.' Finnis, above n 29, 88.

⁹⁷ Indeed, this premise enjoys much broader support than Dworkin appears to appreciate. Dworkin can fairly be said to pound a straw man on occasion; he frequently acts as though those who support criminalising abortion and assisted suicide want to force their own moral convictions on others. No serious thinker believes that brainwashing or indoctrinating citizens to take pro-life views is justifiable. However, that the state cannot and should not force people to believe that murder (for example) is gravely immoral

decisions about important life issues, such as abortion and assisted suicide.⁹⁸ He offers two paths to this conclusion.

1 *Valuing Life as a Religious Exercise*

First, Dworkin asserts that ‘our opinions about how and why our *own* lives have intrinsic value influence every major decision we make about how we live.’⁹⁹ Thus convictions about the intrinsic value of human life are ‘*essentially* religious beliefs’.¹⁰⁰ How does Dworkin classify a belief as religious? He asks ‘whether it is sufficiently similar in content to plainly religious beliefs’,¹⁰¹ such as the orthodox Christian view that it is for God alone deliberately to end human life. On this test, Dworkin maintains, ‘the belief that the value of human life transcends its value for the creature whose life it is—that human life is impersonally and objectively valuable—is a religious belief, even when it is held by people who do not believe in God.’¹⁰²

Dworkin goes on to distinguish this religious belief from ‘more secular convictions about morality, fairness, and justice’.¹⁰³ These secular beliefs are essentially about adjusting and compromising competing interests of persons and they ‘rarely reflect a distinctive view about why human interests have objective intrinsic importance, or even whether they do.’¹⁰⁴ This simply is not true, of course. Secular moral and legal philosophies make claims about the objective value of human goods, apart from subjective individual interests and apart from religious convictions. Indeed, Dworkin himself makes several such claims in the course of his putatively-secular philosophical reasoning.

Putting all that aside, at this point in Dworkin’s argument the reader meets a less sophisticated adumbration of Olree’s argument about the relationship between religious practice and the human ends about which religions and moral philosophies discourse and opine. Dworkin, like Olree, would subsume at least some basic goods within the ostensibly more foundational good of religion and would on that ground treat those goods as reflexive. For the reasons stated in Part III.B above, there exist good reasons to contest this account.

2 *Valuing Life as an Exercise in Integrity*

Second, Dworkin asserts that decisions about when and how to die are intimately tied up in the reflexive practice of discerning the good life, of developing one’s own character and moral identity. Each of us, he observes, thinks that integrity is important, that

does not entail that the state cannot and should not act to prohibit murder, even (or especially) by coercive means. In other words, that morally responsible choosing entails some freedom to choose poorly does not resolve the question *how much* freedom to choose poorly people should possess.

⁹⁸ Dworkin, above n 79, 153.

⁹⁹ Ibid 155.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid 155-56.

¹⁰³ Ibid 156.

¹⁰⁴ Ibid.

‘someone who acts out of character, for gain or to avoid trouble, has insufficient respect for himself.’¹⁰⁵

This ‘independent importance of integrity’ explains a tension in moral reasoning, asserts Dworkin.¹⁰⁶ On one hand, one’s commitment to a particular conception of virtue and the good is part of what makes that commitment valuable for that individual person.¹⁰⁷ On the other hand is our ‘even more fundamental conviction’ that some conceptions of virtue and the good are mistaken, ‘that a person’s thinking a given choice right for him does not make it so’.¹⁰⁸ Moral reasoning is thus a process of both choice and judgment.¹⁰⁹ This tension between choice and judgment poses for Dworkin a dichotomy. The significance of autonomous choice, and the integrity it safeguards, pulls Dworkin toward ‘the annihilating idea that critical interests are only subjective, only matters of how we feel.’¹¹⁰ The belief that some choices are wrong pulls ‘us toward the equally unacceptable idea that everyone’s critical interests are the same, over all history, that there is only one truly best way for anyone to live.’¹¹¹

Perhaps unsurprisingly, Dworkin resolves this putative tension by rejecting the ‘discovery of a timeless formula, good for all times and places,’ and embracing autonomous choice.¹¹² Because people treat the time and manner of their deaths as expressions of their value systems, the state should leave individual persons free to resolve these matters for themselves.¹¹³ Each person who respects the intrinsic value of his or her own life will want his or her own life to go well, to not be wasted, to be lived (and ended) with integrity.¹¹⁴ Dworkin concludes:

Someone who thinks his own life would go worse if he lingered near death on a dozen machines for weeks or stayed biologically alive for years as a vegetable believes that he is showing more respect for the human contribution to the sanctity of his life if he makes arrangements in advance to avoid that, and that others show more respect for his life if they avoid it for him. We cannot sensibly argue that he must sacrifice his own interests out of respect for the inviolability of human life.¹¹⁵

The value of human life is thus in an important sense reflexive (though Dworkin does not use this term) in Dworkin’s view.

C Avoiding Dworkin’s False Dichotomy

¹⁰⁵ Ibid 205.

¹⁰⁶ Ibid 206.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid 208-13.

¹¹⁴ Ibid 215-16.

¹¹⁵ Ibid 216.

Dworkin's resolution of the putative dichotomy between integrity and judgment in end-of-life decisions raises for him many difficulties, which Judge Gorsuch has explored.¹¹⁶ Leaving those aside, there is good reason to believe that Dworkin's dichotomy is false in the first instance. Many of those who affirm the intrinsic, unconditional value of some basic goods do not, as Dworkin supposes, maintain that there is only one truly best way for anyone to live. Here, as elsewhere, Dworkin could benefit much from the exchange between Raz and George, who both recognize 'many forms of the good which are admitted to be so many valuable expressions of people's nature', while also affirming 'that certain conceptions of the good are worthless and demeaning, and that political action may and should be taken to eradicate or at least curtail them.'¹¹⁷

In other words, there are many different ways for people to live well, but there are some ways of living that are simply not valuable. The choice between pursuing a life of marital communion or a life of celibacy devoted to religious or charitable causes is a choice between mutually-exclusive good ends.¹¹⁸ One might reasonably choose either course of action (and one can choose only one of them) without disparaging or denying the self-evident value of the other and without acting immorally.¹¹⁹ By contrast, the decision whether or not to destroy oneself in an act of suicide has no intelligible value, even when autonomously made. If human life is intrinsically and unconditionally valuable, its deliberate destruction can never be rationally grounded. One can thus affirm the objective, intrinsic value of human life without claiming that there exists only one best way to live.

In other words, perfectionist jurisprudence need not be at odds with pluralism, as Dworkin supposes. The question is not whether the government should leave people uncoerced, free to make autonomous choices. The question is which autonomous choices have some intelligible basis, such that governments ought not to interfere in their selection, and which autonomous choices have no intelligible value, such that governments might deflect citizens from them.

V A WAY FORWARD

The way forward on many controversial issues, I humbly suggest, lies in the path of recognizing both the limited but important, instrumental value of autonomy in moral decision-making and the non-reflexive, intrinsic value of certain basic goods other than religion and practical reasonableness. As we have seen, this recognition produces rather straightforward resolution of two sets of issues. First, because religious adherence is a reflexive basic good the state should not coerce its citizens to adhere to any particular religious tradition. Second, because human life is a non-reflexive basic good, the state can coercively prohibit assistance in suicide, even in cases where the suicidal person suffers from some painful affliction. Yet this proposition does not entail the additional

¹¹⁶ Gorsuch, above n 29, 40-41, 130-32, 160-63.

¹¹⁷ George, above n 6, 164, note 7 (quoting Raz, above n 4, 133).

¹¹⁸ George, above n 6, 164, note 7.

¹¹⁹ In the words of moral philosophy, the choice is 'rationally grounded,' and therefore not arbitrary but also 'rationally underdetermined.' Ibid.

conclusion that the state should interfere where an autonomous person does not *deliberately* kill himself.

Of course, not everyone will agree with me that these are easy cases. So, in order better to understand the implications of the contingent value of autonomy and the reflexivity of some basic goods, let us take a case that fewer people think is easy: criminalisation of marijuana use and possession. Careful reflection on the relationship between autonomy and the basic goods of health and practical reasonableness will provide at least a starting point for intelligently answering the question whether such laws are just.

The argument for criminalisation proceeds from the observation that recreational marijuana use injures a basic human good, namely health, in service of no other rational end. (The pleasure that the user experiences is a sub-rational motivation, not a reason for using.) Furthermore, many marijuana users become addicted to marijuana and more destructive substances. These addictions often injure the user's relationships with other people, causing harm to the basic good of community. Health and community are non-reflexive basic goods; they retain their intelligible value even when they are not freely chosen. To deter injury to these goods, the state reasonably prohibits marijuana use and possession.

However, it is easy to overstate this case. Some chemical substances have greater deleterious effects than others. Alcohol is more or less destructive than marijuana, and both are arguably less destructive than heroin. And we permit the consumption of alcohol, in moderation and with certain restrictions, so why not marijuana? Once we frankly acknowledge that we are engaged in line-drawing, how do we avoid being arbitrary about it?

The argument for legalisation proceeds from the observation that criminalisation will also harm the drug user in an important way, by deflecting the user from realizing the basic good of practical reasonableness. One does not act uprightly when one chooses well only out of fear of punishment. However, it is easy to overstate this case, as well. It is particularly easy to underestimate the harm to users and their friends and family that results from much use and abuse of narcotics.

Moreover, legalization itself might deflect marijuana users from exercising practical reasonableness. Robert George is helpful on this point. He observes, 'Obviously, great good is accomplished when the victims of crime and other wrongs are spared the effects of the actions which their victimizers would otherwise have committed.'¹²⁰ George continues:

Moreover, the immoral actors themselves are benefited, whether the acts from which they were deterred would have harmed others or only themselves. For, by deterring such acts, the law may prevent people from habituating themselves to corrupting vices which will more or less gradually erode their character and will to resist.¹²¹

¹²⁰ Ibid 226. See also Calabresi, above n 38, 499-500.

¹²¹ George, above n 6, 226-27.

Drug addiction, of course, is the paradigmatic instance of habituation to a corrupting vice, which erodes the character and will of the user.

Furthermore, George observes that sound moral laws do not always deflect people from realizing the good of practical reasonableness, because the threat of the law's coercive effect does not necessarily supervene reasoned choice of the good, but rather merely countervails what often amounts to an otherwise-overwhelming temptation to vice.¹²² In this way, according to George, moral laws actually support morally upright choosing, that is, choosing goods ends for the right reasons.

So it might reasonably be argued that the degree of harm from either criminalisation or legalisation is less than immediately clear. Even when confined to jurisprudential considerations, this is a complicated issue. It becomes even more complicated once one includes prudential considerations. Will legalization or criminalization more dramatically incentivize a criminal black market in narcotics? Does criminalisation actually deter potential users? Does it deter addicts?

I make no attempt to answer any of these questions. The point here is to identify a productive way of thinking about the problem, which avoids much of the polemics that currently engulf the debate. Productive discussion depends upon a prior, candid acknowledgement that the value of autonomy is contingent upon the end autonomously chosen and that some, though not all, basic goods are reflexive in nature, and therefore require autonomy as a precondition to their realization.

Many other issues implicate complex relationships between autonomy and respect for basic goods—whether the state should recognize and endorse conjugal monogamy, polygamy, polyandry, or same-sex marriage; coercive taxation to subsidize art museums, climatology studies, or embryo-destructive stem-cell research; the extent and nature of compulsory education. Perhaps careful attention to the multi-faceted relationship between autonomy and basic human goods will shed more light than heat on those important policy deliberations.

¹²² Ibid 227.