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**AT AND ALONG: A REVIEW OF
THE LAW AND ETHICS OF MEDICINE:
ESSAYS ON THE INVIOABILITY OF HUMAN LIFE**

by John Keown
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Discourse about bioethics is plagued by the appearance of simplicity. The most controversial issues — abortion, embryo-destructive research, assisted suicide, and euthanasia — are perceived as some of the simplest. If one views personal autonomy as intrinsically valuable, or as an indispensable precondition of morally significant choosing, then one will naturally find oneself committed to expansive liberties in bioethics, as in other areas of law. Likewise, if one perceives intrinsic value in human life qua human life then one feels bound to circumscribe some of those liberties. On both sides the arguments seem to run in straight lines.

As the best discussions of medical law reveal, things are not so simple.¹ The study of bioethics is trammled in thickets of misunderstanding, and in the complexities of human intention and action. Those who are committed to the study will find John Keown's latest book a helpful resource. *The Law and Ethics of Medicine*, published by Oxford University Press,² is not designed primarily to persuade, but rather to clarify.³ Keown's project is to clear away obstructions that have gathered around the keystone principle of the inviolability of human life, so that the thing *itself* comes into view. In this, Keown succeeds. But the number of words required to clear the view, and the challenges that Keown meets in bringing out very fine distinctions against attacks from capable scholars and lawyers, makes it easy to see how the inviolability principle came to be misunderstood in the first place.

Keown proceeds first to rough out the monument, removing fragments that might resemble the principle of inviolability but in fact obscure it. He contrasts the

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¹ See, eg, Emily Jackson and John Keown, *Debating Euthanasia* (Hart Publishing, 2012).

² John Keown, *The Law and Ethics of Medicine: Essays on the Inviolability of Human Life* (Oxford University Press, 2012).

³ Keown states that he has not in this book attempted a comprehensive analysis or defence of the inviolability principle in either law or ethics. Nevertheless, much of the book is devoted to critiquing the arguments of skeptics of the principle.

inviolability principle with vitalism, and with quality-of-life. Vitalism holds that life ‘is the *supreme* good and one should do everything possible to preserve it’.⁴ On the other side, a measure of the quality of human life makes it permissible to terminate life when it loses its instrumental value.⁵ The inviolability principle neither requires the administration of futile or unwanted medical treatments,⁶ nor entails that any withdrawal or withholding of treatment must be viewed as an assessment that the patient’s life is no longer worthwhile.⁷

In the medical context, the core of the inviolability principle holds that ‘it is always wrong to try to extinguish a patient’s life’,⁸ whether the attempt is made by act or omission.⁹ The principle holds that the value of life is neither absolute nor merely instrumental. Instead, human life is a basic or intrinsic good, the value of which inheres in the radical capacities of humans to exercise ‘understanding, rational choice, and free will’.¹⁰ All humans possess these capacities, even if they have not yet developed, or have lost, the ability to exercise them.¹¹ Thus, as a Select Committee of the House of Lords found, the prohibition against intentional killing, a ‘cornerstone of law and social relationships’, embodies ‘the belief that all are equal’.¹²

The book is a collection of essays, and is therefore not organised as a systematic or comprehensive rehabilitation of the inviolability principle. Keown deals with several misunderstandings of the principle in passing. The variety of criticisms to which Keown is moved to respond suggests that, though the injunction against intentional killing is itself simple, it rests upon a complex understanding of the human person, human reasoning, and moral and legal obligation.

Things get particularly complicated around the principle of double effect, a corollary of the inviolability principle, which holds that one may do something good even though one foresees a harmful effect from one’s action.¹³ This principle makes sense of a doctor’s decision to administer palliative care that he knows will abbreviate the life of the patient. Given the known difficulties of distinguishing intention

⁴ Keown, above n 2, 4. As Keown documents, many of the most influential critics of the inviolability of human life have mistaken the principle for vitalism, and therefore rejected the latter while claiming to refute the former: at 63, 65–6, 89–93.

⁵ Ibid 5.

⁶ Ibid 75–6, 92–5.

⁷ Ibid 93–5.

⁸ Ibid 6.

⁹ Ibid 12.

¹⁰ Ibid 5.

¹¹ Ibid.

¹² Ibid 83.

¹³ Ibid 8–12. See also Germain Grisez, ‘Toward a Consistent Natural-Law Ethics of Killing’ (1970) 15 *American Journal of Jurisprudence* 64; Joseph M Boyle, ‘Toward Understanding the Principle of Double Effect’ (1980) 90 *Ethics* 527; Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011) 293–5.

from foresight and of evaluating proportionality, one understands how skeptics of the inviolability principle might perceive double effect as an evasion. And at one point, even Keown might appear to give way to consequentialism. In explaining why the inviolability principle forbids only unjust acts of killing he states that '[i]ntending a good end (protecting the innocent from unjust attack) can justify what would, absent such an intention, be impermissible (the use of deadly force)'.¹⁴ The ambiguity in this formulation¹⁵ is uncharacteristic of Keown's writing, and it demonstrates just how difficult these concepts are to articulate, even for those who best understand them.

Double effect is not the only source of confusion. Keown concedes that 'it is not surprising that judges and academics have sometimes confused' evaluations of the value of treatment with evaluations of the value of the patient's life.¹⁶ Keown might have assisted his readers by supplying a fuller discussion of the distinction between the intrinsic value of human life and life's instrumental value. Keown's 'quality of life benefits', a measurement of the benefits of treatment, and his critics' 'quality of life', a measurement of the quality of the life lived after the treatment,¹⁷ will often converge upon the same benefits. In each approach the burdens of treatment are being weighed against *something*, and that something will generally be the patient's marginally improved (or unimproved) ability to enjoy the goods for which life is instrumentally valuable.

This recognition does not cast doubt upon the *intrinsic* value of the patient's life. Defenders of inviolability can accept the claim of critics that a patient who rejects unduly burdensome treatment is, in a limited sense, passing judgment on the future instrumental value of her life. The inviolability principle rests upon the *independent* claim that human life always retains its intrinsic value, even when its instrumental value diminishes as a result of illness. Thus, though a patient at the end of life might rationally refuse treatment that is unlikely to produce much improvement in her ability to enjoy the rich experiences that life instrumentally enables, her life remains a reason for action in itself. No-one may act with an intention to end the patient's life, and we need not view the patient's refusal of treatment as evincing an intention to die.¹⁸

Keown attributes much of the confusion in bioethics to the importation of parental privacy interests into the definition of the legal status of unborn humans. The Supreme Court's decision in *Roe v Wade*¹⁹ looms large over American medical law,

¹⁴ Keown, above n 2, 10–11.

¹⁵ Perhaps a more precise formulation would state that the means are not evil, and therefore require no independent justification, as long as the actor's intention truly is to defend himself or another, and not to kill, and he takes action proportionate to the necessity. Keown defends the principle at some length: see *ibid* 8–12, 53–4, 62–3, 85–6, 319–21, 344–5.

¹⁶ *Ibid* 12–13.

¹⁷ *Ibid* 93–5.

¹⁸ See *ibid* 345–6.

¹⁹ 410 US 113 (1973).

and Keown argues persuasively that the gravitational pull of *Roe* and its progeny has distorted areas of the law in which the privacy right is not implicated. But things are just as muddled at the other end of life.²⁰ Proposals to legalise assisted suicide and euthanasia often conflate intention and foresight.²¹ Unwarranted attention to the distracting difference between action and omission leads to sloppy references to ‘passive euthanasia’, which often refers not to euthanasia, but rather withdrawal of futile treatment,²² a practice that everyone agrees is morally unobjectionable and legally unproblematic.

Keown traces the history of confusion back to Glanville Williams and his influential book, *The Sanctity of Life and the Criminal Law*.²³ Published in 1958, the book became the ‘foundation stone’ of medical law. Despite attacking the inviolability principle, Williams did not anywhere articulate it, but instead presented various caricatures of it. The book was replete with misstatements and departures from the historical record,²⁴ and at critical junctures in his argument, Williams ‘seemed to assume what he needed to prove’.²⁵

Some might find it implausible that a principle which plays such a prominent role in bioethics and law can be so badly misunderstood by so many competent scholars and lawyers. Those whom Keown criticises are capable intellectuals. How could they have erred so badly? A possible explanation comes to mind when one considers the perspective that Keown has adopted in this book. He is not looking at the problems of bioethics opposite, but rather orthogonal, to his interlocutors.

Much as H L A Hart opened to view new insights about law by adopting the ‘internal point of view’²⁶ of the law-abiding citizen — looking with the citizen along the law, rather than merely at it — Hart’s pupils, especially John Finnis and Joseph Raz, have achieved significant insights into practical reason and deliberation by looking along reasons for choice and action, rather than merely at them. Many reasons, when viewed from the internal point of view of the person whose choice and action is guided by such reasons, are transparent for more fundamental goods. Money is desirable because it enables one to purchase other things. But some reasons are — whatever their instrumental worth — also valuable in themselves, as intelligible reasons for action in their own rights. Looking toward those reasons, one can perceive their beauty and their value as basic goods, reasons for action the value of which is not dependent upon any more fundamental goods.

²⁰ Keown notes that under current law in the United Kingdom ‘doctors may not intentionally end the life of a patient in [persistent vegetative state] by an act but they may do so by withholding or withdrawing tube-feeding’: Keown, above n 2, 343.

²¹ See *ibid* 341–2.

²² *Ibid* 289–90.

²³ Glanville Williams, *The Sanctity of Life and the Criminal Law* (Faber & Faber, 1958).

²⁴ Keown, above n 2, 26–59.

²⁵ *Ibid* 51.

²⁶ H L A Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 90–6.

The inviolability principle supposes that life is one such intrinsically valuable good. Looking along a life from the internal point of view of the person living it, life, much like a beam of light through a keyhole, is transparent for the ends toward which it is directed, goals and commitments that supply life's instrumental value. But one can also step outside the beam to view it from the internal perspective of another human being, who perceives its intrinsic and unique beauty.

To see the full worth of each member of the human family one must view each life from *both* directions. Generalising a bit, it seems that confusion about the inviolability principle often results from failure to do just that. At the beginning of life, the beam has not yet projected itself into space and time, and can thus elude observation. The corrective here is to look along the life of the newly existent being and to recognise the capacities for future, distinctly human, actions and experiences, which capacities are already present in the very young human being. The tendency at the end of life is to defer to the internal point of view of the patient who, suffering from physical, mental, or emotional anguish, sees no point to it all. This person needs the external perspective of others, whose view is not obstructed by pain and depression. Looking *at* the patient one sees a human being with intrinsic worth. By considering the internal perspectives of both patients and those who encounter them, we might correct many misunderstandings about the important role that law and ethics play in protecting the equal dignity of all human beings.

