*Brian Davis**

TAMING DEATH BY LAW

by David Lanham
Longmans, Australia
xiii 235 pages
ISBN 0-582-80071-4

THERE are two advantages to *Taming Death by Law* which do not frequently go together in books by academics. First, it is short: it can be read in a couple of hours. Secondly, it is written (with one exception) in clear and often elegant prose, without a trace of legal or sociological jargon from beginning to end. (The exception is an unnecessary 14 page Appendix consisting of a pretentious "Values Statement" developed, we are told, at the "Center for Health Law and Ethics", University of New Mexico.) Despite its brevity, however, the book makes a valuable and topical contribution to an important debate.

As the Royal Australian College of Physicians has recently remarked:

> [M]edical end of life decisions are increasingly being discussed in many countries, including Australia and New Zealand. While there is near universal agreement that the making of such decisions is an integral part of good medical practice, there is less agreement on the types of end of life decisions that are morally, professionally, and legally acceptable.[1]

The debate, of course, is not new. In Judaea, sometime in the second century BC, Joshua ben Sirah observed that death was "a bitter remembrance to him who liveth at rest in his possessions, but welcome unto him whose strength faileth, and who despaireth and hath lost patience". Those in the last stages of Hodgkin's Disease are but one possible example. In Nancy Mitford's case this caused "one of the two most atrocious pains

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1 *Ethics: Voluntary Euthanasia, Issues Involved in the Case For and Against* (1993) p7.

known to medical textbooks. After two years torment, its bedridden victim regularly wolfed down fistfuls of pain-killers ... so useless that she took to stuffing her pillow into her mouth to choke back the screams".[2]

Nonetheless, Jewish tradition, followed in this respect by Christianity, regards suicide as sinful, whatever the degree of suffering. "The earth is the Lord's, and the fullness thereof"; we hold our lives like our other possessions merely as His trustees, and we have no right to surrender our stewardship when it becomes a burden.

The Halakhah on this point has recently been summed up as follows:

> [H]astening death in order to relieve pain is not allowed, and the shortening of a dying patient's life is forbidden even if he suffers terribly ... The doctor has no authority to decide on lethal treatment for his critically ill patient, and will be regarded as a murderer if he kills the patient in order to save him from further suffering.[3]

In the Netherlands, however, doctors have practised active euthanasia for the sake of, and at the request of, their patients since the early 1980's, with the approval of their medical association and the Dutch courts. But most Western jurisdictions follow the Judaeo-Christian tradition and refuse to countenance deliberate mercy-killing in any circumstances. For example, in November 1993 a certain Dr Jack Kevorkian (known throughout the United States as "Dr Death") was sent to gaol. A 65 year old pathologist, he had provided assistance to 19 terminally ill men and women who wished to commit suicide. A newly enacted statute of the State of Michigan had made this a felony. Dr Kevorkian - like Antigone - had defied that law as a matter of conscience, and paid the price.

But if compassionate killing is illegal, the withdrawal of treatment from a patient, which has the same intention and effect, is not. It seems to be the case, (as Arthur Hugh Clough sarcastically remarked in *The Latest*

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2 *The Adelaide Review*, December 1993 at 39.

3 Rosner, *Modern Medicine and Jewish Ethics* (1986) p156, quoted in Charlesworth, *Bioethics in a Liberal Society* (Cambridge University Press, Cambridge 1993) p42. Even Kant, that great apostle of personal autonomy, denied that there was a moral right to suicide. His arguments on the point are not convincing however: see *The Groundwork of the Metaphysic of Morals*, trans by Paton (Harper, New York 1964) pp88-89.

Decalogue over 100 years ago) that "Thou shalt not kill; but needst not strive/Officiously to keep alive".

Or, as Father Bill Uren, Jesuit and "bioethicist" was reported by *The Australian* as saying to a recent Australian conference on death, dying and euthanasia, "resources" should be withdrawn in most cases when their continued provision was futile or of little benefit.[4] On the other hand, allowing "health professionals" to actually intervene to accelerate death could not be condoned in any circumstances. Consent by the patient did not justify a breach of the sanctity of life ethic.

The distinction between acts and omissions in this context seems artificial and tenuous to many commentators. But it was recently re-affirmed by the House of Lords, in *Airedale NHS Trust v Bland*.[5] This concerned a victim of the Hillsborough football disaster on 15 April 1989, who was in "a persistent vegetative state" on 4 February 1993 when the House of Lords ruled that it was lawful to discontinue feeding him so that he could die. According to Lord Goff:

> [T]he law draws a crucial distinction between cases in which a doctor decides not to provide for his patient treatment or care which could or might prolong his life, and those in which he decides, for example by administering a lethal drug, actively to bring his patient's life to an end.[6]

On this view of things, both Dr Kevorkian and the Halakhah have got it wrong.

The position may be different in Australia, however, at least as far as minors are concerned. In *Taming Death by Law* Professor Lanham refers to the case of *Re F*, decided in the Supreme Court of Victoria in July 1986.

> A baby had been born with spina bifida and there was some evidence that the mother did not wish the child to be [kept alive]. A decision was made by the hospital to sedate the baby and withdraw sustenance. The baby's grandparents applied to the court for an order preserving the life of the child. The judge said that no parent, doctor or court had any

4 *The Australian*, 23 September, 1993
5 [1993] 1 All ER 821.
6 At 867.

> power to determine that the life of a child, however disabled, will be deliberately taken away ... He made an order that all necessary and reasonable measures consistent with medical practice ... should be taken to preserve the baby's life.[7]

Professor Lanham says that *Taming Death by Law* is not a law textbook, and that he has deliberately economised on the number of footnotes and references to be found in such treatises. Despite this modest disclaimer, there is a great deal of learning in his book, but it is worn very lightly. *Taming Death by Law* is "intended for a wide readership". It deserves to have it.

Perhaps, however, one might be permitted a couple of minor quibbles. First, Professor Lanham devotes too much space to specifically Victorian legislation. This will diminish the book's appeal to readers in other States. Secondly, why does he not use footnotes printed at the bottom of the page? The pernicious fashion for inconvenient endnotes has increased, is increasing and ought to be diminished.

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7 *Taming Death By Law* at 115. *Re F* is unreported. But a reasonably full account of Mr Justice Vincent's judgement (extracted from *The Age*, 3 July 1986) can be found in Ingleby, *Family Law and Society* (Butterworth's, Sydney 1993) at pp95-96. Interestingly, Dr Brendan Nelson, President of the AMA recently called on the States to legalise a doctor's right to withdraw treatment for premature or malformed babies if death was inevitable. Dr Nelson said most doctors believed the law was out of step with sound medical practise and reform was needed urgently. Dr Nelson also said that Australia had to consider whether doctors had a right "aggressively to treat every single baby, who, if they do survive, need medical support, with no ability to care for themselves"; *The Australian*, 17 November 1993.