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## How to reach consensus on ethical issues?

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## Literatuur

### How to reach consensus on ethical issues?

M.J. Trappenburg

Review article about:

R. Dworkin, *Life's Dominion. An Argument about Abortion, Euthanasia, and Individual Freedom*, Alfred A. Knopf, New York 1993.

H. Zwart, *Ethische Consensus in een Pluralistische Samenleving. De Gezondsethiek als Casus* (Ethical Consensus in a Pluralist Society. The Case of Health Care Ethics) diss. KUN, Thesis Publishers, Amsterdam 1993.

One of the most intriguing findings in Joyce Outshoorn's study on Dutch abortion policy is the changing rhetoric of Dutch pro life activists. During the twenty years of struggle that preceded the legalization of abortion in the Netherlands, all pro life groups changed their tune. They all started arguing in legal or medical-biological terms (human rights, the constitution, penal law, the beginning of human life) and later on shifted toward an explicitly religious discours (each human life represents divine value, we are not to meddle with God's creation, human beings should not judge on life or death). (Outshoorn 1986: 178) There does not seem to be a plausible explanation for this phenomenon. Once the pro life rhetoric changed, pro choicers could picture their opponents as merely a religious minority group that should not be given a chance to rule other people's lives. Any sensible group of lobbyists could have predicted this. Outshoorn adequately explains the battle tactics of pro choice groups (notably the feminist variety): they chose a very effective issue definition focussing on the question 'who should decide', so as to avoid a messy debate on the question whether it may be deemed morally wrong to kill innocent human foetuses in the first place. She does not offer understanding of the pro lifers' strategy, though. Their change of weaponry is presented first and foremost as a prime opportunity for their opponents.

Reading Dworkin's *Life's Dominion* and Zwart's *Ethical Consensus in a Pluralist Society* may shed new light on the pro lifers' puzzling behavior. Neither

*Life's Dominion* nor Zwart's dissertation were written with an audience of political scientists in mind. Zwart is an ethicist interested in a wide array of classical and/or famous philosophers (Nietzsche, Kant, Heidegger, Jaspers, Strawson, Rorty); Dworkin's new book is a reinterpretation of American jurisprudence on abortion and euthanasia. However, both books are definitely worth reading; very much so for political philosophers; more indirectly for empirical scientists interested in the process of reaching consensus on ethical issues.

Zwart belongs to a group of moral philosophers referred to as hermeneutical ethicists, anti-ethicists or critical ethicists. Mainstream ethicists (the 'medical ethics establishment', also referred to as 'liberal bio-ethicists' or 'ethical engineers') try to find answers for what might be called 'every day moral puzzles': is it morally admissible to allow a severely damaged foetus to die? are we allowed even to kill it, if it does not die of its own? is it justifiable to submit people to an HIV test if they do not want to know the results? should the doctor inform partners of HIV positive patients if the patients themselves want to keep their affliction a secret? if there are two patients needing a heart transplant where there is only one heart available, should we then grant the organ to, for instance, the non-smoking, non-drinking, healthy living person? et cetera. Mainstream ethicists usually try to find answers in terms of (legal or moral) rights and interests. Mainstream ethicists resemble liberal political philosophers such as Rawls or Nozick. Dutch mainstream medical ethicists tend to resemble Rawls, while English or American bio-ethicists also come in more libertarian varieties. (Cf. Harris 1985, 1993; Engelhardt 1986).

Critical ethicists on the other hand, do not concern themselves with these down to earth moral questions, complicated though they may be. In their view, the mainstream ethicist is trapped in some sort of symptom fighting. Real philosophers, they maintain, ought to address the problem behind or beneath the superficial moral dilemma which the doctor has to cope with. Real philosophers wonder about the nature of modern medicine, the meaning of life, or the limits of rationality (thus: what does it mean to live in a society where doctors are asked to kill handicapped infants? is it possible to make a rational decision concerning other people's lives? does modern technology dictate life in the twentieth century and if so, what does it mean to be subjected to a technological imperative? is not the fact that we have to choose which patient will be treated the ultimate consequence of living in a modern, capitalist society, where survival is our prime interest? why are we no longer able to face death, like people did in the Middle ages? et cetera). (Cf. Van Willigenburg versus Van Tongeren in Brom et al. (eds.) 1993.)

The critical ethicists are a miscellaneous company. Some of them advocate what they call a more narrative approach to medicine (bringing the

patient's story back in); others defend a religious orientation, still others, usually followers of Ivan Illich (Illich 1978), are very much in favor of preventive medicine as opposed to the clinical, curative approach. However, they all share, what one might call 'the digging attitude': they all intend to concentrate on the problem beyond what seems to be the problem.

Hub Zwart starts his investigation from 'a sense of uneasiness' with respect to mainstream medical ethics. He aptly characterizes the ethical engineering way of arguing as a discourse of rights, interests, self-determination and rational deliberation; thus opposing equally critical philosophers like Alisdair MacIntyre (MacIntyre 1987), in whose opinion contemporary ethics is in a very sorry state indeed. In MacIntyre's *After Virtue* twentieth century ethics consists of fragments of moral traditions (Christianity, Greek antiquity, Kantianism) that have been drawn out of context and have thereby become literally incomprehensible. Contemporary moral man can only echo ethical phrases in a parrot-like fashion. He knows the Kantian categorical imperative, but he does not know the first thing about Kantian metaphysics. He knows about neighbourly love but he no longer believes in a God who ordained it. He may mutter things about honour and glory, without having a clue as to what he is talking about. Hence, in MacIntyre's opinion, there is not the slightest chance of anything like moral consensus in the twentieth century. The only thing we seem to agree on, is that all moral statements are essentially relative; we have reduced moral statements to mere preferences or matters of taste. Ethical debate in a modern society, in MacIntyre's view, is a futile enterprise. In Zwart's opinion, MacIntyre's analysis is fundamentally mistaken. The ultimate principle in contemporary ethics is, what Zwart calls, a readiness to discussion and deliberation at all times, about anything (-Zwart, p. 74). One is not supposed to just have an ethical view on certain issues, based on vague notions as 'moral feeling' or 'religious belief'; one has to provide reasons to back up one's point of view, one must be prepared and be able to defend it. You can no longer get away with arguments like 'I feel we should not mess around in the animal gene pattern' or 'I can sense that this is a line we dare not cross'. MacIntyre's description of modern ethics as being 'emotivistic' - modern man feels about ethical issues the same way as he feels about eating cake or watching a movie - is wrong, since modern man is not at all supposed to just feel the answers to moral issues. He is supposed to provide reasonable arguments.

In Zwart's opinion this imperative of rationality or reasonable argument leads to a bias in favor of pseudo-neutral, liberal ethics. One can no longer refer, like Antigone in Sophocles' tragedy, to duties toward metaphysical entities taking precedence over the laws of mankind or state morality. Ethics is reduced to a body of reasonable rules for peaceful coexistence. Zwart claims that the Antigone feeling (being in touch with higher order obligations) is a

general moral experience, which not only gets hold of religious people but of non-religious people as well. Maarten Luther's (Augustinus's) doctrine of two realms (one belongs to the realm of men and to the realm of God) is an existential experience that Christians and non-Christians alike will recognize. Personally I do not share Zwart's comments on the imperative of reasonable argument. I very much prefer not to live in a political community where people may go around having all sorts of idiosyncratic feelings on moral issues; public debate should not end up being some sort of psychotherapeutic session ('I feel this is just utterly wrong, don't you?' 'Can you please explain why?' 'No I can't and I won't. It's just a very strong feeling. Don't you feel the same way?') Various philosophers (e.g. Hare 1990) have pointed out that this may lead to a community where people no longer have to explain their racist, sexist or religious prejudices and I agree with them wholeheartedly. Zwart, interestingly enough, compares this debate between pro-intuitionists on the one hand and the champions of reasonableness on the other hand with the debate between followers of the Marquis de Sade and their victims. The sadists, like the rational bio-ethicists, appealed to reasons and rationality, whereas their poor victims could provide no reasons for their resistance against perversion. Likewise moral philosophers such as Michael Tooley make a very convincing case in favor of infanticide, leaving their opponents speechless, like De Sade's victims. This is definitely an exaggeration. Accepting the imperative of reasonableness (even of rationality) does not oblige us to legitimize each and every new practice modern medicine may come up with. There are much better arguments against an unconditional acceptance of infanticide than just the feeling that it is against our innermost intuitions. (We may for instance argue that the unconditional legalization of infanticide will give parents or doctors too much power in matters of life and death and then point out that power is bound to corrupt. There is nothing wrong with a strong dose of consequentialist reasoning in medical ethics.)

Zwart does make an interesting point though, especially when we take a look at the 'institutional consequences'. Suppose we do not agree with him, suppose we do not want to accept moral intuition or divine inspiration or innermost feelings as legitimate arguments. Why should we then strive for something like representation according to religious (or pseudo-religious; 'converted humanists' may fall in this category) denomination in (governmental or advisory) committees on ethical issues? If one is not allowed to refer to divine revelation (as it is felt by the group of people one is supposed to represent), then why should members of religious groups be asked to participate in such committees in the first place? Disagreeing with Zwart may change our view on the composition of committees on all sorts of issues. Those of you who tend to agree with Zwart may leave the institutional status quo intact. They should, however, probably have to disapprove of the

reigning tendency to produce majority reports. Zwart believes that differences of opinion ought not to be hushed up; public debate should be as fundamental, as thorough and as deep ranging as possible. (Followers of Zwart's will also have to find a convincing reply to Hare's question about racial and sexist prejudice. Zwart does not offer much help there.)

It may be interesting to find out whether Outshoorn's pro lifers have been critical ethicists or anti-ethicists fed up with the moral minimalism of mainstream medical ethics, long before professional ethicists started to write books like Zwart's dissertation. (Critical ethics, apart from the Ilich variety, which is only indirectly related to moral philosophy, is usually considered to be a recent phenomenon, starting in the late 1980's.)

Another interesting point is the problem of building consensus. Mainstream medical ethics (like liberal political philosophy) is considered to be a peace keeping, consensus creating operation. Granting people a right to abortion, euthanasia, genetically engineered pets, or even genetically tampered babies, is supposed to be a way to avoid major conflicts. After all, to be given a right to have an abortion does not force anyone to undergo this kind of treatment; one may still feel that one's conscience does not allow it. The only thing we have to agree upon is, what may be called, 'the ethical main frame' (cf. Engelhardt 1986). We have to agree for instance that foetuses are not moral persons, and accordingly cannot be harmed or injured in the way adults or children can be hurt or injured. As long as pro lifers do not go along with this point of view, as long as they argue, for example, that the unborn should be given the same rights as the born because one cannot refuse personhood to human beings merely because they happen to reside in someone else's body (there is racism, there is sexism, radical environmentalists accuse us of speciesism, why not make a case against born-ism?), there will be no consensus. Perhaps Dutch pro lifers at a certain point in time felt they no longer disagreed on the ethical main frame (it is very difficult to stick to the conviction that foetuses are persons, morally equal to your grown up neighbour. Not even the pope would condemn abortion equally harshly as brutal murder). If we believe Zwart, they may have felt (like Zwart himself) uneasy or uncomfortable in spite of this public agreement. Hence they changed their vocabulary so as to give words to this feeling of uneasiness (yes, you convinced us, but we still feel abortion is wrong, it is sinful in the eyes of God, and there is no way your reasonable argument can change our feelings). Their change in rhetoric exposed the mainstream liberal consensus for what it really was: some form of hidden power over non-liberals, intuitionists, Christians, spiritualists. The change in rhetoric thus revitalized the struggle; Zwart would add 'and rightly so'. According to Zwart, ethical disputes simply cannot be solved by applying mainstream ethical minimalism, and we ought to stop pretending that it can. In Zwart's opinion we must not strive

for consensus, we must confront our differences and in this way hope to acquire insight in The Ethical Truth. (The Ethical Truth will probably forever elude us, but that is no reason to give up striving for it. It is, moreover, certainly no excuse to let ourselves be lulled asleep by the pseudo-consensus of liberal moral philosophy.) I am not convinced by Zwart's moral argument in favor of intuitionism, but making use of Zwart's viewpoint to explain the pro lifer's change of rethoric seems to offer a profitable strategy.

One might summarize Zwart's argument as follows: mainstream liberal ethics leads to public consensus. This consensus, however, is highly superficial. We ought to prefer ethical disagreement in view of higher values such as 'rich moral argument', authentic ethical convictions and ultimately Ethical Truth. Dworkin's *Life's Dominion* may be summarized as presenting the exactly opposite argument: pro lifers and pro choicers (with regard to abortion as well as euthanasia) in the United States will keep on disagreeing vehemently as long as they stick to the vocabulary of mainstream liberal ethics. They ought to change their terms of disagreement in order to find one another at a deeper level. They would agree much more if they did not talk about the rights of the foetus or the rights of women, but instead talked about the sanctity, the wholeness, or the meaning of human life. The actual disagreement that divides the American people is not about the rights and interests of the unborn. It is 'a markedly less polar disagreement about how best to respect a fundamental idea we almost all share in some form: that individual human life is sacred.' (Dworkin, p. 13)

Mainstream medical ethicists in the Netherlands tend to dismiss arguments like Zwart's, stating that the days of shared metaphysical truths concerning the meaning of life are gone forever. In the bold words of Theo van Willigenburg: hermeneutical or otherwise critical philosophers do not feel obliged to offer solutions for minor practical dilemmas. Instead they intend to search for deeper problems, thus sending the people dealing with the day to day dilemmas straight into a philosophical swamp (Van Willigenburg in Brom et al. (eds.) 1993, p. 191.) Dworkin maintains that there is firm ground to be found in the swamp. We share our deepest convictions concerning what is intrinsically valuable or wonderful. We all agree (in Dworkin's opinion) that it would be terrible if great works of Renaissance art were destroyed; really terrible, not just a violation of public or private property. Likewise, we would really regret it if the Siberian tiger would go extinct, if a beautiful countryside would be destroyed. All these convictions are pretty inconsistent from a philosophical-theoretical point of view (we would mourn the disappearance of baby seals much more than the extinction of baby sharks). Some skeptics will no doubt insist that for that very reason, they must be viewed as inconsistent superstitions. Yet we tend to be remarkably

alike with regard to these inconsistent superstitions. Trying to find each other at that level might be worth the effort. Dworkin argues that abortion and euthanasia are essentially questions about why human life is intrinsically valuable. Pro lifers think that human life is sacred and should be respected at all cost. Most American pro lifers conclude from this that states must have the right to protect the human foetus, that the Supreme Court was mistaken when it ruled (in *Roe v. Wade*) that state legislation restricting abortion was unconstitutional. According to Dworkin this indicates that pro lifers do not really think that the human foetus ought to be granted personhood in the moral or legal sense of the word. Personhood, after all, is not a matter of state legislation. How about a state that were to claim that it was entitled to restrict personhood to mentally able human beings, and, by doing so, to take personhood away from mentally retarded or senile citizens? Pro lifers would not accept states' discretion in that direction. The pro life opposition to *Roe v. Wade* is grounded on a certain view on the sanctity of human life, but not on moral personhood.

Pro choicers are often almost equally unhappy with *Roe v. Wade*, and for similar reasons. They point out that the Supreme Court's ruling somehow suggests that women have the right to be selfish with regard to their unborn children, whereas in most cases the choice for abortion ought to be seen as responsible parenting. Women feel that their children are entitled to comfort and love and if they cannot possibly give that, they may have an abortion. It is not fair to ground a decision like that in a fundamental right to selfishness. Pro choicers feel that the sanctity of human life requires full respect for new born individuals; either full respect or nothing. Mere biological parenthood (having one's child adopted by other people) is inconceivable to them. Pro choicers and pro lifers should recognize each other's concern for the intrinsic value of human life instead of scolding each other for not recognizing other people's rights.

Something similar is going on with regard to the termination of life. Dworkin asks himself why so many people care so much about what will happen in case they should ever become permanently comatose. Doctors assure us that we shall not be feeling any pain, we shall not know what happens one way or the other. So why do people draw up testaments either to insure that they will be kept alive or to make sure that they will not be kept alive in that condition? Why did Nancy Cruzan's parents (Cruzan was one of America's most famous lawsuits with respect to patients who are in, what is generally called, 'a permanently vegetative state') go through all the trouble of spending their money on lawyers just to have their daughter die, when the costs of medication were all paid by the insurance company? 'Why do we care so much, one way or the other, about dying when there is nothing to live for but also no pain or suffering that death will stop? Why aren't most

of us simply indifferent about what happens to us, or to those we love, in that circumstance?' (Dworkin, p. 194) The answer to this question is, according to Dworkin, again strongly related to our deepest feelings concerning the sanctity of human life. Advocates of free euthanasia are not primarily afraid of pain and suffering; neither are they preoccupied with a right to self-determination. In their view the sanctity of human life entails the dignity of human life; they desperately want to end their life in a dignified manner. Opponents of free euthanasia should understand this, since they are equally concerned with the sanctity of life. In Dworkin's opinion this changes a great deal in the American debate on free euthanasia. Thus far opponents of euthanasia argued that one must not allow euthanasia because of the sanctity of human life and because of the risk that old and vulnerable people can be talked into euthanasia where they do not really want to end their lives. However, advocates of euthanasia cannot be asked to give in 'in view of the sanctity of human life', once it is recognized that it was precisely the sanctity of human life that drove them to ask for euthanasia in the first place. Granted, old and vulnerable people can be talked into a good death once euthanasia is legalized, but as long as euthanasia remains classified as a criminal offense, many people have to live through a deathbed that is contrary to their innermost feelings with regard to human dignity. In Dworkin's opinion the wrong that these people have to suffer balances the wrong that accidental involuntary euthanasia can occur in the future. (This is a very intriguing part of the argument. On the whole I think I disagree. Dworkin seems to be saying that it is equally wrong to be convicted when one is innocent as it is to be acquitted when one is guilty. I should think the first is a lot worse. Moral and legal principles are not necessarily symmetrical.)

From Dworkin's perspective Outshoorn's pro life groups should probably be seen as searching for consensus on a deeper level. We may even explain their fading away, after the legalization of abortion in the law on pregnancy termination (1984), by stating that they must have felt that the Dutch law is much more about the sanctity of human life than *Roe v. Wade*. The messy, compromise character of the present Dutch legislation may have been an advantage after all.

From the perspective of the current debate in Dutch medical ethics or moral philosophy, this is the most interesting part of *Life's Dominion*. There is more, though. There is for instance the question whether states, in Dworkin's sanctity of life doctrine, ought to have the right to endorse a particular vision on the sanctity of life. After all, we let them destroy or protect particular parts of our natural environment, particular pieces of our cultural inheritance. In Dworkin's opinion states do not have that discretion, because the effects of particular visions on the sanctity of human life on the lives of particular people are infinitely greater than the effects of particular visions

on how to protect an endangered animal species. There is the usual (vintage Dworkin) sermon against those who advocate a literal interpretation of the constitution. (Anyone who still thinks that we must find out the founding fathers' feelings on contemporary issues must also be prepared to overrule *Brown v. Board of Education*, and reinstate the 'separate but equal doctrine'. According to Dworkin, no one will be ready to do that.) And there is a lesson legal and political philosophers may take to heart: 'Political philosophers, philosophers of law, social theorists [...] have in recent years produced innovative and sometimes compelling theories, which other people have tried to apply to social and political issues. But these theories have not yet improved the quality of public political argument as much as they might have, and that is partly because though the theories plainly do have implications for particular contemporary political controversies, they were not constructed for or in response to them.' (Dworkin, p. 28-29) *Life's Dominion* is an exception to this rule, which makes it worth reading very much for practitioners and theorists alike.

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