

## BOOK REVIEW

### CHOOSING LIFE, CHOOSING DEATH: THE TYRANNY OF AUTONOMY IN MEDICAL ETHICS AND LAW

By Charles Foster,  
Oxford: Hart Publishing, 2009, 189 pp., £22.50, ISBN 978-1-84113-929-6

As the title suggests, this book is concerned with challenging the hegemony of autonomy. This is not the first such attack, nor is it likely to be the last. As a challenge to what may fairly be described as the dominant view in Anglo-American bioethics and law, it is a predictable, but necessary part of the cycle of debate, creation and criticism of the way in which society approaches the relationships between individuals and between the individual and his or her community.

Before turning to the individual parts, it is worth noting that Foster's approach is polemical and heavily reliant on rhetorical devices that are more suited to the art of oratory than to a written essay. His style is like Marmite, and the reader will either love it or hate it: it will either be seen as provocative or irritating.

In chapter one, Foster tackles the principle of autonomy. Although asserting that "parody is not argument", parody is his main weapon and much of his criticism is aimed at a caricatured picture of autonomy as libertarian and atomistic self-determination rather than at a more nuanced conception that is more characteristic of the current academic debate. There is much to criticise in Foster's approach to autonomy. However, I will restrict myself to two related points.

Foster anthropomorphises autonomy and refers to it as a "god", whose religion is "policed with terrifying vigour" by the "intellectual fascis[ts]" who worship at autonomy's temple. I am happy to concede that different approaches to autonomy are based on differing views about the way the world is, which may reasonably be compared to religious beliefs. However, I am yet to meet these frightening academics that are "dangerous" to cross. Perhaps I have just not been to the right conferences, but the picture that Foster paints is unrecognisable to me as a grossly caricatured analogy with religious fundamentalism.

One wonders, in reading this first chapter, whether autonomy is Foster's sole target, or if he is also gunning for academics. This impression is confirmed in the epilogue where Foster suggests that judges should be "less reverential" to academics whose "abstraction[s]" are "dull" and, "when read out in the court room...life-threatening". His solution is to suggest that "intellectual democracy" and "integrity" should be introduced by requiring academics to swear fealty to "a sort of academic Hippocratic Oath".

In chapter two, Foster turns from autonomy to look at some of the other principles contending for influence in the realm of medical ethics and law. The chapter is short, with a total of three pages devoted to the principles of non-maleficence, beneficence and justice, supported by a brief mention of professional integrity and "rights and duties". The point of this unhelpfully brief chapter is to highlight the existence of

these other important principles to allow their relevance to be recognised in subsequent chapters.

In the final part of chapter two, Foster engages with rights and duties, again highlighting his caricatured parody of autonomy by declaring that: “Autonomy loathes the idea of duties”, with duties being tolerated “in the same way that swaggerstick brandishing colonials tolerated the natives”. On this note, he introduces the idea that doctors also have a right to autonomy and that this autonomy is in the middle of a “civil war” with patients’ autonomy. It is this “war” that forms the subject for chapter three, which focuses on the clash between a woman’s “right” to an abortion and the doctor’s option of conscientious objection.

In chapter four, Foster turns his attention to reproductive autonomy. Here he raises some interesting questions about the clash between the autonomy rights of the various interested parties and the other relevant interests, including the issue of property rights in body parts. In the second part of the chapter he goes on to address the question of whether one should “be entitled to have a child?” Foster focuses on adoption and access to assisted reproduction for prisoners. As with his other arguments, he highlights some interesting points, but his discussion stops short of a deep engagement with the issues. The main point that Foster appears to be making is that, while autonomy is an important and relevant principle it is not always decisive. Thus, he suggests that the reluctance to allow prisoners access to IVF shows that autonomy can be defeated by beneficence, non-maleficence and justice. If the world does not end because autonomy is not revered in these non-medical law areas, then – Foster concludes – “the world might not end for medical law either”.

In chapter five, Foster returns to the issue of abortion and fetal protection. His approach is clearly weighted in favour of fetal protection and he is sometimes quite dismissive of the woman’s interests. While Foster writes entertainingly, and certainly highlights some of the law’s failings, his arguments remain superficial. Perhaps the biggest problem with this chapter on abortion is Foster’s failure to really engage with the questions that precede the issue of competing interests: what is the moral status of the fetus, and what interests does it have that deserve legal protection. Thus, Foster dismisses the “no personhood” argument by stating that it is “manufactured in a philosopher’s study” rather than the “ward or the laboratory”, it is not “robust enough” and relies, not on argument, but on “mere unevidenced assertions”. This is, ironically, asserted without any supporting evidence bar an appeal to the “conviction of many pregnant women that their unborn child has joined the human community”.

Chapter six is short chapter that looks at “[q]uestions raised by reproductive technology”, focusing on genetic selection and genetic enhancement. Again Foster raises some interesting and important issues, but these are often dealt with superficially. For example, he addresses the idea of “procreative beneficence”, which refers to the claim that parents do not just have a right to choose the child with the “best” prospects; they have a duty so to do. For Foster, this is “offensive”, although he never explains why, and curiously it is all autonomy’s fault. It is, however, difficult to see how autonomy can be solely responsible for an argument that the parents do not have the right to choose but must select the child with the “best” prospects. Foster’s crude attack on autonomy similarly sees him misapply the “non-identity problem”.

In chapter 7, Foster addresses confidentiality. He provides some interesting insights into the legal protection of confidentiality, but one is still left wondering who are the “wildly and uncritically autonomistic ethicists” who staunchly defend autonomy as

the be-all and end-all of any argument. Thus, in discussing the article 8(2) exceptions to the right to private and family life enshrined in article 8(1) of the ECHR, Foster suggests that: “A thorough going autonomist, trying to maintain his philosophical monopoly, will say that Article 8(2) is actually about autonomy too”. However, Foster fails to point to a single commentator who has adopted this tactic.

In chapter 8, Foster turns his attention to consent. Here he cogently shows that autonomy is not absolute or limitless, both in principle and practice. The chapter is marred, however, by the by now familiarly superficial arguments and by two errors. The more serious of these is his misinterpretation of the Court of Appeal’s judgment in *Re MB (An Adult: Medical Treatment)* [1997] 2 FLR 426, but he also curiously claims the *Mental Capacity Act 2005* “does nothing to change the law”. This is patently untrue and is inconsistent with his earlier acknowledgment that the Act introduces a new scheme that allows the patient or the court to appoint a proxy decision maker.

In chapter 9, Foster looks at litigation and clinical negligence, again arguing that autonomy is not the sole driving force. For Foster, justice is a more important. While this may be a reasonable claim it remains relatively superficial since Foster fails to engage with the concept of justice in any depth.

In chapter 10, Foster turns his attention to medical research. While acknowledging the central dominance of autonomy in the regulation of such activity, Foster challenges its role by exploring two cases. One is a hypothetical scenario involving HIV drug trials in a developing country. The other is the case of *Simms v Simms*, [2003] 1 All ER 669, which involved two teenagers infected with vCJD. Foster raises some interesting questions about the role of autonomy, but unfortunately fails to explore the possible answers in any depth. He simply concludes that: “Autonomy dislikes Simms, and autonomy, if it is being consistent, would probably withhold the anti-retrovirals from the Kenyan woman – thinking it better that she died (and so became wholly non-autonomous) than that the principle of autonomy became diluted”. These assertions simply beg the question, why?

In chapter 11, Foster focuses on the law at the end of life, engaging with the case of the conjoined twins and the clash between the sanctity of life principle and autonomy. Again he raises some relevant issues and makes some cogent observations about the law. However, his discussion of the normative issues, such as the acts-omissions distinction, is overly dismissive. He concludes that: “autonomy, if it were consistent, would oppose euthanasia/physician-assisted suicide”. He gives a number of reasons, however, these are asserted in bullet point form, often without supporting evidence and certainly without any deep engagement with the issues. This is unfortunate, because a deeper discussion would have been very useful. Foster also considers advance directives, but his argument is undermined by a flawed interpretation of the relationship between s 4(6) (a) and ss 24-26 of the *Mental Capacity Act 2005*.

In chapter 12, Foster examines the law regulating transplantation. He covers primarily living donation, but fleetingly touches on xenotransplantation. In considering living transplantation he raises a number of interesting ethical dilemmas, but again his approach to the role of autonomy is superficial. This is particularly true of his claim that there is an “unholy alliance” between autonomy and a “stern type of utilitarianism”, which would justify the sacrifice of one autonomous person to maximise the autonomy of three others. The flaw in Foster’s approach is highlighted by his conclusion that autonomy can only criticise the outcome if it “recruit[s]

principles other than autonomy”. However, Foster can only arrive at this by appealing to a utilitarian approach to autonomy. It is the principle of utility, and a rather crude version of it, that is doing the work here, not autonomy.

In chapter 13, Foster considers the ownership of body parts. Again he engages with important issues, but the discussion remains relatively superficial. For example, he discusses the question of conditional deceased organ donation where the donor gives his kidneys with the caveat that they should not be given to a Jew. Foster asks: “Should his kidneys be accepted?” His answer comprises a number of assertions, with very limited explanatory argument. In particular, he simply asserts that: “Justice is quite clear: this sort of condition is entirely unacceptable”. He may be correct, but the claim does at least warrant an explanation as to why that is so. I suspect that once one really engages with the issue – the interests, burdens, rights and obligations that are involved – it may be less clear-cut than Foster thinks, particularly if the rejection of the condition means the organs cannot be used.

Foster’s book is a fine example of soapbox oration. It is a provocative read, but one that ultimately leaves the reader dissatisfied. Foster engages with some important and interesting issues, but tends to assert rather than argue. However, if used as a starting point for discussion, the book may well prove to be useful for seminars or in the context of a reading/discussion group.

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