

— JUDGING LIVES —

Autonomy, Dignity and Human Well-Being in cases of Voluntary Assisted
Suicide in a South African Constitutional Context

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If suicide be supposed a crime, 'tis only cowardice can impel us to it. If it be no crime, both prudence and courage should engage us to rid ourselves at once of existence, when it becomes a burden. 'Tis the only way, that we can then be useful to society, by setting an example, which, if imitated, would preserve to everyone his chance for happiness in life, and would effectually free him from all danger of misery.

~ **David Hume (1757)**

Padre Francisco: Freedom without a life is not freedom.

Ramón Sampedro: A life without freedom is not a life.

~ **The Sea Inside (2004)**

Mirri Maz Duur: So, tell me again exactly what it was that you saved?

Daenerys Targaryen: Your life!

Mirri Maz Duur: Why don't you take a look at your Khal? Then you will see exactly what life is worth, when all the rest has gone.

~ **Game of Thrones, Season 1, Episode 10: Fire and Blood (2011)**

AUTHENTICITY DECLARATION

I declare that this research report is my own unaided work. It is submitted for the degree of Master of Arts, Applied Ethics for Professionals, in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree, or examination, in any other university.



Eron Fasser

15 March 2017

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ABSTRACT

In this thesis I explore the issue of voluntary assisted suicide in a South African constitutional context through the tri-coloured normative prism of autonomy, dignity and human well-being. I will focus on the way South Africa, as a secular society, ought to engage with this highly emotive issue in light of the socio-legal framework in which we are embedded and which framework carries with it profound normative implications.

I divide the discussion into two broad sections. In the first section I articulate, from an **ethical standpoint**, what I take to be the strongest positive case for South African society to permit voluntary assisted suicide. I argue that by permitting voluntary assisted suicide South African society would be giving *proper expression* to (i) **individual autonomy** (ii) **human dignity**, and (iii) **human well-being**.

In articulating the positive case I also analyse the triumvirate concepts of individual autonomy, dignity and human well-being as well as their relationship to each other. I argue that individual autonomy is an essential component of a good human life, that is to say, a worthwhile life and that to speak of a dignified life is, in turn, to speak of the sort of life that is worthy of respect, reverence and honour.

I then turn to an examination of two of the principal ethical arguments against the moral permissibility of voluntary assisted suicide in the literature, namely (i) **the Sanctity of Life Argument**, and (ii) **the Social Harm Argument**.

I argue that neither argument is sufficiently persuasive to rebut the positive case in favour of voluntary assisted suicide. However, certain critical considerations are raised that do speak to the need for effective *oversight* and *regulation* of such a practice in South African society.

Accordingly, I advance the view that, in light of the failure of these two principal arguments (and in the absence of any stronger arguments) voluntary assisted suicide ought to be permitted in South Africa subject to uniform, public and specifiable oversight criteria applicable to each individual who wishes to end his life with the assistance of another.

In the second section, I describe the South African **legal standpoint** on voluntary assisted suicide in light of (i) the normative underpinnings of the Constitution of the Republic of South Africa, 1996 (and in particular the Bill of Rights) and (ii) the present legal status of voluntary assisted suicide, taking into account both the common law and the *South African Law Commission Report on Euthanasia and Artificial Preservation of Life, 1998*.

This analysis involves an examination of (i) the recent decision of *Stransham-Ford v Minister of Justice and Correctional Services & Others*¹ handed down on 4 May 2015 in which the North Gauteng High Court granted, for the first time in South African legal history, an application allowing a terminally ill man the right to die and to be actively

¹ 2015 (4) SA (GP) 50.

assisted to do so by a consenting physician; as well as (ii) the subsequent Supreme Court of Appeal decision in *The Minister of Justice and Correctional Services & Others v Estate Late Stransham Ford*² that overturned the original decision.

I argue that the best way to understand the socio-legal framework in which we find ourselves is as a social contract that ‘instantiates’ or ‘gives expression to’ a rights-based ethic, which in turn protects vital human interests. I argue further that this constitutional legal framework is capable of tracking and incorporating the positive ethical case for voluntary assisted suicide admirably.

Finally, I posit that the quickest and most effective way to implement a permissive policy for voluntary assisted suicide is through the development of the common law. In the process, I tentatively suggest what appropriate safeguards and oversight of voluntary assisted suicide might look like, the practical implementation of which would allow South African society – specifically through the judicial branch of government - to more sagaciously and compassionately judge lives.

² 2016 ZASCA 197 (6 December 2016).

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1. LIST OF ABBREVIATIONS

Elysian Fields: A Thanatological Taxonomy

US	Unassisted Suicide
AS	Assisted Suicide
VAS	Voluntary Assisted Suicide
DVAS	Direct Voluntary Assisted Suicide
INVAS	Indirect Voluntary Assisted Suicide
NPAS	Non-Physician Assisted Suicide
PAS	Physician-Assisted Suicide
NVAD	Non-Voluntary Assisted Death
IVAD	Involuntary Assisted Death

The Ethical Standpoint

SLA	Sanctity of Life Argument
SHA	Social Harm Argument
NCT	Neutral Container Theory
VCT	Valuable Container Theory
DIC	Doctrine of Informed Consent

2. INTRODUCTION

Human beings find themselves in a strange predicament. We are each catapulted into existence³ seemingly out of nothing only to learn, all too quickly, that we are on a conveyor belt leading ineluctably toward an abyss that awaits insidiously ahead of us. Nabokov, viewed this predicament *sub specie aeternitatis*⁴ when he wrote ‘our existence is but a brief crack of light between two eternities of darkness’ (1966 [2000], p.5). And so, temporally sandwiched between the immense void behind us and the yawning abyss in front of us, we discover ourselves passengers on a rock hurtling around a gargantuan ball of fire as a result of gravity and angular momentum. It is on *this* cosmic carousel that human beings make, experience and discover their lives.⁵

Good philosophy begins with good questions and so it is only natural, faced with such a preposterous predicament, that questions about how we ought to live begin to surface. Questions about how we ought to live inevitably lead to other questions about life’s antithesis. What is death? Should we fear it? Can there be good ways to die? Is it always a bad thing for us to die when we do? Such questions, once posed, seem only to beget further questions like an interrogative hydra.

³ Heidegger described this as the state of the human individual ‘being thrown into the world’ (Dahlstrom, 2013, p.212).

⁴ From the perspective of the eternal.

⁵ I am reminded of the wonderfully poignant words of Geertz that ‘man is an animal suspended in webs of significance he himself has spun’ (1973, p.5).

After all, what do we value in human life? Is it simple existence or is it something more? If we conclude that we value ‘something more’ how precisely should we characterize that ‘something more’? Why are we so concerned when people take their own lives or express desires for others to assist them to take their own lives? Ought we, as a society, to permit human beings to take their own lives and for others to assist them to do so? How ought we to judge, in moral terms, both those who desire the plunge into the abyss as well as those who throw them in on request? Ronald Dworkin, in considering these sorts of moral questions, writes:

We cannot think intelligently about the legal and political issues – about who should make what choices, what constitutions should permit, and what nations and states should do – unless we have a better shared understanding, not necessarily about the meaning of death but at least about what kind of question we are asking. How should we think about when and how to die? (1994, p.182)

In this thesis I explore some of these challenging questions, particularly as they relate to those of us living in a fledgling constitutional democracy grappling with the emotive issue of voluntary assisted suicide.

3. MAJOR PHILOSOPHICAL ASSUMPTIONS

However, it is first necessary to adumbrate four philosophical positions I shall assume. While not being the focus of this thesis, these assumptions are necessary to articulate explicitly at the outset insofar as they both inform, ground and contextualise my approach to the foregoing questions. It is important for readers to understand the

worldview that I endorse and which colours my approach to philosophical questions in general and ethical questions specifically.

The first is a broad metaphysical position about reality taken as a whole (**Metaphysical Naturalism**). The second is a broad position about the appropriate approach and attitude to ethics (**Humanism**). The third is a broad politico-legal position (**Secularism**). The fourth is a narrower metaphysical position specifically related to the concept of free will (**Compatibilism**).⁶

3.1. METAPHYSICAL NATURALISM⁷

The broad metaphysical position⁸ I shall adopt for the purpose of this thesis is principally an ontological stance.⁹ I shall take it, without further argument, that the universe and its contents are entirely natural and are (to a greater or lesser degree) accurately described by the natural sciences¹⁰ which have as their epistemological¹¹ foundations (i) *a posteriori*¹² empirical and sceptical methodologies augmented by (ii) *a priori*¹³ mathematical and logical schema.

⁶ A full articulation and defence of these philosophical positions is far beyond the scope of this thesis and will not be attempted here.

⁷ Metaphysical Naturalism is the belief that only the natural world exists. A proponent of such a view denies the existence of the supernatural as a separate ontological category. It follows that Metaphysical Naturalism is a monistic ontology that entails the rejection of the type 'supernatural' and, accordingly, all tokens of the supernatural. Metaphysical Naturalism, therefore, logically entails Atheism. Atheism, however, does not logically entail Metaphysical Naturalism.

⁸ Metaphysics is the philosophical study of the *nature* of existence.

⁹ Ontology is the philosophical study of *what* exists.

¹⁰ This is a Scientific Realist view, which entails the belief that the methodologies of science provide the most accurate description of the world.

¹¹ Epistemology is the philosophical study of *knowledge*.

¹² Knowledge gained by means of sensory experience.

¹³ Knowledge gained by means of reason, logic and deduction.

Richard Carrier gives a crisp sketch of **Metaphysical Naturalism** as well as the principal ground for accepting it as the most probable ontological position:

Thus, all metaphysical naturalists believe is that if anything exists in our universe, it is a part of nature, and has a natural cause or origin, and there is no need of any other explanation. This belief is not asserted or assumed as a first principle, but is arrived at from careful and open-minded investigation of all evidence and reason. . . As we see it, the progress of science and other critical methods has consistently found natural causes and origins for everything we have been able to investigate thoroughly – for so long, so widely, on so many subjects, both disparate and related. Indeed it has never once failed in this regard whenever a problem or question could be properly investigated. So it is a thoroughly reasonable inference that this shall continue unabated. We have every reason to believe that the results of future investigations will most probably be the same for every subject once we have access to sufficient evidence to decide the matter. (2005, pp. 67-68)

This thesis, thus, will not address the influence of God¹⁴ or the supernatural on the realm of ethics nor will it involve examining any of the foregoing questions through a supernaturalist lens. Therefore, I explore them and the moral permissibility of voluntary assisted suicide in South African society, on the basis that Metaphysical Naturalism is true. It follows that I shall take it that **Theism**¹⁵ is false and **Atheism**¹⁶ is true. Such a metaphysical position also rules out the possibility of an ‘after-life’ as conceived by most religious traditions as well as the possibility of a human being surviving the destruction

¹⁴ The classic theistic conception of God is that of a transcendent omnibenevolent, omnipotent, omniscient and omnipresent non-physical personal agent who created the universe, including human beings, and with whom human beings can have a personal relationship. God is, in short, classically conceived of as a transcendent personal metaphysical, axiological and soteriological ultimate. (Schellenberg, 2015)

¹⁵ Theism is the belief that God exists.

¹⁶ Atheism is the belief that God does not exist.

of her physical body¹⁷ at least without radical, massive and prodigious technological advances.¹⁸

Accordingly, for the Metaphysical Naturalist, given the current state of technological progress, destruction of the physical body *truly* marks the end of personal existence. It may already be persuasively argued that in light of the finality such a philosophical position promises, the ethical questions which I intend to explore about voluntary assisted suicide acquire an immediacy, urgency and import that they may otherwise have lacked.

3.2. HUMANISM¹⁹

The broad ethical position I shall adopt fits comfortably and naturally (no pun intended) with my endorsement of Metaphysical Naturalism. For the purpose of this thesis I shall adopt **Humanism** as the appropriate attitude to ethics. To adopt a Humanist approach to ethics is not yet to align oneself with any particular normative ethical²⁰ or meta-ethical²¹ theory. There are as many different Humanist ethical theories as there are

¹⁷ In particular, the destruction of the central nervous system (or a significant subset of the central nervous system) and the attendant patterns of neurological activity that ‘instantiate’ and/or ‘give expression to’ and/or ‘ground’ consciousness and personhood in human beings. The precise characterisation of the metaphysical relationship between ‘mind’ and ‘body’ forms the subject matter of philosophy of mind and is beyond the scope of this thesis.

¹⁸ The possibility of such technological advances as well as the ethical questions that arise in relation thereto form the subject matter of Transhumanist thought and philosophy.

¹⁹ Humanism is the belief that ethics and ethical discourse ought to be grounded in reason and our most generous, sympathetic and compassionate understanding of the human condition, divorced from supernatural explanations and considerations.

²⁰ Normative ethics is the philosophical study of *right action* and encompasses three broad approaches to ethics, namely (i) Deontology (ii) Consequentialism and (iii) Virtue Ethics.

²¹ Meta-ethics is primarily the philosophical study of (i) the *meaning* of moral propositions and claims (moral semantics) (ii) the *nature, justification* and *truth* of moral propositions and claims (moral

individual philosophers to articulate them. Some are **Consequentialists**²², others are **Deontologists**²³ and some are espousers of **Virtue Ethics**.²⁴

Common, however, to all Humanistic approaches to ethics, is the idea that an enquiry into ethical matters is a distinctly human concern to be rationally discussed, debated and developed without reference or recourse to the supernatural in general, or to any gods and goddesses in particular.

A.C. Grayling characterises these central features of Humanism in most eloquent fashion:

Humanism is above all about living thoughtfully and intelligently, about rising to the demand to be informed, alert and responsive, about being able to make a sound case for a choice of values and goals, and about integrity in living according to the former and determination in seeking to achieve the latter. . . As the foregoing shows, in the sense now given to the word, 'humanism' is a general label for ethical views about the nature of the good and well-lived life. It concerns the fundamental question – a

ontology) and (iii) the methodologies and possibilities of acquiring moral *knowledge* (moral epistemology). (Darwall, 2003)

²² Consequentialism is the ethical view that holds that an action, rule or policy is morally permissible if and only if it brings about the best intrinsically good consequences compared to the alternatives available. In other words, the moral permissibility of an action (rightness) is defined *in terms of* the consequences it brings about (goodness). What constitute *intrinsically good* consequences will in turn depend on the particular axiological theory adopted. Consequentialism thus depends on an axiological theory to provide it with content and there will be as many types of Consequentialism as there are theories of 'the good'. (Darwall, 2003)

²³ Deontology is a family of ethical views that hold that the moral permissibility of an action, rule or policy is *not* exhausted by intrinsically good consequences. In other words, that the moral permissibility of an action depends on intrinsically normative factors *other than* good consequences. For example, whether the action, rule or policy (i) *disrespects* a person or can be *nomologically universalized* (Kantian Deontology) or (ii) violates a person's *rights* (Rights-based Deontology) or (iii) is *agreed to* by members of a moral community under certain specified conditions (Social Contract Theory). Deontological ethical theories can, therefore, be regarded broadly as Non-Consequentialist theories where the rightness of an action is defined *independently* of an action's consequences. (Darwall, 2003; Davis, 1993)

²⁴ Virtue Ethics is the ethical view that holds that an action, rule or policy is morally permissible if and only if it would be performed or endorsed by a person of *virtuous character*. Virtue Ethicists are, therefore, principally concerned with exploring the nature of virtue (*arête*), the praxis of virtue (*phronesis*) and the cultivation of a flourishing life (*eudaimonia*). (Darwall, 2003; Pence, 1993)

question that everyone has to consider – of what matters in life, and its answer is premised on the view that ethics must be based on our most generous and sympathetic understanding of human nature and the human condition. Humanism is the concern to draw the best from, and make the best of, human life in the span of a human lifetime, in the real world, and in sensible accord with the facts of humanity as these are shaped and constrained by the world. This entails that humanism rejects religious claims about the source of morality and value The key point about humanism is that it is an attitude to ethics based on observation and the responsible use of reason, both together informing our conversation about human realities, seeking the best and most constructive way of living in accordance with them. (2013, pp. 139-141)

Humanism, viewed in this way, therefore, provides an expansive and creative intellectual space within which to explore the questions relating to voluntary assisted suicide, with one eye firmly on the terrestrial realities that face human beings in all their complexity, vulnerability and fallibility, and the other on the normative ideals that are deserving of rational endorsement in the face of those same challenging realities.²⁵ It is also important to note that a Humanistic attitude to ethics could even, in principle, be adopted without contradiction by a Theist provided she was not also committed to a meta-ethical view that located the ultimate source, justification or grounds of morality in God's commands²⁶ or her character.²⁷

²⁵ Fromm spoke of a humanistic approach to ethics in the following terms: '[h]umanistic ethics, for which "good" is synonymous with good for man and "bad" with bad for man, proposes that in order to know what is good for man we have to know his nature. *Humanistic ethics is the applied science of the "art of living" based upon the theoretical "science of man."*' (1947 [2003], p.12)

²⁶ Divine Command Theory.

²⁷ Divine Aretaic Theory.

3.3. SECULARISM²⁸

The broad politico-legal position I shall adopt for the purpose of this thesis is **Secularism**. Such an attitude acknowledges that peoples, societies and cultures have numerous religious, theological and supernaturalist commitments but that such commitments have to be handled in pluralistic societies (such as South Africa) where, at the very least, epistemological uncertainty as to the veracity of competing religious claims, would make it unwise to have any *one* religious tradition underwrite the politico-legal system applicable to *all* the citizens of a country.

It is more practical and prudent to keep politico-legal and religious institutions separate and have the politics, policies and laws of a country founded on reasons that all citizens (or at the very least, the majority of citizens) could reasonably endorse and which are not narrowly tethered to any controversial religious text, code or practice.

Grayling characterises the Secularist position as follows:

A secular dispensation is one in which matters of government, public policy and administration, and publicly funded provision of services, are kept distinct from religious organizations or movements and their particular wishes for the form that society should take and how it should be run. . . Secular does not imply ‘anti-religious’, it implies ‘non-religious’. So there have been and are many religious people who are also secularists, because they take the view that religion and government should be kept apart. . . Secularism should be distinguished from both atheism and humanism. There is of course a natural connection between the three positions, but any one of them can be held without the other two. . . In the natural way of things, the word

²⁸ Secularism is the belief that the politico-legal institutions and religious institutions of a society ought to be kept separate.

'secular' has come to acquire additional connotations and extensions of meaning. So for a main example, a secular outlook is one that bases itself on reason and evidence, at the same time opposing acceptance of views on the basis of faith, tradition, authority or superstition. (2010, pp. 472-473)

Accordingly, in light of such a characterisation, I intend to examine the questions that sit at the core of this thesis without appealing to the religio-normative principles of any particular faith, dogma, authority or tradition. Furthermore, I shall assume without further argument that religious and politico-legal institutions and structures are best kept separate and that it is unwise to contaminate the latter with the former or attempt to forge robust connections from the one to the other.

While this would follow in any event from my endorsement of Metaphysical Naturalism, it is worthwhile emphasising the reason for this approach again insofar as some readers may not embrace Metaphysical Naturalism (and its philosophical implications). However, they may nevertheless believe that Secularism, in the context of a pluralistic South Africa, at the very least, (i) represents a sound practical approach to structuring society where there are competing (and contentious) religious institutions, practices and moral codes, (ii) acts as an efficacious prophylactic against overtly theocratic and/or theonomous ideologies and (iii) requires that laws, policies and conduct be guided by reasons that could be endorsed by anyone regardless of their idiosyncratic theological commitments.

3.4. COMPATIBILISM²⁹

The spectre of **Hard Determinism**³⁰ looms threateningly over all of ethics³¹ and for this reason it is necessary at the outset to adopt a philosophical position for the purposes of this thesis which affirms the ability to make meaningful moral judgments about the actions of personal agents and their moral praiseworthiness or blameworthiness but, at the same time, does not wallow in the obscure and panicky metaphysics of **Libertarianism**.³² (Strawson, 1962)

Accordingly, insofar as questions about autonomy, choice and human dignity sit at the heart of this thesis, I intend to adopt a **Compatibilist** position to free will. Carrier gives a straightforward articulation of the Compatibilist view as follows:

Even if my choices are entirely determined in advance, I still make decisions, and my decisions are still caused by who I am and what I know – my thoughts and desires and personality – just as they must be if I am to be “free” in any sense that matters. And because I am still their cause, I can still be praised or blamed for them . . . free will is doing what you want – nothing more, nothing less. And being responsible is being the

²⁹ Compatibilism – sometimes called Soft Determinism - is the view that asserts the existence of free will is not logically incompatible with causal and/or nomological determinism. (See Iredale, 2011; Mackie, 1977)

³⁰ Hard Determinism is the incompatibilist view that asserts (i) the existence of free will is incompatible with causal and/or nomological determinism and (ii) causal and/or nomological determinism is true. The implication of such a view is that free will does *not* exist. (See Iredale, 2011; Mackie, 1977)

³¹ The existential fear for many philosophers is that if Hard Determinism is true then it appears to entail that agents are not *ultimately* responsible for their actions and, accordingly, ascribing moral praise or blame to their conduct is unjustified. In short, moral responsibility *appears* to evaporate if Hard Determinism is true. (See Iredale, 2011; Mackie, 1977)

³² Libertarianism is the incompatibilist view that asserts (i) the existence of free will is incompatible with causal and/or nomological determinism and (ii) causal and/or nomological determinism is false. The implication of such a view is that free will *does* exist. (See Iredale, 2011; Mackie, 1977) Libertarian free will rests on two propositions that are thought to be *intuitively* plausible, namely (i) agents are the ultimate conscious authors of their thoughts and actions (*fons et origo*) and (ii) agents could really have acted other than they did in a given situation (principle of alternative possibilities) (Harris, 2012)

cause – nothing more, nothing less . . . This conception of free will is commonplace in law, and clearly assumes that free will means getting what you want, such that you lose your free will only when you are tricked or forced to do something you didn't really want – in other words, only when there is a substitution of someone else's will for yours, or constraints that prevent you from doing what you will to do. This notion of free will is not eliminated by determinism. (2005, p.109)

On such a view a person is free just in case her actions are performed in accordance with *her* will, desires, beliefs and reasons. Conversely, a person is 'unfree' precisely to the extent that her actions are *not* performed in accordance with her will, or her will is prevented from being actualised by other worldly constraints. Ultimate causal responsibility for an agent's will, desires, beliefs and reasons for action is not required for the agent to be described as 'free' on the Compatibilist view. Accordingly, for the purpose of this thesis I align myself with Arthur Schopenhauer's view regarding free will that a person can do what he wants, but he cannot want what he wants. (1839 [2005])

4. ELYSIAN FIELDS: A THANATOLOGICAL TAXONOMY³³

Having now explicitly stated the four major philosophical positions that underlie my general approach to the questions that sit at the heart of this thesis, it is now time to articulate and disambiguate the key concept that is the subject matter of our enquiry-*suicide*.

³³ See **Appendix I**. In Greek mythology the Elysian Fields were the final resting place of the souls of the heroic, righteous and the virtuous.

There are intentional and unintentional ways to kill oneself. Suicide is the intentional act of killing oneself.³⁴ Suicide is, of conceptual necessity, an act which has as its object, aim, purpose or goal, the termination of one's own life. Therefore, a person commits suicide if and only if the person (i) intends to die by performing a given act³⁵ and (ii) the person's intention is then satisfied by performing that act (Hill, 2011; McMahan, 2002).

It is, therefore, a contradiction to say of a person that he committed suicide 'unintentionally'. To unintentionally kill oneself is to be the victim of either (i) an accident or (ii) one's own recklessness, negligence or stupidity. In such a case the terms 'accidental death'³⁶ or 'negligent death'³⁷ would then seem to be appropriate.

Suicide can be performed with or without the assistance of another individual. In the former case there is only *one* individual involved who is both the *subject* and *object* of the act. This can then be classified as **Unassisted Suicide (US)** and is the conception of suicide that is most immediately familiar.³⁸ However, the moment that a further person is involved in deliberately assisting or aiding an individual to end her life, in

³⁴ There are of course (i) a variety of *ways* for an individual to commit suicide (causal routes) and (ii) a variety of *motivations* for an individual to commit suicide (psychological reasons).

³⁵ The action can be either a commission (doing) or an omission (allowing). Much ink (perhaps too much) has been spilled arguing over whether there is an important and intrinsic moral distinction between 'killing' and 'letting die'. (e.g. Foot, 1984, Glover, 1977; Kagan, 1998; Quinn, 1989; Thomson, 1976) I do not intend to add to that debate and for the purpose of this thesis I shall take it that there is, in the final assessment, no significant moral difference between these two types of actions. (See Grayling, 2005; Rachels, 1975; Singer, 2011; Sumner, 2011)

³⁶ E.g. The individual who engages in a potential lethal activity but who, despite taking reasonable precautions, nevertheless kills himself while engaging in that activity.

³⁷ E.g. The individual who engages in a potentially lethal activity but does so *without* taking precautions or who acts recklessly thereby killing himself as a consequence.

³⁸ E.g. The individual who deliberately shoots himself in the head with his own gun, swallows a lethal overdose of prescription painkillers, suffocates himself in his car with carbon monoxide, jumps off a skyscraper, hangs himself, performs seppuku, starves himself to death etc.

whatever manner³⁹, we are then dealing with an instance of **Assisted Suicide (AS)**. When the individual who wishes to commit suicide (i) is capable of requesting the assistance of another and (ii) has, in fact, *requested* the assistance of another person we are then dealing with a case of **Voluntary Assisted Suicide (VAS)**. An individual may desire (or be motivated) to engage in **VAS** precisely because the individual is (i) *unwilling* to engage in **US**⁴⁰ or (ii) he is *incapable* of engaging in **US**.⁴¹

The person who may ultimately provide the assistance or aid in cases of **VAS** could be (i) a friend, family member or other person with a sufficiently close connection⁴² to the life of the requester, or (ii) a physician. In the former case we would have an instance of **Non-Physician Assisted Suicide (NPAS)**. In the latter case we would have an instance of **Physician Assisted Suicide (PAS)**.

Within the category of **VAS** the aid and assistance provided (either in the form of **PAS** or **NPAS**) could take one of two further forms, namely (i) direct assistance or (ii) indirect assistance. In the former case, we are dealing with instances whereby the person providing assistance to the individual *himself* administers the medicinal means or agents⁴³ to the individual which have the effect of hastening the death of the individual or who takes some other positive step that hastens the death of the

³⁹ Either through a commission or an omission.

⁴⁰ Such unwillingness could be due to, inter alia, fear of (i) botching the suicide altogether and being left alive but in an even worse predicament, or (ii) the successful suicide being marred by undue pain, violence, degradation, loneliness or humiliation.

⁴¹ The incapacity could be due to a physical, psychological or emotional impediment.

⁴² It is an open question as to what the limits of a 'sufficiently close connection' are.

⁴³ The medicinal 'means or agents' administered are most often (but by no means limited to) lethal doses of barbiturates, opioids or other pharmacological concoctions such as potassium chloride.

individual.⁴⁴ Such a case could be termed an instance of **Direct Voluntary Assisted Suicide (DVAS)**. In the latter case, we are dealing with instances whereby the person providing assistance to the individual delivers the medicinal means or agents to the individual who then, in turn, *self-administers* those medicinal means or agents to hasten his own death. Such a case could be termed an instance of **Indirect Voluntary Assisted Suicide (INVAS)**.

When an individual has *not* requested the assistance of another person to die because either (i) she is *presently* incapable of making such a request⁴⁵ (although she may have once had the capability) or (ii) has *not yet developed* the capability to make such a request⁴⁶ we are dealing with instances of **Non-Voluntary Assisted Death (NVAD)**.

In such cases we are dealing with situations in which a life and death decision must be made by a surrogate *for and on behalf* of an individual who is presently incapable of requesting assistance to die. Such cases should not be classified as ‘suicide’ proper, precisely because the incapacitated individual presently lacks the ability required to form the intention to terminate his life. After all, the ability to presently request another to assist oneself to die presupposes the capacity to presently form the intention to terminate one’s life in the first place.

⁴⁴ E.g. turning off life-sustaining machinery like a ventilator.

⁴⁵ E.g. an individual who is in a so-called ‘permanent vegetative state’, an irreversible coma, or who is in the advanced stages of dementia.

⁴⁶ E.g. infants and some minors who are too young to conceptualise at all and thereby express anything remotely like a request to die.

It is also important to mention a final category that encompasses situations when a person (i) is *capable* of requesting assistance to die but (ii) has either *not* requested assistance to die or has specifically requested *not* to die i.e. does not wish her life to end. When a person is killed in such circumstances, presumably because it is thought to be for his own good, the term that might be used is **Involuntary Assisted Death (IVAD)**. However, in my view, this term (or any like it) should be eschewed and such cases, insofar as they ever occur, should be called what they really are – *murder*.

At this stage many readers may wonder where the term ‘Euthanasia’ fits into this analysis. The term ‘Euthanasia’ has meant (and continues to mean) a variety of different things to different people. We can distinguish between broad and narrow uses of the word. When used in the *broadest* sense it is a word that denotes ‘a good dying’ (Grayling, 2013, p.217), ‘a gentle and easy death’ (Singer, 2011, p.157) or ‘the action of inducing a quiet and easy death’ (Foot, 1977, p.1). However, the term has also been used in a number of *narrower* senses to refer to specific ways that an individual might die.

For example, some thinkers have reserved the term solely for instances of **PAS** where the physician’s motive for assistance is specifically to alleviate the pain and suffering of another person (e.g. Sumner, 2011). For others it is a term used to refer to any decision that is made to end the life of an individual sooner than it could have otherwise ended (e.g. J. Harris, 1985). Yet for others still, it is a term reserved solely for instances of **DVAS** (e.g. Glover, 1977). Given the multitude of different ways that the term has been used in the literature, I shall, for the purpose of this thesis, use the term ‘Euthanasia’ simply as a word that covers *all* types of **VAS** and cases of **NVAD**.

However, while questions around **NVAD** are ethically complex and important in their own right, this thesis will focus exclusively on (i) the moral permissibility of **VAS** (either in the form of **DVAS** or **INVAS**), (ii) the supplementary question as to whether the assistance and aid provided (once found to be morally permissible) should emanate from either a physician or a non-physician (either **PAS** or **NPAS**) and (iii) what appropriate safeguards and regulatory criteria there should be in respect of such a practice.

5. ISSUE OF CONTEMPORARY SOCIETAL IMPORTANCE

The importance of addressing the question of the moral permissibility of **VAS** in a contemporary South African context cannot be overstated. The question of **VAS** necessarily arouses deep human emotion and sentiment. It is an issue that is capable of galvanizing societies, philosophers and politicians because it is an issue that exposes our deepest axiological convictions and commitments as moral agents.

Robert Young frames the history of the debate about **VAS** (what he refers to as voluntary euthanasia) as follows:-

Debate about the morality and legality of voluntary euthanasia has been, for the most part, a phenomenon of the second half of the twentieth century and the beginning of the twenty first century. Certainly, the ancient Greeks and Romans did not believe that life needed to be preserved at any cost and were, in consequence, tolerant of suicide in cases when no relief could be offered to the dying or, in the case of the Stoics and Epicureans, when a person no longer cared for his life. In the sixteenth century, Thomas More, in describing a utopian community, envisaged such a community as

one that would facilitate the death of those whose lives had become burdensome as a result of 'torturing and lingering pain'. But it has only been in the last hundred years that there have been concerted efforts to make legal provision for voluntary euthanasia. (2016, p.2)

The need for sound analytic thinking on this topic is, therefore, indispensable especially considering that suicide (and by implication **VAS**) often carries with it enormous social opprobrium, stigma and normative condemnation. No country in Africa has any direct legal framework in place addressing **VAS**. South Africa is the first country on the continent that is in the process of actively reassessing the morality and legality of **VAS**.⁴⁷

The need to provide moral and legal clarity to this issue is especially important in a contemporary South African context in light of the following:-

- (i) There is a complete lack of any extant statutory legislative structure or framework dealing with and/or addressing the question of **VAS** despite the recommendations made in the *South African Law Commission proposal on Euthanasia and Artificial Preservation of Life prepared, November 1998*;
- (ii) On 4 May 2015, in the North Gauteng High Court⁴⁸, judgment in the case of *Stransham-Ford v Minister of Justice and Correctional Services & Others*⁴⁹ was

⁴⁷ There are a number of jurisdictions beyond Africa that, in one way or the other, legally regulate **VAS** (either **DVAS** or **INVAS**), namely, Albania, Belgium, Canada, Colombia, the Netherlands, Luxembourg, Japan and the American States of Oregon, Vermont, Washington, California, New Mexico and Montana. Since I am focussed on the question of the moral permissibility of **VAS** in a South African context it is beyond the scope of this thesis to engage in a comparative analysis of the ways these jurisdictions have dealt with the issue. They are mentioned only for the sake of completeness.

⁴⁸ The High Courts of South Africa are established in terms of s 166 read with 169 of the Constitution of the Republic of South Africa, 1996.

⁴⁹ 2015 (4) SA 50 (GP).

handed down in which, for the first time in South African history, an application was granted allowing a terminally ill man the right to die and to be directly assisted to do so by a consenting physician.

- (iii) The State, as well as the Health Professions Council of South Africa (**HPCSA**)⁵⁰ opposed the application which opposition, inter alia, involved raising the (i) **Sanctity of Life Argument**, and (ii) **Social Harm Argument**.
- (iv) The matter was taken on appeal to the Supreme Court of Appeal⁵¹ where a number of other interested parties joined the appeal as *amicus curiae*.⁵²
- (v) The Supreme Court of Appeal, on 6 December 2016, in the decision of *The Minister of Justice and Correctional Services & Others v Estate Late Stransham Ford*⁵³ upheld the appeal and overturned the decision of the court *a quo* albeit without fully addressing the merits of the ethical arguments involved.

⁵⁰ The **HPCSA** is a statutory body set up in terms of the Health Professions Act 56 of 1974 which is designed to guide and regulate the health professions in South Africa in aspects pertaining to registration, education, training, professional conduct and ethical behaviour, ensuring continuing professional development, and fostering compliance with healthcare standards. All individuals who practise any of the health care professions incorporated in the scope of the **HPCSA** are obliged to register with the **HPCSA**.

⁵¹ The Supreme Court of Appeal is established in terms of s 166 read with s 168 of the Constitution of the Republic of South Africa, 1996. It is the highest court of appeal on non-constitutional issues in the Republic.

⁵² Friend of the court.

⁵³ 2016 ZASCA 197 (6 December 2016).

(vi) The common law⁵⁴ of South Africa as it currently stands, criminalises **VAS** either in the form of **DVAS** or **INVAS** and whether or not it is an instance of **PAS** or **NPAS**. In short, **DVAS** is considered murder and **INVAS** can, in appropriate circumstances, be considered murder.

Having now set out my major background philosophical assumptions, disambiguated the key concept related to our inquiry and set out the pressing contemporary social importance of analysing the issue of **VAS** in a South African context, it is now time to turn our attention to the articulation and defense of what I consider to be the principal ethical argument in favour of **VAS**.

⁵⁴ South African common law consists of legal precedent embodied, articulated and developed in judgments of the Courts handed down over periods of time, and which has its historical roots primarily in Roman-Dutch jurisprudence.

PART A: THE ETHICAL STANDPOINT

In this section I intend to set out and analyse the key concepts that constitute and contribute to the positive case for the moral permissibility of **VAS**. In so doing it will be necessary to explore a number of related philosophical issues.

First, it will be necessary to articulate and distinguish between different categories of 'value' as well as two differing accounts about the 'value of human life' which have a profound influence on beliefs about the moral permissibility of **VAS**. Second, it will be critical to articulate a plausible account of what death is, as well as a plausible account of what makes people consider death to be bad (and thus something to be avoided). We will then be in a position to discuss and explore the inter-related concepts of **human well-being, individual autonomy** and **human dignity** which are the core components of the positive case for **VAS**.

Having articulated and explained the positive case for **VAS**, I shall then turn to discuss the two principal arguments against **VAS**, namely, the (i) **Sanctity of Life Argument** and the (ii) **Social Harm Argument**. In so doing, I intend to argue that neither argument undermines the positive case for the moral permissibility of **VAS**. They do, however, raise legitimate ethical concerns regarding effective *oversight* and *regulation* of such a practice.

A1. THE VALUE OF HUMAN LIFE

A substantial part of the social anxiety over **VAS** is that we all have an intuitive feeling that human life is valuable. This intuitive feeling appears to be practically universal and all contemporary societies and cultures have come to believe (albeit for different reasons) that there is something *precious* about being a human being and that killing a human being (at least an innocent one) is morally impermissible. **US** and thus, *a fortiori* **VAS**, is considered by many people to be a direct antagonistic act that strikes at a fundamental normative intuition and is, thus, anathema to the very fabric of morality. This sort of conviction was forcefully expressed by Ludwig Wittgenstein when he wrote:

If suicide is allowed then everything is allowed. If anything is not allowed then suicide is not allowed. This throws a light on the nature of ethics, for suicide is, so to speak, the elementary sin. And when one investigates it, it is like investigating mercury vapour in order to comprehend the nature of vapours. Or is even suicide in itself neither good nor evil? (Notebooks, 10.1.17, p.91)

Furthermore, and as a result of the very strong intuitive feeling that human life has this special sort of value, we naturally tend to think that death is *always* an evil and something to be avoided. However, it is not a straightforward task to unpack what exactly it is about human life that makes it worthy of moral concern nor is it simple to explain why death is bad. It is reasonable to suppose, however, that the badness of death will be closely bound up with whatever is thought to make human life particularly valuable. In order to answer these questions it is, therefore, important to

first engage in analysis of the different categories of value and how human life might possibly fit into such categories.

A1.1. TYPES OF VALUE: INTRINSIC AND EXTRINSIC

There are two broad and overarching categories of value that are often appealed to within axiological theory⁵⁵ and which have important implications not only for the debate about VAS but many other philosophical issues in general. These are the categories of **intrinsic value**⁵⁶ and **extrinsic value**.⁵⁷ Within the category of extrinsic value there is often a further distinction drawn between the following sub-categories of value, namely, (i) **instrumental value** (ii) **contributive value** and (iii) **inherent value**. (Taylor, 1972)

A thing⁵⁸ can be said to be intrinsically valuable insofar as its value is not dependent on anything else.⁵⁹ In other words, to say that a thing has intrinsic value is to say it is valuable in-and-of itself, as an end-in-itself, it has terminal value or its value is not axiologically dependent on anything else.⁶⁰ A thing instantiating intrinsic value could,

⁵⁵ Axiology is the philosophical study of value and its categories.

⁵⁶ Intrinsic value is also referred to as non-derivative value.

⁵⁷ Extrinsic value is also referred to as non-intrinsic or derivative value.

⁵⁸ I am using the word 'thing' in a broad sense to refer to *any* spatio-temporal object, event or experience that could potentially be an item of axiological enquiry or assessment.

⁵⁹ Pleasure is often thought to be one example of something that is intrinsically valuable.

⁶⁰ It is a debateable question within axiology whether there are *many* things that have intrinsic value (**Axiological Pluralism**) or whether there is only *one* thing with intrinsic value (**Axiological Monism**). It is a further debateable question as to whether value can exist *independently* of the existence of conscious beings who desire (**Axiological Objectivism**) or whether the existence of value is *dependent* on the existence of beings who desire (**Axiological Subjectivism**). Another way of putting this perplexing problem is to ask the question 'are things valuable because they are desired, or are things desired because they are valuable?' (See Brandt, 1959)

therefore, be judged as a *summum bonum*.⁶¹ As Dworkin explains '[s]omething is intrinsically valuable . . . if its value is *independent* [emphasis added] of what people happen to enjoy or want or need or what is good for them' (1994, p.71)

Intrinsically valuable things confer value onto other things, specifically things that fall within the category of extrinsic value. Intrinsically valuable things have the property of being 'value-conferring'. Things of intrinsic value can, therefore, be said to have axiological primacy and act as the axiological foundations for all other things which are axiologically secondary.

Accordingly, all things that are judged to be extrinsically valuable are things whose value is derivative. In short, what this means is that all forms of extrinsic value (**instrumental**⁶², **contributive**⁶³, and **inherent**⁶⁴) are *ultimately* axiologically grounded in, or tethered to, things of intrinsic value.

It is important to emphasise that any given thing need not be limited to one category of value and it is entirely possible for a thing to be *both* intrinsically valuable and

⁶¹ Highest or ultimate good.

⁶² A thing can be said to have instrumental value insofar as it promotes, causes or somehow brings about another thing which itself has some type of value. The value of this further thing can in turn be intrinsic or extrinsic (e.g. money that allows one to purchase a sports car from which, in turn, pleasure is derived).

⁶³ A thing can be said to have contributive value insofar as it promotes and/or maintains the value of the larger system of which it is a part, where the larger system can be extended in space (e.g. a brick that forms part of a bridge extending over a chasm) or in time (e.g. a series of novels written as sequels over a number of years). This sort of value is grounded in the mereological relation of parts to wholes.

⁶⁴ A thing can be said to have inherent value insofar as the thing is *capable* of producing, causing or facilitating in the mind of an entity encountering it some qualitative experience that is judged by that entity as having intrinsic value (e.g. a painting that produces an aesthetic sensation in a person which is judged by the person to be pleasurable, or a book that provides the person who reads it with new knowledge, or even a sunset that produces in a person with an experience of awe).

extrinsically valuable.⁶⁵ Insofar as a thing is valuable, it is the appropriate object of praise, acquisition and positive moral assessment. Valuable things are, accordingly, desirable and are worth having, pursuing and maintaining. Finally, it is to be mentioned that the opposite of something that is valuable would be something that is *disvaluable*.⁶⁶ Insofar as a thing is truly disvaluable, it is the appropriate object of scorn, avoidance and negative moral assessment.⁶⁷ Disvaluable things are, accordingly, undesirable and not worth having, pursuing or maintaining.⁶⁸

In light of these axiological distinctions, the crucial question becomes: what sort of value could human life be thought to possess? Is the value of human life intrinsic or extrinsic? There are two distinct theories that can be developed to answer this question - **neutral container theory (NCT)** or **valuable container theory (VCT)**. While it will later prove necessary in our discussion to decide between the two theories, at this stage let us simply articulate them.

A1.2. NEUTRAL CONTAINER THEORY

If one wishes to adopt the view that human life is extrinsically valuable then one is of necessity committed to the idea that human life derives its value from other things that must themselves be intrinsically valuable. A human life could, therefore, be

⁶⁵ Knowledge, for example, could be both intrinsically valuable and instrumentally valuable.

⁶⁶ One could, accordingly, have intrinsically disvaluable things or extrinsically disvaluable things.

⁶⁷ Pain is often thought to be an example of something that is intrinsically disvaluable and thus an evil.

⁶⁸ I am assuming here (i) an **Axiological Objectivist** and (ii) **Axiological Pluralist** stance to value and will do so for the remainder of this thesis. I, therefore, eschew **Axiological Subjectivism** and **Axiological Monism**.

instrumentally valuable precisely to the extent that it allows for the possibility of the existence of other things of intrinsic value.

This conception of human life sees it as a **neutral container**, valuable only insofar (and precisely to the extent) that its *contents* have intrinsic value.⁶⁹ Shelly Kagan explains this sort of theory as follows:

How good it is to be alive is a matter of adding up all of what we can call the contents of life. . . That's what's relevant in determining the value of your life: what's happening *within* your life. Being alive per se has no value. Rather, life itself is only a container which we fill with various goods or bads. And deciding how valuable it is, how good it is for me to be alive, is a matter of adding up the value of the contents. The container itself is indeed a mere container; it has no value in and of itself. (2012, p.258)

Accordingly, we can say that if there are either (i) no such intrinsically valuable things in existence at all⁷⁰ or (ii) a given human life does not, in fact, contain, express or instantiate intrinsically valuable things, then that particular human life will lack value. It is important to note that nothing about NCT in itself yet tells us what the intrinsically valuable and disvaluable things are.

⁶⁹ A useful analogy to consider might be a bank account. A bank account is valuable if and only if it contains money in it. The existence of the bank account *itself* is completely neutral. A bank account *per se* is not intrinsically valuable. The bank account is thus only instrumentally valuable if there is a positive balance. On the other hand, an overdrawn bank account, as anyone with a substantial overdraft will tell you, is positively disvaluable.

⁷⁰ The view that there is nothing of intrinsic value is called **Axiological Nihilism**. If such a view were true then this would entail that *no* human life could *ever* be valuable. I shall, for the purpose of this thesis, proceed under the assumption that this view is a highly implausible (if not completely false) axiological view.

A1.2. VALUABLE CONTAINER THEORY

If, however, one wishes to adopt the view that human life is intrinsically valuable then one is of necessity contending that human life has terminal value and is valuable in-and-of itself. Accordingly, its value is not dependent on anything else of intrinsic value and is worth having (is desirable) for its own sake. This conception of human life sees it as a **valuable container**. Kagan, once again, usefully summarizes what this sort of theory entails:

But there are those who think that in addition to thinking about the value of the contents of life, we also have to remember that life *itself* is worth having. There's a benefit in being alive above and beyond the question of what's going on *within* my life. These people claim that the mere fact that I am indeed *alive* gives my life some additional value. These are *valuable container* theories. (2012, p.259)

It is important to note that, unlike NCT which does not, on its own, articulate what the intrinsic goods and evils are, VCT does, from the outset, incorporate a substantive account of value when it says that there is at least *one* thing that is intrinsically valuable – human life itself. As Peter Suber points out '[t]o say that life has sanctity (or is sacred) is normally to say that life *per se* has sanctity. For the assertion is meant to be distinguished from the view that the value of a life may depend on its quality, condition, or circumstance.' (1996, p.2)

Peter Singer similarly explains '[w]e may take the doctrine of the sanctity of human life as simply a way of saying that human life has some very special sort of value, a value quite distinct from the value of the lives of other living things.' (2011, p.72) Another way

of articulating this core point is to say that human life itself, regardless of its contents (indeed in spite of its contents), is **inviolable** or **sacred**.⁷¹

A1.4. WHAT IS DEATH?

The concept of **death** should first be distinguished from the concept of **dying**. Dying is a causal process that happens to all of us while we are still alive and which is, barring a few exceptions⁷², subjectively and qualitatively experienced. Death, on the other hand, is the negation of life and all experience.⁷³ Wittgenstein noted '[d]eath is not an event in life: we do not live to experience death.' (1922 [2001], 6.4311, p.87). Grayling, in a similar vein, points out '[d]ying is an act of living . . . We do not experience death, which is not an activity but a state – a state of nonexistence indistinguishable from being born. But we very much experience dying . . .' (2001, p.2).

This is easy enough to understand and appreciate. However, when we then turn our attention from the concept of dying to the concept of death itself, we see that attempting to define what death is and when it occurs, is itself no easy task. There are at least two major conceptions that seek to provide an answer to the question about what death could be and, importantly, when it occurs – the **biological account** and the **personal account**. (J. Harris, 1985; Sumner, 2011)

⁷¹ The word 'sacred' will obviously have religious, transcendent or theistic connotations for many readers but it need not. It is perfectly reasonable to suppose that the idea of sacredness can be explored in naturalistic and secular terms shorn of any superstitious shroud. (See Dworkin, 1994)

⁷² When a person dies suddenly in her sleep for example.

⁷³ I am reminded of what Isaac Asimov once said about the process of dying 'Life is pleasant. Death is peaceful. It's the transition that's troublesome.'

The **biological account** focusses on the idea that death is intimately related to the *breakdown* of the holistic functionality of living organisms.⁷⁴ Organisms are dead when their component parts irreversibly cease to function in an integrated, systemic and co-ordinated way. The emphasis of the biological conception, when applied to organic organisms like human beings, is on the cessation of the complex and inter-related processes and functions we cannot help but associate with life. Such function include, for example, respiratory processes, metabolic processes, circulatory processes as well as other endogenous autopoietic processes such as cellular mitosis and meiosis. On such a conception, a human being is dead just in case her heart isn't pumping, her cells have stopped dividing, she has stopped breathing, she has started to decompose etc.

The **personal account**, in contrast, focusses on the idea that human beings are not simply biological organisms of just any sort. Rather it acknowledges that we are *highly complex* biological organisms that (i) have an inner psychological, rational and conscious dimension to their existence⁷⁵ and (ii) experience themselves as such. Carl Sagan believed that 'what distinguishes our species is thought' (1980 [1990]). Bertrand Russell too, believed that 'thought is great and swift and free, the light of the world, and the chief glory of man' (1916 [2009], p.389). Both appear to have been greatly

⁷⁴ The organism could, in principle, be organic or synthetic.

⁷⁵ This is the so called 'qualitative and intentional dimension' of personal existence and is captured by the felt visceral sense that 'there is something that there is like to be' the sort of entity that I am, from the 'inside' as it were (Nagel, 1974). Of course, a Metaphysical Naturalist would argue that this internal qualitative dimension (i) is ultimately reducible to the complex material substrate that constitutes a human being, particularly, the central nervous system (**Central State Materialism**), or (ii) is ultimately reducible to a complex set of functions and/or causal capacities realized by the central nervous system (**Functionalism**), or (iii) is emergent and metaphysically supervenient on the central nervous system (**Non-Reductive Materialism**).

influenced by John Locke who gave, what is perhaps the best articulation of the nature of personhood:

We must consider what *person* stands for; which, I think, is a thinking intelligent being, that has reason and reflection, and can consider itself, the same thinking thing, in different times and places; which it does only by that consciousness which is inseparable from thinking and seems essential to it; it being impossible for anyone to perceive without perceiving that he does perceive. (1689 [1976], p.162)

Locke's account of personhood incorporates self-consciousness⁷⁶ as a sub-category of consciousness together with the attendant ability to conceive of being an entity that exists diachronically. John Harris elaborates slightly further on Locke's conception of a person when he writes 'a person will be any being capable of valuing its own existence.' (1985, p.18). Nothing appears objectionable to such an addition, provided of course, it is remembered that the capacity to value one's own existence logically piggybacks on the other capacities articulated by Locke. The capacities articulated by Locke seem to be more fundamental than the so called 'valuing capacity', insofar as they serve as necessary preconditions for the ability to engage in the cognitive act of valuing anything at all.⁷⁷

From the foregoing, we can now say that on the personal account, a human being dies when he irreversibly ceases⁷⁸ to have the inner psychological, rational and conscious

⁷⁶ By 'self-consciousness' I mean nothing more extravagant than the capacity of an entity to treat its *subjectivity* as an *object* of enquiry.

⁷⁷ Kagan refers to this complex set of capabilities as 'person functions' or 'p-functions' for short (2012, pp. 19-20).

⁷⁸ The proviso of 'irreversibility' appears necessary insofar as we do not want to say someone has died simply because they are *temporarily* unconscious, for example, when in a deep, dreamless sleep. Determining in any given case whether 'irreversibility' obtains is an *epistemological* and *empirical* issue.

capacities of the sort articulated by Locke and which are the necessary preconditions for valuing anything at all, including his own existence. In short, when he irreversibly ceases to be a person.⁷⁹

Normally, biological death and personal death are synchronically associated. But they need not be. We can easily imagine a situation where the two ‘come apart’. For example, the individual in the so called ‘persistent vegetative state’ who is still breathing, her blood is circulating, her heart is beating and her cells are still undergoing mitosis and meiosis but, though all these outward indicia of life exist, she has lost the capacity to have any felt psychological, rational or self-conscious experiences and thus lacks the capacity to value her own life. In short, there is no ‘point-of-view’ associated with this individual or anything ‘that it is like’ to be this individual. In a case like this, we could reasonably say that such an individual has died in the *personal* sense but is still alive in the *biological* sense.

However, as interesting as the **biological account** of death is, and as important as it may be to determine in certain circumstances when a human being has died in the biological sense, it would appear that the sort of death we ought to be morally concerned with is the **personal account** – the irreversible cessation of being a person. After all, it is to persons that we think moral concern is principally owed.⁸⁰ Once this

⁷⁹ Personhood is plausibly a broader category than ‘human being’. Human beings might be persons but it does not necessarily follow that all persons are human beings. Personhood, as philosophers are apt to remind us, could be ‘multiply realizable’ and instantiated across a vast panoply of possible platforms including synthetic (and not just organic) platforms.

⁸⁰ I use the word ‘principally’ because moral concern is also owed to entities that are not persons but are nevertheless sufficiently complex such that they can experience pain and suffering. For example, at least *some* types of animals will be able to experience pain and suffering. As Bentham persuasively argued when

sort of death occurs 'the being has ceased to be a person and then, even if their body is still technically alive, it has lost its moral significance and can either be killed or allowed to die or preserved as we choose.' (J. Harris, 1985, p.242) As Kagan succinctly puts it regarding the two competing accounts of death and when it occurs: '[i]n terms of getting what matters, the important question is not whether I am alive or not, but whether or not I am a person.' (2012, p.178). If this is right - and it certainly appears to be - the next question crucially becomes: what is bad and, thus undesirable, about irreversibly ceasing to be a person?

A1.5. THE BADNESS OF DEATH⁸¹

Even armed with a rather plausible account of what death is and when it occurs - the **personal account** - there is still a conundrum that has troubled many a philosopher who has contemplated it. The conundrum is this: if death is correctly conceived of as the irreversible cessation of personhood then when a person dies he is not around to experience his death as something bad - death being the complete annihilation of personhood as well as any attendant experiences.⁸² On the other hand, when one *is* a person one is *not* dead. In what way, then, can death *itself* be bad?

talking about moral obligations to such beings '[t]he question is not, Can they *reason*, nor Can they *talk*? But, Can they *suffer*.' (1789 [1823], chap XVII, sec.1, footnote, p.144)

⁸¹ We are here concerned with the badness of death for the person who dies. Of course it goes without saying that the death of an individual can be bad for *other* people left alive insofar as they may suffer emotional and psychological pain at the loss. 'We experience *dying* for ourselves; but we experience *death* only in losing others, and the experience is one of grief and loss.' (Grayling, 2013, p. 224)

⁸² Death unmoors persons from the quay of existence and experience.

Epicurus, adopting this line of reasoning, denied that death could ever be bad for anyone:

So death, the most terrifying of ills, is nothing to us, since so long as we exist, death is not with us; but when death comes, then we do not exist. It does not then concern either the living or the dead, since for the former it is not, and the latter are no more. (1940, p.31)

Lucretius too, following Epicurus' lead, concurred:

Death therefore to us is nothing, concerns us not a jot . . . For he whom evil is to befall, must in his own person exist at the very time it comes, if the misery and suffering are haply to have any place at all; but since death precludes this, and forbids him to be, upon whom the ills can be brought, you may be sure that we have nothing to fear after death, and that he who exists not, cannot become miserable. (1940, p.131)

For many people, this answer seems to come a little too quickly and appears slightly glib.⁸³ I share their intuition. However, articulating the reason why Epicurus' and Lucretius' answer does not seem completely satisfactory is slightly more difficult. What they both seem to be correctly gesturing toward is the idea that because there is 'nothing that it is like' to be dead then death itself is not a sort of experience that can be intrinsically bad. After all, the experience of *dying* may be bad, insofar as it may be painful, but the state of *being dead* is no sort of experience at all – it is equivalent to non-existence (Grayling, 2013).⁸⁴ While this is an undoubtedly correct and critical fact

⁸³ If Epicurus and Lucretius were *entirely* correct in their assessment that death is not bad then it would seem to lend support to the view that there is nothing bad in bringing about, hastening or facilitating someone's death ever (especially if this was achieved painlessly). We should find such a view implausible insofar as we believe murder to be morally impermissible.

⁸⁴ The point is often convincingly made that death bears an uncanny resemblance to the period of time before birth. This resemblance is emphasized by Lucretius when he writes '[l]ook back at the eternity that passed before we were born, and mark how utterly it counts to us as nothing. This is a mirror that nature

about the metaphysical nature of death, many will still have a powerful residual intuition that death is bad, albeit that it is not experienced as such by the person who dies.

To my mind, the account which appears to most plausibly articulate the central bad making feature of death and which best cashes out our residual intuition, is what is known as the **deprivation account**.⁸⁵ On this account, death is bad insofar as it deprives a person of intrinsically valuable goods and/or of the possibility of attaining further intrinsically valuable goods in future (Kagan, 2012; Nagel, 1979; Sumner, 2011).⁸⁶ This appears to be what Epicurus and Lucretius are failing to consider in advancing their rather sanguine attitudes about death.⁸⁷ When we combine the **deprivation account** with our two competing theories of the value of life we achieve some interesting results.

Those who adhere to VCT will believe that, insofar as human life is itself intrinsically valuable, death *always* deprives one of something of intrinsic value – one’s life. Thus for proponents of VCT death will *always* be bad and undesirable. Such a theory will also explain rather straightforwardly why killing a person (including oneself) is considered morally impermissible – it *always* destroys something sacred or inviolable.

holds up to us, in which we may see the time that shall be after we are dead.’ (1951, p.125) This is not to completely exclude the possibility of an *asymmetry* to existence that could entail that the anticipated oblivion *ahead* is worse than the forgotten oblivion *behind*.

⁸⁵ This is not to say that the deprivation account does not face philosophical quandaries of its own. (See McMahan, 1988) However, I shall not attempt to resolve such quandaries here.

⁸⁶ The deprivation account finds humorous expression in the epitaph that W.C. Fields apparently wanted on his tombstone – ‘Here lies W.C. Fields. I would rather be living in Philadelphia’.

⁸⁷ There may be other additional *supplementary* features that make death bad for the person who dies, for example, its inevitability, its unpredictability, its variability and/or its ubiquity. (Kagan, 2012)

However, proponents of NCT will believe that death is bad only in circumstances when human life on the whole contains, and can reasonably be expected to contain in the future⁸⁸, a set of intrinsic goods. Grayling articulates the *contingent* badness of death on this sort of view:

Because on a naturalistic view, being dead is identical to being unborn, nothing about death in itself makes it good or evil. It is what it takes away from us that makes it one or the other. If it takes away suffering, it is good; when it takes away hopes, possibilities, relationships with those beloved, it is bad. (2013, p.226)

If a human life lacks intrinsic goods or contains sufficient intrinsic evils then death will be a boon. Accordingly, for proponents of the NCT, death will only *sometimes* be bad. The adoption of such a view thus also entails that the killing of a person (whether it is oneself or another) may *sometimes* be morally permissible.

A2. HUMAN WELL-BEING

Armed with (i) a statement of the two principal theories of the value of human life (VCT and NCT) and (ii) a plausible conception of what death is and when it occurs (**personal account**), as well as (iii) a plausible account of the badness of death (**deprivation account**), we can now turn to consider the next important building block in the positive case for VAS, namely, **human well-being**.

⁸⁸ There is, of course, never any guarantee that the future will contain, on average, more intrinsic goods than evils. Human beings, by virtue of being embedded in a four-dimensional space-time manifold, are temporally myopic and epistemically hamstrung in this regard. All we can do is judge, as best we can on the information presently available, whether the future will most *probably* contain more intrinsic goods than evils or vice versa.

First, it is important as a matter of terminology to state that I shall take the term ‘well-being’, when used in connection with human life, to refer to ‘a flourishing life’ or a ‘worthwhile life’.⁸⁹ Thus, to say that a particular human life is characterised by (or instantiates) ‘well-being’ is simply to state that one is in the presence of a life that is flourishing or a life that is worth living.

In speaking of such a life one would be committed to believing, at the very least, the following definite things about it: (i) it is a **good** life to lead (ii) it is a life that is the appropriate object of **admiration**, and (iii) it is a life worthy of **pursuit** and **maintenance**. Such a life would express or instantiate what the Ancient Greeks called **eudaimonia** viz. the state of having an objectively desirable life.⁹⁰ When one thinks about the concept of ‘well-being’ in such terms it is indeed difficult not to think that it is the beating heart of value and the life-blood of ethics.

Second, it is important going forward to keep in mind a crucial distinction between (i) what a given human life must contain if it *is to be* a worthwhile life, and (ii) whether one is capable of *learning, discovering or judging* a given human life to be worthwhile or not. The former is an *ontological* issue, the latter an *epistemological* one. The two should not be conflated.

Finally, it is important to note that for a proponent of **VCT**, human life will *always* be good to lead, will *always* be the appropriate object of admiration and *always* be worthy

⁸⁹ I use the terms ‘well-being’, ‘flourishing’ and ‘worthwhile’ interchangeably throughout.

⁹⁰ The term ‘eudaimonia’ has a variety of meanings in English including ‘flourishing’, ‘happiness’ or ‘well-being’. For a fuller analysis of the term (See Hursthouse & Glen, 2016).

of pursuit and maintenance. After all, according to VCT, human life itself is sacred. This will not necessarily be the case for the proponent of NCT. For the proponent of NCT human life will only be good to lead, be admirable and be worthy of pursuing and maintaining if it contains, on the whole, more intrinsic goods than evils. This presents a further challenge for any proponent of NCT insofar as it would appear necessary to provide a positive account of the *content* of a worthwhile human life – what exactly are these intrinsic goods that conduce to the eudaimon life?

A2.1. WHAT IS IT FOR A LIFE TO GO WELL?

It is customary to distinguish between at least three broad accounts of well-being that can be put forward at this point, namely, (i) **hedonistic accounts**⁹¹ (ii) **desire-satisfaction accounts**⁹² and (iii) **objective list accounts**⁹³ (Crisp, 2006, 2013).

Hedonistic accounts, in essence, equate the worthwhile life with a pleasurable life. Such accounts are, however, highly implausible for two principal reasons: First, they are unduly axiologically restrictive since, intuitively, there appear to be a *plurality* of things that are intrinsically valuable over and above the experience of pleasure (e.g. knowledge, friendship, love, truth, beauty etc.). Second, we do not just want to *seem* to have pleasurable experiences, we also want them to be *actually connected* to reality in

⁹¹ Hedonism is the belief that the *experience* of pleasure is the *only* thing of intrinsic value.

⁹² There are various desire-satisfaction accounts but what they all share in common is the belief that having one's desires *actually satisfied* is what is of intrinsic value.

⁹³ Such accounts share the common belief that certain things are valuable regardless of whether they are desired by any particular person.

veridical ways.⁹⁴ Subjective experiences of pleasure may be *necessary* for a worthwhile life but they do not appear to be *sufficient* for one.

The most plausible version of the various **desire-satisfaction accounts**, in essence, equates the worthwhile life with the satisfaction of the most fundamental desires a person would have if they were fully informed and cognisant of all their options. However, even this most plausible version is vulnerable to a powerful counter-example. One need only imagine the person who is fully informed of all the possible things she could desire and have satisfied but who, nevertheless, (i) develops the deep and fundamental desire to watch paint dry and (ii) proceeds to satisfy that desire every day of her life to the exclusion of anything else. For many, including myself, it seems highly implausible to say that she is living a worthwhile life.

Finally, **objective list accounts**, in essence, equate the worthwhile life with an objective set of goods.⁹⁵ Such theories are ones that:

[H]old that being well off is a matter of having certain goods in one's life, goods that are simply worth having, objectively speaking. Similarly there may be certain objective bads or evils, the having of which simply leaves one worse off. Possession of the relevant goods and the absence of the relevant evils is what constitutes well-being. And the goods and evils themselves have intrinsic value or disvalue independently of our desires (actual or ideal); indeed, they have the particular value they have regardless of whether anyone is in a position to realize this. (Kagan, 1998).

⁹⁴ Nozick's thought experiment – 'the experience machine' - is an example of an intuition pump that presses this point powerfully (1974, p.43).

⁹⁵ It is important to point out that both (i) the experience of pleasure and (ii) the actual satisfaction of desires are likely to appear on any objective list account worth the name.

In light of the persuasive criticisms that have been levelled at both hedonistic accounts and desire-satisfaction accounts, taken together with my endorsement of **Axiological Objectivism** and **Axiological Pluralism**⁹⁶, it should come as no surprise that I also believe that a pluralistic objective list account is the most plausible account of well-being.⁹⁷ This is not, however, to say that such a view is free of any and all difficulty.

Possibly the most serious criticism is that it is thought by many to be an absurd notion, and perhaps even elitist, to ever hope to enumerate a *comprehensive* and *exhaustive* list of intrinsic goods that make life worth living i.e. a *numerus clausus* of well-being. The concern appears, in part, to be that in articulating such a list one is being unjustifiably prescriptive and unduly procrustean.⁹⁸

Jonathan Glover, appears to be articulating something like this when he writes:

Any list of the ingredients of a worth-while life would obviously be disputable. . . I shall not try to say what sorts of things do make life worth living (Temporary loss of a sense of the absurd led me to try to do so. But apart from the disputability of any such list, I found that the ideal life suggested always sounded ridiculous) . . . If life is worth preserving . . . because it is necessary for something else, then, that ‘something else’ is the heart of this particular objection to killing. It is what is meant by “a life worth living” or a “worth-while life”. (1977, pp.51-52)

J. Harris, too, recognises the difficulty of enumerating such a list, stating:

⁹⁶ See footnote 68.

⁹⁷ The adoption of such an account entails that a person can *really* be wrong in her assessment about whether a life is worth living, even if it is an assessment of her own life.

⁹⁸ I must confess that, to my ear, this is a strange sort of criticism to level at any theory of value that is supposed to underwrite our ethical concerns. After all, is not the entire point to articulate a reasoned and true account of value which has prescriptive consequences for human conduct?

Here, our question is so profound as to be almost absurd. Like the question of the meaning of life, that of the value of life, when put in such broad terms, seems unanswerable. Not because there is no answer, but rather because there are so many answers. There are likely to be, and perhaps are, as many accounts of what makes life valuable as there are valuable lives. Even if we felt confident that we could give a very general account of what makes human life valuable for human beings, perhaps by singling out the most important or most frequently occurring features from the lists of what they value of a large cross-section of people, we would have no reason to suppose that we had arrived at a satisfactory account. (1985, p.16)

It is this difficulty that leads J. Harris to eschew the notion of providing a detailed list of the *content* of a worthwhile life and instead to focus on the fact that persons can (and do) value their lives for a variety of reasons. For J. Harris, it is not necessary to exhaustively enumerate what those reasons are in order to say that a human life is worth living. In order to *recognise* we are in the presence of a worthwhile life it is only necessary that we *know* (i) those reasons - whatever they may be - exist, and (ii) are, in fact, valued by the person whose life it is. After all, according to him:

Our interest is in *knowing* [emphasis added] which other beings have valuable lives, and there may be good reasons for being much surer of this than of the value of any of the features that are supposed to make life valuable? . . . What matters is not the *content* of each account but rather that the individual in question has the capacity to give an account. (1985, p.16).

Although there is much to be said for this *epistemological* shift in emphasis, it does seem to me that the pessimism about articulating *ontologically* what 'goes into' making a worthwhile life is perhaps a little quick. After all it could be argued that we can go at least *some* way to enumerating the content of a worthwhile life even while (i)

acknowledging that it is not a presently exhaustive list, and that (ii) the content of the list could expand in future as we learn more about what it is to be a person.

Sam Harris adopts this more optimistic attitude:

Defining goodness in this way [equivalent to well-being] does not resolve all questions of value; it merely directs our attention to what values actually are – the set of attitudes, choices, and behaviours that potentially affect our well-being, as well as that of other conscious minds. While this leaves the question of what constitutes well-being genuinely open, there is every reason to think that this question has a *finite* [emphasis added] range of answers. Given that change in the well-being of conscious creatures is bound to be a product of natural laws, we must expect that this space of possibilities – the moral landscape – will increasingly be illuminated by science. (2010, pp.12-13)

It could thus persuasively be argued that, in light of the sort of entities we already know human beings to be, it is not too soon to say authoritatively and robustly that a human life which contains, for example, pleasure, knowledge, truth, beauty, love, friendship and actual achievement is *really* more worthwhile than a life that lacked such things (or which was filled with their antithesis). If making such a pronouncement is considered ‘elitist’ or ‘unduly prescriptive’ then the title should be worn with pride, especially insofar as such a pronouncement would be a product of the continuous collation of self-knowledge distilled by human beings over the course of millennia.

A2.2. WELL-BEING AS AN ELASTIC CONCEPT

What I suggest then is that the most plausible notion of human well-being is going to be pluralistic and *elastic*: the list of intrinsic goods will at least, in principle, be capable of being extended as more is learned about human beings and the complex world we inhabit. However, there will also be some definite things we can already, with confidence, put on such a list. In short, we can already articulate *some* of the desiderata of the eudaimon life.

It may be useful, at this juncture, to also mention and distinguish between what Dworkin calls **experiential interests** and **critical interests**. (1994, p.201) **Experiential interests** are things people engage in doing because they are enjoyable to them when they are engaged with them. One person finds reading philosophy enjoyable, another person finds ornithology fascinating, while yet another finds solving differential equations positively exhilarating. No one person is wrong, or making a genuine mistake, in pursuing one interest or the other. They simply have different *tastes* or *personal preferences* when it comes, for example, to the cultivation of enjoyment. **Critical interests**, however, are interests that are genuinely better to have and to satisfy. In other words, a person can be genuinely mistaken and worse off precisely to the extent that he does not recognise these critical interests or attempt to satisfy them. Such interests are *not* simply matters of taste or personal preference. In short, either to not have such interests at all, or to fail to satisfy such interests in life, would make a life legitimately worse off. For example, it would be a mistake (and a

tragedy) for a person to either eschew love, friendship or knowledge entirely or to fail in the attempt to have such things instantiated or expressed in his life.

This distinction between **experiential interests** and **critical interests** seems, to my mind, to track the distinction between things that are extrinsically valuable and things that are intrinsically valuable. **Experiential interests** could be thought of as the plethora of possible activities one might undertake that result in the experience of some intrinsic good like pleasure or knowledge, for example. **Critical interests**, on the other hand, could be conceived of as that set of intrinsic goods themselves.

Now, of course, the content of any objective list will not reflect particular or idiosyncratic tastes or preferences like ‘wind-surfing’, ‘eating waffles’, ‘listening to Beethoven’s ninth symphony’, ‘studying chemistry’ or ‘making coffee for one’s spouse’. That truly would be absurd insofar as it would fallaciously identify the particular *means, modes* and *methods* of producing, experiencing and discovering intrinsic goods (**experiential interests**) with the intrinsic goods themselves (**critical interests**).

Instead, the content of the list will be the ultimate, fundamental and terminal features of our experiences, activities and behaviours that are intrinsically, as opposed to extrinsically, valuable. I have already alluded to some of the things that will (hopefully) strike the reflective reader as reasonable contenders for the title of ‘intrinsically

valuable' viz. pleasure, knowledge, truth, beauty, love, friendship, and real accomplishment.⁹⁹

Grayling offers a compelling portrait of 'the worthwhile life' which reflects and records a number of the intrinsic goods already mentioned:

So – bearing in mind that by 'good lives' we mean lives worth living, fruitful or flourishing lives, lives that have a positive impact on others – we might try to identify a number of characteristics that such lives are likely to display. One is that good lives seem meaningful or purposeful to the people living them. Another is that they are lives lived in relationships, having at their core real intimacy – love or friendship – with one or more others. A third is that they are lives of activity – of doing, making or learning. A fourth is that they are consistently marked by honesty and authenticity. A fifth is that they manifest autonomy, that is, the acceptance for the choices that shape the course of life. A sixth is that the felt quality of the life from an aesthetic point of view is positive; that is, the experience of living it feels rich or satisfying to the person living it. The seventh and last is integrity, in the sense of the integration of all the others into a whole which constitutes the individual's chosen project for the good. (2013, pp.161-162)

What is important, for the purposes of our discussion, and especially from the point of view of the proponent of NCT, is that in Grayling's portrait there is one thing mentioned which appears to have the right sort of axiological 'aseity' that demands inclusion in any list of intrinsic goods that would make human life worthwhile, but which until now has not been mentioned – **individual autonomy**.

⁹⁹ It is important here to mention that such things are also *incrementally* valuable. That is to say, *ceteris paribus*, it is better (i) to have more of each of these things (*quantitative dimension*) and (ii) to have richer, deeper and more profound instances of these things (*qualitative dimension*). It is beyond the scope of this thesis to determine whether *quantity* trumps *quality* (or vice versa) within a given sort of intrinsic good or across (or between) intrinsic goods.

A3. INDIVIDUAL AUTONOMY

The philosophical literature is replete with attempts to articulate the necessary and sufficient conditions of an ‘autonomous action’. As an exercise in metaphysics this is a perfectly noble and important project. However, for the purposes of our discussion the labyrinthine twists and turns of such an endeavour would force us to wander too far afield and would be worthy of a thesis all its own.

Kagan, while acknowledging the difficulty in defining ‘autonomy’, thankfully offers a useful starting point:

Now the basic notion of autonomy is a complex and controversial one, but one basic idea seems to be something like this. To have autonomy is to have the various aspects of one’s life under one’s control. Typically, if I have autonomy over some aspect of my life (whether my career, my hair color, or how I spend this Thursday afternoon), then I can deliberate concerning how I want that aspect of my life to go, choose among various alternatives open to me, and act so as to make my life the way I want it to be in that regard. (1998, p.111)

It is the twin notions of *control* and *choice* that appear to constitute the beating heart of autonomy. In this vein, J. Harris writes ‘[a]utonomy is strictly speaking “self-government”, and people are said to be autonomous to the extent to which they are able to control their own lives, and to some extent their destiny, by the exercise of their own faculties.’ (1985, p.195) Singer follows a similar formulation stating “[a]utonomy” here refers to the capacity to choose and to act on one’s own decisions. Rational and self-aware beings presumably have this capacity, whereas beings who cannot consider

the alternatives open to them are not capable of choosing in the required sense and, hence, cannot be autonomous.’ (2011, p.84) Dworkin speaks of autonomy as ‘the right to make important decisions about defining their own lives for themselves’ (1994, p.222) while Joseph Raz states that autonomy ‘is essentially about the freedom of persons to choose their own lives.’ (1985, p.370) Finally, L.W. Sumner’s understanding is that ‘exercising autonomy/self-determination is a matter of managing one’s own life in accordance with one’s own values and priorities.’ (2013, p.33)

Taking my cue from such thinkers, I would begin simply by gesturing toward some *general* features of ‘autonomy’ which, at the very least, should not strike the reflective reader as highly implausible.¹⁰⁰ In this regard I think it useful to paint a portrait of two types of possible existences and compare them – we will call the one an **autonomous existence** and the other a **heteronomous existence**.

An **autonomous existence** is one characterised by self-determination. This means thoughtful control, not simply over the formulation of one’s goals and plans but also over the most appropriate means to achieve one’s goals and plans and their actual execution. Importantly, it involves the ability to use reason and discernment to assess and pass judgment on the world (including oneself). It involves being open, receptive and amenable to reasons for acting one way rather than another. It further involves a sensitivity to new information, evidence, debate and deliberative reflection as well as a

¹⁰⁰ The word ‘autonomy’ literally means ‘one who gives oneself one’s own law’.

capacity for self-reflexivity and introspective consideration¹⁰¹ when formulating goals and plans and devising the means to achieve them.

From this general picture we can reason that a **heteronomous existence** is the antithesis of an autonomous one. It is an existence characterised by a lack of self-governance and self-determination. It is an existence where control over one's goals, plans, actions and behaviour is 'outsourced to' and 'dictated by' the beliefs, values and judgments of others as well as the vagaries of circumstance. It is an existence where the assessment and judgment of the world, including one's own life, is left completely to others and where one's own views are forcibly uprooted, supplanted and replaced. It is an existence where decisions for action are divorced from reasons for acting one way rather than another and where one's decisions are simply and solely at the whim of the next temperamental emotion, feeling or desire that comes careening into consciousness.

A3.1. AUTONOMY AS A DESIDERATUM OF WELL-BEING

This distinction between an **autonomous existence** and a **heteronomous existence** is important because, in contemplating their differences, we begin to shed light on what it is about individual autonomy that makes it so valuable and why throughout human history people have fought, bled and even died to achieve it.

¹⁰¹ I am here reminded of Socrates' view that 'the unexamined life is not worth living' (Apology, 38a5-6).

Individual autonomy is clearly extrinsically valuable in the sense that it is both **instrumentally valuable** and **contributively valuable**.¹⁰² Individual autonomy is **instrumentally valuable** insofar as it allows persons to obtain, experience and discover other intrinsic goods. A person can choose to go to an art exhibition, or read a book on philosophy and thereby derive pleasure and knowledge from these activities respectively. Furthermore, a person can choose who they spend time with, who they marry and what profession they wish to engage in and thereby discover friendship, love and meaningful achievement. John Stuart Mill seemed to be gesturing toward the instrumental value of individual autonomy when he wrote:

He who lets the world or his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself, employs all his faculties. He must use observation to see, reasoning and judgment to foresee, activity to gather materials for decision, discrimination to decide, and when he has decided, firmness and self-control to hold to his deliberate decision. And these qualities he requires and exercises exactly in proportion as the part of his conduct which he determines according to his own judgment and feelings is a large one. It is possible that he might be guided in some good path, and kept out of harm's way, without any of these things. But what will be his comparative worth as a human being? It really is of importance, not only what men do, but also what manner of men that are that do it. Among the works of man which human life is rightly employed in perfecting and beautifying, the first in importance is man himself. (1859 [2001], p.55)

For Mill it would appear that autonomy forces a person to utilize his cognitive capacities in his interactions with the world and is valuable precisely insofar as it allows

¹⁰² Individual autonomy can, of course, in certain instances also be instrumentally and contributively disvaluable insofar as autonomous action can bring about or contribute to other things of intrinsic disvalue, for example, pain or ignorance.

a person to, inter alia, *perfect* himself – presumably by utilising that set of complex cognitive faculties to obtain other intrinsic goods that make his life worth living.

Individual autonomy is also **contributively valuable** insofar as it is an integral part of the construction of short, medium and long term goals that give life its *holistic* structure, tone and tenor - a kind of *narrative integrity*. Roger Scruton explains the narrative- like appreciation we have for human life as follows: '[w]e do not understand human life simply as the process whereby a human being endures from birth to death. We understand it as a continuous and developing drama, with a meaning that resides in the whole, and which is not reducible to the felt significance of its parts.' (2012, p.424) Carl Wellman picks up on this narrative motif when he writes 'one's life is a biography experienced as a drama with a beginning, a middle and an end such that the intrinsic value of each part is determined much more by one's awareness of its significance for the whole than by its felt pleasantness or painfulness.' (2003, p.24)

This 'narrative' or 'literary' conception of life is crucial to bear in mind especially when it comes to an assessment of how a person's life might possibly end. This is because '[w]e worry about the effect of [a] life's last stage on the character of [a] life as a whole, as we might worry about the effect of a play's last scene or a poem's last stanza on the entire creative work.' (Dworkin, 1994, p.199) Expanding on this idea, Dworkin writes further:

[T]he value of autonomy. . . derives from the capacity it protects: the capacity to express one's character – values, commitments, convictions and critical as well as experiential interest – in the life one leads. . . It allows each of us to be responsible for

shaping our lives according to our own coherent or incoherent – but in any case, distinctive – personality. . . . Autonomy encourages and protects people’s general capacity to lead their lives out of a distinctive sense of their own character, a sense of what is important to and for them. (1994, p.224)

Individual autonomy would thus appear to be a crucial *part* in the construction of the continuing and developing dramatic *whole* that is a human life and which plays a vital role in how a person might leave the proscenium of existence when the curtain finally falls. Does one leave the stage with one’s integrity intact? Is the exit graceful or grotesque? Is it triumphant or tragic? How a person exits the play may also determine whether there is a standing ovation or whether there is nothing but sorrowful silence and the slow shuffling of shoes as the spectators slink off.¹⁰³

However, in addition to this extrinsic sort of value, it could also be argued that individual autonomy is itself an intrinsic good – that is to say, desirable as an end-in-itself. In order to see how this might be so, let us imagine two possible worlds. Let us call the first possible world **W** and the other **W***. In both **W** and **W*** there is a person – Adam - who is living a certain sort of life. In both **W** and **W*** the intrinsic goods that are contained in each Adam’s life are identical. Each Adam has the same satisfying job, the same pleasurable experiences, the same quantum and quality of knowledge and the same fulfilling friendships and experiences of love. **W** and **W*** are thus identical in every respect except one.

¹⁰³ It is also worth mentioning that the inability to determine the timing and manner of one’s death could itself be a profound source of psychological and emotional anguish for a person.

Unbeknownst to the Adam living in W^* , all his ‘choices’ (what job he engages in, what sort of people he becomes friends with, what he has learned and from where, who falls in love with and marries etc.) are always made on his behalf by a panel of experts known as the ‘Worthwhile Life Collective’ who transmit their committee decisions about Adam’s life, via a complex and clandestine technological process, directly and seamlessly into his central nervous system. Adam then proceeds to act on the basis of these committee decisions as if they were his own. This has all been quite wonderful for Adam of course because his life has turned out to contain a cornucopia of intrinsic goods. After all, the ‘Worthwhile Life Collective’ always has Adam’s best interests at heart!¹⁰⁴

The question arises though: does the Adam living in W^* have the *same sort* of life as his duplicate living in W ? Which Adam is living a better (more worthwhile) life? Which life is more desirable? Which Adam would *you* rather be? The intuition of many, including myself, will be that the Adam living in W^* is not at all living a better life than his duplicate living in W . In fact, there is a very strong sense that he is living a life that is decidedly *worse*.

But what is it that cashes out this powerful intuition? I would suggest it is precisely the fact that the Adam living in W^* is not living his *own* life. Instead, he is living the life dictated, mapped out and planned by *others* viz. the Collective. His existence is thoroughly **heteronomous**. One might reasonably expect that, were the Adam living

¹⁰⁴ I have adapted this idea from similar ones explored both in the film ‘The Adjustment Bureau’ directed by George Nolfi (2011) and ‘The Truman Show’ directed by Peter Weir (1998).

in W^* to discover the Collective's surreptitious scheme, he would (i) feel justifiably indignant toward the Collective, and (ii) understandably dismayed at the state of his own life even though, under the Collective's 'omniscient' and 'omnibenevolent' guidance, it contains a panoply of other intrinsic goods.

Of this exceptionally high premium placed on individual autonomy, Glover writes:

There are many aspects of life where a person may be delighted to hand over decisions to someone else more likely to bring about the best results. . . . But there are many other decisions which people would be reluctant to delegate even if there were the same prospect of greater long-term satisfaction Even in small things people can mind more about expressing themselves than about the standard of the result. And, in the main decisions of life, this is even more so. Suppose people's marriage partners and jobs were chosen by experts, and studies showed a far higher level of satisfaction among those whose marriages and jobs were chosen than among people who made their own arrangements. Even so, many of us would prefer not to delegate such important decisions, for if we did so we would lose the sense of living our own lives, and we prefer to forgo a great deal of happiness, or risk a fair amount of disaster, to losing control of our lives in this way. (1977, p.81)

J. Harris, in a similar vein, articulates the value placed on individual autonomy in the following terms:

Autonomy has a very special and very central role in the value of life. People have been and continue to be prepared to sacrifice their lives in order to win for themselves or others autonomy over relatively minor sorts of decisions. Many things that we would find delightful if we had chosen them for ourselves lose all charm when they are seen to have been chosen for us or imposed on us by others. A life that seems thoroughly rich and worthwhile may be so only because we choose freely to live it. If we are *condemned* to live it, it may be worthless to us. And if life is far from rich and worthwhile, how much more terrible to be condemned to live it against our will. (1985, p.80).

What I believe the ‘Adam – Collective’ thought experiment highlights is that it is not sufficient for a life to contain a list of intrinsic goods like pleasure, knowledge, friendship etc. in order to be considered worthwhile. It is highly important that those intrinsic goods are themselves felt to be the product of autonomous actions taken by the person whose life it is. In short, it is itself intrinsically valuable that our pleasures, loves, friendships, knowledge and accomplishments be *chosen*.¹⁰⁵ This intrinsic value extends to the attendant epistemic ability associated with individual autonomy, namely, the ability to assess and judge the other intrinsic goods contained in one’s life, to weigh them against each other and to adjudicate between them as part of one’s decision making process.

Accordingly, autonomy is, *itself*, something that makes life worthwhile. This conclusion can also help explain why, for the proponent of NCT, killing someone whose life contains a dearth of intrinsic goods and an overabundance of intrinsic evils might nevertheless remain morally impermissible – to do so deprives a person of a distinct intrinsically valuable thing viz. the ability to exercise control over her own life and how she might wish to die.¹⁰⁶

Glover expresses this very point when he writes:

¹⁰⁵ This is not, of course, to discount the possibility of *some* intrinsic goods arising in a human life by chance.

¹⁰⁶ We can think, for example, of the poor wretch living in the most extreme and brutal squalor, who experiences pain and suffering daily without any hope of respite, who lives a solitary life cut off and divorced from friends, family or close interpersonal relationships and whose hopes for real achievement and knowledge in life are thoroughly non-existent but who, nevertheless, desires to persist in the business of living. Of such a person Singer writes ‘the fact that [such a] person wishes to go on living is good evidence that her life is worth living. What better evidence could there be?’ (2011,p.177)

The main argument for the direct wrongness of killing . . . is that it is wrong to shorten a worth-while life. This argument has seemed incomplete, as suggested by considerations of the question of killing someone against his wishes where his life can be [accurately] predicted to be one where he would be better off dead. . . I believe that the incompleteness of the argument against killing stems from its disregard of a person's autonomy in taking decisions about his own life and death. . . This is a reason for holding that, if someone, wants to go on living, it may still be directly wrong to kill him even where there are good grounds for thinking his life is not worth living. (1977, p.74)

A worthwhile life can then be said to be, at least in part, a life that is one's own. And when a person's life is her own this entails that she is epistemically entitled to assess, weigh and adjudicate on its contents as she sees fit and to act on that considered assessment accordingly.¹⁰⁷ It is this intrinsically valuable dimension of self-dominion which seems to underwrite and inform Mill's famous proclamation that '[o]ver himself, over his own body and mind, the individual is sovereign.' (1859 [2001], p.13) as well as Schopenhauer's similar assertion that 'there is nothing in the world to which every man has a more unassailable title than to his own life and person.' (1851 [2015], p.493)

A3.2. SOME WAYS TO LACK AUTONOMY

Having mentioned why it could be thought that autonomy is so valuable, it may be useful at this juncture, if only because it will become important for aspects of our conversation later, to mention briefly some of the specific ways that a person might be thought to lack autonomy. We can begin by distinguishing between two broad

¹⁰⁷ This does not mean that her judgment regarding the contents of her own life is *infallible* or *irrebuttable*; nor does it mean that other people cannot themselves judge the contents of her life and perhaps, in principle, do so more accurately. As Scruton points out '[a] life is an object of judgment, like a work of art; and judgment means viewing it from outside, as the life of another.' (2012, p.425).

categories of what could be called ‘defeaters’ to autonomy – **external defeaters** and **internal defeaters**.

External defeaters are aberrant features of the world that emanate from *outside* a person and which are thought to undermine his ability to engage in self-government. Such defeaters could be either **personal**¹⁰⁸ or **impersonal**.¹⁰⁹ For the purposes of our discussion, **personal defeaters** are the most important and include instances where (i) one person explicitly substitutes his decisions for another person’s decisions¹¹⁰ (**explicit compulsion**), or (ii) one person implicitly substitutes his decisions for another person’s decisions¹¹¹ (**implicit compulsion**).

Internal defeaters relate to aberrant features that emanate from *within* a person himself, specifically, aberrant cognitive and emotional processes that are reasonably thought to undermine his ability to self-govern. J. Harris sketches four sub-categories that could fall under this broad categorisation, namely, (i) defects in the person’s control over her desires and/or actions¹¹² (**defects of control**), (ii) defects in the person’s reasoning process itself¹¹³ (**defects of reasoning**), (iii) defects in the information available to the person upon which her choices are made¹¹⁴ (**defects of**

¹⁰⁸ Defeaters traceable to the conduct of other persons.

¹⁰⁹ Defeaters traceable to features of the world other than the conduct of other persons.

¹¹⁰ E.g. where one person physically forces another person to conclude a contract that the latter does not wish to conclude.

¹¹¹ E.g. where a person is coerced, deceived or manipulated over a period of time to abandon his own decisions in favour of another’s i.e. there is a ‘surreptitious and insidious supplanting’ of the will.

¹¹² E.g. where a person’s desires, choices and actions are vitiated by (i) mental illness, (ii) intoxication, and/or (iii) unwanted addiction.

¹¹³ E.g. where a person’s desires, choices and actions are vitiated by faulty cognitive procedures, like (i) fallacious deductive or inductive reasoning and inference, and/or (ii) cognitive bias.

¹¹⁴ E.g. where a person’s desires, choices and actions are vitiated by (i) insufficient or incomplete relevant information and/or (ii) false information.

information) and (iv) defects in the stability of the person's desires¹¹⁵ (**defects of stability**). (1985, pp.196-199)

From these observations we are then in a position to say that a person will be **maximally autonomous**, in any given situation, when he is free from both **external** and **internal** defeaters. For every defeater present a person will be less and less autonomous. A person will be **minimally autonomous**, in any given situation, when he is beset by the greatest number of **external** and **internal defeaters**. A person could also, in principle, be beset by some defeaters but not others and thus find himself anywhere on the spectrum from **minimal autonomy** to **maximal autonomy**. The crucial point for the purposes of this discussion is that when any person makes any decision of *great* importance it is critical that it be made in a state of **maximal autonomy** or, at the very least, in as close a state to maximal autonomy as the circumstances possibly allow.¹¹⁶

A3.3. INFORMED CONSENT

It is the great importance that autonomy has in our lives that explains why we are especially sensitive to any attempts by others to encroach on or dictate how our lives

¹¹⁵ E.g. where a person's desires, choices and actions are vitiated by temperamental, volatile or capricious swings in mood.

¹¹⁶ This seems to track our intuition that the more important a given decision is, the more important that it be made in a state approximating maximal autonomy. Accordingly, for decisions of relatively *minor* importance, while it may be desirable that they be made in a state of maximal autonomy, it may not be vital.

should go and why we consider it a significant harm when such encroachment occurs.¹¹⁷ This sensitivity is apparent in many social contexts where people interact with each other but it is perhaps particularly heightened in medical contexts where we explicitly demand that medical treatment of persons only be performed on the basis of what is called the **doctrine of informed consent (DIC)** (J. Harris, 1985; Sumner, 2011).

The **DIC** forms a fundamental feature of medical practice precisely because we recognise that anyone who administers a medical treatment to (or performs a medical procedure on) another person encroaches substantially on their bodily and mental integrity and thus encroaches on a domain that is intimately connected to a person's existence and their well-being.

Accordingly, we demand that such encroachments are justified *only* when they are made pursuant to, and as a result of, a person's *own* decision that they should occur - that is to say, as a result of their own autonomous choice.¹¹⁸ It is for this same reason that the **DIC** also operates to allow a person to *refuse* medical treatment outright or to *suspend* medical treatment once it has already begun. In short, adherence to the **DIC** is the principal method by which the intrinsic and extrinsic value of autonomy is protected and respected in medical contexts.

¹¹⁷ The greater the encroachment, especially in respect of major life decisions, the greater the harm suffered by the person.

¹¹⁸ The **DIC** finds application in many other social contexts outside the field of medicine. For example, in a boxing match each fighter consents - that is to say, exercises an autonomous choice - to enter the ring and risk physical injury for the purpose of winning the bout.

Sumner outlines the four essential components of the **DIC** as follows: (i) **assent**¹¹⁹ (ii) **capacity**¹²⁰ (iii) **voluntariness**¹²¹, and (iv) **disclosure**.¹²² (2011, pp.28-30) In outlining these components Sumner is articulating the necessary and sufficient factors that must be met before a decision to undergo or suspend a proposed medical treatment or procedure is autonomous. It should be obvious that conditions (ii) – (iv) seek to negate the **external** and **internal defeaters** already mentioned and thereby ensure that the person is in a **maximally autonomous** state, while condition (i) is simply the obvious requirement that some clear and unambiguous signal be given by the person that he has made the decision.

The idea is that once these four conditions are collectively satisfied then it can be said that the person is making a truly autonomous decision to undergo (or suspend) a medical treatment or procedure and the administration (or termination) thereof will then, accordingly, be morally justified. Conversely, if such conditions are *not* met then if the proposed treatment or procedure occurs (or is not terminated) it will be morally unjustified insofar as it will amount to an unwarranted and disrespectful encroachment on the person's bodily and mental integrity and thus their autonomy.

The **DIC** is, thus, absolutely critical when we contemplate any person who is desirous of engaging in **VAS** insofar as it will provide for us the necessary and sufficient conditions that must be satisfied if a person can be said autonomously to request

¹¹⁹ The person must by some method *express* or *signal* a choice to undergo a particular medical treatment, at a particular time and administered or performed by a particular person or persons.

¹²⁰ The person must be free of (i) defects of control (ii) defects of reasoning and (iii) defects of stability.

¹²¹ The person must be free of explicit and implicit compulsion.

¹²² The person must be free of defects in information.

euthanasia. Determining (or judging) whether such conditions obtain for a given person in any particular circumstance will be a separate *epistemological* and *empirical* issue.

A.4. HUMAN DIGNITY

We have now examined the concepts of **human well-being**, **individual autonomy**, their intimate relationship with each other as well as having outlined what constitutes an autonomous action in a medical context (**DIC**). We have also considered some of the possible defeaters to autonomous action (**internal** and **external defeaters**). It is now time to look at the final building block of the positive case for the moral permissibility of VAS – **human dignity**.¹²³

At the outset it is important to emphasize that the concept of human dignity is intimately connected to the twin notions of *value* and *respect*.¹²⁴ However, it is to be noted that in light of the **Axiological Objectivism** that I endorse, we are not here concerned with any given person's *subjective feeling* that they are respectable or worthy. A person can feel (or believe) that she warrants respect in a given situation without actually being deserving of it.¹²⁵ Conversely a person can feel (or believe) that they are not respectable when in actual fact they are.¹²⁶ Nor are we concerned with

¹²³ Or more correctly, the dignity of human *persons*.

¹²⁴ The word 'dignity' comes from the Latin *dignitas* meaning 'worthiness'.

¹²⁵ E.g. The immoral, callous and cruel king, who rightly deserves contempt, but who feels that, because of his political status and power, he is deserving of respect from his subjects.

¹²⁶ E.g. The magnanimous and compassionate pauper – who rightly deserves to be honoured – but who feels, because of his lowly economic status, he is not deserving of respect from others.

what has been termed ‘appraisal respect’, that is to say, respect that a person may have earned for displaying various kinds of excellences or achievements. (Darwall, 1977) Furthermore, we are not concerned with any parochial *cultural* or *historical* conception of what is considered respectable within a given society at any particular time in human history.¹²⁷

A.4.1. TWO CONCEPTIONS OF A DIGNIFIED HUMAN LIFE

Instead our concern is with a concept of dignity which is far more *fundamental* than personal feeling, appraisal or culture. Our focus is on an idea that has been mentioned a number of times already and that is the idea that human beings are valuable and thus deserving of respect *qua* human being. The status that matters in our discussion is, accordingly, not cultural, ethnic, political, religious or economic, nor is it even a person’s estimation of their own status.¹²⁸ Instead the status that matters for our purposes is that of ‘human being’ – what has been termed ‘recognition respect’. (Darwall, 1977)

This conception of respect captures the idea that human beings, regardless of any accident of birth or station in life, have a special status which demands a certain type of ethical consideration. That special status is, accordingly, thought to place moral constraints (or limits) on how a human being is to be treated by others (and even himself). Human dignity, so construed, thus entails the *comporting* and *constraint* of

¹²⁷ E.g. The Victorian conception of what it is to be a ‘dignified and respectable gentleman’.

¹²⁸ The estimation of one’s worth in one’s own eyes.

conduct out of deference to ‘humanness’ i.e. it determines an *appropriateness* or *fittingness* between any proposed conduct and the object of humanity. Based on our original distinction between VCT and NCT we can then advance two different accounts of human dignity.

For the proponent of VCT the dignity of human beings goes hand-in-glove with the intrinsic and terminal value of human life itself. Human life is thought to be intrinsically valuable and thus it will *always* be the appropriate object of respect. To destroy a human life is, therefore, to unjustifiably violate or undermine human dignity – it is to disrespect something that is *always* meant to be the appropriate object of honour and reverence.

Dworkin, writing of the dignity of human life, links the concept explicitly to intrinsic value:

A person’s right to be treated with dignity, I now suggest, is the right that others acknowledge his genuine critical interests: that they acknowledge that he is the kind of creature, and has the moral standing, such that it is intrinsically, objectively important how his life goes. Dignity is the central aspect of value we have been examining . . . the intrinsic importance of human life. (1994, p.236)

Dworkin has clearly been influenced by the views of Kant, who provided one of the most important and influential secular articulations of human dignity. Gertzler describes Kant’s view of human dignity as follows:

According to him [Kant], dignity (*Würde*) is absolute and unconditional intrinsic value. Objects with dignity are not merely instrumental means to the satisfaction of

various people's ends but rather, in Kant's famous phrase, they are "ends-in-themselves" . . . As such they are to be valued and treated with the utmost respect. . . According to Kant, all human beings have dignity in virtue of their humanity, that is, their capacity for autonomous action. (2003, p.462)

Sandel writes of the Kantian notion of respect as 'a duty we owe to persons as rational beings, as bearers of humanity. It has nothing to do with who in particular the person may be. . . Kantian respect is respect for humanity as such, for a rational capacity that resides, undifferentiated, in all of us.' (2010, p.123) This utmost respect due to human beings is, in Kant's own words 'infinitely above all price, with which it cannot be brought into comparison or competition at all without, as it were, violating its holiness.' (1785 [1996], 4:435) Gunderson points out that Kant's position in this regard 'is best interpreted as meaning that dignity is incommensurable with other values and not to be measured against or traded for other values. Dignity is not to be dealt with in terms of a cost-benefit analysis.' (2004, p.279) Accordingly, human dignity, on this view, is both independent of (and incommensurable with) the contents of life and thus enjoys a sort of normative primacy.

However, for the proponent of NCT, human life *per se* does not *ipso facto* generate dignity and thus does not automatically demand respect or reverence from anyone. Instead it will be the content of a human life that will determine whether any given life is 'dignified', 'worthy of respect' or 'worthy of honour'. This view entails that there is a logical possibility for some human beings to live truly undignified lives. That is to say,

human lives that are not worthy of respect or honour and which are, for that reason, to be judged with disdain, shame or pity.¹²⁹

‘Dignity’ then, for the proponent of **NCT**, is neither a self-standing intrinsic good nor is it part and parcel of human life *per se* but rather it is a feature of a particular *sort* of human life.¹³⁰ In particular, the epithet ‘undignified’ will be appropriate for a human life whenever there is a surplus of intrinsic evils in that life i.e. when the life is not worth living. On this sort of view ‘dignity’ can be said to *track*¹³¹ the ‘worthwhileness’ or ‘flourishing’ of human life. Accordingly, it is a contradiction on such a view to say of a particular person that (i) they have a life that is *not* worth living, but (ii) it is nevertheless a life that is worthy of respect, admiration, honour or reverence i.e. a dignified life. The dignified nature of a human life, on this view, is conditional on the contents of life and is normatively secondary.

¹²⁹ If you doubt this, consider the following sorts of lives: (i) a life suffused with severe pain, anguish and suffering which overshadows and swallows up all present intrinsic goods as well as the possibility of obtaining intrinsic goods in future; (ii) a life where one’s autonomy is so diminished that one can barely conceptualise and/or appreciate and/or attempt to obtain other intrinsic goods; (iii) a life so isolated and divorced from any sort of love, friendship, knowledge, connection or real accomplishment that it is empty, hollow and meaningless; (iv) a life that is characterised by elements of (i), (ii) and (iii). S. Harris paints a particularly nightmarish (but all too plausible) portrait of a life that qualifies for (iv). (2010, p.15)

¹³⁰ My position is similar, but by no means identical, to Aristotle’s conception of a life with dignity as being a life of activities that develop or exercise the human virtues. (See Gentzler, 2003)

¹³¹ However, I should not be interpreted here as meaning that there are degrees of dignity. By ‘tracking’ I mean that the dignified nature of a life can be lost and gained when the worthwhileness of a life is lost or gained. However, if there are two lives that are both worthwhile they will both be just as dignified even if one of the lives contains qualitatively better and quantitatively more intrinsic goods (all things considered) than the other.

A4.2. AUTONOMY AND HUMAN DIGNITY

For the proponent of VCT the link between autonomy and dignity is intimate and straightforward. A human being will only cease to have dignity when he ceases to be a human being. If Kant's view of human dignity is adopted, this will occur only when a human being ceases to be autonomous. To cease to have the capacity for autonomous action, for Kant, is to cease to be a human being and to essentially become 'a thing' or 'an object'.

For the proponent of NCT the relationship between autonomy, dignity and respect is slightly more complicated. Should a human life no longer be worth living it would be appropriate to say that such a life is 'undignified' and is no longer worthy of respect or admiration. This would be to correctly characterize the life viewed *in toto*. However, as already indicated, this would not be to say that for that reason alone the autonomy of the person whose life it is, is to be disrespected or disregarded. A life may not be worth living (or undignified) viewed *in toto* but the autonomy that a person has is still an intrinsic (and extrinsic) good, worthy of concern and respect.

In short, the proponent of NCT could consistently assert the following three things about a human life: (i) that a given human life is not worth living judged *in toto* (**unworthiness of life**) (ii) such a human life is thus an undignified life which is unworthy of honour, respect or reverence (**indignity of life**), however, (iii) the autonomy of the person whose life it is ought to be respected precisely because of its

own intrinsic value as well as the possibility of its extrinsic value (instrumental and contributive) for the future life of the person (**respect for autonomy**).

In this regard, the proponent of **NCT** can be *ad idem* with the proponent of **VCT** who adopts Kant's notion of human dignity that autonomy is a thing to be respected and revered. However, what will separate the two is the latter's assertion that autonomy is both (i) constitutive of what it is to *be* a human being, and (ii) is incommensurable with any other intrinsic goods. This is what I shall term the **constitutive thesis** and the **incommensurability thesis** respectively.

A.5. THE POSITIVE CASE FOR VOLUNTARY ASSISTED SUICIDE

We are now finally in a position to draw the threads of our previous discussion together and articulate the case for **VAS**, weaving together not just our discussion of death, its badness and the value of life but also the three interrelated concepts of **human well-being, individual autonomy** and **human dignity**.

In this section I intend to set out what, in my view, is the strongest positive case in favour of permitting **VAS**. However, it is to be emphasised it is only a *prima facie* case. What I mean by this is that I have adopted the philosophical burden of proof of putting forward *prima facie* reasons for why **VAS** should be permitted in South African society. I thus accept that I bear the so called 'risk of non-persuasion'. Having set out such a case, the positive argument needs to be tested against the strongest arguments

advanced by opponents of **VAS** to see whether it is sustainable. This will be the focus of the following section where the two strongest arguments against the permissibility of **VAS** - the **Sanctity of Life Argument (SLA)** and the **Social Harm Argument (SHA)** - will be articulated, critiqued and found wanting.

The positive case for the moral permissibility of **VAS** has two parts. The first part is based firmly on the view that **NCT** is the correct axiological account of the value of life, and addresses when **VAS** is permissible in respect of individual persons. The second part addresses why a social policy of prohibition of **VAS** is unjust and ought to be replaced by a permissive policy that incorporates regulation. The two parts can be set out in standard form as follows:

PART I – INDIVIDUAL LIVES

1. The value of a person's life is instrumental and dependent on the intrinsic value of its contents. (**NCT**)
 2. A worthwhile life (a flourishing life or a life characterised by well-being) is one that (i) contains a net surplus of intrinsic goods, and/or (ii) will probably contain a net surplus of intrinsic goods in the future. (**eudaimon/dignified life**)
 3. A life that is not worth living is a life that (i) contains a net surplus of intrinsic evils and/ or (ii) will probably contain a net surplus of intrinsic evils in the future. (**non-eudaimon/undignified life**)
 4. Death is the irreversible cessation of being a person. (**personal account**)
-

5. Therefore, (a) death is **bad** if it deprives a person either of (i) a life that has a net surplus of intrinsic goods and/or (ii) of acquiring a probable net surplus of intrinsic goods in the future, and (b) death is **good** if it deprives a person either of (i) a life that has a net surplus of intrinsic evils and/or (ii) of acquiring a probable net surplus of intrinsic evils in the future. (**deprivation account**) (**from 1 - 4**)

6. If the death of a person would be **good** then it is permissible for that person to exercise her **autonomy** to end her life. (**intrinsic and extrinsic value of autonomy**)

7. If it is permissible for a person to exercise her autonomy to end her life then it is permissible for that person (i) to request another's assistance to help her do so, and (ii) to be so assisted. (**DIC**)

8. Sometimes the death of a person would be good.

9. Therefore, it is sometimes permissible for a person to exercise her autonomy to end her life. (**from 6 and 8**)

10. Therefore, it is sometimes permissible for (i) a person to request another's assistance to end her life and (ii) to be so assisted. (**from 7 and 9**)

PART II – SOCIAL POLICY

11. A policy of prohibition in a society is, by definition, a policy that absolutely prohibits a certain practice (i.e. the practice is always impermissible).

-
12. **VAS** is sometimes permissible (**from 10**).
13. There is presently a policy of prohibition of **VAS** in South Africa.
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14. Therefore, it is the case that **VAS** (which is sometimes permissible) is always prohibited in South Africa. (**from 12 and 13**)
-
15. If a policy of prohibition always prohibits that which is sometimes morally permissible then such policy is unjust and ought to be reformed in favour of a policy of permissibility incorporating regulation.
-
16. Therefore, the policy of prohibition of **VAS** in South Africa is unjust and ought to be reformed in favour of a policy of permissibility and regulation. (**from 14 and 15**).

The first thing to notice about both **Part I** and **Part II** is their formal structure. Both parts are deductively valid. That is to say, if the premises are true then the conclusions follow as a matter of deductive inference. The key question then is whether the premises are true, or at the very least, whether they are more *probably* true than false. In short, in order to defeat the positive case, the soundness of **Part I** and/or **Part II** must be undermined. However, before addressing the main arguments against the crucial premises (that will be the focus of the next two sections) it will be useful to explicate the structure of the two parts, the role some of the important premises play and what is actually entailed by each part of the argument.

A.5.1. EXPLAINING PART I

The first thing to notice is that **Part I** does not have a conclusion that permits **VAS** in any and all cases. The conclusion of **Part I** is very clear that **VAS** is only *sometimes* permissible. This means that it is possible for some instances of **VAS** to be impermissible i.e. morally wrong. A question immediately arises: assuming the soundness of **Part I**, under what circumstances would **VAS** be impermissible in the case of an individual person?

To answer that question we must examine and explain premise (6) a little more closely. This premise makes the goodness of death the sole determining feature as to whether a person is entitled to utilise their autonomy to end their life i.e. commit **US** or engage in **VAS**. The implication of premise (6) is that it is impermissible for a person to exercise their autonomy to end their own life if their life is worthwhile i.e. if death would be bad. However, it could be argued that this places autonomy (itself an intrinsic good deserving of respect) in direct conflict with the other intrinsic goods that make life worthwhile and which are also worthy of respect. If this is the case, how can this conflict be resolved?

To think about how we might do this, let us first think about two possible attitudes or views one could have toward the conflict. First, one could say that autonomy always trumps the existence of the other intrinsic goods in a person's life. Let us call this the **autonomy always view**. To adopt the **autonomy always view** would be to say that

no matter how wonderful the content of a person's life they are *always* entitled to end their lives when they so choose. This entails that it would be permissible for a person who was, in fact, living a eudaimon life to end it simply if he chose to do so. On this view, the autonomy of a person is *always* respected even if it is not (objectively considered) in his own good. In short, such a view entitles a person to always act against his own good (even tragically so) in the case of his decision to die, despite being the bearer of a eudaimon life. A person's life is, on this view, analogous to 'property held absolutely' (Chetwynd, 2004, pp.177-179) and, provided there is no substantial harm to other persons, he can absolutely do with it as he wishes (including destroy it).¹³²

Second, one could say that the other intrinsic goods contained in a life always trump and constrain the autonomy of a person. Let us call this the **goods always view**. To adopt the **goods always view** would be to say that if a person is (objectively considered) living a eudaimon life he cannot ever exercise his autonomy to end his life. To adopt such a view would entail that a person living a eudaimon life is *condemned* to live it. The autonomy of a person on this view is respected only to the extent that he chooses to continue living and contribute (in whatever way he pleases) to his life but it is disregarded insofar as he wishes to end his eudaimon existence.

¹³² Chetwynd uses the analogy of a home "[i]f I want to let my house fall down around me, and don't think the effort of saving is worth making, that decision is mine alone, providing of course it does not injure anyone else as it falls down!" (2004, p.178) This is in stark contrast to Kant's view. Sandel writes 'Kant insists that we do not own ourselves. The moral requirement that we treat persons as ends rather than as mere means limits the way we may treat our bodies and ourselves. "Man cannot dispose over himself because he is not a thing; he is not his own property."' (2010, p.130).

These two views – the **autonomy always view** and the **goods always view** – represent two extremes. The **autonomy always view** entails respecting the choices of a person who wishes to destroy his own eudaimon life – the thing that would, by its very nature, be most deserving of moral consideration and protection. The **goods always view** entails that we always disrespect a person's autonomy when, although living a eudaimon life, he wishes to make one of the most important and intimate decisions a person can make, namely *when* and *how* he is to die. This appears to be itself a serious harm to the person. After all, as Wellman points out 'to disrespect the rational agency of another by interfering with her action is to reduce her control over her life and thereby threaten what matters most to the value of her life.' (2003, p.27)

Neither view appears particularly attractive or persuasive. Is there a solution to this apparently aporetic predicament? Or is it simply a matter of arbitrary personal preference which view to adopt? I wish to suggest a third view, which hopefully represents a reasonable middle path, and which acknowledges the powerful points made by its more extreme siblings. We could call this view the **rebuttable autonomy view**.

This view starts first by acknowledging that it is not permissible (and thus undesirable) for people to end their lives if they are, in fact, lives worth living. The reason being that eudaimon lives are, by definition, *precisely* the sorts of lives that are worth having, maintaining, respecting and protecting from destruction. It acknowledges that it would be wrong for a person to end a eudaimon life even if it is his own.

However, this view also acknowledges that the person whose life it is, will often be the one best situated to judge whether he is living a eudaimon life or not. The reason for this is because he will be the one most *intimately* and *viscerally* acquainted with the contents of his life. He will have lived his life from ‘the inside’¹³³ and will in most cases have a *privileged* acquaintance with its present features and future prospects. Of necessity, anyone else judging it from the outside – like Scruton imagines¹³⁴ – will be judging it in a somewhat *impersonal* and *indirect* way. Accordingly, a person’s judgment – being a crucial aspect of his autonomy – about the worthwhileness (or lack thereof) of his life ought to be respected unless his judgment is ‘overruled’ by even more *cogent*, *persuasive* and *prodigious* evidence to the contrary.

This means that there ought to be a presumption in favour of the person’s own epistemic assessment of the contents of his life and his autonomous choices in respect thereof, including a decision to engage in **VAS**. This presumption is, however, rebuttable. This is because it is also to be recognised that while people are usually competent judges of the contents of their lives, occasionally they can be genuinely mistaken in their own assessment.¹³⁵ Human beings are not infallible even in respect of their own lives. And death, after all, is ferociously final.¹³⁶ It is, in my view, only by

¹³³ From ‘the marrow to the meat’ as it were.

¹³⁴ See footnote 107.

¹³⁵ We can think here, for example, of the young man who has just experienced his first romantic heartbreak and is in the midst of emotional suffering sufficient for him to wish his life was over. However, he still has many rewarding friendships and relationships, has the capacity to engage in a worthwhile and meaningful profession, he knows he can yet experience pleasure and realises that he still has the capacity to love and cultivate further knowledge. While he might judge his life to no longer be worth living, it is reasonable to suppose that he is making a tragic mistake and that there is sufficient cogent countervailing evidence to indicate that he is still living, and will probably live in future, a eudaimon life.

¹³⁶ Tyrion Lannister – a character in the HBO television series ‘Game of Thrones’ – perspicaciously reminds us ‘death is so final, whereas life is full of possibilities.’ (season 1, episode 2: The Kingsroad, 2011)

carefully and slowly walking this middle path that we can best ensure that (i) those human lives that are worthwhile continue to flourish, while simultaneously (ii) respecting the autonomy of those who judge their lives to no longer be worth living.¹³⁷

Premise (6) is important for a further reason. Nothing about **Part I** places any additional restrictions on *who* is entitled to request **VAS**. It is sometimes thought, for example, that **VAS** should be permitted but restricted to the terminally ill (Gunderson & Mayo, 2000) or perhaps only to those suffering from severe physical pain. If **Part I** and, in particular, premise (6) is sound then there is no justifiable moral reason for limiting the scope of permissibility to the terminally ill or those in severe physical pain. In fact to do so, would be to act quite arbitrarily and would do justice to neither (i) the rich, multifaceted and elastic concept of a life worth living nor (ii) the intrinsic value of autonomy. If premise (6) is accepted then *any* person who is not living a worthwhile life will be entitled to exercise their autonomy to engage in **VAS**. It is perhaps useful at this juncture to recall, with some compassion and empathy, that there could be any number of human lives that may reasonably be thought not to be worthwhile.¹³⁸ A life touched by terminal illness or severe physical pain may be just one such life.

Next, some readers may also be concerned about premise (7). Does it follow that because a person is entitled to end their own life they are then entitled to request another to assist them to do so and then to be so assisted? As Sumner reminds us

¹³⁷ However, in those rare cases where a person's own epistemic assessment about the worthwhileness of his life and the contradictory evidence pull in *equal* but *opposite* directions, the epistemic assessment of the person (and thus his autonomy) ought to triumph.

¹³⁸ See footnote 129.

‘[w]hile suicide remains within personal boundaries . . . assistance crosses those boundaries: it is an action not by a person on herself but by one person upon another.’ (2013, p.85) It is indeed a conceptual possibility that although it is permissible for some person to perform an action it would be impermissible for another person to assist them to perform it.¹³⁹ However, that being said, given the very nature of **VAS** which is characterised by an autonomous request (consent) for another to assist in the ending of a life ‘[t]he real ethical burden of justifying assistance with suicide seems to be discharged by justifying suicide itself.’ (Sumner, 2011, p.85) Similarly, Glover writes ‘[i]f it is right to stand aside and let someone kill himself, it is hard to see why it is wrong to provide necessary assistance.’ (1977, p.184)

It must also be emphasised that the conclusion reached in **Part I** contains no proscription on the mode or method of assistance that can be provided to the person requesting **VAS**. This means that if **Part I** is sound then **VAS** both in the form of **DVAS** and **INVAS** is permissible.¹⁴⁰ The conclusion of **Part I** also places no restraints on *who* is permitted to provide assistance. The conclusion of **Part I** thus entails the permissibility of both **PAS** and **NPAS**.

We might think, however, that there is at least one persuasive *practical* and *professional* reason for preferring **PAS** over **NPAS** (at the very least, when **PAS** is possible and available). Physicians are specially trained in the field of medicine and

¹³⁹ The converse does not appear to hold though. If it is impermissible for a person to perform some action then it is impermissible to assist that person in performing that action. (McMahan, 2002)

¹⁴⁰ Furthermore, it would not matter whether the assistance provided took the form of a commission or omission. As I have already indicated, I consider there to be no intrinsic *moral* difference between the two types of conduct. See footnote 35.

thus are experts in the provision of medical treatments including the procedures that would be sufficient to end the life of a person requesting **VAS** quickly and painlessly, whereas, friends or family members often lack the medical expertise needed and may do more harm than good in providing the specialised assistance that is required.

Finally, it is worth mentioning that what has been argued for is the *permissibility* of **VAS**. There has been no suggestion that it is ever obligatory for a person to assist someone who requests **VAS**. In fact, there are very good reasons for supposing that it should not be obligatory. To *obligate* a physician (or a non-physician) to render assistance to any person who requested **VAS** would itself undermine the autonomy and well-being of the physician (or non-physician) and constitute a serious harm. No one should be compelled to euthanize another person. The efficaciousness of requests for **VAS** in individual cases will thus depend on a person obtaining the services of a physician (or non-physician) who has himself autonomously agreed to render assistance. In this way the autonomy and well-being of persons who decline to assist can be respected and they need not be concerned by the threat of compulsion.¹⁴¹

However, some readers may wonder, with understandable concern, what is to happen to the person who desires **VAS** but who can find no willing physician to assist them. In such a case the person should then be entitled to obtain the assistance of a non-physician, such as a close friend or family member. However, what of the person who

¹⁴¹ This is especially important because a person may experience substantial emotional and psychological distress and even severe trauma should they be *compelled* to render such assistance. Such harm could arise for a variety of reasons, for instance, they might have strong religious or theological objections or they might simply recoil at the prospect of having a morbid and melancholic chapter forcefully written into their *own* book of life by another person.

can find neither a physician nor a non-physician who is willing to assist? Is such a person to be left without any recourse? Will they be condemned to languish in an undignified existence? I believe that the answer might very well be that they are.¹⁴² However, I also believe that any concerns about such unlikely cases amounts to a premature cry over un-spilt milk. After all, the capacity for human pity is both ubiquitous and potent and the probability of a person being unable to obtain assistance from anyone is, in my view, remarkably slim.

A.5.2. EXPLAINING PART II

Part II is simpler than **Part I**. The crucial premise is premise (15) which asserts one simple point, namely, that the absolute prohibition of a practice is unjust¹⁴³ if there are instances of the practice that would sometimes be permissible. This is simply to state that absolute prohibitions are sometimes unjustly over-proscriptive. Figuratively speaking, they are policies that catch fish in the trawling net that ought properly not to be caught. This is one very strong reason for seeking to change a given policy of prohibition. It is important to emphasise, however, that the pendulum swing from absolute prohibition is not one to absolute permissibility.

The constraints on when **VAS** is permissible arises from premise (6) of **Part I** subject to the **rebuttable autonomy view**. **Part I** thus provides a very good reason for

¹⁴² In such a tragic case a person must either (i) somehow attempt to engage in **US** or (ii) resign herself to the reality that nothing can be done unless and until another person is willing to assist her.

¹⁴³ I use the term 'just' and 'unjust' as the socio-legal and political level analogues of 'morally permissible' and 'morally impermissible' at the individual level.

supposing that while absolute prohibition is unjust, complete permissibility would also be unjust. **Part II** argues that the best route is one that permits and regulates the practice of **VAS** and thereby ensures that only those fish that ought to be caught in the net are, in fact, so caught. It is to be noted finally that nothing about the conclusion of **Part II** indicates *how* the practice of **VAS** should be regulated or what method of regulation would be best. The precise contours of such regulation is an important question and one to which we will return in the second section. For now, let us turn to the two main arguments that stand ready to do battle with **Part I** and **Part II** of the case just presented.

A.6. THE MAIN ARGUMENTS AGAINST THE POSITIVE CASE

Hume wrote that ‘if suicide be criminal, it must be a transgression of our duty, either to God, to our neighbour or ourselves.’ (1757 [2014], p.3).¹⁴⁴ Of course any concerns about moral duties to God have been rendered moot as a consequence of one of the major philosophical assumptions with which we began, namely, **Metaphysical Naturalism**.¹⁴⁵ This leaves us with two remaining viable justifications for moral impermissibility viz. violations of a moral duty to our *neighbours* and/or *ourselves*.

¹⁴⁴ By ‘criminal’ Hume means, in this context, morally impermissible.

¹⁴⁵ Of course, both Metaphysical Naturalism and/or Atheism could be false. It is interesting, however, to point out, that at a purely descriptive level, the overwhelming majority of contemporary analytic philosophers seem to believe that Atheism is true (72.8%). More philosophers also believe Metaphysical Naturalism is true (49.8%) than those who embrace a non-naturalistic view (25.9%). The remainder appeared to endorse some ‘other’ metaphysical view (24.3%) (Borget & Chalmers, 2013).

There are two major arguments that seek to meet Hume's challenge, namely the **Sanctity of Life Argument (SLA)** and the **Social Harm Argument (SHA)**. Each argument addresses a different aspect. The **SLA** addresses most directly the impermissibility of **VAS** as a violation of a duty to ourselves. The **SLA** is a thoroughly deontological argument. By this I mean that the moral permissibility or impermissibility of **VAS** is not going to depend solely on good or bad consequences.¹⁴⁶

On the other hand, the **SHA** acknowledges that even if **VAS** does not violate a duty to oneself (and that there can be some cases where **VAS** is permissible for individuals) there would nevertheless be a cascade of social harms which would ensue if a permissive **VAS** policy was adopted over a policy of prohibition. The **SHA** thus has a consequentialist heart beating in its chest.¹⁴⁷ The idea is that a policy of complete prohibition conduces to better consequences for our neighbours in society than the adoption of any other policy. We can see then that the **SLA** is going to take issue with **Part I** of the positive case while the **SHA** is going to take up the sword against **Part II** of the positive case.

However, before turning to these principal arguments, a preliminary criticism of the positive case and its reliance on the concept of autonomy deserves mention. It is sometimes argued as follows:

[P]roponents of assisted suicide face a dilemma in appealing to autonomy, whether of a descriptive or ascriptive stripe. Descriptive autonomy, devoid of normativity, defies

¹⁴⁶ See footnote 23.

¹⁴⁷ See footnote 22.

restrictions because society thwarts the autonomy of an individual when it denies his “authentic” or “self-creative” choice to die, or any other choice. Ascriptive autonomy retains normativity, but only by capitulating its moral neutrality and violating the autonomy of adherents of conflicting moral theories. Certainly society must limit the harm that autonomous acts could yield, but any limitation implicates a view of the good and undermines opponents’ autonomy. Thus autonomy-based arguments for assisted suicide are self-refuting in two regards: first, acts of assisted suicide committed in the name of autonomy annihilate the very basis of individual autonomy; second, arguments grounded on autonomy ultimately depend on a view of the good that, if socially prescribed, would subvert individual’s autonomy to attain alternative views of the good. (Safranek, 1998, p.35)

This critique is unpersuasive for three reasons. First, it should be obvious to the observant reader that the positive case does not rely on a **descriptive view** of autonomy, that is to say a morally neutral account of autonomy, but rather an **ascriptive view** of autonomy. On such a view autonomy is *itself* considered an intrinsic good that is *constitutive* of human well-being.

Second, insofar as the positive case does appeal to an **ascriptive view** of autonomy it does, of necessity, endorse a specific conception of the good viz. a specific conception of human well-being (**Axiological Pluralism** and **Axiological Objectivism**). This is readily and easily granted. However, since the positive case does *not* entail that any third person is obligated to accede to a given person’s request for **VAS**, we need not be concerned that the autonomy of third persons with alternative conceptions of the good will be violated, or otherwise forced to bend to a foreign conception of the good. In short, their autonomy, well-being and personal conception of the good would remain intact.

Third, the positive case does *not* entail compelling a person to engage in **VAS** even if there is good reason to believe that their life is not worth living. Thus there can be no question of violating individual autonomy by forcing persons to engage in **VAS** out of deference to a particular theory of the good. However, it is true that if the person is *clearly* living a eudaimon life then the positive case would not permit him to exercise his autonomy to engage in **VAS**. This would indeed be a restraint on his autonomy out of deference to a particular conception of the good. However, if that conception of the human good *is* correct then this is not a serious challenge to the positive case but rather the normative consequence of a true account of the human good with prescriptive consequences for human conduct. It is also worth remembering that this *potentially* paternalistic consequence would be tempered by the application of the **rebuttable autonomy view**. That is to say, the presumption in favour of a person's own immediate and intimate epistemic assessment of the worthwhileness of his life, which could be rebutted only by reference to *clear, cogent* and *compelling* evidence to the contrary.

Finally, this leaves the charge that **VAS** annihilates the very basis for autonomy. The idea seems to be that the positive case is somehow illogical insofar as one is justifying the use of autonomy to engage in an act that undermines future autonomy. However, this criticism ignores the fact that, according to the positive case, autonomy is simply *one* intrinsic good among a plurality of intrinsic goods. According to the positive case, autonomy is not to be preserved at the expense of all the other intrinsic goods.¹⁴⁸ If a

¹⁴⁸ It should be emphasized that we recognise this in many other areas of our lives. We often limit, constrain or trade-off our autonomy (to various degrees) for the sake of other intrinsic goods. For example, we make promises to friends that constrain our future autonomy out of deference to the friendship. We undermine present autonomy for the sake of learning activities that give us knowledge. Out of deference to certain pleasurable experiences we are willing to forego autonomous action. We are

person is truly not living a worthwhile life (viewed *in toto*), then he is by definition better off dead even if his life nevertheless contains the intrinsically valuable element of autonomy. In such circumstances, utilising one's autonomy to terminate a non-worthwhile life is not a contradictory or illogical thing to do at all, even though it involves the annihilation of the possibility for autonomous action in the future. With this preliminary challenge out of the way, we can now turn to an examination of the **SLA**.

A6.1. THE SANCTITY OF LIFE ARGUMENT

The **SLA** attacks two fundamental premises of the positive case. First, that the **NCT** is the correct account of the value of a human life - premise (1). Second, that death can ever be a good thing for a person - premise (8). On the contrary it asserts that **VCT** is the correct axiological theory to account for the value of human life and that in virtue of this axiological theory death is *always* bad for a person.

We can put the **SLA** into standard form as follows:-

1. Human life *per se* is intrinsically valuable. (**VCT**) (**Sacred** or **inviolable**)
2. It is impermissible to destroy (or disrespect) something of intrinsic value.
3. **US** and thus, *a fortiori*, **VAS** constitutes the destruction of human life.

also, in many cases, willing to forego autonomy (in various degrees) to avoid intrinsic evils like mental and physical suffering.

4. Therefore, **US** and thus, *a fortiori*, **VAS** always constitutes the destruction of something of intrinsic value. (**from 1-3**)

5. Therefore, **US** and thus, *a fortiori*, **VAS** is always impermissible. (**from 2 and 4**)

Formally the **SLA** is deductively valid and thus if the premises are true the main conclusion will follow straightforwardly. Premise (1) is simply the assertion of the truth of **VCT**. Premise (2) reflects the idea that has been central throughout our discussion, namely, that things of intrinsic value are the very sorts of things that are the appropriate objects of moral concern and ought not to be destroyed, disrespected or undermined. Premise (3) is a straightforward articulation of what is entailed by **US** and **VAS**. When premise (2) is combined with the sub-conclusion in premise (4) what is entailed is an absolute and unconditional conclusion. Such a conclusion, if true, means that not only is **Part I** unsound but we would then also have good reason to reject **Part II**. After all, if a certain practice is always impermissible in individual cases then we will have at least one strong reason to implement a prohibitionist policy across society.

However, what reasons do we have to be convinced of the truth of premise (1) of the **SLA**? If the **SLA** is to be at all persuasive it must defend this premise or fall to be rejected. I shall argue that this key premise cannot be adequately defended and thus the **SLA** is not a good argument. While reflecting on the persuasiveness of the **SLA** it might be useful for the contemplative reader to keep the following question firmly in mind:

Our ability to sustain vital signs virtually as long as we wish pointedly raises the question whether we value life for its electrical efflorescence or for qualities that might be enjoyed by the person whose life is in jeopardy. In fact it raises the question what the life is that we value. Is it biology or biography? (Suber, 1996, p.1)

A6.1.1 ANALYSIS AND RESPONSES

In truth, premise (1) has two philosophical siblings that make even bolder claims which are worth examining, if only for the sake of completeness and conceptual clarity. First, some might believe that it is not human life that is intrinsically valuable but rather that existence *per se* is intrinsically valuable (**brute existence view**). Second, some might believe that even if brute existence is not *per se* intrinsically valuable, biological existence certainly is (**biological existence view**). While the former view is even bolder than the latter, both views entail that human life would be intrinsically valuable. (Frankena, 1976) Unfortunately, it is precisely in virtue of their boldness that these views are highly implausible.

Let us begin with the **brute existence view**. A proponent of this view might argue that it is simply better, all things considered, for things to exist rather than not exist. Existence, on this view, is always axiologically preferable (and thus desirable) to non-existence. When things (regardless of what they are) have the property of existing then they are intrinsically valuable. If this view is correct then anything would be intrinsically valuable simply by virtue of its existing (including human beings). There are at least two problems with the **brute existence view**.

First, the view mistakenly seems to posit ‘existence’ as a separate distinct property that things can possess¹⁴⁹ rather than viewing ‘existence’ as a descriptive term for a thing that has properties.¹⁵⁰ Second, and perhaps more importantly, the question can always be asked: what reasons do we have to accept that brute existence is intrinsically valuable (and thus desirable) over non-existence?

Admittedly, when asking this question it is difficult not to rely on certain intuitions. However, to test our intuitions I propose that we imagine a possible world that has certain things existing in it. Since the **brute existence view** asserts that mere existence is intrinsically valuable we must exclude any other potential intrinsically valuable thing from this possible world. One could, therefore, imagine a possible world filled to the brim with *only* inanimate matter, for example, rocks. Let us call this world W^R . One could then ask is W^R intrinsically valuable?

The answer, to my mind, is clearly no. It seems to be patently obvious that W^R is no better than no world at all. A world consisting only of rocks can, by definition, make no difference to anyone or anything else. It would be a completely inanimate and stagnant world lacking dynamism, change or growth. Such a possible world appears to be nothing more than the ultimate ontological recluse, a hermit world destined to affect nothing and no-one forever. In short, to say that there is a possible world that exists but it affects nothing and no-one seems to be on a *functional par* with the world’s

¹⁴⁹ As if additional information is added to the concept of a particular table, for example, by saying that the table is rectangular, brown, located in my living room, weighs twenty kilograms *and* it exists.

¹⁵⁰ The proponent of this view might then retort it is simply the having of properties that is intrinsically valuable. To exist is to have properties and having properties (whatever they may be) is intrinsically valuable.

non-existence. W^R appears to be a possible world which, when contemplated in the actual world, justifiably prompts the thought 'well if it did exist, it may as well not exist'. It is, therefore, extremely difficult, if not impossible, to see how the brute existence of rocks in W^R could be intrinsically valuable.

In the face of such implausibility, the **biological existence view** might be asserted instead. It may be conceded that while brute existence is not intrinsically valuable, biological existence fares better. After all, it may be argued, that biological existence is sufficiently different from inanimate existence to warrant being thought of as intrinsically valuable. It may be argued, for example, that contrary to inanimate matter biological life grows, is dynamic and changing. Biological life multiplies and perpetuates itself. In short, things that are biologically alive possess a host of properties which are lacking from inanimate matter (like rocks) and which make an axiological difference. Albert Schweitzer best articulated this sort of unconstrained view about the intrinsic value of all biological life when he wrote:

A man is truly ethical only when he obeys the compulsion to help all life which he is able to assist, and shrinks from injuring anything that lives. . . Life as such is sacred to him. He tears no leaf from a tree, plucks no flower, and takes care to crush no insect.
(1923 [2015], p.105)

Once again we can return to our possible world thought experiment to test the inherent plausibility of such a view. This time instead of imagining W^R let us imagine a possible world consisting *solely* of a single biological organism - a weed. Let us call this possible world W^W . In W^W the weed grows, it multiplies, it is dynamic and perpetuates itself. It will continue to grow forever and ever, all the while W^W will

continuously expand to facilitate this weed-like behaviour. Is W^W intrinsically valuable?

I would again suggest a negative answer. The added properties of dynamism, growth, perpetuation and multiplication do not seem to be a sufficient justification for asserting the intrinsic value of the weed (and thus W^W) at all. Certain questions naturally arise. Growth for *whom*? Multiplication to what *end*? Perpetuation for what *purpose*? Again we seem to be faced with a form of existence that is unable to affect anything or anyone ever. The weed's biological self-perpetuation in W^W seems gratuitous and absurd.

What difference could it possibly make whether the weed lives or dies or whether it ever existed at all for that matter? If such a world spontaneously slipped out of existence would anything sacrosanct truly be lost? It may be argued that surely it matters to the weed that it grows, perpetuates itself and continues to exist. But herein lies the rub, since there is no 'point of view' associated with the weed. There is nothing that 'it is like to be' the weed and there are no phenomenal properties that can possibly be ascribed to the weed. Accordingly, I do not believe it is possible to defend the preferability and desirability of the existence of W^W over no world at all. Each seem, on critical reflection, to be axiologically on par with each other - equally devoid of intrinsic worth.¹⁵¹

¹⁵¹ It is important, at this juncture, to remember the crucial distinction between **intrinsic value** and **extrinsic value**, and particularly, **inherent value**. I am not denying that such worlds (W^R and W^W) might instantiate some sort of **inherent value**. I am arguing that such worlds are not intrinsically valuable, that is to say, desirable in any way for their *own* sake.

Perhaps we are being unfair in advancing these two views. After all, it is not brute existence or biological existence of any sort that is intrinsically valuable but rather existence as a *human being* that counts (**human existence view**). This is what the proponent of the **SLA** is really asserting viz. the human organism qua biological entity is intrinsically valuable. Such a proponent is asserting that the human organism is a special sort of living biological machine that is sufficiently different from a rock or a weed to render it intrinsically valuable. On this view, the human body:

[I]s the life of a person and has the dignity of a person. Every human being is equal precisely in having that human life which is also humanity and personhood, and thus that dignity and intrinsic value. Human bodily life is not mere habitation, platform or instrument for the human person or spirit. It is therefore not merely an instrumental good, but is an intrinsic and basic human good. (Finnis, 1995, pp.32-33).

John Keown concurs, writing that human life has ‘an intrinsic dignity [that] grounds the principle that one must never intentionally kill an innocent human being’ (2002, p.40) and thus ‘human life is not only an instrumental good, a necessary precondition of thinking or doing, but a *basic* good, a fundamental basis of human flourishing.’ (2002, p.41). Finally, William Frankena writes:

If we ask ourselves what makes acts of shortening or preventing human bodily life wrong, then one answer is to say that such acts are wrong just because they are acts of ending . . . a human bodily life. In this view (and only in this view), the sanctity of human life, absolute or presumptive, is a *basic* ethical principle, holding that we should respect human bodily life as such, because of what it is and not because of other facts about it. (1976, p.34)

The **human existence view**, therefore, asserts that the complex evolved biological form of a token human being is intrinsically valuable. Dworkin views the sanctity of human life on this view as arising, at least in part, from a kind of evolutionary *investment* in the complex and organic machinery that constitutes human biological existence (1994, p.84), the destruction of which would represent a ‘cosmic shame’ and be a tragic waste. (1994, p.75) However, this view has at least two immediate problems. First, it appears to be arbitrarily speciesist. (Singer, 2011) Second, it appears to be susceptible to exactly the same sort of criticisms levelled against the previous two views.

First, it is extremely difficult (if not impossible) to see how the mere fact that an entity has, over a lengthy period of time, evolved to be biologically human could, on its own, magically transduce the entity into something that is intrinsically valuable. Why is evolved human life special as opposed to evolved weed life? Or evolved virus life? Or evolved mushroom life? As Glover points out:

It is worth mentioning that the objection to taking human life should not rest on what is sometimes called ‘speciesism’: human life being treated as having a special priority over animal life [or any form of life] *simply* because it is human. The analogy is with racism . . . according to which people of a certain race ought to be treated differently *simply* because of their membership of that race without any argument referring to special features of that race being given. This is objectionable partly because of its moral arbitrariness . . . an adequate justification must cite relevant differences between species. (1977, pp. 50-51)

In the absence of at least one distinguishing property that makes a plausible and salient moral difference, the claim that evolved biological human life is intrinsically valuable

appears to amount to no more than the white supremacist's claim that 'white lives' *per se* matter more than 'non-white lives' simply in virtue of their 'whiteness'.

Second, it can be argued that this view is susceptible to exactly the same sort of criticism levelled against both the **brute existence** and **biological existence view**. To see how this might be, let us imagine a possible world where the capability exists to grow entities that are biologically and genetically identical to human beings. Let us call this possible world W^C . These human clones have working respiratory systems, circulatory systems and they take in nourishment from the world in order to perpetuate their metabolic functions. They are, by all accounts, extraordinarily complex biological machines that breathe in oxygen and expel carbon-dioxide. However, the clones lack any 'internal qualitative dimension' to their existence. Although they are biologically and genetically identical to human beings, they lack the capacity for consciousness. In short, the clones are *human* but they are not *persons*. They are phenomenologically vacuous carbon-based organic platforms that simply happen to contain human genetic material. There are no experiences, dreams, relationships, hopes, desires or wants associated with the clones nor are they capable of exercising any rational cognitive capacities.

Now imagine that W^C is filled *only* with such clones suspended in special tanks that provide them with the nourishment necessary to allow them to persist in this purely biological sense.¹⁵² Could such a possible world truly be said to instantiate or express

¹⁵² I adapted this thought experiment from two sources which, in their own way, examine the existence of conscious and non-conscious human clones. First, the film 'The Island' directed by Michael Bay (2005). Second, the interactive video game 'Technobabylon' published by Wadjet Eye Games (2015).

anything of *terminal* value? Could it seriously be contended that such a world represents any kind of existence that is desirable *in itself*? If we do think such a world to be intrinsically valuable are we not simply guilty of *fetishizing* the electrical efflorescence and ‘vital signs’ of human biological existence over its biography?¹⁵³ Would you consider an existence of this sort to exemplify a basic or fundamental human good?

Glover writes ‘I have no way of refuting someone who holds that being alive, even though unconscious, is intrinsically valuable. But it is a view that will seem unattractive to those of us who, in our own case, see a life of permanent coma as in no way preferable to death.’ (1977, p.45). I could not agree more, and believe it can be said with reasonable certainty that no reader who seriously and honestly contemplates W^C could desire to exist as one of its ‘hollow denizens’ or think that such a world instantiates anything remotely sacred, admirable or worthy of respect. Far from being sacrosanct as Finnis or Keown suggests, the relentless respiration of the clones seems chillingly repulsive. Accordingly, if the tanks sustaining the biological existence of the clones were all switched off and their biological functions ceased, I contend nothing bad would have occurred.

If someone did think that such an occurrence would be morally tragic or repulsive then I would align myself with Suber in arguing such a person to be a victim of a moral shibboleth where ‘one is still associating vital signs *per se* with the kind of life that is

¹⁵³ One is here tempted to exclaim in disbelief together with Tennyson’s Ulysses ‘as tho’ to breathe were life!’ (1842 [2004], p.697).

worth living. The repulsion is difficult to shake off because our moral intuitions have been cultivated in circumstances in which biological life is a pretty good surrogate for life worth living. But repulsion is not an argument, only an artefact of our moral genealogy.' (1996, p.25)

At this point the proponent of the **SLA** could become indignant and accuse me of straw-manning her position. After all, what she is really asserting is that conscious human life - personhood - is intrinsically valuable. Let us call this the **personal existence view**. This does seem like a more promising view to hold for two principal reasons. First, by adopting this view the charge of speciesism can plausibly be side-stepped, insofar as consciousness does appear to be a salient moral property that distinguishes persons from most other biological organisms and all inanimate artefacts. After all, it was the **personal account** of death that carried with it a moral valence that the **biological account** of death lacked. Second, this shift to the assertion that personhood is something of intrinsic value is not as far-fetched (or intuitively implausible) as the other views mentioned above. Writing of consciousness and its intimate connection to value, S. Harris says:

I think we can know, through reason alone, that consciousness is the only intelligible domain of value. What is the alternative? I invite you to try to think of a source of value that has absolutely nothing to do with the (actual or potential) experience of conscious beings. Take a moment to think about what this would entail: whatever this alternative is, it cannot affect the experience of any creature (in this life or any other). Put this thing in a box, and what you have in that box is – it would seem, by definition – the least interesting thing in the universe. (2010, p.32)

S. Harris does not, however, distinguish in this passage between the **intrinsic** and **extrinsic** value of consciousness and thus it is not clear whether he takes consciousness to instantiate one or the other? Or perhaps even both? The question now pressingly becomes: is personhood desirable as an end-in-itself or is it desirable simply as a means to other more substantive terminal ends?

It is important here to emphasise that it will not be sufficient for a proponent of the **personal existence view** to argue that personhood is simply another intrinsically valuable thing that can take its place in the pantheon of intrinsically valuable things. Even if this were to be granted, it would entail that personhood (as just one intrinsic good) could nevertheless, in principle, be *outweighed* or *overridden* by a superabundance of other intrinsic evils or the dearth of other intrinsic goods contained *within* a person's life. Death could, in the final analysis, still be good even if personhood were counted as something of intrinsic value on par with other intrinsic goods.

To avoid this unpalatable conclusion, the proponent of the **personal existence view** must not only argue that (i) personhood is intrinsically valuable, but also that it is (ii) incommensurable with other intrinsically valuable and disvaluable things. It would be this feature of *incommensurability* that would ensure that, no matter what is going on 'within' a person's life, death could never be good for a person. Such a view, if sound, would then entail that all cases of **US** and **VAS** would be impermissible.

A proponent who advances the **personal existence view** and who is desirous of articulating the strongest case for such a view might draw quite powerful support from

a particular notion of human worth that has already been mentioned, namely, the Kantian notion of the intrinsic worth of human persons. The **personal existence view**, which is exemplified in David Velleman's writing, thus deserves further detailed consideration (1999).

Velleman openly admits that what he is arguing for is a sanctity of human life position grounded in secularism: 'talk of someone's value as a person sounds like religion rather than philosophy. Such talk is a secular version of religious talk about the sanctity of human life. . . What secular morality must regard as sacrosanct, I have suggested, is not the human organism but the person . . .' (1999, pp.615-616).¹⁵⁴

In advancing his secular argument for premise (1) of the **SLA**, Velleman distinguishes between two sorts of value. He draws a distinction between what he calls **interest-relative value** and **interest-independent value**. (1999, pp.610-611) **Interest-relative value** is the sort of value that one would normally associate with what can be good *for* or bad *for* a particular person. For example, pain and suffering are bad *for* the person whose life it is, whereas love, knowledge and pleasure are good *for* the person whose life it is. Viewed in this way, it is clear that for Velleman, **interest-relative value** is synonymous with a particular person's good or well-being.

¹⁵⁴ Keown, too, acknowledges the potential for a theistic and secular grounding for human dignity with the former being articulated in theological terms (human beings created in the image of God) and the latter being articulated in the language of nature (human beings having the capacity for rationality). (2002, p.40)

On the other hand there is **interest-independent value** which Velleman describes in quite majestic and even transcendent terms as follows:

A value of this kind, which a person has *in* himself but not *for* anyone, is the basis of Kantian moral theory. Kant's term for this value is 'dignity', and he attributes dignity to all persons in virtue of their rational nature. What morality requires of us, according to Kant, is that we respect the dignity of persons. The dignity of a person is a value that differs *in kind* [emphasis added] from his interest. Unlike his interest, for example, his dignity is a value on which his opinion carries no more weight than anyone else's. Because this value does not accrue to him, he is in no better position to judge it than others. Similarly, respect for a person's autonomy does not require deference to him on questions of dignity, as it does on questions of his good. On the contrary, respect for a person's autonomy is an appreciation of a value in him that amounts to dignity, in Kant's sense of the term, precisely because it commands respect. . . He cannot claim, in other words that out of respect for his autonomy we should defer to his judgment that he possesses nothing worthy of our respect . . . challenging a person's judgment about his good is objectionable because it undermines his role as the agent of his own affairs; but his value as a person is not just his affair. Although his good is a value that accrues to him alone . . . his value as a person inheres in him among other persons. It's a value that he possesses by virtue of being one of us . . . The value of being a person is therefore something larger than any particular person who embodies it. (1999, pp.611-612)

What, however, is it exactly that is supposed to make it *be the case* that persons matter in this fundamental way? For Velleman (as for Kant) it is because of their autonomous rational nature. Autonomy is not just another intrinsic good for Velleman, it is *the* intrinsic good. For Velleman, 'autonomy' is what is both constitutive of personhood and what 'bequeaths' unto persons incommensurable value. He thus explicitly advances and endorses the **constitutive thesis** and the **incommensurability thesis** mentioned earlier.

Velleman proceeds to argue that (i) we are only concerned with **interest-relative value** (value *for* persons) because we already believe that persons have a kind of **interest-independent value** (value *in* persons), (ii) **interest-independent value** thus cannot be weighed against **interest-relative value**, and accordingly (iii) if the former is ‘traded’ for the latter something morally impermissible has occurred insofar as personhood itself has been disrespected. He explains as follows:

But the dignity of a person isn’t something that he can accept or decline, since it isn’t a value for him; it’s a value in him, which he can only violate or respect. Nor can it be weighed against what is good or bad for the person. As I have argued, value *for* a person stands to value *in* the person roughly as the value of means stands to that of end: in each case the former merits concern only on the basis of concern for the latter. And conditional values cannot be weighed against unconditional value on which they depend. The value of means to an end cannot be overshadowed by the value of the end, because it is already only a shadow of that value, in the sense of being dependant on it. Similarly, the value of what’s good for a person is only a shadow of the value inhering in the person, and cannot overshadow or be overshadowed by it. (1999, p.613)

To put Velleman’s point another way, the well-being of persons matters if and only if persons matter in themselves. He articulates this forcefully by reflecting on his own value:

But what would it matter how much I lost or gained if I myself would be no loss? My gains and losses would merit concern only on the basis of concern for me – which, being the basis of concern for them, could not be offset by that concern. Hence my gains or losses wouldn’t matter unless I had a value that could not be offset by theirs. (1999, p.614)

For Velleman, it is precisely because a person matters in himself *qua* person that his personhood cannot be weighed against whatever is constitutive of that person's well-being. In short, any concern for well-being, of necessity, commits us to a more fundamental and antecedent normative concern about the terminal value of persons. Accordingly, 'we cannot avoid presupposing the existence of [interest-independent value] anyway, since it's needed to account for the importance of interest-relative values. We cannot justify someone's death on the grounds that it's good for him, while also denying the existence of another value, embodied in him.' (Velleman, 1999, p.615).¹⁵⁵

Unfortunately, Velleman's argument is unsound for three principal reasons. First, it does not appear to be the case that autonomy is constitutive of personhood. On the contrary, autonomy is more plausibly thought of as an intrinsic good that can be possessed by persons. Second, it is not at all obvious that either **US** or **VAS** does, in fact, disrespect personhood. Such actions may very well honour personhood. Finally, Velleman's argument gets our concern about the value of persons precisely backwards.

I shall address each objection in turn.

¹⁵⁵ It is interesting to mention that Velleman does believe there is at least *one* circumstance when **US** (and thus **VAS**) might be permissible, namely, when it would constitute an 'expression of respect for one's person.' For Velleman, this appears limited to cases where a person would be acting to prevent the future deterioration of his rational agency. (1999, pp.616-617) This 'exception' is not without its own problems. If it is true that rational agency is of intrinsic and incommensurable value, and if a person were only going to lose his rational agency in the *future*, then he would still be destroying something of intrinsic and incommensurable value that exists in the *present* i.e. at a time when he still embodies **interest-independent value**. However, if a person were to wait until he lost his rational agency he would then no longer be in a position to autonomously engage in **US** or **VAS**. On Velleman's view, an individual would thus find himself caught between the Scylla of autonomous impermissibility and the Charybdis of heteronomous permissibility.

First, it simply does not appear that autonomy is constitutive of personhood. After all, we had no problem imagining Adam in **W*** who, despite living a **heteronomous** existence, was still clearly a person. We had no reason to doubt that Adam was self-aware, had an internal qualitative dimension to his existence, could conceive of himself as an entity that persists through time and was the sort of entity that could engage in the act of valuing things, including his own existence. We may very well have thought that he was an unfortunate person who was having his existence manipulated by the Worthwhile Life Collective, but it never crossed our minds that such manipulations entailed he was not a person at all. He was simply a person who just happened to lack an intrinsic good that his duplicate in **W** enjoyed viz. autonomy. Rather than being constitutive of personhood itself, autonomy simply seems to be way of talking about (i) how persons may or may not be able to act, and (ii) how it is desirable for persons to act. Velleman could always concede this point and abandon autonomy as the core of the **constitutive thesis**. In its place he could accept that consciousness (and not autonomy) is the feature that is both constitutive of persons and confers incommensurable value to them. In other words, Velleman's argument could potentially be modified to refer only to consciousness.

However, it is at this juncture that the second problem arises. It is not at all clear how exactly, given Velleman's argument, **US** or **VAS** would disrespect consciousness? After all, it could be persuasively argued that it is precisely in exercising her critical and rational faculties regarding the timing and manner of death that a person expresses what is most noble and worthy of respect viz. the ability of a conscious entity to take hold of the reins of existence and direct it toward chosen ends. After all, do we not

think it *noble* when persons seize control from the vicissitudes of chance and rise above the vagaries of circumstance? Do we not think it *honourable* when conscious entities reflect on their position in the world and then direct their lives to better ends? If we think this noble and worthy of honour when contemplating a person's conduct regarding her life why should we think any differently of a person's conduct regarding her death? William McCord articulates this very point in a powerful and poignant passage:

By affirming this uniquely human capacity to meditate and mold death, we enhance our threatened autonomy in the face of remorseless fate. To take the opposite path – as most people do in a mindless submission to the dictates of fate – betrays our highest quality: our capacity for freedom. A death with dignity is a final proof that we are not merely pawns to be swept from the board by an unknown hand. As a courageous assertion of independence and self-control, suicide can serve as an affirmation of our ultimate liberty, our last infusion of meaning into a formless reality. (1993, p.27)

Finally, Velleman's core point is that we only care about the well-being of persons because we *first* care about persons *in themselves*. Without this core point the entire edifice of his argument crumbles. However, this core point is simply untrue and rests on a confusion. We are not concerned about the well-being of persons because of our prior concern for persons in themselves. Rather we are concerned about persons because we are *first* concerned about the nature of well-being. (Sumner, 2011)

It is because persons are the sort of entities whose existence can meaningfully go better or worse that we are concerned how things do, *in fact*, go for them. Our concern for persons is thus deeply dependant on our prior commitment to well-being and how its

absence or presence can shape the contours and content of a person's existence. This fully explains why we are not concerned about how things might go for rocks, weeds or even 'hollow clones'. They are not the sort of entities for which things can be better or worse in any meaningful sense. A person, on the other hand, is the sort of entity whose existence can certainly be better or worse.

Contrary to Velleman, our commitment to the value of persons, therefore, depends thoroughly on our prior commitment to the concept of their well-being. Consciousness (or personhood) is thought valuable only to the extent that it provides the *means* by which to experience, discover and create other things of intrinsic value, things which give substantive content to the notion of an entity's well-being. In short, any value we place on consciousness (and thus personhood) is conditional on other things of terminal value. Persons are worthy of moral concern *because* a conscious existence is the only sort of existence that can possibly be hellish or heavenly. When it is hellish we cease to think of consciousness as valuable at all. In fact, when consciousness bears witness to (or constructs) hell it becomes positively disvaluable.

In conclusion, the **brute existence view**, the **biological existence view** and the **human existence view** are to be rejected for their patent implausibility. The **personal existence view** advanced by Velleman is far more plausible and his articulation of the view is perhaps the strongest secular version of the **SLA**.

However, Velleman's argument is unsound insofar as it: (i) depends on a false view of what constitutes a person, (ii) it is not obvious how either **US** or **VAS** disrespect

personhood. Such practices may, in many cases, be expressions of all that we consider noble and honourable about persons, that is to say, actions we think becoming of conscious entities, and (iii) the argument rests on the flawed notion that our concern for the well-being of persons is presupposed by a prior and incommensurable normative concern for persons in themselves. On the contrary, our moral concern for persons reflects an antecedent normative commitment to the concept of well-being of any entity for whom existence can be meaningfully better or worse.

With the failure of the **personal existence view** it would appear that we are left without a good reason to accept premise (1) of the **SLA**. Therefore, **Part I** of the positive case stands and is perhaps even endowed with greater persuasive force after our tour of the implausibility of the **SLA**. However, as already indicated, the **SLA** is not the only argument that can be made against the positive case. Even if **Part I** of the positive case stands, a successful consequentialist argument could still be constructed against **Part II**. It is to an examination of this sort of argument to which we shall now turn.

A6.2. THE SOCIAL HARM ARGUMENT

The **SHA** is willing to admit the soundness of **Part I** of the positive case and allow for the possibility, that in certain individual cases, **VAS** is morally permissible. However, the **SHA** is concerned not just about any given individual but also for society at large. Specifically, the **SHA** is preoccupied with the slew of possible harms that could befall our neighbours in society if a policy of permissibility was implemented instead of a

policy of prohibition. These consequences are deemed so bad that they outweigh whatever good could possibly accrue from a policy of permissibility. The **SHA** is thus a direct antagonist to premise (15) of **Part II** of the positive case.

However, it is important to mention at the outset that the **SHA** should not be conceived of as one single argument but rather as a constellation of arguments. It is, thus, more accurate to say that there are different versions of the **SHA**. Each version emphasises a different sort of bad consequence that is imagined would befall society if a prohibitionist policy were abandoned. Let us first articulate the five versions that are most often advanced and thought to provide persuasive reasons to reject the implementation of a permissive **VAS** policy. Thereafter, we shall analyse each version in turn and assess their respective plausibility.

A6.2.1. THE FIVE PRINCIPAL VERSIONS

First, there is the version that asserts that if a permissive **VAS** policy were adopted then society would find itself on a ‘slippery slope’ toward another expanded policy that would ultimately permit the morally abhorrent. This version of the argument is often buttressed by emotionally charged thoughts that a policy of permissibility would place society on a path to endorsing horrific Nazi-style ‘euthanasia’ programs, where persons deemed ‘undesirable’, ‘unfit’ or ‘defective’ by society are callously and cruelly culled. This is the **slippery slope argument**. Leo Alexander, writing shortly after World War

II, articulated this concern with explicit reference to the Nazi ‘euthanasia’ programs as follows:

Whatever proportions [Nazi] crimes finally assumed, it became evident to all who investigated them that they had started from small beginnings. The beginnings at first were merely a subtle shift in emphasis in the basic attitude of the physicians. *It started with an acceptance of the attitude, basic in the euthanasia movement, that there is such a thing as a life not worthy to be lived* [emphasis added]. The attitude in its early stages concerned itself merely with the severely and chronically sick. Gradually the sphere of those to be included in the category was enlarged to encompass the socially unproductive, the ideologically unwanted, the racially unwanted and finally non-Germans. But it is important to realize that the infinitely small wedged-in lever from which this entire trend of mind received its impetus was the attitude toward the nonrehabitable sick. (1949, p.44)

Second, there is a version which asserts that a permissive **VAS** policy would inevitably be violated, either mistakenly¹⁵⁶ or intentionally, and that individuals, especially those who are extremely young, elderly, mentally impaired or socio-economically vulnerable, would be pressured or coerced into engaging in **VAS**.¹⁵⁷ The idea is that a policy of permissibility would result in the deaths of individuals who ought not to be killed in terms of that policy. This cannot happen at all under a prohibitionist policy. This is the **mistake and abuse argument**.

Yale Kamisar endorses both the **mistake and abuse argument** and **slippery slope argument** respectively: ‘I see the issue, then, as the need for voluntary euthanasia

¹⁵⁶ There are two general sorts of mistakes possible, namely, (i) mistakes relating to judging whether a person is acting autonomously in requesting **VAS**, and (ii) mistakes relating to judging whether an individual’s life is worth living.

¹⁵⁷ The concern is roughly that family members, physicians and third parties with nefarious intent might manipulate and put substantial pressure on such persons to end their lives prematurely.

versus (1) the incidence of mistake and abuse; and (2) the danger that legal machinery initially designed to kill those who are a nuisance to themselves may someday engulf those who are a nuisance to others.' (1958, p.976)

Third, there is the version that asserts that if a permissive **VAS** policy were adopted then people would cease to trust their physicians. Physicians need to be viewed as being professionally committed to human life at all costs. The physician-patient relationship is thought to be so fundamental that it should not be stress tested at all lest it buckle to the detriment of society. The prohibitionist policy preserves this trust. This is the **corrosion of trust argument**. Leon Kass has argued in this vein that '[t]he patient's trust in the doctor's wholehearted devotion to the patient's best interests will be hard to sustain once doctors are licensed to kill.' (1989, p.35)

Fourth, there is the version which asserts that if a permissive **VAS** policy were adopted it would undermine a set of important physician specific duties not to take or harm human life, which duties are thought integral to the moral character of the medical profession and which, if eroded, would be harmful for society at large. The prohibitionist policy ensures that physician specific duties are not eroded. This is the **special duties argument**. (Baumrin, 1992; Kass, 1989; Pellegrino, 1992)

Finally, there is the version that asserts that if a permissive **VAS** policy were adopted this would be corrosive of a vital societal respect for human life in general. The corrosion of this respect would in turn undermine other important social relationships to society's detriment. A prohibitionist policy is the only policy that promotes a general

respect for all human life and ensures the structural integrity of our other important social relations. This is the **corrosion of respect argument**. Daniel Ncayiyana, writing somewhat apocalyptically of the potential corrosive effects of a permissive VAS policy in a South African cultural context, says:

Euthanasia - a recourse of last resort - can only really be justified in a country with the very best medical care for all, a well-organised and universally accessible palliative care and support system, stable and well-functioning (particularly judicial) institutions, and a *strong culture of respect for human life* [emphasis added]. In South Africa, with its 'severe constraints on health care facilities and the totally inadequate allocation of resources for highly effective medical treatments', there is a real risk of euthanasia becoming a substitute for proper care for the terminally ill and other patients in dire medical straits. Even more damning for South Africa is *the pervasive lack of an ethos of respect for human life* [emphasis added]. We are an extraordinarily violent society, with over 45 murders committed daily and interpersonal violence the second highest cause of death. Mob justice, police brutality and xenophobia abound. Needless deaths occur regularly in our hospitals through staff neglect and indifference. Health care providers think nothing of downing tools and walking off, abandoning critically ill patients, or of blocking ambulances with critical emergencies from entering health facilities during labour disputes. In the circumstances, euthanasia cannot be at the top of the wish-list of things that must be accomplished in order to improve the human condition of South Africans. (2012, p.334).¹⁵⁸

A6.2.2. ANALYSIS AND RESPONSES

Let us begin with the **slippery slope argument**. The first and most obvious point to make is 'that it is easier to assert the existence of a slippery slope than to prove that it exists' (Benatar, 2011, p.206) and thus 'we need to greet claims of its presence with a

¹⁵⁸ Foot voices a similar concern about how a permissive VAS policy might alter general societal expectations about life and death. (1977, pp.111-112)

great deal of caution.’ (Benatar, 2010, p.301) At the outset it does not seem possible to establish that the implementation of a permissive **VAS** policy would *logically* lead to any sort of expanded policy at all. In short, there is nothing about the implementation of a permissive **VAS** policy that *necessarily* entails that any other sort of expanded policy would ever arise, let alone be in the offing. Recognising this logical point, proponents of the argument usually advance a far more modest claim, namely, that a morally abhorrent expanded policy would be rendered more *probable* as a consequence of the implementation of a permissive **VAS** policy. This is the motivation (or so it is argued) for not taking a ‘first step’ onto the slippery slope, lest we slip and fall into a very dark and disturbing ditch.

Sumner distinguishes between the two crucial components of this argument which must both be true if it is to have any persuasive force. The two components are the (i) **empirical component**, and the (ii) **normative component**. The **empirical component** asserts that if a policy of permissibility were implemented then it is probable that it will mutate into a new expanded policy. The **normative component** asserts that the new expanded policy would be ethically abhorrent. (2011, pp.175-176) Sumner goes on to note, however, that it is ‘difficult to find (or imagine) an [e]xpanded [p]olicy such that both claims are true.’ (2011, p.176) Given the thanatological taxonomy I have adumbrated, there are only two expanded policies that could be of potential concern to a proponent of this version of the argument: (i) a permissive **IVAD** policy or (ii) a permissive **NVAD** policy. I shall address each in turn.

It is easy enough to imagine (and be emotionally misled by) horrific expanded policies that might await society at the bottom of the slope. It is also trivially easy to concede that a permissive **IVAD** policy would be a morally noxious policy.¹⁵⁹ However, it is far harder to articulate with any degree of certainty that a society will ever arrive at such a morally abhorrent policy. In fact I would suggest that we can state the following general principle: the more morally abhorrent the expanded policy is imagined to be at the bottom of the slope, the more we are entitled to be initially sceptical that society will ultimately arrive there. This initial scepticism can, of course, always be rebutted by cogent empirical evidence that there is an immediate or immanent toxic moral trajectory. However, herein lies the rub. There is simply no empirical data indicating that any society that presently has a permissive **VAS** policy has either (i) endorsed a permissive **IVAD** policy, or (ii) is presently on its way to doing so.

In fact, it could be persuasively argued that if **Part I** of the positive case is sound then we have already done the philosophical work of articulating the fundamental ethical principles that (i) would render any permissive **IVAD** policy categorically beyond the pale, and (ii) if implemented and affirmed consistently, would render any societal movement toward adopting such a policy highly improbable. After all, the positive case is explicitly premised on a strong and fundamental commitment to human well-being, autonomy and dignity. Whereas, a permissive **IVAD** policy would, of necessity, involve completely rejecting those self-same normative principles. This would, to my mind, be tantamount to society rejecting ethics entirely. It is *exceptionally* unlikely that this

¹⁵⁹ I have already indicated that **IVAD** is simply murder under a sanitized moniker.

would happen. As J. Harris reminds us ‘slopes are only slippery if they catch us unawares and we have strayed on to them inadequately equipped. . . we do not outlaw effective contraception because we fear that to practise population control is to step on to a slope that leads inexorably to the extinction of the human race.’ (1985, p.127). We are not stepping on to the slope ethically unawares and can thus safely say that this possible expanded policy, while normatively noxious, is empirically improbable. The argument thus fails to satisfy both components.

In this thesis I have not explored the moral principles that might govern cases of **NVAD** nor considered the probability that a permissive **VAS** policy would lead to a permissive **NVAD** policy. However, there is no reason to think that the ethical principles about how we ought to deal with cases of **NVAD** are either (i) incompatible with the principles undergirding the positive case for **VAS**, or (ii) would open the door to a permissive **IVAD** policy. Furthermore, any permissive **NVAD** policy would have to be assessed on its own moral merits. Accordingly, even if we did accept that a permissive **NVAD** policy would be rendered *more probable* by the implementation of a permissive **VAS** policy, we would still be owed a valid and sound argument showing that **NVAD** is unambiguously morally impermissible. It is not obviously the case that **NVAD** is morally noxious.¹⁶⁰

¹⁶⁰ It is perhaps even less obvious now especially when we consider the failure of the **SLA**.

It is worth emphasising that **NVAD** may turn out, in the final ethical analysis, to be completely defensible based on similar (if not identical) ethical principles that undergird the positive case for **VAS**. As David Benatar points out:

To be sure, non-voluntary euthanasia raises issues that do not arise in the case of assisted suicide and voluntary euthanasia. Whereas decisions about the quality of a competent person's life can be left largely to that person, decisions about the quality of incompetent beings' lives have to be taken by others. Making such decisions is clearly very difficult but there is no alternative. Never terminating the life of an incompetent being, no matter how poor its quality, is also a decision – a decision to allow suffering to continue. The appropriate response to a difficult decision is to make it as well as possible rather than to pretend that it need not be made. . . I have mentioned non-voluntary euthanasia only to note that many of us take it to be both [sic] a morally acceptable implication of the defence of voluntary euthanasia. (2010, p.304)

Accordingly, this potential expanded policy, even if empirically probable, is not obviously morally noxious. In fact, it could plausibly be defended using similar ethical principles that undergird the positive case. Therefore, once again, the argument fails to satisfy *both* components.

Let us now turn to the **mistake and abuse argument**. I am happy to concede at the outset that this argument is perhaps the strongest version of the **SHA**. Its strength is drawn from three important and related observations, namely, (i) human beings are imperfect and fallible (ii) the implementation of any socially permissive policy will reflect human imperfection and fallibility, and (iii) mistakes and abuse of a permissive social policy are inevitable. From these observations, it is then argued that a permissive **VAS** policy would be vitiated by mistakes and abuses that would be so ubiquitous that

it would constitute an overwhelming social harm. On this point Kamisar writes ‘the incidence of mistake [or abuse] of one kind or another is likely to be quite considerable. . . If this indeed be the case, unless the need for [euthanasia] is compelling enough to override it, I take it the risk of mistake [or abuse] is a conclusive reason against [euthanasia].’ (1958, p.976)

While these are indeed valid observations that ought to be taken seriously by anyone considering the matter, I am by no means convinced that the argument is persuasive for three reasons. First, the mere fact that a permissive **VAS** policy might be fallible or open to abuse is not sufficient justification to prevent its adoption and implementation. Second, the potential risk of mistake and abuse inherent in permissive **VAS** policy must be balanced accurately against the definite harmful consequences visited on society by maintaining the prohibitionist status quo. Third, a permissive policy will probably prevent mistakes and abuses in respect of persons who might otherwise engage in **VAS** in the social and legal ‘shadows’. I shall address each of these points in turn.

First, we already accept that societies often adopt and implement a panoply of permissive policies which are nevertheless fallible or susceptible to abuse and which cause some harm. The most familiar examples, are the permissive policies surrounding the distribution of prescription drugs or the licensing and driving of motor vehicles. (Benatar, 2010) However, we do not believe that the possibilities of such harm require the absolute prohibition of prescription drugs or the licensing and driving of motor vehicles. Instead, we acknowledge the probability of mistake and abuse inherent in the permissive policies, seek to identify the most likely ways in which mistake and abuse

could arise, and then work tirelessly to implement appropriate safeguards and regulatory controls that seek to limit instances of mistake and abuse. As Suber percipiently writes:

‘It is part of the burden of clarity and courage imposed upon us by our cleverness that we must move beyond easily administered crudities to complicated positions that reflect the complexity of the world we have created for ourselves. It is part of that burden to institute the morally preferable theory and *stay awake at night* [emphasis added] to detect abuse. When we invented methods to extend vital signs beyond the extinction of personality, we lost the right to live by a simpler moral code.’ (1996, p.27).

If we are willing to adopt such a reasonable approach toward other permissive social policies, many of which are *no less* concerned with the life and death of persons, then it behoves us to be consistent and adopt a similar approach when it comes to a permissive **VAS** policy. It is worth remembering that:

If we prohibit physician assisted suicide and euthanasia entirely then we will force some patients to endure needless suffering. . . On the other hand, if we permit the practices with no safeguards then we will be exposing some patients to avoidable risks. . . There are costs to both permitting assisted death and limiting it. . . As we raise the bar of regulation we decrease the risk to third parties and increase it for patients; as we lower the bar the reverse will be true. *The best regulatory regime is the one with the optimal balance of these costs* [emphasis added]. No regime can eliminate all of them. (Sumner, 2011, p.187).

As Benatar writes ‘the appropriate response is regulation, imperfect though it may be.’ (2011, p.206) J. Harris concurs, writing ‘[w]hile the fear that people might falsely or implausibly decide that others might be better off dead and act on that decision is a real one, and is one that clearly animates much of the opposition to euthanasia, it is

not an objection in principle but rather a demand for safeguards.’ (1985, p.65) What these *optimal* safeguards and regulatory controls should be, will be a topic addressed in the second section of this thesis.

Second, it is often assumed by proponents of this argument that there is no harm caused to society by maintaining a prohibitionist policy. It is argued that the prohibitionist policy prevents anyone from being killed at all and thus it harms no one. However, this assumption is certainly false and arises from the failure to acknowledge that a prohibitionist policy results in *definite* harm to many persons in society. The harm consists both in condemning certain persons to live non-worthwhile lives when they would be better off dead and depriving them of the ability to exercise their autonomy in the face of that nightmarish prospect.

As J. Harris writes ‘[t]here is no such thing as playing it safe. To make a choice is to entertain the possibility of making a wrong choice. But a wrong choice is no less likely when the decision is not to entertain the idea of euthanasia, but rather countenance the suffering of the individual who can only be released from suffering by death.’ (1985, p.82) Similarly, Singer acknowledges ‘[a]ll of this is not to deny that departing from the traditional sanctity of life ethic carries with it a small but nevertheless finite risk of unwanted consequences. Against this risk we must balance the *tangible harm* [emphasis added] to which the traditional ethic gives rise – harm to those whose misery is needlessly prolonged.’ (2011, p.189) In short, it must be accepted that the prohibitionist policy results in definite harm to persons and there is no reason to think that a permissive **VAS** policy, augmented by appropriate safeguards and regulatory

controls, would be any worse. In fact, there is good reason to think precisely the opposite. This is the thrust of my third point.

Even in a society that endorses a prohibitionist policy, it must be acknowledged that there will inevitably be persons who engage in the practice of **VAS** surreptitiously. Such cases will often take place furtively in the ‘shadow’ of the law and beyond the censorious eye of the public. Physicians are bound to assist their terminally ill patients to die. Friends and family members will inevitably help those who suffer from chronic pain and suffering to shuffle off this mortal coil. To believe that such practices do not already happen is, to put it bluntly, exceptionally naïve.

However, to acknowledge this fact is also to acknowledge that, inherent in such clandestine and opaque practices, there are absolutely no safeguards to prevent (and/or deter) mistake or abuse. This will be especially dangerous for those persons who are considered the most vulnerable members of society viz. the very young, elderly, disabled or socio-economically disadvantaged. As Benatar reminds us ‘[w]e know that there are instances of euthanasia even in jurisdictions where it is legally prohibited. Some of these instances are morally justified, but it is highly unlikely that all are. Yet when euthanasia is illegal the abuses may well be better hidden than when it was legal.’ (2010, p.305).

It could thus be persuasively argued that it is far better for society to have a permissive **VAS** policy with appropriate safeguards and regulatory controls thereby conducting to a culture of *transparency* and *accountability*. Ironically, such a policy would ensure that

the probability of mistake and abuse, especially for those perceived to be the most vulnerable members of society, is minimized. There are perhaps a few things that are better left to proceed in clandestine and furtive obscurity; the deaths of fellow human beings is certainly not one of them.

What of the **corrosion of trust argument**? How likely is it that the relationship between physicians and their patients will be undermined if the former were permitted, under certain prescribed circumstances, to assist the latter to die? Not only does it seem highly unlikely that members of the public would begin to think of physicians as ‘murderers in waiting’ but it is far more probable that the public, once a permissive **VAS** policy was explained and understood, would come to think of this expanded role as a welcome addition to the professional function of a physician.

Not only would physicians be able to speak openly to their patients about their health and well-being but they would now also be able to talk honestly and candidly about *all* available treatment options, including the possibility of **VAS** in those cases that seem to warrant it, and for those persons who specifically enquired about it. If nothing else, I would imagine that this would engender trust between patients and physicians rather than erode it. After all, it is the hallmark of any trusting professional relationship that they are premised on honest and frank discussion of sensitive issues and the best ways to navigate them. The notion that hospital wings of physicians would be waiting with eager anticipation to coerce and kill off their patients instead of expending energy to treat them (Kass, 1985) is not just insulting to physicians but is the sort of

phantasmagorical fever dream that would require substantial evidence to vindicate. Fortunately for us, there is absolutely no evidence that this is the case.

Perhaps the **special duties argument** will fare better? Have we not all heard of the Hippocratic Oath and the physician's sworn duty to first do no harm to his patient? What would become of this role specific duty? Would not physicians become compromised and conflicted about their moral obligations and duties if a permissive **VAS** policy was implemented? Would this not, in turn, lead to an erosion of the medical profession to the detriment of society? I do not think so for four principal reasons.

First, if the positive case is sound then there is nothing morally wrong about a physician assisting a person to engage in **VAS** in certain circumstances. It simply does not entail the violation of any sort of *general* moral duty (Sumner, 2011). Furthermore, it is by no means clear that the duty of care a physician has toward to his patient can be so neatly condensed and limited to the slogan 'physicians should not kill their patients'. Why physicians should not do so will inevitably depend on the reasons we think it is bad to kill a person in general. As Wellman points out 'I do not believe that one can define the role of the physician so simply. What physicians can and ought to do in any society is only *partly defined* [emphasis added] by the traditional purposes of the profession. Also one traditional duty of the physician has been to relieve the suffering of her patient even when to do so may threaten her life.' (2003, p.30)

Second, if there are specific circumstances under which we think it may not be impermissible to kill a person, as the positive case suggests, then perhaps there needs to be a *rethinking* of the physician's role in society and his professional duty of care toward his patients. Perhaps it would be more accurate to say that the following represents the true duty of care owed to patients: 'a physician should never act so as to harm or undermine the well-being or autonomy of his patient.' When we think of a physician's duty in that expanded way, we can see that sometimes keeping a patient alive or refusing to assist him to die when he is no longer living a worthwhile life, (and in the face of his voluntary and informed request) would amount to harming his well-being and his autonomy. Perhaps what should be concluded is that the traditional role specific duties that sit at the core of the medical profession need to be *re-examined* and *expanded* in light of the persuasiveness of the positive case.¹⁶¹ Perhaps it is the character of the medical profession that could do with some moral growth?

Third, even if there were no expansion to the traditional role specific duties of physicians, there would be nothing about a permissive **VAS** policy that would compel any physician to assist an individual to engage in **VAS**. Thus, if a particular physician felt obliged to defer to a traditional role specific duty, like the Hippocratic Oath, then

¹⁶¹ It is apposite to note that the **HPCSA's** ethical guidelines *already* acknowledge that health care practitioners should (i) always regard the best interests or well-being of their patients as their *primary* professional duty (Booklet I, paragraph 5.1.1) and (ii) respect the dignity of their patients (Booklet I, paragraph 5.2.1). Furthermore, a health care practitioner is required at all times to act in the best interests of his or her patient (Booklet II, paragraph 27A(a)) and respect patient dignity (Booklet II, paragraph 27A (b)). Finally, in terms of the National Patient Rights Charter which has been adopted by the **HPCSA**, patients have the responsibility 'to advise health care providers of his or her wishes with regard to his or her death.' (Booklet III, paragraph 3.7). However, despite these ethical guidelines and commitments, the **HPCSA** states that it 'finds active euthanasia, or the willful act by a health care professional to cause the death of a patient unacceptable, notwithstanding whether or not such an act is performed at the request of the patient or his or her closest relatives or of any other person.' (Booklet XII, paragraph 1.3) This patent inconsistency should be done away with in light of the positive case.

he would be entitled to do so. This would simply be for him to say ‘I am not the physician you are looking for. I choose not to provide *that* sort of assistance.’ There is thus no necessary conflict between a permissive **VAS** policy on the one hand and a physician choosing to comport his medical practice to a traditional role specific duty on the other.

Finally, we may also think that this argument could be substantially diffused through a practical intervention, namely, the creation and development of a specialized branch of medicine dedicated *solely* to providing the required assistance to persons wishing to engage in **VAS**. Writing of this sort of practical solution, Grayling suggests:

A practical innovation might therefore be suggested: that there should be a medical sub-division of anaesthesiology which might be called ‘thanatology’ (to coin a word from *Thanatos*, death), and that these specialists should work within a framework of law under the supervision of hospital ethics committees, so that every thanatological treatment is approved in advance, monitored during administration and properly recorded afterwards. Since only thanatologists will be involved in helping those who have shown a stable and intelligent desire to be helped to die, all other medical practitioners will continue to work under the assumption that their sole concern is to save life, cure ills and palliate suffering. (2013, p.233).¹⁶²

Lastly, we come to the **corrosion of respect argument**. The core idea behind this argument is that a permissive policy ‘would change the social scene in a way that would be a spiritual disaster . . . for it envisions widespread side effects on the expectations, attitudes, motivations, and moral principles that enrich our interpersonal relationships

¹⁶² To this I might add that the development of a specific set of **HPCSA** ethical guidelines applicable specifically to thanatologists would be entirely possible.

and sustain the social fabric of our society.’ (Wellman, 2003, pp.34-35) Although the use of the phrase ‘spiritual disaster’ has theological connotations it can be understood in secular terms to be more akin to a ‘disaster for the socio-cultural zeitgeist’.

The central concern is that a permissive policy would (i) radically divert the socio-cultural orientation away from one that respects human life to one that cheapens and denigrates it, and (ii) this would have further inimical implications about our treatment of each other. As already indicated by Ncayiyana, this could be disastrous in a country like South Africa where there is already a culture that purportedly does not place a high premium on human life (2012,p.334).

As plausible as this argument initially appears, I do not believe that it survives closer scrutiny. First, it loses sight of the fact that the positive case is an argument that is premised on a reasoned articulation of what it is that makes human life valuable and worthy of respect in the first place. Any permissive **VAS** policy will thus be premised on, and built around, the ethical principles that undergird the positive case. The permissive policy would thus be reflective of a sharpened social sensibility about what is truly valuable and what we truly value about each other. It would also be a policy which, if properly articulated and implemented, would enhance our moral percipience, and expand our capacity for compassion. In short, the implementation of a permissive policy would invigorate the very elements that are necessary for, and conduce to, flourishing relationships with our neighbours in society.

Wellman has pointed out that when considering a permissive policy '[t]here is no reason that it should damage our expectation that we will be cared for when we become old or ill. Rather, it will reflect and reinforce a deeper and more compassionate understanding of proper medical care.' (2003, p.35) Furthermore, such a policy 'would not devalue the lives of the most vulnerable members of society; it would recognize that society ought to accept their own valuations of their lives and not impose external moralistic constraints upon how they are permitted to live and die' (2003, p.35) In short, rather than constituting a socio-cultural 'spiritual disaster', a permissive policy would represent a socio-cultural 'humanistic maturation.'

Second, there are at least two problems implicit in Ncayiyana's argument. First, there is an implicit assumption about what a permissive policy would have to look like if it were implemented. Second, there is an implicit commitment to the idea that a permissive policy is not a desideratum for South African society because there are other more pressing and immediate social challenges that need to be solved. I shall address each of these problems in turn.

Ncayiyana appears to be operating with a caricature of a permissive policy in mind in terms of which physicians (and the medical profession in general) are given free rein to decide when and if a patient should be euthanized. There does not appear to be an appreciation that a permissive policy could look very different thereby nullifying many, if not all, of Ncayiyana's concerns. For example, a permissive policy could be one that requires explicit engagement with the judicial branch of government at the *sole* and *specific* instance of the person desiring to engage in **VAS**, and limited to instances

where he has, in advance, secured the services of a consenting physician. This is, in fact, the sort of permissive **VAS** policy I have in mind.

Furthermore, it simply does not follow that because South Africa is faced with other social problems like violent crime, police brutality, mob justice, xenophobia and healthcare neglect (all of which reflect horrific disrespect for human life by some persons), that we should not *simultaneously* address the needs of those persons that truly desire (and deserve) to escape the burden of living. In fact, by attending maturely and reflectively to the needs of such persons we would be fostering the exact sort of ethical milieu necessary to counter and combat other moral atrocities that plague South African society. We defeat such moral blights, in no small part, by implementing social policies that reflect the better angels of our nature.

In conclusion, it is my view that none of the five versions of the **SHA** argument are sufficiently persuasive to rebut **Part II** of the positive case. No doubt there may be other versions of the argument I have not articulated or examined. However, the five versions that I have examined are the most common, prototypical and ubiquitous consequentialist arguments raised by prohibitionist proponents set against a permissive **VAS** policy. Accordingly, if these five prototypical versions are unpersuasive then we have good reason to be sceptical that there are other more persuasive versions on offer that would be wholly immune to the criticisms and rebuttals thusfar articulated.

A.7. FAILURE TO REBUT THE POSITIVE CASE

I have now articulated the positive case for **VAS** and argued why, at both an individual and societal level, the practice should be permitted. Against the positive case stood both the **SLA** and the **SHA**. The **SLA** addressed **Part I** of the positive case. The **SHA** addressed **Part II**. Both the strongest secular form of the **SLA** and the five most common versions of the **SHA** were, in the final analysis, unpersuasive. Accordingly, the positive case stands unrebuted. However, this is not to exclude the possibility that a stronger version of either the **SLA** or **SHA** could not be advanced.

That being said, it does seem reasonable at this juncture to wonder precisely how any deontological argument might proceed without, explicitly or implicitly, adopting the core elements of the **SLA**? Similarly, we may also wonder whether other versions of the **SHA** could be articulated without, in some respect, appealing explicitly or implicitly to one of the five common versions that have thusfar been discussed and found wanting. Accordingly, we may be excused at this stage for believing that the probability of (i) constructing a radically different sort of counter argument to the positive case, or (ii) modifying these counter arguments, without explicitly or implicitly, endorsing their core commitments, is slim.

A9. CONCLUSION

This then brings us to the conclusion of the ethical standpoint. I hope to have persuaded you of two conclusions, namely, that (i) the positive case is sound, and (ii) the standard arguments levelled against it are unpersuasive. However, the fact that the counter arguments are unpersuasive, is not to say that the counter arguments did not highlight and draw attention to legitimate concerns about individual cases of **VAS** and the implementation of a permissive policy across society.

To the contrary, both the **SLA** and the **SHA** highlight, and bring to the fore, the potential missteps to which human beings are prone, especially when (i) judging the worthwhileness of human lives (ii) adjudicating whether decisions to engage in **VAS** are truly autonomous, and (iii) implementing permissive social policies with the minimal chance of mistake or abuse.

How then is the positive case to be integrated and applied in contemporary South African society? After all, we are not conducting this discussion in a legal vacuum. We are, whether we like it or not, embedded in a robust legal structure which governs and shapes our interactions with each other as well as the State. How could a permissive **VAS** policy thus be implemented in practice given the contours of that contemporary legal order? What optimal safeguards and regulatory controls would be effective in addressing the legitimate concerns raised by the **SLA** and **SHA**? Is the positive case for **VAS** even capable of being 'translated' into the language of legal and constitutional

rights? These questions shall be my principal focus in the following section – **the legal standpoint.**

PART B: THE LEGAL STANPOINT

In this section I hope to achieve three things. First, I hope to provide a general and non-technical overview of the legal context in which this ethical discussion is taking place. Second, I hope to show that it is possible to adapt the positive case and ‘translate’ it into the language of rights. Finally, it is my desire to articulate (i) the contemporary legal position regarding **VAS**, and (ii) what steps could be taken to develop that legal position into a permissive policy that also caters for optimal safeguards and regulatory controls.

More particularly, I shall proceed to give a brief outline of the foundational socio-legal structure of South African society, namely, the Constitution of the Republic of South Africa, 1996¹⁶³ and why it is to be considered, first and foremost, an objective ethical document against which all other conduct is to be measured. In the process, I shall contend that the Constitution is best thought of as a social contract that instantiates a rights-based ethic, the principal function of which, is to protect vital human interests.

I shall then argue that the positive case for **VAS** is capable of being admirably articulated by reference to three particular rights enshrined in the Bill of Rights, namely, the (i) **Right to Life** (ii) **Right to Human Dignity**, and (iii) **Right to Freedom and Security of the Person**. These three rights read together are capable of doing the work necessary to justify the permissibility of **VAS** in South African society.

¹⁶³ I shall simply refer to it as ‘the Constitution’ for the remainder of this thesis.

I shall then turn to an overview of the current legal attitude to **VAS** in light of (i) historical case law (ii) contemporary case law as well, and (iii) the *South African Law Commission Report on Euthanasia and Artificial Preservation of Life, 1998*. I will then argue that the development of the common law, in accordance with the Bill of Rights, is the best (and quickest) way to implement a permissive **VAS** policy that can simultaneously provide for optimal safeguards and regulatory controls of such a practice. Finally, I shall tentatively suggest how optimal safeguards could be implemented which would, inter alia, include judicial scrutiny over each person desirous of engaging in **VAS** by requiring a comprehensive and substantive application to court.

B1. THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

South Africa is a secular¹⁶⁴ constitutional and democratic Republic¹⁶⁵ that is founded on the **rule of law**.¹⁶⁶ The Constitution is the supreme law of the Republic and law or conduct that is inconsistent with it is invalid.¹⁶⁷ Not only does the Constitution provide for the establishment of the three branches of government – **the Executive**¹⁶⁸, **the**

¹⁶⁴ South Africa is firmly committed to **Secularism** albeit that section 15 of the Constitution provides for freedom of religion, belief and opinion.

¹⁶⁵ Section 1 of the Constitution.

¹⁶⁶ The **rule of law** has both a *formal* and *substantive* component. The *formal component* dictates that the State (and private individuals) are entirely subject to the dictates of the law and the Constitution. The rule of law also places limits on State power and conduct by (i) permitting its functionaries to act only in circumstances prescribed by law, and (ii) prescribing that when they do act, they do so in a way that is, at the very least, rational and non-arbitrary. The *substantive component* dictates that the State is obliged to respect the basic rights of the individual. (Currie & De Waal, pp.10-14).

¹⁶⁷ Section 2 of the Constitution. This is the principle of **constitutional supremacy**. All State and private conduct is measured against (and constrained by) the norms, values and standards contained in the Constitution.

¹⁶⁸ Chapter 5 of the Constitution.

Legislature¹⁶⁹, and **the Judiciary**¹⁷⁰ – but it also delineates the powers and functions of those self-same governmental branches.¹⁷¹

Chapter two of the Constitution contains the Bill of Rights which is the cornerstone of the democracy of the Republic and in which are enshrined the rights of all its peoples.¹⁷² The Bill of Rights applies to all law and binds **the Legislature, the Executive and the Judiciary**.¹⁷³ Furthermore, the State is obliged to respect, protect, promote and fulfil the rights contained therein.¹⁷⁴ Similarly, the Bill of Rights is capable, in certain circumstances, of binding natural or juristic persons, depending on the nature of the particular right involved and the nature of any duty imposed by that right.¹⁷⁵

The Bill of Rights thus provides scope for what is called **vertical and horizontal applicability**.¹⁷⁶ There is also an important conceptual distinction to be drawn between the **direct application** of the Bill of Rights and an **indirect application** thereof. As Currie & De Waal note:

[T]he 1996 Constitution . . . distinguishes two forms of application of the Bill of Rights. Direct application entails imposition of duties by the Bill of Rights on specified actors: a breach of such a duty is a violation of a constitutional right. Indirect application occurs where there is a provision of ordinary law (legislation, common law or

¹⁶⁹ Chapter 4 of the Constitution.

¹⁷⁰ Chapter 8 of the Constitution.

¹⁷¹ This is the **principle of separation of powers**. The principle is not absolute however, and there is an elaborate system of checks and balances on each branch of government by the others.

¹⁷² Section 7 (1) of the Constitution.

¹⁷³ Section 8 (1) of the Constitution.

¹⁷⁴ Section 7 (2) of the Constitution.

¹⁷⁵ Section 8 (2) of the Constitution.

¹⁷⁶ **Vertical application** is the application of the Bill of Rights to matters and disputes between the State and the individual. **Horizontal application** is the application of the Bill of Rights to matters and disputes between individuals.

customary law) that mediates between the Bill of Rights and the actors who are subject to that law. The duty of the courts is to ensure that the ordinary law conforms to the values to which the Bill of Rights, by conferring the rights and duties that it does, give effect. (2013, p.34)

The foregoing entails that all laws and conduct by the State, as well as the conduct of individuals, is *always* considered, assessed and critiqued through the conceptual prism of the Constitution in general and the Bill of Rights in particular.

The Judiciary is constituted by the various courts of the Republic.¹⁷⁷ To **the Judiciary** is bequeathed the monumentally important task of ensuring that the norms, values and standards of the Constitution are upheld and that its prescriptions are enforced. Orders of court must be obeyed by all persons in the Republic including the State and its functionaries.¹⁷⁸

Furthermore, **the Judiciary** is vested with the power¹⁷⁹ to (i) enquire into and strike down unconstitutional legislation either in part or *in toto*, as well as (ii) develop the common law in light of the norms, values and standards contained in the Constitution.¹⁸⁰ This implies that the *final authority* regarding the interpretation, application and implementation of the Constitution and its provisions (including the Bill of Rights) is **the Judiciary**. It is thus not hyperbolic to state that **the Judiciary** is both the final bastion of South African democracy and the aegis that safeguards the individual from the slings and arrows of abuse.

¹⁷⁷ Section 166 of the Constitution.

¹⁷⁸ Section 165 (5) of the Constitution.

¹⁷⁹ Section 172 of the Constitution. This is known as the **principle of justiciability**.

¹⁸⁰ Section 173 read with s 39 (2) of the Constitution.

B2. A SOUTH AFRICAN SOCIAL CONTRACT

What should be immediately obvious from this brief overview of the Constitution and the socio-legal order it establishes, is that the Constitution is the embodiment and codification of a **social contract**. The preamble of the Constitution explicitly acknowledges this fact by utilising the nomenclature of collective agreement:

We, the people of South Africa [emphasis added], Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all who live in it, united in our diversity. *We therefore, through our freely elected representatives, adopt this Constitution* [emphasis added] as the supreme law of the Republic. . .

The Constitution is thus *not* a **hypothetical social contract** of the sort envisioned by John Rawls, in which one imagines what ethico-legal principles and institutional structures persons would rationally agree to in an ‘original position’, while deliberating from behind an epistemic veil of ignorance (1971). Instead it represents an **actual social contract** that specifically acknowledges South Africa’s idiosyncratic unjust historical legacy and the effect that legacy had on the lives of the overwhelming majority of South Africans.

The bindingness of the Constitution on contemporary South African society does not, therefore, derive from any *abstract* hypothetical agreement between idealized rational bargainers (i.e. what ethico-legal rules it would be reasonable to agree to) but rather

arises, at least in part¹⁸¹, from the *actual* agreement of the peoples of South Africa in all their epistemically encumbered glory, acting by proxy, through their elected legislative representatives.¹⁸² Accordingly, when **the Judiciary** sets about the business of Constitutional exegesis, it is in effect articulating normative conclusions about what the people of South Africa have, in fact, agreed to. **The Judiciary**, viewed in this way, acts as the ‘mature, reflective and percipient moral voice’ of South African society – a voice that South Africans have agreed to listen to and be bound by.

In *Carmichelle v Minister of Safety and Security*¹⁸³, Ackermann and Goldstone JJ pronounced on the fundamental *normative* character of the Constitution, holding:

Under section 39(2) of the Constitution concepts such as “policy decisions and value judgments” reflecting the “wishes . . . and the perceptions . . . of the people” and “society’s notions of what justice demands” might well have to be replaced, or supplemented and enriched by the *appropriate norms of the objective value system embodied in the Constitution* [emphasis added]. (paragraph 56).

Furthermore, in *S v Makwanyane & Others*¹⁸⁴, Chaskalson P affirmed the role of **the Judiciary** as the binding normative voice of South African society when he held:

¹⁸¹ I say, ‘in part’, because, in my view, the normative bindingness of the Constitution arises not just from *actual agreement* to its terms but also from the fact that its terms conduce to the well-being (or flourishing) of human persons in the long run.

¹⁸² This of course raises a challenging philosophical question: how are persons born *after* the adoption of the Constitution bound by it? In other words, how is a *subsequent generation* of persons bound by an agreement concluded by an *antecedent generation* of persons? After all, they *never* agreed to it! The answer I would tentatively provide, is that the Constitution continues to bind successive generations, in part, in virtue of the **principle of participatory acquiescence**. That is to say, subsequent generations who live in accordance with its terms, rely on its protections and reap its benefits are tacitly bound by it. However, this is not to say that subsequent generations are obliged to be bound *ad infinitum*. Should persons rally their fellow citizens and elect new legislative representatives, they may either amend the Constitution or perhaps even abandon it completely. Section 74 of the Constitution provides for such radical amendments.

¹⁸³ 2001 (4) SA 938 (CC).

¹⁸⁴ 1995 (3) SA 391 (CC).

Public opinion may have some relevance to the enquiry, but in itself, *it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour . . . This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public* [emphasis added] (paragraphs 88-89)

O' Regan J, later in the same decision, held:

In broad terms, *the function given to this court by the Constitution is to articulate the fundamental sense of justice and rights shared by the whole nation as expressed in the text of the Constitution* [emphasis added]. The Constitution was the first public document of legal force in South African history to emerge from an inclusive process in which the overwhelming majority were represented. (paragraph 362)

Therefore, there can be no denying that the legal context in which we are embedded is one shaped by a social instrument that purports, first and foremost, (i) to be a fundamentally ethical instrument, and (ii) which is taken to articulate objective normative values that have been agreed to by South African society. The next question that immediately arises is: what has South African society agreed to in this instrument?

B3. A RIGHTS BASED ETHICAL DOCUMENT

The obvious answer is that South African society has agreed to a panoply of rights that are borne by persons. However, it is important at the outset to distinguish between two different ways of thinking about 'rights' and the 'language of rights'. First, rights could be understood as being derived from other ethical or normative principles – **the**

derived view. Second, rights could be understood as being basic, fundamental or primitive – **the foundational view.**

On the **derived view** talk of rights is rather like ‘linguistic shorthand’ for talking about independently arrived at ethical conclusions. It is a view that conceives of ‘rights talk’ as simply another way of speaking about our moral duties and obligations that are ultimately grounded in other normative principles. On this view, rights themselves do not do any primary normative work but rather it is the other principles that do the ethical heavy lifting. Rights, so construed, become a convenient way to sum up a conclusion to an ethical argument that has relied on other more fundamental normative premises, for example, the well-being of persons.

In contrast, on **the foundational view**, rights are taken to be the basic units, building blocks or premises in a normative system. They are the fundamental normative capital from which other obligations, duties and constraints on action are constructed. However, this does not mean that rights are self-justifying. One particularly persuasive way to justify the existence of rights is to point out that rights protect vital or crucial human interests from being undermined or threatened. Human persons, descriptively speaking, have a panoply of critical interests. Rights serve to protect those critical interests. Rights can thus be grounded in non-normative facts about persons while still retaining their normative primacy. In this sense, rights are deontological constraints that ‘protect the person against being “sacrificed” to the greater good’ (Kagan, 1998, p.173). As Charles Jones explains:

Human rights are moral claim rights that protect basic or vital interests of individual human beings. Their scope is universal in that each person possesses them. They provide the grounds for protecting persons from 'standard threats' to those interests by ensuring protective mechanisms are put in place, and they generate duties best attached to institutions so as to ensure that the interests themselves may be clearly identified and their protection reliably monitored . . . we should understand human rights as the normative link between interests on the one hand and duties on the other . . . human rights, therefore, are grounded in human interests; but those rights in turn provide the grounds for duties to ensure those interests are secured against standard threats. (2013, pp.58-59).

As I already indicated, the Constitution describes the Bill of Rights as the *cornerstone* of the democracy of the Republic. The Constitution thus clearly construes the rights that are enshrined in it to be **foundational** and not **derived**. The Constitution thus takes rights to be the basic building blocks of the South African normative system and which are designed to protect vital human interests and place constraints on the conduct of the State and other individual persons.¹⁸⁵ However, it is important to emphasise that in the Constitution no right is considered absolute and, in principle, any right can be limited or curtailed provided certain criteria are met.¹⁸⁶

This naturally raises a further question: what is the substantive content of the rights that have been enshrined in the Constitution and can they possibly provide a basis for the permissibility of **VAS** in South African society? However, before turning to

¹⁸⁵ 'Ronald Dworkin proposes . . . that they [rights] may be regarded as trumps in moral disputes' and 'a similar point is made by Robert Nozick when he describes rights as side-constraints.' (Almond, 1991 [1993], p.261).

¹⁸⁶ Section 36 of the Constitution. It is probably safe to say that in light of this fact, the rights based ethic established by the Constitution is a form of **moderate deontology**. That is to say, such rights set barriers (perhaps even very high barriers) to the promotion of the good but such barriers are not absolutely insurmountable.

addressing that question, something should be mentioned about the *formal* structure of rights in general.

A useful point of departure in understanding the formal structure of rights is to consider John Mackie's¹⁸⁷ distinction between two categories of rights viz. **liberty rights** and **claim rights**:

[R]ights can be, formally, of several different sorts, but the most basic distinction is that between a liberty and a claim-right. . . To say that someone has a certain liberty, then, may be to say that the system in question, whatever it is, does not forbid him to act in the way indicated – or (speaking within the system) it may be to give him permission so to act, or explicitly to refrain from forbidding him to do so. To say that someone has a certain claim-right may similarly be to say that if he claims (or if someone representing him claims on his behalf) whatever it is that he has this right to, the system will support his obtaining what he claims – or (speaking within the system) to say that he has this right may be to give him this support, typically by imposing on one or more or indefinitely many others the duty of fulfilling the claim it is made. A liberty and a related claim-right may go together: for example, it will often be natural to associate with the liberty to do something the claim-right not to be impeded by others in doing it . . . (1977, pp.173-174)

From this description we can see that Mackie has explicitly endorsed the Hohfeldian system for the categorization of rights. In such a system, **liberty rights** have the general form: *A has a liberty to ϕ if and only if A has no duty not to ϕ* . Expressed conversely, a **liberty right** entails that other persons have a **duty not to interfere**

¹⁸⁷ It is important to mention that Mackie does not believe in *objective* moral values and thus he does not endorse the notion of *objectively* existing rights. Instead he appears to believe all rights are *relative* to a particular moral or ethical system. I disagree. However, that is a meta-ethical disagreement that would take us far beyond the scope of this thesis.

with the exercise of the liberty. This has the general form: If A has a liberty to ϕ then B has a duty not to interfere with A 's ϕ . (Hohfeld, 1919).

Furthermore, in such a system **claim rights** have the general form: A has a claim that B ϕ *if and only if* B has a duty to A to ϕ . Expressed conversely, a **claim right** entails that other persons are **not at liberty to refuse** the claim. This has the general form: If A has a claim against B to ϕ then B is not at liberty to refuse to ϕ . (Hohfeld, 1919). However, there are two other sorts of rights involved in the Hohfeldian system which Mackie does not mention, namely, **powers** and **immunities**. These sorts of rights relate to the ability of a person to modify either **liberty rights** or **claim rights**.

Powers entitle a person to modify either their own or another person's **liberty** or **claim rights**. In such a system, **powers** have the general form: A has a power *if and only if* A has the ability to alter his own or another person's liberty or claim rights. (Hohfeld, 1919). On the other hand, **immunities** prevent a person from having their **liberty** or **claim rights** modified by another. In such a system, **immunities** have the general form: B has an immunity *if and only if* A lacks the ability to alter B 's liberties or claims. (Hohfeld, 1919). This Hohfeldian characterisation of the formal structure of rights is well suited to analysing the structure of the rights detailed in the Constitution.

B4. TRANSLATING THE POSITIVE CASE

From the foregoing we can now begin to see a way to translate the positive case into the language of rights. It will be recalled that the conclusion of **Part I** of the positive case was that it was *sometimes permissible* for (i) a person to request another's assistance to end her life and (ii) to be so assisted. It will also be recalled that the positive case did not entail that there was an obligation on any person to assist another to engage in **VAS**. Thus we can see that **Part I** of the positive case entails the following conclusions about any individual person desirous of engaging in **VAS**:

- (i) A person sometimes has a **liberty right** to engage in **VAS** and thus sometimes has the corresponding **power** to modify his own **claim right** not to be killed by another.
- (ii) If a person has a **liberty right** to engage in **VAS** then others have a **duty not to interfere** with that instance of **VAS**.
- (iii) A person does not ever have a **claim right** against others to assist him with **VAS** and thus others are always at **liberty to refuse** to assist a person with **VAS**.
- (iv) A person does not ever have a **power** to modify another's **liberty to refuse** to assist with **VAS** and thus persons always have an **immunity** against a person who requires assistance with **VAS**.

It is important to point out that the positive case entails a **derivative view** of rights. This is because the normative work in the positive case is done by other ethical principles, specifically the concepts of human well-being and autonomy. It is from those concepts in particular that the **liberty right** to VAS is derived.

The crucial question now becomes whether there is any scope for articulating such a **liberty right** in the Constitution? It is important to mention that there is no specific right to this effect that has been agreed to or enshrined in the Constitution. However, in my view, it is possible for **the Judiciary** to nevertheless articulate such a right. Such a right can be distilled by reference to three other rights, namely (i) **the Right to Life** (ii) **The Right to Human Dignity**, and (iii) **The Right to Freedom and Security of the Person**. These rights taken together can be plausibly construed as protecting the vital interests human persons have in their well-being, autonomy and dignity.

B4.1. THE RIGHT TO LIFE

Section 11 of the Constitution reads: '**Everyone has the right to life.**'

The phraseology of this right is, of course, ambiguous in that it is capable of being construed in a positive and/or a negative way. That is to say, it can be interpreted as a right not to be treated in certain ways (e.g. not to be killed by other) and/or as a right to be treated in a certain ways (e.g. to be saved by others). For our purposes, it is the negative sense that is important. This is because the negative sense corresponds to a

claim right, namely, the claim a person has against others not to be killed and their corresponding duty not to kill him. This might be thought, *prima facie*, to prevent any basis for the permissibility of **VAS**.

However, if the positive case is sound then the value of a person's life is intimately bound up with the various intrinsic goods that a life might possibly contain. It is then clear that (in the language of rights) a person has a vital interest in living the sort of life that instantiates or expresses those intrinsic goods. In short, a person has a vital interest in living a eudaimon life. In fact, one might even say that this is the most vital and overarching interest that any single person could have. If this is so, then persons have an equally vital interest in *avoiding* a life that is not worth living i.e. a non-eudaimon life.

If persons have (i) a vital interest in a life that is worth living and (ii) a vital interest in avoiding a life that is not worth living, then it follows (in the language of rights) that such persons have a **liberty right** to end their own existence, if and when, their lives ever reach such a horrible state. Furthermore, if a person's life does reach that state and they either (i) cannot end their existence themselves, or (ii) are not willing to do so, then they will have a **power** to modify the **claim right** that they normally have against others not to end their lives. In other words, such persons will be able to waive the **claim right** they would normally have against others. (Benatar, 2010)

Is the **Right to Life** in the Constitution capable of being characterised in this way? I believe the answer can be answered affirmatively and there is even textual support from **the Judiciary** itself to support this view.

In *Makwanyane*, O' Regan J held the following:

The right to life is, in one sense, antecedent to all other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. *But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to share in the experience of humanity. This concept of human life is at the centre of our constitutional values [emphasis added]. . .* The Constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society. The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. *The right to life is more than existence, it is a right to be treated as a human being with dignity [emphasis added]: without dignity human life is substantially diminished. Without life, there cannot be dignity. (paragraphs 326-327).*

What is clear from this passage is that the **Right to Life** enshrined in the Constitution has been understood by **the Judiciary** as protecting the vital interest that (i) persons have in the rich and multifaceted *experience of humanity*, as opposed to (ii) mere *organic existence*. In this passage, **the Judiciary** endorses precisely what Grayling has articulated about the **Right to Life**:

'Life' in the phrase 'the right to life' is not mere existence. It is existence with at least a minimum degree of quality and value. It means a life in which the individual is protected from arbitrary power and threat, is free to seek opportunities and exercise choices, to enjoy the rewards and endeavours in peace, and to seek and foster personal

relationships – and which, to the degree reasonably possible for anyone in this world, is free from distress and pain. (2001, p.2).

The ‘experience of humanity’ that persons have the most vital interest in are precisely that set of intrinsically valuable things that they are capable of experiencing, discovering and creating. That is the sort of experience of humanity which would allow a person to live with dignity. Implicit in this, is the idea that persons have an equally vital interest in *not* being deprived of the rich and multifaceted experience that humanity has to offer. Such an existence would be one that lacked dignity. This passage explicitly acknowledges the link between dignity and the experience of humanity. This is simply another way of saying that a life that does not, or cannot, share in the experience of humanity would be a life that is not worth living.¹⁸⁸ Naturally, the person who would be most immediately and intimately acquainted with his present and future prospects of his experience of humanity, and the dignified nature of his existence, would be the person himself.

The **Right to Life**, construed in this way, entails that if and when a life ceases to be worth living and becomes undignified, a person will have (i) a **liberty right** to end his existence, and (ii) the associated **power** to waive the **claim right** he would, in the normal course, have against being killed by others. This would entail that, whatever the State’s duty might be to ‘protect human life from the violations of others’ (*Makwanyane*, paragraph 117), it would not extend to compelling a person to continue

¹⁸⁸ It is not inconsequential that the preamble to the Constitution itself states that it has been enacted to, inter alia, ‘[i]mprove the *quality of life* [emphasis added] of all citizens and free the potential of each person.’

living a life that was not worth living and lacking in dignity. An absolute prohibition that prevents a person from exercising this **liberty right** (or this **power**) thus infringes the vital interest a person has in avoiding a non-eudaimon existence.

B4.2. THE RIGHT TO HUMAN DIGNITY

Section 10 of the Constitution reads: ‘**Everyone has inherent dignity and the right to have their dignity respected and protected.**’

In *Makwanyane*, immediately after having spoken about the **Right to Life**, O’Regan J speaks of human dignity in the following terms:

The importance of dignity as a founding value of the new Constitution cannot be overemphasised. *Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern* [emphasis added]. . . Recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution’ (paragraph 328-329).

Prima facie, the wording of this passage appears to lend support to the idea that the **Right to Human Dignity** entails that human persons are intrinsically valuable *in themselves*. This runs counter to the positive case. If that is so then it would seem to involve a **claim right** against others not to undermine the intrinsic value of personhood *per se*, which **claim right** is not susceptible to modification and thereby not under a person’s **power** to waive.¹⁸⁹

¹⁸⁹ This would be Velleman’s view (1999).

However, when one realises that the dignity of a person's life is intimately connected to the **Right to Life** which protects the vital interest a person has in avoiding a non-worthwhile and undignified existence, then it is entirely plausible to construe the **Right to Human Dignity** as similarly protecting the vital interest a person has to living a life of a certain quality. From this, it would once again follow that a person would have both a **liberty right** to end his existence if it became undignified and the associated **power** to waive the **claim right** normally placed on others not to terminate his existence. In such cases, the termination of his existence would be the **Right to Human Dignity** vindicated and constitute respect for the person's autonomy. Further textual support for this construal of the right comes from the case of *Barkhuizen v Napier*¹⁹⁰ in which Ngcobo J held that 'self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.' (paragraph 57)

From this passage, it is clear that **the Judiciary** already considers autonomy to be a crucial feature of human dignity. Accordingly, it is plausible to construe the **Right to Human Dignity** as similarly protecting the vital interest a person has in his autonomy and his capacity for self-determination. This must include, at the very least, the epistemic freedom to assess the quality of his life as well as the freedom to act in accordance with that assessment. When persons are absolutely prohibited from doing this, their vital interest in their autonomy and self-determination is undermined. This,

¹⁹⁰ 2007 (5) SA 323 (CC).

simultaneously, undermines the vital interest persons have in the quality of their life. This is what is *really* protected by the **Right to Human Dignity**.

B4.3. THE RIGHT TO FREEDOM AND SECURITY OF THE PERSON

Section 12 (2) (b) of the Constitution reads: ‘**Everyone has the right to bodily and psychological integrity which includes the right to security in and control over their body**’.

In the language of rights, persons clearly have a vital interest in both (i) maintaining their bodily integrity against interference by other persons, as well as (ii) being free to construct an existence of their own choosing. These vital interests thus then generate both a **liberty right** and a **claim right**. These rights secure for persons permissive control over their corporeal forms to live the life they wish to live and impose duties on others not to violate their bodily integrity. As Currie and De Waal have noted:

In essence the right to freedom and security of the person is the right to be left alone. And at least in relation to one’s body the right creates a sphere of individual inviolability. Section 12 (2) (b) tell us that this inviolability has two components. ‘Security in’ and ‘control over’ one’s body are not synonymous. The former denotes the protection of bodily integrity against intrusions by the state and others. The latter denotes the protection of what could be called *bodily autonomy or self-determination against interference* [emphasis added]. The former is the right to be left alone in the sense of being unmolested by others. The latter is a component of the *right to be left alone in the sense of being allowed to live the life one chooses* [emphasis added]. (2013, p.287).

Understanding the right in this way provides very strong support for a **liberty right** to **VAS** and the corresponding **power** to modify the **claim right** a person normally has against other persons not to violate his bodily integrity. This will especially be so when one reads this right in conjunction with the **Right to Life** and **Right to Human Dignity**, both of which plausibly protect the vital interests a person has in avoiding a non-worthwhile and an undignified existence, as well as the vital interest a person has in his autonomy and self-determination. In the decision of *Soobramoney v Minister of Health (Kwazulu-Natal)*¹⁹¹ Sachs J specifically endorsed the observation that ‘dying is a part of life, the completion rather than its opposite’ while also emphasising that ‘[w]e can, however, influence the manner in which we come to terms with our mortality.’ (paragraph 57).

An absolute prohibition preventing a person from exercising control over his body would amount to undermining his vital interest in being able to live his life in a truly self-determined manner. Part of living a life in a truly self-determined manner involves, as I have already argued, being able to choose when and how to die. This is a significant way in which persons can come to terms with their mortality – by taking control of it.

B5. OVERVIEW: COMMON LAW & VOLUNTARY ASSISTED SUICIDE

I believe then that the positive case is capable of being translated quite admirably into the language of rights and that by reference to **the Right to Life, the Right to Human**

¹⁹¹ 1997 BCLR (12) 1696 (CC).

Dignity and the Right to Bodily and Psychological integrity, a sufficiently robust **liberty right to VAS** can be distilled. However, against this sort of analysis stands an historical legacy of common law precedent which entrenches and perpetuates the prohibitionist policy that is currently in place. It is worthwhile then to provide a brief overview of that common law position.

B5.1. HISTORICAL POSITION

Murder is a common law crime in South African society. This means it is not a crime one will find in any statute, proclamation, notice or other piece of legislation. Instead, it is a crime that has been defined and delineated by the court system, the record of which exists only in a string of legal precedent.¹⁹²

The definition of the crime is the following: 'Murder is the unlawful and intentional causing of the death of another human being.' (Snyman, 2008, p.447). The crime thus has four distinct components, namely, '(i) causing the death (ii) of another person (iii) unlawfully, and (iv) intentionally.' (Snyman, 2008, p.447). Furthermore, any conduct that is intended to hasten the death of another person will constitute murder even if the other person was going to die anyway and/or the motive was to alleviate suffering.¹⁹³

¹⁹² S v Ndhlovu 1945 AD 369; S v Valachia 1945 AD 826; S v Sighwala 1967 (4) SA 566 (A); S v Ntuli 1975 (1) SA 429 (A).

¹⁹³ S v Hartmann 1975 (3) SA 532 (C); S v Marengo 1991 (2) SACR 43 (W); S v Smorenburg 1992 (2) SACR 289 (C).

However, conduct that intentionally causes the death of another human being is not considered murder if there is an exculpatory set of facts that can be termed a '**ground of justification**'.¹⁹⁴ In the context of murder, a **ground of justification** can be said to negate (or nullify) the unlawfulness of the intentional conduct that caused the death of the other person. (Snyman, 2008).

Certain recognised **grounds of justification** exist against a charge of murder, the most well-known being that of private defence. If a person acts in private defence then even though he intentionally causes the death of another person he will not be guilty of murder. (Snyman, 2008). However, not all **grounds of justification** are available when defending a charge of murder. Specifically, the **ground of justification** known as **consent**¹⁹⁵ has historically been unavailable. This means that, according to South African common law, it is not possible for a person to **consent** to conduct that intentionally causes his own death. (Snyman, 2008).

Accordingly, any person that were to engage in **DVAS**, even if motivated by a desire to alleviate the suffering of another person, would be guilty of murder.¹⁹⁶ Furthermore,

¹⁹⁴ There are a number of **grounds of justification** recognised in South African law which can be raised as defences, including but not limited to, (i) private defence (ii) necessity (iii) consent. Each has its own specific requirements that need to be satisfied in order to be successfully raised.

¹⁹⁵ The crucial elements of consent in South African law are the following: (i) the consent must be given voluntarily without coercion (ii) the person giving consent must be mentally capable of giving consent (iii) the consenting person must be aware of the true and material facts regarding the act to which he consents (iv) the consent is given expressly or tacitly and (v) the consent must be given prior to the performance of the unlawful act and (vi) the consent must be given by the person himself or, at the very least, by someone lawfully capable of giving it on his behalf. (Snyman, 2008) It is interesting to note that these criteria are almost identical to the criteria that constitute the **Doctrine of Informed Consent (DIC)** examined earlier.

¹⁹⁶ *S v Robinson* 1968 (1) SA 666 (A); *S v Nkwanyana* 2003 (1) SACR 67 (W). For a very useful overview of these authorities as well as the facts of each case. (see Grové, 2007)

even though suicide and attempted suicide is not a crime in South Africa, there is a possibility that, given the appropriate factual circumstances, a person who engages in **INVAS** will either be guilty of murder, attempted murder or culpable homicide. The question of criminal liability in such cases will often turn on whether the person providing the means, methods or modes of assistance to the other person can properly be called 'the cause' of the other person's death in the legal sense.¹⁹⁷

B5.2. THE STRANSHAM-FORD DECISION

Recently, however, there has been an attempt to tackle this common law legacy head on in the case of *Stransham-Ford v Minister of Justice and Correctional Services & Others*.¹⁹⁸ The facts of the case were the following:

Mr Stransham-Ford¹⁹⁹ was a practicing Advocate who had stage 4 terminal cancer and had only a few weeks to live. The Applicant brought an urgent application²⁰⁰ in which he sought three principal things:

- (i) Permission for a medical practitioner to end his life (**DVAS** in the form of **PAS**) or enable him to end his life (**INVAS** in the form of **PAS**) through the administration or provision of some lethal agent.

¹⁹⁷ S v Grotjohn 1970 (2) SA 355 (A); S v Hibbert 1979 (4) SA 717 (D).

¹⁹⁸ 2015 (4) SA (GP) 50.

¹⁹⁹ The Applicant in the case.

²⁰⁰ This is an application brought on protracted time limits in terms of the procedural rules of the High Court. The purpose of such an application is to obtain relief which could not be reasonably obtained if the regular procedures and time limits are followed.

- (ii) A declaratory order that such medical practitioner would not be subject to any civil, criminal or disciplinary liability.
- (iii) A declaratory order that the common law be developed to the extent required to render such conduct lawful and constitutional in the circumstances of his case.
- (paragraphs 1 -4)

The Applicant purported to bring the application freely and voluntarily and without undue influence. He sought to ground his application on the basis that as a result of his terminal condition, *inter alia*, (i) the quality of his life had drastically deteriorated despite palliative care (ii) he suffered from severe pain and discomfort (iii) his condition made him increasingly frail and was only worsening, and (iv) he was afraid of dying while suffering. (paragraphs 6-9) The Applicant based his application principally on the **Right to Human Dignity** and the **Right to Freedom and Security of the Person** in the Bill of Rights. (paragraph 11)²⁰¹

The court, in the final analysis, agreed with the Applicant. The court found, *inter alia*, that:

- (i) The **Right to Human Dignity** was intimately connected to quality of life and the choice of how to die was part of what it was to live in a dignified way. (paragraph 12-14)

²⁰¹ It is interesting to note that the Applicant did not himself rely on the **Right to Life**, although it was referred to by the court when addressing the opposing arguments during the course of the judgment. (paragraph 23)

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- (ii) If events were to take their natural course, the sort of death that awaited the Applicant would be undignified. (paragraphs 15)
- (iii) There was no question of abuse in the present case given the particular medical condition of the Applicant, his persistent and informed decision to end his life and the fact that he was fully in command of his faculties. (paragraph 20)
- (iv) There was no philosophically tenable distinction between killing and letting die and thus no tenable distinction to be made between ‘active’ and ‘passive’ euthanasia. (paragraph 21.2)
- (v) While safeguards on the practice were certainly an important consideration the court could determine appropriate safeguards on a case by case basis and on consideration of the specific facts before it. (paragraph 17)
- (vi) The common law had to be developed in light of the objective normative values enshrined in the Constitution. (paragraph 22-23)

In doing so, the court rejected the counter arguments raised by the other parties to the litigation, in particular, the arguments that:

- (i) The Applicant’s dignity was not infringed by the prohibitionist common law position. (paragraph 21)

- (ii) The Applicant's contention that his dignity was impaired was simply his own 'subjective' assessment. (paragraph 21)
- (iii) A development of the common law that permitted a case-by-case assessment of persons who required assistance in dying would lead to abuse. (paragraph 17 and 19)
- (iv) Human life was paramount and sacrosanct and had to be protected no matter what. (paragraphs 14 and 23)

The court granted the relief sought by the Applicant and proceeded to develop the common law. It did so by holding that the absolute prohibition entailed by the common law crimes of murder or culpable homicide, in the context of assisted suicide by medical practitioners, violated the Applicant's constitutional rights and were, to that extent only, declared to be (i) overbroad and (ii) in conflict with the Bill of Rights. (paragraph 26) In doing so the court engaged in the process of the **indirect application** of the Bill of Rights.²⁰²

²⁰² Unfortunately, unknown to the court and the legal representatives involved, the Applicant had already died some two hours *prior* to the granting of the order. This aspect featured prominently in the appeal decision.

B5.3. THE APPEAL DECISION

The *Stransham-Ford* decision was taken on appeal to the Supreme Court of Appeal and is reported as *The Minister of Justice and Correctional Services & Others v Estate Late Stransham Ford*.²⁰³ The appeal was successful and the *Stransham-Ford* decision was overturned.

The appeal court overturned²⁰⁴ the decision of the court a quo²⁰⁵ based on three broad considerations:

- (i) Since the Applicant had died *prior* to the granting of the order and because the relief sought was highly personal to the Applicant, there was no live issue for the court a quo to pronounce on at the time of the judgment. The issue before the court had become moot and there had been no basis for the court to make any order at all. (paragraphs 5, 13, 15, 18, 19, 20, 21 and 26)
- (ii) There had not been a full and proper ventilation of the law by the court a quo in light of the domestic and international authorities. Specifically, the court a quo had not properly engaged with (a) the issue of consent as a ground of justification to a charge of murder and/or (b) the issue as to whether assisting someone to

²⁰³ 2016 ZASCA 197 (6 December 2016).

²⁰⁴ None of the reasons were directly related to the *merits* of the ethical and constitutional issues that were at the core of the matter.

²⁰⁵ The court beneath it.

commit suicide themselves would always constitute murder. (paragraphs 5, 29, 41, 55, 57, 69 and 74)

- (iii) The court a quo had made the order on an incorrect and restricted factual basis without complying with certain procedural rules. Specifically, there was (a) insufficient admissible evidence presented for the court a quo to make the decision it made, (b) the factual information upon which the court a quo had made its decision was incomplete and misleading, and (c) the court a quo made its decision without affording all interested parties a proper opportunity to be heard. (paragraphs 5, 79, 81, 82 and 89)

Ultimately, the appeal court concluded that:

- (i) It was unsatisfactory for any court (including the appeal court,) to make any finding on the ethical and constitutional issues involved in this case especially in light of the deficient and incomplete evidential record before it. (paragraphs 94 - 95)
- (ii) South Africa faced very different challenges to other jurisdictions that had liberal euthanasia policies and which had sophisticated health care systems and extensive palliative care networks. In South Africa, the health care system faced significant challenges, there were great disparities of wealth and resources in the population and any court would need to be satisfied that a proper and functional regulatory framework could be put in place. (paragraph 98)

- (iii) A court addressing these issues had to be aware of different cultural values and attitudes in a diverse South Africa and to consider the impact of its decisions for the entire population and not just a few. It was in that context that it had to consider whether a decision to change the status quo would undercut the foundational value of **the Right to Life** or be supportive of it. (paragraph 100)
- (iv) It would be welcome for parliament to address the topic by passing legislation and thereby give effect to its proper role as the legislative authority of South African society. (paragraph 101)
- (v) It was wrong of the court a quo to have developed the common law crimes of murder and culpable homicide and that the legal position before the decision of the court a quo would remain in force. (paragraph 101)
- (vi) When an *appropriate case* came before the courts, the common law would no doubt evolve in the light of both a consideration of the common law precedent as well as the developments that had occurred in other jurisdictions. (paragraph 101)

The court in the appeal decision thus effectively did three important things. First, it restored the prohibitionist status quo. Second, it suggested that it would be desirable for **the Legislature** to address the issue of **VAS** by passing legislation. Third, it specifically left the jurisprudential door open for the future development of the common law in an appropriate case.

B6.OVERVIEW: SOUTH AFRICAN LAW COMMISSION DISCUSSION PAPER

In both the *Stransham-ford* decision and the appeal decision, the courts had occasion to refer to the *South African Law Commission Report on Euthanasia and Artificial Preservation of Life, 1998*.²⁰⁶

The report was prepared by the South African Law Commission²⁰⁷ for the purposes of (i) examining the moral and legal issues that inform a plethora of end-of-life questions and (ii) considering proposals for possible law reform. (p.iv) Of these end-of-life questions, the report dealt specifically with possible law reform in respect of **VAS** (both **DVAS** and **INVAS**).²⁰⁸ (pp. 24-56)

The commission framed the question in respect of **VAS** as follows:

Whether it would be lawful for a medical practitioner to give effect to the well informed considered request of a terminally ill, but mentally competent, patient to make an end to the patient's unbearable suffering or to enable the patient to make an end to his or her unbearable suffering by administering or providing a lethal agent (p.v).

The first thing to notice about the framing of the commission's question is that it limits the question to *terminally ill* persons who are experiencing *unbearable suffering*. The

²⁰⁶ I will simply refer to it as 'the report'.

²⁰⁷ The commission is established in terms of section 2 (2) the South African Law Commission Act 19 of 1973. I shall simply refer to it as 'the commission'.

²⁰⁸ The commission referred to **DVAS** as 'voluntary active euthanasia' and to **INVAS** as 'assisted suicide'.

commission clearly assumed that terminally ill persons who are experiencing unbearable suffering would be the *only* persons who might potentially have a **liberty right** to **VAS**.²⁰⁹ This differs drastically from the conclusion reached by the positive case which would secure a **liberty right** to **VAS** for *anyone* who is not living a eudaimon life.²¹⁰ Secondly, it should also be clear that the commission assumed that only a medical practitioner would be entitled to assist a person to engage in **VAS**. This again differs drastically from the positive case which, in principle, would permit either **PAS** or **NPAS**.²¹¹

The commission nevertheless proceeded to consider a number of the versions of the **SHA** as well as the **SLA**. (pp. 44-54) The commission ultimately recorded that it had not taken up any definitive position in respect of **VAS** either for or against the practice. (p.54) However, the commission stated that if legislation was introduced, it proposed the following statutory provisions to regulate the practice:

- (1) Should a medical practitioner be requested by a patient to make an end to the patient's suffering, or to enable the patient to make an end to his or her suffering by way of administering or providing some or other lethal agent, the medical practitioner shall not give effect to the request unless he or she is convinced that:
 - (i) the patient is suffering from a terminal illness;

²⁰⁹ The commission's assumption is understandable insofar as the lives of terminally ill persons in unbearable suffering do constitute proto-typical examples of non-worthwhile lives.

²¹⁰ It will be recalled, that one of the core points of the positive case is that a non-eudaimon life could be 'multiply realizable'. That is to say, the life of person with a terminal illness and who was suffering unbearable pain might just express *one sort* of non-worthwhile life. There is no reason to think that such a life exhausts the category. In fact, according to the positive case, there are good reasons to think that it does not.

²¹¹ It will be recalled that the positive case makes a *practical* argument for the preferability of **PAS** but would permit **NPAS** in circumstances where no physician was available (or willing) to assist a person in a given case.

- (ii) the patient is subject to extreme suffering;
 - (iii) the patient is over the age of 18 years and mentally competent;
 - (iv) the patient has been adequately informed as to the illness from which he or she is suffering, the prognosis of his or her condition and of any treatment or care that may be available;
 - (v) the request of the patient is based on an informed and well considered decision;
 - (vi) the patient has had the opportunity to re-evaluate his or her request, but that he or she has persisted; and
 - (vii) euthanasia is the only way for the patient to be released from his or her suffering.
- (2) No medical practitioner to whom the request to make an end to the patient's suffering is addressed as contemplated in subsection (1), shall give effect to such request, even though he or she may be convinced of the facts stated in that subsection, unless he or she has conferred with an independent medical practitioner who is knowledgeable with regard to the terminal illness from which the patient is suffering and who has personally checked the patient's medical history and examined the patient and who has confirmed the facts as contemplated in subsection (1) (a), (b) and (g).
- (3) A medical practitioner who gives effect to a request as contemplated in sub-section (1), shall record in writing his or her findings regarding the facts as contemplated in that subsection and the name and address of the medical practitioner with whom he or she has conferred as contemplated in subsection (2) and the last-mentioned medical practitioner shall record in writing his or her findings regarding the facts as contemplated in subsection (2).
- (4) The termination of the patient's life on his or her request in order to release him or her from suffering may not be effected by a person other than a medical practitioner.

(5) A medical practitioner who gives effect to a patient's request to be released from suffering as contemplated in this section shall not suffer any civil, criminal or disciplinary accountability with regard to such an act provided that all due procedural measures have been complied with.

(6) No medical practitioner is obliged to give effect to a patient's request to assist with the termination of a patient's life. (pp. 55-56 & pp.99-101).

However, despite the fact that the commission prepared and finalised the report in November 1998, and despite the fact that the report had been submitted to the then Minister of Health, nothing has been done by **the Legislature** in the last eighteen years.²¹²

B7. PROPOSED SAFEGUARDS AND OVERSIGHT CRITERIA

In light of the (i) *Stransham-Ford* decision (ii) the appeal decision, and (iii) the report there appear to be two broad ways to permit **VAS** and implement a permissive **VAS** policy. The first would be through legislative reform at the instance of **the Legislature**. The second would be through careful and incremental development of the common law through the **indirect application** of the Bill of Rights at the instance of **the Judiciary**. I shall address each option in turn and argue that the latter is preferable. I shall then set out what I believe would constitute a robust procedure that would provide optimal safeguards and oversight while still giving effect to the heart of the positive case and the **liberty right** it entails.

²¹² In the *Stransham-Ford* decision it was argued on behalf of the State that other more pressing issues of national importance had demanded the attention of **the Executive** and **the Legislature** viz. the HIV and AIDS epidemic. (paragraph 21)

B7.1. LEGISLATION

The benefits of legislative reform are twofold. First, **the Legislature** is constituted by the elected representatives of the peoples of South Africa. In principle, such representatives are in the best position to act on (and implement) the collective democratic will of South African society. There is also, in principle, a better chance of widespread support for a major paradigm shift in societal policy if it is effected at the instance of the elected representatives of that society. Second, legislative reform allows for the implementation of uniform, public and standardized criteria that can be tailored to a specific issue and immediately implemented and appreciated by society at large. In other words, once legislation is passed and implemented it can be quickly disseminated and complied with by entire sectors of the population.²¹³ However, legislative reform also has a number of drawbacks. Two of which are particularly relevant to the issue of **VAS**.

First, there is the fact that legislative reform can take a long time to be effected. In the case of **VAS** this is particularly noticeable and disconcerting. Despite the recommendations contained in the commission's report, **the Legislature** has done absolutely nothing to bring about reform for the past eighteen years. In all this time this has meant that persons living non-eudaimon lives have been condemned to live in

²¹³ For an example of a proposed piece of legislation. (See Grové, 2007, pp.169-182) This example, however, limits **VAS** to terminally ill persons, places the final discretion to accede to the person's request in the hands of the physician and does not permit **NPAS**.

an undignified state. A substantial harm has already been done to them as a result of legislative laxity.

Furthermore, the laidback and laissez-faire attitude thusfar adopted by the **Legislature** does not instil much confidence that it will have a change of heart any time soon. Despite the fact that the court, in the appeal decision, stressed that **the Legislature** should engage in such reform, it is not obliged to do so and could, in principle, keep the issue on the legislative 'back-burner' indefinitely. The sad reality is that if reform is left to **the Legislature** many persons could find themselves condemned to live non-eudaimon lives for many years to come.

Second, there is the fact that any legislative reform would most likely be based on the commission's report and the recommendations contained therein. While there is certainly much to commend in the report, the recommendations made do differ quite markedly from the conclusions and recommendations that would flow from the positive case. Any legislative reform based on the recommendations contained in the report is thus likely to focus on the limited cases of terminally ill patients who are physically suffering, to the exclusion of other persons who, while not terminally ill or in physical pain, may be living equally non-worthy lives.

Furthermore, given that the commission's recommendations that (i) non-medical practitioners not be permitted to assist a person to engage in **VAS**, and (ii) medical practitioners not be compelled to render assistance to a person wishing to engage in **VAS**, certain persons will still run the risk of not being assisted if they cannot obtain

the services of a consenting physician. Thus while legislative reform may achieve some measure of moral progress it would, in my view, do so at the expense of recognising the full moral force of the positive case and still leave many persons to live non-eudaimon lives.

B7.2. DEVELOPMENT OF THE COMMON LAW

On the other hand, the development of the common law through the **indirect application** of the Bill of Rights could be a relatively quick way to implement a permissive **VAS** policy that acknowledges and incorporates the core points raised by the positive case. In light of the fact that the court, in the appeal decision, has specifically left open the possibility for the common law to be developed, all that would be required is an appropriate test case.²¹⁴

Bearing in mind what was stated in the appeal decision, it would be prudent that any test case conform, at the minimum, to the following criteria:

- (i) The test case should not be brought on an urgent basis.
- (ii) The test case should be brought on the regular procedural time periods in order to give all interested parties an opportunity to be heard, as well as allow for the intervention by potential *amicus curiae*.

²¹⁴ It is far beyond the scope of this thesis to exhaustively prescribe the desiderata of such a test case. Nevertheless, certain general features of such a test case can be mentioned in light of the appeal decision.

- (iii) The test case should be brought to challenge the constitutionality of the common law prohibition on VAS in light of the **Right to Life, Right to Human Dignity and Right to Freedom and Security of the Person.**
- (iv) The test case should specifically challenge the common law precedent that precludes **consent** from being considered a legitimate **ground of justification** to a charge of murder.
- (v) The test case should specifically seek to develop the common law to allow **consent** to constitute a **ground of justification** to murder on condition that certain safeguards and oversight criteria are met.
- (vi) The test case should articulate clearly what the appropriate safeguards and oversight criteria should be if the common law were to be developed, taking into account their functionality for all persons in South African society.

The appropriate safeguards and oversight criteria I would argue should be implemented ought to include both **procedural** and **substantive** elements. What I shall now articulate is how effective and robust procedural and substantive criteria might be developed and implemented which would effectively address the legitimate concerns raised by the **SLA** and the **SHA**, concerns which were echoed by the court in the appeal decision.

B7.3. APPLICATION TO HIGH COURT²¹⁵

From a **procedural** standpoint the principal and overriding safeguard would be to require all persons, regardless of their personal circumstances, and who are desirous of engaging in **VAS** to make a substantive and formal *ex parte* application²¹⁶ to the High Court in order to seek the court's imprimatur to engage in **VAS**. In other words, in order for a person to exercise their **liberty right** to **VAS** and to properly exercise the **power** to waive their **claim right** against others not to kill him, the 'blessing' of **the Judiciary** would first need to be obtained. Demanding such a procedural step has three principal benefits.

First, by requiring persons to apply to court it will naturally and organically filter out those persons who are determined to engage in **VAS** from those who are not. An application to court requires significant time, effort and psychological investment on the part of any person considering **VAS**. By its very nature it would force any given person to consider what they are truly desirous of and whether they are truly committed to ending their life. Not only would the services of an attorney have to be obtained but also that of an Advocate who would be obliged to appear in court to present the application on behalf of the person.²¹⁷ The fact that a person would be

²¹⁵ See **Appendix II** for an outline of a precedent application that one might expect to find in a South Africa that has (i) developed the common law, and (ii) has implemented a permissive **VAS** policy along the lines I have suggested. It goes without saying that a real application would have substantially more detail.

²¹⁶ This is an application in terms of which the applicant is the only party before the court.

²¹⁷ Insofar as there is a legitimate concern that many persons in South Africa may not be able to afford legal representation for such an application, it is to be noted that there are any number of law clinics and pro bono legal institutions that offer professional legal services to financially distressed or impecunious persons (e.g. Legal Aid South Africa or even the University of the Witwatersrand Law Clinic).

obliged to engage legal representatives would already be quite compelling evidence that he has soberly considered his personal circumstances and has taken the question of his death seriously. Such a procedural requirement also serves to ensure that there can be no case of **VAS** unless it is instigated by the person himself. Given the gravity of what is being sought, this is highly desirable.

Second, by requiring persons to apply to court, the public would have **the Judiciary** acting as the final arbiter of whether a given person is entitled to engage in **VAS** or not. This would take the final determination to euthanize a given person out of the hands of physicians, other medical practitioners, family members, friends and any third party who might be acting nefariously or from morally dubious motives. Far better that such a decision ultimately be made impartially, by a trained jurist, with a fine sensitivity to mistake, abuse and deception. Again, this is highly desirable.

Third, by requiring persons to apply to court, the interest that the State (and the rest of society) has in promoting and protecting life could still be served. An application to court is a public act. It signals to the rest of society that one is part of it and that one is connected in innumerable ways to the rest of society and vice versa. It also signals that one does not solely conduct oneself according to one's own idiosyncratic moral standards but rather that one's choices and conduct should be capable of being justified to others. An application to court would require persons to justify their choice to die by articulating reasons, under oath, that could be reasonably understood and appreciated by society at large. Such a procedural step forces a person to take

ownership of their decision and live up to the humanistic ideal which I articulated at the beginning of our discussion. This is also highly desirable.

From a **substantive** viewpoint any given application to court should contain the following information and allegations in order to assist the court to appropriately judge the worthwhileness of the life in question and to come to a just decision:

- (i) The person's full name and personal details, including (a) their age (b) identity number (c) marital status (d) occupation (e) place of residence.
- (ii) A copy of the person's identity document or card must be attached to the application.
- (iii) Facts evidencing that the court has jurisdiction to entertain the application.
- (iv) An allegation that the application is being brought on the basis of the **Right to Life, Right to Human Dignity** and the **Right to Freedom and Security of the Person**.
- (v) Facts evidencing that the person is bringing the application in as **maximally autonomous** state as possible.

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- (vi) Such evidence must including facts showing that the person is (a) free of **external personal defeaters** to autonomy, and (b) free of **internal defeaters** to autonomy (including **defects of control, reasoning, information and stability**).
- (vii) A supplementary affidavit and report by either a clinical psychologist or a psychiatrist must be attached in which the following information must appear:
- (a) The psychologist's or psychiatrists full personal particulars including the allegation that they are registered with the **HPCSA**.
 - (b) The psychologist's or psychiatrist's scope of practice and expertise (if any).
 - (c) Full disclosure of the psychologist's or psychiatrist's relationship to the person (if any).
 - (d) Full disclosure of any and all financial, pecuniary or other legal benefits that the psychologist or psychiatrist might obtain as a result of the person's death.
 - (e) Facts evidencing that the psychologist or psychiatrist has recently examined or interviewed the person and such examination or interview must not have occurred more than two months prior to the launching of the application.

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- (f) Full details must be provided regarding the examination or interview including where, when and for how long the examination or interview occurred.
- (g) The psychologist or psychiatrist must have assessed the person's mental health to determine whether the person suffers from any recognised grounds of psychopathology and/or personality disorder.
- (g) The psychologist or psychiatrist must have assessed the person's mental capacity to appreciate the consequences of his choice, his ability to act in accordance with that appreciation as well as his reasons for wishing to die.
- (h) The psychologist or psychiatrist must have specifically considered and investigated any relevant factors that may militate against the conclusion that the person is acting in a **maximally autonomous** state, in particular, by considering any possibility of undue influence or coercion by third parties.
- (i) The psychologist or psychiatrist must have conducted interviews with the person's immediate friends, family and treating physicians (as the case may require) to obtain as complete a picture as possible of the person's familial and social circumstances.
- (j) The psychologist or psychiatrist must give his professional opinion as to whether the person is in a **maximally autonomous** state and whether he has

any professional reservations about allowing the person to proceed with the application and the reasons therefore.

- (k) The copy of the psychologist's or psychiatrist's report must be attached to the supplementary affidavit.
- (viii) A sufficiently detailed explanation of the reasons why the person is desirous of ending his life.
- (ix) This explanation will inevitably differ from person to person but all explanations must have sufficient particularity and detail so as to justify a conclusion that it would be reasonable to conclude (a) the person's life is no longer worthwhile and dignified, and/or (b) it is probable that the person's life will not be worthwhile and dignified in future.
- (x) Facts evidencing the person's present and future prospects for living a worthwhile and dignified life must be included as well as facts evidencing why his future prospects for a worthwhile life are not probable.
- (xi) In the event that the person's decision to end his life is based on medical grounds (e.g. terminal illness) then supplementary affidavits must be filed by at least two independent physicians each of which must include the following information:-

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- (a) The physician's full personal particulars including the allegation that he is registered with the **HPCSA**.
 - (b) The physician's area of practice and expertise (if any).
 - (c) The physician must detail his relationship to the person (if any).
 - (d) Full disclosure of any and all financial, pecuniary or other legal benefits that the physician might obtain as a result of the person's death.
 - (e) Facts evidencing that the physician has recently examined the person, which examination must not have occurred more than two months prior to the launching of the application.
 - (f) Full details of the examination must be provided including particulars as to where, when and for how long such examination occurred as well as what medical documentation was referred to in order to conduct the examination.
 - (g) A complete and detailed diagnosis of the person's present medical condition and the grounds for making such a diagnosis.
 - (h) A complete and detailed prognosis of the person's medical condition and the grounds for making such a prognosis.

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- (i) Details of any and all treatment options (including palliative care if applicable) that are available to the person.
 - (j) Evidence that such treatment options (if any) have been properly explained to the person and that the person has been fully informed of the consequences of each treatment option.
 - (xii) A confirmatory affidavit from a physician who is willing to assist the person, which affidavit must contain the following:-
 - (a) The physician's full personal particulars including the allegation that he is registered with the **HPCSA**.
 - (b) The physician's area of practice and expertise (if any).
 - (c) Full details of the physician's relationship to the person (if any).
 - (d) Full disclosure of any and all financial, pecuniary or other legal benefits that the physician might obtain as a result of the person's death.
 - (e) The physician must not have been one of the other two physicians who has previously examined the person.
 - (f) The physician must explicitly give his consent to assist the person.

(xiii) If no physician is capable or willing to assist the person then there must be a confirmatory affidavit by a family member or friend who is willing to assist the person, which affidavit must contain the following:-

(a) The family member or friend's full personal particulars.

(b) Full details of the relationship between the family member or friend and the person.

(c) Full disclosure of any and all financial, pecuniary or other legal benefits that the family member or friend might obtain as a result of the person's death.

(d) The reasons why they are willing to assist the person to end his life.

(e) The family member or friend must give explicit consent to assist the person.

(xiv) An explicit allegation that the person has consented to the physician, family member or friend (as the case may be) assisting him to end his life.

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- (xv) Facts justifying why the application should be heard *in camera* (if applicable).²¹⁸
- (xvi) Supplementary affidavits by the person's family or friends expressing their views on the person's decision (if any).
- (xvii) A supplementary affidavit by the person's attorney of record in which the following information must appear:-
- (a) The attorney of record's full personal particulars.
 - (b) Full details of the relationship between the attorney of record and the person.
 - (c) Full disclosure of any and all financial, pecuniary or other legal benefits that the attorney of record might obtain as a result of the person's death.
- (xviii) Facts detailing precisely where and when the person wishes to be assisted.
- (xix) The relief sought by the person, specifically whether the person wishes to engage in **DVAS** or **INVAS**.

²¹⁸ This means that the application is heard by the court without allowing other members of the public to be present at the hearing. This may be important in some highly sensitive matters where persons may wish to maintain their privacy in terms of section 14 of the Bill of Rights.

Faced with such an application the court would then be in the best position humanly possible to assess (i) the worthwhileness of the person's life (ii) the reasons for his decision to end his life (iii) the voluntariness of the request, and (iv) to scrutinize the case for any hint of abuse or mistake. By requiring the application to be supported by both medical and psychological expert evidence, the court would be greatly assisted in this regard and the probability of a mistake or abuse would be greatly reduced.²¹⁹

This is in addition to the fact that the application would be presented by trained legal professionals who, as officers of the court, are encumbered with an overriding professional duty of disclosure and honesty in the presentation of cases. The court, in deciding, whether a given person should be entitled to end his life would then be vested with a discretion whether to grant the application or not.²²⁰ However, the court would be obliged to adjudicate on the worthwhileness of the person's life with the **rebuttable autonomy view** firmly in mind.²²¹

B9. CONCLUSION

We have now reached the end of our discussion and it is time to take stock of the argumentative landscape that has been traversed. During the course of this analysis, I

²¹⁹ It is important to mention that the High Court has the inherent power to regulate its own procedure. Thus a court adjudicating on such an application would be entitled to call for further evidence and information on any matter before it and which would be relevant to its decision. This is yet another reasons why such a procedural safeguard is eminently desirable.

²²⁰ In light of the civil nature of the proceedings the court would make its decision in accordance with the civil standard of proof in South African law viz. on a balance of probabilities.

²²¹ The court's decision to allow a person to end his life would be embodied in a court order authorising the person to end his life with the assistance of another person.

have attempted to do four principal things. First, I presented what I believe to be the strongest ethical argument for the permissibility of **VAS** and for the implementation of a permissive policy across society at large. Second, I examined the two major arguments against the positive case viz. the **SLA** and the **SHA** and found both arguments unpersuasive. In doing so, it was nevertheless conceded that valuable insights were raised by such arguments, specifically relating to the need for effective oversight and regulation.

Third, I described the current ethico-legal attitude to **VAS** in a South African constitutional context and articulated how the positive case could be ‘translated’ into that context by an appeal to three rights enshrined in the Bill of Rights viz. **the Right to Life, the Right to Human Dignity and the Right to Freedom and Security of the Person**. Finally, I presented the two major methods that are available for reform in South Africa each appealing to **the Legislature** and **the Judiciary** respectively. I argued for the favourability of the latter as well as providing what I believe to be a robust set of safeguards viewed from both a **procedural** and **substantive** perspective.

It should go without saying that despite the forcefulness with which I have argued for my position, the conclusions I have come to cannot be said to be either definite or certain. I do, however, believe them to be well-motivated. The quest for certainty in moral philosophy (or philosophy in general for that matter) is almost always a fool’s errand. The value of this particular ethical journey does not necessarily reside in the conclusions that have ultimately been drawn but rather in the questions themselves,

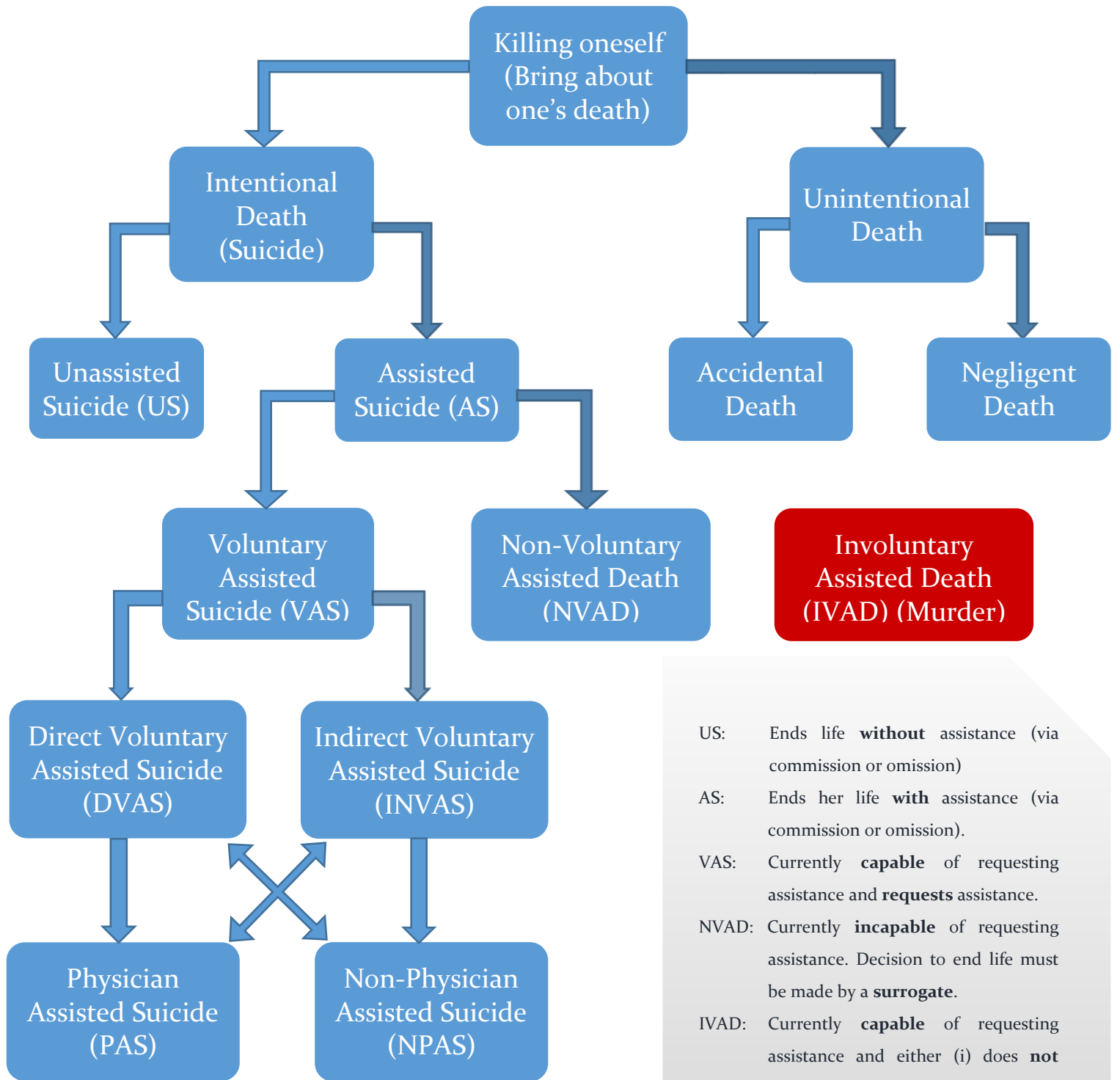
posed at the very beginning, and the process by which we attempted to courageously and honestly answer them.

We began by considering the nature of death and the value of life. From there we attempted to draw some conclusions about how we ought to live. Such questions compelled us to confront and judge the character of our *own* lives as much as we confront and judge the lives of others. Such questions also forced us to re-examine some of the uncritical assumptions that sat at the heart of our attitudes toward those who wish to end their lives, as well as engage in serious and sober reflection about how we would want our own lives to end. Over a hundred years ago, Bertrand Russell wrote:

Philosophy is to be studied, not for the sake of any definite answers to its questions, since no definite answers can, as a rule, be known to be true, but rather for the sake of the questions themselves; because these questions enlarge our conception of what is possible, enrich our intellectual imagination and diminish the dogmatic assurance which closes the mind against speculation; but above all because, through the greatness of the universe which philosophy contemplates, the mind is also rendered great, and becomes capable of that union with the universe which constitutes its highest good. (1912, p.161)

Perhaps by engaging in this ethical discussion about the value of human life we too can expand our imagination and begin to speculate about the various ways in which human life might lack value and why death might not always be the curse it is often thought to be. Such speculations may birth an even greater potential, namely, the possibility of enlarging our empathy as well as empowering us to judge, if only with a little more wisdom and compassion, the lives of our fellow man. And is this not something worth aspiring to? Is this not, in itself, something that makes life worth living?

APPENDIX I: ELYSIAN FIELDS: A THANATOLOGICAL TAXONOMY



- US: Ends life **without** assistance (via commission or omission)
- AS: Ends her life **with** assistance (via commission or omission).
- VAS: Currently **capable** of requesting assistance and **requests** assistance.
- NVAD: Currently **incapable** of requesting assistance. Decision to end life must be made by a **surrogate**.
- IVAD: Currently **capable** of requesting assistance and either (i) does **not** request assistance, and/or (ii) does **not** wish to end life.
- DVAS: Assistor, **himself**, ends the requester's life.
- INVAS: Assistor **provides means** to requester to end her life.
- PAS: Assistor **is** a physician
- NPAS: Assistor **is not** a physician.

EUTHANASIA COVERS BOTH VOLUNTARY ASSISTED SUICIDE AND NON VOLUNTARY ASSISTED DEATH

APPENDIX II: PRECEDENT APPLICATION TO HIGH COURT

**IN THE HIGH COURT OF THE REPUBLIC OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 1234/2017

In the Ex Parte application of:
(For leave to obtain assistance to die)

ADAM ACHERON

APPLICANT

NOTICE OF MOTION

KINDLY TAKE NOTICE that the Applicant intends making application to the above Honourable Court on **15 MARCH 2017** at **9h30**, or as soon thereafter as counsel may be heard, for an order in the following terms:-

1. The Applicant is declared to be:-
 - 1.1. Mentally competent;
 - 1.2. Of sound mind;
 - 1.3. Capable of free and voluntary action; and

- 1.4. Capable of appreciating the choice to end his life and the consequences thereof.
2. It is declared that the Applicant has chosen to end his life without any undue influence, coercion or compulsion and has made his decision autonomously.
3. The Applicant is, accordingly, granted leave to end his life with the assistance of Dr Charon Styx ('Dr Styx') by the administration (or provision of) a lethal agent at a date and time of the Applicant's choosing.
4. The Applicant is at liberty, any time after the granting of this order, to revoke his decision to end his life.
5. Dr Styx is ordered to maintain a written record of the assistance provided to the Applicant, together with a copy of this order as part of his medical practice.

TAKE NOTICE FURTHER that the founding affidavit of the Applicant as well as annexures thereto will be used in support of the application.

KINDLY place the matter on the roll for hearing accordingly.

DATED at JOHANNESBURG on the this 15th Day of MARCH 2017

APPLICANT'S ATTORNEYS DETAILS

TO: The Registrar of the above Honourable Court

Gauteng Local Division

Johannesburg

IN THE HIGH COURT OF THE REPUBLIC OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 1234/2017

In the Ex Parte Application of:
(For leave to obtain assistance to die)

ADAM ACHERON

APPLICANT

FOUNDING AFFIDAVIT

I, the undersigned

ADAM ACHERON

do hereby make oath and state that:-

1. The content of this affidavit is, unless the context indicates otherwise, within my personal knowledge and is both true and correct.

THE APPLICANT

2. I am an adult unmarried male with identity number 8615035041087, currently residing at 123 Elysian Fields, Johannesburg.

3. I am thirty one years old and unemployed. I am also a quadriplegic.
4. A copy of my identity document is attached hereto marked as annexure "A".

PURPOSE OF APPLICATION

5. The purpose of this application is to obtain the leave of the above Honourable Court to assist me to die with the assistance of a physician by the administration or provision of a lethal agent.
6. In bringing this application I rely principally on the following constitutional rights:-
 - 6.1. The right to life (section 11 of the Constitution);
 - 6.2. The right to human dignity (section 10 of the Constitution);
 - 6.3. The right to freedom and security of the person (section 12 of the Constitution).

JURISDICTION

7. The above Honourable court has jurisdiction to entertain this application insofar as I am ordinarily resident within the territorial jurisdiction of the court.

AUTONOMY AND PSYCHOLOGICAL REPORT

8. I have brought this application freely and voluntarily and without any undue influence, coercion or compulsion.

9. The decision to end my life has been one to which I have given serious and sombre consideration over a number of years. I acknowledge the gravity of the relief that I am seeking and am fully cognisant of what the consequences of such a request entail.

10. Attached hereto is a supplementary affidavit together with the attached report prepared by Alexis Psyche (**'Psyche'**), a clinical psychologist, marked as annexure **"B"**.

11. As is apparent from the conclusion to annexure **"B"** as well as the report attached thereto, Psyche has concluded that in her professional opinion:-
 - 11.1. I do not suffer from any diagnosable psychopathology or personality disorder.

 - 11.2. I am mentally competent and of sound mind.

 - 11.3. I am fully capable of appreciating the consequence of my choice to die.

-
- 11.4. I have given serious and proper consideration to the reasons I wish to end my life and have made my decision based on a stable and considered assessment of my current condition and my future prospects.
- 11.5. I am not being pressured or unduly influenced by my friends, family members and physicians to end my life.
- 11.6. She has no professional reservations about why I should not proceed with this application.
12. It is important to point out that my personal interview with Psyche was conducted on 30 January 2017 which is not more than two months prior to the launching of this application.
13. The complete account of her interview with me as well as her discussions with my friends, immediate family and treating physicians are set out in her affidavit and report.
14. I must also emphasise that Psyche is not related to me in anyway and does not stand to benefit in any way, shape or form from my death. This is similarly confirmed in her affidavit and report.

REASONS WHY I WISH TO END MY LIFE²²²

15. During or about January 2000 and when I was thirteen years old, I was involved in a motor vehicle collision that left me paralyzed from the neck down.

16. I am capable of speaking, eating and moving my head. However, I require a mechanical respirator to breathe for me. Every other aspect of my life is attended to by my mother who has looked after me since the day that I was paralyzed.

17. My mother looks after me in her home with the help of a nursing assistant. She herself is essentially a full time nurse. Not only does my mother cook for me, feed me and bathe me but she also dresses me and ensures that I am turned regularly so that I do not suffer from any bed sores. My mother and father divorced a few years before my car accident and I have no meaningful relationship with him as an adult.

18. Although I was capable of graduating from high school through a specialised correspondence program, my dream to study at the tertiary level, graduate with a law degree and ultimately become a criminal prosecutor is not even remotely possible for me.

19. My day to day existence consists of being stuck motionless in a room watching sports

I will never play on television and reading magazines and books about people living

²²² I have adapted the facts presented here from the real case of quadriplegic Dan Crews, whose story was published online by the Journal Sentinel (Ghose, 2010, November 28).

active and exciting lives I will never lead. I am forced to use an electronic pointer to change the television stations. I have no further educational prospects, I am not employable and have no friends. Most painfully, I have no romantic prospects and the thought of growing older alone without any romantic companionship is both terrifying and loathsome.

20. The most demeaning and degrading aspect of my paralyzed condition is the fact that absolutely nothing is under my control. I cannot walk outside in the sunshine, or feel what it would be like to walk hand in hand with someone I love through a park. I cannot play sports with friends or go see a movie when I want to. I cannot travel to the countries I see on television documentaries and in the travel magazines I read. I can never have sex. I am not able to dress myself or bathe myself.
21. None of the things that make life dignified, rich or fulfilling are open to me. While I have a motorized wheelchair that allows me to travel outside on occasion, under the supervision of my mother, such outings serve only to remind me of all the things I will never be able to do, create or experience. The psychological and emotional agony is unbearable to me and so I prefer not to even use my wheelchair.
22. While I could, in principle, end my life by ceasing to eat and drink I am terrified that such a death would be painful, degrading and drawn out. Not only am I terrified for myself when I contemplate such a death, but I could not wish to put my mother through such a horrific ordeal viz. having to watch her only son waste away agonizingly before her eyes.

23. The fact that I am not even capable of ending my life in a dignified way only exacerbates my feeling of helplessness and isolation. While I have been on antidepressants for a number of years they have done nothing to alleviate the psychological distress I go through on a daily basis. Every day that I wake up is another day that forces me to face all my limitations and be reminded of the things I will never be. However, given my immobility, there is simply no way for me to end my life without the assistance of another person. This inability to take my own life serves only to exacerbate my feeling of hopelessness and the utter lack of control over my own destiny.

24. The chances of my condition improving in future are non-existent and there is no chance of me recovering from my paralysis given the state of contemporary medical science.

MEDICAL EXAMINATION AND REPORT

25. Supplementary affidavits by two independent physicians – Dr Rhadamanthus and Dr Cronus - are attached hereto marked as annexures “C1” and “C2” respectively.

26. As can be seen from the content of these affidavits, both physicians:-

26.1. Confirm and corroborate my diagnosis.

26.2. Confirm and corroborate the prognosis for my medical condition.

- 26.3. Confirm and corroborate my description of the quality of my life.
- 26.4. Confirm that I have been informed of all my treatment options (given the nature of my medical condition) and what the consequences are for me should I wish to pursue those respective treatment options.
27. It is important to emphasise that I was examined by both physicians on 10 and 11 February 2017 respectively, which was not more than two months prior to the launching of this application. The complete account of respective examinations is as well as the supporting documentation is set out fully in their respective affidavits.
28. I must also emphasise that neither physician is related to me in anyway nor do either of them stand to benefit in any way, shape or form from my death. This is similarly confirmed in their respective affidavits.
29. I have considered all the treatment options that have been put to me and I have decided to reject all of them. None of these treatment options would allow me to live the life I wish I could live. I want nothing more than to escape from the prison that my life has become over the past seventeen years. However, I wish to do so in a quiet, peaceful and dignified manner with my mother at my side.

CONSENTING PHYSICIAN

30. I have managed to obtain the services of a physician who has agreed to assist me in ending my life – Dr Charon Styx (**‘Styx’**).
31. A supplementary affidavit from Styx is attached hereto marked as annexure **“D”**.
32. As can be seen from Styx’s supplementary affidavit:-
- 32.1. He has explicitly consented to assist me to end my life.
- 32.2. Has absolutely no personal relationship with me and is not one of the other two physicians who examined me.
- 32.3. He does not stand to gain any benefit at all from my death.
33. I would also refer to the supplementary affidavits of my mother which is attached hereto marked as annexure **“E”**.
34. While my mother understandably does not wish me to end my life she accepts and respects my decision. She does not wish to see me in such emotional and psychological anguish.

35. I must point out, in the interest of full disclosure, that I have prepared a will, which is in the possession of my attorneys of record, in terms of which I name my mother as my sole beneficiary of my estate when I die.

36. A copy of my will which contains a full accounting of my estate is attached hereto marked as annexure “F”. Finally, a supplementary affidavit by my attorney of record is attached hereto marked as annexure “G”.

CONCLUSION

37. In conclusion, I humbly request that the above Honourable Court grant the relief as set out in the notice of motion to which this affidavit is attached.

ADAM ACHERON

I HEREBY CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, WHICH WAS SIGNED AND SWORN BEFORE ME AT _____ ON THIS THE _____ DAY OF _____ 2017, THE REGULATIONS CONTAINED IN GOVERNMENT NOTICE NO 3619 OF 21 JULY 1972 AND NO 1648 OF 19 AUGUST 1977 HAVING BEEN COMPLIED WITH.

COMMISSIONER OF OATHS

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