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The Right to be Killed:
Reassessing the Case for the Moral Right to Voluntary Active Euthanasia

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ABSTRACT

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This thesis defends an individual's moral right to be aided in dying by a physician (that is, voluntary active euthanasia, or VAE), but departs significantly from the view in its favor generally accepted in the bioethics literature. The prevailing view appeals to both respect for an individual's autonomy and promotion of an individual's well-being as necessary conditions for a right to VAE, so as to justify the right only for those suffering grave illnesses and/or disabilities. The author argues that such a view is logically untenable; one or another aspect must be given up. Since invoking the premise that certain individuals would be better off dead necessarily relies on controversial assumptions about both the value of life and the nature and value of death, about which reasonable people disagree, it is the justification from an individual's best interest which must be excluded in a liberal society. The author endorses a self-determination justification for the right to VAE, but rejects understanding this in terms of respecting personal autonomy, instead making the case for a right to VAE grounded in self-ownership. The author's main conclusion is that the right to VAE is a general right applying to all competent adults, not only those suffering grave illnesses or disabilities, or those whose choice for VAE is an exercise of autonomy. Moreover, by analyzing the basis of physician authority over prescription medicine and how this can be justified to a society of self-owners, she maintains that individuals have not only the right to choose VAE without state interference, but also the right to be *provided* VAE by doctors. Nevertheless, both rights are compatible with reasonable limitations to protect both the interests of VAE seekers and the rights of others.

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In memory of my grandparents—forever my center of gravity.

For my mother, Amy Chen. At my age, you were out in the world fighting tirelessly for a better life for us. Because of your sacrifices, at the same age, I got to sit in libraries at Oxford, contemplating how the world could be made better. Thank you for giving me the priceless opportunity to think about life and live by my dreams.

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INTRODUCTION

In the past decade, a debate has been waging—in courts, in the media, and in academia—over whether we should allow physicians to actively assist patients who wish to end their lives. Whether one believes legalization of voluntary euthanasia is sanctioned murder or recognition of a fundamental right, it is undeniable that the decision to be made will carry momentous consequences—not only for those directly affected, but also for its implications for our relationship to one another. Is there such a moral right to be respected? This thesis is the result of my exploration of this urgent political question. To specify, my concern is with *voluntary active* euthanasia. The two italicized terms need to be clarified. In *active* euthanasia, a physician intentionally kills the patient (e.g. by providing a pill or lethal injection); this is usually distinguished from *passive* euthanasia, in which the physician allows the patient to die (e.g. by withholding or removing a respirator or feeding tube). *Voluntary* indicates that the act is done at the patient's request, and is to be contrasted with both *involuntary* euthanasia, which is done against the patient's will, and *nonvoluntary* euthanasia, which is done without patient consent because the patient is incapable of it.[1] To put it concisely, the specific form of euthanasia I am interested in is *voluntary active euthanasia*—hereafter, VAE—an act in which a physician kills a patient at the patient's request.

[1] For a discussion of these distinctions within the literature, see Thomas Mappes & David DeGrazia, ed. *Biomedical Ethics*, 4th ed. (New York: McGraw-Hill Publishing, 1996), p. 370-71. Some proponents of euthanasia further distinguish physician-assisted suicide from voluntary active euthanasia on the grounds that in the former, the patient acts last (as with the taking of a pill) and in the latter, the physician does (as with the injection of a drug). The idea is that a right to physician-assisted suicide may be easier to justify, as the patient kills *himself* in this case. I will not make use of this distinction in my thesis—I wish to defend both the case in which the patient acts last and the allegedly more controversial case in which the physician acts last.

My aim in this thesis is to defend a particular version of the moral right to VAE. More precisely, my thesis challenges three features of the prevailing view in favor of this right.[2] First, the normative grounds for the moral right to VAE is usually seen to rest on both a person's autonomy and a person's best interest, which are taken to be necessary and sufficient for justifying the right. Second, most proponents defend a moral right to VAE only *in extremis*—the moral right is seen to apply only to individuals suffering from grave and incurable illnesses or disabilities (e.g. end-stage cancer, Lou Gherig's Disease, multiple sclerosis, beginning Alzheimer's, and quadriplegia). Third, the right defended is only a moral right held against a state or other third party from interfering with a *willing* doctor who provides VAE under the circumstances above; it is usually not contended that a physician has a moral duty to provide the service.

My thesis aims to challenge both the conclusion and the normative foundation of this view. I contend that individuals have a moral right to VAE predicated solely on their self-ownership—an individual's best interest cannot have any part in the justification of the right to VAE. Self-ownership, I argue, grounds a moral right to VAE that applies generally to all competent adults who request it, with weak limitations to be delineated in due course. Moreover, we shall see that self-ownership generates a morally enforceable duty on the part of physicians to provide VAE, with suitable

[2] The prevailing view will be discussed in detail in Section 2. Works that exemplify this view include R.G. Frey Gerald Dworkin, & Sissela Bok, *Euthanasia and Physician-Assisted Suicide*, ed. R.G. Frey, For and Against (Cambridge: Cambridge University Press, 1998), pp. 1-16; Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics*, 6th ed. (New York; Oxford: Oxford University Press, 2009), pp. 177-84; Philippa Foot, "Euthanasia," *Philosophy & Public Affairs* 6, no. 2 (1977): pp. 85-112; Frances Kamm, "Physician-Assisted Suicide, the Doctrine of Double Effect, and the Ground of Value," *Ethics* 109, no. 3 (1999): pp. 586-605; "Ronald Dworkin on Abortion and Assisted Suicide," *The Journal of Ethics* 5, no. 3 (2001): pp. 228-40; Ronald Dworkin, *Life's Dominion: An Argument About Abortion and Euthanasia* (London: Harper Collins, 1995), pp. 179-241; Glanville Williams, "Euthanasia Legislation: A Rejoinder to the Non-Religious Objections," in *Euthanasia and the Right to Death: The Case for Voluntary Euthanasia*, ed. A.B. Downing (London: Owen, 1970), pp. 134-47; Robert Young, *Medically Assisted Death* (Cambridge Cambridge University Press, 2007), pp. 1-60; Dan Brock, *Life and Death: Philosophical Essays in Biomedical Ethics* (Cambridge: Cambridge University Press, 1993), pp. 202-34; Margaret Pabst Battin, *The Least Worst Death: Essays in Bioethics on the End of Life* (New York: Oxford University Press, 1994), pp. 101-29.

restrictions, to all competent adults on request. I believe this argument and conclusion is a novel and important contribution to the literature.

In this Introduction, I will first give a brief account of the history of suicide and euthanasia in Western culture (Section 1). I will then discuss the current philosophical literature on VAE (Section 2), before outlining the argument of this thesis (Section 3). I will end with a short discussion of the methodology used in this thesis (Section 4).

1. THE HISTORY OF EUTHANASIA

In Western society, there has been a strong tradition of opposition against suicide and euthanasia which spans back to the early days of Christianity.[3] Though the New Testament contains no explicit rejection of such acts, their classification as sins was propagated by early church fathers, and justified by St. Augustine and St. Thomas Aquinas.[4] It was also during this time that the Hippocratic Oath, owing to its accordance with Christian values, became established as the ethical foundation of Western medical ethics.[5] The Oath explicitly prohibited euthanasia: "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect."[6] With the coming of the Enlightenment, even though philosophers began questioning traditional authority, many maintained the traditional Christian view on self-willed

[3] See Ian Dowbiggin, *A Concise History of Euthanasia: Life, Death, God, and Medicine* (Oxford: Rowman and Littlefield Publishers, 2005), p. 12; Michael Cholbi, "Suicide," in *The Stanford Encyclopedia of Philosophy* (Winter 2012).

[4] See St. Augustine, *City of God*, trans. Gerald G. Walsh, et al. (Garden City, N.Y.: Image Books, 1958), Book I, chapter 20; St. Thomas Aquinas, "Summa Theologica," in *Basic Writings of Saint Thomas Aquinas*, ed. Anton Pegis (New York: Random House, [1273] 1945), II, q. 64, a. 5.

[5] On the rise of the Hippocratic Oath during the Christian period, see John Harris, ed. *Bioethics* (Oxford: Oxford University Press, 2001), pp. 1-2; Dowbiggin, *A Concise History of Euthanasia*, p. 10. On the Hippocratic Oath being the foundation of Western medical ethics, see Helga Kuhse & Peter Singer, "What is Bioethics? A Historical Introduction," in *A Companion to Bioethics* (Oxford: Blackwell Publishing, 2012), pp. 4-5.

[6] See Ludwig Edelstein, *The Hippocratic Oath: Text, Translation, and Interpretation* (Baltimore: The John Hopkins Press, 1943), p. 6. This seems to explain why some of the strongest opposition against euthanasia today comes from the medical profession itself.

deaths.[7] John Locke, for example, argued that while no individual has rightful ownership over another, we are all ultimately God's property, and so have no right to terminate our lives.[8] Kant also forcefully condemned suicide, arguing that in destroying the rational will, suicide destroys the source of morality and degrades human worth.[9]

In society, Christianity and its stance against suicide remained steadfast throughout the 19th century.[10] The rise of science in the 20th century in many ways reinforced rather than challenged the cultural taboo. Psychology and sociology developed the scientific model of suicide, establishing it as a mental and social illness.[11] After the Nazis, inspired by principles of Social Darwinism, practiced "euthanasia" on the handicapped, the insane, and the mentally disabled, euthanasia became attached with sinister motives—something it has never quite shaken off.[12] Nevertheless, forces motivating the euthanasia movement progressed in society and reached a tipping point in the latter half of the 20th century, propelling the topic quickly to the forefront of public and philosophical debate.

One of these forces was the advance of medical technology. In the 20th century, medical breakthroughs changed the scene of life and death choices. In particular, the development of life support technologies in the 1950s allowed humans to sustain lives in previously fatal circumstances. One was now able to survive when one's digestion has shut down (by attaching total parenteral nutrition), one's kidneys have failed (by

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[7] Some Enlightenment thinkers did endorse suicide, including David Hume, Voltaire, and Montesquieu. See David Hume, *Of Suicide* (New York: Penguin, [1783] 2005); George Minois, *History of Suicide: Voluntary Death in Western Culture*, trans. Lydia G. Cochrane (Baltimore: John Hopkins University Press, 1999), pp. 228-34.

[8] See John Locke, *Second Treatise of Civil Government in Locke's Two Treatises of Government* (Cambridge: Cambridge University Press, [1690] 1960), ch. 2, para. 6.

[9] See Immanuel Kant, "The Metaphysics of Morals " in *Practical Philosophy*, ed. & trans. Mary J. Gregor (Cambridge: Cambridge University Press, [1797] 1996), 6:421-6:423.

[10] See Dowbiggin, *A Concise History of Euthanasia*, p. 39.

[11] See Battin, *Least Worst Death*, pp. 186-188. Battin discusses three subtypes of the scientific model of suicide which are "ubiquitous in contemporary medical and psychiatric practice" (p. 188): (1) the medical model—suicide as a mental illness or the product of mental illness; (2) the "cry for help" model—suicide as a communicative strategy; and (3) the sociogenic model—suicide as a product of social forces (as argued by Emile Durkheim).

[12] See Neil M. Gorsuch, *The Future of Assisted Suicide: For the Right to End-of-Life Care* (Princeton, N.J.: Princeton University Press, 2006), pp. 35-37; Marvin Kohl, "Voluntary Beneficent Euthanasia," in *Beneficent Euthanasia*, ed. Marvin Kohl (Buffalo: Prometheus Books, 1975), p. 114.

attaching a dialysis machine), and even when one could no longer breathe (by attaching a respirator). In short, more lives were being saved, but the possible quality of life one could have became lower than ever before. Scientific advance created a situation in which the question "Would it be better for me to die now rather than to live on?" became relevant to many people who would not have had the opportunity to contemplate this choice before. Moreover, medical advance allowed for extreme ways of existence which were not always coupled with the need for life support, and so could not easily be ended by refusing treatment. For example, while as late as the 1940s, the quality of life of people with quadriplegia was not a problem for long because they died within a few weeks, new understanding in the 1950s of how to treat spinal lesions in the acute stages meant that such people could survive for a very long time.[13] Since such individuals, while requiring some medical treatment, often did not require respirators or other life support, their lives could not easily be ended by withholding or withdrawing treatment. In short, the increase in survival in such extreme physical conditions meant that there was a growing demographic of people preferring death to life, and for reasons many who otherwise believed suicide should be prevented found compelling.

The right to die campaign began in the 1970s with a push for the right to *passive* euthanasia. Activists fought for legal affirmation of both *voluntary passive* euthanasia—allowing patients to die (i.e. by withholding or withdrawing treatment) at their request—and in certain cases of particularly grave illness, *nonvoluntary passive* euthanasia—allowing patients to die without consent because the patient is incapable of it (e.g. brain-dead patients and seriously deformed newborns). Eventually, proponents for euthanasia won the fight for both voluntary and nonvoluntary passive euthanasia.[14]

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[13] For a history of the treatment of spinal injuries, see William H. Donovan, "Spinal Cord Injury--Past, Present, and Future," *The Journal of Spinal Cord Medicine* 30, no. 2 (2007).

[14] The two seminal court cases that established the right to voluntary passive euthanasia in the U.S. were that of Karen Ann Quinlan and Nancy Cruzan. Both women had fallen into persistent vegetative states—Quinlan's family won the right to have her taken off of a respirator and Cruzan's family won the right to have her taken off of artificial feeding and hydration. See *In Re Quinlan*, 70 N.J. 10, 355 A.2d 647

Since the 1990s, the debate has centered on whether individuals have a moral and legal right to VAE. Despite numerous court battles, this remains a highly contested issue in both society and in the philosophical literature.[15]

2. THE CURRENT LITERATURE

Philosophers in favor of VAE are usually interested in defending both the moral *and* legal right. A general structure of arguments in favor of VAE may be delineated as follows: 1.) a positive argument is made for the moral right; 2.) objections to the moral right are rebutted; 3.) objections such as abuse and practical slippery slope are addressed to show that the moral right ought to be institutionalized (occasionally, the moral right is constrained in light of practical considerations).[16] My concern is with the first step of the argument: the positive justification for the moral right.

The reason for my focus is two-fold. Firstly, it is underexplored. Margaret Battin, one of the central proponents of VAE, criticizes her own camp, pointing out that "characteristic of the current debate . . . on the 'for' side is to move straight to the attack

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(1976) and *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990). The later well-known case of Terri Schiavo involved similar circumstances as that of Cruzan, but became highly contentious in part due to the dispute between Schiavo's husband and parents regarding her care and previous wishes. In England, the most influential case was that of Tony Bland, whose family won the right to have him taken off of artificial feeding and hydration after he had fallen into a persistent vegetative state following being trampled at a football stadium. See *Airedale N.H.S. Trust v. Bland*, A.C. 789 (1993). Affirmation of the right to be taken off artificial feeding and hydration came after recognition of the right to withdraw other treatments because of the "symbolic significance" thought to attach to withholding food and water from a person. See DeGrazia, *Biomedical Ethics*, p. 307.

[15] Amongst the most famous court cases regarding the right to VAE are perhaps the U.S. Supreme Court cases of *State of Washington v. Glucksberg* and *Vacco v. Quill* in 1997, which led to the anomalous co-authorization of an amicus brief by six of the most well-respected philosophers of our time: Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, and Judith Jarvis Thomson. See Ronald Dworkin et al., "Assisted Suicide: The Philosophers' Brief," *New York Review of Books* (27 March 1997), http://www.nybooks.com/articles/archives/1997/mar/27/assisted-suicide-the-philosophers-brief. Despite the amicus brief, the U.S. Supreme Court decided against the legal right to VAE in both cases. At the time of the submission of this thesis, some form of VAE is legal in just a handful of jurisdictions—namely, Switzerland, Netherlands, Belgium, Luxembourg, Colombia, and the U.S. states of Oregon, Washington, Montana, and Vermont. Some form of VAE is set to become legal in Canada and the U.S. state of California sometime in 2016.

[16] See Battin, *Least Worst Death*; Dworkin, *Life's Dominion*; Young, *Medically Assisted Death*; Beauchamp and Childress, *Principles of Biomedical Ethics*; Brock, *Life and Death*; Gerald Dworkin, *Euthanasia and Physician-Assisted Suicide*. For an outline of the structure of current debate see Margaret Pabst Battin, *Ending Life: Ethics and the Way We Die* (New York: Oxford University Press, 2005), p. 18.

against their opponents"—that is, to fight on the opponents' "turf."[17] The justification for the moral right, she argues, is often glossed over: "[w]hat they do is *assume* the principles on which their side of the argument is based, principles of autonomy and freedom from suffering, without explicitly or directly defending these principles," even though the moral justification "is where the really interesting philosophical work might occur."[18] Unfortunately, Battin does not offer a fuller account here, and her own understanding of the moral right to VAE is, as has been pointed out elsewhere, similarly vague.[19] Nevertheless, I think her observation is correct: proponents by and large state the moral case and swiftly move on to other issues, assuming it to be uncontroversial. Glanville Williams, for example, writes, "The argument in favour of voluntary euthanasia . . . is a quite simple one."[20] Gerald Dworkin states, "The reasons for favoring physician-assisted suicide are not difficult to determine."[21] Robert Young calls it a "very straightforward moral case."[22] Of course, the lack of an extensive analysis of the normative basis for the right to VAE would not be troublesome if the case were indeed unproblematic. The second reason for my focus is that I believe both the justification and conclusion generally accepted for the moral right are unsustainable.

There are three distinctive features of the prevailing view in favor of VAE—which, for brevity, I will call the Standard View—that will be challenged in this thesis. The first two features I will describe pertain to its conclusion, and the third pertains to its argument. First, proponents usually carve out a special set of circumstances in which the right to engage in VAE applies. More specifically, such a right is thought to extend

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[17] *Ending Life*, pp. 33 & 34.
[18] Ibid., pp. 33-34. Emphasis in original.
[19] See Julian Savulescu, "Review: The Least Worst Death, by Margaret Pabst Battin," *Journal of Medical Ethics* 22, no. 3 (1996).
[20] Williams, "Euthanasia Legislation," p. 134.
[21] Gerald Dworkin, "Introduction," in *Euthanasia and Physician-Assisted Suicide*, ed. R.G. Frey Gerald Dworkin, & Sissela Bok (Cambridge: Cambridge University Press, 1998), p. 3.
[22] Robert Young, "Voluntary Euthanasia," in *The Stanford Encyclopedia of Philosophy* (Fall 2010).

only to individuals suffering from extreme and incurable diseases and disabilities.[23] Williams, for example, endorses the right given three conditions: "euthanasia, the merciful extinction of life, is morally permissible and indeed mandatory where it is performed upon a dying patient with his consent and where it is the only way of relieving his suffering."[24] As John Keown notes, for advocates, one of the essential features of the moral right is that "the patient is suffering gravely from a terminal or incapacitating illness or . . . the patient's condition is thought to be an 'indignity.'"[25] That is, the right to VAE is a right *in extremis* only—applying to those at the end of or barely hanging onto life; individuals who wish to die but who are *not* suffering from grave physical conditions have no right against state intervention. Battin bluntly states that "if the person is healthy and without pain, we will interfere to keep him or her alive (preventing, for instance, suicide attempts)."[26] Ronald Dworkin similarly acknowledges in his defense of VAE that if the person is healthy, "we might think it right to try to prevent his suicide."[27] Frances Kamm is particularly adamant that the moral right to VAE cannot be a general one, as it cannot be that a person who simply "wishes to give up his life for some noble causes" should be allowed to empower another to kill him.[28]

Now, there are slight variations in the particular reasons for VAE that advocates claim should be protected. For example, while Battin and Ronald Dworkin suggest that VAE requests invoking the ordinary infirmities of old age should be respected, not everyone believes such a reason qualifies.[29] Proponents also differ on whether individuals with grave illnesses but who want to die not because they believe their

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[23] One exception to this general view is Tristram Engelhardt, who endorses a broad right to VAE. See Tristram Engelhardt, *The Foundations of Bioethics* (New York; Oxford: Oxford University Press, 1996), pp. 341-57.
[24] Glanville Williams, *The Sanctity of Life and the Criminal Law* (New York: Knopf, 1957), p. 311.
[25] John Keown, *Euthanasia Examined: Ethical, Clinical, and Legal Perspectives* (Cambridge: Cambridge University Press, 1995), p. 10.
[26] Battin, *Least Worst Death*, p. 111.
[27] Ronald Dworkin, *Life's Dominion: An Argument About Abortion and Euthanasia* (London: Harper Collins, [1993] 1995), p. 193.
[28] Kamm, "Ronald Dworkin on Abortion and Assisted Suicide," p. 234.
[29] See Battin, *Least Worst Death*, p. 271-75; Dworkin, *Life's Dominion*, pp. 218-42.

condition is a burden for themselves *per se*, but because they believe it is a burden *for others,* have a right to VAE. Philippa Foot holds that we may intervene in such cases: if a person "wants to die for the sake of someone else on whom he feels he is a burden," she says, "his wish to die might here be opposed for his own sake just as it might be if suicide were in question."[30] Against this, Ronald Dworkin argues that wanting to die so as not to be "continuing objects of anguish" should be respected, though only because he believes "the aversion [against this] is not fully captured in that other-regarding preference"—it has at least in part to do with concern for one's own good.[31] Despite these discrepancies, a general line is drawn between those who wish to die because of personal suffering stemming from some grave physical affliction, and everyone else.

The second feature of the Standard View is that a patient's request in certain circumstances is usually thought to give a physician *permission* to perform VAE, such that third parties, like the state, have a duty not to intervene. Most advocates of VAE do not hold that physicians have any duty to *provide* VAE at the patient's request.[32] Indeed, many theorists take pains to explicitly deny such a duty. As Brock notes, "physicians too are responsible agents whose moral and professional commitments sometimes will justify an unwillingness to follow patients' wishes."[33] Ronald Dworkin et. al. emphasize, "The right in question . . . is only a right to the help of a willing doctor"—patients "have no right to compel a doctor to assist them."[34] This, too, will be challenged by my thesis.

Thus far, I have noted two distinctive features of the Standard View concerning its conclusion—the first concerns when people can exercise the moral right, and the

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[30] Foot, "Euthanasia," pp. 107-8.
[31] Dworkin, *Life's Dominion*, p. 210.
[32] I refrain from framing this as a distinction between negative and positive rights because, as we shall see in Chapter 5, the right to be provided VAE by doctors turns out to be a negative right.
[33] Brock, *Life and Death*, p. 4.
[34] Dworkin et al., "Assisted Suicide: The Philosophers' Brief". One exception to the general trend is Kamm, who offers an argument for a doctor's duty to provide VAE in the particular case where a patient's physical pain makes death in his best interest. See Kamm, "Ronald Dworkin on Abortion and Assisted Suicide," pp. 239-40.

second, what duties it entails. The third distinctive feature of the Standard View to be rejected has to do with its normative foundation. The most common approach to justifying the narrow right to choose VAE without state interference combines two "fundamental moral principles" or "moral norms" which are considered necessary and sufficient for justifying the right.[35] Robert Young, who supports the Standard View, explains that there are two key arguments which proponents offer "in the full knowledge that neither argument in isolation can make the moral case."[36] Gerald Dworkin indicates that the two reasons are "most naturally and plausibly understood as providing necessary conditions that, in suitable circumstances, may be together sufficient for making [VAE] permissible."[37]

The first argument appeals to respect for personal autonomy—that is, respect for a person's freedom to shape her life according to her own conception of what is valuable in human life. Since the choice to live or die is a central decision in a person's life, involving a person's most basic values and commitments, respect for personal autonomy requires respecting a person's choice regarding VAE. Ronald Dworkin outlines this line of thought, which he ultimately affirms: "People who believe that competent patients should be permitted to arrange their own deaths, with the assistance of willing doctors if they wish, often appeal to the principle of autonomy. They say that it is crucial to people's right to make central decisions for themselves that they should be allowed to end their lives when they wish, at least if their decisions is not plainly irrational."[38] In their discussion of the literature, Thomas Mappes and David DeGrazia summarize this arm of the justification succinctly: "Individual choice should be respected to the extent that it does not result in harm to others. Since no one is harmed

[35] Respectively, Battin, *Ending Life*, p. 96; Beauchamp and Childress, *Principles of Biomedical Ethics*, p. 85.
[36] Young, *Medically Assisted Death*, p. 21.
[37] Gerald Dworkin, *Euthanasia and Physician-Assisted Suicide*, p. 10.
[38] Dworkin, *Life's Dominion*, p. 190.

by terminally ill patients' undergoing active euthanasia, a decision to have one's life ended in this fashion should be respected."[39]

The second argument necessary for making the case for the moral right is that under certain conditions, death is in the best interest of the person. As Keown notes, "[T]he belief that in some circumstances death is better than life, that life is no longer worth living, is an important strand in the argument for VAE . . . . The bulk of those campaigning for relaxation of the law weave the two strands together."[40] Kamm stresses that the argument for the moral permissibility of VAE relies "on showing that we would do him a greater good."[41] Elsewhere, she explicitly endorses the "dual condition"—in determining the scope of the moral right, "both [the patient's] right to autonomy and the duty not to harm apply."[42] Variously referred to as the principle of non-maleficence, beneficence, mercy, compassion, and best interest, the idea is that not just *any* autonomous choice for VAE should be free from intervention, but only autonomous choices *consistent with the person's well-being*. Gerald Dworkin summarizes this view: "If euthanasia is justified, it is because death is in the interest of the person, and because it is the settled intent of the person that chooses death."[43]

Why join such odd bedfellows? One reason has already been indicated: the well-being requirement protects individuals who are healthy or whose conditions are not truly dire for them. For some proponents, permitting VAE in the latter cases is intuitively wrong. This seems to be Kamm's starting point: "I suggest [the] theoretical argument is too broad if it yields [the] conclusions" that "a person has a right to assisted suicide from a willing physician if he decides his medical treatment is consuming too

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[39] DeGrazia, *Biomedical Ethics*, p. 371.
[40] John Keown, *Euthanasia, Ethics and Public Policy: An Argument Against Legalisation* (Cambridge: Cambridge University Press, 2002), p. 52.
[41] Frances Kamm, *Morality, Mortality, vol. 2: Rights, Duties, and Status* (New York: Oxford University Press, 1996), p. 197.
[42] "Physician-Assisted Suicide," p. 590.
[43] Gerald Dworkin, "Patients and Prisoners: The Ethics of Lethal Injection," *Analysis* 62, no. 2 (2002): p. 189.

much of his family's finances or if he wishes to give up his life for some noble cause."[44] From this, she reasons that a patient's best interest must be a condition for the right against intervention in VAE. Other advocates appear to deny the moral right to VAE for healthy individuals as a concession to opponents. Critics often claim that the argument for the right to VAE in exceptional cases logically commits one to affirming the right for everyone, and since the latter is manifestly wrong, the former must be as well—this is known as the "logical slippery slope."[45] In dealing with the objection, proponents tend to concede the premise, and appeal to the well-being criterion as a principled way of endorsing the right to VAE *in extremis* without supporting the allegedly unacceptable cases. Thus, Gerald Dworkin rebuts Kass' logical slippery slope objection by stressing the dual conditionality: "Kass sets up a straw man. He considers a view that counts either 'choice' or 'life not worth living' *but not both* as the relevant considerations. And, indeed, if either of these views is considered by themselves they do have unwanted implications. But the most plausible view [is] that it is both choice *and* condition that make a doctor's killing permissible."[46]

There is also a more theoretical reason for requiring both criteria to be met. By affirming a justification which balances the principles of well-being and autonomy, VAE advocates appear to be able to justify a controversial right from moderate premises. This conservative approach has been particularly important in bioethics. The discipline arose in the 1970s in the shadow of traditional medical ethics, which had been focused solely on patient well-being—specifically, patient health. Mappes and DeGrazia describe the paradigm shift:

> The Hippocratic Oath reflects the traditional paternalism of the medical profession. The oath requires physicians to act so as to 'benefit' the sick

[44] Kamm, "Ronald Dworkin on Abortion and Assisted Suicide," p. 234.
[45] See Daniel Callahan, "When Self-Determination Runs Amok," *The Hastings Center Report* 22, no. 2 (1992): p. 64; Keown, *Euthanasia, Ethics and Public Policy*, p. 79.
[46] Gerald Dworkin, *Euthanasia and Physician-Assisted Suicide*, p. 10. Emphasis in original.

> and 'keep them from harm, but it says nothing about patients' rights. Most of the medical codes of ethics developed through the years by the American Medical Association reveal a similar approach . . .. For example, physicians are expected to promote their patients' well-being, but nothing is said about a patient's right to define his or her own well-being, or to participate in decisions affecting it. In contrast, the discussions that have taken place over the past quarter of a century in biomedical ethics have frequently emphasized patients' rights, especially the right of self-determination.[47]

With this paradigm shift, some bioethicists feared the "triumph of autonomy."[48] But, in reality, most liberal bioethicists, perhaps as a reaction to their criticisms, affirmed the need to balance concern for autonomy with the traditional concern for patient well-being. A testament to this is the emergence of Tom Beauchamp's and James Childress' Four Principles as one of the main approaches to bioethics. They propose four moral principles—respect for autonomy, non-maleficence, beneficence, and justice—which determine moral rights and duties in medicine. The four values are to be balanced *in situ*, with none having lexical priority over another.[49] As we saw above, many VAE proponents seem to argue within this framework. The advantage of incorporating both an individual's autonomy and well-being in the justification is illustrated by the fact that though Beauchamp and Childress initially rejected the right to VAE, they eventually sided with supporters.

To summarize, in this section, I have delineated three notable features of the Standard View in favor of VAE. First, the moral right endorsed is a right *in extremis* only—it applies only to those with grave illnesses and disabilities. Second, the moral right is only a right against interference by a third party, such as the state; a doctor has no duty to provide VAE. Third, the moral right to VAE above is predicated on a

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[47] DeGrazia, *Biomedical Ethics*, p. 51.
[48] See Onora O'neill, *Autonomy and Trust in Bioethics* (Cambridge: Cambridge University Press, 2002), p. 48; Leon Kass, *Life, Liberty and the Defense of Dignity: The Challenge for Bioethics* (San Francisco: Encounter Books, 2002), p. 3; Edmund Pellegrino & David Thomasma, *For the Patient's Good: The Restoration of Beneficence in Health Care* (New York; Oxford: Oxford University Press, 1988), viii.
[49] See Beauchamp and Childress, *Principles of Biomedical Ethics*, p. 72.

commitment to both individual autonomy *and* individual well-being, such that VAE is permissible only when it is autonomously chosen *and* in the patient's best interest.

3. THE ARGUMENT

My contention is that the Standard View is unsustainable both in its justification and in its conclusion, and not only must we support a different position, more importantly, we must expose the problems of this view to show that it is not a viable alternative for advocates to hold. The aim of this thesis is to deconstruct and reject the Standard View, and from its remnants, rebuild a more sustainable case for the right to VAE.

Ultimately, I believe proponents cannot endorse a right to VAE *in extremis* without accepting a broad right to VAE—they cannot justify the right for those with serious illnesses and simultaneously reject or proclaim agnosticism regarding the right for other competent individuals. In other words, they must own up to the logical slippery slope that opponents accuse them of—the argument in favor of the right to VAE in extreme cases logically commits them to supporting the right for everyone. The first two chapters of this thesis will establish this conclusion. In Chapter 1, I will show that one cannot consistently argue for the right to choose VAE by appealing to individuals' autonomy rights and at the same time require their choice to align with a particular conception of well-being, which is necessary to restrict the right to VAE. At least one of these positions must be given up. In Chapter 2, I will argue that proponents do not have the option of giving up the autonomy argument and appealing solely to well-being to restrict the right to their desired cases. This is because the argument for VAE from an individual's best interest necessarily relies on controversial premises about the value of life and the nature of death, which reasonable people disagree on. Thus, such an argument has no place in the justification of basic moral rights in a liberal society. The conclusion from these two chapters is that we can either endorse a self-

determination argument for VAE, along with the broad right to VAE that it entails, or, it seems, be left with no case for the right at all.

From the rubbles of my criticism, I will construct my case for the right to VAE. I affirm a self-determination justification, but I contend that such an argument should be understood in terms of self-ownership rather than respect for personal autonomy. In Chapter 3, I will begin by showing that respect for autonomy—that is, respect for individuals' capacity to shape their lives according to their own values and aims—is inadequate for understanding our fundamental personal liberties; the recognition of self-ownership is needed to account for certain irrevocable intuitions we have about our self-determination rights. Chapter 4 continues the argument by showing that the thesis of self-ownership is supported not only from the bottom up, by our considered judgments, but also from the top down, by a weak, abstract principle we can all accept. The upshot of the two chapters is that self-ownership is a rock-bottom right which must be met before loftier moral considerations, like personal autonomy, are taken up. Chapter 5 applies my thesis of self-ownership to the issue of VAE. I show that such a justification supports an even broader right to VAE than does respect for autonomy. I also demonstrate that my understanding grounds not only a right to choose VAE free from state interference, but also a right to be provided VAE by doctors. Nevertheless, I delineate weak restrictions on both kinds of rights to VAE which are consistent with self-ownership (e.g. waivable protective measures based on consent, and certain limitations based on previous commitments, such as having dependent children), showing that while a right to VAE grounded in self-ownership is a liberal view, it does not result in a dangerous moral free-for-all.

If successful, this thesis would be a significant contribution to the literature for several reasons. First, no one has cashed out the unsustainability of the Standard View in favor of VAE. On the one hand, while a few proponents take contrary positions, they

do not directly criticize the Standard View. For example, Tristram Engelhardt affirms a broad right to VAE, but he deduces this from a general view of morality—he believes that there is no single, content-full understanding of morality which can be rationally justified, and so the only possibility left for morality between strangers is one based on consent; he does not take issue with the Standard View in any more direct way.[50] On the other hand, opponents of VAE have gestured toward the problem with the Standard View by pointing to the logical slippery slope, but they fail to develop the objection thoroughly.[51] The second contribution of this work is in its positive argument: most theorists, as the outline above shows, ground the right to self-determination in the value of autonomy. Yet, if I am right, self-ownership better captures our concerns with respect to VAE. Third, this thesis endorses a conclusion on the breadth and scope of the moral right to VAE that is markedly different from what is affirmed both in the academic literature and in public discourse. According to my thesis, the moral right to VAE is not an exceptional right, applying only at the end of life, but, given certain weak restrictions to be delineated, a general right applying to all competent adults, generating duties of noninterference by the state, as well as duties of service provision by doctors.

Finally, my arguments have direct implications for the basic framework of medical ethics, and so for the resolution of other issues in bioethics. As I have already hinted, my arguments entail rejecting Beauchamp's and Childress' Four Principles and its approach of balancing *in situ* respect for autonomy, an independent account of well-being, and other principles. The upshot of my criticism of the autonomy-plus-best-interest justification for VAE is that this kind of balancing ultimately leads us to an incoherent rather than moderate view. If I am right, then, this approach in bioethics

[50] See Engelhardt, *The Foundations of Bioethics*, esp. pp. 341-57.
[51] See Callahan, "When Self-Determination Runs Amok," p. 64; Gorsuch, *The Future of Assisted Suicide*, p. 96; Keown, *Euthanasia, Ethics and Public Policy*, p. 79. Their arguments will be described in greater detail in Chapter 1, Section 1.1.

must be substantially modified. This will be further discussed in the next section on methodology.

Of course, the significance of this work should not be overstated. The aim of this thesis is in a way considerably more modest than most other works in this area. In particular, I confine my concern to the *moral* right to VAE. Even if my argument is successful, its conclusion does not show that VAE should be legalized. Other considerations must be taken into account when determining whether a moral right should be established as a legal right. Namely, if the social harms resulting from institutionalizing the right would be extremely high (due to the possibility of abuse, empirical slippery slope, etc.), and mechanisms for preventing such harms would be impossible or unacceptably costly, then we may deny citizens the legal right despite their having the moral one.[52]

I have deliberately distanced my inquiry from the more practical debate. As mentioned, advocates tend to discuss both the moral and legal right to VAE simultaneously. Though they distinguish between the two, their sights are clearly set on the legal right. I believe that because of this, practical concerns like the likelihood of getting certain laws passed influence the arguments and conclusions they put forth regarding the moral right. Brock's discussion of philosophers' role in the public debate is telling. He notes that "philosophers have a credibility problem in policy circles that leads to pressure for some cutting and trimming in at least the voicing of one's more

[52] Although the distinction between moral and legal rights/duties is often utilized within normative political theory, it must be acknowledged that such a distinction is not always perfectly clear-cut. First, discussions about moral rights sometimes cannot avoid legal or quasi-legal questions. For example, both in discussing professional ethics in Chapter 1 and in discussing doctors' prerogatives in providing VAE in Chapter 5, I will ask whether and how certain established regulations, like the Hippocratic Oath and the institution of prescription medicine, respectively, affect doctors' moral rights and duties. Second, not all social harms are irrelevant for *moral* rights. For example, in Chapter 5, I will discuss how harms to children may curb the moral right to VAE. It should be noted that some moral theorists, such as utilitarians, would insist that even the particular social consequences I have cited, such as the possibility of abuse and empirical slippery slope, matter for moral rights.

extreme, unconventional, or radical views."[53] While Brock distinguishes bioethicists' public policy work from their work in bioethics *proper*, it seems unlikely that they can be oblivious to the fact that their scholarly work might be used by their critics within public policy. My suspicion is that this is at least in part responsible for the general conservatism in the bioethics literature. Thus, I believe there are important advantages to constraining one's discussion to the moral.

Nevertheless, my interest is not purely abstract or unconcerned with practical matters. Thus, I focus on the moral *right* to VAE, rather than whether choosing VAE would be the morally right or good thing to do. The assumption is that our legal rights should be based on our moral ones. In fact, it seems that if proponents are able to build a cogent case for the moral right, much of the work would be shifted to the other side. As Ronald Dworkin et al. point out, "If certain patients have the [moral] right to choose death, then the state has a high burden of proof to show that there are indeed very serious risks in granting the right, such as to justify a blanket prohibition."[54] Typically, opponents' objections about the social costs of legalization are coupled with rejection of any moral right to begin with. If the moral right must be admitted, then their speculative judgments about possible harm or abuse become much less compelling. Thus, by strengthening the case for the moral right, this thesis strengthens the case for the legal right as well.

4. METHODOLOGY

Let me briefly clarify the methodology used in this thesis. As I noted above, Beauchamp's and Childress' Four Principles is one of the main approaches employed in contemporary bioethics. Underlying this approach is a well-known methodology in

[53] Dan Brock, "Truth or Conseqence: The Role of Philosophers in Policy-making," in *Life and Death: Philosophical Essays in Biomedical Ethics* (Cambridge: Cambridge University Press, 1993), p. 413.
[54] Dworkin et al., "Assisted Suicide: The Philosophers' Brief".

bioethics called *principlism*.[55] According to this methodology, in resolving bioethical disputes, we should try to avoid the controversy of appealing to particular moral theories (say, deontology vs. consequentialism, or liberalism vs. communitarianism), and instead rely on mid-level principles—principles that all of us share no matter what our deeper theoretical commitments.[56] This is how Beauchamp and Childress justify their four mid-level principles—respect for autonomy, beneficence, nonmaleficence, and justice. In resolving a particular problem, we should apply the principles that are relevant to the case at hand, based on the particular details of the case, without appealing to more abstract theory.[57]

It should be clear that I reject this methodology. According to the argument of this thesis, the prevailing justification for VAE exemplifies why such an approach is deficient. In particular, it is a mistake to maintain agnosticism on theoretical issues. We need to appeal to theory to determine, for example, how to resolve disputes when autonomy and beneficence conflict.[58] The evasion of theory does not make our argument more plausible or acceptable; rather, we fail to test the coherence of our argument against a systematic view. As Bernard Gert and K.D. Clouser point out, this "smorgasbord approach" means that theorists cannot resolve disputes in a principled way; we end up adjudicating principles however we wish in order to justify the conclusions we want.[59]

However, neither do the two other methodologies prevalent in bioethics seem better. One approach is casuistry, a bottom-up methodology in which we infer

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[55] See James Childress, "A Principle-based Approach," in *A Companion to Bioethics*, ed. Helga Kuhse & Peter Singer (Oxford: Blackwell Publishing, 2012), p. 69.
[56] Ibid., pp. 67-76.
[57] For others who defend versions of principlism, see, e.g., David DeGrazia, "Moving Forward in Bioethical Theory: Theories, Cases, and Specified Principlism," *Journal of Medicine and Philosophy* 17 (1990): pp. 511-39; Henry Richardson, "Specifying Norms as a Way to Resolve Concrete Ethical Problems," *Philosophy and Public Affairs* 19, no. 4 (1990): pp. 279-310.
[58] Norman Daniels makes a similar claim. See Norman Daniels, *Justice and Justification: Reflective Equilibrium in Theory and Practice* (Cambridge: Cambridge University Press, 1996), p. 336.
[59] See K.D. Clouser & Bernard Gert, "A Critique of Principlism," *Journal of Medicine and Philosophy* 15 (1990): pp. 219-36. The apt term "smorgasbord approach" was coined by Daniels in his description of Clouser's and Gert's criticism. See Daniels, *Justice and Justification*, p. 335.

principles from our intuitions about paradigmatic cases and apply them to other cases.[60] The second methodology is Gert's and Clouser's top-down "theoretical approach," in which answers to moral conflicts are deduced from a general moral theory.[61] Both approaches lack the rigor and extensiveness of a fourth possible methodology: Rawls' wide reflective equilibrium.[62] Norman Daniels forcefully argues for the use of this methodology in bioethics in lieu of the more common methodologies above.[63] According to the method of wide reflective equilibrium, neither a simple top-down nor bottom-up (nor, for that matter, middle-down) approach is adequate. Rather, we need to go back and forth between our considered moral judgments and theoretical commitments to try to fit our views into a coherent, unified understanding. Moreover, unlike *narrow* reflective equilibrium, we need to ensure coherence not only between our considered moral judgments and moral principles—if this were the only requirement, then, at best, we could be assured only that our principles match our particular judgments, not that we should accept either. Rather, both our principles and our considered judgments must cohere with the broadest evidence we have available—what Daniels calls "background theories"—which include all moral and nonmoral beliefs and theories (ranging from the conflict between consequentialism and deontology to accounts of human psychology and sociology).[64] The idea is that by testing our beliefs at all three levels against each other, and revising them when necessary to seek coherence, we can be more confident in our conclusions. I believe this demanding process is superior to the other approaches above for resolving bioethical problems, and so it is the underlying methodology of this thesis.

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[60] See Albert Jonsen & Sephen Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning* (Berkeley: University of California Press, 1988).
[61] See Gert, "A Critique of Principlism," pp. 219-36; R.M. Green, "Method in Bioethics: A Troubled Assessment," ibid.: pp. 179-97.
[62] John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press, 1971), pp. 48-51.
[63] See Daniels, *Justice and Justification*, pp. 333-50. Daniels is more diplomatic, framing the reflective equilibrium as a compromise between the other methodologies.
[64] Ibid., pp. 6, 22-26.

CHAPTER 1:

THE TRILEMMA: THE INTERNAL INCONSISTENCY OF THE STANDARD VIEW IN FAVOR OF VAE

In the Introduction, I delineated what I called the Standard View in favor of an individual's moral right to choose VAE. It is worth recounting this view in brief. According to its justification, there are two necessary and sufficient reasons for affirming the right to choose VAE from a willing doctor: respect for personal autonomy and promotion of individual well-being. The first line of argument claims that we should respect a person's autonomy—a person's capacity to shape her life according to her own conception of what is valuable. Since the choice to live or die is a central decision in a person's life, involving a person's most basic values and commitments, respect for autonomy requires that we respect her choice regarding VAE. The second line of argument says that while death is usually catastrophically bad for a person, in exceptional cases, it is in the person's best interest, such that the consideration of individual well-being supports, rather than opposes, the right to choose VAE. According to the Standard View, *both* reasons are necessary to justify the right to VAE. Thus, the scope of the negative right extends only to those who are suffering from

extreme illnesses and/or disabilities.[1] For the argument of this chapter, it is helpful to understand the Standard View in terms of the following three tenets:

> **Tenet 1:** Invocation of respect for individual autonomy as a necessary but insufficient condition for the right to choose VAE.
>
> **Tenet 2:** Invocation of the consideration of an individual's best interest as a necessary but insufficient condition for the right to choose VAE.
>
> **Tenet 3:** Affirmation of the right to choose VAE without state (or other) interference for *and only for* individuals suffering from extreme illnesses and/or disabilities (e.g. end-stage cancer, Lou Gherig's Disease, multiple sclerosis, developing Alzheimer's, and quadriplegia).

This chapter will show that the Standard View is untenable because it faces a *trilemma*: we cannot uphold all three tenets simultaneously without contradicting ourselves. More precisely, we cannot plausibly affirm the right to choose VAE by proclaiming respect for a person's autonomy (Tenet 1), and then insist that the person's best interest is also a necessary condition (Tenet 2) which justifies restricting the right to those with serious medical conditions (Tenet 3). As I will argue below, at least one of the three tenets must be given up. We can uphold the justification from an individual's well-being (Tenet 2) along with the narrow right to choose VAE (Tenet 3), but then we must relinquish the argument invoking respect for autonomy (Tenet 1). We may also maintain a commitment to both respecting autonomy (Tenet 1) *and* promoting well-being (Tenet 2), but we would have to redefine well-being in such a way that it ends up

[1] See the Introduction, Section 2. Theorists holding the Standard View include Gerald Dworkin, *Euthanasia and Physician-Assisted Suicide*, pp. 1-16; Beauchamp and Childress, *Principles of Biomedical Ethics*, pp. 177-184; Foot, "Euthanasia," pp. 85-112; Kamm, "Physician-Assisted Suicide," pp. 586-605; "Ronald Dworkin on Abortion and Assisted Suicide," pp. 228-40; Dworkin, *Life's Dominion*, pp. 179-241; Williams, "Euthanasia Legislation."; Young, *Medically Assisted Death*, pp. 1-60; Brock, *Life and Death*, pp. 202-34; Battin, *Least Worst Death*, pp. 101-29.

not being able to restrict the right to VAE to exceptional cases (Tenet 3). What we cannot do is maintain all three commitments at once. Any attempt to reconcile two facets of the argument will cause the third to come apart logically. In the next section, I will complicate the picture of the Standard View by distinguishing several variants of it, before systematically rejecting each possible version in the remainder of the chapter.

1. DELINEATING THE PROBLEM

1.1 Opponents' Criticisms

The claim that the Standard View is internally inconsistent is not altogether novel. Many opponents of VAE have gestured toward this objection. However, none has pursued the criticism fully: they either oversimplify the problem or mischaracterize it altogether. Daniel Callahan makes the latter mistake in his well-know article against VAE. He writes:

> These two motives [of respect for autonomy and concern for individual interest] are typically spliced together and presented as a single justification. Yet if they are considered independently—and there is no inherent reason why they must be linked—they reveal serious problems. It is said that a competent, adult person should have a right to euthanasia for the relief of suffering. But why must the person be suffering? Does not that stipulation already compromise the principle of self-determination? . . . Whatever the person's motives may be, why are they not sufficient?[2]

Callahan is alluding to the logical slippery slope—the objection that although advocates of VAE insist that the right is limited to exceptional cases by the well-being requirement, the internal rationale of the argument does not justify such a constraint.

[2] Callahan, "When Self-Determination Runs Amok," p. 54.

While I will show that this is ultimately correct, Callahan misframes the issue, allowing Gerald Dworkin to swiftly dismiss it:

> Of course [the two reasons] are not 'inherently' linked; it is just that they are both required to make the moral case. Compare someone arguing against the position that it is legitimate for you to destroy my painting only if (1) I give you permission and (2) it is not a great work of art on the grounds that when these 'reasons are considered independently—and there is no inherent reason why they must be linked—they reveal serious problems,' e.g., you can destroy any of my paintings as long as they are not great works of art or you can destroy the only surviving Rembrandt because it is mine and I give you permission to do so.[3]

Dworkin's rebuttal succeeds because the issue with the justification is *not* that the two arguments are not inherently linked. That is not a deep problem with the Standard View, for why should it be problematic to combine two distinct moral considerations which, when considered separately, justify different conclusions? The problem with the Standard View, as I shall argue below, has a different source: it concerns how one moral consideration bears on the other when they *are* put together.

Two other opponents, Neil Gorsuch and John Keown, get closer to the heart of the matter. Gorsuch points out, "[A] right limited only to terminally ill persons seems incompatible with full respect for the neutrality and harm principles. . . . Many rational autonomous (and purportedly 'harmless') decisions to die would continue to be suppressed."[4] Similarly, Keown objects, "If the core justification for VAE is thought to be respect for patient autonomy, this is surely logically inconsistent with a requirement that the patient be suffering unbearably, bearably, or at all."[5] Both seem to be claiming that a right to VAE which is constrained to individuals who cite suffering from serious illness, even if supported by the best interest argument, is inconsistent with the

[3] Gerald Dworkin, *Euthanasia and Physician-Assisted Suicide*, p. 11.
[4] Gorsuch, *The Future of Assisted Suicide*, p. 96.
[5] Keown, *Euthanasia, Ethics and Public Policy*, p. 79.

autonomy argument. Unfortunately, neither theorist goes much further than the statements above. Their objections provide a good beginning, but by themselves, they are over-simplistic. This chapter, thus, engages in a much more comprehensive evaluation of the coherence of the Standard View.

One major complication within the pro-VAE literature is that advocates who endorse the Standard View do not affirm a single version of it. In particular, there are multiple interpretations of how Tenet 1, respect for a person's autonomy, and Tenet 2, concern for a person's well-being, fit together. The precise relationship between the two arms of the argument varies depending on, firstly, one's interpretation of well-being (does a person's well-being coincide with his autonomous choice?) and, secondly, one's interpretation of the moral weight of autonomy (does it have lexical priority or is it a reason to be weighed against others?). Different answers to these questions yield arguments with different logical structures, and so each must be addressed in the assessment of the internal consistency of the Standard View.

We should begin by distinguishing two major strands within the Standard View. In the prevailing version that I described in the Introduction, a person's well-being is seen to be distinct from his autonomous choice, such that the two arms of the argument set distinct requirements. On this understanding, while respect for autonomous choice would justify a broad right to choose VAE, concern for individual welfare confines it to a right *in extremis*. This appears to be a concession to *hard paternalism*—the view that we should sometimes intervene even in a person's fully voluntary, that is, fully autonomous, choice to protect his welfare.[6] Thus, I will call this version of the Standard View the Hard Paternalist Strategy (hereafter, HPS). Formally stated, the argument runs as follows:

[6] The distinction between hard and soft paternalism employed in this thesis follows Joel Feinberg's influential discussion. See Joel Feinberg, *Harm to Self*, The Moral Limits of the Criminal Law (Oxford: Oxford University Press, 1986), pp. 12-16.

> **HPS**: Individuals have a right to choose VAE grounded in respect for their autonomy (Tenet 1). However, their well-being sets the limit to this right, such that it applies only to individuals who choose VAE when VAE is in their best interests (Tenet 2). The latter constrains the right to choose VAE from what would otherwise be a broad right to one applying only to those with severe illnesses and/or disabilities (Tenet 3).

This version seems to be the target of Gorsuch's and Keown's criticism above. However, although the HPS is the predominant interpretation of the Standard View, there is another variation. To avoid the apparent tensions between Tenet 1 and Tenet 2 of the justification above, some theorists interpret concern for a person's well-being in a way that aligns it with the person's autonomous choice, such that to say that a person's choice is against his interest just is to say that it is not autonomous. According to this argument, to be expounded below, when we prohibit a healthy person from getting VAE in virtue of his best interest, we are merely prohibiting a nonautonomous choice. On this view, the restriction of the right to choose VAE appeals to *soft paternalism*—the view that we should sometimes intervene in a person's choice for his own good when his choice is substantially nonvoluntary, that is, substantially nonautonomous. Since, as will be discussed subsequently, soft paternalism is compatible with respect for autonomy, the two arms of the argument appear to run parallel here. I will call this the Soft Paternalist Strategy (hereafter, SPS). Formally stated, the argument has the following form:

> **SPS**: Individuals have a right to choose VAE grounded in respect for their autonomy (Tenet 1). While their best interest is also required to

> justify the right, this consideration should be interpreted in a way that aligns with autonomous choice, such that to say that a healthy person's choice for VAE is against his best interest is to say that his choice is substantially nonautonomous (Tenet 2). Thus, both respect for autonomy and concern for individual well-being support the same limit on the right to choose VAE—to wit, applying only to those with severe illnesses and/or disabilities (Tenet 3).

As we shall see, a critique of the SPS will be very different from a critique of the HPS. I will dedicate the remainder of this section to filling out these two versions of the Standard View, before criticizing them in Section 2 and Section 3.

1.2 The SPS

Let us begin with the SPS. Before examining how theorists make this argument, we need to clarify why soft paternalism is compatible with respect for autonomy. As I noted, the principle of respect for autonomy refers to the importance of allowing people to shape their lives for themselves according to their own values and aims. The normative basis of the principle is rooted in the value or ideal of autonomy, which, as John Christman notes, should be contrasted with freedom (or what is usually referred to as *negative liberty*). While the latter, being a "property of human action," has to do with being unimpeded by others from acting on whatever one wants to do at a given moment, autonomy has to do with the more demanding ideal of rational self-direction—it is, at its most fundamental level, "a property of preference or desire formation."[7] Peter Jones puts the distinction aptly:

[7] John Christman, *The Inner Citadel: Essays on Individual Autonomy* (Oxford: Oxford University Press, 1989), p. 13.

> It would be possible to use the term autonomy to describe a purely external condition. Individuals' autonomy would then be wholly a function of the extent to which they were unimpeded in acting on their wishes without reference to the origin of those wishes. However, the idea of autonomy usually embraces the notion that individuals are capable of making choices and reaching decisions which are, in some sense, authentically their own.[8]

In philosophy, the concept of autonomy has come to be associated with authoring one's life, of directing and shaping it based on preferences, desires, values, etc. that are truly one's own. In language popularized by John Rawls, autonomy has to do with forming, revising, and pursuing one's own conception of the good life.[9] This is the concept Standard View theorists usually appeal to in making the self-determination argument for the right to VAE.[10]

Now, based on Joel Feinberg's influential discussion of paternalism, "Soft paternalism holds that the state has the right to prevent self-regarding harmful conduct . . . *when but only when* that conduct is substantially nonvoluntary, or when temporary intervention is necessary to establish whether it is voluntary or not."[11] Feinberg clarifies: "the crux of voluntariness [is] the faithful expression of the settled values and preferences of the actor, or an accurate representation of him in some

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[8] Peter Jones, *Rights* (Basingstoke: Palgrave, 1994), p. 125.
[9] See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 19.
[10] It is true that the term "autonomy" is sometimes used to refer to concepts other than what I delineated above. See discussion of this in Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988), p. 6; Joel Feinberg, "Autonomy," in *Inner Citadel: Essays on Individual Autonomy*, ed. John Christman (Oxford: Oxford University Press, 1989), pp. 27-53. Dworkin observes that "autonomy" is sometimes used to refer to negative liberty (though he himself uses it in the way described above), and Feinberg associates the term "autonomy" not only with the concept above, but at times, also with related concepts like personal sovereignty and self-ownership. The concept of autonomy will be discussed in greater detail in Chapter 3, Section 1.1. What is important here is that, within the philosophical literature, the term "autonomy" has generally come to be associated with the concept above—*and this is the concept invoked by pro-VAE philosophers*. See Brock, *Life and Death*, pp. 150-51; Timothy Quill & Margaret Pabst Battin, *Physician-Assisted Dying: The Case for Palliative Care and Patient Choice* (London: Johns Hopkins University Press, 2004), p. 7; Dworkin, *Life's Dominion*, p. 190; Dworkin, "Patients and Prisoners," p. 189; Young, *Medically Assisted Death*, p. 22; Beauchamp and Childress, *Principles of Biomedical Ethics*, p. 103.
[11] Feinberg, *Harm to Self*, p. 12. Emphasis in original.

centrally important way."[12] So *voluntariness* refers to the *autonomousness* of a choice. In contrast to hard paternalism, which "imposes its own values and judgments on people," soft paternalism is concerned with "whether or not the [person's] choice is truly his." Its concern is "to help implement [the person's] real choice, not to protect [the person] from harm as such. After all, to whatever extent [the person's] apparent choice stems from ignorance, coercion, derangement, drugs, or other voluntariness-vitiating factors, there are grounds for suspecting that it does not come from his own will, and might be as alien to him as the choices of someone else."[13] Because soft paternalism attempts to protect people from substantially nonautonomous choices, it is usually thought that interfering with people for their own good *in this sense* is compatible with respect for autonomy. As Beauchamp and Childress note, "Soft paternalism does not involve a real conflict between the principle of respect for autonomy and beneficence."[14] Feinberg writes that "we should think of [soft paternalism] as a principle in accord with the animating spirit of liberalism, and one the liberal could endorse."[15]

This is important for us because some proponents of the Standard View suggest that the criterion of an individual's best interest for the right to choose VAE (Tenet 2) should be construed in a way that entails merely soft paternalism. More specifically, they interpret the consideration of a person's well-being in a way that aligns it with a person's autonomous choice, such that to prohibit a person's choice for VAE because it is bad for him just is to prohibit a choice that is substantially nonautonomous. There are two ways to align our understanding of a person's well-being with his autonomous choice—and so, align Tenet 1 and Tenet 2 of the Standard View.

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[12] Ibid., p. 117.
[13] Ibid., p. 12.
[14] Beauchamp and Childress, *Principles of Biomedical Ethics*, p. 210.
[15] Feinberg, *Harm to Self*, p. 14.

First, we can appeal to a *corrected preference-satisfaction* account of the good. On this account, there is no objective answer as to a person's interest independent of the person's own preferences. However, it is acknowledged that people often have preferences which are internally contradictory, based on false information, manipulated, and the like, such that it is implausible to think that the satisfaction of any and all preferences a person has makes his life go well. To avoid the pitfalls of a *simple* preference-satisfaction account, the *corrected* preference-satisfaction account stipulates that for the satisfaction of a person's particular preference to contribute to his good, it must reflect his fundamental, settled preferences for himself. In short, on this account, a person's good *just is the satisfaction of his autonomous choice*. If a person's well-being is understood in this way, then hard paternalism is ruled out *by definition*, since it is impossible to promote a person's good by interfering with his autonomous choices. If this is the account of well-being employed, then to prohibit people from getting VAE because their choice is not good for them is to prohibit them from getting VAE because their choice is nonautonomous. There is no conflict between Tenet 1 and Tenet 2 of the argument.

Margaret Battin suggests this interpretation of the Standard View. In discussing the requirement that a person's request for VAE must be consistent with his well-being, she writes: "In the absence of an objectively valid answer [as to an individual's good], we must appeal to the individual's own preferences and values. Which is the greater evil—death or pain? . . . [T]he answer always is tied to the person whose life it is, and cannot be supplied in any objective way."[16] Though this might be taken to mean that we should always defer to a person's own preference, Battin qualifies her statement: "Of course, there are limits to such a claim."[17] While whether death is a benefit for someone depends ultimately on the person's own preferences and values, we need not

[16] Battin, *Least Worst Death*, p. 110.
[17] Ibid., p. 111.

always defer to a person's apparent choice for death to promote his good because "there may be very good external clues to the way in which a person is in fact valuing [life]."[18] The suggestion is that a person's choice for death might not reflect his own settled preferences and values, and we can judge that it does not based on "external clues." In particular, "when there is no evidence of suffering or pain, mental or physical . . . an external observer usually can accurately determine whether life is a benefit . . . life *is* a benefit to him or her."[19] That is, when a healthy person without pain or suffering seeks VAE, his physical condition is a good external clue that he has made a mistake based on his own settled preferences and values. Battin concludes that in such cases, "paternalistic considerations come into play: if the person is healthy and without pain, we will interfere to keep him or her alive (preventing, for instance, suicide attempts)."[20] However, since this is because we believe the healthy person's choice is nonautonomous, it is merely an endorsement of soft paternalism. Battin's argument can be stated as follows:

> **SPS (version 1):** An individual's best interest just is what the individual would autonomously choose. It follows that to prohibit a person from doing what is bad for himself is, *by definition*, to prohibit a choice that is nonautonomous. Thus, to claim that we may intervene in the healthy person's choice for VAE (Tenet 3) for the sake of his own good (Tenet 2) is to claim that we may intervene in the healthy person's choice because it is nonautonomous. This poses no conflict for the claim that we ought to respect individual autonomy (Tenet 1).

[18] Ibid., p. 106.
[19] Ibid., p. 111. Emphasis in original.
[20] Ibid.

Now, consider a second version of the SPS. Instead of *defining* a person's good as the satisfaction of her autonomous choices, we might instead appeal to certain epistemic conditions to align the two considerations. We might argue that while, in principle, a person's well-being may clash with her autonomous choice, given the epistemic limits of an external observer, if we wish to promote a person's good, we should nevertheless defer to the person's autonomous choice. Dan Brock suggests this line of reasoning at one point.[21] He says that a person's autonomous choice is the most reliable "evidence" we have for what would be in that person's best interest.[22] The suggestion is that while there might indeed be an objective answer as to an individual's good—his autonomous choice is merely "evidence" for it—the latter is nevertheless the best gauge we have given our epistemic shortfalls. Brock notes that this is particularly true when we are asking whether a severely ill or disabled person would be better off dead, since in such cases, it is especially difficult to know what the correct answer is—and so all we have to go by is "the competent patient's judgment of whether continued life is no longer a benefit."[23]

But if a person's autonomous choice is the best answer we have for his good, then how is Brock's view able to exclude the right to choose VAE from healthy individuals altogether? Brock qualifies the claim that a person is the best judge of his own interest: "Of course, there are conditions, such as clinical depression, that call into question whether the patient has made a competent choice . . . and then the patient's choice need not be evidence that continued life is no longer a benefit for him or her."[24] Brock suggests that most requests for death may be ruled out in this way. He writes,

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[21] Brock's actual view is difficult to decipher, as he vacillates between different understandings of the best interest argument. Tom Tomlinson, for example, criticizes Brock for wavering between endorsing an objective and subjective account of well-being throughout the articles in his anthology *Life and Death*. See Tom Tomlinson, "Brock over a Decade," *The Hastings Center Report* 24, no. 4 (1994): pp. 43-44. In the discussion above, I have picked out a strand of Brock's argument for VAE that suggests the epistemic deference view. Whether or not this is Brock's true view, what is important for us is that it is a possible version of the Standard View which needs to be addressed.

[22] Brock, *Life and Death*, p. 207.

[23] Ibid.

[24] Ibid.

"Even strong defenders of individual self-determination generally agree that most suicide attempts . . . occur when a person's decision-making capacity is seriously disordered by such conditions as depression."[25] The idea is that when a physically healthy person has a wish to die, the wish can be traced to the presence of clinical depression, which renders his choice substantially nonautonomous. If so, then the choice, being nonautonomous, is not the most reliable evidence we have for his good, such that in terms of promoting his well-being, there is no longer reason to defer to his choice. This understanding of the best interest argument is as follows:

1. Due to our epistemic limitations, we best promote a person X's well-being with regards to VAE by deferring to X's autonomous choice regarding VAE.
2. But if X chooses VAE while physically healthy, then it can be inferred that X suffers from clinical depression.
3. If X suffers from clinical depression, then his choice for VAE is substantially nonautonomous.
4. If X's choice for VAE is substantially nonautonomous, then there is no case for epistemic deference to promote his well-being.
5. X is physically healthy.

Therefore:

6. We do not promote X's well-being by deferring to his choice for VAE.

[25] "Ethical Issues," in *Encyclopedia of Bioethics*, ed. Warren Thomas Reich (New York: Macmillan Library Reference, 1995), p. 570.

According to Brock's version of the SPS, concern for individual well-being supports intervening in healthy individuals' requests for VAE. But since prohibiting them from getting VAE protects them from substantially nonautonomous choices, it is merely soft paternalism. Brock's argument can be stated as follows:

> **SPS (version 2):** Though an individual's good is not necessarily just the satisfaction of his autonomous choice, because of the epistemic limits of an external observer, in practice, we should defer to his autonomous choice to promote his good. In cases where a physically healthy person wants to die, we can infer that his choice is substantially nonautonomous (i.e. the result of clinical depression), and so, not the best evidence we have for his interest. We should intervene in the healthy person's choice for VAE (Tenet 3) for the sake of his own good (Tenet 2), but since this is necessarily an interference with a substantially nonautonomous choice, it poses no conflict for the claim that we ought to respect his autonomy (Tenet 1).

In summary, there are two ways in which the SPS argument can be made. The first aligns a person's well-being to her autonomous choice *by definition*; the second aligns them by appealing to outsiders' *epistemic limitations*. Both appear to tie Tenet 1 and Tenet 2 of the Standard View together, such that they support the same rather than different conclusions.

1.3 The HPS

Let us briefly compare the above to an HPS argument. Most advocates of the Standard View do not try to align our understanding of well-being with autonomous choice. Instead, in arguing that VAE must be in a person's best interest, they invoke an *objective account of well-being.* The objective account says that there are aspects to what makes a person's life go well which are independent of whether the person prefers it or whether it makes the person happy. Ronald Dworkin explicitly states that this is the account underlying his argument. He explains that having a good life depends not merely on having *experiential interests*—interests grounded in the pleasure which people get from their lives—but also requires *critical interests*—"interests that it does make their life genuinely better to satisfy, interests that it would be mistaken, and genuinely worse off, if they did not recognize."[26] In arguing why it may be in the interest of a person who is severely disabled to die, he notes that "total dependence is in itself a very bad thing, quite apart from the pain or discomfort it often but not invariably entails."[27] Although other VAE advocates are not as clear, their discussion of when and why death is in a person's interest suggests a similar view. For example, Beauchamp and Childress write that "loss of cognitive capacity can ravage and dehumanize patients so severely that death is in their best interests."[28] Gerald Dworkin accepts as uncontroversial Kass' characterization of the pro-VAE view as holding that "advanced senility or extreme degradation" can render a life not worth living.[29] Such statements reflect an objective understanding of well-being for two reasons.

First, the inclusion of diminished cognitive capacity indicates an objective account of the good since rational agency is an objective value. After all, those who are short of it are not necessarily unhappy; nor does everyone prefer or place great stock in

[26] Dworkin, *Life's Dominion*, p. 201.
[27] Ibid., p. 210.
[28] Beauchamp and Childress, *Principles of Biomedical Ethics*, p. 183.
[29] Gerald Dworkin, *Euthanasia and Physician-Assisted Suicide*, pp. 8 & 11.

a life lived rationally. Second, to suggest that a person's life is bad because it is lacking in dignity (or, comparably, that it is degraded or dehumanizing) signifies an objective account of well-being. Dignity, as opposed to a *sense* of dignity, is an objective concept, since whether a person's life has dignity is independent of the person's own judgment of it. We would not, for example, say that a life dedicated to sun tanning has dignity as long as the person genuinely believes it is a worthwhile life. To say that a person's life has dignity is to say that it is has *objective* value—it is *worthy* of self-respect. In parallel, to say that certain lives *lack* dignity (or are degraded or dehumanizing) suggests that certain lives *lack objective value*.

If well-being is understood objectively, then a person's best interest can diverge from his autonomous choice for himself. After all, it is possible for people to have genuine, fundamental desires to do things that are objectively bad for them. For proponents of the HPS, it is an objective account of a person's well-being that justifies prohibiting VAE for healthy individuals. Unlike advocates of the SPS, they acknowledge that healthy individuals can make perfectly autonomous requests for VAE, but argue that their objective good nevertheless justifies opposing their decision.[30] Recall Ronald Dworkin's statement that "even if [a healthy person] has reflected on the matter and still wants to die" we should nevertheless interfere because "dying is against his interest."—the person's objective interest in continuing to live justifies "violating his autonomy."[31] Similarly, Kamm recognizes that when we deny a healthy person's request for VAE because of their interests, in many cases, it will be true that the

[30] Though I have focused on an objective account of well-being, as I believe this is the one theorists rely on, it is worth noting that a hedonist account of well-being would have the same effect. That is, if we understand individual well-being as the net amount of happiness or suffering a person experiences, then whether VAE is in a person's interest will also diverge from his autonomous choice. This is because people do not always intend what produces the most happiness in themselves, and a choice need not end up producing the most happiness in oneself in order to be deemed autonomous. Because a hedonist account of the good does not necessarily align with a person's own autonomous choice, to say that we should prevent a healthy person's choice for VAE because it is against the person's (hedonistic) interest is not to say that we should prevent a nonautonomous choice for VAE.

[31] Dworkin, *Life's Dominion*, 192-93. Emphasis added.

person's "own values [do not] determine his life."[32] For advocates of the HPS, a person's objective well-being needs to be stipulated precisely to override autonomous but objectively mistaken choices to die.

The major complication in the HPS arises from a discrepancy between how a theorist conceives of the stringency of Tenet 1—the commitment to respect autonomy. As I mentioned before, there are two ways to conceive of the demand to respect autonomy: first, one could take it as having lexical priority over other considerations; second, one could take it as a consideration to be weighed against others. These two versions of the HPS must be distinguished, as they alter the logical relation between Tenet 1 and Tenet 2 of the HPS. I delineate the two views below.

First, according to the lexical priority view, a person has a right to autonomy that acts like a trump card, defeating (almost) all other considerations. According to this common liberal stance, the *only* justifiable reason for interfering with a person's autonomy is to protect others from harm. This is sometimes referred to as the Harm Principle. As J.S. Mill, who originated the principle, writes, "The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others."[33] Some proponents of the HPS invoke this stringent stance on respect for autonomy. For example, Robert Young writes that "respect for persons *demands* respect for their autonomous choices, as long as those choices do not result in harm to others."[34] James Rachels claims, "People's freedom may be restricted *only* to prevent them from doing harm to others."[35] Thomas Mappes and David DeGrazia aptly summarize this line of reasoning: "Individual choice should be respected to the extent that it does not result in harm to others. Since no one is

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[32] Kamm, "Physician-Assisted Suicide," p. 591.
[33] J.S. Mill, *On Liberty and Other Writings*, ed. Stefan Collini (Cambridge: Cambridge University Press, 1989), p. 13.
[34] Young, *Medically Assisted Death*, p. 22. Emphasis added.
[35] James Rachels, "Euthanasia," in *Matters of Life and Death: New Introductory Essays in Moral Philosophy*, ed. Tom Regan (New York: McGraw-Hill, 1992), p. 58. Emphasis added.

harmed by terminally ill patients' undergoing active euthanasia, a decision to have one's life ended in this fashion should be respected."[36] This gives rise to the following version of the HPS:

> **HPS-Lexical Priority:** Individuals have a right to choose VAE because it is morally impermissible to interfere with their autonomous choices for themselves, except to prevent harm to others (Tenet 1). However, their objective well-being sets the limit to this right, such that it is morally permissible to prevent them from choosing VAE (autonomously or otherwise) if death is not in their objective interest (Tenet 2). This justifies a right to choose VAE applying only to those with severe illnesses and/or disabilities (Tenet 3).

Now, consider a second view on respecting individual autonomy. According to value pluralism, we must recognize that there is a multiplicity of important values, such that in the adjudication of moral problems, no one value has lexical priority over others. Instead, values need to be balanced *in situ:* one principle may sometimes be outweighed by another principle, one right may sometimes be trumped (or justifiably infringed) by another. This is the rationale which Beauchamp's and Childress' Four Principles approach to bioethics, discussed in the Introduction, relies on. In the case of VAE, it might be argued that while respect for a person's autonomy is important, a person's well-being is important as well. Thus, especially given the high-stake situation of the choice between life and death, we cannot be concerned only with a person's autonomy. Instead, both a person's autonomy and a person's well-being are necessary to justify noninterference in VAE. On this understanding, a person's autonomy provides a strong

[36] DeGrazia, *Biomedical Ethics*, p. 371.

but defeasible reason for supporting the right to VAE. Some advocates of the HPS rely on this weaker stance on autonomy. As Beauchamp and Childress put it, a person's right to autonomy is only "*prima facie* binding."[37] Similarly, Thomas Preston et al. note, "The principle of respect for autonomy does not provide a conclusive reason for adopting [VAE]."[38] This leads to a second version of the HPS:

> **HPS-Value Pluralism:** Individuals have a right to choose VAE grounded in their *prima facie* right to autonomy (Tenet 1). However, because their objective well-being is also important, and the potential loss is considerable, their *prima facie* right to autonomy is overridden in cases where death is not in their objective interest (Tenet 2). This justifies a right to choose VAE applying only to those with severe illnesses and/or disabilities (Tenet 3).

It should be obvious that the two interpretations of the argument from autonomy significantly alter the logical structure of the HPS. Both need to be addressed in our assessment.

We now have a conceptual map of the major distinctions within the Standard View. As a brief summary, we have seen that the Standard View can be interpreted as either the SPS or the HPS. In the SPS, the two arms of the justification run parallel, such that the argument from autonomy and the argument from well-being are seen to support the same right to VAE. This is advanced by appealing either to a corrected preference-satisfaction account of well-being or to epistemic deference. In contrast to the SPS, in the HPS, the two arms of the justification are seen to issue divergent

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[37] Beauchamp and Childress, *Principles of Biomedical Ethics*, p. 73.
[38] Thomas Preston, Martin Gunderson, and David Mayo, "The Role of Autonomy in Choosing Physician Aid in Dying," in *Physician-Assisted Dying: The Case for Palliative Care and Patient Choice*, ed. Timothy Quill & Margaret P. Battin (Baltimore: John Hopkins Press, 2004), p. 40.

requirements, such that respect for autonomy supports a broad right to VAE while concern for individual well-being constrains this right to exceptional cases. There are two strands of the HPS: the first relies on a lexical priority view of respect for autonomy; the second relies on a value pluralism view of respect for autonomy.

We are now in the position to systematically criticize the Standard View. In Section 2, I will reject the HPS. In Section 3, I will reject the SPS. Finally, in Section 4, I will consider whether we can reinterpret the HPS to avoid hard paternalism altogether, by invoking the professional ethics of doctors—in particular, their special obligation to "do no harm."

2. REJECTION OF THE HPS

2.1 The HPS and the Lexical Priority of Autonomy

It is fairly clear that the combination of HPS with the lexical priority of autonomy is contradictory. According to the HPS, since healthy individuals' decisions for VAE can be perfectly autonomous, to rule out their right to choose VAE as a class requires hard paternalism—interference in individuals' fully autonomous choices out of consideration for their own welfare. But interference for this reason is impermissible if the principle of respect for autonomy has lexical priority over all other considerations except harm to others. If we accept the Harm Principle, then the *only* reason we may interfere in another person's autonomous choice is to protect others. As Mill emphasizes, a person's "own good, either physical or moral, is not a sufficient warrant."[39] While the lexical priority of autonomy is compatible with soft paternalism, since, as explained above, protecting a person from acting on a substantially nonautonomous choice does not contradict respect for autonomy at all, one clearly cannot affirm the lexical priority

[39] Mill, *On Liberty and Other Writings*, p. 13.

of autonomy and accept interference in a person's fully autonomous choice, not to protect others, but in the name of an understanding of the person's good which the person does not endorse. By imposing others' values on him, this clearly does violate respect for autonomy.

To put it another way, if respect for autonomy has lexical priority, then this arm of the argument does not merely *support* respecting autonomous choices for VAE—it *justifies* respecting all autonomous choices for VAE that do not harm others. To invoke the Harm Principle to ground the right to VAE already ties one's hands, logically, from limiting the right for any reason except others' harm; one no longer has the option of conceding hard paternalism. Thus, Tenet 1 and Tenet 2 of the justification are contradictory.

2.2 The HPS and Value Pluralism

But as we have seen, some pro-VAE theorists deny that autonomy is lexically prior to all other moral considerations. Instead, they hold that, given the plurality of values, we should take concern for autonomy as a strong but *defeasible* reason for supporting a person's right to choose VAE. From this perspective, to give autonomy lexical priority places undue weight on a single value. Given that a person's well-being is also immensely important, and that one who mistakenly dies loses everything, we ought to require that VAE accords not only with a person's autonomy, but also with his objective interests. In other words, it might be thought that it is reasonable, rather than contradictory, to give a person's good priority over his autonomy when the potential harm is sufficiently great. Given the weaker interpretation of Tenet 1, one might conclude, we can consistently ground the right to VAE in respect for autonomy while

allowing that even hard paternalism may sometimes be justifiable—Tenet 1 and Tenet 2 of the Standard View are reconciled.

Now, I accept that value pluralism is a coherent view, and that, from this perspective, one may affirm respect for autonomy while sanctioning certain hard paternalistic interferences. I argue, however, that the *particular kind* of hard paternalistic interferences needed in the HPS cannot be endorsed simultaneously with respect for autonomy. This is because while it might be reasonable to say that given the multiplicity of values, there is a need for balance in cases of conflict, it is also reasonable to think that we cannot simply balance values *however we wish*. Rather, the normative grounds of certain values or principles will preclude certain compromises. Beauchamp and Childress, in defending their methodology, concede this point. In rebutting the criticism that their methodology leads to arbitrary balancing, they note that the logic of particular principles "impose conditions that prevent just any judgment based on a relevant principle from being acceptable in a conflict."[40] The problem with the HPS is that the sort of hard paternalistic interferences sanctioned is so invasive of individual autonomy that one cannot endorse it without relinquishing the claim to respect autonomy.

To begin, let us note that when theorists aver both respect for autonomy and hard paternalism, the kind of paternalistic interferences they usually endorse *rules out* certain values or conceptions of the good; they do not *specify* the particular aims that we are allowed to pursue. Value pluralists often appeal, for example, to bans on gambling, prostitution, and (hard) drug consumption as permissible cases of hard paternalism. Notice that by upholding such injunctions, we prevent people from acting on *specific* aims and values. People are still free to pursue whatever other aims and values they want outside of the particular ones proscribed. It is at least plausible to think that this

[40] Beauchamp and Childress, *Principles of Biomedical Ethics*, p. 73.

kind of targeted hard paternalism is compatible with respecting personal autonomy. We might appeal to Joseph Raz's point that it is possible to rule out certain choices while leaving people just as autonomous if there remains an adequate range of options for them to choose from.[41] We might say that as long as they have sufficient choice, individuals' autonomy—their freedom to live according to their own convictions about the good life—will still be substantially respected.

At first blush, it might seem that the hard paternalism of the HPS fits this form. After all, the well-being criterion for the right to choose VAE rules out only a particular choice—namely, active euthanasia (in most circumstances). Since the hard paternalistic intervention applies to just a single option, it might appear that like the prohibitions on gambling and prostitution, even in excluding potentially fully autonomous choices, it still leaves people substantially autonomous, since they are still free to pursue whatever other aims and values they want outside of this option. However, this is false because of the particular nature of the option in question. Choosing VAE involves not just a single aim or value (say, death). Autonomous decisions to die will draw on and encompass the deepest values and commitments which people hold, for if a person is choosing autonomously, then she will wish to end her life because within her conception of the good life, some indispensable value or values have been lost, and cannot be compensated by other values. So a decision for VAE, insofar as it is autonomous, is the ultimate affirmation of a person's deepest commitments, and of the kind of life the person deems worthwhile and has lived up to this point. Thus, a state which prohibits fully autonomous requests for VAE prevents people from making a decision central to self-authorship. When people are prohibited from acting on an

[41] Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1987), pp. 395-99. Raz builds in two other stipulations for having minimal autonomy—mental competence and freedom from subjection to another's will—the latter of which, if interpreted strictly, may lead to a more restrictive view of respect for autonomy than the one delineated here. However, as I am motivating the more permissive view which might justify my opponent's position, I will not explore this here. The idea that respect for autonomy demands not subjecting others to our will is explored in Chapter 3, Section 2.1.

autonomous decision for death—when they are forced to live against their fundamental commitments and values—this undercuts and may even make a mockery of the life they have shaped for themselves. In short, because of the nature of the choice, to exclude VAE is not simply to exclude people from pursuing one aim or value; a multitude of conceptions of the good which people hold are at stake, for it is a single choice with far-reaching implications for personal autonomy.

Now, exponents of the HPS recognize the importance of the choice of VAE for individual autonomy. What they do is to try to walk a fine line, supporting VAE by emphasizing its great bearing on people's freedom to shape their lives according to their own convictions about what is valuable (this is the autonomy arm of the argument), but then allowing people to choose VAE only based on select values lost through illness and disability. To wit, only individuals with severe illness and disability who say that they want to die because of reasons like great pain, loss of independence, loss of rational agency, and the like, associated with their medical conditions will be allowed to go through with VAE. Choices for VAE based on any non-medical reason will be prevented.[42] But this means that with respect to a choice which, according to its own line of reasoning, has extensive consequences for people's autonomy, the HPS does not simply *proscribe* specific values from being admissible for a fully autonomous choice to be respected. Rather, it *prescribes* a narrow range of considerations and values which it deems capable of making life objectively bad, such that only individuals who

[42] Although, for brevity, I have generally referred to the Standard View's well-being criterion in terms of its specification of qualifying *conditions* for VAE (i.e. having a severe illness or disability), it additionally stipulates qualifying *reasons* for choosing VAE (i.e. the sick or disabled person must want VAE for specific reasons stemming from illness or disability). Unbearable physical pain, physical, dependence, and impending loss of rational agency are ones generally agreed-upon by HPS proponents (see Section 1.3 of this chapter for discussion of this). As I noted in the Introduction (Section 2), while there are slight variations in the reasons Standard View theorists deem acceptable (should a severely ill person who wants VAE to relieve *his family* from his illness be allowed to get it?), all agree that the reasons accepted must be directly related to the presence of serious illness or disability, since they do not want to say that as long as a person is seriously ill or disabled, he may choose VAE for any reason he wants (say, to further some political cause). Relatedly, I have omitted a reason that is widely endorsed by HPS advocates for choosing VAE—namely, the loss of dignity—because this consideration must tag onto one of the reasons above to be acceptable. Within the HPS, one may not cite loss of dignity due to, say, failing at one's career, as a reason to be allowed to choose VAE.

take these, and only these, values to be indispensable will be allowed to end their lives according to their conception of the good.

It follows that the hard paternalism of the HPS will exclude many people from living—or more accurately, dying—according to their own conception of the good. If a woman, after irreparably failing at the career she had built her life on, decides that her life is no longer worthwhile, the state will prevent her from choosing VAE from a willing doctor. If a father wishes to die in order to donate his organs to his sick child, the state will forbid him. If an old man decides that with his wife gone, his children grown up, and his friends dead, he is done with life, the state will prohibit his choice for VAE. Given the diversity of conceptions of the good life that people hold, the values that people will take to be indispensable will also be diverse. The HPS's objective well-being criterion rejects all of them as invalid, allowing through only the decisions which recognize the indispensability of freedom from physical pain, physical independence, rational agency, and the like.[43] Moreover, the HPS cannot adopt a substantially more inclusive understanding of individual good, for then the well-being criterion would no longer justify the conclusion it needs—to wit, the right to choose VAE only for the gravely sick and disabled.

Because the HPS's well-being criterion 1.) prescribes a specific set of admissible values and 2.) applies this to a decision which is central to people's lives, it fails to leave an adequate range of options for many people. Those prevented from autonomously choosing to die cannot simply choose another course that would equally conform to their core convictions. For example, the father who has resolved to sacrifice his life to save his child cannot simply find another good to pursue which he will find equally valuable. Rather, one who is prohibited from VAE is forced to live a life that betrays his conception of the good. By allowing people to die only when their decision

[43] For discussion of the possibility that the value of freedom from pain derives from a *thin theory of the good* which everyone accepts, see Chapter 2, Section 2.2.

coincides with a few pre-selected values, the HPS does not give people the options necessary for meaningful choice when it comes to a decision which is, and which the argument affirms to be, central to people's exercise of autonomy.

Now, one might object to this that the well-being criterion applies only to VAE—that is, to acts of *assisted* suicide; the HPS could allow that people have a right to commit *suicide* even when death does not accord with their objective good. If so, then a person prevented from getting VAE when her choice is fully autonomous is not necessarily condemned to live a life against her values. Since she is still free to kill herself, she is not left without recourse. However, *how* a person ends her life may be just as important for her efforts to shape her life as *when* she ends her life, for, to use Ronald Dworkin's elegant metaphor, the way in which a life ends may be compared to "the effect of a play's last scene or a poem's last stanza on the entire creative work."[44] While self-killing might be acceptable on some conceptions of the good, on others, it might not be a genuine option at all. For one, most acts of suicide involve a significant degree of violence (e.g. death by hanging, shooting, jumping off a building, wrist-slitting, etc.). While less violent methods are possible (e.g. swallowing pills), most methods of suicide carry an appreciable amount of uncertainty—and if a person falters, she might not only fail to achieve her aim, but she might also end up disfigured, disabled, mentally incompetent, and so forth. Moreover, suicide is, by definition, a solitary act. Even if surrounded by others, a person who commits suicide must ultimately do it alone—she must kill *herself*.

All of these factors may make many people who wish to die by VAE—that is, with the use of appropriate medication prescribed by a professional whether in a hospital or in the comfort of their own homes, possibly assisted by their family and friends—consider suicide to be opposed to their conception of the good. Indeed,

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[44] Dworkin, *Life's Dominion*, p. 199.

advocates of VAE cannot accept that having the recourse to suicide preserves an adequate range of options, for this would entail that seriously ill patients who are still able to kill themselves retain sufficient options, such that we may prohibit them from getting VAE while respecting their autonomy. If having the alternative of suicide is not enough to preserve their autonomy, then the same can be said of those who have no serious illness, but who also wish to die by VAE rather than suicide.

In short, unlike the kind of hard paternalism justified within value pluralism, the kind of hard paternalism the HPS relies on is much more invasive of autonomy. By permitting *only* autonomous choices for VAE which accord with the HPS theorist's specific understanding of the disvalues that can make life not worth living, it endorses preventing all others who do not espouse this understanding, but who wish to end their lives through VAE, from shaping their lives by their own lights. In other words, unlike the targeted hard paternalism of Raz, which sanctions minor incursions on personal autonomy, the HPS permits profound intrusions on a central aspect of self-authorship. *This* kind of hard paternalism cannot be consistent with respect for autonomy.

A theorist affirming this version of the HPS might be analogized to a father saying to his adult daughter the following: "I will not interfere with your decision to become a lawyer because I respect your autonomy—your capacity to shape your life according to your own convictions about what is good for you. Oh, by the way, the other reason, without which I would not have accepted your decision, is that law is on my list of professions which I consider good (or not bad) for you. Had you chosen anything outside of my list (say, anything in the arts or humanities), I would have, of course, had to protect you from the catastrophic harm of going down the wrong career path (after all, wasted youth can never be recovered), and locked you in your room until you changed your mind."

We have good reason to suspect that the father's proclamation of respect for his daughter's autonomy is disingenuous. He respects his daughter's present choice only because it happens to accord with his specific understanding of what would be good (or not bad) for her. By his own account, if she had chosen a career that had not been on his pre-approved list, he would not have hesitated to prevent her from pursuing it. He cannot make this admission without sabotaging his own claim that his acceptance of her choice in the current scenario is motivated by respect for her autonomy. What this suggests is that while I have focused on how the HPS's well-being criterion can violate the autonomy of those prevented from choosing VAE, the HPS does not respect the autonomy even of those whose decisions for VAE it accepts—namely, the severely ill and disabled. For their decisions are allowed only because they happen to conform with the narrowly defined list HPS theorists espouse of conditions and considerations that genuinely make death good (or not bad) for a person. If a severely ill person wants to test the state's respect for his autonomy, he simply has to try to get VAE for some non-health-related reason; the HPS theorist will, of course, support intervening. So while, in practice, the severely ill and disabled individual's autonomy might appear to be respected by the HPS, it is merely an appearance. Since his choice is accepted only because he happens to want what the HPS theorist thinks is reasonable for him, he is not, in reality, choosing from an adequate range of options.

To conclude, while grounding individual rights against interference in both respect for autonomy and concern for objective well-being might *in theory* be compatible, the HPS's *particular* well-being criterion is inconsistent with respect for autonomy. In order for the HPS's well-being criterion to justify constraining the right to choose VAE to the sick and disabled, it must stipulate a specific understanding of people's good—in particular, of which values are and are not dispensable for a good life—and it must set this as a condition for respecting their autonomous choice for

VAE. In doing so, it sanctions extensive restrictions on individuals' autonomous choice regarding a matter immensely important to their self-authorship and self-legislation, such that it cannot be reconciled with any serious concern for individual autonomy. That is, in order for Tenet 2 (the well-being criterion) to justify Tenet 3 (a right to choose VAE only *in extremis*), it cannot be made compatible with Tenet 1 (respect for autonomy).

2.3 Other Justifications of Hard Paternalism

I have argued above that whether one affirms the lexical priority of autonomy or value pluralism, the hard paternalistic interferences required by the HPS to reach the Standard View's conclusion is incompatible with its invocation of respect for autonomy. However, we need to consider other possible arguments which might justify the hard paternalism sanctioned by the HPS. Below, I consider two alternative justifications of hard paternalism to see if they might rescue the HPS.

First, consider a consequentialist view according to which we ought to respect personal autonomy only because doing so is usually the best way to promote an individual's good. Since the normative source of respect for autonomy is based solely on its contribution to well-being, in cases where this relationship breaks apart, it is perfectly consistent with its grounding to prioritize individual well-being above respect for autonomy. From this perspective, since autonomy has merely instrumental value and what we care about at bottom is a person's well-being, we should, of course, intervene even in a fully autonomous choice to die whenever it is against a person's own good. The consequentialist might then interpret the HPS as follows:

> **HPS-Consequentialism:** Individuals have a right to choose VAE grounded in respect for their autonomy, which is, in turn, grounded in concern for their well-being (Tenet 1). Since their well-being is the ultimate concern, in cases where respecting a person's autonomous choice does not promote his well-being, we have no reason to respect his choice (Tenet 2). This justifies a right to choose VAE applying only to those for whom death would be a benefit, namely, those with severe illnesses and/or disabilities (Tenet 3).

I believe that this line of reasoning is logically consistent. But notice that this justification is not really a bipartite argument at all. Since concern for autonomy is based solely on concern for an individual's good, this justification for the right to VAE relies solely on the value of individual well-being. That is, there is no real Tenet 1 in this argument, since respect for autonomy is just a specification of how to implement the promotion of people's best interest. Since it is not a version of the Standard View at all, I will not address it here. My objections in the next chapter against the best interest argument for the right to VAE apply to it.

Consider a second possible justification of hard paternalism. Unlike the consequentialist, Raz argues that autonomy's value is not merely instrumental; it is valuable in and of itself. Nevertheless, on Raz's view, autonomy is valuable in and of itself insofar—*and only insofar*—as it is exercised in pursuit of valid ends. Autonomously making choices that are depraved, for example, is worse than having those repugnant choices imposed on one.[45] This normative basis of autonomy appears compatible with hard paternalism: if respect for autonomy is ultimately grounded in the value of a person authoring *an objectively good life*, this is consistent with not

[45] Raz, *The Morality of Freedom*, pp. 380-81.

respecting the person's autonomy—with prohibiting even a fully autonomous choice—when the choice opposes or does not embody his objective good. Following this line of reasoning, the HPS might be interpreted as follows:

> **HPS-Razian Autonomy**: Individuals have a right to choose VAE grounded in the value of autonomy, which is intrinsically valuable *when used to pursue an objectively good life* (Tenet 1). In cases where a person uses his autonomy in a way that opposes or does not further his objective good, we need not respect his autonomous choice because his exercise of autonomy here has no value (Tenet 2). This justifies a right to choose VAE applying only to those for whom death would be an objective benefit, namely, those with severe illnesses and/or disabilities (Tenet 3).

The problem with this strategy is that while the Razian view of autonomy might justify hard paternalism, much like the argument from value pluralism, it does not support the *kind* of hard paternalism needed by the HPS to restrain the right to VAE *in extremis*. Within the internal logic of the Razian view, it would indeed be permissible to prohibit some fully autonomous requests for VAE—for example, preventing a man who requests VAE because he can no longer count blades of grass.[46] But it would still let in an array of reasons beyond extreme illness and disability as a basis for choosing death. For example, it would not seem to rule out the choice of the man who wishes to die because he has lost his entire family, since a life without family may be considered objectively bad—autonomy is not being used here to pursue a worthless conception of the good. Recall that the Razian view holds that respect for autonomy requires granting

[46] For Rawls' famous case of the grass counter, see Rawls, *A Theory of Justice*, p. 432.

others an adequate range of options. If we are to respect personal autonomy, then we cannot impose a single conception or a narrow selection of conceptions of the good life, but must accept a multitude of conceptions of it. Thus, appealing to Raz's understanding of respect for autonomy does not justify insisting that *only* illness and disability—*and no other consideration*—can make a person's life objectively bad, such that no one else's choice for VAE needs to be respected except those of the extremely ill and disabled. To put it succinctly, the Razian view does not yield the Tenet 2 needed to justify Tenet 3.

Neither the consequentialist perspective nor the Razian understanding of respect for autonomy redeems the HPS. Thus, I maintain my original conclusion that the HPS is internally contradictory. If we claim to respect individuals' autonomy in their choice for VAE, we cannot endorse prohibiting their choice whenever it fails to coincide with their objective interest. In the HPS, the requirement that a person's decision for death must be in line with his best interest, objectively construed, such that the right to choose VAE applies only *in extremis,* entails a kind of hard paternalism that is potentially so extensive in its ramifications for individual choice that it is contrary to the HPS's claim to respect personal autonomy. Tenet 1 and Tenet 2 of the HPS are logically inconsistent.

3. REJECTION OF THE SPS

3.1 Battin's and Brock's Arguments

Let us move on to the SPS. It might be contended that Tenet 1 and Tenet 2 of the Standard View can be reconciled if we interpret the well-being criterion differently. This, as we saw, is precisely Battin's and Brock's strategy. Both construe a person's well-being, whether by definition or by invoking outsiders' epistemic limitations, so as

to align it with a person's own autonomous choice. By doing so, they can claim that there is no conflict at all between the two arms of the argument—to block a person's decision for VAE when it is against his interest is to block a decision that is substantially nonautonomous. It is an instance of soft paternalism, which is compatible with respect for autonomy.

I agree that in the SPS, there is no contradiction between Tenet 1 and Tenet 2.[47] The problem with the SPS is how, once we assimilate a person's best interest to his autonomous choice, we are to justify the conclusion that the right to choose VAE is excluded from everyone except those who choose VAE due to a serious illness or disability. That is, the problem is how Tenets 1 and 2 are supposed to yield Tenet 3. If we need to defer to a person's autonomous choice in order to judge his interests, then how are we to deny that death can be in the interest of the healthy mother who wants to donate a vital organ to her son, the misanthrope who no longer wishes to live in a degenerated world, or even the avid grass counter who is no longer able to count grass? And if we cannot deny that death can be in their interests, then the stipulation of individual well-being in the SPS cannot restrict the right to choose VAE to the sick and disabled—the conclusion Standard View proponents want.

Of course, even on an objective account of interest, it is possible to challenge the claim that the only circumstance in which dying can be in a person's interest is that of serious medical illness and disability. But at least on an objective account, the medical criterion appears plausible. One might say that given the multitude of ways to live a genuinely good life, only extreme damage to the very instrument through which we

[47] One might want to question the coherence of Tenet 1 and Tenet 2 in the SPS. In particular, Battin's argument supposes that interference is compatible with respect for autonomy insofar as the person's choice does not reflect her fundamental values and aims. But some might object that such a ground for interference is too lax—soft paternalism allows for preventing *substantially* nonautonomous choices (e.g. those due to coercion, drugs, depression, etc.), not any choice which fails to be fully autonomous (i.e. fails to embody the person's true preferences). The precise limits of an autonomy-respecting soft paternalism will be discussed in Chapter 5, Section 1. I will not take this route of criticism because, as we shall see in that section, with the particular choice for death, a concern for autonomy allows for interference whenever a person's decision contradicts her true values and aims.

exist in this world can exclude the possibility of living a worthwhile life. But if a person's good (or our judgment of it) is to be assimilated with her autonomous choice, then the only way her decision for VAE could be (or could be judged to be) bad for her is if it fails to reflect her own fundamental preferences and values. If the standard for determining a person's best interest is ultimately subjective, it is difficult to see how it can justify a thick objective criterion for when death is or is not good for someone, applicable universally to everyone, so as to exclude the right to choose VAE from all except those suffering serious medical conditions.

Thus, while the correlations Battin and Brock make between individual interest and autonomous choice seem reasonable, their arguments for the medical criterion for the right to VAE appear *ad hoc*. Battin says that while a person's best interest depends on his own fundamental values, when a person is physically healthy, this is objective evidence that living, rather than dying, is compatible with his fundamental values. But why should we think that death cannot be compatible with a healthy person's deep values and preferences? Why should we believe that everyone who is healthy really does value life? Given the plurality of conceptions of the good which people hold, such a claim is highly implausible. Thus, if we accept the view that a person's best interest just is what the person would autonomously choose, then both concern for well-being and respect for autonomy support a right to VAE whose application extends beyond the sick and disabled.

Brock suggests that a healthy person's decision to die may be judged to be substantially nonautonomous because we can infer the presence of clinical depression. Indeed, theorists frequently cite depression as a competence- or autonomy-negating condition.[48] The idea is that severe depression is a mental disorder which substantially

[48] E.g. Beauchamp and Childress, *Principles of Biomedical Ethics*, p. 210; R.B. Brandt, "The Morality and Rationality of Suicide," in *Biomedical Ethics*, ed. Thomas Mappes & David DeGrazia (New York: McGraw-Hill Publishing, 1996), p. 382; Terrence Ackerman, "Why Doctors Should Intervene," ibid., p. 74; Louis Lasagna, "Discussion of 'Do No Harm'," in *Philosophical Medical Ethics: Its Nature and*

manipulates a person's reasoning, crippling the person's decision-making capacity. Brock notes that clinical depression leads to the "distortion of values."[49] Richard Brandt elaborates that it "tends to primitivize one's intellectual processes. It restricts the range of one's survey of possibilities," such that one often overlooks the "best alternative."[50] Given this, it might seem clear that a depressed person's choice to die is very likely not to reflect his true values and aims. A request for VAE made in the throes of clinical depression is comparable to a decision made under the influence of alcohol or drugs—both may be subject to soft paternalistic interference, as both are substantially nonautonomous.

However, to dismiss healthy individuals' decisions to die by citing clinical depression begs the question. It is true that according to current psychiatric standards, any perfectly healthy person who wishes to commit suicide would be diagnosed with clinical depression. But so would a person who wishes to die because of an illness or disability. This is because the diagnosis of clinical depression solely indicates a person's current state of mind; it does not tell us anything about the mental process that led the person to his current state. Consider the standard criteria published by the American Psychiatric Association for diagnosing a person with clinical depression: the person must exhibit over two months or more, at least five of nine symptoms, including "depressive mood most of the day," "diminished interest or pleasure in all or most activities," "agitation or loss of energy," and "recurrent thoughts of death."[51] Another common diagnostic tool, the Beck Depression Inventory, rates as the most extreme cases those who affirm statements like "I am so sad and unhappy that I can't stand it,"

Significance, ed. Jr. Stuart Spicker & Tristram Engelhardt (Boston: Reidel Publishing Co., 1977), p. 45; Brock, *Life and Death*, 207; Battin, *Ending Life*, pp. 20-21; Keown, *Euthanasia, Ethics and Public Policy*, p. 56.

[49] Brock, *Life and Death*, pp. 87-88.

[50] Brandt, "The Morality and Rationality of Suicide," p. 382.

[51] American Psychiatric Association, *Diagnostic and Statistical Manual for Mental Disorders: DSM-IV-TR* (Washington, DC: American Psychiatric Association, 2000), pp. 320-23.

"I feel the future is hopeless and that things cannot improve," and "I would kill myself if I had the chance."[52]

As this suggests, any person who despairs of her life and believes that it is not worth living could be diagnosed with clinical depression. To say that a person has clinical depression does not tell us whether the person reached this state of mind after careful reasoning based on her situation and values, or whether it is caused by chemical imbalance or psychosis. In other words, to say that someone seeking VAE has severe depression does not tell us anything we do not already know based on the fact that the person is seeking assistance in suicide (the exception being, perhaps, altruistic cases). Now, it is true that some psychological studies suggest that depression makes people suppress positive facts about their lives and focus on the negatives.[53] If so, then depression indeed distorts decision-making capacity, vitiating the possibility for autonomous choice. However, such results are far from conclusive. Other psychological studies suggest that depressives actually make *more accurate* evaluations about themselves and their lives than their counterparts (that is, it is the *non*-depressives who are *overly* positive in their evaluations when compared to the facts).[54]

We must be careful about assuming that individuals with depression are necessarily incompetent or nonautonomous, as such judgments may simply reflect ingrained biases within our society against those who do not affirm life. Often, the judgment that another person suffers depression reveals the values of the judge rather than the competence of the one judged. This is aptly illustrated in Brian Clark's famous play, "Whose Life Is It Anyway?" In one scene, two doctors debate whether Ken, a

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[52] Aaron T. Beck, Gregory K. Brown, and Robert A. Steer, *Beck Depression Inventory-II (BDI-II)* (San Antonio: Psychological Corporation, 1996).
[53] Aaron T. Beck, *Depression: Causes and Treatment* (Philadelphia: University of Pennsylvania Press, 1970), pp. 228-242.
[54] See Lauren B. Alloy & Lynn Y. Abramson, "Depressive Realism: Four Theoretical Perspectives," in *Cognitive Processes in Depression*, ed. Lauren B. Alloy (New York: Guilford Press, 1988), pp. 223-65. For an interesting discussion of how depression may lead to moral insight, see Mike W. Martin, "Depression: Illness, Insight, and Identity," *Philosophy, Psychiatry, & Psychology* 6, no. 4 (1999): pp. 271-86.

quadriplegic, has clinical depression or is just rationally depressed. Dr. Emerson holds that because it is unreasonable for Ken to choose death, his request for passive euthanasia clearly reveals the presence of clinical depression, and so he is incompetent to make the decision. Meanwhile, Dr. Barr, who believes Ken's preference is reasonable given his physical condition, contends that he is merely rationally depressed, and so is competent to choose to die.[55] I suspect that something like this is happening when theorists like Brock assume that individuals who wish to die while physically healthy have clinical depression and individuals who wish to die while seriously ill or disabled do not—their judgment is rooted in their own values and understanding of what makes a life worth living. Because of this, as the exchange between Dr. Emerson and Dr. Barr illustrates, it begs the question to Kafkaesque proportions to appeal to clinical depression as a way to deem a person incapable of autonomous choice—of making decisions based on his own values and conception of the good.

The discussion above suggests that the diagnosis of clinical depression should stay faithful to the more objective standards used by the psychiatric community today, which I described above. Recall that such standards are outcome-based (i.e. based on a person's current state and outlook: Does she experience any enjoyment? Does she have any appetite? Is she motivated to live?), rather than process-based (i.e. based on the reasoning process which got the person to where she is: Is the person's depression warranted by the facts? Are there distortions in her reasoning process?). Based on this, we cannot assume that a person diagnosed with clinical depression is unable to make an autonomous choice to die. So while it is true that any healthy individual seeking VAE could be diagnosed with depression, this does not show that we may block her choice consistently with respecting her autonomy (if so, then we may block everyone's choice, including the severely sick and disabled). Moreover, since healthy individuals'

[55] Brian Clark, *Whose Life Is It Anyway?* (Woodstock, IL: The Dramatic Publishing Company, 1978), p. 76.

decisions to die may be perfectly autonomous, depression notwithstanding, Brock's case for deferring to a person's autonomous choice to promote her good applies to them as well. Thus, on Brock's view, neither respect for autonomy nor concern for well-being supports the restriction of the right to choose VAE *in extremis.*

I conclude that both Battin's and Brock's arguments are unsuccessful. While they are able to render the Standard View's commitment to respecting autonomy and promoting well-being compatible, they fail to show that this would justify prohibiting healthy individuals from getting VAE. That is, in reconciling Tenet 1 and Tenet 2 of the Standard View, they lose Tenet 3.

3.2 Future Consent

Before rejecting the SPS, we must consider a final possibility. Sometimes, it is thought that we may prevent a person's present choice by appealing to her future consent to such intervention. The authors of the Philosophers' Brief rely on this line of reasoning to exclude healthy individuals from the right to choose VAE when they claim that unlike the gravely ill and disabled, healthy individuals "would later be grateful if they were prevented from dying."[56] Unlike Battin's and Brock's arguments, the claim here is not that the healthy person's wish to die is necessarily nonautonomous; rather, the normative grounds for intervention is the person's *future* autonomous choice. The idea is that a sophisticated view of personal autonomy must recognize that a person's fundamental values are not set in stone. Through learning and experience, a person's conception of the good may undergo change throughout her lifetime. So a person may truly wish to die *now* because of the loss of a value or values which she *currently* finds indispensable, but if prevented from dying, she may *subsequently* discover another value or values which make her life equally (or more) meaningful. The defeated

[56] Dworkin et al., "Assisted Suicide: The Philosophers' Brief".

businessperson who cares fundamentally and solely about financial success might, after being prevented from jumping off the bridge, come to value a life centered on spirituality, and even believe that she had been sorely mistaken before in her attachment to monetary wealth. Now, this does not strictly fit into Feinberg's definition of soft paternalism above, since the claim here is not that the prevented choice is substantially nonvoluntary, or nonautonomous. Nevertheless, appeal to future consent is sometimes thought to be a version of soft paternalism in the wider sense, in that it appears to be an autonomy-respecting form of paternalism, since interference is still justified by the person's own autonomous choice—here, of the future self. Following this view, the SPS might be reinterpreted as follows:

> **SPS-Future Consent:** Individuals have a right to choose VAE grounded in respect for their autonomy (Tenet 1). However, we may prohibit an autonomous choice for VAE for a person's own good *if* it can be shown that the person would later consent to the interference (Tenet 2). This is not opposed to respect for autonomy since interference is justified by the person's future autonomous choice. This justifies preventing physically healthy individuals from choosing VAE; the right to VAE applies only to those with severe illnesses and/or disabilities (Tenet 3).

Setting aside the highly questionable assumption that all healthy individuals would later be grateful for having been prevented from dying, the more fundamental difficulty with the argument above is that future consent does not make present interference consistent with respect for autonomy at all. That is, unlike Battin's and Brock's arguments, it does not even reconcile Tenet 1 and Tenet 2. The problem with

grounding intervention in future consent is well-documented, so I will discuss it only briefly.[57] The central issue has to do with what Jon Elster calls the *phenomenon of sour grapes*, or more formally, *adaptive preference formation*. Sometimes, people adjust their preferences and values not because of learning and experience, but out of habituation and resignation when what they truly want has been excluded from them.[58] A wife prevented by her husband from taking a job outside the home might come to dismiss working life, much like the fox deeming the grapes out of his reach sour; a young man locked out of college because of his race might later decide that education would have been a waste of his time anyway. As a result, such individuals might consent to the previous limitation of their options, but we would not think that their altered preference reflects their autonomous choice, since it is not the consequence of genuine self-authorship or rational self-direction, but of a subconscious psychological drive occurring behind their backs, so to speak, to reduce frustration in the face of scarce options. Thus, consent derived in this way cannot make the original restriction respectful of autonomy. The possibility that later consent might be the result of adaptive preference formation undermines it as a justification for earlier intrusion.

It is true that people's values and preferences are regularly affected by a variety of contingent factors beyond their control, including limitations in their options (e.g. I might value an intellectual's life, though I would have valued a dancer's life had I had any talent). Not all external influences on preference formation—not even all external causes of adaptive preferences—violate a person's autonomy. For example, being rejected from a promotion might cause someone to form an adaptive preference against moving up in his job, but even though the adaptive preference makes him less

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[57] See Amartya Sen, *Commodities and Capabilities* (Oxford: Oxford University Press, 1999); *The Standard of Living: The Tanner Lectures* (Cambridge: Cambridge University Press, 1987); Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000).

[58] Jon Elster, *Sour Grapes: Studies in the Subversion of Rationality* (Cambridge: Cambridge University Press, 1983), pp. 109-40.

autonomous, his bosses do not necessarily violate his autonomy in denying him the promotion. The problem adaptive preference formation poses for paternalism grounded in future consent has to do with the particular kind of influence used—namely, coercion—and how it is supposed to be justified—namely, preference adjustment after coercion. Applied to the SPS, we cannot proclaim that we respect the healthy person's autonomy, then force him to live against his will, and justify this by the conception of good he adopts because we forced him to live. Interference based on subsequent consent is not consistent with respect for autonomy; it is not soft paternalism at all.

I conclude that the SPS interpretation of the Standard View fares no better than the HPS. While the SPS advanced by Battin and Brock renders the arguments from respect for autonomy and promotion of well-being consistent, it loses the desired conclusion—it cannot justify a right to VAE that applies only to exceptional cases. That is, while the SPS reconciles Tenet 1 and Tenet 2, the weakened Tenet 2 no longer justifies Tenet 3. On the other hand, appealing to future consent is not a viable option because it is not an autonomy-respecting form of paternalism—it does not reconcile Tenet 1 and Tenet 2 at all.

4. THE HPS REVISITED: PROFESSIONAL ETHICS

Before categorically rejecting the Standard View, we need to consider a final response that could be made—namely, that I have mischaracterized the HPS altogether, and a more defensive interpretation of it is possible. In my delineation of the HPS, I claimed that if a theorist acknowledges that healthy individuals can make autonomous choices for VAE, but nevertheless argues that we should prohibit their requests because VAE is against their objective welfare, then the theorist is endorsing hard paternalism. However, it might be objected that I have left out a crucial aspect—namely, that VAE is not a solitary act, but involves doctors, who have commitments and obligations of their

own. One might contend that while the HPS sanctions prohibiting a person's fully autonomous choice for VAE when it is against the person's welfare, the injunction is directed *not toward the person who harms himself*, as I have presented it, but toward the *physician who causes harm to her patient.* More precisely, one might argue that a physician has an obligation to be committed to her patient's welfare which cannot simply be waived, and *this* is the reason for requiring that VAE must be in the interest of the person to be assisted in dying.

For some advocates of the Standard View, this seems to be the underlying rationale for limiting the right to VAE by an objective well-being criterion. The notion of professional ethics—that is, of a set of special obligations which bind doctors *qua doctors*—is influential in the bioethics literature. Opponents of VAE often cite professional integrity as the reason for prohibiting physician involvement in VAE under any circumstance, and rather than disputing the claim, many advocates argue instead that a correct interpretation of medicine's foundational norms and aims, as currently understood, shows that it is consistent with the provision of VAE in certain circumstances. This reflects the overall conservative strategy VAE proponents that I mentioned in the Introduction. They wish to show that VAE does not require an upheaval of professional medical ethics, but is actually in line with how we *already* conceive of the ends and principles of medicine.

This is important for the current issue because dedication to patient well-being has long been seen as one of the hallmark commitments of the medical profession. As Beauchamp and Childress note, "The idea that beneficence expresses the primary obligation in health care is ancient."[59] By "ancient," they are referring to Hippocrates' time-honored injunction to doctors: "To practice about disease two: to help or not to

[59] Beauchamp and Childress, *Principles of Biomedical Ethics*, p. 206.

harm."[60] Despite great changes in the modern understanding of physicians' roles and obligations, this foundational commitment has not altered. The President's Commission for the Study of Ethical Problems in Medicine reiterated in 1982, "In sum, the promotion of well-being provides the primary warrant for health care."[61] Beauchamp's and Childress' influential text similarly takes beneficence and nonmaleficence as two of the four primary obligations of physicians.[62]

It seems to be because of this understanding of physicians' primary obligation to "help or not to harm" that some proponents of VAE believe the procedure should be allowed only when it is in the patient's objective interest. Franklin Miller and Howard Brody exemplify this line of reasoning: "If a reasonable quality of life remains available to the patient, with the help of comfort care, then assisted death is not appropriate, regardless of the wishes or requests of patients." This is because "[t]he physician is an independent moral agent, committed to the internal morality of medicine," which "excludes physician assistance on demand."[63] As Young notes, for the right to VAE to be justified, it must be shown that it does not contradict the first principle of medicine, *primum non nocere* ("first, do no harm").[64]

Those who take the physician's obligations to be the underpinning of the objective well-being criterion for VAE might object that my construal of the version of the Standard View in which the two arms of the argument set distinct criteria as a *hard paternalistic strategy,* or the HPS, is simply mistaken. It might be argued that while a person may commit suicide even when it is harmful to himself, *physician-assisted*

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[60] Though the maxim is often attributed to Hippocratic Oath, it is in fact found in another work of the Hippocratic Corpus, i.e. Book I, Chapter 11 of the *Epidemics*. See Albert Jonsen, "Do No Harm: Axiom of Medical Ethics," in *Philosophical Medical Ethics: Its Nature and Significance*, ed. Jr. Stuart Spicker & Tristram Engelhardt (Boston: Reidel Publishing Co., 1977), p. 26.

[61] President's Commission for the Study of Ethical Problems in Medicine and Biomedical Behavioral Research, "The Values Underlying Informed Consent," in *Biomedical Ethics*, ed. Thomas Mappes & David DeGrazia (New York: McGraw-Hill Publishing, 1996), p. 90.

[62] Beauchamp and Childress, *Principles of Biomedical Ethics*, pp. 149-239.

[63] Franklin Miller & Howard Brody, "Professional Integrity and Physician-Assisted Death," in *Bioethics*, ed. Justin Oakley (Farnham: Ashgate, 2009), p. 365.

[64] Young, *Medically Assisted Death*, pp. 119-21.

suicide is not solely a matter of a person's right to autonomy because it involves another person—namely, a physician—who has professional obligations which may not be waived. Since the grounds for interference is ultimately not the patient's good *per se,* but the doctor's obligation, this is *not hard paternalism—or any kind of paternalism at all.* Jeffrey Blustein, for example, contends that we do not act paternalistically by insisting that doctors have obligations which prevent them from carrying out, without limitation, the patient's autonomous choices. The idea is that patient autonomy is not infringed or violated at all if certain options cannot be offered to them because of the medical profession's own moral constraints. As the President's Commission emphasize, "[T]he well-being principle circumscribes the range of alternatives offered: [the right to autonomy] does not mean that patients can insist upon anything they might want. Rather, it is a choice among medically accepted and available options, all of which are believed to have some possibility of promoting the patient's welfare"[65]

If this line of reasoning is successful, then it seems that we may, after all, both endorse respect for autonomy and require that a person's choice for VAE be in his objective interest. Contrary to my construal of the HPS, the prohibition of VAE when it does not conform to the patient's objective well-being is not an endorsement of hard paternalism, but a matter of professional ethics. This is consistent with respecting the patient's autonomy because the latter does not require the medical profession to provide VAE to them without limitation. To avoid confusion, let us call this new interpretation the Professional Ethics Strategy (hereafter, PES):

> **PES:** Individuals have a right to choose VAE grounded in respect for autonomy (Tenet 1). However, their objective well-being sets the limit to this right because in cases where VAE is against their objective

[65] President's Commission for the Study of Ethical Problems in Medicine and Biomedical Behavioral Research, "The Values Underlying Informed Consent," p. 90.

> interest, a physician is prohibited from offering the procedure due to the professional ethics of medicine (Tenet 2). Since the well-being criterion for choosing VAE is grounded in the physician's professional obligations, this is not hard paternalism—or any kind of paternalism—at all. This justifies a right to choose VAE applying only to those with severe illnesses and/or disabilities (Tenet 3).

Below, I assess whether this reinterpretation of the HPS—namely, as the PES—can reconcile Tenet 1 and Tenet 2 of the Standard View.

4.1 Clarification of the Professional Ethics Argument

To begin, we need to unpack the PES, as there are several potential sources of confusion regarding how it might reconcile Tenet 1 and Tenet 2. First, it behooves us to distinguish between two cases in which a patient's request might be denied in the name of professional integrity. In the first, the physician is willing to comply with the patient's request, but is prevented from doing so because of the professional ethics of medicine. In the second, the physician endorses the rules of professional ethics and believes that it would be violated by the patient's request, and so she is unwilling to comply. Though theorists defending professional ethics often invoke the second case, for example, arguing that patients' right to autonomy does not entail a right to *demand*, it is essential that we do not conflate the two. Since the question currently under consideration is whether and when patients have a right to choose VAE from a willing doctor without a third party's intervention, we can grant for the time being that physicians may refuse to provide VAE when they disagree with the choice—whether based on personal, religious, or professional ethics. The relevant case for us is the one

in which the physician *wants* to comply with the patient's request, but her compliance is prohibited by the professional ethics of medicine. To evaluate the PES, we need to ask whether a third party like a state or governing medical association may prevent a consensual act of VAE between a willing physician and her patient in virtue of the physician's obligatory commitment to patient well-being—and whether this justification for intervention is truly consistent with respect for the patient's autonomy.

Second, it might be tempting to think that if the well-being criterion is rooted in the physician's obligations, then it cannot be paternalistic toward the patient. After all, if the prohibition of non-beneficial VAE is directed not toward person A, who wants the non-beneficial VAE, but toward person B, who is providing it, how could it be paternalistic toward A at all? However, to see that appealing to B's obligations may simply be a circuitous way of being paternalistic toward A, consider Feinberg's distinction between "single-party cases" and "two-party cases" of paternalism. Single-party cases are exemplified by laws against suicide, self-mutilation, and drug use, while two-party cases are exemplified by laws against euthanasia, dueling, and drug sales.[66] So what is relevant for VAE is the two-party case. While in single-party cases, the state prohibits A from acting in order to protect A, in two-party cases, the state might prohibit B from acting in a way consented to by A in order to protect A. Feinberg notes, "The two-party cases are paternalistic when one party's request for (or consent to) the action of a second party does not give the second party license to do what the first party wants (or is willing) to have done. . . . The law prevents the first party from having what he wishes done and in that way interferes with *his* liberty on the grounds that it knows best what is for his own good."[67] In other words, paternalism—including hard paternalism—can be indirect: the state can act paternalistically toward you without directly prohibiting you from acting, but by restricting someone else who wishes to abet

[66] Feinberg, *Harm to Self*, p. 9.
[67] Ibid.

in your act (e.g. punishing solicitors of prostitutes as a way to protect would-be prostitutes).

This suggests that just because the PES frames the well-being criterion for VAE as a restriction on *the physician* does not mean that it avoids hard paternalism toward *the patient*. For holding doctors to an obligation to be committed to patient well-being—an obligation which patients cannot waive through consent—may simply be an indirect way of limiting patients' fully autonomous choices for their own good. In order to show that a physician's unwaivable obligation not to harm is consistent with respecting the patient's autonomy, it must be shown that such an obligation does not ultimately rely on hard paternalistic premises about protecting the patient's own good which the patient does not accept. That is, we must investigate further into the grounds of professional medical ethics to see why doctors must be bound to an obligation not to harm in the first place which a competent patient may not waive. Why is a doctor *qua* doctor not allowed to provide whatever procedure the patient autonomously chooses? Unless there is a good, non-hard-paternalistic reason for imposing on doctors an unwaivable commitment to patient well-being, the invocation of professional ethics to circumscribe VAE does not show that the patient's autonomy is being respected.

The final potential source of confusion with the PES is that although I have followed the usual terminology in describing the obligation in question as the doctor's commitment to *benefit* the patient or to *not harm* the patient, such locution is misleading. In order for the patient's well-being to "circumscribe the range of alternatives offered,"[68] the doctor's unwaivable obligation cannot simply be to benefit (or not harm) the patient's well-being *tout court*—it must be to benefit (or not harm) the patient's *objective* well-being. After all, if a doctor can be dedicated to just any account of a patient's well-being, say, a preference-satisfaction account, then she can provide

[68] See n. 65.

VAE to anyone who autonomously chooses it. This is important because contrary to how it is sometimes portrayed, a doctor who flouts the obligation need not intend to harm the patient. A physician who wants to comply with a patient's autonomous request for VAE even though the patient does not meet the objective well-being criterion need not be motivated by greed or malice. She might think that fulfilling the patient's autonomous wish *is* to benefit the patient, or that the patient should make the final decision about his own life. The question we need to ask then, in assessing whether the PES can reconcile the Standard View, is what the grounds are for holding doctors to an unwaivable commitment to patients' *objective* interests. To show that this is compatible with respecting patient autonomy, we need to have good, non-hard-paternalistic reasons for justifying this professional code.

4.2 The Grounds of Professional Ethics

The grounds for binding doctors to special obligations are not always clear. In discussing professional integrity, theorists often suggest that physicians' obligations depend on the *ends* or *goals* of medicine. But the question remains: who or what determines the ends and goals of medicine, and why should doctors be confined by them? Below, I analyze three answers that have been offered (by theorists on both sides of the spectrum with respect to VAE). By assessing the possible grounds for espousing professional ethics, I will establish that none show that holding doctors to an unwaivable obligation to act in the patient's objective interests is consistent with respect for the patient's autonomy. That is, Tenet 1 and Tenet 2 are not rendered consistent by the PES.

According to the first argument to be considered, the ends and norms of medicine are justified by a form of internal agreement by those within the profession.

That is, similar to how religious groups and cultural associations have the right to establish special obligations for their members, we might think that through tradition, influential writings, and explicit decisions made by governing medical associations, the medical profession has legitimately established certain goals and principles as binding on those within the group. Individuals who enter into the profession then implicitly commit themselves to observe the codes of the group. On this understanding, since commitment to patients' well-being, objectively understood, has been a long-established principle within the medical community, a person who enters into the profession must be confined by this principle, and so refuse any procedure that may be detrimental a patient's objective welfare. To renege on this obligation is to betray one's peers, as such principles of self-regulation may be considered crucial for the reputation of the profession. As the British Medical Association notes, doctors have a duty to "work to the standards established by their peers and avoid any action that would bring the profession into disrepute."[69]

Later on in the discussion, I will question the claim that a person who enters the medical profession today makes any implicit commitment to his peers to follow particular goals. The deeper problem with the argument above is that internal agreement is not a tenable justification of professional ethics at all. For most of medicine's history, physicians as a group have indeed generated and followed their own ethical codes without oversight.[70] The insularity of these standards led to a hierarchical and dictatorial model of proper physician conduct. From the time of Hippocrates, the medical profession espoused a model of the physician-patient relationship analogous to that between parent and child. The physician, based on his knowledge and skill set, was expected to make unilateral decisions about the patient's treatment; the patient was to

[69] British Medical Association Ethics Department, *Medical Ethics Today: the B.M.A's Handbook of Ethics and Law*, 3rd ed. (Chichester: John Wiley & Sons, 2012), p. 1.
[70] Beauchamp and Childress, *Principles of Biomedical Ethics*, pp. 7-8.

simply follow the "doctor's orders."[71] The notion of "informed consent" did not take hold in medical ethics until the 1970s, when patients and others in society challenged the traditional paternalism of the medical institution.[72] It was also during this time that people in society challenged the policy against honoring patients' requests (or their families' requests on their behalf) to withdraw life-saving treatment.[73] Despite vast disagreement amongst bioethicists today regarding the correct principles of medical ethics, all agree that such policies are unacceptable.

But if we accept the justification of professional ethics currently under consideration, then we need to accept whatever principles the medical community establishes to regulate its own conduct. It was wrong of patients to challenge their internally agreed-upon policies, and wrong of courts to force alternative policies on them. The problem with grounding doctors' obligations on internal agreement is that the medical profession is not on a par with religious groups or cultural associations—it is more on a par with bankers or public officials. Just as we would not think bankers can band together to make up whatever rules they want for governing their activities, neither can physicians. This is because both occupy public and powerful roles, and they do so by mandate of society, which has given them a monopoly on the provision of certain services. It is by law that only licensed physicians can write prescriptions, perform surgeries, and provide certain other services crucially related to our bodies. Given their sanctioned monopoly, they do not have a right to demand that we interact with them only on their terms. In short, the ends and codes of medicine cannot be grounded solely in the internal agreement of those within the profession. We cannot justify a physician's unwaivable obligation to act in the patient's objective interest in this way.

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[71] DeGrazia, *Biomedical Ethics*, p. 51; Justin Oakley, ed. *Bioethics* (Farnham: Ashgate, 2009), xix; Brock, *Life and Death*, p. 148.
[72] Thomasma, *For the Patient's Good*, pp. 12-13; Oakley, *Bioethics*, xv.
[73] See *In Re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976) and *Cruzan v. Director, Missouri Department of* Health, 497 U.S. 261 (1990). Also see DeGrazia, *Biomedical Ethics*, p. 307.

A second understanding of professional ethics says that the ends and norms of medicine are determined by the *concept* of medicine. This view is most famously advanced by Kass, who claims that because medicine is inherently the art of healing, for a person to be a practitioner of *medicine*, her actions must not contradict this goal.[74] This is sometimes called the "essentialist view" of professional ethics.[75] While advocates of VAE cannot accept *healing* as the sole end of medicine, since this would rule out aiding in a patient's death altogether, they might argue that medicine's intrinsic end is broader—it is to preserve and promote patients' objective well-being. If so, then it might be argued, a doctor *qua* doctor has an obligation to act only in the objective interest of the patient. Even if the patient autonomously chooses VAE, to end the patient's life when it is not in her interest is to act contrary to the ends of medicine, such that one who acts in this way is no longer a physician, no longer a practitioner of medicine. Moreover, since the doctor's unwaivable obligation is rooted in safeguarding the "art" of medicine, not individual well-being *per se,* such a justification does not seem to rely on any paternalistic premises about protecting a patient's good against her will.

However, even if objective well-being is the natural end of medicine, the claim that a physician is obligated to act in accordance with the intrinsic concept of medicine is ultimately unconvincing. For the sake of argument, suppose medicine does have an inherently given end, and this end is to promote patients' objective well-being. Now, suppose that a person practices medicine, but takes as her overarching goal not the promotion of her patients' objective interests, but the fulfillment of her patients' autonomous choices. Given this, she is willing to provide VAE to patients who autonomously request the procedure, even if she thinks the person would be better-off continuing to live. Now, even if we think that her practice deviates too much from what

[74] Leon Kass, "Neither for Love nor Money: Why Doctors Must Not Kill," *The Public Interest* 94 (Winter 1989): p. 29.
[75] See Young, *Medically Assisted Death*, p. 117.

we understand the medical profession to be about, such that we are no longer willing to call her a doctor, why should her actions be prohibited if she does not violate anyone's rights? As Arthur Applbaum argues, if an individual's practice is sufficiently different from what we call "doctoring," then we can call it by another name, such as "schmoctoring." As long as the goals of "schmoctoring" are morally permissible, then there is no normative problem.[76]

It seems what is doing the work in Kass's argument is ultimately not the concept of medicine, but the concept of a profession, and the link he sees between being a professional and making a commitment. He writes, "A profession, as etymology suggests, is an activity or occupation to which its practitioner publicly professes—that is, confesses—his devotion."[77] The suggestion here is that while the concept of medicine might not bind the physician in and of itself, by *becoming a physician*, a person makes a promise to others in society to be devoted to the values distinctive of that profession. It might be said that one's speech-act creates reasonable expectations in others. This is distinct from Kass' previous argument, since what matters here is not necessarily the *intrinsic* end(s) of medicine, but our *shared understanding* of its end(s). Following this, it might be argued that given that medicine is seen to promote patients' objective welfare, a physician is not at liberty to offer procedures that are objectively bad for their patients—to do so would be to break one's public commitment and to betray the trust that others have because of the commitment one has made.

The problem with this kind of argument is two-fold. First, the act of *professing* does not tell us any more about what a doctor *ought* to be committed to than the concept of medicine. Following the line of reasoning above, it might be argued that by entering the profession, doctors in the past professed to abide by the traditional authoritarian norms of medicine, since this was the shared understanding of the profession across

[76] Arthur Applbaum, *Ethics for Adversaries: The Morality of Roles in Public and Professional Life* (Princeton: Princeton University Press, 1999), pp. 45-60.
[77] Kass, "Neither for Love nor Money," p. 29.

society at the time. But people might *understand* medicine to operate under these principles while finding them *objectionable*. If so, then the fact that doctors declared themselves to abide by these norms is hardly a justification for them. Since our shared understandings and social expectations might simply reflect existing injustices (i.e. if a profession has always followed objectionable norms of conduct in the past, we will *expect* it to continue following objectionable norms of conduct), honoring social expectations is a bad measure for how a profession should behave.

Second, even if physicians can be bound to certain standards by the act of professing, given the breakdown of our shared understandings, the claim that physicians profess to be committed to our objective interests is dubious. We do not think, for example, that plastic surgeons lie by professing to be doctors, even though many of us believe that procedures like breast enlargements do not promote people's objective interests. In a pluralistic society, where people disagree about what constitutes a person's good, neither the medical professional nor the public at large necessarily expects medicine to serve a single, objective understanding of well-being. We can conclude that neither the concept of medicine nor the act of professing to practice medicine justifies requiring that the doctor must intend only her patient's interest, where this is understood independently of the patient's own autonomous choice.

Consider a third understanding of professional ethics, according to which the proper norms and ends of medicine are rooted in the *social role* of the medical profession. On this view, different institutions within society contribute to different human goods. To understand the correct principles for governing a profession, we must assess its point and function within society as a whole to see its particular contribution to the community.[78] Miller and Brody sometimes suggest this view. They claim that

[78] This view of professional medical ethics accords with the more general institutionalist view of justice, according to which first principles depend on the point and function of the particular institution to which they are meant to apply. See Andrea Sangiovanni, "Justice and the Priority of Politics to Morality," *The Journal of Political Philosophy* 16, no. 2 (2008): pp. 137-64.

the "moral responsibilities that are distinctive of physicians" are obligations which come with their "distinctive social role"—they are "social role obligations."[79] Similarly, the BMA notes that crucial to the grounds of professional ethics is "the notion of medicine serving and promoting the welfare and goals of society."[80] From this, it might be argued that given the moral division of labor, and doctors' work with our bodies and lives, it makes sense to assign to them the role of being devoted to patients' objective well-being.

Unlike my treatment of the previous two arguments, I will not criticize the notion of social roles as a justification for professional ethics. What I reject is the claim that doctors have the particular social role obligation to tend to patients' objective welfare, which the patient cannot waive. This, I believe, simply reintroduces hard paternalism at another level. In a pluralistic society where people disagree about the good life, not everyone will accept that the social role of the medical profession is to serve a single, objective conception of citizens' welfare. To insist on this as medicine's social role, such that citizens may not choose to use it differently, is to constrain their autonomy in virtue of a conception of the good which not everyone accepts. It is simply another version of Feinberg's two-party case of hard paternalism: we forbid a patient's consent from giving a physician license to do what the patients wants, and we justify this by appealing to the promotion of a notion of the patient's good which he rejects.

As Alasdair MacIntyre argues, in a society that lacks rational consensus of the hierarchy of goods, it does not make sense to assign to the medical profession the social role of being in charge of our welfare.[81] In today's society, no one can rely on anyone

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[79] Brody, "Professional Integrity and Physician-Assisted Death," p. 360.
[80] British Medical Association Ethics Department, *Medical Ethics Today: the B.M.A's Handbook of Ethics and Law*, p. 5.
[81] Alasdair MacIntyre, "Patients as Agents," in *Philosophical Medical Ethics: Its Nature and Significance*, ed. Jr. Stuart Spicker & Tristram Engelhardt (Boston: Reidel Publishing Co., 1977), pp.

else to know his best interest. The patient approaches the doctor as a stranger to stranger—he neither expects nor wants the doctor to be devoted to his well-being, if this is understood independently of his own choices. The problem with deriving doctors' unwaivable obligation to intend our objective well-being in their supposed social role is that it begs the question by assuming precisely what is at issue. Namely, it assumes that everyone *wants* doctors to have such a role in their lives. For example, in arguing why doctors should accept the obligations of beneficence that come with their social role, Beauchamp and Childress point out that "many physicians and health care professionals owe a large debt to society (e.g., for education and privileges) and to their patients past and present (e.g., for research and 'practice')."[82] The suggestion is that doctors must accept their role in contributing to the good of society *as a matter of reciprocity*. But even if the medical profession owes special obligations to others because of their acceptance of special benefits, we cannot assume that people wish to be repaid by having doctors become guarantors of their objective good. Given the diversity of conceptions of the good, doctors' debt to society might justify obligations like staying after hours if a patient needs urgent care, but it does not justify obligating them to refuse patients' autonomous requests in the name of their objective welfare.

In short, there is no good, non-hard-paternalistic ground for holding doctors to an unwaivable obligation to act in patients' objective interests, such that we can claim to respect patient autonomy while insisting on permitting only objectively beneficial VAE. As we saw, doctors' obligations cannot be grounded in internal agreement within the medical profession, since this would justify many practices we all agree are unacceptable. Nor does the concept of medicine or of a profession (as related to the act of professing) tell us what doctors *ought* to be committed to. Finally, while grounding medicine's professional ethics in its social role is not in itself objectionable, the

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207-10. In fact, MacIntyre goes so far as to say that every physician or hospital should be able to publish its own codes, such that patients can choose to whom they wish to entrust. See Ibid, p. 211.

[82] Beauchamp and Childress, *Principles of Biomedical Ethics*, p. 206.

particular claim that doctors' social role requires them to act only in a patient's objective interest, irrespective of a patient's autonomous choice, simply masks hard paternalism at a more fundamental level. We can conclude that the notion of professional ethics does not salvage the Standard View. Since there is no non-hard-paternalistic ground to justify a physician's unwaivable obligation to a patient's objective well-being, Tenet 1 and Tenet 2 are still inconsistent within the PES.

5. CONCLUSION

In this chapter, I have justified the claim that the Standard View for the right to choose VAE faces a trilemma: we cannot uphold all three of its tenets simultaneously without contradicting ourselves. When we interpret the Standard View as the HPS, Tenet 1 and Tenet 2 are contradictory. The argument from respect for autonomy cannot be reconciled with the kind of hard paternalism entailed by the objective best interest criterion for choosing VAE. This is true whether we affirm value pluralism or the lexical priority of autonomy. Nor is the PES able to reconcile Tenet 1 and Tenet 2, for bringing in the professional ethics of medicine does not, after all, allow us to evade hard paternalism. On the other hand, when we interpret the Standard View as the SPS by aligning our conception of individual well-being, whether definitionally or epistemically, to respect for the person's autonomous choice, we are indeed able to render Tenet 1 and Tenet 2 compatible. On this understanding, appealing to both respect for autonomy and individual best interest as necessary conditions for the right to choose VAE presents no internal conflicts. But, here, with a weakened understanding of well-being, we can no longer affirm the conclusion, Tenet 3. If we ought to defer to a person's autonomous choice to promote his good, then we have no reason to prevent healthy individuals who make autonomous requests for VAE from going forth with a willing doctor. By trying to reconcile two facets of the argument, the third logically

comes apart, and so one of these commitments must be given up. In the next chapter, I will argue which one.

CHAPTER 2:

REJECTION OF BEST INTEREST ARGUMENTS FOR THE RIGHT TO VAE

We saw from the foregoing chapter that the Standard View for the right to VAE—which appeals simultaneously to concern for individual well-being and respect for personal autonomy to justify a right to VAE restricted to the severely ill and disabled—faces a trilemma. An argument from concern for well-being interpreted so as to be consistent with respect for autonomy cannot constrain the right to VAE *in extremis*, and a well-being argument that *can* constrain the right is inconsistent with the position's own argument from respect for autonomy. As it stands, the Standard View is internally inconsistent. In this chapter, I will continue to deconstruct the Standard View by showing that it is the argument from an individual's best interest which must be abandoned. I contend that grounding a right to VAE on the premise that a person's welfare would be served by VAE inevitably violates liberal neutrality by presuming the falsity of certain reasonable comprehensive doctrines. It does so in two related ways: firstly, by requiring specific assumptions about the *value of life* which reasonable people disagree about, and secondly, by requiring specific assumptions about the *nature and value of death* which reasonable people disagree about. It is not merely that the particular well-being arguments employed by proponents of VAE to justify their desired conclusion violate neutrality. I will show that it is not possible to make *any* kind of argument for VAE invoking its advancement of individual welfare without relying on

premises which some reasonable people dispute. If so, then in a liberal society, the well-known argument that VAE should be allowed for certain individuals because (or in part because) death would be a benefit to them, in fact, cannot support the right to VAE for anyone.

If successful, such a conclusion has significant implications for both the grounds and the scope of the right to choose VAE. Regarding the *grounds* of the right: First off, the critique from liberal neutrality rules out two alternative justifications of VAE which uphold the well-being argument that remain untouched by my objection of internal inconsistency in Chapter 1. The first option left open from the previous chapter is that of giving up the argument from respect for autonomy and appealing *solely* to a person's objective well-being to justify a narrow right to VAE. The second option is to maintain both autonomy *and* well-being as necessary conditions for the right by aligning a person's well-being to his autonomous choice and accepting a broad right to VAE. While based on the conclusion of the last chapter, these two variations are internally consistent, both are excluded by the conclusion of this chapter. In fact, the reach of my conclusion extends beyond this. Insofar as judgments about individuals' best interests in choosing death necessarily violate neutrality, they cannot have *any* role in justifying the right to VAE in a liberal society—even as a subsidiary or supportive argument (for example, as a consideration to take into account after respect for autonomy is met). Given the centrality of well-being arguments for VAE both in lay culture and in the philosophical literature, this is an important conclusion.

The rejection of best interest arguments for VAE also has broad implications for the *scope* of the right to choose VAE. First, it means theorists cannot respond to the objection of internal inconsistency in Chapter 1 by giving up the argument from autonomy and appealing solely to individuals' objective well-being to maintain a right to VAE restricted to exceptional cases. The criticism from liberal neutrality excludes

this option, and in doing so, it shows that if the right to VAE is to be justified at all, it cannot be restricted by the consideration of well-being to a right *in extremis*. Second, since best interest arguments cannot legitimately have any role in the justification of the right, they cannot have *any* effect on its scope—even, as we shall see, in cases of scarce resources after respect for autonomy is met. This critique lays the groundwork for my positive argument for the right to choose VAE in the next chapters.

This chapter is divided into three main sections. In Section 1, I delineate the precise account of neutrality relied on in this chapter, and explain why many theorists espouse it as a basic requirement of a liberal society. In Section 2, I argue that the premise that VAE would benefit some individuals necessarily violates neutrality because it requires making particular assumptions about what makes a life worth living which reasonable people dispute. In Section 3, I show that the premise that VAE would benefit some individuals violates neutrality also by assuming a controversial view about the nature and value of death.

1. LIBERAL NEUTRALITY

Since John Rawls' *A Theory of Justice,* many theorists have come to affirm the principle of neutrality as a foundational requirement of a liberal state. Ronald Dworkin, for example, describes it as the "nerve of liberalism."[1] Bruce Ackerman calls it "*the* organizing principle of liberal thought."[2] "The germ of the idea," as Ackerman puts it, "is that nobody has the right to vindicate political authority by asserting a privileged insight into the moral universe which is denied the rest of us."[3] Liberal neutrality is a vast subject area in political theory. To provide a complete enunciation and defense of

[1] Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985), p. 183.
[2] Bruce A. Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980), p. 10.
[3] Ibid.

the doctrine is beyond the bounds of this thesis. The aim of this section is more modest: I will delineate the account of neutrality that I take as the basis of my argument, explain why many theorists believe it is normatively imperative, and address some well-known perfectionist objections against it. I will end this section by clarifying why arguments about the moral right to VAE come under the purview of liberal neutrality.

1.1 What is Liberal Neutrality?

The root idea of liberal neutrality is that for a state's exercise of political power to be legitimate, it must not take sides on reasonable citizens' contested conceptions of the good or comprehensive doctrines. There are many ways in which the principle of neutrality can, and has, been interpreted, and so I must clarify the precise account of neutrality which I take as the basis for my rejection of best interest arguments for VAE. All interpretations of neutrality share the following general structure:

> For political power to be legitimate, certain decisions X must be neutral in the sense Y with respect to beliefs Z.

We arrive at a complete account of neutrality by defining each of the three variables: the first variable, X, specifies the scope of neutrality—it tells us *what* exactly must be subject to the requirement of neutrality; the second variable, Y, defines the precise *meaning* of neutrality—it tells us what counts as being neutral; and the third variable, Z, specifies the sorts of beliefs that need to be protected—it answers the question, neutral *in relation to what*? Different interpretations of neutrality arise from different ways of construing these three variables. As we shall see, the interpretation of neutrality which I need for my argument is a fairly weak one.

To start, neutralists differ with respect to the delineation of X—the scope of neutrality. Some theorists, such as Ronald Dworkin and Jonathan Quong, argue that for a state to be legitimate, *all political decisions* must meet the requirement of neutrality.[4] Gerald Gaus goes even further, contending that the scope of neutrality should extend beyond principles endorsed by the state to all "social moral rules"—that is, all moral imperatives which one person addresses to another.[5] For my argument, I need only the more modest position held by Rawls, Brian Barry, amongst others that the requirement of neutrality applies only to matters of basic justice and constitutional essentials, which include the delineation of citizens' fundamental rights and liberties.[6] Since, as we shall see, the right to VAE clearly falls within the constitutional essentials, I do not need to uphold a more extensive scope.

There is also discrepancy in the literature surrounding the specification of Y—the *meaning* of neutrality. Sometimes, neutrality is taken as an outcome-based notion: to say that a policy must be neutral in this sense is to say either that it must guarantee that every comprehensive doctrine or conception of the good has the same chance of flourishing, or that it must at least impact them in the same way.[7] The outcome-based interpretation of neutrality is clearly quite demanding and, in fact, few neutralists affirm it. Instead, the prevailing view amongst proponents of neutrality takes it to be a procedural notion: to say that a policy must be neutral in this sense is to say that its *justification* must not be based on controversial claims about which reasonable people

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[4] See Ronald Dworkin, "Liberalism," in *A Matter of Principle* (Cambridge: Harvard University Press, 1985), pp. 191-204; Jonathan Quong, *Liberalism Without Perfection* (New York: Oxford University Press, 2011), pp. 256-89.

[5] Gerald F. Gaus, *Justificatory Liberalism: An Essay on Epistemology and Political Theory* (New York: Oxford University Press, 1996), pp. 3-13.

[6] See Rawls, *Political Liberalism*, pp. 137-38; Brian Barry, *Justice as Impartiality* (New York: Oxford University Press, 1995), pp. 143-45.

[7] See Robert Goodin & Andrew Reeve, "Do Neutral Institutions Add Up to a Neutral State?," in *Liberal Neutrality*, ed. Robert Goodin & Andrew Reeve (London: Routledge 1989), pp. 193-210; Raz, *The Morality of Freedom*, pp. 106-15; Steven Wall, "Neutrality and Responsibility," *Journal of Philosophy* 98, no. 8 (2001): pp. 389-410.

disagree.[8] According to this interpretation, neutrality rules out certain *aims* of public policy; it makes no demand on the *consequences* of such policies. This is the meaning of neutrality I affirm.

Thus far, I have delineated the principle of neutrality as the demand that matters concerning basic justice and constitutional essentials must be justified by reasons that are neutral. Here, it behooves us to specify Z: neutral *with respect to what*? Neutralists usually define Z either as reasonable *comprehensive doctrines* or reasonable *conceptions of the good*. While Rawls uses the former terminology, other proponents tend to use the latter.[9] However, the difference does not signify any real discrepancy in the specification of Z. Although the locution *conceptions of the good* appears to comprise solely normative views—that is, views about *value*—neutralists usually hold that the reasons used by the state must remain neutral also with respect to philosophical and religious doctrines more generally (and not only the normative aspects within them). They emphasize that liberal justification must not rely on controversial epistemological and metaphysical doctrines about which reasonable people disagree.[10] This suggests that neutralists often use the terminology *conceptions of the good* synonymously with Rawls' *comprehensive doctrines*, which encompass all sectarian moral, philosophical, and religious views, including those about epistemology, metaphysics, and so forth. For the sake of clarity, I shall use Rawls' terminology in

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[8] For an influential statement on this issue, see Will Kymlicka, "Liberal Individualism and Liberal Neutrality," *Ethics* 99, no. 4 (1989): pp. 883-905. Neutralists who affirm the neutrality of justification include Rawls, *Political Liberalism*, pp. 192-94; Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 272-73; Ackerman, *Social Justice in the Liberal State*, pp. 10-13; Charles E. Larmore, *Patterns of Moral Complexity* (Cambridge: Cambridge University Press, 1987), pp. 44-45; Thomas Nagel, *Equality and Partiality* (Oxford: Oxford University Press, 1991), p. 166; George Klosko, "Reasonable Rejection and Neutrality of Justification," in *Perfectionism and Neutrality: Essays in Liberal Theory*, ed. Steve Wall & George Klosko (Lanham, M.D.: Rowman & Littlefield Publishers, 2003), p. 168.

[9] See Rawls, *Political Liberalism*, p. 175. Cf. Larmore, *Patterns of Moral Complexity*, pp. 50-59; Quong, *Liberalism Without Perfection*, p. 4; Dworkin, "Liberalism," pp. 191-92; Ackerman, *Social Justice in the Liberal State*, pp. 10-11; Nagel, *Equality and Partiality*, p. 154; Barry, *Justice as Impartiality*, p. 12; Klosko, "Reasonable Rejection and Neutrality of Justification," p. 168.

[10] See Larmore, *Patterns of Moral Complexity*, pp. 51-52; Quong, *Liberalism Without Perfection*, p. 8; Ackerman, *Social Justice in the Liberal State*, pp. 356-57; Barry, *Justice as Impartiality*, p. 29; Klosko, "Reasonable Rejection and Neutrality of Justification," p. 172.

saying that a state must not take sides on citizens' *reasonable comprehensive doctrines* (though I will use the phrase *conceptions of the good* to refer specifically to views about value).

Of course, in defining Z, much rides on what is to be construed as *reasonable*. My understanding of liberal neutrality follows Rawls on this as well. According to Rawls, a reasonable comprehensive doctrine has three main features: 1.) it is an exercise of theoretical reason in the sense that it expresses an intelligible, internally consistent view of the world; 2.) it is an exercise of practical reason in that it balances and gives priority to values in an internally consistent way; and 3.) it usually belongs to, or draws upon, a tradition of thought and doctrine.[11] So according to this understanding of Z, a liberal state must not take sides with respect to conflicting moral, philosophical, and religious views satisfying the three criteria above. To summarize, the demand of liberal neutrality undergirding the argument of this chapter stipulates that matters concerning basic justice and constitutional essentials, including individuals' fundamental rights and liberties (X), must not be justified by reasons that presuppose the validity or falsity (Y) of comprehensive doctrines about which reasonable citizens disagree (Z).

1.2 Why Liberal Neutrality?

Why should we affirm this basic requirement? I believe the best case is provided by Rawls, and arises from two premises. Firstly, human beings are free and equal with respect to one another—no person has natural authority over another. Secondly, the diversity of comprehensive doctrines is a natural product of the exercise of human reason, such that reasonable pluralism with respect to them is a permanent feature of a free society. From these two premises, the question arises how political power can ever be legitimate. Specifically, how can it be justifiable for a state to impose a common set

[11] Rawls, *Political Liberalism*, p. 175.

of laws, backed by coercive force, to regulate the lives of individuals who are not naturally subject to anyone else's authority, and who have deep and irresolvable disputes about morality, the good life, religion, metaphysics, and the like? According to Rawls, the answer is that the basic framework upon which laws are built must be justified by *public reason*—by reasons all citizens can accept despite their different reasonable comprehensive doctrines. That is, a state's coercive power can be legitimated if the basic structure of political authority, in accordance with which coercive power is exercised, is rooted in "principles and ideals acceptable to [citizens'] common human reason."[12] On the other hand, a state which fails to meet this demand, and which bases its use of force on the advancement of a specific comprehensive doctrine or doctrines, fails to respect its citizens as free and equal, and its exercise of power is a form of oppression.[13]

For such reasons, neutrality is often regarded as the foundation of contemporary liberal theory. Of course, as with much else in philosophy, this view is not undisputed. Volumes have been written on the perfectionist-neutralist debate, and as this is not a thesis about neutrality, I will not attempt to address all of the issues involved. I will simply suggest below that quick objections against it are unsuccessful—liberal neutrality is a plausible view. Two major kinds of objections are typically leveled against neutrality: the first has to do with its purported undesirability, the second, with its alleged impossibility.

First, perfectionists sometimes contend that a neutral state would be vacuous and, therefore, undesirable. George Sher, for example, argues that some ways of life are

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[12] Ibid., p. 137.

[13] For Rawls' argument, see ibid., pp. 134-50. For similar lines of reasoning, see Quong, *Liberalism without Perfection*, pp. 2-4; Ackerman, *Social Justice in the Liberal State*, pp. 3-30; ibid., pp. 50-66; Larmore, *Patterns of Moral Complexity*, pp. 50-66; Gerald F. Gaus, "Liberal Neutrality: A Compelling and Radical Principle," in *Perfectionism and Neutrality*, ed. Steven Wall & George Klosko (Lanham, M.D.: Rowman & Littlefield Publishers, Inc., 2003), pp. 139-49. Though these neutralists invoke similar rationales for demanding neutrality, as noted previously, they do not all agree on the precise conception of neutrality needed to legitimate political power. The justification of Rawls' conception—i.e. its restriction of scope to the basic structure—will subsequently be discussed in this section.

clearly better than others, and if so, the demand for neutrality cuts citizens off from important goods that the state is in the position to provide.[14] As Joseph Raz puts it, a government's rightful aim should be to enable citizens to pursue *valid* conceptions of the good—that is, to lead lives that are *actually* valuable—since *this* is what is ultimately important to people.[15]

To begin, it is important not to overstate how "value-less" a liberal neutral state would be. Firstly, on the moderate account outlined above, the demand for neutral justification applies only to the constitutional essentials and matters of basic justice. It would not restrict the state from supporting projects like conservation and cultural advancement, as these matters fall outside the basic structure. Secondly, even where neutrality applies, what Rawls calls a *thin theory of the good*—composed of weak values we can all endorse from within our reasonable comprehensive doctrines—may be invoked.[16] On the basis of this thin theory, many fundamental values we care about, and which fall within the constitutional essentials and basic justice, may still be advanced. For example, the provision of healthcare could appeal to physical health as a general value independent of our specific conceptions of the good, and a right to education may rely on the all-purpose value of having basic literacy, mathematical skills, knowledge of history, and so forth.[17] For the reasons above, many neutralists maintain that neutrality is consistent with much of what modern liberal states already do.[18]

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[14] George Sher, *Beyond Neutraliy: Perfectionism and Politics* (New York: Cambridge University Press, 1997), p. 3.
[15] Raz, *The Morality of Freedom*, pp. 133 & 390-95.
[16] See Rawls, *Political Liberalism*, p. 178; Larmore, *Patterns of Moral Complexity*, pp. 51-52; Quong, *Liberalism Without Perfection*, p. 8; Ackerman, *Social Justice in the Liberal State*, pp. 356-57; Barry, *Justice as Impartiality*, p. 29; Klosko, "Reasonable Rejection and Neutrality of Justification," p. 172.
[17] For more on how an argument for the provision of healthcare might proceed through a thin theory of the good, see Section 2.2 of this chapter.
[18] See Steven Wall and George Klosko, "Introduction," in *Perfectionism and Neutrality: Essays in Liberal Theory*, ed. Steven Wall and George Klosko (Lanham, M.D.: Rowman & Littlefield Publishers, Inc., 2003), p. 22. Cf. Gerald F. Gaus, "Liberal Neutrality: A Compelling and Radical Principle," in *Perfectionism and Neutrality*, ed. Steven Wall & George Klosko (Lanham, M.D.: Rowman & Littlefield Publishers, Inc., 2003), pp. 156-62.

More importantly, however, since a state which abided by neutrality would be held back from promoting values in significant ways, the undesirability objection, by itself, simply misses the point of the neutralist's argument. While a state that aims to help citizens live truly worthwhile lives appears ideal—after all, it seems reasonable that what matters is not simply choosing, but choosing well—the neutralist's point is that given the fact that reasonable people disagree about *what constitutes choosing well*, and the fact that people have no natural authority over one another, appeal to public, shared reasons is the fairest method for adjudicating such disputes when coercive force is involved. That is, according to the argument, if a state is to refrain from oppression, neutrality is required *even if* it leads to a society in which we think people are not leading the best lives they can be leading. So the fundamental issue is not whether neutrality results in the most desirable state, but whether a state that flouts it can exercise legitimate power over its citizens. If it cannot, then the merit of helping citizens live worthwhile lives does not justify eschewing the demand.

So can a state respect its citizens as free and equal while pursuing perfectionist values? Vinit Haksar makes the case that it can by distinguishing between respecting people and respecting their comprehensive doctrines. According to Haksar, rejecting people's comprehensive doctrines when we take them to be unsound does not entail disrespecting the people who hold them—if anything, it signifies respect for them as rational agents with the capacity to change their beliefs in light of good arguments.[19] We respect them *as truth seekers*. However, this is a dangerous kind of "respect" with which to ground political power. It means telling an individual who repudiates the perfectionist values the state is designed to advance, "We respect you as a truth seeker, which is why we will force you to live according to the truth." Does this genuinely respect the individual as a rational agent? For what is in question is not the

[19] Vinit Haksar, *Equality, Liberty and Perfectionism* (Oxford: Oxford University Press, 1979), pp. 289-90.

permissibility of rejecting others' comprehensive doctrines, say, in a philosophy seminar. What is in question is whether, and on what basis, we may use coercive force on others. If we truly respected someone as a rational agent capable of altering her beliefs in light of good arguments, in a situation of disagreement, we would try to change her mind through debate, not justify constraining her on the basis of values and reasons she denies in the name of respecting her rational agency. But consensus through debate is precisely what neutralists deny is possible when it comes to people's comprehensive doctrines. According to Rawls, the burdens of judgment prevent rational individuals from ever coming into agreement on the deepest issues regarding the ultimate meaning and nature of human life ("What makes life worth living?" "Is there a God?").[20] This is why we must confine the justification of political authority to public reason. Respecting individuals as rational agents requires not rejecting the soundness of their comprehensive doctrines *in the justification of political authority.* Haksar line of reasoning does not show that neutrality is unnecessary for legitimate (i.e. non-oppressive) power.

The second kind of criticism typically leveled against liberal neutrality has to do with the alleged impossibility of fulfilling such a demand. On one well-known version of this objection, Raz criticizes the unavoidability of state policies being more favorable to some comprehensive doctrines over others. That is, it is impossible for a state to guarantee that all comprehensive doctrines will be affected equally or will flourish equally.[21] But it is clear that this objection applies only to the outcome-based conception of neutrality, whereas most neutralists, as I noted, hold the view that the requirement of public reason applies only to the justification stage. Liberal neutrality does not require a neutral outcome.

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[20] For Rawls' discussion of the burdens of judgment, see Rawls, *Political Liberalism*, pp. 54-58.
[21] Raz, *The Morality of Freedom*, pp. 117-24.

There is a more worrisome version of the impossibility objection. Some opponents charge that neutrality is impossible on a justification-based approach as well, for public reason is not substantial enough to enable us to arrive at any determinate answer on many important political questions, including those which belong to the constitutional essentials and matters of basic justice. Critics cite questions like how a state ought to handle abortion, euthanasia, same-sex marriage, human cloning, and stem-cell research, amongst others, as matters which cannot be answered at all without endorsing one sectarian metaphysical, religious, and/or moral premises or another. For example, how can we judge whether women have a right to abortion without taking any position on whether a fetus is a human being—that is, on when human life begins?[22]

Many plausible rejoinders have been offered by neutralists to show that indeterminacy is not insurmountable—they address the specific cases cited above to suggest how such issues could be dealt with through public reason alone.[23] A complete account of their responses is not possible here, but I believe they are right that the charge of indeterminacy is not as compelling as it might at first appear. With respect to abortion, for example, Judith Thomson offers a plausible argument for a woman's right to abortion that does not require denying that the fetus, at conception, is a person.[24] For my own part, I hope the arguments in Chapters 3 through 5 of this thesis demonstrate how at least one issue which critics allege to be necessarily indeterminate when approached through public reason—namely, the right to choose euthanasia—may be resolved without controversial moral, religious, and metaphysical premises. This is important, since it means that I am not criticizing the best interest argument for VAE on

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[22] For this version of the impossibility objection, see, e.g., Michael J. Sandel, *Liberalism and the Limits of Justice*, 2nd ed. (Cambridge: Cambridge University Press, 1998), pp. 196-202; David Reidy, "Rawls's Wide View of Public Reason: Not Wide Enough," *Res Publica* 6, no. 1 (2000): pp. 49-72; John Horton, "Rawls, Public Reason, and the Limits of Liberal Justification," *Contemporary Political Theory* 2, no. 1 (2003): pp. 5-23.

[23] See, e.g., Samuel Freeman, *Justice and the Social Contract: Essays in Rawlsian Political Philosophy* (New York: Oxford University Press, 2007), pp. 242-252; Micah Schwartzman, "The Completeness of Public Reason," *Politics, Philosophy, & Economics* 3, no. 2 (2004): pp. 191-220; Andrew Williams, "The Alleged Incompleteness of Public Reason," *Res Publica* 6, no. 2 (2000): pp. 199-211.

[24] Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy & Public Affairs* 1, no. 1 (1971).

the basis of a demand (i.e. for neutral justification) that is impossible to meet for the issue to be addressed at all.

Now, the current objection to upholding liberal neutrality that I have tried to dispel—namely, that public reason is insufficient to yield determinate answers to political questions—is more difficult to reject the wider scope of neutrality one endorses. While I have accepted Rawls' modest scope of applying neutrality only to the constitutional essentials and matters of basic justice, some charge that such a restriction is arbitrary.[25] If neutrality of justification is crucial for legitimating political power, why apply it only to a state's basic framework, and not to all coercive rules it imposes on citizens? And if Rawls' specification is *ad hoc*, then it is untenable to demand neutrality without requiring a wide scope, in which case the impossibility objection is, again, more difficult to deny. However, I believe there is a valid rationale for Rawls' constraint: for if we accept that it is impossible to apply neutrality to the justification of *all* coercive rules, yet liberal neutrality is important for legitimating political power, then given that we cannot demand what is impossible, it is reasonable that we demand that at least the basic framework of political authority meet this requirement. Since the basic framework has the most profound effect on our lives and interests, it is reasonable to require that public reason applies firstly—and if only—to this.[26] In short, I believe that a moderate account of neutrality is both tenable and feasible.

The brief discussion above hardly reflects the full depth and complexity of the ongoing debate between perfectionists and neutralists. However, I hope to have shown that liberal neutrality cannot be easily dismissed, such that it is a reasonable basis for my argument in this chapter. With this established, whether individuals have a right to

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[25] See, e.g., Kent Greenwalt, "On Public Reason," *Chicago-Kent Law Review* 69, no. 3 (1994): pp. 685-86. This critique of Rawls' restricted scope is also sometimes levelled by neutralists who endorse a wider scope. See, e.g., Quong, *Liberalism Without Perfection*, pp. 273-89.

[26] Of course, if the premise that a wide scope of liberal neutrality is impossible is false (as neutralists who endorse a wide scope would contend), then this justification of the restriction on neutrality would fall with it. But in this case, the impossibility objection dissolves as well. I have appealed to Rawls' more modest account because I believe the right to VAE is already covered by the constitutional essentials—accepting a wider scope would not negatively impact my argument.

VAE clearly falls within the scope of liberal neutrality as defined above. Whether or not we are entitled to end our lives and to license others to do so is a question involving our basic rights and liberties, and so qualifies as a constitutional essential. It is on a par with—if not more fundamental to our lives and interests than—other issues included within the constitutional essentials and matters of basic justice, such as whether individuals have a right to choose their occupations and whether they have a right to keep all of what they can get in a free market. If the determination of such issues ought to be subject to the purview of public reason, then the justification of the right to VAE ought to be as well.

It might be objected that my concern, as I indicated in the Introduction (Section 3), is solely with the *moral* right to VAE, while neutrality is meant to limit what a *state* can do, and so applies specifically to legal rights. However, in contrast to the question of whether we have a moral right, say, to have promises fulfilled, the moral right to VAE fundamentally has to do with what laws a state should *in principle* endorse. This is why I noted in the section cited above that my inquiry is foundational for the legal right to VAE. I distinguished my concern from the legal right only to bracket practical considerations which might alter how the moral right should ultimately be instituted. Nevertheless, to ask whether and when individuals have a moral right to choose VAE is to ask whether and when individuals who chooses VAE may be prevented with the use of coercive force by the state. So the rationale for requiring liberal neutrality applies here. If individuals are regarded as free and equal, with no natural authority over one another, then the reasons adduced to resolve this issue must not take sides on reasonable comprehensive doctrines. Having sought to motivate support for liberal neutrality, defused some challenges to it, and substantiated its relevance for arguments regarding VAE, the remainder of the chapter will concern how best interest arguments for VAE violate this demand.

2. BEST INTEREST ARGUMENTS AND THE VALUE OF LIFE

The following two sections discuss two major ways in which an argument for the right to VAE predicated on the advancement of individual well-being violates liberal neutrality. In this section, I show that such an argument necessarily entails a particular conception of what makes a life worth living, which reasonable people disagree on. In the first subsection, I discuss the sectarian accounts of value underlying proponents' best interest arguments for VAE. In the second subsection, I show that there is no hope of making such an argument neutral by drawing upon weak values accepted by everyone, for such values are insufficient for deriving judgments about the worth of a person's life for him. If so, then given the demand of neutrality, the argument that VAE is in some individuals' best interests has no part in the justification of the right to VAE in a liberal state.

2.1 Proponents' Arguments

We saw from Chapter 1 (Sections 1.2 and 1.3) that proponents of the Standard View invoke different accounts of the good to make the best interest argument. Let us review them in brief. Most proponents rely on an objective account of the good—they imply that there are aspects of what makes a life go well or badly that are independent of what the person wants or how it makes the person feel.[27] Thus, in discussing why some seriously ill and disabled persons' lives are no longer worthwhile for them, they refer not only to the badness of unremitting pain and suffering, but also to the badness of

[27] See Gerald Dworkin, *Euthanasia and Physician-Assisted Suicide*, pp. 3-16; Kamm, *Morality, Mortality, vol. 2*, p. 197; "Physician-Assisted Suicide," pp. 592-94; Beauchamp and Childress, *Principles of Biomedical Ethics*, p. 183; Young, *Medically Assisted Death*, pp. 17 & 22. Ronald Dworkin explicitly refers to an objective account of the good in his argument. See Dworkin, *Life's Dominion*, pp. 199-208.

losing physical independence and rationality, which, they contend, can undermine persons' dignity. As I argued in Chapter 1 (Section 1.3), this indicates an objective account of the good for two reasons. First, people who lack physical independence or rationality are not necessarily unhappy, nor does everyone regard these as indispensable values necessary for a good life. Second, bringing in the notion of dignity implies an objective understanding of the good life, since whether a person's life is deemed to have dignity is at least in part independent of the person's mental state or subjective judgment—a person's life does not have dignity simply because he is happy or because he prefers it. Thus, the assertion that some people's lives are no longer worth living because certain medical conditions subject them to indignity entails an objective account of the good life.

In contrast, Margaret Battin invokes a corrected preference-satisfaction account of the good life. She holds that what makes a life go well or badly depends solely on a person's fundamental preferences and values. Recall Battin's statement:

> [I]s death the worst of harms that can befall a person, or is unrelieved, hopeless suffering a still worse harm? . . . In the absence of an objectively valid answer, we must appeal to the individual's own preferences and values. Which is the greater evil—death or pain? . . . [T]he answer always is tied to the person whose life it is, and cannot be supplied in any objective way.[28]

For Battin, to claim that a person would be better-off dead is not to say that the person's life is bad in some objectively true sense, but merely that the person's life is not worth living according to the person's own preferences and values.

However, both objective and preference-satisfaction accounts of interest—as well as the hedonist account, if any theorist prefers this—are sectarian conceptions of the good which reasonable people disagree on. Recall Rawls' three features of

[28] Battin, *Least Worst Death*, p. 110.

reasonable comprehensive doctrines: (1) it is an exercise of theoretical reason in the sense that it expresses an intelligible, internally consistent view of the world; (2) it is an exercise of practical reason in that it balances and gives priority to values in a coherent way; and (3) it usually belongs to, or draws upon, a tradition of thought and doctrine.[29] The objective, preference-satisfaction, and hedonist accounts of the good are all intelligible and internally consistent views with long histories within the philosophical literature. Thus, it is illegitimate to rely on a specific account to justify individuals' right to VAE in a liberal state. If we invoke a disputed conception of the good to justify a fundamental right, we presume the falsity of other reasonable conceptions of the good, and in doing so, fail to respect those who hold them as free and equal persons.

It might be contended that a corrected preference-satisfaction account of well-being does not violate neutrality, since on this view, whatever kind of life a person ultimately believes is good for him *is* a life that is good for him. According to the corrected preference-satisfaction account, if I ultimately believe that having rationality, independence, or some other objective value is what matters, then it is indeed what matters for the realization of a good life for me; if my basic belief is that pleasure is what matters, then, again, this is what matters for my life to go well. Thus, while both the objective and hedonist accounts require telling some people who, on the basis of their conception of the good, believe their lives are bad, that their lives are actually still good for them, the corrected preference-satisfaction account does not entail this. So if we rely on a corrected preference-satisfaction account of well-being to ground the right to VAE, the scope of the right supported by it would overlap with what would be supported by various different accounts of the good. As Battin's statement above suggests, such an argument seems to support the right to VAE for anyone who, on the

[29] Rawls, *Political Liberalism*, p. 175.

basis of his conception of the good, decides that death is better for him.[30] This is why I granted in Chapter 1 that Battin's best interest argument is consistent with respect for autonomy. Given the inclusivity of the corrected preference-satisfaction account of the good, it might be thought that we can argue that VAE advances some individuals' well-being without violating neutrality, if by well-being, we are referring to the corrected preference-satisfaction account.

However, this line of reasoning is untenable because neutrality is not about what rights we ultimately support. Recall, it is fundamentally about how we *justify* basic rights and liberties. This is because to respect people in a society as free and equal, the *reasons* we present to justify their basic rights and liberties must be acceptable to all reasonable citizens. Even if the corrected preference-satisfaction account does not contradict other accounts as to *whether* a particular life is or is not worth living, it still violates public reason because it rejects other accounts' views on *why* a particular life is or is not worth living. Consider a quadriplegic who believes his life is worthwhile because he is still able to be with his family, which he takes to be objectively valuable. An adherent of the corrected preference-satisfaction account of the good may concur that his life is worth living, but she would insist that he is mistaken about *why* his life ultimately has value. Being with his family makes his life worthwhile only because he prefers it, not because it has any intrinsic value. But someone who believes in the objective value of love and family would certainly reject this understanding of his life's worth.

In other words, invoking the corrected preference-satisfaction account to support VAE entails rejecting other views regarding the *source* of value, which is just as important an aspect of a conception of the good as judgments about *whether* a life has value. Thus, even though the scope of the right to VAE supported by the corrected

[30] At this point in the argument, I do not have the resources to reject this claim. However, I will show that it is false in Section 3.2, when I discuss the need for an objective premise about the nature of death to judge whether a person would be benefitted by it, even on a preference-satisfaction account of the good.

preference-satisfaction account would not favor a particular conception of the good, the underlying rationale for the right to VAE would still deny some reasonable views about the good life. We would have to tell citizens who believe that their well-being lies in objective values or positive mental states that we support their right to choose VAE, but only because satisfaction of their fundamental preferences is what ultimately matters for their good. A state that grounds a basic right in this way does not treat its citizens as free and equal. Given this, we must modify the conclusion of Chapter 1 that an argument for VAE rooted in the corrected preference-satisfaction account of the good is consistent with respect for autonomy. An analysis of political legitimacy reveals that appealing to such an account of value violates individual autonomy on another level, since it justifies the use of coercive power based on reasons contrary to some people's conceptions of the good.

Thus far, I have avoided Brock's best interest argument. As I noted in Chapter 1 (Section 1.2), Brock suggests that we can remain agnostic on the correct conception of the good, and say simply that wherever a person's good lies, we should defer to his autonomous choice as the best "evidence" we have for his good.[31] According to this line of reasoning, we can deem VAE to be in a person's best interest if it is his autonomous choice, but not because we *equate* his good to his autonomous choice, but because we take him to be the best judge of his own good. It might seem that this ecumenical stance is compatible with liberal neutrality, since it does not embrace a specific account of individual well-being.

However, while Brock remains agnostic on the precise conception of the good, he relies on an epistemic premise which reasonable people holding different conceptions of the good may dispute. Although deference to autonomous choice is theoretically consistent with all three accounts of well-being, it is reasonably contested

[31] Brock, *Life and Death*, p. 207.

on some accounts. For example, VAE advocates invoking the objective account reject that the best way to judge individuals' well-being is simply to look to their autonomous choices—rather, we must also hold up their lives to objective criteria (e.g. are they suffering irremediable pain and/or total loss of physical independence and/or impending loss of rational agency?). Similarly, some hedonists hold that a person's autonomous choice is not necessarily the best measure for that person's future mental state. To determine whether VAE would benefit certain individuals on the hedonist account, it might seem more reliable to assess psychological data of how individuals with similar personalities and in similar situations have fared in the past. In other words, discrepancies on how well-being can be promoted is part of the disagreement reasonable people have with respect to their different views on human well-being. Brock's assertion that we should always defer to an individual's autonomous choice to judge her best interest is not a weak notion that everyone can accept from within their different conceptions of the good, and so such a case for the right to choose VAE also fails to meet the requirement of neutrality.

2.2 A Thin Theory of the Good Life?

The discussion above shows that all exponents of the Standard View rely on controversial accounts of well-being or of how to judge well-being. However, this does not yet establish that a case for VAE predicated on its advancement of individual welfare *necessarily* violates liberal neutrality, for there might be a way to make the case by adducing a weak notion of the good, rather than a particular conception of the good. Recall, liberal neutrality does not demand eschewing all value judgments in justifying citizens' basic rights and liberties. It is consistent with the rationale of neutrality to appeal to what Rawls calls a *thin theory of the good*, which is composed of general

values all reasonable citizens can endorse from within their comprehensive doctrines. For example, Rawls' Justice as Fairness relies on the notion of primary goods, which are considered general, all-purpose means which people need to pursue their comprehensive doctrines, whatever they might be (e.g. certain basic liberties, income and wealth, and the social bases of self-respect).[32] Given this, it might seem that my position—that it is illegitimate to rely on any claim about how VAE advances individual welfare—is too strong.

A best interest argument for the right to VAE might be derived from a thin theory of the good as follows: A theorist might first cite the general value of human life as something which all reasonable people accept, irrespective of their conceptions of the good. After all, just as goods like wealth and the social bases of self-respect are all-purpose means which people need in order to pursue their conceptions of the good, whatever they might be, can we not consider *being alive* a primary good which is needed to pursue any conception of the good at all? If so, then we do not favor any particular conception if we make the weak assertion that death is generally very bad for a person. A theorist might then point out that people with different conceptions of the good can also all agree that involuntary physical pain is a great disvalue—all things equal, a life with unremitting pain is worse than one without it. Thus, T.M. Scanlon suggests that freedom from physical pain should be added to the list of primary goods; Rawls concurs.[33] Based on our thin consensus, the theorist might contend, we can say that concern for individual well-being opposes affirming the right to VAE in most cases (because of the general, all-purpose value of being alive), but supports it in cases of unremitting pain (because of the great disvalue pain). Individuals' best interests support the right to VAE in, and only in, cases of unremitting pain.

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[32] See Rawls, *Political Liberalism*, pp. 178-87.

[33] T.M. Scanlon, "Moral Basis of Interpersonal Comparisons," in *Interpersonal Comparisons of Well-Being*, ed. Jon Elster and John E. Roemer (New York: Cambridge University Press, 1991), p. 41; Rawls, *Political Liberalism*, p. 182.

I accept that both life and freedom from pain can be regarded as primary goods—that they are valuable is a weak premise we can all accept.[34] However, I will show that the thin consensus we have is incapable of grounding any view on individuals' best interests which can impact their right to choose VAE. First, let us consider why the notion of life as a primary good cannot serve as a basis for opposing the right to choose VAE in ordinary (no pain) cases. To see this, we need to bring out a crucial aspect of the notion of primary goods. To wit, while the neutralist can claim that primary goods have value for everyone, she cannot cite something's being a primary good as a reason to restrict individuals' liberty to forsake it. For example, while wealth is a primary good, a liberal state may not, on the basis of this premise, prevent a person from giving up all of his material possessions, say, if he espouses a life of asceticism or of charity. This is because for the state's reliance on primary goods to be neutral on conceptions of the good, it cannot entail judgments about the validity of individuals' final ends. So the affirmation of wealth as a primary good cannot entail the judgment that the ascetic's life is ultimately bad for lacking (material) wealth, such that this can be used to affect his fundamental rights and liberties.

Rawls clarifies his understanding of primary goods as follows:

> Justice as Fairness rejects the idea of comparing and maximizing overall well-being in matters of justice. Nor does it try to estimate the extent to which individuals succeed in advancing their way of life or to judge the intrinsic worth (or the perfectionist value) of their ends. When seen as rights, liberties, and opportunities, and as general all-purpose means, primary goods are clearly not anyone's idea of the basic values of human life, and must not be so understood, however essential their possession.[35]

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[34] While in the next section, I will argue that neutrality is violated by the assumption that death is the end of existence, this need not undermine the view that life on earth is a primary good, since everyone—including those who believe Heaven lies beyond death—would agree that life in this world is *pro tanto* good, such that all things equal, it is better to have more rather than less of it. As we shall see, this is sufficient for life to be considered a primary good.

[35] Rawls, *Political Liberalism*, p. 188.

As this suggests, when Rawls deems people better-off or worse-off on the basis of their possession of primary goods, he is not making judgments or comparisons about how well or badly their lives are going in some all-things-considered sense. It is not that the ascetic's life is ultimately worse than that of the well-off. To maintain liberal neutrality, a state can maintain only that a person with less primary goods is worse-off in the more narrow, *political* sense that he has less of the goods which we all accept have at least *pro tanto* instrumental value, and which the state is in a position to provide and/or protect.[36] So, that something is a primary good may give the state a reason to provide or protect it, but something's being a primary good may not be employed to "compar[e] and maximiz[e] overall well-being"—for example, by compelling the ascetic to keep his wealth. In a liberal society, people must be free to decide for themselves whether and when they would ultimately be better-off giving up their primary goods in the pursuit of their final ends.

Insofar as being alive is considered a primary good, the same applies. That is, while the primary good of life gives the state reason to protect and support life for those who want it, for example, by outlawing murder and providing healthcare and other resources to sustain it, it does not give the state reason to institute measures on the basis that preserving life is all-things-considered better for a person, or that it is all-things-considered better for a person except in circumstances X, Y, or Z. Insofar as a state is to remain neutral on conceptions of the good, a person must be free to decide for herself when, if ever, life is no longer useful for the pursuit of her ends, and when, if ever, the value of life is worth sacrificing for a more important value. After all, if a person

[36] To say that liberal neutrality allows regarding primary goods as *pro tanto* instrumental goods is not to say that we can all agree that they are *merely pro tanto* instrumental goods. For example, on some conceptions of the good, it might be that living in a society with the basic rights and liberties is valuable in and of itself (independently of whether they are actually exercised or used for other ends). Rawls should not and need not have said that "primary goods are clearly not anyone's idea of the basic values of human life." The neutralist need not take any position on this. Rather, the grounds for treating primary goods as *pro tanto* instrumental goods is that people can all agree that they have *at least* this value (and possibly more).

wishes to die in order to gain honor or for the sake of some moral principle, we cannot insist that continuing to live is in her best interest without denying her conception of the good. In short, our thin consensus on the value of life cannot help determine whether and when individuals should be allowed to choose VAE.

Now, it might be objected that restricting *VAE* (as opposed to *suicide*) does not, as I have suggested, prevent anyone from choosing to forfeit the primary good of life. Rather, it denies (some) individuals only the *specific means* of forfeiting the primary good by limiting others' freedom to participate in it. However, recall the discussion of Joel Feinberg's two-party case of hard paternalism in Chapter 1 (Section 4): a state can coercively enforce a conception of the good on people not only by directly prohibiting the individuals in question, but by prohibiting others who would abet them in pursuing their conception of the good. So a state can restrict individuals' freedom in sacrificing the primary good of life not only by directly thwarting an act of theirs—to wit, with laws against suicide—but also by thwarting those who would help them—to wit, with laws against VAE. Doing so can be an indirect way of curbing people's efforts to forsake their lives by making the possible routes of accomplishing this end more difficult or more unsavory.[37] Consider the case of Cato the Younger, who committed suicide because he refused to live in a Rome led by Julius Caesar. Based on the discussion above, it is clear that we cannot prohibit Cato's suicide on the grounds that life, being a primary good, is good for him, without violating liberal neutrality. Now, envisage a hypothetical scenario in which, instead of stabbing himself, Cato, suddenly feeling shaky, asks his son to do it, and his son consents. If we prohibit Cato from giving his son license to take his life *on the grounds that Cato's life, being a primary good, is good for him*—recall, this is the grounds for delimiting VAE under consideration—then our argument still relies on a thick, contested view of the all-

[37] Possible difficulties and disadvantages of death by suicide, compared to VAE, include the uncertainty of success, the possibility of unwanted consequences in the case of failure, the degree of violence often required, and the solitary nature of the act. See my discussion of this at the end of Chapter 1, Section 2.2.

things-considered value of being alive about which people with different ultimate ends disagree. The mere fact that the restriction applies to a second party does not correct the non-neutrality of the underlying justification. The first person's liberty to relinquish life is just curbed through other means.

Let us turn to the disvalue of intractable physical pain. It might be thought that even abandoning hope of invoking the value of life, given our agreement on the disvalue of pain, we can still utilize the premise that lives of unremitting pain are bad for the people living them to support their right to VAE. However, we shall see below that our agreement on the disvalue of pain is also too narrow to derive any view on an individual's best interest with respect to ending life. To begin, it is worth noting that our concurrence on the badness of pain cannot be used to ground a *necessary* condition for the right to VAE. For even if all reasonable conceptions of the good shared the belief that a life of unremitting pain is ultimately a bad life, reasonable conceptions of the good differ on what other kinds of lives are *also* bad or not worth living. For some people, lives of physical dependence might make their lives just as bad as enduring unrelenting pain; for others, lacking pleasure or desire-fulfillment might be enough to make their lives not worth living. Given the diversity of ultimate ends, we cannot, without rejecting the validity of some reasonable conceptions of the good, make the presence of pain a necessary condition for deeming life bad for a person, such that it can be used to deny some individuals' right to VAE.

Now, it might be thought that our agreement on the badness of pain could still be developed into a *supplementary* best interest argument for VAE, in the sense that when a person is enduring unremitting pain, the fact that her welfare would be served by ending life is an *additional* reason for respecting her choice for VAE, whatever other reason(s) we have for respecting individual choices on VAE. However, our concurrence on the disvalue of pain is even thinner than what was granted in the

preceding paragraph. To wit, we do not even agree that a life with interminable pain is ultimately a bad life or one not worth living. Just as we agree only that being alive is *pro tanto* good, conceptions of the good converge only in accepting pain as *pro tanto* bad. On some conceptions of the good, a life of relentless pain can still be a great benefit to a person, for example, if it allows the person to finish a great work of art, to experience love, or to serve God's Will. According to some religious doctrines, like Catholicism, even a life with *only* unremitting pain and *no* redeeming goods is worthwhile because the value of life is beyond comparison.

Thus, within the socio-political discourse, some opponents of VAE sincerely object to VAE even in cases of severe pain on the basis that ending life, even under such a circumstance, would be an immense harm to the individual's well-being, for even a life with severe pain is of great value to a person. Of course, as advocates of VAE often point out (if not in these precise words), it is illegitimate for opponents to invoke sectarian comprehensive doctrines in arguments about citizens' basic rights and liberties. But if the line of reasoning above is correct, then neither can the supporter of VAE predicate individuals' right to choose VAE in cases of severe pain on the belief that their lives are indeed bad or not worth living, for this also denies the validity of others' reasonable comprehensive doctrines. Since different comprehensive doctrines agree only on the *pro tanto* badness of pain, and since they weigh the disvalue of pain differently relative to other values (including the value of life), neither the proponent nor detractor of VAE may legitimately cite the effect of VAE for individual well-being to support their position.

Some readers might remain unconvinced. They might object that the fact that some people are enduring intractable pain surely has some normative impact on their right to VAE. To bring out this point, envisage a scenario in which two individuals are both pleading for VAE, but the state has enough resources to grant only one of their

requests. It seems that in this situation, the state should prioritize the person in greater pain, and it should prioritize her *because continued life would be worse for her*. This suggests that the state should sometimes make judgments based on the disvalue of pain about how well-off or badly-off people ultimately are, such that it constitutes a consideration in favor of a person's right to VAE.

It is helpful here to explicitly distinguish between two ways of making well-being claims which I gestured to before. First, we can make what I shall call a *partial well-being claim*. This involves asserting that some people are well-off or badly-off, or better-off or worse-off, in what I referred to before as a narrow, *political* sense. To say that a person is badly-off in this sense is to say that he lacks primary goods—he lacks goods which we all agree have at least *pro tanto* instrumental value, and which the state is in a position to provide. Similarly, to say that one person is worse-off than another in this partial, political sense is to say that he has less of such goods than another. This weak judgment does not violate public reason because it involves the uncontentious claim that some things like income and wealth, social bases of self-respect, life, and freedom from physical pain have some basic value for people. The second kind of well-being claim is what I shall call an *overall well-being claim*. It involves making assertions about how well people's lives are going not just in terms of their level of primary goods, but in the more general sense of how good or bad their lives ultimately are for them. It is this kind of all-things-considered claim about the value of people's lives that I have been arguing a liberal state must avoid. As I have shown, whenever we start making judgments about whether a person's life is worth living, we take sides on specific conceptions of the good life.

Applying the distinction to the hypothetical example above, I argue that it is reasonable for a liberal state to prioritize the person in more pain, but *only* if this is based solely on her being in more pain—that is, on a *partial well-being claim*—and not

on the premise that her life is altogether worse than her counterpart's—that is, on an *overall well-being claim*. Supposing, for the sake of argument, that the two individuals have an equal amount of all other primary goods, a liberal state may cite the more pained person's disadvantaged position with respect to her possession of the primary good of freedom from pain as a reason for prioritizing her in the distribution of pain-relieving resources, including VAE. The partial interpersonal comparison may justify her priority. What the state may not do is appeal to the more comprehensive claim that life is, all things considered, worse for her than it is for her counterpart. Consider that even the person prioritized might reasonably dispute this claim. Suppose that the person in more pain is religious and the other is not. The religious person in greater pain might deny that she is all-things-considered worse-off than her counterpart. She might think that because she has her religion, her life is still better than the other person's, despite her greater pain. The basis for her demand for priority is simply that she has less primary goods, which is the standard for adjudicating competing claims in a liberal society.

According to my argument, then, it is consistent with liberal neutrality to invoke the great pain a person is enduring as a reason for supporting his right to VAE—if, and only if, this does not entail the assertion that life is a disservice to him, such that ending it would be in his best interest.[38] This is not merely a quibble about semantics. The

[38] This limited assertion about a person's great pain is linked to the consideration of mercy. While appealing to mercy is often conflated with the best interest argument, the two are, in fact, importantly different. For when we invoke mercy to support doing or allowing X for a person, we appeal only to a person's current suffering, not to the promotion of a person's overall well-being by doing or allowing X. Consider a dentist who stops drilling on a screaming child who is pleading for mercy, even though continuing would be in the child's best interest. Employing this weaker claim in support of the right to VAE is preferable to employing the consideration of best interest for several reasons. First, as it relies only on the *pro tanto* badness of pain and suffering, it does not involve a controversial view of the good life. Second, as mercy refers only to *present* suffering, not future or overall interest, adducing it to support a person's right to VAE does not necessitate a controversial premise on the nature and value of death, which will be another aspect of the best interest argument to be criticized below. Third, acting out of mercy is always consistent with respecting self-determination. For to *have mercy* always involves *giving into a person's request* to be released from suffering—it is not considered merciful to prevent a person, against his will, from enduring suffering (though it might be in his best interest to do so). It is not mercy, for example, to drag a protesting patient away from the dentist's chair because we see that he is

consideration which supporters of VAE usually find compelling is the purported fact that for certain individuals, their lives are so bad for them that death through VAE is their best option. But according to my view, public reason allows us only the premise that those with unremitting pain lack a *pro tanto* value—death (and VAE) might or might not ultimately benefit them. This diluted premise can have only limited normative impact. It does not have the force, for example, to by itself *justify* a right to choose VAE. For while it seems at least *prima facie* compelling that a person's right to choose VAE is justified by the advancement of his overall welfare, the argument loses its original force if what we mean is only that the person lacks one primary good, but VAE might or might not be consistent with his welfare at all. Nor should we suppose that the narrow well-being claim can now, without violating liberal neutrality, make pain a *necessary condition* for the right to choose VAE. For what would be the justification for making pain a necessary criterion for allowing VAE if it is only one *pro tanto* disvalue amongst many possible *pro tanto* disvalues—if people lacking pain might be suffering equal or greater disvalues (even based solely on public reason, say, because of the lack of wealth)?

The partial well-being claim can function only as one consideration weighing in favor of a person's right to VAE: when a person has interminable pain, this is an additional reason for supporting his right. But since it is neither necessary nor sufficient to justify his right to VAE, it affects his right only in limited circumstances. One such circumstance is illustrated by the example above: the presence of severe pain may tip the scales to justify one person's right to be provided VAE over another, if there can be a right to be provided VAE by the state, and there is a situation of insufficient resources (a situation which, as will be argued in Chapter 5, does not ordinarily apply in our society). As will also be discussed in Chapter 5 (Section 2.2), the presence of

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suffering. However, the mercy argument will have the same limited normative impact on the right to VAE as the *pro tanto* disvalue of pain, to be discussed below.

intractable pain may also tip the scales to help justify a person's right to choose VAE in the situation where he has dependent children to whom his special obligations would otherwise override his right to self-determination. As this suggests, the implications for the right to VAE of having severe pain is limited. In short, the disvalue of pain from a thin theory of the good can neither get the well-being argument VAE proponents want—to wit, the argument that some individuals' lives are so bad for them that VAE is their best option—nor have the central role they believe it has in justifying the right to VAE.

To conclude, the case for the right to VAE which appeals to the worth of a person's life for her is not salvaged by a thin theory of the good. Our limited concurrence on the value of life and the disvalue of pain cannot ground as sweeping and far-reaching a judgment as one which is entangled with the ultimate meaning of life. Thus, the claim that life is a great harm to a person, though seemingly compelling, cannot be adduced to support the person's right to choose VAE in a liberal society.

3. BEST INTEREST ARGUMENTS AND THE VALUE OF DEATH

I wish now to turn to another important reason why theorists may not predicate the right to VAE on its benefit to individual welfare. In the previous section, we saw that such a claim necessarily involves a particular judgment about what ultimately makes life valuable, about which reasonable people disagree. In this section, I argue that such a claim also requires a controversial assumption about the nature and value of death—it rests on a presupposition about what happens when people die, a subject on which reasonable comprehensive doctrines are deeply divided. In the first subsection, I will show how proponents' best interest arguments for VAE depend on the claim that we cease to exist upon the death of our physical bodies. This premise assumes the falsity of certain reasonable comprehensive doctrines—particularly, religious doctrines, which

usually posit some form of afterlife. In the second subsection, I survey the wider philosophical literature on the general badness of death to show that the theories found here on how to understand the (dis)value of death do not avoid the atheistic assumption either. By assessing their accounts, I show precisely why it is impossible to formulate any claim about a person's well-being with respect to ending life without implying a specific judgment on death's nature. Thus, even if the premise that VAE advances some individuals' welfare did not rely on a controversial view about life's ultimate values, it would still have to rely on a controversial judgment about the nature and value of death. Insofar as it does, appealing to it to justify the right to VAE fails to respect some reasonable comprehensive doctrines.

3.1 Proponents' Arguments

In Section 2.1, we saw that theorists making the best interest argument for VAE differ on the accounts of the good life they invoke. However, all of their arguments share a single basic structure which might be easily overlooked. Namely, the value of VAE for someone is taken to be simply the inverse of the absolute value of continued life for that person. If the person's future life would be good, absolutely speaking, then dying would be against her interest; if her future life would be bad, absolutely speaking, then dying would be in her interest. This is true whichever understanding of the good life a theorist employs. Those who rely on an objective account, for example, deem VAE to be a benefit whenever life is bad, objectively speaking, and those who rely on a corrected preference-satisfaction account deem VAE to be a benefit whenever life is bad, according to a person's corrected preferences. So Gerald Dworkin writes that when death is in a person's best interest, "it is because the patient's *life* is by some

'objective' measure not worth living."[39] Similarly, though taking an epistemic deference view, Brock notes that death is not considered a harm insofar as "*life* is no longer considered a benefit by the patient."[40] The underlying calculus is the same: whether one's best interest is in choosing death depends solely on the value or disvalue of the life prevented by one's death.

But this is an unusual way of assessing a person's best interest. Suppose I have two possible options, A and B, and I want to know whether choosing A would be in my best interest. To assess this, I would not only look at the absolute value for me of the alternative, B, but also compare this to the absolute value for me of the option under consideration, A. For example, if I want to know whether getting a job right out of high school would be a benefit for me, I cannot infer from the fact that going to college (let us assume) would be laborious and unrewarding that getting a job would therefore be in my best interest, since getting a job could be even *more* laborious and unrewarding (or worse on some other dimension). To determine whether getting a job would be good for me, I must compare the absolute disvalue of going to college with the absolute disvalue of getting a job. In parallel, with respect to the choice between life and death, whether death is a benefit depends not just on the value or disvalue of continued life—it depends also on what value death would have. Inferring from the fact that one's future life would be bad, absolutely speaking, death must therefore be a benefit, makes sense *only if we treat death as the ultimate end*. Only if death is the end of our existence—mathematically, an absolute value of zero—can we assess the relative merits of the two options, life and death, by looking solely at the absolute value of life, such that if the future segment of life would be bad—mathematically less than zero—then death would be better.

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[39] Gerald Dworkin, *Euthanasia and Physician-Assisted Suicide*, p. 10. Emphasis added.
[40] Brock, *Life and Death*, p. 207. Emphasis added.

Indeed, VAE proponents do not shy away from declaring this assumption about death, apparently taking it to be a given. Kamm notes in passing that death stops "consciousness simultaneously with stopping the person."[41] Foot remarks that "one who is dead has nothing."[42] Ronald Dworkin writes, "Death's central horror is oblivion—the terrifying, absolute dying of the light."[43] Jonathan Glover most explicitly explains that "we treat being dead or unconscious as nothing, and then decide whether a stretch of experience is better or worse than nothing."[44] But the death-is-nonexistence premise is an immense assumption. What happens after the demise of our physical bodies is a question regarding the ultimate nature of human existence. The mystery of death has divided philosophers, religious thinkers, and laymen for thousands of years. Insofar as the claim that VAE benefits some individuals presupposes that death is their ultimate end, such an argument for the right to VAE assumes the falsity of all of the world's major religions, since an afterlife in one form or another is central to the beliefs of Christians, Jews, Muslims, Hindus, and Buddhists.[45] It also presupposes the falsity of an agnostic view on death that holds that we are not in the epistemological position to know what, if anything, lies on the other side.

3.2 Literature on the Value of Death

But perhaps, despite VAE advocates' assumption, it is possible to calculate the value of death without endorsing a sectarian claim about the nature of death. A number of philosophers have contemplated the questions of why death is generally bad for the one who dies and why some deaths are worse than others, resulting in various competing

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[41] Kamm, "Physician-Assisted Suicide," p. 605.
[42] Foot, "Euthanasia," p. 89.
[43] Dworkin, *Life's Dominion*, p. 199.
[44] Jonathan Glover, "The Sanctity of Life," in *Bioethics: An Anthology, 1st ed.*, ed. Helga Kuhse & Peter Singer (Oxford: Blackwell Publishers 1999), p. 198.
[45] See Gerald A. Larue, *Euthanasia and Religion: A Survey of the Attitudes of the World Religions to the Right-to-Die* (Los Angeles: The Hemlock Society, 1985), pp. 19-143.

models for calculating death's value. They must be addressed, since they may offer a method for proponents of VAE to make the best interest argument without a controversial metaphysical premise.

However, one finds in the literature that far from avoiding the death-is-nonexistence premise, many philosophers begin with it. In *Well Being and Death*, Ben Bradley states in the Introduction, "Death, I will assume, causes a person to go out of existence."[46] Jeff McMahan writes, "First, it is important to note that, in what follows, I will assume that when we die we cease to exist."[47] Similarly, in his famous article on the topic, Thomas Nagel remarks that "if we realize that death is . . . a mere blank, we will see that it can have no value whatever, positive or negative."[48] To see how their accounts of death's value rely on this premise, let us briefly examine two prevailing models—Bradley's Difference-Making Principle and McMahan's Time-Relative Interest Account.

Bradley begins with the formula that to determine the value of a person's death for him, we should compare the absolute value for him of two possible worlds: the value of the actual world in which he dies when he does, and the value of the closest possible world in which he dies later. We arrive at the value of a person's death for him by subtracting the absolute value for him of the actual world from the absolute value for him of the closest possible world. If the closest possible world (in which he dies later) has greater absolute value, then his actual death is bad for him, and vice versa. Bradley then reasons that since the value of a person's life up to the point of death must be identical in both worlds, and the value of death itself is zero in both worlds, the difference in value between the two worlds is simply the value of the additional life that would have been lived in the closest possible world. So Bradley concludes that the

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[46] Ben Bradley, *Well-Being and Death* (New York: Oxford University Press, 2009), p. xiv.
[47] Jeff McMahan, *The Ethics of Killing: Problems at the Margin of Life* (New York: Oxford University Press, 2002), p. 98.
[48] Thomas Nagel, "Death," in *Mortal Questions* (New York: Cambridge University Press, 1979), p. 1.

value or disvalue of a person's actual death for him is the simple inverse of the absolute value to him of the extra segment of life in the closest possible world.[49] This should sound familiar to VAE proponents' claim that death is a benefit for an individual insofar as his potential future life is bleak. Bradley's account merely clarifies the underlying calculus of such an assertion.

McMahan's Time-Relative Interest Account is regarded as a rival approach offering a more sophisticated model for understanding death's value. But McMahan only complicates the way in which we calculate the value to a person of her future life. Citing Derek Parfit's view on personal identity, McMahan discounts the value to oneself of one's future life if the psychological unity (the extent to which one has the same beliefs, desires, etc.) between oneself now and oneself in the future is very weak. The value of death is still the simple inverse of the absolute value of this future segment, now more intricately construed.[50]

Two other views might appear to offer ways of avoiding the atheistic assumption about death. First, central to Fred Feldman's thesis on death is his belief that death is a mystery.[51] Moreover, while Feldman agrees with Bradley's final formulation of assessing the value of death solely in terms of the absolute value of the potential future life, he reinterprets this in a way that might be significant for the current discussion. Feldman begins with Bradley's formula of comparing the absolute value of the two possible worlds, but where Bradley assigns an absolute value of zero to death in both cases, Feldman argues that this is the wrong interpretation of the calculus. He contends that we are not assigning *any* absolute value to death at all, not even zero.[52] Rather, we are comparing the absolute value of two possible *lives* for a person—the

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[49] See Bradley, *Well-Being and Death*, pp. 47-52. For his claim that death has a value of zero, see esp. pp. 44 & 49.
[50] See McMahan, *The Ethics of Killing*, pp. 170-83 & esp. p. 275.
[51] See Fred Feldman, *Confrontations with the Reaper: A Philosophical Study of the Nature and Value of Death* (New York: Oxford University Press, 1992), p. 5.
[52] See ibid., pp. 145 & 152-53.

total value of her *life* if she dies now, and the total value of her *life* if she dies later. Following Harry Silverstein, he calls this a "life-life comparison."[53] Because the person's life up to the point of death must be identical in both worlds, the value difference between the two possible lives is solely the value of the additional life in the closest possible world—and so his account converges with Bradley's. But since Feldman's calculation avoids assigning a value to death itself, it might be thought that his account does not rely on the death-is-nonexistence premise.

However, this would be a misapprehension of Feldman's argument. Feldman's central claim about death is that it is a *conceptual* mystery—he believes we cannot formulate a philosophically satisfactory *definition* of death.[54] Though less prominent in his writing, Feldman also endorses the view that death is our oblivion. He writes, "[T]he dead simply have no psychological experiences."[55] Feldman denies assigning zero as the absolute value of death not because he wishes to refrain from taking a particular position about what death entails. Rather, he does so because he accepts that we cease to be when we die, and he wishes to answer critics who claim that nonexistence can have no mathematical value at all, not even zero.[56]

Feldman can bracket the absolute value of death altogether only by affirming that death is the ultimate end. If we do not presume the atheistic premise, then death's absolute value cannot simply be bracketed in the two possible worlds, since they would not necessarily be equivalent. Consider the calculation given a religious premise on death's nature. According to many religions, the manner in which a person dies can alter the person's fate in the afterlife. According to many denominations of Christianity, for example, a person who commits suicide goes straight to the gates of

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[53] Harry Silverstein, "The Evil of Death," *The Journal of Philosophy* LXXVII, no. 7 (July, 1980): p. 414. Quoted in Feldman, *Confrontations with the Reaper*, p. 153.
[54] See *Confrontations with the Reaper*, p. 125.
[55] Ibid.
[56] See ibid., p. 145.

Hell.[57] If so, then compare the possible world in which I die by suicide at age 30 and the one in which I continue to live a moral life to age 90. In the first, death would entail an eternity of Hell, in the second, an eternity of Heaven. Surely, this cannot be bracketed in calculating the difference in value of the two possible worlds for me. In short, without the assumption that death is the ultimate end, the absolute value of death would not necessarily cancel each other out in the different possible worlds, and so must be entered into the calculation. We would not be able to simply make a "life-life comparison" to determine the value of a particular death.[58]

I mentioned a second account that might offer a way out of making the death-is-nonexistence assertion. Unlike the theorists surveyed above, Bernard Williams holds that death *can* have absolute value, and it need not be zero.[59] This diverges from my previous characterization of philosophers' views, which all take death to have only relative value when held up against the life that it takes away. However, Williams allows the possibility of death having an absolute value not because he abandons the controversial assumption about death being oblivion. Rather, it flows from his preference-satisfaction account of the good. For Williams, death itself might have positive or negative value only because its occurrence might fulfill or frustrate a fundamental preference the person had *prior to death.* So death might have positive value if, for example, the person had desperately longed to die or if the person had wanted revenge and his death accomplishes that.[60] The idea is that to calculate a

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[57] See Ronald P. Hamel, *Choosing Death: Active Euthanasia, Religion, and the Public Debate* (Philadelphia Trinity Press International, 1991), pp. 62-95.

[58] If there is an afterlife, the absolute value of death in the two possible worlds would also differ because of the dimension of time. Suppose, for example, that the afterlife is an eternity of Heaven, and every year of life in Heaven has an absolute value of +1000. Suppose further that had I not died in an accident at age 30, I would have lived until age 90. To calculate the fortune or misfortune of my dying at 30, we must factor in the value to me of the afterlife in the two possible worlds, for even though I go to Heaven in both worlds, the two values will not be equivalent. If going to Heaven at age 90 has an absolute value of $+1000 \times \infty$, then going to Heaven at age 30 has an absolute value of $+1000 \times (\infty + 60)$. The extra 60 years in Heaven surely affects the comparison of the two worlds.

[59] See Bernard Williams, "The Makropulos Case: Reflections on the Tedium of Immortality," in *Problems of the Self* (New York: Cambridge University Press, 1973), p. 85, n. 5.

[60] See ibid., p. 85.

person's total well-being, the preferences which the person had in life that are posthumously fulfilled or frustrated by the timing, manner, impact on others, and so forth of the person's death must be taken into account as well. It is because of this that death, and not only life, can have absolute value for a person. This modification notwithstanding, Williams' basic calculus does not stray far from the one delineated by Bradley. Williams also compares the value of the two possible worlds under the assumption that in both worlds, "death is annihilation."[61] He just adds into the comparison of the two worlds the desires fulfilled or frustrated by the two possible circumstances of annihilation. It is only in this sense that we cannot look solely at the value of the potential future segment of life. Williams' equation does not evade the atheistic premise—after all, if death is not the end, then the preferences fulfilled or frustrated *in the afterlife* must be factored in as well.

Despite appearances, even on a preference-satisfaction account of the good, we cannot determine whether a person would be better off dying without insinuating an independent, objective judgment about the nature of death. Though I had granted it before, a corrected preference-satisfaction account of well-being cannot, after all, be promoted solely by deferring to a person's own autonomous choice regarding death. Consider a cancer patient who endures a painful life until its natural end because, having reflected on the matter deeply, she endorses the Catholic doctrine that she must do so to gain entrance to Heaven. While her decision may be autonomous, we cannot infer from this fact alone that it accords with her well-being on the preference-satisfaction account, for whether it does depends significantly on what death in fact entails. If it is Heaven, then her decision satisfies her fundamental preferences. But if death is nonexistence, then her decision will diminish her preference-satisfaction, for she will endure unwanted pain without this being offset by the fulfillment of her other

[61] See ibid., pp. 87-88. For the quote, see p. 83.

preferences. Because different factual possibilities of death have tremendous impact on preference-satisfaction, without taking one position or another on its nature—is she (and her doctrine) correct about what death entails?—we cannot form any plausible judgment as to whether her decision is good for her on the preference-satisfaction account of the good. Utilizing this account to determine a person's welfare with respect to death does not bypass the need for taking a view on the nature of death.[62] Williams' treatment of death's value does not help us find a way out of the predicament.

As we have seen, all of the major contenders for comprehending the value of death in the literature rely on the death-is-nonexistence premise. No theorist offers a method for VAE proponents to make the argument that certain individuals are benefited by death without implying the falsity of some reasonable comprehensive doctrines. Indeed, by reflecting on their accounts, it becomes clear why we cannot come to a judgment about a person's best interest with respect to death without appealing to a substantive and, therefore, controversial premise about its nature. If we do not assume that death is our demise, then we would need to take some other position, for without anchoring our assessment of the value of a person's life in an assessment of the nature and value of a person's death, we cannot arrive at any determinate judgment about the person's best interest, whichever account of well-being we take. So suppose that for a particular person, it is determined that her prospective future life is extremely bad for

[62] In Chapter 1, Sections 1.2 & 3.1, I had granted Battin's argument that promoting individuals' well-being in terms of corrected preference-satisfaction will get us the same results as respect for autonomy. This conclusion was modified in Section 2.1 above when I argued that because preference-satisfaction is a sectarian account of the good, it violates autonomy by violating liberal neutrality. We now see another way in which appealing to this account does this. Namely, even if public reason allowed us to invoke the preference-satisfaction account, it cannot be promoted *with respect to death* without insinuating a sectarian premise on death—we cannot, after all, simply defer to a person's autonomous choice to judge what would be best for her in terms of preference-satisfaction without also taking some position on whether she is correct about the nature of death. It is worth emphasizing that the example above of the religious cancer patient is *not* meant to show that promoting preference-satisfaction is incompatible with respecting autonomy *in the sense* that it can lead to different results than respecting autonomous choice. Though we might want to say that the religious cancer patient's decision to endure pain for the sake of Heaven, while autonomous, will frustrate her preferences, this requires the death-is-nonexistence premise, and so is ruled out by neutrality. My point is rather that, within the confines of public reason (and in this sense, respect for individual autonomy), we cannot make any judgment on how her preference-satisfaction can be promoted at all with respect to death.

her, absolutely speaking (based on her objective good, her hedonist interest, her basic preferences, or whatever understanding of the good we wish to adopt for the sake of argument). If death is Hell, then she would nevertheless be better off living for as long as possible. If it is Heaven, or if it is oblivion, then death would indeed be better than continuing the extremely bad life. If reincarnation follows death, then it matters what the next life would have in store for her. Without some assumption or another about the factual circumstances of death, the assessment of whether life or death would be better for someone would be critically incomplete.

Because a judgment about an individual's best interest with respect to death is always undergirded by a controversial metaphysical premise, such an argument for the right to VAE must be abandoned. People holding different views on death can reasonably and in good faith disagree about whether concern for a person's well-being supports allowing VAE. Let us look at the paradigmatic VAE case—a terminally ill patient suffering intractable pain—from different religious perspectives. Assume that, contrary to the argument of Section 2, we all agree that such a life is bad for the person living it. Many Christians would still aver deeply and sincerely that if we care about the person's well-being, we should not allow her to choose VAE. Since, according to many denominations of Christianity, a self-willed death for any reason is a grave sin against God's Sovereignty,[63] while a natural death might benefit a person suffering great pain, a self-willed death can never be to a person's benefit, as it would condemn a person to Hell. For Hindus and Buddhists, the idea of escaping pain and suffering through self-willed death is self-defeating for other reasons. According to both doctrines, human suffering is the result of bad karma accrued in this and past lives—a person's suffering is a repayment for past misdeeds. Since karma carries forth from one life to the next, it

[63] See Hamel, *Choosing Death: Active Euthanasia, Religion, and the Public Debate*, pp. 57-95.

would be futile for the terminally ill patient in great pain to try to escape it though death, for it would only need to be faced again in a future life.[64]

So the view which most VAE advocates take to be undeniable—that VAE would be a benefit to the pain-addled, terminally ill patient because of her bleak future—seems self-evident only on the assumption that her death is the ultimate end of her. If we take the perspective of most religions, such a calculus is tragically short-sighted—if we care about well-being, then we need to be concerned primarily with the more enduring afterlife, and how our actions in this life affect it. Proponents cannot insist that VAE is in an individual's best interest even in the paradigmatic case of the terminally ill patient suffering intractable pain without denying central religious convictions, including those about the ultimate nature and meaning of reality and human existence. The claim that for some individuals, their lives are so bad that death would be better for them, though seemingly reasonable, conceals a partisan, atheistic bias which makes it illegitimate as a ground for the right to VAE in a liberal society.

4. CONCLUSION

I have shown in this chapter that any claim about an individual's best interest with respect to death requires two kinds of assumptions which are disputed by reasonable people with different comprehensive doctrines. First, the claim requires a specific view about what makes life worth living. I showed that in making the argument that some individuals' lives are bad for them, all VAE proponents invoke one or another contested view about human good or how to judge it. Moreover, such an argument cannot rely on a thin theory of the good, since any claim about the worth of a person's life for her necessitates a specific judgment about how values should be ranked, which is central to

[64] See Larue, *Euthanasia and Religion*, pp. 133-37; Hamel, *Choosing Death: Active Euthanasia, Religion, and the Public Debate*, pp. 95-101.

disputes about the good life. Second, a judgment about an individual's welfare with respect to ending life requires a controversial view about the nature and value of death. Both proponents of VAE and philosophers working on the general value of death rely on the atheistic premise that death is the ultimate end, thus presupposing the falsity of all of the world's major religious doctrines. Moreover, I argued, we cannot make any claim about a person's best interests with respect to VAE without anchoring our claim in one or another judgment about the nature of death, on which reasonable people disagree fundamentally and invariably.

For the reasons above, we can conclude that any argument for VAE invoking an individual's best interest in dying violates liberal neutrality. If so, then VAE proponents must abandon it. It is not just that we cannot adduce VAE's advancement of welfare as a necessary or sufficient condition for the right to VAE—insofar as such a claim violates neutrality, it cannot have *any* part in the justification of a basic right in a liberal society. This is significant, for it has long been thought by many that the fact that death is a benefit to certain individuals is central to the justification for VAE, reflected in the very etymology of *euthanasia,* or "good death." But if the arguments of this chapter are correct, then this purported fact, which supporters of VAE regularly and unreservedly cite in their justification of the right, is undergirded by controversial premises about the value of life and the meaning of death which other people in society can reasonably deny. Even in the central VAE case—the terminally ill patient enduring interminable pain—reasonable people with different religions and conceptions of the good life can disagree in good faith on, firstly, whether the person's life is ultimately bad, and secondly, even if it was, whether death would be an improvement. Their objection that VAE proponents foist their own sectarian views on others when they insist that death benefits the pain-addled terminally ill is, unfortunately, correct—such a claim, indeed, rejects the validity of their comprehensive doctrines. Fortunately, for

advocates of VAE, religious and other opponents also cannot invoke people's welfare with respect to VAE—to wit, by saying that it would be a great harm to them—to support *their* position, for this also requires sectarian premises. In a liberal society, whether VAE is in an individual's best interest has no place in the determination of his right to it.

This chapter has further dismantled the Standard View for the right to VAE. Whereas Chapter 1 had shown that the predominant view is internally inconsistent, this present chapter has shown which argument must go. We now see that *if* the right to VAE is to be justified at all, it cannot be justified by an individual's best interest. What we have left of the Standard View, then, is the case for VAE from respect for autonomy. If the right to VAE is justified by personal autonomy alone, this would by itself be a significant conclusion, for it would be mean that the right to VAE is not merely an *in extremis* right. In the next two chapters, however, I will modify this argument as well, by showing that self-ownership, rather than autonomy, grounds individuals' right to VAE.

CHAPTER 3:

A SELF-OWNERSHIP ARGUMENT FOR THE RIGHT TO VAE, PART I

The upshot of the previous two chapters is that *if* we believe people have a right to choose VAE from a willing doctor, then it appears all we have left of the original argument (i.e. the Standard View) is the appeal to an individual's right to self-determination. The question we must now ask is whether this argument for VAE is justified at all. As we have seen, most proponents of VAE interpret the appeal to self-determination more specifically as an appeal to respecting personal autonomy—it is because of the importance of respecting personal autonomy that we ought to refrain from interfering with choices people make for themselves, including the choice for VAE. In the next two chapters, I will show that this argument for VAE is misguided and propose that self-ownership is the basis for our right to VAE. I will argue that, contrary to popular assumption, respect for autonomy is inadequate for understanding an individual's right to self-determination, for it is unable to account for some of our most fundamental intuitions about personal liberties. Nor are alternative principles capable of accounting for them. Instead, to understand these irrevocable considered judgments, self-ownership is needed. This is not to deny that autonomy has value, which shapes some of our rights and liberties. But, I will argue, both by appealing to particular cases and through abstract argument, that respect for self-ownership

constitutes a basic, rock-bottom requirement that must be met for justice amongst moral equals, and *this,* rather than respect for autonomy, explains people's right to choose VAE. This reformulation of the self-determination argument for VAE is important, as it provides a more plausible case for the right to VAE, and also has significant implications for its scope.

My case proceeds as follows. In Section 1 of this chapter, I begin by differentiating the concepts of autonomy and self-ownership, as well as their various conceptions. In Section 2, I discuss two indispensable, rudimentary rights of personal liberty which cannot be justified by respect for autonomy, and which naturally follow from the recognition of self-ownership. I focus in-depth on just two rights because theorists sometimes claim cursorily that self-ownership is necessary to explain our fundamental rights without recognizing that the principle of autonomy is versatile and multi-faceted. To prove that it is inadequate, we must prove that all of its facets are inadequate—a job that requires painstaking argument and careful untangling of our intuitions. Having shown that self-ownership can explain these rights where autonomy falls short, in Section 3, I reject other plausible candidates which might be recruited to explain these rights in place of self-ownership. This chapter completes my "bottom-up" argument in favor of self-ownership, in which I argue for the principle by showing that our irrevocable intuitions about particular cases support its recognition.

However, for reasons having to do with the nature of the concept of ownership, such an argument is not completely satisfactory (this will be explained in due course). Thus, in the next chapter, I continue by building a "top-down" argument for my thesis of self-ownership, providing an abstract, theoretical argument in favor of its recognition. I also rebut theoretical and other objections to the principle of self-ownership I affirm. The argument of these two chapters reflects the methodology of

reflective equilibrium discussed in the Introduction.[1] My case for self-ownership relies on, on the one hand, showing that its recognition is necessary to account for some of our irrevocable judgments in particular cases, and on the other, showing that the principle of self-ownership is itself justified by a weak, abstract principle we can all agree on. That is, my thesis of self-ownership is justified by the process of reconciling our beliefs at three levels—particular judgments, moral principles, and background theories—into a coherent and consistent system.

1. AUTONOMY VS. SELF-OWNERSHIP: THEORETICAL DISTINCTIONS

Before making the case that respect for autonomy is inadequate and the recognition of self-ownership necessary for understanding our personal liberties, it is important to clarify the distinction between the ideas of autonomy and self-ownership. In this section, I will first discuss the concept of autonomy, along with various complexities within the concept that potentially affect my argument. I will then delineate the concept of self-ownership, along with its different possible conceptions, and discuss the understanding relied on in my argument in favor of its recognition and use in justifying the right to VAE.

1.1 A Theoretical Analysis of Autonomy

It is useful to distinguish between the *concept* of autonomy—that is, the abstract understanding of the term generally shared by philosophers discussing it—and particular *conceptions* of it—that is, more specific understandings of what autonomy

[1] See Section 4 of the Introduction

precisely entails.[2] Though there is fierce and intractable debate over the correct *conception* of autonomy, there is a common *concept* that is generally invoked by philosophers discussing it. As John Christman and Joel Anderson note, the core of the concept lies in a "person's competent self-direction free of manipulative and 'external' forces."[3] An autonomous person is someone who is governed by desires, preferences, values, etc. that are in some sense genuinely her own. Autonomy exponents often cite Isaiah Berlin's well-known statement on the idea of being subject to one's own will, rather than another's will or other external force (e.g. social conditioning, psychological impulses, etc.):

> I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be an instrument of my own, not of other men's acts of will. I wish to be . . . moved by reasons, by conscious purposes, which are my own, not by causes which affect me, as it were, from outside. I wish to be a doer . . . deciding, not being decided for, self-directed, and not acted upon by external nature or by other men.[4]

To put it another way, an autonomous person is part *author* of his own life.[5] Following John Rawls' famous formulation, theorists often refer to the right to autonomy as the right to form, revise, and pursue one's own conception of the good. To ground certain personal liberties in an individual's autonomy is to ground them in the importance of allowing people to lead their lives according to their own values and aims.[6]

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[2] For more on the concept vs. conception distinction, see Rawls, *A Theory of Justice*, pp. 5-6; Ronald Dworkin, *Taking Rights Seriously* (London: Bloomsbury Academic, 1997), pp. 134-36.

[3] John Christman & Joel Anderson, *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge: Cambridge University Press, 2005), p. 3. See also Christman, *The Inner Citadel*, pp. 3-14.

[4] Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), p. 131. Berlin was describing positive liberty, but many theorists see the idea he conveys in the quote as central to the concept of autonomy. See, e.g., Dworkin, *The Theory and Practice of Autonomy*, p. 13; Christman, *The Inner Citadel*, p. 3.

[5] See Raz, *The Morality of Freedom*, 369-73.

[6] See ibid., pp. 368-95; Jones, *Rights*, pp. 124-8; G.A. Cohen, *Self-Ownership, Freedom, and Equality* (Cambridge: Cambridge University Press, 1995), p. 237. Within biomedical ethics, see Brock, *Life and Death*, pp. 150-51; Battin, *Physician-Assisted Dying*, p. 7; Dworkin, *Life's Dominion*, p. 190; Dworkin, "Patients and Prisoners," p. 189; Young, *Medically Assisted Death*, p. 22; Beauchamp and Childress, *Principles of Biomedical Ethics*, p. 103. Cf. Feinberg, "Autonomy," pp. 27-53. Feinberg denies that different conceptions of autonomy share any core notion. It is true that the term "autonomy" is at times

Specific theories of autonomy and its implications result from discrepancies along two axes: its conception—what, precisely, constitutes an autonomous choice?—and its normative basis—why should we care about autonomy? Both aspects are potentially relevant for my argument, since which rights respect for autonomy can justify depends on both the conception of autonomy appealed to and the normative grounds for respecting autonomy. Conceptions of how autonomy ought to be spelled out are usually divided into procedural and substantive accounts. In procedural accounts, a person's choice is autonomous insofar as it meets certain formal constraints; there are no stipulations about the content of the values or preferences an autonomous person may have. The most influential of these are versions of the hierarchical account, according to which a person's choice is autonomous when her first-order desires, preferences, values, etc. are endorsed by her second-order desires, preferences, values, etc.[7] In contrast, substantive conceptions stipulate additional conditions about the agent's attitudes or values for a choice to count as autonomous. Such conditions vary from weak to strong, depending on how narrowly it defines an autonomous choice. A well-known constraint is that of substantive independence, the stipulation that to give up the *exercise* of one's capacity for self-direction (as in voluntary slavery) can never be

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used where it does not refer to the core notion above. To delineate a concept, we must look at the meaning a term has *generally* come to signify within a particular literature. Just as some writers may refer to the concept of autonomy without invoking the term, other writers may associate the term with something beyond the concept. When a certain usage falls too far outside of the meaning the term has come to be associated with, such that it cannot be taken to refer to the same thing that most other writers are referring to, clarity would be served by employing alternative terminology. For example, at one point in the article above, Feinberg describes violating people's autonomy as "analogous to the invasion of their property," related to the objection "What I do with *my own* life is no one else's business" (p. 27). It would be clearer to refer to this idea as "self-ownership," rather than "autonomy." In another work, Feinberg refers to personal autonomy as personal sovereignty—that is, as analogous to the rights a state has over its territory. See *Harm to Self*, pp. 52-54. Again, I believe it is better to treat this as a distinct concept rather than assimilate it to the concept of personal autonomy delineated above.

[7] For examples of the hierarchical account, see Harry Frankfurt, *The Importance of What We Care About* (Cambridge: Cambridge University Press, 1988), pp. 11-25; Dworkin, *The Theory and Practice of Autonomy*, esp. pp. 3-33; John Christman, "Autonomy and Personal History," *Canadian Journal of Philosophy* 21, no. 1 (1991): pp. 1-24. There are also lesser-known procedural conceptions. For example, according to coherence/integration accounts, what matters to autonomy is whether one's desires, preferences, values, principles, etc. fit together as a whole. See Laura Ekstrom, "A Coherence Theory of Autonomy," *Philosophy and Phenomenological Research* 53 (1993): pp. 599-616; Marilyn Friedman, "Autonomy and the Split-Level Self," *Southern Journal of Philosophy* 24 (1986): pp. 19-35.

autonomous, for it would be antithetical to the very concept of self-government.[8] The strongest substantive account of autonomy is that propounded by Kant, who holds that the *only* way to be truly self-governing is to act according to the objective moral law.[9] This is usually termed *moral* autonomy, and is distinguished from the *personal* autonomy I have been discussing which understands self-direction more broadly. As *personal* autonomy is what is usually thought to underlie various personal liberties, including the right to choose VAE, my focus is limited to it.[10]

The second axis relevant for autonomy's implications is its normative basis. There are at least three major types of justification for autonomy: utilitarian, perfectionist, and Kantian. On a utilitarian justification, respect for autonomy is required because and to the extent that doing so maximizes aggregate utility. J.S. Mill, for example, provides a utilitarian case for autonomy by suggesting that living autonomously is essential to human happiness.[11] On a perfectionist justification, such as that propounded by Thomas Hurka and Joseph Raz, protecting autonomy is

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[8] For those who endorse substantive independence, see, e.g., Natalie Stoljar, "Autonomy and the Feminist Intuition," in *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self*, ed. Catriona MacKenzie and Natalie Stoljar (New York: Oxford University Press, 2000), pp. 94-111; Paul Benson, "Freedom and Value," *Journal of Philosophy* 84 (1987): pp. 465-86; Marina Oshana, *Personal Autonomy in Society* (Hampshire: Ashgate, 2006), pp. 53-57. In contrast, weak substantive accounts do not directly constrain the types of actions or values an autonomous person can endorse, but infuses normative content by requiring certain competencies such as self-worth, self-respect, and self-trust. See a more recent work by Paul Benson, "Feminist Intuitions and the Normative Substance of Autonomy," in *Personal Autonomy: New Essays on Personal Autonomy and Its Role in Contemporary Moral Philosophy*, ed. James Stacey Taylor (Cambridge: Cambridge University Press, 2005), pp. 124-42; Robin Dillon, "Toward a Feminist Conception of Self-Respect," *Hypatia* 7 (1992): pp. 52-69; Trudy Govier, "Self-Trust, Autonomy and Self-Esteem," ibid.8, no. 99-120 (1993): pp. 99-120. For more on the distinction between weak and strong substantive accounts, see Stoljar, "Autonomy and the Feminist Intuition," pp. 19-21.

[9] Immanuel Kant, "Groundwork of the Metaphysics of Morals," in *Practical Philosophy*, ed. & trans. Mary J. Gregor (Cambridge: Cambridge University Press, [1785] 1996).

[10] My discussion of *moral* autonomy as one conception of autonomy on the same continuum with conceptions of *personal* autonomy reflects the idea that the distinction between the two is not as stark as it is often made out to be. Ideas about what kind of life is valuable, characteristic of personal autonomy, is already a normative, not amoral, judgment, and may include commitments about how people ought to be treated. For more on the overlaps and interrelations between moral and personal autonomy, see Jeremy Waldron, "Moral Autonomy and Personal Autonomy," in *Autonomy and the Challenges to Liberalism: New Essays*, ed. John Christman & Joel Anderson (Cambridge: Cambridge University Press, 2005), pp. 307-29.

[11] See Mill, *On Liberty and Other Writings*, esp. 211-14 & 216-17. Mill himself uses the term "liberty" instead of "autonomy," but since liberty, for him, has to do with leading and shaping one's life according to one's own values, it is reasonable to interpret his argument as an argument for autonomy. John Gray, for example, believes that Mill's foremost concerns were autonomy and security. See John Gray, *Mill on Liberty: A Defence* (London: Routledge & Kegan Paul, 1983), esp. pp. 52, 54-6, 73-81.

important because and to the extent that it contributes to or is partly constitutive of an objectively good life.[12] On both justifications, we have grounds for respecting autonomy insofar and only insofar as doing so serves some further good (utility or objective well-being).

In contrast, for Kant, the capacity for rational self-direction has incomparable intrinsic value. Indeed, our capacity to be autonomous is pivotal to our status as persons, distinguishing us from mere animals. This grounds Kant's stringent principle of respect for autonomy: the Humanity Formula of the Categorical Imperative, which says that we must never treat a person's capacity for autonomy as a means only, but always as an end in itself.[13] As indicated above, Kant holds an extremely strong substantive conception of autonomy, namely, moral autonomy. Peter Jones notes that while many modern Kantians, such as John Rawls and Ronald Dworkin, espouse purely procedural conceptions of autonomy, they still rely on a distinctively Kantian justification. On their understanding as well, respect for autonomy is rooted in its being a fundamental aspect of our personhood, such that "[i]n thinking about how it is proper to treat human individuals and, more particularly, in thinking about what rights they possess, we must take full account of their nature as autonomous beings. Not to allow people the freedom to develop and to act upon their capacity for autonomous conduct is . . . to treat them as less than persons."[14]

It is clear that where one stands along the two axes—the conception of autonomy and its normative basis—has an effect on the scope of personal rights and liberties one affirms. Invoking respect for a *substantive conception* of autonomy likely protects fewer liberties than invoking a *procedural conception* would. For example,

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[12] Thomas Hurka, *Perfectionism* (New York: Oxford University Press, 1993), pp. 149-52; Raz, *The Morality of Freedom*, p. 378-90.

[13] See Kant, "Groundwork of the Metaphysics of Morals," pp. 4:429-31. Kant uses the term "humanity," not "autonomy"—it is *humanity* that must be treated as an end in itself. But Kant uses "humanity" as a technical term for a person's capacity for rational agency—which is, essentially, a person's capacity for autonomy.

[14] Jones, *Rights*, p. 128.

respect for the conception of autonomy which insists on substantive independence would not entail the right to choose to be slaves, while a purely procedural account might (depending on whether one believes such a choice can ever pass procedural independence). Meanwhile, a *Kantian justification* of respect for autonomy would be more robust than either a *utilitarian* or *perfectionist justification* of the principle. On the latter two justifications, there would be no rationale for protecting a particular right in cases where respecting autonomy did not coincide with aggregate utility or individual well-being, respectively. But since the Kantian justification ties autonomy to our moral status as persons, respect for autonomy will be fundamental, and the rights and liberties it justifies not easily circumscribed or defeated.

While such distinctions are potentially important for what respect for autonomy entails, they will not ultimately impact my argument, for I will be discussing personal rights and liberties that would be left unprotected *whichever* conception of autonomy or its normative basis one holds. Though I will be appealing in large part to the general *concept* of autonomy, if one finds it helpful, one may bear in mind as the yardstick for assessing my argument in Section 2 the *Kantian justification* of a *purely procedural* conception of autonomy, as this would yield the most expansive and robust understanding of respect for autonomy possible. We shall see that even on this understanding, respect for autonomy is inadequate to account for certain basic and irrevocable intuitions we have about our rights to self-determination.

1.2 A Theoretical Analysis of Self-Ownership

In contrast with autonomy, which has to do with the value of living according to one's own conception of the good, self-ownership has to do with entitlement. To proclaim, "This is *my* body and *my* life!" is to remind others that I have title over myself: I have

rights over my own body and person analogous to the rights I have over my external property. To put it another way, self-ownership is a claim about the legitimate distribution of power over one's person. Jan Narveson writes, "To say that A owns x is to say that A is in charge: A becomes the authority on the use of x."[15] Thus, to say that I own myself is to say that I and no one else is the rightful final arbiter over my own person. Christman notes that to be a self-owner means that "insofar as my body moves or acts, *I* should be the one who has the ultimate say over what it does or where it goes."[16] Jeremy Waldron writes, "To say that I own myself is to say that nobody but me has the right to dispose of me or to direct my actions. *I* have rights to do these things (though I must not harm others in doing so; that is, I must not exercise my self-ownership in a way which violates theirs)."[17] Moreover, I have the rights to do these things simply because I have title over myself, irrespective of whether my choices reflect my own values or are relevant for pursuing my conception of the good.

To better understand the concept of self-ownership, it is helpful to utilize Tony Honoré's influential analysis of ownership in general.[18] Honoré lists eleven standard incidents which are together sufficient but not individually necessary for ownership. His understanding employs Wittgenstein's notion of family resemblance: just as there is

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[15] Jan Narveson, "Property and Rights," *Social Philosophy and Policy* 27, no. 1 (2010): p. 102.

[16] John Christman, "Self-Ownership, Equality, and the Structure of Property Rights," *Political Theory* 19, no. 1 (1991): p. 39.

[17] Jeremy Waldron, *The Right to Property* (Oxford: Clarendon Press, 1988), p. 398. Waldron is describing Nozick's use of the concept of self-ownership here, but he subsequently endorses this understanding of the concept when he describes being owner of something as meaning "it is for me rather than for anyone else to make decisions about its use." Ibid., p. 399.

[18] See Tony Honoré, "Ownership," in *Making Laws Bind: Essays Legal and Philosophical* (Oxford Clarendon Press, 1987), pp. 161-92. For the prevalence of Honoré's approach to ownership, see, e.g., Andrew Reeve, "Property," in *A Companion to Contemporary Political Philosophy*, ed. Robert Goodin, Philip Pettit, and Thomas Pogge (Malden: Blackwell Publishing, 2007), p. 720; Lawrence Becker, "Moral Basis of Property," in *Property: Nomos XXII*, ed. Roland Pennock & John Chapman (New York: New York University Press, 1980), p. 190; Stephen Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 1990), pp. 22 & 27; Waldron, *The Right to Property*, p. 49. For theorists who assess self-ownership within the Honoréan framework, see, e.g., Munzer, *A Theory of Property*, pp. 37-43; Waldron, *The Right to Property*, pp. 398-99; Christman, "Self-Ownership, Equality, and the Structure of Property Rights," pp. 28-46; Muireann Quigley, "Property and the Body: Applying Honoré," *Journal of Medical Ethics* 33, no. 11 (2007): pp. 361-64. It is also alluded to in Judith Jarvis Thomson, *The Realm of Rights* (Cambridge Harvard University Press, 1990), p. 226. Unless otherwise noted, when I use the term "ownership," I am referring to *private* ownership, as opposed to, say, *common* ownership. Similarly, unless otherwise noted, by "property," I mean *private* property.

no single characteristic or set of characteristics that is shared by all games, but merely "a complicated network of similarities overlapping and criss-crossing," things we consider owned share merely an overall similarity and not necessarily any particular incident or set of incidents.[19] We should understand the standard incidents to elucidate the *concept* of ownership, while specific combinations of incidents yield different *conceptions* of ownership.[20] To illuminate the concept of self-ownership, in what follows, I will define the ownership incidents, and discuss how each would apply to *self*-ownership. It is worth emphasizing that just as one need not have all of Honoré's incidents with respect to a thing to be an owner of that thing, one need not have all of the self-ownership incidents to be a self-owner. This will be discussed in more detail subsequently. A final note: following many theorists, I will modify Honoré's analysis in two ways. First, I will omit two incidents which are better thought of as limitations to ownership rather than aspects essential to the concept of ownership—these limitations will be discussed following the list of nine incidents. Second, for clarity, I will supplement Honoré's incidents with the Hohfeldian terminology of liberties (privileges), claims, powers, and immunities.[21]

The nine standard incidents of ownership, and their application to self-ownership, are as follows:

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[19] For the quotation, see Ludwig Wittgenstein, *Philosophical Investigations, 4th ed.*, ed. & trans. P.M.S. Hacker & Joachim Schulte (Chichester: John Wiley & Sons, [1953] 2009), p. 36.
Honoré does not explicitly refer to Wittgenstein in his original text, but this analysis was suggested by Richard Flathman, and is now a widely-accepted understanding of Honoré's analysis of ownership. See Richard Flathman, "On the Alleged Impossibility of an Unqualified Disjustificatory Theory of Property Rights," in *Property: Nomos XXII*, ed. Roland Pennock & John Chapman (New York: New York University Press, 1980).

[20] See Waldron, *The Right to Property*, p. 52.

[21] According to Wesley Hohfeld, rights can be divided into four basic components: (1) *Liberty (privilege)*: A has a liberty (privilege) to Φ if and only if A has no duty to anyone else not to Φ. (2) *Claim*: A has a *negative claim* to Φ if and only if all others have a duty to A not to interfere with A Φ-ing; A has a *positive claim* that B (or all others) Φ if and only if B (or all others) has a duty to A to Φ. (3) *Power:* A has a power if and only if A has the authority to alter her own or another's Hohfeldian incident(s). (4) *Immunity*: A has an immunity if and only if others lack the authority to alter A's Hohfeldian incident(s). See Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven: Yale Publishing Press, 1919), pp. 35-64. For the Hohfeld-Honoré analysis of ownership, see Lawrence Becker, *Property Rights: Philosophic Foundations* (London: Routledge & Kegan Paul, 1980), Ch. 2; Munzer, *A Theory of Property*, pp. 22-30; Reeve, "Property," p. 720.

1. The Right (i.e. Claim) to Possess: The negative claim right against all others to have exclusive physical control of a thing; others may not trespass on a person's property (e.g. enter it, harm it, or even touch it without the owner's consent).

Application to Self-Ownership: Others may not trespass on my body. Without my consent, you may not have sex with me (rape), confine me (false imprisonment), beat me (assault), kill me (murder), or even kiss me on the back of my neck.

2. The Right (i.e. Liberty) to Use: The liberty right to use the thing owned at one's discretion; the owner has no duty to others to use his property in a certain way.

Application to Self-Ownership: I am at liberty to do what I wish with my body, and so my life; others do not have a claim right that I must live a certain way. Unless I have committed myself to particular special duties to others, I am at liberty either to speak or to remain silent, to work for a charity or as an investment banker, to stay in my hometown or to move across the world. It is worth noting that this does not entail that we are free from moral blame for all the things we are at liberty to do. We might say that while the owner of a house has a liberty right to refuse entry to a stranger running from an angry mob (the stranger does not have a *right* to use his house), the owner would nevertheless be a bad person to refuse. Similarly, we might think that a person who never helps others, though acting within his rights, is nevertheless a bad person.

3. The Right (i.e. Power) to Manage: The power to decide how and by whom the thing owned shall be used; the authority to license acts that would otherwise be wrong

(e.g. the authority to give another the right to use one's property, say, by lending or leasing it out).

Application to Self-Ownership: I have the power to alter others' rights with respect to my person and body. I may give another the right to have sex with me (as in acts of consensual sex), to beat me (as in boxing), or even to kill me (as in VAE).

4. The Right (i.e. Claim) to Income: The claim right to fruits, rents, and profits of the thing owned.

Application to Self-Ownership: I have a claim right to the fruits of my labor.[22] You may not, for example, compel me to work for you without compensation (as in forced labor).[23]

5. The Right to Capital: This can be further subdivided into two distinct rights to capital.

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[22] This is not to take a position on whether it is possible to own one's *labor*. Waldron, for example, argues that the concept of owning one's labor is incoherent. See Waldron, *The Right to Property*, pp. 180-83. Here, I refer merely to a "right to the fruits of my labor," which is just a natural way of saying that I have a right to the products which result from the use of my body, which belongs to me.

[23] Some theorists reject self-ownership because they believe it is incompatible with egalitarianism. For example, G.A. Cohen's denial of self-ownership is motivated by his view that it entails libertarianism. See Cohen, *Self-Ownership, Freedom, and Equality*, esp. pp. 215-16. However, this understanding is misguided for two reasons. First, according to my analysis, self-ownership does not require that one possess every self-ownership incident, and so does not require that one possess a full right to the fruits of one's labor. Second, even if a self-owner has the right in question, such a right does not rule out taxing what one could get in the free market. The belief that people have full rights to the fruits of their labor has no substantive implication for the distribution of income, for income depends not merely on labor, but on the use of various natural resources. As Peter Vallentyne argues, for self-ownership to yield any particular results with respect to the distribution of income, it has to be paired with some view about the ownership of natural resources, since "any products that involve natural resources involve materials that may belong to others." See Peter Vallentyne, "Self-Ownership," in *Encyclopedia of Ethics* ed. Lawrence Becker & Charlotte Becker (New York: Routledge, 2001), p. 1562. This is how left libertarians are able to combine self-ownership with some form of egalitarian distribution. Cohen believes that self-ownership cannot be combined with egalitarianism only because he insists that the latter requires forcing the well-off to *help* the worse-off. See Cohen, *Self-Ownership, Freedom, and Equality*, pp. 223-26. If, on the contrary, it is not a matter of the well-off *helping* the worse-off because everyone benefits from a scheme of social cooperation, then self-ownership does not preclude even Rawlsian egalitarianism, since the question becomes what the fair rules are for distributing cooperatively-produced benefits, and self-owners are not exempt from accepting fair terms of distribution.

A. **The Power to Capital:** The power to alienate the thing or a part of the thing owned, for example, to transfer it *inter vivos* by exchange or gift or to abandon ownership.

   Application to Self-Ownership: I have the power to alienate parts of my body (e.g. limbs and organs) by donation or sale. I have the authority to abandon or transfer my self-ownership rights to another—in the most extreme case, to consent to slavery.

B. **The Liberty and Claim to Capital:** The liberty right to consume, waste, or destroy the whole or part of the thing owned; the negative claim right that others not prevent one from doing so.

   Application to Self-Ownership: I am entitled to waste away my body (e.g. by smoking, doing drugs, or eating unhealthily), to maim it (e.g. by having radical plastic surgery), and even to destroy it (e.g. by committing suicide). Unless I have committed myself to certain special duties to others, I am at liberty to do all of these things to myself, and others have a duty not to forcefully prevent me from doing them.

6. The Right to Security (Immunity against Expropriation): The immunity against any power on the part of others to alter an owner's rights to the thing owned without his consent; others may not expropriate an owner's property.

Application to S*elf-Ownership:* Others have no power to alter my rights to my own body. You may not expropriate my blood, organs, or other body parts without my consent. You may not make a slave of me without my consent.

7. The Right (i.e. Power) to Transmit: The thing owned may be transmitted to the holder's successors after death, and so on *ad infinitum*; the power to bequeath.

Application to Self-Ownership: I may bequeath my body to others after I die (e.g. I am entitled to give another the right to decide whether to bury or cremate my body, or to take its parts for transplantation). The power to bequeath my body is limited given the nature of a dead body. For example, bodies and body parts cannot ordinarily be passed on *ad infinitum* (though we might imagine some technological advance that allows, for example, my heart to be transplanted *ad infinitum*, in which case the recipient of my heart would have the right to bequeath it to another person, and so on).

8. Absence of Term: There is no set time period of ownership. Should the owner live forever, then barring voluntary alienation/transfer or insolvency/forfeiture, she would own the property forever.

Application to Self-Ownership: My self-ownership rights do not expire. Barring voluntary alienation/transfer or forfeiture (see discussion of liability to execution below), I retain ownership rights over myself until death.

9. Residuary Character: After the rights of those with lesser interests in the property lapse (e.g. after a lessee's lease is up), the rights revert to the owner.

Application to Self-Ownership: Insofar as I transfer any rights over myself temporarily to others, once their entitlements to me lapses, these rights always revert to me. For example, if I "lease" myself to someone (e.g. sign a job contract), once the contract is up, the ownership rights I alienated (e.g. to decide what to do with my time from 9 a.m. to 5 p.m. Monday to Friday) returns to vest in me.

As the delineation above suggests, ownership may be said to be constituted by a package of rights, or, in Stephen Munzer's well-known metaphor, "a bundle of sticks."[24] Liberal Ownership is instantiated when the full bundle of sticks is present. Waldron emphasizes that while this understanding of ownership is often considered the paradigm of ownership, it is simply one particular *conception* of it.[25] For example, the understanding of ownership in China may consist of less than the full bundle of rights, even though it still makes sense to say that people own things there. Such alternative conceptions of ownership—let us call them conceptions of Limited Ownership—can be found even within a liberal society. For example, a trust fund can be said to be a person's property, even though the person does not have the right to manage it, consume its capital, or bequeath it to others.[26] Similarly, owners of historical landmarks might not have the right to destroy or alter their property, even though we would still call them owners. Recall that the concept of ownership is constituted not by a particular incident or set of incidents, but by a Wittgensteinian family resemblance; ownership is a concept with many conceptions.

Indeed, it is usually acknowledged that within Liberal Ownership itself—that is, where all of the standards incidents are present—there may be substantial variations. For example, known as eminent domain or compulsory purchase, a state might affirm a general right to the security of land ownership while retaining the power to expropriate

[24] Munzer, *A Theory of Property*, p. 16.
[25] Waldron, *The Right to Property*, pp. 49-52.
[26] See Becker, "Moral Basis of Property," p. 191.

it for public use in certain circumstances. Honoré considers Liberal Ownership to be instantiated insofar as all of the standard incidents are *generally* upheld, giving some leeway for the precise definition (i.e. possible exceptions) of each incident.[27] This means that there are, in fact, many different possible conceptions of Liberal Ownership, depending on the specific delineation of each incident. Given this, it is more accurate to regard Liberal Ownership as a particular *set of conceptions* of ownership. We can then define Full Liberal Ownership as the specific conception of Liberal Ownership in which all incidents are *maximally* met. More specifically, in Full Liberal Ownership, there is no limitation on any of the incidents except those necessary to protect the equal Full Liberal Ownership of others and the general restrictions to ownership to be discussed below.

To summarize, conceptions of ownership may be categorized as follows:

Limited Ownership: The *set of conceptions* of ownership in which some but not all of the nine ownership incidents are generally met. Nevertheless, within this set, each package of incidents bears sufficient family resemblance to the other conceptions of ownership below to qualify as an instance of private property (e.g. ownership of trust funds and ownership of historical landmarks)

Liberal Ownership: The *set of conceptions* of ownership in which all nine ownership incidents are *at least generally* met. Each conception within this set will define the nine incidents differently (specifically, the extent to which each incident needs to be met or, put alternative, its possible exceptions).

[27] Honoré, "Ownership," pp. 166, 168, 170, & 171. See also Becker, "Moral Basis of Property," p. 190.

> **Full Liberal Ownership:** The *particular conception* of Liberal Ownership in which all nine incidents are *maximally* met. To wit, there is no limitation on any of the incidents except those necessary to guarantee the equal Full Liberal Ownership of all and the general restrictions to ownership to be discussed subsequently.[28]

It is true that, as some have pointed out, when people refer to self-ownership, they usually have in mind Full Liberal Ownership of the self.[29] When we proclaim that our bodies belong to ourselves, we do not usually mean, for example, that we are Limited Owners of our bodies like, say, owners of historical landmarks, such that we have no right to alter our own bodies (e.g. tattoo or pierce them), and perhaps even a duty to maintain our bodies to a certain standard. Nor do we think that our self-ownership is respected if all of the standard incidents are merely *generally* upheld—that is, as long as we have Liberal Self-Ownership—such that the state may, for example, retain a right to expropriate our organs in limited circumstances, analogous to the doctrine of eminent domain. I believe that, ultimately, the correct conception of our rights over ourselves will be either Full Liberal Self-Ownership, or something very close to it. However, I will not attempt to establish this, for doing so would be beyond the scope of this thesis. To show that the right to choose VAE is justified by self-ownership, I do not need to prove that *all* of the self-ownership incidents are maximally or generally met. To argue that self-ownership justifies the right to VAE, I need to convince the reader of the following only: (1) We have *at least* Limited Self-Ownership, so as to justify the claim that we are self-owners, and (2) our self-ownership

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[28] This terminology differs somewhat from the literature. Many writers follow Honoré in using "full liberal ownership" to refer both to the situation in which all of the standard incidents are *generally* met and the situation in which they are *maximally* met—there is no particular term to distinguish the latter from the former. But since the two are significantly different, my clarification avoids the danger of talking past one another.

[29] See discussion in Vallentyne, "Self-Ownership," pp. 1561; Attracta Ingram, *A Political Theory of Rights* (Oxford: Oxford University Press, 1994), p. 32.

includes full versions of Incident 5B, the Liberty and Claim Right to Capital, which would justify the right to commit suicide, and Incident 3, the Power to Manage, which would justify giving another the right to aid in our suicide.

As previously mentioned, following the lead of several prominent commentators, I have excluded two of Honoré's original incidents from the positive delineation of the meaning of ownership: the duty not to harm and the liability to execution.[30] The former stipulates that ownership rights may justifiably be constrained when they are used in ways that harm others. The second says that an owner's property may justifiably be taken away from her in case of debt or insolvency. Though both are important for understanding the concept of ownership, they are better thought of as *justifiable constraints* on ownership rather than positive aspects of the meaning of the concept. As Waldron points out, the duty against injuring others is not particular to owners, but is instead a general constraint on action, so it is misleading to treat it as a specific feature of the concept of ownership.[31] I have a duty not to hit you over the head with a bat whether or not the bat is mine. In other words, while such a duty is a justifiable limitation on ownership—even Full Liberal Ownership—it is not a defining feature particular to the concept of ownership.

In contrast, liability to have a thing taken away as payment for debt does appear to be specific to ownership. For example, it may be permissible to confiscate the house you live in as recompense for your unpaid debt if you own your house, but not if you rent it. However, such liability is not a necessary feature of even Liberal or Full Liberal Ownership. Suppose I live in a society that does not uphold this incident. For example, it does *not* take away my house as recompense when I fail to pay my debts. Not having this incident—that is, not being liable to have my house taken away—would not

[30] See, e.g., Reeve, "Property," p. 720; Christman, "Self-Ownership, Equality, and the Structure of Property Rights," pp. 29 & 45; Waldron, *The Right to Property*, pp. 32-33 & 49. Waldron excludes only the duty not to harm.

[31] *The Right to Property*, pp. 32-33 & 49.

weaken my ownership over my house. On the contrary, absence of the liability to execution seems to make me a more *robust* homeowner. Thus, Honoré is mistaken to categorize it as a standard incident of ownership, such that one is less than a Full Liberal Owner if it is not met. It is more accurate to regard the liability to execution as a *justifiable limitation* on ownership—even Full Liberal Ownership—in the sense that we do not usually think a person's ownership rights are violated if her belongings are seized to recompense others for unpaid debt. It might be argued that expropriation in this circumstance protects *others'* property ownership, and so helps to secure *equal* rights of ownership. In other words, liability to execution is not essential to the concept of being an owner *per se*, but is instead a measure which may be used, in practice, to secure a system of ownership for all.[32]

Both limitations to ownership apply to self-ownership, though the liability to execution applies in a modified form. With regard to the duty not to harm, to say that we own our own bodies is not to say that we can use them in ways that gratuitously harm others; my right to swing my arm as I wish is limited by my duty not to swing it into your face (unless you ask me to). With respect to the liability to execution, it is true, as Gerald Gaus points out, that it would be unacceptable to expropriate people's bodies as repayment for their debts.[33] However, Gaus is wrong to insist that no comparable limitation may be placed on our personal rights and liberties. Known as criminal forfeiture, people's rights and liberties are liable to be curtailed or taken away as recompense for violating other people's rights, including property rights. For example, if I destroy someone's house or murder someone, then the state may be

[32] For a similar view, see Christman, "Self-Ownership, Equality, and the Structure of Property Rights," pp. 29 & 45.
[33] Gerald Gaus, "Property, Rights, and Freedom," *Social Philosophy and Policy* 11, no. 2 (1994): p. 213.

entitled to imprison me, and so severely limit (possibly negate) my self-ownership either for a period of time or, in the extreme case, until my death.[34]

We need not be worried that self-ownership and ownership of external property is not completely analogous with respect to the liability to execution. For it to make sense to talk about self-ownership, our rights over our own bodies need not be *exactly* like our rights over external property. Considering that ownership of external property is itself greatly variable, such a standard would be arbitrary. Our relation to ourselves is, of course, not exactly like our relation to external things. For one, empirically speaking, a person necessarily has a more intimate relationship to his body than he does to external things. As Judith Thomson notes, I can destroy all of my external things and still remain me, but if I destroy all of my body, there might well be nothing left to me at all.[35] But given the flexibility of the concept of ownership, this disanalogy between a person's body and external property does not pose a problem. Thomson continues, "[O]wnership really is no more than a cluster of claims, privileges, and powers; and if the cluster of rights that a person X has in respect of his or her body is sufficiently like the cluster of rights people have in respect of their houses, typewriters, and shoes," then there is no reason we should not call this relation one of ownership.[36] The particularly intimate relation we bear to our bodies makes our control rights over them all the more important, and explains why self-ownership is less liable to be curtailed than ownership of external property.

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[34] Of course, while the state may sell off people's external property as payment for unpaid debt, it may not acquire such rights over people even when they violate others' rights. The state may take away their self-ownership rights by imprisoning them, but it may not torture them, sell them into slavery, expropriate their body parts, etc. It is reasonable to think that while, in cases of criminal forfeiture, such punishments are neither prohibited nor supported by self-ownership itself, other considerations may come into play. For example, even if someone has tortured and killed another person, and in doing so, forfeited his self-ownership rights, mercy or some other consideration might weigh against the state torturing and killing him.

[35] Of course, one can destroy *certain parts* of one's body and retain personal identity. If I cut off my right hand, I would still be me. This point is discussed in Chapter 4, Section 2.1.

[36] Thomson, *The Realm of Rights*, p. 226.

In this section, I have distinguished the concept of self-ownership from the concept of autonomy, two distinct grounds for the right to self-determination (others will be considered in Section 3). While personal autonomy has to do with the value of an individual leading and shaping his life according to his own values, self-ownership has to do with entitlement—it is a claim about the legitimate distribution of power over oneself. More specifically, a self-owner has final authority over his body and person, with rights over himself analogous to the rights external property owners have over their external property. There are nine standard incidents of self-ownership, and different conceptions of self-ownership arise from different packages of self-ownership incidents. The understanding of self-ownership needed to justify the moral right to VAE is modest—namely, we would need to affirm only Limited Self-Ownership with the Right to Capital (including the right to destroy oneself) and the Right to Manage (including the power to give another the right to destroy one). Having elucidated the concepts of personal autonomy and self-ownership, and addressed the complications within them, we are now in the position to assess their relative merits for grounding the right to self-determination by applying them to two test cases in the next section.

2. AUTONOMY VS. SELF-OWNERSHIP: TEST CASES

At first glance, it might seem that invoking respect for personal autonomy is perfectly adequate for protecting our fundamental rights and liberties. It appears plausible that the importance of allowing people to form, revise, and pursue their own conceptions of the good can ground our rights against being assaulted, raped, and killed, and our rights to freedom of speech, freedom of religion, freedom to choose VAE, and so forth. In this section, I will reject this assumption, and begin to show that certain proprietary rights over ourselves are necessary to explain some of our basic, rock-bottom intuitions about personal rights and liberties. This is not a new idea, but exponents of self-

ownership often make their case too quickly. For example, Peter Vallentyne simply asserts, "Something like control self-ownership is arguably needed to recognize the fact there are some things (*e.g.*, various forms of physical contact) that may not be done to an individual without his or her consent, but which may be done with that consent."[37] Similarly, Hillel Steiner claims in one broad stroke that "many of the familiar claims we do tend to make . . . are claims which would be arbitrary or even unintelligible if we refuse to endorse the right to self-ownership," citing rights against "murder, assault, rape, arbitrary arrest and detention, interference with free speech, free contract, free association, and so forth."[38]

An argument for the necessity of self-ownership would have to be significantly more nuanced for three reasons. Firstly, autonomy and self-ownership overlap in much of what they can protect. Even if it is self-ownership rather than autonomy that ultimately grounds the rights above, to reveal this would require teasing out and analyzing these liberties in great detail. Thus, I will approach this task in this section by focusing on two such rights—the right against rape and the right against body part confiscation—to demonstrate that respect for autonomy cannot explain our intuitions about these rights and self-ownership can. Secondly, to show that proprietary rights over oneself are *necessary* to explain these intuitions, it needs to further be shown that other principles distinct from either autonomy or self-ownership cannot account for them. This will be the task of Section 3. Thirdly, as we have seen, self-ownership consists of a bundle of *separable* rights, and to be a self-owner, we must have a bundle sufficiently similar to other types of ownership. This means that showing that we have *some* of the self-proprietary rights in the bundle does not entail that we have the *others*, or that we even qualify as self-owners (as opposed to, say, renters, who are not owners but nevertheless have some proprietary rights). Thus, after making the case for certain

[37] Vallentyne, "Self-Ownership," p. 1561.
[38] Hillel Steiner, "Property in the Body: A Philosophical Perspective," in *Property Rights in the Human Body*, ed. Kristina Stern & Pat Walsh (London: King's College London 1997), p. 1.

self-proprietary rights in this chapter, in the next chapter, I will continue my justification of self-ownership by providing a theoretical argument which supports all of the self-ownership incidents and gives them some degree of unity.

2.1 Raping an Unconscious Person

It might appear self-evident that respect for personal autonomy is capable of accounting for our intuitions about the impermissibility of rape. It seems clear that a rapist disregards another person's conception of her own good and subjects her to his own will. Moreover, the trauma of rape surely impacts a person's ability to continue pursuing her conception of the good in the future. But, though all of this may be true, does it explain *why* rape is wrong—that is, *why* we have a right against rape? We can clarify our intuitions by studying a hypothetical case that strips out most of the epiphenomena usually accompanying rape. John Gardner devises a thought experiment in which a stranger stealthily has sexual intercourse with a person without her consent while she is unconscious.[39] We are to imagine that the victim has consumed drugs or alcohol to the point of unconsciousness. The perpetrator uses no force on the victim, wears a condom, and sneaks out before the victim awakes. The point is to imagine that no harm—either physical or psychological—comes to the victim as a result of the act. Gardner argues from this that although grave harm almost invariably accompanies rape, the injunction against harming others is inadequate to account for what is actually *wrong* with rape. For if all that were wrong with rape is the harm it causes a victim, then we would have no reason to think that the case outlined above is wrong. But on the contrary, few would dispute that such an act is categorically unjustifiable.

[39]John Gardner, "The Wrongness of Rape," in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007), pp. 3-8.

I argue that, by extension, the same example shows that respect for autonomy is also inadequate to explain a person's right against rape. The argument here will not be a quick one. For while there is a single, unified concept of autonomy, it is a unified concept with multiple facets, and just as shining a light on a cut diamond at different angles brings out different patterns of colors, emphasizing certain facets of the concept of autonomy might bring out the impermissibility of sleep rape where it is imperceptible in others. This complicating feature of autonomy has often worked in favor of the concept's plausibility as a basis for rights, but below, I will tease it apart to show that no reading can explain our intuitions about the impermissibility of rape. Below, I will address three facets of autonomy: autonomy as (1) forming, revising, and pursuing one's own conception of the good, (2) not being subjected to others' acts of will, and (3) being author of one's own life. I will also address a fourth possibility that some autonomy exponents might appeal to, having to do with a particular interpretation of the imperative to respect autonomy—namely, Kant's dictum never to treat a person's capacity for autonomy as a mere means, but always as an end in itself.

First, the rapist in this scenario in no way jeopardizes or diminishes the person's ability to form, revise, or pursue her conception of the good life—in fact, he does not affect it at all. We might imagine that the victim, having passed out in bed after a night of heavy drinking, which the rapist had no involvement in, wakes up the next morning and continues to live her life just as before.[40] Unless chastity is central to her conception of the good, the act does not undermine the pursuit of her life aims. Yet, a victim has no less of a right against rape when it does not affect her conception of the good. A sexual libertine has an equally strong right against being unwittingly

[40] This is a slight modification from Gardner's example. Gardner suggests that the victim may be drugged by another (possibly the rapist himself). See ibid., p. 5. I believe specifying that the victim's unconsciousness is self-induced better excludes both the presumption of rape's harm and its diminution of autonomy.

penetrated in her sleep as a virgin nun, though the act would have a much more devastating effect on the nun's than the libertine's conception of the good.

Now, it might be objected that the victim of sleep rape is nevertheless being subjected to another's will, freedom from which is presumably a part of everyone's conception of the good. That is, it might be plausible to think that all people will have a preference—and not a peripheral one—against having their bodies used without their consent. If so, then any perpetrator of rape—even sleep rape—*is* thwarting a person's conception of the good life for herself, and so respect for autonomy would prohibit it. However, we could imagine a person who did not care about the ideal of freedom from subjection. For example, the libertine above—let us call her Heather—might have a purely hedonistic conception of the good, such that she is not concerned about being subjected to another's will in and of itself. For example, if someone drugs Heather against her will, but she turns out to enjoy the experience, then this act would be consistent with her conception of the good.

Now, suppose that in the same way described above, a stranger, Jack, has sex with Heather while she is asleep, without any prior consent. This time, however, the event comes to light. During the police investigation, Heather confirms that Jack had indeed subjected her to his will, for she had not wished to have sex with Jack. However, she acknowledges that since the act caused her no pain, it has not undermined her purely hedonistic values and aims. Would we then judge Jack's act to be morally permissible? Would Heather have no right against such unconsented-to sexual intercourse because she fails to affirm the value of freedom from subjection? This is implausible. Whether or not Heather would feel motivated to press charges in this case, it is clear that she has a right to do so, for example, by demanding Jack's prosecution, or restitution from Jack. Insofar as she did not consent to Jack's doing what he did, he violates her right to self-determination. The right against sleep rape cannot be

accounted for by respect for people's preferences to be free from others' subjection, since a person without such a preference still has such a right.

This discussion brings out the more general point that it is irrelevant to whether a person's sexual advance on another is permissible whether it undermines the other's preferences or conception of the good. If a woman tells a man "No," it would not matter if her secret wish or genuine preference was for the man to have sex with her without her consent. Rapists often appeal to such (dubious) facts to justify their own actions, but the important point is that the truth of them would be irrelevant. Unless the woman *expresses* her wish or preference to him—that is, unless she gives him consent—then he violates her. Thus, rape cannot be wrong *because* the rapist disregards the victim's self-regarding preferences or conception of the good, since it would be wrong even if it were consistent with them.

To recapitulate my response to the first understanding of autonomy to be discussed: I have argued that if autonomy is understood as forming, revising, and pursuing one's own conception of the good, then the case of sleep rape above does not violate the victim's autonomy, for the case is designed precisely so as not to hinder the victim's ability to form, revise, and pursue her own ends. I considered the objection that a sleep rapist opposes a woman's conception of the good by subjecting her to his will, which is a part of everyone's conceptions of the good. However, whether or not the empirical premise is true, I showed that a person's right against sleep rape is independent of whether the person upholds the value of freedom from subjection. More generally, whether a sexual act is a rights violation cannot depend on a person's preferences or conception of the good *per se*, for a rapist can never justify his act by showing that a woman secretly wanted him to do as he did, or that his act is, in fact, consistent with her values.

Perhaps it might be thought that this merely shows that respecting autonomy is not only about respecting people's conceptions of the good, whatever they happen to be. It might be argued that to subject another person to one's will just *is* to undermine the other's autonomy (irrespective of the other's conception of the good), for being free from others' subjection is at the crux of autonomy. Recall Berlin's famous line: "I wish to be an instrument of my own, not other men's acts of will. I wish to be a subject, not an object . . . deciding, not being decided for . . . ."[41] Raz holds that freedom from subjection to another's will is one of the three minimal conditions of autonomy.[42] According to the second understanding of autonomy to be discussed, Jack violates Heather's autonomy simply by imposing his will on her—and this is so irrespective of her particular conception of the good.[43] But this reading of respect for autonomy, according to which we violate others' autonomy whenever and insofar as we bend them to our wills—cannot be a basis for distinguishing permissible and impermissible action. For we sometimes think it is permissible—that is, non-rights-violating[44]—for one person to subject another to his will—namely, when he has the other's consent. For example, it is not a violation of anyone's rights to engage in consensual sadomasochism. But in such a relationship, one person subjects another to his will. If consensual sadomasochism is permissible, even though one person is subjecting another to his will, then rape cannot be impermissible *because* the rapist subjects the victim to his will, for she may be subjected to another's will without having her rights violated.

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[41] Berlin, *Four Essays on Liberty*, p. 131.
[42] Raz, *The Morality of Freedom*, pp. 377-78.
[43] The difference between this and the first understanding of autonomy is not that between procedural and substantive accounts of autonomy. Though the current description might appear substantive in that it says people must be free from subjection in order to be autonomous, as we shall see below, there is a version of the freedom-from-subjection understanding of autonomy which says that one who consents to be under another's will is not really subject to another's will at all—and so not nonautonomous. Here, whether a person is free from another's will—and so autonomous in this sense—is itself understood purely procedurally, depending solely on whether there had been consent.
[44] Here, it is worth emphasizing that when I speak of "moral permissibility," I am referring particularly to whether an act violates anyone's moral rights, not whether it is the morally right thing to do overall.

One possible maneuver might be to contend that insofar as one *consents* to being under another's thumb, then one is, in fact, subject to one's own will, not another's. That is, there is no such thing as consented-to subjugation, for consent precludes it from being a case of genuine subjugation. In turn, consensual sadomasochism is permissible because no one is actually being bent to another's will, while rape is impermissible because it is an actual case of subjection. However, it is false that consenting to be under another's control necessarily means that one's own will has not been bent. For example, consider a case where Victoria does not want to have sadomasochistic sex with Sebastian, but agrees to it because he tells her that he would otherwise leave her, even though he would have stayed. Though Victoria voluntarily obliges, she is not doing what she truly wants, but what Sebastian wants; she has been bent to his will, despite consent. Here, Sebastian has subverted Victoria's autonomy in the sense that he has subjugated her to his will. Yet, insofar as Victoria is a competent adult, then Sebastian has not violated her rights. Getting others to agree to act according to our will, rather than their own, is a part of ordinary human interaction: a child might flash an innocent smile to manipulate his father to give him more candy; advertisers use subtle psychological tactics to get us to buy what *they* want us to buy. In such instances, one person bends another to his will, yet they do not necessarily constitute rights violations. Thus, respect for autonomy understood as not bending others to our will cannot explain why rape is a rights violation.

Could we amend this reading of autonomy to fit our intuitions? My opponent might concede that subjecting or bending another's will with consent can be genuine subjection, but contend that consented-to subjection does not undermine autonomy—thus, why respect for autonomy does not rule out the cases above. On this view, it is not that a voluntary slave is actually subject to his own will, not his master's; it is that, in virtue of his consent, he is *autonomous* even though he is subject to another's will. If

so, then we could say that consensual sadomasochism is permissible due to the fact that, since it is *consensual* subjection of one's will to another, it is does not violate autonomy; rape is impermissible because it is *nonconsensual* subjugation, and so violates autonomy. However, this understanding of autonomy is unsustainable. Just as a person may consent to being under another's will without it being an expression of his own will, a person may consent to being under another's will without it being an expression of his autonomy. The examples above—of Sebastian getting Victoria to consent to do what she does not really want to do, and of advertisers tempting us into buying products we do not truly want—are paradigmatic cases of autonomy being subverted. In these examples, the party who consents to act as the other wishes is not autonomous *even at the time of consent*. Victoria's consent to have sadomasochistic sex and the consumer's consent to buy unneeded products never reflected their genuine preferences or conceptions of the good. Their capacity for genuine self-government is subverted even as they consent.

Yet, as I have suggested, this way of undermining another's autonomy—namely, by bending their will to our own with their consent—is a part of ordinary life, and does not necessarily constitute a rights violation. In other words, the moral distinction between consensual sadomasochism and rape cannot be that the former is permissible because it is *consented-to* subjection—and so *autonomy-preserving*—while the latter is impermissible because it is *unconsented-to* subjection—and so an *infringement of autonomy*. Both kinds of subjection may equally undercut individual autonomy, and yet consented-to subjection is permissible while unconsented-to subjection is not. This suggests that something else underlies the difference.

Let us review my response to the second understanding of autonomy: I have been considering the possibility that the rapist infringes the victim's autonomy simply by subjecting her to his will, which is antithetical to the notion of autonomy,

irrespective of the victim's particular conception of the good. I do not contend that rape can occur without the rapist subjecting the victim to his will. Instead, I show that subjecting another to one's will cannot be a basis for permissible and impermissible action, for we sometimes subject others to our will without violating their rights—namely, when they consent to it (as in consensual sadomasochism). I rejected the idea that *consented-to* subjection is *not subjection at all*—thus, why consensual sadomasochism is permissible—while *unconsented-to* subjection is *genuine subjection*—thus, why rape is impermissible. This is unsustainable because a person can consent to another's request while being, even at the time of consent, bent to the other's will (as in cases of emotional manipulation). Similarly, it cannot be insisted that *consented-to* subjection *preserves autonomy*, and this is why respect for autonomy prohibits rape but not consensual sadomasochism—a person can choose to be subjected to another's will, but choose nonautonomously, that is, in opposition to his genuine preferences. In short, this reading of autonomy, and its possible variants, cannot be a basis for distinguishing rights-violating and non-rights-violating action because it would rule out too much.

The same response could be made to a third reading of autonomy—namely, one which emphasizes that an autonomous person *authors* her own life. Now, it might seem mysterious how the victim of sleep rape is prevented from authoring her life—after all, being asleep, she is not capable of authoring any life at all in that moment. However, people can interfere with our control of our life narrative not only by thwarting our self-direction, but also by adding chapters to our life story that we do not approve or would not approve if we knew about it. If every single night, after I fall asleep, someone dresses me up as a clown and broadcasts this to a group of people I will never meet, this becomes an important aspect of my life history. That is, even if it does not hinder my positive acts of self-direction, my self-authorship has been undercut.

However, people undermine our autonomy in the sense of self-authorship all the time, and often in ways we do not consider rights-infringing. If the love of my life breaks up with me, then he unilaterally transforms the course of my life and prevents me from having a hand in directing this crucial aspect of my life course. But he violates no right of mine. Indeed, recognizing that our lives are inevitably interlinked, such that no one can be *sole* author of his own life, Raz associates autonomy only with being *part* author of one's life.[45] But, with the exception of cases where a person is prevented from having *any* say in his own life (e.g. slavery), this understanding of autonomy is too vague to distinguish between permissible and impermissible interferences: if to respect autonomy, we need only respect people's *part* self-authorship, when is an interference with self-authorship permissible versus impermissible? In short, the impermissibility of the rapist's actions cannot simply lie in his thwarting the victim's (part) authorship of her own life, for this reading of autonomy is not a basis for grounding permissible versus impermissible action.

Finally, let us consider whether the friend of autonomy could appeal to a particular understanding of the *dictum* of respect for autonomy—to wit, Kant's understanding that we must never treat a person's capacity for autonomy as a means only, but always as an end in itself (i.e. the Humanity Formula of the Categorical Imperative). In the case of sleep rape, does not the rapist treat the victim like a sex tool, and in so doing, regard her capacity for rational self-direction as a mere means, instead of a source of ultimate value? Though apparently plausible, I do not believe this story ultimately works. To begin with, it is worth noting that the victim's capacity for autonomy is not being *used* at all here. Since the victim is unconscious, and so her capacity for rational self-direction not operative at all, it is impossible for the rapist to

[45] Raz, *The Morality of Freedom*, pp. 369-73.

utilize it as a means for his ends, as he could if the woman were conscious, and he uses, say, deception or coercion to get her to agree to have sex with him.

The point in question, then, is whether the rapist fails to treat the victim's capacity for autonomy as an end in itself—as an independent center of value. How to interpret Kant's principle so as to rule out only the cases that ought to be ruled out and allow only the cases that ought to be allowed is notoriously difficult. It is generally agreed that the Humanity Formula entails the perfect duty to limit one's actions based on the recognition of the inherent worth of the capacity for autonomy, and the imperfect duty to cultivate and support it through one's actions.[46] Since we are concerned with how the Humanity Formula might ground the rape victim's rights, we will focus on what perfect duties Kant's imperative issues for the rapist.

According to Thomas Hill, a person who treats another's capacity for autonomy as an end in itself would recognize the perfect duty to limit his actions in the following ways: he would not do anything to destroy or impair the capacity for autonomy (e.g. by hitting the person over the head or drugging the person), he would not thwart or manipulate its exercise (e.g. by lying to or deceiving the person), he would not destroy the person herself, and he would leave the person free to set and pursue her rational ends.[47] But if so, then the sleep rapist could point out that his act meets all of these demands. Indeed, he might earnestly explain that it was precisely because he recognized the intrinsic value of the woman's capacity for autonomy that he painstakingly waited until she was unconscious, so as not to interfere with her capacity for rational self-direction, and why he took measures to ensure that it would not otherwise be affected.

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[46] See, e.g., Thomas Hill, "Humanity as an End in Itself," *Ethics* 91, no. 1 (1980): p. 87; Onora O'neill, "Univesal Laws and Ends-In-Themselves," in *Constructions of Reason* (Cambridge: Cambridge University Press, 1989), p. 138.

[47] Hill, "Humanity as an End in Itself," pp. 93-94.

There is another interpretation of the Humanity Formula that might serve my opponents better. In his brief discussion of the dictum, Kant suggests that making a false promise fails to regard the other's capacity for autonomy as an end in itself because "he whom I want to use for my purposes by such a promise cannot possibly agree to my way of behaving toward him, and so himself contain the end of this action."[48] Two strands of thought have been picked out from Kant's statement above. First, I fail to regard another's capacity for rational self-direction as a center of intrinsic value if the other *cannot share my end* in treating him in this way. Second, I fail to regard the other's capacity for rational self-direction as an end in it self if the other *cannot assent to the way I am treating him.*[49] Let us begin with the first strand. According to Samuel Kerstein, one cannot share in another's end if that end, or the means to that end, contradicts one's own end, or the means to one's own end.[50] However, I have already noted that the sleep rape victim *can* share in her rapist's end in the sense that she might have a secret wish to have sex with the rapist (perhaps even a fantasy of him having his way with her in her sleep), such that his end and the means to his end do not contradict her end or the means to her end. Yet, insofar as she did not express this wish to him, he rapes her and violates her rights. This understanding of the Humanity Formula cannot explain the wrongness of his act.

In a different article than the one previously cited, Hill also endorses the idea that an agent fails to treat another's capacity for autonomy as an end in itself if he acts according to an end that the other cannot share, but he interprets this differently than Kerstein. Hill acknowledges that it is possible for a person who loans another money based on a false promise of repayment to share in the borrower's end of using the

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[48] Kant, "Groundwork of the Metaphysics of Morals," 4:429.

[49] See Samuel Kerstein, "Treating Others Merely as Means," *Utilitas* 21, no. 2 (2009): 163-80; Thomas Hill, "Hypothetical Consent in Kantian Constructivism," *Social Philosophy and Policy* 18, no. 2 (2001): 300-29; Chrstine Korsgaard, "The Right to Lie: Kant on Dealing with Evil " *Philosophy & Public Affairs* 15, no. 4 (1986): 325-49; Onora O'neill, "Between Consenting Adults," ibid.14, no. 3 (1985): 252-77.

[50] Kerstein, "Treating Others Merely as Means," pp. 171 & 179. He also adds the proviso that the person would not be willing to alter his own end in light of the other's end, but this does not affect my criticism.

money without repaying (e.g. if the lender is particularly generous and would not have asked for the money back). The sense in which the lender *cannot* share in the false promisor's end is that it is *logically impossible* for him to want to *loan* money without repayment, since "lending is transferring one's property to another with the understanding that the other party means to return or repay the lender."[51] If the person gives the false promisor money, knowing he will not be repaid, then he is not intending to *loan* the money without repayment, for this is logically impossible—and yet, it is the false promisor's end.

But even if this interpretation of the Humanity Formula is valid, such logical impossibility does not apply to the stipulation above where the victim shares the sleep rapist's end because she secretly wants him to do as he does. That she *wants* to be raped does not render it no longer rape, for insofar as she has not *expressed* her wish to him—that is, given him consent—then he rapes her. In short, it is logically possible for the rape victim to share in the rapist's ends, and so it is not the case that a rapist necessarily acts for an end which the victim cannot share, in the sense that it is logically impossible for her to do so. The Humanity Formula construed in this way cannot explain why the victim with the unexpressed, perverse wish to be raped still has a right against rape (e.g. she has a right to stop the perpetrator's act or to press charges afterward).

Christine Korsgaard and Onora O'neill emphasize the second strand of thought suggested by Kant's statement above on the Humanity Formula, according to which an agent fails to treat another's capacity for autonomy as an end in itself if the other *cannot assent* to the way the agent is treating him. By this, they mean that the agent's act leaves the other no choice whether to consent or not.[52] Paradigmatic examples of this are coercion and deception, since such acts prevent the other person from being able to

[51] Hill, "Hypothetical Consent in Kantian Constructivism," p. 307.
[52] Korsgaard, "The Right to Lie: Kant on Dealing with Evil " pp. 7-10; Onora O'neill, "Between Consenting Adults," ibid.14, no. 3 (1985): pp. 259-62.

assent to or dissent from the agent's treatment (in the latter case, because the person does not know what is actually being offered). So what matters is not whether one *could* or *would have* agreed to someone's ends, but whether one was given the *opportunity* to choose whether or not to agree and collaborate in it. Since I have been emphasizing throughout that *consent* is what matters to whether a sexual violation has occurred, this reading of the Humanity Formula seems promising for my opponents. It is undeniable that the sleep rapist's act is designed precisely so that the victim, being unconscious, can neither agree to nor dissent from his treatment of her. According to this understanding, then, the rapist does fail to treat his victim's capacity for autonomy as an end in itself, and so acts impermissibly.

However, the problem with this reading of the Humanity Formula is that, while it is able to prohibit sleep rape, there are also many instances in which people give us no opportunity to assent to or dissent from their treatment of us, and yet they do so permissibly. Consider, for example, situations of market competition. Suppose you and I are the sole competitors selling pizza pouch necklaces (for holding extra pizza slices on-the-go). I persistently lower my price below yours in order to drive you out of the pizza pouch business. In doing so, I deny you the chance to choose whether or not to collaborate in my end, even though my end directly involves you. Yet, in lowering my price, I do not violate your rights. Despite the more sophisticated language, the current reading of the Humanity Formula is not significantly different from the demand to respect self-authorship, which I have already rejected. Recall the example where the love of my life dumps me, which I used to illustrate the fact that others often permissibly prevent us from authoring our own lives. Similarly, the love of my life who unilaterally dumps me does not give me the opportunity to either assent to or dissent from his treatment of me—and yet, he does so permissibly. Thus, if Kant's dictum to never treat others' capacity for autonomy as a mere means, but always also as an end in

itself, is understood as giving others the opportunity to assent to or dissent from our treatment of them, then the dictum cannot be a basis for distinguishing permissible and impermissible action.

It is worth reiterating my response to appealing to the Kantian dictum of always treating people's capacity for autonomy as an end in itself to account for the impermissibility of rape. I argued that based on one of Hill's interpretations of the Humanity Formula, the sleep rapist does regard the capacity for autonomy as a center of ultimate value, for he limits his actions so as to guarantee not impairing, thwarting, destroying, etc. the woman's capacity for autonomy. On another interpretation which follows Kant's original intention more closely, an agent fails to treat another's capacity for autonomy as an end itself if the agent either acts in such a way that the other cannot share in his end or the other cannot assent to it. Ultimately, I concluded that the sleep rapist necessarily breaches not the former, but the latter—he acts in a way that pre-empts the victim from choosing whether or not to consent to his act. However, doing so is not in and of itself impermissible, and so it cannot ground the impermissibility of sleep rape.[53]

I have turned the principle of respect for autonomy every which way to attempt to find an aspect that would explain the impermissibility of rape. If we emphasize being autonomous as being able to form, revise, and pursue one's own conception of the good, then the sleep rapist does not affect his victim's autonomy at all. If we emphasize other facets of autonomy, such as the idea of not being subject to another's act of will or being author of one's own life, these *do* seem capable of ruling out all types of rape, including sleep rape, but they also rule out other acts that we believe are permissible,

[53] The Humanity Formula is often read as an injunction against treating *persons* as sheer means, rather than their *capacities for autonomy* as sheer means. See, e.g., "The Public Use of Reason," p. 45; Hill, "Humanity as an End in Itself," p. 85; Kerstein, "Treating Others Merely as Means," p. 166. This appears to be a more plausible explanation of the impermissibility of rape, but it is *not* an interpretation of respect for *autonomy*, since what is to be regarded as an end in itself here is not autonomy, but the person himself (who may have intrinsic value for reasons beyond his capacity for autonomy). Thus, this variation of the Kantian principle will be addressed separately, in Section 3.1, as an alternative to both self-ownership and respect for autonomy.

and so they cannot serve as a basis for distinguishing permissible and impermissible acts at all. Similarly, if respect for autonomy is interpreted on the basis of Kant's dictum of always treating people's capacity for autonomy as an end in itself, on certain readings, it is not breached by sleep rape, and on a reading whereby it *is* breached (i.e. the reading that says we must give others' the opportunity to assent to how we treat them), it rules out too much, and so cannot be what accounts for the wrongness of rape. The principle of autonomy cannot seem to draw the right boundary distinguishing when interferences in people's control of their lives is permissible and when it is impermissible.

On the other hand, the thesis of self-ownership explains why the prophylactic boundary should be drawn at the perimeter of an individual's person and body (rather than his capacity for autonomy), and it has no problem accounting for the impermissibility of any type of rape. If people own their own bodies, then they are entitled to have the final say over what may be done to them. The right against rape would be secured by the first standard incident of ownership, the Right to Possess, which gives an owner the negative claim right to exclusive physical control of her property, such that no one may use it without her consent. Thomson takes this to be the central incident of self-ownership.[54] Such a right is independent of whether any negative consequences come of another's trespass—independent of whether the encroachment causes the owner harm, undermines her autonomy, and so forth. The prohibition against raping someone while she is unconscious is comparable to the prohibition against "harmless parasitism" on others' external property.[55] You may not, for example, sneak into my house every night and sleep in a room I do not use, even if you leave everything as is and take precautions to ensure that I am utterly unaffected. Insofar as you do not have my consent, you violate my property right against trespass.

[54] Thomson, *The Realm of Rights*, p. 543.
[55] For discussion of "harmless parasitism," see Richard Arneson, "Lockean Self-Ownership: Towards a Demolition," *Political Studies* 39, no. 1 (1991): pp. 41-42.

In the same way, if my body belongs to me, then I have as much of a right against another person having sex with me without my consent when it has no effect on me whatsoever as I do when the breach would blight my autonomy.

As this suggests, the thesis of self-ownership better accounts for why consent is the cornerstone of rape. That is, it explains why a sexual act is considered rape and impermissible when it lacks consent, but with consent, the same act is considered just ordinary sex.[56] Just as to determine whether it is permissible for X to use Y's property, we do not ask how X's use affects Y, but simply whether Y consents to that use, in determining whether it is permissible for X to act on his wish to have sex with Y, we should not ask whether X's act would harm Y or whether it would respect Y's autonomy (e.g. would sex with X be compatible with Y's fundamental aims and values?), but simply whether Y consents. Consent is what matters because Y has a proprietary relation to her body; she owns her body, and is rightfully the ultimate arbiter over what happens to it. Self-ownership can explain our deep intuitions about the wrongness of rape, whereas respect for autonomy cannot.

2.2 Confiscating Body Parts

Thus far, I have focused extensively on one case in which an act is clearly wrong, and yet autonomy cannot capture its wrongness while self-ownership can. I turn now to a second case which yields the same conclusion: the expropriation of others' body parts.

[56] It might be asked why I have not addressed the issue of prostitution. Many people believe that there is no moral right to prostitute one's own body—that is, to consent to sex for pay—such that the illegality of prostitution, prevalent throughout the world, does not violate anyone's moral rights. Does this not show that self-ownership *also* fails to draw the right boundaries between permissible and impermissible sexual intercourse, since if we are self-owners, then we should be able to consent to selling our bodies for sex? I do not address prostitution in this section for two reasons. First, the idea that people do not have a right to prostitution is controversial, and the moral methodology here is to appeal to uncontroversial and irrevocable intuitions. Second, the right to prostitution would be justified by a different incident of self-ownership, namely, the Right to Capital, than the one under discussion, which is the Right to Possess. Since self-ownership is a bundle of *separable* rights, and I am not trying to show that we have the full bundle, whether we have a right to market our bodies for sex is irrelevant to whether others may trespass on our bodies for sex. We may be self-owners with one but not the other right.

Of course, respect for autonomy would prohibit killing a person to use her body parts to save others, since in destroying her, we destroy her autonomy. But many other more minor forms of expropriation would leave people's autonomy intact. For example, suppose that tomorrow, the government institutes a system of compulsory blood transfer, in which it will take—with the backing of coercive force—a pint of blood from each citizen once a month, with no choice of opting out of the system. If a person refuses, it would be permissible for the government to come seize the blood, for she no longer has a right to that portion of blood that has been claimed as a social resource. Such a system may well save lives, but no liberal society has it. Most of us find the prospect of siphoning blood from unwilling people deeply violating. This is so even if we think that those who refuse to donate blood are bad and selfish people, deserving of social censure and public shame.

Yet, a system of compulsory blood transfer can be instituted with minimal effect on our autonomy. Drawing a pint of blood from a person for ten minutes once a month would be no more disruptive of her ability to form, revise, and pursue her conception of the good than a London traffic jam. If we are worried about any autonomy-reducing trauma that might result from holding unwilling citizens down to draw blood, we could imagine sending small drones to attach to people's arms while they sleep to suction blood, such that people would wake up none the wiser. But, if anything, this minimally intrusive and nonviolent practice seems even more of a violation and perversion of our rightful moral relation to ourselves, and to one another. Now, it could be said that autonomy is infringed here if we mean by this that taking a person's blood when he is unwilling subjects him to another's will or treats him in a way that does not give him the opportunity to assent or dissent, but I have already argued that such understandings of autonomy cannot explain why certain acts are prohibited, since it is sometimes permissible to subject others to our will (e.g. certain

uses of emotional manipulation) or to treat them in ways that they cannot assent (e.g. romantic breakups or market competition). Nor can respect for autonomy in the sense of honoring others' self-regarding preferences account for the impermissibility of forced blood transfer, for someone might consent to give blood without it being his genuine preference (perhaps he is pressured into it by blood drive propaganda)—and yet, it would be permissible to take his blood. In short, the principle of respect for autonomy cannot explain why forcing people to give blood is rights-violating.

Indeed, the principle of respect for autonomy would leave much more than just our blood free for the taking. If the reader does not find the confiscation of his blood objectionable, would he feel the same about the seizure of a lobe of his liver? A kidney? An eye? Most of us would regard the prospect of body part redistribution horrifying. Yet, Cécile Fabre convincingly argues that to take people's bone marrow, liver lobes, kidneys, and corneas would not jeopardize people's ability to frame, revise, and implement their own conception of the good. There are exceptions—for example, an athlete for whom the loss of a kidney would be devastating, or a painter for whom the loss of an eye would be calamitous. But we could simply allow these particular individuals to be exempted. For the rest of us, Fabre points out, confiscating these body parts would be less disruptive of people's projects than the common practice of taxing 25 to 40 percent of their income.[57] I agree with Fabre that taking such body parts would not violate anyone's autonomy, but *contra* Fabre, I do not believe this shows that confiscating such body parts is permissible. For I do not think that our sense of indignation at having our body parts seized from us has to do with a concern for our

[57] See Cécile Fabre, *Whose Body Is It Anyway? Justice and the Integrity of the Person* (Oxford: Oxford University Press, 2006), esp. 103-5. Fabre does not think that respect for autonomy necessarily exempts even the athlete or the painter from compulsory donation of their kidney or cornea, respectively. This is because, for her, we respect autonomy insofar as we give people sufficient room to pursue *a* conception of the good they find meaningful, such that whether we may take the athlete's kidney or the painter's cornea depends on "how easy it would be for him to find an alternative conception of the good he finds meaningful." See ibid., p. 104. I am taking a more stringent interpretation of the principle of autonomy (according to which we may not force people to change their conception of the good) to show that even this will leave most of our kidneys and corneas vulnerable to expropriation.

autonomy. Rather, the intuition is that, whatever the effect on my autonomy, it is *my* body—*my* kidney, *my* eyes—I have the right to decide what happens here. The prohibition against body part confiscation is protected by the sixth standard incident of self-ownership, the Right to Security, which gives owners immunity from others altering their rights to their property, including expropriating it.[58]

G.A. Cohen acknowledges that self-ownership seems to be the most straightforward explanation for the impermissibility of body part redistribution, but he tries to show that it is *unnecessary* for justifying this conclusion. Cohen asks us to imagine a case in which it would be clear that people did not own their eyes.[59] In this world, people are born without eyeballs, and the state implants artificial eyes in them during infanthood. These eyes, however, are regarded as a loan. Suppose that through accident, some people lose their eyes in adulthood, and the only way to restore their sight is to take an eye from a sighted person. Cohen claims that we would find eye redistribution unacceptable even in this world, and this shows that our objection to eye redistribution is not grounded in self-ownership—since no one owns her eyes in this world. The suggestion that arises from this example, Cohen says, is that we find eye redistribution repugnant because, contrary to Fabre's claim, it involves severe interference in people's lives. However, I argue that Cohen's example is not the right case to look at at all. For we want to know whether *we*—that is, *you and I*—are self-owners, and whether this fact is needed to explain the impermissibility of redistributing *our* eyes. If so, then Cohen's example is not the relevant case, for it could be that self-ownership is crucial to explaining the unacceptability of redistributing *our* eyes, while other reasons can also justify the prohibition *even* in a world where people are *not* self-owners. To put it another way, while severe interference (without self-ownership)

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[58] Self-ownership can accommodate the view that expropriating a person's kidney, say, is worse than expropriating her blood. Both stealing a flower from a person's yard and stealing her car is a violation of her property rights, but the latter is a worse violation of her property rights than the former.

[59] Cohen, *Self-Ownership, Freedom, and Equality*, pp. 243-44.

might be logically sufficient to rule out eye redistribution, it might not be sufficient to fully explain *why* redistributing our eyes is wrong, just as the causation of harm is logically sufficient to rule out rape, but does not fully explain its wrongness.

So let us come back to our world, where our eyes are not loaners implanted by the state. If severe interference is sufficient to explain our objection to redistributing our eyes, then we should have no reason to object if severe interference is eliminated. Fabre has convincingly argued that absent particular conceptions of the good (e.g. if one is a painter), the loss of sight from one eye would not impede one's life plans. But perhaps we are worried about the severe interference involved in the surgical procedure itself and the subsequent impact on one's life as the brain adapts to receiving data from one eye. So suppose that future technology allows for eye transplants to be done easily and non-invasively—perhaps much like laser eye surgery is done today—and the state takes eyes only from newborns and young infants, so that there will be little need for adjustment or adaptation. Do we think that such a program would be permissible? I do not think so. The intuition remains that a person's eyes belong to himself or herself, and may not simply be taken away. We do not think that people lose their right to bodily integrity when it involves little interference in their lives. Thus, *pace* Cohen, severe interference is inadequate to account for the wrongness of body part expropriation. Unless we can find an alternative explanation, it appears that self-ownership is needed to explain our intuitions about its impermissibility after all.

Indeed, without the thesis of self-ownership—if autonomy were all that mattered—we may have to accept not merely the *permissibility* of body part redistribution, but the *requirement* of it, as a matter of justice. According to an argument first suggested by critics of egalitarianism but later developed by Fabre (who wished not to reject egalitarianism but to defend compulsory body part redistribution), the same considerations that would justify redistributing some of the well-off's income

to the less well-off would justify redistributing some of the medically well-off's non-essential body parts to the medically needy. After all, the person born without sight does not deserve his situation any more than the person with two eyes deserves hers. Just as the amount of resources we are able to get in the free market is largely a matter of luck, whether we are healthy is also largely a matter of luck. Given this, how can we consistently hold that a sick person has a right to the external resources she needs to stay alive, but not to the liver or kidney she needs for the same purpose?[60]

Since the impermissibility of confiscating body parts is usually seen as a rock-bottom commitment, most egalitarians regard this alleged implication of their view as an attack on their theory rather than an argument *for* body part redistribution.[61] Fabre argues that this is a mistake, since redistribution of certain body parts would be consistent with individual autonomy. Fabre believes that once we see this, then, given the egalitarian reasons we have for redistributing body parts, we would be compelled to endorse the practice. Indeed, if what undergirded our personal liberties were simply respect for autonomy, then there would be very good *autonomy-based* reasons for endorsing body part redistribution. Given that many people who need these body parts would be unable to live autonomous lives without them, it seems that the principle of respect for autonomy would itself not merely *permit*, but *support* Fabre's particular proposal of body part redistribution.

Fabre's argument has been noted for its logical rigor, and yet, as far as I know, few theorists have been convinced by her case. Her argument illustrates how the process of reflective equilibrium supports my position that respect for autonomy is inadequate, and that self-ownership is necessary, as a basic moral principle. Fabre

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[60] Though this argument applies specifically to luck egalitarians, Fabre later emphasizes that Rawlsians, who see redistribution of external resources as contingent on social cooperation, do not escape the implication that body parts should be redistributed. She cites Nir Eyal, who points out that bodily health and maintenance depends on prior social cooperation (e.g. social supply of food, medical care, education, etc.). See Cécile Fabre, "Reply to Wilkinson," *Res Publica* 14 (2008): p. 139; Nir Eyal, "Is the Body Special? Review of Cécile Fabre, Whose Body is it Anyway," *Utilitas* 21, no. 2 (2009): p. 237.

[61] See discussion in Fabre, *Whose Body Is It Anyway?*, pp. 3-4.

begins with two principles of justice: an egalitarian principle of resource distribution and the principle of respect for autonomy. She then shows that these principles entail what she acknowledges is a very controversial and counter-intuitive conclusion, namely, the redistribution of body parts, which she believes we are now compelled to accept.[62] But according to the moral methodology of reflective equilibrium, this is not the end of the story. For if our theoretical principles lead us to a conclusion that contradicts foundational commitments which we cannot relinquish, even in light of the theoretical arguments, it suggests that we need to reevaluate the principles we started off with, for they may be wrong or incomplete. In other words, that respect for autonomy does not rule out redistribution of human body parts does not prove that we must then accept the practice. Insofar as our qualms about it are not quelled because autonomy is preserved—and I have illustrated through the analyses and thought experiments of this section that they are not—it instead suggests that our basic liberties cannot be rooted solely in the principle of respect for autonomy. Insofar as we still feel the weight of the objection, "But my body belongs to me, you cannot just take away parts of it without my consent!" it suggests that what is missing from Fabre's picture is the principle of self-ownership. In short, instead of proving that we should abandon bodily integrity, Fabre's argument and conclusion supports the view that self-ownership is a basic moral principle to be respected before loftier moral considerations like autonomy and distributive fairness may be advanced.

Now, it might be objected that insofar as we are arguing from intuitions in which we are confident, self-ownership is also problematic. For instance, it might be pointed out, many of us would be equally horrified at the prospect of people being

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[62] Ibid. Fabre's own egalitarian principle is weaker than the luck egalitarianism she uses to motivate her argument. It says that each person has a right to the resources necessary for living a "minimally flourishing life"—by which she means a life in which a person is able to frame, revise, and pursue a conception of the good with which she can identify. See ibid., ch. 1 & 5. The second principle says that once everyone has such a life, each person should be allowed to use the fruits of her labor in pursuit of her own conception of the good—that is, to *maximize* her autonomy. See ibid., p. 34.

permitted to *sell* their kidneys, eyes, and other organs, and yet this also seems to be a natural entailment of self-ownership. Does this not show that our resistance to the expropriation of body parts is not motivated by belief in self-ownership? However, recall that self-ownership is a bundle of separable rights. The right against body part confiscation is secured by the Right to Security, which gives owners the immunity against expropriation of their property. This does not imply a right to sell whatever we own, which would be secured by the Power to Capital. For example, a person who owns a non-transferable concert ticket has a right against expropriation, and yet, she has no right to sell the ticket. Since the aim of this chapter is not to argue that we have *all* of the incidents of self-ownership (i.e. Liberal Self-Ownership), much less all of the incidents to the *maximal extent* without exception (i.e. Full Liberal Self-Ownership), if it is indeed uncontroversial that marketing body parts is impermissible, this would not be an objection to my thesis.[63]

There is another intuition, however, that is more worrisome, for it has implications for the very self-ownership incident I have been defending. Most of us believe that conscription is, under certain circumstances, morally permissible. That is, compulsory enlistment of citizens into war is not necessarily a rights violation. But if this is true, then it seems to contradict the Right to Security. I have contended that our irrevocable intuition against body part redistribution points to our belief that people have an immunity against others expropriating our bodies. But would not conscription be an even more drastic form of expropriation, whereby our rights are changed not only with respect to certain nonessential organs, but with respect to our entire bodies, such that the government may unilaterally (without our consent, or forfeiture through

[63] Whether the intuition against the permissibility of marketing body parts should ultimately compel us to affirm a more restricted conception of self-ownership depends on the strength of our commitment and the outcome of the reflective equilibrium. For example, just as I asked whether theoretical arguments from autonomy and equality can convince us to relinquish our objection to body part expropriation (and concluded that it cannot), we would have to ask whether the theoretical bases of self-ownership, to be discussed in the next chapter, could lead to a shift in our intuition about marketing body parts.

wrongdoing, or being a threat to others) acquire a right that our bodies are used to do its bidding, even at the expense of our death? If so, then it could be insisted that the impermissibility of redistributing body parts cannot be grounded in self-ownership, since some types of bodily expropriation are clearly permissible—as far as our fundamental commitments are concerned, not all of our intuitions support the Right to Security.

To begin with, it is worth noting that the problem of explaining how conscription can be permissible is not a problem unique to self-ownership. Theorists grounding personal rights in respect for autonomy also have to explain why such a drastic interference in people's ability to pursue their own values and aims may be allowed. I believe a reasonable explanation is possible based on both theses. It is important to examine the circumstances under which we believe conscription is permissible, for we do not believe that conscription is *always* or even *generally* permissible. We do not think that the government has a right to draft citizens into war for whatever reason it chooses—for example, solely for the sake of conquering new territory or increasing the government's coffers. Even in cases where innocent civilians in other countries stand to be harmed by an aggressor, but the security of one's own country is not at stake, it is often controversial whether the state may draft citizens for such a purpose. Indeed, forcing unwilling people to risk their lives in war, under most circumstances, would be controversial at best. I proffer that the firm intuition we have that conscription is permissible pertains to conscription in a particular situation—namely, in a *defensive war* where coercive enlistment is necessary to fight off aggressors attacking or threatening to attack one's country.

I argue below that self-ownership (and its Right to Security) is compatible with conscripting most citizens in such a circumstance based on a combination of two considerations: implicit consent to certain benefits and fair terms of cooperation. In a

defensive war, an aggressor poses an imminent threat to national security, endangering the basic structure under which people lead their lives, indeed, imperiling their very lives. Moreover, in a genuine defensive war, armed force is *necessary* to ward off attack; defense through non-violent means, such as diplomacy, is not or is no longer reasonably possible.[64] Under such a circumstance, most of us would *want* to be protected from the imminent harm aggressors threaten, and since no other method for achieving this is possible, most of us would want—and would endorse—the state protecting us through armed force (I will subsequently address cases like pacifists and certain right libertarians, who may accept the end—protection from aggressors—but not the means—protection through state-sponsored armed force). So in a defensive war, most of us consent, explicitly or implicitly, to two things: the end of deterring aggressors and the means of deterrence through state-sponsored armed force.[65]

While most of us consent to being protected by the state, what many of us dissent from is *being* the ones *doing* the protecting. That is, most of us want an armed force to fight off aggressors, but we do not want to risk our own lives and be part of that armed force. But getting enough volunteers for an effective army is not always possible. In such a circumstance, the institution of a lottery system to randomly select individuals for our mutual defense is a fair way of resolving the dilemma that most of us want state protection but few of us want to take part in it. In other words, in situations where we would want and assent to the state deploying military force, and there is a dearth of volunteers, then we cannot refuse to be conscripted, since we cannot expect to reap the benefits of such an institution while refusing to take on its costs. Fighting off invading forces involves a cooperative endeavor that, if successful, results in immense

[64] Of course, in practice, democratic citizens almost always disagree about whether a particular war is a genuine defensive war in the sense delineated above: Is X a real threat to national security? If so, is armed force necessary, or even effective, for staving off X? However, in asking why conscription is justifiable, what is important is the *paradigm* of a defensive war, as outlined above, for when we start to question whether a particular war is genuinely defensive (e.g. is armed force really necessary?), then the moral permissibility of conscripting citizens for this war becomes controversial as well.

[65] For more on the normative force of implicit consent on a self-ownership view, see Chapter 5, Section 2.1.

social benefits most of us want to have. If so, then conscription must be accepted as well, for being self-owners does not inoculate us from accepting the fair terms of cooperation.

What about individuals who do not consent, either explicitly or implicitly, to the means used for our collective defense? Why should those who dissent from the deployment of a state military in the first place accept conscription as a fair term of cooperation? For example, pacifists explicitly reject being protected through the use of *military* force, and some right libertarians explicitly reject being protected through *state-sponsored* military force, arguing instead for the use of private military or security companies. If we are self-owners, then anyone who does not want the benefits of cooperation, or does not accept the means to achieving them, should be able to opt out of the system. Given this, I believe individuals who dissent from the use of a state military, even in a defensive war, have a moral right against conscription. But this is not too far from accepted practice. Known as "conscientious objection," many countries allow individuals to be exempted from conscription based on ethical or religious objections. Given self-ownership, it seems that the grounds for dissention need not be confined to the ethical or religious—any genuine dissent against the deployment of a state military might count. Of course, it may be difficult to verify the sincerity of such claims (is the person simply trying to shirk the costs of social cooperation?), but this is a practical issue that applies to conscientious objections as well. In short, our deep intuitions about the permissibility of conscription under certain circumstances does not contradict the Right to Security—the immunity we have against others altering our rights over our own persons and bodies. I maintain my previous conclusion that, unless there are principles other than autonomy which can do the job, self-ownership—and its incident of the Right to Security—is needed to explain our intuitions about the right to bodily integrity.

3. ALTERNATIVES TO AUTONOMY AND SELF-OWNERSHIP?

So are there principles distinct from both autonomy and self-ownership that might account for our conclusions about the test cases above? If there are alternative explanations for our intuitions about rape and body part expropriation, then these cases do not necessarily provide arguments for self-ownership. Below, I address two alternative explanations: the injunction against using *persons* as a mere means and the thesis of personal sovereignty.

3.1 Never Treat Persons as Mere Means

In my discussion about rape, I rejected grounding the wrongness of rape in Kant's dictum to never treat people's *capacity for autonomy* as mere means for our own ends. However, Kant's Humanity Formula is often interpreted more generally, as the demand not to use *persons* as mere means for our own ends. Though Kant used the two formulations interchangeably, the latter formulation has distinctive appeal quite apart from a concern for autonomy, since people may have intrinsic value beyond their capacity for autonomy. I believe many theorists attracted to the Humanity Formula have this more general imperative in mind. After all, what is more basic than not treating other people as mere tools for our own ends? It may also be a good candidate for explaining our intuitions in the test cases, since it seems plausible that both sleep rape and the confiscation of body parts involve the sheer use of *people*. Gardner himself suggests this line of reasoning in explaining the wrongness of rape. He says rape is wrong because it is "the sheer use of a person, and in that sense the objectification of a person, is a denial of their personhood. It is literally dehumanizing."[66]

[66] Gardner, "The Wrongness of Rape," p. 16.

However, a deeper analysis shows that such a principle cannot replace self-ownership to justify our intuitions. Of course, it is indisputable that in both test cases, someone is being used as a means for another's ends—in the rape case, the victim is used as a means for the perpetrator's sexual gratification, and in the body redistribution case, the medically well-off are used as means for advancing the medically needy's welfare and autonomy. However, the Kantian principle does not prohibit using people as a means to our own ends; it prohibits treating them *only* as a means to our own ends. Otherwise, the principle would be highly implausible, since we regularly use people for our own purposes. When I hail a taxi, for example, I interact with the taxi driver only because I wish to use him to get me somewhere. There is nothing wrong with this. What would be wrong, according to this principle, would be if I treated him *only* as a tool. I treat him only as a tool if I do not *also* recognize him as an intrinsic end, as an ultimate center of value. Clearly, then, the important issue is whether the sleep rape victim and the coerced body part donor are being regarded as ends in themselves. *This* determines whether they are being treated as a means *only*, and so determines whether the principle is being violated at all.

To treat people as ends in themselves is to treat them as ultimate centers of value. In terms of our perfect duties, it requires that our actions are limited by the recognition that people have intrinsic value. But all of this is highly abstract; what it amounts to in more concrete terms is unclear and interpreted differently by different theorists.[67] Below, I will explore its various understandings to show that none can account for our conclusions in the test cases. First, many theorists hold that to treat people as ends in themselves is to regard their capacity for autonomy as ends in themselves; we treat people as mere means if we do not limit our actions by the recognition that they are beings with the capacity for rational self-direction, which is not

[67] For a discussion of the variability in interpretations of this principle, see Hill, "Humanity as an End in Itself," pp. 85-87.

to be undercut for our own purposes.[68] But we have already seen that respect for autonomy, however we interpret it, cannot account for the impermissibility of the two test cases. A second understanding of treating people as ends in themselves is offered by Cohen. In asking whether egalitarians treat the talented as mere means, Cohen replies that they do not, for even though they want to use the talented to benefit the less fortunate, they do so only because an egalitarian distribution of resources would not blight the welfare of the talented.[69] The suggestion is that to treat people as ends in themselves is to be concerned about each person's welfare in and of itself, such that we would not sacrifice the welfare of one person in order to increase another's or to further some other social goal. But if we accept this construal of the Kantian principle, then Cohen's rationale could also be applied to our two test cases to justify body part redistribution and sleep rape: redistribution of the medically well-off's body parts to the medically needy is permitted only when and because it would not jeopardize the medically well-off's welfare, and though, in contrast, the sleep rapist's intentions are ignoble, he might have nevertheless restricted his actions in the ways delineated above so as not to affect the victim's welfare.

It might be thought that I am interpreting the Kantian imperative too laxly. Even if the sleep rapist limits his actions so as to not undermine the woman's autonomy or welfare, there seems to be a clear sense in which he is still using her as a mere tool for his own ends. For example, a man who marries a wealthy woman solely for her money and for no other reason surely uses her merely as a means to an end, *even if his conduct does not jeopardize her welfare or autonomy*—say, if he informs the woman beforehand that he is marrying her for her money, and the woman voluntarily accepts

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[68] To equate treating people as ends in themselves with treating their capacity for autonomy as ends in themselves, we need not ground people's intrinsic value in their capacity for autonomy (as Kant did). One could also start with the premise that people are ends in themselves, and then argue that the best way to regard them as important in and of themselves is to respect their autonomy, say, because people care a great deal about their ability to lead autonomous lives.

[69] Cohen, *Self-Ownership, Freedom, and Equality*, p. 240.

because she loves him and knows she would not do better anyways (such that both her autonomy and welfare are preserved). It may be true that there is still a sense in which the woman is being used as a mere means for another's end here. However, this sense of using a person as a mere means cannot explain why sleep rape and body part redistribution are rights violations, for the woman's rights have not been violated here. In other words, some readings of sheer use of persons, though plausible, cannot serve as grounds for explaining why certain actions violate another's rights. Consider another example: if I stand behind a tall stranger to use him as a windbreaker, I regard him as a mere tool for my own end. But I do so permissibly—I do not violate any of his rights. To recruit the Kantian dictum against using people as mere means to prohibit certain actions, we must find an understanding that rules out only the rights-violating cases, and not the cases which are merely unethical or even innocent. Such a reading will necessarily need to be more restricted than everything that could be considered "sheer use," for we sometimes interact with others solely in order to use them for our own goals, but this is not necessarily rights-violating, as long as certain limits are set.

Perhaps the missing element in my construal of the Kantian imperative is respect for human dignity. Perhaps to treat persons as ends in themselves, we must limit our actions not only by consideration of their autonomy and welfare, but also by respect for their dignity. According to this line of thought, it is because both test cases violate human dignity that they exemplify failures to treat people as ends in themselves. I agree that the inviolability of human dignity is important for how theorists generally understand the dictum against treating persons as mere means. But "dignity" is another vague concept—we must first ask how it is to contribute to our understanding of the imperative. According to Kant, to have dignity is to have "inner worth."[70] If so, how does invoking dignity add to the idea of respecting people as ends in themselves—as

[70] Kant, "Groundwork of the Metaphysics of Morals," 4:435.

sources of intrinsic (that is, inner) worth? In fact, treating people with dignity goes beyond treating them as beings with intrinsic, inner worth. Michael Rosen points out that we can fail to respect human dignity not only by undermining the inherent worth of human beings in *concrete ways*—for example, using them without due regard for their autonomy or welfare—but also by acting in ways that *express* or *symbolize* contempt for human worth.[71] For example, part of why torturing prisoners violates human dignity is its involvement of acts that humiliate and demean persons in ways which dismiss their basic human worth. The violation of dignity is rooted not just in the disregard for the prisoner's autonomy and other interests, but the very attitude of contempt for human worth that such an act expresses.[72]

This is important for the present objection against my view, for even though in the two test cases, the victims' autonomy and well-being have been safeguarded, there still seems to be a lingering sense that the very acts involved are dehumanizing and demeaning to the victims, and in this sense incursions on human dignity. In the case of body part expropriation, the disregard for bodily integrity, and the treatment of the human body as something that may be disassembled and used like car parts seems to in and of itself reflect an attitude of contempt for the worth of the person. In the case of sleep rape, the very act of copulating an unconscious person without her knowledge is demeaning and dehumanizing, and so undermines human dignity by expressing an attitude of disrespect for human worth. However, I will argue below that neither test cases can be ruled out by the principle of respect for human dignity. The argument proceeds in two steps: I will first show that, despite appearances, neither disregarding human bodily integrity nor having sex with people in their sleep is *in and of itself* a

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[71] Michael Rosen, *Dignity: Its History and Meaning* (Cambridge: Harvard University Press, 2012), p. 126.

[72] Another way in which having dignity goes beyond being an end in itself is that what has dignity has *incomparable* value. See Kant, "Groundwork of the Metaphysics of Morals," 4:435. This exceeds intrinsic value, for it is to have intrinsic value that cannot be compared to or outweighed by other things with intrinsic value. This will become important when I address in the next chapter the objection that the thesis of self-ownership contradicts human dignity.

violation of human dignity. I will then show that it cannot be the lack of consent in the two test cases that renders them violations of human dignity.

Let us begin with the first step of the argument. Denying bodily integrity cannot in and of itself be an affront to human dignity, for people can deny their own bodily integrity without expressing contempt for their own intrinsic worth as human beings. If a person voluntarily donates the very same body parts endorsed in the test case—blood, bone marrow, a lobe of liver, a kidney, a cornea—we would not think that she has violated human dignity. And while it might seem that having sex with an unconscious person is clearly in and of itself contrary to human dignity, we must be careful, for many sexual acts people ordinarily engage in can involve similarly demeaning and humiliating uses of one or the other's body, but it would be implausible to think that disgraceful sex acts necessarily amount to violations of human dignity. It is true that in the moment of the act, the rapist objectifies the victim in the sense that he uses her as if she were an object. But sexual desire is in a sense always objectifying—in the grip of sexual desire, one regards the other purely as an *object* of enjoyment.[73] A woman does not deny the intrinsic worth of Hugh Jackman simply by gawking at a topless photo of him, and in that moment, regarding him purely as a sex object. Similarly, a woman who gives her partner consent to have sex with her while she is sleeping does not thereby deny her own dignity.[74]

It might be thought that the discussion above merely shows that respecting a person's *consent* is central to recognizing human worth and dignity. That is, it is in taking a person's body parts *without his consent* and in copulating an unconscious

[73] For this argument, see Lara Denis, "Kant on the Wrongness of 'Unnatural' Sex," *History of Philosophy Quarterly* 16, no. 2 (1999): p. 230.

[74] Rosen argues that not all humiliating and demeaning treatment amount to an assault on human dignity. He distinguishes between having dignity and being dignified. While the former refers to the intrinsic worth of human beings, the latter refers to a kind of meritorious behaviour or character (e.g. having grace and honor). He argues that we have neither a duty to always act in a dignified way, nor a right to always be treated in a dignified way. This is why dwarf tossing is not necessarily wrong—it is not necessarily opposed to human dignity—and why caricaturizing Franz Josef Strauss as a copulating pig is not morally impermissible, even though both involve treating another person in a humiliating and demeaning way. See Rosen, *Dignity*, pp. 31-38 & 63-77.

person *without her consent* that the two cases are dehumanizing, and contravene human dignity. However, though this would align respect for dignity to our intuitions in the test cases, it is implausible to take consent to be so central to human dignity. Certain acts show contempt for intrinsic human worth, and they do so whether the act is done by others or by oneself. While we may disagree about which acts constitute affronts to the worth of persons *qua* persons (e.g. Catholics and Kant count masturbation, pre-marital sex, homosexuality, and suicide),[75] we can all agree on certain cases—for example, that slavery is a violation of human dignity. Moreover, slavery does not become compatible with human dignity simply because one consents (or even autonomously consents) to being a slave. The question of whether voluntary slavery is permissible is not a debate about whether consent renders slavery compatible with human dignity; the question is rather whether people have a right to go against their own dignity. Failing to respect the intrinsic worth of humanity is something that we can do to ourselves as much as others can do to us. Thus, it is implausible that in the two test cases, consent makes all the difference, such that the acts violate human dignity *because* they lack consent. The notion of respecting human dignity is incapable of prohibiting the test cases. I conclude that the Kantian principle of treating people as ends in themselves cannot replace self-ownership in justifying our conclusions about the two test cases. The principle is vague and variably interpreted, but I have shown that its most plausible readings rule out neither body expropriation nor sleep rape.

3.2 Personal Sovereignty

Another possible alternative to either autonomy or self-ownership for explaining our intuitions is personal sovereignty. J.S. Mill alludes to this concept in his famous

[75] For a discussion of Kant's view on the relation between human dignity and sex, see Denis, "Kant on the Wrongness of 'Unnatural' Sex," pp. 225-48.

passage on individual liberty: "Over himself, over his own body and mind, the individual is sovereign."[76] Joel Feinberg develops this thought, suggesting at one point that individual liberty should be understood as a matter of personal sovereignty. Feinberg explains the kernel of this idea: "For to say that I am sovereign over my bodily territory is to say that I, and I alone, decide (so long as I am capable of deciding) what goes on there."[77] Now, if this is all that is meant, then I have no objection to using the term "personal sovereignty," for it does not contradict the general concept of self-ownership. As I noted in Section 1.2, to say that I am a self-owner is to say that I am the final arbiter over what happens to my own person and body. As Waldron puts it, self-ownership means "nobody but me has the right to dispose of me or to direct my actions."[78] There is no significant difference between this and Feinberg's idea that I, and I alone, decide what happens with my body. Both refer to an individual's right to self-determination.

But Feinberg means something more specific by sovereignty. Namely, Feinberg argues that personal sovereignty should be understood on the model of state sovereignty—that is, on "the form of legal control a state exercises over its territory."[79] Just as a state is sovereign over its own territory, there is "a domain or territory in which the self is sovereign."[80] Sovereignty, as the concept is used in the international relations literature, is distinct from property ownership. As Lea Brilmayer points out, "New York's purchase of property in Connecticut does not make New York sovereign over that land."[81] To put it another way, a state may be sovereign over a territory, while other entities or individuals may own parts of that very same territory, suggesting that sovereignty and ownership are theoretically distinct. One practical difference between

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[76] Mill, *On Liberty and Other Writings*, p. 13.
[77] Feinberg, *Harm to Self*, p. 53.
[78] Waldron, *The Right to Property*, p. 398.
[79] Feinberg, *Harm to Self*, p. 49.
[80] Ibid., p. 52. Feinberg vacillates between different characterizations of individual self-determination (i.e. between autonomy, personal sovereignty, and self-ownership). See my discussion of this in Chapter 3, n. 6.
[81] Lea Brilmayer, "Consent, Contract, and Territory," *Minnesota Law Review* 74, no. 1 (1989): p. 15.

the two concepts is particularly pertinent for my argument: while the right to destroy property is one of the standard incidents of ownership, a state's sovereignty does not entail a right to destroy its own state (e.g. committing mass genocide). Thus, if personal sovereignty rather than self-ownership explains our deep intuitions about individual liberties, then this would not justify a right for people to kill themselves, much less ask others to kill them, as in VAE.

Personal sovereignty appears to be a promising alternative to self-ownership for explaining our intuitions in the test cases above. One state infringes another's sovereignty if it enters the other's territory without approval, and this is so irrespective of whether the intrusion causes harm or impedes the other state from pursuing its aims. A state's sovereignty is violated if a benign tourist boat from a neighboring state enters its unused shores without permission. In the same way, a person's sovereignty is violated if another person intrudes upon her body without her permission, for sex or other purposes, and this is so even if the intrusion has no consequences for her whatsoever. Personal sovereignty can also justify the right against the redistribution of body parts. Just as a state may not unilaterally annex a part of another state's territory, no matter how small or insignificant it is to that state's aims and purposes, a sovereign person has a right against having any part of her body expropriated for another's use, even if she does not need it, and even if she can continue to pursue her conception of the good without it. In short, it seems personal sovereignty is just as suitable as self-ownership for explaining the intuitions that other concepts fail to account for. Moreover, some might prefer it to self-ownership in order to avoid endorsing certain self-destructive rights, since just as sovereignty does not give a state the right to kill its own people or sell them into slavery, personal sovereignty would not give a person the right to kill himself or consent to slavery.

So let us examine the concept of sovereignty a bit more closely, just as we did with the concept of ownership, to see if it is suitable for illuminating an individual's moral relation to himself. Simon Caney identifies four properties which are considered essential to the concept of sovereignty. The first is *legality:* a sovereign is the juridical authority in the sense that it has the right to make and enforce laws. The second property is *supremacy*: a sovereign's juridical authority is final and absolute in the sense that there is no other entity with ultimate juridical authority to which it must defer. The third essential feature is *territoriality*: a sovereign has supreme juridical authority over a particular geographic territory and the people within that territory. The fourth property is *comprehensiveness*: a sovereign has supreme juridical authority over *all* issues; it is not the case that it has ultimate authority over *some* issues within its territory, while another entity has ultimate authority over *other* issues.[82] On the basis of this analysis, it could be said that personal sovereignty means that a person has final authority (supremacy) over all issues (comprehensiveness) with respect to the internal affairs (legality, or external authority) concerning his own person and body (territoriality).

However, while plausible, this description does not yet distinguish personal sovereignty from the general concept of self-ownership, the crux of which also has to do with the final authority a person has with respect to all affairs concerning his own person and body (being his own property). The problem, I argue, is that once we assess the concept of sovereignty in greater detail, so as to parse out the ways in which it is different from the concept of property ownership, it becomes clear that sovereignty is less suited for describing an individual's moral relation to himself. The idea is this: Personal sovereignty and self-ownership are similar concepts which, in their bare outline, both refer to the same notion of being the final authority over oneself. The important question is what this cashes out into—what specific rights should it entail?

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[82] Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2005), pp. 150-51.

Two metaphors are currently under consideration for elucidating the rights of self-determination a person has over herself—the authority an owner has over her external property and the authority a sovereign state has over its territory. What I will show below is that there are foundational discrepancies between the kind of moral rights a sovereign state has over its territory and the kind of moral rights an individual has over herself. More specifically, two indispensable components of sovereignty lead to absurd conclusions when applied to the individual. While I have acknowledged that an individual's rights over herself need not be *exactly* like external property ownership for self-ownership to be valid, this is because ownership is an inherently flexible concept—as we have seen, even the rights of external property owners can vary greatly. Though a complicating feature, this is, indeed, a merit of the concept of self-ownership. On the other hand, if *indispensable* rights and duties inhering in the concept of sovereignty cannot be applied to the individual's moral relation to herself, then this weighs heavily against relying on the concept of sovereignty to understand an individual's personal rights and liberties.

The first of two essential properties of sovereignty I wish to examine is *legality* (also known as juridical authority, or external authority). This will reveal an important deviation from ownership which undermines the validity of applying the notion of sovereignty to the individual. According to Allen Buchanan, to have jurisdiction is to have "the right to make, adjudicate, and enforce legal rules within a domain."[83] Cara Nine expands on this, stating that jurisdiction encompasses the legislative authority to "determine systems of rights over persons and goods within the region," the adjudicative authority "to interpret these rights," and the enforcement authority to "enforce the right."[84] Though juridical authority is sometimes construed as a

[83] Allen Buchanan, "The Making and Unmaking of Boundaries: What Liberalism Has to Say," in *States, Nations, and Borders*, ed. Allen Buchanan & Margaret Moore (Cambridge: Cambridge University Press, 2003), p. 233.
[84] Cara Nine, *Global Justice and Territory* (Oxford: Oxford University Press, 2012), p. 8.

Hohfeldian power to determine the moral rights of people within its own territory,[85] this claim needs to be heavily qualified. A sovereign state does not have the authority to determine its own system of *moral* rights, since it is possible for its laws to contravene citizens' moral rights. If the UK makes abortions illegal tomorrow, women within the UK would not lose their *moral* right to choose to have abortions tomorrow. Rather, juridical authority consists in a sovereign's *moral right to determine its own system of legal rights.* This amounts to two types of moral rights.

First, a sovereign has *a moral claim right against interferenc*e in choosing which legal rights and duties apply when people come onto its territory, how to adjudicate these legal rights and duties, and how to enforce compliance with them. Even if its legislation, adjudication, or enforcement is arbitrary or contravene people's moral rights within the territory, both external entities, such as other states or supra-state organizations, and internal entities and individuals, have a duty not to intervene with force.[86] Second, the moral authority to determine a state's legal system entails *a moral claim right to compliance with the law* in the sense that anyone who comes within the state's territory has a moral duty to follow the law, and to accept the results of the sovereign's adjudication and enforcement when there is an issue of violation. Juridical authority may be construed, in this sense, as a *limited moral power*. For example, while women in the UK might have no moral duty to others not to get abortions, if the state makes abortions illegal, women might acquire a moral duty not to get abortions within the UK.[87] In short, the sense in which sovereignty entails the moral right to, as Nine puts it, "establish justice within a particular region"[88] is that it has a moral right against all others interfering with how it chooses to define, interpret, and

[85] See, e.g., Tamar Meisels, *Territorial Rights* (Dordrecht: Springer, 2005), p. 6; Nine, *Global Justice and Territory*, p. 14.
[86] Since a claim right against interference is a right against *coercive* interference, the duty not to intervene with a sovereign's jurisdiction does not prohibit citizens from protesting or lobbying against the law, nor outside institutions from sanctioning or putting diplomatic pressure on the state.
[87] Both jurisdictional rights have limitations. If a state's internal violation of rights is serious enough, it may lose both its right to compliance and its right to noninterference (e.g. if it orders mass genocide).
[88] Nine, *Global Justice and Territory*, p. 14.

enforce justice (even when it is wrong), and a moral right that those who come within its region comply with such determinations.

Many theorists take *legality* to be the key feature setting the concept of sovereignty apart from the concept of ownership.[89] Nine writes that "jurisdictional rights are 'higher-order' than property rights."[90] While ownership involves the moral rights to access, use, manage, sell (and so forth) a thing, sovereignty involves the higher-order moral right to determine the legal rights within a territory, including, as Paul Gilbert puts it, "what [legal] rights do go with property and which do not."[91] David Miller similarly emphasizes that a sovereign's territorial right "is not a property right because it is a right that the state will use to *determine* [legal] property rights."[92]

I argue that when applied to the individual, juridical authority, being, as Nine puts it, "'higher-order' than property rights," goes one level too high, leading to unacceptable consequences with respect to a person's rights over himself. Recall that what is important for jurisdiction is not merely having the moral right to make up one's own rules, but also the moral right to adjudicate infractions and to enforce those rules with coercive force. This means that if you come within my bodily territory, I have not merely a right to hold you to arbitrary rules (e.g. I may only be touched from my left side), but, more problematically, a right to unilaterally decide whether my rules have been violated, and if I say they have been, a right to punish you in the way I see fit—others have a duty not to interfere with me, and you have a duty to accept what I do. Let us apply this to the case of sleep rape. Previously, to motivate the thesis of personal sovereignty, I compared sleep rape to a tourist boat from another state coming into a sovereign state's unused shores without permission. If individuals have the rights that

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[89] See David Miller, "Property and Territory: Locke, Kant, and Steiner," *The Journal of Political Philosophy* 19, no. 1 (2011): p. 93; Meisels, *Territorial Rights*, p. 6; Nine, *Global Justice and Territory*, pp. 12 & 14.
[90] *Global Justice and Territory*, p. 14.
[91] Paul Gilbert, *The Philosophy of Nationalism* (Oxford: Westview Press, 1998), pp. 102-3.
[92] David Miller, "Territorial Rights: Concept and Justification," *Political Studies* 60 (2012): p. 266, n. 3. Emphasis in original.

inhere in sovereignty, then just as the intruded state has a right to punish the offending tourists according to its laws, the rape victim has a right to punish the rapist according to her own determinations. If, according to her, justice demands that she give the rapist one hundred lashings, then whether or not this is indeed just, others may not forcefully intervene in her attempting to give the rapist one hundred lashings. If we think rape is more like another state invading a sovereign state's territory, then the victim's rights are even greater: to protect her own sovereignty, the rape victim has a right to "declare war" on the rapist. Of course, on both understandings of sleep rape, there would be limits to the personal sovereign's prerogative, but we generally think that sovereign states have significant leeway in choosing how to deter and punish those who violate their sovereignty.

What this suggests is that understanding people's rights over themselves on the model of state sovereignty, rather than property ownership, puts us, in a sense, back in a state of nature, where each individual is like a personal despot, with the right to enforce, according to her own prerogative, her own rules when others come into contact with her.[93] As Miller notes, juridical authority makes sense applied to political authorities or collectives of individuals, not to each individual himself: "This is not a right that an individual can exercise, except for the special case of an absolute monarch who is himself exempt from the law. The whole point about jurisdiction is that it resolves disputes between individuals by applying a common body of law to these disputes."[94] Attributing the higher-order right of jurisdiction to individuals makes for an unattractive moral view.

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[93] It might be argued that just as sovereign states could theoretically consent to ceding their rights to adjudicate and enforce laws to a supra-state entity, in which case each would no longer have the prerogative to make judgments and use coercive force however they wish, sovereign individuals may not judge and punish others however they wish because they have consented to ceding their original right to the state. However, it is questionable that sovereign individuals have actually consented to ceding their rights to a state into which they are born and from which it is difficult to leave.

[94] Miller, "Property and Territory: Locke, Kant, and Steiner," p. 106.

Let us now look at a second aspect in which sovereignty and ownership diverge. In the preceding paragraphs, I focused on a sense in which the rights of sovereignty are more comprehensive than ownership. However, there is a sense in which the rights of sovereignty are more restricted. As I noted, a sovereign state is not the authority on moral rights, for it is possible for its laws to trample on citizens' moral rights. That is, while a sovereign has a claim right to rule in the sense that all others have a duty not to coercively intervene, and some have a duty to comply, a sovereign is not *at liberty*—it does not have the *liberty right*—to do whatever it wishes with respect to its internal affairs. This is because people within its territory have moral rights, which the sovereign has a duty to respect. What juridical authority means is simply that some of a sovereign's internal duties are non-enforceable, in the sense that if they are violated, others may not use force to intervene. But even this is true only to a certain extent. Most liberals would agree that if a sovereign state's violation of rights within its own territory is serious enough, people within its territory may not only reject their duty to comply, but even forcefully interfere, for example, by revolution. In extreme cases, such as genocide, even external bodies have a right (perhaps even a duty) to forcefully intervene in a sovereign's internal affairs.

These limitations on the scope of sovereignty are essential, for whether one believes that the right to sovereignty ultimately rests with the state or with the people (either collectively or individually), it is clear that on any reasonable theory of sovereignty, a state's moral right to rule cannot be utterly independent of how it treats its people. According to David Miller's and Anna Stilz's theories, for example, a state has no right to sovereignty if it is not a legitimate representative of the people. According to Henry Sidgwick's and Cara Nine's views, a state has no right to

sovereignty if it does not serve its people's well-being or interests.[95] Since there are always individuals whose rights are at stake when a state conducts its internal affairs, such considerations must set a limit on the scope of a state's right to self-rule. I suggest that the duty which a sovereign has to respect the rights of its people sets a crucial constraint on sovereignty, such that sovereignty may be limited when a state's violation of its own people's rights are serious enough.[96]

But this indispensable aspect of sovereignty does not make sense when translated to the context of a person's rights over himself, for who are the individual right-holders whom a person has a duty to consider in making self-regarding decisions? Feinberg suggests that the personal analogue to the collection of citizens within a state is "the collection of diverse psychic elements—memories, loyalties, preferences, opinions" within a person.[97] But such an understanding would lead to absurd conclusions, for it would mean that a sovereign person has a duty to take into account or represent the "interests" of each memory, loyalty, preference, or opinion, and that extinguishing preferences or opinions one no longer wishes to have would be comparable to genocide, warranting other sovereign persons to forcefully interfere to protect the "rights" of the victimized preferences or opinions. The vital restriction on sovereignty which makes sense when applied to a state's self-governance does not make sense when applied to an individual's self-governance. So while some people might take it as an asset of invoking personal sovereignty that it would entail certain duties to oneself, including the duty not to kill oneself, in fact, the concept of sovereignty does not provide a *good reason* for holding that a person has a duty not to kill himself. For

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[95] Miller, "Territorial Rights," p. 258; Anna Stilz, "Why Do States Have Territorial Rights?," *International Theory* 1, no. 2 (2009): pp. 203-5; Henry Sidgwick, *The Elements of Politics* (London: Macmillan, 1908), p. 252; Nine, *Global Justice and Territory*, p. 4.

[96] For further discussion of such a duty, see Alex Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Cambridge: Polity Press, 2009). Bellamy's principle of Responsibility to Protect (also known as R2P) emphasizes sovereignty as a responsibility—in particular, he emphasizes the responsibility a state has to protect its own people from genocide, war crimes, ethnic cleansing, and crimes against humanity.

[97] Feinberg, *Harm to Self*, p. 48.

the *reason* that it is impermissible for a sovereign state to kill its own people is that doing so would violate the rights of individuals who do not wish to be killed, but there are no mini right-holders within the self whose rights a person violates when he kills himself.

Feinberg ultimately contends that the fact that there are no further right-holders within an individual strengthens the concept of personal sovereignty, "even as it weakens the concept of national sovereignty"[98]—that is, it justifies individual rights of self-determination wider in scope than national rights of self-determination. But such a defense of personal sovereignty relies on a switch between "personal sovereignty" as a generic reference to self-determination and "personal sovereignty" as referring to the particular concept used in the international relations literature. There is no controversy with referring to people as sovereigns in the former sense; the issue is whether state sovereignty is an apt model for understanding individual self-determination. The whole point of this section is to show that it is not, for the kind of rights states have over their own territory are fundamentally different in nature to the kind of rights individuals have over their own persons and bodies. To wit, I have shown that personal sovereignty would entail rights which are at once too comprehensive (in giving people too wide a right to decide how to treat those who come within their bodily territory) and too limited (in constraining the right to self-government on the basis of internal right-holders). In contrast to sovereignty, which has several indispensable features, ownership is a more flexible concept and, moreover, as we have seen from my delineation of how each Honoréan incident translates to self-ownership, can be more smoothly and reasonably applied to an individual's moral relation to himself.[99]

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[98] Ibid., p. 51.

[99] It is worth noting that the specific aspect of ownership which I claimed in Section 1.2 requires modification when applied to individual self-ownership—namely, the liability to execution (the liability to have one's property expropriated and sold off for debt)—is, according to my argument, a *justifiable* limitation on ownership, not a *necessary* limitation for ownership to be justified at all; we would not think that the institution of a system of ownership in which some of people's property (e.g. their houses) are not

As mentioned previously, both Nine and Miller indicate that ownership is a concept that applies to individuals, while sovereignty is a concept that applies to states and collections of individuals.[100] My discussion of the two problems of personal sovereignty supports this view. Juridical authority is sensible for states because "[t]he whole point about jurisdiction is that it resolves disputes between individuals by applying a common body of law to these disputes,"[101] and duties to internal right-holders make sense for states only because states are composed of a collection of individuals. This suggests that the thesis of personal sovereignty involves a category mistake. To apply the concept of state sovereignty to the person commits the opposite error of utilitarianism. While a utilitarian applies to a collection of individual right-holders a concept that makes sense only when applied to a single individual (when calculating what would be rational for her to do throughout a lifetime), to take Feinberg's proposal of personal sovereignty seriously is to apply to a single individual a concept that only makes sense when applied to a collection of individual right-holders.

4. CONCLUSION

In this chapter, I have argued that recognizing certain proprietary rights over oneself is necessary to explain some of our irrevocable, rock-bottom intuitions about individual rights and liberties. To justify this, I have focused on our intuitions on two such rights—namely, the right against sleep rape and the right against expropriation of non-essential body parts. I have established that these rights cannot be accounted for by

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liable to be expropriated for debt would be an unjustifiable system of ownership. This is in contrast to the *necessary* limitation on state sovereignty on the basis of gross violation of people's rights; the recognition of state sovereignty without such a limitation would be unjustifiable. This underscores my point that while any deviations between external property ownership and self-ownership does not involve necessary features of ownership, this is not the case when we attempt to translate state sovereignty to individual sovereignty.

[100] Nine, *Global Justice and Territory*, esp. p. 14; Miller, "Property and Territory: Locke, Kant, and Steiner," p. 106.

[101] Ibid.

respect for autonomy, however this principle is interpreted. Nor can the rights violations involved be adequately explained by the Kantian imperative to never treat persons as mere means, but always as ends in themselves. On the other hand, our intuitions about rape and body part expropriation are unmysterious if we endorse self-ownership—they are ruled out by the standard ownership incidents of the Right to Possess and the Right to Security, respectively. While the concept of personal sovereignty appears to explain the test cases as well as self-ownership, in other respects, it leads to unreasonable personal rights and limitations on personal rights, for the concept is unsuitable for application to an individual's rights over himself. In the next chapter, I shall continue the methodology of reflective equilibrium by providing a theoretical argument for self-ownership, before applying self-ownership to the issue of VAE.

CHAPTER 4:

A SELF-OWNERSHIP ARGUMENT FOR THE RIGHT TO VAE, PART II

In the last chapter, I showed that certain proprietary rights over one's own person—namely, the Right to Possess and the Right to Security—are needed to explain our rock-bottom intuitions about the wrongness of rape and body part expropriation. While this constitutes *strong support* for self-ownership, it does not by itself *fully justify* the thesis. For a critic of self-ownership could point out that given that ownership is like a bundle of sticks, showing that we have some sticks in the bundle does not entail that we have the others. Since to be considered a self-owner requires that the cluster of rights one holds toward oneself be *sufficiently similar* to the list of standard incidents,[1] it is possible for a person to have the two incidents above and still fail to qualify as a self-owner. It could be contended that I have shown merely that we have certain *property rights*—not necessarily *ownership*—over our bodies, just as renters have certain property rights, but not ownership, over the things rented.

Some theorists reject self-ownership precisely because many self-ownership incidents, including the particular incidents I need to justify the right to VAE, entail implications which *contradict* their intuitions. They deny the Right to Capital, as this includes the right to sell one's body parts, to consent to slavery, and to commit suicide,

[1] See Chapter 3, Section 1.2 for discussion of this.

and the Right to Manage, as this includes the right to prostitute oneself and to consent to being killed. They insist that certain personal rights, such as the right to life and the right to bodily integrity, cannot be foregone or transferred to another person.[2] Why not accept only the rights that I have shown to be demanded by our rock-bottom intuitions—namely, the Right to Possess and the Right to Security—and avoid the controversial ones, by denying that we are bona fide self-*owners*? Neither has my argument eliminated the possibility that we *are* self-owners, but in a sense comparable to owners of historical landmarks—this would also rule out some of the more contentious rights, including the right to destroy oneself or to empower another to destroy one.

In short, while I have gone some way in supporting the thesis of self-ownership, I have not yet *established* that we are self-owners, much less that we are the *kind* of self-owners who have the right to choose VAE. Debates over self-ownership often threaten to degenerate into circular arguments about the controversial intuitions, with those against self-ownership insisting that we must not be self-owners because we have no right to kill ourselves, to sell our bodies, and so forth, and those in favor of self-ownership insisting that we have those rights. Thus, although I have gained some traction against the opposition by justifying two standard incidents of self-ownership from uncontroversial intuitions, because self-ownership involves many intuitions we disagree about, ultimately, we need to transcend the vicious circle described above.

I will attempt to do this in Section 1 of this chapter by offering an abstract, theoretical basis for my thesis of self-ownership. I will show, firstly, that this normative basis justifies self-*ownership*, rather than just a few piecemeal proprietary rights, and, secondly, that it justifies the two incidents I need for the right to VAE—namely, the Right to Capital (which includes the right to kill oneself) and the Right to Manage

[2] See Gaus, "Property, Rights, and Freedom," pp. 215 & 224; Munzer, *A Theory of Property*, pp. 43 & 46-52; Frank Snare, "The Concept of Property," *American Philosophical Quarterly* 9, no. 2 (1972): p. 204; J. W. Harris, "Who Owns My Body," *Oxford Journal of Legal Studies* 16, no. 1 (1996): pp. 63-64.

(which includes the right to empower another to do so). This argument will show that the thesis of self-ownership which would justify the right to VAE is supported not only from the bottom up, by certain considered moral judgments we find irrevocable, but also from the top down, by an abstract, background theory we can all agree on. Section 2 will assess some potential objections to my argument. One set of worries is methodological: the first concerns the possible redundancy and the second concerns the possible inconsistency of my self-ownership argument for the right to VAE. Another set of worries pertains to criticisms which theorists have brought forth about the conceptual incoherence and moral unacceptability of self-ownership. By rebutting these objections, Section 2 completes the process of reflective equilibrium began in the previous chapter to establish the thesis that the right to VAE is grounded each individual's self-ownership.

1. THEORETICAL GROUNDS FOR SELF-OWNERSHIP

It is notoriously difficult to provide deeper justifications for basic moral notions like self-ownership. However, for the reasons delineated above having to do with the special nature of ownership and the risk of circularity, I believe it is ultimately necessary to go beyond our intuitions about particular cases. In the first subsection below, I will argue that an abstract moral principle which we all accept justifies the thesis of self-ownership. In the second subsection, I will show, in particular, that this moral principle justifies the Right to Capital (which includes the right to destroy oneself) and the Right to Manage (which includes the right to empower another to destroy one). The aim of this section is to argue that we are self-*owners*, and the kind of self-owners with the right to choose VAE.

1.1 Respecting Others and Self-Ownership

The first aim of this section is to show that a weak principle which we all agree on justifies recognizing some conception of self-ownership. To anticipate the argument, I believe that the demand to recognize people as self-owners is rooted in the very abstract dictum of respecting other persons. This is an extremely weak imperative which underlies many divergent moral positions. That is, it is reasonable to assume that we all endorse the principle; we just disagree about how it should be cashed out in more concrete terms. This may remind the reader of Ronald Dworkin's discussion of the principle of equal concern and respect, which he argues is a highly abstract requirement that many theorists agree on but interpret differently, such that they arrive at conflicting principles of political justice.[3] I am concerned specifically with the aspect of *respect* for others.[4] The previous chapter may be regarded as an exploration of some possible interpretations of this demand. Some believe that respecting people amounts to respecting their capacity for autonomy. Some believe that it means never treating people as mere means, but always as ends in themselves. Another way of seeing the argument of the last chapter is that it shows that neither of these principles are adequate interpretations of the abstract imperative to respect others, since one can fulfill these principles and nevertheless fail to respect people in intuitively basic ways, for example, not raping them in their sleep and not expropriating their body parts.

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[3] See Dworkin, *Taking Rights Seriously*, pp. 180-83. One of the differences in our positions is that Dworkin takes the principle of equal concern and respect as a principle of political legitimacy—owed only by a political community that exercises dominion over us. Part of the reason for this restricted application seems to be that it would be implausible to insist that we have a right to equal *concern* from everyone in general. But I think it is reasonable that treating people with equal *respect*, in the broadest sense, need not be a demand that is restricted only to a political community.

[4] I omit the modifier *equal* because this is unnecessary when discussing what Stephen Darwall calls *recognition respect*. While *appraisal respect*—the positive appraisal we give to a person because of his merits or virtues—admits of degrees, *recognition respect*—which has to do with recognizing others' moral status—is an all-or-none concept. Either we recognize their moral status, or we do not. Thus, it is superfluous to say that we ought to give others *equal* recognition respect. For the distinction between the two kinds of respect, see Stephen Darwall, "Two Kinds of Respect," *Ethics* 88 (1977): pp. 36-49.

It is instructive to uncover, in more theoretical terms, *why* these principles fail to fulfill the requirement of respecting other people, for having an *error theory*—an understanding of why these other principles are wrong interpretations—will help shed some light on the correct principle. To begin, the principle of respect for autonomy, to put it bluntly, does not enjoin us to respect *people.* Rather, it is an injunction to respect a particular *capacity* within people. However we construe the principle in more specific terms, at its core is the idea that there is a capacity within people that is valuable and worthy of respect—a potential to lead our lives not merely like lower animals, directed this way or that by external forces (e.g. impulses, desires, and the wills of others), but with genuine and rational self-direction or self-government.[5] It is acknowledged that actual people are flawed and unlikely to act autonomously all of the time—we are likely to live up to this ideal only to certain degrees and in some but not other aspects of our lives.[6] Nevertheless, our capacity to attain this ideal is an important value which gives rise to certain demands on how others may or may not treat us.

But to respect this *capacity within us* is not the same as respecting *us*. It is to respect a potential we have. What is valued is an idealized conception of the actual, often irrational, nonautonomous person in question—a version of the person that, according to some moral theorists, is worth respecting. The grounds for not interfering with an actual person's choices are rooted in his potential to live up to this ideal. Feinberg puts this sentiment aptly when he says that when Kant enjoins us to treat the capacity for autonomy as an end in itself, "Kant does not respect *me;* he respects some alien presence in me." That is, "when he respects a person, he respects him not as someone in rightful control of his own life, but rather as the locus or repository of

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[5] For more on the concept of autonomy, see Christman, *The Inner Citadel*, p. 13; Dworkin, *The Theory and Practice of Autonomy*, pp. 3-20. Also see my discussion in Chapter 1, Section 1.2 & Chapter 3, Section 1.1.

[6] As John Christman points out, "people vary, in different aspects of their lives, in the autonomy they manifest. A smoker might be perfectly autonomous in choosing whether to watch a baseball game or read a book, but is virtually powerless against the overwhelming urge for nicotine." See Christman, *The Inner Citadel*, p. 13.

abstract qualities which are the true objects of esteem."[7] Of course, Kant's conception of autonomy—to wit, *moral* autonomy—is substantially narrower than conceptions of *personal* autonomy, which is our focus, such that the gulf between the autonomous person and actual people is even wider on Kant's understanding. Nevertheless, the same criticism applies with respect to personal autonomy: the true "object of esteem" is an ideal capacity within the person, not the actual person herself. This is why the principle of respect for autonomy fails to guarantee certain basic ways of respecting the person. When the particular intrusions in question—for example, sleep rape and expropriation of non-essential body parts—do not affect the ideal capacity for rational self-direction, the principle provides no grounds for prohibiting such actions.

The same observation can be made of another possible interpretation of the imperative to respect other persons: the Kantian principle to never treat persons as mere means, but always as ends in themselves. To be sure, this dictum, *read literally,* does manifestly make the person the focus of our respect. But the dictum itself is highly abstract, on the same level as, and perhaps intimately related to, the principle of regarding others with respect. Endorsing the Kantian imperative, we still need to ask what this amounts to in more concrete terms. Treating people not as mere means but as ends in themselves may mean respecting their autonomy, or taking their well-being into consideration, or acknowledging their self-ownership, or something else. At this level of abstraction, I have no objection to the Kantian principle, for it is not in conflict with self-ownership; the two principles are simply at different levels within the reflective equilibrium. What I am interested in is what *middle principles*—principles which specify the kinds of rights and duties we have—follow from our shared *background theories*—abstract principles like respect for other people and treating people as ends in themselves.

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[7] Feinberg, *Harm to Self*, pp. 95-96.

It is when we look at how Kant and other theorists construe the imperative of treating persons as ends in themselves in more concrete terms that the problem of not respecting the person arises. In Chapter 3, in discussing the various interpretations of the dictum found within the literature, I eliminated some interpretations on the basis that they are implausible because they prohibit too much. On the other hand, we found that the remaining interpretations could not prohibit what clearly ought to be prohibited (i.e. our two test cases).[8] Now, we are better equipped to see why they are inadequate. First, Kant and many Kantians equate treating people as ends in themselves with treating their capacity for autonomy as ends in themselves, but I have already argued that respecting a capacity within the person is different from respecting the person. Second, the Kantian precept is sometimes interpreted as treating each person's well-being as an end in itself. But insofar as well-being is separated from a person's own explicit decisions for herself, it is clearly not an interpretation of respecting the person; the "object of esteem" is now the person's welfare, which determines how we may or may not treat her, independently of her own determinations. Finally, we considered the interpretation which says that central to treating people as ends in themselves is respecting their dignity. But, again, what is to be respected is not the person herself, but something within her which is itself sacred and inviolable—some universal human worth which the person has a duty to respect within herself as much as others have a duty to respect it in her. This is why if a person acts in a way that degrades her own dignity, we may be justified in protecting her dignity—against *her*. Given that the Kantian principle, as it is usually understood, does not in the end take the *person* as the center of respect, it should come as no surprise that it fails to rule out certain fundamental ways of violating and disrespecting actual people.

[8] See Chapter 3, Sections 3.1.

The error theory above leads to the idea that to respect other people at a most basic level requires acknowledging that actual, non-ideal people, who sometimes act autonomously and sometimes not, who sometimes embody human dignity and sometimes not, always retain a certain moral status. More precisely, they are our moral equals in the sense that we have no natural authority over them. To deny this is to fail to afford others the most rudimentary respect—namely, to use Stephen Darwall's influential term, *recognition respect*—for it is to fail to treat them in accordance with the kind of entity that they are.[9] And if we must acknowledge that we have no natural authority over one another, then, for better or worse, each person is ultimately his own keeper, responsible for his own person and life. When we prevent a person from carrying out a self-regarding choice, or a choice that affects only her and consenting others, not through argumentation or persuasion, but with force or threat of force, and not to protect non-consenting third parties, but to help those involved live with more well-being, more autonomy, more dignity, or some other moral value, we treat them not as our moral equals, but as our wards or partial wards. It may be appropriate to regard animals or children in this way, but it is not befitting of the standing one adult person has in relation to another. In short, to treat *me* with basic respect is to acknowledge your lack of authority over me, and this entails recognizing that, with regard to my self-regarding decisions, "nobody but me has the right to dispose of me or to direct my actions."[10] *I* am in charge over my own person; no one else has title over me. This is precisely the pith of self-ownership.[11]

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[9] According to Stephen Darwall's well-known understanding, the kind of respect philosophers generally agree underlies our rights and duties is *recognition respect*, which "consists in giving appropriate consideration or recognition to some feature of its object in deliberating about what to do." See Darwall, "Two Kinds of Respect," p. 38. For the distinction between this and *appraisal respect*, see n. 4 in this chapter.

[10] Waldron, *The Right to Property*, p. 398.

[11] Of course, this is also the pith of personal sovereignty. As I argued in Chapter 3, I have no objection to the idea that we are sovereign over ourselves, if all that is meant by this is that we have ultimate authority over ourselves. However, I reject conceiving of such authority on the model of a state's rights over its territory for reasons detailed in Section 3.2 of that chapter.

If the argument above is correct, then the principle of respect for others grounds each of the Honoréan incidents of self-ownership, for the standard incidents are simply specific demands that concretize the pith of self-ownership, to wit, a person's final authority over herself. To fully respect others means acknowledging their moral equality to us, and this entails acknowledging that each person has a right to exclude others from intruding upon her person and body without consent (Right to Possess), to decide how to dispose of herself and live her life (Right to Use), to confer rights to herself to others (Right to Manage), to manage the fruits of her labor (Right to Income), to alienate all rights to a part or the whole of herself (Power to Capital), to waste away or destroy herself (Liberty and Claim Right Capital), and at death, to bequeath her body to another or others (Right to Transmit). Moreover, since others have no natural authority over a person, they have no power to alter the above rights without her consent (Right to Security), and these rights do not expire until her death (Absence of Term). These incidents together secure a person's full entitlement and authority over her own person and life, which I have argued follows from the principle of giving others recognition respect.

This discussion suggests that the standard incidents of self-ownership have their roots in a unitary theoretical basis. That is, although self-ownership is a bundle of rights, it is not a miscellaneous bundle, as is sometimes supposed. The nine incidents embody an attitude of basic respect for other people as our moral equals over whom we have no natural authority. Note that my aim is not to show that *all nine* incidents must be ultimately justified—to wit, that all self-ownership rights may never be overridden. Since there are moral principles other than the principle of respect that might conflict with it, whether and to what extent each incident must be upheld in the final analysis depends on the outcome of the reflective equilibrium. For example, whether a right to voluntary slavery is ultimately justified will depend, in part, on how it relates to other

moral principles and how central it is to the principle of respect for persons. Defining the precise scope of our self-ownership rights is beyond the scope of this thesis. Since the aim of this subsection is to first argue that we are bona fide self-*owners* (the argument that we have the particular self-ownership incidents necessary for the right to VAE will come in the next subsection), what is important at this point is that if we are committed to respecting others as our moral equals, then we would have to acknowledge them as the final authority over themselves if not always, then *at least in general*. That is, we do not fully respect others if we allow them only a few rights of control over their own persons and bodies—if, for example, we treat them as *leaseholders* of their own persons and bodies. To meet the imperative of respecting others, we would have to accept that they have rights over themselves *at least substantially similar* to the list above, even if we believe certain incidents may ultimately be curbed or omitted. That is, the principle of respect for others justifies *self-ownership*.[12]

[12] According to Shelly Kagan, although the principle of respect for other persons is a weak principle, it is generally invalid to appeal to it as an argument for the particular ways in which we may or may not treat others. This is because, except in rare cases involving purely symbolic gestures of disrespect, an act counts as disrespectful *because* it involves the wrongful treatment of another, rather than the reverse that the act is wrong *because* it is disrespectful. This means that to show that a certain kind of treatment contravenes respect for others, we must *first* show that it is wrong. Thus, it is invalid for philosophers to appeal to the principle of respect to ground the justice or injustice of particular kinds of actions or treatment of others. See Shelly Kagan, *The Limits of Morality* (Oxford: Clarendon Press, 1989), pp. 175-76. If Kagan's claim is true, then my argument that respect for others grounds the demand to recognize them as self-owners begs the question, for it relies on my presupposition that failure to recognize self-ownership is unjust; appealing to respect adds nothing to the argument apart from fist-banging. However, I do not believe Kagan is correct on this point. The principle of respect for persons cannot be bent to buttress whatever demands we think are required. The principle conveys a particular way in which we must treat other persons—namely, as moral equals over whom we have no natural authority—and many acts are not wrong apart from the fact that they fail to regard others in this way. For example, there is nothing wrong with acting paternalistically to safeguard a person's well-being, *apart* from the fact that it fails to treat the person as our moral equal over whom we have no natural authority. That is, unconsented-to paternalism is wrong *because*—and *only because*—it fails to meet the principle of respect, not vice versa. Similarly, denying the thesis of self-ownership (i.e. that each person is the final authority over himself) need not be unjust absent the criterion that we must regard other adult persons as our moral equals. There is no injustice, for example, in denying self-ownership to pigs and cows *because* we need not respect them as our moral equals (we must first determine what recognition respect entails for our treatment of animals before we can conclude whether self-ownership is appropriate for them, not vice versa). The notion of respect is excessively pliable for Kagan because he uses an overly broad understanding of respect (incorporating not only recognition respect, but also appraisal respect and general concern for others). See his discussion in ibid., pp. 170-76.

1.2 The Right to Capital and the Right to Manage

Having shown that the principle of respect justifies *some conception* of self-ownership, I wish now to move on to the second aim of this section. I wish to focus on the two particular self-ownership incidents necessary for the right to VAE, to establish that these incidents *are* ultimately justified, such that the correct conception of self-ownership would include them. The first, the Liberty and Claim Right to Capital, is needed to secure a person's right to destroy himself (i.e. his absence of duty to others not to destroy himself and his right that others not interfere with him doing so). The second, the Right to Manage, is needed to secure a person's power to give others rights to him, including the right to destroy him.

It is not difficult to see how these self-ownership incidents follow from people's recognition of one another as the kind of being over whom they have no natural authority. With regards to the Liberty and Claim Right to Capital, if I am a being with no earthly moral superiors, then whether or not self-destruction would be wise or foolish, ethical or unethical, sanctioned by God or sinful, it is ultimately my responsibility to bear; insofar as I do not harm others, others have no right to my continued survival. To use force to compel me to live against my wishes, even for my own good, contravenes the respect owed to me as a being of equal moral standing. For the same reasons, it is my prerogative to decide how others may treat me, as the Right to Manage stipulates—I have the power to license another to do what otherwise would be impermissible, including destroying me, even if it is catastrophically ill-advised or immoral, for the reason that, for better or worse, amongst moral equals, I have ultimate authority and responsibility over my own person. That such rights involve the most high-stake choices one can make for oneself is irrelevant. It could be argued that the acknowledgement of people's prerogative over high-stake choices is at the center, not the periphery, of respecting one another as equals. After all, we may grant even

children and animals the liberty to do what they wish for themselves when the risk is appropriately contained. Such restrictions are not befitting of the kind of recognition respect owed by one competent adult to another.

Nevertheless, as I have suggested, whether the two incidents must be upheld in the final analysis depends on the outcome of the reflective equilibrium. That is, though I have argued that there are strong reasons for endorsing them, it could still be the case that other considerations which must also be taken into account ultimately defeat the grounds for these two incidents. Thus, I will dedicate the remainder of this subsection to show that this is not the case. A particularly influential consideration which conservative medical ethicists often bring to bear on the VAE debate is the sanctity of life.[13] According to the doctrine, human life has objective intrinsic value. That is, human life demands respect not only because humans value it or because it is instrumental for other values. As Leon Kass puts it, human "life is something before which we stand (or should stand) with reverence, awe and grave respect."[14] Though this view arises from Judeo-Christian doctrines,[15] non-religious people can feel the force of this idea as well—even on a purely scientific level, human life is something of a wonder, a marvel. John Keown indicates that the sanctity of human life doctrine, as it is ordinarily understood by its advocates, refers to the familiar belief that human life is inviolable because it inherently commands respect; the secular equivalence of sanctity is inviolability.[16] It might be thought that any acceptable moral system must include the recognition of this as a fundamental tenet which comes in to curb individual rights. On this view, given the sanctity/inviolability of human life, it may not be destroyed even if

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[13] For discussion of the sanctity of life doctrine in the VAE debate, see Gail Tulloch, *Euthanasia: Choice and Death* (Edinburgh: Edinburgh University Press, 2005), pp. 34-35; Nigel Biggar, *Aiming to Kill: The Ethics of Suicide and Euthanasia* (London: Longman & Todd, 2004), Ch. 2; Leon Kass, *Life, Liberty, and the Defense of Dignity: The Challenge for Bioethics* (San Francisco: Encounter Books, 2004), Ch. 8; Keown, *Euthanasia, Ethics and Public Policy*, Ch. 4; Jonathan Glover, *Causing Death and Saving Lives* (Harmondsworth: Penguin, 1977), Ch. 3; Dworkin, *Life's Dominion*, pp. 71-84; Peter Singer, *Rethinking Life and Death: The Collapse of Our Traditional Ethics* (Oxford: Oxford University Press, 1995), Ch. 4.
[14] Kass, *Life, Liberty, and the Defense of Dignity*, p. 235.
[15] See ibid., pp. 239-42.
[16] Keown, *Euthanasia, Ethics and Public Policy*, p. 40.

the person whose life it is consents to it being destroyed. The respect owed to human life itself overrides the self-ownership rights to self-destruction and to consent to self-destruction which would otherwise be justified by respect for the individual.[17]

However, I will argue below that even if human life is sacrosanct—even if it demands respect because of its objective intrinsic value—this is not a consideration which can curb *individual rights*. To begin, although, as I noted, the sanctity of human life is often equated with the *inviolability* of human life, it is questionable whether the latter is an adequate reading of the doctrine. If human life is sacred, if it is something so inherently magnificent it commands our reverence and awe, is it enough that we merely refrain from opposing or destroying it? If we recognize a religious object or a piece of art as something of great inherent worth, then we ought to not merely refrain from destroying it, but also actively work to preserve it. Similarly, it seems that recognition of the inherent worth of human life entails that we should actively preserve and promote

[17] Ordinarily, the sanctity of human life is understood as the claim that *all* human life is inviolable, irrespective of its quality, such that it rules out both the abortion of fetuses and the euthanasia of permanently unconscious persons in the last breaths of life. Some theorists have attacked this view, questioning why all human life should be considered of equal intrinsic worth. See Glover, *Causing Death and Saving Lives*, Ch. 3; Singer, *Rethinking Life and Death*, Ch. 8, esp. p. 183. Such a criticism seems warranted especially given the justification of the sanctity of human life given by many of its proponents. For example, both Daniel Callahan and Leon Kass suggest that human life is sacred because it is what makes possible unique human potentials. See Daniel Callahan, "Defending the Sanctity of Life," *Society* 38, no. 5 (2001): pp. 17-8; Kass, *Life, Liberty, and the Defense of Dignity*, pp. 242-43. As Kass puts it, "everything high about human life—thinking, judging, loving, willing, acting—depends absolutely on everything low—metabolism, digestion, respiration, circulation, excretion. . . . And because of what it holds, human blood—that is, human life—deserves special respect." See ibid., p. 243. Beyond the question of whether the value of human life can then be considered *intrinsic,* we might ask why a particular human life should still be considered sacrosanct when it has no potential for or no longer upholds anything "high about human life." Callahan's and Kass's insistence that in the end, all human life must categorically be regarded as sacred irrespective of whether it possesses anything of what is allegedly sacred about it amounts to nothing more than assertion. Nevertheless, a qualified account, which might say that what is sacred/inviolable is human life *that exhibits some minimal standard of normal human capacity*, would still be opposed to the two self-ownership incidents above, for it would imply the permissibility of destroying only certain kinds of human lives, not the permissibility of ordinary persons to destroy or consent to destroying theirs own lives. Thus, I cannot rely on the watered-down version of the sanctity of life doctrine; my rebuttal will target both (though for brevity, I will omit the qualifier in italics above in my discussion). Similar things can be said of Ronald Dworkin's analysis of the sanctity of life. By supposing that the demand to recognize the sanctity of life sets a limit to our rights, but arguing that people may interpret what the sanctity of life entails differently, Dworkin justifies, at best, a right to suicide and VAE *only in some cases*. On his view, there would be no right to suicide if the person in question wants to kill himself not because he thinks it would best honor the intrinsic worth of his life (e.g. because he thinks being plugged up to a dozen machines would *insult* this intrinsic worth), but, for example, out of contempt for or indifference to his own life or mere exhaustion of the circumstances of his life. Thus, Dworkin's view would still oppose the self-ownership rights to choose suicide or consent to VAE in general. See Dworkin, *Life's Dominion*, Ch. 3.

the existence of human life as such.[18] And if it is legitimate for the sanctity of human life to constrain individual rights, then it seems the upkeep and preservation of our own lives would be a matter not only of prudence or even moral responsibility, but a morally enforceable duty that may justify others' interference if and when we fail to comply.

Yet, such a conclusion is unsustainable. It would mean, for example, that it is impermissible even to reject medical treatment whenever it would effectively preserve our lives. Moreover, people would have an enforceable duty to work toward prolonging their health on a day-to-day basis, for example, to eat only healthy foods and to exercise for the amount of time optimal for promoting health.[19] Yet, even if a person who fails to actively take care of his health is morally censurable in some way (perhaps because he fails to appreciate the miracle of human life), it seems clear that he has a *right* not to expend his energies in this way. In short, if appreciating the intrinsic objective worth of human life demands positive acts, as it seems it should, then it clearly cannot be a consideration which affects our rights.

Suppose that advocates of the sanctity of life doctrine can adduce some plausible reason to explain why the objective intrinsic value of human life entails only its inviolability—that is, to explain why it demands only that we refrain from opposing or destroying it. What might this mean in more concrete terms? A reasonable interpretation is that the inviolability of human life means it is never permissible to kill human beings; even if we need not promote or preserve human life, we must never act to end it. But this cannot be a correct understanding of our rights either. Most people accept that we have a right to kill enemy combatants in war and aggressors in self-defense. To account for this, proponents of the sanctity of life further qualify their

[18] Kass appears to acknowledges this. See Kass, *Life, Liberty, and the Defense of Dignity*, p. 235.
[19] Frances Kamm suggests that recognizing the objective intrinsic value of human life might even demand producing more human life. See Kamm, "Ronald Dworkin on Abortion and Assisted Suicide," pp. 224-25.

position: they note that what is inviolable is *innocent* human life.[20] But there cannot be an absolute ban on killing innocents either. Most of us accept that we may sometimes kill innocent civilians in war or innocent aggressors in self-defense. Most of us also believe that people sometimes have a right to destroy human life not for the purposes of protecting human life—indeed, not for very weighty reasons at all. For example, we believe that people have a right to work themselves to the bone, smoke, eat unhealthy foods, partake in daredevil stunts, and otherwise act in ways that actively hasten their own deaths. Yet, to jeopardize one's life in exchange for, say, the high of nicotine or five minutes of fame, surely contradicts the view that human life is sacrosanct or inviolable.

Now, some exponents of the sanctity of life offer a further qualification to try to avoid the kind of implausible implications indicated above. They say that what the sanctity of human life prohibits is the *intentional* killing of an innocent human being; appealing to the Doctrine of Double Effect, they claim that there is a fundamental moral distinction between intention and foresight, such that the absolute prohibition issued by the sanctity of human life is against only killing with the *aim* of ending the life of an innocent person, not killing an innocent person as an unintended but foreseeable consequence of one's act.[21] This is thought to explain why certain cases of killing innocent persons are morally permissible. For example, while bombing with the aim of killing innocent civilians in a war (Terror Bombing) is always morally impermissible, bombing the opposition's artillery store with the unintended but foreseeable consequence of killing innocent civilians (Tactical Bombing) is sometimes morally permissible. According to the amended sanctity of life doctrine, only the former, but not necessarily the latter, violates the principle. In the same vein, self-destructive acts

[20] See, e.g., Keown, *Euthanasia, Ethics and Public Policy*, p. 40; Callahan, "Defending the Sanctity of Life," p. 16.
[21] For discussion of this interpretation of the sanctity of life, see Keown, *Euthanasia, Ethics and Public Policy*, pp. 40-42; Singer, *Rethinking Life and Death*, pp. 70-74.

like smoking and doing daredevil stunts are morally permissible because people who partake in such acts presumably do not *intend* their own deaths—they intend to acquire pleasure or fame, and merely foresee their deaths as a possible side effect of their aim.

The problem for sanctity of life proponents is that this is an implausible interpretation of their principle. For if the motivating idea is that human life is inviolable, then this is undermined whenever an agent knowingly causes death; that the causation of death is merely an accepted consequence of the agent's aims does not show that human life has been regarded as sacred. To put it another way, both intending death, say, by jumping off a building, and acting in ways which merely foresee death, say, chain smoking for fun, may equally disparage the sanctity of human life. Indeed, some cases of directly intending death, such as Socrates' suicide, are *more* respectful of the objective intrinsic value of human life than some cases of foreseeing death, such as doing daredevil stunts to get on reality television (since Socrates considers the value of life to be surpassable by something weightier than the aspiring television star does, namely, moral principle as opposed to five minutes of fame).[22] To summarize the argument thus far, I have shown that whether or not human life has objective intrinsic value, this is not a consideration which bears upon people's rights. I have contended that plausible readings of the doctrine would issue implausible constraints on individual rights, and while some of its proponents stress that the sanctity of life's prohibition is only against *intentional* killing, this is not a reasonable understanding of the doctrine. Thus, it cannot be that the sanctity of human life overrides the grounds we have for affirming people's self-ownership rights to end their lives or to empower others to do so.

[22] This suggests that objective intrinsic worth will not get us inviolability. For human life to be inviolable, we need the stronger claim that it has *incomparable* objective intrinsic value, such that its value cannot even be weighed with or sacrificed for any other objectively and intrinsically important values (such as, say, moral integrity).

Although the injunction against intentional killing is not a plausible interpretation of the sanctity of life doctrine, it could still be an independent principle which reins in individual rights. As Peter Singer puts it, "The idea that it is always wrong intentionally to end an innocent human life is often seen as the one moral commandment that we must never violate."[23] So to justify the Right to Capital and the Right to Manage, we must, after all, address whether there is an absolute prohibition against the intentional ending of innocent human life. To see that there is no such absolute prohibition, notice that many acts we already agree are acceptable may involve the intentional—and not merely foreseen—killing of an innocent person. For example, consider the following: The distinction between intention and foresight is thought to explain why it is morally permissible for a doctor to grant a terminal patient's request for morphine in order to relieve pain, even knowing that it will or will likely cause his death—a widely-accepted practice known as *terminal sedation*—but morally impermissible for the doctor to grant the same patient's request for a drug for VAE; it is argued that the first involves merely foreseeing the patient's death as a side-effect of pain relief, but the second involves the intention of causing death. However, as Judith Thomson points out, a doctor who grants a terminal patient's request for morphine could also *intend* to end the patient's life. For example, knowing that the patient is suffering and desperately seeking death, the doctor's intention in giving the morphine might be to help end the patient's life in a legally-protected way. Or the doctor might hate the patient and in complying with the request for morphine, revel in the fact that his action will promptly end the patient's life. Yet, however we judge the doctor's character, the general consensus is that terminal sedation is morally permissible insofar as the patient consents to the drug and its foreseeable consequences. The act is not made impermissible because of the particular intentions of the doctor, for it would be

[23] Singer, *Rethinking Life and Death*, p. 70.

absurd to hold that a terminal patient may get morphine only if he can find a doctor whose pure intention is his pain relief, and not at all his death.[24]

Similarly, consider that a person who works herself to the bone, smokes, eats unhealthily, or partakes in daredevil stunts need not merely foresee her own death as a possible consequence of an ulterior aim. Such a person may indeed have a death wish—she may *intend* her own death. Yet, it is clear that she still has a right to do these things. Moreover, if others who enable her to do these things (her boss, tobacco companies, fast food chains, television producers, etc.) also wish to see her die (perhaps because she is a bad person), this would not negate their right to collaborate with her. Such examples discredit the view that there is an absolute ban on the intentional ending of an innocent human life. Moreover, note that these examples of permissible acts of intentional killing involve precisely situations where the life that the agent intends to destroy is the agent's own or the life of someone who consents to the agent's intention. This suggests that even if there is a *general* ban on intentional killing, the principle is vulnerable precisely in the kinds of cases relevant to a person's self-ownership rights to kill himself and to license others to kill him. Thus, the principle cannot be appealed to in order to reject these two rights.

Now, it might seem that my rejection of the principle against intentionally killing innocents is too quick. After all, the Doctrine of Double Effect is a subject of complex and continuing debate within the philosophical literature. However, although I am sympathetic to critiques of the Doctrine of Double Effect (hereafter, the DDE),[25] my defense of the Right to Capital and Right to Manage does not require denying the doctrine. That is to say, advocates of the absolute prohibition against intentionally

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[24] See Judith Jarvis Thomson, "Physician-Assisted Suicide: Two Moral Arguments," *Ethics* 109, no. 3 (1999): pp. 514-16.

[25] For influential objections to the DDE, see, e.g., Thomson, "The Trolley Problem," *Yale Law Journal* 94 (1985); "Self-Defense," *Philosophy and Public Affairs* 20 (1991); Frances Kamm, "Terrorism and Intending Evil," *Philosophy and Public Affairs* 36 (2008); T.M. Scanlon, *Moral Dimensions: Permissibility, Meaning, and Blame* (Cambridge, Mass.: Belknap Press, 2008).

killing innocents appeal to the DDE, but the DDE does not entail the absolute prohibition. Because it is an influential doctrine, and its full rejection difficult, I wish to show below why, unlike the principle against ever killing innocents, the DDE is not an opposition to my view.

In its most general form, the doctrine states that an agent's intention often makes a fundamental difference to the moral permissibility of an act, such that in many cases, there is a stronger reason against an act if the agent's intention is to cause a bad event (such as an innocent person's death) than if the bad event were an unintended but foreseen side effect of the agent's act. Put simply, the DDE states that intention can make a non-derivative moral difference to an act's permissibility.[26] The DDE is weaker than the absolute prohibition against intentionally killing innocents in two ways.

First, the DDE's claim is that intention makes a moral *difference*, such that there is a *stronger reason* against the permissibility of an act of killing when the death of an innocent is intended than if it is merely foreseen. As Ralph Wedgwood points out, a DDE proponent need not be committed to the view that intending the death of an innocent is *categorically* wrong, "since sufficiently strong countervailing reasons may make the act permissible after all."[27] Such a position is not an objection to my view, since according to my argument, there *is* a very strong countervailing reason for allowing people to intentionally kill themselves and to empower others to do so—namely, the basic respect owed to them as moral equals. That is, we could say that when a person uses her self-ownership rights to intentionally kill herself, it is worse (i.e. closer to the line of impermissibility) than if she uses those rights in other ways, but given the strong reasons we have for accepting her right to do what she wants with her own body and life, we must ultimately accept her right *even* to kill herself.

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[26] See Jeff McMahan, "Intention, Permissibility, Terrorism, and War," *Philosophical Perspectives* 23, no. 1 (2009): pp. 345-46; Ralph Wedgwood, "Scanlon on Double Effect," *Philosophy & Phenomenological Research* 83, no. 2 (2011): pp. 465-66.

[27] "Scanlon on Double Effect," p. 465.

The second way in which the DDE is weaker than the absolute principle against intentional killing is that its claim is that intention makes a moral difference to permissibility in *many cases* where an agent causes a bad event, like the death of an innocent. So it is possible for a DDE advocate to hold that while in many cases of killing innocents, intention makes a moral difference to permissibility, in other cases of killing innocents, intention makes no moral difference at all. This means that even if we wish to maintain the stronger view that when the life in question is one's own or belongs to someone who consents to one's intention to kill, the fact that it is an intentional killing of an innocent does not matter *at all* to its permissibility (it is not even *closer* to the line of impermissibility), this is still consistent with the DDE. Since the Right to Capital and the Right to Manage involve only *a specific class* of killing—to wit, *consented-to* killing—we could hold that intention is irrelevant *in these specific cases* while accepting that the intention to kill an innocent is *generally more objectionable* than foreseeing an innocent's death, or even that the intention to kill an innocent is *generally impermissible*. In short, in contrast to the absolute prohibition on killing innocents, the DDE is not necessarily inconsistent with an innocent person's right to intentionally kill himself, or with one's right to intentionally kill an innocent person who has asked to be killed by one. For it is logically possible, under the DDE, that intention does not matter when the killing is consensual.

Now, to say that the DDE *could* be interpreted so as to permit consensual intentional killing is not to say that it *should* be interpreted in this way. It is likely that many DDE proponents would insist that intention does matter in cases of consented-to killing as well, and that intention makes killing—even with consent—morally impermissible. If this is the correct interpretation of the DDE, then the doctrine is opposed to my justification of the Right to Capital and the Right to Manage after all. However, two responses are possible to this understanding of the DDE. First, if DDE

proponents wish to insist that consensual killing is amongst the kind of cases in which intention makes a moral difference, then they have the onus of providing an explanation for why this is so (in general, why is the intention to kill an innocent relevant for some cases and not others?). Second, there is, in fact, a good theoretical reason why the DDE, for whatever other merits it has, cannot be applied to consensual killing.

Before I explain this reason, consider that the cases in which the DDE is most plausible are those in which the life in question belongs to someone who is unwilling and does not consent to be killed. The two motivating cases for the DDE are standardly the Terror/Tactical Bomber Case (discussed above) and the Trolley Problem.[28] In the Trolley Problem, the DDE is thought to explain why it would be morally permissible to redirect a runaway trolley so that it kills one person instead of five, but it would be impermissible to throw one person on the track to stop the trolley from killing the five. It is argued that the difference has to do with intention: in the first case, the death of the one person need not be the intended aim, but in the second case, the death of the one person must be intended, since the five cannot be saved without the one being sacrificed. Thus far, it appears at least plausible that it is the intention to cause death that makes the second case impermissible.

But consider a third case, which is just like the second—a person is thrown on the track with the intention to use the person's death to save five others—except the person whose death is intended to save five others is now the agent *herself*. In this case, the agent's act is clearly not made impermissible by her intention to end her own life to save others; nor does her intention to cause death even constitute a strong reason against the moral permissibility of her act. On the contrary, most of us would regard this as a supererogatory act of heroism. Now, consider a fourth case, in which, again, the person wishes to sacrifice herself to save five others, but in this case, she cannot do it herself

[28] For discussion of the two cases and their centrality to the DDE argument, see McMahan, "Intention, Permissibility, Terrorism, and War," pp. 347, 358-60.

(perhaps in order to stop the trolley, she needs to be pushed with great momentum), and so she enlists another, who agrees with her aim, to help her. Unlike the second case, where a person is unwillingly pushed onto the tracks, this solution to the runaway trolley does not seem morally objectionable either. In short, although the third and fourth versions of the Trolley Problem are almost identical to the second, the DDE is no longer compelling once the single detail is changed that the life intentionally ended is the agent's own or belongs to someone who consents to the agent's intention.

This result—that the DDE loses its plausibility when applied to *consensual* killing—makes sense if we reflect on the most plausible theoretical basis we have for affirming the principle. Now, proponents of the DDE generally rely on hypothetical cases like the Terror/Tactical Bomber Case and the original Trolley Problem; within the literature, there is a dearth of developed theoretical arguments for the doctrine. Indeed, one of T.M. Scanlon's objections to the DDE is that, as he says, "to my knowledge no one has come up with a satisfying theoretical explanation of why the fact of intention . . . should make a moral difference" in the way that the DDE stipulates.[29] Taking exception to this, Wedgwood responds that there *is* a compelling theoretical basis, namely, one rooted in Thomas Nagel's idea that a bad intention reflects that one's "will" is being "guided by evil."[30] But such a basis makes the DDE vulnerable to the familiar objection that those who focus on intention confuse the moral permissibility of an act with the blameworthiness of an agent.[31] After all, it seems odd that a conception of our rights and duties to one another—of what it is morally permissible or impermissible for us to do to one another—should ultimately hang on its effect on *agents*, in particular, on whether it taints the agent with evil. This seems to mistakenly

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[29] Scanlon, *Moral Dimensions*, p. 18.
[30] Wedgwood, "Scanlon on Double Effect," p. 466. Also see "Intrinsic Values and Reasons for Action," *Philosophical Issues* 19 (2009). Nagel's statement is found in Thomas Nagel, *The View from Nowhere* (Oxford: Clarendon Press, 1986), p. 181.
[31] See, e.g., Thomson, "Physician-Assisted Suicide: Two Moral Arguments," p. 517; Scanlon, *Moral Dimensions*, pp. 20-28.

make justice centrally about the moral purity of agents, such that victims are relevant only insofar as they serve as reflections for agents' moral character.

To avoid this criticism, a relational explanation of the moral significance of intention is needed. Jeff McMahan gestures at such an understanding when he suggests that people can have a *right* against others treating them with wrongful intentions.[32] It could be argued that people can have such a right because an act done with a wrongful intention—an intention to cause a bad event to another—shows that the agent is regarding the other with a morally objectionable attitude—an attitude to which the other may validly object. It is in this way, it could be contended, that a bad intention can push an act over the line of impermissibility. For example, holding constant the consequences of the act, the victim of terror bombing has a complaint which the victim of tactical bombing does not—namely, that in actively *aiming* to end his life, the terror bomber acts towards him with extreme *malevolence*, and to be regarded with such an attitude magnifies the moral objectionableness of the harm done. In the Trolley Problem, though the agent need not regard the man she throws on the tracks with particular malice, nevertheless, he could object that the fact that she actively aims at his death as part of her project shows that she regards him with contempt, as a mere tool for advancing other goals.

I am not claiming that this theoretical basis for the DDE ultimately holds up. As I have suggested, proponents of the DDE have trouble explaining why, in principle, intention should matter for the permissibility of acts. My strategy is to find the *most plausible* theoretical explanation for the moral significance of intention, to show why the DDE that would follow from it would not apply to the cases relevant for my argument. For if a bad intention can make an act morally impermissible not simply because of the moral stain an evil will can have on the agent, but because the potential

[32] McMahan, *The Ethics of Killing*, pp. 348-49.

victim can have a right, a valid objection, against being treated with an evil will, then it becomes clear why the DDE cannot apply to cases where the person the agent intends to kill is himself or someone who consents to his intention. Where the person is the agent himself, and he intentionally kills himself out of self-hatred, his bad intention cannot affect the moral permissibility of the act, since it makes no sense to talk about a right held against oneself. Even if the idea of rights held against oneself were comprehensible, the person who kills himself out of self-hatred presumably waives the right he holds (against himself) to not be regarded with bad intentions. Similarly, where an agent kills a person who requests to be killed by that agent, the person presumably waives the right she has against the agent's potentially evil will—she does not object to it.[33] This analysis of the DDE is further supported if we imagine a case in which the person killed consents to being killed, but not to the intention with which the agent killed him. For example, suppose a person asks not merely to have his life ended by someone, but for it to be ended *with compassion*. Knowing this but wanting to end the person's life, the killer hides that her intentions are, in fact, malicious, and kills the person. It seems plausible to say that in this case, the killer's act *is* morally impermissible, since the person killed has not consented to—that is, has not waived his right against—the evil intention with which the killer killed him. In short, if the best theoretical explanation we have for the DDE is that intention is morally significant for permissibility because potential victims can have a right, or a valid objection, against being treated with an evil will, then the DDE cannot apply to cases where the intention to kill has been consented. That is, it cannot apply to cases relevant for the Right to Capital and Right to Manage.

[33] Note that the intention to kill need not be a bad intention (i.e. an intention to cause an event that the agent sees as bad). This is another vulnerability in the use of the DDE to ground the prohibition against intentionally killing innocents. However, I do not exploit this gap because, at best, it would show only that the prohibition against intentionally killing innocents does not apply to cases where the intention to kill is not a bad intention. This would still oppose the Right to Capital and the Right to Manage, since they allow suicide and consented-to killing with good or bad intentions.

In this subsection, I have argued that the correct understanding of our self-ownership rights should include the Right to Capital, which includes the right to kill oneself, and the Right to Manage, which includes the right to empower another to kill one. I began by delineating how these two incidents follow from the principle of respect owed to moral equals. I then showed that the most compelling considerations which might be thought to override the grounds for affirming these two rights do not actually do so. In particular, I first demonstrated that the sanctity of human life cannot curb individual rights. Second, I rejected that there is an absolute prohibition on the intention to kill innocent human beings. Finally, I showed that whatever the merits of the DDE, it cannot be recruited to prohibit the particular class of cases of intentional killing relevant to the two self-ownership incidents in question. The abstract principle of respect for persons justifies the thesis that we are self-owners with the right to kill ourselves and to empower others to kill us.

2. OBJECTIONS TO THE ARGUMENT

Before concluding this chapter, I wish to address two kinds of objections that might be leveled against my justification for the right to VAE. The first has to do with methodological worries regarding the redundancy and inconsistency of my argument. The second appeals to influential challenges against the conceptual coherence and moral desirability of self-ownership in general. I believe that both kinds of objections are ultimately unfounded.

2.1 Methodological Worries

There are two potential worries regarding my methodology. First, why have I gone through the trouble of justifying self-ownership at all? Why not go straight from the

principle of respect for persons to the right to VAE? Given that self-ownership is simply a bundle of rights, it might appear that the concept adds nothing to my argument for VAE. However, while I agree that invoking self-ownership is cumbersome because of the complexity of the concept, I do not believe it is superfluous. As I noted before, respect for persons is a highly abstract principle. In and of itself, it does not tell us much, since it can be interpreted in a multitude of ways. Bringing in the concept of self-ownership elucidates what respect for persons ought to amount to in more concrete terms—it gives us a fuller picture of our moral relation to ourselves and to others. Thus, to say that the right to VAE is grounded in the moral fact that we are self-owners, with final authority over ourselves comparable to the rights owners of external property have over their things, tells us more than merely saying that the right to VAE is grounded in respect for persons. It provides a more complete explanation of the normative grounding, and more precisely, the person's moral standing, that undergirds the right to VAE. The right to kill oneself and the right to license another to do so do not stand in complete isolation. They are part of a bigger bundle of rights, and we miss the big picture if we do not see them in this context. And if foregoing the concept of self-ownership would be incomplete—if it would not tell us the whole story of why people have a right to VAE—then we must provide the full story, even if it is more laborious to do so.

A second methodological worry relates to how the arguments of Chapter 3 and Chapter 4 fit together. It might be objected that the principle of respecting *persons,* appealed to in the present chapter, does not lead to *whole-body*-ownership, an intuition I relied on heavily to motivate the thesis of self-ownership in Chapter 3 (by appealing to our objection to the unconsented use of others' sexual organs and expropriation of their non-essential body parts). One of Cécile Fabre's main points in defending body part redistribution is that a person is not constituted by the *whole* of his body—a person can

lose, say, a limb, a kidney, or a pint of blood without ceasing to be one and the same person.[34] If a person is not constituted by all of his body parts, then it does not seem that denying him ownership rights over, say, the kidney or limb attached to him, is necessarily a failure to respect *him*; respect for the person may justify *self*-ownership, but this does not entail *whole-body*-ownership. If so, then my justification of self-ownership is disjointed, for I used our particular judgments about rape and body part redistribution to argue that we have proprietary rights over our own bodies, but this does not seem to be justified by what I claim is the normative basis of self-ownership, namely, respect for other persons.

However, I believe respect for other persons *can* justify ownership rights to our bodies as a whole. At least for the duration of our earthly existence, our bodies are too intimately connected to our person for us to retain ownership—that is, final authority—over ourselves if our rights of control are cut off at the non-person-constituting parts of our body. If we accept Fabre's view, then the liver, kidney, blood, and so forth that happen to be connected to me are social resources—they are things to which others have legitimate claims. This has implications for just about everything I do. For it means that if I choose to eat a fatty burger or drink a sugary soda, I harm not just myself, but also others who have claims to parts of my blood and other organs. If I choose to smoke, I do not just damage something of *mine*; I damage a social resource. If I wish to commit suicide, I must be aware that I am not entitled to all of the body that would be destroyed and wasted; I may have a morally enforceable duty to make provisions to transfer the usable body parts attached to me before I kill *me*.

In other words, if self-ownership applies only to those parts of the body that are necessary for personhood—if others have legitimate claims over various other parts—then even the most basic, paradigmatic self-regarding acts (such as what to eat and

[34] Fabre, *Whose Body Is It Anyway?*, pp. 12-16, 101, & 111.

drink) must be regarded as, at the same time, *other-regarding,* and outside the realm of our own exclusive control. This suggests that people cannot be respected as *self*-owners—as having final authority over themselves and their lives—if their self-ownership is defined so strictly. Different parts of the body are too interrelated to draw such a severe moral boundary separating person-constituting and non-person-constituting parts. Self-owners need a certain amount of breathing space, and the periphery of the body is the most reasonable place at which to draw the line.

Now, Fabre denies that others' claims on parts of our bodies preclude us from doing what we wish with them while they are in our possession. She argues that giving others a right that the abled-bodied preserve their body parts for others would infringe the latter's autonomy by preventing them from living according to their own aims and values.[35] However, respect for autonomy, without whole-body-ownership, would not rule out the objectionable duty to preserve our bodies for others for three reasons. First, it is unclear whether it is true *in every case* that holding an individual to a duty to preserve his health would contravene his autonomy, since being healthy and alive comports with what many people truly want for themselves, being that health is a condition of pursuing most conceptions of the good (at least with respect to some individuals, then, prohibiting unhealthy habits might be regarded as partly a soft paternalistic measure).

Second, even if holding a potential donor to a duty to preserve health would undermine his autonomy, *allowing* the potential donor to damage valuable social resources other people need to live autonomous lives jeopardizes *others'* autonomy. If, for example, the potential donor renders his extra kidney unusable because he chooses a career requiring long, sedentary hours and heavy drinking with clients, then the potential donee with no functional kidney loses out on the opportunity she otherwise

[35] Ibid., pp. 115-16.

would have had of living an autonomous life. And since we are denying that the potential donor has any special claim to the kidney that happens to be in his possession—it does not *belong* to him—a concern for autonomy cannot explain why we should prioritize his choices about how the kidney is used. To get that conclusion, we would need to assume that he owns it.

Finally, even supposing that autonomy is able to rule out enforceable duties to preserve our bodies, the fact remains, on this view, that our bodies are not exclusively ours to decide what to do with. Insofar as I have a right to drink cola everyday, it would only be because this freedom is required by the value of autonomy, not because I have the ultimate say-so over my own life. This view on our rights over our bodies is still incompatible with respect for the *person,* with recognition of the person as the final authority over his own life. Thus, I maintain my previous claim that the principle of respect for persons requires recognizing that people's self-ownership apply to their bodies as an entirety; the arguments of Chapter 3 and Chapter 4 are cohesive.

2.2 Objections to Self-Ownership

The reader might have another kind of worry. It might be wondered, if self-ownership is, as I have made it out to be, such a self-evident way of seeing our moral status with respect to one another, why does it remain a controversial thesis? In this subsection, I wish to address the most influential challenges to the general concept of self-ownership. As Michael Freeman notes, Kant is "the seminal source" of objections to self-ownership.[36] Well-known criticisms regarding the incoherence of the concept and self-ownership's commodification of the person are both rooted in Kant's arguments. Thus, to quell any persisting hesitation against accepting that certain individual rights are

[36] Michael Freeman, "Taking the Body Seriously?," in *Property Rights in the Human Body*, ed. Kristina Stern & Pat Walsh (London: Centre of Medical Law & Ethics, 1997), p. 13.

grounded in the fact that we are self-owners, I will explore Kant's argument against self-ownership below.

An oft-cited criticism of self-ownership is that the concept itself is, in fact, incoherent.[37] Such a critique can be traced to the following passage in Kant's *Lectures on Ethics*:

> Man cannot dispose over himself because he is not a thing; he is not his own property; to say that he is would be self-contradictory; for in so far as he is a person he is a Subject in whom the ownership of things can be vested, and if he were his own property, he would be a thing over which he could have ownership. But a person cannot be a property and so cannot be a thing which can be owned, for it is impossible to be a person and a thing, the proprietor and the property.[38]

To put it simply, according to Kant, for a person to own himself, he must be both a person—to do the owning—and a thing—to be owned. Since one cannot be *both* a person and a thing, the concept of self-ownership is incoherent. However, the apparent plausibility of this objection is superficial. As Cohen argues, it begs the question, for it assumes that only *things* can be owned.[39] It is only by making the assumption that persons cannot be owned that we can claim that self-ownership requires one to be a thing in addition to being a person. But this leaves unanswered the fundamental question why a person is the kind of entity which cannot be owned.

In spite of his statement above, I believe Kant's objection to self-ownership is ultimately rooted not in the incoherence of the concept of self-ownership, but in its violation of human dignity. As we shall see, for Kant, the reason that we cannot regard a *person* as a property is that persons have dignity; it is because being owned violates human dignity that only things can be owned. But if this is the underlying criticism,

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[37] See discussion in Cohen, *Self-Ownership, Freedom, and Equality*, pp. 210-11.
[38] Immanuel Kant, *Lectures on Ethics*, trans. Louis Infield (Indianapolis: Hackett Publishing, 1963), p. 165.
[39] Cohen, *Self-Ownership, Freedom, and Equality*, pp. 211-13.

then the objection to self-ownership is ultimately not logical, but moral; one needs to be a person *and* a thing to be a self-owner because being an object of ownership opposes human dignity. This is a potentially powerful criticism of self-ownership, for while I have shown that respect for human dignity is *insufficient* for understanding individual rights,[40] it may nevertheless be a demand which must be met within any acceptable moral system, such that self-ownership, for whatever merits it has, cannot be acceptable if it violates human dignity.

How does treating oneself as property violate human dignity? In Chapter 3, I discussed human dignity in terms of the intrinsic worth of persons. As a critique of self-ownership, we need to introduce another aspect of human dignity. Namely, for Kant, what has dignity has not merely *intrinsic value*, but *incomparable value*.[41] Incomparable value exceeds intrinsic value, for it is to have intrinsic value *which cannot be compared to or outweighed by other things with intrinsic value*. Kant writes that while "[w]hat has a *price* can be replaced by something else as its *equivalent*," what has *dignity* "is raised above all price and therefore admits of no equivalent."[42] It is, quite literally, priceless. The idea that we must never act in ways which deny our own pricelessness is problematic for self-ownership, since the freedom to exchange one's property for other things is central to ownership. This lies at the heart of Kant's rejection of self-ownership. Thus, Kant says,

> [A] human being is not entitled to sell his limbs for money, even if he were offered ten thousand thalers for a single finger. If he were so entitled, he could sell all his limbs. We can dispose of things that have no freedom, but not of a being which has free will. A man who sells himself makes of himself a thing and, as he has jettisoned his person, it is open to anyone to deal with him as he pleases.[43]

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[40] See Chapter 3, Section 3.1 & Section 1.1 of this chapter.
[41] Kant, "Groundwork of the Metaphysics of Morals," 4:434-35.
[42] Ibid., 4:435. Emphasis in original translation.
[43] *Lectures on Ethics*, p. 124.

In other words, persons have incomparable worth (that is, dignity) in virtue of their capacity for free will. To treat the value of one's body, which is part of one's person,[44] as if it could be weighed and exchanged with other values (say, ten thousand thalers) is to fail to respect one's incomparable worth (that is, dignity) as a person. In doing so, one treats oneself as a thing.

This line of thought constitutes an influential objection to the notion of self-ownership. As George Brenkert writes, self-ownership commodifies persons and their bodies, transforming "questions of the pricelessness and irreplaceability of human beings into questions of their exchangeability."[45] Stephen Munzer argues, more subtly, that although having property rights in one's body does not *necessarily* involve undermining human dignity, since people can recognize that their bodies have incomparable value *as well as* a value in the marketplace, it *allows* people to undermine their own dignity, for it *allows* them to treat their bodies as if it had *only* market value.[46] For example, while a person may regard a family heirloom as her property but refuse to sell it because she regards it as priceless, that it is her property means that she has a *right* to regard it as having only market value and sell it to the highest bidder. Thus, it is by allowing people to do what they want with themselves that recognizing self-ownership contravenes the demand that each of us must regard our own persons and bodies as having a worth beyond all other goods. This consideration of human dignity seems also to motivate some theorists' objection to self-ownership on the basis that individual rights like the right to life, liberty and bodily integrity are inalienable and

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[44] Ibid., p. 166.
[45] George Brenkert, "Self-Ownership, Freedom, and Autonomy," *The Journal of Ethics* 2, no. 1 (1998): p. 49.
[46] Stephen Munzer, "An Uneasy Case Against Property Rights in Body Parts," *Social Philosophy and Policy Foundation* 11, no. 2 (1994). For other objections citing the commodification of the self and body, see Freeman, "Taking the Body Seriously?," pp. 13-16; E. Richard Gold, *Body Parts: Property Rights and the Ownership of Human Biological Materials* (Washington, D.C.: Georgetown University Press, 1997), pp. xi-xii; Ingram, *A Political Theory of Rights*, p. 40; Honoré, "Ownership," p. 180.

non-transferable.[47] Self-ownership incidents that involve the right to deny one's own dignity in the sense of one's own pricelessness include the Power to Manage, which contains rights like leasing one's body out in return for financial profit (as in prostitution), the Power to Capital, which contains rights like selling oneself or parts of one's body (as in a marketplace for human body parts), and the Liberty and Claim Right to Capital, which contains the right to destroy oneself (say when one considers the worth of one's personhood to be outweighed by the disvalue of life's suffering). Both because it is unclear whether a conception of personal rights which requires people to always uphold their own dignity could qualify as self-ownership, and because it would rule out an incident I need for the right to VAE, it is important that this objection is rebutted.

Before explaining why such an objection to self-ownership is invalid, I wish to briefly address two counter-arguments that would be inadequate. First, I cannot dismiss the objection by pointing out that regarding *body parts* as having a price does not imply regarding *persons* as having a price. This reply is not available to me because in defending whole-body-ownership in Section 2.1, I argued against any strict division between the self and non-essential body parts. Moreover, a self-owner may regard *himself*, not just his body parts, as exchangeable for other values, for example, if he kills himself in exchange for a payment to his family. Second, Cohen's rebuttal that a self-owner need not treat herself as a commodity, in the same way that "[i]f I own a valuable picture, I need not make the money I could by charging people to see it," misses the point of the objection.[48] As I noted above, the Kantian objection is not that a self-owner *necessarily* violates her own dignity, but that she has a *right* to do so. Just as the owner of a priceless artwork has a right to regard it as having mere market value, a self-owner

[47] See Gaus, "Property, Rights, and Freedom," pp. 215 & 224; Munzer, *A Theory of Property*, pp. 43, 46-52; Snare, "The Concept of Property," p. 204; Harris, "Who Owns My Body," 63-64.
[48] Cohen, *Self-Ownership, Freedom, and Equality*, p. 92.

has a right to do the same to herself. Self-ownership is unacceptable, according to this objection, because it *allows* people to act in ways that undermine their own dignity.

Instead of holding that self-ownership is consistent with the protection of human dignity, I contend that people have a *right* to act in ways which compromise their own dignity. The reader might notice that the demand to recognize that human beings have incomparable worth is closely related to the demand to recognize that human life is sacrosanct. While the sanctity of life doctrine commands us to recognize that our *lives* have incomparable worth, such that we must never destroy it, whatever other values might be gained, the Kantian principle tells us that *we ourselves* have incomparable worth, such that we are prohibited not only from destroying ourselves to gain some other value, but also from selling ourselves or parts of ourselves to gain some other value. This similarity suggests that we already have much of the material to reject this seemingly formidable Kantian objection to self-ownership.

To begin, while defining human dignity as each human being's *incomparable worth* is an ennobling sentiment, it is too strong. The Kantian proviso is thought to explain why it is impermissible to kill one person in order to save five others: Because each person has superlative value, transcending comparison, people cannot be weighed on a scale and traded off with one another. Entities which are priceless cannot be compared; they are non-fungible.[49] But consider, again, cases of self-sacrifice. If a person kills *herself* in order to save five others—for example, if a soldier jumps on top of a grenade to keep it from blasting five people nearby—not only do we think it is her right to do so, *we do not think that she acts foolishly or mistakenly*. In particular, we do not think that she exchanges herself for something which cannot be compared to her own worth (as we might if, say, she jumps on a grenade to save a cat). This suggests that we do not think that a person's worth is incomparable, such that it cannot be

[49] See discussion in Hill, "Humanity as an End in Itself," pp. 92-93.

measured against the worth of five people. Nor is this kind of intuition contained only to cases of self-sacrifice for the sake of other *people*. If someone sacrifices himself for the sake of an important principle or cause—for example, to advance political justice—we would not say that he trades himself for something that cannot be measured to his own worth, that he violates his own dignity. On the contrary, we would praise him for his impartiality in recognizing the truth that his own value can be trumped by other important values, and his selflessness for rising above the natural and reasonable partiality we all have towards our own interests.

This suggests that what is doing the work in prohibiting the killing of *another* person to save more people or to advance an important cause is not the notion that each person is priceless and non-fungible. After all, we *hope* that one person would jump on the grenade in order to save five others and that someone would put his life on the line to advance a worthwhile cause. We hope for these things because we recognize that as intrinsically important as each person is, what would be gained in such cases is worth more than any single one of us. The reason why we may not sacrifice another person in order to rescue others or for some other worthwhile cause is not because of each person's incomparable value, but because of each person's right to self-determination. Even though sacrificing a person may well result in more intrinsic worth in the world, respect for others' self-ownership means that we may only hope that in such cases, a person will choose to give up his life to bring about more good, but we may not choose it for him.

A better understanding of human dignity is not a human being's *incomparable worth*, but a human being's *great intrinsic worth*. This could still be cited as an objection to self-ownership, since self-ownership gives people the right to exchange themselves or parts of themselves not only for other great intrinsic values, but also for things with mere instrumental value (such as financial gain) or things with lesser

intrinsic value (such as desire-satisfaction). It is in allowing people to *undervalue* their own worth as human beings that self-ownership violates human dignity. Now, it certainly seems correct to say that selling one's kidney in order to go on holiday to Bali or killing oneself after one's favorite television show is cancelled undervalues one's intrinsic worth *qua* person and undermines human dignity. However, there is still a gap between this judgment and a judgment about whether people have a right to do these things. Recall people's rights to work to the bone, smoke, eat unhealthily, and partake in daredevil stunts. These are not only examples of people trampling on the sanctity of their own lives; they are also examples of people undervaluing themselves, and trading off the worth of personhood with lesser values like financial gain, social recognition, and desire-fulfillment. In doing so, such people undermine human dignity—and yet, they act well within their rights. The appeal to human dignity, or the great intrinsic worth of each human being, does not undermine individual self-ownership.

In this section, I rejected two well-known challenges to self-ownership, namely, its alleged logical incoherence and its supposed moral objectionableness in violating human dignity. We have seen that the charge of logical incoherence is question-begging, as it relies on an unjustified assumption that persons are not the kind of entity that can be owned. In fact, this and several other arguments against self-ownership ultimately rely on Kant's principle of respecting human dignity—including the criticism that self-ownership commodifies human beings and the objection that it makes inalienable and non-transferable rights into alienable and transferable rights. While Kant and others claim that self-ownership violates human dignity by regarding persons, who are priceless and irreplaceable, as things with comparable and exchangeable value, I showed that this cannot be an objection against self-ownership, for a human being's worth is *not* incomparable—it can be measured and sometimes trumped by other values.

It is more plausible to make the weaker claim that human dignity is violated when we act in ways which *undervalue* our own worth as persons, for example, when we regard ourselves or our bodies as exchangeable with things that have merely instrumental value or lesser intrinsic value. It is undeniable that self-ownership allows people to violate their own dignity, defined in this way. However, the same examples which show that people have a right to undermine the sanctity of their own lives show that people have a right to undervalue themselves *qua* persons. Thus, the principle of respect for human dignity cannot be brought in to curb people's rights over themselves; it cannot serve as a basis for rejecting self-ownership.

3. CONCLUSION

In this chapter, I have argued that the very weak requirement of respecting other persons justifies recognizing them as self-owners with the right to kill themselves and to license others to do so. This shows that the thesis of self-ownership justifying our right to choose VAE is not only supported by our rock-bottom intuitions, as demonstrated in the previous chapter, but also by a weak, abstract principle we can all agree on. I have also rebutted potential objections to my self-ownership justification of VAE, including methodological worries, as well as challenges to the general concept of self-ownership. These two chapters have shown that the process of reconciling our considered judgments, moral principles, and background theories into a coherent understanding justifies a self-ownership right to choose VAE. In the next chapter, we will explore the implications of the self-ownership justification for the scope and possible limitations of a person's right to VAE. This will lend further support to my thesis within the methodology of reflective equilibrium, for we shall see that while a right to VAE grounded in self-ownership is a revisionary view, the resulting understanding is reasonable both in its allowances and its restrictions.

CHAPTER 5:

A NEW CONCEPTION OF THE RIGHT TO VAE

What is the significance of appealing to self-ownership to justify an individual's right to VAE? How does it alter our understanding of such a right? This chapter will delineate in some detail the scope and limitations of the right to VAE given its grounding in self-ownership, and compare it to our previous understanding. It is worth reminding the reader where we left off with the Standard View's conception of the right to VAE. By the end of Chapter 2, all we had left of the Standard View's justification of VAE—which appeals to both an individual's autonomy and an individual's well-being as necessary conditions for the right—was the argument from autonomy. I contended then that respect for autonomy would justify a broader right to VAE than what is usually affirmed, in the sense that the right to choose VAE without state (or other) interference would not be a right applying only *in extremis*. Nevertheless, I went on in the next two chapters to establish an alternative self-determination argument for the right to VAE by undercutting the centrality of autonomy in our thinking about basic personal liberties and defending a thesis of self-ownership that grounds the right to VAE.

Now, it might be thought that although my alternative justification is theoretically distinct, it makes no practical difference to the right to VAE, since both self-ownership and autonomy would justify a broad as opposed to an *in extremis* right to choose death. However, in Section 1 of this chapter, I will distinguish the implications of the two arguments by showing that self-ownership justifies an even wider scope of

the right against interference to choose VAE than does autonomy. More specifically, we shall see that self-ownership rules out certain objectionable restrictions on the right that would still be consistent with respect for autonomy. Lest the reader think that accepting a self-ownership grounding of the right to VAE requires endorsing a radical view without any moral room for constraint, Section 2 will delineate some justifiable limitations on the right to VAE given self-ownership. I will argue that self-ownership is consistent with certain modest soft paternalistic restrictions on the right, and even, under certain circumstances of special commitments, limitations grounded in other-regarding considerations. Finally, in Section 3, I will contend that self-ownership justifies not merely a right to *choose* VAE from a willing doctor, free from third-party interference, but a right to be *provided* VAE by a doctor. While this appears to be a radical claim, once we assess the basis of the institution of drug prescriptions, and how this can be justified to a society of self-owners, it will become clear that it is reasonable to hold doctors to such a duty. The aim of this chapter is two-fold. First off, I wish to elucidate the implications and significance of my argument. But beyond this, within the process of reflective equilibrium, by showing that the contours of the right to VAE justified by self-ownership is reasonable (and more reasonable than its alternative), I provide further support for my thesis that our right to VAE is rooted in self-ownership.

1. AN EXPANSION OF SCOPE

We have already seen some of the ways in which self-ownership tends to protect a wider scope of individuals' rights against interference compared to respect for autonomy. I wish now to delineate the specific ways in which self-ownership would justify a wider scope of an individual's right against interference to choose VAE. The comparative discussion of the implications of the two competing arguments for VAE will further strengthen my thesis by showing that the self-ownership justification

corrects certain objectionable implications of an autonomy argument for the right to choose VAE.

To show this, I need to first establish the precise limitations of a right to choose VAE grounded in respect for autonomy. In Chapter 1, I argued that respect for autonomy justifies a broad right to choose VAE in the sense that it would apply not only to the ill and disabled. In defending my view, I conceded a point made by many advocates of the restricted right that respect for autonomy is compatible with soft paternalism—the view that it is sometimes permissible to interfere in a person's choice for his own sake when the choice is substantially nonvoluntary, or substantially nonautonomous. My claim was simply that some *non*-medically-based choices for dying may be perfectly autonomous, and so soft paternalism would not justify limiting the right to choose VAE to circumstances of grave illness and/or disability.[1] Nevertheless, as we shall see, an autonomy-respecting soft paternalism would still license significant, across-the-board restrictions on the right to choose VAE which are ultimately objectionable, and which are ruled out by my thesis of self-ownership.

Of course, the validity of the above claim rides on the particular conception of soft paternalism affirmed—in particular, on the understanding of how nonautonomous a choice needs to be to warrant interference. For example, preventing a person from acting because he is nonautonomous in the sense that he is mentally incompetent (e.g. insane or mentally disabled) is neither controversial nor in conflict with self-ownership.[2] Thus, it is important to establish the conception of soft paternalism consistent with respect for autonomy. As noted in Chapter 1, a fairly uncontroversial definition of soft paternalism is that offered by Joel Feinberg, who writes, "Soft paternalism holds that the state has the right to prevent self-regarding harmful conduct . . . *when but only when* that conduct is substantially nonvoluntary, or when

[1] See Chapter 1, Section 1.2 & Section 3.1.
[2] To see why self-ownership allows for this, see Section 2.1 below.

temporary intervention is necessary to establish whether it is voluntary or not."[3] Voluntariness refers to the autonomousness of a choice: "the crux of voluntariness [is] the faithful expression of the settled values and preferences of the actor, or an accurate representation of him in some centrally important way."[4] While this is a weak understanding of autonomy-respecting paternalism, its precise boundaries are fuzzy. In particular, what qualifies as *substantially* nonautonomous? It is generally agreed that choices made under conditions like factual ignorance, coercion, drug addiction, insanity, hypnosis, and the like are substantially nonautonomous, but there is no agreement on how much further we may go. That is, most adherents of the principle of respect for autonomy accept that the principle is compatible with interfering in some nonautonomous choices, but there is no unanimity on the limits of such interference: How much below a fully autonomous choice does a person's decision need to be to justify interference? Are correcting only some errors that undermine genuine self-authorship, but not others, consistent with respect for autonomy?

Below, I will argue that a concern for individual autonomy would support a stronger conception of soft paternalism than many autonomy theorists would acknowledge. More specifically, I will show that in the particular case where a person's apparent wish stands to irrevocably sabotage his autonomy—that is, irreversibly destroy his efforts to shape his life in the way that he truly wants—a concern for his autonomy would support utilizing the highest criterion for autonomous choice, such that the person may be prevented from carrying out a decision whenever and insofar as it opposes his true preferences and values.

To begin, we need to first ask why the demand to respect autonomy should *ever* be consistent with interfering with a person in the name of his true preferences and values. Recall that in contrast to negative liberty, or what Peter Jones describes as

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[3] Feinberg, *Harm to Self*, p. 12. Emphasis in original.
[4] Ibid., p. 117.

being "unimpeded in acting on [one's] wishes without reference to the origin of those wishes," individual autonomy refers to the more demanding ideal of genuine self-direction in one's life.[5] An autonomous person does not simply drift through life, pushed this way or that by heteronomous forces like others' wills or unendorsed desires or compulsions, but shapes the contours of his life according to values and aims that are truly his own. Because this internal dimension is crucial to the concept of autonomy, a person is not necessarily autonomous simply because he is not being interfered with by other people, since other forces may equally vitiate his ability to be a genuine self-legislator.

It is because of the recognition that internal impediments may also thwart a person's autonomy that it is generally agreed that when a person is, say, drunk or ignorant of the empirical facts relevant to his decision (e.g. that the bridge he wants to cross is defective), respect for autonomy is consistent with preventing him from acting on his present wish.[6] But if so, then as Gerald Dworkin points out, the same rationale can be extended to justify protecting people from other autonomy-vitiating factors. For example, suppose that people who choose not to wear seatbelts do so not because the kinds of lives they want to live support bearing such risks. Rather, even though wearing seatbelts conforms with what they truly want for themselves, they either make some logical error in weighing the benefits and burdens of seatbelt-wearing, or while having concluded that the benefits outweigh the burdens on an intellectual level, they fail to emotionally appreciate this conclusion, so as to act according to their own determination. If people who forego wearing seatbelts are acting on such mistakes, Dworkin argues, then they do not act autonomously—a concern for autonomy is consistent with legal requirements on wearing seatbelts.[7]

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[5] Jones, *Rights*, p. 125.
[6] For the oft-cited bridge example, see Mill, *On Liberty and Other Writings*, p. 96.
[7] Gerald Dworkin, "Paternalism," *The Monist* 56, no. 1 (1972): pp. 79-80.

So the idea is that if we may oppose an incompetent or ignorant person's present wish because we recognize that allowing him to act on the wish would undermine his autonomy, then why may we not sometimes oppose a person's present wish when, *due to other distorting factors*, acting on it would also undermine his ability to lead his life autonomously? Under certain conditions (to be delineated below), it may be more respectful of autonomy to prevent a person from acting against his own enduring values and aims than to simply leave him alone. Ronald Dworkin, who, like Gerald Dworkin, suggests that preventing a person's choice on behalf of his own conception of the good can be consistent with respect for autonomy, notes that we should "distinguish between stopping someone from taking drugs . . . because we think it will lead to the kind of life he now disapproves of, or because it will lead to the kind of life we but not he disapproves of." Only "[t]he last is genuine moral paternalism, and . . . is almost always objectionable in the case of adults, when it can be avoided."[8] That is, forcing someone in virtue of his *own* values does not necessarily contravene respect for his autonomy.

It might be objected that forcing someone to do something in accordance with his values is still forcing his will, and if we affirm a Razian conception of autonomy, then we violate autonomy whenever we bend another's will to our own. Previously, I had contended that undermining others' autonomy by bending their wills to our own is not always impermissible, but I need not appeal to this argument here.[9] For notice that in soft paternalism, A is not subjugating B's will *to A's own*—instead, the basis of constraint is precisely *B's own will*. We can interpret this observation in one of two ways, both of which lead to the same conclusion. First, it could be argued that what the discussion in the preceding paragraph suggests is that people do not always act according to their own will. When we prevent someone from acting on a desire that has

[8] Dworkin, *Life's Dominion*, p. 259, n. 20.
[9] See Chapter 3, Section 2.1.

been distorted in some way, such that it contradicts what he really wants for himself, we constrain not his will, but only what *appears* to be his will (so in the examples above, it might be said that the desire to not wear a seatbelt even though it contradicts one's own life plans and the desire to take drugs even though it would lead to a life one disapproves of do not reflect a person's will at all).

Second, if such a definitional move looks too much like a sleight of hand, we could accept that a heteronomous choice which contradicts a person's true values and aims can still be his will—it may be a will that does not reflect what he really wants for his life, but it is still his will. For example, a person whose life goal is to be a ballerina might nevertheless find himself everyday with a very real will (intention, desire, etc.) to eat a tub of chocolate ice cream, perhaps because he is swayed by a common cognitive bias of overweighing near-future gains and underweighing distant-future losses. However, given that the core of individual autonomy is rooted in self-*legislation*, even if a heteronomous choice in conflict with one's own aims and values can still be described as a person's will, it is clearly not the kind of will which matters to autonomy, and which demands to be respected if we are to respect the value of autonomy. Assuming that impetuousness or hedonism is not also part of the set of values the ballerina endorses, competing with the value for him of being a ballerina, if he gives into his will to eat a tub of ice cream everyday, then he would not be autonomous; whatever other objections we have against interfering, his life would be more autonomous overall if he were prevented from acting on his errant will to eat ice cream everyday (say, if his coach convinces all ice cream shops within his vicinity to not sell to him).[10] To insist that respecting autonomy requires respecting every self-regarding

[10] It might seem possible to have a *genuine* will which opposes one's own fundamental aims and values. But I hold that insofar as it appears so, it is because we have not taken into account all of a person's aims and values. So the ballerina could indeed have a genuine will to binge eat ice cream even though it contradicts his own life dream of being a ballerina, but this would be because he also holds other aims or values in tension with this life dream, for example, to enjoy the simple pleasures of life. If he does not,

will a person has, without reference to whether the will reflects what the person genuinely wants for his life, would be to conflate individual autonomy with negative liberty. In short, whichever interpretation of a person's will we choose, neither bending people's merely apparent wills nor bending the wills they have which hinder the exercise of their genuine wills are necessarily attacks on individual autonomy.

Now, it is true that to be autonomous, it is not enough that one is living in accordance with one's true aims and values; one must also *be the one choosing* to live in this way. A person who lives according to her own conception of the good only by compulsion is still being determined by external forces, and as such, she is not truly self-governing. But the point I have been trying to make is that neither is she truly self-governing if *she* chooses, but chooses heteronomously. Genuine authorship over one's own life can be diminished equally by other people's acts as by other impediments which prevent a person from leading the life she truly desires, and a concern for individual autonomy cannot distinguish between the two kinds of assaults on self-legislation, so as to prefer one over the other. For example, suppose that a person's true will is to live in the countryside as a farmer, but because of certain ideals of success that have been indoctrinated in him since childhood, he convinces himself that he wants to work in the city as a banker. It is fair to say that if we send a guard with a gun to keep him in the countryside working as a farmer, while he, held by the sway of the social ideals imposed on him, continues to plead to go back to the city, then he is not autonomous, despite living according to his own true values and aims. But on the other hand, if we let him live out his life in the city as a banker, then his life would be *no more autonomous*, for while *he* is deciding, he is still not *self-legislating*. He is still not the one authoring his life in a meaningful sense. Thus, solely from the standpoint of

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then something has gone wrong in his reasoning to the decision of binge eating ice cream—it is a distorted will.

autonomy, neither option is preferred to the other at this point in the discussion; non-interference is not necessarily more respectful of autonomy than interference.

I suggest that in dealing with a nonautonomous choice that thwarts a person's efforts to lead his life according to his true values, whether, in the end, a concern for autonomy supports overriding the person's nonautonomous choice depends on the particularities of the case. More specifically, it depends on which of the available options would ultimately provide the better chance of restoring or facilitating genuine self-legislation. Such a view does not deny that it may be perfectly autonomous for a person to forsake all future opportunity for self-legislation—it does not rely on a substantive, as opposed to procedural, conception of autonomy. Rather, a decision may be prevented when it contradicts one's own enduring preferences and values, *whatever they may be*, and when prevention would best help one to eventually choose to live according to one's own enduring preferences and values, *whatever they may be*. Nor is this a consequentialist view, for coercion is allowed only when a choice is *nonautonomous*, such that the intervention would not violate respect for autonomy (since there is no autonomous choice to be respected). It is when neither interference nor noninterference is in and of itself preferred by the principle of respect for autonomy that it directs us to look forward to see which option would best restore or preserve autonomy overall.

So suppose that in the example above, the person's distorted will to be a banker in the city is resistant to more modest interferences like rational discourse and compulsory psychotherapy. Nevertheless, we are sure that his genuine conception of the good is to be a farmer in the country. Someone concerned with his autonomy should then ask: Would forcing him to move to the country, so that he finally breathes in the crisp air and works with the earth, better help him realize the truth that he really prefers this life? Or would letting him continue to breathe the smog of the city and

experience the grind of being a banker better make him see his mistake? If being free from others' interference is also part of his system of values, does it rank higher or lower in comparison to his repressed dream of living a bucolic life? *If* compulsion would best facilitate his chances of eventually coming to live an autonomous life—of living, of his own accord, consistently with his genuine preferences and values—then from the perspective of his autonomy, it would be better to take him to the countryside by force.

So we have seen that when a person's choice is nonautonomous, respect for autonomy may or may not support prohibiting her choice, depending on the expected outcome of the interference on her overall autonomy in the particular case. I now want to argue that in the particular situation where a person's nonautonomous choice would *irreversibly sabotage* her efforts to live an autonomous life, respect for autonomy *would support* prohibiting her choice.[11] Consider a diabetic patient who rejects having her foot amputated, knowing this would lead to her death. Even though such a decision is against her own conception of the good life, which is to live pleasurably for as long as it is possible, common psychological impediments distort her decision-making, for example, the difficulty of "vividly imagining" oneself being happy again after a major catastrophic event.[12] Suppose that short-term compulsory psychotherapy fails to correct her errors. If we forcefully amputate her foot, it is true that she would not be autonomous as long as she is living only by our compulsion. But there would at least be the hope that, with further experience and therapy, she would eventually realize she had chosen wrongly by her own standards, and go on to live a truly autonomous life. On the

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[11] My view is compatible with the notion of a variable criterion for soft paternalism endorsed by Feinberg, according to which how autonomous a person's choice needs to be in order to be immune from interference depends on various factors, such as the nature of the circumstance and the interests at stake and, in general, the higher risk and more irreversible a choice, the more autonomous it must be to be free from interference. See Feinberg, *Harm to Self*, pp. 118-25.

[12] For the idea that vivid imagination of the consequences of one's action is essential for autonomous choice, see Julian Savulescu, "Rational Desires and the Limitation of Life-Sustaining Treatment," in *Bioethics: An Anthology*, ed. Helga Kuhse & Peter Singer (Oxford: Blackwell Publishing, 1999), pp. 196-99. The description of the diabetic patient is derived from Savulescu's article, though I have added and modified certain details. See ibid., pp. 202-3.

other hand, if we allow her to die when it is against her own values and aims, then there would be no chance at all that she might still correct course so as to choose to live the life she genuinely wants; the life she ended nonautonomously would be lost to her forever.[13] In other words, where a person's nonautonomous decision would *destroy* her chance for living an autonomous life, and the effects would be *irrevocable*, it would be more respectful of the value of autonomy to prevent the person's nonautonomous decision.[14]

The rationale above justifies the claim made by some medical ethicists that given a concern for autonomy, with respect to medical decision-making, the current standard of gaining a competent patient's informed consent—to wit, consent after the provision of relevant information—is inadequate. Where a medical decision involves an irrevocable and potentially autonomy-destructive act, such as the patient's death, simply accepting the patient's informed consent is not always the option most respectful of autonomy.[15] Some argue that concern for patient autonomy justifies mandatory measures to facilitate patients in making autonomous decisions. Allen Buchanan and Dan Brock argue that if a patient's choice seems mistaken, an evaluator ought to ask: "Help me try to understand and make sense of your choice. Help me to see whether your choice is reasonable, not in the sense that it is what I or most people would choose, but that it is reasonable for you in light of your underlying and enduring aims and

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[13] Such irreversibility is independent of any view of the afterlife—it is not dependent on the assumption that death is oblivion. For even if one believes in reincarnation, such that a person would not only continue to live, but continue to live in the same world, one would still not be living the same life. Whatever our views of the afterlife, we all agree that once a person dies, she cannot return to *that* life (i.e. in the same body, with the same family, with the same achievements, etc.). Once a person dies nonautonomously, then the opportunity to shape *that* life autonomously is over.

[14] One qualification to this might be a person for whom freedom from others' interference takes precedence over *all* other values and aims in his life. Such a person would be a problem not merely for my view, but for the compatibility of respect for autonomy with *any* soft paternalistic intervention against him (e.g. interference in cases of incompetence or factual ignorance, as in Mill's defective bridge scenario).

[15] See, e.g., Terrence Ackerman, "Why Doctors Should Intervene," *The Hastings Center Report* 12, no. 4 (1982); Beauchamp and Childress, *Principles of Biomedical Ethics*, pp. 128-31; Savulescu, "Rational Desires and the Limitation of Life-Sustaining Treatment."; Bruce Miller, "Autonomy and the Refusal of Lifesaving Treatment," in *Bioethics*, ed. Justin Oakley (Farnham: Ashgate, 2009 [1981]), esp. p. 8.

values."[16] Terrance Ackerman reasons that given the numerous psychological hurdles to autonomy involved in medical decisions, rather than simply telling the truth, doctors ought to release information "in a way, at a time, and in whatever increments are necessary to allow the patients to effectively use the information in adjusting to their life plans," for example, "emphasizing a positive attitude with the overly depressed or anxious patient, or a more realistic, cautious attitude with the denying patient."[17]

Failing efforts to help patients make autonomous choices, some hold, doctors ought to act against patients' decisions not only with respect to nonautonomous *requests* for treatment, but also with respect to nonautonomous *rejections* of crucial (i.e. life-saving) treatment. For example, Julian Savulescu, who argues incisively for this view, supports forced amputation in cases like the nonautonomous diabetic patient above. He argues that if what we care about is patient autonomy, then we need "to go beyond what people have said, or written, to how they have lived their lives, what they have thought important, what their goals and rational desires are"—in some cases, "[i]f we respect a person's autonomy, it is more important to respect a person's values than satisfy an obstructive actual desire."[18]

I believe the revisionist view above of what a person's right to make medical decisions should look like if it is grounded solely in respect for autonomy is, broadly speaking, correct; when a medical decision involves an irreversible and potentially autonomy-destructive option, such as death, respect for autonomy is compatible with requiring the patient's decision to be consistent with his own aims and values. I say "broadly speaking" because someone concerned with autonomy might object to the conclusions above because it seems absurd to think that doctors, who have no special

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[16] Allen Buchanan & Dan Brock, "The Standards of Competence," in *Biomedical Ethics*, ed. Thomas Mappes & David DeGrazia (New York: McGraw-Hill Publishing, 1996), p. 104.
[17] Ackerman, "Why Doctors Should Intervene," pp. 16 & 17.
[18] Savulescu, "Rational Desires and the Limitation of Life-Sustaining Treatment," p. 211 & 215. The view that we should sometimes treat a person against his nonautonomous will is also endorsed in Miller, "Autonomy and the Refusal of Lifesaving Treatment," p. 8. Though many of us would object to this conclusion on the grounds of a person's right to bodily integrity, as we saw in the discussion on rape and body part expropriation in Chapter 3, respect for individual autonomy gives us no such right.

training in psychology or philosophy, nor necessarily any intimate relationship with the patient, would know better than the patient what is required given the patient's aims and values. Indeed, given the highly personal and complicated nature of such questions, it might be argued that no one can know for sure. It often seems dangerous to appeal to what people "truly want" to justify interfering in their decisions. If our beliefs are fallible and often merely projections of our views about what others *should* want (illusorily confirmed by phenomena like adaptive preferences), then such justifications for interfering do not really protect, but violate, autonomy.

However, while it is reasonable to have such concerns, some degree of epistemological uncertainty is inevitable no matter who makes the decision. It seems implausible to insist that a person always knows best which choice coincides with his own aims and values (after all, closeness to a situation may heighten psychological hurdles). If we are concerned with individual autonomy, then we should safeguard attacks on the value due to epistemological errors, whether coming from others or from the person himself. To minimize the worries raised above, we could, instead of relying solely on doctors, assemble a panel of psychologists, philosophers, and intimate associates of the patient, who would be in the best position to ensure that any critical and irreversible decision made by the patient is truly autonomous. We might also imagine a computer program being invented in the future which plugs into a person's brain via electrodes to analyze whether a person's decision coincides with what he truly wants. A concern for individual autonomy does not have the normative resources to protect against instituting such mandatory tests as a condition for respecting personal choice, at least when it comes to decisions, like death, where a nonautonomous choice would profoundly and irreversibly sabotage the person's autonomy.[19]

[19] Autonomy theorists sometimes distinguish between the *ideal* of autonomy and the *right* to autonomy. For example, Ronald Dworkin notes at one point that we "must distinguish between the general point or value of autonomy and its consequences for a particular person on a particular occasion. Autonomy encourages and protects people's general capacity to lead their lives out of a distinctive sense of their own

Thus, an argument for VAE grounded in respect for autonomy would sanction significant, across-the-board limitations on a person's right against interference from choosing VAE. To wit, for both the healthy and the sick, a person's choice to be aided in dying may be subjected to scrutiny as delineated above, and prevented if it is deemed to be incompatible with the person's genuine life plans and values. In contrast, such paternalistic limitations on the right to choose VAE are incompatible with self-ownership, since the latter is not motivated by an ideal conception of human beings or of the kind of life we can lead. Like many choices we make in life, a decision to die is likely fraught with difficulties, complexities, and likely, even internal inconsistencies. A cancer patient might think that he wants VAE to preserve his dignity when, in fact, what drives his decision is a fear for pain which he represses because such fear opposes everything he stands for and lives by. A woman who requests VAE because she has lost her career might indeed be overweighing near-future losses to distant-future gains. Recognizing self-ownership, it is still open to anyone who thinks such individuals are making a mistake to try to convince them so (since self-ownership is not violated by rational discourse), but the state may not require patients to prove that their choice does not contravene their autonomy before allowing them to engage in VAE with a willing doctor. Self-owners with the Right to Capital and the Right to Manage are entitled to end their lives and to empower their doctors to do so even if their decision makes a mockery of the life they had authored and the values they endorse. Though I will defend more modest restrictions on the right to choose VAE in the next subsection, that a self-owner is not doing what she truly wants is never a sufficient reason for opposing

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character, a sense of what is important to and for them. . . . But the right to autonomy protects and encourages the capacity in any event." See Dworkin, *Life's Dominion*, p. 224. It might be thought that I have confused the ideal and the right here. That is, it might be claimed that though the right to autonomy is grounded in the ideal of autonomy, the right to autonomy protects a person's choice insofar as certain minimal conditions are met, even if the particular choice opposes the ideal. However, we cannot try to make the implications of a right to autonomy more plausible by mere assertion. My whole point is that the value motivating the right to autonomy does not justify protecting a choice that would irreversibly sabotage the value. In other words, if the right to autonomy is grounded in the ideal of autonomy, then the boundaries of the right should accord with the ideal it is meant to protect.

her act with force. Self-owners are entitled to choose for themselves, even if they choose tragically. Thus, self-ownership corrects for an objectionable restriction on the right to VAE that would be sanctioned by an autonomy argument.

2. JUSTIFIABLE LIMITATIONS ON THE RIGHT TO VAE

We have seen that self-ownership justifies a broader right against interference in choosing VAE than respect for autonomy. Nevertheless, as we shall see in this section, self-ownership is still compatible with certain protections and limitations on the right to choose VAE. I will delineate, in the first subsection, justifiable restrictions which serve to protect the agent seeking VAE, and in the second subsection, I will explore possible restrictions based on the claims of those with special relationships to the individual seeking VAE. This discussion will further clarify the scope of a right to VAE given self-ownership, and further demonstrate that the implications of a self-ownership argument for the right to VAE is reasonable.

2.1 Limitations to Protect Individuals Seeking VAE

In this subsection, I will show that a right to choose VAE justified by self-ownership is consistent with some "soft paternalistic" restrictions to protect the agent seeking VAE. I use quotation marks because, as we saw, soft paternalism is generally defined in terms of interference in nonautonomous choices, which I have argued is not in and of itself a legitimate reason for coercive intervention. Nevertheless, self-ownership may, on other grounds, allow for policies that are usually *regarded as* soft paternalistic policies. Below, I will delineate two grounds for "soft paternalism" that would be compatible with self-ownership.

First, self-ownership would permit the state to monitor and, in some cases, prohibit requests for death assistance made by young children and mentally incompetent adults (e.g. the insane and the severely mentally disabled) because self-ownership applies only to minimally competent adults; we do not usually think of young children or incompetent adults as self-owners, with final authority over their lives. Of course, such individuals still have *some* self-determination rights (and for children, these will increase as they gradually come into maturity), but the rights they possess over themselves and their lives are substantially limited compared to self-owners. This restriction on the class of persons to whom self-ownership rights apply is rooted in the theoretical basis for self-ownership presented in Chapter 4. There, I argued that if we fail to treat competent adults as final authorities over themselves, then we fail to afford them the most rudimentary recognition respect—we fail to treat them in accordance with the kind of entity that they are. I pointed out that while it is appropriate to regard certain beings, such as animals and children, as our wards or partial wards, this kind of moral authority is not befitting our standing to other competent adults.[20]

So recognition respect requires that we treat entities according to their properties. This explains why respecting animals does not require granting them, say, the right to vote; such treatment would be inappropriate given their capacities. Similarly, while respecting competent adults requires recognizing them as authorities over themselves, respecting children or mentally incompetent adults is not inconsistent with regarding them as our wards, for it is reasonable to think that for it to be appropriate to regard a person as the final authority over himself, the person must have the minimal rational competence necessary to take on such a role. Thus, children's rights to self-determination increase in accordance with the development of their rational competence,

[20] See Chapter 4, Section 1.1.

and those temporarily insane regain their status as self-owners as soon as they regain their sanity.

For the reasons delineated above, children and mentally incompetent adults do not have the general right which competent adults have to decide to end their lives and to empower others to do so. This is not to say they can never have a right to get euthanasia without state interference, since another consideration may come in to justify such a right. For example, in cases where a child or incompetent adult is suffering irremediably from a grave illness or unbearable pain, *mercy* may ground a duty on our part not to interfere with their pleas to their doctor for euthanasia, or as in the case of those unable to express any desire at all, such as newborns, their guardians' pleas on their behalf.[21] However, since such individuals are not self-owners, they do not have a general right against interference to choose VAE for whatever reasons they have.

Let us consider a second ground for "soft paternalistic" restrictions on VAE that would be compatible with self-ownership, for certain protective measures may be justified even for the class of individuals who are self-owners. I suggest that modest safeguards on the practice of VAE may be justified on a self-ownership account by reference to what self-owners, or minimally competent adult persons, consent to for their own protection. Of course, in a society of self-owners, it is impossible for citizens to give *explicit* consent to each and every law that governs them; if explicit consent were required to justify each law, then it would be impossible for a society to have any developed legal system. Yet, most of us want—and assent to—having a system of laws to protect ourselves, from prohibitions against murder and rape to laws against fraud and negligence to traffic regulations like stopping when the light turns red. While

[21] Granting a right to VAE on the basis of mercy, as opposed to the judgment that death would be in the individual's best interest, is consistent with liberal neutrality, for the appeal to mercy does not require any assumption about the ultimate value of life or the nature of death. See Chapter 2, n. 38 for my discussion of mercy. The demand for liberal neutrality is important not only if we care about autonomy, but also if we accept self-ownership, for a society of self-owners cannot be presumed to consent to a legal framework justified by a conception or conceptions of the good they do not accept.

unscrupulous individuals might object to such regulations, their self-ownership does not allow them to reject measures designed to prevent them from harming non-consenting others. In other words, within a society of self-owners, a system of laws may be justified through *implicit* consent—since it is unrealistic for citizens to explicitly approve or veto every law that governs them (even indirectly through their elected representatives, since many laws will have been established long before they were born), a law may also be justified by appealing to whether the (majority of) citizens whom the law is meant to protect can be inferred to consent to it, that is, to whether it is reasonable to believe that they *would* explicitly consent to it *if asked*.

Now, this reliance on implicit consent, on what people *would* agree to *if* asked, might appear to go against the grain of what I have been arguing in the previous sections and chapters. Throughout, I have emphasized the importance of *actually* seeking and gaining self-owners' consent prior to interfering with their lives and bodies (as in the discussion of rape), and criticized views which appeal to what people *would* agree to, for example, *if* they chose according to their true desires or consistently with their own conception of the good. However, what my previous critiques opposed were not implicit consent, but models of hypothetical consent that ultimately rely not on consent at all, but on some other value, such as autonomy, in determining whether it is justifiable to interfere in a person's life. In contrast, asking whether it is reasonable to believe that a particular, actual person, as he is (not an idealized version of him) would agree to some measure if explicitly asked is not a matter of hypothetical consent in the sense described above. Implicit—or inferred—consent is a type of actual—rather than hypothetical—consent; it is to be contrasted with explicit consent, which is another type of actual consent.

It is sometimes sufficient to gain self-owners' implicit consent in situations where the process of gaining explicit consent is impracticable and even undesired by the

people interfered with. As I argued above, the legal system that governs an entire society of individuals across generations belongs to this class of situations. Even certain circumstances of sexual relations belong to this class: While I have rejected the validity of invoking hypothetical consent (e.g. is it what she *truly* wants?), implicit consent is sometimes sufficient for making sexual contact permissible. For example, long-term spouses do not usually seek explicit consent each time they have sex. Instead, each spouse often infers consent from the other's actions or, sometimes, inactions—that is, each spouse infers from the other's non-verbal cues that the other would explicitly consent if explicitly asked—and insofar as the inference is reasonable, the implicit consent is sufficient to make the sexual contact permissible; we do not regard it as a breach of self-ownership every time spouses have sex without explicit, verbal consent.[22]

So certain legal restrictions to protect VAE recipients may be justified on a self-ownership account if it is reasonable to infer that minimally competent adults would accept them for their own protection if asked to approve or veto such measures. A restriction that may be justified on such grounds is the legal stipulation of informed consent—the legal requirement, in certain situations, for merchants and service providers to present all relevant information to buyers and service recipients, and for the latter to sign a multitude of forms to verify that they have been properly informed. In making large purchases, such as cars or houses, informed consent is ordinarily required for a transaction to be considered legally valid, and while the process may be tedious, consumers do not usually consider such a policy as a violation of their rights. This

[22] In recent years, many women's rights supporters have advocated for explicit consent (sometimes called *affirmative consent*) as the standard for consensual sex across college campuses. They argue that lack of protest is *not* valid consent; rather, an affirmative, verbal "yes" must be gained for such sexual relations to be considered truly consensual, rather than rape. Whatever we think of this view, it is not an attack on the perspective that implicit consent is sometimes valid consent. Rather, the view here is that in situations of casual relationships between barely-of-age individuals, which is the circumstance under which sex often occurs in college settings, consent cannot reasonably be inferred through inaction, since lack of protest often reflects not consent, but fear or something else. That is, given the particular circumstances in question, implicit consent is not practicable—it is not possible to infer consent through non-verbal behavior here. This is not opposed to the view that under other circumstances (e.g. sexual relations between loving, long-term spouses), implicit consent can be practicable and valid, since action/inaction can reflect consent.

suggests that competent adults *want* and *assent to* a policy of informed consent to protect their large transactions from fraud, negligence, and the like. Similarly, it is reasonable to think that, if presented with the option, competent adults would authorize the legal protection of informed consent for the practice of VAE—to ensure that doctors supply them with the relevant information and the procedure is free from negligence and fraud. I believe a basic legal framework for protecting VAE seekers from unconsented-to harm by others may be justified in this way.

Such a rationale may even justify certain modest and waivable restrictions designed to rein in a VAE seeker's own decision, for many competent adults would want to have an insurance policy in place to prevent, for example, their mistakenly getting VAE during a drunken night out or a fleeting fit of depression. The notion of a "social insurance policy" is suggested by Gerald Dworkin, who argues that "since we are all aware of our irrational propensities, deficiencies in cognitive and emotional capacities, and avoidable and unavoidable ignorance, it is rational and prudent for us to in effect take out 'social insurance policies'" to protect ourselves, particularly with respect to far-reaching and irreversible choices.[23] Now, the kinds of paternalistic interferences Dworkin believes to be justified by a social insurance scheme is too broad given self-ownership, for he claims that restrictions are justified insofar as they are "what *fully rational individuals* would accept as forms of protection."[24] In his discussion, he suggests that by "fully rational individuals," he means fully autonomous individuals.[25] Such hypothetical consent makes sense if our right to choose is grounded in respect for autonomy, but if it is grounded in self-ownership, then restrictions must be justified not by what fully autonomous individuals would accept, but by what *actual* self-owners do or would accept.

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[23] Dworkin, "Paternalism," p. 78.
[24] Ibid. Emphasis added.
[25] Ibid.

Nevertheless, the notion of a social insurance policy may justify certain modest and waivable restrictions on our choices for VAE. For example, given that "we are all aware of our irrational propensities, deficiencies in cognitive and emotional capacities, and avoidable and unavoidable ignorance," with respect to a decision where a misstep would cause us to lose everything, it could be argued that most minimally competent adults would authorize a short, requisite "cooling off" period before requests for VAE may be carried out. Of course, given self-ownership, a particularly impetuous individual should be able to decline this and any other mandatory protection for herself, for example, by signing a waiver once she becomes a legal adult. As a matter of practicality, if the protective measure in question, such as a short waiting period, is something which most competent adults within a society would authorize, then it would be reasonable to institute the policy with an opt-out mechanism. We could also envisage stronger protections that only a minority of individuals would authorize—say, a suicide board consisting of professionals and people chosen by the individual whose approval is required. More idiosyncratic policies like these ought not be generally instituted, but made available to citizens via an opt-in system. Much like how people today fill out advanced directives, people might fill out legally-binding directives instructing others how they should be treated should they ever seek VAE.

As the discussion above shows, a self-ownership argument for the right to VAE does not leave us without any safeguards on the practice of VAE. The recognition of self-ownership is consistent with reasonable "soft paternalistic" policies, for example, robust protections for vulnerable individuals like children and incompetent adults. It is also compatible with modest protections for competent adults, including informed consent, waivable waiting periods, as well as various other insurance measures which self-owners could choose for themselves. This suggests that contrary to what might be thought, self-ownership does not lead to a dangerous and implausible understanding of

the moral right to choose VAE. Indeed, the restrictions compatible with self-ownership are clearly more morally desirable than those compatible with autonomy. For on my account, various protective measures are still available to citizens, but for competent adults, the choice whether or not to be reined in by them is kept, as it should, squarely in their own hands.

2.2 Limitations to Protect Others

To further elucidate the scope of the right to VAE on my view, I wish now to explore possible limitations on the right based on considerations of those other than the person seeking VAE. Recall that it is widely accepted that self-ownership may justifiably be limited by the duty not to harm others: that my arm belongs to me does not give me a right to gratuitously swing it into your face.[26] At this point in the discussion, it is necessary to note that the terminology here is somewhat misleading, for we do not have a duty against causing any and all harms to others, and certainly not in the sense that could impinge on our rights. This would be implausible.[27] Since no man or woman is an island, every action we take is likely to have some ripple effect on the people around us—some positive and some negative. For example, my choices about where to live, what career to have, whom to marry, and so forth all have the potential of causing significant harm, both psychological and concrete, to those around me—say, a parent whose biggest dream is that I follow in her career path or an ex-boyfriend whose life is made worse by my choosing to marry someone else. Yet, I have no duty to them not to cause such harm—that is, they have no right against my doing so. Certainly, the fact that they would be harmed is not in and of itself sufficient to limit my right to make

[26] See Chapter 3, Section 1.2 for my delineation of the standard justifiable constraints on self-ownership.
[27] As Peter Jones notes of Mill's Harm Principle (the principle that individual liberty may be restricted only to prevent harm to others): "Mill's principle indicates which actions are eligible for restriction rather than which, all things considered, ought to be restricted . . . ." See Jones, *Rights*, p. 141.

such self-regarding choices free from others' interference. In parallel, while a person who decides to die is likely to cause harm to those around him, both by causing grief and by making some people's lives worse off for not having him in it, there is no general right against being harmed by others' decisions; the fact that others would be harmed is not in and of itself sufficient for limiting a self-owner's right to choose to die.

It is more accurate to say that self-ownership rights may be constrained not by a duty not to harm, but by a duty not to cause *wrongful* harms—that is, harms *which violate others' (claim) rights.*[28] That an act causes the kind of harm which another person has a claim right against would, by definition, alter a self-owner's original *liberty right* to act (since to have a liberty right is to lack any duty corresponding to the right of another; it is to be free from another's claim right).[29] More importantly for us, that an act is a violation of another's claim right would also, in almost all cases, circumscribe a self-owner's original *negative claim right* to do what he wants with himself. As we shall see below, a self-owner's claim right against interference is not always defeated even by a rights-violating harm. Nevertheless, if we want to know whether, on a self-ownership account, the negative right to choose VAE may be limited by harm to others, a good place to start would be to look at harms which are rights violations, since the latter is usually a conclusive ground for circumscribing a person's general claim rights against interference.

In Chapter 3, I argued that self-owners have a general liberty right to choose to end their lives—that is, others in society generally lack any claim right against their doing so.[30] However, it might still be the case that, through voluntary commitments self-owners make or special relationships they form, *particular* people in self-owners' lives hold special claim rights against being abandoned by them. Below, I will assess

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[28] This leads to the question whether the notion of harm adds anything here. Is not the duty not to harm simply the duty not to violate others' rights? I will not pursue this question here.
[29] See Chapter 3, n. 21 for Wesley Hohfeld's distinction between claim rights and liberty rights.
[30] See Chapter 4, Section 1.2.

three categories of individuals within a person's life who are most likely to be harmed *in a rights-violating way* by a person's decision for VAE—namely, spouses, dependent children, and elderly parents—to see whether such harms may set a limit on a self-owner's right to choose VAE without state (or other) interference. This is an important question, since many adults will have one or more of the relations above. I will show that while, in most cases, the harm caused to spouses and elderly parents by a decision for VAE constitute moral wrongs, only the harm it causes dependent children may set a limit on a self-owner's moral right to choose VAE without interference.

First, when two people agree to join their lives together in matrimony, they voluntarily assume special obligations to one another, granting one another rights to the performance or forbearance of certain actions. For example, whereas a single, unattached adult is at liberty (i.e. has a liberty right) to move wherever he desires, take up or not take up whatever job he wants, and so forth, if the same adult gets married, he now gains obligations to his spouse—insofar as a decision affects the couple's *joint life*, his spouse possesses a right to have a say in it. Moreover, if a person deserts his spouse, then it seems clear that he breaches a central tenet of the marital contract, which involves an abiding commitment to remain together and to not abandon one another. That is, a spousal deserter appears not merely to harm his spouse—by unilaterally breaking a mutual agreement, he appears to harm her in a rights-violating way. It seems at least plausible to say that there is no moral right to spousal abandonment. But if so, how can a person have a moral right to abandon his spouse *by choosing to die*? Perhaps a married person's right to choose VAE is contingent on spousal consent, which is required to release him from his obligation to his spouse.

To assess this question, we need to distinguish between two ways that marriage can produce moral obligations and rights: the first is through the contract involved in the legal institution of marriage and the second is through the covenant implicit in the

social institution of marriage. First, marriage is in part a legal contract that accords a couple specific benefits and obligations. By accepting this legal contract, one *morally* binds oneself to fulfill the terms of the contract—one gives one's spouse a claim right to its fulfillment which restricts one's original claim right to act without interference. Now, in many countries, the legal institution of marriage confers many benefits (e.g. tax breaks, immigration preferences, hospital visitation rights, etc.), but is surprisingly sparse in terms of the specification of obligations and rights which spouses hold towards one another. For example, vows traditionally associated with marriage (e.g. pledges to remain together "for better, for worse, for richer, for poorer, in sickness and in health" and the like) have no legal force. In most countries, it is not against the law to desert one's spouse. In England and Wales, a spouse who has been forsaken may file for divorce, so abandonment gives her a right to unilaterally dissolve the marital contract, but the marital contract does not confer to her a right to non-abandonment *per se*—she may not, for example, appeal to the state to detain her fleeing husband or to impose a fine on him until he returns. Indeed, English and Welsh law allows a spouse to not only unilaterally separate, but also to unilaterally end a marital contract without the other having acted in any contract-negating way (i.e. a person may obtain a divorce without spousal consent by living apart for five years).[31] As this discussion suggests, marriage, as a legal contract, is much weaker than the unwavering commitment traditionally associated with matrimony. A person who consents to the legal terms of marriage does not morally commit to non-abandonment, since there is no such term. Thus, a person who abandons his spouse by choosing VAE does not violate any spousal right gained through the legal contract of marriage.[32]

[31] Matrimonial Causes Act, 1973, c. 18.

[32] We could imagine a couple signing a special marital contract, like a prenuptial agreement, which prohibits any act of voluntary abandonment, or perhaps suicide or VAE specifically. In such a case, if one spouse seeks VAE, she *would* violate her spouse's moral right by breaching the terms of the contract, and it would be morally permissible for the state to prohibit her request for VAE on her spouse's behalf.

But, as I mentioned, there is a second route through which marriage creates special obligations and rights between spouses. To wit, marriage is not only a legal institution; it also involves non-legal, moral commitments made by partners to one another. This may come in the form of solemn vows declared in the presence of witnesses in a wedding ceremony. But even absent explicit pledges, marriage is a social institution imbued with shared meanings. Relevant for us, in most cultures, marriage is understood as an enduring commitment between two people to remain together and to not abandon one another. Such a covenant may be altered by mutual understanding (e.g. a couple might agree beforehand that theirs will be a marriage of convenience, and either person is free to leave whenever he or she prefers it). But absent any discussion, if someone marries me, it is reasonable for me to believe that this person has made a solemn pledge to remain by my side through life.

Now, it might be argued that the social contract of marriage, as embodied in traditional vows which unite couples "until death do us part" or for "all the days of my life," is not contravened by abandonment *through death*, since the commitment of partnership is only for a lifetime. However, this would be a perversion of the social meaning of marriage. Death is accepted as the end of a union because it is inevitable; it is not meant as a loophole for getting out of one's obligations to one's spouse. People who get married typically understand themselves and their partners to be making a commitment not to voluntarily abandon one another. If I enter into a marriage, I expect that, absent exceptional circumstances such as unexpected death, the person whom I marry will be the one I share the remainder of my life with and with whom I will grow old. I forsake other opportunities (e.g. other romantic relations, alternative lifestyles, possibly alternative careers) for the sake of this reciprocal commitment. If my spouse then unilaterally decides to desert me at the age of forty, whether by fleeing, filing for divorce, committing suicide, or getting VAE, assuming that I have not breached any

other marital vows (e.g. fidelity, love, etc.), my spouse violates my reasonable expectation, in virtue of matrimony, of life companionship. It is not merely that my spouse treats me badly, but that he violates a moral right I have in virtue of the mutual commitment that has been made. I have been harmed in a rights-violating way.

So a married person who gets VAE without a spouse's consent violates the spouse's claim right to non-abandonment. There are exceptions to this. If, for example, a married person chooses to die not simply because he tires of life, but because he is suffering from intractable pain and illness, then this weighty reason seems sufficient to trump his spouse's original claim right against abandonment; even if he gets VAE without his wife's consent, he does not, all things considered, wrong his wife. I will explore considerations which may override a person's non-abandonment obligations in the discussion on children's rights, but I will not pursue this here, for we shall see that although married people generally violate their spouse's right against voluntary abandonment by choosing to die (they have no liberty right to do so), they still retain a claim right against interference in making this choice; that is, even the married man who wants VAE simply because he tires of life has a right to choose VAE without state interference, even while simultaneously violating his wife's right to non-abandonment. For although we do not usually have a right against interference to violate another's rights, it is not always the case. In some cases, a person may have a negative claim right to refuse to provide what another has a positive claim right to receive. Such a statement might appear odd, but it follows when a particular claim right does not justify the use of coercion to ensure its fulfillment.

To see this, consider an example where a wife leaves her husband for another man. It is reasonable to hold that the wife violates her husband's claim right to fidelity and non-abandonment (she has no liberty right to do so). But it is a further question what it is morally permissible for the husband to do to enforce his claim right to fidelity

and non-abandonment from his wife. After all, we would not think it right for him to physically prevent her from leaving, for example, by locking her inside the house and allowing her to go out only with a tracking device (this would be regarded as "false imprisonment"). Nor would it be morally acceptable for the state to enforce the husband's claim right on his behalf, for example, by issuing a warrant for the wife and imprisoning her if she refuses to return, or blacklisting her at border control and prosecuting anyone who abets in matrimonial desertion. It is not only that such practices would be costly or impractical; it is that despite the fact that the wife violates her husband's right, the use of force to prevent this *would violate or wrong the wife*. That is, the use of coercive force is inappropriate for enforcing the vows implicit in matrimony, perhaps because it cannot be done without breaking other marital vows (e.g. love, understanding, etc.). Thus, a person has a negative claim right against others compelling her to fulfill the obligations she has in virtue of the non-legal marital pledges she has made, even though her spouse has a moral right to their fulfillment. So if a married person requests VAE against the protests of his spouse because he tires of the incursions of middle age, he violates his wife's right to non-abandonment, but he nevertheless retains his negative claim right to choose to die, for since others have a duty to forebear from coercively enforcing non-legal marital promises, the state may not, on the basis of marital desertion, prohibit him from getting VAE on his spouse's behalf.

Let us consider a second category of people to whom we might have duties which set a limit on our right to choose VAE without interference: dependent children. Parents have a duty to their children to take care of them, and to not abandon them for purely self-regarding reasons.[33] For example, a parent does not wrong his child if he

[33] The precise delineation of what constitutes a moral parent—a person who bears the primary duties to a particular child—is a matter of debate. There are genetic accounts, gestational accounts, causal accounts, and intentionalist accounts, as well pluralist accounts which combine different elements of each. See, e.g., discussion in Tim Bayne and Avery Kolers, "Toward a Pluralist Account of Parenthood," *Bioethics*

leaves the child to be raised by another (e.g. grandparent or spouse) in order to financially provide for the child, or if he transfers his parental role to another altogether (as through adoption) because he is in poverty and cannot provide adequate opportunities for the child. But if a parent leaves his child to another's care or puts his child up for adoption simply because he finds parenthood unappealing or, say, because he wants to pursue the career of a rock star, then he does breach his parental duties to his child—and this is so whether or not he sends back monthly child support payments. A child has a claim right not to be abandoned by her parents.[34]

Moreover, I argue, in contrast to a spouse's right to non-abandonment, a child's right to non-abandonment is morally enforceable, such that parents have no general moral right against interference to desert their children. Now, in most countries, it is legal to put one's child up for adoption for purely selfish reasons, but this seems to reflect not our belief in a person's moral right to shirk parental duties without interference, but our concern for children's interests (since prohibition of "selfish adoptions" would likely increase cases of unsafe abandonment or neglect). In fact, in many states in the U.S., it is considered a criminal offense, punishable by imprisonment, to leave one's child even with a consenting adult (e.g. grandparent or spouse) with the intent to cease contact with the child.[35] In contrast to the coercive enforcement of matrimonial non-abandonment, such a policy does not seem *morally* objectionable.

17, no. 3 (2003). Each account comes with its own weaknesses. For example, if genetics is what matters, then a man whose sperm is stolen or a woman who is forcefully cloned would hold the primary parental responsibilities for the resulting child. If gestation is matters, then in surrogacy, the woman who carries the child has the primary parental responsibilities, and it is unclear how men become parents at all. Yet, if intention is what matters, this seems to absolve parents of accidental, unwanted children of parental duties. My argument does not rely on any particular account. We can conceive of moral parents broadly as individuals who are responsible in some morally relevant way for the existence of a child or have voluntarily accepted the role of parenthood over a child (as through adoption).

[34] Some philosophers deny that children have moral *rights*. See, e.g., Onora O'neill, "Children's Rights and Children's Lives," *Ethics* 98 (1988); James Griffin, "Do Children Have Rights?," in *The Moral and Political Status of Children: New Essays*, ed. David Archard and Colin M. Macleod (Oxford: Oxford University Press, 2002). It would not matter to my argument if we think of children as having, instead of rights, strong interests or moral claims not to be abandoned by their parents, such that this consideration may constrain parents' right to choose VAE without interference.

[35] E.g. Code of Ala. § 13A-13-5 (2006); Cal Pen Code § 271 (2007); 11 Del. C. § 1101 (2007); HRS § 709-902 (2006).

Whatever we think of its effectiveness (after all, someone who wants to desert his child will not likely be a good parent), it does not seem that we *wrong the parent* by using force or the threat of force to compel him to fulfill his basic parental duties. The wrongful harm caused to a child by desertion sets a limit on a parent's self-ownership rights to non-interference. After all, unlike the spouse deserter, the child deserter cannot complain that the use of force on him would involve breaking duties or obligations which his child bears towards him. In short, a parent with a dependent child has no general moral right against being prevented from abandoning his child by choosing to die, as through VAE.[36]

There are exceptions to this. First, I mentioned above that a parent who is financially unable to provide adequate care for a child does not breach his parental duties by transferring the child's care to another. We could think of this either as an instance of a parental duty being negated by the inability to discharge it or as an instance in which abandonment is necessary to fulfill the more general parental duty of ensuring the adequate care of one's child. Now, consider that a parent may be unable to provide adequate care for her child not only because of financial poverty, but also because of grave illness, severe disability, and/or extreme physical pain. For example, a parent with terminal cancer suffering intractable pain and needing round-the-clock care might feel that not only is she unable to take care of her child, she is taking time and resources away that could otherwise be spent on the child, such that despite the trauma that would be caused by her death, an earlier death would be better for the child overall. A parent who seeks VAE under such circumstances cannot be said to be shirking her duties to her child. She retains her moral right to choose VAE without interference.

[36] This conclusion also leads to a qualification of the statement made in Chapter 4, Section 1.2 that individuals have a moral right to act recklessly with their own lives, for example, by doing daredevil stunts, smoking, working themselves to the bones, etc. While childless individuals have such a moral right, parents with dependent children do not, in virtue of the right their children have to parental care.

There is a second kind of case in which the parent of a dependent child may retain her original negative right to choose VAE. For it cannot be that only the child's rights and interests may be taken into account. Consider again the cancer patient above who is suffering unbearable and interminable pain—even if her death were *not* in her child's overall interests, it seems that, all things considered, we ought not hold such a parent to her duty to be present for her child's care. For she has an exceptional and sufficiently weighty reason for shirking her duty; it is ultimately a *justifiable infringement* of the child's right to non-abandonment. This parallels Joel Feinberg's case of a hiker who, after encountering an unanticipated blizzard, breaks into an empty, private cabin. As Feinberg suggests, the cabin owner's property right against trespass is trumped by the weightier consideration of the hiker's survival, such that it is ultimately a justifiable infringement of the cabin owner's rights.[37] It would be appropriate for both the parent and the hiker to express regret and apologize for their acts, but others have a duty to them not to prevent them from so acting. So a parent suffering unbearable and untreatable pain has, based on purely self-regarding reasons, a claim right against others not to be prevented from infringing her child's right to non-abandonment.[38]

This line of reasoning seems to widen the possible grounds for justifying a parent's right to get VAE without interference. For if irremediable *physical* pain is sufficient to override a parent's duty of non-abandonment, then irremediable *psychological* pain may do so as well. After all, for people who suffer severe clinical

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[37] Joel Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," in *Medicine and Moral Philosophy*, ed. Thomas Nagel Marshall Cohen, and Thomas Scanlon (Princeton, N.J.: Princeton University Press, 1981), p. 233.

[38] Some may prefer to say that children simply have no moral right to non-abandonment *under this circumstance* (it is a *prima facie* right or a strong moral claim). For the full factual specification view of moral rights, see Judith Jarvis Thomson, "Self-defense and Rights," *The Lindley Lecture* at University of Kansas (1976). If children have no moral right to non-abandonment when their parents suffer irremediable and unbearable pain, then such parents would retain not only a negative claim right, but also a liberty right, to abandon their children (they have no duty not to do it under this circumstance). I will not pursue this question here. Offhand, it seems to be a better description of a spouse's moral right to non-abandonment: a spouse has no moral right at all against being left behind *in the particular circumstance* in which the other spouse is suffering a grave illness or irremediable pain (it is not that the spouse has a moral right that his other half stays under this circumstance, which his spouse justifiably infringes). This makes sense with respect to marital obligations and rights because matrimony is meant to be an equal partnership (in contrast, the moral relation between parent and child is more asymmetrical).

depression, life may be just as painful and unbearable as for people enduring physical pain. Consider the film *The Hours,* which depicts a mother who suffers from an unrelenting depression that renders her life hell on earth. After a failed attempt at suicide, she ultimately leaves her child and spouse another way—by fleeing to Canada and starting a new life. Though she wrongs her child by deserting him, given the exceptional circumstance, her act does not seem altogether unjustifiable. All things considered, it seems that, just as with the cancer patient, the extreme pain and suffering she would have to endure in order to continue caring for her child justifies her right to hand over her child's care to another. Now, empirically speaking, it may be that clinical depression applies to most cases where an individual wishes for death, since anyone who despairs of life will likely be diagnosed with depression.[39] However, according to my argument, the depression must be *irremediable*. After all, a person may not cite physical pain as a justification for failing to meet her parental obligations if she is unwilling to take painkillers. Similarly, a parent citing severe depression as a reason for VAE may be required to undergo psychiatric treatment, for if her depression is treatable, then she has no exacerbating consideration to be relieved of her duties.

In conclusion, parents with dependent children lack a general right to choose VAE without interference; they may not choose to die for whatever reason they have. Nevertheless, parents with dependent children may still have a right to choose VAE without interference if they can show that they are either unable to take care of their children or if they have a particularly weighty self-regarding consideration that justifies infringing their children's right to non-abandonment. On these grounds, parents with underage children retain a right to choose VAE if they have a grave and incurable illness, severe disability, or unbearable and untreatable physical or psychological pain.

[39] See my discussion of the relationship between clinical depression and death wishes in Chapter 1, Section 3.1.

Finally, let us consider whether similar restrictions may be placed on individuals on the basis of their duties to care for elderly parents. Though I mentioned before that the distress caused to parents by their adult children's life choices is insufficient to preclude the latter's right to make such choices, parents may have a right to the provision of care from their adult children in old age, just as children have a right to the provision of care from their parents while young. Now, in modern Western societies, it does not seem that people generally recognize any moral duty to be physically present to care for elderly parents. Indeed, in contrast to legally-mandated child support, there is not even usually an enforced legal duty to provide financial support for indigent elderly parents. However, I believe this attitude reflects a major moral failing in our society. Though parents are not necessarily owed anything by their children in virtue of genetic linkage, parents and guardians who have sacrificed and taken good care of their children do not deserve to be abandoned by them in old age, left to fend for themselves financially, or tended to by paid strangers in nursing homes. Children owe *a duty of gratitude and reciprocity* to parents who have cared for them during their dependent, initial stages of life to return the care when their parents are in the dependent, final stages of life. But if so, then should the narrow right to choose VAE applying to parents with young children also apply to adults with aging parents? This would have a major impact on my thesis, since most adults will have at least one parent who is still alive and expected to live until old age.

However, I argue that although children have a solemn moral duty to repay the love and care they have received from their parents, *parents do not have a moral right to full reciprocity.* Consider a parent who documents every expense she incurs on behalf of her child and requests reimbursement once the child is grown, or a parent who demands that his child give up her career to care for him in old age as he had sacrificed his career to take care of her. It is clear that such people are sorely mistaken about what

it means to be a parent, for a parent's obligation to care and provide for a child is not conditional on later repayment. Children do not ask to be brought into this world, and so those responsible for their existence, and anyone who subsequently assumes responsibility for them, owe them the provision of care and support. Parents and guardians do not have a right to full repayment, just as a neighbor who does me an unsolicited though welcomed favor may not then demand that I repay him in kind, even if I have a duty of gratitude and reciprocity to do so.[40]

So absent exceptional circumstances, like those outlined above for overriding a parent's duty of non-abandonment, a person who fails to care for her parents in old age fails to meet her duty of gratitude and reciprocity to her parents. Yet, even when this duty is breached, it is not a duty which corresponds to a claim right on the part of her parents. Just as elderly parents have no moral right to appeal to the state to prevent their children from abandoning them by moving across the world, they have no moral right to appeal to the state to prevent their children from abandoning them through VAE. Adults with living parents may well harm their parents by choosing to die, but they do not do so in a rights-violating way. They retain their self-ownership right to choose to end their lives when and how they wish, even if what they choose involves the morally shameful and undutiful act of deserting their parents.

In this section, I have explored how people's general right against interference from choosing VAE, justified by self-ownership, might be modified by special relationships a self-owner forms throughout her life. I assessed three categories of individuals who might be harmed in a right-violating way by a person's choice for VAE to see if any of them may constrain the person's right to choose VAE without interference. We saw that adults with spouses and/or parents retain the general negative right to choose VAE, even though their choice to do so may run up their moral debt

[40] See this example in Jones, *Rights*, p. 206.

sheets in various ways. Absent exceptional circumstances, those who choose to die without spousal consent violate their spouse's moral right against voluntary abandonment (they do not have the liberty right to do so), and while those with parents do not act in a rights-violating way, they nevertheless commit moral wrongs. This means that the general self-ownership right to choose VAE for whatever reason one has comes with a moral price for most people (since most adults have, if not spouses, then at least one living parent who will one day need care). But this should not come as a surprise; I have already noted that a self-owner's general authority to choose what to do with his own person and body does not entail that he is free from moral blame for his choices. Ultimately, we found that only the harm caused to dependent children may constrain a self-owner's right to choose VAE. A child's claim right to parental non-abandonment may justify the use of coercive force on the child's behalf, such that parents with dependent children do not have the general right they had before to choose VAE without state interference; they have such a right only under exceptional circumstances. This conclusion shows that a self-ownership account of the right to choose VAE is compatible not only with reasonable safeguards to protect the person seeking VAE, but also with reasonable other-regarding constraints.

3. A RIGHT TO THE PROVISION OF VAE

I wish to further fill in the conclusion of my self-ownership argument for the right to VAE. Thus far, I have argued that, with the exceptions delineated above, self-ownership justifies a general right against interference when people get VAE from a willing doctor. But do people have a right to the *provision* of VAE from an *unwilling* doctor? That is, does a doctor have a duty to provide VAE to any competent person who requests it within the limits set out above? As I noted in the Introduction, most proponents of VAE insist that the right to choose VAE is only a right against

interference. As Ronald Dworkin et. al. emphasize, "The right in question… is only a right to the help of a willing doctor"—patients "have no right to compel a doctor to assist them."[41] Dan Brock explains that "physicians too are responsible agents whose moral and professional commitments sometimes will justify an unwillingness to follow patients' wishes."[42] It might be thought that given the basis of my argument for VAE, I would have to agree. After all, self-ownership justifies duties against intervening in what people consent to, not duties to provide them with what they want. It might seem obvious that since doctors are self-owners as well, they have the right to decide whether or not they wish to collaborate in their patients' aims. However, in this section, I will argue that we need to dig deeper into the institutional structure of physician authority, and, in particular, their authority over the system of prescription medication. I will show that once the basis of such authority is unpacked, it becomes clear that, given certain qualifications, self-ownership justifies a right to be provided VAE by a doctor.

To begin, it is important to clarify the following: when a person goes to a doctor asking for VAE, what, precisely, is the person asking the doctor to do? In the majority of cases, a person is asking the doctor to write a prescription for lethal pills. In exceptional cases, where a person is not physically able to take or swallow pills, a person is asking for both the prescription *and* administration of a lethal intravenous injection. But even in the latter case, the doctor's central role in VAE, I argue, is the prescription of medication. For unlike, say, the performance of surgery, the insertion of an intravenous needle does not require special medical expertise—even recreational drug users are often proficient at it. If the legal prohibition on VAE were removed, a person unable to perform the action herself could enlist a friend or family member or hire an assistant through a specialized company to administer the injection. The reason

[41] Dworkin et al., "Assisted Suicide: The Philosophers' Brief".
[42] Brock, *Life and Death*, p. 4. One exception to this general trend is Frances Kamm, who offers an argument for a doctor's duty to provide VAE in the particular case where a patient's physical pain makes death in his best interest. See Kamm, "Ronald Dworkin on Abortion and Assisted Suicide," pp. 239-40.

why a person wanting VAE must seek out a doctor at all is that in modern states, doctors are the final arbiters over other citizens' access to potent drugs—without physician authorization, a person would not be able to go to a pharmacy and legally purchase potent drugs like those necessary for VAE. In short, when a person goes to a doctor requesting VAE, what is asked of the doctor is either *solely* the provision of a drug prescription (as in the request for lethal pills) or *centrally* the provision of a drug prescription (as in the request for a lethal injection).

In modern society, the system of drug prescriptions—by which I mean the institution in which a designated class of drugs is available to consumers only with authorization by a physician—is rarely questioned, except in a piecemeal fashion. Some people might ask whether a particular drug should belong to the class of restricted substances or whether medical professionals other than doctors (e.g. nurse practitioners, physician's assistants, etc.) should also have the authority to write scripts. But there is no debate in society or in the medical ethics literature about whether and why doctors have the moral authority at all to prevent others from buying a certain class of drugs. Yet, it is not straightforwardly clear why this is so. After all, the drugs in question do not belong to them. Presumably, they are owned by pharmaceutical companies, which are in general happy to sell their products to consumers without additional restrictions. Within a society of self-owning agents, why do doctors have the moral power to alter others' rights to acquire certain drugs without interference?

My claim is not that the institution of drug prescriptions is unjustified. As I acknowledged in Chapter 1, understanding the rights and duties of the medical profession may require analyzing its institutional role to assess its point and function within society.[43] In order to answer the question of whether physicians have legitimate power over prescription medicine, we must ask whether there is a good reason for

[43] See Chapter 1, Section 4.2.

having such an institution. For we may find that the system of drug prescriptions serves a certain purpose or purposes in the organization of a society, such that a community of self-owners would elect to have it to safeguard their own interests.[44] But even if prescription medicine can be justified in this way, it is essential to reveal its precise moral basis, for this determines the legitimate scope of physicians' power over others' access to drugs.

So we want to know whether there are any functions of a drug prescription system that self-owning agents would authorize for their own protection. I propose that we can identify three such functions. First, it is reasonable to suppose that self-owners would accept an institution to prevent others from using potent drugs to harm them. Certain drugs are liable to be used for nefarious purposes. For example, flunitrazepam is an effective treatment for severe insomnia; it is also an effective date rape drug. VAE drugs belong within this category: powdered pentobarbital mixed with juice is as effective for suicide as it is for homicide. It is reasonable to suppose that, in general, minimally rational adults—to wit, self-owners—would want such drugs to be controlled and tracked to mitigate the threat of harm others might cause them. A prescription system allows doctors to serve as gatekeepers, assessing whether those attempting to acquire flunitrazepam really have insomnia, and whether those requesting pentobarbital really intend to commit suicide.[45] Even though some people might oppose this institutional aim (e.g. those who wish to use drugs for unscrupulous aims and those who are innocent but reckless), this would not be an objection to the legal restriction, since self-ownership rights may justifiably be constrained if necessary to prevent wrongful, unconsented-to harms to others.

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[44] See Section 2.1 of this chapter for further discussion of how laws can be justified in a society of self-owners.

[45] It could be argued that psychiatrists are the only kind of doctors qualified to assess whether a person genuinely intends to commit suicide rather than homicide. If so, then it could be argued that only psychiatrists should have the authority to prescribe VAE medication.

Consider a second function of drug prescriptions that a society of self-owning agents would authorize. The effects of drugs on the human body are vastly complex. In particular, drugs which cause multiple and powerful chemical effects may be impossible to use for one's intended aim without expert knowledge of one's precise medical history, proper diagnosis of one's medical condition or conditions, and a comprehensive understanding of drug-drug interactions, contraindicated conditions, dosages, and so forth. For example, while chemotherapy is the most effective treatment option available today for certain types of cancer, if the wrong chemotherapy drug is used given the type of cancer present or if chemotherapy is used when the existing illness is not cancer at all, its effects on the human body would be deleterious and possibly fatal. Or consider blood thinners like warfarin, which are highly useful for treating blood clots, but if used with a family of anti-bacterial drugs called quinolones, could result in severe hemorrhaging and death.[46] Making such drugs available only with a physician's script prevents unintended noxious consequences that can be detected only with medical expertise.

It makes sense to establish such a system not only to preclude our own mistakes, but also to deter others from harming us without our knowledge. For example, it prevents pharmaceutical and other companies from taking advantage of our medical naiveté. Consider a society without a system of drug prescriptions. Suppose I go to the pharmacy for symptoms which, unbeknownst to me, would require further testing to determine the appropriate treatment. If I am lucky, a conscientious pharmacist might advise me to go to a doctor for diagnosis. But I might not be so fortunate. Even with legal requirements on labeling of a drug's effects, because of the complex specialist knowledge required, without medical expertise, I would be left susceptible to exploitation by branders, advertisers, shop keepers, pharmaceutical companies, and so

[46] See "Dangerous Drug Interaction: Warfarin-Quinolones," AMDA, accessed July 26, 2015, https://www.amda.com/tools/clinical/m3/warfarin_quinolones.cfm.

forth, each standing to profit from my use of their products even when they are not the best option for my aims.[47] A system of medical prescription prevents such abuse and provides social meaning, indicating to otherwise unwitting consumers which drugs require physician assessment, from a chemical point of view, for correct usage.

Lastly, self-owners would authorize doctors to deny drug access to individuals whose moral rights to take these drugs may be limited by the state. This function of prescription medicine does not necessarily rely on doctors' special expertise, but instead, hitches onto the other two functions, as a way to make administering the justifiable restrictions on the acquisition of certain drugs more efficient. For example, we saw in the previous section that a state may set certain limitations on citizens' rights to choose VAE without interference—it may deny the general right to acquire VAE from children and mentally incompetent adults, or on the basis of insurance policies justified by implicit consent, like a waiting period and informed consent, or on the grounds that the choice would cause wrongful harm to dependent children. Instead of a complicated system in which people seeking VAE must go to two separate places to get the necessary paperwork to acquire VAE medication—first from their doctors, and then from a separate governmental body—it would make sense for doctors, already needed as gatekeepers of potent medication, to also act as an arm of the state to streamline the process. In this capacity, doctors have the authority to prevent a person from accessing a certain drug on the state's behalf, for example, by refusing to write a script for VAE medication to an individual with dependent children and no extenuating circumstance.

Now, it might be thought that I have missed an important function of prescription medicine. Some might argue that within the organization of society, the specific contribution of the medical institution is to serve citizens' health and welfare,

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[47] Bans on direct-to-consumer pharmaceutical marketing for prescription medication, existent in all countries except the U.S. and New Zealand, seem to reflect this worry. See Barbara Mintzes Peter R. Mansfield, Dee Richards, & Les Toop, "Direct to Consumer Advertising: Is At The Crossroads of Competing Pressures from Industry and Health Needs," *British Medical Journal* 330, no. 7481 (2005).

and the prescription system is a mechanism which secures this end by allowing doctors to authorize or deny requests for potent drugs based on their judgment of a patient's medical interests. According to this view, the social function of the medical profession justifies doctors' authority to ensure that drugs are used only in ways which further health and welfare, and to prevent citizens from accessing drugs for whatever self-regarding aims they choose. However, I have already rejected this view of the end of medicine in Chapter 1, when I rejected the idea that doctors have a social role obligation to always act to advance patients' objective interests, irrespective of patient consent. There, I argued that in a pluralistic society where people disagree about the good life, many people would dispute that the medical system may have no other function besides promoting an objective measure of individual health and welfare.[48] After all, we do not think that plastic surgery falls outside the proper functions of medicine, even though breast enlargement, for example, contributes to neither health nor welfare, objectively speaking. To justify restricting citizens' freedoms by imposing a narrow conception of the medical profession which many people would reject is simply to reintroduce hard paternalism at another level. The legitimate functions of the institution of drug prescription, and its corresponding restriction of citizens' rights, must be those which a society of self-owners would accept, and this rules out grounding physicians' authority over medicine in the requirement to advance patients' objective health and well-being.

So according to my argument, there are three purposes of the institution of prescription medicine that could be justified to a society of self-owners: first, the prevention of potent drugs from being nefariously used to harm nonconsenting third parties, second, the assurance of correct chemical usage (i.e. that the drug used is chemically apt for the user's intention), and third, the administration of any justifiable state limitations on the individual choice in question. On these bases, a doctor has

[48] See Chapter 1, Section 4.2.

legitimate authority to refuse to prescribe pentobarbital to a person suspected of wanting to use it to kill a nonconsenting other, to someone who does not realize that it causes death, or to an individual who the state may prevent from choosing death altogether. Moreover, insofar as at least some of the functions of prescription medicine are to protect consenting individuals from unconsented-to harm, such controls may not simply be waived (e.g. I cannot refuse to get a prescription before buying a drug, since I might use it to wrongfully harm another). What cannot be justified to a society of self-owners is the role of doctors as moral authorities, with the right to preside over which self-regarding aims are appropriate for others to seek through chemical substances.

So the justification of the institution of drug prescription reveals the limits of a doctor's power to alter others' rights to access drugs. If a person wishes to purchase VAE drugs at the pharmacy with the aim of achieving VAE for himself, he is neither attempting to injure others nor using the drug in a chemically contraindicated way, and so, subject to the justifiable limitations on choosing VAE delineated in the previous section, there is no legitimate basis for a physician to block the person from obtaining the drug. A doctor is not at liberty to refuse to provide VAE—that is, to refuse to write a prescription for VAE drugs—say, because the doctor disagrees with the person's decision to die or the person's particular reasons for dying.

It might be asked, what about a doctor's right to self-determination? Just as a patient has a right to choose to die, does not a doctor, who is also a self-owner, have a right to refuse to participate in killing him? But the point of the argument above is that to hold doctors to a duty to write prescriptions of VAE medication for those seeking VAE does not infringe doctors' *self*-determination. For doctors have no *natural* authority to withhold drugs from others; they have the power to control our access to medicine only by our consent, and for specific and limited purposes. Whenever they refuse to prescribe—that is, whenever they prevent us from being able to legally

purchase a certain drug—they actively interfere in our lives. If they do so on the basis of reasons associated with the consented-to functions of their institutional role, then their interference is justified. But if they do so on the basis of other reasons, say, personal disapproval, then their interference is unjustified, and they have a negative duty not to prevent us from accessing the drug, by refusing to prescribe. This analysis is true independently of whether the doctor's practice is public or private, for even in the context of a private practice, the doctor's role as gatekeepers over potent medicine is always a public role, backed by the state and authorized only by the consent of others in society for particular purposes.

In other words, while a doctor's duty to supply VAE looks at first to be a positive duty, once we parse out a doctor's central role in VAE—to wit, the prescription of medication—and the basis of a doctor's authority to control prescription medication in the first place, then it can be shown that a doctor's duty to supply VAE to those seeking VAE stems from a general negative duty not to interfere in others' lives without consent. In writing the prescription, the doctor is not so much participating in killing the patient as allowing the patient to proceed with VAE by not preventing him from legally purchasing lethal medication. As this suggests, the distinction between negative and positive duty does not align perfectly with the distinction between acts and omissions: sometimes, meeting our negative duty not to interfere in another's life requires an act. For example, if a patient indicates that he does not consent to the use of life support in the situation that he falls into a coma, then should he fall into a coma while on life support, a doctor must positively act—by pushing an off-switch or pulling a plug—in order not to violate his duty not to interfere in another's life. Similarly, according to my argument, if a person asks a doctor to authorize his purchase of VAE medication so that he can realize VAE for himself (and not to kill an ex-lover or to cure osteoporosis), and his choice to get VAE does not run afoul of any justifiable state

constraints, then a doctor has a duty to write the prescription to avoid violating his general duty not to interfere in another's life without consent.

What about pharmaceutical companies? Do the makers of pentobarbital, for example, have a right to refuse to sell their drugs to those whose reasons for wanting death they morally disapprove? The answer to this depends on whether pharmaceutical companies are privately or publicly funded, for if they are strictly private entities, then the resources in question belong to the companies' owners or shareholders, who have a right to decide to whom and on what terms they wish to sell their private property. But the more pharmaceutical companies depend on public subsidies or resources, the more the public may legitimately place constraints on them. Now, even within public healthcare systems, pharmaceutical companies are usually privately owned. However, in both public and private healthcare, private pharmaceutical companies always rely heavily on public resources. It is widely understood that the development of pharmaceutical drugs depend critically on basic research—research oriented toward discovering and establishing fundamental scientific principles—which is largely publicly funded, undertaken in government-affiliated laboratories, universities, and so forth. One study traced the development of 25 drugs identified as having the most significant impact on medical treatment by two leading industry experts between 1970 and 1995 found that "[p]ublicly funded research appears to have been a critical contributor to the discovery of nearly all of these drugs, in the sense that publicly funded researchers made a majority of the upstream 'enabling' breakthroughs such as identifying the biological activity of new classes of compounds or elucidating fundamental metabolic processes."[49] In this sense, the development of drugs relies

[49] Iain Cockburn and Rebecca Henderson, "Public-Private Interaction in Pharmaceutical Research," *Proceedings of the National Academy of Sciences* 93 (1996): p. 12726. The writers do emphasize that the conventional linear model in which the public sector is responsible for basic research and the private sector is responsible for applied research is over-simplified, as there is significant cross-over and interaction. Nevertheless, they reinforce the common wisdom that drug development by pharmaceutical companies depends heavily on public research.

crucially on public funding. Moreover, in recent years, pharmaceutical companies have begun directly acquiring public funding, including government funding, for their own research and development efforts as well.[50]

Since the creation of pharmaceutical drugs hinges critically on publicly financed research, they are not wholly private property—people in society have the right to have a say with regard to the terms of their distribution. It is reasonable to think that a society of self-owners would authorize funding research needed to develop VAE drugs only on the condition that pharmaceutical companies serve the needs of self-owners, such that they may not sell such drugs entirely based on their own discrimination, for example, refusing to sell to those whose reasons for dying they personally reject. In short, given the character of drug development, prescription medication is semi-public, and pharmaceutical companies may be required to sell VAE medication to anyone, subject to the criteria delineated above.

Thus far, I have assumed that the person seeking access to VAE medication is able and willing to pay for it. But does a state have a duty to supply, that is, pay for VAE medication to anyone who asks for it? To answer this question in full would be beyond the scope of this thesis, as it would require first addressing the general issue of the just distribution of medical resources in society—more specifically, of whether there should be a system of publicly funded medical care. Nevertheless, as a contingent answer, I suggest that *given* a system of public medical care, it would be reasonable for the state to provide VAE drugs to those who request it, subject to the justifiable constraints on VAE medication outlined in this and the previous section.

It is true that a public healthcare system expands a doctor's justifiable institutional role. Given publicly funded healthcare, it is reasonable that a society of self-owners would authorize a special body to adjudicate the distribution of scarce

[50] See John LaMattina, "Pharma Continues to Seek External R&D Funding, This Time from the Government," *Forbes* (2013), http://www.forbes.com/sites/johnlamattina/2013/05/23/pharma-continues-to-seek-external-rd-funding-this-time-from-the-government/.

public resources (such as, in the UK, the National Institute of Health and Care Excellence), and to charge doctors with administering the determined policies. In this capacity, doctors may decline requests for drugs by invoking fair distribution, as determined by the appointed body. Thus, under a public system, it might be thought justifiable for doctors to prioritize some requests for VAE over others, since supplying publicly funded drugs to anyone on request may lead to unfair opportunity costs for others. It might be argued that this justifies discriminating between requests for VAE in virtue of need, for example, granting VAE medication to patients suffering intractable pain and/or illness, but not to those who are not.

However, although cost is, in principle, a legitimate reason for denying a person medication within public healthcare, this consideration cannot be brought in to deny drugs for VAE. It is usually agreed that the provision of VAE would result in a net cost *savings* to the healthcare system.[51] This is because the one-off cost of providing and administering VAE medication is fairly modest—substantially lower than the cumulative costs of other medical procedures (particularly at the end of life), all of which would be obviated if a person chooses an earlier death. Thus, individuals' requests for VAE cannot be denied on the basis of fair distribution of resources. Given a public healthcare system, it would be reasonable to expect the state to make VAE medication available to citizens.

In this section, I have argued that people have a claim right held against certain individuals to the provision of VAE. First, doctors have a duty to provide VAE to individuals in the sense that they have a duty to write scripts for VAE medication—their central role within such a procedure—unless it can be shown that the individual in question may be excluded based on the consented-to functions of the drug prescription system. On this basis, a doctor may refuse to write a script for VAE medication if the

[51] See discussion in Ezekiel J. Emanuel and Margaret P. Battin, "What are the Potential Cost Savings from Legalizing Physician-assisted Suicide?," *New England Journal of Medicine* 339, no. 3 (1998).

individual intends to use it to harm a non-consenting other or for aims for which it is not chemically suited, or if the individual may be prevented from choosing death on the basis of the justifiable limitations delineated in the previous section (i.e. the individual is a minor, is mentally incompetent, has dependent children without any extenuating circumstance, or has signed an advanced directive permanently excluding the option). Absent these exceptional circumstances, doctors must provide the prescription, after providing all relevant information, and after a waiting period (unless previously waived). Doctors may not invoke their self-ownership to refuse participation in VAE in virtue of personal disapproval. Second, because pharmaceutical companies depend substantially on public funding for the development of their products, they also have no right to refuse to sell their products based on personal reasons. A society of self-owners can be presumed to consent to funding such research only on certain terms, namely, that such products are used to serve the interests of self-owners. Thus, makers of VAE medication may not refuse to sell their products to anyone with a prescription. Finally, I argued that *if* a society has an institution of public healthcare, then the state should be expected to supply VAE for citizens at their request, since given the low cost of VAE medication, it is implausible that coverage should be curbed by the consideration of fair distribution.

4. CONCLUSION

In this chapter, I have delineated in some detail the right to VAE that is justified by my thesis of self-ownership. I showed that, unlike the argument from individual autonomy, self-ownership grounds a general right to VAE—the right applies to any competent adult, irrespective of whether the person's wish to die is truly autonomous. Nevertheless, such a right is consistent with certain limitations, including modest and waivable soft paternalistic restrictions (e.g. informed consent, waiting periods, etc.) and

restrictions for individuals with certain special responsibilities (e.g. parents with dependent children and no extenuating circumstance). Finally, we have seen that self-ownership justifies not only a right to VAE against government interference, but also a right to the provision of VAE by doctors, in the sense they have a morally enforceable duty to comply with patient requests for VAE, and may not refuse service based on their own discrimination. By detailing the contours of a self-ownership right to VAE, which I believe upon reflection are compatible with our deep intuitions about individual rights and liberties, I hope to have not only clarified the conclusions of my view, but to have buttressed my argument from the perspective of reflective equilibrium.

CONCLUSION

This thesis has defended an individual's moral right to VAE, but has departed fundamentally from the prevailing view in its favor. In this concluding chapter, I will summarize the argument of this thesis (Section 1), call attention to two key lessons to be learned (Section 2), and discuss an unresolved matter warranting further research (Section 3).

1. SUMMARY OF THE ARGUMENT

This thesis began with what I called the Standard View for the right to VAE, which is composed of three tenets. First, it invokes respect for autonomy—respect for individuals' freedom to shape their lives according to their own values and aims. Second, it appeals to the promotion of well-being—it argues that for some individuals, death is in their best interests. Both arguments are regarded as necessary and sufficient to justify the right to choose VAE, such that the third tenet, its conclusion, holds that the right to VAE applies to, and only to, individuals suffering severe illnesses and/or disabilities.

Chapter 1 rejected the Standard View. Because the tenacity of this view relies on the multiplicity of ways in which it can be interpreted (i.e. with respect to the conception of well-being, the weighting between the principles of autonomy and well-being, and the incorporation of professional duties), I dedicated the chapter to systematically assessing each possible interpretation to show that none is logically

tenable. I concluded that the Standard View suffers a trilemma: one cannot uphold all three of its tenets simultaneously without contradicting oneself. More precisely, one cannot affirm the right to choose VAE by proclaiming respect for a person's autonomy (Tenet 1), and at the same time maintain that a person's best interest is also a necessary condition for having the right (Tenet 2), so as to justify a right to choose VAE only for those with serious illnesses and/or disabilities (Tenet 3). Any attempt to reconcile two facets of the argument causes the third to come apart, logically, and so at least one of the three tenets must be given up.

Chapter 2 contended that it is the argument from individual well-being which must be eschewed. Grounding the right to VAE on the claim that certain individuals would be better off dead inevitably violates liberal neutrality by assuming the falsity of certain reasonable comprehensive doctrines. It does so in two distinct ways: firstly, by relying on specific assumptions about the *value of life* that reasonable people disagree on, and secondly, by necessitating a specific assumption about the *nature and value of death*, which reasonable people disagree on. Given this, such an argument must be excluded from the justification of basic rights in a liberal society.

Chapter 3 began to build a self-ownership justification for the right to VAE from the ground up, so to speak. By exploring, in-depth, certain basic intuitions we have about individual liberties, I undermined respect for autonomy and other principles in our thinking about basic moral rights, and showed that recognizing individuals as having proprietary rights over themselves is necessary to explain our irrevocable commitments regarding individual rights to self-determination. Chapter 4 made the case for self-ownership from the top down, by showing that self-ownership is supported not only by our considered judgments about particular cases, but also by a weak, abstract principle we can all agree on: the demand to treat others with recognition respect—that is, with the recognition of them as our moral equals over whom we have

no natural authority. I argued that it is because other principles, like respect for autonomy, are poor interpretations of respect for persons that one can fulfill them and still violate others in intuitively basic ways (e.g. raping them in their sleep and redistributing their unneeded body parts). The upshot of these two chapters is that self-ownership is a fundamental, rock-bottom right to be met before loftier moral values like personal autonomy are addressed. I then showed that, whatever precise conception of self-ownership is ultimately justified, it must include the Right to Capital—which includes the right to kill oneself—and the Right to Manage—which includes the right to empower others to do so.

Finally, Chapter 5 delineated the contours of a right to VAE grounded in self-ownership. First, I showed that relative to an autonomy argument, self-ownership further broadens the scope of the right to choose VAE—it justifies the right not only for those who are healthy, but also for those whose decisions to die are internally contradictory or otherwise mistaken based on their own values. Second, by assessing how an institution of prescription medicine can be justified to a society of self-owners, I showed that self-ownership justifies a right to be *provided* VAE by a doctor. Finally, I outlined certain limitations on VAE that are justifiable on a self-ownership account—both to protect those seeking VAE and to protect others.

The main conclusion of this thesis is that if the moral right to VAE is justified at all, then it is significantly more extensive than is usually recognized. For we cannot invoke the consideration of an individual's well-being with respect to death to constrain the right to VAE *in extremis*. Nor can we invoke the value of personal autonomy to limit healthy individuals' choices for VAE. Finally, we cannot rely on the distinction between positive and negative duty to maintain only a right to *choose* VAE without state interference, for according to my argument, the right against interference includes the right to be provided VAE by a doctor. While this conclusion appears provocative, I

hope to have shown that, upon reflection, it aligns with both our deep intuitions about individual rights and liberties and with our abstract commitment to respect others as moral equals over whom we have no natural authority. As with all philosophical work, this is by no means meant to be the last word. I will count this thesis as successful if it prompts the reader, whether for or against VAE, to reconsider the case we have for the moral right.

2. GENERAL THEMES AND LESSONS

This section discusses two broader implications which can be drawn from the arguments of this thesis: the first is theoretical, concerning the basis of individual rights and the right to VAE, and the second is methodological, regarding how bioethics ought to be approached.

2.1 Theoretical Lessons: The Basis of Rights and the Right to VAE

This thesis might appear provocative for another reason besides its substantive conclusions—namely, its theoretical conclusions regarding the right to VAE and individual rights more generally. In this thesis, I have sought to dismantle almost the entire theoretical basis ordinarily thought to make up the case for the right to VAE—respect for autonomy and promotion of well-being—and in the process of doing so, and in order to build a new case from self-ownership, I have also sought to relegate the significance of these and other moral considerations for understanding individual rights in general. First, most obviously, I argued against taking respect for autonomy as central to grounding rights against interference. I showed in Chapter 3 (Section 2) that while the complexity of the concept makes it appear promising for justifying a wide range of rights, upon closer inspection, it is incapable of grounding very basic rights

against interference. Second, in Chapter 2 (Section 2.2), I warned against justifying basic rights on the grounds of comprehensive well-being judgments—judgments which involve assessing the overall value of people's lives for them or ranking values for them. I argued that in order to respect people as free and equal, basic rights can be justified only by more restricted, partial well-being judgments, which invoke thin, *pro tanto* values without ranking them—and these will have more limited normative weight, for example, as a consideration to support overriding people's self-regarding choices. Third, in Chapter 3 (Section 3.1), I rejected the relevance for determining individual rights of prevailing interpretations of the Kantian dictum to never treat persons as mere means, but always as ends in themselves. I showed that while stricter interpretations prohibit too much, laxer interpretations cannot prohibit what clearly need to be prohibited.[1]

There is another moral consideration whose significance for individual rights I have undercut in this thesis: human dignity. In Chapter 3 (Section 3.1), I argued that respect for human dignity is, in fact, unable to account for basic human rights like the right against rape and the right to bodily integrity—that is, it is unable to explain why we have them. In Chapter 4 (Section 2.2), I contended that respect for dignity cannot be used to reject or restrict self-ownership rights. Now, while the entirety of this thesis and the way in which it argues for the right to VAE might offend many supporters of the right-to-die movement, my attempt to relegate the importance of human dignity for individual rights might be particularly jarring to them. Within the social movement, respect for human dignity has pride of place, as embodied by the slogan "death with dignity," which has come to be identified with the cause. Yet, it is a direct implication of this thesis that not only should the consideration of dignity be demoted in the discussion of individual rights, it must be jettisoned altogether, along with the

[1] It is worth reminding the reader that my criticism applied not to Kant's highly abstract dictum, but to how it is usually conceived. See Chapter 4, Section 1.1.

considerations of well-being and autonomy, from the basis for the right to choose VAE. Because it has been implicitly but not explicitly established, I wish to spend the remainder of this subsection to show why the "death with dignity" rationale for the right to VAE is also invalidated by this thesis.

Consider the two ways in which supporters of the right-to-die movement interpret "death with dignity." First, it is sometimes said that a government which prohibits VAE violates individual rights because it condemns some people to live without dignity. Advocates argue that people at the end of terminal illness or enduring extreme disabilities are often forced to live in states of total dependence, incapable of controlling basic bodily functions and unable to do any of the things we usually think make human lives *human*. They contend that such individuals have a right to choose VAE because they have lives which lack basic human dignity.

This rationale for VAE is rejected by two lines of argument in this thesis. First, I argued in Chapter 2 (Section 2) that talk of lives with or without dignity connotes an objective conception of the good life, as dignity is an objective notion—we think people live with dignity not simply because they live happily or according to their preferences, but because we think their lives have genuine, independent worth. But, as I argued in that chapter, to invoke a specific conception of human good to justify the right to VAE fails to respect people in society as free and equal. Most glaringly, to endorse a right to VAE on this basis is to tell those who are seriously ill or disabled, but who wish not to die, that while their choice to live will be respected, their lives are understood to be so lacking in objective worth that they *warrant* self-chosen death. It is in part because of this implication of "death with dignity" that many disability groups actively oppose the right-to-die movement.[2] Such a justification for the right to VAE fails to respect some individuals within society.

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[2] In 1995, the disability advocacy groups Not Dead Yet and ADAPT wrote a joint amicus brief for *Vacco v. Quill*, in which they noted that the pro-VAE movement is the "ultimate expression of society's fear and

Second, it follows from my discussion of the concept of dignity in Chapter 4 (Section 2.2) that it is simply false to claim that such lives lack dignity. Recall that the most reasonable understanding of human dignity we have takes it to denote a person's great intrinsic worth *qua* person. But if dignity refers to a person's *intrinsic* worth, then the possession of dignity cannot vary according to a person's condition of life: an individual who is unable to turn herself over in bed or who cannot control her bowel movements still possesses great intrinsic worth simply because she is a person. Insofar as one remains a person, one's great intrinsic worth *qua* person, and so, one's human dignity, cannot be taken away, either by acts of nature or by acts of men. Now, what acts of men can do is *violate* human dignity—we can treat others (or ourselves) *as if* they (or we) are beings without great intrinsic value.[3] So we saw in Chapter 4 (Section 2.2) that people violate their own dignity when they regard their own value as fungible with lesser values, for example, when they do daredevil stunts to get on TV. But an act of nature like illness or disability can neither *take away* a person's dignity—her great intrinsic worth *qua* person—nor *violate* her dignity—*treat her* as a being without great intrinsic worth. To continue to live under such conditions is not an affront to human dignity.

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revulsion regarding disability." See Amici Curiae Brief of Not Dead Yet and American Disabled for Attendant Programs Today in Support of Petitioners in *Vacco v. Quill,* the Supreme Court of the United States, No. 95-1858, October Term, 1995. *Vacco v. Quill*, 117 Sup. Ct 2293 (1997). In response to such objections, VAE activists sometimes emphasize that they are not saying *all* severely disabled lives lack dignity—it is only when the disabled person himself believes his condition demeans his life that we say it is an indignity. However, this seems to be nothing more than lip service. If no judgment is being made about the disability itself, why believe *them*, and not others, when they tell us that their lives are objectively not worthy to be lived by a human? While it is plausible that in order to live an objectively good life, the person living it must affirm it, it is not plausible that to live an objectively bad life, the person himself must believe it is bad.

[3] In his dissenting opinion on the legality of same-sex marriage, U.S. Supreme Court Justice Clarence Thomas recently claimed, "Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. . . . The government cannot bestow dignity, and it cannot take it away." See *Obergefell v. Hodges*, No. 14-556, slip op. at 17 (U.S. June 26, 2015) (Thomas, J., dissenting). This statement was widely condemned by liberal progressives, but based on my analysis, Thomas is correct: the intrinsic value of persons *qua* persons cannot be taken away by others. However, the crucial point which Thomas misses is that while the government cannot bestow or take away human dignity, it can certainly *violate* it. This is the real point of those who refer to human dignity when opposing slavery or supporting same-sex marriage, and which he should have addressed.

Consider the second way in which "death with dignity" is interpreted. Supporters sometimes argue that when the government prohibits ill or disabled individuals from getting VAE, it violates their dignity by denying them the *prerogative* to die according to their own determination. So it is not that their condition of life is *inherently* lacking in dignity; the indignity comes in when the government prevents them from making their own decisions about their lives. However, Chapter 3 (Section 3.1) rejected conflating respect for dignity with respect for self-determination. Since people can, and often do, make choices that violate their own dignity, respecting individual self-determination will not invariably protect human dignity; sometimes, it requires allowing human dignity to be trampled, as when we allow the daredevil to play with his life for fame. For this reason, it is misguided to try to ground individuals' self-determination rights in respect for human dignity.

Thus, based on the arguments of this thesis, neither interpretations of "death with dignity" help the case for VAE. Instead, advocates ought to acknowledge that a person's right to choose VAE has nothing to do with protecting human dignity. A person's choice for VAE may reflect human dignity or it may not; the right to choose it is not ultimately about this. According to my view, the government must refrain from interfering with people's decisions regarding their own deaths because we are self-owners with final authority over ourselves and our lives. As such, we have the right to choose for ourselves whether we choose wisely or tragically, virtuously or reprehensibly, with dignity or without. To summarize the general lesson of this subsection, if this thesis is taken seriously, then we must re-examine many of the most commonly held bases for individual rights, and we must ultimately discard almost all of the considerations usually regarded to make up the case for the right to VAE, both within the bioethics literature and in the wider socio-political discourse, including the notion of "death with dignity."

2.2 Methodological Lessons: Principlism and Professional Ethics

Let us turn to a second lesson to be drawn from this thesis. Namely, if my criticisms against the Standard View are valid, then two of the most widely used methodological strategies in bioethics are invalid: principlism and professional ethics. First, as discussed in the Introduction (Sections 2 and 4), the Standard View is connected to the prevailing bioethical methodology of *principlism*, according to which we are to bracket abstract moral theory, and instead, rely solely on uncontroversial mid-level moral principles to determine the conclusion to moral problems. The leading version of this is Beauchamp's and Childress' Four Principles, which takes as its basis four mid-level principles—respect for autonomy, non-maleficence, beneficence, and justice—which are to be balanced *in situ*, as deemed relevant and appropriate, without reference to higher moral theory. This methodology is reflected in the Standard View in the sense that if one starts from this approach, then the Standard View follows—one must apply both respect for autonomy and promotion of well-being to determine individuals' rights with respect to VAE.[4]

Thus, my criticism of the internal incoherence of the Standard View also reveals the pitfalls of this methodology. We saw from my arguments in Chapter 1 that reasoning from within this approach can lead one to shoot oneself in the normative foot, by sabotaging one's own argument from within. In Chapter 1 (Section 2.2), I contended that while value pluralism—the view that there is a multiplicity of important values which sometimes need to be balanced—is a coherent perspective, the issue with simply balancing mid-level principles however seems appropriate in a situation is that it neglects the fact that the logic of certain moral principles precludes us from making whatever compromises we want between them and other moral principles. Respect for

[4] The claim is not that all proponents of the Standard View adhere to principlism. To be sure, Ronald Dworkin, Frances Kamm, amongst others, do not bracket higher moral theory. Rather, any adherent of Beauchamp's and Childress' Four Principles who wishes to make a case for the right to VAE will end up with the Standard View.

individual autonomy, for example, must preclude certain interferences in virtue of an individual's objective well-being. The failure of the Standard View demonstrates that putting blinkers on in order to focus solely on mid-level principles, ignoring abstract moral theory, does not avert controversy—it undercuts one's own argument. Thus, in my own justification for the right to VAE in Chapters 3 through 5, I relied instead on Rawls' methodology of reflective equilibrium: I attempted to test and render coherent our moral judgments at three levels—abstract background theories, mid-level moral principles, and deep intuitions about particular cases. Insofar as my justification for the right to VAE appears more compelling than the Standard View (as I hope it does), it lends support to the view that the reflective equilibrium is a superior methodology for understanding bioethical problems.

There is a second, more specific strategy—a particular method of argument—which is widely used in bioethics, and which this thesis requires to be reconsidered. As discussed in Chapter 1 (Section 4), in determining what it is permissible for doctors to do, theorists commonly invoke the professional ethics of medicine: special codes of conduct which are thought to apply to doctors in virtue of the proper end(s) or aim(s) of medicine. Under the heading of professional ethics, bioethicists commonly invoke traditional principles established within the medical community. For example, the Hippocratic injunction "do no harm," associated with the proper end of medicine in promoting well-being, is utilized to constrain what doctors may do to their patients even with their consent. The lesson to be learned from this thesis is not that there is no professional ethics of medicine—no special moral principles which apply to doctors *qua* doctors—but that the concrete ways in which bioethicists use this concept must be abandoned.

As I pointed out in my discussion in Chapter 1 (Section 4), within bioethics, the strategy of citing the professional ethics of medicine in argument is usually taken as a

given, but its grounds are mysterious. It is said that such principles are rooted in the proper end(s) or aim(s) of medicine, but who or what determines these end(s) or aim(s), and why should doctors be confined by them? A deeper analysis of the normative foundation of professional ethics is needed to understand whether, and if so, in which ways it can bear upon doctors' rights and obligations. In that section, I argued that most purported normative bases for professional ethics are untenable, including those citing internal agreement, the concept of the discipline, and the act of professing. Ultimately, I accepted one possible ground for professional ethics—namely, that which appeals to the special institutional role of a profession. I argued later in Chapter 5 (Section 3) that free and equal individuals would consent to special restrictions and permissions applying to certain professions on the basis of the social benefits they receive and their social functions within the organization of the community as a whole.

Clarifying the grounds of professional ethics gave us a foundation from which to determine which special principles may—*and may not*—be applied to doctors' actions *qua* doctors. For example, I argued that it justifies doctors' special right to regulate access to prescription medicine. Given that potent medication can be used for harm, and doctors' area of expertise, free and equal individuals would accept granting them a circumscribed authority for their own protection. However, I argued, this basis of professional ethics cannot justify holding doctors to any specific substantive end or aim of medicine—such as the protection or promotion of individual well-being and its corollary principle of "do no harm." Given the plurality of conceptions of the good, it is implausible that people would elect to restrict the allowable uses of medicine to a single aim, thereby prohibiting themselves from choosing to pursue any other aim with a willing doctor.

So the lesson is that bioethicists must be more careful about the ways in which they appeal to professional ethics—they must justify *which* special rights and

obligations doctors have in virtue of their profession. They may not, as they currently do, support the arguments they want simply by gesturing to the "proper aims" of medicine or invoking age-old professional codes like the Hippocratic Oath, all under the umbrella of "professional ethics." This methodological observation has application to many issues across bioethics. Just the refutation of "do no harm" means that many commonly accepted constraints on what it is permissible for doctors to do—for example, the prohibition against their taking part in death penalties or conducting high-risk experiments on voluntary patients—must be re-examined. I suspect that a more restrained use of professional ethics as a method of argument, situated within the reflective equilibrium rather than principlism as the general methodology, would, broadly speaking, lead to conclusions in bioethics that are considerably more liberal than those affirmed today.

3. A LIMITATION OF THE ARGUMENT

Before concluding this thesis, I wish to bring the reader's attention to a limitation of my argument. In the Introduction, I noted that my focus is the *moral* right to VAE. Due to space constraints and in order to avoid the pitfalls of amalgamating the moral and legal right (discussed in that chapter), I stated that I would stop short of justifying the legal institution of the moral right which I intended to justify. Certain considerations might make it permissible for a state to abstain from recognizing a moral right as a legal right. Below, I will touch upon two considerations which opponents adduce specifically to deny the *legal* right to VAE.

The first objection is the danger of an empirical slippery slope—the risk that the legal institution of something morally *permissible* might lead eventually, due to sociological and psychological factors, to the practice of something morally *impermissible*. Now, some versions of this objection have no traction given my

conclusion on the moral right to VAE. For example, my view renders toothless the warning that legalizing VAE for the gravely ill would lead society to eventually sanction VAE for all competent adults, since my position is that the latter is morally permissible as well. Nevertheless, based on this line of reasoning, it could be argued that while *voluntary* euthanasia is morally permissible, allowing such a practice is likely to desensitize society toward killing, resulting ultimately, as opponents often warn, in the practice of *involuntary* euthanasia, or even Nazi-style eugenics.[5] From the perspective of this thesis, if the widespread institution and practice of a self-ownership right across society would lead inevitably or very likely to the serious violation of some individuals' self-ownership or other moral rights, then the prevention of such harm can justify constraining, even entirely, the original self-ownership right. To adequately address the risk of an empirical slippery slope with respect to VAE would require careful analysis of relevant historical, sociological, and psychological data, but offhand, it seems worth noting that opponents' dire warnings of involuntary euthanasia and eugenics have yet to bear out in places with some form of legalized VAE (e.g. Switzerland, Netherlands, Belgium, and Oregon—all of which have practiced VAE for at least a decade). Moreover, since consent is pivotal to the moral right to VAE defended in this thesis, it seems even more unlikely that a society which legally recognizes such a moral right would psychologically drift toward endorsing *unconsented-to* killing.

A more plausible consideration for affirming a moral, but not legal, right to VAE is the risk of abuse and collateral harm from the legal establishment of the moral right across society. This is the worry that the legal institution would itself create serious harm to some individuals, and mechanisms for preventing such harm would be impossible or unacceptably costly. Opponents cite the likelihood of the elderly and

[5] For empirical slippery slope objections to the legalization of VAE, see, e.g., Keown, *Euthanasia, Ethics and Public Policy*, pp. 70-80; Joan Teno and Joanne Lynn, "Voluntary Active Euthanasia: The Individual Case and Public Policy," in *Biomedical Ethics* (New York: McGraw-Hill Publishing, 1996), pp. 404-07.

disabled being pressured by their families to choose VAE, palliative care being neglected by society, and "death industries" being created to sell people on death. David Velleman offers a particularly sophisticated argument in this vein against recognizing a legal right to VAE. I would like to address his argument in greater detail below.

Velleman argues that if people were given the legal option of VAE, the continuation of life would become perceived as a personal choice, and they would lose out on an option they had before—namely, to continue to live by default (i.e. without it being perceived as a personal choice). The loss of this option, Velleman contends, would cause substantial harm to some people.[6] For example, consider an elderly man whose various ailments are taking a toll on his family's financial and emotional well-being. If VAE were a legal option, then it would appear to be his personal choice whether or not he continued to take this toll on his family. One way in which this might harm him is that his family might actively pressure him to opt for VAE. But this is not Velleman's only worry. Rather, it is that, even without any explicit pressure from others, the very legality of VAE might *make* dying his best option where it would not have been before—since if the man chooses to live when there is the option of VAE, it now appears to be *his doing* if he continues to burden his family. The man might wish that he did not have the legal option at all, so that he could have retained the better option of continuing to live by default.[7]

This is a potentially cogent reason against legalizing the right to VAE. Notice that the consideration brought in is not at all paternalistic. The argument, or at least the most plausible interpretation of it, is that some people *want* to have the legal option of VAE excluded for themselves, in order to protect themselves from the pressure of choosing to die which having such an option creates. So legalization would cause

[6] See J. David Velleman, "Against the Right to Die," *The Journal of Medicine and Philosophy* 17 (1992): pp. 665-81.
[7] Ibid., p. 671.

unconsented-to harm to such individuals by putting an option on the table which they do not want on the table—an option which harms them by eliminating a better option they had before (i.e. to live by default). Even on a self-ownership view, the unconsented-to harm caused to such individuals by the legal institution of the moral right to VAE could justify constraining the moral right. And since merely curbing the legal right would not avert the harm in question (since the harm comes from having the option at all), it could justify prohibiting what people have a moral right to do altogether.

Velleman's objection is both philosophically interesting and morally compelling. To fully address worries about the practical risks and harms of instituting my view of the moral right to VAE would require more time and space than I have here. However, I wish to indicate my direction of response to objections of this type. I believe Velleman is correct that the legal institution of VAE would cause unconsented-to harm to the class of individuals he describes—namely, those for whom the very legality of VAE makes it into the best option, and who wish to be protected from this option. But, I suggest, this is not enough to show that VAE may be prohibited. For *not legalizing VAE also causes unconsented-to harm to some individuals*—namely, those who *do* want to have the option of VAE available to themselves, and for whom the prohibition of VAE excludes a fundamental moral right they have and want to exercise. So legalization causes unconsented-to harm to one class of individuals and not legalizing causes unconsented-to harm to another class of individuals. Which side wins out?

Recall my argument in Chapter 5 (Section 2.2) that to justify overriding a moral right, it is not sufficient to cite the causation of harm to another—the harm caused must be a *rights-violating* harm. I suggest that, given that we have a moral right to VAE, other people's desires and interests in being protected from making uncomfortable,

difficult choices cannot justify prohibiting an option which others have a right to choose; there is no right to be thusly protected. The presence of more options often makes moral and social decision-making more difficult because having choice in and of itself creates moral and social pressure for the chooser. If one lived under complete authoritarianism, then one would feel no pressure to justify or explain one's choices to others, since one has none. Consider that the legality of donating blood also brings with it a concomitant pressure, at least on socially conscientious people, to *actually donate* blood, which they would not have if blood donation were not a legal option. Some people for whom, because of this pressure, blood donation becomes the best option, might wish that they did not have the legal option at all, so that they could not donate by default, without it looking like their choice not to do so. Yet, this is not even a reason in favor of legally constraining people's moral right to donate blood if they so wish. So in the example above of the elderly man, it is true that the very presence of the option of VAE may itself produce moral and social pressure: he may feel that if there is this option, then he should choose it, even though he wishes he did not have the option at all. But if he is a fully competent adult, then it seems to be his prerogative, and his responsibility, to make the decision for himself, with all its attendant implications. He should not be able to cite his preference against being confronted with an option to justify making illegal an option which others have a right to have.

Granted, even if this kind of rebuttal can be successful against Velleman's type of objection, we are still left with the related worry that with the legal option of VAE available, some families *will* actively pressure vulnerable individuals, like the elderly and disabled, to choose it. There are, in fact, three distinct worries contained here. The first is the fear that some individuals who are not *truly* competent, for example, demented grandparents, will be pushed to "consent" to VAE. The second is that some vulnerable individuals who *are* competent will be *coerced* into consenting—their

families might threaten to harm them or to abandon their obligation to care for them. The third is that some vulnerable individuals who are competent will be subject to *non-coercive* familial pressure—for example, family members of a competent elderly individual might *tell him* that he is burdening them by continuing to live. It is important to distinguish these concerns because on the self-ownership view, only the first two are objections to legalization; the third does not involve a rights violation. As morally reprehensible as the elderly man's family is, a competent individual, regardless of age or physical disability, has a *moral* right to choose VAE based wholly or in part on the consideration that his family thinks him a burden. This is not to say that the state should not make psychological and social services available to the elderly man, and if he requests it, help him improve his family relations or transfer his care. However, if he is truly competent *and* he does not consent to be protected from his family, then it falls within his self-ownership right to choose VAE, even for this tragic reason. I will not attempt to address how a state should respond to the first two cases, which *are* morally impermissible on my view, or how it can practically distinguish the third case from them. Abuse of vulnerable populations is a serious issue warranting further treatment. However, it is worth noting here that it can occur in many forms. Prohibiting VAE would not protect vulnerable individuals, for example, from being kept alive but subjected to physical or emotional abuse or neglect. Just as mechanisms have been devised to prevent such abuse as far as possible without entirely prohibiting, say, private familial relations, the possibility of familial abuse with respect to VAE does not seem to justify altogether denying people's moral right to VAE.

If the argument of this thesis is correct, then the moral right to VAE is a fundamental right comparable to our right against rape and our right to bodily integrity. If so, then it is very difficult to justify not recognizing it in the legal canons governing individuals' treatment of one another in society. Of course, the possible dangers of

instituting the legal right to VAE is a topic worthy of further discussion. However, the reason I have focused on the moral right is that once we have a cogent justification for it—something which I believe has been sorely needed, and which I hope this thesis has provided—then the burden of proof is shifted to the other side. Moreover, if I am right that the moral right to VAE is a basic, rock-bottom right, then the burden of proof needed on the other side to deny people the legal right to VAE is very high indeed.

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