(2017) 29 SAcLJ 375
(Published on e-First 4 August 2017)

THE CASE AGAINST PHYSICIAN-ASSISTED SUICIDE AND VOLUNTARY ACTIVE EUTHANASIA

A Jurisprudential Consideration

Twenty years after the Advance Medical Directive Act came into force in Singapore, the issue of the legalisation of physician-assisted suicide and voluntary active euthanasia remains live. By examining jurisprudential arguments, this article makes a case against legalisation. In particular, it is important to address the points raised in the article by Toh Puay San and Stanley Yeo, "Decriminalising Physician-assisted Suicide in Singapore", as it is possibly the most comprehensive local article on this subject and includes draft legislation for legalisation in Singapore. As Toh and Yeo also considered the arguments often raised in debates on euthanasia, it is apposite to approach the jurisprudential consideration by countering their arguments. In conclusion, the contention of Toh and Yeo that the benefits of allowing terminally-ill patients the option of physician-assisted suicide far outweigh the harms is not supported. *A fortiori*, voluntary active euthanasia should not be legalised.

TAN Seow Hon*
LLB (Hons) (National University of Singapore),
LLM (Harvard), SJD (Harvard);
Advocate and Solicitor (Singapore);
Associate Professor, School of Law, Singapore Management University.

I. Introduction

1 The Advance Medical Directive Act[1] ("AMDA") has been in force in Singapore for 20 years. The AMDA states that it does not "condone, authorise or approve abetment of suicide, mercy killing or euthanasia".[2] Abetment of suicide remains an offence under ss 305 and 306 of the Penal Code,[3] while attempted suicide is an offence under s 309. What is facilitated by the AMDA is an act that permits the dying

* I appreciate the helpful comments of an anonymous referee of this journal.

1 Cap 4A, 1997 Rev Ed.

2 Advance Medical Directive Act (Cap 4A, 1997 Rev Ed) ("AMDA") s 17(2). A clarification is necessary as the act of withholding or withdrawing extraordinary life-sustaining medical treatments, covered under the AMDA, has sometimes been referred to as passive euthanasia.

3 Cap 224, 2008 Rev Ed.

process to take its natural course, as contrasted with an act that causes or accelerates death.[4] The question whether physician-assisted suicide[5] ("PAS") and voluntary active euthanasia[6] ("VAE") should be legalised in Singapore has been debated in the public square time and again. The central question of the debate is whether the law should facilitate an individual's desire to end his life within a general context that "reverences human life".[7]

2 Amongst several articles dealing with this or related issues in Singapore's context in the last two decades, "Decriminalising Physician-assisted Suicide in Singapore" by Toh Puay San and Stanley Yeo[8] stands out as they included draft legislation for regulating PAS in their advocacy for legalisation.[9] Examining several arguments for and against

4 Advance Medical Directive Act (Cap 4A, 1997 Rev Ed) s 17(1). The distinction on principle is disputed by proponents of euthanasia. See, *eg*, Brett Kingsbury, "A Line Already Drawn: The Case for Voluntary Euthanasia after the Withdrawal of Life-sustaining Hydration and Nutrition" (2005) 38 Colum J L & Soc Probs 201 at 230–231. Indeed, some argue that physicians are directly involved in the withdrawal of life support, but not so in the case of physician-assisted suicide: see Ken Levy, "*Gonzales v Oregon* and Physician-assisted Suicide: Ethical and Policy Issues" (2007) 42 Tulsa L Rev 699 at 728.

5 In physician-assisted suicide ("PAS"), the patient administers the lethal dose; this may be through oral medication supplied by the physician or lethal injection, with the device and drugs set up by the physician and the patient pressing the final button. PAS is not possible in some cases, such as when the patient is wholly paralysed, in a persistent vegetative state or in a coma. In Switzerland, non-PAS is also permissible: see, *eg*, Roberto Andorno, "Nonphysician-assisted Suicide in Switzerland" (2013) 22 *Cambridge Quarterly of Healthcare Ethics* 246.

6 Voluntary active euthanasia ("VAE") is distinguished from physician-assisted suicide in that the final act to cause death is done by a person other than the patient; this person may, for example, be the healthcare professional. VAE is contrasted with non-voluntary euthanasia, which is performed on a person who might never have had the capacity to request or consent, or failed to express his wish when he had the capacity, as well as involuntary euthanasia, which is carried out in the scenario when a patient does not want death or has expressed a wish to the effect, or when the patient's wish is regarded as irrelevant and he is not asked. These definitional distinctions are generally recognised: see, *eg*, Wesley J Smith, "Does Human Life Have Intrinsic Value Merely Because It Is Human?" (2006) 13 Trinity L Rev 45 at 76. VAE is legal, for example, in the Netherlands and Belgium.

7 Melvin I Urofsky, "Do Go Gentle into That Good Night: Thoughts on Death, Suicide, Morality and the Law" (2007) 59 Ark L Rev 819 at 829.

8 Toh Puay San & Stanley Yeo, "Decriminalising Physician-assisted Suicide in Singapore" (2010) 22 SAcLJ 379.

9 As the decriminalisation of PAS does not involve a simple amendment to the Penal Code's (Cap 224, 2008 Rev Ed) prohibition of the abetment of suicide, but must be accompanied by new legislation – dealing with matters such as the categories of patients who may request for PAS, the qualifications of physicians who may perform the required acts, and what constitutes consent, this article will generally refer to what Toh Puay San and Stanley Yeo referred to as the decriminalisation of

(*cont'd on the next page*)

the decriminalisation of PAS, Toh and Yeo contended that the benefits of allowing terminally-ill patients the option of PAS far outweigh the harms.[10] Toh and Yeo suggested decriminalisation would: (a) be in line with the role of criminal law; (b) reflect the pre-eminence of autonomy in a secular pluralistic society; (c) achieve consistency in the law in view of the AMDA; and (d) take into account the importance of quality of life and other practical considerations. They rejected the argument against decriminalisation that relates to the sanctity of life as being "largely based on religious beliefs",[11] which in their view are conflicting and should not influence the decision as to the legalisation of PAS in view of Art 15 of the Constitution of the Republic of Singapore.[12] They also rejected the view that legalisation presents a problem in medical ethics. Finally, they argued that slippery slope concerns "are largely speculative"[13] and that safeguards can be put in place to protect patients from making requests that are not "truly informed and voluntary".[14]

3 When a question was asked in Singapore's Parliament in 2008[15] about whether euthanasia was being considered, the answer was in the negative.[16] The question of legalisation of PAS and VAE, however, remains "live" in Singapore. The Chief Justice spoke on the topic for the Singapore Medical Association Lecture 2012.[17] With advancement in medical technology allowing life to be extended, an aging population, as well as the legalisation of PAS and/or VAE in several other jurisdictions in the last few years, including the removal of the age restriction for euthanasia in Belgium in 2014,[18] the question as to whether euthanasia in any form should be legalised in Singapore may again arise. This article will argue that PAS and VAE should not be legalised. Since Toh

PAS (in their title) as the legalisation of PAS, though the terms will be used interchangeably in this article.

10 Toh Puay San & Stanley Yeo, "Decriminalising Physician-assisted Suicide in Singapore" (2010) 22 SAcLJ 379 at 394.

11 Toh Puay San & Stanley Yeo, "Decriminalising Physician-assisted Suicide in Singapore" (2010) 22 SAcLJ 379 at 389.

12 1999 Reprint.

13 Toh Puay San & Stanley Yeo, "Decriminalising Physician-assisted Suicide in Singapore" (2010) 22 SAcLJ 379 at 393.

14 Toh Puay San & Stanley Yeo, "Decriminalising Physician-assisted Suicide in Singapore" (2010) 22 SAcLJ 379 at 393.

15 A search reveals that in that year, there were about 38 letters and articles in *The Straits Times* on the topic.

16 *Singapore Parliamentary Debates, Official Report* (17 November 2008), vol 85 at col 711 (Question was raised by Mdm Halimah Yacob and answered by Mr Khaw Boon Wan, Minister for Health).

17 Sundaresh Menon, Chief Justice of Singapore, "Euthanasia: A Matter of Life or Death?", speech delivered at the Singapore Medical Association Lecture 2012 (9 March 2013), published in *SMA News* (March 2013).

18 "Belgium's Parliament Votes Through Child Euthanasia" *BBC News Europe* (13 February 2014).

and Yeo considered the main arguments relating to legalisation of euthanasia, and since it is this author's view, in particular, that their consideration of theory is inadequate and does not support their case for decriminalising PAS, their arguments will be used as a launchpad in this article for the consideration of jurisprudential debates.

4 In Part II, the contest between autonomy and quality of life, on the one hand, and sanctity of life, on the other, will be examined. Three issues will be considered, the: (a) philosophical debate relating to giving effect to autonomy in a pluralist society; (b) extent to which individual choices about fundamental matters concerning one's own life must be respected in view of the constitutional protection of religious liberty; and (c) difficulties relating to making a truly autonomous decision in such a context and what the implications are for the debate on legalisation. The first issue is the most important one in Part II, and indeed, is the one on which the rest of the debate pivots. This article will, however, not be making separate philosophical or ethical arguments for the sanctity of life, a topic which has been considered by many moral philosophers. Instead, the author's aim is to highlight what exactly is at stake in the contest between autonomy/quality of life and sanctity of life as contradictory values which proponents on both sides of the debate argue should be foundational for legal frameworks. In Part III, as Toh and Yeo referred to the role of criminal law in advocating decriminalisation, this article will explain how their arguments relating to the role of criminal law are inadequate and contentious, and how continued criminalisation based on the sanctity of life is consistent with an alternative, albeit contested, view of the role of criminal law, which they have not properly considered. In Part IV, the subordinate considerations related to the medical profession's likely involvement upon legalisation will be explored. These concerns are subordinate as the decisive arguments for the debate are those in the preceding Parts. Finally, the present article concludes that neither PAS nor VAE should be legalised.

II. Pitting autonomy and quality of life against sanctity of life in a pluralist society

5 The argument in favour of legalisation is based on autonomy and connected to the argument relating to the quality of life, as well as the denial of the sanctity of life. Toh and Yeo suggested that autonomy and individual freedom have priority in the absence of harm to others and in view of the pluralism of moral convictions, but at the same time

rejected "death on demand".[19] Autonomy and mercy are seen as twin preconditions for allowing euthanasia, otherwise involuntary euthanasia could be permissible, or euthanasia could be offered to anyone, such as a lovesick teen, upon request.[20] If the conditions of life are too bad, one should be allowed to seek release from misery, whether physical or psychic.[21] Toh and Yeo regarded the value of sanctity of life as "largely based on religious beliefs"[22] and not unanimously shared amongst the religious,[23] and argued that laws should not be based on such a value. Quality of life is to be preferred as the determinant of when to permit PAS as it allows each person to die a dignified death. To deny the option of PAS would be "too inhumane, cruel and insulting",[24] particularly as some would end up attempting to die through other means, or physicians would help them die through administering pain-relieving drugs.[25]

6 There are three major issues raised by the arguments relating to autonomy. The first is whether autonomy should have priority over the contending value of sanctity of life in view of the plurality of moral convictions. The second issue is legal: it concerns the view of Toh and Yeo that individuals should be permitted to pursue their "religious or philosophical beliefs and values"[26] in end-of-life matters, in view of the

19 Toh Puay San & Stanley Yeo, "Decriminalising Physician-assisted Suicide in Singapore" (2010) 22 SAcLJ 379 at 385–386.

20 Margaret P Battin, "Physician-assisted Dying and the Slippery Slope: The Challenge of Empirical Evidence" (2008) 45 Williamette L Rev 91 at 95.

21 Critics note that the argument related to the quality of life is based on human happiness and well-being, and question whether well-being might really be served by putting an end to life altogether: see, *eg*, Leonard J Weber, "Ethics and Euthanasia: Another View" (1973) 73 *American Journal of Nursing* 1228. The reply might be that the argument does not hinge on acts being permissible only if they are in service of well-being, but on life being only meaningful if minimum conditions of well-being can be attained. Critics also argue that there is no fate worse than death, or even if there is, based on the Kantian perspective, one should not treat one's person as a means to avoid a medical fate which one perceives as worse than death: see Ben A Rich, "Medical Paternalism v Respect for Patient Autonomy" (2006) 10 Mich St U J Med & L 87 at 112–113; contrast Elvio Baccarini, "Rawls and the Question of Physician-assisted Suicide" (2001) I *Croatian Journal of Philosophy* 331 at 339–340. The specific philosophical debate relating to such metaphysical arguments will not be considered in this article.

22 Toh Puay San & Stanley Yeo, "Decriminalising Physician-assisted Suicide in Singapore" (2010) 22 SAcLJ 379 at 389.

23 Toh Puay San & Stanley Yeo, "Decriminalising Physician-assisted Suicide in Singapore" (2010) 22 SAcLJ 379 at 391.

24 Toh Puay San & Stanley Yeo, "Decriminalising Physician-assisted Suicide in Singapore" (2010) 22 SAcLJ 379 at 388–389.

25 Toh Puay San & Stanley Yeo, "Decriminalising Physician-assisted Suicide in Singapore" (2010) 22 SAcLJ 379 at 389.

26 Toh Puay San & Stanley Yeo, "Decriminalising Physician-assisted Suicide in Singapore" (2010) 22 SAcLJ 379 at 391.

constitutional guarantee of religious liberty. The third issue concerns the problems associated with the individual's choice and whether it might be problematically autonomous, should autonomy be given primacy. Each issue will be explored in turn.

A. Anti-perfectionistic liberalism and pre-eminence of autonomy[27]

7 The argument founded on autonomy is crucial to proponents of legalisation. It seems at first blush attractive, especially if individual autonomy is pitted against the convictions of those who think PAS and VAE are wrong because they believe in the absolute value of the sanctity of life. As no one is forced to undergo PAS and VAE, why should others stop an individual who wants to die when he is not similarly morally convicted?

8 John Rawls's framework for the proper exercise of political power in a liberal society is arguably the best known of anti-perfectionist liberal theories that prioritise autonomy and refuse to ground laws in moral convictions as to what is good or what constitutes the good life. As Toh and Yeo claimed the pre-eminence of autonomy in a secular pluralistic society but offered little analysis, the application of Rawls's theory to laws relating to euthanasia shall be considered so that we can determine whether permissive euthanasia laws are jurisprudentially sound.

9 In Rawls's view, the deployment of political power is "fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason".[28] This would apply to the exercise of legislative power on basic questions of justice, such as whether to criminalise or legalise euthanasia. Rawls regarded as an advantage of his theory that his "political conception of justice", while moral in nature, is not tied to any comprehensive doctrine, which Rawls defined as a philosophy that addresses what is of value in human life and ideals of personal virtue and character. The political conception of justice is affirmed by citizens on moral grounds based on their personal conceptions of the good or their comprehensive doctrines, but it does

27 For a good critique of anti-perfectionist liberalism, see Robert George, *Making Men Moral: Civil Liberties and Public Morality* (Clarendon Press, Reprint 2002) ch 5.

28 John Rawls, *Political Liberalism* (Columbia University Press, 1993; paperback edition, 1996) at p 137.

not presuppose any particular comprehensive doctrine is adopted.[29] In that sense, it is supposed to be neutral amongst the different conceptions of the good life, which are the subject of comprehensive doctrines. The political conception comprises political values, which can be used in support of particular laws. The political conception of justice is worked out for the limited object of structuring government, rather than regulating all of life. When terms of co-operation (including laws) are proposed by citizens, they must be proposed as the most reasonable for fair co-operation, and those proposing those terms (including laws) must think it at least reasonable for others as free and equal citizens to accept them. In so doing, citizens would be enacting laws in accordance with what Rawls termed "public reason".[30]

10 Rawls's actual position in support of legalising PAS is found in "The Philosophers' Brief", co-authored with other philosophers.[31] To figure out Rawls's reasoning for the legalisation of PAS, based on his theory relating to legitimate law-making, a leaf may be taken from the application of his theory in favour of permissive abortion laws. In relation to abortion laws, Rawls observed that those who strongly object to abortion, such as Catholics, but fail to win a majority, need not exercise the rights given by permissive laws but can, nonetheless, recognise those laws as legitimate. They should not impose their comprehensive doctrines on a majority of other citizens who, not unreasonably, do not accept those doctrines.[32] Indeed, in his earlier work, Rawls stated his position on abortion more strongly, observing that any comprehensive doctrine that leads to a balance of political values that excludes a qualified right of mature adult women to end their pregnancy in the first trimester is unreasonable, and might even be cruel and oppressive, for example, when such right is denied except in the case of rape and incest. Voting from such a comprehensive doctrine goes against the ideal of public reason.[33] Rawls considered three political values within a political conception of justice that might lead one to the

29 John Rawls, *Political Liberalism* (Columbia University Press, 1993; paperback edition, 1996) at pp 146–148 and 174–176.

30 John Rawls, *The Law of Peoples with "The Idea of Public Reason Revisited"* (Harvard University Press, 1999) at pp 136–137 and 169.

31 See Ronald Dworkin, Peter L Zimroth & Abe Krash, "The Philosopher's Brief" (10 December 1996) <https://cyber.harvard.edu/bridge/Philosophy/philbrf.htm> (accessed 18 January 2017), submitted to the US Supreme Court in relation to the cases of *Washington v Glucksberg* 521 US 702 (1997) and *Vacco v Quill* 521 US 793 (1997). It has been noted that John Rawls had not made many statements on the issue: see Elvio Baccarini, "Rawls and the Question of Physician-assisted Suicide" (2001) I *Croatian Journal of Philosophy* 331 at 332.

32 John Rawls, *The Law of Peoples with "The Idea of Public Reason Revisited"* (Harvard University Press, 1999) at p 170.

33 John Rawls, *Political Liberalism* (Columbia University Press, 1993; paperback edition, 1996) at pp 243–244.

conclusion that a woman should have a qualified right to abortion: due respect for human life; the ordered reproduction of society over time; and the equality of women as citizens. In his updated thesis on public reason, Rawls did not assess the comparative reasonableness of arguments cast in the form of public reason for or against permissive abortion laws, though he acknowledged the arguments for denying abortion rights on the ground of political values of "public peace, essential protections of human rights, and the commonly accepted standards of moral behavior in a community of law" qualify as such.[34]

11 John Finnis objected to Rawls's suggestion that Catholics need not exercise abortion rights as an answer to their opposition to permissive abortion laws. If permissive abortion laws were similar to the laws of South Carolina in 1859, which permitted but compelled no white men to own slaves, they would be unacceptable even if they were only permissive.[35] Permissive slavery laws did not let each white man decide for himself whether to own slaves while leaving the question of the moral worth of slaves unresolved; in so far as permissive slavery laws did not accord the same property rights over white people, for example, it settled the metaphysical question of the moral worth of the races which could be enslaved – they were inferior and sub-human. Further, Finnis noted that Rawls did not explain why pregnant women, who would have been constrained by restrictive abortion laws, are not unreasonable in rejecting restrictions on their liberty, merely referring in a footnote to the view of Judith Jarvis Thomson,[36] and claimed that many women who reject the idea that a foetus has a right to life from the moment of conception are not unreasonable in doing so. This is a bald assertion if no argumentation is made to demonstrate how the unborn is different from the newborn, such that it does not have rights which a newborn is regarded to have.[37] Permissive abortion laws are founded on the metaphysical view that the unborn *vis-à-vis* the pregnant woman is of less worth than the newborn *vis-à-vis* the pregnant woman. In that sense, permissive abortion laws inevitably settle an intractable question that Rawls thought the idea of public reason, the political conception of justice, and the reference to political values allow legislators to skirt, making his theory attractive in a pluralist democracy where people have

34 John Rawls, *The Law of Peoples with "The Idea of Public Reason Revisited"* (Harvard University Press, 1999) at pp 169–170.

35 John Finnis, "Abortion, Natural Law and Public Reason" in *Natural Law and Public Reason* (Robert P George & Christopher Wolfe eds) (Georgetown University Press, 2000) at p 89.

36 John Rawls, *Political Liberalism* (Columbia University Press, 1993; paperback edition, 1996) at p liv.

37 John Finnis, "Abortion, Natural Law and Public Reason" in *Natural Law and Public Reason* (Robert P George & Christopher Wolfe eds) (Georgetown University Press, 2000) at p 88.

different comprehensive doctrines and, therefore, different views on what is good or moral.

12 These arguments and counter-arguments can be applied *mutatis mutandis* to PAS. Rawls is likely to prioritise autonomy and regard end-of-life decisions to be a fundamental matter concerning one's life that is to be determined by each person's conception of the good life or comprehensive doctrine where the categories of persons given the option of PAS are concerned. Due respect is accorded to life as not everyone is permitted to choose PAS. As laws should not be based on any particular conception of the good life but should be justified by a political conception of justice comprising political values, laws criminalising PAS can be seen as unreasonably restricting the liberty of patients who find their lives unbearable and wish to opt for PAS. Especially if sanctity of life, which connotes its inviolability, is seen as a moral value defensible only within particular comprehensive doctrines, laws criminalising PAS can be seen as founded on the sanctity of life and, therefore, being based on particular comprehensive doctrines.[38] Rawls might have countered opposition to the legalisation of PAS by suggesting that those who are opposed to PAS can simply not opt for PAS: the laws are permissive and not mandatory. Suppose, to view Rawls's argument most charitably, we put aside slippery slope arguments relating to involuntary euthanasia which would colour the argument that such laws are truly permissive in effect. Suppose we also put aside such slippery slope arguments because they would count as public reasons or political values which could restrict such permissive laws under the Rawlsian framework. Even so, far from being based on political values alone and successfully skirting intractable questions, allowing PAS to particular categories of persons (such as those who are terminally ill), but not others, signifies that some lives are not worth living, and that the State does not have as much interest to protect them as it has to protect the lives of the healthy who are disallowed from opting for PAS,[39] as PAS laws do not give all individuals unbridled autonomy. If the question whether life is indeed inviolable is a

38 In "The Philosophers' Brief", it was noted that "[d]enying the opportunity to terminally ill patients who are in agonizing pain or otherwise doomed to an existence they regard as intolerable could only be justified on the basis of a religious or ethical conviction about the value or meaning of life itself": Ronald Dworkin, Peter L Zimroth & Abe Krash, "The Philosopher's Brief" (10 December 1996) <https://cyber.harvard.edu/bridge/Philosophy/philbrf.htm> (accessed 18 January 2017) at Part I. It was also noted that death is "the final act of life's drama, and we want that last act to reflect our own convictions, those we have tried to live by, not the convictions of others forced on us in our most vulnerable moment": "The Philosopher's Brief", at Part I.

39 While it may be that healthy individuals do not need assistance for suicide, it is conceivable that some would prefer to resort to physician-assisted suicide, which assures success in the outcome, than attempt suicide on their own.

metaphysical question to be settled by comprehensive doctrines or conceptions of the good, allowing PAS would in fact settle a metaphysical question – by suggesting that it is not inviolable, in those cases. The right to PAS is based on the denial of the sanctity of life for certain persons, rather than on letting each person choose whether they believe in the sanctity of life.

13 Indeed, more generally, Rawls's theory endorses a distinctive conceptualisation of the good, according to which personal autonomy is prioritised and each person is free to choose his own conception of the good life, restrictions being placed on autonomy only if they are supported by supposedly political values within the political conception of justice necessary to the basic structure of government. On its face, such anti-perfectionistic liberalism in relation to laws, known as the priority of the right over the good, does not overtly claim that objective moral values (such as the sanctity of life) do not exist, but only that it is agnostic to truth claims where the basic structure of government is concerned. It is neutral amongst different conceptions of the good life. A government can decide what rights (such as the right to PAS) a person has without basing those rights on ideas of what is good or settling questions of contentious morality. Such an approach to law-making, however, is rationally defensible if moral laws do not exist, or if moral laws and what is good are for each individual to determine, as it ultimately prioritises individual autonomy over other values such as the sanctity of life (or the good of life). In substance, this approach is in fact not agnostic as to truth claims, even as it purports to avoid grounding laws on truth claims (such as that relating to the moral value of sanctity of life as non-derogable) and seems at first blush neutral amongst competing philosophies by allowing each individual to make his own end-of-life decision according to his moral convictions. Restrictions are placed on those not in unbearable suffering, based on the political value that it is necessary to accord due respect to human life for the basic structure of government, which is different from an assertion as to the sanctity of life. As critics have noted, the philosophy that each individual is free to choose his conception of the good competes on the same normative plane as philosophies offering particular conceptions of the good.[40] An example is Finnis's theory of natural law.

14 According to Finnis, there are goods of human flourishing common to all human beings, which should form the bases of legitimate laws. Finnis's theory "grounds rights in goods".[41] Finnis suggested there

40 Patrick Neal, *Liberalism and Its Discontents* (New York University Press, 1999) at p 38.

41 Robert George, *Making Men Moral: Civil Liberties and Public Morality* (Clarendon Press, Reprint 2002) at p 145. George noted that the intelligibility of the right is rooted in the intelligibility of the good it protects.

are seven self-evident goods in the form of life, knowledge, friendship, aesthetic experience, play, religion, and practical reasonableness.[42] Individuals are free to prioritise subjectively the goods in their own lives,[43] provided they respect a set of methodological requirements of practical reasonableness in the pursuit of the goods. Choosing the seven goods in a manner that respects the principles of practical reasonableness also means one is acting morally.[44] Finnis specifically valued the authenticity of an individual's choice when he endorsed the basic good of practical reasonableness, which involves bringing one's intelligence to bear effectively on the problems of choosing one's actions and lifestyle, with the qualification that practical reasonableness ranks alongside other equally fundamental basic goods in Finnis's typology. Indeed, one of the principles of practical reasonableness is that one must not choose to do an act which of itself does nothing but simply or primarily damages or impedes the realisation of or participation in any one or more of the basic goods.[45] Thus, practical reasonableness is not the equivalent of unbridled autonomy. Beyond the individual level, on a systemic level, legitimate law-making must put in place a set of conditions that enables the members of a community to realise their personal objectives and stipulates the ground rules they must follow, in line with the requirements of practical reasonableness.[46] Thus, laws may legitimately be framed to prohibit acts which of themselves do nothing but simply or primarily damage or impede the realisation of or participation in any one or more of the basic goods.[47] Since euthanasia is an act pursued with the intention of damaging the basic good of life, it may legitimately be prohibited. Only autonomy *within reason* would be supported by the law; the law should not permit acts which destroy the good of life as these are unreasonable exercises of autonomy which disrespect other equally fundamental goods such as life.[48] In contrast to Rawlsian anti-perfectionism, the import of the theory is that a person has a right to euthanasia only if choosing euthanasia is moral (since the product of complying with the requirements of morality is moral action). One cannot decide what rights a person has without settling the

42 John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd Ed, 2011) at pp 85–95.

43 John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd Ed, 2011) at pp 92–95.

44 John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd Ed, 2011) at pp 124 and 126.

45 John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd Ed, 2011) at pp 118–125.

46 John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd Ed, 2011) at pp 154–156.

47 John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd Ed, 2011) at pp 126–127, 154–156, 210–218 and 262.

48 Robert George, *Making Men Moral: Civil Liberties and Public Morality* (Clarendon Press, Reprint 2002) at pp 176–177.

question of whether the act in issue is good. The type of autonomy famously defined in *Planned Parenthood v Casey* by Anthony Kennedy J – "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" – is rejected.[49]

15 Realising that Rawls's theory, as an example of anti-perfectionist liberalism that supports the primacy of autonomy, is also based on a contested idea of the good means we should no longer readily prefer permissive laws on grounds of their neutrality amongst different conceptions of the good.

B. Conflicting religious views, religious liberty and pluralism

16 Relatedly, Toh and Yeo argued that, as there are opposing religious views about end-of-life decisions, the legalisation of PAS should not be influenced by religious considerations. Their argument is bolstered by invoking a constitutional liberty: allowing people to follow their own views in a pluralistic society, whether because they are not religious or do not act in accordance with their religion, "is endorsed by Art 15 of our Constitution granting freedom of religion".[50]

17 There are two interrelated but distinct points to be considered here: first, the extent to which religious arguments may be the basis of laws in a pluralistic society in which freedom of religion is constitutionally protected; second, the extent to which one may act upon one's religious beliefs in one's life choices in view of the constitutional protection of religious liberty.

18 The reason for the exclusion of religious considerations by Toh and Yeo may be understood as follows: if arguments that are purely religious and rationally indefensible are accepted as the basis of laws, to the extent that only some of these arguments would be selected and conflicting views from other religions rejected, they would seem to result in laws which might possibly mandate or permit acts contrary to the practice or values of some religions. Toh and Yeo rejected the sanctity-of-life argument as a proper reason against legalisation (or for criminalisation) as they thought it is largely based on religion. This may be countered. First, some philosophers, such as Finnis, argue for the

49 *Planned Parenthood v Casey* 505 US 833 at 851 (1992). This is in fact noted in Ronald Dworkin, Peter L Zimroth & Abe Krash, "The Philosopher's Brief" (10 December 1996) <https://cyber.harvard.edu/bridge/Philosophy/philbrf.htm> (accessed 18 January 2017) at Part II.

50 Toh Puay San & Stanley Yeo, "Decriminalising Physician-assisted Suicide in Singapore" (2010) 22 SAcLJ 379 at 391.

sanctity of life based on the self-evident fundamental good of life. Their arguments might be challenged, but Toh and Yeo should not have simplistically thought that such arguments are necessarily based on religion. Second, in so far as Toh and Yeo themselves argued for legalisation in limited cases, they arguably valued sanctity of life apart from those cases. But on what basis?

19 Toh and Yeo further noted that religions offer different views on this issue, and concluded that people must be allowed to pursue their own end-of-life choices. This echoes the view of Stevens J in *Cruzan v Missouri*, when he noted that not much might be said confidently about death, unless it was said from the point of view of faith, and that alone was reason enough to protect the freedom to conform choices about death to individual conscience.[51] Crucially, the right to profess and practise one's religion and to propagate it, guaranteed by Art 15(1) of the Constitution, is generally not violated by a government not legalising PAS or VAE, in so far as one's religion does not mandate suicide or euthanasia. Not offering the option of PAS or VAE does not lead one to act in violation of one's religious tenets. If it is not argued that PAS or VAE is a requirement of one's religion, there will be no need to embark on the analysis of whether the prohibition of attempted suicide and abetment of suicide relates to "public order, public health or morality" under Art 15(4). But even if one's religion should mandate suicide, legislators may restrict one's practice for the sake of public order, public health, or morality: for example, if the arguments considered in the next sections[52] are persuasive, there may be reasons to restrict such practice.

C. The reality of an autonomous choice

20 Toh and Yeo rejected the view that autonomous, rational suicide is an oxymoron[53] and addressed the concern that the vulnerable might be harmed in not having free and fully-informed consent through the imposition of safeguards such as psychiatric examination and requirement of witnesses.[54]

21 It is questionable whether safeguards to ensure free and fully-informed consent can guard against subtle pressures on sick individuals who are fearful of burdening family members and loved ones. Some

51 *Cruzan v Missouri* 497 US 261 at 343 (1990).

52 See paras 29–39 or 40–44 below.

53 Toh Puay San & Stanley Yeo, "Decriminalising Physician-assisted Suicide in Singapore" (2010) 22 SAcLJ 379 at 393. Compare Susan R Martyn & Henry J Bourguignon, "Physician-assisted Suicide: The Lethal Flaws of the Ninth and Second Circuit Decisions" (1997) 85 Cal L Rev 371 at 393.

54 Toh Puay San & Stanley Yeo, "Decriminalising Physician-assisted Suicide in Singapore" (2010) 22 SAcLJ 379 at 393.

have suggested, by referring to empirical studies, that there is no heightened risk of abuse in the form of pressure on vulnerable groups,[55] while others have suggested that the availability of such options would have a coercive effect on women, who may have a tendency or are expected to be sacrificial,[56] or minorities who for feelings of inferiority might not choose to continue their treatment as they feel that their existence is a burden to society.[57] With euthanasia being available as an option, some would be lured by the cheaper price of euthanasia[58] over prolonged and possibly ineffective treatment in the face of bleak prognoses, or end up having to justify their existence if they chose to continue with treatment.[59] It has also been noted that the pressure to legalise VAE and PAS comes from educated, well-off, and politically vocal people who are non-religious and under 65, who are likely to have good health insurance, intact and supportive families, and the social skills and know-how to get what they want, while the harms of legalisation are likely to fall on the under-insured.[60]

22 The objectivity of those tasked with assessing requests for euthanasia is also problematic. It has been argued that once one has accepted there are those who prefer to accelerate death when they suffer from particular conditions, "it [becomes] easier to presume an unspoken request from the next patient with a similar medical condition".[61]

---

55 Margaret P Battin, "Physician-assisted Dying and the Slippery Slope: The Challenge of Empirical Evidence" (2008) 45 Williamette L Rev 91. A sad case is recounted in Wesley J Smith, "Does Human Life Have Intrinsic Value Merely Because It Is Human?" (2006) 13 Trinity L Rev 45 at 78. Kate Cheney was a cancer patient; there were conflicting opinions as to whether she understood her decision for euthanasia, given that she had Alzheimer's. She had wanted suicide when her colostomy bag broke, but changed her mind when she was cleaned up; she was later sent to a nursing home for a week and, when she returned home, said she wanted to take pills; her daughter told her she was courageous and called her grandchildren for her to bid them farewell.

56 Jennifer A Parks, "Why Gender Matters to the Euthanasia Debate: On Decisional Capacity and the Rejection of Women's Death Requests" (2000) 30(1) *Hastings Center Report* 30; Katrina George, "A Woman's Choice? The Gendered Risks of Voluntary Euthanasia and Physician-assisted Suicide" (2007) 15 Med L Rev 17 at 18–22.

57 David M Shelton, "Keeping End of Life Decisions Away from Courts after Thirty Years of Failure: Bioethical Mediation as an Alternative for Solving End of Life Disputes" (2008) 31 Hamline L Rev 103 at 125–126.

58 Susan R Martyn & Henry J Bourguignon, "Physician-assisted Suicide: The Lethal Flaws of the Ninth and Second Circuit Decisions" (1997) 85 Cal L Rev 371 at 404.

59 Susan R Martyn & Henry J Bourguignon, "Physician-assisted Suicide: The Lethal Flaws of the Ninth and Second Circuit Decisions" (1997) 85 Cal L Rev 371 at 408.

60 Ezekiel J Emanuel, "What is the Great Benefit of Legalising Euthanasia or Physician-assisted Suicide?" (1999) 109 Ethics 629 at 641.

61 Susan R Martyn & Henry J Bourguignon, "Physician-assisted Suicide: The Lethal Flaws of the Ninth and Second Circuit Decisions" (1997) 85 Cal L Rev 371 at 414–415.

23 Given these concerns, proponents of legalisation who accord primacy to autonomy must confront the possibility of abuse and derogation from autonomy.

III. Role of criminal law

A. Toh and Yeo's view of role of criminal law

24 More broadly, Toh and Yeo suggested the role of criminal law is to prevent "harmful or potentially harmful" behaviour.[62] They elaborated on their idea of harm by referring to "harms which injure the interests and *values* that are considered fundamental to [society's] proper functioning"[63] [emphasis added], suggesting that they had in mind a broad conception of harm beyond physical harm to individuals or society. Despite the wide definition of harm, Toh and Yeo stated that PAS is "a harmless activity if the circumstances are such that death *is seen as* a benefit rather than a harm"[64] [emphasis added]. They regarded the alleviation of "unbearable suffering" of the patient, the likelihood of the family's consent and acceptance, and the removal of social burdens created by the patient as benefits, in contrast to possible losses suffered by the loved ones upon the patient's death. The reference to "is seen as" in this context possibly refers to a weighing of benefits and losses, or to a subjective assessment of harm.

25 The role of criminal law is highly controverted and the subject of the Hart–Devlin debate on the legal enforcement of morality more than half a century ago. Although Toh and Yeo made no reference to the debate, a brief digression to the classic debate – which shows the problems with various proposed justifications of criminal law – reveals that their definition of the role of criminal law, to support their case for decriminalisation, is problematic.

26 In the debate over the Wolfenden Report,[65] H L A Hart adopted, with two qualifications, John Stuart Mill's view in his work *On Liberty*, according to which the coercive force of the law may only be used against an individual for the sake of preventing harm to others, but not

62 Toh Puay San & Stanley Yeo, "Decriminalising Physician-assisted Suicide in Singapore" (2010) 22 SAcLJ 379 at 385.

63 Toh Puay San & Stanley Yeo, "Decriminalising Physician-assisted Suicide in Singapore" (2010) 22 SAcLJ 379 at 385.

64 Toh Puay San & Stanley Yeo, "Decriminalising Physician-assisted Suicide in Singapore" (2010) 22 SAcLJ 379 at 385.

65 United Kingdom, *Report of the Committee on Homosexual Offences and Prostitution* (Cmnd 247, 1957) (Chairman: Sir John Frederick Wolfenden).

for his own physical or moral good.[66] Hart's two qualifications as to when the law may intervene outside of instances of harm to others are in relation to acts of public indecency[67] and when laws are needed to protect actors from themselves in cases when decisions are made "without adequate reflection or appreciation of the consequences; or in pursuit of merely transitory desires; or in various predicaments when judgment is likely to be clouded; or under inner psychological compulsion; or under pressure by others of a kind too subtle to be susceptible of proof in a law court".[68]

27 In contrast, Lord Patrick Devlin was of the view that laws may protect the moral code of society, as society is a community of ideas and is held together by the bonds of common thought about good and evil. The morals of society are the morals of the reasonable person, and the law may step in to prohibit acts, even when he causes no physical harm to individuals and society, when the limits of tolerance are reached.[69] Devlin's thesis has been criticised by those who object to the legal enforcement of morality as well as by those who support it. The thesis as to disintegration of society (in the breakdown of social order) when moral values change seems far-fetched, though Devlin might not have meant that;[70] even those who support the legal enforcement of morality object to his moral non-cognitivism and his willingness to protect any society from his perceived threat of disintegration without regard to whether the moral code of the society in question is salutary or bad.[71]

28 In view of the foregoing debate, Toh and Yeo's case for decriminalisation is problematic. Their position on "harm" is unworkable. There is no clear delineation of, or any justification for, what is regarded as harm. While, at first blush, they appeared to subscribe to Mill's harm principle, they were prepared to consider a very wide definition of harm and weigh certain types of losses suffered by those related to the person seeking PAS, such as the loss of companionship. Their position appears to be an amalgam of some of the foregoing positions, similar to Devlin's in countenancing values fundamental to society's functioning, but leaving these vague.[72] In

66 *John Stuart Mill: On Liberty and Other Essays* (John Gray ed) (Oxford University Press, 1998) at p 14.
67 H L A Hart, *Law, Liberty and Morality* (Stanford University Press, 1963) at p 45.
68 H L A Hart, *Law, Liberty and Morality* (Stanford University Press, 1963) at p 33.
69 Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1996) ch 1.
70 Robert George, *Making Men Moral: Civil Liberties and Public Morality* (Clarendon Press, Reprint 2002) at p 66.
71 Robert George, *Making Men Moral: Civil Liberties and Public Morality* (Clarendon Press, Reprint 2002) at p 71.
72 Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1996) at p 6. While written in relation to England, the laws used to support the principle exist in Singapore.

weighing the interests at stake, Toh and Yeo seemed utilitarian. Aside from the problems plaguing utilitarianism in general,[73] they contradicted themselves in concluding that PAS is "harmless" when they really must have meant that, in their subjective view, the benefits outweigh the cons, such as harm to others. But if so, they should have explained what value they attached to the various interests. As for Hart's exception of paternalism that allows the law to step in to protect actors from themselves in cases when their judgment is likely to be clouded or consent not real, arguably, this has been considered by Toh and Yeo when they proposed legal safeguards to ensure that consent is informed and freely given.

B. Alternative view of role of criminal law

29 The positions advocated in the Hart–Devlin debate are problematic on numerous counts. Instead of addressing the problems at length, this article will instead argue for what is most relevant in relation to Toh and Yeo's point about the role of criminal law. Two matters are pertinent: the importance of maintaining a moral ecology that promotes respect for life and the moral worth of individuals who are no longer useful to society; and the need for coherence in the fundamental principles which undergird existing laws.

(1) Protecting the moral ecology

30 As a modification of Devlin's position, Robert George has persuasively defended the need to maintain a moral ecology inhospitable to vices through the use of law to uphold public morality as a common good of any community, whilst recognising the principle of subsidiarity in letting families, schools and religious institutions play their rightful roles as primary moral teachers.[74] Such a defence of the moral ecology, unlike Devlin's, is not indifferent to true virtue and the right morality, and also recognises the need for difficult prudential choices in light of the fact that the attempt to suppress some vices through law may result in greater evil.[75] The question to be addressed is, thus, whether the sanctity of life and the moral worth of individuals (even those in the last stage of their lives) are fundamental principles which must be unequivocally affirmed so as to facilitate a moral ecology supportive of attitudes that respect lives and all individuals regardless of their utility to society. Toh and Yeo missed the point when they

73 These will have to be considered in some other forum.

74 Robert George, *Making Men Moral: Civil Liberties and Public Morality* (Clarendon Press, Reprint 2002) at pp 43–47.

75 Robert George, *Making Men Moral: Civil Liberties and Public Morality* (Clarendon Press, Reprint 2002) at p 44.

dismissed slippery slope arguments as "largely speculative" in view of their panacea of "strict regulations and safeguards".[76] The arguments they dismissed relate to changing social attitudes towards "death, illness, old age and the medical profession", possibly leading to non-consensual euthanasia, and it becoming easier to kill those who are "comatose, retarded or suffering from crippling diseases", finally degenerating to the killing of the "poor or socially undesirable".[77] There is a twofold rebuttal where the moral ecology arising from permissive PAS laws is concerned.

31 First, the empirical slippery slope cannot be ignored when one looks at the facts across the world. In deciding on legalisation, the progression of euthanasia laws and attitudes towards euthanasia in other jurisdictions that have legalised it cannot be ignored. Even before going into such progression, as an aside, it ought to be mentioned that existing criteria for euthanasia are already problematic: for example, if euthanasia is permitted to those who are terminally ill, and if that is defined to include persons with less than 50% chance of living more than six months, this category might include the frail elderly in nursing homes.[78] Beyond definitional issues, there remains a real possibility of the extension of euthanasia to infants, those with mental incapacities or disabilities, and the elderly, such that one cannot choose to deal with the issue of an empirical slippery slope only if these cases arise later.[79] Indeed, this has materialised to some degree, whether by a formal extension of categories of persons to whom euthanasia is allowed, or by loose application of criteria by personnel involved in the administration of euthanasia. For example, Belgium removed the age restriction for euthanasia in 2014; assisted death has extended beyond the line originally drawn by the law in the Netherlands to patients regarded as legally and medically incompetent and the possibility of extension to those who are not terminally ill but feel their lives are complete is being considered;[80] severe psychic pain in an otherwise healthy person has been thought to be a sufficient ground for requesting euthanasia;[81] and

76 Toh Puay San & Stanley Yeo, "Decriminalising Physician-assisted Suicide in Singapore" (2010) 22 SAcLJ 379 at 393.

77 Toh Puay San & Stanley Yeo, "Decriminalising Physician-assisted Suicide in Singapore" (2010) 22 SAcLJ 379 at 393.

78 Susan R Martyn & Henry J Bourguignon, "Physician-assisted Suicide: The Lethal Flaws of the Ninth and Second Circuit Decisions" (1997) 85 Cal L Rev 371 at 397–398.

79 Ian Dowbiggen, "'A Prey on Normal People': C Killick Millard and the Euthanasia Movement in Great Britain, 1935–55" (2001) 36 *Journal of Contemporary History* 59 at 84.

80 "Netherlands May Extend Assisted Dying to Those Who Feel 'Life Is Complete'" *The Guardian* (13 October 2016).

81 Susan R Martyn & Henry J Bourguignon, "Physician-assisted Suicide: The Lethal Flaws of the Ninth and Second Circuit Decisions" (1997) 85 Cal L Rev 371 at 413–414; Wesley J Smith, "Does Human Life Have Intrinsic Value Merely Because It Is Human?" (2006) 13 Trinity L Rev 45 at 78.

researchers have found cases of non-voluntary euthanasia in the form of the termination of lives of disabled infants in the Netherlands.[82]

32 Second, proper consideration must be given to attitudinal changes when euthanasia is legalised. Particularly, how will the moral ecology of society be affected? There are two main areas of concern: the weakening of respect for the sanctity of life, and how the attitude that treatment is not worthwhile is really a belief that particular patients are not worthwhile,[83] thereby affecting the attitude to other similarly placed persons. However, advocates of euthanasia rebut that even if there would be a genuine weakening of respect for life, the old and suffering should still be allowed euthanasia; otherwise, they would be compelled to live and suffer for an "abstract social end".[84] Whether this rebuttal is tenable, ultimately, depends on the contention between the primacy of autonomy and the sanctity of life.

(2) Protecting fundamental principles on which laws pivot

33 One might also read Devlin more charitably to be concerned with protecting fundamental principles, on which a number of laws are based, which are derogated from when a particular act is decriminalised, and which, therefore, might no longer support those other laws. Arguably, the decriminalisation of euthanasia hinges on the rejection of particular principles which undergird other laws, and the rejection, ultimately, has an effect on the tenability of those other laws in the long run. Two main principles are at stake.

34 The first has been noted in Part II:[85] the primacy of autonomy over the sanctity of life. If autonomy can be given primacy over sanctity of life (at least for particular categories of persons), can it be given primacy in other areas? That depends on whether autonomy is given primacy because it is an essential aspect of liberty, which is now valued above all or many other goods – "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life".[86] Is it because what is right or wrong depends on each individual's subjective definition? The repercussions on the conception of autonomy in areas such as the definition of marriage and family life cannot be ignored.

82 Eduard Verhagen & Pieter JJ Sauer, "The Groningen Protocol – Euthanasia in Severely Ill Newborns" (2005) 352 N Engl J Med 959.
83 Herbert Hendin, "The Practice of Euthanasia" (2003) 33(4) *Hastings Center Report* 44.
84 John B Mitchell, "My Father, John Locke and Assisted Suicide: The Real Constitutional Right" (2006) 3 Ind Health L Rev 45 at 96.
85 See paras 5–23.
86 *Planned Parenthood v Casey* 505 US 833 at 851 (1992).

35 The second main principle at stake relates to the moral worth of persons similarly placed relative to those who are permitted to choose euthanasia: are their lives devalued? Allowing the terminally ill, for example, to choose euthanasia seems to mean that while the State generally upholds sanctity of life for others, the principle may be derogated from in such cases: the State supports their desire for suicide. While, on one hand, it seems to recognise the magnitude of suffering on their part, on the other, it arguably signals that their lives may not be worth living, such that there is no longer any state interest in curtailing their choices to end their lives. The principle that such lives are not worth living, while at first constrained in its application by the autonomous choice of such persons, would be a new principle adopted by the State that may have wider repercussions in future on the worth of similarly placed persons. Such devaluation attacks the principle of equal moral worth and dignity that is essential to the proper functioning of an egalitarian society that respects all persons. How would Toh and Yeo have dealt with such an argument? The devaluation of such lives through legalisation can also be seen as destructive of a fundamental agreement as to good and evil that Devlin regarded as rightfully to be protected by the law.

36 In fact, Toh and Yeo valued the coherence of principles on which laws pivot, because they distinguished PAS and VAE, arguing that legalising PAS does not mean that VAE must be legalised, and further arguing that having allowed advance medical directives ("AMDs"), we must allow PAS. Both arguments may be rebutted.

37 In relation to the distinction between PAS and VAE, it might be argued that there is no significant moral difference between PAS and VAE where ethical issues relating to medical professionals are concerned. The possibility of abuse is not negated by requiring the patient to carry out the final act, though some argue, based on common sense, notwithstanding Stanley Milgram's experiments that suggest the likelihood of people following the directives of authority, that people are less likely to be pressured into killing themselves than letting someone else kill them.[87] But it might be argued that once PAS is available, on principle, those too weak or unable to carry out PAS because of their medical condition should not be denied VAE. Moreover, even patients who can carry out PAS might prefer a professional to carry out the act for them.[88]

87 John Deigh, "Physician-assisted Suicide and Voluntary Euthanasia: Some Relevant Differences" (1998) 88 J Crim Law & Criminology 1155.

88 Nicholas Dixon, "On the Difference between Physician-assisted Suicide and Active Euthanasia" (1998) 28(5) *Hastings Center Report* 25.

38 In contrast, the fact that AMDs are permissible does not entail that PAS should be legalised. Toh and Yeo's rejection of the distinction between AMDs and PAS on the grounds that both quicken death and because the classification of the withdrawal or withholding of life-sustaining treatment is "suspect"[89] is incorrect.

39 Even without the AMDA, a person can choose to reject medical treatment. The common law's approach to the right to refuse treatment is borne out of respect for a person's autonomy, with forced medication being seen as a battery,[90] but this does not mean that it endorses a right to suicide. In the case of rejection of medical treatment, if death results, it is caused by the untreated medical condition, and not by a separate act. Some have argued that as it is impermissible for a physician to let an injured patient bleed to death even though death results from a natural process, the significant factor is not the omission involved in passive euthanasia: an omission can be designed to caused death. They have argued that from the perspective of a patient wishing to die, there is "no morally pertinent difference between a doctor's terminating treatment that keeps him alive, if that is what he wishes, and a doctor's helping him to end his own life by providing lethal pills he may take himself, when ready, if that is what he wishes – except that the latter may be quicker and more humane".[91] The analogy of passive euthanasia with the physician allowing a patient (who wishes to live) to bleed to death is, however, misconceived. In both cases, physicians have duties to treat the patient; in the passive euthanasia case only, such a duty no longer subsists by the rejection of the treatment. Moreover, the characterisation of passive euthanasia and PAS as being the same from the perspective of the patient glosses over the fact that the patient who requests the withdrawal of extraordinary life-sustaining measures may simply be rejecting the invasive measures, without necessarily actually wanting to die. There are instances when extraordinary life-sustaining measures have been removed from patients but patients continued to live, showing the difference between removing life support and causing death.[92] A right to be let alone in refusal of medical treatment does not entail a right to a drug that hastens or causes death. The AMDA merely adds to the common law position in the scenario when a person is no

89 Toh Puay San & Stanley Yeo, "Decriminalising Physician-assisted Suicide in Singapore" (2010) 22 SAcLJ 379 at 386–387.

90 *Washington v Glucksberg* 521 US 702 at 725 (1997).

91 Ronald Dworkin, Peter L Zimroth & Abe Krash, "The Philosopher's Brief" (10 December 1996) <https://cyber.harvard.edu/bridge/Philosophy/philbrf.htm> (accessed 18 January 2017) at Part II.

92 This argument has been made in relation to Karen Quinlan's case, when Quinlan continued to live for another ten years after her respirator was removed: see Wesley J Smith, "Does Human Life Have Intrinsic Value Merely Because It Is Human?" (2006) 13 Trinity L Rev 45 at 88.

longer in the position to express their wishes. In such a case, one may indicate through an AMD that a range of extraordinary life-sustaining treatment is to be withheld or withdrawn, so that the difficult decision is not left to one's relatives, who might also dispute with one another.

IV. Subordinate concerns relating to the medical profession

40 The concerns relating to the medical profession are subordinate or subsidiary as the decisive arguments for whether euthanasia should be legalised really pertain to the issue of whether the law should facilitate an individual's desire to end their life. These concerns are considered as Toh and Yeo discussed the violation of the Hippocratic Oath if physicians were to be involved in PAS, and proposed a modified version of the oath. As the violation of the oath is hardly the main objection in relation to the involvement of the medical profession, the modification of the oath also fails to provide the answer to the objection. The real objection must be a more substantive one: the oath is regarded as important only inasmuch as it captures the quintessential role of physicians.

41 The fact that there is aversion to physicians being directly or indirectly involved in euthanasia is evident in various ways. Rationally or not, PAS is viewed as more acceptable than VAE as physicians do not have to perform the final act that causes death. Oregon's Death with Dignity Act[93] allows PAS through the prescription of oral medicines but not through the provision of drugs for a lethal injection: this may reflect an aversion to physicians performing acts such as the setting up of intravenous lines for the lethal injection.[94] The further removed physicians are, the better.

42 There are several reasons for the aversion. The trust between patients and physicians might be broken if the requirement that physicians act in the best interest of patients could be satisfied by the proposal of euthanasia. Patients might fear seeing physicians if euthanasia might be proposed as the solution to their illness.[95] Given the dynamic of inequality between the physician and the patient, an already dejected patient facing a bleak prognosis could be overwhelmed by

93 Chapter 127, 127.880 s 3.14.

94 Contrast Glen R McMurry, "An Unconstitutional Death: The Oregon Death with Dignity Act's Prohibition against Self-administered Lethal Injection" (2005) 32 U Dayton L Rev 441 at 458, which argued that the integrity of the medical profession is not affected as the final act is still done by the patient.

95 Ken Levy, "*Gonzales v Oregon* and Physician-assisted Suicide: Ethical and Policy Issues" (2007) 42 Tulsa L Rev 699 at 726–727.

suggestions from their physicians,[96] rendering their true consent suspect. The integrity[97] of the profession would be compromised if physicians, traditionally seen as healers, can offer death as an option, instead of doing their best to cure the illness; though some argue that euthanasia can count as an alleviation of suffering and, hence, physicians who propose it are still seen as serving a legitimate medical purpose.[98] Medical practice might change if physicians came additionally to assess patients in terms of their falling within the category described by laws permitting euthanasia: physicians might develop a tendency to regard patients as being in unbearable suffering or as having given up.[99] As it is, clinicians, in spite of the illegality of euthanasia, already intentionally overdose patients.[100] The long-term effects on the ecology of medical practice, when the profession is already under pressure to manage scarce healthcare resources in light of an aging population, cannot be ignored.

43 There is also concern that the legal availability of euthanasia would lend to a failure to invest in palliative medicine. This results in a vicious cycle as a lack of palliative care in turn causes some physicians to propose euthanasia when faced with suffering patients. Conversely, with greater availability of better palliative care, some physicians have been found to become more restrictive in their practice of euthanasia.[101]

44 In relation to palliative care, Toh and Yeo, rejecting the doctrine of double effect, also insisted that the legal act of physicians administering painkillers which have the side effect of hastening death is not very different from the step they propose. Doing such acts with such side effects are "tantamount to intention in the criminal law".[102] While the doctrine of double effect is contentious in ethics, those difficulties do not seriously attend to the case of administering painkillers as part of palliative care. First, as a matter of practice, physicians involved in palliative care do consider the magnitude of the risks or weigh the pros and cons of certain medicines and carefully

96 Susan R Martyn & Henry J Bourguignon, "Physician-assisted Suicide: The Lethal Flaws of the Ninth and Second Circuit Decisions" (1997) 85 Cal L Rev 371 at 395.

97 *Washington v Glucksberg* 521 US 702 at 731 (1997), *per* Rehnquist CJ.

98 Ken Levy, "*Gonzales v Oregon* and Physician-assisted Suicide: Ethical and Policy Issues" (2007) 42 Tulsa L Rev 699 at 700.

99 Henk A M J ten Have & Jos V M Welie, "Euthanasia: Normal Medical Practice" (1992) 22(2) *Hastings Center Report* 34.

100 David A Asch & Michael L DeKay, "Euthanasia Among US Critical Care Nurses: Practices, Attitudes, and Social and Professional Correlates" (1997) 35 Medical Care 890 at 898.

101 Susan R Martyn & Henry J Bourguignon, "Physician-assisted Suicide: The Lethal Flaws of the Ninth and Second Circuit Decisions" (1997) 85 Cal L Rev 371 at 413.

102 Toh Puay San & Stanley Yeo, "Decriminalising Physician-assisted Suicide in Singapore" (2010) 22 SAcLJ 379 at 388.

calibrate the dosage. Second, when physicians, on the pretext of palliative care, administer potentially lethal analgesics[103] in dosages that hasten or lead to death, these cases are regarded as abuses in a regime that disallows euthanasia or as cases in which medical personnel proceeded without consent in a regime that allows VAE. Thus, the fact that physicians administer potentially lethal doses of painkillers in palliative care is not directly relevant to the case for legalisation.

V. Conclusion

45 A scene at a coin-operated tram for young children at a mall is etched in this author's mind: a toddler struggled to get out of the tram after a ride, while his father lovingly put a protective hand over his head to prevent any knocks. There was something unmistakably and disconcertingly familiar about the unsteady gait of the toddler and his dependence on others as he attempted to step out of the tram. They were starkly similar to those of an elderly person who might be suffering from osteoporosis, spinal degeneration and other effects of aging. Some such elderly persons are blessed enough to have others lovingly watching out for them (and their heads) as they struggle out of cars. Others might be treated less patiently. Yet others might have been dumped by family members who now find them to be a burden.

46 Nothing captures more vividly our callous attitudes towards those at the end-stage of their lives than the contrast between how some of us sometimes treat lovingly and with patience dependent toddlers who embody the promise of new life and better days, and how we treat the dependent elderly, some of whose physical and mental conditions seem to be on a course of irreversible deterioration and increasing helplessness. In the case of the former, we can envision the length of the journey of dependence and we might anticipate reaping relational and other benefits thereafter; in the case of the latter, we do not know how short or long the journey is, and some of us might find it hard to walk faithfully with another person through suffering.

47 As Finnis incisively observed when rebutting Ronald Dworkin's view of "one's life as a narrative of which one is the author, so that when one ceases to be in *command* of the plot, one's remaining life – denounced as mere biological life – is valueless":[104]

103 Kenneth I Vaux, "The Theological Ethics of Euthanasia" (1989) 19(1) *Hastings Center Report* 19.

104 John Finnis, "Euthanasia and Justice" in *Human Rights and Common Good: Collected Essays: Volume III* (Oxford University Press, 2011) at pp 266 and 267.

> It is indeed hard for people like judges, professors, classical scholars, and so forth – used to mastery, achievement, and control – to accept the prospect of becoming or being subject to great deprivation and more or less complete dependence. They – we – are understandably misguidedly tempted to view such a state as spoiling their 'narrative'. The view is radically mistaken: the narrative of which they can (where they rightly can) be proud is a narrative which ends when their actual ability to carry out choices ends. Beyond that point, as (in one's earliest years) before it, there is life which is real, human, and personal, but without a story of which to be proud or ashamed. An utterly common human condition.

48 It is an ironic mischaracterisation of opposition to PAS and VAE to view such opposition as stemming from an attitude dismissive or disrespectful of human dignity. Surely, it is those who *refuse to accept* that a human being has not in any way lost their dignity at the end of their lives even when they are helpless who insist on such persons being given the choice of PAS and/or VAE. In contrast, opponents of PAS and VAE are accepting of the different phases in the life cycle of a human being. While young children and people in their end-stage share some similarities in their dependence on others, a person in their end-stage of life is less likely to have loved ones pinning their hopes on the person in the same way that people are prone (rightly or wrongly) to pin their hopes on children. But opponents of PAS and VAE are precisely cognisant that the dignity – the moral worth – of those at the end-stage of life is not any less just because such persons might be worth less to others or because such persons are no longer useful to society. To the pragmatic, the elderly may be a burden, when there is really nothing wrong with being a burden to others.[105] Their – indeed, our – moral worth and dignity are intrinsic, not derivative.

49 Many at the end-stage of life need far more support and love to find the strength to live. Losing the will to live, as might be the case for many, should hardly be conflated with highfalutin ideas of exercise of autonomy and of one's right to define the "sweet-mystery-of-life".[106] Choosing not to fail those at the end-stage of life – choosing to arise in support of them – is not to be equated with prolonging life at all costs. The AMDA already rejects the view that life must be prolonged at all costs. Denying euthanasia honours the sanctity of life and the equal, underived, intrinsic moral worth of all persons, including the very

105 This is how it was put by two commentators: see Stanley Hauerwas & Richard Bondi, "Memory, Community and the Reasons for Living: Theological and Ethical Reflections on Suicide and Euthanasia" (1976) 44 *Journal of the American Academy of Religion* 439 at 451.

106 This was how Scalia J, dissenting in *Lawrence v Texas* 539 US 558 (2003), referred to Kennedy J's famous passage referring to an individual's right to define their own concept of existence, of meaning, of the universe, and of the mystery of human life.

weakest who can no longer contribute to society – principles on which so many other laws pivot.