The Choice Theory and the Right to Life: Capital Punishment, Abortion and Euthanasia

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A thesis submitted in fulfilment of the requirements for the degree of

Doctor of Philosophy in Law

under a Co-tutelle Arrangement

Macquarie Law School

Macquarie University, Sydney, Australia

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Koguan Law School

Shanghai Jiao Tong University, Shanghai, China

May 2017

TABLE OF CONTENTS

Abstract

This thesis deals with debate about the legitimacy of capital punishment, abortion and euthanasia. It adopts the two competing theories of rights — the will and the interest— to examine existing arguments, for the purpose of finding a fresh argument that can provide a legally robust answer to such debate. The thesis highlights the modern version of the will approach, namely the Choice Theory, which defines a right as a choice held by the right holder over the performance of the duty bearer.

This thesis contends that all existing arguments regarding the debate can be interpreted as resting on certain accounts of the right to life, via the concept of a will, a choice, a benefit or an interest. When conceived in this way, weaknesses and strengths of the arguments, namely their ability or inability to reach definite, consistent and acceptable conclusions to the three practices in question, can be critiqued usefully. The best argument is therefore one that possesses merits of certainty, conclusiveness, consistency and acceptability; the thesis finds this to be one raised on the grounds of rights that implies a concept of the right to life as a choice. This leads to the conclusion that capital punishment, abortion and euthanasia all ought to be permitted, unless the law has otherwise incorporated a duty to the contrary. The Choice Theory proves to be the most reliable interpretation of the right to life as regards the legitimacy of the three issues.

Statement of Candidate

I certify that the work in this thesis entitled "The Choice Theory and the Right to Life: Capital Punishment, Abortion and Euthanasia" has not previously been submitted for a degree nor has it been submitted as part of requirements for a degree to any other university or institution other than Macquarie University and Shanghai Jiao Tong University.

I also certify that the thesis is an original piece of research and it has been written by me. Any help and assistance that I have received in my research work and the preparation of the thesis itself have been appropriately acknowledged.

In addition, I certify that all information sources and literature used are indicated in the thesis.

Signature:

Yujie Zhang (43598285)

Date: 15 May, 2017

Acknowledgements

Living in a foreign country and studying for a PhD in a foreign language has at times proved challenging; without the help of these dedicated academics and support staff, this thesis would never have come into being.

I want to thank both my supervisors, Associate Professor Malcolm Voyce and Professor Jinxue Fan, who not only encouraged me to carry out this project, but also supported me with diligent supervision. I also want to thank Emeritus Professor Iain Stewart and Dr Joel Harrison, who welcomed me into their courses and gave me valuable advice as regards selection of the topic.

I am grateful to HDR officers — especially Dr Ren Yi, Jane Kim, Catherine Schedlich, Ed Dharmadji and Helen Mannah — who offered me the opportunity to do this research at Macquarie University with a scholarship, and assisted me with the preparation and submission of this thesis. I would like to thank Faculty of Arts staff Maryanne Hozijan, Andrew Alter, Hannah Choi and Robert Collier, who assisted with my attendance at conferences, and Law School staff Debbie Loo, Eleanor McGhee and Chindy Praseuthsouk, who were always helpful in administrative matters.

I would also like to thank Dr Richard Smith, who helped edit this thesis, making expressions clear and accurate.

Lastly, I acknowledge love and support from my husband and parents, who, although they did not understand my work, provided much in the way of financial and emotional support.

Part One

Introduction and Background

Chapter One

Introduction

1.1. Significance and Objective

Capital punishment, abortion and euthanasia are three of the most controversial issues facing humanity today. There is no universal answer to such questions, including whether they are allowed or not and to what extent they are allowable. Different states vary widely in their approaches, citizens within a state have divergent opinions, and even a scholar may hold contradictory attitudes at different stages of his or her career.[1]

Capital punishment, often called the death penalty or execution, is punishment by death. Before the mid-20th century, capital punishment was universally applied all over the world. Nowadays, over 60 percent of the world's population still lives under such regulation, and some states have reintroduced it after several years' suspension.[2] However, appeals for its abolition have become overwhelming since World War II.[3] Whether capital punishment

[1] For example, Jeremy Bentham changed his views on capital punishment from abolition in principle, but retaining it for the most serious crimes, to complete abolition. See Hugo Bedau, 'Bentham's Utilitarian Critique of the Death Penalty' (1983) 74(3) *Journal of Criminal Law and Criminology* 1033, 1035–36.

[2] States that have always used capital punishment include China, India, the United States and Indonesia. States that have reintroduced it involve Sri Lanka and the Philippines.

[3] Sara Sun Beale, 'Public Opinion and the Abolition or Retention of the Death Penalty Why is the United States Different' (Paper presented at the International Society for Reform of Criminal Law conference, Vancouver, British Columbia, 23 June 2014).

Until now, 103 countries have abolished capital punishment *de jure* for all crimes, including Australia. Six have abolished it except for extremely serious offences such as war crimes. 50 have not used it for at least 10 years or have put it under a moratorium and abolished it *de facto*.

There are many organisations, both national and international, whose purpose is to advocate for the abolition of capital punishment in all countries. Amnesty International, Human Rights Watch, World Coalition against the Death Penalty and American Civil Liberties Union are some of the most prominent.

Other than that, the United Nations (UN) and the European Union (EU) have tried to ban capital punishment amongst member states. For example, the UN introduced a resolution during the General Assembly's 62nd session in 2007, calling for the establishment of a moratorium on the use of the death penalty with a view to abolition, restrictions on the numbers of offences to which capital punishment might apply and greater respect for the rights of those on death row. The UN also resolved that member states that had abolished capital punishment should not reintroduce it. In the subsequent resolution 62/149, the vote ran 99 to 52 for (with 33 abstentions), and, later the same year, was reaffirmed by a vote of 104 to 54 for (with 29 abstentions). In 2008 the General Assembly introduced another resolution, number 63/168, reaffirming its previous call for a global moratorium on capital punishment: this was voted 106 to 46 in favour (with 34 abstentions). A third resolution, number 65/206, was adopted in 2010, with 109 for, 41 against and 35 abstentions. This resolution also raised another resolution on a moratorium in 2012, subject to further discussion, titled 'Promotion and Protection of Human Rights'. The most recent resolution adopted by the General Assembly in 2012 was number 67/117, with 111 in favour, 41 against and 34 abstentions.

Meanwhile, the Second Optional Protocol to The *International Covenants on Civil and Political Rights* (opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991)) adopts the position of abolishing capital punishment and developing human rights. Article 1 states:

1. No one within the jurisdiction of a State Party to the present Optional Protocol shall be executed.
2. Each state shall take all necessary measures to abolish the death penalty within its jurisdiction.

However, resolutions on capital punishment are not binding on any state; they are purely appeals. As such, the

should be abolished or retained is therefore controversial and a topic worthy of critical examination.

Abortion is the deliberate termination of pregnancy. This issue became open to debate during the 19th century when some states introduced legislation prohibiting the practice.[4] At present, a few states completely prohibit it; some generally forbid it except under extreme circumstances.[5] Several countries permit abortion in the early stages of pregnancy, while more than fifty allow abortion without restriction.[6] Divergence on whether and when abortion should be allowed is widespread.

Euthanasia is the practice carried out by a doctor to intentionally end a patient's life and so relieve the latter from pain and suffering.[7] Divergent opinions on its moral legitimacy were

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Protocol is optional rather than compulsory.
The EU and the Council of Europe set abolition of capital punishment as a compulsory requirement of membership and have been actively lobbying for that position. However, a moratorium as an interim measure is also acceptable to them.

[4] Boston Women's Health Book Collective, *Our Bodies Ourselves for the New Century* (Touchstone, 1998) 408.

[5] The states that completely prohibit abortion include the Dominican Republic, Guatemala, Chile and many states in Mexico, all of which protect the right to life of the unborn in their constitutions. Australian states of Queensland and New South Wales also generally forbid abortion by considering it a crime, unless the mother's health is in serious danger.

[6] Many states of the USA and Australian states of Victoria, Tasmania, Western Australia, Northern Territory and South Australia permit abortion at an early stage of pregnancy. States that permit abortion without restrictions include Canada, South Africa, China, and Australian Capital Territory; Canada even grants abortion service providers public funding.

[7] This definition is borrowed from Marvin Khol and Paul Kurtz, who define euthanasia as 'a mode or act of inducing or permitting death painlessly as a relief from suffering'. Marvin Kohl and Paul Kurtz, 'A Plea for Beneficent Euthanasia' in Marvin Kohl (ed), *Beneficent Euthanasia* (Prometheus Books, 1975) 94.
However, Khol and Kurtz's definition may err in including murder. See Tom L Beauchamp and Arnold I Davidson, 'The Definition of Euthanasia' (1979) 4(3) *Journal of Medicine and Philosophy* 294. Murder inflicted on a patient who suffers great pain also relieves the patient from suffering and therefore may also be considered as a type of euthanasia according to this definition. To exclude murder, the intention to relieve pain is added.
Secondly, Khol and Kurtz's definition also confuses euthanasia with assisted suicide. According to John Deigh, euthanasia is carried out by a physician, while in cases of assisted suicide the physician only provides the patient with information or materials to kill himself or herself. The actual act of inducing death is therefore carried out by the patient rather than the physician. See 'Physician-Assisted Suicide and Voluntary Euthanasia: Some Relevant Differences' (1998) 88 *Journal of Criminal Law and Criminology* 1155. Khol and Kurtz's definition, however, does not differentiate the act of killing carried out by the doctor from the act of killing carried out by the patient using knowledge and materials provided by the doctor. To exclude this type of assisted suicide, the doctor's intention is emphasised. For similar exclusions, see Beauchamp and Davidson, 'The Definition of Euthanasia', 311.
Notwithstanding, some define assisted suicide as active voluntary euthanasia, meaning euthanasia carried out by injecting a lethal drug into the patient according to his or her request. See J S Cohen et al, 'Attitudes toward Assisted Suicide and Euthanasia among Physicians in Washington State' (1994) 331 *New England Journal of Medicine* 89. This type of assisted suicide is included in the definition used in this thesis.
Thirdly, Heather Draper argues that a causal proximity between the action and the death of the patient should be expressed in the definition as well. See 'Euthanasia' in Ruth Chadwick (ed), *Encyclopaedia of Applied Ethics 2* (Academic Press, 1998). For a similar claim, see Beauchamp and Davidson, 'The Definition of Euthanasia', 303–4. The intention of ending the patient's life is again stressed.
Fourthly, some scholars claim that the consent or request of the patient should also be included in the definition of euthanasia, such as Michael Wreen, 'The Definition of Euthanasia' (1988) 48(4) *Philosophy and Phenomenological Research* 637, 645. This consent or request confines the realm of euthanasia to voluntary euthanasia as defined by the law. For example, the Netherlands and Flanders both define euthanasia as an action

raised as early as the time of ancient Greece and Rome.[8] When morphine became available to reduce the pain of death during the mid-1800s, euthanasia evolved into more of a legal and moral grey area, which makes the practice subject to controversy.[9]

Euthanasia can be divided into three categories, determined according to patient consent: voluntary, non-voluntary and involuntary.[10] Among these three, voluntary and non-voluntary euthanasia are the two most debated. Involuntary euthanasia, since it is carried out against the patient's will, is generally considered to be murder and is thus forbidden in all states.[11] Voluntary euthanasia is euthanasia conducted with the informed consent of the patient. It is legal in some states, and more are trying to legalise it.[12] However, many states still forbid the practice. Non-voluntary euthanasia occurs when the consent of the patient is unavailable, for example, when the patient is in a coma or a vegetative state. It is, therefore, illegal in most states, except for the Netherlands, which has decriminalised it under particular circumstances.[13]

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conducted by a doctor on the request of the patient.
Such a definition, however, is not accepted in this thesis, which agrees with Beauchamp, Davidson and Wreen that defining a practice does not imply accepting it. The definition of euthanasia, therefore, does not need to conform to the law. Rather, for the convenience of discussion, this thesis chooses a broader definition to cover voluntary, non-voluntary and involuntary euthanasia. Similar views are presented in Wreen, 'The Definition of Euthanasia', 639; N M Harris, 'The Euthanasia Debate' (2001) 147(3) *Journal of the Royal Army Medical Corps* 367.

[8] Euthanasia was practiced in Ancient Greece and Rome, and supported by Socrates, Plato and Seneca the Elder, but disfavoured by Hippocrates. See Michael Stolberg, 'Active Euthanasia in Pre-Modern Society 1500-1800: Learned Debates and Popular Practices' (2007) 20(2) *Social History of Medicine* 205, 206–07.

[9] According to Nick Kemp, contemporary debate on euthanasia started in 1870, becoming more intense in 1906 in the USA and in 1935 in the UK. See *Merciful Release* (Manchester University Press, 2002) 11. One statistical study shows that euthanasia was the most active area of debate in bioethics in 2006; see P Borry, P Schotsmans and K Dierickx, 'Empirical Research in Bioethical Journals: A Quantitative Analysis' (2006) 32(4) *Journal of Medical Ethics* 240.

[10] This classification is widely accepted among scholars, for example, Hugh LaFollette, *Ethics in Practice: An Anthology* (Blackwell, 2002) 25–6.

[11] BBC, *Voluntary and Involuntary Euthanasia* (2014) <http://www.bbc.co.uk/ethics/euthanasia/overview/volinvol.shtml>.

[12] Nowadays voluntary euthanasia is legal in the Netherlands, Colombia, Switzerland, Japan, Germany, Belgium, Luxembourg, Estonia, Albania and the US States of Washington, Oregon, Montana and Vermont, as well as the Canada Province of Quebec. The practice was once legalised in Australian Northern Territory in 1995 via the *Rights of the Terminally Ill Act 1995* (NT), which, however, was soon voided by the *Euthanasia Laws Act 1997* (Cth). The Australian states of Victoria and New South Wales have also tried to legalise voluntary euthanasia; see Australian Associated Press, *Voluntary Euthanasia: Victoria to Introduce Legislation in Late 2017* (8 December 2016) The Guardian <https://www.theguardian.com/society/2016/dec/08/voluntary-euthanasia-victoria-flags-rigorous-review-before-laws-introduced>; Sean Nicholls and Kate Aubusson, *Voluntary Euthanasia laws to Come Before NSW Parliament This Year* (16 January 2017) The Sydney Moring Herald <http://www.smh.com.au/nsw/voluntary-euthanasia-laws-to-come-before-nsw-parliament-this-year-20170115-gtrsz0.html>.

[13] For the details of these circumstances, see related cases reviewed in Eduard Verhagen and Pieter J Sauer, 'The Groningen Protocol — Euthanasia in Severely Ill Newborns' (2005) 352(10) *New England Journal of Medicine* 959.

Considering all three issues together, Ronald Dworkin believed debate about capital punishment, abortion and euthanasia reasonable as it upheld the supremacy of freedom.[14] According to Dworkin, the core requirement of freedom is that no one subjects his or her view to overwhelming opinion.[15] Everyone ought to make his or her own decision and hold his or her personal view on an issue. Divergences and debates, therefore, should be allowed and even encouraged for the greater good of society.[16]

Dworkin's position is sound if we agree with him that the debate on the three issues is mostly religious or spiritual in content.[17] However, this thesis argues that the debate also has significant legal implications. Opinions about capital punishment, abortion and euthanasia directly lead to behaviours that have knock-on effects for those involved. For example, the view that supports abortion makes terminating the pregnancy of a woman on request allowed and the life of a foetus deprived, while the opposite view makes terminating the pregnancy impermissible and the life of a foetus saved. These actions need to be regulated by the law.

The law needs to regulate these actions with clarity, either for or against. For example, the law could forbid abortion. A doctor, therefore, cannot terminate the pregnancy of a woman or deprive a foetus of life. The law could also permit abortion. A doctor thus can terminate the pregnancy of a woman or deprive a foetus of life. However, the law cannot hold contradictory opinions about abortion, or any other issue, because there would be no clear way for individuals to act.

A clear law is also vital for the judicial process to operate effectively. If a lawsuit regarding capital punishment, abortion or euthanasia is brought before a court,[18] the court needs clear

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[14] Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (Alfred A Knopf, 1993) 117. See also Eric Rakowski, 'The Sanctity of Human Life' (1994) 103 *Yale Law Journal* 2049, 2049; John A Robertson, 'Autonomy's Dominion: Dworkin on Abortion and Euthanasia' (1994) 19 *Law and Social Inquiry* 457, 457–58.

[15] Dworkin, Life's Dominion, above n 14, 97. See also Rakowski, 'The Sanctity of Human Life', above n 14; Robertson, 'Autonomy's Dominion', above n 4.

[16] Dworkin, Life's Dominion, above n 14, 117. See also Rakowski, 'The Sanctity of Human Life', above n 14; Robertson, 'Autonomy's Dominion', above n 14.

[17] Dworkin, Life's Dominion, above n 14, 163. See also Rakowski, 'The Sanctity of Human Life', above n 14; Robertson, 'Autonomy's Dominion', above n 14, 457.

[18] Important court cases concerning the right to life are as follows: on the legitimacy of abortion, *Roe v Wade* ((1972) 410 US 113), *Doe v Bolton* ((1973) 410 US 179), *Lakshmi Dhikta v Government of Nepal* ((2007) Writ No 0757), *Vo v France* ((2004) 12 Eur Court HR 326), *Paton v United Kingdom* ((1980) 3 Eur Court HR 408), *A, B and C v Ireland* ((2010) 13 Eur Court HR 2032) and *Bruggemann and Scheuten v Federal Republic of Germany* ((1977) 3 Eur Court HR 244); on the issue of capital punishment, *Baze v Rees* ((2008) 533 US 35); euthanasia was the key issue in *Wilkes v United States* ((1935) 80 F 2d 285), *United States v Perkins* ((1935) 79 F 2d 533), *Washington v Glucksberg* ((1997) 521 US 702), *Vacco v Quill* ((1997) 521 US 793), *Compassion in Dying v Washington* ((1994) 850 F Supp 1454), *Compassion in Dying v Washington* ((1995) 49 F 3d 586), *Compassion in Dying v Washington* ((1996) 79 F 3d 790), *Rodrigues v British Columbia* ((1993) 3 SCR 519),

directives in order to reach its decision. The court cannot refuse to decide the issue because the matter is still under debate. In addition, the court again cannot reach a decision merely according to judges' personal opinions; judges are expected to apply the law appropriately without bias. In this sense, law-making and law-applying activities require the debate to be solved and a definitive answer to be reached. This thesis is one among many efforts trying to achieve a robust answer, mainly from a legal perspective.

1.2. Contribution

Researchers have identified several methods for achieving such a solution, but none have succeeded.[19] Regarding capital punishment, retributivism, deterrent effect, expenditure, irreversibility, public opinion and the right to life are important considerations for scholars who either advocate for the retention or appeal for the abolition of the practice. Retentionists believe capital punishment is a key requirement of retributivism, has a deterrent effect, saves expenditure, and is supported by public opinion. On the contrary, abolitionists insist capital punishment does not conform to the requirements of retributivism, violates the right to life, does not have a deterrent effect, wastes public funds, and is not supported by public opinion.

On the issue of abortion, scholars take into account both the foetus's right to life and the mother's rights, the latter comprising the right to freedom from discrimination, the right to privacy, the right to plan one's family and the right to bodily integrity. Anti-abortionists argue that the foetus has a right to life and that this right ought to prevail over the mother's rights. By contrast, advocates of abortion contend that the foetus does not necessarily have a right to life, or that even if this is the case, such a right does not outweigh the rights of the mother.[20]

Key issues around euthanasia include the slippery slope argument, the burden on the patient's relatives, the state's interest in the patient's life, the patient's right to self-determination and his or her right to life.[21] Opponents of euthanasia assert that the practice violates the patient's right to life, disregards the state's interest in the patient's wellbeing, and sits on a slippery

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Aruna Ramchandra Shanbaug v Union of India ((2011) 4 SCC 454) and *Glossip v Gross* ((2015) 576 US).

[19] Chapter two discusses these arguments in detail.

[20] There are many terms used to denote the two opposing schools of thought on abortion. The most common are 'pro-life' and 'pro-choice'. However, each term implies the other group is 'anti-choice' or 'anti-life', which is not necessarily an accurate presentation of their standpoint. See Kathleen S Lowney, 'Claimsmaking, Culture, and the Media in the Social Construction Process' in James A Holstein and Jaber F Gubrium (eds), *Handbook of Constructionist Research* (Guilford Press, 2008) 331, 337–44. This thesis adopts the terms 'advocates of abortion' and 'anti-abortionists' in a bid for scholarly accuracy.

[21] The slippery slope argument refers to the contention that rejects an action or a premise on the grounds that it easily leads to unacceptable consequences without plausible halting points. See Walter Wright, 'Historical Analogies, Slippery Slopes, and the Question of Euthanasia' (2000) 28 *Journal of Law, Medicine and Ethics* 176, 177.

slope. Proponents of euthanasia argue that the practice does not overlook either the patient's right to life or the state's interest in the patient; they also believe that euthanasia upholds the patient's right to self-determination and relieves both the patient's pain and the emotional and financial burden faced by his or her relatives.[22]

This thesis focuses on the perspective of rights, especially the right to life. It situates existing arguments within their implied accounts of the right to life in order to critique them, and so find the best argument that can provide us with a legally robust answer. The thesis finds the best argument is one that rests on the Choice Theory, which refers to the theory of rights proposed by H L A Hart that defines a right as a choice held by the right holder over the performance of the duty bearer.[23] Viewing the right to life as a choice can reach legally definite and consistent conclusions to all three issues, and avoids many of the problems associated with arguments relying on other accounts.

1.2.1. The Right to Life

The term 'right to life' refers to the concept that a human being should not be arbitrarily deprived of his or her life.[24] This right is considered universally to be one of the most important rights— if not the most important right— that any individual possesses.[25] Biologically, the fact that a person is alive constitutes the minimal basis for him or her to have other rights and pursue other ends in life.[26]

Scholars generally consider the modern idea of the right to life to be that first presented in John Locke's *Two Treatises of Government*.[27] For Locke, the right to life was one of three

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[22] There are other terms used to signify opponents and proponents of euthanasia, for example, 'right to choose' and 'right-to-lifers'. See Jennifer M Scherer and Rita James Simon, *Euthanasia and the Right to Die: A Comparative View* (Rowman and Littlefield, 1999) 27. However, this thesis prefers the terms 'opponents' and 'proponents' to differentiate from the signifiers used to denote the two groups of opinions on the issue of abortion.

[23] H L A Hart, 'Bentham on Legal Rights' in Jules L Coleman (ed), *Rights and Their Foundations* (Garland, 1994) 1, 27. This theory and other accounts of a right will be introduced in 1.3.

[24] Harold Alderman, 'Life, Right to' in Lawrence C Becker and Charlotte B Becker (eds), *Encyclopedia of Ethics* (Routledge, 2001); J O Famakinwa, 'Interpreting the Right to Life' (2011) 29 *Diametros* 22. However, it should be noted that the definition of the right to life has never been decided conclusively.

[25] 'Right to Life' in Roger Scruton, *Palgrave Macmillan Dictionary of Political Thought* (Macmillan Publisher Ltd, 2007), retrieved from <http://search.credoreference.com/content/entry/macpt/right_to_life/0>.

[26] This is a general view. There are other scholars who contend that the right to life is a 'derived right', namely one that derives from the right to life-sustaining material and non-material goods. See Famakinwa, 'Interpreting the Right to Life', above n 24.

[27] Alex Tuckness, 'Locke's Political Philosophy' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (2016) <https://plato.stanford.edu/entries/locke-political/>.
Some scholars extend the origin of the right to life back to the works of Thomas Aquinas. See generally Alderman, 'Life, Right to', above n 24, [2], [4].

inalienable and natural rights a person possessed.[28] This right could not be surrendered to the government when the person entered society. Rather, government was formed for the purpose of protecting the person's enjoyment of the right to life.[29]

Nowadays, the right to life has been incorporated in both national law and international conventions as a fundamental human right. Article 3 of the *Universal Declaration of Human Rights* (UDHR) states that '[e]veryone has the right to life, liberty, and security of person.'[30] Article 6 of the *International Covenant on Civil and Political Rights* (ICCPR) specifies that '[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'[31] Article 2 of the *European Convention on Human Rights* (ECHR) incorporates that '[e]veryone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.'[32]

On a national level, the *United States Declaration of Independence 1776* includes the right to life as an inalienable right endowed by Creator that is enjoyed equally by all human beings.[33] The *Canadian Charter of Rights and Freedoms* considers the right to life as a right that should not be deprived, except in extreme situations.[34] Section 9 of the Australian Capital Territory *Human Rights Act 2004* incorporates that '[e]veryone has the right to life. In particular, no-one may be arbitrarily deprived of life.'[35] Section 9 of the Victorian *Charter of Human Rights and Responsibilities Act 2006* states that '[e]very person has the right to life and has the right not to be arbitrarily deprived of life.'[36]

Concerns about the right to life arise principally regarding the issues of capital punishment, abortion and euthanasia. For example, questions about capital punishment often centre on whether the state's power to carry out punishment by death violates citizens' right to life. The issue of abortion focuses on whether the availability of abortion intrudes into the realm of the

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[28] John Locke, *Two Treatises of Government* (Cambridge University Press, first published 1689, 1988 ed) sec 6, 123, 135, 173. The other two rights Locke discussed are the right to liberty and the right to property.
[29] Tuckness, 'Locke's Political Philosophy', above n 27.
[30] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 3.
[31] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 6(1).
[32] *European Convention on Human Rights*, opened for signature 4 November 1950, 221 ETS 5 (entered into force 3 September 1953) art 2(1).
[33] *United States Declaration of Independence 1776* [2].
[34] *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedom*') sec 7.
[35] *Human Rights Act 2004* (ACT) sec 9(1).
[36] *Charter of Human Rights and Responsibilities Act 2006* (Vic) sec 9.

right to life possibly enjoyed by a foetus.[37] Debate about euthanasia inquires whether the ability to choose one's death or another's death for the purpose of relieving pain contradicts the value of the right to life.[38]

The answers to these questions determine the answer to the three issues: if the answers to these questions are 'yes', the three issues should be legally forbidden; on the contrary, if the answers to these questions are 'no', the three issues are allowable. In this sense, the right to life is the most decisive point in the debate on the three issues.

1.2.2. Accounts of the Right to Life

Notwithstanding, answers to these three issues are still unachievable by purely acknowledging the significance of the right to life. On the issue of capital punishment, simple recognition of the criminal's right to life does not necessarily imply that this right should save the criminal from being executed by the state. As for the issue of abortion, the existence of a right to life does not determine whether the foetus should be entitled to this right, nor whether this right surpasses the mother's other rights. Again, regarding the issue of euthanasia, the protection of the right to life does not answer definitively whether this right outweighs unbearable pain and the patient's right to self-determination. Without answers to these complex questions, there is no answer to the three important issues more broadly.

To answer these questions, a deeper understanding of the concept of the right to life is needed. Several researchers have tried to answer some of these questions through conceptualising the right to life. For example, Joel Feinberg explored the issue of euthanasia by defining the right to life as a waivable claim that entitled its holder to the ability to waive that right and choose to die.[39] In Feinberg's definition, the patient's right to life does not conflict with his or her relief of pain or right to self-determination. Rather, the right to life endows the patient with such an ability to choose death and relieve pain. Voluntary euthanasia, therefore, was justified in his view.[40]

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[37] John-Stewart Gordon, 'Abortion' in James Fieser and Bradley Dowden (eds), *Internet Encyclopedia of Philosophy* (10 August 2015) <http://www.iep.utm.edu/abortion/> [1]–[2].

[38] Joseph Raz, 'Death in Our Life' (28 May 2012) in *Oxford Legal Studies Research Paper* No 25/2012 <http://ssrn.com/abstract=2069357> 10.

[39] Joel Feinberg, 'Voluntary Euthanasia and the Inalienable Right to Life' (1978) 7(2) *Philosophy and Public Affairs* 93, 121–23.
Feinberg (1926-2004) was an American moral, political and legal philosopher, and was one of the most influential figures in American jurisprudence in the last 50 years. His students include Jules Coleman, Russ Shafer-Landau, and Clark Wolf.

[40] Ibid.

Joseph Raz also interrogated the issue of euthanasia by conceiving of the right to life as including the ability to choose 'the time and manner of one's death'.[41] The patient's right to life again empowers him or her to alleviate himself or herself from pain via death.

Peter Singer interpreted the issues of abortion and euthanasia by delineating the right to life as a preference to live.[42] This preference depended on a person's evaluation of his or her life and was subject to consideration of others' wellbeing. Such a conception of the right to life denied the foetus's rights but acknowledged any pain it might experience as a result of abortion; Singer instead, supported the mother's rights, as well as the patient's pain and the right to self-determination. Singer thus approved of voluntary euthanasia, and also supported abortion and non-voluntary euthanasia when the foetus does not feel pain or when the patient does not have and will never have brain function.[43] These early attempts signify the feasibility of solving the three issues through accounts of the right to life.

This thesis builds on the ground work laid by these early attempts, again seeking to achieve an answer through conceptualising the right to life via the Choice Theory. More than that, the thesis further develops these early attempts by, on the one hand, applying accounts of the right to life to all the three issues. These early attempts only applied the account of the right to life to certain issues, especially voluntary euthanasia; other issues were rarely touched upon. For instance, Feinberg and Raz only sought to legitimise voluntary euthanasia according to their concepts of the right to life; non-voluntary euthanasia, abortion and capital punishment were not discussed. The applicability of an account of the right to life for instances other than voluntary euthanasia was untested and unrevealed. Singer also did not employ his definition of the right to life to solve the issue of capital punishment.

On the other hand, the thesis rests all existing arguments on their implied accounts of the right to life. If all these arguments are interpreted as certain accounts of the right to life, reaching a robust answer becomes easier. The challenges and critiques one argument poses to another morph into different opinions on how the right to life should be defined. The divergences

[41] Raz, 'Death in Our Life', above n 38, 1.
[42] Peter Singer, *Practical Ethics* (Cambridge University Press, 3rd ed, 2011), 81–3.
Singer (1946-) is an Australian moral philosopher, specialising in applied ethics. Earlier in his career he supported preference utilitarianism, but in later years converted back to classical utilitarianism. He is now the Ira W DeCamp Professor of Bioethics at Princeton University, and a Laureate Professor at the Centre for Applied Philosophy and Public Ethics at the University of Melbourne.
[43] Singer's justification for voluntary euthanasia, non-voluntary euthanasia and abortion in some situations, versus his opposition to non-voluntary euthanasia and abortion in other situations is multifaceted and hence complicated. Here only a brief resume of the ideas is presented. In particular, it may be unclear how Singer arrived at his position on abortion and euthanasia through this definition of the right to life. Singer's ideas, including those this thesis finds problematic, are discussed in detail in chapters five and six.

between these different arguments become divergences between different accounts of the right to life. The question of which argument is preferable should therefore focus on which account of the right to life is better. Such an answer is more achievable.

The account of the right to life developed in this thesis is carried out via the two main theories of rights in the Western legal tradition — will theories and interest theories.[44]

1.3. Research Approach

Will theories refer to theories that define the idea of a right as either a will or a choice carried out by a will. This approach was initiated by Immanuel Kant and Bernhard Windscheid during the late 17th and early 18th century.[45] Kant defined the concept of a right as a sum of conditions under which an individual's action could be carried out in harmony with similar actions by other people.[46] These conditions could only be achieved and executed via free will.[47] This will, therefore, was the nature of the right. Windscheid agreed with Kant in equating a right with free will,[48] but he conceived of this as a legally acknowledged will, which enabled the right holder to enforce or create legal rules.[49] Such conceptions of rights are referred to as the 'Will Theory'.[50]

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[44] Hart, Raz, Peter Jones and D N MacCormick all considered the will approach and the interest approach the most representative and hence the most significant theories of rights among all efforts trying to define the concept of a right throughout the history. See Hart, 'Bentham on Legal Rights', above n 23, 1; Joseph Raz, 'Rights Theories and Public Trial' (1997) 14 *Journal of Applied Philosophy* 169; Peter Jones, *Rights* (St Martin's Press, 1994) 22; D N MacCormick, 'Rights in Legislation' in Carl Wellman (ed), *Rights and Duties* (Routledge, 2002) vol 1, 149, 152. This view is justified in chapter three as well.
The terms this thesis uses mainly come from Hart. See Hart, 'Bentham on Legal Rights', 1, 13.

[45] Hillel Steiner, 'Working Rights' in Matthew Kramer, N E Simmonds and Hillel Steiner (eds), *A Debate over Rights: Philosophical Enquiries* (Clarendon Press, 1998) 233, 239, 262; N E Simmonds, 'Rights at the Cutting Edge' in Matthew Kramer, N E Simmonds and Hillel Steiner (eds), *A Debate over Rights: Philosophical Enquiries* (Clarendon Press, 1998) 113,114.
Bernhard Windscheid (1817-1892) was a German jurist and a member of the pandectistic school of legal thought. He established the modern German law concept of a legally enforceable claim, took part in drafting German Civil Code, and worked as a teacher in several universities in Germany and Switzerland. He was a student of Savigny.
Major works of Kant included in this thesis are: *Critique of Pure Reason* (Norman Kemp Smith trans, Palgrave Macmillan, first published 1781, 2007 ed); *Groundwork of Metaphysics of Morals* (Mary Gregor and Jens Timmermann trans and eds, Cambridge University Press, first published 1785, 2012 ed); *Critique of Practical Reason* (Mary Gregor trans and ed, Cambridge University, first published 1788, 1997 ed); *Critique of Judgment* (Mary Gregor trans, Oxford University Press, first published 1790, 2007 ed); *The Metaphysics of Morals* (Mary Gregor trans and ed, Cambridge University Press, 1996); *Theoretical Philosophy, 1755-1770* (David Walford trans and ed, Cambridge University Press, 2002).

[46] Kant, *The Metaphysics of Morals*, above n 45, 24.

[47] Ibid, 13.

[48] 莱翁·狄骥 [Léon Duguit], 《宪法论第一卷法律规则和国家问题》 [Constitution: Volume One The Law and the State] (钱克新 [Qian Kexin] trans, 商务印书馆 [Commercial Press], 1959) 200.

[49] Roscoe Pound, 'Legal Rights' (1915) 26 *International Journal of Ethics* 92, 107.

[50] Steiner also used 'the Will Theory' to refer to Kant's theory of rights. Steiner, 'Working Rights', above n 45, 239.

The Will Theory was further developed by Hart in the late 20th century.[51] Hart delineated a right as a choice, which conferred an ability to the right holder to choose how his or her right should be fulfilled.[52] Hart's theory thus is called the 'Choice Theory' and this thesis employs the same term.[53] The Will Theory and the Choice Theory function as the classical version and the modern version of will theories respectively.

Interest theories consider the notion of a right as an interest or a benefit, which also consist of both a classical and a modern version. The classical version was that proposed by Jeremy Bentham and John Stuart Mill.[54] According to these thinkers, the overriding reason to confer and possess any right was an increase in happiness. A right, therefore, was most essentially a type of happiness, also referred to as utility or benefit.[55] This theory of rights is labelled as the 'Benefit Theory'.[56]

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[51] Major works of Hart included in this thesis are: 'Bentham on Legal Rights', above n 23; 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593; *Law, Liberty and Morality* (Stanford University Press, 1963); *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press, 1968); 'Between Utility and Rights' (1979) 79 *Columbia Law Review* 827; 'Death and Utility' (15 May 1980) *New York Review of Books* <http://www.unz.org/Pub/NYRevBooks-1980may15-00025>; 'Legal Rights' in *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon Press, 1982) 162; 'Definition and Theory in Jurisprudence' in *Essays in Jurisprudence and Philosophy* (Clarendon Press, 1983) 21; 'Lon L Fuller: The Morality of Law' in *Essays in Jurisprudence and Philosophy* (Clarendon Press, 1983) 344; 'Are There Any Natural Rights?' in Jules L Coleman (ed), *Rights and Their Foundations* (Garland, 1994) 33; *The Concept of Law* (Clarendon Press, first published 1961, 1994ed); 'Hart Interviewed: H L A Hart in Conversation with David Sugarman' (2005) 32(2) *Journal of Law and Society* 275.

[52] Hart, 'Bentham on Legal Rights', above n 23, 27; Hart, 'Between Utility and Rights', above n 51. See also Steiner, 'Working Rights', above n 45, 301, 297.

[53] However John Finnis mixed up the terms 'will' and 'choice', using both to refer to Hart's Choice Theory; see *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011) 204–5.

[54] Hereinafter, this thesis refers to John Stuart Mill as Mill, and to his father as James Mill.
Major works of Bentham included in this thesis are: *A Fragment on Government* (Cambridge University Press, first published 1776, 1988 ed); *An Introduction to the Principles of Morals and Legislation* (Methuen, first published 1789, 1982 ed); *Of the Limits of the Penal Branch of Jurisprudence* (Clarendon Press, first published 1789, 2010 ed); *The Works of Jeremy Bentham, Published under the Superintendence of his Executor, John Bowring* (William Tait, 1838-1843); *Theory of Legislation* (Thoemmes Continuum, first published 1840, 2004 ed); *A Comment on the Commentaries and A Fragment on Government* (Athlone Press, first published 1928, 1977 ed); *Deontology together with A Table of the Springs of Action and the Article on Utilitarianism* (Clarendon Press, 1983).
Major works of Mill included in this thesis are: *A System of Logic, Ratiocinative and Inductive, Being a Connected View of the Principles of Evidence, and the Methods of Scientific Investigation* (Longmans New Impression, first published 1843, 1959 ed); *Utilitarianism* (Longmans, Green, first published 1863, 1888 ed); *An Examination of Sir William Hamilton's Philosophy and of the Principal Philosophical Questions Discussed in His Writings* (Longmans, Green, Reader and Dyer, first published 1865, 1872 ed); 'Parliamentary Debate on Capital Punishment within Prisons Bill', in *Hansard's Parliamentary Debates* (Hansard, 3rd series, 1868); 'Speech in Favor of Capital Punishment', *Ethics Updates* (given in 1868, 2013), retrieved from <http://ethics.sandiego.edu/books/Mill/Punishment/>; *The Collected Works of John Stuart Mill* (University of Toronto Press, Routledge and Kegan Paul, 1963-1991); *On Liberty and Other Essays* (Oxford University Press, 1991).

[55] Bentham, *Theory of Legislation*, above n 54, vol 1, 144; Bentham, *The Works of Jeremy Bentham*, above n 54, vol 3, 452; Mill, *Utilitarianism*, above n 54, ch 4.

[56] Hart referred to Bentham's theory of rights as the Benefit Theory. Hart, 'Bentham on Legal Rights', above n 23, 13. N E Simmonds distinguished between the classical and modern versions of the interest theories as well; see 'Rights at the Cutting Edge', above n 45, 114. On the contrary, Finnis used both the terms 'benefit' and 'interest' to refer to the Benefit Theory and the Interest Theory respectively; see *Natural Law and Natural Rights*, above n 53, 204–5

The modern version of interest theories is that developed by Raz, Neil MacCormick and David Lyons.[57] Raz argued that a right ought to be an interest resulting in sufficient reason for holding others to a duty.[58] MacCormick believed a right to be an interest acknowledged by the law that concerned a particular individual.[59] Lyons combined both these concepts and emphasised that a right be an interest that was directly related to a duty and was intended by the law to benefit the right holder.[60] Such theories of rights are called the 'Interest Theory'.

1.4. Justification of the Approach

This thesis argues that will theories and interest theories provide the most appropriate framework for different accounts of the right to life. In doing so, it seeks to apply them to interpret existing arguments and find the most suitable one — that is, one employing the Choice Theory — to solve ongoing debate about capital punishment, abortion and euthanasia in a legal context.

Firstly, these two theories of rights are dominant in the Western tradition.[61] On the one hand, the notion of will or interest provides the foundation for almost all the attempts that try to

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[57] See Hart, 'Bentham on Legal Rights', above n 23, 13.
Major works of Raz included in this thesis are: 'Death in Our Life', above n 38; *The Concept of a Legal System* (Clarendon Press, 1970); *The Authority of Law* (Clarendon Press, 1979); 'Legal Rights' (1984) 4 *Oxford Journal of Legal Studies* 1; 'Hart on Moral Rights and Legal Duties' (1984) 4 *Oxford Journal of Legal Studies* 123; 'On the Nature of Rights' (1984) 93(370) *Mind* 194; 'Right-Based Moralities' in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press, 1984) 182; 'Authority, Law and Morality' (1985) 68 *Monist* 295; *The Morality of Freedom* (Clarendon Press, 1986); *Ethics in the Public Domain* (Oxford University Press, 1994); *Practical Reason and Norms* (Clarendon Press, 1999); *The Practice of Value* (Clarendon Press, 2003); 'About Morality and the Nature of Law' (2003) 48 *American Journal of Jurisprudence* 1; 'Can There Be a Theory of Law?' in M P Golding and W A Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing, 2004) ch 23; 'Human Rights in the Emerging World Order' in Brian Bix and Horacio Spector (eds), *Rights: Concepts and Contexts* (Ashgate, 2012) 51.
Major works of MacCormick included in this thesis are: 'Rights in Legislation', above n 44; *H L A Hart* (Edward Arnold, 1981);'Rights, Claims and Remedies' (1982) 1 *Law and Philosophy* 337; 'Natural Law and the Separation of Law and Morals' in R P George (ed) *Natural Law Theory: Contemporary Essays* (Oxford University Press, 1992) 105; *Legal Reasoning and Legal Theory* (Oxford University Press, first published 1978, 1994ed); 'Legal Obligations and the Imperative Fallacy' in Jules L Coleman (ed), *Rights and Their Foundations* (Garland, 1994) 88; *Institution of Law: An Essay in Legal Theory* (Oxford University Press, 2007); *Practical Reason in Law and Morality* (Oxford University Press, 2009).
David Lyons (1935-) is now a professor of law and philosophy at Boston University; his major interest is utilitarianism, especially the theories of Bentham and Mill.
Major works of Lyons included in this thesis are: 'Rights, Claimants, and Beneficiaries' (1969) 6 *American Philosophical Quarterly* 173; 'Moral Aspects of Legal Theory' (1982) 7(1) *Midwest Studies in Philosophy* 223; *Ethics and the Rule of Law* (Cambridge University Press, 1984); 'Utility and Rights' in Jules L Coleman (ed), *Rights and Their Foundations* (Garland, 1994) 153; *Rights, Welfare and Mill's Moral Theory* (Oxford University Press, 1994); 'Rights and Recognition' in Brian Bix and Horacio Spector (eds), *Rights: Concepts and Contexts* (Ashgate, 2012) 391.
[58] Raz, 'On the Nature of Rights', above n 57, 195.
[59] MacCormick, 'Rights in Legislation', above n 44, 152.
[60] Lyons, 'Rights, Claimants, and Beneficiaries', above n 57; Lyons, 'Utility and Rights', above n 57.
[61] This point is demonstrated in chapter three.

define the concept of a right. On the other hand, these two theories are embedded in leading Western philosophical and legal traditions: the Will Theory derived from rationalism and natural law tradition; the Benefit Theory arose from empiricism and utilitarianism; the Choice Theory and the Interest Theory were grounded in legal positivism.

Secondly, these two theories of rights not only explain the idea of the right to life but also several other arguments.[62] For example, the retributivism argument as regards the issue of capital punishment can be seen to rest on the Will Theory. Concerns about the deterrent effect, irreversibility and expenditure can be seen as grounded in the Benefit Theory. The slippery slope argument for the issue of euthanasia can be seen as conceiving of the Benefit Theory. The argument that a foetus has a right to life on the issue of abortion can be seen as based on either the Benefit Theory or the Interest Theory. Lastly, the argument that a foetus does not have a right to life can be seen to rely on either the Will Theory or the Choice Theory.

Thirdly, the two main theories of rights can help reveal both the strengths and shortcomings of existing arguments in providing an answer to these three issues. If an argument is seen to rest on a certain theory of rights, its ability to withstand some challenges and critiques whilst failing to answer others will become apparent. At the same time, an argument may be found to be subject to other weaknesses or to have other strengths. Take the retributivism argument as an example. Retributivism generally supports the retention of capital punishment but is subject to the objection that punishment should react to crime in a consequentialist way. If viewed as deriving from the Will Theory, consequentialist concerns about punishment can be rejected. However, the Will Theory cannot support the retention of capital punishment in legal practice, which makes the retributivism argument fail to provide an answer to this issue.[63]

Lastly, will and interest theories can be applied to explain rights other than the right to life since they also function as more generalised approaches to interpreting such matters. This can be quite helpful in dealing with the debate on the three issues when the problem of competing rights is raised. For example, on the issue of abortion, the mother's right to self-determination, the right to plan her family and the right to freedom from discrimination must compete with the foetus's right to life. As regards the issue of euthanasia, the patient's right to self-determination must be considered alongside his or her right to life. Under these circumstances, merely interpreting the concept of the right to life is not sufficient for the broader concerns of

[62] This point is justified throughout part two of the thesis.
[63] For detailed demonstration, please refer to 4.2.3.

this thesis. Extending that interpretation to the many competing rights involved is also necessary.

Some scholars argue that the two theories of rights were initially raised to explain the concept of the claim-right in the Hohfeldian system; this applies particularly to the two modern versions, namely the Choice Theory and the Interest Theory.[64] They, therefore, are not the best theories to interpret accounts of the right to life which many consider to be an exceptional case.[65] This thesis concurs with the first half of this view whilst disagreeing with the second. Firstly, it is true that the claim-right was targeted by arguments about both will and interest, but it does not mean these theories cannot explain other incidents adequately. After facing critiques about their inability to explain notions that were always referred to as rights, scholars managed to extend the explanatory capacity of the two theories.[66] For example, the Choice Theory has been criticised as being unable to explain the idea of an inalienable right or an immunity;[67] Hart thus adjusted his theory to include these concepts.[68]

Secondly, the right to life does not necessarily exist as an exception. The concept of the right to life is not determined absolutely, which is part of the reason why the debate on capital punishment, abortion and euthanasia is ongoing, and will be for the foreseeable future. The

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[64] Matthew Kramer and Hillel Steiner, 'Theories of Rights: Is There a Third Way?' in Brian Bix and Horacio Spector (eds), *Rights: Concepts and Contexts* (Ashgate, 2012) 243. See also Horacio Spector, 'Value Pluralism and the Two Concepts of Rights' (2009) 46 *San Diego Law Review* 819.
Wesley Hohfeld believed there were four incidents that could be considered as rights: a claim that entitled the subject to ask others either to do or not do something; a privilege that entitled the subject to decide his or her own matters or being free from a general duty; a power that entitled the subject to alter the jural relationship via his or her will; and an immunity that freed the subject from being controlled by others.
These four incidents existed in a relationship of jural-opposites or jural-correlatives, comprising a duty, a no-right, a liability and a disability. Regarding jural-correlatives, a claim correlated with a duty: if one party of a contract claimed the other party should do something according to the contract, the other party was under a duty to do that thing. A privilege correlated with a no-right: when one had a liberty to do something and had no duty not to do that thing, others had no right that the person should not do that thing. A power correlated with a liability: when the government had a right to expropriate its citizens' property, the citizen was bound to cooperate. An immunity correlated with a disability: when citizens were immune from torture, the state was disabled in torturing them.
Concerning jural-opposites, a claim was the opposite of a no-right: if the subject could not ask the other to do something, he or she had no right regarding that thing. A privilege was the opposite of a duty: if the subject had no liberty in behaving or not behaving in a certain way, then he or she must not act in that way. A power functioned as the opposite of a disability: if the government had no right to expropriate its citizens' property without reasonable cause, the expropriation was disabled. An immunity functioned as the opposite of a liability: if a citizen could not be immune from the government's expropriation, he or she was liable to cooperate.
Wesley Hohfeld, 'Fundamental Legal Concepts as Applied in Judicial Reasoning' (1917) 26 *Yale Law Journal* 710.
[65] Alderman, 'Life, Right to', above n 24; Famakinwa, 'Interpreting the Right to Life', above n 24.
[66] Spector, 'Value Pluralism and the Two Concepts of Rights', above n 64, 838; Kramer and Steiner, above n 64, 272.
[67] MacCormick, *H L A Hart*, above n 57, 90.
As stated in the preambles to the UDHR and the ICCPR, human rights, including the right to life, are all 'inalienable'.
[68] This modification is discussed in detail in chapter four.

right to life, therefore, may well be a claim-right that has been targeted by will and interest theories for centuries.[69] It may even be both an immunity and a claim-right, as well as a power and a privilege.[70] As a result, it is inappropriate to exclude such a right from interpretation by the two theories of rights simply by alleging exception.

Thirdly, this thesis does not use the Hohfeldian system — the jural relationships between a claim, a privilege, a power, an immunity and a duty, a no-right, a liability and a disability — as a framework to explain the concept of the right to life. The thesis does not concern itself with discussing which Hohfeldian incident or combination of incidents best explains the concept of the right to life. Rather, it interprets the right to life via the two main theories of rights. As long as these theories can be extended to explain all four incidents, there is no need to inquire whether the right to life is a claim-right or an immunity. The view rejecting the applicability of the two theories on account of their inability to explain the idea of an immunity is therefore futile.

Some scholars even argue that the will and interest approaches both imply a preference for certain political modes of analysis. When a scholar applies a particular theory to interpret the right to life, it also signifies a preference for a certain mode of politics. For example, the Choice Theory is believed to prioritise individual autonomy and therefore the concept of individualism more broadly.[71] The Interest Theory instead emphasises individual interest and havs a tendency to approve of collectivism.[72] In applying the Choice Theory to interpret the right to life, this thesis appeals for an individualist stance on the matter. On the contrary, those who advocate for the Interest Theory seek to advance the idea of collectivist governance.

This thesis argues that the various theories of rights do derive from certain philosophical, political and moral premises, including the natural law tradition, rationalism, empiricism, utilitarianism and positivism.[73] Nevertheless, such a connection does not mean that theories of rights must be logically connected to these premises. Acceptance of the Choice Theory does not necessarily lead to construction of an individualist government. Disagreeing with the

[69] Feinberg, 'Voluntary Euthanasia and the Inalienable Right to Life', above n 39, 94.
[70] The four incidents in the Hohfeldian system are believed not to be exclusionary. A right may include more than one incident. See MacCormick, 'Rights, Claims and Remedies', above n 57.
[71] Spector, 'Value Pluralism and the Two Concepts of Rights', above n 64; Sean Coyle, '"Protestant" Political Theory and the Significance of Rights' in Brian Bix and Horacio Spector (eds), *Rights: Concepts and Contexts* (Ashgate, 2012) 17.
[72] Spector, 'Value Pluralism and the Two Concepts of Rights', above n 64; Coyle, '"Protestant" Political Theory and the Significance of Rights', above n 71.
[73] These premises are presented in chapter three.

Interest Theory also does not mean the law disregards individual interest. Theories of rights can be applied separately from their implied political appeals.

On these grounds, the thesis applies will theories and interest theories to interpret existing arguments on the debate around capital punishment, abortion and euthanasia, for the purpose of reaching a robust legal answer to the three issues. It finds that only by employing the Choice Theory can we reach such an answer.

1.5. Scope and Limitations

This solution is reached within a defined scope and with limitations. The thesis's significance, objective, scholarly contribution and research approach necessarily affect both its scope and limitations. The significance of putting an end to the debate on capital punishment, abortion and euthanasia in the field of the law sets the thesis squarely with a legal context. The objective of finding a sound argument and suggesting appropriate legislation and methods of adjudication situates it within the tradition of legal positivism. Finally, the contribution relying existing arguments about the three issues on their implied accounts of the right to life makes the thesis a 'thought experiment', meaning a mental process that starts with an assumption.[74] Notwithstanding, this thesis does concern itself with real human practices and as such has real-life ramifications down the track.

1.5.1. Scope

Operating within the thought experiment paradigm, this thesis attempts to raise a new perspective in understanding existing arguments on capital punishment, abortion and euthanasia, and in doing so reach an answer about their legitimacy. The question the thesis asks is essentially hypothetical: if we view existing arguments in a way we have never tried before, is such a perspective helpful in finding an argument that can provide us with an appropriate solution?

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[74] A thought experiment normally has four features: setting a situation in imagination; letting the situation run or carry out an operation, for example reasoning; seeing what happens; and finally, drawing a conclusion. Thought experiment is universally applied in mathematics, sciences, economics, history as well as philosophy and ethics. Although particular thought experiments have been contested, the practice is generally accepted among the academic community.
Some believe that a thought experiment could not justify a claim generally, but could only justify the claim as an argument. Alan Sidelle, 'Thought Experiment in Philosophy' (1998) 107(3) *Philosophical Review* 480, 482. This thesis concurs with Sidelle's view. Since a thought experiment is fundamentally an experiment, it is fallible; the result of it may not be final.
On the concept, debate and recent developments in thought experiment, see James Robert Brown and Yiftach Fehige, 'Thought Experiment' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (2014) <https://plato.stanford.edu/entries/thought-experiment/>.

As a result, the thesis does not raise normative questions, such as 'which ought to be the perspective we approach the legitimacy of capital punishment, abortion and euthanasia', 'which ought to be the concept of the right to life', or 'what ought to be the answer to the three issues'. Rather, the thesis inspects 'which may be the perspective that we could apply to approach the three issues', 'which conception of the right to life provides the most robust legal answer to the three issues', and 'what that answer may be'. In this sense, although the perspective of rights is chosen, this thesis does not propose it is *the* best perspective. Rather, the thesis proposes it is *an* applicable perspective in helping find a robust argument and reach an answer to the three issues. Although a preferred argument is found — that is, one employing the Choice Theory — the thesis does not suggest it is *the* best argument. Rather, the thesis suggests it is *a* better argument, provided that the existing arguments be conceived in their implied accounts of the right to life. Also, although an answer is reached — that is, capital punishment, abortion and euthanasia all ought to be allowed, unless the law has otherwise incorporated a duty to the contrary — the thesis does not insist it is *the* definitive answer to the three issues. Rather, the thesis insists it is *an* answer if the perspective of rights is chosen and the better argument found in this perspective is applied.

To carry out this thought experiment, this thesis jurisprudentially commits to legal positivism. The thesis agrees with the 'social fact thesis'.[75] It maintains that the law is a construction of human actions: there is no supernatural law for human beings to discover or, even if there is, it plays no role in determining the validity of positive law.[76] The law-maker and adjudicator, therefore, can choose laws relating to the three issues according to the suggestions proposed in this thesis. Otherwise, if the legitimacy of the three issues had already been determined and was simply waiting for us to discover and abide by it, there would be no point in suggesting a new perspective. According to this alternative view, one would just find the perspective, the argument and the answer.

Similarly to the right to life, this concept can again be selected by human beings. The thesis, therefore, can rest existing arguments on different accounts of the right to reveal their strengths and weaknesses and select a better argument. If the concept of a right is again determined, selection will again be impossible: if there is only one righteous explanation of a right, there will be only one righteous argument. The way one finds the best argument will be

[75] 'Social fact thesis' means that the law is a social construction; see Leslie Green, 'Legal Positivism' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (2012) <http://plato.stanford.edu/entries/legal-positivism/> '1. Development and Influence' [1]. Such a position is also called 'the thesis of law'; see Vittorio Villa, 'Neil MacCormick's Legal Positivism' (2009) *Law as Institutional Normative* Order 45, 46.
[76] George E Moore, *Principia Ethica* (Cambridge University Press, 2nd ed, 1993) 62.

finding out what is or ought to be the concept of the right to life and which argument rests on this concept.

This thesis also agrees with the 'separability thesis'.[77] It appeals for the separation of law and morality: although morality may have a *de facto* influence on law, it should not be considered as necessarily composing part of law. The law therefore does not necessarily meet moral requirements: the law may be morally wrong, but as long as it is considered as part of a legal system, it is still believed to have legal force in guiding individual behaviours. On these grounds, the argument the thesis is engaged in is a non-moral one, meaning that the thesis only concerns whether the perspective it chooses, the argument it prefers and the answer it provides to the three issues are robust in the realm of law; whether that perspective, that argument and that answer are morally right or wrong is not its main consideration.

The separation thesis also appeals for that law ought to be viewed as a separate field of enquiry, and legal research ought to focus on the realm of the law.[78] Legal rights thus ought to be analysed separately from moral or natural rights.[79] This focus on legal rights further allows the thesis to achieve its objective of solving the debate on capital punishment, abortion and euthanasia in the field of law. Arguments about the three issues, when conceived as accounts of the legal right to life, are analysed in a legal context. The most robust argument and its legislative corollary, therefore, are achieved in a legal framework. Meanwhile, the two main theories of rights are usually applied to interpret the concepts of legal rights; Bentham, Hart and MacCormick even believed that a conception of rights was only possible in the realm of law.[80]

Notwithstanding, moral and natural rights are still relevant because some theorists of rights did not differentiate positive law from morality or natural law. Kant and Windscheid, for

[77] 'Separability thesis' means that the law needs not necessarily be related to morality; see Green, 'Legal Positivism', above n 75.
[78] MacCormick, *H L A Hart*, above n 57, 6 ff; MacCormick, *Legal Reasoning and Legal Theory*, above n 57, 233, 239–40.
[79] Moral rights used to be equated with natural rights in the traditional view adopted by natural law theorists. In recent usage, natural rights are differentiated from moral rights, denoting rights related to natural law: thus they are transcendental rights, inseparable from human nature, while moral rights are mundane rights acknowledged by morality. See Lyons, 'Rights and Recognition', above n 57, 1.
[80] Hart, 'Bentham on Legal Rights', above n 23; Hart, 'Are There Any Natural Rights', above n 51; MacCormick, 'Rights in Legislation', above n 44. See also Hillel Steiner, 'Are There Still Any Natural Rights?' in Brian Bix and Horacio Spector (eds), *Rights: Concepts and Contexts* (Ashgate, 2012) 101.
In the following texts, the term 'right' is used to signify 'legal right' in most situations, unless its legal aspect is to be emphasised. When discussing other rights, adjectives are added such as 'moral rights' and 'natural rights'.

example, both insisted on the natural law tradition.[81] Some other theorists — for example, Raz and Lyons — extended their conceptions of legal rights to also explain moral rights.[82]

1.5.2. Limitations

The scope of the thesis is delineated as a thought experiment,[83] grounded in legal positivism and focusing on legal rights. However, such an approach imposes limitations. For example, the thought experiment framework and legal positivism commitment render the thesis unable, as well as unwilling, to make normative claims. This means the thesis is unable and reluctant to propose which perspective we *should* adopt when approaching the debate on capital punishment, abortion and euthanasia. It is also unable and reluctant to suggest which argument we *should* choose and which attitude we should hold in regards to the three issues. Rather, the thesis only tries to find which perspective and which argument we *could* choose to solve the three issues, and which attitude *could* be the result of that perspective and argument and therefore the one we *may* prefer to hold.

Secondly, this thesis does not provide an empirical study on the different practices of the three issues in different jurisdictions. The thesis is theoretical in nature, focusing on which argument can provide a legally robust answer to the three issues. Practical problems are left for further research. Some scholars believe that empirical study cannot be excluded since the legitimacy of the three issues is contextual. Different practices in different jurisdictions and at different periods in time necessarily generate different outcomes. While the thesis agrees with this view, this does not mean that a non-empirical analysis is impossible or inappropriate. Theoretically, the legitimacy of capital punishment, abortion and euthanasia can be discussed and analysed beyond considerations of jurisdiction and time.

Thirdly, the thesis does not analyse contents of particular laws in detail. Some legal rules are referred to, especially those regarding the right to life. However, those rules only serve as a demonstration of the viability of certain points of view.

Lastly, the thesis does not consider itself to have conclusively defined the concept of the right to life in general. The thesis applies the concept of the right to life as a perspective to analyse existing arguments about the legitimacy of the three issues. The fundamental conceptual

[81] Steiner, 'Working Rights', above n 45, 233.
[82] Raz, 'Legal Rights', above n 57; Raz, 'Human Rights in the Emerging World Order', above n 57; Lyons, 'Utility and Rights', above n 57.
[83] A thought experiment denotes a mental process that begins with an assumption; the result of which is therefore an argument rather than a general claim. See above n 74.

question about the right to life is less important than the manner in which it becomes manifest in the realm of legal theory.

As to the jurisprudential commitment to legal positivism, such a commitment renders this thesis open to rejection by natural law theorists, who insist that the content of the law cannot be chosen freely by human beings. According to these thinkers, positive law adopted by human society ought to follow the example of natural law, and hence the objective and research approach of this thesis are invalid.

The focus on legal rights may be rejected on the same grounds. Natural law theorists argue that legal rights cannot be discussed separately from natural rights or moral rights, but instead propose that all three types of right should be analysed together, because moral questions plays a significant role in discussions of law. More than that, the concept of a natural right or a moral right ought to instruct the concept of a legal right;[84] the interpretation of a legal right, for example, the right to life, thus cannot be chosen by human beings as indicated in this thesis. On the contrary, its interpretation ought to be found in the natural right or the moral right it derives from.

The legal context of the thesis also makes it subject to moral critiques. The thesis defines itself as a jurisprudential experiment rather than an ethical one, which means the thesis does not concern whether the perspective, the argument and the answer it provides to capital punishment, abortion and euthanasia are morally right or wrong. On the contrary, the thesis only focuses on whether that perspective, that argument and that answer are the most legally robust ones. In other words, the perspective, the argument and the answer that the thesis prefers may well be a morally wrong perspective, a morally despicable argument and a morally unacceptable answer, although in the realm of law, they prove to be the most proficient. For those who hold such a morally related attitude to these issues, this thesis remains open to challenges.

1.6. Synopsis

This thesis contains seven chapters. The first part, comprising chapters one, two, and three, provides background material: it leads the reader into the research field and provides knowledge for understanding the overall argument. The second part, comprising chapters four,

[84] For example, Kant, Hegel, Locke and Finnis all discussed natural rights as the foundations of legal rights.

five and six, discusses in turn the specific issues of capital punishment, abortion and euthanasia. The conclusion is contained in chapter seven.

The second chapter carries out the literature review. This chapter examines the major arguments on the three issues, as well as refutations to them. Specifically, the issue of capital punishment revolves around the retributivism argument, the deterrent effect argument, the expenditure and irreversibility arguments, the public opinion argument and the right to life argument. The issue of abortion analyses whether the foetus has, or ought to have, a right to life, whether this right outweighs the mother's rights, and whether the mother's rights outweigh those of the foetus. The issue of euthanasia considers the slippery slope argument, as well as arguments about the patient's pain, the relatives' burdens, the state's interest in the patient's life, the right to self-determination and the right to life. The examination of these existing arguments and their respective refutations presents the current situation of debate on the three issues, thus familiarising readers with the broader scholarly context of the thesis. The literature review also introduces arguments that the thesis analyses via implied accounts of the right to life.

Chapter three, following the establishment of context and the introduction of arguments, outlines the research approach. A broad landscape of theories of rights is presented firstly: the major attempts to conceptualise the idea of a right, including the two theories of rights, are briefly depicted. Secondly, the philosophical and jurisprudential backgrounds of the two theories are analysed: these comprise rationalism and natural law tradition for the Will Theory, empiricism and utilitarianism for the Benefit Theory, and legal positivism for the Choice Theory and the Interest Theory.[85] Thirdly, the main tenets of the two theories are studied in depth: the Will Theory, the Benefit Theory, the Choice Theory and the Interest Theory are presented in turn, with further considerations on attempts to combine them into one global theory. This chapter of the thesis provides the necessary background for understanding these two theories of rights. It also reveals the dominant status of these two theories among the

[85] This thesis chooses the generally accepted understanding of the philosophical and legal backgrounds of rights theories. However, this does not mean the thesis denies the existence of alternative interpretations, or believes the generally accepted understandings are the best ones. Rather, this thesis is broadly aware of the multitude of different positions one could adopt. For example, Kant may not be considered a rationalist and a natural law theorist, but rather an empiricist and a legal positivist; see Jeremy Waldron, 'Kant's Legal Positivism' (1996) 109(7) *Harvard Law Review* 1535. The Will Theory Kant raised, therefore, may not owe much to rationalism and natural law tradition.
Notwithstanding, this thesis does not delve into discussing which understanding is a more promising one. On the one hand, solving the problem about how to understand either scholar's theory is a life time work. It is impossible to even address the problem in a thesis. On the other hand, this problem does not significantly relate to the objective of the thesis. Although the presentation of the background will be different, the contentions of the theories of rights are the same. As a result, the different understandings are not included in chapter three.

many theories of rights, thus demonstrating their importance for the research approach of the thesis.

With the background knowledge provided, the scholarly perspective demonstrated and the research approach justified, the second part of the thesis moves on to discuss existing arguments, and particularly their implied accounts of the right to life, thus revealing both their strengths and flaws. Chapter four deals with the issue of capital punishment, examining the retributivism argument through its implied commitment to the Will Theory, the deterrent effect argument through its implied commitment to the Benefit Theory or the Interest Theory, the expenditure and irreversibility arguments through their implied commitment to the Benefit Theory, and the right to life argument through its implied commitment to the Interest Theory or the Choice Theory. This chapter finds that only the right to life argument resting on the Choice Theory can provide an effective answer to the question of whether capital punishment should be permitted.

The fifth chapter concerns the issue of abortion. This chapter examines the argument that insists the foetus has, or should have, a right to life, through its implied commitment to the Benefit Theory or Interest Theory; it also examines the argument rebutting the idea that the foetus has a right to life through its implied commitment to the Will Theory or the Choice Theory. This chapter again finds that only arguments stemming from the Choice Theory can reach a legally viable conclusion on whether abortion is allowable or not.

The sixth chapter deals with the issue of euthanasia. With reference to the Benefit Theory, this chapter analyses the slippery slope argument, arguments about the patient's pain, and arguments relating to the burdens borne by the patient's relatives. It also considers the state's interest in the patient's life via the Interest Theory, and the nature of life and self-determination via the Interest Theory, the Will Theory andthe Choice Theory. Once again, this chapter finds that the question of whether or not euthanasia should be permitted can only be answered through arguments about the right to life and the right to self-determination that rest on the Choice Theory.

A key aim of this thesis is to foreground both the strengths and weaknesses of all the arguments mentioned above by resting them on their implied theories of rights. Generally speaking, arguments that rely on the Benefit Theory, the Interest Theory and the Will Theory are subject to uncertainty, inconclusiveness, unacceptability and inconsistency. Alternatively,

viewing a right as a choice has particular strengths: it does not rely on uncertain evidence, can reach definite and decisive conclusions, applies consistently to all three issues, and does not lead to unacceptable outcomes. The best argument, therefore, is a rights argument that conceives of the right to life via the Choice Theory, and hence this thesis seeks to resolve all three issues satisfactorily via this argument. This thesis argues that capital punishment, abortion and euthanasia all ought to be allowed, unless the law has otherwise incorporated a duty to the contrary; these conclusions are presented in the seventh and final chapter of the thesis.

The thesis now moves to the second chapter — a detailed presentation of the debate on capital punishment, abortion and euthanasia in terms of broader issues about the right to life.

Chapter Two

The Right to Life Debate

2.1. Introduction

Capital punishment, abortion, and euthanasia all regard the deprivation of life. As such, deliberation about them is generally referred to as the right to life debate. The practice of capital punishment concerns the state's power to punish its citizens by taking their lives. There are two schools of opinions on the legitimacy of capital punishment: abolitionists and retentionists. Abolitionists argue that capital punishment should be abolished due to its lack of deterrent effect, high cost and irreversibility; they also insist that the practice runs contrary to public opinion and violates the right to life. On the contrary, retentionists insist that capital punishment does have value mainly by resorting to the theory of retribution, and therefore ought to be practiced.

Abortion is the exercise of deliberately terminating pregnancy. In other words, it is an action that leads to the ending of a potential life, namely a foetus.[86] Again, there are two schools of opinions concerning the legitimacy of abortion: the anti-abortionists and those who advocate for the practice. Anti-abortionists hold that any form of abortion is wrong: they strongly believe that a foetus has solid moral and legal grounds to the enjoyment of the right to life, and that this right prevails over the mother's freedom from discrimination, her right to privacy, her right to plan a family and her right to bodily integrity. Conversely, advocates of abortion argue that a foetus not have an inherent right to life, and that even if such a right does exist, this right ought to be subject to the mother's wellbeing and rights. Advocates of abortion, therefore, supports the mother's right to decide whether to terminate her pregnancy, at least under some certain circumstances or at a certain stage of pregnancy.[87]

[86] The term 'foetus' as used in this thesis refers to the entity in a woman's uterus during the process of her pregnancy. A woman's pregnancy has many steps from fertilization to birth, comprising zygote, pre-embryo, implantation, embryo and foetus. Scientifically, pregnancy only begins at the stage of implantation, which occurs approximately three weeks after fertilization. The word 'foetus', therefore, is properly used in later stages of pregnancy, at any time from the third week. The stages of pregnancy are outlined in Anibal Faundes and José S Barzelatto, *The Human Drama of Abortion: A Global Search for Consensus* (Vanderbilt University Press, 2006) 14, 15, 17.
Some scholars also consider the zygote in their discussion: these include David Boonin, *A Defense of Abortion* (Cambridge University Press, 2003) 31; Peter Singer, *Practical Ethics*, above n 42, 124–25; Leonard Wayne Sumner, *Abortion and Moral Theory* (Princeton University Press, 2014) 90. However the pregnancy has not fully started and hence abortion is largely meaningless when discussed at this early stage.

[87] These circumstances usually include situations in which pregnancy threatens the life of the mother. See Anika Rahman, Laura Katzive and Stanley K Henshaw, 'A Global Review of Laws on Induced Abortion, 1985-1997' (1998) 24(2) *International Family Planning Perspectives* 56; *Attorney General v X and Others* (1992) 1 IR 846P.

Euthanasia refers to an action that intentionally terminates a patient's life, and thus relieves him or her from suffering. As regards patient consent, euthanasia can be divided into three sub-categories: involuntary, voluntary and non-voluntary. Voluntary and non-voluntary euthanasia are the most controversial of these three. Opinions about them generally split into three groups: allowing neither, allowing both, and allowing voluntary euthanasia but disallowing non-voluntary euthanasia. The two groups disallowing the practice, namely the group allowing neither and the group only disallowing non-voluntary euthanasia, harness the slippery slope argument, as well as arguments about the state's interest in the patient's life and the patient's right to life to reject the practice of euthanasia. The two groups allowing the practice, namely the group allowing both and the group only allowing voluntary euthanasia, employ arguments relating to the pain of the patient and the benefit of the relatives of the patient to demonstrate the value of euthanasia.

Within the two groups — those who advocate for euthanasia — opinions can be further divided into two sub-groups: those who only allow passive euthanasia, and those who permit both passive and active euthanasia.[88] Passive euthanasia is carried out by withholding or withdrawing life-sustaining treatment from the patient. Some believe this to be different from the active method of carrying out euthanasia (for example, by using lethal injection) on the grounds of legal causation, the double effect principle or the 'natural lifespan'. Most commentators on the issue therefore perceive passive euthanasia to be more allowable than active euthanasia. However, others refute the grounds for this view, as well as arguing that the difference between active and passive euthanasia is of comparatively little consequence in practice.

This chapter analyses these arguments and the corresponding refutations on the three issues in turn, highlighting those concerning rights, as the thesis finds that they, when interpreted as viewing the right to life as a choice, can provide answers to the three issues in question.

2.2. Capital Punishment

The primary support for capital punishment arises from the retributivism argument.

These stages include, for example, implantation to the point when the foetus can feel pain. See Mary Ann Warren, 'On the Moral and Legal Status of Abortion' (1973) 57(4) *Monist* 43, 45.

[88] See generally Harris, 'The Euthanasia Debate', above n 8; James Rachels, 'Active and Passive Euthanasia' (1975) 292(2) *New England Journal of Medicine* 78.

2.2.1. Retributivism

Retributivism is the idea that punishment ought to respond to a past crime in a proportionate way.[89] Its most representative advocates were Kant and Hegel.[90] Kant contended that retribution was a core requirement for respecting human dignity. Human dignity, according to Kant, lay in the moral belief that a human being could only be treated as an end rather than a means.[91] To treat a human being as an end, punishment must be inflicted in a 'like for like' way; this comprises strict retribution.[92] Kant believed this way required that 'whatever underserved evil you inflict upon another within the people, that you inflict upon yourself.'[93] Regarding murder, anyone who committed it — 'commit[ted] it, order[ed] it, or [wa]s an accomplice in it' — also must suffer death himself or herself.[94] Capital punishment, as a result, is a just punishment for murder.[95]

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[89] 'Retributivism' and 'retribution' have been used to refer to different notions, such as blood revenge, the idea that a crime must be punished, or a principle of 'just deserts'. This thesis prefers the last notion since it is that employed by Kant and Hegel; scholars usually mean as such when they use the term to describe their views on capital punishment. For a similar usage, see John Rawls, *Collected Papers* (Harvard University Press, 1999) 21–2. Different notions of the term, such as idea that a crime must be punished, are outlined in Mark Tunick, 'Is Kant a Retributivist?' (1996) xvii(1) *History of Political Thought* 60, 67–8; the idea of blood revenge appears in Peter J Steinberger, 'Hegel on Crime and Punishment' (1983) 77 *American Political Science Review* 870. For Kant's usage, see *The Metaphysics of Morals*, above n 45, 105.

[90] Kant and Hegel are usually considered as retributivists. For Kant's theory on punishment in terms of retribution, see Tunick, 'Is Kant a Retributivist?', above n 89; Nelson T Potter Jr, 'The Principle of Punishment is a Categorical Imperative' in Jane Kneller and Sidney Axinn (eds), *Autonomy and Community: Readings in Contemporary Kantian Social Philosophy* (SUNY Press, 1998) 169.

For Hegel's theory of punishment being considered as a retributivist approach, see Karl Marx, *Capital Punishment. — Mr. Cobden's Pamphlet. — Regulations of the Bank of England* (17-18 February, 1853) New-York Daily Tribune <https://www.marxists.org/archive/marx/works/1853/02/18.htm>; David E Cooper, 'Hegel's Theory of Punishment' in Z Pelczynski (ed), *Hegel's Political Philosophy: Problems and Perspective* (Cambridge University Press, 1971) 151; Charles Taylor, *Hegel* (Cambridge University Press, 1975) 429; Peter G Stillman, 'Hegel's Idea of Punishment' (1976) 14 *Journal of the History of Philosophy* 169; Ted Honderich, *Punishment: The Supposed Justifications* (Penguin, 1976) 45–8; Allen W Wood, *Hegel's Ethical Thought* (Cambridge University Press, 1990) 108–24; Michael Inwood, *A Hegel Dictionary* (Backwell, 1992) 232–35; Mark Tunick, *Punishment: Theory and Practice* (University of California Press, 1992) 87; Allen W Wood, 'Hegel's Ethics' in Frederick C Beiser (ed), *The Cambridge Companion to Hegel* (Cambridge University Press, 1993) 220–21.

Some scholars argue that Kant and Hegel are not retributivists, or do not conform completely to the abstract definition of a retributivist. For example, Brooks contends that Kant endorsed retribution for moral law transgressions, but favoured consequentialist considerations for positive law violations; see Thom Brooks, 'Kant's Theory of Punishment' (2003) 15 *Utilitas* 206; Thom Brooks, 'Corlett on Kant, Hegel and Retribution' (2001) 76 *Philosophy* 562. Byrd believes Kant preferred consequentialism since Kant viewed punishment as a threat, while retribution only emphasised a restriction on execution; see B Sharon Byrd, 'Kant's Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution' (1989) 8(2) *Law and Philosophy* 151. Brooks argues that Hegel was a retributivist regarding abstract rights, but became prone to consequentialist view when discussing the civil society; see Thom Brooks, 'Is Hegel a Retributivist?' (2004) 49 *Bulletin of the Hegel Society of Great* Britain 113.

Notwithstanding, this thesis agrees with the common view, namely that both Kant and Hegel were retributivists. It does not concern itself with the question of whether Kant and Hegel were retributivists or not. For discussions on the appropriateness of the common view, see articles by Brooks, Byrd and others mentioned above.

[91] Kant, *Ground Work of Metaphysics of Morals*, above n 45, 27.

[92] Kant, *The Metaphysics of Morals*, above n 45, 105–6.

[93] Ibid, 105.

[94] Ibid, 106–7.

[95] Ibid, 105. For Kant's theory of capital punishment, see again Potter Jr, 'The Principle of Punishment is a Categorical Imperative', above n 90; Mark Timmons (ed), *Kant's Metaphysics of Morals: Interpretive Essays*

Hegel also believed in retributivism, but not in Kant's strict way. Rather, Hegel preferred punishments to be commensurate in value with precipitating crimes, since a punishment was 'an annulment, a cancellation' of the performance of the crime or 'a return to a previous state of affairs'.[96] Notwithstanding, the value of life was incommensurate with any other punishments except life itself. According to Hegel, the death penalty, therefore, was the only just punishment for murder.[97] Nowadays, Kant's and Hegel's theories of retributivism are still considered valid justifications for capital punishment in the case of atrocious crimes, such as the murder of child, serial killing, torture-murdering, mass killing via terrorism, massacre and genocide.[98]

However, abolitionists refute retributivism, arguing that capital punishment does not actually react to deeds such as murder in a like-for-like manner. Firstly, capital punishment comprises revenge rather than retribution.[99] According to abolitionists, capital punishment is essentially grounded in the ancient rule of 'eye for eye', as stated via Biblical directive in Exodus 21.24.[100] Deprivation of life, therefore, is inflicted on the person who deprives another of life: as such, abolitionists hold that retribution is purely an argumentative disguise that retentionists use to cover the primary rationale of revenge. However, the vast majority of people consider simple-minded revenge to be both unacceptable and unjustified in modern civilised society; capital punishment, therefore, cannot be allowed.

Secondly, retribution is uniquely applied in cases of capital punishment. In criminal law, most offences are not punished by subjecting the perpetrator to a similar act.[101] For example, rapists are not punished by being sexually assaulted. Such uniqueness places capital punishment apart from the general legal practice of punishment; it is essentially a special case.

(Clarendon Press, 2002); Nelson T Potter, 'Kant and Capital Punishment Today' (2002) 36(2) *Journal of Value Inquiry* 267.

[96] Honderich, *Punishment*, above n 90, 45; G W F Hegel, *The Philosophy of Right* (Alan White trans, Focus Publication, first published 1820, 2002 ed) 80–4.

[97] Hegel, *The Philosophy of Right*, above n 96, 85.

[98] For example Hart, *Punishment and Responsibility*, above n 51, 81–2; Ernest van de Haag, 'The Ultimate Punishment: A Defense' (1996) 99(7) *Harvard Law Review* 1662.

[99] Whitley R P Kaufman, *Honor and Revenge: A Theory of Punishment* (Springer, 2013) 113–46.

[100] Samuel R Gross, 'The Romance of Revenge: Capital Punishment in America' (1993) 13 *Study of Law, Politics and Society* 71, 79.

[101] BBC, *Capital Punishment: Arguments against Capital Punishment* (2014) <http://www.bbc.co.uk/ethics/capitalpunishment/against_1.shtml>.

Thirdly, capital punishment inflicts an unjust 'double punishment' on the convicted.[102] Strictly speaking, retributivism only requires death for a convicted murderer. However, the modern judicial process nearly always places the convicted on death row for many years before execution takes place.[103] Such waiting adds much to the emotional pain experienced by the convicted over and above the act of death itself. Therefore, the sum total of the pain that capital punishment inflicts actually exceeds that required by retributivism, principally because the legal processes pertaining to conviction and sentencing, plus any appeals the convicted murderer may make, significantly lengthens the entire process.

Fourthly, capital punishment is implemented unfairly amongst those who have been convicted. Due to imperfection in the legal system, not all murderers are sentenced to death; thus innocent people may be executed while murderers may be spared. In particular, a murderer belonging to a racial minority may be executed while a murderer belonging to a more privileged majority may be spared.[104] Capital punishment, in this sense, may not punish retributively in particular cases because of entrenched biases in the legal system.

Lastly, life imprisonment without the possibility of parole may serve as better retribution for serious crimes.[105] Life imprisonment sometimes causes more suffering than death since the prisoner who serves life imprisonment suffers the pain of losing freedom for decades, which some view as more painful overall than sudden death. To respond to the most serious crimes, life imprisonment, therefore, is more appropriate than capital punishment because of the psychological impact it has on the convicted prisoner. On these grounds, abolitionists conclude that capital punishment does not meet the requirement of retributivism. Therefore

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[102] For the argument of 'second punishment', see Caycie D Bradford, 'Waiting to Die, Dying to Live: An Account of the Death Row Phenomenon from a Legal Viewpoint' (2010) 5(1*) Interdisciplinary Journal of Human Rights Law* 77, 77.
The term 'double punishment' can also be used to denote the notion of 'Double Jeopardy', as described in the Fifth Amendment to the US Constitution that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb'. See Eileen M Connor, 'The Undermining Influence of the Federal Death Penalty on Capital Policymaking and Criminal Justice Administration in the States' (2010) 100(1) *Journal of Criminal Law and Criminology* 149, 169–74. However, this type of double punishment is not the concern here.
[103] Bradford, 'Waiting to Die, Dying to Live', above n 102.
The average time a death row inmate waits, for example, in the US, is more than a decade. See Death Penalty Information Center, *Time on Death Row* (2017) <http://www.deathpenaltyinfo.org/time-death-row>.
[104] For example, research in the US shows that application of the death penalty is distributed unevenly among racial identities. See Justin D Levinson, Robert J Smith and Danielle M Young, 'Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States' (2014) 89 *New York University Law Review* 513.
However, Alan Marzilli believed capital punishment was applied fairly in the US, citing the case of O J Simpson to show that African Americans may also escape conviction and punishment when the standard of evidence was not met. See Alan Marzilli, 'Capital Punishment is Applied Fairly in Our Society', in *Capital Punishment* (Infobase, 2nd ed, 2008) 61.
[105] William W Berry III, 'More Different than Life, Less Different than Death: The Argument for According Life without Parole Its Own Category of Heightened Review Under the Eighth Amendment After *Graham v. Florida*' (2010) 71(6) *Ohio State Law Journal* 1109, 1124.

even if retributivism can demonstrate the value of capital punishment on a theoretical level, it cannot make the case for such a punishment on a practical level.[106]

In addition, abolitionists believe that capital punishment, and in particular its resort to retributivism, cannot provide an answer to the social issue of criminal behaviour. Rather, a solution ought to depend on the manner in which punishment might deter future crimes. Even so, some abolitionists do not believe that capital punishment does deter future crimes, and therefore contend that it ought not to be allowed. Such ability discouraging citizens from potential crimes is called 'the deterrent effect'.[107]

2.2.2. The Deterrent Effect

Cesare Beccaria is probably the best-known person for opposing capital punishment because of its lack of deterrent effect. According to him, the justification of a punishment arose from its defence of the social contract upon which our society was built.[108] Specifically, this defence required the punishment to make the public environment safer by its ability to deter future crimes.[109] The question of whether a form of punishment should exist, therefore, actually depended on the question of whether it deterred crime. Capital punishment, however, provided an inadequate response to the issue of deterrence. On the one hand, it could not deter determined criminals, since these criminals were not afraid of death.[110] On the other, it did not

[106] Other than the five refutations discussed here, Feinberg also raised two other issues. Feinberg believed, on the one hand, that punishment always inflicted suffering upon innocent persons who loved the criminal punished. Therefore a punishment could never be retributive. On the other hand, exact retribution first required a thorough assessment of the offender's character, which was in practice an impossible task. Retributivism, therefore, could not justify retention of capital punishment. See Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton University Press, 1970) 116–17. However, these two critiques refuted all kinds of punishment because all of them may be inflicted upon innocent persons and require thorough assessment of the offender's character, as pointed out by J Angelo Corlett in his essay 'Making Sense of Retributivism' (2001) 76 *Philosophy* 80, 91. The thesis therefore does not discuss Feinberg's objection any further.

[107] The deterrent effect argument is also referred to as consequentialism or the teleology argument, emphasising the importance of the consequence of a particular practice when it comes to determining the admissibility of the practice. This is in contrast to the deontology argument of retributivism, which determines the admissibility of a practice by resorting to understanding the value of the practice in its own terms. For some analysis of how arguments can be seen as consequentialist, teleological or deontological, see Tunick, 'Is Kant a Retributivist?', above n 89; Antony Duff, *Punishment, Communication, and Community* (Oxford University Press, 2001) 19–20. This thesis, however, prefers to label the consequentialist argument and the deontological argument as the deterrent effect argument and the retributivism argument, since most scholars use these latter terms specifically in regards to capital punishment.

[108] Cesare Beccaria, *On Crimes and Punishments, and Other Writings* (Richard Davies, Virginia Cox and Richard Bellamy trans, Cambridge University Press, first published 1764, 1995 ed) 10–1, 31. See also Robert Bohm, 'American Death Penalty Attitudes: A Critical Examination of Recent Evidence' (1987) 14 *Criminal Justice and Behavior* 380.

[109] Beccaria, *On Crimes and Punishments*, above n 108, 10–1. Bentham embraced a similar view because he considered punishment as an 'evil' that could only be justified by its ability to bring about greater good, such as an effect of 'general prevention'. See *The Works of Jeremy Bentham*, above n 54, vol 1, 390, 396. For similarities between Bentham's view and that of Beccaria, see Bedau, 'Bentham's Utilitarian Critique of the Death Penalty', above n 1, 1043.

[110] Beccaria, *On Crimes and Punishments*, above n 108, 67.

generate a more deterring effect than a perpetual punishment.[111] A steady example over a long time was more threatening than a single and transient execution.[112] Consequently, Beccaria believed that the death penalty should be abolished.[113] Many scholars have followed Beccaria's objection to capital punishment due to its inability to deter serious crime; it should also be noted that statistical studies show no robust deterrent effect of capital punishment.[114]

Moreover, a counter-deterrent effect has been correlated with capital punishment, namely that the existence of the practice seems to increase serious crime overall.[115] Karl Marx and Benjamin Rush both believed that the infliction of capital punishment caused more murders because it justified killing on a state level, which appeared to encourage violance.[116] In addition, some research shows that an increase in murders 'follow[s] closely the execution of criminals', and also that more murders take place in a state that practices capital punishment than one that does not.[117] Abolitionists, therefore, insist that capital punishment ought to be abandoned as a legally sanctioned form of redress.

Retentionists, however, argue that the punishment by death does have a deterrent effect and does not lead to an increase in serious crime such as murders. The existence of studies arguing that capital punishment has no deterrent effect does not necessarily imply that capital

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[111] Ibid, 68–9.
The perpetual punishment in Beccaria's mind was perpetual slavery, which has now been abandoned to history, but the idea that capital punishment should be replaced by a long period of imprisonment has been adopted by abolitionists.
A similar proposal, named 'prison discipline', was also raised by Bentham; see *The Works of Jeremy Bentham*, above n 54, vol 1, 450, 531.
[112] Beccaria, *On Crimes and Punishments*, above n 108, 68–9.
[113] Beccaria's rejection of the death penalty was also based on his consideration of the right to life, discussed later in this thesis.
[114] The scholars include the former US Supreme Court Justice John Paul Stevens in *Baze* (2008)553 US 35, 75; Singer, in Peter Singer and Julia Taylor Kennedy, *Ethics Matter: A Conversation with Peter Singer* (17 October 2011) Policy Innovations <http://www.policyinnovations.org/ideas/audio/data/000619>; Karl Marx noted that 'since Cain the world has been neither intimidated or [sic] ameliorated by punishment': see Robert Bohm, 'Karl Marx and the Death Penalty' (2008) 16 *Critical Criminology* 285.
These statistical studies include the modern econometric study on the data presented by the US Bureau of Justice Statistics from 1977 to 2006. This study concluded that the data provided no empirical support for the deterrent effect of capital punishment. See Tomislav V Kovandzic, Lynne M Vieraitis and Denise Paquette Boots, 'Does the Death Penalty Save Lives? New Evidence from State Panel Data, 1977 to 2006' (2009) 8(4) *American Society of Criminology* 803. Other researches that reached the same conclusion include Hugo Bedau, 'Death Penalty as a Deterrent: Argument and Evidence' (1970) 80(3) *Ethics* 205; Thorsten Sellin, 'Homicides in Retentionist and Abolitionist States' in *Capital Punishment* (Harper and Row, 1967) 135.
[115] Bohm, 'Karl Marx and the Death Penalty', above n 114, 285.
[116] Karl Marx, *Capital Punishment*, above n 98. For more on Marx's view, see also William J Bowers, *Legal Homicide: Death Penalty as Punishment in America, 1864-1982* (Northeastern University Press, 1984) 333. For Rush's view, see Louis Filler, 'Movement to Abolish the Death Penalty in the United States' in Thorsten Sellin (ed), *Capital Punishment* (Harper and Row, 1967) 104, 106.
[117] For example statistical studies showed that more murders occurred in US states where capital punishment was allowed. See Death Penalty Information Center, *Deterrence: States without the Death Penalty Have Had Consistently Lower Murder Rates* (2017) <http://www.deathpenaltyinfo.org/deterrence-states-without-death-penalty-have-had-consistently-lower-murder-rates>.

punishment has no*de facto* deterrent effect.[118] It is possible that capital punishment does have a deterrent effect, but that these studies do not demonstrate such a result. Moreover, along with statistical studies that show no robust deterrent effect of capital punishment, there is also research showing that capital punishment does in fact have a deterrent effect. Some argue that each individual act of capital punishment may prevent five to eighteen murders in the future.[119] Retentionists thus believe capital punishment deters serious crime.

As to the counter-deterrent effect, according to retentionists, that some research shows that murders follow closely upon the execution of criminals does not actually prove any correlation between the act of execution and the subsequent murders. Rather, the murders may be the reason why the state executes criminals in the first place.[120] It is the large number of murders that makes capital punishment necessary. Similarly, such research shows there is more murders in a state that applies capital punishment than a state that does not again does not demonstrate capital punishment causes murders; alternatively, the large amount of murders may again be the reason why the state applies capital punishment. Moreover, such research also does not prove conclusively that capital punishment is useless. Without the appliance of capital punishment, there may be more murders in any given state that adopts the practice.[121] There is little research showing that serious crime decreases once capital punishment has been abolished, or that the amount increases when capital punishment is available for the state to apply. The conclusion that capital punishment has a counter-deterrent effect, instead of a deterrent effect, cannot therefore be reached.

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[118] Marlene W Lehtinen, 'The Value of Life — An Argument for the Death Penalty' (1977) 23(3) *Crime and Delinquency* 237, 239.

[119] For example Ehrlich's multivariate regression analysis of time-series data from 1933 to 1967 concluded that every execution could prevent eight murders; see Isaac Ehrlich, 'The Deterrent Effect of Capital Punishment: A Question of Life and Death' (1975) 65 *American Economics Review* 397. That number was altered to 4.5 in Shepherd's study on data from 1997 to 1999; see Joanna M Shepherd, 'Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment' (2004) 33 *Journal of Legal Study* 283. Shepherd's comparison of states also showed that the deterrent effect of capital punishment could only be generated once the number of executions overall had reached a certain level; see Joanna M Shepherd, 'Deterrence Versus Brutalization: Capital Punishment's Differing Impact among States' (2005) 104 *Michigan Law Review* 203. For more detail, see Cass R Sunstein and Adrian Vermeule, 'Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs' (2005) 58(3) *Stanford Law Review* 703, 710–13.

[120] For example, the high crime rate in South Africa triggered an appeal for the reintroduction of capital punishment. News24, *Youth 'Want Death Penalty Reinstated'* (22 February 2013) <http://www.news24.com/SouthAfrica/News/Youth-want-death-penalty-reinstated-20130222>. Some research also showed that when the crime rate increased or fear of crime was greater, people were more likely to support a reintroduction of the death penalty; see David Johnson and Franklin Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia*(Oxford University Press, 2009) xi–xiv.

[121] For example, research by Dezhbakhsh and Shepherd on the data before and after the moratorium introduced by the US Supreme Court between 1972 and 1976 showed that the murder rate increased immediately after the moratorium and decreased directly after it was lifted. See Hashem Dezhbakhsh and Joanna M Shepherd, 'The Deterrent Effect of Capital Punishment: Evidence from a "Judicial Experiment"' (2006) 44(3) *Economic Inquiry* 512.

On these grounds, retentionists contend that the deterrent effect argument cannot support the abolition of capital punishment. Abolitionists then resort to new arguments: one is that capital punishment places a significant financial burden on the state; the other is that such punishment has irreversible consequences.

2.2.3. Expenditure and Irreversibility

It is natural for a state to pay attention to expenditure on punishment because the operation of a government depends on limited revenue.[122] Many believe that capital punishment ought to be abolished because compared to life imprisonment, the practice not only requires a longer and more complex judicial process, but also demands a higher level of security on death row.[123] There is also research to show that capital punishment requires a huge amount of revenue to operate effectively.[124] Thus, the high cost alone makes capital punishment unjustifiable, and life imprisonment is a more effective form of justice.

Retentionists, however, disagree with this argument. On the one hand, they point out that the research abolitionists rely on to demonstrate the high cost of capital punishment is one-sided: such research only presents the supposedly outrageous expenditure of carrying out punishment by death; it does not show the ongoing expenditure required if this punishment is replaced by life imprisonment. Whether life imprisonment is less costly than capital punishment is therefore a complex issue than can only be answered comprehensively by taking into account many competing factors.

On the other hand, life imprisonment is quite likely to cost more than capital punishment over the long term. According to many, the cost of keeping a convicted criminal in prison for a lifetime is greater than the cost of executing him or her.[125] If the level of security required for life imprisonment is similar to that for a convicted criminal on death row, then expenditure on life imprisonment will easily exceed expenditure on capital punishment. Conversely, life imprisonment may entail less expenditure because of a less complex legal procedure and a lower level of prison security; as a result, the fairness of the trial and the efficacy of the

[122] Carol S Steiker and Jordan M Steiker, 'Cost and Capital Punishment: A New Consideration Transforms an Old Debate' (2010) 2010 *University of Chicago Legal Forum* 117.
[123] Gerald W Smith, 'The Value of Life — Arguments against the Death Penalty: A Reply to Professor Lehtinen' (1977) 23(3) *Crime and Delinquency* 253, 258; Carol Steiker and Jordan Steiker, 'Cost and Capital Punishment', above n 122, 158.
[124] For example, Arthur L Alarcon and Paula M Mitchell, 'Executing the Will of the Voters: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle' (2010) 44 *Loyola of Los Angeles Law Review* 41.
[125] Hugo Bedau, *The Death Penalty in America* (Oxford University Press, 3rd ed, 1982) 193.

punishment may suffer, while the chance of a prison break will increase.[126] In this sense, capital punishment does not consume more government revenue than life imprisonment, and even it does, it cannot be replaced by life imprisonment.

Abolitionists argue that even though life imprisonment is more costly, it is still preferable to capital punishment because death is irreversible; such irreversibility poses a great challenge to the efficacy of capital punishment when judicial mistakes occur.[127] If an innocent person is sentenced to life imprisonment, the mistake can be corrected by releasing the person and then compensating him or her. However, once capital punishment is inflicted, the person cannot be returned to human society. If there is a judicial error, as occasionally happens, such a mistake can never be corrected.[128] The absolute nature of capital punishment is therefore an argument strongly in the abolitionists' favour.

However, the irreversibility argument is again refuted by retentionists, who claim that although judicial mistakes are inevitable on occasion, in most cases the use of capital punishment is legally appropriate. For example, applying the death penalty to those responsible for the Holocaust was both just and necessary. Moreover, the higher requirement on the standard of proof can greatly reduce the number of innocent wrongfully convicted.[129] In addition, the institution of reprieve in the death sentence is also able to reduce the number of the innocent being executed.[130] Therefore, although judicial mistakes cannot be eliminated, their influence can be constrained to a minimum.[131] Taken together, the expenditure argument and the irreversibility argument cannot justify abolitionists' attitude toward capital punishment. Abolitionists then appeal to public opinion.

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[126] See Lehtinen, 'The Value of Life', above n 118, 250–51.
[127] Gerald Smith, 'The Value of Life', above n 123, 255–56.
[128] Bedau, *The Death Penalty in America*, above n 125, 440–52; Bentham, *The Works of Jeremy Bentham*, above n 54, vol 1, 448.
For example, in the US since 1973, 130 people who had been sentenced to death were subsequently found innocent and released from death row. BBC, *Capital Punishment: Arguments against Capital Punishment*, above n 108. Many on death row in China have also been found innocent in recent years. For example, see 吴剑 [Wu Jian], '河南农民赵作海案始末' [The Whole Story of Zhao Zuohai Case] (12 June 2010) Sina <http://news.sina.com.cn/s/2010-06-12/101420465898.shtml>; Sohu, '李怀亮涉嫌杀人案：12 年悬案压垮两个家庭' [The Murder of Li Huailiang: 12 Years has Devastated Two Families] (3 May 2013) <http://news.sohu.com/20130503/n374690436.shtml>.
[129] Bruce Smith's research on the history of the wrongful killings and the reform of judicial system revealed this point. See generally his essay, 'The History of Wrongful Execution' (2005) 56 *Hastings Law Journal* 1185.
[130] Michael L Radelet and Barbara A Zsembik, 'Executive Clemency in Post-Furman Capital Cases' (1993) 27 *University of Richmond Law Review* 289, 289–90.
[131] Lehtinen refuted the irreversibility argument by pointing out that the execution of the innocent accounted for a small percentage of the total annual convictions of murder and non-negligent manslaughter; see Lehtinen, 'The Value of Life', above n 118, 241. However not every homicide qualifies for the death penalty, which actually raises the percentage of the innocent being convicted. Moreover, wrongful killing cannot be justified simply because of its comparative rarity; as a whole, this thesis does not consider Lehtinen's opinion an effective refutation.

2.2.4. Public Opinion

Public opinion is generally used as a compelling argument regarding the issue of whether a state should abolish the death penalty. Since most states operate democratically, majority opinion is the determining point regarding the question of whether capital punishment should be allowed or not. For example, Ireland passed its 2001 constitutional amendment prohibiting the reintroduction of the death penalty with support from more than sixty percent of its voting population. There are also surveys showing that more than seventy-five percent of the population support the abolition of the death penalty in both Australia and Norway, and that less than half of the population is in favour of its practice in France, Finland, Italy and New Zealand.[132] Abolitionists take such public attitudes as a just reason for states to abolish capital punishment.

However, public opinion varies considerably by state. Distinct from the above states, a high percentage of the population in America, Belarus, India and China support the death penalty, especially when applied in response to serious crimes.[133] Public opinion, therefore, cannot provide a global conclusion to the issue of whether capital punishment ought to be abolished in all countries, even if international organisations such as the UN would like that to happen.

Moreover, public opinion is subject to change from time to time. For example, the death penalty was under a moratorium for more than two decades in South African with most of the

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[132] Australian public opinion is generally against capital punishment; see The Sydney Morning Herald, *Tough Fight Remains to Halt Barbaric Death Penalty* (30 November 2011) <http://www.smh.com.au/federal-politics/editorial/tough-fight-remains-to-halt-barbaric-death-penalty-20111130-1v1lv.html>. For the Norwegian, see USA Today, *Can Norwegian Punishment Fit the Crime?* (27 July 2011) <http://usatoday30.usatoday.com/news/world/2011-07-27-Norway-punishment-lenient-death-penalty_n.htm>. For information about France, Finland, Italy, see Death Penalty Information Center, *International Polls and Studies*(2017) <http://www.deathpenaltyinfo.org/international-polls-and-studies-0>. For New Zealand, see The National Business Review, *Sizeable Support for Reintroduction of Death Penalty* (18 August 2013) <http://www.nbr.co.nz/article/sizeable-support-reintroduction-death-penalty-ck-144558>.

[133] Recent data on the American public's attitude toward capital punishment is presented in Gallup, *In US, 64% Support Death Penalty in Cases of Murder* (8 November 2010) <http://www.gallup.com/poll/144284/support-death-penalty-cases-murder.aspx>. See also Lehtinen, 'The Value of Life', above n 118. In Belarus, a referendum in 1996 on the issue of retaining the death penalty was supported by the vast majority of the population; see Richard Boudreaux, *Belarus President Claims Referendum Victory* (26 November 1996) Los Angeles Times <http://articles.latimes.com/1996-11-26/news/mn-3047_1_belarus-claimed-victory>. Public opinion in India shows almost unanimous favour for the death penalty; see Jason Burke, *Delhi Gang-Rape Trial: Death Sentence Inevitable, Says Indian Minister* (10 September 2013) The Guardian <http://www.theguardian.com/world/2013/sep/10/delhi-gang-rape-death-sentence-inevitable>. For information about support for capital punishment amongst the Chinese public, see Johnson and Zimring, *The Next Frontier*, above n 120, 302.
For the role that public opinion plays in supporting capital punishment for the most serious crimes, see Christina Mancini and Daniel P Mears, 'To Execute or Not to Execute? Examining Public Support for Capital Punishment of Sex Offenders' (2010) 38 *Journal of Criminal Justice* 959; Mancini and Mears found that public outrage played an important role in application of capital punishment to sex offenders in the US.

population against the practice. However, in recent years, a significant rise in the number of people who support it has been observed, especially among the younger people.[134] Public opinion, therefore, may vary according to time and circumstance, and hence does not provide any universal attitude regarding the use of capital punishment.

Furthermore, public opinion can reveal fault lines of discrimination within given societies. Some research finds that white Americans are more likely to support the death penalty when they are informed that the penalty is mostly applied to African Americans.[135] As a result, even when there seems to be a stable and internationally accepted public opinion against capital punishment, it cannot be depended on as a reliable source. Public opinion, therefore, is again refuted by retentionists as a justification for the abolition of capital punishment. Abolitionists, in the end, resort to the right to life of the convicted person as their strongest argument, such a right being irreversibly deprived by capital punishment.

2.2.5. The Right to Life

Abolitionists allege that capital punishment represents the cruellest, most inhumane and degrading violation of human rights, a psychological torture, or 'the ultimate irreversible denial of human rights', since it deprives a human being of his or her right to life.[136] The right to life is one of the most important rights a person possesses providing the basis on which the person further enjoys other rights. If the right to life is deprived, the person will necessarily forfeit the possibility of enjoying other benefits or pursuing other ends in life.

Given its significance, the right to life is incorporated in both international covenants and state-specific constitutions as an inalienable human right or constitutional right.[137] Inalienability ensures that the right to life cannot be deprived and that capital punishment cannot be allowed. Therefore, even the cruellest murderers or most sadistic torturers cannot be subjected to punishment by death.[138]

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[134] News24, *Youth 'Want Death Penalty Reinstated'*, above n 120.
[135] Samuel R Gross and Robert Mauro, *Death and Discrimination: Racial Disparities in Capital Sentencing* (Northeastern University Press, 1989) xiii.
[136] For example, Dan Malone, 'Cruel and Inhumane: Executing the Mentally Ill' (2005) 31(3) *Amnesty International Magazine* 20; Johnson and Zimring, *The Next Frontier*, above n 120, vii–x; Bohm, 'American Death Penalty Attitudes', above n 108; Gerald Smith, 'The Value of Life', above n 123.
Beccaria also insisted that the state could not take a citizen's life since the right to life was retained by the citizen when he or she entered the state; see 'Cesare Beccaria (1738-1794)' in James Fieser and Bradley Dowden (eds), *Internet Encyclopedia of Philosophy* (28 August 2015), retrieved from <http://www.iep.utm.edu/beccaria/> '3. Against Capital Punishment'.
[137] See the relevant articles of UDHR, ICCPR, ECHR and United States Declaration of Independence presented in chapter one, page 9.
[138] Gerald Smith, 'The Value of Life', above n 123.

Retentionists, however, argue that even though the right to life is significant and inalienable, it can be forfeited or waived.[139] Inalienability forbids the deprivation of life when the subject refuses to comply, but it does not exclude situations in which an individual elects to lose it himself or herself.[140] For example, Locke believed behaviours that were against the law of nature, such as serious crimes, removed the transgressor from the rule of reason.[141] He or she, therefore, lost his or her capacity to enjoy a right and stepped into a state of war with other members of the society.[142] This state of war conferred other citizens, as well as the state more generally, with a legitimate reason for killing the transgressor, namely self-protection.[143] Capital punishment, thus, was allowable under such circumstances. Blackstone and Albert Camus both held a similar view to Locke, namely that serious crimes severed the transgressor's connection with society, degraded him or her to the state of being a monster and hence rendered it permissible for him or her to be punished by death.[144] Mill, in clearer words, contended that the 'adoption of a rule that he who violate[d] that right in another forfeit[ed] it for himself' represented the best way to respect the value of life.[145] The death penalty, in this sense, does not violate the right to life and ought to be retained. The thesis finds this understanding of the right to life and its retentionists attitude toward capital punishment reasonable as they concur with the Choice Theory, which will be analysed in detail in chapter four.

2.3. Abortion

On the issue of abortion, and specifically the question of whether a mother ought to be allowed the choice of terminating her pregnancy deliberately, scholarly opinion is again divided. Anti-abortionists insist the practice should not be allowed because abortion works against the religious doctrine, violates the foetus's right to life, and affects the mother's health.

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[139] Feinberg, 'Voluntary Euthanasia and the Inalienable Right to Life', above n 39.
[140] Ibid, 110–12.
[141] Brian Calvert, 'Locke on Punishment and the Death Penalty' (1993) 68 (264) *Philosophy* 211, 212; Hugo Bedau, *Death is Different: Studies in the Morality, Law and Politics of Capital Punishment* (Northeastern University Press, 1987) 13; Locke, *Two Treatises of Government*, above n 28, 268, 271–72, 274.
[142] Calvert, 'Locke on Punishment and the Death Penalty', above n 141; Bedau, *Death is Different*, above n 141, 13; Locke, *Two Treatises of Government*, above n 28, 268, 271–72, 274.
[143] Calvert, 'Locke on Punishment and the Death Penalty', above n 141; Bedau, *Death is Different*, above n 141, 13; Locke, *Two Treatises of Government*, above n 28, 268, 271–72, 274.
[144] William Blackstone, *Commentaries on the Law of England: A Facsimile of the First Edition of 1765-1769* (University of Chicago Press, 1979) vol 4, 373–79; Albert Camus, *Resistance, Rebellion and Death* (H Hamilton, 1961) 129, 143.
Albert Camus (1913-1960) was a French journalist, philosopher and Nobel Prize winning author. He supported individual freedom, opposed nihilism, and his view contributed to the rise of the philosophy of absurdism. His writings for L'Express won him the 1957 Nobel Prize in literature.
[145] Mill, 'Parliamentary Debate on Capital Punishment within Prisons Bill', above n 54, 1053–054; Mill, 'Speech in Favor of Capital Punishment', above n 54.

Conversely, advocates of abortion appeal for the acknowledgement of the mother's right to decide whether her pregnancy should continue or not.

For many anti-abortionists, religious doctrine provides a strong rationale for their position. The Catholic Church, Orthodox Churches, Islam, Judaism and Hinduism all take a firm stance against abortion.[146] According to them, life is given by God and cannot be taken away by human action, even from the very beginning. Some anti-abortionists also believe that abortion cannot be permitted because it is similar to manslaughter: abortion is equivalent to consciously taking the risk of depriving another of his or her right to life.[147] This renders the practice a crime and ought to be subjected to prohibition. In addition, pathologically, abortion increases the risk of breast cancer, which generates a bad influence on the health of the mother.[148] For the purpose of protecting the mother's health, the state again ought not to permit the practice.

Advocates of abortion refute these arguments by pointing out that firstly, contrary to religious views that forbid abortion, there are also religious views that allow abortion, especially when the pregnancy threatens the life of the mother.[149] Secondly, abortion needs not necessarily be categorised as manslaughter: if manslaughter includes the deprivation of the life of any entity whose possession of a right to life is under question, ending the life of an animal or a plant might also fit the definition of manslaughter.[150] This categorisation, therefore, is unacceptable because it will incriminate practices of butchering and gardening. Thirdly, the claim that abortion increases the risk of breast cancer has not been demonstrated conclusively; rather, scientists have contrary evidence to show that abortion does not cause breast cancer.[151] Even though breast cancer follows an abortion, the cause-and-effect link cannot be proved as they may just exist concurrently. Additionally, advocates of abortion even believe that allowing abortion reduces the crime rate since an unwanted child is always poorly raised and hence more inclined to commit a crime.[152] This argument, however, is rejected by anti-abortionists

[146] See Society for the Protection of Unborn Children, *Religious View on Abortion* (2017) <https://www.spuc.org.uk/youth/student_info_on_abortion/religion>.
[147] Stephen D Schwarz, *The Moral Question of Abortion* (Loyola University Press, 1990) 58–9.
[148] Joel Brind et al, 'Induced Abortion as an Independent Risk Factor for Breast Cancer: A Comprehensive Review and Meta-analysis' (1996) 50(5) *Journal of Epidemiol Community Health* 481.
[149] For example, the Catholic Church of England. See General Synod's Mission and Public Affairs Division, 'Abortion: A briefing Paper' (February 2005) The Church of England <https://www.churchofengland.org/media/45673/abortion.pdf>.
[150] David Boonin, *A Defense of Abortion*, above n 86, 314–15, 323.
[151] Patricia Jasen, 'Breast Cancer and the Politics of Abortion in the United States' (2005) 49(4) *Medical History* 423.
[152] John J Donohue and Steven D Levitt, 'The Impact of Legalized Abortion on Crime' (2001) 116(2) *Quarterly Journal of Economics* 379.

on the grounds that the causal connection between the crime rate and the legalisation of abortion cannot be verified.[153]

Both anti-abortionists and advocates of abortion then resort to the respective rights of the foetus and the mother in a bid to solve the impasse. This concern about rights constitutes the core of the debate on abortion, and specifically the intertwined issue of whether the foetus has a right to life and whether the mother has a right to terminate the foetus's life.[154]

2.3.1. Does a Foetus Have a Right to Life?

Advocates of abortion believe that a foetus does not have an *a priori* right to life.[155] According to the UDHR, ICCPR, ECHR, as well as Australian Capital Territory *Human Rights Act*, the right to life is possessed by 'every human being' or 'everyone'.[156] Such terms do not include the notion of a foetus.[157] Therefore in the field of law, the foetus does not have a right to life because that specific term is omitted from the relevant legislation.

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[153] Ibid; Christopher L Foote and Christopher F Goetz, 'The Impact of Legalized Abortion on Crime: Comment' 123(1) *Quarterly Journal of Economics* 407.

[154] Gordon considered the core issue of abortion was whether the foetus had a right to life. See Gordon, 'Abortion', above n 37, [1]–[2]. Kirtley thought the abortion debate was primarily based on both the rights of the unborn and the rights of the woman. See Michelle Crotwell Kirtley, *Rising above the Rights-based Abortion Debate* (31 August 2012) The Center for Public Justice <http://www.capitalcommentary.org/abortion/rising-above-rights-based-abortion-debate>.

There is another significant argument raised on the issue of abortion, namely deprivation. This argument believes abortion deprives the foetus of his or her future. Works that particularly focus on this argument include: Don Marquis, 'Why Abortion is Immoral' (1989) 86(4) *Journal of Philosophy* 183; Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life* (Oxford University Press, 2002) 234–35, 271.

However, the deprivation argument is similar to the argument that believes the foetus has a right to life. On the one hand, the right to life is usually interpreted as or connected with anticipation of a future. On the other hand, the deprivation argument is also subject to the refutation that the foetus does not have a right to life. The deprivation argument, therefore, can be included in the two core problems discussed in this thesis.

Hare even believed that the issue of abortion did not need to resort to rights; see R M Hare, 'Abortion and the Golden Rule' (1975) 4(3) *Philosophy and Public Affairs* 201. However, his theory implied an interpretation of the right to life as well; for further discussion see chapter five.

[155] See Jane English, 'Abortion and the Concept of a Person' (1975) 5(2) *Canadian Journal of Philosophy* 233, 235; Judith Jarvis Thomson, 'A Defense of Abortion' (1971) 1(1) *Philosophy and Public Affairs* 47, 47.

[156] See articles presented in chapter one, page 9.

[157] Article 1 of the UDHR states that '[a]ll human beings are born free and equal in dignity and rights.' This indicates that the word 'born' was used intentionally to exclude applying the Declaration's rights to the unborn. The drafters of the Declaration even explicitly rejected a proposal to delete the word 'born'. UN GAOR 3rd Comm, 99th mtg, UN Doc A/PV/99 (28 September 1948) 110–24.

Similar rejections occurred during the drafting of the ICCPR. The drafters rejected both a proposal to extend the right to life to the unborn and a proposal to amend the article regarding the right to life to 'the right to life is inherent in the human person from the moment of conception'; see UN GAOR Annex, 12th sess, Agenda Item 33, UN Doc A/C.3/L.654 (18 November 1957) 96, 113, 119. The European Court of Human Rights also tends to support the idea that the protection of the right to life outlined in the ECHR does not cover the unborn. For example, see the cases of *Paton* (1980) 3 Eur Court HR 408; *Vo* (2004) 12 Eur Court HR 326; *A, B and C* (2010) 13 Eur Court HR 2032.

Section 9 of Australian Capital Territory *Human Rights Act* states explicitly that the right to life 'applies to a person from the time of birth'.

Anti-abortionists, however, contend that although such laws do not acknowledge the right to life of the foetus specifically, the foetus ought to have a right to life because life begins at the point of conception.[158] The right to life, therefore, ought to be incorporated at that particular moment in time.[159]

Many advocates of abortion agree with anti-abortionists that life begins at conception; however, they refuse to agree that the right to life also commences at the same time.[160] Purely being alive, according to advocates of abortion, does not constitute sufficient grounds for an entity to possess a right to life. These advocates also believe that another precondition is needed, namely personhood.[161] Mary Ann Warren argued that a person ought to possess full and actual personhood in order to be granted rights.[162] This full and actual personhood requires at least two of the following: consciousness, reasoning, self-motivation, the ability to communicate and self-awareness.[163] Similar criteria such as brain waves or higher brain function, self-consciousness, rationality, autonomy and self-value-attribution have also been outlined by others working in the field.[164] A foetus, however, does not meet any of these criteria and, as such, cannot possess personhood. Even when the foetus develops the ability to

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[158] Grégor Puppinck, 'Abortion and the European Convention on Human Rights' (2013) 3(2) *Irish Journal of Legal Studies* 142; *Vo* (2004) 12 Eur Court HR 326, [5], [12] (Judge Rozakis), [7] (Judge Costa).
There has been a movement in Australia in recent years appealing for the recognition of the legal status of a late foetus as a human being, such as 'Sophie's law' and 'Zoe's law'; however, it has been defeated in the court. See Calla Wahlquist, *Sophie's Law: Mother Campaigns to Legally Recognise 30-week Foetuses* (14 January 2016) The Guardian <https://www.theguardian.com/australia-news/2016/jan/14/sophies-law-mother-campaigns-to-legally-recognise-unborn-babies>; Bridie Jabour, *Zoe's Law, Which Put Legal Abortion in NSW at Risk, All But Defeated* (13 November 2014) The Guardian <https://www.theguardian.com/world/2014/nov/13/zoes-law-legal-abortion-nsw-risk-defeated>.
[159] Thomson, 'A Defense of Abortion', above n 155, 47. Article 4 of *American Convention on Human Rights* (Signed 22 November 1969, entered into force 18 July 1978) also asserts that the right to life begins 'from the moment of conception'.
[160] English, 'Abortion and the Concept of a Person', above n 155; Thomson, 'A Defense of Abortion', above n 155, 47; Warren, 'On the Moral and Legal Status of Abortion', above n 87, 53.
[161] B A Brody, 'Abortion and the Law' (1971) 68(12) *Journal of Philosophy* 357, 369.
[162] Warren, 'On the Moral and Legal Status of Abortion', above n 87, 44.
'Full' stood in opposition to 'part', the emphasis intended to reject Hayes' argument that the magnitude of personhood and the right to life arose in concert with the development of the foetus; see Warren, 'On the Moral and Legal Status of Abortion', above n 87, 57–9.
'Actual' stood in opposition to 'potential', the emphasis intended to reject the view that a foetus should be protected simply because it had the potential for personhood; see Warren, 'On the Moral and Legal Status of Abortion', above n 87, 59–60.
Mary Anne Warren (1946-2010) was an American writer and philosophy professor, noted for her works in support of abortion-rights.
[163] Warren, 'On the Moral and Legal Status of Abortion', above n 87, 55–6.
[164] For brain waves or higher brain function, see D G Jones, 'The Problematic Symmetry between Brian Birth and Brain Death' (1998) 24(4) *Journal of Medical Ethics* 237. For self-consciousness, see Michael Tooley, 'Abortion and Infanticide' (1972) 2(1) *Philosophy and Public Affairs* 37, 44. Peter Singer seemed to agree with Tooley on self-consciousness in saying that 'the capacity to conceive of oneself as existing over time is a necessary condition of a right to life'; see Singer, *Practical Ethics*, above n 42, 84. For rationality, see Peter Singer, *Writings on an Ethical Life* (Ecco Press, 2000) 128, 156–57. For autonomy, see McMahan, *The Ethics of Killing*, above n 154, 260. Regarding self-value-attribution, this means the capacity of 'attributing to its own existence some basic value such that being deprived of this existence represents a loss'; see Alberto Giubilini and Francesca Minerva, 'After-birth Abortion: Why should the Baby Live?' (2013) 39 *J Med Ethics* 261, 261–63.

feel pain — which starts a couple of weeks from conception — he or she only meets one criterion of consciousness, not the minimum of two demanded by Warren's model.[165] As a result, the foetus does not possess personhood and therefore cannot have a right to life.

However, the personhood argument is rejected by anti-abortionists, who disagree with the manner in which advocates of abortion define personhood. In the view of anti-abortionists, the criteria proposed by advocates of abortion to define personhood are based on the presumption that the legal status of a person and a foetus are different.[166] Such criteria emphasise highly developed mental and emotional capacities possessed only by adults.[167] That advocates of abortion reach the conclusion that the foetus does not have personhood, in this sense, is not surprising. However, the difference between the legal status of a person and the foetus cannot be taken for granted, and so the criteria laid down by advocates of abortion cannot be relied upon.

Secondly, personhood, as defined by advocates of abortion, disqualifies two groups of persons who many would consider to hold rights, namely comatose patients and human infants.[168] Similarly to a foetus, comatose patients and human infants do not satisfy two of the criteria for holding rights (as proposed by Warren) because they at most possess consciousness. In the model of advocators of abortion, such beings do not possess personhood and therefore not have a right to life. This disqualification, however, cannot be accepted because they are always legally acknowledged as having a right to life and depriving them of lives comprises murder.

Advocates of abortion extend their criteria for personhood to include both capacities in use and capacities retained: a normal person has required capacities in use, while a person in a coma still has such capacities but they are suspended.[169] However, this particular extension of the argument only explains the personhood of a patient in a coma. According to this model, an infant has neither capacities in use nor capacities retained. He or she, therefore, still does not

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[165] Warren, 'On the Moral and Legal Status of Abortion', above n 87, 45.
It is universally accepted that a foetus can feel pain before birth, but scientists disagree about when exactly this starts to occur. Some argue this is possible from the sixth month or third trimester of pregnancy, such as S J Lee et al, 'Fetal Pain: A Systematic Multidisciplinary Review of the Evidence' (2005) 294(8) *JAMA* 947. Alternatively, some believe it possible from the 26th week, such as Martin H Johnson and Barry J Everitt, *Essential Reproduction* (Blackwell Science, 2nd ed, 1984) 215.
[166] Marquis, 'Why Abortion is Immoral', above n 154, 184.
[167] Ibid.
[168] Ibid, 197; Schwarz, *The Moral Question of Abortion*, above n 147, 89.
[169] Katherin A Rogers, 'Personhood, Potentiality, and the Temporarily Comatose Patient' (1992) 6(2) *Public Affairs Quarterly* 245.

have either personhood or a right to life. Ending the life of the infant, i.e., infanticide, thus appears allowable.[170]

Thirdly, anti-abortionists raise a new way to define personhood. They argue that personhood ought to rely on a being's natural or inherent capacity to develop its psychological features; a foetus, an infant and a comatose patient all have this capacity.[171] For example, although a foetus or an infant does not have the ability to reason, he or she has a natural potential to build this ability. Although a comatose patient has lost his or her ability to reason, he or she inherently possesses such an ability. These beings therefore all possess personhood and hence have a right to life.[172]

2.3.2. If the Foetus Has a Right to Life, Could the Mother Terminate Him or Her?

Some advocates of abortion then argue that even if the foetus does have a right to life, the mother still ought to be able to deprive the foetus of that right because she should be allowed both freedom from discrimination and the autonomy to make decision about her own affairs.[173]

Regarding freedom from discrimination, some advocates of abortion believe that prohibition of abortion is a type of discrimination against women expressly outlined in the *Convention on the Elimination of All Forms of Discrimination against Women*. According to the Convention, discrimination against women is a 'any distinction, exclusion, or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.'[174] Advocates of abortion contend that prohibition of the practice firstly, impairs women's enjoyment of the right to health care, and particularly access to abortion services. Secondly, such impairment unfairly targets only women, because men

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[170] Singer, *Writings on an Ethical Life*, above n 164, 186–93; McMahan, *The Ethics of Killing*, above n 154, 359–60; Schwarz, *The Moral Question of Abortion*, above n 147, 91–3; Giubilini and Minerva, 'After-birth Abortion', above n 164.
For example, Warren conceded that infants were not persons and killing them should be allowed under some circumstances, such as when an infant was seriously disabled; see Mary Ann Warren, 'Postscript on Infanticide' in Thomas A Mappes and David DeGrazia (eds), *Biomedical Ethics* (McGraw Hill, 5th ed, 2001) 461.
[171] Schwarz, *The Moral Question of Abortion*, above n 147, 91–3.
[172] Ibid, 91–3. See also Warren, 'On the Moral and Legal Status of Abortion', above n 87.
[173] Cook included all these rights in the more general idea of a reproductive right; see Rebecca J Cook, 'Human Rights and Reproductive Self-determination' (1995) 44 *American University Law Review* 975.
[174] *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) [2].

cannot become pregnant and hence can never have any personal need for abortion services. Thirdly, prohibition of abortion causes actual harm to the health, and even the lives of women.[175] If abortion is prohibited, appropriately qualified medical staff will be unavailable or will have to operate outside the bounds of law. For example, a woman with a risky pregnancy might be forced to keep her foetus, to the detriment of her own health. A woman may also seek an abortion from an unqualified individual, whose lack of training may place the mother's life in even greater danger. As a result, prohibition of abortion constitutes a discriminating restriction on women. Fourthly and lastly, prohibition of abortion may even worsen the continuous discrimination against women that believe women should be judged according to their reproductive capacities.[176] To prevent such discrimination, abortion should therefore be allowed.

However, anti-abortionists believe that allowing abortion constitutes another type of discrimination, one directed against the foetus. For example, Ronald Reagan contended that allowing abortion denied the foetus's possession of a right to life, subjected him or her to be easily deprived of life, and targeted unfairly the unborn only, thus comprising a discrimination against the developing human-to-be.[177]

Advocates of abortion then resort to arguments about the mother's autonomy in making decisions about her own affairs. This autonomy has three categories: the right to privacy, the right to plan one's family, and the right to bodily integrity. Regarding the right to privacy, advocates of abortion argue that the decision about whether to abort is one within the realm of the mother's private life. Prohibiting the practice intrudes in this realm, and hence is not something the state ought to legislate against. Moreover, the right to privacy has been applied in several legal cases to quash arguments about foetus's right to life and support the mother's right to abortion instead.[178] The mother thus ought to be free from legal critique in her decision about abortion.

However, anti-abortionists contend that the right to privacy is not an explicitly acknowledged right. According to this view, for a court to infer such a thing is unconstitutional, and

[175] Rahman, Katzive and Henshaw, 'A Global Review of Laws on Induced Abortion, 1985-1997', above n 87; Cook, 'Human Rights and Reproductive Self-determination', above n 173, 1000.
[176] Cook, 'Human Rights and Reproductive Self-determination', above n 173, 994.
[177] Ronald Reagan, *Abortion and the Conscience of the Nation* (New Regency Publishing, revised edition, 2001); Thomson, 'A Defense of Abortion', above n 155, 52.
[178] The most famous cases are *Roe* ((1973) 410 US 113) and *Bruggemann and Scheuten* ((1977) 3 Eur Court HR 244). See also generally Aaron E Michel, 'Abortion and International Law: The Status and Possible Extension of Women's Right to Privacy' (1981) 20 *Journal of Family Law* 214.

therefore cannot be accepted as grounds for legalising abortion.[179] Furthermore, even if one does accept arguments about the right to privacy, such arguments should only allow the mother to abort the foetus before viability.[180] After viability, the state's interest in the foetus prevails over that of the mother.[181] The right to privacy, therefore, cannot by itself justify the overall practice of abortion.

As to the right to plan one's family, advocates of abortion believe that the prohibition of abortion greatly impacts on the mother's ability to decide how many children she wishes to have, and when to have them.[182] Prohibition of abortion may force the mother into giving birth to an unwanted child, thus moving her out of control over her descendants and family size.[183] This impact gets even worse in cases of rape: if a woman becomes pregnancy as a result of rape, she cannot be said to have consented to her pregnancy, nor to the existence of her future child.[184] To enable the mother to control the size and composition of her family, abortion therefore ought to be allowed.

This right, however, is again challenged by anti-abortionists, who argue that even when prohibition impacts on the mother's right to control the size of her family, such a prohibition may not be unjustified because the foetus's right to life also needs consideration. This position is the result of a more general view that protection of the right to life should always be viewed as more important than the ability to control one's family at a personal level. Abortion thus cannot be permitted in consideration of protecting the foetus's right to life.

Concerning the right to bodily integrity, advocates of abortion contend that prohibiting abortion violates the mother's control over her body. This concept was firstly raised by Judith Jarvis Thomson, who alleged that a foetus developing in a woman's body was analogous to a person who was suffering from kidney failure and using another's body to maintain blood

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[179] For example, Justice White and Justice Rehnquist opposed the decision, stating that the court 'fashions … a new constitutional right'. See *Roe* (1973) 410 US 113, 175; *Doe* (1973) 410 US 179, 222.
[180] *Roe* (1972) 410 US 113, 154, 164. Foetal viability is defined as the ability of a foetus to survive outside the uterus, with medical assistance such as humidicribs. It is generally considered a sign of when a foetus is most likely to be born alive; normally, a foetus reaches viability at the end of the second trimester. See Keith L Moore and T V N Persaud, *The Developing Human: Clinically Oriented Embryology* (Saunders, 1998) 103.
[181] *Roe* (1972) 410 US 113, 154, 164.
[182] The right to plan one's family is related to the right to privacy, but is still considered a separate right. For example, The *Final Act of the International Conference on Human Rights* (UN Doc A/CONF.32/41 (13 May 1968)) states that 'parents have a basic human right to determine freely and responsibly the number and spacing of their children and a right to adequate education and information to do so'. This position was restated at the World Population Conference in Bucharest in 1974, the International Conference on Population in Mexico City in 1984, the International Conference on Population and Development in 1994, and the Fourth World Conference on Women in 1995.
[183] Cook, 'Human Rights and Reproductive Self-determination', above n 173.
[184] Ibid.

homoeostasis.[185] Legally, a person who used another's body to maintain blood homoeostasis could only do so with the other's consent. If the healthy person did not consent to having his or her body used in this fashion, the patient could not be medically linked to the other. Again, a foetus can only live in the mother's body with the mother's consent.[186] If or when the mother does not consent to this state of affairs, she ought to be able to abort the foetus.[187] Advocates of abortion thus conclude that abortion ought to be allowed on grounds of the mother's rights.

However, anti-abortionists believe that the physical link between foetus and mother is fundamentally different from the case in which one person uses another's body for medical benefit.[188] The foetus is a part of the body of the mother, whereas the ill patient who uses another's body is merely a stranger to the other; the analogy, therefore, is inappropriate and cannot justify abortion. Moreover, the manner in which the mother may abort the foetus is also different from the case in which a healthy person refuses to have his or her body used to save the life of another. Abortion is an active premeditated killing of the foetus, while refusing to allow one's healthy body to be used to save the life of another instead constitutes a passive standing by and letting another to die.[189] Furthermore, the mother ought to be seen as consenting to her body being used by the foetus when the sexual activity resulting in pregnancy is voluntary.[190] Therefore, in this case, abortion cannot be allowed. Lastly, even in cases of pregnancy resulting from involuntary sex (such as rape), abortion may still not be allowable since the right to life of the foetus can outweigh the right to bodily integrity of the mother.

As a result, agreement between anti-abortionists and advocates of abortion on whether the foetus has a right to life and whether the mother can deprive the foetus of that state seems impossible because they disagree on whether personhood is required for an entity to have a

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[185] Thomson, 'A Defense of Abortion', above n 155.
Judith Jarvis Thomson (1929-) is an American moral philosopher and metaphysician. She is known for her defence of moral objectivity, her account of moral rights, her views about the incompleteness of the term 'good', and her use of thought experiments to make philosophical points. She is most famous for her support of abortion-rights.
[186] Thomson, 'A Defense of Abortion', above n 155; Boonin, *A Defense of Abortion*, above n 84, 135.
[187] Thomson, 'A Defense of Abortion', above n 155.
[188] Schwarz, *The Moral Question of Abortion*, above n 147, 119–20; McMahan, *The Ethics of Killing*, above n 154, 363–64.
[189] Schwarz, *The Moral Question of Abortion*, above n 147, 26–8; McMahan, *The Ethics of Killing*, above n 154, 378–92.
However, the difference between killing a person and letting someone die has never been concluded absolutely. For debate on such differences see '2.4.3. Active and Passive Euthanasia' in the following text and generally Steven D Smith, *The Disenchantment of Secular Discourse* (Harvard University Press, 2010).
[190] Warren, 'On the Moral and Legal Status of Abortion', above n 87; McMahan, *The Ethics of Killing*, above n 154, 364–72.

right to life and whether the mother's rights prevails over the foetus's right to life. This thesis agree with the personhood argument that the foetus does not have a right to life while the mother has rights, as it shares similar views with the Choice Theory; this will be clarified in chapter five.

2.4. Euthanasia

Euthanasia concerns the question of whether a doctor can legitimately end the life of a patient in order to relieve that patient from pain. Opponents of euthanasia insist the doctor cannot do so because the practice of euthanasia sits on a slippery slope, and violates both the patient's right to life and the state's interest in the patient's life. On the contrary, proponents of euthanasia argue that doctor ought to be allowed to practice euthanasia because it upholds the patient's right to self-determination, relieves the patient from pain, and also the patient's relatives from ongoing emotional and financial burdens.

2.4.1. The Slippery Slope Argument

Opponents of euthanasia primarily oppose the practices of voluntary and non-voluntary euthanasia on account of their inclination to bring about horrific outcomes in society. Firstly, if one accepts both voluntary and non-voluntary euthanasia, one may easily fall into the trap of accepting involuntary euthanasia, namely murder.[191] Non-voluntary euthanasia is similar to involuntary euthanasia: non-voluntary euthanasia is carried out when the consent is unavailable, for example, when a patient is in a coma; involuntary euthanasia is carried out against the will of the patient; in either case, the patient's consent is evidently lacking.[192] Allowing non-voluntary euthanasia, therefore, leads to acceptance of involuntary euthanasia. In addition, voluntary euthanasia is close to non-voluntary euthanasia. Allowing voluntary euthanasia, therefore, leads one to accept non-voluntary euthanasia, and then to accept involuntary euthanasia.

However, involuntary euthanasia is always unacceptable: ending a patient's life against his or her will constitutes murder in every jurisdiction. More than that, involuntary euthanasia may even lead one to the position of agreeing with extremist political philosophy, such as that practiced by the Nazi party in Germany in the 1930s and 1940s.[193] Once ending a patient's

[191] Kumar Amarasekara and Mirko Bagaric, 'The Legalisation of Euthanasia in the Netherlands: Lessons to be Learnt' (2001) 27 *Monash University Law Review* 179, 181.
[192] Danuta Mendelson and Mirko Bagaric, 'Assisted Suicide through the Prism of the Right to Life' (2013) 36 *International Journal of Law and Psychiatry* 406.
[193] Richard Sherlock, 'Liberalism, Public Policy and the Life Not Worth Living: Abraham Lincoln on Beneficent Euthanasia' (1981) 26 *American Journal of Jurisprudence* 47, 49–50. For information about the Nazi's

life against his or her will becomes acceptable, ending the life of a person who is not rational may also seem allowable. In consideration of these outcomes, although the practices of voluntary euthanasia and non-voluntary euthanasia may seem acceptable in principle, they still ought to be prohibited to prevent these bad outcomes from happening.

Secondly, decriminalising and legalising voluntary and non-voluntary euthanasia increases the frequency of such practices.[194] On the one hand, according to economic laws of demand, the practice of an action increases when the price of the action decreases.[195] Therefore, on financial grounds alone, it is inevitable that where euthanasia is legal, its practice must increase. Punishment on euthanasia is considered as the price for the practice: thus when punishment is removed, the price drops while the frequency of the practice increases.

On the other hand, the legalisation of voluntary euthanasia also increases the practice of non-voluntary euthanasia. It is harder to police a regulatory regime than a prohibitive one.[196] Regulating the practices of euthanasia — for example allowing voluntary euthanasia but disallowing non-voluntary euthanasia — render it less likely for a state to keep the practice legal than purely prohibiting both of them. Therefore once voluntary euthanasia is allowed, the practice of non-voluntary euthanasia will also emerge as an inevitable consequence.

Thirdly, the legalisation of euthanasia has knock-on effects of a negative nature. For example, the reputation of the medical profession will be weakened because the trust between patient and doctor will be undermined if the doctor can legitimately end the patient's life, with or without the consent of the patient.[197] Moreover, the state will refuse to contribute to the medical care of terminally ill patients, since they could easily choose to die at any moment, or have death imposed on them by a doctor who determines that to be the appropriate course of action.[198] Furthermore, euthanasia, especially non-voluntary euthanasia, will be abused by the patient' relatives in order to accelerate death and thus bring on-stream the financial benefits of

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Euthanasia Program, see Michalsen A and Reinhart K, '"Euthanasia": A Confusing Term, Abused under the Nazi Regime and Misused in Present End-of Life Debate' (2006) 32(9) *Intensive Care Med* 1304.

[194] See *Rodriguez v British Columbia* (1993) 3 SCR 519, 603 (Justice Sopinka); *Washington* (1997) 521 US 702, 734 (Justice Rehnquist), 785–86 (Justice Souter); Mendelson and Bagaric, 'Assisted Suicide through the Prism of the Right to Life', above n 192.

[195] Helga Kuhse, 'From Intention to Consent: Learning from Experience with Euthanasia' in M P Battin et al (eds), *Physician Assisted Suicide: Expanding the Debate* (Routledge, 1998) 252, 263–66.

[196] John Keown, *Euthanasia, Ethics and Public Policy* (Cambridge University Press, 2002) 146.

[197] Zbigniew Zylicz and Ilora G Finlay, 'Euthanasia and Palliative Care: Reflections from the Netherlands and the UK' (1999) 92 *Journal of the Royal Society of Medicine* 370.

[198] It has been pointed out that the legalisation of euthanasia has led to a severe decline in the level of the care for the terminally-ill in Holland; see Simon Caldwell, *Now the Dutch Turn Against Legalised Mercy Killing* (9 December 2009) Daily Mail Australia <http://www.dailymail.co.uk/news/article-1234295/Now-Dutch-turn-legalised-mercy-killing.html>.

an inheritance.[199] In addition, euthanasia will become unaffordable for poorer patient if the legalisation of euthanasia also gives rise to its commercialisation.[200] Private companies will operate euthanasia for benefit, resulting in increase of the price for such a service. To prevent these side effects from happening, the first step of legalising voluntary euthanasia and non-voluntary euthanasia, according to the opponents, should not be allowed.[201]

However, proponents of euthanasia argue that bad outcomes and their applicable side effects (from now on both subsumed as 'bad outcomes') cannot justify prohibition of euthanasia. Primarily, causality between the legalisation of euthanasia and those bad outcomes has not been demonstrated conclusively.[202] Co-existence of bad outcomes alongside the legalisation of euthanasia does not mean that those outcomes are the direct results of the practice; the outcomes and the practice of euthanasia may just exist coincidentally.[203] For example, a reduction in the state's contribution to medical care for terminally ill patients may be coincidental in a state that legalises euthanasia: the reduction in contribution may not occur because the patient can easily choose death; alternatively, the reduction may be because of other legal or cultural concerns.[204] Other outcomes may even be the cause, rather than the result of euthanasia. For instance, an increase in the practices of both voluntary euthanasia and non-voluntary euthanasia may not be a result of their legalisation; it could be that an increase in those practices already taking place renders legalisation necessary.[205]

Secondly, the legalisation of euthanasia may not lead to, and may even prevent, bad outcomes from occurring. Principally, the practice of euthanasia may not increase as a result of legalisation, since doctors who believe euthanasia impermissible may still refuse to carry out a patient's request for medically-induced death.[206] There is also evidence to show that legalisation of euthanasia does not increase the practice, but rather reduces it: for example,

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[199] *Aruna Ramchandra Shanbaug* (2011) 4 SCC 454; Suresh Bada Math and Santosh K Chaturvedi, 'Euthanasia: Right to Life vs Right to Die' (2012) 136(6) *Indian Journal of Medical Research* 899, 900.
[200] *Aruna Ramchandra Shanbaug* (2011) 4 SCC 454; RoopGuisahani, 'Life and Death after Aruna Shanbaug' (2011) 8 *Indian Journal of Medical Research* 68.
[201] Penney Lewis, 'The Empirical Slippery Slope from Voluntary to Non-Voluntary Euthanasia' (2007) 35(1) 28 *Journal of Law, Medicine and Ethics*197, 197.
[202] John Griffiths, 'Comparative Reflections: Is the Dutch Case Unique?' in Albert Klijn et al (eds), *Regulating Physician-Negotiated Death* (Elsevier, 2001) 197, 202; Raz, 'Death in Our Life', above n 38, 7.
The inclination to Nazism is also refuted on the grounds that critics misunderstand the unique historical, political and social situations in Germany during the 1940s; see J A S Burgess, 'The Great Slippery-Slope Argument' (1993) 19 *Journal of Medical Ethics* 169.
[203] Stephen W Smith, 'Evidence for the Practical Slippery Slope in the Debate on Physician-Assisted Suicide and Euthanasia' (2005) 13 *Medical Law Review* 17, 22.
[204] John Griffiths, Alex Bood and Heleen Weyers, *Euthanasia and Law in the Netherlands* (Amsterdam University Press, 1998) 304–5.
[205] Eric A Posner and Adrian Vermeule, 'Should Coercive Interrogation Be Legal?' (2006) 104 *Michigan Law Review* 671.
[206] Raz, 'Death in Our Life', above n 38, 5–6.

some research shows that there has been no actual increase in the practice of euthanasia in the Netherlands after its legalisation in that state.[207] Other research shows that the Netherlands, Flanders and Belgium, all of which have legalised euthanasia, have fewer instances of it than some other states that prohibit the practice.[208] It is also noteworthy that in both Flanders and Belgium the practice of euthanasia is actually less common after its legalisation than before.[209]

Proponents of euthanasia also believe that legalisation generates better control over its misuse or commercialisation.[210] Open regulation, according to proponents of euthanasia, places the practice under government surveillance, and therefore gives the state better control over outcomes. Conversely, prohibiting euthanasia may force the practice underground, and thus lead to increased risks for all concerned. In addition, legalisation of euthanasia also enhances trust between patients and doctors, thereby ensuring that dying patients receive the most appropriate care for their needs.

Thirdly, proponents of euthanasia further point out that even if some research seems to indicate that legalising euthanasia leads to bad outcomes overall, these bad outcomes still cannot justify prohibition, since particular pieces of research may skew interpretation of results in order to prove a politically-based point of view. For example, a doctor who is against the practice of euthanasia may exaggerate its frequency in order to shore up his or her

[207] For example, the rate of 'ending of life without explicit request' in three Dutch surveys in 1990, 1995 and 2001, conducted after the conventional legalisation of euthanasia but before its formal legalisation, remained stable; see B D Onwuteaka-Philipsen et al, 'Euthanasia and other End-of-Life Decisions in the Netherlands in 1990, 1995, and 2001' (2003) 362 *Lance* 395, Table 1.

[208] Griffiths, 'Comparative Reflections', above n 202, 202; Griffiths, Bood and Weyers, *Euthanasia and Law in the Netherlands*, above n 204, 301 n 4.
For comparison between states see the table in Helga Kuhse et al, 'End-of-Life Decision in Australian Medical Practice' (1997) 166 *Medical Journal of Australia* 191, Box 4.
A 1996 survey in Australia showed that the percentage of non-voluntary euthanasia among all deaths was 3.5%, compared with a 1998 survey in Flanders and Belgium that showed the percentage in those countries was 3.2%. For information about the Australian survey, see Kuhse, 'End-of-Life Decision in Australian Medical Practice'. For information about the survey in Flanders and Belgium, see Clive Seale, 'National Survey of End-of-Life Decisions Made by UK Medical Practitioners' (2006) 20 *Palliative Medicine* 3, Table 2 and 3.
However, the Australian result was employed by Amarasekara and Bagaric as evidence for the slippery slope argument, since they believed that Australian non-prosecution policy actually triggered an increase in the practice of euthanasia. Amarasekara and Bagaric, 'The Legalisation of Euthanasia in the Netherlands', above n 191, 191; Kuhse, 'End-of-Life Decision in Australian Medical Practice', 196. For another argument that such causality again cannot be demonstrated see Lewis, 'The Empirical Slippery Slope from Voluntary to Non-Voluntary Euthanasia', above n 201, 204.

[209] The rate of non-voluntary euthanasia in 1998 was higher than the rate after its legalisation; see Seale, National Survey of End-of-Life Decisions Made by UK Medical Practitioners', above n 208.

[210] Griffiths, 'Comparative Reflections', above n 202, 203.

position.[211] Therefore, research demonstrating that the practice of euthanasia increases as a direct result of legalisation cannot be relied upon.

In conclusion, proponents of euthanasia refute the slippery slope argument as a justification for the prohibition of euthanasia, while opponents of the practice resort to arguments about the patient's right to life and the state's interest in the patient's life, which constitute more reliable grounds.

2.4.2. Interests and Rights

Arguments about euthanasia are typically phrased in terms of interests and rights.[212] Opponents of euthanasia frequently reply upon arguments concerning the sanctity of life, the right to life and the state's interests in citizens' lives to support prohibition of euthanasia. Firstly, sanctity of life functions as a keystone argument for opponents of euthanasia, especially in a religious context. The sanctity of life is considered a basic tenet of the Judeo-Christian tradition; taking a life in any form is believed contradictory to religious doctrine.[213] Euthanasia, no matter whether it is voluntary, non-voluntary or involuntary, is therefore wrong.[214]

Secondly, from a secular position, euthanasia again cannot be allowed since it violates the patient's right to life.[215] Regarding voluntary euthanasia, ending someone's life, even with his or her consent, has historically always been viewed as homicide by the law; ending someone's life without his or her consent, i.e., non-voluntary euthanasia, is considered a more serious form of homicide. Even in the states that do not prosecute or punish euthanasia, the practice is still considered as against the law.[216] For example, in the Netherlands and Belgium voluntary euthanasia still constitutes homicide in law, but not prosecuted or punished in reality.

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[211] For example, Magnusson found that doctors are inclined to give misleading answers to researchers, especially when euthanasia is prohibited in that doctor's state; see Roger S Magnusson, *Angels of Death: Exploring the Euthanasia Underground* (Yale University Press, 2002) 229.
[212] 'Euthanasia' in Roger Scruton, *Palgrave MacMillan Dictionary of Political Thought* (Macmillan Publishers, 2007) <http://search.credoreference.com/content/entry/macpt/euthansia/0>.
[213] According to the Bible, human life is given by God and therefore can only be taken away by God; homicide or suicide in whatever form is against the will of God. See Eric Rakowski, 'The Sanctity of Human Life' (1994) 103 *Yale Law Journal* 2049, 2049.
[214] Kemp, *Merciful Release*, above n 9, 11.
[215] Emily Jackson, 'In Favour of the Legalisation of Assisted Dying' in Emily Jackson and John Keown, *Debating Euthanasia* (Hart Publishing, 2012) 37, 38.
[216] See R Cohen-Almagor, 'Belgian Euthanasia Law: A Critical Analysis' (2009) 35(7) *Journal of Medical Ethics* 436.

Thirdly, the state also has an interest in preserving citizens' lives, especially the lives of the young people. As a result, some states have a policy prohibiting abortion and suicide; according to this model, the same interest ought to ground prohibition of euthanasia as well.[217]

Proponents of euthanasia, although generally agreeing with the broad notion of sanctity of life, the patient's right to life and the state's interest in the patient's life, disagree that such interests and rights can justify prohibition of euthanasia. Rather, they believe these interests and rights ought to be subject to the patient's right to self-determination, the intensity of pain experienced by the patient and the financial and emotional burden faced by the patient's relatives.

The first argument that proponents of euthanasia generally use concerns the level of pain experienced by the patient.[218] The practice of euthanasia only becomes relevant once the patient is experiencing unbearable levels of pain: letting him or her continue to suffer is therefore against the patient's interest; euthanasia instead provides a more acceptable outcome.[219] For the purpose of relieving pain, euthanasia does in fact bring overall good to the patient; as a direct result of this, euthanasia ought to be legalised.[220] Moreover, some proponents of euthanasia even argue that a doctor has a duty to help his or her patient seek relief from pain, either through psychological encouragement, knowledge support or lethal medication.[221] Since euthanasia is beneficial for the patient, and the doctor has a fundamental duty of care to the patient, the doctor ought to carry out euthanasia on a terminally ill patient who is suffering greatly. Furthermore, a few proponents of euthanasia also believe patients'

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[217] For example, Judge Rothstein, Judge Eugene Wright and Judge Stephen Reinhardt believed euthanasia ought to be prohibited in consideration of the state's interest in citizens' lives. See *Compassion in Dying* (1994) 850 F Supp 1454, 1464; *Compassion in Dying* (1995) 49 F 3d 586, 594 note 2; *Wilkes* (1935) 80 F 2d 285, 729; *United States* (1935) 79 F 2d 533, 820, 821.

[218] Phillipa Foot, 'Euthanasia' (1977) 6(2) *Philosophy and Public Affairs* 85, 86; Draper, 'Euthanasia', above n 7, 176.

Considerations about pain are also applied to justify the move from voluntary euthanasia to non-voluntary euthanasia under the principle of non-discrimination. Allowing voluntary euthanasia while disallowing non-voluntary euthanasia is considered discriminatory against comatose patients. When the patient is sufficiently competent to elect euthanasia, his or her pain is concerned important and therefore the practice is allowed. Conversely, when the patient is unable to choose euthanasia, his or her pain is considered relatively unimportant and hence euthanasia is not allowed; such lack of consideration about an incompetent patient's pain therefore constitutes discrimination against him or her. See Anthony Lester and Sarah Joseph, 'Obligations of Non-Discrimination' in David Harris and Sarah Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Oxford University Press, 1995) 578.

[219] Albert Bach, 'Medico-Legal Congress' (1896) 14 *Medical Legal Journal* 103. This view was justified under the argument for compassion according to Margaret Otlowski; see *Voluntary Euthanasia and the Common Law* (Oxford University Press, 1997) 203.

[220] Singer, *Practical Ethics*, above n 42, 186.

[221] For example Samuel D Williams, *Euthanasia* (Williams and Norgate, 1872).

pain not only covers physical pain but also includes mental distress.[222] Compared to physical pain, mental distress can in some cases be more agonising. Therefore, when the patient has lost his or her faith in the future, and life has become an unbearable burden for him or her, euthanasia should be allowed.

Opponents of euthanasia, however, disagree. They believe proponents of the practiced liberately exaggerate the nature of patients' pain in order to make euthanasia permissible. In most situations, dying is more painful than the illness itself.[223] Euthanasia, therefore, does not relieve pain and is certainly not for the benefit of the patient; instead, it brings more pain. Given that there are currently alternatives to euthanasia which can effectively relieve patients' pain,[224] the legitimacy of the practice seems unjustified.

If euthanasia is not justified then, on the one hand, the doctor cannot be held to a duty to carry it out.[225] On the other hand, mental distress ought not to be subject to the practice of euthanasia. Opponents of euthanasia believe that being eager for death, for example, does not constitute a kind of pain that one can stand by and let happen, or even encourage via euthanasia. Rather, it is a kind of mental illness that should be subject to medical treatment.[226] If a doctor is to act in the best interests of the patient, he or she ought instead to cure the patient's suicidal inclination with appropriate psychological therapy. According to this model, a doctor ought not to help a patient die via euthanasia in this situation.[227]

Proponents of euthanasia then employ arguments about the financial and emotional burden faced by relatives of the patient. Such burdens, according to proponents of euthanasia, are enormous.[228] Not only is much time and money consumed in keeping a terminally ill patient alive, but there is also great pressure, both physical and psychological, inflicted on the family, because they have to take care of the patient while at the same time watch him or her suffering and dying.[229] The practice of euthanasia can relieve relatives from these burdens by ending the patient's life. Euthanasia, therefore, has broader benefits for members of society other than the patient. Moreover, by relieving the relatives from all the various financial and

[222] For example David Hume, *The Philosophical Works* (Little Brown, 1854) vol 4, 535–46; Foot, 'Euthanasia', above n 218, 86, 95; Singer, *Practical Ethics*, above n 42, 156–57.
[223] Such as C B Williams, 'Euthanasia' (1894) 70 *Medical Record* 909.
[224] Such as cessation of active treatment, combined with the use of effective pain relief; see Griffiths, Bood and Weyers, *Euthanasia and Law in the Netherlands*, above n 204, 186.
[225] Kemp, *Merciful Release*, above n 9, 157.
[226] Jouko Lonnqvist, 'Major Psychiatric Disorders in Suicide and Suicide Attempters' in *The Oxford Textbook of Suicidology and Suicide Prevention* (Oxford University Press, 2009) 275–86.
[227] Ibid.
[228] Math and Chaturvedi, 'Euthanasia', above n 199, 901.
[229] Ibid. Raz, 'Death in Our Life', above n 38, 21.

emotional burdens associated with caring for a terminally ill family member, there are positive flow-on effects for society as a whole; euthanasia, in this sense, is also for the benefit of the state and thus ought to be allowed.[230] Some proponents of the practice even argue that to 'die voluntarily and painlessly' when one reaches the point of being a 'burden' is actually a duty that one owes to society.[231]

However, considerations about the burdens faced by both relatives of the patient and the state are again refuted by opponents of euthanasia. Justifying euthanasia for the benefit of others instead of the patient, according to the opponents of the practice, will make the patient feel duty-bound to die if or when he or she becomes seriously ill.[232] In cases of voluntary euthanasia, although the patient may not want to die, he or she may choose death for the sake of others, especially close family members. In cases of non-voluntary euthanasia, the patient's life may even be ended purely in consideration of others' benefit, especially if the patient leaves a substantial estate upon dying. This, however, constitutes abuse of euthanasia.

Lastly, proponents of euthanasia employ arguments about the patient's right to self-determination on the grounds that the patient ultimately has a right to determine his or her own affairs, especially such important issues as the time and manner of one's death.[233] Voluntary euthanasia, in this sense, ought to be allowed because to prohibit the practice violates the patient's right to self-determination, which is one of the most important factor for human life to have worth.[234]

Notwithstanding, this argument is also refuted by opponents of euthanasia, who believe that the right to self-determination can only justify voluntary euthanasia; such a right is not properly applicable to non-voluntary euthanasia. For example, when the patient is in a coma or vegetative state, it is unclear whether he or she has a minimal level of mental function; even if the patient happens to have that, he or she cannot exercise the right to determine his or her own affairs. The question of whether non-voluntary euthanasia should be allowed under such circumstances therefore has no viable answer; as a result, opponents of euthanasia believe it more appropriate to keep the patient alive, even if there are significant financial and emotional costs involved.

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[230] Raz, 'Death in Our Life', above n 38, 21.
[231] Kemp, *Merciful Release*, above n 9, 99. Raz also consider choosing death in consideration of others' interests an heroic behaviour; see Raz, 'Death in Our Life', above n 38, 21.
[232] W G Burnie, 'Euthanasia' (1899) 1 *Lancet* 561.
[233] C K Millard, 'The Legalization of Voluntary Euthanasia' (1931) 45 *Public Health* 39.
[234] Harris, 'The Euthanasia Debate', above n 7, 368–69.

Overall, there is no general agreement about whether euthanasia ought to be allowed. Proponents and opponents of the practice disagree about whether any of the arguments can ultimately justify either admissibility or prohibition. To make matters even more complex, proponents of euthanasia differ on the issue of whether both active and passive euthanasia should be allowed, or only the latter practice because they have divergent beliefs about whether the two practices hold different legal statuses.

2.4.3. Active and Passive Euthanasia

Active euthanasia is defined as the practice of actively ending a patient's life, for example, by injection of a lethal drug to the patient. Conversely, passive euthanasia constitutes withholding or withdrawing life-sustaining treatment from a patient.[235] Importantly, some scholars believe that significant consequences arise from differences between the two practices.[236] Therefore only passive euthanasia can be allowed while active euthanasia cannot.[237]

Such differences, according to these scholars, rest on three main foundations. The first rationale is causation: active euthanasia is fundamentally different from passive euthanasia because of the direct causal link between the doctor's action and the death of the patient. In cases of active euthanasia, the doctor's act of injecting the lethal drug into the patient directly leads to the patient's death.[238] Put simply, if the doctor does not injuct the lethal drug, the patient does not die. On the contrary, in cases of passive euthanasia, the doctor's action of withholding or withdrawing life-sustaining treatment from the patient does not directly lead to the death of the patient; rather, it is nature itself that ends the patient's life. The doctor's withholding or withdrawing of treatment therefore only comprises the removal of human intervention and an understanding that nature will take its course.[239] Those who only support passive euthanasia thus believe that active euthanasia is too similar to murder because of that direct causal link, thereby rendering it inadmissible.[240]

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[235] Rachels, 'Active and Passive Euthanasia', above n 88, 87.
[236] For example, ibid; David P T Price, 'Assisted Suicide and Refusing Medical Treatment: Linguistics, Morals, and Legal Contortions' (1996) 4 *Medical Law Review* 270, 272–73.
[237] For example, voluntary passive euthanasia has been almost unanimously accepted by American states as legal, for instance, *Glossip* (2015) 576 US. See also John M Luce and Ann Alpers, 'Legal Aspects of Withholding and Withdrawing Life Support from Critically Ill Patients in the United States and Providing Palliative Care to Them' (2000) 162(6) *American Journal of Respiratory and Critical Care Medicine*2029. This view was also endorsed in a statement adopted by the House of Delegates of the American Medical Association in 1973.
[238] *Vacco* (1997) 521 US 793, 801.
[239] See Rachels, 'Active and Passive Euthanasia', above n 88, 93.
[240] Ibid.

The second rationale is the double effect principle. Active euthanasia, so the argument goes, is different from passive euthanasia because of the relationship between the intention held by the doctor and the outcome of the patient's death. The double effect principle differentiates two kinds of effects due to the different intentions a person hold when he or she performs an action. One is an intended effect, and the other is a foreseen effect. The intended effect is the effect explicitly sought by a person when he or she carries out a specific action; this effect is thus considered a direct result of his or her actions. The foreseen effect is the result anticipated but not intended by a person when he or she carries out a specific action; therefore, this effect cannot be seen as the result of his or her actions.[241] Regarding euthanasia, if the death of the patient is intended by the doctor, the doctor's action necessarily causes the patient to die; conversely, if the death of the patient is foreseen but not intended by the doctor, the doctor's action is not the fundamental reason that the patient died. In cases of active euthanasia, the doctor is believed to clearly intend the patient to die.[242] Active euthanasia, therefore, is the only cause of the patient's death and thus cannot be allowed. In cases of passive euthanasia, the doctor is believed to only foresee the death of the patient, but does not actively intervene to speed up that outcome.[243] Withholding or withdrawing treatment is only intended to stop the patient from benefiting from the treatment; as a result, some scholars believe passive euthanasia permissible.

The third rationale concerns the 'natural lifespan'.[244] This rationale differentiates active euthanasia from passive euthanasia on account of a different approach to the issue of the natural span of human life. The span of a human life, according to this rationale, ought to be determined by nature; human intervention thus disrespects such a course. Active euthanasia deliberately shortens the lifespan of the patient, while passive euthanasia does not rely on human intervention (for example, lethal injection) and therefore lets nature to take its course.[245] Passive euthanasia is more respectful of the natural lifespan and thus ought to be allowed.

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[241] See Allison MacIntyre, 'Doctrine of Double Effect' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (2015) <http://plato.stanford.edu/entries/double-effect/>.
[242] *Vacco* (1997) 521 US 793, 801–02.
[243] Ibid.
[244] This idea was raised mainly by Dworkin in *Life's Dominion* (Vintage Books, 1993) 13, 88, 89.
[245] Albert R Jonsen, 'Criteria that Make Intentional Killing Unjustified' in Tom L Beauchamp (ed), *Intending Death: The Ethics of Assisted Suicide and Euthanasia* (Prentice Hall, 1995) 42, 50–2.

These three rationales, however, are refuted by scholars who insist there is no real difference between active and passive euthanasia.[246] Regarding causation, these scholars point out that in cases of passive euthanasia, the doctor's action of withholding or withdrawing life-sustaining treatment is actually the direct reason for the patient's death; if the doctor's action of withholding or withdrawing medical assistance did not occur, the patient would not die.[247] Passive euthanasia, therefore, is no different from active euthanasia when one looks at causation between the doctor's action (or inaction) and the patient's death.[248]

Concerning the double effect principle, this principle, on the one hand, is not an established doctrine in the law.[249] On the other hand, even if the principle were to become established, it still would not justify the difference between active and passive euthanasia because both practices actually intend the death of the patient: injecting a lethal drug and withholding life-sustaining treatment are similar in that both end the patient's life. Active euthanasia, therefore, again ought not to be treated differently from passive euthanasia in law.

As to the issue of natural life span, if human intervention is fundamentally disrespectful of nature, medical care for patients might be disallowed more generally.[250] If medical care other than euthanasia prolongs the lives of the patients, that also constitutes human intervention and, according to those who take a hard-line on the issue of disrespecting nature, cannot be allowed. As a result, the lifespan of a human being ought not necessarily to be determined by nature.[251] If the natural span of a human life should not prevent medical care that prolongs the lives of the patients, such as organ transplants, analogously, natural lifespan should not function as a rationale against medical treatment that shortens the lives of patients either.

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[246] For example Judith Jarvis Thomson, 'Killing and Letting Die: Some Comments' in Tom L Beauchamp (ed), *Intending Death: The Ethics of Assisted Suicide and Euthanasia* (Prentice Hall, 1995) 104, 107; Wreen, 'The Definition of Euthanasia', above n 7; Rachels, 'Active and Passive Euthanasia', above n 88, 91, 94; Steven Smith, *The Disenchantment of Secular Discourse*, above n 189, 48–50. Dworkin and Rawls also concurred, see Steven Smith, *The Disenchantment of Secular Discourse*, above n 189, 47.

[247] Steven Smith, *The Disenchantment of Secular Discourse*, above n 189, 49.

[248] Rachels, 'Active and Passive Euthanasia', above n 88, 94; Steven Smith, *The Disenchantment of Secular Discourse*, above n 189, 48–50; Thomson, 'Killing and Letting Die', above n 246, 107.

[249] This principle was considered purely intuitive by some scholars, such as Samuel Williams, *Euthanasia*, above n 221.
Judge Stephen Reinhardt stated that the only thing that matters to the court '[wa]s that the death of the patient [wa]s the intended result'; see *Compassion in Dying* (1996) 79 F 3d 790, 824; Steven Smith, *The Disenchantment of Secular Discourse*, above n 189, 52. Rachels considered that the intention of helping a patient die painlessly was the only relative factor a doctor should be concerned about when practicing euthanasia. Rachels, 'Active and Passive Euthanasia', above n 88, 89. See the definition of this thesis as well, above n 7.

[250] Steven Smith, *The Disenchantment of Secular Discourse*, above n 189, 58.

[251] Ibid, 54, 59–67. The problem of whether human life can be determined by nature alone concerns the issue whether the natural course — the 'is' — can decide the normative rules — the 'ought' — our behaviour should abide by. This issue, however, is not discussed here, since it is widely accepted as a highly controversial problem and is essentially immaterial to the broader concern of this thesis. For more information about this issue see Donald Walhout, 'Is and Ought' (1957) 54(2) *Journal of Philosophy* 42.

Active euthanasia, therefore, is again no different from passive euthanasia in practice: if one is allowed, then the other should be allowed too.

Additionally, scholars even believe active euthanasia is sometimes more allowable than passive euthanasia.[252] For example, when a patient is in great pain and will die in a short time, ending his or her pain quickly via lethal injection is more humane than letting him or her suffer for a longer period by withholding or withdrawing life-sustaining treatment.

In conclusion, the question of whether both active euthanasia and passive euthanasia are allowable, or whether only passive euthanasia should be permitted, has no general answer. Scholars disagree about whether or not causation, the double effect principle and the natural lifespan can justify the difference between active and passive euthanasia. Along with the disagreement between opponents and proponents of euthanasia about whether the slippery slope argument, as well as the interests and rights arguments can demonstrate the admissibility or inadmissibility of the practice, the issue of euthanasia continues to provoke critical debate. Notwithstanding, this thesis finds the standpoint that euthanasia — voluntary, non-voluntary, active and passive — ought to be allowed on the grounds of rights more reasonable, as it employs the Choice Theory; this will be examined in chapter six.

2.5. Conclusion

Existing research has yet to provide a definitive answer to the question of whether capital punishment, abortion, and euthanasia ought to be allowed, leaving no clear instruction for individual action and adjudication. Regarding capital punishment, many believe that retributivism argument justifies the practice. However, this argument is refuted by abolitionists on the grounds that such punishment does not react to crime in a retributivist way, and that the legitimacy of a punishment ought to stem from its deterrent effect. Capital punishment does not produce an overall deterrent effect, and may even produce a counter-deterrent effect; as such, it ought to be abolished. Notwithstanding, retentionists refute the deterrent effect argument due to the existence of conflicting evidence. Retentionists also refute the expenditure argument, the irreversibility argument and the public opinion argument because of lack of evidence and the existence of conflicting evidence. At last, overall, the right to life argument can be harnessed to argue both for and against the practice of capital punishment.

[252] Rachels, ‘Active and Passive Euthanasia’, above n 88, 88.

In order to contend the case that a foetus does not have a right to life, advocates of abortion rely on two main claims: the law does not consider a foetus to have a right to life, and that in order to possess a right one must first possess personhood. Conversely, anti-abortionists argue that the law and the personhood argument do not necessarily exclude the foetus from having a right. Rather, the foetus ought to possess a right to life and hence abortion cannot be allowed. Advocates of abortion then resort to arguments concerning the mother's freedom from discrimination, her right to privacy, her right to plan a family and her right to bodily integrity; the foetus's right to life should therefore be subject to the mother's rights. Again, anti-abortionists refute these rights on the grounds that they either are not established legal rights or do not prevail over the foetus's right to life.

As for euthanasia, opponents use the slippery slope argument to claim that permitting the practice will bring about bad outcomes, specifically that allowing voluntary euthanasia will lead to involuntary euthanasia being practiced, that euthanasia as a whole will become more prevalent, and that legalising the practice will have other negative side effects such as undermining of trust between patient and doctor, refusal of the state to contribute to the medical care of terminally ill patients, as well as abuse and commercialisation of the practice. However, proponents of euthanasia refute such bad outcomes in view of the indemonstrability of any causal link between legalisation of the practice and these outcomes. Proponents of euthanasia also argue that existence of conflicting evidence proves not that euthanasia leads to such outcomes but rather eases them, as well as the possibility that opponents of euthanasia cite unreliable evidence in order to shore up their position. Opponents of euthanasia then resort to arguments about the sanctity of life, the patient's right to life and the state's interest in the patient's life to oppose the practice. Conversely, proponents of the practice believe that such claims ought instead to be subject to the level of pain experienced by the patient, the burden carried by the patient's relatives, and the patient's right to self-determination.

Moreover, proponents of euthanasia disagree amongst themselves about whether both active and passive euthanasia should be allowed or passive euthanasia alone. Scholars who believe only passive euthanasia is allowable argue that this practice is different from active euthanasia as regards legal causation, the double effect principle and arguments about natural lifespan. Notwithstanding, these three foundations are refuted by scholars of the alternative persuation, who insist there is no such difference: active euthanasia does not differ from passive euthanasia in legal causation, intention for the patient's death, or respect for the course of nature.

As a result, none of the existing arguments outlined above can provide any global solution to these fundamental questions about the right to life. To reach such an answer, this thesis analyses all these arguments in terms of their implied accounts of the right to life. The thesis finds arguments relying on the Choice Theory — namely arguments concerning rights that imply a waivable right to life as regards capital punishment, that suggest a foetus does not have a right to life while a mother has rights as for abortion, and that a patient's right to life and his or her right to self-determination ought to given priority in cases of euthanasia — are more reliable in providing us with this solution. The thesis will now proceed to explore such arguments by examining the two leading approaches that define a right — will theories and interest theories.

Chapter Three

The Two Main Theories of Rights

3.1. Introduction

Since the 16th century, efforts to define the concept of a right have been endless. Representative examples include the following: the Entitlement Theory of Hugo Grotius, H J McCloskey and Alan Milne; the Will Theory of Kant and Windscheid; the Choice Theory of Hart; the Benefit Theory of Bentham and Mill; the Interest Theory of Raz, MacCormick and Lyons; the Claim Theory of Feinberg; the Power Theory of Adolf Merkel, Konrad Cosack and Thomas Green; and finally, the Relation Theory of Paul Puntschart and John Wigmore.[253] These theories define a right as an entitlement, a will, a choice, a benefit, an interest, a claim, a power or capacity, or, lastly, a relation. However, no matter which particular definition a theorist may propose, that definition can fundamentally be explained either as a will or an interest (or a combination of these two ideas). The whole landscape of theories of rights has never deviated from the fundamental intellectual line drawn by will theories and interest theories.[254]

Will theories originated in Kant's rationalist and natural law effort to uphold the value of rationality under determinism during the Age of Enlightenment.[255] According to the idea of determinism, both the scientific world and the moral world were pre-determined.[256] However, this pre-determination did not mean human rationality was valueless; rather, as Kant believed, human rationality played a significant role in human perception of these two worlds. Especially in the moral world, rationality rendered human beings able to conceive of the content of the categorical imperative.[257] This imperative required that a human choice or decision regarding any particular action be made according to such an imperative. The human

[253] H J McCloskey (1925-) is an emeritus professor of LaTrobe University.
Alan John Mitchell Milne (1922-1998) was an English political and legal philosopher. He held the Chair of Political Theory and Institutions at Durham University from 1975 to 1987.
Adolf Merkel (1934-2009) was a German businessman, a millionaire as well as a jurist.
Konrad Cosack (1855-1933) was a German jurist and professor of law.
Thomas Hill Green (1836-1882) was an English philosopher, political reformer and a member of the British idealism movement. He was greatly influenced by Hegel and supported social liberalism.
Paul Puntschart (1867-1945) was a German legal historian.
John Henry Wigmore (1863-1943) was an American jurist, specialising in the law of evidence.
[254] Hart, 'Bentham on Legal Rights', above n 23, 1; Raz, 'Rights Theories and Public Trial', above n 44; Jones, *Rights*, above n 44; MacCormick, 'Rights in Legislation', above n 44.
[255] Steiner, 'Working Rights', above n 45, 239, 262.
[256] Ibid; N E Simmonds, 'Rights at the Cutting Edge', above n 45.
[257] Kant, *Critique of Practical Reason*, above n 45,17.

action chosen according to the imperative, therefore, was righteous.[258] Human ability to choose actions was called as *Willkür*, and human ability to carry out actions according to the categorical imperative was referred to as *Wille*; both *Willkür* and *Wille* are always translated into English as 'Will'.[259] Kant's theory of rights thus is referred to as the Will Theory. Windscheid, following Kant's philosophy and definition of rights, is generally regarded as another significant exponent of the Will Theory. Windscheid was also the first scholar who theorised the Will Theory in a legal context.[260]

Interest theories arose with the empirical and utilitarian tradition of Bentham and Mill: both criticised the transcendental imperative while preferring an empirical and perceivable rationale to describe actions. The empirical and perceivable reason for an action, according to Bentham and Mill, was a utility. They both insisted that utility function as the core of regulative guidelines; the aim of the law was to maximise utility and prevent loss.[261] A right confirmed or conferred by the law, therefore, took utility as a guiding principle, which Bentham and Mill referred to as 'benefit'. Their theory of rights is thus called as the Benefit Theory.

The Will Theory and the Benefit Theory are the classical versions of will theories and interest theories respectively. Will theories and interest theories also have their respective modern versions, namely the Choice Theory and the Interest Theory.

The Choice Theory was developed with Hart's inclusive legal positivism. Hart defined the law as a system of primary rules, the content of which depended on the acknowledgement of secondary rules.[262] These secondary rules may acknowledge moral rules, although not necessarily.[263] The law, in this sense, may include moral requirements; thus the idea of a right as a part of the law may also concern itself with moral values. To be specific, a right, in Hart's view, was a free choice, which conferred the holder with the capacity to choose between different ways of fulfilling his or her right.[264] His theory of rights is thus referred to as the Choice Theory. The thesis finds this theory constitutes the most reliable interpretation of the

[258] Kant, *The Metaphysics of Morals*, above n 45, 20–2, 23–4.
[259] 'WILLKÜR, Rreie Willkür (German)' in *Dictionary of Untranslatables: A Philosophical Lexicon* (Princeton University Press, 2013), retrieved from <http://search.credoreference.com/content/entry/prunt/willkur_freie_willkur_german/0>.
[260] See Pound, 'Legal Rights', above n 49, 107; See also 狄骥 [Duguit], 《宪法论》 [Constitution] above n 48, 200.
[261] Bentham, *Theory of Legislation*, above n 54, vol 1, 144; Bentham, *The Works of Jeremy Bentham*, above n 54, vol 3, 452; Mill, *Utilitarianism*, above n 54, ch 4.
[262] Hart, *The Concept of Law*, above n 51, 81, 95–100.
[263] Danny Priel, 'Farewell to the Exclusive-Inclusive Debate' (2005) 25(4) *Oxford Journal of Legal Studies* 675.
[264] Hart, 'Bentham on Legal Rights', above n 23, 27; Hart, 'Between Utility and Rights', above n 51.

right to life regarding the legitimacy of capital punishment, abortion and euthanasia.

The Interest Theory was established with Raz's exclusive legal positivism, MacCormick's institutional legal positivism, and Lyons's extended legal positivism. Raz viewed legal rules as unique second-order reasons for actions that were different from moral rules.[265] However, morality was still important in ensuring the authority of the law: regarding any specific right, this importance presented as an interest that was a sufficient reason to ground the duty of another person.[266] MacCormick defined the law as a matter of institutional facts.[267] These institutional facts were necessarily connected with moral beliefs, which constituted a right as an interest that could benefit a particular person under normal circumstances.[268] Finally, Lyons expanded Raz's moral concern about the authority of the law, believing that citizens even did not have a duty to obey immoral laws.[269] A right thus ought to be directly intended by the law to benefit the holder of that right.[270] In any of the theories outlined by Raz, MacCormick and Lyons, the nature of a right fundamentally was an interest. Their theories of rights are referred to as the Interest Theory.

This chapter presents some background and arguments of the Will Theory, the Benefit Theory, the Choice Theory and the Interest Theory. Before moving onto discuss the specific philosophical and jurisprudential contexts, the chapter starts by building an understanding of these four theories in the whole landscape of theories of rights.

3.2. A General View of Theories of Rights

Different attempts to define or explain the concept of a right have been classified by Xia Yong according to the following four categories: the Entitlement Theory, the Interest Theory, the Will Theory and the Claim Theory.[271] Somewhat differently, Tom Beauchamp has categorised such work as one of the following: the Entitlement Theory, the Power Theory, the Interest Theory and the Claim Theory.[272] Lastly, Michael Freeden described such efforts as the normative attributes approach, the entitlement approach, the choice approach, and the human

[265] Raz, 'Authority, Law and Morality', above n 57, 299.
[266] Raz, 'On the Nature of Rights', above n 57.
[267] MacCormick, *Practical Reason in Law and Morality*, above n 57, 50–6.
[268] MacCormick, 'Rights in Legislation', above n 44, 152.
[269] Lyons, 'Moral Aspects of Legal Theory', above n 57, 249.
[270] Lyons, 'Rights, Claimants, and Beneficiaries', above n 57, 176.
[271] 夏勇 [Xia Yong], 《人权概念起源》 [The Origins and Foundations of Human Rights — A Chinese Interpretations [sic]] (中国政法大学出版社 [China University of Political Science and Law Press], 1992) 41–8.
[272] Tom L Beauchamp, *Philosophical Ethics: An Introduction to Moral Philosophy* (McGraw Hill, 1982) 195–96. Beauchamp did not use the exact terms this thesis employs, which are conceptualisations of his loose ideas.

good approach.[273] Taking the above as a whole, the Entitlement Theory, the Will Theory, the Choice Theory, the Benefit Theory, the Interest Theory, the Claim Theory and the Power Theory are the most thoroughly systematised, and hence best understood, theories of rights.

3.2.1. Diversity of Theories of Rights

The Entitlement Theory originated in the work of Grotius. He took a right to be a moral quality born within a rational human being.[274] Only with this quality, could a human being possess an object or carry out an activity legitimately.[275] Most recently, Grotiusian quality has been approved of and developed by McCloskey and Milne into an understanding of entitlement.[276] For McCloskey and Milne, the key point in understanding the concept of a right, and thus the most important thing related to a right, was entitlement.[277] A right constituted quality or entitlement to behave, ask, possess, own and achieve. Therefore, possessing a right was equivalent with being entitled to behave, being entitled to ask, being entitled to own and being entitled to achieve.[278]

The Will Theory and the Choice Theory, on the contrary, emphasise the function of a free will or a free choice in the process of possessing and exercising a right. According to the Will Theory, the nature of a right or the foundation of a right is a will, or the capacity to exercise a will. This will presents the right holder's wish for owning an object, carrying an action or having another acting on his or her behalf. Such a theory was initiated by Kant, systematised by Windscheid, and accepted by Friedrich Carl von Savigny.[279] Hart's Choice Theory defines a right as a choice that confers the right holder with an ability to choose and control the performance of the duty bearer.[280] Once a person possesses a right, he or she can ask the bearer to perform or not to perform the relevant duty.

The Benefit Theory and the Interest Theory, however, claim that a right does not rest on a notion of free will or free choice; rather, a right ought to be a benefit or an interest.[281] The

[273] Michael Freeden, *Rights* (Open University Press, 1991) 6.
[274] Hugo Grotius, *The Rights of War and Peace* (Several Hands trans, London, 1715) vol 1, 40.
[275] Ibid.
[276] Jones referred to 'the entitlement' as 'the title'. Jones, *Rights*, above n 44, 36.
[277] Alan J M Milne, *Human Rights and Human Diversity: An Essay in the Philosophy of Human Rights* (State University of New York Press, 1986) 89.
[278] Henry J McCloskey, 'Rights — Some Conceptual Issues' (1976) 54(2) *Australasian Journal of Philosophy* 99.
[279] See Steiner, 'Working Rights', above n 45; Pound, 'Legal Rights', above n 49, 107; 狄骥 [Duguit], 《宪法论》 [Constitution], above n 48, 200. Savigny's theory of rights can largely be explained via Windscheid's work; as a result, Savigny's conception of rights is not presented in detail in this thesis.
[280] Hart, 'Bentham on Legal Rights', above n 23, 27; Hart, 'Between Utility and Rights', above n 51.
[281] Hart, 'Bentham on Legal Rights', above n 23, 26–9. See also Raz, 'Human Rightsin the Emerging World Order', above n 57, 55; S J Stoljar, *An Analysis of Rights* (Macmillan, 1984) 25–7.

purpose of having a right is to enjoy the benefit or interest that the right brings. The reason for claiming a right is to obtain benefit or interest. Lastly, the aim of holding to account the violation of a right is to reinstitute the benefit or interest damaged by such a violation.[282] Specifically, the Benefit Theory views a right as a benefit acknowledged by the law, as Bentham and Mill insisted. Alternatively, as proposed by Raz, MacCormick and Lyons, the Interest Theory conceives of a right as an interest that provides sufficient reason for a duty, generally benefits the right holder, and is directly intended by the law to benefit the right holder. Bierling also agreed with the fundamental claims of these two theories in treating rights as 'recognised and delimited interests'.[283]

The Claim Theory argues that a right was not entitlement, will, choice, benefit or interest but instead a claim. This theory was originally inspired by the practice in Ancient Rome that a claim for remedy could be raised according to the law.[284] This notion then developed into the European idea of taking rights as claims justified by the law, and became the prevalent theory of rights in the English-speaking world in the late 19th century.[285] The current insistence on the Claim Theory has been most notably championed by Feinberg, who contended that a claim was the key to defining the concept of a right.[286] According to him, in a society where there was neither morality nor duty, it was the claim one person made against another that constituted the idea and institution of rights.[287] This claim even functioned as a rationale for the fundamental dignity of humanity and was thus the reason why a human being ought to be respected.[288] Among his four incidents of a 'right', Wesley Hohfeld believed that the claim-right was the one with the truest meaning.[289] Richard Wasserstrom and James Fawcett again agreed with the Claim Theory by asserting that narratives about rights had all been nothing but 'claim', and the modern progress of the law, to a large extent, had been the process of transforming claims into rights.[290]

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[282] Herbert Laube, 'The Jurisprudence of Interests' (1949) 34 *Cornell Law Quarterly* 291, 291.
[283] See Pound, 'Legal Rights', above n 49, 110.
[284] Roscoe Pound, *Social Control through Law* (Yale University Press, 1942) 86.
[285] Ibid.
[286] Joel Feinberg, 'The Nature and Value of Rights' (1970) 4 *Journal of Value Enquiry* 243, 250. It should be noted that Feinberg refused to consider his Claim Theory as an effort to define the concept of a right, insisting that we could never find a perfect 'formal definition of a right'. His theory, therefore, served as a relatively comprehensive description or interpretation of the external appearances and operating modes of rights. See Feinberg, 'The Nature and Value of Rights', 250.
[287] Feinberg called this society Nowheresville; it was an experiment to reveal the importance of the claim in the concept of a right. Ibid, 243–49.
[288] Ibid.
[289] Hohfeld, 'Fundamental Legal Concepts as Applied in Judicial Reasoning', above n 64.
[290] Richard Wasserstrom, 'Rights, Human Rights and Racial Discrimination' (1964) 61 *Journal of Philosophy* 628; James Fawcett, 'The International Protection of Human Rights' in D D Raphael (ed), *Political Theory and the Rights of Man* (Indiana University Press, 1967) 125, 128.

The Power Theory considers the nature of a right as a power conferred by the law for the right holder to enjoy an interest; this idea was primarily raised by Merkel.[291] Cosack and Green also agreed with this view: Cosack defined a right as a legally protected power held by its owner;[292] Green conceived of a right as an ability which promoted the common good.[293] A right in the Power Theory is therefore a legal capacity to achieve interest.

The Relation Theory contends that the nature of a right should be relational.This theory was created by Puntschart, and then systematised by Wigmore.[294] According to Wigmore, the definition of a right contained two major factors: one was subjects, the other was interests.[295] A right, therefore, presented two kinds of relations: a relationship between different subjects, and a relationship between those subjects and the interests the law promoted.[296] A right in this view was thus a connection between a right holder and a duty bearer about the interest the duty performance could bring to the right holder.

3.2.2. The Unchanging Core of Theories of Rights

Earlier versions of the Entitlement Theory and the Claim Theory share a similar world view with will theories. The current version of the Entitlement Theory, as outlined by McCloskey and Milne, can be seen as either a will theory or an interest theory. Lastly, the Power Theory and the Relation Theory are closely connected with interest theories alone.

The early version of the Entitlement Theory views a right as a Grotiusian quality, namely an inherent ability for a human being to possess something or carry out some activity.[297] To a large extent, this ability pointed to the possession of a free will.[298] It was free will that enabled human being to exercise rights; this will was thus the inherent ability rather than entitlement.

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[291] See 佟柔 [Tong Rou] (ed), 《中国民法学・民法总则》 [Chinese Civil Law: General Rules] (中国人民公安大学出版社 [Chinese People's Public Security University Press], 1990) 68.
[292] See Pound, 'Legal Rights', above n 49.
[293] T H Green, 'Lectures on the Principles of Political Obligation' in Paul Harris and John Morrow (eds), *Lectures on the Principles of Political Obligation and other Writings* (Cambridge University Press, 1986) 17, 23, 29.
[294] For such a view, see Pound, 'Legal Rights', above n 49.
Michel Foucault's concept of a right may be taken as another version of the Power Theory or the Relation Theory, since Foucault defined a right (actually every kind of social relationship, including collective human knowledge) as relations of power. He even believed, later in his working life, that a right could possibly function as a strategic tool to destabilise established relations of power within a regime, or what Ben Golder called 'a critical counter-conduct' (see *Foucault and the Politics of Rights* (Stanford University Press, 2015) 'Introduction'). However, this thesis prefers not to consider Foucault's idea as a theory of rights because Foucault did not differentiate the concept of a right from other human institutions, for example, law. This idea, therefore, could not qualify properly as a theory of rights because it is too general in nature.
[295] Pound, 'Legal Rights', above n 49.
[296] Ibid.
[297] Grotius, *The Rights of War and Peace*, above n 274, vol 1, 40.
[298] Ibid.

Grotius's Entitlement Theory, therefore, can be explained as a subset of will theories.

The current version of the Entitlement Theory, namely the version developed by McClosky and Milne, stresses a direct connection between the idea of a right and the concept of entitlement.[299] A right is an entitlement to possess and behave,[300] which is closely related to will and interest: will produces entitlement and renders the latter possible; being entitled to possess and behave is the right holder's will to possess and behave. Interest is the purpose of entitlement; being entitled to possess and behave is in the interests of the right holder. In this sense, the Entitlement Theory has no substantial difference from will theories or interest theories, instead emphasising the bridging function between will and interest in defining the concept of a right.

The Claim Theory is more akin to the Will Theory and the Choice Theory. A claim or demand, on the one hand, requires a will or a capacity to choose as a prerequisite. Only if a person generates a will or a choice can a claim then take form and come into effect. As a result, the nature of a claim is the exercise of a will or a choice. On the other hand, the idea of a claim shares similar content with a choice. For example, such an idea includes the claim for fulfilment of duty. Feinberg also encouraged the right holder to waive his or her right and exempt the bearer from the duty to show the respectful aspect of a right and thus the virtue of the society.[301] Asking for the fulfilment of the duty and the waiver of the duty are two important aspects of the Choice Theory.[302] On these grounds, despite differences in understanding the notion of a right, the Claim Theory views a right in the same way as will theories do.

The basic idea of the Power Theory is a combination of interest and power. This theory interprets a right as a power conferred by the law that allows the holder to enjoy or maintain an interest.[303] The theory thus has no substantial differences from interest theories in general: both the Power Theory and interest theories emphasise the significant function of the interest and the law in protecting a right.[304] The only difference concerns what should be the nature or core of a right. The Power Theory refers to the protection of the law, while interest theories

[299] Milne, *Human Rights and Human Diversity*, above n 277, 89; McCloskey, 'Rights', above n 278.
[300] Milne, *Human Rights and Human Diversity*, above n 277, 89; McCloskey, 'Rights', above n 278.
[301] Feinberg, 'The Nature and Value of Rights', above n 286.
[302] Steiner, 'Working Rights', above n 45, 238.
[303] See 佟柔 [Tong Rou],《中国民法学》 [Chinese Civil Law], above n 291, 68; Green, 'Lectures on the Principles of Political Obligation', above n 293, 23, 29.
[304] See Theodore M Benditt, *Rights* (Rowman and Littlefield, 1982) 18; Hart, 'Bentham on Legal Rights', above n 23, 18.

lay stress on the interest of individual subjects.

Moreover, the Power Theory always transforms itself into taking an interest approach when it faces explanatory difficulties.[305] Primarily, the Power Theory has mostly been applied to explain civil rights.[306] The theory aimed at revealing the right holder's capacity to create or change a legal relationship and therefore could not properly account for other notions of rights. For example, the Power Theory could not explain why a person still had contractual rights when his or her capacity to fulfil a contract had been regulated by the state.[307] The Power Theory again could not differentiate the power of the state from the mob violence.[308] When such situations arose, the Power Theory stressed interest instead of power. The interests the right holder was granted maintained his or her right to exercise a contract, and differentiated the power of the state from the mob violence. On these grounds, the Power Theory is explainable in terms of interest theories.

The Relation Theory again shares more similarity with interest theories. The Relation Theory views a right as both a relationship between subjects, and a relationship between subjects and interests.[309] This theory, therefore, also resorts to interest to define the concept of a right. The only difference this theory has from interest theories is that it does not consider the interest as the only defining point. The links are again relational, with the result that they benefit the subjects.

In conclusion, theories that view a right as an entitlement, a claim, a power or a relation can all be interpreted in terms of will theories or interest theories, or perhaps a mixture of both. These two main theories of rights are thus dominant amongst efforts to define the concept of a right. Their dominant status is particularly demonstrated in the philosophical and jurisprudential contexts in which the two general approaches and the four more specific theories have been established.

3.3. Will and Interest Theories of Rights

The classical version of will theories and interest theories is implicit in the philosophical work

[305] 卡尔・拉伦茨 [Karl Larenz], 《德国民法通论（上册）》 [The General Parts of German Civil Law I] (王晓晔 [Wang Xiaoye] et al trans, 法律出版社 [Law Press China], 2003) 280–81.
[306] 卡尔・拉伦茨 [Karl Larenz], 《法学方法论》 [Legal Methodology] (陈爱娥 [Chen Ai'e] trans, 商务印书馆 [Commercial Press], 2003) 1.
[307] 拉伦茨 [Larenz], 《德国民法通论（上册）》 [The General Parts of German Civil Law I], above n 205, 278–79.
[308] Ibid.
[309] Pound, 'Legal Rights', above n 49.

of Kant, Windscheid, Bentham and Mill during the Age of Enlightenment. Alternatively, modern versions are expressed more explicitly in the legal theories of Hart, Raz, MacCormick and Lyons in recent decades.

3.3.1. Classical Versions of Will theories and Interest Theories

The Will Theory traced its origins back to Kantian rationalism and natural law theory, since Kant was its representative advocate.[310] Kant's rationalism and belief in the natural law tradition were formed in his upholding of human dignity in the face of determinism during the Age of Enlightenment.[311] Specifically, rationalism was developed as his defence of human dignity, while natural law tradition was established in his inescapability of determinism.

Regarding the relationship between rationalism and human dignity, Kant was one among many during the Age of Enlightenment who believed that the core of human dignity lay in human freedom that presented itself as the ability to reason and act freely without directions or interventions from others.[312] The term 'rationality' was key for such thinkers. To uphold human dignity, human rationality had to be upheld first.[313]

However, rationality faced a great crisis due to its collision with determinism. According to determinism, the natural world was not something over which humans had God-like power; the rules of nature were sensible and achievable but only discoverable, not creatable, by human beings. This posed great problems to the fundamental tenets of rationality. Firstly, human rationality seemed to play no role in the natural world and therefore human dignity in the face of the natural world was undermined. Secondly, it was impossible for one to achieve

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[310] Traditionally understood, rationalism signifies the belief that knowledge derives not from sensory experience, but instead from human rationality; see Peter Markie, 'Rationalism vs. Empiricism' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (2015) <http://plato.stanford.edu/entries/rationalism-empiricism/> [1].
The natural law tradition always refers to two types of theories. One is the moral theory that believes moral rules governing human behaviour objectively derive from either human nature or the broader nature of the universe. The other is the legal theory that insists the existence and authority of positive legal rules depends, at least in part, on considerations of the moral merit of those rules. See Kenneth Einar Himma, 'Natural Law' in James Fieser and Bradley Dowden (eds), *Internet Encyclopedia of Philosophy* (8 June 2015) <http://www.iep.utm.edu/natlaw/>; Kant's theory endorses both of the two meanings.

[311] Michael Rohlf, 'Immanuel Kant' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (2015) <http://plato.stanford.edu/entries/kant/> '2.1 The Crisis of the Enlightenment'. Determinism usually denotes the belief that the world is governed in a specific way by the law of nature. See generally John Norton, 'Casual Determinism' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (2015) <http://plato.stanford.edu/entries/determinism-causal/>.

[312] William Bristow, 'Enlightenment' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (2015) <http://plato.stanford.edu/entries/enlightenment/> '1.4 Science of Man and Subjectivism in the Enlightenment' [7]; Roholf, 'Immanuel Kant', above n 311, '2.1 The Crisis of the Enlightenment' [2].
The Age of Enlightenment is generally taken to run from the mid-17th century to the end of the late 17th century or the early 18th century. For example, see J B Shank, *The Newton Wars and the Beginning of the French Enlightenment* (University of Chicago Press, 2008) 'Introduction'.

[313] Bristow, 'Enlightenment', above n 312, [3].

systematic knowledge about nature.[314] If sensibility were the only source of knowledge about nature, the knowledge we achieved would be isolated notions of several factors in nature; consistent and systematic knowledge would thus be unachievable. Thirdly, regarding the moral world, assuming it were similar to the natural world, only sensibility was helpful in achieving knowledge; human rationality again played no role and as a result might even be degraded.[315] Alternatively, if the moral world was different from the natural world in the sense that moral knowledge could not be achieved via sensibility, then moral knowledge seemed impossible. Due to these problems, human rationality and dignity could not be established, which comprised a serious crisis during the Age of Enlightenment.

Kant's theory was devoted to solving this crisis. In his view, our knowledge about nature came from senses, but not from the object itself; rather, our knowledge about nature derived from the manner in which the object appeared to us.[316] The appearance of the object, however, was not achieved directly from nature. Alternatively, the appearance depended significantly on cognitive form. This cognitive form existed prior to our senses and functioned intuitively as a framework in our senses.[317] It was this form that made our knowledge about sensible objects possible.[318]

Cognitive form was a product of human cognitive faculties, an essential one being human rationality.[319] The ability to reason, therefore, was key to enabling knowledge about empirical experiences. In this sense, nature might be mechanical and determinative, but it did not determine human understanding. Nor was human knowledge about the nature derivative. On the contrary, human knowledge was constructed primarily through human rationality: it was the ability to reason that made human understanding of nature possible.

Moreover, cognitive form also made systematic knowledge achievable: the system and order of nature were not a feature of nature itself, but an appearance given by cognitive form.[320] Understanding nature was the process of giving laws to nature through the activity of

[314] David Hume, *A Treatise of Human Nature* (Oxford University Press, first published 1739, 2000 ed) 50; David Hume, 'Enquiries Concerning Human Understanding' in *Enquiries Concerning Human Understanding and Concerning the Principles of Morals* (Clarendon Press, first published 1748, 1975 ed) Sec IV.
[315] Bristow, 'Enlightenment', above n 312, '1.3 Skepticism in the Enlightenment'.
[316] Kant, *Critique of Pure Reason*, above n 45, 22; ibid, '1.4 Science of Man and Subjectivism in the Enlightenment' [4].
[317] Kant, *Critique of Pure Reason*, above n 45, 22; Kant, *Theoretical Philosophy*, above n 45, 389.
[318] Kant, *Critique of Pure Reason*, above n 45, 172–73.
[319] Ibid, 22.
[320] Ibid, 172–73.

reasoning.[321] The cognitive form, as a result, preserved the supremacy of rationality in the face of nature.

The supremacy of rationality in the moral world was again preserved, but not by cognitive form. In nature, knowledge was obtained from appearances of real objects through understanding, while in Kant's theory, the moral world was believed to be different. The moral world was a transcendental world in which moral laws were things in themselves.[322] Unlike natural objects, moral laws existed in a way that was totally independent of the human world.[323] Any objectivity that might be inherent to nature was beyond the reach of the moral world; deriving knowledge of the moral world through senses, therefore, was unfeasible. Worse than that, human beings had no control over the moral world. Giving laws to the moral world, as we did to the natural world, was again impossible. Unlike human understanding of nature, both the intangibility of moral rules and their lack of a prior cognitive form rendered knowledge about them unachievable.[324]

However, that did not mean we never developed comprehension of moral rules or that our moral knowledge was totally determined within the moral world. As Kant believed, even though we had no access to the transcendental world, we could 'guess' what moral laws required.[325] This guess was the whole source of human moral knowledge. Such a guess, nevertheless, was not simply about imagination. Rather, it relied on human rationality, or, as Kant called it, 'practical reason'.[326] Human rationality, therefore, also proved essential in achieving knowledge about the moral world. Moreover, rationality played a more central role in achieving moral knowledge than in understanding nature. Sensibility still constituted a small part in the understanding of nature, but was irrelevant when it came to comprehending the moral world. Morality was purely the outcome of human rationality. Kant's notion of practical reason, in this sense, justified the supremacy of rationality when trying to determine the nature of the moral world.

Notwithstanding, even via practical reason, according to Kant, human beings still could not

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[321] Ibid, 146–47.
[322] Ibid, 23–4.
[323] Ibid, 23. This thesis accepts the explanation of appearances and things in themselves as presenting two different worlds. See also Peter Strawson, *The Bounds of Sense: An Essay on Kant's Critique of Pure Reason* (Routledge, 1966) 21–2. However, some scholars define them as two aspects of a certain object, for example, Henry E Allison, *Kant's Transcendental Idealism: An Interpretation and Defense* (Yale University Press, 2004) 16, 239.
[324] Kant, *Critique of Pure Reason*, above n 45, 23.
[325] Kant, *Critique of Practical Reason*, above n 45, 42–3, 110–11.
[326] Ibid.

achieve complete moral freedom. Human dignity, therefore, could not be established. Practical reason rendered human beings able to choose actions or decide goals of those actions which derived from desires according to their rationality.[327] This ability differentiated human choices from animal choices because an action or goal determined by pure desires was an animal choice, whereas human choice was ultimately decided by the practical reason. Human choice, therefore, was 'free choice'.[328] The operation of the practical reason ensured that choice was freely made and not simply determined by desire.

Freedom of choice, however, was still not complete according to this model. Even though we were free in the sense that we could choose according to our rationality, we were not totally free since we were still partly driven by our desires in the material world.[329] According to Kant, the rules we applied when we carried our actions or established goals were still subjective, 'material and formal principles', 'hypothetical imperatives' or '*Maxime*'.[330] Only 'pure practical reason' could prevent human choices from being influenced by desires, endow those choices with complete freedom and ensure the objectivity of those rules.[331]

Kant believed that pure practical reason was human capacity to acquire knowledge about knowledge in the moral world.[332] The latter knowledge constituted moral rules a person could achieve through his or her practical reason, which directly motivated his or her actions and goals in the real world. The outcome of pure practical reason, therefore, must be in a law-giving form — 'a categorical imperative' or '*Gesetze*' — which informed that person how to use the practical reason and how best to conceive of those moral rules.[333] The outcome, according to Kant, was the demand of universality. This demand required that the act or goal one wanted to take should be an act or goal that could be taken simultaneously by everyone.[334] If a hypothetical imperative chosen via practical reason could meet such a demand, the imperative would negate its subjectivity, and thus become a universal rule that could be applied objectively by everyone.[335]

Knowledge about this categorical imperative was achieved in a manner similar to hypothetical imperatives. Regarding hypothetical imperatives, we used practical reason, while for

[327] Kant, *The Metaphysics of Morals*, above n 45, 13, 146.
[328] Ibid.
[329] Ibid. Kant, *Critique of Practical Reason*, above n 45, 98–9.
[330] Kant, *The Metaphysics of Morals*, above n 45, 18–9, 146.
[331] Ibid.
[332] Kant, *Critique of Practical Reason*, above n 45, 17.
[333] Kant, *The Metaphysics of Morals*, above n 45, 18.
[334] Ibid.
[335] Ibid, 13.

categorical imperatives, we resorted to pure practical reason. We 'guessed' the content of the moral rules through practical reason, and we 'guessed' the content of the universal law through our pure practical reason. Human rationality, as a result, again proved central to achieving the knowledge about the categorical imperative.

If both the categorical imperative and hypothetical imperatives were achieved through human rationality, human beings were thus free in the moral world. We not only gave laws to actions through practical reason but also determined how to generate those laws in the first place through pure practical reason.[336] The categorical imperative was thus the rule of complete freedom. To act according to its demand was to exercise freedom, and the only way to act freely was to act according to its demand.[337] Through both practical reason and pure practical reason, Kant upheld human rationality, freedom and therefore dignity in the face of a determined moral world. Together with the cognitive form required for understanding nature, Kant believed he had proposed a promising solution to the crisis between rationality and determinism.[338]

Notwithstanding, Kant still could not — or did not want to — escape determinism, especially in the moral arena, which made him inclined to follow the natural law tradition.[339] Firstly, Kant did not differentiate positive law from morality or natural law: he discussed both positive law and morality in his concepts of hypothetical imperatives and the categorical imperative.[340]

Secondly, the sources of both positive law and morality were natural law because hypothetical imperatives and the categorical imperative were rules belonging to the transcendental world.[341] Although human beings' free will and free choice were essential for conceiving of and executing imperatives, human will and choice did not create those imperatives in the first place. Rather, the imperatives were per-determined and could only be achieved by human reasoning. Ultimately, it was the determinative nature of the world that determined human actions and goals.

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[336] Ibid, 24.
[337] Roholf, 'Immanuel Kant', above n 311, '5.4 The Categorical Imperative' [2].
[338] Ibid; 'will (Kant)' in Bunnin Nicholas and Yu Jinyuan (eds), *Blackwell Dictionary of Western Philosophy* (Blackwell Publishing 2004) 736.
[339] Kant's endorsement of the natural law tradition is largely accepted by more recent scholars. See for example, B Sharon Byrd and Joachim Hruschka, 'The Natural Law Duty to Recognize Private Property Ownership: Kant's Theory of Property in His Doctrine of Right' (2006) 56(2) *University of Toronto Law Journal* 217.
[340] Steiner, 'Working Rights', above n 45, 233.
[341] Kant discussed both hypothetical imperatives and the categorical imperative in *The Metaphysics of Morals*. See also ibid.

Thirdly, the existence and content of positive law was believed ought to be determined by natural law. If positive law was to confirm, confer or protect freedoms, it had to be constructed according to both hypothetical imperatives and the categorical imperative.[342] If positive law could not be justified according to those imperatives, it would no longer qualify as a law. This belief in a pre-existing world of moral rules which governed human behaviour and therefore qualified positive law placed Kant's theory firmly in the natural law tradition.[343]

Kant's discussion of rights lay in his commitment to rationalism and the natural law tradition. Rights, according to Kant, were key to human freedom, which had two parts: outer freedom and inner freedom.[344] Inner freedom concerned virtue that provided a person with a proper motive to act dutifully, despite his or her passions or desires; outer freedom was a right related to an act, independent of its motive.[345] A right constituted the correct thing to do since it complied with the categorical imperative, while a virtue was a noble motive that stemmed from humans' pure practical reason about the ultimate goal of the world in exercising that right.[346] Both a specific right and a specific virtue, therefore, grounded their righteousness in the transcendental categorical imperative and thus were pre-determined.

Specifically speaking of a right, it firstly concerned action that had direct or indirect influences on others. Duties to oneself arising from virtue were excluded.[347] Secondly, a right pertained to the relationship between one's free choice with that of another. The relationship between one's free choice with another's wishes was not relevant.[348] Kant used the phrase 'external use of *Willkür*' to denote his idea of a right.[349] *Willkür* meant a human free choice in terms of actions and goals.[350] A right, therefore, although determined, was related to a person's exercise of his or her practical reason. Thirdly, a right regarded the formal condition of freedom as important. This formal condition meant that a right required the action it allowed to meet the demands of the categorical imperative.[351] Pure practical reason, therefore, was also required in the concept of a right because it was key to achieving the demands of the

[342] See Byrd and Hruschka, 'The Natural Law Duty to Recognize Private Property Ownership', above n 339, 222.
[343] Himma, 'Natural Law', above n 310.
[344] Kant, *The Metaphysics of Morals*, above n 45, 164–65.
[345] Ibid, 20–2, 164–65.
[346] Kant believed that the ultimate goal of the world was human autonomy; see *Critique of Judgment*, above n 45, 254–74.
[347] Ibid, 20–2, 23–4.
[348] Ibid, 23–4. Wish was the motive that did not result in an action. Ibid, 13.
[349] Ibid, 14.
[350] Kant always referred to *Willkür* as free choice, although the word generally means arbitrariness or caprice. For alternative meanings, see Kant, *The Metaphysics of Morals*, above n 45, 13; 'WILLKÜR, Rreie Willkür (German)', above n 259.
[351] Kant, *The Metaphysics of Morals*, above n 45, 20–2.

imperative.

On these grounds, a right, in Kant's view, was, on the one hand, a choice made by a human being according to a mixture of practical reason and pure practical reason. On the other hand, a right was also a choice that was universalisable and hence determined by the transcendental world. In simple terms, a right was a universalisable choice. Kant labeled the pure practical reason that enabled a person to achieve knowledge about the demands of universality as *Wille*.[352] Kant's theory of rights is thus always referred to as the Will Theory.

Kant's concept of rights was highly integrated into his philosophical theories more generally. A systematic or independent theory of rights did not come into form as a result of his work. Even the attribution of 'the Will Theory' to Kant's discussion about rights is, to a large extent, interpretation by later researchers. In legal terms, the broader theorisation of the Will Theory was first accomplished by Windscheid.[353]

Windscheid was greatly influenced by Kant's discussion of rights, but applied this discussion systematically to rights in terms of positive law.[354] According to Windscheid, a right was a legally acknowledged will.[355] This will was key to making objective legal rules become subjective rights that belonged to any given person. In terms of positive law, objective legal rules, or *Gesetze*, were considered the categorical imperative, according to which a person gave law to how to give law to his or her actions and goals. Subjective rights, or *Maxime*, were understood as the hypothetical imperatives in positive law, according to which a person gave law to his or her actions and goals. Through the application of objective rules according to human will, such rules were reinterpreted by the individual subject to be personal norms of actions and goals, and therefore became subjective rights.[356] The nature of a right was thus inherently bound up with human will.[357]

Windscheid emphasised the application of legal rules to one's actions and goals to understand the concept of a right. He, therefore, mainly inherited Kant's idea of *Willkür*, abandoning the notion of *Wille* and the connection of a right to the transcendental and determined world. Such abandonment raised the possibility of the existence of free will without the need to resort to natural law.

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[352] Ibid, 23.
[353] 狄骥 [Duguit], 《宪法论》 [Constitution], above n 48, 200.
[354] Pound, 'Legal Rights', above n 49, 109.
[355] Ibid, 107.
[356] Ibid.
[357] Ibid.

Regarding the nature of will specifically, Windscheid believed there were two wills that could be taken as rights. One was the will of the right holder to be able to make others either do or not do something, meaning the power to enforce legal rules.[358] The other was the will to create, alter or abolish such a right in the first sense, namely the power to make legal rules come into being.[359] Windscheid's will, therefore, laid stress on the ability of the right holder to generate control over the actions of others. This stress on control, together with the possibility of the existence of a free will in positive law, inspired Hart to some extent and thus preempted the further development of the Will Theory into its modern version, i.e., the Choice Theory.[360] Before analysing the jurisprudential background and general argument of the Choice Theory, this thesis presents the philosophical background of the classical version of interest theories, i.e., the Benefit Theory. The Benefit Theory was developed at the same time as the Will Theory, which, however, rested on different philosophical commitments, namely utilitarianism and empiricism.

Whereas Kant emphasised that human rationality and the transcendental world were the ultimate sources of our moral knowledge, Bentham and Mill insisted that experiences and the sensible world were more important in linking abstract rules to personal behaviour.[361] Bentham and Mill believed that transcendental imperatives did not exist (nor had any need to exist), and that any given person did not have to possess the ability to exercise pure practical reason to achieve knowledge about the moral world.[362] Instead, the sensible world provided us with a basis for moral percepts. Therefore, being able to draw deductions from sensations was sufficient for us to understand and apply moral rules.[363] In believing these, Bentham and Mill followed the basic tenets of empiricism.[364]

Among the various forms of empiricism, Bentham and Mill specifically supported utilitarianism.[365] According to Bentham, moral knowledge was achieved through experiencing

[358] Ibid.
[359] Ibid.
[360] Other than Diguit and Pound, most scholars do not discuss Windscheid's theory of rights in terms of the Will Theory. For example, see Steiner, 'Working Rights', above n 45; Simmonds, 'Rights at the Cutting Edge', above n 45. Therefore, from now on, this thesis employs the term 'the Will Theory' to refer to Kant's theory of rights, although Windscheid's version is still considered as a member of will theories.
[361] Markie, 'Rationalism vs. Empiricism', above n 310.
[362] Bentham, *The Works of Jeremy Bentham*, above n 54, vol 3, 286; vol 8, 246; Bentham, *A Comment on the Commentaries and A Fragment on Government*, above n 54, 495; Bentham, *Of the Limits of the Penal Branch of Jurisprudence*, above n 54, 287–88, 317–18.
[363] Bentham, *The Works of Jeremy Bentham*, above n 54, vol 1, 168.
[364] Traditionally understood, empiricism claims that experience is the ultimate source of our knowledge; see Markie, 'Rationalism vs. Empiricism', above n 303, [1].
[365] Gianfranco Pellegrino, 'Utilitarianism: Historical Theories and Contemporary Debates' (2008) *Notizie di*

both pain and pleasure, the two sovereign matters that dominated human sensation.[366] In essence, human nature sought to seek pleasure and avoiding pain.[367] Thus augmenting pleasure and decreasing pain constituted the actual motives for any given action an individual might undertake. This understanding of pleasure and pain therefore ought to serve as the standard of right and wrong according to which we behaved.[368]

An entity that could bring pleasure or prevent pain — in Bentham's words, that which 'tend[ed] to produce benefit, advantage, good or happiness' — was called 'utility'.[369] The basic rule that governed and should govern human behaviours, therefore, was 'the principle of utility'. This principle 'approve[d] or disapprove[d] of every action whatsoever, according to the tendency which it appear[ed] to have to augment or diminish the happiness of the party whose interest [wa]s in question'.[370] If the party was an individual, the principle approved or disapproved of an action according to the action's tendency to bring pleasure or pain to the individual. If the party in question was a community of people, the principle approved or disapproved of an action according to the action's tendency to increase or decrease the interest of the community as a whole.[371]

Law was the keystone institution through which a community applied the principle of utility to achieve its best interests. The interest of the community as a whole was the aggregate of each member's happiness.[372] The greatest interests, therefore, was defined as the 'greatest happiness of the greatest number'.[373] In most circumstances, an individual sought the action that best augmented his or her pleasure, and so as a general rule the greatest interest could be obtained naturally by everyone making free decisions.

Politeia 3, 3. To be specific, Bentham's and Mill's utilitarianism was classical utilitarianism, which was differentiated from modern utilitarianism in that it rejected mere pleasure but was in favour of the value of beauty; see Julia Driver, 'The History of Utilitarianism', in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy*(2012) <http://plato.stanford.edu/entries/utilitarianism-history/>.

[366] Bentham, *The Works of Jeremy Bentham*, above n 54, vol 1, 168; Bentham, *An introduction to The Principles of Morals and Legislation*, above n 54, 1; James E Crimmins, 'Jeremy Bentham' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (2012) <http://plato.stanford.edu/entries/bentham/> '2. Philosophical Foundations' [4].

[367] Driver, 'The History of Utilitarianism', above n 365, '2.1 Jeremy Bentham' [1].

[368] Ibid; Bentham, *An Introduction to the Principles of Morals and Legislation*, above n 54, 11.

[369] Bentham, *An Introduction to the Principles of Morals and Legislation*, above n 54, 11–2.

[370] Ibid, 12.

[371] Ibid.

[372] Ibid.

[373] Bentham, *A Fragment on Government*, above n 54, 3. Bentham later changed the principle slightly to the 'greatest happiness principle', concerning the happiness of all members in a society, since he realised that the 'greatest happiness of the greatest number' might justify sacrifice of the minority. See Crimmins, 'Jeremy Bentham', above n 366, '4.2 Greatest Happiness Principle'; Bentham, *Deontology together with A Table of the Springs of Action and the Article on Utilitarianism*, above n 54, 309.

However, Bentham realised it was unrealistic for everyone to be absolutely rational throughout his or her life.[374] A person might still judge poorly or desire things that would result in bad outcomes.[375] To prevent these actions, the law must be constituted in a way which could lead individuals to pursue actions that enhanced the public interest.[376] Firstly, the law needed to approve or disapprove of actions according to their ability to augment or decrease 'real' utility.[377] Real utility meant that any action be truly beneficial to an individual and the wider public; conversely, any action that was believed pleasant but was not actually beneficial ought to be discouraged.

Secondly, the law's approval or disapproval of any given course of action had to remind an individual about pleasure and pain when he or she chose what to do.[378] According to the principle of utility, even if the individual in question disagreed with the law about his or her best interest, he or she still needed to consider the legal pleasure and pain when choosing an action.

Thirdly, the approval or disapproval of the law ought to be the single most important pleasure or pain an individual considered when he or she chose a course of action. When the individual found pleasure in actions that the law deemed painful or pain in actions that the law deemed pleasurable, the legal understanding of pleasure and pain still dominated the scale of gains and losses, and thus led the individual to choose actions that were considered pleasurable by the law.

Legally defined pleasure and pain resulted in legal rewards and penalties, for example, regarding property, the law rewarded by protecting one's possession of property, while punished by depriving him or her of that property.[379] The law, therefore, led human behavior towards reaching the greatest happiness of the greatest number through providing legal rewards for actions that really were beneficial, whilst applying legal penalties to actions that were harmful. The principle of utility, in this sense, provided not only the code that guided

[374] Adam Smith was actually the first to argue this point of view; see Crimmins, 'Jeremy Bentham', above n 366, '3.1 Interest' [1].
[375] Bentham, *An Introduction to the Principles of Morals and Legislation*, above n 54, 61; Bentham, *Deontology*, above n 54, 84, 183, 201, 203–4.
[376] Bentham, *Of the Limits of the Penal Branch of Jurisprudence*, above n 54, 233; Bentham, *The Works of Jeremy Bentham*, above n 54, vol 1, 161.
[377] Bentham, *Of the Limits of the Penal Branch of Jurisprudence*, above n 54, 233; Bentham, *The Works of Jeremy Bentham*, above n 54, vol 1, 161.
[378] Bentham, *Of the Limits of the Penal Branch of Jurisprudence*, above n 54, 233; Bentham, *The Works of Jeremy Bentham*, above n 54, vol 1, 161.
[379] Bentham, *Of the Limits of the Penal Branch of Jurisprudence*, above n 54, 233; Bentham, *The Works of Jeremy Bentham*, above n 54, vol 1, 161.

personal behaviours but also ideas that informed legislation.

A right was a type of reward in the law.[380] Having a right meant firstly that the holder of that right was legally benefited by specific actions. By exercising a right, the holder gained legal interest; conversely, by waiving a right or having a right violated, the holder lost legal interest. Secondly, a right was a significant reward. Bentham believed that rights played a decisive role in weighing gains and losses: where there existed a fundamental individual right, it could not be displaced by any consideration of benefits.[381] Thirdly, a right also represented the 'real' interest of both individual and public. The ability to bring about utility was the reason why legislators incorporated rights into law.[382] On these grounds, a right was not only a benefit but also a legal tool that acknowledged and brought benefits.[383] In Bentham's view, the nature of a right therefore was a benefit.[384] Bentham's theory of rights is thus referred to as the Benefit Theory.

Mill, who was deeply influenced both by Bentham and by his father James Mill, advocated utilitarianism as well. Similarly to Bentham, but in slightly different terms, Mill argued that seeking pleasure and avoiding pain were psychological conditions that caused us to carry out actions.[385] Moreover, pleasure and pain ought to provide the governing rule according to which a person behaved.[386] Otherwise, a person would be asked to do something impossible or unreasonable. For an individual, augmenting pleasure and decreasing pain were thus the real purpose, as well as the normative rule, that guided his or her behaviour.[387] Furthermore, augmenting pleasure and decreasing pain also provided the principle that guided the behaviour of a community as a whole. According to Mill, there were no entities beyond individuals.[388] The whole society was no more than the sum of its constituent individuals and therefore there was no happiness except the pleasure of each individual.[389] The ultimate goal

[380] Bentham, *The Theory of Legislation*, vol 1, above n 54, 93.
[381] Ibid, vol 1, 144; Bentham, *The Works of Jeremy Bentham*, above n 54, vol 3, 452.
[382] Bentham, *The Works of Jeremy Bentham*, above n 54, vol 3, 452; Bentham, *Theory of Legislation*, above n 54, vol 1, 144.
[383] Benditt, *Rights*, above n 304, 18.
[384] Ibid; Bentham, *The Works of Jeremy Bentham*, above n 54, vol 8, 290.
[385] Mill, *Utilitarianism*, above n 54, ch 4.
[386] Mill, *An Examination of Sir William Hamilton's Philosophy and of the Principal Philosophical Questions Discussed in His Writings*, above n 54, ch XII, Appendix; Mill, *A System of Logic*, above n 54, vol 2, book VI, ch ix, sec 2.
[387] David Brink, 'Mill's Moral and Political Philosophy' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (2012) <http://plato.stanford.edu/entries/mill-moral-political/> '2.7 Act Utilitarianism'.
[388] Mill, *A System of Logic*, above n 54, vol 2, book VI, ch ix, sec 1, ch vii, sec 1; vol 1, book III, ch vi, sec 1; Fred Wilson, 'John Stuart Mill' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (2012) <http://plato.stanford.edu/entries/mill/> '10. Moral Sciences' [10].
[389] Mill, *A System of Logic*, above n 54, vol 2, book VI, ch xii, sec 1; Mill, *Utilitarianism*, above n 54, ch 3.

of a community was the maximisation of the sum of pleasure of all individuals.[390] Analogously, there was again no rule other than that which governed each individual. The principle that guided the action of the community was the aggregate of the law for each individual action.[391] Therefore, augmenting pleasure and decreasing pain also underscored the principles that instructed law-making. The law, as a result, guided human behaviour by encouraging beneficial actions with legal rewards and discouraging harmful actions with legal penalties. A right, which was a legal reward, took benefit as its nature. Following Bentham's utilitarianism, Mill argued that a right was a benefit. Mill's theory of rights is thus also considered part of the Benefit Theory.

Notwithstanding, Mill held a different view from Bentham about how to define the concept of a benefit.[392] Bentham believed that benefits only differed quantitatively.[393] There was not one benefit hierarchically greater than another, but only benefits that generated more pleasure than others. On the contrary, Mill alleged that some benefits were more important than others, meaning that benefits could differ qualitatively.[394] For example, a combination of several benefits was necessarily more useful than any one benefit itself. A combination of ideas, according to Mill, formed a different whole through a chemical reaction rather than a physical conjunction between them.[395] A combination of benefits, therefore, constructed a different benefit overall from the original benefits.[396] Moreover, as a benefit derivative from the original benefits, the combination was hierarchically greater.[397]

The highest benefit, according to Mill, was freedom or liberty, specifically freedom from others' interference as long as one did not harm others.[398] Therefore, the fundamental human right was liberty.[399] The ultimate goal of government and its institutions — particularly laws and rights — was the preservation and development of individual liberty.[400]

In terms of this emphasis of individual autonomy, Mill's theory of rights seems to have

[390] Wilson, 'John Stuart Mill', above n 388, '12. Moral Philosophy: Utilitarianism' [6].
[391] Ibid, '10. Moral Sciences' [11], [18].
[392] Ibid, '6. The Science of Psychology: Associationism' [7]. However, some scholars argue that Mill's views on the nature of benefit do not have much difference from those of Bentham. For example, see Frederick Rosen, *Classical Utilitarianism from Hume to Mill* (Routledge, 2003) ch 3.
[393] Ibid, '6. The Science of Psychology: Associationism' [7]; Crimmins, 'Jeremy Bentham', above n 366, '3.2 Felicific Calculus'.
[394] Wilson, 'John Stuart Mill', above n 388, '6. The Science of Psychology: Associationism' [7].
[395] James Mill, *Analysis of the Phenomena of the Human Mind* (Longmans, Green, Reader and Dyer, 2nd, 1878) vol 1, 62 n 23 (John Stuart Mill's note).
[396] Ibid.
[397] Ibid.
[398] Mill, *On Liberty and Other Essays*, above n 54, 223–24.
[399] Ibid.
[400] Ibid, xi. See also Jonathan Riley, 'One Very Simple Principle' (1991) 3 *Utilitas* 1, 33.

similarities with that of Kant.[401] However, it is inappropriate to classify Mill's idea as a Will Theory rather than a Benefit Theory. For Kant, the conception of a right lay in both his own concept of rationalism and the natural law tradition; sensational pleasure was rarely considered. On the contrary, in Mill's conception of rights, although liberty was essential, it had no connection with the transcendental world or the categorical imperative. Rather, the notion of liberty was a type of pleasure that came from observation and experience of the empirical world.[402] Mill's theory of rights, therefore, has been considered in line with Bentham's Benefit Theory, but comprised a slightly different version.

3.3.2. Modern Versions of Will Theories and Interest Theories

The modern versions of will theories and interest theories are the Choice Theory and the Interest Theory respectively; both are established together with legal positivism, which was a development of empiricism in the theory of law and thus provide better modes to interpret existing arguments about the legal validity of capital punishment, abortion and euthanasia. Empiricism insisted that rules guiding human behaviour, and hence the relevant legislation, should derive from human sensations. The existence of the law, therefore, also lay in perceivable social facts. These facts, believed by both Bentham and later John Austin, were the command of the sovereign.[403] Positive law, as a result, was the product of human activity; law did not arise from a human guess about moral rules in a transcendental world.[404] Moreover, the validity of law was not determined by moral rules in that transcendental world.[405] The law could require morally dubious behaviour; however, as long as that was the command of the sovereign, it was still the law. The law might also require the same behaviour as a moral precept, but would not necessarily do so. These were the two basic beliefs of legal positivism, called 'the social fact thesis' and 'the separability thesis' respectively.[406] Hart, Raz, MacCormick and Lyons all endorsed the social fact thesis and the separability thesis.[407]

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[401] John Gray, 'John Stuart Mill on Liberty, Utility and Rights' in J Roland Pennock and John W Chapman (eds), *Human Rights: NOMOS XXIII* (New York University Press, 1981) 80, 80–1; Riley, 'One Very Simple Principle', above n 400.
[402] Mill, *On Liberty and Other Essays*, above n 54, 224.
[403] Crimmins, 'Jeremy Bentham', above n 366, '5. Political Philosophy' [6]; John Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* (Weidenfeld and Nicolson, first published 1832, 1971ed) Lec I.
[404] Raimo Siltala, *Law, Truth, and Reason: A Treatise on Legal Argumentation* (Springer, 2011) 121.
[405] Hart, *The Concept of Law*, above n 51, 185–6; Hart, 'Positivism and the Separation of Law and Morals', above n 51.
[406] Green, 'Legal Positivism', above n 75.
[407] For Hart's acceptance of legal positivism, see the following: Hart, 'Are There any Natural Rights?', above n 51, 184–85; Hart, *The concept of Law*, above n 51, vi, 61, 247, 251–52. For Raz's acceptance of legal positivism, see Raz, *The Authority of Law*, above n 57, 233–49. For MacCormick's acceptance of legal positivism, see Villa, 'Neil MacCormick's Legal Positivism', above n 75.
However, there are also scholars who consider MacCormick hard to identify as either a legal positivist or a legal naturalist; for example, see Stefono Bertea, 'Rhetoric and the Rule of Law: An Author's Day with Neil

However, the four scholars expounded these two theses — especially the separability thesis — in different ways, resulting in their proposal of different versions of legal positivism, as well as different definitions of rights.

The Choice Theory was raised with Hart's 'inclusive legal positivism', a term that refers to the idea that moral values can play a role in determining the existence of the law, although they will not necessarily do so.[408] The term 'inclusive' is supposed to differentiate this theory from the idea that excludes morality completely from determining the existence of the law, namely the notion of 'exclusive legal positivism'.[409] Hart adopted the former.

Hart insisted that the social fact that validated the law be an 'internal point of view', which meant that the law owed its existence to the fact that members of a society took it to govern the standard of their behaviours.[410] Specifically, the law consisted of two levels of rules, primary and secondary.[411] Primary rules informed us what we could do, and what we must or must not do.[412] These rules belonged to the class of law when they were constituted in a manner that conformed to the rule of recognition.[413]

The rule of recognition was a rule that advised what counted as law. It was thus a type of secondary rules, in the sense that the rule of recognition was a rule governing primary rules. Secondary rules also contained two other kinds of rules. One was the rule of change that enabled the law-maker to make, alter and abolish primary rules. The other was the rule of adjudication that regulated the operation of adjudication.[414]

The validity of secondary rules, in contradistinction to primary rules, did not stem from a higher level of rules. Rather, their validity lay in the internal point of view, namely a fact that certain rules were accepted by law-applying officials to set the standards for legislation, emendation or judgment.[415] Since secondary rules further determined the form and content of primary rules, the whole legal system depended totally on what was chosen by officials in a particular society. As a result, there was 'no logical restriction on the content' of legal rules.[416]

MacCormick' (2008) 59 *North Ireland Legal Quarterly* 5, 6.
[408] Danny Priel, 'Farewell to the Exclusive-Inclusive Debate', above n 263.
[409] Ibid.
[410] Hart, *The Concept of Law*, above n 51, 56.
[411] Hart, *Essays on Bentham*, above n 51, 253–55.
[412] Hart, *The Concept of Law*, above n 51, 81.
[413] Ibid, 100.
[414] Ibid, 95–100.
[415] Ibid, 109, 115–17, 256.
[416] Hart, 'Lon L Fuller: The Morality of Law', above n 51, 361.

Officials could resort to any notion that they believed qualified as law. For example, officials might employ moral values to validate a primary rule. These moral values thus became the standard according to which a society decided whether a particular rule ought to be a part of the law.[417]

A right as a product of primary rules was also determined by the rule accepted by officials in a certain jurisdiction.[418] According to Hart, officials always referred to the term 'right' as the protection of free choice.[419] The concept of a right thus lay on a moral concern on the right holder's need for liberty and control. A choice conferred the right holder with the ability to decide how the duty regarding the right would be performed. To be specific, a choice enabled the right holder to choose whether to ask the bearer to perform the duty (or to exempt the bearer from that duty), whether to file a lawsuit against the bearer when he or she failed to perform that duty, and whether to exercise or waive the right to remedy following that lawsuit.[420] Hart's theory of rights thus is called 'the Choice Theory' because it places the onus on individual citizen to interpret the law of rights as they see fit.

This emphasis on personal selection places the Choice Theory in a longer line of will theories. Choice, as regarded both particular actions that the right holder might select and the right holder's control over the performance of the duty bearer, inherits Kant's *Willkür* and Winscheid's will power. The Choice Theory, therefore, is always considered part of the will approach more generally.[421] This thesis finds this modern version of will theories most useful in providing answers to the legitimacy of capital punishment, abortion and euthanasia.

Raz followed legal positivism as well as Hart's conception of the law, who also defined the law as a hierarchical system of rules.[422] However, Raz held a different view about the relationship between morality and law. Moral considerations, according to Raz, could never serve as the condition for the existence or validity of the law.[423] Rather, legal norms were legitimate as long as they could empirically demonstrate their inclusion within a legal

[417] Hart, *The Concept of Law*, above n 51, 250.
[418] Ibid, 89, 240.
[419] Hart believed that a general core of a right was achievable because of his acceptance of ordinary language philosophy; see Hart, 'Hart Interviewed', above n 51, 275.
[420] Hart, 'Definition and Theory in Jurisprudence', above n 51, 26; Hart, 'Bentham on Legal Rights', above n 23, 27; Hart, 'Between Utility and Rights', above n 51.
[421] Steiner, 'Working Rights', above n 45, 239.
[422] Raz, 'Legal Rights', above n 57, 5–12; Raz, *The Concept of a Legal System*, above n 57, 2. See also Green, 'Legal Positivism', above n 75.
[423] Raz, *The Authority of Law*, above n 57, 47–52, ch 3; Raz, *Ethics in the Public Domain*, above n 57, ch 10.

system.[424] Raz's legal theory is thus considered a form of exclusive legal positivism.[425]

Notwithstanding, morality was not totally eliminated from Raz's discussion of the law. Morality was still important when the law asserted its authority in guiding individual actions. In Raz's theory, there were two kinds of reasons for actions. First-order reasons, also labeled as 'operative reasons' or 'dependent reasons', functioned in the absence of social institutions or norms; moral rules belonged within this category.[426] Second-order reasons were ones institutionally accepted as authoritative,[427] meaning that where such reasons existed, they provided the sole rationale for actions.[428] The law constituted second-order reasons.

The authority of second-order reasons was grounded in three theses: the 'Dependence Thesis', the 'Preemption Thesis' and the 'Normal Justification Thesis'. The preemption thesis maintained that second-order reasons functioned in an exclusionary way.[429] Second-order reasons sometimes replaced first-order reasons, preventing first-order reasons from guiding human behaviours.[430] Second-order reasons sometimes reflected first-order reasons, relieving individuals from the need to resort to the first-order reasons when performing specific actions.[431] Second-order reasons, therefore, provided exclusive reasons for human actions. The normal justification thesis held that second-order reasons were more likely to be complied with than first-order reasons.[432] Compared to first-order reasons, second-order reasons were normally justified because an individual would generally be better off by following them. Second-order reasons thus provided a more comprehensive rationale for human actions than first-order reasons. Lastly, the dependence thesis required that the second-order reasons ought to be based, at least in part, on first-order reasons.[433] Second-order reasons therefore relied on first-order reasons to generate their guidance of human behaviours. In this sense, if the law functioned as an authoritative second-order reason, it must depend on morality.

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[424] Raz, *The Authority of Law*, above n 57, ch 6.
[425] Andrei Marmor, 'Exclusive Legal Positivism' in Jules L Coleman, Kenneth Einar Himma and Scott J Shapiro (eds), *Oxford Handbook of Jurisprudence and Legal Philosophy* (Oxford University Press, 2004) 104.
[426] Raz, *Practical Reason and Norms*, above n 57, 34.
[427] Raz, 'Authority, Law and Morality', above n 57, 299.
[428] Ibid; Raz, *The Authority of Law*, above n 57, 17; Raz, *Practical Reason and Norms*, above n 57, 41–3.
[429] Raz, 'Authority, Law and Morality', above n 57, 299.
[430] Ibid.
[431] Ibid.
[432] Raz, *Ethics in the Public Domain*, above n 57, 214.
[433] Ibid; Raz, 'About Morality and the Nature of Law', above n 57, 14; Raz, 'Hart on Moral Rights and Legal Duties', above n 57, 131.

A right, as part of the law, again relied on morality.[434] A right firstly functioned as an exclusionary and preemptive reason for actions.[435] To assert that somebody had a right was to suggest that there was an *a priori* legal reason for an action.[436] This action, to be specific, was another's action to fulfil that right, in other words, a legal duty.[437] The existence of a legal right, therefore, primarily connected with the existence of a legally inflicted duty.[438]

Secondly, the authority of any given right depended on first-order reasons. Raz agreed with Bentham and Mill that a first-order reason ensured moral concern about the right holder's interest. A right thus ought to be able to promote the right holder's interest to claim its authority in guiding human behaviours.[439] This interest was the reason why the law inflicted a duty on other people.[440] A right, as a result, was an interest that provided a sufficient reason for holding another to a duty.[441]

Thirdly, an interest that qualified a right ought to be related to the essence of the right — what Raz called a 'core right'.[442] A core right was a fundamental right that would produce other 'derivative rights'; for example, freedom of speech would generate freedom of political speech.[443] To qualify freedom of speech, the interest that grounded a duty ought to be an interest related to this freedom. To use this example just cited, if the interest was only related to political speech, although freedom of political speech might be justified in itself, freedom of speech more generally could not. Summing up these three points, a right, therefore, was the interest that related both to the core of the right and provided enough basis for holding another to a legal duty.

In laying emphasis on the idea of an interest to define the concept of a right, Raz's theory of rights is considered as belonging to the lineage of interest theories. However, by confining the realm of the interest that qualified a right, Raz's theory also differentiated itself from the classical version of interest theories, i.e., the Benefit Theory. Raz's theory of rights is thus sometimes referred to as the Interest Theory, although it should be noted that the term is too general to do Raz's work justice.

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[434] Raz, 'Legal Rights', above n 57, 12.
[435] Ibid, 6–15.
[436] Raz, 'On the Nature of Rights', above n 57, 207.
[437] Ibid.
[438] Ibid, 194.
[439] Ibid, 213.
[440] Ibid, 194.
[441] Ibid, 195.
[442] Alon Harel, 'What Demands Are Rights? An Investigation into the Relation between Rights and Reasons' in Brian Bix and Horacio Spector (eds), *Rights: Concepts and Contexts* (Ashgate, 2012) 377.
[443] Raz, 'On the Nature of Rights', above n 57, 197–98; Raz, *The Morality of Freedom*, above n 57, 168–70.

MacCormick also adopted the basic beliefs of legal positivism, but he advocated 'institutional legal positivism', which rendered his definition of rights different from that of Hart and Raz.[444] Primarily, MacCormick defined the law similarly to Hart.[445] The law, in MacCormick's view, provided a set of principles in which secondary standards justified primary standards, and primary standards possessed normativity because people accepted them as the legitimate model of everyday behaviour.[446] Primary standards and secondary standards were the counterparts of Hart's primary rules and secondary rules, while the notion of human acceptance was analogous to Hart's internal point of view.

However, MacCormick diverged from Hart in believing that both primary standards and secondary standards were institutional facts.[447] According to MacCormick, institutional facts were societal, linguistic or cultural interpretations of empirically observable facts; for example, contract law was the institutionalisation of daily practice of exchange.[448] Institutional facts were not facts accepted by legal officials, as Hart believed; rather, institutional facts were facts accepted by members of a community as conventions.[449] MacCormick's legal theory thus is often referred to as institutional legal positivism.

The law provided an archetype of institutional facts. The existence of the law, therefore, relied on conventions held by members of the community concerned.[450] In MacCormick's theory, the group of people whose acceptance validated the law, therefore, expanded beyond legal officials: this group not only included norm-givers (as Hart insisted) but also contained norm-users, namely ordinary citizens.[451] The connection between law and morality was also extended. Norm-users, MacCormick agreed with Hart, still always held a morally related internal point of view to the law, as officials did. The law thus grounded its existence largely on the moral acceptance of norm-users.[452] MacCormick even claimed that 'provisions which [were] unjustifiable by reference to any reasonable moral argument should not be considered

[444] For example, Siltala, *Law, Truth, and Reason*, above n 404, 130.
[445] MacCormick believed he followed Hart's theory of the law; see MacCormick, *Legal Reasoning and Legal Theory*, above n 57, xiv–xv. For more on Hart's influence on MacCormick, see Neil Walker, 'MacCormick, Sir (Donald) Neil (1941-2009)' in *Oxford Dictionary of National Biography* (Oxford University Press, 2013).
[446] MacCormick, *Practical Reason in Law and Morality*, above n 57, 50–6.
[447] Ibid.
[448] Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (Springer, 1986) 3–29, 148–85.
[449] Ibid.
[450] Ibid; MacCormick and Weinberger, *An Institutional Theory of Law*, above n 448, 3–29, 148–85.
[451] Kyle McGee, *Bruno Latour: The Normativity of Networks* (Routledge, 2014) 152.
[452] MacCormick, *Institution of Law*, above n 57, 276, 304; MacCormick, 'Natural Law and the Separation of Law and Morals', above n 57, 113.

valid as laws'.[453] The connection between morality and law, according to MacCormick, became necessary.[454]

Notwithstanding, MacCormick did not completely reject the separability thesis, but instead insisted on its application to the methodology of legal discipline. In his view, legal research should analyse the law in a descriptive way, meaning that researchers should only describe the law as it was, without attempting moral evaluation of its contents.[455] This methodological separation of morality from law rendered MacCormick unwilling to take moral rights into consideration when he discussed legal rights.[456] One such right targeted by MacCormick was that institutionalised by an article of the law.[457] The conception of a legal right, therefore, must lie in that specific rule.[458]

Moreover, the rule that conferred a right was necessarily a rule which held a moral concern about interest.[459] Deviating further from Hart's view, MacCormick now aligned himself with the Benefit Theory, particularly Raz's notion that a right was representative of an interest that could be extracted from the language of a legal rule.[460] Nevertheless, this interest was neither a benefit acknowledged by the law (as Bentham and Mill believed), nor, according to Raz's view, an interest sufficient to hold another to a duty. Rather, MacCormick contended that the interest ought to be something that promoted the well-being of a particular person in general.[461] Two main points arose from this. One was that the interest must be related to a particular person; the notion of common good could not justify the existence of a right.[462] The other was that interest should benefit that person in general situations and therefore was not something that might always be desired by that person in any specific instance, nor was something that benefited the person in fact.[463] A right, in MacCormick's view, was therefore a legally acknowledged interest that benefited a particular person in general situations. In emphasising the idea of the interest in defining the concept of a right, but confining the realm of the interest, MacCormick's theory of rights is considered another version of the Interest Theory.

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[453] MacCormick, *Institution of Law*, above n 57, 242.
[454] Villa thus believed that, ontologically speaking, MacCormick was prone to a version of naturalism; see Villa, 'Neil MacCormick's Legal Positivism', above n 75.
[455] MacCormick, *H L A Hart*, above n 57, 6 ff; MacCormick, *Legal Reasoning and Legal Theory*, above n 57, 233, 239–40.
[456] MacCormick, 'Rights in Legislation', above n 44, 149.
[457] Ibid.
[458] Ibid, 150.
[459] Ibid, 149–50.
[460] Ibid.
[461] MacCormick, 'Rights, Claims and Remedies', above n 57, 338.
[462] MacCormick, 'Rights in Legislation', above n 44, 150.
[463] Ibid, 152; MacCormick, 'Rights, Claims and Remedies', above n 57, 338.

Lyons also inherited the basic beliefs of legal positivism, and particularly Hart's main account of law.[464] However, he departed not only from Hart, but also Raz and MacCormick, on how to interpret the separability thesis: legal theories raised by Hart, Raz and MacCormick, according to Lyons, did not pay enough attention to the connection between morality and law.[465] This was especially true of both the function of moral principles in evaluating positive legal systems and guiding personal behaviours.[466] Even though the existence of the law, Lyons agreed with Hart and Raz, did not need to depend on moral beliefs, one could not deny that moral principles (such as justice and equality) could give norm-users compelling reason to abide by the law, as well as a critical perspective on how positive law should be legislated to prevent norm-users from obeying blindly.[467] Lyons, therefore, expanded Raz's dependence thesis.[468] In addition to resting the authority of the law on morality, Lyons argued that those who fell under the law had a legitimate reason not 'to obey punctually' when the law was immoral.[469]

As regards rights, firstly, Lyons agreed with Raz and MacCromick that the defining point of a right was a moral concern about interest. However, this conception, according to Lyons, was only applicable to instructing law-making activities, namely, legislation and adjudication.[470] Viewing a right as an interest was inapplicable to guiding individual behavior because to do so might trigger disrespect of established rights. If acquiring an interest was the reason why a person exercised a right, the interest was the moral value that guided human actions. Under certain circumstances, the person might find that violating the right brought more benefits than adhering to it.[471] In such cases, the individual in question would therefore be more inclined to violate the right than respect it. Viewing a right as an interest, in this sense, could only serve as an abstract concept held by legislators and adjudicators.

Secondly, according to Lyons, the interest that qualified as a right was the interest that related directly to a duty and was intended by the law to benefit a subject.[472] That interest, on the one hand, was not a general benefit, but must be directly brought about by a specific duty. On the other hand, that interest was not an unexpected benefit, but was the purpose of the law that

[464] See Philip Milton, 'Review' (1986) 49(2) *Modern Law Review* 277, 279.
[465] Lyons, 'Moral Aspects of Legal Theory', above n 57.
[466] Lyons, 'Utility and Rights', above n 57, 118–21.
[467] Lyons, 'Moral Aspects of Legal Theory', above n 57, 248–52.
[468] Ibid, 248.
[469] Ibid, 249.
[470] Lyons, 'Utility and Rights', above n 57, 153.
[471] Ibid, 118–21.
[472] Lyons, 'Rights, Claimants, and Beneficiaries', above n 57, 176.

granted rights in the first place. A right, as a result, was the legislatively concerned interest of a subject that was directly related to a duty. By agreeing with the idea of the interest in defining the concept of a right, but confining the realm of the interest, Lyons's theory of rights is also understood to be a version of the Interest Theory.

3.3.3. Combinatorial Theories

Other than the Will Theory, the Benefit Theory, the Choice Theory and the Interest Theory specifically, will theories and interest theories also include another member, namely combinatorial theories that try to combine the ideas of will theories and interest theories in order to harness the best of both models. Current representatives of combinatorial theories involve Wenar's 'several functions theory' and Sreenivasan's 'hybrid theory'.

Wenar combined interest theories and will theories by regarding them as presenting different functions of a right. In Wenar's view, a complete theory of rights ought to be able to explain all six basic functions of a right, namely exemption, discretion, authority, protection, provision and performance.[473] However, neither interest theories nor will theories were able to do so.[474] The Will Theory and the Choice Theory only acknowledged rights that conferred subjects with the capacity to control and choose, thus indicating the functions of discretion and discretionary authority.[475] Functions of exemption, nondiscretionary authority, protection, provision and performance were not considered in those models.[476] On the contrary, the Benefit Theory and the Interest Theory included functions of exemption, discretion, protection, provision and performance, but the function of authority was disregarded.[477] None of the four theories, thus, provided a complete framework of rights. The way to make them complete, Wenar believed, was to combine them. Interest theories and will theories each presented several functions among the six of a right; by merging these two main theories, all six functions could be covered.[478] This combinatorial theory, which Wenar dubbed the 'several functions theory', therefore, would be complete.[479]

This several functions theory conceived of a right as a legal tool that served one or several functions among the six: for example, a right either exempted one from a general duty,

[473] Leif Wenar, 'The Nature of Rights' in Brian Bix and Spector Horacio (eds), *Rights: Concepts and Contexts* (Ashgate, 2012) 213.
[474] Ibid, 213.
[475] Ibid, 228–30.
[476] Ibid.
[477] Ibid, 230–33.
[478] Ibid, 228–33.
[479] Ibid, 236.

protected him or her from others' interference, provided him or her with necessities, or enabled him or her to choose freely to do or not to do something, ask another to do or not to do something, and change a legal relationship according to his or her will. This theory was believed by Wenar himself to be able to clarify the phenomena of rights as explained by will theories and interest theories. It could also expound other phenomena of rights that were not explained by will theories and interest theories, such as rights possessed by incompetent entities (for example, newborns and comatose patients), inalienable rights, and rights without benefits.[480]

Sreenivasan, somewhat differently to Wenar, hybridised will theories and interest theories, considering them as presenting different reasons for a person to hold a right. Will theories, which emphasised the right holder's capacity to will or control, relied on subjective interpretation.[481] Alternatively, interest theories, which concerned the obtaining and possessing of an interest, employed objective reason.[482] However, neither subjective interpretation nor objective reason could explain the concept of a right properly. Subjective reason was unable to explain inalienable rights, the existence of rights in the field of criminal law and rights owned by incompetent entities.[483] Objective reason had a tendency to unreasonably expand the scope of rights.[484] To avoid improper use, subjective interpretation and the objective reason had to be hybridised in order to produce a more robust legal theory of rights.[485]

Sreenivasan proposed two models of hybridisation. The first was fairly simple: Y had a right to X regarding φ 'just in case *either* Y ha[d] the power to waive X's duty to φ *or* Y ha[d] no power to waive X's duty, but (that [wa]s because) Y's disability advance[d] Y's interests on balance.'[486] This hybrid viewed will theories and interest theories as alternative conditions for the existence of a right, namely, that a right was either a choice or an interest. Sreenivasan believed this simple hybrid could effectively explain both inalienable rights and rights in criminal law, as well as confine the scope of rights appropriately.[487]

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[480] Ibid, 238.
[481] Gopal Sreenivasan, 'Duties and Their Direction' in Brian Bix and Spector Horacio (eds), *Rights: Concepts and Contexts* (Ashgate, 2012) 345.
[482] Ibid.
[483] Ibid.
[484] Ibid.
[485] Ibid, 362–66.
[486] Ibid, 366; Gopal Sreenivasan, 'A Hybrid Theory of Claim-Rights' (2005) 25(2) *Oxford Journal of Legal Studies* 257, 267.
[487] Sreenivasan, 'Duties and Their Direction', above n 481, 366–68.

However, the simple hybrid could not explain rights owned by incompetent entities. Sreenivasan therefore proposed a complex hybrid: Y had a right to X regarding φ 'just in case Y's measure (and, if Y ha[d] a surrogate Z, Z's measure) of control over a duty of X's to φ matche[d] (by design) the measure of control that advance[d] Y's interests on balance.'[488] This complex hybrid took interest theories as the purpose for will theories: a right was thus a choice that benefited the subject. Sreenivasan believed this complex hybrid explained why a subject possessed a right even though he or she was not mentally competent to choose and control that right.[489] On these grounds, Sreenivasan claimed that the hybrid theory comprised a better conception of rights than will theories or interest theories alone.[490]

Notwithstanding, neither Wenar's several functions theory nor Sreenivasan' hybrid theory have succeeded in combining will theories and interest theories adequately. Wenar's theory misunderstood Hohfeldian incidents, and was prone to side with interest theories.[491] Sreenivasan's theory was unable to avoid the improperness of the two main theories, and was possible to result in unacceptable outcomes.[492]

Regarding Wenar's theory, the six functions a right might serve were raised in terms of the four Hohfeldian incidents. According to Wenar, a privilege implied exemption or discretion, a power implied authority, a claim implied protection, provision or performance, and an immunity implied protection.[493] Specifically, privilege or power provided a person with a right to do something, which had both a paired version and a single version. The single version of a privilege meant that a person had a right to do something, and was not under a duty not to do it; as such, the person was exempt from that duty of not to do such thing. The paired privilege signified that a person was neither under a duty to do something nor under a duty not to do this thing; the person thus had discretion about whether or not to act. Similarly, the single power meant that a person had a right to change but was not under a duty not to change a legal relationship, which conferred him or her with nondiscretionary authority. Alternatively, the paired power meant that a person had both a right to change and a right not to change the legal relationship, which conferred him or her with discretionary authority. Privilege and power, therefore, served the functions of exemption, discretion, or authority as appropriate.

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[488] Ibid, 368; Sreenivasan, 'A Hybrid Theory of Claim-Rights', above n 486, 271.
[489] Sreenivasan, 'Duties and Their Direction', above n 481, 368–70.
[490] Ibid; Sreenivasan, 'A Hybrid Theory of Claim-Rights', above n 486.
[491] Kramer and Steiner, 'Theories of Rights', above n 64, 244–46; Matthew Kramer, 'Rights without Trimmings' in Matthew Kramer, N E Simmonds and Hillel Steiner (eds), *A Debate over Rights* (Clarendon Press, 1998) 7.
[492] Kramer and Steiner, 'Theories of Rights', above n 64, 264, 272.
[493] Wenar, 'The Nature of Rights', above n 473.

A claim or an immunity, on the contrary, meant that a person had a right regarding another's doing or not doing something. A claim denoted that the person had a right to ask another to do something, and the other person was necessarily under a duty to do this thing. The right holder in question, therefore, possessed protection from interference, provision of necessities, and performance in his or her ability to have another act on his or her behalf. Immunity signified that the person had a right to ask another not to do something, and the other was under a duty not to do this thing. The right holder was thus protected from the other's interference. The claim and the immunity, as a result, served the functions of protection, provision and performance.

However, divisions between both single and paired privileges, and single and paired powers are inappropriate.[494] Firstly, a single privilege could actually be a paired privilege at the same time.[495] For example, a person has a right not to donate and is not under a duty to donate. The person, meanwhile, is also not under a duty not to donate. The right (not) to donate, therefore, is both a single and a paired privilege. Secondly, a privilege cannot exempt a person from a duty.[496] Again, take the right (not) to donate as an example; this right does not exempt its holder from a duty not to donate (to donate), since there is not a duty not to donate (to donate). Thirdly, the notion of a power is more complex than the two versions of single and paired; even a single power can confer discretion upon the right holder.[497] For instance, the power to judge, which is a single power in Wenar's classification, confers the judge with discretion. The judge has a certain freedom in reaching the judgment, at least regarding the sentence he or she might impose following a conviction. Wenar, therefore, seems to have misunderstood Hohfeldian privilege and power. As a result, the six functions of a right cannot be justified via the Wenarian model.

Other than that, Wenar's theory is believed to be more prone to a version of interest theories.[498] Functions that a right may serve also include benefits and interests. Exemption from a duty, discretion regarding a choice, authority to change, protection from interference, provision of materials and performance on request are all benefits or interests. Wenar, therefore, again emphasised the importance of the idea of a benefit or an interest in defining a right. The several functions theory, in this sense, was a subset of interest theories rather than a

[494] Kramer and Steiner, 'Theories of Rights', above n 64, 244–46.
[495] Ibid.
[496] Ibid.
[497] Ibid, 246–50.
[498] Kramer, 'Rights without Trimmings', above n 491, 7; Kramer and Steiner, 'Theories of Rights', above n 64, 250–55.

combinatorial theory.

As to Sreenivasan's theory, the two models of hybrids may lead to unacceptable outcomes. For example, a person may possess a right to something that proves irrelevant for him or her.[499] Consider the following: A is under a duty to return $100 to B; C, as a person irrelevant to this loan agreement, has no power to waive A's duty; meanwhile, since B is a brutal man, C's disability to waive A's duty advances C's interest, otherwise, C may be assaulted by B. According to Sreenivasan's hybrid theory, A owes his or her duty to C and C has a right to A's return of the money. This outcome, however, is unacceptable because legally A owes the duty to B.

Secondly, hybridisation models cannot properly explain the existence of rights in criminal law.[500] Sreenivasan believed that in criminal law, prosecutors were the ones who possessed rights.[501] Prosecutors were sometimes able to exempt a person from bearing the duty not to commit a crime, and when prosecutors were unable to do so, this inability benefited the community on balance. However, individuals in the arena of criminal law again cannot exempt a person from bearing the duty not to commit a crime, and on balance this inability again benefits the community, as well as those individuals. Therefore, according to Sreenivasan's model, in criminal law, individuals also have rights, which, however, is different from his belief.

Thirdly, hybrid models cannot prevent expansion of the realm of rights. For instance, in the institution of third-party-beneficiary, A and B agree that B is under a duty to give C a gift. A can exempt B's duty, so A has the right under this agreement. However, according to Sreenivasan's hybrid model, C also has a right: C cannot exempt B's duty, and because of this inability, C is given a gift. This, however, constitutes an improper expanding of rights. On these grounds, Sreenivasan's hybrid theory is believed unable to avoid the improperness of the two main theories in explaining phenomena of rights.[502] As a result of such failure of combinatorial efforts, will theories and interest theories still constitute the two main theories one should employ when interpreting the concept of a right, among which this thesis agrees most with the Choice Theory.

[499] Kramer and Steiner, 'Theories of Rights', above n 64, 264.
[500] Ibid, 272.
[501] Sreenivasan, 'Duties and Their Direction', above n 481, 367–68.
[502] Kramer and Steiner, 'Theories of Rights', above n 64, 272.

3.4. Conclusion

All theories of rights can be interpreted in terms of two global models, namely will theories and interest theories. More specifically, entitlement, claim, power/capacity, or relation all imply either a will, a choice, a benefit or an interest: entitlement indicates either a will or a benefit; claim is similar to a choice; power/capacity or relation involves an interest.

Secondly, these two theories rest on influential philosophical and jurisprudential theories. The Will Theory was founded in Kant's rationalism and natural law tradition, conceiving of a right as a universalisable choice. The requirement of universalisability and human choice, on the one hand, denoted human rationality, believed by Kant to be key to achieving knowledge about the moral world. On the other hand, moral knowledge achieved by human rationality, such as the requirement of universalisability, was transcendental and predetermined. The Will Theory thus also relied on Kant's acceptance of natural law tradition.

The Benefit Theory, on the contrary, originated in Bentham's and Mill's commitment to empiricism and utilitarianism. The Benefit Theory viewed a right as a benefit. A benefit, first of all, concerned pleasure and pain, which were human experiences. The Benefit Theory, therefore, was built upon empiricism. Secondly, a benefit sought to augment pleasure and decrease pain, which was a fundamental concern of utilitarian philosophy.

The Choice Theory and the Interest Theory were established along with legal positivism. Specifically, the Choice Theory was connected to Hart's inclusive legal positivism, which included morality in acknowledging the existence of the law. The Choice Theory therefore defined a right as a choice: a choice presented a moral concern about a person's freedom to choose and his or her capacity to control.

The Interest Theory was constructed with Raz's, MacCormick's and Lyons's exclusive, institutional and expanded legal positivism respectively. The idea that a right was the interest that provided a sufficient reason for a duty was developed with Raz's conception of the law as an authoritative rationale for an action grounded in morality. The notion that a right was the interest acknowledged by the law that benefited a particular person in general situations was raised with MacCormick's definition of the law as an institutional fact, which based its existence on its moral acceptability among members of society. Lastly, the concept that a right was a legislative concern about the interest directly related to a duty was established by Lyons, who extended the emphasis on the role of morality in determining the acceptability of the law.

Finally, attempts to combine the two main theories have failed. Wenar's several functions theory conceived of the two theories as presenting different functions that a right might serve. However, his theory was built upon a false understanding of Hohfeldian incidents, and was more prone to collapsing into a version of interest theories. Sreenivasan sought to hybridise the two theories by viewing them either as alternatives for each other, or one theory as the purpose for the other. However, his theory leaded to unacceptable outcomes and thus could not avoid such implicit weaknesses.

In conclusion, will theories and interest theories are still the two most significant theories one can rely upon when interpreting the concept of a right. They, therefore, are the best theories through which this thesis can interpret existing arguments about the legal validity of capital punishment, abortion and euthanasia. As the interpretation goes, the thesis finds that the Choice Theory grounded in inclusive legal positivism is one that is able to provide a conclusion about the three issues in question; the Will Theory originated in rationalism and the natural law tradition, the Benefit Theory founded in empiricism and utilitarianism, and the Interest Theory developed in exclusive, institutional and expanded legal positivism all cannot do so.

Part Two
Interpreting Existing Arguments via the Two Main Theories of Rights

Chapter Four
Capital Punishment

4.1. Introduction

Capital punishment concerns a state's legal capacity to punish a serious crime by death. To date, researchers have identified several different arguments to support either the retention or abolition of capital punishment, including retributivism, deterrent effect, expenditure and irreversibility, public opinion and the right to life. These issues have already been outlined in chapter two. It is vital to note that all these arguments rest on certain accounts of the right to life. For example, retributivism can be seen as relying on the Will Theory; deterrent effect, expenditure and irreversibility may be explained by both the Benefit Theory and the Interest Theory; reasoning about the right to life is reliant on either the Interest Theory or the Choice Theory.

The retributivist argument was most vigorously argued for by Kant and Hegel. This argument, therefore, shares the same general lineage of argumentation that these two scholars employed in their philosophical thought overall. For Kant, retributivism was considered an integral part of the right to punish, since punishing retributively was the only way that one could restore the righteous situation, as demanded by the categorical imperative.[503] In terms of capital punishment specifically, this righteous situation was everyone having his or her right to life. Therefore, if a state had a right to apply capital punishment to murderers, its citizens must primarily have a right to life that was a universalisable choice. Kant's retributivism was based on his notion of a right to life according to the Will Theory. Hegel justified his idea of retributivism in a similar way to Kant and also held a similar conception of the right to life; Hegel's approach to retributivism, therefore, could also be explained by the Will Theory.

The argument disfavouring capital punishment advanced by Beccaria and Bentham, which emphasised the deterrent effect, was founded in a utilitarian tradition. This argument, therefore, could be seen as conceiving of the right to life in terms of the Benefit Theory. The deterrent effect was considered essential for the legitimacy of punishment because the latter was a kind of pain. According to the principle of utility, punishment was only justified if it brought more benefit to the society.[504] This benefit, most importantly, was the deterrent effect,

[503] Potter Jr, 'The Principle of Punishment is a Categorical Imperative', above n 90.
[504] Draper, 'Euthanasia', above n 7, 14.

intended to ensure fewer crimes in the future. Meanwhile, if punishment by taking a life caused pain, then having a life must be pleasurable. Once this pleasure had been incorporated into the law, it became a right to life. Through the principle of utility, the deterrent effect was inevitably connected to the Benefit conception of the right to life. Moreover, if we view expenditure and irreversibility as other types of pain or pleasure, arguments focusing on these issues can be seen as conceiving of the same explanation of the right to life.

The right to life can also be seen as relying on the Interest Theory. Life is something uniquely beneficial to either an individual or a state and therefore, takes the form of a right. Arguments that focus on human rights, particularly the special value and sanctity of life, quite probably rest on this more general interpretation of rights. The deterrent effect argument may also conceive of this interpretation if we consider the deterrence either as an interest that adds weight to, or competes with, the interest in life.

In addition, a right can still be taken as a choice, other than a will, a benefit or an interest. Arguments that lay emphasis on the notion of the right to life thus can rest on the Choice Theory, especially those insisting that such a right can be waived or forfeited. This chapter finds that the right to life argument resting on the Choice Theory provides an effective answer to the legitimacy of capital punishment.

4.2. Retributivism and the Right to Life as a Will

Kant advocated capital punishment because he believed that the nature of a right was a universalisable choice (as outlined in chapter three), which implied that a right to life demanded the strict law of retribution.[505] Hegel's attitude towards the death penalty, although built on an equal-value version of retribution, can be explained by similar assumptions about the nature of the right.

4.2.1. The Will Theory as the Grounds for Kant's Rights Regarding Punishment

Scholars believe that many ideas underlay Kant's retributivist attitude towards capital punishment, for example, the principle of equality, the broader concerns of justice and the notion that a person should be treated as an end rather than as a means.[506] However, one

[505] The possibility of justifying retributivism through concerns about rights has been noticed by Corlett; see 'Making Sense of Retributivism', above n 106, 85.
[506] For example, ibid, 105; Tunick, 'Is Kant a Retributivist?', above n 89; Byrd, 'Kant's Theory of Punishment', above n 90; Brooks, 'Kant's Theory of Punishment', above n 90.

important thing that Kant raised has been overlooked, namely a ruler's right to punish.[507] In fact, the topic of punishment was considered in the discussion of the Doctrine of Right in Kant's moral philosophy. Therefore, there is another way to understand Kant's retributivism, one that refers back to Kant's analysis of rights and conceives of retributivism through an interpretation of the right to punish.

This right is best explained by the Will Theory. The Will Theory, as presented above, is the idea that insists on the nature of a right as a universalisable choice. It means that a right must present a will of an act that could coexist with a similar action by everyone else. This is the demand of universality, outlined in the Doctrine of Right or the categorical imperative.[508] Kant set this demand as an 'a priori' that grounded the righteousness of every moral rule.[509] Every human law, no matter whether juridical or ethical, was only appropriate if it met this demand.

According to this demand, a human being was believed to have an innate right to 'independence from being constrained by another's choice', a right to property, and so on, because one person's independent choice and possession of property could co-exist simultaneously with similar choices and possessions of other people.[510]

If these rights addressed things that could be universalised, it meant that the opposite action, i.e. depriving anyone of his or her right, could not. For example, stealing another's money could not be exercised universally. Once the opposite action had been taken, the demand of universality was breached.[511] A further action, opposite to the wrong action, therefore needed to be taken for the situation of universality to be restored. This further action was punishment.[512] As a result, anyone who agreed that he or she had a right, must accept punishment; punishment constituted a necessary part of a right.[513] This was why Kant said 'right and authorization to use coercion mean one and the same thing.'[514]

Willing the punishment was again a right, since punishing the wrong action could also be universalised. One robbery being punished could coexist with every robbery being punished.

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[507] Kant, *The Metaphysics of Morals*, above n 45,104.
[508] Ibid, 23.
[509] Ibid, 10, 164.
[510] Ibid, 30, 37.
[511] Ibid, 25.
[512] Ibid; Byrd, 'Kant's Theory of Punishment', above n 90, 194.
[513] Kant, *The Metaphysics of Morals*, above n 45, 108.
[514] Ibid, 25.

Therefore, according to the Will Theory, there existed a right to punish as a natural deduction from notions of independence and the right to property. In the state of nature, this right belonged to everyone.[515] In a state where Kant's discussion of rights lay, this right was held by the ruler alone.[516]

Moreover, the Will Theory even implied a right to punish retributively. If punishment ought to be executed in a universalisable way in order to qualify as a right, punishing proportionately was the only possible method to make this acceptable.[517] Neither excessive nor light punishment would be accepted by everyone; both the convicted and potential criminals would refuse to be punished severely. On the contrary, victims of crime and other people who might benefit from punishment carried out on others would not agree to punish lightly.[518] A right as a universalisable choice, in this sense, required *lex talionis*, namely strict retribution.[519]

Furthermore, the right to punish retributively indicated a right to capital punishment. If seizing the perpetrator's property constituted proper punishment for the violation of one's right to property, the right to property included a right to punish by taking the perpetrator's property.[520] If a constraint on the perpetrator's freedom was the proper punishment for the violation of one's right to live unconstrained, the right to unconstrained choices implied a right to punish by having the perpetrator constrained. Regarding murder and 'other crimes against the state that can only be paid for by death',[521] death, in Kant's view, was the no-more-no-less punishment.[522] Therefore, there may even be a right to enact capital punishment that served as a natural deduction from a certain right. This right was the right to life.

It is important to note that Kant did not discuss life as a right *per se*. Rather, he conceived the preservation of oneself and one's capacity to enjoy life as a virtue in the ethical law, for this preservation only comprised duties to oneself. [523] However, because another could take away life, life itself does regard external actions. Still, the idea that everyone is willing to be alive is

[515] Ibid, 90.
[516] Ibid, 90–1, 104.
[517] Potter Jr reached the same conclusion, but he resorted to the categorical imperative rather than Kant's theory of rights; see Potter Jr, 'The Principle of Punishment is a Categorical Imperative', above n 90.
[518] Ibid, 174.
[519] Latin, means 'reciprocal coercion' which is another term for strict retribution. See Kant, *The Metaphysics of Morals*, above n 45, 25. See also ibid, 172.
[520] Kant, *The Metaphysics of Morals*, above n 45, 106.
[521] Such as rebellion; see ibid,106–7.
[522] Ibid, 106.
[523] Ibid, 151–52, 175.

the type of situation that could be universalised. In this sense, Kant was likely to admit that there was also a juridical right to life.[524]

Summing up these points, Kant's notion of the right to punish, especially the right for a state to inflict capital punishment upon its citizens, indicated that a right to life was a universalisable choice. Strict retribution, as the justification for Kant's support of capital punishment, could therefore be seen as relying on his conception of the right to life according to his Will Theory.

4.2.2. The Will Theory as the Grounds for Hegel's Abstract Rights and Punishment

In regards to rights and punishment, Hegel proposed similar thought to Kant. These similarities make it possible to interpret Hegel's retributivist philosophy on the issue of capital punishment through Kant's Will Theory.[525]

Primarily, Hegel held a similar conception of rights to Kant. A right, in Hegel's terms, was an actualisation of the essence of human spirit (*Geist*).[526] To understand this conception, the various meanings of the words 'actualisation', 'essence' and 'spirit' need to be clarified. Essence (*Wesen*) was the conceptual core of a thing that defined what the thing was.[527] It stood in contrast to 'existence' or 'appearance' (*Erscheinung*), which denoted a certain example of that thing.[528] For instance, the notion of punishment is the essence of that entity, while lethal injection is its appearance. Essence, when it was not related to any certain example via its content, existed in a condition of abstract universality and indeterminacy.[529] Purely the notion of punishment without any example of it would satisfy such a condition. This condition needed to be negated by appearance. The appearance of the thing, since it was a certain example, was particular and determined. It was, therefore, the negation of essence.[530]

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[524] For example, Lance K Stell, 'Dueling and the Right to Life' (1979) 90(1) *Ethics* 7.
[525] This thesis agrees with recent influential interpretations of Hegel's work, namely that he sought to accept and extend Kant's critical philosophy. For this interpretation and other competing ones, see Paul Redding, 'Georg Wilhelm Friedrich Hegel' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (2015) <http://plato.stanford.edu/entries/hegel/> '2. Hegel's Philosophy'.
[526] G W F Hegel, *The Logic of Hegel: Translated from the Encyclopedia of the Philosophical Sciences* (William Wallace trans, Oxford University Press, first published 1874, 1892 ed) 8; Hegel, *The Philosophy of Right*, above n 96, 11.
[527] Hegel, *The Logic of Hegel*, above n 526, 176–80.
[528] The two words are different translations of the German word; this thesis opts to refer to it as 'appearance'.
[529] Hegel, *The Logic of Hegel*, above n 526, 176–80.
[530] Ibid.

Meanwhile, the appearance of the thing again needed to be negated by essence. The appearance, because it was a certain example, was contingent and not actual if it became deprived of its essence.[531] For example, this would happen if we were to watch a lethal injection taking place, but had no concept that it was a type of punishment. Therefore, a second negation was required, which was the negation of the appearance by the essence. Through this two-step negation, the essence and the appearance of the thing were united into an 'Idea' (*Idee*).[532] To use the example already cited, the Idea was a certain injection combined with the concept of punishment.

During this formation of the Idea, the process of actualisation was fulfilled.[533] The abstract universality and indeterminacy (of the essence) were actualised by 'particularity' or 'subjectivity' (*Besonderheit*) (of the appearance),[534] and the contingency (of the appearance) was actualised by the abstract universality (of the essence).[535] They both ended in a concrete universality, or 'individuality' or 'singularity' (*Einzelnheit*) (of the Idea).[536] This process of actualisation, together with the two-step negation, constituted Hegel's fundamental logic of triaddialect and was also applied to Hegel's political philosophy which regarded the concept of rights and actualisation of the human spirit.

The essence of human spirit, according to Hegel, was free will.[537] It needed to be negated and actualised by its appearances in order to generate certain actions or achieve certain things.[538] These certain actions and the achievement of certain things again needed to be negated and actualised via connection with their essence, i.e., free will. The outcome of that actualisation, namely the Idea, was a right. A right, therefore, was an actualisation of the essence of human spirit. This right, however, was still an abstract right, since it needed to be actualised by further negations until it reached the absolute spirit, i.e. the political state.[539]

Notwithstanding, this abstract right was a concrete will, quite similar to Kant's universalisable choice. On the one hand, the essence of the right seemed to be a type of categorical imperative

[531] G W F Hegel, *Hegel's Science of Logic* (A V Miller trans, Humanity Books, first published 1812-1816, 1969 ed) 198, 414; G W F Hegel, *Phenomenon of Spirit* (A V Miller trans, Clarendon Press, first published 1807, 1977 ed) 11.
[532] Hegel, *The Philosophy of Right*, above n 96, 11; Hegel, *The Logic of Hegel*, above n 526, 291.
[533] Hegel, *The Logic of Hegel*, above n 526, 257–59.
[534] Redding, 'Georg Wilhelm Friedrich Hegel', above n 525.
[535] Hegel, *The Logic of Hegel*, above n 526, 291.
[536] Ibid.
[537] G W F Hegel, *Selections from Hegel's Phenomenology of Spirit* (Howard Kainz trans, The Pennsylvania State University Press, 1994) 18.
[538] Ibid, 18–20.
[539] Redding, 'Georg Wilhelm Friedrich Hegel', above n 525, '3.1.2. Science of Logic' [16].

obtained from Kant's *Wille*, since both the essence and the categorical imperative were universalisable. However, there still were important differences. The categorical imperative was more formal and derived from the transcendental world through pure practical reason. On the contrary, the essence was material and was conceived through mutual recognition among historically situated persons in the sensible world.[540] On the other hand, the appearance of the right was analogous to the goal or the action that was intended by *Willkür*. If so, then connecting the essence with its appearance in the external world resembled applying the categorical imperative to real human actions. Actualisation of the free will thus was the universalisation of a human choice. On these grounds, and extending the origin of Kant's demand of universality to include the sensible world, the abstract right could be explained by referring to a universalisable choice.

Other than holding a similar conception of rights to Kant, Hegel also applied his views about punishment in a similar way. Hegel again believed that the state's punishment was an action which was necessary for returning the world to a righteous situation. The righteous situation, according to Hegel, was where everyone had an abstract right,[541] analogous to Kant's idea that everyone had rights. The criminal act, therefore, was an action that negated the righteous situation. The further negation of it, i.e., punishment, was thus required to restore that situation to equilibrium.

However, in distinction to Kant, Hegel considered the negation by criminal act as not only the reverse of a righteous situation but, more importantly, a violation of the criminal's essence of spirit.[542] Punishment as an opposite of the crime, therefore, was not restricted to the purpose of restoring the prior situation, but was also intended to restore the free will of the criminal.[543] In this sense, Hegel believed a criminal was honoured in having punishment inflicted.[544]

Nonetheless, Hegel still agreed with Kant that retribution was significant in realising the negation of the criminal act, although it did not constitute the strict way. According to Hegel, all crimes were injuries in essence.[545] The negation must therefore be conducted in a value-equal way that caused the same amount of injury as the crime.[546] Inflicting greater

[540] Hegel, *Phenomenology of Spirit*, above n 531, ch III. See also Redding, 'Georg Wilhelm Friedrich Hegel', above n 525, 'Phenomenology of Spirit' [8], '3.1.2. Science of Logic' [12].
[541] Hegel, *The Logic of Hegel*, above n 526, 8; Hegel, *The Philosophy of Right*, above n 96, 11.
[542] Hegel, *The Philosophy of Right*, above n 96, 81, 82.
[543] Ibid, 80–7.
[544] Ibid.
[545] Ibid, 83–4.
[546] Ibid, 84.

punishment would produce extra injury that would bring about new wrongs to be negated, while inflicting less punishment would leave some wrongs yet to be negated. Neither of these courses of action was able to restore completely either the righteous situation or the free will of the criminal, with the sole exception of retribution. This would be the same for the crime that deprived others of life. Retribution equal in value to a life was life alone.[547] Therefore, to punish murder, execution by death was the only just punishment.[548]

Like Kant, Hegel did not address the issue of the right to life explicitly, but his view that a state should negate murder by capital punishment implied the existence of such a right. Otherwise, there would be no righteous situation to be negated by murder, and then negated again by the death penalty.

In consideration of these, although Hegel believed in a quantitative retribution, which was not equivalent to Kant's qualitative version, he embraced a similar method of justification as Kant, as well as a similar conception of the right to life. Therefore, if Kant's support of capital punishment could be interpreted as resting on his Will Theory, Hegel's attitude could also be subjected to the same interpretation, providing that we bear in mind Hegel's historically grounded thought processes, in contrasted to Kant's 'residual dogmatically metaphysical aspects'.[549]

4.2.3. The Right to Life as a Will

If the retributivism argument implies that the right to life is a universalisable choice, then the first argument it could refute is to justify capital punishment according to its deterrent effect. As Kant and Hegel argued, negating the legitimacy of capital punishment on the grounds of deterrence treated the criminal as a means rather than an end or a rational being, which was a condition that could not be universalised; as has already been made clear, both men demanded universality in their philosophical systems.[550] For Kant, if everyone subjected himself or herself to serve as another's tool, there would ultimately be no one left to use that tool. For

[547] Ibid, 85.
[548] Ibid.
[549] 'Residual dogmatically metaphysical aspects' refers to Kant's wish to retain aspects of the transcendental world. See Redding, 'Georg Wilhelm Friedrich Hegel', above n 525, '2.3 The Post-Kantian (sometimes called the non-metaphysical) View of Hegel' [2].
[550] Hegel, *The Philosophy of Right*, above n 96, 82, 83; Kant, *Ground Work of Metaphysics of Morals*, above n 45, 27. See also Byrd, 'Kant's Theory of Punishment', above n 90, 193; Hart, *Punishment and Responsibility*, above n 51, 81–2.

Hegel, subjecting oneself to tool-status was against the universal essence of the human spirit, namely free will.[551] The deterrent effect argument, therefore, was unacceptable to both men.

Some scholars believe that Kant and Hegel both used expressions that indicated support for the deterrent effect argument: prominent examples include 'the people's security', 'preservation of the community and the population', 'ordered liberty' and 'the validity of a society's laws',[552] all of which served as the purpose that punishment ought to accomplish in their theories. However, these particular expressions were not employed in the context of deterrence; rather, they were considered important because they met the demand of either Kant's categorical imperative or Hegel's abstract right.[553] That everyone be secure, alive and free were concepts which were readily universalisable. Therefore, by using those terms, Kant and Hegel proposed that what a state wanted to achieve by punishment, including capital punishment, was the restoration of a righteous situation. Concerns about the consequences of these verbal quibbles are largely superficial.[554]

Moreover, even those utilitarian concerns may actually revolve around the general idea of punishment; they did not necessarily provide the justification for a particular penalty for a particular type of crime.[555] As Hegel believed, the purpose of a general idea of punishment was different from the justification of a particular penalty. The former could take into account deterrence and rehabilitation, while the latter should only regard the criminal act itself.[556] Capital punishment for murder belonged to the latter category and therefore ought not to be justified by a deterrent effect. On these grounds, the retributivism argument interpreted in terms of the Will Theory naturally implies a rejection of the deterrence argument.

Secondly, some points of refutation to the retributivism argument can themselves be refuted. If retribution is conceived of as the requirement of the nature of a right, and is therefore a universalisable choice, it no longer adopts the disguise of revenge. Revenge is again not the grounding reason for capital punishment; rather, capital punishment is grounded on that all-important concept of the right to life. For Kant, capital punishment followed naturally from

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[551] Hegel, *The Philosophy of Right*, above n 96, 82, 83.
[552] Tunick, 'Is Kant a Retributivist?', above n 89, 63, 64, 67; Brooks, 'Kant's Theory of Punishment', above n 90, 213; Brooks, 'Is Hegel a Retributivist?', above n 90, 9. For these terms, see Kant, *The Metaphysics of Morals*, above n 45, 107, 145, 337; Kant, *Lectures on Ethics*, above n 45, 55–6; Hegel, *The Philosophy of Right*, above n 96, 168–9.
[553] Kant, *The Metaphysics of Morals*, above n 45,145, 'Introduction', xxi; Hegel, *The Philosophy of Right*, above n 96, 168–69.
[554] Corlett, 'Making Sense of Retributivism', above n 106, 83.
[555] Hegel, *The Philosophy of Right*, above n 96, 82.
[556] Ibid, 82, 83; Rawls, *Collected Papers*, above n 89, 22–4.

the right to life; it had nothing to do with the 'vicious' idea of revenge.[557] Although Hegel admitted that punishment was primarily revenge, he believed that it could be justified through the more immediate idea of an abstract right.[558] With the existence of such a right, wrongful revenge was transformed into a righteous restoration of the right.[559] Punishment by death, therefore, was no longer revenge but rather a key requirement of the right to life.

As to the unique status of capital punishment, even though the Will Theory demanded the strict law of retribution in Kant's system, Hegel still accepted the principle of value-equalisation. In the latter sense, retribution is similar to the principle of proportionality between punishment and crime, as recent penologists insisted.[560] It, therefore, can be generally applied. The unique thing about capital punishment is that the equaliser is life itself rather than property or freedom.

More than that, if the life of the murderer is the only thing deemed proportionate to the life he or she has taken, life imprisonment with or without the possibility of parole cannot serve as a just punishment.[561] If life imprisonment brings more suffering than the deprivation of life, this greater suffering will generate a new wrong, which will itself need to be negated. Conversely, if life imprisonment brings less suffering than the offence committed, that will render the restoration of the righteous situation incomplete. As a result, the Will Theory convinces us that the 'unique' death penalty is the only just punishment for murder (and maybe, as Kant believed, other capital crimes such as rebellion).[562]

Other than the two points supported by the Will Theory discussed above, the Will Theory also implies that the person who gets punished must be a criminal.[563] Punishing an innocent person cannot be universalised because this will subject everyone under punishment and therefore negates the essence of spirit. If one did nothing wrong, the punishment becomes a wrong that then needs to be negated. Normally, this negation could be made through other forms of compensation, such as financial payment. However, given that one cannot bring back life, once an innocent person has been executed, the righteous situation will never have the opportunity of being restored. In this sense, although the deterrent effect and the unique

[557] Kant, *Lectures on Ethics*, above n 45, 214.
[558] Hegel, *The Philosophy of Right*, above n 96, 85.
[559] Steinberger, 'Hegel on Crime and Punishment', above n 89.
[560] Principle of proportionality means that 'penalties be proportionate in their severity to the gravity of the defendant's criminal conduct'. It is a basic requirement in criminal justice. See Andrew von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 *Crime and Justice* 55.
[561] Haag, 'The Ultimate Punishment', above n 98.
[562] Kant, *The Metaphysics of Morals*, above n 45, 106–7.
[563] Ibid, 105.

application can be dismissed as possible justifications for the abolition of the death penalty, both the inevitability and irreversibility of wrongful killing provide strong grounds to oppose the practice.

Fourthly, the Will Theory cannot prevent the problem of unfairness or unjustness. On the one hand, if there are innocent people being executed, then it stands to reason that there must be some guilty criminals who are spared. The application of capital punishment to the innocent person instead of the criminal is therefore unfair. On the other hand, the long waiting time endured by convicted criminals on death row does comprise a 'double punishment'. If the right to life as a universalisable choice requires the deprivation of the criminal's life to account for crimes that destroyed life, the long waiting time appears to be excessive to demands. In addition, more complicated procedures of trial, particularly stricter requirements about evidence that are believed to lower the chance of a judicial mistake, will worsen the unjust punishment for those on death row. Conversely, the less complicated procedures and less strict requirements about evidence will worsen the gap of unfair punishment between the criminal and the innocent person. In real life, the mandate of punishing fairly seems to contradict the mandate of punishing justly. We then confront a serious problem about which side, on balance, one ought to choose.

It looks like Kant and Hegel were suggesting that we depend on public opinion. Kant argued that in a state which did not apply capital punishment, a murderer could legitimately claim not to be executed although the state introduced the punishment in his or her case, since the state should not refute itself.[564] Similarly, Hegel's historical concerns also made him believe that 'the quality or magnitude' of punishment was variable 'according to the condition of civil society'.[565] In either sense, whether a state incorporated capital punishment was subject to the common will within that state during a certain period. For the modern world, this will is presented by public opinion, especially formal referendums. Therefore, what the majority says provides the ultimate evidence for public attitudes for or against capital punishment.

In consideration of this, although the retributivism argument interpreted via the Will Theory provides solid support for the legitimacy of the death penalty, it only works on a theoretical level. In practice, few states would practice capital punishment on such grounds. Retributivism resting on the Will Theory, therefore, is unable to serve as a promising argument.

[564] Ibid, 107. See also Potter Jr, 'The Principle of Punishment is a Categorical Imperative', above n 90, 107.
[565] Hegel, *The Philosophy of Right*, above n 96, 169–70.

4.3. Deterrence, Expenditure, Irreversibility and the Right to Life as a Benefit

Both Beccaria and Bentham opposed capital punishment because of its inability to bring about overall good to the society, particularly in terms of a deterrent effect.[566] Rather, capital punishment produced evils such as consuming state funds and the ever-present risk of killing the innocent. These arguments can all be seen as conceiving of the right to life via the Benefit Theory.[567]

4.3.1. The Benefit Theory and Justification of Punishment

The idea of taking a right as a benefit, as noted in chapter three, derived from Bentham and Mill's empirical belief that the principle of utility was the fundamental rule that guided not only human behaviour but also legislation. Punishment, as an important part of the law, thus derived its legitimacy on the same grounds.[568]

The principle of utility primarily proposed that the ultimate end of society be the 'greatest happiness of the greatest number'.[569] This meant that the aim of the law was to guide human behaviours in that direction. A right served this aim exactly. On the level of legislation, it encouraged an action that was beneficial to an individual, and therefore the wider public, by revealing and, even more importantly, adding benefits to the encouraged action. On the behavioural level, these benefits rendered a person naturally prone to take that action when he or she weighed gains and losses; the aim of public good, therefore, was achieved. The extra legal benefits a right brought made the result even better.

Punishment, as a kind of penalty, however, seemed irreconcilable with this overall goal. In contradistinction to a right, it produced a pain rather than pleasure.[570] According to Bentham, inflicting punishment reduced the public good rather than augmenting it.[571] This implied that the practice of punishment could not be accepted as a proper application of the principle of

[566] Beccaria, *On Crimes and Punishments*, above n 108, 10–1; Bentham, *Theory of legislation*, above n 54, 353–54. See also Bedau, 'Bentham's Utilitarian Critique of the Death Penalty', above n 1, 1036.
[567] For a similar claim, see Tony Draper, 'An Introduction to Jeremy Bentham's Theory of Punishment' (2002) 5 *Journal of Bentham Studies* 1.
[568] Bentham discussed many sanctions: physical, political, moral and religious; see ibid, 8. However, this thesis only concerns itself with legal punishment.
[569] Bentham, *A Fragment on Government*, above n 54, 3.
[570] Bentham, *An Introduction to the Principles of Morals and Legislation*, above n 54, 36; Bentham, *The Works of Jeremy Bentham*, above n 54, vol 1, 390.
[571] Bentham, *An Introduction to the Principles of Morals and Legislation*, above n 54, 158.

utility by merely regarding the punishment itself or a past crime. Rather, it could only be justifiable if it brought about future good.[572] This good, argued Bentham and Mill, was to prevent future criminal actions occurring.[573] The deterrent effect, as a result, was exactly what was asked for by the principle of utility at the legislative level.

Meanwhile, the deterrent effect was only realisable when the punishment also worked along the principle of utility on the behaviour level. The punishment must disclose the pains that crimes incurred as well as attached legal sufferings.[574] Anticipating such pain would necessarily reduce one's inclination to offend because all humans preferred pleasure and sought to avoid suffering.[575] On these grounds, if capital punishment was to be retained, it must meet both the legal and the behavioural demands of the principle of utility.[576] This meant, firstly, that pain must be inflicted legally, not just because of any one individual's desire for revenge. Secondly, by inflicting such pain, broader social good ought to be achieved, namely deterring others from carrying out similar crimes in the future.

However, according to both Bentham and Beccaria, the death penalty met the first demand but not the second. Harnessing empirical evidence, they pointed out that capital punishment did not reduce the number of future murders.[577] It neither 'saved' lives nor enhanced public safety. Therefore, the pain associated with the punishment could only justify its abolition.[578] The same went for irreversibility and expenditure. As Bentham and Beccaria believed, the risk of taking innocent lives and spending state funds in the process were both inadmissible since they increased the existing suffering from execution with more pain overall.[579] This tilted the balance between pleasure and pain that had already turned against capital punishment.[580] These two men, therefore, argued even more strongly that capital punishment ought to be abolished.

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[572] Ibid.
[573] Ibid. For Mill's view, refer to Bedau, 'Bentham's Utilitarian Critique of the Death Penalty', above n 1.
[574] Bentham, *An Introduction to the Principles of Morals and Legislation*, above n 54, 157, 166; Mill, *Utilitarianism*, above n 54, 246.
[575] Draper, 'An Introduction to Jeremy Bentham's Theory of Punishment', above n 567, 16.
[576] Bentham, *An Introduction to the Principles of Morals and Legislation*, above n 54, 166–71.
[577] Bentham, *The Works of Jeremy Bentham*, above n 54, vol 1, 531. See also Bedau, 'Bentham's Utilitarian Critique of the Death Penalty', above n 1.
However, Mill disagreed with Bentham and Beccaria on this point. Mill believed that capital punishment had a deterrent effect; see Bedau, Bentham's Utilitarian Critique of the Death Penalty', 1037.
[578] Bentham, *The Works of Jeremy Bentham*, above n 54, vol 1, 635.
[579] Ibid, vol 1, 449, 450, 528. See also Bedau, 'Bentham's Utilitarian Critique of the Death Penalty', above n 1, 1052.
[580] Bentham, *The Works of Jeremy Bentham*, above n 54, vol 1, 449, 450, 528. See also Bedau, 'Bentham's Utilitarian Critique of the Death Penalty', above n 1, 1052.

Other than rejecting capital punishment on the grounds of the principle of utility, Bentham and Beccaria also implied a right to life by admitting that the punishment satisfied the behavioural demand. The primary pain inflicted by execution was the taking of a criminal's life. Its opposite, namely having a life, must be pleasurable; therefore, pain constituted the loss of one's pleasure in life. If this pleasure had ever been acknowledged by the law, it then became a right to life. In this sense, if we take the principle of utility to understand the arguments raised on the grounds of deterrence, expenditure and irreversibility, these arguments could all be seen as conceiving of the right to life as fundamentally a legal benefit of a person.

4.3.2. The Right to Life as a Benefit

If the right to life is a benefit in Bentham's sense, it means, on the one hand, that this right has no substantial difference from other sensible pleasures.[581] Although it is acknowledged by the law and guaranteed by duty, it motivates one's behaviour in the same way as other pleasures. Thus such a distinction only exists quantitatively.[582] On the other hand, the exercise of this right also needs to adhere to consequentialist concerns about utility.[583] Whether to protect this right or not is therefore determined by whether the right (or the sacrifice of that right) could best augment overall happiness. On these grounds, in order to justify a pain that takes away life, for example, capital punishment, that pain must bring more overall benefit than life itself.[584]

The legitimacy of capital punishment, as a result, does not depend on the deontological concern of retributivism. Rather, it relies on two queries: first, whether the death penalty can bring benefit; second, if it can do so, which benefit has more weight, life itself or the benefit that capital punishment might bring. If capital punishment brings no overall benefit or the benefit it brings is less than that of life, the right to life should prevail, and punishment by death should be abolished. If capital punishment is highly beneficial and surpasses the pleasure one has in life, the right to life ought to be sacrificed in order to realise the benefit to be had from capital punishment.

The first query, however, relies on empirical evidence, which means that arguments about deterrent effect, expenditure and irreversibility are not immune from refutations of

[581] Except for the right to social security: Bentham believe that to be a fundamental right and thus different from other benefits. See Bentham, *The Works of Jeremy Bentham*, above n 54, vol 3, 452.
[582] Ibid.
[583] Draper, 'An Introduction to Jeremy Bentham's Theory of Punishment', above n 567, 12.
[584] Bentham, *An Introduction to the Principles of Morals and Legislation*, above n 54, 166. See also ibid.

retentionists because similar sets of evidence can be interpreted in multiple ways and so provide opposing outcomes. According to abolitionists, there is evidence to support the view that capital punishment has not a deterrent effect, consumes state revenue and inevitably results in some wrongful killing.[585] There is also evidence to demonstrate that capital punishment has a deterrent effect, saves revenue and that the possibility of wrongful killing can be constrained to a minimum.[586] When the evidence is uncertain, whether capital punishment is beneficial is also uncertain.

Moreover, even if the evidence on the matter seems clear cut, whether capital punishment itself is beneficial still remains uncertain. Considering both the arguments and evidence presented in this chapter, and from earlier in chapter two, there are several possible results in regards to the benefit and the pain capital punishment may bring, other than the fact that it takes away the life of a criminal.

1. Capital punishment has no deterrent effect, costs more and inevitably results in some wrongful killing;
2. It does have a deterrent effect, costs more and inevitably results in some wrongful killing;
3. It has no deterrent effect, costs less and inevitably results in some wrongful killing;
4. It has no deterrent effect, costs less and does not result in any wrongful killing;
5. It has no deterrent effect, costs more and does not result in any wrongful killing;
6. It has a deterrent effect, costs less and inevitably results in some wrongful killing;
7. It has a deterrent effect, costs more and does not result in any wrongful killing;
8. It has a deterrent effect, costs less and does not result in any wrongful killing.

Among the eight possibilities, capital punishment can only be obviously rejected when the evidence shows that it has no deterrent effect, costs more and inevitably results in some wrongful killing, i.e., that brings no benefit whatsoever. If any of the evidence proves the opposite, it would be hard to tell whether the death penalty should be allowed or not, since the benefit it might bring would need to be compared to the loss of the criminal's life (as of the concern of the second query noted above)

To make the eight theoretical results easier to compare, the deterrent effect is divided into both security of members in a given society and the lives of persons capital punishment might spare by reducing some potential criminals' desire to kill. Moreover, in consideration

[585] Bedau, 'Death Penalty as a Deterrent: Argument and Evidence', above n 114; Gerald Smith, 'The Value of Life', above n 123.
[586] Shepherd, 'Murders of Passion', above n 119; Bedau, *The Death Penalty in America*, above n 125, 193; Lehtinen, 'The Value of Life', above n 118, 241.

of the possibility that the state might execute the innocent but leave criminals unpunished, the life of the convicted is further divided into the life of a real criminal or the life of an innocent person. The same goes for other lives spared by capital punishment. The overall gains and losses when a state inflicts capital punishment — including the loss of the criminal's life — therefore are presented as such:

1. When capital punishment has no deterrent effect, costs more and inevitably results in some wrongful killing, gains a state will achieve by inflicting it are nothing, while the state will lose the life of a criminal (or possibly the life of an innocent person) and revenue;

2. When it has a deterrent effect, costs more and inevitably results in some wrongful killing, gains a state will achieve by inflicting it are security of members and the lives of persons spared by reducing some potential criminals' desires to kill, both guilty and innocent, while the state will lose the life of a criminal (or possibly the life of an innocent person) and revenue;

3. When it has no deterrent effect, costs less and inevitably results in some wrongful killing, gains a state will achieve by inflicting it are only revenue, while the state will lose the life of a criminal (or possibly the life of an innocent person);

4. When it has no deterrent effect, costs less and does not result in any wrongful killing, gains a state will achieve by inflicting it are revenue, while the state will lose the life of a criminal;

5. When it has no deterrent effect, costs more and does not result in any wrongful killing, gains a state will achieve by inflicting it are nothing, while the state will lose the life of a criminal and revenue;

6. When it has a deterrent effect, costs less and inevitably results in some wrongful killing, gains a state will achieve by inflicting it are security of members, revenue and the lives of persons spared by reducing some potential criminals' desires to kill, both guilty and innocent, while the state will lose the life of a criminal (or possibly the life of an innocent person);

7. When it has a deterrent effect, costs more and does not result in any wrongful killing, gains a state will achieve by inflicting it are security of members and the lives of persons spared by reducing some potential criminals' desires to kill, both guilty and innocent, while the state will lose revenue and the life of a criminal;

8. When it has a deterrent effect, costs less and does not result in any wrongful killing, gains a state will achieve by inflicting it are security of members, revenue and the lives of persons spared by reducing some potential criminals' desires to kill, both guilty and innocent, while the state will lose the life of a criminal.

It is obvious that the situation depicted in ⑤ is similar to that of ①. Regardless of whether the life taken by capital punishment belongs to a criminal or an innocent, there are losses involved. Given that infliction of capital punishment gains nothing, losses always have greater utilitarian value; the additional value brought by cost-savings adds more weight to this. In such a situation, the death penalty ought to be abolished.

However, other than ① and ⑤, all other situations cannot reach a certain conclusion on whether gains or losses of capital punishment have more value. Firstly, it is hard to weigh the life of the convicted with state expenditure as in situations ③ and ④. Normally, the life of an innocent person is considered far more valuable than money. Therefore, when there exists the possibility of wrongful killing as in ③, most people disregard any financial loss and support abolition of the death penalty. However, the money lost might be a significant amount and could have been used to rescue more innocent lives; in this case, we cannot convincingly claim that the benefit of life retained is more than that of money.

Beyond that, even if the life sacrificed is only a criminal's, as in ④, it again cannot be justified that the life of a criminal is less valuable than that of an innocent person and is therefore less valuable than money. Viewed from the surface, the life of a criminal does seem less valuable than the life of an innocent, since a criminal must have done something harmful, both to others specifically and to society more broadly. However, the case is not necessarily so. To explore deeper, let us consider an example. Imagine an innocent person who is homeless; he or she brings no harm to society, but is of little benefit. Also imagine a criminal who happens to be a prominent scientist who will make great contributions to the whole world. Regarding their benefit collectively, the death penalty seems more applicable to the homeless but innocent person rather than the scientist while guilty for murder. However, such uneven application of capital punishment between a homeless and a scientist is unacceptable. There ought to be no difference between the value of life of a guilty person and that of an innocent person, nor between a homeless and a scientist. Bentham seemed to agree with this when he said 'everybody to count for one and nobody for more than one'.[587] Notwithstanding, if the life of the guilty person has the same value with that of an innocent person, it is still hard to determine whether the value in life should prevail, since the money-saving-lives problem still comes in.

[587] Mill cited and accepted this dictum; see Mill, *The Collected Works of John Stuart Mill*, above n 54, vol X, 207.

Secondly, when the death penalty has a deterrent effect as in ⑥ and ⑧, gains by inflicting capital punishment contain 'security of members', 'other lives of the criminals' and 'other lives of the innocent', the result is still unclear. For the situation depicted in ⑧, there is only the life of the criminal to be compared to all the other values. Regarding types of pleasure, the losses are apparently less. Even if we solely consider lives on both sides, gains still win according to the number of people affected in a positive way. After all, the number of people being punished must be less than that of those not being punished. When money-saving value and security of members is further added, it would seem that there are good legal grounds for practicing capital punishment.

However, life cannot be valued by number; two lives are not more valuable than one. The number of lives as capital punishment spares therefore is unable to justify its application. Besides, losses by inflicting capital punishment may involve life of an innocent person, as in ⑥. Justifying capital punishment on the grounds of numbers of lives affected is thus more unacceptable since this might lead to permitting the state to punish an innocent person for a deterrent effect.[588]

The Benefit Theory may contend that we need not only take the number of people affected into account, but also consider the value of each life. However it is again hard to choose between a brilliant scientist and a group of homeless people. In addition, if all of those values are yet to be compared, concerns about security of members cannot be justified to triumph over the life of a criminal once and for all. These problems remain in ② and ⑦, with the situation even more complex when the expense value moved to the side of losses.

Given these eight possibilities, the Benefit Theory seems incapable of providing a definite answer about the legitimacy of capital punishment, unless there is proof to support a situation exactly as in ① or ⑤. However, although we are sure to be in either of those two situations, when taking into consideration the proposed substitute punishment, the answer still becomes obscure. Bentham, Beccaria and many other scholars believed that this substitute was perpetual imprisonment.[589] Since that course of action took no life, it was able to prevent the most significant loss, namely the life of the criminal. The convicted felon's freedom was lost

[588] For example, Rawls raised this concern; see Rawls, *Collected Papers*, above n 89, 24, 27, 28.
[589] Beccaria, *On Crimes and Punishments*, above n 108, 68–9; Bentham, *The Works of Jeremy Bentham*, above n 54, vol 1, 450, 531.

but, compared to death, this pain was much less severe; therefore, that course of action was more justified overall.[590]

Notwithstanding, Mill might disagree with this view. When Mill gave the highest rank to liberty,[591] he might have implied that freedom was even more valuable than life.[592] Life imprisonment took away a larger part of happiness than execution. Therefore, according to the principle of utility, capital punishment ought to be applied rather than life imprisonment. If this is the case, then it seems that even if capital punishment brings no benefit, it needs not necessarily to be abolished; further comparisons between capital punishment and alternative penalties are needed, again rendering it difficult to achieve a convincing answer.

Worse than that, the comparison may become even harder since there are more benefits and losses to be counted than those already discussed in this section, for example, the abolitionists' commitment to the counter-deterrent effect.[593] Firstly, as pointed out by retentionists, whether capital punishment has a counter-deterrent effect is uncertain.[594] Secondly, even if capital punishment is proved to have a counter-deterrent effect, this effect must still be weighed alongside the many other gains and losses that capital punishment brings.

More importantly, there are many people who benefit or incur loss as the indirect result of a particular individual's life.[595] This section solely concerns the benefit of the life holder. However, that does not mean the life holder is the only one who benefits by his or her life: relatives, friends, a class teacher, a manager, and even another person party to a contract all benefit simply by virture of that person being alive and doing normal things in everyday human society. Conversely, a victim (or relatives of a victim) harmed by said individual will benefit from his or her execution. The same situation can arise for a multitude of other gains and losses. If all the gains and losses belonging to all the people who have interacted with that individual also need to be counted in, the sum-total evaluation becomes overwhelmingly complex.

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[590] Bentham, *An Introduction to the Principles of Morals and Legislation*, above n 54, 159.
[591] Mill, *The Collected Works of John Stuart Mill*, above n 54, vol XIII, 474; vol XXVIII, 268.
[592] Mill did not explicitly admit that liberty was more important than life; he only claimed that liberty was the highest pleasure. His emphasis on liberty over life thus is only an inference drawn from his ideas. Similar inference could see Michael Clark, 'Mill on Capital Punishment — Retributive Overtones?' (2004) 42(3) *Journal of the History of Philosophy* 327, 327, 328.
Some scholar may contend that such inference is inappropriate, because one must be alive to be capable of enjoying liberty. However this view would give the highest rank to life rather than liberty, which is in confliction with Mill's idea.
[593] Bohm, 'Karl Marx and the Death Penalty', above n 114, 285.
[594] Dezhbakhsh and Shepherd, 'The Deterrent Effect of Capital Punishment', above n 121.
[595] Siegfried Van Duffel, 'The Nature of Rights Debate Rests on a Mistake' in Brian Bix and Horacio Spector (ed), *Rights: Concepts and Contexts* (Ashgate, 2012) 325.

On these grounds, neither the deterrent effect argument, nor the expenditure argument, nor the irreversibility argument, all of which rest on the Benefit Theory, can produce reliable answers about the legitimacy of capital punishment. Evidence and comparisons are all contestable, with the result that a definite answer is unlikely to be obtained.

4.4. Deterrence, the Right to Life and the Right as an Interest

Differently from Bentham and Mill, modern interest theorists have defined a right as a unique interest. Although these scholars still see it as an interest subject to the principle of utility, it ought to be a unique interest. This interest ought to provide enough reason for a duty (and relate to the core of the right), or to benefit a particular person in general situations, or to be directly connected with the obligation and intended by the law to benefit a subject.[596] This uniqueness makes such an interest take the form of a right and hence distinguishes it from other types of benefits. Life itself constitutes such a unique interest. Arguments that emphasise both human rights and the value and sanctity of life, therefore, can be seen as conceiving of the Interest Theory's explanation of the right to life.

4.4.1. The Individual Right to Life and Public Benefits

If life constitutes a special interest for an individual then, on the one hand, the problem of counting too many people's benefits that is associated with the Benefit Theory can be prevented. Rather than considering every kind of benefits a person could obtain, Interest Theorists highlight those most connected with the right holder.[597] This connection not only confines the realm of the interest but also restricts the scope of right holders involved. Regarding individuals' relationship with life, only the benefit of possessing life constitutes enough reason for a duty. The life possessor is the only person who benefits under normal circumstances, as intended by the law. Therefore only the interest of the life holder as regards his or her life needs to be considered.

On the other hand, the interest in life can weigh down other concerns about gains and losses. For example, the interest in life is taken as more significant than the value of saving money. Compared to life, expenditure on punishment is not enough to hold another to a duty. Although the low cost of state revenue may benefit a person under common circumstances, it does not indicate any particular person. Reducing expenditure is not even directly related to

[596] Raz, 'On the Nature of Rights', above n 57, 195; MacCormick, 'Rights in Legislation', above n 44, 152; Lyons, 'Rights, Claimants, and Beneficiaries', above n 57.
[597] Lyons, 'Rights, Claimants, and Beneficiaries', above n 57, 176.

an obligation. As a result, saving money cannot qualify as a right that rivals the right to life; it is merely a kind of public benefit, or what MacCormick called 'common good'.[598] When the criminal is believed still to have the right to life, concerns about the cost of trial and execution appear insignificant. According to this model, capital punishment seems to be wrong and ought to be abolished.

However, when considering arguments that focus on the deterrent effect and security of members, the answer is no longer simple. According to the Interest Theory, security of person also qualifies as a right and has been incorporated as one in the ECHR. According to Article 5, everyone has the right to 'security of person'. This right is not only intended to benefit a particular individual in most circumstances, but also inflicts duties on states not to deprive of that benefit illegally.[599] The interest in security is again a unique interest and thus similar to the interest in life.

The interest in the right to security of person therefore ought to be considered because the state's decision on whether to inflict capital punishment has an impact on security of both the criminal and others: infliction of capital punishment threatens security of the criminal but enhances that of others, while prohibition of it enhances security of the criminal but threatens that of others. The interest in the right to security of person still needs comparison with the interest in the right to life. The comparison notwithstanding, as noted above in the discussion of the Benefit Theory, is uncertain. An answer that capital punishment ought to be prohibited, therefore, cannot be reached definitively.

Some may try to reach such an answer by resorting to Raz's practical justificatory nexus of core rights and derivative rights. Since the core right functioned as the origin of the derivative right, it was broader and more significant than the latter.[600] As a result, if the right to life could be seen as a core right and the right to security of person as its derivative, a clear answer would be achieved: capital punishment is wrong because it violates the more significant or core right to life.

From the surface, the right to security of person derives from the right to life because the protection of human life requires a safe public environment. However, this relationship is not necessarily sound. As noted above, security of person can be considered in terms of other

[598] MacCormick, 'Rights in Legislation', above n 44, 150.
[599] Article 5 of ECHR stipulates that '[e]veryone has the right to liberty and security of person.'
[600] Raz, 'Legal Rights', above n 57.

people' lives as well. Therefore, when the latter conflicts with the criminal's right to life, the right that clashes is actually different individuals' right to life; then it becomes problematic to protect the criminal's right to life. It is again uncertain if the state should protect other people's lives just because there is greater number of people influenced. When the possibility of executing the innocent exists, which side the state should stand with becomes even more dubious. To answer these questions, we again step into the realm of the impossible comparison as happens in the Benefit Theory.

Worse than that, even if we take security of person to be another type of public benefit, not a right, the criminal's right to life still may not dominate matters. The notion of stable society is also incorporated in international covenants and can serve as an exception to the protection of the right to life. For instance, the ECHR states that one's right to life can lawfully be deprived when it is necessary to prevent prison breaks, quell a riot or insurrection, or maintain the life of a nation during wartime.[601] This means that although the interest in life normally takes the form of a right, it is never absolute. Instead, it always needs to be balanced with the greater public benefit of security. In these terms, the legitimacy of capital punishment is still subject to difficult comparisons. Even worse, the Interest Theory is inclined to side with a state's right to life, which makes an answer all the more difficult.

4.4.2. The State's Right to Life

Bentham insisted that a right holder could only be an individual.[602] There was no entity beyond individuals and therefore no interests beyond individual interests since only an individual could feel pleasure and pain.[603] The interest of a group of people was no more than the collection of the interests of each member in that group. Therefore, the group could not hold a right.

Interest Theorists, however, believed differently. For them, interest did not equal pleasure but was instead something that usually benefited someone.[604] When the law intended a person to benefit from a duty, this was not confined to a natural person with nervous sensation.[605] A legal person still met these requirements and therefore was able to possess a right.[606] The

[601] ECHR art 2(2), art 15(2).
[602] Jones, *Rights*, above n 44, 27–8.
[603] Bentham, *An Introduction to the Principles of Morals and Legislation*, above n 54, 12.
[604] MacCormick, 'Rights, Claims and Remedies', above n 57, 338; MacCormick, 'Rights in Legislation', above n 44, 152; Lyons, 'Rights, Claimants, and Beneficiaries', above n 57, 176.
[605] MacCormick, 'Rights, Claims and Remedies', above n 57, 338; Raz, 'Human Rights in the Emerging World Order', above n 57, 54.
[606] MacCormick, 'Rights, Claims and Remedies', above n 57, 338; MacCormick, 'Rights in Legislation', above

extensive inclusion of non-human persons, such as corporations and associations, as right holders in modern law, strongly supports this view.

According to the Interest Theory, in cases of capital punishment, the state is the most important legal person with a right. Each state is basically composed of citizens. The life of an individual is therefore not only important to that person alone but also relates to the wellbeing of the state. The state's interest in citizens' lives is enough to inflict a duty of care on each citizen not to kill; the interest normally brings good to the state; the interest is also closely connected with that duty and incorporated in the law. For these reasons, although the Interest Theory rules out the need to consider other individuals' benefits obtained via one's life, it does not exclude that of the state. The state has a right to control citizens' lives.[607]

If one has a right, that means he or she is entitled to take any reasonable measures to exercise that right. When the life of a citizen is the object of a right belonging to the state, then it seems the life of the citizen is totally at the mercy of the state. Whether and how to apply capital punishment, therefore, depends absolutely on the decision of the state, and particularly its legal frameworks. This fits the current situation as regards the practice of capital punishment among states — some states have abolished the practice while others regularly employ it.

However, the notion of the state's right to life comes into conflict with the idea that the right to life, as a human right, is inalienable: the life or death of any given person is not decided by the person himself or herself, but is rather determined by the state. Moreover, the fact that a state has a right to life still does not determine whether or not that state ought to execute dangerous criminals: considerations about expenditure, security of members and the possibility of wrongful killing still emerge. A state not only has an interest in its citizens' lives, but also benefits from the execution of dangerous criminals by saving money, enhancing social stability and ensuring less loss of innocent lives. These interests also exist in the form of the state's rights: these interests put the government and its officials under a duty not to misuse such power, and impose citizens with the obligation not to carry out serious

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n 44, 152; Lyons, 'Rights, Claimants, and Beneficiaries', above n 57, 176.

[607] Raz explicitly stated that the state could have a right; see Raz, Human Rights in the Emerging World Order', above n 57. In somewhat less committed fashion, MacCormick and Lyons implied that a legal person could have a right; see MacCormick, 'Rights, Claims and Remedies', above n 57, 338; MacCormick, 'Rights in Legislation', above n 44, 152; Lyons, 'Rights, Claimants, and Beneficiaries', above n 57, 176.
A proponent of the Interest Theory may simply deny that the state could be a holder of rights; however, according to the idea of the Interest Theory, such deduction is inevitable.

criminal activities such as murder. The right to life thus cannot allege supremacy above these rights straight away; comparison is once more inevitable.[608]

Furthermore, even when the state can compare interests and reach a workable conclusion about which is more worthy, a solution about the legitimacy of capital punishment may still not be easy to get. Although the state has a right to govern citizens' lives, it cannot be denied that, simultaneously, each citizen has a right to his or her own life. If these two rights come into conflict — for instance, if the state finds it best to execute a criminal while the criminal's life still has value — it is hard to advise which one should take priority. The right to security of person provides a particularly challenging test case because the state may again find it best enhances social stability by executing a criminal while the criminal secures his or her life when capital punishment is not inflicted.

Viewed in this way, arguments relying on the Interest Theory are inevitably subject to the same difficulties as those that rest on the Benefit Theory. Although the Interest Theory confines the realm of the interest and therefore improves the particularity of the right in question, it still ultimately focuses on benefits, thereby rendering it susceptible to balancing and counter balancing a wide variety of refutations. A definitive answer about whether the death penalty should be allowed is therefore impractical when approached via the Interest Theory. This chapter now moves to discuss arguments about capital punishment in terms of the Choice Theory, arguing that, by employing this methodology, we can arrive at a definitive answer to the legitimacy of capital punishment.

4.5. The Right to Life and the Right as a Choice

Arguments that stress the right to life as all-important may also be seen as resting on Hart's proposition that one should interpret this right as a choice. Hart personally believed that the general justifying aim of a system of punishment should be utilitarianism or consequentialism; while for a specific type of crime, punishment ought to be distributed retributively, that is a person should only be punished if he or she has committed a crime and the punishment must be in accordance with the magnitude of the crime the person has committed.[609] However, Hart was against the application of capital punishment: he held a 'liberal' view towards such matters. [610] He did not realise that his Choice Theory provided an alternative argument for an

[608] Lyons believed it was necessary to make a comparison between costs and benefits for all affected; see Lyons, *Ethics and the Rule of Law*, above n 57, 157.
[609] Hart, *Punishment and Responsibility*, above n 51, 6–13.
[610] Hart, 'Hart Interviewed: H L A Hart in Conversation with David Sugarman', above n 51.

alternative attitude, i.e., the retentionist attitude. This chapter takes Hart's Choice Theory and uses it to present another way Hart might employ to support the application of capital punishment.

4.5.1. Could the Right to Life be a Choice?

According to Hart, a right is a choice; this implies that the right confers the right holder with an ability to control the action of the duty bearer.[611] The right holder presents his or her will within the realm of the right, and the duty bearer must respond.[612] Specifically, this control comprises three aspects, each with two alternatives: beforehand, the right holder could either ask the duty bearer to perform that duty or exempt him or her from performing it; when the duty was not performed (or not properly performed), the holder could choose either to resort to state power to have that duty performed (for example, via litigation) or waive that option; the right holder could further choose either to demand that the duty bearer pay compensation when the duty was breached or exempt the latter from paying.[613] Each of the two aspects in any one of the three phases necessarily conflicts with each other, and so the right holder can only choose one of them.

Among these six, two aspects are the most significant. One is exemption from duty, and the other is resort to state force, since choosing either would render all other options meaningless.[614] If the right holder decided to exempt the duty bearer from fulfilling the duty, he or she could no longer ask the latter to fulfil it, or resort to state force to fulfil that duty, or demand compensation. If the right holder filed a suit against the duty bearer demanding compensation, then the duty must not have been properly fulfilled.

However, the right to life seems lacking in some of these aspects. The first is the ability to exempt the duty. Killing another person, even with his or her consent, is widely accepted to be a crime.[615] Therefore, the holder of the right, in fact, does not have the option of allowing the duty bearer to disrespect his or her life. More than that, the right holder still cannot choose not to sue the violator of his or her life. Murder, as regulated by most criminal laws, is a crime prosecuted by the state, not by individual citizens. The victim and his or her relatives have no absolute control over the procedure. As long as murder has occurred, the perpetrator must be charged, no matter what the right holder wants. In this sense, regarding the right to life, the

[611] Hart, 'Bentham on Legal Rights', above n 23, 22.
[612] Benditt, *Rights*, above n 304, 14.
[613] Hart, 'Bentham on Legal Rights', above n 23, 22. See also Steiner, 'Working Rights', above n 45, 240.
[614] Steiner, 'Working Rights', above n 45, 242.
[615] See Mendelson and Bagaric, 'Assisted Suicide through the Prism of the Right to Life', above n 192.

holder can only choose to ask the duty bearer to fulfil the duty, or to request the help of the state force, or to ask for or waive compensation; waiving the right or prosecution is not an option because the state always sees fit to proceed with a murder trial.

Lacking almost all the other half of such a choice would seem to make 'the right to life' disqualify as a right under such conditions. Even Hart himself appeared to have believed so, categorising 'the right to life' as a kind of unilateral liberty.[616] It only conferred the holder with the freedom either to do or not to do something, without the option of the opposite. This kind of freedom was not a real liberty or a right in Hart's view; rather, a real right ought to be a bilateral liberty that allowed the holder to choose both to do and not to do.[617] Hart thus believed that there only existed a duty not to kill, but not a right not to be killed.[618]

4.5.2. The State's Right to Life?

Nonetheless, this does not necessarily mean that the notion of a choice is inapplicable when it comes to explaining the right to life for problems surrounding capital punishment. Steiner believed that if we must stick to the full choice, the state could be seen as having the right to life. In Steiner's view, although an individual did not have the ability to exempt anyone from fulfilling the duty of not killing him or her, or alternatively not to sue the latter for an act of murder, the state did, both logically and actually, hold such reserve power.[619] In reality, prosecutors who represented the state in a criminal case were able to decide whether to charge a person with a crime and whether to raise and accept plea bargaining. Moreover, the state could still apply the practice of probation to exempt the convicted person from serving any sort of sentence. These practices demonstrated the state's ability to exempt the bearer's duty of not killing, as well as not suing the bearer if the duty was not properly performed.[620] The state, therefore, had full control over the actions of the duty bearer.

In logic, the state's ability to employ all the above techniques was revealed through the ranks of government officials. An inferior official A may show a disability to exempt one's duty not to kill. However relating to this disability, his superior B must own an immunity from exempting one's duty not to kill. Although B may be still unable to waive that immunity and exempt the duty, his superior C again owned an immunity related to B's disability. If we move further up the ladder of authority, there must be an official D who had the ability to

[616] Hart, 'Bentham on Legal Rights', above n 23, 12; Hart, 'Legal Rights', above n 51, 166–67.
[617] Hart, 'Bentham on Legal Rights', above n 23, 12; Hart, 'Legal Rights', above n 51, 166–67.
[618] Hart, 'Bentham on Legal Rights', above n 23, 30–1.
[619] Steiner, 'Are There Still Any Natural Rights?', above n 80.
[620] Ibid, 108, 111.

waive the immunity that related to the inferior official's disability. This ability, projected down the rank, would finally enable A to exempt the duty.[621] As a result, the state controlled the right to life in the form of a full choice as depicted by the Choice Theory. The state not only could ask its citizens to fulfil that right and carry out the duty not to kill, but also could exempt them from that duty. Capital punishment is a good example of such exemption because it relieves both the state and its officials from the duty to respect the criminal's life. In this sense, if the right to life is a choice held by the state, as Steiner suggested, the application of capital punishment ought to be allowed. This punishment is not the violation of the right to life but instead the exact exercise of that right.

However, a state-owned right is still impracticable for several reasons. Firstly, alienation of the holder of the right from the possessor of life occurs again, which is strongly rejected by international declarations and covenants. Secondly, a state-owned right conflicts with the basic idea of the Choice Theory. Viewing a right as a choice, in consideration of its emphasis on the holder's control over the duty, requires the right holder to be able to have, as well as to be able to generate a will. This will must be concrete in form, which means that a collective will — the will of the state, especially of a democratic nation — cannot underscore the existence of a right. As a result, although the state can take full control of the duty, the state ought not to be taken as the holder of the right to life.

Thirdly, even if we expand the realm of the right holders to include the state and admit that the state can have a right to control its citizens' lives, unacceptable outcomes will be inevitable. On the one hand, once the state owns the right, it will be entitled to any action to exercise that right. The state will be able to choose to exempt the duty not to kill serious criminals and legalise capital punishment. It will also be able to lift the duty not to kill persons other than dangeous criminals, for example, the insane or the disabled. In Steiner's theory, the insane or the disabled did not possess a right to life, not even a shared one as conceived of in the Interest Theory. Their lives, therefore, would be totally at the mercy of the state. On the other hand, if the state is the only entity with full choice over the duty not to kill, then every right in criminal law will be controlled solely by the state. Citizens will merely bear duty while having no rights. If this were the case, the Choice Theory could no longer insist that each individual is a 'small-sovereign' with the institution of rights.[622]

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[621] Hillel Steiner, *An Essay on Rights* (Wiley, 1994) 71–2.

[622] Duffel, 'The Nature of Rights Debate Rests on a Mistake', above n 595, 115. Spector again believed that the Choice Theory emphasised individual autonomy; see Spector, 'Value Pluralism and the Two Concepts of Rights', above n 64.

Lastly, if we reconsider Hohfeldian jural-correlates between disability and immunity, the state's right to life may not even exist. In the Hohfeldian system, the disability of official A does not relate to official B's immunity. Rather, the immunity related ought to be the criminal's 'relief' of being exempted from the duty not to kill.[623] Steiner's justification of a state's rights that are channelled through the ranks of officials to the top one who possessed a full choice, therefore, was based on a false understanding of the relationships among Hohfeldian incidents. The state's right to life, as a result, is again unjustified.

4.5.3. The Individual Right to Life

Reformulating the notion of a choice was Hart's solution to expounding the idea of the right to life, once he had accepted the critique that his theory had been unable to include it.[624] Two possible ways to proceed were raised: one was the differentiation between a special right and a general right; the second was admitting an incomplete choice could still qualify as a right.[625]

Regarding the first solution, a special right was a right that existed between two particular parties. Only the right holder in this relationship had the control over the other party's performance. Other individuals did not have control, nor could the holder ask any other to perform the duty. This right aimed to confer the holder with the ability to control fully the liberty of another.[626] The right holder, therefore, had all the six aspects of ability regarding a special right, as discussed earlier.

A general right, on the contrary, was enjoyed by every individual qualified to be a right holder. All these individuals, at the same time, bore a duty not to violate one another's right. A general right was therefore a defensive right that protected the right holder from being controlled by another.[627] The right holder of a general right thus had no ability to waive his or her right, nor to exempt another from the duty regarding that right. The right to life could be a type of general rights: it was possessed by every individual and at the same time inflicted a duty on him or her not to kill others.

Viewing the right to life as a general right has certain advantages over Steiner's idea of the state's rights. Firstly, the character of inalienability is maintained because the right no longer separates its holder from the possessor of life; both entities are finally owed to one person.

[623] Duffel, 'The Nature of Rights Debate Rests on a Mistake', above n 595, 114.
[624] Hart, *Essays on Bentham*, above n 51, 185–86, 192–93.
[625] Hart, 'Are There Any Natural Rights?', above n 51, 41–6.
[626] Ibid.
[627] Ibid.

Secondly, the idea of the choice does not need to be abandoned to realise the inclusion of the right to life. The special right can be interpreted as an active choice, while the right to life, as a general right, can be considered as a passive choice.[628] Hart's Choice Theory, therefore, retains its core idea.

However, the right to life as a general right seems to conflict with the legal institution of self-defence. If the right to life is a general right, this implies that the right is absolute and therefore that any form of taking a life is a violation of the right.[629] As a result of this notion, even if one breaches his or her duty and violates another's right to life, the other cannot legitimately exercise his or her right to self-defense and kill the perpetrator. Notwithstanding, the institution of self-defence is universally permitted, the right to life thus must not be absolute; there must be a condition in which taking another's life is seen to be legally right.

This condition exists when another tries to take one's life illegally; in doing so, the other must waive his or her right to life. The victim, therefore, can deprive the criminal of life legitimately. This is the only way through which the institution of self-defence can be justified in legal terms. However, if this is the case, the holder of the right to life does not necessarily lack the ability to waive his or her right. By committing a murder, he or she waives it. In such cases, the right to life might constitute a special right.

Notwithstanding, this right cannot qualify as a special right. Although the right holder gains both the ability to waive his or her right to life and the ability to exempt another from performing the duty not to kill, he or she still cannot determine whether to sue the duty bearer or not. The choice he or she has is still an incomplete choice. If a special right constitutes a full choice, the right to life still cannot be owed to an individual. To differentiate between the special right and the general right, therefore, does not seem to provide a good solution.

Hart's second proposition then needs to be brought into view, namely that an incomplete choice could still qualify a right. As he pointed out, although a right ought to include all six aspects of control, not all rights met this criterion.[630] A right that enabled its holder with all six abilities was the one with a complete choice, while those that lacked some of the abilities were obviously incomplete.[631] The latter were rights that existed only under certain

[628] Coyle, '"Protestant" Political Theory and the Significance of Rights', above n 71.
[629] Some scholars believe that the right not to be killed is one of the most important absolute rights, for example, Alan Gewirth, 'Are There Any Absolute Rights?' (1981) 31(122) *Philosophical Quarterly* 1, 16.
[630] Hart, 'Bentham on Legal Rights', above n 23, 26.
[631] Ibid.

restrictions, but their status as rights still could not be denied, as long as they were not short of all the opposite options. After all, the right holder had at least some bilateral control over the performance of the duty.[632] For example, regarding the fundamental freedom from arbitrary arrest, the right holder is unable to exempt the state from the duty not to arrest him or her arbitrarily, but this does not mean this freedom is not a right.[633] The right to life can also be seen as such a kind of right.[634] It contains all the aspects demanded by the Choice Theory, except the ability not to sue for life-violating behaviour.

If the right to life constitutes such a choice, it echoes the conception of the right held by Locke, Blackstone and other scholars: when the right holder commits a serious crime, especially one that threatens the life of another, he or she ought to lose his or her right to life as consequence.[635] This concept of a right is one that can provide a workable solution to the legitimacy of capital punishment. Firstly, defining the right to life as an incomplete choice is able to prevent the alienation of the right holder from the possessor of life as successfully as the idea of a general right: if the right is an incomplete choice, individuals are again the only entities who can have it.

Secondly, better than the idea of a general right, the notion of the right to life as an incomplete choice needs less adjustment for the Choice Theory. There is no need to differentiate between a general right and a special right; rather, this notion merely needs the acknowledgement of an incomplete choice above the insistence on a complete choice. Moreover, this notion also does not conflict with current legal institutions, for example, the institution of self-defence. It rather explains and supports such institutions.

Thirdly, and most importantly, a solution to the legitimacy of capital punishment is possible via such a notion. On the one hand, choice emphasises the control and the freedom conferred by a right. As long as a right exists, it will be given priority.[636] No consequentialist concern needs to be brought in, and no interests or benefits (or other interests or benefits if considering a choice as a type of benefit) need to be balanced. Public interest will give way to the right,

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[632] Ibid.
[633] Ibid, 27–8.
[634] Hart only applied this idea to explain the notion of immunity, but Coyle believed it could also be applied to explain the idea of an inalienable right, such as the right to life. See Coyle, '"Protestant" Political Theory and the Significance of Rights', above n 71, 45.
[635] Blackstone, *Commentaries on the Law of England*, above n 144, vol 4, 373–79; Camus, *Resistance, Rebellion and Death*, above n 144, 129, 143.
[636] Duffel, 'The Nature of Rights Debate Rests on a Mistake', above n 595, 115; Spector, 'Value Pluralism and the Two Concepts of Rights', above n 64; Mill, 'Parliamentary Debate on Capital Punishment within Prisons Bill', above n 54, 1053–054.

and the right holder's wellbeing will again be subject to his or her own choice. Therefore, as regards the issue capital punishment, the right to life of the convicted person is the only right that needs to be considered. On the other hand, given that the idea of a right as an incomplete choice concurs with the views of Locke, Blackstone and other scholars, if we employ this concept of choice to interpret the right to life, it will also generate a similar answer for the alternative view, namely the retentionist attitude towards capital punishment. A person is seen to waive his or her right to life when he or she commits a serious crime. The state, therefore, can legitimately deprive that person of life in order to inflict punishment and ensure social order.

Fourthly, and lastly, viewing the right to life as an incomplete choice even explains why and how capital punishment is allowed. In making a choice to commit a serious crime, the perpetrator necessarily waives his or her right to life and therefore subjects himself or herself to a legal process that may result in capital punishment. It is the perpetrator's decision in choosing to waive his or her right to life that renders capital punishment applicable in such cases. Convicted felons on death row, in this sense, are not forced to die but rather choose to do so.

Notwithstanding, the convicted person is seen as choosing to waive his or her right to life only if that person chooses to commit the serious crime voluntarily. If the person committed a crime out of coercion or lacking of alternatives, his or her such action should not be taken as a sign of waiving the right to life, because the choice he or she made was not a free one; rather, the person was forced to make that choice. For example, if A killed B under the coercion of C that if A did not kill B, C would kill A, A's taking of B's life is such a coerced action. A did not *choose* to commit the crime freely; he or she thus did not choose to waive the right to life. Capital punishment in such cases, therefore, should not be allowed.

4.6. Conclusion

From all the above arguments resting on any of the four possible explanations of the right to life, only arguments employing the Choice Theory can provide us with a legally robust answer. The retributivism argument relying on the Will Theory cannot do so. When considering a right to life as a universalisable choice, the counter argument proposed on the grounds of deterrent effect can be rejected. Critiques that focus on capital punishment's similarity to revenge, its unique application of retribution, and the suggestion of alternative punishment — life imprisonment with or without the possibility of parole — are refuted as

well. Theoretically, retributivism can support retention of the death penalty; however, in practice, the Will Theory is unable to allow the existence of wrongful killing, and is prone to rely on public opinion to determine the admissibility of capital punishment. This means the retentionist attitude does not have legal viability according to this theory.

Neither can consequentialist arguments that focus on deterrence, expenditure, irreversibility and the right to life defend this or an abolitionist position. Whether interpreted as conceiving of the right to life via the Benefit Theory or the Interest Theory, they are prone to view this right as a kind of benefit that should be compared with all other kinds of benefit, or alternatively a unique interest that requires balancing against public benefits or other unique interests. The underlying justification is clear: the side with more benefits or interests necessarily succeeds.

However, results of the comparison are hard to determine. Firstly, existing evidence produces conflicting outcomes, especially in terms of whether a deterrent effect exists or not. For expenditure and the substitute punishment, namely permanent imprisonment, evidence that ought to show ongoing expenditure required if capital punishment is replaced by life imprisonment is even lacking. Such comparison is therefore impossible to carry out. Secondly, even if enough consistent evidence is obtained, evaluation is still difficult: there is no widely shared answer to the question of how much weight should be assigned to a certain value or right. Thirdly, wider considerations about benefits in one's life that are enjoyed by people other than the life holder, such as family members, cannot be prevented by employing the Benefit Theory, and may even confuse the issue further. Although to a large extent these considerations are narrowed by the Interest Theory through confinement of the realm of the interest, the state's interest cannot be excluded. Comparison among multiple parties with multiple levels of benefits is still inevitable.

Some may argue that the comparison is not necessarily impossible since many advanced societies have been allowing both the court and the legislator to weigh the action of the government against the value of a right for a long time. The principles of proportionality and balancing were produced as a result.[637] This means we have rules to guide the comparison. However, judicial decisions and legislatures differ between states and vary over time. A definitive answer to the legality of capital punishment, therefore, cannot be guaranteed.

[637] Moshe Cohen-Eliya and Iddo Porat, 'American Balancing and German Proportionality: the Historical Origins' in Brian Bix and Horacio Spector (ed), *Rights: Concepts and Contexts* (Ashgate, 2012) 463.

The only chance of an answer lies in a right to life argument that conceives of this right as a choice. Initially, the right to life may seem to conflict with the idea of a choice, since the right holder lacks both the required ability to exempt another from the duty not to kill and the ability not to sue the perpetrator who has violated that right. Notwithstanding, the right to life can be seen as an incomplete choice that provides for all the required abilities except one not suing. This incomplete choice indicates that the holder of the right to life waives this right when he or she takes another's life. The waiver exempts others from the duty not to kill him or her and legitimises the institutions of both self-defence and capital punishment.

As a result, a right to life argument resting on the Choice Theory provides us with a legally robust answer to the dilemma of capital punishment, namely a retentionist one. The next two chapters will proceed to make a similar case for the issues of abortion and euthanasia.

Chapter Five

Abortion

5.1. Introduction

Debate about abortion mostly concerns two problems: one is whether the foetus has a right to life; the other is whether the foetus's right to life prevails over the mother's other rights. Arguments that are raised for or against either of these two problems can also be seen to rest on different interpretations of the right to life. Regarding the first issue, the belief that the foetus has a right to life can be seen as resting on the Interest Theory or the Benefit Theory, while the opposing view can be seen as relying on one of the Interest Theory, the Will Theory, or the Choice Theory.

The argument that insists life begins at conception — and therefore that the foetus has a right to life from a very early stage — can be viewed in terms of the Interest Theory. The Interest Theory defines a right as a unique interest that provides sufficient reason for a duty, is directly related to a duty, or is intended by law to benefit a subject.[638] If life starts at conception, a foetus has such an interest in life; he or she thus has a right to life.

The argument that the foetus has a right to life can also be seen as resting on the Benefit Theory. The foetus again has a benefit in life because being alive benefits him or her. However, the Benefit Theory, as it conceives of a right as a sensible benefit, requires that the right holder be able to feel pain before he or she can hold such a right. The foetus's right to life, therefore, starts when he or she starts to develop a nervous system.

The opposite view, namely that the foetus does not have a right to life can again be seen as relying on the Interest Theory. As MacCormick implied and Singer expressed explicitly, the precondition of personhood is required for one to have a right.[639] The foetus, therefore, has no right to life, although he or she has a certain wellbeing that needs to be considered.

The argument that insists personhood is a requirement for one to be a right holder can also be seen as resting on the Will Theory or the Choice Theory. According to the Will Theory, a right is a universalisable choice. It requires the holder to be an independent agent who can

[638] Raz, 'On the Nature of Rights', above n 57, 195; MacCormick, 'Rights in Legislation', above n 44, 152; Lyons, 'Rights, Claimants, and Beneficiaries', above n 57.
[639] MacCormick, 'Rights in Legislation', above n 44, 150; Singer, *Practical Ethics*, above n 42, 65, 76–81.

carry out an action all by himself or herself. Meanwhile, the agent ought to be fully rational and able to understand the demands of the categorical imperative in order to carry out that action in compliance with it. As a result, a right holder must be an adult with personhood, not a developing child, and certainly not an unborn baby; a foetus is thus disqualified on these grounds.

The same requirement is held by the Choice Theory. This theory holds that the foetus does not have a right to life because to conceive of a right as a choice means that the right holder should have at least some control over the performance of the duty. Therefore, one must be able to exercise control in order to qualify as the holder of a right. The foetus, however, does not possess that capacity. He or she thus cannot be viewed as having any rights, including the right to life.

Other than the foetus's right to life, the issue of abortion is strongly bound up with the mother's rights. Thus logically speaking, when a certain theory of rights is employed to explain the foetus's right to life, the mother's rights ought to be expounded via the same theory. In all four theories of rights outlined above, the mother is always considered to have rights. However, different theories of rights vary in their understanding of whether the mother's right should always triumph over those of the foetus. According to both the Interest Theory and the Benefit Theory, the foetus's right to life has to be balanced with the mother's other rights. For the Interest Theory with the requirement of personhood, the foetus's wellbeing has also to be compared with the mother's rights. For the Will Theory and the Choice Theory, only the mother's rights ought to be taken into account because the foetus is viewed as not having rights in both theories. This chapter finds that only the argument employing the Choice Theory that rejects the foetus's right to life, and instead concerns itself only the mother's rights, can arrive at a definitive answer.

5.2. The Foetus's Right to Life, the Mother's Rights and the Interest Theory

The Interest Theory is applicable in explaining both the argument that a foetus possesses a right to life and the argument that he or she does not, depending on whether personhood is required as a precondition for a being's interests to be taken as a right.

5.2.1. The Foetus's Right to Life and the Mother's Rights

If the requirement of personhood is not considered, the argument that believes one's right to life starts at conception because one's life begins at conception can be seen as resting on the Interest Theory's explanation of a right. This argument views life as a kind of interest that brings good to human kind. As long as a life is emerging, under common circumstances, the holder — in this case the foetus — will be benefited. Moreover, this benefit qualifies as a special interest for the foetus. On the one hand, the benefit in life is both enough for and directly related to a duty inflicted on another, specifically not to kill the foetus. On the other hand, that benefit is again the core of the right to life. In this sense, a foetus's interest in life meets all the criteria required by the Interest Theory, with only one exception. This exception is that the benefit has not been universally acknowledged as a legal benefit to the foetus. When the above argument contends that a foetus ought to be recognised in law as having a right to life, the last criterion is finally met.[640] The right to life, therefore, is explainable by a unique interest.

If a right is an interest according to this definition of the Interest Theory, that right will come into being once the unique interest exists. Regarding the right to life specifically, it will come into being as long as life has begun, no matter how small the entity developing in the mother's womb. There is no necessity to pay attention to whether the foetus can qualify as a person or not, in contrast to the argument that insists on personhood as a precondition. Neither must we be concerned about when exactly the foetus starts to feel pain, as the Benefit Theory is bound to do. Once we agree that life begins at conception, the right to life will take effect from the same point in time. This view precisely supports the foetus's right to life; abortion, as a result, must be *prima facie* wrong since it deprives the foetus of his or her right to life.

However, problems occur if the right to life is viewed as an interest. Firstly, a need for comparison between different rights belonging to different right holders exists. Other than the right to life of the foetus, there still are the rights of the mother to take into consideration. As abortion advocates declare, the mother's freedom from discrimination, her right to privacy, her right to plan a family and her right to bodily integrity will all be impacted if her abortion is disallowed.[641] For the mother, these rights also function as unique interests and therefore are explainable via the Interest Theory. A comparison thus exists between the right to life of the foetus and the four rights of the mother just listed. The answer to this comparison is not easy to achieve: it is hard to determine whether the mother's rights should win because of the

[640] Puppinck, 'Abortion and the European Convention on Human Rights', above n 158.
[641] Cook, 'Human Rights and Reproductive Self-determination', above n 173; Michel, 'Abortion and International Law', above n 178; Thomson, 'A Defense of Abortion', above n 155.

numbers of rights affected, or the interest in life should prevail over the considerations of all other interests.

Anti-abortionists argue that the foetus also has a right not to be discriminated against, that the constitutionality of the right to privacy is yet to be proven, and that the right to bodily integrity is based on a false analogy.[642] Therefore the rights that come into conflict are in fact twofold: the right to life and freedom from discrimination for the foetus, and the freedom from discrimination and the right to plan one's family for the mother. However even so, the rest of rights in conflict are still hard to compare. Adding of an extra right for the foetus while removing two rights from the mother does not balancing things overall: the interest of the foetus in life and freedom from discrimination again does not necessarily prevail over the interest of the mother in planning her future life.

Secondly, other persons may have claims on the foetus's life, similarly to the situation in which a state has a right to control its citizens' lives. The foetus's mother, father and wider family may still benefit from his or her life, especially the mother, who has a special connection with her baby. The connection may not be analogous to the relationship between a healthy person and someone using his or her body to maintain blood homoeostasis,[643] but the fact cannot be denied that the baby is an integral part of the mother's body before birth. This connection renders the mother's interest in the foetus enough to hold another under duties not to hurt the mother, nor to terminate her pregnancy against her will. These duties are also intended by law and directly bring good to the mother under common circumstances. As a result, according to the Interest Theory, the mother again has a right to control her foetus's life.

If both the mother and the foetus have a right to the foetus's life, two problems arise. One is conflict with the inalienability of human rights. The other is the impossibility of deciding which side of the right should carry more weight and therefore entitle that specific holder's actions with legitimacy. There is no widely shared answer to questions such as whether the mother's right to the foetus's life should prevail over the foetus's right to his or her own life and thus she is free to choose to abort or not, or alternatively the foetus's right to life ought to be granted more significance than the mother's rights, and thus that a woman must not terminate a pregnancy deliberately.

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[642] Reagan, *Abortion and the Conscience of the Nation*, above n 177; Schwarz, *The Moral Question of Abortion*, above n 137, 119–20; McMahan, *The Ethics of Killing*, above n 154, 363–64.
[643] Thomson, 'A Defense of Abortion', above n 155.

Thirdly, the feasibility of viewing a right as an interest in guaranteeing the foetus's right to life is still subject to questions about when life begins and what the word 'conception' means. Regarding the first question, the foetus can only have a right to life as long as we agree that life starts from the point of conception. However, if we believe differently, for example, that a life does not really commence until some period after conception, the foetus will not be entitled to a right to life in the early stages of pregnancy. We may also agree with the law and advocates of abortion that the interest in life is usually only acknowledged after birth. The foetus, therefore, will not be entitled to a right to life during the whole pregnancy.[644] In this sense, before we step into the difficult comparison noted above, the precondition which provides that the foetus has a special interest which needs to be balanced with the mother's special interest is yet to be demonstrated.

Regarding the second question, even if we accept the idea that life begins at conception, uncertainty about the word 'conception' still brings about problems. On the one hand, the word 'conception' is not a scientific term, but can be used to denote both fertilisation and implantation.[645] Normally, it takes only a few days from fertilisation to implantation. Therefore except for determining the exact moment when life starts, this uncertainty seems of no great legal significance. However, when we consider the legitimacy of emergency contraception, significant differences emerge. If conception refers to implantation, there is no legal issue around contraception. If conception means fertilisation, then from the moment of fertilisation to implantation, a life already exists, as well as a right to life. An emergency contraceptive pill taken after fertilisation becomes a form of abortion and this practice violates the foetus's right to life. However, this conclusion cannot be accepted because currently contraception is always believed to be legal.

On the other hand, when the meaning of the word is uncertain, the starting point of life also becomes uncertain. This even perplexes comparisons between the right to life of the foetus and rights of the mother. Other than the problem of how to compare, we now need to confront a further problem about when to compare. On these grounds, viewing the right to life as starting with the bare existence of life (according to the Interest Theory) is unable to provide us with an answer to the question of whether or not a mother ought to be allowed to abort.

5.2.2. Wellbeing of the Foetus and the Rights of the Mother

[644] See generally English, 'Abortion and the Concept of a Person', above n 155, 235–36.
[645] Kurt Baier, 'When Does the Right to Life Begin?' (1981) 23 *Human Rights* 201, 201.

The argument that rejects the foetus's right to life via the requirement of personhood is explainable by MacCormick's or Singer's Interest Theory, specifically when MacCormick uses the term 'person' to refer to a right holder, or when Singer required self-awareness for an entity to qualify as a right holder.[646] If this requirement is accepted, then a right can only be held by a competent person; the foetus is thus not in a position to hold such a right. The rights that need concern us, therefore, are only those of the mother. This seems to suggest that the mother ought to be free to choose whether to abort or not: since the balance is deprived of value on one side, arguments that favour the mother's choice necessarily become stronger.

However, such a conclusion does not always follow. On the one hand, the requirement of personhood, according to anti-abortionists, is unjustified. As noted in chapter two, anti-abortionists argue that the notion of personhood is based on circular reasoning that both starts and ends with the presumption that the legal status of a person and a foetus are different.[647] Secondly, the requirement of personhood disqualifies comatose patients and human infants.[648] Thirdly, an alternative requirement of personhood is also possible that relies on a being's natural or inherent capacity to develop its psychological features.[649] As a result, the requirement of personhood proposed by abortion advocates is not necessarily accepted and so the foetus does not necessarily lack the ability to possess a right.

On the other hand, even if their requirement of personhood is accepted and thus the foetus does not have a right to life, the answer is still not necessarily in favour of abortion. Singer, for example, believed that although only the mother had rights, the foetus's life should not totally be at the mercy of the mother; the mother's rights still had to be balanced alongside the wellbeing of the foetus.

A right, according to Singer, was a preference or a desire to do something.[650] That only became possible when a person had self-awareness or self-consciousness about his or her preferences or desires, which Singer took to be personhood.[651] A foetus that lacked such awareness therefore had no rights, not even a bare right to life. Notwithstanding, he or she had a certain wellbeing that needed consideration, which happened when he or she was able to feel pain, several weeks after implantation. From that point in time, Singer believed, the

[646] MacCormick, 'Rights in Legislation', above n 44, 150.
[647] Marquis, 'Why Abortion is Immoral', above n 154, 184.
[648] Schwarz, *The Moral Question of Abortion*, above n 147, 89.
[649] Ibid, 91–3.
[650] Singer, *Practical Ethics*, above n 42, 81–3.
[651] Ibid, 65, 76–81. Singer extended the term 'person' to include some animals that he considered to have self-awareness, for example, the orang-utan; see ibid, ch 3, 94–100.

foetus became a conscious being.[652] This endowed him or her with a moral standing, specifically not to be arbitrarily inflicted with pain.[653] As a result, even when the mother had formal rights, including the option of abortion, she had to take into account the pain that the abortion procedure would incur for the foetus.

Singer thus argued that if abortion was carried out before the foetus was able to feel pain, it raised no moral or legal issue, since there was no wellbeing to be balanced with the rights of the mother as yet.[654] Abortion was thus allowed in the early stages of pregnancy. However, if abortion took place afterwards, Singer insisted that it ought not to be allowed, except when the following three conditions were satisfied: the foetus must be seriously defective,[655] pain during the procedure must be avoided or minimised,[656] and the foetus would be replaced by a healthier new one.[657] In this situation, although the foetus could still feel pain, Singer believed it was not going to have a life worth living.[658] Therefore, via the parents' decision, abortion could be carried out legitimately with a reduction in pain.[659] Apart from these two situations, no other situation could justify abortion in Singer's view. Singer's considerations about the wellbeing of the foetus thus grounded his stance against abortion, except in extreme cases.

Singer's definition of a right can be taken as a particular version of the Interest Theory, although it conceives of a right differently to Raz, MacCormick and Lyons. On the one hand, preference can be seen as another kind of a special interest: it is preferred or desired by a subject who owns personhood and is therefore different from pure benefit. To take a negative example, the pain felt by a foetus can only comprise benefits or interests, but is not enough to qualify as a right.

On the other hand, Singer's particular way of confining the realm of the interest that qualified as a right made no big difference in justifying his attitude against abortion, in contrast to MacCormick's. Singer's confined example only worked in leading us to believe that the holder of a right must be a self-aware person. If we replace it with MacCormick's definition — that is a right ought to be a legally acknowledged interest that could benefit a particular person under normal circumstances — and at the same time add an extra requirement of

[652] Ibid, 85.
[653] Ibid, ch 4.
[654] Ibid, 137.
[655] Ibid.
[656] Ibid.
[657] Ibid, 162–67.
[658] Ibid, 165.
[659] Ibid.

personhood, the concept of a right holder will still be confined to a competent adult. The logic that the foetus's wellbeing needs to be considered when the mother exercises her rights is again valid. Therefore if we take any special interest that the Interest Theorists raise, together with a requirement of personhood and considerations about the wellbeing of the foetus, an argument similar to Singer's will follow.

Notwithstanding, Singer's argumentation cannot ultimately reach the conclusion he believed he had arrived at. Firstly, Singer insisted that, excepting the two situations discussed above, abortion under other circumstances should not be allowed. This seems to suggest that generally the mother's preference ought to give way to the considerations about the foetus's wellbeing. However, the mother's preference exists in the form of a right. From a legal view, the right rather than the benefit should triumph. Singer could have argued that the foetus's life be an important benefit that needed special concern, but he did not. The benefit he employed to weigh down the mother's rights was preventing the foetus feeling pain. In cases of abortion, pain appeared to be less justified than life itself. Singer then emphasised that his theory only applied in the moral area.[660] However, the conflict with the basic idea of the law still raises a problem, and this problem makes his theory less 'practical'.

Secondly, Singer's argument leads to permitting infanticide because he accepted the requirement of personhood. A newborn is very similar to a late foetus in many respects: a newborn, although it can feel pain, does not yet have self-awareness. He or she is still only a conscious being whose ability to feel pain is the principle consideration. Therefore if abortion is permitted, killing a newborn would also be allowed according to the same logic. In fact, Singer himself believed that under the same circumstances where we allowed abortion, infanticide could be accepted as well.[661] However, this view is currently generally rejected.[662]

Thirdly, Singer's view cannot preclude abortion or infanticide in situations other than the two mentioned above. Singer simply disallowed other situations, but he did not explicitly explain why. The real reason may lie in his justification of the only situation where abortion or infanticide is allowed after the point when the foetus or baby was able to feel pain. To reiterate, the three conditions Singer laid down were as follows: defectiveness, worthlessness and painlessness. According to Singer, physical defectiveness of the foetus was a valid

[660] Ibid, 13.
[661] Ibid, 160–67.
[662] Infanticide is considered to be a crime in most legal systems. This moral inconsistency in Singer's argument has been noticed by Jeff McMahan as well; see 'Infanticide and Moral Consistency' (2013) 39 *Journal of Medical Ethics* 273.

argument because most people would view that as not worthy of life.[663] Defectiveness, therefore, can be conceived of as essentially identical to worthlessness; two conditions are thus reduced to one.

The condition of painlessness seems to be the reason why Singer disallowed abortion and infanticide in other situations, when he argued that if the foetus felt pain, abortion should generally be prohibited. However, in situations where he thought it permissible, a defective foetus could still be aborted legitimately, even though it had the ability to feel pain. Painlessness, in this sense, serves rather as a standard for how abortion should be carried out than a reason that grounds whether or not it should occur.

Then the reason must lie with the condition of worthlessness: whether abortion or infanticide is permissible or not depends on whether the life in question will prove worthy in later years. If the life is considered unworthy, especially by the parents of the foetus or infant, his or her life can be taken legitimately. However, this subjects the very existence of the foetus or newborn totally to a decision made by his or her parents. For instance, if a mother believes her baby will impact negatively on her life in some way (for example, career development), there is a possibility that she will neglect her baby in order to focus on other things. The future life of the baby will therefore be misery and even less worthy than one with a disability. In such cases, the mother seems to be justified, according to Singer's Theory, to abort this foetus or abandon this baby, even though he or she is perfectly healthy. Singer would disallow this, as other scholars would do, but his theory appears unable to prevent such possible consequences.

Last, even if we do not stick with Singer's argumentation but only admit that the foetus's benefit as regards pain ought to be considered when the mother exercises her rights, an answer that abortion ought to be generally prohibited is still impossible because the problem of comparing and evaluating the foetus's pain and the mother's rights occurs once again. As a result, neither the argument that the foetus has a right to life, nor the argument rejecting the foetus's right to life via the requirement of personhood resting on the Interest Theory, is able to provide us with a consistent answer to whether abortion should be allowed or not.

5.3. The Foetus's Right to Life, the Mother's Rights and the Benefit Theory

[663] Ibid, 137.

The argument that a foetus has a right to life can also be seen as relying on the Benefit Theory, but in a different way to the Interest Theory. A benefit, primarily, is not equivalent to an interest: an interest is something that benefits a particular subject in a special way; by contrast, a benefit, according to both Bentham and Mill, was based on sensible pleasure, as perceived by a subject.[664] When and only when one was able to distinguish pleasure from pain, could he or she be considered as capable of having a right. The right to life, therefore, ought not to be conferred on a foetus before the nervous system has developed. Viewing the right to life as a benefit thus does not concern itself with when life begins, but instead when sensations of pain commence. Although there are still different opinions about when exactly the nervous system is developed enough for a foetus to feel pain, a basic consensus does exist: sensations of pain emerge during pregnancy, after conception but before birth.[665]

More than that, viewing a right as a benefit does not need to include the requirement of personhood. As long as one can feel pain, one is entitled to have rights, no matter whether he or she is still held within another's body, has been born or is grown-up. As a result, according to the Benefit Theory, the conscious being that Singer identified as having a pure interest does possess a right to life. However, this right needs to be balanced with the mother's other rights.

5.3.1. Benefits of the Mother and Benefits of the Foetus

If the right to life is a benefit or pleasure, according to the principle of utility, the answer to the question of whether abortion should be allowed will depend on whether it generates a better outcome or a worse one. If allowing the mother to abort brings less benefit than maintaining the foetus's life, or even more pain, abortion ought not to be legalised. In this case, the rights of the foetus prevails. If respecting the mother's decision about whether to terminate her pregnancy intentionally results in more good than life itself, abortion ought to be permitted and the mother's rights override those of the foetus.

However, it is hard to weigh the life of the foetus with the self-determination of the mother. Some argue that only when the pregnancy threatens the mother's life should she be allowed to abort.[666] This view implies that only life can be weighed with life and that no other benefit is as significant as being able to strike down such a consideration. Therefore, as a general

[664] Bentham, *An Introduction to the Principles of Morals and Legislation*, above n 54, 11; Mill, *Utilitarianism*, above n 54, ch 4; Mill, *An Examination of Sir William Hamilton's Philosophy and of the Principal Philosophical Questions Discussed in His Writings*, above n 54, ch XII, Appendix; Mill, *A System of Logic*, above n 54, vol 2, book VI, ch ix, sec 2.
[665] For example, Warren, 'On the Moral and Legal Status of Abortion', above n 87, 45; Lee et al, 'Fetal Pain', above n 165; Johnson and Everitt, *Essential Reproduction*, above n 165, 215.
[666] Rahman, Katzive and Henshaw, 'A Global Review of Laws on Induced Abortion', above n 87.

principle, life overrides self-determination, and abortion is wrong. Bentham would have supported this view, but as noted above, Mill would disagree. In Mill's ranking of pleasures, freedom and autonomy were positioned at the top.[667] This meant that the benefit of self-determination outweighed the benefit of life: when a mother was deprived of the right to control her body and her future, the situation was even worse than her life being taken. According to this view, abortion should by no means be banned because the overall consequences of permitting the practice outweighed those of disallowing it.

Secondly, even if we agree with Bentham's view that life is more important, self-determination is not necessarily discounted. The mother's right to self-determination not only concerns her body and family, but also has a wider social effect. For example, a mother may be a talented medical student; if she carries the baby to full term, she may be unable to complete her studies because of the demands of parenthood. However, if she has the choice to abort, it is quite possible that she will qualify as a doctor and save many more lives in the future. A mother might also be a lawyer working on criminal law cases who can significantly reduce the chance of wrongful killing if her work is not impacted by having to care for an unexpected child. In these cases, self-determination also concerns lives because the mother's decision on abortion impacts lives of future patients and convicted persons.

Thirdly, the benefits that need to be considered regarding the issue of abortion are wider than self-determination and life itself. As declared by advocates of the practice, one must also take into account freedom from discrimination for both the mother and the foetus, and the right to medical care for the mother. Moreover, the pain a family might experience as a result of keeping the foetus, as well as the pleasure, also needs to be taken into account: to give birth and raise a child, the family needs to devote much time and money; while at the same time, the child also brings joy to the family. These benefits and pains make the comparison even harder.

Raz's concept of the right to life may be resorted to by some to work out a solution for this comparison. Raz believed that the benefit of life not only involved the situation and duration of being alive, but also included considerations about quality of life.[668] The situation and duration of being alive are benefits we have discussed so far in terms of the right to life. Alternatively, quality of life also covers freedom from discrimination, the right to medical care and many other rights, the most important of which is the right to self-determination. Raz

[667] Mill, *On Liberty and Other Essays*, above n 54, 223–24.
[668] Raz, 'Death in Our Life', above n 38.

insisted that the life holder was the best judge of the quality of his or her life.[669] Thus the key to the quality of one's life was self-control. In this sense, the mother's rights can be interpreted via the quality of her life, while the foetus's right to life can be taken as the situation and duration of being alive. The conflict between the foetus's right to life and the mother's other rights thus becomes a conflict between the duration of life and the quality of life.

However even so, an answer as to whether abortion is permissible is still impossible because Raz never discusses the scenario in which the duration of one's life came into competition with the quality of another's life. This problem was yet to be solved, and the need for more complex comparisons makes finding a solution more difficult.

5.3.2. Benefits in Terms of the Foetus's Life

The Benefit Theory insisted that the legally acknowledged pleasure brought by a thing or action to an individual be a right. The individual who was benefited by that thing or action, therefore, was a right holder. Regarding life, as long as one's wellbeing is promoted as a result of this, one is a holder of the right to the life. This, however, grants too many people with a right to a certain life, which constitutes another serious critique scholars pose towards the Benefit Theory.[670]

Speaking specifically of the foetus's life, the foetus, no doubt, is benefited by the condition of being alive. He or she is primarily the holder of the right to his or her own life. However, he or she is not the only one who can benefit from this state of affairs. The foetus's mother, father, grandparents and other relatives may still benefit as a result of his or her existence. According to the Benefit Theory, the wider family, therefore, can also be seen as having a right to the foetus's life. More than that, even the parents' friends, classmates or work colleagues may be delighted to see the foetus being born and growing up; thus this wider group of people also seem to have a right to the foetus's life.

The Benefit Theory therefore makes it possible for everyone remotely connected to the foetus to have a right to his or her life, which comprises a much broader concern than the Interest Theory. The Interest Theory is able to constrain the realm of the right holders due to its ability to confine the interest that qualifies as a right. Although this still could not prevent the mother

[669] Ibid, 1, 10–2.
[670] Duffel, 'The Nature of Rights Debate Rests on a Mistake', above n 595.

from having a right to her foetus's life (as noted above), the father, relatives and other people were excluded. The benefits that they might gain from the foetus's life were not enough for a duty, not directly related to a duty, and not intended by the law. By contrast, the Benefit Theory has no such confinement, with the result that all those people mentioned above have a right to the foetus's life. This result comes into conflict with a common sense perception about who qualifies as the holder of a right, as well as the important feature of inalienability of human rights, as defined in international declarations and covenants.

Moreover, if too many people have a right to the foetus's life, that makes comparisons necessary to provide an answer about the issue of abortion even harder because it will be hard to decide whose rights should prevail when the foetus's right to life conflicts with another's rights. For example, one may believe that if the mother's manager will lose her work contribution during the period of pregnancy and birth, the manager ought to be allowed to exercise his or her right to the foetus's life and choose to have the foetus aborted. Another person might claim that the manager's rights are too remotely related to the foetus's life; rather, the mother is more likely to be able to exercise her right to the foetus's life and choose to abort when she believes that carrying a foetus and raising a baby will negatively impact her career. Alternatively, a third person may insist that the foetus's right to life should still prevail over all such considerations.

In addition, even if we prove that the foetus's right to life should prevail over others' rights, viewing a right as a benefit still cannot guarantee that abortion should be banned, especially when a related attitude toward capital punishment is taken into account. Attitude towards capital punishment is considered connected to that towards abortion because both involve views about life: capital punishment concerns about the life of a convicted person, while abortion regards the life of a foetus.

5.3.3. Benefits in Different Lives

Scholars have noticed an interesting phenomenon regarding public attitudes towards the issues of abortion and capital punishment. Frequently, members of the public stand against abortion but for capital punishment, or stand for abortion but against capital punishment, although both issues regard life.[671] The former group uphold their opinion by resorting to arguments about the value of life.[672] They believe abortion is wrong because it disregards the

[671] See Kimberly J Cook, 'A Passion to Punish: Abortion Opponents Who Favor the Death Penalty' (1998) 15(2) *Justice Quarterly* 329.
[672] Louis P Pojman, *The Death Penalty: For and Against* (Rowman and Littlefield, 1998) 63.

life of the foetus. This view fits with the Benefit Theory if the life of the foetus is given greatest significance amongst all the related benefits.

However, the Benefit Theory is unable to support a retentionist attitude towards the death penalty. If the value of life is important for a foetus, it should also be relevant as regards people sentenced to execution. Some argue that the value of life of a foetus is different from that of a criminal because the foetus is innocent but criminals are guilty. The foetus is innocent because he or she has done nothing wrong to other people specifically or to the society as a whole; therefore, his or her life is more valuable than that of people with life experience. On the contrary, the convicted have carried out criminal actions and, in consideration of the punishment they are about to face, those actions must serious; thus their lives are less valuable and can be dispensed with.

Notwithstanding, the life of a foetus does not necessarily outweigh that of a convicted criminal. A mother may be unhappy with her pregnancy and does not intend to raise her baby properly, although she is forced to give birth to that baby. In this case, the baby is more likely to become a criminal in the future, and thus his or her life does not seem valuable. Meanwhile, the life of a convicted criminal may not be less worthy. As noted earlier, innocent people are occasionally sentenced to death. In such cases, we could not say that this life is less valuable than that of a foetus. As a result, it is inappropriate to conclude that abortion ought to be forbidden in order to protect the life of the foetus, while capital punishment ought to be allowed to remove wrongly convicted people from society. Viewing the right to life as a benefit provides no sensible answer to these two issues.

Those who stand for abortion but against capital punishment insist on personhood as a prerequisite for the right to life.[673] The convicted on death row, therefore, should have a right to life and the death penalty is a violation of that right. A foetus, on the contrary, is unable to have any right, including the right to life because it has not attained personhood. According to this position, capital punishment is inadmissible while abortion is allowable.

However, if the right to life is defined as a benefit or an interest, this view also cannot be justified. As required by the principle of utility, the concern about a certain right needs to be balanced with considerations about other benefits or interests. For instance, the right to life of a convicted criminal needs to be balanced alongside other social member's security of person,

[673] Ibid.

and a mother's rights needs to be compared with the foetus's interest in life. However, the right to life of a convicted criminal is not necessarily more important than security of person because the latter also involves lives. Likewise, a mother's rights do not necessarily outweigh the foetus's interest in life, since the latter is always considered as one of the most important interests one could ever possess. A solution that denies the validity of capital punishment but supports abortion therefore cannot be reached. On these grounds, neither the Benefit Theory nor the Interest Theory can provide answers to these two issues.

5.4. The Mother's Rights and the Will Theory

The personhood argument that believes only a competent person can have a right, including the right to life, is also explainable by the Will Theory. In the definition of a right as a universalisable choice, human choice is only connected with an action when one is able to exercise his or her will independently. Universalisability is only achievable when one is rational enough to work out the requirement of the categorical imperative. Therefore, if a right is interpreted according to the Will Theory, the right holder ought to be a human being with full capacity to reason. This means not only being an adult but a competent adult; those with intellectual disabilities would therefore be excluded.[674] The Will Theory shares the basic idea of the personhood argument. Moreover, the Will Theory also agrees with the conclusion of this argument that a foetus has no rights because he or she is not born as an independent entity and does not have the capacity to be rational. The mother, on the contrary, has the ability to reason and therefore is considered as having rights.

Furthermore, the Will Theory rejects the opposing view raised by anti-abortionists regarding the personhood argument. Firstly, the requirement of personhood for an entity to have a right is not based on the circular argument that both starts and ends with the presumption that the legal status of a person and a foetus differ. Rather, this requirement depends on the idea of a right as a will. According to this theory of rights, a person and a foetus are fundamentally different, and only a person can have a right.

Secondly, requiring personhood does not necessarily permit infanticide.[675] The Will Theory acknowledges a right when the action the right encourages or allows can be universalised. However, killing an infant cannot be universalised because if every infant were killed, the

[674] For a similar conclusion, see Bertha Alvarez Manninen, 'A Kantian Defense of Abortion Rights with Respect for Intrauterine Life' (2014) 39 *Diametros* 70.
[675] The argument resting on the Will Theory, however, leads to permitting ending the lives of comatose patients; this issue is analysed under the title of 'euthanasia' in chapter six.

human species would cease to exist.[676] Infanticide, as a result, is impermissible according to this theory.

Thirdly, the personhood required by the Will Theory again denies the acceptability of an alternative definition of personhood. If viewing a right as a will calls for a person to be a competent adult in order to hold that right, the alternative idea that an incompetent foetus also has a right cannot be supported. In this sense, the personhood argument raised by abortion advocates that emphasises capacities of an adult, namely consciousness, rationality, autonomy and so on, can be upheld in the Will Theory.

5.4.1. The Mother's Right to Abortion?

The Will Theory only acknowledges the mother's rights; this seems to imply that the mother has freedom in choosing whether to abort or not. According to the Will Theory, a person has a right to self-determination, providing that can coexist with every other person's right to self-determination. Regarding abortion, the mother also has the ability to determine. This determination, as noted above, covers the mother's control over her body, family size and privacy. Such control would be greatly affected if the mother could not freely choose whether to carry or abort her foetus, since being forced to keep a baby necessarily influences her physical state, as well as personal life.[677] Therefore, if the right to self-determination is to be upheld, the mother ought to be entitled to a right to abortion.

However, abortion may not qualify as a right if it is considered separately from influences on the mother's right to self-determination. Different from determining one's own affairs, abortion is not an action that can be universally taken. If every mother chooses to terminate a pregnancy, there would be no human beings in the future.[678] This is against the basic idea that maintains human society, namely the preservation of the species.[679] In this sense, although the mother has a right to self-determination, it does not follow that she has a right to abortion.

A problem immediately follows from this, which is the Will Theory cannot provide whether the mother has a right to abortion or not. The right to self-determination requires that the mother possess a right to abortion, which, however, contradicts the principle of preserving the human species. If, according to this principle, the mother does not have a right to abortion,

[676] This is also true of abortion, as acknowleged in the next section.
[677] Manninen, 'A Kantian Defense of Abortion Rights with Respect for Intrauterine Life', above n 674.
[678] Harry J Gensler, 'A Kantian Argument against Abortion' (1986) 49(1) *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition* 83.
[679] Kant, *The Metaphysics of Morals*, above n 45, 151–52, 175.

this would obstruct her enjoyment of the right to self-determination. As a result, having a right to abortion and being denied that right are both universalisable and not universalisable.

Moreover, if we choose to stand by the side that does not acknowledge the mother's right to abortion, a further problem will occur, namely the denial of the right to abortion as a result of rape. According to the principle of universalisation, rape is not an action that can be carried out by everyone, is thus wrong and needs to be negated by punishment. However, carrying a baby is different: although this occurs because of rape, it is still possible for every woman who has suffered rape to give birth. The Will Theory, therefore, seems to suggest that the mother cannot choose to abort, even when she becomes pregnant as a result of rape. This conclusion, however, is unacceptable because most people would agree that a woman has a right to abortion in such cases.

Some scholars try to reject this conclusion by arguing that pregnancy in the case of rape occurs against the will of the mother.[680] However, any unwanted pregnancy is against the will of the mother. The difference between pregnancy due to rape and pregnancy as a result of consensual sex needs further demonstration. The scholars then argue that, in the case of rape, the woman did not consent to be raped and therefore did not agree to becoming pregnant. On the contrary, in cases of voluntary sex, the woman has agreed to sexual activity and thus she ought to be viewed as agreeing to becoming pregnant.[681] However, it is still possible that the woman only agreed to have sex, but did not agree to have a baby; for example, she demonstrated her refusal to become pregnant by using a contraceptive that happened to fail. Agreeing to the cause of pregnancy, in this sense, does not guarantee that one agrees to the effects of pregnancy. As a result, no matter whether or not sex results in pregnancy is rape, as long as the pregnancy is unwanted, its existence is against the will of the mother.[682] If the mother's free will in choosing to abort is rejected by those who do does not acknowledge her right to abortion, abortion in the case of rape is again disallowed.

If the argument that does not acknowledge the mother's right to abortion generates more problems, this seems to suggest that it is better to stand with those who acknowledge the mother's right to abortion. However, R M Hare believed differently. Hare contended that the

[680] Warren, 'On the Moral and Legal Status of Abortion', above n 87; McMahan, *The Ethics of Killing*, above n 154, 364–72.
[681] Warren, 'On the Moral and Legal Status of Abortion', above n 87; McMahan, *The Ethics of Killing*, above n 154, 364–72.
[682] Eileen L McDonagh, *Breaking the Abortion Deadlock: From Choice to Consent* (Oxford University Press, 1996) ch 3.

balance would tilt toward the side that rejected the idea of a right to abortion and disallowed the practice if the categorical imperative was interpreted in an extended way.[683]

5.4.2. The Extended Golden Rule

Hare called Kant's categorical imperative — an action that can be performed universally — 'the Golden Rule'.[684] This rule meant that, in his view, the action one took ought to be the one which he or she wished others to do to him or her.[685] The action others would take in the future, therefore, would set the standard for one's choice of his or her current action.[686] Hare also believed that if future action was a proper standard, similar behaviour in the past ought to be appropriate as well.[687] The requirement of the golden rule thus became that the action one wanted to take ought to be the one that he or she wished others to have taken to him or her.[688] The golden rule, as a result, became extended.

Hare insisted that the golden rule should function as the key to solving the debate about abortion.[689] Specifically as concerns the rule regarding a past behaviour, Hare required that a woman who wanted to abort should consider the question of whether or not she wished her own mother to have aborted her. Normally, any expectant mother would wish that her parents did in fact make a conscious decision to carry, give birth to and raise her because otherwise she would never exist.[690] Therefore, the woman in this case could not do so either.

However, a specific woman might wish she had never been born because she perceives her life to be miserable. In such cases, abortion seems permissible. If Hare agreed with this, he appears to suggest the permissibility of abortion should be determined on a case-by-case basis: when one enjoys her life, abortion will be prohibited, while when one holds a different view, abortion will be permitted. Then a problem comes into view about who decides whether a woman's life is enjoyable or not. It may be the woman herself; however, she may simply claim to be miserable in order to make an abortion seem permissible. It may alternatively be the opinion of an external reasonable person; however, this will subject a woman's feeling of

[683] Richard Mervyn Hare (1919-2002) was an English moral philosopher. He held the post of White's Professor of Moral Philosophy at the University of Oxford from 1966 to 1983. He was best known for his development of prescriptivism as a meta-ethical theory. Some of his students have become well-known philosophers, such as Brian McGuinness, Bernard Williams and Peter Singer.
[684] Hare, 'Abortion and the Golden Rule', above n 154.
[685] Ibid, 208.
[686] Ibid.
[687] Ibid.
[688] Ibid.
[689] Ibid.
[690] Ibid, 209.

her life and wish to the decision of another. Also, this will make the golden rule advise about abortion depending on whether or not a reasonable person wishes his or her mother has aborted him or her, rather than whether or not a woman involved make a judgment about that matter.

If the value of a woman's life should not be decided by any given individual, then it may be decided according to majority opinion. Most people would certainly agree with Hare in wishing that their parents decided to keep them alive and raise them. This wish seems sufficient to disallow the practice of abortion, even in statistically rare cases where a woman might wish differently. However, similar to letting the opinion of an external reasonable person advise the permissibility of abortion, in such cases, the standard for the right action is no longer what a woman wishes her own mother has done to her; rather, it becomes what most people wish about such matters. In this sense, Hare's extended golden rule was unable to reach a conclusion against abortion by itself.

Worse than that, the extended golden rule appears to be closer to the principle of utility than the categorical imperative. If we stick to Hare's formulation of the rule, the question of whether a woman might have wished her own mother to abort her depends on whether the woman thought her life enjoyable or not. Whether such a woman has a claim to abortion thus relies on whether she is satisfied with her life. The question of whether to allow abortion more generally, as a result, relies on how one evaluates the lives of women. Qualifying a right and an action according to the requirement of universability of the categorical imperative thus fades and the benefit in one's life dominates. Although Hare believed he was applying the golden rule faithfully, he carried it out in a different way — a utilitarian way.

Even though we might allow Hare to apply the golden rule in a utilitarian way, this rule still does not reconcile with the principle of utility, especially when it comes to comparing competing rights. Hare's golden rule seems to imply that the question of whether the foetus's right to life outweighs the mother's other rights depends on whether the mother enjoys her life. According to the Benefit Theory or the Interest Theory, that abortion is not allowed means the foetus's right to life outweighs the mother's other rights, while that abortion is allowed means the mother's other rights outweighs the foetus's right to life. As regards the golden rule, whether abortion is allowable depends on whether or not the pregnant woman wished her own mother had aborted her, and what the woman wished relies on whether she enjoys her life. Taken together, this seems to imply that if the mother enjoys her life, her rights ought to be

subjected to the foetus's right to life, while if the mother does not enjoy her life, her rights ought to prevail over the foetus's right to life.

However, the comparison between the foetus's right to life and the mother's other rights could not be justified to determine just according to the mother's wishes, because this renders the permissibility of abortion in a specific case totally at the mother's hand. Some may argue that the mother's feelings about the worth of her own life can be taken as a presumption of the future life of the foetus, and thus are able to reach the conclusion about this comparison.[691] According to this view, if the mother enjoys her life, the foetus will also enjoy his or her future life; the foetus's interest in the right to life thus has more weight. Alternatively, if the mother feels her life miserable, the foetus will also feel miserable about his or her future life; the foetus's interest in the right to life thus has less weight. However, the interest in the mother's life is different from that of the foetus. The foetus's interest that concerns us here is simply an interest in being alive, while the mother's is an interest in the quality of life. The question of whether the foetus ought to live thus should not be determined by whether he or she will live happily, especially when the happiness of his or her future life is only determined by the mother's current mental state.

Moreover, mere wish again cannot be the determinative point of a right. Bentham made it clear that although someone may find it pleasurable to hurt himself or herself, that could not be taken as a right.[692] As a result, even if a woman wishes that she had not been born and thus justifies her abortion in this case, that may still be prohibited by law on the grounds of overall utility. It may be argued that even if one individual's desire is not appropriate, the collective desire of the whole society will be. Therefore, if a society as a whole desired that the mothers did not choose to abort, abortion ought to be disallowed. However, this again deviates from Hare's formulation of the golden rule, changing the rule such that one ought to do depends on what the whole society wishes its members to have done.

In addition to those problems, Hare's conclusion that abortion should be prohibited as a result of his extended golden rule also has further implications of an unacceptable nature, the most significant of which is to deem contraception wrong. According to Hare, abortion should not be allowed because most women would not have wished their own mothers to abort them. By extension, contraception should not be permitted because most women would also wish that their own parents had not used it themselves. Hare anticipated this problem, developing

[691] Ibid, 213.
[692] See Hart, 'Bentham on Legal Rights', above n 23, 14.

several criteria to differentiate contraception from abortion. For example, the use of contraception happens prior to pregnancy so, compared to abortion, the foetus (which may actually be only a group of cells) has a less close affiliation with the mother, less chance of being born alive, and lacks identification as a recognisable being.[693] However, these criteria depart even further from the golden rule because none of them can be demonstrated by resorting to what a woman wishes her own mother had done to her; rather, the golden rule is irrelevant in these criteria. This departure again reveals that the golden rule itself is not enough to support Hare's conclusion.

As a result, the personhood argument, no matter whether it rests on Kant's Will Theory or Hare's extended golden rule, cannot provide an answer to the question of whether abortion is allowable or not. Such an answer can only be achieved via the Choice Theory, to which we now proceed.

5.5. The Mother's Rights and the Choice Theory

Arguments about personhood can also be seen as resting on Hart's Choice Theory, which emphasises the control of the right holder over the performance of duty. An individual who qualifies as a holder of a right must be able to express and exert control over that right. If she is an adult, a mother would normally meet this demand and thus can have such rights.[694] On the contrary, a foetus, due to his or her inability to carry out actions independently or even to think by himself or herself, falls out the realm of right holders. Therefore a foetus has no rights, not even a right to life. The Choice Theory shares the conclusion of the personhood argument, namely that only the mother's rights ought to be taken into account regarding abortion.

Moreover, the Choice Theory refutes opposing ideas that the personhood argument raised by abortion advocates is circular and ought to be replaced by an alternative view of personhood. As with arguments that rest on the Will Theory, the Choice Theory again provides reasons for the different legal status between a person and a foetus. The personhood argument, therefore, is also supported if one views a right as a choice. Furthermore, by resting this personhood argument on the Choice Theory, a workable solution to the legal permissibility of abortion

[693] Hare, 'Abortion and the Golden Rule', above n 154, 214, 220.

[694] A mother may also be a teenage girl, who is seen as not having rights according to the Choice Theory; she therefore does not have a right to abortion either. However, this does not mean abortion in her case is not allowed; rather, a legal duty to protect a teenage may render abortion permitted.
Notwithstanding at this stage, this thesis concerns itself only with cases regarding adult women; cases regarding teenage are left to be discussed in conclusion when applicability of the Choice Theory has been thoroughly revealed.

can be reached: in general, abortion ought to be allowed, unless the law has incorporated a duty to the opposite.

5.5.1. The Mother's Right to Abortion

Primarily, the Choice Theory seems to conflict both with the personhood argument and the mother's rights that it acknowledges. If a right is a choice, the right holder must have total control over the performance of a related duty. The right to self-determination, in this sense, cannot qualify as a right, since its holder cannot exempt others from the duty of respecting his or her decisions about his or her own affairs. As a result, either the mother has no right to self-determination and hence no control over abortion, or the Choice Theory is inapplicable to the issue of abortion.

Notwithstanding, the Choice Theory does not necessarily reach this conclusion. Similarly to the right to life, the right to self-determination can again be seen as an incomplete choice. The right to self-determination confers the right holder with all six aspects of control except two: the ability to exempt others from a duty and the ability not to sue others if the duty was not properly performed. Meanwhile, the ability to exempt such a duty is not necessarily lacking. Similarly to the right to life itself, the holder of the right to self-determination is again able to waive this right by violating another's right, i.e. carrying out a criminal act. The criminal act constitutes a choice made by the holder to exempt others from respecting his or her rights, which makes the punishment of restricting his or her determination — for example, imprisonment and deprivation of political rights — justified. In this sense, the right to self-determination sits within the same category as the right to life when one considers the Choice Theory. It is an incomplete choice with all the controlling ability except not to sue.

If the right to self-determination is a choice, then one thing is sure, namely that the holder of this right must be able to demand others respect his or her decisions about his or her own affairs. Abortion can be counted among those affairs or at the very least is related to them. Therefore, if a woman has a right to self-determination, she ought to also have a right to abortion as well; the right to self-determination naturally implies a right to abortion.

5.5.2. The Mother's Duty to the Foetus

If the mother has a right to abortion but the foetus has no rights, this seems to imply that the mother can freely choose whether to terminate her pregnancy. A right allows control over

performance of the duty and thus a right to abortion signifies that the mother has control over the option of whether or not to have an abortion.

However, a problem occurs that infanticide may also be permissible according to this logic. If the foetus has no right since he or she is intellectually incompetent, a newborn would seem to have no such rights either. After birth, a baby may be able to express his or her will independently, but not in a rational way. A proper control over duty, therefore, is also impossible for a newborn baby. On the contrary, the mother always possesses rights; if she can decide to abort by exercising her rights, she necessarily ends her baby's life on the same grounds. According to the Choice Theory, there seems to be nothing to substantially differentiate a newborn baby from a foetus. Therefore by basing the personhood argument on the Choice Theory, allowing abortion inevitably leads to permitting infanticide.

Worse than that, if both a foetus and a newborn have no right to life, neither being has any other rights either. For example, neither could been titled to inherit properties, be free from harm, nor obtain other benefits. This, however, conflicts with humanity that protects both a foetus and a newborn's developing interest in property and life; the Choice Theory thus has been substantially criticised on these grounds.[695]

To solve these problems, Hart raised another notion, specifically a duty without a related right. According to Hart's theory, a right must imply a duty, since a right controlled the performance of a duty.[696] However, a duty did not always provide evidence for the existence of a right.[697] For example, a person may be under a duty not to hurt animals or pollute the environment, but this does not mean that either animals or the environment as a whole has a right to ask the person not to do so.[698] Indeed, they never could ask because both entities fail the basic requirement of personhood. The same went for a foetus or newborn. A foetus or newborn did not have the ability to ask his or her mother not to hurt him or her, but the mother might be under a duty not to do so anyway.[699] In this sense, even if the mother has a legal right to abortion, that does not mean abortion is allowable. The exercise of the right is still under the restriction of the duty to protect the foetus.

[695] Sreenivasan, 'Duties and Their Direction', above n 481; McCloskey, 'Rights', above n 278.
[696] Hart believed personally that a right did not always imply a duty; see Hart, 'Bentham on Legal Rights', above n 23, 10–1. However, Hart's theory of rights based the idea of a right on the idea of a duty.
[697] Hart, 'Are There Any Natural Rights?', above n 51.
[698] Ibid.
[699] Ibid.

However, Hart seemed to view the duty not to abort as a moral one. He insisted that a legal rule preventing abortion actually neglected the distinction between morality and law.[700] Whether to abort was purely a moral choice made within the realm of one's own life. It was not an issue that needed the concern of society more generally, including, for example, prevention of the practice under law. According to Hart, the mother therefore ought to be able to choose abortion freely; only in a moral sense, could she be blamed for breaching her duty to protect the foetus's life.

Notwithstanding, the duty not to hurt the foetus on moral grounds does not exclude that duty from positive law. As Hart admitted, if the rule of recognition allowed this, morality could be included in the primary rules of law.[701] For instance, if the supreme court of a common law state makes a decision to disallow abortion on the grounds of such a duty, the moral duty becomes a legal one from then on. Although the mother always has a right to abortion, she still cannot choose to abort because she is bound by the restrictions of this duty. Given that Hart's positive legal theory was an inclusive one, the issue of whether abortion ought to be allowed actually depends on whether and how a state incorporates the moral duty not to hurt the foetus into law. If the law does not incorporate that duty, abortion ought to be allowed. If the law has incorporated it, abortion ought to be prohibited; *Roe v Wade* provides an exemplary case of such an incorporation.

5.5.3. *Roe v Wade*: A Representative Case of Viewing a Right as a Choice

In June 1969, Norma L McCorvey, a Texas citizen, wanted to abort her foetus. However, Texan law disallowed abortion, except for particular cases such as rape and incest. McCorvey tried to obtain an abortion by lying about being raped and resorting to unauthorised medical facilities, but neither of them succeeded. She then filed a lawsuit under the alias 'Jane Roe' in the United State District Court for the Northern District of Texas against the State of Texas; the state was represented by Dallas County District Attorney Henry Wade. The case thus was titled *Roe v Wade*. The decision of the district court was made in June 1970, finding that Texas law was unconstitutional and hence that McCorvey could have an abortion.

Later the same year, the case reached the Supreme Court on appeal. The final decision was issued in January 1973, with seven justices in favour of Roe and two against. Justice Harry

[700] Hart, *Law, Liberty and Morality*, above n 51, 25–6. See also David Sugarman and H L A Hart, 'Hart Interviewed: H L A Hart in Conversation with David Sugarman' (2005) 32(2) *Journal of Law and Society* 267, 284.
[701] John Finnis, 'H L A Hart: A Twentieth-Century Oxford Political Philosopher' (2009) *Notre Dame Law School Legal Studies Research Paper* 09-40.

Blackmun wrote the majority opinion; Justices Warren Burger, James Douglas and Potter Steward filed concurring opinions; Justice Richard White filed a dissenting opinion, joined by Justice William Rehnquist. Notwithstanding, McCorvey, although she won the case, did not have an abortion but rather gave birth to her baby.

The majority opinion ruled that the state's interest in protecting a woman's health, including the provision of standard medical services,[702] as well as keeping a potential life, ought to be acknowledged. At the same time the mother's right to privacy also needed consideration. According to the opinion handed down, during the first trimester, the mother's right to privacy prevailed over the state's interest in her health.[703] The state thus was not allowed to regulate abortion during this period of time. During the second trimester, the mother's right to privacy still prevailed over the state's interest in a potential life but was overridden by the state's interest in her health.[704] The state, therefore, was able to regulate abortion procedures and qualifications, but it still could not prevent a woman from having an abortion.[705] Only after the second trimester, when the foetus reached his or her viability and his or her potential of being born alive was maximised, could the state's interest in a life prevail and the woman's decision to abort be disallowed.[706]

The two decisive points about whether to allow abortion were thus the mother's right to privacy and the state's interest in a potential life. At first sight, concerns about both the right and the interest, as well as comparison between the two, seem to make the judgement in the case of *Roe v Wade* more applicable to the Benefit Theory or the Interest Theory. However, neither is appropriate, as we now discuss.

As to the Benefit Theory, problems occur when considering why the state's interest should be compelling after viability but not before, and also why the foetus is not seen as having a right to life. The Benefit Theory seems able to explain the first problem: if a right is a benefit, then the mother's right to privacy is indeed a benefit and that ought to be respected. It ought also to be balanced with the state's interest in a potential life. Since, according to the Benefit Theory, there is no entity beyond individuals, there can be no interest beyond everyone's benefit. The state's interest, therefore, is the sum total of each individual's benefit in a foetus's life. The

[702] The interest in health and standard medical care will both be referred to as the interest in health in what follows.
[703] *Roe* (1973) 410 US 113, 164.
[704] Ibid.
[705] Ibid.
[706] Ibid.

comparison, in this sense, comes between the mother's benefit in her privacy and the sum total of other citizens' benefit in a potential life. Before viability, the total benefit in life is less than the benefit of privacy, and the mother's rights are therefore more compelling. Alternatively, after the foetus reaches viability, this potential reaches its peak. The total benefit in life rises and then surpasses the benefit of privacy, and the mother's right to an abortion no longer prevails over other considerations.

However, we cannot reach such a conclusion via the Benefit Theory: we cannot convincingly claim that before viability the benefit in life is less than the benefit of privacy, while after viability the reverse is true. Even if we can be sure that the benefit in life after viability is greater than before, we still cannot confirm its importance in comparison with the benefit of privacy.[707] Evaluation and comparison are inevitable when one employs the Benefit Theory. The proposed conclusion, therefore, is difficult to reach.

More than that, the Benefit Theory also considers benefits other than the mother's benefit of privacy and the state's benefit in a potential life, for instance, the mother's benefit in self-determination. These additional benefits make comparisons even harder and reaching the proposed conclusion more difficult. To assert that the state's interest in the foetus's life is compelling after viability but not before is therefore problematic.

Regarding the second problem, if a right is a benefit, many individuals — including the foetus, his or her mother, father and others family members — can all be seen as having some sort of right to the foetus's life. These rights, however, were not considered in the Court's decision about *Roe v Wade*. The foetus's right to life was even declined explicitly, as the Court ruled 'the word "person", as used in the Fourteenth Amendment, d[id] not include the unborn'.[708] As a result, the Benefit Theory is unable to explain the opinion of the court.

The Interest Theory, again, is not an appropriate theory of rights when considering the Court's decision regarding abortion. If a right is a unique interest, the state can still be seen as having a right to the foetus's life, as has been shown earlier in this chapter. However, those judging the case of *Roe v Wade* only considered the state as having an interest — albeit a very significant interest — but not a right to a potential life. Neither is the Will Theory applicable

[707] Justices White and Rehnquist raised this issue as well; see *Roe* (1972) 410 US 113, 175; *Doe* (1973) 410 US 179, 222.
[708] *Roe* (1973) 410 US 113, 157–58.

to these circumstances because there was again no consideration about the categorical imperative or the concept of universality in the Court's decision.

The only theory of rights that can explain the majority opinion in *Roe v Wade* is the Choice Theory. The Choice Theory, on the one hand, concurs with the belief held by the Court that a foetus does not have a right to life but the mother has a right to abortion. On the other hand, the Choice Theory explains why abortion is permissible before viability but not afterwards. The first point has been made clear at the beginning of this section, while the second point lies in this theory's inclusion of the idea of a duty without the existence of a related right. To be specific, before viability of the foetus, a legal duty to protect the foetus has not emerged. The mother's rights, therefore, prevail and abortion is allowable. However, after viability, this duty emerges, which overrides the mother's rights and abortion should thus be prohibited.

Primarily, this idea of a duty explains why the state's interest in life was able to override the mother's right to privacy. If the right to privacy was a fundamental right, as the Court believed,[709] this right ought to be protected unless there were extenuating circumstances. However, the Court's decision did not indicate if the interest in a potential life was indeed such an extreme circumstance, and thus it could triumph the mother's freedom in choosing whether to abort, as the Court decided. Only the Choice Theory provides an answer to this problem: the state's interest in a potential life does not need to be considered as merely an interest; rather, it can be viewed as a legal duty that is borne by all citizens, including the mother, towards the foetus. This duty requires us to respect the potential that a foetus has before he or she is born.[710] By employing the Choice Theory, an institution that weighs down a fundamental right to privacy is no longer a suspicious interest, but a legal duty.

Secondly, the Choice Theory also explains why the mother bears a legal duty to her foetus that she should not end his or her life: that is according to the ancient history, the Hippocratic Oath, English common law and statutory law, American law and attitudes of medical bodies,[711] this duty has already existed as a moral one. The Court therefore could apply it in the realm of law to restrict the mother's freedom on whether to abort. In the Court's majority's opinion, Justice Blackmun referred to those early histories and laws to demonstrate that abortion had always been restricted, which could be seen as evidence of the existence of

[709] Ibid, 156.
[710] See also Manninen, 'A Kantian Defense of Abortion Rights with Respect for Intrauterine Life', above n 674, 81–2. However, Manninen raised this argument using Kant's categorical imperative.
[711] *Roe* (1973) 410 US 113, 129–47.

such a duty: in the ancient times, this duty was universally accepted; while in recent years, it has become less strict, and abortion is allowed in more and more situations.[712]

Notwithstanding, this moral duty is not the direct reason for the prohibition of abortion. Rather, this duty only provides the moral grounds that the Court could resort to acknowledge a legal duty borne by the mother not to end the foetus' life. The duty that had effect on restricting the mother's right to privacy was the legal one; only when this moral duty becomes a legal one, could it generate legal force and thus lay restrictions on the mother's legal right.

Thirdly, the Choice Theory further illustrates why and how this moral duty can be a part of law and restrict the mother's right to privacy accordingly: the Court's decision comprised the incorporation of moral duty in law and turned it into a legal duty. By allowing for existence of moral duty in its decision, the Court did not merely agree that the moral duty is applicable to abortion; rather, the Court included the duty as part of the law. According to Hart's theory, this constitutes the exercise of the recognition rule that incorporates morality into the primary rules of the law which directly guide human behaviours.[713] Therefore, through Court recognition, moral duty became a legal one and took effect regarding the issue of abortion.

Fourthly, the idea of a legal duty also accounts for why abortion was prohibited after foetal viability but not before. That is the Court inflicted the legal duty after viability but not before. As the Choice Theory believes, only when a duty is acknowledged as a legal one, could it generate legal force and restrict another's legal right. In the decision of *Roe v Wade*, the Court only acknowledged the existence of such a legal duty after foetal viability; this duty therefore could restrict the mother's freedom on abortion only after that time. Before viability, there might still be a moral duty borne by the mother that she should not hurt or kill her foetus. However, this duty was only a moral one; it did not have legal effect to prohibit the exercise of abortion. Legally, the mother was still free on whether to choose to abort; only from a moral perspective, could she be blamed for her decision on abortion.

Lastly, the idea of a duty without the existence of a related right again supports the view of the Court that the foetus does not have a right to life: the duty not to harm the foetus is one-sided; it does not relate to a life that a foetus may claim a right to. On these grounds, the Choice Theory seems to be a more convincing explanation of attitudes toward abortion held by the Court. *Roe v Wade* can thus be seen as representative of the Choice Theory. However,

[712] Ibid, 142–45.
[713] Hart, *The Concept of Law*, above n 51, 109, 115–17, 256.

we need to bear in mind one thing: legal duty to a foetus after viability was only recognised once in the US — or more accurately by some justices in US Supreme Court. The decision of *Roe v Wade* has been both reaffirmed and modified, even in the Court's own cases that followed.[714] This duty, therefore, has never been established as a legal one that will stand for all time.

Meanwhile, this duty does not necessarily stand as a legal duty in other countries. Only when a state incorporates such a duty in law could this duty become legally binding and the practice of abortion restricted accordingly.[715] When a state does not incorporate such a duty in law, that duty is still only a moral duty that might condemn a woman who chooses to abort; legally, the woman would always have a right to abortion and would therefore be free to choose whether to abort or not.[716]

5.6. Conclusion

Overall, the personhood argument that rests interpretation of a right in the Choice Theory is the only method that can provide us with an answer to the question of whether abortion should be allowed or not. Neither the argument that insists both the foetus and the mother be entitled to rights (which views a right as a unique interest or a benefit), nor the personhood argument that claims only the mother has rights (which relies on the Interest Theory or the Will Theory) is able to achieve such an answer.

The argument that concerns both the foetus's right to life and the mother's rights can be seen as resting either on the Interest Theory or the Benefit Theory. If it rests on the Interest Theory, problems of evaluation and comparison occur since firstly, it is hard to decide whether the foetus's right to life outweighs the mother's rights. Secondly, the mother also has a right to the foetus's life: this not only perplexes the comparison but conflicts with the feature of that right's inalienability. Thirdly, the point in time when the foetus has a right to life is uncertain

[714] For example, both *Planned Parenthood of Southeastern Pa v Casey* ((1992) 505 US 833) and *Stenberg v Carhart* ((2000) 530 US 914) upheld the core opinion of *Roe v Wade*. *Webster v Reproductive Health Services* ((1988) 492 US 490) and *Gonzales v Carhart* ((2007) 500 US 124) were prone to strike down that decision, although not explicitly.

[715] For example, similar to *Roe v Wade*, Australian states of Victoria, South Australia, Tasmania, Western Australia and Northern Territory have incorporated a duty of the mother in their legislation not to carry out abortion after certain stages in pregnancy by deeming such a practice as illegal. *Abortion Law Reform Act 2008* (Vic); *Criminal Law Consolidation Act 1935* (SA) ss 81–2; *Reproductive Health (Access to Terminations) Bill 2013* (Tas); *Health Act 1911* (WA) ss334-35; *Termination of Pregnancy Law Reform Act 2017* (NT). Australian states of Queensland and New South Wales have also acknowledged such a duty for the whole pregnancy by considering abortion at any stage a crime. *Criminal Code Act 1899*(Qld) ss 224–26; *Crimes Act1900* (NSW) ss 82–4.

[716] For example, Australian Capital Territory does not incorporate such a duty of the mother in the law; abortion is thus legal in this jurisdiction.

and hence the point in time when such comparisons become applicable is also uncertain. The legitimacy of contraception is even subject to question because if the foetus has a right to life from fertilisation, the practice may be considered as another type of abortion. A solution to the legality of abortion, as a result, is difficult to reach.

An answer is again difficult when employing the Benefit Theory. If the foetus's right to life and the mother's rights are both considered to be benefits, the difficulty of evaluating and comparing the benefit of the foetus's life with the benefit of the mother's rights exists again. Moreover, many other individuals might also claim a right to the foetus's life, which makes the comparison harder and raises the problem of inalienability. Furthermore, viewing a right as a benefit cannot explain why members of the public might stand against abortion but for capital punishment, or alternatively for abortion but against capital punishment.

The personhood argument that concerns only the mother's rights and rests on the Interest Theory is also unable to reach an answer. On the one hand, this argument is subject to the refutation of unacceptability on the grounds of circularity, disqualifying comatose patients and infants from having a right to life, and the possibility of an alternative definition of personhood. On the other hand, although this argument may seem acceptable, as it was to Singer, the proposed answer — that abortion ought to be generally prohibited due to considerations about the foetus's wellbeing — still cannot be upheld for the following reasons. Firstly, comparison between the mother's rights and the foetus's wellbeing is hard to carry out. Secondly, the wellbeing of the foetus cannot be justified if that were to override the mother's other rights. Thirdly, the contrary answer — that abortion is generally allowable — may be reached because the decision about whether to abort is ultimately determined by the foetus's parents. Last, permitting infanticide cannot be avoided when employing this argument because an infant is deemed substantially similar to a foetus.

Resting the personhood argument on the Will Theory is still incapable of providing an answer: permitting and prohibiting abortion are both universalisable and not universalisable because universalisation of abortion upholds the mother's right to self-determination but results in the human species cease to exist, while universalisation of prohibition of abortion preserves human species but obstructs the mother's such right; the Will Theory is therefore unable to suggest whether or not the mother has a right to abortion. Hare's extended rule of universality not only cannot account for his anti-abortion stance, but also deviates from Kant's idea of the categorical imperative and, by extension, would make practicing contraception illegal.

The only way to reach an answer is to rest the personhood argument on the Choice Theory. Viewing a right as a choice again refutes the opposing ideas on the grounds of unacceptability raised by anti-abortionists and the idea that the foetus has a right to life. Instead, the Choice Theory confers the mother with a right to abortion that allows her to choose freely whether to abort or not. Notwithstanding, this choice does not conceive of the right to abortion as absolute. Rather, it proposes that this right can be restricted by a legal duty to the opposite, i.e., a legal duty that forbids the practice. Generally, such a duty is a moral one, unless the law of a certain jurisdiction at a certain time incorporates it. For example, in the decision of *Roe v Wade*, a duty not to abort was inflicted after foetal viability. The duty then became a legal duty restricting the mother's right to abortion. If the law does not incorporates it, the mother still has complete freedom in choosing whether or not to abort.

In addition, the argument that favours the Choice Theory also provides logical accounts for positions held by many scholars, as well as members of the public, that is they stand against abortion but for capital punishment, or alternatively, for abortion but against capital punishment. For both two groups, the convicted on death row can be seen as having a right to life, but a foetus does not. However, for the first group, convicted felons choose to waive their right to life in committing a serious crime; under such circumstances, capital punishment is therefore justified. For the foetus, although he or she has no right to life according to the Choice Theory, the mother has a duty not to hurt him or her and to respect his or her potentiality to become a living person; abortion thus is not allowed. For the second group, abortion is allowed since the mother's duty ought not to be included in the law; moral duty, therefore, cannot prevent the mother from exercising her legal right to abortion. Regarding capital punishment, a serious crime is considered insufficient for the perpetrator to waive his or her right to life, although he or she can still make a waiver; capital punishment for such a crime thus ought to be illegal.

On these grounds, the personhood argument which rejects the idea that the foetus has a right to life while the mother has rights as choices, is the best argument regarding the issue of abortion in a legal sense. The next chapter will explore why the Choice Theory also provides a compelling rationale for the legality of euthanasia.

Chapter Six
Euthanasia

6.1. Introduction

Euthanasia is the last issue concerning the right to life that this thesis explores in detail, with voluntary euthanasia and non-voluntary euthanasia the two sub-issues most concerned. Regarding voluntary euthanasia, considerations focus on the question of whether a doctor can end a patient's life once that patient's has expressed a will to die. In cases of non-voluntary euthanasia, concerns focus on the question of whether a doctor can end a patient's life by consulting with the patient's relatives; this occurs when the patient is unable to communicate with the doctor because he or she is in a coma or otherwise unable to express an opinion on the matter.

Arguments raised for or against either of these two sub-issues can be seen as resting on different interpretations of the right to life, as well as other related rights. The Benefit Theory can be employed to explore the slippery slope argument, concerns about gains and losses related to the patient and those related to his or her relatives. These arguments consider the outcome or consequence of euthanasia as key to deciding the legitimacy of the practice: if the outcome is beneficial, the practice ought to be allowed; if the outcome is harmful, it ought not to be allowed.

The Interest Theory is useful for understanding the state's interest in the patient's life, the right to self-determination argument and the right to life argument more generally. All can be viewed as conceiving of a right as a special interest that is different from a general benefit. Moreover, a state's interest in a patient's life, in terms of the Interest Theory, exists as that state's right to control the patient's life. The question of whether euthanasia should be allowed therefore depends on which right — the patient's right to life, the patient's right to self-determination, or the state's right to control the patient's life — has most importance. Regarding voluntary euthanasia, all three rights need to be considered because the patient has both the right to life and the right to self-determination, and the state has the right to control that patient's life. As for non-voluntary euthanasia, the patient's right to life and the state's right to that patient's life ought to be taken into account; the right to self-determination argument does not apply in this case because a patient in a coma or a vegetative state cannot express a decision about his or her own affairs.

The right to life argument and the right to self-determination argument can also be interpreted via the Will Theory or the Choice Theory. According to the Will Theory, a right is a universalisable choice. Two suppositions follow from this. The first is that a person must be able to reason and to carry out an action according to that reasoning in order to have a right. In cases of voluntary euthanasia, a patient therefore has both a right to life and a right to self-determination, while in cases of non-voluntary euthanasia a patient does not have any rights. The other point to consider is that as long as a right exists, other things need not to be considered. The patient's right to life and his or her right to self-determination are thus the only two rights that ought to be taken into account. The state's right to control the patient's life (as included in the Interest Theory) or pleasures and pains experienced by the patient and his or her relatives (as included in the Benefit Theory) are excluded from the Will Theory.

According to the Choice Theory, if a right is a choice, this means that a right constitutes control held by the right holder over the performance of the duty bearer. Two similar deductions follow. First, a person must be able to express a will to control, as well as be able to carry out that control in order to qualify as a right holder. In cases of voluntary euthanasia, the patient therefore has rights, while in cases of non-voluntary euthanasia the patient does not. Second, the only two rights that need consideration are the patient's right to life and his or her right to self-determination. The state does not have a right to the patient's life; nor do other benefits or pains need to be taken into account.

Within voluntary and non-voluntary euthanasia, there is another sub-issue to consider, namely whether or not there are differences in legal status between active and passive euthanasia. Arguments raised by scholars on this sub-issue can also be seen as conceiving of different theories of rights. Concerns about legal causation and the double effect principle seem to favour aspects of the Benefit Theory or the Choice Theory. By contrast, the concept of natural lifespan can be viewed as relying on either the Benefit Theory or the Interest Theory. This chapter again finds that only the right to life argument and the right to self-determination argument resting on the Choice Theory can provide us with an answer to the question of whether or not the various forms of euthanasia ought to be permitted by law.

This chapter is significantly longer than the previous two chapters. However, this does not mean that the thesis considers issues regarding euthanasia more important than those about capital punishment and abortion; rather, the thesis deems them as equally important. This

chapter is longer just because it covers several sub-issues, namely voluntary euthanasia, non-voluntary euthanasia, as well as active and passive euthanasia.

6.2. The Slippery Slope Argument, Patient Pain, Relatives' Benefits and a Right as a Benefit

The slippery slope argument, arguments concerning the wellbeing of the patient, as well as arguments about burdens faced by the patient's relatives are most compatible with the Benefit Theory. The slippery slope argument objects to the practice of euthanasia because of the harm it brings, for example, accepting involuntary euthanasia. Concerns about patient wellbeing generally approve of euthanasia, since it is beneficial for both the patient and his or her relatives. The underlying logic behind these arguments, therefore, is clear: if an action is harmful, it ought not to be allowed, while if an action reduces harm or enhances a benefit, it ought to be permitted, even encouraged. This is exactly the logic that grounds the utilitarian interpretation of a right in the Benefit Theory. If these arguments are interpreted via the Benefit Theory, the question of whether euthanasia should be allowed depends on whether it produces more benefit or more harm.

6.2.1. Benefits to Be Considered

The first problem one encounters when employing the Benefit Theory is the sheer volume of benefits to be considered. The slippery slope argument believes the harm brought by allowing euthanasia to be extraordinary. It, therefore, lays great emphasis on the negative impacts that euthanasia generates. The other side, namely the positive influences are either overlooked or considered insignificant: for example, regarding non-voluntary euthanasia, relief of pain for the patient and alleviation of the relatives' financial and emotional burdens are rarely considered; the same is true for the benefit of controlling one's own affairs as regards voluntary euthanasia.[717] On the contrary, the relatives' burdens argument and the patient's pain argument stress the benefit euthanasia brings; negative consequences are seldom discussed, such as loss of life or other possible bad outcomes.

If we bring all these benefits and harms together, the result is not as clear as any of the three arguments might suggest initially. Specifically speaking, in cases of voluntary euthanasia, positive outcomes include the reduction of pain for the patient and relieving the burden faced by relatives, as well as the pleasure in deciding one's own affairs. Negative effects include the

[717] Foot, 'Euthanasia', above n 218, 86; Draper, 'Euthanasia', above n 7, 176; Math and Chaturvedi, 'Euthanasia', above n 199, 901; Millard, 'The Legalization of Voluntary Euthanasia', above n 233.

loss of the patient's life and the possibility of slipping into accepting disallowed forms of euthanasia, such as involuntary euthanasia. Other problems also include increasing both allowed and disallowed forms of euthanasia, side effects such as weakening trust between patient and doctor, decreasing the state's contribution to medical care, abuse and commercialisation of euthanasia.[718]

On the surface, the life of the patient appears to be the most valuable benefit. To end that life, therefore, would be the most painful loss and ought to surpass all the other considerations about pleasures and pains. According to this point of view, euthanasia, no matter whether voluntary, non-voluntary or involuntary, should not be allowed. However, as noted in chapter four and five, this conclusion does not necessarily follow. For example, Mill would disagree, since he laid more stress on the benefit of self-determination rather than the benefit of life.[719] Deprivation of control over one's own affairs, in Mill's view, was more serious than taking a life. In this sense, Mill probably supported voluntary euthanasia at the very least, although he did not write explicitly about this issue.[720]

Moreover, loss of life is not necessarily more painful than economic and emotional burdens borne by the patient's relatives. Regarding the economic burden, saving or maintaining the life of a seriously ill person is very expensive.[721] This cost may exceed the contribution the patient brings to the world generally, especially when he or she is in great pain, a coma or a vegetative state and can no longer work. More than that, if the cost is also a social cost, as noted in chapter two, time, effort and money might be used to save other more beneficial lives.[722] By expending resources on a dying patient, those other lives might be sacrificed. The life of the patient, as a result, may not outweigh the economic burden.

The life of the patient does not necessarily outweigh others' emotional burdens either. Anxiety, together with restlessness about the eventual outcome, may have a significant impact on the health of the relatives. This impact may in turn lead to illnesses or shorter lifespan for

[718] Amarasekara and Bagaric, 'The Legalisation of Euthanasia in the Netherlands', above n 191, 181; Mendelson and Bagaric, 'Assisted Suicide through the Prism of the Right to Life', above n 192; Zylicz and Finlay, 'Euthanasia and Palliative Care', above n 197; Caldwell, *Now the Dutch Turn Against Legalised Mercy Killing*, above n 198; Math and Chaturvedi, 'Euthanasia', above n 199; Guisahani, 'Life and Death after Aruna Shanbaug', above n 200; Jackson, 'In Favour of the Legalisation of Assisted Dying', above n 215, 38.
[719] Mill, *On Liberty and Other Essays*, above n 54, 223–24.
[720] See Simon Clarke, 'Mill, Liberty and Euthanasia' (2015) 110 *Liberty and Equality* 12. However, some believe that Mill might forbid the voluntary ending of one's life since that would end the fundamental condition necessary for autonomy; see Lee Goldman and Andrew I Schafer (eds), *Goldman's Cecil Medicine* (Saunders, 23rd ed, 2008) ch 2, 4–9.
[721] Math and Chaturvedi, 'Euthanasia', above n 199, 901; Raz, 'Death in Our Life', above n 38, 21.
[722] Raz, 'Death in Our Life', above n 38, 21.

those individuals. An emotional burden, similarly to the economic burden, may also concern lives and therefore the life of the patient cannot allege supremacy.

Furthermore, the pain of the patient also needs consideration. Compared with life itself, the benefit of painlessness seems to be of much less importance. However, that is a judgement almost always made by a person in reasonable health. For a dying patient, painlessness may well seem more important than life itself. After all, if the patient is dying of an incurable condition, death may come soon anyway.[723] To die in great pain therefore seems much crueller than choosing to die in peace. Euthanasia, in this sense, is beneficial; although it shortens the patient's life by a short period of time, it relieves unbearable pain.[724]

Opponents of euthanasia contend that dying is more painful than illness.[725] The pain experienced by the patient, therefore, adds weight to arguments against euthanasia. However, on the one hand, some illness is generally believed to be unbearably painful, for example, lung cancer, and morphine used to carry out euthanasia is able to reduce the pain the patient endures during death. Dying, therefore, is not necessary more painful. On the other hand, even if dying is more painful, the loss of the patient's life and wellbeing still does not necessarily override the self-determination of the patient and burdens felt by the relatives. In any sense, the loss of the patient's life cannot convincingly prove that euthanasia should be prohibited.

In addition to that, even if the weight of arguments against euthanasia can be further added by the bad outcomes euthanasia produces, the conclusion that euthanasia should be prohibited still does not necessarily follow. Firstly, bad outcomes may not occur. Scholars in favour of euthanasia arguing that allowing either voluntary euthanasia or non-voluntary euthanasia will not lead to an increase in their practice or accepting involuntary euthanasia. The four side effects, namely trust weakening, state's contribution decreasing, abuse and commercialisation,

[723] The Liberal MP Duncan McFetridge agreed with this view when he introduced the latest bill on euthanasia to the lower house of the South Australia Parliament in November 2016. He insisted that the bill should be passed since patients who would be entitled to voluntary euthanasia via this bill were those who only had a few days to live. However, the bill was knocked back. See Australian Associated Press, *Voluntary Euthanasia Laws Fail to Pass South Australian Parliament by One Vote* (17 November 2016) The Guardian <https://www.theguardian.com/society/2016/nov/17/voluntary-euthanasia-laws-clear-hurdle-in-south-australian-parliament-after-15th-attempt>.
[724] Samuel Williams, *Euthanasia*, above n 221.
[725] C B Williams, 'Euthanasia', above n 223.

according to those scholars, may not emerge, either. Rather, allowing such practices may prevent such bad outcomes from occurring in the first place.[726]

Secondly, even if bad outcomes do occur, they may not be the result of the legalisation of euthanasia. On the one hand, these bad outcomes may be a lie spread by doctors who appeal for the prohibition of euthanasia.[727] On the other hand, the causal connection between bad outcomes and the legalisation of euthanasia may in fact run the other way, namely that euthanasia ought to be made legal in order to prevent bad outcomes; for example, it may be that a rise in the practice of euthanasia encourages the state to legalise it.[728] At the same time, other factors may have contributed to bad outcomes as well: specific legal and cultural situations, such as lacking of constraining institutions or ineffectiveness of the legal system as a whole in the given state, may also lead to the emergence of disallowed practice of euthanasia, namely involuntary euthanasia.[729]

Thirdly, 'bad' outcomes may not be negative after all. For opponents of euthanasia, acceptance of non-voluntary euthanasia, coupled with an increase in the practice of voluntary and non-voluntary euthanasia are considered bad outcomes because the loss of life is viewed as a great loss. The more lives lost, and lost in more ways, therefore, makes things even worse. However, if we take the ending of life to be a pleasure because it relieves pain or other burdens, the more ways one can practice that will lead to better outcomes. Since there is no absolute answer to whether euthanasia is beneficial or not, it is again hard to decide whether these outcomes add weight to the negative side or the positive side.

Fourthly, though bad outcomes will surely add weight to the negative side, this does not mean that the pain euthanasia brings must surpass the benefit it generates. The pain in the loss of a patient's life and the bad outcomes that might follow do not necessarily prevail over the benefit of the patient's self-determination, pain relief and alleviating the relatives' burden. As a result, arguments that appeal for the prohibition of euthanasia cannot be demonstrated. The negative side may not weigh more than the positive side. Similarly, the positive side again does not necessarily weigh more than the negative side; the attitude for the practice, notwithstanding, cannot be justified, either. The arguments resting on the Benefit Theory are

[726] Raz, 'Death in Our Life', above n 38, 5–6; Griffiths, 'Comparative Reflections', above n 202, 202–3; Griffiths, Bood and Weyers, *Euthanasia and Law in the Netherlands*, above n 204, 301 n 4.
[727] Magnusson, *Angels of Death*, above n 211, 229.
[728] Stephen Smith, 'Evidence for the Practical Slippery Slope in the Debate on Physician-Assisted Suicide and Euthanasia', above n 203, 22.
[729] Griffiths, Bood and Weyers, *Euthanasia and Law in the Netherlands*, above n 204, 304–5.

thus unable to provide an answer to whether euthanasia should be allowed or not in the first place.

6.2.2. A Right to Life or a Right to Die?

The second difficulty occurs to the Benefit Theory is that it generates unacceptable implications for the practice of euthanasia, which again makes an answer impossible. If a right is a benefit, it means that when a thing or an action brings benefit to an individual, it can qualify as a right. If the thing or the action does not bring benefit or, alternatively, brings harm to an individual, it can never qualify as a right.

Normally, having a life is beneficial for a person. Life, therefore, exists in the form of a right. However, this may not be true for everyone. Some people may view life as an unbearable burden that causes misery. As mentioned in chapter five, this view might be held by a woman who is about to have a baby against her will. It may also be held among patients who are seriously ill and suffer great pain. In fact, it is not uncommon for such patients to feel that being alive is no longer pleasant, but instead a source of constant pain, both physical and emotional. If being alive is a pain, then according to the Benefit Theory, life can no longer qualify as a right. Rather, choosing to die or being made to die painlessly is a form of pleasure. In such cases, the patient seems to have a right to euthanasia — or more generally a right to die — and thus the practice of voluntary and non-voluntary euthanasia ought to be justified.

Some scholars argue that there should not exist a right to die, since the benefit that qualifies a right, according to the Benefit Theory, does not equate to individual pleasure. Rather, a right ought to be a benefit that brings real utility for that individual. For instance, an individual may experience pleasure in hurting himself or herself. However, this pleasure, according to Bentham, could not qualify a right because hurting oneself produced more harm rather than benefit for that individual.[730] In this sense, whether a person has a right to die does not depend on whether the person feels the practice is beneficial or not, but whether death brings real benefit or harm.

This dependence, nonetheless, leads to inadmissible results. Here only the benefit in life, the pain of the patient and the benefit of self-determination in voluntary euthanasia are under consideration; bad outcomes and burdens faced by relatives are put aside. Two results may

[730] Bentham, *Of the Limits of the Penal Branch of Jurisprudence*, above n 54, 233; Bentham, *The Works of Jeremy Bentham*, above n 54, vol 1, 161.

follow from this. One is that the benefit in life surpasses the benefit in relieving the pain of the patient (and self-determination in voluntary euthanasia); euthanasia thus is harmful. The other is that the benefit in relieving the pain of the patient (and self-determination in voluntary euthanasia) exceeds the benefit in life; euthanasia thus is beneficial. If the result is the former, the Benefit Theory will qualify a right to life while disqualifying the right to die and the right to self-determination. Therefore, in cases of non-voluntary euthanasia, relatives and the doctor must respect the patient's benefit in life and keep him or her alive; non-voluntary euthanasia will not be allowed.

However, problems arise when regarding voluntary euthanasia. Disqualifying the right to die and the right to self-determination seems to imply that the patient himself or herself does not have control over his or her life. Instead, he or she must choose an action that augments his or her pleasure — in this case being alive. If this were to happen for all other actions, a person would always be forced by law to choose only the action that benefits him or her. Individual autonomy and liberty would be rendered meaningless, and self-determination would never take the form of a right.

In an absolute state, restrictions on one's autonomy and self-determination on account of a benefit are deemed acceptable. However, in democratic states, as is the case for most countries today, this cannot be accepted. In fact, the law confers many rights just for the purpose of maintaining personal freedom, no matter whether they inflict pain or pleasure on the holder. Freedom of expression is an instance of this.[731] For example, a man may express an opinion opposing discrimination against women. He obviously will not be benefited from that speech, and may instead lose his job due to the increasing number of competitive women. However, the loss of benefit does not prevent the man from maintaining his right to free expression because he is entitled to giving that kind of speech.[732] Regarding the issue of euthanasia, the right to die may again provide such an instance of this; however, the Benefit Theory is unable to allow it.

As for the latter result, the Benefit Theory will qualify a right to self-determination and a right to die while disqualifying the right to life. In cases of voluntary euthanasia, the patient will be able to choose freely to die. However, if the patient does not want to die, we seemingly ought to force him or her to do so since death is more beneficial. Similarly, in cases of non-

[731] Wenar, 'The Nature of Rights', above n 473; Raz, *The Morality of Freedom*, above n 57, 149–51, 274–75; Kramer, 'Rights without Trimmings', above n 491; Kramer and Steiner, 'Theories of Rights', above n 64, 85–8.
[732] Raz, *The Morality of Freedom*, above n 57, 149–51, 274–75.

voluntary euthanasia when the patient cannot make a decision, the patient's possession of a right to die but not the right to life seems to suggest that his or her life must be ended, and anyone can end his or her life legitimately. These conclusions, however, are unacceptable, since they make the patient duty-bound to die when his or her death is considered more beneficial than life, and may even result in the legalisation of involuntary euthanasia.[733] As a result, although the difficulty that lies in comparing benefits in the first place can be disregarded, an answer as to whether euthanasia is beneficial or not is still unachievable.

6.2.3. Having Benefits in Life

A third difficulty emerges when the Benefit Theory considers about many people's pleasure or pain as regard a patient's life. Firstly, similarly to the situation that occurred in the issue of abortion, there are relatives, friends and even work colleagues who may be benefit from the patient's life. This also happens to benefits and pains other than the patient's life, such as the patient's right to self-determination or his or her suffering: others are again benefited or harmed by the patient's ability to determine his or her own affairs or his or her level of pain. All these benefits and pains have to be calculated by comparing the negative side of euthanasia with the positive one, which makes it more difficult.

Secondly, consideration about many people's pleasure or pain confers these people with rights. If any benefit in the patient's life qualifies a right, others relevant can also have rights to the patient's condition of being alive. Similarly, if life is a pain while death becomes a pleasure (as noted above), others can have a right to the patient's death. This state of affairs, however, is in conflict with the feature of inalienability of the right to life or death.

Thirdly, these people's rights render it hard to decide which right ought to prevail if they conflict with each other. For example, the patient may benefit from being alive while others may benefit from his or her death. Alternatively, the patient may benefit from death while others would gain from the patient being alive. Worse than that, if the answer comes down on the side of other people, unacceptable outcomes will occur because if another's pleasure or pain carries more weight than that of the patient, the patient's wishes may be totally disregarded. That is, when the patient finds it painful to continue living, while the others find great pleasure in his or her being alive, the others can ask doctors to keep the patient alive and suffering, even though the patient wishes to die. This conclusion is acceptable to scholars who

[733] Burnie, 'Euthanasia', above n 232.

are against the practice of voluntary euthanasia. However, it interferes with the autonomy and liberty of the patient.

Alternatively, when others find it painful for the patient to continue living, while the patient finds pleasure in being alive, the others seem again able to ask that the patient die, even if he or she wants to live. This matches the view that the patient has a duty to die for the benefit of others and the whole society.[734] However, it is still unacceptable because it leads to the legalisation of involuntary euthanasia and even political extremism. As a result, the consideration of many people's benefits and pains in the Benefit Theory not only worsens the first two difficulties in comparison and inadmissible implications, but also further raises the problem of inalienability. An answer to the question of whether euthanasia should be allowed or not, therefore, becomes even more unattainable.

6.2.4. Active and Passive Euthanasia

Such an answer, again, is not possible regarding the difference between active and passive euthanasia. This comprises the fourth reason for the difficulty of authorising euthanasia via the Benefit Theory. Arguments raised on the grounds of causation, the double effect principle and the natural lifespan can also be seen as resting on the Benefit Theory. Causation concerns the difficulties a doctor confronts if punishment were to follow his or her practice of euthanasia. That is, if the death of the patient occurred because of the doctor's active action—for example, injecting a lethal drug — that action is considered the direct reason for the death of the patient and thus similar to murder.[735] The doctor, therefore, may be sentenced and face considerable punishments. Alternatively, if the death of the patient occurs because of the doctor's passive action — such as withholding medical treatment — the action is considered as not the direct reason for the death of the patient and thus is not similar to murder.[736] The doctor, therefore, will not be sentenced to punishment, or at least one that is much less severe.

However, as pointed out by scholars who are against the idea of a difference between active and passive euthanasia, the distinction in causation between the action of the doctor and the death of the patient does not exist.[737] The passive action of the doctor, namely withholding medical treatment, again directly leads to the death of the patient: without the doctor's action

[734] Raz, 'Death in Our Life', above n 38, 20–1.
[735] *Vacco* (1997) 521 US 793, 801.
[736] Rachels, 'Active and Passive Euthanasia', above n 88, 93.
[737] Ibid, 94.

of withholding, the patient does not die.[738] The punishment meted out to the doctor, therefore, may be exactly the same. Moreover, different causation needs not to be considered in the Benefit Theory. No matter how euthanasia is carried out, the patient is dead and his or her pain is relieved. Alleviation of the burden faced by others and generation of possible bad outcomes are also similar. Therefore, if there are punishments, they may again be the same. The difference between active and passive euthanasia thus cannot be justified on the grounds of causation.

The difference again cannot be justified by the double effect principle. Similarly to causation, this principle stresses the difference between punishments that a doctor may confront, but it does not argue that the difference comes from the different causation between the doctor's action and the death of the patient. Rather, the difference is the result of different intentions the doctor holds when he or she chose to end the patient's life. When the doctor intends the death of the patient, the death of the patient is considered the result of the doctor's action of ending the patient's life.[739] The doctor is thus held liable for this action and faces severe punishment. On the contrary, when the doctor does not intend but only foresees the death of the patient, the death of the patient is not considered the result of the doctor's action.[740] The doctor is thus not held liable or only held partly liable for this action, and either will not face punishment or at least one that is less severe.

However, this principle also has problems. Firstly, similarly to the situation of causation, a difference in punishments may not exist. As pointed out by scholars who are against the idea that there is a difference between active and passive euthanasia, the intention of the doctor when he or she carries out active euthanasia and passive euthanasia may actually be the same: the doctor may also intend to end the life of the patient when he or she withholds or withdraws life-sustaining treatment from the patient. The punishment for active and passive euthanasia, if we employ this principle, therefore, ought to be the same.

Moreover, a doctor who carries out active euthanasia may not intend the death of the patient, but a doctor who carries out passive euthanasia may well do so intentionally. For example, the doctor may inject a lethal drug for the purpose of relieving the pain of the patient, which, however, ends in death. On the contrary, the doctor may remove a life-sustaining facility for the purpose of ending the patient's life. According to the double effect principle, in this case,

[738] Steven Smith, *The Disenchantment of Secular Discourse*, above n 189, 49.
[739] *Vacco* (1997) 521 US 793, 801–2.
[740] Ibid.

the punishment for passive euthanasia ought to be more severe than that for active euthanasia, which, however, conflicts with the one proposed by this principle initially.

Secondly, the double effect principle has not yet been established as a legal principle because it does not adequately codify the intention in play when one carries out an action, as examples in the previous point illustrated.[741] The principle, therefore, cannot be applied to justify the difference between active and passive euthanasia.

Thirdly, the Benefit Theory does not concern itself with different intentions the doctor might have held when he or she carried out the act of euthanasia; it only considers effects of the act. These effects, no matter whether intended or not, are the same, namely the death of the patient, the relief of his or her pain, and so on. The punishments, therefore, may be the same as well. A convincing claim that there is a difference between active and passive euthanasia is thus again unachievable.

The last rationale about the natural lifespan emphasises the benefit that a person has in his or her life, which is mostly maximised when his or her birth and death are controlled by nature. When a patient reaches his or her death naturally, his or her benefit in life is maintained. On the contrary, if a patient ends his or her life before nature takes it, he or she is seen as being deprived of the benefit in life.[742] Active euthanasia interrupts the course of nature and thus is not allowable. Passive euthanasia, on the contrary, removes human interruption of the course of nature and hence should be permitted by law.

If viewed via the Benefit Theory, this rationale can refute some opposing ideas of scholars who are against the idea that there is difference between active and passive euthanasia, particularly those raised on the grounds that this rationale renders prolonging life via medical treatment disallowable.[743] This rationale suggests that other than the benefit in his or her death being determined by nature, the person also has a benefit in his or her life being maintained. Medical care that prolongs life is thus for the benefit of the person and is allowable; by contrast, euthanasia inevitably shortens a lifespan, is not for the benefit of the person and hence is not allowable.

[741] Rachels, 'Active and Passive Euthanasia', above n 88, 94.
[742] Jonsen, 'Criteria that Make Intentional Killing Unjustified', above n 245, 50–2.
[743] Steven Smith, *The Disenchantment of Secular Discourse*, above n 189, 58.

However, this rationale cannot explain properly the problem that on occasion active euthanasia is more humane than passive euthanasia. According to the Benefit Theory, the patient's benefit in his or her death being determined by nature still has to be compared with the benefit in relieving his or her pain, allowing the patient to determine his or her own affairs, and relieving his or her relatives of various burdens. Actively ending a patient's life in a shorter time span may be more beneficial than the passive ending of his or her life over an elongated period. In consideration of this, the natural lifespan rationale again cannot demonstrate that there is a viable difference between active and passive euthanasia. Summing up, arguments resting on the Benefit Theory are unlikely to provide us with an answer as to whether euthanasia — voluntary, non-voluntary, active or passive — should be allowed or not.

6.3. The State's Interest in Life, the Right to Life, the Right to Self-Determination and a Right as an Interest

The emphasis on the patient's right to life and the right to self-determination can be seen as viewing a right as a unique interest. This uniqueness either presents as the sufficiency of the interest to prove the reason for a duty, the generality of the interest to benefit a particular person, or the direct and intended relationship of the interest with a duty.[744] As noted in chapters four and five, both the right to life and the right to self-determination qualify as such unique interests. They therefore constitutes rights in terms of the Interest Theory.

When these two rights are interpreted as interests, their uniqueness differentiates them from other general benefits. This means that when the patient's right to life and his or her right to self-determination exist, other benefits and pains that are taken into account in comparison when employing the Benefit Theory can be disregarded. For example, the patient's pain, burdens faced by the relatives, and bad outcomes more generally can all be overlooked.

Notwithstanding, the right to life and the right to self-determination are not the only two rights related to the issue of euthanasia. The state also has a special interest in its citizens' lives, as noted in chapters four and five. Concerns about the state's interest in a patient's life, therefore, also needs to be involved when employing the Interest Theory. More than that, the state's interest in a patient's life takes the form of a right, specifically the state's right to control the patient's life. As a result, the rights that need to be included in the Interest Theory

[744] Raz, 'On the Nature of Rights', above n 57, 195; MacCormick, 'Rights, Claims and Remedies', above n 57, 338; MacCormick, 'Rights in Legislation', above n 44, 150; Lyons, 'Rights, Claimants, and Beneficiaries', above n 57, 176.

are the state's right to the patient's life, the patient's right to life and his or her right to the self-determination. Specifically speaking, the patient's right to life, right to self-determination and the state's right to the patient's life should be considered in cases of voluntary euthanasia; the patient's right to life and the state's right to the patient's life should be taken into account in cases of non-voluntary euthanasia.

6.3.1. The Patient's Right to Life, the Right to Self-Determination, and the State's Right to the Patient's Life

In cases of voluntary euthanasia, whether the practice ought to be allowed depends on whether the patient's right to life, his or her right to self-determination, or the state's right to the patient's life carries more weight, which, however, is difficult to determine. Interest theorists employ different methods to differentiate a special interest from a general benefit, and to differentiate a right from a benefit, but no effective way to differentiate further the weight of different special interests — i.e., rights — is available. This point has already been made clear in chapters four and five: it has been hard to decide whether the state's right to the criminal's life is more important than the criminal's right to life, or if the mother's right to self-determination is more important than the foetus's right to life. The same happens for the issue of euthanasia: there is again no answer as to whether the patient's right to life or his or her right to self-determination is more significant, or the state's right to his or her life. Difficulties in evaluation and comparison occur again.

Raz tried to solve this problem by pointing out that self-determination formed an integral part of the right to life. As mentioned in the discussion on the issue of abortion, Raz proposed that the interest in the condition of being alive and the duration of that condition was an integral part of the right to life.[745] However, that was not the whole of the right; other than it, the quality of one's life was actually more important.[746] This quality, namely the answer to the question of whether one's life was worth living or not, was best evaluated by oneself.[747] Therefore, the core of the right to life was one's 'normative power to choose the time and manner of one's death'.[748] Letting one choose when and how to die did not sabotage the right to life, but rather fulfilled one's enjoyment of the interest in life.[749] Voluntary euthanasia, according to Raz, thus ought to be allowed.

[745] Raz, 'Death in Our Life', above n 38.
[746] Ibid.
[747] Ibid, 10–2.
[748] Ibid, 1.
[749] Ibid.

Some may argue that choosing to die is not beneficial for the patient and therefore the patient cannot have a right to carry out such an action. However, this position does not pose a real threat to Raz's argument. According to Raz, the interest that qualified a right was not any random interest brought by the right. Rather, it ought to be an interest related to the core of the right.[750] For the right to life specifically, that core was the ability to determine one's death. The interest that had an effect on qualifying a right to life was thus the interest affiliated with the ability to determine. As long as this ability benefited the subject, he or she ought to be seen as having a right to life: whether the result of that determination was in his or her best interest was not under consideration.

Notwithstanding, a problem that remains with Raz's argument is that self-determination may not constitute the core of the right to life. If, as Raz insisted, self-determination was core, that meant the right to life derived from the right to self-determination. However, this contradicts common sense, logically as well as empirically. Regarding logic, the right to life cannot be deducted naturally from the right to self-determination. The examples Raz raised to explain notions of core and derivative rights were freedom of speech and freedom of political speech.[751] It was obvious that the latter fell under the category of the former since a political speech was always a kind of speech. However, life and self-determination are different. The concept of life cannot be owed to the concept of self-determination. The derivative relationship between them, therefore, cannot be logically justified.

Empirically, life cannot be seen as deriving from self-determination either. Normally, one needs to have a life before one can obtain the ability to determine one's own affairs; ability to determine without the existence of life is meaningless. Rather, self-determination can be seen as deriving from life itself: to protect one's enjoyment of life, one should be entitled to decide his or her personal affairs, such as when and how to die. It is the enjoyment of life that makes it necessary for one to control his or her death and so on, not the opposite. In this sense, self-determination is not the core of the right to life. Alternatively, the core of the right to life is enjoyment of one's life; this determination is only a derivative of the right to life.

If the right to life is a core right while the right to self-determination is derivative, then firstly, the right to life ought to rank higher than the right to self-determination, since the core right should rank higher than the derivative.[752] Thus when the enjoyment of life comes into conflict

[750] Raz, 'On the Nature of Rights', above n 57, 197–98; Raz, *The Morality of Freedom*, above n 57, 168–70.
[751] Raz, 'On the Nature of Rights', above n 57, 197–98.
[752] Ibid.

with self-determination, life should be given more weight. This, however, would make voluntary euthanasia unallowable, which contradicts Raz's conclusion on this matter.

Secondly, the existence of a right to life does not depend on interests of self-determination. On the contrary, it relies on the interest in life. When enjoying a life is for the benefit of the subject, he or she ought to be seen as having a right to life, no matter whether he or she has control over his or her life or not. Meanwhile, the question of whether there exists a right to determine the time and manner of one's death does not rest on whether maintaining that person's ability to determine so is in his or her best interest. Rather, it is grounded on whether the result of that determination augments or reduces the interest in life. If the determination brings benefit, or at least does not harm life, it can take the form of a right. If it harms life, even if it has an interest in determination, this interest will be overridden by the interest in life, and the right to self-determination will not exist. The latter possibility cannot be ruled out; Raz thus again could not convincingly claim that a patient must always have a right to end his or her life.

Thirdly, even if the right to self-determination is not viewed as deriving from the right to life, Raz's claim still cannot be justified. If the two rights are simply different rights with different cores, it is again hard to decide which right ought to prevail. As regards the right to life, its core is the enjoyment of life itself; for the right to self-determination, its core is the ability to determine one's own affairs. Then we face the problem of whether the interest in life or the interest in determination carries more weight, to which Raz did not give us an answer.

Singer also tried to solve this problem. Like Raz, he believed that the interest of life lay in its quality, and self-determination was therefore significant in realising that interest. Singer thus reached a similar conclusion to Raz, namely that voluntary euthanasia ought to be allowed. However, Singer argued in a different way. As mentioned in chapter five, Singer defined a right as a preference.[753] This preference was made on the grounds of the interest or pain that a certain action would bring. If the action brought pain, the preference would render one inclined to prevent that action from happening. If the action brought interest, the preference would tend to allow it. By extension, if life brought interest, one would prefer to have it. Conversely, if it brought pain or reduced interest, one would prefer not to have it.

[753] Singer, *Practical Ethics*, above n 42, 81–3.

Similarly to Raz, Singer again believed that the question of whether there was interest or pain in life depended on whether or not a specific life was worth living, the answer to which was always best achieved by the life holder himself or herself. Moreover, Singer explored why that was so. Singer believed that there were two kinds of values regarding life: intrinsic value and extrinsic value.[754] Intrinsic value was the value of the life according to its holder, i.e., how someone evaluated his or her own life.[755] Extrinsic value was the value that others attibuted to it, i.e., how an individual's life benefited others.[756] Singer believed that intrinsic value carried more weight than extrinsic value in determining whether life was worth living or not. Since intrinsic value was only determined by the holder of the life, the question of whether life was worth living or not was best decided by the life holder alone.

If the life holder is the only one able to determine whether his or her life is worth living or not, he or she must be able to think rationally: only when a person can determine things can his or her evaluation of life be taken seriously. If one could not determine his or her own affairs, he or she would not be able to assess the quality of his or her life; even if he or she could do so, that advice would not necessarily count because he or she did not have the ability to determine such matters. On these grounds, Singer held a similar belief to Raz that the decision to live or die was best left to the patient. Voluntary euthanasia, therefore, ought to be allowed since it upheld the patient's ability to determine his or her life.[757] On the contrary, involuntary euthanasia could never be allowed due to the fact that it deprived the patient of control over his or her own affairs.[758]

Notwithstanding, Singer seemed to have taken a different view to Raz about the relationship between the right to self-determination and the right to life. Rather than being a special core, self-determination, in Singer's view, was more a precondition of the right to life. It was one's ability to determine the value of life that rendered one able to enjoy the right to life. Difficulties in evaluating and comparing those two rights are thus avoided.

However, this does not mean Singer's argumentation is perfect; it has its own problems. The first one comes with the definition. If a right is a preference, this seems to mean that if the patient prefers to live, he or she should have a right to life, while if the patient prefers to die, he or she should have a right to die. This further suggests that the patient may not have a right

[754] Ibid, 167–69.
[755] Ibid.
[756] Ibid.
[757] Ibid, 169–76.
[758] Ibid, 176–78.

to life when he or she chooses to die, and thus anyone could take his or her life legitimately. Such a conclusion, however, is unacceptable according to common sense.

The second problem lies in the assertion that intrinsic value of life is more important than extrinsic value of one's life. Singer does not explain why this is so and we ought not to take his assertion for granted. It is still possible that extrinsic value is more important. For example, in a society where the value of one's life is weighed according to its contribution to the society as a whole, the value of a life to its owner is seen as less important than its impact on others. If such a case cannot be ruled out, then the reason for Singer's assertion may lie in self-determination: if everyone ought to determine his or her own affairs, the value of one's own life therefore ought to carry the most weight. On the contrary, allowing the value of one's life to be determined by others necessarily hinders a person from controlling his or her own affairs. Extrinsic value is thus less important than intrinsic value. However, this justification cannot stand. As noted above, self-determination is again the conclusion of the assertion; if it also serves as the reason for it, the logic in between will become circular. The right to self-determination, in this sense, is not the precondition of the right to life.

If neither taking the right to self-determination as the core of the right to life or as a precondition is acceptable, this seems to mean that these two rights are separate. Then a problem of how we should compare them occurs, which Singer again does not provide an answer. As a result, there is no solution to the question of whether voluntary euthanasia ought to be allowed or not; neither when we employ Raz's argument; nor when we agree with Singer's theory.

Besides these problems, the Interest Theory's inclusion of the state's right to the patient's life makes reaching an answer even more difficult. Neither Raz nor Singer considered this right, but it cannot be ruled out when a right is viewed as an interest. As a result, even if Raz and Singer were correct that one's right to self-determination was either a part of, or a precondition of the right to life, their conclusion that voluntary euthanasia was allowable still cannot be justified. The combination of the right to life and the right to self-determination does not necessarily carry more weight than the state's right to the patient's life. The legitimacy of voluntary euthanasia, therefore, is unanswered, as is the legitimacy of non-voluntary euthanasia.

6.3.2. The Patient's Right to Life and the State's Right to the Patient's Life

In cases of non-voluntary euthanasia, the patient is in a special state of being unable to express his or her will. The right to self-determination, therefore, does not need to be taken into account. Although the patient still possesses the right to determine whether he or she is going to die or continues to receive medical treatment, he or she cannot exercise that right. The unique interest that needs consideration is only his or her right to life. This seems to imply that the right to life triumphs and non-voluntary euthanasia must therefore be illegal.

However, regarding the state's right to the patient's life, the answer becomes complicated. Normally, the state benefits from citizens being alive. The attitude the state's right appeals for is thus similar to that of the patient's right to life, namely that non-voluntary euthanasia ought not to be allowed. Nonetheless, this is not always the case. Costs of maintaining the life of a seriously ill patient may be much higher than the gains he or she brings to the state, especially when he or she is in a vegetative state or a coma. The state, therefore, may bear a loss rather than achieving an interest in keeping the patient alive. If this is the case, the state's interest in the patient's life will point in a different direction, namely supporting non-voluntary euthanasia. If the state has an interest in practicing non-voluntary euthanasia while the patient's rights stand against this, then we face a problem of which argument should prevail.

Other than that, if the state has no interest in the patient's life but rather his or her death, it seems to further suggest that the state has a right to the patient's death rather than his or her life. Similarly, when the patient has no interest in his or her own life, he or she again has a right to die rather than a right to life. The idea of such a right to die, however, leads to unacceptable outcomes. For example, Raz believed that when one could tell a patient's life was not worth living, non-voluntary euthanasia ought to be permitted.[759] The situation of life-not-worth-living meant that neither the patient nor the state had an interest in the patient's life. The patient's life thus could be taken legitimately. However, if both the state and the patient have a right to the patient's death, this seems to imply that the patient's life can legitimately be taken by anyone in any form. For example, it may be possible to legalise the murder of a patient who is in a vegetative state and whose life many consider unworthy. Moreover, any life considered not worth living may be subject to the practice of non-voluntary euthanasia. For example, considering a severely disabled person, such as Steven Hawking, his life might be subject to this practice. His life, if not for his talent in physics and cosmology, would easily be considered not worth living; it then seems justifiable to put an end to his life when he lost his ability to speak.

[759] Raz, 'Death in Our Life', above n 38, 10–1, 20–1.

Singer may have realised these problems. He constrained the practice of non-voluntary euthanasia that he considered allowable to those applied to vegetative patients who had no brain activity and little chance of recovery.[760] A person who was entitled to a right to life, according to Singer, did not need to have a life worth living. Rather, the person ought to have the ability to realise the value of his or her life through self-awareness.[761] When a person was able to realise his or her interest (or pain) in life, he or she had a right to life, even though he or she might not be able to express it.[762] Only when a person lost self-awareness could he or she be seen as losing the right to life.[763] A patient in a coma or a vegetative state who still had brain function thus had a right to life. By contrast, a patient who had lost brain function had no right to life. In Singer's view, non-voluntary euthanasia was only allowable in the latter situation.

The inclination to generalise the practice of non-voluntary euthanasia, therefore, was deterred, but that does not mean Singer's argumentation is perfect. Problems remain: firstly, the method of evaluating life that Singer applies here is different from the one he resorted to on the issue of abortion. As noted in the previous paragraph, the patient's lack of self-awareness was the reason that justified the practice of non-voluntary euthanasia. This means Singer must have borne in mind that whether the patient's life was worth living or not ought to be decided by the patient himself or herself, as in cases of voluntary euthanasia; decisions made by others should not count. Otherwise, even if the patient was in a situation of not being able to value his or her life, others may still think it valuable. Non-voluntary euthanasia, therefore, would not be allowable.

However, as mentioned in chapter five, Singer argued that whether a foetus's life had worth or not should be decided by his or her parents. Then we need a reason for why values of different lives are evaluated by different people, and also why they should not be evaluated by the same group of people. Singer tried to differentiate abortion from non-voluntary euthanasia by pointing out that the patient used to have self-awareness but no longer did, while the foetus did not have self-awareness but would later on.[764] Since the patient had been deciding the value of his or her life, his or her decision ought to be the one that counted in the future. When he or she could no longer decide such matters, there would be no one to decide for him

[760] Singer, *Practical Ethics*, above n 42, 167–69.
[761] Ibid.
[762] Ibid.
[763] Ibid.
[764] Ibid, 159–60.

or her. On the contrary, for the foetus, he or she could not decide the value of his or her life at this moment. A decision made by someone else thus was necessary, until one day he or she was able to do so.

Notwithstanding, even so, it is still unclear why such a difference *should* make us choose different people to decide the value of different lives. If the value of a foetus's life can be decided by his or her parents, the value of a patient's life should again be decided by his or her family. For example, when a patient is in a vegetative state, the decision about whether and how to carry out euthanasia should be made by his or her close family members. Alternatively, if value in life is better evaluated by oneself, we again should not allow someone else to decide the life or death of a foetus. We should apply the rule of non-voluntary euthanasia in cases of abortion and conclude that since the foetus has no self-awareness, his or her life can be ended. After all, abortion and non-voluntary euthanasia are similar in some respects: both of the entities facing death lack the ability to evaluate the value of life. The differences between them thus may not be as obvious or significant as Singer believed. Inconsistencies in the ways to evaluate life, therefore, cannot be justified.

Secondly, disregarding the issue of abortion, even if we only consider Singer's argument in cases of non-voluntary euthanasia, his requirement of self-awareness may not be able to confine the practice to those who will never regain brain activity. According to Singer, self-awareness was the precondition of the right to life. When one had it, he or she had a right to life and euthanasia was impermissible. When one did not have self-awareness, he or she had no right to life and euthanasia was allowable. Then we also need a reason for why there is a difference between a patient who will regain brain activity and a patient who will not.

Singer again resorted to differences noted above that distinguished abortion from non-voluntary euthanasia. He contended that a person who would have self-awareness was fundamentally different from one who would not.[765] However, we still need to question on what grounds Singer raised that difference, while neither Singer nor his theory gives us the answer. If the difference is yet to be proven, then maybe we overlook it and believe that as long as one loses self-awareness, we can put an end to that person's life. This is a possible conclusion of Singer's theory, but an absurd outcome follows, namely that non-voluntary euthanasia may be applied to a sleeping person. Given that a person loses self-awareness during sleep, he or she, therefore, does not have a right to life and it can be taken legitimately.

[765] Ibid.

Thirdly, even if we do not get involved in the question of whether or not non-voluntary euthanasia can be allowed for a patient who will regain brain function, and accept Singer's conclusion that only one who will never regain brain function can be subject to non-voluntary euthanasia, this conclusion may still render non-voluntary euthanasia permissible for the insane. An insane person may not be able to tell life from death and therefore may be unable to realise the value in having a life. If he or she never recovers from this state, his or her life seems can also be ended legitimately.

The same conclusion is also implied in Raz's theory. Life in total insanity would again be considered as not worth living and non-voluntary euthanasia, therefore, would be allowed in such cases. In fact, Raz agreed with the practice of voluntary euthanasia in cases of mental deterioration.[766] Although he did not raise this issue for non-voluntary euthanasia, he seemed to have implied such an answer.

This problem still goes for the Interest Theory more generally, even if we do not resort to Raz's or Singer's argumentation; the Interest Theory again cannot prevent applying non-voluntary euthanasia to the insane, for instance, sentencing such individuals to death. If a mentally disabled person has killed or will kill innocent people, his or her life no longer comprises an interest but rather harm, both to him or her and the state. According to this view that conceives of a right as an interest, the person does not have a right to life but rather a right to die; the state also does not have a right to his or her life but rather a right to enforce his or her death. The person's life, therefore, can be ended legitimately, and capital punishment allowed. However, this answer is hard to accept because the law does not allow ending the lives of the insane on these grounds.

As a result, arguments that rest on the Interest Theory are unable to provide answers to the question of whether non-voluntary euthanasia should be allowed or not. There is no answer when we let the patient decide whether his or her life is worth living. There is even no answer when we take the state's right to the patient's life into account. Such an answer is again impossible if we disregard both the patient and the state and instead let the non-voluntary euthanasia question be decided by relatives.

6.3.3. Third-Party-Beneficiary

[766] Raz, 'Death in Our Life', above n 38, 21.

In the particular situation of non-voluntary euthanasia — where a patient is unable to express his or her will — a legal institution may be of great help, specifically third-party-beneficiary. This institution allows a third party to be benefited by a contract between two other parties. For example, a relative of the patient and the patient's doctor can reach an agreement for the benefit of the patient: they can agree that when the patient is unable to express his or her will, the relative can ask the doctor to carry out an action that brings most interest to the patient. In this agreement, the relative is the holder of the right. This right renders the relative able to decide whether to apply non-voluntary euthanasia to the patient. The doctor is the duty bearer; whatever the decision made by the relative, the doctor is bound to make it happen through his or her medical knowledge and facilities. The patient is the beneficiary, who is intended by the agreement to gain in some positive way.

If such an agreement is permissible, the question of whether non-voluntary euthanasia should be allowed or not for a patient in a coma or a vegetative state will be decided by the relative. As long as the patient's wellbeing is considered by the relative, the decision — no matter whether it leads to death or further life for the patient — should be upheld. This institution may also be applied in the situation when a patient has deteriorating mental ability.

Some may argue that we can never be sure the relative makes the decision for the benefit of the patient. Misuse of the right is more than possible, and has already been noted by some as one of the bad outcomes that euthanasia may bring.[767] However, this does not mean that the institution of third-party-beneficiary must be disregarded. On the one hand, there are similar institutions acknowledged in law, such as the relationship between parents, a childcare provider and a child. The parents make an agreement with the childcare provider to take care of their child; this is also a third-party-beneficiary agreement, with the parents as the right holder, the childcare provider as the duty bearer, and the child as the beneficiary. In this agreement, it is again unclear whether the parents make the best possible choice for the child because they may in practice be forced to use a childcare provider if they both have to work. Nevertheless, in consideration of the special connection of the parents to their child, their decisions are always trusted; after all, most parents prefer their children to live a good life.

The situation is similar for an agreement reached between a close relative and a doctor for the purpose of benefiting a patient. Generally, relatives — parents, children, sisters or brothers — prefer the patient to live well. They, therefore, also tend to make the best choice for the

[767] Math and Chaturvedi, 'Euthanasia', above n 199.

patient. If parents' decisions about their child are to be trusted, relative's decisions about an ill family member ought to be trusted as well. Moreover, the law also provides institutions to prevent misuse of the right provided under the agreement. Take the parents and their child again as the example. If the parents intentionally choose something that does harm to their child, their custodial right will be deprived: they will no longer be able to make decisions about affairs relating to the child and may even face trial and punishment.

Similar institutions can be applied for cases of non-voluntary euthanasia as well. If the relative of the patient prefers the patient to die because that will benefit the relative rather than the patient, the relative's rights can also be deprived and punishment inflicted. The third-party-beneficiary agreement is reached on the precondition that the relative will make a decision for the benefit of the patient. If the relative does not do so, the agreement will not take effect and the relative will have no right to decide the life or death of the patient. On these grounds, the institution of third-party-beneficiary can help solve some of the problems of non-voluntary euthanasia.

However, the Interest Theory is unable to explain this institution.[768] Generally speaking, the interest approach views a right as a benefit or an interest. The holder of the right, therefore, is the one benefited, while the situation in third-party-beneficiary is different. In the relative-doctor-patient agreement, the beneficiary (the patient) has no rights provided under the agreement. The right holder (the relative) may have no interest in having the right. The Interest Theory, in this sense, comes into conflict with the institution of third-party-beneficiary. This is one of the weaknesses on which the Interest Theory has been most stringently criticised.[769]

Some Interest Theorists refute this critique by pointing out that the right holder in a third-party-beneficiary agreement has certain interests and the beneficiary has certain rights. Take the example of the parents and the child again. The parents are benefited by the childcare agreement since the time and energy that may have been devoted to taking care of their child has been saved.[770] Their right, therefore, did not exist without interest. Meanwhile, the child is sometimes endowed by law with a right to sue — although represented by his or her parents

[768] Hart, 'Are There Any Natural Rights', above n 51, 38–9.
[769] Ibid.
[770] Sreenivasan, 'Duties and Their Direction', above n 481, 352–54; Sreenivasan, 'A Hybrid Theory of Claim-Rights', above n 486, 262–64. See also Hart, 'Bentham on Legal Rights', above n 23, 25–6.

or a lawyer — if the duty of the childcare is not performed properly.[771] The beneficiary thus does have rights related to the agreement. However, this refutation cannot work for the non-voluntary euthanasia agreement. Firstly, a patient in a coma or a vegetative state never has a right to sue, or although he or she has that right, he or she can never exercise it. The right of the beneficiary, in this case, is meaningless.

Secondly, the relative does not always benefit in having the right provided under the agreement, namely the right to decide the life or death of the patient. It is true that the financial burden of the relative will be removed if the patient dies, while the emotional pain will be relieved if the patient continues to live. However, it is also true that the emotional pain of the relative may be strengthened if the patient dies, while the financial burden will be increased if the patient lives. In the latter situation, the relative will suffer pain rather than gain benefits in making a decision about whether the patient is going to live or die.

Thirdly, even if the relative is benefited by that decision, this benefit is not one that makes him or her have the right provided under the agreement. Rather, the benefit that matters is the benefit of the patient: it is the benefit of the patient that makes the relative able to have and exercise his or her own right according to the agreement. The question of whether the relative gains is not important on this matter. However, the Interest Theory needs the relative's benefit to entitle him or her to a right.

Lyons also tried to solve this difficulty, believing that differentiating between the direct beneficiary and the indirect beneficiary, as well as the intended beneficiary and the contingent beneficiary could achieve this goal.[772] According to Lyons, only the direct and intended beneficiary of an agreement could be a right holder.[773] The indirect or contingent beneficiary could not be seen as having a right. In an experimental case where A makes a decision that he will give C a present if B pays his debt, C is such an indirect and contingent beneficiary.[774] C's obtaining a present is neither directly related to, nor expected by the duty performance of B. C, therefore, has no right to the debt. On the contrary, A will be benefited directly by B's paying back the money, and he is expected to be benefited by B's doing so. A thus is the holder of the right provided under that loan contract.

[771] Sreenivasan, 'Duties and Their Direction', above n 481, 352–54; Sreenivasan, 'A Hybrid Theory of Claim-Rights', above n 486, 262–64. See also Hart, 'Bentham on Legal Rights', above n 23, 25–6.
[772] Lyons, 'Rights, Claimants, and Beneficiaries', above n 57, 175–76,
[773] Ibid.
[774] Ibid.

However, Lyons's differentiation again cannot solve the problem. As noted above, in both the childcare agreement and the non-voluntary euthanasia agreement, the one who is expected to be benefited and is directly related to the duty is the third party, in these cases the child and the patient. According to Lyons's theory, they ought to have the right provided under the agreement, while actually, they do not. Rather, the holders of the right — the parents and the relative — are indirectly and unexpectedly benefited by the agreement, which Lyons considers as not having a right. As a result, Lyons's theory renders the actual right holder and the actual beneficiary in alternative positions. In fact, the experimental case Lyons raised was not even a third-party-beneficiary agreement. There was no agreement that pointed to the benefit of the third party. Its inability to explain the institution of third-party-beneficiary is thus unsurprising.[775]

This difficulty again could not be solved via MacCormick's theory, which required that the holder of a right ought to be generally benefited by that right.[776] However, a relative's right to decide affairs of the patient does not generally benefit the relative. Rather, the right is conferred because of its ability to benefit the patient generally. MacCormick's idea of a right, therefore, also assigned incorrect positions to the right holder and the beneficiary.

Raz's theory of rights was again unable to solve this difficulty. According to Raz, a right was an interest that was enough for holding another to a duty.[777] The person whose interest held another to a duty, therefore, was the right holder. However, in a third-party-beneficiary agreement, it is the interest of the patient that holds the doctor to a duty, who has no right regarding this duty. On the contrary, the relative, who has no interest regarding this duty, is the right holder.

Some may argue that Raz could resort to his differentiation of the core right and the derivative right to solve this difficulty. Raz believed the interest taken as a right ought to be the one related to the core of that right. The holder of the right, therefore, should be one who enjoyed the interest in the core of the right. Regarding the right provided under an agreement, its core was the ability to reach, alter and terminate the agreement.[778] The holder of this right was thus the one who had reached that agreement and was able to alter and terminate it. The parents in

[775] Lyons actually anticipated this problem himself; see ibid, 182–83.
[776] MacCormick, 'Rights, Claims and Remedies', above n 57, 338; MacCormick, 'Rights in Legislation', above n 44, 150.
[777] Raz, 'On the Nature of Rights', above n 57, 195.
[778] Raz, 'Human Rights in the Emerging World Order', above n 57, 55.

the childcare agreement and the relative in the non-voluntary euthanasia agreement, in this sense, were exactly the holders of rights provided under these agreements.

In contrast to the parents and the relative, beneficiaries only gain derivative benefits. For example, care given to a child or life support provided for a patient are both benefits connected with derivative rights. The care of the child was the result of the right that belonged to his or her parents to place him or her in childcare. Pain relief or life maintenance for a patient is the outcome of the right possessed by the relative to ask the doctor either to carry out euthanasia or to maintain the life of the patient. The parents' ability to ask the childcare provider to take care of their child and the relative's ability to ask the doctor to apply euthanasia or to maintain the life of the patient are not core rights. Rather, they derive from core rights, namely the ability to reach, alter and terminate the agreement. It is the enjoyment of the core right to reach, alter and terminate the agreement that confers the parents or the relative with a right to ask another to bring about those particular actions. According to Raz, benefits that are related to a derivative right cannot justify the possession of a core right. The child and the patient who only have an interest in the derivative rights, therefore, have no core rights provided under the agreement.

However, the fact the child and the patient have no core rights does not mean they have no derivative rights. The child and the patient do not have the right to reach, alter and terminate the agreement, but they do have interest in the ability to ask the childcare provider to take care of him or her and the ability to ask the doctor to carry out non-voluntary euthanasia on him or her. According to Raz's Interest Theory, they therefore ought to have rights to these specific actions. This, however, again does not conform to the actual assignment of rights in a third-party-beneficiary agreement. The institution of third-party-beneficiary, as a result, although it may prove helpful for the issue of non-voluntary euthanasia, cannot be admitted to the Interest Theory.

Other than inadmissibility, a further problem remains with this institution. Up until now, we have only considered the benefit of the patient, the right of the relative and the doctor's duty. One thing the Interest Theory is also likely to include is the state's right to the patient's life. If we take this right into account, the relative's ability to choose the life or death of the patient according to the agreement will not even stand, especially when the state may have a different evaluation of the patient's condition from that of the relative. For example, the relative may think it is better for the patient to die because the patient suffers unbearable pain, but the state

believes maintaining the patient's life is more beneficial, since he or she has one last brilliant piece of work to complete that would help cure others of disease. Conversely, the state may think it is better for the patient to die because keeping him or her alive is costly, but the relative believes maintaining the patient's life is more beneficial. If these situations occur, then we face a problem of which right should prevail: the right of the relative according to the agreement, or alternatively the state's right to the patient's life.

6.3.4. Active and Passive Euthanasia

An answer, again, is impossible when one considers the sub-issues of active and passive euthanasia via the Interest Theory. Resting causation, the double effect principle, and the natural lifespan argument on the Interest Theory still provides no convincing evidence for any great difference between the two types of euthanasia. Regarding differences raised on the grounds of causation and the double effect principle, stress, as noted above, is laid on the pleasure or pain a doctor confronts as a result of his or her ways or intentions in carrying out euthanasia. However, this pleasure or pain, in the Interest Theory, is not the key to deciding the question of whether certain types of euthanasia ought to be allowed or not. The key, rather, lies in the relative pleasure and pain of the patient and the state, especially those that take the form of a right. According to the Interest Theory, a right ought to be considered more significant than other benefits, since it is unique and special. The key, therefore, lies in analysing the patient's right to life and the right to self-determination, as well as considering the state's right to the patient's life.

For voluntary euthanasia, if the practice is allowed, that means the patient's right to self-determination carries more weight than either his or her right to life or the state's right to control his or her life. For non-voluntary euthanasia, if the practice is permitted, this means that both the patient and the state have a right to the patient's death rather than his or her life. In any case, the entity that is justified is the result, namely the death of the patient. The course that leads to this result — the manner in which death occurs — is not considered in the justification. Therefore, no matter whether euthanasia is carried out actively or passively, it should be allowed.

Moreover, if both voluntary and non-voluntary euthanasia are allowable, both the patient and the state may even have a right to ask for euthanasia to be carried out actively. For voluntary euthanasia where the patient's right to self-determination prevails, the patient ought to have an ability to choose how to die. The right to self-determination signifies that the patient can

decide his or her own affairs, including the manner of his or her death. Therefore, if the patient prefers to die via lethal injection, this preference should be respected. For non-voluntary euthanasia, both the state and the patient may also have more benefit in the patient's life being ended with active intervention. This would be especially pertinent when the patient is in great pain and ending his or her life in a short period would be more beneficial than letting him or her suffer too long.[779] As a result, active euthanasia is not necessarily more disallowable than passive euthanasia.

Analogously, passive euthanasia is not necessarily more allowable than active euthanasia either. If active euthanasia is disallowed, that means the patient's right to life and the state's right to control the patient's life outweighs other considerations. The patient thus ought to be kept alive, and his or her death via euthanasia would be wrong. If a doctor happened to end the patient's life, his or her actions would therefore be illegal. Although the punishment the doctor confronts may vary due to different actions and intentions, such differences do not alter any legal evaluation of the doctor's action. For example, injection of lethal drugs may be punishable by imprisonment, whereas termination of treatment that directly causes death may be punishable by a fine. However, no matter what kind of the punishment is meted out, it signifies that the action it punishes is against the law. As a result, if active euthanasia is not allowed, passive euthanasia ought not to be permitted either.

As regards the natural lifespan rationale, it can be seen to emphasise the special interest of the right to life, and specifically a person's birth and death being determined by nature.[780] Human intervention that ends one's life earlier — as in the practice of active euthanasia — thus is wrong. On the contrary, removing human intervention — as in the practice of passive euthanasia — would be permissible according this viewpoint.

However, according to the Interest Theory, the rights and wrongs of euthanasia cannot be solely determined via the right to life. As shown above, the patient's right to self-determination and the state's right to control the patient's life also need to be considered. Meanwhile, the special interest in life is not confined to a period of time determined by nature; that life is worth living may also be an important interest, as Raz and Singer insisted. If all these rights and interests are taken into account, arguments about the natural lifespan will be unable to claim supremacy in deciding the difference between active and passive euthanasia. Summing up, arguments resting on the Interest Theory are unable to provide answers to the

[779] Singer, *Practical Ethics*, above n 42, 178–86.
[780] Jonsen, 'Criteria that Make Intentional Killing Unjustified', above n 245, 50–2.

question of whether voluntary or non-voluntary euthanasia ought to be allowed; nor are such arguments able to determine whether passive or active euthanasia ought to be allowed.

6.4. The Right to Life, the Right to Self-Determination and a Right as a Will

The Will Theory was Kant's insistence on a right as a universalisable choice. This will meant a right was an action that could be universally carried out by everyone. The right to life and the right to self-determination, as noted in chapters four and five, are explainable by such a concept of will: both the situation that everyone is alive and the situation that everyone should decide his or her own affairs can coexist with a situation in which everyone else is alive and can decide his or her own affairs. The right to life argument and the right to self-determination argument, therefore, can be seen as resting on viewing a right via the will approach.

If a right is a will, that means one must be competent in order to have a right. As noted in chapter five, regarding *Wille*, one ought to be rational in order to achieve the requirement of universality via the categorical imperative; regarding *Willkür*, one ought to be able to implement that requirement. Only when a person has both of these abilities can he or she be entitled to a right. In this sense, viewing a right as a will signifies that a patient in cases of voluntary euthanasia has rights, while a patient in cases of non-voluntary euthanasia does not. If a patient can choose death voluntarily, he or she can both reason and act, and therefore hold rights. On the contrary, a patient in a coma or a vegetative state lacks the ability to express his or her will, not to mention being unable to take out an action. Some patients may still have the ability to reason, for example, those who still have brain function; however, this ability is not sufficient to ground their enjoyment of a right because they lack the other ability, namely the ability to implement an act. Other patients may not even have the ability to reason, especially when they are in a coma. These patients thus do not have any rights according to the Will Theory.

Specifically, in cases of voluntary euthanasia, the patient has both a right to life and a right to self-determination. In cases of non-voluntary euthanasia, the patient has no rights, not even a right to life. These are the only factors that need to be considered for arguments that rest on the Will Theory. It should be noted that the state's right to control the patient's life, which was included in the Interest Theory, is not accepted; nor are other benefits considered in the Benefit Theory. Regarding the state's right, the state is neither able to reason nor able to carry out an action by itself. It, therefore, does not qualify as a holder of a right in the Will Theory.

As to other benefits, the Will Theory, similarly to the Interest Theory, again highlights the existence of a right. As long as there is a right, the action it relates to is allowable; benefits do not need to be considered.

6.4.1. The Patient's Right to Life and the Right to Self-Determination

According to the Will Theory, whether a certain action is allowed or not depends on whether this action constitutes a right, which relies on whether the action can be universalised or not. The acknowledgement of a right to life therefore implies that being alive is universalisable and is thus righteous. The opposite action, i.e., taking another's life, is therefore wrong. This point has already been examined in some depth in chapter four. By extension, the rights or wrongs of the action of taking one's own life, such as requesting voluntary euthanasia, again depends on whether that action can be universalised or not.

In normal circumstances, killing oneself obviously cannot coexist with everyone else doing likewise because the end result will be a situation where no one is left alive. This end is firstly against the fundamental idea that upholds all human society — i.e., the preservation of the species.[781] Secondly, the state of affairs would eliminate the necessary condition for human rationality, namely that a human being must be alive.[782] Thirdly, this would even imply that the patient himself or herself is a means to an end, that is, his or her life is taken for the purpose of avoiding pain.[783] Neither suicide nor assisted suicide, therefore, is allowable.

However, the situation in cases of voluntary euthanasia if different: for a patient who is not seriously ill and will get better soon, relieving pain by ending his or her life is not acceptable because it works against all three standards listed above; while for a seriously ill patient who will die in a short period of time, it is no longer wrong to take his or her life. Primarily, he or she is going to die anyway and life cannot be preserved over the longer term. The condition for the patient's rationality will not be preserved either. There thus seems to be no great difference between reaching death in a short time (perhaps weeks) or a very short time (perhaps days). Secondly, the death of a seriously ill patient does not have a significant impact on the preservation of human species: loss of life is inevitable in such cases and the total number of seriously ill patient comprises a very small fraction of the total human population. Even if all such individuals chose to die, the human species as a whole would not be greatly affected. Thirdly, ending one's life to avoid pain does not necessarily imply using

[781] Kant, *The Metaphysics of Morals*, above n 45, 151–52, 175.
[782] Goldman and Schafer, *Goldman's Cecil Medicine*, above n 720, 4–9.
[783] Kant, *Grounding for the Metaphysics of Morals*, above n 45, 31.

oneself as a means. If we view pain as something external to the patient, taking a patient's life in order to relieve pain will render the patient a means rather than an end. However, if we view painlessness as the demonstration of an enjoyable life, pain will become internal to the patient; taking one's life to relieve pain will rather be reaching one's ends.[784] In this sense, ending the life of a seriously ill patient is universalisable, and voluntary euthanasia therefore ought to be allowed.

Notwithstanding, Kant still did not allow voluntary euthanasia for a seriously ill patient, except in one situation, namely when one was going to lose his or her rationality. For example, Kant believed if a person had been bitten by a crazy dog, that individual should choose to end his or her life voluntarily.[785] In Kant's view, it was a shame for a person to lose his or her rationality. If one lost the ability to reason, he or she could no longer be considered human being. Therefore, before reaching that point, the person was obligated to end his or her life. In this situation, the person did not have a right to die but was instead under a duty to do so.

If losing one's rationality constitutes a situation in which euthanasia is allowable, then maintaining the ability to reason seems to have been the argument that ultimately underscored Kant's objection to all other kinds of euthanasia. However, problems remain for this implied views on euthanasia. On the one hand, if rationality is so important, we ought to allow a patient to decide his or her own affairs as regards life and death. It seems better to respect human rationality by allowing one the right to self-determination, even if one does use that in order to die. Forcing a person to live, on the contrary, obstructs his or her control over life and thus ought not to be allowed. However, Kant also believed that choosing death would undermine the basic condition for human rationality: if a person was dead, he or she could no longer be able to reason. Kant's argument, therefore, ends in a paradoxical situation: both allowing and disallowing one's ability to choose to die voluntarily has a negative impact on one's ability to reason. Neither, thus, appears to be righteous.

On the other hand, even if we overlook that paradox and follow Kant's argument through to its conclusion, we still confront unacceptable implications. For example, if a patient knows he or she is going to become mad, he or she seems also ought to choose to end life beforehand. To make this example clearer, a person may have been under great pressure from parents, friends and teachers to perform well in exams, with the result that he or she believes sincerely

[784] R M Hare, 'Euthanasia — A Christian View' (1975) 1(6) *Philosophic Exchange* 43.
[785] Joshua Beckler, 'Kantian Ethics: A Support for Euthanasia with Extreme Dementia' (2014) 12(1) *Cedar Ethics: A Journal of Critical Thinking in Bioethics* 1, 3–4.

that insanity looms. That person seems again could legitimately choose to die, or even be considered as under a duty to die. However, in the example just cited, insanity could be avoided if that person's friends and relatives were to change their attitudes towards notions of success. Thus what seemed inevitable is no longer valid when an alternative point of view is taken; insanity is not a foregone conclusion. On these grounds, viewing a right as a will is unable to provide an acceptable answer to the question of whether voluntary euthanasia ought to be allowed or not.

6.4.2. The Patient's Duty to Die?

In cases of non-voluntary euthanasia, the patient has no rights, not even a right to life. However, this does not mean the Will Theory believes that anyone can end his or her life legitimately. If we apply Kant's rationality argument here, different situations will generate different outcomes. Regarding a patient who has no brain function, as noted above, a person who is going to lose his or her rationality may be considered as under a duty to die since lacking the ability to reason deprives that person of his or her status as a human being; choosing to die shows a respect for that status. Therefore, if one has already lost that status, he or she ought no longer to be viewed as a human being, and ending his or her life thus raises no legal or moral issues.[786] Notwithstanding, this outcome only applies when the patient is unable to reason, i.e., has little or damaged brain function. If the patient has full brain function and can therefore reason but just lacks the ability to express that rationality, his or her life cannot be taken. Although the patient cannot express his or her will, either to live or to die, he or she is still fundamentally a rational human being. Taking such a life would therefore fall under the category of actions that deny the patient's rationality.

However, if non-voluntary euthanasia is allowed on patients who cannot reason but not allowed on patients who can, an unacceptable implication becomes inevitable, namely that non-voluntary euthanasia may be practiced on the insane. Given that such individuals lack the ability to reason, their lives can be ended without raising any legal or moral issues. Moreover, as Kant suggested, such individuals may actually be under a duty to die: when the insane do not kill themselves by choice, we therefore ought to help them reach death.

Kant's rationality argument inevitably leads to such a conclusion. His categorical imperative again could not avoid this implication because ending one insane person's life can coexist with ending every other insane person's life. Regarding the preservation of human species,

[786] Ibid.

since the insane constitute a relatively small proportion of the total population, ending such individuals' lives does not undermine this fundamental directive. As to the requirement of not taking human beings as means, Kant would not have considered insane people human beings since they cannot reason. Ending their lives, therefore, would not violate any of Kant's requirements. In this sense, allowing the practice of non-voluntary euthanasia on the insane seems inevitable if the issue of non-voluntary euthanasia is solved through arguments resting on the Will Theory. Such arguments thus are unable to solve the issue of non-voluntary euthanasia.

6.4.3. Active and Passive Euthanasia

Regarding the sub-issue of active and passive euthanasia, the Will Theory again provides no convincing evidence to demonstrate any difference between the two practices. Firstly, when a right is viewed as a will, whether a specific practice of euthanasia is allowed or disallowed depends on whether or not it preserves the human species, upholds the conditions for human rationality, and treats a person as an end rather than a means. The question of how the life of the patient is taken is not of concern. If the practice of euthanasia is allowed, both active and passive methods will be permitted. If the practice is not allowed, both active and passive methods are forbidden.

Secondly, these three standards cannot justify the idea that passive euthanasia is more allowable than active euthanasia. Regarding the standard that requires treating a human being as an end rather than a means, ending a life by lethal injection does not treat a human more like a means to an end than withdrawing medical treatment. Lethal injection may be considered as working against this directive because it ends the patient's life for the purpose of relieving pain. However, eliminating medical treatment is also usually carried out for the same reason; it therefore also treats the patient as a means rather than an end. As to the condition for human rationality, passive euthanasia again cannot uphold this condition more than active euthanasia; after all, the patient will die anyway and this condition is therefore sabotaged.

Regarding the requirement of preservation of human species, active euthanasia still does not work against this requirement any more than passive euthanasia. Generally, permitting active killing leads to more deaths than allowing standing by and letting another die. The active way of ending one's life, therefore, has more negative impacts on the human species. However, the situation of euthanasia is different: as far as euthanasia is concerned, a doctor's action is

required and so no matter whether the doctor kills actively (for example, via lethal injection) or passively (for example, by withdrawing medical treatment), the patient's death is imminent. The total number of people who die will therefore be the same, as well as its overall impact on the human species. The different legal status of active and passive euthanasia thus cannot be justified on these grounds.

Thirdly, the various rationales raised by scholars to differentiate the two types of euthanasia — causation, the double effect principle and the natural lifespan — are not explainable by Kant's three standards. Resorting to these arguments to demonstrate the difference, therefore, is not applicable for the Will Theory. Viewing a right as will, as a result, like arguments resting on the Benefit Theory or the Interest Theory, is unable to answer questions about whether we ought to allow voluntary euthanasia or non-voluntary euthanasia, or even whether there is any real difference between active and passive euthanasia. Instead, the only viable answer lies in arguments that rely on the Choice Theory.

6.5. The Right to Life, the Right to Self-Determination and a Right as a Choice

The right to life argument and the right to self-determination argument can again be seen as resting on the Choice Theory. As noted in chapters four and five, these two rights are explainable via the Choice Theory: they are incomplete choices that confer the right holder with five out of the six aspects of control, the only exception being that one cannot sue the bearer when the duty has not been properly performed.

If a right is a choice, similar to viewing a right as a will, the only rights we need to consider regarding the issue of euthanasia are the patient's right to life and his or her right to self-determination. The state does not have a right in this case since it is unable to choose with integral will. Nor do any other benefits or pains need to be considered. The Choice Theory emphasises the control of the right holder over the duty performance of the duty bearer. Whether this performance leads to bad outcomes or relief of burdens on the relatives or society as a whole is not important because accroding to this theory, these benefits or pains do no qualify as rights.

Like the Will Theory, the Choice Theory also does not support the idea that every patient in the situation of euthanasia has such control. A patient who has control ought to have both the ability to express a will to control and the ability to carry that out. The patient in cases of

voluntary euthanasia, therefore, has rights. The patient in cases of non-voluntary euthanasia, since he or she lacks both these abilities, has no rights.

6.5.1. The Patient's Right to Life, the Right to Self-Determination and Right to Die

In cases of voluntary euthanasia, the patient has both a right to life and a right to self-determination. These two rights, if interpreted as choices, imply that the patient has a right to die. The five aspects of control these two rights confer suggests that the patient is able to do the following: choose to ask the bearer to perform his or her duty, namely respecting the patient's life and the importance of his or her decisions; waive the right and exempt the bearer from performing that duty; choose to file a suit against the bearer if he or she did not perform the duty properly; choose to either request a compensation for the losses due to the improperly performed duty; waive that request.

Especially regarding the first two aspects of control, the patient can decide to live and, in choosing life, imply that this decision be respected. The patient can also decide to die and, in choosing death, imply that this decision also be respected. In the former situation, the patient has both the right to life and the right to self-determination. The action that deprives the patient of his or her life, therefore, is wrong. In the latter situation, the patient maintains the right to self-determination whilst waiving his or her right to life. The doctor, therefore, is exempt from a duty to keep the patient alive; rather, the doctor is under a duty not to interfere with the patient seeking death. In such cases, the patient has a right to die as a result of his or her possession of the right to life and his or her right to self-determination.

It should be noted that if there is a right to die according to the Choice Theory, then primarily, suicide raises no legal issue.[787] It is exactly the exercise of this right. Secondly, the practice of voluntary euthanasia ought to be allowed. If the patient chooses to exercise his or her right to die, this means that he or she has waived the right to life. A doctor's action that ends his or her life on request, therefore, no longer comprises a violation of this right. Rather, it demonstrates respect for his or her right to die and even helps with the realisation of that right. For example, a patient may be in great pain and wants to die, but cannot find a method of killing himself or herself. Euthanasia allows the patient to ask a doctor to help him or her to reach that point.

[787] Hart, *Law, Liberty and Morality*, above n 51, 'Preface', 25.

Thirdly, suicide and euthanasia are also permissible for a patient in a mental distress. A person in this situation again has a right to life and a right to self-determination. He or she, therefore, has a right to die too; when he or she chooses death, this decision ought to be respected. Notwithstanding, suicide and euthanasia are only permissible for a patient who is able to tell life from death. For a patient who cannot do so, for example, an insane or a minor, he or she does not the ability to choose; such an individual therefore does not have any rights according to the Choice Theory. He or she does not have either a right to life or a right to self-determination, and thus does not have a right to die. His or her desire for death, as a result, is actually an illness that needs curing, as opponents of euthanasia suggest.[788]

Moreover, when a patient decides to die and asks another for help to do so, not every way of ending the patient's life is allowable. An enemy taking the life of a patient who has just decided to die is one such unallowable instance. Since a right is a choice, the person who has a right to die still has control over the manner of his or her death. Death that occurs outside the right holder's control, such as murder, is thus illegal.

Furthermore, a person's possession of a right to die does not imply that there exists a general right to euthanasia.[789] As defined in the introduction, euthanasia means ending one's life for the purpose of relieving pain. A right to euthanasia, therefore, signifies that one can ask another to end his or her life in order to relieve pain. If interpreted via the Benefit Theory or the Interest Theory, the existence of such a right means that allowing the patient to ask for help in reaching death will bring more good to him or her and society as a whole. If interpreted via the Will Theory, such a right suggests that the practice of taking a patient's life according to his or her request should be universalisable. Disregarding the question of whether or not any of these three theories can justify a right to euthanasia, its existence does not comprise much of a problem for them.

However, a serious problem occurs if this right is interpreted via the Choice Theory: if a right to euthanasia is a choice, this means the doctor is under a duty to end the patient's life according to his or her request. The doctor has no legal standing to refuse, and if he or she do so may face a lawsuit. Proponents of euthanasia may agree with this duty since they believe the doctor is under a duty to benefit the patient.[790] However, as opponents of euthanasia point

[788] Lonnqvist, 'Major Psychiatric Disorders in Suicide and Suicide Attempters', above n 226.
[789] A general right means everyone other than the right holder is under a duty to respect the holder's right. This is in contrast to a special right that only holds the other in agreement with the right holder under a duty to respect and realise the holder's right. See Hart, 'Are There Any Natural Rights?', above n 51, 41–6.
[790] Samuel Williams, *Euthanasia*, above n 221.

out, the idea that the doctor must end the patient's life as long as he or she is asked to do so is unusual.[791]

Actually, the right to die does not necessarily imply a right to euthanasia. Like the right to property, the fact that everyone has such a right does not imply that everyone realises that in practice. In other words, even if someone does not own a property and cannot realise this right, others are not under a duty to help him or her in this regards. This is analogous to the right to die: the fact that everyone has a right to die does not guarantee that everyone will do so. If a person is unable to reach death himself or herself, others are not under a duty to help him or her reach that point. In this sense, the patient does not have a general right to euthanasia and so he or she cannot hold the doctor under a duty to end his or her life purely by asking the doctor to do so.

Nonetheless, the lack of a general right to euthanasia does not mean the patient cannot ask the doctor for a favour or reach an agreement with another to end his or her life. The doctor is not under a duty to help the patient to reach death, but the doctor can still assist him or her as a favour. As noted above, this favour is both respectful of and helpful for the realisation of the right to die. It, therefore, is legal and allowable. Other than asking for a favour, the patient can still sign a contract with the doctor to create a special right to euthanasia. The contract may provide that when the patient asks the doctor to end his or her life, the doctor ought to do so; this gives the patient control over the duty performance of the doctor. As a result, viewing the right to life and the right to self-determination as choices leads to the conclusion that the practice of voluntary euthanasia can and should be allowed, although the patient does not actually have a right to it.

6.5.2. Our Duty to the Patient

In cases of non-voluntary euthanasia, the patient has neither the ability to express a will nor the ability to carry out that will. He or she, therefore, does not have any rights according to the Choice Theory, not even a right to life. Taking such an individual's life thus violates no right. By extension, the practice of non-voluntary euthanasia comprises no legal wrong and ought not to be banned.

However, if euthanasia is allowed on patients who are unable to express a will, the practice may also be allowed on an insane person or a minor. Similarly to a patient in a coma, an

[791] Kemp, *Merciful Release*, above n 9, 157.

insane person or a minor lacks the ability to express a real will or to generate rational control over the duty of another. Such individuals, therefore, have no right to life, nor any other rights. As a result of this, we seem able to end these people's lives in the name of non-voluntary euthanasia. If this follows, permitting the practice of non-voluntary euthanasia would inevitably lead us into accepting the proposition that the lives of minors and the insane ought to be taken.

The Choice Theory, nonetheless, does not allow for such a situation. Although the insane and minors have no rights, we are always under a duty to them. As mentioned in chapter five, the mother is under a duty not to hurt a foetus or newborn baby. Likewise, we are under a duty not to hurt a minor or an insane person. This duty, similarly to the mother's duty to the foetus or newborn, is primarily moral in nature. It does not necessarily carry any legal weight. Only when it is incorporated in the law as a legal duty are we bound to stop actions of this sort.

According to current law, this duty has already been incorporated. Firstly, parents are under a duty to take care of their children, and close relatives are under a duty to take care of the insane.[792] Secondly, criminal law punishes actions that hurt a minor or the insane.[793] Thirdly, the death penalty never applies to a criminal who committed a crime prior to the age of criminal responsibility or was mentally unstable.[794] In this sense, the law has acknowledged special duties both to minors and the insane.

If we have a duty to a foetus, a newborn child, a minor in general and the insane, then we probably also have a duty to a patient in a coma or vegetative state. We still ought not to hurt him or her or even end his or her life. This duty, again, has already been incorporated in law. For example, the law acknowledges a duty to take care of and protect one's elderly parents,

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[792] For example, in Australia, parents are under a duty to provide their children with the 'necessities of life' and to protect their children; *Child Support (Assessment) Act1989* (Cth) s 3. The parent duty of care normally extends to children up to the age of 16 years, but may apply to older children in some circumstances, for example, when the child has a disability.

[793] For example, in Australia, serious child abuse and neglect are usually dealt with under general criminal law as a violent offence — for example, assault or manslaughter. Sexual abuse is also dealt with under criminal laws of states and territories, each of which criminalises a number of sexual offences that may occur against children. See *Crimes Act 1900* (ACT) ss 50, 54; *Crimes Act1900* (NSW) ss 66A–66D; *Criminal Code Act 1983*(NT) ss 127, 192; *Criminal Code Act 1899*(Qld) ss 210, 215, 347–49; *Criminal Law Consolidation Act 1935* (SA) ss 49, 58; *Criminal Code Act 1924* (Tas) ss 124–125A; *Crimes Act1958* (Vic) ss 45–49A; *Criminal Code Act 1913* (WA) ss 320–22.
Crimes against the mentally ill are usually dealt with under general criminal law.

[794] For example, the US Supreme Court banned the execution of insane persons in *Ford v Wainwright* ((1986) 477 US 399). Then, in 2002, it ended the execution of persons with mental retardation in *Atkins v Virginia* ((2002)536 US 304). In 2005, the Court ruled in *Roper v Simmons* ((2005) 543 US 551) that the death penalty should not be applied to those who had committed crimes whilst under 18 years of age because it was 'cruel and unusual' punishment barred by the Eighth Amendment to the Constitution.

requiring that when one's parents have reached a point when they need help to continue living, the person is bound to provide them with that help.[795] The person cannot stand by and let them die, nor can he or she actively causes their deaths. If the person did so, he or she would face not only moral condemnation but also legal punishment. A vegetative state or coma is a case in point. For example, an elderly patient in a coma may need the help of others, including his or her children, to maintain life. The children thus ought to help their mother or father live and hence cannot enforce non-voluntary euthanasia.

If children of the patient cannot make a decision to end the patient's life, then a doctor who is not under such a duty may do so. Morally, everyone is under a duty not to hurt or kill another and thus this idea is impracticable. However, legally, the answer depends on whether the law has imposed a duty on the doctor not to hurt or kill a patient in a vegetative or comatose state. Most countries outlaw ending the life of a patient in such circumstances as a type of murder. These states, therefore, accept that moral duty as a legal one; non-voluntary euthanasia, as a result, is not allowed.

Hart might be against the idea that such a duty could be incorporated in law, because it would confuse the difference between law and morality, as he believed to have happened when the law forbade abortion. [796] However, as mentioned in chapters two and five, Hart's rule of recognition allowed morality to be included in the primary rules of law.[797] The existing practice to prohibit non-voluntary euthanasia, in this sense, although not acceptable to Hart personally, was admissible via his theory.

Notwithstanding, this legal duty can again be removed: if the law can incorporate a moral duty as a legal one, it again can decide not to include that moral duty as part of the law any more. The moral duty excluded by the law, although it still has moral force and may be resorted to criticise actions that violates it from a moral perspective, no longer has legal force. That means legally, the action prohibited by the moral duty is well permitted. For example, the Netherlands exempts the practice of non-voluntary euthanasia from criminalisation and punishment under certain circumstances.[798] These circumstances then comprise exceptions in a general duty: according to these exceptions, the duty not to hurt or kill the patient is

[795] For example, filial responsibility laws impose a duty upon adult children to support their parents or other relatives; these laws have been accepted in most US states.
[796] Hart, *Law, Liberty and Morality*, above n 51, 'Preface'. Hart did not explicitly express his attitude toward euthanasia. However as similar to cases of abortion, Hart might be also against the idea that personal decision about life and death could be restricted by a moral duty, for example, a duty not to end one's own life.
[797] Ibid.
[798] Verhagen and Sauer, 'The Groningen Protocol', above n 13.

occasionally removed, and non-voluntary euthanasia is allowed. However, these exceptions are only applicable in the Netherlands; other states have not seen fit to implement them. Nor does other states' decision to criminalise all practices of non-voluntary euthanasia seem acceptable in the Netherlands. As noted in chapter five, the incorporation of certain moral duties in law is only valid within the jurisdiction in which the law takes effect. Meanwhile, incorporation or exception of specific laws is again only valid during the time when the law is effective. In the future, there may be more exceptions or less in the Netherlands or other states, and hence the realm of the allowable practices of non-voluntary euthanasia will change accordingly.[799]

6.5.3. The Patient's Right to Die and Our Duty to Him or Her

Similarly to non-voluntary euthanasia, in cases of voluntary euthanasia, the law also inflicts duties on us. For example, assisting another to die, even according to his or her request, is considered murder under most circumstances in most legal systems.[800] In general, this implies that the doctor is under a duty not to help a patient die.

However, as noted above, the patient has a right to die; he or she may be able to exercise such a right and so relieve the doctor from a duty not to assist. According to the Choice Theory, this conclusion does not necessarily follow. Although the patient has a right to die, he or she has no right to euthanasia. This means he or she has no control over whether the doctor can help him or her to die. The patient is unable to ask the doctor to help him or her to die. Nor could the patient prevent the doctor from bearing a duty not to do so. Therefore, if the law incorporates a moral duty for the doctor not to end the life of his or her patient and imposes it legally on the doctor, the doctor must abide by it. Voluntary euthanasia thus is practically forbidden: the doctor cannot do the patient a favour or reach an agreement with him or her about his or her death.

Nonetheless, the doctor's duty does not influence the rights held by the patient. The patient still has a right to die. He or she can choose to reach death himself or herself but cannot ask the doctor to help him or her to do so. In this sense, the doctor is under both a duty not to

[799] For example, both the government of Victoria and a cross-party working group in the NSW Parliament introduced bills to legalise assisted dying in September 2017. See Andrew Lund, *Victoria's Assisted Dying Bill Passes First Upper House Test* (3 November 2017) Nine News <https://www.9news.com.au/national/2017/11/03/15/23/assisted-dying-laws-upper-house>; Sarah Hawke, *National MPs Trevor Khan Makes Emotional Plea on Assisted Dying Bill* (21 September 2017) ABC News <http://www.abc.net.au/news/2017-09-21/voluntary-assisted-dying-bill-to-be-introduced-to-nsw-parliament/8966528>. However, neither of the bills has been completely passed; they are still under parliament or council debate.

[800] For example, *Criminal Code Act 1899* (Qld) s 311.

interfere with the patient's decision to die and a duty not to help him or her with that decision. Suicide is allowable in such circumstances, while voluntary euthanasia is not. Notwithstanding, the law has again incorporated exceptions to this rule. Acceptance of certain practices of voluntary euthanasia in the Netherlands, Belgium, Luxembourg, Switzerland and Québec provide precedents and relevant legislation.[801] These cases prevent the doctor from bearing a duty not to help the patient reach death in some special situations. Voluntary euthanasia thus is allowed in these situations, but again only in these states and at this point in time.

Summing up, the right to life argument and the right to self-determination argument resting on the Choice Theory are successful in providing a legally robust answer to whether or not voluntary and non-voluntary euthanasia should be allowed. That is, theoretically, voluntary euthanasia and non-voluntary euthanasia ought to be allowed. Practically, whether they are allowed depends on whether or not the law, in a certain jurisdiction and at a certain point in time, imposes a duty not to do so, and whether or not there exist any exceptions that need to be taken into account. Within voluntary and non-voluntary euthanasia, viewing a right as a choice also provides an answer to the question of whether there is any difference between the legal status of active and passive euthanasia.

6.5.4. Active and Passive Euthanasia

Arguments raised about the distinction between causation and the principle of double effect can also be seen as resting on the Choice Theory. These rationales differentiate the action of a doctor who breaches his or her duty to the patient from an action that doesn't breach such a duty. As noted above, the doctor is always under a duty not to end the life of the patient. However, according to these two rationales, not every way of ending the life of the patient breaches this duty. If ending the life of the patient is not intended by the doctor or is the result of the doctor's passivity, the duty is not breached and the action of the doctor is allowable. If ending the life of the patient is intended by the doctor or is due to the doctor's proactive behaviour, the duty is breached, and the action of the doctor must be disallowable. On these grounds, passive euthanasia is thus allowed while active euthanasia is not.

However, according to the Choice Theory, there is no such difference as regards the duty the doctor bears to the patient. A duty not to end a patient's life means the doctor ought to keep

[801] For example, *Termination of Life on Request and Assisted Suicide Act 2002* (The Netherlands); the Postma case in 1973 in the Netherlands; *Criminal Code1942* (Swiss).

him or her alive. Therefore, any action that leads to the death of the patient, no matter whether the injection of a lethal drug or the removal of tubes that supply nutrition, constitutes a breach of that duty. The seriousness of the breach may differ, and hence the punishment handed out. The legal status of both ought to be the same: since both actions breached a legal duty, both should be deemed illegal. Consideration about causation and the double effect principle, therefore, cannot justify any difference between active and passive euthanasia in the Choice Theory.

The Choice Theory itself again does not demonstrate such a difference. As noted above, when the law does not impose a duty on us, both voluntary and non-voluntary euthanasia are allowable. Voluntary euthanasia is allowable because the patient has a right to die and the doctor is free to provide him or her with the help necessary to achieve that end. Non-voluntary euthanasia is allowable because the patient does not have any rights; when we do not bear a duty not to take him or her of life, ending his or her life can comprise no wrong. Once again, there are no restrictions on how euthanasia can be carried out.

Arguments about the concept of natural lifespan do not even need consideration. For the Choice Theory, whether the practice of euthanasia is permissible depends on whether the patient has a right to die and whether the doctor is under a duty not to help him or her to die. Whether the patient has a right to die relies on whether he or she is sufficiently competent to make such a choice. Whether the doctor has a duty to the patient rests on whether that has been incorporated in law. The question of whether the patient's life comprises a natural lifespan is immaterial.

In addition, considerations about natural lifespan may further go against the Choice Theory. In cases of voluntary euthanasia or suicide, if the death of the patient is allowable, the patient ought to have freedom in choosing whether to die or to live, as well as in determining the manner of death. If he or she can only choose a pathway that conforms to the requirement of the natural lifespan, his or her ability to choose will therefore be restricted. In this sense, viewing a right as a choice goes against the idea that there is a difference between active and passive euthanasia.

Notwithstanding, there may be a difference in practice. According to Dworkin, the concept of natural lifespan is a moral belief;[802] it therefore may be accepted by legislators in the future and incorporated into law as a function of the Choice Theory. At that time, doctors will be under a duty not to carry out euthanasia in an active way. Similarly, differences between causation and the double effect principle can again be incorporated in law and inflict such duties on the doctor.

6.6. Conclusion

Among all the argument discussed above, those that conceive of a right as a choice are the only ones which can provide an answer to the question of whether euthanasia ought to be legalised or not. By contrast, arguments that rely on the Benefit Theory, the Interest Theory or the Will Theory are all lacking in several respects.

Regarding the slippery slope argument and concerns about gains and losses of the patient and his or her relatives that rest on the Benefit Theory, they fail because they consider too many benefits and losses, which makes evaluation and comparison difficult. Moreover, even if comparison is possible, a conclusion that either for or against euthanasia may have unacceptable implications: if the conclusion is that euthanasia is beneficial, legalising involuntary euthanasia may inevitably follow; if the conclusion is the opposite, the patient's autonomy and self-determination are deprived. At last, these problems are made worse in situations where the Benefit Theory enables many people — other than the patient — to have rights to the patient's life, death or level of pain. As a result, an answer to whether voluntary or non-voluntary euthanasia is permissible cannot be achieved via the Benefit Theory.

Nor is an answer achievable employing arguments that emphasise the state's interest in the patient's life, the patient's right to life and his or her right to self-determination, all of which rest on the Interest Theory. Difficulties in evaluation and comparison occur among all three interests. Raz's and Singer's definition of the right to self-determination as the core or the precondition of the right to life still cannot solve this difficulty because such arguments may lead to permitting ending the lives of the insane in the name of non-voluntary euthanasia. It should also be noted that the institution of third-party-beneficiary, which could have helped to solve this difficulty, comes in conflict with the Interest Theory.

[802] Dworkin, *Life's Dominion*, above n 244, 13, 88, 89; Jonsen, 'Criteria that Make Intentional Killing Unjustified', above n 245, 42, 50–2.

Conceiving of the right to life and the right to self-determination via the Will Theory also cannot answer the question of whether we ought to allow euthanasia or not. Kant believed euthanasia could not be allowed since it threatened the preservation of the human species, treated human beings as a means rather than an end, and undermined the precondition for human rationality. However, euthanasia is not necessarily incompatible with these three standards. Employing these standards via the Will Theory also leads to unacceptable deductions, including depriving a person's ability to choose death over life in order to uphold his or her rationality, and permitting ending the lives of the insane.

Resting the right to life argument and the right to self-determination argument on the Choice Theory provides the only viable answer to these important questions about euthanasia. Theoretically, the Choice Theory allows both voluntary and non-voluntary euthanasia. Voluntary euthanasia is permissible because the patient has a right to die as a result of his or her possession of a right to life and a right to self-determination. Although he or she does not have a right to euthanasia, namely holding a doctor to a duty to help him or her reach death, he or she is free to ask the doctor for a favour or enter an agreement with the doctor regarding this matter. Non-voluntary euthanasia is permissible since the patient in a coma or vegetative state is considered not to have rights, not even a right to life. His or her life, therefore, can be taken without that action raising legal issues.

However, in practice, whether voluntary or non-voluntary euthanasia is permissible depends on whether there are legal duties that forbid the doctor from doing so. If the law provides that the doctor is under a duty not to do so, the practice becomes illegal. Since most current legal systems have incorporated such duties except under extreme circumstances, voluntary and non-voluntary euthanasia are generally not allowed; only in exceptional cases can they be carried out lawfully.

Regarding the difference between the legal status of active and passive euthanasia in cases of voluntary and non-voluntary euthanasia, viewing a right as a choice is again the only way that can provide us with an answer. Resting the three rationales — legal causation, the double effect principle and natural lifespan — on the Benefit Theory or the Interest Theory cannot do so because difficult evaluation and comparison occur. Viewing a right as a will also cannot do so, because the idea of a will does not support the idea of difference between active and passive euthanasia. The three rationales are even not considered or explainable by the Will Theory, which is thus of even less use in solving this problem.

The answer again lies with the Choice Theory. Theoretically, viewing a right as a choice refutes the idea that the law ought to treat active euthanasia differently from passive euthanasia. The distinction between causation and the double effect principle are not supported by the Choice Theory. Concerns about natural lifespan even go against the Choice Theory's emphasis on the right holder's ability to choose. However, practically, whether there is a difference again depends on whether the law imposes a duty on us not to carry out euthanasia in a certain way. If the law has incorporated a duty not to carry out active euthanasia, it may only be allowed passively.

As a result, the argument viewing a right as a choice provides an answer to the issue of whether euthanasia should be allowed or not, as well as the issue of whether there should be any difference between the legal status of active and passive euthanasia. The solution is that they all ought to be allowed unless the law otherwise imposes a duty that forbids any of them. Notwithstanding, forbidding duties, as well as exceptions, for or within either voluntary euthanasia or non-voluntary euthanasia, can only take effect within certain jurisdictions and over certain periods of time.

Chapter Seven

Conclusion and Further Implications

7.1. Overview

Among existing arguments, only those that rest on the Choice Theory can provide answers to questions of whether capital punishment, abortion and euthanasia ought to be allowed. Arguments relying on the Benefit Theory, the Interest Theory or the Will Theory cannot do so.

Arguments resting on the latter three theories of rights are subject to four types of weakness: uncertainty, inconclusiveness, unacceptability and inconsistency. Arguments resting on the Benefit Theory and the Interest Theory are subject to the weakness of uncertainty, meaning that they rely on evidence of a contentious nature. Arguments that employ the Will Theory are subject to the weakness of inconclusiveness, meanning that they cannot reach definite conclusions about the legitimacy of any of the three issues in question. Arguments relying on these three theories of rights are also subject to the weaknesses of unacceptability and inconsistency: they both lead to deductions or implications that are unacceptable and are unable to serve consistently on all three issues.

Only arguments resting on the Choice Theory can avoid these four weaknesses. Viewing a right as a choice employs hard evidence, can reach definite conclusions, applies consistently to all three issues, and does not lead to unacceptable outcomes. Other than that, this theory provides acceptable explanations about other issues related to capital punishment, abortion and euthanasia. Overall, this thesis finds that the Choice Theory provides the most robust methodology for understanding the legal status of these three important issues.

7.2. Weaknesses and Strengths of Existing Arguments

Arguments that highlight the wellbeing of an entity can always be seen as conceiving of the right to life and other related rights as benefits. For example, the Benefit Theory can apply to the following: for the issue of capital punishment, the deterrent effect argument and concerns about expenditure and irreversibility; for the issue of abortion, arguments that insist the right to life begins when a foetus feels pain; for the issue of euthanasia, the slippery slope argument, concerns about the patient's pain and burdens on relatives, as well as the differentiation of legal causation, the double effect principle, and the concept of natural lifespan.These arguments insist that when answering the question of whether a practice ought to be allowed

or not, understanding gains and losses of the practice is key. This, however, renders them subject to the weakness of uncertainty.

The weakness of uncertainty that these arguments confront has two manifestations. On the one hand, gains and losses of a certain practice are hard to determine. On the other hand, even if those gains and losses can be determined, it is still hard to evaluate and compare them. Regarding the first issue, gains and losses are hard to determine because the evidence that supports them is uncertain. Firstly, conflicting evidence may exist. To take the issue of capital punishment, some kinds of statistical evidence support the view that this practice has a deterrent effect whilst other kinds of evidence appear to demonstrate that no such effect exists.[803] Whether capital punishment has a deterrent effect or not, therefore, is uncertain.

Secondly, some evidence may only be hypothetical instead of factual. For example, regarding the slippery slope argument for the issue of euthanasia, when the practice of euthanasia has not been allowed in a certain country, alleging that it leads to more frequent practices or acceptance of involuntary euthanasia is nothing but a postulation. Worse than that, some evidence may even be a result of deception. Regarding the issue of euthanasia, a doctor may lie about existing practices of euthanasia if it is not allowed in his or her jurisdiction.[804] As to the issue of capital punishment, a lawyer may also lie about the deterrent effect capital punishment generates or the expenditure it saves compared to life imprisonment, if he or she believes the practice to be wrong.

Thirdly, even if the evidence is independently verifiable and does not conflict with anything else, it may still prove irrelevant to the particular issues in hand. Causal relationships between phenomena can be very complex. Taking the deterrent effect as the example again, the situation of fewer crimes may occur, but that does not mean this is the result of the implementation of capital punishment. Rather, this situation may have no connection with capital punishment or even exist as the cause of, rather than the outcome, of capital punishment.[805] The same goes for a situation in which more crimes occurs, believed to be a counter-deterrent effect of capital punishment, and bad outcomes that are thought to result from permitting euthanasia.[806]

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[803] Bedau, 'Death Penalty as a Deterrent: Argument and Evidence', above n 114; Bedau, *The Death Penalty in America*, above n 125, 193.
[804] Raz, 'Death in Our Life', above n 38, 5–6. It should be noted that the doctor may exaggerate the exiting practices of euthanasia in order to have it banned; he or she may also lie about its existence to demonstrate its impermissibility.
[805] Johnson and Zimring, *The Next Frontier*, above n 120, xi–xiv.
[806] Ibid; Stephen Smith, 'Evidence for the Practical Slippery Slope in the Debate on Physician-Assisted Suicide

Lastly, different interpretations of the same evidence may also occur. For example, on the issue of abortion, using the same scientific proof about the stages of pregnancy, different scholars have different beliefs regarding the point when life commences and different delimitations of personhood. On the issue of euthanasia, with the same idea that active and passive euthanasia may be carried out in different ways, scholars hold differing views about legal causation and intention. The evidence that existing arguments rely upon, therefore, is uncertain. Whether the practice of capital punishment, abortion and euthanasia produces gains or losses to society as a whole thus is also uncertain.

In addition to that, even when the evidence can be determinative, as well as gains and losses, it is still hard to decide whether gains or losses regarding a specific issue at question carry more weight; this constitutes the second facet of uncertainty occurs to the Benefit Theory. As for the issue of capital punishment, gains and losses are determined by the deterrent effect, expenditure, irreversibility, and the lives of both the convicted person and the victim. However, as noted in chapter four, it can be hard to evaluate their relative significance. Even expenditure, which seems to be the least important of these considerations, may not carry less weight than life itself. The rest of the evidence is even more difficult to evaluate and compare. A similar situation occurs when one considers the issues of abortion and euthanasia. For abortion, the foetus's right to life and the mother's right to self-determination, freedom from discrimination, and right to medical care are all important factors, but difficult to compare. For euthanasia, it is again impossible to measure the value of pain, self-determination and the life (or natural lifespan) of the patient, along with burdens placed on relatives, and any other bad outcomes that euthanasia may bring.

Moreover, comparisons become even harder when the benefits that need to be considered are not confined to those concerned with existing arguments. If the legitimacy of any given practice should be determined by whether it brings gains or losses, every gain or loss relevant to this practice ought to be taken into account. On the issue of capital punishment, other gains or losses include the emotional pain experienced by the victim's relatives, as well as that experienced by the relatives of the convicted person. On the issue of abortion, the parents' care for the baby, before and after birth, also needs consideration.

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and Euthanasia', above n 203.

Furthermore, difficulties of comparison become more complicated when many individuals are seen to gain or lose as a result of a particular action. Take life itself as an example. Not only convicted criminals, foetuses, or terminally ill patients have a benefit in life, but also friends and family members may gain in some way as a result of that individual being alive. Meanwhile, these other persons' gains and losses regarding a particular practice may point in a different direction from the individual whose life is in question. For example, the convicted criminal, the foetus, or the terminally ill patient may benefit from being alive, but that individual's friends and family may have something to gain from his or her death. If this is the case, it will be hard to decide whether any particular life accounts as a gain or a loss overall. When the same happens to every gain or loss related to a certain practice, an answer as to whether a practice is beneficial or not becomes more impossible. Arguments relying on the Benefit Theory, on these grounds, are inevitably subject to the weakness of uncertainty.

Arguments resting on the Interest Theory are also subject to this weakness of uncertainty. Arguments raised on the grounds of rights can be seen as conceiving of a right as an interest, such as the right to life argument for the issue of capital punishment, the belief that a foetus has a right to life after conception, and concerns about the right to self-determination of a terminally ill patient. The natural lifespan argument that is employed to differentiate between active and passive euthanasia, if viewed as emphasising a special interest in life, can also be seen as viewing the right to life as an interest. Other than those, arguments laying stress on the deterrent effect of capital punishment and arguments that emphasise the state's interest in a terminally ill patient's life can also be seen as resting on the Interest Theory. These two arguments concern about the state's interest in the lives of the convicted and the patient, which is conceived as a right in the Interest Theory.

These arguments confront two kinds of uncertainty, although they can avoid some of the uncertainty related to the Benefit Theory. Regarding uncertainty of evidence, the Interest Theory does not consider evidence to decide gains and losses that result from a certain practice. Rather, it decides by considering rights: if there is a right, there is a gain; if the right is violated, there is a loss.[807] Reliance on conflicting or inadmissible evidence, as well as complex causality, is thus avoided. However, different interpretations of the same evidence still occur, for example, different beliefs about the starting point of life for the issue of abortion.[808] These beliefs concern the question of whether a foetus has a right to life or not, and therefore are related to whether there is a certain gain or loss to be considered. When the

[807] Raz, 'On the Nature of Rights', above n 57, 197–98; Raz, *The Morality of Freedom*, above n 57, 168–70.
[808] See generally English, 'Abortion and the Concept of a Person', above n 155, 235–36.

belief accepted becomes uncertain, whether abortion is harmful or not, and whether abortion can be allowed or not, also becomes uncertain.

As to the comparison, the Interest Theory does not consider every gain or loss to which a certain practice relates. Nor does it consider every person's gains or losses to which the practice relates. Rather, it lays emphasis on gains and losses of right holders. Difficulties of comparison are thus relieved. Notwithstanding, the Interest Theory still needs to compare interests in competing rights possessed by different right holders. For the issue of capital punishment, the right that citizens have to their security needs to be compared with the right to life of convicted criminals. For the issue of abortion, the right to life of the foetus has to be balanced with the rights of the mother. For the issue of euthanasia, the patient's right to life competes with his or her right to self-determination.

More than that, the Interest Theory also considers interests of entities other than a convicted criminal, a foetus or a patient. These other interests include the state's interest in the life of the convicted person, the foetus or the patient, and the mother's interest in the foetus's life. When these interests also need to be taken into account and point in a different direction from rights held by the convicted criminal, the foetus or the patient, the comparison becomes more difficult. As a result, arguments resting on the Interest Theory, like arguments that rest on the Benefit Theory, still cannot avoid the weakness of uncertainty.

Arguments relying on the Will Theory can avoid such weakness. The retributivism argument regarding the issue of capital punishment and arguments concerning the right to life and other related rights for the issues of abortion and euthanasia can be seen as conceiving of a right via the Will Theory. The Will Theory views a right as a universalisable choice. It considers an action as righteous and thus constituting a right when that action can be carried out universally. Problems of uncertain evidence, as well as difficult evaluation and comparison, all of which are inevitable in arguments that rely on the Benefit Theory or the Interest Theory, therefore do not need to be taken into account. Arguments resting on the Will Theory can provide concrete answers to whether a particular issue can be allowed or not. For example, the concept that capital punishment aims at restoring the situation of universality is itself universalisable; it thus ought to be allowed. The concepts of self-determination and being alive can also be universalised. An action that is within the realm of determining one's own affairs, therefore, should be permitted, such as abortion, while taking one's life, such as euthanasia, should not.

Notwithstanding, arguments resting on the Will Theory are still imperfect. They cannot translate theory into practice. On the issue of capital punishment, the theoretical conclusion is that capital punishment is allowable. However, the Will Theory cannot allow wrongful killing and is prone to let the existence of capital punishment in a legal system be decided by the public opinion.[809] Whether capital punishment is allowable in practice thus has no conclusive answer. On the issues of abortion and euthanasia, theoretically, the mother's ability to determine her own affairs and the patient's condition of being alive are acknowledged to be universalisable. Abortion thus is allowed while euthanasia is disallowed. However, in practice, the action of abortion cannot be universalised, since that will ultimately lead to the end of the human species. In cases of voluntary euthanasia, obstructing the exercise of the patient's right to self-determination again cannot be universalised. Rather, ending the life of a patient who is in great pain is universalisable. In this sense, the practices of abortion and euthanasia are both universalisable and non-universalisable. By purely referring to universability, the Will Theory is unable to conclude whether to support the side of the mother's self-determination and the patient's right to life on the one hand, or the preservation of the human species and the patient's right to self-determination and relief of pain on the other.

Hare's reformulation of the demand of universality still cannot solve this inconclusiveness. Hare reformulated the demand to require that the action one wanted to take ought to be that he or she wished others to have done to him or her.[810] This reformulation places the rule closer to the Benefit Theory; because of this, even if Hare's rule is followed, an answer is still impossible since the weakness of uncertainty then applies. As a result, arguments that view a right as a will cannot avoid the weakness of inconclusiveness.

Worse than that, these arguments are also subject to the weakness of unacceptability, as are arguments resting on the Benefit Theory and the Interest Theory. Regarding arguments that employ the Benefit Theory, unacceptable outcomes presents in four ways. Firstly, too many people will have a right to an action that should belong to another person. Take one's life as an example: as noted above, friends and family members all have rights to the life of a convicted criminal, a foetus or a terminally ill patient, if a right is viewed as a benefit. However, this goes against the feature of inalienability that is fundamental to the right to life.

Secondly, many unusual rights will be brought into existence. For the Benefit Theory, if there is a benefit, as long as it is incorporated in law, it is a right. Therefore, when the law

[809] Kant, *The Metaphysics of Morals*, above n 45, 107; Hegel, *The Philosophy of Right*, above n 96, 169–70.
[810] Hare, 'Abortion and the Golden Rule', above n 154, 208.

acknowledges the benefits of lower expenditure and pain avoidance, these are transformed into rights to save expenditure and to avoid pain. Similarly, there may even be a right to eat, to wear clothes, or even a right to use a spoon. We then confront an unnecessary explosion of rights.[811]

Thirdly, a right without a benefit cannot be explained adequately. Freedom of political speech which entitles a man to deliver a speech opposing discrimination against women that brings him no gains is such an example.[812] The same can happen to the right to life: under certain circumstances, one may actually benefit from death rather than life; the Benefit Theory thus views him or her as not having a right to life but a right to die in this case, or more accurately, a duty to die. Therefore, when the person in question does not choose to die himself or herself, we ought to force him or her to do so. However, this result is again unacceptable because it violates common sense.

Lastly, the Benefit Theory renders the right to self-determination meaningless. A benefit that qualifies a right is something which actually benefits an individual. If being alive is actually beneficial, the individual has a right to life and can only choose to live. On the contrary, if death is actually beneficial, the individual has a right to die and can only choose to die. The individual in question therefore has no control over which kind of action to take; he or she has no substantial right to self-determination.

Arguments that rest on the Interest Theory can avoid the explosion of rights and devaluation of the right to self-determination that prove problematic for the Benefit Theory. Regarding the explosion of rights, the idea of an interest does not necessarily result in the existence of many unusual rights. In contrast to the Benefit Theory, the Interest Theory defines a right as a unique interest. Only an interest that is enough for a duty, generally benefits an individual, or is directly and intentionally related to a duty can qualify as a right. The right to save on costs, the right to ease from pain and other uncommon rights thus are not considered to be rights in the Interest Theory.

The Interest Theory also makes the right to self-determination accessible, especially via Raz's differentiation of core rights and derivative rights. According to Raz, an interest that qualifies

[811] Leonard Wayne Sumner, 'Rights Denaturalized' in R G Frey (ed), *Utility and Rights* (University of Minnesota Press, 1984) 20.
[812] Wenar, 'The Nature of Rights', above n 473; Raz, *The Morality of Freedom*, above n 57, 149–51, 274–75; Kramer, 'Rights without Trimmings', above n 491; Kramer and Steiner, 'Theories of Rights', above n 64, 85–8.

as a right should be related to the core of that right.[813] As long as the core interest is achieved, that right can be justified; whether the result of the right is beneficial or not is unimportant. The core of the right to self-determination should be self-determination itself. Since determining one's own affairs is beneficial, the right to self-determination ought to be upheld. A person, therefore, has freedom in choosing the action he or she desires, no matter whether that will bring benefit or harm.

Notwithstanding, the Interest Theory still allows entities other than the life holder to have a right to that individual's life: that is, the state has a right to control its citizens' lives, and a mother has a right to control her baby's life. These two rights still run against the feature of inalienability of the right to life. Moreover, the Interest Theory also cannot explain a right without reference to an interest: as in the institution of third-party-beneficiary, a situation in which a beneficiary has no rights but a right holder has no interests is incompatible with the fundamental idea of this theory. In addition, the Interest Theory further leads to a third unacceptable deduction, namely allowing ending the lives of certain groups of people. For example, Singer's emphasis on the self-awareness of a person and Raz's stress on the worthiness of life may include unwanted results that legalise infanticide and euthanasia for the insane.

Resting arguments on the Will Theory can avoid the situation in which other people can gain a right to control one's life, and also explain a right without reference to a benefit or an interest, since it does not conceive of a right in those terms. However, this theory also leads to permitting ending the lives of certain groups of people. On the issue of euthanasia, the Will Theory implies a belief that the lives of insane persons and patients in a vegetative state can be taken legitimately, and there may even be an overriding duty for others to ensure that this happens.[814] Other than that, the Will Theory may make some practices that have in fact been legalised illegal. For example, on the issue of abortion, if the conclusion of the Will Theory is that abortion should not be allowed, termination of pregnancy due to rape should also be disallowed. If such a conclusion is reached via Hare's argument, even the practice of contraception may be considered illegal. On these grounds, arguments that view a right as a benefit, an interest or a will are all subject to the weaknesses of unacceptability.

These arguments also confront the weakness of inconsistency, which arises when we consider the three issues — capital punishment, abortion and euthanasia — together. Although they

[813] Raz, 'On the Nature of Rights', above n 57, 197–98; Raz, *The Morality of Freedom*, above n 57, 168–70.
[814] Beckler, 'Kantian Ethics', above n 785.

can be discussed separately, all have important features in common: that is, the involuntariness or non-voluntariness of the subject upon whom the act is performed. Capital punishment is similar to involuntary euthanasia, as it is carried out by the state against the will of the convicted. Abortion shares similarities with non-voluntary euthanasia, since it is carried out by the mother when the consent of the feotus is unavailable.[815] In this sense, if an argument that applies to one of the three issues is acceptable, it ought to apply to the other two consistently.

However, arguments resting on the Benefit Theory, the Interest Theory or the Will Theory are unable to achieve this consistency. On the one hand, most arguments within each theory are inapplicable to others. For example, the retributivism argument is meaningless for the issues of abortion or euthanasia. Questions such as whether and when a foetus has a right to life and whether the mother's right to self-determination includes a right to abortion are irrelevant to capital punishment and euthanasia.The slippery slope argument also does not apply to capital punishment and abortion. Except for general arguments about the overall framework of rights, no one argument is applicable to any other issuess.

On the other hand, if a right is interpreted as a benefit, an interest or a will, that is still unable to support a particular scholar's attitudes to all three issues. Take Singer's argument about abortion, which can be seen as a particular version of the Interest Theory. Singer emphasised both the mother's interest in her right to self-determination and the foetus's interest in not being inflicted with pain.[816] He thus considered abortion permissible before the foetus was able to feel pain, but impermissible after that time, except in very restricted situations.[817] On the issue of euthanasia, the patient's interest in his or her right to self-determination and relief of pain also suggested that voluntary euthanasia was allowable.

If Singer's argument is followed through to its logical conclusion, the practice of non-voluntary euthanasia again ought to be allowed due to that the patient in this situation lacks the right to self-determination while benefits from relieving pain. However, Singer was against the practice, except in very restricted situations. The emphasis on interest in the right to self-determination and relief of pain was therefore unable to support Singer's attitudes to both abortion and euthanasia. To support his position against non-voluntary euthanasia,

[815] Barbara Finlay, 'Right to life vs. the Right to Die: Some Correlates of Euthanasia Attitudes' (1985) 69 *Sociology and Social Research* 548–60; Elizabeth Adell Cook, Ted G Jelen and Clyde Wilcox, *Between Two Absolutes: Public Opinion and the Politics of Abortion* (Westview Press, 1992) 74, 76, 123–27.
[816] Singer, *Practical Ethics*, above n 42, ch 4.
[817] Ibid.

Singer raised a different concern about the intrinsic value of the life. However, he still failed to apply this value consistently to both abortion and euthanasia. Other than that, Singer did not apply any of these concerns — the interest in self-determination, the interest in painlessness and the intrinsic value of the life — to his discussion on capital punishment. Instead, he argued that capital punishment was impermissible because it lacked deterrent effect.[818]

The weakness of inconsistency also occurs in arguments that rely on the Benefit Theory or the Will Theory. As mentioned in chapter five, individual members of the public usually stand for capital punishment but against abortion, or against capital punishment but for abortion.[819] However, neither arguments viewing a right as a benefit nor arguments conceiving of a right as a will can explain why this is so. For the Benefit Theory, problems of uncertain evidence and difficult comparison again occur. For the Will Theory, no conclusive answers to capital punishment and abortion can be achieved. As a result, arguments resting on the Benefit Theory, the Interest Theory and the Will Theory are subject to the four weaknesses of uncertainty, inconclusiveness, unacceptability and inconsistency.

The only arguments that can avoid these weaknesses are those interpret a right as a choice. Arguments that emphasise the right to life and other related rights can also opt to view a right as a choice. A choice means a right endows its holder with the ability to control the performance of the duty bearer, unless the law imposes a duty to the contrary. Overall, the Choice Theory is far more robust than others discussed in this thesis.

Firstly, similarly to the Will Theory, if a right is viewed as a choice, there is no need to worry about problems such as uncertain evidence or inapplicable comparisons, as happens for arguments resting on the Benefit Theory or the Interest Theory. Arguments relying on the Choice Theory provide answers to the issues of capital punishment, abortion and euthanasia by asking whether there is a right and a duty: if there is a right without a restraining duty, the practice ought to be allowed; on the contrary, if there is both a right and a restraining duty, or there is no rights but a duty, the practice ought to be prohibited. To these questions, an answer can always be found. Primarily, the Choice Theory provides definite answers to questions about which parties have rights and which do not. Regarding the issue of capital punishment, convicted criminals have a right to life, while the state does not have a right to their lives. As for the issue of abortion, the mother has a right to self-determination, while the foetus has no

[818] Singer and Kennedy, *Ethics Matter*, above n 114.
[819] See Cook, 'A Passion to Punish', above n 671.

right to life; others do not have a right to the foetus's life, either. In cases of voluntary euthanasia, the patient has both a right to life and a right to self-determination. In cases of non-voluntary euthanasia, the patient has neither a right to life nor a right to self-determination; others, again, do not have a right to the patient's life.

Moreover, the Choice Theory is certain about what kind of control a right confers on a right holder. Most significantly, a right means the right holder can choose to have his or her right respected; he or she can also choose to waive his or her right. A convicted criminal therefore can choose to waive his or her right to life by committing a serious crime. A mother can choose to have her right to self-determination respected and so have a right to determine affairs regarding her pregnancy. A terminally ill patient can choose to waive his or her right to life and so have his or her right to self-determination respected, which entitles him or her to choose freely to die.

Meanwhile, the question of whether there is a legal duty that restricts the control conferred by a legal right is also clear because the answer depends on the content of the law. When the law forbids an action, it acknowledges a legal duty; when the law advises nothing, it acknowledges no legal duty. As regards abortion and euthanasia, the law sometimes forbids ending the life of a foetus, and always prohibits ending the life of a seriously ill patient; a legal duty to protect the foetus or patient is therefore acknowledged, and so the mother's control over her pregnancy and the patient's control over his or her death is restricted. In addition, the answer to the question of when a legal duty exists is certain. For example, in *Roe v Wade*, the Court allowed abortion before foetal viability but disallowed it after that time, a legal duty to protect the foetus was therefore imposed only after viability.[820] The mother's control over her pregnancy was thus also restricted only after that point in time.

As a result of these rights and duties, broader answers to the dilemmas surrounding capital punishment, abortion and euthanasia also fall into place. On the issue of capital punishment, the ability of a convicted person to waive his or her right to life renders the practice allowable when he or she has committed a serious crime. On the issue of abortion, the mother's ability to determine her own affairs makes her free to abort, assuming the law acknowledges no duty to restrict this practice. If the law acknowledges such a duty, the mother's right is restricted and she can no longer choose to abort. Similarly, on the issue of euthanasia, if the law acknowledges no duty to restrict this practice, the patient's ability to choose freely to die

[820] *Roe* (1973) 410 US 113, 164.

makes him or her able to choose voluntary euthanasia or have his or her life ended via non-voluntary euthanasia. If the law acknowledges the duty, the patient can still choose freely to die, but he or she cannot choose voluntary euthanasia or for others to choose to end his or her life via non-voluntary euthanasia. The same applies to the difference between active and passive euthanasia: if the law allows euthanasia but inflicts a duty not to carry it out actively, that form of euthanasia is not allowed but passive euthanasia is permitted; if the law does not inflict such a duty, active and passive euthanasia are both allowable.

Secondly, the Choice Theory is conclusive on the three issues in question. On the one hand, unlike the Will Theory, viewing a right as a choice does not confront practical difficulties. Although theoretically the Choice Theory concludes that capital punishment, abortion and euthanasia are all admissible practices, they can still be restricted by the existence of relevant duties. On the other hand, viewing a right as a choice even answers questions about the extent to which the three issues are allowable. For example, regarding capital punishment, the right to life of the convicted person is considered waived when he or she commits a serious crime, but not a minor infraction. On the issue of voluntary euthanasia, the patient has a right to die and can therefore choose to reach death alone or ask a doctor for help. However, the patient does not have a right to euthanasia; as a result, he or she cannot hold the doctor under a duty to help him or her to reach death.

Thirdly, it should also be noted that arguments employing the Choice Theory apply consistently to all three issues. Viewing a right as a choice provides a more logical explanation for public attitudes that are generally for capital punishment but against abortion, or against capital punishment but for abortion. For the first case, a convicted person is seen as having a right to life, but this right is waived because he or she has committed a serious crime. A foetus, by contrast, is believed not to have a right to life, but we bear a duty to him or her according to the law. For the second case, the convicted also has a right to life while the foetus does not. However, the law may not inflict a duty on us not to hurt the foetus but rather a duty not to end the life of an adult, no matter how serious the crime he or she committed. Moreover, viewing a right as a choice provides a better account of why Singer was against abortion and non-voluntary euthanasia but favoured voluntary euthanasia: abortion and non-voluntary euthanasia are impermissible because the law inflicts a duty on us not to hurt a foetus or a comatose patient; voluntary euthanasia is permissible because the patient has both a right to life and a right to self-determination.

Fourthly and lastly, viewing a right as a choice does not lead to unacceptable outcomes. The Choice Theory defines a right in terms of control and does not extend the exercise of any particular right to many people, since a person who has no control over the performance of the duty bearer is excluded. An explosion of rights is also prevented because a benefit that does not endow the right holder with control is not considered to be a right. The idea of a choice also explains a right without reference to benefit or interest, as a benefit or an interest is irrelevant to this definition of a right. It even highlights the significance of the right to self-determination: the control this theory confers upon the right holder maintains and enhances the determination in one's own affairs.

7.3. Further Implications of Viewing a Right as a Choice

Viewing a right as a choice further provides acceptable solutions to, and explanations of, sub-issues relating to capital punishment, abortion and euthanasia, which cannot be explained properly by viewing a right as a benefit, an interest or a will. These sub-issues include, but are not confined to, the inapplicability of capital punishment to certain groups of people, the legitimacy of population control, contraception and abortion for teenage girls, the illegitimacy of infanticide, the acceptability of suicide, as well as the unacceptability of ending the lives of the insane and minors.

7.3.1. Inapplicability of Capital Punishment to Certain Groups of People

The Choice Theory allows the practice of capital punishment generally. However, it does not mean the practice should be allowed on any person who has committed a serious crime. The insane, minors and pregnant women should not be subject to punishment by death. Meanwhile, capital punishment again should not be allowed on any person who is convicted; a person who has committed a less serious crime, again, should not be subject to punishment by death.

Primarily, the insane and minors are not considered to have a right to life according to the Choice Theory: both lack the ability to make a reasonably rational choice or to generate effective control over another's duty. Notwithstanding, lacking a right to life does not mean such lives can be legitimately taken. The Choice Theory also acknowledges a duty to restrict the practice of capital punishment, for example, a moral duty not to hurt the insane or minors. If this duty is incorporated in the law, capital punishment on these groups will be legally

disallowed. According to content of the current law, this duty is always incorporated.[821] Capital punishment on the insane and minors, therefore, is always prohibited.

However, the Choice Theory only forbids capital punishment if a person commits a crime when insane or under the age of criminal responsibility. If those with intermittent periods of insanity commit a crime when actually sane, or young adults commits a crime when above the age of majority, we no longer bear a duty not to hurt them. Rather, such individuals have a right to life and have chosen to waive this right by committing a serious crime. Capital punishment, therefore, is allowable in such cases.

Some scholars argue that almost all murderers suffer some sort of a mental disorder. Therefore, if the insane are protected from capital punishment, all murderers ought not to be sentenced to death.[822] However, according to the Choice Theory, this conclusion is not necessarily applicable. A mental disorder may affect a person's choice or control, but it need not always be so serious that the person loses entirely the ability to make a rational choice or generate effective control. For a person who still possesses that ability, he or she still has a right to life and can be viewed as choosing to waive that right by committing a serious crime. Only those who have totally lost that ability — for example, the permanently insane — can be seen as not having a right but instead enjoying our duty towards them. According to the Choice Theory, capital punishment should still be allowed for most murderers with mental illnesses, excepting those who have totally lost sanity.

As regards a pregnant woman, she normally has a right to life according to the Choice Theory. When she has committed a serious crime, she is deemd to have chosen to waive that right. However, as noted in chapter five, we may bear a legal duty not to hurt the foetus. This duty not only forbids the woman from choosing to abort, but also prohibits us from harming a woman such that her pregnancy would end, including executing her for a serious crime. Therefore, although the woman chooses to waive her right to life by committing that serious crime, capital punishment may be hindered by our legal duty to the foetus. The law currently acknowledges such a duty;[823] capital punishment on a pregnant woman is thus forbidden.

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[821] Regarding the duty not to hurt minors and the insane, see above n 794. The ICCPR again acknowledges the prevention of capital punishment for those aged under 18. Article 6 Section 5 states: 'Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women'.

[822] For example, Joshua Marquis, the district attorney of Clatsop County, Oregon, and the chairman of the capital litigation committee of the National Association of District Attorneys, held this view. See Malone, 'Cruel and Inhumane', above n 136.

[823] The ICCPR declares the prevention of capital punishment on a pregnant woman a basic principle of human

The Choice Theory also does not allow capital punishment on the innocent. If a convicted person has committed no crime or committed a crime not serious enough to warrant the death penalty, he or she has not made a choice to waive his or her right to life and thus capital punishment cannot be allowed. If capital punishment does go ahead, that constitutes a violation of the person's right to life. This violation, as a legal wrong, ought to be corrected and compensation becomes a must. In this sense, the Choice Theory also explains why compensation is necessary if an innocent person is executed due to miscarriage of justice.

7.3.2. Legitimacy of Population Control, Contraception and Abortion for Minors, and Illegitimacy of Infanticide

The issue of abortion is related to the legitimacy of population control, contraception, infanticide and abortion for teenage girls, all of which can be properly explained via the Choice Theory. Regarding population control, this can be seen as the opposite case of abortion. Abortion concerns a situation in which a woman's wish to terminate her pregnancy intentionally may face obstruction. On the contrary, population control regards a situation in which a woman's wish to carry the foetus to full term and give birth may be obstructed. In other words, a woman may be forced to abort even though she wants to keep the foetus. This can happen in a state where a second child is not allowed, such as China before 2015.[824]

At first sight, the Choice Theory appears to disallow the practice of population control since the mother has a right to abortion as a result of her possession of the right to self-determination. This right endows the mother with not only the freedom to choose to abort, but also the freedom to choose not to abort. The mother, therefore, cannot be forced not to abort, nor can she be forced to abort. The freedom to choose to abort may be restricted by a legal duty not to hurt the foetus. However, the freedom to choose not to abort is not obstructed because that determination still lies with the mother. Population control, which violates the mother's this freedom, thus should not be allowed.

However, this conclusion does not necessarily apply in all cases. On the one hand, the legal duty not to hurt the foetus, which restricts the mother's freedom to choose to abort (according to the Choice Theory), only exists when the law acknowledges it. If the law does not acknowledge such a duty, legally, the mother still has the freedom to choose to abort. On the

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rights. Refer to Article 6 Section 5, as presented in above n 821.

[824] China had been implementing the one-child policy since 1980, until it was removed in 2015.

other hand, the law does not always impose a duty on the mother not to carry a second baby, but that does not mean the law cannot. If such a duty is incorporated, such as once in the law of China, the mother will lose the legal freedom to choose not to abort if she becomes pregnant again. Population control, on these grounds, is justified.

Some may argue the duty not to carry a second baby is different from the duty not to hurt a foetus. The latter duty is more generally accepted as a moral obligation; its acknowledgement in the law, therefore, is generally seen to be more acceptable. On the contrary, the former duty is no more than a strategic policy that cannot and ought not to be incorporated in law; its restriction on the mother's right to abortion, therefore, should not take effect.

This thesis agrees with the view that there is a difference between these two duties. However, this difference does not mean the duty not to abort can be incorporated as a legal duty, while the duty not to give birth to a second foetus cannot. According to Hart, the content of the law was ultimately determined by that law-applying officials considered to be primary rules.[825] The officials may take morality as basis for primary rules. They may also find policy more suitable to serve as the primary rules. In practice, there is no actual restriction on which category primary rules belong.[826] As a result, even the duty not to give birth to a second child is not universally approved of; as long as it is accepted by the law-applying officials, it is therefore acknowledged by the law, and can justify the practice of population control. The Choice Theory can allow the practice of population control in terms of practical duty.

As to contraception, the Choice Theory also allows this practice. A foetus — no matter before or after implantation — is viewed in the Choice Theory as not having a right to life. On the contrary, the mother has a right to abortion. Theoretically, there is no restriction on the mother's right and she can freely choose whether to abort or not, as well as whether or not to use contraception.

However, this allowance is not general. The mother's right to abortion may be restricted by a legal duty not to hurt the foetus; her freedom in using contraception can again be restricted by this duty. Presently, most legal systems place no restrictions on the use of contraception. The legal duty not to hurt the foetus is thus imposed after implantation. Some laws impose this duty immediately after implantation, whereas others do so after foetal viability, as in *Roe v Wade*. For either of these two situations, the mother's freedom to abort or to use a

[825] Hart, *The Concept of Law*, above n 51, 109, 115–17, 256.
[826] Hart, *Essays in Jurisprudence and Philosophy*, above n 51, 361.

contraceptive is not restricted until the moment of implantation or foetal viability. Notwithstanding, this does not mean the law cannot inflict the duty before implantation. For a law founded in a certain culture, contraceptives used after fertilisation but before implantation may also be seen to constitute a kind of hurt to the foetus. The practice of contraception thus is disallowed by a legal duty not to hurt the foetus.

As for infanticide, the Choice Theory disallows this practice because one also bears a legal duty not to hurt an infant. Similarly to the situation of abortion, although the infant does not have a right to life, we are under a moral duty towards him or her. This duty, similarly to the duty not to hurt a foetus, is always acknowledged by the law. Moreover, the moral duty not to hurt an infant is even more universally acknowledged than that to a foetus, since many see the act of birth as the key turning point in going from pre-human to actually human. Infanticide, as a result, is more disallowable than abortion.

Lastly, as regards abortion for a teenage girl, according to the Choice Theory, such an individual is not competent enough for the law to consider her a right holder.[827] She therefore does not have a right to self-determination, nor a right to abortion; abortion in such cases thus seems as if it ought to be prohibited. Notwithstanding, the Choice Theory also suggests that we are always under a legal duty to protect minors because the law currently incorporates so.[828] Being pregnant may well affect a teenage girl in negative ways that do not apply to an older woman; any legal duty to the foetus this girl may bear is thus inapplicable and ought to be reduced to a minimum. As a result, abortion in such cases is allowable. On the same grounds, parental or judicial permission may also be required for a teenage girl to have an abortion because this further protects her from making an irrational decision or seeking help at inadequate medical facilities.[829] However, in some states a legal duty to a teenage girl may be considered unimportant in comparison to a legal duty to a foetus; abortion in such countries will therefore be prohibited, even for minors.

7.3.3. Acceptability of Suicide and Unacceptability of Ending Lives of the Insane and Minors

[827] Although a teenager may well have developed the capacity to choose and control the behaviour of another to at least some degree, she must still lacks the full capacity of such; otherwise, she would be considered by the law as an adult rather than a teenager.
[828] For example, in Australia minors under the age of 18 are not permitted to enter a bar or purchase alcohol.
[829] For example, the US states of Alabama, Arizona and Florida (plus some others) require permission from at least one parent before a teenage girl has an abortion; only a judge can excuse this requirement.

The issue of euthanasia relates to the problems of suicide and ending the lives of the insane and minors. As regards suicide, the Choice Theory allows it because a right is viewed as a choice. As noted in chapter six, a person's right to life and right to self-determination imply a right to die, which endows the person with the freedom to choose to die or not. Although this right cannot hold another under a duty to help the right holder to live or die, it protects the right holder's decision about such matter from being interfered with by another. Suicide, as a result, ought to be allowed.

Notwithstanding, suicide is not allowed for every person who wishes to die: for a patient who cannot rationally tell life from death, for example, an insane person or a minor, suicide is not allowable. The Choice Theory confers a person with a right when he or she has the ability to express his or her will and generate control over the performance of the duty bearer; a person who does not have such ability does not have a right. Therefore, for a patient who can tell life from death, he or she has both the right to life and the right to self-determination, and thus the right to die. However, for an insane person or a minor who cannot tell life from death, he or she does not have either the right to life or the right to self-determination, and thus does not have the ability to end his or her life.

Regarding ending the lives of the insane, the solution provided by the Choice Theory has been presented in part already as it relates to capital punishment. That is, capital punishment should not be applicable to the insane. Similarly, non-voluntary euthanasia cannot be employed to end the lives of the insane either. The insane, in situations of non-voluntary euthanasia, again have no right to life. However, we are under a legal duty not to hurt such an individual. Other than this general duty, relatives are also under another legal duty to take care of him or her. Both these two duties are always incorporated in law;[830] ending the lives of the insane, therefore, is never permissible.

On the same grounds, letting minors decide to undertake voluntary euthanasia or ending their lives in the name of non-voluntary euthanasia is also prohibited. As regards voluntary euthanasia, according to the Choice Theory, a teenage person does not have a right to self-determination because he or she is not considered competent enough to hold any right. In such cases, his or her consent is viewed as unavailable and thus voluntary euthanasia is inapplicable. For non-voluntary euthanasia, although minors do not have a right to life, we are

[830] See above n 793, 794 and 795.

always under a legal duty not to hurt them because almost all current laws incorporate such a duty.[831] Practicing non-voluntary euthanasia on them, as a result, is also impermissible.

Drawing to a conclusion, if the right to life and other related rights are viewed as choices, the practice of suicide, as well as non-voluntary euthanasia for the insane or minors, are allowable on a theoretical level; however, the latter is always prohibited by legal duty on a practical level. The Choice Theory also provides for the following: prevention of the application of capital punishment to the insane, minors, and pregnant women; prevention of infanticide; justification for compensation after wrongful killing; and the permissibility of contraception, population control and abortion for minors. Overall, viewing a right as a choice allows for conclusions that are far more acceptable than other explanations of rights.

[831] See above n 792, 793, 794 and 821.

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