A Superpaternalist Constraint: John Arras’ Opposition to Physician-Assisted Suicide and Euthanasia.

Peter Gildenhuyss

1. Introduction
In what follows, I address John Arras’ opposition to physician-assisted suicide (PAS) and active euthanasia (AE). Arras’ opposition to PAS and AE hinges almost entirely on the potential for these practices to be abused. I argue that even one grants Arras his suppositions about the course of social life upon legalization of physician-assisted suicide, his arguments fail to justify a ban of either physician-assisted suicide or active euthanasia.

Even though other writers have refused to support legalization of PAS and AE on the grounds that the practices of PAS and AE are likely to be abused (Kamisar 1980[1958], 1993, 1996, 1998; Fletcher 1982; Callahan and White 1996; Steinbock 2005), I focus on Arras’ stance in what follows because his opposition rests almost entirely on his concern about the likelihood of abuse, and I find abuse-based arguments dissatisfying. I also focus on Arras because he undertakes a number of plausible auxiliary stances that provide a definite context in which the value of abuse-based arguments can be discerned.

Arras follows Yale Kamisar in rejecting the “religious view” that killing is intrinsically different from allowing to die:

Certain individual actions can be morally appropriate even when the intent is simply and unambiguously to end the patient's life, and even when "the cause" of death is simply and unambiguously attributable to the action of the physician. (Arras 1997, 380).

Furthermore, as Norman Cantor has pointed out with respect to Kamisar’s abuse-based arguments, “every cited hazard of physician-assisted death exists as well in the context of rejection of life-sustaining medical treatment” (Cantor 2004, 1811). Arras recognizes that WLST is subject to abuse (1997, 381), so he must carefully craft an argument against PAS and AE that does not undermine WLST, too. I argue that he fails to do just this.

I begin by examining the character of Arras’ arguments against PAS and AE, focusing in particular both on his invocation of putative “social costs” of legalization and on what he calls his “policy-oriented” approach the question of legalization. Then, I show that Arras is advocating a ban of an unusual type, one I call superpaternalist. Superpaternalist constraints prohibit many people from engaging in an activity on the grounds that some, but not all, will do so their personal detriment. Such impositions on personal autonomy are especially difficult to justify, even if we allow consequentialist considerations to play a part in our moral reasoning, as Arras does.

2. The threat of abuse.
Arras deploys two slippery slope arguments in his essay, but the first serves merely to raise the stakes for the second, which focuses on the abuse of PAS and AE. In his first slippery slope argument, Arras foresees a slide from the legalization of physician-assisted suicide to the deployment of active euthanasia upon not only competent people who
deliberately seek it, but also incompetents who are judged to be best served by being killed on the basis of the same sorts of “subjective” and “objective” tests that are used to justify withholding treatment from incompetents (Arras 1997, 369-70). However, Arras himself notes that “it is not obvious that each of these highly predictable shifts … are patently immoral and unjustifiable” (Arras 1997, 370). Rather, Arras deploys this initial slippery slope argument in an effort to show that “if all of the extended practices predicted above pose substantially greater risks for vulnerable patients …, then we need to factor in these additional risks” (Arras 1997, 370). I propose to set aside incompetent patients and focus instead on the abuse of competent patients. I return to consider incompetent patients in the penultimate section of the paper.

Arras’ second slippery slope focuses on the possibility that the practices of PAS and AE will be abused such that “patients who fall outside the ambit of our justifiable criteria will soon be candidates for death” (Arras 1997, 370). Arras’ concerns about abuse take several forms. Arras is concerned that physicians will subtly coerce patients to request PAS/AE, especially in this era of turnstile medicine (Arras 1997, 366). Such coercive influences might also come from family members, who, like physicians, may have perverse incentives to promote PAS/AE (Arras 1997, 366). Arras thinks that depressed patients, particularly the elderly, will request PAS/AE when they could be successfully treated for their illnesses (Arras 1997, 366). Indeed, Arras laments how the diagnosis of depression has trailed behind progress in its treatment (Arras 1997, 366). Finally, Arras is concerned about discrimination against the poor and minorities who will bear the brunt of the social costs associated with legalization (Arras 1997, 367). In sum, in a world in which PAS/AE have been legalized, there will be people who engage in these practices who will suffer unnecessarily for doing so, and that suffering will be disproportionate in ways that exacerbate social injustice. I propose to simply hand Arras these suppositions for the sake of argument; even if we do so, Arras has not made the case for the prohibition of PAS/AE.

3. Social costs
Because we can expect that the practices of PAS and AE will be abused, Arras argues that the “social cost” of legalization of PAS/AE is too great to lift the ban on these practices. The terms “social cost,” “social danger,” and “social risk,” appear throughout Arras’ essay when he discusses the downside of legalization. But we need to distinguish two senses of the word “social” in order to clarify how there might be social costs, or social risks, to lifting the ban on PAS and AE.

If Arras is right in his predictions, then lifting the euthanasia ban will entail social costs in the sense that the costs associated with legalization will be borne by members of society. Costs that are “social” in this sense might find their contrast with ones borne by non-human animals. Debates over vivisection might be characterized as ones that pit social benefits against non-social costs, in this sense of “social.”

Another common use of the notion of “social cost” is to pick out deleterious consequences felt by others of an individual’s act, specifically consequences that the harmed individuals are not responsible for facing. “Social” in this sense is typically contrasted with “individual.” For instance, pollution often leads to social costs in this sense, ones that can be evaluated against the benefits gained by the individual polluters. One might equally weigh the social costs of the legality of firearms against the wishes of individuals to protect themselves and their families. “Social” costs of this sort are really borne by individual people, in the last case by individuals who are the innocent victims either of gun violence or accidents involving firearms that would not have otherwise
occurred had firearms been prohibited. But despite being borne by individuals, such costs and risks are termed “social costs” and “social risks” because they are diffuse: We do not know who will pay the costs associated with legal firearms and exposure to toxins.

The debate over euthanasia can seem like a classic conflict of individual vs. society. At times, Arras seems to present the debate over PAS and AE in these sorts of terms. He claims that his policy-oriented perspective “is crucial for adequately assessing the individual benefits and social risks involved in the proposal to legalize PAS” (Arras 1997, 375). Later he writes that “state legislatures are in a better position than federal judges to study the social and clinical facts and come to a reasonable conclusion on the likely balance of individual benefit and social risks” (Arras 1997, 383). One group of thinkers who explicitly present the euthanasia debate in classical individual vs. society terms is the authors of the Philosopher’s Brief. They seek to expose just how compelling a state interest would have to be to justify a euthanasia ban by proposing the following analogies:

Consider, for example, the burden a state would have to meet to show that it was entitled altogether to ban public speeches in favor of unpopular causes because it could not guarantee, either by regulations short of an outright ban or by increased police protection, that such speeches would not provoke a riot that would result in serious injury or death to an innocent party. Or that it was entitled to deny those accused of a crime the procedural rights that the Constitution guarantees, such as the right to a jury trial, because the security risk those rights would impose on the community would be too great. One can posit extreme circumstances in which some such argument would succeed. See, e.g., Korematsu v. United States, 323 U.S., 214(1944) (permitting United States to detain individuals of Japanese ancestry during wartime). But these circumstances would be extreme indeed, and the Korematsu ruling has been widely and severely criticized. (London et al., 493)

Though I am sympathetic to the stance on PAS and AE undertaken by these authors, their analogies are fundamentally flawed. A riot is costly to individuals other than the rioters, such as storeowners and passersby, who cannot be held responsible for avoiding the harms caused by the rioters. Similarly, the security risks posed by wartime freedom for Japanese-Americans or by trials for accused criminals find no parallel in the ban on PAS and AE. There is simply no state or social interest at all in preventing PAS and AE, at least not in the “individual vs. society” sense of “social.” People who engage in euthanasia do not harm others by their actions. At the very least, if patients who engage in PAS/AE do harm others, such as friends or family members who might be saddened to lose them, we can hold those close associates responsible for incurring the harms that they do. Moreover, Arras argues that the legalization of euthanasia will be bad for its practitioners, not bad for other people who know them; indeed these latter folk are among those who might selfishly manipulate candidates for PAS and AE into engaging in these practices.
Some opponents of PAS and AE, though notably not Arras, have argued that these practices should be matters of public policy because of their impact on friends and family. For instance, Kamisar faces the charge that those who would engage in PAS are not hurting anybody else, but responds by quoting Marty and Hamel: “We are not merely a collection of self-determining individuals … we are connected to others in many different ways.” (Marty and Hamel 1991, 46). Kamisar infers from these platitudes that physician-assisted suicide and active euthanasia “are social issues and matters of public policy” (Kamisar 1996, 113).

The difficulty here is that were we to generalize Kamisar’s grounds for making an activity a matter of public policy, then just about anything a person does would become such. In particular, a great many medical decisions people make would become matters of public policy, including decisions to end life support, and this cannot be right, since medical decisions are among our most intimate and personal ones. While we should recognize that PAS and AE may have an impact on friends, family and even society more generally, the distinction between personal and public matters should not be made in simple causal terms.

Something should not become a matter of public policy just because it may have repercussions for other people (Mill 1978[1859]). Mill requires not just that an individual harm others but further that the individual violate a distinct and assignable obligation to them for her action to become public act “amenable to moral disapprobation in the proper sense of the term” (Mill 1978[1859], 79). I have been framing the matter in an similar fashion: if the affected person is responsible for facing the effects of another's action, then the agent is not responsible for those effects even should they be deleterious. When we become close, I take responsibility for any deleterious consequences I face that result from your medical decisions.

There are perhaps alternatives to these ways of drawing a principled line between the public and the personal, but the important point is this: any principle used to draw a line between the public and the personal must place PAS/AE on the same side of the line as WLST along a great many other medical decisions, for all of these may have deleterious effects on the same set of individuals other than the patient. Indeed, a suggested sorting principle for distinguishing the public from the personal would assuredly be judged a failure were it to deem individuals’ medical decisions a matter of public policy. And once again, Arras does not consider the deleterious impact that euthanasia might have on friends and family members as a social cost; indeed, he concerned that such individuals might attempt to profit by coercing patients into engaging in PAS or AE against the patients’ interests.

The appearance WLST and PAS/AE differ in terms of their impact on individuals and society is fostered in part by the current de facto status of these practices around the world. Since PAS/AE are illegal nearly everywhere, it can seem as though we are contemplating giving people a new right or entitlement when we consider legalization of PAS and AE, and thereby merely extending to individuals a novel privilege. Since obeying patient requests for WLST is at present not just legitimate but mandatory, a prohibition on WLST would appear to constitute a drastic invasion of personal liberty unlike what results from the euthanasia ban. Arras takes this stance:

Whereas the refusal to honor a request for PAS or direct euthanasia amounts to a refusal if a positive benefit or assistance, the imposition of medical treatment against one’s will represents a violation of personal autonomy and
physical integrity totally incompatible with the deepest meaning of our traditional respect for liberty. (Arras 1997, 381)

But when we contemplate WLST, PAS, and AE in the abstract, we can see that a prohibition upon any of these practices constitutes an invasion of personal autonomy. This means that those who would ban PAS and AE must make the case that the invasion of personal autonomy that they propose is in fact justified. Furthermore, insofar as patient autonomy is the ultimate source of the legitimacy of WLST (Lindsay, Beauchamp, and Dick 2006, 2), an opponent of PAS/AE must make clear why personal autonomy fails to justify PAS and AE, too. As Arras himself notes (1997, 365), proponents of legalization see present bans on these practices as unjustified precisely because they involve unfair constraints on personal liberty (e.g., Brock 1992).

At one point, Arras seems to argue that PAS and AE differ from WLST in terms of their social impact. He claims that “when society fails to honor requests to prescribe or deliver a lethal dose, the results can be onerous for individual patients” (Arras 1997, 381). He goes on one paragraph later to write:

By contrast, were society, systematically and as a matter of policy, to refuse to honor requests to forgo life-sustaining treatments, then everyone would have to submit to the imposition of unwanted and often invasive measures. (Arras 1997, 381)

It is not at all clear how Arras means to argue here for a disanalogy between a constraint on PAS/AE and one on WLST. Surely it is hyperbole to say that a ban on withholding of life-sustaining care would require everyone to submit to unwanted invasive medical treatment: plenty of people never find themselves on life support, and of those that do, plenty are never inclined to refuse it. Perhaps Arras means that, were WLST banned, then everyone would have to submit themselves to unwanted life-sustaining medical treatments were they to find themselves in need of life-sustaining medical care and disposed to refuse it. But there is no lack of a parallel there, since everyone would have to submit to an unwanted, prolonged and undignified death were they to find themselves desirous of PAS or AE and constrained from profitably engaging in either of those practices.

It should be emphasized that I am not trying to make the case against Arras at this point. I am merely noting that PAS and AE do not automatically become matters of public policy in the way that, say, pollution does. PAS and AE should not be considered matters of public policy on the grounds that they have social costs in the “individual vs. social” sense, because they patently lack these. But this is not yet to argue that the state cannot regulate euthanasia.

In sum, the practices of PAS/AE do not impose social costs in any sense of “social” according to which these practices count as having social costs while WLST does not do so. Since intimate medical decisions must fall on the personal side of any principled line distinguishing the personal and the public, a decision to engage in PAS/AE must do so too. Constraining patients from engaging in any of the trio of practices constitutes an invasion of personal autonomy requiring adequate justification.
4. Superpaternalism
We have seen that there are potential “social costs” to the legalization of euthanasia only in the sense that such costs are ones borne by human agents who are members of societies. But there are no “social costs” to euthanasia in the way that “social” costs and benefits are contrasted with “individual” ones in typical public policy debates. What is important is that the situation is patently unlike cases in which individual agents seek to pursue their own interests, where such pursuit confers costs or risks upon other members of society who are not responsible for incurring those costs. What’s more, a ban on PAS and AE is positively harmful to individuals who would not hurt anyone, even themselves, by engaging in PAS or AE. Arras explicitly recognizes the existence of patients who would profit from the availability of PAS or AE:

> With all due respect for the power of modern methods of pain control, it must be acknowledged that a small percentage of patients suffer from conditions, both physical and psychological, that currently lie beyond the reach of the best medical and humane care. Some pain cannot be alleviated short of inducing a permanent state of unconsciousness in the patient, and some depression is unconquerable. For such unfortunate patients, the present law on PAS/euthanasia can represent an insuperable barrier to a dignified and decent death. (Arras 1997, 365; see also Kamisar 1998)

So we face, says Arras, a tragic choice: we must cause the suffering of some in order to prevent the deleterious termination of the lives of others.

Given that euthanasia has no adverse social consequences and its prohibition leaves some people worse off, what sort of constraint are we contemplating here? As far as I know, we have no name for the type of constraint that Arras is advocating. Prima facie it looks as though Arras is advocating a kind of paternalism. We restrict the conduct of individuals seeking PAS or AE for their own good, since they might request such procedures to their detriment, perhaps because they are pressured to do so unfairly, or perhaps because treatment that would improve their conditions is available but is not being offered, or perhaps because their requests stem from treatable depression. But it is not only these individuals whose conduct a ban on PAS and AE restricts; the ban also constrains the conduct of candidates for PAS and AE who would in fact benefit from PAS and AE and are not making a mistake by requesting it. These are the patients who are harmed by Arras’ tragic choice. Thus, a ban on PAS and AE is a kind of sweeping paternalism that constrains individuals from engaging in a form of conduct on the grounds that some of them, but not all of them, might engage in it to their own personal detriment. It is a kind of superpaternalism, constraining all for the sake of keeping some from harming themselves.

Superpaternalist constraints might be mistaken for two other kinds of constraints, and it is important that we distinguish these. On the one hand, it might look as though superpaternalist constraints are just paternalist ones writ large: superpaternalism is just paternalism at the policy level. Indeed, superpaternalist constraints do share with paternalist ones the key feature that they are justified in terms of the personal benefit conferred upon constrained individuals rather than a benefit or harm reduction for other people. But some broad-based social constraints on individuals’ activities might be
justified as constraining everyone involved to their own benefit. Alan Goldman, for instance, thinks that motorcycle helmet laws can be justified in this way: anyone not wearing a helmet can be assumed to be acting in a manner inconsistent with her long-run preferences (Goldman 2009[1980], 64). Many motorcycle enthusiasts would disagree. Nonetheless, there is a difference between a paternalist constraint, one that benefits those constrained, and a superpaternalist one, which personally benefits only some of those constrained and produces a personal detriment to others.

The other sorts of constraints from which the superpaternalist ones need to be distinguished are those in which only some of the individuals constrained from engaging in a practice pose a threat of harm to others. Take the case of a constraint against firearms possession. Some individuals constrained from owing firearms would pose no threat, or even risk, to innocent people were they allowed to possess a firearm. Furthermore, these individuals have something to gain from firearms possession: amusement, protection for themselves and their family members, etc…. Other individuals constrained from owning firearms do pose a threat of harm, individuals who are inclined to criminal, or perhaps merely reckless, activity. A ban on firearms possession, then, constrains many people in order to keep some from producing harmful consequences. Contrast the firearms ban with constraints on pollution. Idealizing a little, we can say that any polluter produces harmful consequences for others, through elevated risks of death, disease and discomfort in the broader population. Call constraints of the former sort, such as the ban on firearms, “shotgun constraints,” since they constrain more people than really need or deserve to be constrained.

Shotgun constraints also share a feature with superpaternalist constraints, but a different one from that which is shared between paternalist and superpaternalist constraints. Superpaternalist constraints are like shotgun constraints insofar as many people are being constrained from engaging in a practice even though only some of them would engage in the practice to anyone’s detriment. Critically, however, while shotgun constraints share one feature with superpaternalist constraints, they fail to share another. The disutility that results from firearms possession is felt by individuals other than those who are constrained by the ban, people who cannot be expected to take responsibility for avoiding that harm. In contrast, the disutility that results from superpaternalist constraints is felt only by those who would engage in the practices and not by others.

5. The Justification of a Superpaternalist Prohibition of PAS and AE

Having identified the kind of constraint that Arras seeks to impose upon society by banning PAS/AE, I now turn to the question of whether his proposed constraint can be justified. Prima facie, it would seem as though consequentialism would provide the best theoretical stance to use to defend a ban on PAS/AE. This is because the pure consequentialist would not distinguish paternalist or even superpaternalist constraints as ones that are especially difficult to justify; the foregoing identification of the ban on PAS/AE as superpaternalist is, for the pure consequentialist, simply besides the point.

Arras often presents the issue of legalization in consequentialist terms. For instance, in criticizing the Ninth Circuit court ruling that patients have a liberty interest in

---

1 Some readers may disagree with this claim, but it is at least plausible, and I am merely using the case for illustration.
2 To de-idealize: it is not the case that every particle of pollutant emitted by a given polluter will actually do harm but rather that the harm caused by toxins cannot be traced to individual polluters and so all emitters must be held responsible for the damage they do in proportion to the contribution they make to overall environmental toxicity.
PAS, Arras writes of “the very real possibility that the social and individual harms attendant upon the legalization of PAS would eventually prove disproportionate to their benefits” (Arras 1997, 383). Moreover, states that would take the risk of legalizing PAS would “run these risks as a social experiment, i.e., to determine empirically for themselves whether more good than harm will come from legalizing PAS” (Arras 1997, 383). Finally, Arras picks out, in his prologue, John Fletcher’s secular “consequentialist” case against euthanasia as an inspiration (Fletcher 1982; Arras 1997, 1). But the difficulty for the consequentialist opponent of PAS/AE lies in the fact that WLST is no less susceptible to abuse than are PAS/AE. Successful abuse-based arguments against PAS/AE threaten to commit the pure consequentialist to the illegitimacy of WLST.

The pure consequentialist might evade this threat if the patients who are candidates for WLST are in general different from those who are candidates for PAS/AE. Arras claims that candidates for WLST will already be generally worse off than candidates for PAS/AE (Arras 1997, 381), making the costs associated with permitting WLST smaller per patient than the corresponding ones for PAS/AE. But it should also be recognized that candidates for WLST will tend to be less competent in their decision-making, and hence more easily coerced and more prone to requesting an unnecessarily early death. People will lose less by WLST but they will do it more often. And we should remember, too, that candidates for WLST are not always such because they are suffer from a serious and debilitating life-threatening medical condition, one which would end their lives in short order were it not for ongoing medical interventions. A candidate for WLST may be prompted to demand it because they suffer from one condition and yet be a candidate for it because they suffer from another. Moreover, patients who are candidates for WLST must be dramatically different from candidates for PAS/AE, otherwise the consequentialist case against PAS/AE is quite weak, with the rule permitting WLST at best narrowly passing consequentialist scrutiny while a rule permitting PAS/AE barely fails.

There is another familiar threat to the pure consequentialist defense of Arras’ stance. While a rule permitting WLST but not PAS/AE might beat out one that permits all three, a rule that dissects the class of candidates for WLST more finely might prove better than either on strict consequentialist grounds. A pure consequentialist who is concerned about abuse might very well find it justifiable to curtail the practice of WLST, perhaps by allowing only patients with sufficiently poor prognoses to engage in WLST.

But perhaps the biggest difficulty with a pure consequentialist perspective is that it is frankly out of keeping with the importance of patient autonomy in contemporary medical practice. That the pure consequentialist must even consider curtailing patient rights to control their own care is probably evidence enough against the viability of a pure consequentialist position. What’s more, Arras himself introduces considerations of personal autonomy as grounds for maintaining the norm of WLST: “The imposition of medical treatment against one’s will represents a violation of personal autonomy and physical integrity totally incompatible with the deepest meaning of our traditional respect for liberty” (Arras 1997, 381).

Arras then must, and does, take a mixed stance in which both concerns about personal autonomy and utilitarian consequences have justificatory import in the euthanasia debate. What’s more, the introduction of personal autonomy as a moral value relevant to what ought to be legally pursuable does not obviously threaten Arras’ position. Earlier, I noted that considerations of personal autonomy are available to justify

---

3 This is just an application of the well-known act-utilitarian response to rule-utilitarianism in which the latter is reduced to the former (Lyons 1965).
both WLST and PAS/AE, and this fact may in fact be congenial to Arras. This is because considerations of personal autonomy, by providing the same moral weight in favor of both WLST and PAS/AE, will simply wash-out in the moral calculus. If on consequentialist grounds, WLST is less dangerous than PAS/AE, concerns about personal autonomy cannot equalize the two practices. Nevertheless, I will argue that the introduction of personal autonomy into the equation is in fact ultimately extremely debilitating to Arras, and to see why, we must consider what superpaternalist constraints look like to the deontologist.

5.1. Superpaternalism from the deontological point of view

One reason why it was important that we earlier distinguished superpaternalist constraints from paternalist constraints, on the one hand, and shotgun constraints on the other, is that superpaternalist constraints will be more difficult to justify that either of their close cousins, at least from the point of view of the nonconsequentialist. We can accordingly begin to get a grip on whether Arras’ proposes ban on PAS/AE can be justified by considering how paternalist and shotgun constraints might be justified on grounds other than consequentialist ones.

Consider paternalist constraints first. On one view, paternalism is wrong because it constitutes the imposition of a constraint on one person when no other agents’ interests are being threatened by their actions. A more lenient approach to paternalism would permit paternalist interventions in cases where individuals are making a decision that is out of keeping with their own considered long-run interests; this is Goldman’s stance (2009[1980]). Simple ignorance, along with distress, panic, pain, suffering, and other temporary and highly charged psychological states can disable our pursuit of our own values. Paternalistic interventions may well be justified to prevent individuals from doing harm to themselves on such occasions. The panicked agent is literally out of her mind, not acting as a person at all, when pursuing what seem to her to be immediate and overwhelmingly pressing goals that conflict with her considered long-term ends. When we constrain someone from the pursuit of such short-term goals, we arguably evince a greater respect for persons than we do if we do not interfere. What is noxious about some paternalistic constraints is that they involve an imposition of one person’s values upon another person, and paternalistic interventions that further an individual’s own considered interests do not do this; rather, they are justified in terms of the values of the individual whose behavior is being restricted.

While paternalism might be justified as respectful of personal autonomy when it is a matter of keeping a person from stymieing their achievement of their own rational ends, superpaternalism cannot be legitimated by appeal to a parallel justification. This is because superpaternalist constraints thwart the pursuit of considered long-run interests on the part of at least some people who are constrained by them, the ones who would profitably engage in PAS/AE. Accordingly, even the mellow deontologist who accepts paternalistic interventions that are justified in terms of the values of those intervened upon will find superpaternalist constraints on personal autonomy dubious.

Consider shotgun constraints now. The nonconsequentialist may well balk at shotgun constraints because they interfere with the autonomy of individuals who pose no threat to other members of society. Indeed, the nonconsequentialist might regard shotgun constraints as unfair and even discriminatory. A ban on firearms effectively forces a subsection of the populace, those who would profitably possess firearms to no one else’s disadvantage, to pay a greater share of the price of keeping society safe from less upstanding citizens who by chance share their inclination to own weapons.
Clearly, the nonconsequentialist who balks at lumping upright citizens together with dangerous miscreants and constraining all of them from engaging in a practice just because the latter pose a threat to society will regard superpaternalist constraints as unjustified, because superpaternalist constraints involve a similar lumping together of those who would profitably engage in a practice with others who would not. But even the nonconsequentialist who is comfortable with a firearms ban might very well still balk at a ban on euthanasia. Sureshot Sheila might pay an elevated price for the safety of society when firearms are banned or restricted, but she remains among the pool of individuals who profit from the ban, too (presuming a firearms ban is an effective means to reduce diffuse gun violence). Social goods quite often have the feature that their costs are spread differently than their benefits. People may vary in the number of children they have and yet pay the same fraction of their income in school taxes, for instance. With shotgun constraints, there are at least social goods, properly speaking, that result from the constraint and the benefit these provide to the constrained and unconstrained individuals alike can be invoked to justify the admittedly uneven impositions upon individuals’ autonomy.

Superpaternalist constraints, however, do not produce any social benefit in the way that shotgun constraints do, and so cannot be justified in similar terms. Rational Raymond the suffering cancer patient, along with the rest of society, gains nothing from a ban on euthanasia that serves to keep Confused Constantine from losing valuable years of her own life. This is not a case of a public good being paid for unevenly by those who benefit from it, but a case of a personal good being paid for by individuals who in no way stand to profit from it.

Accordingly, from a deontological point of view, superpaternalism is extremely difficult to justify. Superpaternalist constraints cannot be justified in terms of the values of the individuals constrained, nor can they be justified in terms of public benefit. Precisely the features of paternalist constraints and shotgun constraints that may make each of these acceptable to the relatively mellow deontologist are absent in the case of superpaternalism. In fact, the way in which superpaternalist constraints are like paternalist ones keeps superpaternalist constraints from being redeemed in the way that shotgun constraints are, and the way that superpaternalist constraints are like shotgun constraints keeps superpaternalist constraints being redeemed in the way that paternalist ones are. In sum, it is hard to imagine that concerns about the invasion of personal autonomy would ever provide reasons to oppose a social policy and yet fail to do so in the case of superpaternalist constraints.

Lastly, Arras’ concerns about the impact of legalization within a broader social framework marked by entrenched inequities should little impress the deontologist. The nonconsequentialist might well agree with Arras that the current state of geriatric and palliative care is abysmal and that physicians routinely neglect to offer their patients the best possible care. But that the diagnosis and treatment of depression among the elderly remains unacceptable is a problem for society as a whole, or at least for those members of society who are responsible for the care of the elderly. In the name of this and other failings of our healthcare system, Arras would foist additional suffering upon people who are in no way especially responsible for the broader societal failings. Similarly, while discrimination against minority groups should be recognized as a ongoing social ill, additional suffering should not be forced upon individuals who would profitably engage in the euthanasia because of this lamentable state of affairs. Unlike justified paternalistic interventions, superpaternalistic constraints do involve the imposition of values upon autonomous individuals: those who would profitably engage in PAS or AE are effectively
being forced to value others’ well-being, along with the rectification of healthcare inequities and social injustice, above their own interests.

5.2. Can a superpaternalist ban on PAS and AE be defended on mixed grounds? That superpaternalist constraints are so difficult to justify from a deontological point of view is ultimately severely debilitating to Arras’ position. Even when consequentialist concerns are taken into account, personal autonomy should be accorded decisive moral weight in the debate over PAS/AE.

According to the mixed perspective that Arras must take up, the positive value accorded personal autonomy must be insufficient to compensate for the negative utility that would result from permitting PAS/AE, despite being sufficient to override the cost associated with the abuse of WLST (remember we are assuming all three practices are abused). If the value of personal autonomy is given either too high or too low a value in our moral calculations, we will end up finding all three practices either legitimate or illegitimate. This means that Arras must regard patient autonomy as having a middling value in debates over legalization. But the weight that personal autonomy is afforded in policy debates is not an invariant quantity, and we have every reason to think it should bear enormous weight in the case at hand, even for someone like Arras who takes consequences into account, too.

To see why personal autonomy does not carry the same weight in every moral debate, consider again our contrast between the prohibitions on firearms possession and pollution. Were the social costs of pollution and firearms possession equal, a constraint on pollution might well be justified while a constraint on firearms possession was not. For every polluter effectively harms society (or at least must be taken to do so), while only some people who bear arms threaten the rest of us. When we limit someone’s pollution, we invade their personal liberty, but we do so on the best possible grounds: they are contributing to other people’s suffering. The same is not true of a ban on firearms possession. Such a ban is not only a constraint on individual autonomy, but also a manifestly unfair one; we are constraining some people not because they are a threat to others but because they happen to share the inclinations of other people who are threatening. This means, or at least it should mean, that the costs associated with legal firearms must be especially high to compensate for the loss of personal liberty suffered by those who would otherwise like to own a gun and are no threat to anyone for it. And the more people there are like this, the more costly preventable gun violence must be for a constraint against firearm ownership to be legitimate. The principle I am invoking here is this: the degree to which impositions on autonomy matter to the legitimacy of a constraint is partly a function of the degree to which the constraint is unfair.

If the foregoing principle is correct, then personal autonomy should bear an enormous weight in debates over superpaternalist constraints. Like shotgun constraints, superpaternalist ones are unfair because they harm individuals who harm no one, not even themselves. But superpaternalist constraints are further unfair because they force individuals to suffer for the sake of an essentially personal benefit gained by those who would engage in the target practice to their own detriment. Arras needs the moral weight of concerns over personal autonomy to be a middling quantity, big enough to legitimate WLST despite its abuse, but not so big as to legitimate PAS/AE. But instead, we should accord personal autonomy an enormous value in the debate over PAS/AE, even if we take consequences into account, too.
6. Incompetents
Early on, I chose to focus on cases of the coercion of competent patients, and this
decision may have struck some readers as one that stacks the deck in my favor. Indeed,
Kamisar has argued that an individual who considers PAS/AE will hardly be the model of
the competent decision-maker (Kamisar 1980[1958], 414). Were incompetent individuals
allowed to “decide” to engage in PAS/AE, despite their lack of competence, then the ban
on euthanasia would no longer count as superpaternalist. Instead of keeping people from
harming themselves, the ban on PAS/AE would keep patients from being harmed by
others. According to this vision, some of the people who will die from AE upon
legalization will be incompetent patients who do not wish to die but from whom an
official gesture of request for euthanasia is somehow extracted and then seized upon by
zealous euthanizers as an excuse to engage in what really should be considered the killing
of the innocent.

The view that PAS/AE will be used to kill incompetent people against their will is
not among Arras’ concerns, and it is hard to square with Arras’ more sober worries about
subtle coercion by physicians and family members. Moreover, this possibility can be
effectively countered by consideration of the practice of WLST. If our assessments of
competence are so unreliable as to make possible the envisioned practice, then a great
many individuals are at present being killed, murdered in fact, by means of the
withholding of life-sustaining medical care without their true informed consent. Coercive
physicians and family members have no less reason to encourage WLST than AE; they
are also presumably indifferent to how they achieve their goal of bringing about the death
of patients. Indeed, if candidates for WLST generally are worse off than patients who
would pursue AE, then it is even more likely that incompetent patients are being
murdered by the withholding of life-sustaining care than it is likely that candidates for
AE would be, upon legalization. An argument against PAS/AE that posits that life-and-
death decisions are being made for incompetent patients by individuals who want to kill
them is unrealistic and anyhow far too strong. In a fantasy world such as this, WLST
should be banned along with PAS/AE, at least until the posited gross improprieties with
respect to assessments of competence are rectified.

It might be responded that competence is a vague notion, not the cut-and-dried
affair I treat it as above. But competence assessments must issue in determinations of
decision-making capacity; their function is to make an all-or-nothing classification
(Buchanan and Brock 1986, 27). Either such determinations are made reliably, in which
case we need not worry about incompetents making poor decisions about their own
welfare in a future in which euthanasia is legal, or such determinations are already being
made poorly, in which case we ought at present to halt the practice of withholding of life-
sustaining care until our competence-determination practices are improved. The
vagueness of competence does not further the argument against PAS/AE.

Another group of patients I set aside initially were those who are incompetent and
actually recognized as such. At the foot of Arras’ first slippery slope, we find ourselves
killing patients we regard as incompetent on the basis of the same “subjective” and
“objective” tests already used to make decisions about their care generally. But given
Arras’ broader commitments, it hard to see why this practice would be morally offensive.
The act of removing incompetent patients from life-support is not intrinsically morally
different, from Arras’ point of view, from euthanizing them; for Arras, the problem with
euthanasia lies at the policy level only. Moreover, an incompetent patient who is a
candidate for euthanasia in a future society that has arrived at the bottom of Arras’ first
slippery slope is identical to a patient in our contemporary society who we would not
treat were she to contract an easily treatable medical condition. Clearly, the lives of such individuals are not ones to which we ascribe a high value at present: we allow the vicissitudes of their contraction of treatable illnesses to determine whether they live or die. So we cannot regard the legalization of euthanasia as posing any serious threat of harm to them.

7. Conclusion
In the above, I have considered only Arras’ argument for banning physician-assisted suicide and active euthanasia. Other writers, notably Yale Kamisar, deploy a broader spectrum of arguments against the legalization of PAS and AE. Still, the foregoing criticism of Arras’ second slippery slope argument should transpose fairly well to the stances of other critics who invoke the threat of abuse in their opposition to PAS and AE. To correctly assess whether PAS and AE should be legalized, we need to see that a ban on euthanasia is a superpaternalist constraint and for that reason one that is especially difficult to justify, even when social utility is taken into account.

Works Cited

