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THE MEANS BY WHICH WE WISH TO END — THE STATE'S MONOPOLY ON LEGITIMATE DYING

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Abstract

In the 2020 General Election New Zealand voters will decide whether Parliament will introduce a new form of state-sanctioned dying, the End of Life Choice Act 2019, in Aotearoa New Zealand. This paper examines the state-sanctioned death penalty and its abolition to consider, from a jurisprudential lens, how the state may or may not justify state-sanctioned assisted dying today. This paper draws on arguments made for and against capital punishment in New Zealand in the 20th century and compares them to the debate around assisted dying. In assessing the morality of legitimate dying, this paper draws on how individual morality, diversity in society and rights-based arguments influence changes in the law. It argues that ultimately, New Zealanders should review the state monopoly on legitimate death, and voters must carefully weigh the diverse needs of society in considering the introduction of assisted dying.

Keywords

"State-sanctioned dying", "morality", "assisted dying", "death penalty", "monopoly" "End of Life Choice Act"

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*I Introduction and Background to Legitimate Dying**

Sanctioning legitimate dying is a role only the state can perform. This research paper examines the state's monopoly on the legitimate taking of life in New Zealand using two case studies - the death penalty and assisted death. The death penalty was abolished for murder in 1961, providing a historical form of state-sanctioned death. The End of Life Choice Act 2019 (the Act) is a contrasting modern study. The salient link between the two is that they are both forms of state-sanctioned death. The starting suggestion is that state-approved death is unwanted; even the state should avoid or limit the authority to legally take life. Therefore, changes in this area demonstrate not only important developments in the legal framework but a transformation of moral values. Their highly emotive nature also makes for slow and contentious legislative reform. Civilian forms of state-sanctioned dying were mostly illegal from the abolition of the death penalty until Parliament passed the Abortion Legislation Act 2020.[1] However, abortion had been de facto legal before the legislation.[2] There has been a demonstrable shift from the state's absolute monopoly on legitimate dying. Abrupt legislative reform in this area is unlikely and undesirable. However, changes in the legal, social, moral, and political climate of New Zealand show a shift towards greater individual freedoms in legitimate dying. The 60 years between the abolition of the death penalty and the Act provides space for analysis of the shift in the moral, political, and legal thinking.

The death penalty and assisted death have been historically discouraged and emotionally disapproved of by certain groups in society while they are desirable for others. The moral and legal arguments surrounding the death penalty remain relevant and can illuminate the debate about assisted death. This research hopes to highlight whether these arguments are relevant in 2020, or whether the social and moral climate of society has changed so that state-sanctioned death in the form of assisted death is acceptable. The paper avoids stating that assisted death is morally right or wrong. Like the position of the Royal New Zealand College of General Practitioners, this paper

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1 An exception to this is suicide discussed at page 27.

2 Hugo Farmer "An analysis of New Zealand's abortion law system and a guide to reform" [2013] PILJNZ 9.

agrees that the morality of assisted death is for the individual conscience.[3] The focus is the morality of state-sanctioned death and whether the moral reprehensibility of the death penalty remains relevant. The End of Life Choice Act 2019 referendum will be a significant revelation of the moral judgements of Aotearoa New Zealand society.

Analysing what the state's role should, or should not be, in dictating how and when people can die, is a legal and moral question. Where "[a] person's right to life [is concerned there] must be a mixed question of morality and law".[4] The intersection of morality and law is fundamentally a question of jurisprudence.[5] Therefore, this paper will take a jurisprudential approach in analysing the historical and modern study to draw findings around: the state's monopoly over sanctioning legitimate dying; the role of law in an area that is inherently moral; protecting minority vulnerabilities and possible criticisms of a rights-based approach.

II Definitions

State-sanctioned dying is a form or method of killing authorised by and through the government or judicial bodies. This paper is concerned with civilian forms of state-sanctioned death. This paper does not discuss abortion, as the link between the death penalty and assisted death is that an adult loses their life.

A Assisted Dying/Euthanasia

The Australia and New Zealand Society of Palliative Medicine (ANZSPM) defines assisted dying and euthanasia as:[6]

> Euthanasia is the act of intentionally, knowingly and directly causing the death of a patient, at the request of the patient, with the intention of relieving intractable suffering. If someone other than the person who dies performs the last act, euthanasia has occurred.

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3 Royal New Zealand College of General Practitioners, "Submission to Justice Committee on the End of Life Choice Bill 2019" (2018) at 2.

4 David Beattie "The Right to Life" [1975] 14 NZLJ 501 at 501.

5 Beattie, above n 4, at 501.

6 Australian and New Zealand Society of Palliative Medicine Inc "Position Statement: The Practice of Euthanasia and Assisted Suicide" (31 October 2013) at 4.

> Assisted suicide is the act of intentionally, knowingly and directly providing the means of death to another person, at the request of the patient, with the intention of relieving intractable suffering, in order that that person can use that means to commit suicide. If the person who dies performs the last act, assisted suicide has occurred.

The divergence between euthanasia and assisted death is the person who performs the act that causes death. The End of Life Choice Act 2019 defines 'assisted dying' as:[7]

> (a) the administration by an attending medical practitioner or an attending nurse practitioner of medication to the person to relieve the person's suffering by hastening death; or
> (b) the self-administration by the person of medication to relieve their suffering by hastening death

The Act, therefore, is using 'assisted dying', regardless of who administers the medication. This research paper uses the term 'assisted dying' after the Act to cover both assisted dying and euthanasia as defined by the ANZSPM. By avoiding the term 'euthanasia' and 'suicide', this essay prevents complications and misunderstandings involved with those terms. The law prohibits aid in dying by accelerating death under section 164 of the Crimes Act.[8] However, under current medical practice, practitioners may "increase dosages of opiates to relieve patients' suffering… this can sometimes hasten a person's death".[9] The Act does not consider this as assisted dying.

Additionally, section 63 prohibits a person's ability to consent to their death.[10] In 2015 the High Court confirmed the common law position toward assisted dying in *Seales v Attorney-General.* Collins J found that "Ms Seales' doctor would be acting unlawfully if she administered a fatal drug to Ms Seales… [or that] it would be lawful for Ms Seales' doctor to provide her with a fatal drug" that Ms Seales could administer herself.[11] The case acknowledged it was a significant policy decision for Parliament to make.

It is necessary here to outline the limits of the End of Life Choice Act. Section 5 of the Act provides that the requirements for eligibility are that a person:[12]

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7 End of Life Choice Act 2019, s 4.
8 Crimes Act, s 164.
9 Royal New Zealand College of General Practitioners, "Submission to Justice Committee on the End of Life Choice Bill 2019" (2018) at 4.
10 Section 63.
11 *Seales v Attorney-General* [2015] NZHC 1239, at [9].
12 Section 5.

(a) is aged 18 years or over; and

(b) is—

(i) a person who has New Zealand citizenship as provided in the Citizenship Act 1977; or

(ii) a permanent resident as defined in section 4 of the Immigration Act 2009; and

(c) suffers from a terminal illness that is likely to end the person's life within 6 months; and

(d) is in an advanced state of irreversible decline in physical capability; and

(e) experiences unbearable suffering that cannot be relieved in a manner that the person considers tolerable; and

(f) is competent to make an informed decision about assisted dying.

(2) A person is not a person who is eligible for assisted dying or an eligible person by reason only that the person—

(a) is suffering from any form of mental disorder or mental illness; or

(b) has a disability of any kind; or

(c) is of advanced age.

B Capital Punishment

The terms 'capital punishment' and the 'death penalty' are used interchangeably in this paper. They refer to a convicted criminal's death sentence. The death penalty was only by hanging in New Zealand as a mandatory sentence for murderers from 1840 to 1961. There was, however, a period between 1941 and 1950 when the Labour government removed the death penalty, but the National government reinstated it.[13] Two other periods during which Labour was in government between 1935-1941 and 1957-1960 the "Royal prerogative of mercy" was used to commute every death sentence.[14] From 1840-1961 there were only 85 death sentences carried out in New Zealand.[15] Parliament abolished the death penalty for murder and piracy with the Crimes Act 1961.

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13 Sherwood Young *Guilty on the Gallows: Famous Capital Crimes of New Zealand* (Grantham House, Wellington, 1998) at 7.

14 Young, above n 13, at 7.

15 Young, above n 13, at 9.

In 1989 it was removed from the Crimes Act entirely.[16] However, its extradition from statute was a long and adversarial process.

C Jurisprudential Framework

This paper focuses on the intersection of law and morality. Law and morality are inseparable where the law concerns death, contrary to H L A Hart's starting proposition that the "analytical distinction must be maintained between law and morality".[17] However, this framework is not here used to analyse the legal validity of laws around legitimate dying. Instead, the focus is on how morality has affected the law around state-sanctioned death from the 1960s. This approach focuses on how changes in the morality of society affect the law, and changes in law affect morality.

Positivists often allow the law to be "simply correct, normative goals aside".[18] Frederick Schauer distils positivist thought to reveal a potential motivation. He recognises "a distinction between what the law is and what the law ought to be *in order to* produce morally desirable results for some population".[19] He argues that legal positivism may allow for or facilitate "certain other goals… that are themselves morally or politically defined".[20] If the law truthfully facilitates other goals which are "politically or morally defined" then positivism creates an illusion that law is valid because of the process, not substance. The law can, therefore, be used as a means of passing an agenda motivated by morals and politics.

Naturalism's influence in New Zealand's policy and legal framework remains pervasive. If adherence to a higher moral code is still as widespread in 2020 as it was in the 20th century when the death penalty was abolished, competing moral standards continue to motivate legislative reform. The debate over assisted death remains as morally rooted as arguments over 70 years ago – despite a secular society that seems less religious. Arguably the law still prescribes or attempts to subscribe, to the same Christian utopian progressiveness as in the 20th century. Other moral or

16 Young, above n 13, at 7.
17 Raymond Wacks *Understanding Jurisprudence: An Introduction to Legal Theory* (3rd ed, Oxford University Press, Oxford, 2012) at 77.
18 Frederick Schauer "The Path-Dependence of Legal Positivism" (2015) 101 Va L Rev 957 at 969.
19 At 968 (emphasis added).
20 At 969.

cultural views discussed in this paper that influence opinions on the morality of law in New Zealand challenge this position.

III Law Making Authority and its Influences

A The State's Monopoly over Legitimate Dying

The state makes the law, and it is "through the state alone that law exists".[21] It is the state's function to establish laws, administer their application, and enforce their obedience. However, where state laws appear to infringe on individual morality, the state's role can be further interrogated. "The development of our legal systems ha[s] been powerfully influenced by moral opinion, and, conversely, … moral standards ha[ve] been profoundly influenced by law".[22] The "historical causal connection" between law and morality may be hard to track; however, it has resulted in "the content of many legal rules mirror[ing] moral rules or principles".[23]

Law enacted by the state does not equate to it being just to the individual. Nor does it necessarily result in citizens following practices regulated by law. Although from a strictly legal positivist view, this is irrelevant as the law *is the law.* Hart notes that "legal rules… purport to regulate behaviour regardless of whether or not those rules reflect actual practice".[24] However, where issues are inherently and irremovably moral, the state's law should not be accepted because of validity alone. It is insufficient that the de facto situation is different from the legal standards because the state is the only source of legitimate constitutional authority in Aotearoa New Zealand. However, people circumvent the state's law. The ability to travel abroad and get aid-in-dying reconciles easily uneasily with the function of the law as a legitimate institution. The state is instead unable to exercise its monopoly over the individual's sense of morality.

Salmond wrote we "are not merely in a special manner under the protection of the state but are also in a special manner under its coercion".[25] Hermann von Jhering goes further to state that "the right to coerce forms the *absolute monopoly* of the state".[26] Bentham "believed that a central

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21 John Salmond *Jurisprudence* (8th ed, Sweet & Maxwell, London, 1930) at 139.
22 H L A Hart "Positivism and the Separation of Law and Morals" (1958) 71 Harv L Rev 593, at 598.
23 Hart, above n 22, at 598.
24 Wacks, above n 17, at 85.
25 Salmond, above n 21, at 151.
26 Rudolf von Jhering *Law as a Means to an End* (A M Kelley, New York, 1968), at 238 (emphasis added).

function of the law was to supply the incentives necessary to adjust, modify, or steer actual human motivations to the demands of the law".[27] Laws prohibiting assault or murder, for example, protect citizens from having those crimes inflicted upon them and give the state the legitimate authority to punish people who commit them. It seems contradictory, therefore, that a citizen from one state, can pass into another and use their law to end their life – in a way that is legally justified. Abortion demonstrates this phenomenon. People have travelled abroad to avoid state prohibition on abortion, representing a lapse in assent to the state's coercion and the lack of synonymity between "doing good… and obeying the law".[28] Despite separate state's laws, the movement of social human beings with individual and collective senses of morality exists across the world.[29] In the area of state-sanctioned death, the intersect between law and morality becomes important to recognise, rather than reject or disprove. If people can actively disobey the law to pursue their moral instinct – the state weakens its ability to exercise its monopoly over legitimate dying.

B Assessing Conditions from 1840 to 2020

In pre-1951 Aotearoa New Zealand, certain crimes justified the state in taking a convicted criminal's life. New Zealand adopted this approach in inheriting the English legal system. The deterrent benefit of the death penalty made it a valuable part of the criminal justice system.[30] Movements in England to abolish the death penalty existed as early as the 18th century; however, the primary parliamentary debates considering the topic in New Zealand were in 1941, 1950 and 1961.[31] A Justice Department Memorandum to the Joint Committee on the Capital Punishment Bill, who were considering legislation to remove the death penalty, stated that:[32]

> Some of the people who support abolition say that it is quite wrong to take human life in any circumstances. Their view is a logical one, whether or not it is a practical one…The law-giver must, we suggest, above all things be practical, and must make the laws to govern

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27 Schauer, above n 18, at 970.
28 Jhering, above n 26, at 68; Wacks, above n 17, at 31.
29 Jhering, above n 26, at 68.
30 Pauline F Engel *The Abolition of Capital Punishment in New Zealand 1935-1961* (Department of Justice, 1977) at 1.
31 Engel, above n 30, at 4.
32 Engel, above n 30, at 43.

> conditions and people as they are, rather than as they should be, or he thinks they should be.

There is no discrete measurement of 'the conditions and people as they are'. Social, political, spiritual, and moral conditions are in flux and with those fluctuations move people's opinions on how the law should reflect social needs. In New Zealand, the variability of societal conditions is immense. We are a heterogeneous society. Increasingly so compared to 1951 when the population of New Zealand was under 2,000,000 and demographic make-up was less diverse.[33] The statement can extend to the assisted dying debate. There are voices within that variability that want assistance in dying and for it to become a form of legitimate state-sanctioned death. However, the taking of human life is difficult to reconcile for the average layperson. As the Attorney General in 1950, Clifton Webb pointed out, "everyone naturally and instinctively shrinks from the thought of death".[34] Whether due to socialisation into a Judeo-Christian rooted society, other religious upbringings or because it is an inherently human reaction.[35] The New Zealand Medical Association (NZMA) encapsulates this by stating "medical institutions and legal determinations are generally weighted heavily against actively ending human life, thereby capturing the roots of our moral sensitivity in general".[36]

The Justice Department Memorandum indicates lawmakers should prioritise practicality in the law over normativity or individual morality. The state must prioritise practicality because "the State alone possesses the monopoly of coercion".[37] While legislative reform is a product of a plethora of other players, "*the State is the only source of law*".[38] Practicality is essential. However, as Schauer argues it is for "society to decide what sources will be recognised… and if that society… recognises morality, politics, or for that matter astrology as part of its law, then it is law".[39] Thereby only the state, through the legislature or judiciary can enact valid law, but society influences the content of that law. Assisted dying was once bizarre, in the same way, 'astrology'

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33 Census and Statistics Department "The New Zealand Official Year-Book 1951-52" (15 June 1952) < www3.stats.govt.nz/New_Zealand_Official_Yearbooks/1951-52/NZOYB_1951-52.html#idsect1_1_980 >.

34 Engel, above n 30, at 48

35 John Keown *Euthanasia, Ethics and Public Policy: An Argument Against Legislation* (Cambridge University Press, Cambridge, 2002) at 40.

36 Grant Gillet *A Report on Euthanasia for the NZMA* (New Zealand Medical Association, 2017) at 7.

37 Jhering, above n 26, at 240.

38 Jhering, above n 26, at 240.

39 Schauer, above n 18, at 974.

is presented in Schauer's example. A rational, traditionalist, and legitimate institution such as law, would have been unable to recognise it. To do so would be unconventional and impractical. Therefore, even if practicality were the touchstone of law-makers decisions, the assessment of what the conditions and people are to inform what is practical, is far from clear. The tension arising here applies to the historical capital punishment and the current assisted dying debate.

Where practicality is the decider in law and policy, the framework used by lawmakers to assess it is unclear. Central arguments to the capital punishment debate were on the deterrent effect of the death penalty. However, the argument was used by both sides because the quantitative evidence was not clear.[40] For certain legislators, an economic theory might be the primary consideration. A cost-benefit analysis of assisted dying might show that allowing the practice places a lesser burden on palliative care facilities, hospitals, and other medical infrastructures.[41] It might just as quickly conclude that the cost of implementing and administering the End of Life Choice Act 2019 outweighs any benefit.[42] Economic considerations are, however, not necessarily the dominant persuasion underlying legislative decisions. The Commission on Capital Punishment report in Massachusetts argued there is no moral justification for a state to take a life, except where it does *in fact* "protect other lives at the expense of one".[43] This utilitarian view attempts to quantify the value of human life. Assisted dying would not satisfy this threshold as the individual's choice to die does not protect others' lives. Lon L Fuller observed that "when men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness, by whatever standards of ultimate goodness there are".[44] Perhaps even law and policy decisions that are cloaked by the guise of practicality are motivated by the state decision-makers' standards of ultimate goodness.

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40 Engel, above n 30, at 32.

41 Matthew Taylor "Economics and decisions to end life: van Acht and Stooker revisited" (2002) 1(3) Applied Health Economics and Health Policy 1 at 3.

42 Taylor, above n 41, at 3. This article is about the United States, but the economic theory may apply to New Zealand.

43 The Nathaniel Centre "The Abolition of Capital Punishment" < http://nathaniel.org.nz/component/content/article/13-bioethical-issues/what-is-bioethics/376-the-abolition-of-capital-punishment-in-new-zealand-synopsis-only >.

44 Lon L Fuller "Positivism and Fidelity to Law: A Reply to Professor Hart" (1958) 71 Harv LR 630 at 636.

IV Navigating State Power in a Diverse Society

A Good Policy According to Who?

Michael McGonnigal argues that a crucial factor against assisted dying is that it is a dangerous form of "concentrated power".[45] He promotes the reader to be "suspicious of concentrated power and… identify with the interests of the downtrodden".[46] Yet the state already has and maintains a concentrated power on legitimate dying, by disallowing it. The downtrodden might be minority groups adversely affected by the Act; or equally, Lecretia Seales representing an individual that wants their choice respected in law.

Thus far, this paper has demonstrated the essential bind between law and morality in the area of state-sanctioned death. However, moral standards change. Social conditions affect the substance of morality. Dr Thorsten Sellin indicated in 1951 to the UK Royal Commission on Capital Punishment that "the retention or abolition of the death penalty is not dependent on utilitarian evidence but is rooted in popular sentiments and beliefs of a people's culture".[47] If the law is dependent on popular sentiments and culture, whose morality should inform the law in a heterogenous democratic society? Ahdar argues, quoting Felicia Cohn and Joanne Lynne, that an individual justified act (assisted dying) does not necessarily mean it is good for "groups of people and might be harmful to several groups of people".[48] The death penalty also demonstrates this idea.

Particularly heinous crimes can invoke a reaction that the death penalty is justified. Engels writes that there "is a sense that the crime must be expiated" and the criminal must be "put to death ritually by the state in the name of the people".[49] Although this vindictive reaction might exist in some instances, it does not equate to its beneficial application to general society. The NZMA indicate that "a 'gut-level reaction' that cannot establish the morality or immorality of active euthanasia", just as a 'gut-level reaction' cannot establish the morality of the death penalty.[50]

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45 Michael McGonnigal "This is Who Will Die When Doctors Are Allowed to Kill Their Patients" (1997) 31 J Marshall L Rev 95, at 98.
46 McGonnigal, above n 45, 98.
47 Engel, above n 30, at vi.
48 Rex Ahdar "The Case Against Euthanasia and Assisted Suicide" [2016] 3 NZ L Rev 459 at 493.
49 Engel, above n 30, at 4-5.
50 Gillett, above n 36, at 7.

Cases exist where it is neither appropriate nor desirable, and decision-makers take into account mitigating factors. For example, a debate ensued as to whether women or individuals without mental capacity should be subject to the death penalty. A murder requiring the death penalty might have been particularly gruesome or heinous. However, the evidence lacked the requirement for a guilty verdict. Oliver Wendell Holmes reminds us that "hard cases make bad law" just as Cohn and Lynne recognise that "hard individual situations make bad policy".[51] Indeed, this was a core reason behind Lecretia Seales failure to win her case in the High Court to enable her doctor to administer her a legal drug. As previously noted, the court accepted that it was a matter for Parliament.[52]

Ahdar goes on to write that "the larger point is that majority desire alone [is] not the touchstone of public policy".[53] He continues, that "if the majority of citizens wanted to bring back the stocks or duelling that ought not to win the day".[54] Although this seems logical, Ahdar is here conflating his moral standards of behaviour, with good public policy decisions by using the term 'ought'. As a society, the majority condemn those behaviours because we recognise them as 'draconian'.[55] They sit outside of the normative judgement in society.[56] However, the removal of behaviours such as public humiliation through torture devices, or the death penalty, from the statute books more often begins by grass-root movements.[57] Behaviours which are at one moment legal and deemed justified, become excessively harsh through shifts in moral norms. Eventually, the law changes, propelling the rest of the society to agree (with exceptions) that it is a just result, legally and morally. In this way, the state "coerces us by its laws".[58] Perhaps substantial changes in law hinging on an individual are reckless and undesirable. However, voices which begin to fight against what has been status quo, reveal an alternative moral view – which is essential. They challenge the state norm, which is imposed on us as citizens in Aotearoa New Zealand. Legal issues that people feel deeply moral towards, for example, abortion, the death penalty, assisted dying, prostitution, and suicide must be challenged by the individual cases to reveal that society is

51 Ahdar, above n 48, at 494.
52 At [13].
53 At 501.
54 At 501.
55 *Seales v Attorney-General*, above n 11, at [189].
56 *Seales v Attorney-General*, above n 11, at [189].
57 Engel, above n 30, at 2.
58 Jhering, above n 26, at 13.

not homogenous on these issues. It may well be that the majority disagrees with the state's current imposition, and the law should change to reflect those desires.

Nevertheless, Dr Justice Beattie justifiably claims that "Before a moral precept should be given the force of law it needs… the overwhelming support of the public".[59] In contrast to Ahdar's view, the majority desire should be the "touchstone for public policy".[60] Indeed, for changes as important as the End of Life Choice Act, Parliament recognises the need for a majority consensus. As Andrew Geddis points out "Whether the practice ultimately is permitted within New Zealand's legal framework, therefore, depends upon the decision of a majority of the general public at that time".[61] Majority desire is, however, subject to qualifications in New Zealand.

B Non-homogenous Society and Te Ao Māori

There is an important limitation to this fundamental aspect of majoritarian democracy. Where majority opinion demonstrated through a referendum, "could adversely affect minorities" there is a risk of majority tyranny.[62] Use of referendum promotes direct democracy which "may overlook the individual in the name of the purported general good".[63] Professor Sellin indicated that when popular sentiments move toward abolition, abolition becomes acceptable.[64] However, when a referendum for the abolition of the death penalty was suggested to Parliament, Retentionists were enthusiastic of the idea as "Public opinion polls almost invariably supported capital punishment".[65] Seemingly, the majority of New Zealanders at the time supported retaining the death penalty. New Zealanders today would almost certainly support its continued disuse. A 2004 poll demonstrated a 24% support for and 67% against reintroducing it.[66] We might, therefore, be grateful that Parliament decided to abolish through a 'free' vote, rather than a public referendum.

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59 At 501.

60 Ahdar, above n 48, at 501.

61 Jessica Young and Andrew Geddis "Vox populi, or vox Dei? Previewing New Zealand's Public Decisions on Assisted Dying" (2020) 27 JLM 937 at 937.

62 John Parkinson "Who Knows Best? The Creation of the Citizen-initiated Referendum in New Zealand" (2008) 36 Government and Opposition 403 at 408.

63 Young and Geddis, above n 61, at 940.

64 Engel, above n 30, at vi.

65 Engel, above n 30, at 71.

66 New Zealand Herald "Poll shows 24pc want death penalty back" (15 July 2004) < www.nzherald.co.nz >.

The End of Life Choice Bill also used a conscience vote. The Act is going to a referendum because of a bloc party vote from New Zealand First (NZF). NZF agreed to support the Bill if a supplementary order paper required a public referendum to bring the Act into force.[67] If NZF had not added this provision, the Bill would likely have failed in a tied vote 60-60.[68] Submissions during the Bills select committee process would have been the limit of evidence on public sentiments. Ultimately, indications of public support for the End of Life Choice Act vary.[69] Young and Geddis point out that "there appears to be broad but relatively shallow support among the public for permitting the practice, while opposition to the issue is narrower but more deeply felt".[70]

In Aotearoa, New Zealand society is pluralistic. Studies along demographic lines demonstrate how "gender, religiosity, age, ethnicity, income, deprivation, education, occupation…" and other identifying factors affect views on assisted dying.[71] This paper does not have the scope to compare factors which might influence an individual's moral stance, such as religiosity or ethnicity, across history to the death penalty. However, Aotearoa New Zealand has obligations to uphold Te Tiriti O Waitangi in law and, recently, principles of tikanga are being more actively engaged in legal reasoning.[72] How assisted dying may interact with Te Tiriti, and customary law is an essential factor to consider in the development of the law.

Māori perspectives regarding assisted dying are diverse.[73] Tikanga can also evolve and adapt. Māori elders engaged in a kaupapa to ascertain levels of understanding and attitudes towards assisted dying. The research acknowledges that "how decisions are made, and the cultural practices that guide and support the dying process for indigenous people, requires deeper engagement".[74] In Te Ao Māori "the events surrounding times of serious illness, dying, death and grieving, are among the most sacred and important".[75] Some participants saw "physician aid in dying" as a

67 Young and Geddis, above n 61, at 944.
68 Young and Geddis, above n 61, at 944.
69 Matt Burrows "Euthanasia referendum explained: Everything you need to know about the End of Life Choice Bill Decision" (10 July 2020) Newshub < newshub.co.nz >.
70 Young and Geddis, above n 61, at 947.
71 Jessica Young and others "The euthanasia debate: synthesizing the evidence on New Zealander's attitudes" (2019) 14 Kōtuitui: New Zealand Journal of Sciences Online 1 at 5.
72 *Ellis v R* [2019] NZSC Trans 31.
73 Phillipa J Malpas and others "'It's not all just about the dying'. Kaumātua Māori attitudes towards physician aid-in dying: A narrative enquiry" (2017) 31 Palliat Med 544 at 545.
74 Malpas and others, above n 73, at 545.
75 Paratene Ngata "Death, Dying and Grief, A Maori Perspective" in Department of Health *the Undiscover'd Country* (Wellington, 1987) 5 at 5.

"further stripping down of [their] tikanga [and that] there are spiritual implications when [they] lose the mana of a certain individual [which is] important for the well-being of the whole whānau".[76] Others recognised the aspect of pain relief as a positive.[77]

The effect on minority groups and concerns for tikanga and Te Ao Māori perspectives on assisted dying require a more in-depth analysis. This paper does not have the scope to engage with this issue thoroughly. However, as the new Act is going to referendum, education on these issues is essential for all New Zealanders.

V Morality in the Context of State-sanctioned Dying

Laws do not exist based on any "immutable principle" and "while the sense of justice and morality remain constant in man, his ideas of what is just and moral change greatly over the years".[78] As discussed, Aotearoa New Zealand society is different in 2020 to 1961. Does the shift mean that the majority of New Zealander's agree that the state should grant greater individual liberties, thereby reducing the states monopoly? While there are multiple grounds on which assisted dying is resisted, the state should not deny legitimate dying relying solely on principles, often religious, of life's sanctity.

In 1961 the New Zealand legislature decided that state-sanctioned dying was no longer law. Drawing from Schauer's position above this equates to society deeming it morally inappropriate.[79] Why is a new form of state-sanctioned dying now feasible, both legally and morally? Raymond Wacks points out that "the intricate distinctions generated when the law confronts awkward moral questions of this kind suggest that they are not susceptible to resolution by slogans such as 'the right to die', 'autonomy', 'self-determination', or 'the sanctity of life'".[80] The lack of resolution highlights the difficulty in answering legal questions of moral importance.

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76 Malpas and others, above n 73, at 547.
77 At 547.
78 Engel, above n 30, at 7.
79 See above at page 12.
80 Wacks, above n 17, at 38.

A Naturalism and the Sanctity of Life

The sanctity of life is first principle in New Zealand, but does that pertain to disallowing an individual to access a form of state-sanctioned legitimate dying? John Finnis, a modern natural law theorist, asserts that "all human societies show a concern for the value of human life".[81] Arguments opposing and supporting both the death penalty and assisted dying, infuse doctrines of natural law. "All legal systems… coincide with morality at such vital points" as murder, violence, and theft.[82] However, the opponents to the death penalty and assisted dying, demonstrate a more straightforward application of traditional naturalist law principles. Prohibitions on murder that exist in every society are often due to spiritual and religious roots. During the 1995 debate of the Death with Dignity Bill, Rex Ahdar highlighted the primary use of religious arguments against the introduction of assisted dying.[83] Despite acknowledging that government "may have rejected an established religion", the parliamentary prayer "support[s] the view… that the state was committed to a form of non-specific, non-sectarian Christianity".[84] Reference to Jesus Christ in the prayer was unilaterally removed by Speaker of the House Trever Mallard, sparking anger among Christian communities.[85] The removal reflects growing sectarian views and the backlash shows the persistence that "New Zealand [is] Christian nation".

Engel notes that "both abolitionist and retentionist have been lavish quoters of Scripture in the effort to prove that theirs is the Christian viewpoint".[86] Opponents contested capital punishment on the basis that it is wrong to kill someone. There is a sense of unease if the state solution to murder — is killing. Punishment, abolitionists argued, does not have to take human life.[87] Similarly, arguments against assisted dying rely on the same proposition.[88] It is wrong, abominable even, to take a human life, especially if that person is vulnerable. More practical arguments provide

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81 John Finnis "Natural Law and Natural Rights" in Lord Lloyd of Hampstead (ed) *Introduction to Jurisprudence* (4th ed, Sweet & Maxwell, London, 2001) 171 at 172.

82 Hart, above n 22, at 623.

83 Rex Ahdar "Religious Parliamentarians and Euthanasia: A Window into Church and State in New Zealand" [1996] 38 *Journal of Church and State* 569.

84 Ahdar, above n 83, at 570.

85 Eleonor Ainge Roy "Anger as Jesus reference removed from New Zealand parliamentary prayer" (30 October 2018) < www.theguardian.com >.

86 Engel, above n 30, at 6.

87 Some arguments claim death is too good for such people, and they deserve to live a 'less than' life, removed from society, in prison cells.

88 Young and Geddis, above n 61, at 938.

a contrast. Hanging someone because they committed murder is a practical solution. A 'life for a life.'[89] Letting someone choose to end their life because they are in unbearable pain that is incurable, gives them the practical solution of escaping that suffering.

Religiously driven arguments were central to the 1995 debate around assisted dying. Michael Laws, MP, who introduced the Bill stated in response to the Roman Catholic Church that:[90]

> The basic theological line against the Bill is that only God should decide the time and manner of one's passing. As a practising Christian, I reject this argument. Like many modern theologians, I remain unconvinced God has any particular role in the exact timing and determination of one's death… And neither do I accept the all-embracing command of the Sixth Commandment "thou shalt not kill"— as a valid argument against voluntary euthanasia.

Andrew Geddis grapples with the irreducible morality of opinions around assisted dying. He states, "there is a somewhat nebulous set of constraints imposed on individual freedom of choice out of irreducibly moral judgments regarding the nature of certain acts".[91] Geddis explains that the 'sanctity of life' principle is such a "core moral belief", whether held out of religious or secular views, it is "unlikely to be swayed" by contrary arguments.[92] The sanctity of life stipulates that "that each human life is of unique value and ought to be protected and cherished on that basis alone".[93] It is "recognised not only in our own society but also in most, if not all, civilised societies throughout the modern world" as Lord Goff notes this is evidenced by the European Convention of Human Rights and the International Covenant on Civil and Political Rights.[94] A conflation occurs, however, between a "commitment to life's value" and the necessity to go on living. Opponents to assisted dying that argue on this basis are excluding non-natural death from the concept of valuing human life. Death is the antonym, the pejorative, the evil. Nevertheless, these "unrelenting moral convictions" may ultimately prevent human compassion.

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89 Engel, above n 30, at 4.
90 Ahdar, above n 83, at 580.
91 Andrew Geddis "The Case for Allowing Aid in Dying in New Zealand" [2017] NZCLR 3 at 9.
92 At 9.
93 Gillett, above n 36, at 1.
94 *Airedale NHS Trust v Bland* [1993] 1 All ER 821 at 865.

The sanctity of life gives weight to two important arguments against both forms of state-sanctioned dying. The possibility of a "miscarriage of justice" was "always a cardinal argument in the abolitionist case".[95] While the practicality of 'life for a life' carried persuasion, the possibility of a wrongful conviction, and therefore unjustified killing by the state, was a significant weapon in the abolitionist's arsenal. Similarly, the possibility of undue influence and involuntariness in assisted dying provides a compelling argument against the practice, relying on the sanctity of life. D L Mathieson, QC, stated that "It must… be sound policy to prevent even one intentional killing which is involuntary."[96] The prominence of arguments centred on life's sanctity, whether religious or not, has not shifted since debate around the death penalty.

B The Movement of Moral Standards

The past decades have seen more significant steps toward human-rights law, allowing for greater personal freedoms. Justice Beattie called this a "revolution, in human values and rights".[97] Destro noted, writing on bioethics and cases of morality, that the "steps are incremental, but only go in one direction".[98] He notes that the law and judicial decisions come to consider issues that would have been "unthinkable" only a few years before.[99] Without adhering necessarily to Kant's notion of universal progress, the moral standard of the law seems to move towards greater rights-based protections. While it was once common that a convicted murderer was put to death, accounting for mitigating circumstances, in modern New Zealand, it would not gain similar support. The same progression has occurred with sex work and is arguably occurring with abortion. The legalisation of marijuana and assisted dying in 2020 might demonstrate this progression further. Alternatively extending the ability for state-sanctioned dying might represent a step too far.

A similar progression has occurred in international human rights law. International norms now sanction legislation that was publicly intolerable in the early part of the 20th century – allowing abortion and assisted dying.[100] Where domestic legislation picks up these trends, it is the state's role to ensure that the laws are well-drafted to protect the vulnerable and ensure effective

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95 Engel, above n 30, at 43.
96 D L Mathieson "Euthanasia: appropriate safeguards?" [2011] NZLJ 315 at 316.
97 Beattie, above n 4, at 501.
98 Robert A Destro "Quality of Life and the Law" [1989] 25 NZLJ 321 at 321.
99 At 321.
100 *Universal Declaration of Human Rights* GA Res 217A (1948).

administration. The legal system is a bedrock of functioning New Zealand society. This paper persistently defends that law and morality are intimately bound — one has a large effect on the other. However, "Law is not morality; [and we should not] let it supplant morality".[101] While jurisprudential theorists, of different schools, have wrestled with the concept of law and morality, "law is not a game".[102] Gardner states that the law "purports to bind us morally… in a way that binds even those of us who do not fancy playing".[103] In this sense, regardless of our morality toward state-sanctioned dying in the form of capital punishment or assisted dying, the law remains dictator of whether these are possible.

This ultimate reality had significant consequences for capital punishment and so too for assisted dying. Individual morality can be non-intrusive to others – but what is *law* affects us all. The personal, moral, and individual decision to receive aid-in-dying does not reconcile with overly paternalistic restrictions on individual autonomy. However, the essential role of the state in protecting society can justify paternalism. Whether or not the death penalty or assisted dying is morally right or wrong to the reader, the state's monopoly on legitimate dying deserves scrutiny given the coercive power of the law, and its ability to direct moral behaviour.

VI The Protection of Rights in Aotearoa New Zealand

A Rights-Based Approach to State-sanctioned Dying

Members of New Zealand society have rights and responsibilities. We are part of a community. The right to life has emerged alongside the right to liberty, as a fundamental and universal human right. These rights are a core element of the legal and moral justifications in arguments concerning both the death penalty and assisted dying. How and why a human right emerges is, in fact, essential to the future of assisted dying and its current debate. Rex Ahdar, who strongly opposes voluntary euthanasia in New Zealand, argues that legalising or decriminalising something is equivalent to recognising social endorsement of it. From this point, it is a small leap to it being a human right.[104] The abolition of the death penalty demonstrates this process.

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101 Hart, above n 22, at 618.

102 John Gardner "Legal Positivism: 5 ½ Myths" (2001) 46 The American Journal of Jurisprudence 199 at 226.

103 Gardner, above n 102, at 226.

104 Ahdar, above n 48, at 484.

Capital punishment was legal before 1961, except for prior mentioned pauses during periods that the Labour party was in government. After 1961 legal condemnation of capital punishment concurrently pulled public opinion to condemn it socially. As the NZMA indicates "the law and professional codes do not merely reflect the moral standards of a society but, in fact, have a profound influence on them".[105] Consequently, the right to life has been realised in article 3 of the Universal Declaration of Human Rights and further expanded in Article 6 of the International Covenant on Civil and Political Rights (ICCPR).[106] New Zealand ratified the ICCPR on 28 December 1978.[107] Section 8 of the New Zealand Bill of Rights 1990 incorporates the right not to be deprived of life into domestic legislation. The progression is strikingly visible as the death penalty went from being state-sanctioned to becoming the antithesis of a fundamental right in New Zealand — the right to life. What might this potential progression mean for the new contemplated form of state-sanctioned dying?

Human rights are an articulation of intrinsic values of humanity. They may also be natural rights. Jean Porter expresses the view that "natural rights exist prior to particular social arrangements, even though their effective exercise may require the existence of specific institutions".[108] Articulated rights do not, however, remain stagnant. One view is that the content of human rights are universal because they "contain timeless provision of the rights inherent to 'human beings' and their conditions for dignity and well-being wherever they are situated, and whatever time period they are living" in.[109] The better view, McNeilly articulates, takes issue with "strict adherence to such content as representing the epitome of what human rights are or how they can be understood".[110] The content of human rights changes with the social, moral, legal climate of the state (and the influence of international law). Human rights may also conflict with one another. When the right to life and the right to individual freedom and liberty conflict, it is unclear which the law should uphold. John Keown notes that the two rights-based strands of the assisted dying

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105 Gillett, above n 36, at 4.

106 *Universal Declaration of Human Rights* GA Res 217A (1948); and *International Covenant on Civil and Political Rights* GA Res 2200, XXI (1966).

107 Ministry of Justice "International Covenant on Civil & Political Rights" (5 March 2020) < justice.govt.nz >.

108 Jean Porter "From Natural Rights Law to Human Rights: Or, Why Rights Talk Matters" (1999) 14 J L & Relig 77 at 84.

109 Kathryn McNeilly *Human Rights and Radical Social Transformation: Futurity, Alterity, Power* (Taylor & Francis Group, Florence (US), 2017) at 65.

110 At 65.

debate are the right to life and the right to choose.[111] He notes "The bulk of those campaigning for relaxation of the law weave the two strands together".[112]

Capital punishment engages the right to life and right not to be deprived of life. Although the right not to be deprived of life is limited by circumstances which are "consistent with the principles of fundamental justice" these no longer include punishment for severe crimes.[113] The application of rights under the Bill of Rights is less evident concerning assisted dying. Ms Seales in *Seales v Attorney-General* based an argument on ss 8 and 9 of the Bill of Rights. Collins J found that the right to life under s 8 was engaged, but not breached. The right under s 9 to not be subjected to torture or cruel treatment was not engaged. The Canadian Supreme Court found that the illegality of assisted dying infringed upon "the right to life, liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice".[114] The New Zealand Bill of Rights Act articulates the right to life and liberty differently. The right to life does not encompass 'liberty' and the right to liberty does not exist on its own accord. Perhaps this is a primary reason for the tension between those who feel assisted dying is contrary to the right to life, and those who argue it upholds individual liberty. David Seymour, MP, who prepared the End of Life Choice Bill, claims that "an absolute prohibition on assistance in dying effectively creates a 'duty to life' rather than a 'right to life'".[115]

What could a rights-based approach mean for the progress of assisted dying? Using Ahdar's logic, the legalisation of assisted dying could propel society (at large) to value its use. From there, it may become a human right itself rather than deriving from the individual's right to life or liberty. The danger is that it could extend further than the original legislation intended due to this process. Destro pointed out that "once policy choices, [are] made, [they] are extraordinarily difficult to overturn, even in the face of strong arguments that the initial cases on which they were based are wrong".[116] The scope of the Act currently covers a narrow segment of qualifying people. However, if this progression occurred, patients might begin to include children, the elderly, the mentally

111 Keown, above n 34, at 52.
112 At 52.
113 Bill of Rights Act 1990, s 8.
114 *Carter v Canada (Attorney*-General) [2015] SCC 5 at [64]; David Seymour "Why End of Life Choice" Life Choice < lifechoice.org.nz >.
115 Seymour, above n 114.
116 Destro, above n 98, at 321.

unwell or disenfranchised member of society. Proponents of libertarianism and universal human rights might not see an issue with this phenomenon if the result affords greater sought-after liberties and rights. However, as the above discussion demonstrates, the pursuit of individual liberty and universal rights cannot set aside minority views, especially if the safeguards are not sufficient to protect all members of society.

B The Individual, the State and the Other

There are three actors in both capital punishment and assisted death. When an individual was sentenced to the death penalty by the state, it was the hangman that conducted the task. Similarly, when an individual requests aid in dying, lawfully through state enacted legislation, it is a medical professional that provides or administers the medication.

An abolitionist newspaper editor in 1941 wrote:[117]

> The state is simply the people acting collectively. No man should speak for the gallows unless he is able in imagination to adjust the noose and pull the lever himself – for we, the people, are the common hangman.

Should this line of reasoning extend to assisted dying? In a similar vein to execution, undertaking the task might be traumatic or uncomfortable. Other inmates were sometimes paid to do the unfavourable task of playing the hangman.[118] For assisted dying this process is medicalised, sanitised, and professionalised. Although there were professional prison officials, "hangings [often] had a serious psychosomatic effect" on those involved.[119] This factor contributed heavily to abolitionist arguments. It also translates to the context of assisted dying. The NZMA position statement in 2005 states that it is "not dependent on euthanasia and doctor-assisted suicide remaining unlawful".[120] The NZMA would regard them as unethical, whether legalised or decriminalised. The Act also allows medical professionals to object to administer or provide the

117 Engel, above n 30, at 62.
118 Young, above n 13, at 11.
119 Engel, above n 30, at 60.
120 *Seales v Attorney-General*, above n 11, at [57].

medication conscientiously.[121] This provision recognises the possible 'serious psychosomatic effect[s]' of engaging in a practice that takes someone's life.

The necessity of a third person to administer 'death' is a salient link. Save for one significant difference. In the context of assisted dying the taking of life occurs with the underlying and continued request and consent of the patient. Majority of convicted murderers would not have consented to their hanging. Sherwood Young notes that of those convicted of the death penalty in New Zealand, only four "faced up to their responsibilities".[122] A core differentiation arises here, contributing to a justified reintroduction of state-sanctioned dying in New Zealand society. Whilst both forms of state-sanctioned killing engage the right to life assisted dying more intimately engages with an individual's right to choose.

C Individual's Role in Society

An interesting divergence in rationalising state-sanctioned death in the form of assisted dying, versus capital punishment, comes from Jhering's definition of 'society'. "The concept of society cannot be avoided… in legal theory" because, according to Jhering, the law's purpose is to protect the interests of the individual, the state and society.[123] Jhering notes that people use the term 'society' pervasively, but its definition is often assumed. His definition is that "Every one exists for the world, and the world exists for every one".[124] This definition recognises the interconnectedness of human beings to one another, to their community and the world. If this definition is correct, when a person murders another, their action has fractured and damaged society. They have acted against the law, the individual, the state, and society. New Zealand law for the past 60 years has supported the view that where this extreme act occurs, it would be further reprehensible, for the state to do the same. This change may also reflect a greater significance of the rehabilitative purposes of punishment over retributive.[125]

The situation is different where death occurs in the context of assisted dying. There has been no action against the law, the individual, the state or society when a person is suffering from a terminal

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121 Section 8.
122 Young, above n 13, at 15.
123 Jhering, above n 26, at 70.
124 At 70.
125 Wacks, above n 17, at 276.

illness, irreversible decline in physical capacity or unbearable suffering that cannot be relieved.[126] They still exist for the world and the world for them. There has been no fracture or damage to this mutually constitutive cycle. Why is their decision to part with society disallowed? A society which they have spent their lives contributing to and receiving from in a cycle of reciprocity. Our society's current legal response is to deny their final wishes. By using this concept of society, capital punishment helps to demonstrate the greater acceptability of state-sanctioned death by assisted death. The individual in the second scenario has given no reason for society to dispel their wishes. In the first, they have committed an act against the law, the death penalty removes their wish to live, and imprisonment removes their participation in society. Geddis explains this by commenting that these people:[127]

> [a]re not choosing to end their lives through aid in dying, but rather how and when their death will occur. And as Eugene Debs poetically expressed the matter a century ago:
>
> > Human life is sacred, but only to the extent that it contributes to the joy and happiness of the one possessing it, and to those about him, and it ought to be the privilege of every human being to cross the River Styx in the boat of his own choosing, when further human agony cannot be justified by the hope of future health and happiness.

Some may argue that the law does allow people to choose to die as suicide is not a criminal act in New Zealand.[128] However, sections in the Crimes Act that criminalise actions surrounding suicide "reflect the law's antipathy to the suicide as a social phenomenon".[129] To again use the concept of society to distinguish suicide, people contemplate suicide when people feel they do not exist for the world, and the world does not exist for them. There has been perhaps a mental, or physical removal from society which has caused contemplation of extreme action, taking their own life. Assisted dying has different motivations all-together, in circumstances that satisfy the criteria in the Act.

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126 End of Life Choice Act 2019, s 5.

127 Geddis, above n 91, at 10.

128 Ahdar, above n 48, at 506; Richard A Poser "Euthanasia and Health Care: Two Essays on the Policy Dilemmas of Aging and Old Age" (The Tanner Lectures on Human Values, Yale University, Connecticut, 10-11 October 1994) at 19.

129 Ahdar, above n 48, at 465.

VII Conclusion

In considering whether state-sanctioned death remains morally reprehensible, this paper has explored two different forms. The death penalty and assisted dying have undeniably different motivations. The death penalty had retributive, punitive, and deterrent characteristics. Whereas supporters of assisted dying view it as a compassionate act which aims to end suffering and preserves dignity. These ends are unmistakably dissimilar, but death remains the common denominator. Is there a moral justification for the state to take life for such a different desired result?

This paper proposes that state-sanctioned death is a delicate subject to consider in a heterogeneous society. Individual rights to life and liberty must be carefully weighed by voters and legislators while focusing on minority and disproportionately affected groups. Tikanga views on state-sanctioned dying should be considered, especially regarding legislative reform decisions concerning death. In Te Ao Māori, it is a sacred time for both the mana of the individual and respective whānau. The proposed legislative reform could dangerously progress to being a human right leading to an over-exaggeration of the legislation's narrowly intended application.

While the jurisprudential thinking behind state control and the intersect of law and morality provides interesting analysis — there are real life and death consequences for the people of Aotearoa New Zealand depending on the outcome. This paper discussed possible motivations behind the legislative reform around state-sanctioned dying. The state's task is to balance competing needs — upholding the sanctity of life; protecting vulnerable people; respecting individual autonomy and balancing core moral beliefs of the society they represent. New Zealanders should recognise and review the state's monopoly in this area that affects the choice of the individual. The debate over assisted death is inherently moral. Although some moral views have changed since 1961, opponents of the End of Life Choice Act continue to reject assisted death on substantial, pre-secular moral grounds. Every voter in Aotearoa New Zealand will have to decide in the next election. Will we reduce the state's absolute monopoly on legitimate dying by introducing a new form of state-sanctioned death? While there is a sense of morality in the community that supports a change in law, there must firstly be a majority that holds that view.

Parliament and society must then take into considerations Te Ao Māori views and the nuances of minority groups.

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