

## DE-MORALIZING DEATH: A HUMANISTIC APPROACH TO THE SANCTITY OF LIFE

*Shelly Cohen*

*In this note, Ms. Cohen examines the judiciary's treatment of the principle of the sanctity of life and its effect on the right to physician-assisted suicide. After supplying two traditional derivations of the principle of the sanctity of life—one religious and one humanistic—she argues that the proper approach in right-to-die cases is the humanistic approach. Ms. Cohen argues that in order for meaningful adjudication of right-to-die issues to occur, it is imperative that religiously informed decisions not control the debate.*

### I. Introduction

Human life is regarded by the law to be both sacred and precious, and the State holds its interest in the

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Shelly Cohen is Internet Editor 2005–2006, Member 2004–2005, *The Elder Law Journal*; J.D. 2006, University of Illinois College of Law; M.D. 2007, University of Illinois College of Medicine; B.A. 1997, University of California at Berkeley.

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preservation of life above almost all other interests.<sup>1</sup> The Declaration of Independence claims that the right to life, liberty, and the pursuit of happiness is a self-evident truth—so apparent that its truth is not only beyond scrutiny, but also beyond justification.<sup>2</sup> Most legal principles are founded on precedent, whether in the form of case precedent, legislative history or, in the most tenuous of situations, dicta.<sup>3</sup> However, what is often referred to as the “principle of the sanctity of life,”<sup>4</sup> is relied upon time and time again with unquestioning acceptance and little to no acknowledgment of the legal or ideological presuppositions which underlie the principle.<sup>5</sup>

There are a number of possible reasons for the lack of justification for the “principle of the sanctity of life.” Perhaps the basis for the law’s adherence to the concept of the sanctity of life are so deeply embedded in our individual and collective consciousness that they have come to supersede the need for justification;<sup>6</sup> or perhaps they have been accepted for such a long period of history that their underlying doctrines have been forgotten.<sup>7</sup> Still, while the depth and duration with which we can measure acceptance of the sanctity principle may offer *explanations* for the legal silence on the subject, they do not provide valid excuses.

Regardless of plausible reasons for it, the absence of a stated foundation for the revered principle of the sanctity of life is becoming increasingly problematic, both legally and medically. At the core of the sanctity principle is the assumption that a binary system exists in

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1. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990); *In re Quinlan*, 355 A.2d 647 (N.J. 1976); Shai Lavi, *Euthanasia and the Changing Ethics of the Deathbed: A Study in Historical Jurisprudence*, 4 THEORETICAL INQUIRIES L. 729, 754 (2003) (stating that “one of the most fundamental principles of the legal system is the sanctity of life, which prohibits the unjustified taking of human life in any form”).

2. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

3. See generally J. MYRON JACOBSTEIN ET AL., LEGAL RESEARCH ILLUSTRATED (7th ed. 1998).

4. Lavi, *supra* note 1, at 754.

5. See discussion *infra* Part III.A.

6. Alexander Morgan Capron, *Informed Consent in Catastrophic Disease Research and Treatment*, 123 U. PA. L. REV. 340, 399 (1974) (noting the state’s “ritualistic desire to uphold ‘the sanctity of life’”).

7. Interestingly, it is this sense of unquestioning acceptance which characterizes the fundamental rights that are worthy of protection by the substantive Due Process Clause. See *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). Such a right attains its status by looking to “principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” See *id.*

which life and death are two separate and mutually exclusive states.<sup>8</sup> Within such a context, one may conclude that life is good because death is bad. Historically, the legal concept of the preservation of life could be stated without qualification because reality tended to reflect this binary system.<sup>9</sup> Because of its limitations at the time, medicine could not successfully prolong life to the extent that medicine now does.<sup>10</sup> Over the course of history, the limitations of the medical profession necessarily defined the role of the physician: first as a mere defeated bystander in the face of death, then as a dominant presence at the deathbed, and finally as an active participant in the warding off of death.<sup>11</sup> The law consequently has been forced to acknowledge these changes in the role of the physician, as well as parallel changes in medical technologies.<sup>12</sup> Further, as medicine continues to push the boundaries of life to once unimaginable stages, we rely upon the law to provide definitions of life and death.<sup>13</sup> Thus, the source of the principles upon which such qualifications are made gains growing importance.

This note argues that the law has provided an inadequate foundation for courts to rely upon when addressing issues surrounding the sanctity of life. Although courts adjudicating end-of-life issues appear to frame their reasoning in neutral legal principles, this note will demonstrate that the bases of these holdings are decidedly ambiguous, in large part because of their heavy reliance on the ill-defined principle of sanctity of life. Because this reliance is likely to continue, this note urges courts to define more concretely the foundation of the principle and, further, to use the doctrine with more transparency.

Part II of this note will introduce a context for understanding judicial decisions on end-of-life issues. In an effort to chronicle the ways the law has addressed these issues, Part II will begin by presenting relevant case law and statutory developments concerning right-to-die legislation. Part II will then briefly discuss the ways the law has dealt

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8. See Michael Mello, *The Non-Trial of the Century: Representations of the Unabomber*, 24 VT. L. REV. 417, 465 (2000).

9. See Lavi, *supra* note 1, at 754.

10. See Normal L. Cantor, *On Kamisar, Killing, and the Future of Physician-Assisted Death*, 102 MICH. L. REV. 1793, 1797 (2004) (noting medical advancements since Yale Kamisar's classic 1958 article on physician-assisted death).

11. Lavi, *supra* note 1, at 743.

12. *Id.* (discussing the law's institutionalization of medical euthanasia as it has changed).

13. *Id.*

with death in other contexts. Finally, Part II will present the two major philosophical doctrines which are often invoked to provide conceptual derivations of the sanctity of life. The first doctrine explores the theologically based derivation, claiming that the source of life's sanctity is linked inextricably to God.<sup>14</sup> The second doctrine presents the humanistic derivation which claims that life becomes sacred when imbued with meaning by man.<sup>15</sup>

Next, through an analysis of the relevant case law, Part III will seek to uncover the foundations which inform both the case law and the bioethical debate at large. This section will examine the context in which the Court adopts the sanctity of life principle and the arguments put forth by the Court to distinguish cases involving the withdrawal or withholding of medical treatment from those involving physician-assisted suicide (PAS). The section will demonstrate that the Court implicitly adopts the theological rationale in defining the sanctity of life principle and in upholding the distinctions that rationale makes. Part III will then explore the Establishment Clause of the First Amendment as a framework for discussing the appropriateness of the Court's reliance on this doctrine.

Finally, Part IV will propose that in order to move the right-to-die dialogue in any meaningful direction, judicial candor is essential. First, this section will recommend that courts acknowledge the weight placed on the sanctity of life doctrine in order to make legal distinctions. Secondly, this section argues that courts must recognize that their foundation for the sanctity of life doctrine relies heavily on a theologically based derivation that may not be appropriate in light of the ethos of the Establishment Clause. Finally, this section proposes that employing the humanistic derivation of the sanctity principle offers a more inclusive mode of argumentation.

## II. Background

### A. A Legal Context for Right-to-Die Adjudication

Before looking at the principles underlying the courts' decisions in right-to-die adjudication, it is necessary to provide a context in which these principles can be evaluated. This section will outline the

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14. See discussion *infra* Part II.B.1.

15. See discussion *infra* Part II.B.2.

courts' arguments in case law, explore right-to-die statutory developments, and briefly discuss the law's treatment of death in contexts other than the right to die.

#### 1. CASE LAW ON END-OF-LIFE CARE

In contrast to the amount of attention that end-of-life care receives in public dialogue and the mass media, case law on the subject is not extensive. There are two major cases on withdrawal/withholding of treatment,<sup>16</sup> one of which was decided by the Supreme Court,<sup>17</sup> and two major cases on physician-assisted suicide, both of which were decided by the Supreme Court in the same year.<sup>18</sup> The following discussion of the cases will provide a general account of legal developments with regard to end-of-life care. While this section presents the facts, arguments, and outcomes, Part III will analyze the specific language and conceptual framework used by the courts to describe the sanctity of life.

*a. Withdrawal/Withholding of Treatment Cases: The Right to Refuse Treatment* The landmark case which brought the issue of the right to die to the forefront of legal discourse was *In re Quinlan*.<sup>19</sup> The case involved Karen Ann Quinlan, a young woman in a persistent vegetative state whose father petitioned the court to have Karen's respirator removed so that she might die.<sup>20</sup> The New Jersey Supreme Court held that a comatose individual such as Karen has a constitutional privacy right "to be free from bodily invasion by further treatment (a respirator), that the right was not diminished by her mental incompetency, and that her father could refuse such treatment on her behalf."<sup>21</sup> The court noted, however, that the right was not absolute: it had to be balanced against the State's interest in preserving life.<sup>22</sup> Here, the court

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16. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990); *In re Quinlan*, 355 A.2d 647 (N.J. 1976).

17. *Cruzan*, 497 U.S. 261.

18. *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997).

19. *In re Quinlan*, 355 A.2d 647.

20. *Id.*

21. *People v. Kevorkian*, 527 N.W.2d 714, 725 n.28 (Mich. 1994), *cert. denied sub nom. Hobbins v. Kelley*, 514 U.S. 1083 (1995).

22. *In re Quinlan*, 355 A.2d at 663-64.

crafted its oft-quoted formula<sup>23</sup> for balancing the State's interest in preserving life against the patient's privacy interest. According to the test, "the State's interest *contra* weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims."<sup>24</sup> Here, the State's interest was overcome, as Karen's invasive treatment was deemed quite burdensome and her chance for recovery seemingly hopeless.<sup>25</sup>

Significantly, *In re Quinlan* established a precedent upon which future courts would rely to allow the withholding or withdrawal of life-sustaining treatment from both incompetent and competent individuals. Following *In re Quinlan*'s lead, courts would base their decisions on the right to refuse treatment, a right that is inherent in the doctrine of informed consent and stems from the right to privacy.<sup>26</sup>

Although *In re Quinlan* did not reach the U.S. Supreme Court, twenty-four years later, a factually similar case, *Cruzan v. Director, Missouri Department of Health*,<sup>27</sup> presented the Court with the opportunity to rule on its first right-to-die case. Nancy Cruzan, a twenty-five-year-old woman, was seriously injured in a car accident after which she lapsed into a persistent vegetative state from which she was unlikely to regain any cognitive or physical function.<sup>28</sup> Nancy's guardians requested the removal of her nutrition and hydration tubes, asking the Court to determine the constitutionality of withdrawing life-sustaining treatment.<sup>29</sup> The Court ruled that a competent person

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23. See, e.g., *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 271 (1990); *Woodland v. Angus*, 820 F. Supp. 1497, 1505 (D. Utah 1993); *Woods v. Commonwealth*, 142 S.W.3d 24, 32 (Ky. 2004); *People v. Kevorkian*, 527 N.W.2d 714, 725 (Mich. 1994); *State v. Pelham*, 824 A.2d 1082, 1088 (N.J. 2003).

24. *In re Quinlan*, 355 A.2d at 664.

25. *Id.* At the age of twenty-two, Karen Ann was removed from her respirator; however, she continued to live for another ten years. See JERRY MENIKOFF, *LAW AND BIOETHICS: AN INTRODUCTION* 252 (2001). Still, her case is recognized as the seminal case in "dying with dignity" and a patient's "right to die."

26. See, e.g., *Cruzan*, 497 U.S. at 271-77 (citing Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 435 (Mass. 1977) (holding that the rights of privacy and informed consent permit withholding chemotherapy from a profoundly retarded and leukemic sixty-seven-year-old man)); *In re Conroy*, 486 A.2d 1209 (N.J. 1985) (holding that the removal of nasogastric feeding tube from eighty-four-year-old incompetent nursing home resident suffering irreversible mental and physical ailments is permitted by right to self-determination and informed consent); *In re Storar*, 420 N.E.2d 64, 71 (N.Y. 1981) (holding that the right to refuse treatment is adequately supported by the informed consent doctrine).

27. 497 U.S. 261.

28. *Id.* at 266-68.

29. *Id.* at 267-68.

indeed does have a “constitutionally protected liberty interest in refusing unwanted medical treatment.”<sup>30</sup> The Court pointedly framed the right to refuse treatment as one stemming from an interest in liberty rather than in privacy.<sup>31</sup> The narrower question, however, involved the application of this interest to an incompetent person.<sup>32</sup> The Court refused to extend the right to incompetent patients absent clear and convincing evidence of the patient’s wishes regarding treatment.<sup>33</sup> Still, the Court’s ruling admittedly implied that competent patients have such a liberty interest in refusing treatment.<sup>34</sup>

*b. Physician-Assisted Suicide Cases: The Right to Die* While *In re Quinlan* and *Cruzan* dealt solely with the issue of the withdrawal/withholding of treatment, the two cases set the stage for the oncoming adjudication of the right to PAS. It is important to recognize here that not all end-of-life cases will fall under the withdrawal/withholding category. A person may be terminally ill and suffering, yet not be dependent on any form of life-sustaining treatment.<sup>35</sup> Such patients do not receive any benefit from the “negative” right to be free from unwanted care.<sup>36</sup> Some have thus sought an affirmative right to die—a right which would allow a terminally ill and suffering patient to receive the aid necessary to assist them in dying.<sup>37</sup> Two such cases came before the Supreme Court in 1997.<sup>38</sup>

In *Washington v. Glucksberg*,<sup>39</sup> Justice Rehnquist delivered the opinion of the Court which provided that a state’s prohibition against

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30. *Id.* at 278.

31. *Id.* at 279 n.7 (“Although many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest.”).

32. *Id.* at 280.

33. *Id.* at 281 (“Missouri may legitimately seek to safeguard the personal element of this choice [between life and death] through the imposition of heightened evidentiary requirements.”).

34. *Id.* at 279 (“But for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.”).

35. See MENIKOFF, *supra* note 25, at 327; *Quill v. Vacco*, 80 F.3d 716, 727, 729 (2d Cir. 1996); see also discussion *infra* Part III.A.2.

36. See MENIKOFF, *supra* note 25, at 327.

37. *Id.*

38. *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997).

39. 521 U.S. 702.

PAS was not a violation of the Due Process Clause.<sup>40</sup> The Court underwent a typical due process claim analysis: “First, we have regularly observed that the Due Process Clause specifically protects those fundamental rights and liberties which are objectively, deeply rooted in this Nation’s history and tradition. . . . Second, we have required in substantive-due-process cases a careful description of the asserted fundamental interest.”<sup>41</sup> The Court went on to find that banning PAS was not a violation of the Due Process Clause because of the historical disallowance of suicide and because legitimate state interests exist that are rationally related to banning PAS.<sup>42</sup>

Finally, in a similar case, *Vacco v. Quill*,<sup>43</sup> the Court addressed, under equal protection grounds, the constitutionality of a New York statute which prohibited PAS.<sup>44</sup> Here, the Court was faced with a statute that permitted withholding treatment to hasten death, but denied the right to assisted suicide to patients who were situated so as to necessitate this process.<sup>45</sup> The Court ruled that the statute was not arbitrary and capricious and was thus not a violation of the Equal Protection Clause.<sup>46</sup> The Court offered a number of reasons as to why the two are different, relying most heavily on arguments of causation of death (natural versus unnatural) and intent (intent to let die versus intent to kill).<sup>47</sup> Part III will explore these distinctions in depth in an attempt to uncover the philosophical assumptions underlying the distinctions.<sup>48</sup>

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40. *Id.*

41. *Id.* at 720–21 (citations omitted).

42. *Id.* at 725 (“The right assumed in *Cruzan*, however, was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted treatment, our assumption was entirely consistent with this Nation’s history and constitutional traditions. The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection.”).

43. *Id.* 793.

44. *Id.* at 797.

45. *Id.*

46. *Id.*

47. *Id.* at 800–09.

48. See discussion *infra* Part III.A.2.



## 2. STATUTORY DEVELOPMENTS

Despite several attempts across the country, only one state has successfully enacted a right-to-die statute.<sup>49</sup> In 1994,<sup>50</sup> voters in Oregon approved ballot Measure 16, which enacted the Oregon Death with Dignity Act,<sup>51</sup> thereby legalizing physician-assisted suicide for competent, terminally ill adults.<sup>52</sup> The Act passed by a remarkably narrow margin, fifty-one percent to forty-nine percent.<sup>53</sup> In 1997, however, Oregonians reaffirmed their narrow approval when opponents of PAS in the legislature instigated a second public referendum.<sup>54</sup> After the federal government stepped in, the U.S. Supreme Court ruled that the Attorney General did not have the authority to prosecute doctors for prescribing regulated drugs for use in PAS under state law permitting the procedure.<sup>55</sup> Since the Oregon vote, many proposals to legalize assisted-suicide have been and continue to be introduced in other states' legislatures but without success.<sup>56</sup>

## 3. THE LAW'S TREATMENT OF DEATH IN OTHER CONTEXTS

Despite the law's repeated expression of its respect for the sanctity of life, it nevertheless sanctions death in a number of situations.<sup>57</sup> Many scholars have attempted to reconcile these disparate treatments of death.<sup>58</sup> Perhaps most famously, Thomas Nagel has explored the idea that our actions reflect a world where the preservation of life is not interpreted in absolutist terms, but rather in consequentialist

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49. Or. Dep't of Human Servs., Physician-Assisted Suicide, <http://egov.oregon.gov/DHS/ph/pas/faqs.shtml> (last visited Oct. 17, 2005).

50. Death with Dignity National Center, <http://www.deathwithdignity.org> (last visited Feb. 12, 2006).

51. OR. REV. STAT. § 127.800 (2003).

52. *Id.*

53. Death with Dignity National Center, <http://www.deathwithdignity.org> (last visited Feb. 12, 2006).

54. *Id.*

55. *See* *Gonzales v. Oregon*, 126 S. Ct. 904 (2006). It is important to recognize that while this decision indirectly upheld the Oregon Death with Dignity Act, it does not discuss the merits of PAS. Rather, the decision involves a discussion of statutory interpretation of the Controlled Substances Act to determine the appropriateness of Executive action. For this reason, this decision is not a part of this note's analysis section.

56. Death with Dignity National Center: News, <http://www.deathwithdignity.org/news/> (last visited Mar. 13, 2006) (providing an account of various state efforts in legalizing PAS).

57. *See, e.g.*, THOMAS NAGEL, MORTAL QUESTIONS (1979).

58. *Id.*

terms.<sup>59</sup> So, it becomes defensible to sacrifice one life in order to protect a greater number of other lives, or even one innocent life.<sup>60</sup> Thus, sending soldiers to war in order to protect the life and liberty of an entire country is “acceptable,”<sup>61</sup> as is killing in self-defense.<sup>62</sup>

The merits of such an interpretation notwithstanding, the imposition of the death penalty continues to elicit a great deal of controversy among both legal authorities and the general public.<sup>63</sup> Perhaps this is because the execution does not actually protect the victim or the public because the criminal is already presumably sentenced for the remainder of his or her life. The killing is therefore a punishment for violating the sanctity of life, and this represents a symbolic, albeit retroactive, protection of the sanctity of life.<sup>64</sup> It is as if we could not act preventively (as in the sacrifice of soldiers to prevent a larger harm),<sup>65</sup> and we could not act in the face of present danger (as in self-defense), and so we are forced to act retroactively through punishment.<sup>66</sup> Still, all of these examples of legally sanctioned death are grounded in the premise that preserving life is the ultimate good to be upheld.<sup>67</sup> However, the ever-growing capacity of medical technology to prolong life shifts the focus from one in which life is weighed against life, to one in which life must be weighed against death.

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59. *Id.*

60. *Id.*

61. See, e.g., Joseph L. Falvey, Jr., *Our Cause Is Just: An Analysis of Operation Iraqi Freedom Under International Law and the Just War Doctrine*, 2 AVE MARIA L. REV. 65, 66–69 (2004).

62. See, e.g., Michael Thompson, *Aquinas, Locke, and Self-Defense*, 57 U. PITT. L. REV. 677, 683 (1996).

63. See, e.g., R. Gregory Wright, *The Death Penalty and the Way We Think Now*, 33 LOY. L.A. L. REV. 533 (2000).

64. *Id.*

65. The war analogy is often used to demonstrate the importance of intent in actions that may or will cause death. See, e.g., *Compassion in Dying v. Washington*, 79 F.3d 790, 858 (Kleinfeld, J., dissenting) (“When General Eisenhower ordered American soldiers onto the beaches of Normandy, he knew that he was sending many American soldiers to certain death . . . . His purpose, though, was to . . . liberate Europe from the Nazis.”).

66. See, e.g., Richard Lowell Nyagaarc, *On Death as Punishment*, 57 U. PITT. L. REV. 825 (1996).

67. See generally EDMOND CAHN, *THE MORAL DECISION: RIGHT AND WRONG IN THE LIGHT OF AMERICAN LAW* (1981) (discussing moral decisions as related to life and death).

## B. A Philosophical Context for Right-to-Die Adjudication—The Sanctity of Life: Two Philosophical Doctrines

Neither the law nor medicine provides adequate justification for its enforcement of the principle that is often referred to as “the sanctity of life.”<sup>68</sup> Philosophers, however, have explored the matter extensively. From these philosophical writings emerge two clear approaches on the subject. One approach views the sanctity of life as a God-given value, one that is external to man.<sup>69</sup> The other derives the sanctity of life from experiential or psychological foundations internal to man.<sup>70</sup> By exploring the differences by which these theories arrive at the sanctity of life, this note will demonstrate that decisions on whether and how to change categorical rules depend not only on contextual changes in the world, but also on the basic premises to which one ascribes in order to accept the principle at hand.

### 1. AN EXTERNALLY DERIVED MEANING OF LIFE: A RELIGIOUS APPROACH TO THE SANCTITY OF LIFE

The idea that life is sanctified by divine means that are external to man can be found in almost every religion.<sup>71</sup> This note will look to ancient Greco-Roman culture and the Judeo-Christian religion to demonstrate the religiosity of the sanctity principle by looking at explicit views offered on the taking of one’s own life.<sup>72</sup>

The first reference to suicide appears in the writings of Plato on Pythagoras of Samos (580–500 B.C.).<sup>73</sup> Pythagoras posits a doctrine of transmigration of souls, stating that only after the soul cycles sufficiently through expiation and purification can it be liberated to return

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68. RONALD DWORKIN, FREEDOM’S LAW 138 (1996) (“[T]here has been remarkably little attention, either in Supreme Court opinions or in the legal literature, to the questions of what [this] supposed interest is or why it is legitimate for a state to pursue it.”).

69. *Id.*

70. See discussion *infra* Part II.B.1–2.

71. See generally Daniel M. Crone, *Historical Attitudes Towards Suicide*, 35 DUQ. L. REV. 7 (1996) (discussing various cultural and religious attitudes about suicide).

72. I have chosen to explore suicide rather than physician-assisted suicide because of the dearth of historical-philosophical writings about physician-assisted suicide in its current form. I make the assumption that philosophical approaches to suicide can be extended to the present context of physician-assisted suicide. I realize that by employing this approach, I am neglecting issues regarding the role of the physician; however, I will address issues such as these in other sections. See discussion *infra* Parts III & IV.

73. Crone, *supra* note 71, at 11–12 (quoting R.W. BLUCK, PLATO’S PHAEDO 61c–63c (1955)).

to its divine source.<sup>74</sup> “Life in this world is a series of trial and preparation, the conditions of which are ordained by God.”<sup>75</sup> Any self-inflicted death is therefore a violation of the divine order and consequently, immoral.<sup>76</sup> Plato similarly asserts that death frees the soul from corporeal existence so that it can “aspire to the realm of the gods and of the Forms, where perfect happiness (the supreme aim of life) reigns.”<sup>77</sup> Though on the Platonic framework, one wishes to be freed from the body in order to attain happiness, Socrates concludes that suicide is immoral for two reasons.<sup>78</sup> First, though Socrates likens the body to a prison for the soul, he explains that it is nevertheless a possession of the gods, and thus suicide would violate the “proprietary rights” of the gods.<sup>79</sup> More importantly, Socrates concludes suicide to be immoral because one should not try to escape from the prison to liberate the soul. Rather,

the soul needs the body in order to transcend it . . . . The process of dialectics that leads to this vision (of truth) begins with the data provided for by the senses of the body. Thus, while corporeal existence is a troublesome burden to be borne and managed, it must be embraced insofar as it is the means to spiritual liberation.<sup>80</sup>

Early Christian theology followed the brief period where Stoicism wielded its deterministic worldview.<sup>81</sup> In the fourth century A.D., St. Augustine revitalized a theocentric perspective that claimed that all existence is created by God and that it is the human purpose “in mirroring the Divine life” to conform to the natural law which is itself a product of God’s will.<sup>82</sup> St. Augustine goes beyond suggestion and explicitly states that suicide is prohibited by the Sixth Commandment: “Thou shall not kill.”<sup>83</sup> He further insists that killing is to be prohibited because it signifies “a violation of God’s rights over man

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74. *Id.*

75. *Id.* at 11.

76. *Id.* at 14.

77. *Id.* at 11.

78. *Id.* at 12.

79. *Id.*

80. *Id.* (quoting R.W. BLUCK, *PLATO’S PHAEDO* 61c–63c (1955)).

81. *Id.* at 15 (quoting THOMAS G. MASARYK, *SUICIDE AND THE MEANING OF CIVILIZATION* 155–57 (1970)).

82. *Id.* at 18 (quoting FRANCOIS JOSEPH THONNARD, *A SHORT HISTORY OF PHILOSOPHY* 215, 230, 262 (1955)).

83. *Id.* (quoting SAINT AUGUSTINE, *The City of God*, in 2 *BASIC WRITINGS OF SAINT AUGUSTINE* 27 (Whitney J. Oates ed., Random House 1948)).

as man's Creator."<sup>84</sup> Aquinas adds that suicide is both a violation of the natural inclination to preserve oneself and an offense against the state, as men have moral obligations to their community.<sup>85</sup> While these latter reasons seem to be secularly rooted, Aquinas explicitly bases them in the supreme governance of Natural Law; that is, that all laws are derived from the eternal God-given law.<sup>86</sup>

A theological derivation of the sanctity of life can thus refer to a number of paradigms. All of them, however, deem the taking of one's life immoral because of an ultimate offense to the divine order imposed by God.

## 2. AN INTERNALLY DERIVED MEANING OF LIFE: A HUMANISTIC APPROACH TO THE SANCTITY OF LIFE

The first voiced opinion against the divine condemnation of suicide emerged during the Renaissance and the Reformation.<sup>87</sup> However, it was neither John Calvin nor Martin Luther that led this opposition.<sup>88</sup> Luther believed suicide to be "the work of the devil,"<sup>89</sup> and Calvin stated that the individual must be "prepared to remain in [life] . . . [f]or it is a station in which the Lord has placed us, to be retained by us until he calls us away. Believers must leave the limits of our life and death to his decision."<sup>90</sup> The Anglican clergyman Robert Burton was the first to cast doubt upon the idea that victims of suicide are eternally damned with his publication of the groundbreaking *The Anatomy of Melancholy* in 1621.<sup>91</sup> Burton's work was followed by another critical work by Anglican clergyman and poet John Donne.<sup>92</sup> In his 1646 publication of *Biathanatos*, Donne posits the argument that the act of suicide should be judged based on individual circumstance and concludes that in some cases, such an act may be acceptable to God.<sup>93</sup>

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84. *Id.* at 20 (quoting THOMAS AQUINAS, SUMMA THEOLOGICA, II-II, 64.5 (Dominican ed. 1947)).

85. *Id.*

86. *Id.* at 21.

87. *Id.* at 22.

88. *Id.*

89. *Id.* (quoting MARTIN LUTHER, THE TABLE TALK OR FAMILIAR DISCOURSES OF MARTIN LUTHER 315 (DLXXXV) (Phila. 1868)).

90. *Id.* (quoting JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION 568 (bk. III, ch. IX, para. III) (London, 1838)).

91. *Id.* (quoting NORMAN L. FARBEROW, *Cultural History of Suicide, in SUICIDE IN DIFFERENT CULTURES* 1, 9 (Norman L. Farberow ed., 1975)).

92. *Id.*

93. *Id.* at 23.

Around the same time, Thomas Hobbes conceived of the notion that society's goal was to overcome the misery of man's state of nature and accept the more civilized social contract.<sup>94</sup> Although he does not speak explicitly about death, the social contract is premised on the rejection of natural law.<sup>95</sup> John Locke, on the other hand, embraced natural law as a basis for both of his major contributions—the concept of limited government regarding individual affairs and the less influential, but more immediately relevant idea of prohibition of suicide.<sup>96</sup>

The eighteenth century solidified the notion that diverse opinions might reasonably coexist on the subject of suicide.<sup>97</sup> The “Age of Reason” witnessed philosophical skepticism toward religion as well as a new emphasis on individualism and autonomy.<sup>98</sup> Although many thinkers continued to hold to the traditional religious dialectic,<sup>99</sup> others began to question the notion that God has anything to do with human morality.<sup>100</sup> Hume, for example, found it absurd that anyone could perceive individual action as an affront to divine universal order.<sup>101</sup> To underscore his disdain for man's overestimation of his place in the universe, he claimed that “[t]he life of a man is of no greater importance than that of an oyster.”<sup>102</sup> Voltaire echoed Hume in his observation that “[t]he republic, will do very well without me after my death, as it did before my birth.”<sup>103</sup>

Not all Enlightenment thinkers went so far as to deny the sanctity of life.<sup>104</sup> Immanuel Kant, for instance, upholds the notion of sanctity of life in the form of a “categorical imperative,”<sup>105</sup> where inherently derived universal morality dictates that actions are to be performed out of moral obligation.<sup>106</sup> For Kant, however, God is no longer in the equation.<sup>107</sup> Instead, morality is derived from “human

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94. *Id.* at 32.

95. *Id.*

96. *Id.* at 33–34.

97. *See id.* at 35–36.

98. *Id.*

99. *Id.* at 24.

100. *Id.* at 25.

101. *Id.*

102. *Id.* at 27 (quoting DAVID HUME, *On Suicide*, in *ETHICAL ISSUES IN SUICIDE* 31, 95 (1982)).

103. *Id.* at 29 (quoting Lester Crocker, *The Discussion of Suicide in the Eighteenth Century*, 13 *J. HIST. IDEAS* 47, 63–64 (1952)).

104. *Id.* at 28.

105. *Id.* at 27.

106. *Id.*

107. *See id.*

nature” and the obligation to which he refers is one owed to humanity, not to God.<sup>108</sup> Kant thus initiated the discourse that identifies the sanctity of life as stemming from the human realm, rather than something that is placed upon us by a transcendent God.<sup>109</sup>

Many others have expounded upon the idea of internally derived sanctity since the writings of Kant. Edward Shils<sup>110</sup> is perhaps the most frequently cited author in this respect, but his theory of the “natural metaphysic” is not unique.<sup>111</sup> The term describes a self-evident principle of the sanctity of life that derives its foundation from human experience.<sup>112</sup> For Shils “[t]he idea of sacredness is generated by the primordial experience of being alive, of experiencing the elemental sensation of vitality and the elemental fear of its extinction.”<sup>113</sup> Shils makes two basic claims: first, that life becomes sacred because of the experience of living; and second, that life is sacred because we fear losing life.<sup>114</sup> Shils’s second claim<sup>115</sup> is based primarily in Heidegger’s complex discussion of death in *Being and Time*.<sup>116</sup> Heidegger presents the situation as a dichotomy where men can either live authentically, by facing the inevitability of death, or live inauthentically by defying it.<sup>117</sup> Together, these thinkers describe sanctity not only as an internally derived process, but also as one that is achieved precisely by confronting death.<sup>118</sup>

It is clear, however, that removing God from the equation creates a considerable amount of anxiety in man.<sup>119</sup> Irvin D. Yalom<sup>120</sup> pioneered an existential model of psychotherapy based on the anxiety surrounding death denial.<sup>121</sup> Yalom bases much of his model directly

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108. *See id.*

109. *See id.*

110. Edward Shils, *The Sanctity of Life*, in LIFE OR DEATH: ETHICS AND OPTIONS 2 (1968).

111. *Id.* at 12.

112. *Id.* at 12–13.

113. *Id.* at 12.

114. *Id.* at 12–13.

115. *See, e.g.*, IRVIN D. YALOM, EXISTENTIAL PSYCHOTHERAPY 30 (1980) (basing its premise on this idea of Shils and Heidegger).

116. MARTIN HEIDEGGER, BEING AND TIME (John Macquarrie & Edward Robinson trans., 1962).

117. *See id.*

118. *See* Shils, *supra* note 110, at 13. *See generally* HEIDEGGER, *supra* note 116.

119. *See* YALOM, *supra* note 115, at 29–74.

120. Irvin D. Yalom, MD, Professor Emeritus of Psychiatry at the Stanford University School of Medicine, has made significant contributions to the field of existential psychotherapy.

121. YALOM, *supra* note 115.

on Heidegger, explaining that “the awareness of our personal death acts as a spur to shift us from one mode of existence to a higher one.”<sup>122</sup> This higher state, however, does not refer to a form of divine transcending; rather, Yalom uses Heidegger’s terms to explain that death anxiety moves one from a state of “forgetfulness of being” to one of “mindfulness of being.”<sup>123</sup> It is this mindfulness that creates meaningful experience.

A humanistic account of the principle of the sanctity of life thus generally refers to the experiential model discussed above. While the related idea that experiences give significance because of death anxiety offers one explanation for the source of such meaning, this notion is not an essential element of the humanistic outlook.

### III. Analysis

Before addressing the ideological roots of decisions in withdrawal/withholding of treatment cases and PAS cases, it is important to note that these decisions have typically been framed in seemingly neutral “rights language”—namely, the right to refuse care—which is grounded in a more general right to privacy.<sup>124</sup> While it is true that rights language lies at the core of constitutional law and has developed into a robust form of discourse, its use has been criticized as an adjudicatory masking technique, and more broadly, as an inadequate means of resolving complex issues.<sup>125</sup> Duncan Kennedy has described the use of rights language as one of a number of techniques which hide moral claims under more acceptable terms.<sup>126</sup> The problem with

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122. *Id.*

123. *Id.*

124. See generally, e.g., Penney Lewis, *Rights Discourse and Assisted Suicide*, 27 AM. J.L. & MED. 45 (2001) (explaining right-based arguments in favor of assisted suicide).

125. See DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 305 (1997) (discussing the way rights are used to mediate between factual and value judgment). But see generally MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991) (discussing the inadequacy of rights discourse in general); Lewis, *supra* note 124 (discussing the inadequacy of rights discourse on issues of physician assisted suicide).

126. See KENNEDY, *supra* note 125, at 329–30. Kennedy posits the term “legalism” to describe what he sees as the three leading masking behaviors in adjudication. First, there is Dworkin’s method of invoking a preconstructed set of principles which underlay the law, not in ideological terms, but as an impartial reflection of the law, in order to arrive at the correct answer to any legal dilemma. Kennedy suggests that these impartial set of principles on which judges should rely may as well be called morality because these “principles” will inevitably be



employing rights language, he explains, is that rights are likely to exist in support of any ideological supposition, and the winner in a battle of rights simply showcases the victorious underlying, and often unexpressed, ideology.<sup>127</sup> Other critics of rights language have pointed out that the law fails to provide an adequate ordering of rights.<sup>128</sup> This lack of clear guidelines regarding a rights hierarchy allows those engaging in “rights talk” simply to talk past one another without actually resolving the issue.<sup>129</sup> Further, rights discourse can oversimplify any given debate, distort the issues, and be inappropriately conclusory.<sup>130</sup>

This note seeks to explore the actual issue being concealed by rights language in withdrawal/withholding cases and PAS cases, namely, the ideological presuppositions upon which the principle of the sanctity of life is based. Both of the two major withholding/withdrawal cases, *In re Quinlan* and *Cruzan*, are indeed, rights-based opinions. This note’s analysis, however, will focus only on *Cruzan*, because of its definitive Supreme Court holding. An exploration of the underlying arguments which inform the *Cruzan* decision demonstrates that beneath the rights talk a specific derivation of the principle of life’s sanctity exists and that this derivation is the actual basis of the decision.

In contrast to the withdrawal/withholding cases, the PAS cases do not rely heavily on rights, but rather base their decisions on the *distinction* between withholding treatment and PAS. Again, there are two such cases, *Glucksberg* and *Vacco*, both of which were decided by the Supreme Court. This note’s analysis will focus only on *Vacco*, however, because there the constitutionality of PAS is framed as an equal protection claim rather than a due process claim.<sup>131</sup>

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politically and morally charged derivations of the law. Second, Kennedy posits that the use of public policy is yet another way that judges (and lawyers) may disguise ideological viewpoints as neutral legal reasoning. Kennedy writes that a “policy argument is interminably ideological” and thus indeterminate. Finally, he writes that the third way in which ideology can masquerade as law is through rights language. *Id.* at 104, 119–30, 329–30. For an interesting critique of Kennedy’s triad, see RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 265–69 (1999).

127. KENNEDY, *supra* note 125, at 329–30.

128. Lewis, *supra* note 124, at 72.

129. *Id.*

130. *Id.* at 71.

131. See *supra* Part II.A.1.b.

The opinion in *Glucksberg* is not very helpful because it disposes of the case altogether by finding that the right to die is not a fundamental interest subject to due process analysis.<sup>132</sup> An analysis of *Vacco* will reveal the underlying principles that inform the distinction between withdrawal/withholding of treatment and PAS. Again, the adoption of a particular derivation of the sanctity of life emerges as the basis of the decision.

#### A. The Law's Codification of the Religiously Based Sanctity of Life

##### 1. FOUNDATIONS OF THE WITHDRAWAL OF LIFE-SUSTAINING TREATMENT: *CRUZAN*

*Cruzan*'s majority opinion is perhaps the best example of the Supreme Court's invocation of the sanctity of life principle with inadequate reference to its legal foundation or validity. When discussing the nature of Missouri's interest in the protection and preservation of life, Chief Justice Rehnquist asserted that "a State may properly decline to make judgments about the quality of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life."<sup>133</sup> To support the proposition that there "can be no gainsaying"<sup>134</sup> Missouri's interest in preserving life, Justice Rehnquist explains that "[a]s a general matter, the States . . . demonstrate their commitment to life by treating homicide as a serious crime."<sup>135</sup> For additional support, he points to the fact that assisted suicide is a crime in the majority of states.<sup>136</sup> Justice Rehnquist's somewhat circular reasoning showcases the presumed obviousness of the validity of the sanctity of life. He explains that Missouri's interest in preserving life is uncontested because society does not challenge an interest in preserving life in other realms.<sup>137</sup>

Justice Rehnquist also points to the Due Process Clause as supplying both the interest in protecting life as well the interest in refusing life-sustaining medical treatment.<sup>138</sup> However, Justice Rehnquist does not attribute the notion of an "unqualified interest in life" as

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132. *Quill v. Vacco*, 80 F.3d 716, 727 (2d Cir. 1996).

133. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 282 (1990).

134. *Id.* at 280.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 281.

stemming from the Due Process Clause. The Due Process Clause, he explains, entitles the State to place heightened evidentiary requirements on safeguarding the personal choices of incompetent patients because of the potential for unavailability or inadequacy of surrogate decision makers.<sup>139</sup> While he presents legal foundation for the adoption of heightened evidentiary standards, Justice Rehnquist expressly ascribes his interpretation of the interest in life as unqualified to the Court: “Finally, *we* think a State may properly decline to make judgments about the quality of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life . . . .”<sup>140</sup>

Interestingly, in his concurrence, Justice Scalia points to the lack of foundation with which the majority rules.<sup>141</sup> He states that while he agrees with the outcome of the opinion, it would be best to leave to the citizens of Missouri the decision of whether and when to honor a person’s wish to end his or her life.<sup>142</sup> He explains that he reaches this conclusion because he recognizes that the “point at which life becomes worthless, and the point at which the means necessary to preserve it become extraordinary or inappropriate are neither set forth in the Constitution nor known to the nine justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory.”<sup>143</sup> In this admission, Justice Scalia acknowledges the impossibility of any judiciary’s ability to find legal authority on the subject of how to assign value to life.

Yet despite the absence of legal authority for the decision, *Cruzan* successfully leaves behind a precedent that treats the balance of interests between a state and an individual as having one fixed side, an unqualified interest in life.<sup>144</sup> While the source upon which the majority bases its decision remains unclear, its definition of life as consistently and irrefutably valuable is unmistakably in line with the theological derivation of the principle of the sanctity of life. Whether one looks to the historical rooting of man’s value in God, as explored in

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139. *Id.*

140. *Id.* at 282 (emphasis added).

141. *Id.* at 293 (Scalia, J., concurring).

142. *Id.*

143. *Id.*

144. *Id.* at 282.

Part II.B.1, or to contemporary writings of the Church,<sup>145</sup> “an unqualified interest in life” can only be justified in religious terms.

In contrast to the silence regarding the foundation for Justice Rehnquist’s sanctity of life argument, Justices Brennan and Stevens, in their respective dissents, approach the issue with much more transparency. Both Justices explicitly premise their arguments on the idea that the sanctity of life should be derived internally; that is, with human experience in mind.<sup>146</sup> Both Justices Brennan and Stevens explain that the State cannot legitimately uphold the doctrine of preservation of life without regard to the person living that life.<sup>147</sup> Justice Brennan asserts, “the State has no legitimate interest in someone’s life, completely abstracted from the interest of the person living that life, that could outweigh the person’s choice to avoid medical treatment.”<sup>148</sup> Justice Brennan’s criticism of the State’s unqualified interest in life is quite practical. He does not attack the lack of legal foundation for the interest nor does he attack the theological underpinnings of the interest. He simply points out that an unqualified interest in life removes Nancy Cruzan from the equation. Justice Brennan exposes the fact that there can be no act of balancing if the State has an outright deference to an insurmountable proposition. By offering validity to the personal choices an individual might make about her life or death, Justice Brennan impliedly asserts the appropriateness of a humanistic derivation of the sanctity of life. He states, “Dying is personal. And it is profound. For many, the thought of an ignoble end, steeped in decay, is abhorrent.”<sup>149</sup> The majority’s theologically derived interpretation of the sanctity of life precludes any such considerations because dying, and living, for that matter, are domains of God, not human beings.

Justice Stevens’s dissent in *Cruzan* echoes Justice Brennan’s. However, Justice Stevens relies more on a humanistic approach to the sanctity of life. In his dissent, he recounts the lower court’s charac-

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145. POPE JOHN PAUL II, EVANGELIUM VITAE 24, ch. 3 (1995), available at [http://www.vatican.va/edocs/EN60141/\\_PR.HTM](http://www.vatican.va/edocs/EN60141/_PR.HTM) (“Euthanasia is a grave violation of the law of God, since it is the deliberate and morally unacceptable killing of a human person. This doctrine is based upon the natural law and upon the written word of God, is transmitted by the Church’s Tradition and taught by the ordinary and universal Magisterium.”).

146. *Cruzan*, 497 U.S. at 301, 331.

147. *Id.* at 313 (Brennan, J., dissenting); *id.* at 331 (Stevens, J., dissenting).

148. *Id.* at 313 (Brennan, J., dissenting).

149. *Id.*

terization of Missouri's policy as one that "treats life as a theoretical abstraction severed from, and indeed opposed to, the person of Nancy Cruzan."<sup>150</sup> Like Justice Brennan, he criticizes the majority's lofty account of life and asks the Court to return its focus to the life of the individual woman at hand.<sup>151</sup> Interestingly, Justice Stevens acknowledges the importance of faith and spirituality in this case. He does not discount the sacredness of life, nor does he reduce the concept of life to a mere inhabitation of a body; rather, he points specifically to the "spiritual" realm of life, but in the context of man:<sup>152</sup> "[T]he constitutional protection for the human body is surely inseparable from concern for the mind and spirit that dwell therein."<sup>153</sup> He recognizes that death is inextricably related to faith for most people, but narrows the scope of application for such an assertion, explaining that personal ideology, not State-imposed faith should be most influential.<sup>154</sup> "The more precise constitutional significance of death is difficult to describe; not much can be said with confidence about death unless it is said from faith, and that alone is reason enough to protect the freedom to conform choices about death to individual conscience."<sup>155</sup>

Justice Stevens goes on to remind the majority that the meaning of life indeed is not defined in our founding legal texts.<sup>156</sup> While Justice Stevens does not propose a definition, he negates the appropriateness of the definition emerging from the majority's opinion.

The State's unflagging determination to perpetuate Nancy Cruzan's physical existence is comprehensible only as an effort to define life's meaning, not as an attempt to preserve its sanctity. . . . [T]here is a serious question as to whether the mere persistence of their bodies is "life" as that word is commonly understood, or as it is used both in the Constitution and the Declaration of Independence.<sup>157</sup>

Remarkably, Justice Stevens's discussion of a plausible meaning of life resoundingly echoes the humanistic conception of sanctity. He asserts:

Life, particularly human life, is not commonly thought of as a merely physiological condition or function. Its sanctity is often

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150. *Id.* at 338 (Stevens, J., dissenting).

151. *Id.* at 343.

152. *Id.* at 342.

153. *Id.* at 343.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 345.

thought to derive from the impossibility of any such reduction. When people speak of life, they often mean to describe the experiences that comprise a person's history, as when it is said that somebody has "led a good life." They also may mean to refer to the practical manifestation of the human spirit . . . . If there is a shared thread among the various opinions in this subject, it may be that life is an activity which is at once the matrix for, and an integration of, a person's interests. In any event, absent some theological abstraction, the idea of life is not conceived separately from the idea of a living person.<sup>158</sup>

Here, Justice Stevens not only offers a humanistic alternative to the majority's interpretation, but he points out that the majority interpretation can only be attributed to a theological derivative of the sanctity of life. He is acutely aware that conclusions surrounding the issue ultimately hinge on the presence or absence of theology. Perhaps most importantly though is not Justice Stevens's presentation of two alternate conceptions of valuing life, but the fact that he reframes the discussion. For Justice Stevens, reconciling the question at hand lies not in battle of state versus individual interest, but rather in the definition and derivative of the interests themselves.

The dissents of both Justices Brennan and Stevens expose the shortcomings of the "balance of interests" debate behind which much of right-to-die scholarship hides. Although interest balancing is the traditional approach used in assessing the viability of fundamental interests, the *Cruzan* dissents demonstrate that this type of analysis may be inapt in right-to-die cases. Justice Brennan recasts the State's unqualified interest as illegitimate because it cannot take into account the interests of Nancy Cruzan and, thus, is essentially undefeatable. Justice Stevens goes further and questions the foundation of the majority's definition of life, suggesting that the only basis for such a definition could be theological. Justice Stevens then offers a humanistic account of the sanctity of life as a more appropriate alternative.

## 2. FOUNDATIONS OF THE ALLEGED DISTINCTION BETWEEN WITHDRAWAL OF TREATMENT AND PAS: *VACCO*

While "balance of interests" analyses take center stage in early right-to-die cases, subsequent cases explore the sanctity principle in the context of making distinctions between withdrawal/withholding of care and PAS.<sup>159</sup> On appeal to the Second Circuit, a group of physi-

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158. See *id.* at 347.

159. See *infra* Part III.A.2.a-c.

cians asserted that simultaneously prohibiting PAS and allowing withdrawal of life-sustaining treatment was an example of unequal treatment of like cases that violated the Equal Protection Clause of the Fourteenth Amendment.<sup>160</sup> The Second Circuit concluded that the law indeed treats differently those at the end of life who can hasten death by ending treatment, and those at the end of life who can only choose to hasten death through PAS but are prohibited from doing so.<sup>161</sup> Upon review, the Supreme Court notes that reaching any other conclusion would mean that “ending or refusing lifesaving medical treatment is nothing more nor less than assisted suicide.”<sup>162</sup> The Court continues, “We think the distinction between assisting suicide and withdrawing life-sustaining treatment . . . is both important and logical.”<sup>163</sup> The Court’s step-by-step analysis shows that the two methods of hastening death are, in fact, distinct.<sup>164</sup> All of these distinctions, however, are rooted in the presumption that the sanctity of life is derived externally, by God.<sup>165</sup>

The following subsections will detail this step-wise analysis, bringing to light the fact that the validity of the Court’s analysis depends wholly on prescription to this externally derived concept of sanctity. The subsections are structured so as to introduce each of the three main distinctions upon which the Court relies, present counter-arguments that reject the validity of each claim of distinction, and then present a possible foundation upon which the Court’s argument is based.

*a. “Natural” v. “Unnatural” Death* The first distinction which the Supreme Court presents is the differing causations of death involved in refusal of treatment and PAS. The Court explains that when a patient refuses life-sustaining treatment, she dies of the underlying disease, but if she requests lethal medication prescribed by a physician, she is killed by that medication.<sup>166</sup> The Supreme Court is responding to the circuit court’s discussion that the distinction is irrelevant as life-sustaining treatment complicates the natural path of the original ill-

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160. *Quill v. Vacco*, 80 F.3d 716, 729 (1996).

161. *Id.*

162. *Vacco v. Quill*, 521 U.S. 793, 800–01 (1997) (quoting *Quill*, 80 F.3d at 729).

163. *Id.*

164. *Id.* at 801–09.

165. See *infra* Part III.A.2.a–c.

166. *Vacco*, 521 U.S. at 801.

ness such that its removal cannot be said to return the patient to a “natural” state. The circuit court explains, “Indeed there is nothing ‘natural’ about causing death by means other than the original illness . . . . The withdrawal of nutrition brings on death by starvation, the withdrawal of hydration brings on death by dehydration, and the withdrawal of ventilation brings about respiratory failure.”<sup>167</sup> The circuit court explains that these causes of death are no more unnatural than the unnatural death by medication.<sup>168</sup> The Second Circuit cites also to Justice Scalia’s remarks on the “irrelevance of the action-inaction distinction.”<sup>169</sup> In his concurrence in *Cruzan*, Justice Scalia notes that “the cause of death in both cases is the suicide’s [sic] conscious decision to ‘pu[t] an end to his own existence.’”<sup>170</sup> Despite the lower courts’ attempts to eradicate the difference, the Supreme Court states that the distinction exists and must be legally recognized.<sup>171</sup>

In response to the natural death argument, scholars David Orentlicher and Richard Epstein echo the lower courts’ point that medicine in itself deviates from what could be called natural.<sup>172</sup> Specifically, they point out that treatments such as kidney dialysis, artificial hearts, and even medication itself have unnaturally prolonged our lives.<sup>173</sup> Thus, medical technology renders the term “natural disease” obsolete, as its use moves the patient to a state beyond that of the original illness. When such technology is discontinued, the patient dies from the effects of stopping that particular treatment rather than from the original illness.

Although there is much discussion in both the cases and in independent scholarship on how to *reconcile* this alleged distinction, little meaningful discussion exists on how a natural death is different from, and better than, an unnatural death. In its opinion, the Supreme

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167. *Quill*, 80 F.3d at 729.

168. *Id.*

169. *Id.* (citing *Cruzan*, 497 U.S. at 296 (Scalia, J., concurring)).

170. *Id.* (citing *Cruzan*, 497 U.S. at 296–97) (alteration in original).

171. *Vacco*, 521 U.S. at 800–01.

172. DAVID ORENTLICHER, MATTERS OF LIFE AND DEATH 29 (2001) [hereinafter ORENTLICHER, LIFE AND DEATH]; RICHARD EPSTEIN, MORTAL PERIL: OUR INALIENABLE RIGHT TO HEALTH CARE? 294 (1997); see also David Orentlicher, *The Alleged Distinction Between Euthanasia and the Withdrawal of Life-Sustaining Treatment: Conceptually Incoherent and Impossible to Maintain*, 1998 U. ILL. L. REV. 837, 839–43 [hereinafter Orentlicher, *Alleged Distinction*]; Note, *Physician-Assisted Suicide and the Right to Die with Assistance*, 105 HARV. L. REV. 2021, 2028–31 (1992) (arguing that there is no distinction between assisted suicide and the withholding or withdrawal of treatment).

173. EPSTEIN, *supra* note 172; Orentlicher, *Alleged Distinction*, *supra* note 172.



Court provides no discussion of the distinction, but rather settles the issue by listing in a footnote the numerous courts that recognize the distinction between “acts that artificially sustain life and acts that artificially curtail life.”<sup>174</sup>

While citation to precedent is sufficient to dispose of an issue, one must turn from legal writing to theological writing for any evidence of thoughtful discussion. From the theological literature, it becomes clear that the belief that a natural death exists, and moreover that it is purer somehow as compared to an unnatural death, is linked to the idea that life’s meaning and sanctity is derived from God. As discussed in Part II.B.1, a theological derivation of the sanctity of life is premised on the notion that there is a divine order, a violation of which is immoral.<sup>175</sup> This divine order holds God to be the creator of life with subsequent proprietary rights over human bodies and the souls.<sup>176</sup> Philosophical theologians would thus hold that a natural death is a submission to God’s will and as such, abides by the divine order.<sup>177</sup> Contemporary Catholic teachings echo the moral superiority of dying naturally.<sup>178</sup> Papal writings have rejected physician-assisted suicide, portraying it “as a usurpation of God’s sole dominion over innocent life, and as a refusal to accept suffering in union with Christ.”<sup>179</sup>

In a discussion on death and dying in *Christian Bioethics*, the author notes that “the traditional Christian focus concerning dying is on repentance, not dignity.”<sup>180</sup> The author further explains that secular society has distorted the true meaning of death, focusing on self-determination and control rather than on submission to God.<sup>181</sup> Thus, for theologians, it is a natural death, unhindered by secular concepts of dignity, that allows for a holy death and a true submission.<sup>182</sup>

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174. See, e.g., *Vacco*, 521 U.S. at 804 n.8.

175. See discussion *infra* Part II.B.1.

176. Crone, *supra* note 71, at 12 (quoting R.W. BLUCK, PLATO’S PHAEDO 61c–63c (1995)).

177. See discussion *infra* Part II.B.1.

178. Kevin D. O’Rourke, O.P., *Physician Assisted Suicide, A Religious Perspective*, 15 ST. LOUIS U. PUB. L. REV. 433 (1996). See generally H. Tristram Englehardt, Jr., *Physician-Assisted Suicide Reconsidered: Dying as a Christian in a Post-Christian Age*, 4 CHRISTIAN BIOETHICS 143 (1998); Kevin Wm. Wildes, S.J., *Particularism in Bioethics: Balancing Secular and Religious Concerns*, 53 MD. L. REV. 1220 (1994).

179. O’Rourke, *supra* note 178, at 446.

180. Englehardt, Jr., *supra* note 178.

181. *Id.*

182. *Id.*

It is far from groundbreaking to point out that religion holds a natural death to be a holy one. And it may be appropriate for religion to hold certain forms of dying as morally superior to others without much explanation or qualification. It is not appropriate, however, for the Supreme Court of the United States to make the same claim without offering principled justification on how a natural death is different than, and moreover, more acceptable than an unnatural death. In the face of the legal silence on the issue, one can only justify its holding in religious terms.

*b. Right to Refuse Treatment v. Suicide* The second distinction that courts point to in order to differentiate withdrawal/withholding of treatment from PAS is that PAS is an act of suicide,<sup>183</sup> which under no circumstances can be state-sanctioned, whereas treatment withdrawal/withholding is simply a rejection of burdensome medical treatment.<sup>184</sup> Here, the Court can draw upon the legal principle that the right to refuse treatment is recognizable in furtherance of the liberty interest in the preservation of bodily integrity.<sup>185</sup> It is well established that “[t]he imposition of unwanted medical treatment is a battery and therefore unlawful.”<sup>186</sup> Some argue, however, that the Court could very easily see the “right to . . . assisted suicide as a right to preserve bodily integrity.”<sup>187</sup> As “[t]erminal illness typically ravages a person’s body, . . . a dying person’s choice of euthanasia/assisted suicide may reflect a desire to avoid further bodily deterioration.”<sup>188</sup> Others criticize the bodily integrity argument because it assumes knowledge of a patient’s intent, and it is conceivable that many permitted withdrawals of treatment are in fact representations of rejections of burdensome life rather than burdensome treatments.<sup>189</sup> Finally, some argue that when a life is dependent upon medical

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183. *Vacco v. Quill*, 521 U.S. 793, 807–08 (1997).

184. *Id.*; see also William E. May et al., *Feeding and Hydrating the Permanently Unconscious and Other Vulnerable Persons*, 3 ISSUES L. & MED. 203, 208 (1987).

185. See *Vacco*, 521 U.S. at 807.

186. Orentlicher, *Alleged Distinction*, *supra* note 172, at 847; see also *Vacco*, 521 U.S. at 807.

187. Orentlicher, *Alleged Distinction*, *supra* note 172, at 847.

188. *Id.*

189. Gilbert Meilaender, *On Removing Food and Water: Against the Stream*, HASTINGS CENTER REP., Dec. 1984, at 13.

treatment, the life and the treatment are inseparable, as ending treatment will automatically end life.<sup>190</sup>

Again, in order to find principled reasoning regarding why rejecting burdensome treatment is acceptable but rejecting burdensome life is not, one must look beyond the case holding to theological propositions. As discussed in Part II, the rejection of suicide has, theologically, always been framed in terms of the sanctity of existence.<sup>191</sup> This is so, the argument states, either because corporeal existence is the means to spiritual liberation,<sup>192</sup> or more generally, because man's body is a creation of God and made in the likeness of God, and a rejection of life itself would be a rejection of God himself.<sup>193</sup> On the other hand, although rejection of treatment will inevitably result in death, the offense of rejecting life outrightly is not committed.<sup>194</sup> The difference fails logically but is quite powerful in religious terms. In an article entitled, *Physician Assisted Suicide, A Religious Perspective*,<sup>195</sup> the explanation of the relevant Catholic doctrine sheds light on the religious importance of causing death through rejecting treatment rather than through rejecting life.

First, Catholic theology does not interpret God's sovereignty over human life . . . as if the process of dying must be left totally to divine providence without intervention of human reason and freedom. Rather, Catholic theology presents human beings as co-creators with God, called upon to make decisions about the positive acts and medical procedures that would prolong life but that might not be beneficial to the person in question. The free choice a person has concerning life support, in regard to the mission of life, does not extend to bringing about death at the time and under the conditions one stipulates. Rather, the freedom a person can exercise in dying is to accept one's existence as God's creature and to consent to one's powerlessness in the face of death.<sup>196</sup>

Again, this theologically based argument, although never invoked by the Supreme Court, helps in understanding the basis for its reasoning.

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190. ORENTLICHER, LIFE AND DEATH, *supra* note 172, at 33. *But cf.* Sanford H. Kadish, *Letting Patients Die: Legal and Moral Reflections*, 80 CAL. L. REV. 857, 867 (1992) ("[A]lthough he knows that his conduct will result in his death, his conscious object is not to die, but to be free of the medical treatment.").

191. See discussion *infra* Part II.B.1.

192. Crone, *supra* note 71, at 11–12 (quoting R.W. BLUCK, PLATO'S PHAEDO 61c–63c (1955)).

193. See discussion *infra* Part II.B.1.

194. BENEDICT M. ASHLEY, O.P. & KEVIN D. O'ROURKE, O.P., HEALTHCARE ETHICS: A THEOLOGICAL ANALYSIS 184–88 (3d ed. 1989).

195. O'Rourke, *supra* note 178.

196. *Id.* at 443.

c. *Appropriate v. Inappropriate Roles of Physicians* The third and fourth distinctions that the Supreme Court makes to justify the allowance of withdrawal of care and the prohibition of PAS are somewhat related. First, the Court turns from the intent of the patient (to commit suicide versus refusing treatment) to the analogous argument of the intent of the physician.<sup>197</sup> The Court states that a physician is within her role when she acts in compliance with the patient's wishes in order to alleviate pain and severe discomfort.<sup>198</sup> However, the Court explains, acting with the sole intent to kill a patient is not within the professional ambit of the physician.<sup>199</sup> The Court further posits that the endorsement of actions that exceed the professional role of the physician will erode the trust that patients as a whole have in the medical profession and the role of the physician as healer.<sup>200</sup> The Court bases its conclusion on concepts of intent and causation, focusing on the doctrine of double effect. This doctrine explains that the unintended, albeit foreseeable, effect of a permitted action is ethically sound, while the intended effect of a prohibited action is not ethically sound.<sup>201</sup>

Criticisms of this argument range from an attack on the premise to more practical considerations. Those that attack the premise of the intent argument point out that while the law often takes intent into account, it primarily holds people responsible for the foreseeable consequences of their acts.<sup>202</sup> In addition to the argument that the intent of the physician is not an appropriate or sufficient factor to consider,<sup>203</sup> many have argued that intent does not create a difference between the two forms of dying.<sup>204</sup> Of most force is the argument that physicians can engage in action that would constitute suicide assistance without intending that the patient die.<sup>205</sup> The physician may intend only to

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197. *Vacco v. Quill*, 521 U.S. 793, 807-09 (1997).

198. *Id.* at 801-09.

199. *Id.* at 808 n.11.

200. *Id.* at 808.

201. *Id.* (explaining not only refusal versus PAS, but also the act of terminal sedation to alleviate pain).

202. See Orentlicher, *Alleged Distinction*, *supra* note 172, at 846 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 31, at 280-300 (5th ed. 1984)).

203. R. G. FREY, *Distinctions in Death*, in EUTHANASIA AND PHYSICIAN-ASSISTED SUICIDE 17, 21-22 (Gerald Dworkin et al. eds, 1998).

204. *Id.* at 38.

205. See ORENTLICHER, LIFE AND DEATH, *supra* note 172; see also Frances M. Kamm, *Physician-Assisted Suicide, Euthanasia, and Intending Death*, in PHYSICIAN

honor her patient's wishes.<sup>206</sup> In fact, this reasoning is employed to allow "terminal sedation:" the provision of aggressive palliative care which is intended to ease pain but will have the effect of killing the patient.<sup>207</sup> Thus, one can see that it is not the actual intent of the physician that is at issue, but rather the possible existence of an intent other than the intent to kill. Ultimately, then, framing the issue as one in which the intent is to honor a patient's wishes or alleviate suffering can dispose of this distinction.

The disposal of this distinction, however, does not address the question of why the physician's role is constructed as it is. This too can be traced to theological reasoning. According to Roman Catholic moral tradition, "[a]bsolute dominion over human life is an exclusively divine prerogative."<sup>208</sup> Thus, any overstepping of a physician into the realm of taking life is an offense to the concept that "God alone is the Lord of life from beginning to end."<sup>209</sup> These same arguments emerge to defend the position that death should be caused "naturally," by disease.<sup>210</sup> Indeed, the natural/unnatural argument is very much related to ensuring a proper role for the physician. Religiously grounded bioethics would hold that a physician that intends to cause death and causes it, contributes to an unnatural and immoral death; however, a physician who intends to alleviate pain and causes death, brings on a natural death.<sup>211</sup>

Finally, the Court concludes that if a physician functions outside the realm of her prescribed role by exhibiting this immoral intent to kill, trust in the physician-patient relationship is subsequently eroded.<sup>212</sup> In order to reach this conclusion, however, the Court must assume that the patient is functioning under the same paradigm of moral construction that the Court employs;<sup>213</sup> that is, the doctrine of double effect. In the Court's eyes, the patient must understand that although she intends to die in both the case of withdrawal of treatment and PAS, the doctor does not outrightly intend the consequence

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ASSISTED SUICIDE: EXPANDING THE DEBATE 28, 30 (Margaret P. Battin et al. eds., 1998).

206. *Vacco v. Quill*, 521 U.S. 793, 808 n.12 (1997).

207. *Id.* at 808 n.11.

208. O'Rourke, *supra* note 178, at 443.

209. *Id.* at 446.

210. *See infra* Part III.A.2.a.

211. *See* O'Rourke, *supra* note 178.

212. *Vacco v. Quill*, 521 U.S. 793, 801-08 (1997).

213. *Id.* at 808.

of death when withdrawing treatment, but does intend it in PAS.<sup>214</sup> To put it mildly, it is unlikely that the public engages in this type of analysis, and it is therefore implausible to think that the physician-patient relationship is harmed by PAS.

All of these distinctions that the Supreme Court makes to differentiate withdrawal/withholding of treatment from PAS stand on questionable logic and inadequate legal foundation. The only principled reasoning behind the distinctions seems to be in the adoption of a theologically derived notion of the sanctity of life. While disclosure of this derivation is satisfying in a truth-seeking sense, it leaves the legal institution at a loss in terms of moving the discussion forward in a meaningful way. To be able to reframe the discussion in a way in which the legal community can constructively engage, neither negotiating through rights language nor attacking the logic of distinctions made by the Court will be useful. Rather, the legal institution must first admit that in end-of-life adjudication, courts rely on a specific theologically based derivation of the sanctity of life. Only then can we assess the appropriateness of such a derivation.

#### **B. Appropriateness of Religious Argumentation in the Law: The Establishment Clause**

The Establishment Clause of the First Amendment prohibits government from favoring one religion over another religion or favoring religion over nonreligion.<sup>215</sup> The test articulated in *Lemon v. Kurtzman*<sup>216</sup> has traditionally been used to decide whether a particular statute has violated the Establishment Clause.<sup>217</sup> In order for a statute to pass constitutional muster, it must first “have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster ‘an excessive government entanglement with religion.’”<sup>218</sup> As the focus of this note is not to prove that anti-PAS adjudication is a viola-

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214. *Id.* at 801.

215. *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 696 (1994); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

216. 403 U.S. 602 (1971).

217. *But see* Matthew P. Previn, *Assisted Suicide and Religion: Conflicting Conceptions of the Sanctity of Human Life*, 84 *GEO. L.J.* 589, 604 (1996) (discussing the fact that the Supreme Court has questioned the appropriateness of the *Lemon* test, although still has declined to overrule it).

218. *Lemon*, 403 U.S. at 612–13 (citation omitted).

tion of the Establishment Clause, per se, this note will not analyze each prong of the *Lemon* test as it applies to PAS adjudication.<sup>219</sup> Rather, this test is provided here solely as an indication of the *ethos* of the Establishment Clause. The Establishment Clause was intended to create “a wall of separation between church and State.”<sup>220</sup> This principle is premised on the concern that “a union of government and religion tends to destroy government and to degrade religion.”<sup>221</sup>

Anti-PAS adjudication, on its face, seems to be in line with the *ethos* and intention of the Establishment Clause. However, as shown above, a closer look at the holdings of these cases reveals that their reasoning is derived from wholly theological concepts. This is an inappropriate and disappointing departure from the tenets upon which the Constitution is based.

#### IV. Resolution

Resolving a legal question which relies heavily on moral grounds is always difficult.<sup>222</sup> It is equally difficult to determine the level of candor which should be expected from, or imposed upon, the judiciary in holdings that are seemingly grounded in moral premises.<sup>223</sup>

This note does not espouse a universal requirement for judicial candor in all cases. Similarly, it is beyond the scope of this note to decide the level at which Justices should engage in the philosophical issues that underlie law, or the degree to which we want that engagement to be transparent and available for critique. The following discussion will, however, briefly illustrate some problems that judicial

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219. For an in-depth analysis of the *Lemon* test as it applies to PAS adjudication, see Previn, *supra* note 217.

220. See *Torcaso v. Watkins*, 367 U.S. 488, 493 (1961).

221. *Engel v. Vitae*, 370 U.S. 421, 431 (1962).

222. See generally RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 265–69 (1999) (construing Duncan Kennedy’s theory that judges do not want to be seen as reaching decisions on ideological grounds).

223. For an in-depth discussion on the obligation of judges to engage in candid adjudication, see GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* 78–79 (1978) (viewing subterfuges as preferable to clear choice of one value over another in absence of clear societal consensus). *But see* David Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 750 (1987) (advocating abandonment of judicial subterfuge in favor of judicial candor in cases of conflict between legal and moral rights). *See also* GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 180–81 (1982) (positing the idea that judges may reject the notion of candor because of the fundamental difference between the role of the scholar and the role of the adjudicator).

masking presents and the benefits that can be reaped if candor is utilized as a tool in PAS dialogue.

The lack of judicial candor in all cases, and particularly in cases that deal with morally controversial issues, limits both the depth and the breadth of the discussion, ultimately thwarting meaningful dialogue. First, concealment of ideological underpinnings encourages a superficial and thus ineffective engagement with the question at hand. That is, if the PAS question is actually going to hinge on differing concepts of the sanctity of life, then the relevant dialogue should focus on the ways in which we want to interpret that principle. The merits of theological and humanistic approaches could and should be discussed openly. Instead, both proponents and opponents of physician-assisted suicide engage on a superficial level, respectively trying to uphold and critique the logic of the distinguishing factors given by the Court.

Moreover, when ideologies underlie justifications for any given outcome, there is an inherent limitation on the Court's ability to consider competing justifications, which are likely to be masking a competing underlying ideology. Thus, in PAS adjudication, the Court upholds its decision by presenting reasons such as the preservation of life and the need to maintain appropriate roles of physicians; however, it does not weigh these against competing justifications based on humanism, such as autonomy or dignity.<sup>224</sup> Because these sets of justifications are grounded in different ideologies, the Court could truly balance the merits of the justifications only by assessing the merits of the underlying ideologies. When these underlying ideologies are hidden, however, the Court essentially cannot consider competing justifications in a meaningful way.

Despite the real obstacles that judicial masking creates and the benefits that candor may engender, the question remains whether and how a candid Court should go about choosing among underlying ideologies in cases involving morally laden issues. This note supplies the two traditional derivations of the concept of sanctity of life: a theological approach and a humanistic approach. A humanistic approach to the sanctity principle is recommended for two reasons. First, a humanistic approach is more consistent with the nation's historical ethos of "a wall of separation between church and State."<sup>225</sup> As discussed in

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224. Previn, *supra* note 217, at 597–602.

225. *Id.* at 604 (quoting *Torcaso v. Watkins*, 367 U.S. 488, 493 (1961)).



Part III.B, employment of the theologically based derivation of the sanctity of life negates the intention and ethos of the Establishment Clause. A humanistic derivation of the sanctity of life principle will eliminate this tension and reinstate the separation that the First Amendment seeks to create.

Second, and more generally, religious claims as a form of argument are publicly inaccessible and deny the existence of cultural pluralism.<sup>226</sup> In his account of “public reason,” John Rawls explains that a natural outgrowth of democracy and the culture of free institutions is a “plurality of conflicting reasonable comprehensive doctrines.”<sup>227</sup> He suggests that the only way to achieve mutual understanding in a context of cultural, religious, and moral pluralism is to engage in “public reason.”<sup>228</sup> Public reason demands that when deliberations occur regarding a fundamental question, they must be carried out within a framework that regards “the most reasonable political conception of justice, a conception that expresses political values that others, as free and equal citizens might also reasonably be expected reasonably [sic] to endorse.”<sup>229</sup>

Rawls looks specifically at the clash between religion and public reason in a democracy, and asks, “[h]ow is it possible—or is it—for those of faith . . . to endorse a constitutional regime even when their comprehensive doctrines may not prosper under it, and indeed may decline?”<sup>230</sup> He concludes that the doctrine of public reason is premised on the assumption that a constitutional regime values the maintenance of legitimate democratic law as the primary goal.<sup>231</sup> Other goals, such as a religion’s interest in maintaining a certain degree of success and influence, are distinctly secondary.<sup>232</sup> Thus, “[w]hile no one is expected to put his or her religious or nonreligious doctrine in danger, we must each give up forever the hope of changing the consti-

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226. See also Kerry Bowman, *What Are the Limits of Bioethics in a Culturally Pluralistic Society?*, 32 J.L. MED. & ETHICS 664, 664 (2004). See generally Wildes, *supra* note 178, at 122 (illustrating the diversity of viewpoints within both secular and religious discourse).

227. See John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 766 (1997).

228. *Id.*

229. *Id.* at 773 (alteration added).

230. *Id.* at 781.

231. *Id.* at 782–83.

232. *Id.* at 782.

tution so as to establish our religion's hegemony, or of qualifying our obligations so as to ensure its influence and success."<sup>233</sup>

While Rawls's account of public reason initially appears to be little more than an endorsement of the Establishment Clause, his claim is much broader. For Rawls, public reason is a mode of argumentation that is useful, if not necessary, for successful navigation through a culturally pluralistic society.<sup>234</sup> Employing a theological view of the sanctity of life principle is not in line with Rawls's conception of public reason primarily because it is not a widely accessible and defensible proposition based in the common denominator of experience.<sup>235</sup>

A major and often-elicited counterargument to the employment of a humanistic derivation of sanctity in PAS adjudication is that such reasoning will lead to the inevitable slippery slope.<sup>236</sup> This argument claims that using a less absolutist concept of the sanctity of life introduces unclear guidelines for when life should be reasonably allowed to end.<sup>237</sup> Furthering the argument, some insist that these poor guidelines are, in turn, likely to create the potential for abuse of the elderly and disabled.<sup>238</sup> While these arguments properly recognize that these decisions are difficult ones, they gravely underestimate the ability of the legal and medical communities<sup>239</sup> to engage in meaningful dialogue concerning this issue. There is an abundance of professional literature, both in the legal and medical communities, that contemplates the technical questions brought up by PAS.<sup>240</sup> Further, this argument ignores the reality that physicians have been engaging in various forms of PAS (i.e., analgesic-induced death) for years.<sup>241</sup> Such experience suggests that reasonable decision making in these circumstances is plausible. More importantly, though, the fact that physicians are

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233. *Id.*

234. *Id.* at 766.

235. *Id.* at 773-74.

236. See, e.g., Cantor, *supra* note 10, at 1817-31; David Orentlicher & Christopher M. Callahan, *Feeding Tubes, Slippery Slopes, and Physician-Assisted Suicide*, 25 J. LEGAL MED. 389, 389-90 (2004) [hereinafter Orentlicher & Callahan, *Feeding Tubes*].

237. Cantor, *supra* note 10, at 1817.

238. Orentlicher & Callahan, *Feeding Tubes*, *supra* note 236, at 404-06.

239. See, e.g., ORENTLICHER, LIFE AND DEATH, *supra* note 172, at 41-43; Cantor, *supra* note 10, at 1809-10; Frey, *supra* note 203, at 30-31; Orentlicher, *Alleged Distinction*, *supra* note 172, at 841-43; Orentlicher & Callahan, *Feeding Tubes*, *supra* note 236, at 406.

240. See, e.g., ORENTLICHER, LIFE AND DEATH, *supra* note 172; Cantor, *supra* note 10; Frey, *supra* note 203; Orentlicher, *Alleged Distinction*, *supra* note 172; Orentlicher & Callahan, *Feeding Tubes*, *supra* note 236.

241. See *Vacco v. Quill*, 521 U.S. 793, 807-08 n.11 (1997).

already engaging in PAS-like behavior provides yet another reason to support the creation of state-sanctioned guidelines that can be monitored.<sup>242</sup> In addition to clearer guidelines, open debate might actually produce more restrictive safeguards than are presently employed on an informal and ad hoc basis.<sup>243</sup> Oregon's Death with Dignity Act<sup>244</sup> illustrates the fact that clear guidelines are not only plausibly attainable, but have beneficial consequences as well, in terms of upholding uniformity and legitimacy of law.<sup>245</sup>

## V. Conclusion

Presently, right-to-die adjudication is stuck. While courts have framed the debate in seemingly neutral legal terms, their reasoning relies heavily on a theologically based derivation of the sanctity of life principle. At the most basic level, religiously informed decision making is problematic because it violates the ethos of the Establishment Clause. In addition, such decision making departs from the acceptable modes of argumentation necessary to uphold the cultural pluralism essential to a legitimate democratic regime.

Beyond these general problems, theologically based reasoning has led to an intolerable impasse within the PAS debate. Meaningful dialogue cannot continue until the actual unit of analysis—the derivation of the sanctity of life—is acknowledged. Finally, if PAS is ever to be recognized as a right, this acknowledgment must be followed by the adoption of a humanistic derivation of sanctity. Such a change would not only alleviate the tension caused by the present entanglement of government and religion, but would also allow for a candid and fair consideration of physician-assisted suicide as a recognizable right.

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242. Orentlicher & Callahan, *Feeding Tubes*, *supra* note 236, at 405–07.

243. *Id.*

244. OR. REV. STAT. § 127.800 (2003).

245. Orentlicher & Callahan, *Feeding Tubes*, *supra* note 236, at 406–09.