

4-2010

## Assisted Suicide, Morality, and Law: Why Prohibiting Assisted Suicide Violates the Establishment Clause

Edward Rubin

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# Assisted Suicide, Morality, and Law: Why Prohibiting Assisted Suicide Violates the Establishment Clause

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Edward Rubin

63 Vand. L. Rev. 763 (2010)

*This Article argues that general prohibitions against assisted suicide violate the Establishment Clause because they support a particular and religiously based moral position. Many laws overlap with religious proscriptions, of course. The conclusion that laws against assisted suicide are unconstitutional because of their religious origin is based on the specific historical context of these laws within our existing culture. Over the course of Western civilization, attitudes about suicide have oscillated from positive approbation in many Greek and Roman sources, to outright and unalterable opposition by Christian writers, to acceptance and limited approval by contemporary secular thinkers and health practitioners. At present, traditional, Christian-based morality and an emerging secular morality centered on the value of self-fulfillment are in conflict within our society, a conflict that probably reflects a slow historical transition from the first to the second. The intense debate about the morality of assisted suicide is one aspect of this conflict. Blanket prohibitions of assisted suicide support one side of this debate, a side that happens to be allied with the Christian religion. Consequently, these laws violate the Establishment Clause.*

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# Assisted Suicide, Morality, and Law: Why Prohibiting Assisted Suicide Violates the Establishment Clause

*Edward Rubin\**

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For the past several decades, American policymakers and judges have been grappling with the closely related issues of assisted suicide and euthanasia. These issues gain drama from the permanence of death and terror that accompanies it. They gain poignancy from the fact that unlike capital punishment—another purposeful termination of life—the laws governing assisted suicide and euthanasia potentially affect us all as we head toward the decrepitude that frequently accompanies our final years. Emotion runs high on these subjects, making them unusually difficult to resolve, and the complex imbrications of ethical, metaphysical, and jurisprudential theories that address them seem to add complexity without providing clarity. The injection of these subjects into the

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congressional debate over the seemingly separate topic of health care reform is only the latest indication of the controversy and confusion that accompanies them.<sup>1</sup>

This Article is directed to the question of assisted suicide, and specifically to the constitutionality of laws prohibiting that practice. The Supreme Court has addressed the issue several times over the past few decades. In *Cruzan v. Director, Missouri Department of Health*,<sup>2</sup> the Court held that the Due Process Clause provides people with a constitutional right to refuse life-saving medical treatment. But soon thereafter, in *Washington v. Glucksberg* and *Vacco v. Quill*, the Court held that neither the Due Process Clause nor the Equal Protection Clause prohibits states from making it a crime to assist a person in committing suicide.<sup>3</sup> Most recently, in *Gonzales v. Oregon*, the Court invalidated a Bush Administration effort to preempt the state of Oregon's Death with Dignity Act, which authorizes physicians to provide lethal drugs to an adult suffering from an incurable disease.<sup>4</sup> The *Gonzales* decision, quite properly, does not address the constitutional issues, since the question that was raised involved the statutory authority of the Attorney General to preempt state law.<sup>5</sup> But

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1. See, e.g., Carrie Budoff Brown, *Will Proposal Promote Euthanasia?*, POLITICO, July 28, 2009, <http://www.politico.com/news/stories/0709/25486.html>; Stephanie Condon, *Ten Health Care Reform Myths*, CBS NEWS, Aug. 6, 2009, <http://www.cbsnews.com/stories/2009/08/05/politics/main5215880.shtml>; Barack Obama's *Abortion Drama: Religion is Causing the President Headaches*, ECONOMIST, Mar. 13–19, 2010, at 38.

2. 497 U.S. 261, 286–87 (1990); see also RONALD DWORIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 130–43 (1996) (providing a summary of the *Cruzan* decision and noting that this case recognized the constitutional principle “that a state has no right to keep a comatose patient alive against his previously expressed wish[es]”); Louis Seidman, *Confusion at the Border: Cruzan, “The Right to Die,” and the Public/Private Distinction*, 1991 SUP. CT. REV. 47, 49–55 (providing an explanation of the *Cruzan* decision and its holding).

3. *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997); *Vacco v. Quill*, 521 U.S. 793, 807–09 (1997). The doctrine that the Supreme Court has fashioned in this area is not particularly unstable; there is certainly a recognizable difference between terminating life support and affirmatively causing death. But the rationale behind these two actions is sufficiently similar to raise questions about the conceptual coherence of the Court's approach. At the pragmatic level, both involve efforts by physicians to provide terminally ill patients with a dignified and painless death. At the theoretical level, both are based on the idea that people should have the right to decide whether they want to go on living, and that those who truly choose to die should not be prevented from obtaining assistance in implementing their decision.

4. OR. REV. STAT. §§ 127.805–.885 (2005).

5. *Gonzales v. Oregon*, 546 U.S. 243, 348 (2006). In 2001, Attorney General John Ashcroft issued an interpretive rule, 21 C.F.R. § 1306 (2005), declaring that prescribing drugs to terminate a person's life violated the Controlled Substances Act of 1970, 21 U.S.C. §§ 801–903 (2006). The Court of Appeals for the Ninth Circuit invalidated the rule, holding that it ran afoul of constitutional federalism and reflected an improper interpretation of the Act. *Oregon v. Ashcroft*, 368 F.3d 1118, 1125–26 (9th Cir. 2004). On appeal, the Supreme Court affirmed the

the majority opinion and the two dissents are clearly written with the awareness that these issues lie just below the legal surface of the case. Thus *Gonzales*, when viewed in conjunction with the controversy surrounding Terri Schiavo's death,<sup>6</sup> the prosecution of Dr. Jack Kevorkian,<sup>7</sup> a second state's legalization of assisted suicide by voter initiative,<sup>8</sup> and the current health care debate, indicates that the question of assisted suicide is likely to occupy a central place in public discourse for some time.<sup>9</sup>

The most commonly stated legal rationale for arguing that the Constitution protects people's ability to obtain assistance in ending their lives is the so-called right to die, which is grounded on either substantive due process or the right of privacy, that is, the penumbra of the first eight amendments.<sup>10</sup> The Court employed this rationale in

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Ninth Circuit holding on the ground that the rule lay beyond the authority granted to the Attorney General under the Controlled Substances Act.

A somewhat similar case, *Gonzales v. Raich*, 545 U.S. 1 (2005), involved an effort by the federal government to preempt California's Compassionate Use Act, which legalized marijuana when used pursuant to the instructions of a licensed physician. Although the case obviously reverberated with larger issues, the Court restricted itself to federalism doctrine, in this case validating the federal action.

6. See generally THE CASE OF TERRY SCHIAVO: ETHICS AT THE END OF LIFE (Arthur L. Caplan, James J. McCartney & Dominic A. Sisti eds., 2006) (collecting documents related to the controversy); DIANA LYNNE, TERRI'S STORY: THE COURT-ORDERED DEATH OF AN AMERICAN WOMAN (2005); Joshua E. Perry, *Biblical BioPolitics: Judicial Process, Religious Rhetoric, Terri Schiavo and Beyond*, 16 HEALTH MATRIX 553 (2006). For views of those involved in the Terri Schiavo controversy, see MICHAEL SCHIAVO & MICHAEL HIRSH, TERRI: THE TRUTH (2006); MARY & ROBERT SCHINDLER ET AL., A LIFE THAT MATTERS: THE LEGACY OF TERRI SCHIAVO – A LESSON FOR US ALL (2006).

7. See *People v. Kevorkian*, 639 N.W.2d 291, 332 (Mich. Ct. App. 2001) (upholding trial court conviction of Dr. Kevorkian). For a biography of Dr. Jack Kevorkian's life including a summary of his prosecution, see NEAL NICOL & HARRY WYLIE, BETWEEN THE DYING AND THE DEAD: DR. JACK KEVORKIAN'S LIFE AND THE BATTLE TO LEGALIZE EUTHANASIA (2006).

8. This past Election Day, voters in the State of Washington approved Initiative 1000 by a margin of 58 percent to 42 percent. Curt Woodward, *Wash. Voters Approve Assisted Suicide Initiative*, SEATTLE TIMES, Nov. 4, 2008, at A1. The measure was modeled on Oregon's Death with Dignity Act. See OR. REV. STAT. §§ 127.805–885 (2005). Interestingly, it was the preexisting Washington statute forbidding assisted suicide that the Supreme Court found constitutional in *Washington v. Glucksberg*. See 521 U.S. 702, 735 (1997).

9. For thoughtful discussions of these arguments, pro and con, see GERALD DWORKIN, R.G. FREY & SISSELA BOK, EUTHANASIA AND PHYSICIAN-ASSISTED SUICIDE: FOR AND AGAINST (1998); ARGUING EUTHANASIA: THE CONTROVERSY OVER MERCY KILLING, ASSISTED SUICIDE AND THE RIGHT TO DIE (Jonathan D. Moreno ed., 1995); JAMES RACHELS, THE END OF LIFE: EUTHANASIA AND MORALITY (Oxford Univ. Press, 1986); Judith Thompson, *Killing, Letting Die, and the Trolley Problem*, 59 MONIST 204 (1976).

10. See *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 424–33 (Mass. 1977) (discussing the constitutionally protected right to die); *In re Quinlan*, 355 A.2d 647, 667–69 (N.J. 1976) (same); LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1365 (2d ed. 1988); Rachel D. Kleinberg & Toshiro M. Mochizuki, *The Final Freedom: Maintaining Autonomy and Valuing Life in Physician-Assisted Suicide Cases*, 32 HARV. C.R.-C.L. L. REV. 197, 209–24

*Cruzan* and rejected it in *Glucksberg*.<sup>11</sup> This Article does not rely on that approach. Substantive due process and the right of privacy, which may or may not be the same thing, are such troubled and vaguely defined doctrines<sup>12</sup> that they seem to obscure rather than illuminate the underlying moral issues on which decisions regarding human rights ultimately rest.<sup>13</sup> That is not to say that they should be eliminated from our constitutional jurisprudence, but only that they are best avoided if an alternative, more textually grounded rationale is available.

This Article argues that the intense controversy about assisted suicide and the related issue of terminating life support reflects the conflict between two moral systems, one traditional and the other evolving. It further argues that because one of these conflicting systems—the traditional one—is religiously based, any governmental action that imposes this morality through coercive governmental action violates the Establishment Clause. There have been previous efforts to use the Establishment Clause in place of substantive due process or the right of privacy, most notably in dealing with the issue of abortion.<sup>14</sup> These arguments, however, suffer from well-recognized conceptual defects,<sup>15</sup> and more seriously, it will be argued, are nonhistorical. The argument in this Article is based on the specific

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(1997) (critiquing existing right to die analyses and offering a modified framework for analyzing the constitutionality of the right to die under the Due Process Clause); Jonathan Rosen, *The Constitutionality of Statutes Prohibiting and Permitting Physician-Assisted Suicide*, 51 U. MIAMI L. REV. 875, 880–903 (1997) (analyzing the constitutional right to die and the related right of a physician assisted suicide); Cass Sunstein, *The Right to Die*, 106 YALE L.J. 1123, 1124–44 (1997); Note, *Physician-Assisted Suicide and the Right to Die With Assistance*, 105 HARV. L. REV. 2021, 2021–41 (1992) (analyzing whether the constitution provides constitutional right to die before any court had recognized the legality of physician assisted suicide).

11. *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 286–87 (1990). The companion case, *Vacco*, rejected the less common argument that laws against assisted suicide violate the equal protection clause. 521 U.S. 793, 799 (1997). The Court had little difficulty concluding that the Equal Protection Clause creates no substantive rights and that no suspect classification was involved. *Id.*

12. See generally LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990); Robert Dixon, *The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 BYU L. REV. 43; John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980); Jed Rubinfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989); Raymond Wacks, *The Poverty of Privacy*, 96 L.Q. REV. 73 (1980). For a defense of the privacy doctrine, see ANITA ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* (1988).

13. For a discussion on the moral character of human rights, see EDWARD RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE* 260–95 (2005).

14. See, e.g., DWORKIN, *supra* note 2, at 98–110 (applying the Establishment Clause in the context of abortion); Lawrence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 21–25 (1973) (same).

15. See *infra* Part II.A.

historical experience of Western civilization and the idea that in our society, current laws against assisted suicide are in fact efforts to take sides in an ongoing controversy and impose a religiously based morality on those who would otherwise choose an alternative approach. As a result, the Article grounds its argument about the unconstitutionality of laws against assisted suicide on an explicit, well-developed constitutional provision, rather than on substantive due process or the penumbral right of privacy.

Part I explores the relationship between systems of morality and views of suicide, tracing the changes in Western culture from a morality of honor to a morality of higher purposes to a morality of self-fulfillment. It further discusses the connection between the morality of higher purposes and the Christian religion. Part II discusses Establishment Clause doctrine. It then shows how laws against suicide or assisted suicide represent the coercive imposition of the Christian-based morality of higher purposes on citizens, and are thus unconstitutional under the First Amendment.

### I. SUICIDE AND MORALITY

While nothing is more universal or ineluctable than death, few things are more culture dependent or avoidable than suicide. The patterns of suicide and attitudes toward suicide exhibit wide gyrations from one society to another and from one era to another in the same society. Consequently, the study of suicide provides a window into one of the most disconcerting but significant aspects of human culture, namely, the malleability of moral attitudes. As we look back over three millennia of Western civilization, the variation in these patterns and attitudes betoken changes in our society's most basic conceptions of good and bad, right and wrong.

The attitudinal gyrations that characterize Western attitudes toward suicide can be illustrated by three quotations, three snapshots from a long, complex tradition. The first is from Plutarch, the second-century moral philosopher. Among his many works are the *Parallel Lives*, biographies of famous Greeks and Romans, arranged in pairs and designed to teach moral lessons by positive and negative example.<sup>16</sup> Plutarch pairs Demosthenes, the fiery Athenian orator and politician, with Cicero, the urbane Stoic orator, politician, and

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16. PLUTARCH, *THE LIVES OF THE NOBLE GRECIANS AND ROMANS* (John Dryden trans., Arthur Hugh Clough ed., Modern Library, rev. ed. 1992) (1979).



philosopher.<sup>17</sup> In their later years, both men found themselves under sentence of death and with no means of escape. Comparing their responses to this situation, Plutarch writes:

Cicero's death excites our pity; for an old man to be miserably carried up and down by his servants, flying and hiding himself from that death which was, in the course of nature, so near at hand; and yet at last to be murdered. Demosthenes, though he seemed at first a little to supplicate, yet, by his preparing and keeping the poison by him, demands our admiration; and still more admirable was his using it. When the temple of the god no longer afforded him a sanctuary, he took refuge, as it were, at a mightier altar, freeing himself from arms and soldiers, and laughing to scorn the cruelty of Antipater.<sup>18</sup>

Some twelve centuries later, Dante placed all suicides on the seventh level of Hell, where they are turned into stunted trees that produce poison in the place of fruit. One of these monstrosities tells the poet what has happened to him and what will occur on Judgment Day:

When the fierce spirit separates amiss  
 From out the body whence itself has torn,  
 Minos consigns it to the seventh abyss . . .  
 We shall go seek our bodies like the rest,  
 But with them never to be re-arrayed  
 For 'tis not just to have what we divest.  
 Here we shall drag them, and the forest glade  
 Shall see our bodies hanging dismally,  
 Each on the thorn tree of its injured shade.<sup>19</sup>

The person who has suffered this fate is Pier delle Vigne, advisor to Frederick II, the Holy Roman Emperor, who incited Frederick's ire by allegedly conspiring with Frederick's archenemy, Pope Innocent IV. At the time he committed the suicide for which Dante, and his society, were so ready to condemn him to eternal perdition, delle Vigne's eyes had been put out, and he had been locked in an underground dungeon.<sup>20</sup>

Six centuries after Dante, Emile Durkheim described the distribution and frequency of suicide and attempted to discern its

17. *Id.* at 1070–72. The comparison is somewhat weird, since the two men were not only very different people but played rather different roles in public affairs.

18. *Id.* at 1072.

19. DANTE ALIGHIERI, *THE DIVINE COMEDY* 52 (Melville Best Anderson trans., 1921).

20. DANTE ALIGHIERI, *THE DIVINE COMEDY* 80 n.3 (Carlyle-Wicksteed trans., Modern Library 1932).

cause in a book that remains one of the classics of sociology.<sup>21</sup> After discussing the “extra-social factors” that cause suicide, such as psychopathology and heredity, he proceeds to consider social causes, distinguishing among egoistic, altruistic, and anomic suicide. Summarizing the effect of these social causes, he states:

[I]ndividual peculiarities could not explain the social suicide-rate; for the latter varies in considerable proportions, whereas the different combinations of circumstances which constitute the immediate antecedents of individual cases of suicide retain approximately the same relative frequency. They are therefore not the determining causes of the act which they precede. . . .

Wholly different are the results we obtained when we forgot the individual and sought the causes of the suicidal aptitude of each society in the nature of the societies themselves. The relations of suicide to certain states of social environment are as direct and constant as its relations to facts of a biological and physical character were seen to be uncertain and ambiguous. Here at last we are face to face with real laws, allowing us to attempt a methodological classification of types of suicide.<sup>22</sup>

What is behind the dramatic changes in Western attitudes toward suicide that these three quotations typify? Not surprisingly, the answer is that the changes reflect more general transformations in the moral systems that prevailed in the different eras from which the quotations are drawn. This Part will trace, in an admittedly cursory fashion, the nature of those changes in morality. The passage from Plutarch reflects the characteristic morality of the Greco-Roman world, which can be described as a morality of honor. The passage from Dante reflects the characteristic morality of the medieval and early modern period, which is described here as a morality of higher purposes. Durkheim’s discussion reflects the emerging morality of contemporary times, which is described as a morality of self-fulfillment. Implicit in this account is that morality is related to culture and will change when culture changes. No particular metaethical claim about cultural relativism is being advanced, however.<sup>23</sup> Philosophical analysis may reveal a particular morality to

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21. EMILE DURKHEIM, *SUICIDE: A STUDY IN SOCIOLOGY* (John Spaulding & George Simpson trans., Free Press 1979) (1952). For an analysis of Durkheim’s work on suicide, see STEVEN LUKES, *EMILE DURKHEIM: HIS LIFE AND WORKS: A HISTORICAL AND CRITICAL STUDY* 191–225 (Stanford Univ. Press 2d ed. 1985) (1973).

22. DURKHEIM, *supra* note 21, at 261, 263.

23. For general discussions of this subject, see *ESSAYS ON MORAL REALISM* (Geoffrey Sayre-McCord ed., 1986); GILBERT HARMAN & JUDITH JARVIS THOMPSON, *MORAL RELATIVISM AND MORAL OBJECTIVITY* (1996); GILBERT HARMAN, *THE NATURE OF MORALITY: AN INTRODUCTION TO ETHICS* (1977); STEVEN LUKES, *MORAL RELATIVISM: BIG IDEAS/SMALL BOOKS* (2008); J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* (1977); *MORAL RELATIVISM: A READER* (Paul K. Moser & Thomas L. Carson eds., 2000).

be the one that all rational beings should follow,<sup>24</sup> but that would not contradict the observation that the actual moral systems people have adopted over the course of Western history—perhaps because they were irrational or unenlightened—have changed with changing times, an observation that, as will be shown below, is empirically demonstrable.

### A. *The Classical Morality of Honor*

The classical or Greco-Roman era was a long and complex period, as long as or longer than the Medieval, Renaissance, Reformation, Enlightenment, and Modern periods which followed,<sup>25</sup> and itself displays great variations of moral attitudes. But one major aspect of Greco-Roman morality that persisted over time is the morality of honor. Honor lies at the center of the virtues that were celebrated by classical society.<sup>26</sup> It appears to be the dominant morality of the Homeric era and plays a significant, if not exclusive, role in the more sophisticated moral thinking of the succeeding eras.<sup>27</sup>

According to this moral system, one's position in society was determined by one's status, and status, even if originally conferred by birth, is maintained by preservation of one's honor.<sup>28</sup> Because of its

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24. See generally Richard Boyd, *How to be a Moral Realist*, in *ESSAYS ON MORAL REALISM*, *supra* note 23, at 181; MATTHEW KRAMER, *MORAL REALISM AS A MORAL DOCTRINE* (2009); MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* (1998); RUSS SCHAFFER-LANDAU, *MORAL REALISM: A DEFENSE* (2005). This is certainly our general attitude toward science. Although many people subscribe to the idea that modern science has an objective validity that prior efforts fail to achieve, very few would dispute the observation that the scientific theories of these prior eras are the product of each era's culture, or even that our theories, such as General Relativity or evolutionary biology, can be linked to distinctive features of our culture. The argument would be that our culture has equipped us to grasp certain scientific truths in a way that prior cultures did not.

25. Periodization is often controversial. The period from the Middle Ages to contemporary times is about 1000 years, but the period from the formation of the Greek city-states to the fall of Rome was about 1300 years. See generally MICHAEL GRANT, *THE RISE OF THE GREEKS* (1988) (discussing the beginning of Greco-Roman civilization); PETER HEATHER, *THE FALL OF THE ROMAN EMPIRE: A NEW HISTORY OF ROME AND THE BARBARIANS* (2006). Since what used to be called the Dark Ages is now called the Early Middle Ages, that 500 years might be added to the postclassical era, but one can also date the classical era back 500 years to Mycenaean times. See generally JEAN-PIERRE VERNANT, *THE ORIGINS OF GREEK THOUGHT* (1962).

26. For classic statements of the ancient world's virtue ethics generally, see Aristotle, *Nicomachean Ethics* (W.D. Ross, trans.), in *THE WORKS OF ARISTOTLE* 339 (Robert Maynard Hutchins ed., 1952); PLATO, *THE REPUBLIC* (Allan Bloom trans., 1968). See ALISDAIR MACINTYRE, *AFTER VIRTUE* 121–64 (2d ed. 1984); VERNANT, *supra* note 25, at 82–90.

27. M.I. FINLEY, *THE WORLD OF ODYSSEUS* 114–54 (1965); JOINT ASS'N OF CLASSICAL TEACHERS, *THE WORLD OF ATHENS* 134–42 (1984); MACINTYRE, *supra* note 26, at 121–45.

28. WILLIAM MILLER, *BLOODTAKING AND PEACEMAKING: FEUD, LAW, AND SOCIETY IN SAGA ICELAND* 26–41 (1990) (discussing the development of “status, rank, and the economy of honor”).

link to status, honor was intrinsically hierarchical; one gained honor by showing respect and loyalty to powerful superiors, such as the king, and also by being generous and protective toward one's inferiors, particularly one's dependents. At the same time, honor was an essentially individualized possession. It involved one's personal reputation, one's position in the eyes of others. This reputation was based on courage, fortitude, and dignity; it could be damaged by another's disrespect and restored only by canceling that disrespect through some socially acknowledged means, such as punishing its author.<sup>29</sup> Ultimately, honor was regarded as being the purpose of life. In honor-based societies, as M.I. Finley notes, "[e]very value, every judgment, every action, all skills and talents have the function of either defining honor or realizing it."<sup>30</sup>

The relationship between honor and death was well established: honor was more important. Finley goes on to say: "The Homeric heroes loved life fiercely, as they did and felt everything with passion, and no less martyr-like characters could be imagined; but even life must surrender to honor. . . . [A]t the call of honor they obeyed the code of the hero without flinching and without complaining."<sup>31</sup> This relationship applied to suicide as well as death in battle. Perhaps the most famous suicide in Greek mythology is Ajax, who succumbs to an uncontrollable rage when Agamemnon awards Achilles's armor to Odysseus thus directly dishonoring Ajax, and resolves to murder the entire Hellenic army in their sleep. Athena saves the Hellenes by turning Ajax insane, so that he slaughters their cattle and sheep instead. When he comes to his senses, he realizes that his madness has resulted in a greater loss of honor than Agamemnon's decision did, and kills himself by falling on his sword.<sup>32</sup> In Sophocles's play, Menelaus refuses to give Ajax a proper burial because he tried to murder the Hellenes, not because he committed suicide.<sup>33</sup>

This approach to suicide persisted throughout the classical period. Plutarch clearly regarded suicide as a virtue when its purpose

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29. See WILLIAM MILLER, *HUMILIATION AND OTHER ESSAYS ON HONOR, SOCIAL DISCOMFORT, AND VIOLENCE* 83–87 (1993) (describing the restorative quality of retribution). As Miller observes: "To simplify greatly, honor is that disposition which makes one act to shame others who have shamed oneself, to humiliate others who have humiliated oneself." *Id.*

30. FINLEY, *supra* note 27, at 121.

31. *Id.*

32. 2 ROBERT GRAVES, *THE GREEK MYTHS* 321–25 (1960). The event does not appear in the *Iliad*, since it occurs after the death of Achilles.

33. SOPHOCLES, *AJAX*, IN *ELECTRA AND OTHER PLAYS* 17, 54 (E.F. Watling trans., 1953). Through the efforts of Teucer, his half-brother, and of Odysseus, Ajax receives a proper burial.

was to preserve a person's honor. To flee from death by being carried around by one's servants was undignified and dishonorable; to welcome death by taking poison, to take refuge "at a mightier altar," was an act of admirable courage. The Stoics, Plutarch's contemporaries, continue this theme, although modifying it into the more refined or sophisticated notion of dignity, and are even more explicit in their support for suicide.<sup>34</sup> According to Marcus Aurelius, if one cannot maintain virtues such as rationality and equanimity, "depart at once from life, not in passion, but with simplicity and freedom and modesty, after doing this one laudable thing at least in thy life, to have gone out of it thus."<sup>35</sup> At other points, his Stoicism leads him to an almost casual approach to suicide. "But it is not worth while to live, if [right actions] cannot be done. —Take thy departure then from life contentedly, just as he dies who is in full activity, and well pleased too with the things which are obstacles."<sup>36</sup> Cicero, the Roman statesman, orator, and Stoic philosopher expresses a similar sentiment: "It is the appropriate action to live when most of what one has is in accordance with nature. When the opposite is the case, or is envisaged to be so, then the appropriate action is to depart from life."<sup>37</sup> Epictetus, perhaps the leading Stoic thinker of the era,<sup>38</sup> is reported to have said:

[R]emember that the door is open. Do not be a greater coward than the children, but do as they do. Children, when things do not please them, say, 'I will not play any more'; so, when things seem to you to reach that point, just say, 'I will not play any more,' and so depart, instead of staying to make moan.<sup>39</sup>

This is not to suggest that the ancient world uniformly favored suicide. A recurrent countertheme is that suicide is a dereliction of duty; by depriving the state of one of its members, it represents a

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34. For more information on Stoicism generally, see TAD BRENNAN, *THE STOIC LIFE: EMOTIONS, DUTIES AND FATE* (Oxford Press 2d ed., 2007) (2005); *THE CAMBRIDGE COMPANION TO THE STOICS* (Brad Inwood ed., 2003); F.H. SANDBACH, *THE STOICS* (1975). Imperial Roman ethics and religion were highly pluralistic, but Stoicism was probably the leading ethical system of the early Empire.

35. *The Meditations of Marcus Aurelius Antonious* (G. Long trans.), in *THE STOIC AND EPICUREAN PHILOSOPHERS* 491, ¶ 8, at 564 (Whitney J. Oates ed., 1940) [hereinafter Oates].

36. *Id.* ¶ 47, at 550.

37. CICERO, *ON MORAL ENDS* 84 (Raphael Woolf trans., Julia Annas ed., 2004). Like many philosophers, however, Cicero did not follow his own advice. As Plutarch reports, he was captured and executed by Octavian's soldiers while attempting to hide. PLUTARCH, *supra* note 16, at 722–23; see ANTHONY EVERITT, *CICERO: THE LIFE AND TIMES OF ROME'S GREATEST POLITICIAN* 315–19 (2003).

38. See generally A.A. LONG, *EPICETUS: A STOIC AND SOCRATIC GUIDE TO LIFE* (2002).

39. ARRIAN, *DISCOURSES OF EPICETUS* (P.E. Matheson trans.), in Oates, *supra* note 35, at 223, 266. Epictetus did not write anything himself. Arrian's Discourses are assumed to record his teachings accurately; if not, then they record the thoughts of Arrian. *Id.* at 223.

wrong against the community. It would appear to be on this ground that suicide was illegal in the Roman Empire, since the penalty imposed was the forfeiture of the suicide's property to the state.<sup>40</sup> Both Plato and Aristotle condemn suicide, but Aristotle's condemnation is tepid and Plato's circumscribed. Aristotle states: "[H]e who through anger voluntarily stabs himself does this contrary to right reason, and thus the law does not allow; therefore he is acting unjustly. But towards whom? Surely towards the state, not towards himself."<sup>41</sup> This passage from the *Ethics* sounds more like an explanation of an odd law than an ethical condemnation. Plato condemns suicide but recognizes exceptions for a person acting under state command, suffering from an "excruciating and unavoidable misfortune," or falling into "some irremediable disgrace that he cannot live with." Plato reserves his condemnation for someone who "imposes this unjust judgment on himself in a spirit of slothful and abject cowardice."<sup>42</sup> Despite the disapproving tone, the exceptions Plato recognizes are so broad that they amount to a virtual endorsement of the practice, while his condemnation is so qualified that it is almost a nullity—after all, almost any action taken "in a spirit of slothful and abject cowardice" would merit moral condemnation.<sup>43</sup>

### B. The Christian Morality of Higher Purposes

Christianity replaced the morality of honor with what can be called a morality of higher purposes. While the transition from the Greco-Roman morality of honor to the Christian morality of higher purposes was far from unidirectional or well defined,<sup>44</sup> the new

40. Daniel M. Crone, *Historical Attitudes Toward Suicide*, 35 DUQ. L. REV. 7, 14–16 (1996).

41. Aristotle, *supra* note 26, \*1138a, at 1796.

42. Plato, *Laws* (Trevor Sanders trans.), in PLATO: COMPLETE WORKS 1318 § 873c–d, at 1532 (John M. Cooper trans., 1997). In excusing suicide under state command, Plato is certainly thinking of Socrates. See Plato, *Crito* (G.M.A. Grube trans.), in PLATO: COMPLETE WORKS, *supra*, at 37. The penalties Plato would impose on suicides all relate to the mode of their burial. *Id.*

43. Plato, *Laws* (Trevor Sanders trans.), in PLATO: COMPLETE WORKS, *supra* note 42, § 873d, at 1532.

44. The preexisting, Greco-Roman morality of Western society survived well into the Christian era, diluting the impact of the new religion. See generally ROBIN LANE FOX, PAGANS AND CHRISTIANS (1986). Moreover, the barbarian invasions meant that a new population of pagans had to be converted to Christianity. See ROGER COLLINS, EARLY MEDIEVAL EUROPE 300–1000, at 179–86, 234–61, 385–89 (2d ed. 1999); PATRICK J. GEARY, BEFORE FRANCE AND GERMANY: THE CREATION AND TRANSFORMATION OF THE MEROVINGIAN WORLD 171–78, 214–18 (1988); J.M. WALLACE-HADRILL, THE FRANKISH CHURCH (1983). During the intervening period, which resembled the Greek Dark Ages when the Greco-Roman morality of honor took shape, a new morality of honor emerged, under the name of chivalry. See generally GEORGES DUBY, THE CHIVALROUS SOCIETY (Cynthia Postan trans., 1980); MAURICE KEEN, CHIVALRY (1984). It was only in the High Middle Ages that Europe was fully re-Christianized through the Gregorian

morality was well established by the beginning of the High Middle Ages. Rather than defining morality in terms of personal attributes and comportment, Christian transcendentalism saw morality as both a means of salvation and an indication that one was going to be saved. This morality involved a rejection of the material world, as Max Weber noted in his pathbreaking study, *The Sociology of Religion*.<sup>45</sup> The world, from the perspective of such world-rejection religions,

is full of temptations, not only because it is the site of sensual pleasures which are ethically irrational and completely diverting from things divine, but even more because it fosters in the religiously average person complacent self-sufficiency and self-righteousness in the fulfillment of common obligations, at the expense of a uniquely necessary concentration on active achievements leading to salvation.<sup>46</sup>

But the morality that formed an integral part of the Christian religion possessed a positive as well as a negative dimension. It counseled not only an ascetic rejection of worldly pleasures but also an affirmative ethos that human action should be directed toward higher purposes. These purposes were both individual and collective; individually, each person should direct his actions to achieving or accepting personal salvation,<sup>47</sup> while collectively, people should create a social and political environment that facilitated such individual action.<sup>48</sup> Both the source and content of the actions that would produce this desirable effect were a matter of considerable controversy. During the Middle Ages, theologians debated whether either reason or faith

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Reforms, the Peace of God movement, and the new monastic orders. *See generally* H.E.J. COWDREY, *THE CLUNIACS AND THE GREGORIAN REFORM* (1970); HANS MAYER, *THE CRUSADES* (John Gillingham, trans., 2d ed., 1988); *THE PEACE OF GOD: SOCIAL VIOLENCE AND RELIGIOUS RESPONSE IN FRANCE AROUND THE YEAR 1000* (Thomas Head & Richard Landes eds., 1992); R.W. SOUTHERN, *THE MAKING OF THE MIDDLE AGES* (1953).

45. 1 MAX WEBER, *ECONOMY AND SOCIETY* 541–76 (Guenther Roth & Claus Wittich eds. (1978)).

46. *Id.* at 542.

47. 1 THOMAS AQUINAS, *SUMMA THEOLOGICA* 819–77, 996–1001 (Fathers of the English Dominican Province trans., 1981); JOHN DUNS SCOTUS, *ON THE WILL AND MORALITY* 237–92 (Allan Wolter trans., William A. Frank ed., 1997); WILLIAM OF OCKHAM, *PHILOSOPHICAL WRITINGS* (Philotheus Boehner trans., 1964) [hereinafter *PHILOSOPHICAL WRITINGS*]; WILLIAM OF OCKHAM, *ON THE VIRTUES* 111–19 (Rega Wood trans., 1997). *See generally* 2 FREDERICK COPLESTON, *A HISTORY OF PHILOSOPHY: AUGUSTINE TO SCOTUS* 398–411, 545–51 (1993); Mark D. Jordan, *Theology and Philosophy, in THE CAMBRIDGE COMPANION TO AQUINAS* 232, 232–47 (Norman Kretzmann & Eleonore Stump eds., 1993). Aquinas incorporated, or at least attempted to incorporate, the Aristotelian concept of virtue into his system, but redefined virtue so that it is infused by God, rather than being developed by habit, and so that it has God as its object. AQUINAS, *supra*, at 851–53.

48. AQUINAS, *supra* note 47, at 993–1025; WILLIAM OF OCKHAM, *ON THE POWER OF EMPERORS AND POPES* 87–98, 113–14 (Annabel S. Brett trans., 1998); *see* A.S. MCGRADY, *THE POLITICAL THOUGHT OF WILLIAM OF OCKHAM: PERSONAL AND INSTITUTIONAL PRINCIPLES* 48–74 (1974); Antony Black, *The Individual and Society, in THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT* c.350—c.1450, at 588 (J.H. Burns ed., 1988).

was a sufficient source by itself, and whether the required actions consisted of actions that produced results, actions based on good intentions, or a combination of the two.<sup>49</sup> Reformation thinkers failed to resolve these controversies but did succeed in adding others. Human beings are saved by faith alone, they argued, not by good works, however well intentioned, although they tended to revive good works as an emblem of true faith.<sup>50</sup> One constant throughout all these controversies, however, is that people must obey divine commands and act in ways directed toward their individual salvation and the salvation of their fellow human beings.

This morality of higher purposes generated a complicated set of attitudes toward death. The early Christian Church did not take a definitive position on suicide,<sup>51</sup> and there is no explicit prohibition of suicide in the Old or New Testaments.<sup>52</sup> The Christian prohibition of suicide developed over time as a result of both pragmatic and moral concerns. The martyrdoms that were so central to Christianity's self-conception were often close to voluntary self-destruction.<sup>53</sup> St. Polycarp, according to Eusebius, allowed himself to be arrested, responded to the threat of wild beasts and fire with equanimity, and

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49. PHILOSOPHICAL WRITINGS, *supra* note 47, at 109–25, 160–63; JOHN DUNS SCOTUS, PHILOSOPHICAL WRITINGS 133–62 (Allan Wolter trans., 1962); *see* DAVID LUSCOMBE, MEDIEVAL THOUGHT 52–56 (1997); John Haldane, *Medieval and Renaissance Ethics*, in A COMPANION TO ETHICS 133 (Peter Singer ed., 1993).

50. MARTIN LUTHER, ON THE BONDAGE OF THE WILL (J.I. Packer & O.R. Johnson trans., 1957); *see* HEIKO A. OBERMAN, LUTHER: MAN BETWEEN GOD AND THE DEVIL (1989); BERNARD M. G. REARDON, RELIGIOUS THOUGHT IN THE REFORMATION (2d ed. 1995); W.P. STEPHENS, ZWINGLI: AN INTRODUCTION TO HIS THOUGHT (1992); FRANÇOIS WENDEL, CALVIN: ORIGINS AND DEVELOPMENT OF HIS RELIGIOUS THOUGHT (Philip Mairet trans., 1997). Biblical sources for basing salvation on works are *Matthew* 25:34–40; *Mark* 10:21; and *Luke* 16:19–31. *See also James* 2:14–26. Biblical sources for basing salvation on faith alone come primarily from St. Paul. *See Romans* 1:17–18; *Colossians* 1:4–24.

51. Crone, *supra* note 40, at 17.

52. There are a number of Biblical stories in which a person commits suicide, asks to die, or takes action leading directly to death. Some of these persons are portrayed as good, for example, Samson, *Judges* 16:29–30, and Saul, 1 *Samuel* 31:4–6, while other are portrayed as evil, for example, Ahithophel, 2 *Samuel* 17:1–23, and, of course, Judas, *Matthew* 27:5. No explicit statement about suicide itself is provided.

53. The policy of the Roman government was not only to tolerate, but to actually encourage all religions, and demanded only that the Empire's inhabitants include sacrifices to the imperial cult among their rituals. Persecutions against Christians were based on their refusal to conduct these sacrifices, but most Roman officials had little taste for such an enterprise, and begged the Christians to relent. *See* FOX, *supra* note 44, at 419–92. Eusebius provides similar accounts:

The proconsul tried to dissuade [the Christian], stressing his youth and begging him as one still in the very prime of life to spare himself; but without a moment's hesitation he drew the savage beast towards him, wellnigh forcing and goading it on, the more quickly to escape from their wicked, lawless, life.

EUSEBIUS, HISTORY OF THE CHURCH: FROM CHRIST TO CONSTANTINE 169 (G.A. Williamson trans., 1965).



stood willingly upon the pyre.<sup>54</sup> The appeal of martyrdom was that it was said to absolve all sins and provide immediate entry to Heaven, where the martyr's rewards were a hundred times greater than those of an ordinary Christian.<sup>55</sup> This created the pragmatic danger of mass suicides. The reversal of Greco-Roman attitudes on the subject can thus be seen as the necessary consequence of a religion that portrayed the afterlife as a glorious reward, rather than a dreary shadow world.<sup>56</sup>

There is, however, a deeper explanation that lies in the underlying shift in moral attitudes.<sup>57</sup> Because Christianity's dominant morality was that human action must serve higher purposes, rather than individual honor, suicide was rejected as a selfish act that did not serve the purposes that God prescribed for human beings.<sup>58</sup> Translating into transcendental terms Aristotle's notion that suicide was a wrong against the community, Christian thinkers argued that people had a moral obligation to remain alive and endure whatever miseries confronted them.<sup>59</sup> Moreover, Thomas Aquinas insisted that decisions of life and death "belong[] to God alone."<sup>60</sup> The closely related act of welcomed martyrdom was distinguished as serving divine purposes.

This condemnation of suicide became more intense by the time of the High Middle Ages. Dante's enthusiasm for inflicting eternal punishment on a man who had so little reason to live is characteristic of the era.<sup>61</sup> When Joan of Arc, imprisoned in the tower of Beaurevoir

54. Eusebius, *supra* note 53, at 168–74.

55. FOX, *supra* note 44, at 419. *See generally id.* at 419–92.

56. St. Augustine, the most important theorist of the early Church, confronts this issue directly. 1 Aurelius Augustine, *The City of God*, in THE WORKS OF AURELIUS AUGUSTINE, BISHOP OF HIPPO 1, 38–39 (Marcus Dods trans., 1993). His answer is that suicide itself is a grievous sin, which is circular but, at least in his case, heartfelt. *Id.*

57. *See* HEINRICH FICHTENAU, LIVING IN THE TENTH CENTURY: MENTALITIES AND SOCIAL ORDERS 245–332 (Patrick J. Geary trans., 1991); TOM HOLLAND, THE FORGE OF CHRISTENDOM: THE END OF DAYS AND THE EPIC RISE OF THE WEST 223–64 (2008); JACQUES LE GOFF, THE MEDIEVAL IMAGINATION 67–77 (Arthur Goldhammer trans., 1988).

58. *See* AQUINAS, *supra* note 47, at 1465–70; Augustine, *supra* note 56, at 25–36. Augustine grounds his argument in the Decalogue's prohibition "Thou shalt not kill," and Aquinas follows him. But this obviously requires interpretation, which in this case is guided by the sense that life has higher purposes prescribed by God.

59. AQUINAS, *supra* note 47, at 1463; Augustine, *supra* note 56, at 32–36. Aquinas quotes Aristotle on this point; although he endorses Aristotle's secular argument that suicide wrongs the community, he quickly proceeds to the argument that judgment about life and death "belongs to God alone." AQUINAS, *supra* note 47, at 1469. *See* ERNST KANTOROWICZ, THE KING'S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THEOLOGY 269 (1957), for the sense of connection between these two principles that pervaded High Medieval thought.

60. AQUINAS, *supra* note 47, at 1469.

61. *See supra* text accompanying notes 19–20.

by John of Luxembourg, learned that she was about to be sold to the English, she leapt from the tower in an attempt to escape. She was knocked unconscious by her fall and thus recaptured, but she suffered no other damage and was fully recovered in short order. At her trial, much was made of the fact that jumping from the tower—the distance to the ground was about forty feet—was a suicide attempt, thus confirming her evil nature.<sup>62</sup> Her accusers suspected her of intending to commit this grievous sin although she was facing almost certain execution if she remained a prisoner, although jumping out of an open window is a fairly obvious means of escape, and although she had actually survived the jump without serious injury.<sup>63</sup>

The Catholic Church, of course, has not retracted this position in the modern era.<sup>64</sup> Rather, it has set itself in opposition to the moral changes that have accompanied the advent of modernity. Papal encyclicals combine the repetition of the Church's premodern morality with condemnations of the current beliefs and practices that will be described below.<sup>65</sup> There is nothing surprising about this, however. Moral transformations, unlike political revolutions, do not happen all at once, and it is standard, not unusual, for a powerfully stated and widely accepted morality to continue into the following era. Reverberations of the morality of honor can be found throughout the medieval period,<sup>66</sup> and the morality of higher purposes continues to command many people's loyalty in the current one. Indeed, the gradualness of the transition and the simultaneous existence of two

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62. MARINA WARNER, *JOAN OF ARC: THE IMAGE OF FEMALE HEROISM* 112–14 (1981).

63. Of course, the English were not conducting a fair trial, but looking for reasons to execute her. Thus, they simultaneously charged that if she had not intended to kill herself, she must have jumped because her voices told her she could fly, which was clearly the work of the devil. DESMOND SEWARD, *THE HUNDRED YEARS WAR: THE ENGLISH IN FRANCE 1337–1453*, at 213–22 (1978); WARNER, *supra* note 62, at 114. Still, they were in a highly charged political situation, and had to devise plausible-sounding charges.

64. U.S. CATHOLIC CONF., *CATECHISM OF THE CATHOLIC CHURCH* 549–50 (1994).

65. JOHN PAUL II, *EVANGELIUM VITAE: ON THE VALUE AND INVIOABILITY OF HUMAN LIFE* ¶¶ 64–66 (1995) (condemnation of assisted suicide); *id.* ¶¶ 15, 46–47, 71 (condemnation of modern morality *passim*); Pope Pius XI, *Casti Connubii* (Dec. 31, 1930) (condemnation of modern morality); see Father Robert Barry, *The Catholic Condemnation of Rational Suicide*, in JAMES L. WERTH, JR., *CONTEMPORARY PERSPECTIVES ON RATIONAL SUICIDE* 29 (1999).

66. One example is dueling. Characteristic of the morality of honor, it was condemned by European monarchs, see ROBERT BARTLETT, *TRIAL BY FIRE AND WATER: THE MEDIEVAL JUDICIAL ORDEAL* 109, 120–25 (1986); I.W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 308–14 (1956), and yet persisted throughout the second millennium. See ERIC JAGER, *THE LAST DUEL* (2004); GEORGE NIELSON, *TRIAL BY COMBAT* 167–201 (1890); BERTRAM WYATT-BROWN, *THE SHAPING OF SOUTHERN CULTURE: HONOR, GRACE, AND WAR, 1760s–1990s* (2001). The most famous duel in American history was fought between Alexander Hamilton and Aaron Burr, see *infra* note 72, but it was not the only one involving famous people. Andrew Jackson challenged John Sevier to a duel two years before, see H.W. BRANDS, *ANDREW JACKSON: HIS LIFE AND TIMES* 105–10 (2005).

distinct moralities are responsible for many of our social conflicts, as will be described below.

### *C. The Modern Morality of Self-Fulfillment*

The late eighteenth and early nineteenth centuries saw still another transformation of Europe's moral system as a result of the momentous changes stemming from the industrial revolution, the advent of the administrative state, and the development of systematic natural and social science. What emerged, although neither fully formed nor fully recognized for another century, can be described as a morality of self-fulfillment.<sup>67</sup> Its central idea is modern individualism: each person should be able to lead a life that makes use of her distinctive abilities and satisfies her particular aspirations and desires.<sup>68</sup> In other words, human action should not be directed toward a uniform ethos of achieving honor or toward higher purposes prescribed by a transcendental religion, but rather toward self-defined goals that will provide the most subjectively satisfying life.<sup>69</sup>

The intellectual origins and ramifications of this moral system are too complex to trace in this discussion, but one obvious and essential component is the shift from a religious to a psychological concept of human well-being, and of life's meaning in general. While part of the general secularization of Western civilization that has been occurring since the Renaissance, the shift toward psychology represents a distinctive theme in modern society. Its greatest champion was Freud, who redefined subjective discomfort with sexuality from a salutary transcendental warning to a dysfunctional

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67. A variant of this description appears in Edward Rubin, *Sex, Politics, and Morality*, 47 WM. & MARY L. REV. 1 (2005).

68. See HANNAH ARENDT, BETWEEN PAST AND FUTURE 17–40 (1954); EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 191–95 (W.D. Halls trans., 1984); 1 JURGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY (Thomas McCarthy trans., 1984); NIKLAS LUHMANN, THE DIFFERENTIATION OF SOCIETY (Stephen Holmes & Charles Larmore trans., 1982); J.B. SCHNEEWIND, THE INVENTION OF AUTONOMY: A HISTORY OF MODERN MORAL PHILOSOPHY (1998); MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Talcott Parsons trans., 1958).

69. Gewirth distinguishes between these two modes of self-fulfillment, identifying them as aspiration-fulfillment and capacity-fulfillment. ALAN GEWIRTH, SELF FULFILLMENT 13–18 (1998). While the two notions are theoretically distinguishable, as Gewirth suggests, they are connected both psychologically and sociologically in the modern world. *Id.* Psychologically, people's capacities tend to determine their aspirations, both because the modern world's social mobility encourages talented people to aim high and because its competitiveness and relative lack of entrenched privilege cautions less talented people to be realistic. Sociologically, the modern world allows for a wide range of roles, ideologies, and life experiences, allowing individuals to construct their aspirations and develop their capacities as part of a unified experience of maturation. The result is a unified ethos centered on the general concept of self-fulfillment.

mental affliction.<sup>70</sup> The response that follows from this redefinition is therapy, not prayer—that is, an effort to eliminate the sense of discomfort rather than to suppress the underlying desire.<sup>71</sup> This equation of ontological well-being with somatic well-being—the term “mental health” being indicative and distinctly modern—reflects an ethos which excludes higher purposes and defines human goals in individualistic terms.

From the perspective of the preexisting morality of higher purposes, self-fulfillment may not seem like a morality at all, but rather like the absence of morality. However, like the Greco-Roman morality of honor or the Christian morality of higher purposes, it provides comprehensive criteria for people’s relationships with each other, as well as for their understanding of themselves. It generates the political principle that each person should be allowed as much freedom of action as she can exercise without impinging on the efforts of others to achieve self-fulfillment. But it also extends to more personal principles that we place beyond the reach of politics, such as an obligation to provide others with assistance in their efforts to fulfill themselves. Just as Greco-Roman morality subordinated the continuation of life to its master value of honor and Christian morality subordinated it to the service of higher purposes, modern morality subordinates life’s continuation to personal self-fulfillment. For the most part, life is to be preserved at nearly all costs; for individuals to fulfill themselves, it is generally necessary for them to be alive. Modern morality is thus more solicitous of life than either of its predecessors. It views the sacrifice of life for honor as jejune and wasteful pride, and perhaps—since it is the first moral system to assert the equality of men and women—as testosterone-driven male

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70. On Freud generally, see PETER GAY, *FREUD: A LIFE FOR OUR TIME* (1998); TONY THWAITES, *READING FREUD: PSYCHOANALYSIS AS CULTURAL THEORY* (2007). At present, the scientific validity of Freud’s theories is a matter of controversy. See generally ALLEN ESTERSON, *SEDUCTIVE MIRAGE: AN EXPLORATION OF THE WORK OF SIGMUND FREUD* (1993); SEYMOUR FISHER & ROGER GREENBERG, *FREUD SCIENTIFICALLY REAPPRAISED: TESTING THE THEORIES AND THERAPY* (1996); JOHN FORRESTER, *DISPATCHES FROM THE FREUD WARS: PSYCHOANALYSIS AND ITS PASSIONS* (1997). But the impact of Freud on Western culture is vast and incontestable. See generally ILHAM DILMAN, *FREUD AND HUMAN NATURE* (1983); PHILIP MANNING, *FREUD AND AMERICAN SOCIOLOGY* (2005); THWAITES, *supra*.

71. See generally MARTIN L. GROSS, *THE PSYCHOLOGICAL SOCIETY: A CRITICAL ANALYSIS OF PSYCHIATRY, PSYCHOTHERAPY, PSYCHOANALYSIS AND THE PSYCHOLOGICAL REVOLUTION* (1978); CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS* (1979); EVA MOSKOWITZ, *IN THERAPY WE TRUST: AMERICA’S OBSESSION WITH SELF-FULFILLMENT* (2001); PHILIP RIEFF, *THE TRIUMPH OF THE THERAPEUTIC: USES OF FAITH AFTER FREUD* (1987); RICHARD SENNETT, *THE FALL OF PUBLIC MAN* (1986). The negative tone of these studies reflects the general discomfort with the moral transformation of the modern era and the desire to judge the new morality in terms of the old.

display behavior.<sup>72</sup> It views martyrdom as a fetishistic and unnecessary response to duress. What is important is to lead a life that is fulfilling in its entirety and that meets the individual's goals, aspirations, and desires. If some insult to one's honor or compelled violation of one's religion is so disturbing that it impedes one's ability to lead a fulfilling life, one should go into therapy to rid oneself of this obsession.<sup>73</sup>

According to the morality of self-fulfillment, suicide is an appropriate, though not obligatory, response when there is no further possibility of living a fulfilling life. Whether such a possibility exists is always a subjective judgment by the individual. In some cases, the circumstances that produce this situation are observable by another person, as when the individual is suffering from a painful and soon-to-be-fatal disease.<sup>74</sup> In other cases, these circumstances may be apparent only to the individual, like Edward Arlington Robinson's Richard Cory.<sup>75</sup> Those who are devoted to a person may feel profound

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72. Consider a famous incident of death for honor in American history—the duel between Alexander Hamilton and Aaron Burr. Its late date—dueling had been illegal in virtually all Western countries for hundreds of years—betrays it as an atavism, a holdover from a prior era that had survived among a narrow social class. The dispute centered on the single word “despicable” that Hamilton was reported in a newspaper to have applied to Burr's behavior. Burr demanded that Hamilton retract the word, which he had probably never used in the first place, but Hamilton refused out of a sense of wounded honor and goaded Burr into challenging him. Having done so, he decided to throw away his first shot as further proof of his honor. At the time, Burr (whom Hamilton knew to be an expert marksman) gunned him down. Hamilton was the primary source of support for his sickly wife and six children — and there would have been seven, except his eldest son had been killed in exactly the same manner one year before. See RON CHERNOW, *ALEXANDER HAMILTON* 650–55, 680–709 (2004).

73. The antiheroic, egalitarian, individualistic character of modern times is widely noted, most often in negative terms. See generally GERTRUDE HIMMELFARB, *THE DE-MORALIZATION OF SOCIETY: FROM VICTORIAN VIRTUES TO MODERN VALUES* (1994); LASCH, *supra* note 71; MOSKOWITZ, *supra* note 71; SENNETT, *supra* note 71. For more balanced, less disconsolate accounts, see ANTHONY GIDDENS, *THE TRANSFORMATION OF INTIMACY: SEXUALITY, LOVE AND EROTICISM IN MODERN SOCIETIES* (1992); ANTHONY GIDDENS, *MODERNITY AND SELF-IDENTITY: SELF AND SOCIETY IN THE LATE MODERN AGE* (1991); CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989). Another perspective on the same process is provided by discussion of the decline of religion and religious values in the modern world. See, e.g., STEVE BRUCE, *GOD IS DEAD: SECULARIZATION IN THE WEST* (2002); OWEN CHADWICK, *THE SECULARIZATION OF THE EUROPEAN MIND IN THE 19TH CENTURY* (1975); RONALD INGLEHART, *CULTURE SHIFT IN ADVANCED INDUSTRIAL SOCIETY* (1990); CHARLES TAYLOR, *A SECULAR AGE* (2007).

74. For a comprehensive analysis, see C.G. PRADO & S.J. TAYLOR, *ASSISTED SUICIDE: THEORY AND PRACTICE IN ELECTIVE DEATH* (1999).

75. And he was rich—yes, richer than a king;  
And admirably schooled in every grace:  
In fine, we thought that he was everything  
To make us wish that we were in his place.  
So on we worked, and waited for the light

sorrow at that person's suicide, but the suicide itself is not a matter for moral condemnation. Of course, it may be condemned on the grounds that others were dependent on the person for their own self-fulfillment, but this is a condemnation of irresponsible action, not of suicide per se.

The passage quoted above from Durkheim reflects the way suicide is viewed in the new morality of self-fulfillment as clearly as the passage from Plutarch reflects the morality of honor or the passage from Dante reflects the morality of higher purposes. Of course, Durkheim's discussion is sociological, not moralistic, but that is precisely the point. According to the morality of self-fulfillment, dysfunctional human behavior does not result from a lack of virtue or belief, but from the interaction of large-scale social forces with the individual. Part of the complex of cultural phenomena that both generate and are generated by the morality of self-fulfillment is the development of social science,<sup>76</sup> and the general attitude toward social and individual behavior that this development implies. Because individual behavior is seen as the result of social forces, the modern response to it is not one of general approval or condemnation. Rather, we try to intervene at the individual level to help people deal with these forces in terms of their own values and aspirations. We try to intervene at the social level to ameliorate the negative impact of these forces on individuals. Durkheim, reflecting modern attitudes, ascribes suicide to sociological forces, not to a moral failing of the individual;<sup>77</sup> the modern response to this way of understanding suicide is therapy for the individual and social welfare programs for society at large.

## II. ASSISTED SUICIDE AND LAW

Lurking behind the dispute about assisted suicide is a clash of conflicting moralities regarding suicide itself. Behind this, in turn, lies a larger conflict regarding different conceptions of morality in

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And went without the meat, and cursed the bread;  
And Richard Cory, one calm summer night,  
Went home and put a bullet through his head.

EDWIN ARLINGTON ROBINSON, COLLECTED POEMS 82 (1921).

76. See generally HOWARD BECKER & HARRY ELMER BARNES, SOCIAL THOUGHT FROM LORE TO SCIENCE (3d ed. 1961); A.H. HALSEY, A HISTORY OF SOCIOLOGY IN BRITAIN: SCIENCE, LITERATURE AND SOCIETY (2004); ROSCOE C. HINKLE, DEVELOPMENTS IN AMERICAN SOCIOLOGICAL THEORY 1915–1950 (1994); DONALD MACRAILD & AVRAM TAYLOR, SOCIAL THEORY AND SOCIAL HISTORY (2004); LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA 151–200 (2001).

77. DURKHEIM, *supra* note 21.

general.<sup>78</sup> The perspective offered in the preceding Part links these attitudinal conflicts with major trends in the moral thinking of Western society over the course of its entire development. The point is not simply to advance a more venerable explanation than is usual in discussing assisted suicide, but rather to suggest that basic moral attitudes must be viewed in the context of the historical and cultural experience that generates them. Attitudes develop over long periods of time and are linked with other long-developing belief systems; it is difficult to understand their distinctive features without the comparison afforded by an extended historical perspective.

The morality of honor is largely defunct in the Western world, despite occasional reverberations.<sup>79</sup> Our current cultural experience involves the transition from the Christian morality of higher purposes to the modern morality of self-fulfillment. This transition is gradual, having been in process for at least two centuries, but it is far from gentle. In fact, it is disturbing, painful, and vertiginous—disturbing because we are moving from an established ethos to an emerging one, painful because the displacement of something as basic as morality inevitably engenders a severe sense of loss, and vertiginous because the criteria by which we decide whether social change is good or bad are the very things undergoing transformation.

With respect to the issue at hand, the emergence of the new morality of self-fulfillment can be seen in the abolition of criminal laws against suicide in every state,<sup>80</sup> as well as in the Death with Dignity Acts that Oregon and Washington have adopted.<sup>81</sup> The resistance to this new morality, and the desire to cling to its declining predecessor, can be seen in the controversy over the Terri Schiavo

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78. See JAMES D. HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991) (attributing conflict to schisms between progressive and traditional interpretations within major religions); GEORGE LAKOFF, *MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK* 65–140 (2d ed. 2002) (attributing conflict to different theories of child rearing). Lakoff's account is essentially nonhistorical, however, while Hunter's is limited to contemporary events. This Article is an attempt to link recent development to more extensive historical trends.

79. One such example is the Hamilton-Burr duel. See *supra* note 72. This occurred many centuries after dueling, a practice that originated with the morality of honor, ceased to be a judicial procedure. See ERIC JAGER, *THE LAST DUEL: A TRUE STORY OF CRIME, SCANDAL, AND TRIAL BY COMBAT IN MEDIEVAL FRANCE* (2004) (providing historical overview of medieval judicial duels and narrative of the last recorded judicial duel in Paris); GEORGE NIELSON, *TRIAL BY COMBAT* 203, 306–07 (1890) (discussing some of the last judicial duels).

80. See Stacy Mojica & Dan S. Murrell, *The Right to Choose—When Should Death Be In the Individual's Hands?*, 12 *WHITTIER L. REV.* 471, 487–88 (1991) (noting that while attempted suicide was treated as a misdemeanor at common law, it is no longer a crime in any state in the United States, though some states retain provisions stating that suicide or suicide-related procedures are not condoned).

81. OR. REV. STAT. §§ 127.805–.885 (2005); WASH. REV. CODE § 70.245 (2008).

case, the Bush Administration's effort to preempt the Oregon statute, and, of course, the continued opposition to legalizing assisted suicide. It is hardly a surprise to find that the Republican Party, which self-identifies as conservative, tends to align itself with the traditional morality on this issue (and other issues), while the Democratic Party, the more liberal of the two, tends to align itself with the more modern, emerging morality.<sup>82</sup>

This account is purely descriptive and makes no effort to pass normative judgments. Such judgments would be difficult to formulate in a persuasive manner because they require a choice among the competing moralities or the introduction of some different morality that would possess even less traction for modern Americans.<sup>83</sup> But law, and particularly constitutional law, does provide a basis to advance judgments. The U.S. Constitution ensconces a set of normative choices within our legal system, and these norms, as law, are ones that our society has agreed to implement and abide by.

This Part will argue that the Establishment Clause of the U.S. Constitution embodies a normative decision that forbids blanket prohibitions of assisted suicide. The Establishment Clause norm, of course, is separation of church and state. When the prohibition of assisted suicide is viewed within the historical context described in Part I, it can be shown to violate the Establishment Clause because it enforces a particular religiously inspired moral choice and lacks a countervailing secular justification. The first section of this Part briefly describes Establishment Clause doctrine. The next section applies that doctrine to laws prohibiting assisted suicide and shows that these laws are properly regarded as religiously motivated. The following section then argues that the secular justifications that have been invoked in support of these laws are unconvincing. The final section argues that this Establishment Clause rationale is preferable to arguments against prohibitions of assisted suicide that are based on a substantive due process or penumbral right to die.

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82. For discussions of current political alignments, see generally THOMAS FRANK: WHAT'S THE MATTER WITH KANSAS: HOW CONSERVATIVES WON THE HEART OF AMERICA (2005); LAKOFF, *supra* note 78; POLITICIANS AND PARTY POLITICS (John G. Geer ed., 1998).

83. C.G. PRADO, CHOOSING TO DIE: EFFECTIVE DEATH AND MULTICULTURALISM (2008), attempts to define the meaning of a rationally justifiable decision to commit suicide in cross-cultural terms. His definition, however, does not free itself from culturally-grounded perspectives, but rather incorporates a variety of those views in an effort to go beyond the perspectives of any particular culture. *Id.* at 41–45, 111–34.



*A. The Establishment Clause*

The meaning of the Establishment Clause, like that of so many of the Constitution's important provisions, is highly controversial and subject to a number of competing approaches. Even a cursory account of Establishment Clause doctrine would require more space than this entire Article. This section, therefore, will focus almost entirely on the element in the doctrine that is central to my argument—the element of coercion.<sup>84</sup>

Establishment Clause doctrine in general centers around three basic principles, which can be described—moving from most to least restrictive on governmental action—as strict separation, neutrality, and accommodation.<sup>85</sup> Strict separation is the principle expressed by *Everson v. Board of Education*,<sup>86</sup> the Supreme Court's first decision applying the Establishment Clause to the states. It sees the First Amendment as having erected a "high and impregnable" wall between church and state<sup>87</sup> and as creating an essentially secular government.<sup>88</sup> Its stringency has led to its decline in recent years<sup>89</sup> and to its displacement by the principle of neutrality. Neutrality

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84. For example, Establishment Clause doctrine includes an important antidiscrimination principle—that legislation may not favor one religion over another. *See, e.g., Larson v. Valente*, 456 U.S. 228, 245–55 (1982) (laws may not distinguish between religious organizations on the basis of the amount of support they receive from members). Because this Article discusses a choice between a religiously motivated law and a secular law, it does not need to invoke this aspect of the doctrine.

85. John Witte suggests that recent cases display several additional principles, which he describes as endorsement, coercion and equal treatment. *See* JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 149–84 (2000).

86. 330 U.S. 1, 15–18 (1947).

87. *Id.* at 18. Other decisions have also expressed this separationist view. *See, e.g., Walz v. Tax Comm'r*, 397 U.S. 664 (1970) (upholding state tax exemptions for religious organizations); *Engel v. Vitale*, 370 U.S. 421 (1962) (forbidding prayer in schools). *See generally* FRANK SORAUF, THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE (1976) (discussing church-state separation litigation in the mid- to latter-twentieth century and the various positions and interpretations involved in the constitutional struggle surrounding church-state relationships); THE WALL BETWEEN CHURCH AND STATE (Dallin Oaks ed., 1963) (providing collection of essays on church-state relationship in America).

88. *See Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 313 (Stewart, J., dissenting) (arguing that prohibition of certain practices under strict separationist principles promotes a "religion of secularism"); Alan Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692, 700 (1968) (observing that denial of aid to parochial schools on strict separationist grounds promotes a certain secular religionism). *But see* John C. Jeffries, Jr. & James Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001) (finding that the concept of separation was strongly motivated by anti-Catholicism and division among various denominations).

89. *See* STEPHEN CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZES RELIGIOUS DEVOTION (1993); Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1994).

forbids government from favoring one religion over another, but is distinguishable from strict separation, at least in theory, because it also forbids the government from favoring secularism over religion.<sup>90</sup> It is often operationalized through the *Lemon* test, which provides that a statute is constitutional only if it has a secular purpose, neither advances nor inhibits religion as its primary effect, and does not foster excessive government entanglement with religion.<sup>91</sup> The *Lemon* test is far from unambiguous<sup>92</sup> and has been severely attacked by several members of the Court,<sup>93</sup> but it has never been overruled and probably remains the leading interpretation of the Establishment Clause.<sup>94</sup>

The third principle, frequently described as accommodation, reflects the Court's more sympathetic treatment of religion in recent years.<sup>95</sup> It permits the government to acknowledge and accommodate the religious character of the American people and only invalidates

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90. See *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 8–17 (1989); *Mueller v. Allen*, 463 U.S. 388, 393–95 (1983); *Epperson v. Arkansas*, 393 U.S. 97, 103–05 (1968). See generally Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961); Douglas Laycock, *Formal, Substantive and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990); Michael W. McConnell, *Religious Freedom at the Crossroads*, 59 U. CHI. L. REV. 115 (1992).

91. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). Several opinions by Justice O'Connor have suggested the separate criterion that the government may not act in a manner that symbolically endorses a particular religion. See *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 776 (1995) (O'Connor, J., concurring in the judgment); *County of Allegheny v. ACLU Pittsburgh Chapter*, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring in part and in the judgment); *Lynch v. Donnelly*, 465 U.S. 668, 679–80 (1984) (O'Connor, J.). For a favorable assessment of this approach, see Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049 (1986). For a critique, see Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987).

92. See Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905 (1987) (discussing development of *Lemon* test and proposing reforms aimed at greater consistency and objectivity in application of the test).

93. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 232–35 (1997) (rejecting *Lemon's* entanglement criterion).

94. See Ira C. Lupu, *Which Old Witch?: A Comment on Professor Paulsen's Lemon is Dead*, 43 CASE W. RES. L. REV. 883, 884–89 (1993); Daniel O. Conkle, *Lemon Lives*, 43 CASE W. RES. L. REV. 865 (1993). But see Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795 (1993).

95. See generally Arlin M. Adams & Sarah Barringer Gordon, *The Doctrine of Accommodation in the Jurisprudence of the Religion Clauses*, 37 DEPAUL L. REV. 317 (1988); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992). The current reliance on this approach should be regarded as a comeback rather than an innovation, since accommodationist reasoning appears in a number of the Court's early cases. See, e.g., *McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding Sunday closing laws); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961) (same); *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding statute granting students release time from public school for religious study).

laws that coerce religious activity or fail to treat different religions equally.<sup>96</sup> It has been advanced in several spirited dissents<sup>97</sup> and by the plurality opinion in *Mitchell v. Helms*,<sup>98</sup> but it does not seem to have supplanted the neutrality test.<sup>99</sup> The concern about a test that takes coercion or open favoritism as its touchstone is that it would significantly limit the Establishment Clause's current scope.<sup>100</sup> Many governmental actions that are now regarded as unconstitutional, such as direct fiscal aid to religious organizations and religious displays in public buildings, could be deemed acceptable if this test became the prevailing one.<sup>101</sup>

These crosscurrents were plainly evident in *Lee v. Weisman*,<sup>102</sup> probably the leading case on the applicability of a coercion principle in Establishment Clause doctrine. The case centered on two brief prayers that an invited clergyman offered at the graduation ceremony of a public middle school in Providence, Rhode Island. Writing for the majority, Justice Kennedy declined to revisit controversy over the Court's use of the *Lemon* test.<sup>103</sup> Instead, he declared, the case was governed by the basic fact that both public pressure and peer pressure compelled the graduating students to listen to the prayers in question. This was sufficient, in his view, to render the prayers unconstitutional. "It is beyond dispute that, at a minimum, the

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96. In the legal academy, Michael McConnell has been the most enthusiastic advocate of this approach. See Michael McConnell, *State Action and the Supreme Court's Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 PEPPERDINE L. REV. 681 (2001); McConnell, *supra* note 95; Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM & MARY L. REV. 933 (1986); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1.

97. See *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 397-400 (1993) (Scalia, J., concurring in judgment); *Lee v. Weisman*, 505 U.S. 577, 631-45 (1992) (Scalia, J., dissenting).

98. 530 U.S. 793, 801-36 (2000).

99. Some of the recent cases that were decided under the neutrality principle, however, have a distinctly accommodationist flavor. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 649-56 (2002) (upholding school voucher program that allowed vouchers to be spent on parochial schools); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 113-19 (2001) (invalidating exclusion of religious group from use of school facilities after hours).

100. See Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 884-85 (1986); Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691, 1703-14 (1988).

101. See, e.g., *Stone v. Graham*, 449 U.S. 39 (1980) (prohibiting a state from requiring that the Ten Commandments be posted in public school buildings); *Ill. ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203 (1948) (striking down a program that provided religious instruction on public school grounds during regular school hours for children whose parents opted for such instruction). Both decisions, which are currently regarded as fixed points in Establishment Clause jurisprudence, could be reversed under a coercion-only test.

102. 505 U.S. 577 (1992).

103. *Id.* at 586-87.

Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'<sup>104</sup>

Justice Kennedy's decision, which prevailed by a 5-4 vote, elicited two concurrences and a dissent. The concurrences, written by Justices Blackmun and Souter and each joined by Justices O'Connor and Stevens, readily agreed that coerced religious observance was a clear violation of the Establishment Clause.<sup>105</sup> The concern in both concurrences was to counteract any implication in the majority opinion that the Establishment Clause was limited to cases of coercion. Both opinions argued that the coercion involved in *Weisman* itself was an appropriate and obvious basis for invalidating the government's action, but that there are many situations not involving coercion where governmental action would be invalid as well.

Justice Scalia's dissenting opinion, which was joined by Justices Rehnquist, Thomas, and White, was largely silent about noncoercion cases, which may indicate a willingness to limit the Establishment Clause in the manner that the concurring opinions feared. But the opinion was in complete agreement with the majority that coercion is constitutionally anathema. While it was written in Justice Scalia's typically intemperate style,<sup>106</sup> its disagreement with the majority was limited to the question of whether the specific situation in the case was actually coercive. Because the middle school neither imposed any formal participation requirement nor any

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104. *Id.* at 587 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)). *Weisman* was reaffirmed in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), which involved a student-led prayer at high school football games. Even though the prayer was offered by a student selected by other students, not school officials, and attendance at football games was entirely voluntary, the Court held that there was a sufficient element of coercion involved to support a facial challenge to the practice. "Even if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship." *Id.* at 312. Justice Rehnquist's dissent, joined by Justices Scalia and Thomas, resembled Justice Scalia's *Weisman* dissent in that it questioned the factual basis for concluding that coercion had occurred, but not the principle that any coerced practice would be unconstitutional. *Compare id.* at 318-26 (Rehnquist, J., dissenting), with *Weisman*, 505 U.S. at 631-46 (Scalia, J., dissenting).

105. See, e.g., *Weisman*, 505 U.S. at 605 (Blackmun, J., concurring) ("There is no doubt that attempts to aid religion through government coercion jeopardize freedom of conscience. Even subtle pressure diminishes the right of each individual to choose voluntarily what to believe.").

106. See Edward Rubin, *Question Regarding D.C. v. Heller: As a Justice, Antonin Scalia is (A) Great, (B) Acceptable, (C) Injudicious*, 54 WAYNE L. REV. 1105 (2008) (critiquing the tone of Justice Scalia's opinion and linking it to defects in his reasoning).

sanction for a student's failure to follow the informal norms of participation, Justice Scalia argued that no coercion was involved.<sup>107</sup>

For present purposes, the important point is that all the Justices agree that coercing someone to follow the dictates of a particular religion is unconstitutional. In the midst of the doctrinal farrago that afflicts the Establishment Clause,<sup>108</sup> there appears to be a consensus that coercion is a core principle of the clause's application. Some of the Justices might choose to limit the clause to this core and "accommodate" noncoercive governmental action that supports religious practices. Others—still the majority at present—extend the clause's reach, using the *Lemon* test or similar criteria to include financial support, religious displays, endorsement, and entanglement within the ambit of its prohibition. But the clause's application to coercive governmental action seems to be common ground.

One reason that coercion is recognized as so central to the Establishment Clause is because this principle is functionally connected to the closely allied Free Exercise Clause, which is centrally concerned with coercion.<sup>109</sup> Even more significantly, it is connected to

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107. As Justice Scalia stated: "Thus, while I have no quarrel with the Court's general proposition that the Establishment Clause 'guarantees that government may not coerce anyone to support or participate in religion or its exercise,' [citation omitted] I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty . . ." *Weisman*, 505 U.S. at 642. Expanding on this point, he explained:

The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty. Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities.

*Id.* at 640 (emphasis in original).

108. Daniel Farber, in the final chapter of his book discussing the doctrinal complexities of the First Amendment, states: "From a lawyer's point of view, the Establishment Clause is the most frustrating part of First Amendment law. The cases are an impossible tangle of divergent doctrines and seemingly conflicting results." DANIEL A. FARBER, *THE FIRST AMENDMENT* 263 (1998).

109. See, e.g., *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (striking down city ordinances that prohibited the ritual sacrifice of animals within the city limits because these ordinances were designed to forbid one of the practices of Santeria); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (rejecting a Free Exercise claim brought by Orthodox Jews against Pennsylvania's Sunday closing law on the ground that the law may have disadvantaged Jews, but it was not coercive). Regarding the relationship between the two religious clauses, see generally Jesse H. Choper, *A Century of Religious Freedom*, 88 CAL. L. REV. 1709 (2000) (discussing the relationship between the two religion clauses); Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980) (discussing judicial treatment of the two clauses and arguing for a reconciling principle whereby the Establishment Clause would forbid only government action that has a solely religious purpose and that is likely to impair religious activity by coercing or otherwise influencing religious beliefs); Ira C. Lupu, *Threaded Between the Religion Clauses*, 63 LAW & CONTEMP.

the general concept of human rights at a much more organic level than other elements of Establishment Clause doctrine. Theories of human rights generally center around the protections afforded to individuals against government coercion, rather than on the government's use of resources or its symbolic behavior.<sup>110</sup> While constitutional provisions, as positive law, do not necessarily demand a theoretical justification, the interpretation of a vague and general provision such as the Establishment Clause is greatly aided by such theoretical support. This is not to argue that the Establishment Clause should be limited to noncoercive government action, but only that its application to coercive action stands on a particularly secure footing because of the theoretical support for that interpretation that human rights theory provides.<sup>111</sup>

The idea that government coercion of religious practices lies at the center of the Establishment Clause's prohibition is further supported by empirical considerations. Any regime that engages in such coercion is generally regarded as an oppressive one.<sup>112</sup> In contrast, a number of the nations that possess the world's best human

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PROBS. 439 (2000) (discussing legal treatment of religious clauses and arguing for a more balanced, interweaving approach that takes all relevant parts of clauses into account).

110. See, e.g., MAURICE CRANSTON, *WHAT ARE HUMAN RIGHTS?* (1973); JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* (1989); JOEL FEINBERG, *RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY* (1980); ALAN GEWIRTH, *THE COMMUNITY OF RIGHTS* (1996); JAMES NICKEL, *MAKING SENSE OF HUMAN RIGHTS: PHILOSOPHICAL REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (1987); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

111. This concern with coercion underlies the strong stand that the Supreme Court has taken against school prayer, which is probably the single most stringent and coherent line of decisions in Establishment Clause law. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (student-led nondenominational prayer at football game); *Lee v. Weisman*, 505 U.S. 577 (1992) (nondenominational prayer at graduation); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (moment of silence); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (voluntary Bible reading); *Engel v. Vitale*, 370 U.S. 421 (1962) (nondenominational prayer written by school officials). In contrast, the Court has upheld the use of prayer to open sessions of a state legislature. See *Marsh v. Chambers*, 463 U.S. 783 (1983). Although the opinion speaks primarily in terms of history and tradition, there is a clear implication that no one was particularly affected by the prayer. See *id.* at 795 ("the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow" (quoting *Abington*, 374 U.S. at 308)). The distinction between adult state legislators and school children is best understood in terms of implicit coercion, rather than historical tradition.

112. The United Nations' Universal Declaration of Human Rights prohibits coercion of religious practices in Article 18, which states: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." But the Declaration contains no prohibition on governmental financial or symbolic support of a particular religion. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

rights records have established churches, thus providing both financial and symbolic support to a particular religion.<sup>113</sup> Again, this does not mean that the Establishment Clause in the American Constitution should not be more broadly interpreted. In light of our history of secular government and religious pluralism, separation of church and state is clearly an important principle in our particular political tradition. But our history confirms, even more decisively, the centrality of the concern about coerced religious observance. The Framers were acutely aware that Europe had been convulsed by two centuries of almost continuous and often devastating religious conflict.<sup>114</sup> As heirs of the Enlightenment, and perhaps full-fledged members,<sup>115</sup> they shared the Enlightenment conviction that such conflict was inevitable as long as governments attempted to impose a single religion on confessionally diverse populations.<sup>116</sup> This insight

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113. Denmark, Costa Rica, Iceland, Liechtenstein, Norway, Switzerland, and the United Kingdom, all of which have established churches (Switzerland at the canton level) regularly rank among the leading nations in the world on the Freedom House tabulation of human rights performance, which is widely cited. See FREEDOM HOUSE, *FREEDOM IN THE WORLD: COMBINED AVERAGE RATINGS: INDEPENDENT COUNTRIES*, 2008, <http://www.freedomhouse.org/template.cfm?page=410&year=2008> (Denmark, Costa Rica, Iceland, Liechtenstein, Norway, Sweden, and the United Kingdom all given highest ranking (1.0: Free)). Admittedly, there is some circularity to this measurement because freedom of conscience is one of the ranking criteria and separation of church and state is not. But the rankings for Freedom House's separate tabulation regarding freedom of the press alone, which would not be directly affected by religious issues, correspond closely to its general human rights ranking. See FREEDOM HOUSE, *GLOBAL FREEDOM PRESS 2008: A YEAR OF DECLINE*, <http://www.freedomhouse.org/uploads/fop08/FOTP2008Tables.pdf> (Iceland: 1; Denmark, Norway: 3; Switzerland: 8; Liechtenstein: 12; United Kingdom: 25; Costa Rica: 29 (cf. United States: 21)). This ranking is confirmed by Reporters Without Borders, *Worldwide Press Freedom Index 2006*, [http://www.rsf.org/rubrique.php?id\\_rubrique=639](http://www.rsf.org/rubrique.php?id_rubrique=639) (Iceland: 1; Norway: 6; Switzerland: 8; Denmark: 19; United Kingdom: 27; Costa Rica: 29) (Liechtenstein not ranked) (cf. United States: 53).

114. See generally RONALD G. ASCH, *THE THIRTY YEARS' WAR: THE HOLY ROMAN EMPIRE AND EUROPE, 1618–1648* (1997); G.R. ELTON, *REFORMATION EUROPE 1517–1559* (2d ed. 1999); MACK HOLT, *THE FRENCH WARS OF RELIGION 1562–1629* (2d ed. 2005); DIARMAID MACCULLOCH, *REFORMATION: EUROPE'S HOUSE DIVIDED 1490–1700* (2003); DAVID OGG, *EUROPE IN THE SEVENTEENTH CENTURY* (1962); THEODORE K. RABB, *THE STRUGGLE FOR STABILITY IN EARLY MODERN EUROPE* (1976); C.V. WEDGEWOOD, *THE THIRTY YEARS WAR* (1992).

115. PETER GAY, *THE ENLIGHTENMENT: AN INTERPRETATION: THE SCIENCE OF FREEDOM 555–68* (1977); GERTRUDE HIMMELFARB, *THE ROADS TO MODERNITY: THE BRITISH, FRENCH, AND AMERICAN ENLIGHTENMENTS 191–226* (2004); GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 103–07 (1969).

116. GAY, *supra* note 115, at 396–447; GERTRUDE HIMMELFARB, *THE ROADS TO MODERNITY: THE BRITISH, FRENCH, AND AMERICAN ENLIGHTENMENTS 152–58* (2004); DANIEL ROCHE, *FRANCE IN THE ENLIGHTENMENT 519–607* (Arthur Goldhammer trans., 1998). These views built on arguments for toleration that were articulated in the latter part of the seventeenth century while religion still served as a basis for conflict. For two classic statements, see generally JEAN BODIN, *COLLOQUIUM OF THE SEVEN ABOUT SECRETS OF THE SUBLIME* (Marion Leathers Daniels Kuntz trans., 1975), and JOHN LOCKE, *A LETTER CONCERNING TOLERATION* (1689), in *33 GREAT BOOKS OF THE WESTERN WORLD* (William Pople ed., 2d ed. 1990).

was the essential inspiration for the religion clauses of the First Amendment.<sup>117</sup>

While Establishment Clause doctrine does not include any explicit recognition that different types of governmental action merit different levels of scrutiny, the forgoing considerations strongly suggest that coercive action by the government should be particularly disfavored. Whatever the rule may be regarding subtle, complex issues such as the release of children from public school to attend religious institutions, the use of public facilities by groups that include those with varying levels of religious affiliation, financial support for students being educated by religious institutions, or the display of religious symbols on public property,<sup>118</sup> it seems clear that the state should not compel people to follow the dictates of any given religion or impose burdens on them for failing to do so.

### *B. The Religious Character of Laws against Assisted Suicide*

Religiously motivated laws against suicide itself were once common in the Western world, but those laws have generally been repealed as irrational, unfair, or simply ineffective.<sup>119</sup> Laws against assisted suicide remain in force throughout the United States, however. At present, some thirty-seven states have statutes declaring

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117. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 251–72 (1992); ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: A MORAL DEFENSE OF THE SECULAR STATE* 67–78 (rev. ed. 2005); JACK RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 312–16 (1996); GORDON WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 189–212 (1991). As Gertrude Himmelfarb points out, the Americans who associated themselves with the Enlightenment never displayed the hostility to religion that characterized the French Enlightenment, and the Second Great Awakening, which occurred at the end of the eighteenth and the beginning of the nineteenth centuries, brought a new wave of religious fervor to the United States at the same time that it was becoming organized as a nation. HIMMELFARB, *supra* note 73, at 204–17. But the Framers' sense of religion was such that it led to a demand for tolerance and a distaste for coercion, and the Second Awakening, although certainly intense, was so pluralistic that it served to discourage any efforts to impose uniformity, rather than the reverse.

118. See, e.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (display of religious symbol in public forum does not violate Establishment Clause); *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 690 (1994) (preference for one particular religion in creating school district violated the Establishment Clause); *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (display of religious scene in public space did not violate Establishment Clause); *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (Establishment Clause does not bar equal access to public university facilities by religious organizations); *Lemon v. Kurtzman*, 403 U.S. 602, 607 (1971) (salary supplement for teachers of secular subjects in religious schools violates Establishment Clause); *Zorach v. Clauson*, 343 U.S. 306, 315 (1952) (release of public school students to receive religious instruction is constitutional).

119. See Mojica & Murrell, *supra* note 80, at 487.



that it is a crime to assist someone in committing suicide,<sup>120</sup> and two others impose civil penalties on the practice.<sup>121</sup> The law is unclear in nine states,<sup>122</sup> and as discussed above, Oregon and Washington now authorize and regulate assisted suicide.<sup>123</sup>

Laws that criminalize assisted suicide are suspect under the Establishment Clause because they use the coercive force of government to advance a religiously based position. Specifically, as discussed above, they represent a choice of the traditional morality of higher purposes over the modern morality of self-fulfillment. The traditional morality thus favored is specifically Christian.<sup>124</sup> It embodies the Christian view that suicide is a moral wrong and that those who provide assistance in its commission should be punished. According to the modern morality of self-fulfillment, however, suicide is an unfortunate event that should be prevented by therapy, if possible, but accepted by society as a valid personal decision. To choose between these two approaches is to favor a particular religious position over a secular, culturally available alternative.<sup>125</sup>

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120. ALASKA STAT. § 11.41.120 (2009); ARIZ. REV. STAT. § 13-1103 (2009); ARK. CODE ANN. § 5-10-104 (2009); CAL. PENAL CODE § 401 (2009); COLO. REV. STAT. § 18-3-104 (2009); CONN. GEN. STAT. ANN. § 53A-56 (2009); DEL. CODE ANN. tit. 11, § 645 (2009); FLA. STAT. § 782.08 (2009); GA. CODE ANN. § 16-5-5 (2009); HAW. REV. STAT. § 707-702 (2009); 720 ILL. COMP. STAT. ANN. § 5/12-31 [(A) (2)] (2009); IND. CODE ANN. § 35-42-1-2.5 (2009); IOWA CODE ANN. § 707A.2 (2010); KAN. STAT. ANN. § 21-3406 (2009); KY. REV. STAT. ANN. § 216.302 (2009); LA. REV. STAT. ANN. § 14:32.12 (2009); ME. REV. STAT. ANN. tit. 17-A, § 204 (2009); MD. CODE ANN., CRIM. LAW § 3-102 (2009); MICH. COMP. LAWS ANN. § 750.329a (2009); MINN. STAT. ANN. § 609.215 (2009); MISS. CODE ANN. § 97-3-49 (2009); MO. REV. STAT. § 565.023 (2009); MONT. CODE ANN. § 45-5-105 (2009); NEB. REV. STAT. § 28-307 (2009); N.H. REV. STAT. ANN. § 630:4 (2009); N.J. STAT. ANN. § 2C:11-6 (2009); N.M. STAT. ANN. § 30-2-4 (2009); N.Y. PENAL LAW § 125.15 (2009); N.D. CENT. CODE § 12.1-16-04 (2009); OKLA. STAT. tit. 63, §§ 3141.1 to 3141.8 (2009); 18 PA. CONS. STAT. ANN. § 2505 (2009); R.I. GEN. LAWS § 11-60-1 to -5 (2009); S.C. CODE ANN. § 16-3-1090 (2009); S.D. CODIFIED LAWS § 22-16-37 (2009); TENN. CODE ANN. § 39-13-216 (2009); TEX. PENAL CODE § 22.08 (2009); WIS. STAT. ANN. § 940.12 (2009).

121. OHIO REV. CODE ANN. §§ 3795.01–.03 (2009); VA. CODE ANN. § 8.01-662.1 (2009).

122. Alabama, Idaho, Massachusetts, Nevada, North Carolina, Utah, Vermont, West Virginia, and Wyoming. InternationalTaskForce.org, Assisted Suicide Laws, [http://www.internationaltaskforce.org/assisted\\_suicide\\_laws.htm](http://www.internationaltaskforce.org/assisted_suicide_laws.htm) (last visited Mar. 2, 2010).

123. In addition, a number of states have enacted statutes that allow individuals to refuse life-sustaining treatment, thus codifying the rule of the *Cruzan* case. Thomas A. Eaton & Edward J. Larson, *Experimenting with the "Right to Die" in the Laboratory of the States*, 25 GA. L. REV. 1253, 1300–18 (1991).

124. See Perry, *supra* note 6, at 556 (arguing that laws against euthanasia are a form of "biblical biopolitics").

125. Stephen Carter and Cass Sunstein both argue that the courts should not interject themselves into this highly controversial issue, but rather allow the democratic debate to run its course. See Sunstein, *supra* note 10, at 1163; Stephen Carter, *Rush to Lethal Judgment*, N.Y. TIMES, July 21, 1996, § 6 (Magazine), at 29. In some sense, the issue they raise lies beyond the scope of this Article, which is about the content of the Establishment Clause and does not venture into larger matters regarding the role of judicial review. But it can be observed in

If the Supreme Court were to strike down laws against assisted suicide on constitutional grounds, it would in some sense be taking sides in the cultural conflict between these two moralities, just as the state legislatures have taken sides in enacting these laws. The obvious difference, however, lies precisely in the coercive nature of the existing prohibitions. If the laws were struck down, no one would be prohibited from following the traditional morality of higher purposes. The existing laws, however, prohibit people from following certain aspects of the emerging morality of self-fulfillment.

In fact, a further argument is available. Even compelling certain aspects of the emerging morality of self-fulfillment would not violate the Establishment Clause because that morality, from a contextualized historical perspective, is not linked to a particular religion.<sup>126</sup> It would simply be regarded as the government's permissible use of its coercive authority. But there is no need to go that far for present purposes. Eliminating laws against assisted suicide would not result in any government coercion at all; it would leave people free to make their own decisions in this area.

Arguments that various laws, such as prohibitions on abortion, should be struck down because of their religious origins have been offered by others, most notably Ronald Dworkin<sup>127</sup> and Lawrence Tribe.<sup>128</sup> But as both Dworkin and Tribe acknowledge, these arguments have foundered on the awkward fact that many laws originate in religious thought.<sup>129</sup> No one would argue that we should hold that laws against murder violate the Establishment Clause because the prohibition is found in the Ten Commandments, or that we should declare the prohibition of slavery unconstitutional because it was first advanced by the Quakers and carried forward by evangelical Christians.<sup>130</sup> Tribe's response is to abandon the argument in its entirety,<sup>131</sup> while Dworkin tries to reconstruct it with a complex

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passing that the rationale suggested here, as opposed to the traditional, substantive due process or penumbral right of privacy rationale for striking down laws against physician-assisted suicide, rests on a clearly stated constitutional provision.

126. Of course, state compulsion of this sort might be open to attack on the basis of some other constitutional provision, including the Free Exercise Clause.

127. DWORKIN, *supra* note 2, at 98–110.

128. Tribe, *supra* note 14, at 21–25.

129. DWORKIN, *supra* note 2, at 105; TRIBE, *supra* note 10, at 1349–50.

130. See DAVID BRION DAVIS, *INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD* 231–67 (2006); HUGH THOMAS, *THE SLAVE TRADE: THE STORY OF THE ATLANTIC SLAVE TRADE: 1440–1870*, at 449–557 (1997).

131. Tribe, *supra* note 12, at 1350. Tribe adds that laws against abortion may be based on secular morality, and that invalidating these laws because they are religiously based “appears to give too little weight to the value of allowing religious groups freely to express their convictions

explanation that asserts first that a fetus cannot be deemed a constitutional person, next that antiabortion laws must thus be based on arguments about the intrinsic value of life, and finally that such views about life's intrinsic value are religious ones because religion can be defined as a set of beliefs about life's intrinsic value.<sup>132</sup>

Because Dworkin, unlike Tribe, tries to maintain the position that antiabortion laws are unacceptable due to their religious origin, his argument merits some consideration here. To begin with, his argument rests on the highly contestable claim that a fetus cannot be a constitutional person,<sup>133</sup> which is precisely the point that many antiabortion advocates contest.<sup>134</sup> Even if one grants that premise, Dworkin's argument collapses back into the very assertion that he rejects because the mere fact that views about the intrinsic value of life have religious origins does not preclude a legislature from adopting such views for secular reasons. Moreover, he invokes a questionable definition of religion that seems to have been selected for purposes of the argument. Standard anthropological and sociological definitions of religion include a shared or communal division of the world into sacred and profane,<sup>135</sup> a belief in higher powers and an attempt to propitiate them,<sup>136</sup> or the symbolic abstraction of magical efforts to manipulate the natural world.<sup>137</sup> Defining religion as beliefs about the intrinsic value of life is not unreasonable,<sup>138</sup> but it is hardly a consensus position.

The argument advanced in this Article does not rely on a general claim that laws against assisted suicide have religious origins. Rather, it rests on an analysis that in this society, at this historical time, these laws are based on one particular, specifically religious concept of morality and specifically reject rival concepts of morality. They thus align with one side in an ongoing debate within society and

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in the political process . . ." Tribe, *supra* note 12, at 1350 (footnote omitted). But striking down anti-assisted suicide laws does not limit the ability of religious groups to argue that assisted suicide is immoral and to urge individuals to abjure the practice. The freedom that the Free Exercise Clause grants religious groups (which is presumably what Tribe is addressing) is the freedom to proselytize, not the authority to impose their views on others.

132. DWORKIN, *supra* note 2, at 106–09.

133. *Id.* at 87–90.

134. See Christine E. Gudorf, *Contraception and Abortion in Roman Catholicism*, in DANIEL MAGUIRE, *THE CASE FOR CONTRACEPTION AND ABORTION IN THE WORLD RELIGIONS* 55, 69 (2003); KRISTEN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 5–6, 207–08 (1984).

135. EMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* 51–63 (Joseph Ward Swain trans., 1965).

136. JAMES GEORGE FRAZER, *THE GOLDEN BOUGH: A STUDY IN MAGIC AND RELIGION* 56–69 (1963).

137. WEBER, *supra* note 45, at 399–412.

138. John Dewey advances this position in *A COMMON FAITH* (1934).

employ the coercive force of the state to impose that side's view upon the other. This is simply not true for laws against murder or slavery. This argument is not a claim about society in general but about our particular society—which is, after all, the society to which our Constitution applies.<sup>139</sup> In other societies, or at other times, things would be different. At one time, for example, the propriety of child sacrifice was socially contested, a contest that has left its trace in the Biblical story of Isaac<sup>140</sup> and Greek mythology's stories of Tantalus and Agamemnon.<sup>141</sup> But we now treat the prohibition as part of an unchallenged secular morality; unlike the debate over assisted suicide, it no longer reflects a contest between conflicting moral positions.

The need for a contextualized inquiry is supported by the fact that there is no particular set of issues that is necessarily linked to religion, as anthropologists who have struggled with the definition of religion would concede.<sup>142</sup> In some religions, for example, the particular type of food one eats is a matter of central importance, but in other religions such as Christianity, it is largely irrelevant. The Buddhist religion treats control over one's bodily functions as a matter of religious observance, but for Judeo-Christian religions, it is an entirely secular concern.<sup>143</sup>

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139. Barry Friedman and Scott Smith, in an article that criticizes Supreme Court opinions and constitutional scholarship for failing to take cognizance of constitutional law's historical development since the founding, praise the *Glucksberg* decision—both the majority and the dissent—as an exception. See Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 75–76 (1998). Their general point is an excellent one, but the argument of the present Article is that awareness of history must be projected backward as well as forward. It is true, for example, that we have developed a rich, complex history of free speech cases and commentary since 1789, and that an understanding of this history is necessary to make sense of the constitutional clause. It is also true that the concept of free speech possessed a long history prior to the time the Constitution was drafted, and that this history is in a very real sense continuous with the subsequent one, despite the dramatic event of codification in 1789. This is all the more true of suicide, which has been an issue of central concern for the entirety of Western history, but not mentioned in the Constitution or addressed by the Supreme Court until 1990.

140. *Genesis* 22:1–18.

141. 2 ROBERT GRAVES, *THE GREEK MYTHS* 25–26, 51–52, 291 (1955). Tantalus was said to have served Pelops, his son, to the gods because he was preparing a feast for them and had run out of food. Agamemnon's sacrifice of his daughter, Iphigenia, is a more explicit reference to the practice of human sacrifice, since his purpose was to obtain favorable weather for his fleet to sail to Troy.

142. See *supra* notes 135–137 and accompanying text; see also WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE* 39–57 (1958) (same point, from a psychologist's perspective).

143. Even the significance of faith and ritual varies greatly from one society to another. The Romans were prepared to execute people for refusing to enact ritual sacrifices, but were unconcerned about their internal beliefs – indeed, they were content to allow people to declare their lack of belief while performing the required rituals. See FOX, *supra* note 44, at 421–22. In

It may seem that the prohibition of a nonreligious act like assisted suicide should not be regarded as religiously motivated because it does not involve religious ritual.<sup>144</sup> But religion is much more than ritual; there are no particular rituals connected with a Catholic education, for example, but we have no trouble recognizing a Catholic parochial school as a religious institution. Conversely, rituals only acquire their religious character in light of the same sort of contextualized history that was presented in Part I. In a public school setting, for example, children who misbehave are regularly urged, when being disciplined, to own up to their actions, admit that they acted wrongly, and make amends in some fashion. No one would regard this approach as a violation of the Establishment Clause, but how different is it from the Catholic sacrament of confession?<sup>145</sup> In order to know that putting confessional booths in a public school would violate the Establishment Clause, while urging students to admit that they were wrong to misbehave does not, one needs to know the historical context in which those two actions occur.<sup>146</sup>

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the Middle Ages, Renaissance, and Reformation eras, any sign of disbelief was punishable, often by death, but the failure to carry out religious rituals was regarded as a less serious and generally excusable offense. *See, e.g.,* FICHTENAU, *supra* note 57, at 400–01. *See generally* EMMANUEL LE ROY LADURIE, *MONTAILLOU: THE PROMISED LAND OF ERROR* (Barbara Bray trans., 1978).

144. Suicide in societies whose religion endorses suicide rather than condemning it has often involved religious ritual. The two most popularly known examples, sati in India and seppuku in Japan, were real enough, although both their prevalence and their religious significance have probably been exaggerated. *See* EDWIN O. REISCHAUER, *THE JAPANESE* 57, 153 (1981); 1 ROMILA THAPER, *A HISTORY OF INDIA* 41, 152 (1966). But when the British, employing the coercive force of law, forbid sati in 1827, it was seen as a serious intrusion on Indian tradition. *See* LAWRENCE JAMES, *RAJ: THE MAKING AND UNMAKING OF BRITISH INDIA* 226 (1997); JOHN KEAY, *INDIA: A HISTORY* 429 (2000).

145. Particularly in its contemporary incarnation. *See generally* SCOTT HAHN, *LORD, HAVE MERCY: THE HEALING POWER OF CONFESSION* (2003).

146. While the question may arise about how the Court can know that anything is religion without at least some sort of agreed-upon definition of the term, it has in fact proceeded to decide cases under the Free Exercise and Establishment Clauses without attempting this daunting task. The closest the Court has come to grappling with the issue has been, interestingly, not in purely constitutional cases, but in statutory cases interpreting the conscientious objection exception to the Selective Service Act. *See* *Welsh v. United States*, 398 U.S. 333, 335 (1970) (finding conscientious objection on religious basis valid); *United States v. Seeger*, 380 U.S. 163 (1965) (same). From a theoretical perspective, the Court's instinct seems sensible. Religion is probably a term that can only be defined as a cluster of culturally recognized practices, with individual practices that become an issue being evaluated with respect to the cluster. *See* LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 31–36 (G.E.M. Anscombe trans., 1958) (definition of a "game"). Wittgenstein says: "What is common to [all games]? . . . [I]f you look at them you will not see something that is common to *all*, but similarities, relationships, and a whole series of them at that . . . [W]e see a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail." *Id.* at 31–32.

As discussed above, it is not necessary for a just society to separate church and state,<sup>147</sup> but any society that wishes to do so in a serious manner must rely on a contextualized definition of religion. Such a definition must identify religious positions in the context of the actual history of that society. Ancient Romans debated the morality of suicide in secular terms, with opponents arguing that it represented an act of cowardice or a disservice to the state.<sup>148</sup> In our society, however, it seems clear that opposition to assisted suicide aligns with the Christian religion.<sup>149</sup> The emergence of a new, non-Christian morality that adopts a different stance toward suicide and assisted suicide highlights the religious nature of that opposition. If we allow the mere fact that many or all laws had religious origins in the misty past to immunize laws with current religious motivations from constitutional scrutiny, we will have undermined the basic purpose of the Establishment Clause.

### *C. The Lack of Secular Purpose of Laws against Assisted Suicide*

Concerns about the religious motivation of laws against assisted suicide might be allayed by demonstrations that these laws have a separate secular justification. This section begins by explaining the doctrinal significance of this possible response. It proceeds by arguing that the proffered secular justifications are either too ill-defined or insufficiently compelling to overcome First Amendment concerns. At most, they support restrictions on the practice, but not an outright ban.

Although stated as an independent principle in *Weisman*, heightened Establishment Clause scrutiny for coercive governmental action can be regarded as either the core of the accommodation test or as one element of the *Lemon* test. While the coercive nature of a particular government action may be a matter of controversy, as it was in *Weisman*, there can be little doubt that a criminal law is coercive. According to the accommodation test, any governmental action that imposes particular religious practices is prohibited, while noncoercive action is presumptively permitted unless it crosses some currently unspecified line. Thus, the demonstration that a criminal law, like a law prohibiting assisted suicide, was designed to enforce

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147. See *supra* notes 113–116 and accompanying text.

148. Aristotle, *supra* note 26, at 386, 1138a; Plato, *supra* note 43, at 1314, 873c–d.

149. Of course, other religions such as Buddhism, Hinduism, and Islam take positions on suicide as well, but the only religion that has influenced American culture to a significant extent is Christianity. Greco-Roman religion, discussed above, and Judaism have been influential through the medium of Christianity.

the views of a particular religion would be sufficient to render that law unconstitutional and the inquiry would be at an end.

The *Lemon* test is more complex. Under that test, governmental action must be scrutinized to determine whether it has a sufficient secular purpose, whether it advances or inhibits religion as its primary effect, and whether it creates an excessive government entanglement with religion. These criteria apply to both coercive and to noncoercive action, but the demonstration of a secular purpose would need to be clearer, the connection to religion more attenuated, and the government entanglement less severe where coercive action is involved. It may seem ironic that the accommodation test, which is generally regarded as more lenient toward religion, would be quicker to strike down religiously motivated criminal laws than the more stringent *Lemon* test. The reason, however, is that the accommodation test focuses primarily on coercion and generally leaves noncoercive government action favoring religion to the political process.<sup>150</sup> *Lemon* covers a much wider set of governmental actions, including noncoercive ones, and thus must articulate a more modulated position if it is to function as a single test.

Since the *Lemon* test, despite its bruised and battered condition, remains the prevailing one, it is important to continue the inquiry in accordance with its terms. In theory, its three criteria are disjunctive, so that violation of any one renders the action in question unconstitutional. It would appear, however, that the first criterion is the crucial one in connection with the argument this Article advances. With respect to the second *Lemon* criterion, laws against assisted suicide do not advance religion as their primary effect. As discussed above, the prohibition they establish is a consequence of religion, not religion itself.<sup>151</sup> Additionally, those laws do not inhibit religion since the morality they oppose is a secular one. With respect to the third criterion, the laws support a religious position, but since they do so by means of a simple proscription, they do not involve any excessive entanglement with that religion. Thus, the first criterion is the crucial one and has been the focus of scholarly debate about the validity of laws against assisted suicide. The question that the remainder of this

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150. But it is difficult to imagine that the Supreme Court, even in the absence of further appointments by President Obama, would countenance noncoercive governmental actions that are characteristic of nations with established churches, such as placing civilian religious officials on a government payroll or providing direct support for religious schools. Since the accommodation doctrine has thus far been articulated primarily in dissent, however, as an argument against majority opinions striking down noncoercive action, the contours of the doctrine are unclear.

151. See *supra* Part II.B.

section will address, therefore, is whether laws against assisted suicide have a sufficient secular purpose to prevent them from violating the Establishment Clause, even though they use coercive force to favor a religiously motivated position.

One basic problem with a claim that laws against assisted suicide serve a secular purpose is that such a purpose is rather difficult to define, at least in general terms. These laws currently treat the assistance as some form of homicide, but assisting someone's suicide, particularly if the authorization is confined to trained medical personnel, does not create the sort of threat to public order that serves as the basis of most criminal laws. A possible justification that sometimes appears in litigation documents and judicial decisions is that the state has the authority, and perhaps the obligation, to protect the lives of its citizens.<sup>152</sup> This can be understood as a claim about either our existing legal doctrine or about the moral stance that the government should adopt in general. At the level of specific legal doctrine, however, it reflects a conflation of disparate principles. The state certainly has the moral obligation to protect its citizens' lives from threats by criminals or foreign powers, and it has a constitutional obligation to protect their lives from its own actions,<sup>153</sup> but that is because people generally want to live. Protecting people from themselves when they no longer want to live is an entirely different matter, as Peter Singer has pointed out.<sup>154</sup>

At the more general level, the idea that the state has a moral obligation to human life itself is too abstract and ambiguous a claim to

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152. See *Washington v. Glucksberg*, 521 U.S. 702, 728–30 (1997); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990); *Hobbs v. Attorney Gen.*, 518 N.W.2d 487, 492 (Mich. Ct. App.) (1994); Melvin Urofsky, *Leaving the Door Ajar: The Supreme Court and Assisted Suicide*, 32 U. RICH. L. REV. 313, 363 (1998) (quoting oral argument in *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996)).

153. See U.S. CONST. amend. V ("No person shall be . . . deprived of life . . . without due process of law"); U.S. CONST. amend. XIV ("No state shall . . . deprive any person of life . . . without due process of law"). This is, of course, what rights theorists call a negative right, that is, a limit on governmental action rather than an affirmative government obligation. Whether this is an important distinction is a matter of debate. Compare Isaiah Berlin, *Two Concepts of Liberty*, in ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 118–72 (1969) (difference is crucial, with positive rights being a dangerous threat to real, negative rights), and Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001) (same), with Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990) (no justifiable distinction), and Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984) (two types of rights are dependent on each other). But the only reasonable way to articulate a positive right in this area would be the right to decide for oneself whether to live or die. It would be hard to construct a governmental prohibition on the individual's ability to obtain assistance in committing suicide as a right.

154. PETER SINGER, *PRACTICAL ETHICS* 194–96 (1993).



be used in the context that its proponents suggest.<sup>155</sup> While it is certainly sufficient to provide a rational basis for presumptively valid legislation, it cannot overcome the constitutional right to be free of religiously based coercion. The state also has an unquestionable authority to advance the truth, and this rationale is sufficient for the creation of the National Science Foundation, the creation and support of public universities, and even the compulsory education requirement. But that authority cannot be used to overcome people's constitutional right to speak, even if their speech consists of demonstrably false statements. If the government could defeat a claim of right by invoking vague, resounding phrases of this sort, none of our constitutional protections would survive.

Further, a particular problem with any claim that these laws possess an essentially secular purpose is that suicide itself is legal. In most areas of human activity, if it is legal to perform a particular act, it is legal to employ an agent to perform that act on one's behalf. It is legal to travel, to buy property, and to eat food; under what circumstances would we want to prohibit people from hiring a travel agent, a real estate agent, or a cook? Of course, society may want to ensure that only competent people are allowed to provide certain forms of assistance as a consumer protection measure. But this is not a problem with respect to assisted suicide. It is generally recognized as a medical procedure, and our society has a well-accepted system in place for regulating medical providers.

Efforts to articulate secular justifications for laws against assisted suicide do not typically rely on generalities about the meaning of life or the functions of the state, but rather focus on pragmatic considerations. Yale Kamisar advances a number of them in a well-known article.<sup>156</sup> Disclaiming any religious motivation,<sup>157</sup> he points to three major difficulties that arise in the most readily acceptable context for assisted suicide, namely a seriously ill person requesting assistance in committing suicide from a trained physician. First, the physician may make mistakes about a sick person's

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155. This is the argument that Ronald Dworkin addresses in DWORKIN, *supra* note 2. Dworkin's response is derived from his argument against antiabortion laws, *see id.*, namely, that claims about the intrinsic value of life fall within a transcultural definition of religion.

156. Yale Kamisar, *Some Non-Religious Views Against Proposed "Mercy Killing" Legislation*, 42 MINN. L. REV. 969 (1958) [hereinafter Kamisar, *Mercy Killing*]. As its title suggests, the article is about euthanasia, not assisted suicide. But Kamisar has written a follow-up article about assisted suicide, Yale Kamisar, *The Reasons So Many People Support Physician-Assisted Suicide, and Why These Reasons are Not Convincing*, 12 ISSUES L. & MED. 113 (1996), which explicitly adopts the reasoning of the original (and hence more famous) article.

157. Kamisar, *Mercy Killing*, *supra* note 156, at 974.

prognosis; second, it may be impossible for a person to truly agree to her own death; third, apparent agreement can be obtained by outside pressure, specifically from family members who wish to end the emotional stress or financial drain of the person's terminal illness.<sup>158</sup>

While we can take Kamisar at his word that he himself is not religiously motivated,<sup>159</sup> the secular arguments he advances convey a sense of post hoc rationalization that suggests an underlying discomfort with suicide itself, a discomfort whose religious origin is readily identified in our society. All his arguments go to the question of consent; he focuses on whether the person who is requesting assistance in terminating her life really wants to die.<sup>160</sup> This is undoubtedly a serious concern. A physician who terminates a person's life without that person's consent is committing murder. But it is not a problem that is intrinsic to assisted suicide or otherwise unknown to our legal system. Sexual intercourse without consent is rape; the acquisition of another's property without consent is theft. In general, our entire legal system is centered on the idea that individual action is permitted unless it is specifically prohibited, and that such action is something that people have consciously chosen to do or consented to have done to them.<sup>161</sup>

As a result, we have an extensive set of resources for determining consent. Most proposals for assisted suicide rely heavily on them. The standard way to ensure that a person genuinely

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158. For other statements of these concerns, see WESLEY SMITH, *FORCED EXIT: THE SLIPPERY SLOPE FROM ASSISTED SUICIDE TO LEGALIZED MURDER* 122–25 (Spence Publ'g Co., 2003) (1997); Daniel Avila, *Assisted Suicide and the Inalienable Right to Life*, 16 *ISSUES L. & MED.* 111, 130–36 (2000); Daniel Callahan & Margot White, *The Legalization of Physician-Assisted Suicide: Creating a Regulatory Potemkin Village*, 20 *U. RICH. L. REV.* 1, 26–41 (1996); Susan Martyn & Henry Bourguignon, *Physician-Assisted Suicide: The Lethal Flaws in the Ninth and Second Circuit Decisions*, 85 *CAL. L. REV.* 371, 391–410 (1997).

159. Kamisar, *Mercy Killing*, *supra* note 156, at 974; Kamisar, *Reasons*, *supra* note 156, at 118–19.

160. There are obviously complex issues regarding consent in euthanasia cases that do not arise with respect to assisted suicide, specifically the validity of one person acting for another.

161. See Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 *GEO. WASH. L. REV.* 165, 171–83 (2007); Malcolm Thornburn, *Justifications, Powers and Authority*, 117 *YALE L.J.* 1070, 1113–16 (2008). Professor Thornburn states:

The reason why lack of consent is an important element of so many offenses is that the wrongness of the conduct in question lies precisely in the fact that it constitutes a usurpation of another person's exclusive power to decide what shall be done with her body or property. . . . [I]t is now widely understood that all of these offenses are usurpations of another's exclusive power to decide what shall happen to his body and property—and that the equivalent conduct, when undertaken with valid consent, is not wrongful (and needs no justification) because it is simply carrying out the other's wishes. As such, consent affirms the other party's power to determine the use to which his body and property may be put, rather than undermining it.

Thornburn, *supra*, at 1115.

consents to some treatment that would be undesirable in the absence of consent is to obtain explicit, objectively verifiable confirmation of the person's decision.<sup>162</sup> For example, a statute regulating assisted suicide might require that the person considering suicide be mentally competent, provide a written or recorded statement, and be orally examined by a neutral party. The statement, the examination, or both could be required at two different times to ensure that the decision was not the product of a passing mood or temporary disorder. This is certainly a lot more protection than the law provides in many other situations. People do not need to provide signed authorizations before engaging in sexual intercourse, and contracts for the transfer of property require only a single signature. In fact, people do not need to provide any formal indication of intention before taking their own lives. When state laws against suicide were repealed, legislatures could have provided that sanctions such as forfeiture would still be imposed if the person committing suicide failed to provide a signed declaration of intent prior to the actual commission of the act. But instead, suicide has been decriminalized in all cases, even when the person does it in a temporary state of depression. Assisted suicide offers many more opportunities to ensure that the person genuinely intends to commit the act because affirmative obligations can be imposed on the assistant.

Kamisar's argument relies heavily on cases where consent is problematic, such as the elderly, sick person who is being pressured by family members. We can, if we choose, add that the elderly person controls a large fortune, that the family members are impecunious sociopaths, that the treating physician has been secretly promised a large fee by these family members if they inherit, that the elderly person has a pathological aversion to disagreements with family members, and perhaps other details that would occur to people who regularly watch soap operas on television. But all this really means is

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162. Professor Bergelson, *supra* note 161, at 210–15, argues that murder is distinguishable from rape or theft because the underlying action, killing a person, is inherently wrong, unlike having sex or transferring property. She argues that this places a greater burden on the consent requirement, but is nonetheless willing to recognize consent as an excuse because of the value she attaches to personal autonomy. Meir Dan-Cohen contests the view that consent and autonomy are complete answers because of the social effects that extend beyond the individual. Meir Dan-Cohen, *Basic Values and the Victim's State of Mind*, 88 CAL. L. REV. 759 (2000). In their place, he proposes human dignity as a master value. The argument here has a separate basis in religious freedom; it invokes consent only to ensure that the other party is participating in what is truly a suicide. But it would also pass muster under Professor Dan-Cohen's test, because assistance in committing suicide, unlike being subjected to slavery or sadomasochistic treatment (Professor Dan-Cohen's examples) is consistent with our concept of dignity. In fact, the preservation of one's dignity is often a major motivation for wanting to commit suicide, as the name of the Oregon statute attests.

that we should be especially careful about obtaining consent in these circumstances.<sup>163</sup> The mere possibility of abuse is a fairly weak argument against a public policy and an even weaker one against a constitutional consideration. The legal system is always required to draw lines to separate abuses from desired or protected behavior; relabeling these lines as a slippery slope, which is what Kamisar and other critics do,<sup>164</sup> can only be convincing if one can demonstrate that the lines are more difficult to draw in the area under discussion, which is not the case.

It is perhaps indicative of Kamisar's discomfort with suicide itself that he does not raise what might appear to be the strongest argument against consent: that a person who truly wants to commit suicide would simply do so and does not need to obtain a physician's assistance. The easiest answer to this question is illustrated by two popular movies, *Whose Life Is It Anyway?*<sup>165</sup> and *Million Dollar Baby*,<sup>166</sup> involving quadriplegics who find life burdensome in this condition, although they are neither dying nor in physical pain. Unable to commit suicide themselves, as an uninjured person could, they demand that others allow them to make this choice by administering lethal drugs. As presented in these movies, the situation is a compelling one. Both characters are unquestionably competent, their decisions are unambiguous, and they have objectively understandable reasons for their choices since both depended on physical movement for their purpose in life.<sup>167</sup>

But constructing an argument for assisted suicide on the basis of situations where assistance is required for the individual to take any physical action is no better than constructing an argument against assisted suicide on the basis of those situations which may not be suicides at all. Both rely on empirical variations to sidestep the central issue. A more convincing answer is that most people who choose suicide are presumably anxious to avoid the pain and

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163. See Martha Minow, *Beyond State Intervention in the Family: For Baby Jane Doe*, 18 U. MICH. J.L. REF. 933, 971-74 (1985).

164. Kamisar, *Reasons*, *supra* note 156, at 115; see SMITH, *supra* note 158; Callahan & White, *supra* note 158; Marshall Kapp, *Old Folks on the Slippery Slope: Elderly Patients and Physician-Assisted Suicide*, 35 DUQ. L. REV. 443 (1996); Margaret Miller, *Boot-Strapping Down a Slippery Slope in the Second and Ninth Circuits: Compassion in Dying is Neither Compassionate nor Constitutional*, 30 CREIGHTON L. REV. 833 (1997).

165. (MGM 1981) (quadriplegic is a sculptor).

166. (Warner Bros. 2004) (quadriplegic is a boxer).

167. In fact, the situation has greater generality than might initially appear, since many terminally ill people who decide to kill themselves are in hospitals, where convenient means of doing so are not readily accessible.

uncertainty of outcome that accompany amateur efforts.<sup>168</sup> Even this may not go far enough, however. The real answer is that the same arguments apply to assisted suicide as apply to suicide in general. Whether suicide is a permissible option for an individual is a matter of deep moral division in our society, and the negative clearly reflects a religiously based perspective. The state may not coerce individuals to adopt this perspective unless it has a compelling secular interest in doing so. The only reason not to allow such assistance is when it might raise questions about the genuine voluntariness of the person's decision, which can be addressed in the manner specified above.

The real question is whether it is constitutional to place a variety of specific limitations on a person's ability to obtain assistance in committing suicide, or whether such restrictions impermissibly advance one particular religion and lack a sufficient secular purpose. Here, Kamisar's arguments are more convincing. Since taking purposeful action to cause another's death is generally viewed as murder unless the person consents, it is extremely important to ensure that such consent has been given. As the Supreme Court held in *Cruzan*,<sup>169</sup> the state has a compelling interest in making sure that the person actually wants to die. Moreover, unlike the general proscription of assisted suicide or suicide in general, rules ensuring that the person genuinely consents to dying have no clearly religious origin. Rather, they emerge from the general principle that we use in our society to distinguish between proper and improper conduct toward other individuals.

Requiring definitive evidence that a person wants to die in fact imposes rather strict requirements on assisted suicide. Our society makes the background assumption that people generally want to live, and that a person's expressed desire to die is a transient mood that she will subsequently disavow. Like the general requirement of

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168. It is virtually obligatory to quote Dorothy Parker's *Resume* at this point:

Razors pain you;  
Rivers are damp;  
Acids stain you;  
And drugs cause cramp.  
Guns aren't lawful;  
Nooses give;  
Gas smells awful;  
You might as well live.

DOROTHY PARKER, ENOUGH ROPE: POEMS 61 (1926).

169. See *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 280–84 (1990) (“[A] State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state.”).

consent, and unlike the prohibition against suicide, this assumption is not derived from any particular religious doctrine, and it is equally prevalent among adherents of both our traditional and emerging moralities. In constructing rules to implement this requirement, however, it is also important to avoid going too far and imposing procedural constraints that rise to the level of religiously inspired coercion of the individual's personal choices.<sup>170</sup>

One fairly reliable way to ensure that a person genuinely consents is to require that her decision be objectively reasonable—the sort of decision that an average person would make under similar circumstances.<sup>171</sup> In the case of suicide, those circumstances might be that the person has a terminal illness and is in serious pain, as the Oregon and Washington statutes require, or that he is permanently disabled to an extent that destroys his ability to live a fulfilling life. A similar formulation has been advanced by C.G. Prado in his analysis of the circumstances under which the decision to commit suicide can be regarded as rational from a philosophical perspective.<sup>172</sup> His conclusion, in an essay coauthored with S.J. Taylor, is that suicide, to be rational, “must be an autonomous choice that is unimpaired, that is

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170. *Id.* at 343–46 (Stevens, J., dissenting).

171. *See id.* at 277–78. Both *Cruzan* and the recent controversy regarding Terri Schiavo turned on the separate question of a living will, that is, whether the two women had given a sufficiently clear indication before becoming nonfunctional that they would have wanted to die if they in fact suffered this fate. *See* U.S. Living Will Registry: Frequently Asked Questions, <http://www.uslivingwillregistry.com/faq.shtml> (last visited Mar. 2, 2009). Virtually no one would be willing to enforce a living will that provided for its execution when the person was still competent—“kill me if I don't get tenure” – because the person can be asked: “What do you want now?” But if the person's consent cannot be obtained and there is no living will, complex evidentiary problems are likely to arise. These may argue against killing nonfunctional persons, by either administering or withdrawing treatment, but it does not provide an argument against allowing mentally competent people to obtain assistance in committing suicide.

172. *Compare* PRADO, *supra* note 83, at 47–64 (crafting a “rationality criteria” which considers suicide rational when it is a release from terminal illness; the choice to do so follows logically from the circumstances, which must be known truly; and it is done after a “cross-cultural dialogue”), *with* PRADO & TAYLOR, *supra* note 74, at 152 (defining rational suicide as that made autonomously, cogently, and consistent with the individual's best interests), *and* C.G. PRADO, *THE LAST CHOICE: PRESUMPTIVE SUICIDE IN ADVANCED AGE* 145–46 (Praeger Publishers 1998) (1990) (defining rational suicide as any which is “soundly deliberated, cogently motivated, prescribed by well-grounded values without undue depreciation of survival's value, and in the agent's best interests” and arguing that this definition encompasses more motives for suicide than just avoiding severe pain but that even “advanced age is itself a ground for preemptive suicide”). A similar set of criteria appears in Franklin Miller et al., *Regulating Physician-Assisted Death*, 331 *NEW ENG. J. MED.* 119 (1994); *see also* SINGER, *supra* note 154, at 196, 200 (outlining the guidelines used by the Netherlands courts in determining the appropriateness of voluntary assisted suicide in any given case and arguing that “voluntary euthanasia” is best justified, in part, by respecting the rational choices of patients).

done for cogent reasons, and best serves the agent's interests."<sup>173</sup> In the context of assisted suicide, the "autonomous choice" part of his formulation relates to the procedure by which consent is determined. The part about cogent reasons and the agent's interest refers to an objective standard by which it can be determined that the agent's choice is a genuine decision, and not the result of a temporary mood or disordered thinking. This formulation tends to yield a similar, although somewhat more permissive result than the state statutes, which limit the justification for assisting suicide to cases where the person is terminally ill.<sup>174</sup>

#### *D. The Establishment Clause Rationale vs. the Right to Die*

As stated at the outset, current arguments for declaring laws against assisted suicide unconstitutional generally rely on the idea that people have a right to die or a more general right of personal autonomy.<sup>175</sup> While readily comprehensible in theory, the effort to embody this idea in constitutional doctrine encounters formidable difficulties that the Establishment Clause approach outlined above manages to avoid. This final section discusses the problems that the right to die or the right of personal autonomy present. It does not assert any general argument against the constitutionalization of these

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173. PRADO & TAYLOR, *supra* note 74, at 152. In a later work, PRADO, *supra* note 83, offers a similar formulation that is intended to avoid making the external standard subject to the consensus views of a particular culture, and thus less rational in his view. The formulation is that

[c]hoosing to die is rational when the decision is a valid conclusion following from true premises that take accounts of facts pertinent to the decision . . . and, additionally, when . . . the motivation is justifiable to cultural peers and members of other cultures as not unduly overriding interest in continued life.

PRADO, *supra* note 83, at 44–45. Prado offers his revised version in response to one of the major conceptual problems for analytic philosophy, namely its underlying assumption that universal principles or morality or rationality exist, and can be discerned by argument, in the face of the empirical evidence for cultural relativism. *See supra* notes 25–26 and accompanying text. As previously mentioned, *see supra* note 83, he imagines that the decision must be validated by a dialogue among people from different cultures. The solution seems unsatisfactory because it seems to conflate pluralism with rationality, but is of no particular concern here. This is an article about the application of the Establishment Clause, and thus is necessarily limited to the United States. So we can refer back to Prado's earlier formulation, and simply ask whether he has properly defined the criteria for what we, in this country, regard as a rational decision.

174. Thus, Prado would argue that the decision to commit suicide because one mistakenly believed that a relatively minor disease was fatal was an irrational decision. A physician, as a matter of medical ethics, would of course refuse to help someone commit suicide under these circumstances; instead, she would explain the true nature of the ailment. Enacting this concept of rationality or medical ethics into law would be constitutionally acceptable under the analysis suggested here.

175. *See supra* notes 80–82 (citing sources).

rights or their philosophic integrity. The point, rather, is that they present a number of difficulties that the historically grounded Establishment Clause argument manages to avoid.

The proper way to interpret the Constitution is, of course, highly contested; three leading approaches, which will be sufficient for present purposes, are textualism, originalism, and evolutionism.<sup>176</sup> From a textual perspective,<sup>177</sup> the difficulty with a right to die and a general right of personal autonomy is that they appear nowhere in the constitutional text, whereas the prohibition against establishing religion obviously does. To be sure, the reading of the Establishment Clause suggested here, like most readings of that clause, is controversial. But all readings of important constitutional provisions require interpretation of the text, and all are open to debate. Textualism, despite its fond desires,<sup>178</sup> will never succeed in eliminating interpretation; its only coherent claim is that acceptable interpretations must be grounded on specific textual provisions such as the Establishment Clause.

Originalists would presumably conclude that the absence of discussion about assisted suicide at the time the Constitution was drafted means that laws prohibiting this practice should not be struck down on constitutional grounds.<sup>179</sup> But the right-to-die rationale fares no better than the proposed Establishment Clause rationale from this

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176. See PHILLIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1984); ERWIN CHEMERINSKY, *INTERPRETING THE CONSTITUTION* 129–41 (1987); MARK TUSHNET, *RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 22–23 (1988).

177. For works adopting this approach, see, for example, ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997); Gary Lawson, *On Reading Recipes . . . And Constitutions*, 85 *GEO. L.J.* 1823, 1833–36 (1997); John Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 *YALE L.J.* 1663, 1713–20 (2004); Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why Hollingsworth v. Virginia Was Rightly Decided and Why INS v. Chadha Was Wrongly Reasoned*, 83 *TEX. L. REV.* 1265, 1367–71 (2005); Adrian Vermuele & Ernest Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 *HARV. L. REV.* 730, 774–77 (2000). See generally William Eskridge, *The New Textualism*, 37 *UCLA L. REV.* 621 (1990).

178. See SCALIA, *supra* note 177, at 23–29; Lawson, *supra* note 177, at 1833–36.

179. Regarding the originalist approach, see generally, GREGORY BASSHAM, *ORIGINAL INTENT AND THE CONSTITUTION* (1992); RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); MICHAEL PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS* (1994); KEITH WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT AND JUDICIAL REVIEW* (1999); Lino Graglia, “*Interpreting*” the Constitution: *Posner on Bork*, 44 *STAN. L. REV.* 1019 (1992); Richard Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 *NW. U. L. REV.* 226 (1988); Michael McConnell, *Originalism and the Desegregation Decisions*, 81 *VA. L. REV.* 947 (1995); Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. CIN. L. REV.* 849 (1989). See also Daniel Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 *OHIO ST. L.J.* 1085 (1989).



perspective. Moreover, if one relaxes the rigors of originalist interpretation, the Establishment Clause rationale becomes more plausible. The effect of requiring a demonstration of conscious intent by the Framers is to shrink the Constitution's reach to issues that were available and salient at the time. Quasi-originalists are willing to consider what the Framers would have thought about issues that have arisen subsequently, and that they could not possibly have considered, like the rights of prisoners or public school students.<sup>180</sup> Assisted suicide belongs in this category. We do not really know what the Framers would have thought about it. But we do know that they were products of the Enlightenment, which was aggressively secular. They had enormous admiration for Roman culture and philosophy, particularly Plutarch and the Stoic thinkers such as Cicero and Marcus Aurelius.<sup>181</sup> Given the attitude toward suicide that these thinkers maintained,<sup>182</sup> it seems reasonable to suppose that the Framers were more sympathetic to the idea, and more hostile to the commands of Christian doctrine, than either their predecessors, their immediate successors, or ourselves. To be sure, the same argument might be used to support a quasi-originalist argument for the right to die, but that right is much less directly connected to the secular attitudes of the Enlightenment than the Establishment Clause.

The only interpretive theory that would directly support the right to die or a right of personal autonomy is an evolutionary one.<sup>183</sup>

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180. Compare Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) (how would the Framers have responded had they been confronted with the issue in its contemporary context), with H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (Framers did not intend for future generations to be guided by their actual intent).

181. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 22–26 (2d ed. 1992); WOOD, *supra* note 115, at 51–53; WOOD, *supra* note 117, at 102–06. Cicero was particularly revered amongst Enlightenment thinkers. See PETER GAY *THE ENLIGHTENMENT: THE RISE OF MODERN PAGANISM* 105–09 (1966). For Cicero's attitude toward suicide, see *supra* note 37.

182. See *supra* Part I.A.

183. For works advancing this position, see, for example, SOTIROS BARBER & JAMES FLEMING, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS* 79–98, 155–70 (2007); RICHARD POSNER, *OVERCOMING LAW* 229–55 (1995); LAURENCE TRIBE, *GOD SAVE THIS HONORABLE COURT* 41–49 (1985); Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 230–37 (1980); Rebecca Brown, *Tradition and Insight*, 103 YALE L.J. 177, 200–05 (1993); Owen Fiss, *The Supreme Court 1978 Term: Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 41–44 (1979); Michael Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 412–15 (1997); Stephen R. Munzer & James W. Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1041–62 (1977); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 588–98 (2003); Jed Rubenfeld, *The Moment and the Millennium*, 66 GEO. WASH. L. REV. 1085, 1100–10 (1998); David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 928–34 (1996).

But even if one accepts this approach, the argument for recognizing either right is not an easy one. In *Griswold v. Connecticut*,<sup>184</sup> the Court held that the first eight amendments combine to create a general right of privacy which could then be extrapolated to novel issues such as a married couple's use of contraception in their home. It was this same rationale, but grounded on the Fourteenth Amendment rather than the first eight, that was used to strike down state antiabortion laws in *Roe v. Wade*.<sup>185</sup> By that point, however, the characterization of the protection being provided as a right of privacy no longer possessed the same intuitive appeal. What a married couple does within the confines of their bedroom seems to fall comfortably under the rubric of privacy, but a woman's right to a surgical procedure that is typically performed by a physician at a hospital or clinic seems like something else entirely.<sup>186</sup> Describing assisted suicide as an element of privacy suffers from this same difficulty, not only as a pragmatic matter but also as a matter of its basic definition—it necessarily involves an outside party.<sup>187</sup>

Many observers have pointed out that the Supreme Court's right of privacy is better treated as a right of personal autonomy that is cognizable as an element of substantive due process, rather than a penumbra of the first eight amendments.<sup>188</sup> While this formulation avoids a counterintuitive use of language, it suffers from serious conceptual defects. As a legal doctrine, it is overstated because our society tolerates innumerable restrictions on the autonomy of individuals that do not advance the autonomy of other individuals.<sup>189</sup>

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184. 381 U.S. 479 (1965).

185. 410 U.S. 113 (1973). See generally Rubinfeld, *supra* note 183 (discussing these cases).

186. For a thoughtful argument that reproductive rights are linked to the concept of privacy, see ALLEN, *supra* note 12, at 82–122.

187. For criticisms of the right to die, and efforts to distinguish it from other rights regarding personal decision making, see Kreimer, *supra* note 153; Thomas Mayo, *Constitutionalizing the "Right to Die,"* 49 MD. L. REV. 103 (1990); Marc Spindelman, *Are the Similarities Between A Woman's Right to Choose an Abortion and the Alleged Right to Assisted Suicide Really Compelling?*, 29 U. MICH. J.L. REF. 775 (1996).

188. See, e.g., June Eichbaum, *Towards an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy*, 14 HARV. C.R.-C.L. L. REV. 361, 365–72 (1979); Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 459–71 (1980); Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1424–29 (1974); Sanford H. Kadish, *Letting Patients Die: Legal and Moral Reflections*, 80 CAL. L. REV. 857, 862–70 (1992); Linda McCain, *Toleration, Autonomy and Governmental Promotion of Good Lives: Beyond "Empty" Toleration to Toleration as Respect*, 59 OHIO ST. L.J. 19, 23–27 (1998); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 58–59 (1988).

189. Our modern theory of autonomy rests heavily on Kant. See IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 42–54 (James Ellington trans., 2d ed. 1981); IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 145–71 (Mary Gregor trans., 1996); see also SCHNEEWIND, *supra* note 68, at 483–530; ROGER SULLIVAN, *IMMANUEL KANT'S MORAL THEORY*

The limitation used to make the principle coherent is that the autonomy in question refers to the individual's control of basic life decisions regarding family structure, reproduction, and existence. But it is far from easy to explain the theme that unites these disparate issues and divides them from other issues that might seem equally essential to an individual, such as one's career, the education of one's children, the kind of medical care that one receives, the place one lives, or many other activities whose regulation is widely accepted in our society. It is possible to propose a further limitation of the autonomy principle to laws involving sexuality. This succeeds in including most of the cases decided under the right of privacy rationale, but it does not encompass assisted suicide, which is about as far from sexuality as a matter of human behavior can be.<sup>190</sup>

In contrast, the prohibition of laws against assisted suicide follows naturally from an Establishment Clause rationale. Prohibition of assisted suicide is readily recognized as one of the core issues on the conservative social agenda, along with prohibition of abortion, gay marriage, and perhaps stem cell research.<sup>191</sup> Religion, and specifically a particular view of Christianity, is clearly the motivating force of this agenda; whatever secular justifications the proponents of this view may offer, it seems clear as a matter of empirical observation that they are in fact attempting to impose a religiously based position on the populace at large. An Establishment Clause rationale for opposing this effort speaks much more directly to this controversy than more philosophic theories about the right to die or the right of personal autonomy.

## CONCLUSION

Discussions of suicide and assisted suicide have tended to focus on the right to die. This Article suggests an alternative to this rather difficult argument. In the cultural context of Western civilization, the context into which the U.S. Constitution fits rather securely, prohibitions against suicide must be understood as religiously

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44–50 (1989). But Kant is asserting the moral autonomy of individuals, as opposed to grounding morality on obedience to tradition or divine command. Legal autonomy does not necessarily follow from this general principle.

190. The same result follows if one treats the sexuality decisions as embodying the principle that men and women should be treated equally. Restrictions on abortion necessarily affect women to a greater extent than men. But restrictions on assisted suicide affect both sexes equally. See Kreimer, *supra* note 153, at 1315–25.

191. Although beyond the scope of this Article, a contextualized inquiry into the social history of these laws is needed to determine if they too raise Establishment Clause issues. For the argument that they do, see Rubin, *supra* note 67.

motivated. They emanate from a particular interpretation of Christianity, one associated with the morality of higher purposes. This morality dominated Europe during the Middle Ages, the Renaissance, and the Reformation eras, but it is now in retreat. It has been partially, although not entirely, displaced by the modern morality of self-fulfillment. The morality of self-fulfillment does not prohibit suicide and in fact would recognize it as desirable, although certainly not obligatory, under certain circumstances. Laws against suicide or assisted suicide thus represent coercive action by the government that imposes the rules of a particular morality, one that derives from religion, over another morality with more secular derivations.

The Establishment Clause is best read as prohibiting the state from favoring the doctrines of one religion over competing views, unless the prohibition has a secular basis independent of religious doctrine. Laws against suicide or assisted suicide have no such basis. The concern that allowing assisted suicide will offer an excuse for murder can serve as a secular basis for regulating assisted suicide, but not for its outright prohibition. Assisted suicide is distinguished from murder by the individual's consent, the same principle that distinguishes sex from rape, exchange from theft, confession from duress, and a variety of other matters found throughout our legal system. This Establishment Clause rationale is preferable to any analysis based on the right to die, because it is based on a much more explicitly stated constitutional command, and is more specifically tailored to the issue in question.

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