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# ***EVANGELIUM VITAE:***

## **CROSSING THE THRESHOLD OF LAW WITH THE GOSPEL OF LIFE**

DAVID A. DAIGLE\*

*See now that I, I am He, and beside me there is no other god.  
It is I who deal death and life.*<sup>1</sup>

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<sup>1</sup> *Deuteronomy* 32:39 (New Jerusalem Bible).

I. INTRODUCTION: APOLOGIA PRO STUDIIS SUIS<sup>2</sup>

In his book *Crossing the Threshold of Hope*,<sup>3</sup> His Holiness, John Paul II,<sup>4</sup> articulates the meaning of human dignity and af-

<sup>2</sup> This article is written with an unequivocal acceptance of the special role that the Holy Father holds in the life of the Roman Catholic Church. The Pope is deemed infallible when teaching faith and morals. Thus, papal teachings contained in encyclicals command the religious assent of every Catholic. See ANNE FREMANTLE, *THE PAPAL ENCYCLICALS IN THEIR HISTORICAL CONTEXT* 27-28 (1956) (citing Monsignor Joseph Fenton, *American Ecclesiastical Review*).

The word "encyclical" comes from two Greek words, *en*, meaning in, and *kyklos*, meaning circle. See *id.* at 21. "Thus *enkyklike* means a circular letter, a letter that is meant to 'go the rounds.'" *Id.* The term originally applied to the pastoral letters of many bishops. It now applies only to the letters of the Bishop of Rome (the Pope), who as successor to St. Peter, speaks with the special teaching authority originally conferred by Jesus Christ to the Apostle Peter. See *id.* at 21, 25.

Typically, encyclicals discuss contemporary matters of faith, morals or culture and may resound warnings or exhortations. See *id.* As such, encyclicals may be instructive and useful to all people, and are not meant to be limited to members of the Roman Catholic Church. See *id.* at 10 (discussing significance of encyclicals to non-Catholics).

Canon Law describes the appropriate response of faithful Catholics to the teachings of the Pope. In the language of the Vatican Council II document, *Lumen Gentium* 25, faithful Catholics shall manifest "religious respect" to all teachings of the Pope. See *THE CODE OF CANON LAW: A TEXT AND COMMENTARY* 548 (James Coriden et al. eds., 1985).

<sup>3</sup> JOHN PAUL II, *CROSSING THE THRESHOLD OF HOPE* (Vittorio Messori ed., 1994).

<sup>4</sup> John Paul II (1920 - ), Pope since 1978, was originally known as Karol Jozef Wojtyla. Born and educated in Poland, he became the first non-Italian Pope in 450 years. Ordained in 1946, he was a professor of moral theology at the Universities of Lublin and Cracow before being named a bishop. Archbishop of Cracow from 1964 to 1978, he became a cardinal of the Church in 1967. Noted for his energy and analytical ability, he has made numerous foreign trips, preaching to huge audiences. He is the author of numerous poems, several books, and many important encyclical letters. See *CAMBRIDGE BIOGRAPHICAL DICTIONARY* 787 (1990).

The Pope's encyclicals to date are: *Evangelium Vitae*, The Gospel of Life (discussing value and inviolability of human life) (Mar. 25, 1995); *Centesimus Annus*, On *Rerum Novarum*, The Hundreth Year: "New Things" One Hundred Years Later (reviewing *Rerum Novarum*, John Paul II offers framework of analysis for socio-political questions of our day) (May 1, 1991); *Redemptoris Missio*, The Mission of the Redeemer (Dec. 7, 1990); *Sollicitudo Rei Socialis*, On Social Concerns (reaffirming continuity of church's social doctrine and its vital link with Gospel of Christ) (Dec. 30, 1987); *Redemptoris Mater*, Mother of the Redeemer (discussing Mother of God's role in economy of salvation) (Mar. 25, 1987); *Dominum et Vivificantem*, On the Holy Spirit (drawing from soul of Vatican Council II, this work seeks to penetrate and illuminate the Trinitarian mystery of ineffable Godhead) (May 30, 1986); *Laborem Exercens*, On Human Work (devoting itself to issue of human work and to man's role) (Sept. 14, 1981); *Dives In Misericordia*, On the Mercy of God (drawing from clear language of faith that God is "Father of mercies," and is close to man) (Nov. 30, 1980); *Redemptor Hominis*, On the Redemption of Man (seeking to reawaken society's awareness of Jesus Christ who became Word and dwelt among

firms that all persons have a fundamental right to life. According to Pope John Paul II, "The right to life means the right to be born and then continue to live until one's natural end: 'As long as I live, I have the right to live.'"<sup>5</sup> His words are in direct contrast to a judicial system which, by legalizing death by abortion and permitting the debate over euthanasia's legality to rage on in state courts,<sup>6</sup> has acted in a manner "both procedurally undemocratic and substantively immoral or unjust."<sup>7</sup> In speaking of this great tragedy of our age, the Holy Father insists that:

We are dealing with a problem of tremendous importance, in which all of us must show the utmost responsibility and vigilance. *We cannot afford forms of permissiveness* that would lead directly to the trampling of human rights, and also to the complete destruction of values which are fundamental not only for the lives of individuals and families but for society itself. Isn't there a sad truth in the powerful expression *culture of death*?<sup>8</sup>

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us) (Mar. 4, 1979); *Dominicae Cenaе*, On the Holy Eucharist (discussing certain aspects of Eucharistic mystery, especially as it relates to bishops and priests) (Feb. 24, 1980).

<sup>5</sup> JOHN PAUL II, *supra* note 3, at 205.

<sup>6</sup> Jeffrey Rosen, *Nine Votes for Judicial Restraint*, N.Y. TIMES, June 29, 1997, at E15.

<sup>7</sup> Ramesh Ponnuru, *Con Job: Theocons v. Neocons? Strauss v. Aquinas? Catholics v. Jews? Or The New Republic v. Reality?*, 44 NAT'L REV., Jan. 27, 1997, at 36. In his article, Mr. Ponnuru addresses whether Supreme Court decisions, particularly those regarding abortion, have called into question the Court's ability to review cases within a common framework of morality or ethics. *Id.*

<sup>8</sup> JOHN PAUL II, *supra* note 3, at 208 (emphasis in original). The echo of the current Pontiff's sentiments are heard in the words of Pope John XXIII (1958 - 1963), who wrote: "Human life is sacred ... [f]rom its very inception it reveals the creating hand of God. Those who violate His laws not only offend the divine majesty and degrade themselves and humanity, they also sap the vitality of the political community of which they are members." Pope John Paul XXIII, *Mater et Magistra*, On Christianity and Social Progress, in THE PAPAL ENCYCLICALS 1958-1981, ¶194, at 80.

In contemplating the meaning of the phrase "culture of death", Mary Ann Glendon, Learned Hand Professor of Law at Harvard Law School, states:

[T]he culture of death is building, spreading, moving - even as we speak toward a new class of victims - sick and elderly people who have no hope of leading productive lives and who are expensive for the state or their families to maintain. Surely, soft voices whisper that "compassion" requires they be given the right to die. And if they're too ill or weak to express or implement their wishes, then surely we should give them help in exercising that right. The legal machinery has already clanked into gear. As with abortion, it starts small - with the case of those who are in great physical pain.

But who can doubt that relief of suffering by removing the sufferer will eventually slide into elimination of the inconvenient? The only wonder is

An intensely sad truth, indeed.  
As we approach the Third Millennium,<sup>9</sup> euthanasia,<sup>10</sup> along

that society has resisted the temptation to legalize active euthanasia up until now. According to the late Malcolm Muggeridge, that delay is probably due to the memory of Nazi atrocities. The Hitler regime killed off the sick and handicapped pursuant to perfectly clear laws with carefully defined conditions.

Muggeridge's chilling conclusion was: "It takes just 30 years in our humane society to transform a war crime into an act of compassion."

Mary Ann Glendon, Forum, *Society's on a Slippery Slope, Legal Abortion Has Given Birth to Culture of Death*, BOSTON HERALD, July 21, 1996, at 27.

<sup>9</sup> The Third Millennium is a time of special significance for the Holy Father. The Pope looks upon the approach of the millennium as an opportunity for re-evangelization. One author relates that: "In *Tertio Millennio Adveniente*, or *The Coming of the Third Millennium*, the Pope calls us to embark upon a 'super-advent' if you will, a time of preparation, recommitment, and re-energization. When the Holy Father talks about the time leading up to the millennium, it is in terms of preparing oneself for a new era of hope, reconciliation, and understanding." MICHAEL A. FERGUSON, PUBLIC CATHOLICISM 26, (Thomas P. Melady ed., 1996).

<sup>10</sup> In its most general sense, euthanasia may be defined as "the act or practice of painlessly putting to death persons suffering from incurable conditions or diseases." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 786 (1986). The word itself is derived from Greek words *eu* ("good") and *thanatos* ("death"). See, e.g., 1 ENCYCLOPEDIA OF ETHICS 335-339 (Lawrence C. Becker & Charlene B. Becker eds., 1992); A GREEK-ENGLISH LEXICON 714, 731, 784 (1940). Black's Law Dictionary defines euthanasia as "the act or practice of painlessly putting to death persons suffering from incurable and distressing disease as an act of mercy." BLACK'S LAW DICTIONARY 554 (6th ed. 1990). As the etymology indicates, the word "euthanasia" can be defined without reference to intention or consequences. See 1 ENCYCLOPEDIA OF ETHICS, at 335.

The classifications of euthanasia which have evolved distinguish passive euthanasia from active euthanasia and both from assisted suicide. The American Medical Association, for example, distinguishes assisted suicide from euthanasia based upon the degree of physician participation. See *Council Report: Decisions Near the End of Life*, 267 JAMA 2229 (1992).

The Vatican rejected these legalistic classifications, defining euthanasia as "an action or an omission which of itself or by intention causes death, in order that all suffering may in this way be eliminated. Euthanasia's terms of reference, therefore, are to be found in the intention of the will and in the methods used." *Vatican Declaration on Euthanasia*, 10 ORIGINS, Aug. 14, 1980, at 155.

For purposes of this paper, the distinctions between passive euthanasia and active euthanasia and assisted suicide are likewise rejected. Euthanasia is an action or an omission, which by itself or by intention, causes death to eliminate suffering. Legal theorists distinguish active euthanasia from passive euthanasia in that active euthanasia can be regarded as "the direct inducement of a patient's death, generally through the lethal injection of drugs." Matthew P. Previn, *Assisted Suicide and Religion: Conflicting Conceptions of the Sanctity of Human Life*, 84 GEO. L.J. 589, 590 (1996). Passive euthanasia is described as "euthanasia effected through a person's refusal to accept or continue life-sustaining medical treatment." Tom Stacy, *Euthanasia and the Supreme Court's Competing Conceptions of Religious Liberty*, 10 ISSUES IN L. & MED. 55, 56 n.5 (1994).

In sum, euthanasia's terms of reference are to be found in the intention of the

with abortion, has become a second great threat to human life and can no longer be considered a remote menace.<sup>11</sup> Chief Justice William H. Rehnquist recently wrote of euthanasia's prevalence that, "[T]hroughout the nation, Americans are engaged in an earnest and profound debate about the morality ... of physician-assisted suicide."<sup>12</sup> In essence, the recent decisions of the Supreme Court, in *Vacco v. Quill*<sup>13</sup> and *Washington v. Glucksberg*,<sup>14</sup> lend credence to the debate. The Supreme Court denied the existence of a fundamental right to die, declaring that the state may prohibit physician-assisted suicide as long as it has a rational basis for doing so. At the same time, the door is left open for states to permit physician-assisted suicide—a statutory result that may occur as interest groups put increasing pressure

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will and in the methods used. Euthanasia is synonymous with the concept of "mercy killing." See BLACK'S LAW DICTIONARY 988 (6th ed. 1990) (defining "mercy killing").

<sup>11</sup> Euthanasia has been a troubling menace for quite some time. In fact, "euthanasia ... has incrementally carved out its present course during the last half of the century." Rita L. Marker, et al., *Euthanasia: A Historical Overview*, 2 MD. J. CONTEMP. LEGAL ISSUES 257, 258 (1991). However, events within the last few years have accelerated the pace at which euthanasia threatens American society. Before the court of appeals' decisions, the courts had not previously recognized any right to assisted suicide. A primary example of this threat is demonstrated through the experience of Michigan state prosecutors, who have unsuccessfully sought to bring Jack Kevorkian to justice. Many view Kevorkian as someone who has repeatedly flaunted the law and showed the utmost disrespect for the sanctity of life and contempt for established laws. "Recent actions by Dr. Jack Kevorkian have, once again, sparked debate over whether or not euthanasia should be legalized ... [S]upporters of euthanasia praise Dr. Kevorkian's courage to speak openly and promote the principle ... . Opponents, on the other hand, attack such conduct as being unethical, immoral, or an unwanted practice." Antonios P. Tsarouhas, *The Case Against Legal Assisted Suicide*, 20 OHIO N.U. L. REV. 793 (1990). For a further discussion of Kevorkian's battles with the state of Michigan, see Jay McNally, *Dr. Death and the Euthanasia Crusade*, THE CATH. WORLD REP., Oct. 1996, at 22.

The controversy regarding euthanasia is not new. Euthanasia has long been a controversial topic of debate throughout recorded history. Although the word is derived from the Greek meaning "good death," not all ancient Greeks supported the practice. See *supra* note 10 (describing etymology of euthanasia). "The ancient Greeks, including Pythagoras, Plato, and Aristotle, did not approve of suicide and believed it was 'a cowardly way of avoiding life's hardships and one's duties to self and state.'" Tsarouhas, *supra*, at 794 (citations omitted). "However, these Greek philosophers felt that suicide ought not to be prohibited in every situation, they believed that, in cases involving incurable disease along with pain and suffering, the person could choose an earlier death." *Id.* at 794-95 (citations omitted).

<sup>12</sup> David Garrow, *Letting the Public Decide About Assisted Suicide*, N.Y. TIMES, June 29, 1997, at E4.

<sup>13</sup> 117 S. Ct. 2293, 2302 (1997) (holding New York State statute prohibiting assisted suicide does not infringe on a fundamental right).

<sup>14</sup> 117 S. Ct. 2258, 2271 (1997) (finding no constitutional right to commit suicide or to obtain assistance in doing so).

on legislatures. The air of respectability and the increasing national support for euthanasia's legalization will not soon dissipate, despite the Supreme Court's pronouncements.<sup>15</sup>

It should come as no surprise that lower courts found grounds for legalizing euthanasia. The Supreme Court had encouraged the debate over euthanasia to continue throughout the nation.<sup>16</sup> Sadly, the Court had already enshrined death by per-

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<sup>15</sup> As two commentators explain, "Things have changed ... . What was once an unquestioned good (the inestimable worth of each human life) is today not only questioned, but renounced. Official recognition and sanction for the oddly conceived 'right' to renounce this inherent good [of life] is now demanded of legislatures, voters, and courts." Mark E. Chopko & Michael F. Moses, *Assisted Suicide: Still A Wonderful Life?*, 70 NOTRE DAME L. REV. 519, 519 (1995).

One telling indication of the gaining national momentum towards legalizing euthanasia is the number of commentators calling for its acceptance. See, e.g., Julia A. DiCamillo, *A Comparative Analysis of the Right to Die in the Netherlands and the United States after Cruzan: Reassessing the Right of Self-Determination*, 7 AM. U. J. INT'L L. & POL'Y 807 (1992) (suggesting proposed guidelines for legalizing euthanasia); Edward J. Larson, *Seeking Compassion in Dying: The Washington State Law Against Assisted Suicide*, 18 SEATTLE U. L. REV. 509 (1995) (advancing notion that terminally-ill persons may have liberty interest in physician-assisted suicide); Leslie L. Mangini, *To Help or Not to Help: Assisted Suicide and Its Moral, Ethical, and Legal Ramifications*, 18 SETON HALL LEGIS. J. 728, 778 (1994) (stating arguments for "appropriate balance" between state's compelling interest in preserving life and individual's interest in dying with dignity); Previn, *supra* note 10 (arguing that competent and terminally ill patient should be permitted to commit euthanasia); Robert A. Sedler, *Are Absolute Bans on Assisted Suicide Constitutional? I Say No*, 72 U. DET. MERCY L. REV. 725 (1995) (concluding that absolute prohibition against taking physician-prescribed medicine to end life is unconstitutional); Kathryn L. Tucker & David J. Burman, *Physician Aid in Dying: A Humane Option, a Constitutionally Protected Choice*, 18 SEATTLE U. L. REV. 495 (1995) (arguing that legislative efforts to implement euthanasia are constitutional); Deborah A. Wayne, Note, *Active Voluntary Euthanasia: The Ultimate Act of Care for the Dying*, 37 CLEV. ST. L. REV. 645 (1989) (asserting that principle of euthanasia has been distorted mainly as result of Christian views on suicide and sanctity of life). See also Note, *Physician Assisted Suicide and the Right to Die with Assistance*, 105 HARV. L. REV. 2021 (1992) (asserting that society's morality is not violated by physician-aided suicide).

Even within the medical literature there is clear and growing evidence that doctors themselves are beginning to look at the killing of patients as an alternative to treating or caring for them. See *Nutrition and Hydration: Moral Considerations, A Statement of the Catholic Bishops of Pennsylvania* (1991), at n.32. In one anonymous article, a young resident describes his own intentional killing of a suffering patient by a morphine injection calculated to end the patient's life. *It's Over, Debbie*, 259 JAMA 272, 272 (1988). In a special article in *The New England Journal of Medicine*, ten of a group of twelve authors (all medical doctors) reported that they consider physician-assisted suicide an alternative plan of care for the terminally ill, concluding that "it is not immoral for a physician to assist in the rational suicide of a terminally ill person." Sidney H. Wanzer et al., *The Physician's Responsibility Toward Hopelessly Ill Patients: A Second Look*, 320 NEW ENG. J. MED. 844, 848 (1989).

<sup>16</sup> In fact, two early judicial decisions provided an important foundation for the

mitting the legalized killing of innocent and defenseless children.<sup>17</sup> When the Supreme Court legalized abortion, it failed the American public socially, medically, legally, politically, and morally. A critical examination of the decision to legalize abortion, and the decision's sociological impact, attest to the profound destruction of social and moral values which have occurred in its wake. Moreover, the proponents of euthanasia, capitalizing on the Court's improvident failure, have leveraged an increasingly broad basis of public support. Claiming to be the *vox populi*,<sup>18</sup> contemporary pro-euthanasia forces have channeled a morally bankrupt agenda into the legal system and have succeeded in influencing Americans' cultural values to the extent that physician-assisted suicide is presently considered a noble cause, rather than a grave moral evil.<sup>19</sup>

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current debate. The first landmark case was the 1976 decision of the New Jersey Supreme Court allowing the parents of Karen Ann Quinlan to disconnect their comatose daughter from a respirator. See *In re Quinlan*, 355 A.2d 647 (N.J. 1976). The second decision occurred in 1990 when the United States Supreme Court sustained the state of Missouri's right to keep a comatose patient, Nancy Beth Cruzan, alive despite her family's objections, because she failed to provide explicit instructions as to her wishes in the event that she became permanently impaired. *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261 (1990). Nevertheless, the Supreme Court did enunciate a constitutionally protected right to terminate such unwanted medical treatment as artificial respirators and tube feeding. See *id.* at 265.

<sup>17</sup> Professor Mary Ann Glendon has observed the connection between abortion and euthanasia. Professor Glendon states that many people:

[S]ee no connection between the abortion mentality and euthanasia. They don't understand how abortion 'built us up' to accepting euthanasia. But ask yourself what lesson today's young adults have learned from their parents' generation about what to do with those who are burdensome, inconvenient and expensive.

How many of these young men and women, one wonders, will interpret their elders' attitude ... as implicit permission to 'do unto us as we did unto your unborn brothers and sisters'?

That's what's so frightening about the culture of death: It doesn't use terror and death squads. It operates on the mind and leaves the rest up to us ... . No one will have to force the frail elderly into the death chambers. They will go willingly, signing their own execution orders. And the real cause of death will not be lethal injection, but terminal sadness.

Glendon, *supra* note 8, at 27.

<sup>18</sup> According to one survey, nearly two-thirds of those polled said they favored euthanasia as it relates to the withdrawal of life support systems, including food and water. See SOCIETY FOR THE RIGHT TO DIE, HANDBOOK OF LIVING WILL LAWS 13 (1987).

<sup>19</sup> See Most Reverend Rabian Bruskewitz, Bishop of Lincoln, *An Ordinary Viewpoint: Suicide*, S. NEB. REG., Sept. 6, 1996, at 6. Those who argue for the constitutional right to euthanasia insist that there is a liberty interest and a right to privacy in bodily self-determination in order to prevent pain and suffering. For an article



This was not always so. At one time, Americans commonly understood that euthanasia was a serious affront to mankind. The common law reflected this deep-rooted understanding and proscribed euthanasia because it was known to be a grave violation of the dignity of the individual,<sup>20</sup> an affront to society,<sup>21</sup> and

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which exposes various errors in the constitutional analysis of certain pro-euthanasia proponents and also explains why the social consequences of legalized euthanasia would make assisted suicide unsound public policy, see Chopko & Moses, *supra* note 15, at 523, 545-79. The full import of the grave and immoral nature of euthanasia is eloquently captured by St. Augustine, who says that:

It is significant that in Holy Scripture no passage can be found enjoining or permitting suicide either in order to hasten our entry into immortality or to void or avoid temporal evils. God's command, "Thou shalt not kill," is to be taken as forbidding self-destruction, especially as it does not add "thy neighbor," as it does when it forbids false witness... "Thou shalt not kill," [applies] to man alone, oneself and others ... Of course, one who kills himself kills a man.

ST. AUGUSTINE, *THE CITY OF GOD* 55-56 (Vernon J. Bourke ed., Walsh et al. Trans., Image Books 1958).

Joseph Cardinal Ratzinger recently indicated that "relativism" is the most urgent challenge to the faith. See John Thaus, *Doctrine Not Democratic: Cardinal Ratzinger Sees Relativism as a Danger to the Church*, CATH. STANDARD & TIMES, Oct. 17, 1996, at 9. Relativism is the idea that no one can presume to know the true way. See *id.* Relativism, the Cardinal says, is a troubling threat because its ideas are so imbedded in democratic societies. See *id.* The keys to success in modern politics are compromise and a rejection of absolute positions. See *id.* This, of course, leads to the enculturation of the structures of sin. Politicians are afraid to take a stand against abortion or euthanasia for fear of not being re-elected. Judges and Supreme Court Justices are afraid of overriding bad precedent for fear of a social backlash from various organizations. Perhaps those who argue most vociferously for the legalization of euthanasia are suffering the most from the relativism of which the Cardinal spoke.

<sup>20</sup> See 4 WILLIAM BLACKSTONE, COMMENTARIES \*189. "[T]he law has therefore ranked [suicide] among the highest crimes, making it a peculiar species of felony, a felony committed on one's self." See *id.*

<sup>21</sup> The serious affront to society is no longer keenly felt. There are those in our society who believe that certain categories of people in our nation would benefit from a hastened death, a sentiment also expressed during the German euthanasia movement, a precursor to the Nazi movement. See Marker et al., *supra* note 11, at 266. Of course, just as in pre-war Germany, the proponents of euthanasia proudly enumerate the many benefits for the individual and society to be gained by legalized euthanasia. Thus, in its exalted and purified form, with all of its legal safeguards enacted to prevent abuse, the proponents of euthanasia stress its compassionate nature. See *id.*

While some authors differentiate Nazi genocide from euthanasia, see Wainey, *supra* note 15, at 671 (differentiating Nazi programs on basis that Nazi euthanasia was enacted to purify German race), the only way to be sure that we do not encounter similar atrocities is by "swiftly snuffing out ... small beginnings of what we do not want to happen here." Yale Kamisar, *Some Non-Religious Views Against Proposed 'Mercy-Killing Legislation'*, 42 MINN L. REV. 969, 1038 (1958).

an offense against the Creator.<sup>22</sup> Euthanasia was seen for what it clearly is: murder.<sup>23</sup> For this reason, euthanasia was a felonious crime,<sup>24</sup> and a majority of states enacted statutes that prohibited the aiding of suicide.<sup>25</sup> Even today, assisting someone to

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<sup>22</sup> God alone is the creator and author of life and has absolute authority and primacy over human life. This is amplified by the sacred author in the Book of Wisdom, who wrote, "O Lord! For you have dominion over life and death." *Wisdom* 16:13.

The influence of this truth was reflected in society's respect of the laws of God. The church and state were closely aligned at the time when suicide was considered a common law felony, and the two entities supported each other's actions. One commentator explained that:

Church canon law denied suicides a [C]hristian burial. According to custom, a suicide's burial was performed along a public highway with a stake driven through the body. Since suicide was considered a felony, the suicide's property was forfeited to the King. Blackstone enumerated the ecclesiastical and royal rationales for punishing suicide: "[T]he suicide is guilty of a double offense; one spiritual, in evading the prerogative of the Almighty, and rushing to his immediate presence uncalled for; the other temporal, against the King, who hath an interest in the preservation of all his subjects ... ."

Suicide in the American colonies until the nineteenth century in the United States was also considered an offense and, consistent with traditional English common law, imposed penalties of forfeiture of goods to the state, and ignominious burial.

Tsarouhas, *supra* note 11, at 795 (citations omitted).

<sup>23</sup> See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW*, § 7.8, at 249-50 (WEST 1986).

<sup>24</sup> For examples of state statutes describing euthanasia as a felony, see NEB. REV. STAT. § 28-307 (1990); PA. STAT. ANN. tit. 18, § 2505 (Purdon 1983). Other states denote assisted suicide as a "crime"; see, e.g., ME. REV. STAT. ANN. tit. 17-A, § 204 (1983). See also LAFAVE & SCOTT, *supra* note 23, at § 7.8, at 249-50 (providing an in-depth look at various classifications of suicide); Helen Silving, *Euthanasia: A Study in Comparative Criminal Law*, 103 U. PA. L. REV. 350, 352 (1954) ("[T]he act [of euthanasia] is usually performed with premeditation and deliberation, and thus, within our legal system, constitutes the gravest type of homicide, murder in the first degree.").

<sup>25</sup> The state statutes which expressly proscribe assisted suicide include: ALASKA STAT. § 11.41.120(2) (1989); ARIZ. REV. STAT. ANN. § 13-1103(A)(3) (West 1989); ARK. CODE ANN. § 5-10-104(a)(2) (Michie 1993); CAL. PENAL CODE § 401 (West 1988); COLO. REV. STAT. ANN. § 18-3-104(1)(b) (West 1990); CONN. GEN. STAT. ANN. § 53a-56(a)(2) (West 1994); DEL. CODE ANN. tit. 11, § 645 (Supp.1992); FLA. STAT. ANN. § 782.08 (West 1992); ILL. ANN. STAT. ch. 720, para. 5/12-31 (Supp. 1994); IND. CODE ANN. § 35-42-1-2.5 (Burns 1994); KAN. STAT. ANN. § 21-3406 (1995); ME. REV. STAT. ANN. tit. 17-A, § 204 (West 1983); MICH. COMP. LAWS ANN. § 752.1027 (West 1994); MINN. STAT. ANN. § 609.215 (Supp. 1995); MISS. CODE ANN. § 97-3-49 (1972); MONT. CODE ANN. § 45-5-105 (1992); NEB. REV. STAT. § 28-307 (1986); N.J. STAT. ANN. § 2C:11-6 (West 1995); N.M. STAT. ANN. § 30-2-4 (Michie 1994); N.Y. PENAL LAW §§ 120.30, 125.15(3) (McKinney 1987); N.D. CENT. CODE § 12.1-16-04 (1991); OKLA. STAT. ANN. tit. 21, §§ 813-818 (West 1983); OR. REV. STAT. § 163.125(1)(b) (1990); PA. STAT. ANN. tit. 18, § 2505 (Purdon 1983); TEX. PENAL CODE ANN. § 22-08

commit euthanasia constitutes criminal homicide in a great majority of states, regardless of the motive behind the act.<sup>26</sup>

The two lower court decisions in *Quill* and *Glucksburg*, although overturned, represented what may be best described as a continued slide down a slippery and dangerous slope.<sup>27</sup> Abdicating a well-recognized precedent in the common law, which rests squarely on the state's interest in preserving life and preventing suicide,<sup>28</sup> the federal appellate courts had inferred from the Four-

(Vernon 1994); WASH. REV. CODE § 9A.36.060 (1994); WIS. STAT. ANN. § 940.12 (West 1996).

<sup>26</sup> See Maria T. Celocruz, *Aid in Dying, Should We Decriminalize Physician-Assisted Suicide and Physician-Committed Euthanasia*, 18 AM. J. L. & MED. 369, 372 (1992).

<sup>27</sup> The notion behind the so-called "slippery slope" is the expectation that once euthanasia is legally sanctioned, the boundaries initially established will undoubtedly expand. This will most likely lead to abusive practices. The Dutch experience is enlightening and provides realistic expectations about containment or limitations of euthanasia in the United States — once it gains a foothold. In the Netherlands, for example, it is widely recognized that involuntary deaths frequently occur where physicians administer death-inducing drugs, or kill by other methods, non-consenting patients. See Dana E. Hirsch, Note, *Euthanasia: Is it Murder or Mercy Killing? A Comparison of the Criminal Laws in the United States, the Netherlands and Switzerland*, 12 LOY. L.A. INT'L & COMP. L.J. 821 (1990). For an in-depth look at euthanasia in the Netherlands, see Barry A. Bostrom, *Euthanasia in the Netherlands: A Model for the United States?* 4 ISSUES IN LAW & MED. 467 (1989); Richard Fenigsen, *A Case Against Dutch Euthanasia*, 19 HASTINGS CTR. REP. 22 (1989); Hirsch, *supra*; Henk Rigter, *Euthanasia in the Netherlands: Distinguishing Facts From Fiction*, 19 HASTINGS CTR. REP. 31 (1989).

<sup>28</sup> Throughout the history of the United States, the state has had a long-recognized interest in the preservation of life as part of its broader interest in the welfare of its citizens. Traditionally, the state viewed life as a value to be protected and courts generally identified four primary state interests: (1) the preservation of life; (2) the prevention of suicide; (3) the safeguarding of the medical profession's integrity; and (4) the protection of innocent third parties. See DiCamillo, *supra* note 15, at 823. Of the four identified interests, the overreaching state interest is in protecting the life of its citizens. By way of further explanation, DiCamillo states that:

The most significant state interest is preserving life, which is composed of two aspects, the state interest in preserving the sanctity of life in general, and the state interest in preserving a particular individual's life . . .

The [second] state's interest in preserving life gives rise to its interest in protecting people from self-destruction, i.e., suicide . . . . The third state interest, maintaining the integrity of the medical profession, seeks to ensure that proper medical care is given to those in need . . . . When a physician-patient relationship exists and the patient is dependent on the physician, the state may not deprive a person of the physician's care arbitrarily . . . .

The state may also have an interest in protecting third parties from the adverse effects of an individual's decision to forego medical treatment. When the health and safety of innocent third parties may be jeopardized . . . . [t]he state may require individuals to undergo medical procedures to protect the public health.

teenth Amendment a right for terminally ill persons to obtain the assistance of physicians to end their lives.<sup>29</sup> These decisions utilized dubious constitutional jurisprudence, abandoned legally sound precedent, and represented unwarranted judicial activism.<sup>30</sup> By arrogating to the judiciary the immutable domain of

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*Id.* at 823-24 (citations omitted).

<sup>29</sup> In *Compassion in Dying v. Washington*, the Ninth Circuit had held violative of substantive due process a Washington statute that prohibited physicians from prescribing life-ending medication for the terminally ill. 79 F.3d 790, 838 (9th Cir. 1996) (*reh'g en banc*), *rev'd sub nom.* *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997). The court had found there was a constitutionally protected liberty interest in determining the time and manner of one's own death, and that interest must be weighed against the state's legitimate and countervailing interests, especially those that relate to the preservation of human life. Opining that "a liberty interest exists in [one's] choice of how and when one dies," *id.* at 838, the court believed that the state's interest in avoiding undue influence and other forms of abuse is ameliorated in large measure by the mandatory involvement of physicians in the decision-making process, who presumably will have a strong bias in favor of preserving human life, thereby providing safeguards from abuse. However, the court did not limit the interest to "competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors." *Id.* The court's failure to indicate the boundaries of its decision suggests both a judicial naiveté regarding the possible social effects of its decision, and a patent disregard for the lessons previously learned by the United States Supreme Court in *Roe v. Wade*. For example, the court failed to recognize the risk in having the doctors who perform the procedures self-police the practice, and the pressures on those same doctors by family members and by society at large, concerned about the costs of medical care, to terminate the lives of those who may be too weak to speak for themselves.

Similar in result, but applying a different constitutional theory, the Second Circuit in *Quill v. Vacco* held that the "New York statutes criminalizing assisted suicide violate the Equal Protection Clause ... [as] they are not rationally related to any legitimate state interest." 80 F.3d 716, 731 (2d Cir. 1996), *rev'd*, 117 S. Ct. 2293 (1997). The Second Circuit had determined that the statutes fell within the category of social welfare legislation and therefore were subject to rational basis scrutiny. *See id.* at 727. The court then reasoned that the state had a very limited interest in a life that was all but ended, and thus the statute did not bear on a legitimate state interest. *See id.* at 729. Perhaps it would have been better had the *Quill* court considered the state's interests, either on its own or by reference to the legislative history, before basing its decision as to the statute's constitutionality on the statute not passing the undemanding rational basis test. The *Quill* court recognized certain state interests, such as "denying to physicians 'the role of killers of their patients'" and preventing "legal guidelines [that] have tacitly allowed assisted suicide or euthanasia in response to a repeated request from a suffering, competent patient." *See id.* at 730. The court, however, failed to find any relationship between certain recognized interests and the harms that the statute sought to prevent. *See id.* Even more disturbing, without explanation, the court equated a physician who prescribes life-terminating medication with a physician who withdraws life-sustaining treatment. *See id.* The court thus arrived at its decision without addressing or distinguishing an obvious and critical issue. *See id.*

<sup>30</sup> *See Compassion in Dying v. Washington*, 85 F.3d 1440, 1443 (9th Cir. 1996) (O'Scannlain, J., dissenting from the order rejecting a *sua sponte* request for a re-

the sacred, these rulings represented an unjust usurpation of power and an unwarranted disparagement of the sanctity of life.

The lower court rulings striking down statutes banning physician-assisted suicide confused many individuals who set their moral compasses according to judicial opinions, and who consider such rulings to be guideposts for their own ethical behavior. Despite their reversal, proponents of euthanasia will undoubtedly rely on the persuasive language within the circuit court decisions in their continued quest to justify and legalize physician-assisted suicide. The Supreme Court's decision to reject both the Equal Protection and the Due Process analyses of the lower courts can only be cheered, and represents encouraging news to those who oppose physician-assisted suicide. However, the Second and Ninth Circuit decisions have caused a great deal of concern within the Catholic Church.<sup>31</sup> While the subsequent Supreme Court decision reversed the Circuit Court rulings,<sup>32</sup> the

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hearing en banc by the full circuit court, stating, "[i]t is clear that the *Casey* Court upheld the right to abortion more on the basis of *stare decisis* than on a reasoned reaffirmation of the notion that abortion is a protected liberty interest"). Agreeing that *stare decisis* was the driving cause for the *Casey* court's holding, one commentator noted that "[t]he plurality's emphasis on the need to respect precedent reflects an unwillingness to be in the vanguard of the kind of major social change that it feared overruling *Roe* would unleash." Stacy, *supra* note 10, at 66.

<sup>31</sup> For an enlightening discussion of the contemporary crisis in American society arising from an exaggerated notion of individual rights, see MARY ANNE GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991) (discussing the crisis arising from exaggerated absolutism, hyperindividualism, insularity, and silence with respect to personal, civic, and collective responsibilities). The Roman Catholic Church is absolutely opposed to euthanasia, or physician-assisted suicide. The Church holds that "no one can in any way permit the killing of an innocent human being, whether a fetus, or an embryo, an infant or an adult, an old person, or one suffering from an incurable disease, or a person who is dying." *Vatican Declaration on Euthanasia*, 10 *ORIGINS*, Aug. 14, 1980, at 155. Of course, other religious denominations beside the Roman Catholic Church are opposed to physician-assisted suicide. However, proponents of euthanasia recognize the power of the Catholic Church's witness and fear the authority of the Pope. To that end, one author declares that "[t]he principle of euthanasia became distorted over the years, mainly as a result of Christian views on suicide and the sanctity of life." Wayne, *supra* note 15, at 646. For an examination of the various positions taken by other religions, see Courtney S. Campbell, *Religious Ethics and Active Euthanasia in a Pluralistic Society*, 2 *KENNEDY INST. ETHICS J.* 253, 258-63 (1992).

<sup>32</sup> The Supreme Court held that assisted suicide is not constitutionally protected by the Due Process Clause. *Glucksberg*, 117 S. Ct. at 2262. The Court further held that prohibitions on assisting suicide do not violate the Equal Protection Clause. *Quill*, 117 S. Ct. at 2297. See *supra* notes 13-14 and accompanying text; for a discussion of the lower court decisions, see *supra* note 29.

Congress has also recently taken up the issue of euthanasia in a proposed bill entitled *The Assisted Suicide Funding Restriction Act*. H.R. 4149, 104<sup>th</sup> Cong. (1996).

door remains open for future legalization of physician-assisted suicide.<sup>33</sup>

Perhaps it is the Catholic Church that is most concerned with the possibility of the legalization of physician-assisted suicide. The church has always defended the sanctity of life as part of the authentic will and mind of God. In line with this, the bishops of New Jersey have stated:

From our Judaeo-Christian heritage, the Catholic Church has developed a distinctive approach to fostering and sustaining human life. Our tradition not only condemns direct attacks on innocent life, but also promotes a general view of life as a sacred trust over which we can claim stewardship but not absolute dominion. A positive duty to preserve life is part of this tradition.<sup>34</sup>

In spite of this constant teaching and clear understanding, euthanasia presents the Church with many compelling challenges because it "forces us to confront basic questions about the meaning of freedom and the value of human life."<sup>35</sup> Euthanasia, at its core, is an emotional issue that draws dogged support from its proponents. These supporters present ill-considered notions of the right to individualistic self-determination, are misled by a

The bill expressly provides:

Notwithstanding any other provision of law, no funds appropriated by the Congress shall be used to provide, procure, furnish, fund, or support, or to compel any individual, institution, or government entity to provide, procure, furnish, fund, or support, any item, good, benefit, program, or service, the purpose of which is to cause, or to assist in causing, the suicide, euthanasia, or mercy killing of any individual.

H.R. 4149, 104<sup>th</sup> Cong. § 2 (1996).

In discussing the legislation, Senator Dorgan stated that the bill is not an attempt to tell "the States what their policies ought to be with respect to whether physician-assisted suicides should be allowed." 142 CONG. REC. S11175 (daily ed. Sept. 24, 1996) (statement of Sen. Dorgan). Rather, the bill is intended to limit the use of federal dollars "to advance the health of patients and the delivery of medicine to those in this country who need it - not to advance Federal payment for those who would elect physician-assisted suicide." *Id.*

<sup>33</sup> But just as our conclusion that capital punishment is not always unconstitutional did not preclude later decisions holding that it is sometimes impermissibly cruel, so is it equally clear that a decision upholding a general statutory prohibition of assisted suicide does not mean that every possible application of the statute would be valid.

*Glucksberg*, 117 S. Ct. at 2305 (Stevens, J., concurring).

<sup>34</sup> *New Jersey State Catholic Conference Brief: Providing Food and Fluids to Severely Brain Damaged Patients*, 16 ORIGINS, Jan. 22, 1987, at 582.

<sup>35</sup> Richard S. Myers, *An Analysis of the Constitutionality of Laws Banning Assisted Suicide from the Perspective of Catholic Moral Teaching*, 72 U. DET. MERCY L. REV. 771, 771 (1995).

flawed understanding of suffering,<sup>36</sup> and employ skillful manipulation of those with an understandable fear of suffering, pain and death.<sup>37</sup>

Euthanasia also presents additional challenges to the Church because it pits two powerful authorities against each other in a scenario in which there is no winner. Those who are in favor of legalizing physician-assisted suicide view the Church as an enemy, and portray the Church as outdated and as acting outside of its proper sphere of influence in its attempts to implore the state to protect life.<sup>38</sup> These articulations become more

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<sup>36</sup> According to St. Paul, suffering can mean that "[t]his is my way of helping to complete, in my poor human flesh, the full tale of Christ's afflictions still to be endured, for the sake of his body which is the church." *Colossians* 1:24 (New English). "Qui nunc gaudeo in passionibus pro vobis et adimpleo ea quae desunt passionum Christi in carne mea, pro corpore ejus, quod est ecclesia ... ." *Colossians* 1:24 (Biblia Sacra).

<sup>37</sup> Few people have experienced another's death first-hand, and even fewer Americans have witnessed a death in a home environment. See Donald E. Spencer, *Practical Implications for Health Care Providers in a Physician-Assisted Suicide Environment*, 18 SEATTLE U. L. REV. 545, 546 (1995). This fact contributes to the gnawing fear of death:

Although Americans want to die at home in the company of family and friends, their perceptions are based on media representations of hospital deaths. Consequently, decisions about physician-assisted suicide are often driven by fears and misunderstandings. In general, terminally-ill patients, and many of the rest of us as well, fear suffering, being kept alive on machines, losing our quality of life, losing our dignity, and being emotional and financial burdens to loved ones. Many think there is no alternative to suffering, except as some sort of 'dying cyborg' kept alive by machinery. They envision weeks or months of lingering without any quality of life. They focus on the "indignity" of being helped with the most personal activities of daily living. Often unmentioned but most important, a fear of losing control runs through all these thoughts.

*Id.* at 546-57. See also Stephen A. Newman, *Euthanasia: Orchestrating "The Last Syllable ... of Time,"* U. PITT. L. REV. 153, 155 (1991) (arguing "new openness in thought" regarding euthanasia is "no doubt motivated by a dread of medical technology that draws life out to harrowing extremes").

<sup>38</sup> The focus of this article is the Pope's commentary on life as found in his primary work on this matter, *Evangelium Vitae*. Some argue that the religious viewpoint cannot be validly considered under the strictures of the law regarding the separation of the church and state. Hence, the Catholic Church in general, and the Pope in particular, has no place in the debate about legalizing euthanasia. While some may argue that religion may not involve itself rightly in the raging legal debate by adding the witness of religion, others disagree while acknowledging that "[r]eligion's involvement [in the law] raises important issues concerning the proper relationship between government and religion." Stacy, *supra* note 10, at 55.

Regarding constitutional law, the two primary areas of conflict are the religion clauses of the First Amendment to the United States Constitution and the so-called unenumerated right of privacy, which has been used conveniently by the Supreme

furious as the Church consistently rejects the right to death as contrary to the will and mind of God.

Proponents of euthanasia are able to circulate their ideas in our society by means of a sympathetic media, finding a voice in any number of articles, television broadcasts, and interviews, as well as letters to the editors of newspapers and periodicals. As a result, a large number of people are receptive to the argument that the Church should have no voice in the secular arena in matters of the law, and, most specifically, on the issues of abortion and euthanasia.<sup>39</sup> The Church, it is argued, has no place dictating what a woman may do with her body, nor should the Church interfere with an adult's decision to terminate his or her own life.<sup>40</sup> What most laypersons have not understood, however, is that the Church has an obligation to be the voice of truth and must proclaim that truth, whether it is in season or not.<sup>41</sup>

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Court in locating "fundamental" rights not expressly enumerated in the Bill of Rights. See *Roe v. Wade*, 410 U.S. 113 (1973) (holding that there is a constitutional right to have an abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (stating that the constitutional right to privacy extends to unmarried couples' right to use contraceptives); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that there is a constitutional right of married persons to use contraceptives). For the purposes of this article, it is sufficient to note that the establishment clause is not violated when those with a deeply held religious belief advance arguments against legalizing euthanasia because, even though a ruling or statute may be motivated in part by a religious purpose, the First Amendment requires only that a statute or law must be invalidated if it is entirely motivated by a purpose to advance religion. See *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

In presenting the position against legalizing euthanasia, neither the Pope nor anyone else within the Catholic Church argues solely from religious beliefs, but incorporates the deleterious effects such actions will engender on both the individual and society. In addition to the religious principles, there are numerous aspects to euthanasia that militate against legalization: sound public policy, *stare decisis*, the overwhelming tradition in our country that murder is wrong and numerous philosophical, psychological and social arguments. Beliefs about the sanctity of life cannot be classified as religious beliefs alone, and the courts cannot rightfully create any exception to the principle that self-murder or euthanasia are always wrong. *But see Previn*, *supra* note 10, at 591 (arguing that Supreme Court should carve out exception from general prohibition against physician-assisted suicide).

<sup>39</sup> See Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19, 21 (describing trend to make "[r]eligion [] a private affair [one] that should not play a role in public life").

<sup>40</sup> Some critics have gone so far as to say, "[t]he Roman Catholic Church, it needs to be remembered, is quite literally an *un-American* institution." David R. Boldt, *The Bishops Return to a Darker Era of U.S. Politics*, PHIL. INQUIRER, July 1, 1990, at D7 (quoted in Myers, *supra* note 39, at 21).

<sup>41</sup> Contrary to popular misconception, the Church still proclaims a "coherent, plausible [and] intellectual framework" to speak on crucial matters of faith and morals. E. MICHAEL JONES, JOHN CARDINAL KROL AND THE CULTURAL REVOLUTION



With the preceding discussion as background, the purpose of this article is to present the recent work of His Holiness, John Paul II, regarding human life. In his encyclical, *Evangelium Vitae*,<sup>42</sup> His Holiness instructs and reminds us anew, in a singularly powerful manner, about the miracle and sanctity of all life. Because it has been sufficiently treated elsewhere, the author does not set out to provide a comprehensive critique of constitutional law as it relates to life issues, nor is there any attempt to critically assess legal issues currently in vogue regarding Fourteenth Amendment rights.<sup>43</sup> Instead, the purpose of this Article

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97 (1996). According to Jones, the main task of the Second Vatican Council was "to make the Church plausible to the modern age, to bridge the gap between piety and reason, [and] to situate the gospel in terms the Church's own ministers would find persuasive." *Id.* It is well documented, of course, that the Church has had to face internal division and scandal in the wake of the conciliar changes. Nevertheless, the church has ridden the storm and still proclaims the gospel boldly and faithfully, in season and out of season.

<sup>42</sup> Pope John Paul II, *The Encyclical Evangelium Vitae*, 24 ORIGINS, Apr. 6, 1995, at 689 [hereinafter *Evangelium Vitae*]. As indicated earlier, the encyclical *Evangelium Vitae* represents the expression of official Church doctrine on the subject of euthanasia since it constitutes the official position of the living Magisterium of the Church as proclaimed by His Holiness, John Paul II. As one of the Holy Father's most remarkable encyclicals, the message of life is presented with uncharacteristic forcefulness and hard-hitting language which immediately distinguishes it from his other encyclicals, which displayed a more pastoral tone and style. In this encyclical, the Pope's primary emphasis is on society's atrocious crimes against life, and what he considers to be the world's headlong tumble into a state of barbarism as indicated by the legalization of abortion and euthanasia. Using strong, personalized language to underscore the systematic destruction of society's paramount values, His Holiness conveys his deeply held conviction, and thus that of the Church, that euthanasia is the deliberate and morally unacceptable killing of a human person, and a grave violation of the law of God. The Vatican Council II documents also amplify the tradition from which the Pope speaks.

The highest norm of human life is the divine law itself—eternal, objective and universal, by which God orders, directs and governs the whole world and the ways of the human community according to a plan conceived in his wisdom and love. God has enabled man to participate in this law of his so that, under the gentle disposition of divine providence, many may be able to arrive at a deeper and deeper knowledge of unchangeable truth.

VATICAN COUNCIL II, THE CONCILIAL AND POST CONCILIAL DOCUMENTS 801 (Austin Flannery, O.P. ed., Liturgical Press 5th prtg. 1980).

<sup>43</sup> Those who advocate the position that euthanasia should be legalized maintain that the United States Constitution "protects the right of a mentally competent, terminally-ill person to choose to hasten his or her death in a manner that is sure to result in death, is nonviolent, and preserves dignity by self-administering drugs prescribed by a doctor for that purpose." Tucker & Burman, *supra* note 15, at 497. Advocates of euthanasia assert that the Fourteenth Amendment protects the individual decision to hasten death with physician-prescribed medication and that statutes prohibiting physician-assisted suicide deny equal protection, abridging the liberty guaranteed by the Constitution. *See id.* at 498. They argue that the right of

is to provide a platform for the insights of one of the great moral leaders and thinkers of this century.

Part II of this Article follows with a review of the Pontiff's encyclical, *Evangelium Vitae*. Within this section, subpart A begins with a broad outline of the culture of death. Subpart B follows with an examination of the Pope's insights into a society which embraces the culture of death by permitting abortion and euthanasia. Subpart C discusses Pope John Paul II's emphasis on individual worth. The Article concludes with some thoughts on the obligations that we as individuals have within our sphere of influence. The conclusion is simple: the risk of becoming a *persona non grata*, both individually and collectively, is necessary in order to prevent the grip of legalized death from encompassing the frail and the elderly.

There is much to be learned by examining the Pope's encyclical as it relates to our society and our judicial system. Reflecting on the immeasurable worth and dignity of every individual, His Holiness exhorts all people, in a grave and urgent manner, to assess the moral direction of our country and to evaluate prevailing cultural values which encourage and even enshrine the culture of death. He deals candidly with a world that is becoming increasingly hedonistic and has pleasure and freedom as its incessant mantra. The Pope warns us that by legalizing the moral crimes of abortion and euthanasia, our nation is reverting to a state of savagery, which has as a principal enterprise the destruction of all life deemed not worth living. In so doing, the Pontiff unmasks abortion and euthanasia as moral and civil crimes of the highest order, and he laments the growing assumption that these acts constitute fundamental and inalienable rights.<sup>44</sup>

In spite of the increased pressure to legalize physician-assisted suicide, the Pope is hopeful about the future. His hope provides a source of strength from which Catholic attorneys and judges can draw while working to ensure the protection of life under the laws. Using forceful language to summarize, criticize, and express hope for the future of our society, the Pope provides a profoundly relevant message to the people of our nation and

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competent, terminally-ill adults to choose to hasten inevitable death is a choice protected by the Liberty Clause of the Fourteenth Amendment and is a fundamental right. *See id.* at 506; *supra* note 29.

<sup>44</sup> *See Evangelium Vitae, supra* note 42, at 691.

suggests a course of responsible and effective conduct for the world.

The challenge of changing the minds of those who embrace the culture of death is daunting indeed. In explaining the turn of events that has brought society to this point, the Pope has identified a progressive diminishing of the modern person's capacity to discern God's presence in the world, which, as a cultural phenomenon, has driven God from the public square.<sup>45</sup> As a culture, we have lost both an individual and communal sense of sin, further eclipsing the perception that God is present in day-to-day life, and that he is relevant within the world of law and justice.<sup>46</sup> Consequently, a sense of wrong is no longer clearly

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<sup>45</sup> "A way of thinking and living without reference to God and his word has spread on a massive scale ... . According to modernity, human beings become autonomous by freeing themselves from their traditional guardians and even from God." Normand Provencher, *Modernity*, in *DICTIONARY OF FUNDAMENTAL THEOLOGY*, 723, 724 (Rene Latarelle ed., Crossroad 1994). This commentator further notes that:

The non-necessity of God for the achievement of human progress is a dimension of modernity... . [T]he God whom modernity ignores is the God who was thought to be necessary for the running of the world and as the guarantor of the social order, but this was not the God of the Christian faith. One task of fundamental theology is to bring about a rediscovery of the God of the covenant, the God who gives himself to human beings in a completely unmerited way and with full respect for their autonomy and freedom, the God whose power is the power of love and the law of grace. It must show that the mystery of God is not merely a response to a vague religious need and sense of helplessness. It must speak of the God who goes beyond all the expectations of the human heart and who, in one sense, is not necessary for successful human progress. It must make known the God who wills to communicate himself freely to human beings, and must show that it is possible for human beings to recognize him and be in communion with him. At a time when religion and the meaning of God are being eclipsed, fundamental theology must show that God is always present to human beings, even to those living in modernity and in God's apparent absence, an absence manifested in the cross of Jesus. In the eyes of the Christian faith it is on the cross, where Jesus experiences the silence of God, that God saves the world and manifests his solidarity with those who suffer and die.

*Id.* at 724-25.

<sup>46</sup> Part of the cultural problem in the United States stems from an exaggerated sense of individualism and rights. Professor Glendon speaks of the "legalization of popular culture," which:

[I]s both cause and consequence of our increasing tendency to look at law as an expression and carrier of the few values that are widely shared in our society: liberty, equality, and the ideal of justice under law. With increasing heterogeneity, it has become quite difficult to convincingly articulate common values by reference to a shared history, religion, or cultural tradition.

seen, appreciated, nor delineated within the order of law.<sup>47</sup>

There is, the Pope believes, a disjunction between the civil law as it stands, and the moral good as it is or ought to be. That justice and virtue within a state can co-exist with abortion or euthanasia is implausible. Underscoring this notion, the Holy Father has addressed the tragic character of the modern state which uses conceivable pretenses of legality to provide safeguards for those who would take human life. Although not specifically identifying the United States, the Pope alludes to every nation which, by legalizing abortion and debating the legality of euthanasia, arrogates that which only God, through the moral law, can rightfully arbitrate.<sup>48</sup> Tragically, in these nations, the

GLENDON, *supra*, note 31, at 3.

<sup>47</sup> The disembowelment of the sacred from American legal principles has been increasing with the help of the American Civil Liberties Union, which supports a strict separationist position regarding church and state, and opposes any intermingling between the two entities. See WILLIAM A. DONOHUE, *TWILIGHT OF LIBERTY: THE LEGACY OF THE ACLU* 93-128 (1994). Contrary to this thinking, religion is not the enemy, nor the opiate of the masses. As one author noted, “[t]hose who embrace a social idea of liberty understand the functional relationship that exists between religion and freedom.” *Id.* at 93. In speaking about the cultural disintegration achieved by the ACLU and other strict separatists, the author also stated:

When the Constitution was written, crèches were permitted on public property and blasphemy was punishable by death. Now we’ve banned the crèches and provided public funding for blasphemy (the National Endowment of the Art’s funding of Andre Serrano’s ‘Piss Christ’ exhibit is a case in point). The inversion has as much to do with a profound shift in the tastes of the cultural elite as with the tenor of contemporary legal arguments.

*Id.* at 94.

<sup>48</sup> Pope John Paul II addressed the “structures of sin” in his 1987 encyclical, *On Social Concerns*. In his letter he stated:

It is not out of place to speak of ‘structures of sin’ which, as I stated in my apostolic exhortation *Reconciliatio et Paenitentia*, are rooted in personal sin and thus always linked to the concrete acts of individuals who introduce these structures, consolidate them and make them difficult to remove. And thus they grow strong, spread and become the source of other sins, and so influence people’s behavior.

Pope John Paul II, *On Social Concerns*, 33 *THE POPE SPEAKS* 144 (Summer 1988). Indeed, the Pope articulated four means by which individuals are guilty of sinful social structures:

Whenever the church speaks of *situations* of sin or when she condemns as *social sins* certain situations or the collective behavior of certain social groups, big or small, or even of whole nations or blocs of nations, she knows and she proclaims that such cases of *social sin* are the result of the accumulation and concentration of many *personal sins*. It is a case of the very personal sins of those who cause or support evil or who exploit it; of those who are in a position to avoid, eliminate or at least limit certain social evils but who fail to do so out of laziness, fear or the conspiracy of silence,

law loses its moral force as it refuses to recognize and protect values of the highest order. Ultimately, this corruption and perversion of the law may lead to the state being transformed into both a profane tool and savage agent of death.

## II. EUTHANASIA: MALUM IN SE

Euthanasia is an act *malum in se*<sup>49</sup> regardless of how many

through secret complicity or indifference; of those who take refuge in the supposed impossibility of changing the world and also of those who sidestep the effort and sacrifice required, producing specious reasons of a higher order. The real responsibility, then, lies with individuals. A situation—or likewise an institution, a structure, society itself—is not in itself the subject of moral acts. Hence a situation cannot in itself be good or bad.

*Id.* at 144 n. 65 (quoting *Reconciliatio et Paenitentia*, AAS 77 (1985), at 217).

<sup>49</sup> *Malum in se* is an act which is evil in itself, “something inherently and universally considered evil.” Bryan A. Garner, A DICTIONARY OF MODERN LEGAL USAGE 545 (2d ed 1995). *Malum in se* is distinguished from *malum prohibitum*, which is “wrong merely because it is proscribed; made unlawful by statute.” *Id.* Thus murder is the usual example of a crime *malum in se*, but running a traffic light is said to be *malum prohibitum*. See *id.* Black’s Law Dictionary emphasizes this distinction by explaining that “[a]n act is said to be *malum in se* when it is inherently and essentially evil, that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state.” BLACK’S LAW DICTIONARY 959 (6th ed. 1990).

As one commentator explains:

Christianity changed the way the West thought about life and death. The Christian Church, particularly after Saint Augustine, advocated absolute respect for the sanctity of human life and condemned suicide under all circumstances. ... Augustine played a major role in popularizing the sanctity of life principle and in denouncing suicide ... . He declared that suicide violated the Sixth Commandment: “The commandment is, ‘Thou shalt not kill man,’ therefore neither another nor yourself, for he who kills himself kills nothing else than man.” Concluding that suicide violated the will of God, Augustine proclaimed:

[N]o man ought to inflict on himself voluntary death, for this is to escape the ills of time by plunging into those of eternity; ... no man should put an end to this life to obtain that better life we look for after death, for those who die by their own hand have no better life after death. ...

The Church’s condemnation of suicide became the law throughout Christian Europe, and the Catholic Church to this day continues to decry suicide and euthanasia. ... Christian theologians, particularly Catholic ones, also assert that human suffering has value. Killing a suffering patient is wrong, therefore, because it deprives that patient of the divine rewards for suffering and also deprives the souls in purgatory of potential favors. In a recent encyclical entitled *Evangelium Vitae* (“The Gospel of Life”), Pope John Paul II declared that modern culture mistakenly “fails to perceive any meaning or value in suffering, but rather considers suffering the epitome of evil, to be eliminated at all costs.” The Pope claimed that modern nations are part of a “conspiracy against life” and reaffirmed the Catholic Church’s vigorous

proponents argue for its legalization, and no matter how many and which federal courts legalize it. It is proscribed absolutely by the Roman Catholic Church because the act is in and of itself completely evil and devoid of justification and good. The Catholic Church remains ever true to the principle that innocent human life is sacred at all stages of its existence. Relying on Holy Scripture, the Church commands a dominant role in witnessing to the fundamental truth of the sanctity of life. With the fifth commandment, "You shall not kill," as a principal basis, the Church forbids direct and intentional killing as gravely sinful.

### A. *Outlining the Culture of Death*

The Supreme Court's decision legalizing abortion in *Roe v. Wade*<sup>50</sup> stands as a defining moment in the history of our country, as it marks the moment when the destruction of life became a solution to societal problems.<sup>51</sup> Thus, the *Roe* ruling has pro-

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opposition to euthanasia. The theological underpinning to this position is that Christians should bear their suffering just as Christ bore the cross to save humankind from evil.

Previn, *supra* note 10, at 595-96 (alterations in original) (citations omitted).

The Second Vatican Council describes God as conferring on all the surpassing ministry of safeguarding life. Abortion and euthanasia are unspeakably tragic because, in the words of the Council, they poison human society, and do more harm to those who practice and promote the acts than those who suffer the injury. At their core, they are a supreme dishonor to the Creator, and *de facto* examples of man's inhumanity to man.

<sup>50</sup> 410 U.S. 113 (1973).

<sup>51</sup> See *Roe*, 410 U.S. at 173. The destruction of those lives in the womb, lives determined not to be worth living, has become one of the most controversial and explosive social issues the Supreme Court and our nation has ever faced. Even twenty years after the ruling, the Court is still reeling from the jurisprudence introduced within the opinion. The Court cannot extricate itself from the raging emotional arguments and polarized debate about the value and dignity of life. Perhaps due to being saddled with questionable abortion law precedent and fearful of impugning its self-imposed chains of *stare decisis*, the Supreme Court declined to hear a recent abortion-related case, despite it being posed as an outcome-determinative interpretation of constitutional law. See *Janklow v. Planned Parenthood*, 116 S. Ct. 1582 (1996). Indeed, one commentator explained that it is "the Supreme Court's inclination to defend *Roe* on grounds of *stare decisis* rather than upon any principle of constitutional adjudication." Chopko and Moses, *supra* note 15, at 577. Justice Scalia, using as evidence the Court's denial of the certiorari petition in *Janklow v. Planned Parenthood*, excoriated the current state of abortion jurisprudence within the Supreme Court as an "abortion ad hoc nullification machine." 116 S. Ct. at 1585 (denying cert. to *Planned Parenthood v. Miller*, 63 F.3d 1452 (8th Cir. 1995) (Scalia, J., dissenting)). Justice Scalia's characterization challenges the Court's on-going abortion jurisprudence that supports the judicially-constructed liberty interest conceived in *Roe*. Amplifying these sentiments, Justice Scalia on another occasion has said that the Court "should get out of th[e] [abortion] area, where we have no right

vided legal justification and social support for euthanasia.<sup>52</sup> Unquestionably, it is the source for the recent attempt to legalize physician-assisted suicide by the federal courts.<sup>53</sup>

This failure to protect life, whether by legalizing abortion or euthanasia, is beyond the comprehension of many.<sup>54</sup> Indeed, the Union of Orthodox Rabbis of the United States recently characterized euthanasia as a "moral outrage."<sup>55</sup> In the words of Rabbi Ginsberg:

We as Jews must necessarily be apprehensive and concerned

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to be, and where we do neither ourselves nor the country any good by remaining." *Planned Parenthood v. Casey*, 505 U.S. 833, 1002 (1992) (opinion of Scalia, J.).

It seems that the Supreme Court did not deny certiorari in *Janklow* on defensibly consistent legal grounds. The Court's inconsistency in its approach to its abortion jurisprudence has not received the same rigorous analysis and intellectual honesty required in other areas of the law. The 6-3 vote to deny certiorari in *Janklow* may represent a fragmented Court's divided, but firm loyalties to a legal mindset that disregards the broad patrimony of the Judeo-Christian legal tradition. This outlook ignores the contemporary advances in medical science which attest to the miracle of life, the deleterious social consequences engendered by legalized abortion, the persuasive moral pleas made by people of good will, the sound constitutional arguments assembled since *Roe* that abortion is an unwarranted usurpation of state legislative authority by the Court, and the ultimate denial by the state of the natural good and value of life. If the Supreme Court is not an active partner in creating what the Pope calls the culture of death, it is at least a willing and complacent agent in establishing a "structure of sin." See *supra* note 48 for further discussion of the Pope's commentary on society's structures of sin.

<sup>52</sup> In the early 1960's, abortion was proscribed by law in all states. By the late 1960's, abortion laws had been "liberalize[d]" in several states, even though abortion was still generally proscribed or permitted only rarely under limited circumstances. See *Roe*, 410 U.S. at 140. On January 22, 1973, the Supreme Court held that the constitutional right to privacy includes a woman's right to abort her child. See *id.* at 173; *Doe v. Bolton*, 410 U.S. 179 (1973). The Justices classified unborn life as "potential" life, not entitled to the protection of the law prior to viability. Even after viability, according to the Court's ruling, a legal abortion can still be performed when it is "necessary to preserve the life or health of the mother." *Roe*, 410 U.S. at 164.

<sup>53</sup> See *supra* notes 13-14 and accompanying text. It should come as no surprise that the Second and Ninth Circuits ruled in favor of an individual's right to terminate her own life given the constitutionally recognized fundamental right to terminate pre-natal life.

<sup>54</sup> Among those who believe that mercy killings are a "moral outrage" is the Union of Orthodox Rabbis of the United States and Canada. See *Rabbis Urge Constitutional Amendment Against Euthanasia*, 11 ISSUES IN LAW & MED. 215, 215 (1995). This body constitutes the "oldest rabbinic body in North America of over six hundred rabbis serving one-half million Jews" and has condemned a recent referendum legalizing a form of euthanasia. *Id.* Rabbi Hersh Ginsberg, spokesman for the Union, declared that "this first legal euthanasia step in the United States, however limited, has the potential within a few years to open the floodgates to full-blown nationwide euthanasia — merciless mercy killing." *Id.*

<sup>55</sup> *Id.*

when we review the early twentieth century in Germany, especially ... when so-called progressive thinkers actively promoted the euthanasia ideology, including the concept that quality of life called for eliminating so-called useless people—the very old and infirm, those seriously handicapped, the mentally retarded, etc.—much as is now advocated in the United States ... . Our American people must not remain silent as we see the organized promotion in America of active euthanasia.<sup>56</sup>

The consequences that arise when the state expressly sanctions the killing of innocent human lives are almost unimaginable. Such a society cannot be well-ordered or prosperous. Germany, before World War II, is an example of such a state.<sup>57</sup>

In 1995, Pope John Paul II issued an encyclical in which he addressed, with grave alarm, the threats being posed to innocent human life.<sup>58</sup> The encyclical *Evangelium Vitae* reaffirmed the Christian tradition of firm opposition to direct and willful abortion and euthanasia as crimes against God and humanity. The Holy Father attempted to understand why the threat to life is so great in our day, and described the characteristics of what he calls a “culture of death.”<sup>59</sup> The Pontiff also appealed for a trans-

<sup>56</sup> *Id.* at 215-16.

<sup>57</sup> See Marker, *supra* note 11, at 265 (tracing development of euthanasia in Germany and arguing “[d]espite widely held aversion in certain quarters, comparisons between pre-war Germany and contemporary America merit careful attention, not denial.”). A common misperception is that the German euthanasia program was rooted in Nazism; it actually has been traced back to the early 1920’s. See *id.* at 266.

<sup>58</sup> The encyclical, entitled *Evangelium Vitae, The Gospel of Life*, was issued on March 25, 1995. Given Pope John Paul II’s recognition of the symbolic significance of dates, it is not insignificant that the date His Holiness chose for the promulgation of an encyclical dealing with the immorality of abortion was March 25, the Feast of the Annunciation, on which Christians commemorate the appearance of the angel Gabriel to Mary informing her that she was to conceive the Savior. Christians look on this date as the beginning of the salvation brought to them by the Redeemer in the womb. For centuries this Feast has been celebrated exactly nine months prior to the Feast of the Nativity of Christ on December 25.

<sup>59</sup> Within the Christian understanding of death, Pope John Paul II has repeatedly lamented the “culture of death” that is emerging in the United States. In addition to the earlier commentary, one recent example is partial-birth abortions. In an unusually strong statement, the Vatican characterized President Bill Clinton’s veto of the Partial-birth Abortion Ban Act as a shameful act. See Maura Fisher, *Vatican Denounces Clinton’s ‘Shameful Veto’ of the Partial-Birth Abortion Ban Act*, U.S. NEWSWIRE, Apr. 19, 1996.

Partial-birth abortions are a particularly gruesome type of abortion used after twenty weeks of pregnancy and involve extracting the baby feet first with only the head left in the birth canal. An incision is made into the back of the baby’s head and the brain is suctioned out with a catheter until the skull collapses.



formation of the culture of death into a civilization of love in which all innocent human life is cherished and protected.<sup>60</sup> However, he has realized that this cannot be accomplished through moral exhortation alone.<sup>61</sup> The complexity of the state and its powerful juridical structures contribute to the problem faced today. Yet, a collaboration between the state and its powerful instrumentalities, such as the court and police systems, is the only means of achieving the civilization of love.<sup>62</sup>

Although only a short portion of the encyclical is devoted to the relationship between the divine, moral, and civil law,<sup>63</sup> the

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In a strong statement, Vatican spokesman Joaquin Navarro-Valls warned that by approving an "inhuman procedure," the president has put the ethical and moral future of American society at risk. "The presidential decision against the position of the American Congress is a 'shameful' veto which in practice is equivalent to an incredibly brutal act of aggression against the innocent human life and against the inalienable human rights of the unborn."

*Id.*

The Pope has been joined by the bishops of the United States in his message. For example, the Archbishop of Newark, Theodore McCarrick, castigated the "growing power of death merchants" and warned that America "has in its sick selfishness sown the seeds of deep moral decay." See David Gibson, *Archbishop Condemns Rise of 'Death Merchants,' Singles Out Abortion, Assisted Suicide*, THE RECORD (N.J.), Mar. 28, 1996, at A1, available in LEXIS, News Library, Curnws File.

<sup>60</sup> "[T]his Christian hope for a better world is quite different from mere optimism. Our duty to our neighbor is a duty in love." THE TEACHING OF CHRIST 298 (Ronald Lawlor, O.F.M. et. al. eds., 2nd prtg. 1976).

<sup>61</sup> Understanding the need for vigorous action, the eight Cardinals of the United States and President of the National Conference of Catholic Bishops promised more than moral exhortation in fighting our nation's manifestations of the culture of death. Greg Schleppeback, *Life Insight*, S. NEB. REG., May 3, 1996, at 5. In an unprecedented letter to President Clinton, they noted their deep sorrow and dismay over the president's veto of the Partial-Birth Abortion Ban Act, and vowed that, along with the bishop's conference, they would do all they could to educate people about partial birth abortions. See *id.* They informed the president that they would report to people that partial-birth abortions will continue because of the president's choice to veto H.R. 1833. See *id.* The cardinals are urging Catholics and other people of good will—including the 65% of self-described "pro-choice" voters who oppose partial-birth abortions—to do all they can to convince Congress to override this veto. See *id.* Writing this response in unison was virtually unprecedented. See *id.* It will, they hope, underscore their resolve to be unremitting in their defense of human life. See *id.*

<sup>62</sup> The Catholic Church views the state as necessary for obtaining the interests of its citizens, and as supreme in its own province of the civil or temporal interests of its citizens. See THE TEACHING OF CHRIST, *supra* note 60, at 348 (discussing essential nature of legitimate political authority).

<sup>63</sup> "Divine positive law: That which has been revealed by God." CATHOLIC ALMANAC 316 (Felician A. Foy, O.F.M. and Rose M. Avato eds., 1994). "Among its essentials are the twin precepts of love of God and love of neighbor, and the Ten Commandments." *Id.* "Civil law: That which is established by a socio-political com-

Pope does not speak solely in terms of his own personal opinion. Rather, he encompasses an intellectual and legal tradition far broader than the Catholic patrimony. The western patrimony, formed by the Christian understanding of the human person and his life in community, contributed greatly to shaping this tradition.<sup>64</sup> The Pope articulated the Catholic position on the relationship between divine, moral, and civil law in the context of western legal and social tradition, and recognized that contemporary western societies place supreme importance on freedom of choice and democratic forms of government. In his encyclical, the Pope also recognized that the practice of abortion has risen, and that those societies exalting individual rights and personal autonomy have largely sanctioned this procedure.<sup>65</sup> These same values are being used to legalize euthanasia in the United States. This is not without an immense price; with the legalization of abortion and the movement towards legalizing euthanasia, the decline of the state and society has begun. The challenge

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munity for the common good." *Id.* "Ecclesiastical law: That which is established by the Church for the spiritual welfare of the faithful and the orderly conduct of ecclesiastical affairs." *Id.* "Natural law: Moral norms corresponding to man's nature by which he orders his conduct toward God, neighbor, society and himself." *Id.*

<sup>64</sup> The Pope is not relying strictly on moral teachings for the basis of his argument. To do so would call into question the extent to which substantive moral principles potentially relevant to political choice rest on particular religious beliefs, and whether they may be appropriately relied upon by good citizens. See Kent Greenawalt, *Natural Law and Political Choice: The General Justification Defense—Criteria for Political Action and the Duty to Obey the Law*, 36 CATH. U. L. REV. 1, 27 (1986-87).

The suggestion often has been made that in a liberal democracy the bases for political judgments should be publicly accessible. Because rational public reasons are commonly thought to be incapable of settling matters of religious truth, the practical import of the suggestion that bases for judgments should be publicly accessible is that reasons deriving from particularist claims of religious truth are inappropriate bases for political decisions. On this view, neither officials nor citizens should rely on such bases to impose laws and policies on fellow citizens who cannot be expected to understand and accept these bases. To take an obvious example, it would be wrong in a liberal society to prohibit the eating of pork on the ground that a dietary law in the Old Testament forbids it. Similarly, if an absolute norm against taking innocent human life could be supported only on the basis of particular revelation, the norm should not be written into the law.

*Id.*

<sup>65</sup> Freedom of choice does not mean that another individual has the right to trample the rights of other individuals, especially those who are not in a position to protect their rights, such as the unborn or the frail of mind or body. See *Evangelium Vitae*, *supra* note 42, at 692.

is to recognize the value of personal autonomy while protecting all individuals through the recognition of ethical norms.

His Holiness suggests that in contemporary thought:

[V]iews go so far as to maintain that in a modern and pluralistic society people should be allowed complete freedom to dispose of their own lives as well as the lives of the unborn: it is asserted that it is not the task of the law to choose between different moral opinions, and still less can the law claim to impose one particular opinion to the detriment of others.<sup>66</sup>

The Pope thus captures a sentiment found in American society, that it is quite impossible to adopt any particular moral code common to all. He writes: “[I]f it is believed that an objective truth shared by all is *de facto* unattainable, then respect for the freedom of the citizens—who in a democratic system are considered the true rulers—would require that on the legislative level the autonomy of individual consciences be acknowledged.”<sup>67</sup> According to this philosophy, “the state should not adopt or impose any ethical position but limit itself to guaranteeing maximum space for the freedom of each individual.”<sup>68</sup> In fact, some would hold that moral norms themselves threaten human freedom and autonomy. The Pope notes that those who believe ethical relativism is necessary for democracy consider objective moral norms to be binding and ominous. They believe the imposition of moral norms will result in authoritarianism and intolerance.<sup>69</sup> The Pope recognizes that the very notion of morality itself can be

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<sup>66</sup> *Id.* at 713.

<sup>67</sup> *Evangelium Vitae*, *supra* note 42, at 713. The implications of this, of course, are anarchy and a totally ineffectual and essentially non-existent government. Anarchy, “[a]t its best ... pertains to a society made orderly by good manners rather than law, in which each person produces according to his powers and receives according to his needs, and at its worst ... pertains to a terroristic resistance of all present government and social order.” BLACK’S LAW DICTIONARY 84 (6<sup>th</sup> ed. 1990).

<sup>68</sup> *Evangelium Vitae*, *supra* note 42, at 714. In granting “maximum space” to its citizens, the state does in fact take ethical and moral positions on critically important issues. The state cannot remain neutral, and it is specious to assert that government should not adopt or impose a particular moral or ethical position on its citizens. The state exists to serve its citizens by enacting and enforcing laws reflecting right reason. Serving the citizens includes enforcing that which is for the good of society. If the state chooses to grant “freedoms” such as legalized abortion and euthanasia, the state is failing in its capacity to act for the common good. By permitting these actions, the state has made a value-judgment, and by its powerful legal mechanisms, has enforced one faction’s views on freedom and fundamental rights which flies in the face of reason and truth.

<sup>69</sup> *Id.* at 714-715.

seen by some to constitute a threat to the individual's pursuit of happiness.

However, as His Holiness points out, such an understanding of universally binding norms is the opposite of that which actually exists. In reality, if freedom is not essentially ordered to objective truth, it becomes merely the power to exercise an absolute individualism to the detriment of society. The Pope insists that freedom must be open to "an objective and universal truth, which is the foundation of personal and social life."<sup>70</sup> When freedom is not linked to truth, it becomes arbitrary and threatening. As the Pontiff indicates, "[f]reedom negates and destroys itself, and becomes a factor leading to the destruction of others when it no longer recognizes and respects its *essential link with the truth*."<sup>71</sup> Indeed, if the only limit which can be placed by the state on the exercise of freedom is that one may not interfere with another person's exercise of freedom, the result may be that those in power will assign certain categories of people a status which does not qualify them to receive protection of the laws. This has been done with tragic frequency in recent history.

Such deterministic, subjective attitudes are found even in the decisions of the Supreme Court.<sup>72</sup> In *Planned Parenthood v.*

<sup>70</sup> *Id.* at 697.

<sup>71</sup> *Id.*

<sup>72</sup> This deterministic attitude automatically entails a reference to the mythical separation of law and morality as articulated by Oliver Wendell Holmes. See Walter H. Bennett, Jr., *Making Moral Lawyers: A Modest Proposal*, 36 CATH. U. L. REV. 45, 49-50 (1986-87). Justice Holmes maintained a strict analytical separation between the law and morality. He noted that "Our system of morality is a body of imperfect social generalizations expressed in terms of emotion. To get at its truth, it is useful to omit the emotion and ask ourselves what those generalizations are and how far they are confirmed by fact accurately ascertained." Oliver Wendell Holmes, *Ideals and Doubts*, 10 ILL. L. REV. 1, 3 (1915). As Professor James R. Elkins noted, Holmes' approach has its direct roots in legal positivism, particularly the philosophies of Hans Kelsen – who sought to separate all judgments of morals and politics. See Bennett, *supra*, at 49-50. Explaining this position, the commentator states:

Christopher Langdell's scientific case method was based precisely on this premise—that the study of law should be disembodied from the influence of less "scientific" disciplines and considerations. The case method, which began in the Positivist era and became, and to a large degree remains today, the ordained method of legal teaching, institutionalized the notion that the study of law should be divorced from cloudy issues of morality... . Holmes' statement also reveals that he was attracted by the notion that law should be studied in pure form, "uncolored" by the "unnecessary confusion" of less precise disciplines. There is something very seductive about this inclination among lawyers to attack and solve all problems through the high science of laws and legal reasoning unimpeded by more basic con-

*Casey*,<sup>73</sup> the Court wrote: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."<sup>74</sup> The result, then, is that each individual forms his or her beliefs about the attributes of personhood and then chooses whether to apply these beliefs to the issues of abortion and physician-assisted suicide.<sup>75</sup>

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siderations. It has obvious intellectual roots in Positivism, but one suspects it has psychological and emotional roots as well... There is also in Holmes' remarks an element of distrust of the imprecision of, and distraction in, matters "outside" the law. He repeatedly refers to the "confusion" caused by moral ideas. This attitude is sustained in the study and practice of law by the widely held and, some might argue, mythological belief that the best students and the best lawyers are the ones who can focus upon the legal question and place extraneous matters, be they irrelevant facts or their own feelings about the case, aside.

*Id.*

<sup>73</sup> 505 U.S. 833 (1992).

<sup>74</sup> *Id.* at 851. It is remarkable and rather distressing to think that the Court philosophized that personal choice trumps all other interests, including that of the good of society and the true good of the individual. Many believe otherwise, as indicated by the following commentary:

The contention that there is no objective or universal truth has achieved a measure of official status among us by fiat of the Supreme Court. In *Planned Parenthood v. Casey*, ... [it] declared that it is up to each individual to determine "the concept of existence, of meaning, of the universe, and of the mystery of human life" ... . When truth itself is democratized—when truth is no more than the will of each individual or a majority of individuals—democracy, deprived of the claim to truth, stands naked to its enemies. Thus does freedom, when it is not "ordered to truth," undo freedom.

Chopko & Moses, *supra* note 15, at 580 (quoting Richard Neuhaus, *The Splendor of Truth, A Symposium*, FIRST THINGS, Jan. 1994, at 15).

<sup>75</sup> The question of individual determination of the morality of abortion and euthanasia ultimately is reduced to the role of conscience, however malformed. In human society, the law is the basis of human conduct. Conscience is the means by which the moral law is apprehended, interpreted and understood. See JOHN A. HARDON, *THE CATHOLIC CATECHISM* 289-93 (1975). "[I]n the strict sense, conscience is the action of the practical intellect deciding whether a particular, proposed operation is good or bad." *Id.* at 291. It is the final product of reason after the principles of morality have been duly applied to a specific course of action. See *id.* Fidelity to conscience cannot be separated from sincerity in wanting to learn the truth, whether the person is a Catholic or not. Catholic morality presumes that there are objective norms of conduct which are always objectively good or evil. "Certain actions are good and others bad, certain forms of behavior are virtuous and others sinful, always and everywhere and for everyone who knows what he is doing and does so with sufficient reflection and freedom of assent." *Id.* at 293.

### B. Communitarian Interests vs. the Culture of the Individual

If there is no truth to be discovered, because one will not seek the truth, or recognize the truth as objective, one creates the truth.<sup>76</sup> When this is done, “society becomes a mass of individuals placed side by side, but without any mutual bonds.”<sup>77</sup> Although this destroys any semblance of a well-ordered and functioning community, there may be enough similar interests among these individuals that they will work toward a compromise of their beliefs to achieve their own respective goals. However, when this occurs, virtually “everything is negotiable, everything is open to bargaining: even the first of the fundamental rights, the right to life.”<sup>78</sup>

When a society no longer has a shared vision of what constitutes the common good, then a common life cannot be forged.<sup>79</sup> One is left with various groups within that society occasionally banding together to pursue their particular interests at the expense of other groups who may not be as effective at forming alliances. The Pope’s insights into the socially disruptive effects of extreme individualism, which result when there is no longer a shared vision of what constitutes the common virtues to be pursued by society, recall to mind the words of Aristotle:

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<sup>76</sup> See THE TEACHING OF CHRIST, *supra* note 60, at 292-93. “Christian morality is not a morality for Christians only. It is for all men, for all men are called to follow Christ.” *Id.* at 293.

<sup>77</sup> *Evangelium Vitae*, *supra* note 42, at 697.

<sup>78</sup> *Id.*

<sup>79</sup> “A nation,” says one commentator, “like a person, can lose its moral compass if it disengages itself from the traditions from which it was born.” Chopko & Moses, *supra* note 15, at 580. It is impossible for a nation which has disengaged itself from its most basic and sacred beliefs and traditions, to remain stable and to continue to prosper. As the commentator states:

Those traditions, enshrined in and protected by law, shape us as a nation and as local communities. Our nation and local communities in turn shape personal character, which makes moral understanding of any kind possible. The content of our laws is therefore critical to who we become. The law must take into account not just the legal status of the individual, but a proper understanding of the common good. As Mary Ann Glendon has pointed out, Americans have a rich vocabulary for describing individual rights and a remarkably impoverished vocabulary for describing communitarian interests. The prevailing ethic, sadly, seems to be to preserve at any cost the individual even to the extent of isolating him from the human community altogether. Many ... would say that this isolation has already taken place in the case of abortion, and it threatens to happen again in the case of assisted suicide.

*Id.*

"[A] state exists for the sake of a good life, and not for the sake of life only... . Whence it may be further inferred that excellence must be the care of a state which is truly so called, and not merely enjoys the name: for without this end the community becomes a mere alliance... ."80

It is precisely this danger of communities degenerating into unstable and shifting alliances which the Pope foresees in a society in which individual freedom is no longer linked to the objective truth, which ultimately provides the basis for the moral order. As the Pope says, "without an objective moral grounding not even democracy is capable of ensuring a stable peace."<sup>81</sup> Indeed, without a grounding in objective morality, democracy can

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<sup>80</sup> ARISTOTLE, *POLITICS*, Bk. III, Ch. 9, at 63 (Steven Everson ed., Cambridge Univ. Press 1988). Many different people go to make up a political community, and inevitably there will be differences of opinion on how things should be done. See *THE TEACHING OF CHRIST*, *supra* note 60, at 348-49.

[I]f the political community is not to be torn to pieces as each person follows his own viewpoint, authority is needed in order to direct the energies of all citizens toward a common good – not mechanically or despotically, but primarily as a moral force which depends on freedom and on the conscientious discharge of the burdens of any office which has been undertaken. It is therefore obvious that the political community and public authority are based on human nature and hence belong to an order of things preordained by God, though the choice of government and the designation of leaders is left to the free choice of the citizens.

But God, of course, does not command immoral actions. Certainly moral evils do not become justified because civil law permits or demands them. If civil authorities issue laws or decrees which are in contravention of the moral order, "and therefore against the will of God," these "cannot be binding on the consciences of the citizens, since 'one ought to obey God rather than men.' (*Acts 5:29*).<sup>81</sup> Moreover, "if any government does not acknowledge human rights, or violates them, not only does it fail in its duty, but its orders are wholly lacking in binding force."

*Id.* (citations omitted).

<sup>81</sup> *Evangelium Vitae*, *supra* note 42, at 714. In a democracy, responsibility for the virtue and stability of the union ultimately rests with each individual and with community leaders. One commentator noted:

Responsibility for answering the pressing questions of the day, including the issue of suicide, ultimately resides with the people of our nation and communities. That is the very essence of a democracy. Requiring that the answers be devised within constitutional limits does not undermine democracy. The Constitution itself is a consensual document, representing the will of our people. But if our Constitution becomes simply a font into which our courts pour their own values in disregard of the traditions and history that have shaped our nation, they will be disregarding the will of the nation that holds to the Constitution as its charter. We will then cease to be a nation of constitutional and democratic government, and will be ruled instead by judicial fiat.

Chopko & Moses, *supra* note 15, at 579.

easily degenerate into tyranny.<sup>82</sup> The Pope writes:

[D]emocracy, contradicting its own principles, effectively moves toward a form of totalitarianism. The state ... is transformed into a tyrant state which arrogates to itself the right to dispose of the life of the weakest and most defenseless members, from the unborn child to the elderly, in the name of a public interest which is really nothing but the interest of one part. The appearance of the strictest respect for legality is maintained ... . Really, what we have here is only the tragic caricature of legality; the democratic ideal, which is only truly such when it acknowledges and safeguards the dignity of every human person, is betrayed in its very foundations ... . When this happens, ... the disintegration of the state itself has already begun.<sup>83</sup>

Those are harsh words on the part of our Holy Father, but they reflect a certainty of conviction. Today the United States has all the might, influence, power, and prestige which one would associate with a world power, perhaps, the world power. But such might and prestige are placed in great jeopardy when immoral and unjust practices are sanctioned by the law. Once a free society allows such treatment of its most vulnerable members, its very foundations in freedom are assaulted and social disintegration threatens. In 1939, Pius XII spoke of powerful states built on human authority and noted that the seeds of destruction of a society were planted when there was a:

disproportion between the greatness of the material and outward success, and the weakness of the inward value of its moral foundation. Such disproportion exists whenever public authority disregards or denies the dominion of the Supreme Lawgiver, Who, as He has given rulers power, has also set and marked its bounds.<sup>84</sup>

The repudiation of the Supreme Legislator is seen in the repudiation of the moral law.

Nearly 60 years later John Paul II is warning of the seeds of destruction that are planted in societies, such as the United

<sup>82</sup> It becomes a problem not merely of inefficient governance but of dangerous governance. John Paul II asks rhetorically: "When a parliamentary or social majority decrees that it is legal ... to kill unborn human life, is it not really making a 'tyrannical' decision with regard to the weakest and most defenseless of human beings?" *Evangelium Vitae*, *supra* note 42, at 714.

<sup>83</sup> *Id.* at 697.

<sup>84</sup> Pope Pius XII, *Summi Pontificatus*, in *THE PAPAL ENCYCLICALS 1939-1958*, ¶ 57, at 13 (1981).



States, which currently seem strong and robust. The Pope insists that, where the moral foundation of a society is weakened, that society cannot and will not flourish. The moral foundations of a society are undermined by calling a crime a right, and by having those crimes protected by the powers of the state – those powers which have been entrusted to the state by God to ensure the protection of the innocent and the advancement of justice. “To claim the right to abortion,” says the Pope, “and to recognize that right in law, means to attribute to human freedom a perverse and evil significance: that of an absolute power over others and against others. This is the death of true freedom ... .”<sup>85</sup> A democracy can flourish only when its citizens exercise their freedom in a moral way, which means in a just way. In fact, only then can citizens be truly free, for if they place at jeopardy the most fundamental rights of certain members of society, they place their own rights in jeopardy as well. Indeed, it is morality which is most necessary for a society to flourish. Hence:

Democracy cannot be idolized to the point of making it a substitute for morality ... . Fundamentally, democracy is a “system” and as such is a means and not an end. Its “moral” value is not automatic, but depends on conformity to the moral law to which it ... must be subject ... . [T]he value of democracy stands or falls with the values which it embodies and promotes ... values such as the dignity of every human person ... .<sup>86</sup>

It is here that we come to the relationship the Pope sees between the moral and the civil order. The moral ordering of society is found in the respect given to the dignity of the individual person. The dignity of each individual is a value which is discovered and acknowledged by the state, not bestowed gratuitously. The value of the individual cannot come and go according to a changing public opinion; it cannot be subject to the fickle ideologies of one leader or president to the next. Undoubtedly, different societies might follow certain apparently democratic processes to accord value to certain human beings or remove such value from others, but the adherence to procedure can hardly be seen as ensuring the morality of that which is done.

The Pope tells us that:

The basis of these [human] values cannot be provisional and

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<sup>85</sup> *Evangelium Vitae*, *supra* note 42, at 697.

<sup>86</sup> *Id.* at 714.

changeable “majority” opinions, but only the acknowledgment of an objective moral law which, as the “natural law” written in the human heart, is the obligatory point of reference for civil law itself. If, as a result of a tragic obscuring of the collective conscience, an attitude of skepticism were to succeed in bringing into question even the fundamental principles of the moral law, the democratic system itself would be shaken in its foundations  
 ...<sup>87</sup>

The only way to avoid the risk of weakening the very foundations of democratic order is to make certain that civil law conforms to and expresses the moral law. As His Holiness says, “[T]here is a need to recover the basic elements of a vision of the relationship between civil law and moral law ... .”<sup>88</sup> He also tells us that the “doctrine on the necessary conformity of civil law with the moral law is in continuity with the whole tradition of the Church,”<sup>89</sup> and it is “also part of the patrimony of the great juridical traditions of humanity.”<sup>90</sup>

In the thirteenth century, Saint Thomas Aquinas wrote of the necessity of the civil law conforming to the moral law. The moral law, he noted, was a reflection of God’s own creative, ordering intellect:

Human law has the nature of law in so far as it partakes of right reason; and it is clear that, in this respect, it is derived from the eternal law. But in so far as it deviates from reason, it is called an unjust law, and has the nature, not of law but of violence.<sup>91</sup>

An unjust law would become an act of violence by its very nature since it could not be reasonably enforced. Since such a law would be contrary to human nature, the only way it could be enforced would be by imposing it through varying degrees of violence. For example, legitimizing abortion inflicts violence upon both the mother and the unborn child. In the same manner, euthanasia is a violent offense against the individual who is killed, the society which sanctions it, and the God who is the giver of all life.

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 715.

<sup>90</sup> *Id.* at 714.

<sup>91</sup> ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* I-II, Q. 93, Art. 3, at 1005 (Fathers of the English Dominican Province trans., 1947) [hereinafter *SUMMA THEOLOGICA*].

Writing out of the western juridical tradition, the Pope insists that:

Laws which authorize and promote abortion ... are ... radically opposed not only to the good of the individual but also to the common good; as such they are completely lacking in authentic juridical validity. Disregard for the right to life, precisely because it leads to the killing of the person whom society exists to serve, is what most directly conflicts with the possibility of achieving the common good. Consequently, a civil law authorizing abortion ... ceases by that very fact to be a true, morally binding civil law. ... Abortion and euthanasia are thus crimes which no human law can claim to legitimize. There is no obligation in conscience to obey such laws; instead there is a grave and clear obligation to oppose them by conscientious objection.<sup>92</sup>

The Pope indicates that his insistence that law ultimately derives its power from a higher authority, rather than the coercive power of the state, exists in other traditions as well. Many are familiar with the moving story of the upright Antigone. In the play, the tyrant Creon denies Antigone the right to bury the body of her dead brother who had died fighting injustice. She is caught in an attempt to do so, and is dragged before the king. Creon asks Antigone: "And yet wert bold enough to break the law?" Antigone responds: "Yea, for these laws were not ordained

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<sup>92</sup> *Evangelium Vitae*, *supra* note 42, at 715. St. Thomas says: "Consequently every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law." *SUMMA THEOLOGICA*, *supra* note 91, at Q. 95, Art. 2, at 1014.

Johannes Messner, a professor of social ethics at the University of Vienna, wrote out of this tradition in the 1940's and insisted on the necessity of the lawgiver legislating in conformity with the moral law. Messner taught that the lawgiver himself is bound in principle by moral law and cannot arbitrarily create morally binding law. A legislature's disregard could lead to a divergence between "legality" and "legitimacy" in legislation. Out of this grows the danger of legal positivism, which places the legality of legislation in a democracy in the will of the majority as the ultimate source of law. *See generally* JOHANNES MESSNER, *SOCIAL ETHICS, NATURAL LAW OF THE WESTERN WORLD* (J.J. Doherty trans., B. Herder Book Co. 1965). Regrettably, in our own country, certain unjust laws which derive their coercive power from the state alone and not from the moral order, have become a "poisoned weapon" against the unborn. The German philosopher Josef Pieper writes in his autobiography of a professor of jurisprudence with whom he studied as a young man who was a legal positivist and who defined a crime as whatever was forbidden by the state. Pieper writes that the man most regrettably died eventually by the application of his own jurisprudence. He was a Jew and under the Nazi regime it became a capital crime to be a Jew. *See* JOSEPH PIEPER, *NO ONE COULD HAVE KNOWN* 68-69 (Graham Harrison trans., Ignatius Press 1987).

of Zeus ... so provoke [t]he wrath of Heaven."<sup>93</sup>

As Antigone testifies, the governing authorities and the nation's courts are not the ultimate source of legality, and certainly not of morality nor of the rights of man. Regrettably, legal positivism is all too prevalent in the collective consciousness of our nation's legislature and judiciary. It can be seen, for example, in the majority opinion of the Supreme Court in *Planned Parenthood v. Danforth*.<sup>94</sup> After *Roe v. Wade*, the state of Missouri had enacted laws to afford a degree of protection to unborn human life, which the state believed it was able to do within the guidelines offered by *Roe*.<sup>95</sup> One of the provisions of the Missouri law was that a married woman could not obtain an abortion without the consent of her husband.<sup>96</sup> That law was itself immoral, because it involved the husband in the commission of a moral crime, but it was an attempt to provide an additional safeguard for the unborn child. Planned Parenthood challenged the law and the spousal consent provision was declared unconstitutional.<sup>97</sup> The rationale for denying the husband's involvement was interesting. As Justice Harry Blackmun wrote: "[T]he State cannot 'delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising ...'"<sup>98</sup> Behind that statement is the belief that the state was not in a position to delegate that power to the husband.

The truth is, however, that a father has an obligation, and hence a right, to act to save the life of his unborn child. He has that right and obligation by virtue of being the child's father.<sup>99</sup>

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<sup>93</sup> SOPHOCLES, *ANTIGONE* 349 (F. Storr trans., Harvard Univ. Press 1962).

<sup>94</sup> 428 U.S. 52 (1976) (invalidating broad portions of Missouri's abortion law including those allowing spouses and parents of unmarried minors to concur in woman's abortion decision).

<sup>95</sup> See *id.* at 60-61.

<sup>96</sup> See *id.* at 58.

<sup>97</sup> See *id.* at 71.

<sup>98</sup> *Id.* at 69 (quoting *Planned Parenthood v. Danforth*, 392 F. Supp. 1362, 1375 (E.D. Mo. 1975), *aff'd*, 428 U.S. 52 (1976)).

<sup>99</sup> The law affords little rights to the father in the abortion area, giving the woman nearly all control of whether or not to bring the child into the world. However, it is interesting to note just how much, over the past few decades, gender equality has made its way into many areas of family law where women were once the favored sex. See Mary A. Tetz, *What's Good for the Goose is Good for the Gander: Toward Recognition of Men's Reproductive Rights*, 15 N. ILL. U. L. REV. 141 (1994). Despite the trend toward treating men and women equally, women continue to have the unilateral right to decide whether a conception, which was jointly formed, will result in parenthood. From the time a pregnancy commences until a fetus is either

The state does not delegate such rights to him, nor can it deny them. The state can only recognize and protect rights and principles, such as the right of a father to save the life of his developing child. The state fails to act by right reason, virtue, and justice when it denies the father this right. A mother and father have certain rights and obligations *vis-a-vis* their child, because they are the parents of a person who is of inestimable value, worthy of protection and nurture. As the Pope says,

It is therefore urgently necessary for the future of society and the development of a sound democracy to rediscover those essential and innate human and moral values which ... safeguard the dignity of the person: values which no individual, no majority and no state can ever create, modify or destroy, but must only acknowledge, respect and promote.<sup>100</sup>

### *C. The Worth of the Individual in Society*

His Holiness speaks out of a venerable tradition, and he articulates this tradition in his unique way and with the authority of the papacy as he discusses the relation between divine, moral, and civil law. The Pope's philosophical approach has sometimes been termed phenomenological personalism.<sup>101</sup> He does not speak so much of the "natural law" as his immediate predecessors did, but rather he speaks frequently of the inestimable worth and inviolability of each human person. The Pope does not begin his argument by articulating a general, formal norm, such as all men "naturally seek the good and avoid evil,"<sup>102</sup> from

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born or aborted, courts have held that a man has no right to decide whether or not he will become a parent.

In essence, when it comes to reproductive rights, men are confronted with a set of inequities and inconsistencies. As it stands today, the law places an absolute economic burden on the man, and then, figuratively speaking, slices the male's reproductive capacity by affording him unequal protection in deciding whether to bear or beget a child.

*Id.* at 145 (citations omitted). See also Ruth H. Axelrod, *Whose Womb is it Anyway: Are Paternal Rights Alive and Well Despite Danforth?*, 11 CARDOZO L. REV. 685 (1990); Andrea M. Sharrin, *Potential Fathers and Abortion: A Woman's Womb is Not a Man's Castle*, 55 BROOK. L. REV. 1359 (1990).

<sup>100</sup> *Evangelium Vitae*, *supra* note 42, at 714.

<sup>101</sup> See Thomas Cahill, *John Paul II as the Last Hippie*, L.A. TIMES, June 19, 1988, at 15 (stating the "Pope's approach is, after all, so phenomenological - so dependent on describing things as everyone with eyes must see them"); Leo D. Lefebure, *John Paul II: The Philosopher Pope*, CHRISTIAN CENTURY, Feb. 15, 1995 (stating that the Pope's recent encyclical, *The Splendor of Truth*, addresses phenomenological concerns).

<sup>102</sup> See Joseph C. Cascarelli, *Presumption of Innocence and Natural Law: Ma-*

which the more concrete norms are then formulated, such as "Do not bear false witness" or "Do not steal." Rather this Pope, in a way consonant with the natural law tradition, fixes his gaze on the awesomeness of the individual person who is so good, so precious, so worthy of love and protection that the person engenders almost a religious veneration within the beholder. As the Pope said in his inaugural Mass upon his elevation to the papacy: "with what veneration ... [we] must utter this word; 'man.'"<sup>103</sup> Morality within the law consists in responding to the other person in ways which lead to that person's flourishing, and which in no way violate that person's dignity.

Immoral laws are understood to be in contravention of the divine will because they allow violations of the individual human person for whom civil society exists. Such laws do not serve and promote the good of the individual; in the case of abortion laws, they neither serve the child being killed, nor the mother being violated, nor the abortionist which the state permits to perpetrate the grave act, not only against the child and mother but, most profoundly, against the abortionist's own dignity as well.

The Catholic Church has always respected the role of the state in society as God's agent for the promotion of justice and the protection of the innocent.<sup>104</sup> The Christian scriptures teach

*chiavelli and Aquinas*, 41 AM. J. JURIS 229, 263 (1996) (stating this is the first principle of natural law).

<sup>103</sup> Pope John Paul II, *The Inauguration Homily*, 8 ORIGINS, Nov. 2, 1978, at 308.

<sup>104</sup> This notion is articulated in the encyclical, *Pacem in Terris*, by Pope John XXIII who instructed us on the necessary and proper role of the state. To promote justice and to protect the innocent, a well-governed and properly functioning state is indispensable, the Pontiff says:

Human society can be neither well-ordered nor prosperous without the presence of those who, invested with legitimate authority, preserve its institutions and do all that is necessary to sponsor actively the interests of all its members. And they derive their authority from God, for, as St. Paul teaches, "there is no power but from God."

But it must not be imagined that authorities know no bound. Since its starting point is the permission to govern in accordance with right reason, there is no escaping the conclusion that it derives its binding force from the moral order, which in turn has God as its origin and end.

Governmental authority, therefore, is a postulate of the moral order and derives from God. Consequently, laws and decrees passed in contravention of the moral order, and hence of the divine will, can have no binding force in conscience, since "it is right to obey God rather than men."

As St. Thomas Aquinas teaches, in regard to the second proposition, we maintain that human law has the *rationale* of law in so far as it is in accordance with right reason, and as such it obviously derives from eternal law.

that the governing authorities have been instituted by God to assist Him in the governance of His people. Paul of Tarsus writes:

Would you have no fear of him who is in authority? Then do what is good, and you will receive his approval, for he is God's servant for your good. But if you do wrong, be afraid, for he does not bear the sword in vain; he is the servant of God to execute his wrath on the wrongdoer.<sup>105</sup>

These same scriptures tell us that even Christ, on one occasion, counseled us to "[r]ender therefore to Caesar the things that are Caesar's, and to God the things that are God's."<sup>106</sup> And as Christ stood under Pilate's judgment, Jesus said to him: "You would have no power over me unless it had been given you from above."<sup>107</sup> What has brought us to such a dilemma today that the state, which alone may legitimately use coercion to lead citizens to virtue and restrain them from evil acts, is now using its coercive power to withhold protection from that class of individuals most in need of its protection?

The Pope gives us a very direct answer to these queries: "[T]he heart of the tragedy being experienced by modern man: the eclipse of the sense of God and of man, typical of a social and cultural climate dominated by secularism . . ."<sup>108</sup> The Pope says that this egregious error in thinking, that our personal and communal lives can be forged as though there were no God, has come to permeate society and has had the most deleterious consequences for us as individuals and for our society. The Pope reminds us that: "When the sense of God is lost, there is also a

A law at variance with reason is to that extent unjust and has no longer the *rationale* of law. It is rather an act of violence.

The chief concern of civil authorities must therefore be to ensure that [personal rights and duties] are recognized, respected, co-ordinated, defended and promoted, and that each individual is enabled to perform his duties more easily. For "to safeguard the inviolable rights of the human person, and to facilitate the performance of his duties, is the principal duty of every public authority."

Pope John XXIII, *Pacem in Terris*, in THE PAPAL ENCYCLICALS 1958-1981, at 112-114 (1981) [hereinafter *Pacem in Terris*].

<sup>105</sup> Milner S. Ball, *Obligation: Not to the Law but to the Neighbor*, 18 GA. L. REV. 911, 924 (1984) (quoting the Bible).

<sup>106</sup> *Matthew 22:21*. "Reddite ergo quae sunt Caesaris, Caesari et, quae sunt Dei, Deo."

<sup>107</sup> *John 19:11*. "Non haberes potestatem adversum me ullam, nisi tibi datum esset desuper."

<sup>108</sup> *Evangelium Vitae*, *supra* note 42, at 697.

tendency to lose the sense of man, of his dignity and his life ... . [This leads to] the systematic violation of the moral law, especially in the serious matter of respect for human life ... .<sup>109</sup>

It is in the individual, created in the image and likeness of God, and hence of inestimable worth, that one can find the necessity of linking the civil law to the moral and the divine law. The law exists only for the good of man. Christ taught that the Sabbath, with all its laws, "was made for man, not man for the Sabbath."<sup>110</sup> Saint Thomas Aquinas refers to the law as our kindly tutor which wants to point the way to our happiness.<sup>111</sup> It is not adherence to some abstract natural law which is the basis for moral society and a sound democracy, but rather the love for each concrete human being created in the image and likeness of God. Because there is a Creator, there is an objective moral order seen in human beings, the highest of earthly creatures, and conformity to this moral order will bring individual happiness and social flourishing.

If a society does not acknowledge God, it cannot acknowledge the human person for what that person truly is — a transcendent being of inestimable worth created in God's image and likeness. If God is forgotten, the Pope warns us that "Man is no longer able to see himself as 'mysteriously different' from other earthly creatures ... . Enclosed in the narrow horizon of his physical nature, he is somehow reduced to being 'a thing' ... ." <sup>112</sup> In a milieu of Marxist or secular atheism, the human person ceases to be venerated with awe, and innocent life ceases to be sacred and inviolable. Human beings simply become the "stuff" for the building of society. Human personhood becomes the arbitrary construct of society which decides which organism is going to be afforded the privileged title of person and which receives the law's protection. Today, in our country there are species of animals which are protected with more legal safeguards than the

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<sup>109</sup> *Id.* The pope points out that "when the sense of God is lost, the sense of man is also threatened and poisoned." *Id.* He then quotes *Guadium et Spes* of the Second Vatican Council: "[W]hen God is forgotten, the creature itself grows unintelligible." *Id.*

<sup>110</sup> *Mark* 2:27. "The Sabbath was made for man, not man for the sabbath; so the Son of man is lord even of the sabbath." *Mark* 2:27-28. "*Et dicebat eis: Sabbatum propter hominem factum est, et non homo propter sabbatum. Itaque dominus est Filius hominis, etiam sabbati.*"

<sup>111</sup> See generally VINCENT McNABB, O.P., *ST. THOMAS AQUINAS AND LAW* (1955).

<sup>112</sup> *Evangelium Vitae*, *supra* note 42, at 697.



unborn human being or the terminally ill.<sup>113</sup>

In 1994, a panel of the National Institutes of Health recommended government funding for the engendering of human embryos solely for purposes of experimentation.<sup>114</sup> The panel members could hardly deny that the embryos were human lives; to provide for experimentation on human life was, after all, the point of the proposals. The panelists commented on the "profound respect" which was due human life, but then made a distinction between human life and personhood, obviously excluding from the latter category those on whom they wished to perform their experiments.<sup>115</sup> One of the panel members had written an article arguing that there were no "qualities existing out there" in any human being requiring us to respect that being as a person.<sup>116</sup> Whether society decided to grant personhood or not was "the outcome of a very active and complex process of de-

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<sup>113</sup> This inversion of the natural order is astounding, and points to the counter-intuitive nature of the law when it accords greater protection and status to creatures than to the human person. Numerous examples exist within contemporary jurisprudence. For example, environmentalists recently urged the federal Endangered Species Committee to protect the tiny snail darter by prohibiting the filling of a reservoir behind the Fellico Dam on the Little Tennessee River, thereby placing the animal under the extensive protection of the Federal Endangered Species Act ("ESA"). See Oliver A. Houck, *Why Do We Protect Endangered Species, and What Does That Say About Whether Restrictions on Private Property to Protect Them Constitute "Takings"?*, 80 IOWA L. REV. 297, 297 (1995). The author states that:

[T]he idea of saving endangered species is not about merely saving species any more than maintaining aquatic life in ambient waters is really about fish. Rather, these species are indicators of something larger: the health of the earth. Threats to the earth are threats to ourselves and threats to ourselves, are, at the least, motivating.

*Id.* at 299.

The fact that many people have more passion and political involvement regarding the Indiana bat, the snail darter, the northern spotted owl, the wolf, the sandhill crane, or a charismatic megavertebate (a bear) says a great deal about the values of our society. A logical assumption would be that people would care as much about human rights, if not more, than they do about animals.

<sup>114</sup> See *Embryonic Idea Fund Research on Human Life*, NEWSDAY, Oct. 14, 1994, at A46; Alice C. Shepard, *Embryo Research Comes Down to Issue of Intent*, ATLANTA J. - CONST., Dec. 10, 1994, at E7.

<sup>115</sup> See Daniel Callahan, *The Puzzle of Profound Respect*, HASTINGS CTR. REP., Jan. 1, 1995, at 39 (stating human embryo is entitled to "profound respect").

<sup>116</sup> See George Weigel, *Creating Life to Study, Then Kill*, STAR TRIB. (Minneapolis-St. Paul), Dec. 13, 1994, at A17 (quoting Ronald Green, panel member, as stating, "personhood, ... is not a set of 'qualities existing out there' but something that 'we' bestow on a human creature"); George Weigel, *Research Decision Would Be Step Toward Brave New World*, MONTREAL GAZETTE, Nov. 30, 1994, at B3.

cision on our part."<sup>117</sup> In other words, these researchers indicate that personhood is understood by many today to be merely a social construct which we choose to apply to some categories of living human beings and which we withhold from others. From those living human beings from which we withhold the social construct of personhood, we also withhold the protection of the law.

#### CONCLUSION: RISK BECOMING A *PERSONA NON GRATA*

The Supreme Court has been instrumental in creating the contemporary challenges to human dignity and life, which could hardly be more grave than they are today in the areas of medicine and the law, areas developed to serve human needs.<sup>118</sup> But it is not enough to fall silent and to feel powerless as the Court's jurisprudence permits the destruction of life. We cannot afford to take the path of least resistance, "whether out of fear, embarrassment or displaced compassion."<sup>119</sup> In the words of Professor Glendon:

We are all implicated in the conspiracy of lies and silence in which the culture of death has flourished over the past few decades. The air is full of many little sayings to lull our consciences: "Don't be judgmental"; "Who am I to impose my views on someone else?"; or simply, "What's the use?"<sup>120</sup>

The issue of euthanasia is about concern for and preservation of human life. As Edward D. Pellegrino, M.D., director of the Center for Clinical Bioethics at Georgetown University Medical Center says, "This is an ethical, moral question. You don't settle it by law, by vote or public opinion polls."<sup>121</sup> Thus, the operative challenge is to put our faith into action. As Catholic lawyers we have, because of our privileged position within the legal

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<sup>117</sup> Richard John Neuhaus, *Don't Cross This Threshold*, WALL ST. J., Oct. 27, 1994, at A20.

<sup>118</sup> John M. Haas, President of the Pope John Center, Braintree, MA. (private communication with the author). The Pope John Center has a particularly valuable contribution to make in building a new culture of human life; online access provides World-Wide Web users with greater access to the notable research and educational services of the Center. The Center has served the Catholic Church since 1972 in affirming moral-ethical teaching in the field of bioethics.

<sup>119</sup> GLENDON, *supra* note 31.

<sup>120</sup> *Id.*

<sup>121</sup> See Deborah Marquardt, *The Battle Over Who Dies When and Who Decides it is Intensifying*, 25 NOTRE DAME MAG., Summer 1996, at 17.

system, a particular responsibility to counteract the malicious forces unleashed against human life. We must work toward the enactment of just laws and seek to eradicate unjust laws where they arise within the legal system.

In working toward a just society, living with right reason, we risk upsetting some people. For such people, we must each risk becoming a *persona non grata*, individually and collectively, in order to transform our civilization into a culture of love in which the rights of all are honored and respected. Indeed, we must both pray and work for substantive changes within the legal system to eliminate laws both procedurally undemocratic and substantively immoral or unjust. We must be persuasive voices within the courthouse and at the law office so that human life be seen as it truly is: a precious gift that deserves unqualified protection and recognition by the state.

Our great western intellectual tradition has always insisted that it was possible through the use of reason to know that there was a God who is in all and above all and to whom all must answer. Antigone was not a Christian, yet she acknowledged the unwritten laws of God that do not know changes. And John Calvin, who was not Catholic, insisted that the law of God, which we call the moral law, must alone be the scope, the rule, and end of all laws.<sup>122</sup>

We as Catholic lawyers, however, need to work in unity with the Catholic Church because although the process of change is, at its core, spiritual, it necessitates legal action premised on the sound use of medical facts and clear moral thinking.

As the Holy Father said, in both *Evangelium Vitae* and in his *Letter to Families*: "We are facing an immense threat to life: not only to the life of individuals but also to that of civilization itself."<sup>123</sup>

Conversion of heart and mind, as well as a properly trained mind, are needed to begin to reverse and transform the culture of death. The process of reversal begins right where the culture of death gained its first foothold – in the minds and hearts of individual men and women. It begins with each one of us "living in truth," and [is] about 'calling good and evil by name.'<sup>124</sup> But

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<sup>122</sup> See W. Stanford Reid, *John Calvin, Lawyer & Legal Reformer*, in THE BIOGRAPHY OF CALVIN, at 57 (Richard C. Gamble ed., 1992).

<sup>123</sup> *Evangelium Vitae*, *supra* note 42, at 710.

<sup>124</sup> GLENDON, *supra* note 31, at 180 (quoting TIMOTHY GARTON ASH, THE USES

as we work to change the hearts of all men and women, we must always keep in mind the guiding wisdom of Pope John XXIII who counseled that:

It is always perfectly justifiable to distinguish between error as such and the person who falls into error—even in the case of men who err regarding the truth or are led astray as a result of their inadequate knowledge, in matters either of religion or of the highest ethical standards. A man who has fallen into error does not cease to be a man. He never forfeits his personal dignity; and that is something that must always be taken into action.<sup>125</sup>

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OF ADVERSITY: ESSAYS ON THE FATE OF CENTRAL EUROPE 48, 191, 203 (1989).

<sup>125</sup> *Pacem in Terris*, supra note 104, at 125.

