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THE SOUL AND ITS IMPACT ON LIFE AND DEATH CHOICES: A CONSTITUTIONAL STUDY OF ABORTION, THE RIGHT TO DIE, AND OTHER BIOETHICAL DILEMMAS

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I. INTRODUCTION

One of the great topics of debate throughout the history of man has been the mysteries surrounding the events at the beginning and the end of life. In recent years, the arguments that have raged for centuries have taken on a new face. With the advent of modern advances in medicine and technology, new possibilities and complexities regarding such pivotal moments in life have been brought to fruition. Yet, with all the knowledge these incredible breakthroughs have yielded, they have also brought forth to their respective fields a greater depth of confusion and uncertainty.

While classically a topic common in the areas of philosophy and theology, the oft-debated "right to life" and "right to death" are also regarded as some of the most personal issues

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ever to come under legal scrutiny.[2] While these issues have been analyzed countless times by courts, legal scholars and social commentators, a novel approach to these issues that embraces new perspectives can provide new methods to understanding them. The overall purpose of this note is to explore one such perspective, and in doing so, to ultimately provide such an approach.

It is no mystery that issues such as abortion, withdrawal of necessary medical treatment, and medically assisted death are topics that touch deeply on our fundamental understanding of life, death, and in fact, our perception of ourselves as human beings. They are issues that go to our core understanding of human life and what value, if any, should be attributed to it when faced with such bioethical dilemmas. These scenarios, given the deeply-rooted concepts they invoke, can be said to hold extraordinary implications for how we perceive ourselves and the world around us. With this in mind, it is valuable to examine such dilemmas alongside another concept that is often deemed a fundamental aspect of human existence: the concept of the soul.

Analyzing the concept of the soul can provide society with a broader understanding of the events that occur at both the beginning and the end of life. These events are particularly noteworthy as they are often relevant to determining the legality of practices such as abortion, withdrawal of necessary medical treatment, and medically assisted death. Moreover, a thorough understanding of the soul as it pertains to these so-called "bookends of life" is paramount to the development of moral and philosophical arguments that can be applied to these practices.

While American law is undoubtedly secular in nature, it is possible to identify various intersections between particular conceptions of the soul, i.e. "soul theory," and various legal rules and principles. This note shall identify these intersections as they pertain to abortion, assisted suicide, and the withdrawal and/or refusal of medical treatment. The first part will present an analysis of abortion and the soul centering primarily on legal dicta set forth in the Supreme Court case, *Roe v. Wade*.[3] These sections will also put forth the concept of the fetal soul, along with a thorough examination of the various ways in which this conception of the soul

[2] Issues regarding marriage, procreation, contraception, family relationships, and child rearing are also deemed to be topics that are of great personal privacy that warrant Constitutional protection. *See* Roe v. Wade, 410 U.S. 113, 152 (1973).
[3] *Roe*, 410 U.S. 113.

can be defined and articulated in the context of religious, philosophical and constitutional theories. Finally, there will be a discussion of the soul and its intersections with the well-documented constitutional standards of personhood and fetal viability.

The second half of this note will deal with legal principles pertaining to the "right to die," including the right to refuse life-sustaining medical treatment and the right, if any, to assisted suicide. The discussion here will focus on the soul and its impact on the various definitions of death that have been advanced in American law. Given these definitions, these sections will address how and when the soul "departs" from the body, and the impact these ideas have on American legal principles of death. Lastly, this portion of the note will draw parallels between religious and philosophical "soul theory," and how these different constructions compare to the rationales surrounding various "right to die" situations, such as the withdrawal of necessary medical treatment and physician-assisted suicide.

II. ABORTION RIGHTS AND THE SOUL – UNDERSTANDING THE DOCTRINE

Much of the modern Constitutional doctrine regarding abortion rights is set forth in the Supreme Court case, *Roe v. Wade*. The following section will provide a general background on this area of American law. In addition, a detailed discussion will be presented regarding the concept of soul, in both general terms, and with special consideration to the unborn.

A. General Legal Background: Roe v. Wade*, Fundamental Rights, and Abortion*

While there are numerous cases in American legal history which have addressed abortion rights, this note shall focus primarily on the most well-known abortion case in United States history, *Roe v. Wade*. In *Roe*, the Supreme Court of the United States struck down a Texas state statute which criminalized abortion unless the procedure was necessary to save the mother's life.[4] Holding that the statute at issue was unconstitutional, the Court held that the Due Process Clause of the 14th Amendment included an implied right to privacy which encompassed the right

[4] *Id.* at 166.

to make the decision about whether to have an abortion.[5] The Court went on to state that such a right, because it is derived from the right to privacy, is "fundamental" and "implicit in the concept of ordered liberty."[6] However, while deemed to be fundamental, such a right was not held to be absolute, as it could be overridden by a compelling state interest, namely, the preservation and protection of the health of the pregnant mother, coupled with the state interest in potential human life.[7] *Roe* ultimately held that up until the point of fetal viability *or* the end of the first trimester, the State cannot interfere with a woman's choice to have an abortion.[8] Notably, the Court justified this holding, and essentially, its failure to outlaw abortion, by stating that the "unborn," i.e. fetuses, embryos and the like, are not considered "persons" for the purposes of the Constitution.[9]

B. Soul Theory Part 1: The Soul and the Unborn

The concept of the soul has been discussed in a variety of contexts throughout religious and philosophical doctrines. Yet, when dealing with the concept of rights, the unborn and the rights which may or may not exist with regard to the soul, no context is more important than that of the *fetal soul*. While the general mechanism for the fetal soul is derived from the process of ensoulment, it is the subtleties surrounding such a process which ultimately give way to the rights which are ascribed to it.

[5] *Id*. at 153.
[6] *Id.* at 152. A fundamental right is also recognized as one that is "rooted in the traditions and conscience of our people . . . ." *Id*. at 174 (Rehnquist, J., dissenting) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).
[7] *Id*. at 153-54.
[8] *Id*. at 163. The trimester framework for abortion rights has since been rejected via *Planned Parenthood of Pennsylvania v. Casey*. "The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*." Planned Parenthood of Pennsylvania v. Casey, 505 U.S. 833, 873 (1992).
[9] Roe, 410 U.S. at 156-57. The Court concedes that while the word "person" is referenced in numerous laws, including § 1 of the Fourteenth Amendment, "in nearly all these instances, the use of the word is such that it has application only *postnatally*." *Id*. (emphasis added). The Court claims that none of the references to the term "person . . . indicates, with any assurance, that it has any possible pre-natal application." *Id.* Thus, "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Id*. at 158.

1. Ensoulment: Defining the Key Mechanism

The first question that this note shall address with regard to soul theory and abortion rights is perhaps the most pertinent one: Does a fetus have a soul?

Historically, this question has been answered through a concept known as ensoulment, which analyzes how and when a fetus or embryo is "infused" with a soul.[10] Early philosophers have referred to this process as "animation," and throughout philosophical literature have toiled over the point during human development at which such a process occurs.[11] Generally, with regard to the question of how this occurs, various purveyors of soul theory have characterized the act of ensoulment as a divine act or gift.[12] Yet, throughout the history of philosophy, there has been a great deal of contention over *when* such an act takes place. On one hand, "the view that the human soul begins *at conception* [has been] championed by some, [including] the Pythagoreans, who stressed medicine in their religio-moral cult."[13] On the other hand, the Greek philosopher Aristotle advocated for a post-conception ensoulment, claiming that the unborn child, if male, would become ensouled after forty days of gestation, and, if female, after eighty days.[14] Alternatively, English common law, along with early American law, speculated that the ensoulment of the unborn takes place at or around the fourth month of gestation, a process generally referred to as "quickening."[15]

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[10] In the most basic sense, "ensoulment" means to "endow or imbue with a soul." Meriam-Webster Online Dictionary, *Ensoulment*, http://www.merriam-webster.com/dictionary/ensoulment.

[11] STEPHEN M. KRASON, ABORTION, POLITICS, MORALITY, AND THE CONSTITUTION 351 (Univ. Press of America 1984).

[12] "Roman Catholics believe that the soul is a gift of God . . . ." Tom C. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOY. L.A. L. REV. 4 (1969). The divine nature of ensoulment has had a considerable impact on historical abortion law, which will be covered in the following subsection.

[13] Martin J. Buss, *The Beginning of Human Life as an Ethical Problem*, 47 J. RELIG. 244, 245 (July 1967) (emphasis added). This view has been denounced by scholars such as Augustine, whose allusions to prenatal death suggested that ensoulment *at conception* could cause the unborn child to "die before it lives." RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 40 (Vintage Books 1994) (1993).

[14] KRASON, *supra* note 11, at 360. This view was also held by classical Catholicism, up until the nineteenth century.

[15] KENNETH R. NISWANDER, & MANUEL PORTO, *Abortion Practices in the United States*, *in* ABORTION, MEDICINE, AND THE LAW 568 (J. Douglas ed., Facts on File Publications 1992) (1973). The term "quickening" is regarded as the first perception of fetal motion, and ultimately, the beginning of a fetus' "legal existence." *Id.* Due to problems with the acceptability of other theories regarding the timing of ensoulment (lack of empirical data, etc.), "[t]he significance of quickening . . . [has] found its way into the received common law in this country." *Roe*, 410 U.S. at 134.

2. Soul Theory and the Accordance of Rights at the Beginning of Life

Critical to the discussion of the intersections between abortion rights and the soul is an understanding of not only the doctrinal concept of the soul, but what implications the soul may have for the unborn. In the following subsections, several pertinent issues concerning these two topics shall be addressed.

a. Historical and Contemporary Understandings of the Soul

In the most basic sense, the soul is defined as an "immaterial essence, animating principle, or actuating cause of an individual life."[16] Yet throughout history, there have been countless attempts to discern a more comprehensive understanding of what terms such as "actuating cause of . . . life" actually mean.[17] While it is impossible to analyze each and every one of these hypotheses, the following subsection will address some of more prominent understandings put forth in Western thought.

One of the most popular conceptualizations of the soul identifies the soul as an entity that exists separately and independently from the body.[18] Unlike the body, the soul is non-physical and is ultimately ungrounded in any aspect of the material or natural world.[19] Nonetheless, many philosophical minds have agreed that the soul is essential to human existence, as it facilitates a metaphysical unity between the body and itself.[20] In addition to this concept of unity, a considerable amount of doctrine has been formulated with regard to the soul and its relationship

[16] Meriam-Webster Online Dictionary, *Soul*, http://www.merriam-webster.com/dictionary/soul.
[17] *Id.*
[18] Peter Simpson, *Symposium on Natural Law and Human Fulfillment: Grisez on Aristotle and Human Goods*, 46 AM. J. JURIS. 75, 79-80 (2001). Traditionally, this line of thought has been referred to as "dualism," a vastly important and highly influential doctrine in the field of ontological philosophy. *Id.*; *see generally* Stanford Encyclopedia of Philosophy, *Dualism*, http://plato.stanford.edu/entries/dualism/.
[19] As an immaterial entity, the soul is widely regarded to "transcend" the physical world. *Id.*
[20] According to Aristotle, the "unity" between the soul and the body can be analogized to the unity between the clay of a statue and the comprehensive shape it forms. *Id.* Thus, while the soul and the body are, in a sense, one, the soul can be thought of as the essential "form" of the body." *Id.*

to both "potential" and "actual" life.[21] According to Aristotle, the soul exists both as a potential life and an actual life as well.[22]

A corollary to this doctrine of actual and potential life is Aristotle's "functional" analysis of the soul.[23] Under this system, the soul is thought of as a "holistic" set of functions and capacities, "*realized* in the human body through its interaction in rational and social . . . life."[24] This view draws on strong parallels between the soul and the mind, as emphasized through what Aristotle refers to as the "psyche."[25] A principle somewhat divorced from the traditional dualistic concept, the soul in this sense is ultimately said to be comprised of various aspects of mental functions, such as the integration of the body with regard to a person's ability to enjoy an "ongoing narrative identity, consciousness of his or her surroundings, and the ability to respond to things that happen."[26]

b. The Soul in the Unborn

While the overall nature of the soul is a topic of extensive academic and philosophical debate, what makes the nature of the soul particularly relevant to this note is how the various ideas of the soul pertain to the biological process of fetal development. A number of these views shall be addressed in the following subsection, particularly those put forth by the ancient philosopher, Aristotle.

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[21] ST. THOMAS AQUINAS, AN AQUINAS READER 215-16 (Mary T. Clark ed., Image Books 1972). St. Thomas Aquinas had been a main advocate for this view, as well as the Greek philosopher, Aristotle. St. Thomas Aquinas states that

> by its very essence the soul is in act, so that . . . whatever has a soul would always be actually vitally acting, just as that which has a soul is always actually living . . . [I]t is noticeable that whatever has a soul is not always actual in the sense of vitally acting; so in the soul's definition it is said this it is *the act of a body having life potentiality*; but this potentiality does not exclude the soul.

Id. at 216

[22] KRASON, *supra* note 11, at 352. This is of particular relevance to the discussion of the soul as it pertains to the unborn, which will be addressed in the following subsection.

[23] GRANT R. GILLETT, BIOETHICS IN THE CLINIC: HIPPOCRATIC REFLECTIONS 182 (Johns Hopkins Univ. Press 2004).

[24] *Id.* (emphasis added).

[25] *Id.*

[26] According to Gillett, Aristotle believed the functional aspect of the soul and the mind to form the basis for the value of human life. *Id.*

It is in this particular arena of soul theory where Aristotle's concept of potential and actual existence takes form; the most basic premise being that the unborn child has a soul, and because of this, is alive.[27] As previously mentioned, Aristotle adopts a post-conception model of ensoulment, professing that the unborn child becomes "animated" either at forty days for males, or eighty days for females.[28] Yet regardless of whether the unborn child is male or female, it is at this point of animation, or where some physical sign of life becomes apparent, where the essence of the soul changes from potential to actual existence.[29] Thus, in this sense, Aristotle claims that the fetal soul, throughout the course its development, exists both potentially and actually.[30]

Touching further on fetal development, Aristotle also employs a three-fold notion of the soul that has particular significance.[31] The three "types" of souls he refers to are the nutritive soul, the sensitive soul and finally, the rational soul.[32] According to Aristotle, because it is able to take in and process nutrition from its mother, the unborn child possesses, at the very least, a nutritive soul.[33] Moreover, given that the unborn child develops its senses while *in utero*, it possesses a sensitive soul as well.[34]

Yet, with regard to the unborn fetus or embryo, the most pertinent application of Aristotle's "three-fold soul" doctrine is that regarding the rational soul. Recognized primarily by

[27] KRASON, *supra* note 11, at 352.
[28] *Id*. at 350-51.
[29] *Id*. According to Aristotle, "[t]he transformation of inanimate to animate matter is explained by viewing all matter as potentially living. *To become living is to have this potency actualized*." *Id*. (emphasis added).
[30] *Id*.
[31] *Id*.
[32] *Id*. The possession of a nutritive soul is defined through an organism's ability to take in nutrition and support itself. On the other hand, "[t]he sign of a sensitive soul is, simply, the presence of the sense, primarily the sense of touch." *Id*. at 356. However, "the ability of a creature to *think* is the sign of his having the rational soul." *Id*. at 359 (emphasis added).
[33] *Id*. at 356. As stated previously, it should come to no surprise that Aristotle's principles were formulated with limited biological knowledge. *Id*. Nonetheless, Aristotle believed that "the unborn child, at every stage in [its] development, has *potentially* a sensitive soul and a rational soul. By saying that 'the end is developed last,' he indicates that . . . a creature gradually moves toward what it is fully to become." *Id*.
[34] *Id*. The development of the sensitive soul can be said to occur at a very early point. The first, and most "indispensible" sense that develops is the sense of touch, which occurs in stages beginning at the sixth week of gestation and continuing through the tenth. *Id*. While Aristotle regards the sense of touch as the most important to the sensitive soul, it thereby follows that "the unborn child . . . possesses a sensitive soul from a quite early stage of pregnancy (close to the point [of] . . . animation . . . for males). *Id*.

the ability to think, the possession of a rational soul is, according to Aristotle, the crucial factor in determining whether the unborn child is, in essence, human.[35] As such, there are many subtleties surrounding the concept of the rational soul that are particularly relevant to articulating a definitively "human" existence. For example, thinking, as it pertains to the rational soul, is quite different from the sensory act of perceiving, as it is "held to be in part imagination, [and] in part judgment . . . ."[36] As such, while both humans and animals are capable of mental processes like perception and discrimination, the possession of a rational soul is particularly significant for humans, as it gives humans the unique capability to think, and ultimately to *reason*.[37] Aristotle describes the human ability to reason as "speculative thinking . . . [which allows human kind to] form . . . calculative . . . *opinions* which will be either right or wrong . . . ."[38] Furthermore, while higher mammals have the capacity to develop memories, the rational soul is important because it grants humans the unique ability of *recollection*.[39]

As a corollary to Aristotle's concept of the rational soul, Thomas Aquinas's famous doctrine of Hylomorphism recognizes the "full" existence of a fetal soul only at the point at which the unborn child is capable of mental thought.[40] Within this concept, Aquinas states that a "human soul, which is essentially intellectual, cannot be the form of a creature that has never had the material shape necessary for even the most rudimentary stage of thought or sentience."[41]

[35] *Id*. at 359.
[36] *Id*. (quoting Aristotle, *De Anima*, *in* THE BASIC WORKS OF ARISTOTLE 427b, 586-87 (Richard McKeon ed., E. M. Edghill trans., Random House 1941)).
[37] *Id*. at 360. (quoting Aristotle, *De Anima*, *in* THE BASIC WORKS OF ARISTOTLE 433a, 596-97 (Richard McKeon ed., E.M. Edghill trans., Random House 1941)).
[38] *Id*. (emphasis added). Unlike humans, animals possess "no thinking or calculation but only imagination." *Id*.
[39] KRASON, *supra* note 11, at 360. Recollection is different from memory in that it can be done *willfully* and with "understanding." *Id*. This further indicates that the aforementioned mental processes of animals, such as perception and discrimination, are essentially based upon *instinct*, not reason. *Id.*
[40] DWORKIN, *supra* note 13, at 42.
[41] *Id*.

C. SOUL THEORY PART 2 – THE SOUL, ENSOULMENT, AND THEIR IMPACT ON LAW THROUGHOUT HISTORY

Despite the various positions regarding the details of when and how ensoulment may occur, the concept of the fetal soul has, throughout history, had a considerable impact on both secular law and religious doctrine, particularly in the Christian faith. Thus, before the discussion at hand delves into subtleties and dilemmas of bioethical law, this section shall provide a brief note on how the concept of the soul has touched on a variety of legal areas.

The notion of ensoulment as a divine gift has led to the establishment of Catholic and other Christian law that "aborting a pregnancy at any time amounts to the taking of a human life"; one which ultimately violates the "will of God."[42] However, under early Catholic law, abortion was not considered murder, as the fetus was not deemed to be "formed," or infused, with a soul.[43] Later, with the onset of the quickening doctrine, "abortion of the 'unformed' or 'inanimate' fetus (from *anima*, soul) was [regarded as] something less than true homicide, [and] rather [as] a form of anticipatory or quasi-homicide."[44] This view was most famously championed by Saint Thomas Aquinas, who stipulated that "[what is] seed and what is not seed is determined by *sensation and movement*."[45] As such, during the time of medieval Christendom, penalties for homicide were restricted to abortions of animated fetuses only.[46]

Thus, throughout its history, the condemnation of abortion by the Catholic Church, given the existence of a fetal soul *at some point during development*, generally centered on the

[42] Clark, *supra* note 12, at 4.
[43] DWORKIN, *supra* note 13, at 43.
[44] Webster v. Reprod. Health Servs., 492 U.S. 490, 567 (1989) (quoting Congressional Research Service of the Library of Congress, *Catholic Teaching on Abortion*).
[45] *Id.* (quoting C. Whittier, *Catholic Teaching on Abortion: Its Origin and Later Development* (1981)) (emphasis added).
[46] *Id.* at 567-568. However over time, this view of "restricted abortion" has also been abandoned in favor of a more sweeping ban on abortion practices that exists today. In his *Evangelium Vitae*, Pope John Paul II stated that "scientific and philosophical discussions about the precise moment of the infusion of the spiritual soul have never given rise to any hesitation about the moral condemnation of abortion." Vatican: the Holy See, Pope John Paul II, *Evangelium Vitae,* 61 (1995) *available at* http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html. Not all modern-day Catholics support this view. Some, according to Clark, believe that abortion practices should remain legal "until the baby is viable." Clark, *supra* note 12, at 4. Without viability, some argue that "the evil of destroying the fetus is outweighed by the . . . evils accompanying forced pregnancy and childbirth. *Id.*

construction of abortion as a form of homicide that effectually "interfere[d] with God's creative force."[47] On the other hand, many ancient Greek and Roman societies did not recognize the presence of the soul in the unborn.[48] As a result, in these societies, abortion was deemed legal and was at many times widely practiced.[49] Of course, one of the most prevalent incorporations of ensoulment into law has been that of early English law, which identified quickening as the threshold for legal abortion practices, stipulating that "abortion performed *before* quickening . . . was *not* an indictable offense."[50]

Aside from its impact on the overall legality of abortion, the concept of the fetal soul, particularly the principle of ensoulment and fetal animation, has been instrumental in delineating when the unborn fetus or embryo may be recognized as a separate entity; one that is independent and distinct from the mother.[51] When addressing this concept, the ensoulment doctrine has generally stated that "the new [fetal] soul [is] in no sense an automatic derivative of its parents."[52] This has not always been the case however, as the evolution of this idea can be traced through the developments of early American law.[53]

Initially, the "reasonable creature in being" doctrine, adopted in the early twentieth century, stated that a child "[could] not be the subject of a homicide until its complete expulsion from the body of the mother and the establishment of an independent existence."[54] Under this doctrine, such an "independent existence" was established through infant breathing, i.e. respiration, or the existence of an independent circulatory system.[55] What is particularly significant with regard to this determination is that, while these criteria were used during this

[47] DWORKIN, *supra* note 13, at 43. In his *Humanae Vitae,* Pope Paul VI supported this claim by stipulating that man does not have complete control over his sexual facilities. Rather, because sexual facilities are inherently linked to the generation of life, it is God, not man, who holds the ultimate dominion over them. *Id*.
[48] Buss, *supra* note 13, at 245.
[49] Pope John Paul II, *supra* note 46, at 61. These practices were highly opposed by Christians, who considered "as murderesses women who [had] recourse to abortifacient medicines . . . ." *Id.*
[50] *Roe*, 410 U.S. at 133 (emphasis added). "The absence of a common-law crime for pre-quickening abortion . . . developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of . . . when a 'person' came into being, that is, infused with a 'soul' or 'animated.'" *Id.*
[51] Buss, *supra* note 13, at 245.
[52] *Id.*
[53] *Id.*
[54] Clark, *supra* note 12, at 9.
[55] *Id.* (citing Morgan v. State, 148 Tenn. 417, 421 (1923)).

period to articulate independent existence, life (and the possible existence of the soul), the same criteria were used to determine the absence of existence: death (and the eventual departure of the soul).[56] In any event, if an infant was "killed" before birth, such an event could not be regarded as criminal homicide.[57]

However in subsequent years, American courts have abandoned this kind of independent existence-live birth doctrine, holding that an "unborn infant [is at all times in its development] a *separate biological entity* and hence a legal one in contemplation of law."[58] Of course, while American courts have never explicitly incorporated the principle of ensoulment into common or statutory law, the recognition of the unborn as a separate entity, especially a separate legal entity, can undoubtedly be derived from the fundamental parameters of the ensoulment doctrine.[59]

III. ABORTION RIGHTS AND THE SOUL PART 2: A MODERN CONSTITUTIONAL ANALYSIS

Within the realm of abortion rights, the two ideas put forth in Constitutional law which have the most applicability to the notion of the soul are the concept of personhood, embodied in the appropriately named "constitutional person standard" and the concept of viability. In this section, each of these concepts will be explored in detail, with one focused on Constitutional context, and the other turned toward the soul.

A. Further Analysis of the Rational Soul, the Unborn, and the Implications for the "Constitutional Person" Standard

While it can be said with little difficulty that the unborn child possesses both a nutritive soul and a sensitive soul, these conclusions have little bearing on the parameters of American

[56] Rakestraw, *infra* note 130.
[57] "[W]here the evidence showed that an infant was killed before its birth was complete or was killed by means used to assist in its delivery, it was not deemed a homicide. Therefore, under the common law, abortion could not be murder." Clark, *supra* note 12, at 9 (citing Evans v. State, 48 Tex. Cr. App. 589 (1905)).
[58] Clark, s*upra* note 12, at 9. The adoption of this new legal doctrine was derived from *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946), where an accoucheur was held liable for brain damage inflicted on a viable prenatal infant. While the defendant in this case was held to be liable under civil, rather than criminal law, the recognition of the unborn child as a distinct biological and legal entity established the foundation for subsequent findings of criminal liability.
[59] *Id*. The change in this law can be traced to courts' widespread and overarching disagreement over when life begins.

Constitutional law and its ultimate application to the unborn. One of the pertinent issues that arise in abortion rights cases, particularly in *Roe* and *Casey*, is whether the unborn fetus or embryo can, under the parameters of the Constitution, be construed as a *person*, particularly with regard to the Due Process Clause of the Fourteenth Amendment.[60] Moreover, as this note has previously discussed, the possession of a rational soul is an attribute that is, for all intents and purposes, exclusively human.[61] Therefore, the inevitable question arises: does the unborn child possess a rational soul, and if so, what implication does this hold for an unborn child's status, or lack thereof, of "personhood"[62] under the Fourteenth Amendment of the Constitution?

As the concept of the rational soul is defined primarily by one's mental capacities, it follows that by examining the mental capacities of the unborn, at all relevant stages of development, the existence of a fetal rational soul can be determined. According to certain contemporary psychiatrists, "[t]here is evidence to show that the unborn child possesses the faculties Aristotle mentions above . . . ."[63] Thomas Verny's studies indicate that "as early as three months, [a fetus] has rudimentary emotional responses – such as vague feelings of discomfort – to material emotional reactions . . . ."[64] Moreover, Verny states that as the pregnancy progresses, the unborn "can sense and react not only to large, undifferentiated emotions such as love and hate, but also to more shaded complex states like ambivalence and ambiguity."[65] It is even documented that "soft, soothing talk makes [the fetus] feel loved and wanted."[66] Given this evidence, there appears to be a moderately reasonable deduction that an

[60] *Roe*, 410 U.S. 113. Under the Constitution, particularly the Fourteenth Amendment, the unborn child is not considered to be a "person."
[61] *See* KRASON, *supra* note 11. There is a point of notable contention over whether the possession of a rational soul is necessary or sufficient to regard one as "human." One of the most popular arguments is that possession of a rational soul may not necessarily be *required* to identify one as human, because of the implications this would have on comatose and other "brain-dead" individuals who may, due to their condition, be unable to exercise rational thought. *Id*.
[62] A concept often evoked in philosophical and ethical analysis, personhood is regarded in this note as threshold that identifies "persons" in the legal sense, thereby allowing for the ascription of specific rights.
[63] KRASON, *supra* note 11 at 361.
[64] *Id*. (quoting THOMAS VERNEY, & JOHN KELLY, THE SECRET LIFE OF THE UNBORN CHILD 62 (Summit 1981)).
[65] *Id*. (quoting THOMAS VERNEY, & JOHN KELLY, THE SECRET LIFE OF THE UNBORN CHILD 18 (Summit 1981)).
[66] *Id*.

unborn fetus does possess, albeit not as complex as an adult's, some rudimentary form of consciousness.[67]

There is also mounting evidence indicating that a fetus possesses a functional memory, or the ability to store away data relating to its existence, which can subsequently be retrieved "when special efforts are made years later."[68] Patients, through the use of hypnosis or free association, have typically been documented to construct recollections of their experience in the womb, indicating:

> I am a sphere, a ball, a balloon, I am hollow, I have no arms, no legs, no teeth, I don't feel myself to have front or back, up or down. I float, I fly, I spin. Sensations come from everywhere. It is as though I am a spherical eye.[69]

Of course, if a rational soul is a quality only humans possess, it is necessary to show how the aforementioned evidence exhibits a mental faculty that is distinctly beyond that of other higher animals. Termed as "willful recall," the form of recollection illustrated above is inherently unique to humans, as animals are generally incapable of remembering specific events, as opposed to simple "general notions, such as some creature or some situation being bad for them or causing them pain . . . ."[70] In addition, the development of fetal consciousness, particularly of feelings regarding affection and rage, is also something that is experienced exclusively by humans.[71] Aside from various emotive responses however, the womb is also a place of development for the subtleties encompassing human personality.[72] According to Verny, certain physiological conditions and/or reactions of the mother, such as anxiety, anger and depression, play an instrumental role in shaping and influencing an unborn child's "likes and dislikes, fears and phobias . . . all the distinct behaviors that make us uniquely ourselves . . . ."[73] More importantly, development of the human "ego" and the establishment of self-awareness, i.e.

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[67] *Id.*
[68] KRASON, *supra* note 11, at 361.
[69] *Id.*
[70] *Id.*
[71] *Id.* at 364. This point is not terribly persuasive, as Krason concedes that such feelings or emotions are experienced by higher animals as well. While he claims however that they are nonetheless experienced exclusively by humans, there is minimal justification offered for this claim.
[72] *Id.*
[73] KRASON, *supra* note 11, at 364 (quoting THOMAS VERNEY, M.D. & JOHN KELLY, THE SECRET LIFE OF THE UNBORN CHILD 20 (Summit 1981)).

"distinguishing himself from the selves of others and from objects of his thought," also takes place in utero, usually at some time during the second trimester, when the nervous system gains the ability to transmit various sensations to an unborn child's higher brain.[74] Hence, given the foregoing data, it seems quite apparent that, by the beginning of the second semester, an unborn child is capable of forming and holding emotions, preferences, memories and other intrinsically human faculties.[75] As such, a case can be made that an unborn child, while not possessive of the mental capacity of an adult human, does possess the mental abilities that enable it to possess a rational soul.

Thus, given that there is evidence indicating that an unborn child possesses the mental faculties intrinsic to a rational soul, an inherent problem arises with regard to the Constitutional Person, or as it is commonly called, "personhood," standard discussed in *Roe*. Of course, no such standard is explicitly established within the bounds of the Constitution itself. Rather, the Constitutional Person standard shall, for the purposes of this note, be understood not only as what specifically *defines* a person per se, but also how the term "person" is *applied* throughout the Constitution.

As mentioned earlier, the Supreme Court in *Roe* held that the "unborn," i.e. fetuses, embryos and the like, are not considered "persons" under and for the purposes of the Constitution.[76] However, apart from this statement, the Court offers no justification for such a claim, therefore opening the door to various criticisms. Theological pundits, for example, argue that an unborn child should be regarded as such a person, claiming that the God-given endowment with a rational soul entitles the unborn to the same rights, particularly the right to

[74] *Id*. at 365.
[75] *Id*.
[76] *Roe*, 410 U.S. 113. Traditionally,

> [i]n areas other than criminal abortion, the law has been reluctant to . . . accord legal rights to the unborn except in narrowly defined situations and except when the rights are *contingent upon live birth* . . . In a recent development, . . . some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the *parents*' *interest* and is thus consistent with the view that the fetus, at most, represents only the *potentiality* of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians *ad litem*. Perfection of the interests involved, again, has generally been *contingent upon live birth*. *Id*. at 161 (emphases added).

life, as those persons who have been born.[77] Given the evidence developed by Verney, discussed *supra*, this is a facially persuasive claim. Because the unborn, from even an early point in development, possess characteristics that are definitively human, failure to recognize their personhood essentially leads to a constitutional and ethical quandary. Acknowledging the tell-tale characteristics of a rational soul in a fetus, while at the same time failing to acknowledge the personhood of that fetus, could "mean, perhaps, that in the common law the unborn is considered a sort of half-person . . . [a] person in some lesser sense . . . [or][a] person, but somewhat less than a born one."[78] Consequently, legal commentators generally claim that

> [h]alf-persons, or three-quarter persons, do not exist. Instead, there exist individual humans who are true and authentic persons, but who have not yet developed all of the properties typical of persons (for example, certain physical attributes; a certain level of intelligence and formation; and the capacity to act freely and responsibly) . . . [Thus,] [g]iven that the unborn is a human person with all of the rights connected with "being man," we must conclude that Roe v. Wade is simply based on an error.[79]

Given this argument, there are several possible outcomes from which to choose. First, one may accept both *Roe*'s account of fetal personhood and also the existence of a rational soul in the unborn. This, however, is undesirable, as it ultimately leaves American law to solve the seemingly impossible dilemma of a rational fetal soul on one hand, and a somewhat ambiguous lack of fetal personhood on the other. Alternatively, one may opt, as Rhonheimer suggests, to disregard *Roe's* account of fetal personhood, thereby opening the door to the recognition of fetal personhood on the basis of a rational soul.[80] Yet while this may be a valid option, it does little to clarify the overall analysis of this problem. There is, however, a third option, one that Rhonheimer himself actually adopts. Despite the persuasiveness of the argument advanced by theologians and advocates for the unborn, Rhonheimer downplays the importance of the rational soul with regard to constitutional law, arguing that

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[77] DWORKIN, *supra* note 13, at 110.
[78] Martin Rhonheimer, *Fundamental Rights, Moral Law, and the Legal Defense of Life in a Constitutional Democracy: A Constitutionalist Approach to the Encyclical Evangelium Vitae*, 43 AM. J. JURIS. 135, 160 (1998).
[79] *Id*. at 160-161. The "error" in *Roe* is, as mentioned, the failure to recognize the unborn as a "person" for Constitutional purposes. *Id*.
[80] *See id.*

> [a] "person" is not "[a] soul," and we cannot affirm that the human fetus is a person [simply] because it has a rational soul. Rather, it is maintained that the living fetus has a soul because it is a human person and that it is a person precisely because and inasmuch as he or she is a living individual of the species homo sapiens. The latter point is a matter of scien-tific [sic] fact, not "religion."[81]

Thus, as convincing as it may be to equate possession of a rational soul with the status of a Constitutional "person," arguments like Rhonheimer's prevent such an equation from ever being written into modern American law, as they reinforce the notion that a soul, even a rational soul, is ultimately a *theological* concept, and as such, carries little weight with regard to constitutional black letter law.[82]

Aside from the idea of the rational soul, the concept of consciousness, through its relationship with reproductive conception, can create additional implications for the status of an unborn "person."[83] As mentioned previously, there is a widely held belief that consciousness, while not an intrinsically human characteristic, is nonetheless a vital characteristic of personhood status and further, the rational soul. Thus, by focusing on the moment of human conception, some scholars believe it is possible to explore ways in which human consciousness is actually tied to the soul.[84]

B. The Soul of the Unborn, the Sanctity of Life, and the Parallels Regarding the "Viability Standard"

While the previous subsection analyzed the impact of the soul on the Constitutional Person standard, the material set forth in this subsection shall examine the soul's implications for

[81] *Id*. at 159.
[82] The "weight" soul theory carries may actually be larger than it appears, as some commentators believe that, due to a generally pervasive belief in God throughout the world, "[t]he concept of the soul is embodied in our everyday vocabulary." M. SCOTT PECK, DENIAL OF THE SOUL: SPIRITUAL AND MEDICAL PERSPECTIVES ON EUTHANAISA AND MORTALITY 130 (Harmony Books) (1997). However, given this pervasiveness, religious "talk" of this nature is generally frowned upon, and it remains unclear why the words "God" and "soul" "cannot be mentioned in medical professional meetings . . ." particularly those regarding psychiatry. *Id*. Despite the fact that society is regarded primarily as secular, Peck suggests that the use, or lack thereof, of such language may be a result of individuals failing to take their religion and religious beliefs seriously. *Id*. at 131.
[83] JEFF MCMAHAN, THE ETHICS OF KILLING: PROBLEMS AT THE MARGINS OF LIFE 9 (Oxford Univ. Press 2002).
[84] *Id.*

another legal standard that has been given great dialogue in the debate over reproductive and abortion rights: the "Viability Standard."

The Constitutional Person Standard is inherently different from and ultimately much broader in scope than the Viability Standard. By defining a primarily general principle, i.e. what constitutes a person, the Constitutional Person Standard can be utilized to define any rights that may pertain to the unborn child, regardless of whether they pertain to abortion. Alternatively, the Viability Standard, as it is much more specific in its scope, is directed almost exclusively toward abortion rights. Yet, the two standards do share a similarity with regard to origin. Like the Constitutional Person standard, the Viability Standard is not based on or specifically derived from the Constitution. Rather, such a standard is addressed initially in *Roe v. Wade*, later in *Planned Parenthood v. Casey*, and is ultimately solidified as the primary criteria for regulating abortion rights in American society.[85] In *Casey*, this standard is articulated as a

> right of the woman to choose to have an abortion *before viability* and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second[ly, *Casey* establishes a] confirmation of the State's power to restrict abortions *after fetal viability*, if the law contains exceptions for pregnancies which endanger the woman's life or health. [86]

Thus, given that the Court has identified fetal viability as the crucial point for determining whether an abortion is to be carried out, what can be said of the impact of the soul? While viability is inherently a biological principle, and the standard derived from it is predominantly secular, there may also be, under a religious perspective, two concepts that can be used to regulate abortion under this phenomenon, viz. ensoulment and the sanctity of life.

The first step in linking the viability standard to the concept of ensoulment rests on the argument that, under United States common law, particularly that set forth in *Roe* and *Casey*, viability is the quintessential threshold for regulating abortion, essentially because viability

[85] *Casey*, 505 U.S. at 871.
[86] *Id*. at 846.

represents, and effectually is, *sustainable (human) life*.[87] Consequently, aborting an unborn child at a point where this type of life is sustainable is greatly problematic. The question remains, however, as to why. Among other, more abstract justifications,[88] the most notable objection to terminating the unborn at a point at which life is sustainable rests on the assumption, and in many cases, deeply held belief, that human life has intrinsic value *simply because it is human life*.[89] It is here, therefore, that a connection can be drawn between this belief and a fairly prevalent religious principle that human life, specifically human life infused with a soul is, by virtue of divine construction, sacred.[90] Hence, once an unborn human is infused with a soul, abortion is impermissible, as such an infusion represents a "divine investment" in the child's life.[91] Consequently, any killing of the fetus subsequent to this stage constitutes a "waste . . . of

[87] Viability, as it pertains to human reproduction, is defined in the most basic sense as "capable of living; *especially* having attained such form and development as to be normally capable of surviving outside the mother's womb . . . ." Meriam-Webster Online Dictionary, *Viable*, *available at* http://www.merriam-webster.com/dictionary/viable.

[88] The Court in *Roe* recognized that the State has an "important and legitimate interest in protecting the potentiality of human life." *Roe*, 410 U.S. at 163. This is regarded as a "detached" justification for abortion regulation because it focuses not primarily on human life itself as a separate and distinct philosophical concept, but rather the *State* and the *interest* the State has in it.

[89] MCMAHAN, *supra* note 83, at 210. The belief that human life possesses a high intrinsic value simply because it is human life is regarded in some circles as a concept called "speciesism." A term coined by philosopher and ethicist Peter Singer, speciesism states that humans, including undeveloped human embryos, are of the highest intrinsic value because they are members of the human *species*. *Id*. at 214. As such, killing humans, including through abortion, is morally worse than killing any other organism, since humans, by nature of their species, possess a "special moral status" that precludes such activity. Of course, while Verney's studies indicate that characteristics such as "conscious appreciation, interactions, and behavior" may indeed be present within unborn humans, the claim that humans' "special moral status" is derived from these characteristics, or the ability to develop them, raises a problem with regard to defective embryos and anencephalic children who do not possess these traits, nor the ability to develop them. *Id*. at 210. While these individuals are no doubt recognized as human, the claim for speciesism becomes weaker, as "the special value of the defective embryo cannot be attributable to its psychological capacities" or from its "psychological potential" because it has neither. *Id*.

[90] *Id*. at 256. Despite the widespread prevalence of this principle, some modern commentators remain wary of its ultimate soundness, indicating that

> [i]f we are to postulate certain properties as the basis of our worth, they had better be props which we demonstratably have. Accounts of the morality of respect that base our worth on certain 'metaphysical' attributes – such as that we possess a soul, or that we have been made in the image of God . . . are always vulnerable to the possibility . . . that the favored attribute is illusory. *Id*.

[91] *Id*. at 333. The particulars of such a bar are of course dependent upon the point of development at which ensoulment ultimately occurs. Many theologians and philosophers discussed in this note regard ensoulment to occur while a human is *in vitro*. On the other hand, those who are more tolerant toward abortion ultimately find the "primary source of intrinsic value" to be within those humans who have already been born. *Id*. Looking beyond the aforementioned sanctity of ensoulment, these proponents believe that

the . . . divine investment in the life," a life that is ultimately given "intrinsic value" by way of the soul.[92]

Up until this point, the secularly-based viability standard, and the religiously-based ensoulment standard have been described as two separate thresholds for regulating abortion and ascribing the rights that justify its regulation. However, an argument can be made linking the two. As previously mentioned, the viability standard precludes the abortion of viable fetuses because their viability represents human life and as such, is of an intrinsic value too high to permit abortion. While this intrinsic value is something that is generally agreed upon by American courts, apart from the boilerplate specieist positions that have been elucidated in this note,[93] the details surrounding this intrinsic value is not discussed a great deal. In essence, this question, which is left unanswered by the Court, is the issue which ultimately illustrates the details surrounding such an intrinsic value. It is here that the concept of the soul is of particular significance, as it is the soul itself which confers, and thereby is, its source. Some scholars indicate that the "special moral status" indigenous to humans is evinced by the possession of an intangible soul, which thereby grants humans the tangible characteristics that make such organisms as a species so valuable, e.g. Verney's concepts of "conscious appreciation, interactions, and behavior."[94]

In *Roe,* the Court does not articulate these exact attributes, but clearly alludes to them. The Court states that, as a general principle, abortion may be regulated at viability due to the State's "important and legitimate interest in protecting the potentiality of human life."[95] However, the crucial point is when the Court goes on to state that the "'compelling' point [of

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> it may be more frustrating of life's miracle when an adult's ambitions, talents, training, and expectations are wasted because of an unforeseen and unwanted pregnancy than when a fetus dies before any significant investment of that kind has been made. *Id*.

[92] *Id*. Alternatively, there are other abortion opponents who, as previously mentioned, claim that life, because it is sacred, represents an exercise of God's creative force. *Roe*, 410 U.S. at 162; *see also supra* notes 20-21 and accompanying text. Therefore, any termination of life, regardless of whether it has been ensouled, represents a denial of God's sacred creative force and should therefore be forbidden. *Id*.

[93] *See supra* note 87 and accompanying text.

[94] MCMAHAN, *supra* note 82, at 256.

[95] *Roe*, 410 U.S. at 162. This particular holding was affirmed in *Casey*. *Casey*, 505 U.S. at 871.

such a State interest] is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb."[96] Through this language, the Court brings to fruition essentially the same issues touched upon above. Given that viability is the point at which "meaningful life outside the mother's womb" becomes possible, what is it that makes such "meaningful life" intrinsically valuable?[97] It may be true that this intrinsic value, or "meaningfulness," of human life referred to by the Court, a trait acquired at viability, could be grounded in the infusion of a soul, thereby making it *possible* for humans to *develop* characteristics that are both tangible and extrinsically valuable. These characteristics, such as "conscious appreciation, interactions, and behavior," point not only to the intrinsic value of human life, but also its sacredness.

III. DEATH, DYING, AND THE SOUL

In addition to the issues regarding soul doctrine and its influence on bioethical controversies occurring at the "beginning" of life, the controversies occurring at the "end" of life, i.e. death and dying, are similarly painted with great contention. While there are many topics that have come under analysis in recent legal history, this note will focus on two specifically. First, the issue of the soul as it pertains to a right to die, specifically the right to withdraw life-sustaining medical treatment, shall be addressed in the context of *Cruzan v. Director, Missouri Dept. of Health*.[98] This section will also include a detailed discussion on the intersection of soul theory regarding both traditional and modern definitions of death. Secondly, this note will turn to the issue of soul and its impact, influence and intersections on American law regarding assisted suicide.[99]

[96] *Id.*
[97] *Id.*
[98] *See generally*, Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990).
[99] *See* Washington v. Glucksberg, 521 U.S. 707 (1997).

A. General Legal Background: Cruzan, Glucksberg, *and the Right to Die*

The much debated and highly publicized "right to die" was first addressed in detail by the Supreme Court in *Cruzan v. Director, Missouri Deptartment of Health*.[100] In *Cruzan*, the Court held that, when faced with the desire of surrogate decisionmakers to remove necessary life-sustaining medical treatment from a persistently comatose patient, the state could require the production of clear and convincing evidence indicating that such a withdrawal would indeed be the desire of the patient, if the patient could make such a decision on her own.[101] While these requirements undoubtedly created an additional burden for removing the life support, the Court stated that such a burden was permissible, recognizing a patient's right "to be free of unwanted medical treatment" to be a "Constitutionally protected liberty interest,"[102] one derived from the fundamental right to bodily integrity.[103] Thus, if such "clear and convincing" evidence could be produced, the Court held that the patient's "right to die" would be recognized, and the removal of treatment would be granted.[104]

[100] *See generally*, *Cruzan*, 497 U.S. 261.
[101] *Id*. at 286-287.
[102] *Id*. at 302. Justice Brennan and Justice Stevens take this holding even further, arguing that such a right is not only a liberty interest, but a *fundamental right* as well. As such, an individual "has a liberty interest to be free of unwanted medical treatment, as both the majority and Justice O'Connor concede, it must be *fundamental*. 'We are dealing here with [a decision] which involves one of the basic civil rights of man.'" *Id*. at 304 (Brennan, J., dissenting) (quoting Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942)).
[103] *Cruzan*, 497 U.S. at 342 (Brennan, J., dissenting). The right to bodily integrity can further be extrapolated from the right to be free from battery or unwanted contact. *Id*. American common law indicates that "our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination." *Id.* (quoting Cruzan v. Harmon, 760 S.W.2d 287 (1989) (O'Connor, J., concurring)). "Thus we have construed the Due Process Clause to preclude physically invasive recoveries of evidence not only because such procedures are 'brutal' but also because they are 'offensive to human dignity.'" *Id.* (quoting Rochin v. California, 342 U.S. 165, 174 (1952)). Hence, "[e]very violation of a person's bodily integrity is an invasion of his or her liberty." *Id.* (quoting Washington v. Harper, 494 U.S. 210, 237 (1990) (Stevens, J., concurring in part and dissenting in part)).
[104] *Cruzan*, 497 U.S. at 286-87 (O'Connor, J., concurring). "It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment." *Id.* at 281. Nonetheless, "[t]he choice between life and death is a deeply personal decision of obvious and overwhelming finality," and as such, when faced with surrogate decisionmakers, "[the] State is entitled to guard against potential abuses in such situations." *Id*. On the other hand, when faced with the personal decision of the patient, "'the State has no legitimate general interest in someone's life, completely abstracted from the interest of the person living that life, that could outweigh the person's choice to avoid medical treatment,'" and therefore "must accede to [the patient's] particularized and intense interest in self-determination in her choice of medical treatment." *Id*. at 299 (Scalia, J., concurring) (quoting Brennan, J., dissenting).

The bedrock case in American constitutional law which dictates the right to assisted suicide, or more appropriately lack thereof, is *Washington v. Glucksberg.* In *Glucksberg*, the Court held that a state statute prohibiting assisted suicide was constitutional.[105] The Court supported this holding by reiterating that while the right to die in the form of withholding necessary medical treatment was indeed a liberty interest, one whose principles were "deeply rooted in this Nation's history and tradition,"[106] such a liberty interest could in no way be expanded to encompass the practice of assisted suicide.[107]

B. Soul Theory: Death and the Soul

To fully understand the context in which rights are constructed at the end of life, it is necessary to understand how law, particularly constitutional law, religion, and society as a whole has perceived and articulated the end of life. Within this discussion, a great deal of analysis is applied toward the experiences that occur at death, and what impact these experiences have on one's rights, duties, and ultimately, one's status as a "person." However, when determining the right to actively or passively terminate life, an event which, in either case, inevitably results in death, the definition of death is the essential corollary that dictates the parameters of such a right, and essentially, whether it can exist at all.

1. Death, the Soul, and Personhood

While there are many general facets of the soul and soul theory which have been discussed in the previous section concerning the ethics of abortion, there are several aspects of the soul that are particularly worthy of mention due to their intimate association with death. One of the most prevalent aspects is the relationship between the soul and personhood. A topic

[105] *Glucksberg*, 521 U.S. at 735.
[106] *Cruzan*, 497 U.S. at 305 (Brennan J., dissenting).
[107] *Glucksberg*, 521 U.S. at 723, 725.

> The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted "right" to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. *Id*. at 728.

vigorously addressed in Section II, the issue of personhood is a crucial element to the definition and articulation of the "right to die," just as it is to the "right to life."[108]

As in discussions regarding a right to life, one of the issues that arises in discussions regarding the right to death is the issue of suffering, or more specifically, the ability to suffer.[109] With regard to killing versus simply allowing a life to end (a rather complicated distinction which will be covered in the following subsection), a comparison is often made between humans and animals, and the impact that a soul, and also, personhood, has on each.[110] Philosopher and ethicist Peter Singer has been at the forefront of this debate, arguing that while both humans and animals appear, at least on the visceral level, to have the ability to suffer, there is obviously a clear distinction between how we as society view the termination of human life versus that of animal life.[111] In essence, he poses the question: "[s]ince animals share this ability [to suffer] with human beings, why are we justified in treating them differently in regard to the termination of life?"[112] In presenting an answer to this moral quandary, Singer claims that traditionally, the reason why humans are afforded unique rights to death and dying is because humans, unlike animals, possess a soul, and furthermore, personhood.[113] Of course, this position opens up the floor for the various positions on what a soul actually is, along with the criteria for possessing it. However, these arguments have already been discussed in the previous section, and as such will not be addressed here.

Nonetheless, the issue of personhood is just as vital to the discussion of death and dying rights as it is to abortion rights. Yet, unlike the debate over abortion rights, personhood in this context is not examined in regard to organisms that are unborn, but rather organisms that have already gone through live birth.[114] As such, once live birth, and presumably, ensoulment, has

[108] ETHICAL ISSUES RELATING TO LIFE AND DEATH 11 (John Ladd, ed., Oxford Univ. Press 1979).
[109] *Id*.
[110] *Id*.
[111] *Id*.
[112] *Id*.
[113] *Id*. To avoid the obvious religious connotations, "many contemporary philosophers prefer to use the term 'person' *instead of* 'soul.'" *Id*.
[114] Ladd, *supra* note 108, at 11.

occurred, Singer argues that "a person . . . is a possessor of rights (and duties)."[115] However, the inevitable caveat to this viewpoint is that if it is argued that animals (who assumedly possess no rights or duties) have no rights regarding the termination of life, and therefore can be euthanized without considerable moral objection, it is ultimately unclear whether comatose or persistently vegetative humans should be afforded such "human" rights as well.[116]

2. Defining Death

a. A Legal Perspective

The most prevalent definitions and articulations of death used in secular law are "brain," or neocortical death, and "heart," or respiratory death.[117] Of these two, the most commonly used in the American legal arena is the concept of neocortical death.[118] The basic principle behind neocortical death rests on the position that "death . . . [has] occurred when the entire brain ceases functioning."[119] While this principle is generally the one most American courts adhere to, there is some contention over specificity and extent, as "[a] distinction [can be] drawn between 'whole brain death' meaning the irreversible cessation of all functions of the brain, including the brainstem, and 'neocortical death' which occurs when a patient suffers an irreversible loss of cognition and consciousness, but retains brainstem functions."[120] Despite this contention however, many states, in their construction of law regarding the determination of death, have ultimately recognized neocortical death as one of the primary indicators of death.[121]

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[115] *Id*.

[116] *Id*. This point is somewhat intertwined with discussions regarding abortion rights, as a preborn, unconscious fetus possesses the same mental faculties and to an extent "human rights," as a born human with severe mental retardation, brain damage, etc.

[117] *See generally* C. Anthony Friloux, Jr., *Death, When does it Occur?*, *in* DEATH, DYING, AND EUTHANASIA 29 (Dennis J. Horan ed., 1980).

[118] *See generally* Delio v. Westchester County Medical Center, 129 A.D.2d 1 (N.Y. App. Div. 1987).

[119] *Id.* at 20.

[120] *Id*. at 20 n.2. *See also* David Randolph Smith, *Legal Recognition of Neocortical Death*, 71 CORNELL L. REV. 850 (May 1996).

[121] Kansas is often cited as one of the first states to do so, as it states that "[a]n individual who has sustained . . . irreversible cessation of all functions of the entire brain, including the brain stem, is dead." Determination of Death, K.S.A. § 77-205 (2007). Furthermore, "a determination of death must be made in accordance with accepted medical standards." *Id*.

Along with neocortical death, cardiopulmonary death is also used to legally define the end of life. Sometimes referred to as "heart death," cardiopulmonary death rests on the principle that "death does not occur under the heart stops beating and respiration ends."[122] Of the two definitions of death discussed in this note, cardiopulmonary death is the oldest and more traditional of the two,[123] but has in many states been included alongside neocortical death to form a singular definition of cessation of life.[124] Expansions of this kind have generally drawn support from commentators, who view neocortical death often times as the more "ethical" and righteous of the two definitions.[125]

b. Defining Death from a Religious Perspective: the Mechanics of Dying and the Mechanism of Soul Departure

Due to the religious underpinnings regarding the concept of the soul, it is also necessary for one to address how death is defined from a religious perspective. From this standpoint, a bridge can then be formed between soul theory and secular laws on death and dying. Of course, while there are countless religions throughout the world that adopt a multitude of theories with

[122] Friloux, *supra* note 117, at 28. As the more traditional of the two definitions, cardiopulmonary death was, for many years, regarded as the legal standard in Black's Law Dictionary, with "death" regarded as "a total stoppage of the circulation of blood, and a cessation of the animal and vital functions consequent thereon, such as respiration, pulsation, etc. . . . ." *Id.* at 29 (quoting BLACK'S LAW DICTIONARY 488 (4th ed. 1959)).

[123] Historical definitions of death are generally equated with the "locus of death" defined at the time. ROBERT M. VEATCH, DEATH, DYING, AND THE BIOLOGICAL REVOLUTION 43 (1976). Hence, the history of cardiopulmonary death can be traced back to Ancient Greece, with the Greek interpretation of the term "pneuma" suggesting the soul to be closely related to or synonymous with *breath*. *Id*. at 33. As such, this mode of "respiratory death" was recognized through the function, or lack of function, of the reparatory system, notably the lungs. *Id*.

[124] Friloux, *supra* note 117, at 29. "In clinical circumstances the traditional standards, cessation of heart beat and respiratory functions, have been expanded to include the newly acceptable . . . 'brain-death' standards." *Id*.

[125] David Randolph Smith, *Legal Recognition of Neocortical Death*, 71 CORNELL L. REV. 850 n.51 (May 1996).

> [A] neocortical approach to death strengthens the case for human rights [with regard to the senile, severely sick or unborn] by stressing consciousness and the capacity for thinking as the essential test for dispensing or defining death. By contrast, alternative formulations that focus on other values such as privacy, quality of life, or the perceived best interests of the patient do not prevent patients (or the unborn) from being put to death even though there may be the presence or potential for consciousness. *Id*.

regard to death, this discussion shall focus primarily on Christian/Roman Catholic principles, with some attention also given to classical philosophical theory as well.

Most Christian and Catholic doctrines view death as an event, rather than an ongoing process of deterioration.[126] With regard to the concept of the soul, this "event" has "most traditionally been defined as the departure of the soul from the body."[127] Of course, while the soul is a nonphysical entity, Christian scholars have often compared the departure of the soul at death to the physical event of a person leaving his or her house.[128] Despite its religious origins however, this model is not recognized to be the only mechanism of death, as the *nonphysical* events of this model are inherently intertwined with the *physical* event of neocortical death.[129] Scholars claim that "if a person can no longer make certain responses or if his brain is dead, then the soul must have left."[130] As such, the destruction and the mind and the subsequent departure of the soul are key elements to the religious, particularly Christian, understanding of death.[131] Robert Rakestraw illustrates this claim using a quintessential example, claiming that "the correctly diagnosed PVS [Persistent Vegetative State] individual is a body of organs and systems, artificially sustained, without the personal human spirit that once enabled this body-soul unity to represent God on earth."[132] Given this insight, the concepts of neocortical death and the

[126] Ladd, *supra* note 108, at 123.
[127] *Id*.
[128] *Id*.
[129] *Id*. Critics of this position argue that defining death in such a way is of limited purpose in the secular legal arena, claiming that if society "fail[s] to [demythologize] the concept of death . . . [and] if we . . . look for realities in places where they do not exist [than therefore] we will not see them where they do exist." *Id*. Such visualization is thus erroneous, as it "forces on us a mythology that there is still something in the body as long as any part of the brain continues to function." *Id*. Rather than endorse this "mythological conception" of death, these critics adopt a strictly "medical conception," and in turn view death not as an event like a person leaving a house, but rather as a *process* of a house burning down." *Id*.
[130] *Id*.
[131] Robert V. Rakestraw, *The Persistent Vegetative State and the Withdrawal of Nutrition and Hydration*, 35 JOURNAL OF THE EVANGELICAL THEOLOGICAL SOCIETY 389-405 (Sept. 1992) *available at* http://www.bethel.edu/~rakrob/files/PVS.html. Rakestraw claims that because the "Bible on occasion uses the language of the human spirit's departure as something different from the person's life-force or final breath to signify death (Luke 23:46; Acts 7:59-60), we may use similar language in suggesting that the spirit of the PVS individual has already returned to God." *Id*.
[132] *Id*.

departure of the soul may in fact be one in the same, as they are essentially governed by the same underlying process of mental faculty and neocortical function.[133]

Hence, while "[t]he concept of body-soul separation is a *theological* understanding of death [and] not a scientific one,"[134] there are a number of parallels that can be drawn between the "religiously connotated" departure of soul at death and America's secular laws regarding death and dying.

C. Comparing the Logistics and Mechanics of Soul Theory to Secular Laws Regarding Death, Dying and Suicide

While there are undoubtedly connections between soul theory and the overarching definition of death, one of the most pertinent bioethical issues regarding the end of life is the withdrawal of life-sustaining medical treatment. Here, a more limited connection exists between religious soul doctrine, which utilizes objective standards to dictate the ultimate course of action, and the concepts of Constitutional law, which look instead to the individual freedom and autonomy of the patient.

1. A Deeper Look at *Cruzan*, Soul Theory, and the Permissibility of Withholding Medical Treatment

As mentioned above, there are many elements of soul theory regarding death that can be compared to secular law in American society. One of the ways in which a comparison can be made is through one of the most prevalent issues regarding death in American law: the general

[133] *Id*. This comparison to neocortical death corrects an apparent disconnect which exists when one attempts to compare the departure of the soul to the other definition of death, circulatory death. While many Christians believe that

> when the soul or spirit departs permanently from the body death occurs, the major problem with [viewing death as the departure of the soul] is how to determine *when* the soul is gone. Cessation of the flow of bodily fluids may accompany the departure of the soul, but the two events are not to be equated. With this concept of death the Christian must still ask: How can I know *when* the soul has departed? *Id*. (emphasis added).

[134] *Id*. (emphasis added).

permissibility of withholding medical treatment.[135] While often times considered as analogous or even equivalent to assisted suicide, the procedure of withdrawing or withholding necessary medical treatment has given rise to an entire doctrine of law and philosophy distinct from that regarding assisted suicide. In this subsection, the rationale behind the *Cruzan* holding will be examined, alongside various aspects of soul theory that similarly permit the withdrawal of medical treatment. For the purposes of this discussion, the concept of death shall be defined according to the neocortical model.

The overall holding in *Cruzan* indicated that, when faced with the desire of surrogate decisionmakers to remove necessary life-sustaining medical treatment from a persistently comatose patient, the state could require the production of clear and convincing evidence indicating that such a withdrawal would indeed be the desire of the patient, if the patient was capable of making an informed choice him or herself.[136] The Court based this holding on the claim that under the Fourteenth Amendment (specifically the Due Process Clause), the refusal of necessary medical treatment was not only derived from a considerable liberty interest, but a fundamental right as well.[137] Of course, the question most relevant for the purposes of this discussion lies in the rationale for a liberty interest in withholding or withdrawing necessary medical treatment. The Court in *Cruzan* offers several arguments that are particularly important to divulging such a rationale, as they reveal from a secular perspective how such practices can be regarded as permissible. One of the primary rationales the Court employs is the concept of "self determination."[138] Here, the Court argues that "[o]n balance, the right to self-determination ordinarily outweighs any countervailing state interests . . ." and therefore, "competent persons generally are permitted to refuse medical treatment, even at the risk of death."[139] Furthermore, when faced with a patient in a persistent vegetative state, i.e. a "mentally incompetent person," this right does not disappear, as it can be "exercised by a surrogate decisionmaker using a

[135] *See generally Cruzan*, 497 U.S. 261.
[136] *Id.* at 286-287.
[137] *Id*. at 302.
[138] "It may truly be said that our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination." *Id.* at 342 (O'Connor, J., concurring) (internal quotation omitted).
[139] *Id*. at 273 (citing In re Conroy, 486 A.2d 1209, 1225 (1985)).

'subjective' standard when there [is] clear evidence that the incompetent person [if competent] would have exercised it."[140]

In carving out this right to self-determination, the court is careful to distinguish the practice of withdrawing medical treatment from the practice of assisted suicide. In delineating an effectual "right to die," because the former is ultimately recognized as legal while the latter is not, this is indeed an important distinction to make. Hence, the Court crafts a "dichotomy between action and inaction . . . [for] [s]uicide, [or similarly, assisted suicide] it is said, consists of an *affirmative* act to end one's life; refusing treatment is not an affirmative act 'causing' death, but merely a *passive* acceptance of the natural process of dying."[141]

Thus, according to the Court, given the apparent distinction between such passive and active actions, the recognition of a liberty interest in withholding necessary medical treatment does not extend to the recognition of any comparable liberty interest, or right for that matter, in assisted suicide.

Yet, along with the justifications proffered by the Court in *Cruzan*, there are many religious and philosophical justifications for the permissibility of withdrawing medical treatment that can be addressed in a somewhat different context. While it would be incorrect to say that American law, specifically that which is put forth in *Cruzan*, is based explicitly on these positions, several noteworthy comparisons can be made between these two "competing" schools of thought.

To best draw this comparison, one may consider the circumstances which exist when the patient is in a persistent vegetative state, with little to no brain activity. According to the definitions discussed above, such a person can be regarded as neocortically dead. Rakestraw explores this scenario through his concept of "divine image," claiming that a person, while on

[140] *Cruzan*, 497 U.S. at 273 (quoting In re Conroy, 486 A.2d 1209, 1229-33 (1985)).
[141] *Id.* at 296 (Scalia, J., concurring). In *Cruzan*, the action-inaction distinction is starkly opposed by Justice Scalia. While Scalia "readily acknowledge[s] that the distinction between action and inaction has some bearing upon the legislative judgment of what ought to be prevented as suicide . . . it [seems] . . . unreasonable to draw the line precisely between action and inaction, rather than between various forms of inaction." *Id.* Rather, he states that the "intelligent line" should fall between "those forms of inaction that consist of abstaining from 'ordinary' care and those that consist of abstaining from 'excessive' or 'heroic' measures." *Id.*

Earth, functions as God's representative and is therefore an "image of God."[142] However, he also claims that "[w]hile the body [and neocortex] is necessary for imaging God, it is not sufficient for doing so."[143] Hence, according to Rakestraw, once brain activity stops, a withdrawal of medical treatment is permissible, since "[a] body without neocortical functioning cannot [serve as an] image [of] God . . . ."[144] However, unlike the Court in *Cruzan*, which emphasizes *self*-determination, Rakestraw takes a different approach, arguing that with the onset of neocortical death, "[o]ur attitude and intention should be that of turning the individual over to *God's providence*, allowing the condition to take its course."[145]

Along with Rakestraw's "image" concept, the issue of withdrawing life-sustaining treatment has also been addressed using the personhood concept. Some theologians have argued that when faced with neocortical death, the withdrawal of treatment is permissible because "we are no longer dealing with a person in the proper sense of that term but a mere human body: a biological entity that formerly was a person but now is merely alive."[146] Essentially, the onset of neocortical death is said to rob a person of what is termed "personal content," as the functioning brain alone provides the biological basis for personhood, which in turn allows for the presence of a soul.[147] Under this interaction between the physical body and the nonphysical soul, the ultimate conclusion rests on the claim that, without a soul, an organism which was once considered a "person" is now nothing more than a mere "biological organism," and, as a result, the duty to save it no longer exists.[148] As such, there can be no qualm with the withdrawal of necessary medical treatment, as under these circumstances, such a practice is regarded by religious officials as "[nothing] more than an indirect cause of the cessation of life."[149] Of course, while this view is common throughout both Christian thought and classical

[142] Rakestraw, *supra* note 130.
[143] *Id*.
[144] *Id*.
[145] *Id*. (emphasis added).
[146] EIKE-HENNER W. KLUGE, ETHICS OF DELIBERATE DEATH 86 (1981).
[147] *Id*. at 87. Given the religious nature of this argument, it is commonly conceded that the claim that one either possesses or does not possess a soul is one that can never truly be empirically proven. *Id*. at 88.
[148] *Id.*
[149] In re Quinlan, 70 N.J. 10, 26 (1976) (citing Pope Pius XII in his *allocutio* (address) to anesthesiologists on November 24, 1957).

philosophy,[150] it is not without criticism. Generally speaking, with regard to the "personhood argument," the same problems apply, as classifying certain physical characteristics as representative of the presence of a soul and thus, personhood, has been argued to lead to considerably undesirable results for the "remedially comatose and the momentarily unconscious . . . ."[151]

Thus, with regard to secular American courts on one hand, and their philosophical and religious counterparts on the other, the justifications for permitting the withdrawal of necessary medical treatment lie on considerably different planes. Essentially, the divergence exists in regard to *who* is responsible for determining the ultimate course of action of whether treatment may in fact be withheld. On one hand, secular law primarily stresses bedrock constitutional principles such as self-determination and personal autonomy, thus deferring to the subjective freedom and desire of the individual patient, be those desires expressed by the patient themselves, or a surrogate on their behalf. Regardless, religious rationales, on the other hand, utilize a more objective rubric to dictate treatment options – one that lies outside the realm of individual freedom – in the concepts of personhood, the presence of a soul and divine providence.

2. *Glucksberg*, Soul Theory, and a Brief Note on the Illegality of Assisted Suicide and Medically Assisted Death

While the withdrawal of necessary medical treatment may appear to some to be merely a form of assisted suicide, it is generally regarded throughout the legal, ethical and religious arenas as a separate and distinct circumstance. Unlike the withdrawal of necessary medical treatment, medically assisted death, or death that is *actively induced* by the physician, even at the behest of the patient, is regarded as illegal and by and large, morally objectionable.

[150] A staple point regarding the ethics of death in classical Greek Stoicism centered on the claim: "If the body is useless for service, why should one not free the struggling soul?" JERRY B. WILSON, DEATH BY DECISION: THE MEDICAL, MORAL, AND LEGAL DILEMMAS OF EUTHANASIA 22 (1975).
[151] KLUGE, *supra note* 146, at 88.

To elucidate the legal perspective on the impermissibility of assisted suicide, this subsection shall focus primarily on the Supreme Court case, *Washington v. Glucksberg*. In *Glucksberg*, the Court upheld the constitutionality of a Washington state statute prohibiting assisted suicide.[152] In doing so, the Court articulated several key arguments that have shaped the legality, or more appropriately, the illegality, of assisted suicide. Focusing solely on the purposeful act of taking one's own life through one's own action, the Court reasoned that "suicide is a serious public-health problem," and that "[t]he State has an interest in preventing [it], and in studying, identifying, and treating its causes."[153] Turning then to the act of taking one's own life through the action of another, the Court claimed that because the "State also has an interest in protecting the integrity and ethics of the medical profession," such a practice should not be legally permissible, since "physician-assisted suicide is fundamentally incompatible with the physician's role as healer."[154] Yet the most compelling justification for the impermissibility of assisted suicide, particularly for the purposes of this discussion, was the Court's recognition of the State's "unqualified interest in the preservation of human life."[155] Under this rationale, the Court equated the practice of assisted suicide to homicide, drawing parallels between a ban on assisted suicide and other such laws that "reflect[ed] and advanc[ed] [the State's] commitment to this interest."[156] Ultimately, the Court concluded that when faced with the concept of assisted suicide, "interests in the sanctity of life that are represented by criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another."[157]

As in the abortion discussion, the recurrence of the State interest in preserving human life, presumably due to its sacred quality, is vital fodder for applying soul theory to secular, constitutional law. Of course, while the Court does not explicitly invoke soul theory as a justification for its holding in *Glucksberg*, analysis of some of the religious and philosophical

[152] *Glucksberg*, 521 U.S. at 735.
[153] *Id*. at 730.
[154] *Id*. at 731.
[155] *Id.* at 728 (quoting Cruzan, 497 U.S. at 282).
[156] *Id*.
[157] KLUGE, *supra* note 146, at 728. (quoting Model Penal Code § 210.5, Comment 5, at 100) (emphasis added).

justifications for the impermissibility of assisted suicide can give rise to several noteworthy comparisons.

When dealing with the religious justifications for the impermissibility of assisted suicide, it is necessary to first examine how various doctrines evaluate the practice of unassisted suicide. Many religious thinkers, particularly Christians and Catholics, regard such a practice as a "gravely evil choice," and one that is "as morally objectionable as murder."[158] As one might imagine, this rationale carries over to assisted suicide, as an individual's concurrence "with the intention of another person to commit suicide," along with his or her assistance "in carrying it out through so-called 'assisted suicide,'" classifies the individual as not merely an accomplice, but a "perpetrator" of "an injustice which can never be excused, even if it is requested."[159] Despite the possibility that an individual who assists another in suicide may seemingly be motivated entirely by benevolent intentions, Christianity has traditionally regarded such a practice as morally objectionable and ultimately, as a "false . . . and . . . disturbing 'perversion' of mercy."[160]

In order to justify such fervent condemnation, Christian doctrines have drawn on the concept of divine providence, a concept with inexorable ties to that of the soul as it pertains to death. According to high-ranking Christian authority, assisted suicide, or even self-induced suicide, through its active inducement of the end of life, "represents a rejection of God's absolute sovereignty over life and death."[161] What makes soul theory particularly relevant here is that divine providence applies not only to the divine "gift of life," but to the soul as well, as "strenuous efforts . . . to hasten death . . . interfere with God's plans for the soul."[162] As such, an

[158] Pope John Paul II, *supra* note 46, at 66.

[159] *Id*. In his encyclical, *Evangelium Vitae*, Pope John Paul II cites "a remarkably relevant passage" by Saint Augustine, claiming that

> it is never licit to kill another: even if he should wish it, indeed if he request it because, hanging between life and death, he begs for help in freeing the soul struggling against the bonds of the body and longing to be released; nor is it licit even when a sick person is no longer able to live. *Id*.

[160] *Id*.

[161] *Id*.

[162] Cristina L. H. Traina, *Pope John Lecture on Professionalism: Religious Perspectives on Assisted Suicide*, 88 J. CRIM. L. & CRIMINOLOGY 1147 (Spring 1998).

act of this kind ultimately violates divine providence, and makes such "efforts" morally condemnable.[163]

Unlike the issues regarding abortion, the withdrawal of necessary medical treatment, and the definition of death, the degree of similarity existing between secular and religious law amidst the discussion of assisted suicide is somewhat limited. There is undoubtedly some common ground that exists regarding the preservation of human life in light of its intrinsic, and according to some, sacred, value. Religious and constitutional doctrines have expressed unequivocal reverence for human life, a reverence which has helped shape many laws and theories encompassing the bioethical dilemmas discussed in this note. On the other hand, a divergence exists again when considering principles of patient autonomy, a concept commonly lauded by constitutional law, and divine providence, an idea which, by its very name, hails from a primarily religious perspective. Of these two mentalities, constitutional law seems to be slightly more complicated in the face of modern medical ethics because, while it recognizes a patient's autonomy in regard to *passive withholding* of life-sustaining treatment, no such autonomy has yet to be recognized in regard to the *active termination* of his or her life. Of course, given the apparent parallels the Supreme Court draws between medically induced suicide and the practice of homicide, it remains highly unlikely that any such right will be recognized anytime soon.

IV. CONCLUSION

It should come as no surprise that constitutional law is, by and large, secular in nature. And in many facets, this extraordinary doctrine of legal principles is exactly what it purports to be: a body of legal doctrine removed from an overarching religious influence. However, by closely examining the parameters of various religious doctrines, specifically those regarding the soul, an argument can be made that such a bright line separation many times does not exist. This note has shown that it is indeed possible, in certain bioethical circumstances such as abortion and the determination of death, to draw parallels between religious teachings and well-established principles of constitutional law. Of course, given the divergence that exists in the topics of

[163] *Id*.

withdrawing necessary medical treatment and assisted suicide, it would be error to claim that parallels between religious and secular principles run rampant through American law. However, in light of the foregoing discussions, these two forms of thought, be they similar, different, or a combination of both, can offer a wide perspective on how rights are defined and recognized at the beginning and the end of life.

As scientific technology expands, so shall the complexity of bioethical decisions that arise at the "bookends of life." And, as the bounds of American legal doctrine stretch to accommodate them, it remains unclear how deep the influence of soul theory and other religious doctrines may run. Nonetheless, our understanding of the soul can in many ways lend invaluable understandings of the ethical concepts that define not only our laws and our values, but our very existence as human beings. Thus, while the extent of such comparisons amidst secular and religious doctrine remains to be seen, legal scholarship should continue to remain vigilant, as such comparisons will undoubtedly be vital to the future development of constitutional law.