

# A NEW APPROACH TO THE ETHICS OF LIFE: THE “WILL TO LIVE” IN LIEU OF INHERENT DIGNITY OR AUTONOMY-BASED APPROACHES

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## I. INTRODUCTION

“Death is different.”<sup>1</sup> Many would recognize these words from the U.S. Supreme Court’s jurisprudence on capital punishment. In that jurisprudence, the Court has distinguished death from every other form of punishment “in its pain, in its finality, and in its enormity.”<sup>2</sup> No one would doubt, however, that these simple words have import far beyond the context of capital punishment. Implicating many other spheres of both ethics and law, these words from the Supreme Court encompassed what is arguably the most universal and self-evident of human intuitions: human life has paramount value.

But despite the ubiquity of this intuition, the ethics of life and death have inspired passionate debate and disagreement throughout the ages. When debating issues like abortion, assisted suicide, capital punishment, self-defense, gun rights, and war, people from all political and religious beliefs agree on one fundamental truth—that human life has paramount value. Yet, the agreement appears to end there. Intractable questions, such as whether life begins at conception, whether capital punishment upholds the value of life or tarnishes it, and whether people have a responsibility to protect others whose lives are at stake even when someone else is causing the harm, continue to divide us.

Extraordinary developments in technology designed to save or prolong human lives, as well as in technology designed to make killing more efficient, only complicate these questions. This added complexity manifests itself particularly in two issues: First, end of life care, where there would be no ethical debate over people like Terri Schiavo if medical technology capable of artificially sustaining life did not exist in the first place. And second, war in the age of terrorism, where debate on the ethics of war is colored by the development of drones that make it easier to kill people, including those who do not pose a truly immediate deadly threat.<sup>3</sup>

Greater public access to far simpler technologies also stimulates ethical debate. This is evident in debates about abortion, where anti-abortionists take advantage of the existence of ultrasound technology to

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1. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

2. *Id.* at 230 (Brennan, J., dissenting).

3. See *infra* note 236 and accompanying text. See also Editorial Board, Editorial, *A Thin Rationale for Drone Killings*, N.Y. TIMES (June 3, 2014), <http://www.nytimes.com/2014/06/24/opinion/a-thin-rationale-for-drone-killings.html>.

push for mandatory ultrasound laws, in hopes of convincing pregnant women that human life begins before birth, and gun rights, where public access to guns contributes to incidents like the killing of Trayvon Martin by George Zimmerman, incensing advocates who want to restrict such access.<sup>4</sup>

As interesting as each of these debates is, what is even more interesting is to compare the ethical stances people take *across* these varied subjects. It is particularly interesting to see how traditionalists and progressives define their life ethics so differently, despite both starting from the idea that human life has paramount value. Traditionalists are fiercely opposed to abortion and assisted suicide under most, if not all, circumstances. However, they are far more ambivalent at best, if not fiercely in favor of, capital punishment and liberal use of deadly force for self-defense.<sup>5</sup> Progressives are the exact opposite, fiercely opposing capital punishment and the liberal use of deadly force, particularly guns, for self-defense. However, they firmly support individual choice with respect to abortion and assisted suicide.

It is this divide that inspires this Article, which seeks to critique both what it calls the “traditional” life ethic, as well as the standard progressive life ethic. Either set of ethical principles tends to present itself as capturing axiomatic moral truths, with which any “rational” person would agree if she thought through these issues enough. Yet, the ethical principles they offer are hardly self-evident, as this Article will attempt to establish. Indeed, neither set of ethical principles is truly successful at fully capturing our most powerful intuitions about why human life (and death) is valuable in the first place, or applying ethical principles consistently across different contexts, specifically the abortion/assisted suicide and capital punishment/self-defense divides.

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4. See *infra* note 235 and accompanying text.

5. It is necessary to note that some prominent traditionalists hold different positions. For example, since the papal reign of John Paul II, the Catholic Church has appeared to pull back its support for capital punishment and broadly permissive use of deadly force for legitimate self-defense. See Marvin Lim, *Just War and the Roman Catholic Life Ethic*, 26 FLA. J. INT'L L. 151 (2014). This Article focuses, however, on the more “mainstream” conservative thought on these issues. These include the strong minority of Catholics who adhere to pre-John Paul II tenets of Catholicism, which are far more broadly supportive of both capital punishment and broad use of deadly force for self-defense. See generally Antonin Scalia, *God's Justice and Ours*, FIRST THINGS (May 2002), available at <http://firstthings.com/article/2002/05/gods-justice-and-ours> (defending capital punishment from the standpoint of Catholic doctrine and asserting that John Paul's interpretation of the issue is not binding Catholic doctrine).

On one end of the spectrum, the traditional life ethic presents itself as self-evident morality. Indeed, it brands itself as “natural” law, and presents its conclusions as ones that even irreligious people would invariably reach, if they contemplated these issues thoroughly enough.<sup>6</sup>

But the traditional ethic is far from axiomatic. Ironically, this is best illustrated by one of the most universally accepted rights of personhood: the “natural” right of self-defense. Hypothetically, one could argue that a self-defender violates the sanctity of life if he kills his attacker. After all, he is intentionally taking another person’s life.<sup>7</sup> The evident counterargument to this would be that the person employing self-defense is rightfully seeking to preserve his bodily autonomy against an unwarranted threat to it.<sup>8</sup> But to accept this argument implicitly means prioritizing a single value, namely autonomy, over others, such as the idea that intentionally killing someone is always wrong. This is unchanged by the fact that most people reach this moral conclusion intuitively.

The argument that human life possesses “inherent” dignity and inviolability is the high watermark of traditionalists’ attempts to present the sanctity of life as a self-evident moral concept.<sup>9</sup> But, like self-defense, what seems like an obvious moral truth is actually deceptively complex, if one unpacks the intuition behind it. Like self-defense, inherent dignity is grounded in an appeal to what is ostensibly “natural,” even regardless of one’s personal religious beliefs. In this case, value is placed on the natural

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6. As Pope John Paul II stated in his landmark encyclical *Evangelium Vitae* (“The Gospel of Life”), life and death ethics “is based upon the natural law and upon the written word of God” and “[n]o circumstance, no purpose, no law whatsoever can ever make licit an act which is intrinsically illicit, since it is contrary to the Law of God which is written in every human heart, knowable by reason itself, and proclaimed by the Church.” John Paul II, *EVANGELIUM VITAE* ch. III ¶¶ 62, 65 (2002), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_25031995\\_evangelium-vitae\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html).

7. See *infra* notes 118–19 and accompanying text (discussing the “double effect doctrine” and its prohibition on intentional killing).

8. See, e.g., Benjamin Levin, *A Defensible Defense?: Reexamining Castle Doctrine Statutes*, 47 *HARV. J. LEGIS.* 523, 538–39 (2010) (discussing the autonomy rationale for self-defense).

9. See, e.g., Joseph Boyle, *Sanctity of Life and Authorization to Kill: Tensions and Developments in the Catholic Ethics of Killing*, 1 *U. ST. THOMAS L.J.* 217, 217–18 (2003) (discussing the concept of “inherent” dignity). See also Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 *NOTRE DAME L. REV.* 183, 199–200 (2011) (distinguishing the word dignity as standing for the “inherent worth of a life” from dignity as standing for the right of individuals to be self-governing and self-defining).

biological process spanning from conception to natural death.<sup>10</sup> This process is deemed to have a remarkably “rational” quality, and, thus, to be inviolable.

As this Article will argue, however, this idea is vulnerable to arguments that valuing the rationality of a continuous, ordered process cannot rule out that the *termination* of this process can also be considered “rational” and “natural.”<sup>11</sup> This idea challenges the very cornerstone of traditionalists’ position on when human life begins and ends, and when inherent dignity truly inheres.

Other aspects of the traditional life ethic also involve choices between competing moral values—choices that are hardly inevitable. For example, even as it places significant value on the natural lifespan, the traditional life ethic also distinguishes between innocent people and guilty people.<sup>12</sup> The biological life of innocent people must be considered to have unquantifiable “potential” (specifically in the case of abortion or assisted suicide). By contrast, the biological life of guilty people can lose its inherent dignity and potential (specifically in the case of capital punishment or self-defense).

Like the appeal to rational biological processes, this distinction between guilt and innocence is vulnerable to criticism. One could ask, for example, how a person who has fully repented for his (admittedly heinous) wrongdoings, and who commits to leading a moral life moving forward, can ever be considered to have lost the inherent dignity and potential of his life, making him eligible for capital punishment.<sup>13</sup> Does this demean the sanctity of life, considering that even people with terminal illnesses who face imminent death, as well as unconscious people in so-called vegetative states, are traditionally considered to possess unquantifiable human

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10. See, e.g., Charles I. Lugini, *Respecting Human Life in 21st Century America: A Moral Perspective to Extend Civil Rights to the Unborn to Natural Death*, 48 ST. LOUIS U. L.J. 425, 450 (“Human development is a rational continuous process of generating the human organism as well as the rational process of degeneration before death.”).

11. See *id.*

12. See Irene Merker Rosenberg & Yale L. Rosenberg, *Lone Star Liberal Musings on “Eye for Eye” and the Death Penalty*, 1998 UTAH L. REV. 505 (1998) (discussing support in society for the Biblical concept of “an eye for an eye”).

13. See *id.*

potential until the end of their natural lifespan?<sup>14</sup> Why does the ostensibly remarkable biological process of human life become, in effect, less “remarkable” in the first case, but not the second? Is arguing that the guilty have lost their inherent dignity any different from arguing that those without the capacity for autonomy and consciousness are not persons—a more progressive idea that the traditional ethic rejects, and emphatically?

A final aspect of the traditional life ethic involves another moral choice that is not necessarily self-evident. Traditionally, violations of life’s sanctity require, not just killing an innocent person during her natural lifespan, but also doing so with a particular intent. For most people, this makes intuitive sense. It is generally accepted that blameworthiness is proportional to how “close” the agent is to the harm, and “it is in and by intending a result that a man relates himself most closely to it is an agent: for he is not just prepared to bring it about as a by-product of something else, but directs his will toward it.”<sup>15</sup> Also driving this intuition is the universally revered idea of free will.<sup>16</sup> As Benjamin Levin states, “The belief in free will and the consequent duty to choose rightly—and not heinously or cruelly—drives our criminal law to punish the vicious will.”<sup>17</sup>

What is questionable, however, is exactly *how* the traditional life ethic makes distinctions between different grades of intent. For example, in self-defense, why is a clear intent not only to incapacitate an aggressor, but to kill him outright, not always a violation of the sanctity of life? One possible answer given, again, is that a person has a right to maintain his bodily autonomy. But is this consistent with the traditional view that certain abortion methods, like fetal craniotomies, are immoral *even supposing* that they are necessary to maintain a pregnant woman’s bodily autonomy—and precisely because they are considered to involve a direct intention to kill?<sup>18</sup> Is this problematic, considering that these procedures can be thought of as

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14. See, e.g., Richard Stith, *Toward Freedom from Value*, 38 JURIST 48, 64–65 (1978) (arguing that one cannot “give up” the sanctity of one’s own life, as proponents of assisted suicide appear to be arguing).

15. R.A. Duff, *Mens Rea and the Law Commission Report*, 1980 CRIM. L. REV. 147, 156 (1980).

16. Richard W. Garnett, *Depravity Thrice Removed: Using the “Heinous, Cruel, or Depraved” Factor to Aggravate Convictions of Nontriggermen Accomplices in Capital Cases*, 104 YALE L.J. 2471, 2497 (1994)

17. See Levin, *supra* note 8, at 538–39.

18. Susan T. Nicholson, *The Roman Catholic Doctrine of Therapeutic Abortion*, reprinted in FEMINISM AND PHILOSOPHY 387–88 (Mary Vetterling-Braggin et al. eds., 1977).

merely *foreseeing* death—indeed, far more easily than many other acts of self-defense that traditionalists consider “legitimate”<sup>19</sup>

Avoiding a focus exclusively on the traditional life ethic, this Article likewise argues that the progressive ethic is also vulnerable to criticism. This ethic is also far more complex than it is self-evident. The progressive ethic tends to emphasize one value above all: a person’s individual autonomy.<sup>20</sup> In doing so, it shies away from the idea that there is an inherent dignity to life, regardless of how each person qualitatively experiences her life. Instead, this ethic embraces the idea that human life is to be valued for certain qualities, like autonomy and consciousness. This helps to explain why progressives typically support choice with respect to abortion and assisted suicide, but reject capital punishment completely.

However, as this Article attempts to establish, autonomy and consciousness fail to capture very powerful intuitions that progressives have. An example is the distinction between third-trimester abortion and infanticide. These procedures involve organisms that share great similarities in their degree of autonomy and consciousness.<sup>21</sup> Yet, progressives hardly support infanticide. Another example is capital punishment. Typically, progressives oppose the death penalty by appealing, not to human capabilities like autonomy and consciousness, but ironically enough to the idea of an intangible and immeasurable human “dignity.”<sup>22</sup>

Ultimately, both the traditional life ethic and the progressive ethic can be criticized for being inconsistent. Seeking to address these challenges, this Article proposes an entirely different approach to the ethics of life. In particular, it argues that this ethic should revolve around the “will to live.” This concept encompasses the idea that the most powerful driving force of human life is our primal will to survive, exist, and live as human beings. In turn, these pursuits comprise life’s most fundamental purpose. In this ethic,

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19. See *infra* Part III.

20. See Rao, *supra* note 9, at 221–242 (discussing the word dignity as standing for human autonomy, stating that “by contrast to inherent or intrinsic dignity, positive conceptions of dignity promote substantive judgments about the good life”).

21. See, e.g., PETER SINGER, PRACTICAL ETHICS 169 (2d ed. 1993) (arguing that a fetus lacks the qualities that make a person fully human, such as rationality, self-consciousness, and the capacity to feel pain, and that “these arguments apply to the newborn baby as much as to the fetus”).

22. See, e.g., *Gregg v. Georgia*, 428 U.S. 227, 229 (1976) (Brennan, J., dissenting) (arguing that the “moral concept[]” of “human dignity” would prohibit the death penalty); cf. Rao, *supra* note 9, at 198 n. 50 (discussing how the Catholic Church uses the dignity argument to support an anti-death penalty position).

what matters is whether actions that result in the death of a human being (or claimed human being) respect or denigrate this will to live. This question depends, among other things, on whether the will to live exists in the first place. When it does exist, however, the justification for overpowering this most powerful of human forces must be paramount. It cannot be to further interests that do not implicate an actual, physical life that is imminently at stake, no matter how otherwise important those interests are.

An ethic centered on the will to live is superior to existing approaches for two major reasons. First, as Part II will argue, this concept captures the most universal and powerful intuitions about why we value human life in the first place—even more so than arguments that human life possesses “inherent” dignity and potential, or that human life derives its value from a person’s capacity for autonomy and consciousness.

Second, as Parts III to VI will attempt to show, an ethic centered on the will to live is consistent across different contexts. These contexts include abortion, assisted suicide, capital punishment, self-defense, and the responsibility to protect. In particular, this proposed ethic avoids the problems arising from having to make distinctions between innocence and guilt, and among different grades of intent, in order to keep the life ethic internally consistent. It does not argue that people possess an inherent dignity from the moment of conception because that is when a remarkable biological process begins. Nor does it argue that people can lose their inherent dignity if they act immorally, in spite of the continuation of their biological processes. Instead, it argues that what matters, first and foremost, is whether a will to live actually exists. Only then can there even be a possibility that the sanctity of life has been violated.

Applying this ethic, this Article argues that at least some circumstances of abortion and assisted suicide should be morally permissible. Focusing on abortion, Part III will show abortion should be permissible where a prenatal entity does not yet manifest a will to live, or when the brain (which is necessary for a will to live to exist) does not yet function to the point of displaying minimal, subconscious awareness, which is the most rudimentary form of the will to live. This idea is related to, but ultimately distinct from, currently popular anti-abortion arguments that fetuses are conscious and can feel pain at a certain point in their development—arguments that ironically rely on more progressive concepts.

Focusing on assisted suicide, Part IV will show that assisted suicide should be permissible where a person is terminally ill. I argue that, in these circumstances, the artificial termination of life need not denigrate the will to live. This is because terminal illness is arguably the one condition that can diminish the will to live. This is *not* because people merely wish to avoid the suffering that comes from terminal illness. Instead, it is because the real prospect of imminent natural death can stimulate a person to achieve a sense of resolution with her life, and a sense of peace regarding her inevitable mortality. To the extent that terminal illness can threaten this sense of peace, the termination of life should be a permissible choice for people to make.

When a will to live indisputably exists, such as where acts of self-defense or capital punishment are involved, whether there is a violation of the sanctity of life depends on what particular attitude toward life is manifested by an act of killing. This is not determined by traditional notions of intent. These notions are too inconsistent: they are broadly permissive with respect to self-defense and capital punishment, but extremely restrictive with respect to abortion and assisted suicide. Instead, it is determined by whether the choice of the actor (in some cases, not to act) respects the will to live.

Applying this ethic, in Part V, I argue that capital punishment should never be morally permissible. This is because capital punishment is in grave conflict with our primary reason for valuing human life in the first place: simply because people display the will to live, which we see as the most powerful and overwhelming force, one that *should* triumph over artificial attempts to overwhelm it in turn.

Meanwhile, a broad conception of “legitimate” self-defense should be rejected, as Part VI argues. In particular, it is not enough for deadly force to be justified by the belief that people possess a broad right of autonomy—in this instance, a belief that innocent persons have the right to live as they see fit and should have broad leeway to defend themselves against guilty aggressors. Instead, deadly force should be permissible only in instances where deadly force is actually necessary to preserve one’s own life. As Part VI will also show, the belief that people should have a broad right of autonomy also drives the traditional ethic’s rejection of the “responsibility to protect,” that is, its rejection of the idea that failing to save others’ lives can also be morally wrong. Rejecting a broad right of autonomy once again, the proposed ethic would find a violation where people fail to save

others even if doing so would not have been costly, that is, if doing so would not have cost one's own life.

## II. THE "WILL TO LIVE"

This Article begins by introducing the central concept around which it argues the life ethic should revolve: the will to live. Fully explaining this idea requires dissecting people's intuitions about human life across different contexts, like abortion, assisted suicide, capital punishment, self-defense, and the responsibility to protect. The remaining Parts, each of which discusses these subjects in turn, will engage in this analysis.

But, first, Part II gives a more general introduction to the will to live. It explains what this concept is, what fundamental human intuitions it captures, and how it differs from what either the traditional or the progressive life ethic values. By doing so, this Part lays the groundwork for what the remainder of the Article attempts to establish: the will to live is the principle that most coherently harmonizes the life ethic across all contexts.

### A. WHAT IS THE WILL TO LIVE?

What is the will to live? Quite simply, this concept encapsulates the idea that the most powerful driving force of human life is the primal will to live, or to exist and survive as a living human being. These pursuits, in turn, comprise life's most fundamental and universal purpose, preceding any other purpose a person might claim.

Both the ordinary and extraordinary experiences that comprise every person's life show how central this concept is to human existence. These experiences show how the will to live is more central to our existence than even other concepts that we also value highly. These concepts include the "rationality" of the natural biological lifespan, which forms the basis for the idea that humans possess an "inherent" dignity, and autonomy and consciousness, which form the basis for the more progressive life ethic.

Certainly, the will to live manifests itself in extraordinary events that people experience, particularly life or death situations. There are many examples of people at the brink of death undertaking astounding life-saving feats, or making astounding recoveries. These examples are surely a testament to the will to live, which is displayed in the face of monumental

odds against survival, or in the face of human suffering that would test any person's will to continue believing that, even at its worst, life is better than death.<sup>23</sup> Indeed, as I will explore further in Part III on assisted suicide, the idea that all humans possess such an overwhelming will to live is what makes the intentional ending of life problematic for many people. This is true even where continuing to live would mean experiencing extraordinary pain, as a result of illness.<sup>24</sup>

But even more than these heroic displays, the more mundane parts of life are what truly show how central the will to live is to our existence. At base, every person is continuously attempting simply to survive in the world, and to experience human life in the most basic sense. Driven by this common pursuit, every person ultimately seeks the same basic things and acts continuously to secure them.<sup>25</sup>

Two other ideas unfold from these premises. First, though living organisms of other species can also demonstrate their own will to live, what makes this concept particular to humans is that we are all driven to live a *human* life. In a biological sense, a human being can live only a human life because of his or her immutable membership in this species. And driven by our common genetic code, every human shares the same unique set of fundamental needs and desires, including some need not to be alone and desire for contact with other members of our species.<sup>26</sup>

Second, *how* people attempt to attain these universal needs and desires, whether morally or immorally, has no bearing on the fact that nearly *all* human actions amount to a manifestation of the will to live. The exact way in which a person attempts to get what he needs and wants is tied to the concept of autonomy, or how we each choose to live our lives. But the fundamental "good" of life does not arise from this autonomy, or from the varying degrees of good (or bad) that are generated by our autonomous choices to act. Instead, this good comes from the will to live itself. This will manifests a simple, but dynamic mission: to live as all humans do,

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23. See, e.g., Alex Hannaford, *127 Hours: Aron Ralston's Story of Survival*, TELEGRAPH (Jan. 6, 2011, 5:46PM), <http://www.telegraph.co.uk/culture/film/8223925/127-Hours-Aron-Ralstons-story-of-survival.html> (discussing a story of a mountaineer who was forced to amputate his arm to survive).

24. See *infra* notes 150–52 and accompanying text.

25. See ABRAHAM MASLOW, *TOWARD A PSYCHOLOGY OF BEING* (1968) (discussing Maslow's hierarchy of human needs).

26. See *id.*

irrespective of any personal, subjective decision as to what one's purposes are in life.

To an extent, this approach is similar to traditional ideas about the inherent dignity of life. Both perspectives reject that qualities like autonomy and consciousness are the most important and defining characteristics of human life.<sup>27</sup> These concepts arguably treat a human being as merely a "means" to achieving certain experiences, rather than as an "end" in itself. This is one of the central criticisms that traditionalists have of the progressive ethic, that is, that this ethic treats a human being as an "object" rather than a "subject."<sup>28</sup> In contrast, the will to live concept treats the human being as a subject and end unto itself: the end being simply to live.

Where this approach diverges from the traditional life ethic, however, is in how it values biology. In defining human life and professing what possesses "inherent" dignity, the traditional ethic almost exclusively values the biological processes that continuously drive and sustain a human being from conception unto natural death.<sup>29</sup> It does so, in particular, because of the "rationality" of this process. In effect, this ethic decides that *biology* is what by far has the greatest *moral* value, because only the unfolding of biological order and sequence, and not its termination, is to be considered remarkably "rational." As one scholar has stated, in summarizing the biology-based justification for the traditional life ethic:

To be a person, it is enough just to be a living human organism of the species *Homo sapiens*. Human development is a rational continuous process of generating the human organism as well as the rational process of degeneration before death. Medical doctors know there is an innate, organized and coordinated pattern to body functions in the living and in the stages of dying that by their very nature are rational activities.<sup>30</sup>

An approach centered on the will to live takes a different tack. Rather than placing a great deal of value on the rationality of biology, it values the idea that humans have an overwhelming will simply to exist in the living human world; indeed, it considers this will to be the most defining characteristic of human life. That the will to live constitutes life's defining

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27. See *supra* note 9 and accompanying text.

28. See Stith, *supra* note 14, at 53 (criticizing the object-based approach).

29. See *supra* note 10 and accompanying text.

30. See Lugosi, *supra* note 10, at 450.

characteristic is based not on how “rational” it is. Rather, it is based on plain observation that we universally *believe* that such a metaphysical will exists and drives every moment of human life—whether this will is “rational” or not.

This position certainly does not deny that rationality and biology are also omnipresent forces in our lives. However, among all concepts that purport to capture why we value human life in the first place, the will to live has the greatest intellectual, as well as intuitive and moral, appeal. People will likely never reach agreement on what is rational, which is a word that can be used to describe many phenomena beyond those of the biological kind. However, people generally agree that living in itself is the most basic “purpose” of human life. Living in itself is indispensable to every other purpose or deeper meaning that humans can ascribe to their life. Indeed, to the extent that people ascribe moral significance to biology, is hardly because of the rationality behind it, as debates on abortion and assisted suicide particularly show. Instead, it is because biology supports the idea that there is a primal will to live that humans both display and revere.

#### B. A BIOLOGICAL PERSPECTIVE

It follows, then, that biology sheds light on how and when the human will to live exists. Consequently, biology helps guide how we should apply this concept to resolve ethical questions like when human life begins and ends. Equally important, biology reinforces the idea that the will to live is not merely some aspirational concept. Instead, the will to live describes something that very much exists in everyday human experience.

When looking to human biology to see what it reveals about the will to live, it is immediately evident that the brain is intertwined with this concept. Studying the brain not only illuminates how and when the will to live exists; it also shows that humans have long appreciated this concept, even if only unconsciously. This appreciation arises from the traditionally accepted view that the brain is what fundamentally drives human efforts to survive and to exist.<sup>31</sup> This view complements the idea that some “will” to

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31. As stated by the National Institute of Health, “This three-pound organ is the seat of intelligence, interpreter of the senses, initiator of body movement, and controller of behavior. Lying in its bony shell and washed by protective fluid, the brain is the source of all the qualities that define our humanity. The brain is the crown jewel of the human body.” *Brain Basics: Know Your Brain*, NAT'L

survive and to live exists in the first place, and that we have long been able to conceptualize of and revere it.

Adapting the approach taken by the traditional life ethic, one could argue that, once the first cell of a human entity exists, that entity manifests a will to live.<sup>32</sup> But common intuition would say that any human “will” to live requires a live brain, even defining will in the broadest way possible.

This intuition makes at least some biological sense. This is in significant part because the seat of the human “instinct” for survival is in the more rudimentary parts of the brain: the brainstem, the limbic system, and the amygdala.<sup>33</sup> What people generally think of as our instincts for survival, such as fight or flight, reproduction, and others, are controlled by the limbic system and amygdala, which develop in the womb after the brainstem and before the cerebral cortex.<sup>34</sup> These instincts are not volitional or from consciousness. However, they still depend on the brain.

A broader, but more disputed definition of survival instinct includes not only more complex patterns of behavior, but also simpler, yet critical reflexes, such as respiration.<sup>35</sup> However, even this definition of instinct effectively requires at least part of the brain to function, as it is the brainstem that substantially controls these reflexes.<sup>36</sup>

Beyond its role in our survival instincts, the brain’s special function as the central coordinator of all human experience, conscious or otherwise,

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INST. OF NEUROLOGICAL DISORDERS & STROKE, BRAIN BASICS: KNOW YOUR BRAIN (2014), available at [http://www.ninds.nih.gov/disorders/brain\\_basics/know\\_your\\_brain.htm](http://www.ninds.nih.gov/disorders/brain_basics/know_your_brain.htm).

32. See *supra* note 53 and accompanying text.

33. See Joseph H. Baskin et al., *Is A Picture Worth a Thousand Words? Neuroimaging in the Courtroom*, 33 AM. J.L. & MED. 239, 244–46 (2007) (comparing the brainstem, the limbic system, the cerebellum, which is responsible primarily for movement, and the cerebrum, which is responsible for more complex functions).

34. See Kirsten Rabe Smolensky, *Defining Life from the Perspective of Death: An Introduction to the Forced Symmetry Approach*, 2006 U. CHI. LEGAL F. 41, 65 (2006) (describing the point at which the brainstem begins to function relative to the more complex parts of the brain); Limbic System Definition, OXFORD DICTIONARY (2013) (defining limbic system as “a complex system of nerves and networks in the brain, involving several areas near the edge of the cortex concerned with instinct and mood”).

35. See Instinct Definition, AMERICAN HERITAGE SCIENCE DICTIONARY (2010) (distinguishing instinct from reflex, stating that “[i]n Instinct, as opposed to reflex, is usually used of inherited behavior patterns that are more complex or sometimes involve a degree of interaction with learning processes”).

36. See Brainstem Definition, RANDOM HOUSE DICTIONARY (2013) (defining brainstem as “the portion of the brain that is continuous with the spinal cord and comprises the medulla oblongata, pons, midbrain, and parts of the hypothalamus, functioning in the control of reflexes and such essential internal mechanisms as respiration and heartbeat”).

supports our intuitive association of the brain with the will to live.<sup>37</sup> Even more important than its capacity for any particular experience, like consciousness or pain, the brain is human's primary processor of information. It receives continuous input from the rest of the body, regarding what is happening both inside and outside of the body. The brain also directs the rest of the body's outputs, all in service of the person's survival and existence.<sup>38</sup> Whether a person is experiencing homeostasis or trauma, it is clear that the brain directs the biological processes that, in turn, manifest each person's will to live.

The brain's coordinative capacity sets it far apart from even the complex coordination of isolated body parts. As the traditional life ethic asserts about the zygote (and would likely recognize about every other type of cell), single cells can display a remarkable coordination that enables them to survive, even to grow and to divide into other cells that form the human body.<sup>39</sup> But without the brain, it is difficult to describe these entities as having an "instinct" or "will" to live in any traditional sense of the word, whether the word is defined in the biological or the metaphysical sense.<sup>40</sup>

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37. See *supra* note 31 and accompanying text. See also Smolensky, *supra* note 34, at 45–46 (discussing the near-universal acceptance within the United States of the "whole brain" standard of death, after the development of new medical technologies that could artificially sustain life).

38. In Part III, I will argue that, even prenatally, the subconscious region of the brain directs a complex set of actions that drive the fetus to develop, unfold, and live in the world.

39. Elizabeth Spahn and Barbara Andrade, *Mis-Conceptions: The Moment of Conception in Religion, Science, and Law*, 32 U.S.F. L. REV. 261, 292–93 (1998) (discussing the process of mitosis and cell division after conception).

40. It must be noted that the concept of the "will to live" is distinct from the Catholic theory of "ensoulment," which, as the word indicates, is the moment at which the body gains a "soul." See Carol A. Tauer, *Abortion: Embodiment and Prenatal Development*, in EMBODIMENT, MORALITY, AND MEDICINE 78 (Lisa Sowle Cahill & Margaret A. Farley, eds. 1995) (describing the ensoulment as the moment "when God breathes life" into the body, a point that Christians and particularly Catholics now believe to occur at conception). See also *Roe v. Wade*, 410 U.S. 113, 133 (1973) (discussing the concept of ensoulment). The will to live, while metaphysical in nature, does not posit that there is a soul given by God. Rather, it posits that, independent of a being like God, each person has an animating drive to live for the sake of living—that is, regardless of any divine purpose, that is manifested partially though not exclusively by its biological characteristics. Put differently, I do not argue that a soul is injected at some point in the biological process by God. Instead, I argue that humans have constructed, and chosen to place moral value on, the idea of a will to live. I also do not argue that a "soul" is infused by the development of the organ essential to any given species, which is the organ necessary for the operation specific to the species. Joseph Donceel, *Immediate Animation and Delayed Hominization*, 31 THEOL. STUD. 76 (1970); Thomas A. Shannon & Allan B. Wolter *Reflections on the Moral Status of the Pre-Embryo*, 51 THEOL. STUD. 603 (1990). There is a danger to defining human life by the existence of certain functions that are specific to our species: it effectively treats humans as a means to a particular end, rather than as an end in themselves.

Even accepting that a zygote's capacity for coordination is remarkable in its own right, what reinforces our association of the brain with the will to live is the fact that we also associate the brain with the concept of human agency.<sup>41</sup>

From a biological perspective, the primitive instinct to survive is subconscious. Nevertheless, we would hesitate to describe this instinct as not just *automatic*, but *automatous*. This should not be surprising, because this instinct is located in the same place as the origin of our unique capacity to exercise individual *autonomy*: the brain.<sup>42</sup> In contrast, it is difficult to say that other body parts act truly autonomously, rather than automatously. Without even a partially functioning brain, the human body and its various components can still attempt to sustain themselves.<sup>43</sup> But it is difficult to describe the body as actually possessing any true *will* to live, in either the biological or the metaphysical sense of the word.

Biologically speaking, without the functioning of even the rudimentary brainstem, a human entity can attempt to sustain itself. However, it does so in only a preprogrammed manner. The heart is a good example. After whole brain death, a heart can sustain itself indefinitely. But it is only able to do so because it possesses what, in physiological terms, is called automaticity. Automaticity allows the heart to generate electrical impulse that, in turn, facilitates its physical contractions.<sup>44</sup> This automaticity can hardly be described as evidence of a will to live. And, metaphorically speaking, we would not say that this cell is somehow "fighting" for, or willing, life, as we would say that the survival instinct does despite being subconscious.

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41. As famously put forward in the theory of Cartesian dualism, René Descartes posits that there is an "immaterial" mind and a "material brain, which interact with each other, the point of interaction between the pineal gland in the brain. RENÉ DESCARTES, *MEDITATIONS ON FIRST PHILOSOPHY IN WHICH ARE DEMONSTRATED THE EXISTENCE OF GOD AND THE DISTINCTION OF THE HUMAN SOUL AND THE BODY* (2010).

42. *Id.*

43. See Smolensky, *supra* note 34, at 43 n. 7 (quoting KENNETH V. ISERSON, *DEATH TO DUST: WHAT HAPPENS TO DEAD BODIES?* 17 (2d ed. 2001) ("Even though a person may be dead because his heart stops working, some muscle, skin, and bone cells may live on for many days.")).

44. See Yoshio Watanabe, *Brain Death and Cardiac Transplantation*, in *BEYOND BRAIN DEATH: THE CASE AGAINST BRAIN-BASED CRITERIA FOR HUMAN DEATH* 178 (Michael Potts et al., eds., 2001) ("[W]hen an isolated heart is perfused . . . it continues to beat for many hours. This is because the heart possesses automaticity and spontaneously generates electrical impulses, which, in turn, trigger mechanical contraction.").

The unique connection between the will to live and the brain is reinforced by another fact: despite obviously being not fully conscious, the subconscious brain plays an important role in processing and storing information that *could* be consciously accessed in the future. The conscious mind can hardly process or hold even a small portion of information that a person will encounter in everyday life. Therefore, a significant function of the subconscious mind is to store information that the conscious mind can later retrieve, including information that is necessary for a person's sustenance and survival.<sup>45</sup>

This fact leads to two other ideas. First, the human experience of life cannot be defined even predominantly by in-the-moment conscious experience. Second, the subconscious brain indicates that a complex human experience can still exist even in the absence of a person's *immediate* ability to access information consciously. For example, as I will discuss more fully in Part III, research has shown fetuses to be sensitive to their surroundings at a certain point in their development.<sup>46</sup> This sensitivity gives rise to a physical sensation, which is then coded into the amygdala's memory system. This memory system becomes functional at birth, enabling this person to access this prenatal sensory experience.<sup>47</sup> In other words, the unconscious part of the brain stores a sort of memory that a person can later recapture and experience.<sup>48</sup>

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45. See Benedict Carey, *Who's Minding the Mind*, NY TIMES (Jul. 31, 2007), <http://www.nytimes.com/2007/07/31/health/psychology/31subl.html?pagewanted=all> (last visited Feb. 15, 2014).

46. See *infra* notes 92–98 and accompanying text.

47. See also SAM TYANO ET AL., PARENTHOOD AND MENTAL HEALTH: A BRIDGE BETWEEN INFANT AND ADULT PSYCHIATRY 27 (2010) (discussing the possibility of deducing the existence of fetal emotions from observations like thumb-sucking, crying, and movement); Eduard Bercovici, *Prenatal and Perinatal Effects of Psychotropic Drugs on Neurocognitive Development in the Fetus*, 11 J. ON DEVELOPMENTAL DISABILITIES 1, 14 (2005) (citing evidence that prenatal exposure to narcotics affected the limbic system of the brain, including the amygdala); Heili Varendi et al., *Soothing Effect of Amniotic Fluid Smell in Newborn Infants*, 51 EARLY HUMAN DEV. 47, 55 (1997) (discussing fetal olfactory memory that is stored in the amygdala).

48. As Lloyd DeMause has argued,

[F]ar from being an unfeeling being, the fetus has been found to be exquisitely sensitive to its surroundings, and our earliest feelings have been found to be coded into our early *emotional memory system* centering in the amygdala, quite distinct from the *declarative memory system* centering in the hippocampus that becomes functional only in later childhood. These early emotional memories are usually unavailable to conscious, declarative memory recall, so early fears and even defenses against them are often only recaptured through body memories and by analyzing the consequences of the traumas.

In this way, even people who have only partial brain functioning are not “preprogrammed” as individual cells are, merely reacting to stimuli based exclusively on what genetics and biochemistry has directed them to do. Instead, the brain takes stimuli and, from that, forms complex responses for the future: responses that will facilitate a human’s continued living existence. This reinforces the idea that the will to live is hardly automatous, even though it operates only at the level of subconscious instinct (that is, because a person has not yet developed full autonomy). And while this instinct might arise from the subconscious, it serves to preserve every aspect of the human experience—including the full consciousness and autonomy that a person will later develop.

Ultimately, without a functioning brain, a person cannot possess this will to live. In the traditional sense of the word, “will” requires something more than genetic material driving an entity, although it requires something less than consciously formed desire. In particular, it requires awareness of some purpose, which in turn requires awareness in general. But awareness does *not* require full consciousness.<sup>49</sup> A certain degree of “awareness” is displayed in the many *subconscious* perceptions we experience constantly every day. That we can later access these perceptions in full consciousness, after all, suggests that we had at least a more rudimentary awareness of this information in the first place. From that moment, with even a little bit of awareness of the world around us, we are then driven to experience that world, and live the life that only we, as a unique human being, can live.

It is particularly important take heed of the fact that such awareness is key to our subconscious survival instincts. Indeed, scientific studies have shown that instinctual learning in humans happens with subconscious awareness, that is, subconsciously, but with some awareness nonetheless. As one study has stated, “[w]hile we don’t experience the neuronal changes that lead to learning or memory, the new knowledge or recollection doesn’t stay forever beyond the reach of our conscious mind. Instead, we can dip just below the surface of our consciousness, when we wish to retrieve such things.”<sup>50</sup> But even this most basic type of awareness requires a sufficiently

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Lloyd DeMause, *Restaging Early Traumas in War and Social Violence*, 8 INT’L J. OF PRENATAL AND PERINATAL PSYCHOL. AND MED. 171 (1996).

49. See Laura A. King, *The Nature of Consciousness*, in THE SCIENCE OF PSYCHOLOGY ch. 5.1. (2nd ed. 1987) (discussing “subconscious awareness,” such as incubation, or “subconscious processing that leads to a solution to a problem after a break from conscious thought about the problem”).

50. WILLIAM ROBERT KLEMM, ATOMS OF MIND: THE “GHOST IN THE MACHINE” MATERIALIZES 73 (2011) (finding that the limbic system plays a key role in our subconscious learning).

functioning brain. Therefore, without a sufficiently functioning brain, no will and no will to live in particular can exist.

All of this said, it is important to reiterate how this approach differs from the traditional life ethic, which values the “rationality” of the body’s biological processes until its natural death. As Parts III and IV will explore more fully, the will to live based approach rejects this sort of equating of biology and morality. To wit, this approach argues that the will to live cannot be defined *solely* by the existence of a functioning brain.

From the beginning of life to near its end, the brain is clearly integral in the human entity’s efforts directing himself to survive and to exist. But when a person has a will to live, *every* physical movement—including reflexive movements that need not actually engage the brain, but engage only the more rudimentary parts of the central nervous system—fulfills a profound purpose that, on some level, he is aware he has: to live. Even the most mundane and tiniest of movements amount to an effort at achieving the self-existence that a person so completely wills for himself. In this way, even the physical movements that do not directly engage the brain can be evidence of a creature that is not purely automatous. Instead, these movements remind us of this person’s profound will to be part of human existence. Every human being displays these movements, and in this way, they are ordinary. Yet, they should help us visualize the extraordinary will to live people have, people who, in going about the basic business of living, are manifesting a subconscious, but profound will just to exist.

All of that said, at the very end of life, the brain and the body also undergo a process of natural degeneration. This process directs the human organism toward, not perpetual survival, but a peaceful, non-traumatic way to reach the end of life that, at some point, is inevitable for every human being.<sup>51</sup> Thus, even where the brain is still functioning “rationally” to perform important functions, the will to live may not exist. Conversely, the will to live can exist even when an organism cannot meaningfully be described as rationally self-sustaining. For example, a person who has been fatally shot and faces unavoidably imminent death. Examples like this only reaffirm the power of the will to live, the central role it plays in our lives, and the great value we place on it, even if only implicitly.

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51. See, e.g., Tom Reynolds, *To Rehydrate or Not*, 88 J. NAT’L. CANCER INST. 862, 863 (1996) (asserting that end-of-life biological processes, like dehydration, can be “seen as a natural part of the body’s shutting down before death, even acting as a ‘natural anesthetic’”).

Ultimately, biology is important not for its own sake. Instead, it is important to the extent that it manifests certain qualities that we value, such as self-sustenance, which is a traditional criterion of biological life. Beyond self-sustenance, however, we also value the will to live. In turn, we value the brain, and every other part of the body, not for their biological processes *per se*. Instead, we value them to the extent that their biological processes support the existence of some deeper (even if subconscious) awareness about one's purpose. This awareness is evidence that a person's will to live exists.

### III. ABORTION

Having explored the will to live at a general level, this Article now proceeds to argue how this concept forms the cornerstone of a life ethic that is coherent and consistent across many different contexts. In this endeavor, I will show how neither the traditional life ethic nor the typical progressive ethic succeeds at being truly consistent across different arenas, including abortion, assisted suicide, capital punishment, self-defense, and the responsibility to protect. I will also show how, in each of these contexts, the will to live captures our most powerful intuitions about why we value human life in the first place.

It is particularly useful to begin this endeavor by discussing abortion, because abortion involves *the* first order question and arguably biggest quandary of the ethics of life: when does human life and personhood actually begin? Logically, only after determining when human life actually exists should one then attempt to define when it can and cannot be taken.

In this Part, I show how the biology-based approach is problematic in the abortion context. In particular, this approach erroneously assumes that the "rationality" of a continuous biological process entails that its termination cannot also be rational. Then, I will show how methods that attempt to appeal to our anti-abortion intuitions—for example, the use of sonograms and the analogy to infanticide ultimately appeal most strongly to our intuition that human life is valuable because it manifests a dynamic will to live. Concurrently, I will show how the will to live is superior to the concepts of innocence and potential (used historically to justify the traditional life ethic), as well as autonomy and consciousness (used typically to justify the progressive ethic).

Having established that the will to live is important in our intuitions about abortion, I then argue that the fetus manifests this will only at a

certain point. In particular, it manifests this will only when the brain functions substantially enough to display minimal, subconscious awareness: the most rudimentary form of the will to live. Before this point, abortion should be considered fully moral, barring the few justifications for it that are morally problematic even independent of whether human life exists or not, such as selective abortion.

Even where a fetus manifests a will to live, however, I argue that what counts as a morally “legitimate” intention to terminate life via abortion, in particular, what counts as legitimate self-defense, must be broader than how the traditional life ethic defines it. Driven by its reverence for human innocence and potential, this ethic has a very narrow definition of legitimate intent in the case of abortion. By comparison, it has a broad definition of legitimate intent where a “guilty” wrongdoer is involved, as in more typical instances of self-defense, which do not involve abortion.

But a sound life ethic must accept that self-defensive abortion is critical in preserving not merely a woman’s autonomy to live her life as she wishes. This is the typical argument that progressives use to justify why abortion is moral, and it is one that traditionalists routinely criticize. Instead, self-defensive abortion is best justified by a person’s basic will to survive and to live. This is analogous to self-defense in any other context, which is permissive enough that it often sanctions force even where there is a good deal of uncertainty that physical harm is both imminent and deadly. This leeway is best justified by the idea that people do not have an interest solely in a broad right of autonomy, a concept that, interestingly, traditionalists are far more willing to sanction in this context. Instead, people have an even greater interest in their basic survival. In turn, because the will to live is equally at stake in abortion as in more typical instances of self-defense, abortion for self-defensive purposes should be considered equally as licit.

#### A. INHERENT DIGNITY FROM CONCEPTION

##### *1. Rational Biological Processes, Human Potential, and Innocence*

It cannot be denied that biology plays a powerful role in our moral intuitions. This is demonstrated by the likelihood that, regardless of their ultimate stance on abortion, many people would feel at least some

discomfort with the fact that a zygote can be described accurately as both “human” and “living.”<sup>52</sup> These descriptions are accurate even independent of whether the zygote can also be considered an individual living human *being* or *person*. After all, in addition to having an undoubtedly “human” quality, the zygote formed from the union of human sperm and egg meets a number of the criteria that scientists have typically used to define biological life.<sup>53</sup>

Yet, it is necessary to go beyond the intuitive appeal of biology. Consider that it would also be accurate to use both “human” and “life” to describe *any* individual living cell or body part. For example, a beating heart may continue to live, function, and sustain itself even after a person is completely brain dead. Nevertheless, the idea that the *person* with the beating heart can be considered alive without at least a partially functioning brain has fallen out of scientific favor.<sup>54</sup> Fewer still would argue that destroying just *any* human cell violates the sanctity of life.

Of course, there are important distinctions between a zygote and these examples. For example, the zygote is arguably more self-sustaining than the typical individual cell, or a brain dead person who maintains a living heart. But this comparison only reinforces the larger problem with rooting

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52. See Smolensky, *supra* note 34, at 65 (discussing how it is possible to consider individual cells or body parts as living, but the entire human being as dead). An interesting example of anti-abortionists attempting to capitalize on the possibility of describing zygotes as both human and living is illustrated in the case of *Rounds*. *Rounds* saw a challenge to an informed consent law in South Dakota that required doctors to tell a woman considering abortion that “the abortion will terminate the life of a whole, separate, unique, living human being.” The statute specifically defined “human being” as “an individual living member of the species *Homo sapiens*, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation.” *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 738 (8th Cir. 2008) (en banc). Interestingly, *Planned Parenthood* did not challenge the statute’s characterization of human life. Arguably, it would have had some difficulty doing so. On the one hand, it is debatable whether an unborn fetus can be accurately described as “whole, separate, [and] unique.” On the other hand, there is little room for debate that the unborn fetus is both “living” and “of the species *Homo sapiens*.” See Kaitlin Moredock, Note, “Ensuring So Grave a Choice Is Well Informed”: The Use of Abortion Informed Consent Laws to Promote State Interests in Unborn Life, 85 NOTRE DAME L. REV. 1973, 1994-95, 2001 (2010) (arguing that this information is not misleading).

53. See National Aeronautics and Space Administration, *Life’s Working Definition: Does It Work?*, [http://www.nasa.gov/vision/universe/starsgalaxies/life%27s\\_working\\_definition.html](http://www.nasa.gov/vision/universe/starsgalaxies/life%27s_working_definition.html) (last visited Feb. 13, 2014) (discussing the biological characteristics of life, such as homeostasis, organization, growth, and response to stimuli).

54. See Smolensky, *supra* note 34, at 44–45 (discussing how this definition of death has fallen out of favor since the 1960s and the development of the ventilator and organ transplantation technology).

the ethics of abortion in biology: the legitimacy of this biology-based approach cannot stand on its intuitive appeal alone. If this approach is legitimate, there must be other factors—exactly like these distinctions—that make it so.

Adherents of the traditional life ethic would counter that there is, in fact, a principled reason for placing moral value on the zygote: the “rationality” of the biological process that begins at conception, and which continues to unfold in logical order and sequence from that point forward.<sup>55</sup> This argument is powerful. It can hardly be doubted that the unfolding of this ordered process is truly unique and remarkable, even miraculous. The zygote is just one cell, yet it gives rise to every other cell that a human being will have for the rest of her life. As Richard Stith so eloquently stated, “human life is unique because the power at work in it is unique. That power is designed and directed, even in the infant, toward human and (according to some) divine communion.”<sup>56</sup>

This idea is also inextricably tied to another concept that people value: the human drive to reproduce, to conceive entirely new human beings, and to give life. As Dorothy Roberts stated, “[c]all it a cosmic spark or spiritual fulfillment, biological need or human destiny—the desire for a family rises unbidden from our genetic souls.”<sup>57</sup> “Blood ties are . . . a powerful cultural symbol of stability in human relationships—the only real guarantee against loneliness and isolation’ amid the fragility of contemporary friendships and marriages.”<sup>58</sup> Thus, the idea that human life has already begun at conception is far from baseless, even from a completely secular, biological perspective.

As these words suggest, the idea that humans are perfect in form and image from conception, innocent and possessing ineffable potential, also

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55. See Lugosi, *supra* note 10, at 450. See also CHRISTOPHER KACZOR, *THE ETHICS OF ABORTION: WOMEN’S RIGHTS, HUMAN LIFE, AND THE QUESTION OF JUSTICE* 104 (2011) (“No outside agency is present changing the newly conceived organism into something else, but rather the human embryo is self-developing toward functional rationality.”); PATRICK LEE, *ABORTION AND UNBORN HUMAN LIFE* 71 (1996) (“Fertilization is a radical discontinuity in a series of events in which it does not seem possible to place necessary discontinuity anywhere else.”).

56. Richard Stith, *On Death and Dworkin: A Critique of His Theory of Inviolability*, 56 MD. L. REV. 289, 366 (1997).

57. Sarah Franklin, *Deconstructing “Desperateness”: The Social Construction of Infertility in Popular Representations of New Reproductive Technologies*, in *THE NEW REPRODUCTIVE TECHNOLOGIES* 200, 207 (Maureen McNeil et al. eds. 1990).

58. Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 269 (1995) (citations and internal quotations omitted).

grows out of acknowledging the remarkable continuity of the biological process.<sup>59</sup> Indeed, arguably even more so than the rational quality of biology, perfection and potentiality are what advocates for legally mandated sonograms arguably seek to emphasize most. As Carolyn Ramsey has stated, “[t]he personhood (or at least the human status) of the fetus has grown more difficult to deny due to the advent of medical technology that essentially renders the contents of the womb visible and audible.”<sup>60</sup> This is because an image of a fetus can evoke all of the qualities we cherish in infants: not only small and helpless, but also perfectly innocent and representative of all of the potential good in the world.

And since these ideas are an outgrowth of the biology-based approach, it would be a mistake to argue that their appeal necessarily comes from people’s religious beliefs alone. Derek Parfit once famously argued that, at least unconsciously, most people believe “that our continued existence is . . . *distinct from physical and psychological continuity*, and a fact that must be all-or-nothing.”<sup>61</sup>

If he is correct that most of us adhere to this belief (and do so irrespective of religious motive) then it makes even more sense why so many believe that a human being’s life begins at conception. Irrespective of a human’s *actual* biological development, which is limited at this point, people will naturally value its metaphysical existence. By extension, people will naturally value the intangible potential toward which the biological process is driving the entity.<sup>62</sup> At that moment, the entity can be seen as already perfect, just as it is.

## 2. *The Meaning of “Rational”: Motivations Matters*

As compelling as the biological approach is, however, it is too problematic to serve as the basis for defining the start of human life. One can, and should, appreciate the rational order and sequence manifested by

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59. See Stith, *supra* note 56, at 360 (discussing the idea that humans are made in the image of God, and are thus not merely a product, or object, of him, but a representation, or subject).

60. Carolyn B. Ramsey, *Restructuring the Debate Over Fetal Homicide Laws*, 67 OHIO ST. L.J. 721, 749 (2006).

61. DEREK PARFIT, REASONS AND PERSONS 95 (1984) (emphasis added).

62. The intuitive appeal of the concept of potentiality is also evident in the degree of support within society for laws against “fetal farming,” or the practice of intentionally creating fetal tissue for scientific or medical purposes. Even if people agree that these entities are not yet living human beings, they might still oppose this practice on the grounds that it gives little regard to the potentiality of these entities. See *infra* notes 79–80 and accompanying text.

the biological process beginning at conception. This process is noteworthy for its intricacy and coordination: characteristics that would accurately describe it even if, in some hypothetical dystopian universe, that process *always* terminated at a point before birth.

But biology need not be the same thing as morality. Arguably, there must be something more than the rationality of this biological process to establish that, from conception, it has moral value as an “end” in itself: that is, rather than as only a transitional “means” to creating an infant. Accepting its rational quality as a sufficient reason to value this process requires making an implicit, but critical assumption: that it is *universally* and *exclusively* rational for this process to continue uninterrupted. Conversely, it is wholly *irrational* ever to stop this order and sequence. In other words, this argument too quickly assumes that the termination of this process could not, in itself, constitute a rational order and sequence.

The field of physics offers a helpful comparison in Newton’s first law of motion, which states that an object in motion stays in motion.<sup>63</sup> Like the biological process beginning at conception, this “natural” principle demonstrates a remarkably rational and self-sustaining quality. Thus, it is venerable for this reason. But this phenomenon does not mean that stopping the object is somehow irrational, or unnatural, in the greater universe of unfolding events.

Ultimately, there are numerous reasons that this process might be interrupted. In fact, there are several reasons that do not even require human action. For example, not all fertilized eggs actually result in an ongoing pregnancy.<sup>64</sup> Another relevant phenomenon is ectopic pregnancy, in which a fertilized egg develops outside the uterus, a phenomenon that accounts for approximately ten percent of maternal mortalities in the United States.<sup>65</sup>

The real point of contention, however, has nothing to do with these, or any biological phenomena. Instead, the real point of contention is whether people’s subjective *motivations* to terminate a pregnancy could also ever be

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63. ISAAC NEWTON, *NEWTON’S PRINCIPIA: THE MATHEMATICAL PRINCIPLES OF NATURAL PHILOSOPHY* 72 (Andrew Motte, trans., First American ed. 1846).

64. See Rebecca J. Cook, *Legal Abortion: Limits and Contributions to Human Life*, in *ABORTION: MEDICAL PROGRESS AND SOCIAL IMPLICATIONS* 223 (1985) (“The fact that not all fertilized eggs give rise to embryos seems to be ethically as well as biologically significant.”).

65. Meredith Blake, *Welfare and Coerced Contraception: Morality Implications of State Sponsored Reproductive Control*, 34 U. LOUISVILLE J. FAM. L. 311, 327 (1995).

considered “rational.” In practice, an overwhelming majority of pregnant women might never have reason to interrupt their pregnancies. Nevertheless, *any* reason to interrupt pregnancy that can be considered even remotely “rational” must challenge the idea that the ordered nature of this biological process proves human life. In this sense, as this Part will argue, the definition of human life is inextricable from the reasons people might and might not carry a pregnancy to actual childbirth.

The most powerful argument that it is rational for this biological process *only* to proceed is that it will eventually produce a postnatal (and indisputable) human being. It would be difficult for most people, including anti-abortionists, to believe that this process already constitutes life, if it hypothetically *never* produced a child.<sup>66</sup> This is true despite my earlier argument that, in this hypothetical scenario, the process would still show a semblance of rational order. Accordingly, the entity’s development is remarkable not because this development is *inherently* rational. Instead, this development is remarkable because its steps are coordinated toward the creation of something even greater that we value. In turn, this is what makes these steps rational to us.

For anti-abortionists, this potential end eclipses almost every possible motivation for abortion. As their argument goes, allowing this process to unfold is the only rational course of events, because any reason to stop it will be outweighed by its ultimate outcome: the birth of a child, an undisputed human being with priceless moral value.

This position is implicit in how traditionalists reject the idea that abortion could ever be justified by the *potential* suffering of a child.<sup>67</sup> They

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66. That we generally value this “rational” biological process primarily because of its ultimate outcome is further evidenced by our shared view of death. Rarely has human death been popularly defined as the necrosis of *all* of a person’s cells. See Smolensky, *supra* note 34, at 44–45 (discussing the widespread acceptance of the “whole brain” definition of death since the 1960s). This has been the case even though each of these cells is in biological continuity with the zygote, and despite these cells continuing to “live” until their necrosis. It is clearly relevant to our common intuition that brain death, which has long been the accepted definition of death, occurs at the end of the lifespan, rather than at the beginning when so much of the biological lifespan and human experience lie ahead.

67. As Pope John Paul II once stated, “Some ask themselves if it is a good thing to be alive or if it would be better never to have been born; they doubt therefore if it is right to bring others into life when perhaps they will curse their existence in a cruel world with unforeseeable terrors . . . . The ultimate reason for these mentalities is the absence in people’s hearts of God, whose love alone is stronger than all the world’s fears and can conquer them.” John Paul II, *Familiaris Consortio* (Nov. 22, 1981), *available at*

are not blind to the fact that many children are born helplessly into situations of great suffering.<sup>68</sup> Many lack the basic resources that every human being requires merely to survive, let alone to thrive. And many of them might die very quickly, living only a brief life full of only great physical suffering. However, traditionalists argue that no amount or quality of future suffering can justify the termination of a pregnancy, because the pregnancy would still result in a human being with absolute moral value, regardless of its quality of life.<sup>69</sup> To reach a different conclusion would be, as the argument goes, to engage in a cost-benefit analysis that places a qualified value on human existence. And placing any qualified value on human existence would constitute a complete rejection of the concept of inherent dignity.

The problem with this argument, however, is that it does what the anti-abortion position strongly condemns as immoral: it treats what is ostensibly considered an “end” in itself, the biological process between conception and birth, as actually a “means” to another end—the birth of a human being.<sup>70</sup> That is, the moral value of the biological process only arises from the fact that it serves as a means to birth. Of course, it is all but inevitable that *anyone* would value the zygote, not because its qualities are somehow inherently remarkable, but truly because it is remarkable in its ability eventually to develop into an infant. But this only strengthens the argument that what is “rational” very much depends on broader context.

This is a particularly important point because, somewhat understandably, traditionalists may be somewhat skeptical of comparing the rationality of a zygote’s biological processes with the supposed “rationality” of a woman’s decision to terminate that process. The zygote is physically concrete; the latter seems like an intangible thing. But again, in practice, whether something has a rational quality depends overwhelmingly on broader considerations than just its present physical qualities. This opens the door to arguing that people’s decisions to terminate a zygote might themselves be considered rational, despite being intangible. After all, the “rational” quality of a zygote arguably turns on the ends that it might

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[http://www.vatican.va/holy\\_father/john\\_paul\\_ii/apost\\_exhortations/documents/hf\\_jp-ii\\_exh\\_19811122\\_familiaris-consortio\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio_en.html) (last visited Feb. 13, 2014).

68. *See id.*

69. *See id.* (“[T]he [Catholic] Church firmly believes that human life, even if weak and suffering, is always a splendid gift of God’s goodness.”).

70. *See Stith, supra* note 14, at 53 (criticizing the object-based approach).

eventually produce (a postnatal human being), rather than truly on its present physical qualities. Therefore, the “rationality” of terminating a zygote should be able to turn on different ends that people value, such as dedicating one’s life to noble causes and pursuits besides parenthood. Ultimately, the “rational” quality that we ascribe to other, uncontroversial decisions people might make is no different than the rational quality that we ascribe to biological processes; both have an order and logic that we find intuitively remarkable. Thus, abortion can have a rational quality in the same way we describe a zygote as having a rational quality.

Alternatively, another argument that the only rational course of events is to let the biological process continue is that this process is self-sustaining.<sup>71</sup> Ironically, this approach is rooted in a concept that the traditional ethic normally deems irrelevant to the ethics of life: individual autonomy and bodily independence. As an early American proponent of the life-at-conception position stated,

[T]he fecundated ovum is not only the embryonic man, already vital, but it is, in an important sense, an independent, self-existent being, that is having in itself the materials for development, being actually separated from the mother, as well as from the father, though maintaining a connexion in utero by the vascular arrangement repeatedly referred to; there is, really, as has been fully demonstrated, no actual attachment of the placenta to the uterus.<sup>72</sup>

The flaw of this autonomy-based argument, however, is that it is not as self-evident as traditionalists find it to be, scientifically speaking. The biological process that begins at conception hardly is *completely* self-sustaining. Instead, like many biological processes, it requires some degree of external assistance from other living beings, particularly the pregnant woman.

Even a healthy infant can hardly be called truly self-sustaining. It has limited physiological and psychological capabilities, hindering its ability to engage in basic activities, like finding food and feeding itself. Consider that, if an infant were left to fend for itself in the wild, it would die. Of course, few would actually dispute labeling an infant as an independent

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71. See Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 288–89 (1992) (discussing this perspective).

72. J. Boring, *Foeticide*, 2 ATLANTA MED. & SURGICAL J. 257, 266 (1857).

being, and rightly so. But this only goes to show that determining whether a particular biological process is self-sustaining requires judging whether it is *sufficiently* self-sustaining. And this is inevitably a matter of degree.

To wit, judging self-sustenance requires looking at a zygote's independence *not* relative to the human sperm and egg before fertilization, the approach under the traditional life ethic. This approach only raises the question of why a single-cell zygote is considered a living human being, but a person who maintains non-brain functioning even after whole brain death is not. As Part IV will show, this question can hardly be answered by pointing to any difference between biological generation at the beginning of life and degeneration at the end of life. Instead, even the traditional ethic assesses self-sustenance at the end of life by looking to what the entity requires of *others* to stay alive, allowing this ethic to consider a partially brain dead person to be alive, but not a wholly brain dead person whose non-brain functions still work.<sup>73</sup>

Similarly, assessing self-sustenance at the beginning of life requires looking at the zygote's power relative to others who help sustain it. And this analysis inevitably shows that the mother does as much, if not far more, of the work required to sustain a zygote than the zygote itself does. Indeed, if one concedes that the biological process beginning at conception is remarkable, as we should, it is only fair to recognize that what is required of the mother to carry a pregnancy to term is also remarkable.

On the mother's end, to help the zygote in its growth from microscopic single cell to "life-sized" infant requires continuous expenses of energy.<sup>74</sup> The more the fetus grows, the more complex and remarkable its biological systems get, but, in turn, the more complex and remarkable is the effort required of the pregnant woman carrying it. Emphasizing this fact is the risk of miscarriage, which public health studies show is the ultimate outcome for ten to even twenty-five percent of clinically recognized pregnancies.<sup>75</sup> Further emphasizing this fact is the extensive medical and

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73. See *infra* notes 143–46 and accompanying text.

74. See, e.g., Nancy F. Butte et al., *Energy Requirements During Pregnancy Based on Total Energy Expenditure and Energy Deposition*, 79 AM. J. CLINICAL NUTRITION 1078, 1078 (2004) (analyzing the "extra energy intake . . . required by healthy pregnant women to support adequate gestational weight").

75. See *Miscarriage*, AMERICANPREGNANCY.ORG, <http://americanpregnancy.org/pregnancycomplications/miscarriage.html> (last visited Feb. 17, 2014).

[I]t has become clear that the vast majority of human fertilizations *in vivo* die before ever reaching fetal viability. A conservative estimate suggests that at least 75 percent of all human

social support pregnant women may seek out to sustain even healthy pregnancies.

This argument is best underscored by several recent cases of pregnant women who became brain dead, then had to be kept on life support in order to sustain their fetuses until viability. As this scenario shows, the coordination of many complex biological systems is, not merely secondary, but absolutely necessary to sustaining the zygote. The zygote is not a body separate from some tertiary structure that exists primarily to support it. Instead, it is a microscopic body nestled within a monumentally larger structure, one with its own independent and complex functions. Even as the zygote grows into something much larger, it continues to be embedded within this conglomerate structure, rather than “separate” from it. Indeed, to exist as a distinct entity, the zygote *absolutely* requires the life of the singular pregnant woman who bears it. She, too, is her own distinct entity, indeed one that does *not* require the zygote in turn.

For these reasons, to say that a distinct human being originates from the zygote alone is misleading. If one thing must be given this designation, it is the pregnant woman that should be considered the distinct entity from where a human being originates. Arguably, she gives more energy and effort to the zygote than the zygote itself expends. And even though the zygote is the *physical* site where a human being is assembled, it is the woman that *animates* that site, more so than the zygote does.<sup>76</sup>

At best, a human being’s life can be said to originate from *two* distinct entities. Both are the only entities in the universe, the efforts of which are entirely irreplaceable in producing a unique human being. Even under this more generous argument, however, it is inaccurate to say that a distinct

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fertilizations fail to advance to the point of viability, with the vast majority of such failures occurring prior to the development of a clinically recognizable pregnancy. Approximately 30 percent of fertilized oocytes are lost before they even reach the uterus, and another 30% either fail to implant or shrivel up and die shortly after implantation. Most women in whom these events occur are unaware that they are even taking place.

L. Lewis Wall & Douglas Brown, *Regarding Zygotes as Persons: Implications for Public Policy*, 49 PERSP. BIOLOGY & MED. 602, 606–09 (2006).

76. It should also be noted that, at the current line of fetal viability around 24 weeks, premature deliveries have about a 50% chance of survival. However, they require intensive oxygenation. Alan H. Jobe, *Post-Conceptional Age and IVH in ECMO Patients*, 145 THE JOURNAL OF PEDIATRICS A2 (2004), available at [http://www.jpeds.com/article/S0022-3476\(04\)00583-9/abstract](http://www.jpeds.com/article/S0022-3476(04)00583-9/abstract). In this way, just because a fetus is viable does not mean that it should be considered sufficiently independent and self-animating. Here, rather than the mother, it is technology that quite literally breathes life into the entity, so that it can function in the way that it is genetically designed to function.

human being originates from the zygote alone. Even though its body parts are moving, those parts are not self-sustaining. Rather, they are animated by the mother, who effectively “breathes” life into them, so that they can function in the way they are genetically designed to function.

Pregnancy also requires a great deal of not just a woman’s energy but also a woman’s exercise of agency. The often cited example of pregnancy by rape, which challenges even traditionalist intuitions, shows how pregnancy is neither perfunctory nor inevitable. Even traditionalists are hard pressed to deny that pregnancy by rape requires a great deal of physical and psychological energy from the woman in order to sustain the zygote. The woman is not a merely passive actor, engaging in the ordinary effort of caring for a pregnancy. Instead, the woman must make very active, continuous, and ultimately demanding efforts to sustain the zygote’s normal course of biological development. Parallel to this point, if one concedes that there is a remarkable difference in the self-sustaining abilities of a zygote and the abilities of a sperm/egg before fertilization, one must simultaneously concede that there is a remarkable difference between what a woman must expend to carry a zygote to birth, and what she must expend merely to conceive a zygote in the first place. Ultimately, the former involves far more energy and effort. In the end, traditionalists would still reject that any of this renders a zygote *insufficiently* autonomous. But the rape example makes it far more difficult to argue that burdens on a woman are *completely* irrelevant to how much autonomy we consider the zygote to have.

Ultimately, self-sustenance will always be a matter of degree. On the one hand, it is futile to question that a zygote is special, given its characteristics. On the other hand, it is also futile to question whether a mother provides more than a nominal contribution herself. So, to assert that life begins at conception amounts to making a judgment call—one that is not *scientifically* inevitable.

And because self-sustenance is a question of degree, to judge whether it sufficiently exists requires importing other values into one’s analysis: here, whether we think it is only “natural” for others to help sustain it. Inevitably, this amounts to judging people’s motivations for *not* providing aid. In this way, once again, our judgment of what is “rational” cannot escape normative human judgment.

Accordingly, some see the zygote as self-sustaining not just based on an appreciation of its biological qualities. In addition, their belief is

implicitly based on an assumption: what the pregnant woman gives in assistance to the zygote is, if not minimal relative to what the zygote provides for itself, then still something that a woman *should* give with full willingness. In other words, it is “natural” that a woman undergo pregnancy, no matter how much work and effort it requires. This conviction amounts to believing that few, if any motivations a woman might have to terminate her pregnancy can be “rational.”

Indeed, even more so than the rational quality of biology, what probably most drives traditional beliefs is the view that abortion is not motivated by good faith sensibility. Instead, it is invariably motivated by callousness toward life, the importance of family, and the paramount adult role of caring for children. In this sense, even the anti-abortion position is not grounded solely in biological fact. Instead, it necessarily also makes a critical assumption about people’s subjective motivations.

But judging motivations is ultimately far more helpful to the progressive position. This is undoubtedly a consequence of the fact that the reason we look to rationality in the first place is to determine when human life begins. Therefore, judging the rationality of people’s motivations to discontinue a pregnancy cannot be colored by any *prior* assumption that a human being does, indeed, exist before birth. In other words, when evaluating whether the rationality of biology is sufficient to establish that life begins at conception, one cannot judge people’s motivations to terminate this process as *irrational* merely because one *already* assumes human life is at stake. If one assumes that life is at stake, then none of these reasons, no matter how compelling, will ever be enough. The challenge is when people allow their judgment of these reasons to affect their judgment of whether life exists in the first place, namely their judgment of the zygote’s qualities of self-independence. Because some see these reasons as bad, they minimize the burdens that a woman experiences, which, in turn, shapes the belief that what the woman contributes to the zygote is minimal. But even if from a subjective perspective, it is easy for a woman to carry a pregnancy to term, this cannot change the fact that what she gives in aid to the zygote is tremendous.

Unsurprisingly, judging people’s motivations for abortion becomes far harder to do after discarding our assumptions about the definition of human life. When this moral intuition is checked, these motivations appear somewhat, if not significantly, less offensive and selfish, and far more understandable.

To this, it must be said that many morally honorable people who forego children lead extraordinarily purposeful lives. These people contribute and sacrifice much for the sake of others, including for their families, communities, and society at large. These are contributions that they would be unable to undertake, if they took the enormous responsibility of bearing and raising a living human being in truly good faith. This is how all parents *should* undertake this responsibility (although even people who actively pursue parenthood often fail to do so).<sup>77</sup> These are the very reasons that some people choose not to conceive children in the first place.<sup>78</sup>

Ultimately, the only “irrational” reasons to terminate the biological process begun at conception are those that would be considered *independently* problematic—that is, problematic even if this process were not seen as valuable for its “rational” quality. It is beyond the scope of this Article to explore these arguments fully; however, two abortion practices may serve as potential examples. One is the case of “fetal farming,” or the practice of intentionally creating fetal tissue for scientific or medical purposes.<sup>79</sup> We might believe that, even if there were no other justification for sustaining a biological process, terminating it is problematic if its original creation was in “bad faith”—that is, if it was created with the knowledge that it would always be later terminated.<sup>80</sup>

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77. Furthermore, the lack of resources for proper child rearing is not a problem that should be dismissed out of hand, particularly not in economically challenged geographical areas. According to some statistics, over 400 million “abandoned children live on their own on the streets of hundreds of cities around the world. They subsist hand to mouth. They struggle just to survive the day.” *Statistics on Abandoned Children*, INTERNATIONAL STREET KIDS, <http://www.internationalstreetkids.com/statistics.php> (last visited Feb. 18, 2014). For comparison, even the most generous estimates of the number of Americans actively interested in adoption are only above 1 million, with only 2 million having ever pursued it at any time. See Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1166 n.5 (1991).

78. See John Paul II, *supra* note 67, at ¶ 32 (“When, instead, by means of recourse to periods of infertility, the couple respect the inseparable connection between the unitive and procreative meanings of human sexuality . . . they ‘benefit from’ their sexuality according to the original dynamism of ‘total’ self-giving, without manipulation or alteration.”).

79. See Fetus Farming Prohibition Act of 2006, Pub. L. No. 109-242, 120 Stat. 570 (codified at 42 U.S.C. 289g-2).

80. See Wesley J. Smith, *Does Human Life Have Intrinsic Value Merely Because It Is Human*, 13 TRINITY L. REV. 45, 51 (2006) (“We cannot, we dare not, view human beings in this way. Otherwise, there is logically no reason to say we cannot create embryos and fetuses for the purpose of destroying them, engage in “fetal farming,” or in other ways instrumentalize some humans for the benefit of others, or for the concept of scientific progress.”). This would also be somewhat analogous to the idea that people should be barred from engaging in certain acts of “organ harvesting” of dead bodies, despite the fact that, at that point, the person is certainly dead by every possible account. See

Another example is race or sex selective abortion. Even disregarding the argument that biology has moral value because of its rational quality, the discriminatory aspect of this kind of abortion is sufficiently problematic. After all, even decisions about whether to *conceive*, let alone bear children, should be made without regard to the possible race or sex of the child.<sup>81</sup> In contrast, abortions that are driven by one's concern for the prospective suffering of a child are not problematic, at least, so long as this concern does not amount to discrimination based on a traditionally impermissible characteristic.<sup>82</sup> Regardless of whatever good reasons might exist for continuing a pregnancy, this reason for terminating a pregnancy is not independently precarious.

In the end, I argue that a newly born infant and a late term fetus or, as I define it, a fetus with a brain developed enough to display minimal, subconscious awareness, both manifest a will to live. Put differently, one

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Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 451 (2000) (discussing the Uniform Anatomical Gift Act, which treats the dead body a property of the individual owner who has sole right to dispose of it without regard for others).

81. See Jaime Staples King, *Not This Child: Constitutional Questions in Regulating Noninvasive Prenatal Genetic Diagnosis and Selective Abortion*, 60 UCLA L. REV. 2, 58 (2012) ("The collective results of individual reproductive decisions can produce radical changes in the makeup of society that are self[-]perpetuating and reinforcing.").

82. I would also argue that disability-selective abortion is different from race or sex-selective abortion. Even if one does not consider an embryo or fetus to be a living human being, race and sex-selective abortion are still problematic, since even decisions about whether to *conceive* children should be made without regard to race or sex. Arguably, this is because any hardships that might arise from one's race or sex (hardships that people in good faith might want to prevent) still arise primarily from societal forces rather than biological ones. In contrast, whether disability-selective abortion is morally problematic depends on whether one considers an embryo or fetus to be a living human being. If it is not considered to be a living human being, disability-selective abortion has the potential to be rational, in the same way that we consider it rational for a couple not to conceive if genetic counseling foresees a high likelihood that their offspring would face a severe and debilitating condition. This is because, with respect to the most severe disabilities, the hardships that a person experiences arguably arise primarily from biological forces, which even the most well-intentioned (and scientifically advanced) societies cannot alleviate. However, if an embryo or fetus *is* considered a living human being, disability-selective abortion should be impermissible. This is analogous to the idea that it would be impermissible to kill an adult human being merely to end his suffering, no matter how severe and debilitating his disability. In this sense, because its moral status depends on whether an embryo or fetus is already considered a living human being, disability-selective abortion is not *independently* problematic. Finally, merely because race and sex-selection abortion are morally problematic does not mean that regulations of these practices are automatically legitimate. Given how underinclusive these regulations are, it is reasonable to infer that they are motivated by an interest in prohibiting, not just discriminatory abortions, but all abortions, discriminatory or not. In the end, as long as people are able to make decisions about conception motivated by the race or sex of the potential child, despite the fact that such a decision would be morally problematic, people should also be able to make decisions about abortion motivated by these same considerations, up to a point.

cannot argue that the only rationality that matters in determining whether abortion is moral is the rationality of biology and nothing else. The rationality of biology does not eliminate the rationality of the woman's motivations for terminating her pregnancy.

Of course, it works both ways: the rationality of a woman's motivations for terminating her pregnancy cannot eliminate the rationality of biology. Interestingly, natural law scholars use precisely this argument to deem artificial contraception morally illicit. Thus, they argue that artificial contraception is illicit because any reason to use it cannot eliminate the reasons *not* to use it, above all, the possibility of procreation. But this argument loses its force here where, instead of attempting to determine whether something is "against" life, or contra life, one is attempting to define what qualifies as life in the first place.<sup>83</sup> Thus, merely because nothing can take away the rationality of biology hardly means that termination amounts to taking a life. After all, life has not even been determined to exist.

## B. THE WILL TO LIVE

### 1. *At the Beginning of Life: Distinct from Fetal Consciousness/Pain*

Having rejected an approach that values biology above all, I will now argue that the will to live better captures universal human intuitions about why we value human life, particularly within the context of abortion. As I argued in Part II, the will to live represents the idea that the most basic and universal meaning of human existence is simply to live, that is, to survive and exist as a living human being. Analyzing the will to live vis-à-vis abortion supports the idea that the entire life ethic should revolve around this concept.

The importance of the will to live is shown, ironically, when we unpack people's reactions to seeing a sonogram. It can hardly be doubted that traditionalists push for mandatory ultrasound laws because they wish to appeal to people's intuitive reactions to seeing a sonogram.<sup>84</sup> Whether it is conscious or not, that reaction is invariably to ascribe to the embryo the visceral characteristics that newborn infants possess. These characteristics, which partially drive our naturally protective reaction to infants, include

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83. Germain Grisez et. al., *Every Marital Act Ought to Be Open to New Life: Toward a Clearer Understanding*, 52 THOMIST 365, 376–86 (1988).

84. See Ramsey, *supra* note 60, at 749.

autonomy, consciousness, and pain. Ironically, these are qualities that the traditional ethic typically finds morally *irrelevant* in determining when human life begins.<sup>85</sup>

On the one hand, this strategy elides many of the differences that do exist between an embryo or fetus and a newly born infant. Sonograms are also less helpful in establishing, not merely that a particular entity is undergoing a remarkable process of development, but also that this process begins at conception: far sooner than when an embryo or fetus actually begins to resemble an infant.

On the other hand, sonograms can be useful for illuminating how we intuitively value the will to live. To the extent that the corporeal form of the fetus has a strong effect on us, it is arguably an *imagined* “will to live” that drives our intuitive reaction. And the idea that the fetus has a will to live is evoked precisely by its physically “dynamic” quality: a quality that is evident in an ultrasound. It is this ascribed quality that stimulates our protective reaction, even more so than the pain or consciousness we ascribe to the fetus (or any reverence we may have for the rational quality of the fetus’s biology).

The instinct of at least some people to compare abortion to infanticide also shows how people intuitively value the will to live.<sup>86</sup> This comparison is something else that traditionalists use to engender support for their position. This analogy plays on the intuitively appealing idea that there can be no moral distinction between a fetus seconds from birth and an infant seconds after. In turn, this idea forms the basis for arguing that no moral distinction should exist between an infant and the embryo or fetus even earlier in the pregnancy. This comparison to infanticide is compelling because, like a sonogram, it invokes a visceral reaction.

However, I would argue again that this visceral reaction arises primarily from our reverence for the “will to live.” Consider a common intuition: knowing with absolute certainty that an infant born only moments ago will live only a few moments longer, and in abject pain, most of us would still hesitate to kill him even if there were a completely painless way

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85. See Rao, *supra* note 9, at 199–200.

86. See generally MICHAEL TOOLEY, *ABORTION AND INFANTICIDE* (1983). Probably the most prominent argument in favor of the choice of infanticide is Peter Singer’s. See PETER SINGER, *PRACTICAL ETHICS* 172–73 (1993) (“We should certainly put very strict conditions on permissible infanticide; but these restrictions might owe more to the effects of infanticide on others than to the intrinsic wrongness of killing an infant.”).

to do so. It is the will to live that, I argue, drives this intuition. One can hardly say that this infant is autonomous; among other things, he is unable to make a *conscious* choice to fight to live.

Yet, it is intuitively clear to us that he exhibits a “will” to live regardless. When one sees an infant and all of his physically dynamic reactions to stimuli, one sees an individual that is clearly, even if without full consciousness or self-awareness, displaying a primal will simply to exist in the world. It is this sort of grit to survive even in the face of abject pain that we revere most in this infant: not its consciousness or any other quality it may display.<sup>87</sup>

Both of these examples show how the will to live captures our strongest intuitions about abortion, even more so than the “rationality” of the biological process. This concept is also more intuitively appealing than the idea that a zygote possesses sufficient autonomy.<sup>88</sup> This definition of autonomy captures the concepts of physical independence and self-sustenance. But even more so than whether a zygote is physically self-sustaining, arguably what truly matters to us is whether it displays at least a rudimentary, subconscious awareness of its *purpose* for existing.

A good comparison here is to a virus, which scientists do not traditionally classify as living. Physically, a virus possesses a significant degree of autonomous independence and ability to sustain itself. But, still, it is difficult to say that it is anything more than an automatus creature, rather than an autonomous one.<sup>89</sup> Of course, we should value a zygote more than we would ever value a virus. But this only further emphasizes that the value we place on the zygote comes from something beyond the characteristic of autonomy that it shares with a virus.

An important question still remains, however: even after conceding the importance of the will to live in our intuitions, how would a life ethic centered on the will to live answer the question of whether or not abortion is morally licit? In the end, I argue that a newly born infant and a late-term fetus (or, as I define it, a fetus with a brain developed enough to display minimal, subconscious awareness) both manifest a will to live. Thus,

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87. See SINGER, *supra* note 86.

88. See *supra* notes 71–72 and accompanying text.

89. See Edward Rybicki, *The Classification of Organisms at the Edge of Life, or Problems with Virus Systematics*, 86 S AFR J SCI. 182 (1990) (describing viruses as “organisms at the edge of life” since they possess genes, evolve, and reproduce by self-assembly).

abortion would ideally be considered morally illicit when the fetus has reached this advanced stage. However, abortion should generally be considered morally permissible beforehand.

This argument has both an intuitive appeal and a clear biological basis. Intuitively, it is impossible for some to believe that a fetus could ever have the same status as a newborn. But, comparing abortion to infanticide, it also seems problematic to say that a fetus seconds from birth should be accorded a significantly different moral status than an infant who has just been born.<sup>90</sup> We accord this person the greatest protection even if it has suffered the most severe damage possible to its capacities. Human beings that have just been born can still display a will to continue living, even those born with medical conditions that inflict tremendous physical suffering on them (an idea to which I will return in Part IV on assisted suicide<sup>91</sup>). Similarly, one can imagine that moments from birth, a fetus can manifest a will to live as well.

Looking at the will to live through the lens of biological (and particularly brain) science further supports this intuition.<sup>92</sup> Instinctual behaviors for basic human survival clearly exist in the moments after birth. This suggests that this instinct may have existed beforehand. Indeed, while

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90. As Singer argues about infants, “[a] week-old baby is not a rational and self-conscious being, and there are many nonhuman animals whose rationality, self-consciousness, awareness, capacity to feel, and so on, exceed that of a human baby a week or a month old.” SINGER, *supra* note 21, at 149.

91. An example might be a baby with Tay-Sachs disease, a disease that causes a child inevitably to die in only a few years, and, before that, to experience medical complications and pain for the entirety of her short life. *But see* ROBERT F. WEIR, SELECTIVE NONTREATMENT OF HANDICAPPED NEWBORNS: MORAL DILEMMAS IN NEONATAL MEDICINE 235–41 (1984) (arguing in favor of euthanasia for Tay-Sachs and other terminal congenital anomalies, but not for other conditions, like spina bifida, that are not terminal). A much more difficult condition to grapple with, I would argue, is anencephaly, as children with anencephaly are “by definition permanently unconscious because they lack the cerebral cortex necessary for conscious thought, rendering them rather similar to those in a persistent vegetative state.” Fazal Khan & Brian Lea, *Paging King Solomon: Toward Allowing Organ Donation from Anencephalic Infants*, 6 IND. HEALTH L. REV. 17, 20 (2009). Still, I argue that there should be no option to terminate the life of an anencephalic child. This argument stands in contrast to my position in support of assisted suicide at the end of life, particularly where a person has an imminently terminal illness. *See generally* Part IV. There is an important distinction between an anencephalic child and a terminally ill adult, in that the person with terminal illness can express for herself either in advance or in the present moment, whether or not she has made peace with her life and with the prospect of death. *See infra* notes 192–93 (arguing that assisted suicide or withdrawal of LSMT should not exist where consent is unclear). While denying euthanasia to anencephalic children may seem cruel to some, it should be noted that a child with anencephaly is unconscious. Therefore, the child does not consciously experience pain.

92. *See generally* Part II.

the neo-cortex continues to form and grow substantially after birth, the amygdala at birth has already developed entire sets of complex bodily reactions to certain stimuli.<sup>93</sup> There is even evidence that the amygdala stores prenatal memories, which in turn inform a person's conscious attempts after birth to survive and to live. In particular, studies on the transmission of narcotics from mother to fetus suggest that the fetus "experiences" the chemical effects of these substances subconsciously. The brain processes the stimuli generated by the intake of these substances, in a way that creates prenatal memories—memories that, after birth, he or she can access, in full consciousness, as feelings of fear, aggression, and sadness.<sup>94</sup>

So when *exactly* does a fetus manifest the will to live? Science is not, and perhaps never can be, absolutely conclusive on when certain stages of fetal development occur. However, what can be reliably established is that the brainstem only begins to form after about thirty days of gestation; continues developing well into the second trimester; and, according to scientists, only "nearly completes its cycle of development and myelination around the seventh gestational month," or the third trimester.<sup>95</sup> And, even more importantly, only after this point does the limbic system complete its own course of development.<sup>96</sup> The limbic system, and particularly the amygdala, only undergoes its peak stage of cell differentiation in the second trimester.<sup>97</sup> This is important because awareness is necessary for a

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93. See *supra* notes 47–48 and accompanying text.

94. See *supra* notes 47–48 and accompanying text.

95. R. Joseph, *Fetal Brain Behavior and Cognitive Development*, 20 DEV. REV. 81, 82–85 (2000). It must be acknowledged that, before this point, the brainstem certainly displays some activity, including spontaneous body movements and fetal heart acceleration. *Id.* However, these movements and activities occur infrequently, "because the fetal brainstem matures in a caudal to rostral arc, and as different nuclei mature and myelinate at different rates, fetal brainstem reflexes are initially triggered infrequently or in isolation and thus emerge gradually and in an irregular fashion." *Id.* at 84–85. "For example, around the tenth week of gestation the fetus may take a single 'breath' over a twenty-four hour time period, whereas by the fortieth week 'breathing' occurs much more frequently with some degree of regularity in regard to chest and abdominal movement." *Id.* "However, it's not until birth that the breathing (inhalation–exhalation) response occurs in a continual fashion; a function of increasingly mature brainstem development." *Id.*

96. The limbic system, responsible for biological instinct, begins to develop after the brainstem does. See Joseph, *supra* note 95, at 83.

97. Ida Nikolic & Ivica Kostovic, *Development of the Lateral Amygdaloid Nucleus in the Human Fetus: Transient Presence of Discrete Cytoarchitectonic Units*, 174 ANAT. EMBRYOL. 355, 359 (1986) (describing the fifteenth through twentieth week of gestation as the "peak" stage of cytoarchitectonic organization). See also Julie L. Fudge et al., *Considering the Role of the Amygdala in Psychotic Illness: A Clinicopathological Correlation*, 10 J. NEUROPSYCHIATRY CLIN NEUROSCI. 383,

will to live to exist. And awareness requires a limbic system, which can operate at the level of the subconscious: in comparison to the brainstem, which regulates automatic reflexes that do not require any awareness to learn or to activate, the limbic system regulates more complex information that constitutes a person's survival instincts, which are learned and activated subconsciously.<sup>98</sup> This suggests that more than a brainstem, and at least the limbic system, is necessary for awareness.

For this reason, while it is self-evident that the embryo or fetus develops other parts and functions before this point, even frequently displaying spontaneous movement,<sup>99</sup> it is difficult to argue that it has even the minimal awareness required for the will to live to exist.<sup>100</sup> The embryo or fetus is self-developing, and even looks like a human being at a certain point. But any "purpose" it might have still seems completely automatous.

Thus, I would argue that this entity manifests the will to live only when the brain is developed enough to be able to display minimal, subconscious awareness. This occurs around the third trimester, when the brainstem, which exercises substantial control over a person's reflexes, has nearly completed its myelination, and when the limbic system and amygdala, which are integral to awareness and instinct, complete their own course of development.<sup>101</sup>

Finally, it is worth noting that these arguments are distinct from popular claims that a fetus at twenty or more weeks is a human being because it is conscious and feels pain.<sup>102</sup> As I previously argued, concepts

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391–92 (1998); *see also* Norbert Ulfing, *Ontogony of the Human Amygdala*, 985 ANN. N.Y. ACAD. SCI. 22, 29, 30 (2003).

98. *See* WILLIAM ROBERT KLEMM, *ATOMS OF MIND: THE "GHOST IN THE MACHINE" MATERIALIZES* 73 (2011) ("While the limbic system does control some more instinctual functions like appetite and sleep with thirst, it also manages emotion, memory, and homeostatic functions of the subconscious brain. Though many of the mechanisms of the limbic system are carried out below our awareness, the results of these mechanisms often inhabit our consciousness. . . . Many of the limbic system operations that govern emotions are considered subconscious operations. For example, the limbic system plays a role in learning and memory.").

99. I would argue that this, by itself, is insufficient to show that a will to live exists. This is because this will requires not just physical activity, but a deeper awareness of purpose. It is possible, after all, for something to undergo physical activity without having this deeper awareness. In this case, there is no actual will to engage in that activity.

100. *See supra* Part II (discussing the biology of the will to live).

101. *See supra* notes 95–98 and accompanying text.

102. *See also* BARUCH BRODY, *ABORTION AND THE SANCTITY OF HUMAN LIFE: A PHILOSOPHICAL VIEW* 100–08 (1975) (arguing that individual human life begins at six weeks because that is when the brain begins to develop). *See generally* John A. Robertson, *Abortion and Technology:*

like consciousness fail to capture the complete extent of why we value life at this stage. Instead, to the extent we do care about consciousness and pain, it is largely because these concepts are indicators that a fetus's will to live exists. These arguments are also completely inconsistent with the traditional ethic's rejection of the idea that consciousness and autonomy are defining characteristics of personhood. For these reasons, a will to live based approach is not only distinct from, but also superior to, approaches that emphasize how a fetus is conscious (or feels pain) at a certain point.

## 2. *Compared to Innocence and Potentiality*

Beyond providing an alternative to the biology-based approach, the will to live is also superior compared to other principles used to justify the traditional life ethic. For example, the will to live helps to reconcile the admittedly appealing intuition that humans are "perfect" from conception, possessing human innocence and innumerable potential from that point forwards. As discussed earlier, this idea is an outgrowth of the biology-based approach.

The intuitive appeal of "potential" manifests itself in what is likely the common reaction to philosopher Thomas Nagel's famous argument: once a person becomes brain-damaged, there is absolutely no reason to pity him, because he is content in the present.<sup>103</sup> That reaction would of course be to pity this person. We do so because of his loss of potential: a potential that he may realized had he not become brain-damaged. But, if we break this intuition down further, arguably we would realize that we lament this loss only because the person manifested a will to live at the time he experienced brain damage. This is because, in asserting that every human has a drive to live, this concept recognizes that every human is driven to reach his *greatest* potential in life: an attempt that, in this case, is thwarted by brain damage.<sup>104</sup>

Of course, at the time that this person experienced brain damage, he also possessed autonomy. Thus, we might also lament the brain damage because it limited what is possible, with respect to *how* this person chooses

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*Sonograms, Fetal Pain, Viability, and Early Prenatal Diagnosis*, 14 U. PA. J. CONST. L. 327 (2011) (discussing the debate on fetal pain).

103. THOMAS NAGEL, *MORTAL QUESTIONS* 7 (1979).

104. The same idea applies to a person who has died, whose eternally lost potential we mourn. See *infra* notes 218–19 (discussing how, in the context of capital punishment, we lament the death of an innocent victim because she loses the possibility of making an *effort* toward her full potential).

to live his life. But I contend what saddens us most is not the fact that the person can never choose to fulfill the wishes and desires he once had. It is possible, after all, that the person would have been thwarted from reaching his full potential in the end, regardless. At the other end of the spectrum, we are also intuitively still saddened by people's deaths even if they have *no* concrete desire but to die, as in the case of typical suicide. In other words, what saddens us most is not the loss of a certain level of achievement. Instead, it is that a person can no longer even *attempt* to reach his greatest potential, an attempt that is an inextricable component of the will to live. We are sad when someone who wishes for a particular life course has that life course diverted, in part also because that life course is unique and irreplaceable.

Nagel's example involves a significantly different scenario than the one presented by an embryo or fetus before it manifests the will to live. Before this point, a fetus possesses an abstract kind of potential. However, it has no will to live. Therefore, it has no drive to achieve its potential, and thwarting this potential creates only an abstract harm, if any at all. But once it possesses a drive to achieve its greatest potential, much like the person in Nagel's example did, thwarting this potential very much causes a harm. This potential remains concrete even after this person no longer manifests a drive to reach the same level of achievement that he once strove to reach. A person will continue to strive for what, at the present time, is his greatest potential. Still, that he can no longer strive for the greater potential that he was *once* capable of saddens us, even regardless of whether he would have ever achieved it anyway.

In this way, the will to live helps to reconcile the understandable discomfort people might have at abortions motivated by a desire to prevent a child's suffering. On the one hand, once a fetus possesses the will to live, she manifests a drive to live her life as best as she can, regardless of her present or future quality of life. Certain barriers, abject poverty and the resultant lack of the most basic resources for survival, for example, can frustrate her efforts on this front.<sup>105</sup> These barriers can also inflict tremendous suffering. Nevertheless, she strives to live in spite of these barriers.

On the other hand, a mother may prospectively decide, before the fetus manifests the will to live, that her future child's life will likely

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105. See *supra* note 77 and accompanying text.

involve great suffering. Accordingly, abortion is the best course of action. This choice is completely consistent with the idea that a person has a will to live even in the face of extreme suffering. After all, this choice occurs before a person either experiences this suffering *or* wills itself to live in spite of it. Put simply, there is no clash between suffering and the will to live regardless of suffering, because the fetus has experienced neither.

Thus, it can be moral to believe that the prospect of suffering can outweigh reasons to give birth—at least, when the will to live is not yet present.<sup>106</sup> In deciding to undergo abortion for this reason, a woman's attitude is no different than a woman's decision not to conceive in the first place: a choice traditionalists may still see as immoral, but never on the grounds that this decision takes an actual human life. This decision recognizes that without a will to live, the loss of potential creates too abstract of a harm to be of significant moral importance.<sup>107</sup>

### 3. *Compared to Autonomy: A Progressive Challenge?*

The will to live is also superior to principles that the progressive ethic emphasizes, particularly autonomy. Like the idea of consciousness, autonomy or at least the progressive version of autonomy, supports the position that personhood does not begin until birth. The progressive objection to the abortion-infanticide comparison, that an infant displays far greater independence than a fetus, demonstrates how autonomy lends support to this position.<sup>108</sup> As the argument goes, because it is autonomy on which we place the *greatest* moral significance in determining personhood, the difference in autonomy between an infant and a fetus distinguishes their moral status as persons versus non-persons.

However, this autonomy-based position is vulnerable to criticism on several fronts.<sup>109</sup> First, the same criticism that can be leveled at the

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106. Of course, when the will to live is present, it should be considered to outweigh the prospect of even extreme suffering.

107. From a practical perspective, it is fortuitous that, with ever-rapidly developing technology, many of these conditions can be caught far earlier than the point at which the will to live manifests itself in the fetus. See generally Jaime S. King, *And Genetic Testing for All: The Coming Revolution in Non-Invasive Prenatal Genetic Testing*, 42 RUTGERS L.J. 599 (2011) (discussing methods such as amniocentesis, chorionic villus biopsy, fetoscope, and non-invasive prenatal genetic diagnosis, many of which can be performed in the first trimester).

108. See, e.g., Mary Anne Warren, *The Moral Difference Between Infanticide and Abortion: A Response to Robert Card*, 14 BIOETHICS 352 (2000) (distinguishing fetuses from infants on the basis of factors like consciousness and self-awareness).

109. See *supra* Part II.

traditional ethic's version of autonomy can be leveled here: we value an infant's life despite the fact she hardly has much autonomy. Just as the infant possesses consciousness but not self-consciousness, the infant possesses autonomy but not much. For all intents and purposes, she continues to depend on other people to survive, whether on her mother or on others who rear the child.

This argument is tied to the idea of fetal viability. Fetal viability sees the point when the fetus can survive outside of the mother's womb as significant.<sup>110</sup> One criticism of the fetal viability concept is that the line of viability changes depending on the advancement of technology: technology that is provided by other people to care for the premature infant.<sup>111</sup> Thus, the concept of viability only underscores the fact that even if a viable fetus is not dependent on her mother, it would still be very much dependent on others once it is born. One can hardly say that a premature infant has a great degree of autonomy. Yet, still, most would recoil at the idea of infanticide.

Second, even if one argues that only *maternal* dependence matters in determining whether an infant or fetus is sufficiently autonomous, an autonomy-based life ethic remains weak.<sup>112</sup> Pregnancy takes a great physical and psychological toll on the pregnant woman that is unique to this experience alone.<sup>113</sup> Naturally, this is an indicator that a fetus relies heavily on the pregnant woman.

But absent conditions that endanger the very life of the pregnant woman, conditions where abortion should be made available even if the

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110. As the Supreme Court has held, fetal viability is necessarily a "flexibl[e] . . . term," and lawmakers cannot "place viability, which essentially is a medical concept, at a specific point in the gestation period." *Planned Parenthood v. Danforth*, 428 U.S. 52, 64 (1976). Instead, "when viability is achieved may vary with each pregnancy." *Id.*

111. *See id.*

112. There is no principled basis for arguing that maternal dependence is the only type of dependence that matters in determining whether a human entity should be considered sufficiently autonomous. If the presence of autonomy is the determinative quality of human life, it should not matter how the lack of autonomy manifests itself. If something is dependent, it lacks autonomy regardless of whether it is dependent on the mother or on someone else. Thus, it would not be considered a living human being.

113. As Justice O'Connor stated in *Casey*, pregnancy is "unique to the human condition . . . . The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear." *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992).

fetus *were* considered a living human being,<sup>114</sup> it is not clear why this toll should be considered significantly greater than the toll experienced by mothers who care for their still-dependent infants. Yet, despite the physical and psychological difficulties that women face after giving birth—particularly the many without truly workable options for alternative child-rearing—we would not allow them to choose infanticide.<sup>115</sup> In this sense, the argument that many use to support a pro-choice position—the difficulties a mother might face after giving birth—also undermines this very position.<sup>116</sup> At least, this is true to the extent that a reverence for autonomy is what drives this position.

In comparison, the will to live has several advantages over autonomy, as a potential basis for an abortion ethic. First, it avoids a critical objection to the autonomy-based approach: that it treats the human being as a “means” to achieving certain experiences, rather than as an “end” in itself—put differently, that it does not treat the human being as morally worthy regardless of how much control she exercises over her life.

Second, it is arguably far easier to distinguish when a person does and does not manifest the will to live, than to distinguish when a person does and does not display sufficient autonomy.<sup>117</sup> At the beginning stages of life, whether the will to live exists depends only on the functioning of the brain. By contrast, a variety of factors are relevant to determining how dependent a person is on others. In this way, just as the will to live circumvents the challenges posed by the traditional life ethic, it also circumvents the challenges posed by the progressive ethic. And, unlike viability, the will to live does not change with technology.

Above all, the will to live captures human intuitions about why we value human life better than the concept of autonomy does. To many, it makes no sense to prioritize an unborn human over a woman who,

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114. In this case, a legitimate self-defense claim can be made. *See infra* notes 120–32 and accompanying text.

115. *See supra* note 77 and accompanying text (discussing postnatal difficulties).

116. And, as I later argue in Part VI, people should have a moral responsibility to protect others in many more circumstances than the duty-to-rescue law typically recognizes: an argument that emphasizes the life and death interdependence of humans on one another. This progressive reverence for human interdependence further weakens the argument that the differences in autonomy between a fetus and an infant means they should be accorded different moral statuses. After all, if even adult humans are considered to be interdependent under a progressive ethic, it follows that infants themselves should not be considered to be so *independent*.

117. *See supra* notes 92–102 and accompanying text.

whatever her reason for wanting an abortion, has a far greater capacity for autonomy and consciousness. But as our reactions to infanticide show, we value something far beyond these qualities: above all, the will to live. And to the extent that we focus on autonomy and consciousness because we revere the human brain, distinct as it is from other species' brains in how it allows a person to experience free will and self-consciousness, the brain is important for a greater reason still: it is inextricably tied to the will to live.

C. RECONCEPTUALIZING INTENT: A PREGNANT WOMAN'S WILL TO LIVE

An ethic based on the will to live differs from one other aspect of the traditional life ethic: what it considers to be a legitimate justification and "intention" for taking human life through abortion. This difference is particularly relevant where a fetus does, in fact, manifest a will to live. In cases of abortion, the traditional life ethic interprets what qualifies as legitimate self-defense very narrowly. This interpretation is implicitly driven by the ethic's reverence for the fetus's "innocence" and potential. This reverence is made quite clear in the ethic's very broad interpretation of legitimate self-defense in cases where a "guilty" aggressor is involved (that is, in the cases we usually envision when thinking about self-defense).

A life ethic must accept that self-defensive abortion is critical in preserving not merely a woman's autonomy to live her life as she wishes. This is an argument that progressives typically use to justify their position that abortion is moral. Even more importantly, self-defensive abortion is critical in allowing a person to realize her primal desire to survive and to live. In this way, abortion is exactly like self-defense in any other context. In those contexts, the traditional ethic conceptualizes self-defense so broadly that it sanctions deadly force even where there is some uncertainty about whether an aggressor will, in fact, inflict imminent, physically grave harm. To the extent that this interpretation is better justified by a reverence for people's will to live, rather than merely their autonomy, the universe of what qualifies as legitimate self-defensive abortions must be enlarged.

The traditional ethic's position on intent arises from its adherence to the so-called "double effect" doctrine. This doctrine distinguishes between what people intend and what people merely foresee.<sup>118</sup> Under this doctrine,

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118. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, IIa-IIae Q. 64, art. 7, available at <http://www.basilica.org/pages/ebooks/St.%20Thomas%20Aquinas-Summa%20Theologica.pdf>.

in order to qualify as morally licit, an action must meet four criteria: (1) the immediate action itself must be good or indifferent, and must not be intrinsically evil, (2) the foreseen evil effect itself must not be intended, (3) the intended good effect must not be an effect of the evil, but produced directly by the immediate action, and (4) the intended good effect must be commensurate with the foreseen evil effect.<sup>119</sup> As this applies to life ethics, these principles entail that killing, which is considered an “intrinsically evil” immediate action, cannot be either the *ends* (that is, the intended effect itself) or the *means* (that is, the action that produces the intended good effect).

With regards to many, if not most, instances of abortion undertaken for self-defensive purposes, the traditional ethic finds both the means *and* the ends involved to be problematic. This position has several flaws. First, I would reject the traditional position that certain *means* to achieve self-defense, that is, certain abortive procedures, like fetal craniotomies, must be conceptualized as killing *per se*. This renders these procedures morally illicit *even assuming* that they would save the pregnant woman’s life.<sup>120</sup>

Instead, the means of these procedures should be conceptualized as performing a particular procedure, the resulting death of which is *foreseeable*, but not *intended*. This argument might seem like a stretch to some, and understandably so. But this logic is the same as the logic that the traditional ethic applies in more typical instances of self-defense. In that context, legitimate killing is seen as neither the ends that a person seeks, nor even the *means* a person uses to achieve self-defense. This is true even in scenarios when a person absolutely *must* use deadly force in order to preserve her life, and knows it.<sup>121</sup> Instead, the traditional ethic conceptualizes the means used to achieve self-defense as, in effect, “using enough force merely to disarm an aggressor.”<sup>122</sup>

Using the same logic, one can conceptualize a procedure like a fetal craniotomy as merely “achieving enough force to ensure vaginal evacuation of the fetus, in order to save the mother’s life.” Indeed, it is arguably less of a stretch to characterize this procedure as foreseen killing than to characterize typical self-defense this way. In both circumstances, a

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119. T.A. CAVANAUGH, DOUBLE-EFFECT REASONING: DOING GOOD AND AVOIDING EVIL 36 (Oliver O’Donovan ed. 2006).

120. See Nicholson, *supra* note 18, at 387–88.

121. See *infra* notes 244–45 and accompanying text.

122. See *infra* note 244 and accompanying text.

person is directing physical force toward a specific entity, with the same degree of certainty that death will result. But, arguably, the death one foresees from a craniotomy is accompanied with a much greater sense of regret, and a wish that the procedure were unnecessary to save a life. In this sense, it is harder to argue that the person acts specifically to effectuate death. By contrast, in many acts of typical self-defense, no sense of regret accompanies the killing. After all, the aggressor is not innocent. Instead, the person acting in self-defense very much wishes death on the other person, and acts specifically with the intent to effectuate that wish.

Second, the universe of abortions that qualify as having legitimate *ends* (in particular, the universe of abortions that qualify as legitimately self-defensive) must also be broader than what the traditional ethic recognizes. After all, even abortions that do *not* qualify as legitimately self-defensive hardly show the extreme irreverence for human life many would ascribe to them. Certainly, decisions to procure an abortion invariably fail to manifest the same irreverence for life as, for example, the typical homicide does. Abortion is usually, if not always preceded by at least some personal and moral reflection. By contrast, homicide frequently amounts to murder under the law, where any “reflection” amounts, not to deep moral contemplation about legitimate reasons for taking another person’s life, but premeditation in planning *how* to take another person’s life.<sup>123</sup>

Furthermore, in the case of murder, there is very little indication of personal regret. By contrast, in abortion, the invariable presence of regret—if not for choosing to have an abortion, then for feeling that one must make this choice in the first place—is an indicator that the end actually sought is always something besides the termination of life itself.<sup>124</sup> These ends are almost never truly selfish or prurient, words much more accurately describing typical justifications for murder, such as jealousy, greed, or even pleasure from the act of killing itself. The winding course of the abortion debate within America shows that, even after prolonged personal and moral deliberation, it is possible for people to believe that having an abortion is a

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123. See Howard J. Curtis, *Malice Aforethought*, in *Definition of Murder*, 19 YALE L.J. 639 (1910) (discussing the “malice aforethought” component of murder).

124. Traditionalists themselves frequently emphasize the regret experienced by those who ultimately choose to have abortion. In *Carhart*, the Supreme Court asserted committing to an abortion requires a difficult and painful moral conundrum. *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) (“[I]t seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.”).

moral decision.<sup>125</sup> Whether these people are ultimately “right” does not change this. Indeed, many people we consider morally upstanding in every other way believe that abortion is moral.

Ultimately, the ends of most abortions, self-defensive or otherwise, might be characterized in the same way that natural law scholars characterize the intention of married couples who engage in natural family planning, or purposefully abstaining from sex during periods when a woman is able to conceive: not as an intention to prevent or terminate life, but as a *lack* of intention that life be realized.<sup>126</sup> This sort of intention is perfectly licit, even to traditionalists. Of course, it cannot be denied that there are differences between abortion and natural family planning. Among them, while no one would contend that natural family planning takes a life, many would contend that abortion does. But the *reasons* people engage in abortion or natural family planning, the only thing that is relevant to determining which intentions are legitimate and which are illegitimate, are not so morally different among the two to render natural family planning licit and abortion illicit. This is because one can have reasons for procuring an abortion that do not manifest a direct intent to terminate a fetus’s life. Instead, these reasons can just as easily be conceptualized merely as foreseeing the termination of a fetus and nothing more.<sup>127</sup>

For these reasons, even where a fetus manifests the will to live, the universe of abortions that qualify as having legitimate ends must be enlarged. The question remains, however: in what *specific* circumstances should abortion be considered to constitute legitimate self-defense, where the traditional life ethic considers abortion to be illicit?

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125. I recognize that many people have a ready willingness to attribute a guilty will to people who commit certain acts, regardless of their actual state of mind. For example, many people are willing to attribute a guilty will to wrongdoers who are young, have a mental handicap, or have a mental illness, even though these attributes generally lessen a person’s culpability for crimes they have committed. But, in these instances, there is no doubt that the crimes in question are morally wrong; what is in doubt is whether the people who committed these crimes have the mental faculties to appreciate that what they did was wrong. By contrast, with respect to abortion, even people who are generally considered to have sound mental faculties can reach the conclusion that abortion is morally licit. Therefore, it is debatable whether there is a blameworthy act in the first place, which should make us hesitant to attribute a guilty will to people who participate in abortion.

126. See Grisez et al., *supra* note 83, at 402–06 (arguing that natural family planning “means *not willing* that the good [of life] *be realized*, but it does not mean *willing* that the good *not be realized*”) (emphasis added).

127. See *infra* Part IV (arguing that any distinctions in intent and causation between withdrawal of LSMT and assisted suicide do not rise to a morally significant level).

To answer this question, it is necessary to recognize that, in restricting what counts as “legitimate” self-defense, traditionalists may rely greatly on the assumption that women typically have sufficient support throughout the pregnancy process, including medical, psychological, and social support. They also rely on the assumption that, should she not wish ultimately to keep her child, the woman typically has access to viable adoption or other alternative child-rearing options. Few actually doubt that the lack of these support mechanisms inflicts great costs on the mother and her child, threatening both of their lives; still, many assume that these mechanisms do exist. But this assumption is very often wrong. In turn, this suggests expanding the universe of abortions considered as “legitimately” undertaken by a pregnant woman to save her own life.

This argument is particularly relevant in cases that may not appear to present the imminent and grave harm that acts of legitimate self-defense ostensibly require. A quintessential example is young girls and teenagers who get pregnant. It would be callous and unrealistic to deny that, in these cases, pregnancy, birthing, and the postnatal period are all extremely difficult, both psychologically and physically.<sup>128</sup> This is true even in circumstances where a young woman actually has adequate medical and social support. Another difficult situation arises when pregnancy arises from rape or incest. This situation also poses unique physical and psychological challenges for the woman, long after conception and continuing into the postnatal period.<sup>129</sup>

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128. U.N. Population Fund, *Motherhood in Childhood: Facing the Challenge of Adolescent Pregnancy*, 18–19 (2013), <http://www.unfpa.org/webdav/site/global/shared/swp2013/EN-SWOP2013-final.pdf> (finding that 70,000 adolescents in developing countries die annually of causes related to pregnancy and childbirth. These include the girl’s age, physical immaturity, complications from unsafe abortion and lack of access to routine and emergency obstetric care from skilled providers, with contributing factors being poverty, malnutrition, lack of education, child marriage, and the low status of girls and women). See also Francis X. Rocca, *Vatican Official Defends Child’s Abortion*, THE WASHINGTON POST (Mar. 21, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/20/AR2009032002415.html> (describing Catholic responses, both positive and negative, to the case of a nine year old who was fifteen weeks pregnant when she underwent abortion at her doctors’ recommendation and her mother’s approval; carrying twin fetuses, which were conceived through rape at the hands of her stepfather, the girl weighed only 80 pounds, and her doctors were concerned about the risk of death from carrying her pregnancy to term).

129. See Shauna R. Prewitt, *Giving Birth to a “Rapist’s Child”: A Discussion and Analysis of the Limited Legal Protections Afforded to Women Who Become Mothers Through Rape*, 98 GEO. L.J. 827, 831–36 (2010) (describing the unique traumas that a woman may face in giving birth to a child conceived through rape).

In these types of cases, the universe of scenarios that may arise that should be considered life-endangering is not small. In these instances, it is possible that, even after the fetus manifests a will to live, a woman's inability to terminate her pregnancy could gravely endanger her life, for a wide range of physical, psychological, and sociological reasons. This grave risk can pose a threat even in scenarios that do not outwardly appear to involve *reasonably* certain, *imminent* danger.

For those who might be troubled by this kind of reasoning, this broader definition of legitimate self-defense is fully consistent with how permissive self-defense has been in every other context besides abortion (an issue I will discuss in greater depth in Part VI, which discusses self-defense outside of abortion in greater depth). In particular, the traditional ethic has sanctioned deadly force even where the probability of imminent harm, while not negligible, is also not significant. It has also sanctioned deadly force even where the risk of imminent harm is not to physical life or health, but to property or possessions.<sup>130</sup> The use of deadly force in these scenarios has quite often resulted in wholly innocent people being killed after they were mistaken for wrongdoers. However, traditionalists have still sanctioned deadly force, based on the belief that assaults to property or possessions naturally give rise to a legitimate fear that life is *likely* also at stake, and that a person has a right to defend, not just his life, but also his sense of "dignity," which is threatened by this kind of aggression.<sup>131</sup>

It follows that an abortion undertaken for self-defensive purposes should be given the same sorts of leeway. Of course, in some instances where there is an identifiable medical condition, such as ectopic pregnancies or so-called inevitable spontaneous abortions, where a miscarriage is certain, but pregnancy tissue remains in the fetus, it is clear that a significantly elevated threat to life exists.<sup>132</sup> But even absent an

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130. See *infra* note 234 and accompanying text. Similarly, to the extent that the traditional life ethic actually permits the withdrawal of life-saving medical treatment (LSMT) even in situations where LSMT can save a person's life indefinitely, leeway should also be given for women to undergo abortion for self-defensive purposes. See *infra* note 179 and accompanying text (discussing the traditional life ethic's position that LSMT is permissible in cases of amputations, even where such amputations might be indefinitely life-saving).

131. See *infra* note 234 and accompanying text.

132. See Henry McDonald, *Irish Abortion Laws to Blame for Woman's Death, Say Parents*, THE GUARDIAN (Nov. 15, 2012), [www.theguardian.com/world/2012/nov/15/irish-abortion-law-blame-death](http://www.theguardian.com/world/2012/nov/15/irish-abortion-law-blame-death) (last visited Feb. 16, 2014). A scenario that does not involve self-defense, but a pregnant woman's will to live nonetheless, is where a woman is pregnant with a fetus, but also has a terminal illness and/or is on life support with little likelihood of regaining consciousness, yet is pregnant with a fetus. Terry E.

identifiable condition, the life ethic should take seriously mere *risks* or *probabilities* of imminent grave harm, to the same extent that it does in the context of typical self-defense.

Similarly, the life ethic should take seriously threats to physical health and integrity even where life itself is not at stake, considering that it takes threats to mere property and possessions so seriously. Having a physically dynamic, potentially unpredictable entity inside one's body can already be overwhelming. Even for women undertaking pregnancy in full health, this condition presents enormous physical and psychological consequences. Thus, it should be clear why any kind of complication that arises on top of this, medical or otherwise, might engender the same sense of fear for one's life as the fear that arises in typical instances of self-defense. Furthermore, this fear may be reasonable even if, as frequently also happens in typical instances of self-defense, ultimately no truly deadly threat arises. Thus, to the extent that pregnancy complications tend to proceed rapidly and with a great deal of uncertainty, the very characteristics that are said to justify a broad conceptualization of legitimate self-defense, the universe of abortions considered to be legitimately self-defensive should be enlarged.

Thus, rather than permitting emergency abortion only when there is a near certain risk to life or health, we should permit it even when the risk to life or health is not certain, but still exists to a real degree. Similarly, we should permit abortion even when there is a small chance that the procedure would preserve life or health, just as we might permit the use of deadly force in self-defense even when there is slim hope that it will actually work.

One might object that the distinction between innocence (abortion) and guilt (typical self-defense) justifies these differing interpretations of what qualifies as legitimate self-defense. However, this distinction is untenable, in large part because the person asserting self-defense is herself innocent in both cases, and in large part because traditionalists sanction self-defense so broadly that it permits deadly force even when there is

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Thornton and Lynn Paltrow, *The Rights of Pregnant Patients: Carder Case Brings Bold Policy Initiatives*, HEALTHSPAN (Jan. 31, 1991), [http://advocatesforpregnantwomen.org/main/publications/articles\\_and\\_reports/the\\_rights\\_of\\_pregnant\\_patients\\_carder\\_case\\_brings\\_bold\\_policy\\_initiatives.php](http://advocatesforpregnantwomen.org/main/publications/articles_and_reports/the_rights_of_pregnant_patients_carder_case_brings_bold_policy_initiatives.php). In Part IV, I explain why the withdrawal of LSMT should be considered morally licit, and I would apply the same reasoning to this situation: denied the withdrawal of LSMT, the pregnant woman remains in a traumatic state, thwarting the resolution she has reached with her life and the prospect of imminent death.

significant doubt that an alleged aggressor is, in fact, guilty of any wrongdoing. Ultimately, the ethics of life must accept that self-defensive abortion can be critical in preserving not only autonomy: a woman's desire not to be a mother, for example, which the traditional ethic rejects as a legitimate justification, but even more importantly, a person's life.

#### D. CREATING THE CORNERSTONE OF THE LIFE ETHIC

As the preceding analysis begins to show, the will to live serves as the cornerstone of a better life ethic. The traditional life ethic is certainly with some merit. The ethic does well to capture that reproductive decisions are unavoidably decisions about not just autonomy, either the fetus's or the woman's, but also personal conscience and morality.<sup>133</sup> Given the scientific and philosophical complexities of abortion, as well as its enormous consequences for individuals and society at large, all people should give deep thought to whether an embryo or fetus is a human being. If nothing else, certain phenomena such as race and sex selective abortion should urge each individual to think critically through his or her positions, as much without preconceived bias as possible. If abortion need not be a difficult decision in any other sense, perhaps it should be difficult in this sense.

In thinking through their positions, some will inevitably reach the conclusion that life begins at the moment of conception. While I challenge this argument, I also believe that it is neither a moral or intellectual failing to reach this conclusion.<sup>134</sup> Conception, biology, and the drive to reproduce are powerful, even arguably miraculous concepts worthy of respect, even if not the absolute respect that the traditional life ethic pays them. Partially for this reason, I would not completely reject modest regulations genuinely designed to convey that these concepts are worthy of some regard, regardless of whether it is true that an actual human being's life is at stake.<sup>135</sup> Nor would I oppose regulations that attempt to convey disapproval

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133. See *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992) (stating that the "abortion decision may originate within the zone of conscience and belief").

134. See, e.g., Courtney Megan Cahill, *Abortion and Disgust*, 48 HARV. C.R.-C.L. L. REV. 409 (2013) (arguing that anti-abortionists are inevitably susceptible to sexist prejudices).

135. Merely because the decision is personal does not mean that it must be completely unregulated. The problem with many, if not most, abortion regulations is that they go beyond this. Some regulations do indeed attempt to regulate how women process information. Truly informed consent would give not only accurate information, but also information showing that, even if there is some legitimacy to the anti-abortion position, there are other considerations conversely supporting a pro-choice position. Yet other regulations proffer to be concerned about legitimate interests beyond the moral status of the fetus, such as women's health or race or sex-discriminatory abortion. However,

of, without necessarily prohibiting, abortions that are morally problematic even if everyone accepts that an actual human being's life is not at stake.<sup>136</sup>

That said, it is also far from a moral or intellectual failing to conclude that abortion can be moral. Pro-choice adherents are not inevitably disrespectful and callous toward human life. Nor do they believe that sex should be without moral consequence, despite what some would accuse them of believing. There are a host of reasons that women might choose to procure an abortion. Most of them can be considered "rational," if one discards any prior assumption that abortion terminates the life of a human being. Above all other concepts, the will to live supports the idea that abortion can be moral. And, though the traditionalist position is understandable; it must still work to reconcile the consequences this position will have for women whose physical lives are at stake.

Finally, even when the will to live is present, women must be able to seek an abortion for a number of reasons that should qualify under "legitimate" self-defense. This argument is made all the more compelling by the fact that, in instance of self-defense outside of abortion, the traditional ethic conceives legitimate intent very broadly. In those contexts, the overwhelming will to live of the person claiming self-defense is merited recognition. This concept should be given the same recognition in the context of abortion.

#### IV. ASSISTED SUICIDE

Having tackled the beginning of human life, it is now fitting to turn to its end. This subject implicates two medical procedures that raise significant ethical questions: the withdrawal of life-saving medical treatment ("LSMT") and physician assisted suicide. The withdrawal of LSMT raises the question of when human life should be considered to have

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many of these regulations are actually intended simply to stop abortions. They do so by not merely presenting anti-abortion information to women for them to consider, but by preventing their access to abortion altogether.

136. Given the unsettled debate on the morality of abortion, the importance of medical privacy, and the rational justifications most women have for the procedure, it would be inequitable yet to brand these women as criminals worthy of moral blame, or to prohibit abortion outright. Thus, though I advocate a will to live approach to abortion ethics, I would only ever support regulations attempting to persuade women that their fetus has a certain moral status. I would not support regulations that attempt to coerce by criminalization or total prohibition, even where abortion would terminate a fetus that already manifests the will to live. Incidentally, the same logic would apply to criminalization of when pregnant mothers attempt to engage in risky behaviors, such as drinking alcohol or doing drugs.

ended. Ultimately, it is not easy to provide a clear cut answer to this question. This is made particularly evident by studying the persistent vegetative state (“PVS”), a medical condition where the more advanced sections of a person’s brain no longer functions, but the more rudimentary sections like the brainstem do. An especially noteworthy example of a person with this condition is Terri Schiavo, whose case drew national attention because of the ethical disagreement between Schiavo’s parents and her spouse.<sup>137</sup> Her parents argued that, despite being partially brain dead, their daughter should still be considered to be living. In contrast, her spouse argued that Schiavo would not have wanted to remain on life support in this condition. Ultimately, Schiavo’s spouse prevailed under the law, securing the legal right to remove her from LSMT.

Assisted suicide raises a slightly different question: besides the preservation of another person’s life, can there be a legitimate justification for the intentional taking of life? Or should every justification for assisted suicide be considered inconsistent with the sanctity of life, particularly given that, unlike in abortion, no one questions that a person who chooses to undergo assisted suicide is a living human being?

In this Part, I argue that the same problems with the traditional ethic’s positions on the beginning of life plague its positions on the end of life. Above all, this ethic ignores that, when people make decisions on end-of-life care, they often cannot avoid making “cost-benefit” determinations. Indeed, even the strictest of traditionalist views implicitly accept that these kinds of cost-benefit determinations are sometimes inevitable. This is evident in how traditionalists sanction the withdrawal of LSMT where LSMT would cause an “extraordinary” burden.

I will also argue how, more so than any other principle, the will to live captures human intuitions about why we value human life at the end of the lifespan. For example, the will to live captures why we value a person’s life even when he or she faces difficult medical conditions that limit her capabilities, more so than the idea that a person’s biological processes continue to display a “rational” quality until natural death. In this way, the concept of the will to live provides more support for certain traditionalist

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137. See Cathy Cleaver Ruse, *Terri Schiavo Case Reveals How We Treat Disabled Americans*, LIFENEWS (Mar. 24, 2005), <http://archive.lifenews.com/bio841.html> (asserting that Schiavo was merely a person who had “cognitive disabilities” and thus was unable to feed herself, all of which did not change the fact that Schiavo retained “every ounce of her human dignity and deserv[ing] respect and care”).

positions, namely that human life does not end after partial brain death, and that assisted suicide should be prohibited for even the most debilitating and degenerative conditions, than even a biology based approach does. In this end-of-life context, I will again show how the will to live is superior not only to the traditionalist concepts of innocence and potential, but also to progressive concepts, like autonomy and consciousness.

Having established that we value the will to live intuitively, I will then argue that the will to live can decline as the body nears the end of its natural, ultimately inevitable degeneration. At this point, the body prepares itself, not for perpetual survival at all costs, but for as peaceful and trauma less a termination as possible. Given the possibility that the will to live can naturally decline at this point, I argue that assisted suicide should be considered a morally permissible choice for a patient to make in cases of terminal illness. For the same reason, the withdrawal of artificial LSMT should always be considered a morally permissible choice for a patient to make. This extends to circumstances where only partial brain death has taken place, such as patients in a persistent vegetative state, who have expressed their choice to be taken off life support through advanced directives.

This Part concludes by arguing that, as in the context of abortion, what should qualify as “legitimate” intent in the end-of-life decisionmaking must be guided by the will to live. The traditional life ethic sees a crucial distinction between the intention manifested by the withdrawal of LSMT and the intention manifested by assisted suicide: the former can sometimes be characterized as manifesting repugnance toward a *particular procedure*, but the latter must always be characterized as manifest repugnance toward *life itself*. The traditional ethic uses this distinction to deem the withdrawal of LSMT sometimes permissible, while deeming assisted suicide never permissible.

But the concept of the will to live enables us to reconceptualize the intention of assisted suicide, showing how this procedure need not manifest an attitude of repugnance toward life *per se*. Instead, assisted suicide can manifest repugnance toward a unique state of being—one where a person, in experiencing a burdensome condition so close to his imminent natural death, is thwarted in achieving a sense of resolution with both the life he or she has lived and the prospect of death. Seeking to maintain this sense of resolution through assisted suicide can respect, rather than reject, the value of life. Indeed, even Catholic doctrine sanctions this sort of justification,

even though it does not explicitly discuss the will to live. To wit, it permits the withdrawal of LSMT where a person experiences burdens that are purely psychological, yet still considered “extraordinary.”

#### A. INHERENT DIGNITY UNTIL NATURAL DEATH

##### 1. *Rational Degeneration at the End of Life: Human Potential Until Natural Death*

As in abortion, the traditional life ethic points to the “rationality” of biology to support its absolute prohibition against assisted suicide. This ethic points to the same concept to justify its highly restrictive position on the withdrawal of LSMT, which this ethic sanctions only when sustaining a person’s life would require “extraordinary” means that create “disproportionate” burdens.<sup>138</sup> Similar to its argument that conception begins a “rational continuous process of generating the human organism,” this ethic argues that the human body undergoes “a rational process of degeneration” at the end of life, terminating only at the point of natural whole brain death (that is, the end of all brain activity).<sup>139</sup> And as with abortion, growing out from this biology-based approach is the idea that humans “perfectly” possess infinite potential until natural death, regardless of the quality of their lives.

Assisted suicide ostensibly offends these ideas, as do certain instances of withdrawing LSMT: withdrawing life support for a PVS patient whose “body continues to be effectively nourished by [LSMT] means, and where those means are not otherwise disproportionate to the needs of the patient.”<sup>140</sup> According to this argument, instead of respecting the “inherent” dignity possessed by a person during his natural lifespan, these acts are invariably motivated by a poor quality of life and a desire to end suffering. As such, they treat people not as an “ends” in themselves, but as a “means” whose value is dependent on their capacities and experiences.<sup>141</sup> In other words, these acts engage in qualified “valuation” of

138. See Kevin W. Wildes, *Ordinary and Extraordinary Means and the Quality of Life*, 57 THEOLOGICAL STUD. 500 (1996).

139. Lugosi, *supra* note 10, at 450 (“Human development is a rational continuous process of generating the human organism as well as the rational process of degeneration before death.”).

140. *FAQ on the Persistent Vegetative State*, NATIONAL CATHOLIC BIOETHICS CENTER, <http://www.ncbcenter.org/page.aspx?pid=1286> (last visited Feb. 14, 2014).

141. Pope John Paul II, Address of John Paul II to the Participants in the International Congress on “Life-Sustaining Treatments and Vegetative State: Scientific Advances and Ethical Dilemmas,” ¶ 5 (Mar. 20, 2004), available at

human life. As Richard Stith argues, such valuation is problematic because “no amount of valuing of human life . . . can be in harmony with our intuitive regard for life: We think that the particular individual matters, whereas for something we merely valued, we would accept a relevantly identical substitute.”<sup>142</sup>

## 2. *Motivations Matter, Again*

As was the case in the context of abortion, this reasoning is not without significant appeal. Certainly, a person’s biological functioning continues to be remarkable, even miraculous until its very end. But centering the life ethic on the “rationality” of biology is ultimately as problematic in this context as it is in the context of abortion. Most importantly, this position assumes that only the continuation of the biological process, and never its termination, can be considered sufficiently “rational.” This flaw has implications for the question of when a person’s life should be considered to have ended (implicated in the withdrawal of LSMT). It also has implications for the question of whether terminating one person’s life for reasons beyond preserving another person’s life can be morally licit.

Of course, it is difficult to argue with how remarkable human biology is, even in the last stages of life. Among other things, the human body is extraordinary in its ability to preserve and maintain many of the body’s functions even up until its last moments. That said, one can make the same argument here that applies in the context of abortion: though the traditional ethic values the rational quality of a continuous biological process, it could be considered equally as “rational” to interrupt this process. And adopting either stance effectively requires judging people’s *motivations* for wanting to terminate this biological process, just as in abortion. Even a purportedly objective, biology based approach takes an implicit position on whether these subjective motivations are or are not legitimate. With respect to withdrawing LSMT, these motivations include a desire to remove the burdens caused by artificial assistance, even if a person continues to manifest qualities suggesting that she is alive, such as functioning of the rudimentary parts of the brain. With respect to assisted suicide, these

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[http://www.vatican.va/holy\\_father/john\\_paul\\_ii/speeches/2004/march/documents/hf\\_jp-ii\\_spe\\_20040320\\_congress-fiamc\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/speeches/2004/march/documents/hf_jp-ii_spe_20040320_congress-fiamc_en.html) (arguing that “acknowledging that increasing and decreasing levels of quality of life, and therefore of human dignity, can be attributed from an external perspective” will lead to “a discriminatory and eugenic principle”).

142. See Stith, *supra* note 14, at 55.

motivations include a desire to remove the burdens caused by the biological process itself, when the body is in the final stages of its degeneration.

Here the rationality argument relies on the idea that, even as it nears its end, this biological process is remarkably self-sustaining. This is evident in the traditional ethic's definition of human death, which requires the whole brain to stop functioning. This ethical stance is driven by the idea that the brain is the central coordinator of human existence and sustains a person's so-called "integrative" capacity, in turn showing that this person is self-sustaining.<sup>143</sup> Under the traditional ethic, partial brain death cannot constitute death, because even in that state the brain functions, indicating that a person is still self-sustaining. The Terri Schiavo case is a prime example of how the traditional ethic makes these arguments.<sup>144</sup>

Yet, the traditional ethic also accepts that a person can be considered dead even as his or her non-brain functions are indefinitely sustainable *after* whole brain death, with help from artificial means.<sup>145</sup> The traditional ethic is unmoved by the fact a partially brain dead person is no likelier to regain true self-sustenance than a person in this state.<sup>146</sup> Indeed, to say that a person whose non-brain functions are indefinitely sustainable is lacking "integrative" capacity is to dismiss the body's remarkable biological coordination even without a functioning brain, an argument that traditionalists readily make in support of their position that life begins at conception.

Ultimately, a person's biology in one state is no less remarkable than a person's biology in the other. It becomes clear then that, based on its interpretation of what qualifies as self-sustaining, this ethic adheres to a line between life and death that actually straddles the "rational process of

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143. Pope John Paul II, *Address of the Holy Father John Paul II to the 18th International Congress of the Transplantation Society* (Aug. 29, 2000), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/speeches/2000/jul-sep/documents/hf\\_jp-ii\\_spe\\_20000829\\_transplants\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/speeches/2000/jul-sep/documents/hf_jp-ii_spe_20000829_transplants_en.html).

144. See Ruse, *supra* note 137 and accompanying text.

145. See, e.g., Pope John Paul II, *supra* note 141. See also Smolensky, *supra* note 34, at 45–46 (discussing American society's adoption of the whole brain standard of death).

146. See also Ari Bloomekatz, 'Inevitable': *As Jahi McMath Deteriorates, Brain-Death Case Nears End*, LA TIMES (Jan. 9, 2014), <http://www.latimes.com/local/lanow/la-me-ln-jahi-mcmath-body-deteriorating-20140108,0,4831276.story> (quoting expert Rebecca S. Dresser as stating that "[b]odies of the brain-dead have been maintained on respirators for months or, in rare cases, years," although "once cessation of all brain activity is confirmed, there is no recovery").

degeneration.” Certain body parts can continue to “live,” but the human being as a whole can still be considered dead.

In the end, judging self-sustenance requires judging whether a biological process is *sufficiently* self-sustaining. Exactly like in abortion, these judgments requiring looking at the entity’s power relative to others who help sustain it. Thus, our judgment of whether a person is sufficiently self-sustaining amounts to determining what artificial means of assistance we consider to be too burdensome, on both the patient and those who provide this assistance. Invariably, such judgments are a matter of degree, again exactly like in abortion. And, inevitably, our assessment of people’s subjective motivations for *not* wanting to provide (or to rely on) this assistance impacts these judgments.

The great pains the traditional ethic takes to distinguish a person who has experienced partial brain death from a person who has experienced whole brain death, but whose other organs continue to function, shows that even this ethic engages in judgments that are far from black-and-white. In fact, as Part IV will discuss, cost-benefit analysis is essentially how Catholic doctrine justifies its stance that LSMT can be morally licit even in some circumstances where a person’s *whole* brain continues to function.<sup>147</sup>

That the traditional ethic considers some forms of artificial life sustenance to be moral casts further doubt on how it values the “rational continuous process” of the natural lifespan.<sup>148</sup> Why is abortion immoral, but not artificial LSMT, even though both thwart what is ostensibly a natural process? One cannot argue that LSMT is less artificial than abortion. And one cannot argue that LSMT is less necessary to save human life than is a woman’s choice not to have an abortion. By definition, without LSMT a person will die.

Intuitively, the best answer to this question is that LSMT, unlike abortion, involves only a limited alteration of the natural lifespan. But this distinction should have no bearing on whether the rational quality of

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147. See Wildes, *supra* note 138, at 503–04 (discussing the various factors that Catholic moralists have used to determine whether a means might be too “extraordinary” to be justified, including *quaedam impossibilitas* (impossibility), *summus labor* (excessive effort), and *sumptus extraordinarius* (expense)).

148. See Pew Research, *Religious Leaders’ Views on Radical Life*, PEW RESEARCH CENTER (Aug. 6, 2013), <http://www.pewforum.org/2013/08/06/religious-leaders-views-on-radical-life-extension> (last visited Feb. 16, 2014) (discussing the ambivalent views of various faiths in the United States regarding the prospect of radical life extension).

biology justifies the traditional position on when human life begins and ends, the question at stake in this comparison between abortion and LSMT. After all, this would jump to the conclusion that human life is at stake in the first place, even though one can argue that life should not be considered to exist where artificial LSMT is required.

That people cannot help but to distinguish between abortion and artificial life sustenance only shows that objective biological analysis is not what drives their beliefs. Rather, it is their judgment of people's subjective motivations for wanting certain end-of-life care. This includes their judgment that no *legitimate* reason exists to reject artificial life-saving treatment, or to terminate life artificially. But as I establish next, there can be compelling reasons for making these choices that the traditional ethic considers illegitimate. In turn, these reasons underscore the flaw of basing end-of-life ethics on biology and its supposed "rational" quality.

## B. THE WILL TO LIVE

Having rejected the biology-based approach, I will reiterate that the will to live is the concept that best captures universal intuitions about why we value human life—this time, in the end-of-life context. As I argue, the will to live captures our intuitions better than do the traditionalist ideas of not only rationality, but also innocence and potential. It also manages to avoid the criticism often leveled at the more progressive principles of autonomy and consciousness. It does so by treating the human being as an end unto itself: the end being simply to live. But at the same time, it recognizes what the traditional ethic itself recognizes when it distinguishes between partial brain death and whole brain death, but continued functioning of other organs: that humans need not preserve life at all cost. This is especially true as the body nears its natural, inevitable termination.

### *1. In the Context of LSMT: Partial Versus Whole Brain Death*

That the will to live best captures human intuitions about the end-of-life becomes clear when, once again, comparing the artificial prolongation of life with abortion. That we see the artificial prolongation of life as morally permissible, even at times morally mandatory, is undoubtedly driven by the value we place on the will to live. Consider our reaction to, for example, a person seeking aggressive treatment for cancer. We laud him for fighting to live.

Consider also the persistent vegetative state condition and the Schiavo case, once again. I would argue that the emotional reactions invoked by this case do not arise from some poignant reverence we have for biology, that is, the idea that Schiavo's biological processes had yet to reach their "rational" end. Instead, these reactions are driven by the idea that, with a partially functioning brain, Schiavo continued to be a person with an "integrative capacity." This capacity existed not only in the sense that Schiavo was somehow self-sustaining. Rather, it also existed in the sense that she manifested a metaphysical drive to exist as a unique, individual human being—regardless of the degree of autonomy, consciousness, or quality of life she possessed. Indeed, as this Article argued earlier, a person with a partially functioning brain can maintain a rudimentary awareness, including an awareness of her basic purpose to live. Thus, she maintains a drive simply to continue existing as a unique, individual human being—an idea implicitly captured by the concept of "integrative capacity."

In addition, the will to live likely provides the most coherent justification for the traditionalist distinction between whole brain death, partial brain death, and cessation of respiratory and cardiac functions. After a person has undergone whole brain death, a person's genetic code and chemical composition directs the body's cells to continue functioning, at least for a time.<sup>149</sup> This activity amounts to efforts to maintain the "life" of these cells, efforts that are blind to the fact that the human being has reached the end of his or her lifespan.

As such, this person cannot be said to display even the minimal, instinctual "fight" to live—a quality that can be ascribed to both a fetus with substantial brain functioning and a PVS patient with a functioning brainstem. One can intuitively see that, after whole brain death, a person's cells are essentially automatous. This is true even as they are still attempting to maintain their "life" after the person's life has ended. In contrast, even as those with PVS will likely never experience full consciousness again, their functioning brainstem allows them to maintain some minimal awareness. Thus, they maintain a basic will to live.

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149. See Smolensky, *supra* note 34, at 50 ("[I]t is true that many brain dead patients indefinitely retain cardio-pulmonary functioning with the assistance of life support."). Bloomekatz, *supra* note 146.

## 2. *In the Context of Assisted Suicide: Rejecting Autonomy and Quality of Life-Based Arguments*

The will to live is also a better explanation for common intuitions about assisted suicide, in contrast to not only the traditionalist approach, but also more progressive concepts like autonomy, consciousness, and pain. Arguably the most powerful argument against assisted suicide is that, even when people are suffering during the natural breakdown of their bodies, there is immeasurable worth in their lives. Thus, this breakdown must be allowed to progress naturally. Yet, arguments that assert this immeasurable worth go far beyond pointing out the “rationality” of biology.

One example is a compelling illustration of this argument: Scott Matthews, who was a twenty-eight year old with severe cognitive and physical disabilities.<sup>150</sup> Among these disabilities included quadriplegia, incontinence, and a swallowing disorder that complicated oral feeding, which contributed to his dehydration and malnutrition. Despite this multitude of severely restricting conditions, Matthews made one decision that his mother called purely voluntary: he chose to feed himself.<sup>151</sup> Accordingly, after obtaining a second medical opinion, his parents fought efforts by Matthews’ healthcare providers to force surgical insertion of a feeding tube, in part because of “the effect on Scott’s emotional well-being if he [were] denied the social contact that feeding with others” provides.<sup>152</sup>

This example is a quintessential illustration of the will to live. In the background of a whole host of medical and social conditions that made life difficult for Matthews, he continued to demonstrate an overwhelming affinity for life. This included an affinity for one of life’s most basic activities, that is, feeding one’s self. Of course, one could also argue that Matthews’ story is compelling because, in the face of his conditions, he continued to display the remarkable biological attributes that typically define human life. Or, one might argue that his story is compelling because it highlights the value people place on autonomy. In this case, Matthews’ choice to live his life in the manner he wished to live, specifically to feed himself rather than relying on others to do so.

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150. See Alicia Ouellette, *Disability and the End of Life*, 85 OR. L. REV. 123, 167–68 (2006).

151. See *id.*

152. *Id.*

But this case is far more inspiring because Matthews' decision clearly manifested not only a desire for autonomy, but also a plain and simple will to continue living in the world, even in a state that probably most people could not imagine inhabiting. At the same time, Matthews' story is noteworthy for another important reason: it shows that, even as people are driven to survive in unfathomable conditions, they do not seek to extend life blindly or perpetually. Matthews' choice to reject feeding by a surgically implanted tube exemplifies this idea, because this choice actually *increased* the risk that his life would be cut shorter. It is inaccurate to argue, then, that manifesting the will to live means that one would be willing to preserve life at any price.

The distinction that exists between assisted suicide and typical suicide further illuminates the complexities of the will to live. Many people make no intuitive distinction between these two acts. As with abortion, many think of any kind of suicide as a selfish and cowardly act, blind to the hurt that it causes loved ones. The appeal of this argument cannot be denied. After all, few would respect the complete autonomy of a person considering typical suicide, if not because of the hurt this act will cause to loved ones, then certainly because of the hurt and regret it will cause to the person herself contemplating suicide.<sup>153</sup> In turn, this common view of suicide shows why, by itself, the respect we have for people's autonomy is hardly sufficient to justify assisted suicide.

Yet, there also seems to be a difference between typical suicide and the assisted suicide that "dignity in death" advocates support.<sup>154</sup> In typical

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153. See Tad Friend, *Jumpers*, NEW YORKER (Oct. 13, 2003), [http://www.newyorker.com/archive/2003/10/13/031013fa\\_fact?currentPage=all](http://www.newyorker.com/archive/2003/10/13/031013fa_fact?currentPage=all); JENNIFER MICHAEL HECHT, *STAY: A HISTORY OF SUICIDE AND THE PHILOSOPHIES AGAINST IT* (Yale Univ. Press 2013) (discussing Arthur Schopenhauer and Ludwig Wittgenstein's philosophies against suicide, which argue that the part of a person who wants to commit suicide is only one part, and essentially plots against the rest of the person).

154. See generally DEATH WITH DIGNITY NATIONAL CENTER, <http://www.deathwithdignity.org> (last visited Feb. 14, 2014). One other difference between the two is that the individual plays far more of a role in death when he or she commits suicide, as compared to when he or she undergoes assisted suicide, or the withdrawal of LSMT. This goes to a difference in causation. As I argue in Part IV, there is not necessarily anything wrong with attempting to make a moral distinction between natural and artificial causation of death. However, assisted suicide and the withdrawal of LSMT should not be considered as morally distinct as traditional doctrine, which completely bars assisted suicide, but permits at least some withdrawals of LSMT. The two are more common than different, in that both involve a person nearing the end of the body's natural degeneration. None of this precludes, however, that typical suicide be considered morally distinct from both assisted suicide and the withdrawal of LSMT.

suicide, we generally envision a person who uses death as a means of escaping a troubled life. This person has not achieved a sense of peaceful resolution with life. But that person chooses to die anyway, because he or she experiences a pain that will end only in death. Thus, this person is not fully content with the prospect of death; certainly that person would prefer to live were life a better alternative in his or her eyes. In this sense, dignity is elusive in both life and death.

In assisted suicide, we can envision a person with terminal illness whose will to live has naturally declined, as the body nears the inevitable end of its “rational process of degeneration.” Motivated by the powerful belief that death is natural and gives meaning to life in the first place, this person is truly content with the life he or she has lived. Thus, he or she accepts the coming prospect of a death that, ultimately, is every person’s inevitable end. In this case, the will to live is overcome by attaining a sense of resolution with the life already lived, and with the prospect of mortality: something that every person naturally seeks as his or her time on earth ends, and which only comes when we face the real prospect of natural, imminent death. However, this dual sense of peace is threatened by an illness that takes a violent toll on the body near its end. This illness renders the body unable to provide the palliation it normally would provide to a dying person.

Here it is crucial to note that, though this person is afflicted with the physical and psychological suffering of terminal illness, this person does not primarily seek to escape pain *per se*. Empirical evidence lends at least some credence to this account of typical assisted suicide: as shown by evidence from Washington State, which has legally sanctioned assisted suicide since 2008, concerns about dignity actually take precedence over concerns about experiences of conscious pain and suffering.<sup>155</sup> Of course, one should not downplay the physical pain experienced by terminally ill people. It is not insignificant, and even the best palliative care may be unable to reduce this pain significantly. As “death with dignity” advocates have argued, “[e]ven many [assisted suicide] opponents admit the most aggressive pain management measures fail to alleviate the suffering of 5% of terminally-ill patients, and many Drug Enforcement Administration

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155. See WASHINGTON STATE DEPARTMENT OF HEALTH, 2012 DEATH WITH DIGNITY ACT 7, available at <http://www.doh.wa.gov/portals/1/Documents/Pubs/422-109-DeathWithDignityAct2012.pdf> (last visited Feb. 14, 2014) (revealing that only thirty-three percent of those who chose assisted suicide under Washington State’s Death with Dignity Act were concerned about inadequate pain control).

activities today prevent physicians from providing adequate pain management for suffering patients out of fear of investigation and possible prosecution.”<sup>156</sup>

Yet what matters most to people considering assisted suicide is not the conscious experience of pain, an experience that is not exclusive to the end of life. Instead, what matters is that this pain has a violent effect on the body, leaving it in a state where it is unable to provide sufficient palliation. In turn, this lack of palliation disrupts a person’s ability to make and maintain peace with his life and his imminent death. In particular, this lack of palliation tarnishes the memories of the life that has preceded him, as well as upsets the peaceful last moments that everyone wishes to experience to close out life.<sup>157</sup> And even though a person may “wish” for death to end the pain, being forced to wait for death in a lamentable condition engenders some regret about having to die. After all, someone would ideally prefer to die only after having achieved a sense of peace prior to doing so.<sup>158</sup> In this sense, the condition exacerbates the extraordinary feelings of terror that, to some degree, every person experiences when death is imminent.

In this way, looking at the end-of-life through the lens of the will to live illuminates human intuitions in a way that lends support to assisted suicide. Indeed, this does more to support assisted suicide than looking at the end-of-life through the lens of physical pain, the cornerstone of the “quality of life” argument that progressives typically use to argue in support of assisted suicide. At this stage of the lifespan, pain is indicative not of ordinary wear and tear on the body, or even “merely” a serious, life-threatening illness. Much as it is a significant conscious experience, pain is only a symptom. In particular, it is a symptom of the fact that the body is, not just starting, but nearing the inevitable end of its “rational process of degeneration.” And, at this stage, pain affects the primal will to live.

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156. *Frequently Asked Questions*, DEATH WITH DIGNITY NATIONAL CENTER, <http://www.deathwithdignity.org/historyfacts/questions> (last visited Feb. 14, 2014).

157. As Justice Stevens states in *Glucksberg*, “Allowing the individual, rather than the State, to make judgments about the ‘quality’ of life that a particular individual . . . gives proper recognition to the individual’s interest in choosing a final chapter that accords with her life story, rather than one that demeans her values . . . .” *Washington v. Glucksberg*, 521 U.S. 702, 746 (1997) (Stevens, J., concurring in the judgment).

158. In turn, the person may also experience a fear that life ultimately has little meaning in the grand scheme of a world that appears to show such little mercy and compassion.

One might argue that a person considering assisted suicide is merely “giving up” psychologically, because the *physical* body undoubtedly continues to fight for the person’s survival. One might also point to the fact that, in the context of abortion, an approach centered on the will to live emphasizes the brain’s functioning to determine whether the will to live exists.<sup>159</sup> In the present case, the brain clearly still functions.

But the very terminal nature of terminal illness indicates that the body *is* shutting down and approaching imminent death. So it is possible that the brain is not directing and coordinating the body to do everything it can to survive as long as possible. Instead, the brain may be anticipating the body’s shutdown.<sup>160</sup> This does not mean that the body stops functioning or sustaining itself completely. But it can mean that the body is acting only palliatively to minimize the extraordinary trauma that one inevitably experiences while dying of illness.<sup>161</sup> Yet, illness may overwhelm the body’s natural capacity for palliation, leaving people in a unique state of agony.

Thus, where the weakened body has lost much of its natural capacity to cope with trauma, particularly the unique sort of physical and psychological trauma presented at the end of life, a person’s will to live can decline. In this case, a person may not be driven to survive until the very end. Instead, he may be driven to experience the end of life as non-violently as possible. This drive can respect, rather than reject, the value of life. We will all die sometime, and genuinely being at peace with this fact is something that eludes most of us in our lifetime. But even traditionalists accept that it is possible to achieve this peace. Hence, they sanction the withdrawal of LSMT in some circumstances. Similarly, assisted suicide need not be about quality of life, or any other extrinsic reason not to value one’s life. It can instead be an appreciation of the intrinsic, universal, even divine nature of life and death, that it will reach a natural end. In the end, we should respect, even laud that a person could submit one’s self to this transcendent fact. Just as death is different, so the prospect of it is distinguishable from every other type of suffering one can experience. The will to live is no more absolute than life itself is: people can come to accept their demise, where they might otherwise fight to live.

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159. See *supra* notes 92–98 and accompanying text.

160. See *supra* note 51 and accompanying text.

161. *Id.*

### 3. *Gauging the Will to Live at the End of Life: Setting the Boundaries*

The will to live captures powerful human intuitions in the end-of-life context. Guided by this concept, however, under what exact conditions should we consider assisted suicide or the withdrawal of LSMT to be morally licit?

With respect to assisted suicide, I argue that an imminently terminal illness is necessary to make one's choice to undergo this procedure morally licit. It is this biological state alone—a body facing the very real prospect of natural death, as it nears the end of its physical degeneration that has bearing on a person's will to live. Of course, some might choose not to give up even in the face of imminent death. But no two people experience the unique course of their own body's degeneration in the same way, even if they share the same medical diagnosis. Given the uniqueness and profundity of terminal illness, those who make a different decision can hardly be branded as giving up.<sup>162</sup>

But imminently terminal illness is distinguishable from other types of afflictions, including ones that may inflict even greater physical and psychological pain. These afflictions include, for example, non-terminal psychological illnesses like severe depression, or non-terminal physical conditions like locked-in syndrome.<sup>163</sup> Assisted suicide in these situations would be akin to suicide carried out by a person seeking to escape a troubled life, filled with pain that he or she saw no other way to stop.<sup>164</sup>

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162. Giving up implies a conscious choice. But people do not necessarily consciously "choose" whether or not they have the will to continue living. Instead, it is the *circumstance* of their specific situation and illness that can determine whether or not, biologically speaking, a person has sufficient capacity to cope with extreme trauma at the end of life. So even as people can consciously choose to undertake assisted suicide, they might merely identify – without having actually chosen – that their will to live has declined. In this sense, what is significant about this choice is not that it is an exercise of individual autonomy. What is significant is that this decision is ultimately driven by the will to live, or the absence thereof.

163. Locked-in syndrome is a condition where people retain full consciousness, but cannot move or verbally communicate because of complete paralysis of all voluntary muscles except for the eyes. See George P. Smith, II, *Refractory Pain, Existential Suffering, and Palliative Care: Releasing an Unbearable Lightness of Being*, 20 CORNELL J.L. & PUB. POL'Y 469, 514–15 (discussing assisted suicide for non-acutely terminal conditions, like Lou Gehrig's disease); Carl E. Fisher and Paul S. Appelbaum, *Diagnosing Consciousness: Neuroimaging, Law, and the Vegetative State*, 38 J.L. MED. & ETHICS 374, 383 (2010) (discussing locked-in syndrome).

164. In these cases, I would advocate, as disability advocates do, that the experience of suffering as a result of one's disabilities may be socially, rather than biologically, constructed, at least partially. See Ouellette, *supra* note 150, at 138 (discussing disability rights movements with respect to end-of-life decisionmaking).

This stands in contrast to terminally ill patients who achieve a sense of resolution with both their life and the prospect of their death.<sup>165</sup>

Similarly situated are those who experience terminal illnesses where death is not imminent in the sense of time, as well as those whose genes predict that they will have a terminal illness, long before the body actually begins deteriorating.<sup>166</sup> Despite their illness or future illness,<sup>167</sup> these people differ from people who are imminently dying, whose will to live is tied directly to the real prospect of imminent natural death, and to the burdens a body experiences as it approaches its inexorable end.<sup>168</sup>

With respect to the withdrawal of LSMT, I argue that every person should be given a choice to reject any LSMT that causes more than a temporary burden.<sup>169</sup> Situations involving LSMT are admittedly different from cases of irreversibly and imminently terminal illness. After all, the degeneration of the body can be reversed or at least staved off. Nevertheless, the will to live is not tied to a terminal prognosis. Instead, it is tied to the very real *prospect* of imminent death as the body naturally breaks down, whatever may have caused this breakdown to begin. It is this bodily state alone that has an impact on the will to live. In particular, this state engenders a unique appreciation for a fundamental fact about mortality: even under the best of circumstances, human life will still end in natural death. Therefore, being in this state can engender a person's sense

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165. See *supra* note 157 and accompanying text.

166. See Smith, *supra* note 163, at 515 (asking the question “[d]oes the great suffering this disease causes at the end of life outweigh the joy experienced before it manifests?”).

167. It is possible that public understanding of this distinction is what explains the continuing line in the Netherlands, which has authorized assisted suicide since 2001, between permitting assisted suicide from “lasting and unbearable suffering” and prohibiting assisted suicide for people claiming to be simply tired of life. See Norman L. Cantor, *On Kamisar, Killing, and the Future of Physician-Assisted Death*, 102 MICH. L. REV. 1793, 1823 (2004). A contrast can also be drawn to a person with the non-terminal illness of locked-in syndrome. See *supra* note 163 and accompanying text. While certainly some people in this condition do report a great deal of existential suffering, there is also some evidence, based on a survey of patients with this condition, that their perceptions of well-being and distress are not actually significantly worse than those of age-matched controls. See *id.* Ultimately, I would argue that people with locked-in syndrome generally presents a different circumstance than people with imminently terminal illness. See *id.* In cases of the former, it is difficult to envision a person seeking assisted suicide for any reason other than out of despair over, rather than contentment with, the course of one's life. See *supra* note 154 and accompanying text.

168. At the very least, these people might be legally forced to undergo counseling during a waiting period, to see if they feel differently about life afterwards, an option that is moot for someone who will die imminently.

169. For the purposes of length, this Article does not attempt to define what qualifies as temporary.

of peace with life and death. In turn, this sense of peace colors the will to live.

Indeed, traditionalists themselves acknowledge that LSMT can cause burdens so significant that withdrawing it becomes morally permissible, even if LSMT would have allowed a person to live indefinitely. Therefore, it should not matter that LSMT can stave off a person's bodily degeneration. Ultimately, it should be enough that a person is close to imminent, natural death, even if death is not absolutely unavoidable. When a person undergoes this unique experience, death becomes a real prospect to him. Thus, after also weighing the options for staving off this fate, he or she can now make peace with his mortality, in a way that he or she cannot otherwise do. Conversely, forcing unwanted LSMT would negatively impact that sense of peace.

We should feel obligated to give medicine and care to someone whose body is naturally shutting down. But if we force this care on someone in this condition who does not want it, we assume that people should want to take artificial means to prolong their lives. In doing so, we assume that people should want to live as long as they can, even when the body is already naturally shutting down, as it inevitably will one day. This is simply not the case; people need not want to live as long as they can, or even until they reach a particular stage of the regular lifespan, because every person's life course is actually biologically different. As evidenced by the fact that average human life spans have changed through time, to say that people follow a regular life span is inevitably to impose an artificial construction of what human life is supposed to look like. This is not how the will to live universally works, or should work.

In other words, it should be up to an individual to decide for him or herself what he or she is willing to tolerate to continue living. Only a person who has faced the real prospect of imminent, natural death, and who faces treatment options to stave off that death, whether for a few days or for a few years, can decide whether he has achieved a sense of peace with life and death. And only this person can decide whether undergoing treatment would disturb that peace.

This does not speak to the quality of life no more than the traditionalist approach does when it permits the withdrawal of LSMT in the instances where there is an "extraordinary" burden. Instead, natural bodily degeneration speaks to something much deeper: that we value human life, not primarily because of the quality of any particular life, or because it has

potential until the absolute end, but because it will break down one day even under the best of external circumstances. When the body is already internally breaking down, and would require artificial means to sustain it, we can make peace with the idea that we might not want to live until the absolute possible end, or even until a particular stage of the lifespan. We can make peace with the idea that the natural, biological course of our lives has run, even if it is not like other people's courses.<sup>170</sup>

This distinguishes the rejection of any kind of LSMT from conditions like disabilities or depression. Where LSMT is involved, the prospect of imminent, natural death is acute. So people should be able to reject any LSMT that will more than temporarily burden their life for the purpose of extending it. As with people who choose assisted suicide, their decision need not be about avoiding suffering. Instead, it can be about preserving the resolution with their life that they have attained. Just as in assisted suicide, this resolution would be threatened by the tremendous burdens caused by continuing treatment—burdens that people would have to endure for the remainder of their life.

In this way, the will to live guides the ethics of withdrawing LSMT for a person in the persistent vegetative state. On one hand, a fetus with a partially functioning brain should be considered to manifest the will to live.<sup>171</sup> It naturally follows that PVS patients could be described in a similar way. Given the patients' subconscious brain capacities, they cannot be called automatous, even though they cannot exactly be called fully autonomous either. For example, there is evidence that people with persistent vegetative states continue to have limbic system functioning, which is crucial to awareness and instinct.<sup>172</sup> On the other hand, it should

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170. It should be stated explicitly that natural bodily degeneration matters, not because what causes death is something "natural." Instead, it matters because of the mindset it can create in a person. Thus, even though PVS and even the withdrawal of LSMT in many circumstances can hardly be called "naturally" causing death, the fact that death is naturally coming allows a person to reach a peace with life and death, thus impacting the will to live. Then, a peace comes with the body shutting down, in a way that does not come even when people can merely foresee that some potentially catastrophic external event, such as a car accident, is imminent.

171. At the beginning of life, in comparison to its end, I argue that it is difficult to imagine that a human being with sufficient brain functioning would ever fail to manifest a will to live, regardless of whatever medical condition he or she may have. At this stage, any human being, regardless of medical condition, would undoubtedly be fighting to live. For this reason, I would argue that, with respect to a fetus, the brain's functioning should be sufficient in itself to indicate whether the will to live exists.

172. Haggai Sharon, *Emotional Processing of Personally Familiar Faces in the Vegetative State*, 8 PLOS ONE 1, 4–7 (2013) (finding that the amygdala is still active in PVS patients).

be possible for those with full consciousness to choose assisted suicide. It logically follows that those experiencing PVS, too, might wish *not* to preserve their lives. Again, the will to live does not mean that a person will sacrifice anything to live.<sup>173</sup> Of course, a problem arises from the fact that people with PVS are unable to speak for themselves, in the way people considering assisted suicide can. Thus, where people have not made their wishes clear in advance regarding whether they would like to be kept on life support, such as through advanced directives, LSMT should continue. This is precisely because it is possible that these people continue to possess the will to live.<sup>174</sup> At the same time, it should also be ethical to follow people's clear and advanced directive to remove them from life support. In that state, the body is nearing the end of its natural process of degeneration and approaching imminent death, which is a state that people can experience even if there is a medical possibility of staving off the *absolute* end. An advanced directive indicates that people have already made peace with both life and the prospect of death.<sup>175</sup>

#### *4. Innocence and Potential Despite Suffering: Challenging the Will to Live?*

Finally, just as in the abortion context, the will to live helps to reconcile the powerful idea that humans possess innumerable potential until the natural end of their lives, even in the face of the debilitating suffering. In particular, the concept of the will to live illuminates how making peace with the life one has already lived can be more valuable than preserving life because of an abstract sense that this life continues to have potential. Simultaneously, maintaining a sense of peace and dignity can justify a person's decision to end the traumatic experience wrought by terminal illness *without* rejecting the idea that suffering is an important part of life. In fact, these very arguments are implicitly present in Catholic doctrine on the withdrawal of LSMT. This doctrine permits withdrawal of LSMT

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173. Furthermore, I would point to the comparative intuition that, even under the strictest, Catholic interpretations of the withdrawal of LSMT ethic, there comes a point when it is more than reasonable to believe that sustaining life is disproportionately burdensome, in turn permitting people to take action directly that leads to death (i.e., ending the administration of life-saving medical treatment). See *infra* note 177 and accompanying text.

174. See, e.g., *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 272 (1990) (analyzing evidence that a patient had expressed in advance the desire for removal of LSMT). Cf. Jonathan Herring, *Entering the Fog: on the Borderlines of Mental Capacity*, 83 *IND. L.J.* 1619, 1639 (2008) (presenting various views as to whether following advanced directives respects a person or does not).

175. See *id.*

where artificial means would create “extraordinary” burdens. Thus, this doctrine implicitly considers the absence of a person’s will to live as something that constitutes an “extraordinary” burden.

The idea that people should endure their lives even in the face of suffering, whether physical, psychological, or “existential,” should not be dismissed lightly. Respect for this idea is firmly rooted within Judeo-Christian tradition and its views on death. As one scholar has argued, when it comes to death, the traditional Christian focus has been on “repentance, not dignity,” while “secular society place[s] . . . an emphasis on self-determination and control rather than on submission to God.”<sup>176</sup> But even from a purely secular perspective, there is a certain appeal to this idea. This appeal is evident, for example, in our common intuition against respecting the complete autonomy of a person who wants to commit suicide because of situational depression.

But even accepting moral principles like repentance and submission, or the broader idea that people must embrace suffering, assisted suicide can actually be consistent with these principles. Supporting this idea is the phenomenon of withdrawing life-saving medical treatment, which even the most restrictive traditionalist frameworks have permitted in at least some circumstances. By not always prohibiting the withdrawal of LSMT, these frameworks implicitly accept the idea that, in certain circumstances, the ill need not suffer until the very end of their lives. Ultimately, this idea is just as applicable to the phenomenon of assisted suicide.

The most noteworthy and strictest of these frameworks is the Catholic Church’s. The Church’s framework permits the withdrawal of LSMT where sustaining life would require “extraordinary” means that would create a “disproportionate” burden.<sup>177</sup> As this language suggests, the Church makes a distinction between “ordinary” means to sustain life (which cannot be withdrawn) and “extraordinary” means (which may be withdrawn without violating the sanctity of life).<sup>178</sup> These sorts of distinctions engage in cost-benefit analysis, showing that the Church’s own doctrine is surprisingly tolerant of the idea that people need not always endure suffering, even when the only alternative to suffering is death. This

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176. Shelly Cohen, *De-Moralizing Death: A Humanizing Approach to the Sanctity of Life*, 14 ELDER L.J. 91, 115 (2006) (citing H. Tristram Englehardt, Jr., *Physician-Assisted Suicide Reconsidered: Dying as a Christian in a Post-Christian Age*, 4 CHRISTIAN BIOETHICS 143 (1998)).

177. See Wildes, *supra* note 138, at 500.

178. See *id.*

amounts to revering a biological entity, not truly because its qualities are *inherently* remarkable, but only when it possesses sufficient future potential.

The Church's doctrine is so tolerant of this idea, in fact, that it implicitly recognizes the concept of the will to live. This is apparent in how Catholic doctrine differentiates "ordinary" from "extraordinary" life-saving means. This doctrine goes far beyond evaluating the physical afflictions that a patient experiences. Instead, it looks at not only financial cost of treatment, but also psychological fear and anxiety that a patient would feel toward treatment.

A quintessential example is the person who is permitted to refuse amputation, even if this procedure would not only save his life, but also do so indefinitely, in contrast to treatment that might delay death for only a short time. Traditional Catholic teaching has permitted such refusals, not only on psychological grounds, but also on the grounds that "the repugnance to living with a mutilated body . . . could constitute a moral impossibility for a patient."<sup>179</sup> This "repugnance" amounts exactly to a lack of the will to live. As this example shows, there are certain psychological limits to our willingness to persevere with life.

Of course, the Church attempts to ensure that this exception does not swallow the rule. As the United States Conference of Catholic Bishops has stated, "[i]n keeping with our moral teaching against the intentional causing of death by omission, one should distinguish between a repugnance to a *particular procedure* and repugnance to *life itself*."<sup>180</sup> However, this hardly negates the Church's implicit recognition of the will to live concept. As has been argued about artificial nutrition and hydration, which is normally considered "ordinary" means of LSMT, "The problem . . . is that one cannot draw a sharp distinction between life and the *means* used to sustain life. Artificial nutrition and hydration become part of a patient's life the way amputation does."<sup>181</sup>

Thus, if notwithstanding the idea that people must endure suffering, a person's psychological and moral fears can justify her refusal of an

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179. Wildes, *supra* note 138, at 503–05 (emphasis added). See also GERMAIN GABRIEL GRISEZ & JOSEPH M. BOYLE, LIFE AND DEATH WITH LIBERTY AND JUSTICE: A CONTRIBUTION TO THE EUTHANASIA DEBATE 267–69 (1979) (natural law scholars making similar arguments about when treatment can be refused).

180. Wildes, *supra* note 138, at 510 (emphasis added).

181. Wildes, *supra* note 138, at 510–11 (emphasis added).

*indefinitely* lifesaving amputation, why cannot the same sort of concern justify her refusal of more “ordinary” means of LSMT?<sup>182</sup> And why cannot the same sort of concern justify assisted suicide? After all, one can undergo this procedure while not manifesting “repugnance” toward life itself. Instead, one may have a repugnance toward “living with a mutilated body,” such as by a terminal illness that ravages the body’s ability to cope with end-of-life trauma.

Ultimately, assisted suicide and the withdrawal of LSMT need not reject the idea that a person has potential even in the face of tremendous suffering. Instead, these procedures can be consistent with what Catholic doctrine on LSMT already recognizes: that achieving and maintaining a sense of peace and dignity can sometimes be more important than having to endure biologically violent trauma to preserve one’s life. What probably most troubles us with these practices is our inability to fathom that anyone would ever want to die before natural death—that is, that anyone, regardless of her quality of life, would ever believe that death can be a better alternative to life. But coming to terms with one’s mortality as one’s body naturally breaks down can be a profound thing. It is this state of being and arguably this state of being alone that can affect the will to live.

C. RECONCEPTUALIZING INTENT: ACHIEVING PEACE WITH LIFE AND DEATH

In this context, the will to live reaffirms the need to reconceptualize what should qualify as legitimate “intent” to take a life, this time in the context of end-of-life decisionmaking. As with abortion, the traditional life ethic characterizes both the intended “means” and the intended “ends” of these decisions inaccurately. This is most evident in the distinction that the traditional ethic makes between withdrawal of LSMT and assisted suicide. This ethic permits the withdrawal of LSMT sometimes, while it never permits assisted suicide, in large part because it characterizes the intentions behind these procedures very differently.<sup>183</sup> I argue that this distinction is ultimately untenable.

Of course, one cannot ignore the key difference that does exist between assisted suicide and the withdrawal of LSMT: in the former, death

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182. It must be noted that disability advocates criticize the idea that the thought of being an amputee should incite such repugnance. Still, this hardly establishes that there are no situations or conditions that can “legitimately” cause sufficient repugnance.

183. See *supra* note 178 and accompanying text.

appears to result from a person's action, while in the latter, death appears to result from a person's *inaction*.<sup>184</sup> Arguably, this distinction is what drives people's intuition that assisted suicide is always morally wrong, but that withdrawing LSMT is sometimes morally permissible.

As strong as this intuition is, however, I argue that the action or inaction distinction does not hold up here.<sup>185</sup> Above all, avowing an action or inaction distinction here requires taking an overly narrow view of what qualifies as blameworthy intention, as well as blameworthy causation of harm. In particular, this distinction fails to capture the idea that a human willfully and consciously exercises extraordinary power over human life whenever LSMT is withdrawn. In terms of the specific, subjective intention that a person manifests actions, exercising this power shows little more reverence toward life or transcendental submission than does undergoing assisted suicide.

First, it is problematic to argue that the *means* employed in assisted suicide, but not in the withdrawal of LSMT, is always the act of killing *per se*.<sup>186</sup> This is a question of not only intent, but also causation. With respect to assisted suicide, one cannot seriously doubt that killing *is* used as a means to achieve an end, like ending suffering. The person who administers the procedure is an overwhelming factor in the death of the patient. But one also cannot seriously doubt that the person withdrawing LSMT is similarly a critical but for cause of death, even as the illness itself is a causal factor as well.<sup>187</sup>

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184. See Cantor, *supra* note 167, at 1803–1808 (discussing the action-inaction distinction in the context of assisted suicide).

185. I will argue in Part VI that the action or inaction distinction fails in at least some other contexts, namely in the context of the responsibility to protect. See *infra* notes 261–69 and accompanying text. Instead, the will to live counsels the life ethic to hold people morally responsible for failing in this responsibility, even though their moral blameworthiness cannot be ascribed to action, but rather to inaction.

186. As the Catholic Church has stated, “[a]n act or omission which, of itself [intended means] or by intention [intended ends], causes death in order to eliminate suffering constitutes a murder gravely contrary to the dignity of the human person and to the respect due to the living God.” *Catechism of the Catholic Church*, ¶ 2267, 2277, 2309, available at [http://www.vatican.va/archive/ccc\\_css/archive/catechism/p3s2c2a5.htm](http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a5.htm) (last visited Feb. 18, 2014).

187. Another argument employed to distinguish between withdrawal of LSMT and assisted suicide is bodily integrity, as the former involves removing something from the body, while the latter involves putting something into the body. Yet, to the extent that the former is actually justified by autonomy, the same argument from autonomy naturally extends to a person choosing to have his or her body “invaded.”

This is particularly evident in the cases where a patient is permitted to refuse life-saving treatment like an amputation not because of physical concerns, but because of psychological ones. In these cases, it should be intuitive to us that it is man, not the “natural” course of illness that causes death. Indeed, that at least some instances of withdrawing LSMT are considered immoral only reinforces this fact. One also cannot doubt that typically the person withdrawing LSMT not only foresees, but also specifically wishes for death to follow imminently, and acts in accordance with that desire. After all, this death will remove the tremendous burdens that the patient has been experiencing. None of this is to say that withdrawing LSMT and assisted suicide are exactly equivalent in intent and causation. But the two are far from polar opposites.

The *ends* sought in assisted suicide and in the withdrawal of LSMT are also quite similar. As the Catholic doctrine on LSMT states, there is a difference between “repugnance to life itself” and “repugnance to a particular procedure.”<sup>188</sup> This doctrine also concedes that some instances of withdrawing LSMT can fall into the latter category. But deciding to undergo assisted suicide does not necessarily manifest an attitude of repugnance toward life itself. A person making this decision need not consciously believe that life is not worth living or that it is better to die than to live. This is no truer than self-defense constituting a belief that it is better that this person die than live, even though this is what self-defense amounts to.<sup>189</sup> Instead, the will to live makes it possible to reconceptualize the intended “ends” of assisted suicide as sustaining one’s sense of peace with life and death, rather than seeking to avoid suffering. In this way, rather than manifesting “repugnance toward life” itself, this choice can actually manifest respect for it.

But attempts to distinguish the two on the basis that one artificial sustains life, while the other artificial terminates it, are ultimately unconvincing. Consider that, under Catholic doctrine, artificial LSMT is morally mandatory for a person who faces imminent death, but can be easily restored to a healthy state. In that case, artificiality is irrelevant; what matters is that the benefits of LSMT far outweigh the burdens. I would argue that what really drives people’s predisposition to distinguish assisted suicide from withdrawal of LSMT is that they calculate the costs and benefits of the two procedures very differently. In particular, they

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188. See *supra* note 180 and accompanying text.

189. See Cantor, *supra* note 167, at 1805 (discussing the bodily integrity argument).

undervalue the burdens experienced by a person facing terminal illness, and overvalue the costs of terminating life. By contrast, when they deem that LSMT can be withdrawn from people experiencing “extraordinary” burdens, they weigh the resultant costs and benefits more accurately.

Thus, does the ultimately small difference in degree of intent and causation justify the significant moral distinction that the traditional ethic makes between assisted suicide and withdrawal of LSMT? Does one show a significantly greater reverence toward life or submission to a higher power than the other? No, as the concepts of action and inaction are not important in themselves. Rather, they are important to the extent that they show how closely an agent is tied to a harmful result, making that agent blameworthy.<sup>190</sup> The action or inaction distinction can be morally significant in contexts where the gap between action and inaction speaks to a big difference in the agent’s responsibility for the harm. But, where one is comparing withdrawal of LSMT and assisted suicide, the gap between action and inaction speaks to an ultimately insignificant difference in the agent-harm relationship.

Ultimately, this distinction fails to capture the *full* extent of human intuition regarding why we value human life at the end of the lifespan, a matter that touches on extremely complex existential issues going far beyond this one distinction. The withdrawal of LSMT is no less “playing God” than assisted suicide. Instead, one usually makes an active choice to die. Surely this must overwhelm the fact that, chronologically speaking, the illness is the final cause of death, rather than the withdrawal of LSMT that may have occurred only moments earlier, accompanied no less by a person looking forward to death. In the end, both physician assisted suicide and the withdrawal of LSMT involve actions that intentionally lead to a person’s imminent death. And both involve a person that, because of some condition, was already near the end of her body’s natural degeneration.

Here it would be remiss not to address the slippery concerns of expanding what qualifies as “legitimate” intent in order to sanction assisted suicide. Many argue that assisted suicide is problematic because it can be coerced, crossing the line into involuntary assisted suicide or even active euthanasia.<sup>191</sup> These concerns underscore two potential problems with expanding the universe of what qualifies as “legitimate” intent: the

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190. See *supra* notes 15–16 and accompanying text.

191. See Cantor, *supra* note 167, at 1817–18, 1825–31.

challenges of securing truly informed consent from a “competent” individual, and the temptation for well-meaning people to disregard even a patient’s clear consent *not* to undergo a particular procedure.

Though it is beyond the scope of this Article to address these concerns fully, it suffices here to say that, as in the abortion context, I am far from supportive of complete deregulation. For example, I support regulations designed to secure truly informed consent from “competent” individuals, whether the individuals are seeking assisted suicide *or* the withdrawal of LSMT.<sup>192</sup> Though I do not advocate a blanket ban on assisted suicide or withdrawal of LSMT, I also recognize, that, just as with abortion, certain justifications for these actions are morally problematic. It follows that regulations should attempt to curb life ending decisions that are based on these justifications. Thus, regulations should attempt to ensure that people are in a sufficient frame of mind to make a life-ending choice, so that this choice is not motivated by desperation.

For example, regulations should prohibit assisted suicide for conditions like disabilities or severe depression. As I earlier argued, such instances of assisted suicide would constitute a decision motivated more by depression than by a sense of resolution with life and death. As with selective abortion, I would argue, in line with many disability rights

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192. Related to the issue of involuntary assisted suicide is the issue of children and assisted suicide, which is a complex and emotionally charged issue that can only briefly be addressed here. Yet, it is an important issue to address in part because countries, such as Belgium, have recently legalized this practice. *Belgian Senate OKs Child Euthanasia Bill*, USA TODAY (Dec. 12, 2013), <http://www.usatoday.com/story/news/world/2013/12/12/belgium-senate-child-euthanasia/4000713/> (discussing Belgium’s passage of a bill permitting euthanasia for children). In Belgium, the requirements that a case must meet before a child is permitted to undergo physician assisted suicide are rigid and strict: the child must be in great pain, suffer from a terminal condition, be expected to die soon, and have given informed consent. Realistically, however, even the strictest possible requirements will not change the reaction of horror that most people would have to the prospect of children undergoing assisted suicide. For most people probably, death seems an unnatural aberration that is uncomfortable even to think about most. But this is especially true with children, whose dying is an aberration of what is considered to be the “natural” lifespan, and represents the end of both the innocence and infinite potential that we consider every child to have. So it is more difficult to accept that a child, even one with terminal illness, would ever want, or have the mental competence, to assess that their body is shutting down, rather than fighting to live. But nothing prevents a child with terminal illness from deciding, based on the totality of the circumstances, that the body is undergoing the natural process of degeneration. Nothing prevents this child from deciding that, in order to preserve the peaceful resolution he or she has achieved with his limited life, he or she would like to avoid dying in the violent manner that the last stages of terminal illness might entail. For all the innocence and infinite potential of a child, a child with a terminal illness might choose not to “pursue” that potential. Instead, he or she may accept that, even with the limited time he has had, his life has been perfect as it is.

advocates, that assisted suicides motivated for these reasons are independently morally problematic. In this instance, they would amount to discrimination and even eugenics with patient consent.<sup>193</sup> Thus, a person claiming these reasons for seeking assisted suicide should not be declared competent enough to make this choice. Regulations are important to ensure, for example, that the disabled are prevented from procuring assisted suicide out of despair, which they must be doing if their bodies are far from naturally shutting down.

It must also be noted that, in the end, it is possible for someone to regret this decision. But it is also possible for people to regret the withdrawal of LSMT. Yet, traditionalists sanction the withdrawal of LSMT in at least some instances. This amounts to accepting that, in some circumstances, it is morally permissible to end one's life before the *absolute* possible end, despite the unavoidable possibility of regret.

The possibility that assisted suicide will open the doors to active euthanasia is also an issue that we should not take lightly.<sup>194</sup> But this, too, can be addressed with robust regulations. Naturally, those disinclined toward assisted suicide will be unconvinced by the argument that regulations will mitigate these problems.<sup>195</sup> At the same time, the previous discussion of the differences in intent or lack thereof between assisted suicide and the withdrawal of LSMT makes two things very clear. One, ostensibly clear moral distinctions can actually be very blurry. Two, even conceding its imprecision, line drawing is an inherent and necessary part of end-of-life ethics.

This does not ultimately mean that the distinction between voluntary assisted suicide and active euthanasia is not morally significant; certainly, it is. Instead, it is necessary for us to accept that certain actions should be

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193. See Ouellette, *supra* note 150, at 126–27 (discussing the position of disability rights' advocates).

194. See Cantor, *supra* note 167, at 1826 (describing the slippery slope to active euthanasia, particularly for suffering patients who have become incompetent and thus cannot make their own decisions).

195. The problem of regulating euthanasia is also salient within the context of the withdrawal of LSMT. As Cantor has stated, "in jurisdictions where removal of life support is legally confined to formerly competent patients who previously articulated their wish to forgo life support in the circumstances now at hand, circumventions and contrivances by medical staff are common." *Id.* at 1819. Consequently, "[t]he medical staff either coaches the family to recall prior 'instructions' from the now-incompetent patient or suddenly determines that the LSMT is actually futile and should be withdrawn." *Id.* at 1819. Still, it is possible to set the standard at the highest levels possible: clear, previous instructions from the patient, the absence of which would demand that LSMT be sustained.

deemed morally permissible, even when sanctioning these actions creates a real slippery slope concern. To wit, the traditional life ethic does not absolutely bar the withdrawal of LSMT, even though there is a real risk that, under certain circumstances, withdrawing LSMT would amount to active euthanasia. In fact, many would say that this is exactly what happened with Terri Schiavo.<sup>196</sup> Yet, even after that incident, the Catholic Church did not go so far as to prohibit all withdrawals of LSMT.

A final point: it should not escape notice that traditionalists emphasize slippery slope concerns far more emphatically here than they do when discussing self-defense. This should not be surprising, given that, outside of the abortion context, the traditional ethic has a very broad interpretation of what qualifies as “legitimate” intention in self-defense.<sup>197</sup> Of course, unlike even abortion, assisted suicide can never be characterized as an act of self-defense, legitimate or illegitimate. Still, “legitimate” self-defense is conceptualized so broadly as to permit killings that fall in a murky gray area between licit and illicit. By contrast, “legitimate” end-of-life acts are conceptualized so narrowly as to prohibit assisted suicide completely, even though, in some circumstances, withdrawal of LSMT itself can amount to assisted suicide. This contrast makes it clear that the traditional ethic is only selectively concerned with slippery slopes.

All of this goes to show that preserving another person’s life is not the only justification for taking a life that should be considered legitimate. It is true that assisted suicide and the withdrawal of LSMT take the lives of people who are not “guilty” of wrongdoing, without the possible benefit of preserving another person’s life. But to value only concepts like innocence and life preservation is to ignore some of the strongest and most universal human intuitions regarding why we value human life, specifically in the end-of-life context. What best captures these intuitions is the concept of the will to live, a concept that, under the right circumstances, acts of assisted suicide or withdrawal of LSMT can actually respect. In particular, these acts recognize that certain end-of-life conditions can impact this will, justifying a person’s choice to undergo these procedures.

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196. See *supra* note 137 and accompanying text.

197. See *supra* notes 120–32 and accompanying text.

#### D. REINFORCING THE CORNERSTONE OF THE LIFE ETHIC

Decisions to undergo assisted suicide, or the withdrawal of LSMT, are inherently decisions of conscience. On the one hand, there are numerous arguments against assisted suicide, all of which must be seriously acknowledged: the value of life, eugenics and vulnerability concerns, and the idea that suffering is a part of life. We should also understand why people would intuitively object to *any* intentional taking of life. On the other hand, it is not an abject moral or intellectual failing to reach the conclusion that assisted suicide can be moral in some circumstances, or that the withdrawal of LSMT can be moral in a much wider range of circumstances than the traditional life ethic currently recognizes. The will to live shows how these procedures can actually manifest a profound respect for the value of human life and death. In summary, the traditionalist reaction is certainly understandable and intuitive. Certainly, we want people to live. That said, it must work to reconcile the consequences this position will have for people who, despite even the most advanced palliative, may be unable to achieve the peace we would all seek in the same situation.

#### V. CAPITAL PUNISHMENT

The previous Parts have largely addressed the issue of when human life begins and ends. Thus, it is necessary to explore further the question of when taking a person's life should be considered morally licit when human life indisputably exists. The previous discussions of abortion as self-defense and assisted suicide partially addressed this question. But fully addressing this question requires addressing one circumstance where killing has traditionally been considered licit: when a person acts in such an egregiously wrongful way that he is said to have forfeited the "inherent" dignity of his life. Naturally, discussion on this subject begins with a discussion of capital punishment. Capital punishment presents a question that has inspired great debate: whether "a life for a life" reaffirms or demeans the sanctity of life. Debate on this issue is particularly interesting because of traditional Christian rhetoric that the most heinous wrongdoers have lost the inherent dignity of being human. According to this rhetoric, the wrongdoers have transformed themselves into subhumans that operate outside of the "natural" human order. In this way, debate over capital punishment is intertwined with the question of when personhood begins and ends. This debate also shows that biology is not all that matters to

traditionalists: biology alone matters in determining when human personhood begins, but traditionalists also believe that human personhood can *end* long before the body's biological processes have ended.

Ultimately, it is problematic to justify capital punishment on the grounds that inherent dignity is forfeitable. On the one hand, I accept that retribution can be an appropriate justification for punishment generally. On the other hand, capital punishment necessarily goes a step further than mere retribution: it engages in not just retrospective judgment of an individual's actions, but also prospective judgment of the individual's future worth as a person.

Thus, deciding that a person deserves the death penalty amounts to a determination that this person has lost what was supposed to be his "inherent" dignity. This idea is in deep tension not just with the concept of infinite human potential, but also with how *innumerable* the traditional life ethic claims a person's potential to be otherwise. In this sense, two different ideas of what is natural and rational regarding human life, that a human being is "perfect" despite his mistakes, and that a human being can lose his status in the human order because of his mistakes, contradict each other.

In addition, that capital punishment judges a person's worth illuminates a flaw in the argument that capital punishment manifests a "legitimate" intent: killing in this context not only serves as a *means* of retribution, but also becomes the very *end* in itself. This is because capital punishment is intended to affirm that a person *deserves* to lose both life and personhood status.

Switching gears, I argue that the concept of the will to live should inform whether we see the death penalty as morally licit. On the one hand, I argue that what fundamentally drives our desire for retribution for the most heinous crimes is, ironically, a respect for the will to live. Thus, we see certain crimes as particularly heinous because of the repugnance they reveal toward not only innocent life or another person's autonomy, but also a victim's primal will to live.

On the other hand, the concept of the will to live ultimately counsels against capital punishment. This is because the retributive interest of the death penalty is met only when a perpetrator can empathize with the victim's experience, particularly the horrific experience of having his drive to live overwhelmed by man. Indeed, for the perpetrator to know exactly

what this feels like is why many victims' families are so insistent on the death penalty. But to overpower the will to live intentionally is at odds with why we value the will to live in the first place: because we see it as the most powerful human force, one that *should* triumph over any human driven attempt to overpower it in turn. For this reason, capital punishment must be considered morally illicit.

A. A LOSS OF "INHERENT" DIGNITY

1. *Retribution and the Natural and Rational Human Order*

The traditional life ethic prizes the inherent dignity of a person, which is retained throughout that person's natural biological lifespan. However, it also considers certain killings to be legitimate. Indeed, it deems these killings as a "natural" and "rational" part of the human order, as much as biology itself is natural and rational. As the Supreme Court stated in *Gregg v. Georgia*, "The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law."<sup>198</sup> In turn, the concept of retribution drives the idea that capital punishment could be legitimate, despite amounting to intentional killing.<sup>199</sup>

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198. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (citation omitted). *See also infra* notes 207, 212–13 and accompanying text.

199. I will not address the consequentialist arguments for capital punishment. There are many reasons to dismiss these arguments within the context of the present discussion, but I will highlight two. One, while capital punishment can be analogized to self-defense as a means of preserving life and security, it is highly questionable that the true motivation for pro-death penalty advocates is actually self-defense, whether through the deterrent or incapacitative effects of the death penalty. Two, even conceding for the sake of argument that preservation of life and security is a genuine motivation behind the death penalty, not only is it questionable whether it is actually necessary and effective in achieving these objectives (an argument already made by many others), but an inconsistency problem also arises: why is uncertainty regarding whether abortion is ever necessary for self-defense enough to make it immoral, while uncertainty regarding whether capital punishment is truly necessary for deterrence is *not* enough to make it immoral? In those contexts, any possible life-preservation justification must be near-irrefutably established in order to qualify as legitimate. If, for example, capital punishment can be deemed morally acceptable despite the empirical uncertainty that capital punishment is actually a better deterrent to crime than is life imprisonment, why cannot abortion be morally acceptable even in the face of alleged uncertainty that it ever genuinely serves self-defensive aims? Or, similarly, uncertainty that any particular abortion method, such as partial-birth abortion, is ever genuinely necessary to achieve self-defensive aims? *See supra* Part III. For reasons such as these, I address only the retributive arguments for capital punishment.

As a justification for punishment generally, as well as for capital punishment specifically, retribution has been no stranger to criticism.<sup>200</sup> But none of that criticism changes an important fact about our criminal justice system: this system is founded on the idea that, when people act in certain ways, they are deserving of blame. In turn, blameworthiness is built on two ideas: free will and proportionality. Regarding free will, people are said to be blameworthy because they generally have free will to choose between acting good and acting evil. Regarding proportionality, blameworthiness is considered to be proportional to the degree of the connection between an agent and the harm her actions allegedly cause.

Considering all of this, one cannot deny the appeal of the idea that taking a person's life is "just deserts" for choosing to take another person's life. Invariably, crimes legally warranting the death penalty manifest extraordinarily malicious intent on the part of the perpetrator, who specifically and voluntarily wills the suffering that his or her actions cause. The perpetrator is very guilty and very blameworthy, and so it is understandable why people would seek retribution.

The purpose of retribution, as well as the reason we should see it as "natural" to human order, is perhaps best communicated by philosopher Jean Hampton. Hampton argues that retribution undoes a "moral injury" or an "affront to the victim's value or dignity."<sup>201</sup> As another author similarly puts it, retribution "undo[es] a certain facet of the offender's wrongful imposition of control, namely, the offender's implicit assertion of the power to impose control over the victim and other members of the community."<sup>202</sup> Retribution can "annul the offender's *message* that she has the power to control the violated right, even if it cannot retroactively negate the offender's *actual* imposing of control or defeat the continuing physical effects of the crime."<sup>203</sup>

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200. See *Gregg*, 428 U.S. at 237, 240–41 (1976) (Marshall, J., dissenting) (criticizing the idea that retribution is "just deserts" as an improper rationale for capital punishment, and arguing the "crucial role [that retribution plays] in determining who may be punished by no means requires approval of retribution as a general justification for punishment").

201. Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1666 (1992). See also *id.* at 1691 (arguing that capital punishment likely succeeds in "simultaneously respect[ing] the wrongdoer and defeat[ing] him in a way that destroys his claim to mastery").

202. Benjamin B. Sendor, *Restorative Retributivism*, 1994 J. Contemp. Legal Issues 323, 339 (1994).

203. *Id.* at 340 (emphasis added).

Looking at capital punishment through the lens of this account of retribution, one sees a potent justification for the death penalty, one going far beyond the idea that the death penalty functions only as thinly veiled revenge.<sup>204</sup> The death penalty can neutralize that which makes these perpetrators very blameworthy: their will to impose their control over others, in a way that is horrifying.<sup>205</sup> In this sense, punishment does not serve to address tangible harm, such as physical or psychological pain and suffering. Instead, it serves to address a harm to the dignity of the community and of the victims. For these reasons, it is difficult to argue that people who personally support the death penalty must themselves possess a callous attitude toward life.

## 2. *The Loss of Inherent Dignity and Its Conflict with Potentiality*

Despite the appeal of capital punishment as a means of retribution, it is also problematic in a significant sense: the death penalty is in deep tension with how unequivocally the traditional ethic reveres human “potential.” The traditional ethic attempts to reconcile its support for retribution with its reverence for human potential, by asserting that people who have committed such horrendous crimes have completely lost their inherent dignity as human beings. However, it is difficult to reconcile this argument with traditionalists’ stance that, throughout their natural lifespan, people retain all of their inherent dignity even with repeated, if more “minor” wrongdoings.<sup>206</sup> The question arises: why is inherent dignity such an all or nothing proposition? Ultimately, the idea that people can lose their inherent dignity depending on how they act is far more dangerous than the idea that human dignity is conditional on the presence of certain physical and mental capabilities. The latter is the very idea that the traditional ethic rejects when it condemns assisted suicide and abortion.

As a basic matter, capital punishment cannot avoid placing a very clear value on the worth of a person’s life. A pithy illustration of this point is the traditional concept of *lex talionis*, or an “eye for an eye.” It is

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204. See Hampton, *supra* note 201, at 1691 n. 49 (discussing those who equate retribution and revenge).

205. Stephen Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1823 (1999) (arguing that “because insofar as the wrongdoer identifies with the victim and insofar as punishment is necessary . . . to vindicate the victim’s moral worth, so too is penance a necessary part of the process of expiation and atonement”).

206. See Stith, *supra* note 56, at 360 (discussing the idea that humans are made in the image of God, and, in that way, are priceless and perfect).

difficult to argue that the tit-for-tat nature of “an eye for an eye” is anything *but* valuation.<sup>207</sup> Even *lex talionis* aside, no theory of capital punishment can circumvent the fact that, when administered, the death penalty clearly considers a person’s life to have a finite value, one that is far less than the innumerable potential that all people ostensibly have during their natural lifespan.

At best, it is a tricky endeavor to evaluate the worth of people’s lives. The problem of bias in capital sentencing makes this point very effectively. As Thomas Berg has argued about the process of sentencing for death eligible crimes:

[T]he presentation of victim impact statements to the jury naturally implies that some victims’ lives are worth more than others, and it calls on the jury to measure even the murderer’s life in a flawed way. Likewise, when the application of the death penalty systematically values white victims more than black victims, and white murderers more than black murderers—and when the public realizes that this is so—the message undermines the inherent value of life rather than affirming it. And when innocent people are sentenced to death, often because of inadequate, underfunded legal representation, the message could hardly be clearer that some human life is cheap.<sup>208</sup>

The problem of these biases becomes even clearer when considering traditionalist views on bias in the context of abortion and assisted suicide. In those contexts, traditionalists point to even the slightest possibility that biases like these will influence people’s decisions, in order to argue that these procedures should *always* be considered morally illicit. For example, one of the most formidable arguments against abortion and assisted suicide is that human beings allow prejudiced judgments about the worth of certain minority or vulnerable groups to affect their decisionmaking.<sup>209</sup> But this

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207. See Rosenberg & Rosenberg, *supra* note 12, at 525–26. According to Rosenberg and Rosenberg, the proper Biblical interpretation of an eye for an eye is that it is not a law of retaliation, but rather compensation: “this aphorism instead means only compensatory damages . . . . Requiring retaliation rather than compensation as a remedy for assault would be in tension with this approach, for retaliation is a punishment and does not assist the victim in any meaningful way.” *Id.*

208. Thomas C. Berg, *Religious Conservatives and the Death Penalty*, 9 WM. & MARY BILL RTS. J. 31, 45 (2000).

209. Pope John Paul II, *supra* note 141 (arguing that considering “increasing and decreasing levels of quality of life, and therefore of human dignity” will lead to “a discriminatory and eugenic principle”).

argument is equally strong, if not even stronger, in the death penalty context.

As these examples suggest, the death penalty does not merely determine who is retrospectively deserving of death for the sake of retribution. Instead, it cannot avoid devolving into an exercise of determining who is *prospectively* salvageable despite their wrongdoing, thus retaining their inherent dignity.<sup>210</sup> In other words, capital sentencing inevitably turns into a search for those who are *irretrievably* evil and, as such, unforgiveable. This category of people stands in contrast to the category of people who are somehow forgivable, despite their horrific intentions and actions. With respect to this latter category, forgiveness eliminates the need for the death penalty to serve a retributive purpose, because forgiveness itself “end[s] the continuing, indirect control that the offender’s past conduct has over the victim and the community.”<sup>211</sup>

Indeed, from a Biblical perspective, the question of who deserves capital punishment is inextricably intertwined with the question of whether a person is “salvageable.” As Thomas Aquinas argues, those who commit the worst crimes have “dehumanized” themselves to the status of subhuman beasts, who disrupt the natural and rational human order.<sup>212</sup> Thus, in order to root out this evil and preserve the rest of God’s dominion, they must be eliminated.<sup>213</sup>

Ultimately, these kinds of determinations about a person’s worth are morally problematic, if not impossible to do in a principled, consistent way, considering the ethical principles to which traditionalists adhere in the contexts of abortion and assisted suicide. Consider the example of a perpetrator who, among all wrongdoers, would probably most deserve the death penalty: a mass murderer. Envision that this murderer is undoubtedly

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210. As Joseph Bottum has argued, victim impact statements imply that the death penalty aims to compensate survivors for the harm they experience, as opposed to teaching that life is sacred. See Ethics and Public Policy Center, *Center Conversation: Current Catholic Thought on the Death Penalty* (2002), available at <http://www.eppc.org/library/conversations/02-deathpenalty.html>.

211. Sendor, *supra* note 202, at 399.

212. See AQUINAS, *supra* note 118, at IIa-IIae Q. 64, art. 2 (“By sinning man departs from the order of reason, and consequently falls away from the dignity of his manhood, in so far as he is naturally free, and exists for himself, and he falls into the slavish state of the beasts, by being disposed of according as he is useful to others.”).

213. *Id.* (“Hence, although it be evil in itself to kill a man so long as he preserve his dignity, yet it may be good to kill a man who has sinned, even as it is to kill a beast. For a bad man is worse than a beast, and is more harmful.”).

sociopathic, and not only displays little remorse or repentance, but also continues to feel pride and even glee for his horrific actions. For comparative purposes, this example might be compared to those instances where assisted suicide and abortion are most morally problematic. An example would be a person who does not have a terminal illness, but wishes to undergo assisted suicide because of situational depression. Another example would be a person who wishes to undergo abortion mere days before her due date, because she has suddenly decided that she does not want a female baby.

But then consider murderers who *do* express at least some remorse and repentance for their actions. In that case, how can society truly decide that, instead of deserving to live because they still have potential as human beings, they are so evil that they must be “rooted out”? Under the backdrop of the principle that people should be treated as “ends” in themselves, how can society argue that these people are no longer qualified to be “ends” in themselves, and that they have so dehumanized themselves that, despite their overwhelming wish to continue existing in the living human world, they do not deserve to do so?<sup>214</sup> Why is that outcome any more “natural” or “rational” than the idea that human beings retain their inherent dignity, and are “perfect” in form and image despite any mistakes they might make?

Even with respect to the mass murderer who displays no remorse for his actions, the right cases for comparison are not the “easy” ones where assisted suicide and abortion are most morally problematic. Instead, we should address how this person can be deemed to have no value that merits preserving his life, even though he continues to have the same human needs and desires that drive us all, but a person who is in the last, most debilitating stages of a neurodegenerative disease *must* continue to live, because he is deemed to have infinite worth.

One might counter that it is through his wrongful exercise of free will that the mass murderer has lost inherent dignity and potential. In contrast, a person considering assisted suicide has not exercised free will in such an egregious way. Yet, that egregious wrongdoers can somehow redeem their

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214. See Hampton, *supra* note 201, at 1691 (discussing how, with regards to a perpetrator who “may be morally worse than others, the Kantian theory of value insists that he is still an end-in-himself, and thus still someone whose value requires respect”); Tom Sorell, *Punishment in a Kantian Framework*, in PUNISHMENT AND POLITICAL THEORY 10, 17–18 (Matt Matravers ed., 1999) (arguing that criminals transgress the social compact that society live free from the violence of the “natural state”).

dignity, up until the moment of natural death, is only complemented by the idea that those with debilitating conditions have incalculable worth until the same moment. Furthermore, the idea that a person's inherent dignity is conditional on that person's actions is as dangerous as, if not more dangerous than, the idea that personhood is conditional on the existence of certain physical and mental capabilities.

Even more so than the latter idea, where the status of personhood is dependent on a person's general capacity for autonomy, but not on how he exercises his autonomy and free will,—the former essentially states that a person possesses the ability, and indeed are required, to *earn* and to *keep* his or her humanity. By contrast, even the traditional ethic gives *some* consideration to the existence of certain physical and mental capabilities, as evident in the distinction it draws between partial and whole brain death. Evaluating these kinds of capabilities cannot be inherently problematic. Instead, it is actually necessary, to some extent.

A final, somewhat novel comparison to abortion underscores the inherent problem of determining which wrongdoers continue to possess potential as human beings, and which do not. Many of those who believe that rapists should be eligible for capital punishment also believe that there should be no rape exception to legal restrictions on abortion.<sup>215</sup> Absent this exception, society effectively considers an “innocent” zygote as equal in value—if not more valuable than a similarly innocent victim of rape. However, this very stance implies that even morally heinous people like rapists have the potential to “produce” something morally priceless, as evidenced by their part in creating a creature whose life is valued to the utmost.

This irony becomes even greater in the case of child rapists.<sup>216</sup> Support for capital punishment of child rapists is even stronger among society, indicating a belief that this kind of rape is even more egregious. But this support is in tension with the stance that even young girls who get pregnant by rape must carry to term, even despite the high physical and psychological risks of such a pregnancy. The justification for this stance is

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215. See, e.g., *Coker v. Georgia*, 433 U.S. 584 (1977) (Burger, C.J., dissenting) (arguing that there could be some circumstances where the death penalty is a proportionate response to the crime of rape).

216. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (Alito, J., dissenting) (arguing that it is untrue that “every person who is convicted of capital murder and sentenced to death is more morally depraved than every child rapist”).

appealing: the young girl is carrying something priceless in value. Yet, one cannot deny that the rapist himself was an absolutely critical factor in producing that priceless and unique human being. In this sense, it is difficult to say that the rapist himself has no potential as a human being.

## B. THE WILL TO LIVE

These problems suggest that the ethics of capital punishment must take a different approach, one centered on the will to live. In the context of the death penalty, this concept again captures our most powerful intuitions about why human life is valuable. On the one hand, I will show that what fundamentally drives our desire for retribution for the most heinous crimes is, more than anything else, a deep reverence for the will to live. We see certain crimes as particularly horrifying because of the repugnance they manifest toward, not just innocent life broadly, or another person's autonomy, but a victim's primal will to live.

On the other hand, the concept of the will to live ultimately counsels against capital punishment. This is because intentionally overpowering the basic human drive to live devalues precisely what we most value about the will to live in the first place. Even above our free will, which produces actions to which we are held accountable, and above the qualities of autonomy and consciousness, we prize this will to live as the most powerful human force, which must triumph over any human driven attempt to overwhelm it in turn.

### *1. Desire for Retribution: the Overcoming of the Victim's Own Will to Live*

Something becomes quickly clear when one attempts to understand why anyone would support the death penalty: what drives people's intuitive support for the death penalty cannot simply be the traditionalist idea that innocent life is universally sacred, and that guilt can actually strip a perpetrator of his or her own inherent dignity. Nor is this support solely driven by outrage over the fact that a perpetrator violates the victim's right to autonomy, although he certainly does. Though powerful, these ideas do not completely capture the emotions driving people's desire to achieve retribution through the death penalty. Instead, what clearly matters most to people's outrage is that the perpetrator manifests a desire to overcome the victim's overwhelming will to live. Put differently, we are most horrified because the killer has little regard for the other person's basic will simply to exist as a living person, no matter her degree of autonomy or even her innocence.

Victim impact statements in capital sentencing attest to how the will to live best captures intuitions favoring the death penalty. In the terrifying moment preceding death, a victim manifests a will to live that the offender ultimately overwhelms. But victim impact statements also speak to the life of the victim beyond the moment of imminent death.<sup>217</sup> In doing so, these statements illuminate more than the fact that a person lived a life of virtue and potential, which traditionalists might wish to emphasize, or of autonomous and conscious experience, which emphasizes progressive principles. In rounding out the details of a victim's life, victim impact statements paint a picture of a person who strove to live the human experience *as best he or she could*: that is, regardless of that person's imperfect capabilities, or that person's bad choices.

Thus, as with the Nagel example,<sup>218</sup> what saddens us most is not the loss of potential *per se*. Instead, what most saddens us is the lost possibility of making an *effort* toward one's full potential, which is a drive that is encapsulated in the concept of the will to live.<sup>219</sup> And it is the perpetrator's overcoming of that will to live that victim impact statements underscore, making a stronger case for the death penalty. In that one, unique and irreplaceable moment of life, that person experiences extraordinary suffering and pain. But even beyond that suffering, we are saddened when someone who wishes and wills life has that life taken away—a life that will have a unique and irreplaceable life course and potential.

## 2. *Conceptually Superior to Potential*

All of this said, the concept of the will to live ultimately counsels against capital punishment. To see why, it is necessary again to distinguish between potential and the will to live in the context of how the perpetrator, rather than the victim, manifests these qualities. The traditional ethic asserts that certain people can lose their otherwise innumerable potential as human beings, depending on how they act when exercising their free will. Normally, human beings are considered "perfect" as they are, notwithstanding the mistakes they make in life.<sup>220</sup> But these perpetrators have gone beyond forgivable mistake, losing their "perfection" in the process.

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217. See Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 316 (1996).

218. NAGEL, *supra* note 103.

219. See *supra* notes 103–07 and accompanying text.

220. See *supra* note 59 and accompanying text.

However, what is “perfect” about humans is their will to live. This will to live drives a human being to attempt fulfilling his or her full potential: a drive that remains no matter how much that person’s falls short of that potential throughout life, and no matter how immoral that person’s actions are in some instances. Even a serial killer can manifest the human will to live. Despite the killer’s actions, and despite how little potential we subjectively believe this person to possess at all, he or she continues to be driven to fulfill universal human needs and desires. Again, it is possible to value a human being’s potential in the abstract, even before that human being exists. But once the will to live exists, it transforms the idea of potential into something beyond the realm of abstraction: there is an *actual* will that drives an organism to fulfill its potential. And no action, no matter how evil, can remove this drive.

Even the worst, most unrepentant and remorseless wrongdoers can manifest the will to live.<sup>221</sup> This becomes particularly obvious when comparing these wrongdoers to the example of Scott Matthews. Matthews derived a sense of purpose in his life from the simplest and most purely self-seeking of actions: feeding himself.<sup>222</sup> Yet we still consider actions such as these to be morally worthy.

Similarly, even the worst sociopaths undertake the simplest and most self-seeking and yet still morally worthy actions. Even the worst sociopaths have the most basic human needs and desires, as people like Matthews and even people in persistent vegetative states do. They seek to eat, sleep, think, and experience life as a human. Invariably, they also seek contact with other human beings. And these needs and desires are not negated by the fact that the *means* by which some people pursue them are often immoral. The very act of thinking, saying, or doing manifests the will to live, even if what one thinks, says, or does is wrong.

Thus, all of these ideas do not speak merely to the human capability for autonomy. Instead, they also speak to the idea that every person has a will simply to exist, regardless of how they choose specifically to act. In other words, the will to live transcends moral blameworthiness. No matter

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221. This rebuts the pro-death penalty arguments that life without parole is actually worse than death. While life without parole certainly denies the prisoner autonomy, and a denial of autonomy is insufficient to deny the will to live. Life without parole respects the idea that, even with restricted autonomy, there can still be a profound will to live, as can be seen in the Matthews example. *See supra* notes 150–52 and accompanying text.

222. *See id.*

how many mistakes people make or how bad these mistakes are, mistakes have no impact on people's drive to live a human existence. People still awake every day driven to attempt the basic pursuits that, in turn, define our humanity.

Altogether, even the most ordinary actions, done by the most extraordinarily immoral person, remain extraordinarily good. All of these actions are a manifestation of the will to live: something that we value as having an immutably human quality in itself. In turn, the will to live defines our humanity as much as the specific needs and desires we all share in common. The will to live is what fundamentally drives humans forward at every moment of their lives, independent of even the conscious choices they make to act. And even the most mundane and tiniest of physical movements, the blink of an eye, the shift of an appendage, or the movement of the mouth, can be evidence, not of a creature that is purely automatous. Instead, they can be evidence of a person's autonomous drive to be a part of human existence: an existence of which she has at least subconscious awareness and appreciation.

And because this is a purpose that always remains "perfect," regardless of how a person actually acts, these movements are always remarkable, even if a person is simultaneously acting immorally while engaging in these movements. Put differently, acting in even the most immoral way possible does not take away, or affect in any other way, the power of this human force. To take away the life of a guilty person who has killed others is not the same as to take away the life of an innocent person. However, in this, most important sense, it is. In the end, capital punishment saps each body part and function. In this way, it is contrary to the will to live.

When one recognizes that even the worst perpetrators manifest a will to live, it becomes easy to see why capital punishment should be considered morally illicit. On the one hand, it is difficult to refute that, for at least some acts of wrongdoing, full retribution would require the sentence of death. Even putting aside "an eye for an eye," capital punishment may be necessary to achieve full retribution because it is the only way for the community, including the victims' families, to feel that their moral injury has been given full recognition. After all, only if the perpetrator experiences what the victim experiences can the perpetrator

truly understand the injury, and thus the magnitude of the “wrongful imposition of control.”<sup>223</sup>

With life in prison, a perpetrator loses only autonomy. This gives rise to the discomfort some people have at the prospect of the perpetrator being allowed to live, while an innocent person does not: the innocent person has lost far more than autonomy. Thus, full retribution for this moral injury comes by taking away not just a perpetrator’s autonomy, but the perpetrator’s will to live as well. In this sense, retribution is not about animal-like, emotionally driven revenge. Instead, it has a higher aspiration: eliciting the perpetrator’s empathy.

On the other hand, as distinct as retribution is from revenge, capital punishment is still problematic. Above all, capital punishment devalues precisely what we value most about the will to live: that it not only exists apart from the mistakes we make, but is so powerful that it is supposed to triumph over artificial human attempts to overpower it. Indeed, this very idea is present in the argument that people can bear suffering, rather than capitulating to suicide. Like suicide, capital punishment constitutes an artificial overpowering of this most powerful human force.

What is more, capital punishment is often administered with the specific intention that a perpetrator experience what it feels like to have one’s desire to live overwhelmed. This intention is driven by the idea that retribution is achieved only when a perpetrator experiences exactly what the victim did. In this way especially, the death penalty intentionally degrades what is supposed to be the most extraordinary human force.

Thus, the will to live shows why “a life for a life” can never uphold the sanctity of life. In the end, even the worst wrongdoer manifests this most simple, yet by far extraordinary, drive of human life. Capital punishment not only fails to recognize this fact, but also directly denigrates it, by declaring that a person has been stripped of *any* value as a living human being. Even if we prize retribution, this value should not be considered something that a person has to earn or deserve.

### *3. Conceptually Superior to Autonomy and Consciousness*

Finally, the will to live provides a better reason for rejecting the death penalty than even the progressive principles typically used to argue against it. Of course, the continuing autonomy and consciousness of a person who

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223. See *supra* note 202 and accompanying text.

may be put to death are characteristics that should garner our empathy. However, important as they are, these qualities are not what fundamentally drive progressive intuitions about the death penalty.

Qualities like consciousness and autonomy appeal to the fact that capital punishment inflicts tangible harm on human beings. Yet, even progressives admit that there appears to be something more “intangible” that deeply concerns them about the death penalty. This concern for “intangible” harm is expressed by Justice Brennan’s dissent in the case of *Gregg v. Georgia*. There, Brennan criticized the U.S. Supreme Court’s affirmation of the death penalty as constitutional, effectively ending a *de facto* temporary moratorium on the death penalty in the United States.<sup>224</sup> Brennan does not emphasize concepts like autonomy and consciousness. Ironically enough, he emphasizes something that sounds like the traditional concept of inherent dignity instead:

I emphasize only that foremost among the “moral concepts” recognized in our cases and inherent in the Clause is the primary moral principle that the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings—a *punishment must not be so severe as to be degrading to human dignity*.<sup>225</sup>

I would even argue that people’s reactions to the most brutal methods of capital punishment manifest a concern for something beyond tangible harm.<sup>226</sup> Of course, methods of capital punishment that significantly abuse the body offend our reverence for physical autonomy and consciousness. But, I would argue, these methods of capital punishment are even more offensive to the idea that our intangible will to live is the most powerful human force, and should be treated as such. Again, this force is so powerful that it is supposed to triumph over any human attempt to overwhelm it. But certain methods of capital punishment do not just overwhelm a person’s will to live. Instead, they completely annihilate it.

For example, consider death by firing squad. At least some evidence indicates that this method of death is instant, painless, and not consciously

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224. *Gregg v. Georgia*, 428 U.S. 227, 229 (1976) (Brennan, J., dissenting)

225. *Id.* (emphasis added).

226. See Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 WM. & MARY L. REV. 551 (1994) (discussing electrocution, hanging, and the firing squad as methods of capital punishment).

felt.<sup>227</sup> But presenting this evidence to death penalty skeptics would likely fail to diminish the sense of disgust that they feel toward this method of punishment. To understand why, it is useful to see the connection between this disgust and Catholic end-of-life ethics, which permits the withdrawal of LSMT in circumstances of “repugnance” (such as the amputation example).<sup>228</sup> As this part of Catholic doctrine recognizes, people’s concerns about bodily integrity may include a concern for not only physical pain, but also psychological and moral injury, even when physical pain is absent.<sup>229</sup> In the context of withdrawing LSMT, this concern is manifested in a person’s inability to summon the will to live in certain conditions of bodily disintegration.

In the context of death by firing squad, I would argue that a similar sort of concern exists for a person’s bodily integrity, even absent the possibility that this person will consciously experience physical pain from this method of punishment. In my opinion, this concern can be reduced to a person’s belief that this level of brutality offends, not just autonomy or consciousness, but also the body’s manifest will to live and to survive even the greatest physical threats. Such brutality completely degrades this human force that we revere as the most powerful, by not only overtaking this force, but overtaking it so utterly and violently.

### C. RECONCEPTUALIZING INTENT: TERMINATING BIOLOGICAL LIFE AND PERSONHOOD STATUS

The will to live also counsels one more change to the traditional life ethic: as with abortion and assisted suicide, what qualifies as “legitimate” intent in the context of capital punishment should be recharacterized. As I argued earlier, it is unfair to cast those who personally believe in the death penalty as having a completely callous attitude toward life. Still, the act of capital punishment must itself be seen as manifesting an illicit intent. This is because the intentional killing in capital punishment not only serves as the *means* of retribution, but also becomes the very *end* in itself. This is evident in how capital punishment is intended to affirm that a person *deserves* to lose both biological life and personhood status—in spite of that

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227. *Id.* at 688–89 (asserting that “[s]ome evidence demonstrates that a competently performed shooting may cause nearly instant death” and that “[e]xperimentation suggests that death may occur quickly”).

228. *See supra* notes 179–80 and accompanying text.

229. *See supra* notes 179–80 and accompanying text.

person continuing to manifest the will to live that is so central to the human experience.

One can hardly deny that, while the “ends” of capital punishment might be a moral good, like retribution, the specific means used to achieve that goal cannot be characterized as anything but the intentional taking of life. Before the twentieth century, Catholic ethics saw the death penalty as a means of achieving self-defense against violent individuals.<sup>230</sup> In this way, it was able to conceptualize capital punishment not as specifically intending death, even if death was a foreseeable outcome, but as intending to inflict enough bodily harm to incapacitate an individual. By contrast, when retributive ends are what motivate the death penalty, it is difficult to deny that death is specifically intended as a means to an end.<sup>231</sup> In this scenario, there is no way to characterize the means employed as merely “incapacitation.”

But the bigger problem with capital punishment is that even its retributive ends cannot be classified as a moral good. Retribution through capital punishment fails to qualify as a moral good not because retribution *per se* is problematic. Instead, what is problematic is that, in attempting to achieve retribution, the intended goal of capital punishment necessarily becomes killing in itself.

Consider that retribution seeks to provide restitution for the “moral injury” that the perpetrator caused. But retribution *through capital punishment* necessarily adds the element of declaring that a person is no longer fit to hold the right to life, which every being accorded the status of “person” supposedly possesses. Because the person has reached the end of his or her personhood, killing then becomes necessary to effectuate a baser, non-human status. Thus, the person’s death becomes an end in itself.

In this way, even if the retributive intent of capital punishment does not manifest an obvious repugnance toward life, it still manifests an

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230. See Berg, *supra* note 208, at 50 (citing the 1566 Roman Catechism that endorsed the death penalty as a “lawful slaying,” and which asserted that the death penalty’s “just use” was “far from involving the crime of murder, but instead was an act of paramount obedience to the Commandment against murder”).

231. It must be noted that the Catholic Church itself is more reluctant than other Christian faiths today with respect to the death penalty. See, e.g., *Catechism of the Catholic Church* ¶ 2267, available at [http://www.vatican.va/archive/ccc\\_css/archive/catechism/p3s2c2a5.htm](http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a5.htm) (last visited Feb. 18, 2014) (“Today, in fact, as a consequence of the possibilities which the state has for effectively preventing crime . . . the cases in which the execution of the offender is an absolute necessity are very rare, if not practically nonexistent.”).

attitude that should be deemed morally unacceptable. One can contrast the retributive intent of capital punishment with other instances where life and death are at stake. For example, unlike capital punishment, legitimate self-defense does not directly evaluate the moral worth of another person's existence, in the face of that person's overwhelming wish to live. Instead, legitimate self-defense is far more about valuing one's own life, as opposed to affirming that a person deserves to have his or her life taken away.

Even in abortion or assisted suicide, the intended end is different from the intended end of capital punishment. While these acts may be problematic in other ways, neither uses death directly to assert a human being's baser status. In some instances, the act makes no direct determination at all that a human being is unworthy of personhood status. This is true in assisted suicide, where not even proponents of this procedure go so far as to say that the patient no longer qualifies as a person. In other instances, any determination about personhood is simply incidental to other goals. This is also true in abortion, where pregnant women who abort their fetuses do so not to affirm the fetus's non person status, but to pursue other goals like self-defense.

#### D. BRIDGING THE INNOCENCE/GUILT DIVIDE

Many concerns of pro-death penalty advocates deserve serious consideration, including the untold harm caused by perpetrators of death penalty eligible crimes, and the community's understandable need for retribution. And while capital punishment seems dehumanizing to some, we cannot go so far as to brand supporters of the death penalty as morally deficient themselves. To the extent morally possible, we must pursue retribution for communities and victims' loved ones, who experience tremendous suffering and an eternal sense of loss.

The concept of the will to live shows why capital punishment should be considered morally illicit. To snuff out a person's life when she manifests the most powerful human force, even regardless of the limited autonomy and quality of life that she would surely experience as a convicted perpetrator, must give us pause. Indeed, I argue that traditionalists' argument against assisted suicide, that suffering in life serves some greater purpose, actually applies better in this context, where

life imprisonment is a viable alternative to death.<sup>232</sup> It is this method of punishment, rather than capital punishment, that can reconcile society's interest in retribution with the value it places on the will to live.

## VI. SELF-DEFENSE

In determining when it should be morally permissible to take a person's life, where life indisputably exists, it is necessary to address one final issue: self-defense. Self-defense is arguably the most self-evident part of the traditional life ethic. In fact, like capital punishment, self-defense is characterized as simply a "rational" and "natural" part of the human order.<sup>233</sup> Consistent with how much it values self-defense, the traditional ethic adheres to an expansive definition of what qualifies as "legitimate" use of deadly force against an aggressor. However, the proper rationale for the general right of self-defense, and the exact boundaries between what qualifies as "legitimate" versus "illegitimate" use of force, are hardly axiomatic.

In this Part, I concede that the general right of self-defense is justified. At the same time, the traditional rationale for this right is incomplete. In justifying self-defense, the traditional ethic makes an argument that it also makes to justify capital punishment: that a perpetrator of aggression has acted so wrongfully that inherent dignity is lost. Interestingly, this ethic also makes a more progressive argument, asserting that an innocent person has a right to preserve his or her autonomy against an aggressor.

However, as this Part argues, what actually best captures our intuitions about why we value human life, particularly in the context of self-defense, is the will to live. This will manifests itself in our primal survival instinct, which kicks in at the moment we sense a serious threat to our lives. Distinct from our exercise of autonomy, which concerns how we choose to live our lives, this survival instinct is concerned more simply with whether we live at all.

In turn, the will to live should shape what we consider to be "legitimate" acts of self-defense. As it stands, the traditional ethic sanctions self-defense so broadly that it often permits deadly force where the predominant intent is one, not of seeking to preserve one's life, but of

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232. The difference, of course, is that death is not biologically imminent in this case. Therefore, suffering can clearly serve a purpose.

233. See *infra* notes 238–42 and accompanying text.

merely “standing one’s ground.” In these instances, those who use deadly force are almost willfully ignorant of other people’s own desire to live. Unsurprisingly, these acts of claimed self-defense frequently kill people who are innocent of wrongdoing, without conferring even a marginal benefit to the self-defender’s actual safety. As this Part will argue, this phenomenon is better described as unnatural aggression, rather than a “natural” or “rational” exercise of self-defense.

As I further argue, what drives this broad interpretation of “legitimate” intent is, ironically, a reverence for autonomy that the traditional ethic rejects in the context of abortion and assisted suicide. There, the traditional ethic spurns the idea that people should have wide berth to live and defend their lives as they wish. Accordingly, it interprets “legitimate” intent very narrowly in those contexts, including with respect to abortions undertaken for the purpose of self-defense. In contrast, this idea is precisely what motivates the traditional ethic’s broad interpretation of “legitimate” self-defense outside of abortion.

A reverence for autonomy manifests itself once more in a related context, where the traditional ethic is also broad in defining what qualifies as morally “legitimate” intent: inactions, omissions, and the abrogation of the responsibility to protect or duty to rescue. Ultimately, I reaffirm that the will to live, as opposed to autonomy, is what should guide our interpretation of what qualifies as legitimate intent. In the specific contexts of self-defense and the responsibility to protect, this means that “legitimate” intent should be interpreted more narrowly than it currently is.

A. THE NATURAL, RATIONAL RIGHT OF SELF-DEFENSE: THE WILL TO LIVE AS AN ALTERNATE JUSTIFICATION

To see why the traditional life ethic recognizes the right of self-defense, it is first useful to see what the ethic considers to qualify as “legitimate” acts of self-defense, in both the individual and the collective sense. While there is some difference of opinion among traditionalists, many hold an expansive view of what qualifies as legitimate use of deadly force against one’s aggressors.

This expansive view is manifest in every instance that the law sanctions force where (1) it is debatable whether any reasonable person can believe that harm is *imminent*, (2) it is debatable whether any reasonable person can believe that deadly force is *proportionate* to the harm posed, (3) the harm posed is to one’s *property or possessions*, not to one’s life or

bodily health, or (4) the harm posed may have easily been avoided by retreat.<sup>234</sup>

The idea that “legitimate” self-defense can be so broadly conceptualized was recently demonstrated by “Stand Your Ground” laws, and in particular the Trayvon Martin and George Zimmerman case in Florida.<sup>235</sup> Representative of this class of laws, Florida’s statute explicitly removes a person’s duty to retreat from an aggressor, both inside and outside one’s home. Thus, no such duty exists even where retreat would foil the perpetrator’s attempt to harm, as well as eliminate the need for a person to use deadly force to thwart that harm.

The traditional doctrine on collective self-defense, as encapsulated in classic “Just War Theory,” also sanctions an expansive view of what qualifies as “legitimate” self-defense.<sup>236</sup> Under this doctrine, deadly force has been routinely sanctioned even where the threat of imminent or actual physical harm is minimal. Deadly force has also been routinely sanctioned where such force was disproportionate to the goal of repelling aggression.<sup>237</sup>

The broad scope of these laws implicitly reveals what the traditional ethic considers to justify the general right to self-defense. Consider laws that permit deadly force to protect one’s property or possessions, or those that remove any duty to retreat. Looking at these laws, it becomes clear that what matters to the traditional ethic is *not* merely bodily integrity. Instead, the traditional ethic justifies self-defense on two additional grounds, both of which are presented as rational and natural to the human order.

First, the traditional ethic makes an argument it also uses to justify capital punishment: a perpetrator loses inherent dignity in committing certain acts of wrongdoing, particularly the types of wrongdoing that are so egregious that they justify another person’s use of deadly force.<sup>238</sup> Thus,

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234. *Expanded Self-Defense Laws*, CNN.COM, <http://edition.cnn.com/interactive/2012/04/us/table.selfdefense.laws> (last visited Feb. 15, 2014).

235. See Tamara Rice Lave, *Shoot to Kill: A Critical Look at Stand Your Ground Laws*, 67 U. MIAMI L. REV. 827, 851–55 (2013) (discussing the case).

236. States Conference of Catholic Bishops, *The Challenge of Peace: God’s Promise and Our Response* (May 3, 1983), available at <http://old.usccb.org/sdwp/international/TheChallengeofPeace.pdf>.

237. See Lim, *supra* note 5 (arguing that the application of Just War theory in the 20th century, particularly by the Catholic Church, has interpreted these concepts very broadly).

238. See AQUINAS, *supra* note 118, at IIa-IIae Q. 64, art. 2 (“By sinning man departs from the order of reason, and consequently falls away from the dignity of his manhood, in so far as he is

the perpetrator forfeits the right to life, regardless of whether taking that life is absolutely necessary to preserve another person's. This is akin to capital punishment, where the perpetrator can be put to death even after the innocent victim has irretrievably lost his or her own life. Indeed, if wrongful acts like attempted murder are considered to merit the death penalty, certainly they should be considered to justify deadly self-defensive force.

Yet, the traditional ethic also sanctions self-defense against acts of wrongdoing that, though serious, do not rise to the same level of blameworthiness, such as interference with another person's property. In his defense of the right to use deadly force against an aggressor, Thomas Aquinas suggests that a perpetrator loses inherent dignity in exactly this type of circumstance. He quotes a passage from the Book of Exodus that ostensibly justifies defense of property: "If a thief be found breaking into a house or undermining it, and be wounded so as to die, he that slew him shall not be guilty of blood."<sup>239</sup>

Second, the traditional ethic argues that self-defense is justified because it preserves an innocent person's autonomy. This argument is made emphatically by those who assert that self-defense is part of the "natural" law of mankind.<sup>240</sup> As Thomas Aquinas stated, saving one's life is morally licit as "it is natural to everything to keep itself in 'being,'"<sup>241</sup> This language suggests that a person will naturally look after himself and his own well-being, an idea that speaks to the concepts of autonomy and independence. As Benjamin Levin states, "[t]o deny the right to resort to force would compel the individual to cede his or her autonomy to some other party, whether to the intruder at the same time of the invasion or to the state after the fact."<sup>242</sup>

These two basic rationales for the general right to self-defense are certainly not without merit. However, they still fail to capture the full extent of human intuition on why self-defense is a right, and a self-evident one at that. First, consider that most people would likely support a person's

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naturally free, and exists for himself, and he falls into the slavish state of the beasts, by being disposed of according as he is useful to others.").

239. *Id.* at IIa-IIae Q. 64, art. 7.

240. *See, e.g.*, IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 105 (Mary Gregor ed., Cambridge Univ. Press 1996) (1797); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 31 (1974).

241. AQUINAS, *supra* note 118, at IIa-IIae Q. 64, art. 7.

242. Levin, *supra* note 8 at 539.

right to use deadly force against an aggressor who has been influenced by duress, insanity, or some other external force. In these instances, one can hardly argue that the aggressor manifests the truly vicious will that a person ostensibly must display to lose his inherent dignity. Yet, most of us would support self-defense anyway.

Second, self-defense is driven above all, not by a conscious desire to live that is borne out of a person's exercise of autonomy, but by a subconscious instinct common to all humans: the basic instinct to survive. As Part II demonstrated, this concept is very much at the heart of the will to live. At the moment when a person's life is under attack, what overwhelms that person is not any conscious thought, whether a thought about what he or she is choosing to live for, or even a thought that he or she is "choosing" to live at all. Instead, what overwhelms this person is the instinct to survive for the sake of it. In other words, the person seeks simply to live, before anything else. Clearly, autonomy cannot be doing all the work.

It is this primal will to live that provides the best possible justification for traditionalists' expansive view of what qualifies as "legitimate" self-defense. Most of us would go to extraordinary lengths to save our own lives. And we would feel completely justified in doing so, even if it would cause some unintended harm to others. Undoubtedly, this stance is partly a manifestation of our belief in self autonomy. This idea speaks to the fact that each human being will act in what he perceives to be his own best interests.

But this stance is also a testament to our primal desire to live, which gives rise to the equally primal fear of death. In turn, this fear is a natural emotion that justifies a reasonable margin of error being afforded to acts of self-defense. As one scholar states, "Requiring some sort of threat or imminence calculus during a home invasion, *particularly in emotionally charged situations* where delay may not be an option, may effectively force a home occupant *to value the well-being of the intruder more highly than his or her own safety.*"<sup>243</sup>

#### B. RECONCEPTUALIZING INTENT: DEFENSE VERSUS OFFENSE

That we all have an overwhelming will to live explains what seems self-evident: we want to protect our own lives. Furthermore, because of the frenetic nature of the typical circumstances where self-defense might be

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243. *Id.* (emphasis added).

necessary, it also makes sense that the definition of “legitimate” self-defense accommodate some margin of error, for acts that are in a gray area between legitimate and illegitimate.

That said, when this margin of error becomes too large, the intent sanctioned may be one, not of seeking to preserve one’s own life, but merely of “standing one’s ground.” In these circumstances, acts of claimed self-defense are likelier to kill people who are wholly innocent of wrongdoing, without conferring even a marginal benefit to the self-defender’s safety. This phenomenon is better described as unnatural aggression, rather than truly natural or rational. Ultimately, as with abortion, assisted suicide, and capital punishment, the concept of the will to live suggests reinterpreting what qualifies as legitimate intent. Here, it suggests that legitimate self-defense should be interpreted more narrowly. As it stands, with respect to many acts of self-defense that it considers to be legitimate, the traditional ethic conceptualizes the act of killing as neither the ends sought, nor even the means for preserving an innocent life. Both of these interpretations of intent are problematic.

According to the traditional ethic, the intentional use of deadly force does not entail that killing is the intended means for achieving self-defense. In the context of self-defense, the traditional ethic conceptualizes death as merely a concurrent, foreseeable effect of the act of disarming an aggressor.<sup>244</sup> But when a person uses deadly force against another whom he or she believes to be a “guilty” aggressor as opposed, for example, to an innocent bystander, it is improbable to believe anything other than that a person actually desires to kill the aggressor and acts to that end.

In doing so, the person engaging in self-defense is not necessarily making a conscious determination about the aggressor’s moral worth as a person, in comparison to what happens in capital punishment. Among other things, there is usually very little time to engage in such deliberation. Nevertheless, a person whose life is under grave physical attack is almost inevitably intending something beyond mere disarmament or incapacitation. Instead, the defender intends, with little qualm or regret, specifically to end the other person’s life.

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244. See AQUINAS, *supra* note 118, at IIa-IIae Q. 64, art. 7 (“Accordingly the act of self-defense may have two effects, one is the saving of one’s life, the other is the slaying of the aggressor. Therefore this act, since one’s intention is to save one’s own life, is not unlawful . . .”).

In comparison, it is much easier to believe that killing *per se* is not the typical *ends* of self-defense. In individual self-defense, typically a person using deadly force does not consciously think that the person whom he or she will kill somehow deserves to die. Instead, this person is focused far more on his or her own life. Collective self-defense is similar. As required by Just War Theory, military decisionmakers must ensure that any use of force is proportional. In turn, this requires ensuring that a disproportionate number of innocent bystanders are not killed.<sup>245</sup> But, despite what may seem like cold calculations, these judgments hardly mean that decisionmakers are *directly* evaluating the moral worth of people's lives. Instead, their specific intent may be to preserve their own lives, while making none of the "just deserts" type of judgments that invariably render capital punishment morally problematic.

Nevertheless, the traditional life ethic is still problematic, to the extent that it sanctions overly broad uses of force that are far beyond what is actually necessary to preserve anyone's life. In these cases, a person's intent in using deadly force might not actually be to preserve her own life. Indeed, this is true even if an act of self-defense is executed without any sort of malicious will toward the aggressor's life. This becomes particularly evident when the margin of error with respect to what qualifies as legitimate use of deadly force becomes too large—that is, when the usual prerequisites for legitimate self-defense are not interpreted strictly, or even abandoned outright. For example, the greater the leeway for what counts as proportionate force in collective self-defense, the likelier it is that a person is not actually intending to preserve her own life.<sup>246</sup>

Here it is useful to distinguish between people's primal and defensive fear for their safety, which arises from an overwhelming will to live, and the concept of more naked, offensive aggression. Primal fear is certainly a natural and rational instinct. But it is distinct from the concept of more naked aggression, which is what truly thwarts the natural human order and transforms people into subhumans. Primal fear is also distinct from a person's desire to use deadly force to defend, not just one's physical life,

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245. See Gabriella Blum, *The Laws of War and the "Lesser Evil"*, 35 *YALE J. INT'L L.* 1, 35 (2010) ("War itself is all about choosing between evils. Acts that are outrageous and abhorrent in daily life are commonplace in war. Choices of who to kill or how to destroy are routine, unlike the extraordinary rescue operation or the trolley gone astray which make the more common hypothetical subjects for philosophical conundrums about lesser evils.").

246. See generally Lim, *supra* note 5 (discussing the permissiveness of proportionality in contemporary Just War theory).

but one's greater sense of dignity and honor.<sup>247</sup> These are qualities that can easily be threatened by lesser acts of wrongdoing, such as the invasion of mere property or possessions.

A margin of error must be tolerated to account for people's understandable fears, which speak to their survival instinct. But no such margin of error need be tolerated to account for people's desire to engage in more naked, offensive aggression. Particularly where there is more time to deliberate the possible use of deadly force, one can argue that primal fear becomes less of a genuine motivation for people's behavior. In these circumstances, only a small margin of error can be justified.

Ultimately, the traditional ethic has tolerated too wide a margin of error, manifesting a concern for something far beyond bodily integrity. These concerns may be for a person's autonomy broadly defined, or for the perceived need to "root out" wrongdoers who disrupt the human order, regardless of whether deadly force is truly necessary to preserve an innocent person's life.<sup>248</sup>

In this sense, the traditional ethic sanctions offensive aggression rather than the defensive protection of life, as evident in how this ethic sanctions Stand Your Ground laws. On one hand, in the moment where physical harm is imminent, people should absolutely be able to follow their survival instinct, should it dictate they fight. On the other hand, Stand Your Ground laws also encourage people who do not currently face imminent harm to enter situations where such harm is far likelier. Indeed, this has been a common criticism leveled at Florida's law, in the wake of the Trayvon Martin case.<sup>249</sup>

Laws that allow people to use deadly force to protect their property or possessions also sanction excessive aggression. Invasions of property, like trespass, are naturally accompanied by concerns that a perpetrator will also cause bodily harm. Still, these laws allow people, in some instances, to use

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247. This is seen in the very name of "Stand Your Ground" laws.

248. See *supra* notes 239–43 and accompanying text.

249. Julia Dahl, *Author of "Stand Your Ground" Law: George Zimmerman Should Probably Be Arrested for Killing Trayvon Martin*, CBS NEWS (Jul. 12, 2013), <http://www.cbsnews.com/news/author-of-stand-your-ground-law-george-zimmerman-should-probably-be-arrested-for-killing-trayvon-martin> (quoting both co-sponsors of Florida's law as saying that Zimmerman lost his right of self-defense when he pursued Martin, as the law does not license people actively to pursue and confront a perceived aggressor). Florida's law stands in comparison to laws that only allow for a self-defense claim where the person did not in the first place cause the situation creating the need for self-defense.

deadly force before it is reasonably certain that harm is truly imminent, or even that a significant risk of such harm *would* develop if one waits to take action. They also allow people, in some instances, to use deadly force before it is reasonably certain that any suspected wrongdoing—including the initial trespass itself—is actually occurring. In these instances, delaying the use of deadly force would be just as effective in incapacitating a person who *does* turn out to be an aggressor. Instead, there have been many documented instances of people being quicker to use deadly force than is necessary, producing many tragic stories of wholly innocent people dying.<sup>250</sup>

And, of course, excessive aggression has been repeatedly sanctioned in the context of collective self-defense, particularly in the post-9/11 world. Interpreting concepts like imminence and proportionality very broadly, traditionalists have endorsed military actions that have contributed little to self-defense.<sup>251</sup> Wholly innocent people have been killed in disproportionate displays of human aggression, each one overpowering what should itself be the most powerful human force of the will to live

This expansive definition of “legitimate” self-defense is glaring, especially when one compares it to the traditional ethic’s narrow definition of “legitimate” intent in abortion and assisted suicide. Most accept self-defense as a general moral good, even if some might quibble with the morality of specific acts of self-defense. In contrast, assisted suicide and abortion, save for legitimate use of abortion for self-defense, where the definition of legitimate is construed very narrowly anyway, are considered never justified.<sup>252</sup> This is true no matter how good one subjectively believes her reasons are for undergoing these procedures. And this is true even though a woman can assert her autonomy to justify her abortion—just as a person can claim autonomy to justify her expansive use of deadly force, whether or not such force is actually *necessary* to save her life.

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250. See Kristi Murphy, *Man Charged with Murder After Barboursville Shooting*, HERALD-DISPATCH (Jan. 26, 2014), <http://www.herald-dispatch.com/news/briefs/x300071350/Two-people-shot-by-homeowner-in-Barboursville> (last visited Feb. 15, 2014); Associated Press, *Suffering from Alzheimer's, Ga. Man Fatally Shot*, USA TODAY (Dec. 7, 2013), <http://www.usatoday.com/story/news/nation/2013/12/07/suffering-from-alzheimers-ga-man-fatally-shot/3904791/> (last visited Feb. 15, 2014); See Natasha Lennard, *Standing Your Ground? Black Woman Shot in Head Seeking Help in White Neighborhood*, SALON (Nov. 6, 2013), [http://www.salon.com/2013/11/06/standing\\_your\\_ground\\_black\\_woman\\_shot\\_in\\_head Seeking\\_help\\_in\\_a\\_white\\_neighborhood](http://www.salon.com/2013/11/06/standing_your_ground_black_woman_shot_in_head Seeking_help_in_a_white_neighborhood) (last visited Feb. 15, 2014).

251. See Lim, *supra* note 5 and accompanying text.

252. See generally Parts III & IV.

Yet, legitimate intent is so broadly interpreted in self-defense that the traditional ethic sanctions acts of self-defense with questionable intentions. If this is the case, why are not at least some instances of abortion or assisted suicide considered to manifest the same minimal degree of “repugnance toward life” as some instances of legitimate self-defense? Why must abortion and assisted suicide be considered always illicit, even though killing in those instances might be no more intended than in self-defense?

One comparison arguably illustrates this point better than any other: the use of guns for self-defense versus the use of abortion for self-defense. For many people, even if there is empirical uncertainty as to whether guns (or at least certain guns) are ever necessary for self-defense, these guns are considered to be far from repugnant to life.<sup>253</sup> Quite the contrary, these guns are said by these people to be paramount to human order and freedom. This attitude prevails even though few truly doubt that guns also can facilitate senseless killings of innocent people, often during instances of claimed self-defense. In these instances, the self-defender actually becomes the wrongdoer, by going beyond the boundaries of legitimate self-defense.

Yet, one can mount a similar defense of abortion. Indeed, whatever one can criticize about the typical motivations for abortion, one can hardly say that these motivations amount to the overwhelming attitude of aggression that is more often manifested in countless instances of typical self-defense. And, certainly, the autonomy justification for women here is no more broadly conceptualized than the autonomy justification that ostensibly justifies such overwhelming displays of typical self-defense. Nevertheless, many of the same people who support gun rights stress the empirical uncertainty of whether abortions (or at least certain methods) are ever necessary for self-defense.<sup>254</sup> In fact, as I argued earlier, the Catholic

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253. See Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 122–23 (1987) (arguing that the Second Amendment's purpose is both to discourage political oppression and to protect the “fundamental right to self-preservation, together with the basic postulate of liberal theory that citizens only surrender their natural rights to the extent that they are recompensed with more effective political right”).

254. Indeed, at least one person has recognized this argument, albeit to argue in support of the Second Amendment, rather than privacy rights. Nicholas Johnson analogizes the empirical uncertainty of the need for so-called partial-birth abortion with the uncertainty that guns, or at least certain guns, are necessary for self-defense. Nicholas Johnson, *Supply Restrictions at the Margins of Heller and the Abortion Analogue: Stenberg Principles, Assault Weapons, and the Attitudinalist Critique*, 60 HASTINGS L.J. 1285 (2009). But given the documented perils of childbirth, the idea that abortion might be necessary for self-defense should be no more controversial than the idea that guns are *truly* and

Church prohibits abortive procedures that it considers to be a direct means of killing *even assuming* that these procedures would save the life of a pregnant woman who is clearly innocent.<sup>255</sup>

To the extent that traditionalists are genuinely concerned about pregnant women's capacity to make decisions in their inherently fraught condition,<sup>256</sup> there is a clear contrast to their lesser concern for people's capacity to use guns properly. This lesser concern is evident in many gun advocates' staunch opposition, for example, to laws attempting to keep guns away from those with mental illness.<sup>257</sup> Thus, analyzing self-defense through the lens of the will to live calls into question not only whether the traditional ethic interprets legitimate self-defense too broadly, but also whether it interprets legitimate intent in other contexts too *narrowly*.

### C. A COMPARISON TO THE RESPONSIBILITY TO PROTECT/RESCUE

Here, I argue how a special reverence for autonomy—a concept that the traditional ethic rejects in the abortion and assisted suicide contexts—is what most drives this ethic's broad interpretation of legitimate intent when

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*absolutely* necessary in some instances to defend one's self. After all, instances where guns are considered truly necessary would have to exclude the many where retreat, or standing one's ground, is actually a sufficient means of self-defense. These instances would also have to exclude instances where guns would actually be *insufficient* to overpower the threat, without also disproportionately costing innocent lives. Merely because something is necessary to defend life may not be sufficient to justify it.

255. Here it should be noted that there are several countries in the world that ban any abortion, including abortions intended to save the life of the mother. See Chris Kirk et al., *Reproductive Rights Around the World*, SLATE (May 20, 2013), [http://www.slate.com/articles/news\\_and\\_politics/map\\_of\\_the\\_week/2013/05/abortion\\_and\\_birth\\_control\\_a\\_global\\_map.html](http://www.slate.com/articles/news_and_politics/map_of_the_week/2013/05/abortion_and_birth_control_a_global_map.html). Johnson ultimately argues that the self-defense case is actually stronger, because there life is much more often at stake than with most cases of abortion, and in abortion the "aggressor" is always innocent. See Nicholas J. Johnson, *Principles and Passions: The Intersection of Abortion and Gun Rights*, 50 RUTGERS L. REV. 97 (1997) ("[T]he case for armed self-defense against a criminal attacker appears stronger than the case for terminating the innocent fetus, who we can more easily say is owed a duty by the parents."). This distinction, of course, does not account for the arguments against personhood in abortion, whereas in self-defense, even the guiltiest aggressors are certainly considered persons, even if not innocent. Similarly, whereas the state's interest in regulating arms is effectively an interest in protecting actual personhood, a state's interest in potential life in the abortion context is less compelling.

256. *Gonzales v. Carhart*, 550 U.S. 124 (2007) ("Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.") (citations omitted).

257. See Michael Luo & Mike McIntire, *When the Right to Bear Arms Includes the Mentally Ill*, N.Y. TIMES (Dec. 21, 2013), <http://www.nytimes.com/2013/12/22/us/when-the-right-to-bear-arms-includes-the-mentally-ill.html> (last visited Feb. 15, 2014).

people act in self-defense. In the process, I show how an autonomy driven interpretation of intent differs from an interpretation of intent guided by a reverence for the will to live. In the end, I reassert that the latter should guide our interpretation of intent throughout the life ethic, including with respect to acts of self-defense.

To see how intent and autonomy are related, it is necessary to start from a simple premise: placing importance on a person's intentions amounts to placing importance on the concept of free will.<sup>258</sup> With free will, we can intend our actions; without free will, our actions are intended for us. In turn, placing importance on the concept of free will amounts to placing importance on the concept of autonomy.<sup>259</sup> And, in turn, placing importance on autonomy amounts to valuing the "self." This entails that we value a person's "self" centric decisions to act as deems fit, including valuing the person's subjective interpretations of the world around him. All of this means that, when determining what qualifies as a violation of the life ethic, placing importance on a person's intentions amounts to adopting a "self" centric approach to this question.

Conversely, where a life ethic places importance on a person's autonomy, it inevitably broadens the definition of legitimate intent in a way that gives extensive protection to an individual's autonomy to act as he deems fit. As this plays out in the context of self-defense, the traditional ethic places importance on a person's right to live his life in the manner he chooses, and within that, to defend that life in the manner he or she chooses. This amounts to placing importance on a person's autonomy. Accordingly, this ethic interprets a person's intentions very narrowly, so as not to impinge on this autonomy. To wit, legitimate self-defense is seen as intending exclusively to protect one's self, rather than as intending to cause harm to another person. In other words, a crafty distinction is made between intending harm and merely foreseeing it.

As a result, this approach affords a wide margin of error for people to act in self-defense, even when doing so not only inflicts a great cost on others, but also provides very little benefit to one's own safety. For example, in the context of collective self-defense, military actions often kill larger numbers of innocent people without much resulting benefit.

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258. See *supra* notes 15–17 and accompanying text.

259. See Boyle, *supra* note 9 and accompanying text (discussing the value of Kantian autonomy, or the right of individuals to be self-governing and self-defining).

However, the person making the decision to use such deadly force is often not deemed morally blameworthy. Instead, he or she is deemed as having only “foreseen” the consequences of his actions. In this way, the traditional life ethic sanctions questionable, at best willfully negligent regard of others’ lives, on the part of the person claiming self-defense.

As this example pointedly illustrates, the traditional ethic ultimately places a greater value on one person’s autonomy than on even innocent lives and their “inherent” dignity—a dignity that, without a particular sort of intent, is not necessarily violated regardless of how extraordinary a suffering another human being experiences. By contrast, an ethic guided by a reverence for the will to live puts more emphasis on the basic desire simply to live, as possessed by not just one person, but also the people around him or her. Less concerned about impinging on autonomy, this approach counsels a much more restrictive interpretation of what qualifies as legitimate intent. On the one hand, it acknowledges that people should be able to engage in vigorous self-defense, driven by their primal will to live. On the other hand, it would prohibit disproportionate uses of force that flagrantly disregard others’ desire to keep living, while achieving marginally little to protect one’s own safety—even when such disregard is not intentional in the traditional sense. Under this approach, concepts like imminence and proportionality would be interpreted in a way that is more protective of actual human life.

Ultimately, the will to live gives greater regard to the idea that *every* person’s life is valuable. This stands in contrast to the traditional approach, which, in the end, places far more emphasis on one person’s self-autonomy. This approach argues that intent cannot be what matters most, because autonomy cannot be what matters most.

The difference in these two approaches is particularly evident when comparing self-defense to a closely related context, one where the traditional ethic is also quite permissive in defining what qualifies as legitimate intent: inaction, omissions, and the responsibility to protect. Most failures of the responsibility to protect escape classification as a violation of life’s sanctity.<sup>260</sup> What explains this result is precisely that the traditional ethic does not, above all, emphasize the idea that every life is inherently dignified. Instead, it emphasizes autonomy above all the autonomy of innocent people.

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260. Stith, *supra* note 14, at 69–70.

Prizing a person's right to live life as he or she wishes, this approach interprets what qualifies as morally blameworthy intent and causation very narrowly, so as not to impinge on his autonomy. As Mari Matsuda states,

Under the modern view, causation is a notion best cabined and controlled lest it spin wildly out of control. Not every citizen who is in a position to stop a harm, not every neighbor who helped create the circumstances under which harm occurs, not every mourner who nurses regrets, is held responsible. Broad causation leads to 'crushing liability,' thus various legal devices apply to limit causation.<sup>261</sup>

As with self-defense, this interpretation of the life ethic, the low threshold for what qualifies as legitimate, morally licit intent, is not axiomatic. As Matsuda has stated, "[t]hese limiting doctrinal devices are artificial. That is, they do not represent any natural, logical, or inevitable restraint on the finding of causal connection between an act and a consequence. Legal causation [is] a policy choice."<sup>262</sup> That policy choice is to value autonomy above all.

On the one hand, that choice is, to a certain degree, quite understandable. Certainly we *do* want people to enjoy a significant degree of autonomy. On the other hand, as with self-defense, reverence for this autonomy can be taken too far. Like many acts of self-defense that should be but are not considered illegitimate, many instances of inaction protect merely the autonomy of the person who acts or fails to act, rather than actually doing anything to preserve his own life. All the while, these instances of inaction can result in people who need rescuing losing their lives instead.

Prizing autonomy over even the will to live, the traditional life ethic sanctions most acts of omission. With regards to what qualifies as blameworthy intent, this ethic affirms the intuitively appealing idea that a person who fails to protect another person is not himself *directing* the physical force that, ultimately, will take the other person's life. He might be able to *stop* this force in some cases very easily and without cost,<sup>263</sup> but he

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261. Mari Matsuda, *On Causation*, 100 COLUM. L. REV. 2195, 2202 (2000).

262. *Id.* at 2202.

263. See Ken Levy, *Killing, Letting Die, and the Case for Mildly Punishing Bad Samaritanism*, 44 GA. L. REV. 607 (2010) (discussing instances where rescuing is not costly). Even where actual rescue is costly, arguably there should be a duty to warn others of danger, and a duty to call for help.

is not directing it.<sup>264</sup> Under this approach, no matter how costless it would be for a person to save even scores of people who are clearly facing a grave threat, this person is considered to have an insufficient connection to the harm.

I would argue, however, that merely because a person who fails to protect is not “as bad” as those who actively kill others does not mean he is blameless.<sup>265</sup> To reach that conclusion first requires answering the question of whether this action or inaction distinction be determinative in assessing violations of the sanctity of life? In other words, should direct causation be a necessary condition of such a violation? No.

What best supports this argument is a comparison between omissions, self-defense, and, interestingly enough, assisted suicide. First, it is necessary to acknowledge that the traditional ethic’s distinction between self-defense and assisted suicide comes down to how worthy it considers the justification for killing. In both situations, there is indisputably a direct cause and effect relationship between the agent and the harm. That the traditional ethic sees the two as worlds apart suggests that the intention behind the action is what matters.

As I have already argued, however, both the intended means and ends of self-defense can easily be characterized as the act of killing itself.<sup>266</sup> Thus, what ultimately appears to matter to the traditional ethic is an implicit judgment: that preserving one’s own autonomy is a morally worthy justification for the act of killing. In contrast, achieving a sense of resolution with one’s life and death is not a worthy justification, regardless of the fact that assisted suicide pursued for this reason need not manifest any “repugnance toward life itself.”<sup>267</sup>

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These scenarios clearly create only a minimal intrusion on people’s autonomy, and do not put their physical safety at risk.

264. As discussed earlier, this also explains traditionalist intuitions about assisted suicide, which the traditional life ethic sees as always illicit, and the withdrawal of LSMT, which this ethic sometimes permits. *See supra* Part IV.

265. *See* Melody J. Stewart, *How Making the Failure to Assist Illegal Fails to Assist: An Observation of Expanding Criminal Omission Liability*, 25 AM. J. CRIM. L. 385, 407 n. 113 (1998) (discussing states with failure-to-aid statutes that require “easy rescue,” a situation where a rescuer “generally assumes no unreasonable risk, significant disruption, or inconvenience; that is, the personal, moral, and financial costs to the rescuer would be minimal or non-existent).

266. *See supra* notes 244–57 and accompanying text.

267. *See supra* notes 180–82 and accompanying text.

But if the exact justification can determine whether an action is morally blameworthy, even where there is a direct cause and effect relationship between agent and harm, why does it not do the same thing where there is more indirect causation? For example, why should the autonomy rationale for not imposing a responsibility to protect on people be considered to outweigh the value of other people's lives, even when following through with this responsibility would actually cost very little?

After all, in contrast to self-defense, the actual life of the person who acts, or rather fails to act, is not itself at stake. And in contrast to assisted suicide, the autonomy justification for inaction is arguably more selfish, callous, and in bad faith than most justifications for assisted suicide are. Should this not entail that, though inaction causes harm less directly than action does, assisted suicide and the abrogation of the responsibility to protect be deemed *equally* illicit, at least? Should not the agent-harm relationship be considered of at least equal degree, giving rise to the same level of moral blameworthiness?

In the end, the idea that we value the will to live above all suggests rejecting a more autonomy-based approach to the life ethic, and its broad interpretation of what qualifies as legitimate killing.<sup>268</sup> The traditional life ethic asserts that even seemingly worthless lives are worth living. But if this is the case, the life ethic should not revolve so predominantly around intent, and certainly not an inconsistent conceptualization of intent. Instead, it should revolve around the will to live.

Regarding self-defense, this approach implores that people's lives not be endangered merely because others believe in a broad right to self-autonomy, inclusive of a right to err broadly when defending themselves against people whom they subjectively see as wrongdoers. Regarding the responsibility to protect, this approach counsels that a duty be imposed on people to protect and care for others who they can clearly see are facing a life-and-death threat, and whom they can help without much cost to themselves. And unlike with self-defense, it is clear in these situations that there is no time to wait, or to use less deadly force.

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268. As Ken Levy states, such an "obligation would derive from something arguably even deeper than our voluntary actions. It would derive from our common humanity, from the mere fact that we are in a situation in which a fellow human being needs our help to survive." See Levy, *supra* note 263, at 663.

Ironically enough, the argument that a person's obligations to others arises from something beyond his voluntary actions and that good intentions are not always sufficient to excuse a person's actions when they cause harm, is the cornerstone of the argument against exceptions to abortion restrictions where a woman has been forcibly raped and impregnated. As Richard Stith fluently states, "[t]he presence of the developing image of fulfilled humanity is what makes the infant one of our kind and accounts for our sense of the special inviolability of newborn human life over that of other species."<sup>269</sup> But, the visceral imagery used by anti-abortionists cannot be considered any more brutal than the imagery of suffering people throughout many places of the world, where war and violence take place.

And, unlike with the controversial issue of abortion, every person regardless of political leaning can appreciate the simple will to live manifested by these innocent, living human beings. These human beings clearly desire to continue living. Yet, their primal desire is ultimately overpowered by brutal human force.

In the end, failing to protect people from meeting such a demise—or, by being unnecessarily trigger ready in self-defense, directly causing such a demise—is problematic. These actions manifest no less of a repugnance toward life itself than abortion ostensibly does. So, why should the abrogation of the responsibility to protect, or the sanctioning of the permissive use of self-defense, evoke any less of a concern than the sanctioning of abortion?

## VII. CONCLUSION

This Article ends where it began: everyone agrees that matters of life and death are different. Yet, it would seem that precisely because people see these matters as so extraordinary, they disagree very fiercely on the ethical and legal boundaries that govern them. These disagreements play out over a range of issues, implicating age-old ethical questions like when life begins and ends, and when life can be legitimately taken even where it indisputably exists.

What is particularly interesting within this debate is how traditionalists and progressives reason differently across various subjects,

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269. See Stith, *supra* note 56, at 366

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like abortion, assisted suicide, capital punishment, self-defense, and the responsibility to protect. On the one hand, it should be no surprise that both camps present their positions as self-evident. On the other hand, not only are both sets of ethical principles hardly axiomatic, but, as this Article concludes, both are vulnerable to criticisms of being inconsistent across different contexts.

Seeking to address the shortcomings of both of these perspectives, this Article proposes an entirely different approach to the ethics of life: these ethics should center around the concept of the will to live. More so than traditionalist ideas about the rationality of biology and the value of human innocence and potential and more so than progressive ideas about the value of autonomy and consciousness, what captures human intuition about the value of life is the will to live. The will to live is at once common and extraordinary. It is our primal, universal will simply to live, as humans do, that comprises the most powerful driving force of human life. In turn, to live becomes our most basic purpose in itself. In the end, it is this concept of the will to live that should drive—and that ultimately unifies—the life ethic.

