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## ARTICLES

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### “STATUTES OF JUDGMENT”: CAPITAL PUNISHMENT’S ESTABLISHMENT CLAUSE PROBLEM

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ALYCEE LANE

#### INTRODUCTION

In the closing argument for his murder case against Jim Haselden, the prosecutor offered to jurors for their consideration of whether to impose the sentence of death the following analysis of North Carolina’s death penalty statute:

Ladies and gentlemen of the jury, North Carolina Statute 15A-2000 is a statute of judgment. That is simply that, a statute of judgment. And what does it say in the Bible about a statute of judgment? “A statute of judgment unto you throughout your generations and all your dwellings. Whosoever killeth any person, the murderer shall be put to death by the mouth of witnesses. Moreover ye shall take no satisfaction for the life of a murderer which is guilty of death, but he shall surely be put to death.” That’s the statutes of judgment.<sup>1</sup>

This argument was one that flew in the face of the North Carolina Supreme Court’s previous warnings that counsel should not rely on religious texts for their closing arguments. “[A]s we have done on several occasions,” the court wrote, “we strongly encourage counsel ‘that they should base their jury arguments solely upon the secular law and the facts.’”<sup>2</sup> The court, nevertheless, found against Haselden’s claim on appeal that the prosecutor’s closing constituted misconduct that necessitated reversal of his conviction.<sup>3</sup> The court noted that, contrary

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<sup>1</sup> State v. Haselden, 357 N.C. 1, 22 (2003).

<sup>2</sup> *Id.* at 24 (quoting State v. Williams, 350 N.C. 1, 27 (1999)).

<sup>3</sup> *Id.*

to what Haselden argued, “the prosecutor did not suggest that the Bible mandates a death sentence. Indeed, the prosecutor told the jury that the Bible verses he was citing were ‘[n]ot a mandate . . . but [were] the [Biblical] authority for those of you [who] worry about that.’”<sup>4</sup> And while the prosecutor’s closing was improper given the court’s previous cautions, it was “not so grossly improper as to warrant a new sentencing proceeding.”<sup>5</sup> In fact, “[w]e have held similar religious arguments not to be reversible error in other cases.”<sup>6</sup> The court nevertheless emphasized once again that counsel should keep in mind that closing arguments “based on any of the religions of the world inevitably pose a danger of distracting the jury from its sole and exclusive duty of applying secular law and unnecessarily risk reversal of otherwise error-free trials.”<sup>7</sup>

By framing the prosecutor’s argument as one in which he asserted or did not assert that the Bible “mandated” a sentence of death in the particular case of Jim Haselden, both the court and Haselden missed entirely what was most startling about the prosecutor’s closing: his claim that North Carolina’s capital punishment scheme is a “statute of judgment.”<sup>8</sup> Indeed, through his repetition of the phrase “statute of judgment”<sup>9</sup> and his recitation of biblical verses commanding death for “‘whosoever killeth any person,’”<sup>10</sup> the prosecutor conveyed to the jury that, far from being secular law, North Carolina General Statute Section 15A-2000 is a theological decree through which jurors can effect a theological end. In other words, it is biblical in character, intent and effect, signified by the very punishment of death for which it provides. As such, Section 15A-2000 is biblical justice codified as North Carolina law, at least insofar as it enables jurors to exercise the option of voting for death.

The prosecutor’s argument, then, was not only improper; it also rendered Haselden’s conviction a violation of the U.S. Constitution’s Establishment Clause (an issue that was not specifically addressed in the case).<sup>11</sup> After all, if the prosecutor was asking jurors to condemn

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 22.

<sup>6</sup> *Id.* at 23.

<sup>7</sup> *Id.* at 24.

<sup>8</sup> *Id.* at 22.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> U.S. CONST. amend. I. The Establishment Clause declares that “Congress shall make no law respecting an establishment of religion . . . .”

Haselden to death with the understanding and belief that they were fulfilling Section 15A-2000 as *divine* law – and I believe that he was – then surely the prosecutor’s request constituted government endorsement of religion.<sup>12</sup>

Not that this would have mattered to the North Carolina Supreme Court had the issue been argued. As dissenting Justice Edmunds wrote, while the court

has frequently expressed its disapproval of [arguments based upon the Bible] . . . my research has failed to reveal *any* case where this Court reversed a conviction because of an improper argument based upon religion . . . . As a result, we have a situation where this Court has determined that a certain type of argument is improper, even if not so grossly improper as to require the trial court’s intervention *ex mero motu*, but has failed to enforce that determination even once.<sup>13</sup>

To be fair, the North Carolina Supreme Court is not unique among courts in failing to enforce holdings that closing arguments based upon religion are improper.<sup>14</sup> As Brian C. Duffy writes,

[n]otwithstanding the great risk, indeed likelihood, of a prejudicial effect from arguments based on religion rather than secular law, courts consistently find that other factors sufficiently mitigate any danger of unfair prejudice . . . . Whether on direct appeal or writ of habeas corpus, state and federal courts perform a contextual analysis in capital cases in which prosecutors invoke religious arguments, and the courts almost invariably find that the weight of the evidence, the length of the proceedings, or the trial judge’s instructions overcome any prejudicial effect of the argument.<sup>15</sup>

Moreover, like the North Carolina Supreme Court, many state and federal courts have consistently rejected challenges to prosecutorial closings based on the Bible while, at the same time, they have affirmed and underscored the fact that the law requires jurors to

<sup>12</sup> The Supreme Court “has interpreted the Establishment Clause as mandating an ‘endorsement test’ that prohibits governmental action taken for the purpose, or having the primary effect, of endorsing religion . . . . For the endorsement test to apply there must be *government* action of some sort that may be understood as sending a message of government endorsement of religion. When the prosecutor, a governmental actor, makes religiously based closing arguments, this requirement is obviously met.” Gary J. Simson & Stephen P. Garvey, *Knockin’ On Heaven’s Door: Rethinking the Role of Religion in Death Penalty Cases*, 86 CORNELL L. REV. 1090, 1112-13 (2000).

<sup>13</sup> *Haselden*, 357 N.C. at 36-37 (Edmunds, J., dissenting).

<sup>14</sup> Brian C. Duffy, *Barring Foul Blows: An Argument for a Per Se Reversible-Error Rule for Prosecutors’ Use of Religious Arguments in the Sentencing Phase of Capital Cases*, 50 VAND. L. REV. 1335, 1337 (1997).

<sup>15</sup> *Id.* (citations omitted).

abide by secular law when determining a defendant's fate. For example, as one Oklahoma court put it:

The punishment to be imposed for criminal offenses is secular and is prescribed by the legislative bodies of this State. It is the duty of the jury to follow the law enacted by the Legislature, as interpreted by the courts in instructions to the jury. It is to the Legislature, rather than to the jury, that these moral and religious concepts must be directed, for the authority to abolish capital punishment is vested in that body.<sup>16</sup>

Indeed, it is clear that the courts have reached a consensus on this issue that, I believe, is driven in part by the imperative to avoid running afoul of the Establishment Clause. For as one court put it, "religious references during trial are fraught with possible establishment clause complications."<sup>17</sup> I would argue that this imperative, obscured as it is by the fact that the courts and defendants have addressed the problem

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<sup>16</sup> *Dare v. State*, 378 P.2d 339, 350 (Okla. Crim. App. 1963). The courts usually frame the religious argument issue by implicitly or explicitly juxtaposing secular or state law with "biblical" or "higher" law. *See, e.g., Manning v. Epps*, 695 F. Supp. 2d 323, 373 (N.D. Miss. 2009) (observing that "[t]he prosecutor's argument was not urging the jury to apply biblical law to justify the death penalty but using familiar biblical references to argue that secular law demanded the punishment."); *Jones v. Kemp*, 706 F. Supp. 1534, 1559 (N.D. Ga. 1989) (explaining that "any decision to impose death must be the result of discretion which is carefully and narrowly channelled [sic] and circumscribed by the secular law of the jurisdiction."); *People v. Zambrano*, 163 P.3d 4, 65 (Cal. 2007) (holding that a "prosecutor may not cite the Bible or religion as a basis to impose the death penalty [citations] . . . . On the other hand, we have suggested it is not impermissible to argue, for the benefit of religious jurors who might fear otherwise, that application of the death penalty according to secular law does not *contravene* biblical doctrine."), *overruled by People v. Doolin*, 198 P.3d 11, 36 n.22 (Cal. 2009); *People v. Lewis*, 140 P.3d 775, 843 (Cal. 2006) (holding that "[t]he prosecutor could properly urge jurors to consider evidence of the location in which defendants chose to commit their crimes in making the normative decision whether to impose death under the secular law in which they had been instructed."); *Carruthers v. State*, 528 S.E.2d 217, 221 (Ga. 2000) (stating that "[b]y quoting these [biblical] texts during closing arguments, prosecutors may 'diminish the jury's sense of responsibility and imply that another, higher law should be applied in capital cases, displacing the law in the court's instructions.'"), *overruled by Vergara v. State*, 657 S.E.2d 863, 866 (Ga. 2008).

Because the courts' holdings and cautions more often than not have been of no consequence regarding defendants' convictions, they have failed to put an end to the practice of evoking the Bible in closing argument. And it should be said that while the courts readily acknowledge the ways that biblical arguments "displace" secular law, it is difficult to see how their decisions actually reinscribe secular law as paramount.

<sup>17</sup> *State v. Ceballos*, 832 A.2d 14, 35 n.36 (Conn. 2003). Although not a death penalty case (this is one of the few non-capital cases in which counsel engaged in religious closing argument), the court here articulated its Establishment Clause concerns after having reviewed death penalty cases for the purpose of fashioning a rule by which to decide challenges to religious closing arguments.

of biblical argument primarily through a Due Process Clause and Eighth Amendment analysis, underlies *another* consensus that the courts have reached but has yet to be subjected to critical scrutiny: that capital punishment schemes are secular in fact. In case after case, this belief has functioned as a “truth” requiring neither explanation nor analysis.<sup>18</sup> Thus, capital punishment is secular because the courts say it is so.

Given this shared understanding among the courts (and, in fact, among a broad swath of the legal community)<sup>19</sup> that death penalties are secular, the prosecutor’s argument in *Haselden* seems downright heretical. In effect, what the prosecutor did was indict the consensus as nothing less than a mystification of the true character of capital punishment. In so doing, he also provided (no doubt inadvertently) the key to understanding not only why death penalties are, fundamentally, the consummation of biblical justice, but also why death penalty cases are almost exclusively the only cases that become the occasion for prosecutors and defense attorneys to make closing arguments based on biblical precepts.<sup>20</sup> That key is “death” itself.

Following the *Haselden* prosecutor’s lead, I will show that by constructing capital punishment as secular, the courts have avoided having to contend with what is actually brought to bear not only on death penalty cases that concern biblical closing arguments, but also on the very existence of capital punishment statutes: the religious *meanings* ascribed to “death” – indeed, to both “death” *and* “life” – and the unquestioned as well as unspoken investment in such meanings. As the *Haselden* prosecutor makes clear, the imposition of death as punishment is truly a condemnation of the defendant to a theological, i.e., Judeo-Christian *idea* of death.<sup>21</sup> It is also the reification of a Judeo-Christian idea of both death and life, such that the very meaning of the death penalty as it is imposed in this country is inherently and unequiv-

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<sup>18</sup> See e.g., *Kemp*, 706 F. Supp. at 1559; *State v. Haselden*, 357 N.C. 1, 24 (2003) (quoting *State v. Williams*, 350 N.C. 1, 27 (1999)).

<sup>19</sup> *Haselden*, 357 N.C. at 24.

<sup>20</sup> While prosecutors are primarily the ones who offer biblical arguments, “defendants also can and do make religious arguments to the jury as they seek mercy,” as Justice Edmunds pointed out in his *Haselden* dissent. “A review of the reported cases demonstrates that many religious arguments are made by a party to preempt religious arguments that may be made by opposing counsel in an unrebuttable closing argument. Consequently, these arguments feed on themselves as each side rolls out the ecclesiastical artillery.” *Haselden*, 357 N.C. at 38 (Edmunds, J., dissenting).

<sup>21</sup> *Id.* at 34.

ocally religious. To put this differently, because in death penalty law and discourse the “higher law” of the Bible is embedded within the meanings attributed to both death and life, higher law is in fact what reigns supreme when a defendant is “secularly” condemned and then killed by the state. The courts’ frequent pronouncements that the death penalty is secular law imposed for secular purposes is nothing less than an “adjudicatory masking technique”<sup>22</sup> which conceals the punishment of death for what it is: a theological act, a means by which “higher law” is called upon to effect a Judeo-Christian end.

In Part I, I focus on the courts’ claim that criminal homicide laws represent the interests in the “sanctity of life” and examine how the courts have inscribed into the law, through their adoption and use of the sanctity principle, a Judeo-Christian definition of “life.” For this analysis, I discuss *Cruzan v. Harmon*,<sup>23</sup> *Cruzan v. Director*,<sup>24</sup> and *Washington v. Glucksberg*,<sup>25</sup> three assisted suicide cases (the latter two being U.S. Supreme Court decisions) in which the courts conflated the “sanctity of life” principle with “criminal homicide laws” and thus imbued these laws with the meaning that they ascribed to “life.” In Part II, I address the courts’ adoption of the idea of “death” as a state of post-mortem existence – a theological construct that is ultimately driven by a belief that “death” is as the Bible frames it. It is upon this idea of “death” that the death penalty depends for its force and effect. Having determined that the meanings ascribed by the courts to “life” and “death” render capital punishment “religion in act,” I discuss in Part III the penalty’s incompatibility with the First Amendment, particularly the Establishment Clause. Finally, I conclude by showing that, because of the way “life” and “death” are construed within the context of capital punishment, from the perspective of most Americans, capital punishment conveys the message that the states – and the federal government – favor religion. Consequently, capital punishment is unconstitutional.

## I. LIFE

### **Sanctity**

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1. The condition of being sanctified; holiness.
2. Anything regarded as sanctified or holy.

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<sup>22</sup> Shelly Cohen, *De-Moralizing Death: A Humanistic Approach to the Sanctity of Life*, 14 ELDER L. J. 91, 106 (2006).

<sup>23</sup> 760 S.W.2d 408 (Mo. 1988).

<sup>24</sup> 497 U.S. 261 (1990).

<sup>25</sup> 521 U.S. 702 (1997).

3. The condition of being inviolable; sacredness: the sanctity of marriage.  
[from Old French: *saincteté*, from Latin *sanctitās*, from *sanctus* holy]<sup>26</sup>

U.S. law regards “[h]uman life . . . to be both sacred and precious,” writes Shelly Cohen in her analysis of physician-assisted suicide and the law, “and the State holds its interest in the preservation of life above almost all other interests.”<sup>27</sup> As a consequence of this regard, the “principle of the sanctity of life” not only guides courts’ decisions in assisted suicide cases, it also, Cohen notes, ironically serves as the underlying rationale of the death penalty.<sup>28</sup> For while the killing of the capital defendant suggests that, to the State, not all lives are sacred and precious, it actually protects the idea that life is sacred in that the defendant is ultimately punished “for violating” the principle.<sup>29</sup> In a sense, his execution “represents a symbolic, albeit retroactive, protection of the sanctity of life.”<sup>30</sup>

Although the death penalty is not Cohen’s primary focus, it could very well have been given that assisted suicide cases, as well as right-to-die cases, are places in which the courts have explicitly construed criminal homicide laws as, at bottom, designed to protect and affirm the sacredness of human life. In so doing, the courts have imbued criminal homicide laws with the meaning that they have attached to human life, i.e., that it is sacred, and have thereby suggested that these laws – and by extension, the death penalty itself – vindicate this principle.

I want to explore this trajectory by first analyzing the cases that addressed the fate of Nancy Cruzan,<sup>31</sup> a woman who was reduced to a persistent vegetative state as a result of injuries that she suffered in a car accident.<sup>32</sup> Prior to the Nancy Cruzan cases, both state and federal courts had enunciated in various iterations the sanctity of life principle and had framed criminal homicide laws as in part motivated by it. However, I focus on the Nancy Cruzan cases because they culminated in the U.S. Supreme Court’s holding in *Cruzan v. Director* that “a State [may] simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected inter-

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<sup>26</sup> COLLINS ENGLISH DICTIONARY, COMPLETE & UNABRIDGED (10th ed. 2012).

<sup>27</sup> Cohen, *supra* note 22, at 91-92.

<sup>28</sup> *Id.* at 92.

<sup>29</sup> *Id.* at 100.

<sup>30</sup> *Id.*

<sup>31</sup> See *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988); *Cruzan v. Dir. Mo. Dept. of Health*, 497 U.S. 261 (1990).

<sup>32</sup> *Cruzan*, 760 S.W.2d at 411.

ests of the individual”<sup>33</sup> – a holding by which the Court for the first time both implicitly affirmed the sanctity of life principle as it had been articulated by the lower courts *and* conflated it with criminal homicide laws.<sup>34</sup> This decision set the stage for *Washington v. Glucksberg*, a later assisted suicide case in which the Court went a step further and not only explicitly affirmed the sanctity of life principle, but also more directly aligned the principle with the nation’s criminal homicide laws.<sup>35</sup> Lower courts would soon thereafter follow suit.<sup>36</sup> By aligning the sanctity principle with criminal homicide laws, the Court both invested these laws with the meaning of life that it embraced in its right-to-die/assisted suicide cases and reaffirmed that “life” is precisely what it has always been in death penalty jurisprudence – a theological construct.

#### *CRUZAN and GLUCKSBERG*

On one fateful morning in 1983, twenty-five year-old Nancy Cruzan of Missouri was found “lying face down in a ditch, approximately thirty five feet from her overturned vehicle.”<sup>37</sup> To the state trooper who discovered her, Nancy showed no signs of “respiratory or cardiac function.”<sup>38</sup> Paramedics who arrived at the accident scene, however, were able to revive Nancy, though she was hospitalized in a comatose state and remained that way for three weeks.<sup>39</sup> When Nancy did emerge from her coma, she was able “to take nutrition orally” (though doctors surgically implanted a gastronomy feeding tube in order to “ease the feeding process”) and to undergo rehabilitation.<sup>40</sup> While Nancy initially showed some signs of improvement, the efforts to rehabilitate her failed and she declined precipitously.<sup>41</sup> Eventually, doctors diagnosed Nancy as “in a persistent vegetative state,” and because she could no longer feed herself, she had to be fed solely through the gastronomy tube.<sup>42</sup>

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<sup>33</sup> *Cruzan*, 497 U.S. at 282.

<sup>34</sup> *See Cruzan*, 497 U.S. 261.

<sup>35</sup> *Washington v. Glucksburg*, 521 U.S. 702 (1997).

<sup>36</sup> *See, e.g.*, *Herrera-Inirio v. INS*, 208 F.3d 299 (1st Cir. 2000); *Robles v. Dennison*, 745 F. Supp. 2d 244 (W.D.N.Y. 2010); *Giordano v. Conn. Valley Hosp.*, 588 F. Supp. 2d 306 (D. Conn. 2008).

<sup>37</sup> *Cruzan*, 760 S.W.2d at 411.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 410-11.



Because Nancy had expressed, on several occasions, to family and friends that should she ever be reduced to such a condition, she would not want to be kept alive, her family asked the hospital where Nancy was receiving treatment to remove the feeding tube and allow Nancy to die.<sup>43</sup> The hospital refused and the family took its case to court.<sup>44</sup> The family won at the trial level, where the trial court ruled that “no state interest outweighed Nancy’s ‘right to liberty’ and that to deny Nancy’s co-guardians authority to act under these circumstances would deprive Nancy of equal protection of the law.”<sup>45</sup> However, Nancy’s guardians *ad litem* appealed her case to the Missouri Supreme Court which, through a discourse firmly grounded in the sanctity of life principle, reversed the lower court’s decision.<sup>46</sup>

In finding that the “trial court erroneously declared the law,” the Missouri Supreme Court wrote that both privacy rights and the right to refuse treatment to extend life must be “balanced against the State’s interests to the contrary,” namely, the “preservation of life, prevention of homicide and suicide, the protection of interests of innocent third parties and the maintenance of the ethical integrity of the medical profession.”<sup>47</sup> Turning its attention specifically to the State’s interest in life (“in this case, only the state’s interest in the preservation of life is implicated”), the Court stated that this interest “embraces two separate concerns: an interest in the prolongation of the life of the individual patient and an interest in the sanctity of life itself.”<sup>48</sup> The State’s “relevant interest,” in other words, “is in life, both its preservation and its sanctity.”<sup>49</sup> As for the sanctity of life, this idea, the Court explained,

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<sup>43</sup> *Id.* at 410.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 411.

<sup>46</sup> *Id.* at 410.

<sup>47</sup> *Id.* at 410, 419.

<sup>48</sup> *Id.* at 419.

<sup>49</sup> *Id.* at 424. This formulation of “state interests” was hardly unique to the Missouri Supreme Court. *See, e.g., In re Eichner*, 73 A.D.2d 431, 450 (N.Y. App. Div. 1980) (stating that “no one dare question the existence of a strong public policy that values and protects the sanctity of life”); *In re Longeway*, 133 Ill.2d 33, 52 (1989) (noting that “Illinois has a strong public policy of preserving the sanctity of human life, even if in an imperfect state”), *superseded by statute*, Health Care Surrogate Act, 755 ILCS 5/11a-1, *as recognized by Lower v. Murphy*, 275 Ill. App. 3d 665, 777 (1995); *Norwood Hosp. v. Munoz*, 409 Mass. 116, 125 (1991) (stating “the State’s interest in preserving life has ‘two separate but related concerns: an interest in preserving the life of the particular patient, and an interest in preserving the sanctity of all life’”).

“rests on the principle that life is precious and worthy of preservation without regard to its quality.”<sup>50</sup>

The Court established early on that it intended to undertake its analysis from a *theological* definition of “sanctity of life,” and it did so by erecting – through the two concepts of “sanctity of life” and “quality of life” – a framework by which it would decide Nancy’s fate as an issue of the relationship between the body and the spirit.<sup>51</sup> In the Court’s decision, “quality of life” concerns Nancy’s body.<sup>52</sup> It is, in other words, a concept that the Court discussed in terms of Nancy’s medical condition. Sanctity of life, on the other hand, concerns something other and more significant than the body. Indeed, as a concept that the Court positioned against “quality of life” (i.e., the body), “sanctity of life,” I would argue, is nothing less than a euphemism for *spirit*, the Court’s affirmation that life is spiritual existence of which the body is in complete service.<sup>53</sup>

What this means is that the Court had in essence proceeded from the presumption that – Nancy’s vegetative state notwithstanding – some spirit, some blessed, sacred thing nevertheless continued to live in her body and was ultimately being served by it (or was making use of it). Because for the Court such service or use sanctifies, Nancy’s body had to be kept alive.

The Court’s introduction to the issues of the case had actually provided the first clue that it would ground its decision in theology. For example, after underscoring that the “debate here is . . . between quality of life and death” and acknowledging the “anguish” of Nancy’s parents who have “suffered terribly these many years,” the Court then went on to state that

[n]either this, nor any court lays proper claim to omniscience. We share the limits borne by all as human beings, only too aware of our earth-bound perspective and frustrated by what we cannot now know. Our role is a limited one to which we remain true only if our decision is firmly grounded on legal principles and reasoned analysis.<sup>54</sup>

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<sup>50</sup> *Cruzan*, 760 S.W.2d at 419.

<sup>51</sup> Given the extent of Nancy’s brain injuries, the court did not indulge in any speculation that Nancy’s mind or cognitive life might be operative in spite of her diagnosis. Thus, “mind” is not at issue in the court’s analysis.

<sup>52</sup> *Cruzan*, 760 S.W.2d at 412, 414, 420.

<sup>53</sup> *Id.* at 419.

<sup>54</sup> *Id.* at 412.

Here, the Court posits the existence of not only a human realm (limited and earthbound), but also, by implication, some other realm beyond Earth where presumably something (not human) can lay proper claim to omniscience and where the answer to Nancy’s dilemma (i.e., knowledge) can be found. This answer is not by any means limited to the merely human and earthbound perspective embodied by “legal principles and reasoned analysis.”<sup>55</sup> Through this discourse, the Court signaled that it would make its “reasoned analysis” genuflect properly before “what we cannot now know.”<sup>56</sup>

Perhaps more significantly, however, the Court repudiated here the trial court’s argument – through which it rejected a “religious” challenge to its decision<sup>57</sup> – that “Nancy’s present unresponsive and hopeless existence is *not the will of the Supreme Ruler* but of man’s will to forcefully feed her when she herself cannot swallow thus fueling respiratory and circulatory pumps to no cognitive purpose for her except sound and perhaps pain.”<sup>58</sup> As far as the Missouri Supreme Court was concerned, the trial court’s statement was an assertion of that court’s claim to omniscience – to knowledge that is neither human nor earthbound – for it betrayed the court’s presumption to know the mind of God. This being the case, there was no basis from which to conclude that the trial court had rendered a decision “firmly grounded on legal principles and reasoned analysis.” Thus, the Missouri Supreme Court corrected the lower court’s decision, and did so precisely by reasserting a theological order in which the will of the Supreme Ruler is properly acknowledged as both inaccessible and incomprehensible to human beings. It was to this order, of course, that the Court ultimately pledged Nancy’s continued existence.<sup>59</sup>

Given that the sanctity principle itself emerged out of the Judeo-Christian tradition and that use of the phrase “sanctity of life” carries with it the history and presumptions of that tradition,<sup>60</sup> the theological

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

<sup>56</sup> *See id.*

<sup>57</sup> *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 333 (1990) (Stevens, J., dissenting).

<sup>58</sup> *Cruzan*, 760 S.W.2d at 433 (emphasis added) (internal quotations omitted).

<sup>59</sup> *See id.* at 412.

<sup>60</sup> As William Frankena argues, “most historians of Western morals agree . . . that the rise of Judaism and even more of Christianity, had a great deal to do with the growth of the ‘sense of the sanctity of human life’ – that there was either little or no recognition of the sanctity of life in ancient pagan culture, and that any such recognition was either generated or greatly increased by the advent of the Judaic and Christian religions.”

order which the Court reasserted is embedded in a Judeo-Christian world view – even though the Court made no explicit mention of Judaism or Christianity. Thus, in spite of its claims to reason and legal principles, what the Court had handed down as precedent was theological analysis dressed in secular clothing.

But what are we to make of the Court's failure to define "sanctity of life" (as opposed to its willingness to state only the principle upon which it rests)? Though it employed the phrase repeatedly throughout its analysis, not once did the Court take pains to make transparent its meaning.<sup>61</sup> This being the case, one can assume that by proceeding as if "sanctity of life" need not be defined at all – as if the phrase would be understood by anyone who encountered it – the Court intended a definition of "life" according to what "sanctity" *commonly* means: sanctified, sacred, holy.<sup>62</sup>

Such a reading is encouraged by the fact that the Court's body-spirit framework is also at play in the Court's failure to define "sanctity of life." In particular, when it came to the state of Nancy's body, the Court was more than willing to define life by specifically employing as its working definition the Missouri Revised Statutes Section 194.005 (1986) (Missouri's Living Will Statute).<sup>63</sup> Ironically, this section of the statute actually defines "for all legal purposes" the "occurrence of death" and does based on the cessation of enumerated bodily functions.<sup>64</sup> For the Missouri Supreme Court, however, Section 194.005 served as a definition of life.<sup>65</sup> Hence, the Court wrote, "Nancy is not dead" because she "is otherwise *alive* within the meaning of Section 194.005."<sup>66</sup>

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Matthew P. Previn, *Assisted Suicide and Religion: Conflicting Conceptions of the Sanctity of Human Life*, 84 GEO. L.J. 589, 593 (1996).

<sup>61</sup> See *Cruzan*, 760 S.W.2d at 419-20, 430.

<sup>62</sup> See MERRIAM WEBSTER'S NEW WORLD POCKET DICTIONARY 248 (3d ed. 1997).

<sup>63</sup> MO. REV. STAT. § 194.005 (1986).

<sup>64</sup> The statute provides that for "all legal purposes, the occurrence of human death shall be determined in accordance with the usual and customary standards of medical practice, provided that death shall not be determined to have occurred unless the following minimal conditions have been met: (1) When respiration and circulation are not artificially maintained, there is an irreversible cessation of spontaneous respiration and circulation; or (2) When respiration and circulation are artificially maintained, and there is total and irreversible cessation of all brain function, including the brain stem and that such determination is made by a licensed physician." *Cruzan*, 760 S.W.2d at 411 n.3.

<sup>65</sup> See *id.*

<sup>66</sup> *Id.* at 412 (emphasis added).

“Life” in the “sanctity of life” context, however, means something entirely different, something beyond mere corporeal functioning, for surely the Court did not mean sanctity of “spontaneous respiration and circulation” or sanctity of the continued and full operation of the brain, “including the brain stem.”<sup>67</sup> Indeed, I would argue that the Court did not define “sanctity of life” because for the Court, life is ultimately “what we cannot now know,” a mystery that the word “sanctity” (as commonly understood) captures and expresses.

Having thus privileged a non-secular definition of “life” to determine the fate of Nancy Cruzan, the Court firmly fixed the meaning of “life” as sanctified, sacred, holy into the law itself – enshrined it, in fact, as a paramount “State interest.”<sup>68</sup>

This definition of life – and its identification as a paramount state interest – became even more firmly ensconced within the law when, in *Cruzan v. Director*, the U.S. Supreme Court affirmed the rationale by which the Missouri Supreme Court determined that the trial court had “erroneously declared the law.”<sup>69</sup> At issue in this case was whether the procedural requirement announced by the court in *Cruzan v. Harmon* – that “evidence of the incompetent’s wishes as to the withdrawal of treatment” must be “proved by clear and convincing evidence”<sup>70</sup> – was forbidden by the United States Constitution.<sup>71</sup> Holding that the Constitution did not forbid the requirement, the Court noted that “Missouri relies on its interest in the protection and preservation of human life, and there can be no gainsaying this interest.”<sup>72</sup> Indeed, “a State may . . . simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual.”<sup>73</sup>

By accepting without qualification the Missouri Supreme Court’s rationale, the U.S. Supreme Court implicitly adopted for itself the non-secular terms by which the lower court defined “life.”<sup>74</sup> One could say that the Court positively affirmed the state court’s definition, signified

<sup>67</sup> *Id.* at 411.

<sup>68</sup> *See id.* at 408-15.

<sup>69</sup> *Cruzan v. Dir. Mo. Dept. of Health*, 497 U.S. 261 (1990).

<sup>70</sup> *Id.* at 280.

<sup>71</sup> *Id.* at 280-85.

<sup>72</sup> *Id.* at 280.

<sup>73</sup> *Id.* at 282.

<sup>74</sup> The majority’s “definition of life as consistently and irrefutably valuable,” writes Shelly Cohen, “is unmistakably in line with the theological derivation of the principle of the sanctity of life. Whether one looks to the historical rooting of man’s value in God

by its statement that “there can be no gainsaying” Missouri’s interest in the preservation of life – an interest (let us not forget) that for the state of Missouri “embraces . . . an interest in the sanctity of life itself.”<sup>75</sup>

That the state court asserted as a state interest a non-secular definition of life as well as handed down a decision that was theologically-driven was not something that the Court could have easily missed. First, Justice Stevens addressed outright in his lengthy dissent the theological implications of Missouri’s position regarding Nancy’s life and, by extension, the non-secular dimensions of the state court’s decision.<sup>76</sup> After noting, for example, that the “State’s unflagging determination to perpetuate Nancy Cruzan’s physical existence is comprehensible only as an effort to define life’s meaning, not as an attempt to preserve its sanctity,”<sup>77</sup> Justice Stevens observed:

[T]here is no reasonable ground for believing that Nancy Beth Cruzan has any *personal* interest in the perpetuation of what the State has decided is her life. As I have already suggested, it would be possible to hypothesize such an interest on the basis of theological or philosophical conjecture. But even to posit such a basis for the State’s action is to condemn it. It is not within the province of secular government to circumscribe the liberties of the people by regulations designed wholly for the purpose of establishing a sectarian definition of life.<sup>78</sup>

Justice Stevens went on to say, “the only apparent *secular* basis for the State’s interest in life is the policy’s persuasive impact upon people other than Nancy and her family.”<sup>79</sup> Notwithstanding his own apparent embrace of the sanctity principle, Justice Stevens clearly saw that the Missouri court’s ruling was at odds with “secular government” and thus, by implication, secular law.

Second, in three cases that the Court itself cited, the issue of the sanctity principle’s religious implications – and by extension, the construction of “life” as sacred and holy existence – was very much in play.<sup>80</sup> For example, in his dissent from the opinion reached in *Brophy*

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. . . or to contemporary writings of the Church, ‘an unqualified interest in life’ can only be justified in religious terms.” Cohen, *supra* note 22, at 109-10.

<sup>75</sup> *Cruzan*, 497 U.S. at 335 (Stevens, J., dissenting) (quoting *Cruzan v. Harmon*, 760 S.W.2d 408, 419 (Mo. 1988)).

<sup>76</sup> *See id.* at 330-57.

<sup>77</sup> *Id.* at 345.

<sup>78</sup> *Id.* at 350.

<sup>79</sup> *Id.*

<sup>80</sup> *See generally* *Brophy v. New England Sinai Hosp., Inc.*, 497 N.E.2d 626 (Mass. 1986); *In re Grant*, 747 P.2d 445 (Wash. 1987); *Corbett v. D’Alessandro*, 487 So. 2d 368 (Fla. Dist. Ct. App. 1986).

*v. New England Sinai Hospital, Inc.*, wherein the court held that "the State's interest in the preservation of life does not overcome Brophy's right to discontinue [the] treatment [that has kept him alive],"<sup>81</sup> Judge Nolan wrote that "the balance which the court struck today . . . is but another triumph for the forces of secular humanism (modern paganism) which have now succeeded in imposing their anti-life principles at both ends of life's spectrum."<sup>82</sup> By equating the majority's decision with paganism and branding it anti-life, Judge Nolan not only revealed that he construed "life" in religious terms, but he also showed that he considered the "sanctity of life" principle to be one that is firmly grounded in religious belief.<sup>83</sup>

In *In re Grant*, another case that the Court cited, Judge Goodloe wrote in his dissent that "the majority strikes a balance which fails to give appropriate weight to the State's interest in preserving life – whether that of the particular patient, or the sanctity of all human life in general."<sup>84</sup> In this case, the Washington Supreme Court had overturned the trial court's ruling that denied the "withholding of mechanical or artificial life sustaining procedures" from the appellant.<sup>85</sup> Goodloe then went on to explain why the majority's opinion failed to give the appropriate weight to the State's interest.<sup>86</sup> "As stated in regard to the most basic of all rights – the right to life," Goodloe noted that, according to Judge Lehman, the late Chief Judge of the Washington court, "The Constitution is misread by those who say that these rights are created by the Constitution. The men who wrote the Constitution did not doubt that these rights existed before the nation was created and are dedicated by God's word."<sup>87</sup>

Here, Goodloe used Chief Judge Lehman's constitutional analysis to critique the majority's decision as one that not only belied the meaning of life, i.e., that it is sacred and holy existence, but also as one

<sup>81</sup> *Brophy*, 497 N.E.2d at 638.

<sup>82</sup> *Id.* at 640 (Nolan, J., dissenting).

<sup>83</sup> For a more recent iteration of Judge Nolan's viewpoint, see *Woods v. Commonwealth*, 142 S.W.3d 24, 64-65 (Ky. 2004) (Wintersheimer, J., dissenting) (stating that "the majority [in finding that "Wood's constitutional rights of self-determination far outweighed any interests the Commonwealth may have had in his continued biological existence"] has now taken the next step down the slippery slope away from the sanctity of all innocent human life and toward the secular value of meaningful life introduced in *Roe v. Wade*").

<sup>84</sup> *In re Grant*, 747 P.2d at 463 (Goodloe, J., dissenting).

<sup>85</sup> *Id.* at 446 (majority opinion).

<sup>86</sup> See *id.* at 460-64 (Goodloe, J., dissenting).

<sup>87</sup> *Id.* at 463.

that denied the fact that “God’s word” (i.e., the Bible) serves as the foundation of our constitutional rights.<sup>88</sup>

Finally, in *Corbett v. D’Alessandro*, while the majority affirmed that “under the circumstances of the instant case” the right “to have a nasogastric tube removed is a constitutionally protected right,”<sup>89</sup> the court did not reach its conclusion without having first cloaked itself in religious garb.<sup>90</sup> “[W]e want to acknowledge,” the court wrote, “that we began our deliberations in this matter, as did those who drafted our Declaration of Independence, with the solemnity and gratefulness of the knowledge ‘that all are . . . endowed by their Creator with . . . Life.’”<sup>91</sup> Moreover, “[w]e forcefully affirm that Life having been endowed by our Creator should not be lightly taken nor relinquished. We recognize, however, that we are also endowed with a certain amount of dignity and the right to the ‘Pursuit of Happiness.’”<sup>92</sup> For the court, life is endowed by God (as he is conceived, presumably, through biblical doctrine) – a fact that the court was moved to repeat.<sup>93</sup> By implication, life is sacred existence, and it is this definition of life, the court suggested, that our laws embrace and articulate.

What these cases show is that the inherently religious meaning of “sanctity of life” was definitely an issue that was on the table for the judiciary at the time that the U.S. Supreme Court issued its ruling in *Cruzan v. Director*. Thus, the Court’s silence (or, at the very least, its choice not to address the Missouri Supreme Court’s underlying religious rationale) – in the face of Justice Stevens’ critique as well as the theologically-focused opinions contained in the cases that the Court cited – suggests that the majority in *Cruzan v. Director* approved of a “sectarian definition of life” as a basis for deciding issues of life and death.

Neither the Missouri Supreme Court nor the U.S. Supreme Court took up the issue of Missouri’s interest in the “prevention of homicide.”<sup>94</sup> It is telling, however, that in affirming Missouri’s “interest in the protection and preservation of human life,” the U.S. Supreme

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

<sup>89</sup> 487 So. 2d 368, 371-72 (Fla. Dist. Ct. App. 1986).

<sup>90</sup> *See id.* at 371.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *See id.*

<sup>94</sup> *See Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 280 (1990); *Cruzan v. Harmon*, 760 S.W.2d 408, 419 (Mo. 1998) (en banc).



Court did note that as "a general matter, the States – indeed, all civilized nations – demonstrate their commitment to life by treating homicide as a serious crime."<sup>95</sup> Given that the Court embraced "life" as the lower court defined it, it seems clear that the Court construed the States' treatment of homicide as fundamentally a commitment to "life" defined as sanctified, sacred, holy existence.

If, however, the connection that the Court made here between criminal homicide laws and the sanctity of life principle appears to be a bit tenuous,<sup>96</sup> such is not the case with *Washington v. Glucksberg*, a decision in which the Court overturned the Ninth Circuit's affirmation of a district court's ruling that the state of Washington's ban on physician-assisted suicide was unconstitutional.<sup>97</sup> The district court had determined that the ban placed "'an undue burden on the exercise'" of a "'liberty interest protected by the *Fourteenth Amendment*" because that interest "'extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide.'"<sup>98</sup> Moreover, the district court held that the ban "violated the *Equal Protection Clause*'s requirement that 'all persons similarly situated . . . be treated alike.'"<sup>99</sup>

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<sup>95</sup> *Cruzan*, 497 U.S. at 280.

<sup>96</sup> It should be noted that following the *Cruzan v. Director, Missouri Department of Health* decision, lower courts began to take up the homicide issue as framed by the Court. See, e.g., *In re L.W. v. L.E. Phillips Career Dev. Ctr.*, 482 N.W.2d 60, 74 (Wis. 1992) (writing that the "interest in preserving life is the most significant of the four [state interests]. As stated in *Cruzan*: '[T]here can be no gainsaying this interest. As a general matter, the States – indeed, all civilized nations – demonstrate their commitment to life by treating homicide as serious crime.');" *People v. Kevorkian*, 527 N.W.2d 714, 732 (Mich. 1994) (noting that the "United States Supreme Court repeatedly and unequivocally has affirmed the sanctity of human life," and quoting the Court's statement in *Cruzan v. Director, Missouri Department of Health* that "the States – indeed, all civilized nations – demonstrate their commitment to life by treating homicide as a serious crime.);" *Quill v. Koppel*, 870 F. Supp. 78, 84 (S.D.N.Y. 1994) (citing *Cruzan* homicide quote), *rev'd on other grounds*, *Vacco v. Quill*, 521 U.S. 793, 808 (1997); *Laurie v. Senecal*, 666 A.2d 806, 808 (R.I. 1995) (stating that "Indeed, the Supreme Court of the United States in *Cruzan* points out that '[a]s a general matter, the States – indeed, all civilized nations – demonstrate their commitment to life by treating homicide as a serious crime.');" *In re Edna M.F. v. Eisenberg*, 563 N.W.2d 485, 488 (Wis. 1997) (writing that "[i]n making its decision, the Court determined that the states have an interest in protecting the lives of their citizens and that that interest is demonstrated, among other ways, 'by treating homicide as a serious crime.'").

<sup>97</sup> 521 U.S. 702, 735-36 (1997).

<sup>98</sup> *Id.* at 708 (emphasis added).

<sup>99</sup> *Id.* (emphasis added).

In holding that Washington's ban did not offend the Fourteenth Amendment to the United States Constitution, the U.S. Supreme Court returned to the issue of homicide by reiterating its statement in *Cruzan v. Director* that states "demonstrate their commitment to life by treating homicide as a serious crime." The Court also, more importantly, directly incorporated Comment 5 of Model Penal Code Section 210.5 into its discussion of homicide, which explicitly frames the sanctity of life principle as an interest that criminal homicide laws represent.<sup>100</sup> The Court wrote:

Washington has an "unqualified interest in the preservation of human life." *Cruzan*, 497 U.S. at 282. The State's prohibition on assisted suicide, like all homicide laws, both reflects and advances its commitment to this interest. See *id.*, at 280; Model Penal Code § 210.5, Comment 5, at 100 ("The interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another.").<sup>101</sup>

Having thus directly incorporated Comment 5 into its decision, the Court revealed that it considered the sanctity of life principle central to, if not the underlying logic and rationale of, criminal homicide laws. Because "the 'unqualified interest in the preservation of human life' . . . is equated with 'the sanctity of life'" – as Justice Stevens pointed out in his concurrence<sup>102</sup> – then the meaning of life *as* sanctified, sacred, holy existence is, for the Court, what is both advanced and reflected by homicide laws.

Although *Glucksberg* represented a first for the U.S. Supreme Court – the Court had not, until this moment, explicitly conflated criminal homicide laws with the sanctity of life principle – this was not the case for lower courts.<sup>103</sup> In fact, for some years prior to *Glucksberg*, the idea that criminal homicide laws represent an interest in the sanctity of life had already served as a basis from which a handful of courts framed the issues presented in murder and suicide cases.<sup>104</sup> Now that

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<sup>100</sup> *Id.* at 710, 728-29.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 746 (Stevens, J., concurring).

<sup>103</sup> See, e.g., *Quill v. Koppel*, 870 F. Supp. 78, 84 (S.D.N.Y. 1994) (quoting Comment 5 to Model Penal Code § 210.5(2)).

<sup>104</sup> See, e.g., *Rinehart v. Brewer*, 421 F. Supp. 508, 519 n.5 (S.D. Iowa 1976) (writing that "Homicide statutes protect the sanctity of life and sentencing ought to reflect concerns of deterrence, rehabilitation, and incapacitation as they relate to that interest."); *Ladd v. State*, 568 P.2d 960, 972 (Alaska 1977) (noting that "the crime of murder protects the greater and distinct interest in the sanctity of life"); *In re Joseph G. v. Joseph G.*, 667 P.2d 1176, 1181 (Cal. 1983) (quoting Comment 5 to Model Penal Code § 210.5(2)); *People v. White*, 870 P.2d 424, 468 (Colo. 1994) (en banc) (noting the trial

the *Glucksberg* decision serves as binding precedent, this idea has gained more currency, demonstrated by the fact that the lower courts have begun both to examine claims through the prism of the *Glucksberg* analysis and/or to include in their decisions, as did the U.S. Supreme Court, direct reference to Comment 5.<sup>105</sup> Consequently, the sanctity principle and the definition of life it articulates are becoming more firmly entrenched as the language by which courts construe both the meaning and purpose of criminal homicide laws.<sup>106</sup>

As criminal homicide laws, death penalty statutes also represent "the interests in the sanctity of life"<sup>107</sup> – meaning, that in spite of their secular trappings, they stand for, defend, or express indirectly (i.e., represent), interests that are at bottom committed to defining "life" as sacred and holy existence – particularly in a Judeo-Christian sense of what is sacred and holy. I believe that this is a significant reason why prosecutors in death penalty cases have not hesitated to emphasize in their closing arguments both the statutes' theological imperative and the nonsectarian, i.e., Judeo-Christian definition of life in which the statutes are grounded. Indeed, the courts' construction of these laws

court's holding that the "Defendant, subsequent to this murder, demonstrated a complete indifference to the humaneness and to the sanctity of life of his former friend by brutally striking, in a rage, the face of Paul Vosika's corpse").

<sup>105</sup> See, e.g., *Sampson v. State*, 31 P.3d 88, 100 n.60 (Alaska 2001) (quoting Comment 5 to Model Penal Code § 210.5(2)); *People v. Kevorkian*, 639 N.W.2d 291, 332 n.40 (Mich. Ct. App. 2001) (quoting Comment 5 to Model Penal Code § 210.5(2)); *In re Ryan N. v. Ryan N.*, 92 Cal. App. 4th 1359, 1373 (2001) (noting that "[a]nother reason [for imposing criminal penalties on one who aids suicide] is the belief that the sanctity of life is threatened by one who is willing to participate in taking the life of another, even at the victim's request.").

<sup>106</sup> See, e.g., *State v. Carter*, 584 S.E.2d 792, 806 (N.C. 2003).

<sup>107</sup> A few states, in fact, enable jurors to find that a capital defendant acted with "disregard for the sanctity of life." See, e.g., *id.* (holding that "[d]efendant's actions demonstrate an egregious and callous disregard for the sanctity of life and the safety of others."); *Guevara v. State*, 97 S.W.3d 579, 581 (Tex. Crim. App. 2003) (stating that "[t]he evidence presented at trial demonstrates appellant's complete disregard for the sanctity of human life.").

Even before the *Cruzan v. Harmon* decision, the state of Missouri had already specifically incorporated the sanctity principle into its criminal homicide laws. In determining whether a capital defendant acted with "depravity of mind," for example, Missouri permits jurors to consider whether "the defendant acted with callous disregard for the sanctity of life." *State v. Johnson*, 284 S.W.3d 561, 587 (Mo. 2009). See also *Hawkins v. Mullin*, 291 F.3d 658, 667 (10th Cir. 2002) (noting the "Oklahoma legislature's 'policy that one who, by his willful criminal conduct, sets in motion a chain of events so perilous to the sanctity of life that death results [therefrom] must bear the ultimate responsibility for his actions.'").

as representing the interests in the sanctity of life practically begs prosecutors to offer religious argument.<sup>108</sup>

Thus, in *People v. Vieira*, for example, the prosecutor told jurors:

[T]he Judeo-Christian ethic comes from the Old Testament – I believe the first five books – called the Torah in the Jewish religion. And there are two very important concepts that are found there. And that’s, one, capital punishment for murder is necessary in order to preserve the sanctity of human life, and, two, only the severest penalty of death can underscore the severity of taking life.<sup>109</sup>

In *Manning v. Epps*, the district attorney, in response to defense counsel’s argument that “the jury could exemplify the love of Jesus Christ by sparing” the defendant’s life, argued to jurors that “biblical law recognized a society’s right to defend itself,” and that the defendant “posed a danger to the sanctity of life.”<sup>110</sup> “The death penalty,” avowed another prosecutor,

is the only way . . . that we as Christian civilized people can proclaim in no uncertain terms that the most precious of all God’s gift [sic] is human life, and if you take human life, you forfeit your own right to live. And if you vote to impose a penalty of death in this case, you are not minimizing human life; you are emphasizing the sanctity of human life.<sup>111</sup>

And, finally, in *People v. Zambrano*, the prosecutor explained to jurors that,

Genesis chapter 9, verse 6 (“whoever sheds the blood of man shall his blood be shed, for in [H]is image did God make man”) . . . stood for two concepts: “The first is that capital punishment for murderers is necessary to preserve the sanctity of human life, and second being it is man’s obligation to do it.”<sup>112</sup>

Indeed, the “sanctity of life,” he continued, “does not forbid, but demands, the death penalty for murder, because a lesser penalty ‘means that the taking of life is not that serious an offense.’”<sup>113</sup>

In the end, these arguments demystify capital punishment schemes because they reveal the schemes’ so-called secular character as veneer. What prosecutors did in the above cases is invite jurors both to see the statutes for what they actually are – theologically-driven and-

<sup>108</sup> *Johnson*, 284 S.W.3d at 587.

<sup>109</sup> *People v. Vieira*, 106 P.3d 990, 1010 (Cal. 2005).

<sup>110</sup> 695 F. Supp. 2d 323, 372 (N.D. Miss. 2009), *rev’d*, 688 F.3d 177 (5th Cir. 2012).

<sup>111</sup> *Williams v. Campbell*, No. 04-0681-WS-C, 2007 U.S. Dist LEXIS 27050, 100 (S.D. Ala. Apr. 11 2007).

<sup>112</sup> 163 P.3d 4, 65 (Cal. 2007), *disapproved of by* *People v. Doolin*, 198 P.3d 11 (Cal. 2009) (emphasis omitted).

<sup>113</sup> *Id.*

determined rules of law – and then to join the state in reifying, by handing down a death sentence, “a sectarian definition of life.”<sup>114</sup> Just as critically, the prosecutors invited jurors into a cosmology wherein the *executed* defendant could be viewed as an eloquent synonym for “life” defined as sacred and holy existence. This idea is suggested, for example, by the prosecutor’s argument in *Williams v. Campbell* that, “if you vote to impose a penalty of death in this case, you are not minimizing human life; you are emphasizing the sanctity of human life.”<sup>115</sup> This idea makes eminent sense, though it seems counterintuitive, considering that executing the defendant directly conflicts with the sanctity principle (if life is sacred, isn’t the defendant’s life sacred as well?).<sup>116</sup> When the state kills the defendant, it threatens our interests in the sanctity of life because it demonstrates “a willingness to participate in taking the life of another.”<sup>117</sup> However, if the defendant *as executed* is elevated symbolically as a synonym for sacred existence, i.e., if he is viewed as the triumph of the idea that life is sacred, holy existence, then the conflict between the state’s act and the sanctity principle is effectively contained.

Ultimately, “life” in the framework of capital punishment undercuts any claim or assurance that capital punishment schemes are secular law and demonstrates how empty courts’ warnings are that counsel should adhere to secular law in closing argument. Even if, however, counsel were *never* to offer *any* Biblical argument, a theological definition of life nevertheless remains since capital punishment schemes as criminal homicide laws represent our interests in the sanctity of life. In this regard, the system never really needs prosecutors to invite jurors to participate with the state in reifying “a sectarian definition of life” because once juror participation in a death penalty trial is secured, jurors must then decide, within the parameters of a system which presupposes the truth of the sanctity principle, whether a defendant will live or die.

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<sup>114</sup> *Cruzan v. Dir. Mo. Dep’t of Health*, 497 U.S. 261, 350 (1990) (Stevens, J., dissenting).

<sup>115</sup> *Williams*, 2007 U.S. Dist LEXIS 27050, at \*100.

<sup>116</sup> A prosecutor addressed this issue by construing the lives of victims as more sacred than the life of the defendant (“[If capital punishment is not imposed] the sanctity of life of a convicted killer means more than the sanctity of life of an innocent future victim.”). *People v. Brisbon*, 544 N.E.2d 297, 300 (Ill. 1989).

<sup>117</sup> *Washington v. Glucksburg*, 521 U.S. 702, 716 (1997).

## II. DEATH

“The more precise constitutional significance of death is difficult to describe,” wrote Justice Stevens in his *Cruzan v. Director* dissent, “not much can be said with confidence about death unless it is said from faith . . . .”<sup>118</sup>

But this much can be said: the capital defendant’s dead body, and the idea of death *as* the death of his body, is largely uninteresting to the death penalty regime. To be sure, parties who support capital punishment do want to guarantee that a defendant found guilty of murder is swiftly and properly executed, so his dead body is not irrelevant.<sup>119</sup> Still, however, his dead body seems almost unspeakable, or perhaps just beside the point, even though his “death” is very much at issue. Thus, in their closing arguments (Biblical or not) – to give an example – neither prosecutors nor defense attorneys evoke the defendant’s dead body as a way to drive home to jurors the point of the death sentence that they might choose to impose.<sup>120</sup>

This disinterest in the defendant’s dead body mirrors the disinterest in the body that marks the *Cruzan* cases – which suggests that the sanctity of life principle, and specifically its body/spirit trajectory, informs as well the meaning that the courts in these cases have attached to death. In fact, looking at *Cruzan v. Harmon* as a case in point, it is clear that although the Court relied on Missouri’s legal definition of death as a basis for proclaiming that Nancy was “not dead,” it nevertheless presupposed – because it grounded its analysis in the sanctity of life principle – that death is ultimately a state of spiritual existence.<sup>121</sup> As I noted earlier, “sanctity of life” is a euphemism for “spirit” and thus by implication, posits a state of existence that simply *is*, whether embodied or not. Because “spirit” is not body-dependent, it must continue to exist after the body that it had inhabited dies.

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<sup>118</sup> *Cruzan*, 497 U.S. at 343 (Stevens, J., dissenting).

<sup>119</sup> See generally Chris Fisher, *Evolution of Execution*, CBA REC., Sept. 2007, at 40; Brent E. Newton, *The Slow Wheels of Furman’s Machinery of Death*, 13 J. APP. PRAC. & PROCESS 41 (Spring 2012).

<sup>120</sup> See *People v. Zambrano*, 163 P.3d 4, 65 (Cal. 2007), *disapproved of by* *People v. Doolin*, 198 P.3d 11 (Cal. 2009) (emphasis omitted); *People v. Vieira*, 106 P.3d 990, 1010 (Cal. 2005); *Williams v. Campbell*, No. 04-0681-WS-C, 2007 U.S. Dist LEXIS 27050, at \*100 (S.D. Ala. Apr. 11, 2007); *Manning v. Epps*, 695 F. Supp. 2d 323, 372 (N.D. Miss. 2009), *rev’d*, 688 F.3d 177 (5th Cir. 2012).

<sup>121</sup> *Cruzan*, 760 S.W.2d at 411.

That the sanctity principle proceeds from the assumption that death is a state of spiritual existence is an effect, too, of the “binary system” that lies at the principle’s “core” – which is that “life and death are two separate and mutually exclusive states.”<sup>122</sup> As Shelly Cohen explains, “within such a context, one may conclude” not only that “life is good because death is bad,” but also that whatever death is, it is not better than life.<sup>123</sup> Again, *Cruzan v. Harmon* is instructive. In that case, the Court criticized what it called the plaintiff’s “thinly veiled statement” that Nancy’s “life in its present form is not worth living.”<sup>124</sup> Against the plaintiff’s statement, however, the Court affirmed the sanctity of life principle and, in so doing, revealed “sanctity of life” as *the Court’s own* thinly veiled statement that Nancy’s “life in its present form” was *better* than death.<sup>125</sup>

To reach either of these conclusions (life is good because death is bad, or life is better than death), one must assume death to be some *other* kind of existence that is experienced after the body dies. For if life really ends once the respiratory and circulatory functions cease, then there is *nothing* for *anyone* to experience as either good or bad/better or worse than what the body experienced when its respiratory and circulatory systems functioned. Having at its core, then, the life/death binary, the sanctity principle eschews any notion that death could in fact be solely the death of the body.

Because capital punishment operates from this framework (it represents the interests in the sanctity of life), the defendant’s death as the death of his body could only be uninteresting, for his punishment is presumed to begin *after execution*. This is when he experiences death, which for the defendant is bad not only because death is bad, but also because his experience of being dead is shaped and determined by a crime that constitutes a theological violation (i.e., a disregard for the sanctity of life).

The death penalty, then, is a statement of faith – faith that death is a state of post-mortem existence, faith that death can constitute punishment because it is felt and experienced by the one who is executed. And this faith, marked by the courts’ embrace of the sanctity principle, is ultimately driven by a belief that death is as the Bible frames it.

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<sup>122</sup> Cohen, *supra* note 22, at 92-93.

<sup>123</sup> *Id.* at 93.

<sup>124</sup> *Cruzan*, 760 S.W.2d at 422.

<sup>125</sup> *Id.* at 424.

Thus, for one who has committed the crime of murder, death is punishment because, as the Bible infers, it is a state whereby the murderer is directly and immediately subject to God's violent and everlasting retributive justice (if not God's mercy and forgiveness).<sup>126</sup> Since imposing the death penalty makes the murderer available to God, capital punishment constitutes man's sacred partnership with Him to ensure compliance with higher law.<sup>127</sup> Consequently, the executed defendant is a sign of sacred service, the fulfillment of God's will *through man* that murderers be put to death.

It is hardly surprising, then, that both prosecutors and defense attorneys (though for different reasons) have used their closings to situate jurors within the idea of death as the Bible construes it.<sup>128</sup> The closing arguments addressed by the court in *Bennett v. Angelone*, fairly typify how this gets played out in many capital cases. In response to the prosecutor's argument that Jesus, though hanging from the cross, had no quarrel with Rome's use of the death penalty ("the moral," noted the prosecutor, is "follow the law and leave the rest to Heaven,")<sup>129</sup> defense counsel countered in rebuttal that the prosecutor "has told you that vengeance is mine saith the Lord, and I submit to you that is true because Ronnie will answer for this to someone far

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<sup>126</sup> See, e.g., *Hebrews* 9:27-28 (New Int'l Version) "Just as people are destined to die once, and after that to face judgment, so Christ was sacrificed once to take away the sins of many . . ."; *Revelation* 2:23 (New Int'l Version) "I will strike her children dead. Then all the churches will know that I am he who searches hearts and minds, and I will repay each of you according to your deeds"; *Revelation* 20:12 (New Int'l Version) "And I saw the dead, great and small, standing before the throne, and books were opened. Another book was opened, which is the book of life. The dead were judged according to what they had done as recorded in the books."

<sup>127</sup> "[M]any Christians have placed considerable emphasis on the counsel of the apostle Paul in his epistle to the Romans that Christians should respect civil authorities, since the ruler 'does not bear the sword in vain; he is the servant of God to execute his wrath on the wrongdoer.' Indeed, for centuries, Christians have seized on this notion of the civil magistrate as 'the servant of God to execute his wrath on the wrongdoer' as support for the notion that God has authorized the state to conduct executions." Davison M. Douglas, *God and the Executioner: The Influence of Western Religion on the Death Penalty*, 9 WM. & MARY BILL RTS. J. 137, 145 (2000). See, e.g., *Bennett v. Angelone*, 92 F.3d 1336, 1346 (4th Cir. 1996) (noting the prosecutor's argument that after God "covered the Earth with water and left only Noah and his family and some animals to survive . . . God said 'I'll never do that again' and handed that sword of justice to Noah. Noah is now the Government. Noah will make the decision who dies.").

<sup>128</sup> See *Bennett*, 92 F.3d at 1346.

<sup>129</sup> *Id.*



greater than this jury, and I would submit to you that the ultimate power of punishment belongs not with this jury.”<sup>130</sup>

Both counsel here grounded their closings in a narrative that posits as true post-mortem existence. This the prosecutor did through his command to jurors to “leave the rest to Heaven,” a statement by which he suggests that after Ronnie is executed by the state, he will nevertheless continue to exist, albeit in some other place where “Heaven” will determine his fate.<sup>131</sup> Defense counsel’s statement that “Ronnie will answer,” conveys as well the reality of a post-death existence by suggesting that after death, Ronnie will have to account (presumably to God) for the crimes that he committed.<sup>132</sup> Both counsel, moreover, frame Ronnie’s experience of death as determined by the way that the Bible construes his crime.<sup>133</sup> Thus, Ronnie will be subject to whatever “Heaven” has in store for him, i.e., he will “answer for this to someone far greater than” the jury.

Because this definition of death is one in which capital punishment laws are grounded, it pertains whether or not counsel argue it in their closing. Jurors will always already have to decide, within the parameters of a legal discourse that presupposes that death means post-mortem existence, the fate of a capital defendant. But capital punishment laws are not merely grounded in this theological definition of death. More critically, they are absolutely dependent upon it, for to imagine death as *only* the “irreversible cessation of spontaneous respiration and circulation”<sup>134</sup> is not only to accept the alternate possibility that the defendant’s punishment comes to an end the moment that he is executed; but it is also to acknowledge that the experience of execution itself – all of its attendant terror and pain – may be the only real punishment that the state makes the defendant suffer. Which is to say that the penalty *is* the punishment of being tortured to death by *human* hands – a retaliatory, vengeful, retributive form of justice that, with only a few exceptions, has been “roundly condemned as [an] intolerable” aspiration “for a government in a free society.”<sup>135</sup> Not to mention

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<sup>130</sup> *Id.* at 1346 n.9.

<sup>131</sup> *Id.* at 1346.

<sup>132</sup> *Id.* at 1346 n.9.

<sup>133</sup> *Id.* at 1346.

<sup>134</sup> *Cruzan*, 760 S.W.2d at 411 n.3.

<sup>135</sup> *Furman v. Georgia*, 408 U.S. 238, 343 (1976) (Marshall, J., concurring). “[W]e explained that unless a criminal sanction serves a legitimate penological function, it constitutes ‘gratuitous infliction of suffering’ in violation of the Eighth Amendment.”

that it is precisely what “the Eighth Amendment itself was adopted to prevent . . . .”<sup>136</sup>

The idea of death as post-mortem existence circumvents these uncomfortable truths. It turns our attention away from the defendant’s tortured-to-death body and instead directs our focus on his suffering in the afterlife at the hands of something greater (and other) than ourselves. Viewed from this perspective, capital punishment appears to be nothing less than a means by which citizens employ “the machinery of the State” to practice “religious belief,”<sup>137</sup> i.e., to thrust murderers into the “hands of an angry God”<sup>138</sup> who brings “every deed into judgment.”<sup>139</sup> It is to use the state to condemn the defendant to a theological end.

### III. THE DEATH PENALTY’S ESTABLISHMENT CLAUSE PROBLEM

Given the meaning of life and death within the context of capital punishment, the death penalty constitutes *not* secular law, as courts have insisted, but instead “‘religion *in act*’”<sup>140</sup> – a truth that has marked capital punishment since the colonial period.<sup>141</sup> Thus, for example, while the Old Testament references for the crimes listed in *The Capitall Lawes of New-England*<sup>142</sup> provided justification for the Massachusetts Bay Colony’s decision to make certain behaviors capital offenses, the references also provided the Colony an opportunity to mark capital punishment explicitly as Christian faith in practice, as the performance of belief.<sup>143</sup> Crucial to this performance were the early Americans’ con-

Baze v. Rees, 553 U.S. 35, 78 (2008) (Stevens, J., concurring) (noting the opinion in *Gregg v. Georgia*, 428 U.S. 153 (1978)).

<sup>136</sup> *Furman*, 408 U.S. at 343 (Marshall, J., concurring).

<sup>137</sup> See *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 226 (1963).

<sup>138</sup> “O sinner! Consider the fearful [d]anger you are in: ‘Tis a great Furnace of Wrath, a wide and bottomless Pit, full of the Fire of Wrath, that you are held over in the Hand of that God . . . .” Jonathan Edwards, *Sinners in the Hands of an Angry God*, sermon preached in Enfield, Conn. (July 8, 1741) in *Electronic Texts in American Studies* 16 (Reiner Smolinski ed.) available at <http://digitalcommons.unl.edu/estas/54>.

<sup>139</sup> For God will bring every deed into judgment, including every hidden thing, whether it is good or evil. *Ecclesiastes* 12:14 (New Int’l Version).

<sup>140</sup> *Marsh v. Chambers*, 463 U.S. 783, 811 (1983) (Brennan, J., dissenting).

<sup>141</sup> Douglas, *supra* note 127.

<sup>142</sup> *Furman v. Georgia*, 408 U.S. 238, 335 (1976) (Marshall, J. concurring) (noting these laws were “the first expression of capital offenses known to exist in this country.”).

<sup>143</sup> To underscore the idea that executions were the performance of belief, colonists carried them out with all the solemnity of a religious service and ritual. Thus, executions were “typically preceded by church services wherein clergy preached to the condemned and to the community, urging repentance and explaining the divine

ceptualization, in Biblical terms, of both life and death, for how the colonists understood life and death is what made their acceptance and execution of capital punishment intelligible as faith in action.<sup>144</sup> In other words, for the majority of colonists, executions made sense as faith in action because they reified life, on the one hand, as sacred, holy existence, and death, on the other hand, as post-mortem existence. In so doing, executions were a testament to the truth of the biblical worldview to which early Americans subscribed.

By the "end of the eighteenth century, capital punishment had been restricted in much of the new nation to a limited number of crimes," a reduction that was in great part the result of an "'unprecedented assault on the death penalty'" waged both by Enlightenment thinkers who offered utilitarian and other philosophical arguments against capital punishment as well as by liberal religious groups that "articulated theologies of divine and human nature that emphasized God's goodness and the human capacity for moral improvement."<sup>145</sup> This shift – as well as the evolution throughout the 19th and 20th centuries of so-called secular justifications for the death penalty (deterrence, prevention of other criminal acts, cost effectiveness, encouragement of guilty pleas and confessions, and retribution) – has often been presented as the evidence that capital punishment had ultimately become a secular practice.<sup>146</sup>

And yet, the shift did not end capital punishment altogether, nor did it make capital punishment any less an instance of religion in act. Indeed, the continued religious controversies and vitriol surrounding this form of punishment, as well as the relentless ecclesiastical duels that pass for closing arguments in capital cases, reveal the degree to which capital punishment continues to be Judeo-Christian belief in act – and to be perceived as such.<sup>147</sup> To this we can owe in part the death

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requirements of execution." Douglas, *supra* note 127, at 156; "The sermon remained a standard part of the execution ceremony as long as executions were held in public, through the first half of the nineteenth century in the North and well into the twentieth in parts of the South." STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 35 (2002).

<sup>144</sup> Douglas, *supra* note 127.

<sup>145</sup> *Id.* at 158.

<sup>146</sup> *Id.* at 161-70.

<sup>147</sup> This is exemplified, for example, by the statement made by Mark Tooley, president of the Institute on Religion and Democracy, in response to the execution of Troy Davis. According to Tooley, "Historic Christianity has understood capital punishment as the state acting as God's instrument for justice." By implication, then, capital punishment is the state's performance of Judeo-Christian belief. Mark Tooley, *The Churches Debate Troy*

penalty's internal logic, the fact that it rests on (and thus expresses) theologically-determined constructions of "life" and "death," constructions that have never been abandoned as the terms by which many render the penalty intelligible.<sup>148</sup> The argument, then, that capital punishment has become a secular practice that expresses citizens' justified outrage over the crime of murder is simply a mystification.

Nevertheless, this kind of mystification is precisely what many courts have indulged when faced with the ever-increasing Establishment Clause challenges to the death penalty. Whether petitioners' appeals have focused on legislative intent,<sup>149</sup> the method of execution,<sup>150</sup> or the fact that "a neutral post-execution existence would not cause the offender to experience the secular purposes of punishment,"<sup>151</sup> in many of these cases the courts have found that – because they are secular – death penalties comport with the Establishment Clause. Consequently, petitioners' arguments fail to pass the Establishment Clause test as set out by the U.S. Supreme Court in *Lemon v. Kurtzman*.<sup>152</sup> Under the *Lemon* test, a challenged action is unconstitutional if 1) it

*Davis*, THE AMERICAN SPECTATOR (Oct. 3, 2011, 6:07 AM), <http://spectator.org/archives/2011/10/03/churches-debate-troy-davis>.

The Southern Baptist Convention, which boasts a membership of 16 million, embraces capital punishment and, in its "official stance" on the issue, "cites" for support of its position "the divine command to Noah after the flood, as recorded in *Genesis*: 'Who-soever sheds the blood of man, by man shall his blood be shed; for in the image of God has God made man.'" *Id.* Again, the implication is that through execution, Noah (i.e., the state) practices faith in action because he follows God's "divine command."

Besides the fact that these statements demonstrate the degree to which capital punishment is perceived as religion in action, it also shows that capital punishment utterly fails the Establishment Clause endorsement test, which "asks whether the government action has 'the effect of communicating a message of government endorsement or disapproval of religion' . . . viewed from the perspective of a reasonable observer "in light of history and ubiquity.'" *Kalman v. Cortes*, 723 F. Supp. 2d 766, 783 n.15 (E.D. Pa. 2010). In saying this, I'm assuming that there are reasonable observers among the 16 million members of the Southern Baptist Convention.

<sup>148</sup> A good example of this is the statement made by Southern Baptist Theological Seminary President Albert Mohler in response to the Troy Davis execution. According to Mohler, "The death penalty is intended to affirm the value [and] sanctity of every single life," though the "general trend of secularization and moral confusion has undermined the kind of moral and cultural consensus that makes the death penalty make sense." Tooley, *supra* note 147.

<sup>149</sup> See, e.g., *Roach v. Dretke*, 2:02-CV-0042, 2005 U.S. Dist. LEXIS 19697, at \*36-42 (N.D. Tex. Sept. 9, 2005); *Hanson v. State*, 55 S.W.3d 681 (Tex. App. 2001); *Holberg v. State*, 38 S.W.3d 137 (Tex. Crim. App. 2000).

<sup>150</sup> See, e.g., *Andrews v. Shulsen*, 600 F. Supp. 408, 431 (D. Utah 1984).

<sup>151</sup> See, e.g., *Hogan v. State*, 2006 OK CR 19, ¶¶ 78-82 (Okla. Crim. App. 2006).

<sup>152</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

lacks a secular purpose; 2) its primary effect is to advance or inhibit religion; or, 3) it fosters excessive entanglement of government with religion.<sup>153</sup> It is under the test’s first prong that the courts have generally found petitioners’ claims wanting.<sup>154</sup>

In *Holberg v. State*, for example – a Texas death penalty decision that courts in other jurisdictions have followed – the petitioner challenged Texas’ death penalty statutes on Establishment Clause grounds by arguing that not only did the sponsors of these statutes fail to articulate a secular purpose for enacting them, but the sponsors also argued “at length, the religious purpose for the punishment.”<sup>155</sup> This they did while “siding . . . with the viewpoint of a particular and identifiable religious sect.”<sup>156</sup> Moreover, the Texas statutes’ primary effect, petitioner argued, “is to advance the beliefs of fundamentalist Protestants over those of other branches of American Christianity and other sects and religions that oppose the death penalty on contrasting religious grounds.”<sup>157</sup>

To the court, however, appellant’s arguments were unpersuasive. Holberg’s first prong challenge failed, the court determined, because

*it is at least as likely* that the Legislature’s actual purpose in enacting the statutes was the secular one of establishing the appropriate penalty for certain heinous crimes, and that the legislators acted as they did because they held one *or more* of the following reasonable, secular beliefs: (1) the death penalty is the only proportional punishment for certain crimes; (2) the death penalty ensures, at a minimum, that the offender will never harm anyone again; (3) the death penalty may deter some persons . . . from committing murder; and (4) life imprisonment without parole is not a viable alternative to the death penalty because (a) capital offenders are a danger to others in the prison environment, (b) persons imprisoned literally for life have little incentive to behave properly, and (c) it is undesirable, costly, and possibly inhumane to keep persons in prison until they actually die from old age or disease.<sup>158</sup>

What is extraordinary about the court’s holding here is that the court ascribed to the Texas legislators who adopted Texas’ death penalty statutes “secular” rationales that the legislators themselves did not offer.<sup>159</sup> The court simply determined that it was “at least as likely” that

<sup>153</sup> *Id.*

<sup>154</sup> *See, e.g.,* *Holberg v. State*, 38 S.W.3d 137 (Tex. Crim. App. 2000).

<sup>155</sup> *Id.* at 139.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 140 (emphasis added) (internal citations omitted).

<sup>159</sup> *Id.* at 139-40.

the legislators had these “secular” purposes in mind and that they may have “held one or more” of the reasons enumerated when they adopted capital punishment.<sup>160</sup> By ascribing to the legislators “secular” arguments that they did not in fact offer – the source of these arguments, apparently, was the U.S. Supreme Court in its *Gregg v. Georgia* decision, rather than the Texas legislative record itself – the court was able to avoid actually addressing the Establishment Clause implications of the legislators’ *religious* pronouncements and thus to declare Texas’ capital punishment scheme constitutional.<sup>161</sup>

The court was not persuaded as well by Holberg’s second prong challenge, i.e., that the primary effect of the statutes is to “advance or inhibit religion.”<sup>162</sup> Without engaging Holberg’s argument, the court simply pronounced that the “primary effect of the statutes is penal in nature, not religious, and the mere fact that the statutes are consistent with the tenets of a particular faith does not render the statutes in violation of the Establishment Clause.”<sup>163</sup> Holberg’s argument, of course, did not concern the statutes’ consistency “with the tenets of a particular faith.”<sup>164</sup> Instead, it addressed the fact that in adopting the statutes, the legislators took sides, i.e., they advanced “the beliefs of fundamentalist Protestants over those of other branches of American Christianity and other sects and religions that oppose the death penalty.”<sup>165</sup>

The court might have had a more difficult time evading Holberg’s arguments had Holberg also challenged the court to face what is truly the Texas death penalty’s Establishment Clause problem: its reliance on “higher law” to effect a theological end. For even if the legislators had articulated the so-called secular arguments that the court gratuitously ascribed to them, the death penalty – and thus Texas’ capital punishment scheme – was always already the articulation of religious belief, steeped as it is in Judeo Christian beliefs concerning life and death. No list of “secular purposes” changes this fact, and one could argue that the legislators themselves simply laid bare this truth.

Other courts have been as dismissive of Establishment Clause challenges as the *Holberg* court. Some have found against a petitioner by

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<sup>160</sup> *Id.* at 140.

<sup>161</sup> *Id.* at 139-40.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 139.

simply re-stating the *Holberg* court’s list of possible “secular” purposes.<sup>166</sup> In two cases, the courts noted petitioners’ Establishment Clause arguments but did not apply any of the U.S. Supreme Court’s tests to the facts of the cases.<sup>167</sup> Finally, one court dismissed a petitioner’s claim altogether as irrelevant to death penalty jurisprudence.<sup>168</sup> This refusal on the part of the courts to offer any substantive analysis of the petitioners’ claims is telling, for it suggests, first of all, that the courts are incapable of addressing them in ways that could render the death penalty reconcilable with the Establishment Clause.<sup>169</sup> It also signifies that the courts, in their rote recitation of “secular” purposes, are simply providing “post hoc rationalizations” which, in the end, reveal the courts’ underlying investment in protecting from scrutiny the theological implications of a particular government action (and thus keeping the death penalty in tact).<sup>170</sup> Again, however, the courts’ evasion of the issues would have been made more difficult had the petitioners zeroed in on the statutes’ deeper religious logic which, ironically, has been consistently unmasked by prosecutors themselves.

It could certainly be argued, of course, that the courts’ secular rationale, as well as the religious meanings embedded in “life” and “death,” are of no matter given that when the Framers wrote the Constitution, they apparently did not consider capital punishment to be at odds with the Establishment Clause. This is signified most clearly by their having adopted the Fifth and Eighth Amendments, which imply, respectively, that the government may legitimately take life so long as it provides a capital defendant due process of law and ensures that the penalty imposed is not cruel and unusual.<sup>171</sup> If the Framers believed

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<sup>166</sup> See, e.g., *Hogan*, 2006 OK 19 ¶¶ 80 - 81; *Hanson*, 55 S.W.3d at 695-96.

<sup>167</sup> *People v. Williams*, 49 Cal. 4th 405, 467 (2010); *People v. Danks*, 32 Cal. 4th 269, 310 (2004).

<sup>168</sup> In *Jackson v. Epps*, No. 4:03CV461-P, 2010 WL 3853158, at \*27 (N.D. Miss. Sept. 28, 2010), the court wrote that not only was it “not aware of any clearly established federal law applying the endorsement test of First Amendment jurisprudence to closing argument in capital sentencing proceedings,” but also that it did not find the First Amendment to be an “appropriate governing standard here.”

<sup>169</sup> Interestingly, in one assisted suicide case where the plaintiff argued that “the state has no logical, secular motive to demand his continued existence, given his medical condition and prognosis,” the court ignored the argument altogether even though it was the crux of the plaintiff’s case. See *Donaldson v. Lungren*, 2 Cal. App. 4th 1614, 1619 (1992). That the court ignored the argument suggests the extent to which this line of cases may also be irreconcilable with the Establishment Clause.

<sup>170</sup> Edward Rubin, *Assisted Suicide, Morality and Law: Why Prohibiting Assisted Suicide Violates the Establishment Clause*, 63 VAND. L. REV. 763, 801 (2010).

<sup>171</sup> See U.S. CONST. amend V; U.S. CONST. amend VIII.

that the death penalty as constructed and applied constituted an establishment of religion, then they would not have legitimized its practice through the proceeding amendments.

But for “those who authored the Bill of Rights, it seems reasonable to suppose” that the death penalty “would have been regarded as at least a sensitive matter, if not deeply controversial.”<sup>172</sup> Indeed, at the time when the Framers debated and wrote the Bill of Rights, the death penalty was under direct assault by abolitionists.<sup>173</sup> Hence, while

in the 1760s and 1770s . . . many Americans started to question whether death was too great a punishment for property crimes like burglary and larceny . . . [by] the 1780s and 1790s the propriety of capital punishment for *any* crime, even murder, was a bitterly contested issue. Whether to abolish capital punishment completely was taken up in debating societies and at college commencement ceremonies. Newspapers carried editorials and letters arguing for and against abolition.<sup>174</sup>

As a result of this “revolution in public consciousness,”<sup>175</sup> colonial governments began to reduce the number of crimes for which one could be executed.<sup>176</sup> No colony, of course, completely abolished capital punishment, but by the time the colonies ratified the Constitution, its application had been considerably narrowed.<sup>177</sup>

This retention and narrowing of capital punishment, which constituted a break from an absolutist interpretation and application of Biblical doctrine, reflects as well a balancing of competing interests (abolitionists and supporters of capital punishment) which, arguably, marks the Constitution’s Fifth and Eighth Amendments. That is, through these Amendments the Framers, too, appear to have struck a balance in that they neither endorsed outright nor prohibited explicitly capital punishment. Yet in striking a balance, they made the Constitution a doctrine that “itself identifies the death penalty as specially vulnerable to constitutional strictures.”<sup>178</sup> Nothing in the Constitution suggests that this could not include vulnerability to the strictures of the Establishment Clause. In fact, it could be argued that it was *because*

<sup>172</sup> *Lynch v. Donnelly*, 465 U.S. 668, 723 (1984) (Brennan, J., dissenting).

<sup>173</sup> BANNER, *supra* note 143, at 88-111.

<sup>174</sup> *Id.* at 88. This “dramatic transformation in penal thought and practice” was not relegated to the new colonies; instead, it constituted “an international phenomenon.” *Id.* at 89.

<sup>175</sup> *Id.* at 88.

<sup>176</sup> *Id.* at 89.

<sup>177</sup> *Id.*

<sup>178</sup> Steven R. Manley, *The Constitution, the Punishment of Death, and Misguided “Originalism,”* 1999 L. REV. M.S.U.-D.C.L. 913, 923 (1999).



colonies were beginning to break from strict adherence to the Bible in their application of the death penalty (and thus appeared to be abandoning the practice) that the punishment did not raise for the Framers a First Amendment flag.

But why assume at all that “the framers of the Establishment Clause would not have themselves authorized a practice that they thought violated the guarantees contained in the Clause [?]”<sup>179</sup> As Justice Brennan argued in his *Marsh* dissent, such an assumption “is questionable” given that legislators

influenced by the passions and exigencies of the moment, the pressure of constituents and colleagues, and the press of business, do not always pass sober constitutional judgment on every piece of legislation they enact, and this must be assumed to be as true of the Members of the First Congress as any other.<sup>180</sup>

Given the insurmountable religious divisions surrounding capital punishment at the time of ratification and, more pointedly, the penalty’s clear basis in Biblical doctrine (as signified by the religious meanings of “life” and “death” upon which capital punishment depends), it is fair to conclude that the death penalty rendered, as it continues to render, the First, Fifth and Eighth Amendments “irreconcilable constitutional commands”<sup>181</sup> – a fact that we can no longer ignore. Consequently, courts must stop proceeding as if “the dilemma does not exist” and instead “admit the futility of” any “effort to harmonize” these amendments.<sup>182</sup> This may well mean “accepting the fact that the death penalty cannot be administered in accord with” the Constitution’s First Amendment.<sup>183</sup>

#### CONCLUSION

It is not “within the province of secular government to circumscribe the liberties of the people by regulations designed wholly for the purpose of establishing a sectarian definition” of either life or death.<sup>184</sup> And yet, this is precisely the work that capital punishment accomplishes. The meanings attached to life and death in the Judeo-Chris-

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<sup>179</sup> *Marsh v. Chambers*, 463 U.S. 783, 814 (1983) (Brennan, J., dissenting).

<sup>180</sup> *Id.* at 814-15.

<sup>181</sup> *Callins v. Collins*, 510 U.S. 1141, 1157 (1994) (Blackmun, J., dissenting).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 350 (1990) (Stevens, J., dissenting).

tian tradition animate death penalties and get reinforced as truth through a capital defendant's execution. Ultimately, life and death as framed in the context of capital punishment are terms that convey to citizens that the state favors religion because they reveal that the state intends for its citizens to understand and to address the crime of murder in specifically religious terms.<sup>185</sup>

Hence, whenever a defendant's time for execution arrives, invariably citizens galvanize (or, just state an opinion that is) for or against the death penalty, and many do so primarily on religious grounds – as they have since the early days of the Republic. Some claim that the Bible authorizes the defendant's execution; others claim that the Bible forbids it. Each side (like so many prosecutors and defense attorneys) mobilizes the correct biblical verses for or against, and each side stakes a claim regarding the meaning of life and death.

Yet, in spite of the conflict, each side agrees on one important point: the Bible is the authority on the question of capital punishment, the text from which an interpretation of life, death, and the crime of murder should proceed – which means that each side also implicitly agrees that the issue of capital punishment is not secular law. Indeed, both sides apparently view the law as anything but religiously neutral and consider the state an actor that is either playing God or doing God's work (and thus inserting itself in the middle of a divisive *religious* issue, one that has been a point of contention “for some time”).<sup>186</sup>

To be sure, many citizens do not subscribe either to Christianity or to using the Bible as a basis for taking a position on the death penalty. Given, however, that “Americans attend their places of worship more often than do citizens of other developed nations and describe religion as playing an especially important role in their lives,” most probably

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<sup>185</sup> This explains, I believe, the courts' leniency (generally speaking) toward jurors' use or consultation of the Bible throughout the deliberative process – even as the courts, at the same time, warn that jurors should ultimately rely on “secular law” to make their final decision. *See, e.g.*, *People v. Danks*, 32 Cal. 4th 269, 311 (2004) (reiterating that the “court in no way means to suggest that jurors cannot rely on their personal faith and deeply-held beliefs when facing the awesome decision of whether to impose the sentence of death on a fellow citizen.”). But by being lenient, the courts reinforce capital punishment – and participation in a capital case – as religion in act, as a process that presumes a juror will ground herself in Biblical doctrine – however she interprets it – and then act from faith.

<sup>186</sup> *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 286 (3d Cir. 2011).

do.<sup>187</sup> Thus, unless the courts find that a broad swath of the American public is made up of unreasonable observers, then it is clear that from the perspective of most Americans, capital punishment conveys the message that the states – and the federal government – favor religion.<sup>188</sup>

Indeed, the machinery of death *is* that message, the language by which the states and the federal government speak Judeo-Christian beliefs about life and death, such that the execution of a defendant is, in the end, nothing less than religious practice. This was true in the past, and it remains true today. For this reason, capital punishment is a violation of the Establishment Clause.

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<sup>187</sup> *McCreary Cnty. v. ACLU*, 545 U.S. 844, 882 (2005) (O’Connor, J., concurring) (internal citations omitted).

<sup>188</sup> The Court “‘must determine whether, under the totality of the circumstances, the challenged practice conveys a message favoring or disfavoring religion . . . .’ In doing so, we adopt the viewpoint of the reasonable observer and may take into account ‘the “history and ubiquity” of [the] practice,’ since it ‘provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.’” *Indian River*, 653 F.3d at 284.

