

Appealing to the Concepts of Nature and (Un)Naturalness in the UK Debate on End-of-Life Decisions is Neither Morally nor Legally Desirable

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ABSTRACT: The analysis put forward in this work is aimed at providing evidence that, in the UK, appealing to the concepts of nature and (un)naturalness in the context of end-of-life decisions is neither morally nor legally desirable. Through inquiring into the function and meaning of these ideas, it will be determined what consequences derive from their use, and why such implications raise concern. In particular, with regard to the moral analysis it will be shown that all the interpretations given to these concepts prove to be flawed, either because they lack conceptual autonomy or because they rely on unrealistic or morally irrelevant definitions of nature and (un)naturalness; or again, as in the case of natural law, because they are not coherent with their theoretical foundations, and, even worse, they come up to unpleasant approaches to medical ethics, such as vitalism. Similarly, the legal relevance of the concepts of nature and (un)naturalness proves to be particularly flimsy. They are not a decisive factor in establishing causation in the cases of withholding and withdrawing of life-sustaining treatments, which instead hinges on the existence of a duty to act; whereas, if understood in terms of compliance with the natural law principles of practical rationality they find very little application in the relevant English law.

KEYWORDS: Natural; end-of-life decisions; moral; legal; UK.

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Introduction



Unlike in other bioethical scenarios, such as environmental ethics or genetic engineering¹, interestingly, with regard to end-of-life decisions (ELDs) the concepts of nature and (un)naturalness, though often invoked by academics, judges and laypeople, have not been subject to much study»².

The analysis proposed in this work is aimed at showing that appealing to these ideas in the UK end-of-life context is problematic to the extent that it becomes neither morally nor legally desirable.

It must be clarified that hereinafter the expressions end-of-life decisions and end-of-life decision-making will be used to refer to the following types of decisions: «withdrawing or not starting a treatment when it has the potential to prolong the patient's life»³; «palliative care that focuses on managing pain and other distressing symptoms»⁴, which can potentially hasten death. However, they can encompass also euthanasia and physician assisted suicide⁵.

Section 1 will discuss the way in which these concepts are employed in relation to end-of-life decisions as well as the various interpretations that they have been given. Both aspects are instrumental to the understanding of the moral and legal issues ensuing from the use of the ideas of nature and (un)naturalness, which will be presented in sections 2 and 3 respectively.

Section 1 – Function and meaning of nature and (un)naturalness in end-of-life decisions

1.1. Function of nature and (un)naturalness

This section will inquire into the function performed by the concepts of nature and (un)naturalness in the ethical and legal discourse relating to end-of-life decisions.

In this context, the concepts of nature⁶ and (un)naturalness⁷ recur frequently. Generally, the latter is employed together with the idea of death (e.g. 'natural death')⁸, or some of its aspects, such as the

¹ H. SIIP, *Dimensions of Naturalness*, in *Ethics & the Environment*, 13/1, 2008, 71. See also G.E. KAEBNICK, *Nature, human nature, and biotechnology*, in M. CROWLEY (ed.), *From Birth to Death and Bench to Clinic: The Hastings Center Bioethics Briefing Book for Journalists, Policymakers, and Campaigns*, 2008, 117, <http://www.thehastingscenter.org/Publications/BriefingBook/Detail.aspx?id=2194> (last visited 01/08/2014).

² M. ORLANDO, *Research Plan for the Dissertation*, submitted as part of the MA in Medical Ethics and Law, London, 2014, 1.

³ GENERAL MEDICAL COUNCIL (GMC), *Treatment and Care Towards the End of Life: Good Practice in Decision Making*, 2010), 9, http://www.gmcuk.org/static/documents/content/Treatment_and_care_towards_the_end_of_life_-_English_0414.pdf, (last visited 30/07/2014). The document explains that this kind of decisions can «involve treatments such as antibiotics for life-threatening infection, cardiopulmonary resuscitation (CPR), renal dialysis, 'artificial' nutrition and hydration ... and mechanical ventilation».

⁴ *Ibid.*, 9-10.

⁵ See A. VAN DER HEIDE, L. DEHENS, K. FAISST, T. NILSTIM, M. NORUP, E. PACI, G. VAN DER WAL, P.J. VAN DER MAAS, on behalf of the EURELD consortium, *End-of-life Decision Making in Six European Countries: Descriptive Study*, in *The Lancet*, 362/9381, 2003, 345.

⁶ For judicial decisions, see: *Airedale NHS Trust v Bland* [1993] A.C. 789, 802, 831, 840, 878, 886; *Re A (Children) (conjoined Twins: Surgical Separation)* [2001] Fam. 147, 173, 204; 240; *Re B (A Minor) (Wardship: Medical*

process that leads to death (e.g. 'natural dying process')⁹ or the causes of this event (e.g. 'natural causes')¹⁰. Unnaturalness is sometimes used also to describe the medical procedures involved in the decisions at stake¹¹.

Appealing to these ideas does not seem to be a mere matter of linguistic taste, but instead a way to provide or support the arguments put forward to establish the morality¹² or lawfulness of various end-of-life decisions¹³. Some further explanation as well as specific examples may be useful to clarify this assertion.

Treatment) [1981] 1 WLR 1421, 1423-1424; W v M and others [2011] EWHC 2443 (Fam), [109], [116]; Rodriguez v Attorney General of British Columbia [1993] 3 S.C.R. 519 (SCC), 103; Vacco v Quill (1997) 50 BMLR 119, 121; Washington and others v Glucksberg and others (1997) 50 BMLR 65, 114; Re a Ward of Court (withholding medical treatment) (1995) 50 BMLR 140, 146, 151, 154, 172, 193, 194, 196, 197. For academic articles, see: A. MCGEE, *Finding a Way Through the Ethical and Legal Maze: Withdrawal of Medical Treatment and Euthanasia*, in *Medical Law Review*, 13, 2005, 383, 385; J.B. MITCHELL, *Understanding Assisted Suicide. Nine Issues to Consider. A Personal Journey*, Michigan, 2007, 20.

⁷ H. SIIP, *Dimensions of Naturalness*, cit., 71; T. TAKALA, *The (Im)Morality of (Un)Naturalness*, in *Cambridge Quarterly of Healthcare Ethics*, 13, 2004, 15.

⁸ For academic articles and books, see: L. SANDMAN, *Should People Die a Natural Death?*, in *Health Care Analysis*, 13/4, 2005, 275; K. RAUS, S. STERCKX, F. MORTIER, *Continuous Deep Sedation at the End of Life and the 'Natural Death' Hypothesis*, in *Bioethics*, 2012, 26(6), 329; S. MICHALOWSKI, *Assisted Dying Bill Gives the Terminally Ill More Control*, 2014, <http://theconversation.com/assisted-dying-bill-gives-the-terminally-ill-more-control-27665>, (last visited 29/07/2014); J. GRIFFITHS, H. WEYERS, M. ADAMS, *Euthanasia and Law in Europe: With Special Reference to the Netherlands and Belgium* (2nd ed.), Oxford, 2008, 2. For judicial decisions, see: Auckland Area Health Board v. Attorney General [1993] 1 N.Z.L.R. 235, [253]; R (on the application of Nicklinson and another) v Ministry of Justice [2014] UKSC 38, [357]; Rodriguez, cit., 103, 106; In re Quinlan 70 N.J. 10, 355 A.2d 647 (1976), [32] [39]; Cruzan v Director, Missouri Department of Health, 497 U.S. 261 (1990), [314-315, footnote 15]; Re a Ward of Court, cit., 174.

⁹ For an example of professional guidance, see: GENERAL MEDICAL COUNCIL, *Withholding and Withdrawing Life-prolonging Treatments: Good practice in Decision-making*, 2002, [22], http://www.gmc-uk.org/Withholding_and_withdrawing_guidance_for_doctors.pdf_33377901.pdf, (last visited 30/07/2014). This document was withdrawn by the GMC in July 2010. For judicial decisions, see: W v M, cit., [77]; Cruzan, cit., [296]; Re a Ward of Court, cit., 172.

¹⁰ For judicial decisions, see: R (on the application of Burke) v General Medical Council [2004] EWHC 1879, [6] and [24]; Bland, cit., [794]; Re Colyer (1983) 99 Wash 2d 114, 123, 660 P 2d 738, 743; Quinlan, cit., [51]; Cruzan, cit., [340, footnote 11]; For academic articles, see: A. MCGEE, *Finding A Way Through the Ethical and Legal Maze: Withdrawal of Medical Treatment and Euthanasia*, cit., 357, 384; D. PRICE, *Euthanasia, Pain Relief and Double Effect*, in *Legal Studies*, 17, 1997, 342.

¹¹ For judicial decisions, see: Bland, cit., 809, 810; Re A (Children) (conjoined Twins: Surgical Separation), cit., 197; An NHS Trust v L [2013] EWHC 4313 (Fam), [25].

¹² M. WARNOCK, *What is Natural? And Should We Care?*, in *Philosophy*, null/4, 2003, 446, where she argues that «it has to be acknowledged that whatever is the opposite of 'natural' readily takes on a sense of something suspect, not to be trusted». See also K. RAUS, S. STERCKX, F. MORTIER, *Continuous Deep Sedation at the End of Life and the 'Natural Death' Hypothesis*, cit., 331, in which they state that «'natural' death in itself seems to have become a normative ideal, making the concept more than simply descriptive»; L. SANDMAN, *Should People Die a Natural Death?*, cit., 275-276; T. TAKALA, *The (Im)Morality of (Un)Naturalness*, cit., 15; H. SIIP, *Dimensions of Naturalness*, cit., 72, who states that «[t]he question about an entity's status as natural or unnatural is often motivated by the implications of such status».

¹³ Clear evidence of the fact that these concepts play a role in the context of ELDs is provided by Lord Mustill's statement in Bland, cit., 886.

1.1.1. Moral function

Normally, by stating that certain ELDs respect nature¹⁴ or produce natural outcomes, such as a natural death¹⁵, there is the intention to convey a positive moral evaluation with regard to those decisions, and vice versa if they are considered to run against nature or to bring about unnatural effects¹⁶.

Evidence of this reasoning is provided by the American Medical Association (AMA)'s statement whereby one of the reasons why withholding and withdrawing life-sustaining treatments «are ethically and medically appropriate» [emphasis added]¹⁷ is the fact that they allow «the natural course of the disease to take place». The same could be said of «palliative sedation to unconsciousness»¹⁸.

In the Irish case *Re a Ward of Court (withholding medical treatment)*¹⁹, the judge of first instance affirmed that given the circumstances artificial nutrition and hydration were to withdraw «so as to allow nature to take its traditional and rightful place in this circumstance» [emphasis added]²⁰.

Again, in *Re B (A Minor) (Wardship: Medical Treatment)*²¹ the parents' refusal to subject their baby, born with Down's syndrome, to life-saving surgery was motivated by their conviction that it was «a case where nature [had] made its own arrangements to terminate a life which would not be fruitful and nature should not be interfered with» [emphasis added]²²

However, compliance with nature or bringing about natural effects may also be given a negative connotation in order to express moral disapproval towards a specific practice.

For instance, Sabine Michalowski has recently argued that the legalisation of physician-assisted suicide in the UK would be preferable to the actual situation in which terminally patients have no choice but to experience a «slower natural death»²³, which does not offer them the same level of control over it.

¹⁴ See G.E. KAEBNICK, *Nature, Human Nature, and Biotechnology*, cit., 117, there he points out that «an increasing number of social debates feature what might be called “moral views about nature” – claims that leaving a naturally occurring state of affairs alone possesses a moral value that should be weighted in moral decision-making and protected in public policy».

¹⁵ See L. SANDMAN, *Should People Die a Natural Death?*, cit., 275; the author maintains that «[l]ooking at the literature on death and dying, the concept of natural death has often played an important role in distinguishing a good death from a bad or less good death».

¹⁶ *Ibid.*, 278, 280. See also K. RAUS, S. STERCKX, F. MORTIER, *Continuous Deep Sedation at the End of Life and the 'Natural Death' Hypothesis*, cit., 331.

¹⁷ AMERICAN MEDICAL ASSOCIATION (AMA), *Sedation to Unconsciousness in End-of-Life Care. Report of the Council on Ethical and Judicial Affairs*, 2008, download available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion2201.page>, (last visited 06/08/2014). See also K. RAUS, S. STERCKX, F. MORTIER, *Continuous Deep Sedation at the End of Life and the 'Natural Death' Hypothesis*, cit., 330.

¹⁸ *Ibid.* See also: K. RAUS, S. STERCKX, F. MORTIER, *Continuous Deep Sedation at the End of Life and the 'Natural Death' Hypothesis*, cit., 329; T. TÄNNSJÖ, *Terminal Sedation: Euthanasia in Disguise?*, Dordrecht, 2004, 20-21.

¹⁹ *Re a Ward of Court*, cit.. In this case the Irish Supreme Court held that the withdrawal of artificial nutrition and hydration from a woman who had spent more than twenty years in a condition that nowadays would be likely to be classified as minimally conscious state was lawful.

²⁰ *Ibid.*, 146, per Lynch J.

²¹ *Re B (A Minor)*, cit.

²² *Ibid.*, 1423-1424. See also *W v M*, cit., [116].

²³ S. MICHALOWSKI, *Assisted Dying Bill Gives the Terminally Ill More Control*, cit.

Similarly, in *R (on the application of Nicklinson and another) v Ministry of Justice*²⁴, Lord Kerr cast doubt on the fact that the principle of sanctity of life would be effectively «protected or enhanced by insisting that those who freely wish to but are physically incapable of bringing their lives to an end, should be required to endure untold misery until a so-called natural death overtakes them»²⁵.

1.1.2. Legal function

At common law, the concepts of nature and naturalness have been frequently invoked to support the legal reasoning employed to establish causation (*actus reus*)²⁶ when life-sustaining treatments are withheld or withdrawn. According to this argument, the conduct involved in these cases should not be classified as an act, but rather as an omission, which, unless the agent has a duty to act, could not be considered the cause of the patient's death. Such cause should instead be ascribed to 'nature', in the form of the underlying disease. Indeed, in these cases, it is often said that nature or the natural causes of death are allowed to take their course²⁷.

This function will be examined more in depth in section 3²⁸, when dealing with the issues related to one the meanings given to nature and naturalness. At this point, it is enough to provide some examples of this way of making use of these concepts.

Following this argument, the Airedale NHS Trust in *Bland*²⁹ sought, among others, a declaration «that if death should occur following [the] discontinuance or termination [of the life-sustaining treatments administered] the cause of death should be attributed to the natural and other causes of the defendant's persistent vegetative state»³⁰. Likewise, in *Cruzan v Director, Missouri Department of Health*³¹ Rehnquist CJ explained that «refusing treatment is not an affirmative act "causing" death, but merely a passive acceptance of the natural process of dying»³².

²⁴ Nicklinson, cit. In this case, the Supreme Court had to decide on the compatibility with the European Convention on Human Rights as well as on the lawfulness of the Director of Public Prosecutions' code "relating to prosecutions of those who are alleged to have assisted suicide", [1].

²⁵ *Ibid.*, [357].

²⁶ See G. WILLIAMS, *The Principle of Double Effect and Terminal Sedation*, in *Medical Law Review*, 9, 2001, 42, where, she summaries the necessary elements of murder: "Murder requires first, that a person causes death by an unlawful act or omission (the 'actus reus') and secondly, that a person must have the necessary mental element (the 'mens rea')".

²⁷ See A. MCGEE, *Finding a Way Through the Ethical and Legal Maze: Withdrawal of Medical Treatment and Euthanasia*, cit., 357, 363.

²⁸ See *infra*, § 3.1.

²⁹ See *Bland*, cit. In this case, the House of Lords held that it was lawful to withdraw ANH from a patient in a persistent vegetative state, as the continuation of this treatment was not in his best interests.

³⁰ See *Bland*, cit., 794.

³¹ See *Cruzan*, cit. The same line of reasoning was followed also in *In re Quinlan*, cit., [51]; and in *Re Colyer*, cit., 743.

³² See *Cruzan*, cit., [297]. However, the withdrawal of life-sustaining treatments was denied by the US Supreme Court because of the lack of "clear and convincing evidence" ([261]) about the patient's intention to refuse them.

1.2. Meaning of nature and (un)naturalness

In end-of-decisions, like in other bioethical contexts³³, the ideas of nature and (un)naturalness can be interpreted in different ways³⁴, especially when associated to the event of death³⁵. In order to both avoid conceptual confusion³⁶ and understand the issues that will be presented in the following sections, it is necessary to provide an account of those meanings of nature and (un)naturalness that appear to have broader ethical and/or legal implications.

1.2.1. Nature and naturalness as quality of life indicators

With regard to terminally ill patients, the ideas of nature and naturalness can be employed to describe deaths resulting from decisions (e.g. DNAR) that are capable of guaranteeing a level of quality of life³⁷ considered acceptable by the patients themselves or those close to them³⁸. As a matter of fact, in these cases, what would allow defining deaths as 'natural' would not necessarily be the abstention from «the use of technology or medicine»³⁹, but instead the degree of quality of life achieved. Moreover, given that this way of interpreting naturalness hinges on the different quality of life expectations⁴⁰ held by the person or people involved in the decision-making process⁴¹, it is likely to lead to diverse conclusions pertaining the (un)naturalness of the death under discussion⁴².

1.2.2. Nature and naturalness as independence from human interference

Nature and naturalness refer frequently to «a state of affairs prior to or independent of human interference in them»⁴³. Accordingly, naturalness – especially when used in relation to the event of death or the process of dying – «is understood as independence from human activities. ... Unnaturalness, on the other hand, is associated with human involvement»⁴⁴. However, it appears that in the context of end-of-life decisions, naturalness is more likely to be interpreted as independence only from «certain types of human activities»⁴⁵; or from a specific «degree of human-caused change process»⁴⁶; that is, independence from a certain level of change caused to 'nature' by human action. In this case, medical treatments would always be unnatural as they belong to those human activities that inter-

³³ For a list of these contexts, see H. SIIPI, *Dimensions of Naturalness*, cit., 71-72.

³⁴ See H. SIIPI, *Dimensions of Naturalness*, cit., 95, who explains that «there are several forms of (un)naturalness and the terms 'natural' and 'unnatural' are used in numerous different senses in bioethical argumentation».

³⁵ See L. SANDMAN, *Should People Die A Natural Death?*, cit., 275.

³⁶ See H. SIIPI, *Dimensions of Naturalness*, cit., 73. See also *Ibid.*, 95.

³⁷ L. SANDMAN, *Should People Die a Natural Death?*, cit., 280, 281, 284, 285.

³⁸ J.E. SEYMOUR, *Revising Medicalisation and 'Natural' Death*, in *Social Science and Medicine*, 49, 1999, 701.

³⁹ L. SANDMAN, *Should People Die a Natural Death?*, cit., 281, 284 See also J.E. SEYMOUR, *Revising Medicalisation and 'Natural' Death*, cit., 701.

⁴⁰ See J.E. SEYMOUR, *Revising Medicalisation and 'Natural' Death*, cit., 701.

⁴¹ *Ibid.*, 701. See also D. CALLAHAN, *Natural Death*, in *The Hastings Center Report*, 7/3, 1977, 32.

⁴² See L. SANDMAN, *Should People Die a Natural Death?*, cit., 282.

⁴³ See G.E. KAEHNICK, *Nature, Human Nature, and Biotechnology*, cit., 119.

⁴⁴ H. SIIPI, *Dimensions of Naturalness*, cit., 78. See also T. TAKALA, *The (Im)Morality of (Un)Naturalness*, cit., 17.

⁴⁵ H. SIIPI, *Dimensions of Naturalness*, cit., 79-80. For instance, the decision to withhold or withdraw treatments is likely to refer only to some of the treatments in place.

⁴⁶ *Ibid.*, 82.

fere with nature; however, their unnaturalness could be more or less acceptable according to the different amount of interference that they would produce⁴⁷.

1.2.3. Nature and naturalness as accordance with natural law

Nature and naturalness can be conceived also in terms of compliance with natural law⁴⁸. Because of the broadness and complexity of the theoretical background that stands behind this meaning, its analysis will require more attention than the one given to the previous ones.

It must also be stated that this section will be concerned only with natural law moral theories⁴⁹, and among them⁵⁰, the focus will be placed mainly on the work of Thomas Aquinas for the following reasons: this philosopher «occupies a uniquely strategic place in the history of natural law theorising»⁵¹; the core of Aquinas's theses has been reworked and applied to end-of-life decision-making by contemporary natural law philosophers such as John Finnis, but also by the Roman Catholic Church⁵². In section 3, it will be explained why this moral theory is claimed to be also a legal theory, whose principles should found application also in end-of-decisions.

1.2.3.1. Main features of natural law moral theory

According to Aquinas, natural law was given by God⁵³ and it constitutes both «one aspect of divine providence»⁵⁴ and «the principles of practical rationality ... by which human action is to be judged as reasonable or unreasonable»⁵⁵.

⁴⁷ See Bland, cit., 809, per Sir Thomas Bingham, who described «the mechanical pumping of food through a tube» as «a highly unnatural process».

⁴⁸ See T. TAKALA, *The (Im)Morality of (Un)Naturalness*, cit., 17. See also M. MURPHY, *The Natural Law Tradition in Ethics*, 2011, <http://plato.stanford.edu/entries/natural-law-ethics/>, (last visited 13/08/2014).

⁴⁹ As pointed out by M. MURPHY, *The Natural Law Tradition in Ethics*, cit., besides natural law moral theories, there also «theories of politics, theories of civil law, and theories of religious morality» that can be encompassed in the general «label» of «Natural law theory».

⁵⁰ See *Ibid.* See also C. PATERSON, *Assisted Suicide and Euthanasia. A Natural Law Ethics Approach*, London, 2008, 2. In his work, Paterson presents a secular version of natural law, which is meant to be a «revised approach to natural law» (3) that is able to overcome the challenges brought to the traditional version of natural law by «the reality of pluralism in contemporary society» (2).

⁵¹ J. FINNIS, *Natural Law & Natural Rights* (2nd ed.), Oxford, 2011, at vi in the preface. See also: M. MURPHY, *The Natural Law Tradition in Ethics*, cit., who states that «If any moral theory is a theory of natural law, it is Aquinas's»; C. PATERSON, *Assisted Suicide and Euthanasia. A Natural Law Ethics Approach*, op. cit., 2.

⁵² See J. FINNIS, *Natural Law & Natural Rights* (2nd ed.), cit., at vi in the preface, where he states that in his work he occasionally refers «to the Roman Catholic Church's pronouncements on natural law, because that body is perhaps unique in the modern world in claiming to be an authoritative exponent of natural law». Both Finnis and the Roman Catholic Church have derived their positions also from the work of the moral theologian Germain Grisez.

⁵³ See M. MURPHY, *The Natural Law Tradition in Ethics*, cit. See also UNITED STATES. PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL RESEARCH, *Splicing Life: A Report On The Social And Ethical Issues Of Genetic Engineering With Human Beings*, 1982, 55-56, <https://bioethics.georgetown.edu/documents/pccmr/splicinglife.pdf>, (last visited 09/08/2014).

⁵⁴ M. MURPHY, *The Natural Law Tradition in Ethics*, cit.

⁵⁵ *Ibid.* The author points out that these two «theses about natural law ... structure [Aquinas's] overall moral view and ... provide the basis for other theses about the natural law that he affirms».

By virtue of the first feature, human beings as rational beings can participate in the eternal law, which is «the rational plan by which all creation is ordered»⁵⁶. Whereas, the second feature bears two implications: natural law precepts are «universally binding by nature»⁵⁷, that is, by the mere fact that all human beings share a human nature; and they are also «universally knowable by nature»⁵⁸, as «[a]ll human beings possess a basic knowledge of the principles of the natural law»⁵⁹. As explained by Murphy, according to Aquinas:

«This knowledge is exhibited in our intrinsic directedness toward the various goods that the natural law enjoins us to pursue, and we can make this implicit awareness explicit and propositional through reflection on practice»⁶⁰.

As far as the normative content of natural law is concerned, Aquinas maintains that it has to be derived from the fundamental principle whereby «good is to be done and evil avoided»⁶¹. The good to be pursued would be represented by specific things ('goods') that human beings could identify by natural inclination and apply through reason⁶². Among these goods, Aquinas encompasses «life, procreation, knowledge, society, and reasonable conduct», though he does not clarify whether his list is exhaustive⁶³.

Therefore, Aquinas appears to move from 'the good' to 'the right'. Indeed, in his view «whether an action, or type of action, is right is logically posterior to whether that action brings about or realizes or is some good»⁶⁴. However, he also holds that human beings are able to envisage general «guidelines about how these goods are to be pursued»⁶⁵, because there exist «ways of acting in response to the basic human goods that are intrinsically flawed»⁶⁶. In order to identify these general principles, human beings should «look at the features that individuate acts, such as their objects, their ends,

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* See also F.C. COPLESTON, *A History of Philosophy (Vol. II). Medieval Philosophy: from Augustine to Duns Scotus*, Tunbridge Wells, 1999 [1950], 409, who explains that: «The natural law is expressed passively in man's natural inclinations, while it is promulgated by the light of reason reflecting on those inclinations». Whereas, in his secular version of natural law, C. PATERSON, *Assisted Suicide and Euthanasia. A Natural Law Ethics Approach*, cit., 4, focuses only on the role of reason. He maintains that «[c]ommitment to objectivism is central to all varieties of natural law. This emphasis allows us to identify a significant though not exclusive condition that helps make a moral theory a natural law theory, namely, the insistence that moral principles are discernible by reason and are held to be objectively valid».

⁶¹ See also F.C. COPLESTON, *A History of Philosophy (Vol. II). Medieval Philosophy: from Augustine to Duns Scotus*, cit., 409, who states that: «The natural law is the totality of the universal dictates of right reason concerning that good of nature which is to be pursued and that evil of man's nature which is to be shunned, and man's reason could, at least in theory, arrive by its own light at a knowledge of these dictates or precepts».

⁶² M. MURPHY, *The Natural Law Tradition in Ethics*, cit.

⁶³ *Ibid.*

⁶⁴ *Ibid.* See also K. EINAR HIMMA, *Natural Law*, <http://www.iep.utm.edu/natlaw/>, (last visited 22/08/2014).

⁶⁵ *Ibid.*

⁶⁶ *Ibid.* See also C. PATERSON, *Assisted Suicide and Euthanasia. A Natural Law Ethics Approach*, cit., 4.

their circumstances, and so forth»⁶⁷. For instance, «[a]n act might be flawed merely through its intention: to direct oneself against a good – as in murder ... - is always to act in an unfitting way»⁶⁸. As pointed out by Murphy, «Aquinas substantive natural law» shows some features of the «contemporary categories for moral theories»⁶⁹, yet it does not fully embrace any of them. On the one hand, he seems to get close to utilitarians by arguing that what is right has to be determined according to what is good; on the other hand, he embraces the deontological view whereby there are conducts that are intrinsically wrong – e.g. killing innocent human beings intentionally – and therefore unjustifiable, regardless of the allegedly good consequences that they would bring about⁷⁰.

1.2.3.2. Implications for end-of-life decisions

Moving the focus closer to medical ethics, Finnis and the Catholic bioethics⁷¹ have developed the following points:

1. Human life is «not a merely instrumental good, but is an intrinsic and basic human good»⁷². This means that it should “be valued for its own sake and not merely for the sake of some other good it can assist in bringing about»⁷³.
2. Therefore, the deliberate choice to kill an innocent person is always wrong because «contrary to the practical reason constituted by that human good»⁷⁴.

The first two points are endorsed also by supporters of the principle of sanctity of life⁷⁵.

3. Given that human conducts will inevitably produce some harm⁷⁶, it is essential to distinguish the harm brought about intentionally from that that is merely foreseen and accepted as unavoidable

⁶⁷ M. MURPHY, *The Natural Law Tradition in Ethics*, cit.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ M. MURPHY, *The Natural Law Tradition in Ethics*, cit. See also C. PATERSON, *Assisted Suicide and Euthanasia. A Natural Law Ethics Approach*, cit., 4, where he explains that «natural law at least shares a joint commitment with Kantian ethics that objectively valid principles are to be our guide when discerning how to make moral judgments».

⁷¹ See for example THE LINACRE CENTRE FOR HEALTHCARE ETHICS (renamed Anscombe Bioethics Centre in 2010), *Submission to the House of Lords Select Committee on the Assisted Dying for the Terminally Ill Bill*, 2004, 1, <http://www.linacre.org/AssistedDyingBillSub.htm>, (last visited 25/08/2014), where it defines itself as «a research institute under the trusteeship of the Catholic trust for England and Wales».

⁷² J. FINNIS, *A Philosophical Case Against Euthanasia*, in J. KEOWN (ed.), *Euthanasia Examined, Ethical, Clinical and Legal Perspectives*, Cambridge, 1995, 32. See also J. FINNIS, *Bland: Crossing the Rubicon?*, in *Law Quarterly Review*, 109, 1993, 333.

⁷³ K. EINAR HIMMA, *Natural Law*, cit.

⁷⁴ J. FINNIS, *A Philosophical Case Against Euthanasia*, cit., 29.

⁷⁵ See M. ORLANDO, *Moral Theory And Medical Ethics Coursework*, submitted as part of the MA in Medical Ethics and Law, London, 2014, 3, where it is stated that «[t]he conviction that human life is sacred was first conceived by religious deontology” According to the Catechism of the Catholic Church, no. 2258 “[h]uman life is sacred because from its beginning it involves the creative action of God and it remains forever in a special relationship with the Creator, who is its sole end. God alone is the Lord of life from its beginning until its end: no one can under any circumstance claim for himself the right directly to destroy an innocent human being». However, there is also a secular version of this principle: see among others, R. DWORKIN, *Life's Dominion. An Argument about Abortion and Euthanasia*, Hammersmith, 1993, 69, 71, 79.

⁷⁶ J. FINNIS, *A Philosophical Case Against Euthanasia*, cit., 29-30.

side-effects. Hence, it is the distinction between intention and foresight to be morally relevant, and not that between acts and omissions⁷⁷. According to Finnis: «intentionally terminating life by omission [passive euthanasia] ... is just as much murder as doing so by 'deliberate intervention' [active euthanasia]»⁷⁸.

This point refers to the so-called doctrine of double effect (DDE) and to the distinction between acts and omissions respectively. The former,

«is usually invoked when the action carried out by the moral agent produces two effects: one good and the other bad. The basis of this doctrine is the key role played by the agent's intention in determining the nature of the action taken; accordingly it gives a much heavier moral weight to "intended consequences than to consequences that are merely foreseen»⁷⁹.

Whereas, according to the latter: «[In] certain contexts, failure to do something with certain foreseen bad consequences, is morally less bad than to perform a different act which has the identical foreseen consequences»⁸⁰.

4. The ban on intentionally killing does not allow exceptions because «where the reason not to act is a basic human good [life], there cannot be a rationally preferable reason to choose so to act»⁸¹. Accordingly, all basic goods are incommensurable, namely they «cannot, as reasons for action, be rationally commensurated with one another»⁸²

The application of this line of reasoning to end-of-life decision-making has the following implications:

1. Every form of euthanasia entails the intention to die (patient's perspective) or to kill (agent's perspective); therefore, it must always be morally condemned regardless of whether it is carried out through an act or an omission⁸³.
2. The administration of drugs in order to relieve terminally ill-patients from pain is not morally condemned as euthanasiast, because the possible «earlier onset of their death» is accepted «as a side-

⁷⁷ *Ibid.*, 29.

⁷⁸ *Ibid.*, 28.

⁷⁹ M. ORLANDO, *Medical Ethics and Moral Theory Coursework*, cit., 8. See also P. WALSH, *Handout on The Doctrine of Double Effect*, London, 2013, which at 2 lists the four conditions that must be met for this doctrine to be effective: «1. The intended action is morally good (or at least not morally bad); 2. The agent's intention is good, in that he in no way intends the bad effect i.e. he does not act so as to achieve the bad effect; 3. The good effect does not follow from the bad effect i.e. the bad effect is not a means by which the good effect is achieved; 4. There is proportionately grave reason for such an action – the good effect must be sufficiently worthwhile to justify the bad effect and unobtainable by other methods».

⁸⁰ P. WALSH, *Handout on the Act-Omission Distinction*, London, 2013, 1.

⁸¹ J. FINNIS, *A Philosophical Case Against Euthanasia*, cit., 29. See also THE LINACRE CENTRE FOR HEALTHCARE ETHICS, *Withdrawing and Withholding Treatment. A Response to Withholding and Withdrawing Treatment (A Consultation Paper from the BMA's Medical Ethics Committee)*, 1998, 7, <http://www.linacre.org/www.html>, (last visited 25/08/2014).

⁸² J. FINNIS, *A Philosophical Case Against Euthanasia*, cit., 29. See also R.A. MCCORMICK, *Current Theology. Notes on Moral Theology: 1984*, in *Theological Studies*, 46, 1985, 51.

⁸³ See THE LINACRE CENTRE FOR HEALTHCARE ETHICS, *Withdrawing and Withholding Treatment. A Response to Withholding and Withdrawing Treatment (A Consultation Paper from the BMA's Medical Ethics Committee)*, cit., 2.

effect of that choice»⁸⁴. The doctrine of double effect can be applied also to the decision to withhold or withdraw life-prolonging medical treatments, provided that such decision is moved only by the intention to «avoid the burdens (e.g. disfigurement or expense) imposed by such treatment»⁸⁵. According to this view,

«There is a significant difference between continuing to value the patient's life, while foreseeing that it will be shortened by giving or omitting treatment, and seeing life as having no value, and thus to be deliberately curtailed»⁸⁶.

3. Consequently, patients' autonomous requests to withhold or withdraw life-sustaining treatments can be accepted only if they are not or are not known to bear «suicidal intent»⁸⁷. Doing otherwise would be like acknowledging that «human life in certain conditions or circumstances retains no intrinsic value and dignity»⁸⁸.

4. Finnis clarifies that the prohibition on killing protects also patients in a persistent vegetative state, whose lives do not lose their status of basic goods despite being «inadequately instantiated»⁸⁹. In relation to these patients, he reaffirms that it is acceptable not to impose on them and/or their relatives «the burden of expense involved in medical treatment and non-domestic care for the purpose of sustaining them in such a deprived and unhealthy state»⁹⁰. However, in order to respect the «one good in which they still participate»⁹¹ they cannot be denied artificial nutrition and hydration, which is considered tantamount to food and water and not to medical treatment⁹². According to Finnis, the

⁸⁴ J. FINNIS, *A Philosophical Case Against Euthanasia*, cit., 28. See also THE LINACRE CENTRE FOR HEALTHCARE ETHICS, *Withdrawing and Withholding Treatment. A Response to Withholding and Withdrawing Treatment (A Consultation Paper from the BMA's Medical Ethics Committee)*, cit., 7.

⁸⁵ J. FINNIS, *A Philosophical Case Against Euthanasia*, cit., 28. This further requirement whereby the treatments can be withheld or withdrawn only when they are or have become excessively burdensome refers to the distinction between ordinary-proportionate or extraordinary-disproportionate measures. In this regard, see A. BUCHANAN, *Medical Paternalism*, in M. COHEN, T. NAGEL, T. SCANLON (ed.), *Medicine and Moral Philosophy. A Philosophy & Public Affairs*, Princeton, 1981, 231. See also: J. KEOWN, *Euthanasia, Ethics and Public Policy. An Argument against Legalisation*, Cambridge, 2002, 43; THE LINACRE CENTRE FOR HEALTHCARE ETHICS, *Withdrawing and Withholding Treatment. A Response to Withholding and Withdrawing Treatment (A Consultation Paper from the BMA's Medical Ethics Committee)*, cit., 2, 7, where it is specified that «[t]he traditional view is that only in certain circumstances may you foreseeably bring about a bad effect».

⁸⁶ THE LINACRE CENTRE FOR HEALTHCARE, *Submission to the House of Lords Select Committee on the Assisted Dying for the Terminally Ill Bill*, cit., 6.

⁸⁷ J. FINNIS, *A Philosophical Case Against Euthanasia*, cit., 33-34.

⁸⁸ *Ibid.*, 34.

⁸⁹ *Ibid.*, 33.

⁹⁰ *Ibid.*, 33.

⁹¹ *Ibid.*, 33. See also J. FINNIS, *Bland: Crossing the Rubicon?*, cit., 332, where, with regard to the case of Anthony Bland, he states: «since human bodily life is not a merely instrumental good, extrinsic to the reality and value of the human person, their inability to participate in any other basic human good does not nullify their participation in the good, the benefit, of human life - not even when that participation is wounded and deficient as hopelessly as Bland's».

⁹² See JOHN PAUL II, *Evangelium Vitae*, 1995, http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html, (last visited 25/08/2014), in which it is stated that «administration of water and food, even when provided by artificial means, always represents a natural means of preserving life, not a medical act».

choice not to provide artificial nutrition and hydration could be motivated only by the belief that «such patients ... would be better off if they were dead»⁹³. In his opinion:

«Such a choice involves the intent to terminate life and thus violates a basic and intrinsic good of human persons, and denies such people's still subsisting equality of value and worth, and their equal right to life»⁹⁴.

Section 2 – Moral issues arising from the use of nature and naturalness in end-of-life decisions

2.1. Ambiguity

The first issue concerning the employment of the concepts of nature and (un)naturalness in ELDs arises from the fact that they are «highly ambiguous»⁹⁵. Indeed, depending on the way in which they are interpreted, they can lead to different, and even conflicting evaluations about the morality of a specific course of action⁹⁶.

A clear example of this problem is provided by the opposite conclusions that can be reached with regard to the decision to withdraw artificial nutrition and hydration from PVS patients by embracing the first two meanings of (un)naturalness described in the first section as opposed to the natural law account. Indeed, while according to the former two withdrawing artificial nutrition and hydration is normally deemed morally acceptable as it would allow, though for difference reasons, a natural death to occur; the latter, namely natural law, would define as natural only the death occurred despite the administration of ANH, which could be withdrawn only if the patient were about to die.

The statement of the American Medical Association as well as the extracts from *Re a Ward of Court* and from *Bland*, all quoted in section 1⁹⁷, represent examples of the first account outlined above⁹⁸.

According to this view, providing artificial nutrition and hydration amounts to a duty of ordinary care for doctors. See THE LINACRE CENTRE FOR HEALTHCARE ETHICS, *Withdrawing and Withholding Treatment. A Response to Withholding and Withdrawing Treatment (A Consultation Paper from the BMA's Medical Ethics Committee)*, cit., 14-15.

⁹³ *Ibid.*, 33.

⁹⁴ *Ibid.*, 33.

⁹⁵ See H. SIIP, *Dimensions of Naturalness*, cit., 71.

⁹⁶ *Ibid.*, 95. According to H. SIIP, this is true also of other bioethical contexts. Indeed, she points out that “there are several forms of (un)naturalness and the terms ‘natural’ and ‘unnatural’ are used in numerous different senses in bioethical argumentation. The central bioethical entities ... may be natural in one sense and unnatural in another”. See also: M. WARNOCK, *What is natural? And should we care?*, cit., 475; G.E. KAEHNICK, *Nature, human nature, and biotechnology*, cit., 118, who explains that «[a]ppeals to nature ... have been contested on a number of grounds by philosophers and others. They argue that such arguments are muddy because nature itself is not a straightforward concept». And again later “Nature” is a famously complicated term, employed to make a variety of different points at different times».

⁹⁷ See *supra*, footnote 6.

⁹⁸ See GENERAL MEDICAL COUNCIL, *Withholding and Withdrawing Life-prolonging Treatments: Good practice in Decision-making*, cit., [22], in which it was stated that «For some patients not taking nutrition and hydration may be part of the natural dying process».

Conversely, in *Burke*⁹⁹ the claimant took a position closer to what prescribed by natural law, as he sought a declaration aimed at preventing the attending physicians from withholding or withdrawing artificial nutrition and hydration once this treatment would become necessary, arguing that he wanted to die «of natural causes»¹⁰⁰.

Interestingly, in both cases the concept of naturalness has been employed to express a positive evaluation concerning the death that would occur from the preferred course of action¹⁰¹: withdrawal of ANH in the first case, its continuance in the second one.

Because of this inherent ambiguity, it appears that these concepts cannot be considered as effective decision-making criteria in this context¹⁰².

2.2. Defective moral relevance

Not only are these concepts ambiguous, but they also present a series of theoretical flaws that jeopardizes their moral validity. The following sections will describe some of these flaws and explain why they affect the moral relevance of these ideas.

2.2.1. Nature and naturalness or quality of life?

When nature and naturalness are employed as indicators of the quality of life warranted by certain end-of-life decisions¹⁰³, they cannot acquire the status of independent action-guiding principles. Indeed, they are used to voice a normative concern already expressed by the principle of quality of life¹⁰⁴. Accordingly, they would lack conceptual autonomy.

Lars Sandman has explained this issue very effectively with regard to the use of the idea of natural death in the context of palliative care, by stating that

«[W]e might again view the talk about natural death as of no real substantial action-guiding content but more as a value-laden concept expressing a positive evaluation of the situation based on other considerations about the facts of the situation, facts that boils down to considerations in terms of quality and length of life»¹⁰⁵.

⁹⁹ *Burke*, cit.

¹⁰⁰ *Ibid.*, [6].

¹⁰¹ L. SANDMAN, *Should People Die a Natural Death?*, cit., 275, argues that «the concept of natural death [has] been given a large number of different and sometimes conflicting meanings drawing on this positive evaluative content». And also at 276: «[T]he views on natural death ... either suffers from being ambiguous or from having non-accepted implications».

¹⁰² *Ibid.*, 279, where the author maintains that «the distinction between natural and un-natural death becomes too arbitrary and loose to be workable as an action-guiding distinction. That is, if “natural death” allows some artificial measure but not other artificial measures, and rather stands for quietness and dignity it seems we have lost most of what we in other context might associate with natural and un-natural».

¹⁰³ *See supra*, footnote 6.

¹⁰⁴ L. SANDMAN, *Should People Die a Natural Death?*, cit., 276.

¹⁰⁵ *Ibid.*, 286.

2.2.2. An unfeasible and unjustified independence

Turning the attention to nature and naturalness conceived in terms either of independence from certain types of human activities, or of a certain degree of independence from human interference with nature, it appears that even this meaning is morally flawed.

First of all, this meaning takes for granted the existence of «a thing such as nature apart from humans»¹⁰⁶, without giving any evidence of the actual existence of this “thing”. Secondly, it does not explain, «in what humans should be different from nature»¹⁰⁷. Moreover, even assuming the validity of these two preconditions, the meaning does not offer an explanation of what it takes for men to interfere with nature. Indeed, if nature is understood as «the scientific laws that describe natural processes»¹⁰⁸, it appears that «human activity cannot interfere with nature»¹⁰⁹, as the former will always be subject to the latter¹¹⁰. If instead this meaning refers to something other than humankind, then everything humans do should be considered an (unnatural) interference¹¹¹; indeed, every human action interacts with this entity that is all around us, but somehow different from us¹¹². However, as pointed out by Takala: «It is not a very good starting point for ethical inquiries to assume that everything done by the only (thus far) acknowledged moral agents is unnatural and hence immoral»¹¹³.

The attempt to limit the scope of unnaturalness only to certain types of human activities or to a specific degree of human interference would not make this interpretation of nature and naturalness less controversial for the following reasons:

1. It does not, *per se*, offer a way to determine which forms of human involvement or what level of human change to nature could be tolerated.

¹⁰⁶ T. TAKALA, *The (Im)Morality of (Un)Naturalness*, cit., 16.

¹⁰⁷ *Ibid.*, 16, where the author maintains that «a justification is needed to the claim that human beings are somehow different from the rest of the nature. What quality, event, or process could have enabled us to perform nonnatural or unnatural acts? Are we not part of the natural evolution as well?».

¹⁰⁸ UNITED STATES. PRESIDENT’S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL RESEARCH, cit., 55.

¹⁰⁹ *Ibid.*, 55, where it is stated that «all human activities ... proceed according to the scientific laws that describe natural processes» and also that “[i]ronically, to believe that “playing God” in this sense is even possible would itself be hubris according to some religious thought, which maintains that only God can interfere with the descriptive laws of nature (that is, perform miracles)».

¹¹⁰ See T. TAKALA, *The (Im)Morality of (Un)Naturalness*, cit., 17, who argues that «[g]oing against the laws of nature in this sense is a ridiculous idea – a contradiction in terms».

¹¹¹ See G.E. KAEHNICK, *Nature, Human Nature, and Biotechnology*, cit., 199.

¹¹² See UNITED STATES. PRESIDENT’S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL RESEARCH, cit., 55. See also J.B MITCHELL, *Understanding Assisted Suicide. Nine Issues to Consider. A Personal Journey*, cit., 20. The author argues that «much of human endeavour is to mitigate and limit the day-to-day impact that the natural/physical/biological world has on our choices... Most of medicine is aimed at curtailing nature».

¹¹³ T. TAKALA, *The (Im)Morality of (Un)Naturalness*, cit., 16, where she maintains that the «deduction from nature to morality involves the logical fallacy generally known as “Hume’s guillotine” (a term invented by Bertrand Russell). Hume questioned the way in which many philosophers move from how things are to how they should be without justifying this move in any way. This is/ought problem is prominent in the ethical discussions concerning naturalness».

2. If, as it was argued in section 1 in relation to the legal function played by these concepts¹¹⁴, the distinguishing criterion has to be found in factual causation¹¹⁵, its application to decisions such as withholding or withdrawing life-sustaining treatments or administering pain relief or palliative sedation is highly disputed. As recalled by Kasper Raus and others:

«[D]etermining the exact cause of a patient's death is very difficult in most circumstances – especially in cases of non-sudden deaths, such as deaths after CDS. (...) Simply to claim that the underlying disease is the sole cause of death suggests an overly narrow perspective on the situation; several causes can be presumed to be at work. When CDS is combined with withholding or withdrawing of all food and fluids, it is clear that that this will play a causal role (small or large) in the dying process of the patient»¹¹⁶.

3. In any case, the major issue affecting this interpretation of nature and naturalness concerns its inability to justify the alleged link between naturalness and morality. That is, it does not explain why naturalness should be «morally better than its opposite»¹¹⁷. It seems that without being backed by a clear moral theory, this meaning «cannot help make any moral distinctions»¹¹⁸.

2.2.3. An inconsistent or undesirable meaning

In the previous two sections it has been argued that nature and (un)naturalness are either reducible to other concepts (e.g. quality of life) or otherwise morally flimsy (e.g. independence from human interference). Conversely, it appears, at least at first glance, that by linking these concepts to natural law it is possible to overcome the objections moved to the previous meanings. Indeed, natural law is not meant to express principles that belong to other ethical theories. Moreover, it does not hinge on an anachronistic idea¹¹⁹, at least in the context of end-of-life decisions, of independence from human

¹¹⁴ See *supra*, § 1.1.2.

¹¹⁵ See K. RAUS, S. STERCKX, F. MORTIER, *Continuous Deep Sedation at the End of Life and the 'Natural Death' Hypothesis*, cit., 332, in which it is explained that, supporters of CDS – continuous deep sedation, «namely sedation that is both deep and deliberately continued until the patient dies» (at p. 329); it is also called palliative sedation, see P. LEWIS, *The Limits of Autonomy: Law at the End of Life in England and Wales*, in S. NEGRI (ed.), *Self-Determination, Dignity and End-of-Life Care. Regulating Advance Directives in International and Comparative Perspective*, Leiden-Boston, 2012, 232 - «frequently emphasize that a death following CDS shares the 'internality' of its causes with a 'natural' death. They admit that medical interventions (sedating the patient and sometimes withholding food and fluids) are present, but these are said to be not the 'real cause' of death. The key idea in this type of reasoning is that the patient dies of 'the underlying disease', which is an obvious internal cause. This idea can be found in many of the existing guidelines on CDS»

¹¹⁶ *Ibid.*, 332-333. See also: M. BATTIN, *Terminal Sedation: Pulling the Sheet over Our Eyes*, in *Hastings Center Report*, 38, 2008, 28; A. MEISEL, *End-of-Life Care*, in M. CROWLEY (ed.), *From Birth to Death and Bench to Clinic: The Hastings Center Bioethics Briefing Book for Journalists, Policymakers, and Campaigns*, 2008, 51, <http://www.thehastingscenter.org/Publications/BriefingBook/Detail.aspx?id=2270>, (last visited 27/08/2014), who maintains that «[w]hile the fact of death remains inevitable, its timing is often very much a function of human agency. Once it was common to speak of nature taking its course, but today it is more common to view death as a matter about which people—individuals at or near death, or their surrogates—have some control».

¹¹⁷ T. TAKALA, *The (Im)Morality of (Un)Naturalness*, cit., 16.

¹¹⁸ G.E. KAEBNICK, *Nature, Human Nature, And Biotechnology*, cit., 199.

¹¹⁹ See B. MITCHELL, *Understanding Assisted Suicide. Nine Issues to Consider. A Personal Journey*, cit., 20-21. See also A. MEISEL, *End-of-Life Care*, cit., 51.

involvement. Lastly, this interpretation of nature and (un)naturalness is supported by an authoritative theory of ethics that provides an explanation of the link between morality and (un)naturalness. However, a closer look at the way in which natural law precepts have been applied to the decision to withhold or withdraw life-prolonging treatments reveals that even this account presents issues that either affect its validity, or make it lacking moral desirability.

As pointed out in section 1, the proponents of natural law hold that the decision not to start or to interrupt life-sustaining treatments can be morally acceptable only if death is not intended¹²⁰ and the medical treatments under examination have become excessively burdensome for the patients or those close to them¹²¹. Indeed, the absence of suicidal or euthanasiast intention would make these decisions morally acceptable despite the harm caused to the fundamental basic good of human life. However, this line of reasoning cannot be followed for artificial nutrition and hydration which should not be classified as medical treatment, but instead as ordinary care that must always be provided¹²² «to the extent to which, and as long as, it is shown to accomplish its proper finality, which is the hydration and nourishment of the patient»¹²³.

A major issue involved in holding this position concerns the assumption that if the decision to forgo life-sustaining treatments is aimed exclusively at avoiding excessive burdens for the patients or their loved ones, then 'evil would be avoided', as the basic good of human life would not be damaged intentionally. In fact, it appears that the equally intentional assessment of the burdens related to the treatments to be forgone implies weighting the 'good' life against other factors, such as excessive pain or expense¹²⁴.

¹²⁰ The applicability of the doctrine of double effect to cases of withholding or withdrawing treatments has been questioned by A. MCGEE, *Finding A Way Through The Ethical And Legal Maze: Withdrawal Of Medical Treatment And Euthanasia*, cit., 374-376. See also G. WILLIAMS, *The Principle of Double Effect and Terminal Sedation*, in *Medical Law Review*, cit., 53.

¹²¹ See *supra*, § 1.2.3.2. See also: CATECHISM OF THE CATHOLIC CHURCH, no. 2278, <http://www.vatican.va/archive/ENG0015/INDEX.HTM>, (last visited 25/08/2014); UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Ethical and Religious Directives for Catholic Health Care Services*, Fifth Edition, 2009, directive 57, <http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf>, (last visited 25/08/2014); SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Declaration on Euthanasia*, 1980, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19800505_euthanasia_en.html, (last visited 29/07/2014).

¹²² See *supra*, § 1.2.3.2. THE CATECHISM OF THE CATHOLIC CHURCH, cit., no. 2279, states that: «[e]ven if death is thought imminent, the ordinary care owed to a sick person cannot be legitimately interrupted».

¹²³ SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Responses to Certain Questions of the United States Conference of Catholic Bishops Concerning Artificial Nutrition and Hydration*, 2007, http://www.doctrinafidei.va/documents/rc_con_cfaith_doc_20070801_risposte-usa_en.html, (last visited 29/07/2014).

¹²⁴ According to the THE LINACRE CENTRE FOR HEALTHCARE ETHICS, *Withdrawing and Withholding Treatment. A Response to Withholding and Withdrawing Treatment (A Consultation Paper from the BMA's Medical Ethics Committee)*, cit., 12: «We should allow a wide interpretation to the notion of 'burdens of treatment': they may be physical ... psychological ... social and economic». With regard to this distinction, it is often argued – see A. BUCHANAN, *Medical Paternalism*, cit., 233; B. MITCHELL, *Understanding Assisted Suicide. Nine Issues to Consider. A Personal Journey*, cit., 21-22; P. SINGER, *Rethinking Life and Death. The Collapse of Our Traditional Ethics*, Oxford, 1995, 71 – that the assessment required to distinguish extraordinary from ordinary measures would ultimately hinge on quality of life assessment. Contra, see J. KEOWN, *Euthanasia, Ethics and Public Policy. An*

However, this activity would be clearly incompatible with the intrinsic and “incommensurable” value ascribed to basic goods such as human life. Indeed, in this case, the reason to act (i.e. the intention to avoid burdens) would prevail over the reason not to act (i.e. the fact that life is a basic good); this implies also the acknowledgment that the value of life is not intrinsic, but instead it varies according to the actual circumstances of the case.

The only scenario in which, by virtue of the deontological maxim «ought implies can»¹²⁵, these sorts of evaluations could still be consistent with the principles of natural law is represented by situations in which withholding or withdrawing treatments are the only possible option due to «resource constraints»; that is «personnel, facilities, equipment or medication are not available»¹²⁶.

In fact, even the position embraced by natural law advocates in relation to artificial nutrition and hydration appears capable of avoiding the criticism pointed out above. By classifying this procedure as basic or ordinary care, the otherwise inevitable comparison between on the one hand the patient's life and on the other hand other factors would be ruled out. Indeed, only when artificial nutrition and hydration cannot achieve its goal, namely it cannot prolong the patient's life through nourishment and hydration anymore, it can then be legitimately foregone. However, this further application of the principle ‘ought implies can’ in respect of artificial nutrition and hydration has the undesirable consequence of making this account almost vitalistic¹²⁷. A similar view has been taken by Richard A. McCormick, who has cited the following statement by William May as an example of vitalism: «feeding such patients and providing them with fluids by means of tubes is not useless in the strict sense because it does bring to these patients a great benefit, namely, the preservation of their lives»¹²⁸.

Argument against Legalisation, Cambridge, cit., 42-49, where he proposes a very controversial distinction between “quality of life” and “quality of life” aimed at avoiding this criticism.

¹²⁵ See C. PATERSON, *Assisted Suicide and Euthanasia. A Natural Law Ethics Approach*, cit., 3, who recalls that «although since ‘ought implies can’, as Immanuel Kant pointed out, laws of nature certainly place logical and physical limitations on the powers we have to deliberate and will».

¹²⁶ THE LINACRE CENTRE FOR HEALTHCARE ETHICS, *Withdrawing and Withholding Treatment. A Response to Withholding and Withdrawing Treatment (A Consultation Paper from the BMA's Medical Ethics Committee)*, cit., 13.

¹²⁷ Medical vitalism has been defined by E.W. KEYSERLINGK, *Sanctity of Life or Quality of Life in the Context of Ethics, Medicine and Law. A Study Written for The Law Reform Commission of Canada, Protection of Life Series*, Ottawa, 1979, 19-20, as «an approach which insists that where there is human life, even mere metabolism and vital processes, no matter what the patient's (or newborn's) condition, or the patient's wishes, it would be inconsistent with the sanctity of life principle either to cease to preserve it or to intervene with it». Indeed, as pointed out by G.D. COLEMAN, *Subjectivism, Vitalism? Catholic Teaching Avoids Extremes*, in *Health Progress. Journal of the Catholic Health Association of the United States*, 35, 2014, <http://www.chausa.org/publications/health-progress/article/january-february-2014/subjectivism-vitalism-catholic-teaching-avoids-extremes>, (last visited 29/07/2014): «An extreme overinterpretation of the sacredness of human life roots certain vitalist mentalities».

¹²⁸ R.A. MCCORMICK, *Corrective Vision. Explorations in Moral Theology*, Lanham, 1994, 223. See also G.D. COLEMAN, *Subjectivism, Vitalism? Catholic Teaching Avoids Extremes*, cit., 36.

Section 3 – Legal issues arising from the use of nature and naturalness

3.1. Neither factual not legal causation

In the law relating to end-of-life decisions the concepts of nature and (un)naturalness are invoked almost exclusively to refer to an entity or a condition independent from humankind; as a matter of fact, neither the ambiguity inherent in these concepts nor their interpretation in terms of quality of life are likely to give rise to concern in the legal field. Conversely, that idea of independence from human interference appears to be quite problematic.

As outlined in section 1¹²⁹, in cases of withholding or withdrawing of life-prolonging treatments, the criminal law holds that, in the absence of an agent's duty to act, the responsibility for the patients' death is diverted from the human conduct to 'nature', disguised as the 'underlying disease'; it would be the latter and not the former to cause that death¹³⁰.

In order to reach this conclusion, the common law of murder makes use of the distinction between acts and omissions¹³¹. As pointed out by Lord Browne-Wilkinson in *Bland*:

«As to the guilty act, or *actus reus*, the criminal law draws a distinction between the commission of a positive act which causes death and the omission to do an act which would have prevented death. In general an omission to prevent death is not an *actus reus* and cannot give rise to a conviction for murder. But where the accused was under a duty to the deceased to do the act which he omitted to do, such omission can constitute the *actus reus* of homicide, either murder ... or manslaughter ... depending upon the *mens rea* of the accused»¹³².

Following the same reasoning, Butler-Sloss P held in *NHS Trust A v M; NHS Trust B v H*¹³³, that the withdrawal of artificial nutrition and hydration from two PVS patients would not violate article 2(1) of the European Convention on Human Rights¹³⁴ as «the phrase deprivation of life must import a deliberate act, as to opposed to an omission, by someone acting on behalf of the state, which results in death»¹³⁵.

¹²⁹ See *supra*, § 1.1.2.

¹³⁰ See A. MCGEE, *Finding A Way Through The Ethical And Legal Maze: Withdrawal Of Medical Treatment And Euthanasia*, cit., 357, 363.

¹³¹ See G. WILLIAMS, *Textbook of Criminal Law* (2nd ed.), London, 1983, 282.

¹³² *Bland*, cit., 881. See also *Ibid.*, 893, per Lord Mustill. See also R (on the application of Nicklinson and another) v Ministry of Justice, cit., [18], per Lord Neuberger, who recalled that: «the House of Lords in [*Bland*] decided that no offence was involved in refusing or withdrawing medical treatment or assistance, ultimately because this involved an omission rather than a positive act». And again, at [22]: «Lord Goff accepted that there was a fundamental difference between a positive action which caused death and an omission which resulted in a death».

¹³³ *NHS Trust A v M; NHS Trust B v H*, [2001] 1 All ER 801, [30]

¹³⁴ Art. 2(1) ECHR states: «Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law».

¹³⁵ See *NHS Trust A v M; NHS Trust B v H*, cit., [30]. See also A. MCGEE, *Finding A Way Through The Ethical And Legal Maze: Withdrawal Of Medical Treatment And Euthanasia*, cit., 380-381.

However, relying on this meaning of nature and (un)naturalness to establish legal causation is far from been unproblematic¹³⁶ as it raises at least two important issues.

The first one has already been examined in section 2, as it also affects the moral relevance of this interpretation of nature and (un)naturalness. Hence, it will be enough to summarise that point as follows: given the level of medicalisation that pervades human life, envisaging a scenario in which the disease «does all the work itself» appears to be inaccurate¹³⁷. This seems to be especially true in the context of end-of-life decisions, where the decision to withhold or withdraw treatments often occurs «at the end of a curative or palliative process» which «needs to be taken into account in both the factual and the normative evaluation of this practice»¹³⁸.

It appears that in *Bland* both Lord Goff and Lord Browne-Wilkinson in some way acknowledged the existence of this issue. The former conceded that “it may be difficult to describe what the doctor actually does as an omission, for example where he takes some positive step to bring the life support to an end”¹³⁹. Whereas, the latter, though not referring explicitly to the distinction between act and omission, argued that because of the developments in medical science, «[i]n many cases the time and manner of death is no longer dictated by nature but can be determined by human decisions»¹⁴⁰. With regard to cases of withholding or withdrawing of life-sustaining treatments involving competent patients, David Price argues that, though there is a widespread “perception” that in these situations the primary or only cause of death would be the underlying disease, «to say the patient is not the cause of his own death is spurious apart from in circumstances where treatment cannot offer a cure or the prolongation of life»¹⁴¹. And he also adds that

«[t]here is no doubt though that the patient's refusal of further treatment here is a factual cause of the person's death. In such cases the immediate cause of death is the patient's deci-

¹³⁶ See *Bland*, cit., 886, per Lord Mustill, who holds that «Emollient expressions such as “letting nature take its course” and “easing the passing” may have their uses, but they are out of place here, for they conceal both the ethical and the legal issues, and I will try to avoid them». See also, P. HANAFIN, *D(En)Ying Narratives: Death, Identity And The Body Politic*, in *Legal Studies*, 20/3, 2000, 399, who talks of a «legal fiction set up on the basis of the allegedly morally significant distinction between acts and omissions».

¹³⁷ See B. MITCHELL, *Understanding Assisted Suicide. Nine Issues to Consider. A Personal Journey*, cit., 20-21. Contra, see A. MCGEE, *Finding A Way Through The Ethical And Legal Maze: Withdrawal Of Medical Treatment And Euthanasia*, cit., 383. See also A. MCGEE, *Ending The Life Of The Act/Omission Dispute: Causation In Withholding And Withdrawing Life-Sustaining Measures*, in *Legal Studies*, 31/3, 2011, 360.

¹³⁸ See, K. RAUS, S. STERCKX, F. MORTIER, *Continuous Deep Sedation at the End of Life and the ‘Natural Death’ Hypothesis*, cit., 333.

¹³⁹ *Bland*, cit., 866. See also *R (on the application of Nicklinson and another) v Ministry of Justice*, cit., [22], per Lord Neuberger.

¹⁴⁰ *Bland*, cit., [878].

¹⁴¹ D. PRICE, *Assisted Suicide and Refusing Medical Treatment: Linguistics, Moral and Legal Contortions*, in *Medical Law Review*, 4, 1996, 283. See also D. BROCK, *Life and Death: Philosophical Essays in Biomedical Ethics*, Cambridge, 1993, 211, who believes that «that expressions such as “letting nature take its course or stopping prolonging the dying process” both seem to shift responsibility from the physician who stops life support to the fatal disease process. However psychologically helpful these conceptualisations may be in making the difficult responsibility of a physician's role in the patient's death bearable, they nevertheless are confusions. Both physicians and family members can instead be helped to understand that it is the patient's decision and consent to stopping the treatment that limits their responsibility for the patient's death and that shifts the responsibility to the patient».

sion to refuse further life supporting mechanisms. Death would not have occurred when and as it did without the implementation of the patient's decision. The underlying disease becomes the means of death only»¹⁴².

There is a second issue related to the practice of appealing to this interpretation of nature and (un)naturalness to determine *actus reus*. In order «to allocate responsibility for the consequences»¹⁴³ of the decision to withhold or withdraw life-sustaining treatments, the law does not take the absence of human interference as the determinative factor¹⁴⁴. Instead it focuses its attention on the existence of a duty to act¹⁴⁵. Indeed, as recalled by Lord Browne-Wilkinson in *Bland*¹⁴⁶, when there is a duty to care the conduct can be found unlawful even if it is classified as omission¹⁴⁷. The central importance of the duty to act is indirectly confirmed by Lord Goff, when he explained that

«The distinction [between acts and omissions] appears, therefore, to be useful in the present context in that it can be invoked to explain how discontinuance of life support can be differentiated from ending a patient's life by a lethal injection. But in the end the reason for that difference is that, whereas the law considers that discontinuance of life support may be consistent with the doctor's duty to care for his patient, it does not, for reasons of policy, consider that it forms any part of his duty to give his patient a lethal injection to put him out of his agony»¹⁴⁸.

Similarly, with regard to alleged violations of art. 2(1) ECHR, the crucial factor in establishing *actus reus* in cases involving withholding or withdrawing medical treatments would not be the active or

¹⁴² D. PRICE, *Assisted Suicide and Refusing Medical Treatment: Linguistics, Moral and Legal Contortions*, cit., 283-284. See also *Re B (Adult: Refusal of Medical Treatment)* [2002] 1 FLR 1090, a case in which the claimant, Ms B, wanted the ventilator that kept her alive to be removed. Dr R, one of the consultant anaesthetists who had treated Ms B gave oral evidence that «if the ventilator were switched off the end would be in a few hours. Immediate withdrawal would cause her death». ([56]).

¹⁴³ D. PRICE, *Assisted Suicide and Refusing Medical Treatment: Linguistics, Moral and Legal Contortions*, cit., 284.

¹⁴⁴ See *Bland*, cit., 831, per Hoffmann LJ, who explains that «If someone allows a small child or invalid in his care to starve to death, we do not say that he allowed nature to take its course. We think he has committed a particularly wicked crime. We treat him as if he had introduced an external agency of death». See also *Ibid.*, 895, per Lord Mustill, who held that «[i]n one form the argument presented to the House asserts that for the purpose of both civil and criminal liability the cause of Anthony Bland's death, if and when it takes place, will be the Hillsborough disaster. As a matter of the criminal law of causation this may well be right, once it is assumed that the conduct is lawful...It does not perhaps follow that the conduct of the doctors is not also causative, but this is of no interest since if the conduct is lawful the doctors have nothing to worry about».

¹⁴⁵ J. KEOWN, *A Futile Defence Of Bland: A Reply To Andrew McGee*, in *Medical Law Review*, 13, 2005, 401.

¹⁴⁶ See *Bland*, cit., 881, 893, per Lord Mustill. See also *Ibid.*, 866, per Lord Goff, who held that «as a matter of general principle an omission such as this will not be unlawful unless it constitutes a breach of duty to the patient».

¹⁴⁷ See also D. PRICE, *Assisted Suicide and Refusing Medical Treatment: Linguistics, Moral and Legal Contortions*, cit., 285, who clearly states that «[i]n the context of omissions [causation] involves determining whether an omission is a cause of death by reference only to whether the doctor had a duty to act». (285). See also J. COGGER, *On Acts, Omissions, and Responsibility*, in *Journal of Medical Ethics*, 34, 2008, 577, where he argues that «[a]lthough omissions were pivotal to the decision in the case, Mr Bland's carers escaped liability for murder not because of omissions simpliciter, but because of omissions combined with the evaporation of the duty to treat».

¹⁴⁸ *Bland*, cit., 866.

passive character of the conduct carried out by the healthcare professionals, but instead the existence of a positive obligation to “take adequate and appropriate steps to safeguard life”¹⁴⁹.

3.2. Natural law v. English law

In this section, it will first be explained on what basis it can be claimed that the moral precepts of natural law set out in section 1¹⁵⁰ can also hold legal relevance. Subsequently, it will be provided evidence of the very limited application that these principles have been given in the English law governing end-of-life decision-making.

3.2.1. Legal relevance of natural law theories

Besides natural law theories of ethics, there exist also legal theories of natural law that subscribe to the so-called Overlap Thesis. As explained by Einar Himma, according to this thesis:

«[T]here are at least some laws that depend for their “authority” not on some pre-existing human convention, but on the logical relationship in which they stand to moral standards. Otherwise put, some norms are authoritative in virtue of their moral content, even when there is no convention that makes moral merit a criterion of legal validity»¹⁵¹.

Both the classical natural law theory of Aquinas, and the neo-naturalism of John Finnis subscribe to this argument¹⁵². The latter can be considered a development of the former¹⁵³.

According to William Blackstone, the consequence of this thesis is that the law produced by human beings has to comply with natural law precepts in order to be legally binding¹⁵⁴. However, Finnis believes that «the claim that an unjust law is not a law should not be taken literally»¹⁵⁵, as both Aquinas and Blackstone were more concerned to provide explanations for the moral force of law than «with giving a conceptual account of legal validity»¹⁵⁶. In Finnis’s opinion, a law that does not comply with natural law principles is unjust as it fails to «provide an adequate justification for the use of the state

¹⁴⁹ NHS Trust A v M; NHS Trust B v H, cit., [23]. With regard to this obligation, see *Osman v UK* (1998) 5 BHRC 293, 321 [115].

¹⁵⁰ See *supra*, § 1.2.3.1.

¹⁵¹ K. EINAR HIMMA, *Natural Law*, cit. The author clarifies that the «conceptual theories of law have traditionally been divided into two main categories: those like natural law legal theory that affirm there is a conceptual relation between law and morality and those like legal positivism that deny such a relation».

¹⁵² See *Ibid.* The author points out that «[l]ike classical naturalism, Finnis’s naturalism is both an ethical theory and a theory of law».

¹⁵³ See *Ibid.* This article reviews also the following natural law theories of law: John’s Austin conceptual jurisprudence; Lon L. Fuller’s procedural naturalism; and Ronald Dworkin’s response and critique of legal positivism.

¹⁵⁴ See W. BLACKSTONE, *Commentaries on the Laws of England*, Chicago, 1979, 41, where he argues that «[t]his law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original».

¹⁵⁵ K. EINAR HIMMA, *Natural Law*, cit.

¹⁵⁶ *Ibid.* See also J.W. HARRIS, *Legal Philosophies* (2nd ed.), Oxford, 1997, 12.

coercive power»¹⁵⁷; accordingly, it cannot not have «obligatory force (in the fullest sense of ‘obligation’)¹⁵⁸, but it retains its binding force. This means that «[u]njust laws may obligate in a technical legal sense, on Finnis’s view, but they may fail to provide moral reasons for action of the sort that it is the point of legal authority to provide»¹⁵⁹.

Offering a detailed account of Aquinas and Finnis’s legal theorizing would be beyond the scope of this work; for the purposes of this section, it is enough to stress that a major implication of the Overlap Thesis is that the natural law principles of practical rationality should inform positive law, including, as argued by both Finnis and the Roman Catholic Church, the regulation of end-of-life decision-making.

3.2.2. The mismatch between natural law precepts and English law

In the remaining part of this section, it will be shown that the main tenets of Aquinas and Finnis’s natural law theorizing are largely at odds with the English law regulating end-of-life decisions; accordingly the legal relevance of this way of interpreting nature and naturalness is extremely limited in this field of law.

This section will focus on the following natural law cornerstones: the intrinsic and incommensurable value of the basic good human life; and the decisive role played by intention in determining which exceptions to the prohibition on killing are acceptable¹⁶⁰.

Following the line of reasoning pointed out in section 1, according to natural law theorists, in light of its intrinsic and absolute value, the basic good of human life is endowed with an incommensurable character. Consequently, the law should never envisage the possibility to ‘intentionally’ balance this fundamental basic good against other reasons for action such as self-determination and quality of life. However, this is precisely what the law applicable to end-of-life decision-making appears to do in cases of withholding and withdrawing of life-sustaining treatments.

As far as adult competent patients are concerned, the English common law has clearly stated that they have an absolute right to refuse any kind of medical treatment, including life-saving procedures, regardless of the reasons, if any, behind their refusal¹⁶¹. In these cases the law does not inquire into whether the patients’ intent is suicidal or not as this is not considered a relevant factor in establishing the lawfulness of the decision at stake.

Moreover, not only is this legal arrangement applied to contemporaneous refusals, but also to advance refusals of treatments, which the common law first¹⁶², and the Mental Capacity Act 2005

¹⁵⁷ K. EINAR HIMMA, *Natural Law*, cit.

¹⁵⁸ J. FINNIS, *A Philosophical Case Against Euthanasia*, cit., 23-24. See also J. FINNIS, *Natural Law Theories*, 2011, <http://plato.stanford.edu/entries/natural-law-theories/#NatLawPurPosLawConDimLegRea>, (last visited 23/08/2014).

¹⁵⁹ K. EINAR HIMMA, *Natural Law*, cit.

¹⁶⁰ For both points, see *supra*, § 1.2.3.2.

¹⁶¹ Re M.B. (Medical Treatment) [1997] 2 F.L.R. 426, [432]. See also P. LEWIS, *The Limits of Autonomy: Law at the End of Life in England and Wales*, cit., 221-222.

¹⁶² See: Re T, (Adult Refusal of Treatment) [1993] Fam 95, [103]; Bland, cit., [864]; Re C (Adult Refusal of Treatment) [1994] 1 All ER 819, [825].

(MCA)¹⁶³ later have recognised as legally binding. Therefore, with regard to these patients, it appears that «the state acknowledges the primacy of the patient's self-determination over other fundamental interests, most notably preservation of life»¹⁶⁴.

As for incompetent patients the law prescribes that:

«Regardless of the identity of the decision-maker, decisions on medical treatment for incompetent individuals are made using the 'best interests' test, which involves weighing the benefit and detriment that will flow from the proposed procedure. The best interests test is based on the protection of the incompetent individual's welfare interests»¹⁶⁵.

Preservation of life must certainly be included among the welfare interests. Indeed, the courts have often affirmed that end-of-life decision-making has to start by acknowledging the existence in law of a strong presumption in favour of preserving human life¹⁶⁶. However, the same authorities have also held that this presumption is rebuttable¹⁶⁷. Therefore, preservation of life, though it can sometimes be decisive in determining the best interests of patients¹⁶⁸, it has always to be balanced against other factors, such as quality of life¹⁶⁹, and, when feasible, autonomy¹⁷⁰. In fact, even when life has been said to possess intrinsic value like in the statements of Lord Hofmann and Lord Mustill in *Bland*¹⁷¹, this has not prevented the latter from conceding that «[t]he interest of the state in preserving the lives of its citizens is very strong, but it is not absolute. There are contrary interests, and sometime these prevail»¹⁷².

¹⁶³ See MCA, s. 26(1), and the related Explanatory Notes [84], [91].

¹⁶⁴ M. ORLANDO, *Law at the End of Life 2*, Coursework submitted as part of the MA in Medical Ethics and Law, 2014, 4. See also: *Bland*, cit., 864, 892; *Re T*, cit., [112]. As pointed out by P. LEWIS, *The Limits of Autonomy: Law at the End of Life in England and Wales*, cit., 222-223, the law does not protect the autonomy of competent children as much as that of competent adults. The former's refusal of medical treatment can be overridden when it is not deemed to be in their best interests.

¹⁶⁵ P. LEWIS, *The Limits of Autonomy: Law at the End of Life in England and Wales*, cit., 225. In respect to adults, see MCA, ss. 1(5) and 4; in relation to children see: *Re J* [1991] Fam 33, 46-47, 52, 55.

¹⁶⁶ See *Re J*, cit., 46; *Burke*, cit., [100]; *W v M*, cit., 7; *Aintree v James* [2013] UKSC 67, [35]; *United Lincolnshire Hospitals NHS Trust v. N*, [2014] EWCOP 16, [52].

¹⁶⁷ See *Re J*, cit., 46, per Lord Donaldson: «There is without doubt a very strong presumption in favour of a course of action which will prolong life, but ... it is not irrebuttable». See also *Aintree v James*, cit., [35], where Lady Hale summarised this point by stating that: «The authorities are all agreed that the starting point is a strong presumption that it is in a person's best interests to stay alive. ... Nevertheless, they are also all agreed that this is not an absolute. There are cases where it will not be in a patient's best interests to receive life-sustaining treatment».

¹⁶⁸ See *W v M*, cit., [249], in which Baker J held that the withdrawal of artificial nutrition and hydration from a patient in a minimally conscious state was not in her best interests as in his opinion «the importance of preserving life is the decisive factor in this case».

¹⁶⁹ See *Re J*, cit., 46-47, 52, 55. See *Aintree v James*, cit., [40].

¹⁷⁰ According to sec. 4(6)(a) MCA, the wishes of incompetent patients should be taken into account in determining their best interests. Their relevance seems to be increased following the decision of the Supreme Court in *Aintree v James*, cit., [24], [45]. In this sense see *United Lincolnshire Hospitals NHS Trust v. N*, cit., [55], [56] [58, vi].

¹⁷¹ See *Bland*, cit., 894, per Lord Mustill, and 826, per Hofmann LJ.

¹⁷² *Ibid.*, 894. Whereas, according to Hofmann LJ, *Ibid.*, 829: «[T]he very concept of having a life has no meaning in relation to Anthony Bland. He is alive but has no life at all».

According to natural law, in addition to ‘incommensurability’, a further implication of the intrinsic value ascribed to human life is the prohibition on intentional killing¹⁷³. In order to distinguish licit from illicit exceptions to this ban, natural law theorists rely on the distinction between intention and foresight, and the related doctrine of double effect¹⁷⁴. In their opinion, this doctrine should be applied to both administration of palliative drugs that in theory could hasten death, and decisions to withhold or withdraw life-prolonging treatments.¹⁷⁵

While, the English courts have adopted the doctrine of double effect in cases concerning the administration of both drugs aimed at relieving pain¹⁷⁶ and palliative sedation¹⁷⁷, they have not done the same in relation to withholding and withdrawing of life-sustaining treatments. The leading authority¹⁷⁸ in this sense is still *Bland*, in which «[t]he House of Lords decided that although the intention of the doctor would be to bring about Bland’s death, the proposed withdrawal would be lawful as it constituted an omission rather than an act»¹⁷⁹. Consequently, this decision has been heavily criticised by supporters of natural law¹⁸⁰.

Conclusion

The analysis conducted in this work has provided some evidence that, in the UK, appealing to the concepts of nature and (un)naturalness in respect to end-of-life decisions is not desirable.

With regard to the moral issues pertaining to the use of these ideas, it was shown that their ambiguity prevents them from being effective decision-making criteria. Moreover, each of the meanings in which they can be employed presents problematic aspects: when they refer to quality of life they lack conceptual autonomy; if they are understood as an entity or a condition independent from human beings, they seem to rely on an unfeasible reality without even explaining why it should be preferable to its opposite; when instead they hinge on natural law, they embrace a theory that in relation to end-of-life decision-making is either inconsistent with its main tenets or is very close to unpleasant approaches to medical ethics, such as vitalism.

Moving from the ethical to the legal discourse, it does not seem that these concepts can claim to be less controversial. In cases of withholding or withdrawing of treatments, the idea of nature as the

¹⁷³ See *supra*, § 1.2.3.2.

¹⁷⁴ See *supra*, § 1.2.3.2. See also G. WILLIAMS, *The Principle of Double Effect and Terminal Sedation*, cit., 41.

¹⁷⁵ See *supra*, § 1.2.3.2.

¹⁷⁶ See P. LEWIS, *The Limits of Autonomy: Law at the End of Life in England and Wales*, cit., 230. See *Re J*, cit., 46; *Bland*, cit., 867-8. As pointed out by P. LEWIS, *The Limits of Autonomy: Law at the End of Life in England and Wales*, cit., 231: «[T]he approach taken in medical cases is ... ‘less stringent’ than the position in the criminal law more generally». Indeed, outside the medical context, «a consequence is intended if the consequence either is the actor’s purpose or desire, or is foreseen by the actor as morally certain to occur». See *R v Woollin* [1999] 1 A.C. 82, 96.

¹⁷⁷ *Ibid.*, 232.

¹⁷⁸ *Ibid.*, 226.

¹⁷⁹ *Ibid.*, 226. See *Bland*, cit., 876, 881, 887. See G. WILLIAMS, *The Principle of Double Effect and Terminal Sedation*, cit., 51.

¹⁸⁰ See J. FINNIS, *Bland: Crossing the Rubicon?*, cit., 330. See also THE LINACRE CENTRE FOR HEALTHCARE ETHICS, *Withdrawing and Withholding Treatment. A Response to Withholding and Withdrawing Treatment (A Consultation Paper from the BMA’s Medical Ethics Committee)*, cit., 9.

factual cause of death is anachronistic and more importantly irrelevant to establishing legal causation, which instead relies on the presence of a duty to act. Whereas, as far as the principles of natural law are concerned, it seems that they are widely disregarded by the English law governing end-of-life decisions. Indeed, the latter allows for comparisons between the interest in preserving life and other interests such as self-determination and quality of life. Moreover, in certain circumstances it considers lawful to intentionally terminate the life of patients though only by omission.

Chapter 2