

THE USE AND ABUSE OF HISTORY IN  
*COMPASSION IN DYING*

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We must never forget that it is a *constitution* we are expanding.

—From a 21st century casebook on constitutional law.

All our final resolutions are made in a state of mind that is not going to last.

—Marcel Proust<sup>1</sup>

## I. INTRODUCTION

Barely thirty years ago, in *Griswold v. Connecticut*,<sup>2</sup> the Supreme Court discovered that there were certain fundamental rights not expressly to be found in the Constitution, but rather to be teased out of the Bill of Rights by way of the Fourteenth Amendment's Due Process Clause. In that case, a Connecticut statute made it a crime to use any contraceptive device; the question the Court addressed was whether a married couple could be prosecuted for using such devices. The Court held that the Connecticut law was unconstitutional. In the opinion of Justice Douglas, certain explicit constitutional guarantees—the First, Third, Fourth, Fifth, and Ninth Amendments—gave rise to a new, general right of privacy. To use Justice Douglas's famous phrasing: "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."<sup>3</sup> Thus, the commonly understood "right of privacy" (which all polite people respected) became quite a different constitutional right.

In the succeeding thirty years, the penumbras have lengthened. *Griswold* was followed by a series of cases that found new avatars of the "right of privacy," particularly in the abortion cases<sup>4</sup> and other related decisions on procreation and child rearing.<sup>5</sup>

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1. "Ce n'est jamais qu'à cause d'un état d'esprit qui n'est pas destiné à durer qu'on prend des résolutions définitives." MARCEL PROUST, *A LA RECHERCHE DU TEMPS PERDU* 578-79 (Bibliothèque de la Pléiade, Paris 1954). Translation supplied by the authors of this Article.

2. 381 U.S. 479 (1965).

3. *Id.* at 484.

4. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

5. See *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

## II. THE USE OF HISTORY IN CONSTITUTIONAL DECISION-MAKING

The Supreme Court, mindful of the need to limit the creativity of its own members, has continued to insist on the importance of history in determining what implicit fundamental rights are to be recognized. Despite *Roe v. Wade* and its progeny, the Court has insisted that there should not be automatic recognition of other, novel fundamental rights. In *Bowers v. Hardwick*,<sup>6</sup> for example, the Court refused to find a fundamental constitutional right to homosexual sodomy. In *Cruzan*,<sup>7</sup> the Court addressed the problem of withdrawal of medical treatment from a patient in a persistent vegetative state, but did not recognize a right to physician-assisted suicide or even a fundamental right to suicide *tout court*.

Indeed, *Cruzan* expressly recognized that “there can be no gainsaying” the interest of the state in the protection and preservation of human life, noting that “all civilized nations . . . demonstrate their commitment to life by treating homicide as a serious crime” and that “the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide.”<sup>8</sup> There was no suggestion in *Cruzan* that the constitutionality of such laws was in question. Justice Scalia’s concurrence noted the strong legal tradition against assisted suicide, and explained:

Although the States abolished the penalties imposed by the common law [on suicide] (*i.e.*, forfeiture and ignominious burial), they did so to spare the innocent family and not to legitimize the act. . . . Thus, “there is no significant support for the claim that a right to suicide is so rooted in our tradition that it may be deemed fundamental or implicit in the concept of ordered liberty.”<sup>9</sup>

Nonetheless, earlier this year, the Ninth Circuit became the first appellate court in American history to hold that physician-assisted suicide of terminally ill patients is protected by the Constitution under the Fourteenth Amendment’s Due Process Clause.<sup>10</sup> In so ruling, it struck down a Washington state statute

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6. 478 U.S. 186 (1986).

7. *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261 (1990).

8. *Id.* at 280.

9. *Cruzan*, 497 U.S. at 294-95 (Scalia, J., concurring) (citations omitted).

10. *See Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir.) (en banc), *cert.*

that criminalized the practice. The case, *Compassion in Dying v. Washington*, was decided en banc,<sup>11</sup> eight to three, with the majority opinion written by Judge Stephen J. Reinhardt.

In *Bowers*, the Supreme Court had described the considerations appropriate in determining which fundamental rights should be recognized even though they are "not readily identifiable in the Constitution's text."<sup>12</sup> Such rights, said the Court, are either those that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed," or those "liberties that are 'deeply rooted in this Nation's history and tradition.'"<sup>13</sup> These seemingly alternative formulations both depend on history. For what else could serve as a reliable guide to locate those rights "implicit in the concept of ordered liberty" except history, which identifies those rights "deeply rooted in the nation's history and traditions"? Justice Cardozo, the source of the first phrase, immediately glossed it as equivalent to a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."<sup>14</sup>

Significantly, when *Bowers* held that "neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy,"<sup>15</sup> the argument was strictly historical:

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*granted sub nom.* *Washington v. Glucksberg*, 117 S. Ct. 37 (1996); *see also* *Quill v. Vacco*, 80 F.3d 716 (2d Cir.) (holding that New York's statute prohibiting assisted suicide is unconstitutional under the Fourteenth Amendment's Equal Protection Clause because it lacked a rational basis when applied to the terminally ill, but noting that the prohibition would be upheld under the Due Process Clause), *cert. granted*, 117 S. Ct. 36 (1996). *But see* *People v. Kevorkian*, 527 N.W.2d 714, 733 (Mich. 1994) (holding that the Fourteenth Amendment provides no due process fundamental right to physician-assisted suicide), *cert. denied*, 115 S. Ct. 1795 (1995).

11. The original three-judge panel had upheld the statute 2-1. *See* *Compassion in Dying v. Washington*, 49 F.3d 586 (9th Cir. 1995).

12. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

13. *Id.* at 191-92 (citing *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937) and *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (Powell, J., for plurality)).

14. *Palko*, 302 U.S. at 325 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). Justice Holmes had a similar understanding of the importance of history. For example, in his famous *Lochner* dissent, Holmes suggested that legislation might give way when "a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). As he later wrote, "If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . ." *Jackman v. Rosenbaum*, 260 U.S. 22, 31 (1922).

15. *Bowers*, 478 U.S. at 192.

Proscriptions against that conduct have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. Against this background, to claim that a right to engage in such conduct is “deeply rooted in this nation’s history and tradition” or “implicit in the concept of ordered liberty” is, at best, facetious.<sup>16</sup>

The Court properly identified the danger of reckless invention of new fundamental rights:

The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930’s, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.<sup>17</sup>

In fashioning a constitutional right to physician-assisted suicide, then, Judge Reinhardt could hardly—given *Bowers*—have avoided dealing with history. The overruled three-judge panel had said that the “constitutional right to aid in killing oneself” was “unknown to the past.”<sup>18</sup> *Quill v. Vacco*, the Second Circuit case striking down New York’s assisted suicide prohibition under the Equal Protection Clause, similarly recognized that the right to assisted suicide is in no sense deeply rooted in the nation’s history and traditions.<sup>19</sup>

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16. *Id.* at 192-94 (citations omitted).

17. *Id.* at 194-95.

18. *Compassion in Dying v. Washington*, 49 F.3d 586, 591 (9th Cir. 1995), *rev’d en banc*, 79 F.3d 790 (9th Cir. 1996), *cert. granted sub nom. Washington v. Glucksberg*, 117 S. Ct. 37 (1996).

19. *See Quill v. Vacco*, 80 F.3d 716, 724 (2d Cir.) (“Indeed, the very opposite is true.”), *cert. granted*, 117 S. Ct. 36 (1996).

## III. JUDGE REINHARDT'S USE OF HISTORY

Judge Reinhardt employs three strategies to minimize the significance of what ought to have been the heart of the inquiry—history.

First, his historical inquiry is surprisingly brief. It consists of just four pages, in a fifty-page opinion, which give us a *tour d'horizon* of the subject, from the ancient Greeks to the present day. Second, his inquiry is not into the proper subject: his heading is "Historical Attitudes Toward Suicide," despite the fact that there is an enormous difference between suicide and physician-assisted suicide. Third, his inquiry is dishonest because, perhaps uncertain of the historical record, which he describes as "checkered,"<sup>20</sup> he claims that where the historical evidence does not support a position, it scarcely matters: "we believe that the [three-judge] panel's historical account is misguided, but even *if it were indisputably correct, historical evidence alone is not a sufficient basis for rejecting a claimed liberty interest.*"<sup>21</sup>

Those not inured to modern constitutional adjudication, and to the bland self-assurance of some of its practitioners, may be surprised. Even though neither the language of the Constitution, nor the historical record, supports the recognition of the "fundamental right" in question but actually supports the opposite, Judge Reinhardt is unwilling to allow "historical evidence alone" to stop him.

Let us, nonetheless, examine Judge Reinhardt's *Compassion in Dying* inquiry as if history mattered—for we allow ourselves to believe that it does. He claims that his four-page historical study<sup>22</sup> leads to no clear result. How accurate is his review of "Historical Attitudes Toward Suicide"? He begins by noting that the majority opinion of the three-judge panel, written by Judge John Noonan (a noted legal historian), claimed that "[a] constitutional right to aid in killing oneself" was "unknown to the past."<sup>23</sup> But Judge Reinhardt is quick to note that his own inquiry is "not so narrow" nor "[the en banc court's] conclusion so facile."<sup>24</sup> As he puts it:

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20. See *Compassion in Dying*, 79 F.3d at 806.

21. *Id.* at 805 (emphasis added).

22. See *id.* at 806-10.

23. *Id.* at 806 (quoting *Compassion in Dying*, 49 F.3d at 591).

24. *Compassion in Dying*, 79 F.3d at 806. The full quote reads: "As we have pointed out at p. 803, our inquiry is not so narrow. Nor is our conclusion so facile. The relevant

[T]he subject we must initially examine is not nearly so limited. Properly analyzed, the first issue to be resolved is whether there is a liberty interest in determining the time and manner of one's death. We do not ask simply whether there is a liberty interest in receiving "aid in killing oneself" because such a narrow interest could not exist in the absence of a broader and more important underlying interest—the right to die. In short, it is the end and not the means that defines the liberty interest.<sup>25</sup>

To justify his approach, Judge Reinhardt makes an analogy to the approach used by the Supreme Court in the abortion cases.<sup>26</sup> In those cases, he says, the Court initially determined whether a general liberty interest existed (an interest in having an abortion), not whether there was an interest in implementing that general liberty interest by a particular means (with medical assistance).

#### IV. ANTIQUITY

##### *A. The Hippocratic Oath*

If, as Judge Reinhardt argues, a historical inquiry ought to focus on a general "right to die," we should consider all three possibilities—suicide, assisted suicide, and euthanasia—in a continuum from the more to the less accepted. But he avoids all historical discussion of both physician-assisted suicide and euthanasia. It might be argued that there simply is not enough evidence to bring to bear on physician-assisted suicide. But there is at least one important bit of evidence from the past—the Hippocratic Oath.

Curiously, Judge Reinhardt does not mention the Hippocratic Oath in his historical survey. Instead, the Oath is dealt with in another section of the opinion. Nevertheless, it is the historical evidence most relevant to the issue of physician-assisted suicide. The language of the Oath, composed in classical antiquity, flatly forbade doctors from administering lethal drugs to patients.

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historical record is far more checkered than the [three-member panel's] majority would have us believe." *Id.* Because there is no such discussion on page 803, the court must have intended to refer to page 801.

25. *Id.* at 801.

26. *See id.* at 801. The use of history in the abortion cases has been widely criticized. *See, e.g.,* John Finnis, "Shameless Acts" in *Colorado: Abuse of Scholarship in Constitutional Cases*, 7 *ACADEMIC QUESTIONS* 10, 10-19 (1994).

Doctors were not permitted even to suggest such a course.<sup>27</sup> The marginalization of this important piece of historical evidence is perhaps foreshadowed by Judge Reinhardt's quotation from *Roe v. Wade* that "only the Pythagorean school of philosophers frowned upon the related act of suicide."<sup>28</sup> But the Hippocratic Oath was administered throughout the Western world for more than two millennia. Whatever one now makes of its original formulation, a survey devoted to "Historical Attitudes Toward Suicide" surely ought not overlook the Oath, correctly described by Justice Blackmun in *Roe* as "the apex of the development of strict ethical concepts in medicine."<sup>29</sup> The Oath expressly forbids administering poisons to patients *even when requested*. A clearer rejection of physician-assisted suicide cannot be imagined. What is important is not only the Oath itself, but also its wide acceptance, in so many countries, over so long a period, as the solemn accompaniment to full-fledged admission to the profession of medicine.

Elsewhere in the opinion, Judge Reinhardt notes that the Hippocratic Oath, in his view, is no longer relevant, because, according to him, it also forbade abortion.<sup>30</sup> His logic is: abortion is now allowed despite the Hippocratic Oath; ergo physician-assisted suicide should also be allowed. But this does not follow.

It is true that the Hippocratic Oath has recently fallen into desuetude. But there is ample evidence that the Hippocratic

27. See Hippocrates, *Oath*, reprinted in 1 HIPPOCRATES 299 (W.H.S. Jones trans., 1923) ("I will use treatment to help the sick according to my ability and judgment, but never with a view to injury and wrong-doing. Neither will I administer a poison to anybody when asked to do so, nor will I suggest such a course.")

28. *Compassion in Dying*, 79 F.3d at 807 (citing *Roe v. Wade*, 410 U.S. 113, 131 (1973)). The majority opinion observes that the *Roe* Court "noted that the Pythagorean school represented a distinctly minority view." *Id.* *Roe* had also claimed that

with the end of antiquity a decided change took place. Resistance against suicide and against abortion became common. The Oath came to be popular. The emerging teachings of Christianity were in agreement with the Pythagorean ethic. The Oath "became the nucleus of all medical ethics" and "was applauded as the embodiment of truth." Thus, suggests Dr. Edelstein, it is "a Pythagorean manifesto and not the expression of an absolute standard of medical conduct."

This, it seems to us, is a satisfactory and acceptable explanation of the Hippocratic Oath's apparent rigidity.

*Id.* at 132 (quoting LUDWIG EDELSTEIN, *THE HIPPOCRATIC OATH* 64 (1943)).

29. *Roe*, 410 U.S. at 131.

30. See *Compassion in Dying*, 79 F.3d at 829 ("Clearly, the Hippocratic Oath can have no greater import in deciding the constitutionality of physician assisted-suicide than it did in determining whether women had a constitutional right to have an abortion.")

Oath's prohibition of physician-assisted suicide remains compelling to medical practitioners today. The dissent of Judge Beezer quotes the current American Medical Association (AMA) Code of Ethics:

While not legally binding, the AMA Code of Ethics provides clear guidance on the current position of medical ethicists. Section 2.211 of the American Medical Association's *Code of Medical Ethics and Current Opinions of the Council on Ethical and Judicial Affairs* ("AMA Code of Ethics") prohibits physician participation in physician assisted suicide. In virtually identical language to its condemnation of euthanasia, section 2.211 provides:

Physician assisted suicide occurs when a physician facilitates a patient's death by providing the necessary means and/or information to enable the patient to perform the life-ending act (e.g. the physician provides sleeping pills and information about the lethal dose, while aware that the patient may commit suicide).

It is understandable, though tragic, that some patients in extreme duress—such as those suffering from a terminal, painful, debilitating illness—may come to decide that death is preferable to life. However, *allowing physicians to participate in assisted suicide would cause more harm than good. Physician assisted suicide is fundamentally incompatible with the physician's role as healer, would be difficult or impossible to control, and would pose serious societal risks.*<sup>31</sup>

This part of the Hippocratic Oath thus remains, in its AMA guise, still vital.

### *B. Literary Suicides*

How accurate and complete an account does Judge Reinhardt give? How does he summarize views on suicide in classical antiquity? And how do these views accord with his sources? He relies on a handful of secondary sources, and never on the original texts themselves. Indeed, fully half of the footnotes in his historical survey refer to a single article.<sup>32</sup>

Judge Reinhardt begins by confounding history and literature. He states that "[i]n Greek and Roman times, far from

31. *Compassion in Dying*, 79 F.3d at 855 (Beezer, J., dissenting) (emphasis added).

32. Thomas J. Marzen, Mary K. O'Dowd, Daniel Crowe, & Thomas J. Balch, *Suicide: A Constitutional Right*, 24 DUQ. L. REV. 1 (1985).

being universally prohibited, suicide was often considered commendable in literature, mythology, and practice."<sup>33</sup> Hence in an "historical" survey he allows himself to start with "the first of all literary suicides," Jocasta, who chose "an honorable way out of an insufferable situation."<sup>34</sup> As for Homer, he "records self-murder without comment, as something natural and heroic" and the "legends bear him out."<sup>35</sup> One legend is offered, presumably by way of example: "Aegeus threw himself into the sea—which therefore bore his name—when he mistakenly thought his son Theseus had been slain by the Minotaur."<sup>36</sup> This is breezily done, of course—no doubts, no weighing of evidence. "The legends bear him [Homer] out."

Aside from the eponymous tale of How the Aegean Got Its Name, how many Greek legends can Judge Reinhardt adduce in support of the proposition that the Greeks regarded suicide tolerantly? Is he so sure that it is proper to derive such a conclusion from that—or any—legend? As for Jocasta, neither her suicide, nor that of any other character in literature, whether deplorable or admirable, can be adduced to prove anything other than what all sensible people already know—that sometimes, feeling desperate or hopeless, people kill themselves. Jocasta and Aegeus do not exhaust the list. But we cannot claim that Cleopatra affixing that reluctant asp to her breast, nor Emma Bovary poisoning herself *en province*, nor Anna Karenina throwing herself under a St. Petersburg train, can tell us whether or not Elizabethan England, France under the Second Empire, or Czarist Russia, respectively, regarded suicide as noble or ignoble, practiced only by the very great or only by the very foolish. Judge Reinhardt's bizarre initial paragraph, fortunately, represents his only foray into world literature; he has other worlds to conquer.

### C. The Uses Of Ancient History

#### 1. The Hebrews

One might have expected Judge Reinhardt to begin with the

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33. *Compassion in Dying*, 79 F.3d at 806.

34. *Id.* at 806 (quoting Alfred Alvarez, *The Background, in SUICIDE: THE PHILOSOPHICAL ISSUES* 7, 18 (M. Pabst Battin & David J. Mayo eds., 1980)).

35. *Id.*

36. *Id.*

Hebrews. The contribution of ancient Israel to Western civilization includes monotheism and the moral code enshrined in the Ten Commandments. The Hebrew Bible, as well as the traditions of the Jews, have helped form Western attitudes toward suicide. The opinion devotes one footnote of two sentences to the Bible: one for the Old Testament, and one for the New ("the stories of four suicides are noted in the Old Testament—Samson, Saul, Abimlech(sic), and Achitophel—and none is treated as an act worthy of censure").<sup>37</sup> To all of ancient Israel's history and religion and moral teachings Judge Reinhardt devotes not even a paragraph, but merely one sentence in one footnote: "Hundreds of Jews killed themselves at Masada in order to avoid being captured by Roman legions."<sup>38</sup>

This well-known fact, of course, tells us nothing about the accepted attitude toward suicide in ancient Israel.<sup>39</sup> But if we turn back to the text Judge Reinhardt uses with such assiduity, we find quite a different story. In the Old Testament the article finds, and lists, not four but eight suicides, and notes that:

With the exception of Samson, none of the eight who died by suicide are presented as heroes.

Only Samson's suicide was arguably heroic. . . . Since Samson does not appear directly to will his own death, but only the death of the Philistines at the cost of his own life, his intention is arguably not even suicidal.<sup>40</sup>

The article cites several scholars on the subject as well. One observes that "suicide may have been a relatively rare phenomenon in Biblical times";<sup>41</sup> another scholar notes that "those who did commit suicide were considered deranged. . .";<sup>42</sup> a third says that "[w]hen the act did occur, the victim and his family were punished by denial of a regular burial and the customary rituals of mourning."<sup>43</sup> It took time, however,

37. *Id.* at 808 n.25 (quoting Marzen, *supra* note 32, at 19).

38. *Id.* at 807 n.24 (quoting Marzen, *supra* note 32, at 20).

39. To attribute a particular significance to the facts of Masada, one would have to adduce evidence as to the reaction to the event by the Jews of the time. The bald statement of those facts permits no conclusion about the accepted view of suicide among the ancient Hebrews, any more than the facts of Jonestown allow us to conclude anything about American society's attitude towards such mass suicides.

40. Marzen, *supra* note 32, at 18-19.

41. *Id.* at 19-20 (citing M. PABST BATTIN, *ETHICAL ISSUES IN SUICIDE* 31 (1982)).

42. *Id.* at 20 (quoting JACQUES CHORON, *SUICIDE* 13-14 (1972)).

43. *Id.* at 20 (quoting Norman L. Farberow, *Cultural History of Suicide*, in *SUICIDE IN*

for Jewish writers to develop their ideas more explicitly:

As the influence of Hellenism spread, Jewish writers developed a more philosophic posture and became more explicit in their treatment of moral problems such as suicide. The earliest known formal prohibition of suicide among the Jews occurred in the first century A.D., when Josephus, after his army had been conquered by the Romans, forbade his soldiers to kill themselves on the grounds that suicide was a cowardly act, contrary to nature and the law of God, who committed man's soul to his body. Josephus' order contrasted with that of Eleazer Ben Jair, who successfully urged his Zealot followers to commit mass suicide at Masada in order to avoid capture by the Romans. After the exile, prohibitions of suicide were included in the Rabbinic and Talmudic writings, expressed in stories and in mourning and funeral sanctions.<sup>44</sup>

Judge Reinhardt ignores all this.

Regardless of whether there are four or eight instances of suicide in the Hebrew Bible,<sup>45</sup> Judge Reinhardt says that "none is treated as an act worthy of censure." But there is at least one instance in which assisted suicide or mercy killing is clearly censured. That is the case of Saul, first King of Israel:

Saul was badly wounded in battle by a Philistine arrow. Afraid of being tortured and humiliated by his captors, he pleaded with his armour-bearer to kill him (I Sam 31:1-4; I Chron 10:1-4). There are two versions of what happened next. According to the first, the man refused, so Saul committed suicide by falling on his own sword (I Sam 31:5-6; I Chron 10:4). In the other account a young Amelikite came upon the wounded Saul leaning on his spear, perhaps attempting suicide. Saul begged him, "Stand beside me and slay me, for anguish has seized me and yet my life lingers." So the youth obliged (2 Sam 1:6-10) in what today we would call an act of voluntary euthanasia, assisted suicide or mercy killing.<sup>46</sup>

If the second story is followed, when David heard the news from the Amelikite, he "took hold on his clothes, and rent them . . . mourned, and wept, and fasted . . ." <sup>47</sup> Then he bade

DIFFERENT CULTURES 1, 4 (Norman L. Farberow ed., 1975)).

44. *Id.* at 20.

45. Compare *Compassion in Dying v. Washington*, 79 F.3d 790, 808 n.25 (9th Cir.) (en banc), cert. granted sub nom. *Washington v. Glucksberg*, 117 S. Ct. 37 (1996), with *id.* at 845 (dissent).

46. Anthony Fisher, *Theological Aspects of Euthanasia*, in EUTHANASIA EXAMINED: ETHICAL, CLINICAL AND LEGAL PERSPECTIVES (John Keown ed., 1995), 315-16.

47. 2 *Samuel* 1:11-12.

one of his men go up and make an end of the Amelikite, and when the blow had fallen, said over his dead body, "Thy blood be on thy head; for thy mouth hath testified against thee, saying, I have slain the Lord's anointed."<sup>48</sup> Although the Amelikite's act was what we would today call assisting a suicide ("Saul begged him"), David treated it as the equivalent of murder.<sup>49</sup> One commentator has noted that "the undoubted conclusion of this story is that despite being done with the best will in the world, this was none the less a wicked act, deserving the severest of punishments."<sup>50</sup>

One would expect nothing less of a tradition that gave the world the Ten Commandments, with the categorical "Thou shalt not kill."<sup>51</sup> According to the Anchor Bible, this commandment is "formulated in the most absolute manner, without specifying the object of the crime, in order to include any possible object, any human being (including suicide)."<sup>52</sup>

Judge Reinhardt might have consulted Baruch Brody's meticulous study of rabbinical commentary on suicide,<sup>53</sup> which notes that "Judaism has not traditionally stressed patient autonomy, and it has on the whole opposed suicide and euthanasia."<sup>54</sup> Brody concludes more specifically that the "active euthanasia of a dying patient, even one who is in great pain, is prohibited in Jewish law because it is an act of killing, even if the goal in question—the death of the patient—is viewed as desirable."<sup>55</sup>

48. 2 *Samuel* 1:16.

49. The Amelikite's crime was more serious than murder, as it was technically regicide, the murder of an anointed king. However, if, as Judge Reinhardt imagines, that society condoned suicide and assisted suicide, then the fact that the king had requested the mercy killing ought to have mitigated the Amelikite's offense. Yet David characterized this "assisted suicide" as tantamount to murder.

50. Fisher, *supra* note 46, at 316.

51. *Exodus* 20:13; *Deuteronomy* 5:11.

52. MOSHE WEINFELD, DEUTERONOMY 1-11, at 314 (Anchor Bible Vol. 15, 1991). The Anchor Bible commentary, by Protestant, Catholic, and Jewish scholars, is the most detailed modern commentary on the Bible, and now runs to more than 60 volumes.

53. Baruch A. Brody, *A Historical Introduction to Jewish Casuistry on Suicide and Euthanasia*, in SUICIDE AND EUTHANASIA: HISTORICAL AND CONTEMPORARY THEMES 39 (Baruch A. Brody ed., 1989).

54. *Id.* at 40.

55. *Id.* at 64. What makes Brody's summary even more persuasive is that he also argues that traditional Judaism "is not committed to a belief in the sanctity of human life," which he defines as a "belief that mere physical existence is in the patient's best interest or . . . a belief that residual life in pain has infinite worth." *Id.* at 40. It is curious that Judge Reinhardt makes no mention of Brody's essay, of which he can hardly have been unaware, for he cites another essay from the same book in which Brody's study

Of course, in the New Testament Judas commits suicide. But he is not exactly a role model. Judge Reinhardt, the revisionist, demurs: "In the New Testament, the suicide of Judas Iscariot is not treated as a further sin, rather as an act of repentance."<sup>56</sup> This is ludicrous exegesis. As one scholar has said:

[T]he Jewish attitude toward suicide as infringing on God's rights makes it extremely unlikely that Judas' hanging himself would have been considered a divinely acceptable expiation. . . . To those who say that for various reasons it is noble to destroy oneself, Josephus replies with indignation, "It is an act of impiety towards God who created us."<sup>57</sup>

## 2. The Greeks

Judge Reinhardt's treatment of the Greeks does not inspire greater confidence. First, he says that "[i]n Athens, as well as the Greek colonies of Marseilles and Ceos, magistrates kept a supply of hemlock for those who wished to end their lives. The magistrates even supplied those who wished to commit suicide with the means to do so."<sup>58</sup> This passage relies on Emile Durkheim's *Suicide*.<sup>59</sup> But immediately above the quoted passage, we read the following:

Suicide was only considered illegal if it was not authorized by the state. Thus at Athens a man who had killed himself was punished with "atimia" [dishonor] for having committed an injustice to the city; the honors of regular burial were denied him; also his hand was cut from his body and buried separately. It was the same at Thebes with variations in detail, and also at Cyprus. The rule was so severe at Sparta that Aristodemus was punished for the way he sought and found death at the battle of Plataea.<sup>60</sup>

Furthermore, when one consults sources other than the polemical Durkheim, the historical record regarding state-authorized suicide seems more ambiguous: "[t]he lack of clearness in the information [about suicide practices] is a strong

appears. See *Compassion in Dying v. Washington*, 79 F.3d 790, 808 n.30 (9th Cir.) (en banc), cert. granted sub nom. *Washington v. Glucksberg*, 117 S. Ct. 37 (1996).

56. *Compassion in Dying*, 79 F.3d at 808 n.25.

57. 1 RAYMOND G. BROWN, *THE DEATH OF THE MESSIAH* 644 (1994) (citations omitted).

58. *Compassion in Dying*, 79 F.3d at 807.

59. EMILE DURKHEIM, *SUICIDE: A STUDY IN SOCIOLOGY* 329-30 (George Simpson ed. & John A. Spaulding & George Simpson trans., 1951).

60. *Id.* at 329-30 (bracketed word added) (citations omitted).

indication that the customs of Ceos and Massilia [Marseilles] were exaggerated to meet the taste of a public that enjoyed hearing of strange situations 'abroad.'"<sup>61</sup>

When Judge Reinhardt turns his attention from Greek practices to philosophy, he deals with the pre-Socratics in short order. Here his scholarly source is the Supreme Court. He states:

In *Roe*, while surveying the attitudes of the Greeks toward abortion, the Court stated that "only the Pythagorean school of philosophers frowned on the related act of suicide," . . . it then noted that the Pythagorean school represented a distinctly minority view.<sup>62</sup>

Unwittingly, perhaps, we are given a glimpse into the solidity of historical scholarship of the *Roe* court as well. To state that among the Greeks, "only the Pythagorean school of philosophers frowned on the related act of suicide," is to ignore Plato and Aristotle, an odd omission in a survey of Greek philosophy.

It is natural that Judge Reinhardt's discussion of the Greeks then turns to Socrates, whom some consider the most famous suicide in history. But it should be remembered that Socrates was under a death sentence. He took the hemlock rather than flee Athens or be killed by the state. Not everyone would consider this a classic suicide; some might consider it simply enforcing the state's punishment. As with his mention of Masada, however, Judge Reinhardt seems to think that the very circumstances of Socrates' end imply the culture's admiration, or approval, of suicide. It is humanly understandable that we are, in some sense, "impressed" with the obstinate bravery and self-sacrifice of the warriors at Masada, or with Socrates' willingness to die rather than be exiled, but this does not permit one to conclude that either ancient Israel or classical Greece approved of suicide.

Judge Reinhardt tells us that "[w]hile Socrates counseled his disciples against committing suicide, he willingly drank the hemlock as he was condemned to do, and his example inspired

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61. ANTON J.L. VAN HOOFF, FROM AUTOTHANASIA TO SUICIDE: SELF-KILLING IN CLASSICAL ANTIQUITY 168 (1990).

62. *Compassion in Dying*, 79 F.3d at 807 (quoting *Roe v. Wade*, 410 U.S. 113, 131 (1973)) (citation omitted).

others to end their lives."<sup>63</sup> One might conclude from this that suicide met with approval in ancient Greece; Judge Reinhardt does nothing to dispel this misapprehension. He tells us further that "Plato, Socrates' most distinguished student, believed suicide was often justifiable."<sup>64</sup> According to Judge Reinhardt, Plato

suggested that if life itself became immoderate, then suicide became a rational, justifiable act. Painful disease, or intolerable constraint were sufficient reasons to depart. And this when religious superstitions faded was philosophic justification enough.<sup>65</sup>

But Judge Reinhardt's primary source—a source he carefully refrains from using in this portion of the opinion—arrives at quite a different conclusion concerning Plato's views. An examination of the *Phaedo*, the *Laws*, and the ethical system developed in the *Republic* and the *Timaeus*, shows that Plato certainly did not approve of suicide. In the *Phaedo*, Plato's narrative of Socrates' last hours,

Socrates compares the human relationship to the gods with that of slave to master: as the slave is the possession of the master, all humans are the possession of the gods, and none have the right themselves to dispose of their lives. Moreover, to commit suicide would provoke the anger of the gods and would thus entail consequent punishment. Even though the choice of death seems preferable to life in some cases, suicide is not morally justified. . . .

In the time of Socrates, suicide is deemed immoral, not simply because it violates the "property rights" of the gods, but because it undermines the attainment of ultimate happiness.<sup>66</sup>

The rest of Plato's works bear out this conclusion:

In the *Laws*, Plato addresses the problem of suicide in the context of the individual's relationship with the social order. His treatment of the matter there can best be understood in light of the ethics he developed in the *Republic* and the *Timaeus*. In those works, Plato stressed an organic interrelationship between the individual person, the state, and the universe; morality ultimately being a matter of the

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63. *Id.*

64. *Id.*

65. *Id.* (quoting Alvarez, *supra* note 34, at 19).

66. Marzen, *supra* note 32, at 22 (citations omitted).

human soul's disposition in the cosmic order . . . Plato's public policy on suicide stated in the *Laws* presumes this ethical and cosmic perspective:

*the graves of such as perish thus must, in the first place, be solitary; they must have no companions whatsoever in the tomb. Furthermore, they must be buried ignominiously in waste and nameless spots . . . and the tomb shall be marked by neither headstone nor name.*<sup>67</sup>

Therefore, at least according to Judge Reinhardt's own major source, Plato

is concerned with suicide as a deliberate and reasoned decision, rather than as the result of passion, compulsion, or madness. In the latter cases, culpability is lacking and the fault of malice against society is not assumed; hence the state, while not condoning such action, suspends its judgment. *But when suicide is a rational and deliberate choice, it is deemed to be a flagrant act of contempt for the state and an abandonment of duty to society and the divine order.*<sup>68</sup>

If Judge Reinhardt's discussion of Plato can be criticized, the discussion of Aristotle cannot—but only because Aristotle is not mentioned by Judge Reinhardt. Again, however, Judge Reinhardt's major source correctly describes Aristotle as one who unconditionally condemned suicide. In Book V of the *Nicomachean Ethics*, Aristotle addresses the matter of “why the state punishes a man who kills himself (not merely why the state *should* punish him, it must be stressed, but why it in fact *does*).”<sup>69</sup>

Aristotle, like Plato, believed that the individual has a moral obligation to serve society:

The law does not allow a man to kill himself . . . when a man voluntarily—that is, knowing who the victim and what the instrument is—injures another (not by way of retaliation) contrary to the law, he is acting unjustly. But a man who cuts his throat in a fit of anger is voluntarily doing, contrary to right principle, what the law does not allow; therefore he is acting unjustly, but towards whom? Surely not himself, but the state; because he suffers voluntarily, and nobody is voluntarily treated unjustly. It is for this reason that the state imposes a penalty, and a kind of dishonor is attached to a man who has taken his own life, on the ground that he is

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67. *Id.* at 23 (emphasis added) (citations omitted).

68. *Id.* at 24 (emphasis added).

69. Robert P. George & William C. Porth, Jr., *Death, Be Not Proud*, NAT'L REV., June 26, 1995, at 49.

guilty of an offence against the state.<sup>70</sup>

Elsewhere, in a catalogue of virtues and vices, Aristotle defines the courageous as "those who are fearless in the face of honorable death, such as death in battle or any life threatening circumstance."<sup>71</sup> However, he draws a distinction between courageously facing death and the kind of suicide that results from a desire to "escape from poverty or love or anything else that is distressing."<sup>72</sup> Suicide, "as an act of cowardice, was deemed a rejection of one's personal duty, both to society and to oneself."<sup>73</sup>

No doubt Aristotle's emphasis on the collective, on the duty of the individual to society, is foreign to, even antipathetic to, modern ears. But if the history of Western attitudes toward suicide is to be a guide, then passing over Aristotle is passing strange.

### 3. Roman Law

In discussing Roman history, the Ninth Circuit's opinion refers to Roman law. It acknowledges that the "Romans did sometimes punish suicide" in the case of those accused of a crime, whose property would escheat to the state unless the suicide was caused by "impatience of pain or sickness."<sup>74</sup> This does indeed seem to open a window for what we would call physician-assisted suicide. However, the opinion ignores the effect of the Roman *Lex Cornelia on Murderers and Poisoners*, which provided that:

[S]omeone is liable who kills any man . . . . He also is liable who makes up [and] administers poison for the purpose of killing a man . . . . [S]omeone is punished who makes, sells, or possesses a drug for the purpose of homicide.<sup>75</sup>

It would seem that the person who supplies the lethal drug would fall within the proscription of Roman law, regardless of

70. Marzen, *supra* note 32, at 24 (quoting ARISTOTLE, ETHICS 200-201 (J. Thompson trans., 1976)).

71. *Id.* at 24 (citing Aristotle, *supra* note 70, at 128-29).

72. *Id.* (quoting Aristotle, *supra* note 70, at 130).

73. *Id.* at 24.

74. Compassion in Dying v. Washington, 79 F.3d 790, 807 (9th Cir.) (en banc) (quoting Álvarez, *supra* note 34, at 22-23), cert. granted sub nom. Washington v. Glucksberg, 117 S. Ct. 37 (1996).

75. *Lex Cornelia de sicariis et veneficis*, DIG., 48.8.1.1, 48.8.3 (Marcian, Institutes, 14).

how the individual suicide would be viewed. Gaius recognized that drugs may be either "harmful or beneficial."<sup>76</sup> In other words, regardless of how it treated the individual person who committed or attempted suicide, when it came to assisting suicide, Roman law came down exactly where the Hippocratic Oath did.<sup>77</sup> A recent treatise on Roman criminal law concluded that while suicide itself was not generally considered a crime, "a mercy killing would have still counted as murder."<sup>78</sup>

Roman law also provided that "[g]uilty intention could be presumed from the deed, which need not be direct, for furnishing the cause of death was expressly provided for."<sup>79</sup>

76. *Id.* at 50.16.236 (Gaius, XII Tables, 4).

77. Judge Reinhardt, however, states in a footnote:

We note that even in ancient times many physicians did not interpret the oath literally. As three commentators said, "It is well established that Greek and Roman physicians, even those who were Hippocratic, often supplied their patients with the means to commit suicide, despite the injunction against suicide embodied in the Hippocratic oath."

*Compassion in Dying*, 79 F.3d at 829 n.110 (quoting Rebecca C. Morgan, Thomas C. Marks, Jr., & Barbara Harty-Golder, *The Issue of Personal Choice: The Competent Incurable Patient and the Right to Commit Suicide*, 57 MISSOURI L. REV. 3, 46 (1992)). The "three commentators" turn out to be the three co-authors of that law review article. Their source for that assertion is a letter to a medical journal, which in turn cites Sherwin Nuland's book. See Morgan, *supra*, at 46 n.290 (citing Steven Beeson, Letter to the Editor, *Euthanasia and the American College of Physicians Ethics Manual*, 111 ANNALS OF INTERNAL MED. 952-53 (1989) (quoting SHERWIN B. NULAND, DOCTORS: THE BIOGRAPHY OF MEDICINE 25 (1988)). However, there is no authority given in Nuland's book for this remark; he simply states: "certain of the Oath's prohibitions, such as those against abortion, cutting for stone, and aiding a suicide, fly in the face not only of the usual medical practices of the time, but specifically of those in which some of the Hippocratics are known to have engaged." NULAND at 25. How this undocumented assertion "establishes" that "Greek and Roman physicians . . . often supplied their patients with the means to commit suicide" is a puzzle. One celebrated ancient source provides us, almost in passing, with evidence quite to the contrary. The source is *The Golden Ass* by Apuleius, a pagan novelist of the second century.

A physician, we are told, was asked for a fast-acting poison, allegedly "for a sick man in the throes of an inveterate, intractable disease who longed to escape the torture of his life," in reality for the purpose of murdering him. The physician sold a potion, but when later an innocent man was accused of murder, the physician revealed that the poison had only been a sleeping draught and not a deadly poison, "because he did not believe it proper for his calling to be instrumental in bringing death to anybody, and because he had been taught that medicine had been invented not for the destruction of man but for his welfare."

Owsei Temkin, *The Idea of Respect for Life in the History of Medicine*, in Owsei Temkin, William K. Frankena, & Sanford H. Kadish, RESPECT FOR LIFE IN MEDICINE, PHILOSOPHY, AND THE LAW 1, 4 (1977) (quoting APULEIUS, METAMORPHOSES [the Latin title of *The Golden Ass*] 10.9-12 ).

78. O.F. ROBINSON, THE CRIMINAL LAW OF ANCIENT ROME 44 (1995).

79. *Id.* (citing DIG. 48.8.15 (Ulpian, *Lex Julia et Papia*, 8), which says, "It makes no difference whether someone kills or provides the occasion of death." [*Nihil interest, occidat quis an causam mortis praebet.*]).

When the Ninth Circuit's ruling extends the right to assist in suicide to "those whose services are essential to help the terminally ill patient obtain and take that medication and who act under the supervision or direction of a physician," including "the pharmacist . . . , the health care worker . . . , the family member or loved one who opens the bottle, places the pills in the patient's hand, advises him how many pills to take . . . , or the persons who help the patient to his death bed,"<sup>80</sup> the court departs from the historical liability imposed on poisoners. Justinian's *Institutes*, commenting on the *Lex Cornelia*, say, "This statute also inflicts punishment of death on poisoners, who kill men by their hateful arts of poison and magic, or who publicly sell deadly drugs."<sup>81</sup>

#### 4. *The Middle Ages*

In the Christian world, at the end of antiquity, St. Augustine was—as the dissent notes—a clear and unambiguous voice for the tradition against self-killing. He viewed suicide as a simple violation of one of the Ten Commandments, "Thou shalt not kill."<sup>82</sup> Judge Reinhardt explains Augustine's opposition by saying, "Prompted in large part by the utilitarian concern that the rage for suicide would deplete the ranks of Christians, St. Augustine argued that committing suicide was a 'detestable and damnable wickedness' and was able to help turn the tide of public opinion."<sup>83</sup> The Ninth Circuit opinion fails to refer to any of Augustine's writings to substantiate the claim that he was against suicide because it depleted the ranks of Christians. In the *locus classicus* on suicide by Augustine, Book One of his *City of God*, there is no such reason for opposition to suicide given—only the categorical one of "Thou shalt not kill."<sup>84</sup> Indeed, if Augustine had been such a utilitarian, then given that suicide was a practice of his Donatist opponents, presumably he would

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80. *Compassion in Dying*, 79 F.3d at 838 n.140.

81. J.INST. 4.18.6.

82. *Compassion in Dying*, 79 F.3d at 845 (Beezer, J., dissenting) (citing Marzen, *supra* note 32, at 27).

83. *Compassion in Dying*, 79 F.3d at 808 (citing Alvarez, *supra* note 34, at 27).

84. See ST. AUGUSTINE, *THE CITY OF GOD* 31 (Henry Bettenson trans., Penguin 1972) ("It is significant that in the sacred canonical books there can nowhere be found any injunction or permission to commit suicide either to ensure immortality or to avoid or escape any evil. In fact we must understand it to be forbidden by the law 'You shall not kill' . . .").

not have objected to *their* use of suicide. But he clearly did object, which makes still more implausible the suggestion that his opposition to suicide was prompted by utilitarian considerations. Augustine's treatment of Judas' suicide is instructive, and differs from Judge Reinhardt's version:

We rightly abominate the act of Judas, and the judgement of truth is that when he hanged himself he did not atone for the guilt of his detestable betrayal but rather increased it, since he despaired of God's mercy and in a fit of self-destructive remorse left himself no chance of a saving repentance. How much less right has anyone to indulge in self-slaughter when he can find in himself no fault to justify such a punishment! For when Judas killed himself, he killed a criminal, and yet he ended his life guilty not only of Christ's death, but also of his own; one crime led to another.<sup>85</sup>

Judge Reinhardt quotes Marzen as observing that "confusion regarding the distinction between suicide and martyrdom existed up until the time of St. Augustine (354-430 A.D.)."<sup>86</sup> Augustine was very clear on what constituted martyrdom. It was not the fact of dying, but the reason for the dying. *Non enim facit martyrem poena, sed causa.* "It is not, after all, the punishment that makes the martyr, but the cause."<sup>87</sup> Thus, for Augustine, the critical factor was the object and intent of the martyr, not simply the fatal result. The ham-handed way in which the majority confuses martyrdom and suicide is similar to the way it mangles the principle of double effect.<sup>88</sup> The court's view is that if death results it is suicide or it is intentional, whereas the tradition drew a careful distinction between what was directly intended and what was merely foreseeable as an unintended side-effect.<sup>89</sup> The

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85. *Id.* at 27. Significantly, this passage from St. Augustine was included in Gratian's *DECRETUM*, the collection of authoritative canon law texts, edited around the year 1140. Second Part, C.23, q.5, c.9 (Emil Friedberg ed., Leipzig 1879).

86. *Compassion in Dying*, 79 F.3d at 808 (citing Marzen, *supra* note 32, at 26).

87. St. Augustine, Sermon 328, in *ST. AUGUSTINE, III-9 SERMONS* 179 (Edmund Hill trans., New City Press 1994). There are at least a dozen appearances in Augustine's works of this phrase, or one virtually identical.

88. "[W]e see little, if any, difference for constitutional or ethical purposes between providing medication with a double effect and providing medication with a single effect, as long as one of the known effects in each case is to hasten the end of the patient's life." *Compassion in Dying*, 79 F.3d at 824. The court had previously recognized that "[p]hysicians routinely and openly provide medication to terminally ill patients with the knowledge that it will have a 'double effect'—reduce the patient's pain and hasten death. Such medical treatment is accepted by the medical profession as meeting its highest ethical standards." *Id.* at 823.

89. The distinction between intention and foresight is traditional. Abraham Lincoln,

martyr accepted death in order to be true to his beliefs. If he could have been faithful without dying, he would have done so. Similarly, the behavior of a person who uses medication to relieve pain and dies sooner than he would otherwise is acceptable and allowable. If the sick person could relieve his pain without hastening death, he would do so. In contrast, the potential suicide seeks death as a way of relieving suffering, either as an end or as a means, not as an unintended side-effect.

A glaring example of the tendentious quality of Judge Reinhardt's historical scholarship is his statement that Thomas More "strongly supported the right of the terminally ill to commit suicide and also expressed approval of the practice of assisting those who wished to hasten their deaths" in his book *Utopia*.<sup>90</sup> But the pro-suicide talk comes from the character Hythlodæus, whose name literally means "learned in nonsense."<sup>91</sup> The character named "Thomas More" takes issue with those views.<sup>92</sup>

Professor Gerard Wegemer of the University of Dallas, author of a recent biography of Saint Thomas More as well as a study of More's writings on statesmanship,<sup>93</sup> states that to claim Thomas More's *Utopia* supports the right of the terminally ill to commit suicide is akin to saying that Jonathan Swift's *Modest Proposal* supports the right to kill Irish babies in order to provide food and fine gloves for English aristocrats.<sup>94</sup> Both works are satires.

Furthermore, *Utopia* was an early work of More. At the end of his life, while imprisoned in the Tower of London awaiting his execution, he wrote *A Dialogue of Comfort Against Tribulation*. In that work, he devotes a lengthy passage of remarkable subtlety

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for example, had insisted in another context: "I simply expressed an *expectation*. Cannot the Judge perceive the distinction between a *purpose* and an *expectation*. I have often expressed an expectation to die, but I have never expressed a *wish* to die." Abraham Lincoln, Speech at Springfield, Illinois (July 17, 1858), in ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1832-1858, at 470 (Don E. Fehrenbacher ed., 1989).

90. *Compassion in Dying*, 79 F.3d at 808 (citing Thane Josef Messinger, *A Gentle and Easy Death: From Ancient Greece to Beyond Cruzan Toward a Reasoned Legal Response to the Societal Dilemma of Euthanasia*, 71 DENV. U. L. REV. 175, 185 (1993)).

91. GERARD B. WEGEMER, THOMAS MORE ON STATESMANSHIP 92 (1996).

92. See THOMAS MORE, *UTOPIA* 82-83 (H.V.S. Ogden ed. & trans., 1949) ("I admit that not a few things in the manners and laws of the Utopians seemed very absurd to me . . . I cannot agree with everything that he said.")

93. GERARD B. WEGEMER, THOMAS MORE: A PORTRAIT OF COURAGE (1995); GERARD B. WEGEMER, THOMAS MORE ON STATESMANSHIP (1996).

94. E-mail correspondence from Gerard B. Wegemer to Dwight G. Duncan (Mar. 13, 1996).

and perception to the ways to cure a person tempted by suicide. More himself used all legal means to avoid martyrdom, but in the end, he was ready to suffer death rather than violate the moral teachings and canon law of his Church. It is extremely unlikely that his *Utopia* urged repudiation of the same doctrines he was willing to be martyred to defend.

To be charitable, perhaps these criticisms of the Ninth Circuit can be regarded as quibbles. For Judge Reinhardt does acknowledge the prohibitions on suicide contained in canon law. Strangely, he mentions two regional and early councils<sup>95</sup>—those of Toledo and Braga—but ignores with regard to the latter its appearance in the standard canonical collection from the High Middle Ages, Gratian's *Decretum* (circa 1140),<sup>96</sup> which fixed and enshrined the unequivocal prohibition of suicide for Western civilization. The *Decretum's* incorporation of the canon from the Council of Braga thus promulgated it throughout Christendom:

Those who bring death on themselves voluntarily, whether by iron, or by poison, or by casting themselves down headlong, or by hanging, or in any way, let there be no commemoration of them in the oblation [at Mass], nor will their cadavers be brought to burial with psalms.<sup>97</sup>

Despite this, Judge Reinhardt correctly summarized the view of the Middle Ages on suicide: "Once established, the Christian view that suicide was in all cases a sin and crime held sway for 1,000 years . . . ."<sup>98</sup>

95. "In 562 A.D., the Council of Braga denied funeral rites to anyone who killed himself. A little more than a century later, in 693 A.D., the Council of Toledo declared that anyone who attempted suicide should be excommunicated." *Compassion in Dying*, 79 F.3d at 808 (citing Marzen, *supra* note 32, at 27-28). (In fact, there is no mention of the Council of Toledo in Marzen, and Marzen's discussion actually occurs on page 29.)

96. Gratian quotes St. Augustine, St. Jerome, and the Council of Braga as expressing virtually unqualified disapproval of suicide. See GRATIAN, *supra* note 85, at C.23 q.5 cc.9-12. He introduces the canons by saying that "it is permitted by no authority of law for anyone to do away with himself." *Id.* at c.10. Translation by the authors of this Article.

97. *Id.* at c.12. Translation by the authors of this Article.

98. *Compassion in Dying v. Washington*, 79 F.3d 790, 808 (9th Cir.) (en banc), *cert. granted sub nom. Washington v. Glucksberg*, 117 S. Ct. 37 (1996). Obviously, one could expound at length on the medieval authorities' condemnation of suicide. Judge Beezer's dissent quotes St. Thomas Aquinas as saying it is contrary to love of self, opposed to the community, and opposed to God. *Id.* at 845-46 (citing 2 ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE* 1465 et seq. (Fathers of the English Dominican Province eds., 1947)). Nor did such a view end with the Middle Ages. In the late eighteenth century Blackstone, whom Judge Beezer also quotes, treated suicide in a virtually identical manner. See *id.* at 846 (citing 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*189).

## V. THE ENGLISH COMMON LAW

A. *Bracton*

Henry de Bracton was a major figure in the development of the English common law, the writer who brought Roman law and English law into some kind of synthesis. Along with Sir Edward Coke and William Blackstone, Bracton is one of the three major figures in the common law before the modern period. Judge Reinhardt's treatment of him is instructive. Here is how he represents Bracton's view:

Suicide was a crime under the English common law, at least in limited circumstances, probably as early as the thirteenth century. Bracton, incorporating Roman Law as set forth in Justinian's *Digest*, declared that if someone commits suicide to avoid conviction of a felony, his property escheats to his lords. Bracton said "[i]t ought to be otherwise if he kills himself through madness or unwillingness to endure suffering." Despite his general fidelity to Roman law, Bracton did introduce a key innovation: "[I]f a man slays himself in weariness of life or because he is unwilling to endure further bodily pain . . . he may have a successor, but his movable goods [personal property] are confiscated. He does not lose his inheritance [real property], only his movable goods." Bracton's innovation was incorporated into English common law, which has thus treated suicides resulting from the inability to "endure further bodily pain" with compassion and understanding ever since a common law scheme was firmly established.<sup>99</sup>

Judge Reinhardt considers Bracton's innovation on Roman law as a manifestation of greater compassion for the person who committed suicide due to an inability "to endure further bodily pain." The historical record establishes just the opposite, as Judge Reinhardt had earlier noted by describing Roman law as holding that "suicide of a private citizen was not punishable if it was caused by 'impatience of pain or sickness, or by another cause,' or by 'weariness of life . . . lunacy, or fear of dishonor.'" <sup>100</sup>

The innovation made by the English common law with respect to suicide was really two-fold: to punish *all* suicides of

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99. *Compassion in Dying*, 79 F.3d at 808-09 (quoting Marzen, *supra* note 32, at 58-59, in turn quoting 2 HENRY DE BRACON, ON THE LAWS AND CUSTOMS OF ENGLAND 366, 424 (Samuel E. Thorne trans. & George E. Woodbine ed., 1968)).

100. *Id.* at 807 (quoting Alvarez, *supra* note 34, at 22-23).

sane people, rather than only certain kinds of suicide (those accused of crime, soldiers, slaves); and to *add* the penalty of confiscation of personal property to those suicides that were motivated by “impatience of pain or weariness of life.” If the suicide was not so motivated, the real property would be confiscated as well. Can either of these common-law modifications of Roman law be viewed as Judge Reinhardt characterizes them, as treating “suicides resulting from the inability to ‘endure further bodily pain’ with compassion and understanding”?<sup>101</sup>

This example nicely illustrates the shaky foundations of the majority opinion’s purported survey of “Historical Attitudes Toward Suicide” (a rubric borrowed, incidentally, from the Marzen article that, carefully filleted, serves as Judge Reinhardt’s major source). Judge Reinhardt offers three footnotes to Marzen in this section. Had Judge Reinhardt bothered to check Marzen’s sources, however, he would have understood that the key passage in Marzen on which he relies lets him down here.

Here is the excerpt from Marzen on which Judge Reinhardt relies:

Under Justinian’s *Digest*, the concern with suicide was primarily with ensuring that those who were accused of a crime for which the Emperor would confiscate their property (disinheriting their heirs), would not evade familial impoverishment by committing suicide before judgment was passed. To prevent cheating the Emperor of otherwise confiscatable property, the Roman law provided, “Persons who have been caught while committing a crime, and, through fear of impending accusation, kill themselves, have no heirs.” The Roman condemnation was not of suicide itself.<sup>102</sup>

Marzen then turns to Bracton, who naturally, in his *De Legibus et Consuetudinibus Anglie* [*On the Laws and Customs of England*], incorporated parts of Roman law as set forth in Justinian’s *Digest*.

Bracton clearly repeats the statement of the *Digest*:

But the goods of those who destroy themselves when they are not accused of a crime or taken in the course of a criminal act

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101. *Id.* at 809.

102. Marzen, *supra* note 32, at 57-58 (quoting 9 THE CIVIL LAW 129 (Samuel P. Scott trans., 1932)).

are not appropriated by the fisc, for it is not the wickedness of the deed that is reprehensible but that the fear of guilt in the accused takes the place of a confession.<sup>103</sup>

Yet Marzen writes that Bracton “could hardly have meant all that this language implies.” Marzen bases his conclusion on what he describes as:

[Bracton’s] *key innovation*: [I]f a man slays himself in weariness of life or because he is unwilling to endure further bodily pain . . . he may have a successor, but his movable goods are confiscated. He does not lose his inheritance, only his movable goods. In other words, real property was to go to the heirs, but personal property was to be confiscated. *The principle that suicide of a sane person, for whatever reason, was a punishable felony was thus introduced into English common law.*<sup>104</sup>

As Marzen describes it, Bracton’s innovation made the common law more lenient than Roman law:

It thus became the common law that a sane suicide’s personal property (movable goods or chattels) was confiscated, whereas his land would not be forfeited, as it generally had been under Roman law.<sup>105</sup>

However, land was not “generally” forfeitable under Roman law, as both Judge Reinhardt and Marzen had earlier recognized.<sup>106</sup>

Indeed, in the quoted passage, Marzen misstates the case that he had made just one paragraph previously. Under Roman law, a sane suicide’s property—*whether personal property or land*—*would not be forfeited*. A person who “put[] an end to his life through *taedium vitae* or unendurable pain of some kind”<sup>107</sup> did not forfeit any property. Only those “who have been arraigned or who have been caught red-handed, and have committed suicide from fear of the impending charge”<sup>108</sup> would forfeit their property. To prevent cheating the state, the Roman law said that this class of suicide, and no other, will have all its property taken. The ordinary suicides would not have their property escheat. Further, attempted suicides would be punished if the

103. *Id.* at 58 (quoting BRACTON, *supra* note 99, at 423-24).

104. Marzen, *supra* note 32, at 59 (emphases added).

105. *Id.*

106. See *Compassion in Dying*, 79 F.3d at 807; Marzen, *supra* note 32, at 58.

107. DIG. 48.21.3.4 (Marcian, Accusers).

108. *Id.* at 48.21.3.

attempt was “without any cause”; acceptable cause included “weariness of life, or because he was compelled to take this step through pain of some description.”<sup>109</sup> In other words, under Justinian, someone who committed suicide, not because he had been accused of a crime, but for a cause which included “pain of some description” or “weariness of life,” would not forfeit either personal property or land.

Judge Reinhardt tells us that “Bracton’s innovation was incorporated into English common law, which has thus treated suicides resulting from the inability to ‘endure further bodily pain’ with compassion and understanding ever since a common law scheme was firmly established.”<sup>110</sup> This characterization of what Bracton did in the area of suicides is at least curious; some, less charitably, might describe it as bizarre. Bracton’s innovation in fact made the legal position of the ordinary suicide worse than under Roman law. Further, far from treating the suicide with “compassion,” the treatment of suicide under the common law was to become steadily more severe, as one can see in Blackstone. Yet relying solely on Judge Reinhardt’s use of history and on his tone, an unsuspecting reader might well conclude the opposite.

### *B. Blackstone*

After Bracton, the opinion devotes a paragraph to Sir Edward Coke, who, the opinion correctly observes, held that killing oneself was an offense and that people who committed suicide should forfeit their movable property. Judge Reinhardt then employs various rhetorical devices to minimize what an unwary reader can be excused for missing—the fact that in the English common law, there was a firm prohibition against suicide by the sane. Here is how the trick is performed:

Thus, although, formally, suicide was long considered a crime under English common law, in practice it was a crime that was punished leniently, if at all, because juries frequently used their power to nullify the law.<sup>111</sup>

But, as Justice Scalia wrote in his concurring opinion in *Cruzan*, “the States abolished the penalties imposed by the

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109. Marzen, *supra* note 32, at 58 (quoting THE CIVIL LAW, *supra* note 102, at 129).

110. *Compassion in Dying*, 79 F.3d at 809.

111. *Id.* at 809.

common law . . . to spare the innocent family and not to legitimize the act."<sup>112</sup> This is very different from approving of suicide—much less, of course, physician-assisted suicide—or thinking of it as a right.

The very next paragraph of Judge Reinhardt's opinion deploys to even greater effect the patronizing vocabulary of belittlement:

The traditional English experience was also shaped by the taboos that have long colored our views of suicide and perhaps still do today. English common law reflected the ancient fear that the spirit of someone who ended his own life would return to haunt the living.<sup>113</sup>

Note the words that evoke a pre-rational world of credulous peasants: views are shaped by "taboos" that have "long colored our views of suicide." And those credulous peasants with their "ancient fear" of a "spirit" that would "haunt the living" have their counterpart in those benighted souls who continue to regard suicide with horror (which is to say, who differ with Judge Reinhardt on his view of physician-assisted suicide): these are the people for whom those ancient "taboos . . . perhaps still [color their views] today." And then Judge Reinhardt becomes positively Transylvanian:

Accordingly, the traditional practice was to bury the body at a crossroads—either so the suicide could not find his way home or so that the frequency of travelers would keep his spirit from rising. As added insurance, a stake was driven through the body.<sup>114</sup>

One would think, from this kind of tone, that none of those who over so many centuries had produced so many coherent arguments against suicide had ever existed—or that they were to be treated, tainted with a guilt by verbal association, as slack-jawed rustics practicing a bit of apotropaic mumbo-jumbo. It is bizarre that while Judge Reinhardt cites Blackstone's *Commentaries*, he never bothered to look into those *Commentaries*. For if he had, he would have found that Blackstone, certainly the most influential legal figure in Anglo-American law from the Revolution to the Civil War, expresses no ambiguity or doubt

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112. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 294 (1990) (Scalia, J., concurring).

113. *Compassion in Dying*, 79 F.3d at 809.

114. *Id.*

about where the English common law then stood on this matter:

SELF-MURDER, the pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure, though the attempting it seems to be countenanced by the civil law, yet was punished by the Athenian law by cutting off the hand, which committed the desperate deed. And also the law of England wisely and religiously considers, that no man hath a power to destroy life, but by commission from God, the author of it: and, as the suicide is guilty of a double offence; one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; *the law has therefore ranked this among the highest crimes*, making it a peculiar species of felony, a felony committed on oneself. A *felo de se* therefore is he that deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death: as if, attempting to kill another, he runs upon his antagonist's sword; or, shooting at another, the gun bursts and kills himself. The party must be of years of discretion, and in his senses, else it is no crime. But this excuse ought not to be strained to that length, to which our coroners' juries are apt to carry it, *viz.*, that the very act of suicide is an evidence of insanity; as if every man who acts contrary to reason, had no reason at all: for the same argument would prove every other criminal *non compos*, as well as the self-murderer. The law very rationally judges, that every melancholy or hypochondriac fit does not deprive a man of the capacity of discerning right from wrong; which is necessary, as was observed in a former chapter, to form a legal excuse. And therefore, if a real lunatic kills himself in a lucid interval, he is a *felo de se* as much as another man.

But now the question follows, what punishment can human laws inflict on one who has withdrawn himself from their reach? They can only act upon what he has left behind him, his reputation and fortune: on the former, by an ignominious burial in the highway, with a stake driven through his body; on the latter, by a forfeiture of all his goods and chattels to the king: hoping that his care for either his own reputation, or the welfare of his family, would be some motive to restrain him from so desperate and wicked an act. And it is observable, that this forfeiture has relation to the time of the act done in the felon's lifetime, which was the cause of his death. As if husband and wife be possessed jointly of a term of years in land, and the husband drowns himself; the land shall be forfeited to the king, and the wife shall not have it by

survivorship. For by the act of casting himself into the water he forfeits the term; which gives a title to the king, prior to the wife's title by survivorship, which could not accrue till the instant of her husband's death. And, though it must be owned that the letter of the law herein borders a little upon severity, yet it is some alleviation that the power of mitigation is left in the breast of the sovereign, who upon this (as on all other occasions) is reminded by the oath of his office to execute judgment in mercy.<sup>115</sup>

This quotation is adduced, not to provide readers with a frisson of horror at the way suicides were once treated, but simply to show that the exemplary punishment meted out to suicides—a punishment that could be mitigated by feelings “in the breast of the sovereign” who may “execute judgment in mercy”—reflects the English (and at that time American) common law's special abhorrence for suicide. That abhorrence was not lessened by the fact that mercy tempered justice and that frequently the official punishment was not inflicted. Nor was that disapproval in any sense diminished by the (growing) feeling that punishing the already-dead suicide was both futile and cruel. And certainly the existence of any such feeling had nothing to do with the notion of a fundamental right to physician-assisted suicide.

Further, it cannot be argued that Blackstone's *Commentaries* are unrepresentative, being either reactionary (that is, a statement of the law as it had been in ancient times, but was no longer) or revolutionary (a statement of the law not as it was, but as Blackstone wished it to be in the future). The *Commentaries* were a single-handed massive compilation that became authoritative for all judges and lawyers of what the common law was at the time of its writing: a kind of omnium-gatherum Restatement of the Common Law at the moment when the American Republic was founded.<sup>116</sup>

## VI. THE AMERICAN EXPERIENCE

### A. *The Declaration of Independence and John Locke*

Although one might expect that in a historical survey Judge

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115. BLACKSTONE, *supra* note 98, at \*189-90 (first emphasis added).

116. See Stanley N. Katz, *Introduction to 1 WILLIAM BLACKSTONE, COMMENTARIES*, at i (University of Chicago Press 1978).

Reinhardt would devote special attention to the American Republic, this is not the case. The English philosopher whose work stands most behind the Framers was John Locke. As Bernard Bailyn has written, “[T]he great *virtuosi* of the American Enlightenment—Franklin, Adams, Jefferson—cited the classic Enlightenment texts . . . . In pamphlet after pamphlet the American writers cited Locke on natural rights and on the social and governmental contract . . . .”<sup>117</sup> Yet Judge Reinhardt ignores Locke as though he had never existed.

Let us not make the same mistake. Locke’s *Second Treatise of Government* is most relevant here; scholars of the Revolution have generally agreed that it is this work which most influenced Thomas Jefferson’s draft of the Declaration of Independence.<sup>118</sup> Jefferson had in mind Locke’s trinity of “life, liberty, and estate”<sup>119</sup> when he wrote that “all men are endowed by their creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.”<sup>120</sup>

To understand what Jefferson meant by “inalienable rights to life [and] liberty” we have to look to Locke’s *Second Treatise*. In his chapter on “The State of Nature,” Locke observes that:

though this be a *State of Liberty*, yet it is *not a State of Licence*, though Man in that State have an uncontrollable Liberty, to dispose of his Person or Possessions, *yet he has not Liberty to destroy himself*, or so much as any Creature in his Possession, but where some nobler use, than its bare Preservation calls for it. . . . Every one as he is *bound to preserve himself*, and not to quit his Station wilfully; so by the like reason when his own Preservation comes not in competition, ought he, as much as he can, *to preserve the rest of Mankind*, and may not unless it be to do Justice on an Offender, take away, or impair the life, or what tends to the Preservation of the Life, the Liberty, Health, Limb or Goods of another.<sup>121</sup>

Later in the *Second Treatise*, Locke returns to the theme that “a

117. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 27 (1992).

118. See FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* at ix (1985) (“That the central argument of the Declaration is based mainly upon John Locke’s *Second Treatise* is indisputable . . .”).

119. *Id.* “Jefferson, as is well known, departed from Locke’s trinity . . . and substituted ‘the pursuit of happiness’ for Locke’s ‘estate.’” *Id.*

120. *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776).

121. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 270-71 (Peter Laslett ed., 1988) (third emphasis added).

Man” does not have “the Power of his own Life”:

This *Freedom* from Absolute, Arbitrary Power, is so necessary to, and closely joyned with a Man’s Preservation, that he cannot part with it, but by what forfeits his Preservation and Life together. For a Man, not having the Power of his own Life, *cannot*, by Compact, or his own Consent, *enslave himself* to any one, nor put himself under the Absolute, Arbitrary Power of another, to take away his Life, when he pleases. No body can give more Power than he has himself; and he that cannot take away his own Life, cannot give another power over it.<sup>122</sup>

Locke sounds his anti-suicide theme firmly and repeatedly: “yet he has not Liberty to destroy himself”; “[e]very one as he is *bound to preserve himself*”;<sup>123</sup> “[f]or no Body can transfer to another more power than he has in himself; and no Body has an absolute Arbitrary Power over himself, or over any other, to destroy his own Life, or take away the Life or Property of another.”<sup>124</sup> One cannot voluntarily give up either the right to life or the right to liberty: “he that cannot take away his own Life, cannot give another power over it.”<sup>125</sup>

Another way of expressing this, one more familiar to Americans, is that these rights are “inalienable”—for Jefferson’s formulation is an expression of the demands of Lockean natural rights.

Yet none of this—not Locke, not Jefferson, not the Declaration of Independence, and certainly not the Constitution—merits even passing mention in Judge Reinhardt’s remorseless historical review. Nor does President Lincoln, whose comment on the *Dred Scott* decision illustrates what happens when judges ignore the meaning of the Declaration of Independence:

In those days, our Declaration of Independence was held sacred by all, and thought to include all; but now . . . it is assailed, and sneered at, and construed, and hawked at, and torn, till, if its framers could rise from their graves, they could not at all recognize it . . .

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122. *Id.* at 284.

123. *Id.* at 271.

124. *Id.* at 357.

125. *Id.* at 284.

Chief Justice Taney, in his opinion in the Dred Scott case, . . . [did] obvious violence to the plain unmistakable language of the Declaration. . . . [T]he authors of that notable instrument . . . defined with tolerable distinctness, in what respects they did consider all men created equal—equal in “certain inalienable rights, among which are life, liberty, and the pursuit of happiness.” This they said, and this meant.

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And now I appeal to all . . . are you really willing that the Declaration shall be thus frittered away?—thus left no more at most, than an interesting memorial of the dead past? thus shorn of its vitality, and practical value . . . ?<sup>126</sup>

The “inalienable right to life” in the Declaration comes from Locke, and so it is Locke who supplies us with the part of its meaning that we tend to forget: that a man “has not Liberty to destroy himself,” still less “give another power over [his life].”<sup>127</sup>

### *B. The States*

Turning briefly to American law, Judge Reinhardt tells us that

[b]y 1798 six of the 13 original colonies had abolished all penalties for suicide either by statute or state constitution. There is no evidence that any court ever imposed a punishment for suicide or attempted suicide under common law in post-revolutionary America.<sup>128</sup>

The question is, what are we to make of this information?

126. Abraham Lincoln, Speech on the *Dred Scott* Decision (Springfield, Illinois) (June 26, 1857), in LINCOLN, *supra* note 89, at 396-400. Lincoln’s insistence on equality in the inalienable right to life should be compared with the Ninth Circuit’s remark that

even though the protection of life is one of the state’s most important functions, the state’s interest is dramatically diminished if the person it seeks to protect is terminally ill or permanently comatose and has expressed a wish that he be permitted to die . . . . When patients are no longer able to pursue liberty or happiness and do not wish to pursue life, the state’s interest in forcing them to remain alive is clearly less compelling.

Compassion in *Dying v. Washington*, 79 F.3d 790, 820 (9th Cir.) (en banc), *cert. granted sub nom. Washington v. Glucksberg*, 117 S. Ct. 37 (1996). The Second Circuit was even more blunt: “But what interest can the state possibly have in requiring the prolongation of a life that is all but ended? Surely, the state’s interest lessens as the potential for life diminishes.” *Quill v. Vacco*, 80 F.3d 716, 729 (2d Cir.), *cert. granted*, 117 S. Ct. 36 (1996). Note that the state’s prohibition on helping to kill people at their actual or constructive request is described by these courts as “forcing them to remain alive” or “requiring the prolongation of a life.”

127. LOCKE, *supra* note 121, at 284.

128. *Compassion in Dying*, 79 F.3d at 809.

Marzen's comment here is judicious:

It has sometimes been supposed that the abolition of forfeiture and ignominious burial as punishment for suicide occurred because the colonists had come to believe that suicide was an individual autonomous choice without adverse impact on the rights of others and society and that therefore government should not interfere with it. But as Stroud Milsom has warned, "Perhaps more than in any other kind of history, the historian of law is enticed into carrying concepts and even social frameworks back into periods to which they do not belong." The anachronistic assumption that our forebearers held and applied a political philosophy derived from Mills [sic] is not borne out by the available evidence.

The principal piece of evidence concerning the rationale of the colonists for their abolition of forfeiture is in a 1796 treatise by Zephaniah Swift, later Chief Justice of Connecticut, that clearly establishes that rationale.

There can be no act more contemptible, than to attempt to punish an offender for a crime, by exercising a mean act of revenge upon lifeless clay, that is insensible of the punishment. There can be no greater cruelty, than the inflicting a punishment, as the forfeiture of goods, which must fall solely on the innocent offspring of the offender. This odious practice has been attempted to be justified upon the principle, that such forfeiture will tend to deter mankind from the commission of such crimes, from a regard to their families. But it is evident that where a person is so destitute of affection for his family, and regardless of the pleasures of life, as to wish to put an end to his existence, that he will not be deterred by a consideration of their future subsistence. Indeed, this crime is so abhorrent to the feelings of mankind, and that strong love of life which is implanted in the human heart, that it cannot be so frequently committed, as to become dangerous to society. There can of course be no necessity of any punishment. This principle has been adopted in this state, and no instances have happened of a forfeiture of estate, and none lately of an ignominious burial.

Swift makes clear that the traditional penalties were abolished *not* because suicide itself was viewed as a lesser evil or as a human right, but because the penalties punished the innocent family of the suicide, without in any way reaching

the real perpetrator of the act.<sup>129</sup>

Although criminalizing suicide does tell us something about society's attitudes, it is far less certain that we can conclude anything about whether or not a society regards suicide as a right merely from its refusal to punish suicides. Judge Reinhardt does not hesitate over the significance of this evidence. It means, in his review, what he wants it to mean. Because the excerpt above is from *his* principal source, he must have read it; it is too bad that Judge Reinhardt did not take this example of historical judiciousness as a model.

The Ninth Circuit's opinion tells us that "[b]y the time the Fourteenth Amendment was adopted in 1868, suicide was generally not punishable, and in only nine of the 37 states is it clear that there were statutes prohibiting assisting suicide."<sup>130</sup> The footnote goes on, however, to provide information that ought better to have been in the text:

Nevertheless, extrapolating from incomplete historical evidence and drawing inferences from States' treatment of suicide and from later historical evidence, Marzen hypothesized that in 1868, "twenty-one of the thirty-seven states, and eighteen of the thirty ratifying states prohibited assisting suicide."<sup>131</sup>

When one goes back to Marzen, Judge Reinhardt's source for this footnote, one finds that his conclusion—sneeringly described merely as a "hypothesi[s]" derived by "extrapolating" from "incomplete" evidence, and "drawing inferences" from "later historical evidence"—is far more precise than Judge Reinhardt would have us believe. The following paragraph gives a flavor of Marzen's method:

When the fourteenth amendment was ratified in 1868, nine of the thirty-seven states had statutes that prohibited assisting suicide. Of these, all but one state's legislature voted to ratify; Mississippi did not vote. In addition, Massachusetts, which voted to ratify, had case law to the same effect, and since South Carolina (which voted to ratify) had a statute condemning suicide as a felony while retaining the common law of crimes, it may be presumed that that state also

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129. Marzen, *supra* note 32, at 68-69 (quoting ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 305 (n.p. 1795-96)). Swift's use of the words "crime," "offender," "such crimes" and "this crime so abhorrent" make his attitude clear.

130. *Compassion in Dying*, 79 F. 3rd at 809.

131. *Compassion in Dying*, 79 F. 3rd at 809 n.42 (citing Marzen, *supra* note 32, at 76).

criminalized assisting suicide. Under the same principle of imputation employed with regard to the ninth amendment, ten additional states (Alabama, Connecticut, Georgia, Kentucky, Maryland, Michigan, North Carolina, Pennsylvania, Tennessee, and Virginia) can be held to have prohibited assisting suicide under the common law of crimes. Of these, all but two voted to ratify; the legislatures of Kentucky and Maryland voted against the fourteenth amendment.

Of four states that ratified the fourteenth amendment (Nevada, New Hampshire, Rhode Island and West Virginia), and one that voted against ratification (Delaware), it can be said with confidence that although these states recognized the common law of crimes, there is insufficient evidence, apart from that, to establish their positions on attempting suicide or assisting suicide. Vermont, which voted to ratify, and California, which did not vote, applied the common law, but it is unclear whether they included the common law of crimes.

Illinois, Indiana, Iowa, Louisiana, Maine, Nebraska, and Texas, which voted to ratify, and Ohio, which voted against ratification, had no prohibition on assisting suicide. The status of New Jersey is unclear. Of the ten existing territories, Washington prohibited assisting suicide by statute; Colorado, the District of Columbia, Idaho, and Wyoming recognized the common law of crimes but, again, there is insufficient evidence to establish their position on assisting suicide; Arizona and Utah applied the common law, but it is unclear whether they included the common law of crimes; New Mexico and North Dakota had no prohibition on assisting suicide; and the status of Montana is unclear.

In short, twenty-one of the thirty-seven states, and eighteen of the thirty ratifying states prohibited assisting suicide. Only eight of the states, and seven of the ratifying states, definitely did not.<sup>132</sup>

The reader can now judge for himself who is being sloppy by "extrapolating from incomplete historical evidence," who has "hypothesized," and who, on the other hand, has specified in meticulous fashion how he arrived at his conclusions. Should one really describe as "extrapolating from incomplete historical evidence" and "drawing inferences" the assumption that if a State treats suicide as a crime, then it can be presumed to have "also criminalized assisting suicide"? How plausible is the

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132. Marzen, *supra* note 32, at 75-76.

assumption that such a State would *not* do so?

In Judge Reinhardt's entire historical survey, only one legal case is actually discussed:

The New Jersey Supreme Court declared in 1901 that since suicide was not punishable it should not be considered a crime. "[A]ll will admit that in some cases it is ethically defensible," the court said, as when a woman kills herself to escape being raped or "when a man curtails weeks or months of agony of an incurable disease."<sup>133</sup>

Again, Judge Reinhardt misleads through his selective quotation. Here is what appears immediately *above* the discussion in his cited source:

Perhaps a better candidate for Engelhardt and Malloy's title of "Aberrant Jurisdiction" (though the jurisdiction quickly repudiated it), would be New Jersey. In a 1901 insurance case, *Campbell v. Supreme Conclave Improved Order Heptasophs*, nine of the seventeen members of the state's highest court joined an opinion by Justice Gilbert Collins stating that since suicide was not punished with forfeiture, it was not a crime.<sup>134</sup>

And here is what *follows* the discussion of the case in the source:

It is, however, the only pre-1980 case we have found that articulates such a view. It is isolated not only in contrast to cases in other jurisdictions, but within New Jersey as well. Two years later, an inferior appellate court took the extraordinary step not only of criticizing the Justice Collins' opinion but also of rendering a holding directly contrary to its language, which it characterized as dictum.<sup>135</sup>

Burke Balch, one of the co-authors of the quoted article,<sup>136</sup> noted recently:

Indeed, in 1922, New Jersey's highest court . . . wrote, "So strong is this concern of the state [in 'the preservation of the life of each of its citizens'] that it does not even permit a man to take his own life. . . ."<sup>137</sup>

133. *Compassion in Dying*, 79 F. 3d at 809-10 (citing *Campbell v. Supreme Conclave Improved Order Heptasophs*, 49 A. 550 (N.J. 1901)).

134. Marzen, *supra* note 32, at 84.

135. *Id.*

136. Burke Balch also writes under the name Thomas J. Balch, the name he used as a co-author of Marzen, *supra* note 32.

137. Burke Balch, *Court Suicide Decision Distorts American History*, NAT'L RIGHT TO LIFE NEWS, May 7, 1996, at 22 (citing *State v. Ehlers*, 119 A. 15 (1922)). Judge Reinhardt mistakenly assumed that Marzen's reference to a 1901 New Jersey decision by "the state's

And of course, even if those cases in which suicide was not punished were held to mean that it was not a crime, there is a great difference between declaring something not a crime and recognizing it as a constitutional right.

## VII. CONCLUSION

The use of history in *Compassion in Dying* is disturbing on several counts. It is wildly inaccurate in part, as when Bracton's "innovation" to Roman law is portrayed as lessening, rather than increasing, the punishment for sane suicides who kill themselves in order to "avoid pain." It is peculiar in the manner in which it deals with topics of major importance. The practices and moral code of ancient Israel are limited to one sentence in one footnote. Aristotle is not mentioned. Plato is discussed, but only in a paragraph quoted, not from Plato himself, nor from any of the modern experts on Plato, but in a few sentences lifted whole from Durkheim's polemical book *Suicide*. Blackstone, one of the essential figures in the common law, whose *Commentaries* served as the law school for generations of Americans from independence until the mid-nineteenth century, is mentioned only as the source for one footnote. And Western history, from the founding of the American Republic until the present, is summed up in two breathless paragraphs. There is no mention, for example, of the Nazi experience in euthanasia, which at times retained some elements of physician-assisted suicide,<sup>138</sup>

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highest court" meant the New Jersey Supreme Court; it did not. The highest court at that time was called the Court of Errors and Appeals.

138. This is not surprising, as that experience is not an advertisement for assisted suicide but more like a cautionary tale. On October 7, 1933, in Berlin,

[t]he Ministry of Justice in a detailed memorandum explaining the Nazi aims regarding the German penal code today announced its intention to authorize physicians to end the sufferings of incurable patients.

The memorandum, still lacking the force of law, proposed that "it shall be made possible for physicians to end the tortures of incurable patients, upon request, in the interests of true humanity."

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According to the present plans of the Ministry of Justice, incurability would be determined not only by the attending physician, but also by two official doctors who would carefully trace the history of the case and personally examine the patient.

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The legal question of who may request the application of euthanasia has not been definitely solved. The Ministry merely has proposed that either the patient himself shall "expressly and earnestly" ask it, or "in case the patient no longer is able to express his desire, his nearer relatives, acting from motives

and might have offered a salutary perspective.

Further, Judge Reinhardt's opinion repeatedly disguises the paucity of evidence supporting the idea that suicide was not abhorred by summarizing that evidence quite inaccurately. Sometimes he does it before presenting that evidence. For example, he slips the "Jews" into one sentence, in a footnote that begins: "Other ancient peoples also viewed suicide with equanimity or acceptance."<sup>139</sup> This sentence is meant to summarize what immediately follows:

Hundreds of Jews killed themselves at Masada in order to avoid being captured by Roman legions. The ancient Sythians [sic] believed it was an honor to commit suicide when they became too frail for their nomadic way of life. The Vikings believed that the next greatest honor, after death in battle, was death by suicide.<sup>140</sup>

One must keep in mind that *Compassion in Dying* was no ordinary Ninth Circuit opinion. It makes new law in an area that is, literally, a matter of life and death. Surely this is a case where a decent respect for the opinions of the major philosophers, religious traditions, and legal history—the accumulated wisdom of the past, of all those who have pondered the matter, of philosophers, religions, and legal scholars—would lead to a certain hesitancy, circumspection, and doubt. But there is nothing hesitant about the opinion's treatment of historical attitudes toward suicide. If one could allow oneself to believe that it was simply the product of undue haste, that would be bad enough. But a close examination of this part of Judge Reinhardt's opinion shows no sifting of the sources, no distinguishing of those sources that are famous polemical

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that do not contravene morals, so request."

As cited Press, *Nazis Plan to Kill Incurables to End Pain; German Religious Groups Oppose Move*, N.Y. TIMES, Oct. 8, 1933, at 1. One ought always to be diffident about invoking the Nazi example. In defense of the Ninth Circuit's omission, it could be argued that the Nazis are simply outside the Western tradition. Nevertheless, once the "taboo" against the direct taking of innocent human life is violated, the violation may not be so easy to cabin.

139. *Compassion in Dying v. Washington*, 79 F.3d 790, 807 n.24 (9th Cir.) (en banc), cert. granted sub nom. *Washington v. Glucksberg*, 117 S. Ct. 37 (1996).

140. *Id.* It is interesting that Judge Reinhardt does not mention the Eskimos, where suicide among the aged was once encouraged in order to preserve scarce resources. For clearly Reinhardt is not unsympathetic to such considerations: "we are reluctant to say that, in a society in which the costs of protracted health care can be so exorbitant, it is improper for competent, terminally ill adults to take the economic welfare of their families and loved ones into consideration." *Id.* at 826.

defenses of suicide (Alvarez's *The Savage God* and Durkheim's *Suicide*), and those that are serious efforts at summarizing historical attitudes toward suicide. Most disturbing of all, when we examine the court's use of a single law review article on which the historical summary largely rests, we find what can only be described as systematic distortion and obfuscation.

Recently, Professor Alan Watson discussed some of the problems that arise for students in understanding the justifications that judges offer for changes in the law, noting that "when a judge argues from the facts of history, the watchword is *Beware*. False history is probably as often adduced to support a proposition as is plausible or even accurate history."<sup>141</sup> False history is bad.<sup>142</sup> When false history seems to be the result not of carelessness but of premeditation, it is something worse.

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141. Alan Watson, *Introduction to Law for Second-Year Law Students?*, 46 J. LEGAL EDUC. 430, 442 (1996).

142. John Finnis has demonstrated some of the ways in which, in recent constitutional adjudication, history and the truth have been abused. In *Roe v. Wade*, 410 U.S. 113 (1973), the majority opinion relied on two historical articles that were "demonstrably false," see Finnis, *supra* note 26, at 11; in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), 281 historians signed an amicus brief supporting a version of American attitudes towards abortion that was contradicted by the best evidence, including a book written by one of the signatories, see Finnis, *supra* note 26, at 12-13; in the trial of *Romer v. Evans*, 116 S. Ct. 1920 (1996), one well-known scholar offered highly misleading philological evidence as to classical Greek attitudes towards homosexuality, see Finnis, *supra* note 26, at 19-35. Finnis regards these abuses of scholarship as "nothing less than attempts to get the American people to constitute themselves around conceptions of their own past, and the past of their civilization, that are profoundly untrue—worlds not of reality, which we in principle can share, but of fantasy, which can provide no lasting basis for community." *Id.* at 35. Finnis thinks it does matter whether or not constitutional rulings "are being promoted by means of deeply corrupt scholarship." *Id.* So do we.