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THE RIGHT TO SELF-DIRECTED DEATH: RECONSIDERING AN ANCIENT PROSCRIPTION*

G. STEVEN NEELEY**

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.

- Holmes, *The Path of the Law*

Rationality ex post facto - Whatever lives long is gradually so saturated with reason that its irrational origins become improbable. Does not every accurate history of the origin of something sound paradoxical and sacrilegious to our feelings? Doesn't the good historian contradict all the time?

- Nietzsche, *The Dawn*

INTRODUCTION

In recent years, tremendous controversy has been generated over the legal and ethical questions surrounding euthanasia, self-directed death, physician assisted suicide, and the direct and active disemployment of artificial life-support.1 At its core, this tangle of issues ulti-

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1 See, e.g., James J. McCartney, *The Right to Die: Perspectives from the Catholic and Jewish Traditions, in To Die or Not to Die?* (Arthur S. Berger & Joyce Berger eds., 1990);
mately implicates the more basic question of whether, and under what circumstances, an individual may terminate his own existence.\(^2\)

In the area of death and dying, the law has failed to keep pace with medical technology.\(^3\) Human life can now be extended to points where rational, competent adults often conclude that it is no longer worth living.\(^4\) Nevertheless, current law often severely restricts the individual's right to exercise unfettered control over the circumstances of dying.\(^5\)

The current dilemma is a result of a clash of ancient ideals. The common law long recognized the individual's right to freedom from non-consensual invasions of bodily integrity,\(^6\) and this right has been extended to include the freedom to refuse necessary life-saving medical...

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Footnotes:


3 See Glenn W. Peterson, Comment, Balancing the Right to Die with Competing Interests: A Socio-Legal Enigma, 13 Pepper L. Rev. 109, 155 (1985) (“While medical science has progressed by leaps and bounds... our courts and legislatures have mostly lagged behind...”).


5 See Cruzan v. Director, 497 U.S. 261, 286 (1990) (holding that Missouri may require clear and convincing evidence of incompetent's desire to remove life-sustaining support); In re Westchester County Medical Ctr., 531 N.E.2d 607, 608 (N.Y. 1988) (requiring showing of clear and convincing evidence of patient's resolve to decline life-sustaining medical assistance); Anne M. Guadin, Cruzan v. Director, Missouri Department of Health: To Die or Not to Die: That is the Question - But Who Decides?, 81 La. L. Rev. 1307, 1320-27 (1991).

treatment.\textsuperscript{7} Yet, the law has been equally anathematic to suicide.\textsuperscript{8} For centuries, these doctrines peacefully co-existed. It is only with the explosion of invasive medical technology that such tenets have come to battle within the medical arena.\textsuperscript{9}

Approximately one-half of United States jurisdictions statutorily prohibit assisted suicide,\textsuperscript{10} punishing it as, among other classifications, murder or manslaughter.\textsuperscript{11} Other states criminalize the causing, rather than the assisting, of a suicide.\textsuperscript{12} Still others place no prohibitions on suicide.\textsuperscript{13} Decisions to terminate life-support are easily swept under the same broad rubric. Indeed, the accepted legal definitions of suicide include: “[s]elf-destruction; the deliberate termination of one’s own life;”\textsuperscript{14} and “the deliberate and intentional destruction of [one’s] own life by a person of years of discretion and of sound mind.”\textsuperscript{15} Elections to suspend life-support are also deliberate acts virtually certain to result in death. In this arena, the prevention of suicide has even been identified by the courts and commentators as an important state interest that may limit a person’s right to refuse life-saving medical treatment.\textsuperscript{16} As a result, sit-

\textsuperscript{7} Natanson v. Kline, 350 P.2d 1093, 1104 (Kan. 1960); In re Spring, 405 N.E.2d 115, 119 (Mass. 1980); In re Torres, 357 N.W.2d 332, 339 (Minn. 1984).
\textsuperscript{8} See Keith Burgess-Jackson, The Legal Status of Suicide in Early America: A Comparison with the English Experience, 29 WAYNE L. REV. 57 (1982) (exploring varied development of law governing suicide in colonial America); see also Newman, supra note 4, at 155 (“Part of the reticence about euthanasia can be traced to the social opprobrium that attaches to suicide.”).
\textsuperscript{9} A number of the recent “right to die” cases address this conflict directly, balancing the common right of bodily integrity against a state’s interest in preventing suicide. In re Conroy, 486 A.2d 1209, 1224 (N.J. 1985); In re Storar, 420 N.E.2d 64, 71 (N.Y.), cert. denied, 454 U.S. 858 (1981); Elbaum v. Grace Plaza of Great Neck, 544 N.Y.S.2d 840, 847 (N.Y. App. Div. 1989).
\textsuperscript{11} Shaffer, supra note 10, at 353.
\textsuperscript{12} Marzen et al., supra note 10, at 98; Shaffer, supra note 10, at 353. But see WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 649 (1986).
\textsuperscript{13} Marzen et al., supra note 10, at 98.
\textsuperscript{14} BLACK’S LAW DICTIONARY 1434 (6th ed. 1990).
\textsuperscript{15} WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2286 (1981).
\textsuperscript{16} Satz v. Perlmutter, 362 So. 2d 160, 162 (Fla. Dist. Ct. App. 1978), aff’d, 379 So. 2d 359 (Fla. 1980); Commissioner of Correction v. Meyers, 399 N.E.2d 452, 456 (Mass. 1979); Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 425-27 (Mass. 1977); Torres, 357 N.W.2d at 339; Conroy, 486 A.2d at 1223; President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Deciding to Forego Life-Sustaining Treatment, 32 (1983); Carol A. Colabrese, Comment, In re Storar: The Right to Die and Incompetent Patients, 43 U. PIT. L. REV. 1087, 1092 (1982). However, in its seminal Saikewicz decision, the court minimizes the influence of this state interest in many right to die cases:
utations have developed in which seriously ill competent adults have found it nearly impossible to compel the removal of invasive life-support systems. Thus, many rational and humane decisions to deliberately facilitate death are treated as suicide by the patient, and assisted suicide or even murder by the administering agent.

As a reaction to this expanding problem, a number of legal scholars and courts have addressed the notion of a constitutional right to suicide which would protect the individual's right to terminate his own existence in certain circumstances. This Article undertakes a detailed examination of a critical, yet virtually unexplored, area of that debate. Historical analysis of the legal proscription of self-destruction reveals that the origins of this taboo lie in theological dogma. This Article endeavors to show that the rationale behind the age-old proscription of self-willed death will not survive modern-day constitutional scrutiny. In so doing, it will demonstrate the pervasive influence of religious ideologies on the legal interdiction of suicide, and suggest that modern legal thought need not be bound by the traditional eschatologies of these ideol-
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ogies. Now that medical technology can extend human existence beyond the point where the rational person might well choose to die, universal proscriptions of suicide based only on blind imitation of the past must be reexamined.

I. Pre-Christian Thought

Suicide was widely practiced among ancient peoples. Among Aryan immigrants into the Punjab, it was commonplace for widows to commit suicide in order to avoid dependence on relatives. Hindu widows frequently sacrificed themselves as part of the funeral rites of their husbands. Under the influence of Brahmanism, persons who believed that their sins had doomed them to many more transmigrations of the soul and were dissatisfied with life would commit suicide in the hope of improving it through reincarnation. In China and Japan, suicide was recognized as an honorable alternative to disgraceful existence. The ancient Norse were known to bring on death rather than die by natural infirmity and be deprived of a seat in Valhalla. Also, despite the alleged religious commandment against self-slaughter, there are a number of suicides recorded by the ancient Hebrews.

The ancient West generally viewed suicide as a matter of grave import, but nevertheless a matter of personal decision which was quite often appropriate in grievous circumstances. Thus, although the laws of ancient Thebes and Athens expressed a general disinclination towards self-destruction, the philosophical community often accepted suicide as noble. Plato reports Socrates' belief that man is the property of the gods and that self-imposed death would bring divine vengeance, but that the gods' permission could be found in situations such as the sentence imposed upon Socrates himself. In fact, Plato admitted a number of exceptions to the prohibition of suicide—"shame of extreme

21 JAMES J. O'DEA, SUICIDE 5 (1882).
22 Id. at 5-6.
23 Id. at 17.
24 Id. at 25-26.
25 Id. at 57.
26 George Rosen, History, in A HANDBOOK FOR THE STUDY OF SUICIDE 3, 4-5 (Seymour Per- lin, M.D. ed., 1975). Also, the Old Testament includes accounts of assisted suicide, such as that of the Amalekite who killed Saul on Saul's request. 2 Samuel 1:5-10.
28 Plato, Phaedo, in FIVE GREAT DIALOGUES 90 (Benjamin Jowett trans., Walter J. Black 1942).
29 Id. at 90-91. Socrates argued that the rule that "things which are evil may be good at certain times and to certain persons" applies to death and suicide. Id. at 90. The true philoso-
distress and poverty" or "extraordinary sorrow"—and actually defined the term in such a way as to severely curtail the effectiveness of the general proscription.\(^{30}\) Thus, a suicide is one: (1) who uses violence to take his fate out of the hands of destiny; (2) who is not acting in obedience to any legal decision of his state; (3) whose hand is not forced by the pressure of some excruciating and unavoidable misfortune; (4) who has not fallen into some irremediable disgrace that he cannot live with, and (5) who imposes this unjust judgment on himself in a spirit of slothful and abject cowardice.\(^{31}\)

Aristotle, to the contrary, occupies a minority position among the ancients, refusing to admit of any exceptions to the prohibition of suicide. He argues that "the law does not expressly permit suicide, and what it does not expressly permit it forbids,"\(^{32}\) even though the injustice is "towards the state, not towards [the felo de se] himself."\(^{33}\) "This is also the reason why the state punishes; a certain loss of civil rights attaches to the man who destroys himself, on the ground that he is treating the state unjustly."\(^{34}\)

The Stoic and Epicurean philosophers devoted much more attention to suicide than did their predecessors. The Epicureans were occupied chiefly with the sensitive and emotional side of human nature, and equated happiness with freedom from pain.\(^{35}\) Epicurus labored strenuously to eradicate the fear of death,\(^{36}\) which he considered the bugbear of humanity and a nemesis to happiness.\(^{37}\) "Death is nothing to us," he writes, "for what has been dissolved has no sensation, and what has no sensation is nothing to us."\(^{38}\) The sagacious Epicurean surrounds himself, then lives his life in constant search of death; in fact, he wills his own death.\(^{39}\)

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\(^{30}\) Williams, supra note 18, at 251-52 (describing how Plato's condemnation of suicide was largely destroyed by his admitting exceptions "of the most elastic character").


\(^{33}\) Id. at 422.

\(^{34}\) Id.

\(^{35}\) Epicurus, Letter to Menoeceus, in Letters, Principal Doctrines, and Vatican Sayings 55-56 (Russel M. Geer trans., 1964) ("[H]ealth of body and (peace of mind) . . . is the final end of the blessed life. For to gain this end, namely freedom from pain and fear, we do everything.").

\(^{36}\) Id. at 54 ("Accustom yourself to the belief that death is of no concern to us, since all good and all evil lie in sensation and sensation ends with death.").

\(^{37}\) Id. ("[T]he true belief that death is nothing to us makes a mortal life happy, not by adding to it an infinite time, but by taking away the desire for immortality . . . . [H]e is foolish who says he fears death, not because it will be painful when it comes, but because the anticipation of it is painful." Id.

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self with all possible safeguards against the calamities of life. Failing to achieve happiness in this way, he is at liberty to retire from life itself.\textsuperscript{39} Such a man could take this ultimate step free from a fear of divine wrath or of societal mores, for his devotion to reason has made him the master of his fate.\textsuperscript{40} Indeed, the wise man “thinks it better to meet misfortune while acting with reason than to happen upon good fortune while acting senselessly; for it is better that what has been well-planned in our actions (should fail than that what has been ill-planned) should gain success by chance.”\textsuperscript{41} Suicide is a matter of private judgment for each person. Individuals deliberating suicide should remember that even though nature has furnished only one door into life, it has furnished many ways out.\textsuperscript{42} Such an understanding liberates humankind from the dread of enduring a miserable life.\textsuperscript{43} Understanding that death means nothing more than the cessation of sensation is liberating. “There is no reason why the man who is thoroughly assured that there is nothing to fear in death should find anything to fear in life.”\textsuperscript{44} As Cicero’s advocate of Epicureanism observes,

a strong and lofty spirit is entirely free from anxiety and sorrow. It makes light of death, for the dead are only as they were before they were born. It is schooled to encounter pain by recollecting that pains of great severity are ended by death, and slight ones have frequent intervals of respite; while those of medium intensity lie within our own control: we can bear them if they are endurable, or if they are not, we may serenely quit life’s theatre, when the play has ceased to please us.\textsuperscript{45}

The Stoics were oftentimes even more adamant than the Epicureans in their belief that we should live only by our own decree. Reason was regarded by the Stoics as the ultimate arbiter of such decisions, and is even referred to as the God in man.\textsuperscript{46} The Stoics also advocated acceptance of life’s vicissitudes, and regarded death as a friend which opens to every soul an escape from the bondage of the body and the evils of this

\textsuperscript{39} See infra note 35 and accompanying text.  
\textsuperscript{40} Letter to Menoeceus, supra note 35, at 54 (“While we exist death is not present, and when death is present we no longer exist. [Death] is therefore nothing either to the living or the dead . . . .”). “[T]he pleasant life . . . is produced by the reason which is sober . . . .” Id. at 57.  
\textsuperscript{41} Id. at 58-59.  
\textsuperscript{42} 2 Seneca, Ad Lucilium Epistulae Morales 65 (Richard M. Gummere trans., 1967) (“The best thing which eternal law ever ordained was that it allowed to us one entrance into life, but many exits.”).  
\textsuperscript{43} Letter to Menoeceus, supra note 35, at 54.  
\textsuperscript{44} Id.  
\textsuperscript{45} Cicero, De Finibus Bonorum et Malorum 53 (H. Rackham, trans., 2d ed. 1961).  
\textsuperscript{46} 2 Seneca, supra note 42, at 465 (“Reason . . . is a common attribute of both gods and men; in the gods it is already perfected, in us it is capable of being perfected.”).
world.\textsuperscript{47} Death merely reduces the body to its primitive elements, and either annihilates the soul or ushers it into regions of rest.\textsuperscript{48} The union of body and soul was effected to equip the soul with the necessary means for its fulfillment.\textsuperscript{49} Should any obstacle prevent the soul from such fulfillment, then suicide is not only reasonable, it is a noble expression of human freedom.\textsuperscript{50} Thus, Seneca exhorts, "[i]t is wrong to live under constraint; but no man is constrained to live under constraint."... On all sides lie many short and simple paths to freedom; and let us thank God that no man can be kept in life."\textsuperscript{51}

While the Epicureans viewed suicide as a reasonable alternative to an unfortunate life, the Stoics went even further, arguing that an individual might commit suicide even though not presently dissatisfied with his lot in life.\textsuperscript{52} Cicero reports that for the Stoic, very often it is appropriate for the Wise Man to abandon life at a moment when he is enjoying supreme happiness if an opportunity offers for making a timely exit, for the Stoic view is that happiness, which means life in harmony with nature, is a matter of seizing the right moment.\textsuperscript{53} The general rule, however, is that "[w]hen a man's circumstances contain a preponderance of things in accordance with nature, it is appropriate for him to remain alive; when he possesses or sees in prospect a majority of the contrary things, it is appropriate for him to depart from life."\textsuperscript{54}

Among all of the Stoics, Seneca was preeminent as an advocate of suicide.\textsuperscript{55} His calm, rational approach to the matter exemplifies the very paradigm of the Stoic position on the subject.\textsuperscript{56} Seneca's view is largely based on common sense.\textsuperscript{57} He is quick to press the point that it is not the quantity of life which should be of paramount concern, but rather the

\textsuperscript{47} See infra note 35 and accompanying text.
\textsuperscript{48} 2 Seneca, supra note 42, at 83 ("[T]he soul at death is either sent forth into a better life, destined to dwell with deity amid greater radiance and calm, or else, at least, without suffering any harm to itself, it will be mingled with nature again, and will return to the universe.").
\textsuperscript{49} 1 id. at 453-57.
\textsuperscript{50} 1 id. at 457 ("Never shall I lie in order to honour this petty body. When it seems proper, I shall sever my connexion with it . . . . To despise our bodies is sure freedom.").
\textsuperscript{51} 1 id. at 71-73.
\textsuperscript{52} Cicero, supra note 45, at 277-281.
\textsuperscript{53} Id. at 281.
\textsuperscript{54} Id. at 279.
\textsuperscript{55} 2 Seneca, supra note 42, at 57-73.
\textsuperscript{56} 2 id. at 63. "If one death is accompanied by torture, and the other is simple and easy, why not snatch the latter? Just as I shall select my ship when I am about to go on voyage, or my house when I propose to take a residence, so I shall choose my death when I am about to depart from life." 2 id.
\textsuperscript{57} 2 id. "The best form of death is the one we like." 2 id.
quality, and when that quality is gone one's living is done. Seneca views the act of suicide as a rational means of depriving fate of its sting. When misfortune has robbed this life of all hope and promise, it is better to take matters into our own hands rather than suffer at the whims of fate. Seneca entreats us, "[l]ive, if you so desire; if not, you may return to the place whence you came." He continues, "[i]f you would pierce your heart, a gaping wound is not necessary; a lancet will open the way to that great freedom, and tranquility can be purchased at the cost of a pin-prick." The man who thus consorts to control his own destiny is far from seeking the coward's way out, but rather by wrestling control of his life from the hands of fortune, he has earned entitlement to be counted as a noble soul. But the life of reason advocated by Seneca is not a life of unadulterated egoism. In particular, the decision to terminate one's own existence should be accompanied by external considerations of an ethical nature, and Seneca balances his rationalistic support of suicide with an altruistic concern for the welfare of others.

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58 2 Seneca, supra note 42, at 57-59. "For mere living is not a good, but living well. Accordingly, the wise man will live as long as he ought, not as long as he can." 2 id. at 59. Indeed, "[i]t is not a question of dying earlier or later, but of dying well or ill. And dying well means except from danger of living ill." 2 id. "He always reflects concerning the quality, and not the quantity, of his life. As soon as there are many events in his life that give him trouble and disturb his piece of mind, he sets himself free." 2 id.

59 2 Seneca, supra note 42, at 65. "Must I await the cruelty either of disease or of man, when I can depart through the midst of torture, and shake off my troubles?" 2 id. "It is reason which teaches us that fate has various ways of approach, but the same end, and that it makes no difference at which point the inevitable event begins." 2 id. at 71.

60 2 Seneca, supra note 42, at 59. Seneca urges, "[s]hall I reflect that Fortune has all power over one who lives, rather than reflect that she has no power over one who knows how to die?" 2 id. In this sense, "[t]he best thing which eternal law ever ordained was that it allowed to us one entrance into life, but many exits." 2 id. at 65.

61 2 id.

62 2 id.

63 2 Seneca, supra note 42, at 71-73. "He is truly great who not only has given himself the order to die, but has also found the means." 2 id. at 71.

64 3 id. at 191-211. Seneca instructs that although at times it's easier to go than to stay, one must stay for the sake of those around him. 3 id. at 191.

65 3 Seneca, supra note 42, at 191.

For one must indulge genuine emotions; sometimes, even in spite of weighty reasons, the breath of life must be called back and kept at our very lips even at the price of great suffering, for the sake of those whom we hold dear; because the good man should not live as long as it pleases him, but as long as he ought. He who does not value his wife, or his friend, highly enough to linger longer in life—he who obstinately persists in dying—is a voluptuary.

3 id. at 191-93.
The later Stoics continued to look upon reason as the supreme guide of human action, and favored suicide as a suitable and rational alternative to a life devoid of pleasure. Thus, Epictetus reminds us, the door is open. Do not be a greater coward than the children, but do as they do. Children, when things do not please them, say, “I will not play any more;” so, when things seem to you to reach that point, just say, “I will not play anymore,” and so depart, instead of staying to make moan.

Similarly, Marcus Aurelius instructs us to keep the temporal fate of humankind always in sight: “Soon, very soon, thou wilt be ashes, or a skeleton. . . . Why then dost thou not wait in tranquility for thy end, whether it is extinction or removal to another state?” But, if we are thwarted in the attempt to achieve happiness or some other goal in life because some insuperable object is in the way,

[do] not be grieved then, for the cause of its not being done depends not on thee.—But it is not worth while to live, if this cannot be done.—Take thy departure then from life contentedly, just as he dies who is in full activity, and well pleased too with the things which are obstacles.

Partly as a result of the dominant philosophical perspective of the time, suicide was a frequent occurrence under the first Roman emperors. During the reign of the Caesars, persons under threat of prosecution for treason would commit suicide in order to escape conviction, forfeiture of their property to the state, and denial of customary burial. “Notwithstanding these practices, Roman law never came to include any general prohibition of suicide.” However, in the particular case of those who entertained suicide as a means to ensure the proprietary rights of their heirs, it was later ordained that the estate of criminals would nevertheless be forfeited: “Persons who have been accused, or have been caught while committing a crime, and, through fear of impending accusation, kill themselves, have no heirs.” However, in order to avoid injustice, the prospective heirs were permitted to challenge the guilt of the deceased. If the innocence of the accused could be estab-

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66 See infra notes 58-60 and accompanying text.
67 Epictetus, The Discourses of Epictetus, in The Stoic and Epicurean Philosophers 224, 266 (P.E. Matheson trans., 1940).
69 Id. at 550.
70 WILLIAMS, supra note 18, at 253.
71 Id. at 254.
72 Id.
73 11 The Civil Law 129 (S.P. Scott trans., 1932).
74 WILLIAMS, supra note 18, at 254.
lished, the heirs were entitled to his effects. Furthermore, it was clear that the Roman condemnation was not of suicide per se:

[W]here persons who have not yet been accused of crime, lay violent hands on themselves, their property shall not be confiscated by the Treasury; for it is not the wickedness of the deed that renders it punishable, but it is held that the consciousness of guilt entertained by the defendant is considered to take the place of a confession.

II. THE INFLUX OF RELIGIOUS BELIEF

There is nothing in the Old Testament which can clearly be understood as offering explicit judgment on the ancient Judaic view of suicide. Indeed, it contains no expression equivalent to the English term “suicide” as a distinct cause of death. The earliest known prohibition of self-killing among the Jews occurred in the first century A.D. when Josephus forbad his soldiers from sacrificing themselves in order to avoid surrender to the Romans. On this occasion, in an address to his troops, Josephus advanced the view that self-killing was a cowardly act contrary to nature and the law of God, who committed man’s soul to his body. As such, the souls of those whose hands have acted madly against themselves, a region of darker Hades receives; and God, their father, visits on the offspring the impiety of their parents. Hence this deed is hateful to God, and is punished by the wisest of lawgivers. This it is ordained among us, that those who destroy themselves shall be exposed unburied till sunset.

There is no offering in the New Testament to suggest a condemnation of suicide. The dominant Christian belief was that temporal existence “was important only as a preparation for the hereafter.” The supreme duty in this life was to avoid the sin which would result in eternal damnation.

75 11 THE CIVIL LAW, supra note 73, at 130.
76 WILLIAMS, supra note 18, at 254.
77 11 THE CIVIL LAW, supra note 73, at 129.
78 Marzen et al., supra note 10, at 17 (citing NORMAN ST. JOHN-STEVAS, THE RIGHT TO LIFE LAW 58 (1964)).
79 Id. at 18 (citing Daube, The Linguistics of Suicide, 1 PHIL. AND PUB. AFF., 387-437 (1972)).
81 Id. at 199-203.
83 WILLIAMS, supra note 18, at 254.
84 Id.
85 Id. at 254-55.
Since all natural desires tended towards sin, the risk of failure was great. Many Christians, therefore, committed suicide for fear of falling before temptation. It was especially good if the believer could commit suicide by provoking infidels to martyr him, or by austerities so severe that they undermined the constitution, but in the last resort he might do away with himself directly.\(^{86}\)

It became commonplace for fanatical Christians to taunt their Roman persecutors into acts of violence.\(^ {87}\) The sect whom Saint Augustine noted in particular for this practice was the Circumcelliones:

[T]hese people not only sought out martyrdom, profaning the temples of paganism in order to be executed, but, when all other expedients failed, cast themselves by the hundreds in ecstasy from lofty cliffs “till the rocks below were reddened with their blood.” “To kill themselves,” said Augustine, “out of respect for martyrdom is their daily sport.”\(^ {88}\)

Undoubtedly, these religious excesses led Augustine to condemn suicide in forthright terms and to become “the chief architect of the later Christian view.”\(^ {89}\) Augustine’s main argument is that suicide is forbidden by the sixth commandment’s admonition against killing:

Not for nothing is it that in the holy canonical books no divinely inspired order or permission can be found authorizing us to inflict death upon ourselves, neither in order to acquire immortality nor in order to avert or divert some evil. For we must certainly understand the commandment as forbidding this when it says: “Thou shalt not kill,” particularly since it does not add “thy neighbour,” as it does when it forbids false witnessing.\(^ {90}\)

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\(^ {86}\) Id., at 255.
\(^ {87}\) O’DEA, supra note 21, at 67-77.
\(^ {88}\) WILLIAMS, supra note 18, at 255.
\(^ {89}\) Id.

The true reason for Augustine’s stand against suicide appears plainly enough from the historical events of his age. These indicated that a prohibition of suicide was a necessary corollary of the church’s other teaching, which would, without this corollary, have operated, and did in fact operate, as an incitement to suicide. If death means annihilation, there can be no point in suicide except as an escape from suffering. But if man’s life on earth is merely a period of waiting for a divine glory to be revealed, the true believer is naturally subject to the temptation to accelerate his eternal bliss, unless a new religious rule is devised to forbid it. Augustine himself pointed this out when he said that if suicide were permissible to avoid sin, then suicide would become the logical course for all those who were fresh from baptism. It is not surprising that Augustine recoiled from this result, but he could deny it, within the framework of his own beliefs, only by postulating a divine prohibition of suicide.

Furthermore, although the ancient philosophers generally held that suicide often can be a laudable and noble act, Augustine equated it with an act of cowardice. No matter what hardship or calamity befell an individual, Augustine’s interpretation of the holy edict was unwavering: suicide is never permissible. Those misguided souls who defied God’s will and took their destinies into their own hands were met with a fate far worse than anything imaginable upon earth.

Augustine’s views on suicide eventually found expression in Church law.

The first Christian prohibition of suicide is sometimes attributed to the Council of Arles, A.D. 452. In fact, however, this measure was directed only against the suicide of servants (famuli). ‘Not the act, but dislike of its repercussions as they affect the master and landowner, provides the motive which makes the act criminal in certain cases and envisages the suicide as diabolicus repletus furore.’ The earliest disapproval was expressed by the second Council of Orleans, A.D. 533, which allowed churches to receive the oblations (offerings) even of those who were killed in the commission of a crime, provided that they did not lay violent hands on themselves.

In 563 A.D., the Council of Braga denied full burial rights to suicides, and the Capitula of Theodore, Archbishop of Canterbury, stated that mass could not be said for suicides, although prayers and alms could be offered. The Synod of Auxerre, in 578 A.D., specifically announced that “no offering should be received from one who had taken his own life.” The Council of Toledo, in 693 A.D., punished attempted suicide with exclusion from Church membership for two months.

91 See supra notes 27-29, 35-67 and accompanying text.
92 See 1 Augustine, supra note 90, at 97-99. St. Augustine argues that those who commit suicide do so because of lack of strength and weakness of mind. 1 id.
93 1 id.
94 1 id. at 117 (voicing argument that suicide is not even permitted in order to avoid commission of sin). “For if there could be any legitimate reason for committing suicide, there could be none more legitimate than this, I am sure. But since not even this one is legitimate, therefore there is none such.” 1 id.
95 1 Augustine, supra note 90, at 113. “[N]o man ought to inflict on himself a voluntary death, thinking to escape temporary ills, lest he find himself among ills that are unending . . . as the better life after death does not accept those who are guilty of their own death.” 1 id.
96 See Norman St. John-Stevas, Life, Death and the Law, 249 (1961) (citing to 5 August Neander, General History of the Christian Religion and Church 141 (Joseph Torrey trans., Crocker & Brewster 1865)).
97 Williams, supra note 18, at 257 (citations omitted).
98 St. John-Stevas, supra note 96, at 249.
99 Id.
100 Id.
Nimes, 1284, refused suicides even the right of quiet interment in holy ground.”

Saint Thomas Aquinas unerringly followed the theological and philosophical parameters established by Augustine in his continued elaboration of Church teaching on suicide. Integrating faith with reason in an effort to support a predetermined theological doctrine, Aquinas argued that suicide is always intrinsically wrong:

"It is altogether unlawful to kill oneself, for three reasons. First, because everything naturally loves itself, the result being that everything naturally keeps itself in being, and resists corruption so far as it can. Wherefore suicide is contrary to the inclination of nature, and to charity whereby every man should love himself. Hence suicide is always a mortal sin, as being contrary to the natural law and to charity.

Secondly, because every part, as such, belongs to the whole. Now every man is part of the community, and so, as such, he belongs to the community. Hence by killing himself he injures the community, as the Philosopher declares.

Thirdly, because life is God's gift to man, and is subject to His power, Who kills and makes to live. Hence whoever takes his own life, sins against God, even as he who kills another's slave, sins against that slave's master, and as he who usurps to himself judgment of a matter not entrusted to him. For it belongs to God alone to pronounce sentence of death and life, according to Deut. xxxii. 39, I will kill and I will make to live."

The influence of scholasticism stifled free-thinking discussions of suicide throughout the Middle Ages and cast a shadow of religious intolerance over the subject which continues today. The scholastics erected an unwavering proscription of self-willed death which was supported by appeal to Divine authority. Saint Thomas Aquinas, the preeminent philosopher of the Church, stated the matter succinctly: suicide is al-

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101 WILLIAMS, supra note 18, at 258.
102 See infra notes 106-20 and accompanying text.
103 2 THOMAS AQUINAS, SUMMA THEOLOGICA, 1468-69 (Fathers of the English Dominican Province trans., Benzinger Bros. 1947) (citations omitted) (emphasis in original).
104 See EARL A. GROLLMAN, SUICIDE 22-29 (1971).
105 Id.
106 The philosophy of Aquinas "occupies a favoured position in the intellectual life of the Catholic Church." FREDERICK COPLESTON, AQUINAS 235 (Penguin Books 1955). This is due in part to the encyclical letter of Pope Leo XIII, Aeterni Patris in 1879, which "asserted the permanent value of the Thomist synthesis and urged Catholic philosophers to draw their inspiration from Aquinas, while developing Thomism to meet modern intellectual needs." Id. at 238. See also GROLLMAN, supra note 104, at 24. The theories of Aquinas hinged on his perception that "all life was a preparation for the eternal." Id. His opposition to suicide was based upon an absolute reverence for human life and submission to the will of God. Id.
ways a mortal sin. By further asserting that heaven does not accept the soul of one who commits suicide, medieval philosophers enveloped the concept of self-imposed death within a web of superstition and fear. Suicide was thought to be an abominable and unnatural crime which deprived God of His sole authority over life and death. The felo de se was deprived of the possibility of repentance, and so necessarily died with a grievous sin on his conscience. As an act *mala in se*, it was certain to result in damnation.

Although it would perhaps be unfair to demand a thoroughgoing conceptual analysis of the issue by thinkers who antedated such a movement, it would nevertheless seem that the Church patriarchs might have examined the question with greater care. A more complete analysis of the subject—even within the rigid theological parameters of the medieval consciousness—might have yielded quite a different result.

Augustine’s contempt for suicide stems from his conclusion that the sixth commandment applies to self-killing. Augustine limits the overbreadth of the holy canon by stating that it does not prohibit the killing of plants and animals, but he asserts that it does encompass self-imposed death “for in fact he who kills himself kills what is no other than a man.” Augustine allows for a number of exceptions to the rule as applied to homicide, but is loathe to sanction any exceptions for suicide. Thus, one man may kill another in times of war, capital punishment, or out of obedience to God, while suicide is permissible only when ordered by the Creator and the “divine command is not made precarious by any doubt.”

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107 *See* 2 AQUINAS, *supra* note 103, at 1468-70.
108 *See* 1 AUGUSTINE, *supra* note 90, at 91-95.

[H]ow on earth does anyone say to a human being, “Do away with yourself so as not to add to your petty sins one more serious, living as you do in slavery to a shameless master who has the manners of a savage,” when he cannot say without utter wickedness, “Do away with yourself now that all your sins have been washed away, lest you commit the like again or even worse, living, as you do, in a world so alluring with its unclean pleasures, so insane with its abominable cruelties, so hostile with its errors and its terrors?”

110 *Id.* at 117 (citations omitted).
109 WILLIAMS, *supra* note 18, at 264.
111 *Id.* at 255-56.
112 *Id.* at 255.
113 *Id.* at 255-56.
114 *Id.* Augustine sets forth the stringent exceptions to the sixth commandment, all of which require the authority of God’s command. *Id.*
115 WILLIAMS, *supra* note 18, at 255, 321-323 (describing suicide as detestable and a damnable wickedness but admitting some euthanasia is “justified by necessity”).
116 1 AUGUSTINE, *supra* note 90, at 113. *See also* GROLLMAN, *supra* note 104, at 23 (stating Augustine did not condone self-imposed death). Ironically, Augustine’s philosophies come
But is the sixth commandment truly this inflexible? Are there no other exceptions to the Divine condemnation of suicide? Does God always intend us to prolong life to its last bitter breath? Suicide may not be the most rational or morally responsible course of action for those whose lives hold some realistic glimmer of hope or promise and it is understood that zealots should be restrained from ending their lives in a moment of religious ecstasy in the hope of obtaining everlasting bliss. But there are always some for whom life has become an intolerable and irremediable burden. Under the traditional view entertained by the patristics, God granted us stewardship over our lives, and through utilization of free will and intellect we are expected to manage our affairs wisely. It would seem to be in accordance with the dictates of reason and the will of a merciful God to summon death when life's value has been spent. When reason shows that life has no more to offer, it is folly to perpetuate an unrewarding existence. If I may lay down my life in defense of others, why not surrender my life in order to spare myself further agony? Again, if God allows us to take human life in instances of self-defense, why should I be prohibited from exiting life when my existence per se has become my own greatest nemesis?

The advocate of scholasticism might reply that human suffering serves a greater purpose, such as atonement for the transgressions of God's law, and that we are never justified in circumventing such punishment. It is arguable that God mercifully allows us to suffer in this life so that torment might be avoided in the world to come. Lofty conceptions of ascetic virtue might compel the religious mind to welcome whatever frowns of fortune God sees fit to visit, and many individuals may wish to prolong their existence as long as possible in order to affect their peculiar understanding of God's will. But it is questionable whether such religious heroism ought to become the standard for all to bear.

Aquinas augments the Augustinian position by declaring that suicide is unnatural, violative of the rights of the community, and derogative of God's sole authority over life and death. Yet even this buttress is not sufficient to make the orthodox position unassailable. Aquinas is quite correct to assert that animate life seeks to preserve itself and so resists hostile forces. But it does not follow from this observation that suicide is necessarily unnatural. Aquinas ignores the attendant observation that sentient beings also resist hostile forces in order to avoid pain. Circumstances arise in which death becomes the only certain means of

to a head when theorizing whether suicide may be utilized "in the case of a woman whose honor was in danger." 1 id. Ultimately the sixth commandment prevails in this instance, since God does not afford such a woman the option of taking her own life. 1 AUGUSTINE, supra note 90, at 115.

118 3 id.
quelling physical and psychic torment. In light of such occurrences, it becomes difficult to argue that the decision to exit life by one's own hand is unnatural in any real sense.

Aquinas invokes an Aristotelian notion in order to assert that suicide violates the rights of the community. The argument proposes: every part belongs to the whole in virtue of what it is; every man is part of a community, and so must belong to the community. As such, suicide damages the community.\textsuperscript{119} It is difficult to understand what Aquinas really had in mind by invoking this syllogistic rationale. The Aristotelian precursor to which Aquinas refers seems aimed at protecting the rights of the civil community from the harm incurred through the loss of one of its constituents. Yet any argument that seeks to prohibit individual suicide for the sake of the community at large is tantamount to a stark form of utilitarianism which would subjugate the rights of the individual to the purported good of the masses. Members of a community do not belong to the community in the same sense that parts belong to a machine. The spokes of a wheel may have no purpose apart from the wheel. But do we want to make the same claim about persons, that the individual has purpose and meaning only insofar as she is a constituent of a larger whole? Arguments which assert that individual rights are always subordinate to the welfare of the state run roughshod over the sanctity of personal liberty and are accordingly antithetical to the most basic tenets of Anglo-American jurisprudence.

Aquinas' final argument asserts that because life is a "gift" from God, we are subject to His sole authority concerning life and death.\textsuperscript{120} Not only does this metaphor fail to do justice to the complexity of the actual issue of man's existence in relation to God, but Aquinas fails to follow through on all of the attendant ramifications. A true gift can be refused; only sentences are mandatory. Even once accepted, no gift is expected to be retained indefinitely at the expense and harm of the recipient. When its possession becomes more injurious that its surrender, it would be a prudent use of God's gift to relinquish it. To suppose that suicide defrauds God of His supreme right over creation betrays a rather naive concept of both God and creation.

\textsuperscript{119} See 2 Aquinas, supra note 103, at 1469. See Joseph Fletcher, In Defense of Suicide, in Suicide and Euthanasia 38, 43 (Samuel E. Wallace & Albin Eser eds., 1981) (Christian moralists also felt that "human life is a divine monopoly," and therefore to take from this monopoly is to take what is God's). But see Mary Margaret Penrose, Comment, Assisted Suicide: A Tough Pill To Swallow, 20 Pepp. L. Rev. 689, 693-94 (1993) (pointing out that many ancient cultures viewed suicide as "a dignified act of heroism").

\textsuperscript{120} Williams, supra note 18, 264-65.
III. SUICIDE AT THE COMMON LAW

The endeavor to unearth the attitude of the law toward suicide in very early England has been compared to toying with a mist.\textsuperscript{121} English law originated with community attempts to regulate conduct and to provide substitutes for the feuds that frequently developed between persons or their families.\textsuperscript{122} Because suicide does not involve disputes between individuals, it did not inspire the same sort of community concern.\textsuperscript{123} Eventually, the King and courts of royal justice provided an alternative to local dispute resolution by administering an amalgamation of laws common to the realm.\textsuperscript{124} Thus, the “common law emerged in the twelfth century.”\textsuperscript{125}

As early as 673 A.D., however, suicide was condemned by the canon law of the Catholic Church, and this law was adopted into England by the Council of Hereford in that year.\textsuperscript{126} This prohibition was formalized by King Edgar in 967 A.D.\textsuperscript{127} Edgar’s canon was “wholly ecclesiastical in character,”\textsuperscript{128} and provided, “[i]t is neither lawful to celebrate Mass for the soul of one who by any diabolical instigation hath voluntarily committed murder on himself, nor to commit his body to the ground with hymns and psalmody or any rites of honorable sepulture.”\textsuperscript{129} To this penalty, popular custom added the further punishment of dishonoring the corpse, which eventually became incorporated as part of the law.\textsuperscript{130}

\textsuperscript{121} Marzen et al., supra note 10, at 56.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id. (citing J.H. Baker, An Introduction to English Legal History 4-5, 412 (2nd ed. 1979)). See also Rebecca C. Morgan et al., The Issue of Personal Choice: The Competent Incurable Patient and the Right to Commit Suicide?, 57 Mo. L. Rev. 1, 6 (1992). (“Blackstone argued that it was a crime against the King because the King had a desire and a stake in the lives of all his subjects.”).
\textsuperscript{126} St. John-Stevas, supra note 96, at 233; see also Williams, supra note 18, at 257 (stating that Canon law was adopted into England by 673 A.D.).
\textsuperscript{127} Williams, supra note 18, at 257 (stating that King Edgar denied burial rights to persons committing suicide).
\textsuperscript{128} See O’Dea, supra note 21, at 131; Maria T. Celot Cruz, Aid-in-Dying: Should We Decriminalize Physician-Assisted Suicide and Physician-Committed Euthanasia?, 18 Am. J.L. & Med. 369, 373 (“The origin of Suicide as an English common law offense was clearly ecclesiastical.”).
\textsuperscript{129} See O’Dea, supra note 21, at 311-12 (citing Charles Moore, A Full Inquiry into the Subject of Suicide (London, 1790)).
This custom was a carryover from pagan practice\textsuperscript{131} and reflected the air of superstition which hung over suicide.\textsuperscript{132} In 1601, it was noted that the corpse of a felo de se was "drawn by a horse to the place of punishment and shame, where he is hanged on a gibbet, and none may take the body down but by the authority of a magistrate."\textsuperscript{133} Blackstone recorded that burial was "in the highway, with a stake driven through the body."\textsuperscript{134} Individuals committing suicide were often buried at crossroads with stones placed over their faces.\textsuperscript{135} Such morbid interment was intended to prevent them from rising again as a ghost or vampire.\textsuperscript{136} Even in modern times this primitive superstition survives in many ghost stories which assume that the ghost belongs to a person who has either been murdered or committed suicide.\textsuperscript{137}

The first English legal treatise of consequence, known simply as Glanvill, was published around 1187 and contains no mention of suicide.\textsuperscript{138} However, Henry de Bracton's treatise, written between 1220 and 1260, largely incorporates the Roman law on suicide as presented in the Digest of the Emperor Justinian.\textsuperscript{139} Bracton charged that "[i]n the same way, in which a person may commit a felony by killing another, so he may commit a felony by killing himself, which felony indeed is said to be committed against himself."\textsuperscript{140} If one is accused of a felony and is "conscious of his crime and afraid of being hanged or of some other punishment, he has slain himself, and the inheritance shall be an escheat of the lords. But if he has through phrensy or impatience of grief or by misadventure, it shall be otherwise."\textsuperscript{141} Bracton reiterated the Roman view that suicide was not punished because of any intrinsic "wickedness" of the deed: "[O]f those who... have slain themselves, let their goods be confiscated, that is the goods of those who have brought upon themselves the guilt of death, as if they were guilty of a crime for which they would

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\textsuperscript{131} See WILLIAMS, supra note 18, at 258 (stating that pagan practice intruded into Christian philosophy).
\textsuperscript{132} Id. at 258-59.
\textsuperscript{133} Id. at 259.
\textsuperscript{134} Id.
\textsuperscript{135} Id. at 259.
\textsuperscript{136} See WILLIAMS, supra note 18, at 259. See also ST. JOHN-STEVAS, supra note 96, at 233 (stating purpose was to prevent ghost from returning to earth).
\textsuperscript{137} WILLIAMS, supra note 18, at 259; see also Morgan et al., supra note 125, at 7 n.33 (explaining superstitious basis for burial of suicide).
\textsuperscript{138} Marzen et al., supra note 10, at 57.
\textsuperscript{139} WILLIAMS, supra note 18, at 261-62 (describing Bracton's treatment of suicide as "Romanizing" the general rules).
\textsuperscript{140} 2 HENRiCl DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 505 (Sir Travers Twiss ed., Longman & Co. 1879).
\textsuperscript{141} 2 id. at 351.
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be condemned to death or banishment."\textsuperscript{142} Elsewhere, however, Bracton introduced the innovation that the personal property of a \textit{felo de se} could be forfeited even if his real property was not.\textsuperscript{143} Thus, one who killed himself in order to escape felony conviction lost his entire estate, but "if any one from weariness of life or impatience of pain has slain himself, he may have a successor, and such a person does not lose his inheritance, but let his movable goods only be confiscated."\textsuperscript{144} Finally, Bracton provided that no penalty would attach to the \textit{felo de se} born out of insanity, for such persons could not commit felony \textit{de se}.\textsuperscript{145}

Three English legal treatises, \textit{Fleta}, \textit{Britton}, and and Andrew Horn's \textit{Mirror of Justices}, were written between 1290 and 1292.\textsuperscript{146} These treatises did little more on the subject of suicide than to restate Bracton in slightly different terms.\textsuperscript{147}

The earliest statement of the rationale for the legal prohibition of suicide was afforded by the Court of King's bench decision of \textit{Hales v. Petit} in 1561-1562.\textsuperscript{148} Accordingly, suicide

\begin{quote}
is an offence against nature, against God, and against the King. Against nature, because it is contrary to the rules of self-preservation, which is the principle of nature, for every thing living does by instinct of nature defend itself from destruction, and then to destroy one's self is contrary to nature, and a thing most horrible. Against God, in that it is a breach of His commandment, thou shalt not kill; and to kill himself, by which act he kills in presumption his own soul, is a greater offence than to kill another. Against the King in that hereby he has lost a subject, and . . . he being the head has lost one of his mystical members. Also he has offended the King, in giving such an example to his subjects, and it belongs to the King, who has the government of the people, to take care that no evil example be given them, and an evil example is an offence against him.\textsuperscript{149}
\end{quote}

The rationale of a law articulated by a court is of paramount concern, if the law is to have any binding force beyond blind adherence to precedent. Thus, the court's holding that suicide is an offense against nature, against God and against the King will now be reviewed.

The assertion that suicide violates a fundamental law of nature\textsuperscript{150} coincides with Aquinas' argument of the same design discussed ear-

\textsuperscript{142} 2 \textit{id.} at 507.
\textsuperscript{143} 2 \textit{id.}
\textsuperscript{144} 2 \textit{id.}
\textsuperscript{145} 2 \textit{Bracton, supra note 140, at 507-09.}
\textsuperscript{146} Marzen et al., \textit{supra} note 10, at 59-60.
\textsuperscript{147} See \textit{id.} at 59 (stating \textit{Fleta} restated \textit{Bracton} in more cohesive terms).
\textsuperscript{148} 75 Eng. Rep. 387 (1562).
\textsuperscript{149} \textit{Id.} at 400.
\textsuperscript{150} \textit{Id.}
RIGHT TO SELF-DIRECTED DEATH

While every living thing appears to instinctively defend itself from destruction, this generalization hardly compels a rude prohibition of suicide. Even if this observation is assimilated into the Thomistic belief that self-preservation is the imprint of Divine Law upon the rational creature, it is nevertheless only one of the natural laws exemplified through instinct. Other innate propensities which seemingly evince natural law canons include the tendency to preserve bodily integrity and the desire to maintain human dignity. Yet situations often arise in which these various natural laws come into conflict; am I to preserve my being to the cost of all else? Furthermore, whatever natural laws are imprinted upon the rational creature are not spelled out in unambiguous terms; a certain amount of reason and common sense is required in the interpretation of any law.

The moralistic argument that suicide violates one of God's commandments was first asserted by Augustine in The City of God. Thus, it is susceptible to the same objections that could be launched against Augustine's stance discussed earlier. In neither the Old nor the New Testament can one find support for this argument. More-

151 See supra notes 117-20 and accompanying text.
153 Id. at 1-42; Hadley Arkes, That 'Nature Herself Has Placed in Our Ears a Power of Judging': Some Reflections on the 'Naturalism' of Cicero, in Natural Law Theory 264 (Robert P. George ed., 1992) ("[C]earing to be cannot be chosen as good.").
154 Arkes, supra note 153, 264-65; Lisa Sowle Cahill, A 'Natural Law' Reconsideration of Euthanasia, in On Moral Medicine: Theological Perspectives in Medical Ethics 445, 450 (Stephen E. Lammers & Allen Verhey eds., 1987). Cahill, for example, has argued that there is both a positive and a negative expression of the principle of the sanctity of life to be found in Aquinas. Id. at 445. Whereas the negative expression is typically cast in terms of prohibiting the direct killing of an innocent person, the positive "principle of totality" proclaims the proper subordination of a part to the good of the person as a whole. Id. Since Catholic natural law teaching provides a strong basis for describing human personhood as a totality comprised of both spiritual and physical aspects, see, e.g., Pope Pius XII, Mystic Corporis Christi: Encyclical of Pope Pius XII on the Mystical Body of Christ (June 29, 1943), reprinted in 4 The Papal Encyclicals 225 (Claudia Carleen ed., McGrath Publishing 1981), it is clear that biological existence is never a preeminent good to be valued at all costs. Thus, even voluntary euthanasia may constitute a legitimate moral option. Cahill, supra at 450 ("Deliberately-caused death is not so great an evil that it can never be outweighed by greater goods."); see also McCartney, supra note 1, at 15 (Catholic tradition recognizes right to refuse medical treatment).
156 Saint Augustine, The City of God 55-56 (Vernon J. Bourke ed. & Gerald G. Walsh et al. trans., 1958). The commandment "Thou shalt not kill" is interpreted as prohibiting suicide because it does not reference thy neighbor as do the commandments aimed solely at others. Id.
157 See supra notes 106-20 and accompanying text.
158 Karen Lebacqz & H. Tristam Engelhardt, Jr., Suicide, in Death, Dying and Euthanasia 669, 674 (Dennis J. Horan & David Mall eds., 1977). There is no "explicit condemnation
over, a purely religious prohibition could not survive constitutional scrutiny. The Establishment Clause of the First Amendment\(^{159}\) erected a "wall of separation between church and state\(^{160}\) which estops ecclesiastical concerns from intruding into secular institutions.\(^{161}\)

The argument that suicide deprives the King of one of his mystical members\(^{162}\) is redolent of the Thomistic-Aristotelian assertion that suicide treats the state unjustly.\(^{163}\) While such feudal notions may have had considerable impact during the Middle Ages and early Renaissance, the entire American constitutional scheme rebels at the thought that the interests of the individual are somehow subservient to the needs of the community. A free society exists for the individual, not the converse.\(^{164}\)

The rationale advanced in *Hales v. Petit* for the prohibition of suicide, that the King must not perpetrate an evil example to his subjects,\(^{165}\) is worthy of consideration. This admonition taken as a statement concerning the educative or deterrent functions of the law, has merit. The law should theoretically educate the public as to what types of behavior will not be condoned. It should deter violations of that code by imparting a certain fear of punishment to the perspective wrongdoer. Suicide, however, is peculiar from all other crimes in one pertinent respect: apart from whatever "punishment" can be inflicted upon a suicide post mortem, the *felo de se* is beyond all legal sanction.\(^{166}\) Thus, while

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\(^{159}\) U.S. Const. amend. I. ("Congress shall make no law respecting an establishment of religion . . . .").


\(^{161}\) See id. at 15-16 (government cannot participate in religious organizations).

\(^{162}\) *Hales*, 75 Eng. Rep. at 400 (1562).

\(^{163}\) Burgess-Jackson, *supra* note 8, at 71. People belong to a community and when they take their own life they deprive the community of their existence. *Id.* The state has an interest in preserving life because each person serves an economic purpose for the state. *Id.* (citing *Hales*, 75 Eng. Rep. at 402).

\(^{164}\) See, e.g., *Cruzan* v. Director, Mo. Dep't of Health, 497 U.S. 261, 277 (1990). In *Cruzan*, a serious auto accident rendered the petitioner incompetent with virtually no chance of recovering her cognitive faculties. *Id.* at 265. Her parents sought a court order directing the removal of the life support systems, keeping her alive. *Id.* Although the Court recognized a competent adult's Fourteenth Amendment liberty interest in not being forced to undergo unwanted medical procedures, *id.* at 278, the Court qualified this interest by stating that it must be balanced against the state's right to preserve life. *Id.* at 279. The Court held that since the petitioner was incapable of making an informed decision, Missouri can constitutionally require a heightened procedural standard of clear and convincing evidence. *Id.* at 280.

\(^{165}\) *Hales*, 75 Eng. Rep. at 400.

\(^{166}\) JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW—HARM TO OTHERS 78-95 (1984). Feinberg argues that posthumous harm can occur when a surviving interest of the deceased is violated after his death. *Id.* If the *felo de se* had a "surviving interest" in decent
legal proscriptions of suicide may well inform the public that suicide is generally met with reprobation, such edicts are not likely to serve as an effective deterrent to the would-be suicide.

Scholars played a vital role in shaping the common law. Although Sir Edward Coke, William Hawkins, and Sir Mathew Hale contributed greatly to the development of the common law, the most noteworthy contribution came from Sir William Blackstone's *Commentaries on the Laws of England*, published in 1765. It is an invaluable source of information on the common law and will forever be a part of English literature. In condemning suicide, Blackstone advances a similar rational to that espoused by the court in *Hales v. Petit*:

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 one's self.

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167 See Marzen et al., *supra* note 10, at 60-62. Sir Edward Coke's *Third Institute* of 1644 regarded suicide as a category of murder: "*Felo de se* is a man or woman, which being *compos mentia*, of *second* memory, and of the age of discretion, killeth himself, which being lawfully found by the oath of twelve men, all the goods and chattels of the party so offending are forfeited." *Sir Edward Coke, The Third Part of the Institutes on the Laws of England* 54 (1680), reprinted in Marzen et al., *supra* note 10, at 60-61. Explicitly disagreeing with Bracton, however, Coke asserted that under no circumstances did a suicide forfeit lands, but only goods and chattels. Marzen et al., *supra* note 10, at 61. William Hawkins' *A Treatise of the Pleas of the Crown*, published in 1716, mentioned that the laws of England had consistently been opposed to suicide. *Id.* (citing 1 W. HAWKINS, *A Treatise of the Pleas of the Crown* 164 (T. Leach ed., 7th ed. 1795)). In 1736, Sir Mathew Hale's *Historia Placitum Coronae* mirrored and confirmed Coke, yet added a twofold rationale for the prohibition of suicide:

No man hath the absolute interest of himself but, 1. God almighty hath an interest and propriety in him, and therefore self-murder is a sin against God. 2. The king hath an interest in him, and therefore the inquisition in case of self-murder is *felonice et voluntarie seipsum interfecit et murderarit contra pacem domini regis* (feloniously and voluntarily killed and murdered himself against the peace of the lord king).


170 *Id.* at 837.
While it is clear that "[t]he colonial American treatment of suicide was rooted deep in the English past," there was no general adoption of English law regarding suicide in the American colonies. Rather, the colonies modified or even rejected the common law depending upon circumstances of their new environment.

It has been argued that there are "two avenues by which to infer the attitude of the law toward the assistance of suicide during the period when the ninth amendment ... was submitted to the fourteen existing states and ratified by eleven of them." The initial option "is to make reference to the one source confidently known to have guided the American lawyers and judges during that era: Blackstone." The alternative approach "is to impute the later holdings of courts in the relevant states (where there have not been intervening statutes) and in some cases the judgments of treatises, to the period of which we speak." Under the latter approach and based upon the available evidence, "six to eight of the fourteen states are described as having prohibited assisting suicide at the time of the adoption of the ninth amendment."

Few of the early reported decisions and treatises announce a rationale for the criminalization of suicide. Those that do echo the types of argument advanced by the early English decision of *Hales v. Petit*. Moreover, a certain mien of religiosity can be discerned throughout many of the decisions. Indeed, "[it] is impossible to overemphasize the extent to which colonial law reflected religious doctrine. It has been said the 'the primary objective of criminal law in the prerevolutionary period was to give legal effect to the community's sense of sin and to punish those who breached the community's taboos.'"

**CONCLUSION**

The controversy in legal and ethical theory regarding the desirability of anti-suicide legislation is of recent vintage. Society's disapproval of self-destruction found expression in early social, religious and legal

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171 Burgess-Jackson, *supra* note 8, at 60.
173 Burgess-Jackson, *supra* note 8, at 60-61.
174 Marzen et al., *supra* note 10, at 72.
175 Id.
176 Id.
177 Id. at 73. These states include Connecticut, New York, Maryland, Massachusetts, North Carolina, and South Carolina. Id.
178 See notes 155-66 and accompanying text.
taboos. The inertia generated through the adherence to legal precedent caused the proscription to become firmly imbedded in the law.

Due to recent medical and technological advances which make it possible to extend human existence beyond the point where the competent individual might rationally conclude that life is no longer worth living, the sagacity of such legislation must be brought under scrutiny. Recent court decisions attest to situations in which even seriously ill, competent adults have found standards to compel the removal of life support systems to be, at times, insurmountable due to the requirements stipulated by state law.\textsuperscript{180} If the Supreme Court of the United States recognized suicide as a fundamental right, then legislation which infringed upon that right would not be permitted unless it was necessary to advance some compelling state interest\textsuperscript{181} and was narrowly drawn to provide the least restrictive means of advancing that interest.\textsuperscript{182} A constitutional right would ensure that the individual has control over the circumstances of dying. States would still be permitted to promulgate reasonable restrictions to regulate the exercise of this right and would thereby fully continue present efforts to prevent the unwarranted self-destruction of incompetents and minors; but no competent adult could be forced to remain alive to their considered detriment.

An examination of the rationale behind the legal prohibition of suicide through pertinent common law legacy reveals that the proscription is almost exclusively the result of dubious theological precedent. Nevertheless, the prohibition of suicide has been carried through the centuries on the wings of conservative prescription. Until recently there has been no reason to reexamine the taboo. But legislation which sweeps too broadly can run roughshod over the rights of individuals, and laws which flatly forbid all forms of self-destruction can inure to the detriment of seriously ill competent adults who find themselves forced to remain alive against their will and best interests. As Justice Holmes observed,

\begin{quote}
[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.\textsuperscript{183}
\end{quote}

\textsuperscript{180} See supra notes 16-18.
\textsuperscript{182} Id. at 232 (citing Shelton v. Tucker, 364 U.S. 479, 488 (1960)).
\textsuperscript{183} Justice Holmes, \textit{The Path of Law}, 10 Harv. L. Rev. 457, 469 (1897).
If there are grounds which will support an absolute prohibition of self-willed death,\textsuperscript{184} or which will prevent the establishment of the proposed constitutional right to suicide, they will have to be found elsewhere. There are no such grounds in the common law.

\textsuperscript{184} Lebacqz & Engelhardt, Jr., supra note 158, at 669-705; see generally David A.J. Richards, \textit{Constitutional Privacy, The Right to Die and the Meaning of Life: A Moral Analysis}, 22 WM. & MARY L. REV. 327, 372-403 (1981) (giving arguments which would prohibit acts inflicting death). Suicide tends to maximize evil, therefore it is wrong. Lebacqz & Engelhardt, Jr., supra note 158, at 673-680. Deontological arguments, such as suicide is unnatural, irrevocable and self-contradictory, prove equally unavailing. \textit{Id.}