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Article

Suicide: A Constitutional Right?

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I. INTRODUCTION

It is estimated that over 25,000 people now commit suicide in the United States each year, and that over 200,000 attempt it.¹ The total number of reported suicides in this country has increased slightly since 1970² with the annual rate averaging twelve suicides per population of 100,000.³ The highest rate of suicide, by far, is among white males who are eighty-five years of age or older. In comparison with other groups in this age category, suicides among white males occur about three times more often than among non-white males, ten times more often than among white females, and twenty times more often than among non-white females.⁴

Since 1970, the rate of suicide for those between the ages of fifteen and twenty-four has increased dramatically;⁵ suicide is now the third leading cause of death for persons during those youthful years.⁶ The suicide rate among those between twenty-five and thirty-four years of age and among those eighty-five or older has increased marginally,⁷ while the rate has either slightly declined or

1. M. Ahmed, *Suicide and Attempted Suicide*, 75 OHIO ST. MED. J. 73, 73 (1979).

2. From 23,480 in 1970 to 29,480 in 1983, a 23.9% increase. See generally U.S. NATIONAL CENTER FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, VITAL STATISTICS OF THE UNITED STATES (1970-1979) [hereinafter cited as VITAL STATISTICS]; PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, UNITED STATES PUB. NO. 84-1232 (1984) (including years 1980-present) [hereinafter cited as PUBLIC HEALTH SERVICE].

3. In 1970, the rate was 11.8 suicides per population of 100,000. The reported rates in succeeding years were as follows: 1971 (11.7); 1972 (12.0); 1973 (12.0); 1974 (12.1); 1975 (12.7); 1976 (12.5); 1977 (13.3); 1978 (12.5); 1979 (12.4); 1980 (11.9); 1981 (11.3); 1982 (12.4). The average rate of suicide over these twelve reported years was 12.2 suicides per average population of 100,000. VITAL STATISTICS, *supra* note 2 (cited and calculated from annual figures 1971-79); PUBLIC HEALTH SERVICE, *supra* note 2 (cited and calculated from annual figures 1980-82).

4. The average rates of suicide by age group for the eleven year period from 1970 to 1980 are as follows:

	15-24 years	25-34 years	45-54 years	65-74 years	85+ years
White Males	18.5	23.4	27.4	36.2	50.7
Non-White Males	14.1	22.5	12.7	12.6	13.8
White Females	4.8	8.6	13.1	8.9	5.0
Non-White Females	4.0	5.9	4.1	2.7	2.4

VITAL STATISTICS, *supra* note 2 (cited and calculated from annual figures 1970-79); PUBLIC HEALTH SERVICE, *supra* note 2 (cited and calculated from 1980 annual figures).

5. In 1970, the rate of suicide per population of 100,000 in the 15-24 age category was 8.8. VITAL STATISTICS, *supra* note 2 (1970). In 1980, the rate of suicide in the same age category was 12.3, an increase of forty percent. PUBLIC HEALTH SERVICE, *supra* note 2 (1980).

6. NATIONAL CENTER FOR HEALTH STATISTICS, PUB. NO. 10, 32 MONTHLY VITAL STATISTICS REPORT, (Supp.2, Feb. 17, 1984).

7. The rate of suicide per population of 100,000 in the 25-34 age category in 1970 was

remained constant in all other age categories.⁸

As one eminent psychologist recently noted:

Suicidal risk is considerably high in single, elderly, and white males; in cases of depression, chronic disabling illnesses, recent childbirth, and surgery; in persons who are unemployed, facing financial difficulties; and in persons living alone with a history of recent loss of family member, job or prestige. Incidence of suicide is high among alcoholics. Also included in high risk groups are young people . . . whose suicidal attempt is diagnosed as a suicidal gesture or a nonserious attempt and who are discharged without adequate treatment, family involvement, or follow-up.⁹

Thus, the ranks of those who attempt suicide are disproportionately filled with marginal members of our society—the aged, the poor, the ill or disabled—and with those who are isolated and lacking in personal and social support—the single or recently bereaved, the alienated and unhelped young.

II. CONTEMPORARY ADVOCACY OF SUICIDE

It is in this context that a social movement has arisen, supported by a number of philosophers and legal commentators, that regards suicide¹⁰ as neither tragic nor wrong, but as a basic human right. In the United States, the Hemlock Society has published a manual

14.1. For the same year, the rate of suicide in the 85 years or older category was 19.0. VITAL STATISTICS, *supra* note 2 (1970). In 1980, the rate of suicide per population of 100,000 people in the 25-34 age category was 16.0. For the same year, the rate of suicide in the 85 years or older category was 19.2. PUBLIC HEALTH SERVICE, *supra* note 2 (1980). The average suicide rate in 1970 was 11.6; it was 11.9 in 1980. *Id.*

8. The average rates of suicide for all other age categories in 1970 and 1980 are as follows:

	1-14 years	35-44 years	45-54 years	55-64 years	65-74 years	75-84 years
1970	0.3	16.9	20.0	21.4	20.8	21.2
1980	0.4	15.4	15.9	15.9	16.9	19.1

9. M. Ahmed, *supra* note 1, at 75.

10. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2286 (3d ed. 1969) defines suicide as "the act or an instance of taking one's own life voluntarily and intentionally: self-destruction . . . [;] the deliberate and intentional destruction of his own life by a person of years of discretion and of sound mind: *felo-de-se*." BALLENTINE'S LAW DICTIONARY 1236 (3d ed. 1969) defines it as "Death by one's own hand intentionally lifted against himself." BLACK'S LAW DICTIONARY 1286 (rev. 5th ed. 1979) defines it as "Self-destruction; the deliberate termination of one's existence." Some advocates of suicide prefer to avoid the term. "Euthanasists are repulsed by the label of 'suicide' in lieu of voluntary active euthanasia, since suicide is correlated with irrational behavior. The term 'self-deliverance' is a more accurate description of the act." D. HUMPHRY, LET ME DIE BEFORE I WAKE: HEMLOCK'S BOOK OF SELF-DELIVERANCE FOR THE DYING. 4 (2d ed. 1982). This article will employ the more generally accepted word. (WEBSTER, BALLENTINE AND BLACK contain no definition of "self-deliverance.")

describing and comparing various methods of suicide.¹¹ The society also conducts an active campaign to secure the legalization of assisted suicide.¹² Some psychiatrists have argued that the current efforts of suicide prevention centers are misguided, at least in part, and have called for such centers to facilitate rather than discourage suicide in some instances.¹³ A number of books and articles have appeared attacking the notion that society should attempt to stop or deter all suicide attempts.¹⁴

Positions such as these can spring from ethical claims directly justifying suicide, from jurisprudential claims concerning the proper role of government, or from some combination of the two. For example, some advocates of removing social sanctions against suicide and legal prohibitions against assisting suicide justify this position with the ethical premise that some suicides are virtuous, and that the law ought not prohibit what is ethically good. Others base their jurisprudential arguments either on an almost absolute respect for individual autonomy, or on a claim that the benefits of discouraging undesirable suicides are outweighed by the evils of coercion and the social burdens created by laws and policies opposing suicide.

Suicide supporters who maintain that some suicides are ethical usually claim that death can be a benefit to the individual who commits suicide¹⁵ and that suicide can sometimes benefit others by relieving them of the burden of supporting an individual who has lost the desire or ability to continue living a full life.¹⁶ Common to

11. D. HUMPHRY, *supra* note 10.

12. *Id.* There are presently no criminal laws punishing an individual who commits or attempts suicide. See *infra* appendix notes and accompanying text.

13. *Clinics that facilitate suicides foreseen by MD*, AM. MED. NEWS, June 8, 1984, at 38; *National Conference on Euthanasia*, HUM. LIFE ISSUES, Spring 1985, at 7, 8; see also T. SZASZ, *THE THEOLOGY OF MEDICINE* 82-85 (1977).

14. See, e.g., *BENEFACTANT EUTHANASIA* (M. Kohl ed. 1975); *EUTHANASIA* (A. Carmi ed. 1984); *EUTHANASIA AND THE RIGHT TO DEATH* (A.B. Downing ed. 1970); D. HUMPHRY, *supra* note 10; D. MACGUIRE, *DEATH BY CHOICE* (1973); D. PORTWOOD, *COMMON SENSE SUICIDE: THE FINAL RIGHT* (1978); B. ROLLIN, *LAST WISH* (1985); *SUICIDE: THE PHILOSOPHICAL ISSUES* (M.P. Battin & D. Mayo eds. 1980); Englehardt & Malloy, *Suicide and Assisting Suicide: A Critique of Legal Sanctions*, 36 SW. L.J. 1003 (1982); Williams, *Propagation, Modification, and Termination of Life*, in *TO LIVE AND TO DIE* 89-97 (R. Williams ed. 1973); Comment, *Voluntary Active Euthanasia for the Terminally Ill and the Constitutional Right to Privacy*, 69 CORNELL L. REV. 363 (1984).

15. See, e.g., D. HUMPHRY, *JEAN'S WAY* (1984); G. WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 277 (1957); Barrington, *Apologia for Suicide*, in *SUICIDE: THE PHILOSOPHICAL ISSUES* 90, 93 (1980).

16. See, e.g., G. WILLIAMS, *supra* note 15, at 97-99. The view that death is ethically appropriate when one is a burden on others or on society as a whole can lead to the position

both aspects of the ethical argument is a vigorous assault on the assumption, traditionally accepted by law and society,¹⁷ that all human lives are essentially and equally valuable. Instead, the "quality of life," rather than the "sanctity of human life," is considered the focus of inquiry.¹⁸ Under certain circumstances, such as age, pain, terminal illness, or inability to feel that the benefits in one's life outweigh its burdens, preserving life may be less humane and less rational than ending it.¹⁹ Similarly, preservation of one life may impact adversely on the quality of other lives. "[S]uicide or mercy killing could be the right thing to do . . . for instance," writes ethicist Joseph Fletcher, "when an incorrigible human vegetable . . . is progressively degraded while constantly eating up private or public financial resources in violation of the distributive justice owed to others."²⁰ Thus, it is claimed, when one's own life lacks sufficient quality or diminishes the quality of others' lives, suicide can be the best ethical solution; the law should not, under such circumstances, hinder those who would assist these persons in committing suicide.

The jurisprudential claim most frequently and strongly asserted by suicide proponents is rooted in the principle of personal autonomy. Society's proper role, many say, is to prevent individuals from inflicting harm on others. Societal efforts to establish standards regulating the choices of an individual that affect only herself or himself are considered exercises in unwarranted coercion.²¹ In this regard, government oversteps its role when it punishes assisted suicide, or when it attempts to prevent it through the use of force or persuasion.²² Unless one is too young to have the use of reason, or is adjudged incompetent for some reason *other* than the desire to kill oneself, the government should not interfere in the

that under at least some circumstances death is ethically mandatory, and that compulsion by the state or other individuals is justified to bring it about. See, e.g., J. FLETCHER, *HUMANHOOD: ESSAYS IN BIOMEDICAL ETHICS* 155 (1979).

17. For the longstanding acceptance of this assumption, see generally Sherlock, *Liberalism, Public Policy and the Life Not Worth Living: Abraham Lincoln on Beneficent Euthanasia*, 26 AM. J. JURIS. 47, 51-55 (1981).

18. See e.g., J. FLETCHER, *HUMANHOOD*, *supra* note 16, at 174.

19. See e.g., D. RICHARDS, *SEX, DRUGS, DEATH AND THE LAW* 221 (1982); Greenberg, *Involuntary Psychiatric Commitments to Prevent Suicide*, 49 N.Y.U. L. REV. 227, 232 (1974).

20. J. FLETCHER, *HUMANHOOD*, *supra* note 16, at 155.

21. See generally D. RICHARDS, *supra* note 19 (general exposition of autonomy theory and specific application of it to justify legal toleration of suicide); Engelhardt & Malloy, *supra* note 14, at 1005-1013 (similar argument).

22. See T. SZASZ, *supra* note 13, at 80-85.

commission of suicide, or prohibit others from assisting it.²³

Less frequently advanced is what Engelhardt and Malloy call the "public welfare" argument for removal of policy sanctions against suicide and for legalization of assisted suicide.²⁴ Under this approach, the key question is the weight of the interest of the State. For example, "in the suicide of a healthy contributing member of society the state's legitimate interest may be strong," while in circumstances "such as an aged invalid's choosing suicide rather than a protracted death involving considerable costs that would be borne by the government, suicide would be in the interest of the state."²⁵ From this perspective, society should discourage suicide only for those individuals who will, on balance, contribute materially to the public good should they survive.

Ethical and jurisprudential claims are often intertwined in both the popular and the scholarly debates, but neither set of arguments necessarily depends upon the other for support. Either, if valid, might arguably be independently sufficient to support the abolition of present social and policy sanctions against suicide and warrant decriminalization of assisted suicide.

Of these arguments, however, the implications of the autonomy principle are the broadest in scope. Under the "quality of life" argument, suicide is rational only in certain circumstances and ought to be permitted only in those circumstances, however they are to be defined. The "public welfare" argument entails similar limitations on suicide. Under the "autonomy" argument, however, the suicide of an autonomous individual for any reason, and under any circumstances, should never be prevented.²⁶ If one has an auton-

23. See D. RICHARDS, *supra* note 19, at 227; Engelhardt & Malloy, *supra* note 14, at 1005. Some suicide proponents, however, contend that those who are minors or incompetents should be granted the benefits of suicide through the exercise of substituted judgment on their behalf. See *infra* note 26 and accompanying text. Some attack the notion that it is possible to separate the incompetent from the competent, and thus believe that no interference, or at most very minimal interference with suicide attempts is justifiable on the grounds of mental illness. See T. SZASZ, *supra* note 13, at 84 (never justifiable "to treat people for their suicidal desires against their will"); Greenberg, *supra* note 19, at 243-45 (justifiable to intervene to prevent suicide attempt in progress and detain for up to twenty-four hours, but not justifiable to interfere with immediate subsequent attempt or to employ twenty-four hour detainment when anyone desirous of suicide registers intent "a short waiting period" in advance).

24. Engelhardt & Malloy, *supra* note 14, at 1020.

25. *Id.*

26. As we have noted, some autonomy adherents extend the claim to include individuals other than competent adults. See *supra* note 23. For example, at the Second National Voluntary Euthanasia Conference in February 1985, sponsored by the Hemlock Society, Dr. Allan Pollard argued, "the essence of life is the ability to choose. . . . [E]veryone has the

omy-based right to suicide, then one's motives for exercising this right are not within the scope of proper inquiry any more than one's motives for attending a particular church would be. The right could be exercised with equal legitimacy by a young man disappointed in love and an old woman afflicted with cancer.

III. THE ISSUE: A CONSTITUTIONAL RIGHT TO SUICIDE?

While suicide advocates have argued that the practice should be permitted on policy grounds, a number have also raised constitutional claims.²⁷ In general, these claims are based on the assumption that the broad autonomy principle that recognizes suicide as a basic human right has been incorporated into the United States Constitution, rendering suicide a fundamental constitutional right as well. In particular, it is contended that the criminal penalties that most states maintain against assisting suicide²⁸ violate the right of privacy contained in the fourteenth amendment.²⁹ It is argued that, because suicide is a constitutional right, laws that forbid assisting the commission of suicide can no more be constitutional than could the imposition of criminal penalties for assisting another to reach a voting booth or a place of worship.

This constitutional issue is the subject of the present article. Much of what we say will undoubtedly have implications regarding policy issues (*e.g.*, whether states *should* have laws that bar assisted suicide or provide for temporary detainment of suicidal individuals), but such questions are not the central focus of our inquiry. Rather, we are primarily concerned with whether, under the federal Constitution, states can have such laws; we are concerned with whether suicide may truly be considered a constitutional right.³⁰

right to end their life, yes, even a child." Statement by Dr. Allan Pollard, Hemlock Society's Second National Voluntary Euthanasia Conference (Feb. 8, 1985). Frances Graves said: "If we view the right to die as a human right . . . , I don't see how we can deny it to incompetents or minors without . . . making an age discrimination or discrimination against a type of illness." Statement by Frances Graves, Hemlock Society's Second National Voluntary Euthanasia Conference (Feb. 8, 1985). See also *National Conference on Euthanasia*, *supra* note 13, at 7.

27. See D. RICHARDS, *supra* note 19; SULLIVAN, *A Constitutional Right to Suicide*, in *SUICIDE: THE PHILOSOPHICAL ISSUES* 229 (M. Battin & S. Mayo eds. 1980); Comment, *Voluntary Active Euthanasia*, *supra* note 14.

28. See *infra* notes 31-34 and accompanying text.

29. See, *e.g.*, Comment, *Voluntary Active Euthanasia*, *supra* note 14, at 383. The same right may alternatively be classified as a substantive due process right under the same amendment.

30. See *Bisenius v. Karns*, 42 Wis. 2d. 42, 165 N.W.2d 377, *appeal dismissed*, 395 U.S.

A. *Acts Versus Omissions*

Proper analysis of the constitutional claim requires another scope-limiting line of demarcation. A distinction has traditionally been made between the withholding of life-prolonging medical treatment, nutrition, or hydration, and the taking of direct action to kill, as by shooting oneself with a firearm. There have been a series of decisions, primarily by state courts, that have found a constitutional right, as well as a common law right, to refuse life-sustaining treatment and, more recently, food and water.³¹ The

709 (1969), in which the Wisconsin Supreme Court, considering a challenge to a law requiring motorcyclists to wear helmets, stated:

We do not deal here with the wisdom or lack of wisdom of these . . . legislative enactments. The legislative history of these laws, in this state and others, demonstrates that they have dedicated proponents and equally dedicated opponents. The question before us is not what a legislature should do, but what the legislature can do. As has been said: "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . ."

Id. at 45, 176 N.W.2d at 378-79 (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954)).

31. See *Bartling v. Glendale Adventist Hosp.* 163 Cal. App. 3d Supp. 186, 209 Cal. Rptr. 220 (1984); *Severns v. Wilmington Medical Center*, 421 A.2d 1334 (Del. 1980); *John F. Kennedy Memorial Hosp. v. Blutworth*, 452 So.2d 921 (Fla. 1984); *Satz v. Perlmutter*, 362 So.2d 160 (Fla. Dist. Ct. App. 1978), *opinion adopted* 379 So.2d 359 (Fla. 1980); *In re L.H.R.*, 253 Ga. 439, 321 S.E.2d 716 (1984); *In re Spring*, 380 Mass. 629, 405 N.E.2d 115 (1980); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977); *In re Conservatorship of Torres*, 357 N.W.2d 332 (Minn. 1984); *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985); *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom.*, *Garger v. New Jersey*, 429 U.S. 922 (1976); *In re Storar*, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 858 (1981); *Leach v. Akron General Medical Center*, 68 Ohio Misc. 1, 426 N.E.2d 809 (1980); *In re Yetter*, 62 Pa. D. & C.2d 619 (1973); *In re Guardianship of Hamlin*, 102 Wash. 2d 810, 689 P.2d 1372 (1984); *In re Colyer*, 99 Wash. 2d 914, 660 P.2d 738 (1983); *State ex rel White v. Narick*, 292 S.E.2d 54 (W. Va. 1982).

In two of these decisions, the highest courts of New York and New Jersey have held that it is unnecessary to reach the question of a constitutional privacy right, since the relief sought could be justified on the narrower ground of a common law right. *Storar*, 52 N.Y.2d at 376-77, 420 N.E.2d at 70, 438 N.Y.S.2d at 272-73; *Conroy*, 98 N.J. at 348, 486 A.2d at 1223. The other decisions have based their conclusions on what they have held to be a constitutional right of privacy.

In the majority of these cases, the patient has been incompetent—usually, although not always in a comatose state. *But Bartling*, (conscious man with lung cancer, emphysema and other ailments refusing respirator) *Yetter* (otherwise healthy woman with breast discharge refusing biopsy); *White* (competent prisoner starving himself to death). A choice to withhold life support, therefore, has either been inferred from the patient's previously expressed wishes, see e.g., *Storar*, 52 N.Y.2d at 371-72, 379-80; 420 N.E.2d at 68, 70; 438 N.Y.S.2d at 270, 274 (implementing previously expressed wishes of Brother Fox), or exercised for the patient through the "substituted judgment" of the court or the patient's relatives, see, e.g., *Saikewicz*, 373 Mass. at 748-53, 370 N.E.2d at 429-31.

courts deciding these cases have recognized that the withholding of life-prolonging care will, in all probability, lead to the patient's death.³² Indeed, the right they affirm has sometimes been characterized as a "right to die."³³ Nevertheless, almost all of these decisions have drawn an explicit distinction between the sanctioned withholding of care and suicide; indeed, nearly all have affirmed the existence of a compelling state interest in the prevention of suicide.³⁴ The articulation of this position by the New Jersey Supreme Court in *In re Conroy*³⁵ is typical of the distinction the courts have drawn:

[D]eclining life-sustaining medical treatment may not properly be viewed as an attempt to commit suicide. Refusing medical intervention merely allows the disease to take its natural course; if death were eventually to occur, it would be the result, primarily, of the underlying disease, and not the result of a self-inflicted injury.³⁶

Thus, court decisions warranting withholding of treatment do not serve as relevant precedents for the recognition of a constitutional right to suicide. Failure to provide life-preserving treatment is conceived to be fundamentally different from intended self-injury.

The law has traditionally distinguished acts and omissions on pragmatic jurisprudential grounds. This is true of legal attitudes toward homicide as well as toward suicide. For example, one who shoots another will generally be guilty of homicide. If, however, a physician passes the scene of an automobile accident without stopping to offer assistance, he or she commits no crime—even if the physician knows that the probability is great that the victim will

32. However, Karen Ann Quinlan remained alive for nearly nine years after her respirator was removed. *Quinlan Dies—Decade in Coma*, USA Today, June 12, 1985, at 1A, cols. 2-5.

33. See, e.g., *Yetter*, 62 Pa. D. & C.2d at 623.

34. See *Bartling*, 163 Cal. App. 3d at ___, 209 Cal. Rptr. at 225-26; *In re Severns*, 425 A.2d 156, 158 (Del.Ch. 1980); *Bludworth*, 452 So.2d at 924; *Perlmutter*, 362 So.2d at 162-63; *Spring*, 380 Mass. at 641, 405 N.E.2d at 123; *Saikewicz*, 373 Mass. at 743 n.11, 370 N.E.2d at 426 n.11 (1977); *Torres*, 357 N.W.2d at 339; *Conroy*, 98 N.J. at 348-51, 486 A.2d at 1223-24; *Quinlan*, 70 N.J. at 54-55 n.9, 355 A.2d at 670 n.9; *Storar*, 52 N.Y.2d at 377 n.6, 420 N.E.2d at 71 n.6, 438 N.Y.S.2d at 273 n.6; *Leach*, 68 Ohio Misc. at ___, 426 N.E.2d at 815; *Yetter*, 62 Pa. D. & C.2d at 623; *Colyer*, 99 Wash.2d at 123, 660 P.2d at 743; *contra State ex rel White v. Narick*, 292 S.E.2d at 58 n.3 ("Prevention of suicide is a tenet of our society, but inroads are being made upon it by terminally ill patients who refuse medical treatment."); *In re Caulk*, 125 N.H. 226, 232, 480 A.2d 93, 96-97 (1984) (prisoner's self-starvation tantamount to suicide).

35. 98 N.J. 321, 486 A.2d 1209 (1985).

36. *Id.* at 351, 486 A.2d at 1224 (citations omitted) (quoting, Note, *The Tragic Choice: Termination of Care for Patients in a Permanent Vegetative State*, 51 N.Y.U.L. REV. 385, 310 (1976)).

die without medical help.³⁷

The legal distinction between act and omission is given content by *Prosser and Keeton on Torts*:

In the determination of the existence of a duty, there runs through much of the law a distinction between action and inaction . . . [T]here arose very early a difference, still deeply rooted in the law of negligence, between "misfeasance" and "nonfeasance"—that is to say, between active misconduct working positive injury to others and passive inaction or a failure to take steps to protect them from harm. The reason for the distinction may be said to lie in the fact that by "misfeasance" the defendant has created a new risk of harm to the plaintiff, while by "nonfeasance" he has at least made his situation no worse, and has merely failed to benefit him by interfering in his affairs.³⁸ . . .

Liability for "misfeasance" . . . may extend to any person to whom harm may reasonably be anticipated as a result of the defendant's conduct, or perhaps even beyond; while for "nonfeasance" it is necessary to find some definite relation between the parties, of such a character that social duty justifies the imposition of a duty to act.³⁹

A forceful affirmation of this distinction is found in an often cited 1897 decision of the Supreme Court of New Hampshire:

There is a wide difference—a broad gulf— . . . in law, between causing and preventing an injury. . . . The duty to do no wrong is a legal duty. The duty to protect against wrong is, generally speaking and excepting certain intimate relations in the nature of a trust, a moral obligation only, not recognized or enforced by law.⁴⁰

37. Feinberg, *The Moral and Legal Responsibility of the Bad Samaritan*, 3 CRIM. JUST. ETHICS 56, 57 (1984) ("[T]he English-speaking countries ['] . . . common law has never imposed liability either in tort or in criminal law for failures to rescue (except where there exist *special duties* to rescue, as for example, those of a paid lifeguard toward the specific persons who bathe on his stretch of beach. . . .") (emphasis in original). Feinberg criticizes what he recognizes as the traditional and current state of the law in this regard.

38. W. PROSSER, *THE LAW OF TORTS* § 56 at 373-74 (5th ed. 1984).

39. *Id.*

40. *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 261, 44 A. 809, 811 (1897). Although the application of the quoted principle to the facts of *Buch* has since been repudiated (it overturned damages awarded against a mill-owner whose dangerous machinery injured a trespassing child, and that holding was overruled by *Castonguay v. Company*, 83 N.H. 1, 136 A. 702 (1927)), it is still cited as epitomizing the traditional approach to the distinction between the act and omission. See, T. GREY, *THE LEGAL ENFORCEMENT OF MORALITY* 158-59 (1983).

The classic defense of the act/omission distinction may be found in T.B. MACAULAY, *Notes on the Indian Penal Code*, 7 WORKS 493-97 (1897); see also Binavince, *The Ethical Foundation of Criminal Liability*, 33 FORDHAM L. REV. 1, 11 (1964); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 197-201 (1973). This distinction is applied to the difference between suicide and refusal of medical treatment by Byrn, *Compulsory Lifesaving Treatment for the Competent Adult*, 44 FORDHAM L. REV. 1, 16-19 (1975).

In *Erickson v. Dilgard*,⁴¹ a New York court, considering the argument that a woman's refusal of a blood transfusion was tantamount to suicide, relied on the traditional distinction between act and omission in rejecting the claim. The court noted that under such circumstances, medical diagnosis and treatment are always tentative and questionable. The patient has the ultimate right to weigh the risks of treatment alternatives, explained the court, regardless of what a physician's recommendations may be,⁴² and the exercise of this right bears no necessary relation to a death wish or "right to die."⁴³ As Robert Byrn observed in criticizing the reasoning of the *In re Yetter*,⁴⁴ which held that Mrs. Yetter's right to forego treatment was an exercise of her right to die, "Mrs. Yetter did not assert any such right In fact, Mrs. Yetter refused treatment precisely because she feared she would die from it."⁴⁵

Some ethicists would say that it is possible—even probable—that in particular instances, in which one rejects treatment, the intent is the same as that of one who commits suicide: to die soon through one's own choice. From the point of view of these ethicists, therefore, both may be similarly blameworthy.⁴⁶ The law, however, does not mirror ethics in this regard. Although there are exceptions, in general the law looks to outward conduct, not inner motivation; it punishes acts, not thoughts. All else being equal, it ill behooves a non-totalitarian society to police thoughts by inquiring into the motivations of all who choose a course which can be pursued for either licit or illicit reasons. Moreover, in view of the vast number and almost infinite variety of fact situations in which competent adults make choices concerning medical treatment, it would be an administrative impossibility to regulate such choices.

41. 44 Misc. 2d 27, 252 N.Y.S.2d 705 (Sup. Ct. 1962).

42. Under Anglo-American law, it is axiomatic that a physician must first obtain the patient's consent before undertaking any treatment (unless, as in an emergency, that consent is presumed). As Justice Cardozo stated in a classic opinion on the subject, "[A] surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914). Since at least 1957, American law has required that this consent be informed. As a result, reasonable disclosure must be made to the patient of the nature and probable consequences of the proposed treatment. See *Salgo v. Stanford University Board of Trustees*, 154 Cal. App. 2d 560, 317 P.2d 170 (Ct. App. 1957) (landmark case introducing the principle); see generally A. ROSOFF, *INFORMED CONSENT* 4 (1981).

43. *Erickson*, 44 Misc. 2d at 28, 252 N.Y.S.2d at 706. See also *In re Guardianship of Ingram*, 102 Wash. 2d 827, 689 P.2d 1363 (1984).

44. *Yetter*, 62 Pa. D. & C.2d 619.

45. Byrn, *supra* note 40, at 5.

46. See e.g., J. FLETCHER, *supra* note 16, at 156; T. GREY, *supra* note 40, at 159-60.

Sound jurisprudential reasons, therefore, support the distinction that now exists in the law between the foregoing of medical treatment, which the law condones, and the commission of suicide, which it presently discourages. Having thus explored what suicide is and is not, we now examine the arguments for and against a constitutional right to suicide.

B. *Is There A Constitutional Right to Autonomy?*

Those who advocate a constitutional right to commit suicide grounded in the right to privacy (or in substantive due process) generally do so by construing that right as one which guarantees personal autonomy.⁴⁷ By this account, the right to privacy essentially incorporates John Stuart Mill's view that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."⁴⁸ Advocates of this position may admit that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics,"⁴⁹ but apparently believe that it does enact Mr. John Stuart Mill's *On Liberty*.⁵⁰ This view has been ably advocated in scholarly publications,⁵¹ but its legitimacy and desirability are far from unanimously affirmed. In fact, a variety of competing models of constitutional jurisprudence have been proffered.⁵²

For present purposes, however, it is enough to observe that the Supreme Court has not identified the right of privacy with the pure autonomy advocated by Mill. In *Paris Adult Theatre I v. Slaton*,⁵³ the Court stated "for us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation, is a step we are unable to take."⁵⁴ In a footnote, the Court listed a variety of areas in which it considered such conduct appropriately prohibited; among them it

47. See, e.g., DAVID RICHARDS, *SEX, DRUGS, DEATH AND THE LAW* 29-34, 61-63, 185-89, 245-47, 251-54, 277 (1982); Note, *Voluntary Active Euthanasia for the Terminally Ill and the Constitutional Right to Privacy*, 69 CORNELL L. REV. 363, 369-74 (1984).

48. J. MILL, *ON LIBERTY* 13 (C. Shields ed. 1956).

49. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

50. The comparison is made in P. BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 798 (1975). See *In re Caulk*, 480 A.2d 93, 99-100, (N.H. 1984) (Douglas, J., dissenting) (In support of upholding a constitutional right to starve oneself to death, Justice Douglas relies upon a quotation from J. MILL, *ON LIBERTY*).

51. See generally P. BREST, *supra* note 50, at 798.

52. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

53. *Id.*

54. *Id.* at 68 (Footnotes omitted).

included "constitutionally unchallenged laws against . . . suicide" ⁵⁵

Similarly, in *Roe v. Wade*,⁵⁶ noting that in connection with the abortion decision "a State may properly assert important interests in safeguarding health, in maintaining medical standards,"⁵⁷ the Court remarked, "[I]t is not clear to us that the claim asserted by some . . . that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions."⁵⁸ Evidently, the Court did not consider the basis for the right to privacy to be autonomy.

C. *The Basis of the Right to Privacy*

Perhaps the most explicit theoretical formulation of the right to privacy given by the Supreme Court was articulated in *Whalen v. Roe*.⁵⁹

The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.⁶⁰

Relevant in this context, of course, is the second interest: "independence in making certain kinds of important decisions." As noted by the *Whalen* Court, "[in] *Paul v. Davis* . . . the Court characterized these decisions as dealing with 'matters relating to marriage, procreation, contraception, family relationships, and child rearing and education.'" ⁶¹

In *Roe v. Wade*, the Court, apparently gleaning a determinative principle from its previous decisions concerning the right to privacy, held, "These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of

55. *Id.* at 68 n.15. Accordingly, the Court has summarily affirmed a decision upholding the constitutionality of laws prohibiting homosexual conduct. *Doe v. Commonwealth's Attorney for the City of Richmond*, 425 U.S. 901 (1976), *aff'g*, 409 F. Supp. 1199 (E.D. Va. 1975). On November 4, 1985, the Supreme Court granted certiorari in *Bowers v. Hardwick*, No. 85-140, 54 U.S.L.W. 3309 (Nov. 5, 1985) to review the Eleventh Circuit's holding that the right to privacy covers consensual homosexual conduct.

56. 410 U.S. 113 (1973).

57. *Id.* at 154. These are interests an autonomy theorist would certainly regard as paternalistic. Indeed, such is the basis of the criticism of *Roe* in Erickson, *Women and the Supreme Court: Anatomy is Destiny*, 41 BROOKLYN L. REV. 209 (1974).

58. 410 U.S. at 154.

59. 429 U.S. 589 (1977).

60. *Id.* at 598-600 (citations omitted).

61. *Id.* at 600 n.26, (quoting *Paul v. Davis*, 424 U.S. 693, 713 (1976)).

ordered liberty' . . . are included in this guarantee of personal privacy."⁶² In *Griswold v. Connecticut*,⁶³ the first Supreme Court case to explicitly enunciate a "right of privacy," Justice Goldberg, joined in his concurrence by two other members of the Court, stated:

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental."⁶⁴

Justice Powell, writing for four members of the Court in *Moore v. City of East Cleveland*,⁶⁵ opined, "Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful respect for the teachings of history [and] solid recognition of the basic values that underlie our society."⁶⁶

Indeed, in its opinions first finding certain rights to be within or without the scope of the constitutional right of privacy (or of substantive due process), the United States Supreme Court has characteristically resorted to what Justice Powell called "an approach grounded in history."⁶⁷

For example, in *Meyer v. Nebraska*,⁶⁸ the Court declared that "the liberty guaranteed . . . by the Fourteenth Amendment" is "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."⁶⁹ Thus the Court, following a historical analysis, concluded, "The American people have always regarded education and acquisition of knowledge as matters of supreme importance The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare."⁷⁰ This historical finding was the basis for the Court's conclusion that a teacher's right to teach a foreign language and the right of parents to engage a foreign language

62. *Roe*, 410 U.S. at 152 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

63. 381 U.S. 479 (1965) (Goldberg, J., concurring).

64. *Id.* at 493 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

65. 431 U.S. 494 (1977) (Powell, J.).

66. *Id.* at 503. Justice Stevens, concurring in the judgment, began his independent analysis with an historical proposition: "Long before the original States adopted the Constitution, the common law protected an owner's right to decide how best to use his own property." *Id.* at 513 (Stevens, J., concurring).

67. *Id.* at 504 n.12.

68. 262 U.S. 390 (1923).

69. *Id.* at 399.

70. *Id.* at 400.

teacher to instruct their children "are within the liberty of the Amendment."⁷¹

Similarly, the *Griswold* Court, recognizing the rights of married people to use contraceptives, stated, "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system."⁷² In striking down an anti-miscegenation statute in *Loving v. Commonwealth of Virginia*⁷³, the Court stated, "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."⁷⁴ Significantly, nearly half of the pages of the Court's opinion in *Roe v. Wade*⁷⁵ are devoted to a survey of societal and legal attitudes toward abortion from antiquity to the contemporary era.⁷⁶ The Court concluded,

[a]t common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today.⁷⁷

It was this historical conclusion that evidently persuaded the Court that abortion was a time treasured liberty which the framers of the fourteenth amendment at least implicitly held to be fundamental.⁷⁸

71. *Id.*

72. *Griswold*, 381 U.S. at 486.

73. 388 U.S. 1 (1967). *See also* *Wisconsin v. Yoder*, 406 U.S. 205 (1972) in which the Court, in recognizing the right of Amish parents to keep their children out of school, concluded that its holding was supported by the strong tradition in "the history and culture of western civilization," *id.* at 232, of deferring to parental decisionmaking concerning childrearing, an attitude the Court found "established beyond debate as an enduring American tradition." *Id.* Another example of the Court taking a historical approach to establish the content of constitutional rights can be found in *Moore v. City of East Cleveland*, where the plurality stated, "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition," and accordingly invalidated a zoning ordinance that prohibited an extended family from living in the same house. 431 U.S. at 503.

74. *Loving*, 388 U.S. at 12.

75. 410 U.S. 113 (1973).

76. *Id.* at 129-52.

77. *Id.* at 140.

78. *Id.* at 117, 158. The authors do not intend to imply that they agree with *Roe's* historical and legal conclusions. Indeed, it is noteworthy that a major theme of the considerable scholarly criticism that has been directed at *Roe* has been an attack on the adequacy of its historical analysis. *See, e.g., id.* at 174 (Rehnquist, J. dissenting); S. KRASSON & W. HOLLBERG, *THE LAW AND HISTORY OF ABORTION: THE SUPREME COURT REFUTED* (1984); Dellapena, *The History of Abortion: Technology, Morality, and Law*, 40 U. PITT. L. REV. 359, 424 (1979); Epstein, *Substantial Due Process by Any Other Name*, 1973 SUP. CT. REV. 159,

To determine whether suicide should also be deemed a constitutionally protected liberty, therefore, we must determine whether it is "so rooted in the traditions and conscience of our people as to be ranked as fundamental."⁷⁹ To do this, we must attempt a comprehensive survey of the attitude toward suicide in the history of western civilization, paying particular attention to England and to the United States.

IV. HISTORICAL ATTITUDES TOWARD SUICIDE

Suicide is an issue that has concerned all cultures,⁸⁰ but the attitude of ancient primitive societies toward suicide is a matter of controversy. Most seem to have regarded it with horror that was often associated with fear of the evil spirits it was believed to set loose.⁸¹ Some anthropologists who have studied contemporary "primitive" cultures have found that suicide met with general condemnation among them;⁸² others document instances of traditionally sanctioned suicides that expiate an impropriety or protest an affront to honor.⁸³ At least some ancient and primitive cultures tolerated or encouraged "altruistic suicide."⁸⁴ In ancient China and India, for example, the "suttee," in which a widow leapt onto the burning funeral pyre of her deceased husband, was widely practiced.⁸⁵ It is clear, however, that the roots of the Western Tradition, in which the American constitutional order is firmly embedded spring primarily from ancient Judaic, Greek, and Roman cultures.

A. Ancient Judaic Culture

There is no Old Testament passage which can be clearly understood as offering explicit judgment on the ancient Judaic view of the morality of suicide.⁸⁶ Indeed, it contains no expression in Aramaic, Hebrew, or Greek that is equivalent to the English term "su-

167.

79. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

80. Burgess-Jackson, *The Legal Status of Suicide in Early America: A Comparison with the English Experience*, 29 WAYNE L. REV. 57, 59 (1982).

81. R. FEDDEN, *SUICIDE: A SOCIAL AND HISTORICAL STUDY* 27-48 (1938).

82. La Fontaine, *Anthropology*, in *A HANDBOOK FOR THE STUDY OF SUICIDE* 77-91 (S. Perlin ed. 1975).

83. B. MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* 78, 94-98 (4th ed. 1947).

84. *Id.* at 78-79.

85. Farberow, *Cultural History of Suicide*, in *SUICIDE IN DIFFERENT CULTURES* 1, 3-4 (N. Farberow ed. 1975).

86. N. ST. JOHN-STEVAS, *THE RIGHT TO LIFE* 58 (1964).

icide" as a distinct cause of death.⁸⁷

The Old Testament, including the Apocrypha, lists only eight cases that might be considered as instances of suicide; the Pentateuch contains none. Abimelech committed suicide to escape the disgrace of being slain by a woman;⁸⁸ Samson destroyed the Philistines and himself by pulling down a Philistine temple.⁸⁹ Saul, when all hope of victory was lost, died by falling on his sword;⁹⁰ Ahithophel hanged himself when his counsel was refused.⁹¹ Zimri burned himself in the royal citadel, apparently as a self-imposed judgment for his sins;⁹² Hannah, the mother of seven sons who were tortured and martyred for refusing to eat pork, threw herself on their funeral pyre.⁹³ Ptolemy, a Syrian official who lost respect because of his leniency toward the Jews, poisoned himself;⁹⁴ Razis chose to commit suicide rather than fall prey to his enemies.⁹⁵

With the exception of Samson, none of the eight who died by suicide are presented as heroes. Abimelech and Zimri are presented as evil rulers whose conduct was displeasing to the God of Israel. Zimri is said to have "died in his sins . . . doing evil before the Lord."⁹⁶ Saul and Ahithophel were both enemies of David, who would become known as the greatest of Israel's kings. Saul, the Lord's anointed king in his youth, died after turning away from God for many years, and slaying many innocent people in his attempts to kill David. Ahithophel committed suicide in the course of an unsuccessful effort to betray and depose King David.⁹⁷

Only Samson's suicide is arguably heroic. The writer of Judges notes "[t]hose [Philistines] he killed at his death were more than those he had killed during his lifetime."⁹⁸ As with the other Old Testament suicides, the nature of Samson's act is neither praised nor condemned, but only Samson among the six is described as a man whose life was, on the whole, pleasing to God. Samson's pri-

87. Daube, *The Linguistics of Suicide*, 1 PHIL. & PUB. AFF. 387-437 (1972). Even in English, the term, derived from the Latin *suicidium*, "to kill oneself," was not used until 1651. Farberow, *supra* note 85, at 1.

88. *Judges* 9:54.

89. *Judges* 16:30.

90. 1 *Samuel* 31:4.

91. 2 *Samuel* 17:23.

92. 1 *Kings* 16:18.

93. 2 *Maccabees* 7:1-42.

94. 2 *Maccabees* 10:113.

95. *Id.* at 14:41.

96. 1 *Kings* 16:18, 19.

97. 2 *Samuel* 17:19-23.

98. *Judges* 16:30.

mary intent seems to have been the destruction of the Philistines, the arch-enemies of his people. Yet he knows that in destroying them he will also cause his own death, and he gains the strength to commit the act after beseeching his God. 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.

Razis, like Samson, is seen as a good man.⁹⁹ Yet Razis' suicide, though dramatized, is hardly glorified:

Now as the multitude sought to rush into his house and to break open the door and to set fire to it, when he was ready to be taken, he struck himself with his sword. Choosing to die nobly rather than to fall into the hands of the wicked and to suffer abuses unbecoming his noble birth.

But whereas through haste he missed of giving himself a sure wound, and the crowd was breaking in the doors, he ran boldly to the wall and manfully threw himself down to the crowd. But they quickly making room for his fall, he came upon a place where there was no building and as he had yet breath in him, being inflamed in mind, he arose and while his blood ran down with great stream and he was grievously wounded, he ran through the crowd.

And standing upon a steep rock, when he was now almost without blood, grasping his bowels with both hands, he cast them upon the throng, calling upon the Lord of life and spirit to restore these to him again. And so he departed this life.¹⁰⁰

Evidently, the suicide assister in the time of King David was not excused by the suicidal intent of the deceased. For example, King David unhesitatingly orders the death of a young man who claims to have killed Saul at Saul's own request and with the belief that Saul was terminally ill. The young man asserts:

"[King Saul] said to me: Stand over me, and kill me. For anguish is come upon me, and as yet my whole life is in me."

So standing over him, I killed him; for I knew that he could not live after the fall

And David said to him: Why did you not fear to put out your hand to kill the Lord's anointed?

And David, calling one of his servants, said: "Go near and fall upon him." And he struck him so that he died.

And David said to him: "Your blood be upon your own head. For your own mouth has spoken against you saying: I have slain the Lord's anointed."¹⁰¹

Some authors believe that suicide may have been a relatively

99. 2 *Maccabees* 14:41-46.

100. *Id.*

101. 2 *Samuel* 1:9, 10, 14-16.

rare phenomenon in Biblical times.¹⁰² It has been suggested that a cultural prohibition existed toward suicide "because it represented a dangerous form of spilling blood, a loss of community control over the blood of a tribal member, and the possibility of an unattended corpse in the wilderness."¹⁰³ Choron states that "those who did commit suicide were considered deranged, and no sanctions were taken against suicide."¹⁰⁴ Nevertheless, according to Farberow, "[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."¹⁰⁵ The infrequency of suicide among the Hebrews, however, was most probably due to their religious creed's positive emphasis on the value of life and the special providence of God.¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸ After the exile, prohibitions of suicide were included in the Rabbinic and Talmudic writings, expressed in stories and in mourning and funeral sanctions.¹⁰⁹

B. *Ancient Greco-Roman Culture*

Among the ancient Greeks, the earliest reference to suicide is found in the poems of Homer. In his writings, no attitude of condemnation is expressed toward suicide, and the suicides mentioned are of a heroic rather than melancholy nature.¹¹⁰ During this "He-

102. See M.P. BATTIN, *ETHICAL ISSUES IN SUICIDE* 31 (1982).

103. Hankoff, *Judaic Origins of the Suicide Prohibition*, in *SUICIDE: THEORY AND CLINICAL ASPECTS* 6 (1979).

104. J. CHORON, *SUICIDE* 13-14 (1972). See also ST. JOHN-STEVAS, *supra* note 86 at 59.

105. Farberow, *supra* note 85, at 4.

106. N. ST. JOHN-STEVAS, *supra* note 86, at 59.

107. F. JOSEPHUS, *THE JEWISH WAR* bk. 3, ch. 8 (London 1851), *relevant portions reprinted* in N. GLATZER, *JERUSALEM AND ROME* 283-90 (1960).

108. Farberow, *supra* note 85, at 4.

109. BATTIN, *supra* note 102, at 32.

110. Mair, *Suicide*, 12 *ENCYCLOPEDIA OF RELIGION AND ETHICS* 26-27 (J. Hastings ed.

roic Age" of the Greeks, there appears to have been a particular enthusiasm for life; suicide seems to have been an exceptional event.¹¹¹ While it was not considered an offense against the law, both Thebes and Athens denied funeral privileges to suicides, and it is likely that certain religious sanctions were imposed on attempted suicides.¹¹²

The only clear reference to suicide found among the Pre-Socratic philosophers comes to us from Pythagoras of Samos (580-500 B.C.) through the writing of Plato. Influenced by the sages of Egypt or of India, Pythagoras adhered to the doctrine of transmigration of souls. According to this belief, the immaterial soul is imprisoned in the body where it undergoes expiation and purification; at death, the soul enters another body to repeat the cycle of life and death until it is wholly purified and thus set at liberty to return to its divine source.¹¹³ Life in this world is a period of trial and preparation, the conditions of which are ordained by God. For Pythagoras, suicide constituted a violation of this divine order, and hence was judged immoral.¹¹⁴

According to Plato (429-348 B.C.), happiness is the supreme aim in life, and the essential constituent of happiness is wisdom. Wisdom unites one with the immutable and transcendent Forms, and, in particular, with the all-encompassing and preeminent Form of the Good.¹¹⁵ It is only upon death, according to Plato, that the soul, freed from corporeal existence, may aspire to the realm "of the gods and of the Forms, where perfect happiness reigns."¹¹⁶

In the *Phaedo*, Plato's narrative of Socrates' last hours, suicide is discussed in light of one's relationship both with oneself and with the gods.¹¹⁷ Socrates, who has been condemned to die by drinking hemlock, recalls to his friends the view passed on from Pythagoras and through the Orphic Mysteries that "we mortals are in a sort of prison, and that a man must not . . . free himself from it, or try to run away," and "that gods are our guardians and that we men are one of the gods' possessions . . ."¹¹⁸ But, as the dialogue indicates, a paradox arises because the philosopher longs for

1922).

111. T. MASARYK, *SUICIDE AND THE MEANING OF CIVILIZATION* 126-27 (1970).

112. Mair, *supra* note 110, at 29-30.

113. F. THONNARD, *A SHORT HISTORY OF PHILOSOPHY* 18 (1955).

114. CHORON, *supra* note 104, at 108.

115. THONNARD, *supra* note 113, at 80-81.

116. *Id.* at 85.

117. R.W. BLUCK, *PLATO'S PHAEDO* *61c-63c (1955).

118. *Id.* at *62b.

death in order that the soul may be set free from the body and attain direct knowledge of truth.¹¹⁹ He is then asked: "How do you mean, Socrates, that it is wrong to commit suicide, and yet that the philosopher would gladly follow one who was dying?"¹²⁰

According to Socrates, to unravel this paradox it must be understood that, although the body is "a sort of prison," the soul needs the body in order to transcend it and attain the vision of truth. The process of dialectics (philosophy) that leads to this vision begins with the data provided by the senses of the body.¹²¹ Thus, while corporeal existence is a troublesome burden to be borne and managed,¹²² this life must be embraced insofar as it is the means to spiritual liberation.

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.¹²³ Moreover, to commit suicide would provoke the anger of the gods and would thus entail consequent punishment.¹²⁴ Even though the choice of death seems preferable to life in some cases, suicide is not morally justified.¹²⁵ Rather, as Socrates states, "one should refrain from bringing one's life to an end until God sends some necessity, such as the present one in my case."¹²⁶

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. Although it is through death that one may behold the Forms, this can only be achieved through a life of virtue and wisdom—the practice of philosophy. Only a life of "purification" can qualify one for true happiness in the life hereafter, and thus Socrates asserts:

So long as we are alive, it seems likely that we shall come nearest to having knowledge if we do our utmost to have no contact or association with the body except insofar as is absolutely necessary, and do not infect ourselves with its nature, but purify ourselves of it, until God Himself gives us final

119. *Id.* at *67c, 68a-b.

120. *Id.* at *61d.

121. See PLATO, *REPUBLIC* at *523; PLATO, *TIMAEUS* at *47a-c; D. NOVAK, *SUICIDE AND MORALITY*, 11-15 (1975).

122. BLUCK, *supra* note 117, at *66b-e.

123. *Id.* at *62b-c.

124. *Id.* at *62c.

125. *Id.* at *62a.

126. *Id.* at *62c.

release.¹²⁷

It is not lawful to join the gods without having pursued philosophy, without departing absolutely pure.¹²⁸

As much as the philosopher prepares himself for the attainment of the Good, knowledge in this life is always obscured and imperfect. Only the gods know whether we are sufficiently prepared to leave this life because only they have perfect knowledge of us.¹²⁹

In the *Laws*,¹³⁰ 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 human soul's disposition in the cosmic order, of which the social order is an important component.¹³¹ Plato's public policy on suicide stated in the *Laws* presumes this ethical and cosmic perspective:

But what of him . . . whose violence frustrates the decree of destiny by *self-slaughter* though no sentence of the state has required this of him, no stress of cruel and inevitable calamity driven him to the act, and he has been involved in no desperate and intolerable disgrace, the man who thus gives unrighteous sentence against himself from mere poltroonery and unmanly cowardice[?] Well, in such a case, what further rites must be observed, in the way of purifications and ceremonies of burial, it is for heaven to say; the next of kin should consult the official canonists as well as the laws on the subject, and act according to their direction. But 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.¹³²

127. *Id.* at *67a.

128. *Id.* at *82b-c.

129. *Id.* at *62c. The "suicide" of Socrates is not evidence of an ancient belief in a "right to suicide", rather the dialogue in the *Phaedo* supports the opposite conclusion. The notion that Socrates believed suicide was ethical probably stems from application of traditional definitions of suicide to Plato's work without an examination of Plato's own explanation of Socrates' act. By some definitions, Socrates' death might be considered a "suicide", albeit a coercive one, in that he does terminate his own existence by consuming poison. To Socrates himself, however, the act was not a suicide, but an accession to his execution order promulgated by the state.

130. PLATO, *LAWS* *873c-e, in *COLLECTED DIALOGUES OF PLATO* 1432 (E. Hamilton & H. Cairns eds. 1963).

131. See PLATO, *TIMAEUS* *47b-c.

132. PLATO, *supra* note 130, at *873c-e (E. Hamilton & H. Cairns eds.).

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.¹³³

Aristotle (384-322 B.C.) shared with Plato the view that society is necessary for the individual to attain happiness and that the individual has a moral obligation to serve the 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 guilty of an offence against the state.¹³⁴

Aristotle again refers to suicide in a discussion concerning the different virtues and vices. He begins by defining the courageous as those who are fearless in the face of honorable death, such as death in battle or any life threatening circumstance,¹³⁵ but he draws a distinction:

To kill oneself to escape from poverty or love or anything else that is distressing is not courageous but rather the act of a coward, because it shows weakness of character to run away from hardships, and the suicide endures death not because it is a fine thing to do but in order to escape from suffering.¹³⁶

Aristotle postulated that there was an obligation to pursue the good moral life, to realize our own nature according to the principle of order and universal finality.¹³⁷ Thus suicide, as an act of cowardice, was deemed a rejection of one's personal duty, both to society and to oneself.

In the centuries following Aristotle, internal and external factors

133. NOVAK, *supra* note 121, at 20-21.

134. ARISTOTLE, *ETHICS* 200-201 (J. Thompson trans. 1977).

135. *Id.* at 128-29.

136. *Id.* at 130.

137. F. THONNARD, *supra* note 113, at 124.

combined to alter the spirit of Greek life and thought. As the City-States dissolved and Greece was subjected to foreign rule, philosophy turned from metaphysical speculation toward modes of thought, such as Stoicism, that emphasized individual contentment in an otherwise troubled and unhappy world.¹³⁸

Founded by Zeno of Citium (336-264 B.C.), Stoicism later became popular among the Roman nobility, and has found followers in "every age, particularly since the Renaissance."¹³⁹ It is essentially a philosophy of freedom as based on rational choice. For the Stoic, the universe is governed by universal determinism; one seeks to live by reason in an effort to know the very principle of universal order—the Logos. But it is not enough simply to know the Logos; happiness lies in consciously and voluntarily acquiescing to it.¹⁴⁰

For the Stoic, the inevitability of death is the ultimate challenge to liberty. This explains the Stoics' fascination with death and the frequency with which they dealt with the subject of suicide. Seneca, the Roman Stoic, wrote:

What is evil is to live in necessity; but there is no necessity to live in necessity. Why no necessity? Because a path to freedom is open on every side. The ways are countless, short and easy. Let us thank God that no one can be forced to remain alive.¹⁴¹

For the Stoic, virtue is a disposition of deliberate will with regard to the fatal development of events. The Stoic strives to be free of anything that would impede the will, never surrendering freedom of the will to passion or compulsion.¹⁴² Even if certain death should confront the Stoic, imposing itself against an autonomous will to live, the Stoic must, as Seneca asserts, "make death [one's] own in order to be free from it."¹⁴³ Thus, rational will, pure and simple, constitutes human dignity and justifies, even glorifies, an act such as self-inflicted death.

One of the most celebrated examples of suicide among the Stoics was that of Cato, who put himself to death for fear of dishonor when his military hopes had been crushed by Caesar. Montaigne

138. See T. MASARYK, *supra* note 111, at 129; F. THONNARD *supra* note 113, at 148-49.

139. P. & L. LANDSBERG, *THE EXPERIENCE OF DEATH AND THE MORAL PROBLEM OF SUICIDE* 45 (1953).

140. F. THONNARD, *supra* note 113, at 148-50.

141. Seneca, *Epist. ad Lucilium XII*, reprinted in LANDSBERG, *supra* note 139, at 43.

142. F. THONNARD, *supra* note 113, at 48-49.

143. See Seneca, *Epist. ad Lucilium*, LXXVII: "Fac tui juris quod alieni est;" *De Otis VII*, I: "Non sit ipsa mores otiosa," reprinted in LANDSBERG, *supra* note 139, at 41-45.

says of Cato, "This was a man chosen by nature to show the heights which can be attained by human steadfastness and constancy . . . [s]uch courage is above philosophy."¹⁴⁴

In contrast to the Stoics' acceptance of suicide and popular admiration for individuals such as Cato, Roman law forbade suicide, and introduced a penalty that, while it apparently did not prove a strong deterrent,¹⁴⁵ persisted in Western Civilization for almost two millenia: forfeiture of the suicide's goods and confiscation of the suicide's estates, so that they could not pass to the heirs.¹⁴⁶

C. *Early Christian Culture*

The gradual dominance of Christianity in the Roman Empire, culminating in the conversion of the Emperor Constantine in the 4th century A.D., worked a transformation in the cultural attitude toward suicide. Imbuing all strata of the Roman world with its spiritual principles, Christianity provided a view of life that was itself inimical to suicide.¹⁴⁷

The New Testament, like the Old, contains no explicit prohibition against suicide. The one suicide it describes is that of Judas Iscariot, who ignominiously hanged himself after betraying Christ. Judas' act hardly recommended suicide to the early Christian church. Indeed, the early Christians incorporated Judaic attitudes and Platonist philosophy which both opposed the practice. Nevertheless, there were many examples of Christian martyrs whose deaths bordered on suicide, and confusion regarding the distinction between suicide and martyrdom existed up until the time of St. Augustine (354-430 A.D.).¹⁴⁸ Augustine felt compelled to make explicit the condemnation of suicide when confronted with certain heretical sects that embraced the act, and with the Stoics who reproached Christian women for *not* killing themselves when violated at the hands of barbarians.¹⁴⁹

Augustine's views combined Greek, Roman and Oriental traditions of divine law, as transmitted through Cicero and Plotinus, with the formulas of the Christian faith. Augustine's perspective was theocentric: all existence, he believed, is created by and wholly dependent upon God. Because God embodies creative and unitive

144. Cited in LANDSBERG *supra* note 139, at 68.

145. CHORON, *supra* note 104, at 21.

146. Farberow, *supra* note 85, at 6.

147. T. MASARYK, *supra* note 111, at 155-57.

148. *Id.* at xxviii.

149. LANDSBERG, *supra* note 139, at 77.

love, it is the human purpose, in mirroring the Divine life, to participate in the free and creative act of love by conferring upon creation the highest possible degree of order and perfection in accordance with the universal and invariant eternal law. While God demands the accomplishment of order and perfection, humans are free agents. They have moral obligations, in their liberty, to conform themselves to the natural law, itself a product of God's will. In their free assent and correspondence to this law lies their true happiness.¹⁵⁰

From this perspective of moral obligation toward the objective Good (natural law), Augustine addressed the problem of self-imposed death. In the *City of God*, Book I, he examined the issue of suicide from a variety of different motives, and condemned the act as intrinsically sinful on the grounds that it violates the Sixth Commandment:

It is not without significance, that in no passage of the holy canonical books there can be found either divine precept or permission to take away our own life, whether for the sake of entering the enjoyment of immortality, or of shunning, or ridding ourselves of anything whatsoever. Nay, the law, rightly interpreted, even prohibits suicide, where it says, "Thou shalt not kill."¹⁵¹

To this Commandment, Augustine recognized two exceptions: The taking of a life is tolerated when performed through the justice of the state (as in the case of war and capital punishment) or by special intimation by God (as presumed to be the case with Abraham, Samson and a number of other Saints).¹⁵² In any event, none have of themselves the authority to take their own lives.¹⁵³ He also discussed the question of suicide committed through fear of punishment or dishonor: "[If] it is not lawful to take the law into our own hands, and slay even a guilty person, whose death no public sentence has warranted, then certainly he who kills himself is a homicide"¹⁵⁴

Responding to the case of the woman faced with the choice of suicide or rape, Augustine asserted that virtue—in this case, chastity—is proper to the soul and is not lost through external circumstance, as when one is compelled by force to yield to another.

[A] woman who has been violated by the sin of another, and without any

150. THONNARD, *supra* note 113, at 215, 230, 262.

151. W. OATES, BASIC WRITINGS OF ST. AUGUSTUS 27 (1948) (*City of God* I, XV).

152. *Id.* at 28, 32-33 (*City of God* I, XXI, XXVI).

153. *Id.*

154. *Id.* at 23 (*City of God* I, XVII).

consent of her own, has no cause to put herself to death; much less has she cause to commit suicide in order to avoid such violation, for in that case she commits certain homicide to prevent a crime which is . . . not her own.¹⁵⁵

By the same principle, Augustine asserted that suicide can never be permitted to avoid a possible evil;¹⁵⁶ rather, he extolled the virtue of fortitude, "which will rather endure all ills than consent to evil."¹⁵⁷ What is more, Augustine maintained, suicide jeopardizes salvation as no other mortal sin can since it deprives one of the time needed for contrition.¹⁵⁸

Augustine also challenged the notion that suicide could ever be an admirable deed:

[I]f you look at the matter more closely, you will scarcely call it greatness of soul, which prompts a man to kill himself rather than bear up against some hardship of fortune, or sins in which he is not implicated . . . Again, it is said many have killed themselves to prevent an enemy doing so. But we are not inquiring whether it has been done, but whether it ought to have been done.¹⁵⁹

In discussing the suicide of Cato, Augustine asked:

But of this notion of his, what can I say but that his own friends, enlightened men as he, prudently dissuaded him, and therefore judged his act to be that of feeble rather than a strong spirit, and dictated not by honorable feeling forestalling shame, but by weakness shrinking from hardship?¹⁶⁰

As a true example of courage, Augustine offered the example of Marcus Regulus, who, after facing defeat by the Carthaginians, submitted to captivity rather than kill himself.¹⁶¹ Augustine concluded that if such valiant warriors of earthly kingdoms and false gods who had no fear of death would rather endure slavery than commit suicide, then "how much rather must the Christians, the worshippers of the true God, the aspirants to a heavenly citizenship, shrink from this act"¹⁶²

With Augustine's contribution, the Roman Catholic Church articulated its stance against suicide; its condemnation consistently expressed in canonical directives applied to civil life. The Council of Arles (452 A.D.), for example, incorporated the Roman law's for-

155. *Id.* at 24 (*City of God* I, XVIII).

156. *Id.* at 31, 33 (*City of God* I, XXV, XXVII).

157. *Id.* at 23 (*City of God* I, XVIII).

158. *Id.* at 31-32 (*City of God* I, XXV).

159. *Id.* at 28-29 (*City of God* I, XXII).

160. *Id.* at 29-30 (*City of God* I, XXIII).

161. *Id.* at 30 (*City of God* I, XXIV).

162. *Id.* at 31 (*City of God* I, XXIV).

feiture of a suicide's estate. The Council of Braga (563 A.D.) banned religious rites for suicides. The Antisidor Council (590 A.D.) provided penalties for suicide, and the Synod of Nimes (1284 A.D.) denied suicides Christian burial.¹⁶³ Due to the Church's dominant cultural and ethical influence in Europe, from the time of the late Roman Empire through the period of the Renaissance and Reformation, the occurrence of suicide is said to have been negligible: "Deliberate suicide seems to have ceased almost entirely with the establishment of Christianity, and to have continued in abeyance until the reign of philosophic skepticism. . . ."¹⁶⁴

D. *The Middle Ages*

The Christian world-view that so greatly dominated Western attitudes throughout the Middle Ages was further developed and synthesized by the most eminent philosopher of this period, St. Thomas Aquinas. Following in the tradition of Augustine, Cicero, Aristotle and Plato, Aquinas grounded his moral and legal philosophy on the Natural Law. Aquinas' treatment of suicide is found in his *Summa Theologica*, II-II, question 64, article 5. There Aquinas stated that it is unlawful to kill oneself for three reasons: first, suicide is contrary to the natural inclination toward self-preservation and to charity whereby everyone should love oneself; second, since each person is a part of a community, the killing of oneself involves injury to that community; and third, suicide is a violation of God's rights over man as man's Creator. Like Augustine, Aquinas concluded that suicide is always intrinsically sinful.¹⁶⁵

Aquinas maintained that the natural inclination toward self-preservation is due to an existent's inherent nature, which is to preserve its existence. He reasoned that it is virtue that disposes a person to act in accordance with the principles of this aspect of Natural Law.¹⁶⁶ Through vice, one can alienate oneself from the natural inclination—including the natural inclination to preserve one's life—but Natural Law cannot itself be negated.¹⁶⁷ Thus, although one may err in one's perception of the Natural Law, which may reduce subjective culpability, an erroneous intent or action is always an objective wrong.

163. Farberow, *supra* note 85, at 7.

164. J. O'DEA, *SUICIDE: STUDIES ON ITS PHILOSOPHY* 85 (1882).

165. See T. AQUINAS, *SUMMA THEOLOGICA* 1470, (Dominican ed. 1947) (II-II, 64.5).

166. 2 T. AQUINAS, *THE BASIC WRITINGS OF ST. THOMAS AQUINAS* (A. Pegis ed. 1945) (*SUMMA THEOLOGICA* II-II, 123.12).

167. *Id.* at 647 (*SUMMA THEOLOGICA* II-II, 64.7).

Arguing that suicide is also an offense against the state, Aquinas stressed the moral obligation one has, as a social creature, toward one's community. He also rejected any utilitarian claim that suicide may be a service to society if the person in question is perceived as a social burden, and argued instead that human sociality is grounded in charity and transcends the exclusive consideration of utility.¹⁶⁸

Man is not ordained to the body politic according to all that he is and has; and so it does not follow that every act of his acquires merit or demerit in relation to the body politic. But all that man is, and can, and has, must be referred to God; and therefore every act of man, whether good or bad, acquires merit or demerit in the sight of God from the fact of the act itself.¹⁶⁹

The community, it is true, must be served; but it is not an end unto itself. Society must not eclipse the human relationship with God by making any "existential demands" on its members in the interest of social expediency.¹⁷⁰

Since, then, the eternal law is the plan of government in the Chief Governor, all the plans of government in the inferior governors must be derived from the eternal law. . . . Therefore all laws, in so far as they partake of right reason, are derived from the eternal law.¹⁷¹

Consequently, every human law has just so much of the nature of law as it is derived from the law of nature. But if in any point it departs from the law of nature, it is no longer a law but a perversion of law.¹⁷²

Thus, the sociality of man imposes a moral prohibition against self-imposed death; suicide can never be justified, whether it be for personal or social considerations. It should be noted that the utilitarian ethic of "the greatest good for the greatest number" finds application in the Thomist outlook: The greatest good is realized in the ultimate purpose of the Law; the greatest number includes the totality of existents.

Aquinas also condemned suicide on the ground that it is a violation of God's domain over human beings as their Creator. Since human persons are not individually responsible for conferring life upon themselves, the question of existence is not proper to human jurisdiction. Thus, concluded Aquinas, one has no right to intend

168. AQUINAS, *supra* note 165, at 365 (SUMMA THEOLOGICA I-II, 21.4 ad 3. Cf. *id.* at 1035 (113.9 ad 2)).

169. D. NOVAK, *supra* note 121, at 67.

170. T. AQUINAS, *supra* note 166, at 766 (SUMMA THEOLOGICA I-II, 93.3).

171. T. AQUINAS, *supra* note 165, at 784 (I-II, 95.2).

172. T. AQUINAS, SUMMA THEOLOGICA 1469 (1922) (II-II, 64.5).

one's own death.¹⁷³

The medieval view of suicide was expressed in dramatic form by Dante. In the *Inferno*, those who have committed suicide are depicted as trees continually tormented by Harpies who feed on them. Flung over their branches are the vacant skins of the bodies they once inhabited; unlike the other souls in Hell, the suicides do not have the use of their earthly forms which they have wantonly thrown away.¹⁷⁴

E. *The Renaissance and Reformation*

The firm and unanimous opposition to suicide that prevailed for over ten centuries in the West weakened with the coming of the Renaissance and Reformation.

Such weakening, however, was not brought about by the reformers. Martin Luther believed suicide to be the work of the devil.¹⁷⁵ John Calvin stated that "the faithful should accustom themselves to such a contempt of the present life, as may not generate either hatred of the present life, or ingratitude towards God."¹⁷⁶ While one may be "obnoxious to sin" he may not hate life itself, but be "prepared to remain in it during the Divine pleasure. . . . For it is a station in which the Lord hath placed us, to be retained by us till he call us away."¹⁷⁷ Believers must "leave the limits of our life and death to his decision. . . ."¹⁷⁸

But, two works that questioned complete condemnation of suicide were published in the Seventeenth Century. In 1621, the Anglican clergyman Robert Burton (1577-1640) published, under a pseudonym, *The Anatomy of Melancholy*.¹⁷⁹ This work explored at length the purported causes, symptoms, and cure of melancholy, and questioned the accepted position that those who commit suicide are eternally damned.¹⁸⁰ *Biathanatos*,¹⁸¹ authored by another Anglican clergyman, the poet John Donne (1572-1631), was pub-

173. DANTE ALIGHIERI, *THE DIVINE COMEDY: INFERNO* 166-75 (trans. J. Sinclair 1982) (canto XIII).

174. M. LUTHER, *THE TABLE TALK OR FAMILIAR DISCOURSE OF MARTIN LUTHER* 315 (DLXXXV) (Philadelphia 1868).

175. J. CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* 568 (bk. III, ch. IX, para. III) (London 1838).

176. *Id.* at 569 (bk. III, ch. IX, para. IV).

177. *Id.*

178. Farberow, *supra* note 85, at 9.

179. *See generally id.*

180. J. DONNE, *BIATHANATES* 36 (London 1700).

181. *Id.*

lished in 1646. In this work, Donne argued that actions are intrinsically neither good nor evil; rather, their good or evil depends entirely upon God's command.¹⁸² Since circumstances vary, each suicide must be judged individually, and in some cases the suicide is justified and acceptable to God.¹⁸³

There were many Christians in England who were solidly against suicide and opposed views such as those that Burton and Donne held. Thomas Cranmer (1489-1556), Archbishop of Canterbury and the most influential man in shaping the Church of England, said that the self-murder was "cursed of God, and damned forever."¹⁸⁴

In 1594, John King (who later became Bishop of London) taught that Scripture expressly commanded against suicide.¹⁸⁵ He specifically approved the positions of Augustine and Aquinas.¹⁸⁶ Likewise, in 1600, George Abbot (later Archbishop of Canterbury) cited the sixth commandment as forbidding suicide.¹⁸⁷ John Sym, an Anglican clergyman with Puritan inclinations, wrote *Lifes Preservative Against Self-Killing* in 1637, claiming self-murders were "certainly and infallibly damned souls and body for evermore without redemption."¹⁸⁸ His concern was with a contemporary increase in suicide and he wrote recommendations for prevention as well.¹⁸⁹ Another Puritan, Sir William Denny, wrote a volume of poetry against suicide in 1653, called *Pelecanicidium: or the Christian Advisor Against Self-Murder*.¹⁹⁰ This was in response to the 1646 publication of *Biathanatos*.¹⁹¹ Henry Hammond's popular *Practical Catechism*,¹⁹² published in many editions from 1645 to 1700, re-emphasized the Anglican opposition to suicide as did Jeremy Taylor's two volume treatment of suicide in 1660 entitled *Doctor Dubitantium, or the Rule of Conscience*.¹⁹³ In 1655, at the height of the suicide epidemic then in effect, Richard Capel enlarged the treatment of suicide in his previously published book, *Tentatious*.¹⁹⁴ He presented the Puritan solution to suicide, as an

182. Farberow, *supra* note 85, at 9.

183. S. SPROTT, *THE ENGLISH DEBATE ON SUICIDE FROM DONNE TO HUME* 13 (1961).

184. *Id.* at 3.

185. *Id.*

186. *Id.* at 5.

187. *Id.* at 42.

188. *Id.* at 31.

189. *Id.*

190. *Id.* at 32.

191. *Id.* at 41.

192. *Id.* at 40.

193. *Id.* at 46.

194. *Id.* at 47. Interestingly, the suicide epidemic from 1640 to 1660, a period when

“intensified piety.”¹⁹⁵ John Bunyan in *Pilgrim’s Progress* (1678) had Hopeful advise Pilgrim that suicide was forbidden when Giant Despair held them captive in Doubting Castle.¹⁹⁶ Orthodox Christianity in England continued its opposition to suicide with the publication of Anglican Thomas Philopot’s *Self-Homicide-Murther* in 1674,¹⁹⁷ Ezra Pierce’s *A Discourse on Self-Murther*¹⁹⁸ in 1692, and Samuel Puffendorf’s *The Whole Duty of Man According to the Law of Nature*¹⁹⁹ in 1691. By 1705, clergymen had ceased to mention *Biathanatos* in sermons on suicide.²⁰⁰ Suicide still continued to increase but the arguments in defense of it were becoming atheistic rather than deistic.²⁰¹

In Italy, jurists held an inquiry into the reasonableness of suicide laws during which Montaigne and Charron presented limited defenses to the practice.²⁰² The theologians of seventeenth century France, however, severely condemned suicide: Malebranche, Nicole, Arnaud, Descartes, and La Mothe le Vayer were joined in their condemnation by “theologians of every stripe, Jansenist, Jesuit and Protestant.”²⁰³

F. *The “Age of Reason” and Beyond*

During the eighteenth century, the controversy between opponents and defenders of suicide became more pronounced. Scholars had become divided and isolated in rival positions; no unifying system of thought prevailed.²⁰⁴ Individualism and subjectivism inclined philosophers toward the forces of nature and the resources of the thinking-self to explain existence;²⁰⁵ skepticism and religious

Puritans were in the ascendancy, may have been fostered by popular notions of Calvinist theology. First, one who felt no sense of election was tempted to end his life before further sin caused greater punishment in Hell. Second, an emphasis on direct, personal revelations from God led some to feel fleeting impulses to suicide to be God’s special direction, as with Samson in the Old Testament. Puritan writers later countered this by arguing that direct revelation could not be contrary to revelation in Scripture. See generally Farberow *supra* note 85, at ch. II.

195. SPOTT, *supra* note 183, at 52.

196. *Id.* at 68.

197. *Id.* at 69.

198. *Id.* at 84.

199. *Id.* at 92.

200. *Id.* at 93.

201. Crocker, *The Discussion of Suicide in the Eighteenth Century*, 13 J. HIST. IDEAS 47, 52 (1952).

202. *Id.* at 50.

203. F. THONNARD, *supra* note 113, at 453-54.

204. *Id.* at 476-77.

205. Crocker, *supra* note 201, at 54.

indifference began to spread throughout society.

Among the apologists for suicide was John Robeck, a Swede, who wrote a 1736 treatise defending it, and who then promptly killed himself.²⁰⁶ Other defenders were Montesquieu, Voltaire, Helvetinus, Vauvenargues, D'Holbach, Concorcet, Charron, Saint-Cyran, and J.M. Merian.²⁰⁷ Still others condemned suicide from a religious point of view—whether from conviction or caution—but held it justified from a purely human perspective. These included Bayle, D'Alembert, and Maupetuis.²⁰⁸ Yet those who espoused the traditional condemnation of suicide were, if anything, more numerous and prolific. They included Spinoza, Moses Mendelsohn, Jean Jacques Rousseau, Formey, Jean Dumas, John Adams, Charles Moore, Robinet, J.B. Meriso, Deliste de Sales, Richard Hey, Holland, Bergier, Dupont de Nemours, Chaudon, La Mettrie, Sabatier de Castres, d'Argens, and Turgot.²⁰⁹ Mme. de Stael began as a supporter of suicide in the eighteenth century,²¹⁰ but became an ardent opponent in the nineteenth.²¹¹ Perhaps the most illustrious contestants in the two camps, however, were David Hume and Immanuel Kant.

Faithful to the empiricism for which he is best known, Hume (1711-1776) believed that it is impossible to found morality either on God, because we are ignorant of His existence, or on reason, because the proper domain of reason is merely speculation.²¹² The foundation of morality for Hume, then, lies in a natural sentiment that distinguishes the good and the bad. The good is that which is useful to sensible life, satisfies its aspirations, and is approved by others; the bad is either what is opposed to sensible life or that which society holds in disapproval. Hume thus advocated a morality based on a natural inclination toward general utility,²¹³ and his view on the question of suicide conformed to this ethic:

If suicide be supposed a crime it is only cowardice can impel us toward it. If it be no crime, both prudence and courage should engage us to rid ourselves at once of existence when it becomes a burden. It is the only way that we can be useful to society—by setting an example which, if imitated, would preserve to everyone his chance for happiness in life and would effectually

206. *Id.* at 53-65.

207. *Id.* at 50-59, 64-65.

208. *Id.* at 50-68.

209. *Id.* at 53, 60.

210. *Id.* at 55, 56, 58, 59.

211. F. THONNARD, *supra* note 113, at 642-44.

212. *Id.*

213. Hume, *On Suicide*, in BATTIN, *supra* note 102, at 95.

free him from all danger of misery.²¹⁴

Hume further argued that no one is obligated to society if such an obligation entails great suffering to oneself. If, by living, there is no mutual benefit for both the individual person and his society, then there ceases to be any moral imperative for continuing one's life. As Hume states:

All our obligations to do good to society seem to imply something reciprocal. I receive the benefits of society and therefore ought to promote its interests, but when I withdraw myself altogether from society, can I be bound any longer?²¹⁵

Thus, when one removes oneself from society by committing suicide, argues Hume, one no longer derives any benefit from the community and is no longer obliged to provide any benefit in return.

To the claim that suicide is a violation of Natural Law, Hume replied that we interfere with the laws of nature consistently, and do so as a matter of necessity:

[A]ll animals are entrusted to their own prudence and skill for their conduct in the world and have full authority, as far as their power extends, to alter all the operations of nature. Without the exercise of this authority they could not subsist a moment; every action, every motion of man, innovates on the order of some parts of matter and diverts from their ordinary course the general laws of motion.²¹⁶

To commit suicide is thus claimed by Hume to be as much a disturbance to the laws of nature as postponing one's death by treating a disease or defending oneself against an assailant:

If I turn aside a stone which is falling upon my head, I disturb the course of nature, and I invade the peculiar province of the Almighty by lengthening out my life beyond the period which by the natural laws of matter and motion he had assigned it.²¹⁷

Hume argued that if interference with the laws of nature is granted as permissible, then suicide cannot be held to be wrong on the grounds of disturbing such laws.²¹⁸ If God is able to use natural events to bring about a person's death, he asked, then why can God not use suicide?²¹⁹

214. D. Hume, *On Suicide*, in *THE PHILOSOPHICAL WORKS* 566 (1826).

215. *Id.* at 561.

216. *Id.* at 562.

217. *Id.*

218. *Id.* at 563.

219. *Id.* at 562.

To assume that the action of anyone is an encroachment on Divine providence or a disturbance of the universal order was, to Hume, absurd in that such an assumption presupposed that we have a special importance in the scheme of things. He did not believe in the sanctity or significant importance of human life: "The life of a man is of no greater importance than that of an oyster."²²⁰

As opposed to philosophers such as Plato and Aquinas, who based morality on an objective Good, and empiricists such as Hume, who based morality on sensual or material interest, Immanuel Kant (1724-1804) sought to ground morality in the *form* of law that he believed was inherent in the moral subject. Kant maintained that practical reason possesses an *a priori* form, or "category," that parallels the categories of understanding. The operation of this *a priori* category is rooted in the basic structure of human nature that is common to all human beings. Therefore, it could be used to build a necessary and universal morality. For Kant, morality depends upon the nature of the human person for its foundation.²²¹ In his view, the moral law recognizes no "hypothetical imperative" in the conscience—as, for example, when one considers whether one "ought" to purchase one coat or another. Such imperative is but an inclination based on caprice of sensibility. True morality, rather, is distinguished by the "categorical imperative" of *pure obligation* wherein an action is performed solely for the sake of duty.²²²

In *Fundamental Principles of the Metaphysic of Morals*, Kant proposed three formulations of the categorical imperative for determining the morality of any practical maxim. Briefly stated, these formulations are: 1) act in such a way that your action could serve as a universal law; 2) always act so that you treat humanity, whether in your own person or in that of another, as an end and never merely as means; 3) act in such a way that your will could consider itself as making universal laws by its maxims.²²³ To illustrate his general moral principles, Kant applied these formulations to the example of suicide:

A man reduced to despair by a series of misfortunes feels wearied of life, but is still so far in possession of his reason that he can ask himself whether it would not be contrary to his duty to himself to take his own life

220. F. THONNARD, *supra* note 113, at 689-91.

221. *Id.*

222. *Id.* at 691.

223. I. KANT, *FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS* 39-40 (T. Abbott trans. 1964).

His maxim is: From self-love I adopt it as a principle to shorten my life when its longer duration is likely to bring more evil than satisfaction. It is asked then simply whether this principle founded on self-love can become a universal law of nature. Now we see at once that a system of nature of which it should be a law to destroy life by means of the very feeling whose special nature it is to impel to the improvement of life would contradict itself, and therefore could not exist as a system of nature; hence that maxim cannot possibly exist as a universal law of nature. . . .²²⁴

He who contemplates suicide should ask himself whether his action can be consistent with the idea of humanity as an end in itself. If he destroys himself in order to escape from painful circumstances, he uses a person merely as a means to maintain a tolerable condition up to the end of life. But a man is not a thing, that is to say, something which can be used merely as means, but must in all his actions be always considered as an end in himself.²²⁵

To destroy the subject of morality in his own person is tantamount to obliterating from the world, as far as he can, the very existence of morality itself.²²⁶

Nevertheless, Kant further asserted that the duty of self-preservation is subordinate to yet a higher duty.

[T]here is much in the world far more important than life. To observe morality is far more important. It is better to sacrifice one's life than one's morality. To live is not a necessity; but to live honourably while life lasts is a necessity.²²⁷

Mindful of the Stoics' similar attitude towards human dignity, Kant would not allow his notion of self-sacrifice to be confused with suicide. Challenging the Stoics' motive for suicide, Kant argued that true courage in not fearing death ought rather to compel one to preserve that very life which is capable of triumphing over the most extreme of emotions:

And yet this very courage, this strength of mind—of not fearing death and of knowing of something which man can prize more highly than his life—ought to have been an ever so much greater motive for him not to destroy himself, a being having such authoritative superiority; consequently, it ought to have been a motive for him not to deprive himself of life.²²⁸

To suffer death in the fulfillment of moral obligation is, in Kant's view, quite different from committing suicide. In the former case,

224. *Id.* at 46.

225. Kant, *Metaphysics of Morals* in *METAPHYSICAL PRINCIPLES OF VIRTUE* 83-84 (Elington trans. 1964).

226. I. KANT, *LECTURES ON ETHICS* 152 (L. Infield trans. 1963).

227. Kant, *Metaphysics*, *supra* note 225, at 83.

228. *Id.* at 84. See NOVAK, *supra* note 121, at 97-103.

death is a consequence of disinterested moral duty; in the latter case, death is the very end sought from a motive of personal interest.²²⁹

The eighteenth century controversy over suicide also touched on an issue of central importance to the autonomy theorists of the twentieth century.²³⁰ As supporters of suicide, Montesquieu and d'Holbach argued that society is founded for mutual advantage, and when there is no longer an advantage for the individual to remain living in society, society has broken the contract and the individual is freed from social obligations, including any obligation not to commit suicide.²³¹ Hume added that at times the individual's existence is a burden on society, and in such instance, suicide serves the social good.²³²

Critics of suicide, like Dumas, Delisle, and Bergier, argued that such evaluations and decisions cannot be made unilaterally. "If d'Holbach's argument were to be accepted," wrote Bergier, "then we must conclude that a man has no social duty at all, except when he finds it to his advantage."²³³ As Lester Crocker observed,

Other harmful consequences to society were pointed out, often repetitiously, by Bergier, Delisle, Dumas, Sabatier de Castres, d'Argens, Chaudon, Robinet, Du Pont de Nemours, Moore, Hey and Adams and others. Suicide prevents reparation of injuries and cuts off any further good action It causes deep sorrow and lasting disgrace to one's family, and thereby does irreparable harm precisely to those to whom we owe the most Worst of all, approval of suicide would make each man the judge of his own actions and destroy public order. It would teach a man not only to die when he pleases, but also to live as he pleases, since it secures him from all dread of human punishment; thus it would nullify the penal laws. It could logically be extended to the right of murder: if we may kill ourselves to end our unhappiness, why may we not dispose of the person who is causing our unhappiness? We might even kill our family, to spare them the chagrin of our suicide. In addition, suicide would decimate the population.²³⁴

Such claims struck suicide proponents as inflated. "The republic," Voltaire laughed, "will do very well without me after my death, as it did before my birth."²³⁵

It is noteworthy, however, that the lines drawn over the ethics of

229. See *supra* notes 21-23 and accompanying text.

230. Crocker, *supra* note 201, at 63-64.

231. *Id.* at 64.

232. *Id.*

233. *Id.* at 65.

234. *Id.*

235. Crocker, *supra* note 201, at 66.

suicide were not preserved intact in debates about the then existing laws against it. While suicide opponents such as Hutcheson, Hey, Dumas, Formey, and J.B. Merian defended anti-suicide laws, suicide proponents like Voltaire and Condorcet were joined by suicide opponents like Moore and Deliste de Sales in denouncing them. This latter group accepted the argument of Beccaria that "[p]unishment of a suicide is unjust and tyrannical, since it affects only an insensible body and innocent people. To be just or effective, punishment must be personal. The present law was no more than whipping a statue, and could have little influence in preventing the crime itself."²³⁶

The opposition of the English Church to suicide continued unabated throughout the eighteenth century. Numerous books, pamphlets, and sermons were issued throughout the period in efforts to stem the recurring epidemics of suicide.²³⁷ The names of Isaac Watts and John Wesley are especially well-known. Watts in 1726 published *A Defence Against the Temptation of Self-Murder*.²³⁸ He saw the main problem as the growing atheism of the period.²³⁹ Wesley, in 1790, called self-murder a "horrid crime" and proposed publicly hanging suiciders in chains to discourage the practice.²⁴⁰ Wesley considered the consistent finding of insanity by coroners' juries to be an abuse of the law.²⁴¹ During this period John Jortion, while opposing suicide, wrote, in 1772, that the juries were correct to incline "on the merciful side" because this reduced the suffering of the suicide's relatives, and because he did not believe that God would judge a person by one action but rather by the whole of his or her life.²⁴² This more lenient tendency eventually became the prevailing view. Hume's writing on suicide was not generally discussed until after the publication of its 1783 edition.²⁴³ George Horne, Bishop of Norwich, replied in 1784 with *Letters on Infidelity*.²⁴⁴ He attacked Hume's failure to distinguish between natural principles and moral ends and blamed suicide partly on the writings of philosophers.²⁴⁵ One other English product needs mention

236. See generally SPROTT, *supra* note 183, at ch. IV.

237. *Id.* at 117.

238. *Id.*

239. J. WESLEY, *Thought on Suicide*, in 13 WORKS OF JOHN WESLEY I 320 (1952).

240. *Id.*

241. SPROTT, *supra* note 183, at 140.

242. *Id.* at 143.

243. *Id.* at 144.

244. *Id.* at 145.

245. *Id.* at 152.

because of its comprehensive approach and size. In 1790, Charles Moore wrote *A Full Enquiry into the Subject of Suicide* in two quarto volumes.²⁴⁶ It remains one of the most detailed works on suicide in the English language. In the work, he attacked the Stoics, Donne, and Hume.²⁴⁷

The Church in America continued this opposition to suicide, although fewer writings are available from the colonial period. A clear example of the attitude is found in a sermon by Timothy Dwight, *Depravity of Man—It's Degree*.²⁴⁸ Dwight was a grandson of Jonathan Edwards and was a member of Edward's church while Edwards was yet the pastor. He served in the Continental Army, was a pastor, a professor of Divinity, and president of Yale University from 1795-1817. He "did more than any one man in the newborn United States of America to stem the tide of atheism and advance the cause of the Christian faith."²⁴⁹ In his sermon he spoke of suicide as a testimony of "enormous corruption."²⁵⁰ His statement that it was unnecessary to dwell on the subject other than to give some statistics indicated a general consensus.²⁵¹

G. Seventeenth and Eighteenth Century Political Philosophers and the American Founders

American political culture draws deeply both from seventeenth century natural rights philosophy and from the ideas of the eighteenth century statesmen, lawyers, polemicists, and theorists who undertook to interpret and criticize that philosophy.

Thomas Hobbes, the first modern natural rights theorist, popularized the notion that government is founded on a social contract among asocial individuals designed to secure their own preservation. This concept is common in American political discourse. Indeed, one school of thought maintains that Hobbes best anticipated the views of the Federalist Papers on human nature.²⁵² Hobbes did not discuss suicide explicitly. He seemed exclusively concerned with portraying the fear of a violent death at the hands

246. *Id.* at 152-53.

247. III TWENTY CENTURIES OF GREAT PREACHING 203 (1971).

248. *Id.* at 173.

249. *Id.* at 203.

250. *Id.*

251. See, e.g., G. MACE, LOCKE, HOBBS AND THE FEDERALIST PAPERS: AN ESSAY ON THE GENESIS OF THE AMERICAN POLITICAL HERITAGE x-xii (1979).

252. L. STRAUSS, THE POLITICAL PHILOSOPHY OF HOBBS: ITS BASIS AND ITS GENESIS 16-17 (E. Sinclair trans. 1963).

of others as humanity's motive passion.²⁵³ Though one modern student of Hobbes' thought maintained that Hobbes believed a life might be so miserable as to be not worth living,²⁵⁴ it should be noted that, although life in Hobbes' hypothetical state of nature was quite wretched, human beings in the natural state nevertheless sought to preserve their existence.²⁵⁵

In Hobbes' theory, this overwhelming natural desire became a natural right.²⁵⁶ The commonwealth was created and the sovereign was endowed with immense power for the purpose of effecting this right.²⁵⁷ Therefore, the sovereign could not command the self-destruction of any individual.²⁵⁸ The natural right to self-preservation remained vested in each subject.²⁵⁹ If the subject had any duty in Hobbes' system, it was a duty to keep his or her covenants and this duty was intimately connected with a duty to preserve oneself. "Justice, that is to say keeping of covenants, is a rule of reason, by which we are forbidden to do anything destructive to our life; and consequently a law of nature."²⁶⁰

Although other polemicists may have had more widespread influence and although there are certainly non-Lockean elements in America's revolutionary ideology²⁶¹ and in American political culture in general, John Locke's teachings are undeniably an important part of this nation's political consciousness.²⁶² Lock consist-

253. *Id.* at 16.

254. T. HOBBS, *LEVIATHAN* 82 (M. Oakeshott ed. 1947). *See also id.* at 84, 86-87.

255. *Id.* at 84.

256. *Id.* at 109-13. *See also id.* at 113-20, 129-36.

257. *Id.* at 142-43.

258. *Id.* at 144-45.

259. *Id.* at 96. A strong case can be made for the thesis that Hobbes did not consider self-preservation a duty in the strictest sense. Rather, Hobbes' rule of reason was merely a prudential maxim counseling self-preservation. *See* L. STRAUSS, *NATURAL RIGHT AND HISTORY* 1 (1953).

260. *See* *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 719 (A. Koch and W. Peden eds. 1944) (letter from Jefferson to Henry Lee in which he admitted the influence of Aristotle, Cicero, and Sidney on that "expression of the American mind"—the Declaration of Independence). *See also* G. MACE, *supra* note 251; H. JAFFA, *HOW TO THINK ABOUT THE AMERICAN REVOLUTION* 37-40 (1978).

261. B. BAILYN, *THE ORIGINS OF AMERICAN POLITICS* 1 (1965) (Locke's theories formed the "skeleton" of revolutionary political discourse). *See also*, L. STRAUSS, *supra* note 252 at 165; *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON*, *supra* note 260, at 719.

262. J. LOCKE, *ESSAYS ON THE LAW OF NATURE* 173 (W. Von Leyden ed. 1954). In Locke's view, this was not surprising. For "men have already shown so much ingenuity in the corruption of morals and such a variety of vices that . . . it is impossible to commit any crime whatsoever of which there has not been an example already." *Id.* at 165. For instance,

What is one to believe about duty towards parents if whole nations have been met with where grown-up offspring kill their parents, where children . . . take away the

ently opposed a right to suicide. His argument against suicide was intertwined with an essential feature of his political theory—limited government grounded on the consent of the governed. He derived both the prohibition of suicide and the idea of limited government from one and the same source—natural law. In Locke's writings, the limitations on liberty to dispose of oneself were closely linked with limitations on the government's authority to dispose of the individual's affairs.

In an early work, *Essay on the Law of Nature*, Locke adduced suicide to illustrate the thesis that the law of nature cannot be known from the general consent of humanity. That suicide has been practiced in and sanctioned by different societies at different times is no proof that the practice is sanctioned by natural law for "if any law of nature would seem to be established among all as sacred in the highest of degree . . . surely this is self-preservation But in fact, the power of custom and opinion based on traditional ways of life is such as to arm men even against their own selves."²⁶³

As Locke's philosophy waxed hedonistic, he turned away from the explication of natural law.²⁶⁴ Nevertheless, his position against any suicide right remained unchanged. Locke's argument against suicide threaded its way through his *Second Treatise on Government* from his discussion of the state of nature, through his treatment of slavery, to his theory of circumscribed governmental power. In Locke's state of nature people were equal and free.²⁶⁵ Nevertheless, though they were in

a state of liberty, yet it is not a state of license, though man in that state [of nature] have an uncontrollable liberty to dispose of his person or his possessions, yet he has not liberty to destroy himself, or so much as any creature in his possession but where some nobler use . . . calls for it.²⁶⁶

life which the Fates continue to bestow, . . . where no ripe old age . . . [is] to be expected, where each is the executioner of his parent and parricide is considered as one of the duties of piety.

Id. at 171. Given this, Locke concluded "that if anyone wants to judge moral rectitude by the standard of such accordance of human actions among themselves, and thence to infer a law of nature, he is doing no more than if he bestowed his pains on playing the fool according to reason." *Id.* at 165.

263. Von Leyden, *Introduction* to J. LOCKE, *supra* note 262 at 60-82. See also L. STRAUSS, *supra* note 259, at 202-51.

264. J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 4-5 (J. W. Gough ed. 1946).

265. *Id.* at 5.

266. *Id.* at 14. Tully points out that this "'workmanship model' is a fundamental feature of all Locke's writings." J. TULLY, *A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES* 4 (1980). See also *id.* at 35-50. The argument from God as maker was common

The reason for this was that "men being the workmanship of one omnipotent . . . makes all servants of one sovereign master, sent into the world by his order and about his business—they are his property, whose workmanship they are, made to last during his, not on another's pleasure."²⁶⁷

Locke reiterated this argument in his chapter on slavery. One could not give oneself over into slavery for the same reason that one could not kill oneself: one does not possess that sort of power over one's own life. "Nobody can give more power than he has over himself; and he that cannot take away his own life cannot give another power over it."²⁶⁸ However, a person could commit a crime by which his or her life was forfeited. Such a person might submit to slavery rather than face deserved execution. Locke seemed to sanction a form of indirect suicide for these "slaves." "For whenever he finds the hardship of his slavery outweigh the value of his life, it is in his power by resisting the will of his master to draw on himself the death he desires."²⁶⁹ This doctrine appears to be contrary to Locke's general prohibition of suicide and is regarded as an inconsistency by one Locke scholar.²⁷⁰ It should be kept in mind that Locke believed these "slaves" to have already forfeited their natural right to life through the commission of some capital crime and that suicide and slavery seemed consistently to be conjoined in Locke's thought.

Lock's anti-suicide argument established a crucial difference between his political theory and the political theory of Hobbes. Hobbes developed no explicit argument against suicide. He also permitted people to enslave themselves by covenant.²⁷¹ From this freedom to enslave oneself, he deduced the freedom to agree to the establishment of an absolute and arbitrary sovereign power. Locke saw this approach as dangerous and opposed it as self-defeating: this sort of sovereign, he argued, poses as great a threat to individ-

in Locke's day. *Id.* at 41-42. Though Strauss, in a much disputed thesis, argued that Locke's traditional natural law arguments were merely cautious writing that did not reflect his own beliefs, the fact that Locke felt compelled to make the argument consistently shows that the ideas behind it were firmly rooted in English political and legal thought. See L. STRAUSS, *supra* note 252, at 202-30. Moreover, even if the ground of Locke's anti-suicide argument were to shift, it does not follow that Locke's position against suicide would change.

267. J. LOCKE, *supra* note 264, at 14.

268. *Id.*

269. J. LOCKE, *TWO TREATISES OF GOVERNMENT* 302 n.23 (P. Laslett ed. 1960) (note by editor).

270. T. HOBBS, *supra* note 254, at 132.

271. J. LOCKE, *supra* note 269, at 9.

ual security and self-preservation as the hazards of the state of nature.²⁷² Unlike Hobbes, Locke had recourse to the anti-suicide argument as a reason for prohibiting the alienation of one's liberty and for limiting the power of the sovereign.²⁷³ As we have observed, Locke employed the workmanship argument to show that one has no right to self-slaughter. He redeployed this argument to prove that there is no right to enslave oneself. Finally, he again pressed the argument as a justification for limiting the sovereign power. All civil power is derived from individual power. But individual power is limited. It follows that the grant of the individual's power to the government is also limited.

[N]obody can transfer to another more power than he has in himself; and nobody has an absolute arbitrary power over himself . . . to destroy his own life A man, . . . as has been proved, cannot subject himself to the arbitrary power of another; and having in the state of nature . . . only so much [power] as the law of nature gave him for the preservation of himself . . . this is all he doth, or can give up to the commonwealth, and by it to the legislative power. . . .²⁷⁴

This argument descended from Locke to the American political tradition through the much less prosaic language of the Declaration of Independence.²⁷⁵ In that document the maker who proscribes our self-destruction became a creator who endows us with a right to life which we cannot alienate. While the author of the Declaration nowhere commented on Locke's anti-suicide argument, Thomas Jefferson did offer some opinions on the problem of suicide in a footnote to a bill he drafted for the general reform of the Virginia laws.²⁷⁶ The bill, "a Bill for Proportioning Crimes and

272. As noted, Hobbes did not employ an anti-suicide argument in any explicit way.

273. J. LOCKE, *supra* note 269, at 68. *See also id.* at 73-74.

Despotical power is an absolute, arbitrary power one man has over another to take away his life This is a power which neither nature gives, for it has made no such distinction between one man and another, nor compact can convey; for man, not having such an arbitrary power over his own life, cannot give another man such a power over it. . . .

Id. at 87. For a discussion of the relationship between the rule of law, liberalism, and judgments about whose lives are worth living, see Sherlock, *Liberalism, Public Policy, and the Life Not Worth Living: Abraham Lincoln on Beneficent Euthanasia*, 26 AM. J. JURIS. 47 (1981).

274. *See THE LIFE AND WRITINGS OF THOMAS JEFFERSON*, *supra* note 260, at 719.

275. 2 T. JEFFERSON, *THE PAPERS OF THOMAS JEFFERSON* 496 (J.P. Boyd ed. 1952). *See also id.* editorial note, at 305-24.

276. *Id.* at 496. The purpose of the revision was to temper the severity of the laws, and to bring them into line with the spirit of moderation regarded as necessary for the success of republican government. *See id.* at 492-507. In the preface to the bills, the "Plan Agreed Upon by the Committee of Revisors at Fredericksburg," suicide is classed "as a disease." *Id.*

Punishments in Cases heretofore capital," provided that, in the case of suicide, "the law will not add to the miseries of the party by punishments or forfeiture."²⁷⁷ Jefferson joined with proponents and opponents of suicide in condemning Beccaria's argument against contemporary anti-suicide laws.²⁷⁸ Jefferson elaborated on his objections to these laws with arguments based on the need for logical consistency in meting out punishments and with arguments based on various practical considerations.

The suicide injures the state less than he who leaves it with his effects. If the latter then be not punished, the former should not. As to example, we need not fear its influence. Men are too much attached to this life to exhibit frequent instances of depriving themselves of it. At any rate, the quasi-punishment of confiscation will not prevent it. For if one can be found who can calmly determine to renounce life, who is so weary of his existence here as rather to make experiment of what is beyond the grave, can we suppose him, in such a state of mind, susceptible to influence from the losses to his family by confiscation? That men in general disapprove of this severity is apparent from the constant practice of juries finding the suicide in a state of insanity; because they have no other way of saving the forfeiture.²⁷⁹

Jefferson opposed forfeiture as a punishment for suicide not only because he regarded it as draconian in punishing the innocent heirs of the suicide but also because he regarded it as a form of rapacity practiced by the government on the citizenry. In 1782, Jefferson petitioned the Governor of Virginia on behalf of a relative and potential heir of a suicide. He reminded the Governor that the British Crown, "in mitigation of the rigors of the law," was wont to "regrant . . . such property as had lapsed by the misfortunes of individuals to the families from which the property had been derived."²⁸⁰ He then attributed the rigors of the forfeiture laws to a "spirit of rapine and hostility by princes towards their subjects."²⁸¹ Such laws, common in "barbarous times . . . [are] inconsistent with the principles of moderation and justice which principally endear a republican government to its citizens . . ."²⁸²

This critique of Anglo-Saxon anti-suicide laws is similar to Montesquieu's criticism of the Roman anti-suicide law under the first

at 325.

277. See *supra* notes 181-82 and accompanying text.

278. T. JEFFERSON, *supra* note 275, at 496.

279. 6 T. JEFFERSON, *THE PAPERS OF THOMAS JEFFERSON* 155 (J.P. Boyd ed. 1952).

280. *Id.*

281. *Id.*

282. See MONTESQUIEU, 1 *SPIRIT OF LAWS* 276 (1802).

emperors.²⁸³ In Montesquieu's view, the Roman law was simply an outgrowth of the Emperor's avarice, a purely fiscal measure designed to enrich the Emperor through the confiscation of the suicide's property.²⁸⁴ Unlike the Greek anti-suicide law which was based on "fine ideas" and had the formation of character as its goal,²⁸⁵ the Roman law, Montesquieu felt, had no natural relation to any legitimate public purpose.

Montesquieu suggested that the same was true of English anti-suicide laws. In England, suicide "is the effect of a distemper."²⁸⁶ The English, Montesquieu explained, "destroy themselves most unaccountably . . . often in the very bosom of happiness."²⁸⁷ Therefore, "It is evident, that the civil laws of some countries may have reasons for brandishing suicide with infamy: But in England it cannot be punished without punishing the effect of madness."²⁸⁸ Montesquieu's views on suicide were actually more subtle than would appear from his apparent reduction of the question to commentary on national temperaments.

Montesquieu articulated both sides of the suicide debate in a succession of fictional epistles that appear in his *Persian Letters*. In the seventy-sixth letter, Usbek, an eastern potentate visiting Paris, complained to a friend at home that "European laws are ferocious against those who kill themselves."²⁸⁹ He first made a political assault on these laws, arguing that no duty is owed to society by the individual, and, therefore, that society cannot proscribe suicide.²⁹⁰ The fictional Usbek then attempted to refute the belief that suicide is a violation of God's Providential order. "What can this mean?" he asked. "Do I disturb the Providential order when I . . . make a ball square, a ball that the first laws of movement . . . have made round? Certainly not, I simply use a right given to me, and in that sense I can disrupt all of nature as I will"²⁹¹

283. *Id.*

284. *Id.*

285. *Id.* at 271. At the request of the Sorbonne Faculty of theology, Montesquieu added a footnote to this chapter in the 1757 edition of *THE SPIRIT OF LAWS*: "Suicide is contrary to the natural law and revealed religion." See M. RICHTER, *THE POLITICAL THEORY OF MONTESQUIEU* 338 n.11 (1977).

286. *Id.*

287. *Id.*

288. MONTESQUIEU, *THE PERSIAN LETTERS* 129 (G.R. Healy trans. 1964).

289. *Id.* at 130 ("Society is based on mutual advantage; but when the society becomes onerous to me, who is to prevent my renouncing it Will the prince demand that I remain his subject if I receive no advantages from subjugation?").

290. *Id.*

291. *Id.* at 130-31.

Prohibitions against suicide, he concluded, "have no other source but our pride."²⁹²

In the next letter, a response from home, Montesquieu turned the tables on Usbek. Usbek's friend argued that it is suicide, rather than the laws prohibiting it, that stems from pride. Our trials in life and our impatience of it only "show us that we want to be happy independents of Him who grants all felicity. . ."²⁹³ He concluded that if the "necessity of preserving unity [of body and soul] is the best guarantee of men's actions then it should be made a civil law."²⁹⁴ On what side did Montesquieu come down in this dispute? Letter 104 points to a possible resolution. In this letter, Usbek, the supporter of a suicide right, criticized Locke's argument for limited, consensual government, which, as we have seen, rested on Locke's assumption that suicide was illegitimate.²⁹⁵ Usbek implied that Locke's doctrine was responsible for the instability of English politics and the insubordination of the English people. Thus, Montesquieu affirmed the connection between a liberal constitution and the belief that the individual's power over one's own life is limited. Significantly, he linked the desire for absolute rule of the eastern autocrat with the belief in individual freedom to commit suicide.²⁹⁶ The real cause of English political unrest, according to Montesquieu's Usbek, could be found in "the impatient temper of the English."²⁹⁷ Of course, this is consistent with Montesquieu's English suicide theory in *Spirit of Laws*.

The works of Jean Jacques Rousseau were widely read in America. In fact, his novel *La Nouvelle Heloise* received a good deal of attention from both American statesmen and the American public.²⁹⁸ Both John Adams and Thomas Jefferson read it and rec-

292. *Id.* at 131.

293. *Id.*

294. *Id.* at 173. As the writer notes:

But if a prince, instead of making his subjects happy, tries to oppress and destroy them, the obligation of obedience ceases They [British subjects] maintain that no absolute power can be legitimate because it could never have had a legitimate origin. For we cannot, they say, give to another more power over us than we have ourselves. Now we have not absolute power over ourselves; for example, we cannot take our own lives. Therefore, they conclude, no one on earth has such power.

Id. Usbek regarded this argument as sophisticated and self-serving. He, himself, employed an argument based on the idea that political obligation bind only insofar as it is advantageous. Unlike Locke, Usbek employed this rhetoric on behalf of a suicide right. *See id.* at 129.

295. *Id.* at 173.

296. *Id.*

297. *See* P. SPURLINE, ROUSSEAU IN AMERICA, 1760-1809 47-56 (1969).

298. *Id.* at 50-51, 55-56.

commended it to others.²⁹⁹ The novel, written in the form of a series of letters, is pertinent because, like Montesquieu's book, it contained two letters debating the validity of suicide.³⁰⁰ The Werther-like Saint Preux wrote, among other arguments, a classic apology for suicide based on individual autonomy and the distinction between self-regarding and other-regarding conduct.³⁰¹ The response to this argument came from a character called Lord Bomston whom Rousseau employed not only to argue against suicide,³⁰² but also to contradict Montesquieu's theory about the suicidal English temper. "I have a firm soul; I am English," Bomston replied. "I know how to die, for I know how to live and suffer . . ." ³⁰³

An examination of Rousseau's political works indicates that he opposed suicide. In an attempt to restore some civic virtue to the modern liberal state, Rousseau grafted the duty-based anti-suicide arguments of the ancients onto the Lockean ones. In his *Social Contract*, Rousseau asked "how individuals who have no right to dispose of their own lives can transmit to the Sovereign this right which they do not possess."³⁰⁴ Moreover, suicide is a "crime,"³⁰⁵

299. J. ROUSSEAU, *LA NOUVELLE HELOISE* 263-65, 414-15 (J.H. McDowell trans. 1968). John Adams made notes in the margins of his copy of the novel, cryptically commenting on the relative merits of Saint-Preux' arguments on behalf of suicide. Saint-Preux contended that the Lockean argument "that God has placed us in this world and therefore we have no right to leave it without permission," is false because God "has placed us also in our city and yet we need no permission to leave that." "Excellent sophistry," Adams commented, "if the word excellent may be used."

Saint-Preux also argued that "once the weariness of life conquers the horror of death . . . life becomes intolerable." Adams thought that this argument was "rather better." See Z. HARASZITIT, *JOHN ADAMS AND THE PROPHETS OF PROGRESS* 97 (1964).

300. J. ROUSSEAU, *supra* note 299, at 264.

301. *Id.* at 265.

302. *Id.*

303. J. ROUSSEAU, *THE SOCIAL CONTRACT* 53 (C. Cheroover ed. and trans. 1974). See also ROUSSEAU, *DISCOURSE ON THE ORIGIN AND FOUNDATIONS OF INEQUALITY AMONG MEN* 168 (D. Masters ed., R.D. Masters and J.R. Masters trans. 1964). In the *Second Discourse* Rousseau repeated his variation on Locke's theme:

[A]s the right of property is only conventional . . . every man can dispose at will of what he possesses. But it is not the same for essential gifts of nature, such as life and freedom, which everyone is permitted to enjoy and of which it is at least doubtful that one has the right to divest himself; by giving up the one, one degrades his being, by giving up the other one destroys it . . . and as no temporal goods can compensate for the one or the other, it would offend both nature and reason to renounce them whatever the price.

Id. at 167. In *EMILE*, Rousseau says that "man's freedom, while it may appear to be unlimited, extends only as far as his natural forces, which are defined by the hard law of necessity and violated only at man's peril." R. MASTERS, *THE POLITICAL PHILOSOPHY OF ROUSSEAU* 319 (1968) (paraphrasing *EMILE*, II).

304. J. ROUSSEAU, *THE SOCIAL CONTRACT*, *supra* note 303, at 53.

305. See generally *id.*

Rousseau claimed, primarily because the suicide shirks the duty he owes to the state. Rousseau was obviously not persuaded by the argument summed up in Voltaire's sarcastic comment that the republic would do very well without him,³⁰⁶ for he asserted that "[t]here is no man so worthless that he cannot be made good for something."³⁰⁷

In his *Second Discourse*, Rousseau condemned suicide as one of the many evils attendant on civil society. "I ask if anyone has ever heard it said that a savage in freedom even dreamed of complaining about life and killing himself. Let it then be judged with less pride on which side [civil society or the state of nature] true misery lies."³⁰⁸ Here Rousseau developed a theme prominent in his works—the distinction between the pride (*amour propre*) that drove humanity to its present state of woe and *amour de soi*, that natural and salutary instinct that urges one in the state of nature to preserve oneself.³⁰⁹ For Rousseau, suicide was a bitter fruit of civil society, which grew out of the evil of human pride. Therefore, Rousseau regarded suicide as an unnatural outgrowth of pride.

Thomas Paine was a partisan of both America's Lockean and France's Rousseauist revolutions.³¹⁰ Paine composed a theme on suicide in the form of a letter to one Lady Smyth who had written Paine while he was in a prison in Luxembourg.³¹¹ Paine shared the common conviction that suicide is contrary to reason. "How dismal must the picture of life appear to the mind in that dreadful moment, when it resolves on darkness, and to die! One can scarcely believe such a choice possible."³¹² Significantly, this ardent opponent of tyranny compared the "necromantic nightmare" that seizes a suicide's mind with tyranny.³¹³

Paine insinuated that the instinct of self-preservation is strong not because death is so terrible but because life is, or can be, sweet. Paine captured the optimism about life characteristic of the new democratic age.³¹⁴ "It is often difficult to know what is misfor-

306. *Id.* at 57.

307. J. ROUSSEAU, *THE SECOND DISCOURSE*, *supra* note 303, at 127.

308. *See* R. MASTER, *supra* note 303, at 39-40. *See also* R. STRAUSS, *supra* note 252, at 270-71.

309. Paine denounced the later excesses of the French Revolution. *See* 2 T. PAINE, *COMPLETE WRITINGS OF THOMAS PAINE* 1124 (P. Foner ed. 1969).

310. *Id.*

311. *Id.* at 1121.

312. *Id.*

313. *Id.*

314. *Id.*

tune,"³¹⁵ he observed. "That which we feel is a great one today may be the means of turning aside our steps into some new path that leads to happiness yet unknown."³¹⁶ Even though we cannot know what the future holds, life is the only rational choice to make regarding that future. Paine concluded his letter with the expectation that his own past disappointments, now transformed into a "condition which is sweet" would grow even "more so when" he arrived in America.³¹⁷

H. *Contemporary Religious Viewpoints*

In line with the teachings of the Talmud and later responsa, contemporary Judaism rejects intentional suicide.

Only for the sanctification of the name of the Lord would a Jew intentionally take his own life or allow it to be taken as a symbol of his extreme faith in God. Otherwise intentional suicide would be strictly forbidden because it constitutes a denial of the Divine creation of man, of the immortality of the soul and of the atonement of death.³¹⁸

In a 1981 survey of Jewish laity, 75% opposed suicide in the absence of incurable disease. Forty-four percent (44%) approved suicide for the incurably ill, while 29% were uncertain and 27% opposed it. Seventy-six percent (76%) felt that a person who commits suicide really is not responsible.³¹⁹

The Roman Catholic Church's position on suicide, although more developed and explicit, remains essentially the same as that articulated by Augustine, Aquinas, and the church councils in the Middle Ages. In 1965, the Second Vatican Council declared, "Whatever is opposed to life itself, such as any type of murder, genocide, abortion, euthanasia or willful destruction, all these

315. *Id.*

316. *Id.*

317. Rosner, *Suicide in Biblical, Talmudic, and Rabbinic Writings*, 11 TRADITION 31, 39 (1970).

318. Domini, Cohen, & Gonzalez, *Jewish and Christian Attitudes on Suicide*, 20 J. RELIGION & HEALTH 203 (1981). *Cf.* THE ENCYCLOPEDIA OF THE JEWISH RELIGION 367 (1966); 15 ENCYCLOPEDIA JUDACIA 490 (1971).

319. *Pastoral Constitution of the Church in the Modern World*, in THE SIXTEEN DOCUMENTS OF VATICAN II 513, 539 (n.d.) (para. 27). The Roman Catholic Church in this regard does make moral judgment on the act itself, and according to the principle of the double-effect, makes moral distinctions between acts of self-destruction and self-sacrifice: in such a determination, the moral status of a given act is judged by its primary intent as distinguished from its secondary consequences, which may be foreseen, but are *not* intended. It would thus be morally permitted, for example, for a priest willingly to risk exposure to enemy fire to administer the sacraments to a dying soldier, but it would not be deemed moral for a person to intend to kill himself or herself in order to avoid an attacker.

things and others of their like are infamous indeed."³²⁰ The church does not condemn the insane person who commits suicide,³²¹ and when mental stability is in question, it tends in practice to give the deceased the benefit of the doubt.

A predominant, though not universal, consensus within the Protestant Churches is expressed in general works from a variety of sources. In 1951, *The Interpreter's Bible* declared that "no man has the right to play providence to his own life. . . ."³²² In 1964, *The New Schaff-Herzos Encyclopedia of Religious Knowledge* stated:

The Christian Church has naturally condemned utterly an act which she cannot but regard as absolute negation of the fear of God and of trust in him, and as an insult alike to divine judgment and to divine grace. It is, therefore, inadvisable to break down the barriers erected by law and custom against the suicide, for such procedure would only invite still greater laxity of public opinion.³²³

In 1973, *Baker's Dictionary of Christian Ethics* spoke of the "almost unanimous opposition" of Christianity to suicide.³²⁴

Leading twentieth century theologians have shared this general Protestant opposition to suicide. Karl Barth states that persons who obviously throw their life away, as suicides or otherwise, are being disobedient to the commandment of life.³²⁵ Such rejection of God's gift is a revolt against God.³²⁶ "[W]hen self-destruction is the exercise of a supposed and usurped sovereignty of man over himself it is a frivolous, arbitrary and criminal violation of the commandment, and therefore self-murder."³²⁷ However, for Barth suicide was is not unforgivable. "God sees and weighs the whole of human life," he wrote.³²⁸ Helmut Thielicke states, "Christian objection to this promethean program of [suicide] has never ceased, and will not do so in the future."³²⁹ He warns of the "fatal slope" encountered when humans thus emancipate themselves from their Creator.³³⁰ "Will not others inevitably begin to pass the death sen-

320. N. ST. JOHN STEVAS, *supra* note 86, at 71.

321. 7 THE INTERPRETER'S BIBLE 592 (1951).

322. 11 THE NEW SCHAFF-HERZOG ENCYCLOPEDIA OF RELIGIOUS KNOWLEDGE 132 (1964).

323. 5 BAKER DICTIONARY OF CHRISTIAN ETHICS 652 (1973).

324. K. BARTH, CHURCH DOGMATICS 404 (1961).

325. *Id.* at 127.

326. *Id.* at 404.

327. *Id.* at 405.

328. H. THIELICKE, LIVING WITH DEATH 76 (1983).

329. *Id.*

330. *Id.* at 75.

tence on us when we do not achieve the required dignity?"³³¹ Paul Tillich writes that while suicide may remove "the conditions of despair on the level of finitude," one must as a Christian consider the "dimension of the ultimate." Thus, suicide is not final escape.³³² Like Barth, Tillich does not believe that suicide "definitively excludes the operation of saving grace."³³³ Soren Kierkegaard writes that suicide is rebellion against God and is "the most decisive sin."³³⁴

Dietrich Bonhoeffer (1906-1945) offered a detailed view on the question of suicide. In his *Ethics*, Bonhoeffer stated that individuals possess the liberty and right to risk and surrender their lives, not for the purpose of self-destruction, but only for the sake of some higher good.³³⁵ "It is not bodily life itself that possesses an ultimate right over man. Man is free in relation to his bodily life, and that, in Schiller's phrase, 'life is not the highest of possessions.'" ³³⁶ Bonhoeffer warned, nonetheless, that the power of human liberty can easily lead to abuse. As an act of freedom, argued Bonhoeffer, suicide is the ultimate justification of the human being as human; and it is therefore, from a purely human standpoint, a form of expiation for a life of failure. Although the deed usually occurs in a state of despair, the impulse of suicide is a self-assertion in the midst of this despair, an attempt to provide final meaning to a life which has become void of meaning.³³⁷

In contrast to philosophers such as Aristotle and Kant, Bonhoeffer asserted that the wrongfulness of suicide exists solely in relation to God as the Creator and Master of life. Because there is God, suicide is immoral as a sin of lack of faith. Through lack of faith, one does not believe in a divine justification, and in seeking one's own justification, one chooses suicide. The freedom to die, which one possesses in natural life, is abused, according to Bonhoeffer, if used otherwise than in faith in God:

God has reserved to Himself the right to determine the end of life, because He alone knows the goal to which it is His will to lead it. It is for Him alone

331. P. TILlich, *SYSTEMATIC THEOLOGY* 76 (1967).

332. *Id.*

333. S. KIERKEGAARD, *Sickness Unto Death*, in *A KIERKEGAARD ANTHOLOGY* 348 (R. Bretall ed. 1956).

334. D. BONHOEFFER, *ETHICS* 168-69 (1978). This was not purely an academic question for Bonhoeffer. He was arrested in 1943 by the Nazis for his political involvement in the Resistance and was hanged in April, 1945.

335. *Id.*

336. *Id.* at 166-67.

337. *Id.* at 168.

to justify a life or to cast it away. Before God self-justification is quite simply sin, and suicide is therefore also sin. There is no other cogent reason for the wrongfulness of suicide, but only the fact that over men there is a God. Suicide implies denial of this fact.³³⁸

While firmly asserting the immorality of suicide, Bonhoeffer pointed out that the Bible nowhere expressly forbids the act. He argued that this demonstrates not that the Bible sanctions suicide, "but that, instead of prohibiting it, it desires to call the despairing to repentance and to mercy."³³⁹ One who is in a state of despondence no longer is responsive to any commandments. He can be helped only by a merciful summons to faith, deliverance, and conversion through God's grace.

Bonhoeffer also called attention to the difficulty in applying the general prohibition of suicide in particular cases. He considered, for example, the prisoner who takes his life to spare his country grievous harm, or the terminally ill patient who wishes to free her family of the material and psychological burden of her care. In these cases, an element of self-sacrifice is strongly involved, and if suicide is not undertaken exclusively and consciously for personal considerations, such as wounded honor, romantic passion, and financial ruin, then guilt is questionable and human judgment is impossible. However, in the case of suicide motivated by personal concerns, the thought of sacrifice, while perhaps not entirely absent, will not outweigh the personal desire to escape from shame and despair. In accord with this view, lack of faith will be the ultimate ground for action, since "[s]uch a man does not believe that God can again give a meaning and a right even to a ruined life, and indeed that it may be precisely through ruin that a life attains to its true fulfillment."³⁴⁰ Because the suicide has no such belief, death is sought as the only possible means of imparting meaning to life. Bonhoeffer concludes that suicide cannot be opposed by a purely secular ethic: rather, "the right to suicide is nullified only by the living God."³⁴¹

Like Bonhoeffer, the French philosopher Leon Meynard holds that "the existence of God is the supreme argument against the legitimacy of suicide."³⁴² He asserts that "at bottom, all the reasons leading to suicide can be reduced to one—namely suffer-

338. *Id.* at 169.

339. *Id.* at 172.

340. *Id.*

341. L. MEYNARD, *LE SUICIDE, ETUDE MORALE ET METAPHYSIQUE* 116 (1958).

342. *Id.* at 105.

ing,"³⁴³ and that only from a religious perspective—namely, that humanity's ultimate purpose transcends natural life—can one attain acceptance of suffering.³⁴⁴

There are some ethicists who seek to justify suicide precisely on religious grounds. Joseph Fletcher states that "the real issue is whether we can morally justify taking it into our own hands to hasten death for ourselves (suicide) or for others (mercy killing) out of reasons of compassion."³⁴⁵ For Fletcher, the only command of God is to "act lovingly." This position leads to a morality of intention that justifies the use of any means for achieving loving ends because "[i]f we will the end, we will the means."³⁴⁶ As a consequence, Fletcher concludes that there are many situations in which a spirit of compassion justifies an otherwise immoral action, such as suicide.³⁴⁷ Sullivan, however, maintains that this view is in reality based on a sense of false compassion, a form of rejection which only compounds a person's feeling of despair.³⁴⁸ To truly care for the suicidal person is to realize that he or she is hopeless, alienated, and doubtful of God's love. According to this view, true charity and mercy entail helping that person recover a sense of hope and love and communion with others and God.³⁴⁹ Other ethicists hold for the "Principle of Proportion"³⁵⁰ and argue that the moral law against suicide admits exceptions. Values and countervalues continue to be enumerated and balanced in order to decide whether suicide is permissible in a particular situation.³⁵¹

A survey of various religious bodies by Gerald Larue, president of the Hemlock Society, records responses to a questionnaire by representative members of these bodies.³⁵² The second question of the survey reads:

What stand or position (if any) has your religious organization taken with regard to so-called "active" euthanasia? By "active" euthanasia I refer to the deliberate intervention into the life process by the patient who is terminally ill and in intractable pain, or by the patient acting with the assistance

343. *Id.* at 111.

344. P. & L. LANDSBERG, *supra* note 139, at 94.

345. ASHLEY & O'ROURKE, *HEALTH CARE ETHICS* 377 (1982).

346. *Id.* at 379.

347. *Id.*

348. *Id.* at 377.

349. *Id.* at 376-77.

350. *Id.*

351. LARUE, *EUTHANASIA AND RELIGION* 1 (1985).

352. *Id.* at 145.

of some other person, or by some person acting on behalf of a patient.³⁵³

Thus, active Euthanasia was defined in the survey to encompass suicide and assisted suicide.

In the Lutheran tradition, both the Lutheran Church-Missouri Synod and the American Lutheran Church oppose active euthanasia.³⁵⁴ In the reformed tradition, the Presbyterian Church (USA) has disapproved active euthanasia in study documents only;³⁵⁵ the Church of Scotland, likewise, has no official statement.³⁵⁶ In the Methodist tradition, the United Methodist Church has no official statement on the subject,³⁵⁷ but Bishop James of the African Methodist Church states that active euthanasia is not approved.³⁵⁸ Mennonites would oppose active euthanasia,³⁵⁹ while the Church of the Brethren has not spoken on the issue.³⁶⁰ The Moravian Church rejects active euthanasia;³⁶¹ the Plymouth Brethren would likely reject it also, but no formal statement has been made.³⁶² The United Church of Christ has no official statement on the issue;³⁶³ the National Association of Evangelicals has a clear statement against it.³⁶⁴ Swedenborgianism opposes active euthanasia.³⁶⁵ Seventh Day Adventists are against suicide and likely against active euthanasia, although no official position has been stated.³⁶⁶ Mormons oppose active euthanasia,³⁶⁷ and the Christian Science would oppose it, but no official statement exists.³⁶⁸ Jehovah's Witnesses oppose the practice;³⁶⁹ Unitarians "would not take a stand on assisted suicide."³⁷⁰ Baptists generally are independent units

353. *Id.* at 63-75.

354. *Id.* at 78.

355. *Id.* at 86-87.

356. *Id.* at 88.

357. *Id.* at 89. The Free Methodist Church in correspondence has said that it has no statement on suicide. However, the Wesleyan Church has clear statements opposing both suicide and euthanasia. *THE WESLEYAN CHURCH, THE WESLEYAN CHURCH SPEAKS ON CONTEMPORARY ISSUES* 21-22 (1985).

358. LARUE, *supra* note 351, at 90.

359. *Id.* at 93.

360. *Id.* at 96.

361. *Id.* at 98.

362. *Id.* at 99.

363. *Id.* at 101.

364. *Id.* at 104.

365. *Id.* at 109.

366. *Id.* at 113.

367. *Id.* at 115.

368. *Id.* at 116.

369. *Id.* at 118.

370. *Id.* at 120.

and some general organizations have not taken a position.³⁷¹ Nevertheless, the General Association of General Baptists opposes active euthanasia.³⁷²

A 1981 survey reveals contemporary attitudes of Christian laity toward suicide. Asked to respond to the statement that "there may be situations where the only reasonable resolution is suicide," 56% disagreed and 28% agreed (18% were uncertain). Seventy-seven percent (77%) agreed that "people should be prevented from committing suicide," while 3% disagreed. Eighty-seven percent (87%) disagreed that "if someone wants to commit suicide it is their business and we should not interfere," while 2% agreed. Seventy-nine percent (79%) would require therapy for attempted suicides, while 5% disagreed. There was, however, greater acceptance of suicide for those with incurable disease: 61% would allow suicide in that instance, 26% would not. Finally, the Islamic religion opposes suicide,³⁷³ as it is expressly forbidden by the Koran.³⁷⁴

V. ENGLISH COMMON LAW

What of the law of suicide? Any discussion of the history of American law on the subject would be sorely incomplete without reference to its roots in English common law.

To attempt to discover the attitude of the law toward suicide in very early England is to toy with a mist. English law originated in local community attempts to regulate and provide substitutes for the feuds that developed between parties or their families.³⁷⁵ Suicide does not involve a feud between individuals or groups, and therefore obviously did not inspire the same sort of community concern. Gradually, the monarch and courts of royal justice provided an alternative to—and eventually almost completely displaced—various local customs. These royal courts began to administer the law "common" to the entire kingdom;³⁷⁶ it has been said that this "common law emerged in the twelfth century."³⁷⁷

The centralizing impulse that resulted in the emergence of the common law was largely due to the consolidation of royal power

371. *Id.*

372. Domini, Cohen & Gonzalez, *supra* note 318, at 203.

373. LARUE, *supra* note 351, at 140-41.

374. KORAN iv.33.

375. See J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 4-5, 412 (2d ed. 1979).

376. *Id.* at 21-27.

377. *Id.* at 11.

and the royal quest for revenue. “[C]entral government took the form of accounting, and consisted in the enforcement by financial sanctions of the financial rights of the crown.”³⁷⁸ Among those financial sanctions was forfeiture to the king of possessions held by one who had committed a wrong.³⁷⁹ “[A] felony was treated as a fundamental breach of the [feudal] contract of homage; the felon forfeited his holding, and the sins of the father were visited on his children by disinheritance”³⁸⁰ Originally, an “appeal of felony” was brought by the victim, not the Crown, but since the victim eventually received no compensation (the penalty went to the King), there was little continuing incentive for the victim to take the matter to court. Thus, in the twelfth century, the Crown began to institute such suits itself, a practice that eventually eclipsed the original private prosecution for retribution.³⁸¹

The first English law treatise of consequence was published around 1187. Known as *Glanvill*,³⁸² the treatise contains no mention of suicide. However, suicide is discussed in the important treatise of Henry de Bracton, probably written between 1220 and 1260.³⁸³ With one significant exception, Bracton largely incorporated the Roman law on suicide as presented in the *Digest* of the Emperor Justinian, rediscovered in the late eleventh century.³⁸⁴

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.³⁸⁵ 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

378. S. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 32 (2d ed. 1982).

379. *Id.* at 26.

380. BAKER, *supra* note 375, at 412-13 (footnote omitted).

381. *Id.* at 413-15. See also T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 424-29 (5th ed. 1956).

382. *TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL* (G. Hall ed. 1965). For the work’s date and importance see BAKER *supra* note 375, at 12-13, 161 and PLUCKNETT, *supra* note 381, at 256-57.

383. W. Mikell, *Is Suicide Murder?* 3 *COL. L. REV.* 379, 379 n.1 (1903). The text accompanying notes 253-66 relies heavily on Mikell.

384. BAKER, *supra* note 375, at 161.

385. Hall, *Introduction*, in *GLANVILL*, *supra* note 382, at xvi. But see Vinogradoff, *The Roman Elements in Bracton’s Treatise*, 32 *YALE L.J.* 751, 752-53 (1923) (maintains Bracton used secondary sources rather than text of the *DIGEST* itself).

heirs."³⁸⁶ The Roman condemnation was not of suicide itself:

[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.³⁸⁷

There was a circumstance in which the Roman law would punish one who had attempted suicide, although the exception to this circumstance seemed to swallow the rule: when one "laid violent hands on himself without any cause, as he who did not spare himself would still less spare another."³⁸⁸ Acceptable "cause" was described as "weariness of life, or because he was compelled to take this step through pain of some description."³⁸⁹

Although Bracton's treatment of suicide³⁹⁰ contained apparent contradictions, these may be attributable to the fact that Bracton had occasionally incorporated the Roman law as set forth in Justinian's *Digest*, uncritically including its terms and phrases. "Just as a man may commit felony by slaying another so may he do so by slaying himself, the felony is said to be done to himself," he wrote.³⁹¹ If one is charged but not convicted of a felony and "conscious of his crime and fearful of being hanged or of suffering some other punishment, he has killed himself; his inheritance will then be the escheat of his lords. It ought to be otherwise if he kills himself through madness or unwillingness to endure suffering . . ." ³⁹² Bracton goes so far as to reiterate 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 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.³⁹³

386. 9 THE CIVIL LAW 129 (S. Scott trans. 1932) (DIGEST, bk. 48, tit. 21, para. 3 [1]. The general rule was that if an accused person died before judgment, then "his heirs can take possession of his estate." *Id.* at para. 2).

387. *Id.* at para. 3.

388. *Id.* at 130, para. 6.

389. *Id.*

390. 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 366 (fol. 130) & 423-24 (fol. 150) (G. Woodbine ed. S. Thorne trans. 1968). Bracton did not use the term "suicide" but referred to "felonia . . . de se ipso" (felony to [or upon] oneself). *Id.* at 423 (fol. 150).

391. *Id.* at 423 (fol. 150).

392. *Id.* at 366 (fol. 150).

393. *Id.* at 423-24 (fol. 150). The Latin is almost identical (Bracton's divergences are in brackets): "non enim facti sceleritatem esse obnoxiam, sed conscientiae metum [metus] in reo velut [veluti pro] confesso teneri placuit [habetur (in place of 'teneri placuit')]." *Id.* at 424 & nn. 7-8 (fol. 150).

Yet Bracton could hardly have meant all that this language implies, for he went on to introduce his 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.”³⁹⁴ 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. The penalty, however, did not apply to the insane: Bracton wrote that a “madman bereft of reason[,] . . . the deranged, the delirious and the mentally retarded . . . or . . . one labouring under a high fever” do not commit felony de se “nor do such persons forfeit their inheritance or their chattels”³⁹⁵

“[I]t is curious to note,” wrote Mikell, “that in the one instance only in which he forsook the Institute, did [Bracton] write what was destined to survive in English law.”³⁹⁶ 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.

Three treatises published between 1290 and 1292 dealt with suicide. The most reliable, *Fleta*,³⁹⁷ restated Bracton in more cohesive terms:

Just as a man may commit felony in slaying another, so he may in slaying himself; for if one who has lately slain a man or has committed some like act whence felonies arise, conscious of his crime and in fear of judgement, slay himself in any fashion, his goods accrue to the Crown nor may he have any other heir than the lord of the fee. But should anyone slay himself in weariness of life or because he is unable to support some bodily pain, he shall have his son for his heir, but his movable goods will be confiscate. Those, too who cast themselves down from a height or drown themselves likewise have heirs, provided they have committed no felony. Similarly, madmen and those who are frenzied, childish, deranged or are suffering from high fever, although they kill themselves, do not commit felony or for-

Bracton added a variation extended from the Roman law of attempted suicide: “But if one lays violent hands upon himself without justification, through anger and ill-will as where wishing to injure another but unable to accomplish his intention he kills himself, he is to be punished and shall have no successor, because the felony he intended to commit against the other is proved and punished, for one who does not spare himself would hardly have spared others, had he the power.” *Id.* at 424 (fol. 150).

394. *Id.* at 424 (fol. 150).

395. *Id.*

396. Mikell, *supra* note 383, at 380-81.

397. See PLUCKNETT, *supra* note 381, at 265.

feit their inheritances or chattels, because they lack sense and reason. Their wives, moreover, should receive their dowers.³⁹⁸

Britton, a second treatise simply states, “[W]here a man is felon of himself, his chattels shall be adjudged ours [the King’s], as the chattels of a felon, but his inheritance shall descend entire to his heirs.”³⁹⁹ Lastly, Andrew Horn’s *Mirror of Justices* noted, “A voluntary homicide may be of oneself or of another person; the former is the case with persons who hang, drown, or otherwise kill themselves of their own proper felony.”⁴⁰⁰

By the reign of Elizabeth I, the rationale for punishment of suicide was well-developed, as appears from a case decided in the Court of King’s Bench in 1561-62:

[A]s to the quality of the offence which Sir James has here committed, he said, it is in a degree of murder

[I]t 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 (as Brown termed it) 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.⁴⁰¹

In 1644, Sir Edward Coke published his *Third Institute*, a work that would have tremendous influence.

There was almost immediately a tendency not to go behind Coke. . . .

[T]he seventeenth century was apt to see the medieval authorities only through Coke’s eyes [F]rom Coke’s day onward lawyers rarely ventured to look at the Year Books unless they had first assured themselves of Coke’s guidance, and made up their minds to reach Coke’s conclusions.⁴⁰²

Coke was self-assured, detailed, and definite on the law of *felo de se*. He regarded it as a category of murder: “*Felo de se* is a man, or woman, which being *compos mentia*, of second memory, and of

398. 2 FLETA 899 (Selden Society vol. 72, 1953) (bk. 1, ch. 34).

399. 2 BRITTON 39 (F. Nichols trans. 1865 & photo. reprint 1983) (bk. 1, ch. 8).

400. A. HORN, *THE MIRROR OF JUSTICES* 23 (W. Whittaker ed. Selden Society vol. 7, 1895) (bk. 1, ch. 9). See also PLUCKNETT, *supra* note 381, at 267 (strong arguments against the book’s veracity by Maitland).

401. Hales v. Petit, 75 Eng. Rep. 387, 399-400 (1561-62).

402. PLUCKNETT, *supra* note 381, at 283-84.

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."⁴⁰³ If one "by the rage of sickness or infirmity, or otherwise" kills himself "while he is not *compos mentia*," there is no felony because the *mens rea* requisite for a violation of the law is absent.⁴⁰⁴ That one had died as a *felo de se* had to be determined of record by a coroner's jury after viewing the body; if the body could not be found, the determination was made by justices of the peace or the Court of King's Bench.⁴⁰⁵

Explicitly disagreeing with Bracton, but following *Britton*, Coke wrote that under no circumstances did a *felo de se* forfeit lands, but only goods and chattels. "For," Coke said—and we are familiar with his reasoning from the Roman law—"no man can forfeit his land without an attainder by course of law."⁴⁰⁶ A dead person could not be so attained.

In 1716, the first edition of William Hawkins' *A Treatise of the Pleas of the Crown* was published.⁴⁰⁷ "[O]ur laws," wrote Hawkins of *felo de se*, "have always . . . an abhorrence of this crime . . ."⁴⁰⁸ His account of "homicide against a man's own life" largely repeated Coke. It is noteworthy, however, that many coroner's juries in the eighteenth century were acting upon the view "that every one who kills himself must be *non compos* of course; for it is said to be impossible that a man in his senses should do a thing so contrary to nature and all sense and reason."⁴⁰⁹ Hawkins disapproved of this tendency:

[I]t is wonderful that the repugnancy to nature and reason, which is the highest aggravation of this offense, should be thought to make it impossible to be any crime at all . . . [H]as a man therefore no use of his reason, because he acts against right reason? Why may not the passions of grief and discontent tempt a man knowingly to act against the principles of nature and reason in this case, as those of love, hatred, and revenge, and such life, are too well known to do in others?⁴¹⁰

In 1736, Sir Matthew Hale's influential work, *History of the*

403. COKE, THIRD INSTITUTE *54.

404. *Id.*

405. *Id.* at *54-55.

406. *Id.* at *55.

407. 12 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 361 (1938).

408. 1 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 164 (T. Leach ed. 7th ed. 1795).

409. *Id.*

410. *Id.*

Pleas of the Crown, was published.⁴¹¹ Like Hawkins, Hale largely mirrored and confirmed Coke, adding as reason for the prohibition of suicide that:

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 and voluntarie seipsum interfecit and murderarit contra pacem domini regis* [feloniously and voluntarily killed and murdered himself against the peace of the lord king].⁴¹²

Regarding the inapplicability of the crime to one who is *non compos mentia*, Hale emphasized:

It is not every melancholy or hypochondrical distemper, that denominates a man *non compos*, for there are few, who commit this offense, but are under such infirmities, but it must be such an alienation of mind, that renders them to be madmen or frantic, or destitute of the use of reason: a lunatic killing himself in the fit of lunacy is not *felo de se*, otherwise it is, if it be at anothertime.⁴¹³

The summation of the law of *felo de se* by Sir William Blackstone, whose magisterial *Commentaries on the Laws of England* were first printed in 1765, was of immense importance for eighteenth and nineteenth century America, for he was the principal source of information about the common law for American lawyers.⁴¹⁴ "Self-murder" Blackstone called "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" ⁴¹⁵ The reasons for its prohibition were enumerated as they had been first stated in *Hales v. Petit*,⁴¹⁶ and handed down by the earlier treatise writers:

411. J. BAKER, *supra* note 375, at 166.

412. M. HALE, *HISTORIA PLACITORUM CORONAE* *411-12. Hale took issue with Coke concerning whether a coroner's ruling of *felo de se* was conclusive or subject to challenge by executors and administrators. *Id.* at *414-17.

413. *Id.* at *412.

414. See PLUCKNETT, *supra* note 381, at 287; Waterman, *Thomas Jefferson and Blackstone's Commentaries*, 27 *ILL. L. REV.* 629, 630-34 (1933), reprinted in *ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW* 451, 452-57 (D. Flaherty ed. 1969). When Abraham Lincoln came to study law in 1834, "By reading [Blackstone] and very few other works, he was almost as familiar with the law as many of his contemporaries at the bar." J. FRANK, *LINCOLN AS A LAWYER* 10 (1961). Twenty years later he advised a young man desiring to become a lawyer, "begin with Blackstone's Commentaries, and after reading carefully through, say twice, take Chitty's 'Pleadings,' Greenleaf's 'Evidence,' and Story's 'Equity,' in succession," quoted in 1 I. TARBELL 109-10 (1924). Notice that Blackstone was the sole book on substantive law the sixteenth President recommended.

415. 4 W. BLACKSTONE, *COMMENTARIES* *189.

416. 75 *Eng. Rep.* 387 (1561-62).

[T]he 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.⁴¹⁷

Blackstone followed Hawkins and Hale (indeed, he assimilated their terminology) in criticizing the tendency of coroner's juries to find "that the very act of suicide is evidence of insanity" and on that basis "save the suicide's family from forfeiture of his or her goods."⁴¹⁸ Yet while Blackstone went on to specify a clearer rationale for the punishment than his predecessors, he was also clearly somewhat uneasy with it, and driven to seek refuge in the power of the pardon:

[W]hat 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, 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.⁴¹⁹

Thus, the common law of England was definitively stated on the eve of the separation of the American colonies to form a new nation: suicide voluntarily committed by one of years of discretion and *compos mentis* was a felony which, when officially found (and we have seen that such a finding was sometimes evaded by ruling the suicide *non compos mentia*), resulted in ignominious burial and forfeiture of all personal but not real property.⁴²⁰

VI. THE UNITED STATES

Was this, however, the law of the American colonies? There is

417. See BLACKSTONE, *supra* note 415, at *189.

418. *Id.*

419. *Id.* at *190.

420. "Personal" property could include some interests in land, such as a term of years or a tenancy at will, called "chattels real." See BAKER *supra* note 375, at 220, 251-52; *Cf. Hales v. Petit*, 75 Eng. Rep. 387 (1561-62).

considerable scholarly dispute among historians over the degree to which English common law was transplanted to the colonies upon their settlement—or if not transplanted, later adopted by them.⁴²¹ Rather than leaping to the general conclusion that the English common law on suicide, as summarized by Blackstone, was the state of the law in America at the time of the adoption of the Constitution, we must look more closely at the legal attitude toward suicide found in colonial legal sources. So far as these sources allow, we shall trace that attitude from the days of the earliest settlements.

The first permanent English settlements in what was to become the United States occurred in 1607 at Jamestown (founding Virginia Colony),⁴²² in 1620 at Plymouth Rock (founding Plymouth Colony), and in 1628-30 at Cape Ann and in the Boston environs (founding Massachusetts Bay Colony).⁴²³ These were followed by the settlement of Maryland in 1634,⁴²⁴ of Connecticut (by immigrants from Plymouth and Massachusetts Bay Colonies) in 1633-35,⁴²⁵ and of Rhode Island in 1636.⁴²⁶ It is evident that these early colonists generally condemned suicide.

Virginia put into practice the traditional penalties of the common law. In 1661, a coroner's jury ruled that the death of Walter Catford was a suicide, and described the incident as one "who for want of Grace tooke a Grindstone and a Roape and tyed it about his middle and Crosse his thighes and most barbarously went and drowned himselfe contrary to the Lawes of the king and this Countrey"⁴²⁷ In the same year, a coroner's jury, dealing with another suicide, "caused him to be buried at the next cross path as the Law Requires with a stake driven through the middle of him in

421. Cf. E. BROWN, *BRITISH STATUTE IN AMERICAN LAW 1776-1836* (1964) (view of British officials was that English common law and statutes were not transplanted, and they resisted colonial efforts to receive them) and R. MORRIS, *STUDIES IN THE HISTORY OF AMERICAN LAW* v-viii, 11-17 (2d ed. 1963) (degree of reception widely varied among particular colonies, and religious or indigenous elements were a key alternate source) with Chafee, *Colonial Courts and the Common Law*, 33 *MASS. HIST. SOC. PROCEEDINGS* 139, (1952), reprinted in *ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW* 53 (D. Flaherty ed. 1969) (more evidence needed, but likely that at least principles of common law were used in early colonial courts), and A. SCOTT, *CRIMINAL LAW IN COLONIAL VIRGINIA* 23-38 (1930) (Virginia colonists treated common law as their own).

422. 29 *ENCYCLOPAEDIA BRITANNICA* 355 (15th ed.1985).

423. 11 *ENCYCLOPAEDIA BRITANNICA* 590 (1974).

424. 29 *ENCYCLOPAEDIA BRITANNICA* 298 (15th ed. 1985).

425. *Id.* at 273.

426. *Id.* at 287-88.

427. A. SCOTT, *supra* note 421, at 198-99 n.16.

his grave."⁴²⁸ There are records in 1706 and 1707 of personal estates that were forfeited to the Virginia government as punishment for the suicide of their owners.⁴²⁹

Massachusetts prohibited confiscation of the personal estates of suicides,⁴³⁰ but in 1660, "considering how far Satan doth prevail upon several persons within this jurisdiction, to make away themselves, judgeth that God calls them to bear testimony against such wicked and unnatural practices, that others may be deterred therefrom," required ignominious burial of a suicide's corpse in a highway with "a Cart-load of Stones laid upon the Grave as a Brand of Infamy, and as a warning to others to beware of the like Damnable practices."⁴³¹ In 1647, the lawmakers of Providence Plantations (later to become Rhode Island), enacted a statute restating the common law:

Self-murder is by all agreed to be the most unnatural, and it is by this present Assembly declared, to be that, wherein he that doth it, kills himself out of a premeditated hatred against his own life or other humor: . . . his goods and chattels are the king's custom, but not his debts nor lands; but in case he be an infant, a lunatic, mad or distracted man, he forfeits nothing.⁴³²

Maryland⁴³³ and Connecticut⁴³⁴ both applied the common law of crimes, including the common law penalties for suicide. In Connecticut, there were apparently no forfeitures, but, in the early years of the colony, some instances of ignominious burial.⁴³⁵

In the third quarter of the seventeenth century, permanent English settlements were established in North Carolina in the 1650's,⁴³⁶ in New Jersey⁴³⁷ and New York in 1664 (with the conquering of Dutch New Amsterdam),⁴³⁸ and in South Carolina⁴³⁹ in 1670. New Hampshire, theretofore administered by Massachusetts,

428. *Id.* at 198 n.15.

429. *Id.* at 108 n.193, 198 n.15.

430. *Body of Liberties*, art. 10 (1641), cited in *Commonwealth v. Mink*, 123 Mass. 422, 425-26 (1877).

431. *The General Laws and Liberties of Massachusetts Colony* (1672), reprinted in *THE COLONIAL LAWS OF MASSACHUSETTS* 137 (W. Whitmore ed. 1887).

432. *THE EARLIEST ACTS AND LAWS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 1647-1719*, at 19 (J. Cushing ed. 1977).

433. See *infra* appendix note 216 and accompanying text.

434. See *infra* appendix note 94 and accompanying text.

435. 2 Z. SWIFT, *A SYSTEM OF LAWS OF THE STATE OF CONNECTICUT* 304 (n.p. 1795). See also *infra* note 462 and accompanying text.

436. 29 *ENCYCLOPAEDIA BRITANNICA* 345 (15th ed. 1985).

437. *Id.* at 301.

438. *Id.* at 307.

439. *Id.* at 348.

became a separate colony in 1679.⁴⁴⁰

The common law of crimes was recognized by North Carolina, at least from 1715, and probably earlier and the highest court of that state held that under that law, suicide was unlawful.⁴⁴¹ New York also recognized the common law of crimes and under it, according to an 1868 treatise, punished one who successfully advised another to commit suicide with the penalty for murder.⁴⁴² From the available evidence, the law of New Jersey on suicide in the colonial period is unclear.⁴⁴³ New Hampshire recognized the common law of crimes, but we have been unable to find any direct evidence of whether it was, in fact, applied to suicide.⁴⁴⁴ South Carolina, by a statute enacted in 1706, directed its coroner's juries, when they determined that a death was caused by "Self-Murder," to "say upon their Oaths, that the said A.B. in Manner and Form aforesaid, then and there voluntarily and feloniously as a Felon, of himself did kill and murder himself, against the Peace of our Sovereign Lady the Queen [sic] her Crown and Dignity."⁴⁴⁵

William Penn received a royal charter for Pennsylvania in 1681; he arrived to assume its government in 1682, the year in which he also obtained from New York the territory that would later become Delaware.⁴⁴⁶ Pennsylvania also seems to have enforced the common law.⁴⁴⁷ In 1701, however, William Penn promulgated his "Charter of Privileges to the Province and Counties" of Pennsylvania and Delaware.⁴⁴⁸ It provided: "If any person, through Temptation or melancholly, shall Destroy himself, his Estate, Real & Personal, shall, notwithstanding, Descend to his wife and Children or Relations as if he had Died a natural death"⁴⁴⁹ By thus abolishing forfeiture as a punishment for suicide, Pennsylvania became the first colony we can confidently identify that did not impose

440. *Id.* at 285.

441. *See infra* appendix notes 437-42 and accompanying text.

442. *See infra* appendix note 403 and accompanying text.

443. *See infra* appendix notes 345-47 and accompanying text.

444. *See infra* appendix notes 335-40 and accompanying text.

445. 1 THE EARLIEST PRINTED LAWS OF SOUTH CAROLINA 1692-1734, at 192 (J. Cushing ed. 1978) (emphasis omitted), quoted in Burgess-Jackson, *The Legal Status of Suicide in Early America: A Comparison with the English Experience*, 29 WAYNE L. REV. 57, 62 (1982).

446. 29 ENCYCLOPAEDIA BRITANNICA 294, 311 (15th ed. 1985).

447. *See infra* appendix notes 500-02 and accompanying text.

448. THE EARLIEST PRINTED LAWS OF PENNSYLVANIA 1681-1713 at 206 (J. Cushing ed. 1978), quoted in Burgess-Jackson, *supra* note 445, at 65.

449. *Id.*

traditional common law punishment upon suicide,⁴⁵⁰ a position that spread throughout most of the colonies by the end of the century.⁴⁵¹

The last of the original thirteen colonies, Georgia, received its first English settlement in 1733.⁴⁵² Georgia seems to have employed the common law of crimes, and its supreme court later opined that that law deemed suicide a "species of crime or wickedness."⁴⁵³

Statutory or constitutional provisions abolished penalties for suicide in Delaware in 1792,⁴⁵⁴ in Maryland in 1776,⁴⁵⁵ in New Hampshire in 1783,⁴⁵⁶ in New Jersey in 1776,⁴⁵⁷ in North Carolina in 1778,⁴⁵⁸ and in Rhode Island in 1798.⁴⁵⁹ Virginia did so in 1847.⁴⁶⁰ The years of these enactments do not necessarily mean that forfeiture was practiced until the specified dates; indeed, it is likely that

450. Massachusetts, as we have seen (*supra* note 431 and accompanying text), prohibited forfeitures in 1641, but within two decades prescribed ignominious burial. We have come upon no evidence indicating whether ignominious burial was ever practiced in Pennsylvania.

451. Burgess-Jackson, *supra* note 445, divided the colonial legal treatment of suicide into four categories. The first category of colony, into which he placed Virginia, North and South Carolina, Georgia, New York, and New Hampshire, he identified as receiving the common law with its attendant criminalization of suicide. The second category, containing Rhode Island and Massachusetts, adopted statutory prohibitions of suicide. The third category, consisting of Pennsylvania and Delaware, "rejected the notion that suicide is—or rather should be—a crime" (*Id.* at 64) because Penn's charter abolished forfeiture for suicide. The fourth category, comprising Maryland and New Jersey, initially received the common law and thus criminalized suicide but abolished the forfeiture penalty at the time of the American Revolution.

It is questionable whether this typology is helpful. For example, South Carolina, as Burgess-Jackson himself noted, enacted a statute specifically categorizing self-murder as a felony, which would logically place it in the second category. At least North Carolina and New Hampshire arguably belong in the fourth category rather than the first, because they too enacted provisions prohibiting forfeiture around the time of the Revolution. Furthermore, Pennsylvania and Delaware, as well as Rhode Island, were in colonial times governed by the common law.

The available evidence seems to support a less divergent picture of the various colonies' approaches: it suggests a nearly universal early condemnation of suicide, coupled with the imposition of traditional common law penalties, followed by an equally nearly universal abandonment of these penalties.

452. 29 ENCYCLOPAEDIA BRITANNICA 330 (15th ed. 1985).

453. See *infra* appendix note 131 and accompanying text.

454. DEL. CONST. of 1792, art. 1 § 15.

455. MD. CONST. of 1776, decl. of rts. § 24.

456. N.H. CONST. pt. 2, art. 89 (adopted 1783).

457. N.J. CONST. of 1776, art. 17.

458. N.C. CONST. of 1778.

459. R.I. PUB. LAWS § 53, at 604 (1798).

460. Act of 1847, ch. 11, §§ 23, 25, 1847-48 Va. Laws 121, 124.

the measure had been abandoned or repudiated at an earlier date, but that the nearly independent states in the process of enacting their first constitutions believed it desirable to affirm existing practice in written law. This caveat applies with equal validity to the colonies not listed above—Connecticut, Georgia, New York and South Carolina.⁴⁶¹

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.⁴⁶² 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."⁴⁶³ The anachronistic assumption that our forebearers held and applied a political philosophy derived from Mills 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

461. In 1777, Vermont became independent of New Hampshire and New York, which states had until then disputed Vermont's sovereignty between themselves and with the territory's inhabitants. 29 *ENCYCLOPAEDIA BRITANNICA* 290-91 (15th ed. 1985).

462. 2 Z. SWIFT, *supra* note 435, at 304.

463. For example, Keither Burgess-Jackson concludes, "As the several American colonies developed, culturally and legally, they adopted widely different stances toward the morality of the suicide act, and ultimately incorporated those stances into their legal rules." See *supra* note 445, at 84. While his account of why the colonists and their English forebearers condemned suicide is detailed and scholarly, he provides not a single source or any analysis either to demonstrate that any colonists came to regard suicide as moral or to provide their rationales for this supposed sea change. His conclusion rests exclusively on the undocumented and unexplained assumption that the abolition of the common law penalties must have been caused by an acceptance of the notion that at least some suicides were morally justifiable.

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.⁴⁶⁴

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.⁴⁶⁵

In Massachusetts, as we have seen, abolition of forfeiture was followed by a statute providing for ignominious burial.⁴⁶⁶ After that statute in turn was repealed (in 1823) after falling into disuse, the legislature's intent in repealing it was interpreted by that state's highest court "as one which may well have had its origin in consideration for the feelings of innocent surviving relatives."⁴⁶⁷

Relatives were not bereft of sympathy even before forfeiture was abolished. In Virginia, their petitions for remission of forfeiture on account of suicide were sometimes granted,⁴⁶⁸ and forfeitures were on occasion prevented altogether through the device of the coroner's jury bringing in a verdict of "death while temporarily insane."⁴⁶⁹

The text of the 1701 Pennsylvania charter that abolished forfeiture itself provides further evidence in support of the conclusion that its motive was not approbation of suicide as a protected right. The statute refers to one who destroys himself "through Temptation or melancholly."⁴⁷⁰ To "tempt" is commonly defined as "to

464. S. MILSOM, *supra* note 378, at vi.

465. *Id.*

466. *See supra* notes 430-31 and accompanying text.

467. *Commonwealth v. Mink*, 123 Mass. 422, 429 (1877). Some years earlier one commentator noted, "But this kind of law since the American revolution has very rarely been executed; not one instance is recollected among the scores of self-murders remembered. It seems to have become a general practice to consider those who kill or destroy themselves as being insane." 7 N. DANE, *GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW* 208 (Boston 1824).

468. A. SCOTT, *supra* note 421, at 108 n.193, 198 n.15. That this mercy was not the equivalent of approbation of suicide may be inferred from the similar remissions of forfeiture in the case of some men executed for taking part in a rebellion in response to a plea to give "the Estate of these wretched men to their poor wives and Children, which will be an act of great mercy." *Id.* at 109-10. It may be presumed, however, that treason was never viewed with approbation.

469. *Id.* at 108 n.193.

470. *THE EARLIEST PRINTED LAWS OF PENNSYLVANIA, 1681-1713 supra* note 448, at 65.

entice to do wrong."⁴⁷¹ Moreover, assigning "melancholly" as a cause of suicide evokes pity rather than admiration or approval.

Finally, the view that forfeiture's abolition among the colonies was intended to aid innocent families rather than to legitimize suicide is implicit in the opinions of the large majority of the courts which have since had occasion to comment on suicide.

Unfortunately, in the absence of comprehensive studies of primary source material of the scale of Scott's analysis of criminal law in colonial Virginia,⁴⁷² detailed information about the legal treatment of suicide through the first quarter of the nineteenth century is scant. The various statutes and court opinions were often uncollected and, where printed, inadequately organized or indexed.⁴⁷³ Zephaniah Swift's 1790's treatise, from which we have previously quoted, began with the lament that "in no country is it more arduous and difficult to obtain a systematic understanding of the law."⁴⁷⁴

"[F]or a generation or more following the Revolution, few states attempted to effect an official revision or even a compilation of colonial laws," historian Charles Cook has concluded.⁴⁷⁵ While poorly indexed session laws existed, they were often unattainable. A Virginia attorney wrote in 1803 that, "Few gentlemen, even of the profession, have even been able to boast of possessing a *complete* collection of its laws."⁴⁷⁶ South Carolina's 1875 attempt to compile its statute was greatly handicapped because it was impossible, even for the state government itself, to obtain a collection of its session laws.⁴⁷⁷

The difficulty is, if anything, compounded with regard to case law. In the words of Charles Cook, "The legacy of colonial decisional law bequeathed to the postrevolutionary generation was nonexistent. Decisions were made orally, and opinions were not published."⁴⁷⁸ James Kent later wrote that in 1798, when he was a judge of the New York Supreme Court, "I never dreamed of volumes of reports and written opinions. Such things were not then thought of We had no law of our own, and nobody knew

471. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2354 (1961).

472. A. SCOTT, *supra* note 421.

473. See generally C. COOK, THE AMERICAN CODIFICATION MOVEMENT 5-12 (1981).

474. 1 Z. SWIFT, *supra* note 435, at 1.

475. C. COOK, *supra* note 473, at 7.

476. Tucker, [*Preface in*] 1 W. BLACKSTONE, COMMENTARIES at iv (St. George Tucker ed. 1803).

477. S.C. PUB. LAWS iii (Grinke ed. 1790).

478. C. COOK, *supra* note 473, at 8.

what it was."⁴⁷⁹ Swift noted in 1795 that "the uncertainty and contradiction of oral reports of cases has been the subject of much complaint."⁴⁸⁰ Considering this state of affairs, it is not surprising that late eighteenth century lawyers relied largely on English cases and treatises, especially Blackstone.⁴⁸¹

As Francis Wharton described the situation in one of the first American treatises on criminal law, published in 1846:

The colonies, leaving behind them the penal code of the country whose common law they adopted, found themselves obliged, as the passage of statutes under the colonial establishment was no easy matter, to establish, each by itself, a system of criminal jurisprudence, which depended much more on the adjudication of the courts than the enactments of the legislature. The consequence, was, that whenever a wrong was committed, which, if statutory remedies alone were pursued, would have been unpunished, the analogies of the common law were extended to it, and it was adjudged, if the reason of the case required it, an offence to which the common law penalties reached. A judicial criminal code has been created, which, though in many cases modified by the several legislatures, constitutes, in part, the law of the land.⁴⁸²

This, of course, makes it all the more difficult to present a documented picture of how the early American law treated one who assisted suicide in the years after the common law penalties for suicide itself were abolished. The absence of specific statutes cannot be given undue significance in light of the reliance on the decisional common law of crimes. Moreover, the problem is compounded by the fact that relevant rulings of courts in the newly independent states are simply not available. In 1789, when Congress proposed the Bill of Rights to the states for ratification,⁴⁸³ only one of the states had published case reports dating back more than eleven years; ten had none at all or were only beginning to publish reports in that year.⁴⁸⁴

As far as we have been able to ascertain, the earliest statute spe-

479. Letter from James Kent to Thomas Washington (Oct. 6, 1828), 9 GREEN BAG 206 (1897), reprinted as KENT, AN AMERICAN LAW STUDENT OF A HUNDRED YEARS AGO, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 837, 842-43 (1907).

480. 1 Z. SWIFT, *supra* note 435, at 45.

481. See, e.g., Chancellor Kent's description of how and when he trained himself in the law in 1779-1785 he "read parts of Blackstone again and again." KENT, *supra* note 479, at 838-39. See also *supra* note 476 and accompanying text.

482. F. WHARTON, TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 27 (1846) (footnote omitted).

483. U.S.C.S. CONST. amend. I explanatory note (Law. Co-op. 1977).

484. See A UNIFORM SYSTEM OF CITATION 141-42, 144, 151-52, 156, 160, 165, 167-68, 172-74 (13th ed. 1981).

cifically addressing the assistance of suicide was passed by New York in 1828,⁴⁸⁵ and the earliest reported case addressing the subject was the 1816 Massachusetts jury charge in *Commonwealth v. Bowen*.⁴⁸⁶

There are, therefore, but two avenues by which to infer the attitude of the law toward the assistance of suicide during the period when the ninth amendment, which reads "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,"⁴⁸⁷ was submitted to the fourteen existing states and ratified by eleven of them.⁴⁸⁸

The first approach is to make reference to the one source confidently known to have guided the American lawyers and judges during that era: Blackstone. As we have seen his *Commentaries* deemed the assistance of suicide culpable.⁴⁸⁹ Of course, Blackstone presupposed the existence of forfeiture and ignominious burial for suicides, so that approach does not take account of what effect, if any, their abolition would have on the culpability of the suicide aider or abettor.

The other avenue 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.⁴⁹⁰

485. 2 N.Y. REV. STAT. pt. 4, ch. 1, tit. 2, art. 1, § 7 at 661 (1829)).

486. 13 Mass. 356 (1816). It is the only relevant American case cited by 7 N. DANE, GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 201 (Boston 1824), by F. WHARTON, *supra* note 482, at 29, and by E. LEWIS, ABRIDGMENT OF THE CRIMINAL LAW OF THE UNITED STATES 573 (1848).

487. U.S. CONST. amend. IX. Although a fourteenth amendment based challenge is the most obvious approach for suicide advocates to employ in asserting a constitutional right that bars punishment for those who assist suicide, basing such a claim on the ninth amendment is another possibility. For a historically based argument that the ninth amendment was intended not to create federally protected rights that might be asserted against the states but rather to prevent any possibility that state common law and constitutional protections of individual rights would be automatically repealed unless listed in the first eight amendments of the Bill of Rights, see Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983).

488. The Bill of Rights was submitted in 1789 and ratified by all states except Connecticut, Georgia and Massachusetts by the end of 1791. U.S.C.S. CONST. amend. I explanatory note (Law. Co-op. 1977).

489. See also *supra* notes 463-64 and accompanying text.

490. The rationale behind imputation is as follows. When a court holds that a particular ruling is the law in that state, it is, in theory, declaring the existing law. Consequently, barring any statute of limitations problems and express rulings about retroactivity, one tried after the decision for an act committed before the decision would normally be bound by the court's ruling. Thus, the law declared by a court in 1841 to be the current interpretation of a statute passed in 1803 would be an accurate description of the law in that state not only

The 1824 edition of Swift's treatise states as the law of Connecticut, "If one counsels another to commit suicide, and the other by reason of the advice kills himself, the advisor is guilty of murder as principal."⁴⁹¹ An 1868 New York treatise described the state's law before 1828 to the same effect.⁴⁹² Later cases in Maryland,⁴⁹³ Massachusetts,⁴⁹⁴ North Carolina,⁴⁹⁵ and South Carolina⁴⁹⁶ referred to assisting suicide as being criminal in those states. If it be assumed that forfeiture was not yet abolished in Virginia, then presumably assisting suicide was there a crime. Court characterization of suicide as criminal in Georgia might be held to entail the punishment of assisting suicide there.⁴⁹⁷ The cases were conflicting with regard to New Jersey⁴⁹⁸ and Pennsylvania.⁴⁹⁹ Unless conclusions are drawn from the existence of the common law of crimes alone, there is no evidence concerning Delaware,⁵⁰⁰ New Hampshire,⁵⁰¹ Rhode Island,⁵⁰² and Vermont.⁵⁰³ From this perspective, six to eight of the fourteen states are described as having prohibited assisting suicide at the time of the adoption of the ninth amendment.

Between the ratification of the ninth amendment and that of the fourteenth, ten states or territories adopted statutes explicitly penalizing the assistance of suicide. Apart from New York, which in 1828 provided that "Every person deliberately assisting in the

from 1841 on, but also from 1803 through 1841. Similarly, in a state with the common law of crimes, a declaration of the law in any given year describes the state of the law on that question for as long as the common law of crimes has been in effect.

From a historical viewpoint, the fictional nature of such a theory is clear. In an era such as that described, in which much of the law was in fact a matter of oral tradition, it is at least as likely that the judges who first issued written opinions on the matter were deciding the oral tradition as it had come down than that these judges were innovating out of whole cloth. Nevertheless, we are dealing with an era in which *stare decisis* had more importance, and in which no other evidence exists as to the state of the law. Thus, we must assume that later holdings accurately reflect the prior state of law.

491. 2 Z. SWIFT, A DIGEST OF THE LAWS OF THE STATE OF CONNECTICUT 270 (2d ed. 1823).

492. 1 J. COLBY, PRACTICAL TREATISE UPON THE CRIMINAL LAW AND PRACTICE OF THE STATE OF NEW YORK 612 (1868).

493. See *infra* appendix note 218 and accompanying text.

494. See *infra* appendix note 232 and accompanying text.

495. See *infra* appendix notes 437-42 and accompanying text.

496. See *infra* appendix note 540 and accompanying text.

497. See *infra* appendix note 131 and accompanying text.

498. See *infra* appendix notes 349-58 and accompanying text.

499. See *infra* appendix notes 506-13 and accompanying text.

500. See *infra* appendix notes 106-08 and accompanying text.

501. See *infra* appendix notes 335-36 and accompanying text.

502. See *infra* appendix notes 526-27 and accompanying text.

503. See *infra* appendix notes 602-03 and accompanying text.

commission of self-murder shall be deemed guilty of manslaughter in the first degree,"⁵⁰⁴ all were new states or territories. Many repeated the New York enactment verbatim. New York was regarded as one of the leading states, and its penal statutes provided a natural model for settlers to follow in establishing the initial law for new jurisdictions. Laws were enacted by Missouri in 1835, Arkansas in 1838, Mississippi in 1839, Wisconsin in 1849, Minnesota in 1851, Washington in 1854, Kansas in 1855, Oregon in 1864, and Florida in 1868.⁵⁰⁵ We have been able to find only three relevant reported cases during the interval. In an 1843 insurance case, a New York trial court referred to suicide while sane as "a criminal act of self-destruction" in an opinion affirmed in 1853 by the state's highest court.⁵⁰⁶ More significant were the Massachusetts cases.

In 1816, one Bowen stood trial in Massachusetts⁵⁰⁷ on the charge that, while a prisoner he had persuaded a man in the next cell, who was about to be executed, to preempt the execution of the sentence by hanging himself. Chief Justice Parker charged the jury:

Self-destruction is doubtless a crime of awful turpitude; it is considered in the eye of the law of equal heinousness with the murder of one by another. In this offence it is true the actual murderer escapes punishment; for the very commission of the crime, which the law would otherwise punish with its utmost rigor, puts the offender beyond the reach of its infliction. . . . But his punishment is as severe as the nature of the case will admit; his body is buried in infamy, and in England his property is forfeited to the King. Now, if the murder of one's self is felony, the accessory is equally guilty as if he had aided and abetted in the murder of A. by B.; and I apprehend that if a man murders himself, and one stands by, aiding in and abetting the death, he is as guilty as if he had conducted himself in the same manner where A. murders B. And if one becomes the procuring cause of death, though absent, he is accessory.⁵⁰⁸

The Massachusetts ignominious burial statute was repealed in 1823,⁵⁰⁹ and the common law of crimes was abolished in 1852.⁵¹⁰ Nevertheless, the holding by four Justices of the state's highest

504. See *supra* note 485 and accompanying text.

505. For a more detailed discussion, see *infra* appendix.

506. *Breasted v. Farmers' Loan and Trust Co.*, 4 Hill 73, 75 (Sup. Ct. 1843), *aff'd.* 8 N.Y. 299 (1853).

507. *Commonwealth v. Bowen*, 13 Mass. 356 (1816).

508. *Bowen's Trial* at 51-52, *reprinted in*, *Commonwealth v. Mink*, 123 Mass. 422, 428 (1877).

509. Act of June 14, 1823, ch. 143, § 2, 1823 Mass. Act 248, 248.

510. See *infra* appendix note 234.

court in the unreported 1862 case of *Commonwealth v. Platt*,⁵¹¹ echoed Chief Justice Parker's charge to the jury in *Bowen*. 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 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.⁵¹²

Illinois, Indiana, Iowa, Louisiana, Maine, Nebraska, and Texas, which voted to ratify, and Ohio, which voted against ratification, had no prohibition on assisting suicide.⁵¹³ The status of New Jersey is unclear.⁵¹⁴ 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 com-

511. 123 Mass. at 429.

512. See *infra* appendix notes 62-63 (California); 104-08 (Delaware); 323-24 (Nevada); 333 (New Hampshire); 528-30 (Rhode Island); 602-04 (Vermont); 651-52 (West Virginia) and accompanying text. U.S.C.S. Const. amend. XIV explanatory note (Law. Co-op. 1984).

513. See *infra* appendix notes 147-50 (Illinois); 164-65 (Indiana); 173 (Iowa); 201 (Louisiana); 209 (Maine); 317-18 (Nebraska); 469-75 (Ohio); 570-83 (Texas) and accompanying text. U.S.C.S. Const. amend. XIV explanatory note (Law. Co-op. 1984).

514. See *infra* appendix notes 349-53 and accompanying text. U.S.C.S. Const. amend. XIV explanatory note (Law. Co-op. 1984).

mon 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.⁵¹⁵

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.

From the 1870's, there is a comparative wealth of evidence about the attitude of the law toward suicide. This attitude may be traced in criminal statutes, in cases relating to criminal punishment for assisting and attempting suicide, in law review articles and treatises commenting on those cases, and finally in cases dealing with claims for life, accident or disability insurance related to a completed or attempted suicide.

Among the controversies that confronted the American republic before the Civil War was the question of whether states should retain and rely upon the common law, modified by statute, or follow the example of France's Napoleonic Code and set forth all the law in statutory form.⁵¹⁶ The particulars of this controversy are well beyond the scope of this article; suffice it to say that the "codifiers" largely lost. However, a relatively late result of the codification movement was that from 1857 to 1865, a code commission led by David Dudley Field worked, under the authority of the New York legislature, to codify the criminal law (and parts of the civil law) of that state. The Field Penal Code was not adopted in New York until 1881, but, in modified form, it provided a model for a few Western states and territories.⁵¹⁷

The Field Penal Code dealt with suicide in some detail. As originally adopted by the Dakota Territory (later divided into North and South Dakota) in 1877,⁵¹⁸ the relevant provisions read:

§ 228. Suicide Defined. Suicide is the intentional taking of one's life.

§ 229. No Forfeiture. Although suicide is deemed a grave public wrong, yet from the impossibility of reaching the successful perpetrator, no forfeiture is imposed.

§ 230. Attempt. But every person who with intent to take his own life, commits upon himself any act dangerous to human life, which if committed upon or towards another person and followed by death as a consequence,

515. See *infra* appendix notes 40-41 (Arizona); 87-89 (Colorado); 113-14 (District of Columbia); 140 (Idaho); 307-09 (Montana); 386 (New Mexico); 455-56 (North Dakota); 597 (Utah); 634-35 (Washington); 671 (Wyoming) and accompanying text. U.S.C.S. Const. amend. XIV explanatory note (Law. Co-op. 1984).

516. See generally C. Cook, *supra* note 473, at 123-26.

517. *Id.* at 195-98.

518. See *infra* appendix notes 450-52.

would render the perpetrator chargeable with homicide, is guilty of attempting suicide.

§ 231. Aiding Suicide. Every person, who willfully, in any manner, advises, encourages, abets or assists another person in taking his own life, is guilty of aiding suicide.

§ 232. Furnishing Weapon or Drug. Every person who willfully furnishes another person with any deadly weapon or poisonous drug, knowing that such person intends to use such weapon or drug in taking his own life, is guilty of aiding suicide, if such person thereafter employs such instrument or drug in taking his own life.

§ 233. Aiding Attempt. Every person, who willfully aids another in attempting to take his own life, in any manner which by the preceding sections would have amounted to aiding suicide if the person assisted had actually taken his own life, is guilty of aiding an attempt at suicide.

§ 234. Incapacity—No Defense. It is no defense to a prosecution for aiding suicide, or aiding an attempt at suicide, that the person who committed or attempted to commit the suicide was not a person deemed capable of committing crime.

The same, or largely similar, language was adopted by Minnesota in 1885, Oklahoma Territory in 1890, Washington in 1909, and Nevada in 1911.⁵¹⁹ California (1874), Montana (1895), the United States Congress for Alaska Territory (1899), and Puerto Rico (1902) also adopted criminal provisions prohibiting the assistance of suicide, although they did not adopt the language of the Field Penal Code.⁵²⁰

Early criminal cases dealing with assisted suicide similarly express a negative attitude toward suicide. For courts that applied statutes penalizing the assistance of suicide, it is significant to note that the issue was an easy one. None of these courts appear to have even considered a claim that the Constitution bars the state from preventing suicide or penalizing one who aids it, much less held that it does so.⁵²¹ Indeed, in the case of a man sentenced to twenty years for assisting a suicide, a New York court wrote in 1903, "To allow a man convicted of such a crime to go at large when his guilt is so apparent, would tend to bring the administration of criminal justice into disrepute."⁵²² Nor have the courts had any difficulty

519. See *infra* appendix notes 325 (Nevada); 477-84 (Oklahoma); 637 (Washington) and accompanying text.

520. See *infra* appendix notes 28 (Alaska); 63 (California); 309 (Montana); 519 (Puerto Rico) and accompanying text.

521. See, e.g., *Farrell v. State*, 111 Ark. 180, 163 S.W. 768 (1914); *In re Joseph G.*, 34 Cal. 3d 429, 667 P.2d 1176, 194 Cal. Rptr. 163 (1983); *State v. Webb*, 216 Mo. 378, 115 S.W. 998 (1909); *State v. Ludwig*, 70 Mo. 412 (1879), *rev'd on other grounds*, 130 Mo. at 434, 32 S.W. at 1120 (1895); *People v. Kent*, 41 Misc. 191, 83 N.Y.S. 948 (Sup. Ct. 1903).

522. *Kent*, 41 Misc. at 195, 83 N.Y.S. at 951.

when the suicide assistor directly killed the one seeking to commit suicide. They have unanimously held that consent is no defense to a charge of homicide.⁵²³

In the absence of a statute or a direct killing, however, the courts were faced with a dilemma regarding the assistance of suicide that one commentator called "as confusing a question as the law can present."⁵²⁴ As we have seen, forfeiture and ignominious burial were abolished as punishments for suicide because they were seen as unfair to innocent relatives of the suicide, not because suicide was deemed a human right or because it was viewed with other than reprehension or pity. Nevertheless, under the logic of the common law, this repeal of all punishment for the completed suicide posed two technical problems for adjudicating the guilt of one who assisted a suicide.

The first problem resulted from the common law rules differentiating the degrees of participation in crime. A principal in the first degree was "one who is the actor or actual perpetrator."⁵²⁵ Principals in the second degree were "those who are present aiding and abetting at the commission."⁵²⁶ Under the common law rules, it was crucial that a principal be present at the scene of the crime, either actually a witness to it, or "constructively" present, meaning "with the intention of giving assistance, [being] near enough to afford it, should the occasion arise," as, for example, a lookout.⁵²⁷ By contrast, "[a]n accessory before the fact is one who, though absent at the time of the commission of the felony, doth yet procure, counsel, command, or abet another to commit such felony."⁵²⁸ Therefore, one who incited or otherwise assisted another to commit suicide (as by procuring poison or a gun, for example) and was present at the death would be a principal in the second degree, while one who did the same but was not present at the death would be an accessory before the fact. The importance of these dis-

523. See, e.g., *People v. Matlock*, 51 Cal. 2d 682, 336 P.2d 505 (1959); *State v. Bouse*, 199 Or. 676, 264 P.2d 800 (1953); *Martin v. Commonwealth*, 184 Va. 1009, 37 S.E.2d 43 (1946); *State v. Fuller*, 203 Neb. 233, 278 N.W.2d 756 (1979); *Turner v. State*, 119 Tenn. 663, 108 S.W. 1139 (1908); *Mullane v. State*, 475 S.W.2d 924 (Tex. Crim. 1971).

524. Comment, *The Crime of Aiding a Suicide*, 30 YALE L.J. 408, 408 (1921). It was evidently seen as a conundrum apt for moot court: See *Moot Court: Commonwealth v. Jones*, 13 DICK. L. REV. 128 (1909); *Moot Court: Commonwealth v. Sears and Hunt*, 9 DICK. L. REV. 222 (1905).

525. F. WHARTON, *supra* note 482, at 27.

526. *Id.* at 28.

527. *Id.* at 30.

528. *Id.* at 34.

inctions was that “[a]t common law, the conviction of someone who has committed the crime must precede that of one guilty only as accessory.”⁵²⁹ Since a suicide could no longer be convicted, one who incited or otherwise assisted the suicide, so long as he or she took care to stay away from the death itself, might theoretically escape conviction.⁵³⁰

The second problem was more direct. It was difficult to conclude that it could be an offense to aid or abet an act that, because it was not punishable, was not technically a crime.

What is noteworthy in the face of these difficulties is the considerable dexterity that the majority of courts addressing these issues in the criminal context employed to avoid following their logic in order to put the power of the state behind the prevention of suicide. Thus, of the seven states confronted with the issue of whether a conviction for assisting suicide could stand, all but Texas held that it could.⁵³¹

One approach to the first difficulty was set forth in the 1904 Kentucky case of *Commonwealth v. Hicks*:⁵³²

It cannot be said that an accessory before the fact in self-murder is not liable to punishment under the terms of the statute, because, his principal being of necessity dead, he cannot be punished by any earthly sentence for his crime The case stands, in principle, as if one was accessory before the fact for the murder by his principal of a third person, and, after the commission of the crime, the principal should immediately kill himself. In this case, it would be impossible to punish the principal; but it is not believed that under any sound reasoning the accessory would thereby go scot free.⁵³³

In essence, the court held that suicide was still a crime, a form of murder, even though unpunishable, and that an aider or abettor of it should be treated just as an aider or abettor of any other

529. *Id.* at 35.

530. For discussion of the difficulty, see Kenner, *The Criminal Liability of an Incitor or Abettor of Suicide*, 61 *CENT. L.J.* 406, 406 (1905); Larremore, *Suicide and the Law*, 17 *HARV. L. REV.* 331, 335 (1904); Mikell, *Is Suicide Murder?*, 3 *COLUM. L. REV.* 379, 387 (1903); Wolfrom, *The Criminal Aspect of Suicide*, 39 *DICK L. REV.* 42, 47 (1934); Comment, *The Crime of Aiding a Suicide*, *supra* note 378, at 410 & n.10; Note, *Criminal Law—Suicide—Accessory—Murder by Means of Poison—Causation*, 1 *Wis. L. REV.* 123, 123 (1920).

531. Some of these decisions, while holding assisting suicide to be a crime, nevertheless overturned convictions on unrelated grounds. We shall shortly deal with the discussion of this question by courts dealing with it tangentially in the course of holdings on attempted suicide, suicide pacts, and instances in which one attempting suicide accidentally killed a would-be rescuer.

532. 118 Ky. 637, 642, 82 S.W. 265, 266 (1904).

533. *Id.* at 642-43, 82 S.W. at 266-67.

murder.⁵³⁴

The first difficulty was often avoided by statutes in derogation of the common law allowing an accessory before the fact to be convicted even though the principal had not been. Such provisions had "been adopted in practically all states" by 1934.⁵³⁵ The most common approach, however, was to analyze the case as though the abettor were in fact the principal, using the suicide victim as an instrument of his or her own murder. This also had the advantage of circumventing the second difficulty as well. This approach was employed in cases that came before the supreme courts of South Carolina⁵³⁶ in 1910 and Indiana in 1932.⁵³⁷

In Ohio, Illinois, and Michigan, the courts acknowledged that suicide was not itself a crime, but held that providing poison to another with the intent that it would cause death constituted murder. In this regard, Ohio led the way in the 1872 case of *Blackburn v. State*.⁵³⁸ The *Blackburn* Court relied on a statute that specifically banned the administering of poison, holding "It is immaterial whether the party taking the poison took it willingly, intending thereby to commit suicide, or was overcome by force, or overreached by fraud."⁵³⁹ The court wrote:

True, the atrocity of the crime, in a moral sense, would be greatly diminished by the fact that suicide was intended; yet the law, as we understand it, makes no discrimination on that account. The lives of all are under the protection of the law, and under that protection to their last moment. The life of those to whom life has become a burden—of those who are hopelessly diseased or fatally wounded—nay, even the lives of criminals condemned to death, are under the protection of the law, equally as the lives of those who are in the full tide of life's enjoyment, and anxious to continue to live.⁵⁴⁰

In *Burnett v. People*,⁵⁴¹ decided in 1903, the Illinois Supreme Court, after explicitly regarding the absence of forfeiture and ignominious burial as meaning that suicide was not a felony, nevertheless held, in effect, that an accessory before the fact to suicide

534. *Id.*

535. Wolfrom, *supra* note 530, at 47 & n.31.

536. *State v. Jones*, 86 S.C. 17, 67 S.E. 160 (1910).

537. *Stephenson v. State*, 205 Ind. 141, 179 N.E. 633 (1932). In *Stephenson*, the defendant was not accused of having consciously aided and abetted a willing suicide but of having subjected a kidnapped woman to a series of especially brutal rapes which drove her to take her own life, and for which he was convicted of murder.

538. 23 Ohio St. 146 (1872).

539. *Id.* at 162-63.

540. *Id.* at 163.

541. 204 Ill. 208, 68 N.E. 505 (1903).

could be held guilty as a principal of murder:

[H]e who acts by another acts by himself If a lunatic or an idiot, at the instigation or direction of another person, should commit a homicide, none would question but that the instigator and director in such case would be guilty of murder, although the principal could not be punished at all; and if A., by virtue of deceit or persuasion, induce B. to kill himself, this is as much the act of A. as though A. had induced C. to kill B. . . . [W]hen we apply the principle . . . that the act of the principal, when done pursuant to the will and direction of the accessory, is the act of the accessory, then it becomes immaterial what was the character of the crime committed by the principal or whether there was any crime⁵⁴²

Michigan's 1920 contribution, *People v. Roberts*,⁵⁴³ relied, like *Blackburn*, on the existence of a statute specifically making poisoning murder. It quoted extensively from the Ohio case, and adopted its rationale.⁵⁴⁴

Reaction to this causational legerdemain was mixed. Some commentators reported it with apparent approbation,⁵⁴⁵ and another called it "at least plausible."⁵⁴⁶ Others, however, protested that the solution "has stretched the doctrine of the abettor's guilt to an extraordinary length, and beyond any of its precedents"⁵⁴⁷ or argued that:

[O]rdinarily the introduction of an independent link in the claim of causation interrupts the liability of the primary wrongdoer [T]he deceased having killed herself and there was no threat, force, fraud or inducement on defendant's part, it is difficult to see how his act could be the cause of the killing.⁵⁴⁸

It is noteworthy, however, that while the critics took issue with the questionable resolution of the technical difficulties employed by these courts, none criticized them on the ground that, as a matter of policy or constitutional right, assisting suicide *ought* not to be the subject of state interference.⁵⁴⁹ Indeed, the purpose of at least one law review article that criticized the legal reasoning of those

542. *Id.* at 223-24, 68 N.E. at 511.

543. 211 Mich. 187, 178 N.W. 690 (1920).

544. *See generally id.*

545. *See Kenner, supra* note 530, at 408; Wolfrom, *supra* note 530, at 47. *See also* Annot., 65 A.L.R. 304, 306 (1904).

546. Withers, *Status of Suicide as a Crime*, 19 VA. L. REG. 641, 645 (1914).

547. Comment, *The Crime of Aiding Suicide, supra* note 378, at 411.

548. Note, *Criminal Law — Suicide — Accessory — Murder by Means of Poison — Causation, supra* note 384, at 124.

549. *Cf.* Comment, *The Crime of Aiding a Suicide, supra* note 524, at 412 ("The result in such a decision may be eminently just and merited, but it is not the sole consideration; the court's reasoning is of material importance").

courts imposing criminal penalties for assisting suicide when suicide itself was unpunished was to urge "statutory regulation" specifically penalizing assistance of suicide.⁵⁵⁰

The Texas courts, however, did indeed hold that assisting suicide was not a crime. H. Tristram Engelhardt, Jr., and Michele Malloy, who are proponents of the legalization of assisting suicide, have put considerable emphasis on this line of cases in Texas, which they call the "Aberrant Jurisdiction."⁵⁵¹ In *Grace v. State*⁵⁵² in 1902, and again in *Sanders v. State*⁵⁵³ in 1908, the Presiding Judge W. L. Davidson, writing on behalf of the Texas Court of Criminal Appeals, held that as suicide was not illegal in Texas, neither was furnishing the means of self-destruction to the suicide illegal. On this ground, two homicide convictions were reversed.

Three points are significant about these Texas cases. First, as *Sanders* makes clear, immunity from punishment was afforded only the passive assistant. The assistor could furnish the pistol or poison to the suicide, but could neither shoot the pistol nor "give . . . the medicine or poison by placing it in the mouth or other portions of the body."⁵⁵⁴ As Engelhardt and Malloy maintain:

In distinguishing between passively and actively assisted suicide, the Texas courts placed the onus of the definitive act upon the suicide. The suicide was obliged to be the last actor in the causal chain. The one assisting the suicide could not relieve the suicide of his responsibility for the last act. These reflections suggest a way in which the court might have been discouraging some precipitous suicides that could have occurred had the suicide been allowed to engage another to kill him.⁵⁵⁵

There is, however, no hint of such a rationale in the opinion, which reads, to the contrary, as though the court were making a distinction purely on the basis of the well-recognized rule that consent is not a defense to homicide. This distinction, in any event, seems inconsistent with any assumption that the court was recognizing an affirmative personal right.

Second, as Engelhardt and Malloy candidly note, *Grace* and *Sanders* "lack any moral or philosophical justifications for their position. Only in *Sanders* are such extra-legal considerations mentioned, and there they are mentioned in opposition to the court's

550. Withers, *supra* note 546, at 647.

551. Engelhardt & Malloy, *supra* note 14, at 1022.

552. 44 Tex. Crim. 193, 69 S.W. 529 (1902).

553. *Sanders v. State*, 54 Tex. Crim. 101, 112 S.W. 68 (1908).

554. *Id.* at 105, 112 S.W. at 70.

555. Engelhardt & Malloy, *supra* note 14, at 1024.

holding."⁵⁵⁶ The relevant passage read:

It may be a violation of morals and ethics, and reprehensible, that a party may furnish another poison, or pistols, or guns, or any other means or agency for the purpose of the suicide to take his own life, yet our law has not seen proper to punish such persons or such acts.⁵⁵⁷

At no point in the opinions is suicide presented as commendable or as a natural human right. The ruling simply is that because the legislature had failed to punish it, neither it nor its passive assistance is a crime.

Third, it is impossible to read the *Grace* and *Sanders* opinions without concluding that in both cases the court regarded the convictions as having been wholly unjustified by the evidence.⁵⁵⁸ If the courts were result-oriented, then it is easy to understand that they might have reached for a technicality on which to overturn the judgments below. The importance of this observation is muted, however, in light of the fact that because the convictions in *Grace* and *Sanders* were not supported by the evidence in the record, the appellate courts simply could have reversed on grounds of insufficient evidence, as did the Illinois court in *Burnett v. People*.⁵⁵⁹

The effect of the *Grace* and *Sanders* opinions was superseded in Texas by a 1965 statute which empowered magistrates and peace officers to take action to prevent those who threatened or at-

556. *Id.* at 1023. Later in their article, however, Engelhardt and Malloy could so far forget this as to assert that "[u]nder old Texas case law, which refused to impose liability for suicide, attempted suicide, or assisted suicide," the "maxim" applied "One ought to protect innocent citizens from others interfering in their life and death decisions." *Id.* at 1034. As the text makes clear, however, there is no evidence that the Texas courts were animated by such autonomy-based motivations.

557. 54 Tex. Crim at 105, 112 S.W. at 70.

558. The appendix sets forth the facts of these cases in considerable detail, along with substantial excerpts from the opinions. See *infra* appendix notes 570-80 and accompanying text.

559. 204 Ill. 208, 68 N.E. 505 (1903). There was at the time some confusion about the power of the Texas Court of Criminal Appeals to overturn a trial court's verdict on questions of fact, as opposed to questions of law. Although there was then in effect a statute specifically recognizing this authority (Act of Apr. 13, 1892, ch. 16, § 42, 1892 Tex. Gen. Laws 34, 39, (codified at TEX. CODE CRIM. PROC. art 848 (1925)), a case decided in the same year as *Sanders* held "[U]nder a long line of authorities of this court we cannot review a controverted question of fact." *McElroy v. State*, 53 Tex. Crim. 57, 58, 111 S.W. 948, 949 (1908). However, Judge Davidson was in dissent in *McElroy* and, in any event, the problem in *Grace* and *Sanders* was not that the facts were controverted but that, if believed, they were deemed decidedly insufficient to support a conclusion that either defendant knowingly assisted a suicide. There is little doubt that the power of the court to set aside a conviction for insufficient evidence was recognized at the time. See generally Notes and Comments, *Appeal and Error—Fact Jurisdiction of Texas Appellate Courts*, 17 Tex. L. Rev. 175, 176-78, 179-80 (1938).

tempted to harm themselves from doing so and a 1973 statute criminalizing the assistance of suicide.⁵⁶⁰ The Practice Commentary to the 1973 statute, perhaps responding to the underlying dissatisfaction of the *Grace* court with the facts relied upon for a conviction in the trial court, was at pains to point out that the penal provision was "narrowly drawn to cover only those who act intentionally."⁵⁶¹

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,⁵⁶² *Campbell v. Supreme Conclave Improved Order Heptasophs*,⁵⁶³ 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. Furthermore, the opinion asserted, "[A]ll will admit that in some cases it is ethically defensible," as when a woman commits suicide to avoid rape or "when a man curtails by weeks or months the agony of an incurable disease."⁵⁶⁴ Beyond this, Justice Collins specifically asserted the right of autonomy and argued that there was no governmental interest sufficient to overcome the individual's choice to commit suicide: "The paternal theory of government does not here prevail I cannot see that the public good is . . . concerned to prolong a life that may be worthless to the public."⁵⁶⁵

Here is language to gladden the heart of any autonomy theorist. 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. In *State v. Carney*,⁵⁶⁶ Justice John Franklin Fort, writing for a unanimous court, upheld a conviction for attempting suicide. He implied that Justice Collins had overlooked the state statute prescribing punishment for common law crimes and dismissed the

560. See *infra* appendix note 587 and accompanying text.

561. See *infra* appendix note 588 and accompanying text. There was little question that *Grace* had no intention for his weapon to be used by the deceased to commit suicide.

562. Other insurance opinions touching upon suicide are reserved for later discussion.

563. 66 N.J.L. 274, 49 A. 550 (1901).

564. *Id.*, 49 A. at 553.

565. *Id.* Longer excerpts from the opinion may be found in the appendix. See *infra* appendix notes 347-53 and accompanying text.

566. *State v. Carney*, 69 N.J.L. 478, 55 A. 44 (Sup. Ct. 1903).

claim that the abolition of forfeiture legalized suicide. "Suicide is none the less criminal because no punishment can be inflicted If one kills another, and then kills himself, is he any less a murderer because he cannot be punished?"⁵⁶⁷ In 1922, the state's highest court, without mentioning *Campbell*, undercut the *Campbell* court's rationale in dictum while affirming a conviction in an unrelated murder case. The supreme court asserted:

[T]he state has a deep interest and concern in the preservation of the life of each of its citizens, and . . . does not either commit or permit any individual, no matter how kindly the motive, either the right or the privilege of destroying such a life So strong is this concern of the state that it does not even permit a man to take his own life, but punishes him for an attempt to do so.⁵⁶⁸

In a series of other cases and statutory enactments, the criminality of suicide and attempted suicide in New Jersey was asserted through 1972, when the criminal penalties for attempted suicide were repealed and replaced by an involuntary commitment statute.⁵⁶⁹

The history of New Jersey is virtually unique on both extremes—in producing an opinion declaring suicide a right of autonomy on the one hand, and in punishing the attempt at suicide on the other. As we have seen, even before the time of Blackstone there was a tendency to regard suicides rather as victims of mental disorder than as culprits. As time passed, this trend grew, first in practice and then in theory. The Field Code and statutes modeled on it punished attempts at suicide, but in the fourth quarter of the nineteenth century unease with this approach began to be widespread. By the beginning of the twentieth century, it was being emphatically rejected. The compassion for the family of a suicide that had led to abolition of forfeiture and ignominious burial in the eighteenth century expanded in the nineteenth and twentieth centuries to include the one who sought suicide. This sympathy for the suicide victim led to a general change from punishment to treatment as the course of action appropriate for the suicide attempter. The law had always made an exception from punishment for the insane, but it came explicitly to regard a suicide attempt as itself evidence, if not of insanity, at least of mental disturbance for which help was more desirable than condemnation. "Help" meant

567. *Id.* at 479, 55 A. at 45.

568. *State v. Ehlers*, 98 N.J.L. 236, 238, 119 A. 15, 17 (1922).

569. *See infra* appendix note 374 and accompanying text.

prevention of suicide and an effort to treat the cause of the attempt, not assistance in completing suicide. Sympathy for the individual, as we shall see, emphatically did not mean approval of the act.

Apart from New Jersey, only one other state has a reported decision in which a court has sustained a conviction for attempting suicide. In 1961, the North Carolina Supreme Court took note that under that state's constitution, both forfeiture and ignominious burial were precluded. Nevertheless, the court stated, "Nearly all [courts] agree that suicide is *malum in se*. . . . For the reason that suicide may not be punished, it is argued that this common law offense is now obsolete and serves no practical purpose for the protection of society. We do not agree."⁵⁷⁰

In contrast, Massachusetts, Pennsylvania and Maine courts have rejected punishment of attempted suicide. Massachusetts led the way in the 1870 case of *Commonwealth v. Dennis*.⁵⁷¹ The Supreme Judicial Court reasoned that a Massachusetts statute provided that the punishment for any attempt was to be one-half the punishment for any completed crime, but the completed crime of suicide was unpunishable; therefore, attempted suicide could not be punished. The court suggested that the legislature could have been motivated by the fear of encouraging attempters to be more sure of completing the suicide to avoid the penalty associated with a completed attempt.⁵⁷² In 1902, a lower court in Pennsylvania, reasoning that without punishment suicide was no crime and therefore an attempt could not be, gave as a policy basis for its holding that for one who attempts suicide, "His act may be a sin, but it is not a crime; it is the result of disease. He should be taken to a hospital and not sent to a prison."⁵⁷³ Four years later, in *May v. Pennel*,⁵⁷⁴ the Supreme Judicial Court of Maine applied similar rationale and concluded that an attempt at it could not be a crime. "Although it may be deemed ethically reprehensible and inconsistent with the public welfare, it has never been declared by the Legislature or held by the court of this state to be such a public wrong as will subject the doer to legal punishment."⁵⁷⁵

Despite the disinclination of the majority of state courts to pun-

570. *State v. Willis*, 255 N.C. 473, 121 S.E.2d 854, 855-56 (1961).

571. 105 Mass. 162 (1870).

572. *Id.* at 162-63.

573. *Commonwealth v. Wright*, 11 Pa. D. 144, 146 (1902).

574. 101 Me. 516, 64 A. 885 (1906).

575. *Id.* at 517, 64 A. at 886.

ish the suicide attempt, state courts have reached different results in cases where the criminality of attempted suicide was at issue in an ancillary matter. In 1877, seven years after its *Dennis* ruling that it was not a crime in Massachusetts to attempt suicide, the Supreme Judicial Court of the state was confronted with a case in which a woman attempting suicide accidentally shot and killed her fiance who was trying to prevent the completion of her attempt. She was convicted in the trial court under the felony murder rule. In *Commonwealth v. Mink*,⁵⁷⁶ the conviction on that theory was upheld. The *Mink* Court reasoned:

[S]uicide is not technically a felony in this Commonwealth. . . . But being unlawful and criminal as *malum in se*, any attempt to commit it is likewise unlawful and criminal. Every one has the same right and duty to interpose to save a life from being so unlawfully and criminally taken, that he would have to deflect an attempt unlawfully to take the life of a third person.⁵⁷⁷

In the 1891 case of *State v. Levelle*,⁵⁷⁸ on similar facts, the South Carolina Supreme Court upheld a murder conviction with substantially the same analysis.⁵⁷⁹ In contrast, the Iowa Supreme Court, in 1933 overturned the murder conviction of a man who, while attempting suicide, unintentionally shot a would-be rescuer.⁵⁸⁰ The court ruled that because there were no common law crimes in Iowa, and no statute barred attempting suicide, it could not be regarded as a crime.

Another arena in which the underlying attitude of the law toward attempting suicide comes into play is the joint attempt of two or more to commit suicide in a "suicide pact." Under the common law, a single survivor of suicide pact was guilty of the other's murder.⁵⁸¹ For example, in the 1910 case of *McMahan v. State*,⁵⁸² the Alabama Supreme Court wrote, "[S]ince the dead cannot be punished, no penalty can be inflicted on the self-destroyer. But collateral consequences may and do, upon occasion, depend on the feloniousness of self-murder."⁵⁸³ Among these collateral consequences was criminal liability for the surviving participant of a sui-

576. 123 Mass. 422 (1877).

577. *Id.* at 429.

578. *State v. Levelle*, 34 S.C. 120, 13 S.E. 319 (1910).

579. *See generally id.*

580. *State v. Campbell*, 217 Iowa 848, 251 N.W. 717, 718 (1933). *See also State v. Willits*, 2 Ariz. App. 443, 445 n.2, 409 P.2d 727, 729 n.2 (1966).

581. *See Annot.*, 92 A.L.R. 1176 (1934).

582. 168 Ala. 70, 53 So. 89 (1910).

583. *Id.* at 74, 53 So. at 90.

cide pact as well as for one who advised or assisted a suicide.⁵⁸⁴ In 1908, the Tennessee Supreme Court upheld the murder conviction of a man who shot his lover, as part of a suicide pact, but lacked the nerve to shoot himself,⁵⁸⁵ and in 1940, a suicide pact survivor was convicted of second degree murder in Maryland.⁵⁸⁶

The murder conviction of a sixteen year old survivor who drove off a cliff with a friend in what appears to have been a suicide pact prompted a thorough and thoughtful opinion by the California Supreme Court sitting *en banc* in 1983.⁵⁸⁷ The court considered the reasoning underlying the law's generally divergent treatment of attempted and assisted suicide. Its analysis revealed a rationale incompatible with the thesis of the autonomy theorists that an absence of punishment for those who seek suicide implies a recognition of suicide as an affirmative human and civil right.⁵⁸⁸

The California Supreme Court noted the felony status of suicide at common law but said, "Under American law, suicide has never been punished and the ancient English attitude has been expressly rejected. . . . Rather than classifying suicide as criminal, suicide in the United States 'has continued to be considered an expression of mental illness.'"⁵⁸⁹ The court cited with approval a law review note's statement that "The current psychiatric view is that attempted suicide is a symptom of mental illness and, as such, it makes no more sense to affix criminal liability to it than to any other symptom of any other illness. . . ."⁵⁹⁰ By contrast, "The law has, however, retained culpability for aiding, abetting, and advising suicide."⁵⁹¹ As a rationale for this retention, the court suggested that (1) people might encourage others to commit suicide for their own personal motives; (2) "interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another, even though the act may be accomplished with the consent, or at the request, of the suicide victim;"⁵⁹² and, (3) that the basis

584. *See generally id.*

585. *Turner v. State*, 119 Tenn. 663, 108 S.W. 1139 (1908).

586. *See infra* appendix note 218 and accompanying text.

587. *In re Joseph G.*, 34 Cal. 3d 429, 667 P.2d 1176, 194 Cal. Rptr. 163 (1983).

588. *See generally id.*

589. *Id.* at 433, 667 P.2d at 1178, 194 Cal. Rptr. at 165 (citations omitted), quoting H. HENDIN, *SUICIDE IN AMERICA* 23 (1982).

590. 34 Cal. 3d at 434, 667 P.2d at 1179, 194 Cal. Rptr. at 166, quoting Note, *The Punishment of Suicide— A Need for Change*, 14 VILL. L. REV. 463, 469 (1969).

591. 34 Cal. 3d at 434, 667 P.2d at 1179, 194 Cal. Rptr. at 166.

592. *Id.* at 437, 667 P.2d at 1181, 194 Cal. Rptr. at 168, quoting MODEL PENAL CODE §

for absolving the suicide attempter of punishment—that he or she suffers from a mental disease—does not exist with regard to the aider and abettor.⁵⁹³

Considering the suicide pact as a hybrid of attempting one's own suicide and aiding another's, the court held that when the death of both is to occur through the same instrumentality (here the car hurtling off a cliff), the "potential for fraud is . . . absent . . . [and the] traditional rationale for holding the survivor of the pact guilty of murder is thus not appropriate . . ." ⁵⁹⁴ On these grounds, it overturned Joseph G.'s conviction.

The California court's explanation of the trend, present even before the nineteenth century but gathering strength through the passing decades, of foregoing criminal punishment for one who attempts suicide, is consistent with statements from other courts and commentators. In 1980, for example, the Supreme Court of Iowa wrote in *State v. Marti*.⁵⁹⁵

The only reason we view suicide [as] noncriminal is that we consider inappropriate punishing the suicide victim or attempted suicide victim, not that we are concerned about that person's life any less than others' lives. To say that aiding and abetting suicide is a defense to homicide would denigrate these views.⁵⁹⁶

When New Jersey finally abolished the offense of attempting suicide in 1972, the legislature simultaneously enacted a provision authorizing involuntary commitment for mental health care of anyone attempting suicide.⁵⁹⁷ The Supreme Court of Minnesota, a state in which attempting suicide has been free from criminal penalty, wrote, "[T]here can be no doubt that a bonafide attempt to prevent a suicide is not a crime in any jurisdiction, even where it involves the detention, against her will, of the person planning to kill herself."⁵⁹⁸

In addition to the case law arising from criminal trials, there are a considerable number of opinions that refer to the attitude of the law toward suicide in the area of insurance. Typically, the issue was whether relatives of one who had committed suicide could, as beneficiaries, recover the payments from a policy taken out on his

210.5 comments (official Draft & Revised Commentaries 1980).

593. 34 Cal. 3d at 437, 667 P.2d at 1181, 194 Cal. Rptr. at 168.

594. *Id.* at 439, 667 P.2d at 1182-83, 194 Cal. Rptr. at 169-70.

595. 290 N.W.2d 570 (Iowa 1980).

596. *Id.* at 581.

597. See *infra* appendix note 374 and accompanying text.

598. *State v. Hembd*, 305 Minn. 120, 130, 232 N.W.2d 872, 878 (1975).

or her life. First, before there could be any question of the insurance company successfully refusing to disburse the benefits, it had to be proved that the insured in fact committed a suicide. This was not an easy matter, because the law imposed a heavy presumption that any questionable death occurred through accidental means. There are a plethora of cases that, in stating the basis for this presumption, included language condemning suicide. An 1895 decision of the Minnesota Supreme Court is representative: "[T]he presumption is against suicide, as contrary to the general conduct of mankind,—a gross moral turpitude, not to be presumed in a sane man. . . ." ⁵⁹⁹

Insurance companies sometimes placed in their policies an exclusionary clause that purported to preclude payment if the insured died by "suicide," "self-destruction," or a synonymous term. Many courts held that this language encompassed only the legal, as opposed to the popular, meaning of suicide—suicide while sane.⁶⁰⁰ Courts tended to favor the beneficiaries and, in order to aid their recovery of benefits, often painted "suicide" in quite negative terms in order to distinguish the cases before them. For example, in 1876 the Georgia Supreme Court, deciding such a case, wrote, "[S]uicide, proper, both in ordinary and legal language, is something more than self-sought and self-inflicted death. It is a species of crime or wickedness—something wrong; a kind of self-murder."⁶⁰¹

599. *Hale v. Life Indemnity & Investment Co.*, 61 Minn. 516, 63 N.W. 1108 (1895), quoting 1 *MAY, INSURANCE* § 325 (3d ed. 1890).

See also *Pennsylvania Mut. Life Ins. Co. v. Cobbs*, 23 Ala. App. 205, 208, 123 So. 94, 97 (1929) ("Suicide . . . is a crime involving moral turpitude . . . [E]very instinct of a normal animal is opposed to self-destruction."); *Brown v. Metropolitan Life Ins. Co.*, 233 Iowa 5, 10, 7 N.W.2d 21, 24 (1943) ("[S]uicide by rational man is an act of moral turpitude."); *St. Louis Mut. Life Ins. v. Graves*, 69 Ky. (6 Bush) 268, 278 (1869) (opinion of Robertson, J. for half of equally divided court) ("monstrous"); *Wellisch v. John Hancock Mut. Life Ins. Co.*, 293 N.Y. 178, 184, 56 N.E.2d 540, 543 (1944) (Suicide implies "criminality or moral turpitude"); *Mallory v. Travelers Ins. Co.*, 47 N.Y. 52, 54-55 (1871) ("contrary to the general conduct of mankind; it shows gross moral turpitude in a sane person."); *Bernard v. Protected Home Circle*, 161 A.D. 59, 62-63, 146 N.Y.S. 232, 235 (1914) ("unlawful and immoral"); *Mitterwallner v. Supreme Lodge, Knights & Ladies of the Golden Star*, 37 Misc. 860, 863, 76 N.Y.S. 1001, 1004 (City Ct. 1902) ("suicide is too odious to be presumed"); *Wyckoff v. Mutual Life Ins. Co. of Tennessee v. Daniel*, 209 Va. 332, 335, 163 S.E.2d 577, 580 (1968) ("The presumption . . . against suicide has its basis in . . . the fact that self-destruction is contrary to the general conduct of mankind, the immorality of taking one's life and the presumption of innocence of crime."); *Wiger v. Mutual Life Ins. Co. of New York*, 205 Wis. 95, 101, 236 N.W. 534, 537 (1931) ("immorality of taking one's own life"), quoting *Fehrer v. Midland Casualty Co.*, 179 Wis. 431, 434, 190 N.W. 910, 911 (1922).

600. See Annot., 9 A.L.R. 3d 1015, 1017-18 (1966).

601. *Life Ass'n. of America v. Waller*, 57 Ga. 533, 536 (1876). See also *Blackstone v.*

Another type of exclusionary clause sometimes inserted by insurance companies into their policies provided that benefits would not be paid if the insured died as the result of a violation of law. The companies would then seek to avoid payment by asserting that since suicide was unlawful, the beneficiaries of an insured who committed suicide should not recover. In such cases a court, seeking to aid innocent family members, had to rule that suicide was not unlawful.

Not all courts were willing to hold that suicide was lawful. The most noteworthy example was the United States Supreme Court. During the period of the federal common law,⁶⁰² the first Justice Harlan, writing in 1898 for the majority in *Ritter v. Mutual Life Ins., Co.*⁶⁰³ held that even a policy silent with regard to suicide could not obligate an insurance company to pay benefits on behalf of an insured who took his life while sane. Justice Harlan explained:

A contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice or be the foundation of its judgment. If, therefore, a policy . . . expressly provided for the payment of the sum stipulated when or if the assured, in sound mind, took his own life, the contract, even if not prohibited by statute, would be held to be against public policy, in that it tempted or encouraged the assured to commit suicide in order to make provision for those dependent upon him or to whom he was indebted.⁶⁰⁴

Several state courts followed *Ritter*. In 1903, New York's highest court, overruling an earlier (1889) decision that had held otherwise,⁶⁰⁵ quoted *Ritter* with approval and held that contract language that barred recovery for a death caused by an illegal act prevented payment after death resulting from suicide.⁶⁰⁶

The majority of courts called on to confront the question, however, were clearly motivated by the same compassion for innocent

Standard Life & Accident Ins. Co., 74 Mich. 592, 610, 42 N.W. 156, 162 (1889) (Suicide "must be an act done with an evil motive."); Connecticut Mut. Life Ins. Co. v. Groom, 5 Pa. 92, 97 (1878) ("[T]he word suicide is employed to characterize the crime of self-murder.").

602. The federal common law period extended roughly from the United States Supreme Court's decision in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842), until *Swift* was overruled by the Court in *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

603. 169 U.S. 139 (1898).

604. *Id.* at 154.

605. *Darrow v. Family Fund Society*, 116 N.Y. 537, 22 N.E. 1093 (1889). See also *Plunkett v. Supreme Conclave, Improved Order of Heptasophs*, 105 Va. 643, 646, 55 S.E. 9, 11 (1906).

606. *Shipman v. Protected Home Circle*, 174 N.Y. 398, 406, 67 N.E. 83, 85 (1903).

relatives of a suicide that had induced their predecessors to abolish forfeiture and ignominious burial. Thus, in 1897, the Illinois Supreme Court allowed recovery of insurance benefits, taking note that "Suicide, at common law, ranked as a crime, and was punished by forfeiture of goods and an ignominious burial" but stating, "In America, however, self-destruction is not a crime . . .,"⁶⁰⁷ a position the court reiterated in a similar 1903 case.⁶⁰⁸ In the latter case, the court rejected the insurance company's claim that even if suicide were not punishable, attempting suicide was a crime. The court avoided the issue of whether attempting suicide was criminal, but noted that in criminal law, attempts are designated as such only when their objects are not accomplished.⁶⁰⁹

Similarly, in 1888, the Minnesota Supreme Court construed a life insurance policy in favor of the assured and held that:

[T]he violation of law referred to in the policy ought not . . . to be construed to mean or include suicide. Suicide, though strictly a crime, is not reckoned among offenses or violations of law, such as the language of the policy would be commonly understood to refer to. Otherwise construed, the policy would be misleading in its practical operations.⁶¹⁰

Similarly, Nebraska's highest court directed that benefits be paid in such circumstances, remarking, "While suicide was considered a crime at common law, yet we have no common law in this state; neither have we any statute making suicide, or an attempt to commit suicide, a crime."⁶¹¹ Also allowing recovery of life insurance benefits, the Wisconsin Supreme Court wrote in 1898:

It is truly said that intentional suicide while sane was a felony at common law. It was punished by forfeiture of goods, but, as we do not inflict such punishments, it is now little more than the shadow of a crime. Technically, it is still a crime in this state because we have retained the common law so far as it is not inconsistent with our laws and general situations; but it is not a crime within the ordinary meaning of the term, or any usual definition, because we have no statute punishing either suicide or attempted suicide.⁶¹²

To place this line of cases in perspective, it is noteworthy that even outside the area of suicide, courts were prepared to go quite

607. *Grand Lodge of Ill. Indep. Order of Mut. Aid v. Wieting*, 168 Ill. 408, 418-19, 48 N.E. 59, 62 (1897).

608. *Royal Circle v. Achterrath*, 204 Ill. 549, 565-66, 68 N.E. 492, 498 (1903).

609. *Id.* at 566-67, 68 N.E. at 498.

610. *Kerr v. Minnesota Mut. Benefit Ass'n.*, 39 Minn. 174, 175, 39 N.W. 312, 313 (1888).

611. *Lange v. Royal Highlanders*, 75 Neb. 188, 201-02, 106 N.W. 224 (1905).

612. *Patterson v. Natural Premium Mut. Life Ins. Co.*, 100 Wis. 118, 126, 75 N.W. 980, 983 (1898).

far to secure insurance benefits for innocent relatives by construing deaths to have occurred other than as a result of a violation of the law. For example, The Nebraska Supreme Court held that a robber, who, after taking funds from the state treasurer's office at gunpoint, was shot while escaping, did not "die while violating any law" on the theory that he was not doing so at the instant when he was shot.⁶¹³ Similarly, the Michigan Supreme Court allowed beneficiaries to recover when a deserter from the army was shot while resisting arrest in construing a policy exclusion "when the death or injury may have happened while engaged in, or in consequence of, any unlawful act."⁶¹⁴

Some courts have been less sympathetic when insurance benefits were sought by surviving suicide attempters. In 1931, for example, the Pennsylvania Supreme Court denied a claim for disability benefits by such an individual:

We are not dealing with . . . the rights of a beneficiary who is himself guilty of no wrongdoing, but with those claimed by the insured, who himself has been guilty of one of the great moral wrongs, of a crime infamous at common law

. . . A principle of public policy, operating on the wrongdoer himself is invocable here, which cannot be applied against a surviving beneficiary who is guiltless of any act contrary to good morals.⁶¹⁵

Even the Indiana Supreme Court, which in 1944 held that a suicide attemptor could receive disability benefits for injuries caused by the suicide attempt wrote, "the . . . issue here is not whether suicide merits public condemnation . . . that self-destruction ought never to be encouraged may be conceded"⁶¹⁶ Nevertheless, the court grounded its ruling in the assured's favor on the proposition, similar to the view of the California Supreme Court, that "The modern view is that one who does such a rash thing is usually the unfortunate victim of some mental or physical disturbance, burden or pressure which is sufficient to warp the natural impulse to survive, though it may not amount to actual unsoundness of mind."⁶¹⁷

With the exception of Justice Collins' opinion in *Campbell*,⁶¹⁸

613. *Griffin v. Western Mut. Benefit Ass'n.*, 20 Neb. 620, 622, 31 N.W. 122, 124 (1887).

614. *Utter v. Travelers Ins. Co.*, 65 Mich. 545, 32 N.W. 812 (1887).

615. *Elwood v. New England Mut. Life Ins. Co.*, 305 Pa. 505, 512, 513, 158 A. 257, 259 (1931). See also *Wallace v. State*, 232 Ind. 700, 701, 116 N.E.2d 100, 101 (1953); *Potts v. Barret Div., Allied Chemical & Dye Corp.*, 48 N.J.Super. 554, 138 A.2d 574 (1958).

616. *Prudential Ins. Co. of Am. v. Rice*, 222 Ind. 231, 235, 52 N.E.2d 624, 626 (1944).

617. *Id.* at 238-40, 52 N.E.2d at 625-27.

618. See *supra* notes 563-65 and accompanying text.

and the possible exception of the Texas opinions,⁶¹⁹ the dominant national attitude toward suicide at least through 1980 was that expressed by the Florida Supreme Court in 1933: "The court may take judicial notice that an act of suicide arouses in the minds of those who become informed of it a feeling of repulsion, although it may be commingled with sentiments of pity."⁶²⁰

The principal development in this area over the last quarter century was the wide influence of the American Law Institute's 1962 promulgation of the Model Penal Code. Although the Model Penal Code as a whole was adopted with few substantial changes in only two states, it served as the initial basis for criminal code revision in many more.⁶²¹ Section 210.5 of the Model Penal Code read:

(1) *Causing Suicide as Criminal Homicide.* A person may be convicted of criminal homicide for causing another to commit suicide only if he purposely causes such suicide by force, duress or deception.

(2) *Aiding or Soliciting Suicide as an Independent Offense.* A person who purposely aids or solicits another to commit suicide is guilty of a felony of the second degree if his conduct causes such suicide or an attempted suicide, and otherwise of a misdemeanor.⁶²²

A lengthy commentary to the Code discussed both the history of the treatment of suicide in the law, and the policy reasons supporting the American Law Institute's recommendations. In accordance with the modern trend, the ALI opposed criminal penalties for those who attempted suicide:

There is scant reason to believe that the threat of punishment will have deterrent impact upon one who sets out to take his own life. By definition, the person who commits what could be denominated a criminal attempt to commit suicide intends to succeed. It seems preposterous to argue that the visitation of criminal sanctions upon one who fails in the effort is likely to inhibit persons from undertaking a serious attempt to take their own lives. Moreover, it is clear that the intrusion of the criminal law into such tragedies is an abuse. There is a certain moral extravagance in imposing criminal penalties on a person who has sought his own self-destruction, who has not attempted direct injury to anyone else, and who more properly requires medical or psychiatric attention.⁶²³

As a corollary, the Institute opposed application of the felony-murder rule or transferred intent doctrine to the extent that they would subject one who, in attempting suicide, unintentionally in-

619. See *supra* notes 552-59 and accompanying text.

620. *Blackwood v. Jones*, 111 Fla. 528, 532-33, 149 So. 600, 601 (1933).

621. MODEL PENAL CODE Official Draft and Revised Comments (Supp. 1985).

622. MODEL PENAL CODE § 210.5 (Official Draft and Revised Comments 1980).

623. *Id.* commentary at 94.

jured another to any greater penalty than would be imposed under a reckless endangerment of life provision or similar statutes.⁶²⁴

The Institute supported penalties for assisted suicide, but argued that such penalties should be mitigated under some circumstances to a penalty less severe than that for either murder or manslaughter:

Criminal punishment in this area raises an issue of some complexity. Self-destruction is surely not conduct to be encouraged or taken lightly. The fact that penal sanctions will prove ineffective to deter the suicide itself does not mean that the criminal law is equally powerless to influence the behavior of those who would aid or induce another to take his own life. Moreover, in principle it would seem that the interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another, even though the act may be accomplished with the consent, or at the request, of the suicide victim. On the other hand, cases such as *People v. Roberts*, where a husband yielded to the urging of his incurably sick wife to provide her with the means of self-destruction, sorely test the resiliency of a principle that completely fails to take account of the claim for mitigation that such a circumstance presents.⁶²⁵

Nevertheless, the Institute explicitly rejected making an unselfish motive a defense to the charge of assisting suicide, maintaining that such considerations are best left to the discretion of the court at the sentencing stage.⁶²⁶ Liability for the full penalty for homicide was deemed appropriate, however, "where the actor actively participates in inducing the suicide of another, as by the use of force, duress, or deception,"⁶²⁷ as the text in the first subsection made clear.

With the stimulus of the Model Penal Code, eight states enacted new statutes between 1965 and 1980 that specifically barred the assistance of suicide,⁶²⁸ and ten states and the District of Columbia revised their existing statutes.⁶²⁹

Until 1982, New Jersey's *Campbell* opinion⁶³⁰ stood alone among

624. *Id.* at 96-97.

625. *Id.* at 100.

626. *Id.* at 101-02.

627. *Id.* at 99.

628. See *infra* appendix notes 44 (Arizona), 90 (Colorado), 100-02 (Connecticut), 110 (Delaware), 210-12 (Maine), 341 (New Hampshire), 514 (Pennsylvania), 587-89 (Texas) and accompanying text.

629. See *infra* appendix notes 30-33 (Alaska), 55-57 (Arkansas), 181-83 (Kansas), 310-13 (Montana), 374-75 (New Jersey), 424-28 (New York), 480-82 (Oklahoma), 493-95 (Oregon), 521-22 (Puerto Rico), 548-50 (South Dakota), 639-41 (Washington) and accompanying text.

630. See *supra* note 563 and accompanying text.

court decisions in enunciating a policy favoring an affirmative right to suicide. In contrast, a number of decisions stated a societal and governmental policy against suicide. In 1933, for example, Florida's Supreme Court wrote in *Blackwood v. Jones*:⁶³¹

No sophistry is tolerated in consideration of legal problems which seek to justify self-destruction as commendable or even a matter of personal right, and therefore such an argument is unsound which seeks to prove that an accusation unfounded in fact that a person sought to destroy his or her own life is not reprehensible but a normal thought reflecting in no wise upon the wickedness of the person accused of suicide.⁶³²

A Pennsylvania Superior Court expressed a similar attitude in a 1959 opinion, stating: "The policy of the law is to protect human life, even the life of a person who wishes to destroy his own."⁶³³ In 1969, the Wisconsin Supreme Court wrote, "It is true that the successful suicide is no longer within the reach of the law, but it does not follow that self-destruction is a legally protected right of individuals It is a 'grave public wrong.'"⁶³⁴ As recently as 1975, the Supreme Court of Tennessee said, "An attempt to commit suicide is probably not an indictable offense under Tennessee law; however, such an attempt would constitute a grave public wrong, and we hold that the state has a compelling interest in protecting the life . . . of its citizens."⁶³⁵

In 1982, however, the Georgia Supreme Court, held, "The State . . . has no right to destroy a person's will by frustrating his attempt to die if necessary to make a point."⁶³⁶ In direct contrast, an intermediate New York court denied a similar claim by John Lennon's killer, Mark Chapman, holding, "The preservation of life has a high social value in our culture and suicide is deemed a 'grave public wrong.'"⁶³⁷ In 1984, a divided New Hampshire Supreme Court held that the state's compelling interests outweighed any right of a prisoner to starve himself to death.⁶³⁸ A dissenting opin-

631. 111 Fla. 528, 149 So. 600-01 (1933).

632. *Id.* at 532-33, 149 So. at 601.

633. *Commonwealth v. Root*, 191 Pa. Super. 238, 244, 156 A.2d 895, 900 (1959), *rev'd on other grounds*, 403 Pa. 571, 170 A.2d 310 (1960).

634. *Bisenius v. Karns*, 42 Wis. 2d 42, 52, 165 N.W.2d 377, 382 (1969), *appeal dismissed*, 395 U.S. 709 (1969).

635. *State ex rel Swann v. Pack*, 527 S.W.2d 377, 382 (1969), *cert. denied*, 424 U.S. 954 (1975). *See generally infra* appendix notes 560-61 and accompanying text.

636. *Zant v. Prevante*, 248 Ga. 832, 834, 386 S.E.2d 715, 717 (1982).

637. *Von Holden v. Chapman*, 87 A.D.2d 66, 68, 450 N.Y.S. 2d 623, 626 (1982). *See also infra* appendix note 432 and accompanying text.

638. *In re Caulk*, 125 N.H. 226, 232, 480 A.2d 93, 97 (1984).

ion, however, quoted John Stuart Mill in urging the establishment of a right of autonomy which would encompass the right to kill oneself.⁶³⁹ That same year, New Hampshire's highest court rejected knowledge of the "moral character" of suicide as a test for the sanity of the deceased in adjudicating life insurance cases, on the ground that there is no longer "a consensus that suicide is morally wrong."⁶⁴⁰ The court reasoned that when the United States Supreme Court decided *Terry* in 1872, "there was such a consensus reflected in statutes or common-law rules making suicide a criminal act,"⁶⁴¹ but concluded that since that time that consensus had been lost to the law.⁶⁴²

Whether or not there is such a consensus — the considerable agitation today for the legalization of assisted suicide and its recognition as a constitutional right presumably prevents any such consensus — but it is nonetheless true that the majority of states continue to prohibit assisting suicide. Twenty-six states and the Commonwealth of Puerto Rico currently have statutes which specifically outlaw assisting suicide.⁶⁴³ Three additional states would apparently hold one who assisted a suicide (at least by furnishing the means) guilty of murder as a principal.⁶⁴⁴ Maryland⁶⁴⁵ and Massachusetts⁶⁴⁶ would probably penalize assisting suicide under the common law of crimes. More debatably, Alabama,⁶⁴⁷ the District of Columbia,⁶⁴⁸ West Virginia,⁶⁴⁹ Virginia⁶⁵⁰ and Tennessee⁶⁵¹ might do so as well. Three other states recognize the common law of crimes but have no precedents that hint at whether they would

639. *Id.* at 227, 480 A.2d at 99-100.

640. *Cole v. Combined Ins. Co. of Am.*, 125 N.H. 126, 480 A.2d 180 (1980).

641. *Id.*

642. *Id.*

643. *See infra* appendix notes 31-32 (Alaska); 44 (Arizona); 55 (Arkansas); 74 (California); 90 (Colorado); 100 (Connecticut); 110 (Delaware); 125 (Florida); 181 (Kansas); 210 (Maine); 267 (Minnesota); 288 (Mississippi); 311-12 (Montana); 319 (Nebraska); 341 (New Hampshire); 374-75 (New Jersey); 388-89 (New Mexico); 424-28 (New York); 480 (Oklahoma); 494-95 (Oregon); 514 (Pennsylvania); 522 (Puerto Rico); 541 (South Carolina); 549 (South Dakota); 587-89 (Texas); 639-41 (Washington); 661-62 (Wisconsin) and accompanying text.

644. *See infra* appendix notes 147 (Illinois), 246-49 (Michigan), 475 (Ohio) and accompanying text.

645. *See infra* appendix notes 218-20 and accompanying text.

646. *See infra* appendix notes 237-39 and accompanying text.

647. *See infra* appendix notes 13-23 and accompanying text.

648. *See infra* appendix notes 116-17 and accompanying text.

649. *See infra* appendix note 653 and accompanying text.

650. *See infra* appendix notes 609-11 and accompanying text.

651. *See infra* appendix notes 559-61 and accompanying text.

also include assisting suicide within their prohibitions.⁶⁵² Hawaii⁶⁵³ and Indiana⁶⁵⁴ make causing suicide an offense but do not prohibit assisting it. Nine states have no prohibitions.⁶⁵⁵

It does not necessarily follow that all these states recognize suicide as an affirmative right. Only Georgia has legal precedents with language implying such an approach.⁶⁵⁶ One of these states, Kentucky, has a statute specifically authorizing the use of force to prevent a suicide attempt.⁶⁵⁷ Others have case precedents or other indications of disapprobation of suicide.⁶⁵⁸ In North Carolina, the abolition of suicide as a common law offense seems to have been prompted by a desire not to impose criminal punishment on those who attempt suicide.⁶⁵⁹ North Dakota's 1973 repeal of an earlier prohibition on assisting suicide seems to have come from a comprehensive code revision which took the federal code as a model, rather than from a considered desire to affirm a right to suicide.⁶⁶⁰

What then may be said of the American law regarding suicide? In some American jurisdictions, neither suicide nor its assistance has been punished; in others, attempted suicide itself has been made criminal. However, for most of the country's history, the majority of jurisdictions have imposed no criminal sanction upon one who, successfully or unsuccessfully, endeavors to take his or her own life, while directing the force of the criminal law against assistance of suicide. Despite the existence of some anomalous jurisdictions, that policy has been predominant. This policy reflects the prevailing state of affairs at the time the fourteenth amendment was ratified and is representative of the approach taken by the majority of the states that ratified it.

The general American approach to suicide in the nineteenth century was ably summed up by Edward Manson, writing at the turn of the century:

In America suicide is not, practically, an offence. At common law, as in

652. See *infra* appendix note 559 and accompanying text.

653. See *infra* appendix notes 136-38 and accompanying text.

654. See *infra* appendix notes 166-69 and accompanying text.

655. See *infra* appendix notes 173 (Iowa), 194 (Kentucky), 201 (Louisiana), 328 (Nevada), 444 (North Carolina), 458 (North Dakota), 597-98 (Utah), 673 (Wyoming) and accompanying text.

656. *Zant v. Prevante*, 248 Ga. 832, 834, 286 S.E.2d 715, 717 (1982).

657. KY. REV. STAT. § 202 A.026 (1982).

658. See *infra* appendix notes 174-75 (Iowa), 188-90 (Kentucky), and accompanying text.

659. See *infra* appendix note 437 and accompanying text.

660. See *infra* appendix note 459 and accompanying text.

England, it is felony; but as no penalty other than the forfeiture of goods — which was the common law punishment — can be inflicted on him who has murdered himself, and as forfeitures for crime are not practiced in any states, the offence is not punishable. “Yet we recognize it as criminal,” say[s] [the] well-known American jurist [Stephen Bishop], “whenever the opportunity arises indirectly, as when one advises another to kill himself. The view that men are naturally entitled to end their own lives at pleasure accords neither with our instincts nor with our better reason.” The special ground taken up in America seems to be that suicide is an offence . . . against all who compose the State — since it deprives each of a support on which he is entitled to rest. For it is neither possible nor desirable that men should be independent of one another⁶⁶¹

In short, the almost universal abstention from treating suicide as a crime, after the early days of the first colonies, cannot accurately be characterized as the recognition of an affirmative “right.” The common law punishment of suicide was rejected as “unsuited to our institutions”⁶⁶² because it inflicted punishment on the suicide’s innocent family and on an unfeeling corpse, not because colonists and early Americans held with the Stoics or Hume that the choice to end one’s life was an aspect of human liberty that should be recognized as worthy of freedom from state interference. Similarly, as time passed, criminal penalties were rarely imposed on attempts at suicide because the reaction of the populace was one of pity rather than vengeance. Decriminalization occurred because of a concern for the despondency or mental disorder that was believed to prompt such deeds, not because suicide was regarded as a human right. A Pennsylvania judge expressed the predominant view succinctly in a 1902 case:

Calling suicide self-murder is a curt way of justifying an indictment and trial of an unfortunate person who has not the fortitude to bear any more the ills of this life. His act may be a sin, but it is not a crime; it is the result of disease. He should be taken to a hospital and not sent to a prison.⁶⁶³

Thus, the few courts that held that assisting suicide was not criminal did so from a strict construction of the common or statutory construction of crime: if suicide were not punished as a crime they reasoned, then the assistance of suicide could not be punished nor deemed criminal. None of their opinions contained the rhetoric or logic of self-determination, except the New Jersey *Campbell* opinion, which was promptly repudiated within that state. To the

661. Manson, *Suicide as a Crime*, 1 J. Soc’y. COMP. LEGIS. (n.s.) 311, 318 (1899).

662. See generally *id.*

663. *Commonwealth v. Wright*, 11 Pa. D. 144, 146 (1902).

contrary, most courts strove to find a theory by which assistance to suicide could be deemed criminal. Their analysis clearly presumed disapprobation of suicide, rested on whether it was characterized as murder (or as *malum in se* and unlawful albeit not punished) or viewed the suicide as the assistor's agent in causing his or her own death.

There were some cases in which the courts held that suicide was not a crime for the purpose of construing life insurance policies that barred recovery when deaths resulted from violation of the law. But it is clear that these courts were not motivated by a favorable attitude toward the choice of suicide, but rather by the desire to compensate innocent family members and by the general rule that insurance policies were to be construed strictly against the insurance companies. In addition, the insurance cases are replete with negative references to suicide.

In short, 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."⁶⁶⁴ Indeed, the weight of authority in the United States, from colonial days through at least the 1970's has demonstrated that the predominant attitude of society and the law has been one of opposition to suicide. It follows that courts should not hold suicide or its assistance to be a protected right under the United States Constitution.

VII. OTHER JURISPRUDENTIAL CONSIDERATIONS

A. *The Scope of a Constitutional "Right to Suicide"*

Recognition of a constitutional "right to suicide" would necessarily entail significant consequences in the legal order and have a substantial impact on public policy. If suicide were to be deemed a fundamental right under the Constitution, then the state could neither prohibit nor substantially burden the exercise of the "right" unless it could properly claim a "compelling" interest warranting prohibition or regulation. Moreover, any state action that impeded the exercise of the right, even if supported by a compelling interest, would have to be narrowly fashioned in order only to protect that interest.⁶⁶⁵ As a consequence, the few remaining laws against attempted suicide, the prohibitions against assisted suicide

664. *Palko v. Connecticut*, 302 U.S. 319 (1937).

665. *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3255 (1985).

in effect in many states, and the operative presumption that those who attempt suicide are mentally ill (and may therefore be stopped by the police or health care professionals, confined, and subjected to mental health therapies), would all be constitutionally suspect.

Plainly, the Constitution would not permit an absolute prohibition on any attempt to exercise an acknowledged constitutional right. It would not permit penalization of those who assist another to exercise such a right, anymore than it would countenance penalties against printers who publish materials protected by the first amendment,⁶⁶⁶ or against physicians who prescribe contraceptives.⁶⁶⁷ It would not support a blanket presumption that all who attempt or threaten to exercise a "right to suicide" are mentally deranged, any more than it would support a presumption that those who would become members of a particular religious sect or political party are mentally suspect.⁶⁶⁸

Moreover, as the Constitution has been held not to support rules that prevent mature minors from exercising first amendment rights,⁶⁶⁹ from securing contraceptives,⁶⁷⁰ or from having abortions,⁶⁷¹ it is questionable whether an absolute state-imposed prohibition on mature minors exercising a "right to suicide," could survive constitutional scrutiny or that parental consent, or even notice, could in all circumstances be required.⁶⁷² Furthermore, if opting between suicide and continued life is a constitutionally protected freedom of choice like that between abortion and continuing a pregnancy to term, a state could not impose counseling requirements that sought to encourage those contemplating suicide to choose life; "regulations designed to influence the . . . choice"

666. See *Bigelow v. Virginia*, 413 U.S. 376 (1973); *Bantam Books v. Sullivan*, 327 U.S. 58 (1963).

667. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

668. See *Church of Scientology v. United States*, 409 F.2d 1146 (D.C. Cir.), cert. denied, 396 U.S. 963 (1969).

669. See *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969).

670. See *Population Services v. Carey*, 431 U.S. 678 (1977).

671. See *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979). *Bellotti* has been cited by a proponent of the constitutional right to suicide as establishing a rule that could apply to cases of suicide. Sullivan, *A Constitutional Right to Suicide*, in *SUICIDE: THE PHILOSOPHICAL ISSUES*, 229, 244 (Battin & Mayo eds. 1980).

672. Cf. *Boddie v. Connecticut*, 401 U.S. 371 (1971) (indigent persons who wish to divorce have a right to governmentally financed legal assistance as an incident of their right to marry if they cannot otherwise secure a divorce).

would be unconstitutional.⁶⁷³ The state might be able to use public funds in such a manner to encourage continued life,⁶⁷⁴ but it probably could not directly regulate the choice making process by specifying "what information a [person] must be given before [he] chooses," an occurrence which would require a waiting period before effectuating that choice.⁶⁷⁵

If individuals have a constitutional "right to die" by withholding of life-support systems that is not diminished when they are incompetent and their wishes are unknown,⁶⁷⁶ a right that may be exercised by third parties by way of substituted judgment under such circumstances,⁶⁷⁷ then it would logically seem to follow that a recognized "right to die" by suicide would also survive incompetence and that third parties would likewise be empowered to exercise this "right" on their behalf. Put another way, if the "right to die" recognized in present case law were deemed to encompass a "right to suicide," then suicide by substituted judgment—constitutionally sanctioned active, involuntary euthanasia—of incompetent persons would be a logical consequence.

Any attempt to limit this "right to suicide" to certain persons or circumstances, for example to persons who are terminally ill or elderly, would conflict with the "freedom of choice" or privacy theory that is advanced to assert the existence of such a "right" in the first place. This theory is based on the premise that one has, or ought to have, the right to do with one's body what one chooses, or more generally, the right to take any action that does not cause harm to another. Public suicide or suicide that puts other lives or property at risk might be condemned under this theory, but it would not warrant limitations on the existence of this right based on the status of the person, such as limitations based on illness or age. Nor would it warrant limitations based on the motives or "reasons why" a person wishes to commit suicide.

The young woman tragically disappointed in love, the middle-aged man who has lost his family and whose career has been destroyed, the depressed teen, and the person of any age who has been severely disabled, all might well believe that they ought to be

673. *City of Akron*, 462 U.S. at 444.

674. *Cf. Maher v. Roe*, 432 U.S. 464 (1977) (government may refuse to finance abortion while financing childbirth).

675. 462 U.S. at 443, 450-51.

676. *Cf. In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976).

677. *See, e.g., Superintendent of Belchertown v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977).

able to exercise this "right" with the same freedom as the person who is terminally ill or older. The lives of the former may be no more "valuable" or "meaningful," either to themselves or to society, than the lives of the latter. Why, then, should "freedom of choice" of suicide exist in one case but not the other? Terminal illness or advanced age may sometimes be more personally tragic or burdensome than physical disability, financial ruin, or emotional loss, but this is not always the case. Obviously, there is nothing in the Constitution that would limit the existence of a right it acknowledges in such a selective and arbitrary fashion.

It might be argued, however, that there exists a state interest that justifies state-imposed restrictions on this "right" for everyone except those who are terminally ill—an interest that is sufficiently compelling to support prohibitions on assisted suicide and suicide attempts, and to support the operative presumption of the mental illness of suicide attemptors. Under this theory, only the "right to suicide" of the very sick or old could be legitimately exercised. The compelling state interest in preserving life would be perceived to diminish as death approaches, finally freeing the very sick or old from state interference in the exercise of their "right" to commit suicide and to secure the assistance of others to do so.

Although this theory would provide a convenient paradigm for limiting the exercise of a putative suicide right to cases for which there might be greater sentimental public sympathy, it makes little rational and no constitutional sense. Why should the state's interest in preserving life diminish as life approaches its end? Are the lives of older persons or the terminally ill less "valuable" to the state than the lives of those who may live indefinitely? And what is it that makes them less "valuable"?

It is certainly not always the case that the terminally ill or the old are more "burdensome" or less "valuable" to the public good than other classes. Indeed, because their lives will presumably end shortly, they might to the contrary impose lesser "burdens" on society than, for example, incorrigible criminals or young persons with permanent severe mental or physical disabilities. If the state has no compelling interest in preserving the lives of the old or very ill because they will make no further substantial contribution to the public good, then it also has no compelling interest in preserving the lives of many others who likewise ought to be able to seek their own deaths and to secure the assistance of others to do so with legal impunity. Stated otherwise, since any restriction on a constitutional "right to suicide" would need to be "narrowly

drawn" to satisfy the compelling interest in preserving life, a restriction limiting the exercise of this "right" to those who are very old or ill would be unduly restrictive: All "burdensome," "noncontributing" persons—those who are "valueless" to the state in the same sense as the very ill or old—would logically be permitted to exercise this right.

Moreover, such a rule would also sweep too broadly: Many who are very old or ill are nonburdensome contributors to the public good and, therefore, would be objects of the compelling state interest in preserving their lives. Logically, the state should continue to apply sanctions against suicide for such individuals.

The assertion that only terminally ill or older persons ought to be able legitimately to exercise a suicide right also has ironic and paradoxical consequences from the perspective of the sentimental rationale usually advanced to justify suicide in such circumstances. If it is "merciful" to allow death by suicide for the terminally ill or the old, then it is even more merciful to legitimize the same choice for many others whose lives may seem as equally devoid of meaning or filled with suffering, but will nevertheless be prolonged indefinitely. If only the terminally ill or the old may exercise this right, then it will be available only to those whose lives will end shortly anyway. All others—no matter how painful, tortured, or hopeless their lives might be—would be enjoined from taking their own lives and from legally seeking others to help them to do so, even though their miserable lives would continue on into the foreseeable future.

Indeed, a jurisprudential scheme that acknowledged a constitutional right to suicide but carefully confined its exercise to a narrow class of persons or set of circumstances would be perverse. A constitutional right that cannot be freely exercised by all persons without state interference except in the most extreme circumstances lacks the most essential indicia of a "right" in our legal order. To assert the existence of a fundamental right to suicide yet qualify it by limiting its exercise, for example, to only terminally ill or older persons—and only after detailed procedural safeguards are honored—would be equivalent to asserting a right to freedom of speech while permitting the state to prohibit its exercise except when few can hear what is spoken and except when the state has licensed the speaker. A "right" so limited is no right at all. Moreover, it would be foolhardy to suppose that a constitutional right to suicide, once recognized, could be so restricted as to apply only to

those who are terminally ill.⁶⁷⁸

B. *"Rational Suicide": A Limitation of the Scope of the Right?*

The incapacity of the state to inquire into the motives or mental state of a person who exercises any constitutional right to choose among competing alternatives—to vote, to select a religious sect or reading materials, to conceive a child or not—describes the very nature of such a right. It is presumed that reasonable persons may differ on the choice among the array of options protected by such a right, but it is never presumed that selection of one or the other option—a certain book, religious sect, or political candidate—is *prima facie* evidence of mental capacity.

Yet, as we have demonstrated, the vast majority of modern courts have conceived of the person who would commit suicide as neither a moral reprobate nor a heroic practitioner of a civil liberty, but as mentally or emotionally deranged or unbalanced. And, as we shall presently demonstrate, this presumption is strongly supported by the psychiatric, psychological, and sociological literature on suicide. If suicide were acknowledged as a constitutional right, however, it is impossible to see how this presumption could survive. It would be absurdly anomalous to assume that anyone who proposes to exercise a fundamental right is therefore mentally or emotionally ill. To the contrary, logic and normal principles of constitutional adjudication would seem to dictate that those who would exercise a "right to suicide" would have to be deemed presumptively competent—rational decision makers, rather than mentally or emotionally disabled individuals.

Given his premise of the existence of a constitutional right to suicide, Alan Sullivan presents a logical argument:

[C]ompetence should be defined by courts in a way that does not deprive the potential suicide of the right to choose. It must be defined with a view to securing for the subject the right to choose to die despite the wishes of doctors, friends, psychologists, and judges. The test of competence should inquire whether the subject has the mental capacity to comprehend his predicament and to evaluate the alternatives. Furthermore, competence should be presumed; the presumption should be rebutted only by convincing evidence of coercion, mental instability, or ignorance.⁶⁷⁹

678. Sullivan, *supra* note 671, at 245 (footnotes omitted).

679. In Note, *Voluntary Active Euthanasia for the Terminally Ill and the Constitutional Right to Privacy*, 69 CORNELL L. REV. 363 (1984), the author maintains that there is a constitutional right to privacy grounded in "the individual's fundamental right to self-determination." *Id.* at 369-70. The author then states that a requirement for the exercise of this

In view of overwhelming evidence that suicide is almost always a product of emotional or mental distress, however, it is sometimes argued that the existence or recognition of such a "right" ought to be reserved for those who propose "rational" suicide. This proposition rests on the premise that a "right to suicide" arises only when a person has a proper mental state or motive, which the state may presumably inquire into before the right may be exercised. As we have indicated, however, no other right to choose among alternatives requires prior proof of "right thinking" before it may be exercised.

In addition, it is exceedingly unclear just what is meant by a right to "rational suicide." If it means only that the individual must be mentally competent to assert the right, then the individual's reasons for choosing suicide are irrelevant. A rational young adult could properly claim the right because he or she was not admitted to a preferred medical school. On the other hand, the person who is terminally ill and in great pain but who also has advanced senile dementia could not. The person who is terminally ill may be no more emotionally distressed than the young adult who was not admitted to a medical school. So if the young adult is judged "irrational" by virtue of his or her distress, then so should the person with terminal illness and a similar distress; and the "right" to rational suicide should not exist in either case.

If "rational suicide" means that the suicide is for a "good cause," then the mental or emotional state of the individual is irrelevant. Children and persons who are mentally ill or disabled ought to be able to exercise such a "right" in the same circumstances as the competent adult might. Moreover, the "good cause" qualification implies that there are constitutionally dictated legitimate and illegitimate "reasons" for suicide—as though the Constitution was intended by its Framers to warrant suicide for terminal illness, but not for disappointment in love.

If it is argued that one must be *both* competent and have good cause to assert a "right to suicide," then the confusion is merely compounded and the class of those who may assert the right is even more radically circumscribed. Indeed, such a dual qualification on the legitimacy of a suicide right limits its exercise to such a

right is that the patient must be terminally ill. Indeed, according to the author, "two independent corroborative medical opinions must agree that the patient has less than six months to live." *Id.* at 380. The author, however, provides no justification for this arbitrary limitation—no reason why, given a constitutional right of suicidal self-determination, it could constitutionally be limited to the narrow class that he postulates.

small class that it is absurd to speak of it as a "right" at all, much less a fundamental right of constitutional dimensions.

To assert the existence of a constitutional right to suicide for "the emotionally and mentally untroubled person with good reasons to commit suicide" makes no jurisprudential sense. If suicide is to be deemed a right at all, then no prior proof of mental competence can be required and no presumption of mental or emotional instability can be attached to suicide. In the absence of a compelling state interest in assuring the continued existence of the particular individual in particular circumstances, the state could not prohibit or burden the exercise of the right or its assistance. Except perhaps in the cases of immature minors and of those who have been previously adjudicated mentally incompetent for reasons *other than* suicidal intent, all persons would logically be free to commit suicide—whether "rational" or not—and to secure the assistance of others to do so without state interference.

C. *The Scientific Literature*

The claim that there exists a "right to suicide" evokes the image of the philosopher imbibing hemlock in the face of inevitable death and after a careful and agonizing decisionmaking process. As we have shown, however, a constitutional "right to suicide" would sweep far more broadly. It could not reasonably be limited in its exercise to isolated classes or limited circumstances and retain the essential character of a "right," much less a fundamental right protected by the Constitution.

Who then would be the principal beneficiaries of such a "right"? The literature overwhelmingly supports the present presumption—a presumption that could not logically survive should suicide be deemed a constitutional right—that those who propose to or do commit suicide do so as the result of mental or emotional disorders or external pressures.

If it exist at all, "rational" suicide is rare.⁶⁸⁰ As a result, recogni-

680. Though many suicide advocates claim to favor only rational suicides, it must be admitted that their ability to employ this term derives mainly from the fact that the people who committed these acts never had their mental status tested. We tend to presume that people like Jean Humphrey [the writer], and Jo Roman were free from mental disorder because no opportunity existed or was taken before their death to analyze their mental status, and no legal hearing was ever held to inquire into their competence. R. Maris's review of *Roman's Exit House* in which she discusses her suicide decision, seriously questions the rationality of Roman's state of mind. By and large no body of evidence exists by which a reasonable comparison may be made between these highly dramatized suicides and those of the thousands of other individuals who have come under study. Hence, suicide proponents

tion of a constitutional right to suicide would warrant suicides primarily among those who are plainly mentally and emotionally disturbed. The social legitimacy and easy availability of effective assistance to commit suicide that would necessarily follow recognition of suicide as a "right" would also contribute to a climate in which both subtle and obvious forms of duress would cause many who would not otherwise do so to choose suicide, whether or not they are mentally or emotionally disturbed.

D. *Ambivalence and Reversibility*

Studies and descriptions of suicide attempters who survived by accident or outside intervention demonstrate that most suicidal individuals have neither an unequivocal nor an irreversible determination to die.

Rubenstein and his associates studied forty-four survivors of attempted suicide and found their true wish was not to die but to establish a means of communication with an important person in each of their lives.⁶⁸¹ As Professor Erwin Stengel, one of the most renowned psychiatrists to have investigated attempted suicide, has commented:

Many suicidal attempts and quite a few suicides are carried out in the mood "I don't care whether I live or die," rather than with a clear and unambiguous determination to end life. A person who denies, after what seems an obvious suicidal attempt, that he *really* wanted to kill himself, may be telling the truth. Most people, in committing a suicidal act, are just as muddled as they are whenever they do anything of importance under emotional stress.⁶⁸²

A study by two psychiatrists in Seattle, Washington of ninety-six suicide attempters revealed that 75% of them (71% of the men and 77% of the women) were ambivalent about their intentions to die. "The ambivalent group," the researchers stated, "are vacillating and confused in intent, but in taking a risk of death . . . may test the affection and care of others. The serious attempt group are similar to the completed suicide group in their depression, hopelessness, and lack of social interaction."⁶⁸³ Psychiatrists have long advanced the opinion that underlying a suicidal individual's ostensible wish to die is actually a wish to be rescued,⁶⁸⁴ which is manifested

ask us to assume that their dead heroes were rational, exceptional individuals free from mental disorder in the face of scant data by which their assertion might be tested.

681. Rubenstein, Meses & Lidz, *On Attempted Suicide*, 79 A.M.A. ARCHIVES NEUROLOGY AND PSYCHIATRY 103, 111 (1958).

682. E. STENGEL, *SUICIDE AND ATTEMPTED SUICIDE* 71 (1964).

683. Dorpat & Boswell, *An Evaluation of Suicidal Intent in Suicide Attempts*, 4 COMPREHENSIVE PSYCHIATRY 117 (1963).

684. Jensen & Petty, *The Fantasy of Being Rescued*, 27 PSYCHOANALYTIC Q. 327, 327

by:

[A] tendency to give warning of the impending attempt to give others a chance to intervene In most suicidal attempts, irrespective of the mental state in which they are made, we can discern an appeal to other human beings. This appeal also acts as a powerful threat. We regard the appeal character of the suicidal attempt, which is usually unconscious, as one of its essential features.⁶⁸⁵

Another study of 886 suicide attempters demonstrates the reversibility of their apparent wish to die. Five years after their attempts, only 34 of 886 persons studied (3.84%) had killed themselves.⁶⁸⁶

A long-term study of 229 individuals in Sweden, who had attempted suicide during the years 1933-42, found that only 10.9% (14% of the men and 8.8% of the women) had actually killed themselves when these individuals were studied an average of 35 years after the initial attempt.⁶⁸⁷ Thus, during that period, 89% of the attempters did not choose death.

Even suicide advocates recognize the reversibility of the suicidal impulse. Neurosurgeon Milton Heifetz, who favors the legalization of physician-assisted suicide for persons expected to die within six months, nonetheless concludes that "Most patients who ask for death reject it when offered the chance to kill themselves."⁶⁸⁸

British psychiatrist Erwin Stengel emphasizes in his study of suicide and attempted suicide that completed suicide is merely the endpoint on a continuum of suicidal behavior. Stengel estimates that of all suicidal acts committed, only about one-eighth to one-sixth actually result in death.⁶⁸⁹ According to Stengel most studies of suicidal acts focus on completed suicides, are retrospective, and ignore a much more numerous and equally vulnerable group of sui-

(1958).

685. *Id.*

686. Rosen, *The Serious Suicide Attempt: Five Year Follow Up Study of 886 Patients*, 235 J.A.M.A. 2105, 2105 (1976).

687. Dahlgren, *Attempted Suicides 35 Years Afterward*, 7 SUICIDE AND LIFE-THREATENING BEHAVIOR 75, 76, 78 (1977).

688. M. HEIFETZ & C. MANGEL, *THE RIGHT TO DIE* 97, 106 (1975).

689. E. STENDEL, *supra* note 682, at 71. Some American investigators estimate the ratio of attempted to completed suicides to be as high as 10:1 or even 100:1. Maris, *The Adolescent Suicide Problem*, 15(2) SUICIDE & LIFE-THREATENING BEHAVIOR 91, 97 (1985). This probably reflects a discrepancy between their methods and those of Stengel. In Great Britain, the most common means of committing suicide is by drug ingestion, whereas in the United States the most common method is gunshot. Since the latter method is more likely to be lethal if tried, one would expect the attempted to completed suicide ratio in the United States to be lower than that in Great Britain.

cide attempters. Attempters are often regarded as radically different from completers. They are perceived as manipulative, hysterical blackmailers who are not "serious" about their suicide attempts and therefore are to be ignored in studies of completed suicide. In fact, the characteristics that most consistently distinguish attempters from completers are that attempters have a younger average age and are predominantly female. Stengel regards this distinction between attempters and completers as artificial, and identifies three factors that determine whether a suicide attempt results in death: lethality of method, seriousness of suicidal intent, and degree of intervention from the environment.⁶⁹⁰ While lethality of method may be a major determinant of survival, it does not closely correlate with seriousness of intent to die.⁶⁹¹ Moreover, suicidal attempters do not frequently plan their acts to maximize the lethality of the method and to minimize the likelihood of intervention by family members or acquaintances. Indeed, nearly all suicide attempters and completers give some advance warning or hint to a significant other person before embarking on their act.⁶⁹² When the act fails, this is normally not attributable to the initiative of the police or other state agents, but, rather, to the attempter's decision to commit his or her act in a setting where discovery is likely.

It is difficult to attribute this behavior pattern to ignorance or lack of opportunity, as advocates of a right to suicide often do.⁶⁹³ This type of "poor planning" occurs even when the individual was in a position to avoid detection. For example, the majority of suicides occur in the attempter's home, where the possibility of detection and intervention is significant unless the individual lives alone.⁶⁹⁴ Rather than ignorance or lack of opportunity, it is more plausible to ascribe such planning to a reluctance to die and to an irrational, bewildered state of mind that suicidal individuals typically possess at the time of the act.

The literature thus supports the conclusion that most suicides are carried forward in an atmosphere of ambivalence and confusion, and that many are intended to effect some purpose other than self-destruction. A relatively small number of attempters ever actually succeed in effecting their purpose, and the wish to die is

690. E. STENDEL, *supra* note 682, at 72-73.

691. E. ROBINS, *THE FINAL MONTHS* 12 (1981).

692. *See generally id.*

693. *See, e.g.*, D. HUMPHREY, *LET ME DIE BEFORE I WAKE* 60 (1982); D. PORTWOOD, *COMMONSENSE SUICIDE: THE FINAL RIGHT* 76-80 (1983).

694. Ettlinger and Flordh, cited in E. STENDEL, *supra* note 532, at 73.

usually dispelled with time. In one study of 500 attempted suicides, only 4% of them were found to have been well-planned to the extent that they allowed for lethality of method and acted in such a manner as would tend to prevent hindrance from the environment.⁶⁹⁵

Stengel underlines the fact that non-intervention in a suicidal attempt does not necessarily respect the intentions of the attempter, even if the act seems obviously calculated to endanger life.

A lethal dose of a narcotic taken with genuine intent in a situation in which immediate counter-measures can be instituted may not seriously endanger life. On the other hand, a relatively small overdose taken half-heartedly by a person in poor health in a situation where help is not available may be fatal.⁶⁹⁶

Stengel noted that in Britain, before the repeal of the law making suicide a crime, the rare cases resulting in a prison sentence involved repeat-attempters of suicide who had no one to care for them. It was also Stengel's observation that suicide attempts tended to be frustrated by people known to the suicide attempter, and only a fraction of them involved the police.⁶⁹⁷ Ironically, it appears that an extreme policy of non-intervention by the state, like the former practice in England of punishing the attempter, would discriminate largely against the socially isolated and those individuals with families too poor to offer them an alternative, such as psychiatric care.

E. *Mental Disorder in Suicidal Individuals*

The Diagnostic and Statistical Manual of the American Psychiatric Association defines mental disorder as:

[A] clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that typically is associated with either a painful symptom (distress) or impairment in one or more important areas of functioning (disability). In addition, there is an inference that there is a behavioral, psychologic, or biologic dysfunction, and that the disturbance is not only in the relationship between the individual and society. When the disturbance is limited to a conflict between the individual and society, this may represent social deviance, which may or may not be commendable, but is not by itself a mental disorder.⁶⁹⁸

695. *Id.*

696. E. STENGEL, *supra* note 682, at 73.

697. *Id.* at 96.

698. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF

In 1974, British researchers interviewed the friends and family of 100 people who had committed suicide along with a sample of matched controls. By thorough and systematic interviewing, joint scrutiny of data, and access to hospital records, they were able to diagnose 93% of those who had committed suicide as being mentally ill at the time of death.⁶⁹⁹ In the United States, Dr. Eli Robins and his associates studied 134 consecutive completed suicides that occurred in St. Louis, Missouri over a one-year period from 1956 to 1957. A detailed description of each one of these 103 men and 31 women was published in 1981, after preliminary reports in 1959.⁷⁰⁰ Robins found that the choice of a particular *method* of committing suicide was generally not a valid indicator of the seriousness of suicidal *intent*, even though certain methods, such as gunshot, tend to be more lethal. Robins emphasized that two-thirds of the individuals gave some communication beforehand of their intent to die, ususally to people they knew. Forty-seven percent (47%), including 45 men and 18 women, were found to have an "affective disorder, depressed phase." Twenty-five percent (25%) were alcoholic, fifteen percent (15%) had a recognizable but undiagnosed psychiatric disorder, four percent (4%) had an organic brain syndrome, five percent (5%) were terminally ill, two percent (2%) were schizophrenic, two percent (2%) were neither physically nor psychiatrically ill, and one percent (1%) were drug addicts. Only fifteen percent (15%) of the men, but one-hundred percent (100%) of the women, reported feeling that they were a burden. The most universal characteristic was that of mental disorder, present in ninety-four percent (94%) of the people studied. Robins further concluded, "individuals suffering from affective disorder and alcoholism account for 70% to 80% of completed suicides."⁷⁰¹

1. *Depressive Disorders and Suicide*

The available evidence demonstrates that ninety-four percent (94%) of the population that commits suicide suffers from mental disorder, although wide variations exist in the type of disorder.⁷⁰²

MENTAL DISORDERS 56 (3d ed. 1980) (hereinafter cited as DSM III).

699. Barraclough, Bunch, Nelson & Sainsbury, *A Hundred Cases of Suicide: Clinical Aspects*, 125 BRIT. J. PSYCHIATRY 355, 356 (1974).

700. E. ROBINS, *supra* note 691, at 12.

701. *Id.*

702. *Id.* The same may not be true for the much larger population which attempts suicide.

The most commonly cited disorders are the depressive affective disorders.⁷⁰³ Some critics regard the affective disorder as part of a normal or rational mental condition. They assert that labeling someone as having an affective or mood disorder is based on a value judgment concerning the appropriateness of an emotion at a given time.⁷⁰⁴ Yet the definition of affective disorder tends to guard against such a basis:

The essential feature of this group of disorders is a disturbance of *mood* . . . that is not due to any other physical or mental disorder. *Mood* refers to a prolonged emotion that *colors the whole psychic life*; it generally involves either depression or elation.⁷⁰⁵

703. This prevalence of depressive affective disorders is not surprising, since they are probably the most common of adult mental disorders. H. KAPLAN & B. SADOCK, *MODERN SYNOPSIS OF COMPREHENSIVE TEXTBOOK OF PSYCHIATRY* IV 362 (1983). At least one study suggests that the prevalence in the general population of a depression severe enough to require treatment is 6% with a lifetime incidence of 12-14% for men and 18-20% for women. Weissman, cited in Fawcett, *Diagnosing the Depression Syndrome*, 9 *MEDICAL STUDENT* (1983). See also S. DUBOVSKY & M. WEISSBERG, *CLINICAL PSYCHIATRY AND PRIMARY CARE* 24 (1983). Of these disorders, there are several subtypes, either variably classified or grouped together under a heading like "affective psychosis." In this article, any clinical entity termed a disorder may be assumed to be defined by the criteria listed for it in DSM III, *supra* note 698, unless otherwise specified. The DSM III classification is employed not to refer to legal definitions of insanity or mental illness but for purposes of clarity. It is commonly used in psychology and psychiatry and offers some degree of precision by which to distinguish among various disorders.

704. See Szasz, *The Ethics of Suicide*, 31 *ANTIOCH REV.*, 7 (1971). Szasz argues that psychiatrists and other physicians falsely claim to value a suicidal person's life more than he or she values life. Hence, for Szasz psychiatric efforts to label an individual mentally ill or deprive him of liberty are grounded solely in the therapist's bias in favor of prolonging or saving life. Such an assertion strains credulity, however, when one recalls that a psychotherapist's practice—which routinely entails diagnoses of mental disorders—involves primarily non-suicidal, non-homicidal individuals for whom therapy does not result directly in prolongation of life. Szasz himself concedes, "It is difficult to find 'responsible' medical or psychiatric authority today that does not regard suicide as a medical, and specifically, as a mental health problem."

705. DSM III, *supra* note 698, at 205. Other authors distinguish more specifically between depression as a disorder and normal sadness.

Depression is different from the ordinary sadness experienced by most people at some point in their lives . . . [Symptoms of sadness] are generally short-lived and not too disabling, and human contact and reassurance makes the patient feel better. Depression is distinguished from such normal, 'reactive sadness' by more severe, *pervasive and disabling* symptoms that continue after the stress that provoked them has abated.

S. DUBOVSKY & M. WEISSBERG, *supra* note 703, at 24 (emphasis added). The imprecise nature of the clinical demarcation between normal depressive moods and milder forms of pathological depression is well-known. H. KAPLAN & B. SADOCK, *supra* note 703, at 361. This difficulty arises not from disputes over whether certain syndromes are pathological but from lack of reliability in assessing the degree of psychopathology. (A controversy over whether a given syndrome ought to be considered pathological, by contrast, would primarily involve a value judgment.)

Thus, in applying the term "affective disorder," one assesses not the validity of a feeling, but rather the degree to which a certain mood misrepresents (or suppresses) the rest of the psychic life, including the person's emotions, values, and thinking capacities at the time of the suicide.

Nearly all of the depressive disorders are associated with change in appetite, weight, sleep disturbances and usual daily activities. Fatigue, irritability, inertia, depersonalization, change in motor activity, difficulty concentrating, indecisiveness, feelings of inadequacy, and self-reproach, or guilty, pessimistic attitudes toward the future, are also common symptoms of the depressive disorders as are hopelessness, despair, suicidal thoughts, suicidal threats and suicidal attempts.⁷⁰⁶

The psychotically depressed are particularly high risk candidates for suicide relative to other depressives, but they are by no means the only group at risk.⁷⁰⁷ Affective disorders, of which suicidal behavior (acts, attempts, threats or thoughts) is a universally recognized manifestation, include major depressive disorders, dysthymic disorder, bipolar disorder and depressive episode. It is estimated that forty-seven percent (47%) of completed suicides are committed by individuals with one of these disorders.⁷⁰⁸ The possible causes of depressive disorders, though controversial, are worth considering because of their implications for treatment of suicidal depressives. Psychological, social and biochemical theories have been invoked to explain these disorders.⁷⁰⁹

The emergence of bipolar depressive disorders, in particular, is considered to be in large part biologically determined. Several modes of inheritance are possible. One type may even be autoso-

706. DSM III, *supra* note 698, at 210-11; 214-15, 223, 364. See also H. KAPLAN & B. SADOCK, *supra* note 703, at 367, 369, 373; Klerman, *Affective Disorders*, HARV. GUIDE TO MOD. PSYCHIATRY 253, 255 (1979); S. DUBOVSKY & M. WEISSBERG, *supra* note 703 at 25; Baker, Dorzab, Winokur & Cadoret, *Depressive Disease: Classification and Clinical Characteristics*, 12 COMPREHENSIVE PSYCHIATRY 354 (1971); Woodruff, Murphy & Herjank, *The Natural History Affective Disorder—I: Symptoms of 72 Patients At The Time of Index Hosp. Admission*, 5 J. PSYCHIATRIC RESEARCH 255 (1967).

707. H. KAPLAN & B. SADOCK, *supra* note 703, at 362 and DSM III, *supra* note 698, at 207, 210-11, 216, 221-23. Not to be overlooked is the chronicity of many of these disorders. Of 97 patients with a major depressive disorder who required hospitalization, 20% did not recover from their illness even after two years. Keller, cited in *Serious Depression May Linger*, AMERICAN MEDICAL NEWS, Aug. 17, 1984, at 14, col. 1-3.

708. H. KAPLAN & B. SADOCK, *supra* note 703, at 362. See also Keller, *supra* note 707, at 14, col. 1-3.

709. These are set forth in the following discussion. For social theory, see E. DURKHEIM, SUICIDE (1897).

mal dominant.⁷¹⁰ Failure of a large number of patients to suppress cortisol secretion and response to specific drugs is considered by many as demonstrating the biochemical basis for an endogenous depression.⁷¹¹ The bulk of research indicates that just under half of the individuals who kill themselves have well characterized depressive disorders.⁷¹² Further evidence suggests that while most suicidal individuals would not be diagnosed as having an affective disorder, most are nonetheless depressed.⁷¹³ For purposes of a more distinct classification, diagnosis of affective disorder can only be made if the depressive symptomatology is "not due to another mental disorder."⁷¹⁴ Yet abundant documentation exists that individuals with other mental disorders display some or all of the characteristics of depressive disorder, including but not limited to suicidal activity.⁷¹⁵ They are no less disabled by these symptoms than is one with an affective disorder.⁷¹⁶

710. H. KAPLAN & B. SADOCK, *supra* note 703, at 365-66. Of more general interest are the recently published data of a Yale-National Institute of Mental Health collaborative study which confirm that "[f]amilial factors [whether genetic or environmental] are important in vulnerability to BP [bipolar] and mild and severe MD [Major depressive disorders]." Weissman, Gershon, Kidd, Prusoff, Feckman, Dibble, Hamovit, Thompson, Pauls & Guroff, *Psychiatric Disorders in the Relatives of Probands with Affective Disorders*, 41 ARCHIVES GEN. PSYCHIATRY 13, 20 (1984).

711. S. DUBOVSKY & M. WEISSBERG, *supra* note 703, at 25. See also Lawcett, *Diagnosing the Depression Syndrome*, 9 MEDICAL STUDENT 4, 5, 7, (1983). One of the most popular of such Stechen tests has been the dexamethasone suppression test. The National Institute of Mental Health, while not recommending routine clinical use of the DST, has advocated further investigation of the test's usefulness in predicting future suicidal attempts. Hirschfeld, Koslow & Kupfer, *The Clinical Utility of the Dexamethasone Suppressions Test in Psychiatry*, 250 J.A.M.A. 2172, 2174 (1983). See also Muscettola, Potter, Picka & Goodwin *Urinary 3-Methoxy-4-Hydroxyphenylglycol and Major Affective Disorders*, 41 ARCHIVES GEN. PSYCHIATRY 334, (1984). Gongalez, *A New Biological Marker for Depression?* 250 J.A.M.A. 21 (1983). Stanley, Virgilio & Gershon, *Tritiated Imipramine — 2 Binding Sites Are Decreased in the Frontal Cortex of Suicides*, 216 SCIENCE 1337 (1982). Meltzer, Umberkoman-Wiita Robertson, Tricou, Lowy & Perline, *Effect of 5-Hydroxytryptophan on Serum Cortisol Levels in Major Affective Disorders: I. Enhanced Response in Depression and Mania*, 41 ARCHIVES GEN. PSYCHIATRY 366 (1984); Asberg, Fraskman, & Thoren, *5-HIAA in the Cerebrospinal Fluid*, 3 PSYCHIATRY RESEARCH 225 (1980); Meltzer, Perline, Tricou, Lowy & Robertson, *Effect of 5-HT on Serum Cortisol Levels in Major Affective Disorders, II. Relation to Suicide, Psychosis, and Depressive Symptoms*, 41 ARCHIVES GEN. PSYCHIATRY 379 (1984). Brown, Ebert, Goyer, Jimerson, Klein, Bunney, & Goodwin, *Aggression, Suicide and Serotonin: Relationships to CSF Amine Metabolites*, 139 AM. J. PSYCHIATRY 741 (1982).

712. E. ROBBINS, *THE FINAL MONTHS* 12 (1981).

713. *Id.*

714. DSM III *supra* note 698, at 220.

715. *Id.* at 210, 221-23; H. KAPLAN & B. SADOCK, *supra* note 703 at 356, 360-61, 364, 373.

716. Illustrative of this point is a 1971 study by Silver of 45 suicide attempters.

This schizoid disorder is commonly associated with suicide and a depressive picture,⁷¹⁷ as are schizophrenic panic disorders⁷¹⁸ and alcoholism.⁷¹⁹ Studies demonstrate that 25 to 50% of those people with panic disorders have an increased mortality rate from suicide and cardiovascular disease.⁷²⁰ Alcoholics often develop a secondary depression.⁷²¹

As the foregoing discussion reveals, a large majority of individuals who kill themselves are depressed. The fact that suicidal behavior is regarded as a blatant feature of mental disorder is one reason why such behavior is considered a psychiatric indication for hospitalization and why risk of suicide is a criterion for referral to a psychiatrist or a psychotherapist.⁷²²

2. *Cognitive Disturbance in Depressive Disorder*

An abundance of psychiatric literature supports the proposition that depression is an objectively verifiable and diagnosable entity and that its designation as an illness or disorder is not purely arbitrary.⁷²³ A proponent of the principle of autonomy might nonetheless question whether the mere presence of an affective disturbance is sufficient (in the case of suicide) to negate the will and intention of the individual, even if the intention is reversible. If one defines (or misdefines) rational suicide as suicide for a good reason, it would not be inconsistent to argue that one might be-

Though the group of subjects was weighed in favor of females and people with personality disorders (16% of the group), psychiatric examination revealed the same prevailing primary diagnoses as in Robinson's group of suicide completers. In both groups, 47% of the individuals had affective disorders and, in the Silver study, 18% were alcoholic, compared with 25% in the Robinson study. Nevertheless, 80% were noted to be clinically depressed on the Beck Depression Inventory, leading Silver to suggest:

that regardless of primary diagnosis, the suicidal patient is likely to be clinically depressed at the time of his attempt, and that depression seems to be common to patients who attempt suicide *in each of the nosological categories*. The primary diagnosis may be misleading in assessing the presence of depression in the suicide attempter.

Silver, Bohnert, Beck & Marcus, *Relation of Depression of Attempted Suicide and Seriousness of Intent*, 25 ARCHIVES GEN. PSYCHIATRY 573, 575 (1971) (emphasis added). See also H. KAPLAN & B. SADOCK, *supra* note 553, at 370.

717. H. KAPLAN & B. SADOCK, *supra* note 703, at 356.

718. Individuals with panic disorders have an increased mortality rate from suicide and from cardiovascular disease. Sheehan, *Current Concepts in Psychiatry: Panic Attacks and Phobias* 307 NEW ENG. J. MED. 156, 157 (1982).

719. Berglund, *Suicide in Alcoholism*, 41 ARCHIVES GEN. PSYCHIATRY 888 (1984).

720. Sheehan, *supra* note 718, at 157.

721. Berglund, *supra* note 719, at 891.

722. DSM III, *supra* note 698, at 221; H. KAPLAN & B. SADOCK, *supra* note 703, at 362.

723. See, e.g., DSM III, *supra* note 698, at 205.

come depressed for a good reason. For some, a painful terminal illness or simply chronic illness might be said to be a rational ground for depression and suicide. Poverty, or more generally, a lower standard of living than one desires might also be considered a rational ground. It might thus be argued that, depending on changing societal values, some of these reasons for depression would be considered understandable and appropriate, while others would be considered illegitimate and maladaptive. Hence, why should all depressions be treated, when at least some may be legitimate and, therefore, in no need of such treatment?

We have previously asserted that the principle of autonomy as the highest good in ethics or law is fundamentally incoherent. Nevertheless, most would agree that there are practical reasons to avoid limiting personal freedom, so that a state might decide to curtail certain individual freedoms only if the individuals in question are determined to have a mental disorder likely to impair cognition or the thought process.

It is noteworthy, therefore, that psychologists view depression not only as a perceptual or motor impairment, but also as a decrease in optimal cognition.⁷²⁴ A depressive disorder is distressing not only due to the dysphoric mood which characterizes it, but also because it may significantly impair the cognitive function.⁷²⁵ Depressed subjects' awareness and reasoning have been found to be colored by unrealistically low self-regard, ideas of deprivation "often in the face of overt demonstrations of . . . affection,"⁷²⁶ and a "tendency [toward self blame with] no logical basis."⁷²⁷ A magnification of problems, impossible self-commands and a rigid tendency to see only one possible solution (such as suicide) to their problem further characterizes these depressed individuals.⁷²⁸ Such persons also suffer from systematic bias against themselves, which distorts the facts in their lives and leads to errors of judgment. These distortions are not preventable while the disorder persists, even when the individuals are aware of their susceptibility.⁷²⁹

In recent years, one symptom of depression, that of hopelessness, has emerged as the most probable and frequent source of the emotional and cognitive impairment which so often leads to sui-

724. H. KAPLAN & B. SADOCK, *supra* note 703, at 356.

725. Beck, *Thinking and Depression*, 9 ARCHIVES GEN. PSYCHIATRY 324, 326 (1963).

726. *Id.* at 321.

727. *Id.*

728. *Id.* at 328.

729. *Id.* at 327.

cide. This factor was first suspected in 1973.⁷³⁰ In 1980, researchers at Washington University Medical School in St. Louis discovered that the factor most significantly correlated with suicidal intent was not depression in general but, specifically, the cognitive component of hopelessness.⁷³¹

The fact that the correlation between suicidal intent and depression disappears when the effects of hopelessness are controlled statistically, suggests strongly that the observed correlation between depression and suicide intent is due solely to the frequent combination of hopelessness and depression. Hopelessness would appear to be much more closely related to suicide intent than depression. As has been previously suggested, it appears that the communicated suicide intent of patients is more dependent on some cognitive aspects of the depressive syndrome than it is on other components of depression.⁷³²

Beck's Hopelessness Scale was found to be a better predictor of suicidal intent than the Minnesota Multiphasic Personality Inventory, which measures general psychopathology.⁷³³ The relationship of hopelessness to suicide becomes apparent when one studies the types of cognitions produced by depression, particularly self-commands and injunctions and escape and suicidal wishes:

These cognitions consisted of constant "nagging" or prodding to do particular things. The prodding would persist even though it was impractical, *undesirable*, or *impossible* for the person to implement the self-instructions. . . . The desire to escape seemed to be related to the patients' viewing themselves at an impasse. On the one hand, they saw themselves as incapable, incompetent, and helpless. On the other hand they saw their tasks as ponderous and formidable. Their response was a wish to withdraw from the "unsolvable" problem The suicidal patients generally stated that they regarded suicide as the *only possible solution* for their "desperate" or "hopeless" situation.⁷³⁴

This narrow view of available possibilities is consistent with Neuringer's hypothesis that suicidal individuals tend to be rigid and dichotomous thinkers.⁷³⁵ "Dichotomous thinking seems to be an 'either-or' kind of value thinking and not an 'and' kind of

730. Minkoff, Bergman, Beck & Beck, *Hopelessness, Depression and Attempted Suicide*, 130 AM. J. PSYCHIATRY 455 (1973).

731. *Id.* at 458.

732. *Id.*

733. *Id.*

734. Beck, *supra* note 725, at 327 (emphasis added). In this context, not only does suicide appear not to result from rational choice, but, in some individuals studied by Beck, it appears to arise from a sense of having no choice at all.

735. Neuringer, *Dichotomous Evaluations in Suicidal Individuals*, 25 J. OF CONSULTING PSYCHOLOGY 445, 445 (1961).

thinking.”⁷³⁶ The extreme dichotomous thinker is trapped in a double bind and must always embrace one of the extremes. For example, either one achieves an ideal desired lifestyle or one chooses death. Alternatives, such as setting more immediately achievable goals or changing present habits, are discounted.⁷³⁷ To further evaluate this characteristic, Neuringer studied forty-five men, including fifteen suicide attempters, fifteen psychosomatics and fifteen controls. He found that the two study groups made significantly more dichotomous evaluations than the control group.⁷³⁸ Neuringer concluded that in the case of the suicide attempters, “[a]lternatives cannot be perceived and the situation becomes unresolvable, thus leading to ideas of escape through death.”⁷³⁹ He also inferred that emotional disturbance correlates with dichotomous evaluations.⁷⁴⁰ Another typical depressive cognition is known as “selective abstraction.”⁷⁴¹ With this phenomenon the individual focuses on a specific detail taken out of context, ignoring “other more salient features of the situation, and conceptualizing the whole experience on the basis of this element.”⁷⁴² Thus, the individual may concentrate on a recent setback in the face of more rewarding features of his or her life. Depressed people also tend to minimize their achievements and abilities and magnify their problems. Two of the more striking characteristics of depressive cognitions noted by Beck were that the depressive cognitions were “automatic responses, i.e., without any apparent antecedent reflection or reasoning”⁷⁴³ and tended “to have an involuntary quality. The patients frequently reported that these thoughts would occur even when they had resolved ‘not to have them’ or were actively trying to avoid them. This involuntary characteristic was clearly exemplified by repetitive thoughts of suicidal content.”⁷⁴⁴

In the 1980’s, Silverman and other researchers tested thirty-five individuals who were treated for and recovered from major depressive disorders. In responding to a series of statements posed to them during their depressions, the subjects tended to attribute happiness to external events and to have absolute expectations for

736. *Id.*

737. *Id.*

738. *Id.* at 448.

739. *Id.* at 445.

740. *Id.* at 449.

741. Beck, *supra* note 725, at 328.

742. *Id.*

743. *Id.* at 329.

744. *Id.* at 329-30.

their own behavior and that of others. Such beliefs were considerably less prominent once the subjects had emerged from depressions. The psychiatrists concluded "that patients who have recovered from affective disorders are not burdened with maladaptive attitudes."⁷⁴⁵ Thus, they concluded that dysfunctional negative attitudes are symptomatic of depression rather than causal factors predisposing to it.

If this study reflects the natural history of major depressions in general, it implies that one mood is not, for purposes of rational decision-making, as valid as another. During a depression, in particular, one possesses cognitive distortions that may affect choices and behavior to a significant degree.⁷⁴⁶ Cognitive explanations emphasize that the suicidal individual despairs of finding any other solution. Consistent with this conclusion are psychodynamic approaches that examine certain unrealistic subjectivized concepts of the death experience.

3. *Psychodynamic Explanations: Freud and Menninger*

One of the first to attempt a psychodynamic explanation of suicide was the Austrian psychiatrist Sigmund Freud. Freud postulated the existence of two competing instincts, one for life, the other for death. Suicide, then, would occur if the death instinct overwhelmed the life instinct. In most individuals, according to Freud, the life instinct is far more powerful than the death instinct. Suicidal tendencies emerge when aggressive drives, instead of being channeled outward, are turned inward on the self. Thus, Freud reasoned, homicidal and suicidal tendencies should bear an inverse relationship.⁷⁴⁷ Such a postulate seemed reasonable to many of Freud's students and to sociologists like Emile Durkheim.⁷⁴⁸ Accordingly, claims emerged that nations or areas with higher homicide rates were likely to have lower suicide rates and *vice versa*.⁷⁴⁹

745. Silverman, Silverman & Eardley, *Do Maladaptive Attitudes Cause Depression?*, 41 ARCHIVES GEN. PSYCHIATRY 28, 29 (1984).

746. *Id.*

747. Beck, *Cognition and Therapy*, 41 ARCHIVES GEN. PSYCHIATRY, 1112, 1114. See also K. MENNINGER, *MAN AGAINST HIMSELF* 50 (1938).

748. See Litman, *Sigmund Freud on Suicide* in SCHNEIDMAN, *ESSAYS IN SELF-DESTRUCTION* (1967) and Litman & Tabachnick, *Psychoanalytic Theories of Suicide* in *SUICIDAL BEHAVIORS* 73 (Resnick ed. 1968).

749. See A. HENRY & J. SHORT, *SUICIDE & HOMICIDE* 121 (1954), and Maris, *Sociology* in PERLIN, *A HANDBOOK FOR THE STUDY OF SUICIDE* 102-03 (1976). To some extent, the conclusion is supported by examination of national suicide rates. The United States, for exam-

The Freudian school had an influence on Karl Menninger, who further developed the psychodynamic theory of suicide. In *Man Against Himself*, Menninger makes his famous pronouncement that one does not kill oneself without having at some time wished to kill another.⁷⁵⁰ According to Menninger, behind each suicide is a wish to kill, a wish to be killed, and a wish to die. He broadens the topic of suicide to include drug addiction, self-mutilation, anti-social behavior, asceticism and chronic invalidism, which he terms "partial suicides."⁷⁵¹

Menninger's analysis concludes with what he terms a "reaffirmation of the hypothesis of Freud, that man is a creature dominated by an instinct in the direction of death, but blessed with an opposing instinct which battles heroically with varying success against its ultimate conqueror."⁷⁵² He maintains that the same self-destructive motives may underlie suicide and other types of behavior.⁷⁵³ Within the framework of Freudian theory, he also provided a more convincing characterization of the influence of the death instinct on human action. Such an instinct, if it exists, leads to suicide in only a tiny fraction of the human species, whereas self-destructive behaviors of the types listed by Menninger are many times more common. If one were to include the taking of potentially self-destructive risks, most adults and older children could be reasonably viewed as displaying behavior ascribable to the death instinct.

Desire to die may spring from a view of death as a retaliatory abandonment, a view dating from a childhood separation from a parent who, the individual believes, has left the child voluntarily. The fear of being abandoned by someone close to the person remains into adulthood. Hence, it is theorized that the suicidal person may attempt suicide either in revenge for a recent, perceived desertion or in order to preclude the possibility of further abandonments. "The abandonment of the object [by suicide] is the active repetition of the original passively experienced abandonment of the ego by the primal object (the parent) This state . . . is regressively reactivated when a situation arises that closely resembles the original trauma of abandonment."⁷⁵⁴ A related view of

ple, has a higher homicide and lower suicide rate than Japan.

750. K. MENNINGER, *supra* note 747, at 50.

751. *Id.* at 160, 231, 185, 87, 145, 88.

752. *Id.*

753. *Id.* at 470.

754. Jensen & Petty, *supra* note 684, at 336.

death as retroflected murder, or inverted homicide, may result in suicide when the individual refuses or is unable to channel aggression outward against the objects of his or her resentment.⁷⁵⁵ Strongly related to the concepts of retaliation and retroflected murder is the psychological defense mechanism of turning against the self,⁷⁵⁶ which forms an important aspect of suicidal behavior.

Dr. Herbert Hendin of the Center for Psychosocial Studies has written that on a personal and even on a social level, the suicidal choice can reflect hopelessness and an illusory quest for control:

Death and physical decline challenge our capacity for control and the grandiosity in all of us, but suicide provides for some the illusion of maintaining omnipotent control through the ability to determine the when and how of death. In this control oriented culture, we delude ourselves that we can perfect a mode of dying and thereby gain control over the pain of life and death.⁷⁵⁷

Dr. Peretz of Columbia University similarly points out:

If our deepest, growing fear is of being destroyed, and we cannot deal with that fear, we take refuge in planning death and rational suicide. We find comfort in the illusion, "It will not be done to me" (a residue of the original denial), I will do it to myself." . . . In the formulation the "self as agent" (the I) imagines killing the "self as object" (the myself) thus preserving an illusion of immortality.⁷⁵⁸

F. *Suicide Attempts: Is Death Always the Goal?*

Studies of attempted suicide reveal the existence of motives just as strong as the wish to die.⁷⁵⁹ Because a suicide attempt arouses attention primarily due to the resulting death or death threat, most scientific studies were initially concerned with intent to die and the subject's views of death.⁷⁶⁰ Hence, completed suicides were termed successful and attempts that did not result in death were said to have failed.⁷⁶¹ The suicide advocacy movement has also focused narrowly on the issue of death.⁷⁶² The main thrust of this

755. H. HENDIN, *SUICIDE IN AMERICA* 223 (1982).

756. Nemiah, *The Dynamic Base of Psychopathology*, HARV. GUIDE TO MOD. PSYCHIATRY 147, 158 (1979).

757. Peretz, *The Illusion of Rational Suicide*.

758. *Id.*

759. See Jensen & Petty, *supra* note 684, at 327;

see also Rubinstein, Moses & Lidz, *supra* note 681, at 103.

760. Stengel, *Inquiries Into Attempted Suicide*, 45 PROC. ROYAL SOC'Y MED. 613, 613 (1952).

761. *Id.*

762. D. PORTWOOD, *supra* note 693, at 119.

movement is that one should be able to succeed in the quest for death or departure from life, without being deterred from one's purpose by friends, family or the law. For instance, suicide advocate Doris Portwood bemoans the fact that while many more women than men make suicidal attempts, three times as many men as women actually cause their own deaths. Portwood then urges her female counterparts to work toward a greater sense of dedication to the suicidal choice, that they carry through the act completely once the decision is made.⁷⁶³

The problem with this approach, quite apart from any question of the ethics of suicide, is that success cannot be measured solely by the criterion of death. A quest for death does not explain a suicide any more than a quest for sexual gratification explains a rape. Only in a minority of cases does the suicide attempt result in death. Nevertheless, suicide attempts can and do serve a variety of other functions including those of ordeal, appeal, blackmail, escape, aggression and self-punishment.⁷⁶⁴

Stengel has written of the uncertainty of outcome inherent in most suicide attempts. In his view, many attempts assume the character of an ordeal or life and death gamble. Thus, one subjects oneself to a test—a situation carrying the risk of death—and awaits the outcome. Stengel relates the case of a schizophrenic who made a suicide attempt to determine whether or not God wanted him to live.⁷⁶⁵ He did live, and assumed it was God's will. Equally frequent, says Stengel, are attempts arranged in such a way that survival depends on intervention by a particular person or group, thus taking on an aspect of *appeal*. As an example, Stengel discusses the 1963 self-poisoning of Stephen Ward, a British osteopath who had been accused of receiving compensation for the solicitation of prostitutes:

On the night before the last day of the trial, he took a large overdose of sleeping tablets He died in hospital several days later *but only after his condition had taken an unexpected turn for the worse*. The large majority of similar cases of [drug] intoxication survive today and Stephen Ward was obviously aware of this possibility It is doubtful whether . . . writers who . . . described him as a victim of hypocrisy would have done so had they not been moved by his suicide—if, that is, he had merely been convicted of the offences he had been charged with.⁷⁶⁶

763. *Id.*

764. Rubinstein, Moses & Lidz, *supra* note 681, at 103.

765. Stengel, *supra* note 760, at 99.

766. *Id.* at 104.

One would also expect that Ward's medical training would have put him in a position to select a poison that would more swiftly and surely result in death, if he had so chosen.

Perhaps the most common effect of suicide attempts is the *appeal* that they make to others. This is why suicide has so often been called "the cry for help."⁷⁶⁷ Often the attempt, if survived, results in a significant change in the individual's life situation. One study of suicide attempters who survived revealed that virtually every one underwent a change in his or her situation, and in nearly every case the attempter saw it as a change for the better.⁷⁶⁸ The strongest appeals are to family members or other people who know the attempter, probably because of the guilt experienced at not meeting or knowing the attempter's needs before the act.⁷⁶⁹ In one striking case, a man whose wife was having an affair turned on the gas in his home while his wife was out. She came home early without visiting her lover, found her husband unconscious, and had him rescued. If she had gone to stay with her lover, her husband probably would have died. After his resuscitation, she terminated the extramarital affair. Thus the attempter effected an improvement (from his point of view) in his marriage by means of "direct appeal to his wife's love."⁷⁷⁰

The suicidal behavior of Marilyn Monroe illustrates a pattern of repeated appeals and life-threatening behavior which culminated in death. After an overdose of narcotics, she was found dead in her bedroom holding the telephone. She had been in the habit of calling her doctor to complain of depression and anxiety and sometimes to make suicide threats. Although he had often come to her house in response to such calls, on this occasion he had tried to help her resolve the acute problem over the phone.⁷⁷¹ When her latest appeal did not achieve the desired result, she died of the overdose she had already taken, making her suicide attempt ironically "successful." The likelihood is high that her overriding desire was to rid herself of the weight of her depression, rather than to die.

Marilyn Monroe's suicide may have qualified as a suicide of *blackmail*. The blackmail suicide is one in which an individual threatens suicide unless another person or group does or refrains

767. Rubinstein, Moses & Lidz, *supra* note 681, at 109.

768. *Id.*

769. *Id.* at 111.

770. *See generally id.*

771. Stengel, *supra* note 760, at 104.

from doing something in accordance with the individual's desires. Such suicide threats are often dismissed as insincere and merely manipulative. The implication from the perspective of the advocate of a right to suicide is that suicide threats in such cases will rarely be carried out. Thus, recognition of such a right will not result in many additional deaths of people who are not really seeking death, but something else. However, the assumption that blackmail suicide threats are insincere is not necessarily accurate.

"Unsuccessful" suicide attempts that follow appeals and result in survival may indeed be manipulative, but the suicidal individual's awareness of the appeal component may be quite vague, just as the concept of death may be. The minority that tends to exploit the appeal contains a high proportion of hysterics and anti-social personalities. Moreover, one should not forget that a completed suicide can serve an equally manipulative function. In terms of the effect on surviving friends or family, the completed suicide is at least equal to the attempted in its ability to engender guilt feelings. Furthermore, these guilt feelings may be less easy to reverse than in the case of the attempter who survives. Perhaps the shame of the blackmail suicide lies in the apparent lack of commitment it is perceived to represent. If one's goal is really death, then arguably one should not hesitate to seek it. Ironically, such a view really works against promotion of individual autonomy by ignoring the plurality of the attempter's motives and concentrating only on what seems to be the most obvious one.

Suicide attempts may also reflect desire for self-punishment or aggression in the form of punishment of another, especially by inflicting guilt. Menninger's thesis, discussed above, outlines the dynamics of these types of suicides.⁷⁷² The attempt may also serve as a release of aggressive impulses that temporarily relieves depression or tension.⁷⁷³

Finally, nearly all suicides are escapist in nature, with the possible exception of the sacrificial or altruistic suicide. The psychosocial stresses from which escape by suicide is believed possible are legion. A few authors take the extreme view that the suicide attempter sees no meaning to life at all. This extreme position stems from the theories of Alfred Adler, an associate of Freud. Unlike Freud, who spoke of innate biological drives, Adler believed that human behavioral goals were mainly social in nature. Among

772. K. MENNINGER, *supra* note 747, at 50.

773. Stengel, *supra* note 747, at 100.

his students was the psychiatrist Margaret von Andics, who in 1947 published *Suicide And The Meaning of Life*.⁷⁷⁴ In this work, she argues that relations between the individual and the social environment are the source of life's meaning. She explains suicidal acts as the product of an individual's decision that his or her life lacks quality or meaning and should therefore be ended. Such a decision in turn is motivated by the person's belief that he or she is no longer necessary to society.⁷⁷⁵ Thus, argues von Andics, the determination that life has or lacks meaning is subjective, varying with the individual.⁷⁷⁶

However, most suicidologists, while acknowledging the role of the social environment in suicide, argue that some level of personal frustration is more normally thought to be a stated motive for suicide. The typical suicide seems less concerned with a comprehensive evaluation of whether his life has meaning in a social context than with a particular set of problems which confront the suicide. In fact, Dr. Stengel writes:

[A]s a physician one observes that man does not stick to life because it has a particular purpose or because it is enjoyable. Although man endeavors to invest it with some aim and meaning, he behaves most of the time as if the preservation of life was life's main purpose⁷⁷⁷

Stengel implies that the suicide attempt, though not the completed suicide, may even be a mechanism for psychological survival or growth, particularly if one considers its appeal and cathartic effects.⁷⁷⁸ Such post-attempt growth is incompatible with the hypothesis that the suicide attempter accurately concluded that his life was devoid of meaning. As Dr. Stengel notes in rebuttal of the view that an incompleting or bungled suicide attempt either demonstrates the attempter's insincerity or represents a failure to achieve his aims:

Only if one defines a genuine attempt as one in which the self-destructive component is strong enough to overcome the life-preserving tendencies can

774. M. VON ANDICS, *SUICIDE AND THE MEANING OF LIFE* 1 (1947).

775. See Stengel, *supra* note 760, at 112.

776. There is a superficial similarity between von Andics' view that suicides are the product of evaluations by suicidal persons that their lives are devoid of meaning and the suicide proponent's view that suicide is justified by precisely such evaluations. The difference is that von Andics' analysis simply describes the subjective motivation of suicide, while the suicide advocacy movement implies that such motivations are objectively valid, as when its proponents cite certain reasons for death being indicative of rational suicide. See, e.g., D. HUMPHREY, *supra* note 693, at 60; M. HEIFETZ & C. MANGEL, *supra* note 688, at 80.

777. Stengel, *supra* note 682, at 113.

778. *Id.*

this be accepted The suicidal attempt is a highly effective though hazardous way of influencing others and its effects are as a rule . . . lasting⁷⁷⁹

G. Socioeconomic Pressures that Induce Suicide

Certain individuals feel constrained by external forces to consider no alternative but suicide. Current undesirable life events, in particular, have been found to influence the choice of death. In one study comprised of 53 people who had just attempted suicide, 185 depressives who were not suicidal, 50 schizophrenics, and a sample from the general population, 60% of attempters reported undesirable life events in the preceding six months compared with 40% of depressives, 42% of schizophrenics and 21% of the general population. Sixty-eight percent (68%) of the attempters reported being mentally upset, compared with 45% of depressed individuals and 23% of the general population.⁷⁸⁰

This does not, of course, prove that suicidal individuals have quantitatively more serious life events than others, but they are likely to view the same event as more traumatizing than the average person would. The study illustrates the relationship of suicide attempts to a preceding interpersonal stress, which may serve as the precipitant for the act.

Certain social situations have repeatedly been shown to increase an individual's vulnerability to thoughts of suicide. Perhaps the most commonly considered problems, especially among male suicide attempters, are financial and work-related. Financial and work-related suicides are not unlike early examples of suicide to avoid dishonor cited by many of the Greek philosophers.⁷⁸¹ Financial difficulty also figured prominently in the suicide of the 17th century English poet Thomas Chatterton. As a precocious adolescent, Chatterton saw his works bring him temporary attention. He was deeply wounded, however, when subsequent efforts failed to bring him the acclaim that he felt he deserved. Too proud to seek jobs he considered beneath his dignity, he ran out of funds and took his own life at the age of seventeen.⁷⁸² Succeeding generations

779. *Id.* at 113-14.

780. Paykel, Prusoff & Myers, *Suicide Attempts and Recent Life Events*, 32 ARCHIVES GEN. PSYCHIATRY 327 (1975). The presence of statistical significance is recorded, though not its level. The authors are unclear about their basis for selecting the attempter and general population samples.

781. *Id.*

782. A. ALVAREZ, *THE SAVAGE GOD* 187-97 (1972). A related concept is the so called

of youths romanticized Chatterton's death, ignoring its rather mundane nature. He became a sort of hero during the suicide epidemics of the Romantic period.⁷⁸³ More recent critics have accused him of possibly overrating his talent and of possessing unrealistically high expectations for immediate success.⁷⁸⁴

Until the 20th century, studies of motivations behind suicide were merely anecdotal. Among the first, and certainly the most famous, to attempt a sociological explanation of suicide based on statistical data was the French social philosopher Emile Durkheim. Durkheim proposed four basic types of suicide: egoistic, anomic, altruistic, and fatalistic.⁷⁸⁵ He regarded a sense of anomie, social-normlessness or irregularity, as proceeding from a lack of social integration. An integrated society, according to Durkheim, would be one in which individuals were strongly attached to the norms or rules, either by moral obligation or by the fact of interdependence. In this, Durkheim is thought to have been influenced by Kant's concept of an individual obligation to act as though one's personal will could become a universal law.⁷⁸⁶ Durkheim concluded that "the suicide rate varies inversely with the integration of social groups of which the individual forms a part."⁷⁸⁷ He noted further that the higher social classes and the wealthy tended to have high suicide rates, because, as he explained, they tended to be less bound to social norms.⁷⁸⁸

Henry and Short related suicide acts to economic cycles.⁷⁸⁹ They noted that such cycles disrupt social rankings and affect efforts to maintain or raise one's social status. According to Henry and Short, frustration ensues when the cycles hinder the achievement of social status goals. They theorized that the aggressive behavior which sometimes results from economic frustration is reflected by the suicide rate.⁷⁹⁰ The choice of suicide or homicide, therefore, depends on the degree of external and internal restraint.⁷⁹¹ High in-

"balance sheet suicide," in which one would list his reasons for living and dying, find the reasons for death to exceed those for life, and calmly take his own life. A few such examples have been cited historically, though their character is largely legendary. *Id.*

783. *Id.* at 187.

784. *Id.* at 199.

785. E. DURKHEIM, *SUICIDE* 209 (1951).

786. R. Maris, *supra* note 689, at 95.

787. E. DURKHEIM, *supra*, note 785, at 209.

788. *Id.* at 165.

789. A. HENRY & J. SHORT *supra* note 749, at 102 (1954).

790. *Id.* at 64.

791. *Id.* at 101.

ternal restraint keeps aggression directed against the self (a view compatible with the psychological defense mechanism) which may result in suicide, unless environmental sanctions or safeguards against such behavior are high.⁷⁹² In the latter case, a state of anxiety persists. As viewed by Henry and Short, external restraint can be vertical, deriving from low social rank, or horizontal existing simply by virtue of a relationship with others, as in a marriage.⁷⁹³ When external restraints are high—including restraints on suicide—a high degree of internal restraint produces anxiety. A low degree of internal restraint, by comparison, releases aggressive tendencies against others, and sometimes produces homicide.⁷⁹⁴ If all types of restraint are low, behavior is less determinable.⁷⁹⁵

In contrast to findings by Gibbs and Martin of high suicide rates among the upper class, Maris, Sainsbury and others have found suicide rates higher among the lower classes.⁷⁹⁶ A connection may lie in the possibility that suicide rates are higher at the social extremes of a country in which the middle class comprises the bulk of the population. If this is true, and if one argues that the upper and lower classes are alienated from dominant middle class values, such a finding would tend to support Durkheim's theory of anomic suicide.

Another contribution of Henry and Short was to relate the suicide rate not merely to current social status but also to social change.⁷⁹⁷ Durkheim had predicted a rise in suicide during such change, regardless of whether the direction was upward or downward.⁷⁹⁸ Henry and Short found that very slight increases in the American Business Index correlated with a rise in suicide rates, particularly for women,⁷⁹⁹ while a rapid rise in the Index correlated with a falling suicide rate.⁸⁰⁰ Albert Pierce, correlating the stock price index with the male suicide rate between 1911 and 1939, found results consistent with the predictions of Durkheim.⁸⁰¹ He found that, for men at least, the suicide rate rose during periods of

792. *Id.* at 121.

793. *Id.* at 80.

794. *Id.* at 121.

795. *Id.*

796. Maris, *supra* note 689, at 104.

797. A. HENRY & J. SHORT, *supra* note 749, at 23.

798. *Id.* at 42.

799. *Id.*

800. *Id.*

801. Maris, *supra* note 689, at 105.

business change and decreased in times of stability.⁸⁰²

The possible effect of social change on suicide was further developed by Breed, who retrospectively studied a group of 309 white males, 103 suicides and 206 controls.⁸⁰³ The groups that had killed themselves had displayed more of a trend of inter-generational downward mobility. That is, a larger percentage of the suicides as compared to the controls were in lower occupational statuses than their fathers had been. More than a third were unemployed, and only half were working full-time. Breed's sample was selected entirely from the city, rather than the suburbs,⁸⁰⁴ thus raising the question of a bias toward the lower end of the social scale. In explanation, Breed wrote that because of the central role that work plays for American males, failure at work means failure in other roles and threatens the self-image, thus leading to suicide.⁸⁰⁵

In criticism, however, it can be said that Breed did not give the statistical significance level of the association he found, though many sociologists have nonetheless supported his arguments.⁸⁰⁶ Yet, even if the association is true, as is probably the case, a causal effect of work failure on suicide remains to be established. A third factor, such as depression, alcoholism or psychosis, could account for both work failure and suicide.

On the individual level, suicides certainly are precipitated by financial frustration. Such was the case in 1984 for a paranoid schizophrenic man living in St. Louis. Interestingly enough, the case also illustrates the peril of arbitrarily presuming certain psychological and physical capabilities. Beginning in the late 1960's, a former machine operator, Verl Hulseley took medication for an illness which had kept him from working. Social Security Disability payments became his sole source of income for more than a decade. In 1982, the benefits were cut off on the grounds that he was in remission. Hulseley's physician and another employed by the state contended that he was unable to work, and Hulseley sued for reinstatement of benefits in late 1983. In October 1984, the Social Security Disability Benefits Reform Act provided for interim benefits dur-

802. *Id.*

803. Breed, *Occupational Mobility and Suicide Among White Males*, 28 AM. SOC. REV. 179 (1963).

804. *Id.* at 180.

805. *Id.* at 188.

806. Maris, *supra* note 689, at 107-08. Supporting Breed's argument, the hypothesis emerged that men at least display a pattern of downward social drift prior to their suicides, and Maris subsequently popularized the concept of "suicidal careers." *Id.*

ing appeals of cutoffs, and established an obligation on the part of the Social Security Administration to show improvement in a recipient's condition before terminating benefits. Pending cases such as Hulse's were, however, returned to the Administration for rehearing, meaning more delays. Meanwhile, Hulse's financial woes continued and his anxiety mounted. He killed himself on December 16, 1984. Had he waited, his benefits probably would have been restored.⁸⁰⁷

H. *Internal Dynamics that Induce Suicide*

Not all suicides have an apparent social triggering factor. Some, designated "chronic," seem to "just . . . happen."⁸⁰⁸ In addition to the external factors pertaining to suicide just discussed, a necessary condition for the average suicide or suicide attempt appears to be a peculiar set of internal dynamics, and in nearly all cases, a mental disorder. Let us, therefore, examine some of the more personal internal factors that have affected individuals who have considered suicide or made actual attempts.

1. *Physical Illness*

It is well known that the risks of suicide are higher among those with chronic physical illness than in the general population.⁸⁰⁹ Stengel, in a study of 138 patients who had attempted suicide, found physical illness to have been a factor (though not the exclusive factor) in 9% of the attempts.⁸¹⁰ Another study of suicide attempters by Dorpat, Anderson, and Ripley found the percentage to be as high as 29%. Illnesses from which patients suffered included peptic ulcer, rheumatoid arthritis, hypertension, cancers, asthma, hyperthyroidism, ulcerative colitis, cardiospasm and cardiovascular diseases. The researchers discovered, however, that the "degree of psychopathology" did not differ significantly between those attempters who were physically ill and those who were not. Though not all were diagnosed as having an affective disorder, nevertheless "[a]ll . . . had some . . . symptoms of depression."⁸¹¹

807. Poor, *Man Cut From Disability Rolls Chooses Suicide*, ST. LOUIS GLOBE DEMOCRAT, Dec. 31, 1984, at 1, cols. 1-4.

808. Maris, *supra* note 689, at 108-09.

809. H. KAPLAN & B. SADOCK, *supra* note 703, at 576.

810. Stengel, *Inquiries Into Attempted Suicide*, 45 PROC. ROYAL SOC'Y MED. 613, 617 (1952).

811. Dorpat, Anderson & Ripley, *The Relationship of Physical Illness to Suicide*, SUICIDAL BEHAVIORS: DIAGNOSIS AND MANAGEMENT 209 (1968).

The motivation for suicide in such cases is not difficult to comprehend. Many reports suggest that even animals, under the influence of sickness, pain, or stress, may kill themselves. Animals so influenced include the dolphin,⁸¹² the lemming, and the horse, leading some to speculate that "a panic component in affective states leading to suicide . . . may well explain how an organism with built-in survival mechanisms comes to engage in . . . self-inflicted death."⁸¹³

Two incorrect assumptions are often made about suicides that follow a physical illness, particularly by advocates of rational suicide. One is that these individuals are free from mental disorders—an assumption that existing medical literature contravenes.⁸¹⁴ The second incorrect assumption is that the physical illness is the only basis for the suicide decision.

Clearly the physical illnesses that precede suicides range widely in their direct lethality and morbidity. As is the case for those with other social handicaps, such individuals may be seeking escape not only from the debilitating effects of their illness but also from the rejection they suffer from others. When rejection changes to care and acceptance, the suicide choice may be abandoned.

Such was the case, for example, with Larry LeBlanc, a forty-year old man with multiple sclerosis. Following onset of his illness, LeBlanc felt rejection keenly. His suicide attempt at age twenty-six was stopped by a friend. LeBlanc later developed more satisfaction with his life and was drawn into new relationships. Ironically, twelve years after his own attempt, he sought to preserve the life of another victim of crippling physical illness: twenty-six year old Elizabeth Bouvia had cerebral palsy and claimed she was physically unable to kill herself. Although she was not terminally ill, Ms. Bouvia sued in 1983 for the right to reside in a California public hospital, where she hoped to starve to death by refusing to take in nourishment.⁸¹⁵ LeBlanc's comments on the case display the views

812. LILLY, *THE MIND OF THE DOLPHIN* 188 (1967).

813. EINSIDLER & HANKOFF, *Self-Inquiry in Animals*, in *SUICIDE: THEORY AND CLINICAL ASPECTS* 131, 138 (1981).

814. See Dorpat, Anderson & Ripley, *supra* note 811, at 215.

815. Yetzer, *MS Victim Understands Woman's Attitude, He Says*, Sun Telegram, Nov. 3, 1983, at B6. Bouvia's claim that she could not physically kill herself was dubious, since she had certain significant manual capabilities, however limited. By traditional standards requiring a positive action, her proposed in-hospital starvation would not have been considered a suicide. She herself stated, however, that she regarded the starvation as a substitute for suicide. Hearing, *She's Had Enough Pity, Is Ready to Die: Woman Fought Cerebral Palsy, But Pride Won*, Press Enterprise, Oct. 9, 1983, at B1, B3, col. 3. Bouvia had a

of this one time suicide attempter in favor of life. He felt the case would "affect thousands of people whichever way it goes. She [Bouvia] can succeed [in winning a right to starvation] and take a lot of handicapped people with her or she can pull back from the abyss, go on and give a lot of people the courage to go on fighting with her."⁸¹⁶ Whether or not one agrees with LeBlanc's philosophy of life for a disabled person, the reversal from his previous suicide decision could not have been more complete.

Moreover, certain physical illnesses, such as epilepsy, which may not necessarily predispose one to suicide, may nevertheless prevent an individual from checking his or her suicidal tendencies. People having an epileptic seizure, for example, may on occasion commit suicide or homicide without having any control over their actions. The case is cited of the 19th century epileptic medical student, who, during his seizure, tried to kill his friends, made suicidal gestures and suffered partial lapses of memory.⁸¹⁷ Such cases are not infrequent; at least one investigator reports that "collected data generally indicates a fairly large number of suicides among the epilepsies."⁸¹⁸ This data was verified at mental hospitals, where the epileptic was agitated, excited or in a psychotic state preceding or following a seizure. Institutionalized epileptics have been said to have a suicide frequency of 45.6 per 100,000, about five times the suicide rate in the general population. In non-institutionalized, non-psychotic epileptics, suicide is infrequently reported.⁸¹⁹ Evidently, the vulnerability to suicide arises most commonly from the physical nature of the illness, and not from any orderly reasoned decisions that life as an epileptic is simply not worth living.

2. Grief

Grief is another altered mental state associated with increased vulnerability to suicide. One who suffers from the death or desertion of another is likely to experience a period of intense grief and

lengthy history of suicidal ideation, threats, and attempts, and an even longer history of rejection by her family. Two of her attempts to die in the manner described were blocked, one in California, the other in Mexico. Then in the spring of 1984, she announced reversal of her quest for death. A few weeks later, spokesmen from the American Civil Liberties Union, whose attorneys had represented her, denied that Elizabeth Bouvia had changed her mind. Bouvia has since made no statement of her own on the subject.

816. Yetzer, *supra* note 815, at B6.

817. O. TEMKIN, *THE FALLING SICKNESS* 362 (1971).

818. Prudhomme, *Epilepsy and Suicide*, 94 *J. NERVOUS AND MENTAL DISEASE*, 723, 723 (1941).

819. *Id.* at 724, 726, 729.

aggression. Grief is a well-known predisposer to suicide, as well as to depression.⁸²⁰ The condition may partially explain why the divorced and widowed populations are at a higher risk for suicide than are married or single persons.

3. *Prejudice and Oppression*

Race, too, appears relevant to suicidal vulnerability, although precisely how is uncertain. Most official national statistics merely separate the white from the non-white population. For years, it has been noted that blacks have a lower suicide rate than do whites. When blacks are compared with whites matched for age and sex, blacks have a lower rate in all categories, according to national statistics. Thus, for years suicidologists commonly denied that black suicide was a significant problem. Others, such as Herbert Hendin, challenged this assumption. In 1969, he published a description of twenty-five black suicide attempters in New York City. Examining city suicide statistics, Hendin found that in the years 1920, 1930, 1940, and 1960 blacks in the 20-24 age group (both male and female) had a higher rate than whites. In all other age groups, the white suicide rate exceeded the black rate. Hendin saw his subjects as fatalistic and without significant hopes for the future.⁸²¹

While the suicides of blacks do not exceed those of whites in actual numbers, a racial component to personal problems probably figures prominently in the mind of some suicidal persons. Many felt this was the case in the suicide of thirty-two year old *Chicago Tribune* columnist Leanita McClain. Several articles and letters appeared after her death in 1984 describing the suffering she had experienced due to racial prejudice, from whites, and criticism from blacks who accused her of forgetting the low social position in which she had grown up. While acknowledging that McClain had suffered from marital and romantic separations, and had experienced bouts with depression, one journalist noted, "many of her personal woes were related to her rapid rise."⁸²² None of the writers who commented on her suicide appear to have seen it as a per-

820. See generally Cassem & Stewart, *Management Care of the Dying Patient*, 6 INT'L J. PSYCHIATRY IN MEDICINE 293 (1975); Brown, *Depression and Childhood Bereavement*, 107 J. MENTAL SCIENCE 754 (1961); Lindemann, *Symptomatology and Management of Acute Grief*, 101 AM. J. PSYCHIATRY 141 (1944). The state of grief is not considered one of true mental illness unless it is prolonged. Instead, it is viewed as a normal human reaction to loss which may temporarily change the individual from his or her baseline state.

821. H. HENDIN, *BLACK SUICIDE* 1 (1969).

822. D. Gilliam, *Burdens*, Wash. Post, June 4, 1984, at D1, col. 1.

sonal or social good, although one of them did ponder her state of mind:

Now she is dead, by her own hand It was nightmarishly premeditated, slow, and she was frighteningly alone. One wonders was there a moment too late, of regret, or was there only calm resignation that there was no other solution.⁸²³

A rational suicide? An autonomous act? No one reacting to her death appeared to consider this possibility. All commentaries shared a sense of loss. Some were sympathetic to her; some defended her moral character.⁸²⁴ No one, however, defended her suicide or even her right to choose it. It is difficult to imagine an attitude more at odds with the "every man for himself" philosophy that typifies the right-to-suicide rhetoric than that evident in the following criticism of Ms. McClain's suicide:

McClain's act is not excusable. She had people who cared, who tried to help her. But she gave up. She quit. . . .
 . . . Black people need the talents, the ambition, the determination and the energies of every one of us. For one person to decide to quit the race, to drop his or her share of our burden, is to harm us all.⁸²⁵

The theory of loss of one individual as a blow to the larger community appears to be a universal one. The anger and distress, if not outright despair, which McClain's suicide provoked in people who did not even know her, illustrates that it was not an isolated event. The fact that her death was self-inflicted also made a difference. Black critics obviously felt disappointed, and in some measure, abandoned as a result of her decision "to quit." They seemed to share a common interest in deploring both her act and the failure of others to prevent it.

Reportedly, suicides resulting from alienation have been especially prevalent among certain groups of Native American Indians. The Blackfeet in Montana, for example, have an unusually high incidence of suicide. In 1970, over an eight month period, 5 individuals died by suicide out of a population of 6,000 on the reservation. This represents a rate of 83/100,000, which is six times more than the rate for the general population. There were also 55 non-fatal suicide attempts on the reservation during the same eight

823. D. White, "I Wish I Had Known Who She Was": *The Loss of Leanita McClain*, Wash. Post, June 3, 1984, at B7, col. 3.

824. See *Leanita McClain*, Wash. Post, June 9, 1984, at A20, cols. 3-4.

825. W. Smith, *A Tragedy for All Black People*, Wash. Post, Aug. 11, 1984, at A21, cols. 2-3.

months. Ages fifteen to seventeen were found to be the ages most at risk for suicidal behavior; half the population, however, was under the age of twenty. In another study between 1961 and 1968, one Pacific Northwest reservation accounted for 11 suicides and 203 attempts. On reservations where the suicide rate is high, the peak rates are among young people.⁸²⁶ As with the non-white population, some observers have blamed prejudice, lack of job opportunities and alcoholism for producing "a sense of helplessness and hopelessness in these young people."⁸²⁷ Another author, commenting on the high rates of suicide, homicide, alcoholism and accidents among the Cheyenne people, cited problems with communication and cultural pressure not to integrate into white society as leading to social isolation on the reservation, where economic opportunities are sparse.⁸²⁸ Although some tribes and reservations have had suicide rates lower than those for the general population, the suicide rate for the entire Native American population is high. The United States Indian Health Service attributes the problem to both alcoholism (believed to be involved in most Native American suicides and homicides) and

the conflict between . . . traditional culture and the demands of modern society The seriousness of this problem is demonstrated by [the Indian] 1974-1976 age-adjusted suicide rate which is 2.1 times as high as that of the 1975 U.S. all races, population, and by their homicide rate which is 2.5 times as high.⁸²⁹

All authors appear to agree that prejudice and unemployment difficulties have a strong bearing on the choice of suicide on many Indian reservations.

4. *Teenage Stress*

Some advocates of "rational suicide" would extend the right to commit suicide to teenagers.⁸³⁰ Since suicide would be a right, no one could intervene to prevent their self-destruction.

Such advocacy runs counter to a strong national sentiment that the recent rise in teen suicide is a tragic crisis. Numerous articles have appeared in popular and technical publications proclaiming

826. Williard, *American Indians* in EINSIDLER & HANKOFF, *supra* note 663.

827. *Suicide Among the Blackfeet Indians*, BULL. OF SUICIDOLOGY 42-43 (1970).

828. Dizmang, *Suicide Among the Cheyenne Indians*, BULL. OF SUICIDOLOGY 8-10 (1967).

829. *The Indian Health Program*, DHHS Publication No. (HSA) 80-1003.

830. See generally HENDIN, *supra* note 755.

the problem and offering explanations and advice.⁸³¹ Crisis centers have been formed.⁸³² Congressional hearings have been conducted.⁸³³ The Center for Disease Control, Atlanta, and the National Institute of Mental Health have investigated and continue to monitor the problem.⁸³⁴ The United States Department of Health and Human Services has set specific goals for reducing teen suicide.⁸³⁵ The consensus is that something must be done to halt the epidemic.

Adolescence today is difficult. Teens are seeking to establish their autonomy and identity. With meaningful work and sexual expression usually postponed by societal demands, adolescents are often overcome by a sense of their own uselessness.⁸³⁶ Most teens realize their crises are transitory and resolvable—products of hormonal and social changes.⁸³⁷ Too many do not. Perhaps the real question is why others do not commit suicide.⁸³⁸ The danger of giving social sanction to suicide as a solution to life's problems is that the teen suicide epidemic may be worsened.⁸³⁹

From 1960 to 1980, the overall suicide rate for fifteen to twenty-four year olds jumped 237% in the United States.⁸⁴⁰ Suicide is the third leading cause of death for this age group;⁸⁴¹ in 1980, there were 5,230.⁸⁴²

Younger persons are not exempt from this trend. Between 1968 and 1976, the suicide rate for females aged ten to fourteen jumped

831. Maris, *The Adolescent Suicide Problem*, 15(2) SUICIDE AND LIFE-THREATENING BEHAVIOR, 91, 91 (1985) (cites several media items and states that adolescent suicide is "the issue" in suicidology now). See also Williams, *Out of Grief, A Drive to Cut Youth Suicide*, New York Times, Nov. 11, 1985, at 1, cols. 1 & 12, 5-6.

832. *E.g. Teenagers in Crisis: Hearing Before the Select Committee on Children, Youth, and Families, House of Representatives*, 98th Cong., 1st Sess. 57 (1983) (discusses the Dallas Suicide and Crisis Center).

833. *Id.* at 1-118.

834. *Leads from the MMWR*, 250(23) J.A.M.A. 3147 (1983).

835. *Id.*

836. Maris, *supra* note 831, at 100.

837. *Id.* at 94.

838. *Id.*

839. One or a few teen suicides seem to trigger others. See Robbins and Conroy, *A Cluster of Adolescent Suicide Attempts: Is Suicide Contagious?* 3 JOURNAL OF ADOLESCENT HEALTH CARE 253, 255 (1983) (contagious suicide "maybe more widespread than currently appreciated").

840. Maris, *supra* note 831, at 93.

841. *Leads from the MMWR, supra* note 834, at 3147.

842. Maris, *supra* note 831, at 97. In 1980 there were three reported suicides among 5 to 9 year olds; 139 among 10-14 year olds; 1,797 among 15-19 year olds; and 3,442 among 20 to 24 year olds. 2 VITAL STATISTICS OF THE UNITED STATES 152 (1980).

100%.⁸⁴³ Even younger children are capable of committing suicide and some do.⁸⁴⁴ However, these statistics scarcely reflect the problem. First, attempts at suicide far outstrip completed suicides. Non-fatal attempts are at least ten times higher (some say even 100 times) than completed suicides.⁸⁴⁵ Thus a minimum of 50,000 nonfatal attempts are made annually by fifteen to twenty-four year olds, and the figure may approach 250,000-500,000.⁸⁴⁶

Second, many suicides are reported as accidents. Accidents are the leading cause of death in children and adolescents.⁸⁴⁷ A study done in Los Angeles estimates that 50% of childhood and adolescent deaths reported as accidents were actually suicides.⁸⁴⁸ Social stigma and insurance requirements are strong motives to interpret accidents as not being suicides.

Third, some homicides are believed to be invited by the victim.⁸⁴⁹ A suicidal person may put himself or herself in a position to be killed. Homicide is the leading cause of death for black males fifteen to twenty-four years old and the second leading cause of death for all fifteen to twenty-four year olds.⁸⁵⁰

Finally, some experts in the area prefer a definition of suicide which encompasses all self-destructive acts.⁸⁵¹ Including "suicide" by such slow acting agents as substance abuse would greatly expand the number of suicides.

One psychologist estimates that a million children a year contemplate suicide.⁸⁵² A survey in California found that half of all teens seriously consider suicide before they complete high school.⁸⁵³ According to a Harvard psychologist, hardly anyone goes through adolescence without thinking about suicide.⁸⁵⁴ Why do some act out suicidal behavior and others do not? Experts offer a

843. Maris, *supra* note 831, at 95.

844. An account of a five year old's suicide (officially described as an accident) and other very young suicides is found in McGuire and Ely, *Childhood Suicide* 63 *CHILD WELFARE* 17 (1984).

845. Maris, *supra* note 831, at 97.

846. *Id.* at 99.

847. McGuire and Ely, *supra* note 844, at 19.

848. *Id.* at 20.

849. Thornton, *Behind A Surge in Suicides of Young People*, *U.S. NEWS AND WORLD REPORT*, June 20, 1983, at 66.

850. *Leads from the MMWR*, *supra* note 834, at 3147.

851. McGuire and Ely, *supra* note 844, at 18.

852. Thornton, *supra* note 849, at 66.

853. Wallace, *Most Teens Sometimes Think of Suicide*, *Indianapolis News*, Apr. 6, 1985, at 35, cols. 3-6.

854. *Id.*

broad range of societal influences, but they may be narrowed to a sense of loss or failure.⁸⁵⁵ One author summarizes the problem as a sense of hopelessness.⁸⁵⁶ An adolescent feels keenly any losses in family harmony or social stature. Having little experience with such emotions and problems, adolescents sometimes fail to note their transitory nature. Adolescence is viewed as a "terminal illness."⁸⁵⁷ Many see suicide as the only escape.

A particularly troubling stimulus to suicide is the suicide of a peer. So called "cluster" suicides (discussed below) have been reported in several places. Two were in suburbs of Dallas, Texas. In one suburb, Plano, six suicides occurred in one high school within a six month period.⁸⁵⁸ Another suburb, Arlington, had sixteen suicides in a two month period.⁸⁵⁹ Two doctors writing in the *Journal of Adolescent Health Care* cited another such "cluster" in Chappaqua, New York and concluded that contagious suicides "may be more widespread than currently appreciated."⁸⁶⁰

If suicidal behavior may be "contagious" in adolescents, and their difficult period of development causes so many suicides already, is it sound public policy to sanction such action?

And what is rational to a teen? In May, 1985, a high school homecoming queen hanged herself. She had argued with her boyfriend. Three weeks later the seventeen year old boyfriend similarly hanged himself with his belt in the bathroom of his home.⁸⁶¹ Was this rational? To him? To his parents? Who would decide?

Extending a right of "rational" suicide to teens would doubtless precipitate a greater flood of adolescent suicides than society would be willing or able to bear.

I. *The Effect on Others: Suicide Epidemics and Mass Suicide*

In addition to its interest in directly preventing the suicide of those who are emotionally unstable, the state arguably maintains a derivative interest in preventing the loss of even the "rational suicide" in light of the effect state sanctioned self-destruction would have on *others* who are emotionally unstable. In the words of Dr. Herbert Hendin of the Center for Psychosocial Studies, "Evidence

855. See e.g., Thornton, *supra* note 849, at 66.

856. Emery, *Adolescent Depression and Suicide*, 18 *ADOLESCENCE* 245, 249 (1983).

857. Maris, *supra* note 831, at 101.

858. *Teenagers in Crisis*, *supra* note 832, at 56.

859. *Id.*

860. Robins and Conroy, *supra* note 839, at 255.

861. Thornton, *supra* note 849, at 66.

relating to the contagious or suggestive effects of suicide . . . on the emotionally vulnerable, is accumulating."⁸⁶² It has been demonstrated, for example, that the number of suicides rises in a statistically significant manner in the month after front page newspaper publicity about a particular suicide.⁸⁶³

Some suicide stories elicit small rises in national suicides; however, other suicide stories elicit much larger rises The largest increase in British and American suicides occurred after the deaths of Marilyn Monroe, the actress, and Stephen Ward, the osteopath involved in the Profumo affair. In the United States, suicides increased by 12% in the month after Marilyn Monroe's death and by 10% in England and Wales.⁸⁶⁴

Similarly, "[i]n a metropolis one can note an accumulation of suicide cases in specific blocks and housing developments, especially in those where through lack of privacy, personal melancholy is easily transferred from one home to the other. Every suicide can start a chain of suicides."⁸⁶⁵

In 1959, a classic study by Arthur Kobler and Era Stolland⁸⁶⁶ was made of a suicide epidemic that took place in a hospital. Over a six month period, five patients attempted or committed suicide. After an in-depth study, the authors concluded:

An individual comes to feel that his future is devoid of hope; he, or someone else, brings the alternative of suicide into his field. He attempts to communicate his conviction of hopelessness to others, in an effort to gain their assurance that some hope still exists for him For actual suicide to occur, a necessary (although not sufficient) aspect of the field is a response characterized by helplessness and hopelessness. The helpless-hopeless response usually is communicated through an implicit or explicit expectation that the troubled person will kill himself.⁸⁶⁷

Societal acceptance of or resignation to a particular publicized suicide may effectively communicate precisely such an expectation.

There are also records of suicide epidemics from ancient times. It is reported that there was a noticeable increase in suicide in Athens at the end of the fifth century B.C. "at least in part under the influence of the example provided by the real or imagined sui-

862. H. HENDIN, *SUICIDE IN AMERICA* 223 (1982).

863. Phillips, *The Influence of Suggestion on Suicide: Substantive and Theoretical Implications of the Werther Effect*, 39 AM. SOC. REV. 340 (1974).

864. *Id.* at 350-51.

865. J. MEERLOO, *SUICIDE AND MASS SUICIDE* 172 (1968).

866. A. KOBLER & E. STOLLAND, *THE END OF HOPE: A SOCIAL-CLINICAL STUDY OF SUICIDE* (1964).

867. *Id.* at 252.

cide of the great statesman Themistocles."⁸⁶⁸ In third century B.C. Egypt, King Ptolemy II Philadelphus prohibited the teaching of the cyrenic philosopher Hegisias, because so many acted upon his teachings that suicide was seen as an acceptable, and even recommended solution, to life's problems.⁸⁶⁹ More recent instances are chronicled by Edward Ellis and George Allen.

Suicide can be contagious Whole cities—even nations—have been swept by epidemics of suicide. Large scale suicide epidemics swept across Europe from the fourteenth to the seventeenth century In the summer of 1856 . . . [s]ome 50,000 [members of the South African tribe called] Kaf-firs committed suicide before the epidemic ended.⁸⁷⁰

In the late eighteenth century, Goethe's romantic novel *The Sorrows of Werther*, about a lovesick youth who killed himself with the pistol of his rival for a girl's affection, stimulated a rash of suicides. Copies of the novel were found on many corpses.⁸⁷¹ In 1792, a similar ripple effect occurred after an invalid soldier hanged himself from a beam in a corridor of the Invalides building in Paris, France. "Within a short space of time twelve other invalid soldiers (five within a fortnight), had followed his example, stringing themselves up to the same beam."⁸⁷² In another case in 1813, after a woman hanged herself from a tree in the village Saint Pierre Monjau, France, her example was soon followed by several other women.⁸⁷³

In 1933, a twenty-four year old student, Mieko Ueki, committed suicide by leaping into the crater of a volcano named Mount Mihara on the island of Oshima, Japan. Another student who learned of her suicide followed her example. The suicide caught the attention of the Japanese press. Others began to jump into the volcano. Soon, five to six persons were committing suicide there daily.⁸⁷⁴ As one commentator noted:

By the end of 1933, Mihara had claimed a total of 143 known suicides
By the end of 1934, the police had forcibly prevented a staggering total of

868. Oppenheim, *Symposium on Suicide*, in DISCUSSIONS OF THE VIENNA PSYCHOANALYTIC SOCIETY—1910 ON SUICIDE WITH PARTICULAR REFERENCE TO SUICIDE AMONG YOUNG STUDENTS 541 (P. Friedman ed. 1967).

869. Choron, *Notes on Suicide Protection in Antiquity*, BULL. OF SUICIDOLOGY, July 1967, at 46, 47.

870. E. ELLIS & G. ALLEN, THE TRAITOR WITHIN: OUR SUICIDE PROBLEM 89, 91, 92 (1961).

871. *Id.* at 92.

872. *Id.* at 93.

873. *Id.*

874. *Id.* at 95.

1,200 persons from ending their lives in Mihara's pit But despite the best efforts of the police, at least 167 persons leaped in Mihara during 1934. In addition, 29 of those who had been saved at the crater's edge fulfilled their intention by leaping from the boat taking them back to Tokyo In 1936 alone, 619 persons leaped to their deaths inside Mihara, bringing it the dubious renown of luring more suicides than any other spot on earth.⁸⁷⁵

Much of the attractiveness of committing suicide at Mihara evidently came from the attention and sanction of society. Although there was official disapproval and there were attempts to prevent suicides both by the public authorities and volunteer private agencies, in the end, the public attention amounted to a glorification of self-destruction in the volcano.

The suicide epidemic brought to Oshima a boom comparable to the Florida land craze of 1925-26. From a barren, desolate place it blossomed into a . . . national shrine Fourteen hotels and 20 restaurants opened within two years. Horses were imported to carry tourists to Mihara's summit. Five taxicab companies opened for business. By 1935, the island's photographers had increased from two to 47. A post office was opened at the crater's edge The Tokyo Bay Steamship Company . . . imported three camels to carry tourists across the mile-wide strip of volcanic desert which surrounds Mihara's center.⁸⁷⁶

Contemporary instances can also be cited. We have already recounted the 1984 teen suicide epidemics in the Dallas suburbs of Plano and Arlington.⁸⁷⁷ This phenomenon is so widespread that the Centers for Disease Control and the National Institute for Mental Health in Washington have formed special units to deal with the so-called "cluster suicides."⁸⁷⁸ In short, suicide tends to generate suicide in a fashion analogous to the spread of a contagious disease. This alone generates a significant public health cancer, which is heightened by the fact that almost all who commit suicide suffer from some mental disorder.

A linked phenomenon is the mass suicide. Perhaps the most widely known recent instance occurred in 1978 with the deaths of nine hundred followers of the Reverend Jim Jones in Guyana.

In November, 1978, Representative Leo Ryan of California led a

875. *Id.* at 96, 98.

876. *Id.* at 98-99.

877. *See supra* notes 793-94 and accompanying text.

878. Barraclough, Bunch, Nelson, & Sainsbury, *A Hundred Cases of Suicide: Clinical Aspects*, 125 BR. J. PSYCHIATRY 355 (1974) (97% of suicides suffer from mental disorder); E. ROBBINS, *THE FINAL MONTHS* (1981) (psychiatric study in the United States concludes that 94% of suicides suffer from mental disorder). *See supra* notes 541-42 and accompanying text.

delegation into the jungles of Guyana, South America to investigate allegations that people were being held in a communal settlement, named Jonestown, against their will. The settlement was part of the "People's Temple," a religious organization with followers in California as well as in Guyana. It had been founded and led by the Reverend Jim Jones. On November 18, 1978, as Ryan, sixteen settlement members who wished to leave, and accompanying press were preparing to depart from an airstrip several miles from Jonestown, many of them were gunned down by armed guards from the Jonestown community sent to punish the defectors and those endeavoring to rescue them. When news of the massacre reached Jonestown, Jones advised his followers to commit suicide. Over nine hundred men, women and children drank a cyanide and grape drink solution, and then lay down to die. Jones shot himself in the head.⁸⁷⁹

Would a constitutional ruling protecting as a right the choice of rational persons to commit suicide mean that, had rescuers arrived in time, they would have been unable to intervene? The answer seems to be that rescuers would have had to stand by, helpless to avert many of the nine hundred suicides.

The evidence is that those who took part in the mass suicide were not so mentally ill as to qualify for a judgment of incompetency under the usual measures. Even their leader, who showed signs of mental imbalance near the end, had an illustrious career which largely masked his imbalance until quite near his death.

Jim Jones was a graduate of Butler University, Indianapolis, Indiana.⁸⁸⁰ He was an ordained minister in the Christian Church (Disciples of Christ), a large main-line denomination.⁸⁸¹ In 1961, he was named director of the Indianapolis Human Rights Commission. After moving to California in 1965, where he began new churches, he was named foreman of the Mendocino County grand jury. Jones' church, known as the "People's Temple," was popular because of "dazzling activities, a mixture of soul and gospel services, day and health care facilities, radical politics, and good works."⁸⁸²

In 1973, the People's Temple donated a substantial sum to

879. C. KRAUSE, *GUYANA MASSACRE 1* (1978). Krause was a survivor of the airport massacre which triggered the mass suicide. He was a reporter for the Washington Post and wrote this book with other members of the newspaper's staff.

880. *Id.* at 161.

881. *Id.* at 162.

882. *Id.*

twelve newspapers to defend freedom of the press. In 1975, a donation was made for the defense of four newsmen who refused to reveal their news sources. Also, in 1975, Jones was named one of the one hundred most outstanding clergymen in America by Religion in American Life (an interfaith organization).⁸⁸³

In 1976, the People's Temple gave \$6,000 to a program for the elderly, which prompted Jones to be named "Humanitarian of the Year" by the *Los Angeles Herald*. The same year he was appointed to the San Francisco Housing Authority.⁸⁸⁴

In 1977, Jones was awarded the Martin Luther King, Jr. Humanitarian Award in San Francisco. A month later he became chairman of the San Francisco Housing Authority.⁸⁸⁵ Nevertheless, a rising tide of critical reports aimed at Jonestown prompted American consular officials in Guyana to visit the village in 1978. On November 7, 1978, they reported "not one confirmation of any allegation of mistreatment" after interviews at Jonestown.⁸⁸⁶ Eleven days later the whole community had died.

There were questions raised about Jones' mental balance near the end by observers at close range.⁸⁸⁷ His followers, however, were perceived by eyewitnesses to be normal people, dedicated to a cause. Charles Krause, a reporter who had visited Jonestown with Ryan, and was injured in the massacre, wrote that the people appeared "healthy, rational, and friendly."⁸⁸⁸ As he was riding back to the airstrip where the massacre would occur, he thought:

But the People's Temple hadn't struck me as a crazy fringe cult It seemed to me that the People's Temple had a legitimate purpose, a noble purpose, and was more or less succeeding. The fact that 16 people, most of them members of two families, were homesick and leaving with Ryan didn't change that view.⁸⁸⁹

One of the defectors even said that she would probably return after seeing her family in California. Krause said, "The hundreds of people still at Jonestown who had chosen not to defect seemed ample proof that they were relatively content."⁸⁹⁰

Even the mass suicide seemed rational. True, a few tried to es-

883. *Id.* at 163.

884. *Id.*

885. *Id.* at 164.

886. *Id.* at 165.

887. *Id.* at 84.

888. *Id.* at 44.

889. *Id.* at 84.

890. *Id.* at 85.

cape; some succeeded, others were shot by guards. But one escapee said that many went happily to their death with smiles on their faces,⁸⁹¹ arms linked in camaraderie as they lay down to die. There had previously been rehearsals and discussion of mass suicide for the glory of socialism. An escapee said that one woman who protested was shouted down by calls of "traitor" from rank and file settlers.⁸⁹²

No doubt Jones' warning of conspiracies and mercenaries made fear a motivation.⁸⁹³ Blackmail was a fear for many.⁸⁹⁴ Some were exhausted by overwork and undernutrition.⁸⁹⁵ True, Jones exerted a mysterious power over his followers,⁸⁹⁶ but visitors in their final days found them "healthy, rational, and friendly."⁸⁹⁷ Krause, later writing about his experience, noted: "Dr John Clark, a professor of psychiatry at the Harvard Medical School has estimated from his studies that 58% of those who join cults are schizophrenic, either chronic or borderline. But [he] added that 42% of those he examined [in cults generally] were neither ill nor damaged."⁸⁹⁸

The conclusion is inescapable that at Jonestown many persons, who could not have been declared legally incompetent, willingly took their lives at the encouragement of Jim Jones. If suicide were to become a constitutional right, no one could legally interfere with a similar mass self-annihilation, even though instigated by a madman.

It seems clear that Jones induced his followers to join in suicide as the culmination of a long period of manipulation.⁸⁹⁹ Suicide proponents Englehardt and Malloy have emphasized that statutory recognition of a right to suicide implies that:

As long as neither physical nor psychological coercion is involved, the usual manipulative ingredients in human nature are to be tolerated. . . . [T]he line between coercion and manipulation is drawn as the line between threatening to deprive a party of his entitlements versus offering inducements to which the party is not entitled, as long as the inducements do not overbear the party's free will. . . . Free individuals . . . have the right to expose themselves not only to reasons, but also to freely chosen manipulations.⁹⁰⁰

891. *Id.* at 111.

892. *Id.* at 121.

893. *Id.* at 79.

894. *Id.* at 61.

895. *Id.* at 63.

896. *Id.* at 61.

897. *Id.* at 44.

898. *Id.* at 120.

899. *Id.*

900. Englehardt & Malloy, *supra* note 14, at 1024 (footnotes omitted).

Recognition of a constitutional right to suicide, therefore, would leave society powerless to retard manipulations designed to bring about others' deaths, of which Jonestown provides only the most extreme example. One of the most significant effects of the establishment of a suicide right, therefore, would likely be an increase in the psychological manipulation and encouragement of suicide of those who are considered personally and socially undesirable. Herbert Hendin has written:

If suicide becomes more socially acceptable, coerced or manipulated suicide is likely to increase. M. Pabst Battin points out that such social acceptance would undoubtedly lead to situations in which families that wish to be free of the burden of caring for the elderly will pressure them to end their lives. This pressure may be expressed through an appeal to the older person that suicide would be for the good of all concerned. Such an appeal would only be effective in a climate that sanctioned suicide for infirm people.⁹⁰¹

Thus, we have seen that the vast majority of those who attempt suicide suffer from a mental disorder, that successful, glorified suicides can create an epidemic of suicides among the emotionally unstable, and that a climate of societally sanctioned suicide could well lead to pressure on the otherwise nonsuicidal elderly and disabled, who are marginal in our society, to end their lives. These realities all provide strong grounds against the recognition of a constitutional right to suicide.

VIII. CONCLUSION

At the turn of the century, William Larremore wrote in the *Harvard Law Review* a defense of societal strictures on suicide which may be taken to express the common sense view that undoubtedly motivates most legislators—and most people—in continuing to use the institutions of society to dissuade suicide:

The occasional suicides of children through fear of parental reprimand or punishment, the comparatively frequent suicides of youths of both sexes from unrequited love, the still more common suicides of middle-aged persons because of financial embarrassment, and, most pathetic of all, the by no means rare suicide of elderly persons who lay down the burden of their own lives, realizing that *ipso facto* they lift a burden from the lives of others—the limitless variety of cases of consummated suicide indicates that dalliance with the thought of self-destruction is well-nigh universal. In the vast majority of instances the apparent mountain of anguish would seem but a molehill of temporary embarrassment in the perspective of a long life. If the momentary impulse be resisted, the unfortunate or discouraged one will

901. H. HENDIN, *supra* note 862, at 222.

have many years of average felicity in which to congratulate himself on his self-control. To the end of helping him bear the ills he has, a strong popular sentiment is of great efficacy. It is of public as well as personal advantage to have suicide in general regarded as immoral, cowardly, and disgraceful. The individual's attitude towards suicide, as towards all ethical matters, is largely influenced by the standards of his age and the moral atmosphere that surrounds him. General history has recorded many local and some quite extensive epidemics of suicide.⁹⁰²

Larremore's discussion of the influence of societal attitude on individual decisions assuredly does not accord with the position of Mill and numerous current theorists that the promotion of contentless autonomy is the highest good for which an organized society can legitimately work. But sociology and psychology combine with common experience to tell us that the ideal of the atomistic individual freely and dispassionately making life and death choices free of societal influence is a myth. Our choices are all influenced by the attitudes of others around us and of the society as a whole. To the lone elderly occupant of a nursing home, to the frustrated individual incapacitated by handicap and moved to the margins of society by discrimination, to the despondent person immobilized by a life crisis, societal affirmation of a "right" to suicide is less likely to seem an ennobling enhancement of personal dignity than a clear signal of indifference: the community does not care whether he or she lives or dies.

In short, it is impossible for society truly to be "neutral" on the question of suicide. Elevating it to the status of a constitutional right so that the government may not punish those who assist it or intervene to stop those who attempt it might well be even more likely to foster suicide than the presence of such laws or policies of intervention are to avert it. To foist such a policy on the nation in the form of a constitutional mandate would be a use of judicial power unwarranted by history, contrary to sound policy, and tragic in its consequences.

902. Larremore, *Suicide and the Law*, 17 HARV. L. REV. 331, 333 (1904).

APPENDIX:
THE LAWS OF THE UNITED STATES
ALABAMA

Originally a part of the Mississippi Territory, Alabama became a separate territory in 1817,¹ and was admitted as a state in 1819.² It was initially governed by the criminal statutes enacted by the Mississippi territorial legislature, which while punishing “wilful murder” and “manslaughter,”³ made no explicit mention of suicide. They did, however, provide “[T]hat every other felony, misdemeanor, or offence whatsoever, not provided for by this or some other act of the general assembly, shall be punished as heretofore by the common law.”⁴

In 1841, the Alabama legislature enacted a new penal code to replace existing law.⁵ This statute provided that “[e]very homicide committed under such circumstances as constitute the crime of murder at the common law, as is not embraced by murder in the first degree . . . shall be deemed murder in the second degree.”⁶ Another revision of the penal code in 1866 stated that, “every other homicide committed under such circumstances as would have constituted murder at common law, is murder in the second degree.”⁷

An 1878 *Manual of the Law of Crimes and Criminal Practice in Alabama* states, “The party killing himself—supposing him in his right mind, and at years of discretion—is said to be *felo de se* (a felon of himself). . . . If one kills another upon his desire or command, he is guilty of murder If one persuades another to kill himself, and the latter does so, the party persuading is guilty of

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1. Act of Mar. 3, 1817, ch. 59, 3 Stat. 371.
 2. Resolution of Dec. 14, 1819, res. 1, 3 Stat. 608.
 3. ALA. DIGEST, tit. 17, ch. 1, §§ 1, 3, at 206 (H. Toulmin ed. 1823).
 4. This provision was codified at ALA. DIGEST, *supra* note 3 § 45, at 214; ALA. DIGEST Crimes & Misdemeanors § 35, at 107 (J. Aikin ed. 1833).
 5. Penal Code, No. 138, ch. 15, § 228, 1840-41 Ala. Acts 103, 192.
 6. *Id.* ch. 3, § 2, 1840-41 Ala. Acts 122 (codified as SUPPLEMENT TO AIKEN’S DIGEST Penal Code ch. 3, § 2, at 210 (A. Meek ed. 1836-41); ALA. Penal Code ch. 3, § 2, at 412-13 (C. Clay ed. 1843); (recodified with minor grammatical changes at ALA. CODE § 3081 (1852)).
 7. Adopted by Act of Feb. 23, 1866, No. 114, § 1, 1866 Ala. Acts. 121 (codified at ALA. CODE § 3653 (1867); ALA. CODE § 4295 (1876); ALA. CRIM. CODE § 3725 (1887); ALA. CRIM. CODE § 4854 (1897); ALA. CRIM. CODE § 12 (1907); ALA. CRIM. CODE § 14 (1923); ALA. CODE tit. 1, § 3 (1940); ALA. CODE § 1-3-1 (1977)).

murder.”⁸ In 1910, the Supreme Court of Alabama affirmed a murder conviction in which one of the theories upon which the jury could have found the defendant guilty, under the trial judge’s charge, was that the defendant had entered into a suicide pact with the deceased. “Every murder at common law,” the court noted, “is murder under our statutes.”⁹ The court explained:

At common law self-murder was a felony; but since with us no forfeiture of estate penalizes the felon, and since the dead cannot be punished, no penalty can be inflicted upon the self-destroyer. But collateral consequences may and do, upon occasion, depend upon the feloniousness of self-murder. It is said in 2 Bish. New Cr. Law, § 1187: “If, under the common law as it was administered in England when this country was settled, one advises another to kill himself, and he does it in the presence of the advisor, the letter [sic] becomes guilty of murder, probably as principle of the second degree, but at all events as principle. And it is the same in our states.” [. . .] That intentional self-destruction by one without avoiding mental distemper is *felo de se*, is a generally recognized criminal doctrine. . . . In Dr. McClain’s treatise on Criminal Law, at section 290, these observations are made: “If two mutually attempt to commit suicide, and one survives, he is guilty of murder of the one who dies . . . [quoting *McClain*] “One who advises and counsels another to commit suicide is an accessory before the fact to murder. Both from reasoning which makes an accessory before the fact to the suicide guilty of murder, . . . it is evident that the wrong involved in the act is felonious in its nature.”¹⁰

Later cases are in conformity. In 1929, an appellate court stated, “Suicide was a felony at common law, and in Alabama is a crime involving moral turpitude Based upon experience and common knowledge, we know that every instinct of a normal animal of any species is opposed to self-destruction.”¹¹ A 1940 appellate court held, “Attaching to that word its legal signification as pronounced by this court, and by our Supreme Court, an admission of

8. F. CLARK, MANUAL OF THE LAW OF CRIMES AND CRIMINAL PRACTICE IN ALABAMA §§ 406-08 at 65 (1878).

9. *McMahan v. State*, 168 Ala. 70, 73, 53 So. 89, 90 (1910). In an earlier case, the Alabama Supreme Court, in construing a life insurance contract, referred to “suicide,” as defined at common law, as “voluntary criminal self-destruction.” *Supreme Commander of the Knights of the Golden Rule v. Aisnworth*, 71 Ala. 436, 447 (1882).

10. *McMahan*, 168 Ala. at 74, 53 So. at 90-91. The court was at pains to distinguish the suicide who has possession of mental faculties at the time of self-destruction, and is, therefore, a *felo de se*, from the one who is *non compos mentis*, in which case “no felony be committed, because of want of mental capacity in the self-destroyer to constitute the act a crime.” *Id.* at 76, 53 So. at 91. In the latter circumstance, the court said in dicta, one who counsels the suicide could not be guilty of murder since “[i]f no felony be committed . . . there could be no principal, and hence no accessory before the fact.” *Id.*

11. *Pennsylvania Mut. Life Ins. Co. v. Cobbs*, 23 Ala. App. 205, 208, 123 So. 94, 97 (1929).

suicide is an admission that the deceased came to his death as the result of voluntary, criminal self-destruction; 'suicide,' as defined at common law."¹²

Although the matter is not free from doubt, it appears that assisting suicide remains a common law crime in Alabama today. Under § 1-3-1:

The common Law of England, so far as it is not inconsistent with the Constitution, laws and institutions of this state, shall, together with such institutions and laws, be the rule of decisions, and shall continue in force, except as from time to time it may be altered or repealed by the legislature.¹³

Alabama adopted a comprehensive new penal code in 1982 that does not expressly mention suicide or its assistance. Section 13A-1-4 of the 1982 code provides, "No act or omission is a crime unless made so by this title or by other applicable statute or lawful ordinance."¹⁴ However, the *Commentary* to that section notes that an explicit provision abolishing common law crimes in the original draft was deleted because "the Advisory Committee considered such provision impolitic and also, unnecessary under a comprehensive Criminal Code. . . . Thus, § 1-3-1, which continues in force the common law 'except as from time to time it may be altered or repealed by the legislature,' remains intact, although its future field of operation may be reduced."¹⁵ It seems, therefore, that the statute preserving the common law is an "applicable statute"¹⁶ under section 13A-1-4.

The Comprehensive Criminal Code renders one who aids or abets an offense, or who "procures, induces, or causes" another to commit the offense, equally guilty of that offense, and includes the independent offense of "criminal solicitation," which covers one who "solicits, requests, commands or importunes" another to "engage in conduct constituting a crime."¹⁷ Homicide crimes under the Code (murder, manslaughter and criminally negligent homicide) do not apply to suicide, since each requires causing "the death of *another* person."¹⁸ If the one assisting suicide can be said to "cause" the death of the victim by a direct act of killing (for example,

12. *Southern Life & Health Ins. Co. v. Wynn*, 29 Ala. App. 207, 211, 194 So. 421, 424 (1940).

13. ALA. CODE § 1-3-1 (1977).

14. ALA. CODE § 13A-1-4 (1982).

15. *Id.* Commentary.

16. ALA. CODE § 13A-2-23 (1982).

17. ALA. CODE § 13A-4-1(a) (1982).

18. ALA. CODE §§ 13A-6-1(1), -2(a)(1), -3(a), -4(a)(1982) (emphasis added).

shooting or injecting poison at the suicide's request), then he or she would presumably be guilty of homicide, since consent by the victim to serious bodily harm is not a defense.¹⁹ Similarly, if the assistor overbears the will of the victim, he or she might arguably be held to "cause" the suicide's death.²⁰ If neither of these circumstances are present, the assistor cannot be guilty of the statutory homicide offenses nor of criminal solicitation with regard to them. If, however, the characterization of suicide as a common law crime survives the criminal codification, the assistor might well be guilty either under the complicity statute²¹ or under the criminal solicitation statute.²² Adding weight to this conclusion is a provision of Alabama's Natural Death Act, which states that the withdrawal or withholding of life-sustaining procedures from a patient qualified under that law, shall not constitute suicide or assisting suicide.²³ This provision would seem to imply that the Alabama legislature views the assistance as well as the committing of suicide as illegal acts.

Current Alabama law also provides for the involuntary commitment of an individual to a mental health facility upon a judicial finding "[t]hat the person sought to be committed is mentally ill; and . . . [t]hat, as a consequence of the mental illness, the person poses a real and present threat of substantial harm to himself"²⁴

For present purposes, it is important to note that, since the time of Alabama's organization as a territory in 1817, suicide has never been considered an affirmative right. In fact, as demonstrated by the foregoing discussion, Alabama clearly condemned suicide both before and after its legislature voted to ratify the fourteenth

19. ALA. CODE § 13A-2-7(b)(1) (1982).

20. See ALA. CODE § 13A-2-5(a) (1982) (causal relationship between conduct and results.) See also ALA. CODE § 13A-2-22 (1982); Brenner, *Undue Influence in the Criminal Law: A Proposed Analysis of the Criminal Offense of "Causing Suicide,"* 47 ALB. L. REV. 62 (1982); Comment, *Civil Liability for Causing or Failing to Prevent Suicide*, 12 LOY. L.A.L. REV. 967 (1979).

21. ALA. CODE § 13A-2-23 (1982).

22. ALA. CODE § 13A-4-1 (1982). A counter-argument is that under Alabama case law, the common law crime of advising and counseling another to suicide was a species of murder, not an independent crime. "Common law jurisdiction cannot be exercised . . . in cases of common law offenses for which punishment is prescribed by statute." *Id.* at § 13A-1-4 Commentary; See also *Tucker v. State*, 42 Ala. App. 477, 168 So. 2d 258 (1964). It is clear, however, that murder is now a statutory offense in Alabama. See ALA. CODE § 13A-6-2 (1982). It arguably follows, therefore, that common law jurisdiction cannot be used to punish assisting suicide.

23. ALA. CODE § 22-8A-9 (1984).

24. ALA. CODE § 22-52-10(a) (1984).

amendment.

ALASKA

Alaska did not become a part of the United States until it was purchased from Russia in 1867.²⁵ It was not organized as a distinct judicial district with its own courts until 1884, when Oregon law was made applicable to it.²⁶ (Prior to that time, Alaska was under the jurisdiction of the federal district courts for California, Oregon, and Washington.)²⁷ The legal history of Alaska's treatment of suicide, therefore, is not very helpful in ascertaining the attitude of America towards suicide at the time of the adoption of the Constitution, the Bill of Rights, or the fourteenth amendment.

Nevertheless, the later history of Alaska law can assist in elucidating how the law has generally viewed suicide. In 1899, Congress adopted a penal code for the District of Alaska.²⁸ It contained this provision: "[I]f any person shall purposely and deliberately procure another to commit self-murder or assist another in the commission thereof, such person shall be deemed guilty of manslaughter, and shall be punished accordingly."²⁹ This language remained in effect until 1980, when this provision was repealed by the new criminal code of Alaska.³⁰ In its place, the new code provides: "A person commits the crime of manslaughter if the person . . . intentionally aids another person to commit suicide,"³¹ and considers first degree murder an intentional act that "compels or induces a person to commit suicide through duress or deception."³² It also provides that, "When and to the extent reasonably necessary to prevent a suicide, a person who reasonably believes that another is imminently about to commit suicide may use reasonable and appropriate nondeadly force upon that person."³³ Involuntary commitment

25. 29 ENCYCLOPAEDIA BRITANNICA 441 (15th ed. 1985).

26. Act of May 17, 1884, ch. 53 § 7, 23 Stat. 24, 25-26.

27. See Act of July 27, 1868, ch. 273, § 7, 15 Stat. 240, 241.

28. Act of Mar. 3, 1899, ch. 429, 30 Stat. 1253.

29. *Id.* at § 7, 30 Stat. at 1254 (successively codified at ALASKA LAWS Penal Code § 7, at 2-3 (1900); ALASKA COMP. LAWS § 1886 (1913); ALASKA COMP. LAWS § 4761 (1933); ALASKA COMP. LAWS ANN. § 65-4-5 (1947); ALASKA STAT. § 11.15.050 (1962)).

30. Act of July 17, 1978, ch. 166, secs. 21, 25, 1978 Alaska Sess. Laws 1, 118, 120 (effective January 1, 1980).

31. *Id.* at sec. 3 § 11.41.120 (a)(2), 1978 Alaska Sess. Laws at 8 (codified at ALASKA STAT. § 11.41.120 (a)(2) (1983)).

32. Act of July 17, 1978, ch. 166, sec. 3, § 1.41.100(a)(2), 1978 Alaska Sess. Laws 1, 6 (codified at ALASKA STAT. § 11.41.1—(a)(2) (1983)).

33. Act of July 17, 1978, ch. 166 sec. 10, § 11.81.430 (a)(4), 1978 Alaska Sess. Laws 1, 87 (codified at ALASKA STAT. § 11.81.430(a)(4) (1983)).

to a treatment facility is authorized under Alaska law upon a judicial finding that a person "is mentally ill and as a result likely to cause harm to self. . . ." ³⁴

ARIZONA

Arizona, as part of New Mexico, was ceded to the United States from Mexico in two parts: first in 1848 after the Mexican War, and second by the Gadsden Purchase of 1853.³⁵ As part of the Territory of New Mexico, Arizona was subject at first to the common law of crimes and, beginning in 1854, to a specific statutory compilation which provided that assisting suicide was murder in the third degree.³⁶ In 1863, the Territory of Arizona was severed from the Territory of New Mexico.³⁷ At that time, New Mexico's laws were to continue in force in the "Territory of Arizona, until repealed or amended by future legislation."³⁸ In 1864, the new territory's legislature enacted a law providing that the "common law of England, so far as it is not repugnant to, or inconsistent with, the constitution and laws of the United States, or the bill of rights or laws of this Territory, is hereby adopted, and shall be the rule of decision in all the courts of this Territory."³⁹ This remained substantially the law throughout the nineteenth century.⁴⁰

In 1901, common law crimes were statutorily abolished by legislation which provided that "No act or omission . . . is criminal or punishable, except as prescribed or authorized by this code

34. ALASKA STAT. § 47.30.755(a) (1984).

35. 29 ENCYCLOPAEDIA BRITANNICA 406 (15th ed. 1985).

36. See *infra* note 386 and accompanying text.

37. Act of Feb. 24, 1863, ch. 56, 12 Stat. 664-65.

38. *Id.* at § 2, 12 Stat. at 665.

39. HOWELL CODE ch. 61, § 7, at 440 (1865); see *id.* at xii, giving date of adoption as Nov. 10, 1864.

40. It was successively codified at ARIZ. COMP. LAWS ch. 61, § 7, at 524 (1871); ARIZ. COMP. LAWS § 3438 (1877); and ARIZ. REV. STAT. § 2935 (1887). The wording in the 1887 revision was slightly altered to read:

The common law of England so far only as it is consistent with and adapted to the natural and physical condition of this territory, and the necessities of the people thereof, and not repugnant to, or inconsistent with the constitution of the United States, or bill of rights, or laws of this territory, is hereby adopted and shall be the rule of decision in all the courts of this territory.

In this form, the legislation remained on the statute book until the revision of 1901, which omitted it. Although it was essentially restored by ch. 10, § 8, 1907 Ariz. Sess. Laws 8 (codified at ARIZ. REV. STAT. Civil Code § 5555 (1913)), it was later superseded by the more specific abolition of common law crimes in the Arizona Penal Code. See *infra* notes 41-45 and accompanying text.

. . . .”⁴¹ It was this abolition that, decades after Arizona was admitted as a state in 1912,⁴² led a state appellate court to state: “Although suicide and attempts to commit suicide were generally considered crimes at common law . . . , neither are crimes in Arizona since, ‘In Arizona, common law crimes have not survived. There must be a statute specifically prohibiting the act.’”⁴³ However, in 1977, suicide legislation was enacted in Arizona that made “[i]ntentionally aiding another to commit suicide” manslaughter.⁴⁴ Finally, current law establishes that involuntary commitment to a treatment program may be had upon a court finding that a person “is, as a result of mental disorder, a danger to himself”⁴⁵

In short, suicide was regarded as criminal under the common law in Arizona throughout the nineteenth century. For the first seventy-six years of the twentieth century it was not condemned by any Arizona law. Since 1977, however, assisting suicide has been a crime in that state.

ARKANSAS

Arkansas was part of the Louisiana Territory obtained from France in the 1803 Louisiana Purchase. After becoming part of the Missouri Territory in 1812, it became the Arkansas territory in 1819. In 1836, Arkansas was admitted as a state,⁴⁶ and in 1868, its legislature voted to ratify the fourteenth amendment.⁴⁷ As part of the Louisiana Territory, Arkansas was governed by the common law of crimes,⁴⁸ and the same was true while it was part of the Missouri Territory.⁴⁹ The Missouri statute, which was carried forward into early Arkansas territorial law, adopted the common law of England except “where the laws and statutes of this territory have made provision on the subject.”⁵⁰ The statute further stated

41. ARIZ. REV. STAT., Penal Code § 3 (1901); ARIZ. REV. STAT., Penal Code § 3 (1913); ARIZ. REV. CODE § 4476 (1928); ARIZ. CODE ANN. § 43-101 (1939). The abolition provision was “omitted as unnecessary” in the revision of 1953. ARIZ. REV. STAT. ANN. § 1-105 Revisor’s Note (1953).

42. 2 ENCYCLOPAEDIA BRITANNICA 1 (15th ed. 1974).

43. *State v. Willits*, 2 Ariz. App. 443, 445 n.2, 409 P.2d 727, 728 729 n.2 (1966) (citations omitted) (quoting *Goodman v. State*, 96 Ariz. 139, 141, 393 P.2d 148, 149 (1964)).

44. Act of May 31, 1977, sec. 60, § 13-1103(A)(3), 1977 Ariz. Laws 678, 724 (codified at ARIZ. REV. STAT. ANN. § 13-1103(A)(3) (Supp. 1985)).

45. *Id.* at § 36-540(A) (Supp. 1985).

46. 29 ENCYCLOPAEDIA BRITANNICA 322 (15th ed. 1985).

47. U.S.C.S. CONST., amend XIV explanatory note, at 11 (Law. Co-op 1984).

48. See *infra* notes 197-98 and accompanying text.

49. See *infra* note 292 and accompanying text.

50. LAWS OF ARK. TERR. Common Law and Statutes of England § 1, at 131 (J. Steele

that: "where the laws and statutes have not made provision for the punishment of offences [recognized by the common law], the several courts may proceed to punish for such offences."⁵¹

In 1838, two years after its admission as a state, Arkansas adopted a criminal code that provided, "Every person deliberately assisting another in the commission of suicide or self murder, shall be adjudged guilty of murder."⁵² In 1914, the Supreme Court of Arkansas upheld a conviction based upon this statute.⁵³ This statutory provision was repealed in 1975,⁵⁴ and replaced by the current law, which provides, "A person commits manslaughter if . . . he purposely causes or aids another person to commit suicide."⁵⁵ The official *Commentary* notes, "One purpose of this section is to underscore the duty not to facilitate the commission of anti-social, although non-criminal, conduct."⁵⁶ The *Commentary* also suggests that when one employs deception or coercion to bring about another's suicide, it constitutes first degree murder.⁵⁷

The Arkansas code further provides that: "A person who reasonably believes that another person is about to commit suicide or to inflict serious physical injury upon himself may use non-deadly physical force upon that person to the extent reasonably necessary to thwart the result."⁵⁸ Involuntary commitment to mental health facilities in Arkansas is authorized for those who are "suicidal."⁵⁹

and J. Campbell eds. 1835) (codified at ARK. REV. STAT. ch. 28, § 2, at 182 (1838)).

51. ARK. REV. STAT. ch. 28, § 2, at 182 (1838).

52. Act of Feb. 16, 1838 printed as ARK. REV. STAT. ch. 44, div. 3, art. 2, § 4, at 240 (1838) (successively codified at ARK. STAT. ch. 51, pt. 3, art. 2, § 4, at 324 (1848); ARK. STAT. ch. 51, pt. 3, art. 2, § 4, at 329 (1858); ARK. STAT. § 1255 (1875); ARK. STAT. § 1523 (1884); ARK. STAT. § 1646 (1894); ARK. STAT. § 1768 (1904); ARK. STAT. § 2345 (1921); ARK. STAT. § 2971 (1937); and ARK. STAT. § 41-2211 (1947)).

53. *Farrell v. State*, 111 Ark. 180, 163 S.W. 768 (1914).

54. Act of Mar. 3, 1975, No. 280, § 3201, 1975 Ark. Acts 500, 698.

55. *Id.* at § 1504(1)(b), 1975 Ark. Acts at 600 (codified at ARK. STAT. ANN. § 41-1504(1) (1977)).

56. *Id.* Commentary.

57. *Id.* The first degree murder statute provides, "A person commits murder in the first degree if . . . with the premeditated and deliberated purpose of causing the death of another person, he causes the death of any person." ARK. STAT. ANN. § 41-1502 (1977).

58. *Id.* at § 41-505.

59. *Id.* at §§ 59-1406, - 1409, -1410 (Supp. 1985). The statute defines "suicidal" as follows:

a person who suffers from a mental illness, disease of disorder and as a result of the mental illness, disease or disorder poses a substantial risk of physical harm to himself as manifested by evidence of, threats of, or attempts at suicide or serious self-inflicted bodily harm, or by evidence of other behavior or thoughts that create a grave and imminent risk to his physical condition.

Id. at § 59-1401(b).

It is evident that Arkansas has never treated suicide as a favored right.

CALIFORNIA

California, ceded to the United States by Mexico in the 1848 Treaty of Guadalupe Hidalgo, was admitted as a state in 1850.⁶⁰ The California legislature did not vote either to ratify or to reject the fourteenth amendment.⁶¹

In 1850, the state legislature provided, "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States or the Constitution or laws of the State of California, shall be the rule of decision in all the courts of this State."⁶² In 1874, the legislature enacted a provision against assisted suicide that has remained in effect to the present: "Every person who deliberately aids or advises, or encourages another to commit suicide, is guilty of a felony."⁶³

In 1959, the California Supreme Court adopted the holding of an Oregon court⁶⁴ that the existence of such a statute encompasses participation in events leading up to another's suicide, but that one who "actually performs, or actively assists in performing, the overt act resulting in death" is guilty of murder.⁶⁵ A 1960 California appellate court noted that suicide was a felony at common law,

60. 29 ENCYCLOPAEDIA BRITANNICA 446 (15th ed. 1985).

61. U.S.C.S. CONST., amend. XIV explanatory note, at 11-12 (Law. Co-op. 1984).

62. Act of Apr. 13, 1850, ch. 95, 1850 Cal. Stat. 219, 219 (codified at CAL. COMP. LAWS ch. 41 (1853); CAL. LAWS art. 735 (1860); CAL. GEN. LAWS para. 599 (1865); CAL. CODES & STATS. § 4468 (1876)).

63. Act of Mar. 30, 1874, ch. 614, sec. 34, § 400 (1873-74), Cal. Code Ann. 419, 433 (codified at CAL. PENAL CODE § 400 (Hittel 1876); CAL. PENAL CODE § 400 (Destry 1881); CAL. PENAL CODE § 400 (Deering 1886); CAL. PENAL CODE § 400 (Deering 1899); CAL. PENAL CODE § 400 (Pomeroy 1901)). As part of a general statutory revision in 1901, the legislature sought to expand the suicide statute to apply to those who aided, advised or encouraged another to attempt suicide. Act of Mar. 16, 1901, ch. 158, sec. 111, § 401, 1901 Cal. Stat. 433, 461. However, the legislature failed to comply with a technical requirement of the California Constitution regarding the revision of statutes, and so the entire code revision was voided as unconstitutional. See *Lewis v. Dunne*, 134 Cal. 291, 66 P. 478 (1901). Subsequent codifications of the statute are as follows: CAL. PENAL CODE § 401 (Deering 1906); CAL. PENAL CODE § 401 (Kerr (1908); CAL. PENAL CODE § 401 (Deering 1915); CAL. PENAL CODE § 401 (Kerr 1920); CAL. PENAL CODE § 401 (Deering 1923); CAL. PENAL CODE § 401 (Ragland 1929); CAL. PENAL CODE § 401 (Chase 1931); CAL. PENAL CODE § 401 (Deering 1931); CAL. PENAL CODE § 401 (Lake 1937); CAL. PENAL CODE § 401 (Deering 1933); CAL. PENAL CODE § 401 (Hillyer-Lake 1947); CAL. PENAL CODE § 401 (Deering 1949); CAL. PENAL CODE § 401 (West 1955); CAL. PENAL CODE § 401 (West 1970).

64. *State v. Bouse*, 199 Or. 676, 702-03, 264 P.2d 800, 812 (1953).

65. *People v. Matlock*, 51 Cal.2d 682, 693-94, 336 P.2d 505, 511 (1959) (quoting *Bouse*, 199 Or. at 702-03, 264 P.2d at 812).

but "is not and never has been a crime in California," while assisting suicide is a felony by statute.⁶⁶

Twenty years later, in *In re Joseph G.*, the California Supreme Court, sitting *en banc*, reversed the murder conviction of a juvenile survivor of a suicide pact, while opining that he could have been guilty of violating the assisted suicide statute. It did so in an opinion that extensively discussed the penology of suicide. The court took note of "the unusual, inexplicable and tragic circumstances" of the case.⁶⁷ Evidence offered at trial revealed that after bragging to their friends that they were going to drive off a cliff, two sixteen year olds refuted the skeptical reaction of their friends by fulfilling this promise. The survivor, who apparently drank a quart of beer prior to executing the stunt, later told a friend "that he had 'no reason' to drive off the cliff, that it was 'stupid' but that he 'did it on purpose.'"⁶⁸ Since the survivor was the driver, he was charged with the murder of his less fortunate friend.

Noting that "[a]t common law suicide was a felony,"⁶⁹ the court said:

Under American law, suicide has never been punished and the ancient English attitude has been expressly rejected. . . .⁷⁰ Rather than classifying suicide as criminal, suicide in the United States "has continued to be considered an expression of mental illness."⁷¹ As one commentator has noted, "punishing suicide is contrary to modern penal and psychological theory."⁷²

Similarly, the court noted that while "[a]ttempted suicide was also a crime at common law, [and while a] few American jurisdictions have adopted this view, . . . most, including California, attach no criminal liability to one who makes a suicide attempt."⁷³

By contrast, the court continued, "The law has . . . retained culpability for aiding, abetting and advising suicide."⁷⁴ The court then expounded upon some of the policies underlying the attitude of the

66. *Tate v. Canonica*, 180 Cal. App.2d 898, 903, 5 Cal. Rptr. 28, 33 (1960).

67. *In re Joseph G.*, 34 Cal.3d 429, 431, 667 P.2d 1176, 1177, 194 Cal. Rptr. 163, 164 (1983).

68. *Id.* at 432, 667 P.2d at 1178, 194 Cal. Rptr. at 165.

69. *Id.* at 433, 667 P.2d at 1178, 194 Cal. Rptr. at 165.

70. *Id.* at 433, 667 P.2d at 1178, 194 Cal. Rptr. at 165. (citing Note, *The Punishment of Suicide - A Need for Change*, 14 VILL. L. REV. 463, 465 (1969)).

71. *Id.* at 433, 667 P.2d at 1178, 194 Cal. Rptr. at 165 (quoting H. HENDIN, *SUICIDE IN AMERICA* 23 (1982)).

72. *Id.* at 433, 667 P.2d at 1178, 194 Cal. Rptr. at 165 (quoting VICTOROFF, *THE SUICIDAL PATIENT: RECOGNITION, INTERVENTION, MANAGEMENT* 173-74 (1982)).

73. *Id.* at 433, 667 P.2d at 1178, 194 Cal. Rptr. at 165.

74. *Id.* at 434, 667 P.2d at 1179, 194 Cal. Rptr. at 166.

law toward assisting suicide:

It has been suggested that "states maintaining statutes prohibiting aiding . . . suicide, attempt to do so to discourage the actions of those who might encourage a suicide in order to advance personal motives." . . .⁷⁵ A further rationale underlying statutes imposing criminal liability is that "the interests in the sanctity of life that are represented by criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another, even though the act may be accomplished with the consent, or at the request, of the suicide victim." . . .⁷⁶ Finally, "although the evidence indicates that one who attempts suicide is suffering from mental disease, there is not a hint of such evidence with respect to the aider and abettor [T]he justifications for punishment apply to the aider and abettor, while they do not apply to the attempted suicide."⁷⁷

The court looked extensively at the policy of the criminal law with regard to mutual suicide pacts, concluding that, on the one hand, "it is actually a double attempted suicide, and therefore the rationale for not punishing those who attempt suicide would seem to apply."⁷⁸ On the other hand, the court continued,

Surviving a suicide pact gives rise to a presumption . . . that the participant may have entered into the pact in less than good faith. Survival, either because one party backed out at the last minute or because the poison, or other agent, did not have the desired effect, suggests that the pact may have been employed to induce the other person to take his own life.⁷⁹

After noting the similar concern of the Model Penal Code with the "‘danger of abuse in differentiating genuine from spurious agreements'⁸⁰ to commit suicide,"⁸¹ the Supreme Court of California nonetheless held on the facts before it that "The potential for fraud is . . . absent in a genuine suicide pact executed simultaneously by both parties by means of the same instrumentality. The traditional rationale for holding the survivor of the pact guilty of murder is thus not appropriate in this limited factual situation."⁸²

75. *Id.* at 437, 667 P.2d at 1181, 194 Cal. Rptr. at 168 (quoting Note, *Criminal Aspects of Suicide in the United States*, 7 N.C. CENT. L.J. 156, 162 (1975)).

76. *Joseph G.*, 34 Cal.3d at 437, 667 P.2d at 1181, 194 Cal. Rptr. at 168 (quoting MODEL PENAL CODE § 210.5 comment 5 at 100 (1980)).

77. *Joseph G.*, 34 Cal.3d at 437, 667 P.2d at 1181, 194 Cal. Rptr. at 168 (quoting Note, *Punishment of Suicide*, *supra* note 70, at 476 (footnotes omitted)).

78. *Joseph G.*, 34 Cal.3d at 437, 667 P.2d at 1181, 194 Cal. Rptr. at 168.

79. *Id.* at 437, 667 P.2d at 1181, 194 Cal. Rptr. at 179 (quoting Brenner, *supra* note 20, at 85-86).

80. *Id.* at 438-39, 667 P.2d at 1182, 194 Cal. Rptr. at 169 (quoting MODEL PENAL CODE § 210.5 comment 6, at 105 (1980)).

81. *Joseph G.*, 34 Cal.3d at 438-39, 667 P.2d at 1182-83, 194 Cal. Rptr. at 169.

82. *Id.* at 439, 667 P.2d at 1183, 194 Cal. Rptr. at 170.

Based on this, the court distinguished prior precedent from the case before it and held that "the actions of the minor constitute no more than a violation of Penal Code section 401" ⁸³

In California, the Lanterman-Petus-Short Act provides for the involuntary commitment to a mental health facility of "any person [who], as a result of mental disorder, is a danger . . . to himself or herself" ⁸⁴ California has also judicially imposed civil liability upon those responsible for the care and treatment of mentally disturbed patients, for their failure to prevent suicide:

If those charged with the care and treatment of a mentally disturbed patient know of facts from which they could reasonably conclude that the patient would be likely to harm himself in the absence of preclusive measures, then they must use reasonable care under the circumstances to prevent such harm. ⁸⁵

Finally, although not regarding suicide itself as a crime, California has never treated suicide as an approved affirmative right.

COLORADO

Colorado was organized as a territory in 1861, and admitted as a state in 1876. ⁸⁶ It was thus a territory at the time of the adoption of the fourteenth amendment, without a vote on whether that amendment should be ratified. The territorial legislature enacted a general adoption of the common law in 1861, and until 1977, common law crimes were recognized in Colorado. ⁸⁷ The state first ad-

83. *Id.* at 440, 667 P.2d at 1183, 194 Cal. Rptr. at 170. Given the court's reasoning, one might expect the minor to have incurred no criminal liability, rather than that associated with aiding suicide. *Id.* at 438, 667 P.2d at 1177, 194 Cal. Rptr. at 168. As a practical matter, the effect of the court's decision may well have been to let Joseph G. go unpunished, since the trial court had dismissed the aiding suicide charge while finding him guilty of first degree murder. *Id.* at 431, 667 P.2d at 1177, 194 Cal. Rptr. at 164. Presumably, the aiding suicide charge could not have been reinstated without double jeopardy.

84. CAL. WELF. & INST. CODE §§ 5150, 5200, 5206, 5213, 5250(a), 5256.6, 5260 (West 1984).

85. *Meier v. Ross General Hospital*; 69 Cal.2d 420, 424, 445 P.2d 519, 522-23, 71 Cal. Rptr. 903, 906-07 (1968). *See also Vistica v. Presbyterian Hospital & Medical Center of San Francisco*, 67 Cal.2d 465, 432 P.2d 193, 62 Cal. Rptr. 577 (1967); *Wood v. Samaritan Institution*, 26 Cal.2d 847, 853, 161 P.2d 556, 558 (1945).

86. 29 ENCYCLOPAEDIA BRITANNICA 421 (15th ed. 1985).

87. Act of Oct. 11, 1861, sec. 1, 1861 Colo. Sess. Laws 35, 35 (successively codified at COLO. REV. STAT. ch. 41, § 1, at 105 (1868); COLO. GEN. LAWS § 156 (1877); COLO. GEN. STAT. § 197 (1883); COLO. REV. STAT. § 6295 (1908); COLO. COMP. LAWS § 6516 (1921); COLO. STAT. ANN., ch. 159, § 1 (1935); COLO. REV. STAT. § 135-1-1 (1953); COLO. REV. STAT. § 135-1-1 (1963); COLO. REV. STAT. § 2-4-211 (1973); COLO. REV. STAT. § 2-4-211 (1980)). Common law crimes were abolished by the Colo. Crim. Code, ch. 121, art. 1, § 40-1-104, 1971 Colo. Sess. Laws 389-90 (codified at COLO. REV. STAT. § 18-1-104(3)(1978)).

dressed suicide in the Colorado Constitution, which became effective upon admission into the Union,⁸⁸ at which time, the framers expressly provided: "[T]he estates of such persons as may destroy their own lives shall descend or vest as in cases of natural death."⁸⁹ As in other American states that adopted the common law, suicide itself was to go unpunished. It may be assumed, however, that the common law treatment of assisted suicide remained intact.

In 1971, the Colorado legislature specifically dealt with assisted suicide by enacting the current provision: "A person commits the crime of manslaughter if . . . [h]e intentionally causes or aids another person to commit suicide."⁹⁰ The same legislature also provided, "A person acting under a reasonable belief that another person is about to commit suicide or to inflict serious bodily injury on himself may use reasonable and appropriate force upon that person to the extent that it is reasonably necessary to thwart the result."⁹¹ Under Colorado law a person may involuntarily be committed for treatment if found, "as a result of mental illness, [to be] a danger . . . to himself."⁹² It cannot be said that Colorado has viewed suicide with approval as an affirmative right.

CONNECTICUT

A patent for Connecticut was obtained in 1631 from the Plymouth Company, and it was first settled in 1633. Originally under the jurisdiction of Massachusetts, in 1636 it was authorized by that colony to establish a separate government, and the first laws of that government's assembly were passed in 1636.⁹³

Until the latter half of the twentieth century, Connecticut's treatment of suicide was derived from the common law. Although the statutes did not explicitly reflect this fact until 1849, it is clear that the legislation of Connecticut and of the later-joined colony of New Haven, was based on the common law of England, unless the common law was regarded as obsolete or a contrary rule was ex-

88. COLO. CONST. art. 26, § 12.

89. *Id.* at art. 2, § 9.

90. Colo. Crim. Code, ch. 40, sec. 1, § 40-3-104 (1)(b), 1971 Colo. Sess. Laws 388, 419 (codified at COLO. REV. STAT. § 18-3-104 (1)(b)(1978)).

91. Colo. Crim. Code, ch. 40, sec. 1, § 40-1-803 (4), 1971 Colo. Sess. Laws 388, 408 (codified at COLO. REV. STAT. § 18-1-703 (1)(d)(1978)).

92. Act of July 6, 1973, ch. 227, § 71-1-5(1), 1973 Colo. Sess. Laws 817, 821 (codified at COLO. REV. STAT. §§ 27-10-107 (1)(a), -109 (4) (1982)).

93. Booth, Woodruff, Mather, Baldwin & Turrill, *Preface to CONN. GEN. STAT.* at iii (1875).

pressly substituted by statute.⁹⁴ In the statutory revision of 1821, a note states, "in the present code the object has been to define and describe, as far as practicable, every act for which a man is liable to punishment, though some offenses are unavoidably left to the common law."⁹⁵ From 1830 through 1969, a penalty was imposed for "conviction of any high crime or misdemeanors at common law" and another for "conviction for any other offense at common law."⁹⁶

Connecticut's adoption of English common law was not uncriticized. In a 1796 publication, Zephaniah Swift, later Chief Justice of the state, explained why the common law of Connecticut did not punish suicide in the manner of the English common law.

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, 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.⁹⁷

As two later editions of the work make clear, however, advising suicide was held to be a crime. The same passage appears unchanged in both an 1823 and an 1871 edition of the work—dates that encompass Connecticut's June 30, 1866 vote to ratify the four-

94. *Id.* at vi.

95. CONN. PUB. STAT. LAWS tit. 20, § 120 note 5, at 121 (1824).

96. Act of June 5, 1830, ch. 1, sec. 118, 1830 Conn. Pub. Acts 253, 277 (May Sess.)(successively codified at CONN. PUB. STAT. LAWS tit. 21 § 117, at 146-47 (1835); CONN. PUB. STAT. LAWS, tit. 20, § 117, at 170 (1838); CONN. REV. STAT., tit. 6, § 177, at 262 (1849); CONN. COMP. STAT. tit. 6, § 177, at 355 (1854); CONN. GEN. STAT. tit. 12, § 257, at 290 (1866); CONN. GEN. STAT. tit. 20, ch. 13, pt. 5, § 21, at 540 (1875); CONN. GEN. STAT. § 1642 (1888); CONN. GEN. STAT. § 1528 (1902); CONN. GEN. STAT. § 6653 (1918); CONN. GEN. STAT. § 6500 (1930); CONN. GEN. STAT. SUPP. § 1728c (1931); CONN. GEN. STAT. SUPP. § 1469e (1937); CONN. GEN. STAT. § 8819 (1949); CONN. GEN. STAT. ANN. § 54-117 (1960); *repealed by* Penal Code, P.A. 828, § 214, 1969 Conn. Pub. Acts 1554, 1618 (Reg. Sess.).

97. 2 Z. SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 304 (n.p. 1796)(spelling modernized).

teenth amendment:⁹⁸

If one man should procure to persuade another to kill himself, this would be murder. If one drinks poison by the provocation of another, and dies of it, this is murder in the person who persuaded. If one counsels another to commit suicide, and the other by reason of the advice kills himself, the advisor is guilty of murder as principal.⁹⁹

In 1969, laws specifically dealing with assisting suicide were enacted by the Connecticut legislature. First, the legislation made it manslaughter in the second degree when one "intentionally causes or aids another person, other than by force, duress or deception, to commit suicide."¹⁰⁰ The official *Commission Comment* noted:

The second part, causing or aiding a suicide, is aimed at such situations as aiding, out of the feelings of sympathy, the suicide of one afflicted with a painful and incurable disease. While such conduct is blameworthy, the possible mitigating circumstances justify its treatment as manslaughter, rather than murder.¹⁰¹

Second, one who "causes a suicide by force, duress or deception" was deemed guilty of murder.¹⁰² In Connecticut, one may be involuntarily committed for mental health treatment upon a court finding that one "is mentally ill and dangerous to himself or herself."¹⁰³

Connecticut has never punished the suicide, and it is evident that suicide has never been held to be an affirmative right. The rationale behind Connecticut's divergence from the traditional common law is based on that state's rejection of the common law's punishment of the innocent for the act of another. Connecticut has continued to condemn suicide and to punish those who counsel or aid it, while (at least in modern times) assuring medical treatment for those who manifest a danger of committing suicide.

DELAWARE

Originally part of the territory of the Duke of York, the territory

98. U.S.C.S. CONST., amend. XIV explanatory note, at 11 (Law. Co-op. 1984).

99. H. DUTTON, 2 A REVISION OF SWIFT'S DIGEST OF THE LAWS OF CONNECTICUT 298 (1871); 2 Z. SWIFT, A DIGEST OF THE LAWS OF THE STATE OF CONNECTICUT 270 (New Haven 1823).

100. Penal Code, P.A. 828, § 57, 1969 Conn. Pub. Acts. 1554, 1578 (Reg. Sess.) (codified at CONN. GEN. STAT. § 53a-56(a)(2) (West 1972)).

101. *Id.* Commission Comment-1971.

102. Penal Code, P.A. 828, § 55, 1969 Conn. Pub. Acts 1554, 1576 (Reg. Sess.) (successively codified at CONN. GEN. STAT. ANN. § 53a-54 (a)(1) (West 1972); CONN. GEN. STAT. ANN. § 53a-54a (a) (West Supp. 1984)).

103. CONN. GEN. STAT. ANN. § 17-178 (c) (West Supp. 1985).

that later became Delaware was added to Pennsylvania in 1682, then separated from it sometime between 1701 and 1704.¹⁰⁴ Its constitution of 1776 provided for the general incorporation of the common law of England.¹⁰⁵ However, the Delaware Constitution of 1792 provided, "The estates of those who destroy their lives shall descend or vest as in the case of natural death"¹⁰⁶ (a provision retained in the current Constitution).¹⁰⁷ From 1852 to 1972, Delaware statutory law provided for the punishment of offenses "indictable at common law."¹⁰⁸ It may be presumed, therefore, that in common with the majority of the states during the nineteenth century, Delaware did not punish suicide, although it deemed it reprehensible and wrong, but it nonetheless did consider counseling or abetting suicide to be a crime. The importance of Delaware's attitude regarding the question of whether suicide was established as a constitutional right by the adoption of the fourteenth amendment is undermined, however, by that state's legislative vote of February 8, 1867 against ratification of the fourteenth amendment, a position it did not thereafter change.¹⁰⁹

In 1972, the Delaware legislature created the crime of "promoting suicide." This occurs when one "intentionally causes or aids another person to attempt suicide, or when he intentionally aids another person to commit suicide."¹¹⁰ In Delaware, an individual may be involuntarily committed for treatment as a "mentally ill person" upon a court finding that he or she suffers from a "mental disease or condition . . . which . . . poses a real and present threat, based on manifest intentions, that such person is likely to commit . . . serious harm to himself."¹¹¹

DISTRICT OF COLUMBIA

What is now the District of Columbia was originally a portion of

104. Hall, *Preface* to DEL. LAWS at iii (1829).

105. DEL. CONST., art. 25 (1776).

106. DEL. CONST., art. 1, § 15 (1792).

107. DEL. CONST., art. 1, § 15.

108. See DEL. REV. STAT. § 2860 (1852); DEL. REV. STAT. § 2860 (1874); DEL. REV. STAT. tit. 20, ch. 127, § 18, at 926 (1893); DEL. REV. STAT. § 4720 (1915); DEL. REV. CODE § 5180 (1935); DEL. CODE ANN. tit. 11, § 105 (1953); *repealed* by Act of July 7, 1972, ch. 497, sec. 1, 58 Del. Laws 1611, 1611 (1971). See also *Steele v. State*, 52 Del. 5, 10, 151 A.2d 127, 130 (1959).

109. U.S.C.S. CONST., amend. XIV explanatory note, at 12 (Law. Co-op. 1984).

110. Del. Crim Code, ch. 497, tit. 11, sec. 1, § 645, 58 Del. Laws 1661, 1663 (1971) (codified at DEL. CODE ANN. tit. 11, § 645 (1979)).

111. Act of June 5, 1975, ch. 95, § 1, 1975 Del. Laws 168, 168, 174-75 (codified at DEL. CODE ANN. tit. 16, §§ 5001(1), 5010(2)(1983)).

Maryland. (When the federal district was first formed, it contained portions of Virginia as well, but that section has since been returned to Virginia).¹¹² It adopted the common law of Maryland, and the common law of crimes remains effective in the District today.¹¹³ In 1911, the D.C. Court of Appeals denied recovery of a police pension to the relatives of an officer who had committed suicide. The court ruled:

[I]t must be held that Congress, in providing for policemen and those dependent upon them, did not intend thereby to invite the commission of crime, or to place a premium upon crime. Certainly, in the absence of any provision in the statute expressly granting a pension in the case of suicide, the court will not supply it by implication. In the absence of express words to that effect, we will not imply that Congress intended by this act to violate the principle of public policy.¹¹⁴

The court quoted with approval the opinion of Justice Harlan, writing for the U.S. Supreme Court, in a case making a similar ruling with regard to a life insurance contract:

A contract the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice, or be made the foundation of its judgment. If, therefore, a policy taken out by the person whose life is insured, and in which the sum named is made payable to himself, his executors, administrators, or assigns, expressly provided for the payment of the sum stipulated when or if the assured, in sound mind, took his own life, the contract, even if not prohibited by statute, would be held to be against public policy, in that it tempted or encouraged the assured to commit suicide¹¹⁵

In 1964, Judge J. Skelly Wright of the United States Court of Appeals for the District of Columbia Circuit, in the course of an opinion explaining an order mandating blood transfusions for a Jehovah's Witness, took note that "If self-homicide is a crime, there is no exception to the law's command for those who believe the

112. 29 ENCYCLOPAEDIA BRITANNICA 295 (15th ed. 1985).

113. Act of Feb. 27, 1801, ch. 15, sec. 1, 2 Stat. 103, 103-105 (adopting law of Maryland and Virginia for respective ceded portions to D.C.); Act of Mar. 2, 1831, ch. 37, secs. 14-15, 4 Stat. 448, 450 (providing for punishment of crimes "not herein specially provided for" or "not provided for by this act")(successively codified at D.C. COMP. LAWS §§ 14-15, at 146-47 (1868); D.C. COMP. STAT. ch. 16 §§ 2-3, at 156 (1894)); Act of Mar. 3, 1901, ch. 854, sec. 910, 31 Stat. 1189, 1337 (provision for punishment of "any criminal offense not covered")(successively codified at D.C. CODE § 49-30 (1940); D.C. CODE ANN. § 22-107 (1973); D.C. CODE ANN. § 22-107 (1981)).

114. *Rudolph v. United States ex rel Stuart*, 36 App. D.C. 379, 389 (1911).

115. *Id.* at 387 (quoting *Ritter v. Mutual Life Ins. Co.*, 169 U.S. 139, 154 (1898) (Harlan, J.)).

crime to be divinely ordained . . . [b]ut whether attempted suicide is a crime is in doubt in some jurisdictions, including the District of Columbia." He did not, however, decide "[t]he Gordian knot of this suicide question" because he concluded that the Jehovah's Witness did not want to die.¹¹⁶ It should also be noted that the District's living will law appears to recognize the crime of assisting suicide because it specifically provides: "[T]he withholding or withdrawal of life-sustaining procedures from a qualified patient in accordance with the provisions of this subchapter shall not, for any purpose, constitute a suicide and shall not constitute the crime of assisting suicide."¹¹⁷ Finally, one found to be "mentally ill and, because of that illness, . . . likely to injure himself" may be involuntarily committed for treatment under the laws of the District of Columbia.¹¹⁸

FLORIDA

Florida was ceded to the United States by Spain in a treaty ratified in 1821, and was admitted as a state in 1845.¹¹⁹ In 1832, the territorial legislature adopted "the Common Law of England, in relation to Crimes and Misdemeanors, except so far as the same relates to the modes and degree of punishment"¹²⁰ The Florida legislature voted to ratify the fourteenth amendment on June 9, 1868.¹²¹ Less than two months later, on August 6, 1868, the legislature enacted a law which provided, in part: "Every person deliberately assisting another in the commission of self-murder, shall be deemed guilty of manslaughter in the first degree."¹²²

In 1930, the Florida Supreme Court described the attitude of

116. Application of the President and Directors of Georgetown College, 331 F.2d 1000, 1009 (Wright, J., sitting alone), *cert. denied*, 377 U.S. 978 (1964).

117. D.C. CODE ANN. § 6-2428 (Supp. 1984).

118. D.C. CODE ANN. § 21-545 (1981).

119. 29 ENCYCLOPAEDIA BRITANNICA 326 (15th ed. 1985).

120. Act of Feb. 10, 1832, No. 55, § 1, 1832 Fla. Laws 63, 63 (codified at FLA. COMP. PUB. ACTS 15 (Duval, Tallahassee 1839); FLA. STAT. LAW div. 4, tit. 1, ch. 1, § 1, at 489 (Thompson, Boston 1847); FLA. STAT. LAW ch. 41 § 1, at 210 (Bush, Tallahassee 1872)). See also Act of Nov. 6, 1829, § 1, 1829 Fla. Laws 8, 8-9 (earlier adoption of common law with somewhat different language).

121. U.S.C.S. CONST., amend. XIV explanatory note (Law. Co-op. 1984).

122. Act of Aug. 6, 1868, ch. 1637 (No. 13), subchap. 3, sec.9, 1868 Fla. Laws 61, 64 (successively codified at FLA. STAT. LAW ch. 43, § 9, at 213 (Bush, Tallahassee 1872); Fla. Laws ch. 55 § 6, at 351 (McClellan 1881); FLA. REV. STAT. § 2385 (1892); FLA. GEN. STAT. § 5040 (1906); FLA. REV. GEN. STAT. § 5040 (1920); FLA. COMP. GEN. LAWS § 7142 (1927)). Act of June 15, 1971, ch. 71-136, sec. 716, 171 Fla. Laws 552, 839 (changed the penalty to second degree felony) (codified at FLA. STAT. ANN. § 782.08 (West 1976)).

Florida law toward suicide:

No sophistry is tolerated in consideration of legal problems which seek to justify self-destruction as commendable or even a matter of personal right, and therefore such an argument is unsound which seeks to prove that an accusation unfounded in fact that a person sought to destroy his own life is not reprehensible but a normal thought reflecting in no wise upon the wickedness of the person accused of suicide.

Suicide at common law was dispunishable; yet the repulsion of the state for such an act was manifested by attain of blood, confiscation of the instrument producing death, and public evidence of the disgrace of the deceased. Such manifestations by law are now by statute abolished, but the court may nevertheless take judicial notice that an act of suicide arouses in the minds of those who become informed of it a feeling of repulsion, although it may be commingled with sentiments of pity.¹²³

In 1969, the supreme court unanimously turned back a constitutional challenge to a law mandating that motorcyclists wear helmets. The court stated:

These unwilling cyclists must obey this law. We admire John Stuart Mill's Essay on Liberty, which their counsel cite to persuade us that the State of Florida has unconstitutionally infringed on their right to be left alone. But Mill said there that "no person is an entirely isolated being: it is impossible for a person to do anything seriously or permanently hurtful to himself, without mischief reaching at least to his near connections, and often far beyond them." If he falls we cannot leave him lying in the road.¹²⁴

Today, the 1868 crime of assisting self-murder remains on the Florida books, although it is now a felony of the second degree.¹²⁵

GEORGIA

Georgia was chartered as the last of the original thirteen colonies in 1732, and received its first English settlement in the following year. In 1752, the independent government of the colony was surrendered by the proprietors in favor of direct British rule.¹²⁶ It

123. *Blackwood v. Jones*, 111 Fla. 528, 532-33, 149 So. 600, 601 (1933). The court was deciding an appeal in a wrongful death case arising from an incident in which an automobile struck a woman crossing in front of it. Counsel for the plaintiff, in closing argument, charged the defendant with trying to escape liability by implying that the woman was committing suicide. Counsel for the defendant asserted that he made no such implication, and objected that the claim stating that he had was prejudicial. The Florida Supreme Court held the trial judge's refusal to order the jury to ignore the offending claim was error. In the quoted language, the court described the negative attitude toward suicide to demonstrate that a false allegation of suicide would turn the veniremen against one they were unfairly led to believe was making such an allegation.

124. *State v. Eitel*, 227 So. 2d 489, 491 (Fla. 1969) (citation omitted).

125. See *supra* note 122.

126. 29 THE NEW ENCYCLOPAEDIA BRITANNICA 327 (15th ed. 1985).

seems clear that in the first century of Georgia's existence the common law of crimes was held applicable, for in 1816 the legislature, in an act specifying a number of crimes and punishments, added "all other crimes or offenses against the persons of citizens not mentioned or enumerated in this code, but heretofore subject to prosecution by the laws adopted or in force in this state, shall, in future be punished by fine and imprisonment" ¹²⁷

A successor provision with the same impact was repealed in 1833, ¹²⁸ which led to a subsequent holding by the superior court of Georgia that from that date only statutory offenses, and no common law crimes, would be recognized. ¹²⁹

In 1876 (eight years after Georgia's vote to ratify the fourteenth amendment on July 21, 1868), ¹³⁰ the Supreme Court of Georgia, in deciding that life insurance should be paid to the widow of a suicide on the grounds that the deceased was insane when he killed himself, reviewed the English common law precedent and legal literature on suicide and characterized it thus: "[S]uicide, . . . both in ordinary and legal language, is something more than self-sought and self-inflicted death. It is a species of crime or wickedness—something wrong; a kind of self-murder." ¹³¹

In 1982, the Georgia Supreme Court ruled that a prisoner might starve himself to death as an aspect of the constitutional right to privacy. It relied on denial of treatment cases, but quoted with approval the language of the trial court that, "[The state] . . . has no right to destroy a person's will by frustrating his attempt to die if necessary to make a point." ¹³²

The Georgia statutes have never incorporated a criminal provision relating in express terms to suicide or its assistance, but current law does specify that "[t]he making of a living will pursuant to this chapter shall not, for any purpose, constitute suicide." ¹³³

127. Act of Dec. 19, 1816, div. 5, § 46 (codified at GA. COMP. LAWS, No. 380, div. 5, § 46, at 572 (1821)); *re-enacted* by Act of Dec. 20, 1817, div. 4, § 46 (codified at GA. COMP. LAWS, No. 381, Div. 4, § 46, at 620 (1821)). In 1822, this was replaced by a provision for punishment of "all crimes and misdemeanors which were recognized by the criminal laws in force in the state, previous to the passage of [the 1816 Penal Code]." Act of Dec. 20, 1820, § 1, 1820 Ga. Laws 99, 99 (codified at GA. DIGEST OF THE LAWS, Penal Laws § 261 (1822)); GA. DIGEST OF THE LAWS Penal Laws § 5, at 276, § 7, at 277 (1831)).

128. Penal Code, div. 15, § 2 1833 Ga. Laws 143, 314-15.

129. *White v. State of Georgia*, 51 Ga. 285, 288 (1873).

130. U.S.C.A. CONST. amend. XIV explanatory note, at 11 (Law. Co-op. 1984).

131. *Life Association of America v. Waller*, 57 Ga. 533, 536 (1876).

132. *Zant v. Prevente*, 248 Ga. 832, 834, 286 S.E.2d 715, 717 (1982).

133. Act of Apr. 5, 1984, No. 1315, sec. 1, § 31-32-9(a), 1984 Ga. Laws 1477, 1485 (codified at GA. CODE ANN. § 31-32-9(a) (Mich. 1985)).

Thus, by implication, the Georgia legislature must consider such an offense to exist. Georgia law also provides that one who is "mentally ill and . . . presents a substantial risk of imminent harm to himself" may be involuntarily committed.¹³⁴

HAWAII

Hawaii was annexed to the United States in 1898, made a territory in 1900, and granted statehood in 1959.¹³⁵ Common law crimes have never been recognized in Hawaii¹³⁶ but, with regard to suicide, Hawaii statutes declare that one who causes another to commit suicide is guilty of manslaughter¹³⁷ and that the use of force to prevent one from committing suicide is justifiable.¹³⁸

IDAHO

Idaho was ceded to the United States by Great Britain as a part of Oregon in 1846, was divided between the territories of Oregon and Washington in 1853, and became the Territory of Idaho in 1863. After yielding portions to Montana in 1864 and Wyoming in 1868, it was admitted as a state in 1890.¹³⁹ Although there is an absence of judicial and statutory law specifically concerning suicide, common law crimes have been recognized by statute in Idaho since 1864.¹⁴⁰ Idaho law also provides that an individual found to be "mentally ill . . . and . . . because of such condition, likely to injure himself" may be involuntarily committed.¹⁴¹

ILLINOIS

Illinois entered the United States as a part of Virginia when the

134. GA. CODE ANN. § 37-3-1(12) -18(c) (1982 & Supp. 1984).

135. 29 THE NEW ENCYCLOPAEDIA BRITANNICA 457 (15th ed. 1985).

136. See Act of Nov. 25, 1892, ch. 57, § 5 1892 Hawaii Sess. LAWS 90, 91 (codified at HAWAII REV. LAWS § 1 (1905); HAWAII REV. LAWS § 1 (1915); HAWAII REV. LAWS § 1 (1925); HAWAII REV. LAWS § 1 (1935); HAWAII REV. STAT. § 1-1 (1955); HAWAII REV. STAT. § 1-1 (1968); HAWAII REV. STAT. § 1-1 (1976)).

137. Hawaii Penal Code, Act 9, sec. 1, § 702 (1)(b), 1972 Hawaii Laws 32, 86 (codified at HAWAII REV. STAT. § 707-702 (1)(b)(1976)).

138. Hawaii Penal Code, Act 9, sec. 1, § 308 (1), 1972 Hawaii Laws 32, 56 (codified at HAWAII REV. STAT. § 703-308 (1) (1976)).

139. 29 ENCYCLOPAEDIA BRITANNICA 423 (15th ed. 1985).

140. Act of Jan. 4, 1864, 1864 Idaho Sess. Laws 527, 527, *Idaho Crimes & Punishments* § 151 (1864); IDAHO COMP. & REV. LAWS *Crimes & Punishments* § 151, at 360 (1875); IDAHO REV. STAT. § 7332 (1887); IDAHO REV. CODES § 7332 (1908); IDAHO COMP. LAWS § 7332 (1919); IDAHO COMP. STAT. § 8604 (1919); IDAHO CODE ANN. § 17-303 (1932); IDAHO CODE § 18-303 (1979).

141. IDAHO CODE § 66-329(k) (Supp. 1984).

British were defeated at Koskasia during the Revolutionary War, was made a separate territory in 1809, and became a state in 1818.¹⁴² Illinois voted to ratify the fourteenth amendment on January 15, 1867.¹⁴³

In November 1897, the Illinois Supreme Court, in the course of construing a life insurance contract, took note that, “[s]uicide, at common law, ranked as a crime, and was punished by forfeiture of goods and an ignominious burial.”¹⁴⁴ In contrast, the court stated further that “In America, however, self-destruction is not a crime”¹⁴⁵ Nevertheless, in 1902 the same court, holding that a life insurance benefit need not be paid to the beneficiary of an insured who shot himself, wrote, “There is no evidence whatever here that the deceased . . . did not have sufficient mental understanding to realize the moral turpitude of his act of self-destruction”¹⁴⁶

The following year, the Illinois Supreme Court was confronted with a murder case arising out of an alleged assistance of suicide in *Burnett v. People*.¹⁴⁷ The defendant and the deceased, each married to another had been having an affair when the deceased learned that her husband’s promotion meant that she would have to move to another state. She purchased morphine and urged the defendant to commit suicide with her. When they were found in a hotel room the woman was dead from an overdose of morphine and her friend was stuporous from gas that had been turned on in the room.¹⁴⁸

Although Illinois recognized common law crimes, the Illinois Supreme Court expressly rejected the view that suicide was thus an Illinois crime:

By the English common law suicide was a felony, and the punishment for him who committed it was interment in the highway with a stake driven through the body, and the forfeiture of his lands, goods, and chattels to the king. We adopted the English common law . . . as far as the same was applicable to our conditions and institutions and of a general nature; but as we have never had a forfeiture of goods, or seen fit to define what character of burial our citizens shall enjoy, we have never regarded the English law as to

142. 29 ENCYCLOPAEDIA BRITANNICA 365 (15th ed. 1985).

143. U.S.C.S. CONST. amend. XIV explanatory note, at 11 (Law. Co-op. 1984).

144. Grand Lodge Indep. Order of Mut. Aid v. Wieting, 168 Ill. 408, 418-19, 48 N.E. 59, 62 (1897).

145. *Id.* at 419, 48 N.E. at 62.

146. Dickerson v. Northwestern Mut. Life Ins. Co., 200 Ill. 270, 274-75, 65 N.E. 694, 696 (1902).

147. Burnett v. People, 204 Ill. 208, 68 N.E. 505 (1903).

148. *Id.* at 212-13, 68 N.E. at 507.

suicide as applicable to the spirit of our institutions.¹⁴⁹

In any event, the illegality of suicide was not central to the disposition of the case because, after noting that the defendant was charged with administering poison to the suicide victim, or at least persuading her to take it, the court stated "We think proof of either one of these charges would warrant the conviction for murder."¹⁵⁰

The same day that it decided *Burnett*, the Illinois Supreme Court upheld an award of life insurance to the widow of a suicide, and concluded that "suicide is not a crime under the statutes of this state."¹⁵¹ The court then turned to a further contention raised by the insurance company:

Counsel for appellant also say that, while suicide itself may not be a crime, yet the attempt to commit suicide is a crime In the case at bar, suicide was actually accomplished, and therefore it cannot be said that the deceased was guilty of the attempt to commit suicide. "If the act fails to accomplish its purpose, it constitutes an attempt; but, if the result of it is the consummation of the purpose, the act is not commonly designated as an attempt."¹⁵²

It is not clear from the opinion whether the court actually regarded the attempt to commit suicide as a retained common law crime, or whether it simply assumed this fact for the purpose of analyzing the argument and disposing of the claim as it did.

The Illinois Living Will Act, adopted in 1983, provides: "The withholding or withdrawal of life-sustaining procedures from a qualified patient in accordance with the provisions of [the] Act shall not, for any purpose, constitute a suicide."¹⁵³ In addition, a person is subject to involuntary admission to a mental health facility if found "mentally ill and . . . because of [that] illness is reasonably expected to inflict serious physical harm upon himself. . . ."¹⁵⁴

149. *Id.* at 222, 68 N.E. at 510.

150. *Id.*

151. *Royal Circle v. Achterrath*, 204 Ill. 549, 565-66, 68 N.E. 492, 498 (1903).

152. *Id.* at 566-67, 68 N.E. at 498 (citing *Darrow v. Family Fund Soc'y*, 116 N.Y. 537, 543, 22 N.E. 1093, 1095 (1889)).

153. Illinois Living Will Act., P.A. 83-824, § 9(a), 1983 Ill. Laws 5352, 5326 (codified at ILL. REV. STAT. ch. 110 ½, § 709(a), ILL. ANN. STAT. ch. 110 ½, § 709(a) (Smith-Hurd Supp. 1985)).

154. Mental Health and Developmental Disabilities Code, P.A. 80-1414, § 1-119, (codified at, ILL. ANN. STAT. ch. 91 ½, § 1-119 (Smith-Hurd Supp. 1985)).

INDIANA

Indiana was taken from Great Britain in 1779 during the Revolutionary War, and was officially ceded to the United States as part of the Northwest Territory by the Treaty of Paris in 1783. In 1816, Indiana was admitted as a state,¹⁵⁵ and its legislature voted to ratify the fourteenth amendment on January 29, 1867.¹⁵⁶ By a statute adopted in 1818, the common law was made applicable in Indiana.¹⁵⁷ In 1852, however, all common law crimes were abolished.¹⁵⁸

In 1932, the Indiana Supreme Court dealt with the appeal of a murder conviction arising from a kidnapping and brutal rape and battery.¹⁵⁹ After an especially horrible assault, the victim managed to take poison. The defendant, informed of this, refused to allow her medical attention but, after a significant delay, arranged for her return to her home. Some time later, the victim died of complications ultimately attributable to the ingested poison. The court upheld the murder conviction:

[I]f it be true, as appellant contends, that . . . [the victim] voluntarily committed suicide, that is, that she took her own life while in sound mind, such an act on her part would constitute an intervening responsible agent such as would break the causal connection between the acts of appellant and the death But . . . it is alleged . . . that [the victim] was, at the time she swallowed the poison, distracted with the pain and shame inflicted upon her by appellant [T]hen . . . taking the poison was not the act of a responsible agent, and the chain of cause and effect between the acts of appellant and the death would not be broken, and appellant would be guilty of murder, provided the alleged irresponsible mental condition . . . could be said to be the natural and probable result of the alleged treatment by appellant.¹⁶⁰

In a 1944 case, the Indiana Supreme Court provided a lengthy and revealing discourse on the interrelation of public policy toward suicide and the law in its opinion affirming a judgment granting

155. 29 ENCYCLOPAEDIA BRITANNICA 369 (15th ed. 1985).

156. U.S.C.S. CONST., Amend. XIV, explanatory note, at 11 (Law. Co-op. 1984 & Supp. 1985).

157. Act of Jan. 2, 1818, ch. 52, sec. 1, 1817 Ind. Acts 308, 308-309 (subsequently codified at IND. REV. LAWS ch. 58, at 256-57 (1824); IND. REV. LAWS ch. 55, at 330 (1831); IND. REV. STAT. ch. 60, at 398 (1838); IND. REV. STAT. ch. 60, at 1030 (1843); IND. REV. STAT. ch. 611, § 1 (1852)).

158. Hopewell v. State, 22 Ind. App. 489, 492, 54 N.E. 127, 128 (1899). See also Knotts v. State, 243 Ind. 501, 504; 187 N.E. 2d 571, 573 (1963); IND. CODE ANN. § 1-1-2-2 (West 1981).

159. Stephenson v. State, 205 Ind. 141, 179 N.E. 633 (1932).

160. *Id.* at 158-59, 179 N.E. at 639.

disability insurance benefits to one who had blinded himself in the course of a suicide attempt. The court stated:

There was a time when life insurance was prohibited by law, upon the theory that it operated as an incentive to those who would benefit by the termination of a life to hasten that end. . . . Suicide was once regarded as an infamous crime and, since a penalty could not be inflicted on the perpetrator, it was decreed that his estate should be forfeited to the crown and his body subjected to the indignity of being buried in the highway without benefit of clergy These harsh concepts have long since been softened by force of an enlightened public opinion. It is now universally accepted that life insurance is not necessarily inducive of murder, and we think it may also be said that the more human view now is that suicide is usually the result of some mental derangement which may or may not amount to actual insanity.

. . .

We have no common law crimes in this state and there is no statute declaring an attempt to commit suicide a public offense

The precise issue here is not whether suicide merits public condemnation, but whether a contract of insurance which is silent on the subject of suicide is enforceable if the insured, while sane, takes his life. That self-destruction ought never to be encouraged may be conceded. . . .

We have already alluded to the more charitable attitude now generally indulged on behalf of those who take their own lives or attempt to do so. The modern view is that one who does such a rash thing is usually the unfortunate victim of some mental or physical disturbance, burden or pressure which is sufficient to warp the natural human impulse to survive, though it may not amount to actual unsoundness of mind.¹⁶¹

The court noted further that "[a]side from the purely moral aspects of self-destruction, the most plausible argument in favor of the view that public policy forbids recovery in a case like the one at bar is that suicide places an undue burden upon the government to care for the perpetrator's dependents."¹⁶² Additionally, the court pointed out that refusing to allow private insurance benefits to go to these dependents would increase rather than reduce that burden.¹⁶³

The supreme court was less sympathetic, however, in a 1953 case involving a homicide charge against a suicide attemptor who took the life of someone trying to prevent the suicide.¹⁶⁴ Upholding the trial judge's refusal to charge the jury "that an attempt to commit suicide is not an unlawful act in the State of Indiana," the court

161. Prudential Ins. Co. of Am. v. Rice, 222 Ind. 231, 235, 238-240, 52 N.E.2d 624, 625-27 (1944).

162. *Id.* at 239, 52 N.E.2d at 627.

163. *Id.*

164. Wallace v. State, 232 Ind. 700, 116 N.E.2d 100 (1953).

said:

That which is unlawful is not necessarily criminal. For example, violations of the rights of others in torts are "unlawful," but some are not "criminal."

In this case there is evidence that appellant was engaged in the act of attempting suicide. The decedent, a good Samaritan, intervened at the cost of her life.

Appellant now seeks to avoid punishment by saying that his attempt to commit suicide was not "unlawful."

Neither legal nomenclature nor Justice agree. Self-destruction is against the law of God and man.¹⁶⁵

In 1976, the legislature created the independent felony of "causing suicide" which applied to one "who intentionally cause[d] another human being by force, duress, or deception, to commit suicide."¹⁶⁶ Indiana's legislature rejected a proposal to include in the offense "wilfully causes another to commit suicide and, having the present ability, . . . fails to rescue the person attempting suicide before death."¹⁶⁷ The Indiana Criminal Law Study Commission noted that:

Suicide is not a crime in Indiana now nor under the Proposed Code as the Commission believed this was not an area of law in which criminal sanctions can be effective. However, intentionally causing another to commit suicide is a different matter and should properly be a prescribed homicide This section requires the person to actually cause the suicide and arguably does not prescribe the mere aiding or soliciting another to commit suicide. Furthermore, this section applies only when the actor is not himself the instrument of death; for in those causes [sic] the charge should be murder notwithstanding the consent of the deceased.¹⁶⁸

In 1982, a conviction of a parent for causing the suicide of his or her minor child was made grounds to institute a proceeding to terminate parental rights to all the parent's children.¹⁶⁹ Under current Indiana law, a person who "as a result of mental illness presents a substantial risk that he will harm himself" may be involuntarily committed.¹⁷⁰

165. *Id.* at 701, 116 N.E.2d at 101.

166. Act of Feb. 25, 1976, P.L. 148, sec. 2, § 35-42-1-2, 1976 Ind. Acts 718, 731 (codified as amended at IND. CODE ANN. § 35-42-1-2 (West 1978)).

167. IND. CODE ANN. § 35-42-1-2 commentary, at 229 (West 1978).

168. *Id.* at 229-30.

169. Act of Feb. 25, 1982, P.L. 183, sec. 5, § 31-6-5(a)(2), 1982 Ind. Laws 1350, 1354 (codified at IND. CODE ANN. § 31-6-5-4.1(a)).

170. IND. CODE ANN. §§ 16-14-9-1(c), -6.5(a), -7(e), -9(g), -10(e)&(f) (Burns Supp. 1985).

IOWA

Iowa became part of the United States through the 1803 Louisiana Purchase from France. It became a territory in 1838, and a state in 1846.¹⁷¹ The Iowa legislature voted to ratify the fourteenth amendment on April 3, 1868.¹⁷² Iowa has rejected the view that there are common law offenses in that state, and apparently has never had a statute declaring either suicide or assisted suicide to be criminal. In fact, the Iowa Supreme Court, in 1933, in overturning a murder conviction of a man who had shot a woman in the course of a struggle in which she was trying to wrest from him the revolver with which he was attempting suicide, emphatically affirmed that suicide was not unlawful:

Neither the attempt to commit suicide nor suicide is a prohibited act under the code of this state. . . .

. . . [A]n act, to be unlawful, must be contrary to law It is true that at common law, under an act of Parliament, suicide was a felony, and the property of the *felo de se* was forfeited to the crown, and he was ignominiously buried in the public highway and a stake driven through his body. Such a provision does not exist under the Code of Iowa. It is . . . settled in this state that there are no common law offences and that all crimes are statutory. . . .

We reach the conclusion, therefore, that under the Iowa law suicide is not unlawful, and that an attempt to commit it . . . cannot be considered an unlawful act.¹⁷³

In 1943, however, the Iowa Supreme Court, emphasizing the evidentiary presumption against suicide in an insurance case, took note "that self-destruction is contrary to the general conduct of mankind and that suicide by a rational man is an act of moral turpitude."¹⁷⁴ Iowa law also provides that suicides are among the deaths affecting the public interest which county medical examiners are to investigate,¹⁷⁵ and that one "who is afflicted with mental illness and because of that illness lacks sufficient judgment to make responsible decisions with respect to his or her hospitalization or treatment, and who [i]s likely to physically hurt himself or herself . . . if allowed to remain at liberty without treatment" is subject to involuntary commitment.¹⁷⁶

171. 29 ENCYCLOPAEDIA BRITANNICA 371 (15th ed. 1985).

172. U.S.C.S. CONST., amend. XIV, explanatory note, at 11 (Law. Co-op. 1984).

173. *State v. Campbell*, 217 Iowa 848, 850-51, 853, 251 N.W. 717, 718-19 (1933).

174. *Brown v. Metropolitan Life Ins. Co.*, 233 Iowa 5, 10, 7 N.W.2d 21, 24(1943).

175. IOWA CODE ANN. § 331.802 (3)(a)(West 1983).

176. *Id.* at §§ 229.1 (2)(a), 229.13 (West Supp. 1984-85).

KANSAS

Kansas was also part of the Louisiana Territory purchased from France in 1803, but was officially designated Indian Territory until the Territory of Kansas was created in 1854.¹⁷⁷ It was admitted as a state in 1861,¹⁷⁸ and voted to ratify the fourteenth amendment on January 18, 1867.¹⁷⁹ In 1855, the legislature passed a statute providing, "Every person deliberately assisting another in the commission of self-murder, shall be deemed guilty of manslaughter in the first degree." This remained the law until 1969¹⁸⁰ when it was replaced by the felony of "assisting suicide," defined by the Kansas legislature as "intentionally advising, encouraging or assisting another in the taking of his own life."¹⁸¹ The Advisory Committee that urged the adoption of the new section wrote, "Suicide is not now a crime in Kansas. Hence, one who aids and abets a suicide is not guilty of a crime in the absence of a statute so providing. Manslaughter, as defined heretofore, probably does not include this situation. Therefore, a specific prohibition seems necessary."¹⁸² In other words, the new provision was thought necessary to ensure that those who aided or abetted suicide by advice or encouragement, and not merely those who directly assisted it, did not escape punishment.¹⁸³

In 1981, the Kansas Supreme Court upheld the conviction for first degree murder of one who, at the deceased's request, injected him with a cocaine overdose and then shot him.¹⁸⁴ Citing an Oregon case,¹⁸⁵ it distinguished between "assisting suicide" in the events leading up to death, such as providing the death instru-

177. 29 ENCYCLOPAEDIA BRITANNICA 74 (15th ed. 1985).

178. *Id.*

179. U.S.C.S. CONST., amend. XIV, explanatory note, at 11 (Law. Co-op. 1984).

180. KAN. TERR. STAT. ch. 48, § 8 (1855), *reenacted in* Act of Feb. 3, 1859, ch. 28, sec. 8, 1859 Kan. Sess. Laws 231, 232 (successively codified at KAN. GEN. LAWS, ch. 33, § 8 (1862); KAN. GEN. STAT., ch. 31 § 13 (1868); KAN. GEN. STAT. § 1356 (Dassler 1876); KAN. COMP. LAWS § 1749 (Dassler 1879); KAN. COMP. LAWS § 1749 (Dassler 1881); KAN. COMP. LAWS § 1860 (Dassler 1885); KAN. GEN. STAT. § 2134 (Taylor 1889); 2 KAN. GEN. STAT. ch. 100, § 13 (Webb 1897); KAN. GEN. STAT. § 1951 (Dassler 1899); KAN. GEN. STAT. § 2501 (Dassler 1909); KAN. GEN. STAT. § 3374 (McIntosh 1915); KAN. REV. STAT. § 21-408 (1949)). This provision was later repealed by Kansas Criminal Code, ch. 180, sec. 21-4701, 1969 Kan. Sess. Laws 440, 503.

181. Kansas Criminal Code, ch. 180, sec. 21-3406, 1969 Kan. Sess. Laws 440, 452 (codified at KAN. STAT. ANN. § 21-3406 (1974)).

182. KAN. CRIM. CODE ANN. § 21-3406 advisory committee comment (Vernon 1971).

183. *Id.* at author's note.

184. *State v. Cobb*, 229 Kan. 522, 625 P.2d 1133 (1981).

185. The case cited by the *Cobb* court was *State v. Bouse*, 199 Or. 676, 703, 264 P.2d 800, 812 (1953).

ment, and actually performing the death-dealing act, which constitutes murder.¹⁸⁶ Kansas also provides for the involuntary commitment of "any person who is mentally impaired to the extent that such person is in need of treatment and who is dangerous to self and . . . who lacks sufficient understanding or capacity to make responsible decisions with respect to the person's need for treatment, or . . . who refuses to seek treatment."¹⁸⁷

KENTUCKY

After first being settled in 1769 as a part of Virginia, the Commonwealth of Kentucky became a separate state in 1792.¹⁸⁸ The legislature voted against ratification of the fourteenth amendment in 1867.¹⁸⁹

In an 1869 Kentucky Court of Appeals opinion, the court termed suicide "monstrous."¹⁹⁰ In 1904, the same court, quoting Blackstone and a group of other treatises, both English and American, held that suicide was a common law felony in Kentucky.¹⁹¹ Therefore, the court concluded, one could be convicted of being an accessory before the fact for advising or assisting a suicide.¹⁹² The court noted, however, that one peculiar aspect of the common law with regard to accessories to suicide had not been adopted in Kentucky. To illustrate Kentucky's divergence on this point, the court quoted with approval *Robertson on Kentucky Criminal Law and Procedure*:

Suicide, or self-murder, is a felony at the common law. It has therefore been held that, if one kills himself upon this advice of another, the advisor, if present when the act is done, is guilty of murder as a principal in the second degree. If the advisor is absent at the time of the suicide, he cannot be punished at the common law, because, being an accessory before the fact, the principal must first be convicted; but by statute in this state, . . . accessories before the fact may be arrested and tried, although the principal has not been taken or tried, and the rule of the common law does not, therefore, apply.¹⁹³

In 1974, the above developments were rendered moot as all com-

186. 229 Kan. at 526, 625 P.2d at 1136.

187. KAN. STAT. ANN. §§ 59-2902(a),-2911 (1983).

188. 29 ENCYCLOPAEDIA BRITANNICA 334 (15th ed. 1985).

189. U.S.C.S. CONST. amend. XIV, explanatory note, at 12 (Law. Co-op. 1984).

190. St. Louis Mut. Life Ins. v. Graves, 69 Ky. (6 Bush) 268, 278 (1869).

191. Commonwealth v. Hicks, 118 Ky. 637, 82 S.W. 265 (1904).

192. *Id.*, 82 S.W. at 267.

193. *Id.* at 642, 82 S.W. at 266 (quoting Robertson on Kentucky Criminal Law and Procedure § 185 ()).

mon law offenses in Kentucky were abolished.¹⁹⁴ In the same act that abolished common law offenses, however, the legislature affirmatively established that anyone could use physical force to prevent a suicide.¹⁹⁵ In addition, Kentucky law also states that one who “presents a danger or threat of danger to self . . . as a result of . . . mental illness” may be involuntarily hospitalized.¹⁹⁶

LOUISIANA

Louisiana, from 1731 to 1762 and from 1800 to 1803, a colony of France (in the intervening years it was owned by Spain), was ceded to the United States in the 1803 Louisiana Purchase. A portion of the land became the Territory of Orleans which in 1812 was admitted as the state of Louisiana.¹⁹⁷ It voted to ratify the fourteenth amendment on July 9, 1868.¹⁹⁸

In 1752, while still a colony of France, Louisiana was prepared to forfeit the goods of the suicide Andre Sauvinien, whose memory and good name were to be “tarnished and sullied forever.” The forfeiture was prevented, however, when the superior counsel ruled that the self-destruction was due to insanity.¹⁹⁹ During Spanish dominion, a sentence on the body of the suicide Jean Baptiste was actually carried out. In 1765, his corpse was dragged to the public square and hanged upside down for twenty-four hours.²⁰⁰

Since 1850, however, no Louisiana laws have been found explicitly forbidding suicide or its assistance. In 1945, an intermediate appellate court, in an insurance case, did state: “[S]elf-preservation is the first law of nature”—for that matter, the first, the sec-

194. Kentucky Penal Code, ch. 406, sec. 2(1), 1974 Ky. Acts 831, 831 (codified at Ky. REV. STAT. § 500.020 (1985)). From the time of its very first constitution in 1792, however, Kentucky had always prohibited the forfeiture of the estate of a suicide. See KY. CONST. of 1792, art. 12, § 21; KY. CONST. of 1799, art. 9, § 21; KY. CONST. of 1850, art. 13, § 23; KY. CONST. § 21.

195. Kentucky Penal Code, ch. 406, sec.35 (1)(a), 1974 Ky. Acts 831, 838 (codified at Ky. REV. STAT. § 503.100 (1)(a)(1985)).

196. KY. REV. STAT. § 202 A.026 (1982).

197. 29 ENCYCLOPAEDIA BRITANNICA 337 (15th ed. 1985).

198. U.S.C.S. CONST., amend. XIV explanatory note, at 11 (Law. Co-op. 1984).

199. Letter from Dr. Steven G. Reinhardt, Archivist, Louisiana Historical Center to Burke [Thomas] Balch (Sept. 23, 1985) (on file at the offices of the DUQ. L. REV.). The information is based on archival material designated LHC RGI Apr. 19, 1752 (1) & (2), Apr. 21, 1752 (1) & (2), and May 6, 1752 (1) & (6). The French Criminal Ordinance of 1670, which governed Louisiana while a French colony, set forth a procedure for trying the cadaver in cases where suicide was alleged. Ordonnance Criminelle, Sainte-Germain-en-Laye (1670) in F. ISAMBERT, RECUEIL GENERALE DES ANCIENNES LOIS FRANCAISES (Paris 1829).

200. Reinhardt letter, *supra* note 199. The information is based on archival material designated LCH RGI Nov. 23, 1765 (1), (2), (3), (4), (5), and (6).

ond and the third.”²⁰¹ Current Louisiana law provides that a court may involuntarily commit one who “is dangerous to self . . . as a result of . . . mental illness.”²⁰²

MAINE

Maine was a part of Massachusetts until admitted to the Union as a separate state in 1820.²⁰³ Its legislature voted to ratify the fourteenth amendment on January 19, 1867.²⁰⁴

In 1906, Maine’s Supreme Judicial Court overturned a conviction for an attempt to commit suicide on the ground that no such offense existed.²⁰⁵ The reasoning of the court was as follows: because forfeiture had been abolished, suicide itself was not punishable and, therefore, was not a crime; since the crime of attempt, by definition, required an attempt to do something the accomplishment of which would be a crime, attempted suicide could not fall within it.²⁰⁶ The court nevertheless acknowledged that common law offenses remained in Maine, and took note that attempted suicide was punished in England under the common law. However, the court stated, “If the accomplished act of suicide had not . . . been a punishable crime [in England], the attempt to commit the act could not have been held to be a punishable misdemeanor.”²⁰⁷ Therefore, the court concluded, “[a]lthough [suicide] may be deemed ethically reprehensible and inconsistent with the public welfare, it has never been declared by the Legislature or held by the court of this state to be such a public wrong as will subject the doer to legal punishment.”²⁰⁸

In a 1927 worker’s compensation case, Maine’s Supreme Judicial Court remarked, “Men naturally heed the instinct of self-preservation. The presumption of the law is against self-murder.”²⁰⁹

In 1975, the legislature enacted a statute punishing one who “aids or solicits another to commit suicide, and the other commits or attempts suicide.”²¹⁰ The commission comment to the new law

201. *Oubre v. Mutual Life Ins. Co. of New York*, 21 So.2d 191, 192 (La. Ct. App. 1945).

202. LA. REV. STAT. ANN. § 28:55(E)(West Supp. 1984).

203. 29 ENCYCLOPAEDIA BRITANNICA 277 (15th ed. 1985).

204. U.S.C.S. CONST., amend. XIV, explanatory note, at 11 (Law. Co-op. 1984).

205. *May v. Pennell*, 101 Me. 516, 64 A. 885 (1906).

206. *Id.* at 518, 64 A. at 886-87.

207. *Id.* at 519, 64 A. at 887.

208. *Id.* at 517, 64 A. at 886.

209. *Moriarty’s Case*, 126 Me. 358, 361, 138 A. 555, 556-57 (1927).

210. Maine Criminal Code, ch. 499, sec. 1, § 206 1975 Me. Laws 1273, 1296 (codified at ME. REV. STAT. ANN. tit. 17A, § 204 comment (1983)).

states, "The participation of the victim in bringing about his own death does not make the forbidden conduct free from fault."²¹¹ In 1977, the legislature added a law providing that intentionally or knowingly causing another to commit suicide by force, duress or deception is murder.²¹² Both laws are still in effect. In addition, a Maine court may involuntarily commit one who "is mentally ill" whose "recent actions and behavior" demonstrate a "substantial risk of physical harm to the person himself as manifested by evidence of recent threats of, or attempts at, suicide"²¹³

MARYLAND

The colony of Maryland, chartered in 1632, was first settled by the English in 1634.²¹⁴ It was one of the original thirteen states at the time of the Declaration of Independence. The Maryland legislature voted against ratification of the fourteenth amendment in 1867.²¹⁵

As it has been from the early days of the colony, the common law of crimes is in effect in Maryland unless altered by statute or regarded by the courts as inapplicable to changed conditions.²¹⁶ Since 1776, forfeiture of an estate for crime has been prohibited.²¹⁷

In 1940, an individual who had survived a suicide pact was convicted of second degree murder. In the case, the defendant and the deceased had sat together in a closed car while a hose connected to the car's exhaust pipe channelled carbon monoxide fumes into the car.²¹⁸ The court, whose verdict was not appealed, did not base its opinion on the "illegality of suicide." In fact, the court "by dictum, did point out that while suicide is no longer punishable in this country or in England, it is still regarded as unlawful and criminal since it was a crime by the common law of England, which has

211. ME. REV. STAT. ANN. tit. 17A, § 204 comment (1983).

212. Act of indeterminate date, 1977, ch. 510, sec. 38, § 201(1)(C), 1977 Me. Laws 919, 925-26 (codified at ME. REV. STAT. ANN. tit. 17A, § 210(1)(c)(1983)).

213. ME. REV. STAT. ANN. tit. 34B, §§ 3801 (4)(A), 3864 (6)(A)(1)(Supp. 1978-1984).

214. 29 ENCYCLOPAEDIA BRITANNICA 298 (15th ed. 1985). For a discussion of the applicability of English common law to early Maryland, see Burgess-Jackson, *The Legal Status of Suicide in Early America: A Comparison With the English Experience*, 29 WAYNE L. REV. 57, 66 n.57 (1982).

215. U.S.C.S. CONST., amend. XIV, explanatory note, at 12 (Law. Co-op. 1984).

216. See *Pope v. State*, 284 Md. 309, 339-43, 396 A.2d 1054, 1072-74 (1978). See also MD. CONST. of 1776, decl. of rts. § 3; MD. CONST. decl. of rts. art. 5.

217. MD. CONST. of 1776, decl. of rts. art. 24; MD. CONST. of 1851, decl. of rts. art. 24; MD. CONST. of 1864, decl. of rts. art. 27; MD. CONST. decl. of rts. art. 27.

218. Note, *Criminal Liability of Participants in Suicide: State v. Williams*, 5 MD. L. REV. 324 (1941).

been adopted in Maryland, and no statute has changed the rule."²¹⁹ Rather, it directly held that the defendant's participation in causing the deceased's death amounted to murder, quoting with approval Wharton's *Criminal Law*:

Whoever is present, actually or constructively encouraging the violent and illegal death of another, is responsible for such death, even though it was voluntarily submitted to by the deceased. Thus, if two persons encourage each other to commit suicide jointly and one succeeds and the other fails in the attempt upon himself, he is a principal in the murder of the other.²²⁰

Commenting on the case, after reviewing a variety of treatises, as well as English and out of state precedents, a student writer concluded:

[T]here are no Maryland Court of Appeals decisions on which to support the points that have been developed with regard to the law of suicide, but, in all probability, Maryland will follow the rules that have been suggested, to wit, that either an active or passive participant in a suicide pact resulting in death to one only, is criminally responsible for the death; that an accomplice to a sole suicide, who is present at the time of the act, is also criminally liable, while an absent accomplice could not be brought to trial because of the accessory rule: that suicide and the attempt thereat are unlawful, and therefore the attempter is criminally responsible for injury or death to a bystander, which is the result of such attempt.²²¹

In 1981, the Maryland Court of Appeals, citing the note, said "We shall assume without deciding that suicide is a criminal or unlawful act in . . . Maryland"²²² for the purpose of ruling on whether a former wife could bring a contract or tort action against her former husband's estate on the ground that his suicide deprived her of alimony. The court held, however, that:

[W]hatever justifications are advanced for deeming suicide an unlawful act, it seems unlikely that protection of a former wife who was not physically present when the act occurred would be included. The State may have an interest in preserving the lives of its citizens, but it does not confer automatically a tort cause upon those persons who believe they have been injured by the illegal act.²²³

Under Maryland law, an individual who "has mental disorder" and "presents a danger to the life or safety of the individual" may

219. *Id.* at 325-26.

220. *Id.* at 325 (quoting 1 WHARTON, CRIMINAL LAW § 575 (12th ed. 1932)).

221. *See supra* note 218, at 331.

222. *Wilmington Trust Co. v. Clark*, 289 Md. 313, 321 n.5, 424 A.2d 744, 750 n.5 (1981).

223. *Id.* at 328, 424 A.2d at 754.

be involuntarily hospitalized.²²⁴

MASSACHUSETTS

Massachusetts was another of the original thirteen colonies, and a cradle of the American Revolution. It was first settled by the Pilgrims in 1620.²²⁵

Forfeiture, the common law punishment for suicide and other crimes, was prohibited by the Body of Liberties adopted in 1641.²²⁶ However, in 1660, the following act was passed:

SELF-MURTHER

This Court considering how far Satan doth prevail upon several persons within this jurisdiction, to make away themselves, judgeth that God calls them to bear testimony against such wicked and unnatural practices, that others may be deterred therefrom;

Do therefore Order, That from hence forth, if any person Inhabitant or Stranger, shall at any time be found by any Jury to lay violent hands on themselves, or be wilfully guilty of their own Death, every person shall be denied the privilege of being Buried in the Common Burying place of Christians, but shall be Buried in some Common High-way where the Select-men of the Town where such person did inhabit shall appoint, and a Cart-load of Stones laid upon the Grave as a Brand of Infamy, and as a warning to others to beware of the like Damnable practices.²²⁷

The practice mandated by this Act eventually fell into disuse,²²⁸ and the Act was repealed in 1823,²²⁹ a legislative action that, in the later view of the Supreme Judicial Court of Massachusetts, "May well have had its origin in consideration for the feelings of innocent surviving relatives."²³⁰

From 1700 into the first half of the nineteenth century, the verdict by which a coroner's jury found a death to be suicide generally took the following form: "the said A. B. in manner and form aforesaid, then and there voluntarily and feloniously, as a felon of himself, did kill and murder himself, against the peace of our sovereign Lord the King, his crown and dignity," or, after the revolution, "against the peace and dignity of the Commonwealth and the laws

224. MD. HEALTH-GEN. CODE ANN. § 10-617(a)(1)&(3)(Supp. 1984).

225. 29 ENCYCLOPAEDIA BRITANNICA 281 (15th ed. 1985).

226. *Body of Liberties*, art. 10 (1641), cited in *Commonwealth v. Mink*, 123 Mass. 422, 425-26 (1877).

227. *The General Laws and Liberties of Massachusetts Colony* (1672), reprinted in *THE COLONIAL LAWS OF MASSACHUSETTS* 137 (W. Whitmore ed. 1887).

228. *Mink*, 123 Mass. at 426.

229. Act of June 14, 1823, ch. 144, § 2, 1823 Mass. Acts 248, 248.

230. *Mink*, 123 Mass. at 429.

of the same."²³¹

An interesting series of cases on suicide has evolved in Massachusetts. In 1816, one Bowen was brought to trial for murder. He was imprisoned in a cell next to that of one Jewett, who was condemned to death. It was charged that Bowen urged Jewett to kill himself and to thus cheat the hangman, and that, persuaded by Bowen, he did so. Chief Justice Parker gave the following charge to the jury:

You have heard it said, gentlemen, that admitting the facts alleged in the indictment, still they do not amount to murder, for Jewett himself was the immediate cause and perpetrator of the act which terminated in his own destruction. That act of Bowen was innocent no one will pretend, but is his offense embraced by the *technical definition of a principal in murder*? Self-destruction is doubtless a crime of awful turpitude; it is considered in the eye of the law of equal heinousness with the murder of one by another. In this offense it is true the actual murderer escapes punishment; for the very commission of the crime, which the law would otherwise punish with its utmost vigor, puts the offender beyond the reach of its infliction. And *in this* he is distinguished from other murderers. But his punishment is as severe as the nature of the case will admit; his body is buried in infamy, and in England his property is forfeited to the king. Now, if the murder of one's self is felony the accessory is equally guilty as if he had aided and abetted in the murder of A by B; and I apprehend that if a man murders himself, and one stands by, aiding in and abetting the death, he is guilty as if he had conducted himself in the same manner when A murders B. And if one becomes the procuring cause of death, though absent, he is accessory.²³²

Despite the vehement charge, the jury chose to acquit Bowen, "probably," the report says, "from a doubt whether the advice given by him was, in any measure, the procuring cause of Jewett's death."²³³

In 1852, common law crimes were abolished in Massachusetts.²³⁴ Nevertheless, in 1862, four Justices of the Supreme Judicial Court, in an unreported case, ruled in the same way as *Commonwealth v. Bowen* on the same issue.²³⁵ In 1867, Massachusetts voted in favor of ratification of the Fourteenth Amendment.²³⁶ In 1870, the Supreme Judicial Court held, in *Commonwealth v. Dennis*, that

231. *Id.* at 426-27, 429.

232. *Commonwealth v. Bowen*, 13 Mass. 356 (1816).

233. *Id.* at 360-61. The quoted charge, however, does not appear in the abbreviated report, but is "the full report of the trial in a pamphlet published at Northhampton in 1816" which is in turn quoted in *Mink*, 123 Mass. at 427-28.

234. 13 Mass. at 360-61.

235. *Commonwealth v. Platt* (Berkshire 1862), described in *Mink*, 123 Mass. at 429.

236. U.S.C.S. CONST., amend. XIV explanatory note, at 11 (Law. Co-op. 1984).

neither suicide nor attempted suicide were crimes.²³⁷ Noting that under statute punishment for attempt was to be one half the penalty for the completed offense, it held that since completed suicide could not be punished, neither could attempted suicide. "The end of punishment is the prevention of crime, and it may have been thought at least impolitic to punish an attempt to do that which is itself dispunishable, when the direct effect of the penalty must be to increase the secrecy and efficiency of the means employed to accomplish the end proposed."²³⁸ The court went on to distinguish the holding in *Bowen*:

There the prisoner was indicted for advising another to kill himself, and the advice was acted upon in his presence. The jury must have found, under instructions, that the advice was influential, and the defendant was properly convicted as a principal. It can make no difference in principle, whether the hand of the victim or the hand of another agent is employed, if the act be done in the presence of the person charged and at his instigation.²³⁹

Seven years later, however, the same court was faced with a case in which a woman, being told by her fiance that he wanted to break the engagement and abandon her, took up a pistol and tried to shoot herself; her sometime fiance tried to stop her and in the ensuing struggle was shot and killed. She was then convicted of homicide on the charge that "if a homicide is produced by the doing of an unlawful act, although the killing was the last thing that the person . . . had in his mind . . . the person would incur the responsibility which attached to the crime of manslaughter."²⁴⁰ The defendant appealed, relying on *Dennis* for the proposition that attempting suicide is not unlawful. The Supreme Judicial Court upheld the conviction:

The life of every human being is under the protection of the law, and cannot be lawfully taken by himself, or by another with his consent, except by legal authority. Suicide has not ceased to be unlawful and criminal in this Commonwealth by the simple repeal of the Colony Act of 1660 [which had provided for the ignominious burial of suicides] by the St. of 1823, c. 143, which may well have had its origin in consideration for the feelings of innocent surviving relatives; . . . nor by the fact that the Legislature, having in the general revisions of the statutes measured the degree of punishment for attempts to commit offenses by the punishment prescribed for each offense if actually committed, has, intentionally or inadvertently, left the attempt to commit suicide without punishment, because the completed act would

237. *Commonwealth v. Dennis*, 105 Mass. 162 (1870).

238. *Id.* at 162-63.

239. *Id.* at 163.

240. *Mink*, 123 Mass. at 423 (quoting the charge to the jury of the trial court).

not be punished in any manner

Since it has been provided by statute that any crime punishable by death or imprisonment in the state prison is a felony, and no other crime shall be so considered, it may well be that suicide is not technically a felony in this commonwealth. But being unlawful and criminal as malum in se, any attempt to commit it is likewise unlawful and criminal. Everyone has the same right and duty to interpose to save a life from being so unlawfully and criminally taken that he would have to defeat an attempt unlawfully to take the life of a third person.²⁴¹

There have been no subsequent cases or statutes to cast doubt upon the conclusion that this remains the law of Massachusetts today. In addition, contemporary Massachusetts law provides for the involuntary commitment to a mental health facility of one who is "mentally ill" if there would be "a substantial risk of physical harm to the person himself as manifested by evidence of threats of, or attempts at, suicide" ²⁴²

MICHIGAN

Although ceded to the United States by the Treaty of Paris of 1783, Michigan was occupied by the British until 1796. It was part of the Northwest Territory created in 1787. In 1805, Michigan became a separate territory, and, in 1837, a state.²⁴³ The fourteenth amendment was ratified by Michigan on February 15, 1867.²⁴⁴

Upon acquiring territorial status, the Ohio criminal code was adopted "as far as necessary and suitable to the circumstances of the territory of Michigan."²⁴⁵ Five years later, a new criminal code was enacted that, in addition to particular statutory crimes, adopted the common law of crimes in a provision that remains substantially the same today.²⁴⁶

An 1889 Michigan treatise on criminal law defined *felo de se*, as "one who deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own

241. *Id.* at 425, 428-29.

242. MASS. GEN. LAWS ANN. ch. 123, §§ 1, 18(a) (West Supp. 1985).

243. 29 ENCYCLOPAEDIA BRITANNICA 378 (15th ed. 1985).

244. U.S.C.S. CONST., amend. XIV, explanatory note, at 11 (Law. Co-op 1984).

245. Woodward Code of 1805, ch. 6, § 3, reprinted in 1 Mich. Terr. Laws 9, 10 (1871).

246. Cass Code of 1816, Crimes § 58, reprinted in 1 Mich. Terr. Laws 132-33 (1871).

Substantially, the same provision was reenacted by Act of Apr. 12, 1827, § 62 (codified at MICH. TERR. LAWS at 462 (1833)), and again by Act of March 14, 1840, No. 39 § 7 1840 Mich. Pub. Acts 42, 45 (codified at MICH. REV. STAT. tit. 30, ch. 161, § 22 (1846); MICH. COMP. STAT. § 5958 (1857); MICH. COMP. LAWS § 7824 (1872); MICH. COMP. LAWS § 11795 (1897); MICH. COMP. LAWS § 15622 (1915); MICH. COMP. LAWS § 17343 (1929); MICH. COMP. LAWS § 750.505 (1948); MICH. COMP. LAWS § 750.505 (1970)).

death.”²⁴⁷ In the same year, the Michigan Supreme Court, in an insurance case, held that:

[one committing suicide] must have had sufficient mental capacity not only to understand that the act will destroy his life, but also distinguish its moral quality and consequences—the right and wrong of it;. . . In other words, that it must be an act done with an evil motive. We think that this doctrine is supported by the great preponderance of authority in this country, and must be conceded to be the prevailing doctrine; and it seems to us to be the safe and more reasonable and more consistent doctrine.²⁴⁸

In 1920, the Michigan Supreme Court upheld the conviction of a man who assisted in the suicide of his wife under the rubric of a statute prohibiting “murder . . . perpetrated by means of poison.”

We are of the opinion that, when defendant mixed the paris green with water and placed it within reach of his wife to enable her to put an end to her suffering by putting an end to her life, he was guilty of murder by means of poison within the meaning of the statute, even though she requested him to do so. By this act he deliberately placed within her reach the means of taking her own life, which she could have obtained in no other way by reason of her helpless condition.²⁴⁹

Under present Michigan law, an individual “who is mentally ill, and who as a result of that mental illness can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure himself . . . , and who has engaged in an act or acts or made significant threats that are substantially supportive of the expectation”²⁵⁰ may be involuntarily committed.²⁵¹

MINNESOTA

In 1849, The Minnesota Territory was carved out of the Wisconsin Territory by Congress, which provided that its residents would be governed by Wisconsin law until their territorial legislature modified it.²⁵² That law proscribed assisting suicide.²⁵³ In 1851, a revised code was passed by the Minnesota territorial legislature containing the provision, “Every person deliberately assisting another in the commission of self murder, shall be deemed guilty of

247. A. TIFFANY, A TREATISE ON CRIMINAL LAW OF THE STATE OF MICHIGAN 828 (4th ed. 1889).

248. *Blackstone v. Standard Life & Accident Insurance Co.*, 74 Mich. 592, 610, 42 N.W. 156, 161-62 (1889).

249. *People v. Roberts*, 211 Mich. 187, 198, 178 N.W. 690, 693 (1920).

250. MICH. COMP. LAWS ANN. § 330.1401 (c) (West 1980).

251. *Id.* at § 330.1468 (2)(West Supp. 1984-1985).

252. Act of Mar. 3, 1849, ch. 121, § 12, 9 Stat. 403, 407.

253. See *infra* note 653 and accompanying text.

manslaughter in the first degree."²⁵⁴ Minnesota was admitted as a state in 1858,²⁵⁵ and voted to ratify the fourteenth amendment in 1867.²⁵⁶

In 1885, a new penal code was adopted.²⁵⁷ Modeled on New York's 1881 Penal Code,²⁵⁸ it substantially expanded the treatment of suicide:

Section 141 "Suicide" defined. Suicide is the intentional taking of one's own life.

Section 142 No forfeiture imposed for suicide. Although suicide is deemed a grave public wrong, yet, from the impossibility of reaching the successful perpetrator, no forfeiture is imposed.

Section 143 Attempting suicide. A person who, with intent to take his own life, commits upon himself any act dangerous to human life, or which, if committed upon or towards another person and followed by death as a consequence, would render the perpetrator chargeable with homicide, is guilty of attempting suicide.

Section 144 Aiding suicide. A person who willfully, in any manner, advises, encourages, abets, or assists another person in taking the latter's life, is guilty of manslaughter in the first degree.

Section 145 Abetting an attempt at suicide. A person who willfully, in any manner, encourages, assists, or abets another person in attempting to take the latter's life, is guilty of a felony.

Section 146 Incapacity of person aided, no defense. It is not a defense to a prosecution under either of the last two sections that the person who took, or attempted to take, his own life, was not a person deemed capable of committing crime.

Section 147 Punishment of attempting suicide. Every person guilty of attempting suicide is guilty of felony, punishable by imprisonment in the state prison not exceeding two years, or by a fine not exceeding one thousand dollars, or both.²⁵⁹

In 1888, the Minnesota Supreme Court decided *Kerr v. Minnesota Mutual Benefit Association*,²⁶⁰ an insurance case in which the insured had fled to Canada to escape arrest for forgery, was apprehended, and committed suicide to avoid being returned to Minnesota for trial. The insurance policy denied payment "if the assured shall die in consequence of the violation of any criminal law of any

254. MINN. TERR. REV. STAT. ch. 100, § 9, at 493 (1851). The same language was re-enacted as part of another general revision in 1866. See MINN. GEN. STATS. ch. 94, § 9, at 598 (1867).

255. 29 ENCYCLOPAEDIA BRITANNICA 381 (15th ed. 1985).

256. U.S.C.S. CONST. amend. XIV, explanatory note, at 11 (Law. Co-op. 1984).

257. Act of Mar. 9, 1885, ch. 240, § 1, 1885 Minn. Laws 311, 311.

258. MINN. STAT. ANN. § 609.215 adv. comm. comment (West 1964).

259. MINN. PENAL CODE §§ 141-47 (1885). It was codified as MINN. GEN. STAT. §§ 6426-32 (1894).

260. *Kerr v. Minnesota Mutual Benefit Ass'n.*, 39 Minn. 174, 39 N.W. 312 (1888).

country, state or territory in which the assured may be.” The court construed this policy limitation as not including suicide:

[U]nder the general language here used, which must be construed favorably to the assured and strictly as against the company, the violation of law referred to in the policy ought not, we think, to be construed to mean or include suicide. Suicide, though strictly a crime, is not reckoned among offenses or violations of law, such as the language of the policy would be commonly understood to refer to. Otherwise construed, the policy would be misleading in its practical operation.²⁶¹

The same court, in 1895, deciding another insurance case, stated that when the cause of an insured’s death is uncertain, “[t]he presumption is against suicide, as contrary to the general conduct of mankind,—a gross moral turpitude, not to be presumed in a sane man”²⁶²

In 1905, the legislature enacted a code commission’s “rearrangement and restatement”²⁶³ of the Minnesota suicide law. The new version read:

Section 4869 Definitions—Suicide is the intentional taking of one’s life.

Section 4870 Attempting suicide—Every person who, with intent to take his own life commits upon himself any act dangerous to human life, or which if committed upon or towards another person, and followed by death as a consequence, would render the perpetrator chargeable with homicide, shall be guilty of a felony, and punished by imprisonment in the state prison not more than two years, or by a fine not exceeding one thousand dollars, or by both.

Section 4871 Aiding suicide—Every person who in any manner shall wilfully advise, encourage, abet, or assist another in taking the latter’s life shall be guilty of manslaughter in the first degree.

Abetting attempt at suicide—Every person who in any manner shall wilfully encourage, assist, or abet another person in attempting to take the latter’s life shall be guilty of a felony.

Incapacity of person aided, no defense—The fact that the person attempting to take his own life was incapable of committing crime shall not be a defence to prosecution under either of Sections 4871, 4872.²⁶⁴

In 1911, the attempted suicide provision, section 4870, was repealed.²⁶⁵ The other sections remained the law²⁶⁶ until 1963, when

261. *Id.* at 175, 39 N.W. at 313.

262. *Hale v. Life Indemnity & Investment Co.*, 61 Minn. 516, 519, 63 N.W. 1108, 1108 (1895), quoting 1 MAX, INSURANCE § 325 (3d ed. 1873).

263. MINN. REV. LAWS iii (1905).

264. *Id.* at §§ 4869-73.

265. Act of April 20, 1911, ch. 293, sec. 1, 1911 Minn. Laws 409, 409.

266. They were variously codified as MINN. GEN. STAT. §§ 8597-8600 (1913); MINN. GEN. STAT. §§ 10,061-64 (1923); MINN. STAT. §§ 10,061-64 (1927); MINN. STAT. ANN. § 619.01 to .04 (West 1947).

they were repealed and replaced by the following statute:

Subdivision 1. Aiding suicide. Whoever intentionally advises, encourages, or assists another in taking his own life may be sentenced to imprisonment for not more than 15 years or to payment of a fine of not more than \$15,000, or both.

Subdivision 2. Aiding attempted suicide. Whoever intentionally advises, encourages, or assists another who attempts but fails to take his own life may be sentenced to imprisonment for not more than seven years or to payment of a fine of not more than \$7,000, or both.²⁶⁷

This statute remains the law today. The Advisory Committee Comment notes that, while suicide was a crime at common law, neither suicide nor attempted suicide are now criminal in Minnesota. The Committee notes further that while one assisting a suicide would normally be liable under this section, "it may be murder if the survivor did the act such as injecting the poison or shooting the deceased," and states, "[C]ausing a person of unsound mind to take his own life is a case of murder, not one of assisting a suicide, and would be dealt with accordingly."²⁶⁸

In 1975, the Minnesota Supreme Court overturned a trial court's refusal to instruct a jury that the motive of preventing suicide was a defense to a charge of false imprisonment, holding, "[T]here can be no doubt that a bona fide attempt to prevent a suicide is not a crime in any jurisdiction, even where it involves the detention, against her will, of the person planning to kill herself."²⁶⁹

Minnesota first provided for commitment of the "insane" in 1866.²⁷⁰ Among the questions to be asked before admitting a patient to the asylum was, "Has suicide ever been attempted? If so, in what way, and is the propensity now active?"²⁷¹ In 1893, the state specifically provided for the involuntary commitment of one who "has perpetrated acts dangerous to himself."²⁷² The Minnesota Supreme Court held the 1893 statute unconstitutional for lack of procedural due process, although it affirmed, that "[t]he state

267. Criminal Code of 1963, ch. 753, art. 2, § 17, 1963 Minn. Laws 1185, 1246. *Id.* art. 1, § 609.215, 1963 Minn. Laws at 1201 (codified at MINN. STAT. ANN. § 609.215 (West 1964)). The fines were increased in 1984 by Act of May 2, 1984, ch. 628, art. 3, § 11, 1984 Minn. Laws 1576, 1662.

268. MINN. STAT. ANN. § 609.215 advisory committee comment (West 1964).

269. *State v. Hembd*, 305 Minn. 120, 126, 232 N.W.2d 872, 878 (1975).

270. Act of Mar. 2, 1866, ch. 6, sec. 17, 1866 Minn. Laws 10, 16 (codified at MINN. GEN. STATS. ch. 35, § 21 (1878)).

271. Act of Mar. 6, 1868, ch. 18, § 14, 186 Minn. Laws 25, 32 (codified at MINN. GEN. STATS. ch. 35, § 27 (1878)).

272. Act of Apr. 19, 1893, ch. 5, § 17, 1893 Minn. Laws 78, 82 (codified at MINN. GEN. STATS. 3463 (1894)).

should take charge of such unfortunates as are dangerous to themselves and to others, not only for the safety of the public, but for their own amelioration”²⁷³ The act was correctively amended in 1895, re-enacting as a ground for commitment that one “has perpetrated acts dangerous to himself.”²⁷⁴ However, as part of a general revision of the statutes in 1905, that law was repealed,²⁷⁵ and the standard became simply that the one to be committed be “insane and in need of care or treatment, or that it is dangerous for him to remain at large.”²⁷⁶ Nevertheless, one of the items on the questionnaire statutorily required to be completed by the board of examiners to substantiate a finding of insanity remained, “Has suicide ever been attempted? . . . Is the propensity now active?”²⁷⁷ These provisions were repealed in 1917,²⁷⁸ and replaced simply by authorization for the commitment of “any person of unsound mind.”²⁷⁹ Specific reference to suicide did not reappear until 1974 when the legislature included among the grounds for involuntary commitment that “the proposed patient is, . . . mentally ill . . . and . . . he has attempted to or threatened to take his own life or attempted to seriously physically harm himself.”²⁸⁰ This statute remains the law in Minnesota today.

MISSISSIPPI

The Mississippi Territory was created in 1798 and admitted as a state in 1817.²⁸¹ Adopting a criminal code in 1807,²⁸² the Mississippi Territorial Legislature made no specific mention of suicide, but provided, “Every other felony, misdemeanor, or offense what-

273. *State ex rel. Blaisdell v. Billings*, 55 Minn. 467, 474, 57 N.W. 794, 801 (1894).

274. Act of Apr. 25, 1895, ch. 119, §§ 3, 17(1), 1895 Minn. Laws 256, 257.

275. REV. LAWS MINN. § 5541 (1905).

276. *Id.* at § 3852 (recodified at MINN. GEN. STATS. § 7465 (1913)).

277. REV. LAWS MINN. § 3856(14) (1905) (recodified at MINN. GEN. STATS. § 7471 (1914)).

278. Act of Apr. 17, 1917, ch. 344, § 20, 1917 Minn. Laws 484, 488.

279. *Id.* at §§ 1, 9, 1917 Minn. Laws at 484, 486 (codified at GEN. STATS. MINN. §§ 8953, 8961 (1923); MINN. STAT. § 8953, 8961 (Mason 1927)).

280. Act of Apr. 11, 1974, ch. 482, sec. 4, § 253A.07 subd. 17, 1974 Minn. Laws 1209, 1210 (codified at MINN. STAT. ANN. § 253A.07 subd. 17 (a)(1)(i) (West 1982)).

281. 29 ENCYCLOPAEDIA BRITANNICA 276 (15th ed. 1985).

282. Apparently only fragments are available of the early session laws of the Territory of Mississippi. D. McMURTRIE, FRAGMENTS OF THE MISSISSIPPI SESSION LAWS (available in Cook County Law Library, Chicago, Illinois). It seems that “An Act for the Punishment of Crimes and Misdemeanors [which does not survive, was] originally passed in June, 1802, but re-enacted with some amendment in 1807.” H. TOULMIN, DIGEST OF THE LAWS OF THE STATE OF ALABAMA 206 (New York 1823) (Alabama was originally part of the Mississippi Territory).

soever, not provided for by this or some other act of general assembly, shall be punished as heretofore, by the common law."²⁸³ In 1839, however, the state legislature dealt directly with suicide, enacting a new criminal code with the provision, "Every person deliberately assisting another in the commission of self-murder, shall be deemed guilty of manslaughter in the first degree."²⁸⁴ In a general revision of the laws adopted in 1856,²⁸⁵ the crime was made simply "manslaughter."²⁸⁶ In June, 1892, another general revision of the statutes resulted in the adoption of the following language which accurately represents the law in force in Mississippi today:

A person who willfully, or in any manner, advises, encourages, abets, or assists another person to take, or in taking, the latter's life, or in attempting to take the latter's life, is guilty of a felony; and, on conviction, shall be punished by imprisonment in the penitentiary not exceeding ten years, or by fine not exceeding one thousand dollars, and imprisonment in the county jail not exceeding one year.²⁸⁷

Finally, under Mississippi law, a mentally ill person who "poses a substantial likelihood of physical harm to himself . . . as demonstrated by . . . a recent attempt or threat to physically harm himself" may be involuntarily committed.²⁸⁸

MISSOURI

Part of the Louisiana Purchase acquired from France in 1803,²⁸⁹ what is now Missouri was first known as the District of Louisiana.²⁹⁰ It was designated as the Territory of Louisiana in 1805²⁹¹ and as the Territory of Missouri in 1812.²⁹² Missouri was finally admitted as a state in 1821.²⁹³

283. Act of Feb. 10, 1807, sec. 45, *reprinted in* MISS. TERR. STAT. 212, 221 (Natchez 1816).

284. Act of Feb. 15, 1839, ch. 66, tit. 3, sec. 7, 1839 Miss. Laws 102, 112 (codified at MISS. CODE ch. 64, art. 12, tit. 3, § 7, at 958 (Hutchinson 1849)).

285. MISS. REV. CODE iii (1857).

286. *Id.* at ch. 64, art. 171. The provision was subsequently recodified at MISS. REV. CODE § 2634 (1871); and MISS. REV. CODE § 2882 (1880).

287. Act of Apr. 2, 1892, sec. 1, 1892 Miss. Laws 60, 60 (codified at MISS. CODE ANN. § 1299 (1892); MISS. CODE § 1373 (1906); MISS. CODE ANN. § 1109 (Hemingway 1917); MISS. CODE § 1138 (1930); MISS. CODE § 2375 (1942); MISS. CODE ANN. § 97-3-49 (1972)).

288. MISS. CODE ANN. § 41-21-61 (d), -73(4)(Supp. 1984).

289. 29 ENCYCLOPAEDIA BRITANNICA 385 (15th ed. 1985).

290. Act of Mar. 26, 1804, 8th Cong., Sess. 1, ch. 38, sec. 12, 2 Stat. 283, 287.

291. Act of Mar. 3, 1805, 8th Cong., Sess. 2, ch. 31, 2 Stat. 331, 331.

292. Act of June 4, 1812, 12th Cong., Sess. 1, ch. 95, 2 Stat. 743, 743.

293. 29 ENCYCLOPAEDIA BRITANNICA 284, 284 (15th ed. 1985).

In 1816,²⁹⁴ and again in 1825,²⁹⁵ the state legislature provided that the common law would be in force in Missouri to the extent not contrary to its codified laws. In 1820, however, the first Constitution of Missouri contained a provision "that the estates of such persons as may destroy their own lives, shall descend or vest as in cases of natural death."²⁹⁶ That language was carried down through the succeeding state constitutions to the one in effect today.²⁹⁷ This direction was also embodied in an 1835 statute,²⁹⁸ which was repealed in 1977.²⁹⁹

The criminal code enacted in 1835 included the provision that, "[E]very person deliberately assisting another in the commission of self-murder, shall be deemed guilty of manslaughter in the first degree."³⁰⁰ In 1919, the crime was changed simply to "manslaughter."³⁰¹ This remained the law until it was repealed in 1983.³⁰²

In 1977, however, the legislature enacted a law establishing that, "The use of physical force by an actor upon another person is justifiable when the actor acts under the reasonable belief that [s]uch other person is about to commit suicide or to inflict serious physical injury upon himself." This statute remains the law today.³⁰³

294. Act of Jan. 17, 1816, § 1 1816 Mo. Laws 37, 37 (codified at ARK.TERR. LAWS Common Law & Statutes of England § 1, at 130-31 (1835)). Act of Feb. 12, 1825 (codified at Mo. LAWS, ch. 1, at 491 (1825)).

295. Mo. CONST. of 1820, art. XIII, § 15.

296. *Id.*

297. Mo. CONST. of 1865, art. 1, § 26; Mo. CONST. of 1875, art. 11, § 13; Mo. CONST., art. 1, § 30.

298. Act of Mar. 20, 1835, art. 9, § 21 (codified in Mo. REV. STAT., Crimes & Punishments art. 9, § 21 at 214 (1835)); Mo. REV. STAT. Crimes & Punishments, art. 9, § 22 at 412 (1845); Mo. REV. STAT. ch. 50, art. 9, § 24 (1855); Mo. GEN. STAT. ch. 207, § 24 (1865); Mo. REV. STAT. § 1669 (1879); Mo. REV. STAT. § 3966 (1889); Mo. REV. STAT. § 2386 (1899); Mo. REV. STAT. § 4917 (1909); Mo. REV. STAT. § 3706 (1919); Mo. REV. STAT. § 4465 (1929); Mo. REV. STAT. § 4858 (1939); Mo. REV. STAT. § 556.300 (1944).

299. Criminal Code, S.B. 60, sec. 1, 1977 Mo. Laws 658, 662.

300. Act of Mar. 20, 1835, art. 2 (codified at Mo. REV. STAT. Crimes & Punishments, art. 2, § 8 at 168 (1835); Mo. REV. STAT., Crimes & Punishments, art. 2, § 8 at 345 (1845); Mo. REV. STAT. ch. 50, art. 2 § 8 (1855); Mo. GEN. STAT. ch. 200, § 8 (1865); Mo. REV. STAT. § 1239 (1879); Mo. REV. STAT. § 3466 (1889); Mo. REV. STAT. § 1822 (1899); Mo. REV. STAT. § 4455 (1909)). Two convictions that resulted in reported cases were had under the statute. *State v. Webb*, 216 Mo. 378, 115 S.W. 998 (1909); *State v. Ludwig*, 70 Mo. 412 (1879). The latter conviction was sustained; the former was reversed and remanded because of an erroneous instruction unrelated to the validity or existence of prohibitions against assisted suicide.

301. Act of May 27, 1919, S.B. No. 226 sec. 1 § 4455, 1914 Mo. Laws 256, 256 (codified at Mo. REV. STAT. § 3237 (1919); Mo. REV. STAT. § 3989 (1929); Mo. REV. STAT. § 4384 (1939); Mo. REV. STAT. § 559.080 (1949); Mo. ANN. STAT. § 565.021 (Vernon 1979)).

302. Criminal Code, S.B. 60, sec. 1, 1977 Mo. Laws 658, 663.

303. Criminal Code, S.B. 60, sec. 1 § 563.061(5), 1977 Mo. Laws 658, 683 (codified at

The Committee Comments explain the language as "designed to support the general policy of the law to discourage or prevent suicides."³⁰⁴

In the state of Missouri, one who "as a result of mental illness" is found to present "[a] substantial risk that serious physical harm will be inflicted by a person upon his own person, as evidenced by recent threats, including verbal threats, or attempts to commit suicide" may be involuntarily committed.³⁰⁵

MONTANA

Originally part of the Idaho Territory, the Montana Territory was established in 1854. It was admitted as a state in 1889.³⁰⁶

Although the early statutes do not appear to have specifically mentioned suicide or assisting suicide, in 1872, the territorial legislature adopted an act providing for the punishment of "[a]ll offenses recognized by the common law as crimes, and not here enumerated."³⁰⁷ On February 14, 1895, as part of a general revision of the laws, this act was replaced by a provision restricting the application of the common law to those cases not governed by the code or the statute.³⁰⁸ Five days later, as part of a new penal code, the state legislature enacted the provision, "Every person who deliberately aids, or advises or encourages another to commit suicide is guilty of a felony."³⁰⁹

This provision remained in the code until repealed in 1973 as a part of a general revision of the criminal code.³¹⁰ The new code added provisions designed to make one who assists another to commit suicide guilty of criminal homicide as well as a separate section providing, "A person who purposely aids or solicits another to commit suicide, but such suicide does not occur, commits the offense of aiding or soliciting suicide."³¹¹ The Compiler's comments

MO. ANN. STAT. § 563.061(5) (Vernon 1979)).

304. MO. ANN. STAT. § 563.061 comment (Vernon 1979).

305. MO. ANN. STAT. §§ 632.355(3), 632.005(9)(a) (Vernon Supp. 1985).

306. 29 ENCYCLOPAEDIA BRITANNICA 427 (15th ed. 1985).

307. Act of Jan. 12, 1872, sec. 185, 1872 Mont. Laws 269, 312 (variously codified at MONT. REV. STAT. Criminal Laws § 212, at 400 (1879); MONT. COMP. STAT. Criminal Laws § 278, at 583 (1887)).

308. MONT. CODES & STAT. Code of Civil procedure § 3452, at 734 (1895).

309. 4 MONT. CODES & STAT. Penal Code § 698, at 865 (1895) (variously codified at MONT. REV. CODES § 8529 (1907); MONT. REV. CODES § 11261 (1921); MONT. REV. CODES § 11261 (1935); MONT. REV. CODES § 94-35-215 (1947)).

310. Criminal Code of 1973, ch.513, sec. 32, 1973 Mont. Laws 1335, 1422-23.

311. *Id.*, sec. 1, § 94-5-106(1), 1973 Mont. Laws at 1356 (subsequently recodified at MONT. CODE ANN. § 45-5-105 (1983)).

explain, "This section makes it a felony to aid or solicit a suicide attempt which does not result in the death of the victim. Under the new sections . . . a person may be convicted of Criminal Homicide . . . for causing another to commit suicide notwithstanding the consent of the victim."³¹² The Criminal Law Commission (which drafted the code) commented, "The rationale behind the felony sentence for the substantive offense of aiding or soliciting suicide is that the act typifies a very low regard for human life."³¹³

In Montana, one who has a "mental disorder [which] has resulted in self-inflicted injury . . . or the imminent threat thereof" may be involuntarily committed.³¹⁴

NEBRASKA

The Territory of Nebraska was created in 1854 and admitted as a state in 1867.³¹⁵ It voted to ratify the fourteenth amendment on June 15, 1867.³¹⁶

In a 1905 life insurance case, the Supreme Court of Nebraska said, "[W]hile suicide was considered a crime at common law, yet we have no common law in this state; neither have we any statute making suicide, or an attempt to commit suicide, a crime."³¹⁷

In a 1979 case before the Nebraska Supreme Court a prisoner, alleged to have injected an air bubble into the vein of his cellmate who wanted to commit suicide, was convicted of murder. The Court noted:

Appellant assigns as error the refusal of a requested instruction that suicide is not a crime. Suicide is not a crime in Nebraska. "Murder is no less murder because the homicide is committed at the desire of the victim. He who kills another upon [the other's] desire or command is, in the judgment of the law, as much a murderer as if he had done it merely of his own [volition]." The requested instruction had no bearing upon defendant's guilt or innocence.³¹⁸

Current Nebraska law, first enacted in 1979, makes "assisting suicide" a felony that one commits "when, with intent to assist an-

312. Montana Criminal Code Law Information Research Center, *MONTANA CRIMINAL CODE OF 1973 ANNOTATED* § 45-5-105 (rev. ed. 1980), reprinted in *MONT. CODE ANN.* § 45-5-105 Compiler's Comments (1984).

313. *MONT. CODE ANN.* § 45-5-105 Crim. Law Comm. Comments (1984).

314. *MONT. CODE ANN.* § 53-21-126 (4)(b) (1983).

315. 29 *ENCYCLOPAEDIA BRITANNICA* 388 (15th ed. 1985).

316. U.S.C.S. CONST. amend. XIV, explanatory note, at 11 (*Law. Co-op.* 1984).

317. *Lange v. Royal Highlanders*, 75 Neb. 188, 201-02, 110 N.W. 1110, 1112 (1905).

318. *State v. Fuller*, 203 Neb. 222, 241, 278 N.W. 2d 756, 761 (1979)(citations omitted), quoting *Turner v. State*, 119 Tenn. 663, 671, 108 S.W. 1139, 1141 (1908).

other person in committing suicide, he aids and abets him in committing or attempting to commit suicide."³¹⁹ The use of force to prevent suicide has been statutorily justifiable since 1972.³²⁰ In addition, "any mentally ill person . . . who presents . . . [a] substantial risk of serious harm to himself . . . within the near future, as manifested by . . . recent attempts at, or threats of, suicide" may be involuntarily committed.³²¹

NEVADA

The land comprising Nevada was ceded to the United States by Mexico in 1848, and deemed a part of California. In 1850, it was made a part of the Utah Territory; in 1861, it was independently organized as the Territory of Nevada and in 1864 was admitted as a state.³²² Nevada voted to ratify the fourteenth amendment in 1867.³²³

In the year it became a territory, Nevada adopted the common law of crimes in a statute that remained effective until 1967.³²⁴

The Nevada legislature, first specifically and comprehensively addressed suicide in 1911 legislation that provided:

SEC. 114 Suicide is the intentional taking of one's own life.

SEC. 115 Every person who, with intent to take his own life, shall commit upon himself any act dangerous to human life, or which, if committed upon or toward another person and followed by death as a consequence, would render the perpetrator chargeable with homicide, shall be punished by imprisonment in the state penitentiary for not more than two years, or by a fine of not more than one thousand dollars.

SEC. 116 Every person who, in any manner, shall wilfully advise, encourage, abet or assist another in taking his own life shall be guilty of manslaughter.

SEC. 117 Every person who, in any manner, shall wilfully advise, encourage, abet, or assist another person in attempting to take the latter's life shall be punished by imprisonment in the state penitentiary for not more than ten years.

SEC. 118 The fact that the person attempting to take his own life was incapable of committing crime shall not be a defense to a prosecution under

319. Nebraska Criminal Code, L.B. 38, § 22, 1977 Neb. Laws 88, 97 (codified at NEB. REV. STAT. § 28-307 (1979)).

320. Act of Mar. 1, 1972, L.B. 895, § 7(7), 1972 Nev. Laws 276, 284 (codified at NEB. REV. STAT. § 28-1412(7) (1979)).

321. NEB. REV. STAT. § 83-1001, -1009 (1981).

322. 29 ENCYCLOPAEDIA BRITANNICA 430 (15th ed. 1985).

323. U.S.C.S. CONST. amend. XIV explanatory note, at 11 (Law. Co-op. 1984).

324. Act of Nov. 26, 1981, ch. 28, § 151, 1861 Nev. Stat. 56, 88 (codified at NEV. COMP. LAWS § 4697 (1885); NEV. COMP. LAWS § 6827 (1912); NEV. COMP. LAWS § 10507 (1929); NEV. REV. STAT. § 193.180 (1957)); repealed by Act of March 29, 1967, ch. 211, § 700, 1967 Nev. Stat. 458, 667 (1967).

either of sections 116 or 117 of this act.³²⁵

Sections 114 and 115 were repealed two years later.³²⁶ The other three sections remained the law³²⁷ until they were repealed in 1967.³²⁸ In the interim, an act was passed in 1957,³²⁹ providing a criminal penalty for “[e]very person who shall willfully attempt to take his life by any means whatsoever.”³³⁰ This act was repealed in 1966.³³¹

One whom a court holds “is mentally ill and, because of that illness, is likely to harm himself . . . if allowed to remain at liberty” may be involuntarily committed.³³²

NEW HAMPSHIRE

The early 17th century saw the first settlements in what is now New Hampshire; towns organized their government themselves, largely drawing on the common and statutory law of England, until they were united with the Massachusetts Bay Colony in 1641, remaining under its law until separation in 1679.³³³

There was a second period of union with Massachusetts Bay from 1690-92.³³⁴ Throughout the colonial period, the province was, of course, subject to the law of England. After independence the legislature statutorily provided for the retention of the laws theretofore in force, until specifically repealed, and the New Hampshire Supreme Court interpreted this as meaning that the State recognized the common law of crimes.³³⁵

The 1783 New Hampshire constitution, still in force, provided, “The estates of such persons as may destroy their own lives, shall not for that offence be forfeited, but descend or ascend in the same manner as if such persons had died in a natural way.”³³⁶

325. Crimes and Punishment Act of 1911, §§ 115-18, codified at NEV. REV. LAWS §§ 6379-83 (1912).

326. Act of Mar. 25, 1913, ch. 238, § 1, 1913 Nev. Stat. 362, 362.

327. They were successively codified (without substantive changes except in the exact punishments) at NEV. COMP. LAWS §§ 10,063-10,065 (1929); NEV. REV. STAT. § 202.499 (1961).

328. Act of Mar. 29, 1967, ch. 211, § 700, 1967 Nev. Stat. 458, 667.

329. Act of Mar. 4, 1957, ch. 35, sec. 1, 1956-57, Nev. Stat. 59, 59-60.

330. *Id.*

331. Act of Mar. 31, 1961, ch. 256, sec. 1, 1961 Nev. Stat. 416, 416.

332. NEV. REV. STAT. § 433A.310(1)(b) (1983).

333. A. Batchellor, *Introduction to N.H. LAWS* xxiv, xxix (1904).

334. *Id.* at lvi.

335. *State v. Rollins*, 8 N.H. 550, 559-65 (1837). *See also State v. Mint Vending Mach.* No. 195084, 85 N.H. 22, 24, 154 A. 224, 226 (1931) (common law crime of gambling).

336. N.H. CONST. pt. 2, art. 89.

New Hampshire voted to ratify the fourteenth amendment in 1866.³³⁷ The common law of crimes was abolished in 1967.³³⁸ At the same time, the legislature provided punishment for one who "purposely aids or solicits another to commit suicide"³³⁹ and established that it is justifiable to use physical force to interfere with a suicide.³⁴⁰

In July, 1984, holding that the State's compelling interests "in the preservation of human life and the prevention of suicide" outweighed the asserted constitutional privacy right of a prisoner to starve himself to death, the Supreme Court of New Hampshire wrote, "[A]t common law, suicide was a felony; however, now our Criminal Code does not proscribe it," but took note of the legislative enactments under which "it is declared a crime to aid or abet the commission of suicide" and involuntary commitment is decreed for the suicidal.³⁴¹

Curiously enough, less than a month later, rejecting the capacity of one who commits suicide to appreciate the "moral character" of the act as a test of whether she or he was sane or insane, the same court explained:

To apply this definition, a finder of fact must first conclude that the act had a "moral character" that the decedent was unable to appreciate. If the definition is to be applied consistently from case to case, there must be a consensus among finders of fact about this moral character. When the Supreme Court of the United States announced this standard as federal common law [in 1872], there was such a consensus reflected in statutes or common-law rules making suicide a criminal act "to which is necessarily attached the moral responsibility of taking one's life voluntarily." That consensus has been lost to the law today, however. When the legislature enacted the present Criminal Code in 1971, it chose not to make suicide a criminal act, and we have been given no indication of agreement on the subject.

Without such a consensus that suicide is morally wrong, the application of any legal standard that refers to the moral quality of the act will vary from case to case with the varying moral positions of decedents and factfinders. One judge or jury could decide suicide was morally acceptable in the circumstances and conclude that a decedent suffered from no incapacity if he believed it was right to kill himself. Another judge or jury could hold that suicide was wrong and conclude that a decedent who believed otherwise

337. U.S.C.S. CONST., amend. 14 explanatory note, at 11 (Law. Co-op. 1984).

338. Criminal Code, ch. 518, sec. 1, § 625:6, 1971 N.H. Laws 644, 645 (codified at N.H. REV. STAT. ANN. § 625:6 (1974)).

339. Criminal Code, ch. 418, sec. 1, § 630:4(I), 1971 N.H. Laws 644, 655 (codified at N.H. REV. STAT. ANN. § 630:4(I) (1974)).

340. Criminal Code, ch. 518, sec. 1, § 627:6(VI), 1971 N.H. Laws 644, 653 (codified at N.H. REV. STAT. ANN. § 627:6(vi) (1974)).

341. In re Caulk, 125 N.H. 226, 232, 480 A.2d 93, 97 (1984).

probably lacked capacity to appreciate this moral position.³⁴²

Under current law in New Hampshire, one determined to be "in such mental condition as a result of mental illness as to create a potentially serious likelihood of danger to himself" may be involuntarily committed.³⁴³

NEW JERSEY

New Jersey was first settled by Europeans after 1609; it became subject to English rule in 1664. The colony shared a government with New York until its own colonial governor was appointed in 1738.³⁴⁴ From 1664, the colony was governed by English derived law "tempered by local needs and customs."³⁴⁵ From at least 1796 to 1978, the common law of crimes was recognized by statute.³⁴⁶ From 1776 to the present day, forfeiture of estate for suicide has been prohibited.³⁴⁷ On September 11, 1866, the New Jersey legislature voted to ratify the fourteenth amendment; then, in April 1868, it purported to rescind that ratification.³⁴⁸

New Jersey has seen a direct conflict in the opinions of its courts on suicide. A 1901 New Jersey Court of Errors and Appeals (then the highest state court) decision construing a life insurance contract is notable as one of the few instances in which an American court has recognized suicide as an affirmative liberty, at least in certain circumstances:

Punishment is of the essence of crime, and suicide is not punishable here

342. *Cole v. Combined Ins. Co. of Am.*, 125 N.H. 397-98, 480 A.2d 178, 180 (1984) (citation omitted) quoting *Dean v. Mutual Life Insurance Co.*, 86 Mass. (4 Allen) 96, 98 (1862).

343. N.H. REV. STAT. ANN. § 135-B:26 (1977).

344. 29 ENCYCLOPAEDIA BRITANNICA 301 (15th ed. 1985).

345. THE FIRST LAWS OF THE STATE OF NEW JERSEY, 1703-1722, at vii (J. Cushing ed. 1981).

346. Act of Mar. 18, 1796, ch. 600 § 68, 1796 N.J. Laws 92,111 (successively codified (with changes not relevant) at N.J. LAWS. Crimes § 68, at 220 (1800)); N.J. LAWS Crimes § 68, at 262 (1821); N.J. COMP. PUB. LAWS. Crimes § 77, at 242 (Harrison 1833); N.J. LAWS DIGEST Crimes § 77, at 115 (Elmer 1838); N.J. REV. STAT. tit. 8, ch. 1, § 92, at 283 (1847); N.J. LAWS DIGEST Crimes § 92, at 176 (Elmer 1855); N.J. LAWS DIGEST Crimes § 92, at 192 (Elmer 1861); N.J. LAWS DIGEST Crimes § 192, at 186 (1874); N.J. REV. STAT. Crimes § 192, at 261 (1877); N.J. GEN. STAT. Crimes § 192, at 1083-84 (1896); N.J. COMP. STAT. § 215 (1910); N.J. REV. STAT. § 2:103-1 (1937); N.J. REV. STAT. § 2A:85-1 (1951); N.J. STAT. ANN. § 2A:85-1 (1969); repealed by Act of Aug. 10, 1978, ch. 95, § 2C:98-2, 1978 N.J. Laws 482, 688.

347. N.J. CONST. of 1776, art. 17 (in effect until 1844).

348. See generally *Campbell*, 66 N.J.L. at 282-83, 49 A. at 553. For subsequent codifications, see N.J. Comp. Stat. § 153 (1910); N.J. REV. STAT. § 2:178-2 (1937); N.J. STAT. ANN. § 2A: 152-2 (1985).

. . . .
 In New Jersey, neither suicide nor attempt to commit suicide has, since 1796, at least, been criminal. This results from the enactment in that year that no conviction or judgment for any offense against the state shall make or work forfeiture of estate

As to the abstract immorality of suicide generally, opinions may differ; but all will admit that in some cases it is ethically defensible. Else how could a man "lay down his life for his friends?" Suicide may be self-sacrifice, as when a woman slays herself to save her honor. Sometimes self-destruction, humanely speaking, is excusable, as when a man curtails by weeks or months the agony of an incurable disease

As to the public good requiring the discouragement of suicide, there may be also two opinions. The paternal theory of government does not here prevail. The common law condemned suicide, according to Hale and Blackstone . . . not only for religious reasons, but for the temporal one that the king has an interest in the preservation of all his subjects—and doubtless the same is true of an organized commonwealth and its citizens; but I cannot see that the public good is more concerned to prolong a life that may be worthless to the public than to secure to creditors their just demands, or to afford a maintenance to wife and children.³⁴⁹

Eight of the justices joined the opinion, written by Justice Collins. Another voted with the majority on different grounds, refusing to join the majority opinion.³⁵⁰ Six dissented, joining an opinion by Justice Van Sycke.³⁵¹ Relying on the reasoning of Justice Harlan in *United States v. Ritter*,³⁵² the dissenters lamented, "Recovery in this case is, to some extent, an encouragement of suicide."³⁵³

Within two years, however, the New Jersey Supreme Court, an intermediate appellate court, characterized Justice Collins' language as "dictum" and came to a directly contrary conclusion in *State v. Carney*.³⁵⁴ In upholding a criminal conviction for attempting suicide the *Carney* court noted:

It will be noticed that the learned justice does not cite or refer to section 215 of our own crimes act [providing the punishment of common law offenses] That the forfeiture of estates for crimes against the state was abolished by the first constitution in 1776, and is still abolished, does not affect the criminal character of the offences to which the non-forfeiture applies. Suicide is none the less criminal because no punishment can be inflicted. It may not be indictable, because the dead cannot be indicted. If one kills another and then kills himself, is he any less a murderer because he cannot be punished? If our statute were like that of Massachusetts, which

349. *Campbell*, 66 N.J.L. at 282-84, 49 A. at 553.

350. *Id.* at 290, 49 A. at 554.

351. *Id.* at 286, 49 A. at 554.

352. 169 U.S. 139 (1898).

353. *Campbell*, 66 N.J.C. at 289, 49 A. at 556 (VanSyckel, J., dissenting).

354. *State v. Carney*, 69 N.J.L. 478, 55 A. 44 (Sup. Ct. 1903).

provided that the punishment for attempts should only be one-half the penalty inflicted for the offence, then it might be said here, as there, that as there was no punishment for suicide there could be no indictment for an attempt unless the legislature had provided punishment for it. But our statute makes it a misdemeanor, because a common law offence, and expressly provides the penalty for it as for other misdemeanors³⁵⁵

The court also cited with approval a series of English cases and Bishop's treatise on *New Criminal Law* in support of the view that, "[a]ttempt at suicide was an indictable offence at common law."³⁵⁶

In 1922, the Court of Errors and Appeals (then still the highest court in New Jersey) affirmed a murder conviction not directly involving suicide or its assistance. In the course of denying the necessity of proof of motive, the court wrote:

Suppose, for instance, that this defendant . . . had conceived the thought that the burdens, the sufferings and the disappointments of life overbalance its benefits, its happiness and its successes, and that he would be doing a kindness to his little boy by destroying the latter's life [T]he defendant was just as much guilty of murder This is so because the state has a deep interest and concern in the preservation of the life of each of its citizens, and (except in case of self-defense) does not either commit or permit to any individual, no matter how kindly the motive, either the right or the privilege of destroying such a life, except in punishment for crime and in the manner prescribed by law. So strong is this concern of the state that it does not even permit a man to take his own life, but punishes him for an attempt to do so.³⁵⁷

Though the sentence imposed was later vacated on grounds that the court lacked jurisdiction, attempted suicide was also characterized as a crime in *State v. LaFayette*,³⁵⁸ where a New Jersey Court of Common Pleas relied on the reasoning of *Carney*.

In 1957, the New Jersey legislature provided that "any person who attempts to commit suicide" would be punished in the manner of those found to be "disorderly."³⁵⁹ The following year, the Appellate Division of the Superior Court explained the legislative intent in *Potts v. Barrett Div., Allied Chemical and Dye Corp.*³⁶⁰

In 1957, the Legislature downgraded suicide attempt to disorderly conduct

355. *Id.* at 480-81, 55 A. at 45.

356. *Id.* at 479, 55 A. at 45.

357. *State v. Ehlers*, 98 N.J.L. 236, 240-41, 119 A. 15, 17 (1922).

358. *State v. LaFayette*, 15 N.J. Misc. 115, 188 A. 918 (C.P. Camden Co. 1937).

359. Act of May 9, 1957, ch. 34, § 1, 1 N.J. Laws 63, 63 (1957) (codified at N.J. REV. STAT. § 2A:170-25.6 (Supp. 1967); N.J. STAT. ANN. § 2A: 170-25.6 (West 1971)).

360. *Potts v. Barrett Div., Allied Chem. & Dye Corp.*, 48 N.J. Super. 554, 138 A.2d 574 (1958).

. . . . (The Statement attached to the enacted bill . . . explains that such an attempt was a misdemeanor under the existing general provisions relating to offenses of an indictable nature at criminal law Since grand juries usually failed to indict, it was thought that such cases could be dealt with more practically in the municipal courts).³⁶¹

The court's opinion, which held that a disability insurance claimant who had attempted suicide after killing another person could not recover benefits in relation to his self-inflicted injuries, dealt with the attitude of the law toward suicide at length. It was explicitly critical of Justice Collins' statements on the subject in the 1901 *Campbell* case, which it characterized as dicta:

The *Campbell* decision may, perhaps, be better understood if we note that the majority of the court (the vote was 9-6) proceeded on Justice Collins' unfounded assumption that in New Jersey "neither suicide nor attempt to commit suicide has, since 1796 at least, been criminal." . . . We consider that assumption not only significant but critical, for the judicial mind did not then have to concern itself with any legislative expression of New Jersey's public policy against self-destruction. *Campbell* was decided in 1901; the Legislature had only three years before, in the 1898 general revision of the Crimes Act . . . , insisted that offenses of an indictable nature at common law, not otherwise provided for by legislative act, continue to be punished as misdemeanors—and similarly attempts to commit such offenses. The erroneous dictum of *Campbell* was not overlooked in *State v. Carney* . . . , decided two years later, where our public policy on suicide and attempts at suicide was again made clear.³⁶²

The court distinguished the variety of cases holding that life insurance benefits should be paid when the insured dies a suicide by noting that such claims "are payable to an innocent third person as beneficiary."³⁶³ It also noted that the result would be different if "Potts was insane or temporarily deranged."³⁶⁴ Disability benefits would not be provided to one who, while sane, attempted to take his own life, because he himself would then be profiting by his own wrong.

Although attempted suicide has . . . been downgraded to disorderly conduct in the interest of a more practical judicial administration of criminal justice, self-destruction or an attempt at self-destruction still remains unlawful. Such an act, which would destroy life itself, is contrary to every moral and religious principle, and has always run counter to the law of this State.³⁶⁵

361. *Id.* at 560-61, 138 A.2d at 578.

362. *Id.* at 564, 138 A.2d at 580.

363. *Id.* at 561, 138 A.2d at 578.

364. *Id.*

365. *Id.* (citation omitted).

The constitutionality of the 1957 statute was challenged in *Penney v. Municipal Court of Cherry Hill, State of New Jersey*,³⁶⁶ on the somewhat inconsistent grounds, among others, that it “unduly encroaches upon an individual’s personal and private freedoms” and “it contravenes the cruel and unusual punishment prohibition of the Constitution in that it punishes, one who is mentally ill.”³⁶⁷ The federal district court dismissed the complaint because of a pending state criminal charge against the plaintiff. The court did remark in reference to the challenged statute, “Seldom, if ever, is any punishment imposed. Usually, a charged person submits or is committed for psychiatric evaluation and the charge is later dismissed.”³⁶⁸ Ignoring *Campbell*, the court cited *Carney* and *LaFayette* for the proposition that, before the enactment of the 1957 statute, “In New Jersey suicide and attempted suicide were crimes at Common Law.”³⁶⁹

In 1971, in *John F. Kennedy Memorial Hospital v. Heston*,³⁷⁰ the New Jersey Supreme Court (by that time highest court in the state) upheld a lower court’s decision requiring blood transfusions against the will of a Jehovah’s Witness, who was religiously opposed to them. The court characterized the refusal of the transfusion as a form of suicide, and asserted the state’s interest in suicide prevention. The court said, that “attempted suicide was a crime at common law and was held to be a crime under N.J.S.A. 2A:85-1,” citing *Carney* with a reference to *Campbell* as a case in contrast.³⁷¹ Additionally the court noted that by statute, “It [attempted suicide] is now denounced” as a disorderly persons offense:

Ordinarily nothing would be gained by a prosecution, and hence the offense is rarely charged. Nonetheless, the Constitution does not deny the State an interest in the subject. It is common place for the police and other citizens, often at great risk to themselves, to use force or stratagem to defeat efforts at suicide, and it could hardly be said that thus to save someone from himself violated a right of his under the constitution subjecting the rescuer to civil or penal consequences.³⁷²

Complicating the subject of suicide is the difficulty of knowing whether a decision to die is firmly held. Psychiatrists may find that

366. *Penney v. Municipal Court of Cherry Hill, State of N.J.*, 312 F. Supp. 938 (1970).

367. *Id.* at 940.

368. *Id.* at 940 n.3.

369. *Id.* at 939 n.2.

370. *John F. Kennedy Memorial Hosp. v. Heston*, 58 N.J. 576, 279 A.2d 670 (1971).

371. *Id.* at 580, 279 A.2d at 672.

372. *Id.* (citation omitted).

beneath it all a person bent on self-destruction is hoping to be rescued, and most who are rescued do not repeat the attempt, at least not at once. Then, too, there is the question whether in any event the person was and continued to be competent (a difficult concept in this area) to choose to die. And of course there is no opportunity for a trial of these questions in advance of intervention by the State or a citizen.³⁷³

In 1972, the law pertaining to attempted suicide was changed. The 1957 classification of suicide as a disorderly offense was repealed by the New Jersey legislature, and the following sections were enacted:

1. Any person who attempts to commit suicide shall not be guilty of a criminal offense, and such attempt shall not be an indictable offense.
2. Any person who attempts to commit suicide shall fall under the jurisdiction of the involuntary commitment and subject to temporary hospitalization as provided herein.³⁷⁴

In 1978, the legislature added a criminal provision penalizing one who "purposely aids another to commit suicide."³⁷⁵ It also provided that force may justifiably be used to thwart a suicide attempt.³⁷⁶

Heston's holding that refusal of medical treatment is tantamount to suicide was explicitly overruled by the New Jersey Supreme Court in the case of *In re Conroy*; the court did not, however, question the validity of laws preventing suicidal acts.³⁷⁷

373. *Id.* at 580-81, 279 A.2d at 672.

374. Act of Feb. 16, 1972, ch. 450, Sec. 3, 1971 N.J. Laws 1934, (1934 repealed the 1957 law). *Id.* Sec. 2 was codified at N.J. STAT. ANN. § 30:4-26:3a (West 1981). *Id.* Sec. 1 was codified at N.J. STAT. ANN. App.: Repealed Sections § 2A:85-5.1 (West 1985) (which indicates the section was repealed by Act of Aug. 10, 1978, ch. 95, § 2C:98-2, 1978 N.J. Laws 482, 688). Sec. 2C:98-2, however, does not list § 2A:85-5.2 among those sections repealed, although it lists the immediately preceding and succeeding sections. However, § 2C:98-2 does begin limiting the list of repealed sections by saying, "All acts and parts of acts inconsistent with this act are hereby superceded and repealed, and without limiting the general effect of the act in superseding and repealing acts . . . inconsistent herewith, the following sections . . . are specifically repealed." 1978 N.J. Laws at 687. The question is academic, however, because § 2CJ:98-1(a), 1978 N.J. Laws at 687, provides, "The enactment of this law shall not, due to the repeal set forth . . . [b]e deemed to revive any common law right or remedy abolished by any sections . . . repealed thereby." Thus, whether or not § 2A:85-5.1 was repealed, the common law punishment for attempted suicide has not been revived.

375. Act of Aug. 10, 1978, ch. 95, § 2C:11-6; 1978 N.J. Laws 482, 524 (codified at N.J. STAT. ANN. § 2C:11-6 (West 1982)).

376. Act of Aug. 10, 1978, ch. 95, § 2C:3-7(e), 1978 N.J. Laws 482, 524 (codified at N.J. STAT. ANN. § 2C:3-7(e) (West 1982)).

377. *In re Conroy*, 98 N.J. 321, 351, 486 A.2d 1209, 1224 (1985).

NEW MEXICO

The territory that is now New Mexico was taken from Mexico during the Mexican-American War,³⁷⁸ and formally became part of the United States on February 2, 1848, under the Treaty of Guadalupe Hidalgo.³⁷⁹ It was organized as a territory in 1850,³⁸⁰ but not admitted as a state until 1912.³⁸¹

In its first session, the territorial legislature adopted the provision that “in criminal cases, the common law as recognized by the United States and the several States of the union, shall be the rule of practice and decision.”³⁸² This remained the law until it was replaced in 1963³⁸³ by the current statutory language, which reads, “in criminal cases where no provision of this code is applicable, the common law, as recognized by the United States and the several state of the Union, shall govern.”³⁸⁴ Thus, New Mexico “incorporat[ed] into the body of our law the common law, *lex non scripta* of England, and such British statutes of a general nature not local to that kingdom, not in conflict with the laws of the United States, nor of this Territory, which were applicable to our condition and circumstances, and which were in force at the time of separation from the mother country.”³⁸⁵

On February 15, 1854, the territorial legislature adopted a comprehensive criminal code, which included the provision, “Every person deliberately assisting another in the commission of self-murder, shall be deemed guilty of murder in the third degree.”³⁸⁶ This remained the penalty for assisting suicide until 1907, when it was reduced to manslaughter.³⁸⁷ There was no further change in

378. 29 ENCYCLOPAEDIA BRITANNICA 409 (15th ed. 1985).

379. *Ex parte DeVore*, 18 N.M. 246, 251, 136 P. 47, 48 (1913).

380. Act of Sept. 9, 1850, ch. 49, § 2, 9 Stat. 446, 447.

381. 29 ENCYCLOPAEDIA BRITANNICA, at 409.

382. Act of July 12, 1851, § 18, 1851 N.M. LAWS 141, 144, (codified at REVISED STATUTES AND LAWS OF THE TERRITORY OF NEW MEXICO ch. 27, § 18 (St. Louis 1865)); COMPILED LAWS OF NEW MEXICO § 2484 (1884); COMPILED LAWS OF NEW MEXICO § 3422 (1897); N.M. STAT. ANN. § 1355 (1915); N.M. STAT. ANN. § 34-102 (1929); N.M. STAT. ANN. § 42-1101 (1941); and N.M. STAT. ANN. § 21-3-3 (1953)).

383. Criminal Code, ch. 303, § 1-3, 1963 N.M. LAWS 882, 829.

384. *Id.* § 1-3, 1963 N.M. LAWS at 829, codified at N.M. STAT. ANN. § 30-1-3 (1984).

385. *Ex parte DeVore*, 18 N.M. at 258, 136 P. at 51.

386. Act of Feb. 15, 1854, ch. 3, § 9, 1853-54 N.M. LAWS 82, 88 (codified at REVISED STATUTE AND LAWS OF THE TERRITORY OF NEW MEXICO, ch. 51, § 9 (St. Louis 1865)); COMPILED LAWS OF NEW MEXICO § 696 (1884); and COMPILED LAWS OF NEW MEXICO § 1072 (1897).

387. The 1854 statute was repealed by Act of March 18, 1907, ch. 36, § 23, 1907 N.M. LAWS 41, 45, and the penalty reduced to manslaughter at *Id.* § 4, 1907 N.M. LAWS at 42 (codified at N.M. STAT. ANN. § 1462 (1915); N.M. STAT. ANN. § 35-307 (1929); N.M. STAT. ANN.

the law until 1963, when it was repealed³⁸⁸ and replaced by the current law, under which "[a]ssisting suicide," which "consists of deliberately aiding another in the taking of his own life" is a felony.³⁸⁹ There are no reported appellate decisions reviewing a case involving the application of any of these statutes.

In 1889, the territorial legislature passed an act creating an insane asylum, and providing for the commitment to it of "any person . . . so far disordered in his mind as to endanger his health [or] person."³⁹⁰ In 1933, this legislation was replaced by an involuntary commitment provision applying to individuals of the same definition posing a danger to themselves or others.³⁹¹ In 1953, the provision again was repealed³⁹² and replaced by legislation providing for the involuntary commitment of one whom a court finds "is mentally ill, and . . . because of his illness is likely to injure himself . . . if allowed to remain at liberty."³⁹³ This in turn was repealed³⁹⁴ and replaced in 1977 with a statute under which one who "as a result of a mental disorder . . . presents a likelihood of danger to himself" is subject to involuntary commitment.³⁹⁵ "[L]ikelihood of serious harm to oneself" has been defined as including the possibility that "more likely than not in the near future the person will attempt to commit suicide"³⁹⁶ In 1978, the commitment standard became "as a result of a mental disorder the client presents a likelihood of serious harm to himself," which remains the law in New Mexico today.³⁹⁷

§ 41 2408 (1941) and N.M. STAT. ANN. § 40-24-8 (1953)).

388. Criminal Code, ch. 303, § 30-1, 1963 N.M. LAWS 822, 905.

389. *Id.* § 2-5, 1963 N.M. LAWS at 836 (codified at N.M. STAT. ANN. § 40A-2-5 (1953)); N.M. STAT. ANN. § 30-2-4 (1984).

390. Act of Feb. 28, 1889, ch. 138, § 52, 1889 N.M. LAWS 323, 338 (codified at COMPILED LAWS OF NEW MEXICO § 3619 (1897); N.M. STAT. ANN. § 5099 (1915); N.M. STAT. ANN. § 130-312 (1929)).

391. Repealed by Act of March 14, 1933, ch. 76, § 27, 1933 N.M. LAWS 114, 129, and replaced by *Id.* § 7, 1933 N.M. LAWS at 114, 119 (codified at N.M. STAT. ANN. § 37-202-207 (1941)).

392. Act of March 20, 1953, ch. 182, § 27, 1953 N.M. LAWS 609, 620.

393. *Id.* § 5(g), 1953 N.M. LAWS at 612 (codified at N.M. STAT. ANN. § 34-2-5(g) (1953)).

394. Act of Apr. 7, 1977, ch. 279, § 24, 1977 N.M. LAWS 2177, 2209.

395. *Id.* § 10(c), 1977 N.M. LAWS at 2190 (codified at N.M. STAT. ANN., § 43-1-11(c)(1) (1984)).

396. N.M. STAT. ANN. § 43-1-3(L) (1984).

397. Act of Mar. 6, 1978, sec. 5, § 34-2A-10(c)(1), 1978 N.M. LAWS 952, 962-63 (codified at N.M. STAT. ANN. § 43-1-11(c) (1984)).

NEW YORK

New York was first settled by the Dutch in 1624, but was conquered by the English in 1669.³⁹⁸ It voted to ratify the fourteenth amendment in 1867.³⁹⁹

As might be expected, the common law governed the colony of New York, including the criminal courts.⁴⁰⁰ The common law was recognized in the first New York Constitution of 1777,⁴⁰¹ and the common law of crimes was specifically recognized by statute before 1788.⁴⁰² An 1868 criminal law treatise discussed the common law penalty for assisting suicide, which was the law of New York until replaced by the legislature in 1828: "At the common law, if one persuaded another to kill himself, the adviser was guilty of murder, and if the party took poison himself by the persuasion of another in the absence of the persuaded, yet it was a killing by the persuader."⁴⁰³ The 1828 statute reduced the grade of the offense from murder to manslaughter in the first degree.⁴⁰⁴

In an 1843 insurance case, the New York Supreme Court (a trial court) referred to sane suicide as "a criminal act of self-destruction."⁴⁰⁵ The Court of Appeals, New York's highest court, remarked in 1871 in another insurance case, "[Suicide] is contrary to the general conduct of mankind; it shows gross moral turpitude in a sane person."⁴⁰⁶

The existing statute was replaced in 1881 by a new penal code that treated suicide and its assistance extensively. It justified the use of force "in preventing an idiot, lunatic, insane person, or the person of unsound mind, including persons temporarily or partially deprived of reason, from committing an act dangerous to himself

398. 29 ENCYCLOPAEDIA BRITANNICA 307 (15th ed. 1985).

399. U.S.C.S. CONST. amend. XIV explanatory note, at 11 (Law. Co-op. 1984).

400. 2 J. DOUGHERTY, LEGAL AND JUDICIAL HISTORY OF NEW YORK 16-17 (1911).

401. N.Y. CONST. of 1777, art. 35. See also Burgess-Jackson, *supra* note 214, at 61.

402. Act of Feb. 21, 1788, ch. 37, § 2, 1788 N.Y. LAWS 664, 665 (codified at 2 N.Y. LAWS 242 (Jones & Varick 1789)).

403. 1 J. COLBY, PRACTICAL TREATISE UPON THE CRIMINAL LAW AND PRACTICE OF THE STATE OF NEW YORK 612 (Albany 1868).

404. Act of Dec. 10, 1828, ch. 209, § 4, 1828 N.Y. LAWS 19, 19 (codified at 2 N.Y. REV. STAT. pt. 4, ch. 1, tit. 2, art. 1, § 7, at 661 (1829); 2 N.Y. REV. STAT. pt. 4, ch. 1, tit. 2, art. 1, § 7 at 550 (1836); 2 N.Y. REV. STAT. pt. 4, ch. 1, tit. 2, art. 1, § 7, at 750 (1846); 2 N.Y. REV. STAT. pt. 4, ch. 1, tit. 2, art. 1, § 7, at 847 (1852); 3 N.Y. REV. STAT. pt. 4, ch. 1, tit. 2, art. 1, § 7, at 940 (1858); 3 N.Y. REV. STAT. pt. 4, ch. 1, tit. 2, art. 1, § 7, at 680-81 (1867); 3 N.Y. REV. STAT. pt. 4, ch. 1, tit. 2, art. 1, § 7, at 932 (1875)).

405. *Breates v. Farmers' Loan and Trust Co.*, 4 Hill 73, 75 (1843), *aff'd*, 8 N.Y. 299 (1853).

406. *Mallory v. Travelers Ins. Co.*, 47 N.Y. 52, 54-55 (1871).

. . . during such period only as shall be necessary to obtain legal authority for the restraint or custody of his person."⁴⁰⁷ The 1881 penal code also contained these provisions:

§ 172 Suicide is the intentional taking of one's own life.

§ 173 Although suicide is deemed a grave public wrong, yet from the impossibility of reaching the successful perpetrator, no forfeiture is imposed.

§ 174 A person who, with intent to take his own life, commits upon himself any act dangerous to human life, or which, if committed upon or towards another person and followed by death as a consequence, would render the perpetrator chargeable with homicide, is guilty of attempting suicide.

§ 175 A person who willfully, in any manner, advises, encourages, abets, or assists another person in taking the latter's life, is guilty of manslaughter in the first degree.

§ 176 A person who willfully, in any manner, encourages, advises, assists or abets another person in attempting to take the latter's life, is guilty of a felony.

§ 177 It is not a defense to a prosecution under either of the last two sections, that the person who took, or attempted to take, his own life, was not a person deemed capable of committing crime.

§ 178 Every person guilty of attempting suicide is guilty of felony, punishable by imprisonment in a state prison not exceeding two years, or by a fine not exceeding one thousand dollars, or both.⁴⁰⁸

In 1889, in *Darrow v. Family Fund Society*,⁴⁰⁹ the New York Court of Appeals, applying the rule that in "upholding the contract of insurance, its provisions will be strictly construed as against the insurer,"⁴¹⁰ ruled that death benefits for a suicide could be recovered despite language in the contract barring their recovery when the death was "in violation of, or attempt to violate, any criminal law"⁴¹¹

At common law, suicide was a crime, and the consequence was the forfeiture of the chattels real and personal, of the *felo de se*. It is not a crime in this state. The attempt to commit suicide is made a crime [A]n attempt to commit crime imports a purpose, not fully accomplished, to commit it It must, for the purpose of the question here, be assumed that Darrow had the purpose of taking his own life, and that he fully accomplished such purpose . . . by the act of taking his own life he violated no criminal law⁴¹²

407. Act of July 26, 1881, ch. 676, § 223 (6), 1881 N.Y. Laws (vol. 3 Penal Code) 1, 54 (codified at 4 N.Y. Laws Penal Law § 246(6), at 2555 (1909)).

408. *Id.* §§ 172-78, 1881 N.Y. Laws (vol 3 Penal Code) at 42-43 (codified at 4 N.Y. Con. Laws, Penal Law §§ 2300 to 2306, at 2809-10 (1909)).

409. 116 N.Y. 537, 22 N.E. 1093 (1889).

410. *Id.* at 544, 22 N.E. at 1095.

411. *Id.* at 542, 22 N.E. at 1094.

412. *Id.* at 542-43, 22 N.E. at 1094-95 (citations omitted).

In the same year a lower court, turning back a will contest in which the testator's suicide was adduced to prove his insanity (and consequent lack of testamentary capacity), stated:

The Penal Code declares the attempt to commit suicide a felony, (section 178,) thus presuming sanity . . . The natural love of life, and the "dread of something after death" are usually such deterrents as to suggest insanity when suicide is attempted or accomplished. But the suggestion is greatly enfeebled when a man has reached that stage when the usual tenor of his long life is wholly changed, when no resources of enjoyment are left, when the present is full of vexations, and the future without hope or promise; with nothing to enjoy in this life, and nothing to fear in the next. If, then, a man deliberately, by his will . . . takes his life, it is plain that he thus acts, not because he is destitute of reason or of the capacity to reason, but because he does reason, and has the courage of his convictions.⁴¹³

In a 1902 insurance case, the City Court of New York, in upholding a jury charge on suicide, explained:

[T]he trial justice charged the jury that suicide was the intentional taking of one's own life; that it was not alone a moral offense, but that the law makes the attempt to take one's own life a crime; and that these facts should be considered by them, because, if the deceased committed suicide, "it is a reflection upon his family."⁴¹⁴

The evidence was then reviewed, and the court charged the jury "that suicide is too odious to be presumed; it must be proved."⁴¹⁵

At some point before July of 1903, one Leland Kent received a twenty year prison term after being convicted of "willfully aiding, encouraging, and assisting Ethel Blanche Dingle in committing suicide by cutting her throat."⁴¹⁶ In turning down an application for certificate, the effect of which would have stayed Kent's imprisonment pending appeal, the judge wrote, "To allow a man convicted of such a crime to go at large when his guilt is so apparent, would tend to bring the administration of criminal justice into disrepute."⁴¹⁷

The Court of Appeals overruled *Darrow* in 1903, holding in *Shipmen v. Protected Home Circle*⁴¹⁸ that a suicide committed while sane did not entitle the beneficiary to insurance benefits when the contract provided for no payments if the insured's death

413. *In re Card's Will*, 8 N.Y.S. 297, 297-98 (Sup. Ct. 1889).

414. *Mitterwallner v. Supreme Lodge, Knights and Ladies of the Golden Star*, 37 Misc. 860, 862-63, 76 N.Y.S. 1001, 1004 (City Ct. 1902).

415. *Id.*

416. *People v. Kent*, 41 Misc. 191, 191, 83 N.Y.S. 948, 949 (Sup. Ct. 1903).

417. *Id.* at 195, 83 N.Y.S. at 951.

418. 174 N.Y. 398, 67 N.E. 83 (1903).

was caused by an illegal act of his own. As the *Shipmen* court stated:

[I]n committing suicide, the plaintiff's husband was guilty of a crime, and all crime is illegal. It is, to say the least, doubtful whether the rule of the common law, declaring suicide to be *malum in se*, has been abrogated by the provisions of our Penal Code; but whether we invoke the stern morality of the common law, or the more merciful decree of our own statute, which declares suicide to be a "grave public wrong," it may fairly be called an illegal act

No act so contrary to good morals and the usual course of human nature should be held to be within the contemplation of the parties to a contract for life insurance, unless it is clearly and unequivocally expressed.⁴¹⁹

In 1914, an intermediate appellate court, dealing with another insurance case, remarked, "Suicide being unlawful and immoral, the presumption obtained [is] in favor of mistake rather than suicide [in assessing the cause of death which could be either]."⁴²⁰ The prohibition and punishment for attempting suicide (set forth above as sections 174 and 178 of the 1861 Penal Code) were repealed in 1919.⁴²¹

An intermediate appellate court in 1935 held it to be error to charge the jury in an insurance case, as the trial court had done, that "[S]uicide is a crime involving moral turpitude and the law presumes that a man who is dead has not committed a crime in order to accomplish what the law says was probably accomplished by accidental means."⁴²² This charge constituted reversible error, the appellate court ruled, because "suicide, although recognized as a grave public wrong, is not a crime."⁴²³ In 1944, however, the New York Court of Appeals described the presumption against suicide in such cases as "one aspect of the broader rule that where evidence is susceptible of two constructions, the construction which does not imply criminality or moral turpitude is to be favored."⁴²⁴

The Penal Law was completely revised in 1965. The section that defined suicide and characterized it as a "grave public wrong," and the section that prevented, as a defense to assisting suicide, the

419. *Id.* at 406, 67 N.E. at 85.

420. *Benard v. Protected Home Circle*, 161 A.D. 59, 62-63, 146 N.Y.S. 232, 235 (1914).

421. Act of May 5, 1919, ch. 414 § 1, 1919 N.Y. LAWS 1193, 1193.

422. *Hundert v. Commercial Travelers Mut. Accident Assoc. of Am.*, 244 A.D. 459, 459, 279 N.Y.S. 555, 556 (1935) (quoting trial court charge).

423. *Id.* at 460, 279 N.Y.S. at 556.

424. *Wellisch v. John Hancock Mut. Life Ins. Co.*, 293 N.Y. 178, 184, 56 N.E.2d 540, 543 (1944).

claim that the person assisted was incapable of committing a crime (set forth in sections 172, 173, and 177 of the 1881 Penal Code), were both omitted entirely.⁴²⁵ Section 175 of the 1881 Penal Code was redrafted as follows: "A person is guilty of manslaughter in the second degree when . . . he intentionally causes or aids another person to commit suicide."⁴²⁶ Section 176 was revised to provide that "[A] person is guilty of promoting a suicide attempt when he intentionally causes or aids another person to attempt suicide," which was considered a felony offense.⁴²⁷ In addition, the legislature adopted a statute that in effect provided that one who, through "the use of duress or deception," caused or aided another to commit suicide, could be found guilty of murder.⁴²⁸ Similarly, one who "by the use of duress or deception," caused or aided another to attempt suicide could be convicted of attempted murder.⁴²⁹

In his work, *Practice Commentaries*,⁴³⁰ Arnold Hechtman takes the view that it was uncertain under the prior law whether one who abetted suicide could be indicted for murder as well as for the suicide—specific offense. However, as Hechtman notes:

This question is recognized and explicitly resolved in the Revised Penal Law. All cases of causing or aiding a suicide are prosecutable as murder This rule is designed to restrict the more sympathetic cases to manslaughter and, at the same time, to permit the more heinous ones to be prosecuted as murder. Thus, a man who, upon the plea of his incurably ill wife, brings her a lethal drug in order to aid her in ending a tortured existence, is guilty at most of second degree manslaughter. On the other hand, a man who, in order to rid himself of an unwanted wife, deceitfully embarks upon an alleged suicide pact with her and then extricates himself according to plan, leaving her to die, is guilty of murder as well as of second degree manslaughter.⁴³¹

Finally, in place of what has been set forth above as section 223

425. Penal Law, ch. 1030, § 500 & Table II, 1965 N.Y. LAWS 2343, 2482, 2516.

426. *Id.* § 125.15(3) & Table II, 1965 N.Y. LAWS at 2387, 2516 (codified at N.Y. PENAL LAW § 125.15(3) (McKinney 1975)).

427. Penal Law, ch. 1030, § 120.30 & Table II, 1965 N.Y. LAWS 2343, 2385, 2516 (codified at N.Y. PENAL LAW § 120.30 (McKinney 1975)).

428. Penal Law, ch. 1030, § 125.25(1)(b), 1965 N.Y. LAWS 2343, 2388 (codified at N.Y. PENAL LAW § 125.25(1)(b) (McKinney 1975)). *See also* Act of May 2, 1967, ch. 791, sec. 9, § 125.25(1)(b), 1967 N.Y. LAWS 2131 2137 (clarifying amendment); Penal Law, ch. 1030, § 120.35, 1965 N.Y. LAWS 2343, 2385 (codified at N.Y. PENAL LAW § 120.35 (McKinney 1975)).

429. Penal Law, ch. 1030, § 120.35, 1965 N.Y. LAWS 2343, 2385 (codified at N.Y. PENAL LAW § 120.35 (McKinney 1975)).

430. *N.Y. Penal Law* § 125.15 practice commentaries (McKinney 1975).

431. *Id.*

of the Penal Code of 1881, the 1965 legislature provided, "A person acting under a reasonable belief that another person is about to commit suicide or to inflict serious physical injury upon himself may use physical force upon such person to the extent that he reasonably believes it necessary to thwart such result."⁴³² In 1982, for example, John Lennon's assassin, Mark David Chapman, began to starve himself to death. Upholding an order authorizing forced feeding, an intermediate appellate court stated, "The preservation of life has a high social value in our culture and suicide is deemed a 'grave public wrong.'⁴³³

Under current New York law, a person "who appears to be mentally ill and is conducting himself in a manner which poses substantial risk of physical harm to himself as manifested by threats or attempts at suicide" may be involuntarily detained.⁴³⁴

NORTH CAROLINA

After brief and unsuccessful attempts at colonization on Roanoke Island during the 1580's, the first permanent English settlement in North Carolina was established in the 1650's. In 1663, the colony of Carolina was created; it was divided into North and South Carolina in 1735. North Carolina was one of the original thirteen colonies to declare independence from England as sovereign states in 1776.⁴³⁵ After rejecting it in 1866, North Carolina voted to ratify the fourteenth amendment in 1868.⁴³⁶

A 1961 North Carolina Supreme Court case, *State v. Willis*,⁴³⁷ directly dealt with the legal status of suicide in North Carolina throughout most of its history. The court held that the common law of crimes was applicable in North Carolina from at least 1715, and a statement of the North Carolina General Assembly, quoted by the Court, implied that this was the case before 1715.⁴³⁸ After quoting Blackstone and citing English cases for the proposition that "[a]t common law suicide was a felony,"⁴³⁹ the court wrote:

The matter of punishment seems to give the courts, in states where the

432. Penal Law, ch. 1030, § 35.10(4) & Table II, 1965 N.Y. Laws 2343, 2355, 2494 (codified at *N.Y. Penal Law* § 35.10 (4) (McKinney 1975)).

433. *Von Holden v. Chapman*, 87 A.D.2d 66, 68, 450 N.Y.S.2d 623, 626 (1982).

434. *N.Y. Mental Hyg. Law* § 9.41 (McKinney Supp. 1983-84).

435. 29 *ENCYCLOPAEDIA BRITANNICA* 345 (15th ed. 1985).

436. U.S.C.S. CONST. amend XIV, explanatory note, at 11 (Law. Co-op 1984).

437. *State v. Willis*, 255 N.C. 473, 121 S.E.2d 854 (1961).

438. *Id.* at 474, 121 S.E.2d at 855.

439. *Id.* at 475, 121 S.E.2d at 855.

common law is recognized, the greatest difficulty in deciding whether or not suicide is a crime. Nearly all agree that suicide is *malum in se*

. . . Our Constitution forbids both ignominious burial and forfeiture of estates as punishment for crime Forfeiture, as punishment, has not had any force in this jurisdiction since 1778

So it must be conceded that suicide may not be punished in North Carolina. But in our opinion this fact does not change the criminal character of the act. The common law considered the offense to have been committed in the lifetime of the offender

For the reason that a suicide may not be punished, it is argued that this common law offense is now obsolete and serves no practical purpose for the protection of society. We do not agree. Since suicide is a crime, one who aids and abets another in, or is accessory before the fact to self-murder is amenable to the law Likewise, where two agree to kill themselves together and the means employed takes effect upon one only Also, where one in attempting to commit suicide accidentally kills another Such offenses, in the absence of statute to the contrary, would not be criminal offenses in a jurisdiction in which suicide is not a crime.⁴⁴⁰

Thus, the court concluded, "An attempt to commit suicide is an indictable misdemeanor in North Carolina."⁴⁴¹ However, so far as punishment was concerned, the court remarked, "This, of course, does not mean that the court may not place offenders on probation or make use of other state facilities and services in proper cases."⁴⁴²

The court's decision provoked criticism. In the words of one commentator, "Its only effect will be to make suicidal attempts more successful, and it probably will not even discourage a second attempt by the same person." As stated by a leading authority on criminal law:

When a man is in the act of taking his own life there seems to be little advantage in having the law say to him: "you will be punished if you fail" What is done to him will not tend to deter others because those bent on self-destruction do not expect to be unsuccessful. It is doubtful whether anything is gained by treating such conduct as a crime.⁴⁴³

In 1973, the legislature abolished the common law crime of suicide as an offense in North Carolina.⁴⁴⁴

Under current law, involuntary commitment may be ordered for one whom a court finds to be "mentally ill . . . and dangerous to

440. *Id.* at 475-77, 121 S.E.2d at 855-857 (citations omitted).

441. *Id.* at 477, 121 S.E.2d at 857.

442. *Id.*

443. Note, *Criminal Law - Attempted Suicide*, 40 N.C.L. REV. 323, 326-27 (1962).

444. Act of Apr. 8, 1974, ch. 1205, § 1, 1973 N.C. Sess. Laws 334, 334 (codified at N.C. GEN. STAT. § 14-17.1 (1981)).

himself,"⁴⁴⁵ which means that "within the recent past . . . [t]he person has attempted suicide or that there is a reasonable probability of suicide unless adequate treatment is afforded. . . ." ⁴⁴⁶

NORTH DAKOTA

The territory that comprises North Dakota, acquired through the 1803 Louisiana Purchase, was originally administered as part of the Northwest Territory, and later, as part of the Michigan Territory.⁴⁴⁷ Still later, a portion became part of the Wisconsin Territory, and (together with what would be South Dakota) was split between the Minnesota and Nebraska Territories. Throughout this period, it was occupied almost exclusively by Native Americans until treaties in 1858 and the following years led to non-native settlement.⁴⁴⁸ Congress created the Territory of Dakota in 1861, and the first territorial legislature assembled in 1862.⁴⁴⁹ A code of criminal procedure that included a general murder statute was enacted.⁴⁵⁰ Fifteen years later, the Territory of Dakota adopted a new penal code that treated suicide at length:

§ 228 Suicide Defined. Suicide is the intentional taking of one's life.

§ 229 No Forfeiture. Although suicide is deemed a grave public wrong, yet from the impossibility of reaching the successful perpetrator, no forfeiture is imposed.

§ 230 Attempt. But every person who with intent to take his own life, commits upon himself any act dangerous to human life, of which if committed upon or towards another person and followed by death as a consequence, would render the perpetrator chargeable with homicide, is guilty of attempting suicide.

§ 231 Aiding Suicide. Every person, who willfully, in any manner, advises, encourages, abets or assists another person in taking his own life, is guilty of aiding suicide.

§ 232 Furnishing Weapon or Drug. Every person who willfully furnishes another person with any deadly weapon or poisonous drug, knowing that such person intends to use such weapon or drug in taking his own life, is guilty of aiding suicide, if such person thereafter employs such instrument or drug in taking his own life.

§ 233 Aiding Attempt. Every person, who willfully aids another in attempting to take his own life, in any manner which by the preceding sections

445. N.C. GEN. STAT. § 122-58.7 (Supp. 1983).

446. *Id.* § 122-58.2(1)(a)(2) (1981).

447. G. HAND, REV. CODES OF THE TERRITORY OF DAKOTA iii-iv (1877).

448. *Id.* at iv.

449. Criminal Code, ch. 9, § 18, 1862 Dakota Sess. Laws 157, 160.

450. Hand, *supra* note 447, at 4620, Penal Code §§ 228-34.

would have amounted to aiding suicide if the person assisted had actually taken his own life, is guilty of aiding an attempt at suicide.

§ 234 Incapacity—No Defense. It is no defense to a prosecution for aiding suicide, or aiding an attempt at suicide, that the person who committed or attempted to commit the suicide was not a person deemed capable of committing crime.⁴⁵¹

The Penal Code also provided penalties of fines and imprisonment for aiding and attempting suicide.⁴⁵²

In 1889, North and South Dakota were split and each was admitted as a separate state.⁴⁵³ North Dakota retained the penal laws of the Territory of Dakota.⁴⁵⁴ In 1895, a legislative revising commission deleted Section 229 while adopting, with minor grammatical changes, the rest of the existing suicide legislation.⁴⁵⁵ Apart from changes in the statutory penalties and a slight reshuffling in their order, these provisions remained unchanged⁴⁵⁶ until 1967, when the provision punishing attempting suicide was repealed.⁴⁵⁷ In 1973, North Dakota enacted a completely revised criminal code, repealing the remainder of the provisions quoted above.⁴⁵⁸

The elimination of any specific penalty for assisting suicide does not appear to have been motivated by a desire to legalize the act. The legislative committee charged with the revision decided that rather than work through the old code, it would use the Proposed Federal Code as a model.⁴⁵⁹ The plain language of the current homicide provisions appears to encompass cases in which one individual kills another at the victim's request or with the victim's consent: One who "[i]ntentionally or knowingly causes the death of another human being is guilty of murder;"⁴⁶⁰ "one who [r]ecklessly causes the death of another human being" or "causes the death under the influence of extreme emotional disturbance for which there is reasonable cause" is guilty of manslaughter;⁴⁶¹ and one

451. *Id.* §§ 235-36.

452. *See generally id.*

453. 29 ENCYCLOPAEDIA BRITANNICA 391 (15th ed. 1985).

454. *See supra* notes 448-50 and accompanying text.

455. N.D. REV. CODE §§ 7045-52 (1895).

456. They were variously codified at N.D. REV. CODE §§ 7045-52 (1899); N.D. REV. CODE §§ 8776-83 (1905); N.D. COMP. LAWS §§ 9449-56 (1913); N.D. REV. CODE §§ 12-3301 to 3307 (1943); N.D. CENT. CODE §§ 12-33-01 to -07 (1960).

457. Act of March 4, 1967, ch. 108, sec. 1, 1967 N.D. Sess. Laws 188.

458. Act of March 15, 1973, ch. 116, sec. 41, 1973 N.D. Sess. Laws 215, 300.

459. Special Project, *Criminal Code Revision - A Hornbook to the North Dakota Criminal Code*, 50 N.D.L. REV. 639 (1974).

460. N.D. CENT. CODE § 12.1-16-01(1) (Supp. 1983).

461. *Id.* § 12.1-16-02.

who "negligently causes the death of another human being" is guilty of negligent homicide.⁴⁶²

In 1957, North Dakota modified its involuntary commitment statute, which had previously provided for involuntary hospitalization simply upon a finding that "the patient requires treatment or observation at the state hospital and is a fit subject therefore and for custody in the hospital."⁴⁶³ The new statute provided specifically for such hospitalization upon a finding that "the proposed patient . . . is mentally ill, and because of his illness is likely to injure . . . himself if allowed to remain at liberty."⁴⁶⁴ In 1977, the section was repealed and replaced by a standard providing for commitment of "[a] person who is mentally ill . . . and who as a result of such condition can reasonably be expected within the near future to intentionally or unintentionally seriously physically harm himself . . . and who has engaged in an act or acts or made significant threats that are substantially supportive of this expectation."⁴⁶⁵

The standard for involuntary commitment changed again in 1979, to apply to "a person [w]ho is mentally ill . . . and there is a reasonable expectation that if the person is not hospitalized there exists a serious risk of harm to himself . . . 'serious risk of harm' means a substantial likelihood of . . . [s]uicide as manifested by suicidal threats, attempts, or significant depression relevant to suicidal potential"⁴⁶⁶

OHIO

Ohio, originally part of disputed territory, was ceded by France to Great Britain with other land in the Treaty of 1763 that concluded the French and Indian War. Part of the Northeast Territory, it became a state in 1802.⁴⁶⁷ It voted to ratify the fourteenth

462. *Id.* § 12.1-16-03 (1976).

463. N.D. REV. CODE § 25-0312(1) (1943).

464. Act of March 18, 1957, ch. 196, sec. 3, § 35-0311(7)(a), 1957 N.D. Sess. Laws 368, 379 (codified at N.D. CENT. CODE § 25-03-11(7)(a) (1960)).

465. Act of Apr. 20, 1977, ch. 239, sec. 48, 1977 N.D. Sess. Laws 528, 548. *Id.* sec. 20, 1977 N.D. Sess. Laws at 536-37 (codified at N.D. CENT. CODE § 25-03.1-20 (1978)). *See also* sec. 1(11)(a), 1977 N.D. Sess. Laws at 529-30 (codified at N.D. CENT. CODE § 25-03.1-02(11)(a) (1978)).

466. Act of Apr. 7, 1979, ch. 334, sec. 4, § 25-03.1-02(11)(b) (codified at N.D. CENT. CODE § 25-03.1-02 (11)(b) (Supp. 1985)).

467. Chase, *A Preliminary Sketch of the History of Ohio*, in 1 OHIO STATE 1788-1833 at 2-40 (1833).

amendment in 1867, but purported to rescind that ratification in 1868.⁴⁶⁸

The Congressional ordinance of 1787 for the Northeast Territory adopted the common law,⁴⁶⁹ as did a territorial statute in 1795 and a state statute in 1805.⁴⁷⁰ The State's statute, the last, was repealed in 1806.⁴⁷¹

In 1872, the Ohio Supreme Court heard an appeal of an individual who had been convicted of murder for mixing strychnine with wine and giving it to a woman who took it in order to commit suicide, apparently as part of a suicide pact with the defendant.⁴⁷² The defendant's attorney argued "that suicide is no crime by the laws of Ohio, and therefore there can be no accessories or principals in the second degree in suicide."⁴⁷³ The court responded, "This is true. But the real criminal *act* charged here is not *suicide*, but the *administration of poison* The charge is that the prisoner, as principal in the first degree, is guilty of *administering poison*, and thereby causing death."⁴⁷⁴ With regard to that crime, the court said:

[I]t is immaterial whether the party taking the poison took it willingly, intending thereby to commit suicide, or was overcome by force, or overreached by fraud. True, the atrocity of the crime, in a moral sense, would be greatly diminished by the fact that suicide was intended; yet the law, as we understand it, makes no discrimination on that account. The lives of all are equally under the protection of the law, and under that protection to their last moment. The life of those to whom life has become a burden—of those who are hopelessly diseased or fatally wounded—nay, even the lives of criminals condemned to death, are under the protection of the law, equally as the lives of those who are in the full tide of life's enjoyment, and anxious to continue to live. If discriminations are to be made in such cases as to the amount of punishment due to offenders, they must be made by the exercise of executive clemency or legislative provision. Purposely and maliciously to kill a human being, by administering to him or her poison, is declared by the law to be murder, irrespective of the wishes or the condition of the

468. U.S.C.S. CONST. amend. XIV explanatory note, at 11 (Law Co-op. 1984).

469. Act of July 13, 1787, art. 2, 1 Stat. 51, 52.

470. Act of July 14, 1795, in OHIO STATS., Terr. Laws ch. 64, at 190-91 (Chase 1833), repealed by Act of Dec. 29, 1804, § 2, in OHIO STATS., Ohio Laws ch. 69, § 2, at 484 (Chase 1833) and again repealed by Act of Feb. 14, 1805, § 2, in OHIO STATS., Ohio Laws ch. 105, § 2, at 512 (Chase 1833).

471. Act of Feb. 14, 1805, § 1, in OHIO STATS., Ohio Laws ch. 105, § 1, at 512 (Chase 1833), repealed by Act of Jan. 2, 1806, § 1, in OHIO STATS., Ohio Laws ch. 122, § 1, at 528 (Chase 1833).

472. *Blackburn v. State*, 23 Ohio St. 146 (1872).

473. *Id.* at 163.

474. *Id.* at 163-64 (emphasis in original).

party to whom the poison is administered, or the manner in which, or the means by which, it is administered. The fact that the guilty party intends also to take his own life, and that the administration of the poison is in pursuance of an agreement that both will commit suicide, does not, in a legal sense, vary the case. If the prisoner furnished the poison to the deceased for the purpose and with the intent that she should with it commit suicide, and she accordingly took and used it for that purpose; or, if he did not furnish the poison, but was present at the taking thereof by the deceased, participating, by persuasion, force, threats, or otherwise, in the taking thereof, or the introduction of it into her stomach or body; then, in either of the cases supposed, he administered the poison to her, within the meaning of the statute. Her act of *taking* and *swallowing* it, in his presence and by his direction, was his act of *administering* it.⁴⁷⁵

Finally, under current Ohio law, “[A] mentally ill person, who, because of his illness . . . [r]epresents a substantial risk of physical harm to himself as manifested by evidence of threats of, or attempts at, suicide” may be involuntarily committed.⁴⁷⁶

OKLAHOMA

Oklahoma was acquired from France in 1803 as part of the Louisiana Purchase. In 1828, Congress banished non-Native Americans and reserved the land as Indian territory. In 1889, Congress officially re-opened the land to non-Native American settlement, and in 1890 created the Territory of Oklahoma. It was admitted as a state in 1907.⁴⁷⁷

From 1890 until 1976, attempted suicide was defined by statute as a crime in Oklahoma.⁴⁷⁸ An 1890 provision stating, “[A]lthough suicide is deemed a grave public wrong, yet from the impossibility of reaching the successful perpetrator, no forfeiture is imposed,” was no longer part of Oklahoma statutory law following a 1910 revision of the statutes.⁴⁷⁹ Dating from 1890, but still in effect, are penal prohibitions on aiding suicide,⁴⁸⁰ on “willfully furnish[ing]

475. *Id.* at 162-63 (emphasis in original).

476. OHIO REV. CODE ANN. §§ 5122.01(b)(1), 5122.15(c) (Page 1970 & Supp. 1984).

477. 29 ENCYCLOPAEDIA BRITANNICA 412 (15th ed. 1985).

478. Subsequently codified at OKLA. TERR. STAT. § 2076 (1890)); OKLA. TERR. STAT. § 2066 (1893); OKLA. TERR. STAT. § 2155 (1903); OKLA. COMP. LAWS § 2256 (1909); OKLA. REV. LAWS § 2301 (1910); OKLA. COMP. STAT. 1721 (1921); OKLA. STAT. ANN. tit. 21, § 812 (West 1983); repealed by Act of Jan. 30, 1976, ch. 6, § 2, 1976 Okla. Sess. Laws 7.

479. Subsequently codified at OKLA. TERR. STAT. § 2075 (1890)); OKLA. TERR. STAT. § 2065 (1893); OKLA. TERR. STAT. § 2154 (1903); OKLA. COMP. LAWS § 2255 (1909).

480. Subsequently codified at OKLA. TERR. STAT. § 2077 (1890)); OKLA. TERR. STAT. § 2067 (1893); OKLA. TERR. STAT. § 2156 (1903); OKLA. COMP. LAWS § 2257 (1909); OKLA. REV. LAWS § 2302 (1910); OKLA. COMP. STAT. § 1722 (1921); OKLA. STAT. ANN. tit. 21, § 813 (West 1983).

another person with any deadly weapon or poisonous drug, knowing that such person intends to use such weapon or drug in taking his own life, is guilty of aiding suicide, if such persons thereafter employs such instrument or drug in taking his own life,"⁴⁸¹ and on aiding an attempt to commit suicide.⁴⁸² These 1890 statutes were derived from the laws of the Dakota Territory.⁴⁸³

Under current Oklahoma law, a person who, as a result of mental disorder is a danger to himself, may be involuntarily committed.⁴⁸⁴

OREGON

While the sovereignty of Oregon was still disputed between England and the United States, American settlers organized the first government in the area, based on Iowa law, in 1843. The territory was recognized as part of the United States by treaty with Great Britain in 1846, and was admitted as a state in 1859.⁴⁸⁵ In 1868, the Oregon legislature voted to ratify the fourteenth amendment.⁴⁸⁶

In 1864, the state legislature adopted a Code of Criminal Procedure⁴⁸⁷ that went into effect May 1, 1865.⁴⁸⁸ It included a provision that "if any person shall purposely and deliberately procure another to commit self-murder, or assist another in the commission thereof, such person shall be deemed guilty of manslaughter."⁴⁸⁹

Explaining the presumption against suicide in a 1944 insurance case, the Oregon Supreme Court wrote in condemnation of suicide, "Blackstone describes how the suicide was given an ignominious burial along the highway with a stake driven through his body. We do not now regard suicide with such severity but, nevertheless, self destruction ordinarily involves moral turpitude and is undoubtedly

481. Subsequently codified at OKLA. TERR. STAT. § 2078 (1890); OKLA. TERR. STAT. § 2078 (1893); OKLA. TERR. STAT. § 2157 (1903); OKLA. COMP. LAWS § 2258 (1909); OKLA. REV. LAWS § 2303 (1910); OKLA. COMP. STAT. § 1723 (1921); OKLA. STAT. ANN. tit. 21, § 814 (1983).

482. Subsequently codified at OKLA. TERR. STAT. § 2079 (1890); OKLA. TERR. STAT. § 2069 (1893); OKLA. TERR. STAT. § 2158 (1903); OKLA. COMP. LAWS § 2259 (1909); OKLA. REV. LAWS § 2304 (1910); OKLA. COMP. STAT. § 1724 (1921); OKLA. STAT. ANN. tit. 21, § 815 (1983).

483. Bunn, foreword, in OKLA. REV. STAT. (1910) (not paginated).

484. OKLA. STAT. ANN. tit. 43A, § 54.4 (J) (West Supp. 1983-84).

485. 29 ENCYCLOPAEDIA BRITANNICA 452, 455 (15th ed. 1985).

486. U.S.C.S. CONST. amend XIV explanatory note, at 11 (Law. Co-op 1984).

487. OR. GEN. LAWS 1845-1864 441 (Deadly 1866).

488. *Id.* Code of Criminal Procedure § 731, at 578.

489. *Id.* § 508, at 528; OR. GEN. LAWS (1843-1872) Criminal Code § 512, at 407 (Deadly & Lane 1874); OR. ANN. LAWS § 1720 (Hill 1887); OR. ANN. LAWS § 1720 (Hill 1892); OR. CODES & STATS. § 1747 (Bellinger & Cotton 1902); OR. LAWS § 1899 (Land 1910); OR. LAWS § 1899 (Olson 1920); OR. CODE ANN. § 14-207 (1930); OR. COMP. LAWS ANN. § 23-407 (1940).

regarded as being wrong."⁴⁹⁰

In 1953, the Oregon Supreme Court had occasion to delineate the differences between the applicability of the assisting suicide statute quoted above and the murder statute:

[T]he [assisting suicide statute] does not contemplate active participation by one in the overt act directly causing death. It contemplates some participation in the events leading up to the commission of the final overt act, such as furnishing the means for bringing about death,—the gun, the knife, the poison, or providing the water, for the use of the person who himself commits the act of self-murder. But where a person actually performs, or actively assists in performing, the overt act resulting in death, such as shooting or stabbing the victim, administering the poison, or holding one under water until death takes place by drowning, his act constitutes murder, and it is wholly immaterial whether this act is committed pursuant to an agreement with the victim, such as a mutual suicide pact.⁴⁹¹

As part of a complete revision of the laws in 1953, the assisting suicide statute was amended to read, "Any person who purposely and deliberately procures another to commit self-murder or assists another in the commission thereof, is guilty of manslaughter."⁴⁹² This provision was repealed in 1971 as part of a general revision of the criminal code.⁴⁹³ The new code, in language that remains the law today, made one who "intentionally causes or aids another person to commit suicide" guilty of manslaughter.⁴⁹⁴ At the same time, the legislature established that assisting suicide did not subject one to the penalty for murder.⁴⁹⁵ The same legislation also provided, "A person acting under a reasonable belief that another person is about to commit suicide or inflict serious physical injury upon himself may use physical force upon that person to the ex-

490. *Wyckoff v. Mutual Life Ins. Co. of N.Y.*, 173 Or. 592, 595-96, 147 P.2d 227, 229 (1944).

491. *State v. Bouse*, 199 Or. 676, 703, 264 P.2d 800, 812 (1953), *overruled on other grounds* in *State v. Brewton*, 238 Or. 590, 599, 395 P.2d 874, 878 (1964) and *State v. Fischer*, 232 Or. 558, 565, 376 P.2d 418, 412 (1962).

492. OR. REV. STAT. § 163.050 (1953). The general revision was adopted by Act of January 26, 1953, ch. 3, secs. 1, 8, 1953 Or. Laws 20, 20-21. It was not reprinted in the session laws. Act of Apr. 24, 1953, 1953 Or. Laws 793.

493. Act of July 2, 1971, ch. 743, § 432, 1971 Or. Laws 1873, 2002.

494. *Id.* § 89(1)(c), 1971 Or. Laws at 1903 (codified at OR. REV. STAT. § 163.125(1)(c) (Repl. 1977)). In 1975, the crime was changed to second degree manslaughter and the subsection lettering was changed. Act of July 2, 1975, ch. 577, § 3, 1975 Or. Laws 1305, 1306. Thus, the current statute is OR. REV. STAT. § 163.125(1)(b) (Repl. 1983).

495. Act of July 2, 1971, ch. 743, sec. 88(3), 1971 Or. Laws 1873, 1903 (codified at OR. REV. STAT. § 163.115(3) (Repl. 1977)). In a 1981 reorganization, this was shifted to OR. REV. STAT. § 163.117 (Repl. 1983). Act of Aug. 22, 1981, ch. 873, §§ 5, 8, 1981 Or. Laws 1399, 1321, 1322.

tent that he reasonably believes it necessary to thwart the result."⁴⁹⁶

In 1973, the Oregon legislature adopted an amendment providing for the involuntary commitment of mentally ill persons specifically including "a person who, because of a mental disorder, is . . . [d]angerous to himself."⁴⁹⁷

PENNSYLVANIA

Following Swedish and Dutch settlements in the 1640's, the English gained control of the territory that became Pennsylvania in 1664. William Penn received a charter entitling him to the region in 1681 and Pennsylvania became one of the original thirteen colonies.⁴⁹⁸ The Pennsylvania legislature voted to ratify the fourteenth amendment in 1867.⁴⁹⁹

An act of Pennsylvania's Provincial General Assembly passed on May 31, 1718, begins with the statement, "It is settled point that as the common law is the birthright of English citizens, so it ought to be their rule in British dominion."⁵⁰⁰ It is clear from the language quoted that the common law was deemed to be in effect in Pennsylvania from the earliest days of English settlement. The quoted portions of the act were reprinted as being in force as late as 1824.⁵⁰¹ From 1790 through 1972, Pennsylvania had statutes specifically adopting the common law of crimes.⁵⁰²

In 1701, William Penn's "Charter of Privileges to the Province and Counties" of Pennsylvania provided, "If any person, through Temptation or melancholly, shall Destroy himself, his Estate, Real and Personal, shall, notwithstanding, Descend to his wife and Chil-

496. Act of July 2, 1971, ch. 743, § 21(4), 1971 Or. Laws 1873, 1882 (codified at Or. REV. STAT. § 161.209 (Repl. 1983)).

497. Act of July 22, 1973, ch. 838, sec. 101, § 426.005(2)(a), 1973 Or. Laws 2820, 2820 codified at Or. REV. STAT. § 426.005(2)(a) (Repl. 1983).

498. ENCYCLOPAEDIA BRITANNICA 153, 308, 311 (15th ed. 1985).

499. U.S.C.S. CONST. amend. XIV explanatory note, at 11 (Law. Co-op. 1984).

500. Act of May 26, 1719 (date of confirmation by the Lords Justices in Council), ch. 236, 3 *Statutes at Large of Pennsylvania* 199, 200.

501. PURDON'S DIGEST Penal Laws preceding § 1, at 639 (1824).

502. Act of Apr. 5, 1790, ch. 1505, § 7, 1790 Pa. Laws 440, 444 codified (with variations in language) at PURDON'S DIGEST Penal Laws § 12, at 644 (1824); PURDON'S DIGEST Penal Laws § 45, at 647 (1853); PA. DIGEST OF THE LAWS Crimes § 187, at 247 (Purdon 1862); PA. DIGEST OF THE LAWS Crimes § 187, at 247 (Purdon 1862); PA. DIGEST OF THE LAWS Crimes § 298, at 371 (Purdon 1873); PA. DIGEST OF THE LAWS Crimes § 146, at 1158 (Pepper & Lewis 1896); PA. DIGEST OF THE LAWS Crim. Procedure, § 73, at 1047 (Purdon 1903); PA. STAT. § 7769 (West 1920); PA. STAT. ANN. tit. 18, § 5101 (1963); repealed by Act of Dec. 6, 1972, No. 334, sec. 5, 1972 Pa. Laws 1482, 1611.

dren or Relations as if he had Died a natural death"⁵⁰³ This abolition of forfeiture as punishment for suicide was pioneering.⁵⁰⁴

In an 1878 insurance case, the Pennsylvania Supreme Court defined suicide as follows:

Generally, in legal acceptance and in popular use, the word suicide is employed to characterize the crime of self-murder. It is called 'self-murder' in terms of Webster, and is defined to be 'the act of designedly destroying one's own life, committed by a person of years of discretion and of sound mind.'⁵⁰⁵

In the 1902 case of *Commonwealth v. Wright*,⁵⁰⁶ the Court of Quarter Sessions for Philadelphia County preemptorily rebuked "the practice of indicting persons for the common law offense of attempting to commit suicide [which] is still followed in this county."⁵⁰⁷ The *Wright* court explained:

Calling suicide self-murder is a curt way of justifying an indictment to and trial of an unfortunate person who has not the fortitude to bear any more of the ills of his life. His act may be a sin but it is not a crime; it is the result of disease. He should be taken to a hospital and not sent to a prison. The magistrates should discharge all such unfortunates as may be brought before them in the future.⁵⁰⁸

The court reasoned that since the common law penalty for suicide—forfeiture and ignominious burial—had been abolished, suicide was no longer a crime. As a result, the court reasoned, "As an accomplished suicide is not a crime, it is plain that an attempt to commit suicide is not a crime unless it is made such by statute"⁵⁰⁹

In 1931, in *Elwood v. New England Mutual Life Insurance Co.*,⁵¹⁰ the Pennsylvania Supreme Court dealt with a claim for disability insurance by a man who, while sane, attempted suicide, but survived in a condition that disabled him for employment. The court ruled that he could not recover:

We are not dealing with suicide accomplished, but with an attempt at self-murder; not with the rights of a beneficiary who is himself guilty of no wrongdoing, but with those claimed by the insured, who himself has been

503. THE EARLIEST PRINTED LAWS OF PENNSYLVANIA, 1681-1713 at 206 (J. Cushing ed. 1978).

504. Burgess-Jackson, *supra* note 214, at 65.

505. Connecticut Mutual Life Insurance Co. v. Groom, 5 Pa. 92, 97 (1878).

506. 11 Pa. D. 144 (Ct. Quarter Sess., Philadelphia Co. 1902).

507. *Id.*

508. *Id.* at 146.

509. *Id.* at 145.

510. 305 Pa. 505, 158 A. 257 (1931).

guilty of one of the great moral wrongs, of a crime infamous at common law, if completed, a species of felony In some jurisdictions, an attempt to commit suicide is a felony

. . . A principle of public policy, operating on the wrongdoer himself is and should be invocable here, which cannot be applied against a surviving beneficiary who is guiltless of any act contrary to good morals.⁵¹¹

Unlike the lower court in *Wright*, the Pennsylvania Supreme Court was not willing to concede that every suicide attempter is a fit candidate for hospitalization rather than prison:

The plaintiff knew the consequences of his act, he knew and stated in writing [in the letter which he wrote just before shooting himself] that it was a cowardly act. He appreciated the distress which his act would bring upon his wife and family and begged their forgiveness. It would be impossible in the light of his own testimony to find that he was insane. As was further observed by the trial judge: "The desire to end unhappiness and escape trouble, or the loss of stamina and courage, leading to the act of suicide, do not amount to insanity." . . . If he had shot some one else and was on trial for the crime, it could not be pretended that he was not mentally responsible.⁵¹²

In a 1959 case, unrelated to suicide, a Pennsylvania Superior Court opined:

The Commonwealth is interested in protecting its citizens against acts which endanger their lives. The policy of the law is to protect human life, even the life of a person who wishes to destroy his own. To prove that the victim wanted to die would be no defense to murder.⁵¹³

In 1972, in the same act which abolished the common law of crimes, the Pennsylvania legislature enacted the following provisions:

§ 2505. Causing or aiding suicide.

(a) Causing suicide as criminal homicide. —A person may be convicted of criminal homicide for causing another to commit suicide only if he intentionally causes such suicide by force, duress or deception.

(b) Aiding or soliciting suicide as an independent offense. —A person who intentionally aids or solicits another to commit suicide is guilty of a felony of the second degree if his conduct causes such suicide or an attempted suicide, and otherwise of a misdemeanor of the second degree.⁵¹⁴

The legislature also provided that the use of force was justifiable to

511. *Id.* at 512, 513, 158 A. at 259.

512. *Id.* at 511, 512, 158 A. at 258.

513. *Commonwealth v. Root*, 191 Pa. Super. 238, 244, 156 A.2d 895, 900 (1959), *rev'd on other grounds*, 403 Pa. 571, 170 A.2d 310 (1960).

514. Act of Dec. 6, 1972, No. 334, sec. 1, § 2505, 1972 Pa. Laws 1482, 1524 (codified at 18 PA. CONS. STAT. ANN. § 2505 (Purdon 1983)).

prevent suicide.⁵¹⁵

Under current Pennsylvania law, one found to be "severely mentally disabled" may be involuntarily committed if it is established "that within the past 30 days . . . the person has attempted suicide and that there is the reasonable probability of suicide unless adequate treatment is afforded"⁵¹⁶

PUERTO RICO

As a consequence of the Spanish-American War, Spain ceded Puerto Rico to the United States by the Treaty of Paris in 1898.⁵¹⁷ Congress created "a body politic under the name of 'The People of Porto Rico'" in 1900,⁵¹⁸ which, in 1952, became the Commonwealth of Puerto Rico.⁵¹⁹

In 1902, the legislative assembly adopted a penal code including the provision, "Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony."⁵²⁰ This was repealed in 1974,⁵²¹ and replaced by the following language: "Incitement to Commit Suicide[:] Every person who deliberately permits, aids, advises, encourages or coerces another to commit suicide shall be punished by imprisonment for a minimum term of six months and a maximum of five years if the death was consummated or attempted."⁵²² Six years later, this provision was amended to read, under the same title:

Every person who deliberately permits, aids, advises, encourages or coerces another to commit suicide if the death was consummated or attempted, shall be punished by imprisonment for a fixed term of three (3) years. Should there be aggravating circumstances, the fixed penalty established may be increased to a maximum of five (5) years; if there should be extenuating circumstances, it may be reduced to a minimum of two (2) years. The court may impose the penalty of restitution, in addition, to the

515. Act of Dec. 6, 1972, No. 334j, sec. 1, § 508(d), 1972 Pa. Laws 1482, 1505 (codified at 18 PA. CONS. STAT. ANN. § 508(d) (Purdon 1983)).

516. 50 PA. CONS. STAT. ANN. §§ 7301(a)-(b)(2)(ii), 7304(b) (Purdon Supp. 1985).

517. Treaty of Paris, Dec. 10, 1898, United States - Spain, art. II, 30 Stat. 1754, 17, 55, T.S. No. 343.

518. Organic Act of 1900 (Foraker Act), ch. 191, § 7, 31 Stat. 79.

519. 29 ENCYCLOPAEDIA BRITANNICA 787 (15th ed. 1985).

520. Penal Code of Porto Rico, § 350, 1092 P.R. Laws 555 entitled REVISED STATUTES AND CODES OF PORTO RICO, RICO COMP. REV. STAT. § 5802 (1911); PENAL CODE § 350 (1937); P.R. LAWS ANN. tit. 33, § 1385 (1956).

521. Penal Code of the Commonwealth of Puerto Rico, art. 277, 1974 P.R. Laws 417, 498 (repealed 1974).

522. *Id.*, art. 90, 1974 P.R. Laws at 444.

penalty of imprisonment established, or both penalties.⁵²³

This is the law of Puerto Rico today.

RHODE ISLAND

Rhode Island was first settled by a group led by Roger Williams in 1636. Williams obtained a royal patent in 1643. Rhode Island was one of the original thirteen colonies that declared their independence in 1776.⁵²⁴ The state legislature ratified the fourteenth amendment in 1867.⁵²⁵

From the earliest days, Rhode Island considered the common law "to be a part of the laws of the Colony."⁵²⁶ From 1798 to the present day, the common law of crimes has been specifically adopted by statute in Rhode Island.⁵²⁷ As early as 1647, the General Assembly of Providence Plantations (which later became Rhode Island) enacted a suicide-specific statute:

Touching Murder, and first of Self-murder.

Self-murder is by all agreed to be the most unnatural, and it is by this present Assembly declared, to be that, wherein he that doth it, kills himself out of a premeditated hatred against his own life or other humor: his death being presented and thus found upon record by the coroner, his goods and chattels are the king's custom, but not his debts nor lands; but in case he be an infant, a lunatic, mad or distracted man, he forfeits nothing.⁵²⁸

Similar legislation was enacted in 1663.⁵²⁹ In 1798, however, the Rhode Island legislature provided, "[N]o conviction or judgment for any crime or offence whatever, which hereafter shall be had or rendered, within any of the courts of this State, shall work corrup-

523. Act of June 4, 1980, § 1, 1980 P.R. Laws 279, 280, 288 (codified at P.R. LAWS ANN. tit. 33, § 4009 (1983)).

524. 29 ENCYCLOPAEDIA BRITANNICA 287-88 (15th ed. 1985).

525. U.S.C.S. CONST. amend. XIV explanatory note, at 11 (Law. Co-op. 1984).

526. Rider, *Bibliographical and Historical Introduction*, in ACTS AND LAWS OF THE COLONY OF RHODE ISLAND 1719, at 11. See LAWS AND ACTS OF HER MAJESTIES COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 48 (1705 & S. & B. Rider, eds. reprint 1896); THE EARLIEST ACTS AND LAWS OF THE COLONY OF RHODE ISLAND 1719, at 45 (1895).

527. R.I. PUB. LAWS Crime, § 55, at 604 (1798); R.I. PUB. LAWS Crimes § 59, at 353 (1822); R.I. PUB. LAWS Crime and Punishment § 119, at 398 (1844); R.I. REV. STAT. ch. 219, § 1 (1857); R.I. GEN. STATS. ch. 235, § 1 (1872); R.I. PUB. STATS. ch. 3477, § 1 (1882); R.I. GEN. LAWS ch. 284, § 1 (1896); R.I. GEN. LAWS ch. 350, § 1 (1909); R.I. GEN. LAWS § 6250 (1923); R.I. GEN. LAWS ch. 621, § 1 (1938); R.I. GEN. LAWS § 11-1-1 (1956); R.I. GEN. LAWS § 11-1-1 (1969); R.I. GEN. LAWS § 11-1-1 (1981).

528. THE EARLIEST ACTS AND LAWS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 1647-1719, at 19 (J. Cushing ed. 1977) (emphasis in original), quoted in Burgess-Jackson, *supra* note 214, at 63.

529. THE EARLIEST ACTS AND LAWS OF THE COLONY OF RHODE ISLAND, *supra* note 526, at 59.

tion of blood or forfeiture of estate," and, with modifications in language, the statute has been carried down to the present.⁵³⁰

Under current law, one whom a court finds to be "in need of care and treatment in a facility . . . and . . . whose continued unsupervised presence in the community would [by reason of mental disability] create a likelihood of serious harm," may be involuntarily committed.⁵³¹ The Rhode Island statute defines a "likelihood of serious harm" as "a substantial risk of physical harm to the person himself as manifested by behavior evidencing serious threats of, or attempts at, suicide. . . ."⁵³²

SOUTH CAROLINA

South Carolina was settled by the English in 1670; it was one of the original thirteen colonies.⁵³³ Its legislature voted to ratify the fourteenth amendment in 1868.⁵³⁴

In 1706, the legislature enacted a statute directing coroner's juries to determine whether one who had died did so as a result of "Felony or Mischance and Accident, and if by Felony, whether of his own or another." This provision, with its capitalization modernized, endures to the present day.⁵³⁵ The 1706 enactment spelled out exactly what the jurors were to say if they found a person's death to be "by Felony . . . of his own:"

If it appear to be Self-Murder, the Inquisition must conclude after this Manner, *viz.*

And so the Jurors aforesaid say upon their Oaths, that the said A.B. in Manner and Form aforesaid, then and there voluntarily and feloniously as a Felon, of himself did kill and murder himself, against the Peace of our Sov-

530. R.I. PUB. LAWS Crime, § 53, at 604 (1798); R.I. PUB. LAWS Crimes § 57, at 352-3 (1822); R.I. PUB. LAWS Crime and Punishment § 115, at 398 (1844); R.I. REV. STAT. ch. 222, § 35, at 564 (1857); R.I. GEN. STATS. ch. 236, § 34 (1872); R.I. PUB. STATS. ch. 248, § 34 (1882), R.I. GEN. LAWS ch. 285, § 35 (1896); R.I. GEN. LAWS ch. 354, § 35 (1909); R.I. GEN. LAWS § 6352 (1923); R.I. GEN. LAWS ch. 625, § 58 (1938); R.I. GEN. LAWS § 12-19-4 (1956); R.I. GEN. LAWS § 12-19-4 (1969); R.I. GEN. LAWS § 12-19-4 (1981).

531. R.I. GEN. LAWS § 40.1-5-8(10) (1984).

532. *Id.* § 40.1-5-2(14).

533. 29 ENCYCLOPAEDIA BRITANNICA 346, 348 (15th ed. 1985).

534. U.S.C.S. CONST. amend XIV explanatory note, at 11 (Law. Co-op. 1984).

535. 1 THE EARLIEST PRINTED LAWS OF SOUTH CAROLINA 1692-1734, at 190 (J. Cushing ed. 1978), quoted in Burgess-Jackson *supra* note 214, at 62; Act of Dec. 21, 1839, No. 2782, § 13, 1839 S.C. Acts 49, 50-51 (codified at S.C. GEN. STATS. ch. 143, § 5 (1871); S.C. REV. STAT. ch. 143, § 5 (1873); S.C. GEN. STATS. § 2668 (1882); S.C. REV. STAT. Criminal Law § 584 (1893); S.C. CODE Criminal Code § 705 (1902); S.C. CODE Criminal Code § 1003 (1912); S.C. CODE Code of Criminal Procedure § 158 (1922); S.C. CODE § 1071 (1932); S.C. CODE § 1071 (1942); S.C. CODE § 17-104 (1952); S.C. CODE § 17-104 (1962); S.C. CODE ANN. § 17-7-150 (Law. Co-op. 1976)).

ereign Lady the Queen, her Crown and Dignity.⁵³⁶

In 1891, upholding a murder conviction in a case apparently involving a defendant who “attempted to kill himself, and in doing so unfortunately killed his wife, who was attempting to prevent the suicidal act,”⁵³⁷ the South Carolina Supreme Court explicitly approved the trial judge’s charge to the jury that:

In the eye of the law, self-destruction—suicide—is an offense; it is an unlawful act; and, if a man with a deadly weapon undertakes to take his own life, he is doing an unlawful act; and if in the commission, or attempted commission, of that act, he takes the life of an innocent party standing by, then, in the eye of the law, that is murder.⁵³⁸

Noting that the statute “prescribing the form of the verdict of a coroner’s inquest, in a case of suicide, by the use of the term ‘feloniously’ expressly recognizes it as retaining its common-law character as a felony,” the supreme court reasoned, “suicide is an unlawful act, *malum in se*, and is a felony.”⁵³⁹

The South Carolina Supreme Court in 1910, held that a trial judge correctly stated the law against the assisting of suicide in the following jury instructions:

In order for one who incites to suicide to be guilty of murder, a causal connection must exist between the incitement and the suicide; the incitement must be not necessarily the sole cause, but an inducing cause of the crime. Provided this connection is established, I charge you that it is the law that the inciter is truly responsible for the act, and therefore as truly a murderer, as though he had prevailed upon a third person to commit the homicide

[I]f a man persuades another to commit suicide, and aids, counsels and abets him in the commission of the act, by furnishing the means, or putting the means within reach, with the intention of bringing about a condition of mind where the person would naturally attempt to commit such act, where the person would seek such means, and place such means in the way, so that the person when aroused him to that state of mind by his deliberate act would attempt to commit suicide, then that would be for the jury to say whether that was such participation in the suicide.⁵⁴⁰

The common law of crimes remains in effect in South Carolina today.⁵⁴¹ Under current law, if one is “mentally ill, needs treatment

536. 1 THE EARLIEST PRINTED LAWS OF SOUTH CAROLINA 1692-1734, at 192 (J. Cushing ed. 1978) (emphasis omitted), *quoted in* Burgess-Jackson, *supra* note 214.

537. *State v. Levelle*, 34 S.C. 120, 130, 13 S.E. 319, 321 (1891).

538. *Id.*

539. *Id.*

540. *State v. Jones*, 86 S.C. 17, 47, 67 S.E. 160, 165 (1910).

541. *See* S.C. CODE ANN. § 16-1-10 (Law. Co-op 1976). *See also* *State v. Carson*, 274

and because of his condition . . . there is a likelihood of serious harm to himself," he or she may be involuntarily committed.⁵⁴²

SOUTH DAKOTA

The territory of Dakota was split in 1889 and North and South Dakota were admitted as separate states.⁵⁴³ South Dakota inherited the strong anti-suicide revisions of the Dakota Territory's Penal Code of 1877,⁵⁴⁴ and maintained them⁵⁴⁵ until 1939, when as a part of a general provision of the law by a code commission, they were revised in form and combined.⁵⁴⁶ For example, sections 228 and 229 of the Penal Code of 1877 were revised to read, "[S]uicide is the intentional taking of one's own life and is deemed a grave public wrong."⁵⁴⁷

In 1968, however, these statutes were completely rewritten, and the definition of suicide became simply "the intentional taking of one's life."⁵⁴⁸ "Every person who willfully in any manner, advises, encourages, abets or assists another in taking his own life" was to be guilty of felony, with a greater punishment if the suicide were completed and a lesser punishment if it were only attempted.⁵⁴⁹ Retaining the substance of section 234 of the Penal Code of 1827, the statute provided, "It is no defense to a prosecution for aiding suicide that the person who committed or attempted to commit suicide was not a person deemed capable of committing crime."⁵⁵⁰ Finally, the following provision was added:

It shall be the duty of any law enforcement office who has knowledge that any party has attempted to take his own life to immediately investigate such attempt and inform the county judge . . . of the facts of such attempt and such county judge shall determine if proceedings should be had under [mental health commitment proceedings].⁵⁵¹

Apart from a 1976 change of the penalty imposed and in the

S.C. 316, 318, 262 S.E.2d 918, 920 (1980).

542. S.C. CODE ANN. § 44-17-580 (Law. Co-op 1985).

543. 29 ENCYCLOPAEDIA BRITANNICA 398 (15th ed. 1985).

544. See *supra* notes 453-54.

545. S.D. STAT. §§ 7687 to 7695 (Grantham 1899); S.D. STAT. §§ 7687 to 7695 (Grantham 1901) (Grantham's compilation was not officially adopted); S.D. REV. PENAL CODE §§ 232 to 240 (1903); S.D. REV. CODE §§ 3999 to 4006 (1919).

546. S.D. CODE §§ 13.1901 - .1904 (1939).

547. *Id.* at § 13.1901.

548. Act of Feb. 17, 1968, ch. 31, sec. 1, § 13.1901, 1968 S.D. Sess. Laws 47, 47.

549. *Id.* at § 13.1902, 1968 S.D. Sess. Laws at 47.

550. *Id.* at § 13.1903, 1968 S.D. Sess. Laws at 47.

551. *Id.* at sec. 2, 1968 S.D. Sess. Laws at 47-48.

procedure for law enforcement office reporting,⁵⁵² these provisions remain the law today.⁵⁵³

In 1975, South Dakota enacted a revision of its involuntary commitment standards and procedures under which it was specifically provided that one "whose mental condition is such that his behavior establishes . . . [h]e is a danger to himself"⁵⁵⁴ could be ordered to undergo treatment.⁵⁵⁵ (The prior law had simply provided for the involuntary commitment of those found to be "mentally ill and fit subject for treatment and custody in the hospital for the mentally ill.")⁵⁵⁶

TENNESSEE

Originally part of North Carolina, the territory which became Tennessee was first permanently settled (by other than native Americans) in 1768. North Carolina ceded the territory to the federal government in 1789, and Tennessee was admitted as a state in 1796.⁵⁵⁷ The legislature voted to ratify the fourteenth amendment in 1866.⁵⁵⁸ The common law pertaining to suicide, which was incorporated into the common law of crimes, has been part of the law of the State of Tennessee since its inception.⁵⁵⁹

In an 1872 insurance case, the Tennessee Supreme Court noted, "[S]uicide is a crime of the highest grade . . ."⁵⁶⁰ The same court, in 1908, affirmed the murder conviction of a man who had shot his lover during execution of a suicide pact which, due to loss of nerve, he failed to carry out himself. The court wrote, "[M]urder is no less murder because the homicide is committed at the desire of the victim. He who kills another upon his desire or command is, in the judgment of the law, as much a murderer as if he had done it merely of his own head."⁵⁶¹

552. Act of Feb. 26, 1976 ch. 158, sec. 16-8, 1976 S.D. Sess. Laws 227, 257.

553. See S.D. CODIFIED LAWS ANN. § 22-16-36 to -40 (1979).

554. Act of March 20, 1975, ch. 181, sec. 42, § 27-1-1(3), 1975 S.D. Sess. Laws 354, 367 (codified at S.D. CODIFIED LAWS ANN. § 27A-1-1(2) (1984)).

555. *Id.* sec. 92, 1975 S.D. Sess. Laws at 379 (codified at S.D. CODIFIED LAWS ANN. § 27A-9-18 (1984)).

556. S.D. COMP. LAWS ANN. § 27-7-18 (1967).

557. 29 ENCYCLOPAEDIA BRITANNICA 351 (15th ed. 1985).

558. U.S.C.S. CONST. amend. XIV explanatory note, at 11 (Law. Co-op. 1984).

559. See *State v. Alley*, 594 S.W.2d 382, 382 (Tenn. 1980); *Gervin v. State*, 212 Tenn. 653, 664, 371 S.W.2d 449, 454 (1963).

560. *Phadenhauer v. Germania Life Ins. Co.*, 54 Tenn. (7 Heisk.) 567, 576 (1872).

561. *Turner v. State*, 119 Tenn. 663, 671, 108 S.W. 1139, 1141 (1908).

The most direct statement of the Tennessee Supreme Court came in *State ex rel. Swann v. Pack*,⁵⁶² in which the court directed an injunction prohibiting the handling of poisonous snakes and drinking of strychnine as part of a religious observance:

Suicide is not specifically denounced as a crime under our statutes but was a crime at the common law. Tennessee adopted the Common Law as it existed at the time of the separation of the colonies An attempt to commit suicide is probably not an indictable offense under Tennessee law; however, such an attempt would constitute a grave public wrong, and we hold that the state has a compelling interest in protecting the life of its citizens.⁵⁶³

Under current Tennessee law, one who is "mentally ill" and "has threatened or attempted suicide [and] . . . needs care, training, or treatment because of the mental illness," may be involuntarily committed.⁵⁶⁴

TEXAS

In 1835, the Republic of Texas was annexed to the United States and admitted as a state.⁵⁶⁵ The provisional revolutionary government provided for the adoption of English common law crimes in 1835⁵⁶⁶ and one year later the republic's assembly passed a law providing, "All offenses known to the common law of England as now understood and practiced, which are not provided for in the act, shall be punished in the same manner as known to the said common law."⁵⁶⁷ However, in 1857, a new penal code was enacted providing that "In order that the system of penal law in force in this State may be complete within itself, and that no system of foreign laws, written or unwritten, may be appealed to, it is declared that no person shall be punished for any act or omission as a penal offense, unless the same is expressly defined and the penalty affixed by the written law of this State."⁵⁶⁸ There was no explicit mention of suicide or assisting suicide in the code. Texas voted in 1866 to reject, but in 1870 to ratify, the fourteenth

562. 527 S.W.2d 99, *cert. denied*, 424 U.S. 954 (1975).

563. 527 S.W. 2d at 113 (citation omitted).

564. TENN. CODE ANN. § 33-6-104 (Supp. 1985).

565. Joint Resolution of Dec. 29, 1845, No. 1, 9 Stat. 108, 108.

566. *Plan and Powers of the Provisional Government of Texas*, art. 7 (1835), reprinted in *Texas Digest of the Laws* 25, 26 (Paschal 1873).

567. Act of Dec. 21, 1836, § 54, 1836 Tex. Gen. Laws 187, 195 (codified at TEXAS DIGEST OF THE LAWS art. 125, at 120 (Hartley 1850)).

568. TEXAS PENAL CODE art. 3 (1857).

amendment.⁵⁶⁹

In 1901, one Dr. J.H. Grace was prosecuted for murder under a statute that made liable for punishment as a principal, anyone who:

[B]y any means, such as laying poison where it may be taken, and with intent that it shall be taken, or by preparing any other means by which a person may injure himself, and with intent that such person shall thereby be injured, or by any other direct means, cause another to receive an injury to his person. . . .⁵⁷⁰

Apparently, Dr. Grace and the woman who died were paramours who seemingly planned to elope, even though Dr. Grace was married to another woman. The woman who died and a friend were staying with Dr. Grace and his wife at the time of the incident. The family of the woman who died was incensed at the relationship between the couple; her father and brother had recently nearly succeeded in killing Dr. Grace and one of the brothers had threatened to kill his sister if she went away with Dr. Grace.⁵⁷¹ Presumably distressed with this situation, the woman attempted suicide with a bottle of digitalis taken from Dr. Grace's medical bag, but Mrs. Grace and her friend wrestled it away from the suicidal woman before she swallowed much, and Dr. Grace and two other physicians successfully revitalized her. Later that day, Dr. Grace obtained a pistol to protect himself and those in his home from the woman's family. He laid the loaded pistol on a dresser while he and a group, including his wife and his paramour, discussed the situation. Suddenly, the woman announced that she would settle the matter, grabbed the pistol, and shot herself. "As we understand the record," the Texas Court of Criminal Appeals wrote, "there is no evidence showing or tending to show that [Dr. Grace] placed the pistol on the dresser for the purpose or with the intent that the deceased should use it in inflicting the fatal wound."⁵⁷²

Nevertheless, Dr. Grace was convicted by the trial court. It was on these facts that the appellate court reversed upon the ground that the statute under which he was convicted "makes it fully certain that the injury intended to the person against whom the machinations or acts of the accused is directed does not apply to

569. U.S.C.S. CONST. amend. XIV explanatory note, at 11 (Law. Co-op. 1984).

570. *Grace v. State*, 44 Tex. Crim. 193, 194-95, 69 S.W. 529, 530 (1902).

571. *Id.* at 195-96, 69 S.W. at 530-31.

572. *Id.*

cases of suicide."⁵⁷³ The court then discussed the legal status of suicide:

It is not a violation of any law in Texas for a person to take his own life. Whatever may have been the law in England, or whatever that law may be now with reference to suicides, . . . by furnishing the means or other agencies, it does not obtain in Texas. So far as the law is concerned, the suicide is innocent; therefore, the party who furnishes the means to the suicide must also be innocent of violating the law. We have no statute denouncing suicidal acts; nor does our law denounce a punishment against those who furnish the suicide with the means by which the suicide takes his own life.⁵⁷⁴

In 1908, the same court reviewed another homicide conviction in *Sanders v. State*.⁵⁷⁵ A young woman who was pregnant (apparently the defendant was the father), and who had previously attempted suicide, awakened in the middle of the night and walked to an outlying field where she later was found dead; she had ingested two vials of carbolic acid. The trial court determined that the defendant had previously purchased two vials of carbolic acid, although the vials were of a different size than those used by the deceased. He apparently had used the carbolic acid to kill screw worms on his ranch. Tracks which might have been made by the defendant's shoes were found 80 to 200 yards from the body (none were found in closer proximity to the body, although the woman's tracks were clearly visible nearby).⁵⁷⁶ The report makes clear that the appellate court was highly skeptical that the evidence presented at trial justified a conviction. It characterized the evidence as merely giving rise to "suspicion and vague conjecture."⁵⁷⁷ Calling it "a peculiar case in many respects," the court stated: "There are some circumstances in this case that would indicate there might be other parties who are more fully cognizant of the facts in connection with the girl's death than they saw proper to tell or admit."⁵⁷⁸

On these facts, the court reiterated that the "statutes [under which Grace was convicted] are based upon the idea and theory that the victim of the accused is not cognizant of the purpose or intent of such accused in preparing the means for the destruction of the life of such intended victim, or that the poison must be

573. *Id.* at 195, 69 S.W. at 530.

574. *Id.*

575. *Sanders v. State*, 54 Tex. Crim. 101, 112 S.W. 68 (1908).

576. *Id.* at 105-07, 112 S.W. at 70-71.

577. *Id.* at 105, 112 S.W. at 70.

578. *Id.* at 111, 112 S.W. at 74.

given against the wish of the taker.”⁵⁷⁹ After noting the lack of law against suicide in Texas in language closely paralleling that of the *Grace* court, the *Sanders* court went on to state:

So far as our law is concerned, the suicide is innocent of any criminality. Therefore, the party who furnishes the means to the suicide is also innocent of violating the law. It may be a violation of morals and ethics, and reprehensible, that a party may furnish another poison, or pistols, or guns, or any other means or agency for the purpose of the suicide to take his own life, yet our law has not seen proper to punish such persons or such acts. A party may furnish another with a pistol, knowing such party intends to take his own life, yet neither would be guilty of violating any statute of Texas. So it may be said of furnishing poison to the suicide. However, a party would not be justified in taking the life of the party who desires to forfeit his life by shooting the would-be destroyer at his request, for in that case it would be the direct act of the accused, and he would be guilty of homicide, although he fired a shot at the request of the would-be suicide. So it would be with reference to poison. If the suicide obtains the poison through the agency of another, that other knowing the purpose of the suicide to take his own life, the party furnishing it would not be guilty, yet if the party furnishing it knew the purpose of the suicide, and he himself gives the medicine or poison by placing it in the mouth or other portions of the body, which would lead to the destruction of life, then it would be the act of the party giving, and he would not be permitted to defend against the result of such act.⁵⁸⁰

The distinction thus drawn in degrees of assistance was applied in the 1925 case of *Aven v. State*.⁵⁸¹ In that case, a man was charged with poisoning his wife with arsenic; there was no suggestion of consent or suicide on her part.⁵⁸² Based on *Sanders*, however, the defendant maintained the indictment was defective because it did not explicitly negate the possibility of self-destruction. Overruling the portion of the *Sanders* case that would have made the indictment insufficient, the court nevertheless said:

[W]e are in accord with the statements in said opinion that, if a party, knowing the purpose of another to destroy her own life, at her request, prepared the medicine, and himself placed it in her mouth, and she swallowed it, than this would be an administration of said poison and the party giving it would be punished in case of death as a murderer.⁵⁸³

579. *Id.* at 105, 112 S.W. at 70.

580. *Id.* at 105-06, 112 S.W. at 70.

581. 102 Tex. Crim. 478, 277 S.W. 1080 (1925).

582. *Aven v. State*, 95 Tex. Crim. 155, 156-57, 253 S.W. 521, 522 (1923) (earlier appeal from a prior trial in the same case that states the facts more completely than does the 1925 case).

583. *Aven v. State*, 102 Tex. Crim. 478, 485-86, 277 S.W. 1080, 1083 (1925).

In 1965, The Texas legislature amended its law requiring and authorizing magistrates and peace officers to take action to prevent the carrying out of any threat or attempt to harm another, and expanded this responsibility to apply to one who threatens or attempts to harm himself.⁵⁸⁴

In 1971, the appellate courts affirmed two convictions, one for murder⁵⁸⁵ and one for being an accomplice to murder,⁵⁸⁶ arising out of a case in which the accomplice solicited the murderer to accept the victim's offer of \$900 to be shot. No issue questioning the illegality of shooting someone at the victim's request appears to have been considered by the court in either instance.

The new Penal Code enacted in 1973 provided, "A person commits an offense if, with intent to promote or assist the commission of suicide by another, he aids or attempts to aid the other to commit or attempt to commit suicide."⁵⁸⁷ The Practice Commentary, noting the *Grace* case, recognizes that under Texas law, assisting suicide was not previously criminal: "Thus Sections 22.08 expands Texas law into a new area, but it is narrowly drawn to cover only those who act intentionally."⁵⁸⁸ It further notes, "This section is designed to punish the aiding of *voluntary* suicide. One who with the requisite culpable mental state *causes* another to commit suicide is guilty of criminal homicide."⁵⁸⁹

Under current law, one may be involuntarily committed upon a court finding that "the person is mentally ill; and . . . as a result of that mental illness . . . is likely to cause serious harm to himself. . . ."⁵⁹⁰

UTAH

The Mormons, led by Brigham Young, entered what is now Utah in 1847, while it was part of Mexico. In 1848, the territory was cede to the United States by Mexico in the Treaty of Guadalupe-Hidalgo.⁵⁹¹ Until March 15, 1849, the Mormon inhabitants were governed by the Ecclesiastical Laws of the Mormon Church; on that

584. Code of Criminal Procedure, ch. 722, arts. 6.01 to 6.07, 1965 Tex. Gen. Laws, 317, 333-34 (codified at TEX. CODE CRIM. PROC. ANN. §§ 6.01 to 6.07 (Vernon Supp. 1985)).

585. *Mullane v. State*, 475 S.W.2d 924 (Tex. Crim. 1971).

586. *Carew v. State*, 471 S.W.2d 860 (Tex. Crim. 1971).

587. Penal Code, ch. 399, sec. 1, § 22.08, 1973 Tex. Gen. Laws 8883, 920 (codified at TEX. PENAL CODE ANN. § 22.08 (Vernon 1974)).

588. TEX. PENAL CODE ANN. § 22.08 practice commentary (Vernon 1974).

589. *Id.* (emphasis in original). The Commentary cites *Sanders* for this proposition.

590. TEX. REV. CIV. STAT. ANN. art. 5547-51(b) (Vernon Supp. 1985).

591. LAWS AND ORDINANCES OF THE STATE OF DESERET Prefatory (1919).

date they met in convention to create a provisional government called the State of Deseret.⁵⁹² A criminal code was adopted which mentioned neither suicide nor the common law.⁵⁹³ The U.S. Congress created the Territory of Utah in 1850, and in April 1851, the State of Deseret government was merged into that of the Territory of Utah, the legislature of which convened in September, 1851.⁵⁹⁴ Utah was admitted as a state in 1896.⁵⁹⁵

From 1898 through 1973, the Utah statutes have included a general adoption of the common law.⁵⁹⁶ In 1973, the legislature provided, “[C]ommon law crimes are abolished and no conduct is a crime unless made so by this code, other applicable statute or municipal ordinance.”⁵⁹⁷ The statutory annotator, however, indicated that the common law crimes were abolished before the enactment of the statute.⁵⁹⁸ In any event, no Utah case law has been found that addresses suicide or assisting suicide as a common law crime or in any other relevant context.

Under current law, a person may be involuntarily committed if a court finds that the “proposed patient has a mental illness; and [b]ecause of the patient’s illness the proposed patient poses an immediate danger of physical injury to . . . self.”⁵⁹⁹

VERMONT

Following French settlement in 1666 and Dutch and English settlement in 1724, Vermont was recognized as undisputed English territory at the end of the French and Indian War in 1763. Its possession was initially disputed between New Hampshire and New York, but in 1777 Vermont declared itself an independent republic. It joined the nation as a state under the federal Constitution in 1791.⁶⁰⁰ It voted to ratify the fourteenth amendment in 1866.⁶⁰¹

592. *Id.*

593. *Id.* at 25-31.

594. *Id.* at Prefatory.

595. 29 ENCYCLOPAEDIA BRITANNICA 430 (15th ed. 1985).

596. UTAH REV. STAT. § 2488 (1898); UTAH COMP. LAWS § 2488 (1907); UTAH COMP. LAWS § 5838 (1917); UTAH REV. STAT. § 88-2-1 (1933); UTAH CODE ANN. § 68-3-1 (1953); UTAH CODE ANN. § 68-3-1 (1968).

597. Utah Crim. Code, ch. 196, § 76-1-105, 1973 Utah Laws 584, 586 (codified (with irrelevant subsequent changes in wording) at UTAH CODE ANN. § 76-1-105 (1978)).

598. UTAH CODE ANN. § 76-1-105 note (1978). The statutory annotation cites two cases for this proposition: *Ogden City v. McLaughlin*, 5 Utah 387, 16 P. 721 (1888); *Roe v. Lundstrom*, 89 Utah 520, 57 P.2d 1128 (1936).

599. UTAH CODE ANN. § 64-7-36(10) (Supp. 1983).

600. 29 ENCYCLOPAEDIA BRITANNICA 290-91 (15th ed. 1985).

601. U.S.C.S. CONST. amend. XIV explanatory note, at 11 (Law. Co-op. 1984).

Apparently, the second act passed during Vermont's first General Assembly, on March 21, 1778, was a bill "establishing the common law as the law of the state;" its text does not survive.⁶⁰² At about the same time Vermont was incorporating the common law, it also expressly abolished forfeiture of the estates of suicides in its first constitution, and this provision has been repeated in each successive constitution through the one in effect today.⁶⁰³

In 1814, Chief Justice Nathaniel Chipman of the Vermont Supreme Court, in dismissing a forgery indictment that failed to conform to common law principles, stated: "It is from . . . the common law, that we derive rules and maxims not only for the construction of our statutes, but of the constitution itself: and . . . it furnishes to the Courts, in all cases, civil and criminal, a rule of decision."⁶⁰⁴ This language was later cited with approval in a 1934 opinion,⁶⁰⁵ in which the same court added:

[The common law] is the foundation of our jurisprudence, and, except as modified or repealed by statute, its rules and principles determine the rights of, and prescribe rules of conduct for, all persons, and such rules and principles are to be followed and applied by our courts in all cases to which they are applicable.⁶⁰⁶

This may perhaps be taken as indicating that the common law of crimes was (and is) in effect in Vermont. No cases directly relating to suicide have been found.

Under current law, a court may involuntarily commit one "who is suffering from mental illness and, as a result of that mental illness, . . . has threatened or attempted suicide."⁶⁰⁷

VIRGINIA

The English settlements in Virginia were among the earliest on the continent, with the first permanent settlement occurring in 1607 at Jamestown. Virginia was, of course, one of the thirteen original colonies and one of the first states of the United States.⁶⁰⁸

602. *Laws of Vermont 1777-1780*, in 12 STATE PAPERS OF VERMONT 27 (A. Soule ed. 1964).

603. VT. CONST. of 1777, ch. 2, § 35 (codified as amended at VT. STAT. ANN. Const. ch. 2 § 65 (Supp. 1984)).

604. *State v. Parker*, 1789-1828 Vt. (1 D. Chip.) 298, 300 (1814).

605. *E.B. & A.C. Whiting Co. v. City of Burlington*, 106 Vt. 446, 459, 175 A. 35, 42 (1934).

606. *Id.* at 459-60, 175 A. at 42.

607. VT. STAT. ANN. tit. 18, §§ 7101 (17)(B)(i), 7617(b) (Supp. 1985).

608. 29 ENCYCLOPAEDIA BRITANNICA 355 (15th ed. 1985).

The Virginia legislature voted to reject the fourteenth amendment in 1867, but to ratify it in 1869.⁶⁰⁹

From its inception, Virginia was unquestionably governed by the English common law, including the common law of crimes.⁶¹⁰ An explicit statutory provision for the punishment of common law crimes, which endures to the present day, can be traced back to 1796,⁶¹¹ but it is clear that it was enforced long before then.⁶¹²

The early colonists of Virginia enforced the common law punishment for suicide—forfeiture of personalty and ignominious burial.⁶¹³ In 1661, a coroner's jury ordered that a suicide's corpse "be buried at the next cross path as the Law Requires [with] a stake driven through the middle of him in his grave."⁶¹⁴ In 1706, after forfeiture, a suicide's estate was sold at a public auction.⁶¹⁵ The following year the issue arose whether the slaves of a suicide were real estate that passed to the widow, or chattels that were forfeited; the General Court voted to deem them chattels and they were forfeited to the government.⁶¹⁶ The state's 1776 Constitution provided for such state action: "All escheats, penalties, and forfeitures, heretofore going to the King, shall go to the Commonwealth, save only such as the Legislature may abolish, or otherwise provide for."⁶¹⁷ In or around 1847, however, the legislature provided, "No suicide. . . shall work a corruption of blood or forfeiture of estate," and this remains the law in Virginia today.⁶¹⁸

In a 1906 life insurance case, the Supreme Court of Appeals of Virginia referred to suicide as a "crime,"⁶¹⁹ and quoted with approval from Justice Harlan's opinion for the U.S. Supreme Court in *Ritter v. Mutual Life Insurance Co.*⁶²⁰

609. U.S.C.S. CONST. amend. XIV explanatory note, at 11 (Law. Co-op. 1984).

610. A. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 27 (1930).

611. See Act of Dec. 15, 1796, ch. 2, § 16, 1976 Va. Act 5, 8 (codified as amended at Va. Code § 18.2-16 (1982)).

612. A. Scott, *supra* note 608, at 108.

613. *Id.* at 198.

614. *Id.* at 198 n.15.

615. *Id.* at 108 n.193.

616. *Id.*

617. Va. Const. OF 1776, PARA. 41.

618. Criminal Code, ch. 120, tit. 2, ch. 11, §§ 23, 25, 1847-48 Va. Laws 93, 124 (codified as amended at Va. Code § 55-4 (1981)).

619. *Plunkett v. Supreme Conclave, Improved Order of Heptasophs*, 105 Va. 643, 646, 55 S.E. 9, 11 (1906).

620. 169 U.S. 139 (1898).

A contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice or be made the foundation of its judgment. If, therefore, a policy. . . expressly provides for the payment of the sum stipulated when or if the assured, in sound mind, took his own life, the contract, even if not prohibited by statute, would be held to be against public policy, in that it tempted or encouraged the assured to commit suicide in order to make provision for those dependent upon him, or to whom he was indebted.⁶²¹

In 1913, R.W. Withers wrote an article for the *Virginia Law Register* in which he urged "statutory regulation" of assisted suicide, giving the example of a Missouri statute that characterized the deliberate assistance of suicide as manslaughter, because he feared the "confusion" surrounding common law principles might result in assisters being held to violate no law.⁶²² Withers noted that the common law punishment of forfeiture for suicide was, at that time, prohibited by law. "Suicide is, therefore, neither a felony nor a misdemeanor in this State."⁶²³ The statutory provision for the punishment of common law offense (cited above) could not be invoked to punish an attempt at suicide, he argued, because a separate statute on attempts applied only "[i]f the offense attempted be punishable" and because another provision provided that a "common law offense for which punishment is prescribed by statute, shall be punished only in the mode so described."⁶²⁴ Secondly, Withers questioned whether one who, while attempting to kill himself unintentionally killed another in the absence of culpable negligence, would be guilty of a crime. This, he maintained, depended upon whether the attempt at suicide was itself an unlawful act, and, Withers opined, "Certainly the mere fact of the act being *malum in se* does not make it criminal."⁶²⁵ Finally, Withers queried whether one who aided or advised suicide could be held criminally liable. "[T]he puzzling question here is, how can there be an accessory or a second degree principal when there is not principal in the first degree, the suicide itself not being a crime?"⁶²⁶ He took note of the "at least plausible. . . solution of

621. *Plunkett*, 105 Va. at 649-50, 55 S.E. at 11, quoting *Ritter*, 169 U.S. at 154.

622. Withers, *Status of Suicide as Crime*, 19 Va. L. Reg. 641, 647 (1914).

623. *Id.* at 643.

624. *Id.* at 643-44.

625. *Id.* at 644-45.

626. *Id.* at 645.

the difficulty," propounded by the courts of Illinois, Massachusetts and Ohio, which treated the act abetting as itself causing the suicide's death, and thus, indicted the abettor as a principal, but suggested that this approach would encounter difficulty in Virginia because the case law required "that in Virginia an accessory before the fact must be indicted *as accessory*."⁶²⁷

In 1946, the Supreme Court of Appeals of Virginia upheld the murder conviction of a woman who shot her husband in a quarrel. Apparently, the woman had told her husband "If I had a gun, I would kill you." He then replied, "I don't believe you would shoot me," got his wife a gun, helped her load it, and taunted her to shoot him.⁶²⁸ After considering this evidence, the court stated, "Invitation and consent to the perpetuation of a crime do not constitute defenses, adequate excuses, or provocations,"⁶²⁹ and quoted with approval from *American Jurisprudence*: "[C]onsent of the deceased is not a defense in a prosecution for homicide. The right to life and to personal security is not only sacred in the estimation of the common law, but it is inalienable."⁶³⁰

In an 1968 insurance case, the same court, characterizing suicide as an "unnatural act," wrote:

This presumption in favor of death by accidental means and against suicide has its basis in the love of life and the instinct of self-preservation, the fear of death, the fact that self-destruction is contrary to the general conduct of mankind, the immorality of taking one's own life and the presumption of innocence of crime.⁶³¹

Under current Virginia law a judge may order the involuntary commitment of one the court finds "presents an imminent danger to himself . . . as a result of mental illness."⁶³²

WASHINGTON

Washington was originally part of the Oregon Territory which was established in 1848 following an 1846 treaty with Great Britain. In 1853, the territory of Washington was separately established, and in 1889 Washington was admitted as a state.⁶³³

627. *Id.* at 647 (emphasis in original).

628. *Martin v. Commonwealth*, 184 Va. 1009, 1012-13, 37 S.E.2d 43, 44-45 (1946).

629. *Id.* at 1018-19, 37 S.E.2d at 47.

630. *Id.* at 1019, 37 S.E.2d at 47 (quoting 26 Am. Jur. *Homicide* § 103 (1940)).

631. *Life and Casualty Ins. Co. of Tennessee v. Daniel*, 209 Va. 332, 335, 163 S.E.2d 577, 580 (1968).

632. Va. Code § 37.1-67.6 (SUPP. 1985).

633. 29 *Encyclopaedia Britannica* 458 (15TH ED. 1985).

In 1854, the first territorial legislature provided that "Every person deliberately assisting another in the commission of self-murder, shall be deemed guilty of manslaughter."⁶³⁴ Identical language was re-enacted in 1869⁶³⁵ and 1873.⁶³⁶ In 1909, the state legislature adopted a new criminal code and replaced this provision with much more extensive statutes patterned after those criminal codes enacted in Minnesota and New York.⁶³⁷ The new statutes provided:

Sec. 133. *Defined.* Suicide is the intentional taking of one's own life.

Sec. 134. *Attempting Suicide.* Every person who, with intent to take his own life, shall commit upon himself any act dangerous to human life, or which, if committed upon or toward another person and followed by death as a consequence, would render the perpetrator chargeable with homicide, shall be punished by imprisonment in the state penitentiary for not more than two years, or by a fine of not more than one thousand dollars.

Sec. 135. *Aiding Suicide.* Every person who, in any manner, shall willfully advise, encourage, abet or assist another in taking his own life shall be guilty of manslaughter.

Sec. 136. *Abetting Attempt at Suicide.* Every person who, in any manner, shall willfully advise, encourage, abet or assist another person in attempting to take the latter's life, shall be punished by imprisonment in the state penitentiary for not more than ten years.

Sec. 137. *Incapacity of Person Aided No Defense.* The fact that the person attempting to take his own life was incapable of committing crime shall not be a defense to a prosecution under either of sections 135 or 136.⁶³⁸

In 1975, these statutes were repealed.⁶³⁹ In their place, a simple provision was enacted which stated: "A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide."⁶⁴⁰ In 1979, in passing a Natural Death Act, the legislature provided that "withholding or withdrawal of life-sustaining procedures" in accordance with a patient's directive under the Act "shall not, for any purpose, constitute a suicide."⁶⁴¹

634. Act of Apr. 28, 1854, sec. 17, 1854 Wash. Laws 75, 78.

635. Act of Dec. 2, 1869, sec. 17, 1869 Wash. Laws 198, 201.

636. Act of Nov. 10, 1873, sec. 19, 1873 Wash. Laws 180, 184 (codified at Wash. Code § 794 (1881)).

637. Criminal Code, ch. 249, secs. 133-137, 1909 Wash. Laws 11th sess. 890, 929 (codified at Rem. & Bal. Code §§ 2385-89 (1910)); Rem. Rev. Stat. §§ 2385-89 (1932); Rev. Code Wash. § 9.80.010 to .050 (1951)).

638. *Id.*

639. Wash. Crim. Code, 1975, ch. 260, sec 9A.92.010 (213)-(217) 1975 Wash. Laws 817, 866 (codified at Rev. Wash. Code §§ 9A.92.010 (213-17) (1977)).

640. *Id.* § 9A.36.060(1), 1975 Wash. Laws at 836 (codified at Rev. Wash. Code § 9A.36.060(1)(1977)).

641. Natural Death Act, ch. 112, sec. 8(1), 1979 Wash. Laws 433, 437 (codified at Rev. Wash. Code § 70.122.070(1) (SUPP. 1984-85)).

Since 1873, the law of Washington has provided for involuntary commitment. In that year, the legislature authorized probate courts to commit "any person [who] by reason of insanity is unsafe to be at large."⁶⁴² In 1890, the law was amended to include insanity "of a . . . suicidal . . . character, or that from the violence of the symptoms the said insane person would be dangerous to his or her own life . . . if at large."⁶⁴³ In 1951, the commitment standards were again revised to apply to "any person found to be suffering from psychosis or other disease impairing his mental health."⁶⁴⁴ These standards were repealed in 1973⁶⁴⁵ and replaced by a new commitment scheme, in force to this day, which applies to, among others, one who "as a result of mental disorder, presents a likelihood of serious harm to . . . himself."⁶⁴⁶ Such "likelihood" was defined as including "a substantial risk that physical harm will be inflicted by an individual upon his own person, as evidenced by threats or attempts to commit suicide"⁶⁴⁷

WEST VIRGINIA

A part of Virginia until the Civil War, West Virginia was admitted as a separate state in 1863.⁶⁴⁸ The legislature voted to ratify the fourteenth amendment in 1867.⁶⁴⁹

West Virginia recognizes the common law of crimes.⁶⁵⁰ Originally adopting the Virginia Code,⁶⁵¹ West Virginia has maintained, from its creation to the present, a statute on its books prohibiting forfeiture of property for suicide.⁶⁵²

642. Act of Nov. 11, 1873, sec. 327, 1873 Wash. Laws 252, 321 (codified at Wash. Code § 1632 (1881)).

643. Act of Mar. 13, 1890, sec. 16, 1889-90 Wash. Laws 482, 487 (codified at Rem. & Bal. Code § 5953 (1910); Rem. Rev. Stat. § 6930 (1932)).

644. Mental Illness Hospitalization Act, ch. 139, secs. 2, 25, 1951 Wash. Laws 340, 341, 349 (following rearrangement in 1959, Mental Illness & Inebriacy, ch. 25, 1959 Wash. Laws Reg. Sess. 80, 80, 85, it was codified at Wash. Rev. Code § 71.02.010, 71.02.200 (1962)).

645. Mentally Disabled Persons—Commitment Procedures ch. 142, sec. 66(1) & (14), 1973 Wash. Laws 1st Extr. Sess. 1014, 1041-42.

646. *Id.* sec. 29, 1973 Wash. Laws at 1028-29 (codified at Wash. Rev. Code Ann. § 71.05.240 (SUPP. 1984-85)).

647. *Id.* sec. 7(3), 1973 Wash. Laws at 1019 (codified at Wash. Rev. Code Ann. § 71.05.020(3) (SUPP. 1984-85)).

648. 29 Encyclopaedia Britannica 358 (15TH ED. 1985).

649. U.S.C.S. Const. AMEND. XIV EXPLANATORY NOTE, AT 11 (LAW. CO-OP. 1978).

650. See *State v. General Daniel Morgan* Post No. 548, V.F.W. W. Va., 144 W. Va. 137, 139, 107 S.E.2d 353, 357 (1959).

651. Va. Code CH. 199, §§ 3, 5 (1860).

652. See W. Va. Code CH. 152, § 4 (1870); W. Va. Rev. Stat. CH. 48, § 4 (1878); W. Va. Code CH. 42, § 4 (1887); W. Va. Code CH. 42 (1891); W. Va. Code CH. 42, § 4 (1899); W. Va.

West Virginia's Natural Death Act, adopted in 1984, provides: "The withholding or withdrawal of life-sustaining procedures from a qualified patient in accordance with the provisions of this article does not, for any purpose, constitute a suicide and does not constitute the crime of assisting suicide."⁶⁵³

Under current law, an individual may be involuntarily committed when a court or the mental hygiene commissioner finds that the individual is "mentally ill, retarded or addicted and because of his illness, retardation or addiction is likely to cause serious harm to himself . . . if allowed to remain at liberty"⁶⁵⁴

WISCONSIN

In 1839, the Wisconsin Territory was created from a part of the Territory of Michigan.⁶⁵⁵ Wisconsin became a state in 1848.⁶⁵⁶ The state legislature voted to ratify the fourteenth amendment in 1867.⁶⁵⁷

In 1849, as part of a general revision of the laws, Wisconsin adopted a provision stating, "Every person deliberately assisting another in the commission of self-murder shall be deemed guilty of manslaughter in the first degree."⁶⁵⁸ This language remained in effect until 1955, when it was repealed⁶⁵⁹ and replaced by "Whoever with intent that another take his own life assists such person to commit suicide may be imprisoned not more than 10 years."⁶⁶⁰ Except for minor changes⁶⁶¹ this remains the law in effect in Wisconsin today.⁶⁶²

In an 1898 case, the Wisconsin Supreme Court held that a provision in an insurance contract barring benefits if the insured died as

Code § 4456 (1906); W. Va. Code § 5461 (1913); W. Va. Code CH. 152, § 4 (1923); W. VA. CODE § 61-11-4 (1931); W. VA. CODE § 6116 (1937); W. VA. CODE § 6116 (1943); W. VA. CODE § 6116 (1961); W. VA. CODE § 61-11-4 (1965); W. VA. CODE § 61-11-4 (1984).

653. Natural Death Act, ch. 134, § 16-30-8(a) (codified at W. VA. CODE § 16-30-8(a) (1984)).

654. W. VA. CODE § 27-5-4(J) (Supp. 1984).

655. Act of Apr. 29, 1836, ch. 54, 5 Stat. 10.

656. 29 ENCYCLOPAEDIA BRITANNICA 401 (15th ed. 1985).

657. U.S.C.S. CONST. amend. XIV explanatory note, at 11-12 (Law. Co-op. 1984).

658. REVISED STAT. OF THE STATE OF WIS. ch. 133, § 9 (Albany, N.Y. 1849) (codified at REV. STAT OF WIS. ch. 164 § 9 (1858); WIS. STAT § 340.12 (1925)).

659. Act of Dec. 16, 1955, sec. 63, 1955 Wis. Laws 974, 1021.

660. *Id.* sec. 1, § 940.12, 1955 Wis. Laws at 983 (codified at WIS. STAT. ANN. § 940.12 (West 1955)).

661. Act of Nov. 23, 1977, ch. 173, sec.12, 1977 Wis. Laws 728, 731. A 1977 amendment reduced the penalty to a class D felony. *Id.*

662. WIS. STAT. ANN. § 940.12 (West 1982).

a result of a violation of the law applied to cases of suicide.⁶⁶³ The court stated:

It is truly said that intentional suicide while sane was a felony a common law. It was punished by forfeiture of goods, but, as we do not inflict such punishments, it is now little more than the shadow of a crime. Technically, it is still a crime in this state, because we have retained the common law so far as it is not inconsistent with our laws and general situations; but it is not a crime within the ordinary meaning of the term, or any usual definition, because we have no statute punishing either suicide or attempted suicide.⁶⁶⁴

Another insurance case in 1922 was occasion for the same court, in explaining the presumption against suicide, to remark, "The love of life, and the immorality of taking one's own life, turns the mind against suicide."⁶⁶⁵ This statement was later quoted with approval by the court in a 1931 case.⁶⁶⁶

In 1955, Wisconsin adopted a law stating, "A person is privileged to use force against another if he reasonably believes that to use such force is necessary to prevent such person from committing suicide, but this privilege does not extend to the intentional use of force intended or likely to cause death."⁶⁶⁷ It remains the law today.

In the course of rejecting a recent constitutional challenge to a statute requiring motorcyclists to wear protective helmets, the Wisconsin Supreme Court noted:

It is true that the successful suicide is no longer within the reach of the law, but it does not follow that self-destruction is a legally protected right of individuals. Suicide, meaning the voluntary and intentional taking of one's own life by a sane person, was a felony at common law, as it still is in some jurisdictions. It is a "grave public wrong," as illustrated by statutes determining the criminality of aiders and abettors, persons joining in suicide pacts, and attempts to commit suicide.⁶⁶⁸

Current Wisconsin law provides that an individual may be involuntarily committed if a court finds that he or she is "mentally ill . . . and [i]s dangerous because the individual [e]vidences a sub-

663. *Patterson v. Natural Premium Mut. Life Ins. Co.*, 100 Wis. 118, 122, 75 N.W. 980, 983 (1898).

664. *Id.*

665. *Fehrer v. Midland Casualty Co.*, 179 Wis. 431, 434, 190 N.W. 910, 911 (1922).

666. *Wiger v. Mutual Life Ins. Co. of New York*, 205 Wis. 95, 101, 236 N.W. 534, 537 (1931).

667. Act of Dec. 16, 1955, sec. 1, § 939.48(5), 1955 Wis. Laws 974, 979 (codified at Wis. STAT. § 939.48(5) (1955); Wis. STAT. ANN. § 939.48(5) (West 1982)).

668. *Bisenius v. Karns*, 42 Wis. 2d 42, 52, 165 N.W.2d 377, 382, *appeal dismissed* 395 U.S. 709 (1969).

stantial probability of physical harm to himself or herself as manifested by evidence of recent threats of or attempts at suicide
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WYOMING

The Territory of Wyoming was created in 1868, and it became a state in 1890.⁶⁷⁰ An 1869 adoption of the common law endures to the present day.⁶⁷¹ Wyoming case law had explicitly adopted the common law of crimes.⁶⁷² Today, however, the common law of crimes has been abolished by statute.⁶⁷³

Under current Wyoming law, one who "presents an imminent threat of physical harm to himself . . . as a result of a physical, emotional, mental or behavioral disorder which grossly impairs his ability to function . . . and who needs treatment and who cannot comprehend the need for or purpose of treatment and with respect to whom the potential risks and benefits are such that a reasonable person would consent to treatment" may be involuntarily committed.⁶⁷⁴

669. WIS. STAT. ANN. § 51.20(a)(a) (West Supp. 1985).

670. 29 ENCYCLOPAEDIA BRITANNICA 437 (15th ed. 1985).

671. See Act of Dec. 2, 1869, ch. 15, § 1, 1869 Wyo. Sess. Laws 291, 291-92 (codified at WYO. LAWS ch. 26, § 1 (1876); WYO. REV. STAT. § 498 (1887); WYO. REV. STAT. 2695 (1899); WYO. COMP. STAT. ch. 234, § 1 (1910); WYO. COMP. STAT. § 4547 (1920); WYO. REV. STAT. § 26-101 (1931); WYO. COMP. STAT. § 16-301 (1945); WYO. STAT. § 8-1-101 (1977)).

672. *State v. Weekley*, 40 Wyo. 162, 275 P. 122 (1929). See also *State v. Faulkner*, 75 Wyo. 104, 292 P.2d 1045 (1956); *State v. Munger*, 43 Wyo. 404, 4 P.2d 1094 (1931); *Ross v. State*, 16 Wyo. 285, 93 P. 299 (1907).

673. Wyoming Criminal Code of 1982, ch. 75 sec. 3, § 6-1-102, 1982 Wyo. Sess. Laws 518, 519 (codified at WYO. STAT. ANN. 6-1-102 (Supp. 1985)).

674. WYO. STAT. ANN. 25-10-101 to 110 (1977).