

# LEGAL TRUTH AND MORAL REALISM

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**T**HIS January, the United States Supreme Court heard oral argument in appeals from two controversial “right to die” cases; decisions in the cases are expected by the end of the term.<sup>1</sup> The Ninth Circuit case held that Washington’s ban on assisted suicide, including physician-assisted suicide, violates the due process clause of the Fourteenth Amendment by impermissibly limiting the liberty rights of terminally ill patients to choose the manner of their dying.<sup>2</sup> The Second Circuit case held that New York’s similar ban on assisted suicide violates the equal protection rights of those terminally ill persons who could not choose to end their lives by withdrawing or withholding medical care.<sup>3</sup> These cases have attracted a great deal of public attention and controversy, both about the role of courts in adjudicating cases that raise complex moral issues, and about the underlying moral issues themselves. These controversies in turn raise deep questions about the status of the moral and the legal claims they invoke. In *Law and Truth*, Dennis Patterson argues for a limited notion of truth in law;<sup>4</sup> this Article argues that Patterson’s view is too limited to account for appeals to truth in complex moral cases such as the aid in dying decisions.

Consider the following questions about the status of the moral and legal claims in the aid in dying cases. Did either of the circuit court decisions rest on true propositions of law? Are the panoply of briefs filed in the cases arguing about truth in law, or about something quite different—say, politics or ethics? What would the claim to legal truth in such cases even mean, and why make it at all? Would the claim to truth mean, for

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1. During this time this Article went to press, the Supreme Court issued its opinion. See *Washington v. Glucksberg*, No. 96-110, 1997 WL 348094 (U.S. June 26, 1997).

2. See *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996), *reh'g denied*, 85 F.3d 1440, *rev'd sub nom.*, *Washington v. Glucksburg*, No. 96-110, 1997 WL 348094 (U.S. June 26, 1997).

3. See *Quill v. Vacco*, 80 F.3d 716, 731 (2d Cir. 1996), *rev'd sub nom.*, *Washington v. Glucksberg*, No. 96-110, 1997 WL 348094 (U.S. June 26, 1997).

4. DENNIS PATTERSON, *LAW AND TRUTH* (1996).

example, more than the Holmesian prediction of what the Supreme Court will do in fact when it hands down its decision? Could either of the circuit court decisions nonetheless rest on true propositions of law if it is overruled by the Supreme Court? What, if any, are the relationships between claims to truth in law and claims to truth in ethics? If the court decisions employ ethical precepts, what is the status of these precepts? Are they matters of opinion, preference, truth? Does their truth status change in virtue of their having been invoked by courts? Are the legal and moral claims in the cases fundamentally different in kind from the fact claims in the cases, such as whether aid in dying has been recently before the legislature, or whether doctors currently engage in the practice?

The view developed by Patterson in *Law and Truth* is that truth claims in law involve warranted assertability. Patterson's fundamental position is that if the Ninth or the Second Circuit relied on recognized patterns of legal argument in reaching the conclusions they did, they asserted legal truths. If they relied on new, different, untried, or unrecognized patterns of argument, they did not assert legal truth. This essay argues that Patterson has opened the issue of legal truth in an enormously important way. In the end, however, he has misunderstood what some modern defenders of ideas of legal truth assert, and his position relinquishes much that is significant about truth claims in law. The assisted suicide decisions are used as illustrative throughout, and it will be helpful to begin with a fuller account of the courts' reasoning in them.

## I. THE ASSISTED SUICIDE DECISIONS

Although there have been a number of legislative proposals, including the successful Oregon initiative, much discussion, and supportive articles dating back at least fifteen years,<sup>5</sup> until last year no appellate decisions had reached the question of whether there is a right to physician assistance in dying. It was, therefore, absolutely stunning to have two of the most highly respected federal courts of appeals conclude within weeks of each other that state bans on physician aid in dying are constitutionally impermissible. Despite involving challenges to similar statutes—general bans on assisted suicide—the decisions are jurisprudentially quite different.

The Ninth Circuit heard a challenge to the Washington state ban on assisted suicide brought by physicians who treat terminally ill patients; patients themselves terminally ill from cancer, AIDS, and emphysema; and the non-profit organization, Compassion in Dying. The challenge was upheld last March in an en banc rehearing. There were three central steps to the en banc opinion. The first established the underlying right: "a person who is terminally ill has a constitutionally-protected liberty in-

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5. Alan L. Sullivan, *A Constitutional Right to Suicide*, in *SUICIDE: THE PHILOSOPHICAL ISSUES* 229 (M. Pabst Battin & David J. Mayo eds., 1980).

terest in hastening what might otherwise be a protracted, undignified, and extremely painful death."<sup>6</sup> The second concluded that the right outweighs interests asserted by the state.<sup>7</sup> The third held that the Washington statute violates the Due Process Clause to the extent that it prohibits physicians from prescribing life-ending medication to terminally ill, competent adults.<sup>8</sup>

In finding the protected liberty interest, the Ninth Circuit relied principally on what can best be characterized as a morally-charged reading of the precedent set by the abortion and *Cruzan*<sup>9</sup> decisions. The court's analysis began by reading the abortion decisions, *Roe*<sup>10</sup> and *Casey*,<sup>11</sup> to hold that a woman has a general liberty interest in securing an abortion, a liberty interest in terms of which any restrictive legislation must be judged. Viewing the elucidation of such liberty interests as a dynamic process, the court then analyzed whether the considerations that supported the general abortion right also supported the general right to die. Historical recognition of liberty interests, while demonstrative, is not determinative of their importance. The court looked also to the impact of a choice on a person's life, to the extent that the choice is constitutive of identity and self-definition. In this analysis, the Ninth Circuit stated explicitly that it read *Roe* to establish a substantive right, and that it also took itself to be recognizing a substantive right for the same underlying moral reasons.<sup>12</sup> The Ninth Circuit applied a parallel methodology to the *Cruzan* decision's postulation of a liberty interest in terminating unwanted medical treatment, arguing that this interest "necessarily recognizes a liberty interest in hastening one's own death."<sup>13</sup> As additional support for recognizing the liberty interest, the court also mentioned changing public conceptions of the role of health care at the end of life.<sup>14</sup> Finally, in emphasizing the fundamental nature of the right to die and the intrusiveness of the Washington ban, the court retold tragic stories of the suicides of terminally ill patients who were unable to arrange aid in dying.<sup>15</sup>

Against this liberty right, the Ninth Circuit arrayed five principal state interests: preserving life, preventing suicide, avoiding improper influence and pressure, protecting family members, and protecting the integrity of the medical profession.<sup>16</sup> It found all of these interests attenuated in the case of competent, terminally ill patients.<sup>17</sup> The Ninth Circuit also con-

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6. *Compassion in Dying*, 79 F.3d at 793.

7. *Id.* at 836-37.

8. *Id.* at 837.

9. *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261 (1990).

10. *Roe v. Wade*, 410 U.S. 113 (1973).

11. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

12. *Compassion in Dying*, 79 F.3d at 801-02.

13. *Id.* at 816.

14. *Id.* at 821-22.

15. *Id.* at 834-35.

16. *Id.* at 816-17.

17. *Id.* at 816-30.

sidered the possibility that through the door opened to some cases of physician aid in dying would stream many other kinds of impermissible practices.<sup>18</sup> However, the constitutionally permissible solution, in the judgment of the Ninth Circuit, was not prohibition but regulation of aid in dying.<sup>19</sup>

The dissenters challenged the majority's morally-charged reading of precedent.<sup>20</sup> They read the Supreme Court as refusing to recognize new fundamental liberty rights beyond those already found in history and tradition.<sup>21</sup> Judge Beezer's dissent was willing to agree that more general liberty rights are found in *Casey* or *Cruzan*, but characterized them as non-fundamental and subject to balancing against ordinary state interests.<sup>22</sup> Judge Kleinfeld's dissent rejected the possibility of any substantive due process claim not rooted in history or tradition.<sup>23</sup> He also observed that the judicial refusal to find such due process rights left open an invitation to proponents of aid in dying to resort to the legislative process.<sup>24</sup>

*Compassion in Dying* was decided in the limited en banc format permitted by the Ninth Circuit. In their vigorous dissent from the order rejecting rehearing by the full Ninth Circuit, Judges O'Scannlain, Trott, and Kleinfeld protested that the en banc panel's opinion was unprecedented. The decision, the dissenters urged, "promulgat[ed] a new constitutional right, one unheard of in over two hundred years of American history."<sup>25</sup> Although the panel claimed to be relying on precedent, it did so "by misapplying language uniquely crafted by the Supreme Court for application in circumstances wholly inapposite."<sup>26</sup> The misapplication ostensibly identified by the dissent lay in using the language of intimacy and personal choice to apply beyond abortion, to any decision—here, the decision about death—that involves an intimate and personal choice.<sup>27</sup> For the dissent, what is crucially mistaken about this methodology is that it ignores the role that historical legitimation has played in the recognition of constitutional protection for liberties of personal choice. "The Supreme Court has never recognized a substantive due process right without first finding that there is a tradition of protecting that particular interest. Here, there is absolutely no tradition of protecting assisted suicide."<sup>28</sup> Further, the dissenters observed, the *Compassion in Dying* court reached its decision despite the state's own rejection of an assisted suicide initiative at the polls.<sup>29</sup>

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18. *Id.* at 830-32.

19. *Id.* at 832-33.

20. *See id.* at 848-49.

21. *Id.*

22. *Id.* at 849 (Beezer, J., dissenting).

23. *Id.* at 857 (Kleinfeld, J., dissenting).

24. *Id.* at 858.

25. 85 F.3d 1440 (9th Cir. 1996) (O'Scannlain, J., dissenting).

26. *Id.* at 1443.

27. *Id.* at 1444.

28. *Id.* at 1445.

29. *Id.* at 1446.

Two central jurisprudential issues thus divide the majority and the dissenters. The first is how to read precedent. The majority extrapolated new protections from underlying reasons. The dissent limited its analysis to explicit historical recognition. The second is how to understand the role of courts. The majority was willing for the court to take steps that the dissent would have left to the legislature (or, by initiative, to the people). These jurisprudential issues appear in different forms in the Second Circuit's assisted suicide decision issued less than a month later.<sup>30</sup>

*Quill* was brought by three physicians challenging the New York ban on assisted suicide to the extent that it prohibited them from prescribing life-ending medication to be self-administered by terminally ill patients. One patient was terminally ill with thyroid cancer; the other two were in the final stages of AIDS. The physicians contended that in these and other cases the lethal prescriptions would be consistent with the standards of medical practice, but were forbidden by New York law. Unlike patients who could choose to die by discontinuing life-sustaining therapy, these patients had no legally available means to bring about their deaths. The Second Circuit agreed with the *Compassion in Dying* dissent that there is no constitutional liberty right to assisted suicide.<sup>31</sup> It considered instead whether the state had interests that were rationally served by distinguishing treatment withdrawal from aid in dying.<sup>32</sup>

The Second Circuit concluded that the distinction between the patients who could withdraw care and the patients who could not served no legitimate state purpose.<sup>33</sup> The court surveyed a number of possible legitimate state purposes—allowing death to occur naturally, keeping physicians from active involvement in causing death, preserving life—and concluded that none corresponded with the ban in its present form.<sup>34</sup> For example, the court reasoned, there is as much active physician involvement in terminating life-sustaining treatment and withdrawing therapy as there is in writing a lethal prescription.<sup>35</sup> The potential for abuse is similar in either case; the state's interest in preventing abuse is not served by the ban on physician aid to competent, terminally ill patients alone—although it might be furthered by stringent regulation of both treatment withdrawal and aid in dying.<sup>36</sup>

This line of reasoning can fairly be characterized as morally-charged equal protection analysis. In deciding whether physician involvement in termination of treatment decisions is relevantly similar to involvement in prescribing lethal medications, the court looked to what it considered the ethically relevant features of the two situations: what the physician does, what his or her intentions are, what the results are, and whether abuse is

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30. 80 F.3d at 724.

31. *Id.* at 724-25.

32. *Id.* at 729.

33. *Id.* at 727.

34. *Id.* at 729-30.

35. *Id.* at 729.

36. *Id.* at 731 n.4.

likely. The court does not consider the historical understanding of the two practices; however reasonable or unreasonable, the law has traditionally made a distinction between withdrawing or withholding care, and assisted suicide or euthanasia, characterizing assisted suicide as permissible omission and euthanasia as impermissible action.

Judge Calabresi concurred in the result, agreeing that the statutory ban could not stand in its present form.<sup>37</sup> Calabresi's analysis relied on the theory of adjudication he developed in *A Common Law for the Age of Statutes*.<sup>38</sup> According to Calabresi, courts in the modern era have been too ready to rely on the Constitution to invalidate statutes. When the rationale underlying a statute has atrophied, or the statute has become obsolete, common law doctrines such as desuetude should weigh against its enforcement. When statutes occupy territory near fundamental constitutional protections—as all sides agree the suicide bans do—courts scrutinizing their validity should insist on “a present and positive acknowledgment of the values that the legislators wish to further through the legislation in issue.”<sup>39</sup> The original basis for the New York ban—historically, the prohibition on aiding and abetting the crime of suicide—has long since eroded, Calabresi contends. Suicide is no longer a crime. The statutes date from the nineteenth century, and were not drafted with modern medicine in mind. When statutes have fallen into disrepair, Calabresi believes, the proper role for courts to play is to force legislative reexamination.<sup>40</sup> Only if statutes are reenacted, with “a recent, affirmative, lucid and unmistakable statement of why the state wishes to interfere,”<sup>41</sup> should courts reach the ultimate constitutional question.

Jurisprudentially, then, the Second Circuit sounds variations on the themes of the Ninth Circuit. Like the Ninth Circuit, the Second Circuit refused to take historically recognized doctrine as determinative. It considers instead whether alleged differences can be rationally grounded. Like the Ninth Circuit dissenters, Judge Calabresi's concurrence centers on the relative roles of courts and legislatures, albeit assigning a more proactive role to the courts.

Different though they are, these are all surely plausible legal strategies. With the exception of Judge Calabresi's methodology, they are standard types of legal argument. Yet the Supreme Court is not going to be able to adopt them all, and a great deal hinges on what the Court ultimately concludes. At this juncture, can or should we expect any help from theories of legal truth?

## II. PATTERSON'S VIEW OF LEGAL TRUTH

For Patterson, the function of an account of legal truth is to move us

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37. See *id.* at 732 (Calabresi, J., concurring).

38. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

39. *Quill*, 80 F.3d at 735 (Calabresi, J., concurring). “[I]nertia will not do.” *Id.*

40. *Id.* at 742-743.

41. *Id.* at 741.

somewhere beyond assertion, in his words “from assertion to truth.”<sup>42</sup> A theory of truth gives us a mechanism for sorting preferred legal assertions (the true ones), from ones to be left aside (the false ones). So it might seem that Patterson is poised to give a great deal of help in answering the questions just posed: a way of distinguishing the true legal assertions in the assisted suicide cases from the false ones. Patterson rejects, however, any suggestion that the true claims are to be distinguished from the false by their relation, correspondence or otherwise, to a reality external to the processes of legal argument.<sup>43</sup> Instead, Patterson develops an account of legal truth rooted in the workings of legal practice; the discussion to follow both develops and challenges this account.<sup>44</sup>

Patterson begins with Philip Bobbitt’s account of legitimacy in constitutional interpretation.<sup>45</sup> Bobbitt’s view (as presented by Patterson) is that it is a mistake to demand a theory of constitutional legitimacy at all—a general theory, that is, about whether courts should rely on original meaning, historical development, substantive moral notions of privacy, or anything else in deciding cases. The legitimacy of the assisted suicide cases thus would not depend on whether they comport with a general theory of originalism, or of natural law, or any other such theory. The *Compassion in Dying* dissenters’ complaint—that the majority had illegitimately postulated a right without historical grounding—would exemplify this mistake of resorting to a theory of legitimacy. Bobbitt contends instead that the claim to legitimacy of legal decisions such as these is not a matter of overarching normative theory at all, but only a matter of whether the decision at issue relies on recognized modalities of legal argument.

According to Bobbitt, there are six recognized modalities of American legal argument: history, text, constitutional structure, doctrine (in the sense of rules generated by precedent), ethics (in the sense of the moral commitments reflected in the Constitution), and cost/benefit analysis.<sup>46</sup> There is nothing more—and nothing less—to constitutional legitimacy than the use of these six modalities. Legal arguments are in this sense self-justifying: they are legitimate if they are recognizable as legal arguments, illegitimate if they are not. There is nothing more ultimate or foundational to be said.

Perhaps not, but there are certainly questions to be asked, and the assisted suicide decisions are a helpful example. First, is it possible for the modalities to be used incorrectly, and what are the standards for determining correct use of a modality? The majority and the dissent in *Compassion in Dying* appear to understand the modality of ethics differently. The majority argues that there is a liberty right to autonomy in the most

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42. PATTERSON, *supra* note 4, at 170.

43. *See id.* at 50-51.

44. *See id.* at 169-79.

45. *See* PHILIP BOBBITT, *CONSTITUTIONAL FATE: A THEORY OF THE CONSTITUTION* (1992); PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991).

46. PATTERSON, *supra* note 4, at 136-37.

important and intimate decisions affecting one's life. The dissent, and the Second Circuit, understand constitutionally protected liberty to be circumscribed historically, including only those personal liberties that have found recognition in American constitutional traditions. Is one use of the modality of ethics to be preferred to the other? Could the conflicting results that they yield be equally true? Or are there gaps in what can be said about legal truth in highly controversial cases? Perhaps the claims of the Ninth and the Second Circuits are neither true nor false, perhaps their truth value is indeterminate until the Supreme Court speaks, or perhaps their truth value will not even be determinate at that point.

Second, do the modalities interact and, if so, how? The view that the moral account of liberty is historically bounded, for example, might be regarded as the argument from precedent constraining the argument from ethics. On the other hand, if there is to be room for a theory of mistake in precedent, the constraints might go the other way. The historical failure to recognize rights to liberty in the manner of one's death, for example, might be a flawed line of precedent if, as the Second Circuit contends, these cases really are not significantly different from the cases protecting the right to refuse treatment.

Finally, there are even questions about which modalities should be employed at all. In cases in which modalities conflict, is it arguable that one should predominate over others, and on what basis? That one modality is utterly inapposite? To get a sense of the extent of such conflicts, it is worth reflecting that all of the arguments outlined in the account given above of the aid in dying cases, with the exception of Judge Calabresi's theory of statutory interpretation, are in wide use in American courts. In dealing with these conflicts, is it arguable that some modalities are preferred, and others cannot be applied at all? For example, would cost/benefit analysis, although a recognized modality, be out of place in the right to die cases? Conversely, is Judge Calabresi's approach, which has not gained general judicial recognition despite its scholarly interest, thereby illegitimate? As presented by Patterson, Bobbitt has no general, theoretical answer to these questions.<sup>47</sup> There are apparently standards set by each modality for what it is to be an argument within that modality, but Patterson does not enlighten us about Bobbitt's further views along these lines. Conflicts or questions of priority among modalities are to be settled by resort to individual conscience. This space for individual conscience to operate among the modalities is, for Bobbitt, how justice enters into law. Patterson does not find this response satisfactory, either as a theory about justice (since conscience and justice may not be the same),

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47. Patterson does make a puzzling general claim at the end of his outline of Bobbitt, however. After reiterating that nothing can be said about legitimacy beyond the modalities, Patterson writes: "To the extent that these modalities are compromised or ignored, particular decisions are illegitimate, and, over time, the legitimacy of the system as a whole is undermined." PATTERSON, *supra* note 4, at 138. To be sure, acceptance of the system might be undermined. But without standards for legitimacy beyond the modalities, it is hard to see how *legitimacy* of the system itself might be compromised.

or as a theory about legal decisions in hard cases (since the standards of conscience might be subjective). Patterson develops instead his own more complicated account of how the modalities of argument interrelate in law.

To develop his account, Patterson elaborates a structure for legal arguments. Legal claims to truth must rest on grounds; grounds must be related to the claims they support by warrants.<sup>48</sup> In *Quill*, “the New York assisted suicide law is unconstitutional as applied to physicians writing prescriptions for their competent, terminally ill patients,” would be the legal truth claim. The ground would be that terminally ill patients who can choose to die by the discontinuation of life supports are relevantly similar to terminally ill patients who cannot so avail themselves of the means of death. The warrant would be the Equal Protection Clause of the Fourteenth Amendment. Culturally endorsed forms of argument would provide support for the use of the warrant. An example might be the Second Circuit’s use of ethical analysis to determine that the two groups of patients are similarly situated. But as Patterson recognizes, the story about backings is far more complicated than this. An objection to the Second Circuit’s Equal Protection analysis is that historically the law has treated the discontinuation of life support quite differently from what has been classified as active intervention in the dying process. Regardless of whether the distinction makes moral sense, and that itself is contested, it has had a considerable legal history. In Patterson’s view, this should be characterized as a conflict among warrants.

Such conflicts surely are at the center of constitutional dispute in hard cases. To resolve them, Patterson resorts to metaphors of coherence drawn from the work of Quine.<sup>49</sup> To see the full impact of such metaphors, it is helpful to quote Patterson in full:

Quine’s metaphor of science as “a total field of force” is the best way to think about legal interpretation. Quine’s contribution to the philosophy of science was to suggest that “it is misleading to speak of the empirical content of an individual statement.” Likewise, in law, it is misleading to speak of the truth of a proposition of law in isolation from other propositions within the legal “web of belief.”

In choosing between different interpretations, we favor those that clash least with everything else we take to be true. In law, as in all matters, “[w]e convince someone of something by appealing to beliefs he already holds and by combining these to induce further beliefs in him, step by step, until the belief we wanted finally to inculcate in him is inculcated.” In law, we choose the proposition that best hangs together with everything else we take to be true.<sup>50</sup>

This is coherence theory applied to truth in law, with a vengeance. Of the many issues raised by coherence theory, two are particularly troubling for an account of truth in law. First, there may be more than one plausi-

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48. *Id.* at 170.

49. W.V.O. QUINE, *WORD AND OBJECT* (1960); W.V.O. QUINE, *FROM A LOGICAL POINT OF VIEW* (1953).

50. PATTERSON, *supra* note 4, at 172 (footnotes omitted).

ble reconstruction of the direction in which the law is moving. Indeed, significant constitutional debates generally involve just such conflicts among courts and commentators about legal direction. The constitutional debate over the interpretation of liberty in the due process clause is a case in point. One possibility is that the law in the area of liberties protects a circumscribed list of historically recognized choices. On this reading, *Cruzan*<sup>51</sup> and *Bowers*<sup>52</sup> are of a piece, with *Bowers* rejecting new forms of sexual relationships and *Cruzan* assuming only the historical liberty to turn down unwanted medical care. *Casey*,<sup>53</sup> moreover, reached the result it did only because *Roe*<sup>54</sup> poked its nose under the tent early. The other possibility reads the due process liberty cases as moving towards a dynamic understanding of autonomy rights, protecting rights of liberty in intimate personal decisions of deep life importance. This possibility reads *Cruzan* as of an intellectual piece with *Roe*, both protecting intimate liberties, and *Bowers* as at best an unfortunate anachronism reflecting outdated attitudes about sexual orientation.

The second difficulty is that Patterson's view just does not allow a theory of legal truth to contribute significantly to these debates. In particular, it does not help in deciding which of several plausible reconstructions is going in the—or at least *a*—"right way."<sup>55</sup> But there is surely more to be said about truth in law than trend.

### III. REALISM AND TRUTH IN LAW

On the realist idea defended here, a theory of legal truth should provide an account of what it is to get things more or less right, legally. Coherence pictures such as Patterson's can at best rely on acceptance and fit: getting things right is a matter of getting them to mesh. When something does not mesh, it must be reshaped or discarded, or the framework must be restructured to fit. How the fit is achieved will be a function of which ideas are more persuasive or more powerful (or have more persuasive or more powerful proponents). Coherence theory cannot see getting things right in terms of objective corrigibility. On the realist view, by contrast, there are discoveries to be made, facts to be accounted for, errors to be identified and corrected.

In recent philosophy, there has been much discussion of the possibilities of realism. The realist enterprise for science is (roughly) to learn what is true about the natural world. In ethics, the realist enterprise is to try to figure out what is really right. Although the issues raised by objectivity in science, ethics, and jurisprudence are surely different, the recent discussions of realism in other fields are useful in understanding the possibilities afforded by a realist theory of legal truth.

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51. *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261 (1990).

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

53. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

54. *Roe v. Wade*, 410 U.S. 113 (1973).

55. PATTERSON, *supra* note 4, at 178.

The realist enterprise incorporates core semantic, metaphysical, and epistemological commitments.<sup>56</sup> Realists claim, first, that the sentences of their subject area (science, or ethics, or law), as literally understood, have a truth value. That is, claims such as “there is a constitutional right to choose the manner of one’s death,” are either true or false. They have their truth value as literally understood—in this example, as about rights, rather than as about rights reduced to other concepts, moral or non-moral. A second central realist claim is that some propositions of the type in question actually are true. The radical skepticism that asserts that all ethical or all legal claims are false is itself misguided. For example, the moral theorist John Mackie argued that all positive moral claims are false because they purport to refer to moral properties in the universe that do not exist; realists reject such claims of systematic error.<sup>57</sup> So, too, would they reject the claims of legal nihilists that all normative legal propositions are systematically biased and therefore false.<sup>58</sup>

More controversial than these claims about truth are realist claims about metaphysics and epistemology. The core of realist metaphysics is that there is a reality in some sense independent of the believer’s beliefs about it.<sup>59</sup> This reality is the touchstone of corrigibility; it is in light of belief-independent reality that propositions of science, ethics, or law must be tested in the end. Of the many notorious difficulties for realists, perhaps the hardest is filling in what this claim amounts to. What realities are scientists, moral philosophers, or judges trying to “get right?” In the history of moral philosophy, realism has been associated with the position that there are real moral properties in the universe—perhaps Platonic forms of justice, or the simple unanalyzeable quality “good.”<sup>60</sup> This version of moral realism has been adopted by some legal theorists in defense of natural law. To the extent that it relies on the idea of a separate moral realm, this position has drawn heavy criticism.<sup>61</sup> The moral theorist John Mackie rejected moral realism, and what he understood as a parallel form

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56. This account is based upon Peter Railton’s recent, immensely helpful survey, and David Brink’s earlier book. See Peter Railton, *Moral Realism: Prospects and Problems*, in *MORAL KNOWLEDGE? NEW READINGS IN MORAL EPISTEMOLOGY* (Walter Sinnott-Armstrong & Mark Timmons eds., 1996). See also DAVID O. BRINK, *MORAL REALISM AND THE FOUNDATIONS OF ETHICS* (1989).

57. J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* (1977).

58. For example, Pierre Schlag argues that all normative legal scholarship is biased, thus systematically in error. Pierre Schlag, *Pre-Figuration and Evaluation*, 80 CAL. L. REV. 965 (1992); Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990).

59. For a discussion of difficulties in formulating this idea of mind-independence, see Michael Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424, 2435 (1992). The basic idea is that of a reality independent of what the particular thinker whose beliefs are at issue believes (so that A’s beliefs about society do not constitute social reality), rather than a reality independent of minds altogether (so that social reality may be in part a function of what members of society believe).

60. See, e.g., PLATO, *THE REPUBLIC*; GEORGE EDWARD MOORE, *PRINCIPIA ETHICA* (1903).

61. For a discussion of these issues, see Michael Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424 (1992). Moore defends a naturalist realism, but is in many ways sympathetic to the stronger and more problematic forms of realism. For example, Moore holds that reality is “gapless,” so every proposition is true or false. *Id.* at 2437. He thus leaves no

of natural law theory, because he understood realism as committed to “queer” moral properties that both attach to states of affairs in the world and motivate human action.<sup>62</sup> Realists certainly owe their critics a plausible metaphysics. But there are many less problematic accounts of the ontological commitments of realism in law particularly, about which more in a moment.

Epistemologically, realists hold that knowledge consists in “getting things right.” They offer, however, many different accounts of what it is to get things right, and to be justified in believing that one has succeeded in doing so. An important epistemological distinction in these discussions of realism is that of the difference between knowledge and justified belief. Knowledge involves, roughly, holding beliefs that are true and holding them for the right reasons—getting things right, and not doing so by accident. Justification involves being in an epistemically favorable position with respect to the beliefs one holds, with the recognition that one might nonetheless be wrong. Realist accounts of knowledge are typically linked to realist metaphysical views; knowledge is the correct understanding of reality, obtained in a dependable way. Accounts of justification, at one remove from accounts of knowledge, seek reliable ways of identifying when one is in a position to think that one knows. But realists offer many different accounts of when this might be so, including accounts that are not directly linked to realist metaphysics.

In developing accounts of justification, some realists do defend the possibility of access to a mind-independent reality, arguing that beliefs are not justified unless there is reason to believe one is in a position to achieve this epistemic access. Others do not seek access to a mind-independent reality. David Brink, for example, argues that justification in ethics is a matter of coherence among carefully considered claims (both moral and nonmoral). The contrasting view about justification, which Brink rejects, is that justification is foundationalist: beliefs are justified if they are themselves privileged foundations, or if they are related in appropriate evidentiary or inferential ways to epistemically privileged foundations.<sup>63</sup> Realists have been drawn to foundationalism about justification because they have thought it was a way to guarantee “contact with reality,” through foundational beliefs. To the contrary, Brink argues that coherence is the best explanation available for the possibility that beliefs accurately represent the world.<sup>64</sup> Brink thus adheres to a coherentist picture of justification as wide reflective equilibrium, a view espoused by a number of contemporary moral theorists.<sup>65</sup> Still others present dif-

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room for the possibility that a legal claim would have an indeterminate truth value until, for example, a court has acted.

62. See generally MACKIE, *supra* note 57.

63. See generally BRINK, *supra* note 56; see also John Rawls, *Outline of a Decision Procedure for Ethics*, 60 PHIL. REV. 177 (1951) (examining a reasonable decision procedure for adjudication of competing ethical interests).

64. BRINK, *supra* note 56, at 125.

65. See, e.g., Robert Audi, *Intuitionism, Pluralism, and the Foundations of Ethics*, in MORAL KNOWLEDGE? NEW READINGS IN MORAL EPISTEMOLOGY 101 (Walter Sinnott-

ferent arguments against committing the realist to foundationalist views about justification. If access to an external reality—"things in themselves"—is not possible, the feminist critic Naomi Scheman argues, relying on such reality is of no use to the social critic.<sup>66</sup> Instead, as a way of correcting bias in beliefs and achieving objectivity in justification, Scheman suggests attention to whether different and challenging voices have been heard and considered.<sup>67</sup> Realists can thus hold many different views about when believers are in epistemically favored positions. Where they agree is in ultimately linking their theories of justification to realist accounts of knowledge and metaphysics, in roughly the following way: being justified in believing is a matter of being in a good position to have knowledge, and having knowledge is being justified in having beliefs about the world that are true.

In law, perhaps even more so than in ethics, there are a number of possible accounts of what legal actors might be trying to get right. One helpful initial observation is that courts rely on many claims about ordinary—that is, non-legal or non-moral—facts. There is, of course, the evidence in the case, but there are other facts as well. Consider some examples of ordinary fact claims made in the assisted suicide decisions. The Ninth Circuit, as a basis for recognizing a liberty interest in physician aid in dying, asserted that practice of physician aid in dying is in fact widespread.<sup>68</sup> The Second Circuit, in rejecting the distinction between withdrawal of treatment and aid in dying, asserted that patients who cannot avail themselves of treatment withdrawal frequently die in pain.<sup>69</sup> Judge Calabresi, in concluding that New York's ban on assisted suicide rested on a rationale atrophied by time, contended that the New York legislature had not recently reexamined the statute in light of contemporary concerns.<sup>70</sup> All of these are fact claims that are crucial to the reasoning presented. Furthermore, these were all contested in briefs filed with the Supreme Court in the appeals. Both the judges who relied on them and the critics who contested them assumed that the fact claims are, in principle, subject to empirical scrutiny. It may be that one of the following is true: there are very few committed patients who cannot find their own means of death; few patients die in pain with properly used modern methods of pain control; or the New York legislature had indeed scrutinized New York's laws regarding end-of-life decisionmaking. To the ex-

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Armstrong & Michael Timmons eds., 1996); Norman Daniels, *Wide Reflective Equilibrium and Theory Acceptance in Ethics*, 76 J. PHIL. 256 (1979); Rawls, *supra* note 62.

66. NAOMI SCHEMAN, *ENGENDERINGS: CONSTRUCTIONS OF KNOWLEDGE, AUTHORITY, AND PRIVILEGE* (1993).

67. *See generally id.*

68. This claim is made in *Compassion in Dying*, 79 F.3d at 828; and disputed in Brief of the American Geriatrics Society as Amicus Curiae, *Washington v. Glucksburg* (No. 96-110).

69. This claim is disputed in Brief of the American Medical Association as Amicus Curiae, *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996) (No. 95-7028).

70. *But see* NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT* (1994); NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *WHEN OTHERS MUST CHOOSE* (1992).

tent that it depends on such claims of fact, the reasoning in the decisions stands or falls on the underlying facts of the matter. Thus, the next step is to ask why the reasoning about the law in the cases should be any different.

In determining what it is that the courts might be trying to get right in putting forth legal claims, there are a number of leading candidates. Each rests on a more general picture of the nature of the legal enterprise. Each would urge answering questions about what the law is in a way that goes beyond coherence, although in different directions. These can usefully be grouped into three categories: ordinary facts, facts about the law, and moral facts. A brief discussion of each follows, using the assisted suicide cases as illustrations.

First are the ordinary facts. Beyond the facts of the case at hand, judges, in deciding cases, might be trying simply to get ordinary facts right. These might be facts about human well-being, about institutional stability, or about social progress. Defenders of what was called "sociological jurisprudence" in the early twentieth century, for example, suggested that judges should try to further social progress.<sup>71</sup> To take another example, in *The Concept of Law*, H.L.A. Hart discusses the relationship between basic human needs and the continuing existence of a legal system.<sup>72</sup> Hart believes that legal systems that do not take into account such facts as that humans are physically vulnerable to threats will not long endure. He does not believe that there are conceptual links between these facts and the existence of a legal system, but he does think that, as a contingent matter, accounting for such facts is part of the ongoing function of a legal system.<sup>73</sup>

The assisted suicide decisions contain many examples of the courts trying to get right facts about human well-being and social stability. Perhaps the principal one is the anticipated impact on society of the recognition of such a right. The Ninth Circuit considers and rejects the possibility that recognizing a constitutional right to aid in dying will risk a slide down a slippery slope to nonvoluntary euthanasia.<sup>74</sup> In arguing for reversal, however, some amici contend that recognition of assisted suicide would be dangerous social policy.<sup>75</sup> In a very recent decision regarding the Oregon law permitting aid in dying, the Ninth Circuit has reiterated the view that it will not lead to a parade of social horrors.<sup>76</sup> The courts here are, quite simply, trying to understand the social effects of legal policy.

Second are facts about the law. The idea that there are facts about the law, which judges are trying to get right, is the central idea of legal posi-

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71. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

72. *See generally id.*

73. *See generally* H.L.A. HART, *THE CONCEPT OF LAW* (1961).

74. *Compassion in Dying*, 79 F.3d at 830.

75. *See, e.g.*, Brief of American Suicide Foundation as Amicus Curiae Supporting Reversal, *Washington v. Glucksburg* (No. 96-110); Brief of Family Research Council as Amicus Curiae in Support of Petitioners, *Washington v. Glucksburg* (No. 96-110).

76. *Lee v. Oregon*, 107 F.3d 1382 (9th Cir. 1997).

tivism. Positivists differ about the existing kinds of legal facts. The principal candidates are facts about precedent, facts about rules, and institutional facts. Positivists also differ about whether legal facts are available in every case or the law runs out at times.

One kind of legal fact that judges might be trying to get right are facts about what courts have decided or will decide. A particularly conservative view is that judges are trying to get facts about precedent in prior cases right; this views the law as static and stable. The extreme realist view (that law is nothing other than a prediction about what courts will do) is another example of the idea that the law consists in facts about judicial decisionmaking.<sup>77</sup> Dispute about the identification and importance of precedent is clearly apparent in the assisted suicide cases. The *Compassion* dissenters believe that the role of the courts is to follow existing precedent with respect to constitutional liberty rights, but not to identify new rights.

A second possibility is that judges are trying to get the rules of law right. On a formalist view, the law is made up of a set of rules, and the enterprise of judging is to “find” the applicable rules for any given case. On the “model of rules,” as developed by H.L.A. Hart, judges attempt to identify the rules that are relevant to a given case by reference to a master rule, the “rule of recognition.” There may, however, be cases in which the law runs out and the judge must call upon extra-legal considerations in making a decision.<sup>78</sup> The effort to identify rules of law in the assisted suicide cases is found in the dispute over whether there is a recognized liberty right that includes control over the manner of one’s dying. Another possibility is that these are genuine “hard cases” of the type identified by Hart, in which there is no clear law to apply and judges must make new law. If so, there would be no legal truth of the matter until a definitive ruling has been obtained.

Yet another view is that judges are trying to get institutional arrangements right. A principal example of this view is conventionalism: judges are trying to reproduce the institutional understandings of society. Such conventions may go beyond the identified rules of law relied upon by Hart.<sup>79</sup> Legal claims can get the conventions right, or they can be mistaken about them.<sup>80</sup> Several examples of the view that courts are trying to get institutions right are found in the assisted suicide cases. One example is the dispute over the relative roles of courts and legislatures in identifying rights, as the Ninth Circuit believes that it is appropriate for courts to elaborate rights under the due process clause and the dissent believes it is not. Another example is Judge Calabresi’s claim that when near-constitutional issues are at stake, the role of courts is to insist on contem-

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77. For identification of this view with extreme realism, see MARTIN P. GOLDING, *PHILOSOPHY OF LAW* 37-39 (1975) (explaining the prediction theory of Holmes).

78. See generally HART, *supra* note 73.

79. For an account of conventionalism, see RONALD DWORKIN, *LAW’S EMPIRE* (1986).

80. Of course, the conventions can run out too, in which case there is nothing to get right and the claims are neither true nor false.

porary endorsements of statutory limits by legislatures.<sup>81</sup> These are significant disputes about the actual design of American institutions as they have been evolving since World War II.

A third realist possibility is that judges are trying to get moral facts right. This view is exemplified in the varieties of the natural law tradition. Some versions of natural law theory link law to accepted moral views. Ronald Dworkin, for example, holds that right answers in legal cases are those which follow from the soundest view of the settled law.<sup>82</sup> Lon Fuller's purposive theory of adjudication linked law and morality by viewing legal institutions as the enterprise of subjecting human conduct to the governance of rules.<sup>83</sup> Still others hold that adjudication rests on getting facts about morality right. Michael Moore, for example, writes:

[J]udges interpreting the Constitution are not merely asserting their own will, nor are they merely reflecting a societal consensus; rather, when judges decide what process is due a citizen, or what equality requires, or when a punishment is cruel, they judge a moral fact as capable of being true or false. When interpreting the provisions of the Bill of Rights and the Civil War Amendments, they make judgments about the moral rights persons possess, rights that those Constitutional provisions did not create but only named.<sup>84</sup>

There are examples of efforts to get morality right in the assisted suicide cases, too. One example is the contention by the Second Circuit that there is no defensible moral distinction between withdrawing and withholding care.<sup>85</sup> This contention is disputed by briefs of amici including the United States.<sup>86</sup> Another example is the role of the physician, with the Ninth Circuit seeing the role of the physician in terms of alleviating suffering,<sup>87</sup> and its critics arguing that active participation in taking a life conflicts with the physician's role as healer.<sup>88</sup> Finally, the Ninth Circuit waxes eloquent about changing social attitudes about the moral permissibility of suicide,<sup>89</sup> a discussion sharply criticized in the amicus briefs.<sup>90</sup>

Finally, why does it matter whether the enterprise of identifying law is understood in realist terms? Considering what adjudication tries to get right brings out the different pictures of the nature of law itself that underlie different theories of adjudication. Law can be viewed as an enter-

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81. See generally CALABRESI, *supra* note 38; see also *Quill*, 80 F.3d at 735 (Calabresi, J., concurring).

82. See generally DWORKIN, *supra* note 79.

83. See generally LON FULLER, *THE MORALITY OF LAW* (1961).

84. Michael S. MOORE, *Moral Reality Revisited*, 90 MICH. L. REV. 2424, 2470 (1992) (footnote omitted).

85. *Quill*, 80 F.3d at 729 (citing Note, *Physician-Assisted Suicide and the Right to Die with Assistance*, 105 HARV. L. REV. 2021, 2028-31 (1992)).

86. Brief for United States as Amicus Curiae Supporting Petitioners, *Quill v. Vacco* (No. 95-1858).

87. *Compassion in Dying*, 79 F.3d at 829.

88. E.g., Brief for the American Medical Association as Amicus Curiae in Support of Petitioners, *Quill v. Vacco* (No. 95-1858).

89. *Compassion in Dying*, 79 F.3d at 810-12.

90. E.g., Brief of American Suicide Foundation as Amicus Curiae Supporting Reversal, *Washington v. Glucksburg* (No. 96-110).

prise of social engineering, self-replication, social stability, or moral rectitude. Debates about complex constitutional issues such as assisted suicide bring these different models of law into play. Identifying the range of available possibilities in realist terms helps bring these different models to light. These kinds of disputes, however, are never forced into the open when the goal is coherence.

