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I swear by Apollo Physician and Asclepius and Hygieia and Panaceia and all the gods and goddesses, making them my witness, that I will fulfill according to my ability and judgment this oath and this covenant:

> To hold him who has taught me this art as equal to my parents and to live my life in partnership with him, and if he is in need of money to give him a share of mine, and to regard his offspring as equal to my brothers in male lineage and to teach them this art—if they desire to learn it—without fee and covenant; to give a share of precepts and oral instruction and all the other learning to my sons and to the sons of him who has instructed me and to pupils who have signed the covenant and have taken an oath according to the medical law, but to no one else.
>
> I will apply dietetic measures for the benefit of the sick according to my ability and judgment; I will keep them from harm and injustice.
>
> I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly I will not give to a woman an abortive remedy. In purity and holiness I will guard my life and my art.
>
> I will not use the knife, nor even on sufferers from stone, but will withdraw in favor of such men as are engaged in this work.
>
> Whatever house I may visit, I will come for the benefit of the sick, remaining free of all intentional injustice, of all mischief and in particular sexual relations with both female and male persons, be they free or slaves.
>
> Whatever I may see or hear in the course of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself holding such things shameful to be spoken about.
>
> If I fulfill this oath and do not violate it, may it be granted to me to enjoy life and art, being honored with fame among all men for all time to come; if I transgress it and swear falsely, may the opposite of all this be my lot.[1]

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An oath represents the strongest possible commitment a speaker can make. In linguistic parlance, an oath belongs to a specific class of statements known as "speech acts" or "performative utterances." By their very articulation, such statements have the power to put their contents into effect.[2] In short, "speech acts" do more than just *say* something; they also *do* something.[3] By swearing an oath, for example, a person promises to perform certain actions in the world. This promise is all the more powerful if, as is usually done, the oathtaker swears upon some divine power and utters the oath in a public setting. Perhaps the most well-known example of an oath is the Hippocratic Oath—the famous code of medical ethics often taken by those about to begin medical practice.

This Article examines the use of this important text in contemporary judicial opinions. In these settings, the Oath does not promise to perform what it says, thus losing its quality as a speech act. We hear the voice not of the oathtaker but rather that of the court. The judicial references to the Hippocratic Oath create a kind of "secondary" performative effect that serves to convince the reader of the Oath's enduring legacy, even if courts do not abide by the Oath's literal words.

The main argument of this Article is that the Hippocratic Oath exerts a powerful influence on modern legal controversies implicating medical ethics, leading courts to adopt an overly doctor-centered view of these disputes. This doctor-centered view results from two distinct phenomena: first, the history and enduring legacy of the Oath have served to dignify the medical profession, causing courts to treat social issues as medical ones and to displace difficult ethical choices onto doctors; and second, judicial reasoning based on the Oath treats the patient as subordinate to the physician, because the text of the Oath itself places a greater emphasis on doctors than on patients.

Part I provides a brief overview of the Oath's history, which points to the Oath's capacity to distinguish and legitimize the medical profession. Part II examines the text of the Hippocratic Oath, analyzing the ways in which the Oath places much more emphasis on the physician than on the patient. Part III demonstrates how leading court opinions on abortion regulation, medical treatment of mentally ill prisoners, physician-assisted suicide, and physician involvement in administering the death penalty, incorporate the Oath's emphasis on doctors over patients even as they flout some of the Oath's specific prohibitions. It also explores how courts have deferred to the modern medical profession's view—in effect allowing doctors to regulate themselves on social issues where the government and judiciary ought to have a greater role. The Conclusion argues that courts should be less passive about adopting the doctor-centered view of medical

regulation embodied in the Hippocratic Oath, because reliance on the Oath in its classic form enacts that document's devaluation of patients, and even reliance on more modern, patient-centered versions unduly privileges medical approaches to social issues.

I. THE ENDURING LEGACY OF THE OATH

The Hippocratic Oath has stood as a major document of medical ethics from antiquity to the current day. Although the precise circumstances of its origin are unclear,[4] the Oath made its earliest recorded appearance in the first century A.D.[5] and is generally attributed to the Greek physician Hippocrates (c. 460-380 B.C.).[6] Hippocrates and his followers used the Oath to distinguish the medical profession as a discipline unique from other occupations, most notably from philosophy[7] and from sorcery.[8] Prior to the Hippocratic era, the doctor and the sorcerer tended to be the same person. That person had both the power to heal and the power to kill.[9] The mid-first-century Roman physician Scribonius Largus, the first extant ancient author to mention the Oath, noted that Hippocratic medicine was exclusively about healing, not harming: "Hippocrates, the founder of our profession...valued it highly that whoever conducted himself according to his principle with a devoted and consecrated heart would preserve the reputation and dignity of medicine, for medicine is the science of healing, not of doing harm."[10]

About a half-century later, Soranus of Ephesus, a Methodist physician, reported a controversy regarding the use of abortives. One party allowed abortives, but only in cases involving medical complication. The other party banished abortives, citing the Hippocratic Oath and noting that "it is the *specific task of medicine to guard and preserve what has been engendered by nature.*"[11] The distinction between doctor and seer is documented in a fifth-century treatise attributed to Hippocrates entitled *On the Sacred Disease,* which "scorns the cathartic healer in the name of nature."[12] The Greeks may have been particularly interested in separating medicine from sorcery because sorcery was a traditionally female occupation.[13] In addition to separating themselves from other disciplines, the Hippocratics sought to amass a body of knowledge that was peculiar among the then-emerging schools of medicine.[14]

Since the beginning of the scientific revolution, the Oath and variants of it have been recited at medical institutions across Europe.[15] When formal medical education came to the other side of the Atlantic, so did the Hippocratic Oath. The Oath was particularly popular among American doctors in the mid-nineteenth century.[16] And, again, "orthodox" practitioners demanded adherence to the Oath to mark themselves off

from other healers.[17] Still today, the Oath continues to demand that physicians maintain ethics higher than those expected of society in general,[18] and it remains a code of professional identity that marks off "proper" medicine from various forms of alternative healing practices.[19]

Many medical schools across the country continue to administer the Oath to their students in formal, public ceremonies. In fact, the use of the Hippocratic Oath in medical schools has increased dramatically throughout the course of the twentieth century.[20] According to one set of statistics, a mere twenty American medical schools administered the Hippocratic Oath or some version of it in 1928. By 1965, the numbers had risen to sixty-eight out of ninety-seven medical schools. The numbers have continued to rise. In 1989, at least 119 medical schools administered an oath, about sixty administering some version of the Hippocratic Oath.[21] In 1993, the 135 American medical schools and twelve Canadian medical schools responding to a survey reported that their graduates took a professional oath, with sixty-nine schools in both countries administering some form of the Hippocratic Oath.[22]

Moreover, the Hippocratic Oath retains enormous symbolic resonance for the doctors who take it, as it marks the moment when they enter a privileged profession distinguished from the rest of society. In the words of one nostalgic physician:

> To most of us...the solemn and moving high spot of the doctor's career was the moment when the class stood up; and with grim or beaming faces, intoned the Oath of Hippocrates. The Oath symbolized crossing the bridge into a kind of priesthood.... No matter if some of the wording of the Oath seemed archaic. It had style and it told the public that, like the priest, we were sworn to solemn vows.[23]

As this testimony indicates, the Oath very much evokes the larger medical community into which the physician is about to enter, creating what Heinrich von Staden calls a "sense of belonging to a transgenerational professional collectivity."[24] Indeed, generations upon generations of medical practitioners have sworn to follow the Oath's words.

II. THE PHYSICIAN'S OATH: TRIUMPH OF DOCTORS OVER PATIENTS

The word "injustice" appears twice in the Hippocratic Oath. The oathtakers swear to "keep [the sick] from harm and *injustice*" and promise that they themselves will "remain...free of all intentional *injustice*."[25] This momentary allusion to patients' rights notwithstanding, the Hippocratic Oath in fact expresses much greater concern about the role of the

physician. Indeed, it is telling that the Oath is sometimes called "The Physician's Oath."[26] The Oath places the physician in the foreground. The patient recedes into the distance, the unabashed object of the physician's artistry. In this Part, I examine the text of the Hippocratic Oath to demonstrate its emphasis on the physician, and the larger medical community, to the exclusion of the patient.

From beginning to end, the Oath devotes much greater attention to the quality of the physician's relationships with his gods, his teacher, and his students, than with his patients. The very order in which these parties are discussed underscores an implied hierarchy that places the gods at top and the patients at bottom. The patient, as defined in the Oath, is the ignorant, passive bearer of sickness and disease—a mere object to be examined and treated—rather than an autonomous, full participant in the healing process.

The Oath begins with an invocation to "Apollo Physician and Asclepius and Hygieia and Panaceia and all the gods and goddesses."[27] The physician calls upon these deities to serve as witnesses to the truth of what he is about to say. That all the divine powers are called upon is a usual feature of an ancient oath[28] and subsequent oaths throughout history, from the book of Genesis[29] to medieval canon law[30] to English common law[31] to the current day.[32] However, the appeal to the heavens in the Hippocratic Oath bears particular significance, as the Oath represents what might be considered a deeply religious conversion: that of layperson into medical professional. Walter Burkert has likened the practice of taking the Hippocratic Oath to a religious initiation ceremony, such as entrance into the priesthood, in that both involve the transmission of "sacred" information and the exclusion of outsiders: "Holy things are shown to holy men; such things are not permitted for the profane until they are initiated through the rites of knowledge."[33]

Next, the Oath positions the physician in relation to his teacher and students. Here the physician becomes part of a new family, as he vows to treat his teacher like a parent and his teacher's children like his brothers. At the same time, the physician promises to pass down his knowledge to his own sons, as well as to his teacher's sons and to all other "pupils who have signed the covenant and have taken an oath according to the medical law, but to no one else."[34]

The Oath then proceeds to address the ways in which the physician intends to comport himself both as a professional practitioner and as a private individual. After the physician affirms that he "will apply dietetic measures for the benefit of the sick according to [his] ability and judgment [and] keep them from harm and injustice,"[35] the Oath lists a number of

specific actions from which the physician vows to abstain. The oathtaker promises neither to administer nor suggest the use of "a deadly drug," not to give a woman "an abortive remedy," not to use "the knife," not to engage in "mischief and in particular...sexual relations with both female and male persons," and not to "spread abroad" what he observes in the course of treatment.[36] In modern parlance, these prohibitions translate into bans on physician-assisted suicide, abortion, surgery,[37] sexual relations between doctors and their patients, and breaches of doctor-patient confidentiality.

Finally, the Oath concludes with a determined resolution on the part of the physician: "If I fulfill this oath and do not violate it, may it be granted to me to enjoy life and art, being honored with fame among all men for all time to come; if I transgress it and swear falsely, may the opposite of all this be my lot."[38] The Oath's closing words seem to indicate that the Hippocratic physician is more concerned about whether he will enjoy eternal fame than whether his patients will live life to the fullest.

This conception of the physician's role is elaborated in the following passage from *Decorum*, another work attributed to the Hippocratic corpus of medical writings:

> [W]atch also the faults of the patients, many of whom often lie about the taking of things prescribed. For by not taking disagreeable drinks, purgative or other, they sometimes die. The fact is never admitted but the blame is thrown upon the physician.... Perform all these things quietly, skillfully, and conceal from the patient most of what you are doing. Give necessary orders cheerfully and with serenity, turn his attention away from what is being done to him; sometimes you have to reprimand him sharply and severely, and sometimes you must comfort him with attention and solicitude.[39]

Here, too, the concern is for the reputation of physicians, specifically that they not be blamed for the deaths of patients who fail to take prescribed medications. In recognizing that "many" patients disobey their doctors' orders, the passage acknowledges a level of patient autonomy that is ignored in the Hippocratic Oath. Nonetheless, the *Decorum* passage places its main emphasis on the physician's active role. The doctor performs, conceals, gives orders, distracts, reprimands, and comforts. This string of active verbs indicates that the physician we encounter in the *Decorum* passage is not so different from the one we see in the Oath.[40]

The Hippocratic Oath is exceptional, however, in that it is the most personal of the more than fifty extant Hippocratic works from the classical period. Oaths naturally focus on the oathtaker; the very genre after all

requires a narrator speaking in the first person. Yet nowhere else within the Hippocratic corpus does the first-person singular possessive pronoun "I" and the possessive adjective "my" or "mine" appear as often as in the Oath.[41] This personalization of the Oath seems to be a way of emphasizing the oathtaker's significant individual investment in his vows. While the commitments expressed in the Oath largely concern professional conduct, the extensive use of the first-person singular form indicates that the oathtaker is committed to apply the Oath's precepts to every aspect of his or her life, both professional and personal.[42]

III. THE OATH IN THE LAW: TRIUMPH OF MEDICINE OVER COURTS

Numerous citations to the Hippocratic Oath in contemporary judicial opinions indicate that it remains an extraordinarily important definition of medical practice. References to the Oath arise in a wide range of cases, including those that involve employment,[43] physicians' disciplinary proceedings,[44] the First Amendment,[45] and the disposition of frozen embryos.[46] This Article focuses on only those U.S. cases whose opinions have devoted more than passing references to the Hippocratic Oath.[47]

Of course, in the context of these opinions, the Oath does not promise to perform what it says, thus losing its "performative" quality as a speech act. As the linguist J.L. Austin has explained in his "doctrine of the *Infelicities*,"[48] the persons and circumstances must be "appropriate" for an utterance to be performative.[49] Thus, for example, the words "I do" perform the act of (Christian) marriage only when the speaker is not already married, and the words "I give it to you" perform the act of gift-giving only if the speaker hands over a gift.[50] Within the context of judicial case law, the Oath is not performative in the sense that it does not commit the speaker (that is, the court) to any particular conduct. Whereas a medical student's promise to follow the Oath's tenets performs an action in the world, a citation to the Oath in a written judicial opinion strips the Oath of its linguistic performativity—the promise that the oathtaker will conduct himself according to the Oath's text. Indeed, in the realm of the judicial opinion, the voice of the oathtaker is silenced. Now the voice is an institutional one, that of the court.

The very fact that judicial opinions refer to the Oath so extensively indicates its status as a symbolic marker imbued with profound social meaning derived from generations upon generations of medical students swearing to follow its words. A kind of "secondary" performative effect of the Hippocratic Oath thus emerges beyond the linguistic performativity it may possess in certain circumstances. This additional character that the Oath assumes is, in Austin's nomenclature, "perlocutionary."[51]

Perlocutionary acts are those that "we bring about or achieve *by* saying something,"[52] such as convincing, persuading, deterring, surprising, and misleading.[53] The courts' references to the Hippocratic Oath subtly convince the reader that the Oath remains a persuasive statement that continues to unite the medical profession. Interestingly, even while citing the Hippocratic Oath, courts have rejected some of the Oath's most important prohibitions—most notably those barring doctors from providing "an abortive remedy" or administering "a deadly drug."[54]

This Part examines judicial opinions that allow doctors to perform abortions for women (*Roe v. Wade*[55]), to administer anti-psychotic drugs to mentally ill prisoners (*Washington v. Harper*[56]), to assist patients in committing suicide (*Compassion in Dying v. State of Washington*[57]), and to participate in the executions of prisoners sentenced to death (*Thorburn v. Department of Corrections*[58]). These opinions directly contradict specific portions of the Hippocratic Oath. But as this Part demonstrates, the respect these opinions accord doctors and medical science reveals that they remain faithful to the Oath's overriding desire to establish the preeminence of the medical profession. *Washington v. Harper, Compassion in Dying v. State of Washington,* and *Thorburn v. Department of Corrections* indicate the enormous trust the judiciary places in doctors and signals the judiciary's trust in the medical profession to regulate itself. *Roe v. Wade,* discussed first, not only reflects the Supreme Court's willingness to defer to the medical profession, but also adopts the Oath's implicit emphasis on doctors at the expense of patients.

A. Abortion: Roe v. Wade

Tucked away in the landmark abortion rights case, *Roe v. Wade* (1973), in which the U.S. Supreme Court recognized that a woman's right to privacy limits the legislature's ability to proscribe or regulate abortion, are four paragraphs devoted to the Hippocratic Oath.[59] Justice Blackmun, the author of the majority opinion, had "pondered the relevance of the Hippocratic Oath" during the summer of 1972, when he immersed himself in research on abortion at the Mayo Clinic medical library in Minnesota.[60] Blackmun explained the scope of his research as follows:

> I traced down, as I hoped to be able to do, the attitudes toward abortion of the American Medical Association (it had changed over the years), of the American Public Health Association, and of the American Bar Association. I wished, furthermore, to study the history of our state abortion statutes, and I wished to ascertain the origin and extent of acceptance of the Hippocratic Oath. That research, personally and very privately performed, was, I believe, rewarding.[61]

The enduring quality of the Oath was not lost on the Justice. In his opinion, he acclaimed the Oath as "the ethical guide of the medical profession"[62] and "the apex of the development of strict ethical concepts in medicine."[63] Blackmun noted that the Oath became particularly "popular" at the end of antiquity. With the rise of Christianity in that period, resistance against abortion and against suicide became common. In turn, the Oath "became the nucleus of all medical ethics" and "was applauded as the embodiment of truth."[64]

Although the Oath may have had its fair share of adherents at certain moments in history, Blackmun was not convinced that the Oath had found universal acceptance across time and place. Instead, Blackmun heartily endorsed a theory promulgated in 1943 by Ludwig Edelstein, a classicist and well-known historian of Graeco-Roman medicine,[65] in his short monograph entitled *The Hippocratic Oath: Text, Translation and Interpretation.*[66] In that work, Edelstein argued that the Hippocratic Oath had not really been authored by the great physician Hippocrates, but that the ideas expressed in the Hippocratic Oath—specifically the prohibitions on administering abortive remedies or poison—reflected the opinions of a "small and isolated" group of philosophers in ancient Greece named the Pythagoreans. According to Edelstein, the Pythagoreans stood alone among all Greek thinkers in outlawing abortion and suicide under all circumstances.[67] Society at large, Edelstein argued, was accepting of abortion and of suicide, both of which were freely practiced with the approval of many ancient physicians.[68]

Blackmun used Edelstein's theory to dismiss the Hippocratic Oath's prohibition on abortion.[69] The relevant section reads as follows:

> Why did not the authority of Hippocrates dissuade abortion practice in his time and that of Rome? The late Dr. Edelstein provides us with a theory: The Oath was not uncontested even in Hippocrates' day; only the Pythagorean school of philosophers frowned upon the related act of suicide. Most Greek thinkers, on the other hand, commended abortion, at least prior to viability. See Plato, Republic, V, 461;[70] Aristotle, Politics, VII, 1335b 25.[71] For the Pythagoreans, however, it was a matter of dogma. For them the embryo was animate from the moment of conception, and abortion meant destruction of a living being. The abortion clause of the Oath, therefore, 'echoes Pythagorean doctrines,' and '[i]n no other stratum of Greek opinion were such views held or proposed in the same spirit of uncompromising austerity.'
>
> Dr. Edelstein then concludes that the Oath originated in a group representing only a small segment of Greek opinion and that it certainly was not accepted by all ancient physicians.... Thus, suggests Dr.

> Edelstein, it is 'a Pythagorean manifesto and not the expression of an absolute standard of medical conduct.' This, it seems to us, is a satisfactory and acceptable explanation of the Hippocratic Oath's apparent rigidity. It enables us to understand, in historical context, a long-accepted and reversed statement of medical ethics.[72]

In retrospect, we can say that at the particular historical moment when *Roe* was decided, the Hippocratic Oath must have been in a period of "reversal," to borrow Blackmun's language. The opinion explicitly rejected the Oath on the theory that it did not reflect most ancient physicians' attitudes. Yet, the *Roe* Court paid homage to medical science even as it departed from the Hippocratic Oath's ban on abortion.

The *Roe* Court seems to suggest that its rejection of the Oath is due only to the fact that the modern medical establishment has a new standard that the Court must take into account. The Court accepted the proposition that the ethics of the medical profession bear heavily on the question of the constitutionality of abortion regulation. It simply disputed the notion that the medical profession has consistently or uniformly opposed abortion. The Court's account of the history of the Hippocratic Oath was certainly convenient; it allowed the Court to disclaim any conflict with the medical profession.

To be sure, the soundness of Edelstein's theory has been a subject of contention among scholars. Von Staden refutes Edelstein's hypothesis by arguing that the Oath's concluding prayer does not correspond to Pythagorean ideals.[73] John M. Dolan believes Edelstein was biased in favor of abortion and finds his argument unconvincing.[74] Martin Arbagi points to the work of an Italian scholar, never cited to in any of these judicial opinions, that he believes modifies Edelstein's theory. Enzo Nardi's work, *Procurato Aborto Nel Mondo Greco Romano* (1971), is a compilation of every extant passage from Greek and Latin writers, from earliest times through the early Middle Ages, that has anything to do with abortion. The work includes quotations from physicians, poets, philosophers, playwrights, lawyers, historians, canonists, theologians, scientists, pagans, Jews, and Christians. Nardi concluded that a broad-based opposition to abortion, not confined to Pythagorean or Christian circles, developed from 300 B.C. onward. In discussing Nardi's work, Arbagi acknowledges the possibility that the book was not available in the United States or that it had not been translated into English by 1973, when *Roe* was decided.[75] Arbagi also raises the question of how Pythagoras can be said to have written the Oath when he apparently prohibited his disciples from taking oaths.[76]

But regardless of whether *Roe* is correct about the Oath's history, the striking fact remains that the Court felt compelled to assert that its view of

the constitutionality of abortion regulation accorded with the medical profession's position on the professional ethics of performing an abortion. One scholar has gone so far as to suggest that *Roe* "read[s] like a set of hospital rules and regulations."[77] That statement may be an exaggeration, but the opinion is in fact organized within a framework created not by jurists, but by medical practitioners. Doctors often divide pregnancies into three equal stages, or trimesters, each of roughly three months. The Court bound itself to these medical divisions by prescribing a different legal rule for each stage of pregnancy. And throughout the opinion, the physician's presence never fades.

The Court held that the decision to have an abortion in the first trimester was to be left to the pregnant woman *and her physician.*[78] Indeed, it implied that a woman has *no* constitutional right to an abortion unless she can secure her doctor's permission.[79] The Court's rationale, moreover, for prohibiting government restrictions on abortion in the first trimester was also medical in nature. It reasoned that the state's interest in the life of the fetus is not implicated in the first trimester because the mortality rate for women having abortions during this trimester is lower than the rate for women who carry their fetuses to term.[80] In arriving at this decision, the Court understood abortion not as a question of the equal citizenship of women, but as a question of doctors' rights to direct, even control, their patients' treatment in the name of maternal health.

Roe's privileging of the medical profession extended into the subsequent trimesters of pregnancy. Relying on medical evidence, the Court found that the risk of maternal death through abortion in the second trimester was higher than the mortality rate for women who carry their fetuses to term.[81] It was this medical statistic that established sufficient grounds for the Court's holding that state regulations during the second trimester, provided they are "reasonably related" to the mother's health, are constitutional.[82] Such regulation might include, for instance, a requirement that the operation take place in a hospital rather than a clinic.[83] Here again, it was medical health and doctors' judgment—rather than any conception of women's equality—that guided the Court's decision.

This emphasis on health as the foremost consideration is all the more apparent in the Court's discussion of the third trimester. The Court stated that the fetus typically becomes "viable" at the beginning of this last stage of pregnancy.[84] It is this concept of viability that supplied the Court with the necessary "logical and biological justifications" for state regulation, or even proscription, of abortion in the third trimester.[85] Viability, a term borrowed from medicine, refers to the point at which a fetus is capable of

living outside the womb. *Roe* determined that after this point the state has a "compelling" interest in protecting the fetus, and may regulate or even prohibit abortion, even though the fetus remains in the woman's womb.[86] However, an abortion must be permitted where it is necessary to preserve the life or the health of the mother.[87] Thus, whether the state may prohibit a woman from having an abortion during the third trimester depends on the outcome of a balancing test that weighs the fetus' medical health against the mother's. In justifying the state's interest in regulating whether a woman may have an abortion, the Court explicitly relied upon a medical definition:

> The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary 478-479, 547 (24th ed. 1965).[88]

This account has nothing to say about a woman's right to equal citizenship, and makes no place for such concerns.

The *Roe* Court's deference to doctors was far from accidental. Blackmun, a former general counsel to the Mayo Clinic, had grown to respect what dedicated physicians could accomplish, and felt that doctors should not always be told how they could or could not treat their patients. While he recognized that states should have the right to enforce their legislative will, the Justice apparently sympathized with the doctor whose medical practice was interrupted by state restrictions.[89] Blackmun's sympathy for the plight of the individual doctor is also manifest in *Doe v. Bolton*,[90] which the Court decided on the same day as *Roe*. In this companion case, also written by Blackmun, the Court held unconstitutional a Georgia law that required a hospital committee and two physicians to approve a physician's decision to perform an abortion. The opinion's reasoning points to Blackmun's concern for the autonomy of the individual doctor: The committee requirement is deemed "unduly restrictive of the patient's rights and needs that, at this point, *have already been medically delineated and substantiated by her personal physician*,"[91] and the required confirmation by two other physicians "has no rational connection with a patient's needs and *unduly fringes on the physician's right to practice*."[92] While the Justice did not ignore the patient's right to be free from these procedural requirements, he also demonstrated great concern for how the requirements infringe upon a doctor's "best clinical judgment."[93] Blackmun's decisions were thus, according to one journalistic account, less an opportunity to decide law than to "ratify the best possible medical opinion[s]."[94]

Beyond Justice Blackmun's personal respect for doctors, larger societal campaigns were also crucial in influencing the Court's decision to rely on medical science. Beginning in the early decades of the nineteenth century, the medical profession waged a deliberate, and quite successful, campaign to place the abortion issue on the national agenda.[95] The profession attempted to assert control over the issue by defending the claim that life begins at conception and highlighting the *medical* risks of abortion as reasons for prohibiting the practice.[96] Doctors voiced strong moral objections to an activity they considered an "unwarranted destruction of human life," whether performed early or late in a woman's pregnancy.[97] Allegiance to the words of the Hippocratic Oath may have moved some nineteenth-century doctors to oppose abortion,[98] but the campaign was also part of an effort by newly minted male gynecologists to take control over women's medical care from female midwives and distinguish themselves as a profession from "the irregular practitioner and the back-street abortionist."[99] New laws criminalizing abortion, with "therapeutic exceptions" allowing doctors to determine when an abortion was necessary to save a woman's life, gave these fledgling doctors the ignition they needed to consolidate control over the provision of medical care, and specifically women's reproductive health care.[100] This nineteenth-century campaign to criminalize abortion assuredly did not emphasize—in fact, completely ignored—any concern for women's equality.

The nineteenth-century focus on women as *bodies* rather than women as *individuals*—that is, the use of "medical analysis" rather than "social analysis"[101]—made its way into the twentieth century. Even today, it is not unknown for doctors to objectify their female patients. For example, in the modern context of in vitro fertilization, doctors have referred to women's bodies as "maternal environments" into which "harvested" eggs are "implanted" so as to "achieve" pregnancies that will result in "state-of-the-art" babies.[102] In addition, standard obstetrical textbooks that are still in use consider the woman to be no more important than the fetus she bears. One asserts that "[h]appily, we live and work in an era in which the fetus is established as our second patient with many rights and privileges comparable to those previously achieved only after birth."[103] Similarly, the American College of Obstetricians and Gynecologists promulgated a statement that characterizes the relationship between a woman and a fetus as unique because it involves "two patients with access to one through the other."[104]

Justice Blackmun's opinion in *Roe* seems to be the triumph of this view: Like the medical opponents of abortion in the nineteenth century, *Roe* framed reproduction as primarily physiological—neglecting the important

social work of reproduction that women perform. Horatio Storer and Franklin Fiske Heard, leaders of the nineteenth-century criminalization campaign, were amazingly prescient when they wrote that "medical men are the physical guardians of women and their offspring; from their position and peculiar knowledge necessitated in all obstetric matters to regulate public sentiment, and to *govern the tribunals of justice.*"[105] On the abortion issue, the tribunals do seem to be governed by "medical men."

B. Medical Treatment of Mentally Ill Prisoners: Washington v. Harper

In *Washington v. Harper* (1990), the U.S. Supreme Court was called upon to decide whether a state prison policy authorizing the treatment of a mentally ill inmate with anti-psychotic drugs violated the inmate's civil rights, when the treatment was administered against the inmate's will and without a judicial hearing. The Washington Supreme Court had found that the policy violated the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution,[106] and the State appealed. In the majority opinion, Justice Kennedy held that the treatment of a prisoner against his will did not violate substantive due process where the prisoner was found to be dangerous to himself or to others[107] and where the treatment was in the prisoner's medical interest.[108] The Justice was confident that "the ethics of the medical profession," including those inscribed in the Hippocratic Oath, would ensure that physicians would administer anti-psychotic medications only in those cases in which it is appropriate by medical standards.[109] Significantly, Justice Kennedy listed the Hippocratic Oath first among his list of enduring sources of medical ethics, which also includes the American Psychiatric Association's "Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry."[110] Kennedy's decision, like the *Roe* decision, demonstrates how the Oath has caused the judiciary to have enormous trust in doctors.

C. Physician-Assisted Suicide: Compassion in Dying v. State of Washington

Washington State enacted a law in 1994 criminalizing physician-assisted suicide.[111] In *Compassion in Dying v. State of Washington* (1996), the U.S. Court of Appeals for the Ninth Circuit struck down the law as a violation of due process.[112] On the surface, it might seem that the court accorded no weight to the Hippocratic Oath. The opinion flatly rejected one of the Oath's central doctrines—that which prohibits a doctor from administering "a deadly drug."[113] Indeed, the opinion clearly stated that "the Hippocratic Oath can have no greater import in deciding the constitutionality of physician-assisted suicide than it did in determining

whether women had a constitutional right to have an abortion."[114] Here the court borrowed *Roe*'s analysis of the Hippocratic Oath to dismiss the Oath's implicit prohibition on physician-assisted suicide.[115]

But although the *Compassion in Dying* court did not adhere to what it considered the "rigid language" of the Hippocratic Oath,[116] it tacitly acknowledged the contribution that the Oath has made to establishing the privileged position of the medical profession in society. The court granted doctors the right to assist terminally ill patients in committing suicide on the ground that "doctors would engage in the permitted practice when appropriate, and that the integrity of the medical profession would survive without blemish."[117] The opinion offered no specific factual evidence, however, to support this claim. It made only the generalized assertions that "sufficient safeguards can and will be developed by the state and medical profession...to ensure that the possibility of error will ordinarily be remote"[118] and that "the ethical integrity of the medical profession remained undiminished" in the wake of *Roe*.[119] The court took it to be essentially a matter of common sense to suppose that it could rely on the general reputation of the medical profession for veracity, honor, and integrity—a reputation that the Hippocratic Oath, of course, powerfully helped establish.[120]

D. Physicians and the Death Penalty: Thorburn v. Department of Corrections

A recent California Court of Appeals case involving the death penalty, *Thorburn v. Department of Corrections* (1998), also displayed enormous respect for the medical profession, even as it explicitly rejected the plaintiffs-physicians' reliance on the Hippocratic Oath. The court held that the participation of physicians in the lethal injection of prisoners sentenced to death is not unlawful.[121] The doctors who filed the lawsuit had alleged that the participation of doctors in executions of prisoners constituted unprofessional conduct. They cited the Hippocratic Oath, among other rules and ethical codes of the medical profession, for the general principle that doctors ought "do no harm."[122] While the court acknowledged that "[t]he Hippocratic Oath reaches back over 2000 years and represents a fundamental principle for the medical profession,"[123] it maintained that physician involvement in executions is unlikely "to erode trust between individual physicians and patients who have not been sentenced to death for a capital crime, or undermine public confidence in physicians or the medical profession as a whole."[124] This dicta again signals the judiciary's trust in the medical profession to regulate itself rather than be subject to rigorous legal control.

CONCLUSION

The cases discussed in this Article could easily have left out any mention of the Hippocratic Oath. It is not obvious why something composed several millennia ago, aimed at doctors, has any bearing on the resolution of contemporary legal questions pertaining to medical issues. That these judicial opinions discuss the Hippocratic Oath attests to the Oath's continuing significance. It is precisely because the Oath remains so powerful that courts found it necessary to address it and deny its lasting import. The very references to the Oath, no matter courts' treatment of its literal content, may in themselves be said to constitute a "secondary" performative effect that underscores the Hippocratic Oath's enduring legacy in our society today.

Given the Oath's resolute emphasis on the doctor and its concomitant deemphasis on the rights of patients, courts would do well to be less complacent about allowing the medical profession to regulate itself according to the strictures of the Hippocratic Oath. To be sure, the judiciary should carefully consider the viewpoints of those in the medical profession. However, in assessing those viewpoints, judges must recognize that the attitudes of medical professionals are as much shaped by political motivations as are those of other parties. The temptation of the legal system to displace difficult ethical choices onto doctors is understandable. But as long as the Hippocratic Oath continues to overlook the patient, this type of legal self-regulation will not necessarily guarantee the most just results.

Today, nearly all medical schools where students swear to uphold the Hippocratic Oath administer a modified version that more closely accounts for contemporary values.[125] Students at Yale Medical School, for instance, take an oath that includes the words "gender" and "sexual orientation" in the oath's statement of non-discrimination.[126] Rather than weakening the strength of the Hippocratic Oath, these alternative oaths actually help augment its power. By incorporating modern values into the Hippocratic Oath, the alternative oaths help ensure that those who swear to them will abide by the oaths' words. These alternative oaths are beginning to place more emphasis on the patient.[127] Finally, most modern incarnations of the Oath are more sensitive to the nuances of complex ethical issues in that they do not prohibit practices such as abortion and euthanasia. Of the 135 medical schools responding to a 1993 survey, only 8% administered oaths prohibiting abortion and only 14% administered oaths prohibiting euthanasia.[128]

Yet modern courts continue to accord significant weight to the

Hippocratic Oath *in its classic form.* As the more modern, patient-centered oaths gain more acceptance within the medical profession, courts ought to pay heed. That said, even if courts were to take account of the modern oaths, the judiciary ought nonetheless focus more on making decisions that do not overly privilege the views of the medical profession. A more independent perspective would ultimately better serve the best interests of the patient.

References

1. LUDWIG EDELSTEIN, THE HIPPOCRATIC OATH 3 (1943).

2. The linguist John Searle distinguishes five broad classes of speech acts: (1) assertives, also known as constatives, which commit the speaker to the truth of the proposition asserted (for example, "I swear that..."); (2) directives, which attempt to get the listener to do something ("I order you to..."); (3) commissives, which commit the speaker to a future course of action ("I swear to..."); (4) expressives, which comprise conventional acts such as thanking, greeting, and congratulating; and (5) declarations, those acts that actually bring about the state of affairs proposed (for example, marrying a couple). An oath is considered both an assertive and a commissive. JOHN R. SEARLE, EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS 12-20 (1979). Searle's work builds on that of J.L. Austin. J.L. AUSTIN, HOW TO DO THINGS WITH WORDS at v-vi (J.O. Urmson & Marina Sbisà eds., 2d ed. 1975).

3. AUSTIN, *supra* note 2, at 6-7, 47. Austin provides the following example to illustrate the difference between an ordinary statement and a speech act (or, in his terminology, between a constative and a performative): The statement "he is running" is ordinary because it depends merely on the statement's truth or falsity, whereas the statement "I apologize" is a speech act because the speaker's "success" in apologizing depends on the statement's "happiness"—that is, whether the persons and circumstances are appropriate for the utterance to "perform" an apology. *Id.* at 47.

4. Robert D. Orr et al., *Use of the Hippocratic Oath: A Review of Twentieth Century Practice and a Content Analysis of Oaths Administered in Medical Schools in the U.S. and Canada in 1993*, 8 J. CLINICAL ETHICS 377, 377 (1997).

5. OWSEI TEMKIN, HIPPOCRATES IN A WORLD OF PAGANS AND CHRISTIANS 21 (1991) (noting that the Oath was first mentioned in the extant literature in the first century A.D.); *see also* Memorandum from Ann Ellis Hanson, Professor of Classics, Yale University (May 27, 1999) (on file with author) (stating that the Roman physician Scribonius Largus was the first to mention the Hippocratic Oath in the middle of the first century A.D.).

6. A DICTIONARY OF ANCIENT HISTORY 316 (Graham Speake ed., 1994).

7. Tension between philosophy, the (theoretical) art of speculation, and medicine, the (practical) art of healing, continues. *See* EDWIN BURTON LEVINE, HIPPOCRATES 54 (1971); Ben A. Rich, *Postmodern Medicine: Deconstructing the Hippocratic Oath*, 65 U. COLO. L. REV. 77, 86 (1993). It was perhaps Hippocrates' ability to differentiate medicine from philosophy that earned him the title "The Father of Medicine." *See id.* The first-century Roman encyclopedist Celsus thought that medicine, prior to Hippocrates, had been in the hands of philosophers because mental strain and insomnia had weakened their bodies. But, according to this same writer, Hippocrates was able to "separate this discipline [of medicine] from the study of philosophy." A. CORNELIUS CELSUS, DE MEDICINA (W.G. Spencer trans., Loeb 1935-38), *cited in* TEMKIN, *supra* note 5, at 41.

8. *See* LEVINE, *supra* note 7, at 54-55; C. Everett Koop, *Introduction*, 35 DUQ. L. REV. 1, 2 (1996).

9. *Id.*; *see also* WALTER BURKERT, THE ORIENTALIZING REVOLUTION: NEAR EASTERN INFLUENCE ON GREEK CULTURE IN THE EARLY ARCHAIC AGE 41 (1992) (remarking that seers and doctors were "closely connected" in the pre-Hippocratic era); LEVINE, *supra* note 7, at 54 (noting that "no more than the popular wisdom or foolishness about sickness, health, and the healing done by healers" prevailed before the Hippocratics).

10. Scribonius Largus, *Epistula Dedicatoria*, *in* COMPOSITIONES art. 5, §§ 2 (*l.*20)-3 (*l.*2) (Sergio Sconocchia ed., B.G. Teubner 1983) (c. 50), *translated in* TEMKIN, *supra* note 5, at 43.

11. SORANUS, GYNECOLOGY bk. 1, § 60, pp. 62-63 (Owsei Temkin trans., Johns Hopkins Univ. Press 1991) (c. 98-138), *cited in* TEMKIN, *supra* note 5, at 43-44 (emphasis added).

12. BURKERT, *supra* note 9, at 41. Ironically, even as the Oath functionally separated "rational" medicine from "magical" sorcery, it did so in a form that is classically religious. *See infra* notes 27-33 and accompanying text.

13. *See* ROBERT FLACELIÈRE, DAILY LIFE IN GREECE AT THE TIME OF PERICLES 144 (1965). Not surprisingly, the doctors referenced in the Oath are unambiguously male. The oathtaker swears "[t]o hold *him* who has taught me this art as equal to my parents and to live my life in partnership with *him*, and if *he* is in need of money to give *him* a share of mine," to regard his teacher's children "as equal to my *brothers* in *male* lineage," and to teach "my *sons* and...the *sons* of him who has instructed me." EDELSTEIN, *supra* note 1 (emphasis added).

14. *See generally* I. M. Lonie, *Cos Versus Cnidus and the Historians*, 16 HIST. SCI. 42 (1978); Wesley D. Smith, *Galen on Coans Versus Cnidians*, 47 BULL. HIST. MED. 569 (1973).

15. Dale C. Smith, *The Hippocratic Oath and Modern Medicine*, 51 J. HIST. MED. & ALLIED SCI. 484, 485-87 (1996).

16. *See id.* at 490.

17. *See* Vivian Nutton, *Hippocratic Morality and Modern Medicine*, *in* MÉDECINE ET MORALE DANS L'ANTIQUITÉ 31, 47 (François Paschoud ed., 1996).

18. Koop, *supra* note 8, at 1.

19. *See* Nutton, *supra* note 17, at 47-48.

20. The historian Dale C. Smith hypothesizes a connection between the increasing use of the Hippocratic Oath in medical schools and the increasing fragmentation of the medical profession into specialty areas. His reasoning is that in the face of increasing specialization, the Oath provides (or, at least, attempts to provide) a necessary "sense of unity" for young physicians. Smith, *supra* note 15, at 495.

21. Nutton, *supra* note 17, at 35. These figures accord with Ralph Crenshaw's finding that seventy-eight American medical schools administered the Oath in 1969, Walter Friedlander's finding that 108 American and Canadian schools administered the Oath in 1977, and that 126 American medical schools used oaths in 1989. Smith, *supra* note 15, at 498-99. *But see* LEVINE, *supra* note 7, at 56 (citing a survey that twenty-one of eighty-four American medical schools reported administering the Hippocratic Oath in 1966).

22. *See* Orr et al., *supra* note 4, at 379, 380 tbl.2.

23. Smith, *supra* note 15, at 497.

24. Heinrich von Staden, *'In a Pure and Holy Way': Personal and Professional Conduct in the Hippocratic Oath*, 51 J. HIST. MED. & ALLIED SCI. 404, 416 (1996) [hereinafter

von Staden, *Personal and Professional*]. The sense of belonging engendered in the Oath is what makes the ancient text attractive to some commentators today, as the Oath has the potential to bind together an increasingly diversified medical profession. *See* Nutton, *supra* note 17, at 47 ("Even if endocrinologists and radiographers, orthopedists and oncologists, biogeneticists and trauma specialists nowadays rarely meet together for academic or even medical purposes...they can all be linked together in the solidarity produced by sharing in the Oath."); *see also* Smith, *supra* note 15, at 500 ("In repeating the oath, physicians ascribe to long held values but they also build bridges one to another across specialties and across time.").

25. EDELSTEIN, *supra* note 1, at 3.

26. LEVINE, *supra* note 7, at 56. The first generation of medical ethicists in the 1960s and 1970s attacked the Hippocratic Oath because "it left out the person whose rights above all should determine medical ethics—the patient." Nutton, *supra* note 17, at 51.

27. EDELSTEIN, *supra* note 1, at 3. Asclepius was the god of medicine, Hygieia the personification of health, and Panaceia a goddess who symbolized "the power of universal healing through herbs." PIERRE GRIMAL, THE DICTIONARY OF CLASSICAL MYTHOLOGY 62-63, 219, 341 (A.R. Maxwell-Hyslop trans., 1986).

28. EDELSTEIN, *supra* note 1, at 50.

29. The earliest recorded oath with an appeal to God is in the book of Genesis. *See* Jonathan Belcher, *Religion-Plus Speech: The Constitutionality of Juror Oaths and Affirmations Under the First Amendment*, 34 WM. & MARY L. REV. 287, 291 n.29 (1992) (*citing Genesis* 21:23-24 (New International)) ("Now swear to me here before God that you will not deal falsely with me or my children or my descendants.... Abraham said, 'I swear it.'"). The Egyptians, Carthaginians, Greeks, Persians, Romans, and Jews frequently used oaths as a way to establish truthfulness. *Id.* at 291.

30. Medieval canon law was a particularly oath-dominated sort of justice. *See* R. H. HELMHOLZ, THE SPIRIT OF CLASSICAL CANON LAW 145, 149 (1996). Those swearing to oaths took them quite seriously, as the church emphasized the damage that could result to an oathtaker's soul if he made God a witness to falsehood. *Id.* at 173.

31. The oath has also long been a part of the English common law. For a discussion of the use of the witness oath as a source of legitimacy prior to the rise of the common law jury system, see George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575 (1997).

32. In many cultures around the world, witness oaths constitute the primary form in which disputes are litigated. *See* Bernard J. Hibbitts, *"Coming to Our Senses": Communication and Legal Expression in Performance Cultures*, 41 EMORY L.J. 873, 900 (1992).

33. BURKERT, *supra* note 9, at 44; *cf.* LEVINE, *supra* note 7, at 61 (noting that the language of *Nomos*, a text from classical antiquity dealing with medical education, is also "typical of closed associations with its strong emphasis on the arcane nature of its subject matter"). The Hippocratic Oath has through the centuries maintained its special function as a rite of initiation. Interestingly, the Oath today is taken sometimes not by medical school graduates, but by beginning students. *Id.* at 56. One study from 1993 found that 13% of medical schools in the United States and Canada administer an oath to their

students at both the beginning of medical school and at graduation. Orr et al., *supra* note 4, at 379.

34. EDELSTEIN, *supra* note 1, at 3. Ludwig Edelstein argues that the Hippocratic Oath was inspired by the Pythagoreans, a religious sect from the fourth century whose doctrines included a belief that a student should honor his teacher like an adoptive father. *See id.* at 43, 47-48. Some classicists contend that the practice of taking the Hippocratic Oath was "the equivalent of a de facto adoption," in that the pupil became like a son within a closed family guild of physicians. This arrangement served to ensure that knowledge remained within the "family." *See* BURKERT, *supra* note 9, at 44-45; EDELSTEIN, *supra* note 1, at vii, 39, 47. It also sparked the development of schools and apprenticeships of rationalist medicine. *See* LEVINE, *supra* note 7, at 55.

35. EDELSTEIN, *supra* note 1, at 3.

36. *Id.*

37. According to one set of commentators, the ban on using "the knife" originally "proscribed surgery for renal stones, by deferring to those more qualified." Orr et al., *supra* note 4, at 379 tbl.1.

38. EDELSTEIN, *supra* note 1, at 3. In this context, "art" means "the art, skill, or craft of medicine." Memorandum from Ann Ellis Hanson, Professor of Classics, Yale University (Feb. 22, 2001) (on file with author).

39. *Cited in* Rich, *supra* note 7, at 94 n.82.

40. A Greek poem, "On the Ethical Duties of the Physician," by the Stoic philosopher Sarapion (c. A.D. 100) might lead one to believe that the well-being of the patient superceded that of the physician, or at least was accorded equal weight. The ancient poem reads: "Like a savior god, let [the physician] make himself the equal of slaves and of paupers, of the rich and of rulers of men, and to all let him minister like a brother; for we are all children of the same blood." TEMKIN, *supra* note 5, at 72. However, it is significant to note that even as the physician is admonished to "make himself the equal" of his patients—no matter rich or poor, free or enslaved—the poem compares the physician to "a savior god," thus placing him in a sacred realm far removed from his mortal patients.

41. *See* Heinrich von Staden, *Character and Competence: Personal and Professional Conduct in Greek Medicine*, *in* MÉDECINE ET MORALE DANS L'ANTIQUITÉ 157, 173-74 (François Paschoud ed., 1996) [hereinafter von Staden, *Character and Competence*]; von Staden, *Personal and Professional*, *supra* note 24, at 418-19.

42. *See* von Staden, *Character and Competence*, *supra* note 41, at 174. Von Staden argues that the physician's explicit promise to "guard [his] life and [his art]" indicates that the Oath covers not only the physician's professional conduct (his art) but also "his life as a whole, and hence his private, personal conduct." *Id.* at 191-92; *see also* von Staden, *Personal and Professional*, *supra* note 24, at 433. The word "life," von Staden contends, is used in the primary classical sense of the Greek word *bíos* to mean "mode of life" or the "manner of living one's life." *Id.* at 420.

43. *E.g.*, Aiken v. Employer Health Servs., No. 95-3196, 1996 U.S. App. LEXIS 6060 (10th Cir. Mar. 26, 1996) (affirming judgment that physician was not wrongfully discharged from his employment, despite physician's reliance on the Hippocratic Oath to establish he had served the interests of his patients).

44. *E.g.*, U.S. v. Rachels, 820 F.2d 325 (9th Cir. 1987).

45. Malnak v. Yogi, 440 F. Supp. 1284 (D.N.J. 1977) (holding that the teaching of the Science of Creative Intelligence/Transcendental Meditation in New Jersey public schools violates the establishment clause of the First Amendment, despite defendants' attempt to analogize the "puja chant" to the Hippocratic Oath).

46. Davis v. Davis, No. E-14496, 1989 WL 140495 (Tenn. Cir. Ct. 1989).

47. For a brief discussion of the use of the Oath in England and in Germany, see Nutton, *supra* note 17, at 61.

48. AUSTIN, *supra* note 2, at 14.

49. *Id.* at 9. *See generally id.* at 12-38.

50. These examples are ones that Austin provides. *Id.* at 8-9.

51. *Id.* at 121.

52. *Id.* at 109.

53. *Id.*

54. EDELSTEIN, *supra* note 1, at 3.

55. 410 U.S. 113 (1973).

56. 494 U.S. 210 (1990). Of course, the administration of an anti-psychotic drug to a mentally ill prisoner is not exactly proscribed by the Hippocratic oathtaker, who vows to "neither give a deadly drug to anybody if asked for it" nor to "make a suggestion to this effect." EDELSTEIN, *supra* note 1, at 3. One could argue that an anti-psychotic drug is different from "a deadly drug" and that the doctor is not administering the drug upon the patient's request. In fact, in the case at issue, the doctor treated the patient against the patient's will. *See Washington*, 494 U.S. at 213.

57. 79 F.3d 790 (9th Cir. 1996) (en banc), *overruled by* Washington v. Glucksberg, 521 U.S. 702 (1997).

58. 66 Cal. App. 4th 1284 (1998).

59. *Roe*, 410 U.S. 113, 130-32 (1973). This mention of the Hippocratic Oath appears in the section of the opinion that surveys historical attitudes toward abortion, from ancient beliefs through common-law understandings.

60. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 229 (1979).

61. Harry Blackmun, Remarks Before the Franco-American Colloquium on Human Rights 14-15 (1979) (transcript available in the Harvard Law School Library), *quoted in* Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717, 723 n.34 (1983).

62. *Roe*, 410 U.S. at 130.

63. *Id.* at 131.

64. *Id.* at 132 (quoting EDELSTEIN, *supra* note 1, at 64).

65. For background on Ludwig Edelstein, see Martin Arbagi, Roe *and the Hippocratic Oath*, *in* ABORTION AND THE CONSTITUTION 159, 160 (Dennis J. Horan et al. eds., 1987).

66. EDELSTEIN, *supra* note 1.

67. *Id.* at 15, 16, 18, 54.

68. *Id.* at 10, 11, 13, 63. Only subsequently, with the rise of Christianity in late antiquity, did the Oath become a universally accepted expression of medical ethics, according to Edelstein's theory. *Id.* at 63-64.

69. *Roe*, 410 U.S. at 131-32.

70. PLATO, REPUBLIC 5 § 461a (S. Halliwell trans., Aris & Phillips 1993). This passage includes a euphemistic reference to abortion: "And we shall allow all this only after instructing them to take care, if at all possible, not to let a single foetus that might be conceived reach birth...."

71. ARISTOTLE, THE POLITICS § 1335b (C.D.C. Reeve trans., Hackett Publishing Co. 1998). Aristotle requires that deformed

offspring be exposed and that any offspring conceived in violation of the laws "should be aborted before the onset of sensation and life." *Id.*

72. *Roe*, 410 U.S. at 131-32.

73. *See* von Staden, *Personal and Professional*, *supra* note 24, at 409.

74. John M. Dolan, *Is Physician-Assisted Suicide Possible?*, 35 DUQ. L. REV. 355, 383-84 (1996).

75. *See* Arbagi, *supra* note 65, at 164-65.

76. *See id.* at 164. While Edelstein's argument thus "may not be accepted nowadays," Nutton explains that "there are many scholars who would agree with him that, as it stands, the Oath represents the views of a small group, and for that reason cannot be taken as representing the whole of medical opinion in Hippocratic Greece, let alone throughout Antiquity." Nutton, *supra* note 17, at 46. For a discussion of how the *Roe* Court also referred inappropriately to Plato's and Aristotle's views on abortion, see Neomi Rao, Comment, *A Backdoor to Policy Making: The Use of Philosophers by the Supreme Court*, 65 U. CHI. L. REV. 1371, 1379-80 (1998).

77. ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 113 (1976).

78. *Roe*, 410 U.S. at 163.

79. *Id.* at 163-64. The opinion states that "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, *in his medical judgment*, the patient's pregnancy should be terminated" *Id.* at 163 (emphasis added).

80. *Id.* at 163.

81. *Id.* at 148-49, 163.

82. *Id.* at 163, 164.

83. *Id.* at 163.

84. *Id.*

85. *Id.* at 163-64.

86. *Id.*

87. *Id.* at 164.

88. *Id.* at 159.

89. *See* WOODWARD & ARMSTRONG, *supra* note 60, at 167, 169, 174-75.

90. Doe v. Bolton, 410 U.S. 179 (1973).

91. *Id.* at 198 (emphasis added).

92. *Id.* at 199 (emphasis added).

93. *Id.* at 197, 199.

94. WOODWARD & ARMSTRONG, *supra* note 60, at 175. Blackmun's deference to the medical profession may have been in part a strategic measure to garner the necessary votes from the other Justices on the Court. Had Blackmun framed his decision more in the language of women's rights, the other Justices may not have signed on to the opinion. By invoking the medical profession and its high ethical standards, Blackmun may have succeeded in securing a woman's right to abortion in a way that was probably more acceptable to the other Justices. However, while this strategy may have been effective, it nonetheless subordinates the patient much as the Hippocratic Oath does.

95. *See* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 282 (1992).

96. *Id.*

97. *Id.* This characterization of abortion became the official stance of the American Medical Association by 1859. *Id.* at 286.

98. *See* JAMES C. MOHR, ABORTION IN AMERICA 35 (1978), *cited in* Siegel, *supra* note 95, at 282-83 n.77. Indeed, recitation of the Hippocratic Oath at the graduation ceremonies of American medical colleges grew more common in the 1850s and 1860s. Smith, *supra* note 15, at 490.

99. Nutton, *supra* note 17, at 62; *see also*

Siegel, *supra* note 95, at 283-84. This problem of "irregular" practitioners was particularly pronounced in the United States. *See* Smith, *supra* note 15, at 490. In the mid-nineteenth century, the medical practitioners who sought to distinguish themselves from these "irregulars" did so largely on the basis of the higher levels of formal education they had attained. In time, doctors organized politically and restricted entry into their guild by convincing state governments to impose licensing requirements that blocked their competitors from entering the medical profession. *See* Nelson Lund, *Two Precipices, One Chasm: The Economics of Physician-Assisted Suicide and Euthanasia*, 24 HASTINGS CONST. L.Q. 903, 932 (1997).

100. Siegel, *supra* note 95, at 315. By the 1920s, most states had made abortion a crime, and most medical schools administered a modified form of the Oath that pledged to "give no drugs and perform no operations for a criminal purpose." Smith, *supra* note 15, at 494.

101. Siegel, *supra* note 95, at 275.

102. Rich, *supra* note 7, at 118.

103. *Id.* (citing JACK A. PRITCHARD ET AL., WILLIAMS OBSTETRICS xi (1985)).

104. *Id.*

105. HORATIO R. STORER & FRANKLIN FISKE HEARD, CRIMINAL ABORTION: ITS NATURE, ITS EVIDENCE, AND ITS LAW 12-13 (Boston, Little, Brown & Co. 1868), *cited in* Siegel, *supra* note 95, at 365 n.414 (emphasis added).

106. U.S. CONST. amend. XIV, § 1.

107. The policy in question required the State to establish by a medical finding that "a mental disorder exists which is likely to cause harm if not treated." Washington v. Harper, 494 U.S. 210, 222 (1990).

108. The opinion reads in pertinent part: "the fact that the medication must first be prescribed by a psychiatrist, and then approved by a reviewing psychiatrist, ensures that the treatment in question will be ordered only if it is in the prisoner's medical interests, given the legitimate needs of his institutional confinement." *Id.*

109. *Id.* at 223 n.8.

110. *Id.* Here, Justice Kennedy distinguished his argument from Justice Stevens, whose concurring/dissenting opinion assumed that physicians would prescribe anti-psychotic drugs for reasons unrelated to the medical needs of patients, but rather for institutional and administrative concerns. *Id.* at 244-46. Stevens found that the Court's reliance on the Hippocratic Oath was "unavailing" because it had "no bearing" on the decisions of the prison doctors. *Id.* at 245 n.11.

111. Wash. Rev. Code § 9A.36.060(1) (1994). The law provided that "[a] person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide." *Id.*

112. *See* Compassion in Dying v. State of Washington, 79 F.3d 790, 793-94 (9th Cir. 1996) (en banc), *overruled by* Washington v. Glucksberg, 521 U.S. 702 (1997). At the same time, the Ninth Circuit became the first appellate court in American history to uphold the constitutionality of physician-assisted suicide of terminally ill patients. Dwight G. Duncan & Peter Lubin, *The Use and Abuse of History in* Compassion in Dying, 20 HARV. J.L. & PUB. POL'Y 175, 177 (1996).

113. EDELSTEIN, *supra* note 1, at 3.

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

115. *See supra* notes 65-72 and accompanying text.

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

117. *Id.* at 830. To be sure, the court did not altogether neglect the interests of

patients who desire assistance in committing suicide. The opinion notes that a state-enforced prohibition against physician-assisted suicide "condemns" such patients to "unrelieved misery or torture." *Id.* at 814.

118. *Id.* at 824.

119. *Id.* at 830. Further, the court noted that assisting a patient to end his life were there any doubt as to the patient's actual desires would violate "the physicians' fundamental training, their conservative nature, and the ethics of their profession." *Id.* at 827.

120. The *Compassion in Dying* decision has since been overruled by the U.S. Supreme Court in *Washington v. Glucksberg*, 521 U.S. 702 (1997). In that case, the Court held that Washington's ban on assisted suicide was rationally related to legitimate government interests. *Id.* at 735. The *Washington* Court did not refer to the Hippocratic Oath, but it did chronicle in some detail an over 700-year-long history in the Anglo-American common-law tradition of disapproval of both suicide and assisted suicide. *See id.* at 710-15. Perhaps the Oath's prohibition against suicide influenced the *Washington* Court's historical focus and its decision to deny patients the ability to decide whether to live or die.

121. 66 Cal. App. 4th 1284, 1286 (1998).

122. *Id.* at 1290 n.6.

123. *Id.*

124. *Id.* at 1293.

125. A 1993 survey of American and Canadian medical schools found that the students of only one school, the State University of New York at Syracuse, recited the Hippocratic Oath in its original form, out of a pool of sixty-nine schools that administered some form of the Oath. Orr et al., *supra* note 4, at 380.

126. Smith, *supra* note 15, at 499.

127. *See* Orr et al., *supra* note 4, at 382. Yale students now swear to "respect the moral right of patients to participate fully in the medical decisions that affect them" and Michigan students swear to "exercise [their] art solely for the good of [their] patients." Memorandum from Ann Ellis Hanson, Professor of Classics, Yale University (Feb. 9, 1999) (on file with author).

128. *See* Orr et al., *supra* note 4, at 380, 382.