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BOOK REVIEW

IN-ZONING: A GUIDE FOR POLICY-MAKERS ON INCLUSIONARY LAND USE PROGRAMS. By Herbert M. Franklin,¹ David Falk,² and Arthur J. Levin.³ Washington, D.C.: The Potomac Institute. 1974. Pp. 212.

Reviewed by Sylvia Ehrental⁴

A certain sense of boredom with the problem of urban decay and its attendant ills of unfair housing and segregated communities seems to have settled over the nation. We have come to a realization of the limits of our resources, with a corresponding rise in a belief in fiscal conservatism and physical conservation. It is no longer assumed that gargantuan amounts of our resources must be used in bolstering the central cities, many of which are floundering on the brink of bankruptcy. There are even suggestions that we turn our back on the nation's cities and concentrate on beginning again in outlying areas with new towns, new suburbs, and other exurban development.⁵ Proponents of such theories hold that these new growth areas will absorb the expanding population and siphon some of the existing population, thereby alleviating the distress of the central city. However, if the growth areas continue to siphon only those segments of the population between the

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4. Librarian, National Housing and Economic Development Law Project, Earl Warren Legal Institute, University of California. B.A., University of California, 1968. Ms. Ehrental is a graduate student in Urban Planning at California State University, San Jose. The research reported herein was performed pursuant to a grant from the Office of Economic Opportunity, Washington, D.C. The opinions expressed are those of the author and should not be construed as representing the opinions or policy of any agency of the United States government or of the University of California.

5. A discussion of this issue can be found in "Observations on Current Anti-City Attitudes," remarks by Samuel C. Jackson, Assistant Secretary for Metropolitan Planning and Development, Dep't of Housing and Urban Dev., before the Fifty-third Annual Conference, American Institute of Planners, *reprinted in* HUD News (Oct. 20, 1970). Columbia, Maryland and Reston, Virginia are examples of American new towns.

middle and the top of the economic pool, as they have in the past, they will not serve the cause of either fiscal conservatism or physical conservation. Indeed, if access to new growth areas in the suburbs is not open to those at the bottom of the economic pool, the conditions in the central city will deteriorate even further, and there will no longer be a place to which the majority of suburbanites can commute to make their living.

The movement toward concentrating resources in the suburbs has gained acceptance in the higher circles of government. The Nixon and Ford administrations, through their reordering of priorities under general and special revenue sharing, have stimulated a shift from big government to local home rule. While this reordering was first applauded by factions on both sides of the political fence, cries of betrayal were heard from liberals when it became apparent that revenue sharing would mean less money for the central city and would not fulfill its promise of more meaningful and widespread citizen participation in government. The reality of revenue sharing has been to redistribute federal funds out of the hands of the large central cities into the hands of suburban communities, while simultaneously eliminating the extensive federal regulations which formerly provided safeguards against improper and unresponsive use of those funds.⁶ The new Housing and Community Development Act of 1974,⁷ an example of special revenue sharing legislation, is formed from the same mold as was general revenue sharing, and may well have the same result. There are indications that the flexibility which the Act affords leaves "only limited authority for HUD influence and enforcement, [and] the key issue is how aggressive and effective HUD can and will be in assuring compliance with the vague

6. See, e.g., LeGates & Morgan, *The Perils of Special Revenue Sharing for Community Development*, 39 J. AM. INST. PLANNERS 254 (1973).

7. 42 U.S.C.A. §§ 5301-17 (Supp. 1975). The product of a compromise between the proposed Better Communities Act, S. 1743, 93d Cong., 1st Sess. (1973), of the Nixon administration and the Democratic Congress, the Housing and Community Development Act of 1974 is an omnibus measure which consolidates all of the housing and urban development categorical grants such as urban renewal, low income housing, water and sewer construction, and the like into a single community development block grant. Whereas metropolitan areas formerly competed for federal matching funds to finance these projects, under the 1974 Act all metropolitan cities (population of 50,000 or more) and urban counties (population of 200,000 or more, excluding the population of any metropolitan cities in the county) will receive an entitlement free of any local matching requirements. The amount of the grant is determined by a formula based upon the extent of housing overcrowding, the extent of poverty (weighted double), and population. Entitlement communities must apply annually for these community development block grants. The application for funds must include a Housing Assistance Plan which "surveys the condition of the housing stock in the community . . . specifies a realistic annual goal for the number of dwelling units or persons to be assisted," and "indicate[s] the general locations of proposed housing for lower-income persons." *Id.* § 5304(a)(4).

safeguards for the poor built into the Act."⁸ It has even been suggested that the formula for the distribution of federal funds under the Act is programmed to strangle the efforts of cities to halt the spread of urban decay, while bolstering the ability of the suburbs to provide a comfortable life style for middle and upper income groups.⁹

Nevertheless, as the Housing and Community Development Act of 1974 has become an established reality and will guide policy for some time to come, it is encouraging to find commentators who are willing to look at the constructive possibilities which it presents rather than scoff at its weaknesses. This is perhaps the most significant contribution of a new book published by the Potomac Institute, *In-Zoning: A Guide for Policy-Makers on Inclusionary Land Use Programs*. Its authors, Herbert M. Franklin, David Falk, and Arthur J. Levin, have approached the subject of promoting diversified growth in suburban areas with a positive attitude. Rather than dwelling on the difficulties inherent in solving our housing and land use problems, they point to the alternative of inclusionary land use programs in growth areas. While this alternative is not proposed to eradicate all housing and land use problems, it does propose to continue the effort to do so. The purpose of inclusionary land use programs is to provide an environment conducive to meeting both local and regional low and moderate income housing objectives. While the authors acknowledge that there is no generally recognized legal responsibility on the part of suburban municipalities to seek to alleviate the suffering of urban America, they advance a reasonable argument as to why and how such relief may be attempted.

Funded by a grant from the National Science Foundation for research in the field of municipal systems, *In-Zoning* is a survey of the literature on the relationship between low cost housing and exclusionary land use. It was the mandate of the granting foundation that the grant be used to evaluate the validity and policy utility of the literature in the field in order to provide decisionmakers with an assessed research base for alternative policy actions. The authors of *In-Zoning* have met their goal of preparing "a readable, lucid primer for policy-makers on land use controls and their connection with more equitable distribution of housing opportunities in new growth portions of metropolitan areas" (pp. 17-18). As a review of the literature, the book is unquestionably valuable to planners, policymakers, city and county counsels, planning and law students, and interested citizens. Beyond that, the book is

8. Kushner, *Community Planning and Development Under the Housing and Community Development Act of 1974*, 8 CLEARINGHOUSE REV. 661 (1975).

9. Hirshen & LeGates, *HUD's Bonanza for Suburbia*, 39 THE PROGRESSIVE, April 1975, at 32-34.

“one of the few which puts the present inclusionary legal climate into the perspective of opportunities rather than cautions.”¹⁰

In-Zoning is divided into six parts. Each of the first four consider inclusionary programs from a different perspective. The first and second parts discuss a community's self-interest in instituting inclusionary zoning programs as well as the relationship between such programs and the larger, regional perspective.¹¹ The nature of an inclusionary zoning program is delineated in the third part, and techniques for implementing such a program are set out in part four. The final sections of the book are devoted to a critical evaluation of the most popular techniques for creating inclusionary land use programs—regional housing allocation plans and land banking. The six parts form an exhaustive exposition of the concepts and data relevant to the relationship between community land use regulation and the production of low cost housing. The work is also remarkable for its excellent documentation and well-annotated, subject-categorized selected bibliography.

The writers address themselves primarily to those suburban communities which are receptive to the idea of inclusionary programs. This focus may be due to the fact that the success of these communities in controlling growth by means of inclusionary programs will be an incentive to others. However, since the book does not seek to address the question of how to make other communities desire the implementation of inclusionary programs, its utility must be weighed in relation to the difficulty of persuading suburban politicians and constituents that such inclusionary growth policies would produce net benefits for their communities. Any criticisms set forth herein are not meant to detract from the achievement of the work, but only to place the authors' assumptions and proposals in a realistic perspective.

The authors of *In-Zoning* take the position that zoning has historically been used as a defensive tool, a means of protecting established property rights. Since the early 1920's, courts have given prime consideration to legislative judgments in land use disputes and have refused to interfere with the traditional concept of home rule in zoning matters. Recently, as the technique of exclusionary suburban zoning has come under attack, the courts have

10. 10 AM. INST. PLANNERS NEWSLETTER 12 (1975).

11. A regional perspective presumes that some social problems, like the provision of adequate housing for all income groups, are of a magnitude which cannot adequately be addressed on the local government level, to which the legal responsibility for dealing with such issues has historically been delegated. Regionalism suggests the transfer of responsibility for decisionmaking on these issues to a regional body. The regional housing allocation plan is a mechanism for determining, by means of a formula, what the fair share of low income housing would be for each community in the region and has been proposed as an aid in solving the problem of segregated housing.

begun to assert themselves as arbiters of the public good. In many states, zoning ordinances have been judicially challenged and invalidated on the basis of their being exclusionary, either in intent or effect.¹² An essential thesis of *In-Zoning* is that continued interference by the judiciary in the land use decisions of suburban localities, as in the recent past, may signal an emerging legal duty on the part of such communities not to have exclusionary zoning. The authors then propose that this emerging legal duty not to be exclusionary implies, as its logical complement, "a legal duty to exercise . . . land use regulatory powers affirmatively to permit some new lower income housing to be built" and to absorb a "fair share of the region's population growth of all economic strata" (p. 2).

While this proposition may ignore the distinction between being constrained from doing something and being required to do its opposite, the authors' view appears to have recently received support from the New Jersey Supreme Court in *Southern Burlington County NAACP v. Township of Mount Laurel*.¹³ The *Mount Laurel* court mandated that a suburban community's land use program must address the needs of all segments of the region's population and that the community must assume at least its "fair share" of regional housing needs, precisely what the authors of *In-Zoning* propose. Since the decision was not handed down until several months after the authors finished their manuscript, they only refer to the issues presented in the body of the text. However, they provide a special appendix fully describing the facts of the case and the opinion of the court, an indication that the authors deemed the decision influential in the establishment of an inclusionary legal duty. Indeed, *Mount Laurel* is clearly of such signal importance in land use litigation that one commentator has gone so far as to suggest it may be "the Magna Carta of suburban low and moderate income housing opportunity."¹⁴

Despite such enthusiasm, disagreement regarding the future utility of the

12. See, e.g., *Crow v. Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd per curiam*, 457 F.2d 788 (5th Cir. 1972); *Southern Alameda Spanish Speaking Organization v. City of Union City*, 314 F. Supp. 967 (N.D. Cal.), *aff'd*, 424 F.2d 291 (9th Cir. 1970), *retried*, 357 F. Supp. 1188 (N.D. Cal. 1970); *Gautreaux v. Chicago Housing Author.*, 503 F.2d 930 (7th Cir. 1974), *petition for cert. filed sub nom. Hills v. Gautreaux*, 95 S. Ct. 1948 (1975) (equal protection); See also *Construction Industry Ass'n v. City of Petaluma*, 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd on other grounds*, 44 U.S.L.W. 2093 (9th Cir. 1975) (restriction of the right to travel).

13. 67 N.J. 151, 336 A.2d 713 (1975), *petition for cert. filed*, 44 U.S.L.W. 3074 (1975).

14. Kushner, *Land Use Litigation and Low Income Housing: Mandating Regional Fair Share Plans*, 9 CLEARINGHOUSE REV. 10 (1975).

decision has already arisen. For instance, Professor Jerome Rose of Rutgers University has suggested that the decision created a dangerously complex standard against which to judge the validity of zoning ordinances,¹⁵ a standard which may prove both judicially and politically infeasible. He suggests that "fair share" and "regional need" are terms of art, the definitions of which are subject to much dispute; he berates the *Mount Laurel* court for employing them without proper delineation.¹⁶ Professor Rose also strikes a responsive chord when he addresses the political realities of the *Mount Laurel* court's decision. It is his contention that many of the suburban communities toward which the decision is directed "will seek and find devices and techniques to protect [their] self-interest by avoiding the intended result of economic and racial integration."¹⁷

Another recent decision suggests that while state courts may be willing to take a more liberal approach to exclusionary zoning cases, as in *Mount Laurel*, the United States Supreme Court is more reticent. In *Warth v. Seldin*,¹⁸ residents of suburban Penfield, along with residents of nearby Rochester, New York, claimed that Penfield's zoning ordinance effectively excluded persons of low and moderate income from living in the town in violation of their constitutional rights. The Supreme Court, however, declined to hear the case on its merits, dismissing it on the grounds that nonresidents do not have standing to sue unless the complaint involves an identifiable and viable housing project demonstrably within their means. It also dismissed the claims of the resident members of a Penfield fair housing group who alleged that they suffered injury by being forced to reside in a segregated community. The Court distinguished *Warth* from its earlier decision in *Trafficante v. Metropolitan Life Insurance Co.*¹⁹ on the ground that petitioners in *Warth* had not asserted a cause of action under the 1968 Civil Rights Act as had petitioners in *Trafficante*. It appears, therefore, that the present majority on the Court is willing only to hear cases of exclusionary zoning in terms of race, color, or national origin. Consideration of the issue of discrimination against persons of low and moderate income, as noted by both dissenting opinions in *Warth*, appears to have little support in the Burger Court.

Since *Warth* will have the likely effect of slowing the pace at which

15. Rose, *The Mount Laurel Decision: Is It Based on Wishful Thinking?* 4 REAL ESTATE L.J. 61 (1975).

16. For example, *Mount Laurel* does not clearly state whether "fair share" means an equal allocation to all communities, an allocation on the basis of community need, an allocation designed to achieve racial and economic integration, or an allocation on the basis of the community's physical suitability for the provision of such units.

17. Rose, *supra* note 15, at 67.

18. 95 S. Ct. 2197 (1975).

19. 409 U.S. 205 (1972).

exclusionary land use cases are brought before the federal courts, the emergence of a duty not to be exclusionary, which *In-Zoning* suggests as the basis for planning inclusionary programs in suburban growth areas, having once surfaced in *Mount Laurel*, may now be retarded. The authors of *In-Zoning* have not, however, constructed their argument solely on the foundation of enlightened judicial intervention. Their most potent rationale for inclusionary land use programs, from a practical and political standpoint, is that of controlling growth. Although they concede that there is no legal obligation on the part of a community to attempt growth control, the authors note that such controls are becoming politically popular in suburban areas.

They suggest that "an inclusionary land use program may become necessary to assure the legal validity of a comprehensive growth control program" (p. 38). As support for this contention, they cite *Construction Industry Association v. City of Petaluma*²⁰ and *Golden v. Planning Board*.²¹ In *Petaluma*, a growth control ordinance was struck down as being exclusionary in effect,²² while in *Golden*, timed growth controls were upheld because, at least in part, the court found that the municipality involved (the town of Ramapo), "coupled with [the growth controls] provisions for low and moderate income housing on a large scale."²³ From these cases, the authors of *In-Zoning* infer that comprehensive growth controls can survive judicial scrutiny if combined with inclusionary land use policies and further, that this combination can be supported by conservatives, conservationists, and liberals alike. While one may have doubts about the likelihood or viability of such a merger, it does represent an intriguing basis for rapprochement with benefits for all.

In addition to its analysis of the legal aspects of inclusionary land use programs, *In-Zoning* sets forth five socioeconomic rationales for implementing such land use policies: (1) better access to expanding job opportunities for lower income workers; (2) higher quality schooling for disadvantaged central city children; (3) achievement of quantitative goals for newly constructed lower income housing; (4) social heterogeneity as a basic value; and (5) the possibility of the improvement of adverse conditions in central city areas (pp. 52-59). Clearly, only the first of these reasons presents an obvious inducement to suburban communities to be nonexclusionary. It is argued in the book that the existence of a more balanced housing supply in a

20. 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd*, 44 U.S.L.W. 2093 (9th Cir. 1975).

21. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

22. The court in *Petaluma* held that a limitation on the number of building permits to be issued annually was a violation of the constitutional right to travel in that it limited access to residence in Petaluma. 375 F. Supp. at 581.

23. 30 N.Y.2d at 380, 285 N.E.2d at 303, 334 N.Y.S.2d at 153.

sizable suburban locality may succeed in attracting a better industrial or commercial tax base than would be the case in an exclusionary community. However, this argument assumes that the need for all sectors of the labor force is expanding at a uniform rate while, in fact, there are indications that the labor force of white collar service industries is expanding while that of blue collar production industries is contracting.²⁴ The argument also does not consider the fact that many of the persons relegated to substandard, segregated housing in the central cities, because of a lack of education and job skills, are not part of the labor force which can take advantage of new suburban job opportunities. Finally, the other four socioeconomic rationales are based upon the concept of social equity, a concept most suburban communities have shown considerable restraint in embracing. While there is a widespread consensus among academic researchers and liberal commentators on the necessity of inclusionary programs, few homeowners, voters, and policymakers in suburbia seem to be in agreement.

Realizing that the social equity argument may not serve to break down many fences around the suburbs, the authors of *In-Zoning* put forth yet another argument in favor of inclusionary programs. This is the mandate of the Housing and Community Development Act of 1974 and the legislative intent behind its provisions. The authors particularly underscore the potential effect of the 1974 Act's provisions for the Housing Assistance Plan.²⁵ Since the Housing Assistance Plan is an essential part of each year's funding application and its provisions require that a community assess the housing needs of those residing in and those expected to reside in the community,²⁶ it may serve to promote adoption of inclusionary programs.

While the authors have touted the flexibility of the 1974 Act for its elimination of wasteful competition for funds, restrictive categorical programs, and bureaucratic red tape, they also note its lack of strong enforcement provisions which would assure implementation of inclusionary policies by communities applying for federal funds. They note that the Department

24. OFFICE OF MANAGEMENT AND BUDGET, SOCIAL INDICATORS 1973, at 121, 143 (1973).

25. The Housing Assistance Plan is a mandatory portion of the application for a Community Development Block Grant under the Housing and Community Development Act of 1974. 42 U.S.C.A. § 5304(a)(4) (Supp. 1975). The congressional intent in requiring the local plan was to ensure that communities receiving federal monies be required to make efforts to address the needs of low income persons. *Id.* §§ 5301, 5304(a)(4).

26. The Act calls for this assessment to promote "greater choice of housing opportunities," *id.* § 5304(a)(4)(C)(ii); to reduce "the isolation of income groups within communities and geographical areas," *id.* § 5301(c)(6); and that there might be a "spatial deconcentration of housing opportunities for persons of lower income," *id.*

of Housing and Urban Development's review of program activities under the Act is limited to a postperformance evaluation to determine the eligibility for new funding (pp. 69-70). While mention is made by the House Report which accompanied this bill²⁷ of how critical is this review responsibility on the part of HUD, it was given short shrift in the Act itself.²⁸

The authors also appear to have optimistically misconstrued the implications of the legislative formula for allocation of federal community development block grant funds when they suggest that "the greatest share of entitlement funds will . . . go to large older cities . . ." (p. 71). While this will be true for the first three years during which the "hold harmless" clause is in effect,²⁹ the very opposite will be true after that point. For example, San Francisco, which received \$28.6 million in housing and community development funds under the old categorical grant programs, will receive as its entitlement under the 1974 Act only \$22 million in 1978, \$16 million in 1979, and \$12 million in 1980.³⁰ A similar diminution of funds will occur in practically all metropolitan centers while at the same time suburbs will be receiving grants many times the size they received under the categorical grant system.³¹

While the authors of *In-Zoning* may feel that these new funds granted to suburban areas will increase the suburbs' ability to establish programs for inclusionary land use and thereby relieve some pressures on the central cities, they have presented little concrete evidence that the funds will actually be used in such a manner. Even they are forced to admit that, under certain circumstances, some of the HUD policies for enforcing the 1974 Act "could push the subsidy program . . . in the direction of reinforcing lower income residential concentrations" (p. 78). In fact, according to a recent HUD report, no more than one-third of one percent of the funds to be allocated in

27. H.R. REP. 93-1114, 93d Cong., 2d Sess. 10 (1974).

28. "The Secretary shall approve an application . . . unless . . . (2) on the basis of the application, the Secretary determines that the activities to be undertaken are plainly inappropriate to meeting the needs and objectives identified by the applicant." 42 U.S.C.A. § 5304(c)(2) (Supp. 1975). Since the locality involved defines its needs and the manner in which it plans to address them, there does not appear to be great latitude for the Secretary in determining that which is "plainly inappropriate."

29. The "hold harmless" clause is a mechanism whereby the level of funding received under the categorical grant system is maintained for the first three years under the 1974 Act, with any reduction due to the allocation formula phased in over the following two years.

30. Hirshen & LeGates, *supra* note 9, at 33.

31. As Hirshen and LeGates have suggested, the 1974 Act will ". . . divert Federal Housing money away from most of the big cities, with their rapidly deteriorating inner cores, increasingly minority populations, and predominantly Democratic electorates, to Republican, largely suburban, Middle America." *Id.* at 32.

the first year could be linked to either the objective of reduction of isolation of income groups or to the promotion of neighborhood diversity and vitality.³² The new flexibility and local responsibility conferred by the legislation may well prove more of a hindrance than a boon to the stimulation of suburban inclusionary land use programs.

Nevertheless, the presentation of judicial and legislative possibilities and opportunities is one of the strengths of *In-Zoning*, and failure on the part of the courts and legislative bodies to take advantage of such opportunities should not be reason to criticize the authors of the book. It would be simple to accuse the authors of ignoring the political realities of their proposals if they had not managed to undercut such an attack by directing the book only to those communities in which such a program could become a political reality. But such communities can only be a small minority, and alone such a minority cannot alter the nature of land use regulation in all suburban areas. The effect of these sections of the book is to leave the reader suspended between satisfaction with the presentation of a hopeful alternative and skepticism occasioned by the realization that empirically, its political application will be so limited.

The last section of the book, dealing with the administrative mechanisms available for achieving inclusionary suburban programs, is not characterized by the same tension. It is, rather, a straight-forward exposition of the exact nature of an inclusionary program, the existing zoning techniques for achieving one, and the advantages and disadvantages of housing allocation plans and land banking. Zoning techniques are delineated and criteria for their selection and application to appropriate situations are discussed. The origin, definition, and specific elements of a regional housing allocation plan are sketched, with the authors reasonably concluding that the influence of such plans will depend significantly upon federal administration of the 1974 Act, as well as judicial interpretation of regional needs and local responsibility for inclusionary planning. Finally, the chapter on land banking is handled so as to render a complicated and unfamiliar subject easy to understand.

These final chapters on administrative technique, along with the opening chapters on the judicial, legislative, and socioeconomic environment for inclusionary land use programs in growth areas, combine to establish *In-Zoning* as the first comprehensive analysis and review of these issues. For this contribution, it should be praised. In spite of any skepticism about the book's assumptions that for various reasons communities will wish to, may be

32. U.S. Dep't of Housing and Urban Dev., Community Development Block Grant Program: A Provisional Report 49 (May 1975).

induced to, or will be compelled to become more "inclusionary" in making their land use decisions, Franklin, Falk, and Levin have produced a concise, readable overview of why and how suburban communities should be encouraged to assume their share of metropolitan problems. In the introduction to the book, the authors note that "[t]he *validity* of the literature, as we analyze it, can only be tested by whether courts or policy-makers accept the prescriptive guidance of the literature, including this analysis" (p. 20). Hopefully, their success in organizing and presenting this material for the nonacademic and nonlawyer will be matched by success in their own terms with courts and policymakers.

FREEDOM TO DIE: MORAL AND LEGAL ASPECTS OF EUTHANASIA.
By O. Ruth Russell.¹ New York: Human Sciences Press. 1975.
Pp. 352.

*Reviewed by Ira M. Lechner*²

The concept of euthanasia has troubled men and women since ancient times. Socrates, Plato and Aristotle each sought to justify the notion that man is the master of his own body with the right to decide his own fate. In the fifth century, Saint Augustine took a different view, shaping Christian thought by declaring that "suicide is detestable and damnable wickedness" (p. 54). This philosophy, which has remained alive but not unchanged throughout the Christian era, is criticized, as is any argument against euthanasia, by O. Ruth Russell in her book *Freedom to Die: Moral and Legal Aspects of Euthanasia*. In her articulate review and analysis of the relevant historical and contemporary thought and action, Dr. Russell expresses open and unabashed support for legalized euthanasia. Readers who have any moral qualms about it, or who for practical and legal reasons support the legislation of less drastic measures, will find little to comfort or support them in this book.

Death with dignity legislation attempts to deal effectively with state laws and court decisions which still cling to the Christian idea as espoused by Saint

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