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EUTHANASIA: NONE DARE CALL IT MURDER

JOSEPH SANDERS

On August 9, 1967, Robert Waskin, a twenty-three year old college student, killed his mother by shooting her in the head three times. Warned by the police that he did not have to make a statement, Waskin allegedly said, "It's obvious, I killed her." He was arrested and charged with murder.¹ Waskin's act, however, was a special type—a type that has troubled and perplexed both laymen and legal theorists. The homicide was a "mercy killing."

Waskin's mother was suffering from terminal leukemia. The doctors in the Chicago hospital where she was killed said that she had, at the most, a very few days to live. She wanted to die and had begged her son to kill her. Only three days before, she had tried to commit suicide by taking an overdose of sleeping pills. According to her husband and the doctors, she was suffering deep pain at the time she was shot.²

In all American jurisdictions motive is no defense to a murder charge. If it is shown that the act was done with intent and premeditation, the motive for the crime is irrelevant.³ Motive can be taken into account by the judge in setting the sentence, but, for Waskin, even the utmost leniency on a murder conviction would have resulted in a sentence of fourteen years in prison with no possibility of probation.⁴

On January 24, 1969, however, after a seventeen month delay, a jury deliberated for only 40 minutes and found Waskin not guilty by reason of insanity. They further found that he was no longer insane, and he was released.⁵ Although it seems doubtful that Waskin was ever legally insane, the verdict, as we shall see, was entirely predictable.

The word *euthanasia* is generally used to describe a killing that is prompted by some humanitarian motive. Euthanasia, however, may vary with the

nature of the act, the status of the actor and the victim, and the presence or absence of consent. The act itself may be one of commission or one of omission. The former, which is the concern of this paper, is at the present time some degree of criminal homicide.⁶

There are three reasonably identifiable groups against, or for whom euthanasia may be committed.⁷ The first group consists of persons with

⁶ There has never been a prosecution of a person for an act of omission with or without consent causing the death of any person falling within one of the groups subject to euthanasia. This fact, however, should not be interpreted as evidence of the infrequency of such acts. There is some evidence that these omissions make up the great majority of euthanasia cases in the United States. In a survey of 250 Chicago internists and surgeons by Levisohn, 156 responded to a questionnaire asking: "In your opinion do physicians actually practice euthanasia in instances of incurable adult sufferers?" Sixty-one percent agreed that physicians actually practiced it, if not in the affirmative at least in the negative or in terms of the omission to use every known medical measure to sustain life." Levisohn, *Voluntary Mercy Deaths*, 8 J. FOR. MED. 57, 68 (1961). Of the same 156 physicians, however, 72% said the practice should not be legalized.

Although this was not a random sample, still 38% or 95 of the Chicago physicians polled admitted knowing of acts of euthanasia, at least by omission. This survey refers only to acts against persons with incurable diseases. Similar results, however, might be expected in cases of old people dying of general deterioration. In both these cases the patient is usually near death and the physician inquires of the family if they wish him to use all possible means or permit the individual to "die in peace".

Williams has proposed a statute confirming the legality of acts of omission in relation to dying patients that would be useful in clarifying the law in this area. "For the avoidance of doubt, it is hereby declared that it shall be lawful for a physician whose patient is seriously ill— . . . to refrain from taking steps to prolong the patient's life by medical means;—unless . . . the omission was not made, in good faith for the purpose of saving the patient from severe pain in an illness believed to be of an incurable and fatal character." G. WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 345 (1957). (Hereinafter referred to as WILLIAMS.)

⁷ While acts of mercy showing just as honorable a motive may be present in other murders against different groups, it appears unlikely that these crimes will be labeled mercy killings. Thus, for example, if one kills his child because he can not feed him, while he may have had the best of motives—to prevent starvation—this will be considered murder. See *Commonwealth v. Hall*, 322 Mass. 523, 78 N.E.2d 644 (1948).

¹ Chicago Tribune, Aug. 9, 1967, at 1, col. 8.

² Chicago Tribune, Aug. 10, 1967, at 1 col. 2.

³ State v. Ehlers, 98 N. J. L. 236, 119 Atl. 15 (Ct. Err. & App. 1922); People v. Kirby, 2 Park Crim. Rep. 28, 31 (1823).

⁴ Ill. Rev. Stat. ch. 38 §89-3; Ill. Rev. Stat. ch. 38 §117-1 (1967).

⁵ Chicago Tribune, Jan. 25, 1969, at 1, col. 8.

painful and terminal diseases such as cancer who, by definition, have at best a month or two, perhaps only a few days, to live. A second group consists of defective or degenerate persons, including the mentally ill, the retarded, those with gross physical defects, and old people suffering from senility. Some of these may be persons who have been rendered permanently unconscious by disease or accident and are being kept alive through artificial medical means. The third group is composed of infants and young children who suffer from gross mental or physical defects. The life expectancy of children in this group may be short, or perhaps even the same as normal infants.

Euthanasia may be performed upon the request of, or without the request of the victim. All those in group three and the insane in group two are incapable of consent. The consent issue, then, usually concerns persons in group one who suffer from painful terminal illnesses.

For purposes of legal analysis, persons committing euthanasia may be divided into two groups: physicians and all others.⁸ It has been suggested that under certain circumstances physicians should be allowed to perform euthanasia legally.

VOLUNTARY EUTHANASIA PERFORMED BY PHYSICIANS

It appears that neither consent of the victim, not the extremity of his suffering, or the imminence of his death are presently defenses to homicide.⁹ Demands have arisen from time to time to enact a statute permitting a physician to terminate the life of a consenting patient who is suffering from some incurable, painful and terminal illness.¹⁰

⁸ As in the groups subject to euthanasia, the persons who can commit this act are limited usually to physicians or a member of the decedent's family. A very close friend might be called a mercy killer, but even this is uncertain.

⁹ *Turner v. State*, 119 Tenn. 663, 671, 108 S.W. 1139, 1147 (1908): The defendant and his girl friend had a suicide pact. She asked him to kill her but he was unable to kill himself. The court affirmed his conviction for murder. There was testimony, however, that the defendant was drunk at the time, and both parties were Negroes, which in Tennessee in 1907 perhaps caused the defendant to fail to get the sympathy we might expect. *Commonwealth v. Bowen*, 13 Mass. 356 (1816): The defendant urged the deceased to kill himself while both were waiting on death row for their impending execution. The deceased took the advice, and the defendant was prosecuted but acquitted for murder as an assistant.

¹⁰ WILLIAMS, 319. Yale Kamisar has written an able reply: See Kamisar, *Some Non-religious Views Against Proposed "Mercy Killing" Legislation*, 42 U. MINN. L. REV. 969 (1957) [hereinafter cited as Kamisar].

There are voluntary euthanasia societies in both England and the United States which have proposed legislation legalizing this type of euthanasia in order "to permit an adult person of sound mind, whose life is ending with much suffering, to choose between an easy death and a hard one; and to obtain medical aid in implementing that choice."¹¹

Two types of statutes have been proposed by those who favor legalizing voluntary euthanasia. The English Euthanasia Society proposal, typical of one type, requires a judicial investigation to assure the existence of the patient's consent and to prevent abuses. It has several requirements. The patient must be over twenty-one, of sound mind, in a hopeless condition and earnestly desirous of a painless death. He must make an application requesting euthanasia. His physician must combine this request with a written recommendation reporting on the patient's condition, and submit them to the court. The court then assigns a euthanasia referee who visits the patient and the physician in order to make himself personally aware of the circumstances of the case. If he agrees with the physician and believes the patient has given rational consent, he may then authorize the death. The authorization would be valid only for a limited period, and the patient may withdraw his consent at any time.¹²

The eminent English legal authority, Glanville Williams, on the other hand, has proposed a statute that would give wide discretion to the physician. The proposed statute provides:

It shall be lawful for a physician, after consultation with another physician, to accelerate by any merciful means the death of a patient who is seriously ill, unless it is proved that the act was not done in good faith with the consent of the patient and for the purpose of saving him from severe pain in an illness believed to be of an incurable and fatal character.¹³

If a physician is prosecuted, he can plead the statute and place the burden of proof on the state to show that his conduct did not fall under the act. Williams does suggest that the burden of proving consent could be placed on the doctor if this safeguard were deemed necessary. To protect

¹¹ EUTHANASIA SOCIETY, *A PLAN FOR VOLUNTARY EUTHANASIA* (2d rev. ed. 1962) hereinafter cited as [EUTHANASIA SOCIETY].

¹² *Id.* at 16.

¹³ WILLIAMS 345.

himself if prosecuted, the physician could obtain a written request from a patient before performing euthanasia.

The main issue created by such proposals is whether a person dying in pain should have the privilege of choosing an easy death. There are several nonreligious objections to permitting such a choice.¹⁴ The first is that it may be very difficult to establish satisfactorily the consent of the victim. If consent is not given until the final stages of a painful illness, the patient may be so wracked with pain or so doped with pain killers that he would be incapable of rational consent. If, on the other hand, consent is given earlier there is the possibility that a person will change his mind after he has become so ill that it is difficult to be sure what his true wishes are. Even an earlier signed document requesting euthanasia might then be contrary to his present intent. A dying person may change his mind several times even in one day, depending upon how he feels.¹⁵ Assuming this to be true, it seems difficult to devise any possible test of consent that would be more effective than the Euthanasia Society plan, which requires repeated rational requests to the physician and the referee.

A criticism that even the Euthanasia Society's proposal cannot meet, however, is that the patient's consent and the physician's decision may be based on factors other than the patient's own best interests and desires. The patient may request euthanasia in order to relieve his relatives' anguish, rather than his own pain. The physician will thus be forced to make life and death decisions while in the unenviable position of arbitrating between the patient and the family who oppose their dying relative's wishes.¹⁶ Perhaps many physicians would be unwilling to assume such a role. The present law does avoid such conflicts between the patient, the physician and the family by simply prohibiting euthanasia under any circumstances.¹⁷

The advocates of voluntary euthanasia do not deny the difficulty in determining the reasons for

the patient's request. They submit, however, that in resolving conflicts between the relatives and the patient, the patient's wishes should govern. If one of the patient's reasons for requesting euthanasia is to relieve anxiety in his family, this should not disqualify him. If, on the other hand, it were apparent that the relatives were pushing the sick person towards euthanasia, the doctor should refuse to perform the act.¹⁸ The referee proposed in the Euthanasia Society statute would provide extra protection against the possibility that the physician and the family might conspire to murder the patient.¹⁹

A second objection to voluntary euthanasia is that the physician may make an incorrect diagnosis,²⁰ or that a new cure might be discovered after the execution of the patient. This assumes that euthanasia may be performed long before the last stages of a fatal illness. The possibility of an incorrect diagnosis seems very remote in cases such as Mrs. Waskin's where death was clearly inevitable. But in the early stages of any illness mistaken diagnoses are possible and, like mistakes in the use of the death penalty, are incorrigible.

Although no one knows the precise number of mistakes that might be made, advocates of legalized euthanasia do not believe that the possibility of error is so great that euthanasia must be completely prohibited.²¹ Williams argues—and his critics partly concede—that the chance of incorrect diagnosis of cancer, the illness most likely to cause requests for euthanasia, is not very great.²² It might be, moreover, that the possibility of euthanasia as an alternative would cause the physician to take extra care in making his diagnosis, realizing that a mistake could not be corrected. The Euthanasia Society proposal does require the referee to make his own independent investigation and Williams' plan requires the independent judgment of two physicians.

Similar to the fear of incorrect diagnosis is the fear that a cure might be discovered the "morning after." Usually, however, there is a considerable

¹⁴ The religious issues involved in euthanasia are not discussed in this comment. Most such objections are based on the Fifth Commandment and the belief that our bodies and life are given by God and, therefore, He only has the right to take them away. See N. ST. JOHN-STEVAS, *THE RIGHT TO LIFE* (1964); J. SULLIVAN, *THE MORALITY OF MERCY KILLING* (1949).

¹⁵ Kamisar 986-87.

¹⁶ Frohman, *Vexing Problems in Forensic Medicine: A Physician's View*, 31 N.Y.U. L. REV. 1215, 1221 (1956).

¹⁷ Kamisar 993, quoting Wechsler, *The Issues of the Nuremberg Trial*, 62 POL. SCI. Q. 11, 16 (1947).

¹⁸ EUTHANASIA SOCIETY 25.

¹⁹ Levisohn observes that if we are going to conjure up the gruesome possibilities of abuse by physicians, it is also possible that they could keep their patient alive for as long as possible, regardless of his suffering, so that they could collect the last ounce of fees. Levisohn, *Voluntary Mercy Deaths*, 8-9 J. FOR. MED. 57, 71 (1961).

²⁰ Kamisar 1005.

²¹ EUTHANASIA SOCIETY 24; WILLIAMS 318.

²² Kamisar 1012.

period of time between the announcement of a new treatment and its general availability. If a cure is first announced shortly after the execution of a patient, it is unlikely that it would be distributed in time to save the individual. Of course, if legalized euthanasia were extended to persons with chronic as well as terminal illnesses, then this problem would be much greater. Under the present proposals, however, this remote possibility should not be an excuse for permitting the suffering of patients who desire euthanasia.²³

A third objection is that in view of modern medical techniques of controlling pain, including tranquilizers, analgesics, narcotics, anesthetics and glandular operations, the humanitarian goal of relieving suffering may be accomplished without resort to euthanasia.²⁴ On the other hand, no adequate relief seems possible for several maladies. The Euthanasia Society of England gives as an example cancer of the throat, which makes any swallowing, and even breathing, extremely difficult and painful long before the patient is about to die. Also, emphysema and some lung cancers may cause shortness of breath and a constant feeling of suffocation. Severe strokes may cause a person to become little more than a vegetable, unable to move, speak or see.²⁵

Even if total pain relief were possible with the use of advanced medical techniques, many people would not be able to take advantage of them. Narcotics, still the most widely used analgesics, may reduce pain, but the side effects, including vomiting, nausea and long periods of consciousness of impending doom, may be just as undesirable.²⁶ Moreover, if narcotics are used their effectiveness tends to wear off after continued use and may bring no relief unless the physician gives such a massive dose that it may cause death.²⁷

A final objection, the "wedge" argument,²⁸ questions the presumed effects legalized euthanasia would have on society. Opponents submit that the creation of the right to choose an easy death under certain circumstances will weaken the psychological and moral fabric of society by reducing the absolute value placed on human life, and that it will eventually lead to the acceptance of the idea

that others may have the right to choose death for an individual under certain circumstances.²⁹

Although anyone may commit suicide,³⁰ what seems to bother many opponents of legalized euthanasia is not the right of the individual to choose an easy death, but the creation of a right of execution in another. They would perhaps be willing to grant the patient's right to die; what they do not wish to grant is the physician's right to kill.³¹

But Williams and other advocates are not demanding that all should be forced to choose euthanasia, or that old people and the insane should be eliminated. Rather, proponents urge that society should not forbid this option to the group presently under consideration. They observe that the "wedge" argument may be raised against any new proposal; each new proposal should be weighed on its own merits. Simply because terrible consequences may be imagined is no reason, according to Williams, to reject a reasonable proposal.³² Replying to the observation of critics that the present demand for euthanasia is not sufficient to justify the risk of later expansion, Williams argues that if such a choice were possible and someone were permitted to perform the act, the number of persons requesting euthanasia would increase. He submits that their wishes overcome any inherent need of society to prohibit this practice because of some fear of future consequences.

Opponents of voluntary euthanasia believe, nevertheless, that there is no way to draft a statute to meet all four of their objections. Williams' proposal fails to provide what they consider to be the necessary safeguards against irrational or non-existing consent and mistaken diagnosis.

²³ See generally Koessler, *Euthanasia in the Hadamar Sanatorium and International Law*, 43 J. CRIM. L. C. & P. S. 735 (1953); Wechsler, *The Issues of the Nuremberg Trial*, 62 POL. SCI. Q. 11 (1947).

³⁰ The whole area of suicide and assisting in suicide is beyond the scope of this comment. Suicide and attempted suicide are not crimes in the great majority of American jurisdictions. An assister in or instigator of a suicide is usually punishable as an accessory or principal in murder, even in some states where suicide itself is not a crime. Texas courts have refused this fiction and said that assistance is not a crime. *Sanders v. State*, 54 Tex. Crim. 101, 112 S.W. 68, 22 L.R.A. 243 (N.S.) (Crim. App. 1908). Other states have special statutory provisions for the crime. 41 VERNON'S ANN. MO. STAT. 559.080, makes an assister guilty of manslaughter. For a general discussion see WILLIAMS 248.

³¹ Kamisar 1011.

³² WILLIAMS 315.

²³ EUTHANASIA SOCIETY 24.

²⁴ Kamisar 1007.

²⁵ EUTHANASIA SOCIETY 7, 8.

²⁶ WILLIAMS 325.

²⁷ WILLIAMS 323-25.

²⁸ WILLIAMS 315.

Williams argues that if his type of statute is unacceptable for failure to protect against possible abuse, those opposing it should not argue that the safeguards incorporated at their demand, such as exist in the Euthanasia Society proposals, are so oppressive that they too are unacceptable.³³ If we concede that some type of safeguard is required, the Euthanasia Society proposal indicates that the State should undertake to establish administrative bodies and have them make the final disposition in each case. This method would surely cause delays. More importantly, it conjures up visions, implied in the "wedge" argument, of a society where the State would choose life and death. The Nazi experience is too fresh in many minds to permit this possibility.³⁴

Even if it is true that neither proposal fully meets all objections, the decision must be made whether the privilege of easy death is so valuable or the present system so unfair to both the physician and patient that some plan should be instituted. Assuming that the need for such a plan does outweigh the objections,³⁵ Williams' proposal, with a major qualification, seems superior. The Euthanasia Society type proposal suffers from delays at the crucial time after the patient and physician have reached a decision, and from its creation of a bureaucracy, which might establish for itself a vested interest in the maintenance and possible extension of the practice of euthanasia.

Although Williams' proposal lacks the safeguards of the Euthanasia Society proposal, hopefully the quality of physicians insures that abuses would be very infrequent, and with consultation and perhaps the development of euthanasia specialists trained in diagnostic work, mistakes would not be common enough to justify refusing euthanasia to those truly desiring it. Nonetheless, the physician should be required to show that he did have the patient's consent. This could consist of a written request. If it were proved that the deceased did not give his consent, the physician would be guilty of some degree of criminal homi-

cide. In order to deal with the problem of an incorrect diagnosis, every voluntary mercy killing should be followed by an autopsy by another physician or the state coroner. A mistake could be the basis of a cause of action on behalf of the relatives for malpractice. Perhaps an erring physician should not be permitted to perform any other mercy killings.

One of the effects of the foregoing restrictions would be to limit the number of mercy killings. Such requirements may discourage the doctor from performing euthanasia, or at least force him to wait until he was sure of his diagnosis even though the counter-risk would exist that by then his patient will no longer be capable of consent.

OTHER TYPES OF EUTHANASIA

Another classification would be involuntary euthanasia committed by physicians as well as voluntary and involuntary euthanasia performed by others. While these acts may have the same humanitarian underpinnings as those previously discussed, they lack either the request and consent of the victim or are performed by persons other than a physician, who presumably cannot be certain of the inevitable fatality of the victim's illness. Because of these factors, no one has suggested that these acts be legalized. Rather, the discussion has been whether the penalties for such crimes should be reduced.

Although most of the present debate about euthanasia concerns acts of commission by physicians, causing the death of consenting victims suffering from some incurable and painful illness, no known cases in the United States have involved this special type of mercy killing. A tabulation of American cases indicates the types of acts which have led to prosecution are one involuntary, one by a physician, and by others three were of a voluntary nature and seven involuntary.³⁶

³⁶ a. Louis Greenfield chloroformed his imbecile teenage son to death. The boy reportedly had the mentality of a two year old. Greenfield said at the trial, "I did it because I loved him, it was the will of God." N. Y. Times, May 11, 1939, at 10, col. 2. He was acquitted of first degree manslaughter. N. Y. Times, May 12, 1939, at 1, col. 5.

b. Louis Repouille read about the Greenfield case. He said, "It made me think about doing the same thing to my boy." N. Y. Times, Oct. 14, 1939, at 21 col. 2. Repouille chloroformed his thirteen year old son, who had been blind for five years, bedridden since infancy and was also an imbecile, who never learned to talk. N. Y. Times, Oct. 13, 1939, at 25, col. 7. Repouille was indicted for first degree manslaughter but convicted of

³³ WILLIAMS 334.

³⁴ Koessler *supra* note 29; Wechsler, *supra* note 29.

³⁵ From a social science viewpoint, moral grounds seem to preclude empirical research as to any of the possible effects of a euthanasia statute, including mistakes in diagnosis and abuses of consent. The only way we may ever be able to know the actual demands for and effects of a statute and the willingness of physicians to use it, is to pass one and see how it operates.

In any given trial for euthanasia, in contrast to a decision involving the disposition of an or-

second degree manslaughter and freed on a suspended sentence of five to ten years. *N. Y. Times*, Dec. 25, 1941, at 44, col. 1.

c. John Noxon, a well-to-do laywer, was charged with first degree murder for killing his six month old mongoloid son by wrapping him in a lamp cord and electrocuting him. Noxon claimed that the boy's death was an accident. *N. Y. Times*, Sept. 28, 1943, at 27, col. 2; *N. Y. Times*, Sept. 29, 1943, at 23, col. 7; *N. Y. Times*, Oct. 29, 1943, at 21, col. 7. Noxon was convicted of first degree murder. *N. Y. Times*, July 7, 1944, at 30, col. 2. His death sentence was commuted to life. *N. Y. Times*, Dec. 30, 1948, at 13, col. 5. Later his sentence was further reduced to six years to life to make parole possible. *N. Y. Times*, Dec. 30, 1948, at 5, col. 6. He was paroled shortly thereafter. *N. Y. Times*, Jan. 4, 1949, at 16, col. 3. The Massachusetts Supreme Court affirmed the trial court's decision and denied Noxon's request for a new trial, based on technical grounds, in *Commonwealth v. Noxon*, 319 Mass. 495, 66 N.E.2d 814 (1946).

d. Harry Johnson asphyxiated his cancer stricken wife. *N. Y. Times*, Oct. 2, 1938, at 1 col. 3. After a psychiatrist said he believed Johnson to have been "temporarily insane" the grand jury refused to indict him. *N. Y. Times*, Oct. 12, 1938, at 30, col. 4; *N. Y. Times*, Oct. 19, 1938, at 46, col. 1.

e. Eugene Braunsdorf took his 29 year old daughter, a "spastic incapable of speech", out of a sanitorium, and shot and killed her because he feared for her future should he die. He then attempted suicide by shooting himself in the chest twice. He was found not guilty by reason of insanity. *N. Y. Times*, May 23, 1950, at 25, col. 4.

f. Dr. Herman Sander was acquitted of the murder of his cancer stricken patient. *N. Y. Times*, Mar. 10, 1950, at 1, col. 4. Dr. Sander, for some unknown reason, had written on his patient's chart that he had given her ten c.c. of air intravenously four times and she died within ten minutes. *N. Y. Times*, Feb. 24, 1950, at 1, col. 1. At the trial, however, his defense was that the patient was already dead at the time of the injections. *N. Y. Times*, Mar. 7, 1950, at 1, col. 1. The patient apparently did not request death. The case turned on the causation question and did not live up to its billing as a case to decide the legality of euthanasia.

g. Miss Carol Ann Paget, a college girl, was indicted for second degree murder (carrying a mandatory life sentence) for killing her father while he was still under anesthetic following an exploratory operation which showed him to have cancer of the stomach. The girl apparently had a cancer phobia and was acquitted on grounds of "temporary insanity". *N. Y. Times*, Feb. 8, 1950, at 1, col. 2.

h. Harold Mohr killed his blind, cancer stricken brother and on a conviction of voluntary manslaughter with recommendation for mercy he was sentenced to three to six years and a \$500 fine. *N. Y. Times*, Apr. 11, 1950, at 20, col. 5. He pleaded insanity and there was testimony tending to show that his brother had repeatedly requested to die. Some of the testimony, however, tended to show that Mohr was drinking at the time and two other brothers testified against him. *N. Y. Times*, Apr. 4, 1950, at 60, col. 4; *N. Y. Times*, Apr. 8, 1950, at 26, col. 1.

i. *People v. Werner*. The transcript of this case is presented in Williams, *Euthanasia and Abortion*, 38 U. COLO. L. REV. 178, 184-87 (1966). The defendant, 69,

dinary murderer, the jury and judge need not consider aspects of rehabilitation, retribution or protection of society from dangerous behavior.³⁷ The jury may still feel, however, that at least involuntary euthanasia is not a practice that should go completely unpunished, and by inference condoned, lest it become more common.³⁸ In order, therefore, to show general opposition to this behavior and to dissuade others from a similar practice, the jury might prefer to stigmatize the actor and perhaps give him some minimal punishment.³⁹ If forced to an election between conviction for murder and an acquittal or finding of insanity, however, the jury will usually acquit, not wishing, perhaps with good cause,⁴⁰ to rely upon an executive pardon to mitigate the sentence.

pleaded guilty to manslaughter for the suffocation of his hopelessly crippled, bedridden wife. The court found him guilty, but then after hearing testimony of the defendant's children and others showing what great devotion the defendant had shown towards his wife and that the murder had been at her request, the court allowed the guilty plea to be withdrawn and a plea of not guilty entered. Held: not guilty. For a criticism of this obviously unorthodox procedure see 34 N. D. LAW. 460 (1959). It is interesting to compare the events in the Werner case with article 37 of the URUGUAYAN PENAL CODE: "The judges are authorized to forego punishment of a person whose previous life has been honorable where he commits a homicide motivated by compassion, induced by repeated requests of the victim." Silving, *Euthanasia: A Study in Comparative Criminal Law*, 103 U. PA. L. REV. 350, 369 (1954).

j. Mrs. Wilhelma Langevin, 56, shot her 35 year old son, an epileptic, with a deer rifle. She was indicted for first degree murder. *N. Y. Times*, Nov. 2, 1965, at 26, col. 6.

k. Robert Waskin. (The facts of this case are presented on page one of this article.)

The table below shows the various punishments inflicted on the persons above.

Punishments

| First Degree Murder (1) | Lesser Degree Homicide (2) | Acquittal by Reason of Insanity (3) | Acquittal (3) | Refusal to Indict (1) |
|-------------------------|----------------------------|-------------------------------------|-------------------------------------|-----------------------|
| Noxon —4 years | Mohr Repouille | Paget Brauns- dorf Waskin | Sander Green- field Werner | Johnson |

³⁷ See E. SUTHERLAND & D. CRESSEY, PRINCIPLES OF CRIMINOLOGY 286-92 (1960).

³⁸ Repouille, *supra* note 36b.

³⁹ Support for this belief is found in the use of the doctrine of diminished responsibility now existing in England. See note 51 *infra*.

⁴⁰ For a review of the political intrigue involved in the Noxon case following his conviction see Newsweek, Jan. 17, 1949, reprinted in INBAU & SOWLE, CASES AND COMMENTS ON CRIMINAL JUSTICE 128 (1964).

The only middle ground available in American jurisdictions at the present time is to convict the defendant of a lesser offense, which by its definition rarely fits the facts of the case.⁴¹ This can be accomplished by indictment for a lesser offense or for several levels of homicide at once.⁴² It may be possible to indict for murder alone and then instruct and empower the jury to bring back a conviction for a lesser offense if it so desires, but this may not be permissible when the facts of a case cannot conceivably support the concept of a crime of passion or an involuntary act.⁴³

There are at least three objectionable features to the present system. First, the consequence of applying what amounts to inapplicable and inadequate rules of law to these cases is that the results range from refusal to indict to findings of first degree murder, generally in the absence of any facts that might justify such wide variations. Secondly, since there is no conceptual legal niche for the handling of mercy killings, we are presently required to use legal fictions in dealing with the problem. Such fictions generally are undesirable since they tend to make the law appear hypocritical in the eyes of the public. Finally, the present system invites the possibility that in some future case an overly severe punishment may be inflicted. Several alternatives to the existing state of affairs are available.

⁴¹ Repouille's murder of his son was not involuntary, *supra* note 36b. Mohr's act was not an act of passion in the legal sense, *supra* note 36h. In relation to this point, Judge Learned Hand said in a later case to determine whether, considering the murder, Repouille had possessed "good moral character" for five years preceding his petition necessary to qualify for citizenship: "Although it was inescapably murder in the first degree, not only did they [the jury] bring in a verdict that was flatly in the face of the facts and utterly absurd—for manslaughter in the second degree presupposes that the killing has not been deliberate—but they coupled even that with a recommendation which showed that in substance they wished to exculpate the offender." Repouille's petition for citizenship was denied, but Judge Hand virtually invited him to file a new one as soon as five years had elapsed from the date of his conviction. *Repouille v. United States*, 165 F.2d 152, 153 (2d Cir. 1947).

⁴² Apparently the best procedure to follow at the present time is to indict for several degrees of homicide, thus assuring that the jury will have a choice.

⁴³ See 41 C.J.S. *Homicide* §389-b (1944). Some prosecutors may say it is their duty to prosecute solely for the offense committed. Such a stance in effect forces the jury to do all the dirty work. The prosecutor has a duty to see that justice is done as well as to see that the law is upheld. In such a morally confused area as mercy killing, to stand back and shake one's head at the present state of the American Law is at best a cowardly point of view.

One alternative is to use motive as a substantive criterion in deciding what offense has been committed. In American jurisdictions, motive is at best an evidentiary factor in prosecuting a case and an administrative tool in setting the punishment after it is determined by other means what offense was committed.

In some criminal codes of civil law countries, motive is a substantive element of the offense of homicide. Both the German and Swiss criminal codes provide for a finding of manslaughter, rather than murder, for homicides where the offender does not show either a reprehensible attitude or dangerous and inhumane behavior. This, of course, applies to almost all mercy killers.⁴⁴ The jury uses motive in deciding to convict for a lesser offense. In those countries, however, the use of motive avoids the conceptual and factual problems that are caused in the United States where this element theoretically should play no part in determining the actual offense committed. While the use of motive as a substantive element is conceptually appealing, it does not seem that euthanasia cases are so frequent or their disposition so unjust that they would justify what amounts to a massive overhaul in our conceptualization of the elements of homicide.

In Norway motive is not used to determine the actual offense committed, but it may be used to reduce the sentence imposed by statute when the victim is hopelessly ill.⁴⁵ American jurisdictions have always used motive in determining the sentence, but this is not a statutory requirement, and the practice is handicapped in the case of capital offenses by the existence of high minimum sentences and the impossibility of probation. Uruguay is the only nation that actually offers the possibility of immunity to the mercy killer.⁴⁶

Norway and several other European countries

⁴⁴ These statutes and all other information about Civil Law techniques in dealing with euthanasia, are taken from an excellent article by Helen Silving, *Euthanasia: A Study in Comparative Criminal Law*, 103 U. PA. L. REV. 350, 378, 380 (1950) [Hereinafter cited as Silving].

⁴⁵ Silving 368. "Punishment according to sections 288 and 289 . . . shall not be applied where the action was committed with consent of the victim. Where a person was killed . . . with his own consent, or where an actor motivated by mercy takes the life of a hopelessly ill person, or assists in such acts of killing, the punishment may be reduced below the minimum set by statute and a milder form of penalty may be imposed." NORWEGIAN PENAL CODE §235.

⁴⁶ Werner, *supra* note 36i.

have special provisions for homicide by request.⁴⁷ In all of these states the penalties attached are less if a request can be shown. The purpose of the request is irrelevant so long as the actor responds to it out of altruistic motives. Since both of these defenses—homicide by request and reduction in sentence for motive—are applicable in Norway, a case such as Waskins' might lead to a dramatic reduction in sentence.

Another possibility is presented by the enactment of a diminished responsibility statute such as is now employed in England.⁴⁸ The statute lessens the offense and punishment for persons who suffer from some mental abnormality which is not sufficient to permit them to use the insanity defense. This, in fact may have been the situation with some of the defendants in the American cases.⁴⁹ The statute has, however, been used for euthanasia cases in general, regardless of mental abnormality.⁵⁰ When applied to mercy killings, it reaches the same result as the law in Germany and Switzerland. However, while it is conceptually more in tune with the general elements of homicide already so well entrenched in the common law, its use does require one to indulge to some extent in the same type of legal fiction that is presently condemned.

One further alternative would be to do away with minimum punishments in all degrees of homicide. A person could be convicted of first degree murder and still be given a minimum sentence or be put on probation. This proposal seems superior to a specific statute for mercy killers, since this is a very hard crime to define, and any codification would probably lead to constant disputes over whether a certain case fits within the statute.

Although this is the easiest change and conceptually the least drastic, it also would have the effect of permitting anyone to receive a very short sentence, a result that might greatly confound those who believe murderers should be

imprisoned for many years.⁵¹ Another objection to this proposal might be that it would increase the possibilities for corruption, or that "soft judges" would return many truly dangerous criminals to the streets. The general movement towards more liberal sentencing power in other areas, however, has not proven especially corrosive.

It might be said that this proposal would weaken the legal supports indicating the high level of social condemnation with which the public views homicide. It is doubtful, however, whether this is the purpose of a minimum sentence;⁵² that function, if it exists, would seem to be performed adequately by the maximum sentence. Nor is it likely that the absence of a minimum sentence would lessen the deterrent effect of the law, if indeed any punishment so uncertain and delayed as imprisonment acts as a deterrent in the individual case.

If this plan is too drastic, perhaps a much lower minimum—one or two years—could be established. The one homicide where abuse through corruption might be most likely, and the defendant the most dangerous to society—murder for profit—could be made a special offense with a higher minimum sentence.

An examination of all of these alternatives, however, makes it questionable whether there should be any change at this time. Using motive as a substantive element is clearly too drastic a conceptual step and the use of diminished responsibility is only a fiction of a lesser degree. Finally, while a reduced minimum sentence for all homicides may be desirable, the proposition should be decided on its own merits, and the more rational handling of mercy killers would be only one rather small consideration.

The present system, as fictitious as it sometimes is, has not yet worked a great injustice on anyone committing euthanasia. Our system of trial by jury permits justice to be done without causing any tear in the conceptual fabric of the law; and although there is no available method of providing a minimum punishment for mercy killers, perhaps the anxiety and discomfort of going through a

⁴⁷ Silving 378, 386.

⁴⁸ Homicide Act of 1957, 5&6 Eliz. 2, c. 11.

⁴⁹ Paget, *supra* note 36g.

⁵⁰ Arthur Gray, 44, killed his son who had cancer of the spine, by giving him sleeping tablets. He pleaded guilty to manslaughter on grounds of diminished responsibility as the statute permits. The sentence was two year's probation. *N. Y. Times*, Oct. 7, 1965, at 1, col. 4. G. WILLIAMS, *CRIMINAL LAW, THE GENERAL PART*, 558 n. 24 (1961), reports on three other cases where diminished responsibility has been used in this manner.

⁵¹ Other than protecting society, already discussed, the reason for a minimum sentence seems to be retribution, a purpose that is widely discredited as an objective of the criminal law.

⁵² Williams, *Euthanasia and Abortion*, 38 *U. COLO. L. REV.* 178, 180 (1966).

criminal trial is both a sufficient deterrent to others and an adequate display of public censure.

CONCLUSION

While the problems of euthanasia are legally intriguing and morally perplexing, legislative solutions seem to be far in the future. There is strong, organized opposition to voluntary euthanasia statutes from religious leaders and others, and from the law itself with respect to changes in the status of the involuntary mercy killer. The medical profession generally seems willing to permit the status quo to remain, partly perhaps because it permits a great deal of discretion with little fear of prosecution and partly perhaps because physicians do not wish to accept the extra burdens a statute might impose on them. On the other hand, there is little organized support for change in any of the areas. The people who would be most di-

rectly affected by change—dying persons—are in no position to argue for their preference.

As this comment has noted, there are valid reasons for opposing the legalization of voluntary euthanasia by physicians and perhaps little need for change in the other areas. As individuals live longer, however, and thus are more likely to contract painful and malignant diseases, and as medical discoveries make it possible to keep persons alive longer, the problems may magnify, and a more extended discussion will then be necessary. What individuals on both sides of the argument should keep in mind is that it is not they, at least at the present, who have to bear the consequences of their decisions. To quote Glanville Williams:

*The toad beneath the harrow knows
Exactly where each toothpoint goes.
The butterfly upon the road
Preaches contentment to that toad.*