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SUMMER 1976

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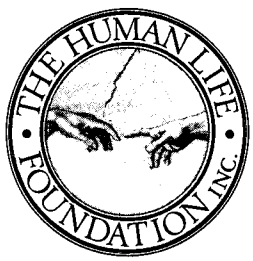
. . . about THE HUMAN LIFE REVIEW

This is our seventh issue. It must certainly be our most diverse (in subject-matter) to date. This is because a) more and more is *available* on the *life* issues we cover here, and b) a great deal more is coming to us (unsolicited), evidently because this review, in less than two years, has managed to establish itself as a useful forum for the ideas of a growing number of writers. This is of course gratifying to us and, we hope, beneficial to those who would not otherwise have so ready a market for their views. We only wish we could publish *all* the material we now receive. Oscar Wilde, given champagne on his deathbed, said: "I die beyond my means." We publish beyond ours. We will not, in the foreseeable future, have the wherewithal to publish everything we would like to include here, but we hope that the material will continue to be sent us, for we are interested in all of it. (We try to maintain the highest standards *vis à vis* handling and acknowledging all manuscripts received, but must prudently add the usual disclaimer: we cannot be responsible for unsolicited ms.)

In our Fall '75 and Spring '76 issues, we published articles by Dr. C. Everett Koop (the well-known chief of surgical services at Philadelphia's Children's Hospital). These articles are included in a new book, "The Right to Live, the Right to Die," just published by *Tyndale House* (336 Gundersen Drive, Wheaton, Illinois 60187; $2.95 per copy).

We continue to receive numerous requests for back issues. It would be helpful to us (and easier for our readers) if you would consult the inside back cover of this issue, where you will find full information on how to order. Please include payment with order, and copies will be sent to you by return mail while available.

THE HUMAN LIFE REVIEW



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INTRODUCTION

"IN 1949 THE United Nations held a world conference on resources, at which I was one of the principal speakers. Recently I looked up the tables of world mineral resources then presented to us, and subtracted from them the amounts which we have in fact already mined since . . . I find that we have already used up the entire world supplies of copper, lead, zinc, and some other minerals."

Thus Dr. Colin Clark, with wry amusement, sets the tone not only of his own article but also for much else that you will find in this issue. We seem to have collected a number of articles that tend to dispute (sometimes strongly) facts, ideas, and opinions widely considered "well known" to most everybody. Dr. Clark, who is a world-renowned authority on the subject, examines some myths of the "over-population" problem, poking some fun along the way at the " 'population community' (rather an odd title for those whose whole concern is to reduce population)" and ending with the disturbing opinion (of French historian Pierre Chaunu) that the "reduction of births which has already taken place . . . will suffice to produce, by the 1990's, a historical disaster worse than the depopulation of Europe by the Black Death."

Even more disturbing to some will be the article by "Jane Doe" (which originally appeared in the New York *Times,* May 14). It caused an immediate nationwide response among thoughtful people on both sides of the abortion issue; we reprint it here because it obviously deserves a more permanent place than that afforded by a daily newspaper—it is, in our judgment, a powerful and profoundly human document that may well be remembered long after most abortion *polemics* have been forgotten. (While we have no idea whatever as to the author's identity, we would be very surprised if she were not, in fact, a professional writer.)

The reader need not take the *Times'* word for the existence of "Mary Roe," the daughter of a friend of ours, who called one day, considerably upset, immediately after the experience she describes here. We asked her to wait a few days, and write us about it. With the briefest of introductions ("Here is what you asked for . . .") we received what you read here—at her request, we cut the actual names, places and dates. Evidently a nurse's *thoughts* on abortion are, for "professional" reasons, best held privately. (In our opinion, should she have difficulties in medicine, she can easily make her way as a writer.)

Most Americans *know* who Bill Stout is, but will nevertheless be surprised at the news he reports here—a most natural complement, it seems to us, to our *Doe* and *Roe* pieces (can we hope for, soon, an anonymous

article from the Supreme Court?). It has long baffled many that *fathers* (prospective or actual) have so little to say about abortion. Mr. Stout proves that some at least *do* care—a great deal, if we can consider his article representative. (In this connection, see also Mr. Sobran's article.)

Messers. Horan and Gorby next bring us yet another unusual article on abortion. It is a small part of a lengthy (well over 100 printed pages) *amicus curiae* brief submitted by the authors (and others) to the U.S. Supreme Court's October, 1975 term in support of the appellees in the now-celebrated *Danforth* case (which remains undecided as we write—but should be decided by the Court before you *read* this). The Danforth case is complicated, as are the issues involved; the full brief provides a great deal more information than we can present here. It is, and will no doubt remain, a notable legal document, if for no other reason than that it was *rejected* by the Court (we contacted a noted constitutional scholar, who tells us: ". . . so far as I am aware this is the first time that a brief has been rejected, when not objected to by any party."). It deserves a hearing. A few copies remain, and we will send them to interested readers ("while they last," as the saying goes) who apply to us.

In our last (Spring, '76) issue, we published the first part of what we consider a truly definitive article on euthanasia by Prof. Yale Kamisar. Except for an earlier article by Malcolm Muggeridge, it has brought us more reader response than anything else we've published to date (and in this, our seventh issue, we no doubt pass—easily—the quarter-million mark in words published). We therefore assume that many readers have been waiting anxiously for this final part, and trust that they will not be disappointed (if you missed Part I, it is still available—see the inside back cover of this issue for details). A curious feature of Prof. Kamisar's article is that his *footnotes* seem to draw as much attention as the article itself. Our usual practice is to put notes at the end of all articles, but perhaps we should have violated that rule here; in any case, we recommend that you consult the notes as you go along, for there is indeed much that is illuminating in them.

It would be hard to imagine a more appropriate companion-piece to Kamisar than Prof. Louisell's marvelous "Euthanasia and Biathanasia," which also has a world-wide reputation as a classic on the subject. (We read the whole thing without questioning "biathanasia," even though it wasn't in our handy dictionary: only when we couldn't find it in the OED did we discover that the good professor had coined it for this article!) Taken together, the two articles provide the reader with the kind of indepth study that he is unlikely to find elsewhere. While we hope to continue our running discussion of euthanasia and related problems (for these problems continue to *grow* as a public concern), the Kamisar-Louisell articles are likely to remain the measure against which all future contributions will be weighed.

Another subject of continuing concern is fetal research (in this context,

experimentation on living human subjects—see especially the symposium in our Fall, '75 issue), discussed here by Juliana Pilon, a young (under 30) medical researcher and philosophy professor who is also a professional writer. She not only raises some vital (but little-considered) points in the debate, but also herself personifies another important fact: young academics and writers are by no means convinced by the answers to "life" questions (e.g., the Court on abortion) given by the ruling generation, with the result that, far from ending the debate, the reigning "givens" may be only the starting points for new controversies (if not new answers). We expect to have much more by such new young voices in future issues.

Alas, we hoped to have such in *this* issue. But our most constant writer, Mr. Sobran, has turned 30 and, however trustworthy he remains, he is no longer (in the modern idiom) young. Perhaps to memorialize this Rubicon, he has become a kind of "instant ancient" in this issue, writing to us not from the viewpoint of a few centuries back (as some of our correspondents have accused him of doing), but from the mists of two *millennia*. As always, Sobran is as entertaining as he is . . . informative opinionated, and (to some) infuriating. We naturally hope, in putting all this together, that you will read it from cover to cover, but we especially hope that, this time, you will not fail to read Sobran's finale, even if you work forwards (as he has) from there.

J. P. MCFADDEN
Editor

Abortion and Population Control

Colin Clark

IT IS NOT MY custom to comment on articles in the *American Journal of Obstetrics and Gynecology* (though this journal is welcome to comment on any article of mine). But this convention may perhaps be waived when a leading article does not deal with obstetrics and gynecology, but with politics and economics.

The article in question (October 15, 1975) was the presidential address to the American Gynecological Society by Dr. Louis M. Hellman, M.D., who holds official rank in the Federal Department of Health, Education and Welfare as Deputy Assistant Secretary.

What is novel about Dr. Hellman's address is that, after the usual fervent demands for population limitation, he goes on not only to tolerate, but actively to demand abortion. "No country has reduced its population growth significantly without resorting to abortion. . . . Despite the Supreme Court decision in 1973 legalizing abortions . . . the issue remains morally and ethically controversial. Public debate continues with an increasing number of legal actions and a variety of proposed legislation. Neither family planning nor AID funds can be used to support or promote abortion."

Dr. Hellman also mentions sterilization, sometimes enforced by legal, or pseudo-legal, means. "We physicians," he admits, "have been incredibly lax in the matter, and in rare instances outright cavalier."

"When I joined the Federal Government five years ago," states Dr. Hellman, "population and family planning were subjects of high priority to both the administration and the Congress. In the last few years, however, I sense a diminishing concern among our own people and our own Government about our own population problem, which many believe to be solved, and the world issues . . . the national will to face population issues continues to falter." "Retrenchment of federally funded support . . . for family planning" will, we are told, "threaten national security."

Dr. Colin Clark is currently a research fellow at Monash University in Melbourne, Australia; for many years (1953-69) he was Director of the Institute for Research in Agricultural Economics at Oxford, and is the author of more than a dozen books on economics and related issues. He enjoys an international reputation as an expert on population problems.

It may be added that the Government of India, after receiving world-wide publicity for its program of mass sterilization of men in return for a small sum of money or a transistor radio, found that this program had only a limited effect and was unpopular—politicians addressing meetings were faced by hecklers who asked if they themselves had been sterilized. Recently India also has reduced expenditure on its family limitation program.

The phrase "zero population growth" can have two very different meanings. One is actual equality of births and deaths, i.e., zero population growth in the literal sense. The alternative meaning is that the average family should be at replacement level (i.e., just sufficient to replace the parental generation).

What constitutes replacement level varies of course with circumstances. The principal factor to be taken into account is the proportion of children who may be expected to die before themselves reaching maturity. Thus, among primitive tribesmen, average completed families of six may only just constitute replacement level. In modern communities however an allowance of only three or four percent need be made for children dying before reaching maturity. Then an allowance must be made for the minority of women who will remain unmarried—that is, if we are considering the required average offspring per marriage. Finally—a factor often forgotten—we must allow for the male surplus at birth. On an average (for biological reasons not known) there are 1.06 male births for every one female. So, even if there were no child mortality, and no women remained unmarried, it would still require 2.06 offspring to replace two parents. Taking all factors into account, it appears that an average of about 2.2 offspring per marriage is required to replace the parental generation. The U.S.A. appears now to be at or perhaps below this level. (The determination, from currently available statistics, of expected average final completed family is an awkward problem in mathematics, for the solution of which several alternative methods are available. Solution is not helped by the extremely late publication of some important vital statistics).

Some people still find it difficult to grasp the proposition that, if births are actually equal to deaths, population in the future is certain to decline, for the simple reason that births will then only be replacing the much smaller generation born on the average some sixty or seventy years ago. (The only exception to this rule would be a country like Ireland, where the generation born sixty or seventy years ago was *larger* than the present generation, so current equality

between births and deaths would mean that the population would be certain to increase—if they did not emigrate.)

So we have the concept of "demographic momentum." Dr. Hellman complains that, even with American families now at or below replacement level, some population growth, though gradual, may be expected to continue for the next sixty or seventy years.

For other countries, however, strikingly different results are obtained. General Draper, President Nixon's appointment as U.S. spokesman on the United Nations' Population Commission, at an international banquet (was this really an appropriate occasion?), made the somewhat undiplomatic statement that not only was the United States adopting the policy of zero population growth but that Latin America was also expected to adopt the same policy by the end of the century. But he did not specify which of the two meanings of the phrase zero population growth he had in mind. M. Bourgeois-Pichat, Director of the French Demographic Institute, made calculations on the two different meanings. If the intention was that Latin American births should literally equal deaths by the end of the century, the average Latin American family, which is now about six, would immediately have to be reduced to about one-tenth of its present size. If, on the more plausible but still extremely unlikely assumption that it was expected that the average Latin American family should fall to replacement size by the end of the century, the demographic momentum of the young people already growing up would still cause Latin American population to go on increasing until well past the middle of next century, eventually stabilizing at about three times its present level.

One of the principal reasons for the "faltering" of which Dr. Hellman complains in the United States is the strong opposition now expressed by spokesmen for blacks and other minorities. This has generated an acute crisis in the minds of many fashionable Leftists, who regard themselves as pro-black, but who think that the best service that they can render to blacks is to reduce their numbers.

The "population community"* (rather an odd title for those whose whole concern is to reduce population) at its First National Congress on Optimum Population and Environment, "was taught a hard lesson by . . . the blacks who attended the sessions . . . not firebrand militants but representatives of relatively conservative groups such as Planned Parenthood and the National Urban League . . . on the last day of the congress the entire black caucus walked out." Some black spokesmen complain that officially sponsored fam-

*Population Reference Bureau, *Population Bulletin* December 1970 pages 18-19.

ily limitations represents a deliberate attempt to check their increasing relative numbers, indeed of "genocide."

In the 1880's the pioneer French sociologist Arsène Dumont made the important observation that racial, linguistic, or religious minorities always tended to be more reproductive than the majorities which surrounded them. The reason for this was, simply, that seeing little prospect of social or economic advancement for their children, they had less incentive to limit their number. Dumont observed this among the Basque, Breton, and Italian-speaking minorities in his own country. It is true alike of the American blacks, of Australian aborigines, of Chinese settlers throughout South-East Asia, and of Indian migrants to Guyana, East Africa, and Fiji—in the last-named case, to the point where the minority eventually became the majority.

The outstanding exception, of course, the "exception which tests the rule," is the case of the Jews, who do not appear to be more reproductive than the Gentile majority which surrounds them. The Jews however are proverbially successful in securing social and economic advancement for their children.

In the international sphere, increasing American indifference, Dr. Hellman complains, "will pose a threat to our leadership role." Well may he complain. Accusations of genocide, etc., have become more strident—as many Americans observed with dismay at the International Population Conference at Bucharest in 1974.

At previous World Population Conferences, the Russian delegates —having conspicuously gone out into the lobby to receive their instructions before they spoke—took a uniform line, namely that Malthusianism was the last, most vicious, and most degraded form of imperialism, designed to destroy the vitality of the peoples of the developing countries. Now our policy in Russia, they continued, is complete economic and social equality for women (including the right, as travelers have observed, to work as builders, labourers, and generally to do most of the heavy work). This having been done, the Russian spokesmen continued, family size fell of its own accord. So far as can be ascertained, the average family in Soviet Russia has now been at or below replacement level for some time and Soviet leaders are clearly concerned. There are, moreover, important regional differences. The Russians, with their keen sense of racial superiority (on which the Chinese have commented unfavorably) observe with dismay the strangely-named non-Russian-speaking peoples of Soviet Asia (Kazakhs, Uzbeks, etc.) continuing to multiply rapidly, while the Soviet Europeans are not replacing themselves.

By the time of the Bucharest Conference the Russian attitude had become more ambiguous, and it was left to the Chinese (in spite of the fact that they are apparently making considerable efforts to reduce their own births, at any rate among the urban population) to take the lead in mobilizing the Third World against the American proposals, which they did with considerable skill. The Conference ended, as will be remembered, with a remarkable alliance between China and the Vatican to oppose these proposals.

The grounds given for the so fervent demands for American and world-wide population limitation are the familiar ones of the supposed inability of the earth to provide food, minerals, and energy for increasing numbers. Attention is drawn to hungry countries such as India, Pakistan, and Bangladesh, where there is little or no additional land for cultivation. But there are countries with much denser populations per acre of agriculture land, such as Japan, Taiwan and Egypt, which succeed in obtaining three times as much rice per unit of land as in the Indian sub-continent. In other Asian countries such as Indonesia, and in almost the whole of Africa and Latin America, there are enormous areas of good potential agricultural land still untouched.

The controversy about the world's capacity to supply food, in which I have been engaged for many years, has now (somewhat to my regret) been brought to an end. Dr. Pawley, formerly head of the FAO Policy Committee, addressing the Scandinavian Economists Conference in 1971 (a summary of his address was given in the FAO Journal *Ceres,* July-August 1971), after making some unfriendly references to my writings, went on to admit that it was far too easy for people like me to criticize FAO, because the truth of the matter was that, in the course of the next hundred years, there should be no serious difficulty about raising food production to thirty or even fifty times what it is now. (Similar conclusions have also recently been published by Wageningen Agricultural University in the Netherlands). My own targets are more modest than these.

In 1949 the United Nations held a world conference on resources, at which I was one of the principal speakers. Recently I looked up the tables of world mineral resources then presented to us, and subtracted from them the amounts which we have in fact already mined since 1949. I find that we have already used up the entire world supplies of copper, lead, zinc, and some other minerals. To treat the proved reserves known to mining companies as estimates of final world resources is ludicrous. Mining companies have to earn dividends for their share-holders, or borrow money at high rates of

interest, and therefore they must apply high rates of discount to their expenditure on exploration, which is very costly. They cannot afford to explore for minerals which they do not expect to use more than fifteen years or so in the future.

It is possible that world reserves of oil will run out in fifty years or so—though we have so often been told this before—and recent high oil prices have lead to remarkable intensification of oil search, and economies and substitution in use. But available coal reserves will last for very much longer and reserves of uranium and thorium for generating nuclear power longer still. If, for any reason, we dislike the idea of being dependent on nuclear power, the energy reaching the earth each year from the sun is far in excess of any conceivable needs, once we develop the technology for harnessing it.

So far from the threat of over-population, the real threat with which a large part of the world will soon be faced is that of *de*population. In countries such as the U.S., there is no indication that the fall in family size, which has already been reduced to the replacement level, may not continue. In some European countries, particularly Germany, Sweden and Switzerland, births are already a long way below replacement level, and the fall may proceed still further. Since the beginning of the 1960's some much more profound force than the discovery of oral contraceptives (which occurred about this time) has been at work in the Western countries, some feeling of loss of purpose in life, what some social psychologists even call "death-wish."

The reduction in births which has already taken place during the last fifteen years, writes the French historian Pierre Chaunu, will suffice to produce, by the 1990's, a historical disaster worse than the depopulation of Europe by the Black Death.

'There just wasn't room in our lives now for another baby'

Jane Doe

WE WERE SITTING in a bar on Lexington Avenue when I told my husband I was pregnant. It is not a memory I like to dwell on. Instead of the champagne and hope which had heralded the impending births of our first, second and third child, the news of this one was greeted with shocked silence and Scotch. "Jesus," my husband kept saying to himself, stirring the ice cubes around and around. "Oh, Jesus."

Oh, how we tried to rationalize it that night as the starting time for the movie came and went. My husband talked about his plans for a career change in the next year, to stem the staleness that fourteen years with the same investment-banking firm had brought him. A new baby would preclude that option.

The timing wasn't right for me either. Having juggled pregnancies and child-care with what freelance jobs I could fit in between feedings, I had just taken on a full-time job. A new baby would put me right back in the nursery just when our youngest child was finally school age. It was time for *us*, we tried to rationalize. There just wasn't room in our lives now for another baby. We both agreed. And agreed. And agreed.

How very considerate they are at the Women's Services, known formally as the Center for Reproductive and Sexual Health. Yes, indeed, I could have an abortion that very Saturday morning and be out in time to drive to the country that afternoon. Bring a first morning urine specimen, a sanitary belt and napkins, a money order or $125 cash—and a friend.

My friend turned out to be my husband, standing awkwardly and ill at ease as men always do in places that are exclusively for women, as I checked in at 9 A.M. Other men hovered around just as anxiously, knowing they had to be there, wishing they weren't. No one spoke to each other. When I would be cycled out of there four hours later, the same men would be slumped in their same seats, locked downcast in their cells of embarrassment.

Jane Doe is the pseudonym of the author, who "works in publishing," according to *The New York Times*, in which this article first appeared (on the May 14 "Op-Ed" page:).

The Saturday morning women's group was more dispirited than the men in the waiting room. There were around 15 of us, a mixture of races, ages and backgrounds. Three didn't speak English at all and a fourth, a pregnant Puerto Rican girl around 18, translated for them.

There were six black women, and a hodgepodge of whites, among them a tee-shirted teenager who kept leaving the room to throw up and a puzzled middle-aged woman from Queens with three grown children.

"What form of birth control were you using?" the volunteer asked each one of us. The answer was inevitably "none." She then went on to describe the various forms of birth control available at the clinic, and offered them to each of us.

The youngest Puerto Rican girl was asked through the interpreter which she'd like to use: the loop, diaphragm or pill. She shook her head "no" three times. "You don't want to come back here again, do you?" the volunteer pressed. The girl's head was so low her chin rested on her breastbone. "Si," she whispered.

We had been there two hours by that time, filling out endless forms, giving blood and urine, receiving lectures. But unlike any other group of women I've been in, we didn't talk. Our common denominator, the one which usually floods across language and economic barriers into familiarity, today was one of shame. We were losing life that day, not giving it.

The group kept getting cut back to smaller, more workable units, and finally I was put in a small waiting room with just two other women. We changed into paper bathrobes and paper slippers and we rustled whenever we moved. One of the women in my room was shivering and an aide brought her a blanket.

"What's the matter?" the aide asked her. "I'm scared," the woman said. "How much will it hurt?" The aide smiled. "Oh, nothing worse than a couple of bad cramps," she said. "This afternoon you'll be dancing a jig."

I began to panic. Suddenly the rhetoric, the abortion marches I'd walked in, the telegrams sent to Albany to counteract the Friends of the Fetus, the Zero Population Growth buttons I'd worn, peeled away, and I was all alone with my microscopic baby. There were just the two of us there and soon, because it was more convenient for me and my husband, there would be one again.

How could it be that I, who am so neurotic about life that I step over bugs rather than on them, who spends hours planting flowers and vegetables in the spring even though we rent out the house and

never see them, who makes sure the children are vaccinated and inoculated and filled with Vitamin C, could so arbitrarily decide that this life shouldn't be?

"It's not a life," my husband had argued, more to convince himself than me. "It's a bunch of cells smaller than my fingernail."

But any woman who has had children knows that certain feeling in her taut, swollen breasts, and the slight but constant ache in her uterus that signals the arrival of a life. Though I would march myself into blisters for a woman's right to exercise the option of motherhood, I discovered there in the waiting room that I was not the modern woman I thought I was.

When my name was called, my body felt so heavy the nurse had to help me into the examining room. I waited for my husband to burst through the door and yell "stop," but of course he didn't. I concentrated on three black spots in the acoustic ceiling until they grew in size to the shape of saucers, while the doctor swabbed my insides with antiseptic.

"You're going to feel a burning sensation now," he said, injecting Novocain into the neck of the womb. The pain was swift and severe and I twisted to get away from him. He was hurting my baby, I reasoned, and the black saucers quivered in the air. "Stop," I cried. "Please stop." He shook his head, busy with his equipment. "It's too late to stop now," he said. "It'll just take a few more seconds."

What good sports we women are. And how obedient. Physically the pain passed even before the hum of the machine signaled that the vacuuming of my uterus was completed, my baby sucked up like ashes after a cocktail party. Ten minutes start to finish. And I was back on the arm of the nurse.

There were twelve beds in the recovery room. Each one had a gaily flowered draw sheet and a soft green or blue thermal blanket. It was all very feminine. Lying on these beds for an hour or more were the shocked victims of their sex life, their full wombs now stripped clean, their futures less encumbered.

It was very quiet in that room. The only voice was that of the nurse, locating the new women who had just come in so she could monitor their blood pressure, and checking out the recovered women who were free to leave.

Juice was being passed about and I found myself sipping a Dixie cup of Hawaiian Punch. An older woman with tightly curled bleached hair was just getting up from the next bed. "That was no goddamn snap," she said, resting before putting on her miniskirt and high white boots. Other women came and went, some walking out

as dazed as they had entered, others with a bounce that signaled they were going right back to Bloomingdale's.

Finally then, it was time for me to leave. I checked out, making an appointment to return in two weeks for an IUD insertion. My husband was slumped in the waiting room, clutching a single yellow rose wrapped in a wet paper towel and stuffed into a baggie.

We didn't talk the whole way home, but just held hands very tightly. At home there were more yellow roses and a tray in bed for me and the children's curiosity to divert.

It had certainly been a successful operation. I didn't bleed at all for two days just as they had predicted, and then I bled only moderately for another four days. Within a week my breasts had subsided and the tenderness vanished, and my body felt mine again instead of the eggshell it becomes when it's protecting someone else.

My husband and I are back to planning our summer vacation and his career switch.

And it certainly does make more sense not to be having a baby right now—we say that to each other all the time. But I have this ghost now. A very little ghost that only appears when I'm seeing something beautiful, like the full moon on the ocean last weekend. And the baby waves at me. And I wave at the baby. "Of course, we have room," I cry to the ghost. "Of course, we do."

Abortion: A Nurse's View

Mary Roe

I WAS FOR ABORTION. I thought it was a woman's right to terminate a pregnancy she did not want. Now I'm not so sure. I am a student nurse nearing the end of my OB-GYN rotation at a major metropolitan hospital and teaching center. It wasn't until I saw what abortion involves that I changed my mind. After the first week in the abortion clinic several people in my clinical group were shaky about their previously-positive feelings about abortion. This new attitude resulted from our actually seeing a Prostaglandins abortion, one similar in nature to the widely-used Saline abortion.

What the medical professionals proudly feel is an advancement in gynecological medicine—the Prostaglandins-induced abortion—is actually, I now believe, a biochemical murder. It is a natural body substance being used to produce what is an unnatural body action: an abortion. Prostaglandins is a fatty acid present in many body tissues and affects the contractability of smooth muscles, especially useful in stimulating the muscles of the uterus. It is now being used in some medical centers to bring on labor post 16 weeks of conception and up to 20 weeks. These second-trimester abortions are induced by Prostaglandins by I.V., vaginal suppositories or most often by intra-amniotic deliverance of Prostaglandins. Actual labor is induced and the average abortion time is anywhere from 6 to 20 hours but can be longer. The pains are strong rhythmic contractions (just like the labor pains a woman has prior to the birth of a child). The fundus, the firm height of the uterus during pregnancy, moves under the nurse's hand. The fetus is moving too.

The placenta, the biological separation between maternal and fetal systems, is jarred by the passage of pain medications. The strong analgesics quickly pass through the maternal blood stream and into the fetal system to be absorbed there at a many-times-greater potency. Further assault. Ironically, it is an obstetrician who carefully advises against the use of even aspirin during pregnancy, for the child's sake, but who now orders the dose of Demerol or

Mary Roe is the pseudonym of a young student nurse currently working in a large metropolitan hospital. This article was sent originally as a letter to the editor of this review, and appears here with only slight alteration (mainly place-names and dates).

Valium for the woman in the pains of abortion.

The fetus continues to move, harshly pushed down the birth canal by the strong muscle contractions of the uterine myometrium caused by Prostaglandins. The woman remains in bed, unattended much of the time. It is a long wait. Hours pass. Vital signs and the progress of labor are checked by the nurse at intervals. This nurse is one who is generally used to dealing with the advent of life, not death. She has at one time reassured a tired woman in labor that the tedious process will bring on the birth of a child, not a "termination of unwanted pregnancy"; an unnamed fetus.

Finally the violent contractions and the Prostaglandins have done their job. The fetus is expelled wet, reddened, mucous covered and warm. Limbs are flexed. The head and chin are bent into the chest. The slit-like eyes are closed innocently. It is a miniature human being, being awakened from a sleep too soon by a woman who was given the choice to interrupt her pregnancy.

The umbilical cord is cut. The fetus is taken away and the woman waits to expel the placenta. In an hour or two the entire process is over. She sleeps and then is discharged if there are no complications. She goes home. But I wonder if she realizes just how much she has left behind.

By that time in gestation chromosomes are laid out—distinctive markers of heredity. Crossing over of the genes assures that this fetus would have been unlike any other human being: alone, special, and unique. Had it lived.

Although still in the experimental stage, this method is being used for termination of pregnancies of 16 weeks and over. I used to find rationales. The fetus isn't real. Abdomens aren't really very swollen. It isn't "alive." No more excuses. By 16 weeks the fetus is well formed. By 20 weeks the face, eyelids, nose and mouth are formed. Organs are well defined. The heart and circulatory system has been laid down and I have heard a fetal heart beat at 20 weeks (a pregnant friend tells me she heard her baby's heartbeat at 10 weeks) with the Doppler Machine—fast and bounding. Hair begins to appear on the head. The arms and limbs are formed. Sex of the fetus is evident. This is what is expelled from the uterus into a hospital bed or bedpan to be wrapped up quickly and carried to pathology and disposed of.

I am a member of the health profession and members of my class are now ambivalent about abortion. Whereas before I was firm on my stand for abortion, I now know a great deal more about what is involved in this issue. Women should perceive fully what abortion

is; how destructive an act it is both to themselves and to the unborn child. Whatever psychological coping mechanisms are employed during the process, the sight of a fetus in a hospital pan remains the final statement.

I've lost the steadiness in my voice when I discuss abortion. I find it difficult to say the word. That firm conviction, "a woman's right," is gone. There is a time to live and a time to die but I feel that there is a far greater authority to decide that time than a woman or her doctor.

NOTES

1. Fitzpatrick, E., Reeder, S., and Mastroianni, L., *Maternity Nursing,* Philadelphia, J. B. Lippincot Co., Twelfth Edition, 1971, P. 458
2. Douglas, R., M.D. and Stromme, W., M.D., *Operative Obstetrics,* New York, Appleton-Century Crofts, Third Edition, 1976, P. 170

He (or She) Would Be 23...

Bill Stout

DOCTORS AND theologians are usually the only men who argue the abortion issue. Mostly, it's a women's debate. On one side: "We have the right to control our own bodies," and on the other: "It's a human life and killing it is wrong." That sort of thing.

But I had a jolt recently that set me thinking seriously, *personally,* about abortion for the first time in more than 20 years. I suspect it was a shock that has hit a great many men, although few ever talk about it.

It came late on a Friday afternoon, at the start of a long holiday weekend. The freeways were jammed, of course, and when I started out for a business meeting on the far side of Los Angeles, the radio was full of "sigalerts." Since there was plenty of time, it seemed logical to skip the freeway mess and loaf across the city on the side streets. Easy enough, until even that oozing pace of traffic squeezed to a dead stop because of an accident at the corner of Beverly and Vermont. There my eye caught the window of a second floor office, and it hit me like a knee in the groin.

That office, in a building I hadn't even noticed in many years, was where I had taken my new bride for an abortion one blistering summer day in 1952. Suddenly I remembered . . . and I re-lived every detail.

We had been married two years and did not consider ourselves poor, but we were close. We had an old car, a few dollars in the bank, and I had a temporary job writing news stories for radio announcers. And she was pregnant.

We had argued for more than a week after her first cautious announcement. I had adopted her young son by a previous marriage, but this would be our first baby together, and I was delighted. Minutes later I was appalled, then infuriated, by her insistence she would not go through with it. Even more hurtful, I suppose, in the callowness of that encounter so long ago, was that she had talked

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with several women friends before telling me anything. She already had the name of the doctor and was ready to make an appointment when I would be off from work to drive her to and from.

There was a lot of shouting and pleading that week and a good deal of pumping up (by me) of my prospects at the radio station. She pointed out that those were prospects only. She noted the sickly condition of our bankbook, plus the fact that we had 12 payments to go on our first television set. She also made the point hammered home today by the women's pro-abortion groups: it was, after all, *her* body, and the *decision* should be hers and hers alone.

That was the most painful week of our marriage, until the final anguish (of divorce) many years later. Of course, she got her way. I dropped her at the curb outside the doctor's office, then pulled around the corner to park and wait. It would be forty-five minutes, she said, no more than an hour at most. She had $200 in cash in her bag. No checks were accepted.

I spent the time multiplying and dividing. How much did this doctor *make* per hour? Per minute? How many of these jobs could he do in a day? Or in a year? Did he take just a two week vacation so he could hurry back to the women with so many different reasons for ending pregnancies?

I remember his name. I can see the sign in his office window as clearly as if it were there now, just a few feet away. Seven letters, four in the first name; below them, centered on a separate line, "M.D." I never saw the man but I hated him then, and do to this moment, even though he died long ago.

When I saw her come out of his office, pale and wincing with each step, I leaped out of the car and ran to her. A couple of days later she was moving around with her usual energy and she made it clear that it was all over, with nothing to talk about. A year and a half later, with everything going fine for me in my work, she gave birth to our first baby, a normal healthy boy, and not long after that there came a daughter.

Yet, again and again, I have found myself wondering what that first one would have been like. A boy or a girl? Blonde or brunette? A problem or a delight? Whatever kind of person the lost one might have been, I feel even now that we had no right to take its life. Religion has nothing to do with that feeling. It was a "gut" response that overwhelmed me while stalled in the traffic that afternoon at Beverly and Vermont.

Now we were moving again. A few minutes later I was at my meeting in the Civic Center, in the office of an old friend, luckily,

because by then I was in tears and they wouldn't stop. It wasn't easy but I finally told him how that glance at an office window had simply been too much for me, sweeping away a dam that had held for more than 20 years.

If I am still wondering about that first one that never was, what about other men? How many of them share my haunted feelings about children who might have been? Why are we, the fathers who never were, so reluctant to talk about such feelings? And if it can be so painful for the men, how much worse must it be for the women who nurture and then give up the very fact of life itself?

Clearly, as the saying goes about wars and generals, abortion is far too important to be left to a woman and her doctor.

Abortion and Human Rights

Denis J. Horan and John D. Gorby

ABORTION IS a human rights issue. Abortion involves the most fundamental of all human rights—the right to life—without which no other human right could exist unless in mockery. As Justice Brennan wrote, in speaking for the abolition of the death penalty for convicted felons:

> "The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death.[1] Death is a unique punishment in the United States. In a society that so strongly affirms the sanctity of life, not surprisingly the common view is that death is the ultimate sanction."[2]

In the abortion issue we have been debating the most fundamental human rights issue: when does each individual's civil right to life commerce? Not unlike the *Dred Scott*[3] decision, *Roe* v. *Wade*[4] has answered that question in a fashion that will breed debate as long as it remains on the books. *Roe* v. *Wade* decreed that the developing human in the womb is not entitled to constitutional personhood.[5] Corporations, supposedly because they enjoy individuality, are persons under the constitution,[6] but actual, individually existing human beings are not, merely because their development at this stage of life occurs *in utero*![7] What can one say about such a decision?

In the Yale Law Journal, Professor John Hart Ely, who states that the result met with his idea of progress, writes nonetheless as follows:

> "Nevertheless it is a very bad decision. Not because it will perceptibly weaken the Court—it won't; and not because it conflicts with either my idea of progress or what the evidence suggests is society's—it doesn't. It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."[8]

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He concludes his criticism by pointing out that the Court has "an obligation to trace its premises to the charter from which it derives its authority."

"But," he says, "if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it. I hope that will seem obvious to the point of banality. Yet those of us to whom it does seem obvious have seldom troubled to say so. And because we have not, we must share in the blame for this decision".[9]

What can one say of the fact that lower Federal Courts see in *Roe* v. *Wade* a mandate to impose the new order of ethics[10] on an unwilling society by mandating public and private hospitals to perform abortions,[11] by declaring conscience clauses void,[12] by mandating the use of public funds to pay for abortions?[13] Perhaps Mr. Justice White directed himself to this question when he wrote in his dissent in the *Greco* case:

> "The task of policing this Court's decision in *Roe* v. *Wade*, 410 U.S. 113, and *Doe* v. *Bolton*, 410 U.S. 179, is a difficult one; but having exercised its power as it did, the Court has a responsibility to resolve the problems arising in the wake of those decisions."[14]

Was that statement a reference to the extent to which lower Federal Courts are completely ignoring the clear limitations to the right to privacy explicitly expressed in *Roe* v. *Wade* in order to create an absolute constitutional right to abortion in a woman? The extent to which proponents of abortion are seeking to push *Roe* v. *Wade* is clear from the concerted attack on private hospitals and conscience clauses in spite of the fact that both are directly protected by *Roe* v. *Wade* and *Doe* v. *Bolton*.[15]

Perhaps Justice White also had in mind cases such as the Missouri case where a fair reading of Plaintiff-Appellants' brief and the record supports the inference that Plaintiffs contend that *Roe* v. *Wade* stands for the proposition that the woman has a constitutional right to a dead fetus.[15a]

Perhaps it is the harsh realities of abortion that finally will bring home to the Court the true nature of this debate. Those harsh realities are causing even the most avid proponents of legal abortion to reconsider their position in this debate and to ask anew what effect legalized killing will have on our society. Bernard N. Nathanson, M.D. in the New England Journal of Medicine[16] recently called attention to this dilemma. Nathanson, a founder of the National Association for Repeal of Abortion Laws (NARAL) and previously

very active in the movement to legalize abortion, recently resigned his position as Director of the Center for Reproductive and Sexual Health where 60,000 abortions had been performed. While still claiming that abortion should be legal he, nonetheless, had the courage to say:

> "Sometime ago—after a tenure of a year and a half—I resigned as director of the Center for Reproductive and Sexual Health. The Center had performed 60,000 abortions with no maternal deaths—an outstanding record of which we are proud. However, I am deeply troubled by my own increasing certainty that I had in fact presided over 60,000 deaths.
>
> "There is no longer serious doubt in my mind that human life exists within the womb from the very onset of pregnancy, despite the fact that the nature of the intrauterine life has been the subject of considerable dispute in the past. Electrocardiographic evidence of heart function has been established in embryos as early as six weeks. Electroencephalographic recordings of human brain activity have been noted in embryos at eight weeks. Our capacity to measure signs of life is daily becoming more sophisticated, and as time goes by, we will doubtless be able to isolate life signs at earlier and earlier stages in fetal development.
>
> "The Harvard Criteria for the pronouncement of death assert that if the subject is unresponsive to external stimuli (e.g., pain), if the deep reflexes are absent, if there are no spontaneous movements or respiratory efforts, if the electroencephalogram reveals no activity of the brain, one may conclude that the patient is dead. If any or all of these criteria are absent—and the fetus does respond to pain, makes respiratory efforts, moves spontaneously, and has electroencephalographic activity—life must be present.
>
> "To those who cry that nothing can be human life that cannot exist independently, I ask if the patient totally dependent for his life on treatments by the artificial kidney twice weekly is alive? Is the person with chronic cardiac disease, solely dependent for his life on the tiny batteries on his pacemaker, alive? Would my life be safe in the city without my eyeglasses?
>
> "Life is an interdependent phenomenon for us all. It is a continuous spectrum that begins *in utero* and ends at death—the bands of the spectrum are designated by words such as fetus, infant, child, adolescent, and adult.
>
> "We must courageously face the fact—finally—that human life of a special order is being taken. And since the vast majority of pregnancies are carried successfully to term, abortion must be seen as the interruption of a process that would otherwise have produced a citizen of the world. Denial of this reality is the crassest kind of moral evasiveness."

Such is the point of view of the sophisticated physician who has suddenly and realistically viewed the issue after participation in thousands of abortions. How the average juror views the related

issue of viability after experiencing it first hand was well described by an interview of a juror in the Boston trial of Dr. Edelin which appeared in Harper's Weekly:[17]

> "Only a few juries in recent memory have excited as much curiosity—and antagonism—as the one that delivered the surprise manslaughter conviction of Boston obstetrician Dr. Kenneth Edelin. For Anthony Alessi, a 30-year-old supervisor at the New England Telephone Company and a part-time student at Northeastern University, the Edelin trial provided his first jury experience. A Baptist (despite reports that all the jurors were Catholic) and the father of three, Alessi has lived in the predominantly black Roxbury section of Boston for the past 16 years.
>
> "Alessi agreed to talk to *Harper's Weekly* because of what he considers unfair and untrue allegations about the group's racism by one of the alternate jurors. He was interviewed by Alan Geismer.
>
> "Since the guilty verdict, it's been repeatedly argued that the real issue was not manslaughter but abortion. How do you feel about that?
> "I completely disagree. Even after everything I've been able to read, I still think manslaughter was the only issue. . . .
>
> "From the time we started deliberating I don't think the word 'abortion' came up twice. When it did, we all agreed that yes, there had been a legal abortion and that once the baby was detached from the mother the doctor's obligation to the mother was completed. But then we asked ourselves; did the doctor owe this baby an obligation although, granted, he was doing an abortion? And the answer we came to was, yes, that under his oath as a doctor, he owed it to the baby to do more to preserve its life, since he had in his hand an individual human life separate from the mother.
>
> "Q. How did you decide the question of viability?
> "A. We had to decide if the baby had taken a breath outside the womb. I think that we really believed Dr. J. F. Ward [a Pennsylvania pathologist called by the prosecution] that the lungs showed the baby had taken a breath. For many of us he was the decisive witness. Of course, only one person could prove viability and that was the baby itself. We felt the doctor [Edelin] didn't give the baby enough of an opportunity. He said he placed his hand on the baby's chest for 3 to 5 seconds. We didn't weight this as a real attempt to see if the baby was alive. We also took under consideration that the mother was under heavy sedation and that therefore the baby was too. With all this, well, we felt Dr. Edelin just didn't give it enough of a chance and that he should have.
>
> "Q. What about the controversial picture of the fetus that was admitted into evidence?
> "A. When it was first introduced and passed among us, the picture did have a traumatic effect on some of the girls, who didn't even want to look at it. But it was very important in our final deliberations. We passed all the evidence around the table and everyone looked at each piece, but we paid a lot of attention to that picture. None of us had ever seen a fetus

> before. For all we knew a fetus looked like a kidney. The picture was obviously of a well-formed baby, over 13 inches long. It didn't carry undue weight, but it helped us see what a baby looks like at that weight.
>
> "Q. What is your reaction to the charges by one of the alternate jurors and others that racism motivated the verdict?
> "A. I was shocked. Nothing like that ever came out in our discussions. There was no discrimination or racist talk that I heard. Those charges are simply ludicrous. We all knew the aborted baby was black—it was in the indictment—but, my God, I never realized Dr. Edelin was black until after the trial. . . ."

It was apparent to these jurors that the issue was human life—in this instance viable human life—and the obligation of society through its physicians to protect that life.

American College of Obstetrics and Gynecology Recognizes Physician's Duty to Viable Fetus

The sophisticated medical mind and the common sense of the juror once more meet in the resolution of an important legal issue. Just as the juror felt that Dr. Edelin had not done enough to preserve the life of the viable fetus, so too, the American College of Obstetrics and Gynecology (ACOG) in response to a request to file an amicus brief in support of Dr. Edelin, replied with a statement of policy which clearly enunciates concern for the viable fetus and states that "the physician does not view the destruction of the fetus as the primary purpose of abortion." The ACOG policy statement, as reported in Ob. Gyn. News December 15, 1975 p. 1, 18, reads in part:

> the College affirms that [resolution of a conflict between a pregnant woman's health interests and fetal welfare] . . . in no way implies that the physician has an adversary relationship toward the fetus and, therefore, the physician does not view the destruction of the fetus as the primary purpose of abortion. The College consequently recognizes a continuing obligation on the part of the physician toward the survival of a possibly viable fetus where this obligation can be discharged without additional hazard to the health of the mother.

The German Opinion[18]

On February 25, 1975, the Federal Constitutional Court of West Germany announced its final judgment holding unconstitutional Section 218A of the Fifth Statute for the Reform of the Penal Law which had depenalized abortion in the first trimester. On June 21, 1974, the Court, upon the application of the State of Baden Wurt-

temberg, issued a provisional order staying the effect of 218A until this final judgment. The case was ultimately heard on application of 193 members of the German Federal Parliament and five States: Baden-Wurttemberg, Bavaria, Rhineland-Pfalz, Saarland, and Schleswig-Holstein. The Court was divided 6-2 on the final judgment, Justices Rupp-von Brunneck and Simon, dissenting.

The dissenting opinion neither questioned the constitutional personhood ("legal value") of the unborn nor did it quarrel with the legal necessity for protecting unborn life; the issue over which the Constitutional Court split was the manner in which the state fulfills its constitutional obligation to protect unborn human life. The dissenting opinion begins with these words:

> "The life of each individual human being is self-evidently a central value of the order of justice. It is uncontested that the constitutional duty to the protection of life includes also its steps before birth. The explanations in Parliament and before the Federal Constitutional Court concern not the *whether,* but on the contrary only the *how* of this protection." (Emphasis in original)

In the Court's opinion, the following was written: "The express incorporation into the basic law of the self-evident right of life, in contrast to the Weimer Constitution, may be explained principally as a reaction to the 'destruction of life unworthy of value' to the 'final solution' and 'liquidations' which were carried out by the National Socialist Regime as measures of State."

The Court construed the word "everyone" in the constitutional language "everyone has the right to life . . ." to mean life in the sense of historical existence of a human individual as it exists according to definite biological and physiological knowledge.

"The process of development which has begun at that point," the Court said, "is a continuing process which exhibits no sharp demarcation and does not allow a precise division of the various steps of development of human life." The Court stated:

> "The right to life is guaranteed to everyone who lives; no distinction can be made here between various stages of the life developing itself before birth or between unborn and born life. Everyone in the sense of Article 2, Para. 2, Sentence 1, of the Basic Law is 'everyone living'; expressed in another way: every life possessing human individuality; 'everyone' also includes the yet unborn human being."

In opposition to the argument that the word "everyone" commonly denotes only a born or completed person, the Court argued:

> "The security of human existence against encroachments by the State would be incomplete if it did not also embrace the prior step of 'completed' life, that is unborn life."

The Right to Life Is The Necessary Foundation for All Other Rights

That Mr. Justice Blackmun appears to accept the scope of constitutional personhood as the primary issue is reflected in his comment in *Roe* that "(t)he appellee (Texas) and certain amici argue that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment . . . If this suggestion of personhood is established, the appellant's case, of course, collapses; for the fetus' right to life is then guaranteed specifically by the Amendment." (410 U.S. at 156, 157.) No one has openly quarreled with Mr. Justice Blackmun on this point, and there is good reason for this. Not only do both the Fifth and Fourteenth Amendments explicitly mention "life" in their respective "due process" clauses[19] but common sense dictates that the right to life is a condition precedent to the enjoyment and exercise of all other fundamental rights, including Mr. Justice Douglas's "absolute" First Amendment rights,[20] and is the necessary foundation upon which all other human rights are built. After all, only the living can enjoy the "freedom of speech," the "right peaceably to assemble," the "right of Assistance of Counsel," the "right of privacy," or even the "right to decide to have an abortion." And as a general principle only those who feel that their "right to life" is secured will dare exercise any of the above fundamental rights. Mr. Justice Brennan expressed the idea simply in *Furman* v. *Georgia*: "An executed person had indeed 'lost the right to have rights.' "[21]

The Right to Life Is Guaranteed by The Constitution

John Locke, whose influence on the thinking of the founders of this nation is well known, wrote in his Second Treatise of Civil Government of the natural rights to life and property.[22] These basic ideas found their way into the Declaration of Independence of July 4, 1776, in the clause to which the people of this nation are so frequently rededicating themselves this bicentennial year:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, . . . That whenever any Form of Government becomes destructive of these ends, *it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles . . .*"

Just fifteen years later, on Dec. 15, 1791, a time when the natural rights theories were still dominant, the "right to life" was explicitly included in the U.S. Constitution via the Fifth Amendment's due process clause.[23]

In speaking of the first official action of this nation, which declared the foundation of our government in those words, the United States Supreme Court has said that ". . . it is always safe to read the letter of the constitution in the spirit of the Declaration of Independence."[24] Then, commenting upon the basic function of government, the court, said:

> "No duty rests more imperatively upon the courts than the enforcement of these constitutional provisions intended to secure that equality of rights which is the foundation of free government."[25]

The concern here is with the attempt to secure that equality of civil rights on behalf of the unborn child in a society which, if it has not abolished the child's civil right to life altogether, has made such inroads on its exercise as to make mention of it a mockery. For what difference does it really make to protect human life in the third trimester, since every individual human being must first pass through the unprotected first and second trimesters?

Although natural law thinking underwent hard times in intellectual circles during the nineteenth century, the importance of the right to life in modern political and social theory has remained nearly unscathed as is evidenced not only by the Fourth Article of The Universal Declaration of Human Rights, according to which "Everyone has the right to life . . .," but also by the Second Article of the European Human Rights Convention,[26] and the movement to abolish capital punishment.

Considering the Court in *Roe* clearly recognized the right to life issue as crucial and was fully aware of the rank of this right in the hierarchy of fundamental legal values, a careful and thorough study of the scope of constitutional personhood as well as the nature of the unborn was certainly to be expected. After all, the last time the Court excluded a human group from the enjoyment of constitutional privileges and immunities, profound tragedy resulted. (See Mr. Justice Taney's decision in *Dred Scott* v. *Sanford*,[27] that slaves were property and that "free persons of color" were not citizens of the United States within the meaning of the Constitution.)

Does the possibility exist that in the Court's eyes the major issue was not the scope of constitutional personhood as stated but rather

other far reaching problems? Some indication of this is given in the *Roe* opinion itself. At the end of the opinion, Mr. Justice Blackmun wrote: "this holding, we feel, is consistent . . . (inter alia) . . . with the demands of the profound problems of the present day".[28] Although he does not specifically state what these problems are, Mr. Justice Blackmun provides at least a hint by mentioning at the beginning of the opinion that: "population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem."[29] If the Court's concern was to resolve or alleviate these "profound problems" by allowing population reduction via the sacrifice of unborn humans, the Court should say so and allow the matter to be debated on the merits rather than presenting the problem of *Roe* in terms of construing several potentially conflicting clauses of the Federal Constitution which guarantee individual rights.

The consequence of the *Roe* decision to the unborn is as severe and final as one can imagine. This, of course, is of no great concern to the rule of law, unless the unborn does meet the criteria of constitutional personhood and the Court either because of poor reasoning or some unstated reason arbitrarily denied the unborn the constitutional protections due it or unless the Fourteenth Amendment is inadequate as a legal device to protect the fundamental rights of all members of the human family. In either case, there is reason for concern, for the legal order has failed. Perhaps society has failed as well by not providing other solutions which were acceptable to women facing unwanted pregnancies. Professor John Ely of Yale obviously had a point when he wrote "having an unwanted child can go a long way toward ruining a woman's life."[30] No one is denying the personal tragedy or the hardships involved in an unwanted pregnancy. The issue, however, is what is being sacrificed to avert the tragedy and hardships. These are hard decisions.

Courts as well as people have faced difficult problems before and have resolved them with dignity and intellectual honesty. Such was the problem in the famous cases of *U.S.* v. *Holmes*,[31] where, following a shipwreck, the sailors threw fourteen passengers overboard to lighten a sinking lifeboat, and *Regina* v. *Dudley* and *Stephens*,[32] where two seamen, after 14 days in an open boat and starving, killed a youthful companion and fed on his flesh until they were rescued. In both of these cases the doctrine of "necessity" was raised; and "necessity" there was—no less than the lives of those later accused of homicide were at stake. These were hard decisions, harder than the abortion decision because rarely is the "necessity" in the abortion situation of the magnitude of that facing Holmes, Dudley and

Stephens. Nonetheless, the courts held that "necessity cannot justify killing."

Is that what is invovled in the abortion controversy? Is abortion an act of killing? The West German Federal Constitutional Court concluded it was and attempted to resolve the abortion problem in a manner consistent with its understanding of the values involved and their authoritative legal principles. In its concluding paragraphs, the West German Federal Constitutional Court wrote:

> The parliamentary discussions about the reform of the abortion law have indeed deepened the insight that it is the principal task of the state to prevent the killing of unborn life through enlightenment about the prevention of pregnancy on the one hand as well as through effective promotional measures in society and through a general alteration of social concepts on the other.[33]

Such an approach would be much more compatible with the deepest values and the authoritative ideals of this society.

To those who see abortion as dangerously close to infanticide, the Court owed a sound distinction. To those who believe the rule of law entails the element of reason, the Court owed more than an arbitrary command. To both of these, the Court failed.

As Philip Selznick has pointed out, "judicial conclusions gain in legal authority as they are based on good reasoning, including sound knowledge of human personality, human groups, human institutions."[34] Accepting this, *Roe* may be the command of the sovereign; but it certainly is lacking in legal authority. To this extent, a woman's right to an abortion is hollow indeed.

The Unborn Child Has A Constitutional Right to Life Which Exists In Utero

As Dr. Nathanson has said: "There is no longer serious doubt in my mind that human life exists within the womb from the very onset of pregnancy, despite the fact that the nature of intrauterine life has been the subject of considerable dispute in the past."[35]

In September, 1948, the World Medical Association (to which the United States is a founding member), "after a lengthy discussion of war crimes based on information from the United Nations War Crimes Commission"[36] adopted the Declaration of Geneva which said, "I will maintain the utmost respect for human life, from the time of conception; even under threat, I will not use my medical knowledge contrary to the laws of humanity."[37]

This was followed in October, 1949, by the International code of Medical Ethics which stated, "A doctor must always bear in mind

the importance of preserving human life from the time of conception until death."[38] At that time, Dr. Paul Cibrie, Chairman of the Committee which had drawn up the International Code, stated that the abortionists were in fact condemned in the Declaration of Geneva.[39] This was reaffirmed by the World Medical Association in 1970 with the Declaration of Oslo, "the first moral imposed upon the doctor is respect for human life as expressed in the clause of the Declaration of Geneva: 'I will maintain the utmost respect for human life from the time of conception' ."[40]

Furthermore, on November 20, 1959, the General Assembly of the United Nations *unanimously* adopted the Declaration of the Rights of the Child. The Preamble to the declaration stated that the child, by reason of his physical and mental immaturity, needs "special safeguards and care, including appropriate legal protection, before as well as after birth."[41] Governments were called upon to recognize the rights and freedoms set forth in the Declaration and to strive for their observance by legislative and other measures.

In addition, the avidly pro-abortion California Medical Association wrote in September, 1970 that "human life begins at conception and is continuous whether intra- or extra-uterine, until death."[42] The late Dr. Alan Guttmacher, pro-abortionist head of Planned Parenthood-World Population, wrote that at the exact moment of conception a new baby is created and that "at the exact moment when a new life is initiated (fertilization), a great deal is determined which is forever irrevocable—its sex, coloring, bodybuild, blood group, and in large measure its mental capacity of emotional stability."[43]

It is clear that human life, human life developing in the womb, commences its individual existence at conception or shortly thereafter. If individual human life is of intrinsic legal value in this Nation, a Nation dedicated to the protection of the rights of man, this value ought by logic and constitutional history, be protected by the Constitution, the very document which purports to put in positive form these fundamental rights. When this civil right commences as a constitutional right is the heart of the abortion controversy. The proponents of legalized abortion argue that it commences at "meaningful live birth." These amici argue that it commences en utero when individual human existence commences. These ideas are recurrent in this litigation. In determining the scope of *Roe* v. *Wade* as it applies in the context of this case, these amici ask this Court to consider these arguments.

NOTES

1. *Furman* v. *Georgia*, 408 U.S. 238, 33 L.Ed. 2d 346, 382 (1972).
2. Ibid. 408 U.S. 238, 33 L.Ed. 2d 346, 376.
3. *Dred Scott* v. *Sanford*, 19 How. 493, 15 L.Ed. 691 (1857).
4. *Roe* v. *Wade*, 410 U.S. 113 (1973) hereafter referred to simply as *Roe*.
5. See dissent of Justice White *Roe* v. *Wade*, 410 U.S. 113, 221-223 where at page 222 he uses that now famous expression characterizing the majority opinion as "an exercise of raw judicial power."
6. *Santa Clara County* v. *Southern Pacific Railroad Co.*, 118 U.S. 394 (1886) where at page 396 the court said: "The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."
7. *Roe* v. *Wade*, 410 U.S. 113, 158.
8. Ely, John Hart "The Wages of Crying Wolf: A Comment on *Roe* v. *Wade*" The Yale Law Journal, Vol. 82, 1973 pp. 920-949 at p. 947. Also see the Winter, '75 issue (Vol. I, No. I) of this review.
9. Ibid. at p. 949. Prof. Ely also remarks: "Abortion ends (or if it makes a difference, prevents) the life of a human being other than the one making the choice". Ibid. at p. 924.
10. "A New Ethic for Medicine and Society", *California Medicine*, official Journal of the California Medical Association, 113, pp. 67-68, Sept. 1970.
11. Public Hospital: *Nyberg* v. *City of Virginia*, 495 F. 2d 1342 (8th Cir. 1974).
    Private Hospital: *Doe* v. *Charleston Area Medical Center Inc.*, ... F. 2d .... (4th Cir. 1975) decided Nov. 6, 1975 #75-1161.
12. *Wolf* v. *Schoering*, 388 F. Supp. 631 (W.D. Ky. 1975).
13. *Klein* v. *Nassau County Medical Center*, 347 F. Supp. 496 (E.D. N.Y. 1972).
14. *Greco* v. *Orange Memorial Hospital Association Corporation*, ... U.S. .... 12-1-75, No. 75-432. Slip Opinion p. 6.
15. *Doe* v. *Bolton*, 410 U.S. 179 (1973).

15a. See Appellant's Brief pp. 108 and 111 and see Trial Record where Plaintiff's direct and cross examination sought to elicit such "admissions" from witnesses. See e.g. Plaintiff attorney's cross examination of Dr. Anderson.

16. Vol. 291, No. 22 (11-28-74) p. 1189.
17. Harper's Weekly, Vol. 64, No. 3116 (3-14-75).
18. Translated by John Gorby and Robert Jonas directly from the slip opinion. Consequently no citations will be given to pages since the slip opinion is generally unavailable in this country. The complete translation of Mr. Gorby and Mr. Jonas of this historic opinion will soon be published in the John Marshall Law Journal, Vol. 9, No. 3, 315 Plymouth Ct., Chicago, Ill. 60604 or Americans United For Life Inc., 230 N. Michigan, Chicago, Ill. 60601. Also, a detailed comparison of the German Court's decision with the U.S. Supreme Court's *Roe* and *Doe*, by Dr. Harold O. J. Brown, was published in the Summer, 1975, issue of this review (HLR, Vol. I, No. 3).
19. It is interesting to note in this connection that "due process of law" is the constitutional protection of the Right to Life. Cf. H. Bedau, "The Right to Life", in *The Monist*, Vol. 52, No. 4 (Oct. 1968) at p. 562.
20. See the concurring opinion of Mr. Justice Douglas, in *Roe*, 410 U.S. at p. 211.
21. 408 U.S. 238 at p. 290.
22. Locke, John *The Second Treatise of Civil Government*, Chapter II "Of the State of Nature".
23. Bedau, H. Op. cit., Note 19 Supra.
24. *Gulf, Colorado and Sante Fe R.R. Co.* v. *Ellis*, 165 U.S. 150, 160 (1897).
25. Ibid. at p. 160.
26. "Everyone's right to life shall be protected by law. No one shall be deprived of his

life intentionally save in the execution of a sentence by a court following his conviction of a crime for which this penalty is provided by law," Article two, European Human Rights Convention.

27. 19 How. 393, 15 L.Ed. 691 (1857).
28. 410 U.S. at p. 165.
29. 410 U.S. at p. 116.
30. Op. cit. Note 8 Supra at p. 923.
31. 26 F. Cas. 36 (1842).
32. 14 Q.B.D. 273 (1884).
33. Op. cit. Note 18 Supra.
34. Selznick, Philip Natural Law in Golding, The Nature of Law.
35. Op. cit. Note 16. Supra.
36. World Medical Assoc. Bulletin, Vol. 1, p. 22, April 1949.
37. Ibid.
38. World Medical Association Bulletin, Vol. 2, pp. 5-34, January 1950.
39. Ibid.
40. Ibid.
41. *Everyman's United Nations*, a complete handbook of the activities and evolution of the United Nations during its first twenty years, 1945-1965, 8th ed. United Nations, N.Y. at p. 360. It should be remembered that these are not just pious statements uttered only to be forgotten. At the War Crimes trial of the abortionists at Nuremberg the prosecutor argued that denial of legal protection to unborn children of Russian and Polish women was a crime against humanity. See closing Brief of Prosecution at 1077, *U.S.* v. *Griefelt*, 4 Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Council Law No. 10 (1946).
42. Op. cit. Note 10 Supra.
43. Guttmacher, Alan, *Having a Baby*, Signet Books, New York, New American Library, 1950 at p. 15.

Some Non-Religious Views against Proposed "Mercy-Killing" Legislation

Yale Kamisar

PART II

A Long Range View of Euthanasia

A. Voluntary v. Involuntary Euthanasia

EVER SINCE the 1870's, when what was probably the first euthanasia debate of the modern era took place,[150] most proponents of the movement—at least when they are pressed—have taken considerable pains to restrict the question to the plight of the unbearably suffering who *voluntarily seeks* death while most of their opponents have striven equally hard to frame the issue in terms which would encompass certain involuntary situations as well, *e.g.*, the "congenital idiots," the "permanently insane," and the senile.

Glanville Williams reflects the outward mood of many euthanasiasts when he scores those who insist on considering the question from a broader angle:

> The [English Society's] bill [debated in the House of Lords in 1936 and 1950] excluded any question of compulsory euthanasia, even for hopelessly defective infants. Unfortunately, a legislative proposal is not assured of success merely because it is worded in a studiously moderate and restrictive form. The method of attack, by those who dislike the proposal, is to use the 'thin edge of the wedge' argument. . . . There is no proposal for reform on any topic, however conciliatory and moderate, that cannot be opposed by this dialectic.[151]

Why was the bill "worded in a studiously moderate and restrictive form"? If it were done as a matter of principle, if it were done in recognition of the ethico-moral-legal "wall of separation" which stands between voluntary and compulsory "mercy killings," much can be said for the euthanasiasts' lament about the methods employed by the opposition. But if it were done as a matter of political

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expediency—with great hopes and expectations of pushing through a second and somewhat less restrictive bill as soon as the first one had sufficiently "educated" public opinion and next a third still less restrictive bill—what standing do the euthanasiasts then have to attack the methods of the opposition? No cry of righteous indignation could ring more hollow, I would think, than the protest from those utilizing the "wedge" principle themselves that their opponents are making the wedge objection.

In this regard the words and action of the euthanasiasts are not insignificant.

No sooner had the English Society been organized and a drive to attain "easy death" legislation launched than Dr. Harry Roberts, one of the most distinguished sympathizers of the movement, disclosed some basis for alarm as to how far the momentum would carry:

> So far as its defined objects go, most informed people outside the Catholic Church will be in general sympathy with the new Society; but lovers of personal liberty may feel some of that suspicion which proved so well justified when the Eugenics movement was at its most enthusiastic height.
>
> In the course of the discussion at the [1935] Royal Sanitary Institute Congress, two distinguished doctors urged the desirability of legalizing the painless destruction of 'human mental monstrosities' in whom improvement is unattainable; and at the inaugural meeting of the Euthanasia Legislation Society, the Chairman of the Executive Committee said that
>
> > . . . they were concerned today only with voluntary euthanasia; but, as public opinion developed, and it became possible to form a truer estimate of the value of human life, further progress along preventive lines would be possible. . . . The population was an aging one, with a larger relative proportion of elderly persons—individuals who had reached a degenerative stage of life. Thus the total amount of suffering and the number of useless lives must increase.
>
> We need to discriminate very carefully between facilitating the death of an individual at his own request and for his own relief, and the killing of an individual on the ground that, for the rest of us, such a course would be more economical or more agreeable than keeping him alive.[152]

In the 1936 debate in the House of Lords, Lord Ponsonby of Shulbrede, who moved the second reading of the voluntary euthanasia bill, described two appealing actual cases, one where a man drowned his four year old daughter "who had contracted tuberculosis and had developed gangrene in the face,"[153] another where a woman killed her mother who was suffering from "general paralysis of the insane."[154] Both cases of course were of the compulsory variety of

euthanasia. True, Lord Ponsonby readily admitted that these cases were not covered by the proposed bill, but the fact remains that they were the *only* specific cases he chose to describe.

In 1950, Lord Chorley once again called the voluntary euthanasia bill to the attention of the House of Lords. He was most articulate, if not too discreet, on excluding compulsory euthanasia cases from coverage:

> Another objection is that the Bill does not go far enough, because it applies only to adults and does not apply to children who come into the world deaf, dumb and crippled, and who have a much better cause than those for whom the Bill provides. That may be so, but we must go step by step.[155]

In 1938, two years after the English Society was organized and its bill had been introduced into the House of Lords, the Euthanasia Society of America was formed.[156] At its first annual meeting the following year, it offered proposed euthanasia legislation:

> Infant imbeciles, hopelessly insane persons . . . and any person not requesting his own death would not come within the scope of the proposed act.
>
> Charles E. Nixdorff, New York lawyer and treasurer of the society, who offered the bill for consideration, explained to some of the members who desired to broaden the scope of the proposed law, that it was *limited purposely to voluntary euthanasia because public opinion is not ready to accept the broader principle.* He said, however, that *the society hoped eventually to legalize the putting to death of nonvolunteers* beyond the help of medical science.[157]

About this time, apparently, the Society began to circulate literature in explanation and support of voluntary euthanasia, as follows:

> The American and English Euthanasia Societies, after careful consideration, have both decided that more will be accomplished by devoting their efforts at present to the measure which will probably encounter the least opposition, namely *voluntary euthanasia.* The public is readier to recognize the right to *die* than the right to *kill,* even though the latter be in mercy. To take someone's life without his consent is a very different thing from granting him release from unnecessary suffering at his own express desire. The freedom of the individual is highly prized in democracies.[158]

The American Society's own "Outline of the Euthanasia Movement in the United States and England" states in part:

> 1941. A questionnaire was sent to all physicians of New York State

> asking (1) Are you in favor of legalizing voluntary euthanasia for incurable adult sufferers? (2) Are you in favor of legalizing euthanasia for congenital monstrosities, idiots and imbeciles? Because only one-third as many physicians answered 'yes' to question 2 as to question 1, we decided that we would limit our program to voluntary euthanasia.[159]

At a meeting of the Society of Medical Jurisprudence held several weeks after the American Society voluntary euthanasia bill had been drafted, Dr. Foster Kennedy, newly elected president of the society,

> . . . urged the legalizing of euthanasia primarily in cases of born defectives who are doomed to remain defective, rather than for normal persons who have become miserable through incurable illness [and scored the] absurd and misplaced sentimental kindness [that seeks to preserve the life of a] person who is not a person. If the law sought to restrict euthanasia to those who could speak out for it, and thus overlooked these creatures who cannot speak, then, I say as Dickens did, 'The law's an ass.'[160]

As pointed out elsewhere, *while president* of the Society, Dr. Kennedy not only eloquently advocated involuntary euthanasia but strenuously *opposed* the voluntary variety.[161] Is it any wonder that opponents of the movement do not always respect the voluntary-involuntary dichotomy?

At the same time that Dr. Kennedy was disseminating his "personal" views, Dr. A. L. Wolbarst, long a stalwart in the movement, was adhering much more closely to the party line. In a persuasive address to medical students published in a leading medical journal he pointed out that

> . . . a bill is now in preparation for introduction in the New York State Legislature authorizing the administration of euthanasia to incurable sufferers on their own request[162] [and stressed that] the advocates of voluntary euthanasia do not seek to impose it on any one who does not ask for it. It is intended as an act of mercy for those who need it and demand it.[163]

What were Dr. Wolbarst's views before the English and American societies had been organized and substantial agreement reached as to the party platform? Four years earlier, in a debate on euthanasia, he stated:

> The question as usually submitted limits the discussion of legal euthanasia to those 'incurables whose physical suffering is unbearable to themselves.' That limitation is rather unfortunate, because the number of incurables within this category is actually and relatively extremely small. Very few incurables have or express the wish to die. However great their

> physical suffering may be . . . they prefer to live.
>
> If legal euthanasia has a humane and merciful motivation, it seems to me the entire question should be considered from a broad angle. There are times when euthanasia is strongly indicated as an act of mercy even though the subject's suffering is not 'unbearable to himself,' as in the case of an imbecile.
>
> It goes without saying that, in recently developed cases with a possibility of cure, euthanasia should not even be considered; but when insane or defective people have suffered mental incapacity and tortures of the mind for many years—forty-three years in a case of my personal knowledge—euthanasia certainly has proper field.[164]

In his 1939 address, Dr. Wolbarst also quoted in full the stirring suicide message of Charlotte Perkins Gilman,

> . . . described as one of the twelve greatest American women [who] had been in failing health for several years and chose self-euthanasia rather than endure the pains of cancer.[165]

He would have presented Mrs. Gilman's views more fully if he had quoted as well from her last article, left with her agent to be published after her death, where she advocates euthanasia for "incurable invalids," "hopeless idiots," "helpless paretics," and "certain grades of criminals."[166] Citing with approval the experience of "practical Germany," Miss Gilman's article asserted that

> . . . the dragging weight of the grossly unfit and dangerous could be lightened [by legalized euthanasia,] with great advantage to the normal and progressive. The millions spent in restraining and maintaining social detritus should be available for the safeguarding and improving of better lives.[167]

In 1950, the "mercy killings" perpetrated by Dr. Herman N. Sander on his cancer-stricken patient and by Miss Carol Ann Paight on her cancer-stricken father put the euthanasia question on page one.[168] In the midst of the fervor over these cases, Dr. Clarence Cook Little, one of the leaders in the movement and a former president of the American Society, suggested specific safeguards for a law legalizing "mercy killings" for the "incurably ill but mentally fit" *and* for "mental defectives."[169] The Reverend Charles Francis Potter, the founder and first president of the American Society, hailed Dr. Sander's action as "morally right" and hence that which "should be legally right."[170] Shortly thereafter, at its annual meeting, the American Society "voted to continue support" of both Dr. Sander and Miss Paight.[171]

Now, one of the interesting, albeit underplayed, features of these

cases—and this was evident all along—was that both were *involuntary* "mercy killings." There was considerable conflict in the testimony at the Sander Trial as to whether or not the victim's *husband* had pleaded with the doctor to end her suffering,[172] but nobody claimed that the victim herself had done such pleading. There was considerable evidence in the *Paight* case to the effect that the victim's *daughter* had a "cancer phobia," the cancer deaths of two aunts having left a deep mark on her,[173] but nobody suggested that the victim had a "cancer phobia."

It is true that Mother Paight said approvingly of her "mercy killing" daughter that "she had the old Paight guts,"[174] but it is no less true that Father Paight had no opportunity to pass judgment on the question. He was asleep, still under the anesthetic of the exploratory operation which revealed the cancer in his stomach when his daughter, after having taken one practice shot in the woods, fired into his left temple.[175] Is it not just possible that Father Paight would have preferred to have had the vaunted Paight intestinal fortitude channeled in other directions, *e.g.*, by his daughter bearing to see him suffer?[176]

The *Sander* and *Paight* cases amply demonstrate that to the press, the public, and many euthanasiasts, the killing of one who does not or cannot speak is no less a "mercy killing" than the killing of one who asks for death. Indeed, the overwhelming majority of known or alleged "mercy killings" have occurred without the consent of the victim. If the *Sander* and *Paight* cases are atypical at all, they are so only in that the victims were not ill or retarded children, as in the *Simpson,*[177] *Brownhill*[178] and *Long*[179] English cases and the *Greenfield,*[180] *Repouille,*[181] *Noxon*[182] and *Braunsdorf*[183] American cases.

These situations are all quite moving. So much so that two of the strongest presentations of the need for *voluntary* euthanasia, free copies of which may be obtained from the American Society, lead off with sympathetic discussions of the *Brownhill* and *Greenfield* cases.[184] This, it need hardly be said, is not the way to honor the voluntary-involuntary boundary. Not the way to ease the pressure to legalize at least this type of involuntary euthanasia as well if any changes in the broad area are to be made at all.

Nor, it should be noted, is Williams free from criticism in this regard. In his discussion of "the present law," apparently a discussion of voluntary euthanasia, he cites only one case, *Simpson,* an involuntary situation.[185] In his section on "the administration of the law" he describes only the *Sander* case and the "compassionate acquittal" of a man who drowned his four year old daughter, a sufferer of tuber-

culosis and gangrene of the face.[186] Again, both are involuntary cases. For "some other" American "mercy killing" cases, Williams refers generally to an article by Helen Silving,[187] but two of the three cases he seems to have in mind are likewise cases of involuntary euthanasia.[188]

That the press and general public are not alone in viewing an act as a "mercy killing," lack of consent on the part of the victim notwithstanding, is well evidenced by the recent deliberations of the Royal Commission on Capital Punishment.[189] The Report itself described "mercy killings" as "for example, where a mother has killed her child or a husband has killed his wife from merciful motives of pity and humanity."[190] The only specific proposal to exclude "mercy killings" from the category of murder discussed in the Report is a suggestion by the Society of Labour Lawyers which disregards the voluntary-involuntary distinction:

> If a person who has killed another person proves that he killed that person with the compassionate intention of saving him physical or mental suffering he shall not be guilty of murder.[191]

Another proposal, one by Hector Hughes, M.P., to the effect that only those who "maliciously" cause the death of another shall be guilty of murder,[192] likewise treated the voluntary and involuntary "mercy killer" as one and the same.

Testimony before the Commission underscored the great appeal of the *involuntary* "mercy killings." Thus, Lord Goddard, the Lord Chief Justice referred to the famous *Brownhill* case, which he himself had tried some fifteen years earlier, as "a dreadfully pathetic case."[193] "The son," he pointed out, "was a hopeless imbecile, more than imbecile, a mindless idiot."[194]

Mr. Justice Humphreys recalled "one case that was the most pathetic sight I ever saw,"[195] a case which literally had the trial judge, Mr. Justice Hawkins, in tears. It involved a young father who smothered his infant child to death when he learned the child had contracted syphilis from the mother (whose morals turned out to be something less than represented) and would be blind for life. "That," Mr. Justice Humphreys told the Commission, "was a real 'mercy killing.' "[196]

The boldness and daring which characterizes most of Glanville Williams' book dims perceptibly when he comes to involuntary euthanasia proposals. As to the senile, he states:

> At present the problem has certainly not reached the degree of serious-

> ness that would warrant an effort being made to change traditional attitudes toward the sanctity of life of the aged. Only the grimmest necessity could bring about a change that, however cautious in its approach, would probably cause apprehension and deep distress to many people, and inflict a traumatic injury upon the accepted code of behaviour built up by two thousand years of the Christian religion. It may be, however, that as the problem becomes more acute it will itself cause a reversal of generally accepted values.[197]

To me, this passage is the most startling one in the book. On page 348 Williams invokes "traditional attitudes towards the sanctity of life" and "the accepted code of behavior built up by two thousand years of the Christian religion" to check the extension of euthanasia to the senile, but for 347 pages he had been merrily rolling along debunking both. Substitute "cancer victim" for "the aged" and Williams' passage is essentially the argument of many of his *opponents* on the voluntary euthanasia question.

The unsupported comment that "the problem [of senility] has certainly not reached the degree of seriousness" to warrant euthanasia is also rather puzzling, particularly coming as it does after an observation by Williams on the immediately preceding page that

> . . . it is increasingly common for men and women to reach an age of 'second childishness and mere oblivion,' with a loss of almost all adult faculties except that of digestion.[198]

How "serious" does a problem have to be to warrant a change in these "traditional attitudes"? If, as the statement seems to indicate, "seriousness" of a problem is to be determined numerically, the problem of the cancer victim does not appear to be as substantial as the problem of the senile.[199] For example, taking just the 95,837 first admissions to "public prolonged-care hospitals" for mental diseases in the United States in 1955, 23,561—or one fourth—were cerebral arteriosclerosis or senile brain disease cases.[200] I am not at all sure that there are 20,000 cancer victims per year who die *unbearably painful* deaths. Even if there were, I cannot believe that among their ranks are some 20,000 per year who, when still in a rational state, so long for a quick and easy death that they would avail themselves of legal machinery for euthanasia.[201]

If the problem of the incurable cancer victim "has reached the degree of seriousness that would warrant an effort being made to change traditional attitudes toward the sanctity of life," as Williams obviously thinks it has, then so has the problem of senility. In any

event, the senility problems will undoubtedly soon reach even Williams' requisite degree of seriousness:

> A decision concerning the senile may have to be taken within the next twenty years. The number of old people are increasing by leaps and bounds. Pneumonia, 'the old man's friend' is now checked by antibiotics. The effects of hardship, exposure, starvation and accident are now minimized. Where is this leading us? . . . What of the drooling, helpless, disorientated old man or the doubly incontinent old woman lying log-like in bed? Is it here that the real need for euthanasia exists?[202]

If, as Williams indicates, "seriousness" of the problem is a major criterion for euthanatizing a category of unfortunates, the sum total of mentally deficient persons would appear to warrant high priority, indeed.[203]

When Williams turns to the plight of the "hopelessly defective infants," his characteristic vim and vigor are, as in the senility discussion, conspicuously absent:

> While the Euthanasia Society of England has never advocated this, the Euthanasia Society of America did include it in its original program. The proposal certainly escapes the chief objection to the similar proposal for senile dementia: it does not create a sense of insecurity in society, because infants cannot, like adults, feel anticipatory dread of being done to death if their condition should worsen. Moreover, the proposal receives some support on eugenic grounds, and more importantly on humanitarian grounds—both on account of the parents, to whom the child will be a burden all their lives, and on account of the handicapped child itself. (It is not, however, proposed that any child should be destroyed against the wishes of its parents.) Finally, the legalization of euthanasia for handicapped children would bring the law into closer relation to its practical administration, because juries do not regard parental mercy killing as murder. For these various reasons the proposal to legalize humanitarian infanticide is put forward from time to time by individuals. They remain in a very small minority, and the proposal may at present be dismissed as politically insignificant.[204]

It is understandable for a reformer to limit his present proposals for change to those with a real prospect of success. But it is hardly reassuring for Williams to cite the fact that only "a very small minority" has urged euthanasia for "hopelessly defective infants" as the *only* reason for not pressing for such legislation now. If, as Williams sees it, the only advantage voluntary euthanasia has over the involuntary variety lies in the organized movements on its behalf, that advantage can readily be wiped out.

In any event, I do not think that such "a very small minority" has

advocated "humanitarian infanticide." Until the organization of the English and American societies led to a concentration on the voluntary type, and until the by-products of the Nazi euthanasia program somewhat embarrassed, if only temporarily, most proponents of involuntary euthanasia, about as many writers urged one type as another.[205] Indeed, some euthanasiasts have taken considerable pains to demonstrate the superiority of defective infant euthanasia over incurably ill euthanasia.[206]

As for dismissing euthanasia of defective infants as "politically insignificant," the only poll that I know of which measured the public response to both types of euthanasia revealed that *45 percent favored euthanasia for defective infants under certain conditions while only 37.3 percent approved euthanasia for the incurably and painfully ill under any conditions.*[207] Furthermore, of those who favored the "mercy killing" cure for incurable adults, some 40 percent would require only family permission or medical board approval, but not the patient's permission.[208]

Nor do I think it irrelevant that while public resistance caused Hitler to yield on the adult euthanasia front, the killing of malformed and idiot children continued unhindered to the end of the war, the definition of "children" expanding all the while.[209] Is it the embarrassing experience of the Nazi euthanasia program which has rendered destruction of defective infants presently "politically insignificant"? If so, is it any more of a jump from the incurably and painfully ill to the unorthodox political thinker than it is from the hopelessly defective infant to the same "unsavory character"? Or is it not so much that the euthanasiasts are troubled by the Nazi experience as it is that they are troubled that the public is troubled by the Nazi experience?

I read Williams' comments on defective infants for the proposition that there are some very good reasons for euthanatizing defective infants, but the time is not yet ripe. When will it be? When will the proposal become politically significant? After a voluntary euthanasia law is on the books and public opinion is sufficiently "educated"?

Williams' reasons for not extending euthanasia—once we legalize it in the narrow "voluntary" area—to the senile and the defective are much less forceful and much less persuasive than his arguments for legalizing voluntary euthanasia in the first place. I regard this as another reason for not legalizing voluntary euthanasia in the first place.

B. The Parade of Horrors

> Look, when the messenger cometh, shut the door, and hold him fast at the door; is not the sound of his master's feet behind him?[210]

This is the "wedge principle," the "parade of horrors" objection if you will, to voluntary euthanasia. Glanville Williams' peremptory retort is:

> This use of the 'wedge' objection evidently involves a particular determination as to the meaning of words, namely the words 'if raised to a general line of conduct.' The author supposes, for the sake of argument, that the merciful extinction of life in a suffering patient is not in itself immoral. Still it is immoral, because if it were permitted this would admit 'a most dangerous wedge that might eventually put all life in a precarious condition.' It seems a sufficient reply to say that this type of reasoning could be used to condemn any act whatever, because there is no human conduct from which evil cannot be imagined to follow if it is persisted in when some of the circumstances are changed. All moral questions involve the drawing of a line, but the 'wedge principle' would make it impossible to draw a line, because the line would have to be pushed farther and farther back until all action became vetoed.[211]

I agree with Williams that if a first step is "moral" it is moral wherever a second step may take us. The real point, however, the point that Williams sloughs, is that whether or not the first step is precarious, is perilous, is worth taking, rests in part on what the second step is likely to be.

It is true that the "wedge" objection can always be advanced, the horrors can always be paraded. But it is no less true that on some occasions the objection is much more valid than it is on others. One reason why the "parade of horrors" cannot be too lightly dismissed in this particular instance is that Miss Voluntary Euthanasia is not likely to be going it alone for very long. Many of her admirers, as I have endeavored to show in the preceding section, would be neither surprised nor distressed to see her joined by Miss Euthanatize the Congenital Idiots and Miss Euthanatize the Permanently Insane and Miss Euthanatize the Senile Dementia. And these lasses—whether or not they themselves constitute a "parade of horrors"—certainly make excellent majorettes for such a parade:

> Some are proposing what is called euthanasia; at present only a proposal for killing those who are a nuisance to themselves; but soon to be applied to those who are a nuisance to other people.[212]

Another reason why the "parade of horrors" argument cannot be

too lightly dismissed in this particular instance, it seems to me, is that the parade *has* taken place in our time and the order of procession has been headed by the killing of the "incurables" and the "useless":

> Even before the Nazis took open charge in Germany, a propoganda barrage was directed against the traditional compassionate nineteenth-century attitudes toward the chronically ill, and for the adoption of a utilitarian, Hegelian point of view. . . . Lay opinion was not neglected in this campaign. Adults were propagandized by motion pictures, one of which, entitled 'I Accuse,' deals entirely with euthanasia. This film depicts the life history of a woman suffering from multiple sclerosis; in it her husband, a doctor, finally kills her to the accompaniment of soft piano music rendered by a sympathetic colleague in an adjoining room. Acceptance of this ideology was implanted even in the children. A widely used high school mathematics text . . . included problems stated in distorted terms of the cost of caring for and rehabilitating the chronically sick and crippled. One of the problems asked, for instance, how many new housing units could be built and how many marriage-allowance loans could be given to newly wedded couples for the amount of money it cost the state to care for 'the crippled, the criminal and the insane. . . .' The beginnings at first were merely a subtle shift in emphasis in the basic attitude of the physicians. *It started with the acceptance of the attitude, basic in the euthanasia movement, that there is such a thing as life not worthy to be lived.* This attitude in its early stages concerned itself merely with the severely and chronically sick. Gradually the sphere of those to be included in this category was enlarged to encompass the socially unproductive, the ideologically unwanted, the racially unwanted, and finally all non-Germans. But it is important to realize that the infinitely small wedged-in lever from which this entire trend of mind received its impetus was the attitude toward the non-rehabilitatable sick.[231]

The apparent innocuousness of Germany's "small beginnings" is perhaps best shown by the fact that German Jews were at first excluded from the program. For it was originally conceived that "the blessing of euthanasia should be granted only to [true] Germans."[214]

Relatively early in the German program, Pastor Braune, Chairman of the Executive Committee of the Domestic Welfare Council of the German Protestant Church, called for a halt to euthanasia measures

> . . . since they strike sharply at the moral foundations of the nation as a whole. The inviolability of human life is a pillar of any social order.[215]

And the pastor raised the same question which euthanasia opponents ask today, as well they might, considering the disinclination of many

in the movement to stop at voluntary "mercy killings": Where do we, how do we, draw the line? The good pastor asked:

> How far is the destruction of socially unfit to go? The mass methods used so far have quite evidently taken in many people who are to a considerable degree of sound mind. . . . Is it intended to strike only at the utterly hopeless cases—the idiots and imbeciles? The instruction sheet, as already mentioned, also lists senile diseases. The latest decree by the same authorities requires that children with serious congenital disease and malformation of every kind be registered, to be collected and processed in special institutions. This necessarily gives rise to grave apprehensions. Will a line be drawn at the tubercular? In the case of persons in custody by court order euthanasia measures have evidently already been initiated. Are other abnormal or antisocial persons likewise to be included? Where is the borderline? Who is abnormal, antisocial, hopelessly sick?[216]

Williams makes no attempt to distinguish or minimize the Nazi German experience. Apparently he does not consider it worthy of mention in a euthanasia discussion. There are, however, a couple of obvious arguments by which the Nazi experience can be minimized.

One goes something like this: It is silly to worry about the prospects of a dictatorship utilizing euthanasia

> . . . as a pretext for putting inconvenient citizens out of the way. Dictatorships have no occasion for such subterfuges. The firing squad is less bother.[217]

One reason why this counter argument is not too reassuring, however, if again I may be permitted to be so unkind as to meet speculation with a concrete example to the contrary, is that Nazi Germany had considerable occasion to use just such a subterfuge.

Thus, Dr. Leo Alexander observes:

> It is rather significant that the German people were considered by their Nazi leaders more ready to accept the exterminations of the sick than those for political reasons. It was for that reason that the first exterminations of the latter group were carried out under the guise of sickness. So-called 'psychiatric experts' were dispatched to survey the inmates of camps with the specific order to pick out members of racial minorities and political offenders from occupied territories and to dispatch them to killing centers with specially made diagnoses such as that of 'inveterate German hater' applied to a number of prisoners who had been active in the Czech underground.
>
> A large number of those marked for death for political or racial reasons were made available for 'medical experiments involving the use of involuntary human subjects.'[218]

The "hunting season" in Germany officially opened when Hitler signed, on his own letterhead, a secret order dated September 1, 1939, which read:

> Reichsleiter Bouhler and Dr. Brandt, M.D., are charged with the responsibility of enlarging the authority of certain physicians, to be designated by name, in such a manner that persons who, according to human judgment, are incurable can, upon a more careful diagnosis of their condition of sickness, be accorded a mercy death.[219]

Physicians asked to participate in the program were told that the secrecy of the order was designed to prevent patients from becoming "too agitated" and that it was in keeping with the policy of not publicizing home front measures in time of war.[220]

About the same time that aged patients in some hospitals were being given the "mercy" treatment,[221] the Gestapo was also "systematically putting to death the mentally deficient population of the Reich.[222]

The courageous and successful refusal by a Protestant pastor to deliver up certain cases from his asylum[223] well demonstrates that even the most totalitarian governments are not always indifferent to the feeling of the people, that they do not always feel free to resort to the firing squad. Indeed, vigorous protests by other ecclesiastical personalities and some physicians, numerous requests of various public prosecutors for investigation of the circumstances surrounding the mysterious passing away of relatives, and a generally aroused public opinion finally caused Hitler to yield, if only temporarily, and in August of 1941 he verbally ordered the discontinuance of the adult euthanasia program. Special gas chambers in Hadamar and other institutions were dismantled and shipped to the East for much more extensive use of Polish Jews.[224]

Perhaps it should be noted, too, that even dictatorships fall prey to the inertia of big government:

> It is . . . interesting that there was so much talk against euthanasia in certain areas of Germany, particularly in the region of Wiesbaden, that Hitler in 1943 asked Himmler to stop it. But, it had gained so much impetus by 1943 and was such an easy way in crowded concentration camps to get rid of undesirables and make room for newcomers that it could not be stopped. The wind had become a whirlwind.[225]

Another obvious argument is that it just can't happen here. I hope not. I think not.

But then, neither did I think that tens of thousands of perfectly

loyal native-born Americans would be herded into prison camps without proffer of charges and held there for many months, even years, because they were of "Japanese blood"[226] and, although the general who required these measures emitted considerable ignorance and bigotry,[227] his so-called military judgment would be largely sustained by the highest court of the land. The Japanese American experience of World War II undoubtedly fell somewhat short of first-class Nazi tactics, but we were getting warm. I venture to say it would not be too difficult to find American citizens of Japanese descent who would maintain we were getting very warm indeed.

In this regard, some of Justice Jackson's observations in his *Korematsu* dissent[228] seem quite pertinent:

> All who observe the work of courts are familiar with what Judge Cardozo described as 'the tendency of a principle to expand itself to the limit of its logic.' [Nature of the Judicial Process, p. 51.] A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court's opinion in this case.
>
> It argues that we are bound to uphold the conviction of Korematsu because we upheld one in *Hirabayashi* v. *United States,* 320 U.S. 81, when we sustained these orders in so far as they applied a curfew requirement to a citizen of Japanese ancestry. I think we should learn something from that experience.
>
> In that case we were urged to consider only the curfew feature, that being all that technically was involved, because it was the only count necessary to sustain Hirabayashi's conviction and sentence. We yielded, and the Chief Justice guarded the opinion as carefully as language will do. . . . However, in spite of our limiting words we did validate a discrimination on the basis of ancestry for mild and temporary deprivation of liberty. Now the principle of racial discrimination is pushed from support of mild measures to very harsh ones, and from temporary deprivations to indeterminate ones. And the precedent which it is said requires us to do so is *Hirabayashi.* The Court is now saying that in *Hirabayashi* we did decide the very things we there said we were not deciding. Because we said that these citizens could be made to stay in their homes during the hours of dark, it is said we must require them to leave home entirely; and if that, we are told they may also be taken into custody for deportation; and if that, it is argued they may also be held for some undetermined time in detention camps. How far the principle of this case would be extended before plausible reasons would play out, I do not know.[229]

It can't happen here. Well, maybe it cannot, but no small part of our Constitution and no small number of our Supreme Court opinions stem from the fear that *it can happen here unless we darn well*

make sure that it does not by adamantly holding the line, by swiftly snuffing out what are or might be small beginnings of what we do not want to happen here. To flick off, as Professor Williams does, the fears about legalized euthanasia as so much nonsense, as a chimerical "parade of horrors," is to sweep away much of the ground on which all our civil liberties rest.

Boyd,[230] the landmark search and seizure case which paved the way for the federal rule of exclusion,[231] a doctrine which now prevails in over twenty state courts as well,[232] set the mood of our day in treating those accused of crime:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. . . .[233]

Recent years have seen the Supreme Court sharply divided on search and seizure questions. The differences, however, have been over *application,* not over the *Boyd-Weeks* "wedge principle"; not over the view, as the great Learned Hand, hardly the frightened spinster type, put it in an oft-quoted phrase,

> . . . that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition.[234]

And when the dissenters have felt compelled to reiterate the reasons for the principle, lest its force be diminished by the failure to apply it in the particular case, and they have groped for the most powerful arguments in its behalf, where have they turned, what have they done? Why, they have employed the very arguments Glanville Williams dismisses so contemptuously. They have cited the Nazi experience. They have talked of the police state, the Knock at the Door, the suppression of political opposition under the guise of sedition. They have trotted out, if you will, the "parade of horrors."[235]

The lengths to which the Court will go in applying the "wedge principle" in the First Amendment area is well demonstrated by instances where those who have labeled Jews "slimy scum" and likened them to "bedbugs" and "snakes"[236] or who have denounced them "as all the garbage that . . . should have been burnt in the incinerators"[237] have been sheltered by the Court so that freedom of speech

and religion would not be impaired. Perhaps the supreme example is the *Barnette* case.[238]

There, in striking down the compulsory flag salute and pledge, Justice Jackson took the position that "those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."[239] "The First Amendment," he pointed out, "was designed to avoid these ends by avoiding these beginnings."[240] Justices Black and Douglas kept in step in their concurring opinion by advancing the view that "the ceremonial, when enforced against conscientious objectors . . . is a handy implement for disguised religious persecution."[241]

What were these pernicious "beginnings" again? What was this danger-laden ceremonial again? Why, requiring public school pupils "to participate in the salute honoring the Nation represented by the Flag."[242] Talk about "parades of horror"! This one is an extravaganza against which anything euthanasia opponents can muster is drab and shabby by comparison. After all, whatever else Williams and his allies make "mercy killings" out to be, *these* beginnings are not "patriotic ceremonies."

The point need not be labored. If the prospects of the police state, the knock on Everyman's door, and widespread political persecution are legitimate considerations when we enter "opium smoking dens,"[243] when we deal with "not very nice people" and "sordid little cases"[244] then why should the prospects of the police state and the systematic extermination of certain political or racial minorities be taken any less seriously when we enter the sickroom or the mental institution, when we deal with not very healthy or not very useful people, when we discuss "euthanasia" under whatever trade name?

If freeing some rapist or murderer is not too great a price to pay for the "sanctity of the home," then why is allowing some cancer victim to suffer a little longer too great a price to pay for the "sanctity of life"? If the sheltering of purveyors of "hateful and hate-stirring attacks on races and faiths"[245] may be justified in the name of a transcendent principle, then why may not postponing the death of the suffering "incurable" be similarly justified?

A Final Reflection

There have been and there will continue to be compelling circumstances when a doctor or relative or friend will violate The Law On The Books and, more often than not, receive protection from The Law In Action. But this is not to deny that there are other occasions

when The Law On The Books operates to stay the hand of all concerned, among them situations where the patient is in fact (1) presently incurable, (2) beyond the aid of any respite which may come along in his life expectancy, suffering (3) intolerable and (4) unmitigable pain and of a (5) fixed and (6) rational desire to die. That any euthanasia program may only be the opening wedge for far more objectionable practices, and that even within the bounds of a "voluntary" plan such as Williams' the incidence of mistake or abuse is likely to be substantial, are not much solace to one in the above plight.

It may be conceded that in a narrow sense it is an "evil" for such a patient to have to continue to suffer—if only for a little while. But in a narrow sense, long-term sentences and capital punishment are "evils," too.[246] If we can justify the infliction of imprisonment and death by the state "on the ground of the social interests to be protected"[247] then surely we can similarly justify the postponement of death by the state. The objection that the individual is thereby treated not as an "end" in himself but only as a "means" to further the common good was, I think, aptly disposed of by Holmes long ago. "If a man lives in society, he is likely to find himself so treated."[248]

NOTES

150. L. A. Tollemache—and not since has there been a more persuasive enthusiast—made an eloquent plea for voluntary euthanasia, The New Cure for Incurables, *Fortnightly Rev.* 19:218, 1873, in support of a similar proposal the previous year, S. D. Willams, *Euthanasia,* 1872 (a book now out of print, but a copy of which is at the British Museum). Tollemache's article was bitterly criticized by the editors of *The Spectator,* Mr. Tollemache on The Right to Die, *The Spectator,* 46:206, 1873 who stated in part: "[I]t appears to be quite evident, though we do not think it is expressly stated in Mr. Tollemache's article, that much the strongest arguments to be alleged for putting an end to human sufferings apply to cases where you cannot by any possibility have the consent of the sufferer to that course."

    In a letter to the editor, The Limits of Euthanasia, *The Spectator,* 46:240, 1873, Mr. Tollemache retorted: "I tried to make it clear that I disapproved of such relief ever being given without the dying man's express consent. . . . But it is said that all my reasoning would apply to cases like lingering paralysis, where the sufferer might be speechless. I think not . . . where these safeguards cannot be obtained, the sufferer must be allowed to linger on. Half a loaf, says the proverb, is better than no bread; one may be anxious to relieve what suffering one can, even though the conditions necessary for the relief of other (and perhaps worse) suffering may not exist. . . . I have stated my meaning thus fully, because I believe it is a common misunderstanding of Euthanasia, that it must needs involve some such proceedings as the late Mr. Charles Buxton advocated (not perhaps quite seriously),—namely, the summary extinction of idiots and of persons in their dotage." I give this round to the voluntary euthanasiasts.

151. Williams, pp. 333-4.

152. Roberts, *supra* 31, pp. 7-8.

153. 103 H.L. Deb. 466, 471, 1936.
154. *Ibid.*
155. 169 H.L. Deb. 551, 559, 1950.
156. *N.Y. Times,* Jan. 17, 1938, p. 21, col. 8.
157. ———, Jan. 27, 1939, p. 21, col. 7 (emphasis added). That the report is accurate in this regard is underscored by Mr. Nixdorff's letter to the editor, *N.Y. Times,* Jan. 30, 1939, p. 12, col. 7, wherein he complained only that "the patient who petitions the court for euthanasia should not be described as a 'volunteer' " and that "the best definition of euthanasia is 'merciful release' " rather than "mercy 'killing' or even mercy 'death' " because "being killed is associated with fear, injury and the desire to escape" and "many people dislike even to talk about death."
158. Dr. Frank Hinman of the University of California Medical School quotes such literature in Euthanasia, *J. Nerv. & Ment. Dis.,* 99:640, 643, 1944.
159. Distributed by the Euthanasia Society of America.
160. *N.Y. Times,* Feb. 14, 1939, p. 2, col. 6.
161. *See supra* 72 and accompanying text.
162. Wolbarst, 1939, *supra* 74, pp. 354-5.
163. *Id. p.* 354.
164. Wolbarst, 1935, *supra* 74, pp. 330-2.
165. Wolbarst, 1939, *supra* 74, p. 356.
166. Gilman. The Right to Die. *The Forum,* 94:297-300, 1935.
167. *Ibid.*
168. *See infra* 172-6. More than 100 reporters, photographers and broadcasters attended the Sander trial. In ten days of court sessions, the press corps filed 1,600,000 words. Not Since Scopes? *Time, Mar.* 13, 1950, p. 43
169. *N.Y. Times,* Jan. 12, 1950, p. 54, col. 1.
170. ———, Jan. 9, 1950, p. 40, col. 2.
171. ———, Jan. 18, 1950, p. 33, col. 5.
172. ———, Feb. 24, 1950, p. 1, col. 6; Feb. 28, 1950, p. 1, col. 2; Similar to Murder, *Time,* Mar. 6, 1950, p. 20. Although Dr. Sander's own notation was to the effect that he had given the patient "ten cc of air intravenously repeated four times" and that the patient "expired within ten minutes after this was started," *N.Y. Times,* Feb. 24, 1950, p. 15, col. 5; "Similar To Murder," *Time,* Mar. 6, 1950, p. 20, and the attending nurse testified that the patient was still "gasping" when the doctor injected the air, *N.Y. Times,* Feb. 28, 1950, p. 1, col. 2, the defendant's position at the trial was that the patient was dead before he injected the air, *N.Y. Times,* Mar. 7, 1950, p. 1, col. 1; The Obsessed, *Time,* Mar. 13, 1950, p. 23; his notes were not meant to be taken literally, "It's a casual dictation . . . merely a way of closing out the chart." *N.Y. Times,* Mar. 7, 1950, p. 19, col. 2. Dr. Sander was acquitted, *N.Y. Times,* Mar. 10, 1950, p. 1, col. 6. The alleged "mercy killing" split the patient's family. The husband and one brother sided with the doctor; another brother felt that the patient's fate "should have been left to the will of God." 40 cc of Air. *Time,* Jan. 9, 1950, p. 13. Shortly afterwards, Dr. Sander's license to practice medicine in New Hampshire was revoked, but was soon restored. *N.Y. Times,* June 29, 1950, p. 31, col. 6. He was also ousted from his county medical society, but after four years struggle gained admission to one. *N.Y. Times,* Dec. 2, 1954, p. 25, col. 6.
173. *N.Y. Times,* Jan. 28, 1950, p. 30, col. 1, Feb. 1, 1950, p. 54, col. 3, Feb. 2, 1950, p. 22, col. 5; For Love or Pity. *Time,* Feb. 6, 1950, p. 15; The Father Killer. *Newsweek,* Feb. 13, 1950, p. 21. Miss Paight was acquitted on the ground of "temporary insanity" *N.Y. Times,* Feb. 8, 1950, p. 1, col. 2.
174. The Father Killer, *Supra* 173.
175. *See supra* 173. Miss Paight was obsessed with the idea that "daddy must never know he had cancer," *N.Y. Times,* Jan. 28, 1950, p. 30, col. 1.
176. " 'I had to do it. I couldn't bear to see him suffering.' . . . Once, when she woke up

from a strong sedative, she said: 'Is daddy dead yet? I can't ever sleep until he is dead.' " The Father Killer, *Supra* 173.

177. *Rex* v. *Simpson,* 11 Crim. App. R. 218, 84 L.J.K.B. 1893 (1915), dealt with a young soldier on leave, who, while watching his severely ill child and waiting for his unfaithful wife to return home, cut the child's throat with a razor. His statement was as follows: "The reason why I done it was I could not see it suffer any more than what it really had done. She was not looking after the child, and it was lying there from morning to night, and no one to look after it, and I could not see it suffer any longer and have to go away and leave it." Simpson was convicted of murder and his application for leave to appeal dismissed. The trial judge was held to have properly directed the jury that they were not at liberty to find a verdict of manslaughter, though the prisoner killed the child "with the best and kindest motive."

178. Told to undergo a serious operation, and worried about the fate of her 31 year old imbecile son if she were to succumb, 62 year old Mrs. May Brownhill took his life by giving him about 100 aspirins and then placing a gas tube in his mouth. *The Times,* London, Oct. 2, 1934, p. 11, col. 2; *N.Y. Times,* Dec. 2, 1934, p. 25, col. 1, Dec. 4, 1934, p. 15, col. 3. Her family doctor testified that the boy's life had been "a veritable living death" *The Times,* London, Dec. 3, 1934, p. 11, col. 4. She was sentenced to death, with a strong recommendation for mercy, *The Times,* London, Dec. 3, 1934, p. 11, col. 4; *N.Y. Times,* Dec. 2, 1934, p. 25, col. 1, but she was reprieved two days later, *The Times,* London, Dec. 4, 1934, p. 14, col. 2; and pardoned and set free three months later, *The Times,* London, Mar. 4, 1935, p. 11, col. 3; Mother May's Holiday, *Time,* Mar. 11, 1935, p. 21. According to the *N.Y. Times,* Mar. 3, 1935, p. 3, col. 2, the Home Office acted "in response to nationwide sentiment." The *Chicago Tribune* report of the case is reprinted in Harno, *Criminal Law and Procedure.* 1957, p. 36, n. 2. Fourth edition.

Incidentally, Mrs. Brownhill's operation was quite successful. *The Times,* London, Dec. 3, 1934, p. 11, col. 4.

179. Gordon Long gassed his deformed and imbecile seven year old daughter to death, stating he loved her "more so than if she had been normal." Goodbye. *Time,* Dec. 2, 1946, p. 32. He pleaded guilty and was sentenced to death, but within a week the sentence was commuted to life imprisonment. *The Times,* London, Nov. 23, 1946, p. 2, col. 7; Nov. 29, 1946, p. 7, col. 2; *N.Y. Times,* Nov. 29, 1946, p. 7, col. 2.

180. For 17 years, Louis Greenfield, a prosperous Bronx milliner, had washed, dressed and fed his son, an "incurable imbecile" with the mentality of a two year old who spoke in a mumble understandable only by his mother. *N.Y. Times,* Jan. 13, 1939, p. 3, col. 1, May 12, 1939, p. 1, col. 6. Finally, after considering killing him for several years, Greenfield sent his wife out of the house, lest she interfere with his plans, and chloroformed his son to death. He is reported to have told members of the emergency squad: "Don't revive him, he's better off dead," *N.Y. Times,* May 9, 1939, p. 48, col. 1. *See also* Better Off Dead, *Time,* Jan. 23, 1939, p. 24.

At the trial Greenfield testified that he killed his son because "I loved him, it was the will of God." He insisted that he was directed by an "unseen hand" and by an "unknown voice," *N.Y. Times,* May 11, 1939, p. 10, col. 2 and was acquitted of first degree manslaughter, *N.Y. Times,* May 12, 1939, p. 1, col. 6. Some psychiatrists were reported to have condemned Greenfield as "a murderer who had simply grown tired of caring for his imbecile son." Better Off Dead, *supra.*

181. This case is quite similar to the *Greenfield* case which preceded it by several months. In fact, Louis Repouille said he had read the newspaper accounts of the Greenfield case and: "It made me think about doing the same thing to my boy. I think Mr. Greenfield was justified. They didn't punish him for it. But I am not looking for sympathy," *N.Y. Times,* Oct. 14, 1939, p. 21, col. 2.

Repouille was an elevator operator who had spent his life's earnings trying to cure his "incurably imbecile" 13 year old son who had been blind for five years and

bedridden since infancy. Repouille is reported to have put it this way: "He was just like dead all the time. . . . He couldn't walk, he couldn't talk, he couldn't do anything." *N.Y. Times,* Oct. 13, 1939, p. 25, col. 7. He testified at the trial that the idea of putting his son out of his misery "came to me thousands of times," *N.Y. Times,* Dec. 6, 1941, p. 34, col. 2. Finally, one day when his wife stepped out of the house for a while, he chloroformed his son to death. *N.Y. Times,* Oct. 13, 1939, p. 25, col. 7.

Repouille kept a number of canaries and lovebirds in his home. When a neighbor found the Repouille boy with a chloroform-soaked rag over his face, he removed the rag and was about to throw it on the floor when Repouille is reported to have said: "Don't, can't you see I have some birds here." *Ibid.*

Repouille was found guilty of manslaughter in the second degree, *N.Y. Times,* Dec. 10, 1941, p. 27, col. 7, and freed on a suspended sentence of 5-10 years. *N.Y. Times,* Dec. 25, 1941, p. 44, col. 1.

Subsequently, Repouille's petition for naturalization was dismissed on the ground that he had not possessed "good moral character" within the five years preceding the filing of the petition. In an opinion which makes Repouille the "mercy killing" perhaps best known to lawyers today, Judge Learned Hand said in part:

"It is reasonably clear that the jury which tried Repouille did not feel any moral repulsion at his crime. Although it was inescapably murder in the first degree, not only did they 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. Moreover, it is also plain, from the sentence which he imposed, that the judge could not have seriously disagreed with their recommendation.

* * *

"Left at large as we are, without means of verifying our conclusion, and without authority to substitute our individual beliefs, the outcome must needs be tentative; and not much is gained by discussion. We can say no more than that, . . . we feel reasonably secure in holding that only a minority of virtuous persons would deem the practice morally justifiable, while it remains in private hands, even when the provocation is as overwhelming as it was in this instance." *Repouille* v. *United States,* 165 F. 2d 152, 153 (2d Cir. 1947).

182. John F. Noxon, a 46 year old well-to-do lawyer, was charged with electrocuting his six month old mongoloid son by wrapping a frayed electric cord about him and placing him—in wet diapers—on a silver serving tray to form contact. Noxon claimed it was all an accident. *N.Y. Times,* Sept. 28, 1943, p. 27, col. 2; Sept. 29, 1943, p. 23, col. 7; Oct. 29, 1943, p. 21, col. 7; Jan. 14, 1944, p. 21, col. 3; July 7, 1944, p. 30, col. 2; July 8, 1944, p. 24, col. 1. After a mistrial because a juror became ill, *N.Y. Times.* Mar. 10, 1944, Noxon was convicted of first degree murder, *N.Y. Times,* July 7, 1944, p. 30, col. 2. His death sentence was commuted to life, but in granting the clemency, Gov. M. J. Tobin of Massachusetts did not explain the "extenuating circumstances" other than to caution that a "mercy-killing, so-called," could not be considered an extenuating circumstance and was not a factor in his decision. *N.Y. Times,* Aug. 8, 1946, p. 42, col. 4. To make parole possible, Noxon's sentence was further commuted to six years to life with the proviso that he would live under parole supervision for life upon release from prison. *N.Y. Times,* Dec. 30, 1948, p. 13, col. 5. Shortly thereafter, Noxon was paroled, *N.Y. Times,* Jan. 4, 1949, p. 16, col 3; Jan. 8, 1949, p. 30 col. 4. He was disbarred the following year. *N.Y. Times,* May 30, 1950, p. 2, col. 7.

183. Virginia Braunsdorf was a spastic-crippled 29 year old "helpless parody of womanhood," who could not hold her head upright and who talked in gobbling sounds which only her father could understand. At one time, to keep her home and well

attended, her father, Eugene, a symphony musician, had held down four jobs simultaneously, but he finally resigned himself to leaving her at a private sanitarium. Worried about his health and the fate of his daughter if he should die, Braunsdorf took her from the sanitarium on a pretense, stopped his car, put a pillow behind her head, and shot her dead. He then attempted suicide. He was found not guilty by reason of temporary insanity. Murder or Mercy? *Time,* June 5, 1950, p. 20; *N.Y. Times,* May 23, 1950, p. 25, col. 4.

The prosecution argued that the girl was "human" and "had a right to live" and accused Braundorf of slaying her because she was a "burden on his pocketbook." *N.Y. Times,* May 23, 1950, p. 25, col. 4. The prosecution failed to explain, however, why a person furthering his own financial interests by killing his daughter would then fire two shots into his own chest, and, on reviving, shoot himself twice more.

184. In Wolbarst, 1939, *supra* 74, Dr. Dr. Wolbarst describes the *Brownhill* case as an act of mercy, based on pure mother-love" for which, thanks to the growth of the euthanasia movement in England, "it is doubtful that this poor woman even would be put on trial at the present day."

In Taking Life Legally, *Magazine Digest,* 1947, Louis Greenfield's testimony that what he did "was against the law of man, but not against the law of God," is cited with apparent approval. The article continues:

"The acquittal of Mr. Greenfield is indicative of a growing attitude towards euthanasia, or 'mercy killing,' as the popular press phrases it. Years ago, a similar act would have drawn the death sentence; today, the mercy killer can usually count on the sympathy and understanding of the court—and his freedom."

185. Williams, p. 319, and n. 9. For a discussion of the *Simpson* case, *see supra* 177.
186. Williams, p. 328. For a discussion of the *Sander* case *see supra* 172. The other case as Williams notes, p. 328. n. 5, is the same one described by Lord Ponsonby in the 1936 House of Lords debate. *See* text at 153, *supra.*
187. Williams, p. 328. Williams does not cite to any particular page of the thirty-nine page Silving article, *supra* 7, but in context he appears to allude to pp. 353-4 of the article.
188. In addition to the *Sander* case, the cases Williams makes apparent reference to are the *Paight* case, *see supra* 173-6 and accompanying text; the *Braunsdorf* case, *see supra* 183; and the *Mohr* case, *see supra* 17. Only in the *Mohr* case was there apparently euthanasia by request.
189. According to the Royal Warrant, the Commission was appointed in May, 1949, "to consider and report whether liability under the criminal law in Great Britain to suffer capital punishment for murder should be limited or modified," but was precluded from considering whether capital punishment should be abolished. Royal Commission On Capital Punishment, Report, Cmd. No. 8932, p. iii, 1953 (called henceforth the *Royal Commission Report*). For an account of the circumstances which led to the appointment of the Commission, *see* Prevezer, the English Homicide Act: A New Attempt to Revise the Law of Murder, *Colum. L. Rev.,* 57: 624, 629, 1957.
190. "It was agreed by almost all witnesses" that it would "often prove extremely difficult to distinguish killings where the motive was merciful from those where it was not." *Royal Commission Report,* 1953, para. 179. Thus the Commission "reluctantly" concluded that "it would not be possible to frame and apply a definition which would satisfactorily cover these cases. *Id.* para. 180.
191. *Royal Commission Report,* 1953, para. 180.
192. Minutes of Evidence, Dec. 1. 1949, pp. 219-20. Mr. Hughes, however, would try the apparent "mercy killer" for murder rather than for manslaughter "because the evidence should be considered not *in camera* but in open court, when it may turn out that it was not manslaughter." *Id.* para. 2825. "[T]he onus should rest upon the

person so charged to prove that it was not a malicious, but a merciful killing." *Id.* para. 2826.

193. Minutes of Evidence, Jan. 5, 1950, para. 3120. The Lord Chief Justice did not refer to the case by name, but his reference to *Brownhill* is unmistakable. For an account of this case, *see supra* 178.
194. Minutes of Evidence, para. 3120, Jan. 5, 1950.
195. *Id.* para. 3315.
196. *Ibid.*
197. Williams, p. 348.
198. *Id.* p. 347.
199. Of all first admissions to New York State Civil Hospitals for mental disorders in 1950, some 5,818 patients—*or more than one third*—were classified as cerebral arteriosclerosis or senile cases. There were 3,379 psychoses with cerebral arteriosclerosis and 2,439 senile psychoses. In the case of cerebral arteriosclerosis this represented a 600% numerical increase and a 300% increase in the proportion of total first admissions since 1920. The senile psychoses constituted almost a 400% numerical increase and a 155% increase in the proportion of total first admissions since 1920. Malzberg. A Statistical Review of Mental Disorders in Later Life. In Kaplan (Ed.) *Mental Disorders in Later Life,* 1956, p. 13. Dr. George S. Stevenson classes both psychoses together as "mental illness of aging": "As a rule these patients have very limited prospect of recovery. In fact, they die on the average within fifteen months after admission to a mental hospital." Stevenson. *Mental Health Planning For Social Action,* 1956, p. 41.
200. U.S. Dept. of Health, Education and Welfare, Patients in Mental Institutions 1955. Part II, Public Hospital for the Mentally Ill. p. 21. Some 13,972 were cerebral arteriosclerosis cases; 9,589 had senile brain diseases.
201. *See supra* 143.
202. Banks. *supra* 143, p. 305.
203. "Mental diseases are said to be responsible for as much time lost in hospitals as all other diseases combined." Boudreau, Mental Health: The New Public Frontier. *Ann. Amer. Acad. Pol. & Soc. Sci.,* 286:1, 1953. As of about ten years ago, there were "over 900,00 patients under the care and supervision of mental hospitals." Felix and Kramer. Extent of the Problem of Mental Disorders. *Id.* pp. 5, 10. Taking only the figures of persons sufficiently ill to warrant admission into a hospital for long-term care of psychiatric disorders, "at the end of 1950 there were 577,000 patients . . . in all long-term mental hospitals." *Id.* p. 9. This figure represents 3.8 per 1,000 population, and a "fourfold increase in number of patients and a twofold increase in ratio of patients to general population since 1903." *Ibid.*

    "During 1950, the state, county, and city mental hospitals spent $390,000,000 for care and maintenance of their patients. *Id.* p. 13.
204. Williams, pp. 349-50.
205. In Turano, Murder by Request *Amer. Mercury,* 36:423, 1935, the author goes considerably beyond the title of his paper. He scores the "barbarous social policy" which nurtures "infant monstrosities and hopelessly injured children for whom permanent suffering is the sole joy of living" and "old men and women awaiting slow extinction from the accumulated ailments of senility," *id.* p. 424, and notes in his discussion of "permissive statutes" that "when the sufferer is not mentally competent, the decision could be left to near relatives," *id.* p. 428.

    In Should They Live? *Amer. Scholar,* 7:454, 1938, Dr. W. G. Lennox refers to the congenital idots, the incurably sick, the mentally ill and the aged as "that portion of our population which is a heavy and permanent liability," *id.* p. 457, and agrees with others that "there is *somewhere* a biological limit to altruism, even for man," *id.* p. 458. Dr. Lennox would presently eliminate "only the idiots and monsters, the criminal permanently insane and the suffering incurables who themselves wish for death,"

id. p. 464. W. W. Gregg similarly advocates euthanasia for all "criminally or hopelessly insane," The Right to Kill, *No. Amer. Rev.*, 237:239, 247, 1934 and concludes, *id.* p. 249:

"With the coming of a more rational social order . . . it is possible to foresee the emergence of a socialized purpose to eliminate such human life as shows itself conspicuously either inhuman, or unhuman, or unable to function happily; in order thereby to help bring about a safer and fuller living for that normal humanity which holds the hope of the future.

W. A. Shumaker, in Those Unfit to Live, *L.N.* 29:165, 166-7, 1925, comments:

"Could we but devise an acceptable formula, ten thousand idiots annually put to death by state boards of health would mean no more to us than ten thousand pedestrians annually put to death by automobilists do now.

* * *

"It is impossible to give a common sense reason why an absolute idiot should be permitted to live. His life is of no value to him or to anyone else, and to maintain its existence absorbs a considerable part of the life of a normal being. Of course one shrinks at the thought of putting him to death. But why is it that we shrink? And why, though we shrink from such an act, do we find it possible to excuse him who does it?

* * *

"Is the balance swinging too far toward over-consideration not only for the idiot but for the moron and the lunatic and too little consideration for the normality on which civilization must rest?" In 1935, Dr. Alexis Carrel, the Rockefeller Institute's famed Nobel Prize winner, took the position that "not only incurables but kidnapers, murderers, habitual criminals of all kinds, as well as the hopelessly insane, should be quietly and painlessly disposed of." *Newsweek*, Nov. 16, 1935, p. 40; *Time*, Nov. 18, 1935, p. 53; Pro and Con: Right and Wrong of Mercy Killing, *The Digest*, 1:22, 1937.

Another debate on mercy killing, *supra* 92, p. 94, similarly embraced involuntary situations. The "question presented" was:

"Should physicians have the legal privilege of putting painlessly out of their sufferings *unadjustably defective infants*, patients suffering from painful and incurable illness and the *hopelessly insane and feeble-minded* provided, of course, that maximum legal and professional safeguards against abuse are set up, *including the consent of the patient when rational and adult?*" (Emphasis added.)

The proponents of euthanasia made the pitch for voluntray euthanasia, then shifted (p. 95):

"Euthanasia would also do away with our present savage insistence that some of us must live on incurably insane or degraded by the helplessness of congenital imbecility."

For the results of a 1937 national poll on the question which covered the problem of "infants born permanently deformed or mentally handicapped" as well as "persons incurably and painfully ill." *See infra* 207 and accompanying text.

206. Dr. Foster Kennedy believes euthanasia of congenital idiots has two major advantages over voluntary euthanasia (1) error in diagnosis and possibility of betterment by unforeseen discoveries are greatly reduced; (2) there is not mind enough to hold any dream or hope which is likely to be crushed by the forthright statement that one is doomed, a necessary communication under a voluntary euthanasia program. Kennedy's views are contained in Euthanasia: To Be Or Not To Be, *supra* 42, 1939, reprinted with the notation that his views remain unchanged, *supra* 42, 1950; The Problem of Social Control of the Congential Defective. *Amer. J. Psychiat.*, 99:13, 1942. *See also* text at 72-4, *supra.*

Dr. Wolbarst also indicates that error in diagnosis and possibilities of a cure are reduced in the case of insane or defective people. *See text* at 74-6, *supra.*

207. The Fortune Quarterly Survey: IX. *Fortune,* July 1937, pp. 96, 106. Actually, a slight *majority* of those who took a position on the defective infants favored euthanasia under certain circumstances since 45% approved under certain circumstances, 40.5% were unconditionally opposed, and 14.5% were undecided. In the case of the incurably ill, only 37.3% were in favor of euthanasia under any set of safeguards, 47.5% were flatly opposed, and 15.2% took no position.

Every major poll taken in the United States on the question has shown popular opposition to voluntary euthanasia. In 1937 and 1939 the American Institute of Public Opinion polls found 46% in favor, 54% opposed. A 1947 poll by the same group found only 37% in favor, 54% opposed and 9% of no opinion. For a discussion of these and other polls by various newspapers and a breakdown of the public attitude on the question in terms of age, sex, economic and educational levels *see* Note, Judicial Determination of Moral Conduct In Citizenship Hearings, *U. of Chi. L. Rev.,* 16:138, 141-2 and n. 11, 1948.

As Williams notes, however, p. 332, a 1939 British Institute of Public Opinion poll found 68% of the British in favor of some form of legal euthanasia.

208. The Fortune Quarterly Survey, *supra* 207.

209. Mitscherlich and Mielke. *Doctors of Infamy,* 1949, P. 114. The Reich Committee for Research on Hereditary Diseases and Constitutional Susceptibility to Severe Diseases originally dealt only with child patients up to the age of three, but the age limit was later raised to eight, twelve, and apparently even sixteen or seventeen years. *Id* p. 116.

210. II Kings, VI, 32, quoted and applied in Sperry. The Case Against Mercy Killing. *Amer. Mercury,* 70:271, 276, 1950.

211. Williams, p. 315. At this point, Williams is quoting from Sullivan, *Catholic Teaching on the Morality of Euthanasia,* 1949, pp. 54-5. This thorough exposition of the Catholic Church's position on euthanasia was originally published by the Catholic University of America Press, than republished by the Newman Press as *The Morality of Mercy Killing,* 1950.

212. *Supra* 26.

213. Alexander. Medical Science Under Dictatorship. *N. Engl. J. Med.,* 241:39, 44, 40, 1949 (emphasis added). To the same effect is Ivy. Nazi War Crimes of a Medical Nature. *JAMA,* 139:131, 132, 1949, concluding that the practice of euthanasia was a factor which led to "mass killing of the aged, the chronically ill, 'useless eaters' and the politically undesirable," and Ivy. Nazi War Crimes of a Medical Nature, *Federation Bull.,* 33:133, 142, 1947, noting that one of the arguments the Nazis employed to condone their criminal medical experiments was that "if it is right to take the life of useless and incurable persons which as they point out has been suggested in England and the United States then it is right to take the lives of persons who are destined to die for political reasons."

Doctors Leo Alexander and A. C. Ivy were both expert medical advisors to the prosecution at the Nuremberg Trials.

See also the Nov. 25, 1940 entry to Shirer, *Berlin Diary,* 1941, pp. 454, 458-9:

"I have at last got to the bottom of these 'mercy killings.' It's an evil tale. The Gestapo, with the knowledge and approval of the German government is systemically putting to death the mentally deficient population of the Reich.

"X, a German, told me yesterday that relatives are rushing to get their kin out of private asylums and out of the clutches of the authorities. He says the Gestapo is doing to death persons who are merely suffering temporary derangement or just plain nervous breakdown.

"What is still unclear to me is the motive for these murders. Germans themselves advance three:

* * *

"3. That they are simply the result of the extreme Nazis deciding to carry out their eugenic and sociological ideas.

* * *

"The third motive seems most likely to me. For years a group of radical Nazi sociologists who were instrumental in putting through the Reich's sterilization laws have pressed for a national policy of eliminating the mentally unfit. They say they have disciples among many sociologists in other lands, and perhaps they have. Paragraph two of the form letter sent the relatives plainly bears the stamp of the sociological thinking: 'In view of the nature of his serious incurable ailment, his death, which saved him from a lifelong institutonal sojourn, is to be regarded merely as a release.'" (Reprinted in *CF* 10:40-58, 1971.)

This contemporaneous report is supported by evidence uncovered at the Nuremberg Medical Trial. Thus, an August, 1940 form letter to the relatives of a deceased mental patient states in part: "Because of her grave mental illness life was a torment for the deceased. You must therefore look on her death as a release." This form letter is reproduced in Mitscherlich and Mielke, *supra* 209, p. 103. Dr. Alexander Mitscherlich and Mr. Fred Mielke attended the trial as delegates chosen by a group of German medical societies and universities.

According to the testimony of the chief defendant at the Nuremberg Medical Trial. Karl Brandt, Reich Commissioner for Health and Sanitation and personal physician to Hitler, the Fuhrer had indicated in 1935 that if war came he would effectuate the policy of euthanasia since in the general upheaval of war the open resistance to be anticipated on the part of the church would not be the potent force it might otherwise be. *Supra* 209, p. 91.

Certain petitions to Hitler by parents of malformed children requesting authority for "mercy deaths" seem to have played a part in definitely making up his mind. *Ibid.*

214. Defendant Viktor Brack, Chief Administrative Officer in Hitler's private chancellory, so testified at the Nuremberg Medical Trial, 1 Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Council Law No. 10, 1950, pp. 877-80 ("The Medical Case").
215. *Supra* 209, p. 107.
216. *Ibid.* According to testimony at the Nuremberg Medical Trial, although they were told that "only incurable patients, suffering severely, were involved," even the medical consultants to the program were "not quite clear on where the line was to be drawn." *Id.* p. 94.
217. *Supra* 92, p. 96.
218. Alexander, *supra* 213, p. 41. Dr. Alexander Mitscherlich and Mr. Fred Mielke similarly note:

"The granting of 'dying aid' in the case of incurable mental patients and malformed or idiot children may be considered to be still within the legitimate sphere of medical discussion. But as the "winnowing process' continued, it moved more and more openly as purely political and ideological criteria for death, whether the subjects were considered to be 'undesirable racial groups,' or whether they had merely become incapable of supporting themselves. The camouflage around these murderous intentions is revealed especially by proof that in the concentration camps prisoners were selected by the same medical consultants who were simultaneously sitting in judgment over the destiny of mental institution inmates." *Supra* 213, p. 41.

219. This is the translation rendered in the judgment of Military Tribunal 1, 2 Trials of War Criminals Before The Nuremberg Military Tribunals Under Control Council Law No. 10, 196 (1950) ("The Medical Case"). A slightly different but substantially identical translation appears in Mitscherlich and Mielke, *supra* 209, p. 92.

The letter, Document 630-PS, Prosecution Exhibit 330, as written in the original German, may be found in Trial of Major War Criminals Before the International Military Tribunal, 26:169 (1947). For conflicting views on whether or not the order was back-dated, *compare* Mitscherlich and Mielke, *supra* with Koessler, Euthanasia. In The Hadamar Sanatorium and International Law, *J. Crim. L., C. & P.S.*, 43:735,

737, 1953.

220. *Supra* 209, pp. 93-4.

221. In the fall of 1940, Catholic priests at a large hospital near Urach "noticed that elderly people in the hospital were dying in increasing numbers, and dying on certain days." Straight. Germany Executes Her "Unfit," *New Republic,* 104:627, 1941. Such incidents led a German bishop to ask the Supreme Sacred Congregation whether it is right to kill those "who, although they have committed no crime deserving death, yet, because of mental or physical defects, are no longer able to benefit the nation, and are considered rather to burden the nation and to obstruct its energy and strength." *Ibid.* The answer was, of course, in the negative, *ibid.,* but "it is doubtful if the mass of German Catholics, even if they learned of this statement from Rome, which is improbable, understood what it referred to. Only a minority in Germany knew of the 'mercy deaths.' " Shirer, *supra* 213, p. 459, n. 1.

222. Shirer, *supra* 213, p. 454.

223. "Late last summer, it seems Pastor von Bodelschwingh was asked to deliver up certain of his worst cases to the authorities. Apparently he got wind of what was in store for them. He refused. The authorities insisted. Pastor von Bodelschwingh hurried to Berlin to protest.

"Pastor von Bodelschwingh returned to Bethel. The local Gauleiter ordered him to turn over some of his inmates. Again he refused. Berlin then ordered his arrest. This time the Gauleiter protested. The pastor was the most popular man in his province. To arrest him in the middle of war would stir up a whole world of unnecessary trouble. He himself declined to arrest the man. Let the Gestapo take the responsibility; he wouldn't. This was just before the night of September 18, [1940]. The bombing of the Bethel asylum followed. Now I understand why a few people wondered as to who dropped the bombs." Shirer, *supra* 213, pp. 454-5.

224. *Supra* 209, pp. 113-4; Koessler, *supra* 219, p. 739.

225. Ivy, 1947, *supra* 213, pp. 133, 134.

226. As Justice Murphy pointed out in his dissenting opinion in *Korematsu* v. *United States,* 323 U.S. 214, 241-2 (1944):

"No adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry. It is asserted merely that the loyalties of this group 'were unknown and time was of the essence.' Yet nearly four months elapsed after Pearl Harbor before the first exclusion order was issued; nearly eight months went by until the last order was issued; and the last of these 'subversive' persons was not actually removed until almost eleven months had elapsed. Leisure and deliberation seem to have been more of the essence than speed. And the fact that conditions were not such as to warrant a declaration of martial law adds strength to the belief that the factors of time and military necessity were not as urgent as they have been represented to be.

"Moreover, there was no adequate proof that the Federal Bureau of Investigation and the military and naval intelligence services did not have the espionage and sabotage situation well in hand during this long period. Nor is there any denial of the fact not one person of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor while they were still free, a fact which is some evidence of the loyalty of the vast majority of these individuals and of the effectiveness of the established methods of combatting these evils. It seems incredible that under these circumstances it would have been impossible to hold loyalty hearings for the mere 112,000 persons involved or at least for the 70,000 American citizens especially when a large part of this number represented children and elderly men and women." Justice Murphy then went on to note that shortly after the outbreak of World War II the British Government examined over 70,000 German and Austrian aliens and in six months freed 64,000 from internment and from any special restrictions. 354

U.S. 242 n. 16.

See generally Rostow, The Japanese American Cases—A Disaster. *Yale L. J.* 54:489, 1945, a tale well calculated to keep you in anger and shame.

227. *See, e.g.,* General J. L. Dewitt's Final Recommendation to the Secretary of War, *U.S. Army, Western Defense Command, Final Report, Japanese Evacuation From the West Coast, 1942.* 1943, p. 32 ("The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship have become 'Americanized,' the racial strains are undiluted. . . ."), and his subsequent testimony, *Hearings Before Subcommittee of House Committee on Naval Affairs on H.R. 30,* 78th Cong., 1st Sess. 1943, pp. 739-40. ("You needn't worry about the Italians at all except in certain cases. Also, the same for the Germans except in individual cases. But we must worry about the Japanese all the time until he is wiped off the map. Sabotage and espionage will make problems as long as he is allowed in this area—problems which I don't want to have to worry about.") After a careful study, Professor (now Dean) Rostow took this position:

"The dominant factor in the development of this policy was not a military estimate of a military problem, but familiar West Coast attitudes of race prejudice. The program of excluding all persons of Japanese ancestry from the coastal area was conceived and put through by the organized minority whose business it has been for forty-five years to increase and exploit racial tensions on the West Coast. The Native Sons and Daughters of the Gold West and their sympathizers, were lucky in their general, for General DeWitt amply proved himself to be one of them in opinion and values." Rostow, *supra* 226, p. 496.

228. *See supra* 226.

229. 323 U.S. at 246-7.

230. *Boyd* v. *United States,* 116 U.S. 616 (1886).

231. *See e.g., Weeks* v. *United States,* 232 U.S. 283 (1914); *Gouled* v. *United States,* 255 U.S. 298 (1921); *McDonald* v. *United States,* 335 U.S. 451 (1948); *United States* v. *Jeffers,* 342 U.S. 48 (1951).

232. *See* Anno. 50 *Amer. L. Rev.* 2d 531, 536, 556-60 (1956).

233. 116 U.S. 616, 635. The search and seizure cases contain about as good an articulation of the "wedge principle" as one can find anywhere, except, perhaps if one turns to the recent *Covert* and *Krueger* cases, where Mr. Justice Black quotes the *Boyd* statement with approval and applies it with vigor:

"It is urged that the expansion of military jurisdiction over civilians claimed here is only slight, and that the practical necessity for it is very great. The attitude appears to be that a slight encroachment on the Bill of Rights and other safeguards in the Constitution need cause little concern. But to hold that these wives could be tried by the Military would be a tempting precedent. Slight encroachments create new boundaries from which legions of power can seek new territory to capture." *Reid* v. *Covert,* 354 U.S. 1, 39-40 (1957).

234. *United States* v. *Kirschenblatt,* 16, F.2d 202, 203 (2nd Cir. 1926).

235. Thus, in *Brinegar* v. *United States,* 338 U.S. 160 (1949), it was Jackson the Chief Counsel of the United States at the Nuremberg Trials as well as Jackson the Supreme Court Justice who warned (338 U.S. at 180-1):

"Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons, and possessions are subject at any hour to unheralded search and seizure by the police."

In *United States* v. *Rabinowitz,* 339 U.S. 56, 82 (1950), Justice Frankfurter cautioned:

"By the Bill of Rights the founders of this country subordinated police action to legal restraints, not in order to convenience the guilty but to protect the innocent. Nor did they provide that only the innocent may appeal to these safeguards. They know too well that the successful prosecution of the guilty does not require jeopardy to the innocent. The knock at the door under the guise of a warrant of arrest for a venial or spurious offense was not unknown to them. . . . We have had grim reminders in our day of their experience. Arrest under a warrant for a minor or a trumped-up charge has been familiar practice in the past, is a commonplace in the police state of today, and too well known in this country. . . . The progress is too easy from police action unscrutinized by judicial authorization to the police state."

In *Harris* v. *United States,* 331 U.S. 145 (1947), four Justices dissented in there separate opinions. The first dissent asked (331 U.S. at 163):

"How can there be freedom of thought or freedom of speech or freedom of religion, if the police can, without warrant, search your house and mine from garret to cellar merely because they are executing a warrant of arrest? How can men feel free if all their papers may be searched, as an incident to the arrest of someone in the house, on the chance that something may turn up, or rather be turned up? Yesterday the justifying document was an illicit ration book, tomorrow it may be some suspect piece of literature."

The second dissent voiced fears of "full impact of today's decision" (331 U.S. at 194):

"The principle established by the Court today can be used as easily by some future government determined to suppress political opposition under the guise of sedition as it can be used by a government determined to undo forgers and defrauders. . . . [It] takes no stretch of the imagination to picture law enforcement officers arresting those accused of believing, writing, or speaking that which is proscribed, accompanied by a thorough ransacking of their homes as an 'incident' to the arrest in an effort to uncover 'anything' of a seditious nature."

The third dissent pointed out (331 U.S. at 198):

"In view of the readiness of zealots to ride roughshod over claims of privacy for any ends that impress them as socially desirable, we should not make inroads on the rights protected by this Amendment."

236. *Terminello* v. *Chicago,* 337 U.S. 1 (1949), striking down an ordinance which imposed a fine of not more than two hundred dollars for a "breach of peace," defined by the trial court as misbehavior which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm." (337 U.S. at 3.) The Court ruled, per Douglas, J., that a conviction on *any* of the grounds charged could not stand. "There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." (337 U.S. at 4-5.) The dissenting opinion by Jackson, 337 U.S. 13-21, culls long passages from the speech in question.

237. *Kunz v. New York,* 340 U.S. 290 (1951), overturning a conviction and ten dollar fine for holding a religious meeting without a permit, defendant's permit having been revoked after a hearing by the police commissioner on evidence that he had ridiculed and denounced other religious beliefs at prior meetings. Samples of Kunz's prior preachings may be found in Jackson's dissenting opinion, 340 U.S. at 296. Kunz displayed a certain flair for bipartisanship; he also denounced Catholicism as "a religion of the devil" and the Pope as "The anti-Christ." *Ibid.*

238. *Board of Education* v. *Barnette,* 319 U.S. 624 (1943).

239. 319 U.S. at 641. There was no majority opinion. Chief Justice Stone and Justice

Rutledge concurred in Justice Jackson's opinion; Justices Black and Douglas wrote a concurring opinion; and Justice Murphy wrote a separate concurring opinion.

240. *Ibid.*
241. U.S. at 644.
242. 319 U.S. at 626.
243. *See, e.g., Johnson* v. *United States,* 333 U.S. 10 (1948). The point is made in rather homey fashion in Houts *From Gun to Gavel: The Courtroom Recollections of James Mathers of Oklahoma,* 1954, pp. 213-7.
244. The phrases are those of Mr. Justice Frankfurter, dissenting in *United States* v. *Rabinowitz,* 339 U.S. 56, 68-9 (1950).
245. The phrase is Justice Jackson's dissenting in *Kunz* v. *New York,* 340 U.S. 290, 295 (1951).
246. Perhaps this would not be true if the only purpose of punishment was to reform the criminal. But whatever *ought to be* the case, this obviously *is not.* "If it were, every prisoner should be released as soon as it appears clear that he will never repeat his offence, and if he is incurable he should not be punished at all." Holmes, *supra* 23, p. 42.
247. Michael and Adler, *Crime, Law and Social Science,* 1933, p. 351. The authors continue, p. 352:

"The end of the criminal law must be the common good, the welfare of a political society determined, of course, by reference to its constitution. Punishment can be justified only as an intermediate means to the ends of deterrence and reformation which, in turn, are means for increasing and preserving the welfare of society. . . ."

248. Holmes, *supra* 23, p. 44.

Euthanasia and Biathanasia: On Dying and Killing

David W. Louisell

IN ITS precise meaning, "euthanasia" is the desideratum of religion as well as of any morally or ethically based social policy that has to do with death. Coming from the Greek words meaning "good" and "death," it specifies the kind of a death that must be as much the ideal of the moral theologian as it is of the philosopher and secular humanist—a happy death. Yet its corruption seems pervasive in popular usage.[1] It has come to mean the deliberate, intended painless putting to death of one human person by another, the willed termination of human life, which is a euphemism for murder as defined by our law. It would have been better to adhere to the original meaning of "euthanasia" and use another word, perhaps "biathanasia" for deliberate, affirmative killing in the mercy-death context. But so pervasive and universal is the terminological corruption that scholars, too, seem to have relinquished any notion of restoring original usage and have accepted the modern meaning of euthanasia. Thus, Professor Arthur J. Dyck, in using "euthanasia" in the modern sense, would adopt as a synonym for its original meaning the Latin expression, *benemortasia.*[2]

The Definitional Problem: Voluntary and Involuntary Euthanasia

Taking "euthanasia," in accordance with modern usage, to mean deliberate, intentional painless killing is only the beginning of the definitional problem. Does this include such a killing only when it is sought and requested by the euthanatee or one imposed upon him without regard to his consent—the elimination of defective or hopelessly ill or senile persons, such as Hitler's "useless eaters"? In a word, is the definition directed against only voluntary, or also involuntary, euthanasia?

On the surface, the dichotomy would appear clean-cut. If so, the precise thinker would have cause to resent the countering of argu-

David W. Louisell is a professor of law at the University of California (Berkeley); this article first appeared in *The Catholic University Law Review* (22 C.U.L.R, 723, © 1973) and is reprinted here with permission. The term "Biathanasia" was coined by Prof. Louisell (and Prof. David Daube, also of Berkeley) to denote "death by killing" as opposed to the "happy killing" implied by euthanasia.

ment for voluntary euthanasia, with argument pertinent only to the involuntary kind. For example, during a debate on a 1936 bill in Parliament for voluntary euthanasia, one of the prominent proponents invoked two dramatic and appealing cases, one where a man had drowned his four year old daughter who had contracted tuberculosis and had developed gangrene on the face, the other where a woman had killed her mother who was suffering from general paralysis of the insane. Obviously these were instances of compulsory, or involuntary, euthanasia, yet, although the proponent acknowledged that the cases were not covered by the proposed bill for voluntary euthanasia, they were the only specific cases he described.[3]

Looking below the surface of the voluntary-involuntary dichotomy may render the purist more understanding of the reasons for the confusion and more tolerant of the confused; a page of history may be worth a chapter of linguistic analysis.

Among some primitive people, the abandonment or killing of the aged or helpless apparently was an accepted practice. The Hottentots carried their elderly parents into the bush to die. The Lapps who became too infirm to trek over the mountains with their families were left behind to die unattended, their frozen corpses to be buried on the families' return. But it is easy to overgeneralize about customs of euthanasia among primitives, for many societies have actually been shown to have had elaborate codes protective of their senior members. "Instances of this are seen in hospitality customs, property rights, food taboos reserving certain choice dishes for the aged [ostensibly as harmful to the young] and other usages."[4]

Doubtless, the settled agricultural communities showed the highest level of solicitude for the elderly, as witness the laws of the Old Testament Hebrews forbidding the killing of the innocent and just. In classical Greece, there does not seem to have been abandonment of elderly or helpless adults. In ancient Rome, largely under the influence of the Stoics, suicide was an accepted form of death as an escape from disgrace at the hands of an enemy, as, indeed, it was until recently in Japan under the form of hara-kiri. Yet Cicero—who wrote that "The God that rules within us forbids us to depart hence unbidden"—abided his conviction and declined to play the "Roman fool" when pursued to death by the revenge of Antony.[5] Jewish, Christian, and Islamic teachings alike have always maintained that deliberate killing in case of abnormality or incurable illness is wrong. The apparent exception in St. Thomas More's *Utopia* is often interpreted to imply his personal endorsement.[6]

The modern interest in euthanasia is usually dated from the

1870's, but the formal movement did not begin in Britain until the 1930's with the organization of the group now known as the Voluntary Euthanasia Society in 1935. The first bill on euthanasia was brought before the British Parliament in 1936. To be eligible for euthanasia, the patient had to be over twenty-one years of age, suffering from an incurable and fatal illness, and sign a form in the presence of two witnesses asking to be put to death. The bill embraced relatively complicated legal proceedings including investigation by a euthanasia referee and a hearing before a special court. In 1950 there was further debate in the House of Lords on a motion in favor of voluntary euthanasia.[7]

In his classic, *The Sanctity of Life and the Criminal Law*,[8] Professor Glanville Williams, realizing the practical necessity of countering the contention that too much formality in the sick room would destroy the doctor-patient relationship, proposed a simple formula quite different from the 1936 attempt. He suggested the uncomplicated provision that no medical practitioner should be guilty of an offense in respect of an act done intentionally to accelerate the death of a patient who is seriously ill, unless it is proved that the act was not done in good faith *and* for the purpose of saving him from severe pain in an illness believed to be of an incurable and fatal character.[9] This proposal formed the basis of the 1968 draft bill which, with changes, was debated in the House of Lords in 1969. The most recent parliamentary euthanasia debate was in the House of Commons in April, 1970, on a motion for leave to introduce a bill.[10] But to date no statute has been enacted.

The Euthanasia Society of America was constituted in 1938 and a bill, following the 1936 British model, was introduced that year in the Nebraska Assembly but lost. A similar attempt failed in the New York Assembly.[11]

> The Euthanasia Society of America had at first proposed to advocate the compulsory "euthanasia" of monstrosities and imbeciles, but as a result of replies to a questionnaire addressed to physicians in the State of New York in 1941, it decided to limit itself to propaganda for voluntary euthanasia.[12]

In any event, there is today no country in the world whose law permits euthanasia either of the voluntary or involuntary type.[13]

In view of the facial restrictions of the current euthanasia movement to the voluntary type, why does confusion persist as to what precisely is being proposed? Why has Glanville Williams protested:

> The [English Society's] bill [debated in Lords in 1936 and 1950] excluded

> any question of compulsory euthanasia, even for hopelessly defective infants. Unfortunately, a legislative proposal is not assured of success merely because it is worded in a studiously moderate and restrictive form. The method of attack, by those who dislike the proposal, is to use the "thin edge of the wedge" argument . . . . There is no proposal for reform of any topic, however conciliatory and moderate, that cannot be opposed by this dialectic.[14]

At least several observations are pertinent in explanation of the persisting terminological confusion. Some pertain only to subjective appraisal of the good faith of discussants, but others proceed from the reality that voluntary euthanasia is not as intrinsically severable from the involuntary as the cleancut verbal distinction suggests.

First, the problem of the rights of minors always lurks to compound the difficulties of human forays into life-death decisions unless application to minors is explicitly precluded. Normally, decisions respecting serious medical procedures on minors must await parental or guardian approval, although historically there have been exceptions for emergencies and even further exceptions under the impetus of permissive abortion laws. If euthanasia is right, should it be withheld from an intelligent and knowledgeable minor, one whose judgment might be highly pertinent to judicial decision respecting child custody in divorce cases? And if the minor and parent differ on acceleration of the former's death, whose judgment controls? Confronted with this dilemma, apparently the best that Glanville Williams could argue, was: "The use that may be made of my proposed measure [euthanasia] in respect of patients who are minors is best left to the good sense of the doctor, taking into account, as he always does, the wishes of the parents as well as those of the child."[15] Those skeptical about the vagaries and nebulosity of judicial "discretion" should take note![16]

Second, voluntary euthanasia by definition would be available only to those who freely, intelligently, and knowingly request it. This presupposes mental competence. Might the test of competence be as intangible and uncertain as it may be with respect to the execution of a will; or commitment as potentially dangerous; or responsibility for criminal conduct—whether under the M'Naghten,[17] Durham,[18] Model Penal Code,[19] or diminished responsibility test;[20] or capacity to stand trial.[21] The determination of competence in such a context might be even more emergent and difficult than its conventional determinations and the significance of error even more dire in its irreversability. Moreover difficulties might be compounded by the inhibition on free choice inherent in subjection to pain-killing drugs.[22]

Third, quite independently of the effect of narcotics on consciousness, pain itself, the toxic effects of disease, and the repercussions of surgical procedures may substantially undermine the capacity for rational and independent thought. As Professor Yale Kamisar asks: "If . . . a man in this plight [throes of serious pain or disease] were a criminal defendant and he were to decline the assistance of counsel would the courts hold that he had 'intelligently and understandingly waived the benefit of counsel?' "[23] Would a confession made in such circumstances be admissible?

Fourth, what of the proposed euthanatee who is unable to communicate for himself? Would another, possibly a spouse or next of kin, be presumed to be a competent speaker for him? Those who have inquired into the authority of one to bear for another the decisional burden in the more conventional medical dilemmas[24] know how difficult it is to construct an adequate juridical basis for placement of the patient's burden of decision on another, even a loving spouse.[25] After all, an adult under no legal disability has no natural guardian. The 1969 British bill partially avoids this dilemma by providing that a declaration for euthanasia shall come into force 30 days after being made, shall remain in force, unless revoked, for three years, and a declaration re-executed within the 12 months preceding its expiration date shall remain in force, unless revoked, during the lifetime of the declarant.[26] Even so, the continuing effectiveness of a declaration might raise the aforesuggested imponderables of a life-death decision made by one for another, during, for example, a declarant's long coma with a spouse claiming its revocation —a psychologically traumatic context.

Lastly, Glanville Williams' resentment of the "thin edge of the wedge" opposition to euthanasia, however justified in the abstract, loses cogency in the actual context of the movement's strategy and tactics. Yale Kamisar has convincingly demonstrated that the movement's purpose and method substantially has been utilization of the "wedge" principle.[27] This conviction is fortified by the effectiveness of the "wedge" principle as used in the movement for permissive abortion. The public protests of the proponents for abortion seeking "only a moderate statute"—as they characterize the California law,[28] permitting abortion when the mother's physical or mental health is threatened and in case of felonious sexual assault—have given way to their real goal: abortion on demand.[29] A physician has drawn a meaningful parallel: "I don't think that human consciousness and psychology as it exists in our society today could tolerate euthanasia.

Yet 20 years ago our society wouldn't have tolerated extensive abortion. Our mores change."[30]

The "thin edge of the wedge" danger is real; the camel's nose does get under the tent; once opened, the movement of the door to death by human choice may be constantly widening, and likely a never narrowing movement. It seems pertinent to remember the Hitlerian eugenic euthanasia—the elimination of "useless eaters"—which preceded his wholesale racial genocide, was supported by "humanitarian petitions" to him by parents of malformed children requesting authority for "mercy deaths." It is perhaps the supreme irony that Jews were initially excluded from the program of eugenic euthanasia in Nazi Germany on the ground that they did not deserve the benefit of such psychiatric care.[31] Whether the distinction between voluntary and involuntary euthanasia is as meaningful and abiding as its facile verbal formulation would suggest is open to debate. This article takes the proponents at their present word and limits the discussion chiefly to so-called "voluntary" euthanasia.[32] The definition of voluntary euthanasia that puts the affirmative case in the strongest possible terms is Professor Kamisar's definition, which assumes:

> [A person] . . . *in fact* (1) presently incurable, (2) beyond the aid of any respite which may come along in his life expectancy, suffering (3) intolerable and (4) unmitigatable pain and of a (5) fixed and (6) rational desire to die . . . .[33]

But before applying that definition to our problem, a few more preliminary delineations are in order.

More Definitional Problems:

1) Euthanasia v. Extraordinary Means to Preserve Life;

2) Euthanasia v. Alleviation of Pain by Drugs.

The word "euthanasia" does not include the withholding of extraordinary means to preserve life. To call the mere withholding of extraordinary means "indirect voluntary euthanasia" is, taking into account the currently accepted meaning of "euthanasia" as deliberate killing, a confusion of terms that cannot conduce to precision of thought.[34] Putting aside for the moment the difficulties in adequately articulating the difference between "extraordinary" and "ordinary" means of preserving life, the soundness of the distinction in principle is central to the main thesis of this article. If the distinction between affirmative killing and letting die is only a quibble, as some have characterized it,[35] my thesis here fails.

When studying this problem, one inured to common law thinking

must be careful lest he assimilate the "extraordinary—ordinary" means distinction to our law's classic differentiation between "action" and "inaction." The common law notion that despite the relative ease of rescue a stranger may safely ignore a person in dire predicament—a drowning child, for example—whereas if he undertakes rescue he is held to the standard of due care,[36] does not govern in the typical application of the "extraordinary"—"ordinary" means distinction. Under the common law rule (which by no means is universally accepted),[37] a physician may refuse aid to the stranger-victim of an emergency without incurring legal liability, while in voluntary rendering aid he incurs the obligation of using due care.[38] The important point is that the *attending* physician is not a volunteer; he is bound to the standards of medical performance, including affirmative acts, under the sanction of malpractice liability,[39] as well as other sanctions.[40] Therefore, an attending physician's attempted justification for failure to fulfill the standards of medical practice, on the sole ground that his failure was "inaction" rather than "affirmative action" would be preposterous.[41] But a failure to use "extraordinary" means is a different matter and, in a given context, may be legally justifiable.

Similarly, the use of drugs to alleviate pain, even though that use in fact may hasten death, is not "euthanasia" in the modern meaning of direct, deliberate killing, because even if in both cases death may be "willed" in the sense of desired, there is a difference in means of abiding significance in the realities of the human condition. Thus a provision in the British euthanasia bill of 1969 works a disservice to clarity of analysis when it couples a provision authorizing true euthanasia with one declaring that a patient suffering from an irremediable condition, reasonably thought in his case to be terminal, shall be entitled to the administration of whatever quantity of drugs may be required to keep him free from pain.[42] There is no serious practical question of the present legality of such use of drugs[43] nor any genuine problem with its ethicality.[44] Daniel Maguire's recent question equating "positive action" and "calculated benign neglect" has a similar defect, although in his instance there is at least the justification of an ensuing explicit confrontation with the question's innuendo.[45]

The Ethics of Voluntary Euthanasia

Had this article been written fifteen years ago, its gist almost necessarily would have been an inquiry into the ethics of euthanasia. But in the meantime such inquiry, acutely engendered at one stage by

the running debate between Glanville Williams[46] and his opponents, has been richly productive. Whatever the diminution of moral reprehensibility by the facts of a given case, euthanasia in principle is unethical, as well as illegal, killing; this viewpoint has already been essentially presented by Yale Kamisar,[47] Charles E. Rice,[48] David Daube,[49] Norman St. John-Stevas, M.P.,[50] and others.[51] Therefore, only a brief comment regarding the ethics of voluntary euthanasia itself—the deliberate, affirmative, intentional act of effecting a mercy death—is necessary.

In discussing the ethics of euthanasia, a warning immediately comes to mind. Except as Scripture, or extrapolations therefrom, or from received Christian tradition, formulate reasons for opposing euthanasia, in what way do "religious" reasons differ from "non-religious" ones?[52]

Are not the following reasons for opposing voluntary euthanasia both "religious" and "non-religious?" Ascertainment of a sick person's abiding desire for death and persistent and true intention affirmatively to seek it, is intrinsically difficult and often impossible. The difficulties inhere in illness with its pain and distraction, and are compounded by narcotics and analgesics. Anything like the legal standard for voluntariness in other contexts would be hard to achieve. Would minors of knowledgeable age and discretion be allowed to elect it, and with or without parental consent? A decision made before illness to elect euthanasia conditionally, would have morbid aspects and would leave lingering doubts as to the continuity of intention; especially with intervening coma. Euthanasia, if legally formalized by procedural restrictions, would threaten to convert the sick room into an adjudicative tribunal. The consequences of required decisions and procedures might be harsher for the family, especially young children, than for the dying person. If left essentially to the discretion of the physician, administration of euthanasia would be as variable as the tremendous variation in medical competence. But not even the best physician is infallible and mistakes, necessarily irretrievable, would have the odious flavor of avoidable tragedy. Moreover, the history of science and medicine increasingly demonstrates that yesterday's incurable disease is the subject matter of today's routine treatment. Even "incurable" cancer is sometimes subject to remissions.[53] In medicine, as in life itself, there is no absolute hopelessness.

Euthanasia would even threaten the patient-physician relationship; confidence might give way to suspicion. Would a patient who had intended to revoke his declaration for euthanasia have faith that his

second word would be heeded? Can the physician, historic battler for life, become an affirmative agent of death without jeopardizing the trust of his dependants? Indeed, would not his new function of active euthanator tend psychologically to undermine the physician's acclimation to the historic mandate of the Hippocratic Oath? And what would acceptance of the psychology of euthanasia do to the peace of mind of the mass of the so-called incurables?

How long would we have voluntary euthanasia without surrendering to pressures for the involuntary? Would not the pressures be truly inexorable?

Merely to ask such questions and state these points seems to belie a dichotomy between "religious" and "non-religious" reasons for opposing voluntary euthanasia. They are essentially human reasons.[54]

There Is No Obligation "Officiously to Keep Alive" the Dying.

"Thou shalt not kill, but need'st not strive Officiously to keep alive." It is about as clear as human answers can be in such matters that there is no moral obligation to keep alive by artificial means those whose lives nature would forfeit and who wish to die. Further, the law, in no manner, seeks to set at nought this moral truth. The moral idea was put this way by Pius XII when, in November 1957, he answered questions for the International Congress of Anesthesiologists:

> Natural reason and Christian morals say that man [and whoever is entrusted with the task of taking care of his fellowman] has the right and the duty in case of serious illness to take the necessary treatment for the preservation of life and health. This duty that one has toward himself, toward God, toward the human community, and in most cases toward certain determined persons, derives from well ordered charity, from submission to the Creator, from social justice and even from strict justice, as well as from devotion toward one's family.
>
> But normally one is held to use only ordinary means—according to circumstances of persons, places, times, and culture—that is to say, means that do not involve any grave burden for oneself or another. A more strict obligation would be too burdensome for most men and would render the attainment of the higher, more important good too difficult. Life, health, all temporal activities are in fact subordinated to spiritual ends. On the other hand, one is not forbidden to take more than the strictly necessary steps to preserve life and health, as long as he does not fail in some more serious duty.[55]

Although Pius XII did not use the expression "extraordinary means," it has become customary to capture his thought in the short-

hand phrase "distinction between ordinary and extraordinary means." It is a convenient condensation but, as with short names generally, may mislead unless clarified. For one thing, there seems to be considerable difference between the significance typically given the "ordinary and extraordinary means" distinction by physicians on the one hand and moral theologians on the other. Physicians seem to take the distinction as equivalent to that between *customary* and *unusual* means as a matter of medical practice. Theologians pour into the distinction all factors relevant to appropriate moral decision however nonmedical they may be: the patient's philosophic preference, the conditions of the family including the economic facts, and the relative hardships on a realistic basis of one course of conduct as contrasted with another.[56] Even means that are "ordinary" from the viewpoint of medical practice may be "extraordinary" in the totality of life's dilemmas.[57]

Take the case of a three-year old child, one of whose eyes had already been removed surgically because of malignant tumor. The other eye later became infected in the same way, and medical prognosis offered only the dilemma of either certain death without further surgery or a considerable probability of saving the child's life by a second opthalmectomy. From the medical viewpoint, such surgery represents an ordinary means of saving life. I take it to be the prevailing theological view that one is not obliged to save his life when that entails a lifetime of total blindness. In other words, under the circumstances, the surgery would be an extraordinary, and morally not required, way of saving life.[58]

Thus an artificial means, however ordinary in medical practice, may be morally extraordinary and not obligatory. Also, it may be non-obligatory, even though ordinary, because it is likely to be useless. It should be noted that this does include *artificial* means, such as surgery, but not natural things, such as furnishing of food, drink, and the means of rest. To save the convenient distinction between ordinary and extraordinary means, while at the same time promoting its accuracy, theologians have wisely incorporated into the definitions qualifications necessitated by such cases as the three-year old's, as well as the common-sense requirement that, to be obligatory, an artificial means must be of potential usefulness. Thus:

> *Ordinary means* are all medicines, treatments, and operations, which offer a reasonable hope of benefit and which can be obtained and used without excessive expense, pain, or other inconvenience.
>
> *Extraordinary means* are all medicines, treatments, and operations, which cannot be obtained or used without excessive expense, pain, or other

> inconvenience, or which, if used, would not offer a reasonable hope of benefit.[59]

Of course, the physician cannot be blamed for emphasizing the purely medical considerations in his appraisal of the appropriateness of the means for staving off death. Necessarily this is the trend of his training and competence, perhaps sometimes fortified by the potentiality of malpractice liability. On a practical level, the reconciliation of the physician's and moralist's views on extraordinary means is in the reality that the decision as to how hard and far to push to keep life going by artificial means ultimately belongs to the patient, not to the physician. Although the patient may be morally entitled to reject it as extraordinary, the physician may be legally obligated to proffer what is customary medical practice.[60] Conversely, where it is his final hope because lesser efforts afford no promise, presumably the patient is entitled to have means that the physician regards as medically unusual or extraordinary.

While discussing physicians' participation in the life-death decisional process, it is pertinent to note an apparent tendency among them to regard as more significant, and more hazardous, the stopping of extraordinary means compared to failure to start them in the first place.[61] There is more hesitancy to turn off the resuscitator than to decide originally not to turn it on. From the moral viewpoint, this distinction is only a quibble. Indeed, might there not be more justification in ceasing after a failing effort has been made, than in not trying in the first place? The medical attitude in this regard seems more psychologically than rationally based. Perhaps the physician has been excessively influenced by the common law's historic distinction between "action" and "inaction." From the legal viewpoint it is worth noting that Professor Kamisar's careful research failed to reveal by 1958 a single case where there had been an indictment, let alone a conviction, for a "mercy-killing" by omission.[62] It seems legally far-fetched to convert "omission" into "commission" by the mere fact that the machine is turned off when it fails to be effective, rather than not turned on in the first place.[63] Civil liability is another matter; but is there really much danger of malpractice because a physician ceases to continue to use an apparently hopeless medical technique, just because he has tried it out? Certainly not so where the patient declines further use; and when he is beyond personal decision, because for example unconscious, clearance from a spouse or family member seems to help, although as previously noted it is hard to find a juridical basis for letting one adult decide for another.[64]

Estoppel might become a relevant defense in a suit for wrongful death.

The frenetic efforts to resuscitate or just to keep going often are an affront to human dignity. Those who make such efforts do not have as their objective the prolongation of life as much as the maintenance of the process of dying. Can one doubt that Shakespeare has perceived the moral as well as psychological reality when, in King Lear, he put it: "Vex not his ghost: O, let him pass! he hates him That would upon the rack of this tough world Stretch him out longer."[65]

Since the case for not stretching out longer seems so self-evident, how does one explain the countervailing motives and practices of so many physicians and families? In the case of the former, is it sometimes sheer professional pride, human ego, the thrill of the game, perhaps akin to the lawyer's will to win? As to the families, there is no need to look further than to the traumatic shock of threatened death of a beloved. But is a sense of guilt over past neglect, rather than love, sometimes at least a partial explanation? In such an area, one should not speak abstractly: each threatened death is unique and very personal. Who, however-much in agreement with what is said here, would not applaud the most persistent and heroic efforts imaginable to succor the youthful victim of a casualty such as an automobile accident? Who would deny that, in such a case, every intendment of the presumption of the will to live should be indulged by the physicians and all concerned?

Perhaps these frantic efforts to prolong the earthly life of the aged that nature would forfeit go hand in hand with the materialism of modern society. Hilaire Belloc observed:

> Of old when men lay sick and sorely tried,
> The doctors gave them physic and they died.
> But here's a happier age, for now we know
> Both how to make men sick and keep them so![66]

The willingness to let pass those who are ready and wish to pass seems as much an act of Christian faith as of reconciliation with nature's way. In this sense perhaps there is as much of Christian hopefulness about death as of pagan acceptance of dissolution in the poet's invocation of the concept of *conquering* "the fever called 'Living.' "[67]

That it is permissible to withhold extraordinary means seems so clear that future discussion is likely to focus instead on whether and under what circumstances there is a duty to do so. Recall the ending

of the quoted allocution of Pius XII: "[O]ne is not forbidden to take more than the strictly necessary steps to preserve life and health, as long as he does not fail in some more serious duty."[68] Doubtless that is the starting point of the relevant analysis and doubtless, too, the decision typically is for the patient, not the physician. But what are the more serious duties that should preponderate for example in the mind of the head of the family, over extravagant efforts to preserve his own life? It certainly seems relevant that profligate expense may deprive the children of education. Hardly less so is the mental torture that may be imposed on the family by indefinite prolongation of the physical dissolution of its head. And possibly, if medical facilities and services increasingly become of lesser availability in relation to the demand, society's needs may some day be held to supersede the personal requests for extraordinary means even by those financially able to pay.

No sooner has one thus spoken of the right, even possibly the duty, of withholding extraordinary means than he wonders if his message tends to undermine the medical profession's proudest boast and happiest claim—its historic bulldogged defense of human life. For in result, even when not in motivation, there is more than professional pride and human ego in the physician's strugglings. As Gerald Kelley put it:

> By working on even the smallest hope doctors often produce wonderful results, whereas a defeatist attitude would in a certain sense "turn back the clock" of medical progress. Also, this professional ideal is a pure preventive of a euthanasian mentality.[69]

Our last, and hardest question, essentially becomes: Is the distinction between letting die and killing sound enough to preclude the euthanasian mentality?

The Distinction between Killing, and Letting Die, Continues to be Viable, Valid and Meaningful

If it is permissible to let die a patient direly afflicted and sorely suffering, why is it wrong affirmatively to help him die with loving purpose and kindly means? The question poses stark challenge to philosopher, theologian, ethician, moralist, physician, and lawyer.

Let us put onto the scales our conclusions to the moment, on the one side the permissible things, on the other those forbidden. Note that on each side there is a negative and an affirmative thing. It is permissible to withhold extraordinary means, and also to give drugs to relieve pain even to the point of causing death. It is not permis-

sible to withhold ordinary means, or affirmatively and intentionally to cause death. Certainly the fact that our distinctions are fine does not of itself condemn them. Biology, psychology and morality, like life itself, are filled with close questions, narrow definitions, and fine distinctions.[70] The margin between pain and pleasure may be as imprecise as that between love and hate.[71] Nor is universal certainty and equality of application of principle to the facts of cases necessarily a test of the principle's validity. Appellate judges are wont to say that much must be left to the discretion of trial judges, and moralists must concur that much must be left to the judgment of those who apply principle to hard facts. As Gerald Vann put it:

> [M]oral action presupposes science but is itself an art, the art of living. Moral science concerns itself first of all with general principles, as indeed being a science it must; but the subject of morality is not human action in general, but this or that human action, in this or that set of circumstances, and emanating from this or that personality. Hence the fact, remarked upon by Aristotle, that ethics cannot be an exact science. There is no set of ready-made rules to be applied to each individual case; the principles have to be applied, but this is the function of the virtue of prudence, and with prudence, as with art, as Maritain points out, each new case is really a new and unique case, each action is a unique action. What constitutes the goodness of an action is the relation of the mind not to moral principles in the abstract but to this individual moral action. Hence an essential element of quasi-intuition is at least implicit in every willed and chosen action.[72]

Common law lawyers have admirable instruments by which to effectuate the moralist's acknowledgement of the necessity of accommodation of principle to fact. There are at the intellectual or formal level the institutions of equity and on the pragmatic level trial by jury. The accommodation by a jury may be radical indeed, as Dryden observed centuries ago:

> Who laugh'd but once to see an ass,
> Mumbling to make the cross grain'd thistles pass;
> Might laugh again, to see a jury chaw
> The prickles of an unpalatable law.[73]

With such means of accommodation, we do not need, I think, formal provisions of law to mitigate the potential harshness in applying homicide principles to mercy deaths. But whether we do need them, is certainly a legitimate and open question; some will argue for statutes authorizing lesser penalties in case of euthanasia, as in Norway.[74] I think such a formal provision for mitigation might do more

harm educationally by way of undermining the distinction between letting die and killing, than good, substantively.[75] This presupposes the validity of the distinction.

Daniel Maguire in Commonweal recently concluded:

> [I]t can be said that in certain cases, direct positive intervention to bring on death may be morally permissible. . . . The absolutist stance opposed to this conclusion must assume the burden of proof—an impossible burden, I believe.[76]

This conclusion on burden of proof might astound the proceduralist, certainly one of historical orientation, as much as the moralist. For centuries, medical ethics has drawn sharp and firm distinction between "positive action" and "calculated benign neglect," to use Maguire's own terms.[77] The theologian's principle of double effect is an ancient one. In the face of the historical realities, why, suddenly, this reversal of the burden of proof? Hardly because today's logic is sharper; the principle of double effect has been reexamined and criticized by able minds for generations. Do the new psychological insights justify such reversal of the field? Quite the contrary!

The principle of double effect has four criteria. They are:

1) the act itself must be morally good, or at least neutral;
2) the purpose must be to achieve the good consequence, the bad consequence being only a side effect;
3) the good effect must not be achieved by way of the bad, but both must result from the same act;
4) the bad result must be so serious as to outweight the advantage of the good result.[78]

Admittedly application of these criteria may produce nuances so delicate that the decision of one able and conscientious mind may be at odds with another equally able and conscientious. Take, for example, the distinction between the administration of drugs to kill, on the one hand, and the administration to relieve pain even though death may be hastened, on the other. Conceding *arguendo* that a principle of such ambivalent potential may have logical deficiencies, is not the ultimate question of its justification not one of dry logic but of its psychological validity? Let us suppose a physician, faced with his patient's intolerable pain unmitigable by lesser doses and his urgent plea for relief, decides on a dose of analgesic likely to cause death. (You may substitute "certainly to cause death" if you wish, but, in the physiological realities, it may always remain doubt-

ful whether the pain itself might have been as death-producing.)

Contrast the attitude and manner which the motive of relieving pain engenders, with those likely consequent upon a grim determination to kill. If the purpose explicitly were to kill, would there not be profound difference in the very way one would grasp the syringe, the look in the eye, the words that might be spoken or withheld, those subtle admixtures of fear and hope that haunt the death-bed scene? And would not the consequences of the difference be compounded almost geometrically at least for the physician as he killed one such patient after another? And what of the repercussions of the difference on the nurses and hospital attendants? How long would the quality and attitude of mercy survive death-intending conduct? The line between the civilized and savage in men is fine enough without jeopardizing it by euthanasia. History teaches the line is maintainable under the principle of double effect; it might well not be under a regime of direct intentional killing.

There would be adverse effects on the family if law—sometimes the great teacher of our society—were to start to teach the legitimacy of direct killing. David Daube relates a telling illustration of the validity of this concern. There was at Oxford one of the great historians of the century who was totally paralyzed up to the shoulders, with all that implies by way of dependence and suffering. A loving wife and family nurtured and sustained him, at no mean cost. The visit of this profound scholar and scintilating conversationalist to All Souls College were a weekly delight to all who could share the coffee hour with him, even as he sipped with a tube from the cup. Immobile in his wheel chair, he nevertheless gave a final memorable lecture. Under a regime of euthanasia's legitimacy, would not cultivated, sensitive, and selfless spirits such as this feel an obligation to spare their families the burden? Certainly in this case, as Professor Daube concludes, scholarship, family life, and All Souls College might have paid a heavy price in a euthanasia regime for an act that might have been coerced by a sense of obligation.[79] To the sensitive and selfless especially, what the law would permit might well become the measure of obligation to family and friends.[80]

The principle mischief with such life-interfering proposals as euthanasia is their undue deprecation of the importance of the natural order in human affairs. As a principle heresy of the 19th Century was that progress lay in human domination of the environment, perhaps the heresy of this century will prove to be that biological evolution must be dominated by human will.[81] Certainly the freedom and integrity of the human person should not be as much ravaged

and stripped as have been the forests and fields and waters of the world. As a physician puts it:

> [W]e are possessed with a technologic spirit in which power over nature is the predominant theme. We ignore the fact that there is an intrinsic despair and disparity in looking to technology for a solution. We forget that our problem is not to master nature, but to nurture nature. We also forget that technological achievements are, at best, ameliorative, and, at worst, dehumanizing.[82]

The additional dilemmas that a regime of mercy deaths would impose—such problems as ascertainment of true and abiding consent—would seem of themselves reasons for avoiding the creation of more unlighted paths.[83] Is not the preferred choice continuing progress in the alleviation of pain, loving care of the dying among our neighbors, rather than killing? We are only mortal, and in this area a grand attempt to restructure the natural order seems more dangerous than hopeful. Nature can be harsh and cruel, but it is never corrupt. Human will can be all three.

Conclusion

The distinction between affirmative killing and allowing one to die according to nature's order without extraordinary effort to "stretch him out longer" continues to be valid, viable, and meaningful.[84] The line of demarcation may be fine, but so are many other lines that men must draw in their fallible perception and limited wisdom. Application of the principled distinction between ordinary and extraordinary means of prolonging life occasions difficulties, but hardly any different in quality from various other decisions in applying a general principle to particular facts. The distinction between the use of drugs to kill and their use to alleviate pain even though death may thereby be hastened is likewise valid.

When the question becomes one for the legal system, fortunately our law has time-tested devices for accommodating principle and facts, notably the jury. It seems hardly necessary or wise for us to attempt articulation of formal legal standards of lesser liability in cases of euthanasia than for other criminal homicides in the manner of Norwegian law. The harm of the educative effects of formalization of lesser penalties for euthanasia probably would outweigh the values thereby gained by way of certainty of legal consequence and surer guarantee of equal protection of the law.

Our era is one that seeks, and often for good reason, a constant expansion of a juridical order in human affairs. But not every human

relationship stands to profit from complete juridicalization. The refusal so far of legislatures to intrude into the mercy-death area has been prudent and in the interest of sound social policy.

NOTES

1. Not long ago one of the country's great financial houses sponsored a television show called "The Very Personal Death of Elizabeth Schell Holt-Hartford." It starkly dramatized one of the saddest phases of the human condition, perhaps especially cruel quantitatively and qualitatively in our generation: the loneliness, sense of uselessness and abandonment, and bitterness of many old people. The subject of the story was a lady living alone, who had been divorced and finally died at the age of 82, leaving no known survivors. She often spoke of her dire need for but lack of human companionship. The sense of her unhappiness can almost be touched from her own words—"It's such a grim life"; "The only thing you can do is to bear it until someone shoots you." Her physician tells her "You do not know what is on the other side" and she answers "What I know is on this side and I don't want any more of it." That she remains rational and indeed intellectual even after she broke her hip and was immobilized—pointing out for example that she knows she is lucky compared to the aged poverty-stricken of India—seems only to exacerbate the tragedy by emphasizing the felt pain.

   At the beginning the announcer had said: "Because of the sensitive nature of this program [the sponsor] has relinquished all commercial messages." But its generous impulses had little counterpart in the public's reaction, which evidenced a bitterness not unlike that of Mrs. Holt-Hartford's own declining years. In a word, the sponsor was charged with advocating euthanasia. The reactions ranged from the frenetic to the thoughtful, one writer pointing out that what was reprehensible about the program was (according to his interpretation) that the only solution to the problem of old age that was suggested was euthanasia. One who did not view the program will withhold appraisal of the accuracy of this essentially artistic judgment of the theme. The interesting thing for our purposes was the universal use of the word "euthanasia" to characterize the theme.

   Based on program of KNXT-TV, Los Angeles, April 23, 1972, and ensuing unpublished information. For a comparable story, *see On the Occasion of a Death in Boston,* N.Y. Times, Oct. 23, 1972, at 31, col. 2.
2. Saltonstall, Professor of Population at Harvard, in a remarkable paper, *Religion: Aid or Obstacle to Life and Death Decisions in Modern Medicine?,* furnished me in manuscript form by the Joseph P. Kennedy, Jr., Foundation, Washington, D.C.
3. Kamisar, *Some Non-Religious Views Against Proposed "Mercy-Killing" Legislation,* 42 Minn. L. Rev. 969, 1016 (1958).
4. Your Death Warrant (Gould & Craigmyle ed. 1971) [hereinafter cited as Death Warrant]. This book, frequently cited, is the product of a Study Group on Euthanasia set up as a joint venture by the Catholic Union of Great Britain and the Guild of Catholic Doctors. The members of the group were Cicely Clarke, Lord Craigmyle, Charles Dent, J.G. Frost, J.E. McA. Glancy, MD, Jonathan Gould, F.J. Herbert, Joseph Molony, QC, G.E. Moriarty, R.A.G. O'Brien, K.F.M. Pole, Hugh Rossi, MP, P.S. Tweedy and William T. Wells, QC.
5. *Id.* at 21.
6. *Id.* at 22. N. St. John-Stevas, Life, Death and the Law 270 (1961).
7. Death Warrant 23-26.
8. G. Williams, The Sanctity of Life and Criminal Law, Ch. VIII (1957) [hereinafter cited as The Sanctity of Life]. *See also* Williams, *"Mercy Killing" Legislation—a*

Rejoinder, 43 Minn. L. Rev. 1 (1958); Williams, *Euthanasia and Abortion,* 38 U. Colo. L. Rev. 178 (1966).

9. The Sanctity of Life 340. *See also* C. Rice, The Vanishing Right to Live 54 (1969) [hereinafter cited as The Vanishing Right].
10. *See* Death Warrant 24-67.
11. *Id.* at 26, 30.
12. *Id.* at 26.
13. French and Swiss permissiveness whereby a physician may provide, but may not administer, poison at the request of a dying patient, is to be distinguished. Death Warrant 27. Apparently the law of Texas is in accord. *See* R. Perkins, Criminal Law 67 (1967).
14. The Sanctity of Life, 333-34. Note how simply the voluntary-involuntary distinction is put in J. Dedek, Human Life: Some Moral Issues 133 (1972).
15. The Sanctity of Life 340, n.8. The proposed 1969 British bill excludes minors by providing that "qualified patient" means a patient over the age of majority. Death Warrant, App., at 139.
16. Regarding the assumed exclusive medical competence of physicians to make moral value judgment in the biological area, *see* Louisell, *Abortion, the Practice of Medicine, and the Due Process of Law,* 16 U.C.L.A. L. Rev. 233, 245-46 (1969); Louisell and Noonan, Constitutional Balance, in The Morality of Abortion 220, 256-57 (J. Noonan ed. 1970). *See* Jakobovits, *Jewish View on Abortion,* Abortion and the Law 124, 125-26 (D. Smith ed. 1967); Hellegers, *Law and the Common Good,* Commonweal, June 30, 1967, at 418.
17. M'Naghten's Case, 10 Clark & F. 200, 8 Eng. Rep. 718 (1843).
18. Durham v. United States, 214 F.2d 826 (D.C. Cir. 1954); *compare* United States v. Brawner, 471 F.2d 909 (D.C. Cir. 1972).
19. § 4.01; *see also* United States v. Currens, 290 F.2d 751 (1961); Diamond, *From M'Naghten to Currens, and Beyond,* 50 Calif. L. Rev. 189 (1962).
20. People v. Wells, 33 Cal. 2d 330, 202 P.2d 53 (1949); People v Gorshen, 51 Cal. 2d 716, 336 P.2d 492 (1959); *see* Louisell and Hazard, *Insanity as a Defense: The Bifurcated Trial,* 49 Calif. L. Rev. 805, 816 (1961). For brief summary of St. Thomas Aquinas' prescription of criteria relevant to responsibility for acts, *see* Louisell & Diamond, *Law and Psychiatry: Detente, Entente, or Concomitance?* 50 Corn. L.Q. 217, 218 n. 8 (1965).
21. For criteria of responsibility in the criminal area, *see* generally W. Clark and W. Marshall, Crimes § 6.01 (7th ed. 1967); Diamond, *Criminal Responsibility of the Mentally Ill,* 14 Stan. L. Rev. 59 (1961).
22. Kamisar, *supra* note 3, at 986-87.
23. *Id.* at 987-88.
24. Such as, for example, the decision of a spouse as to when the respirator should be turned off when it has failed to resuscitate the dying spouse.
25. Louisell & Williams, 2 Medical Malpractice ¶ 22.09 (Rev. ed. 1971).
26. Death Warrant, App., at 140.
27. Kamisar, *supra* note 3, at 1014-41.
28. Cal. Health & Safety Code § § 25951-25952 (West Supp. 1972).
29. N.Y. Penal Law § 125.05 (McKinney Supp. 1972).
30. Dr. Michael Kaback, as quoted in Freeman, *The "God Committee,"* N.Y. Times, May 21, 1972, § 6 (Magazine), at 89. [Since this paper was delivered, Roe v. Wade, 93 S. Ct. 705 (1973) and Doe v. Bolton, 93 S. Ct. 739 (1973) have been decided.]
31. The Vanishing Right 62-63; Kamisar, *supra note* 3, at 1033.
32. In doing so, of course we put outside our ambit one of life's most agonizing dilemmas, crippling infant deformities which at extremity—in terminology as in actuality —produce monsters. The current attention focuses sharply on meningomyelocele, spina bifida, spina aperta, or open spine. *See* E. Freeman, *supra* note 30, at 85.

33. Kamisar, *supra* note 3, at 1042.
34. P. Ramsey, The Patient as Person 152-53 (1970); The Vanishing Right 68-69.
35. J. Fletcher, Euthanasia and Anti-Dysthanasia in Moral Responsibility *(The Patient's Right to Die)* 141-60 (1967).
36. "The result of all this is that the Good Samaritan who tries to help may find himself mulcted in damages, while the priest and the Levite who pass by on the other side go on their cheerful way rejoicing." Prosser, Law of Torts 339 (3rd ed. 1964). Of course, this assumes the absence of a relationship that may impose a duty, *e.g.*, teacher-pupil, carrier-passenger, innkeeper-guest, etc.
37. German Criminal Code § 330c; French Penal Code Art. 63. *See* 2 Louisell and Williams, Medical Malpractice ¶ 21.42 at 594.40 (Rev. ed. 1971) [hereinafter cited as Medical Malpractice].
38. Medical Malpractice ¶ 21.35, at 594.24.
    The way this caused Good Samaritan statutes, exculpating the physician who follows his conscience rather than his convenience, to sweep the country like prairie fire, is a story I have tried to tell elsewhere. *Id.* ¶ 21.01, at 594.3.
39. Mason v. Ellsworth, 3 Wash. App. 298, 474 P.2d 909 (1970).
40. Medical Malpractice, Ch. VIII.
41. Medical Malpractice, Ch. VIII; Kamisar, supra Note 3, at 982, n.41; D. Meyers, The Human Body and the Law 147-48 (1970).
42. Death Warrant, App., at 141.
43. It is true that good motive conventionally does not per se preclude criminality in homicide. Clark and Marshall, Crimes 263-65 (7th ed. 1967); Perkins, Criminal Law 721 (1957); *but cf., Id.* 723. Thus it remains arguable that the good motivation of alleviating pain per se would not relieve from murder a physician who injected a heavy dose of drugs with knowledge that it certainly would cause death, any more than one would be relieved who injected with the specific purpose of killing. But the requisite proof of certain "causation," when death was in process in any event, would in the typical case seem as theoretically impossible as it would be practically unavailable. *Compare* G. Fletcher, *Prolonging Life*, 42 Wash. L. Rev. 999 (1967). In the trial of Dr. Adams for murder in Britain in 1957, the jury was instructed: "If the first purpose of medicine, the restoration of health, can no longer be achieved there is still much for a doctor to do, and he is entitled to do all that is proper and necessary to relieve pain and suffering, even if the measures he takes may incidentally shorten human life." Meyers, *supra* note 41, at 146-47. *See also* Recent Decisions, 48 Mich. L. Rev. 1199 (1950); Recent Decisions, 34 Notre Dame Lawyer 460 (1959).
44. Whether my conclusion that it is ethical for the physician to administer drugs to alleviate pain even to an extent that may shorten life is any more viable than the principle of double effect, or whether indeed that principle is enough to sustain the distinction between such administration and intended killing, let us put aside for the moment. But I should candidly note here that I am among those inclined to emphasize the moral value of pain. Sometimes the writers, particularly some of the more ancient theologians, seem to be arguing that it is, after all, human suffering that makes this the best of all possible worlds! Amidst such mock heroics it is refreshing to turn to the common sense of Pius XII who in his February, 1957 address to the Italian anesthesiologists, after pointing out that the growth in the love of God does not come from suffering itself but from the intenton of the will, candidly concluded that instead of assisting toward expiation and merit, suffering can also furnish occasion for new faults. Surely there must be a mid-ground between the exaltation of human suffering as glorious, and the attitude often lived by today that it is the ultimate evil, reflected in the automatic gulp for the aspirin bottle at the mere hint of a headache.
45. *The Freedom to Die,* 96 Commonweal (August 11, 1972), at 423-24.

46. *See* note 8 *supra* and accompanying text.
47. *See* note 3 *supra.*
48. *See* The Vanishing Right, Ch. 4.
49. Daube, *Sanctity of Life,* 60 Proc. Roy. Soc. Med. 1235 (1967).
50. N. St. John-Stevas, Life, Death, and the Law (1961).
51. *See, e.g.,* Death Warrant; P. Ramsey, The Patient as Person, Ch. 3 (1970). *Compare* D. Meyers, The Human Body and the Law (1970) *with* A. Dyck, Religion: Aid or Obstacle to Life and Death Decisions in Modern Medicine (unpublished manuscript).
52. Apparently to characterize reasons as "religious" is to diminish their significance: It is a great mistake to let people know that moral issues involve religion. If you talk about religion you might just as well talk about politics. Everyone agrees that politics and religion are a matter of opinion. You can take your pick. . . .

    Let this be clear. When we talk about moral problems we are not talking about religious beliefs—which we can take or leave. Stealing, lying, killing, fornicating would be wrong even if no church condemned them. Hijacking aircraft, tossing bombs into crowded shopping centers and selling drugs to your children are not sins mentioned in the bible. Nor is euthanasia. So keep religion out of this. . . .
    Death Warrant, Preface, at 13.
53. *Supra* note 3, at 996-1005.
54. *See* notes 46-50 *supra.* The problem of additional moral sanctions behind reasons formally taught by a religion according to its principles of revelation, or otherwise, is of another matter. For a contemporary analysis of teaching authority of the Church, *see* D. Maguire, Moral Absolutes and the Magisterium 14 (Corpus Papers, 1970).
55. 4 The Pope Speaks 393, 395-96 (Spring, 1958). Compare the condemnation of euthanasia by Pius XII, both compulsory, in his encyclical Mystici Corporis, A.A.S. 35:239 (1943), and voluntary, Address of May 23, 1948, to International Congress of Surgeons. L'Osservatore Romano, May 23, 1948 at 1, col. 1. *See* N. St. John-Stevas, Life, Death, and the Law 270-71; IIII B. Häring, C.S.S.R., The Law of Christ, at 239-41 (1966).

    In March, 1972, a physician's withdrawal of food from a new-born infant with a seriously defective brain because "the best thing to do was to let him die 'mercifully' " aroused wide-spread interest. The withdrawal of food was countermanded by another physician in the hospital before the baby died. H. Nelson, *Life or Death for Brain-damaged Infants?,* Los Angeles Times, March 17, 1972, at 1 col. 4. Apparently the legitimacy of such conduct was in serious dispute among physicians at the August, 1972 hearings before the special U.S. Senate Committee on Aging, although the distinction between withholding extraordinary means and affirmative euthanasia seems not always to have been acknowledged or even perceived. The New York Times, August 8, 1972, at 15, col. 1.
56. P. Ramsey, The Patient as Person 118-24; Death Warrant 82; Decisions about Life and Death, A Problem in Modern Medicine, App. 4, at 56 (Church Assembly Board for Social Responsibility, Church Information Office, Westminster, 1965).
57. *Id.*
58. J. Lynch, S.J., *Notes on Moral Theology,* 19 Theological Studies 165, 176 (1958). Hopefully the increasing faculties afforded by science and technology in substitution for eye-sight, may render this judgment obsolescent. *Compare* the discussion in G. Kelly, S.J., *The Duty of Using Artificial Means of Perserving Life,* 11 Theological Studies 203 (1950), as to whether it is obligatory for a diabetic patient on insulin who develops very painful and inoperable cancer to continue to use insulin (*Id.* at 208, 215), or for a cancer victim to submit to intravenous feeding (*Id.* at 210). Where the patient is not legally competent, e.g., a minor, there are of course the additional problems. *Cf.* Prince v. Massachusetts, 321 U.S. 158, 170 (1944).

59. Kelly, S.J., *The Duty to Preserve Life,* 12 Theological Studies 550 (1951) [emphasis added].
60. Medical Malpractice, Ch. VIII.
61. P. Ramsey, The Patient as Person 121-22; G. Fletcher, *Prolonging Life,* 42 Wash. L. Rev. 999, 1005 et seq. (1967).
62. *Supra* note 3, at 983 n.41.
63. *Supra* note 43.
64. *Supra* note 25 with text.
65. W. Shakespeare, King Lear, Act V, sc. iii.
66. *Supra* note 58, at 174.
67. Edgar Allen Poe, For Annie, first and sixth verses:

Thank Heaven! the crisis—
The danger is past,
And the lingering illness
Is over at last—
And the fever called "Living"
Is conquered at last.
And oh! of all tortures
That torture the worst
Has abated—the terrible
Torture of thirst,
For the naphthaline river
Of Passion accurst:—
I have drank of a water
That quenches all thirst:—

68. *See* note 56 *supra* with text; Death Warrant 69.
69. Kelly, *The Duty of Using Artifiicial Means of Preserving Life,* 11 Theo. Studies 203, 216-17 (1950).
70. Compare the fine distinctions in French and Swiss law whereby a physician may provide, but may not administer, poison at the request of a dying patient. This is because suicide is not a crime, and therefore to be an accessory to it cannot be criminal; but directly to kill another even from humane motives is still murder. Death Warrant 27-28. In 1961 the illegality of attempted suicide was abolished in English law, but it remains a serious crime for a person to incite or assist another to commit suicide. *See* note 13 *supra* and accompanying text.
71. Montaigne's Essays, Vol. 2, Ch. XX, *We Taste Nothing Purely* 607, 608 (Florio trans., Modern Library ed.)
72. G. Vann, O.P., Morals and Man 83 (1960).
73. Quoted in Botein, Trial Judge 182 (1952). *See* Repouille v. United States, 165 F.2d 152, 153 (2d Cir. 1947) (Hand, J.). Sioux City & Pacific Railroad Co. v. Stout, 84 U.S. (17 Wall.) 657 (1873) remains a leading case on the jury's authority to fix standards in ambiguous areas. *Compare* Holmes, The Common Law 123-24 (1881). One wonders how much of *Stout's* meaning is forgotten in the movement to the smaller jury. Williams v. Florida, 399 U.S. 78 (1970); Colgrove v. Battin, 41 L.W. 5025 (1973). *See also* Apodaca v. Oregon, 406 U.S. 404 (1972). And *quaere,* as to the meaning of the death penalty cases. Furman v. Georgia, 408 U.S. 238 (1972), especially the opinions of White and Stewart, JJ., in respect of the significance our society accords jury ascertainment of its value judgments. Note the caveat in the dissenting opinion of Burger, C.J., for himself and Blackmun, Powell, and Rehnquist, JJ.:

> The selectivity of juries in imposing the punishment of death is properly viewed as a refinement on rather than a repudiation of the statutory authorization for that penalty. Legislatures prescribe the categories of crimes for which the death penalty should be available, and, acting as "the conscience of the community,"

juries are entrusted to determine in individual cases that the ultimate punishment is warranted. Juries are undoubtedly influenced in this judgment by myriad factors. The motive or lack of motive of the perpetrator, the degree of injury or suffering of the victim or victims and the degree of brutality in the commission of the crime would seem to be prominent among these factors. Given the general awareness that death is no longer a routine punishment for the crimes for which it is made available, it is hardly surprising that juries have been increasingly meticulous in their imposition of the penalty. But to assume from the mere fact of relative infrequency that only a random assortment of pariahs are sentenced to death, is to cast grave doubt on the basic integrity of our jury system.

It would, of course, be unrealistic to assume that juries have been perfectly consistent in choosing the cases where the death penalty is to be imposed, for no human institution performs with perfect consistency. There are doubtless prisoners on death row who would not be there had they been tried before a different jury or in a different State. In this sense their fate has been controlled by a fortuitous circumstance. However, this element of fortuity does not stand as an indictment either of the general functioning of juries in capital cases or of the integrity of jury decisions in individual cases. There is no empirical basis for concluding that juries have generally failed to discharge in good faith the responsibility described in *Witherspoon*—that of choosing between life and death in individual cases according to the dictates of community values. 408 U.S. at 388-89.

See also Witherspoon v. Illinois, 391 U.S. 510 (1968), McGautha v. California, 402 U.S. 183 (1971).

74. Death Warrant 28.
75. *Compare* Silving, *Euthanasia: A Study in Comparative Criminal Law,* 103 U. Pa. L. Rev. 350, 352-54 (1954); Recent Decisions, 34 Notre Dame Law, 460-64 (1959). *See* note 73, *supra.*
76. *The Freedom to Die,* Commonweal, August 11, 1972, at 423.
77. P. Ramsey, The Patient as Person 118-119.
78. Death Warrant 80. For a contemporary discussion of the principle of double effect, *see* C. Curran, Medicine and Morals 5-7 (Corpus Papers 1970).
79. Daube, *Sanctity of Life,* 60 Proc. R. Soc. Med. 1235, 1336 (1967). In his paper, *supra* note 2, Professor Dyck asks:

> Why are these distinctions [between permitting to die and causing death] important in instances where permitting to die or causing death have the same effect—namely, that a life is shortened? In both instances there is a failure to try to prolong the life of one who is dying. It is at this point that one must see why consequential reasoning is in itself too narrow, and why it is important also not to limit the discussion of euthanasia to the immediate relationship between a single patient and a single physician.

Answering, he states in part:

> . . . If a dying person chooses for the sake of relieving pain drugs administered in potent doses, this is not primarily an act of shortening life, although it may have that effect, but it is a choice of how the patient wishes to live while dying. Similarly, if a patient chooses to forego medical interventions that would have the effect of prolonging his or her dying without in any way promising release from death, this also is a choice as to what is the most meaningful way to spend the remainder of life, however short that may be. The choice to use drugs to relieve pain and the choice not to use medical measures that cannot promise a cure for one's dying are no different in principle from the choices we make throughout our lives as to how much we will rest, how hard we will work, how little and how much medical intervention we will seek or tolerate and the like.

80. *See* Death Warrant 83-84; J. Dedek, Human Life: Some Moral Issues 121, 127 (1972). Compare the euthanasiac death of Sigmund Freud as told by his physician,

Max Schur, Freud: Living and Dying (1972). Freud's cancer of the oral cavity was discovered in April, 1923, when he was about 67 years old. Schur became his personal physician in 1928 and served until Freud's death in 1939, both in Vienna and London. *Id.* at 347. When he first engaged Schur, Freud obtained the promise of euthanasia:

> . . . Mentioning only in a rather general way "some unfortunate experiences with your predecessors," he expressed the expectation that he would always be told the truth and nothing but the truth. My response must have reassured him that I meant to keep such a promise. He then added, looking searchingly to me: "Versprechen Sie mir auch noch: Wenn es mal so weit ist, werden Sie mich nicht unnötig quälen lassen." ["Promise me one more thing: that when the time comes, you won't let me suffer unnecessarily."] All this was said with the utmost simplicity, without a trace of pathos, but also with complete determination. We shook hands at this point.

Id. at 408. Thus doctor and patient were under euthanasiac commitment during approximately the last 11 years of Freud's life. Schur relates the final scene: On the following day, September 21, while I was sitting at his bedside, Freud took my hand and said to me: "Lieber Schur, Sie erinnern sich wohl an unser erstes Gespräch. Sie haben mir damals versprochen mich nicht im Stiche zu lassen wenn es so weit ist. Das ist jetzt nur noch Quälerei und hat keinen Sinn mehr." [My dear Schur, you certainly remember our first talk. You promised me then not to forsake me when my time comes. Now it's nothing but torture and makes no sense any more."]

I indicated that I had not forgotten my promise.

He sighed with relief, held my hand for a moment longer, and said: "Ich danke Ihnen" ["I thank you,"] and after a moment of hesitation he added: "Sagen Sie es der Anna ["Tell Anna about this."] All this was said without a trace of emotionality or self-pity, and with full consciousness of reality.

I informed Anna of our conversation, as Freud had asked. When he was again in agony I gave him a hypodermic of two centigrams of morphine. He soon felt relief and fell into a peaceful sleep. The expression of pain and suffering was gone. I repeated this dose after about twelve hours. Freud was obviously so close to the end of his reserves he lapsed into a coma and did not wake up again. He died at 3:00 A.M. on September 23, 1939. Freud had said in his Thoughts for the Times on War and Death: Towards the actual person who has died we adopt a special attitude: something like admiration for someone who has accomplished a very difficult task.

Id. at 529.

81. *See* Louisell, *Biology, Law and Reason: Man as Self-Creator,* 16 Am. J. Juris. 1 (1971). During my recent visit at the University of Minnesota, Mark Graubard, professor of the history of science (now emeritus), indicated a possible incursion into the areas suggested in this paragraph of the text. I hope it is forthcoming!
82. H. Ratner, M.D., Editorial, 7 Child and Family 99 (1968).
83. While I have often thought that permissive abortion is more morally reprehensible than voluntary euthanasia for the aged in that the former cuts off life before it has had its chance, it must be conceded that the self-centered fears and anxieties a euthanasiac regime might engender among the elderly (or those in the process of becoming elderly—as we all are) have no exact counterpart in the case of abortion.
84. There is disturbing language in John F. Kennedy Memorial Hospital v. Heston, 279 A.2d 670 (N.J. 1971). In upholding the subjection of a Jehovah's Witness, age 22 and unmarried, who had sustained severe injuries in an automobile accident, to a blood transfusion necessary to save her life, the Court *per* Weintraub, CJ., said: "It seems correct to say there is no constitutional right to choose to die." *Id.* at 672. Replying to the patient's contention that there is a difference between passively sub-

mitting to death and actively seeking it, the Court said: "If the State may interrupt one mode of self-destruction [suicide] it may with equal authority interfere with the other." *Id.*, at 673. It acknowledges that "It is arguably different when an individual, overtaken by illness, decides to let it run a fatal course." *Id.* Pretermitting the question of the free exercise of religion, it seems unfortunate that the Court did not confront more directly the extent of the obligation to use artificial means to sustain life. One of the cases cited by the court, Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, 201 A.2d 537, *cert. denied,* 377 U.S. 985 (1964) is distinguishable, in that there the woman involved was bearing a child. Thus another life was involved, and the court there correctly concluded that an unborn child is entitled to the law's protection when a transfusion is necessary to save its life. *See* Louisell, *Abortion, the Practice of Medicine and the Due Process of Law,* 16 U.C.L.A. L. Rev. 233, 244 (1969).

Semantic Problems of Fetal Research

Juliana G. Pilon

DURING THE past few years, the debate over fetal research—whether to allow research on living fetuses and if so under what conditions—has generated considerable reaction from many segments of society. The government has responded with a new set of regulations ambiguously proclaimed to be for the "Protection of Human Subjects." But it seems that such protection does not indeed extend to all human subjects, and that there have been important recent changes having the effect of jeopardizing the lives of *viable* infants. This fact emerges most clearly from an analysis of the infelicitous use, in these new regulations, of some central concepts, behind which lie disturbing moral attitudes.

The moral principle at stake is that individuals cannot be used without their consent—in particular, they cannot be mutilated or killed for the benefit of others. When the Supreme Court legalized abortion (*Roe* vs. *Wade, 1973*) it seemed to have abandoned this principle, insofar as allowing a fetus to be aborted for the sake of the mother's well-being is to use that child (i.e., his death) for the mother's alleged benefit. The Court tried to solve the problem by ruling that fetuses were not individuals. Nonetheless, the principle suffered. "By declining to recognize the fetus as a person 'in the whole sense,' the Supreme Court absolved itself of any legal obligation to protect the life of the early fetus, or probably even to oversee experimentation for the first six months of life."[1] Many reasoned as follows: if an aborted fetus is not a person, indeed if we can kill it, why not use it in research, use it to benefit other fetuses? The implications of this argument may not be immediately obvious. For when the research subject is an abortus — a very young, nonviable, and unwanted fetus condemned to certain death — moral sensibilities are perhaps less aroused by the knowledge that we are using it to profit others. The picture changes, however, when experimentation involves a viable fetus *ex utero* which, even by the Supreme Court's standards,

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is a child: we then expect the regulations that apply to him to be no different from the regulations on research involving other children. Surprisingly, this is not the case at present: experimentation that prolongs the life of nonviable fetuses is allowed, yet no provisions exist for protecting the infant once it becomes viable. The moral principle mentioned above, namely, that individuals cannot be used without their consent for the benefit of others, has therefore been violated by government regulations on fetal research. The reader's patience in following the semantic analysis of those regulations will be rewarded, I hope, by the insight it provides into the moral standards involved.

Without doubt, the most crucial concept in the debate on the ethics of fetal research is the term "fetus" itself. For a straightforward definition, Dorland's Illustrated Medical Dictionary is adequate: "Fetus: the unborn offspring of any viviparous animal." From the viviparous animals in the Department of Health, Education, and Welfare, however, we have a more recent, more elaborate statement: " 'Fetus' means the product of conception from the time of implantation until a determination is made, following expulsion or extraction of the fetus, that it is viable."[2] its authors are the first to admit that the definition "may vary at times from legal, medical, or common usage" and is therefore in need of explanation; this new usage, they assure us, "serves the interests of both consistency and clarity."[3] But closer scrutiny must lead to a different conclusion: the definition creates serious confusion in crucial areas and thus is, philosophically speaking, abortive.

Consider, for example, what it does to the term "nonviable fetus," defined by HEW as "a fetus *ex utero* which, although living, is not viable." Let us look again at the definition of a fetus as "the product of conception from the time of implantation until a determination is made, following expulsion or extraction of the fetus, that it is viable," which outlines an organism from the time of implantation to a point when determination is made, shortly after expulsion, that the fetus is viable. The definition implies quite clearly that a viable fetus (so determined after expulsion) is no longer a fetus — presumably, it then becomes an infant. Suppose, however, that the fetus is expelled soon after implantation and a determination is made of the fetus' nonviability. Is it still a fetus? Had the definition of a fetus referred to "the product of conception . . . until a determination is made *whether* (not *that*) it is viable," and were a proviso added that even after nonviability is determined we still have a fetus—albeit a nonviable one—up to the point of death, ambiguity

might have been avoided. Or, HEW's definition might have read as follows: "A fetus is the offspring of any viviparous animal from the time of implantation until a certain future time T (say, six months) subsequent to which the extracted or expelled fetus would be viable; the offspring is, moreover, considered to be a fetus at all times before T, whether or not it has been expelled." Had HEW meant this, it should have said so. Otherwise, we may conclude that a nonviable fetus—determined to be nonviable after expulsion or extraction—is not a fetus at all, since a fetus must be determined to be, after expulsion or extraction, viable—according to the 1975 regulations.

Perhaps this was an oversight. HEW clearly means that a nonviable fetus is a product of conception *ex utero* which is not expected to live. If we suppose it is *not* a fetus (i.e., after a determination has been made of its nonviability), we then have a syncategorematic term[4]: just as an intellectual dwarf (say, for example, of a six-foot tall government employee) is no dwarf at all, nor a false prophet a prophet,[5] nonviable fetuses are not fetuses. As with many other semantic problems, however, this one is more than language-deep.

Consider, in this regard, § 46.209 (b) of the new regulations:

> No *nonviable fetus* may be involved as a subject in an activity covered by this subpart unless: (1) Vital functions of the fetus will not be artificially maintained except where the purpose of the activity is to develop new methods for enabling *fetuses* to survive to the point of viability . . . (emphasis added).[6]

But if nonviable fetuses are not fetuses, and the artificial maintenance of their vital functions can only be justified by some benefit to fetuses, it necessarily follows that such procedures must benefit *other* organisms. The ambiguity of the term "nonviable fetuses"—which gives the illusion that we are talking about a sub-category of a larger class, namely, the class of fetuses—obscures the simple if odd truth that the research subject in question here is not allowed to reap the fruits of that research. If the government means to avoid this interpretation, it should define the term "fetus" more carefully, as I have suggested.

Contrast this with the previous year's regulations, published in the *Federal Register* of August 23, 1974: "Vital functions of an abortus will not be artificially maintained except where the purpose of the activity is to develop new methods for enabling the abortus to survive to the point of viability."[7] *Clearly,* under these regulations, benefit to the subject himself was a necessary and sufficient

condition for allowing the prolongation of its life. Under the new rules it is not even a necessary, let alone a sufficient, condition. This is surely a remarkable change in outlook.

The new regulations are also in conflict with the recommendation, on this particular issue, of the commission created by Congress to study the ethics of fetal research, although most of the commission's other recommendations *were* adopted by HEW. By a vote of 8 to 1, the commission decided that—at least for nontherapeutic purposes—"no intrusion into the fetus [be] made which alters the duration of life,"[8] not even for its own good. To be sure, the commission's recommendations were not always uniform or consistent, but in this particular case its moral intuitions came down on the side of the fetus, with good reason.

For let us consider the possibility that a live infant *ex utero,* presumed to be nonviable (whether the product of abortion or not is immaterial here), is involved in an experiment designed to prolong the life of fetuses and, to our stupefaction . . . it lives! The experiment is, so to speak, successful. What do we do with the newly rescued individual?

The new HEW regulations timidly assure us that *"experimental activities* which *of themselves* would terminate the heartbeat or respiration of the fetus will not be employed." (emphasis added)[9] This leaves open the possibility of using lethal procedures not themselves "experimental activities"! Even more important, however, is the fact that there are many ways to harm a baby other than by killing it. To cite Paul Ramsey's observation, made in a different context but relevant here, "lest experimentation be prematurely foreclosed, the department [of HEW] may have guaranteed instead that in the ever-receding future, there will always be human fetal research subjects that already *needed* protection."[10]

The nonviable fetus might, therefore, defy the linguistic category created for him by the government and become a child, as a result of successful experimentation. Far be it from me to deplore such a situation—I welcome it. (I am referring not to the category leap but to the new life.) But the category leap brings back the linguistic difficulty mentioned earlier in this article, revealing the curious fact that the new rules allow prolonging the life of nonviable fetuses "where the purpose of the activity is to develop new methods for enabling fetuses to survive to the point of viability." "*To* the point of viability": are we to understand that the formerly nonviable infants are allowed to live "to but not beyond" that point? Then what do we do with the research subject that becomes viable? Do we

abandon it? This solution would settle the problem of what to do with a nonviable fetus turned baby, as well as explain the sense in which the research is to benefit other, *bona fide* fetuses. Why else would the regulations forbid stopping the respiration and heart beat of nonviable fetuses by "experimental activities" if not in the expectation that such organisms might live? This is precisely Paul Ramsey's point:

> Why respiration?, we may ask, in view of the cruciality [sic] of respiration in defining viability? At that point, where there is respiration, have we not been told that every effort should be made to save the infant's life and no experiments are permitted?[11]

The possibility of a sinister motive behind HEW's choice of definitions is not ruled out. The analysis undertaken here seems to indicate that the real intention is to allow research *not* benefitting the research subject (say, an abortus), using him to develop techniques of viability to benefit other (wanted) fetuses, then killing the experimental subject once it becomes viable. Consider the statement appearing in the 1973 proposed regulations for fetal research:

> An abortus having the capacity to attain heart beat and respiration is in fact a premature infant, and all regulations governing research on children apply.[12]

Since an abortus is by definition nonviable,[13] this proviso was most likely intended to apply to the nonviable fetus made to attain heart beat and respiration by experimental procedures, clearly extending protection to it as to all children. But the new regulations are worded quite differently:

> In the event the fetus *ex utero* is found to be viable, it may be included as a subject in the activity [of research] only to the extent permitted by and in accordance with the requirements of other subparts of this part.[14]

In the first place, it is not clear whether a "fetus *ex utero* found to be viable" may be understood to refer to our unprotected nonviable fetus-turned-baby which is, after all, not "found" but *made* viable; but if it does, we then turn to the "other subparts" relevant here and we find that a viable fetus can be experimented on if

> (1) There will be no *added* risk to the fetus resulting from the activity, and (2) the purpose of the activity is the development of *important biomedical knowledge* which cannot be obtained by other means. (emphasis added)[15]

The word "added" is troublesome. What if the nonviable-fetus-

turned-baby has *already* been harmed by experiments performed previous to viability? Assurances that no additional harm from further experiments will be incurred are certainly not enough. The second (disturbingly utilitarian) condition is even worse, explicitly allowing research for the purpose of gathering "important biomedical knowledge," with no protection for the research subject. Stating, as did the 1973 recommendations, that all regulations governing research on children apply to newly-viable fetuses would at least acknowledge that these individuals are children. The absence of this proviso from both the 1974 and the 1975 regulations is too conspicuous to be accidental.

It now seems obvious that the Supreme Court's decision denying humanity to very young fetuses has allowed and even encouraged scientists to *use* such fetuses, to try to make them persons for the future benefit of *other* fetuses, disregarding the rights of such research subjects.

It has not been my purpose here to outline an adequate definition of a fetus. I have merely tried to expose contradictions that spring from the present legal definitions. I do have a suggestion, however, for a more consistent and more candid approach: refer to all fetuses and all children, whether viable, nonviable, or dead, as "offspring." We could then talk of unborn offspring, which may be dead or alive, and born offspring (whether aborted, expelled by natural birth, or extracted through Caeserian operation) which in turn may also be dead or alive. The live born offspring may or may not be expected to live, just as adult, sick people may or may not be expected to live. But "not-yet-dead-offspring," just like "not-yet-dead-adult," is no syncategorematic term. Its ethical connotations are, therefore, considerably more transparent than those of "nonviable fetus."

Objections to HEW's neologisms may be found in the current literature on fetal research. For instance, Rev. Kevin O'Rourke, agreeing with Rev. Richard McCormick and LeRoy Walters, opposes the term "fetus *ex- utero*" as "infelicitous . . . because the living fetus outside the womb, whether it will survive or not, is usually referred to as a human infant."[16] Rev. McCormick and Mr. Walters, citing the National Commission's alleged "respect to dying subjects," accuse it of inconsistently permitting non-therapeutic interventions on aborted fetuses and conclude: "On the very premises accepted by the Commission, we believe that the conclusion should have been that no interventions are permissible here that are not permissible on all other dying subjects."[17] (The Commission's inconsistent stand was also noted by Stephen Toulmin: it "proves compatible . . . both

with support of the thesis that a fetus is a 'person' and with a rejection of that thesis."[18] This inconsistency is even more blatant in the HEW regulations.)

Also Prof. David W. Louisell sees no use for "what is now called the 'nonviable fetus *ex utero*' but which up to now has been known by law, and I think by society generally, as an infant, however premature."[19] Following his sound intuitions and common usage, Prof. Louisell continues: "In my judgment all infants, however premature or inevitable their death, are within the norms governing human experimentation generally. We do not subject the aged dying to unconsented experimentation, nor should we the youthful dying."[20] Amen. Creating a new category for nonviable fetuses does not dispose of the ethical problems involved. To paraphrase the poet, a man by any other name is still a man, HEW and the U.S. Supreme Court notwithstanding.

NOTES

1. Willard Gaylin and Mark Lappe, "Fetal Politics: the debate on experimenting with the unborn," *Atlantic*, vol. 235, May 1975, p. 68.
2. *Federal Register*, vol. 40, no. 154, August 8, 1975, p. 33529.
3. *Ibid.*, p. 33526.
4. Willard van Orman Quine, *Word and Object* (MIT Press, Cambridge 1960), p. 107.
5. *Ibid.*, pp. 132-133.
6. *Federal Register*, op. cit., p. 33530.
7. *Federal Register*, vol. 39, no. 165, Friday, August 23, 1974, p. 30654.
8. *Federal Register* 1975, op. cit., p. 33548.
9. *Federal Register* 1975, op. cit., p. 33530.
10. Paul Ramsey, *The Ethics of Fetal Research* (Yale University Press, New Haven and London 1975), p. 87.
11. Ramsey, *ibid.*, p. 83.
12. *Federal Register*, vol. 38, no. 221, Friday, November 16, 1973, p. 31738.
13. *Federal Register* 1973, *op. cit.*, p. 31739.
14. *Federal Register* 1975, *op. cit.*, p. 33530.
15. *Ibid.*, p. 33530.
16. Rev. Kevin D. O'Rourke, "Fetal Experimentation: An Evaluation of the New Federal Norms," *Hospital Progress*, vol. 56, no. 9, Sept. 1975, p. 64.
17. Rev. Richard McCormick and LeRoy Walters, "Fetal Research and Public Policy." *The Hastings Center Report*, Oct. 1975, vol. 5, no. 5, p. 13. (Reprinted from *America*, June 21, 1975, pp. 473-476.)
18. Stephen Toulmin, "Exploring the Moderate Consensus," *The Hastings Center Report*, June 1975, vol. 5, no. 3, p. 31.
19. *Federal Register* 1975, *op. cit.*, p. 33549.
20. *Ibid.*, p. 33549.

[*N.B.: The Fall, 1975, issue of this review included a Symposium on Fetal Experimentation (see HLR, Vol. I, No. 4.)*]

A Roman Replies

M. J. Sobran

Earlier this year, the New York-based Society for Universal Understanding, expanding its purview, summoned up, with the aid of a necromancer, the shade of a citizen of ancient Rome, and asked him for his views on infanticide. As it happened, he had been bursting to present his thoughts on the subject, and he graciously materialized to deliver a short talk, which we reproduce below.—MJS

YOU ARE KIND, men of America, to invite me here to speak as a member of my race about a custom of ours which you abhor—the exposing of infants to die. I have been studying your language and your ways, and although I know more about them now than formerly, they remain as strange to me, perhaps, as mine must appear to you. Accordingly you must make some allowance for my speaking of your tongue—and not only for my egregious mistakes, but for a certain subtle uneasiness that would make me a stranger to it even if I mastered it perfectly, and would prevent me from using some expressions that would naturally occur to you, as natives.

You, for instance, are in the habit of speaking of "human rights." You use this phrase candidly, and without any self-consciousness of how odd you sound to foreign ears, without any awareness of how peculiar a manner of speech that is. I think I understand this expression by now; yet it remains foreign to me. Your way of using it is too broad and vague for one who, like myself, was raised to other ways, and has not grown up among men who use it unthinkingly. I say this without prejudice to yourselves; for every nation has such words, unavailable to foreigners, and no nation could get anything of consequence done unless it could initiate its young into their unreflective use.—Yet to speak a language as a native and to speak it rationally are very different things, and it is often a rigid rationality, as much as an error or inexactness, that makes the speech of a foreigner impalpably quaint. He may even speak the language too well, too carefully.

I am afraid, moreover, that you may find me an ungracious guest.

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You have given me this chance, in accordance with a quaint custom of yours, to defend our ways, and I will seem instead to be attacking yours. But I ask you to remember that my very insults may reveal more about me and my race than about yours; as you say, "Consider the source."

I confess that it makes me nervous to speak to you in this way, alone, on behalf of one of our practices which you think barbarous. My apprehension is increased when I consider the difference between the kind of men you are and the kind of men you suppose yourselves to be. Why, after all, are we here? Because you are curious men, or as you would say, if you spoke with greater frankness and less modesty, tolerant men, who want to hear what you would call "both sides of the issue." You assume there are two sides, when there may be a hundred—or only one. (On the matter of infanticide, do you really think there is more than one? One would not gather so; but then, why do you entertain another opinion? Are you thinking of encouraging the practice, and using me to introduce it among you?)

The truth is that you greatly exaggerate the value of tolerance, not because you really think it is rational, but because, allowing so much and resisting so little, you want to think your own weakness and lack of character a virtue. When you are afraid to assert yourselves you praise your own restraint. When you are feeble you marvel that you have subdued your strength.

So, I say, it appears to me: my purpose is not to abuse you, but to make you perceive certain traits in yourselves, evident to outsiders, which make you harder to converse with than some who do not flatter themselves on the score of their own tolerance. Because you do not whip or hang men for uttering strange opinions, you imagine that you listen to them attentively and with free minds. I assure you it is not so. True, all kinds of books may be found in your libraries; but this does not mean that you are a race of philosophers. Far from it. It merely means that your intellectual resistance is passive rather than active. In this you are effeminate and indolent, more like the men of India than those of Athens. Your tolerance is that of sleeping rather than of waking men. You hesitate even to speak of "false opinions" or "evil opinions"—yet you despise nations like my own for polytheism. I cannot understand this. Surely it is conceivable that many gods should exist, whether or not it is so; but that *neither* of mutually repugnant opinions should be false and destructive?—That is impossible.

But to the matter: It is true that we did abandon some of our

infants to die. In our families the father had full authority to kill any member he thought deserved death, son, wife, or daughter. This authority was seldom invoked, and then usually to punish a son who had brought disgrace on his family. And of course, as you know, to kill infants who were likely to prove hardships to the family—girls, deformed ones, and the like.

We admitted no "right" of the child to burden the parents who had given them life. The gift of life is unsought and unmerited: and being a gift, how can the child deny the justice of his debt, or complain when it is collected by him to whom it is due? You wonder how a child can deserve death. Among us the question was whether the child deserved life. That was a thing for the father to decide for the family. A child whose shape promised no good to the family was unworthy of membership, and so was denied those ceremonial rites of admission by which, a few days after birth, we made it one of ours, of us.

There is an analogy that may make the matter clearer to you. The father did not receive this awful power from the state—as if the state meant to encourage filicide—but from the gods. He therefore held it before the state took shape, being as he was ruler of the family. The state itself was constituted by families and tribes, as is generally true all over the world; not, as with you, by individuals. An infant was born to his family; the state had nothing to say of him until he had grown to manhood and citizenship. And this was so because the state respected, and had no choice but to accept, the sacred autonomy of the family, and the father's authority over its internal affairs.

Thus you may understand us better if you think of ours as a federal system, with the families delegating limited powers to the central government. The families were local jurisdiction such as your states used to be, with life and death powers over those within them. We allowed no "rights" to individuals as such; the idea of such a tiny sovereignty would have seemed not only impracticable but absurd. For that is what the individual is thought to be under your system: the smallest of sovereignties, the extreme form of local government. Your constitution and your laws are intended to guarantee such personal prerogatives as "speaking one's mind," marrying whom one chooses, and getting an abortion. And what you thus do for the individual, we did, in a way, for the family.

Thus to permit filicide was to protect liberty. We ensured that certain matters would be decided by those most intimately concerned

in them, under their deities, and not by society as a whole. The authority of the father was the liberty of the family. It was the constitutional arrangement which, like (for instance) your own Tenth Amendment, told the central government to mind its own proper business.

So much, perhaps, is not very difficult for you to understand.

But here, I confess, I proceed with hesitation and diffidence. For here we reach one of those gulfs of difference between nations that dispose men to hurl themselves at each other in war, rather than trust to find rational settlement in the calm colloquies of philosophers. Among ourselves, as perhaps among you, there was on some matters such perfect accord that it is hard for one of us to justify our ways to outsiders, so natural and indubitable did they seem. If you ask me why we thought of them as we did, I feel almost as baffled as if you were to ask me why we thought two and two made four; and since it was never necessary for us to justify them among ourselves, in attempting to do so I must adopt a style of speech that will sound as strained and abstract to me as to yourselves.

I refer to the status you have granted to your women. I try to put it simply and neutrally: yet I may already have committed a subtle breach of your manners. For I call them "your" women; I speak not of the position they have "attained," or of the position they "enjoy," but of that which you have "granted" them. Even my formulation assumes the natural authority of men and the concomitant subjection of women.

We revered our fathers for more than life, for more even than their power over us: a son was also indebted to his father for his name, his place, his prospects—for all that he was. We loved life, and we accepted our respective lots with manly gratitude. You Americans are forever apologizing to your children for having given them their being, that which I can imagine nothing more mean-souled and morbid. The special blessings you superadd to birth do not make you proud, but embarrass you. Inheritance and paternal legacies are in disrepute among you: your rulers and politicians are forever whining about the "accident of birth." Accident!—as if all that nature, prudence, industry, and love can bestow on a son were not to be rejoiced in, but hidden in shame as an affront to other sons of meaner destinies. Even the word "destiny" itself makes you uneasy: you hate to think that men are born to different fates. You think it is unfair to the less fortunate. But fortune is unfair, since it is always undeserved; just as life itself is undeserved. The part of

man is to give thanks for both. The first accident of birth is birth itself. It always happens to the unsuspecting. It is the gods' first favor. And we thought the father a worthy representative of this active and positive principle of fortune.

It is in proportion as you despair of life and of the ability of man to live it worthily that you elevate your women. All your old laws have come under review, it being held that they are unjust to the unfortunate. And yet the more you change them, the more complaints you hear. The more you destroy paternal authority, the more you say you are making your society more just and perfect—yet you only increase the accusation that you are corrupt. Your sons and daughters are less and less governable; some of them, far from being satisfied by your attempts to mend your ways, demand the abolition of all your laws and customs. You are forever trying to persuade the lawless and to appease the insatiable; and all that your most earnest efforts gain you is contempt.

Feminine passivity becomes the model of human action and capacity. Instead of requiring your sons to be manly, you console their failures, support their indolence, and excuse their disgrace. The helplessness of the mother is represented as the usual condition of men: as she is burdened with pregnancy, so they with their misfortunes—their accidents of birth.

When life is seen in such an effeminate way, it is no wonder that it is dreaded and hated, and that you regard a child as an innocent victim who has had this curse of living inflicted on him. The result is that you are able to argue for aborting them before they are born as a kind of mercy. Instead of saying candidly that you do not want them, you enumerate the disadvantages to them of their being born. But if this is so, why not kill yourselves? Is life so miserable that you would spare them, and not yourselves? Or do you really desire to live, and make excuses for killing those who would inconvenience you? This last is evidently the case. You lack even the virility to kill frankly. I repeat that we regarded life as a gift, and required that our children be worthy of it. That was our reason for killing the unfit. We said so. You however, pretend that killing your children is a species of kindness to them. You never admit that you kill selfishly. You prefer to speak as if the victims of your cruelty were your beneficiaries.

We had our cruelties, and we acknowledged no duties to strangers except, sometimes, hospitality. Your civilization is different. You admit impossible duties of universal benevolence, and end by killing

your own children in the womb. It is not your murders but your priggishness that distinguishes you. All nations kill their enemies; most practice infanticide. The difference is that they acknowledge what they do. They know they are killing human beings. But they distinguish between those to whom they owe loyalty—those whose society they share—and those to whom they owe nothing.

Usually there are very particular ways of marking off "ours" from "others." Membership in one's own group is usually established or signified ceremonially. Those who are not initiated are not protected. Your own criterion is the largest of all: you say that mere humanity confers "human rights," which you think "natural" and irrevocable. How then do you justify killing those you would exclude, when they are human by birth itself, and not by virtue of a subsequent rite? The answer is that you turn birth itself into the protective initiation, and kill them before birth. This expedient satisfied you, because you think it a "natural" way to distinguish between what is human and what is not. Before birth a child is held a non-member of humanity. I do not blame you for killing them; I merely resent the suggestion that your criterion of membership is truly universal, and therefore more rational than ours.

Now the pretense that the unborn child is only a part of his mother's body entails the consequence that the mother should have sole authority in deciding whether the child should be killed before birth. And this is only proper, since you have made your women independent of masculine authority. Such is the opinion of those who assert new prerogatives for women; how will you dispute them?

But there is a further consequence, which few among you have noted. And this is that the mother, and not the father, now assumes the power to create new members of your society. It is she who decides whether to allow the "initiation" of birth; and whether, thereby, to confer paternity upon the man who begot the child. He becomes a father only at her pleasure, upon the birth of the child; she decides whether he shall have the joy of nurturing it, and the responsibility of supporting it. Less than ever is it in his power to become a father; in having coitus he can do no more than as it were expose himself to the possibility of fatherhood. He may be able to coax the woman into granting him this boon, just as women were formerly able to coax their husbands into giving them their way; but that is all. Children are now the property of your wives. This was to a great extent true already, as witness your divorce settlements. Now it is truer than before.

I can hardly hope to have persuaded you that our ways were bet-

ter than yours. I tell you only how it appears to me. Our system of infanticide was patriarchal; yours is matriarchal. The rites of initiation into society are very different, and our rules were more direct, manly, and pious. Ours encouraged excellence, sustained the family, affirmed the value of life, in a way, even in the act of inflicting death. Otherwise your ways and ours are similar.

Letters

Kamisar on Mercy Killing

Believe me, I'm impressed by Yale Kamisar's "Mercy Killing" article (HLR, Spring '76)—it's as good as you said it was. But I wish you had run the fabulous footnotes on the pages themselves; I cannot recall ever reading any other article in which the *notes* were often as good as (sometimes *better* than) the text itself! This is by no means a knock at the author, who after all assembled the notes. Marshalled them is a better description: it is devastating stuff, and is indeed the classic you describe it as. I strongly oppose abortion, but have been ambivalent about euthanasia. I *remain* ambivalent, but I am now "firmly" ambivalent on Prof. K's side. I await the final installment.

New York City H. E. KINDERMAN

Prof. Kamisar makes a most telling point with his "Law on the Books" as opposed to the "Law in Action" . . . that seems to me to be the real dilemma in both the abortion and euthanasia questions; before the Supreme Court made such matters national problems, we were "free" to muddle through at a level that allowed for mistakes either forgivable, or rectifiable, or both [but] now we are faced with the almost impossible problem of writing constitutional law . . . covering personal and individual situations that can never be ideal. The important point is that our society should favor life as against the taking of it, but the Court has put us in exactly the opposite position . . .

Youngstown, Ohio JEAN M. JENKINS

A Senate Vote

As you are probably aware, we are in an age of "information overkill." There is so much data, representing so many viewpoints, being thrust at decision makers, that it is often difficult to sift out that which is really valuable. Therefore I particularly appreciate receiving insightful material such as yours. It will be of benefit to myself and my staff.

U.S. Senate BILL BROCK

Sobran Revisited

As a regular reader of *The Human Life Review,* I have been following with increasing aggravation the discussion in the "Letters" section as to a) who M. J. Sobran Jr. is; b) whether or not he exists; and c) whether or not he existed a couple of centuries ago but has since passed on.

Well, who cares? As far as I'm concerned, if Sobran didn't exist, it would have been necessary to invent him. That somebody may actually have done so is of no interest to me whatsoever, as long as those marvelous essays keep turning up. One thing's for sure: Sobran isn't a committee.

Windsor, Vt. T. J. ATWILLER

M. J. Sobran defines euthanasia (HLR, Spring '76) as "delegated suicide." Then he compares a man who commits suicide to a deserter from the army—who, he says, is exposing his fellows to more danger by leaving them minus his protection. Sobran tells us humans to "stick together" like an army. But what does anyone gain from the desperate and the old and terminally ill hanging on (especially when they themselves would rather not)? And exactly who is our common enemy (if we're an army, there's got to be an enemy)? It can't be death, because those tempted to commit suicide yearn for death. So the enemy must be life. This is a very peculiar article: Sobran has such terrific sympathy for his friend, and everyone else who finds life tough and cruel and fierce, but he says they are wrong to do anything to end it. He even says having the option of ending it just adds another dilemma. So what's one more dilemma? He has to convince me that being a real trooper and not giving an inch has a meaning.

New Haven, Conn. NAN HARKINS

On Euthanasia

I cannot in my own heart believe that putting the suffering out of their misery is a moral wrong—especially if they request it themselves—but I must say that your euthanasia articles (HLR, Spring '76) have shaken my own convictions on the subject. Jews are haunted by the Hit-

ler precedent. All too often, we forget that what Hitler did was legal in Nazi Germany. Many people at the time did not believe such things could happen in Germany which was, after all, a civilized country. On abortion, the Germans are now more civilized than we are. What guarantee do we have that euthanasia laws, however well-intended, will not someday condemn the unwilling (as abortion laws now condemn the innocent)? . . . is it possible to even suggest that Prof. Kamisar has convinced my mind but not my heart? In matters of life and death it should be, certainly, the other way around, and . . . you have not made a convert but rather made me only uncertain of what I still believe is the properly humane thing [to do] for those suffering without hope.

New York City JEROME SCHWARTZ

I am delighted that you mention ("The Lesson of Euthanasia," HLR, Spring '76) "A Sign for Cain," by Dr. Frederic Wertham. It is a book for our day, and I hope that you will suggest it to your readers. For years friends urged me to read it. I have only done so recently, and they were right. Far too few people know about it.

Queens, N.Y. NELL KORBMAN

Small, Nagging Questions

I found Prof. Kotasek's article (HLR, Spring '76), though very technical, of great interest because it dealt with an aspect of the abortion question that we rarely hear about—the physical and psychological effect of induced abortion on the woman. In this country, where legalized abortion is such a recent development, little is known or written about the aftereffects. Writing from Czechoslovakia where abortions have been available for 17 years, he gives evidence of the seriousness of the procedure.

Most women I know consider abortion to be a care-free operation, presenting no physical or emotional danger. However, the few I know who have had the operation have all known those "small, nagging questions" Suzanne Gordon talks about (HLR, Winter '76). One friend not able to deal with the profound loss, dropped out of school and has been living at home with her parents for well over a year, unable to work and not seeing any friends.

I think it is time for the women's movement which is so concerned with the emotional effects of giving birth to an "unwanted child," to admit that abortion has serious psychological complications.

Huntington, N.Y. ANN WEAVER

(See Jane Doe's article in this issue.—Ed.)

In Praise of Dr. Koop

In C. Everett Koop's article, "A Doctor's View." (HLR, Spring '76), he says, ". . . It comes down to the question as it does in reference to any matter of life: 'Is there life not worthy to be lived?' . . ." That is the only point that needs to be made. I applaud Dr. Koop for making it. . . .

Brooklyn, N.Y. DANNY SCHIRRIPPA

What About the Aged?

I've read all recent issues of The Human Life Review with a keen interest and although you claim to be writing in the best interests of Life itself by condemning abortion and euthanasia you've yet to touch on one of the most pressing "Life" problems in America today—the *conditions* of housing, medical and social care for the aged. Of all the minority groups in America one of the most discriminated against is the elderly. Isn't there anyone in your stable of writers or contributors who could do a telling article on the welfare of our old folks?

Staten Island, N.Y. MARGARET GALLAGHER

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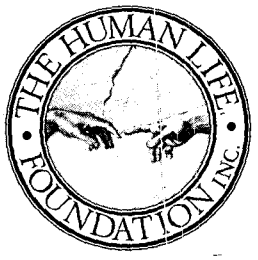
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