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# THE *OTHER* PRO CHOICE-PRO LIFE ISSUE: A COMPARISON OF EUTHANASIA LAW IN THE UNITED STATES AND THE NETHERLANDS

MARK STEPHEN THOMAS

## I. INTRODUCTION

**A**S of March 8, 1993, prosecutors in Macomb County, Michigan were undecided whether to charge Dr. Jack Kevorkian with murder in the February 4, 1993, death of one of his patients.<sup>1</sup> Kevorkian, a retired pathologist, provided the patient, suffering from emphysema and congestive heart disease, an administration of carbon monoxide with which to take his own life.<sup>2</sup> State law enforcement officials are contemplating the first exercise of Michigan's law, enacted in December, 1992, and effective February 26, 1993, prohibiting anyone from assisting another in killing himself.<sup>3</sup> The new statute makes assisting a suicide a criminal felony, subjecting Kevorkian to a possible penalty of up to four years in prison and a fine of up to \$2,000 for participating in the death act.<sup>4</sup> While Kevorkian awaits possible arrest for murder, the American Civil Liberties Union (ACLU) stated it would go to court to challenge the law as an unconstitutional infringement of the right to privacy.<sup>5</sup> Kevorkian defiantly challenged the Michigan state government's actions, stating he would continue to act in the best interests of his patients on a case-by-case basis.<sup>6</sup>

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1. Tom Morganthau, Todd Barrett and Frank Washington, *Dr. Kevorkian's Death Wish*, NEWSWEEK, Mar. 8, 1993, at 46.

2. *Id.* at 47.

3. *Id.* at 46.

4. *Id.*

5. *Id.*

6. *Id.* at 48. Dr. Kevorkian stated:

I don't care about the law. I don't care about injunctions. I don't care about legislators. . . .

This cannot be legislated. That's what's wrong with all these silly initiatives. No other medical practice has law controlling it. . . .

I will help a suffering human being at the right time when the patient's condition warrants it, despite anything else. That's what a doctor should do.

I've been [to jail] twice and I wasn't frightened. When you walk down the aisle with holding cells on each side, and someone spots you and then there's suddenly an uproar of cheers, and hands come through the bars to shake your hand, would you worry? . . .

There continues, however, to be an injunction against the use of Kevorkian's "suicide machine." CARLOS F. GOMEZ, REGULATING DEATH: EUTHANASIA AND THE CASE OF THE NETHERLANDS 12 (1991).

The Kevorkian case addresses an issue of increasing debate and importance, euthanasia, "[t]he act or practice of painlessly putting to death persons suffering from an incurable and distressing disease as an act of mercy."<sup>7</sup> A survey published in July 1991, by *Physician's Management* revealed that half the 2,000 doctors responding to a poll on the issue of assisted suicide reported that they had deliberately taken clinical actions that would indirectly cause a patient's death.<sup>8</sup> Almost one in ten stated they had acted to directly cause a patient's death and approximately four percent had provided patients or their families with information as to committing suicide.<sup>9</sup>

Researchers at the Harvard School of Public Health in Boston reported in the *Journal of the American Medical Association* that the percentage of Americans who felt that physicians should be allowed to end the lives of patients with incurable diseases if the patient and the patient's family so requested has grown from 34% in 1950 to 63% in 1991.<sup>10</sup> "Given the overwhelming support for allowing terminally ill or irreversibly comatose patients or their families to request withdrawal of life support and the level of popular sentiment favouring some form of legalized euthanasia, it is safe to predict that efforts to change public policy on these fronts will continue and likely escalate," the researchers added.<sup>11</sup>

The interest in the United States in seeking euthanasia for the suffering was demonstrated in July 1991, when Derek Humphrey's suicide manual *FINAL EXIT* topped the New York Times bestseller list.<sup>12</sup> Humphrey's book was designed for people with terminal diseases, providing detailed information ranging from how to secure lethal dosages of prescription drugs to finding a doctor to assist in the act.<sup>13</sup> The author predicted that by the end of the century, the issue would be definitively settled and euthanasia for the chronically sick would be universally available.<sup>14</sup>

Public interest in euthanasia is not surprising given the sheer number of persons directly affected. In America, about 80% of all people die in hospitals or nursing homes and of those, approximately 70%

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7. BLACK'S LAW DICTIONARY 554 (6th ed. 1990).

8. Bernd Debusmann, *Author of Suicide Bestseller Sees Wide Support for Euthanasia*, Reuters (a.m. cycle Aug. 13, 1991).

9. *Id.*

10. *Study Finds Growing Acceptance of Euthanasia in the United States*, Reuters (b.c. cycle May 19, 1992).

11. *Id.*

12. Debusmann, *supra* note 8.

13. *Id.*

14. *Id.*

die subsequent to the removal of artificial life support systems.<sup>15</sup> Demonstrating the lack of viable alternatives for those whose lives are maintained almost indefinitely by advanced medical technology, a recent study in the *Journal of Forensic Psychiatry* reported that there are 2,000 gunshot deaths annually in the United States to end the lives of the terminally ill.<sup>16</sup>

The controversy over mercy killing exists world-wide. On June 30, 1992, a Chinese court dismissed intentional homicide charges against a physician who gave injections of sedatives to a terminally ill woman to accelerate her death.<sup>17</sup> The Shaanxi intermediate court stressed that while the doctor's lower court acquittal was legally correct, the decision "does not mean that euthanasia is accepted by most people in China."<sup>18</sup> The decision was one of first impression for China, resulting in an intentionally vague holding because the country has no law on euthanasia.<sup>19</sup> The lower court ruled that the physician was not guilty of murder because the injections hastened the woman's death but did not cause it.<sup>20</sup> Public surveys in 1988 and 1989 indicated that more than 80% of Chinese approved of euthanasia, citing the potentially overwhelming financial and emotional burden of maintaining the life of terminally ill family members.<sup>21</sup>

In Israel, the Knesset gave preliminary approval in early 1992 to a bill "which would allow doctors and relatives of a terminally ill person who does not want to be kept alive artificially to let the patient die. The bill . . . stipulates that the act of allowing such deaths may be 'active or passive.'"<sup>22</sup> The Shulhan Aruch, the code of Jewish law, permits the removal of impediments to dying, while prohibiting anything that would hasten a patient's death.<sup>23</sup> Rabbis have allowed the withholding or withdrawal of respirators and aggressive treatment for the terminally ill when the "burden outweighs the benefits."<sup>24</sup> Further, Rabbinical authorities permit physicians to administer morphine to a dying patient in severe pain when, as a secondary effect, such narcotic will depress the patient's respiratory system, resulting in

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15. Gordon Legge, *Expert urges acceptance of euthanasia*, CALGARY HERALD, July 4, 1992, at C13.

16. *Id.*

17. *Chinese court upholds mercy killing*, AGENCE FRANCE PRESSE, June 30, 1992.

18. *Id.*

19. *China Backs "Not Guilty" Verdict on Mercy-Killers*, Reuters (b.c. cycle June 30, 1992).

20. *Id.*

21. *Id.*

22. Adena K. Berkowitz, "Doctor—help me die", THE JERUSALEM POST, Feb. 28, 1992.

23. *Id.*

24. *Id.*

death.<sup>25</sup> However, Jewish law forbids a physician to administer a lethal injection or prescribe a drug that would intentionally end a patient's life.<sup>26</sup> In May 1992, a Tel Aviv district court judge recognized and abided by the living will of a patient suffering from Alzheimer's disease and permitted the removal of artificial life support.<sup>27</sup> The case has been appealed, reflecting uncertainty as to the holding's meaning of the term, "artificial means to prolong life," ensuring additional controversy and conflict.<sup>28</sup>

On July 2, 1992, the Yokohama district public prosecutor's office in Japan indicted a physician on a charge of murder for administering a lethal injection to a terminal cancer patient.<sup>29</sup> The doctor first injected tranquilizers to suppress respiration and then gave an arterial injection of potassium chloride, which has a side effect of halting cardiac movement, at his own discretion, following the family's request and without consulting his colleagues.<sup>30</sup> The patient was in a coma due to multiple bone marrow tumors and died immediately from heart failure after the injection.<sup>31</sup> The physician could be sentenced to death if convicted in Japan's first test of a doctor's criminal liability for committing euthanasia.<sup>32</sup> Prosecutors charge that the action constitutes murder because the patient, in no pain at the time of the act of mercy killing, had not personally given consent.<sup>33</sup> The Nagoya High Court ruled in 1962 that euthanasia is legal when a patient suffering from an incurable disease provides informed consent.<sup>34</sup>

A Quebec Justice Minister had decided as of June 19, 1992, not to press criminal charges against a Canadian physician who complied with a dying AIDS patient's request by providing a lethal injection of potassium.<sup>35</sup> The Quebec Corporation of Physicians' disciplinary committee placed the doctor on a form of probation for three months after admitting to the mercy killing.<sup>36</sup> In Ottawa, the Canadian Medical Association, which took no action against the physician, is preparing

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25. *Id.*

26. *Id.*

27. Dan Izenberg, *Euthanasia advances another step*, THE JERUSALEM POST, May 29, 1992.

28. *Id.*

29. *Doctor Indicted for Murder in "Mercy Killing"*, JAPAN ECONOMIC NEWSWIRE, July 2, 1992.

30. *Id.*

31. *Doctor Faces Murder Charge Over Patient's Death*, Reuters (b.c. cycle July 2, 1992).

32. *Id.*

33. *Doctor indicted for murder in mercy killing*, REPORT FROM JAPAN, July 3, 1992.

34. *Id.*

35. Mike King, *Euthanasia is murder: expert; Reprimand only for doctor who helped patient die is dangerous trend, he says*, THE GAZETTE (Montreal), June 20, 1992, at A5.

36. *Id.*

a policy paper to clarify medical practitioners' recommended practice as to euthanasia.<sup>37</sup> The current Canadian Criminal Code prohibits the affirmative and intentional cessation of a terminally ill person's life.<sup>38</sup>

The issue of euthanasia was brought to Germany's attention when a West German physician was brought under charges for giving cyanide to an elderly woman with cancer.<sup>39</sup> A poll of West German doctors in 1986 revealed that 40% of responding physicians admitted killing incurably ill patients.<sup>40</sup>

A British doctor convicted of murdering a terminally ill patient with a fatal injection of potassium chloride was given a twelve-month suspended sentence on September 21, 1992.<sup>41</sup> Hastening death by "active" euthanasia is illegal in England, but "passive" euthanasia accomplished by merely withholding life-support, is within the law.<sup>42</sup> The intentional killing of the seventy-year old patient, in unbearable pain due to acute rheumatoid arthritis, ignited a nation-wide debate as to the ethical and moral decisions faced by hospital staffs when caring for the terminally ill.<sup>43</sup>

Conformity of euthanasia regulation across national boundaries is scarce indeed. Portugal, France, Italy and Greece strictly forbid euthanasia, while neighboring countries Belgium, Denmark and Poland permit various limited-forms of mercy killing. Clearly, world-wide attitudes toward the practice appear to be as varied as the multiplicity of cultures.<sup>44</sup>

The term "euthanasia" itself is ambiguous and subject to significant interpretation. Often used synonyms include "death with dignity," "mercy killing" and "right to die." Furthermore, there are several recognized forms of the process. "Passive" euthanasia is defined as withholding or withdrawing treatment to allow a dying per-

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37. *Id.*

38. Stella McMurrin, *Ethical questions*, THE OTTAWA CITIZEN, July 2, 1992, at A10. Canada, like Australia, England and all except two of the United States' jurisdictions, have statutory criminal prohibitions against aiding and abetting suicide, but do not distinguish between "mercy killing" and other types of homicide. N. CANTOR, *LEGAL FRONTIERS OF DEATH AND DYING* 46 (1987); Lynn Tracy Nerland, Note, *A Cry for Help: A Comparison of Voluntary, Active Euthanasia Law*, 13 HASTINGS INT'L & COMP. L. REV. 115, 115 n.3 (1989).

39. *Four in Ten German Doctors Said to Have Applied Mercy Killing*, Reuters (b.c. cycle Jan. 18, 1986).

40. *Id.*

41. *British mercy killing doctor will not be jailed*, Reuters (b.c. cycle Sept. 21, 1992).

42. *Id.*

43. Peter Millership, *British mercy killing stirs controversy*, Reuters (b.c. cycle Sept. 20, 1992).

44. *Dutch move opens debate on mercy-killing*, AGENCE FRANCE PRESSE, Feb. 10, 1993.

son to pass away more quickly.<sup>45</sup> This procedure is recognized by most medical, religious and legal authorities and is commonly accomplished by means of turning off respirators, discontinuance of intravenous deliveries and "do not resuscitate" orders.<sup>46</sup> Much more controversial is the concept of "active" euthanasia, "the direct act of rendering a life-shortening agent to a patient."<sup>47</sup> Medical interventions to affirmatively end life include injections of air, potassium chloride or a large dose of narcotics into a blood vessel.

This Note will discuss the development of views about euthanasia and the act's role in two societies, that of The Netherlands and the United States. The Netherlands was chosen to compare and contrast with America reflecting Holland's status as the only sovereignty to enact a comprehensive euthanasia statute. Emphasis will be placed on the legal treatment euthanasia has received in both countries and on the injustice and hardship inflicted upon those who are directly affected by the inequities of current euthanasia policies. A general proposal will be offered as a remedial step toward the enactment of a fair and just euthanasia regulatory scheme throughout the United States.

## II. THE ROLE OF ETHICS

The essence of modern legal prohibitions of the intentional taking of a human life are based upon Judeo-Christian morality.<sup>48</sup> The ethic is justified by a reliance upon interpretations of God's abhorrence of men assuming activities preempted by otherwise supernatural intervention.<sup>49</sup> This absolutist philosophy reflects intrinsic ethics and the steadfastness of prohibitions against the ending of human life by any means other than that determined by nature.<sup>50</sup> Inherent in the "sanctity-of-life" viewpoint is the orthodox belief that life is precious in itself and must be protected and preserved regardless of its perceived quality.<sup>51</sup> Thus, only God or nature may morally limit the length of a person's life and human intervention is judged to be a sin.

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45. E. KLUGE, *THE ETHICS OF DELIBERATE DEATH* 11-12 (1981); Nerland, *supra* note 38, at 116 n.4.

46. See Fletcher, *Ethics and Euthanasia*, in *DEATH, DYING AND EUTHANASIA* 293 (1977); JUDICIAL COUNCIL OF AMERICAN MEDICAL ASSOCIATION, *TERMINAL ILLNESS* (1982); Nerland, *supra* note 38, at 116 n.5-7.

47. Note, *Euthanasia: A Comparison of the Criminal Laws of Germany, Switzerland and the United States*, 6 B.C. INT'L & COMP. L. REV. 533, 539 (1983) Mustafa D. Sayid; Nerland, *supra* note 38, at 117 n.12.

48. Joseph Fletcher, *In Defense of Suicide*, in *SUICIDE AND EUTHANASIA* 39 (eds. Samuel E. Wallace and Albin Eser 1981).

49. *Id.*

50. *Id.*

51. DORIS PORTWOOD, *COMMON-SENSE SUICIDE: THE FINAL RIGHT* 60 (1978).

More modern ethicists opposing euthanasia warn of introducing the inherent margin of error involved in human decision making. Conceding that the quality of life may well diminish to a point of unacceptability, such thinkers opine that placing persons in the role of decision-makers may lead to deteriorating standards and abuses.<sup>52</sup> As well, opponents provide the examples of misdiagnoses of terminal illness and the possible imminent discovery of new treatments to aid the dying as reasons to eschew euthanasia.<sup>53</sup> Essentially, these postulations recognize the frailty, emotionalism and subjectivity of peoples' mental processes when faced with the enormity of decisions concerning life and death.

In contrast, proponents of assisted death rely upon contingent morality to justify their arguments.<sup>54</sup> Such views provide that the variables and factors in each set of individual circumstances are to be determinant as to the outcome.<sup>55</sup> Moral codes are seen to be secondary to the maximization of real-world human well being.<sup>56</sup> Individual liberty and the right to self-determination are placed as paramount values.<sup>57</sup> Key to this philosophy is that the final arbiter of an individual's lifespan may legitimately be human and not a greater power; either the individual who will die or an informed other may decide when life will end. Some euthanasia advocates perceive the process as an extension of the doctrine of informed consent<sup>58</sup> while others use as justifications the loss of human dignity as a result of terminal illness and the desire to limit pain and suffering.<sup>59</sup> From a more pragmatic outlook, terminal patients often require significant medical care—resources that could otherwise be redirected to many others who possess a reasonable chance to live for an indeterminate time.<sup>60</sup>

### III. THE HISTORY OF EUTHANASIA

Different societies throughout the ages have addressed the many forms of taking one's own life. Views as to elective death throughout time have ultimately been determinant upon personal and societal values.<sup>61</sup>

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52. Beauchamp & Perlin, *Euthanasia and Natural Death: Introduction*, in *ETHICAL ISSUES IN DEATH AND DYING* 217 (R. Weir 2d ed. 1986); Nerland, *supra* note 38, at 118 n.17.

53. *Id.*

54. Fletcher, *supra* note 48, at 39.

55. *Id.*

56. *Id.*

57. Beauchamp & Perlin, *supra* note 52, at 217.

58. Nerland, *supra* note 38, at 118.

59. *Id.*; Beauchamp & Perlin, *supra* note 52, at 217.

60. J. WILSON, *DEATH BY DECISION* 128 (1975); Nerland, *supra* note 38, at 188.

61. Fletcher, *supra* note 48, at 41.



Ancient Greeks were selectively in favor of euthanasia, not criminalizing it but also not advocating it.<sup>62</sup> The term "euthanasia" itself is a derivation of the Greek adverb "eu" meaning "well" and the noun "than tos" or "death."<sup>63</sup> The ancient Athenian Seneca took his own life to avoid Nero's wrath and his wife Paulina joined him.<sup>64</sup> Plato favored euthanasia, as did Aristotle, but specified a passive form.<sup>65</sup> Homer and Euripides opined that Jocasta acted prudently by killing herself after she learned her new husband, Oedipus, was her son as well.<sup>66</sup> Hippocrates stated it was always the duty of a physician to preserve life and thus might never take it.<sup>67</sup> However, Hippocrates implied an exception to the Oath when he stated that medicine's purpose was "to do away with the sufferings of the sick, to lessen the violence of their diseases, and to refuse to treat those who are overmastered by their diseases, realizing that in such cases medicine is powerless."<sup>68</sup>

The Stoics believed that affirmatively causing one's own death was reasonable when life could no longer be lived without pain, incurable disease, or physical abnormalities.<sup>69</sup>

Ancient Romans relied upon Justinian's *Digest* as to the subject, judiciously permitting elective death to all except criminals, soldiers and slaves.<sup>70</sup> The classical philosophy of Greco-Roman civilization was clearly that the dignity and honor of all free persons was of paramount importance.

South American Indians practiced selective forms of suicide as did the Navajo and the Hopi in North America.<sup>71</sup> Other tribes of North American Indians, such as the Alabama and the Dahomey, disposed of the bodies of those who killed themselves because the practice was strictly taboo.<sup>72</sup>

Modern prohibitions against self destruction tend to have origination with the development of wide-spread religious practice. The Islamic Koran holds that taking one's life interferes with "Kismet," Allah's master plan for life and destiny, making the act more heinous

62. *Id.* at 42.

63. WILSON, *supra* note 60, at 17-18; Nerland, *supra* note 38, at 119.

64. Fletcher, *supra* note 48, at 42.

65. *Id.*

66. *Id.*

67. KLUGE, *supra* note 45, at 31; Nerland, *supra* note 38, at 119.

68. Hippocrates, *The Art*, in 2 HIPPOCRATES 193 (W.H.S. Jones trans. 1923); Nerland, *supra* note 38, at 119-20.

69. Mair, *Suicide: Greek and Roman*, in 12 ENCYCLOPEDIA OF RELIGIONS AND ETHICS 29-30 (1924); Nerland, *supra* note 38, at 120.

70. Fletcher, *supra* note 48, at 42.

71. *Id.* at 41-42.

72. *Id.* at 42.

than the also-condemned act of homicide.<sup>73</sup> The rabbinical Talmud prohibited voluntary death as did the Pythagorean theology.<sup>74</sup>

Conversely, early Confucianism, Hindu and Buddhism<sup>75</sup> honored the rites of "seppuku," "hara-kiri" and "suttee," ceremonious and ritualized acts of voluntary death.<sup>76</sup> Shintoism, a hybrid of Confucianism and Buddhism, regarded killing oneself as a privilege to be earned and, in time, formalized the act into an elaborate ritual.<sup>77</sup> A religion in which all life is revered and it is forbidden to kill even insects, Jainism, nevertheless accepted the taking of one's own life as a reward for supreme asceticism.<sup>78</sup>

Christianity is the philosophical base for objections to euthanasia in modern western societies. Early Christian followers adopted the Judaic ban on euthanasia<sup>79</sup> based upon the Sixth Commandment, "thou shalt not kill."<sup>80</sup> While the Bible itself does not condemn elective death, Christian churches historically have done so.<sup>81</sup> Early Christianity condemned self destruction as a direct Catholic-medieval backlash to Greek and Roman tolerance of the practice.<sup>82</sup> Under early feudalism, almost all persons were enfeoffed to another, hence killing oneself was viewed as a worker's unlawful escape from possession.<sup>83</sup>

St. Augustine solidified the Christian Church's ban on taking one's own life.<sup>84</sup> Augustine permitted exceptions to the bar on suicide for martyrs who had God's express directive or "guidance" to take their own lives.<sup>85</sup> These chosen persons were found to be acting as innocently as those whose sin *ex ignorantia inculnata*, in invincible ignorance.<sup>86</sup>

73. *Id.* at 41.

74. *Id.* at 42.

75. While suicide was revered, it would keep one from achieving Nirvana. PORTWOOD, *supra* note 51, at 62.

76. Fletcher, *supra* note 48, at 41.

77. PORTWOOD, *supra* note 51, at 63.

78. *Id.* at 62.

79. WILSON, *supra* note 60, at 23.

80. Fletcher, *supra* note 48, at 42.

81. *Id.*

82. *Id.* at 43.

83. *Id.*

84. *Id.* St. Augustine's teachings were based upon four propositions: (1) if we are innocent, we may not kill the innocent and if we are guilty, we may not take justice into our own hands; (2) the Sixth Commandment of the Decalogue forbids it, *non occides*, suicide is homicide and it is a felony, *felo de se*; (3) our duty is to bear suffering with fortitude, to escape is to evade our role as soldiers of Christ; (4) suicide is the worst sin, it precludes repentance; to do it in a state of grace (after one is saved, or cleansed of sin by Christ's blood) means one dies out of grace (unsaved, eternally lost or rejected). *Id.*

85. *Id.*

86. *Id.*

Thomas Aquinas wrote in *Summa Theologica* that killing oneself was the most dangerous of sins in that it left insufficient time to repent the transgression against oneself, God, and society.<sup>87</sup> Ending one's life, in the eyes of Aquinas, was counter to the natural desire for survival and was thus a wrong against oneself.<sup>88</sup> Society was harmed because friends and family were aggrieved.<sup>89</sup> Most importantly, elective death was seen by Aquinas as an affront against God because only He who had given life should be in the position to take it away.<sup>90</sup>

The "man for all seasons," Thomas Moore, allowed for suicide in *Utopia*, whose views were supported later by Montaigne.<sup>91</sup> David Hume's essay *On Suicide* directly challenged Aquinas' trilogy of prohibition and was praised by Voltaire, Rousseau, Montesquieu and d'Halbach.<sup>92</sup>

Christian philosophy forbidding elective death remained relatively universal in western cultures until 1790 when the French National Assembly repealed all punishment against the person and estate of those killing themselves.<sup>93</sup> In 1864, attempted suicide and aiding in the act was decriminalized in Sweden.<sup>94</sup> England later enacted the Suicide Act of 1961, repealing criminal sanctions against those wishing to take their lives.<sup>95</sup>

The attitudes and allowances for euthanasia and suicide have been both exceptionally varied and passionate throughout history. Clearly, the past treatments of voluntary death illustrate that absolute doctrines, be they philosophical, medical or legal, are essentially unworkable in application. The variety and circumstantial nature of the human condition as a whole precludes any inflexible handling of the issue of euthanasia.

#### IV. EUTHANASIA LAW IN THE UNITED STATES

Unlike most countries, the American treatment of death-by-choice has been one of decentralization; each of the individual states is per-

87. 2 T. AQUINAS, *SUMMA THEOLOGICA* 1468-70 (Fathers of the English Dominican Province trans. 1947); Nerland, *supra* note 38, at 121.

88. *Id.*

89. *Id.*

90. *Id.*

91. Fletcher, *supra* note 48, at 44.

92. *Id.*

93. Silving, *Euthanasia: A Study in Comparative Criminal Law*, 103 U. PA. L. REV. 350, 370 (1954); Nerland, *supra* note 38, at 123.

94. Hadding, *Prevent or Aid Suicide?*, in *EUTHANASIA* 149 (A. Carmi ed. 1984); Nerland, *supra* note 38, at 123.

95. Fletcher, *supra* note 48, at 44.

mitted to apply its own regulatory scheme. By the mid-1970s, almost all of the United States had decriminalized the acts of suicide and euthanasia.<sup>96</sup> However, there are still strong prohibitions against assisting someone else to end their life.

### A. *The Laws of the States*

The states of Alabama, Illinois, Kentucky, Massachusetts and Montana strictly treat complicity to suicide as murder.<sup>97</sup> Several other states consider assistance to suicide as voluntary manslaughter, including Alaska, Arizona, Arkansas, Colorado, Connecticut, Hawaii, New York and Oregon.<sup>98</sup> The two jurisdictions of Alabama and the District of Columbia have specific statutory provisions to distinguish between suicide and assisted suicide from euthanasia and assisted euthanasia.<sup>99</sup> These statutes specifically legislate that the withdrawal or withholding of life support from a "qualified" patient is not aiding in the act of suicide.<sup>100</sup>

Most states categorize the assistance to suicide as a felony apart from all other felonies and apply varying degrees of punishments. These jurisdictions include California, Delaware, Florida, Indiana, Kansas, Maine, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, Oklahoma, Pennsylvania, South Dakota, Texas, Washington, Wisconsin and Wyoming.<sup>101</sup>

96. Nerland, *supra* note 38, at 126. At common law, suicide was considered to be a felony murder. Currently, suicide is punishable as a crime in only Alabama, Oregon and South Carolina. Susan J. Jezewski, Note, *Can A Suicide Machine Trigger The Murder Statute?*, 37 WAYNE L. REV. 1921, 1926 (1991).

97. McMahan v. S., 168 Ala. 70, 53 So. 89 (1910); Burnett v. P., 204 Ill. 208, 68 N.E. 505 (1903); C. v. Hicks, 118 Ky. 637, 82 S.W. 265 (1904); C. v. Bowen, 13 Mass. 356 (1816); MONT. CODE ANN. § 45-5-105 (1988); Nerland, *supra* note 38, at 126.

98. ALASKA STAT. § 11.41.120(A)(2) (1989); ARIZ. REV. STAT. ANN. § 13-1103(A)(3) (1989); ARK. CODE ANN. § 5-10-104(a)(2) (1990); COLO. REV. STAT. § 18-3-104(1)(b) (1990); CONN. GEN. STAT. ANN. §§ 53(a)-56(a)(2) (West 1985); HAW. REV. STAT. § 707-702(1)(b) (1987); N.Y. PENAL LAW §§ 120.30, 125.15(3) (McKinney 1987); OR. REV. STAT. § 163.125(1)(b) (1990); Nerland, *supra* note 38, at 126; Jezewski, *supra* note 96, at 1927-28 n.37.

99. ALA. CODE § 22-8A-9(a) (1984); D.C. CODE ANN. § 6-2428(a) (1989); Nerland, *supra* note 38, at 127.

100. Nerland, *supra* note 38, at 127.

101. CAL. PENAL CODE § 401 (West 1988); DEL. CODE ANN. tit. 11, § 645 (1989); FLA. STAT. ANN. § 782.08 (West 1991); IND. CODE ANN. § 35-42-1-2 § 2. (West 1986); KAN. STAT. ANN. § 21-3406 (1988); ME. REV. STAT. ANN. tit. 17A, § 204 (1989); MICH. COMP. LAWS § 752.1027 (1992); MINN. STAT. ANN. § 609-215 (West 1990); MISS. CODE ANN. § 97-3-49 (1990); NEB. REV. STAT. § 28-307 (1989); N.H. REV. STAT. ANN. § 630:4 (1989); N.J. STAT. ANN. § 2C:11-6 (West 1989); N.M. STAT. ANN. § 30-2-4 (1990); OKLA. STAT. ANN. tit. 21, §§ 813-817 (West 1989); 18 PA. CONS. STAT. ANN. § 2505 (Purdon 1983); S.D. CODIFIED LAWS ANN. § 22-16-37 (1988); TEX. PENAL CODE ANN. § 22.08 (Vernon 1989); WASH. REV. CODE ANN. § 9A.36.060 (1990); WIS. STAT. § 940.12 (1987); WYO. STAT. § 6-2-101 (1990); Nerland, *supra* note 38, at 127; Jezewski, *supra* note 96, at 1927-28 n.37.

At least three states, California, Oregon and Washington have organized legislative movements to overturn existing laws prohibiting physicians from intentionally killing patients in legitimized circumstances.<sup>102</sup>

The voters of Washington State in November of 1991<sup>103</sup> voted against a noteworthy euthanasia regulatory proposal. The Washington provision would have permitted a patient to request euthanasia if two doctors diagnosed her or him as having no more than two months to live.<sup>104</sup> The patient would have been required to sign a consent form in the witness of two disinterested persons and be conscious and mentally competent when the lethal dose was administered.<sup>105</sup> The proposed law did not require either acting physician to be a specialist in euthanasia and no requirement was made to notify authorities or the patient's family.<sup>106</sup> The physicians involved would have become immune from prosecution for any involvement in the death.<sup>107</sup> As well, no investigation would have been required as to the mental state of the requesting terminally ill person; the effects of depression or mania would not have been accounted for.<sup>108</sup> The provision contained no residency requirement, causing concern to bill opponents that the dying from other states and countries would flock to Washington in order to die with dignity.<sup>109</sup> Another point of contention raised by opponents of the proposal was whether health insurance companies would lower premiums for those contractually agreeing to seek early euthanasia instead of seeking expensive life sustaining care in the event the insured person faced such circumstances.<sup>110</sup> However, the issue has been mooted for the near future for the citizens of the state of Washington.

### B. The California Initiatives

Several groups, principally the Hemlock Society, attempted to introduce the "Humane and Dignified Death Act" in California in 1988 which would have permitted physicians in that state to euthanize ter-

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102. GOMEZ, *supra* note 6, at xiii (preface).

103. Phil Reeves, *Dignified death or legal killing?; After today's ballot on euthanasia, some Seattle residents fear they will be living in "suicide city"*, THE INDEPENDENT (Canada), Nov. 5, 1991, at 19.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

minally ill patients requesting the procedure.<sup>111</sup> While proponents failed to secure sufficient signatures to place the proposal on the state's ballot that year, a similar bill did reach California's electorate on November 3, 1992.

The ballot measure for the 1992 California "Death With Dignity Act" provided that patients with less than six months to live would have their written requests for euthanasia honored, provided that: the request had been made repeatedly; the request had been signed by two witnesses; and, a second medical opinion had been solicited.<sup>112</sup>

The proposed active euthanasia provision, which would have made the State of California the only then-existing government in the world to explicitly permit doctor-assisted euthanasia for the terminally ill, was narrowly defeated by voters.<sup>113</sup> Opponents of the measure were able to convince a margin of the electorate that the proposed law lacked sufficient safeguards by failing to require a waiting period or a psychological exam.<sup>114</sup>

### C. *The Federal Mandate: Cruzan*

State provisions regulating elective death are generally enforceable under federal law if found to sufficiently comport with the "liberty

111. GOMEZ, *supra* note 6, at 11.

112. Paul Jacobs, *Prop. 161—A matter of life or death at the polling place; Initiative: If approved, the measure would make California the first place in the world where doctors are authorized to end lives of patients who request it. It has been the subject of a lively political struggle*, L.A. TIMES, Oct. 10, 1992, at A20.

Those who want a doctor's help in ending their lives must sign a directive stating their intentions. The document must be signed by two witnesses unrelated to the patient—family members and health care workers are not allowed [to be witnesses]. For patients in nursing homes, one of the witnesses must be a state-appointed ombudsman.

A doctor may administer a lethal chemical or prescribe a fatal dose of drugs, but only if another physician also certifies that the patient has an incurable or irreversible condition and is likely to die within six months.

Patients who wish to die must make "an enduring request" to end their lives "on more than one occasion." The[re is no] demand [for] a waiting period between requests. Physicians may suggest a psychological examination to determine a patient's competence, but the patient need not agree [in which case no examination will be required]. [A] patient [may not] delegate the decision to anyone else.

Doctors, nurses and hospitals may not be prosecuted or sued if they comply with the terms of the initiative. No doctors, nurses or private hospitals are required to participate if they prefer not to help patients die. Public hospitals, such as government-funded county and university facilities, may have to comply with a patient request [to die].

Insurance companies may not discriminate against those who have [or have not] signed aid-in-dying directives.

Annual reports must be filed with the state Department of Health Services on all physician-assisted deaths, but the names of patients will be kept confidential. *Id.*

113. Virginia Ellis and Paul Jacobs, *California Elections; "Tax-the-rich" plan put hex on welfare cutbacks; Initiatives: Both measures failed, but millions of dollars were diverted from backing Wilson's proposed benefits overhaul*, L.A. TIMES, Nov. 5, 1992, at A3.

114. *Id.*

interest” under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.<sup>115</sup> Specifically, section 1 of the Fourteenth Amendment provides that “[n]o State shall . . . deprive any person of . . . liberty . . . without due process of law . . . .”<sup>116</sup>

The due process liberty interest framework was applied by the United States Supreme Court in the seminal right-to-die case, the 1990 decision in *Cruzan v. Director, Missouri Department of Health*.<sup>117</sup> Nancy Cruzan had been comatose since a January 1983, automobile accident.<sup>118</sup> She was reduced to “what is commonly referred to as a persistent vegetative state: generally, a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function.”<sup>119</sup> After eight years in an unconscious state, it became apparent that Nancy Cruzan had essentially no chance of regaining her mental and physical faculties and her parents requested hospital officials to terminate current artificial nutrition and hydration procedures.<sup>120</sup> Because it was evident to all involved such withdrawal of life support would cause Ms. Cruzan’s death, the hospital refused to comply with the request without prior court approval.<sup>121</sup>

The Supreme Court granted certiorari to determine whether Nancy Cruzan had a right under the United States Constitution, via guardians since she lacked competency, to refuse life-sustaining medical care.<sup>122</sup> It had already been well-established that a competent person has a constitutionally protected right in declining medical treatment

115. The Supreme Court has held that the liberty interest is the only applicable constitutional guarantee pertaining to euthanasia:

Although many state courts have held that a right to refuse [life sustaining medical] treatment is encompassed by a generalized constitutional right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest.

See *Bowers v. Hardwick*, 478 U.S. 186, 194-5 (1986); *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 279 n.7 (1990).

116. Section 1 of the Fourteenth Amendment states that:

[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added).

U.S. CONST. art. XIV § 1.

117. 497 U.S. 261 (1990).

118. *Id.* at 262.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 261.

by way of the liberty interest.<sup>123</sup> The issue to be determined in *Cruzan*, however, was whether there existed a right to have treatment refused on behalf of a patient lacking legal competency, absent a definitive expression of the patient's intent.

In *Cruzan*, Chief Justice Rehnquist writing for the majority, the Supreme Court utilized a two-prong test, the first prong being that Nancy Cruzan did indeed have a liberty interest right to have artificial life support systems withdrawn.<sup>124</sup> The second prong being "whether [petitioner's] constitutional rights have been violated [as] determined by balancing [her] liberty interests against the relevant state interests," as laid down in *Youngberg v. Romeo*.<sup>125</sup>

The State of Missouri requires that the wishes of incompetents to forego life-sustaining hydration and nutrition must be proven by clear and convincing evidence.<sup>126</sup> The Supreme Court held that the United States Constitution did not forbid the establishment of such a safeguard and therefore petitioner failed the test's second prong.<sup>127</sup> Missouri's interest in the protection and preservation of human life was found to out-balance the Cruzans' due process liberty interests.<sup>128</sup>

Specifically, the Court held that a state has the right to require heightened evidentiary proof as to the incompetent's wishes to guard against potential abuses.<sup>129</sup> As well, a state may decline to judge the "quality" of a life in question and seek to strictly preserve that life without qualification.<sup>130</sup>

Justice Scalia concurred separately, finding that "there is no significant support for the claim that a right to suicide is so rooted in our tradition that it may be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'" <sup>131</sup>

Justice Brennan, joined by Justices Marshall and Blackmun, dissented in the decision, arguing that

123. See generally *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30 (1905) (the United States Supreme Court balanced the individual liberty interest to allow the refusal of a smallpox vaccination against the State's interest in disease prevention); *Washington v. Harper*, 110 S. Ct. 1028, 1036 (1990) (Supreme Court found that prisoners possess "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment.").

124. *Cruzan*, 497 U.S. at 271; *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, cert. denied sub nom., *Garger v. New Jersey*, 429 U.S. 922 (1976).

125. 457 U.S. 307, 321 (1982).

126. *Cruzan*, 497 U.S. at 280.

127. *Id.* at 280-81.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 295, quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); *Moore v. City of East Cleveland*, 431 U.S. 494, 502-3 (1977); *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989).



if a competent person has a liberty interest to be free of unwanted medical treatment . . . it must be fundamental. . . .

The right to be free from unwanted medical attention is a right to evaluate the potential benefit of treatment and its possible consequences according to one's own values and to make a personal decision whether to subject oneself to intrusion. . . .

. . . .  
[T]he State has no legitimate general interest in someone's life, completely abstracted from the interest of the person living that life, that could outweigh the person's choice to avoid medical treatment. . . .

Justice John Paul Stevens dissented in a separate opinion, arguing:

[To] be constitutionally permissible, Missouri's intrusion upon [Cruzan's] . . . fundamental liberties must, at a minimum, bear a reasonable relationship to a legitimate state end. . . .

. . . .  
[T]here is no reasonable ground for believing that Nancy Beth Cruzan has any *personal* interest in the perpetuation of what the State has decided is her life. . . . It is not within the province of secular government to circumscribe the liberties of the people by regulations designed wholly for the purposes of establishing a sectarian definition of life. (Emphasis in opinion) (Citations omitted).<sup>132</sup>

#### D. *The Legality of Euthanasia After Cruzan*

Thus, the controlling legal precedent in the United States is less than definitive. The *Cruzan* majority states that there is indeed a Fourteenth Amendment liberty interest provision in refusal of medical treatment.<sup>133</sup> Yet, the majority fails to determine whether that interest is "fundamental," making it preemptive over all other interests and does not define at what point the state has a substantial enough interest to counterbalance that individual interest. Justice Scalia expressly believes the right to such self-determination is not fundamental. Interestingly, Scalia's separate concurrence might suggest that the majority *does* feel euthanasia is a fundamental right by way of the statutory rule of construction of *expressio unius est exclusio alterius*,<sup>134</sup> the expression of one thing is the exclusion of another.

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132. *Cruzan*, 497 U.S. 301-51.

133. *Id.* at 270.

134. BLACK'S LAW DICTIONARY 581 (6th ed. 1990).

In his dissent, Justice Brennan unequivocally evaluates liberty interests as being fundamental and thus controlling over legitimate state concerns.<sup>135</sup> Secondly, he opines that it is erroneous to assume that an individual would choose life over death in all circumstances. This default mechanism places a heightened evidentiary burden on the individual and relieves the state of any responsibility to prove its case. Brennan suggests that this scheme would lead to unjust results when the individual might be more likely to choose not to live.

Justice Stevens questions whether the decision to keep a person alive in a permanent vegetative state would satisfy the standard rational relationship test. As well, Stevens alludes to a First Amendment violation by way of the establishment of a religious tenant regarding the definition of the boundaries of the concept of "life."<sup>136</sup>

For these reasons, the precedent of *Cruzan* appears narrow and easily distinguishable from future right-to-death litigation. Therefore, the premier case law addressing euthanasia in the United States serves to delineate few issues and provides quite limited guidance and insight for legal and medical professionals or the individuals and their families facing such decisions.

## V. THE DUTCH EXPERIENCE

More than any modern society, the people of The Netherlands have directly addressed the subject of euthanasia, and therefore have had the most quantifiable and qualifiable experience with mercy killing.

### A. *The Current Status of Euthanasia in The Netherlands*

On September 10, 1991, the Dutch government released the *Remmelink Report*, a long-awaited analysis of the euthanasia system in The Netherlands.<sup>137</sup> The *Report* indicated that one out of every 50 deaths are intentionally caused each year by Dutch physicians.<sup>138</sup> Holland experiences 2,300 cases of voluntary active euthanasia, 400 cases of assisted suicide and 1,040 incidences of involuntary euthanasia annually, according to the *Report*.<sup>139</sup> Reflecting the reluctance of physi-

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135. *Cruzan*, 497 U.S. at 301-30.

136. See U.S. CONST. amend. I.

137. Carroll Rees, *Euthanasia: There's no middle ground in this debate*, THE OTTAWA CITIZEN, Apr. 14, 1992, at A10.

138. *Dutch Parliament Passes Law Approving Euthanasia*, Reuters (b.c. cycle Feb. 9, 1993).

139. Leonard Doyle, *Dutch doctors pushed on to 'slippery slope' over euthanasia*, THE INDEPENDENT (Canada), Feb. 17, 1993, at 8.

cians in The Netherlands to disclose euthanasia, only 454 of the official estimate of 2,300 voluntary active cases were actually reported in 1990.<sup>140</sup> Involuntary euthanasia was defined in the *Report* as those instances where the physician prescribed, provided or administered a medicine with the deliberate object of hastening the end of life though the patient has made no explicit request to have his or her existence shortened.<sup>141</sup> Dutch patients have their lives terminated in most instances by means of injection of pain medication, typically morphine, by a physician.<sup>142</sup> The decision to administer an intentional overdose was not discussed with 27% of fully competent patients who died in this manner.<sup>143</sup>

These statistics reveal that approximately two percent of all deaths in The Netherlands occur by euthanasia.<sup>144</sup> The *Report* examined and found that most doctors in general practice, the physician group most likely to carry out a mercy killing, perform euthanasia once every three or four years.<sup>145</sup> Public polls in Holland indicate that over 80% of Dutch people are in favor of liberal euthanasia laws.<sup>146</sup> With an average life expectancy of eighty years for women and seventy-four for men, the Dutch have among the longest life span of any country.<sup>147</sup> Over 80% of the Dutch that seek euthanasia every year are cancer victims.<sup>148</sup> Approximately 90% of all seriously ill patients inquire about the procedure to their doctors.<sup>149</sup>

Paradoxically, the practice of euthanasia remains a criminal offense in The Netherlands, carrying a maximum penalty of twelve years of imprisonment.<sup>150</sup> Unlike most countries where the act is treated as a species of murder or manslaughter, Holland has a long-standing specific statutory scheme addressing the unique act of euthanasia.<sup>151</sup>

### B. History of the Law

The euthanasia law dates back to the 19th century and a young Amsterdam barmaid who was so shamed by her pregnancy that she hired

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140. Ben Hirschler, *Dutch Study Brings Euthanasia Taboo Out Into the Open*, Reuters (b.c. cycle, Sept. 13, 1991).

141. *Id.*

142. *Id.*

143. *Id.*

144. *News in Brief*, FACTS ON FILE WORLD NEWS DIGEST, Sept. 19, 1991, at 699 G1.

145. Hirschler, *supra* note 140.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. Tim Harper, *Dutch accept, regulate suicides by doctors*, CHICAGO TRIBUNE, Nov. 3, 1991, at 1C.

151. *Id.*

a man to kill her.<sup>152</sup> The paid killer duly slit the young woman's throat but was arrested and jailed. The euthanasia law was the result of public furor over the case.<sup>153</sup>

The Dutch Penal Code of 1886, Article 293 provides: "[h]e who robs another of his life at his express and serious wish, is punished with a prison sentence of at most twelve years or a fine [up to a maximum of 100,000 guilders] (about \$50,000) . . . ."<sup>154</sup> The maximum sentence for murder in The Netherlands is a fifteen year imprisonment.<sup>155</sup> As well, Article 294 of the Code states that: "[s]omeone who deliberately incites another to suicide, assists him therein or provides him with the means, is punished, if suicide follows, with a prison sentences (sic) of at most 3 years or a fine [up to a maximum of 25,000 guilders] (about \$12,500) . . . ."<sup>156</sup> Physicians in Holland may also be charged with malpractice for improper administration of euthanasia in The Netherlands' special medical courts. Sanctions can include reprimands, fines and license suspension or revocation.<sup>157</sup>

After the passage of Article 293 the issue was relatively dormant until 1973 when a Dutch physician killed her elderly and terminally ill mother with an injection.<sup>158</sup> Although the doctor was convicted under the euthanasia law, her sentence was suspended and the Leeuwarden court found that physicians should be permitted to commit euthanasia when death is "imminent" and the patient makes an informed request.<sup>159</sup> The court devised a five-prong test wherein if all conditions were met, euthanasia would be justified.<sup>160</sup>

The Leeuwarden court appeared to suspend the physician's sentencing more as a basis to alter national policy than strictly based upon

152. *Id.*

153. *Id.*

154. Nerland, *supra* note 38, at 132.

155. *Id.*

156. *Id.*

157. Harper, *supra* note 150.

158. GOMEZ, *supra* note 6, at 28.

159. GOMEZ, *supra* note 6, at 28; Harper, *supra* note 150.

160. GOMEZ, *supra* note 6, at 30. The test contained the following elements:

- A. [When] it concerns a patient who is incurable because of illness or accident . . . from a medical standpoint.
- B. Subjectively, his physical or spiritual suffering is unbearable and serious to the patient.
- C. The patient has indicated in writing . . . that he desires to terminate his life . . . .
- D. According to medical opinion, the dying phase has begun for the patient or is indicated.
- E. Action is taken by the doctor, that is, the attending physician or medical specialist, or in consultation with that physician.

the facts.<sup>161</sup> The doctor's mother was suffering from pneumonia, an acute rather than chronic illness and not necessarily fatal.<sup>162</sup> No medical indications were clear that the woman was terminal and, as well, the daughter was not her mother's attending physician.<sup>163</sup> This judicial activism gave impetus to what appeared to be growing sentiment among the Dutch that euthanasia was acceptable under some circumstances.<sup>164</sup>

In 1981, the Rotterdam district court convicted a layperson of assistance in a suicide.<sup>165</sup> The court emphasized that nonphysicians were prohibited from acts of euthanasia and set down nine criteria that need be met if euthanasia is to be permitted.<sup>166</sup>

### C. Judicial Establishment of Policy

The next year, the district court in Alkmaar acquitted a physician for terminating the life of an elderly patient upon request, deciding, first, that the patient had a right to self-determination and, second, that the physician had been careful enough in his determination of the seriousness of the request.<sup>167</sup> Therefore, the Alkmaar court found that no crime had been committed.<sup>168</sup> The Amsterdam court of appeals overturned the lower court's decision, finding that physician guilty under Article 293 on the basis of "material illegality."<sup>169</sup> On appeal to the Supreme Court of The Netherlands, the appellate decision was upheld, but the case was given to The Hague to consider the following question: "Whether the euthanasia practiced by the accused would, *from an objective medical perspective*, be regarded as an action justi-

161. *Id.* at 31.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 32.

166. *Id.* at 32. The test is comprised of the following:

1. There must be unbearable suffering on the part of the patient.
2. The desire to die must emanate from a conscious person.
3. The request for euthanasia must be voluntary.
4. The patient must have been given alternatives and must have had time to consider them.
5. There must be no other reasonable solutions to the patient's problem.
6. The death does not inflict unnecessary suffering on others.
7. More than one person must be involved in the decision.
8. Only a physician may actually euthanize the patient.
9. Great care must be exercised in making this decision.

*Id.*

167. *Id.* at 34-35.

168. *Id.* at 35.

169. *Id.*

fied in an situation of necessity (beyond one's control)." (Emphasis in translated source).<sup>170</sup>

The Hague released an opinion in 1986 that encompassed elements of both aspects of the controversy: euthanasia was not to be sanctioned per se, but physicians who practiced euthanasia could escape punishment by showing that they acted under *force majeure*, or "situation of necessity."<sup>171</sup> The court based its decision upon recommendations given by the KNMG (Royal Dutch Society for the Promotion of Medicine) pursuant to the organization's commissioning for the task.<sup>172</sup> *Force majeure*, as a principle of jurisprudence, does not presume that no transgression has transpired. Rather, the construct relieves the agent or actor of responsibility due to the mitigating circumstances.<sup>173</sup> The act of euthanasia was thus re-established as illegal and criminally punishable, however, those charged with an Article 293 violation might have their conviction suspended or penalty waived upon a sufficient showing of a "situation of necessity."<sup>174</sup>

In dismissing the charges against the Alkmaar physician, The Hague reasoned that there were "no norms of medical ethics that forbade his actions."<sup>175</sup> The court re-emphasized all patients' rights to self-determination and institutionalized the philosophy that euthanasia was not, in itself, an unacceptable medical practice.<sup>176</sup> To the contrary, the KNMG made official the concept that under proper circumstances, physicians had an affirmative duty to act.<sup>177</sup> Significantly, the determination of sufficient *force majeure* was to be based upon subjective medical opinion and not a court-mandated set of objective criteria.<sup>178</sup> Therefore, the judgement of the individual physician in concert with the patient or patient's family would be dispositive.<sup>179</sup>

By 1986, the judicial compromise on mercy killing had fully established a precedent, but left all parties concerned with a general discomfort. Dutch physicians' attitudes were typified by a belief that the law created undue hardships on the physicians and family involved.<sup>180</sup>

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170. *Id.* at 36-37.

171. *Id.* at 38.

172. *Id.* at 37-38.

173. *Id.* at 38.

174. *Id.*

175. *Id.* at 39.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 40. One physician stated:

Doctor's (sic) aren't sure what the guidelines mean—we are doctors, after all, not lawyers—and there are many unfriendly people to this practice who can create mis-

As well, the situation was difficult for government prosecutors, dealing with the most heinous of crimes, murder, with the suspects being among the most respected and revered of professionals, physicians. Many doctors practicing euthanasia, ostensibly within the law, would intentionally misstate the cause of death on death certificates to avoid any appearance of impropriety and a possible investigation.<sup>181</sup> Given the overwhelming attractiveness to physicians of nondisclosure of euthanasia and that government law enforcement officials were wholly unprepared to investigate cases and regulate medical practice, the entire regulatory scheme was essentially a fiction.<sup>182</sup>

#### D. Legislative Actions

Concomitant to judicial activity pertaining to euthanasia, legislative and executive efforts to provide a working compromise were underway in Holland. Beginning in 1973, The Netherlands Society for Voluntary Euthanasia (NVVE) had attempted to liberalize the restrictions of Article 293.<sup>183</sup> Few inroads were made until the "exercise in creative jurisprudence" of the 1981 court decision in Rotterdam.<sup>184</sup>

In 1982, at the urging of her Minister of Justice, Queen Beatrix created the State Commission on Euthanasia for the purpose of drafting new legislation to remedy the polarity between Article 293 and the case law applying the statute.<sup>185</sup> Prior to a Commission report, a member of the "Democrats '66" Party in the lower house of Parliament entered a bill independently that would have legalized euthanasia.<sup>186</sup>

The Wessel-Tuinstra proposal would have made the practice of euthanasia "not punishable in the framework of careful rendering of assistance to a person who is in a hopeless situation."<sup>187</sup> Before any Parliamentary action on the bill, the Commission released its proposals in August of 1985, supporting or incorporating many of the earlier judicial and professional pronouncements advocating the allowance of mercy killing.<sup>188</sup> The majority of the Commission members suggested

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chief . . . call the police for example. Also, you always technically have to involve the prosecutor in these cases . . . . Article 293 stands . . . and that takes time, it embarrasses the family who should be taking time to grieve.

*Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 44.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

the same lessened euthanasia restrictions advanced earlier by the High Court and the KNMG.<sup>189</sup> Acting on the Commission's recommendation and on behalf of the government, the Minister of Justice, and the Minister of Well-Being, Public Health and Culture sent the proposed trial bill to the Speaker of the lower house of Parliament.<sup>190</sup> This action was met with a Wessel-Tuinstra counter-proposal from D'66 that more closely conformed to the language of the Commission's recommendations.<sup>191</sup>

The government bill would have restricted euthanasia to patients in whom there was a "concrete expectation of death," i.e., terminal cases.<sup>192</sup> Containing no such qualifier, the Wessel-Tuinstra bill proposed permitting euthanasia for patients who were in "a hopeless situation."<sup>193</sup> The language of the government proposal stipulated that "imminent" death was to be determined by "the loss of vital organ functions already begun or is about to begin."<sup>194</sup> This restrictive language was a departure from the more lenient proposals of the KNMG and High Court.<sup>195</sup>

Despite the momentum behind the legislative actions, both were rejected by the Council of State with the announcement that "it would be preferable to await further jurisprudence from the High Council [Supreme Court] before the Lawgiver (Parliament) makes more definitive decisions."<sup>196</sup>

After a lull of several years, a revised government proposal was submitted to the Parliament on April 10, 1992, and accepted.<sup>197</sup> The legislation was approved by a majority vote of the lower House of Parliament on February 9, 1993, and is scheduled to take effect in early 1994.<sup>198</sup>

### E. The New Law

While the compromise legislation will certainly relieve the courts of the unacceptable burden of applying the nearly unenforceable Article 293, the new statute is a hollow victory. While physicians will be able

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189. *Id.* at 44-45.

190. *Id.* at 46.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 47.

197. *Dutch Look Set to Adopt Euthanasia Law*, Reuters (b.c. cycle, Apr. 13, 1992).

198. William Drózdiak, *Dutch Remove Barrier to Doctors Carrying Out Euthanasia*, THE WASH. POST, Feb. 10, 1993, at A23.



to legally perform euthanasia under strict guidelines, euthanasia will remain a criminal offense, continuing to expose practitioners to a maximum twelve-year prison sentence for noncompliance.<sup>199</sup> This compromise regulation forged by the center-left government has been strongly criticized by physicians groups and the right-to-die lobby, who had hoped for a comprehensive decriminalization of the medical procedure.<sup>200</sup>

The legislation will require physicians to notify the local coroner of all events of euthanasia and to report a detailed account of the procedure based upon a twenty-eight-item checklist.<sup>201</sup> The patient must make a well-considered request to die and the physician is required to obtain a second physician's opinion as to the advisability of the act.<sup>202</sup>

A positive impact of the new legislation has been experienced in that the number of mercy killings actually reported to Dutch coroners has increased sharply.<sup>203</sup> Physicians revealed a total of 1,318 euthanasia procedures had been completed in 1992, compared to a reported 590 during 1991.<sup>204</sup> The government stated that this increase reflected the growing willingness to truthfully report acts of euthanasia.<sup>205</sup>

199. *Id.* Public prosecutors will determine on a case-by-case basis whether to charge physicians with murder based upon the physician's report to the local coroner. *Dutch Try to Clarify Controversial Euthanasia Law*, Reuters (b.c. cycle Feb. 24, 1993).

200. Ben Hirschler, *Dutch Pro and Anti-Euthanasia Groups Attack New Law*, Reuters (b.c. cycle Feb. 10, 1993). A spokesman for the KNMG stated: "It is a step forward but we still have the problem that euthanasia remains in the criminal code." *Id.*

201. Tamara Jones, *Netherlands Law Sets Guidelines For Euthanasia*, L.A. TIMES, Feb. 10, 1993 at A1. The "carefulness guidelines" encompass:

\* Voluntary Nature—The request for euthanasia must be made "entirely of the patient's own free will" and not under pressure from others. Patient must be spoken to alone to ensure decision is voluntary.

\* Alternatives Considered—The patient must be well informed about his or her situation and must have been able to consider the alternatives.

\* Certain Decision—The patient should have a "lasting longing for death. Requests made on impulse or based on a temporary depression cannot be considered."

\* Unacceptable Suffering—"The patient must experience his or her suffering as perpetual, unbearable and hopeless. Although these criteria will always contain an element of subjectivity . . . the physician must reasonably be able to conclude that the suffering is being experienced as unbearable."

\* Consultation—Physician must consult at least one colleague on patient's request.

\* Reporting—Well-documented written report must be drawn up stating history of patient's illness and meeting of "carefulness requirements."

*Id.*

202. *Id.*

203. *Dutch doctors report more mercy killings*, THE GAZETTE (Montreal), July 15, 1992, at A8.

204. *Netherlands gives conditional go-ahead to mercy-killing*, AGENCE FRANCE PRESSE, Feb. 9, 1993.

205. Drozdiak, *supra* note 198.

However, in reality the new law is merely the codification of the uneasy balance contrived by judicial precedent prior to the Parliament's actions. Instead of creating a "safe harbor" for all prescribed and valid applications of euthanasia (making "non-euthanasia" killings by physicians a standard murder offense like any other killing), two types of euthanasia have been identified—one legal and one not. Physicians continue to face the same dilemma that any act of euthanasia not adjudicated to be of a proper variety will be criminally punished. Law enforcement officials must still investigate reported euthanasia acts for improprieties. Courts shall be charged with essentially the same duty except instead of attempting to apply a vague and ambiguous judicial precedent, a vague and ambiguous statute is now "the law." The terminally ill and their families will remain in the same psychological and emotional conflict over a life and death decision that the leaders of their country have declared to be a criminal act in certain circumstances, yet not proscribed in other situations.

#### F. *The Status of Euthanasia Under the New Law*

After supposedly addressing the issue of death-by-choice, the Dutch continue to experience an uncomfortable compromise solution. Problems regarding euthanasia continue unabated. The high incidence of mercy killing in The Netherlands has subdued support for palliative care as reported by the Dutch Hospice Movement.<sup>206</sup> In contrast, the United Kingdom's hospice care is among the world's best and has ostensibly met much of that nation's needs for the terminally ill.<sup>207</sup>

Thus far, the Dutch have successfully discouraged foreigners who have sought to enter The Netherlands for the purpose of obtaining legal euthanasia, and physicians state that they limit their cases to longtime residents.<sup>208</sup> However, the country runs the risk of becoming more of a haven for the suffering and dying, particularly given the implications of an ever-increasing world-wide population of AIDS patients.<sup>209</sup>

As well, a report by the Dutch Pediatric Association proposing official guidelines for the mercy killing of severely handicapped newborns is certain to place additional strain on the new legislation's precarious balancing act.<sup>210</sup> The Association's Working Group on Neonatal

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206. Rees, *supra* note 137.

207. *Id.*

208. Harper, *supra* note 150.

209. *Id.*

210. Abner Katzman, *Dutch doctors form guidelines for mercy killing of newborns*, THE TALLAHASSEE DEMOCRAT, July 30, 1992, at 4A.

Ethics states that about ten times a year euthanasia is practiced on a newborn in Holland.<sup>211</sup> As in the case of adult euthanasia, many such cases of infanticide are routinely disguised as natural deaths by physicians for fear of criminal prosecution.<sup>212</sup> Euthanasia of hopelessly defective infants involves problems even more heightened than when applied to competent persons of the age of majority. Newborns cannot give consent to be euthanized and thus infanticide is essentially postpartum abortion.<sup>213</sup>

## VI. THE EFFECTS OF SOCIETAL DIFFERENCES

A comparison between the treatment of euthanasia in the United States and The Netherlands would not be complete without a consideration of the psychological and sociological factors involved.

Holland remains the only modern nation to institutionalize limited-form euthanasia and this reflects, in part, Dutch values of independence and self-reliance.<sup>214</sup> The Chairperson of the NVVE, Pit Bakker, when asked why the Dutch are at the forefront of the use of euthanasia stated:

The only thing I can think of is that we like to talk about things out in the open. . . . We don't like secrecy. We hate to be silent, and we hate to be governed by doctors or police or anyone else. We want to decide things for ourselves, including the self-determination of how and when we should die.<sup>215</sup>

Another explanation for the Dutch demand for comprehensive and individually-customized life-ending procedures may be found in their inclusive national health care system. Holland boasts one of the world's most successful health care delivery systems and citizens are accustomed to first-rate personalized cradle-to-grave accommodations. The Dutch are commonly insured through "Sickness Funds"—nonprofit corporations similar to American Blue Cross/Blue Shield organizations—which charge the equivalent of \$20 monthly for comprehensive medical coverage, approximately one-eighth the comparable average cost in the United States.<sup>216</sup> The addition of spouses and children increases the cost of the premium, but it is strictly limited to

211. *Id.*

212. *Id.*

213. See Richard B. Brandt, *Defective Newborns and the Morality of Termination*, in *INFANTICIDE AND THE VALUE OF LIFE*, 50-51 (Marvin Kohl, ed. 1978).

214. Harper, *supra* note 150.

215. *Id.*

216. Richard A. Knox, *Health-care comparison shows U.S. system overpriced, lacking*, *BOSTON GLOBE* (reprinted in *THE TALLAHASSEE DEMOCRAT*, Aug. 16, 1992, at 1E).

no more than 1.2% of family earnings.<sup>217</sup> The Dutch insurance policies pay for all medical expenses in state-of-the-art hospitals and includes free doctors' house calls.<sup>218</sup> The United States spends more than twice as much on health care per capita and yet The Netherlands has a 43% lower infant mortality rate, longer life expectancy and far fewer years of life lost due to premature death.<sup>219</sup> Remarkd one Amsterdammer when asked about health care in Holland: "[t]here is nothing to worry about when you are Dutch."<sup>220</sup>

A less appealing rationale for Dutch affinity for mercy killing may be that to maintain high-access, low-cost care for the general population, the terminally ill are more readily euthanized to conserve resources. This prospect of institutionally rationing care for the hopelessly ill is undeniably chilling, but rationing also is accomplished in the United States, albeit by the action of free-market economics. Americans who cannot financially afford adequate insurance or self-paid health care simply go without and thereby those medical resources are in effect freed to be allocated to those who possess the ability to purchase the medical care.

Another facet to the rationing explanation may be that the elderly and seriously ill Dutch place self-imposed limitations on their care, avoiding hospitalization for fear of involuntary euthanasia.<sup>221</sup> Some elderly in The Netherlands have elected to carry identification cards expressly stating that they do *not* want to be euthanized if and when the question arises.<sup>222</sup> Such disturbing realities only serve to demonstrate how anecdotal suffering and injustice are impossible to eradicate, regardless of governments' good intent.

As well, the marginally-influential religious opposition to euthanasia in The Netherlands has failed to sway public opinion against the concept.<sup>223</sup> The United States possesses a much more vocal and politicized church infrastructure, thus exercising more influence over both the citizenry and the several branches of government.

## VII. A PROPOSAL FOR THE UNITED STATES

The disappointing results experienced by the Dutch in the establishment of a workable active euthanasia policy should serve to motivate

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. Fenigson, *Letters to the Editor: Involuntary Euthanasia in Holland*, WALL ST. J., Sept. 29, 1987, at 39, Col. 1.; Nerland, *supra* note 38, at 136.

222. Reeves, *supra* note 103.

223. Nerland, *supra* note 38, at 136-37.

American lawmakers to act more preemptively as to the issue. The United States Congress might assemble a commission comprised of learned practitioners from the arts and sciences of law, medicine and religion to draft a model euthanasia code. Alternatively, Congress could offer to the state legislatures a modified version of one of the few existing state provisions addressing euthanasia, such as California's exemplary statutes.

The enacted California "Natural Death Act,"<sup>224</sup> addressing passive intervention, and the voter-rejected "Death With Dignity Act," attempting to regulate active euthanasia, could both be offered to all other states. The former statute authorizes patients to write living wills<sup>225</sup> that specify at what point artificial life-maintaining provisions are to be ceased and directs medical personnel to comply with such patient requests. The Natural Death Act shields physicians who act in accordance with the statute from all civil and criminal liability.<sup>226</sup> An enacted Death With Dignity Act would create "bright-line" regulations to provide those dying persons that so elect, an opportunity to

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224. § 7185.5. Legislative findings and declaration

(a) The Legislature finds that an adult person has the fundamental right to control the decisions relating to the rendering of his or her own medical care, including the decision to have life-sustaining treatment withheld or withdrawn in instances of a terminal condition or permanent unconscious condition.

(b) The Legislature further finds that modern medical technology has made possible the artificial prolongation of human life beyond natural limits.

(c) The Legislature further finds that, in the interest of protecting individual autonomy, such prolongation of the process of dying for a person with a terminal condition or permanent unconscious condition for whom continued medical treatment does not improve the prognosis for recovery may violate patient dignity and cause unnecessary pain and suffering, while providing nothing medically necessary or beneficial to the person.

(d) In recognition of the dignity and privacy that a person has a right to expect, the Legislature hereby declares that the laws of the State of California shall recognize the right of an adult person to make a written declaration instructing his or her physician to withhold or withdraw life-sustaining treatment in the event of a terminal condition or permanent unconscious condition, in the event that the person is unable to make those decisions for himself or herself.

(e) The legislature further declares that, in the absence of a controversy, a court normally is not the proper forum in which to make decisions regarding life-sustaining treatment.

(f) To avoid treatment that is not desired by a person in a terminal condition or permanent unconscious condition, the Legislature declares that this chapter is in the interest of the public health and welfare.

CAL. HEALTH AND SAFETY CODE § 7185 (West 1992).

225. A document which governs the withholding or withdrawal of life-sustaining treatment from an individual in the event of an incurable or irreversible condition that will cause death within a relatively short time, and when such person is no longer able to make decisions regarding his or her medical treatment. BLACK'S LAW DICTIONARY 1599 (6th ed. 1990).

226. CAL. HEALTH AND SAFETY CODE § 7185 (West 1992), *supra* note 224.

end their lives when they determine their quality of life has become unacceptable.<sup>227</sup>

Such a model code need distinguish between the act of euthanasia from the acts of suicide and homicide, reflecting the uniqueness of euthanasia and in recognition of its special role in society. The code would ideally address and regulate all germane areas of concern, including: living wills, patient competency, informed consent, unreasonable pain and suffering, terminal illness, extraordinary medical treatment and clear and convincing proof of patients' wishes.

Each state should then be encouraged to adopt a version of the code acceptable to its legislature. Such state statutory provisions could effectively and judiciously provide a euthanasia scheme that both meets the requirements of the general public and practicing professionals, as well as comport with the law laid down in *Cruzan*.

#### VIII. CONCLUSION

Clearly, the Dutch initiative as to euthanasia, though somewhat unresolved, is significantly more developed and evolved in contrast to the laws of United States. Both societies will continue to face and cope with the agonizing decisions that the subject of euthanasia entails. Hopefully, The Netherlands will eventually realize the goal of a truly decriminalized, just and compassionate euthanasia code. The United States is but beginning to enter the debate and must face the task of forging a euthanasia ethic that provides for medical, religious, legal and familial needs while maintaining the dignity and respect of the dying.

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227. See *supra* note 112 and accompanying text.

