

WILL THE "RIGHT TO DIE" BECOME A LICENSE TO KILL? THE GROWTH OF EUTHANASIA IN AMERICA

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Over the past two decades, Americans have been riding the wave of a triumphal social trend that is championing self-determination and patient autonomy while it is eroding the legal barriers against euthanasia.¹ Bolstered by the rhetoric of compassion, common sense, and death with dignity, Americans are ushering in a new practice: "kill the dying."² More dramatic, we are embracing an ideology which may spawn yet another practice: kill the costly.

Enamored as we are with a right to "death with dignity," many Americans still display uneasiness with "mercy killing" and "active euthanasia."³ We thus find ourselves in an untenable position between countercurrents: a new ethic based on the quality of life is emerging, but the old ethic based on the sanctity

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1. By "euthanasia" I mean "the intentional killing, by omission or direct action, of those whose lives are considered of insufficient value to maintain." C. Everett Koop, M.D., Sc. D. and Edward R. Grant, *The "Small Beginnings" of Euthanasia: Examining the Erosion in Legal Prohibitions Against Mercy-Killing*, 2 NOTRE DAME J. LAW, ETHICS, & PUB. POL'Y 585, 589. Koop and Grant provide a more extensive discussion of the medico-legal definition of euthanasia. In essence, euthanasia is the "wilful and deliberate killing of oneself or another out of motives of compassion, the desire to save another from suffering, or to promote 'the dignity' of the suffering person." *Id.* at 592-93.

Euthanasia is thus a form of homicide in which particular factors of intent and motive are present. These factors in no way exonerate the individual who has committed the homicide; nor does the fact that the homicide was committed by a negative rather than a positive act.

Id. at 593.

2. See Christine K. Cassell, *Foregoing Treatment*, 6 CARDOZO L. REV. 287, 293-94 (1984) (discussing the social and economic forces that threaten to usher in a new practice "which can ominously be called 'kill the dying.'")

3. Many advance directive statutes contain a clause disclaiming any intent to endorse mercy killing. *E.g.*, CAL. HEALTH & SAFETY CODE § 7191.5(g) (West Supp. 1992); FLA. STAT. ANN. § 765.11(1) (West 1986); ILL. ANN. STAT. ch. 110 1/2, para. 709(f) (Smith-Hurd Supp. 1991-92); IND. CODE ANN. § 30-5-5-17(b) (Burns Supp. 1991); MASS. ANN. LAWS ch. 201D § 12 (Law. Co-op. Supp. 1992); N.Y. PUB. HEALTH LAW § 2989(3) (McKinney Supp. 1992); TEX. HEALTH & SAFETY CODE ANN. § 672.020 (Vernon 1992).

In November 1991, the citizens of Washington state rejected an "aid-in-dying" initiative that would have allowed a patient with a "terminal condition" to end his life "in a dignified, painless, and humane manner" at the hands of a physician. *Wash. Initiative 119, An Act Relating to the Natural Death Act*; and Amending RCW 70.122.010, 70.122.020, 70.122.030, 70.122.040, 70.122.050, 70.122.060, 70.122.070, 70.122.080, 70.122.090, 70.122.100, and 70.122.900 (1991); BOSTON GLOBE, Nov. 7, 1991, at 15. California voters similarly rejected proposition 161 in November 1992. *WASH. POST*, Nov. 5, 1992, at A 41, col. 3. Proponents of legalized mercy killing rightly deride as specious attempts to distinguish between active and passive euthanasia. *E.g.*, Joseph Fletcher, "Ethics and Euthanasia," in *To Live and to Die: When, Why, and How* 113 (Robert Williams ed. 1973); Derek Humphry, *Tactical Errors Defeated Proposed Suicide Law*, *NEWSDAY*, Nov. 13, 1991, at 99.

of life has not been discarded. Rather than blindly drifting on, we need to drop anchor for a moment and consider our course.

The ideological and legal transformation taking place did not start with a revolt. It started with a shift in attitude. Gradually, our courts and legislatures subscribed to the premise that life support for terminally ill or profoundly impaired patients is inimical to those patients' interests⁴ and then provided them with the legal means to exercise their "right to die." Our laws are implicitly conceding that there is such a thing as a life not worthy to be lived and creating a legal climate favorable to euthanasia. While it is easy to support the goal of reduced human suffering, we should not myopically examine the public policy proposals being advanced without discerning the reasons for the transformation that is taking place and examining its broader implications.

The advocates of the "right to die" prefer to portray their proposals as patient protection measures; yet, the rhetoric of the euthanasia movement is eerily familiar. The concepts of a "life not worth living" and "death with dignity" propelled the genocide program of the National Socialists in Germany.⁵ Of course, euthanasia proponents decry parallels between the American euthanasia movement and "what the Nazis did."⁶ Joseph Fletcher, a leading euthanasia proponent, for example, exhorts that "the Nazis never engaged in euthanasia or mercy killing; what they did was merciless killing, either genocidal or for ruthless experimental purposes."⁷ As he looks back on that horrifying era, however, what Fletcher fails to perceive are the erroneous beginnings that led to such atrocious ends. Nothing in this article is meant to suggest that every proponent of euthanasia is a latent Nazi. Nevertheless, humanity's interest in avoiding a recurrence of anything resembling the National Socialists' genocide program mandates that we observe the correlation between current thought and practices in our country and those in Germany in the first half of this century.

In the United States today, as in Germany in the 1930s and 1940s, the progression towards active, involuntary euthanasia is being precipitated by a rejection of natural law jurisprudence and the acceptance of positivistic utilitarianism and secularism. Positivistic utilitarianism and secularism disarmed the German jurists in the years before and during the rise of the National Socialists.⁸ It similarly threatens to disarm Americans in the cost-containment atmosphere now prevalent in our health-care system.

1. THE PROGRESSION OF THE EUTHANASIA MOVEMENT IN THE UNITED STATES

Suicide, infanticide and the abandonment or killing of the aged or helpless are not merely twentieth-century phenomena. Those who have searched the annals of history recount the acceptance and rejection of all three practices at various

4. See Koop and Grant, *supra* note 1, at 605-606 (advance directives stem in part from the premise that over-treatment of the terminally ill or profoundly impaired patients is inimical to the interests of those patients).

5. See *infra* notes 126-172 and accompanying text.

6. E.g., Fletcher, *supra* note 3, at 114.

7. Fletcher, *supra* note 3, at 114.

8. See notes 212-214 and accompanying text.

times in various societies.⁹ But Jewish, Christian and Islamic teachings always maintained that deliberate killing in cases of abnormality or incurable illness is wrong and forbade it in their communities.¹⁰ The past 100 years, however, have witnessed the erosion of the legal barriers to euthanasia in American and British jurisprudence. Seemingly innocuous efforts to allow the dying to forego painful life-prolonging treatment have matured into efforts to dispense with disabled incompetent patients. Through case law and advance directive legislation,¹¹ voluntary "death with dignity" by passive measures is evolving into involuntary killing by active measures.

A. FROM VOLUNTARY TO INVOLUNTARY EUTHANASIA

The historical roots of the American euthanasia movement reach back to Britain. The concept of voluntary euthanasia garnered some attention there in 1873 when L.A. Tollemache pleaded for voluntary euthanasia in an article entitled, "The New Cure for Incurables," published in *Fortnightly Review*.¹² In response

9. *Compare YOUR DEATH WARRANT? THE IMPLICATIONS OF EUTHANASIA, A MEDICAL, LEGAL, AND ETHICAL STUDY* 20-23 (Jonathon Gould & Lord Craigmyle eds., 1971) with DEREK HUMPHRY & ANN WICKETT, *THE RIGHT TO DIE* (1986). These historical accounts differ in tone and emphasis in accord with the perspective of the writers. *YOUR DEATH WARRANT* was written to criticize efforts in The United Kingdom to legalize mercy killing. Humphry, founder of the Hemlock Society and author of *FINAL EXIT*, favors the legalization of physician assisted suicide and opines in his historical account that "in more primitive societies, death—as a result of illness, injury, or old age—was treated more realistically than it is today. It was treated as a natural part of life. Aiding death was often done out of respect for an ill person." HUMPHRY & WICKETT at 2.

Although the accounts differ, they make several interesting points. Some primitive people accepted the practice while others had elaborate social codes that protected senior members of the tribe. HUMPHRY & WICKETT at 1-3; *YOUR DEATH WARRANT* at 20-21. In classical Greece, there does not seem to have been wide abandonment of elderly or helpless adults. HUMPHRY & WICKETT at 3; *YOUR DEATH WARRANT* at 21. Humphry cites evidence that suicide was committed as a form of euthanasia in Greece. HUMPHRY & WICKETT at 3-5. But the Hippocratic Oath stated: "I will give no deadly drug to any, though it be asked of me, nor will I counsel such" Under the influence of the Stoics, suicide was an accepted form of death for escape from disgrace in ancient Rome. HUMPHRY & WICKETT at 5; *YOUR DEATH WARRANT* at 21. Yet Cicero wrote: "The God that rules within us forbids us to depart hence unbidden," and declined to succumb to the practice when pursued to death by the revenge of Antony. *YOUR DEATH WARRANT* at 21.

For an historical review of attitudes toward suicide from ancient Judaic culture through contemporary views, See Thomas J. Marzen et al., *Suicide: A Constitutional Right?* 24 DUQ. L. REV. 1, 17-56 (1985).

10. *YOUR DEATH WARRANT*, *supra* note 9, at 22; see also HUMPHRY & WICKETT, *supra* note 9, at 5-9 (discussing and lamenting the influence of Christianity). Some have found an exception to the Christian prohibition in St. Thomas More's *Utopia* where the Utopians allowed euthanasia if the patient's illness was incurable and caused anguish and where the patient consented to death. E.g., GLANVILLE WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 311 (1957). Such reliance on *Utopia*, however, is grossly misplaced since what More attempted to do in his satire was describe a non-Christian society and show how it was in many ways to be preferred to the Renaissance societies of his time. However, More wrote that he was giving an account of the constitution of the Utopians but "(not defend[ing] all their principles)." *YOUR DEATH WARRANT*, *supra* note 9, at 22-23.

11. By the term "advance directive," I include documents such as "living wills," "health-care powers of attorney," "health-care proxies" and other legal documents that either express a patient's health care wishes or direct an agent to act on behalf of a patient in making health-care decisions should the patient become unable to do so.

12. Yale Kamisar, *Some Non-Religious Views Against Proposed "Mercy Killing" Legislation*, 42 MINN. L. REV. 969, 1014 (1958) (citing L. A. Tollemache, *The New Cure for Incurables*, 19 FORTNIGHTLY REV. 218 (1873)). Most proponents of euthanasia since the time of Tollemache have similarly framed the issue in terms that would appear to make euthanasia available to the suffering incurable who voluntarily seeks death. Kamisar traces this studied effort and questions whether the "euthanasiaists" have gone to such lengths for political expediency with hopes of pushing through a less restrictive bill once the public has become "educated." *Id.* at 1014-1030.

to criticism that his arguments in favor of voluntary euthanasia would apply equally to those who could not consent, Tollemache retorted that where consent could not be obtained, "the sufferer must be allowed to linger on."¹³ While the issue of euthanasia continued to be debated in academic circles in Europe, little concrete action took place in Britain until the 1930's. On October 16, 1931, Dr. C. Killick Millard, the Medical Officer of Health for the City of Leicester, made a stirring plea before the Society for the Medical Officers of Health for the legalization of voluntary euthanasia calling the act "rational, courageous, and often highly altruistic."¹⁴ Millard proposed a draft bill and in 1935 founded the Voluntary Euthanasia Legalization Society.¹⁵

The birth of the voluntary euthanasia movement in the United States followed quickly on the heels of the movement in Britain. In 1937, the Nebraska Assembly indefinitely postponed consideration of a bill to allow voluntary euthanasia following the British model.¹⁶ Undaunted by the legislature's inaction, Reverend Charles Potter founded the Euthanasia Society of America on January 16, 1938.¹⁷ As in the British movement, proponents carefully circumscribed the issue and focused attention on the plight of suffering incurable persons who *voluntarily* seek death.¹⁸

The following year at its annual meeting, however, the Society's intentions to limit its quest to *voluntary* euthanasia became suspect. The *New York Times* reported that Charles E. Nixdorff, treasurer of the Society, explained that the Society's proposed bill in the New York legislature was "limited purposely to voluntary euthanasia because public opinion is not ready to accept the broader principle." He added, however, that "the society hoped eventually to legalize the putting to death of nonvolunteers beyond the help of medical science."¹⁹ Similarly, the Society's literature revealed that efforts would begin with voluntary euthanasia because it would generate the least resistance.²⁰

Some disciples within the movement stridently pressed to eliminate the dichotomy between voluntary and involuntary euthanasia in certain cases. In an address before the Society of Medical Jurisprudence at the Academy of Medicine, Foster Kennedy, M.D., early president of the Society, decried laws seeking to "restrict euthanasia to those who could speak out for it, and thus ignore these creatures who cannot speak."²¹ In 1942, Kennedy offered a plan for involuntary euthanasia for defective children. Kennedy proposed that once a child had reached

13. Kamisar, *supra* note 12, 1014 n. 150 (quoting a letter to the editor by L. A. Tollemache, *The Limits of Euthanasia*, 46 THE SPECTATOR 240 (1873)).

14. YOUR DEATH WARRANT, *supra* note 9, at 25 (quoting Millard's address).

15. YOUR DEATH WARRANT, *supra* note 9, at 24-25. The name of the society has changed several times and was finally changed to the Voluntary Euthanasia Society in 1969. *Id.* YOUR DEATH WARRANT traces the British Society's legislative efforts in 1936, 1950 and 1969 and provides details of the debates in Parliament. The 1936 and 1969 debates involved, bills while the 1950 effort was simply a "Motion for Papers" which is the form in which a debate on any subject is raised in the House of Lords. *Id.* at 45.

16. HUMPHRY & WICKETT, *supra* note 9, at 14.

17. N.Y. TIMES, Jan. 17, 1938, at 21, col.8.

18. See Kamisar, *supra* note 12, at 1016.

19. Kamisar, *supra* note 12, at 1016 (quoting N.Y. TIMES, Jan. 27, 1939, at 21, col.7).

20. Kamisar, *supra* note 12, at 1017 (quoting literature).

21. Kamisar, *supra* note 12, at 1017 (quoting N.Y. TIMES, Feb. 14, 1939, at 2, col. 6).

the age of five, the child's guardians should be permitted to apply for permission to relieve the child of the "agony of living."²²

A principled distinction between voluntary and involuntary euthanasia seemed to elude even those who initially insisted that the distinction could be maintained. When Reverend Potter founded the Euthanasia Society, he explained that members "subscribed to the belief that, with adequate safeguards, it should be made legal to allow incurable sufferers to choose immediate death rather than await it in agony."²³ However, Potter later found his position untenable. After Dr. Herman Sander's "mercy killing" of his cancer-stricken patient and Carol Ann Paight's "mercy killing" of her cancer-stricken father in 1950, Reverend Potter publicly hailed Sander's action, and the Euthanasia Society voted to support both Sander and Paight. No one seemed to notice that both cases involved *involuntary* euthanasia.²⁴ Implicitly, Potter and the Euthanasia Society equated "mercy killing" of someone who asks to die with "mercy killing" of someone who *should* ask to die.²⁵

In the past two decades, state court decisions have similarly vitiated any real distinction between the voluntary exercise of the "right to die" and involuntary euthanasia. As a corollary to the doctrine of informed consent or as an outgrowth of the right of privacy, state courts recognized that a competent patient has the right to refuse certain medical treatment even if refusal hastens death.²⁶ In a series of cases, courts began to grope for a means to afford incompetent patients that same right. The legal fiction of substituted judgment proved to be the ideal device.

The substituted judgment approach in right to die cases employs a principle that originated in the nineteenth century English "law of lunacy."²⁷ By "don[ning] the mental mantle of the incompetent,"²⁸ American and English courts administered the estates of those who had become mentally unable to manage their own affairs.²⁹ Before disbursing money from an incompetent's estate, however, courts required certain evidence such as a close family tie or mutual affection between the incompetent person and the recipient, the incompetent person's prior

22. Foster Kennedy, *The Problem of Social Control of the Congenital Defective*, 99 AM. J. OF PSYCHIATRY 1, 13-14 (1942).

23. *Id.*

24. Kamisar, *supra* note 12, at 1019.

25. *Cf.* Kamisar, *supra* note 12, at 1020 ("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.").

26. See *Cruzan v. Director, Missouri Dept. of Health*, 110 S.Ct. 2841 (1990) (discussing surrogate decision-making and the state procedural safeguards to protect the patient). For case citations and a brief discussion of the development of the patient's right to refuse medical treatment from the common law right of bodily self-determination and the constitutional right of privacy, see generally Steven M. Richard, Note, *Someone Make Up My Mind: The Troubling Right to Die Issues Presented By Incompetent Patients with No Prior Expression of a Treatment Preference*, 64 NOTRE DAME L. REV. 394, 397-401 (1989). For a discussion of the rights of competent patients to refuse treatment and the limits on those rights, see Walter M. Weber, *Substituted Judgment Doctrine: A Critical Analysis*, 1 ISSUES IN LAW & MED. 131, 131-133 (1985).

27. Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1 (1990); *Superintendent of Belchertown v. Saikewicz*, 370 N.E.2d 417, 431 (Mass. 1977).

28. *In re Carson*, 241 N.Y.S.2d 288, 289 (N.Y. Sup. Ct. 1962).

29. *Saikewicz*, 370 N.E.2d at 431. See also Harmon, *supra* note 27, at 16-31 (history of doctrine).

intent to donate to the recipient, or a history of the incompetent's generosity.³⁰

In 1969, the highest Kentucky court approved a revolutionary new role for the substituted judgment doctrine in the law of informed consent in the case of *Strunk v. Strunk*.³¹ Before employing the substituted judgment doctrine, the Kentucky court recast it in two ways: first, by expanding the doctrine to apply not just to an incompetent person's property but to any matter that concerned the well-being of an incompetent person, and second by wholly dispensing with the doctrine's strict evidentiary constraints. The Kentucky court then used its new tool to allow a mentally retarded man's kidney to be removed and donated to the man's dying brother.³²

In 1975 the New Jersey Supreme Court invoked the substituted judgment doctrine for the first time in a right to die case in *In re Quinlan*.³³ Like the Kentucky court in *Strunk*, however, the New Jersey Court in *Quinlan* applied substituted judgment without any evidentiary constraints. The court concluded that the evidence of what Karen Quinlan would have done if she were competent was insufficient.³⁴ Nevertheless, the court decided that Karen's "putative decision" to refuse life-saving treatment was incidental to her right of privacy and that Karen's family should exercise her right by rendering their "best judgment."³⁵

Subsequent cases employed "substituted judgment" with and without evidentiary constraints.³⁶ In some cases, the surrogate claimed that the incompetent person expressed his intent prior to incompetency, and thus, the question before the court became whether the surrogate had sufficient proof of that intent. In *Cruzan v. Harmon*,³⁷ for example, the Missouri Supreme Court determined that

30. Harmon, *supra* note 27, at 29.

31. 445 S.W.2d 145 (Ky. 1969).

32. Harmon, *supra* note 27, at 34. In *Strunk v. Strunk*, the court allowed a kidney to be removed from Jerry Strunk, a 24-year-old with a mental age of six. The kidney was needed for Jerry Strunk's brother, Tommy Strunk, who was dying of a kidney disease. The county court had reasoned that because Jerry would suffer more from the loss of Tommy than from the loss of a kidney, it was in Jerry's best interest to allow the operation. *Strunk* at 146. The Court of Appeals of Kentucky affirmed. *Strunk* at 149. This marked the first time the doctrine of substituted judgment had been used other than to make allowances or gifts from an incompetent person's surplus income. It also marked the first time the doctrine was used in a decision involving a person who had never been competent (an "idiot" as opposed to a "lunatic"). Harmon, *supra* note 27, at 32-35. Where a person has never been competent, it is impossible to employ the evidentiary constraints historically associated with the doctrine. Harmon, *supra* note 27, at 35.

33. 355 A.2d 647, 663 (N.J. 1976).

34. *Quinlan*, 355 A.2d at 653.

35. *Id.* 664. The court recognized its predicament and made the following observation: Our affirmation of Karen's independent right of choice . . . would ordinarily be based upon her competency to assert it. The sad truth, however, is that she is grossly incompetent and we cannot discern her supposed choice based on the testimony of her previous conversations with friends, where such testimony is without sufficient probative weight [citations omitted]. Nevertheless we have concluded that Karen's right of privacy may be asserted on her behalf by her guardian under the peculiar circumstances here present. . . . If a putative decision by Karen to permit this non-cognitive, vegetative existence to terminate by natural forces is regarded as a valuable incident of her right of privacy, as we believe it to be, then it should not be discarded solely on the basis that her condition prevents her conscious exercise of the choice.

Id.

36. For a discussion of these cases through *Cruzan*, see Harmon, *supra* note 27, at 39-46.

37. 760 S.W.2d 408 (Mo. 1988), *aff'd sub nom.* *Cruzan v. Director, Missouri Dep't of Health*, 110 S.Ct. 2841 (1990).

a surrogate could not withhold life-sustaining medical treatment from Nancy Cruzan, who was in a persistent vegetative state, without clear and convincing evidence of Ms. Cruzan's desires.³⁸ In *In re Storar*,³⁹ the New York Court of Appeals determined that it could not grant permission to discontinue blood transfusions for John Storar, a 52-year-old man with a mental age of 18 months who had cancer of the bladder. The court reasoned that since Storar had never been competent, the court could not find the clear and convincing evidence necessary for substituted judgment.⁴⁰

Some courts required less than clear and convincing evidence. In *In re Jobes*,⁴¹ the court explored the possible considerations for a patient who had not expressed any wishes regarding health care:

[E]ven if no prior specific statements were made . . . in the context of the individual's prior mental life, including his or her philosophical, religious and moral views, life goals, values about the purpose of life and the way it should be lived, and attitudes about sickness, medical procedures, suffering and death, that individual's likely treatment/nontreatment preferences can be discovered.⁴²

Still other courts required no evidence of the patient's desires. In *Superintendent of Belchertown v. Saikewicz*,⁴³ and *Guardianship of Jane Doe*,⁴⁴ the Massachusetts Supreme Court applied the substituted judgment doctrine even though the life-long incompetency of Joseph Saikewicz and Jane Doe made application of any evidentiary constraints impossible. In the case of Joseph Saikewicz, a profoundly retarded 67-year-old with leukemia, the court reasoned that in light of his present and future incompetency, Saikewicz would not want to receive chemotherapy.⁴⁵ In the case of Jane Doe, a woman in a persistent vegetative state suffering from Canavan's disease,⁴⁶ the Supreme Judicial Court of Massachusetts allowed the removal of Jane Doe's feeding tube and affirmed a probate judge's determination that, in view of Jane Doe's prognosis, her parents' preference was the "best mirror" of their daughter's wishes.⁴⁷

A few courts declined to invoke the "substituted judgment" doctrine and called on surrogates to make their decision by evaluating the "best interests" of the incompetent patient.⁴⁸ The surrogate could consider the patient's "best

38. Some courts have commented that "clear and convincing" evidence should consist of written expression or repeated oral statements amounting to more than passing comments or a reaction to unsettling experiences. The meaning of the term "clear and convincing," however, remains open to case by case interpretation.

39. 420 N.E.2d 64 (1981).

40. *Storar*, 420 N.E.2d at 72-73.

41. 529 A.2d 434 (N.J. 1987), *stay denied sub nom.* Lincoln Park Nursing and Convalescent Home v. Kahn, 483 U.S. 1036 (1987).

42. 529 A.2d at 445 (quoting Steven A. Newman, *Treatment Refusals for the Critically Ill: Proposed Rules for the Family, the Physician and the State*, 3 N.Y.L. SCH. HUM. RTS. ANN. 35, 45-46 (1985)).

43. 370 N.E.2d 417 (Mass. 1977).

44. 583 N.E.2d 1263 (Mass. 1992), *cert. denied sub nom.* Doe v. Gross, 112 S.Ct. 1512 (1992).

45. *Saikewicz*, 370 N.E.2d at 431-32.

46. "Canavan's disease is a genetic disorder. Its 'salient clinical features are onset in early infancy, atonia of the neck muscles, hyperextension of the legs and flexion of [the] arms, blindness, severe mental defects and [megalencephaly]." *Guardianship of Doe*, 583 N.E.2d at 1266 n.6.

47. *Id.* at 1268 (quoting lower court).

48. E.g., *Rasmussen v. Fleming*, 741 P.2d 674, 689 (Ariz. 1987). For a discussion of the origins

interests" if there was inconclusive evidence of the patient's desires or if there was no evidence of the patient's desires.⁴⁹ The New Jersey court in *Matter of Conroy*,⁵⁰ for example, authorized a benefit/burden analysis. The court defined "burdens" in terms of pain and suffering and "benefits" in terms of "physical pleasure, emotional enjoyment, or intellectual satisfaction."⁵¹

By "substituted judgment," "best interests," or a combination of the two, the courts have created the legal mechanism for involuntary euthanasia. The best interests test does not even purport to determine what the incompetent person wants, but instead objectively weighs the benefits and burdens of continued life. A low level of physical pleasure, emotional enjoyment, or intellectual satisfaction does not bode well for an incompetent person's continued life.

The substituted judgment calculation does not ignore the incompetent person, but the incompetent person's desires take a back seat to the desires of those who make treatment decisions for the incompetent person. The court purportedly fulfills the incompetent person's wishes. But since an incompetent person by definition cannot express a legally conclusive intent, any court applying substituted judgment necessarily derives putative intent from sources other than the incompetent person.⁵² Anyone attempting to determine what X would decide if X were capable of expressing beliefs and making decisions runs the risk of confusing X's intent with his own intent.⁵³ Although the risk of error may have been acceptable where the incompetent loses money from his estate, the risk becomes grave when the incompetent loses his life. Where the incompetent has never been competent like Joseph Saikewicz and Jane Doe, a court's effort to derive the incompetent person's intent becomes impossible and subjects the incompetent person to the will of the court.

The move from voluntary to involuntary decision-making has come about relatively quickly. Although Tollemache argued in 1873 that when consent could not be obtained the sufferer must be allowed to linger on, the American judiciary has engineered a means for any incompetent to exercise his or her right to die. While no state has embraced involuntary euthanasia by statute, in less than twenty years the courts have secured the legal means for terminating the lives of incompetent persons by deeming that death is in their "best interests" or by imputing to them a desire to die and fulfilling "their wishes."

B. FROM PASSIVE TO ACTIVE MEASURES

While the dichotomy between voluntary and involuntary euthanasia began to erode, so did the distinction between allowing to die and causing death. The

of the best interests test, see Daniel Griffith, *The Best Interests Standard: A Comparison of the State's Parens Patriae Authority and Judicial Oversight in Best Interests Determinations for Children and Incompetent Patients*, 7 ISSUES IN L. & MED. 283, 287-312 (1991).

49. In re Conroy, 486 A.2d 1209, 1232 (N.J. 1985); Rasmussen, 741 P.2d at 689.

50. Conroy, 486 A.2d at 1209.

51. *Id.* at 1232. For a discussion of the invalidity of the "best interest" approach to surrogate decision-making, see generally Griffith, *supra* note 48.

52. Weber, *supra* note 26, at 145-46.

53. Harmon, *supra* note 27, at 68. Harmon observes that the agency relationship between the surrogate and the incompetent is untenable. The agent is called upon to carry out the will of a principal who no longer has a will. "It is an arrangement worthy of Lewis Carroll." Harmon, *supra* note 27, at 59.

horrors of the Nazi genocide program significantly stemmed the euthanasia movement's efforts after World War II, but in the 1960s euthanasia proponents reemerged with new rhetoric. Seizing upon the widely accepted legal principle that patients have the right to reject medical treatment even if it hastens death, the Euthanasia Society reignited the euthanasia movement with phrases like "death with dignity" and the "right to die." Proponents of the movement expunged the word "euthanasia" from official dialogue to distance their movement from the Nazi legacy. The American Euthanasia Society became the "Society for the Right to Die" in 1975. In 1978, the Euthanasia Education Council became "Concern for Dying."⁵⁴ This semantical maneuvering suggested that the goal of the movement was simply to allow unhindered death. But as "artificial" nutrition and hydration became a medical option that both competent and incompetent patients could refuse, "allowing to die" became synonymous with intentionally causing death.⁵⁵

"Artificial" nutrition and hydration is provided in a variety of ways but because of *Cruzan v. Director, Missouri Dep't of Health*,⁵⁶ gastrostomy tubes have received the most attention in recent years. Gastrostomy tubes are inserted through the abdominal wall directly into the stomach in a simple surgical procedure under local anesthetic.⁵⁷ Food and water have been provided by means of a gastrostomy tube for over 100 years.⁵⁸ In 1987, a government report found that 848,100 people per year receive food by tube in various health-care facilities or in their own homes.⁵⁹ Yet verbal engineering has changed an ordinary procedure into exotic high-tech care.⁶⁰

54. Rita Marker et al., *Euthanasia: A Historical Overview*, 2 MD. J. CONTEMP. LEGAL ISSUES 257, 278 (1991) [hereinafter *Historical Overview*].

55. For opposing viewpoints on active euthanasia by omission, compare David Thomasma, *The Range of Euthanasia*, 73 BULL. AM. C. SURG. 4 (1988) with Robert Barry, *Death Induction, Active Euthanasia by Omission, and Protecting the Vulnerable*, 13 INT'L REV. 205 (1989).

56. 110 S.Ct. 2841 (1990).

57. *Historical Overview*, *supra* note 54, at 281 (citing Major, *The Medical Procedures for Providing Food and Water: Indications and Effects in BY NO EXTRAORDINARY MEANS: THE CHOICE TO FOREGO LIFE-SUSTAINING FOOD AND WATER* 21, 26 (J. Lynn ed. 1986)).

58. *Historical Overview*, *supra* note 54, at 281 (citing two articles published in 1896 discussing the ease with which feeding by gastrostomy tube was accomplished: McMurtry, *Modern Gastrostomy for Stricture of the Esophagus* and Coomes, *Gastrostomy in TRANSACTIONS OF THE KENTUCKEY MEDICAL SOCIETY* 123 (1896)).

59. *Historical Overview*, *supra* note 54, at 281 (citing Office of Technology Assessment, U.S. Cong., Life-Sustaining Technologies and the Elderly 294 (1987)).

60. In *Historical Overview*, *supra* note 54, at 281-82 (citing BOSTON GLOBE, Jul. 29, 1984, at 35, col.3 and In re Hier, 464 N.E.2d 959 (Mass. App. Ct. 1984)), the authors suggest that whether artificial feeding is described as "highly invasive" medical treatment or "minor surgery" may depend on the patient's social or intellectual status. In 1984, the *Boston Globe* reported two telling events. In one story, the paper reported that a Massachusetts court had agreed that implanting a feeding tube in an elderly mental patient who thought she was the Queen of England was "highly intrusive and highly risky." The court agreed to allow the guardian to prohibit reinsertion of the tube after it became dislodged. Ironically, at about the same time, the paper reported that a 94 year-old woman was doing well following "minor surgery to correct a nutritional problem." The 94 year-old woman was Rose Kennedy and the "minor surgery" was the insertion of a gastrostomy tube.

Ronald Cranford, M.D., associate physician in neurology at Hennepin County Medical Center in Minneapolis, testified that there is really no definition of "artificial" feeding and that spoon feeding a patient like Nancy Beth would be "artificial." *Historical Overview*, *supra* note 54, at 284 (citing *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988) (No. CV 384-9P), Transcript at 228-29).

The right to reject "artificial" nutrition and hydration evolved in a series of cases involving both competent and incompetent patients fed with tubes.⁶¹ Court after court flatly rejected any distinction between nutrition and hydration provided by a tube and medical care that a patient may refuse. In 1986, the American Medical Association's seven-member Council on Ethical and Judicial Affairs determined that it was appropriate for doctors to withdraw life-supporting artificial feeding systems from hopelessly comatose patients but not from conscious patients.⁶²

The Supreme Court has not decided whether the United States Constitution guarantees even a competent patient a right to refuse necessary nutrition and hydration. Rather, in *Cruzan*, the Court carefully avoided this issue:

Although we think the logic of the [state] cases . . . would embrace such a liberty interest, the dramatic consequences involved in refusal of such treatment would inform the inquiry as to whether the deprivation of that interest is constitutionally permissible. But for purposes of this case, we *assume* that the United States Constitution would grant a competent person a constitutionally protected right to refuse life-saving hydration and nutrition.⁶³

In her concurring opinion, however, Justice O'Connor opined that "[a]rtificial feeding cannot readily be distinguished from other forms of medical treatment" and that "the Due Process Clause must protect . . . an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water."⁶⁴ Thus, while the majority of the Supreme Court has reserved judgment on the question, at least some of the Justices appear poised to adopt the reasoning of the state courts which have transformed starving and dehydrating the incompetent into a medical option.

While the euthanasia movement may not have directly engineered this common law development, it certainly recognized the development's significance. In 1984, a speaker at the worldwide convention of euthanasia organizations stated: "If we can get people to accept the removal of all treatment and care — especially the removal of food and fluids — they will see what a painful way this is to die, and then, in the patient's best interest, they will accept the lethal injection."⁶⁵

61. *E.g., Conroy*, 486 A.2d at 1229 (withdrawal of artificial feeding from "awake and conscious" 84 year-old incompetent patient suffering from a terminal illness that would cause death within a year); *Bouvia v. Superior Court*, 225 Cal.Rptr. 297, 305 (Cal. Ct. App. 1986) (removal of a nasogastric tube from competent quadriplegic afflicted with severe cerebral palsy upon her request); *Brophy v. New England Sinai Hospital*, 497 N.E.2d 626, 637 (Mass. 1986) (withdrawal of feeding tube from patient in a persistent vegetative state at the request of the family); *Corbett v. D'Alessandro*, 487 So.2d 368 (Fla. Dist. Ct. App.), *review denied*, 492 So.2d 1331 (Fla. 1986) (Although the Florida statute excluded nutrition and hydration from procedures which may be declined, the court found that the statute did not affect the common law right of a patient in a persistent vegetative state to reject artificially administered nutrition and hydration.) *Gray v. Romeo*, 697 F. Supp. 580, 587 (D.R.I. 1988) (withdrawal of gastrostomy tube from patient in a persistent vegetative state at husband's request).

62. CHI. TRIB., Mar. 16, 1986 at C15.

63. 110 S. Ct. at 2852 (emphasis added).

64. *Id.* at 2857 (O'Connor, J., concurring).

65. Rita Marker, *The "Right to Die" Movement and the "Artificial" Provision of Nutrition and Hydration*, 12 INT'L REV. 193, 194 (1988) (quoting Fifth Biennial Conference of the World Federation of Right to Die Societies, Nice, France, September 20-23, 1984. From "Ethics Panel: The Right to Choose Your Death—'Ethical Aspects of Euthanasia.'" Remarks by panel member Helga Kuhse, Ph.D., lecturer in philosophy at Monash University and research fellow at the Center for Human Bio-Ethics in Melbourne, Australia, September 21, 1984).

Likewise, the American judiciary has not completely missed the significance of allowing the withdrawal of nutrition and hydration. Justice Lynch of the Massachusetts Supreme Court inveighed against the perilous course charted by the state courts in his dissent in *Brophy v. New England Sinai Hospital*.⁶⁶ The majority approved the withdrawal of a feeding tube from a patient in a persistent vegetative state. In dissent, Justice Lynch wrote that:

The withdrawal of the provision of food and water is a particularly difficult, painful and gruesome death; the cause of death would not be some underlying physical disability like kidney failure or the withdrawal of some highly invasive medical treatment, but the unnatural cessation of feeding and hydration which, like breathing, is part of the responsibilities we assume toward our bodies routinely. Such a process would not be very far from euthanasia, and the natural question is: Why not use more humane methods of euthanasia if that is what we indorse?⁶⁷

Testimony at "right to die" trials like *Cruzan v. Harmon*⁶⁸ supports Justice Lynch's observations. The record in Nancy Cruzan's trial indicated that the gastrostomy tube feeding had been instituted not because Nancy Cruzan could not swallow but because inserting the tube made her care easier for hospital staff.⁶⁹ Following her accident, Ms. Cruzan ate mashed potatoes, bananas, eggs and link sausage by mouth.⁷⁰ Once the tube feeding was initiated, feeding by mouth again would have required retraining Ms. Cruzan to swallow. No such retraining was attempted.⁷¹ Instead, because of Ms. Cruzan's condition, the court allowed the hospital to comply with her family's request and cause her death by withholding any form of food and water.

Now that treating artificial nutrition and hydration as a medical option has blurred the line between allowing to die and causing death, the right to die debate centers largely on active euthanasia by physician-assisted suicide. The most outspoken advocate of physician-assisted suicide is Dr. Jack Kevorkian, a retired pathologist who in the last two years has helped eight women and one man kill themselves.⁷² In July 1992, a Michigan court dismissed murder charges that had been brought against Kevorkian for two of the deaths.⁷³ The judge urged

66. 497 N.E.2d 626 (Mass. 1986).

67. *Id.* at 641 (Lynch, J., dissenting).

68. 760 S.W.2d 408 (Mo. 1988).

69. *Historical Overview*, *supra* note 54, at 283 (citing *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988) (No. CV 384-9P) Transcript at 283 and 423).

70. *Id.* at 284, Transcript at 281-85.

71. *Id.*

72. N.Y. TIMES, Sep. 27, 1992, § 1, at 32, col. 1; USA TODAY, Nov. 24, 1992, at 2A, col. 1; N.Y. TIMES, Dec. 16, 1992, A21, col. 1; N.Y. TIMES, Jan. 21, 1993, A14, col. 1. Dr. Kevorkian has written a book detailing the events leading up to his decision to assist Janet Adkins, an Alzheimer's patient, to end her life on June 4, 1990. JACK KEVORKIAN, M.D., PRESCRIPTION — MEDICIDE: THE GOODNESS OF PLANNED DEATH (1991). The Mercitron, which Kevorkian invented in September 1989, allowed a patient to self administer an intravenous injection of thiopental and potassium chloride solutions. The thiopental solution puts the patient into a deep coma within twenty to thirty seconds, and the potassium chloride paralyzes the heart muscle within several minutes. "In effect, then, the patient [has] a painless heart attack while in a deep sleep." *Id.* at 208-09.

73. N.Y. TIMES, Jul. 22, 1992, at A12, col. 4. The coroner had classified the two deaths as homicides, not suicides. But Judge David Breck of the Michigan Circuit Court concluded that the testimony at a preliminary hearing revealed that Dr. Kevorkian had merely assisted in suicides. Since Michigan had no law prohibiting assistance in suicide, the murder charges could not stand. *Id.*

Kevorkian, however, not to assist in more suicides.⁷⁴ Nevertheless, on September 26, 1992, Kevorkian assisted in the death of a 52-year-old woman with terminal lung cancer.⁷⁵ Again, on November 23, 1992, he helped a cancer patient kill herself by inhaling carbon monoxide.⁷⁶ Likewise, on December 15, 1992, a woman with heart disease and a woman with Lou Gehrig's disease killed themselves by carbon monoxide poisoning with Dr. Kevorkian's assistance.⁷⁷ Kevorkian has also met with the Michigan State Medical Society where he suggested a new specialty called "obitiatry," the medical management of death. Kevorkian explained that the practice would be called "medicide," and its practitioners would be known as "obitiatrists."⁷⁸

Public support for more active assistance in dying is growing, and public policy is likely to shift to reflect changing attitudes.⁷⁹ State legislative efforts to permit physician-assisted suicide are gaining attention but have been unsuccessful thus far. Washington voters defeated the Aid in Dying Initiative in 1991,⁸⁰ and California voters rejected Proposition 161 in 1992.⁸¹ Other initiatives are on the horizon, however. The Michigan legislature is considering a bill to permit physician-assisted suicide. Unlike most aid-in-dying proposals, the Michigan bill does not specify medical conditions under which physician-assisted suicide would be allowed.⁸² Presumably, then, a patient could request physician assistance in dying for reasons unrelated to health.

In the past 30 years, a significant transformation has taken place. The euthanasia proponents of the 1960's championed the right to allow death. What is emerging, however, is a right to cause death.

Charges against Kevorkian were dismissed on the same basis in December 1990 after Kevorkian helped Janet Adkins, who suffered from Alzheimer's disease, to kill herself. But in the 1990 case, the coroner had classified the death as a suicide, not a homicide. *Id.*

It is interesting to note that like the Alzheimer's patient in the 1990 case, neither of the women at issue in the July 1992 case were terminally ill in the sense that death was imminent. Marjorie Wantz, 58, had a painful pelvic disease. Sherry Miller, 43, had multiple sclerosis. *CHI. TRIB.*, Feb. 29, 1992, at C3. In fact, only one of the women Kevorkian has assisted would qualify for physician-assisted suicide under California's proposed legislation for physician-assisted suicide. Paul Jacobs, *California Elections; Proposition 161; Suicide Measure Losing Cash Battle*, *L.A. TIMES*, Oct. 18, 1992, at A3, col. 4.

On December 3, 1992, Michigan enacted a statute classifying assisted suicide as a felony. The measure will take effect April 1, 1993. It will make assisted suicide a felony punishable by up to four years in prison and a \$2,000.00 fine while a citizens' commission spends 15 months studying the issue of physician-assisted suicide. *CHI. TRIB.*, Dec. 4, 1992, at N5.

74. *N.Y. TIMES*, Sep. 27, 1992, § 1, at 32, col. 1.

75. *Id.*

76. *USA TODAY*, Nov. 24, 1992, at 2A, col. 1.

77. *N.Y. TIMES*, Dec. 16, 1992, at A21, col. 1.

78. Diane M. Gianelli, *Suicide Summit? Dr. Kevorkian Takes Case to Mich. Society*, *AM. MED. NEWS*, Oct. 5, 1992, at 1, col. 1.

79. Blendon, Szalay, Knox, *Should Physicians Aid Their Patients in Dying*, 267 *J.A.M.A.* 2658, 2662 (1992). Blendon, Szalay, and Knox's study showed a steady increase over the past 40 years in public support for euthanasia of some form. Now 63% of Americans believe that physicians should be able to end a patient's life at the patient's request if the patient has an incurable illness. *Id.* at 2659. Sixty-four percent of Americans believe that, when a terminally ill patient is conscious and in pain, physicians should be allowed by law to respond to a patient's request for lethal drugs or injections to aid in dying. *Id.*

80. *See supra* note 3.

81. *WASH. POST*, Nov. 5, 1992, at A41, col. 3.

82. Joyce Price, *Michigan Committee Approves Assisted-Suicide Bill*, *WASH. TIMES*, Oct. 8, 1992, at A5.

C. THE LIVING WILL AND THE HEALTH-CARE POWER OF ATTORNEY

Advance directives have provided a fertile ground for cultivating the tenets of the euthanasia movement. Riddled with potential for abuse, advance directives do little to promote patient autonomy. On the other hand, they do a great deal to promote the notion that the terminally ill, the incompetent and the elderly have a duty to die.

Living wills have a short history. Luis Kutner introduced the "living will" in 1967 at a meeting of the Euthanasia Education Council.⁸³ California enacted the first living will statute nine years later.⁸⁴ In 1983, California enacted a statute recognizing durable health-care powers of attorney which apply commonly recognized agency principles to health-care decision-making.⁸⁵

On its face, an advance directive provides a legally enforceable expression of a patient's health-care preferences after the patient becomes incompetent. When perceived in this light, advance directive legislation should arouse little criticism since it seems to codify the principles of informed consent. However, given the impossibility of contemplating the factors that will be operative at the time that a living will becomes effective and the impossibility of anticipating advances in medical science, even the most detailed living will is virtually useless (or hopelessly general) as a guide to care-givers who must interpret it at some time in the future.⁸⁶ Comparing a living will to an informed consent document is like arguing for the enforceability of a surgical consent form reading: "I hereby authorize whoever is on call to perform whatever surgery is necessary to correct any problem he or she may discover at any time, exercising at all times his or her best judgment." In their current form, living will laws provide illusory protection for the patient's right to make an informed decision regarding health care.⁸⁷

Since living wills offer little guidance to physicians making treatment decisions, it is questionable whether they preserve the patient's self-determination or merely ease the way for physicians, families and institutions to cease efforts at prolonging life once a patient becomes unable to make decisions for himself.⁸⁸ A recent Florida case suggests the latter. In *In re Guardianship of Browning*,⁸⁹ the Florida Supreme Court authorized the withdrawal of a nasogastric tube from a non-comatose stroke victim who had signed a living will specifying that she did not want artificial nutrition or hydration provided if her condition was "terminal" and her "death [was] imminent." The court decided that Ms. Browning's condition was "terminal" not because she was expected to die shortly from her condition, but because if her feeding tube were withdrawn she would die.⁹⁰

83. *Historical Overview*, *supra* note 54, at 278.

84. California Natural Death Act, Stats. 1976, ch. 1439, § 1 (repealed 1991)(current version CAL. HEALTH & SAFETY CODE §§ 7185-7195 (West Supp. 1992)).

85. CAL. CIV. CODE §§ 2430-2444 (Deering 1992) (original version at Stats. 1983, ch. 1204, §10).

86. Koop and Grant, *supra* note 1, at 602.

87. *Id.* at 604.

88. *Id.* at 601. Also see Rebecca Dresser, *Life, Death, and Incompetent Patients*, 28 ARIZ. L. REV. 373, 379-82 (1986) (discussing the invalidity of the assumption that if we know what the incompetent person wanted while competent, we know what he would want in his present state).

89. 568 So.2d 4 (Fla. 1990).

90. *Id.* at 16-17.

Applying similar reasoning, a court could hold that all patients on artificial nutrition or hydration are "terminal" since they would die without nutrition and hydration. While ostensibly relying on the patient's expressed preferences, the Florida court permitted a patient's family to remove the patient's feeding tube by distorting language in the patient's living will.

The broad grant of authority in health-care power of attorney statutes is similarly open to abuse. For example, in North Carolina, the suggested form provided in the living will statute contains language that would allow the health-care agent to withdraw life-sustaining procedures only when a physician determines that the principal is "terminally ill, permanently in a coma, suffer[ing from] severe dementia, or . . . in a persistent vegetative state."⁹¹ However, the form is a "nonexclusive method for creating a health-care power of attorney" in North Carolina.⁹² Unless the principal specifically states otherwise, nothing in the health-care power of attorney statute in North Carolina specifically prevents a health-care agent from authorizing withdrawals of life-sustaining care from non-terminal, non-comatose, or non-demented patients.⁹³

More important than the potential for abuse in the language of advance directives, the propelling forces behind them tend to skew a patient's directive toward refusing medical treatment. Neither health-care powers of attorney nor living wills are written in terms of care that the patient wants to be provided but in terms of care that the patient rejects. In part, advance directives stem from the premise that the medical preservation of terminally ill or profoundly impaired patients constitutes "over-treatment" contrary to the interests of those patients.⁹⁴

In the current cost-containment environment of health care, the overtreatment perspective will undoubtedly induce the abuse of advance directives.⁹⁵ As two commentators have observed:

Cost containment strategies may impose significant financial penalties on those who provide prolonged care for the impaired elderly. In the current environment, it may well prove convenient — and all too easy — to move from recognition of an individual's "right to die" . . . to a climate enforcing a "duty to die."⁹⁶

There is a movement toward the rationing of expensive health care based on age. "We have already begun to spend too much money on one age group (older persons) in comparison with the needs of other age groups . . ."⁹⁷ As a result, we are being called to "justify an increasing proportion of the gross national product going toward health care when so many other areas of our societal life are in great trouble . . ."⁹⁸ In 1992, an article in the *Wall Street Journal* noted that "one in every seven health-care dollars being spent each year is on the last

91. N.C. GEN. STAT. § 32A-25 (1991).

92. *Id.*

93. Of course, the statute does not strip these patients of their common law protections. But the absence of specific protection in the statute invites confusion and litigation.

94. Koop and Grant, *supra* note 1, at 605-06.

95. *Id.* at 604-06.

96. Mark Siegler & Alan Weisbard, *Against the Emerging Stream—Should Fluids and Nutritional Support Be Discontinued?*, 145 ARCHIVES INTERNAL MED. 129, 131 (1985).

97. Daniel Callahan, *Rationing Health Care: Will It Be Necessary? Can It Be Done Without Age or Disability Discrimination?* 5 ISSUES IN L. & MED. 353, 361 (1989).

98. *Id.*

six months of someone's life." The writer asked, "Is this really the most effective way to allocate health-care resources?"⁹⁹ Since 70% of all people who die each year in this country are elderly,¹⁰⁰ the coming allocation of health-care resources will penalize the elderly most. Daniel Callahan, director of the Hastings Center, openly proposes rationing health care by age because "[w]e as individuals need to learn to live within set limits."¹⁰¹ Callahan proposes a natural life span, approximately to the age of the late seventies, when life's possibilities have largely been achieved and when death should be seen as a natural consequence.¹⁰²

Living wills have offered a convenient solution to the high cost of dying. In 1977, Robert Derzon, administrator of the Health Care Financing Administration of the Department of Health, Education and Welfare, suggested that living wills would benefit the nation's economy. In an internal memorandum he wrote: "Encouraging States to pass such a law or, more strongly, withholding Federal funds without passage, would serve to heighten public awareness of the use of such resources and would also lower health spending when such wills are executed. . . . The cost-savings from a nationwide push toward 'Living Wills' is likely to be enormous."¹⁰³ In 1985, Dr. Christine Cassell announced that some policy planners suggested that Medicare patients be provided with living wills upon admission to the hospital in the interest of cost-containment.¹⁰⁴ Derek Humphry, founder of the Hemlock Society and author of *Final Exit*, has proposed that "everybody at age fifty be obliged to sign a legal directive as to their wishes on their deathbed."¹⁰⁵ In November 1990, Congress took a slightly modified approach. Section 4206 of the Omnibus Budget Reconciliation Act of 1990, commonly referred to as the Patient Self-Determination Act, requires most Medicare and Medicaid reimbursed providers to give each patient written information at the time of admission about patient rights relative to advance directives and the facility's policies for safeguarding those rights.¹⁰⁶

The combination of advance directives and cost-containment pressures seems to be precipitating the day euthanasia proponent Joseph Fletcher prophesied in 1973:

The day will come when people will be able to carry a card, notarized and legally executed, which explains that they do not want to be kept alive beyond the humanum point, and authorizing the ending of their biological processes by any of the methods of euthanasia which seems appropriate.¹⁰⁷

To reach that day, health planners are encouraging us to fulfill our duty to die should we become "useless" to society through old age or infirmity. By ostensibly

99. Nicola Clark, *The High Costs of Dying*, WALL ST. J., Feb. 26, 1992, at A12.

100. *Id.*

101. *Id.*

102. See *Historical Overview*, *supra*, note 54, at 287 (citing DANIEL CALLAHAN, *SETTING LIMITS: MEDICAL GOALS IN AN AGING SOCIETY* 66 (1987)).

103. Memorandum by Robert A. Derzon, Department of Health, Education, and Welfare, Health Care Financing Administration on the subject of "Additional Cost-Saving Initiatives—ACTION." Prepared by OPR: CGaus: 6/3/77: X50681.

104. Cassell, *supra* note 2, at 293.

105. HUMPHRY & WICKETT, *supra* note 9, at 312.

106. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 4206, 104 Stat. 1388 (1990) (codified at 42 U.S.C. § 1395cc (1988 & Supp. II 1990)).

107. Fletcher, *supra* note 3, at 122. "Humanum," according to Fletcher, is the point beyond which man loses his rational faculty. *Id.* at 115.

appealing to our desire to exercise our autonomy, they are attempting to curb the rising costs of health care.

The euthanasia movement in the United States has carefully avoided directly confronting the traditional legal strictures against "mercy killing." Instead, there has been an evolution:

Thousands of medical ethicists and bioethicists, as they are called, professionally guide the unthinkable on its passage through the debatable on its way to becoming the justifiable until it is finally established as the unexceptional.¹⁰⁸

Subtle as the changes have been, the events of the past few decades confirm that all barriers against euthanasia are toppling. Why is this transformation taking place?

II. THE IDEOLOGICAL TRANSFORMATION

The growing acceptance of euthanasia as a medical option has not resulted from advances in medical science or from any rampant outbreak of human compassion. Rather, it has resulted from an ideological and ethical transformation. In 1973, Joseph Fletcher insisted that "the traditional ethics based on the sanctity of life — which was the classical doctrine of medical idealism in its pre-scientific phases — must give way to a code of ethics of the *quality* of life."¹⁰⁹ Events in the past two decades confirm that this transformation is taking place. Euthanasia proponents discuss the "quality of life" and manipulate the definitions of "life," "human being" and "person." Embracing the rhetoric and the ideology of the euthanasia movement, the public, the courts, and the legislatures are prepared to topple the prohibitions against euthanasia without moral angst. A similar evolution took place before and during the reign of the National Socialists in Germany. This section examines the parallels between the present evolution of thought in the United States and that in Germany during the first half of this century.

A. THE UNITED STATES

The meaning of "personhood" is pivotal in the brokering of constitutional rights. Laurence Tribe notes that "[t]he Constitution was consecrated to the blessings of liberty for ourselves and our posterity — yet it contains no discussion of the right to be a *human* being; no definition of a person"¹¹⁰ The absence of such a definition has proved problematic.

Denial of "personhood" to certain human beings or the manipulation of its meaning has spawned some of the most controversial Supreme Court decisions. In the *Dred Scott*¹¹¹ decision of 1857, the Court held that free descendants of slaves were not citizens entitled to the jurisdiction of the Court.¹¹² While the Court did not deem that slaves were not persons, it declared that slaves were property. As property, slaves were a special class of persons not entitled to the

108. See *Historical Overview*, *supra* note 54, at 297 (quoting Neuhaus, *The Return of Eugenics*, COMMENTARY 15, 19 (Apr. 1988)).

109. Fletcher, *supra* note 3, at 114.

110. LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-3 at 1308 (1988).

111. *Scott v. Sanford*, 60 U.S. (1. How.) 393 (1857).

112. *Id.* at 426-27.

full protections afforded by the Constitution.¹¹³ In *Roe v. Wade*,¹¹⁴ the Court held that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn"¹¹⁵ The Court further acknowledged that if the unborn were "persons," the case for abortion "collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment."¹¹⁶ Note that the Court did not decide that unborn children were not living human beings. Instead, it decided that regardless of whether or not they were human beings, they were not "persons."¹¹⁷ The reasoning in *Dred Scott* and *Roe* is ominous for the aged and the physically or mentally impaired. Once the law classifies persons in order to discriminately parcel out constitutional rights as in *Dred Scott* or breaks the connection between *Homo sapiens* and personhood as in *Roe*, the law invites the denial of rights to the profoundly impaired.

Commentators have frankly proposed that the profoundly impaired are not persons, not "living" or not "human" like *Homo sapiens* of sound mind and body. In 1973, Fletcher wrote:

[A] so-called "vegetable," the brain-damaged victim of an auto accident or a microcephalic newborn or a case of massive neurologic deficit and lost cerebral capacity . . . is . . . no longer a human being, no longer a person, no longer really alive. . . . Humanness is understood as primarily rational, not physiological.¹¹⁸

While Fletcher regarded the profoundly impaired as "no longer human," Ronald Cranford, M.D., and David Smith, J.D., have adopted the *Roe v. Wade* approach and asserted that while the permanently unconscious may be "human" they are not "persons": "Our major premise is that consciousness is the most critical moral, legal, and constitutional standard, *not for human life itself, but for human personhood*."¹¹⁹ Cranford and Smith went on to examine the cost of caring for the profoundly impaired both emotionally and economically. They noted the anguish and despair of caring for a hopelessly ill patient.¹²⁰ Furthermore, they asked, "[w]hy should society spend [\$120 million to \$1.2 billion annually] for patients who can never benefit from continued treatment in any way. . . ?"¹²¹ Finally, they considered the rights of the permanently unconscious in light of the medical and fiscal realities.¹²²

113. *Id.* at 425.

114. 410 U.S. 113 (1973).

115. *Id.* at 158.

116. *Id.* at 156-57.

117. See 410 U.S. at 762 (Douglas, J., concurring opinion stating that "[w]hen life is present is a question we do not try to resolve."); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 879 (1986) (Stevens, J., concurring opinion stating that "[t]here is a fundamental and well-recognized difference between a fetus and a human being; indeed, if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures."); CHARLES E. RICE, *NO EXCEPTION: A PRO-LIFE IMPERATIVE* 12 (1990) (pointing out that even those who advocate a states' rights position on abortion implicitly agree that an unborn child is a nonperson) ("because the status of personhood clearly carries with it a right to the protection of the law, especially with respect to the right to life.").

118. Fletcher, *supra* note 3, at 115.

119. Ronald Cranford, M.D. & David Smith, J.D., *Consciousness: The Most Critical Moral (Constitutional) Standard for Human Personhood*, 13 AM. J. L. & MED. 233 (1987) (emphasis added).

120. *Id.* at 244.

121. *Id.* at 246.

122. *Id.*

All rights enumerated in the Constitution and the Bill of Rights are predicated on consciousness, or the capacity for consciousness, except for the right to life itself, which becomes meaningless when consciousness can never exist, as in an anencephalic infant, or when consciousness is forever extinguished, as in a vegetative state patient. . . . Indeed, the determination of what constitutes a person under the fourteenth amendment is a question of law to be determined by the federal courts, in the absence of a constitutional amendment.¹²³

No court has openly embraced Smith and Cranford's position, but the courts employing the substituted judgment doctrine have implicitly depersonalized the incompetent. Like any legal fiction, the substituted judgment doctrine achieves a desired result without discarding familiar legal principles.¹²⁴ When applying substituted judgment to administer the estate of the incompetent in England, the judges made an exception in the laws of property that protected a person's wealth from redistribution by the state and gave away part of the incompetent's estate. Although the judges treated the incompetent's wealth differently from the competent's, they avoided owning up to the exception they were creating by crafting a fictional competency and ascertaining the incompetent person's "voluntary" decision. Why would they not admit that they were creating an exception? Because then the judges would have to justify why the property laws afford an incompetent person less protection than a competent person.¹²⁵ Similarly, the substituted judgment doctrine enables the court in a right to die case to achieve the desired result without expressly stating that the incompetent is somehow not worthy of life or is less than alive.¹²⁶ The traditional ethic would not permit such an assessment.¹²⁷ By couching its analysis in terms of informed consent, privacy, and self-determination, however, the court stays within a familiar and accepted doctrinal framework.

Nevertheless, familiar as the doctrinal framework may be, the right to die cases betray the unwritten assumptions that are operating because the courts focus on the patient's prognosis.¹²⁸ Since *Quinlan*, courts have subtly recast the protections afforded to the profoundly impaired.¹²⁹ In *Conroy*, the New Jersey Court authorized decisions for incompetents to be made on the basis of the benefits and burdens of the patient's life. The court defined burdens in terms of pain and suffering and benefits in terms of "physical pleasure, emotional enjoyment, or intellectual satisfaction."¹³⁰ In *In re Peter*,¹³¹ the court insisted that for

123. *Id.* at 247.

124. See Harmon, *supra* note 27, at 55-56 (discussing how legal fictions make hidden changes in the law and avoid the political process).

125. *Id.* at 57.

126. *Id.* at 61.

127. *Id.*

128. See RICE, *supra* note 117, at 17-33 (discussing the depersonalization implicit in the right to die cases).

129. *Cruzan v. Harmon*, 760 S.W.2d 408, 421-22 (Mo. 1988) (*en banc*), *aff'd sub nom.* *Cruzan v. Director, Missouri Dept. of Health*, 110 S.Ct. 2841 (1990). The state's interest in life has been subtly recast since *Quinlan*. It is no longer an interest in life but an interest in the quality of life. The change in the protection afforded to incompetent individuals is commensurate with this change in the state's interest. See *Matter of Quinlan*, 355 A.2d 647 (N.J. 1976).

130. 486 A.2d at 1232. The *Conroy* court declared that it was not authorizing anyone to decide "that someone else's life is not worth living simply because. . . the patient's 'quality of life' or value to society seems negligible." But once the court invited a focus on the patient's prognosis and

a patient in a persistent vegetative state "the focal point . . . should be the prognosis as to the reasonable possibility of return to cognitive and sapient life, as distinguished from the forced continuance of biological vegetative existence. . . ."¹³² If the patient's prognosis serves as the point of departure in the analysis, then the court is implicitly discounting the value of life to the extent that its "quality" has been diminished.¹³³

Where a patient has never been competent, as in *Guardianship of Doe*, the substituted judgment fiction becomes a fantasy. For Jane Doe, there could be no more evidence that she wished to refuse the provision of food and water than there was evidence that she hoped society would continue to provide her basic sustenance in her helpless state.¹³⁴ The Massachusetts Court's decision to terminate Doe's nutrition and hydration necessarily stemmed from an assessment of the quality of Doe's life in light of her prognosis.

As the traditional ethic wanes, some judges are more willing to rely explicitly on what have been implicit assumptions. Justice Stevens, in his dissenting opinion in *Cruzan*, forthrightly questioned whether the profoundly impaired are entitled to constitutional rights:

Nancy Cruzan is obviously "alive" in a physiological sense. But for patients like Nancy Cruzan, who have no consciousness and no chance of recovery, there is a serious question as to whether the mere persistence of their bodies is "life" as that word is commonly understood, or as it is used in both the Constitution and the Declaration of Independence.¹³⁵

Consider the possible impact of Justice Stevens' reasoning. If "life" in the Constitution has some meaning other than its biological meaning, then what

interaction with her environment, its attempt to denounce a "quality of life" analysis became spurious.

131. 529 A.2d 419 (N.J. 1987).

132. *Id.* (quoting *Quinlan*, 355 A.2d at 647). The *Peter* court concluded that the patient would have wanted her feeding tube withdrawn but asserted that under *Quinlan*, interested parties need not provide clear and convincing evidence of a patient's desires but instead need only render their own best judgment. *Id.* at 425.

133. See *Cruzan*, 760 S.W.2d at 421-22 (indicating that the state's interest in life has been recast as an interest in the quality of life). While not involving substituted judgment, *Bouvia v. Superior Court*, 225 Cal.Rptr. 297, 305 (1986), constitutes one of the most forthright judicial acknowledgments of an absolute right to die based on quality of life. In *Bouvia*, Ms. Bouvia, a quadriplegic afflicted with cerebral palsy, sought to prevent a public hospital from feeding her through a nasogastric tube. Since Ms. Bouvia consumed a partially liquid diet, it was not clear that her intent was to commit suicide, but the court imparted to Ms. Bouvia an absolute constitutional right to refuse medical treatment, including nutrition and hydration, even if her intent was to cause death. The court concluded that Ms. Bouvia could hasten her death on the basis of her perception of a poor quality of life.

Her mind and spirit may be free to take great flights but she herself is imprisoned and must lie physically helpless subject to the *ignominy, embarrassment, humiliation and dehumanizing aspects created by her helplessness*. We do not believe it is the policy of this State that all and every life must be preserved against the will of the sufferer.

Id. at 305 (emphasis added). The court dismissed the state's interest in preventing suicide. Moreover, the court stated that "a desire to terminate one's life is probably the ultimate exercise of one's right to privacy." *Id.* at 306. Koop and Grant have noted that the *Bouvia* court's emphasis on the "indignity" of being quadriplegic indicates that the state's interest in life regardless of handicap is irrational and will not stand against a right to terminate life. "This is a sufficient doctrinal foundation for the legalization of euthanasia." Koop and Grant, *supra* note 1, at 632.

134. *Doe*, 583 N.E.2d at 1272 (Mass. 1992) (Nolan, J., dissenting).

135. See *Cruzan*, 760 S.W.2d at 2886 (Stevens, J., dissenting) (emphasis in original).

beyond biological life is necessary to constitute "life" in the constitutional sense? Does "life" in the constitutional sense require a minimum level of self-awareness or does it require more — such as a certain level of intelligence or a certain degree of usefulness to society?¹³⁶ If the definitions of "life," "person" and "human" are debatable, then who will draw the line, on what basis, and where will the line be?¹³⁷

B. THE TRANSFORMATION IN GERMANY

The world has already witnessed the atrocities that follow the ideological shift that is taking place in this country. Forty-three years ago, Leo Alexander, M.D., a Boston psychiatrist who served on the staff of the Office of the Chief Counsel for War Crimes in Nuremberg, identified the insidious change in attitude that propelled the National Socialists' genocide program.

Whatever proportions these crimes finally assumed, it became evident to all who investigated them that they had started from small beginnings. . . . 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 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 nonrehabilitable sick.¹³⁸

The idea that there is such a thing as a life not worthy to be lived, that man's worth derives from his usefulness, did not originate in Hitler's mind or even during the reign of the Third Reich. Instead, the concept germinated in a short but influential book published in 1920 entitled *The Release of the Destruction of Life Devoid of Value* written by the jurist Karl Binding and the psychiatrist Alfred Hoche.¹³⁹ Hoche's and Binding's reasoning eerily resembles that of euthanasia proponents today. The book begins with a focus on voluntary euthanasia for suffering, terminally ill patients.¹⁴⁰ The discussion of the suffering and dying,

136. RICE, *supra* note 117, at 33.

137. The issue of "brain death" criteria is closely related to this topic but is beyond the scope of this article. For further examination of the issue, see David Orentlicher, *Cruzan v. Director of Missouri Dep't of Health: An Ethical and Legal Perspective*, 262 J.A.M.A. 2928 (1989) (discussing the difference between brain death, vegetative state, and coma); Daniel Wikler and Alan Weisbard, *Appropriate Confusion Over "Brain Death,"* 261 J.A.M.A. 2246 (1989) (discussing confusion over the whole-brain death concept); *Report of the Medical Consultants to President's Commission*, 246 J.A.M.A. 2184 (1981).

138. Leo Alexander, M.D., *Medical Science Under Dictatorship*, 241 NEW ENG. J. MED. 39-47 (1949), reprinted in *DEATH, DYING, AND EUTHANASIA*, at 571, 584 (Dennis J. Horan et al. eds., 1977).

139. KARL BINDING & ALFRED HOCHÉ, *THE RELEASE OF THE DESTRUCTION OF LIFE DEVOID OF VALUE* (1920), noted in FREDRIC WERTHAM, *A SIGN FOR CAIN: AN EXPLORATION OF HUMAN VIOLENCE* 161 (1966). (Hoche was professor of psychiatry and director of the psychiatric clinic at Freiburg from 1902-34. Binding was professor of jurisprudence at the University of Leipzig.)

140. Beginning with a focus on suffering, dying patients, Hoche and Binding maintained that when it becomes evident that a painful death is imminent, euthanasia simply replaces the painful cause of death with a painless cause. This action is not killing but healing because "the elimination of pain is also healing." *Id.* at 13. While Hoche and Binding proposed that this "healing" not be provided against the *express* wishes of the terminally ill, they insisted that "[g]ranting of death with dignity is not dependent on the consent of the tortured sick person. . . . [V]ery often, persons who are momentarily unconscious have to be submitted to this healing intervention." *Id.*

however, serve only as a springboard to a proposal that euthanasia be extended to a larger circle of people.

Hoche and Binding unequivocally identified the "most urgent question: Is there any human life that has to such a degree lost its legal rights, that its continuation is of no value for itself or to society?"¹⁴¹ Hoche and Binding answered this question in the affirmative and identified three groups as appropriate recipients of euthanasia.¹⁴² The first group included the "irretrievably lost because of sickness or injury who in full consciousness of their situation have expressed their desire for complete relief — death with dignity."¹⁴³ The second group included "incurable idiots — no matter if they have been born one or if they have become like one at the last stage of their suffering, as for example the paralytics."¹⁴⁴ Hoche and Binding suggested giving the right to consent to euthanasia for these patients to the patients' relatives, guardians and the managers of the institutions caring for these persons (in that order).¹⁴⁵ The third group lay between these first two groups. It included the Karen Quinlans and the Nancy Cruzans: the "mentally healthy persons who through illness or accident, maybe a serious, undoubtedly total injury, have become unconscious."¹⁴⁶ In spite of their lack of consciousness, these patients' "consent may be presumed if the sick person would have given it if he had been able to regain consciousness."¹⁴⁷ Thus, Hoche and Binding conceived substituted judgment as a convenient avenue to euthanasia long before the American judiciary.

Like Smith and Cranford, Hoche and Binding noted the inability of the "mentally dead" person to interact with his environment and determined that the "mentally dead" person's rights are consequently diminished.

The mentally dead person[s] has no clear conception, feeling or will power. [He] cannot conceive a word picture of what is going on in life. [He has] no sensitivity to the environment. Even where [he is] the object of love or caring by a third person, the mentally dead person is not sensitive toward his environment and does not realize he is being loved or cared for. . . . The intellectual level of the mentally dead person is that of very low animal life and the feelings are also most elementary and similar to those of animal life.

Thus, the mentally dead person is not able to subjectively demand life just as he is unable to carry on other intellectual processes. . . .

141. *Id.* at 17.

142. *Id.* at 18.

143. *Id.* at 19.

144. *Id.* at 20.

145. *Id.* at 21. *Compare* N.C. GEN. STAT. § 90-322 (Supp. 1992). In addition to providing for legal recognition of a living will, North Carolina provides for withdrawal of extraordinary means or artificial nutrition or hydration in the absence of a declaration. This provision applies "[i]f a person is comatose and there is no reasonable possibility that he will return to a cognitive sapient state or is mentally incapacitated," and the attending physician and a second physician determine that the person's condition is terminal and incurable, or diagnosed as a persistent vegetative state. N.C. GEN. STAT. § 90-322(a) (Supp. 1992). Before acting under this section, however, the attending physician must obtain the concurrence of (a) the person's health care agent appointed pursuant to a health care power of attorney, (b) a guardian of the person, (c) the person's spouse, or (d) a majority of the relatives of the first degree, in that order. If none of these are available, then the attending physician may order extraordinary means or artificial nutrition or hydration withheld upon his own direction and under his own supervision. N.C. GEN. STAT. § 90-322(b) (Supp. 1992).

146. *Id.* at 22.

147. *Id.*

Because the condition of the mentally dead person prevents him from making a demand for life, if you take away his life you are not invading any of his rights. . . .¹⁴⁸

Like prophets preparing the way for Daniel Callahan, Hoche and Binding trumpeted the economic arguments for euthanasia throughout their book. They noted the average annual expenditure per "idiot person" and noted that "capital, in the form of food, clothing, energy and national resources is deducted for an unproductive purpose."¹⁴⁹ They warned that although in the past money for the care of these "ballast type persons of no value" was available, the financial condition of the time "could be compared to that of a very dangerous expedition into the wilderness which can succeed only if everyone is pulling his own share."¹⁵⁰ After pointing out how much "manpower, patience and capital investment is invested . . . to keep life not worth living alive until finally, often awfully late, nature triumphs,"¹⁵¹ they denounced the treatment of the mentally sick, "creatures of no value at all,"¹⁵² and called upon the legislature to abandon its commitment to the sacredness of life:

Realizing that there is indeed human life whose continuation is of no interest to any reasonably thinking person, then it [is] up to the legislature to ask this fateful question: 'Is it our duty to continually defend this unsocial life by giving it full protection of the law or is it our duty to release it for euthanasia?' You could also pose this question from a legal point of view: Shall we prefer to see the continued support for this kind of life as an example of the sacredness of life or shall we consider the legalization of the mercy killing, so relieving for all those involved, as the smaller evil.¹⁵³

Hoche and Binding were not Hitler's advisors. They probably had never even heard of Hitler when they published their study in 1920 before the rise of the National Socialist Party. Nevertheless, these intellectual leaders dramatically influenced the current of thought in their times. Their book was so popular that a second edition was published two years after its initial release.¹⁵⁴ Although their ideology was not the majority view in medicine and psychiatry at the time, it gained acceptance gradually.¹⁵⁵

Under the Third Reich, the concept of a life not worthy of life slowly became popularized. Movies advanced the notion that a meaningless life should be ended. Early films depicted the medical and social consequences of hereditary impairment. A 1941 film, "I Accuse," based on the novel *Mission and Conscience*, depicted a physician giving a lethal injection to his incurably ill wife in response to her desperate plea to be relieved of her suffering.¹⁵⁶ In polls conducted to ascertain the impact of the film, most Germans accepted the film's argument

148. *Id.* at 38.

149. *Id.* at 35.

150. *Id.* at 36.

151. *Id.* at 17.

152. *Id.* at 17-18.

153. *Id.* at 18.

154. WERTHAM, *supra* note 139, at 161.

155. ROBERT J. LIFTON, *THE NAZI DOCTORS: MEDICAL KILLING & THE PSYCHOLOGY OF GENOCIDE* 48 (1986) (examining the origins and practice of "medicalized killing" under the Nazis).

156. *Id.* at 49.

for voluntary euthanasia in principle with reservations concerning possible abuse and questions of consent. To assuage these reservations, the public was assured that a patient would be declared incurable by "a medical committee in the presence of the family doctor."¹⁵⁷ In other words, the public was assured that the entire procedure would be "medicalized."¹⁵⁸

Cost-containment concerns like those currently being raised in this country fed the euthanasia frenzy in Germany. Journals carried charts comparing the cost of educating the mentally and physically disabled with the cost of educating a healthy child.¹⁵⁹ Physicians condemned the dissipation of costly medical resources on the incurable.¹⁶⁰ The concept of cost-containment was popularized by various means. For example, "a mathematics text asked students to calculate how many government loans to newly married couples could be granted for the amount of money it cost the state to care for 'the crippled, the criminal, and the insane.'"¹⁶¹

Besieged with rhetoric and caught in the undertow of a new ideology, the German people were well-primed for the introduction of euthanasia. Therefore, it is not surprising that the first death did not come by state decree but by request. In response to a plea from a child's father in late 1938 or early 1939, Hitler sent his personal physician, Karl Brandt, to ascertain the facts.¹⁶² The child was retarded, blind, and missing a leg and part of one arm.¹⁶³ Brandt was empowered to inform the child's physicians in Hitler's name that they could carry out the euthanasia.¹⁶⁴ Subsequently, a program was prepared for killing children determined to have no prospect of meaningful life. Some institutions starved children until they died of natural causes while others failed to provide heat and thus caused death by exposure and hypothermia.¹⁶⁵ Many parents requested that their defective children be relieved by euthanasia.¹⁶⁶

"Medicalized killing"¹⁶⁷ thrived both before and during the war. From the concept of "life unworthy of life," came five identifiable steps leading to the mass killings of the concentration camps: (1) coercive sterilization, (2) the killing of "impaired" children in hospitals, (3) the killing of "impaired" adults, mostly in mental institutions, (4) the killing of "impaired" inmates of concentration and extermination camps, and finally (5) the mass killings, mostly of Jews, in the extermination camps.¹⁶⁸

The whole undertaking went by different designations: "help for the dying," "mercy deaths," "mercy killings," "destruction of life devoid of value," "mercy

157. *Id.* Compare N.C. GEN. STAT. §§ 90-321(b) and 90-322(a)(2) which provide that before a living will is given effect, a patient's condition must be confirmed by a second physician.

158. *Id.*

159. *Historical Overview*, *supra* note 54, at 267-68.

160. *Id.* at 268.

161. LIFTON, *supra* note 155, at 48.

162. ROBERT PROCTOR, *RACIAL HYGIENE: MEDICINE UNDER THE NAZIS* 185, 185-86 (1988).

163. LIFTON, *supra* note 155, at 50.

164. *Id.* at 51.

165. PROCTOR, *supra* note 162, at 187.

166. *Id.* at 194.

167. LIFTON, *supra* note 155, at 14.

168. *Id.* Introduction to Part I at 21.

action" — or, more briefly, the "action." They all became fused in the sonorous and misleading term "euthanasia."¹⁶⁹

The scope of the euthanasia program broadened until it included "superfluous people," the unfit, the unproductive, any "useless eaters," misfits, and undesirables.¹⁷⁰ "The over-all picture is best understood as the identification and elimination of the weak."¹⁷¹ Initially, Jews were excluded from the program¹⁷² because they were considered unworthy of its "benefits."¹⁷³ Eventually, however, they were rounded up and treated as members of a diseased race that acted as a parasite on the German people.¹⁷⁴

Nazi officials have rightly been held responsible for the horrors of the Nazi genocide program. Nevertheless, the whole affair cannot be dismissed as the agenda of a madman. It is significant that Hitler never ordered that the mentally and physically disabled be put to death.¹⁷⁵ The authority for the program has been traced to one letter on Hitler's own private stationery dated September 1, 1939, commissioning Reichleader Bouhler, chief of Hitler's chancellery, and Dr. Karl Brandt "to extend the authority of physicians, to be designated by name, so that a mercy death may be granted to patients who according to human judgment are incurably ill according to the most critical evaluation of the state of their disease."¹⁷⁶ As Frederic Wertham, M.D., has pointed out: "The note does not give the order to kill, but the *power* to kill. That is something very different."¹⁷⁷ Proposals for a euthanasia law were widely discussed, but the law was never passed. "The decision was made instead to keep the question of

169. WERTHAM, *supra* note 139, at 155.

170. *Id.* at 159.

171. *Id.* at 159.

172. PROCTOR, *supra* note 162, at 188.

173. WERTHAM, *supra* note 139, at 159.

174. PROCTOR, *supra* note 162, at 195.

Justice Robert H. Jackson, chief counsel for the prosecution in the Nuremberg trials of Nazi war criminals, described in his foreword to the record of the Hadamar trial the incremental progress of the euthanasia movement toward the genocide program:

A freedom-loving people will find in the records of the war crimes trials instruction as to the roads which lead to such a regime and the subtle first steps that must be avoided. Even the Nazis probably would have surprised themselves, and certainly they would have shocked many German people, had they proposed as a single step to establish the kind of extermination institution that the evidence shows the Hadamar Hospital became. But the end was not thus reached; it was achieved in easy stages.

. . . It is not difficult to see how, religious scruples apart, a policy of easing [mentally deficient and incurably sick] persons out of the world by a completely painless method could appeal to a hardpressed and unsentimental people. But "euthanasia" taught the art of killing and accustomed those who directed and those who administered the death injections to the taking of human life. Once any scruples and inhibitions about killing were overcome and the custom was established, there followed naturally an indifference as to what lives were taken. . . . If one is convinced that a person should be put out of the way because, from no fault of his own, he has ceased to be a social asset, it is not hard to satisfy the conscience that those who are willful enemies of the prevailing social order have no better right to exist. And so Hadamar drifted from a hospital to a human slaughterhouse.

CHARLES E. RICE, *BEYOND ABORTION THE THEORY AND PRACTICE OF THE SECULAR STATE* 131-32 (1979) [hereinafter *BEYOND ABORTION*] (quoting Justice Robert H. Jackson of the United States Supreme Court, chief counsel for the prosecution in the Nuremberg trials of Nazi war criminals).

175. WERTHAM, *supra* note 139, 164-65; PROCTOR, *supra* note 162, at 193.

176. *Id.* at 165-66 (quoting letter).

177. WERTHAM, *supra* note 139, at 166.

euthanasia a 'private matter' — between doctors and their patients."¹⁷⁸

The role of physicians in the National Socialists' euthanasia program has been extensively studied.¹⁷⁹ Wertham perceives that "without the scientific rationalization which [psychiatrists] supplied from the very beginning and without their mobilization of their own psychiatric hospitals and facilities, the whole proceeding could not have taken the shape it did."¹⁸⁰ Given the liberty to act, physicians of their own volition initiated the most extreme measures "cloaked . . . in scientific terminology and academic respectability."¹⁸¹ Some used their power extensively, ruthlessly, cruelly.¹⁸²

The motives behind their actions were likely varied, but these physicians were not trained as "medical monsters."¹⁸³ Rather, they perceived what they were doing as furthering the good of society.¹⁸⁴ After the war, Dr. Brandt justified the euthanasia program and predicted its future acceptance in these terms:

It is absolutely necessary to realize what led to its execution and continued to influence it. The underlying motive was the desire to help individuals who could not help themselves and were thus prolonging their lives in torment. . . .¹⁸⁵

. . . I believe that future doctors will be able to lay down a sound scientific basis for the theory of euthanasia, that the theologian will help by incorporating it in his statements and finally that the jurist, as representing the authority of the State over the doctor will again enable him to render assistance to mankind, including even such unfortunate creatures. . . .¹⁸⁶

Advocates of the "right to die," "advance directives" and "aid-in-dying" legislation prefer to portray their proposals as revolutionary advances in patient autonomy and self-determination, but the parallels between theory and practice in the United States today and those in Germany during the 1920s through the 1940s should give a careful observer pause. Just as the Germans in the first half of this century, jurists and physicians of this country are embracing the concept of a life not worth living and advocating death with dignity. What the Nazis did must never happen again; but to prevent it from happening, we need to examine more closely the philosophical underpinnings of current jurisprudence which ultimately provide no footing for courts and legislatures to contain the escalation of euthanasia.

III. THE PHILOSOPHICAL UNDERPINNINGS OF THE EUTHANASIA MOVEMENT

The manipulation of "life," "person" and "human" and other efforts to exclude some *Homo sapiens* from the protection of the law follows logically from philosophical changes that trace their roots to the Enlightenment. Beginning

178. PROCTOR, *supra*, note 162, at 193.

179. See LIFTON, *supra* note 155; PROCTOR, *supra* note 162; WERTHAM, *supra* note 139.

180. WERTHAM, *supra* note 139, at 166.

181. *Id.*

182. *Id.*

183. *Historical Overview*, *supra* note 54, at 275.

184. *Id.*

185. *Historical Overview*, *supra* note 54, at 273 (quoting A. MITCHERLICH & F. MIELKE, *THE DEATH DOCTORS* 266-67 (1949) (translated 1962)).

186. *Id.*

during the Enlightenment, Western society began to reject revealed religion and an objective moral order and to deem man to be the source and the arbiter of all rights.¹⁸⁷ Our old system of legal valuation, which was based largely on natural law, has been incrementally replaced with positivistic utilitarianism and secularism. This article cannot serve as an expose on positivistic utilitarianism, secularism, or natural law.¹⁸⁸ However, even a brief review of positivistic utilitarianism and secularism reveals that they will leave our society as powerless to stem the tide of euthanasia as they left Germany under the National Socialists.

Positivism focuses on the form of the law, not its content. It attempts to free legal theory of value judgments of a political, social, or economic nature.¹⁸⁹ Under the jurisprudence of a pure analytical positivist lies an epistemology that denies the ability of man to know the essence of things. If man cannot know the essence of things, then he cannot know objective truth. If there is no knowable objective truth, then those the courts or legislatures decided were "human" yesterday need not be the same as those they deem are "human" tomorrow. We can object to the definitions chosen only on the basis of esthetics or on practical grounds.¹⁹⁰ One person's opinion on the subject is not necessarily any better than another's; the most that can be said is that any given person's opinion is more or less in accord with the consensus at the time. There is no such thing as an objective moral order to which all law should conform. A law is valid as long as it is validly enacted.

The writings of Hans Kelsen, principal draftsman of the Austrian Constitution in 1920,¹⁹¹ crystallize the basic tenets of pure analytical positivism in legal theory.¹⁹² Kelsen, described as "the jurist of our century,"¹⁹³ asserted that "reality is relative to the knowing subject. The absolute, the thing itself, is beyond human experience; it is inaccessible to human knowledge and therefore unknowable."¹⁹⁴ Kelsen rejected "philosophical absolutism," the idea that there is an absolute reality. According to Kelsen, if there is an absolute reality, then there is an absolute value which leads to political absolutism.¹⁹⁵ Philosophical relativism, on the other hand, insists upon the unintelligibility of the absolute as a sphere beyond experience and leads to democracy.¹⁹⁶ The social order can be enforced against reluctant individuals only if it is in harmony with the will of the majority.

187. See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 290 (1966) (discussing The Declaration of the Rights of Man at the end of the eighteenth century); Aleksandr Solzhenitsyn, *Harvard Commencement Address*, *IMPRIMIS* (Aug. 1978); Charles E. Rice, *Some Reasons for a Return to Natural Law Jurisprudence*, 24 *WAKE FOREST L. REV.* 539, 553 (1989) [hereinafter *Some Reasons*].

Humphry and Wickett, *supra* note 9, at 7-10 recognize the Enlightenment as the philosophical source of the euthanasia movement.

188. For a thorough critique of legal positivism and secularism at work in our legal system, see generally *BEYOND ABORTION*, *supra* note 174.

189. EDGAR BODENHEIMER, *JURISPRUDENCE* 285 (1940).

190. See *BEYOND ABORTION*, *supra* note 174, at 17 (proposing that the secularist is a materialist who can have no enduring objection to abortion or euthanasia).

191. EDWIN PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF LAW* 260 (1953).

192. See BODENHEIMER, *supra* note 189.

193. HANS KELSEN, *ESSAYS IN LEGAL AND MORAL PHILOSOPHY* ix (Ota Weinberger ed. 1973).

194. Hans Kelsen, *Absolutism and Relativism in Philosophy and Politics*, 42 *AM. POL. SCI. REV.* 906 (1948) [hereinafter *Absolutism and Relativism*].

195. *Absolutism and Relativism*, *supra* note 194, at 907-08.

196. *Id.* at 906.

Meanwhile, since "what is right today may be wrong tomorrow," those in the minority must have a chance to express their opinion and must have full opportunity of becoming a majority.¹⁹⁷ The law, in Kelsen's jurisprudence, is a system of legal norms conforming to a basic norm, in the way that our statutes and court decisions (legal norms) conform to our Constitution (basic norm). The validity of a norm depends not on its content but on whether "it has been constituted in a particular fashion, born of a definite procedure and a definite rule."¹⁹⁸

If a legal system rests on the premise that the mind cannot know objective truth, then it is positivistic. The protection of the liberties of the people will ultimately rest in a political process in which the law is not called upon to mirror any higher moral order because that order cannot be known.¹⁹⁹ The rationale for legislation becomes its utility.²⁰⁰ Jeremy Bentham's utilitarianism provides an example of this approach.²⁰¹ Under Bentham's analysis, a law is judged by its consequences to the aggregate of the individuals in society, present and future. The consequences to individuals are determined by measuring their individual pleasures and pains. The interest of society as a whole is merely the aggregate of individual interests. In other words, the greatest good of the greatest number is sought.²⁰² Bentham's approach leaves no basis for criticizing a law as unjust, because man cannot know the rightness or wrongness of a law beyond the law's ability to produce pleasure and pain.²⁰³

Positivism works hand in hand with secularism. While there is more than one form of secularism, all secularistic philosophies deny the existence, or at least the relevance, of God.²⁰⁴ The Humanist Manifesto of 1933 proclaimed that man is part of nature and is "self-existing and not created." The Humanist Manifesto II in 1973 declared that "moral values derive their source from human experience."²⁰⁵ It supported the individual's "right to die with dignity, euthanasia and the right to suicide."²⁰⁶ Sir Julian Huxley wrote that "there is no longer either need or room for the supernatural."²⁰⁷ Barbara Wootton summed up the secularist view when she said that man should ask "no longer what is pleasing to God but what is good for men."²⁰⁸

The secularist and positivist views that developed after the Enlightenment differ dramatically from the natural law approach that constitutes "the oldest and most widely accepted theory of legal valuation in Western civilization."²⁰⁹ The term "natural law" has been loosely used to refer to a variety of legal

197. *Id.* at 913.

198. Hans Kelsen, *The Pure Theory of Law Part II*, 51 L. QUART. REV. 517, 517-18 (1935).

199. See BEYOND ABORTION, *supra* note 174 at 13.

200. *Id.* at 13.

201. For further analysis of Bentham's utilitarianism, see PATTERSON, *supra* note 191, at 439-59.

202. Jeremy Bentham, *The Limits of Jurisprudence Defined in THE GREAT LEGAL PHILOSOPHERS* 279 (Clarence Morris ed., 1959); PATTERSON, *supra* note 191, at 440; BEYOND ABORTION *supra* note 174, at 13.

203. BEYOND ABORTION, *supra* note 174, at 13.

204. For a discussion of secularism, see BEYOND ABORTION, *supra* note 174, at 17-25.

205. N.Y. TIMES, Aug. 26, 1973, at 51.

206. N.Y. TIMES, Aug. 26, 1973, at 51.

207. THE HUMANIST FRAME 18 (Julian Huxley ed., 1961).

208. *Id.* at 351.

209. PATTERSON, *supra* note 191, at 332 § 4.10.

theories. In this article, it refers to the concept that principles of human conduct established by God are discoverable by reason and are absolute and of universal validity for all times and places.²¹⁰ Natural law theory asserts that there is both a law-giver and an objective moral order that is within the range of human intelligence and to which law is bound to conform if it is to foster peace and happiness at a personal, national and international level.²¹¹ The following sketch of natural law theory's premises will serve to elucidate secularism and positivist utilitarianism by contrast.

The idea that man can discover an objective moral law through reason is reflected in the philosophy of Aristotle and Cicero. Aristotle, for example, wrote:

Political Justice is of two kinds, one natural, the other conventional. A rule of justice is natural that has the same validity everywhere, and does not depend on our accepting it or not. A rule is conventional that in the first instance may be settled in one way or the other indifferently. . . .²¹²

Similarly, Cicero observed:

[T]he most foolish notion of all is the belief that everything is just which is found in the customs or laws of nations. . . . If the principles of Justice were founded on the decrees of peoples, the edicts of princes, or the decisions of judges, then Justice would sanction robbery and adultery and forgery of wills, in case these acts were approved by the votes or decrees of the populace. . . . [I]n fact we can perceive the difference between good laws and bad by referring them to no other standard than Nature For since an intelligence common to us all makes things known to us and formulates them in our minds, honourable actions are ascribed by us to virtue, and dishonourable actions to vice; and only a madman would conclude that these judgments are matters of opinion, and not fixed by Nature.²¹³

In the Christian tradition, Thomas Aquinas provides the most systematic exposition of natural law. Aquinas affirmed that beyond knowing what his senses perceive, man's intellect can derive and know the essence of things.²¹⁴ Only after confirming this basic premise could Aquinas go on to reason that man can discern abstract concepts such as good and evil, God and the natural law. Man can discover the natural law through studying human nature and all its facets, including man in relationship to himself, man in relationship to man, man in relationship to God, and man in relationship to things. Because natural law is derived from human nature, which never changes, the natural law never changes.

Human positive law is then derived from the natural law.²¹⁵ Aquinas, however, did not propose that the human positive law merely codify the natural

210. *Id.* at 333 § 4.10. Patterson offers five other ways in which the term "natural law" has been used.

211. A detailed presentation of natural law philosophy is beyond the scope of this article. The brief review is offered here only because the contrast between natural law theory and positivism accents the basic tenets of positivism. For an incisive treatment of natural law jurisprudence, see *Some Reasons*, *supra* note 187.

212. ARISTOTLE, *NICHOMACHEAN ETHICS reprinted in THE GREAT LEGAL PHILOSOPHERS* 21 (Clarence Morris ed., 1959).

213. CICERO, *LAWS reprinted in THE GREAT LEGAL PHILOSOPHERS* 47-48 (Clarence Morris ed., 1959).

214. For a concise exposition of Thomas Aquinas' natural law jurisprudence, see *Some Reasons*, *supra* note 187, at 559.

215. For an explanation of the natural law as a rule of reason and the relationship between natural law and human law, see *Some Reasons*, *supra* note 187, at 561-66.

law. Although human positive law is for the common good of all citizens and should promote virtue, it should not prescribe every virtue or forbid every vice since its unenforceability would render the law despised and greater evils would result.²¹⁶ In order to be just, however, human positive law should never conflict with the natural law.²¹⁷

British and early American jurisprudence acknowledged a law-giver and a higher order and called upon the human law to reflect that order.²¹⁸ Coke's *Commentaries and Decisions* reveal an adherence to fundamental principles. For example, in *Calvin's Case*, Coke wrote:

The Law of nature was before any judicial or municipal law [and] is immutable. The law of nature is that which God at the time of creation of the nature of man infused into his heart for his preservation and direction; and this is the eternal law, the moral law, called also the law of nature.²¹⁹

Similarly, Blackstone observed:

This law of nature being coeval with mankind, and dictated by God himself, is, of course, superior in obligation to any other. . . . [N]o human laws are of any validity if contrary to this; and such of them as are valid derive all their force and all of their authority mediately or immediately from this origin.²²⁰

In arguing against a slavery statute in 1772, George Mason declared that "all acts of legislation apparently contrary to natural rights and justice are in our laws and must be in the nature of things, considered as void. The laws of nature are the laws of God; Whose authority can be superseded by no power on earth."²²¹

In the wake of the secularism and positivist utilitarianism that has captured our nation, Coke, Blackstone and George Mason's arguments would sound odd in either a courtroom or on the floor of the Senate. In the intervening 200 years since Mason stood before the Virginia court, our legal system has embraced a new jurisprudence. Influenced by secularism, this new jurisprudence tends to deny God and the objective moral order; influenced by positivism, it subjects man's rights to the whim of the majority.²²² Therefore, it is little wonder that Justice Oliver Wendell Holmes maintained that:

216. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* I, II, Q. 96, art. 2 (Benziger Bros.) (1947).

217. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* I, II, Q. 95, art. 2 (Benziger Bros.) (1947).

218. For a discussion of the natural law philosophy of the Founding Fathers, see Clarence E. Manion, *The Natural Law Philosophy of the Founding Fathers*, 1 NAT. LAW INST. PROCEEDINGS 3 (1947).

219. *Calvin's Case*, 7 Coke's Rep. 12(a), 77 Eng. Rep. 392.

220. 1 BLACKSTONE'S COMMENTARIES 31 (Lewis Edition).

221. 2 Va. (2 Jefferson) 109 (1772). For a brief discussion of the influence of natural law in English and American case law, see PATTERSON, *supra* note 191, § 4.18. Patterson asserts that American and English courts seldom resorted to natural law principally because they viewed natural law as a source of law for legislatures rather than courts.

222. The influence of such post-Enlightenment jurisprudence on our legal system has been widely recognized.

This new way of thinking, which had imposed on us its guidance, did not admit the existence of intrinsic evil in man nor did it see any higher task than the attainment of happiness on earth.

It based modern western civilization on the dangerous trend to worship man and his material needs. Everything beyond physical well-being and accumulation of material goods. . . were left outside the area of attention of state and social systems, as if

the sacredness of human life is a purely municipal ideal of no validity outside the jurisdiction. I believe that force, mitigated so far as may be by good manners, is the *ultima ratio*, and between two groups that want to make inconsistent kinds of world I see no remedy except force.²²³

In the same vein, Joseph Fletcher has advocated a code of ethics that "offers an optimum or maximum of desirable consequences."²²⁴ Fletcher insists that "[t]he fair allocation of scarce resources is as profound an ethical obligation as any we can imagine in a civilized society. . . ."²²⁵ and proposes that "consequential ethics" must replace "duty-ethics."²²⁶ In the absence of an objective moral order, we cannot declare Holmes' or Fletcher's proposals invalid. The most we can determine is whether or not they work or whether they accord with the will of the majority at the time. In this jurisprudential framework, an individual's rights are open to manipulation for the ends of society.

The inability of post-Enlightenment jurisprudence to restrain the euthanasia movement became evident in Germany under National Socialism. Positivism disarmed the German jurists against arbitrary and unjust laws.²²⁷ Von Hippel observed the impact of positivistic reasoning in the Weimar Republic.

[T]he spirit of the Enlightenment . . . degenerated in . . . the nineteenth century into a materialistic and thereby more coarse way of thinking. As a result, legal thinkers lost the inner power even to visualize the possibility of an archetypal and morally binding ideal of justice above the positive legal order. With all its deficiencies, the medieval concept of order did at least assume as well as recognize as its logical presupposition a higher form of justice, namely, the notion of a natural and divine right. The late nineteenth century in its materialistic and voluntaristic tendencies, on the other hand, concurred with Rudolf von Jhering that law is but the 'child of power.' According to this new positivistic jurisprudence, the legislator, and he alone, *creates* the law. Everything prior to legislative enactment is at best 'custom,' but never true law. Thus, law and right became wholly identified, and bare 'legality' takes the place of substantive justice as an ideal.²²⁸

human life did not have any superior sense.

Aleksandr Solzhenitsyn, *Harvard Commencement Address*, IMPRIMIS (Aug. 1978).

In describing legal education today, Professor Berman articulately observed the erosion of our legal tradition by the positivistic utilitarianism and secularism:

The triumph of the positivist theory of law—that law is the will of the lawmaker—and the decline of rival theories—the moral theory that law is reason and conscience, and the historical theory that law is an ongoing tradition in which *both* politics *and* morality play important parts—have contributed to the bewilderment of legal education. . . .

. . . The traditional Western beliefs in the structural integrity of law, its ongoingness, its religious roots, its transcendent qualities, are disappearing The law is becoming more fragmented, more subjective, geared more to expediency and less to morality, concerned more with immediate consequences and less with consistency or continuity. The historical soil of the Western legal tradition is being washed away in the twentieth century, and the tradition itself is threatened with collapse. . . .

Harold J. Berman, *The Crisis of Legal Education in America*, 26 B.C.L. REV. 347, 350 (1985).

223. Letter from Oliver Wendell Holmes to Sir Frederick Pollock (Feb 1, 1920), in 2 THE POLLACK-HOLMES LETTERS, at 36 (1942).

224. Fletcher, *supra* note 3, at 120.

225. *Id.* at 119.

226. *Id.* at 120.

227. See, *Some Reasons*, *supra* note 187, at 553.

228. Von Hippel, *The Role of Natural Law in the Legal Decisions of the German Federal Republic*, 4 NAT. L. F. 106, 107 (1959) (emphasis in original).

After the war, recognizing the failure of the post-Enlightenment philosophies, numerous German jurists and courts embraced the natural law as a guide for human law. Gustav Radbruch, an influential philosopher of law and Minister of Justice during the Weimar Republic who had defended positivism, openly denounced positivism in these terms:

[F]or the jurist, the law is the law. . . . The law is valid simply because it is the law; and it is the law if it has the power to assert itself under ordinary conditions. Such an attitude towards the law and its validity rendered both lawyers and people impotent in the face of even the most capricious, criminal, or cruel of laws. Ultimately, this view that only where there is power is there law is nothing but an affirmation that might makes right. [Actually] law is the quest for justice [I]f certain laws deliberately deny this quest for justice (for example, by arbitrarily granting or denying men their human rights) they are null and void; the people are not to obey them, and jurists must find the courage to brand them unlawful.²²⁹

If we in the United States ignore the lessons of the past, continue to reject natural law and arm ourselves with only secularism and positivistic utilitarianism, we will be no better equipped than the Germans in the 1930s and 1940s to fend off the evolution of euthanasia that is taking place in tiny steps but at a rapidly accelerating rate.²³⁰ As long as man is viewed as matter and the state defines and protects the rights of man without reference to a higher moral order, our legal system is powerless to restrain the efforts of euthanasia proponents who seek to terminate those deemed of insufficient value to maintain.²³¹

229. Von Hippel, *supra* note 228, at 110-11 (citation omitted).

230. "The only intelligible basis for asserting absolute, inalienable rights against the State is that man is an immortal, spiritual creature, with an eternal destiny, made in the image and likeness of God whose law governs all." *Some Reasons*, *supra* note 187, at 557.

231. Lest supporters of euthanasia think that humanity learned its lesson and believe that "what the Nazis did" can never be repeated, they need only consider recent reports on the euthanasia program in the Netherlands. For a thorough discussion of the evolution of the euthanasia program in the Netherlands, see CARLOS GOMEZ, M.D., *REGULATING DEATH* (1991).

Euthanasia advocates often point to the Netherlands as the model for the practice of euthanasia in a humane, tolerant and democratic society. *E.g.* Hugo Engelhardt, *Death by Free Choice: Variations on an Antique Theme*, *SUICIDE AND EUTHANASIA* 251-80 (B. Brody ed., 1989). They note that the Dutch guidelines require that there be "severe suffering without the hope of relief; a financially and emotionally uncoerced, informed, and consistent choice by the patient; the absence of other treatment options; and second opinions from other professionals." Christine K. Cassel & Diane E. Meier, *Morals and Moralism in the Debate Over Euthanasia and Assisted Suicide*, 323 *NEW ENG. J. MED.* 751 (1990). Comments such as these accept "with remarkable alacrity that the guidelines promulgated by the Dutch are not only enforced but also enforceable." GOMEZ, *supra* at 136.

Dr. Gomez warns that there seems to be an eagerness to believe the best about the Dutch situation whereas his study reveals that the situation in the Netherlands is not as well regulated as its defenders have suggested. *Id.* at 136. The facts belie naive trust in guidelines once the concept of life not worthy of life has been officially condoned. A recent survey of Dutch doctors in a Dutch government committee of inquiry reported that in 1990 there were 2300 cases of voluntary euthanasia (1.8% of all deaths); 400 assisted suicides (0.3%), and more than 1,000 cases of euthanasia without specific request from the patient (0.8%). Doctors acted to "hasten death" in another 16,850 cases. In 8,750 of those cases physicians "hastened" death by either withholding or withdrawing treatment without patient consent. In the other 8,100 cases, the physician administered pain-killing drugs—in almost 5000 cases without patient consent. John Keown, *Dutch Slide Down Euthanasia's Slippery Slope*, *WALL ST. J.*, Nov. 5, 1991, at A18. In other words, Dutch doctors admitted that in 1990 they sought to kill roughly 20,000 patients, and that in the majority of cases they acted without the patient's consent. *Id.* "If the Netherlands—with its generous social services and universal health coverage—has problems controlling euthanasia, it takes little effort to imagine what would happen in the United States, with a medical system groaning under the strain of too many demands on too few resources." GOMEZ, *supra* at 138.

IV. CONCLUSION

In the atmosphere of secular, positivistic utilitarianism that pervades our jurisprudence we have - wittingly or unwittingly - been toppling the barriers against killing those deemed unworthy of life. Our laws are not simply protecting the "right to die" but creating a license to kill. After considering the lessons of the past and the present, however, we can reset our course. As we analyze public policy advanced through legislation or through the courts, we need to examine more than the language of statutes and court opinions. We need to consider the implications of conceding that there is such a thing as a life not worthy to be lived. Moreover, we need to remedy the fundamental infirmity afflicting our jurisprudence that will cripple our efforts to rein in the escalation of euthanasia in the present cost-containment environment: the acceptance of secularism and positivism combined with our rejection of natural law.