6: Voluntary Active Euthanasia and Liberty

A. "Voluntary Active Euthanasia" Defined

At the beginning of chapter four we distinguished voluntary active euthanasia from other types by defining it as the deliberate bringing about of the death of someone with the consent of the person killed. Now we must refine this definition.

First, active euthanasia, whether voluntary or not, is the deliberate killing of one person by another. We use "Agent" to refer to anyone doing such a killing and "Patient" to refer to anyone undergoing such a killing—that is, being killed in this way. A deliberate killing is euthanasia only if three conditions are fulfilled. (1) Patient either is suffering and dying, or is suffering irremediably, or at least is irremediably subject to some disease or defect which would generally be considered by reasonable persons to be grave and pitiable. (2) Agent sincerely believes that Patient would be better off dead—that is, that no further continuance of Patient's life is likely to be beneficial for Patient. (3) Agent deliberately brings about Patient's death in order that Patient shall have the benefit of being better off dead—that is, not continue to suffer the condition (1) under supposition (2).

Second, active euthanasia is *voluntary* only if Patient is legally competent and gives informed consent to being killed by Agent. We distinguish active euthanasia which is not voluntary according to whether Patient is capable of consent or not. If Patient is not competent to give informed consent and if Agent assumes that Patient would consent if Patient were competent, then Agent's euthanasia killing of Patient is *nonvoluntary* on Patient's part. If Patient is competent to give informed consent and does not give it or if Agent assumes that Patient would not consent if competent, then Agent's euthanasia killing of Patient is *involuntary* on Patient's part.

Involuntary euthanasia involves an element of imposition by Agent upon Patient, since Patient's own judgment is not consulted or Patient's judgment

or assumed judgment is overridden. As we shall see, most who advocate legalization of euthanasia support voluntary and nonvoluntary euthanasia—the latter, for example, for seriously defective infants. But no one is advocating involuntary euthanasia. Our primary concern in this chapter is voluntary active euthanasia; we mention nonvoluntary euthanasia only incidentally here and treat it fully in chapter eight.

Our statement of the conditions for active euthanasia above is intended to specify the conditions common to cases of "euthanasia" or "mercy killing" as these expressions are commonly used in news reports and popular discussions. The individual killed in such cases is not always terminally and incurably ill, although these requirements often are built into proposals for legalization of euthanasia. For example, Lester Zygmaniak's killing of his brother who had been paralyzed from the neck down in a motorcycle accident was called "euthanasia" or "mercy killing" although the patient was not dying; John Noxon's electrocution of his mongoloid infant son was called "euthanasia" or "mercy killing" although the baby was neither dying nor suffering.[1] What is common to all cases is simply that the patient is subject to some serious, permanent condition which most people would consider very sad.

Marvin Kohl claims that "mercy killing" is synonymous with "active beneficent euthanasia," and he defines these expressions by saying that "both refer to the inducement of a relatively painless and quick death, the intention and actual consequences of which are the *kindest possible treatment* of an unfortunate individual in the actual circumstances."[2]

Our condition (2) does not say anything about whether or not the killing is in actual consequence kind treatment; we require only that the killer believes the patient would be better off dead. To define "mercy killing" as Kohl does builds in a question-begging moral evaluation and blocks discussion of the question whether it ever makes sense to believe, as mercy killers do, that someone is better off dead. That death should be induced painlessly and quickly is not specified in our statement of the conditions for euthanasia, not that we exclude this element, but that we suppose it to be implicit in the agent's beliefs and motive that *relatively* painless and quick death will be sought.

Our statement of the conditions for *voluntary* euthanasia hinges upon the legal competency and informed consent of the person killed. Very often "voluntariness" is defined by the request of the patient, but persons who are under a misapprehension as to their condition and prospects as well as persons who are not competent to consent might request euthanasia without such a request expressing any voluntary act of theirs. Most proposals for legalization of euthanasia attempt to provide some assurance of voluntariness by safeguards designed to protect persons from being killed without their informed consent.[3]

Kohl has suggested that euthanasia be called "noninvoluntary" if either the patient gives informed consent or a parent or guardian consents on behalf of the patient; more recently he has urged that euthanasia with either personal or substitute consent might be called "voluntary."[4] In most actual cases there has been no question of substitute consent; in many of these cases, of course, the one killing a noncompetent individual has been the parent. As even Kohl himself admits, calling cases "voluntary" in which substitute consent is given is likely to be confusing. Thus, we would class as nonvoluntary both cases in which substitute consent is given and cases in which the consent of a noncompetent individual is presumed by the killer.

In her unpublished doctoral dissertation Sissela Ann Bok examines more carefully than anyone else has done the problem of defining voluntary active euthanasia.[5] We think her work supports our analysis, although she encapsulates the conditions for active euthanasia much more briefly, mainly in the simple statement that "the act must be motivated by mercy for a suffering person."[6] Bok goes on to point out that voluntary active euthanasia includes only a restricted class of cases and that proponents of legalization of euthanasia usually further restrict this class.[7] It is important to notice what voluntary active euthanasia does not include.

As we have already said, the condition of voluntariness excludes cases in which a noncompetent individual is killed and cases in which a competent individual is killed without informed consent. Since most cases of reported mercy killings either are the killings of infants or persons mentally defective or are killings of someone unconscious without prior consent, only a few cases—such as that of Zygmaniak in which the paralyzed brother begged to be killed—could possibly qualify as voluntary. And even in this case voluntariness is questionable to the extent that the expressed desire might not have deliberately been affirmed had the patient fully been informed about his prognosis and the possibilities, however thin, of some degree of rehabilitation.

Active euthanasia also excludes many acts and omissions often confused with it. The termination of the support of the functioning of organic remains after a person as a whole has died, which we considered in chapter three, would not be euthanasia because no one is killed. The omission of life-sustaining treatment which a person has refused or which a physician for some other reason has no duty to provide would not be active euthanasia. And the administering of analgesic drugs to relieve pain is not active euthanasia even if life is shortened provided that the patient's death is not deliberately brought about. Suicide, which may be regarded as self-administered euthanasia, is not active euthanasia as defined above, although we shall suggest that assisting suicide under certain circumstances can be assimilated to active euthanasia.

Insofar as the termination of maintenance of organic remains, the omission

of life-sustaining treatment, the administering of analgesics, and suicide are already permitted by existing law, these activities in many cases can be licit alternatives to the active killing which proponents of euthanasia wish to have legalized.

B. The Present Law and the Basic Argument for Change

At present according to the law of English-speaking countries active euthanasia is criminal homicide. Usually there is premeditation, and the euthanasia killing meets the conditions for murder in the first degree. The consent of the victim, when given, is legally irrelevant to the criminal aspect of an act. The maxim "No injury is done to a willing party" holds in tort law—one cannot both consent to something and then sue the person who does it with one's consent—but not in criminal law. A crime is an offense not only to its victim but also to the public at large, and so consent of a victim to a crime does not justify the criminal act.[8] Thus, if one person kills another in a duel, the killing is criminal homicide even though the victim was a willing participant. The same holds for mercy killing.

The motive of mercy—that the killer acts in the belief that the victim will be better off dead—also is legally irrelevant. Murder presupposes "malice," but legal maliciousness is not in a subjective motive of hatred but in the factual intent to bring about death unlawfully, and so a mercy killer is legally malicious by deliberately killing without legal justification or excuse even if he or she is morally beneficent in trying to benefit a person sincerely believed to be better off dead than alive.[9]

In practice neither those who do mercy killings at the patient's request nor those believed to have acted with similar motives in killing noncompetent individuals and even competent individuals without their express consent are legally treated as typical murderers. Such killers might not be indicted, might be tried but permitted to plead not guilty and acquitted, might be acquitted by reason of temporary insanity, might be found guilty of a lesser charge but punished very lightly—for example, by a fine, a suspended sentence, or being placed on parole—or at the very worst might be convicted of murder but compelled to serve only a few years in prison.[10] As Yale Kamisar points out, two cases resulting in a conviction and imprisonment had features which distinguished them: in one the testimony of other relatives for the prosecution and in the other a hardly credible defense of accident.[11]

Clearly, voluntary euthanasia and assisted suicide are very similar. Between the two there appears to be little difference in effect, in intent, or in motive. In some cases there will be little difference in the objective evidence. In a 1920 Michigan case Frank C. Roberts was convicted of murder by poi-

son. He had mixed poison and placed it within reach of his wife who took the poison herself and died as a result. The assisting of suicide in this case was treated as murder by poison, even though suicide was not held a crime in Michigan at the time.[12]

In chaper five, section E, we argued that apart from cases of euthanasia criminal law ought to treat as a principal in murder anyone who aids another in actually committing suicide, but that evidence that force, duress, or fraud was not used and that the person who committed suicide was a competent adult acting without special pressure or exploitation from the side of the defendant should be considered in mitigation. The burden of proof would be, not on the prosecution to show that mitigating conditions were absent, but on the defense to show that these conditions were present, and the mitigating circumstances could then be taken into account in sentencing.

Cases of euthanasia apart, it seems reasonable that criminal law should deal with homicide with consent in the same way we have argued it should deal with the assisting of suicide, because the two crimes are so similar. (Nevertheless—as we also argued in chapter five, section E—these crimes ought to be defined as distinct offenses for technical reasons having to do with burden of proof.) Applied to homicide with consent, the way we suggested the law should deal with assisted suicide seems close to present law-enforcement practices.

It will follow that, apart from the necessary technical distinction, voluntary euthanasia can be viewed as the same problem as assisting suicide when the condition of the one committing suicide is grave and pitiable and the motive of the accessory is to assist another sincerely believed to be better off dead. Discussion of the two kinds of acts together seems reasonable because it matters little who pushes the plunger of the hypodermic needle or who puts the tablets in the patient's mouth if the one being killed is legally competent and gives informed consent in either case and if the conditions and motives of the parties are otherwise the same. Moreover, if homicide with consent were legalized in cases in which it is voluntary active euthanasia, presumably a method which permitted patients to administer the cause of death to themselves would have to be accepted. And if assisting suicide in cases in which it is self-administered euthanasia were legalized, it would be difficult to maintain more than a conceptual distinction for technical purposes in such cases between assisting suicide and homicide with consent. Therefore, throughout the remainder of this chapter our discussion is intended to apply equally to cases in which someone assists self-administered euthanasia and to cases in which someone carries out voluntary euthanasia upon another without any causal behavior on the patient's part.

Here and there in the arguments of proponents of euthanasia one encounters the suggestion that appropriate candidates for euthanasia are per-

sons who are in any case almost dead, or who are dead "for all practical purposes," or who are mere vegetables beyond recovery.[13] Some remarks of this sort perhaps are based upon lack of clarity about the definition of death, a problem we discussed in chapter three. If the total brain is dead, then the person truly is dead, not practically dead. Some remarks of this sort perhaps are intended only to support a policy of terminating active treatment, a problem we considered in chapter four with respect to competent persons and we shall consider in chapter nine with respect to noncompetent persons. Anyone who might plausibly be meant by references to those almost dead and so on would not usually be in a state to consent to euthanasia. Even if one were to seek the informed consent of one's garden vegetables before harvesting them, one would not be likely to obtain it!

If proponents of euthanasia really hold that the appropriate candidates for mercy killing are those who consent validly and who are certainly in a terminal state, then they are referring to a subclass of the killings (our definition does not specify that the patient be terminal) with which we are concerned here. Within this class some who volunteer to be killed will be nearer death than others; no clear line can be drawn dividing the more from the less proximately dead, since proximity to death varies continuously by infinitesimals. The law makes no distinction based on such degrees; as long as life remains, it is a crime to destroy it.[14] Where active euthanasia is in question, the inherent vagueness of "almost dead" precludes the use of proximity to death in itself as a legally significant criterion of permissible killing.

Proponents of euthanasia often argue that since the withholding or termination of lifesaving treatment can be permissible, the active termination of life should also be permissible, since the distinction between killing and letting die is of little if any importance.[15] In answering this argument it is essential to keep a clear distinction between morality and law. We are not here concerned with morality; the ethical question will be discussed in chapter twelve. It will suffice here to suggest that whether the distinction between killing and letting die is morally important is related to whether the morality of actions is determined by their consequences or by other factors.[16] From a legal point of view there is a fairly clear and significant distinction between killing and letting die. Several commentators have explained and defended this distinction.[17]

Legally one could commit murder by omission, but one's omission is a legal act only if one has a clear legal duty to act, one is not prevented from fulfilling the duty, one omits to fulfill the duty, and the omission is the immediate and direct cause of the consequence which one is legally forbidden to bring about. For a death-causing omission to be murder rather than negligent manslaughter the malicious intent required for murder also is necessary; in other words, the omission has to be deliberate in order to cause death.

As we saw in chapter four, sections B and C, the physician's legal duty is

limited to treatment to which the patient consents or to which consent is presumed, and does not extend beyond what is beneficial to the patient. It seems that there never has been a criminal prosecution of a physician for homicide by omission, and the reason is easy to see. Even if physicians do commit euthanasia—for example, of defective infants—by omission, legal proof of the elements of the crime would be very difficult.[18]

Whether a physician's legal liberty not to prolong life in many cases ought to be extended to a legal liberty (or perhaps duty) to terminate life at least in some such cases is precisely the topic of the present chapter. To attempt to settle the question of whether voluntary active euthanasia ought to be legalized by arguing against the ethical significance of the distinction between killing and letting die is to confuse morality with law and to beg the question as to whether there are sound jurisprudential grounds for maintaining the present legal distinction between the duty not to treat without consent and the prohibition to kill even with consent.

Considered from the point of view of law and law enforcement, killing and letting die at least differ in respect to the cause of death. This difference means that states of affairs for which there is evidence in cases of killing (even killing considered justifiable or excusable) are not easy to distinguish from states of affairs everyone agrees the law must attempt to control (cold-blooded murder), while states of affairs for which there is evidence in cases of letting die (even letting die which actually is murder by omission) are not easy to distinguish from states of affairs everyone agrees the law must not interfere with (the withholding of treatment out of respect for a person's legitimate exercise of the liberty to refuse consent to it). As we shall see shortly, serious jurisprudential problems about proposals to legalize euthanasia arise in part precisely from the difficulty of making and maintaining in practice the distinction between the killings which would be authorized by the legalization of euthanasia and those which would remain forbidden as murder.

The argument in favor of legalizing euthanasia, at least in cases in which informed consent would be given by a terminally ill patient, is not difficult to understand. By hypothesis such a patient wishes to die; hence, the killing would not be an injustice to the person killed. The suffering of the patient—perhaps supplemented by a consideration of the suffering of others and the cost of continuing care—provides some ground for considering the desire to die a reasonable one.[19] Pain relievers may not be wholly effective in eliminating pain and other sources of personal discomfort, embarrassment, and humiliation arising from the illness.[20] In our present pluralistic society many persons do not accept the principle of the absolute sanctity of life which is grounded in traditional moral and religious conceptions.[21] Hence, the argument concludes, the request of such persons to be killed and the liberty of persons willing to perform voluntary euthanasia should be protected by law.

To maintain the legal prohibition of voluntary active euthanasia is cruel to those who are made to suffer needlessly and is an infringement upon the liberty of those persons who would choose to be killed or to kill in order to prevent needless suffering.[22]

Opponents of the legalization of euthanasia can point out that those who wish to die can refuse all treatment except palliative care or can even kill themselves. However, proponents of legalization will respond that a certain proportion of candidates for euthanasia cannot solve their problems without the active help of another person. To maintain the legal prohibition of voluntary euthanasia, opponents must show that legalization would somehow be contrary to the common good.

Since the death sooner rather than later of a person dying in any case does not seem to harm society, how can it be contrary to the common good? If one could maintain that the good of human life is directly and of itself a concern of political society, opponents of euthanasia could base their opposition on the sanctity of life. But we have granted, at least for the sake of the arguments in this book, that in our present pluralistic society the good of human life itself is not to be considered a direct and immediate foundation of legal rights and duties. The question therefore is whether liberty and justice are served by the present prohibition of euthanasia or would be served better by permission of voluntary active euthanasia.

C. Other Arguments by Proponents of Legalization

Sometimes proponents of euthanasia seem to argue that since mercy killings already are done by the medical profession, the law ought to sanction this practice.[23] As a general principle the premiss of this argument can hardly be sustained. Lawyers often suborn perjury; merchants often defraud their customers; chiefs of state often obstruct justice. None of these acts should be legalized merely because they are done. Moreover, it is not clear that physicians to any great extent engage in active voluntary euthanasia. Evidence that they allow patients to die and evidence that they give substantial quantities of drugs to eliminate pain even if life is thereby shortened is not evidence that they engage in active euthanasia or give their approval to it.[24]

Glanville Williams suggests that in a 1936 debate in the British House of Lords two members who were also leaders of the medical profession—Lord Dawson of Penn and Lord Horder—and the Archbishop of Canterbury approved the practice of euthanasia by the medical profession while they opposed legalization of this practice.[25] Lord Dawson of Penn did make statements which taken out of context support the interpretation Williams offers. However, near the end of his speech Lord Dawson said: "We have not in mind to set to work to kill anybody at all. What we say is, if we cannot cure

for heaven's sake let us do our best to lighten the pain."[26] The Archbishop of Canterbury clearly supported the termination of treatment in some cases and the use of means which might also shorten life to assuage pain; he expressly denied that such practices would be criminal and nowhere supported active euthanasia.[27] Lord Horder summed up the common position by saying:

> In conclusion may I repeat my main thesis? The two extremes of dying in pain and being killed do not exhaust the possibilities of the stricken patient, because there is a middle position created by a kindly and skillful doctor who gives assistance to an equally kindly nature, and that is what is at present implicit in the patient's question: "You will stand by me, won't you?" and the doctor's assurance: "Yes, I will."[28]

When the same issue was debated again fourteen years later in 1950, Lord Horder maintained and repeated the same position.[29]

Lord Ponsonby of Shulbrede, in introducing and supporting the 1936 bill, had been the one who urged that narcotics necessary to relieve pain shortened life, and had quoted supporters of euthanasia for the position that what competent physicians did for dying patients bordered upon or crossed the border of illegality.[30]

As a matter of fact these concerns seem to be unreal. Very substantial doses of opiates are required to kill patients, and increasing tolerance affects their action not only upon pain but also upon the brain center which controls respiration.[31] In one case reported in a proeuthanasia work an individual debilitated from advanced cancer and attempting suicide used more than twice the maximum dose normally required to kill without dying.[32]

Moreover, physicians do not incur criminal liability by using pain-killing drugs which incidentally shorten life. A British physician was acquitted of murder although he had administered excessively high doses of morphine, heroin, and other sedatives to a patient, and although circumstantial evidence suggested that his motives in doing so may have been questionable.[33]

In the face of these facts Williams recently has admitted that physicians can kill pain without killing patients and that they can kill pain without legal risk. However, he takes this situation to support rather than to undermine his argument for legalization of euthanasia, on the ground that the facts eliminate the ambiguity which—according to his own earlier myth—permitted physicians to kill with impunity.[34] This recent argument of Williams also is fallacious, since it not only continues to use unproved factual assumptions but also begs the question by taking for granted the acceptability of euthanasia.

Sometimes it has been suggested that the law may be kept as it is and physicians trusted to practice euthanasia in appropriate cases despite its illegality.[35] We by no means subscribe to this view. Rather, if the law ought to remain as it is, then every effort ought to be made to enforce it; if euthanasia

ought to be permitted, then some way of legalizing it ought to be developed. However, perhaps some of those who urge that the law be maintained and the practice of euthanasia permitted do not clearly distinguish between active euthanasia and other practices which either are legal or are difficult to distinguish from legitimate practices of terminating treatment, killing pain, and providing a patient with drugs for proper uses which can also be abused by a patient who happens to be suicidal.

Someone might suggest that it would be desirable to legalize—"for the sake of removing any possible doubt"—legitimate practices short of active euthanasia which physicians now sometimes engage in. This suggestion seems to us to lack compelling grounds. The legal treatment of physicians does not show that the present situation subjects them to any undue threat of criminal prosecution.

Furthermore, where boundaries are now unclear, any attempt to specify them by statute would involve numerous vague terms. If practices expanded in view of the vagueness of a new statute—which is not unlikely—then not less but more doubt about the criminal liability of physicians would arise. Experience with statutes concerning abortion shows that it is more honest and more realistic to face the question of legalization of euthanasia directly; any attempt to clarify the law will substantially alter it or at least make a first step toward so doing.

Several legal commentators have suggested that the present discrepancy between the legal theory that active euthanasia is murder and the legal practice of treating mercy killers mercifully demands that the statutes be brought into conformity with practice. Different reasons are given for thinking that a change is necessary: Some claim that the discrepancy is detrimental to public confidence in the law and respect for it, while others urge that the irregularity of the present situation deprives either those committing euthanasia or those killed by it of equitable treatment or equal protection of law.[36]

Several points may be made in response to this suggestion. First, it is by no means clear that the present law does not prevent many mercy killings, a large proportion of which would be nonvoluntary and would not be legalized if strictly voluntary euthanasia were legalized. Second, most of the mercy killings which are presently dealt with by law are not voluntary; unless new statutory provisions are made with respect to nonvoluntary euthanasia, any present inequality in the treatment of the victims or the perpetrators of these crimes will continue. Third, criminal law in general involves some discrepancy between theory and practice; even apart from mercy killings not all homicide victims are protected equally and not all murderers are dealt with equitably. But this is no reason to repeal the law of homicide. Fourth, it may be possible to bring theory and practice closer together by enlightening judges and potential jurors with respect to the justification—assuming there is one—

for treating active euthanasia as a crime and also by permitting the mitigation of punishment for this crime without legalizing mercy killing.[37]

D. Some Legitimate Interests Opposed to Euthanasia

There are certain inevitable disadvantages which the legalization of voluntary active euthanasia will work upon persons who do not wish to be killed. How much weight these disadvantages ought to be considered to have and whether the imposition of them upon those who do not wish to be killed and do not want euthanasia legalized would be in itself unjust will be a matter of argument. Nevertheless, it is worth noticing these disadvantages because they provide a counterweight—even if it is not judged sufficient in itself—against the suffering which proponents of legalization wish to prevent.

First, as soon as one is able to choose to be killed provided that one gives one's informed consent to this decisive treatment, many people who do not wish to be killed will be given much more information about their condition and prospects than they care to have, with a view to allowing them to exercise their liberty to choose euthanasia. Our point is not that there is anything wrong with the requirement of informed consent for all medical treatment, especially for euthanasia. Our point is merely that other treatments to which one is asked to give informed consent offer some hope; the alternatives may be grim but the prospects are not altogether black.

Someone being asked for informed consent to euthanasia must be told that his or her case is utterly hopeless, that every alternative course of treatment is so repugnant that quick death might seem preferable. Such information need not be hard to bear if one is willing to accept the alternative of euthanasia. But many who do not wish to accept this alternative will be informed very fully, frankly, and horrifyingly of what the days, weeks, months, perhaps even years ahead hold in store. Some of this information they would have to receive bit by bit in any case if they were to make choices about their treatment during each stage of dying. But the possibility of euthanasia cannot be properly proposed without all of the bad news being spelled out at once.[38]

Proponents of euthanasia are likely to object that persons who are willing to consider a possibility must bear the burdens of considering it, while those who are not willing to consider the possibility of euthanasia can make this fact clear and be spared their physician's informative account. But this logical division between the willing and the unwilling is hardly likely to hold up in practice. Physicians might be forbidden by law to raise the possibility of euthanasia with their patients and might be limited to informing patients who demand information. Even if this limitation were not deemed an infringement upon free speech, it would help matters very little.

A friend, a relative, a patient in the next bed who accepted euthanasia would be sure to begin telling most patients what they believed was in store for them if euthanasia were not chosen. Supplied with such distressing information, few patients could resist the temptation to seek verification or correction from a competent person. And so a great many people who do not wish to be killed would be burdened with information which they would prefer not to have and which need never be given for fully informed consent to medical treatment as long as euthanasia remains an option excluded by law.

Hardly anyone seems to have considered the unnecessary suffering which will inevitably be caused by the provision of information necessary for valid consent to euthanasia. Many opponents of legalization do mention a second factor: Once the euthanasia option is available, those who do not wish to exercise it will have to resist it. Relatives, health-care personnel, social workers, friends, and mere acquaintances will more or less urgently suggest that certain persons, despite their reluctance, ought to consider and accept the euthanasia option.

Most people find it difficult to reject flatly any request and even more difficult to cut it off before giving it a hearing—a fact well known to door-to-door salesmen. And almost anyone who is weakened by illness and under psychological stress will be swayed by urgings that euthanasia be considered. Persons who do not wish to be killed will feel such solicitation to be a personal affront to their dignity, an affront difficult to prevent and impossible to redress.[39]

The need to resist the euthanasia option not only will take the form of rejecting the urgings of others but also will take the form of a painful conflict within oneself for some—perhaps for a great many—persons. Many who regard euthanasia as morally excluded in principle and yet who confront a grim prospect will be tempted to violate the principle. Even if one considers the conviction of such persons erroneous, their suffering will be nevertheless real.

Moreover, the temptation to accept euthanasia although one does not approve it may arise not only from selfish but also from altruistic motives. Many who are mortally ill worry that they are a burden to others, feel guilty for the care they need, apologize when they must ask for some service. These feelings will be increased and amplified by the awareness that all of the costs to others—emotional and economic as well—might be cut by one's own choice if one only felt that such a choice would be right.

Anxiety will be a further inevitable cost of legalization of euthanasia to those who do not wish to be killed. Legalization of voluntary euthanasia may be hedged about with more or less stringent safeguards. If the safeguards are less, the level of anxiety will be high and well grounded. If the safeguards are more, still many people will be anxious.

It is all well and good to say that reasonable persons will not worry that they will be killed without consent merely because others are being killed with consent. But not all persons in hospitals, in nursing homes, and in other institutions are reasonable. Many are at least slightly paranoid. Even limitations upon active treatment can generate anxiety when a policy of limiting treatment is known. But if the policy of limiting treatment is justified, this anxiety has to be accepted. The added anxiety which will be generated if active euthanasia is legalized need not be accepted unless the new policy is justified, and this anxiety is a cost which weighs with others against the fairness of the policy to those who do not wish to be killed.

Proponents of legalization often urge that the option of euthanasia would protect the dignity of persons who wish to take charge of their own dying rather than to play a completely patient role in the process of dying. This contention has some plausibility, we think, chiefly because the typical atmosphere of a hospital does not conduce to patient autonomy. Every patient tends by the very technology of modern medicine to be reduced to the status of a malfunctioning object which needs to be repaired. Patients have little active role in their own treatment. The dying are deprived of dignity in this situation largely because *everyone* who is subjected to it is deprived of dignity. But those who can look forward to getting well and resuming normal activities can stand the affront much better than those who have no such hopeful prospects. In section J of this chapter we shall suggest how this problem can be met otherwise than by euthanasia.

The point we wish to make at once, however, is that legalization of euthanasia for those who choose it will not at all improve matters for those who do not wish to be killed. In fact, the dying who do not accept euthanasia are likely to be treated with somewhat less sympathy and respect than is now the case. If they are a burden to themselves and to others, that will be their own fault. If the technically efficient solution of euthanasia is rejected, a dying patient will have rejected the last, most efficient treatment which modern medicine will have to offer. Health-care personnel and social workers who personally accept euthanasia are likely to treat those who persist in dying naturally with about as much respect as nonbelievers now tend to treat those Jehovah's Witnesses who desire health care but refuse blood transfusions.

If euthanasia is legalized, some of the most difficult cases requiring palliative care will be disposed of. As we shall show in section J, the techniques and facilities for palliative care have been improving steadily; improvements in pain-relieving drugs are but one example. Still, there is always room for research and further improvement. The incentive for such work will be lessened if legalized euthanasia takes care of those who would otherwise most benefit from such work. Thus, all who do not choose to be killed will lose the advantage they would otherwise obtain from further work in this field.

A final inevitable cost of euthanasia will be the added sorrow of those who do not approve of euthanasia when the option is chosen by persons they love. Once more, one can say that those who disapprove should not be pained by the exercise of liberty on the part of friends and loved ones. The fact is that many people will suffer more severe grief after a death induced by euthanasia just as many people suffer more grief after a death caused by suicide than they would have suffered had the death been natural. There is some reason to think that it is psychologically very important that those who must undergo the parting of death reach the stage of acceptance of this inevitable parting.[40] Those who choose euthanasia are likely to act not in the acceptance but in the defiance of death, and to leave loved ones to struggle alone for acceptance. Acceptance will not be easy if those who are bereaved also believe that their loved one's last act was an immoral one.

All of the preceding costs of the legalization of euthanasia to those who do not approve of it deserve some consideration. As we have said, it is hard to know how great in fact such costs would be; much would depend upon the complex social conditions of different groups. The costs might be mitigated to a great extent by careful legislation, but we do not think any of them could be eliminated entirely.

Proponents of legalization are likely to disregard such costs, because they largely result from the beliefs and attitudes of those who consider euthanasia immoral. But our argument here has nothing to do with the value of such beliefs and attitudes. The fact is that they exist and will continue to exist for a long time in a large part, perhaps in the majority, of the population. So long as there are people who do not wish to be killed and do not wish euthanasia legalized, they have a reasonable self-interest in avoiding such costs which weighs against the reasonable self-interest of those who wish to be killed in avoiding the suffering of terminal illness.

From the point of view of sound jurisprudence the self-interest of the opponents of euthanasia can no more be excluded from consideration than can the self-interest of its proponents. If the legalization of euthanasia would serve some very substantial public interest—for example, if it would stop the spread of a plague or something of that sort—then the self-interest of opponents would not count for much, for the public interest would stand against it. But as long as all that is proposed is the legalization of voluntary euthanasia, the legalization of euthanasia is not proposed to serve the public interest, because voluntary euthanasia will have little impact upon any important public interest. Nonvoluntary euthanasia, of course, might be promoted to save the cost of caring for the permanently institutionalized. But purely voluntary euthanasia is not promoted as a way of reducing public costs.

Hence, the legalization of voluntary active euthanasia is promoted almost exclusively on the basis of its possible service to those who would choose to

be killed rather than to suffer needlessly. This interest is a personal and private one. Other personal and private interests, no matter what one thinks of the beliefs and attitudes which give rise to them, deserve equal consideration from the law, which may no more despise the moral convictions of those who would not wish to be killed than it may despise the moral convictions of proponents of euthanasia. Therefore, the law may no more disregard the interests of the former group in avoiding suffering especially repugnant to themselves than it may disregard the interest of the latter group in avoiding the suffering otherwise inevitable in waiting for natural death.

E. Argument against Legalization: Possible Injustice

The preceding considerations go far toward neutralizing the central argument in favor of legalizing voluntary active euthanasia. Yet these considerations do not prove that legalization must be excluded. We proceed now to an argument against legalization based upon the jurisprudential principles of justice and liberty. We believe this argument is decisive.

The argument can be stated summarily as follows. If voluntary active euthanasia is legalized without regulation, those who do not wish to be killed are likely to become unwilling victims; this would deny them the protection they presently enjoy of the law of homicide. And since the denial is to serve a private interest, it will be an injustice. If involuntary active euthanasia is legalized with close regulation which will involve the government in killing, those who abhor such killing will be involved against their wishes, at least to the extent that their government and institutions will be utilized for this purpose. Since the government's involvement will be required only as a means to the promotion of a private interest, this state action will unjustly infringe the liberty of all who do not consent to mercy killing as a good to whose promotion state action might be legitimately directed. A solution involving a compromise between legalization of voluntary active euthanasia without regulation of the practice and legalization with close regulation which will involve the government in mercy killing would mean some degree of lessened protection together with some degree of governmental involvement, a situation which will result in injustice partly due to the reduced protection of the lives of those who do not wish to be killed and partly due to the unwilling involvement of those who do not wish to kill. Since the stated conditions are all the possible conditions under which voluntary active euthanasia could be legalized, legalization is impossible without justice. Therefore, the legalization of voluntary active euthanasia must be excluded.

The conditional premisses which form the first and second disjuncts of this dilemma require proof. In the present section we argue that legalization of

euthanasia without regulation would endanger the lives of persons who do not wish to be killed. In section F we shall argue that legalization with the close regulation which would involve the government in acts of mercy killing would infringe the liberty of the many citizens who abhor such killing.

Perhaps the best previous argument against the legalization of voluntary active euthanasia is that articulated by Yale Kamisar. In a famous and widely reprinted article Kamisar argued that since physicians are always fallible, misdiagnosis is not uncommon, and so the decision for euthanasia in a "hopeless case" might be the sole factor which made the case hopeless.[41]

It seems to us that such considerations are reasons which would tell very strongly against the rationality of consenting to euthanasia if it were legal, but they do not tell nearly so strongly against the legalization of euthanasia. Presumably, part of the information which would have to be imparted to someone considering this terminal treatment would be that the diagnosis could be mistaken, the outlook could turn out to be better than expected, and so on. If patients nevertheless elected to be killed on despairing but realistic probabilities rather than to continue on the assumption that as long as there is life there is hope, then the risks of error involved would be part of the evil they voluntarily accepted in order to avoid what they regarded as the greater evil of suffering unto a natural death.

Still, Kamisar's point about the fallibility of physicians does have some weight. The dangers involved in this fallibility can only be assumed voluntarily by the patient if the patient is fully aware of the risk. But the physician who is informing the patient is not likely to stress the fallibility of physicians. And so there will be some built-in bias in favor of underinforming patients about this factor. Such underinformation will be a more or less significant factor in erroneous decisions to die, and to the extent that the voluntariness of such decisions is negated by the lack of information which ought to have been given, such patients will have been done some injustice.

It may be objected that whenever a major operation is done there is danger of an error, whenever someone is buried or cremated there is danger that a living person is being buried or cremated.[42] We admit that such dangers are unavoidable. The point is that in the case of voluntary euthanasia persons are likely to be led to consent without being fully informed of dangers, and this treatment is a preventable injustice: It is not necessary to legalize voluntary active euthanasia to promote any important, commonly accepted public purpose. To reduce the effective protection of the lives of some citizens in serving the personal and private interests of others who would choose euthanasia after being fully informed cannot be justified.

Furthermore, if voluntary active euthanasia is legalized, some persons will be killed on the basis of what will be accepted as their genuine, informed consent. But individuals can easily be pressured into consent. They might be

only marginally capable of deliberation and yet fulfill the legal formalities required to authorize their being killed. They might misunderstand a well-intentioned but inadequate attempt of a physician to provide information, and choose euthanasia when they would not do so were more adequate information given.[43]

Once more, it might be argued that pro forma consent to major surgery, to abortion, and to other forms of medical treatment including self-commitment usually is presumed to be adequate. The capacity of the patient to consent, the possible effects of drugs, the motivation by outside pressures, and the possible inadequacy of information given are seldom called into question. And a physician who holds a pro forma consent is seldom if ever prosecuted for acts which would be criminal without informed consent. Why, then, should there be more concern in the case of euthanasia?

The answer is that in this case a defect in consent will lead in every instance to an unjust killing. How are potential victims to be protected against the consequences of their inadequately informed consent? "In the end, the most reliable and the most practical safeguard against abuse of this admittedly liberal consent provision," two authors say about a provision of their proposed euthanasia statute, "is the good judgment and the humanistic motivation of all concerned."[44]

As a group, doctors surely are as prudent and well-motivated as lawyers, merchants, and chiefs of state. But one cannot stake one's life on the good judgment and humanistic motivation of *every* member of any of these respected groups. Perhaps, indeed, too much confidence is reposed at present in the validity of pro forma consent to major surgery, to abortion, and to self-commitment. However, in most cases an inadequate consent can be challenged later on by a surviving patient. No one will survive to challenge the injustice done them by active euthanasia carried out on the strength of an inadequate pro forma consent.

Moreover, while medical judgments as to what is appropriate surgery are likely to cluster in view of recognized therapeutic aims, judgments—no matter how humanistic—as to when someone is going to be better off dead are likely to diverge, precisely because the standard here is an aspect of subjective well-being which falls outside the usual objectives of the medical art. Hence, only the person to be killed would be in a position to criticize the judgment of the physician who decides to proceed on the strength of a pro forma consent with euthanasia.

Normally, other physicians can criticize a medical judgment to proceed with major surgery, quite apart from considerations of the patient's consent. Admittedly, this is not so in the case of elective abortion, but here the only person recognized by the law to have a vital interest, the pregnant woman, usually will survive the operation and can challenge the validity of her own

consent. This fact induces some caution in medical abortionists. There would not be the same ground for caution in a practitioner of euthanasia.

Thus far we have been considering cases in which persons would be killed on the basis of a pro forma but invalid consent to active euthanasia. Various sorts of safeguards might be considered to limit these dangers. Requirements for more than one declaration, more than one medical certificate, a waiting period, an interview by a public official, and so on are intended to obviate these dangers. Such safeguards would help. We think that they would have to be extremely stringent, for the failure of the safeguards to do their job would mean in each case that someone would be deprived of life nonwillingly, with color of legality but without due process of law.

Indeed, since the right which will be violated if active euthanasia is carried out when it is not truly voluntary will be the right to life, security in which is at present protected by the criminal law forbidding murder, no set of safeguards which omits a judicial hearing in each and every case of euthanasia would seem nearly adequate. Unless it is publicly established beyond all reasonable doubt that a certain person has given informed consent to being killed, the killing of the person should never be permitted.

Careful legal controls also would be required to ensure that there would be no mistakes about the identity of the individual who is killed. Even with the utmost care mistakes do occur in hospitals; occasionally the negligence is so gross that the courts do not require expert testimony to establish it.[45] For the sake of receiving care, which everyone desires, the public must run this risk. But if euthanasia is legalized, the public at large cannot reasonably be expected to assume any new and avoidable risk. So the carrying out of each and every euthanasia killing would have to have many of the formalities of an execution of capital punishment, and especially very great care about identity to preclude killing someone by a simple mistake about identity.

The euthanasia bill which was debated in the British House of Lords in 1936 included fairly careful safeguards. The individual to be killed had to be suffering from a terminal illness and had to make written application on a specified form; the nearest relative had to be consulted; a special quasi-judicial public official (called a "euthanasia referee") had to conduct an inquiry into each and every case before issuing a permit; the relative could take the case to court before the permit became valid; only the medical practitioner named in the permit could kill the patient, and was required to do so in the presence of an official witness.[46] Despite these safeguards, some participants in the debate pointed out possible defects in consent which would invalidate it.

In 1950 euthanasia again was debated in the House of Lords, although on this occasion no new bill was put forward. The Lord Chancellor, Viscount Jowitt, argued against legalization by urging that one could not say for certain

that specified conditions were met. Having discussed competency to consent and other conditions, he concluded:

> None of these things can be asserted, and I ask your Lordships to say that the introduction of a Bill would be wrong, no matter what the safeguards might be, because there can be no adequate safeguards where one human being is allowed to start killing another.
>
> There must be no failure to apprehend the truth. Such a Bill would allow murder in certain circumstances; and the confines within which it is allowed can never be so clearly defined that we may not have people stepping outside them.[47]

Some proponent of euthanasia might object that this argument is question-begging insofar as it characterizes euthanasia as "murder." But such an objection would be to miss the point. The point simply is that what would be legalized *at present* falls into the category of murder. If it is legalized, euthanasia will be permitted by way of exception to the general prohibition of acts of homicide. Thus, any transgressing of the line between legalized euthanasia and the residual category from which it was drawn would be murder.

Proponents of euthanasia seem to pay too little attention to this fact. They argue as if they were still dealing with some other question, such as the sexual relationships of consenting adults in private or abortion. In such cases many proponents of legalization were not greatly worried about the boundaries, for they were prepared to see an entire category of previously criminal behavior made legal. No one can take this attitude with respect to the criminal law of homicide.

Even a proponent of euthanasia must bear in mind that a permit to carry out euthanasia might someday become the death warrant of a person who had not in fact given fully informed consent. That person could even be a proponent of the legalization of euthanasia. Proponents of abortion legalization could not be confused with unborn individuals; laws forbidding abortion could be simply abolished. But laws forbidding homicide cannot be. The safeguards could be extremely stringent, but no safeguards would be perfectly adequate. If euthanasia is legalized, some murder will be done which otherwise would not be done.

One proponent who clearly does not understand this situation is Glanville Williams. Eager for the legalization of euthanasia and frustrated by arguments about safeguards—which were objected to by opponents both as inadequate and as intolerable interference in the sickroom—Williams made a breathtakingly simple proposal. He urged that the law merely be amended to permit physicians a wide discretion. Having asserted erroneously that members of the House of Lords in the 1936 debate approved active euthanasia, Williams claimed his proposal would merely clarify a position which medical practice

already approved. He said the proposal would merely acknowledge a practice already widespread and beneficial, remove from physicians a burdensome fear of the law, leave the matter to individual conscience, and introduce no danger whatsoever.[48]

Williams formulated the part of his proposal concerned with voluntary active euthanasia as follows:

> It shall be lawful for a physician, after consultation with another physician, to accelerate by any merciful means the death of a patient who is seriously ill, unless it is proved that the act was not done in good faith with the consent of the patient and for the purpose of saving him from severe pain in an illness believed to be of an incurable and fatal character.[49]

This formulation may not sound dangerous until one recalls that what is being proposed is an amendment to the law forbidding murder. Once this fact is taken into account, the danger is obvious.[50]

Any two physicians dealing with a seriously ill patient could kill the patient. They could be convicted of a crime only if the prosecution could prove *beyond a reasonable doubt* that they did not act *in good faith* or that they did not *intend* to save the patient from pain or that they did not *believe* the illness to be incurable and fatal. However, once a patient was dead, it would hardly be possible to disprove *beyond reasonable doubt* the physicians' good faith or intent or belief or claim that the patient had consented. Anyone who proposed to murder someone would need only to find a cooperative physician with a cooperative colleague in order to execute the murderous plan.

The point is that criminal law does not merely allow what it does not forbid. It also allows what it does forbid—that is, criminal law allows in practice what it literally forbids—to the extent that what it forbids cannot be proved beyond reasonable doubt to be done with criminal intent and in violation of the law.

The bill debated in the British House of Lords in 1969 did not put forward Williams's simple proposal. It included safeguards: a written certificate by two physicians, a written or oral declaration by the patient attested by two witnesses, a thirty-day waiting period, and a general provision authorizing the Secretary of State for Social Services to regulate the practice of euthanasia. The latter regulations would have included some limitation of those who could be killed and of those who would do the killing, the custody of declarations, and so on.[51] As we pointed out in chapter four, section G, the California Natural Death Act of 1976 incorporated many of these regulations and safeguards.

The Earl of Cork and Orrery, who led the opposition, pointed out that due to inevitable vagueness all of the safeguards in the bill really come down to trusting the two physicians. The witnesses might never be traced and in

practice coud hardly be held liable, although the bill provided for their liability. As to the possibility of an oral declaration he said: "These words provide a loophole big enough for murder."[52] The point was made with regard to the written declaration by Baroness Serota:

> Even if all the practical difficulties of ensuring that all the safeguards incorporated in the Bill were complied with, it would be by no means certain that even these safeguards would be adequate against abuse. Supposing, for example, euthanasia were administered on the basis of a declaration which was afterwards alleged to be forged, or signed under circumstances which rendered it suspect, the Bill would appear to protect the doctor who in good faith administered euthanasia, but it might in practice also protect those who had been responsible for the false declaration. The vital witness would in many cases be the patient himself, and once he had died it might be virtually impossible to prove whether the declaration had been genuine or not, particularly if the witnesses could not be traced; and even if there were strong grounds for suspecting that the declaration was not genuine, it might be difficult to prove who had been responsible.[53]

Earl Ferrers pointed out that the bill would not prevent unscrupulous people from bringing about the killing of the unwilling but would only make them proceed with care in accomplishing the objective.[54] Lord Strabolgi suggested that the elderly would be especially vulnerable to trickery. He also mentioned that a strong argument against the death penalty is that it can be applied to the wrong person, and the same argument stands against legalizing euthanasia.[55]

Proponents of active voluntary euthanasia simply do not face up to this argument. When they come near it, their responses are not to the point and at times appear evasive and disingenuous.

Arval A. Morris, for example, proposes legalization with a safeguard of repeated witnessed requests and a thirty-day waiting period. Still, he admits, "The possibility of a conspiracy against the patient by the doctor and relatives, or by several doctors, probably cannot be fully guarded against by any voluntary euthanasia statute (or any statute at all)." But he claims that a properly drafted statute can minimize risks. He then proceeds to the irrelevant point that physicians can keep patients alive in order to increase their fees, and that a voluntary euthanasia statute will combat such an abuse and offset present malpractice laws. Before the reader has a chance to wonder whether this implausible statement has any relevance, Morris observes, "Ultimately, the best protection against dishonest, conspiring doctors lies in the ethical integrity of the medical profession."[56] He gives no reason for thinking that the ethical integrity most of us would grant to the profession as a body extends to every individual physician.

Walter Sackett, testifying before a committee of the U. S. Senate, brushed aside the suggestion that legalized euthanasia would mean that many people

could get together and do evil things: "If those relatives have evil in their heart and they are going to kill him, they are going to kill him with something. It could be a gun, a knife, medicine. You know that, you are not so naive as to think there is only one way of killing a person."[57] Sackett simply does not seem to realize that euthanasia killing would provide potential murderers with the opportunity and temptation of a new method, which would have the advantage of great similarity to a legal act. The corpses of those who were willing to be killed would be very similar to the corpses of those who were not.

Under present homicide statutes only the possibility of concealing homicide by making it appear suicide has comparable possibilities for abuse. As we argued in chapter five, section C, these possibilities of abuse are surely sufficient to warrant a negative public policy toward suicide; if the law had the means to prevent suicide, the dangerous similarity of suicide to homicide would in itself be sufficient to justify the use of such means.

Kamisar points out that while Williams is most concerned about the liberty of the dying to die painlessly, Kamisar himself is more concerned with the life and liberty of those who would be needlessly killed in the process. He argues that the number wrongly killed would not be small.[58] Bruce Vodiga claims that in making this argument Kamisar "questions whether the premature and unnatural death of but one individual by mistake is worth relieving the pain and suffering of any number of others." Vodiga goes on in a footnote to suggest that here Kamisar "betrays the moral underpinnings of his analysis" to be theological.[59]

Apart from the fact that Vodiga, not Kamisar, set the proportion as one against an indefinite multitude, one must wonder what is theologically colored in this argument. Most people, if asked whether they would mind being killed by mistake if it would relieve the pain and suffering of numerous others, would answer without any theological reflection, in line with simple self-interest. "Indeed, I would mind." And why should anyone accept such a risk? It seems clear enough that to pass a law requiring one innocent person, chosen at random, to die for the benefit of numerous other individuals—especially when the benefit is relief of pain, not protection of life—is unfair.

Marvin Kohl comments on the argument that one ought not to legalize euthanasia because there is evidence that people who ought not to die will die and that this is unfair. Kohl says:

> . . . I would agree that one should ask: is it fair that people who ought not to, will die because of mistakes and abuses? But fairness is a double-edged sword. One must also ask: is it fair that those who ought to die will not be allowed to do so? Better yet: is it fairer to prevent the many who ought to die from doing so in order to protect the few who ought not to? And at what point does one draw the line? Would it be fairer to let one thousand,

> ten thousand, or one hundred thousand suffer in order to prevent the unjust death of, let us say, one man?

He suggests that the question is a difficult one and that fairness demands that both sides be weighed.[60]

Kohl's formulation of and answer to the problem is prejudicial in several ways.

First, he talks about people who ought and ought not *to die,* but the problem is about people *being killed.* If the objection and response are formulated uniformly in terms of being killed, Kohl clearly is begging the question by assuming his own judgment as to the morality of killing: Those who wish to die ought to be killed. But in a jurisprudential argument the proponent of euthanasia is no more justified in assuming this morality and attempting to impose it upon the public at large—especially people who do not wish to be killed—than the opponent of euthanasia is justified in assuming a morality of the inherent sanctity of life.

In the second place, Kohl falsely assumes that the refusal to legalize euthanasia prevents people who wish to die from being killed. It does not. They can commit suicide. They can kill themselves by refusing treatment and even by refusing food. And no law prevents a physician from keeping comfortable people who are killing themselves by supplying them with adequate narcotic drugs until death occurs.

In the third place, Kohl provides no evidence for his suggestion that the proportion between those who will be killed against their wills is insignificant. And he takes no account of the universal and inevitable consequences, including anxiety, inflicted upon those who will not be wrongly killed but who will be made to suffer because some other people's wish to be killed is facilitated by the law.

Glanville Williams also ignored Kamisar's point about the danger of euthanasia when the former answered the critique of the latter. Kamisar had pointed out that legalization in accord with the suggestion of Williams would be dangerous and that the safeguards also would make euthanasia anything but quick and easy.

Williams answers by saying that the problem posed by the alternative of intolerable formalities and a dangerous lack of formalities is not an "ordinary logical dilemma." Williams proposes a parable to clarify what he takes to be the fallacy in Kamisar's argument. The parable concerns a mythical state of Ruritania from which citizens are not permitted to emigrate. A proposal is made to permit emigration, but its proponent is aware "of the power of traditional opinion, and so seeks to word his proposal in a modest way," including many safeguards. An opponent attacks the safeguards as an intolerable imposition upon a free Ruritanian citizen who wishes to emigrate. Wil-

liams states that this attack is only legitimate if the opponent of the safeguards is willing to go further than the original proponent of legalization in permitting emigration.[61]

Williams ignores the fact that the safeguards are to protect those who do not wish to emigrate from being permanently exiled against their will. He also begs the question by using emigration as an analogy, since no one doubts that this practice ought to be legal and that where it is not, liberty is seriously infringed upon. Williams also smuggles in his own moral position, which is not that of most opponents of euthanasia, that mercy killing can be a good thing. Like other proponents, Williams is intensely sensitive to any attempt to impose a traditional morality of the sanctity of life upon those who reject it, but he is very ready to impose the morality of utilitarian killing upon those who reject it.

The foregoing considerations make clear that the legalization of euthanasia, no matter what the safeguards, would impose serious burdens and costs upon those who do not approve of euthanasia and those who do not wish to be killed. In our view such burdens and costs would make legalization unjust to all who do not wish to be killed. However, it must be admitted that with very strict legislation and careful legal control much of the risk could be removed. At the very least proponents of euthanasia ought to grant as a fair demand the requirement that the strictest controls would have to be imposed to prevent serious and unnecessary risks and widespread anxiety.

As a matter of fact, many proposals for euthanasia have included the requirement of a court hearing in each case, or at least the requirement of the direct involvement of a quasi-judicial official, as the euthanasia referee of the British bill of 1936. Except for Glanville Williams, leading proponents of legalization have seemed to recognize the need for judicial control.[62]

Probably the most adequate control would require that a person to be killed by voluntary active euthanasia be certified by a court, transported under police supervision to a special facility—perhaps a hospital attached to a prison—and there put to death by a public official especially authorized for the task. A procedure like this would allow the court to ascertain beyond reasonable doubt that valid consent had been given, allow the police to make certain that only persons licensed by the court to be killed were delivered to the executioner of euthanasia, and would restrict the practice of mercy killing to a small group of specialists who could do such killings only during their working hours. Safeguards like these would not be omitted in the legalized killing involved in capital punishment; we see no excuse for the nonchalant attitude of proponents of euthanasia reflected in their failure to propose safeguards of this sort for legalized mercy killing, which would be far more extensive and dangerous to innocent and unwilling persons than capital punishment is.

F. Legalization of Euthanasia and Liberty

But making euthanasia killing into a public process—whether by the more modest involvement of officials and courts usually projected by proponents of euthanasia or by the more extensive and justly required involvement of public institutions we have just now outlined—raises a new difficulty. Many people in this society still consider euthanasia killing a grave moral evil: They want no part of it. A system which would make such killing a public function not only would demand that such persons tolerate the exercise by others of liberty in a manner morally abhorrent to themselves but also would demand that the public at large become involved in such killing.

Even if the law were carefully constructed to assure that no individual and no private institution opposed to euthanasia were ever forced to participate directly in such killing, that no public funds were expended in support of the activity—for example, by requiring that the petitioner pay the cost of the hearing and of the other services—making euthanasia a public function would still force every member of society to cooperate in the minimal sense that public institutions and facilities would be used for a purpose to which many people take grave objection—an objection which must be respected as legitimate even if it is regarded as erroneous.

Such persons will regard the public institutionalization of mercy killing as a corruption of the political society, which is grounded upon and justified by their willingness to consent and participate. Governmental involvement will infringe upon the liberty of those who wish no part in killing to remain entirely clear of it. They never meant to enter into a compact for mercy killing. Now they shall find their institutions and facilities turned to this purpose. When suicide is made legal, the liberty of such persons to stand aloof is not infringed, for suicide remains a private act. But if euthanasia becomes a public function, the liberty of persons who abhor it to stand aloof from such killing will be infringed.

We expect that this argument will be objected to on the ground that very often society compels its members to participate, at least to the same extent, in activities which many find abhorrent. We now turn to objections along these lines.

Consider war. Even with a broad conscientious objection clause many citizens who consider all war or a particular war immoral are forced to cooperate insofar as war is a public activity, is carried on with tax funds, and so on. Those who have been in the position of dissent from the Vietnam war know how outrageous involvement by the United States in it seemed to them. It would still have seemed so even if all who objected to the war had been exempted from the draft and even from paying taxes to carry on the war, for the national involvement would have meant that those who considered the

war a moral outrage and corruption still would have been involved because their country was involved.

Those who consider mercy killing morally repugnant would feel the same way about it, but if the government can be involved in Vietnam against the conscientious objections of many citizens, why can it not be involved in mercy killing despite the conscientious objections of many? A proponent of euthanasia very likely would add that mercy killing would be more like World War II than like Vietnam—a public activity without so many objectionable aspects and one in which most of the society could concur.

In reply to this objection we point out that war under any conditions is different from publicly institutionalized euthanasia in one vital respect: War is directed toward the promotion of a substantial public interest. Even if one holds that the means—war in general or particular wars—is thoroughly evil, one is committed to the common purpose of national security and one must admit that those who authorize, support, and conduct the war do so in the name of this common purpose. The most extreme pacifist also wishes the society to be peaceful and secure, understands that war is directed to these goods, and objects to violence only insofar as it seems to be a vicious means to a good public purpose.

If society were not able to involve its pacifist members at least minimally in its common action of self-defense in cases such as this, most people believe there could be no society. The liberty of the pacifist to stand aloof from violence must be limited by the general public consensus that there is a substantial public good, that some means must be used to promote and defend it, and that this means is essential (even despite public recognition that use of violence is damaging to the community to the extent that it is divisive because some so strongly and sincerely oppose it).

The standard of a substantial public good, an apparently necessary means, and general consensus about its acceptability should be used in passing laws and in testing their constitutionality to the extent that they impinge upon equal and ordered liberty. Mercy killing serves a private interest in avoiding pain and suffering. There are other means suited to this goal: the refusal of care and suicide. And there is no general consensus that this means is acceptable.

Consider capital punishment. How does it meet the stated criteria? Many object to it and yet are forced to participate in such killing. Our reply is that capital punishment might not meet the stated criteria.

It could be justified only if the public good at stake were substantial. The arguments against retributive punishment by death precisely seek to show that the substantial public good of justice is not directly at stake. If the good at stake is the public safety and prevention of crime, the arguments regarding the failure of capital punishment as a deterrent tend to show that it is not a necessary or even an effective means to this admittedly legitimate goal. And

there is no real consensus that killing criminals is an acceptable means of enforcing law. For these reasons it seems to us quite plausible to argue that the continuation of capital punishment violates the liberty of all who regard it as morally repugnant to stand aloof from this sort of killing.

Someone will object that health care certainly has been accepted as part of the general welfare. May not the help which some desire to die with dignity be considered a legitimate part of health care? Not on the definition of "health care" which is commonly admitted by existing consensus. Euthanasia would stipulate a new definition of "health care" and thus alter a common purpose over the objections of opponents. In other words, proponents of euthanasia cannot claim it as part of health care without trying unilaterally to amend a public purpose. This is precisely the point at which the violation of the liberty of opponents to stand aloof occurs.

If euthanasia were to be justified by being incorporated in some substantial public interest, it would have to be shown that liberty to obtain help in being killed is directly and of itself involved in the common good. Then concerns about the protection of unwilling victims and liberty to stand aloof would be of marginal importance. But if the sanctity of life cannot be defended by its proponents as a direct component of the common good, neither can being killed painlessly be defended by its proponents as having such a status. Of course, we do not deny that the mitigation of the pain and suffering of individuals is a good and a very significant one; we merely deny that it is directly and in itself a matter of public interest. It is a private interest, however important.

What proponents of euthanasia need to show is that their liberty either overrides the right of opponents not to be killed unwillingly or the liberty of opponents not to be involved in a practice from which they wish to stand aloof. In other words, those who favor legalizing euthanasia must show that the demand of opponents to have their lives and liberty to stand aloof respected somehow amounts to an unjust exploitation of those who wish to be killed for their personal and private interest in avoiding pain and suffering. When Kohl suggests that fairness requires that the interests of both proponents and opponents of euthanasia be weighed against each other, he ignores the fact that safe euthanasia would require public authority, and that on libertarian principles the scale is tilted against those who desire public involvement in a practice for private benefit on whose acceptability there is no consensus.

Another objection is that government often is used to promote interests which are essentially private—for example, it provides education which primarily benefits the individual. The reply is that promoting such private interests is acceptable to the extent that there is a general consensus that it is a necessary means to a common good, in this case the general welfare. The general welfare is a whole set of conditions which most everyone needs to pursue their private interests in their own ways.

While extreme libertarians wholly oppose the welfare function of the state, state involvement in a practice such as euthanasia is repugnant in a way in which welfare state functions in general are not, for a practice such as euthanasia is abhorrent to the consciences of many citizens who regard it as evil and corrupting. As we have explained, were the state to participate in legalized euthanasia, such citizens would become unwilling participants in acts they reasonably, even if erroneously, consider to be murder, and their liberty to stand aloof would be seriously infringed.

Still, it will be objected, the public system of education is not really so different from the publicly institutionalized arrangement for safe mercy killing. Many people do have conscientious objections to what the school system is doing—for example, in promoting what they consider to be a secularist value system and in teaching children a morality which is in conflict with that of their parents. Others contend that the present public system of education chills their exercise of religious liberty, for it maintains a monopoly upon public funding of lower education while it offers an educational experience which is shaped by the deeply held conscientious convictions or beliefs of one part of the population and which is incompatible with the convictions and religious beliefs of other segments.[63]

The answer to this objection is that even if some people think that what the public schools are doing is immoral and would like to be at liberty to stand aloof, it is difficult to see how the general welfare could be promoted without some public system of education. If some public education is provided, then equal protection of the laws demands that a rather extensive system be provided to avoid discrimination against those who cannot privately arrange educational facilities.

It might be true that in many places the present system of public education favors secular humanism just as public education in the past favored common Protestant Christianity. But no school system can carry out an educational process without in practice adopting some philosophy of life, some religious or nonreligious world view as the foundation and framework for intellectual formation and for the social interaction in the school which shapes character. Perhaps the present arrangement does chill the exercise of religious liberty, but this could be remedied without doing away with publicly funded education. We shall discuss this issue further in chapter ten, section D.

Another objection is that government is deeply involved in the distribution and sale of alcoholic beverages, which many consider to have no moral use. It is obvious that the use of such beverages serves no substantial public interest and is, if anything, contrary to the public health and safety. Our reply is that in this case government is only trying to control and restrict the abuse of the private activity of drinking.

But cannot the same view be taken of necessary government involvement

in euthanasia? No, because in the case of alcoholic beverages there was a law against the manufacture, sale, and use of them (Prohibition), and it was agreed to repeal this general law, not only out of respect for liberty but also to avoid evils consequent upon the law itself. Proponents of the legalization of abortion succeeded partly by arguing on the analogy of the repeal of prohibition. But in the case of euthanasia the general law against homicide cannot be repealed.

Government involvement in the distribution and sale of alcoholic beverages followed repeal in an attempt to provide some continuing protection for the public interest which had justified Prohibition: Everyone realizes that society would be far better off if most *other* people did not drink at all or drank less than they do. Government involvement in euthanasia would be necessary only because of an amendment to the law of homicide. But the public interest does not require that this be done. Moreover, state involvement in the liquor business serves a substantial public interest in regulation, an interest best recognized by those who prefer Prohibition. Regulation of euthanasia will not be required to protect the public interest unless euthanasia is legalized, and whether it should be legalized is precisely the question at issue.

No doubt, if euthanasia is legalized, then many of those upon whose liberty state involvement will infringe will prefer to accept this infringement upon their liberty to stand aloof than to suffer the injustice of running the risk of being murdered. But the willingness of opponents of euthanasia to accept a lesser evil rather than a greater if this practice is legalized does not mean that legalization would not do them evil, and so does not undermine the argument that legalization without government involvement in the practice of euthanasia would be unjust to those who would be killed unwillingly and that legalization with government involvement would infringe upon the liberty of those who find mercy killing morally abhorrent to stand aloof from a practice they regard as evil and corrupting.

Just as Kohl argued that fairness to those who ought not to die (that is, to be murdered) must be weighed against fairness to those who ought to die (that is, who demand help in being killed), so proponents of euthanasia will argue that the liberty of opponents of euthanasia to stand aloof from such killing must be weighed against the liberty of those who desire euthanasia to be killed and to assist in such killing. But there is no agreed upon principle by which these two liberties can be weighed against one another; the weighing will be wholly arbitrary. Hence, the preference for the liberty of those who approve euthanasia which would be embodied in legalization would infringe upon the basic principle that society is limited by an affirmative common consensus. Mercy killing is no part of this common consensus.

For the sake of liberty euthanasia by refusal of treatment and by suicide must be tolerated. Such acts do not pose any substantial threat to the public

which could be avoided if these practices were not allowed, and so these practices do not demand public involvement in acts widely regarded as immoral. The liberty to remain aloof is an aspect of that liberty to which free societies are dedicated. The liberty to be killed cannot be protected, so far as active euthanasia is concerned, without being drawn from the private into the public sphere. There is no consensus that it ought to be.

Consequently proponents of euthanasia face a dilemma. Either they must advocate the legalization of euthanasia without state action in the killing, but this would unjustly endanger the lives of those who do not wish to be killed; or they must advocate legalization with public institutionalization at a level which would mitigate dangers as much as possible, but this would infringe upon the liberty to stand aloof from such killing of those who abhor it; or they must advocate legalization with some degree of state action short of the institutionalization which would mitigate dangers as much as possible, but any such compromise would to some degree and in some proportion both unjustly endanger the lives of those who do not wish to be killed and infringe upon the liberty to stand aloof from such killing of those who abhor it.

In any case, the fact that the interest of those who wish to be killed is a private one cannot be ignored. As we showed in section D, even the most careful safeguards could not altogether eliminate the imposition of new burdens and costs upon those who do not wish to be killed, and these weigh against, whether or not they outweigh, the suffering which active euthanasia could prevent. The one private interest deserves as much consideration as the other.

G. How our Argument Differs from Yale Kamisar's

The argument we have presented against euthanasia legalization in many ways is like that proposed by Kamisar but is different in one respect. Kamisar also confronted Williams and other proponents of euthanasia with a dilemma, the first leg of which emphasized the danger to those who would be unwillingly killed. But the second leg of Kamisar's dilemma was merely the consideration that safeguards are cumbersome and obnoxious.[64] The weakness of this consideration makes Kamisar's argument rest almost wholly upon the inevitably or probably harmful results of legalization no matter how carefully safeguarded.

As we have shown—and as anyone who reads Kamisar's article carefully will see in much richer detail—a case strictly upon this basis is by no means weak. But our argument emphasizes the dilemma by pointing up something objectionable about safeguards which has more jurisprudential weight than

their mere burdensomeness: They also infringe upon the liberty to stand aloof. Opponents of euthanasia up to now have not focused attention upon this aspect of the matter. We believe that it deserves attention.

Proponents of legalization naturally have been sensitive to their own interest in the libertarian aspect of the issue. They do not wish to be forbidden to kill and be killed as they think fit. Often they argue for euthanasia as if they were arguing once more about the liberty of consenting adults to engage privately in sexual activity of their preference. We have tried to bring out the disanalogy between the legalization of such practices and the legalization of euthanasia.

Society can officially ignore what Doe and Roe do sexually with each other in private provided that they are both adults, that they really do consent, and that they do not cause each other lasting bodily harm. However, if Roe and Doe engage in sadistic practices upon Oe, even with her consent, such that her life is endangered or her body seriously injured, then the situation is more like voluntary euthanasia. If the state, to protect persons who are not masochists, must regulate and institutionalize the consensual practices of Roe, Doe, and Oe—for example, by issuing licenses to certain public houses in which these practices will be permitted and by providing a legal process to certify the consent of Oe—then a jurisprudential problem arises which is even more like that involved in legally regulated and publicly institutionalized voluntary active euthanasia.

Does the public have a liberty to remain aloof from sadomasochism? We submit that the public does have such a liberty, and that such practices could not be safely legalized without public involvement by way of regulation and institutionalization, which would violate the liberty to stand aloof. Our new contribution to the argument against legalization of euthanasia has been that the public has a liberty to stand aloof from the killing of human beings. This consideration, together with the already well-argued point that even voluntary euthanasia cannot be legalized without undue danger or extensive public involvement, poses a very serious dilemma for proponents of legalization.

Proponents of legalization stress libertarian considerations in favor of their view. They ought also to attend to the libertarian aspect of the opposing position. How can a policy be regarded as liberal if it facilitates the liberty of some citizens to kill and be killed by involving in activities repugnant to many citizens the legal processes and institutions in which all participate willy-nilly? Genuine liberals must be careful lest they press for a society in which only secular humanists can live and die comfortably. Such a "liberal" society would be one from which those who abhor killing, even in the context of voluntary euthanasia, would be profoundly alienated.

The moral justification of euthanasia, as we have pointed out, is part of one competing world view among others; some people believe in this world view

and are committed to putting it into practice, so far as possible, in their own lives. Society must respect this world view as a secular religious belief. But proponents of this world view will cease to be liberals and will become totalitarians if they continue to urge its acceptance as a secular, established religion. Society can no more justly become involved in the rites of mercy killing (or sadomasochism) than it can become involved in the rites of religious worship (or snake handling). Although those who accept these rites do so for diverse reasons, those who reject them agree in considering any governmental involvement in practices they abhor to be a serious infringement upon liberty.

So long as mercy killing is limited to suicide and the refusal of treatment and so long as sadomasochism is limited to activities which do not cause serious bodily harm, society can tolerate these exercises of liberty. But when the safety of others begins to be endangered by mercy killing which involves the activity of a person other than the one killed, or by sadomasochistic activity which might result in the injury or even death of nonconsenting persons, then society can limit these dangers in the interest of the public safety, just as it forbids snake handling and enjoins blood transfusions for the children of Jehovah's Witnesses over the objections of their parents. Society has no obligation to legalize snake handling and to make it into a publicly regulated and institutionalized activity in order to protect those not willingly involved in it. No more has society an obligation to legalize euthanasia and make it into a publicly regulated and institutionalized activity.

Nor will it do to say that the liberty of those who abhor mercy killing to stand aloof would only be slightly infringed by governmental involvement in this practice. Reading a few verses of the Bible each day in the public schools is only a little establishment of religion. But that little is too much for those who take conscientious objection to it.

In his article Kamisar proceeded from the short-range view of voluntary euthanasia to a long-range view of the dangers that legalized active euthanasia would not remain entirely voluntary. This part of his argument contains two sections: first, a consideration of the likelihood of the spread of euthanasia to at least some cases in which it would be nonvoluntary; second, an argument based upon the prospect that legalized euthanasia could end in genocide, as it did in Nazi Germany.[65] The second of these points, the Nazi experience, we will consider in chapter eight, section H. But here we shall assume what we will try to prove in chapters seven and eight: Nonvoluntary and involuntary euthanasia ought not to be legalized. If this is correct, any evidence or reasons which would show that voluntary euthanasia cannot be legalized without legalizing nonvoluntary euthanasia as well will confirm in a very important way the conclusion we think we have established already without reference to this longer-range view. Hence, we turn now to it.

H. From Voluntary to Nonvoluntary Euthanasia

Kamisar pointed out that proponents of euthanasia themselves, while urging the legalization of voluntary euthanasia, do not carefully and consistently restrict their consideration to euthanasia of the voluntary sort. From its beginnings many involved in the movement to legalize euthanasia have favored the legalization of nonvoluntary as well as voluntary euthanasia, sometimes even favored the legalization of nonvoluntary euthanasia over the legalization of voluntary euthanasia. But the leadership of the movement restricted proposed bills, for the most part, to strictly voluntary euthanasia and explicitly said that proposals had to be limited because the public was not ready to accept the broader principle. So one must begin by opening the door, one must proceed step by step, and so on.[66] This policy of incrementalism is still being followed.[67]

Kamisar also pointed out that most of the killings commonly called "mercy killings" and frequently discussed by proponents of voluntary euthanasia have been instances or potential instances of nonvoluntary euthanasia—cases in which infants or other noncompetent persons have been killed, even cases in which competent adults have been killed without consulting them.[68] Kamisar's article was published in 1958; a survey of more recent literature produced by proponents of voluntary euthanasia reveals that they still rely heavily upon examples of the nonvoluntary sort.[69]

The use of such examples is significant; it manifests the real interests and concerns of proponents of legalization. If in their own minds they made a sharp and critical distinction between voluntary and nonvoluntary euthanasia and if they were committed as a matter of principle to the legalization of the former and against the legalization of the latter, then either they would never mention examples of nonvoluntary euthanasia at all or they would mention these examples only to distinguish such killing from the killing whose legalization they propose. The use of irrelevant examples would only be confusing and would be carefully avoided.

But as a matter of fact proponents of the legalization of voluntary euthanasia use, not merely mention, examples of nonvoluntary euthanasia. Part of the logical and rhetorical weight—in some cases a very substantial part of it—is placed on these examples. If they prove anything at all, they prove that the practice they exemplify ought to be accepted. And whether they prove anything or not, they unquestionably reveal the belief of those who use such examples: nonvoluntary euthanasia ought to be legalized and a limitation of present proposals to voluntary euthanasia is merely a tactical maneuver in the long-range strategy of legalizing the killing of all who "ought to die."

Kamisar pointed out that proponents of euthanasia often favored the killing of defective children.[70] Leading proponents of legalization—such as Joseph

Fletcher, Glanville Williams, Marvin Kohl, and Walter Sackett—continue to include infanticide in their euthanasia projects, and the same is true of many less well-known authors writing on the subject.[71]

Proponents of the legalization of euthanasia will object that to insist upon the longer-range view beyond the legalization of voluntary euthanasia to the future legalization of nonvoluntary euthanasia is to commit the fallacy of a wedge ("slippery slope" or "camel's nose under the tent flap") argument.

When Williams originally criticized a so-called wedge argument, it was an instance of utilitarian argument to the effect that even if voluntary euthanasia were perfectly acceptable in particular instances, it would be bad to allow it as a general practice. Williams disposed of this objection easily by pointing out that the practice to be generalized was intended to be a particular one which would be justified in each relevant case.[72]

Kamisar does not argue in this fashion. Rather, his point is that the proponents of euthanasia are engaged in a movement, that there is a likely second step consequent upon the projected first step, and that this second step can be prevented only if the first is carefully avoided. One of the most telling points Kamisar makes in defense of his form of the argument is that defenders of civil liberties constantly use it, on the principle that civil liberties can very easily be seriously eroded unless great care is taken to prevent the first step infringing upon them.[73]

Williams also recognizes a psychological version of a wedge argument, according to which the danger in permitting some killing is that it would habituate people to doing and to accepting killing in general. Although this premiss is no part of Kamisar's argument, Williams seems to suppose that it is and easily produces examples which indicate that not every practice tends to become more and more generalized once it is permitted.[74]

Kohl also considers the wedge argument. According to Kohl what underlies it is the belief on the part of the opponents of euthanasia that proponents are concerned with economic utilitarian advantages alone and that all utilitarian theories are the same as those of the Nazis.[75] Arthur Dyck answers Kohl by pointing out that what worries opponents and gives rise to wedge arguments is not the concern which Kohl mentions, but rather the appeal of proponents to some notion of dignity to justify killing. Since there is no agreement upon what constitutes dignity, no one can tell in advance just what is justified when a right to die by mercy killing is justified on this principle.[76]

We believe that Dyck's rejoinder to Kohl is essentially correct. However, not all proponents of the legalization of euthanasia appeal to "dignity." But even when they do not, they appeal to some principle which would justify nonvoluntary euthanasia at least in some cases if it could justify voluntary euthanasia in any cases at all. Sometimes the principle is formulated in terms of quality of life or meaningful life. Sometimes it is formulated in terms of the

naturalness and goodness of death and its utility for the species. Sometimes it is formulated negatively and brutally by talking about certain noncompetent persons as vegetables or cabbages and talking about the institutions in which they live as warehouses or mausolea.[77]

Moreover, the kind of argument proposed by Dyck is not correctly classified as a wedge (or slippery slope) argument. Rather, Dyck is noting that the movement from voluntary to nonvoluntary euthanasia is required by a consistent application of a principle which those who advocate the legalization of voluntary euthanasia appeal to in support of their view. The logical implications of one's principles are not like the probable psychological or sociological consequences of adopting certain policies or engaging in certain practices. Reasonable persons are necessarily committed to all the logical implications of the principles they accept. But a reasonable person can adopt policies or engage in practices while hoping that possible consequences—even consequences which are highly probably—will never come about.

Thus, if one holds that certain sorts of people would be better off dead and would be kindly treated by being killed, it matters little whether these people are competent to consent or not. Their competency to consent would be an important matter only if their informed judgment that they would be better off dead were a condition required for it to be true that they would be better off dead and so a condition that justified killing them. In any other case any characteristic of a person by which that person would be better off dead could be an attribute which might belong to noncompetent as well as to competent persons.

Clearly, proponents of the legalization of voluntary active euthanasia have not restricted themselves to premisses drawn from libertarian considerations—as we, for example, restricted ourselves in chapter four, where we defended the liberty of competent persons to refuse treatment, without introducing any consideration based upon our own views about what would be beneficial to such persons. Rather, proponents of the legalization of euthanasia regularly use premisses which reflect their conviction that under some conditions people are better off dead, that their lives are too poor in quality to be endured, that their lives lack meaning, that their survival offends human dignity,that they deserve the compassion shown a sick beast, that they are mere vegetables, and so on and on. Thus advocates of the legalization of voluntary active euthanasia do not use examples of nonvoluntary mercy killing by an absentminded slip on the psychological or sociological slope of their humane project. The premisses used by proponents of voluntary euthanasia logically entail nonvoluntary euthanasia. To stop short of killing all those whom they sincerely believe would be better off dead would be a completely irrational and arbitrary limitation upon the unfolding—according to its own inner dynamics—of their well-intentioned project of beneficent killing.

To say that proponents of the legalization of euthanasia will not be satisfied with voluntary euthanasia is to make, not a prediction, but merely an observation. This is the importance of what we noted above: Williams, Kohl, Fletcher, and others can denounce wedge arguments all they like, but they continue to argue in accord with their principles for nonvoluntary euthanasia, especially in the case of defective children. The traditional position grounded an unalienable right to life in a conception of the sanctity of life; advocates of euthanasia reject this position in its entirety. But for strategic reasons they seek the concession of the sanctity of life first in the approval of voluntary euthanasia; the right to life of those who are unable to assert this right is reserved for a later agenda.

Williams can assure us that he is not prepared to approve the killing of the elderly at the present time; Kohl can assure us that he only approves killing he regards as kindly; Fletcher can assure us that all who meet his indicators of humanhood will continue to be protected so far as he is concerned. But all of them are drawing jurisprudential conclusions from their own moral principles and failing to pay attention to the jurisprudential implications of the method by which they proceed. Every member of society has his or her own moral principles which must be given as much respect as those of Williams, Kohl, and Fletcher. Hence, it if is once conceded that some people ought to die because others think they would be better off dead, then in practice it is conceded that the law must sanction the killing of anyone whom the majority of citizens sincerely believe would be better off dead.

Special moral conceptions of individual welfare could be excluded altogether; an advocate of the legalization of euthanasia could argue on strictly libertarian grounds that individuals who wish to be killed should be allowed to have the help of other individuals who wish to help them.[78] An approach of this kind would exclude the killing of noncompetents and would emphasize the purely individualistic aspects of dignity—namely, the value inherent in persons asserting themselves in the face of death rather than awaiting it patiently.[79] This kind of approach would remedy to some extent the implausibility of efforts of proponents of euthanasia to limit the practice to those who are dying of a physical illness; if liberty is the ground justifying the legalization of killing with consent, then there is really no reason to restrict such killing.[80] It would, in fact, be discriminatory to permit death with dignity for those suffering and dying, yet not permit it for persons who are simply fed up with life, for those who wish to commit hara-kiri, for those whose concept of honor requires that they engage in duels, for those who would like to play games of hunting human quarry (by mutual consent), and so on.

The obvious difficulty with a purely libertarian approach is that certainly the legalization of killing with consent on this basis could not possibly be

hedged with safeguards which would protect persons who do not consent. All of the dangers in legalized euthanasia return in an even stronger form.

Their writings indicate clearly enough, in any case, that proponents of legalization of euthanasia do not take a strictly libertarian approach. For example, frequently in the literature favoring the legalization of euthanasia one encounters the argument that society should have as much compassion for its members as people are held to have for animals. All approve and indeed desire that an animal which is in misery should be killed mercifully. Must not as much kindness be shown people as horses?[81] Of course, the killing of animals is nonvoluntary euthanasia. Moreover, they are not always killed for their own interest; they are also killed for the interest of humans who own them. Thus, anyone who argues for the legalization of voluntary active euthanasia by appealing to the model of veterinary euthanasia reveals a commitment to principles which extend beyond voluntary to nonvoluntary euthanasia.

There is still another reason why the legalization of active voluntary euthanasia is certain to lead to the legalization of euthanasia for noncompetent persons. In law, parents or guardians of minors or other noncompetent persons can give substitute consent for the handling of the property and affairs of such persons. The consent is considered valid only if the action authorized is in the best interests of the person on whose behalf it is given. In recent years this doctrine has been extended to allow organ transplants from noncompetent persons to their relatives on the theory that such transplants in some way would be in the interests of the noncompetent individuals themselves.[82]

In the Quinlan case the Supreme Court of New Jersey used the doctrine of substitute consent in deciding that Miss Quinlan's right of privacy could be exercised on her behalf and that such exercise by another was necessary lest the right be destroyed.[83] In 1977 the Supreme Court of Massachusetts applied the doctrine of substituted judgment in justifying the refusal by a court-appointed guardian of treatment for acute leukemia to Mr. Joseph Saikewicz, a mentally retarded resident of a public institution. In reaching its decision the Massachusetts Court held that precisely in order to protect the human dignity of noncompetent persons, the law must recognize and protect in them all the rights and choices it protects in competent persons; the law must not proceed on the absolute assumption that the best interests of a noncompetent person will be protected by ordering that treatment be carried out.[84]

We shall discuss these decisions in chapter nine, section L. We mention them here neither to criticize them nor to suggest that either decision in any way justifies active euthanasia of the noncompetent. They clearly do not. But the principle of substituted judgment asserted and applied in these decisions could not be denied or withheld from application without serious inconsistency in any closely analogous case.

If voluntary active euthanasia is legalized, one can be sure that many courts—perhaps including the United States Supreme Court—will assert and apply the doctrine of substituted judgment to extend the law to cover noncompetent persons. The decisions would hold that equal protection of the laws requires that the right to the supremely kind treatment of being killed when one would be better off dead must be accorded the noncompetent as well as those who can give personal consent. To deny the right of the noncompetent to die, the courts would argue, would be to disregard their equal personal dignity. The case would be most plausible with respect to infants who are born defective and who would have been aborted had their defects been anticipated. If they are not beneficently killed, it would be argued, such infants will have to be allowed to die more slowly and more painfully by deliberate neglect.[85]

Between such infants and many other children, between them and adults who have never been competent, and between them and the permanently insane or senile there are no clear boundaries at which to limit the continuous extension of the right to die. Thus no statutes will be needed to legalize nonvoluntary euthanasia; the courts will enter where legislatures might fear to go.

Yet, if legislatures do not take the first step by legalizing voluntary active euthanasia, courts are not very likely to take this step. To do so, the courts would have to assume the legislative function and could not help being obvious about doing so. The United States Supreme Court could strike down all laws against abortion, but no court can strike down all laws forbidding homicide. Voluntary active euthanasia cannot be legalized except by writing an exception to existing statutes forbidding homicide. The defining of such an exception depends upon many policy considerations and the expression of the exception would require a statute. Hence, the battle over the legalization of voluntary active euthanasia will be fought in the political arena, and the effect of the work of proponents and opponents of euthanasia upon legislatures not only will settle the issue of voluntary euthanasia but also will determine the legal life-or-death decision with respect to many noncompetent persons.

I. From Individual Liberty to Public Policy

Those who argue for the legalization of voluntary active euthanasia at times appeal to the liberty of individuals, although they do not restrict themselves to this appeal. We have been arguing that premisses which assert that some persons would be better off dead entail the movement from voluntary to nonvoluntary euthanasia. Utilitarian calculations concerning public welfare are likely to lead from voluntary euthanasia to government programs to solve

the problem of dependency by killing at least some of the dependent: primarily those residing permanently in public institutions and wholly dependent upon public funds for survival.

Some proponents of the legalization of euthanasia say they wish to exclude crass economic considerations from their weighing of the costs and benefits of beneficent killing.[86] We do not question their sincerity. But in American society during the past twenty years developments initiated on the basis of individual liberty and personal privacy have grown into public programs on the basis of utilitarian calculations concerning the costs and benefits of various forms of public welfare expenditure.

The argument for liberty in the field of contraception prevailed (in our view, correctly as a jurisprudential matter). By 1976 the federal government was attempting to find ways of promoting contraception more effectively among teenagers, and the public interest in doing so was spelled out in terms of cutting social costs and welfare dependency. Any requirement for parental consent was a mere obstacle to be removed.[87]

The argument for abortion legalization prevailed (in our view, incorrectly as a jurisprudential matter). The decision made only a passing mention of the social concerns about population growth, pollution, and poverty.[88] However, the liberty to abort became at once a right to abortion, which many courts ruled had to be provided in public and even private hospitals and paid for with public funds.[89] (In this process little respect was shown for the liberty to stand aloof; one federal court struck down the entire conscience clause in a state abortion statute, even that part pertaining to individuals.[90]) The U. S. Supreme Court held unconstitutional the efforts of states to allow parents to veto the abortion decisions of children.[91]

In 1977 the Court relented slightly by holding that the states are not constitutionally *compelled* to provide abortions.[92] Still, Medicaid funding of abortion continues in many places. Nationally and internationally Planned Parenthood and other private organizations heavily supported by public funding divert a substantial part of their resources to abortion.[93]

The underlying public interest is seldom stated explicitly. Yet it has been operative. For example, Harriet F. Pilpel, testifying in 1966 on behalf of the New York Civil Liberties Union before a New York State Assembly committee considering the partial legalization of abortion, gave first place in her attack to the tremendous social cost of illegitimacy. While admitting that it would be simplistic and callous to view the problem merely in monetary terms, she first presented the claim that the nationwide cost of supporting the "unwanted children" born during a single year could run to a public expense of 17.5 billion dollars over a seventeen-year period. She also argued that women have a right to abortion and that the fetus' competing interest in life might be regarded as "highly insignificant."[94]

Similar factors are operative and powerful in the matter of the legalization of euthanasia. In a law journal article Richard Delgado points to the economic aspects of the utilitarian view of the public interest involved in abortion and urges that the same interest is involved in euthanasia[95] In testimony before a committee of the U.S. Senate, Walter Sackett urges that if the severely retarded who are not trainable were "allowed to die," the State of Florida could save 5 billion dollars over a period of fifty years, and a nationwide saving of 100 billion dollars over the same period could be attained.[96]

Robert A. Derzon, Administrator of Health Care Financing in the U. S. Department of Health, Education and Welfare, points out in a memorandum to the Secretary on "Additional Cost-Saving Initiatives—ACTION":

> The cost-savings from a nationwide push toward "Living Wills" is likely to be enormous. Over one-fifth of Medicare expenditures are for persons in their last year of life. Thus, in FY 1978, $4.9 billion will be spent for such persons and if just one-quarter of these expenditures were avoided through adoption of "Living Wills," the savings under Medicare alone would amount to $1.2 billion. Additional savings would accrue to Medicaid and the VA and Defense Department health programs.[97]

Derzon, of course, is not talking about active nonvoluntary euthanasia. If he were, he would be able to project far more substantial savings and to do so with far greater plausibility.

J. Alternatives to Legalizing Voluntary Euthanasia

Some have suggested that short of legalization of euthanasia, the motive of the person committing homicide could be taken into account to reduce the charge or to mitigate punishment.[98] This approach might have the value of reducing the discrepancy between the law on the books and the law in practice. However, we doubt that it would be good policy to make any such change with respect to nonvoluntary mercy killing. If a provision for such killing were made, this might well become a stepping stone toward legalization. Moreover, it is not clear that justice would be served by encouraging people to apply their personal judgments that someone else would be better off dead to the extent of killing the other person without consent.

Nevertheless, we think it would be quite reasonable to make informed consent be a factor which could be established by the defense, and if it were established, a principle for the reduction of the finding of guilt from that of murder to manslaughter. This approach is in line with that which we suggested for assisted suicide. In either case the genuine willingness of the person killed would mitigate substantially the evil of killing by removing its

injustice. The act would remain criminal solely for the protection of the public, which benefits from the reduction to the greatest extent possible of any act which is likely to be difficult to discriminate from murder.

Opponents of the legalization of voluntary active euthanasia ought to give thought to alternatives to legalization compatible with their attitudes toward human life, liberty, and justice. In previous chapters we have proposed legislation in harmony with our own view of the issues considered. Here, we believe, no new legislation will be of much help. Yet proposals to legalize euthanasia would hardly appeal to responsible people if there were not certain genuine needs which deserve consideration. Unless alternatives are developed which are responsive to these needs, those who oppose euthanasia will seem to be confined in a purely negative position in respect to the issue, including the underlying needs.

"Death with dignity" has been one of the most appealing slogans of those promoting euthanasia. We believe that reflection upon the meaning of this slogan and the reason for its appeal will help to clarify at least one area in which authentic, positive alternatives to legalized euthanasia are possible and urgently needed.

In a perceptive essay Paul Ramsey points out that the concept of "death with dignity" is paradoxical: Death is always an indignity, the ultimate indignity, and no talk of its naturalness and appropriateness changes this fact. In making this point Ramsey also attacks the conceptions underlying the belief of proponents of euthanasia that some people ought to die quickly because they would be better off dead.[99]

Ramsey's points are well taken. The slogan "death with dignity" puts a challenge or a question: "You do not wish to die without dignity, do you?" One is inclined to answer without too much thought: "No." But this is like answering someone who asks whether one has stopped beating one's spouse by affirming that one has. The question is not one question but two. Nobody wants to die without dignity, but most people do not want to die at all. Dignity, whatever exactly it is, is no doubt a good thing; by coupling dignity with death the proponent of euthanasia gives death excellence by association which it does not have in itself.

Nevertheless, we feel that there is an important truth which ought not to be overlooked expressed in the slogan "death with dignity." One cannot believe that the slogan could have gained such currency if it was not saying something significant which seemed correct to people. What is this core of significance? One looks in vain in the works of proponents of euthanasia for a clear explication of it. They fail even to try to define the key word "dignity."

Dignity is worth, not worth for something, but inherent worth. Dignity pertains to persons. It is not an achievement but an endowment, something one has which is very close to one's simply being what and who one is. To

the dignity of one person corresponds the attitude of respect on the part of others.

The concept of dignity can perhaps be understood most easily if one considers its significance in an aristocratic society. Dignity is the excellence of those who are born superior to others. The qualities of self-possession, coolness, ability to command which are required for the exercise of the role of a superior come to be associated with and taken as signs of dignity. If superior persons, members of the upper classes, undergo or suffer something which makes clear that they are not so very different from the vulgar mob, then their dignity is offended. Often loss of respect due to dignity follows. Degradation can seem to remove dignity altogether.

In Christian thought all humans have an immense dignity insofar as they are created in the image of God and called to become members of the divine family. Post-Christian conceptions in democratic societies maintain something of the Christian democratization of dignity. Every person has dignity, is entitled to respect. The notions of basic political equality and of liberty and justice for all follow upon this democratic concept of dignity. But there also is a personalistic dimension to post-Christian ideas of dignity. Each person is unique, and respect for dignity demands that the uniqueness of the individual and the irreducibility of anyone to the status of a mere case of a class or a mere functionary in a system be recognized, accepted, and acted upon.[100]

Even in a democratic context the concept of dignity keeps many of its aristocratic connotations. If a child acts very grown-up for her age, adults will remark that she is a very "dignified" little girl, the assumption being that adults are inherently superior to children. If aspects of functioning which humans have in common with other animals are observed, an individual feels humiliation and loss of dignity, since at least there is the natural superiority of all humans to other animals. Members of society who for one reason or another are treated with unusual deference or respect—for example, high public officials—are regarded as having a dignity which attaches to their office. Etiquette maintains dignity by carefully excluding vulgarity—oftentimes distinctions are made purely for the sake of distinctiveness.

With these clarifications one can understand the significance of the notion of dignity in the euthanasia debate.

In the context of refusal of treatment it would be an offense against dignity, because an offense against liberty and justice, to impose unwanted treatment upon a competent adult. To the extent that such impositions occur the individual is no longer regarded as a person and is reduced to the status of a malfunctioning organism which is to be dealt with according to the values and standards of others—the medical technologists. Conversely, to seek the informed consent of patients is to respect their dignity.

Even the allowing of persons to exercise their liberty wrongfully by deliber-

ately killing themselves—whether by refusal of treatment or by active suicide—is a respecting of their dignity. An individual's self-determination and individual wishes are allowed to control, which would be senseless if selfhood had no inherent worth. At the same time, to carefully avoid injustice to anyone and to refuse to impose upon noncompetent persons the judgment of others that they would be better off dead also is to respect their dignity: They are viewed as unique persons, not merely as suffering animals.

In many ways the typical hospital situation infringes upon people's sense of dignity and self-respect. The individual becomes a mere case and a mere patient. Class distinctions vanish in the common dress of the hospital gown and the common misery of disease. Differences between human beings and animals are less important in certain respects than what all sentient creatures have in common. In any case, what persons have in common with animals becomes manifest, often embarrassingly so, and cannot be ignored.

Intense pain is a great equalizer; one's animality takes over and dominates one's consciousness and behavior. Helplessness humiliates; the impatient patient would like to take charge and do something. And many hospital situations add further insults by failing to provide privacy for the carrying on of baser functions, by failing to listen to patients and to inform them about their own condition and prospects, by using cases as material for clinical study and instruction, by subordinating many aspects of the unique personality of each patient to the overriding demands of technically efficient treatment.[101]

The dying patient usually undergoes all of these experiences which take away one's sense of dignity.[102] Those observing dying patients—especially those not emotionally absorbed, who can gaze upon the dying with personal detachment—are intensely conscious of the loss of dignity. (Those who are more personally involved are more concerned about the life and health than about the dignity of the patient.) The observer says: How pitiable is a man or woman dying! And the thought is colored by unavoidable anxiety: And I too shall suffer this indignity.

As long ago as the ancient Stoics, at least, it was considered appropriate to commit suicide in order to avoid loss of dignity. The conception of the suicide of honor in many cultures, especially in military castes, is closely related to this view. Undoubtedly, a voluntary and quick death can prevent indignity.

But there remains the question whether it makes sense to die in order to protect this sort of dignity. There also is a manifestation of dignity in accepting suffering with courage and patience, in maintaining one's uniqueness against the power of suffering and death. Suffering and death is a challenge most people must face sooner or later; dealing with this challenge in a properly human and uniquely personal style can be a triumph which protects and manifests the genuineness and depth of one's dignity. A person with great self-respect grounded not upon superficial appearances of excellence but

upon real and unalienable specifically human and uniquely personal worth will not be unduly humiliated by a recalcitrant organism.[103]

In recent years a number of authors have studied dying with a view to improving the care of persons who are dying rather than with a view to hastening death. Their work points to some simple and obvious truths: Dying persons need and can benefit only from care which is appropriate to them both insofar as they are persons and insofar as they are dying.[104] Psychological help for dying patients and their families and the use of special techniques such as hypnotherapy have received more attention.[105]

But by far the most hopeful development has been the establishment and success of care facilities specially dedicated to appropriate care for dying persons. One of the most outstanding of such facilities is St. Christopher's Hospice in London, whose medical director, Dr. Cicely Saunders, has provided a model of what care which respects fully the dignity of the dying can and ought to be.[106] Lord Raglan, sponsor of the euthanasia bill debated in the British House of Lords in 1969, had recently visited St. Christopher's, and he admitted in the debate, "It might be said that if everyone could spend his last days in such surroundings there would be no need for this Bill."[107] But he observed that there are not enough such places, and that some people would prefer a quick death even to dying with excellent care.

What is so different about a hospice? Its first principle is that the patient is a person. Dying persons must be listened to, and what they wish to know must be told them with gentle honesty. Personal tastes, needs, and interests must be catered for. And persons are not merely patients; they can participate in care, can help to make a valuable community. Community is prior to technology. Visiting takes place freely; families come to help. Patients can come and go, visit home if they are able, and return when they wish. The routines and rules and disciplines of an ordinary hospital or even an ordinary nursing home are mostly ignored.[108]

Secondly, a dying person is dying. Hence no irrelevant and meddlesome treatment is given. But alcohol and pain relievers flow freely. The hospices have made great progress comforting the dying; their work has made clear that the dilemma either of dying in a drugged stupor from a finally fatal dose of morphine or of dying in misery is a false one. Patients can be made comfortable while being kept functional.[109] Moreover, drugs are used freely not only to block pain but also to improve the patient's mood and to treat symptoms. Those who provide care in a hospice never take the attitude that a case is hopeless and there is nothing to be done. Every dying patient has the hope of a "fair and easy passage."

But, thirdly, perhaps the greatest work of the hospices has been in dealing with the psychological, social, and spiritual suffering which is unavoidable when one is dying. Care requires presence and contact; patients are not

allowed to suffer and die alone, without human touch and a compassionate presence. Cooperation with the family helps the social aspects. The dedication and commitment to the dignity of dying patients of all who participate in care, the belief that each dying person is irreplaceable, and the assumption that living, even while dying, can be and ought to be good and meaningful mitigate suffering in these other human aspects.

The evidence of what has been accomplished already in developing good care for the dying is so impressive that anyone who examines it is likely to be convinced that there certainly can be dignity in dying without voluntary active euthanasia. If the legalization of voluntary active euthanasia is to be rejected in the interest of protecting the lives and respecting the liberty of members of society who do not wish to be killed and to kill, then this alternative to death by active euthanasia must be promoted. Indeed, it seems to us, there is some duty of society to make available to all quality palliative care.

There are several aspects of terminal care which could be helped by public action. First, grants could be distributed in a way which would encourage research and education in the more effective alleviation not only of pain but also of various forms of discomfort and inconvenience suffered by dying patients. Second, public and private health-care programs could be amended to encourage care for the dying at home or in facilities especially dedicated to such care. Third, a special program of subsidies for the establishment of hospices or palliative-care units could be designed, in order that examples of such facilities would be available in more places. Fourth, public health programs could provide seminars and special courses to retrain physicians and nurses for better care of the dying even in ordinary hospitals.[110]

There is no necessity that any person die in misery, deprived of human dignity. To recognize the evil that this happens in some cases is to manifest human sensitivity and compassion. To press for active voluntary euthanasia as a solution to the problem is to adopt the technically easiest and most efficient solution, the solution most in line with those aspects of health administration and medical practice which least comport with the dignity of persons. To provide appropriate and excellent care for the dying is to respect fully not only the dignity of those who are terminally ill but also the dignity of all of their brothers and sisters who must someday join them in death, but who are in no hurry to do so by someone mistakenly or maliciously administering "death with dignity."[111]