Euthanasia: A Comparison of the Criminal Laws of Germany, Switzerland and the United States

I. INTRODUCTION

Euthanasia, a subject that has long been a dilemma for medical ethics, has received more attention in the last decade than ever before in the United States.[1] Today, the number of situations in which euthanasia is seriously considered has increased because of developments in medical technology.[2] Individuals who a few years ago would have died now may sustain their lives through medical technology. An illustration of this trend is the situation where a patient with a terminal disease wants to end his suffering and die. Physicians believe the patient has weeks, maybe days, to live.[3] This situation could pose a problem if the individual would rather not have his life sustained by medical technology. Euthanasia provides one resolution to this problem.[4]

Under the current state of the law in the United States euthanasia is a crime of willful homicide.[5] Despite the criminality of the act, physicians continue to practice euthanasia.[6] Therefore, ordinarily law-abiding U.S. citizens are ignor-

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1. *See* Ostheimer, *The Polls: Changing Attitudes Toward Euthanasia,* 49 PUB. OPINION Q. 123 (1980) [hereinafter cited as Ostheimer]. Groups concerned with euthanasia have increased enormously in members and subscription in the past ten years. In twelve years, concern for Dying, a pro-euthanasia organization, has expanded its mailing list from 10,000 in 1967 to 160,000 in 1979. The Euthanasia Educational Council grew from 600 members to more than 30,000 from 1969 to 1974. *Id.*

2. *See* Bellegie, *Medical Technology As It Exists Today,* 27 BAYLOR L. REV. 31 (1975) [hereinafter cited as Bellegie]. *See generally* Ufford, *Brain Death,* 19 WASHBURN L.J. 225 (1980) [hereinafter cited as Ufford]. These developments include heart-lung machines, pacemakers, respirators, AMI Bennett machine (controls the flow of oxygen and CO_2), cribs (controls the body temperature), and hemodialysis machines and monitors.

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

4. *See* Ostheimer, *supra* note 1, at 123. For a definition and discussion of euthanasia, *see* § II *infra.*

5. *See* Collester, *Death, Dying and the Law: A Prosecutorial View of the Quinlan Case,* 30 RUTGERS L. REV. 304 (1977); *see also* Kamisar, *Some Non-Religious Views Against Proposed "Mercy Killing" Legislation,* 42 MINN. L. REV. 969 (1958) [hereinafter cited as Kamisar]; R. PERKINS, CRIMINAL LAW 86 (2d ed. 1969); F. WHARTON, WHARTON'S CRIMINAL LAW §§ 137-70 (14th ed. 1979) [hereinafter cited as WHARTON'S CRIMINAL LAW]. For a discussion of the criminal law in euthanasia, *see generally* Survey, *Euthanasia: Criminal, Tort, Constitutional and Legislative Considerations,* 48 NOTRE DAME LAW. 1202 (1973); Foreman, *The Physician's Criminal Liability for the Practice of Euthanasia,* 27 BAYLOR L. REV. 54 (1975) [hereinafter cited as Foreman]. In criminal law "willful homicide" is murder when the actor intended to kill, *i.e.,* he desired to cause the death of another. WHARTON'S CRIMINAL LAW, *supra* § 137. Acting "purposely" or "willfully" is usually equivalent to acting intentionally. *Id.* Thus if A has an intent to kill B and fires a gun at B desiring to cause his death, and B is actually killed, A would be guilty of willful homicide since A intended to kill B. *Id.*

6. Levinsohn, *Voluntary Mercy Death,* 8 J. FORENSIC MED. 57 (1961) [hereinafter cited as Levinsohn]. Mr. Levinsohn sent a questionnaire to more than 250 Chicago internists and surgeons, and 156 replied. When asked "In your opinion do physicians actually practice euthanasia in instances of incurable adult

ing a criminal law; this result creates a problem for the American criminal justice system. The solution to this problem may lie in the consideration of the penal codes of Germany and Switzerland.[7] Germany and Switzerland are two nations which have express provisions in their penal codes[8] that might mitigate the sentence of an individual who has practiced euthanasia.[9] These countries consider motive an integral element in determining culpability for a crime.[10] The motive of an act may be an index to the probability of recidivism for certain harms the law desires to prevent.[11]

This Comment investigates the criminal law relevant to euthanasia as that law now exists in Germany, Switzerland and the United States. Because of the many misconceptions concerning the term "euthanasia," the author briefly describes the origins, definitions and controversies regarding the term. Commentators use two sets of criteria in defining most acts of euthanasia. First, euthanasia might be active or passive.[12] Second, it can be voluntary or involuntary.[13] Because some commentators would assign greater guilt to some types of mercy killing than to others, the author discusses the distinctions between voluntary and involuntary and between active and passive.

Under current U.S. criminal law, euthanasia is a felony.[14] In some states, euthanasia is equated with the crime of assistance in suicide.[15] This Comment examines some of the underlying reasons why euthanasia remains a crime in the United States. The author also explores the comparison between euthanasia and the crime of assistance in suicide.

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sufferers?" 61% answered in the affirmative. Levinsohn adds that "many doctors are guilty of murder today, at least to the extent that they fail to administer every known medical means to prolong life in specific instances." *Id.* at 68. *See also* Fletcher, *Prolonging Life*, 42 WASH. L. REV. 499 (1967) [hereinafter cited as Fletcher]; B. SHARTEL & M. PLANT, THE LAW OF MEDICAL PRACTICE § 371 (1959).

7. For authorities on criminal law in these countries, *see generally* A. SCHOENKE, STRAFGESETZBUCH KOMMENTAR 565 (6th rev. ed. 1952) (Germany) [hereinafter cited as SCHOENKE]; E. HAFTER, LEHRBUCH DES SCHWEIZERISCHEN STRAFRECHTS ALLGMEINER TEIL 352 (2d ed. 1946) (Switzerland); C. STOOSS, SCHWEIZERISCHES, STRAFGESETZBUCH, VORENTWURF MIT MOTIVEN (1894) (Switzerland) [hereinafter cited as STOOSS]; E. HAFTER, SCHWEIZERISCHES STRAFRECHT 15 (1943) (Switzerland).

8. (a) Germany — Strafgesetzbuch (StGB) (German Penal Code); (b) Switzerland — Schweizeriches Strafgesetzbuch (Swiss Penal Code) [hereinafter cited as Sw. STGB].

9. *See* § IV. B & C *infra* for a discussion of StGB §§ 211-213, 216 and Sw. STGB arts. 63-64, 111-112, 114.

10. StGB §§ 211-212; Sw. STGB arts. 63-64, 111-112.

11. *See* Hitchler, *Motive As An Essential Element of Crime*, 35 DICK. L. REV. 105, 110 (1931).

12. *See generally* Levin & Levin, *DNR: An Objectionable View of Euthanasia*, 49 U. CIN. L. REV. 567 (1980) [hereinafter cited as Levin].

13. *See generally* Morris, *Voluntary Euthanasia*, 45 WASH. L. REV. 239 (1970) [hereinafter cited as Morris].

14. *See generally* Kamisar, *supra* note 5, at 971.

15. Generally, assistance in suicide refers to a person who assists another in committing suicide. Sometimes the assistance may be supplying the deceased with the means of death or by killing him as part of a suicide pact. WHARTON'S CRIMINAL LAW, *supra* note 5, § 175. *See, e.g.*, McMahan v. State, 168 Ala. 70, 53 So. 89 (1910); Burnett v. People, 204 Ill. 208, 68 N.E. 505 (1903); Commonwealth v. Hicks, 118 Ky. 637, 82 S.W. 265 (1904); Commonwealth v. Bowen, 13 Mass. 356 (1816); People v. Roberts, 211 Mich. 187, 178 N.W. 690 (1920).

Germany and Switzerland may serve as models for the U.S. criminal law system because both countries avoid the problems of making law-abiding citizens, who practice euthanasia, criminals.[16] This Comment analyzes the penal codes of these two European nations, emphasizing the specific provisions that either mitigate the sentence or totally exculpate the actor who has practiced euthanasia. The author particularly focuses on the concepts of motive and "homicide upon request" in relation to euthanasia. Looking at the law in the United States, the author considers those states that have enacted "right to die" statutes and have accepted the legal validity of the "living will."[17] After comparing the criminal law in Germany, Switzerland and the United States, the author suggests that the incorporation of several German and Swiss penal code concepts with respect to euthanasia into American criminal law would be beneficial and equitable.

II. THE CONCEPT OF EUTHANASIA

A. *The Origin of the Controversy*

In recent years the controversial subject of euthanasia has received a considerable amount of public attention.[18] Today, with the advances in medical technology, death from disease is no longer simply *fait accompli*.[19] New medical discov-

16. *See* § III. B. 1 & 2 *infra*.

17. For a discussion of the concept of the living will and right to die statutes *see* § IV *infra*.

18. Ostheimer, *supra* note 1, at 123. A Gallup Poll taken during the 1930's revealed that most people at that time did not favor euthanasia for the hopelessly incurable. *Id.* at 125. However, the National Opinion Research Center conducted a poll in 1978 which revealed an amazing turnaround. It revealed that approximately 60% of the nation's population favored physicians ending the life of an incurably ill patient if the patient and his family requested it. *Id.* at 128.

19. *See* SOCIETY FOR THE RIGHT TO DIE, 1981 HANDBOOK 6-7 (1981) [hereinafter cited as SOCIETY]. For 200 years legal and medical practitioners believed that life existed as long as breathing continued and the heart beat. *Id.* at 6. Modern technology, however, has made possible the continuation of cardiac and respiratory systems to be active while the brain has ceased to function. *Id.* The current trend has been to define death as the irreversible loss of brain function. *Id.* at 7. In May, 1980, the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research met with representatives of the American Bar Association, American Medical Association and the National Conference of Commissioners on Uniform State Laws to arrive at the following proposed Uniform Determination of Death Act: "An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead." *Id.* Thus far, 26 states have accepted the brain death standard in their legislation: ALA. CODE § 31-1 (1979); ALASKA STAT. § 09.65.120 (1979); ARK. STAT. ANN. § 82-537 (1979); CAL. HEALTH & SAFETY CODE § 7180 (West 1980); 1979 Conn. Acts 556 (Reg. Sess.); 1980 Fla. Laws 80.216; GA. CODE ANN. § 88-1715.1 (1979); HAWAII REV. STAT. § 327 C-1 (1978); IDAHO CODE § 54-1819 (1979); ILL. ANN. STAT. ch. 110½, § 302 (b) (Smith-Hurd 1979); IOWA CODE ANN. § 702.8 (West 1980); KAN. STAT. ANN. § 77-202 (1979); LA. REV. STAT. ANN. § 9:111 (West 1980); MD. ANN. CODE art. 43, § 54F (1980); MICH. COMP. LAWS ANN. § 333.102 (1980-1981); MONT. CODE ANN. § 50-22-101 (1979); NEV. REV. STAT. § 451.007 (1979); N.M. STAT. ANN. § 12-2-4 (1978); N.C. GEN. STAT. § 90-323 (1979); OKLA. STAT. ANN. tit. 63, § 1-301 (g) (1979-1980); OR. REV. STAT. § 146-001 (1979); PA. CODE ANN. § 53-459 (1979); TEX. REV. CIV. STAT. ANN. art. 4447t. (Vernon 1980); VA. CODE § 54-325.5 (1979); W. VA. CODE § 16-19-1 (c) (1979); WYO. STAT. § 35-19-101 (1980).

eries continually enhance a doctor's ability to prolong life.[20] Individuals who a few years ago would have died due to particular medical circumstances may now have their lives artificially sustained even though their suffering would lead them to choose not to prolong their lives. In a situation where life is not the individual's choice, euthanasia becomes a relevant issue.

The term "euthanasia" is of Greek origin. It is comprised of the Greek words "eu" and "thanatos"; "eu" meaning painless, pleasant and easy, "thanatos" meaning death.[21] Thus, euthanasia literally means an easy, painless death.[22] In practice, the act of euthanasia involves the merciful "act or practice of painlessly putting to death persons' suffering from (an) incurable and distressing disease."[23] Some observers argue that if the practice of euthanasia were legal, physicians would exercise their medical judgment in an unrestrained fashion, increasing the possibility of abuse of discretion in relation to a very serious matter — life or death.[24] In contrast to this opinion, other observers believe that the maintaining of an incurably ill patient and the prolongation of that individual's suffering is far more offensive than allowing a patient to die peacefully.[25] Such authorities believe that the prolongation of treatment is far more cruel than a beneficient death.[26]

B. *The Voluntary-Involuntary Distinction*

One distinctive feature in a discussion of euthanasia is the presence or absence of the patient's consent.[27] Euthanasia is voluntary when a patient or his family

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Arizona, Colorado, Massachusetts and New York have adopted the brain death standard by court decision: State v. Fierro, 124 Ariz. 182, 603 P.2d 74 (1979); Lovato v. District Ct., 198 Colo. 419, 601 P.2d 1072 (1979); Commonwealth v. Golston, 373 Mass. 249, 366 N.E.2d 744 (1978); New York City Health & Hospital Corp. v. Sulsona, 81 Misc.2d 1002, 367 N.Y.S.2d 686 (N.Y. Sup. Ct. 1975). *See generally* Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death, *A Definition of Irreversible Coma,* 205 J.A.M.A. 337 (1968); Levin, *supra* note 12; Ufford, *supra* note 2, at 255.

20. Fletcher, *supra* note 6, at 999.

21. Scher, *Legal Aspect of Euthanasia,* 36 ALB. L. REV. 674 (1972) [hereinafter cited as Scher]. The term euthanasia appeared in the English language in the early seventeenth century, when it meant the theory that in certain circumstances a person should be painlessly terminated. More recently euthanasia means the act or practice of bringing about a gentle and easy death. *See generally* J. FLETCHER, MORALS AND MEDICINE 172-73 (1954).

22. *See* Scher, *supra* note 21, at 674.

23. BLACK'S LAW DICTIONARY 497 (rev. 5th ed. 1979).

24. *See generally* Kamisar, *supra* note 5; Chesterton, *Euthanasia and Murder,* 8 AM. REV. 486 (1937); Miller, *Why I Oppose Mercy Killings,* WOMEN'S HOME COMPANION, June 1950, at 38 [hereinafter cited as Miller]; Walsh, *Life is Sacred,* 94 FORUM 333 (1935); Gumpert, *A False Mercy,* 170 NATION 80 (1950); Morris, *supra* note 13.

25. *See* G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW (1956); Russell, Book Review, 10 STAN. L. REV. 382 (1958) (reviewing G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW (1956)); Scher, *supra* note 21.

26. Beneficient death is defined as a peaceful, calm death. Scher, *supra* note 21, at 674.

27. *See generally* Montange, *Informed Consent and the Dying Patient,* 83 YALE L.J. 1632 (1974) [hereinafter cited as Montange]; Plante, *An Analysis of "Informed Consent,"* 36 FORDHAM L. REV. 639 (1968).

consents to the practice.[28] Recent cases have implicitly accepted voluntary euthanasia by recognizing a patient's right to refuse medical care.[29] The Massachusetts court in *Superintendent of Belchertown State School v. Saikewicz*[30] stated that:

> The constitutional right to privacy . . . is an expression of the sanctity of individual freedom of choice and self determination as fundamental constituents of life. The value of life so perceived is not lessened by a decision to refuse treatment but the failure to allow a competent human being the right of choice.[31]

In contrast to voluntary euthanasia, involuntary euthanasia usually occurs when a patient's consent was not obtained or was unobtainable.[32] For example,

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28. *See* Morris, *supra* note 13. Morris proposed that the

> word *voluntary* . . . specifically applies to the right of an adult person who is in command of his faculties to have his life ended by a physician, pursuant to his own intelligent request, under specific conditions prescribed by law, and by painless means. Thus, voluntary euthanasia involves at least two willing persons — a doctor and a patient.

Id. at 245. (Italics in original.) Morris's proposal seems similar to the "living will," discussed in § V *infra*. Chicago's famous *Waskin's* case illustrates voluntary euthanasia. The case involved a 23 year old college student who shot his mother three times in the head. Waskins' mother was suffering from terminal leukemia and had pleaded with her son to kill her. She herself had attempted suicide by taking sleeping pills. Three days later after she had made the request for death, at a time when she was in severe, deep pain, her son shot her. The son admitted to having killed his mother and was arrested and charged with murder. However, the jury took approximately 40 minutes to find young Waskin not guilty by reason of insanity. Chicago Tribune, Aug. 9, 1967, at 1, col. 8.

29. *See generally In re* Osborne, 294 A.2d 372 (D.C. 1972); Lane v. Candura, 6 Mass. App. Ct. 377, 376 N.E. 2d 1232 (1978); *In re* Quackenbush, Civil no. F-3-1483 (Morris County Ct. N.J. Jan. 13, 1978); *In re* Nemser, 51 Misc. 2d 616, 273 N.Y.S. 2d 705 (N.Y. Sup. Ct. 1962); *In re* Yetter, 62 Pa. D. & C. 2d 619 (C.P. Northampton County Ct. 1973).

A ruling by the Indiana Supreme Court allowed the parents of a severely retarded infant (Down's Syndrome) to order feedings withheld from the week-old infant. The parents also decided to forego an operation to correct a deformity in the child's esophagus. The child subsequently died. Boston Globe, Apr. 16, 1982, at 7, col. 1.

30. 373 Mass. 728, 742, 370 N.E.2d 417, 426 (1977). The Supreme Judicial Court upheld a patient's decision to decline life-prolonging medical treatment on the grounds of the patient's right to privacy and self-determination. The case involved a 67 year old man (Saikewicz) suffering from leukemia, with an I.Q. of 10 and a mental age of approximately two years old, who was in urgent need of medical treatment but was unable to give informed consent for such treatment. The Belchertown State School, where Saikewicz was a resident, petitioned for a guardian ad litem with authority to make the necessary decisions concerning the care and treatment of the resident. The probate court appointed a guardian ad litem, who then filed a report that Saikewicz's illness was an incurable one, and stated that treating Saikewicz would not be in his best interest. *Id.* at 742, 370 N.E.2d at 426. *See also In re* Dinnerstein, 6 Mass. App. Ct. 466, 380 N.E.2d 134 (1978); *In re* Spring, 380 Mass. 629, 405 N.E.2d 115 (1980).

31. *Saikewicz*, 373 Mass. at 742, 370 N.E.2d at 426.

32. *See* Sanders, *Euthanasia: None Dare Call It Murder*, 60 J. CRIM. L., CRIMINOLOGY, AND POL. SCI. 351 (1969) [hereinafter cited as Sanders]. Thus far, no one has suggested that the act of involuntary euthanasia be legalized. The reason for this is that involuntary euthanasia may then be applied to anyone — without consent. This clearly would be an absolute right of death in a physician's hand. In cases involving involuntary euthanasia, juries have refused to allow the practice to go unpunished. *Id.* at 353. Some examples of cases that involved involuntary euthanasia are: (1) Louis Greenfield chloroformed his nine year old imbecile son. The young boy had the mentality of a two year old. Greenfield was indicted for first degree murder. At his trial Greenfield stated, "I did it because I loved

doctors might consider involuntary euthanasia when a patient, who has no relatives, lapses into a coma. However, U.S. courts have never accepted involuntary euthanasia.[33] In the example, no one legally could have granted permission to the attending physician to terminate the life of the patient, and the law has never permitted physicians to exercise their medical judgment in an unrestrained fashion.[34]

The prohibition on involuntary euthanasia is grounded in the conceptual theory of the doctrine of informed consent.[35] The doctrine of informed consent emerged from the cases involving medical malpractice. Under this doctrine, "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body. . . ."[36] In contrast, the touching of a patient's body without his valid consent is an intentional interference with a person or a battery.[37] In this case, a physician would be liable in tort.[38] The doctor is relieved of such liability only if the patient validly consents.[39] Informed consent involves two elements: (1) the patient must be given information on the risks involved in the treatment; and (2) he must assent to the treatment. If a patient is unable to assent to the treatment himself, a relative[40] or guardian[41]

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him, it was the will of God." N.Y. Times, May 11, 1939, at 10, col. 2; (2) Louis Repouille had read about the *Greenfield* case and committed the same act. He administered chloroform to his 13 year old imbecile son, who had been blind for five years. Repouille was indicted for first degree manslaughter but convicted of second degree manslaughter and freed on suspended sentence. N.Y. Times, Dec. 25, 1941, at 44, col. 1; (3) John Noxon was charged with murder of the first degree when he killed his six month old mongoloid son through electrocution. He was convicted and spent four years in prison before parole. N.Y. Times, Jan. 4, 1949, at 16, col. 3; Commonwealth v. Noxon, 319 Mass. 495, 66 N.E.2d 814 (1946); (4) Harry Johnson asphyxiated his cancer-stricken wife. A grand jury refused to indict him after a psychiatrist testified that he was "temporarily insane." N.Y. Times, Oct. 12, 1938, at 30, col. 4; (5) Carol Ann Paget murdered her father while he was still under anesthesia following exploratory surgery in which cancer of the stomach was found. She was released on the grounds of "temporary insanity." N.Y. Times, Feb. 8, 1950, at 1, col. 2; (6) Harold Mohr was sentenced to three years after he murdered his blind, cancer-stricken brother. Testimony showed that his brother had requested to die. N.Y. Times, Apr. 8, 1950, at 26, col. 1.

33. *See* cases discussed in note 32 *supra*. Courts have tended to show general opposition to this practice and have attempted to dissuade others from a similar practice. Juries might prefer to stigmatize the actor, who has committed involuntary euthanasia, and perhaps give him some minimal punishment. Sanders, *supra* note 32, at 356.

34. *See* Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life*. 26 RUTGERS L. REV. 228, 250 (1973).

35. *See* Pratt v. Davis, 118 Ill. App. 161, 79 N.E. 512 (1906).

36. *See* Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92 (1914), *rev'd on other grounds*, 2 N.Y.2d 656, 163 N.Y.S.2d 3, 143 N.E.2d 3 (1957). "The patient's right to an informed consent makes no sense without a right to an informed refusal." Montange, *supra* note 27, at 1648.

37. *See* Montange, *supra* note 37. The intentional touching need not be malicious. "Rather, it is an intent to bring about a result which will invade the interests of another in a way that the law will not sanction." W. PROSSER, HANDBOOK OF THE LAW OF TORTS 31 (4th ed. 1971) [hereinafter cited as PROSSER].

38. *See* PROSSER, *supra* note 37, at 31-34.

39. *Id.*

40. *Id.*

41. *Id.*

may assent on his behalf. If no such relative or guardian exists, the physician may not act, unless treatment is an emergency.[42] Therefore, a patient's right to self-determination overshadows the physician's medical evaluation.[43] A physician may terminate life-sustaining treatment for a patient given the requisite consent by the patient or his family. However, absent this consent, a physician independently may not practice involuntary euthanasia and end medical efforts to prolong a human life.[44]

C. *The Passive-Active Distinction*

Legal and medical authorities have defined another distinction regarding the concept of euthanasia — passive and active.[45] Passive euthanasia is the act of withdrawing life-sustaining apparatus from a terminally ill patient.[46] Active euthanasia is the direct act of rendering a life-shortening agent to a patient.[47] Many commentators have questioned the distinction between active and passive euthanasia.[48] These commentators argue that both passive and active euthanasia result in death, and that no real distinction is necessary since the outcome is

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42. *Id.* This is known as implied consent. It is reasonable to assume that, if the patient were conscious and comprehended the situation, he would consent. *Id.* Since euthanasia does not involve an emergency situation, discussion of this exception is unnecessary in this context.

43. *Id.*

44. *See* Montange, *supra* note 27, at 1649.

45. *See* Levin, *supra* note 12, at 572. *See also* Cannon, *The Right to Die,* 7 HOUS. L. REV. 654 (1970). [hereinafter cited as Cannon]. Authorities have defined these concepts as an omission or commission of an act. Omission or passive euthanasia occurs when a person wishes to die and informs the physician that the physician should not begin lifesaving medical treatment such as respiration or other devices. This concept is known as a nonfeasance. Nonfeasance is the passive inaction or failure to take certain steps to benefit another. PROSSER, *supra* note 37, at 339. Generally, those who permit harm to occur do not bear responsibility for the harm because the law imposes no general affirmative duty to render assistance. *Id.* at 340. However, a physician-patient relationship would create a duty to render assistance. *Id. See generally* L.S. Ayres & Co. v. Hicks, 220 Ind. 86, 89, 40 N.E.2d 334, 337 (1942); H. R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N. E. 896 (1928). Under the law an act of commission to end the life of another human being is illegal, active euthanasia. Courts view this affirmative act as murder. Cannon, *supra,* at 657; Levin, *supra* note 12, at 573-74. For cases involving active euthanasia, *see* note 32 *supra.*

46. *See generally* Cannon, *supra* note 45, at 657; Levin, *supra* note 12, at 573. Prosser notes, however, that the drawing of a clear line between acts and omissions is difficult. PROSSER, *supra* note 37, at 340.

47. *See* Levin, *supra* note 12, at 568. Some of these life shortening agents are air, potassium chloride or heavy, lethal doses of narcotics, such as morphine.

48. *Hearings on Death with Dignity Before the Senate Special Committee on Aging,* 92d Cong., 2d Sess. 69 (1972) (statement of Warren T. Reich, Senior Research Scholar, Kennedy Center for Bioethics) [hereinafter cited as 1972 *Hearings*]. The difference between active and passive euthanasia is that "a physician may not take a life [active euthanasia], but he does not have to preserve it in all circumstances [passive euthanasia]." *Id. See also* Beau, *Legislation et droit a la mort,* Le Monde, Sept. 22, 1977, at 16, col. 3 [hereinafter cited as Beau], *quoting* Prof. Louis Vincent-Thomas, a Sorbonne sociologist who suggests putting "an end to the dual absurdity between active and passive euthanasia: there is no difference between dying by a poison innoculation or by dying through a withdrawal of life support mechanisms." *Id.*

identical.[49] However, other commentators argue that the distinction between active and passive euthanasia is vital because the manner in which the patient dies is the controlling factor.[50] This argument states that an actor is less culpable if he fails to act than if he directly caused death by rendering a death-inducing agent.[51]

Commentators assert that active euthanasia as an intentional act, which is the direct cause of death, raises more serious issues and requires careful restrictions, if not unconditional prohibition.[52] According to this view, active euthanasia is equivalent to murder because of the intent to kill.[53] Likewise, this position considers passive euthanasia to be less reprehensible than active euthanasia[54] because it is the result of an omission rather than a positive act. Several noted philosophers question the validity of differentiating between an act and an omission. To these scholars, the failure to act itself constitutes an act. Therefore, they would argue the distinction between active and passive euthanasia is specious.[55] These commentators, without examining the moral aspects raised by passive euthanasia, merely assert that the distinction between active and passive euthanasia, alone, is enough to justify the legalization of passive euthanasia.

III. THE TREATMENT OF EUTHANASIA IN GERMANY, SWITZERLAND AND THE UNITED STATES

A. *The Present State of the Law in the United States*

American criminal law currently considers euthanasia to be willful homicide.[56] If an individual performs a voluntary termination of an incurably ill or a suffering human being, even with an altruistic motive, he acts with premeditation and deliberation.[57] Under the present U.S. system of jurisprudence, this

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49. *See 1972 Hearings, supra* note 48, at 69; Beau, *supra* note 48, *quoting* Louis Vincent-Thomas.

50. *See 1972 Hearings, supra* note 48, at 70. Senior Research Scholar, at the Kennedy Center for Bioethics Prof. Reich stated:

> The ethical distinction between active euthanasia and passive euthanasia or between euthanasia and benemortasia, is a significant one even though the difference between permitting death . . . and directly causing death . . . is not always a convincing one. To stop dialysis, to turn off a respirator or to withdraw intravenous feeding may seem to be active, death-inducing actions. . . . But it does make a difference how a person engages himself in causing a death.

Id. See also Fletcher, *supra* note 6, at 1005.

51. *See* Levin, *supra* note 12, at 573.

52. *See id.* at 573-75.

53. For a discussion of cases on active euthanasia *see* note 75 *infra*.

54. Fletcher, *supra* note 6, at 999-1000.

55. *Id.* at 1005-14.

56. *See* WHARTON'S CRIMINAL LAW, *supra* note 5, §§ 137-70; Foreman, *supra* note 5, at 54. *See also* People v. Conley, 64 Cal. 2d 310, 49 Cal. Rptr. 815, 411 P.2d 911 (1966).

57. *Conley*, 64 Cal. 2d at 322, 49 Cal. Rptr. at 822, 411 P.2d at 918.

constitutes murder in the first degree, the gravest type of homicide.[58] Murder is the unlawful homicide of an individual with malice aforethought.[59]

1. Motive

In euthanasia cases, the defendant's motive leads him to act compassionately and, thus, to end the suffering of an incurably ill patient. The American criminal justice system, however, makes no provision for the consideration of motive as an element of homicide.[60] Presently, American criminal law does not accept the motive of mercy as a defense to murder.[61] The common law does not recognize motive as an element of crime.[62] "If the proved facts established that the defendant in fact did the killing willfully, that is, with intent to kill . . . and as the result of premeditation and deliberation, thereby implying preconsideration and determination, there is murder in the first degree, no matter what defendant's motive may have been. . . ."[63]

Although the statutory law condemns all mercy killings,[64] the law in practice is in direct opposition to the law in theory.[65] When euthanasia occurs, "the law in action is as malleable as the law on the books is uncompromising."[66] The high frequency of failures to indict by prosecutors and grand juries supports this conclusion.[67] Only two physicians have been indicted for murder after practicing euthanasia and both were acquitted.[68] One reason for the lack of criminal prosecution is that, after consenting to euthanasia, the deceased person's family generally is unwilling to cooperate with the prosecutor.[69] Another reason for the lack of prosecution may be that juries are reluctant to deliver guilty verdicts

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58. *See* WHARTON'S CRIMINAL LAW, *supra* note 5, §§ 137-70.

59. *Id.*

60. *See* W. LA FAVE & A. SCOTT, CRIMINAL LAW 204 (1972) [hereinafter cited as LAFAVE & SCOTT].

61. *Conley*, 64 Cal. 2d at 322, 49 Cal. Rptr. at 822, 411 P.2d at 918.

62. LA FAVE & SCOTT, *supra* note 60, at 204.

63. State v. Ehlers, 98 N.J. L. 236, 238, 119 A. 15, 17 (1922). *See also* Kutner, *Euthanasia: One Process for Death with Dignity, Living Will*, 54 IND. L.J. 201, 206 (1979) [hereinafter cited as Kutner].

64. Kamisar, *supra* note 5, at 971.

65. *Id.*

66. *Id.*

67. For a discussion of cases dealing with euthanasia, *see* note 32 *supra*.

68. *See* Levin, *supra* note 12, at 575. (1) In 1950, Dr. Hermann Sander was indicted for murder for injecting air into the vein of a terminally ill patient. The patient subsequently died from this action. N.Y. Times, Mar. 7, 1950, at 1, col. 1; (2) In 1974, Dr. Vincent Montemarano injected a death-inducing agent, potassium chloride, into the body of a cancer-stricken patient. He, too, was indicted for homicide. N.Y. Times, Feb. 6, 1974, at 1, col. 1. *See also* Culliton, *The Haemmerli Affair: Is Passive Euthanasia Murder?*, 190 SCIENCE 1271 (1975). This article discusses the case against a physician who committed passive euthanasia in Switzerland. The case raises some other aspects of euthanasia, *i.e.*, politics. Haemmerli was indicted for murder, but was later released for lack of evidence. *Id.* at 1275.

69. Robertson, *Involuntary Euthanasia of Defective Newborns: A Legal Analysis*, 27 STAN. L. REV. 213, 243 (1975) [hereinafter cited as Robertson]. Many of these people who have consented to euthanasia would also be criminally responsible for the death of the individual. Thus, they avoid liability by not cooperating with the prosecutor and still relieve the suffering of the individual. *Id.*

against laymen or physicians who have performed euthanasia out of kindness or sympathy for the deceased.[70] The low visibility[71] of the practice of euthanasia may also explain the lack of criminal prosecution. However, this result is more likely "due to the difficulty of proof."[72] "Without doctors, nurses and hospital authorities complying with reporting statutes, a district attorney has little chance to learn of the practice."[73]

Even in cases of laymen having practiced euthanasia, acquittals are numerous[74] and convictions are extremely rare.[75] In reality, U.S. courts recognize the mercy motive of the actor in euthanasia cases.[76] Nevertheless, this recognition has not altered the fact that courts technically treat euthanasia as homicide.[77] Regardless of its criminal nature, the practice of euthanasia continues.[78]

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70. *See* Sanders, *supra* note 32, at 351; *see, e.g.,* N.Y. Times, May 23, 1950, at 25, col. 4. (1) Eugene Braundorf murdered his daughter, a spastic incapable of speech, because he feared for her future should he die. He was found not guilty by reason of insanity. N.Y. Times, Dec. 24, 1953, at 20, col. 7; (2) Herman Nagle shot to death his 28 year old daughter who was afflicted with cerebral palsy. The jury deliberated for 20 minutes and acquitted Nagle on the ground of temporary insanity; (3) Woodrow Collums, 69, shot to death his terminally ill brother at a nursing home. Collums was sentenced to 10 years deferred judgment, later altered to 10 years probation. Associated Press, Mar. 5, 1982, PM cycle.

71. Low visibility basically means that no one, family or patient, complains to a district attorney after they have consented to euthanasia because the parties involved agree that they have taken the best course of action. Robertson, *supra* note 69, at 243. "Nor do district attorneys customarily read the medical journals in which these issues have been discussed. . . . On occasion a particular case is widely publicized." Publicity is rare. *Id.* at 243-44.

72. Montange, *supra* note 27, at 1662. Difficulty of proof results from the fact that the evidence necessary to convict an individual who has committed euthanasia is very well concealed in the deceased's body. Morphine is extremely difficult to detect.

73. Robertson, *supra* note 69, at 244.

74. *Id.*

75. (1) *See, e.g.,* Levin, *supra* note 12, *citing* Chicago Daily News, Aug. 10, 1967, at 1. William Reinecke, 84 years old, was charged with murder after strangling his 74 year old wife who suffered from terminal cancer. Reinecke was later placed on probation after the state's attorney said the defendant was no longer a threat to society. *Id.;* (2) Levin, *supra* note 12, *citing* Chicago Sun Times, Feb. 21, 1980, at 14. Paul Alden murdered his 39 year old wife who suffered from a progressive and irreversible brain disease which caused premature senility. Alden received five years probation. *Id.;* (3) In the case of *People v. Werner,* the defendant suffocated his hopelessly crippled, bedridden wife. Werner pleaded guilty to a charge of manslaughter. The court found him guilty but after testimony from his children and other showings of the great devotion defendant had for his wife, the court allowed the guilty plea to be withdrawn and a plea of not guilty entered. The court upheld the not guilty plea. Crim. No. 58-3636 Cook Co. Ct., Ill. Dec. 30, 1958. The transcript of this case may be found in Williams, *Euthanasia and Abortion,* 38 U. COLO. L. REV. 178, 184-86 (1966) [hereinafter cited as Williams]; (4) The *Suzanne van de Put* case received international attention. This Belgian case involved a woman and four of her relatives who were tried for the murder of her eight day old thalidomide-deformed baby daughter. The jury acquitted all five defendants because the actors had acted with unselfish motives. Life, Aug. 10, 1962, at 34-35.

76. The court in People v. Conley, 64 Cal. 2d 310, 322, 49 Cal. Rptr. 815, 822, 411 P.2d 911, 918 (1966) stated that: "Thus, one who commits euthanasia bears no ill will toward his victim and believes his act is morally justified, but he nonetheless acts with malice if he is able to comprehend that society prohibits his act regardless of his personal belief." *Id.*

77. *Id.*

78. *See* Levinsohn, *supra* note 6, at 68.

2. Bases for the Continued Criminalization of Euthanasia

One reason that euthanasia is a crime in the United States is a belief that legalized euthanasia would result in mass euthanasia and, in time, genocide.[79]

> Opponents submit that the creation of the right to choose an easy death under certain circumstances will weaken the psychological and moral fabric of society by reducing the absolute value placed on human life, and that it will eventually lead to the acceptance of the idea that others may have the right to choose death for an individual under certain circumstances.[80]

Some opponents of legalized euthanasia do not challenge the right of the individual to choose an easy death; rather these opponents object to the creation, in another, of a legal right of execution.[81] Thus, these opponents would allow a patient the right to die, but would not grant a physician the right to terminate that patient's life.[82] These same opponents have further argued that the abuse of euthanasia legislation may lead ultimately to the elimination of the aged and the congenitally defective.[83] The Nazi experience in Germany supports this theory.[84]

The Nazi regime operated under a theory that advocated the destruction of an individual who was useless to society in order to relieve society of a burden.[85]

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79. Kutner, *supra* note 63, at 220. Regarding the Nazi practice of euthanasia, *see* A. MITSCHERLICH & F. MIELKE, DAS DIKTAT DER MENSCHENVARACHTUNG (1947). *See also* Judgment of the International Tribunal, in 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, Proceedings of Sept. 30, 1946 at 490-91, and Proceedings of Oct. 1, 1946 at 546-47, *cited in* Silving, *Euthanasia: A Study in Comparative Criminal Law,* 103 U. PA. L. REV. 350, 356 (1953) [hereinafter cited as Silving].

Victor Brack, the Chief Administrative Officer in Hitler's private chancellory, testified that the German Nazis first applied euthanasia as a blessing only for true Germans and the Nazis excluded German Jews from the program. 1 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBURG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW, No. 10, 877-80 (1950), *cited in* Kamisar, *supra* note 5, at 1033. For a discussion on euthanasia and the Nazi experience and usage of genocide, *see* Koessler, *Euthanasia in the Hadamar Sanatorium and International Law,* 43 J. CRIM. L., CRIMINOLOGY & POL. SCI. 735 (1953) [hereinafter cited as Koessler].

80. Sanders, *supra* note 32, at 354.

81. *Id. See also* Kamisar, *supra* note 5, at 1011.

82. *See* Sanders, *supra* note 32, at 354.

83. Kutner, *supra* note 63, at 220. *See also* Kamisar, *supra* note 5, at 1032.

84. Ivy, *Nazi War Crimes of a Medical Nature,* 139 J.A.M.A. 131, 142 (1952) [hereinafter cited as Ivy]. Ivy concludes that euthanasia was a major factor which led to "mass killing of the aged, the chronically ill, 'useless eaters' and the politically undesirable." *Id.* Alexander, *Medical Science Under Dictatorship,* 241 NEW ENG. MED. 39, 44 (1949). Both Drs. Leo Alexander and A. C. Ivy were expert medical advisors to the prosecution at the Nuremburg Trials. *Id.*

85. 1 TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, Nuremburg 1947, at 247, *cited in* Koessler, *supra* note 79, at 736. The International Military Tribunal in Nuremberg made this statement concerning this policy:

> Reference should also be made to the policy which was in existence in Germany by the summer of 1940, under which old-aged, insane, and incurable people, "useless eaters," were transferred to special institutions where they were killed, and their relatives informed that they had

Karl Binding[86] called this theory "destruction of a life not worth living."[87] Thus, the Nazis expanded the use of euthanasia from being a voluntary practice to include the "elimination of the mentally ill and defective, and finally as a rationale for genocide."[88] Some scholars theorize that the German public during the Nazi era never believed that the merciful act of euthanasia would be abused and utilized as a weapon to cause such a horrifying result. Opponents of legalized euthanasia argue that the Nazi experience could recur in the United States.[89] They worry that someday legalized euthanasia may undermine the American belief in the sanctity of life by increasing the possibilities for abuse by the medical profession.[90]

The risk of mistake[91] is another factor underlying arguments for maintaining criminal sanctions against persons who practice euthanasia.[92] Mistakes by a physician are always possible.[93] Opponents of legalized euthanasia contend that a physician's faulty diagnosis or prognosis may cause unwarranted death.[94] The risk of mistake encompasses not only the possibility of a mistake in the diagnosis of a patient's illness but also in the prognosis for recovery.[95] With respect to this latter issue, many physicians argue against legalized euthanasia because of the irreversibility of the act.[96] Major advancements in medical technology[97] create a

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died from natural causes. The victims were not confined to German citizens, but included foreign laborers, who were no longer able to work, and were therefore useless to the German war machine. It has been estimated that at least some 275,000 people were killed in this manner in nursing homes, hospitals, and asylums, which were under the jurisdiction of the defendant Frick, in his capacity as Minister of the Interior. How many foreign workers were included in this total it has been quite impossible to determine.

Id.

86. A. HOCHE & K. BINDING, DIE FREIGABE DER VERNICHTUNG LEBESUNWERTEN LEBENS (1920).

87. *Id.* This idea was not really an original one; men like Martin Luther believed in the same concept. *See generally* 8 TISCHREDEN No. 5207 (Clemen ed.).

88. Kutner, *supra* note 63, at 220.

89. Kamisar, *supra* note 5, at 1030-37; Ivy, *supra* note 84, at 132. Ivy states:

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

Id.

90. Kamisar, *supra* note 5, at 1030-37.

91. Risk of mistake incorporates the possibilities of a physician making an error in diagnosing or prognosing an illness. Laszlo, Colmer, Silver & Standard, *Errors in Diagnosis and Management of Cancer*, 33 ANNS. INT'L MED. 670 (1950) [hereinafter cited as Laszlo].

92. *See* Kamisar, *supra* note 5, at 1005.

93. *See* Miller, *supra* note 24, at 39.

94. Kamisar, *supra* note 5, at 1005-13.

95. *See* Laszlo, *supra* note 91, at 670.

96. *See* Wolbarst, *Legalize Euthanasia!*, 94 FORUM 330, 332 (1935). These physicians point out the fallibility of the profession. One commentator dramatized this point by using Dr. Richard Cabot as an example:

He was given the case records of two patients and asked to diagnose their illnesses. . . . The patients had died and only the hospital pathologist knew the exact diagnosis beyond doubt, for he had seen the descriptions of the post-mortem findings. Dr. Cabot, usually very accurate in

possibility that a cure or some measure of relief for a given ailment may come within the life expectancy of the patient.[98]

A further reason that legalized euthanasia has failed to gain strong approval in the United States is the attitude of society as a whole.[99] In some respects, the American public is uneasy with the subject of death.[100] Funeral parlors attempt to make the deceased appear as life-like as possible.[101] Americans center their lives around the young and living.[102] This death denying attitude is manifest in the criminalization of euthanasia.[103] By criminalizing the act, society has avoided the discomfort associated with the acknowledgement of death.

3. Assistance In Suicide

The continuing opposition to legalized euthanasia emanates from the fact that opponents equate the practice with the crime of assistance in suicide.[104] These opponents believe that legalized voluntary euthanasia would result in "suicide by proxy."[105] Under English common law, suicide has always been a criminal offense.[106] Following common law tradition, some U.S. states still consider at-

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his diagnosis, that day missed both. The chief pathologist who had selected the cases had purposely chosen two of the most deceptive cases to remind the medical students and young physicians even at the end of a long and rich experience one of the greatest diagnosticians [Cabot] of our time was still not infallible.

Miller, *supra* note 24, at 39.

97. *See* note 2 *supra.*

98. *Pro & Con: Shall We Legalize "Mercy Killing?,"* READERS DIG., Nov. 1938, at 94-96. Dr. James states: "It must be little comfort to a man slowly coming apart from multiple sclerosis to think that, fifteen years from now, death might not be his only hope." *Id.* at 94.

99. E. KÜBLER-ROSS, ON DEATH AND DYING (1969). (Dr.) K.-Ross relates that

"when I was a child, people [in Switzerland] used to be born at home and often died at home. Dying patients were not very often institutionalized. This did not make dying easier for the dying patient, but I think most important of all, it helped the children and grandchildren to learn that death is part of life. . . ."

1972 Hearings, supra note 48, at 10. (Dr.) K.-Ross has outlined her book ON DEATH AND DYING into stages, ranging from acceptance, where the individual has accepted the faith of impending death, to resignation, where the patient resigns and becomes depressed. *See 1972 Hearings, supra* note 48, at 11.

100. P. ARIES, THE HOUR OF OUR DEATH (1980).

101. *Id. See also 1972 Hearings, supra* note 48, at 13.

102. Wellborn, *Death in America: No Longer a Hidden Subject,* U.S. NEWS & WORLD REP., Nov. 13, 1978, at 67-70. The author states that:

Americans emphasize youth, beauty and physical fitness. Fewer than 25% have wills, and many seem to consider death an embarrassment that should not be discussed openly. This country is a leader in the use of heroic medical efforts to preserve life, and commonly isolates terminal patients in institutions throughout their illnesses.

Id. at 68.

103. *See 1972 Hearings, supra* note 48, at 12-13.

104. Kutner, *supra* note 63, at 205.

105. *Id.* at 220.

106. *See* Burnett v. People, 204 Ill. 208, 68 N.E. 505 (1903). "By the English common law suicide was a felony, and the punishment for him who committed it was interment in the highway with a stake driven through the body and the forfeiture of his lands, goods, and chattels to the King." *Id.* at 222, 68 N.E. at 510. However in *Burnett,* the court also stated "but as we have never had a forfeiture of goods, or

tempted suicide a crime.[107] More important, however, under the common law, one who assists another in a suicide is considered a principal to murder.[108] Three different views on the criminal liability of one who assists another in committing suicide currently exist. A few jurisdictions still consider assistance in suicide to be murder.[109] Other jurisdictions deal with this situation specifically by statute, considering it either as voluntary manslaughter[110] or as a separate crime.[111] Some state legislatures which have characterized this as a separate crime treat the crime as involuntary manslaughter;[112] others treat the crime as a minor offense and only require the payment of a fine.[113] In contrast, the Texas legislature has determined that suicide is not a crime and, therefore, has decriminalized the act of assisting another in suicide.[114]

The parallels to be drawn between the aider and abettor of a suicide and a physician performing euthanasia are patent. However, a qualitative distinction between the two exists. Although both parties desire and accomplish the same objective — death, the circumstances are distinctly different; whereas suicide involves an otherwise healthy individual who wants to die because of "severe

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seen fit to define what character of burial our citizens shall enjoy, we have never regarded the English law as to suicide as applicable to the spirit of our institutions." *Id.* at 222, 68 N.E. at 510. For a further discussion on the law of suicide and euthanasia, *see* A. DOWNING, EUTHANASIA AND THE RIGHT TO DIE (1969).

107. *See* State v. Willis, 255 N.C. 473, 121 S.E.2d. 854 (1961). North Carolina maintains attempted suicide as a misdemeanor. *See also* State v. Levelle, 34 S.C. 120, 12 S.E. 310 (1891). S.C. CODE ANN. § 17-122 (Law. Co-op 1962) retains the common law character of felony for attempted suicide. Presently, in the United States there is no punishment attached to a successful suicide. LA FAVE & SCOTT, *supra* note 60, at 569 n.3.

108. LA FAVE & SCOTT, *supra* note 60, at 571-72.

109. *See, e.g.,* (1) McMahan v. State, 168 Ala. 70, 53 So. 89 (1910). Pursuant to a suicide pact, the deceased shot himself in the presence of the defendant; however, the defendant did not shoot himself. The court held that since suicide is self-murder, the defendant who encouraged was guilty as a principal to murder. *Id.;* (2) Burnett v. People, 204 Ill. 208, 68 N.E. 505 (1903). Both the deceased and the defendant admitted to having taken poison as a result of a suicide pact. The defendant survived. The court indicated that this would be murder on the defendant's part; (3) Commonwealth v. Hicks, 118 Ky. 637, 82 S.W. 265 (1904). The court held that one who aided another in the commission of suicide was guilty of homicide as an accomplice; (4) Commonwealth v. Bowen, 13 Mass. 356 (1816). The defendant, a prisoner, advised a fellow prisoner who was to be executed the following day to "cheat" the hangman, *i.e.,* to commit suicide. The Supreme Judicial Court instructed the jury that if the advice was the persuading element, then the fellow prisoner would be guilty of murder; (5) People v. Roberts, 211 Mich. 187, 178 N.W. 690 (1920). The defendant-husband in this case prepared Paris greens (a poison) for his wife and placed it near her bedside at her request. The court convicted Roberts of murder as an accomplice to her suicide.

110. Connecticut and New York treat the aiding and abetting of a suicide as manslaughter. CONN. GEN. STAT. ANN. § 53-13 (West 1949); N.Y. PENAL LAW § 125.15 (McKinney 1965).

111. KAN. STAT. ANN. § 21-3406 (1970), MINN. STAT. ANN. § 609.215 (1963), N.M. STAT. ANN. § 30-2-4 (1963) and WIS. STAT. ANN. § 940.12 (West 1982) treat the act of aiding and abetting a suicide as a separate crime.

112. KAN. STAT. ANN. § 21-3406 (1970).

113. MINN. STAT. ANN. § 609.215 (1963).

114. Aven v. State, 102 Tex. Crim. 478, 277 S.W. 1080 (1925). Defendant furnished the means for committing suicide but the court held no crime existed.

despondency,"[115] euthanasia involves a terminally-ill individual. Further, legislative euthanasia would be distinct from suicide if practiced pursuant to legislative safeguards. These distinctions may be sufficient to justify a separate legal treatment for euthanasia.

Euthanasia remains a crime in most jurisdictions in the United States.[116] In determining a defendant's guilt or innocence for homicide, courts focus on the question of intent rather than that of motive.[117] Even a benevolent motive does not alter the fact that intent to end the life of another human exists. Therefore, euthanasia, which, by definition, is a merciful act, is, nevertheless, condemned by American criminal law.

B. *German and Swiss Penal Codes*

1. Motive

Although most U.S. criminal justice systems believe that "motive is immaterial in substantive criminal law and that the most laudable motive is no defense [to a crime],"[118] some European criminal law systems[119] consider motive a crucial factor in determining culpability.[120] Germany and Switzerland are two such countries whose penal codes consider motive as an important element in determining culpability.[121]

Motive, in common usage, is "the desire coupled with the intention to bring about a certain consequence as an end, by means of other consequences which are also desired and intended but only as means."[122] The role that motive plays in euthanasia is integral.[123] For example, when a physician performs euthanasia on an incurably ill patient, his intent may be to terminate the patient but his motive is to relieve the patient's suffering. This illustration suggests that whereas intent is limited to the physician's purpose to commit the act, motive involves the question of why he performed the act.[124]

The penal codes of Germany and Switzerland consider the motive of the actor in both the grading of the offense and the sentencing of the crime.[125] These two countries adhere to the idea that once the judge considers the motive of the

115. Scher, *supra* note 21, at 679.
116. *See* WHARTON'S CRIMINAL LAW, *supra* note 5, §§ 137-70.
117. LA FAVE & SCOTT, *supra* note 60, at 204.
118. *Id.*
119. *See* note 7 and accompanying text *supra.*
120. Silving, *supra* note 79, at 351.
121. *See* StGB §§ 211-212; Sw. STGB §§ 63-64, 111-112.
122. Cook, *Act, Invention, and Motive in the Criminal Law,* 26 YALE L.J. 645, 660-61 (1917). For further definitions, *see* State v. Hyde, 234 Mo. 200, 136 S.W. 316 (1911); Ball v. Commonwealth, 125 Ky. 601, 101 S.W. 956 (1907).
123. *See* Scher, *supra* note 21, at 676.
124. LA FAVE & SCOTT, *supra* note 60, at 204.
125. StGB §§ 211-212; Sw. STGB §§ 63-64, 111-112. *See also* Scher, *supra* note 21, at 674.

actor, the character and personality of the criminal becomes apparent.[126] The character and personality of the actor reveal the possible recidivist potential of the criminal.[127] The personality of the actor encompasses "the character of the actor, his dangerousness or harmlessness, [and] the probability or improbability of his repeating the crime."[128] Thus, in a prosecution for euthanasia, the judge would direct his attention to the total personality of the actor and not merely to a partial view of the homicide.[129] Under this approach, the judge can better view the entire incident and thus be better prepared to render a fair and equitable sentence.[130]

One of the reasons for the inclusion of the concept of motive in some of the European penal codes is that the consideration of motive usually assists the judge in his decision making.[131] This assistance allows a judge to interpret the laws in a manner which best corresponds to general legal principles.[132] Unlike American case law, which allows a judge to interpret statutes at his own discretion, many European penal codes[133] stress the fact that "a judge cannot give any meaning to the law other than the meaning which clearly arises either from the words and context of the law or from the clear grounds of the law."[134] Therefore, while an American judge may, at his discretion, consider a homicide defendant's motive, the judge, under the German and Swiss systems, is required to investigate motive.[135] Moreover, a homicide defendant will be guilty of one crime with a given punishment if his motive is of a certain type, and be guilty of a different crime with a mitigated punishment if his motive is something else.[136] A German or Swiss judge may not, therefore, refuse to mitigate a sentence[137] even if the defendant has a benevolent motive. In contrast, an American judge may exercise

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126. STOOSS, *supra* note 7, at 147; Silving, *supra* note 79, at 361. Silving believes that the true character of the actor will not be apparent unless the underlying motives of the actor are considered. One must first enter the mind to know what is actually driving the individual to commit such acts. Silving, *supra* note 79, at 361.

127. Silving, *supra* note 79, at 361.

128. *Id.*

129. *See* note 126 and accompanying text *supra*. For further details, *see* R. MAURACH, DEUTSCHES STRAFRECHT, ALLGEMEINER TEIL 35 (1954) [hereinafter cited as MAURACH]; SCHOENKE, *supra* note 7, at 564.

130. *See* MAURACH, *supra* note 129; SCHOENKE, *supra* note 7, at 564. *See also* A. DALCKE, STRAFRECHT UND STRAFVERFAHREN 148 n.2 (37th rev. ed. 1971).

131. *See* STOOSS, *supra* note 7, at 147; MAURACH, *supra* note 129, at 35.

132. Silving, *supra* note 79, at 361.

133. For examples of how judges interpret statutes at their own discretion, *see* note 32 *supra*, and cases discussed therein.

134. The Prussian Code § 46, *quoted in* A. VON MEHREN, THE CIVIL CODE SYSTEM 81 (2d ed. 1977). The basic premise of this statement is that judges have an expressed set of guidelines in the penal code which directs them to include the motive concept. *Id.*

135. Sw. STGB arts. 63-64; STGB §§ 211-212.

136. Sw. STGB arts. 63-64; STGB §§ 211-212.

137. Sw. STGB arts. 63-64; STGB §§ 211-212.

his discretion to impose a harsh sentence even if the defendant acted out of the best of motives.[138]

Prior to Germany and Switzerland's adoption of the motive standard,[139] most civil law countries[140] evaluated homicide by the premeditation and deliberation test.[141] One of the reasons for the earlier existence of the premeditation and deliberation test in European penal codes was that the test provides a guide for predicting whether or not a criminal would repeat his criminal act.[142] However, the use of motive as a standard for determining culpability has caused the decrease in importance, or total disappearance, of the premeditation and deliberation test.[143] Today, Germany and Switzerland apply the concept that the type of motive which determines the criminal act[144] bears on the character and personality of the actor[145] and thus is the best indicator for predicting whether or not a person will repeat a criminal act.[146] Some commentators argue that, whereas a criminal who murders for personal gain or lust may be expected to do so again, an individual who has once committed euthanasia is hardly likely to become a habitual criminal.[147]

2. German Penal Code Provisions

The German Penal Code has abandoned the premeditation and deliberation test.[148] Indeed, the German Penal Code never expresses the term "premedita-

138. *See* LA FAVE & SCOTT, *supra* note 60, at 204.

139. For a discussion of the concept of motive and its pertinent provisions, *see* V. GSOVSKI, THE STATUTORY CRIMINAL LAW OF GERMANY (1947) [hereinafter cited as GSOVSKI].

140. *See* note 7 *supra*.

141. *See* LA FAVE & SCOTT, *supra* note 60, at 562-68. The terms "premeditate" and "deliberate" are not easy terms to define. "Premeditation" requires that an individual reflect, at least for a short period of time before his act of killing. "Deliberation" requires a cool mind that is capable of reflection. Some criminal lawyers have suggested that for premeditation the killer asks himself the question "Shall I kill him?" The deliberation part of the crime requires a thought such as "Wait, what about the consequences? Well, do it anyway." *Id.* at 563-64. *See also* State v. Bowser, 214 N.C. 249, 253, 119 S.E. 31, 34 (1938). The court stated that deliberation means the act is done in a "cool state of the blood." *Id.*

142. Silving, *supra* note 79, at 362.

143. *See* GSOVSKI, *supra* note 139, at 126. The inadequacy of the premeditation and deliberation test may be seen by comparing a series of cases dealing with the distinction between murder in the first degree and murder in the second degree. *Compare* United States v. Parelius, 83 F. Supp. 617 (D. Hawaii 1949), *with* Jones v. United States, 175 F.2d 544 (9th Cir. 1949); *see also* Hiatt v. Brown, 175 F.2d 273 (5th Cir. 1949); Fischer v. United States, 328 U.S. 463 (1946). For criticism of the premeditation and deliberation test, *see* Keedy, *A Problem of First Degree Murder:* Fischer v. United States, 99 U. PA. L. REV. 267 (1950) [hereinafter cited as Keedy]. On the desirability of considering motive in American criminal law, *see* Michael & Wechsler, *A Rationale of the Law of Homicide,* 37 COLUM. L. REV. 1261, 1277 (1937).

144. *See* STOOSS, *supra* note 7, at 147.

145. *Id.*

146. Silving, *supra* note 79, at 362.

147. *Id.* Stooss, a Swiss commentator, also believed that motive was the best indicator for possible recidivism of a criminal act. STOOSS, *supra* note 7, at 147.

148. *See* GSOVSKI, *supra* note 139, at 126, for a collection of the pertinent provisions and those that have been abandoned.

tion" in the definitions of the felonies of murder and manslaughter.[149] One of the reasons for the abandonment of the test is the inadequacy of the distinction between different classes of homicide.[150] Today, the German Penal Code states that a murderer is "anybody who kills a human being out of murderous lust, or to satisfy a sexual urge, or out of greed or from other base motives, maliciously or cruelly, or by means endangering the public, or in order to commit or cover up another punishable act."[151] In the absence of a "base motive,"[152] one who commits intentional homicide is a manslayer,[153] whose punishment would be much less severe than that of a murderer.[154] The distinguishing factor between a murderer and a manslayer is that a murderer "kills a human being . . . with base motives"[155] or in a manner which reveals a depraved mind.[156] Although the German Penal Code does not directly define "base motives," the language implies that "base motives" include "committing a crime out of greed,"[157] "lust for killing"[158] or "satisfying a sexual urge."[159] By implication, a person committing euthanasia would not appear to possess any of the designated "base motives" because his motive is benevolent. Since these base motives tend to indicate the existence of a depraved mind, a quality which would not likely be attributed to the performer of euthanasia, that person should not fall within the definition of a murderer.[160] However, the person practicing euthanasia may be prosecuted as a manslayer.[161] Section 212 of the German Penal Code defines a manslayer as one who "without being a murderer, intentionally kills a human being."[162] Under this provision, such a person "shall be punished, as a manslayer, by confinement in a penitentiary for not less than five years."[163] Thus, a physician who has practiced euthanasia would not be tried as a murderer because he lacks

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149. *See* STGB §§ 211-212.

150. *See* GSOVSKI, *supra* note 139, at 126. *See also* Keedy, *supra* note 143. Generally in the United States there are four degrees of homicide: first degree murder, second degree murder, voluntary manslaughter and involuntary manslaughter. LA FAVE & SCOTT, *supra* note 60, at 562-68.

151. STGB § 211.

152. *Id.*

153. *Id.* § 212.

154. *Id.*

155. *Id.*

156. Silving, *supra* note 79, at 150.

157. STGB § 212.

158. *Id.*

159. *Id*

160. *See* Silving, *supra* note 79, at 364-65. The difference between the United States and Germany in this area is that the United States has no express provisions considering the "base motives" of the actor. Thus, an actor who has committed euthanasia has committed an act voluntarily with an intent to kill (premeditated with deliberation). The actor would be guilty of first degree murder. Cannon, *supra* note 45, at 657.

161. Absense of "base motives" may cause the action to be prosecuted under German Penal Code § 212, manslaughter, not § 211, murder. Silving, *supra* note 79, at 363.

162. *See* STGB § 212.

163. *Id.*

the base motives, but rather as a manslayer. Consequently, he would benefit from the manslaughter provision by receiving a mitigated sentence[164] as opposed to a harsher murder sentence.

Section 213 of the German Penal Code further provides a reduction of penalty if "other extenuating circumstances" exist.[165] The German penal system equates extenuating circumstances with honorable motives.[166] Thus, a person who has committed euthanasia with honorable motives may be able to benefit from Section 213, which mitigates the penalty of manslaughter in the case of "extenuating circumstances."[167]

A person who is prosecuted for euthanasia under the German system would benefit from two key aspects of the German Penal Code. First, he would be prosecuted for manslaughter rather than murder.[168] The penalties for manslaughter are less severe than for murder. Second, due to his honorable motives, the defendant would receive a mitigated sentence.[169]

3. Swiss Penal Code Provisions

As under the German criminal code, the Swiss standard for determination of a murderer does not have to do with deliberation and premeditation, but with motive. The Swiss Penal Code states that the "true mark of a murder[er] is the depraved mind[170] (base attitudes or mentality) or the dangerousness of the actor."[171] Article 112 of the Swiss Penal Code, which deals with murder, pro-

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164. *Id.*

165. The German Penal Code § 213, translated by Mueller and Buergenthal, states:

> If the person charged with manslaughter was provoked into a fit of anger, without fault of his own, by a battery or serious insult, committed by the deceased against the defendant or one of his relatives, and the defendant was prompted instantly to commit the deed, or if other *extenuating circumstances* [sic] are present, the punishment shall be imprisonment for a term of not less than six months.

Id.

166. Silving, *supra* note 79, at 367. Silving states that this section includes honorable motive as an extenuating circumstance. *Id.*

167. *Id.* at 366. For a differentiation between base motives and honorable motives, *see* Decision of Mar. 9, 1951, 77 Entscheidungen des Schweizerischen Bundesgerichtes, Amtliche Sammlung (B G IV) at 57, where a woman gave her husband poison several times at intervals in order to run away with her lover. The court held that:

> Appellant attempted to kill under circumstances . . . which disclose her particularly reprehensible attitude. The motive was particularly reprehensible: appellant wished to kill her husband in order to be able to marry her lover with whom she entertained an adulterous relation. . . . The serious effects of the first attempt at murder did not deter her from repeating the act. No sooner did Hans Eggman recover after a long illness . . . [when] she repeated the attempt with more effective means.

Translation by Silving, *supra* note 79, at 366. The court viewed this as a base motive with a clear intent to kill for lust or greed. *Id. See also* Decision of Dec. 5, 1969, 95 B G IV, at 162, 167.

168. Silving, *supra* note 79, at 366.

169. *Id.*

170. *Id.* at 365.

171. *Id.*

vides: "Where the actor (killer) killed under circumstances or with a premeditation, which shows that he possesses a particular reprehensible attitude (depraved mind) or that he is dangerous, he shall be punished by confinement in a penitentiary for life."[172] For a judge to obtain a clear indication of a depraved mind, he must observe the mentality, character and personality of the actor.[173] Only after the judge has made this observation, may he render a fair and appropriate sentence.[174]

Although the Swiss Penal Code includes the term "premeditation,"[175] the term is neither an exclusive[176] nor a sufficient test for homicide.[177] The Swiss Penal Code takes the actor's premeditation into account only to express the actor's dangerousness or his perverse mentality, rather than as a conclusive element of the crime.[178] The reason for this limited usage of the term "premeditation" is that the actor's premeditation "is not a necessary element of murder, for the danger which the actor represents and his depraved mind may also appear from other circumstances,"[179] such as the motive of the actor. The Swiss Penal Code, thus, places more weight on the motive of the actor than the actor's premeditation.[180] Like the German Penal Code,[181] the Swiss Penal Code determines the harmlessness or dangerousness of the actor through an analysis of his motives.

One way that the Swiss Penal Code differs from the German Penal Code is that the Swiss Code expressly allows a judge to mitigate the punishment of a defendant who acted with honorable motives.[182] More important, however, the Swiss Penal Code directs a judge to "mete out punishment in accordance with the guilt of the actor."[183] The defendant's motive is relevant to the judge's determination.[184] The Swiss Penal Code has to do with the manner in which a judge deals

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172. Sw. STGB art. 112.

173. *See* STOOSS, *supra* note 7, at 147. *See also* O. GERMANN, DAS VERBRECHEN IM NEUEN STRAFRECHT (1950) [hereinafter cited as GERMANN] for a discussion on various motives, such as compassion. *See also* A. VON OVERBECK & P. THORMANN, SCHWEIZERISCHES STRAFGESETZBUCH, 1 ALLGEMEINER TEIL 136 (1940) for a discussion on euthanasia and the Swiss Penal Code.

174. *See* STOOSS, *supra* note 7, at 147.

175. Sw. STGB art. 112.

176. Silving, *supra* note 79, at 365.

177. *Id. See also* Decision of Feb. 11, 1944, 70 B G IV, at 5 where the court took into account the actor's premeditation as to the dangerousness of the actor, but this was not the sole means by which to discover that danger.

178. Silving, *supra* note 79, at 365.

179. *Id.*

180. *Id. See generally* Sw. STGB arts. 63-64.

181. *See* StGB §§ 211-12. The term "qualified" means that the dangerousness of the actor becomes apparent through the actor's motive. *Id. See also* STOOSS, *supra* note 7, at 147; Sw. STGB arts. 63-64.

182. Sw. STGB art. 64.

183. *Id.* art. 63.

184. *Id.* In fact, after giving a judge discretion to hand out punishment that suits the crime, the Code directs a judge to consider the motives, the prior life and the personal circumstances of the guilty person. *Id. See generally* § III. B. 2 for German Penal Code.

with a defendant's honorable motives. The German Penal Code allows a mitigated sentence if extenuating circumstances exist. One such extenuating circumstance is honorable motive.[185] In some cases, the motives may be so benevolent that total exculpation of the actor is warranted.[186] A physician who has acted with a benevolent motive in terminating the life of an individual lacks the malice which is a major element in the exigency to punish a person for homicide.

The significance of these provisions of the Swiss Penal Code is that they clearly instruct a judge to consider the honorable motives of the actor.[187] Thus, a person who has committed euthanasia, and has acted with honorable motives towards the deceased, although convicted of a criminal offense, may nonetheless receive a reduced sentence.[188] The benefits accruing to the person convicted of an act of euthanasia are either total exculpation or mitigated sentence.

4. Homicide Upon Request Under the German and Swiss Penal Codes

Although unknown to the Anglo-American world,[189] many European penal codes recognize the concept of "homicide upon request."[190] The significance of the "homicide upon request" provisions to this discussion is that this provision expressly allows a judge to mitigate the sentence of an individual who has committed a homicide when that individual performs the homicide at the request of the deceased. The underlying concept of this special provision for homicides committed at the request of the deceased is that murder, while always reprehensible, is less reprehensible when performed with the consent of the deceased than when performed against his will.[191]

The current German "homicide upon request" provision is not a modern response to the advances in medical technology. It has deep historical roots. The North German Federation Penal Code of 1870[192] stated that: "[t]he sense of justice requires that killing a consenting person . . . should not be punished as severely as killing a person against his will. But the uncontested moral principle that life is an inalienable value permits neither immunity nor a low penalty."[193]

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185. Sw. STGB art. 63. *See generally* § III. B. 2 for German Penal Code.

186. GERMANN, *supra* note 173, at 56.

187. Sw. STGB art. 64.

188. *Id.*

189. Silving, *supra* note 79, at 352.

190. *See* STGB § 216; Sw. STGB art. 114. For the origins of the provision on "homicide upon request," *see* Decision of Feb. 7, 1952, Bundesgerichtshof (highest court of the Federal Republic of Germany in civil and criminal matters) 258. The court pointed out that the German legislature introduced the provision into German law at a time when the premeditation and deliberation test was in force for the purpose of affording relief against the harshness of the test. *Id.*

191. Silving, *supra* note 79, at 378.

192. This code, Strafgesetzbuch für den Norddeutschen Bund of May 31, 1870, later became the Penal Code of the Reich, Law of May 15, 1871. For a brief discussion of this penal code, *see* A. KLENNER, DIE TÖTUNG AUF VERLANGEN IM DEUTSCHEN UND AUSLÄNDISCHEN STRAFRECHT SO WIE DE LEGE FERANDA 65 (1925) [hereinafter cited as KLENNER].

193. Strafgesetzbuch für den Norddeutschen Bund of May 31, 1870.

Although the North German Federation Penal Code of 1870 recognized the significance of a homicide by the request of a person,[194] it made no special provisions to mitigate the punishment of a person convicted of such a murder.[195] In fact, the Penal Code never even considered the extenuating circumstances such as an euthanasia motive coupled with the person's request.[196] Today, however, "homicide upon request" is a separate instance of the general law of homicide in Germany.[197]

The German Penal Code specifically mandates a reduction of penalty in the case of homicide upon request.[198] This reduction of both penalty and punishment is justified on the grounds of the motivating compassion of the actor coupled with the consent of the deceased.[199] Article 216 of the German Penal Code states:

> 1) If a person kills another after having been expressly and earnestly requested to do so by the person killed, the punishment shall be imprisonment for a term of not less than three years; 2) If extenuating circumstances are present, the punishment shall be imprisonment for a term of not less than six months; 3) The attempt is punishable.[200]

The Swiss Penal Code also treats "homicide upon request" as a special classification of homicide.[201] Article 114 of the Swiss Penal Code states, "[w]hoever kills another upon the latter's earnest and urgent request is punishable by imprisonment."[202] Although this provision punishes by imprisonment, some commentators theorize that the motive of the actor mitigates the punishment considerably.[203] Therefore, in practice, motivation of the actor and the deceased's request have been of substantial importance to the judge in making his determinations for punishment.[204] This provision would also encompass a situation where the actor erroneously believes a request has been made and expedites that request.[205] Again, this provision stresses the actor's motivation. If the actor, with benevolent motives, acts erroneously, he has not acted with

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194. *Id.*
195. *Id.*
196. E. v. LISZT, LEHRBUCH DES DEUTSCHEN STRAFRECHTS 296-97 (22d ed. 1919). *See also* J. OLSHAUSEN, KOMMENTAR ZUM STRAFGESETZBUCH 997 (1944).
197. Silving, *supra* note 79, at 382. *See also* STGB § 216.
198. *See* STGB § 216.
199. *See* Dreher, *Das Dritte Strafrechtsänderungsgesetz,* JURISTENZEITUNG 421 (1953).
200. STGB § 216.
201. Sw. STGB art. 114.
202. *Id.*
203. Silving, *supra* note 79, at 383.
204. *Id.*
205. *Id.*

malice.[206] In such a case, the doctrine of mistake of fact is involved.[207]

The doctrine of mistake of fact suggests that while ignorance of the law is no defense, an actor still must possess the necessary ill will (*mens rea*)[208] to commit a crime. Article 19 of the Swiss Penal Code defines the doctrine of mistake of fact: "Where the person has acted upon an erroneous conception of the factual situation, he will be judged in accordance with the factual situation as conceived by him when it works to his advantage."[209] Thus, if an actor erroneously perceives that the deceased requested him to perform euthanasia and the actor carries out that request, the actor would be precluded from penalty because he lacked the necessary *mens rea*.[210]

In both Switzerland and Germany, the actor practicing euthanasia must follow the requirement of a "request." In Germany such request must be "express and earnest,"[211] while in Switzerland the request must be "earnest and urgent."[212] The German Penal Code considers a request "expressed" if performed through gestures rather than words.[213] If an individual makes a request in the heat of passion, the German Penal Code deems this request to be "earnest."[214] The Swiss Penal Code deems a repeated request "urgent."[215] The significance of the "homicide upon request" provision in both Germany and Switzerland is that a judge may consider the consenting plea of the deceased as a mitigating factor before pronouncing sentence. This mitigating factor has, therefore, become a special classification of homicide.

Under both the German and Swiss penal systems, the benevolent motives of a person who practices euthanasia would lessen the penalty for the act. If the deceased requests the defendant to act, this too would be cause for a mitigated sentence. The emphasis on the actor's motive, as well as on the deceased's consent, is a step toward recognizing the right of a person to decide what is to happen with his person.

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206. *Id.*

207. The Swiss court in Decision of Jan. 18, 1949, 75 B G IV, at 26 held that error of law may lead to either total exculpation or a reduction in penalty. However, faultless error of law does not automatically lead to acquittal. Dec. of Mar. 11, 1949, 75 B G IV, at 37; Decision of Apr. 7, 1949, 75 B G IV, at 76, 82. Sw. STGB arts. 19-20 also may lead to exculpation or to a reduction in penalty.

208. *See* Arzt, *Ignorance or Mistake of Law*, 24 AM. J. COMP. L. 646, 648 (1976) [hereinafter cited as Arzt].

209. Sw. STGB art. 19.

210. *See* Arzt, *supra* note 208, at 648. *See also* E. BELING, UNSCHULD, SCHULD UNDE SCHULDSTUFEN (1910). Beling used euthanasia as an example of the "error juris" defense. *Id.* at 21.

211. STGB § 216.

212. Sw. STGB art. 114.

213. SCHOENKE, *supra* note 7, at 579.

214. Silving, *supra* note 79, at 384.

215. GERMANN, *supra* note 173, at 227.

IV. CHANGES IN THE CRIMINAL LAW IN THE UNITED STATES

A. *The Development of Right to Die Laws*

Although the U.S. Congress has not enacted laws which have the same effect as the criminal laws of Germany and Switzerland,[216] some state legislatures have passed statutes that would allow passive euthanasia.[217] These state legislatures have enacted right to die statutes which recognize the legal validity of the "living will."[218] The "living will" is a written directive through which an adult patient determines whether his doctors should permit him to die.[219]

One of the purposes of the right to die laws is to free physicians and other health care professionals from potential criminal liability for honoring a patient's written directive.[220] Before the enactment of these statutes, physicians who withheld life-sustaining devices or performed passive euthanasia risked criminal liability.[221] This liability arises from a physician's legal duty to act.[222] Under this concept once a physician and his patient have established a doctor-patient relationship, the physician has a duty to act reasonably toward his patient[223] and to continue treatment as long as the case requires.[224] The right to die laws establish a new duty — the duty not to act. This duty not to act arises from the patient's right to die peacefully.[225] Several states thus grant immunity to the physician who acts in accordance with a patient's living will.[226]

The living will is the most important component of the right to die statute.[227] The living will provides the adult patient, while still in possession of his full reasoning powers, with the means to exercise his "right of privacy over his body

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216. For the past 15 years Congress has been struggling to reform the criminal law. The type of reform Congress has considered centered around sentencing. Proposed reforms would allow a judge to consider defendant's danger to the community before allowing bail. Winter, *Criminal Code Reform,* 67 A.B.A.J. 1431-32 (1981).

217. *See* notes 239-52 *infra.* These statutes are discussed in § IV *infra.* These statutes allow a patient to determine whether he should be permitted to die by withholding of medical treatment (thus passive euthanasia is performed).

218. SOCIETY, *supra* note 19, at 1. The "living will" is also sometimes referred to as a "directive." *Id.*

219. *Id.*

220. For example, the California right to die statute states: "No physician or health facility which, acting in accordance with the requirements of this chapter, causes the withholding or withdrawal of life-sustaining procedures from a qualified patient, shall be subject to civil liability [or be guilty of] any criminal act or . . . unprofessional conduct." CAL. HEALTH & SAFETY CODE § 7190 (West 1976). For additional examples *see* notes 239-52 *infra.*

221. Foreman, *supra* note 5, at 55.

222. PROSSER, *supra* note 37, at 338-50. *See also* Braun v. Riel, 40 S.W.2d 621 (Mo. 1931); Thaggard v. Vafes, 218 Ala. 609, 119 So. 647 (1928); Cochran v. Laton, 78 N.H. 562, 103 A. 658 (1918); Mehigan v. Sheehan, 94 N.H. 274, 51 A.2d 632 (1947).

223. PROSSER, *supra* note 37, at 338-50. *See also* Riedinger v. Colburn, 361 F. Supp. 1073 (D. Idaho 1973); Cobbs v. Grant, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972); Wilkson v. Vesey, 110 R.I. 606, 295 A.2d 676 (1972).

224. Ricks v. Budge, 91 Utah 307, 311, 64 P.2d 208, 211 (1937).

226. *See generally* notes 239-52 *infra.*

227. Every statute requires a living will as part of its provision. *See* statutes cited in notes 239-52 *infra.*

in determining whether he should be permitted to die."[228] Under right to die statutes, the living will, which is similar to a testamentary document,[229] provides that if a patient's health condition becomes terminal and physicians in their complete discretion are certain that the patient cannot regain his physical and mental capacities to function, then doctors should withdraw[230] life-support treatment provided that at least two witnesses testify that the declarant was of sound mind and acted of his own free will when executing the document.[231]

Problems arise under the right to die laws when the patient is an incompetent or a minor. Several statutes establish specific guidelines which allow a patient to appoint a proxy or a member of the patient's family, either of whom would have the power to make the decision for the patient.[232] In addition, the patient may revoke the document at any time before he loses his soundness of mind.[233] The declarant may revoke the document by a written or verbal statement expressing his intent to revoke.[234] A qualified patient[235] may also revoke a living will by cancelling, defacing, obliterating, burning, tearing or otherwise destroying the directive.[236]

The basic right to die statute legally recognizes the right of a competent adult to refuse life-prolonging procedures if that adult is terminally ill.[237] While each right to die statute is not identical, each contains certain basic similarities which provide necessary legal guidelines.[238] Thirteen states and the District of Columbia have right to die statutes, including California,[239] Arkansas,[240] New Mexico,[241] Idaho,[242] Oregon,[243] Texas,[244] Nevada,[245] North Carolina,[246] Kan-

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228. Kutner, *supra* note 63, at 226.

229. *Id.* at 228.

> The living will . . . is analogous to the concept of a revocable or conditional trust, with the patient's body as the *res*, the patient himself as the beneficiary and grantor, and the doctor and hospital as trustees. The doctor is given authority to act as trustee of the patient's body by virtue of the patient's consent to treatment.

Id.

230. Lablang, *Death with Dignity — A Tripartite Response*, 2 DEATH EDUC. 171, 177 (1971).

231. Model Bill § 3 (1978) (The Model Bill was written by Yale Law School for a Legislative Service Project. This bill is reprinted in SOCIETY, *supra* note 19, at 23-24.); Kutner, *supra* note 63, at 227.

232. ARK. STAT. ANN. § 82-3801 (1977); N.M. STAT. ANN. §§ 12-35-1 to -35-11 (1977); N.C. GEN. STAT. §§ 90-320 to -332 (1977). *See also* SOCIETY, *supra* note 19, at 5.

233. Thus far, all but one state has specified revocation procedures. For states that have revocation procedures, *see* notes 239-52 *infra* except note 240 (Arkansas). SOCIETY, *supra* note 19, at 18.

234. Kutner, *supra* note 63, at 227-28.

235. The Model Bill defines a "qualified patient" as a "patient who has executed a declaration in accordance with this act and who has been diagnosed and certified in writing to be afflicted with a terminal condition by two physicians." Model Bill § 2, *reprinted in* SOCIETY, *supra* note 19, at 23-24.

236. *See generally* notes 239-52 *infra*.

237. *Id.*

238. *Id.*

239. CAL. HEALTH & SAFETY CODE §§ 7185-7195 (West 1976).

240. ARK. STAT. ANN. § 82-3801 (1977).

241. N.M. STAT. ANN. §§ 12-35-1 to -11 (1977).

242. IDAHO CODE § 39-4501 to -4508 (1977).

243. OR. REV. STAT. §§ 97.050 to -061 (1977).

sas,[247] Washington,[248] Alabama,[249] District of Columbia,[250] Vermont[251] and Delaware.[252] Each of the fourteen statutes provides a means for individuals to establish, in advance, their desire that no physicians use extraordinary measures to delay their dying.[253] Besides granting immunity to physicians,[254] these statutes require medical confirmation of the patient's terminal condition.[255] Under the general statutory scheme, the physician is legally competent to determine whether the patient is in a hopeless and irreversible terminal condition.[256]

In 1976, California[257] became the first state to enact a right to die statute.[258] The California legislature intended that the California Natural Death Act[259] would provide a means by which a terminally ill individual could direct a physician to withhold or withdraw life-support mechanisms.[260] If a physician failed to effectuate the directive of the patient, the Act provided that this failure would constitute unprofessional conduct.[261] The physician would be civilly liable for unprofessional conduct for failure to comply with the directive.[262] The physician would be able to avoid this liability for unprofessional conduct by transferring the patient to a physician who would effectuate the directive.[263]

With the enactment of the first right to die statutes, many pro-euthanasia groups believed that state legislatures had finally taken progressive steps for the legalization of euthanasia.[264] However, the California right to die statute is demonstrative of several important drawbacks. The California legislature intended the California Natural Death Act of 1976[265] to provide the patient with

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244. TEX. STAT. ANN. art. 4590h, §§ 1-12 (Vernon 1977).
245. NEV. REV. STAT. §§ 449.540 to -551 (1977).
246. N.C. GEN. STAT. §§ 90-320 to -332 (1977).
247. KAN. STAT. ANN. § 65-128-101 to -109 (1979).
248. WASH. REV. CODE § 70.122.01 to -.13 (1980).
249. ALA. CODE § 22-A-1 (1981).
250. D.C. CODE ANN. §§ 2421-2429 (1982).
251. VT. STAT. ANN. tit. 18, § 5251 (1982).
252. DEL. CODE ANN. tit. 16, §§ 2501-2509 (1982).
253. SOCIETY, *supra* note 19, at 1.
254. *Id.* at 2. For a comparison of these various right to die statutes, *see id.* at 18-21. Although only 13 states have enacted right to die statues, many other states have considered or will consider similar bills. *Id.*
255. *See generally* notes 239-52 *supra.*
256. *Id.*
257. This Note focuses on an analysis of the California living will statute as California adopted the first living will statute in the United States and most of the literature in the living will field centers around the California Natural Death Act.
258. CAL. HEALTH & SAFETY CODE §§ 7185-7195 (West 1976) [hereinafter cited as Code].
259. *Id.*
260. *See id.* § 7188. *See* Dahlberg, *The California Natural Death Act,* 10 LINCOLN L. REV. 197 (1977) [hereinafter cited as Dahlberg].
261. *See* CODE § 7191 (b).
262. *Id.*
263. *Id.*
264. Dahlberg, *supra* note 260, at 197.
265. *See* note 258 *supra.*

autonomy and the right of self-determination.[266] In reality, however, the Act was only a legislative compromise.[267] The Act in practice does not fully satisfy the desires of the patient.[268] The patient's right to decide is offset by the physician's discretion,[269] since physicians, under the Act, may consider outside factors "such as information from the patient's family or the nature of the patient's illness, injury or disease."[270] Such a weakening of the patient's rights could be avoided if the law deemed the patient's "living will" to be conclusive.[271]

B. *Analysis*

In the United States, euthanasia is punishable as homicide; however, the law in practice does not coincide with strict legal theory.[272] This fact is evidenced by the "high incidence of failures to indict, acquittals, suspended sentences and reprieves."[273] Some commentators suggest that euthanasia should be distinguished from other forms of homicide because of the humanitarian motive involved.[274] These scholars emphasize that euthanasia is distinguishable from other forms of homicide by consideration of the underlying motive as an element of culpability.[275]

In both Germany and Switzerland, the statutory law specifically takes cognizance of the motivation of the actor[276] in arriving at both "the grading of the charged offense and the ensuing sentence."[277] In Germany, the motive is an element of the crime of murder.[278] However, mercy is not one of the motives listed in the Penal Code as an element of murder. In Switzerland, motive is also an element of the crime since the statutes expressly instruct judges to consider the "homicide motives" of an individual in the sentencing process.[279] Thus, the experience of Germany and Switzerland may serve as a model to American legislatures considering motive as device for legalizing euthanasia. Several approaches are available to make euthanasia legal. The first approach is for the legislature to vest a broad discretion in judges to classify cases within the various types of homicide based on motive.[280] Legislatures might also enumerate in the

266. Dahlberg, *supra* note 260, at 197.
267. *Id.*
268. *Id.*
269. *Id.* at 199.
270. CODE § 7191.
271. *See* Dahlberg, *supra* note 260, at 205.
272. Kamisar, *supra* note 5, at 971.
273. *Id.*
274. *See generally* Williams, *supra* note 75.
275. *Id.*
276. *See* note 8 and § IV *supra.*
277. Scher, *supra* note 21, at 676.
278. STGB §§ 211-212.
279. Sw. STGB arts. 63-64.
280. These types include murder, manslaughter, manslaughter under extenuating circumstances and homicide upon request.

statutes themselves particular motives deserving exceptional treatment.

Motive is a decisive element[281] in the distinction between murder and manslaughter with their attendant, distinct penalties.[282] Once a judge equates motive with premeditation and deliberation, then he is better able to make a decision in a given case. If the basic objective of American, or any, criminal law system is to prevent harm to society,[283] then the concept of motive as a substantive element of criminal law is useful.[284] Once motive is considered by American criminal law, then the judge and jury may hear evidence about why the defendant committed the act.[285]

One of the essential elements of homicide in American criminal law is malice aforethought.[286] Because malice is an integral element, judges should consider the motive of an individual who has practiced euthanasia to ascertain whether the required malice is present.[287] If the judge then observes that the individual did not entertain the same malicious motive or intent as a murderer but rather as a concerned citizen, the individual would receive a mitigated sentence. Thus, an individual who is motivated by benevolence would be subject to a less severe punishment than a criminal who is motivated by evil.

Another approach that would mitigate the circumstances of a person who practices euthanasia is to adopt the "homicide upon request" provision of the penal codes of Germany and Switzerland.[288] This provision would allow a mitigated sentence for homicide on the grounds that the compassion motivating the actor and the consenting plea of the deceased reduces the reprehensibility of the act.[289] Thus far, American criminal law has never recognized the consent of the deceased as a defense to criminal homicide.[290] Currently, American criminal law advocates that: "Murder is no less murder because the homicide is committed at the desire of the victim. He who kills another upon his desire or command is, in the judgment of the law, as much a murderer as if he had done it merely of his own head. . . ."[291]

Opponents to euthanasia have attacked the European based "homicide upon request" provision by comparing it with the common law crime of assistance in suicide.[292] These opponents fear that homicide upon request is open for

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281. Scher, *supra* note 21, at 676.
282. Silving, *supra* note 79, at 363.
283. LA FAVE & SCOTT, *supra* note 60, at 21.
284. *See* Scher, *supra* note 21, at 676.
285. J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 83-93 (2d ed. 1960).
286. LA FAVE & SCOTT, *supra* note 60, at 528.
287. Silving, *supra* note 79, at 362.
288. STGB § 216; SW. STGB art. 114.
289. *See* § III *supra*.
290. *See* State v. Willis, 255 N.C. 473, 476, 121 S.E.2d 854, 857 (1961), *citing* Turner v. State, 119 Tenn. 663, 108 S.W. 1139 (1908).
291. Turner v. State, 119 Tenn. 663, 108 S.W. 1139 (1908).
292. Kutner, *supra* note 63, at 204-05.

abuse.[293] This same fear lies behind the policy in making assistance in suicide illegal.[294] To reduce the potential for abuse the provision should contain specific safeguards.

Article 115 of the Swiss Penal Code could serve as a model for such safeguards. Article 115 states that "[w]hoever from selfish motives, induces another to commit suicide or assists him therein" is punishable.[295] Thus, if one person persuades another to commit suicide out of selfish motives,[296] the instigator would be punishable. However, if a physician, motivated by a feeling of mercy, practices euthanasia or assists in a patient's suicide, consideration of this altruistic motive would eliminate the need to apply this safeguard.[297] To complete this statutory scheme, homicide upon request should be incorporated into criminal law as a special classification of homicide, similar to the crime of assistance in suicide but with a lessened sentence.[298] The majority of states have decriminalized either suicide or its assistance.[299]

The German provision of "manslaughter with extenuating circumstances"[300] is another approach that the American criminal justice system could incorporate. This provision calls for a mitigation of the sentence of an individual if he commits homicide under "extenuating circumstances."[301] Like the provision of "homicide upon request,"[302] this provision is a special classification of homicide. This classification is somewhat similar to the American classification of voluntary manslaughter, where an individual's sentence is mitigated because of provocation.[303] When an individual has performed euthanasia, courts would consider the existence of the euthanasia motive as an "extenuating circumstance."[304] However, if a court finds no extenuating circumstances but rather that an individual has committed murder, the court would have no reason to apply this provision.

The three proposed approaches to possible reforms in American criminal law are by no means a complete answer to the complex moral and legal problems of euthanasia. Rather, they serve to demonstrate the manner in which some foreign legal systems deal with this same issue. Foreign law can be a useful model for reexamination of American criminal law treatment of mercy killing. Distinctions between various types of homicide are useful to consider. One criteria for

293. *Id.*
294. *Id.*
295. Sw. STGB art. 115.
296. *Id.*
297. Silving, *supra* note 79, at 387.
298. Assistance in suicide is only a crime in a very small minority of states. *See generally* note 109 *supra.*
299. *Id.*
300. StGB § 213.
301. *Id.*
302. StGB § 216.
303. LA FAVE & SCOTT, *supra* note 60, at 593.
304. *See* Silving, *supra* note 79, at 367.

making these distinctions is the motive of the actor. Motive as an element of a crime has worked well for Germany and Switzerland. Contrasting an evil motive with a beneficient or merciful motive as an element of murder raises questions concerning the purpose of making homicide a crime. The answer to these questions should prove helpful in the debate over the legal status of euthanasia. A careful approach would not legalize murder, but would acknowledge that actions of mercy are distinct from the moral reprehension normally associated with homicide.

V. CONCLUSION

The issue of euthanasia has become important in recent years because euthanasia is arguably a solution to some dilemmas created by advances in medical technology. Today, medical technology has the capability in many instances to maintain a human life far beyond the point which an individual would desire. Euthanasia gives the terminally ill patient a free choice. However, the act of euthanasia in the United States is a crime of willful homicide. Despite this fact, physicians continue to practice euthanasia.

In contrast, the statutory laws of Germany and Switzerland treat euthanasia very differently. Germany and Switzerland's Penal Codes have certain provisions which expressly state that when a person has committed a homicide upon request of the deceased, or out of honorable motives, a mitigated sentence should be applied. Although the United States has not progressed in the same fashion as Germany and Switzerland, some state legislatures have dealt with the question of choice for the terminally ill by enacting right to die statutes which allow a terminally ill patient to request withdrawal from any and all treatment. However, these statutes are less than what pro-ethanasia societies have requested because they provide the treating physician with the discretion to undermine a patient's choice.

A comparison of the statutory laws of Germany and Switzerland to those of the United States shows that certain provisions of these two European penal codes might serve as a useful model for changes in American criminal law with respect to euthanasia. Such a model would enable the participants in the debate concerning euthanasia to explore possible approaches other than the ones now available in American criminal law. With expanded alternatives, legislatures may be able to resolve the issue of euthanasia to a greater satisfaction than is presently practiced.

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