

1988

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Recommended Citation

Zisser, Peter (1988) "EUTHANASIA AND THE RIGHT TO DIE: HOLLAND AND THE UNITED STATES FACE THE DILEMMA," *NYLS Journal of International and Comparative Law*. Vol. 9 : No. 2 , Article 9.
Available at: https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law/vol9/iss2/9

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EUTHANASIA AND THE RIGHT TO DIE: HOLLAND AND THE UNITED STATES FACE THE DILEMMA

I. INTRODUCTION

The subject of euthanasia has received considerable public attention recently,¹ although there are still many misconceptions concerning what is meant by the term.² For many people, euthanasia may bring to mind the atrocities of the Nazis, who directed their campaigns at the handicapped, mentally and chronically ill, and racially undesirable.³ The term is now commonly defined as "painlessly putting to death persons suffering from [an] incurable and distressing disease as an act of mercy."⁴

Most acts of euthanasia are defined under two sets of criteria: voluntary or involuntary; active or passive.⁵ Voluntary euthanasia occurs when the patient or patient's family consents to the procedure,⁶ while involuntary euthanasia occurs when consent is not or could not be obtained.⁷ Active euthanasia is the giving of some substance to another person that actually shortens that person's life,⁸ while passive euthanasia is the withdrawal of any life-sustaining equipment from a terminally ill patient.⁹

The concept of euthanasia has created an ethical dilemma¹⁰ for doctors because they are indoctrinated with the philosophy that their primary responsibility is to heal.¹¹ They are surrounded by the tools of technology,¹² all of which are designed to "continually enhance a doctor's ability to prolong life."¹³ Some of these doctors are then faced

1. Note, *Euthanasia: A Comparison of the Criminal Laws of Germany, Switzerland and the United States*, 6 B.C. INT'L & COMP. L. REV. 533, 535 (1983).

2. *Id.* at 534.

3. Aly & Roth, *The Legalization of Mercy Killings in Medical and Nursing Institutions in Nazi Germany from 1938 until 1941*, 7 INT'L J.L. & PSYCHIATRY 145, 146 (1984).

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

5. Note, *supra* note 1, at 534.

6. *Id.* at 536-37.

7. *Id.* at 537.

8. *Id.* at 539.

9. *Id.*

10. *Id.* at 533.

11. Klagsbrun, *Changing Attitudes Toward Euthanasia*, in EUTHANASIA: A DECADE OF CHANGE 56 (1979).

12. *Id.*

13. Note, *supra* note 1, at 536.

with the situation in which a patient, stricken with a painful and incurable disease, has made the decision that it is time to die.¹⁴ This patient asks the physician for direct assistance in ending his life.¹⁵ It is at this juncture that the difference between active and passive euthanasia is believed to be crucial to medical ethics.¹⁶

The view followed in the United States is that, in some cases, withholding treatment is permissible but taking any direct action designed to terminate the patient's life is not.¹⁷ While active euthanasia is a felony under current United States law,¹⁸ statutes allowing passive euthanasia (withholding treatment) have been enacted in a majority of the states.¹⁹ The debate in the United States continues to focus on passive euthanasia, since it is felt that the issue of active euthanasia is much too controversial to consider at this time.²⁰

This Note is a comparative study of the medical and legal approaches to euthanasia in the United States and the Netherlands, a country where active euthanasia is openly practiced. This Note is not intended to make any moral judgments, nor address the moral issues raised within a religious context.

II. THE NETHERLANDS

The Dutch Government, confronted with a practice of open, active euthanasia, is attempting to democratically decide if doctors should be allowed to perform "active" euthanasia or "mercy" killing.²¹

14. Klagsbrun, *supra* note 11, at 56.

15. *Id.*

16. Rachels, *Active and Passive Euthanasia*, in *ETHICAL ISSUES IN DEATH AND DYING* 240 (T. Beauchamp & S. Perlin eds. 1978).

17. *Id.* In a recent poll conducted by the Journal of the American Bar Association, 56.8% of the lawyers surveyed believed that active euthanasia should be made available to a terminally ill patient who requests it. Reidinger, *Lawpoll*, A.B.A. J., June 1, 1988, at 20.

18. Note, *supra* note 1, at 534.

19. *Id.* at 536.

20. Otten, *Fateful Decision*, Wall St. J., Aug. 21, 1987, at 1, col. 1. This does not mean that this issue is not being actively pursued. Americans Against Human Suffering ("A.A.H.S.") mounted a campaign in California to acquire enough signatures to get its initiative on the ballot for the November 1988 elections. The group was seeking to have enacted the Humane and Dignified Death Act ("H.D.D.A.") which would "permit" a competent, terminal patient to receive a physician's aid in dying if he or she requests it. Letter from Donald T. Gallagher, Chief Executive Officer of A.A.H.S., to Peter Zisser (Dec. 5, 1987). A.A.H.S. was not successful in its efforts to acquire the necessary number of signatures, but will try again in 1990 (after the required two-year waiting period for reintroducing a peoples' initiative). Telephone interview with Shirley Marcus, A.A.H.S. representative (Feb. 28, 1989).

21. Cody, *Dutch Weigh Legalizing Euthanasia*, Washington Post, Mar. 16, 1987, at

Since the seventeenth century, the Dutch have followed a tradition of "legal prohibition and practical tolerance."²² It is their belief that any type of behavior or activity can be tolerated, but they have tried to limit the activity's influence if possible, thus effectively preventing such behavior from entering the mainstream of Dutch society.²³ Beginning in 1965, the possibilities inherent in this social concept of indulging any behavior as long as it does not injure another person have been enthusiastically explored.²⁴ Among these forms of behavior are prostitution and drug use. Prostitution is allowed but is limited to a "red light" district in Amsterdam.²⁵ "Hard" drugs, such as heroin and cocaine, are still illegal, but only dealers can be prosecuted. Users are free from any legal liability unless they commit other crimes.²⁶ After twenty years of welcoming what the Dutch called "drug tourists,"²⁷ and watching the incidence of street crimes (such as thievery) increase dramatically,²⁸ Amsterdam finally took action by limiting hard drug dealing to a specific geographic zone (similar to the "red light" district).²⁹ Only recently has the city started to close down that area.³⁰ Some hold the view that the government of Holland will tolerate "little things, but if you go too far, they'll smash you down."³¹ The opposing view is that, far from any "smashing down," the past twenty years have seen the Dutch people "testing whether anything at all is too far."³²

A basic premise of Dutch culture is the belief that the government and the law should be used as "instruments of altruism."³³ More importantly, the direction of the Dutch people and government has been to address all problems openly, no matter how unpleasant or difficult, and to incorporate the solution (if one can be found) into the law.³⁴ It is with this attitude that the Netherlands has addressed the issue of euthanasia.

The debate over euthanasia, or "mild death"³⁵ as it is commonly

A1, col. 3.

22. Reeves, *The Permissive Dutch*, N.Y. Times, Oct. 20, 1985, (Magazine), at 36.

23. *Id.*

24. *Id.*

25. *Id.*

26. Painton, *Tolerance Finally Finds Its Limits*, TIME, Aug. 31, 1987, at 28.

27. Reeves, *supra* note 22, at 38.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 101.

32. *Id.*

33. Painton, *supra* note 26, at 29.

34. *Id.*

35. Cody, *supra* note 21, at A1, col. 3.

called in the Netherlands, has raged since the early 1970s.³⁶ It began in 1976, when the Dutch government adopted a recommendation made by the Council of Europe that was primarily concerned with a patient's right to refuse medical treatment.³⁷ The Council's recommendation was only intended to address the situation where no "reasonable purpose" would be served by continuing medical treatment.³⁸ This form of passive euthanasia had already been the accepted medical practice in the Netherlands.³⁹ It is premised on the right of "informed consent," where the decision to refuse treatment is made by a competent, well-informed patient. As a result, no legal problems will arise.⁴⁰ It follows from this that a patient's "right to self-determination precludes the physician from continuing treatment."⁴¹ Patients must be informed when their decisions are contrary to medical advice, but from that point on the "responsibility rests completely with the patient."⁴² This holds true even if discontinuing the treatment ends in death.⁴³ Thus, the Dutch view is that euthanasia does not occur when a patient refuses treatment and consequently dies.⁴⁴

In 1985,⁴⁵ the State Commission on Euthanasia⁴⁶ implemented the definition of euthanasia that has become generally accepted in the Netherlands: "Intentional life-termination by somebody else [other] than the person concerned at [the] request of the latter."⁴⁷ Actions taken under this definition are currently illegal, and hold the doctor liable under Section 293 of the Penal Code of the Netherlands.⁴⁸ This

36. H. van Zuydewijn, *Euthanasia in the Netherlands* (Mar. 23, 1987) (from a Dutch Government release available from the Dutch Consulate).

37. DUTCH MINISTRY OF JUSTICE, *AIDE-MEMOIRE ON THE SITUATION IN THE NETHERLANDS WITH REGARD TO EUTHANASIA 1* (1986) [hereinafter *AIDE-MEMOIRE*].

38. *Id.*

39. Cody, *supra* note 21, at A12, col. 2.

40. Gevers, *Legal Developments Concerning Active Euthanasia on Request in the Netherlands*, 1 *BIOETHICS* 156 (1987).

41. *Id.*

42. *Id.*

43. *Id.*

44. H. Leenen, *Euthanasia, Assistance to Suicide and the Law: Developments in the Netherlands 1, 2* (unpublished manuscript, available from the Dutch Ministry of Health, The Hague).

45. H. van Zuydewijn, *supra* note 36, at 1.

46. *AIDE-MEMOIRE*, *supra* note 37, at 1. The Commission was set up by the Dutch Government to advise them on future policy concerning euthanasia "with special reference to legislation and the application of the law." *Id.*

47. H. Leenen, *supra* note 44, at 3.

48. H. van Zuydewijn, *supra* note 36, at 1. Section 293 of the Penal Code of the Netherlands provides that "any person who terminates the life of another person at the latter's express and earnest request is liable to a term of imprisonment not exceeding twelve years." *Id.*

section of the Penal Code interprets the termination of a patient's life on request as tantamount to murder or manslaughter, the circumstances of the request being the only mitigating factor.⁴⁹

A. The Courts

Although euthanasia is officially regarded as a criminal offense, it is estimated that five thousand patients die each year in the Netherlands with the assistance of their doctors.⁵⁰ The actions of these physicians have essentially been supported by what can only be called a "sympathetic" court. Since 1973 few doctors who have performed euthanasia have been prosecuted, and those convicted have received only token punishment.⁵¹

The first case that considered the questions relevant to the acceptability of euthanasia⁵² was decided by the Leeuwarden District Court in 1973.⁵³ A doctor had given her mother an overdose of morphine after her mother's repeated requests to end her suffering.⁵⁴ The doctor was convicted, but was only sentenced to a "symbolic and conditional punishment."⁵⁵ The Leeuwarden court, in limiting the lawful application of euthanasia, held that it could only be applied in situations where the

49. *Id.*

50. Clines, *Dutch Are Quietly Taking the Lead in Euthanasia*, N.Y. Times, Oct. 31, 1986, at A4, col. 1; see also Otten, *supra* note 20, at 1, col. 1, which puts the figure at between one thousand and seven thousand deaths a year; Cody, *supra* note 21, at A1, col. 3, which puts the figure at between six thousand and ten thousand deaths a year.

51. Otten, *supra* note 20, at 1, col. 2.

52. H. Leenen, *supra* note 44, at 13 n.7. While there had been earlier cases involving the taking of life for "merciful" reasons, the courts had not considered issues that were relevant to the acceptability of euthanasia. *Id.*

53. *Id.* at 4. The Netherlands judicial system is comprised of four levels: 1) The Cantonal Court, which deals mostly in minor offenses such as traffic violations and most civil cases of original jurisdiction. There are 62 Cantonal Courts, each representing a specific geographical area (Canton); 2) The District Court, which tries all criminal cases involving felonies, all civil cases outside the jurisdiction of the Cantonal Courts, and any appeals from the Cantonal Courts. There are 19 District Courts, each covering three of four Cantons; 3) The Court of Appeals, which hears appeals from the District Courts. There are five Courts of Appeals, each covering three or four districts; 4) The Supreme Court, which is the court of last resort, where only questions of law are considered. See generally MINISTRY OF JUSTICE, THE DUTCH COURT SYSTEM (1979) [hereinafter THE DUTCH COURT SYSTEM].

54. H. Leenen, *supra* note 44, at 13.

55. *Id.* At her trial, the doctor testified that her mother's "mental suffering became unbearable . . . [that] was most important to me. Now, after all these months, I am convinced I should have done it much earlier." *Id.* Owing to this admission, the court found the doctor guilty, but she was only given a one week suspended sentence and one year of probation. O. RUSSELL, FREEDOM TO DIE: MORAL AND LEGAL ASPECTS OF EUTHANASIA 255-56 (rev. ed. 1977).

patient was incurably ill, was suffering unbearably, and the termination of life was to be performed by the doctor who had treated the patient (or one who was acting with him).⁵⁶

In 1981, the District Court of Rotterdam convicted a "lay person" who had assisted in a suicide.⁵⁷ The court established a set of guidelines that closely paralleled the Leeuwarden criteria, but the guidelines were applied here to the separate crime of "assistance to suicide."⁵⁸ After this decision, the Minister of Justice moved for a coordinated policy on prosecution by requiring that every euthanasia case be discussed by the heads of the prosecution department before they could continue.⁵⁹

In 1983, the Alkmaar District Court acquitted a doctor who had terminated the life of a ninety-five year old patient by giving her a series of injections.⁶⁰ The court based its decision on the patient's right of "self-determination," holding that the act was "essentially not wrongful."⁶¹ The case was appealed to the Amsterdam Court of Appeals, which reversed the Alkmaar court and convicted the doctor, although imposing no punishment.⁶² On November 27, 1984, the Supreme Court of the Netherlands reversed the Amsterdam Court of Appeals.⁶³ The Supreme Court ruled that the Amsterdam court had not examined "whether, according to responsible medical opinion measured according to the prevailing standards of medical ethics, an emergency existed."⁶⁴ The case was remanded with instructions to review

56. H. Leenen, *supra* note 44, at 13.

57. *Id.* at 4.

58. *Id.* at 5. The Rotterdam criteria were: unbearable suffering; suffering and the desire to die being continuous; the person concerned understands his situation and alternatives and has weighed them; no other reasonable solution to improve the situation is available; the death does not inflict unnecessary suffering on others; the decision to terminate life may not be taken by one person; a doctor must be involved in all cases; and the decision has to be made carefully. *Id.*

59. *Id.* Every court has its own public prosecutor's office. The public prosecutors are collectively called the Public Prosecutions Department. The Minister of Justice can instruct the public prosecutor (all except the Attorney General at the Supreme Court) to prosecute or not to prosecute. THE DUTCH COURT SYSTEM, *supra* note 53, at 7.

60. Gevers, *supra* note 40, at 159.

61. H. Leenen, *supra* note 44, at 5.

62. *Id.*

63. *Id.*

64. Gevers, *supra* note 40, at 159. This "emergency" was based on the following facts: [The] woman was seriously ill with no chance of improvement. The weekend before her death, she suffered substantial deterioration, was unable to eat or drink and lost consciousness. She had pleaded with the doctor several times to put an end to her agony and after she became conscious again she declared that she did not want to experience anything like that again and, with great emphasis, begged for euthanasia. Finally, the [doctor] decided to act according to her

certain questions not addressed in the lower court: According to "professional medical judgement," how much more deterioration in her personality and what increase in suffering was she to expect? Would the patient soon be in a position where she would be unable to die with dignity? Were there other ways to alleviate her suffering?⁶⁶ In 1986, the doctor was finally acquitted by the Hague Court of Appeals, which changed the term "responsible" to "reasonable" in assessing the medical judgment to be exercised.⁶⁶

While the decisions of the Supreme Court opened the door to the legalization of euthanasia on request, it still left both doctors and patients uncertain as to their liability.⁶⁷ If the law was to be made "certain," that task rested with the legislative branch of the Dutch government.⁶⁸

B. The Legislature

In 1985, the State Commission on Euthanasia (Commission) submitted its report to the Dutch Government.⁶⁹ In a 13 to 2 vote, the Commission moved for changes in Sections 293 and 294 of the Penal Code (concerning aiding a suicide).⁷⁰ The Commission recommended that any intentional ending of a person's life on request should still be punishable, but an exception should be made for doctors when their patient's condition leaves no hope for any improvement, and the doc-

wishes as, in his opinion, every single day of life was nothing but a heavy burden to the patient, whose suffering was unbearable.

Id.

65. H. Leenen, *supra* note 44, at 6.

66. *Id.* This particular case was important because of the Supreme Court of the Netherlands' tacit acceptance of euthanasia, even with the limitation on acceptable criteria. There were other cases based on the *force majeure* criteria set in the Alkmeer case. In one, the doctor was given a conditional sentence of two months. In the other, the doctor was not punished for performing euthanasia, but did receive a penalty for issuing a false death certificate. *Id.* at 7.

67. *Id.* at 8. Since court decisions are decided on the particular facts and merits of each case, no one was really sure why some cases were prosecuted and some were not. *Id.*

68. *Id.* For an overview on why the Dutch legislature is the better forum for resolving issues "crowded [with] interest groups and advisory institutions," see Polak & Polak, *Faux Pas Or Pas De Deux? Recent Developments in the Relationship Between the Legislature and the Judiciary in the Netherlands*, 33 NETH. INT'L L. REV. 371, 408 (1986). It should also be noted here that the concept of *stare decisis* does not exist in the Netherlands. While the Supreme Court usually follows previous decisions, as do the lower courts, this is done as a matter of practice rather than procedure. THE SUPREME COURT OF THE NETHERLANDS, THE DUTCH LEGAL SYSTEM 6.

69. H. Leenen, *supra* note 44, at 8.

70. Gevers, *supra* note 40, at 160.

tor acts in "accordance with careful medical practice."⁷¹ The Commission also required that the patient's request to have his life terminated, in addition to being made freely, must be given verbally, if at all possible.⁷² While a written request may be taken as indicative of a patient's decision, it will only be considered relevant if the patient can no longer orally express his intent.⁷³ It was also recommended that the offense of assisting a suicide, if done by a physician, be considered under the same criteria as the terminating of life on request.⁷⁴ The Commission included a proviso that the public prosecutor had to be notified by the physician who performed the euthanasia.⁷⁵

Prior to the submission of the State Commission's report, a draft bill decriminalizing euthanasia had been introduced to Parliament⁷⁶ by one of the smaller political parties.⁷⁷ After the Commission's report was published, the draft bill was revised to conform with the Commission's view.⁷⁸ In January 1986, the Dutch government submitted its own specimen bill to Parliament with a cover letter signed by the Minister of Welfare, Health and Cultural Affairs and the Minister of Justice.⁷⁹ The Ministers' position was that they would "prefer" that the Criminal Code not be changed at this time.⁸⁰ The government's bill

71. *Id.* The requirements for "careful medical practice" are: a) The patient has to be informed of his situation; b) The doctor must be convinced that the patient's request be the result of careful consideration, and the request be made freely; c) In the doctor's judgment, terminating the patient's life is justified because he and the patient are left with no alternatives to the untenable situation; and d) Another physician must be consulted. H. Leenen, *supra* note 44, at 9.

72. *Final Report of The Netherlands State Commission on Euthanasia: An English Summary*, 1 *BIOETHICS* 163, 167 (1987) [hereinafter *Final Report*].

73. *Id.* at 166 (The Report makes it clear that any written request can be revoked or amended whenever the patient chooses.).

74. *Id.*

75. *Id.* at 170. The proviso also included the requirement that: 1) the physician submit a statement showing how the Criminal Code criteria had been met; 2) the consulting physician submit a declaration supporting (or not) the findings of the attending physician; and 3) the attending physician could not write the death certificate. *Id.*

76. H. Leenen, *supra* note 44, at 8. An "initiative" must be taken by a member of Parliament before any bill can be put on the agenda for discussion. *Id.*

77. *Id.* The Netherlands has at least 22 different political parties representing the entire political spectrum from extreme left-wing to extreme right-wing, including parties based on religious affiliation. There are 150 seats in the Lower House of Parliament, with the two or three parties having at least 30 seats usually combining to form "coalition" voting blocks. The remaining seats are generally divided among 10 or 11 smaller parties having two or three seats each. *MINISTRY OF FOREIGN AFFAIRS, THE KINGDOM OF THE NETHERLANDS: FACTS AND FIGURES—ELECTIONS AND THE PARTY SYSTEM* 11-19.

78. H. Leenen, *supra* note 44, at 11.

79. *AIDE-MEMOIRE*, *supra* note 37, at 2.

80. *Id.* at 2-3.

and the private member's bill were discussed in Parliament, which decided to forward both bills to the Council of State (Council) for its opinion,⁸¹ which was published on January 16, 1987.⁸² The Council recommended that the laws prohibiting euthanasia remain, but that *force majeure* (necessity) may be claimed by the doctor, provided that the requirements for "careful medical practice and administrative rules" are met.⁸³

The recommendation made by the Council of State will probably mean that euthanasia will not be legalized in the near future.⁸⁴ This does not mean, however, that legislative action on the subject has ceased. On September 17, 1987, a new draft bill lowering the maximum penalty for euthanasia from twelve years to four years was submitted to Parliament.⁸⁵

The feeling in the Netherlands is that any governmental movement towards full legalization of euthanasia will be openly accepted by the Dutch people in general,⁸⁶ and by the Dutch medical practitioners in particular.⁸⁷ It has been said that the practice of euthanasia in the Netherlands has already become a "fact of life and a way of death."⁸⁸

III. THE UNITED STATES

In contrast to the Netherlands, the United States has taken a different approach to the issue of euthanasia. As previously discussed, the Dutch legal system is premised on the notion of practical tolerance, whereas in the United States, the limitations on an individual's personal freedom to choose death over life are generally weighed against what is termed "the State's indirect and abstract interest in preserving

81. *Id.* at 3. The Council of State is the top "advisory body" to the Crown. The Council is authorized to bring to the attention of the Crown any issue that might call for legislative action. MINISTRY OF FOREIGN AFFAIRS, THE KINGDOM OF THE NETHERLANDS: FACTS AND FIGURES—THE CONSTITUTION 13.

82. H. Leenen, *supra* note 44, at 11.

83. *Id.*

84. Gevers, *supra* note 40, at 161.

85. Telephone interview with H.J. de Roy van Zuydewijn, Secretary to the Health Council of the Netherlands (Nov. 20, 1987).

86. H. van Zuydewijn, *supra* note 36, at 2. A recent poll showed that 68% of the Dutch population as a whole, and 69% of Dutch Roman Catholics, are in favor of legalizing euthanasia so long as the State Commission's criteria are followed. *Id.*

87. Gevers, *supra* note 40, at 161. The Dutch Medical Association had advanced changing the Penal Code if only to provide some measure of "legal certainty" to doctors who might become involved with euthanasia cases. *Id.*

88. *60 Minutes: The Last Right* (CBS television broadcast, Jan. 5, 1986) (transcript on file at Journal Graphics Inc., 2 John St., N.Y., N.Y. 10038).

the life of the competent patient."⁸⁹ The rights of the patient, and his freedom to choose, are primarily based on constitutionally mandated religious freedom, the right of "bodily self-determination" under common law, and the right of privacy.⁹⁰ Cases dealing with religious freedom have involved the refusal of blood transfusions,⁹¹ the use of poisonous snakes in religious practices,⁹² and compulsory vaccination.⁹³ Although the constitutional right to religious freedom is considered "absolute," it has not been free from government restraint.⁹⁴ For instance, when the "public interest" is put in jeopardy, as in the compulsory vaccination cases, the courts have found that "[the] public interest [is] considered paramount, without dissolution of respect for religious beliefs."⁹⁵

The right of bodily self-determination is a common law concept giving an individual the power to control his own body unless, as stated above, it can be overridden by a "compelling state interest."⁹⁶ This power to control is an integral part of the doctrine of informed consent.⁹⁷

The right of self-determination has since been merged into the right of privacy.⁹⁸ While the Constitution does not specifically mention this right, prior Supreme Court decisions have held that a "right of personal privacy exists and that certain areas of privacy are granted under the Constitution."⁹⁹ One of the main components of this right is

89. *In re Farrell*, 108 N.J. 335, 349, 529 A.2d 404, 411 (1987).

90. Note, *The Right to Die-A Current Look*, 30 Loy. L. Rev. 139, 145-46 (1984).

91. *Id.* at 145.

92. *In re Quinlan*, 70 N.J. 10, 36, 355 A.2d 647, 661, *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976).

93. *Id.*

94. *Id.*

95. *Id.*

96. Note, *supra* note 90, at 146. The United States Supreme Court has stated that "no right is held more sacred, or is more carefully guarded, by the common law than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Id.* (footnote omitted) (quoting *Union Pac. R.R. v. Bolsford*, 141 U.S. 250, 251 (1891)).

97. *Id.* The courts quantified this doctrine when they said: "[in] sum, the patient's right to self-decision is the measure of the physician's duty to reveal. That right can be effectively exercised only if the patient possesses adequate information to enable an intelligent choice." P. KEETON, R. KEETON, L. SARGENTICH & H. STEINER, *TORT AND ACCIDENT LAW* 208 (1983) (quoting *Cobbs v. Grant*, 8 Cal. 3d 229, 295, 502 P.2d 1, 11, 104 Cal. Rptr. 505, 515 (1972)).

98. Note, *supra* note 90, at 147.

99. *In re Quinlan*, 70 N.J. 10, 39, 355 A.2d 647, 663, *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976). "The Court in *Griswold* found the unwritten constitutional right of privacy to exist in the penumbra of specific guarantees of the Bill of Rights, formed by emanations from those guarantees that help give them life and sub-

the concept of "personal dignity,"¹⁰⁰ including "physical integrity and autonomy as well."¹⁰¹ Courts have held that this right was "broad enough to encompass a patient's decision to decline medical treatment under certain circumstances."¹⁰² This individual right to decline medical treatment, even if it leads to death, is at the heart of court decisions and legislative activity of the states. For the most part, the states have affirmed this right of personal decision-making, now essentially called the "right to die."¹⁰³

A. The Courts

The seminal case that addressed the correlative right of privacy with the discontinuance of medical treatment was *In re Quinlan*.¹⁰⁴ Karen Ann Quinlan was a twenty-one year old girl who was in a "chronic, persistent, vegetative state."¹⁰⁵ Her father petitioned the court to be appointed guardian and to be allowed to discontinue all "extraordinary procedures" designed to keep his daughter alive.¹⁰⁶ The court held that the patient's decision "to permit a non-cognitive, vegetative existence to terminate by natural forces was a valuable incident of her right to privacy."¹⁰⁷ Of equal importance to later cases and legislation was the additional ruling that Ms. Quinlan's right to privacy could be claimed on her behalf by her father, provided he was the guardian appointed by the court.¹⁰⁸ The court found no "external" interest of the state contrary to the patient's rights,¹⁰⁹ and that the pa-

stance." 70 N.J. at 40, 355 A.2d at 663 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965)).

100. *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 1147, 225 Cal. Rptr. 297, 307 (Ct. App. 1986).

101. Note, *supra* note 90, at 147.

102. 70 N.J. at 39, 355 A.2d at 663 (1976).

103. Note, *supra* note 90, at 178. This is to be contrasted with the judicial and legislative structure in the Netherlands which is conducted on a nationally-based system rather than a state-based system. Gevers, *supra* note 40, at 165.

104. 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom.* *Garger v. New Jersey*, 429 U.S. 922 (1976).

105. 70 N.J. at 24, 355 A.2d at 654.

106. *Id.* at 11, 355 A.2d at 647.

107. *Id.*

108. *Id.* The patient's right to choose would normally have to be asserted by the patient. In this case, however, the court felt that the only way to protect Ms. Quinlan's rights was to allow her guardian and family, using their best judgment, to decide whether she would have wanted to suspend treatment. *Id.* at 41, 355 A.2d at 664.

109. 109. *Id.* at 39, 355 A.2d at 663. Further, the court stated that no interest of the state could "compel Karen to endure the unendurable, only to vegetate a few measurable months with no realistic possibility of returning to any semblance of cognitive or sapient life." *Id.*

tient's right to privacy expands as the "degree of bodily invasion increases and the prognosis dims."¹¹⁰ The court appointed her father, Joseph Quinlan, as guardian and, provided certain conditions were met, held that the life-support system keeping Ms. Quinlan alive could be withdrawn.¹¹¹ Since Ms. Quinlan's death would be from the previously existing natural causes, it would not be classified as homicide and thus would be free from any civil or criminal liability.¹¹²

The next important issue that the American courts had to consider was whether to add the "nasogastric tube" to the types of treatment that could be withdrawn under the criteria determined in *Quinlan*.¹¹³ In 1983, the Superior Court of New Jersey approved the removal of the feeding tube from an eighty-four-year-old patient who was in a vegetative state.¹¹⁴ The decision was reversed by the appellate division, which held that:

[s]ince [the] patient was not in a chronic vegetative state, but was simply very confused, [the] bodily invasion [the] patient suffered as [a] result of her treatment was small and death by dehydration and starvation would be painful, [the] state's interest in preserving life, and thus removal of [the] nasogastric tube . . . would be improper.¹¹⁵

In the same year, the California Court of Appeals issued a writ of prohibition restraining a lower court from taking any action on murder and conspiracy charges against two doctors who disconnected a patient's life-support system and feeding tubes at the request of the patient's family.¹¹⁶ Since 1983, the addition of the nasogastric tube to the

110. *Id.* at 41, 355 A.2d at 664. Ms. Quinlan required "[twenty-four] hour intensive nursing care, antibiotics, the assistance of a respirator, a catheter and feeding tube." *Id.*

111. *Id.* at 55, 355 A.2d at 671-72. The court's conditions were: 1) The attending physicians must conclude that there was no "reasonable" possibility of Ms. Quinlan ever emerging from her coma; 2) the attending physician must consult with an "Ethics Committee," set up by the hospital; and 3) this committee must also agree that there is no reasonable possibility of Ms. Quinlan's recovery. *Id.*

112. *Id.* at 55, 355 A.2d at 672. The court stated that "the termination of treatment pursuant to the right of privacy is, within the limitations of this case, *ipso facto* lawful. Thus, a death resulting from such an act would not come within the scope of the homicide statute proscribing only the unlawful killing of another." *Id.* at 51-52, 355 A.2d at 670.

113. Note, *supra* note 90, at 154. This "nasogastric tube" is used to supply nutritional sustenance to patients who are in a coma and cannot eat or drink, and is a mechanism which is likened to basic nourishment. *See id.* at 155.

114. *In re Conroy*, 188 N.J. Super. 523, 457 A.2d 1232 (Ch. Div. 1983).

115. *In re Conroy*, 190 N.J. Super. 453, 464 A.2d 303 (App. Div. 1983).

116. *Barber v. Superior Court*, 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484 (Ct. App. 1983).

types of treatment allowed to be withdrawn has been affirmed in a number of jurisdictions, including the states of Washington,¹¹⁷ Florida,¹¹⁸ California,¹¹⁹ Massachusetts,¹²⁰ and New York.¹²¹

On June 24, 1987, the Supreme Court of New Jersey, considered a respected pioneer in this area of law,¹²² released three separate decisions confirming the judicial acceptance of an individual's right to choose not to receive either artificial maintenance or nasogastric sustenance.¹²³ These decisions constitute the essential nature of passive/voluntary euthanasia because there is consent (although in some cases transferred) and the act is the withdrawing of life-sustaining apparatuses.¹²⁴

It is still true that American criminal law treats active euthanasia as homicide.¹²⁵ Even if it is done for altruistic motives, that is, to "mercifully" end intense suffering, the act is considered premeditated and deliberate.¹²⁶ The case that received the most notoriety in recent years was *Gilbert v. Florida*.¹²⁷ Roswell Gilbert, at age seventy-five, was convicted of first degree murder for killing his wife and sentenced to life imprisonment.¹²⁸ She was suffering from Alzheimer's Disease and osteoporosis.¹²⁹ The combination of the two afflictions left her in constant pain and sometimes confused.¹³⁰ Mr. Gilbert could no longer take care of her, and felt that putting her in a nursing home, separated from

117. See *In re Colyer*, 99 Wash. 2d 114, 660 P.2d 738 (1983).

118. *Corbett v. D'Alessandro*, 487 So. 2d 368 (Fla. Dist. Ct. App. 1986).

119. *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (Ct. App. 1986).

120. *Brophy v. New Eng. Sinai Hosp.*, 398 Mass. 417, 497 N.E.2d 626 (1986).

121. *Delio v. Westchester County Medical Center*, 129 A.D.2d 1, 516 N.Y.S.2d 677 (App. Div. 1987). It should be noted here that only one year prior to the *Delio* decision, the Supreme Court of Nassau County refused to allow the removal of a nasogastric tube from a patient who was found to be neither terminally ill nor brain dead. In addition, it was uncertain whether his comatose condition was irreversible or not. See *Vogel v. Forman*, 134 Misc. 2d 395, 512 N.Y.S.2d 622 (Sup. Ct. 1986).

122. *Right to Die*, A.B.A. J., Oct. 1, 1987, at 120-21.

123. *In re Farrell*, 108 N.J. 335, 529 A.2d 404 (1987); *In re Peter*, 108 N.J. 365, 529 A.2d 419 (1987); *In re Jobs*, 108 N.J. 394, 529 A.2d 434 (1987).

124. See generally Note, *supra* note 1, at 535-37.

125. *Id.* at 540.

126. *Id.*

127. 487 So. 2d 1185 (Fla. Dist. Ct. App. 1986).

128. *Id.* at 1187. Absent any legislative changes, the court was unable to take into account any of the mitigating circumstances that might have allowed them some discretion in sentencing Mr. Gilbert. These circumstances included his age and the fact that he had been a respected, peaceful, law-abiding citizen up until the time of the incident. *Id.* at 1192.

129. *Id.* at 1187.

130. *Id.*

him, would amount to a "horrible death for her."¹³¹ On March 4, 1986, he shot her, as he put it, to "terminate her suffering."¹³² The court stated that "euthanasia is not a defense to first degree murder in Florida and this court has been furnished with no law or statute to the contrary."¹³³

B. The Legislature

The issue of passive euthanasia is not new to state legislatures, although early movements toward some degree of state control were unsuccessful.¹³⁴ Starting in 1976, with the enactment in California of the Natural Death Act,¹³⁵ other states have followed with their own version of similar legislation. These "right to die" statutes are designed to legitimize the concept of a "living will."¹³⁶ This living will, almost always a written document,¹³⁷ establishes a "method whereby an adult person may execute a directive for withholding or withdrawal of life-sustaining procedures."¹³⁸

The living will statutes have two basic components. First, they allow a person to prepare, in advance of any medical treatment, a document that "clearly" provides direction for their care in the event of a terminal condition and second, to "establish clear guidelines to protect physicians from liability."¹³⁹ All of the statutes require that the patient must be terminally ill before withdrawal will be allowed.¹⁴⁰ Some statutes allow an oral statement to be considered as a declaration of a patient's desires, providing it is witnessed by at least two people, one of

131. *Id.* at 1188. It should be added that the Gilberts had been married for over 50 years. *Id.* at 1187.

132. *Id.* at 1188. He went on to say that "I could take care of whatever happens to me and it's happening right now and that was of no consequence to me . . . I know I was breaking the law . . . So it's murder. So what?" *Id.*

133. *Id.* at 1190. This author knows of no American jurisdiction where acts such as Mr. Gilbert's have been explicitly condoned.

134. Note, *supra* note 90, at 143.

135. CAL. HEALTH & SAFETY CODE §§ 7185-7195 (West Supp. 1987).

136. Note, *supra* note 1, at 556.

137. *Id.*

138. *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 1139, 225 Cal. Rptr. 297, 302 (Ct. App. 1986).

139. News From Society For The Right To Die 1, 1-2 (June 1987) [hereinafter Society Newsletter]; see also Medical Treatment Decision Act, COLO. REV. STAT. §§ 15-18-101 to -113 (Supp. 1986). "No physician signing a certificate of terminal condition or withholding or withdrawing life-sustaining procedures in compliance with a declaration shall be subject to civil liability, criminal penalty, or licensing sanctions therefor." *Id.* § 15-18-110(b).

140. Note, *supra* note 1, at 558.

whom is "neither a spouse nor a blood relative."¹⁴¹ If the declaration is oral, and satisfies the witness requirement, the attending physician must include it in the patient's medical record.¹⁴² The statutes also make provisions for incompetent patients by allowing the next of kin or legal guardian to give their substituted consent.¹⁴³ Some states have allowed substituted consent to be extended to cover a terminally ill minor.¹⁴⁴

While some statutes prohibit the withdrawal of sustenance, this prohibition is reserved for patients who are not in a terminal condition.¹⁴⁵ In addition, the absence of a sustenance provision has not precluded the courts from interpreting the statutes as including such a provision.¹⁴⁶ In 1986, the American Medical Association's Judicial Council also included tubal feeding among the life-prolonging treatments that could be withdrawn.¹⁴⁷

As of June 1987, thirty-nine states have enacted some form of living will statute.¹⁴⁸ Legislation has also been proposed in ten of the remaining states, with Kentucky and Ohio being the only two states to have no such statute or proposed legislation.¹⁴⁹ A poll of two thousand people taken by the American Medical Association prompted the poll analyst to state "the American people want to have uniform living will provisions in every state, durable power of attorney provisions in every state, and an ongoing national public education program in place to make the public aware of these . . . documents."¹⁵⁰

141. See Life-Prolonging Procedure Act, FLA. STAT. § 765.03-.04 (1986). It is interesting to note that in *Gilbert*, the defendant attempted to use his wife's complaints of "I'm so sick . . . I want to die" as indicative of her intent. Mrs. Gilbert had left no "mercy will" nor did she express any definitive intent in that direction. *Gilbert v. State*, 487 So. 2d 1185, 1191 (Fla. Dist. Ct. App. 1986).

142. Natural Death Act, VA. CODE ANN. § 54-325.8:3 (Supp. 1987).

143. CONN. GEN. STAT. § 19a-571 (Supp. 1987).

144. LA. REV. STAT. ANN. § 1299.58.6 (West Supp. 1987).

145. CONN. GEN. STAT. § 19a-571 (Supp. 1987).

146. *Corbett v. D'Alessandro*, 487 So. 2d 368 (Fla. Dist. Ct. App. 1986). While the Florida statute specifically excludes sustenance within the definition of life-prolonging procedures, the court found that they were "unable to differentiate between the multitude of artificial devices that may be available to prolong the moment of death." *Id.* at 371.

147. Society Newsletter, *supra* note 139, at 2.

148. *Id.* at 1.

149. *Id.*

150. *Id.* at 5.

IV. CONCERNS

The concerns held by opponents of any euthanasia legislation are generally the same in both the Netherlands and the United States. There is fear that the law will be authorizing a "legal right of execution."¹⁵¹ By the "blasé acceptance"¹⁵² of euthanasia, will euthanasia legislation lead to the elimination of those thought to be no longer useful or productive?¹⁵³ The critics contend that by allowing any form of euthanasia, we are "sliding down the slope to social Darwinism,"¹⁵⁴ leading to the possibility that elderly and "defective" members of society will become the law's victims.¹⁵⁵ They point to the atrocities under the Nazi regime as proof of their claims, for what started in Germany as a "voluntary practice" ultimately became a tool of genocide.¹⁵⁶ Even with the vast array of diagnostic tools available to physicians, what if their prognosis for recovery is wrong?¹⁵⁷ Physicians opposed to legislation raise the point that their act is irreversible.¹⁵⁸

With the onslaught of Acquired Immune Deficiency Syndrome (AIDS), a disease which is presently incurable, a new problem faces the government of the Netherlands. They do not want their country to become a haven for AIDS sufferers who might be looking for "easy access" to painless euthanasia.¹⁵⁹ The Dutch government has tried to emphasize that AIDS sufferers "are most often being offered passive methods of awaiting death, by reducing normal emergency and intensive-care procedures."¹⁶⁰ In a recent court decision in New York State, an AIDS patient's life-sustaining medical treatment was continued, contrary to his living will.¹⁶¹ The court ruled that although there was no possibility of the patient recovering from AIDS, the AIDS-related

151. Note, *supra* note 1, at 543.

152. Clines, *supra* note 50, at A4, col. 4.

153. Otten, *supra* note 20, at 6, col. 4; *see also* Note, *supra* note 1, at 543.

154. Otten, *supra* note 20, at 6, col. 4.

155. Note, *supra* note 1, at 543.

156. *Id.* at 544. The German public "never believed that the merciful act of euthanasia would be abused and utilized as a weapon to cause such horrifying results." *Id.*; *see also* Aly & Roth, *supra* note 3, at 153. These commentators mention that in 1939, in a law proposed by the German Ministry of Justice's Commission of Criminal Law, the first paragraph read: "[a]ny person suffering from an incurable illness seriously hindering himself or others, or leading to certain death may, upon his own express wish and with the permission of a specially authorized physician, have access to mercy killing." *Id.*

157. Note, *supra* note 1, at 544.

158. *Id.*

159. Clines, *Dutch Fear: AIDS Cases' Last Stop*, N.Y. Times, Apr. 15, 1987, at A12, col. 1.

160. *Id.* at col. 2.

161. N.Y.L.J., July 28, 1987, at 11, col. 1.

illness he had could probably be successfully treated.¹⁶²

The Netherlands does not want to be the only country in the world to condone active euthanasia.¹⁶³ Both countries do not want the "right to choose" by the individual to become the right of others to choose for them.¹⁶⁴

V. CONCLUSION

The concepts of both active and passive euthanasia, as practiced in the Netherlands and the United States respectively, are based on an individual's right to decide his or her own fate, regardless of the interest the state might have in that person's welfare. By carefully controlling the criteria necessary for the elimination of criminal liability and keeping the excesses of the past in constant view, both countries might succeed in honoring their citizens' rights without jeopardizing their citizens' futures.

Peter Zisser

162. *Id.*

163. AIDE-MEMOIRE, *supra* note 37, at 3.

164. Note, *supra* note 1, at 543.

