A Cry for Help: A Comparison of Voluntary, Active Euthanasia Law

Lynn Tracy Nerland
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By Lynn Tracy Nerland*

Member of the Class of 1990

I. INTRODUCTION

In 1986, a jury found seventy-five year-old Roswell Gilbert guilty of premeditated murder in the shooting death of his wife of fifty-one years. Mrs. Gilbert, who suffered from osteoporosis and Alzheimer's disease, was in chronic pain and had repeatedly asked to die. Mr. Gilbert was sentenced to life imprisonment with no possibility of release before his one-hundredth birthday. Roswell Gilbert will probably die in prison.

The advent of the AIDS crisis means that scenes like this are touching an ever increasing spectrum of the population. The slow and painful death caused by AIDS forces many sufferers and their families to consider euthanasia as an alternative to continued suffering.

In this Note, the word "euthanasia" is defined as "[t]he act or practice of painlessly putting to death persons suffering from an incurable and distressing disease as an act of mercy."

* This Note is dedicated to my grandparents Alphage and Alice Hamel and Garfield and Bernadette Tracy. Through them I have learned much about life and death.

2. Clines, Dutch Fear: AIDS Cases' Last Stop, N.Y. Times, Apr. 15, 1987, at A12, col. 1 (Dutch authorities are sensitive about the Netherlands developing a "worldwide reputation as an AIDS hospice.").

Florida State Representative Walter W. Sackett, Jr., a doctor who has sponsored several bills about euthanasia, does not use the word "euthanasia," preferring the term "death with dignity." There are certainly many other descriptive phrases such as "right to die," "mercy killing," "right to self-determination," "self-deliverance," and "benemortsia."

Often euthanasia is considered in conjunction with suicide, which is a self-initiated action with the specific intent to bring about one's death. N. Cantor, Legal Frontiers of Death and Dying 46 (1987). The definitions become less clear when discussing aiding and abetting of suicide and euthanasia, and many legal systems draw no distinction between these categories. For example, the United States, England, Australia, and Canada have criminal statutes prohibiting the aiding and abetting of suicide, but do not define a separate offense when the act is one of mercy to a person suffering from an incurable disease or condition. See infra notes 52-64 and accompanying text.
While some people still debate the issues of "pulling the plug" or "passive euthanasia," it has become a fait accompli in modern medicine. Decisions to turn off a respirator, cancel surgery, or discontinue intravenous or other life supporting technology are made daily throughout the world. Hospitals place "do not resuscitate" stickers on patients' files. The American Medical Association has publicly stated that when a doctor is treating a terminal patient the doctor should, under certain conditions, cease or omit treatment. Many of the major world religions accept the need for these actions as well. As academics and members of the population at large accept these passive euthanasia situations, attention is focused toward active euthanasia and its ramifications.

Passive euthanasia has commonly been considered less reprehensible than active euthanasia. When patients choose to refuse treatment, they often do so in the hope of an easier death. Yet, this expectation may in

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4. Passive euthanasia is defined as allowing a patient to die in comfort. E. Kluge, The Ethics of Deliberate Death 11-12 (1981). Passive euthanasia can be further divided into the categories of withholding or withdrawing treatment. The basis for this classification rests on the belief that it is better not to initiate a particular treatment than to stop after it has begun. N. Cantor, supra note 3, at 34; Weir, Treatment Abatement with Critically Ill Patients, in Ethical Issues in Death and Dying 179 (R. Weir 2d ed. 1986).

Another distinction is made between ordinary and extraordinary treatment; the difference being whether a particular kind of treatment is an obligatory or optional means of prolonging life. Among the factors considered in deciding if the treatment is ordinary or extraordinary are its simplicity, naturalness, customariness, invasiveness, chance of success, expense, and the balance of its benefits and burdens to the patient's condition. Lynn & Childress, Must Patients Always Be Given Food and Water?, in Ethical Issues in Death and Dying, supra, at 223.


All fifty states have enacted a durable power of attorney statute which may be applicable to health care decisions. Elder Law Attorneys Work for Older Americans, San Francisco Banner Daily J., Dec. 28, 1988, at 5, col. 1.

5. See Fletcher, Ethics and Euthanasia, in Death, Dying and Euthanasia 293 (1977); N. Cantor, supra note 3, at 35.

6. Fletcher, supra note 5, at 293.


9. President's Commission, supra note 4, at 61-73.
realities consist of weeks of pain preceding death. For example, a patient who is dying from one illness may refuse antibiotics to treat an unrelated infection. Microorganisms multiply and produce toxins, interfering with organ functions. The patient can develop a fever and possibly delirium or shaking and light-headedness. Kidney failure can result in nausea, vomiting, gastrointestinal hemorrhage, coma, neuromuscular twitching, and convulsions. Is there another way to provide the easy death for which people are hoping?

Active euthanasia is "the direct act of rendering a lifeshortening agent to a patient." Methods include injections of air, potassium chloride, or narcotics. Nonmedical options include death by gunshot, strangulation, or suffocation. Additionally, the violation of a patient's strict diet may actively shorten the patient's life. Many philosophers, as well as doctors and attorneys, question the distinction between death by acts of omission (passive euthanasia) and death resulting from direct action (active euthanasia). Is not "pulling a plug" from a respirator a direct act?

In the United States, opponents of legalized, voluntary, active euthanasia suggest that euthanasia cases are best left to the discretion of the prosecutor, judge, and jury. The results of these cases, however, are inconsistent at best. A person should know the general penalty for breaking a law. For this reason, many societies publicly publish criminal codes. Otherwise, the system appears arbitrary: condemning a person under the same facts which allowed the acquittal of another. This is particularly true in active euthanasia cases when a person may choose to violate society's penal code to fulfill a more fundamental moral belief.

This Note will explore the phenomenon of voluntary, active euthanasia in several legal and cultural settings. Twentieth century Americans are not the only ones faced with this difficult issue. A comparison of other legal and cultural norms can assist in developing a proposal for the

11. Id.
14. See E. KLUGE, supra note 4, at 12; President's Commission, supra note 4, at 61-73. See generally G. WILLIAMS, The Sanctity of Life and the Criminal Law 325-26 (1957) (discussing the criminal liability of killing by inaction or omission).
United States legal system which would treat Roswell Gilbert, and others who find themselves faced with a similar dilemma, more humanely.

II. MORAL ARGUMENTS

Legal standards often evolve from moral principles; however, moral concerns are not always directly translated into legal terms.\textsuperscript{16} The moral debate surrounding euthanasia is centered on the choice between the sanctity of life in all forms and the quality of life as one approaches death.

Proponents of euthanasia speak first of individual liberty and the right of self-determination. They assert that the ultimate decision about what to do or not to do to one's body lies with the individual.\textsuperscript{17} Furthermore, no one's right to life is violated because consent is given to die.\textsuperscript{18} In fact, proponents of euthanasia perceive it as an extension of the doctrine of informed consent.\textsuperscript{19} Advocates also speak of the loss of human dignity in terminal situations and the desire to reduce suffering.\textsuperscript{20} Often unspoken is the utilitarian argument that at some point it is wasteful to expend resources on a terminal patient when so many others could benefit from those resources.\textsuperscript{21}

Opponents of legalized euthanasia argue in terms of the sanctity of life. Conceding that pain and suffering are undesirable, they warn of the dangers of making exceptions which may lead to deteriorating standards.

\textsuperscript{16} J. WILSON, DEATH BY DECISION 128 (1975).
\textsuperscript{17} Beauchamp & Perlin, Euthanasia and Natural Death: Introduction in ETHICAL ISSUES IN DEATH AND DYING, supra note 4, at 217; Grisez, Suicide and Euthanasia, in DEATH, DYING AND EUTHANASIA, supra note 5, at 792; Legal Advisors Committee of Concern for Dying, The Right to Refuse Treatment: A Model Act, in ETHICAL ISSUES IN DEATH AND DYING, supra note 4, at 194. See generally D. HUMPHRY & A. WICKETT, supra note 8, at 229-76.
\textsuperscript{18} Grisez, supra note 17, at 789-92.
\textsuperscript{19} Informed consent is
\textsuperscript{20} Beauchamp & Perlin, supra note 17, at 217.
\textsuperscript{21} J. WILSON, supra note 16, at 56.
and abuses. Often called the "wedge argument," the opponents of legalized euthanasia point to the horrors of the Holocaust to demonstrate what can happen when exceptions are made. Additionally, opponents point to the possibilities of mistaken diagnoses as well as the possible discovery of new treatments capable of curing those with terminal diseases.

III. HISTORICAL BACKGROUND

One can trace discussions about euthanasia throughout written history. In all ages, attitudes about euthanasia have depended predominantly on two factors: society's concept of the value of life and whether society allowed a person to freely dispose of his or her life. An historical discussion of attitudes towards euthanasia tests many of the ethicists' arguments both for and against euthanasia.

The word euthanasia is derived from the Greek adverb "eu" meaning "well" and the noun "thanatos" meaning "death." Hence, euthanasia was an easy and happy death at the end of a full life.

Although Athenian law did not criminalize suicide, it did not sanction it either. The Pythagoreans denied a person the right to take ones own life. This philosophy influenced Hippocrates in the fifth century B.C. The Hippocratic Oath stated that it was the duty of a physician never to take a life but always to attempt to preserve it. Yet, in an essay, Hippocrates implied an exception to the Oath when he defined the purpose of medicine as "to do away with the sufferings of the sick, to lessen the violence of their diseases, and to refuse to treat those who are overmastered by their diseases, realizing that in such cases medicine is

22. Beauchamp & Perlin, supra note 17, at 218.
23. In Nazi Germany euthanasia began with mercy deaths of the severely and hopelessly ill. It was a privilege reserved only for "true Germans." From there the Nazis began exterminating first the mentally ill, then the "useless eaters," and finally the "inveterate" (German haters and inferior races). Some 275,000 people perished in Nazi "euthanasia centers," in addition to the millions killed not under the guise of "euthanasia centers." Maguire, Deciding for Yourself: The Objections, in Ethical Issues in Death and Dying, supra note 4, at 285. See generally Alexander, Medical Science Under Dictatorship, 241 NEW ENG. J. MED. 39 (1949).
27. Id. at 18.
28. Id. at 21.
29. E. Kluge, supra note 4, at 31; Maguire, supra note 23, at 304.
30. E. Kluge, supra note 4, at 31.
powerless.\textsuperscript{31}

The Platonists, Aristotelians, Epicureans, and Neoplatonists also opposed suicide.\textsuperscript{32} Yet, suicide was known in the Greek world.\textsuperscript{33} Stoicism, founded in the third century B.C., may have prompted a change in attitude. It embraced euthanasia and suicide, believing that life and death were unimportant to wise men. Hence, suicide was reasonable when life could no longer be lived in accordance with nature because of pain, incurable disease, or physical abnormalities.\textsuperscript{34}

Stoicism also influenced the Romans who saw suicide as an escape from suffering.\textsuperscript{35} In early Roman law, consent or desire to be killed precluded the unlawfulness of the act under a theory of \textit{volenti non fit injuria}.\textsuperscript{36} Later, the Roman Empire viewed homicide, including suicide, as an offense against society and developed a doctrine holding that the right to life was inalienable.\textsuperscript{37}

Ancient Judaic cultures based their opposition to suicide and eutha-

\textsuperscript{31} Hippocrates, \textit{The Art}, in 2 HIPPOCRATES 193 (W.H.S. Jones trans. 1923).
\textsuperscript{32} J. Wilson, \textit{supra} note 16, at 21.

For Aristotle, suicide was an offense against the state. ARISTOTLE, \textit{THE NICOMACHEAN ETHICS OF ARISTOTLE} 134-35 (1925). Therefore, a penalty was imposed, the family dishonored, and the right hand of the dead person was cut off and buried separately. Mair, \textit{Suicide: Greek and Roman}, in 12 \textit{ENCYCLOPEDIA OF RELIGIONS AND ETHICS} 29-30 (1924).

Neoplatonism, which arose in the third century B.C., also condemned suicide because a person should not abandon the post assigned by God. D. Humphry & A. Wickett, \textit{supra} note 8, at 6; J. Wilson, \textit{supra} note 16, at 22-23.

33. Spartans practiced infanticide primarily to create the healthy and vigorous people needed for the war state. J. Wilson, \textit{supra} note 16, at 20.

Ancient Greek writers ascribed to the inhabitants of the island of Ceos (or Keos) a custom requiring a person who reached sixty years of age to commit suicide. \textit{2 STRABO, THE GEOGRAPHY OF STRABO} 210 (H. Falconer trans. 1913).

34. Mair, \textit{supra} note 32, at 30. Stoics were willing to kill themselves over the slightest injury. For example, Zeno, the founder of the school, committed suicide because of a sprained finger. \textit{Id}.


Seneca, the Roman statesman and philosopher, commented:

I shall not avoid illness by seeking death, as long as the illness is curable and does not impede my soul. I shall not lay violent hands upon myself just because I am in pain; for death under such circumstances is defeat. But if I find out that the pain must always be endured, I shall depart, not because of the pain, but because it will be a hindrance to me as regards all my reasons for living. He who dies just because he is in pain is a weakling, a coward; but he who lives merely to brave out this pain, is a fool.

\textit{1 Seneca, Ad Lucilium Epistulæ Morales} 409 (R. Gummere trans. 1917).

36. Horvath, \textit{supra} note 25, at 82.

37. \textit{Id}.
Comparison of Euthanasia Law: "Thou shall not kill." However, Jewish history contains several examples of suicide and euthanasia which are not considered immoral.

When Stoicism suggested a kind of "after life," the value of life on Earth decreased. Death was not the end; therefore, euthanasia was acceptable. Athenians and Stoics valued an individual's freedom and liberty; hence, suicide and euthanasia were not criminal acts. The later Romans emphasized the needs of society, not the individual, and criminalized both suicide and euthanasia.

Influenced by Judaism, Christianity also opposed suicide. In the early fifth century, Augustine reiterated the Judaic position that suicide was wrong because it violated the Sixth Commandment. Throughout the Middle Ages, the Church refused to give those who committed suicide a Christian burial.

In his *Summa Theologica*, Thomas Aquinas wrote that suicide was the most dangerous of sins because it left no time to repent the transgression against oneself, God, and the community. Aquinas extended his belief against suicide to include a request that one's own life be taken.

Despite this stern admonition, people in the Middle Ages practiced

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However, at least one scholar believes that this translation is imprecise. According to Joseph Fletcher, the true Hebrew translation is "thou shalt do no murder," as in the Book of Common Prayer. His view is that the Hebrew of the Decalogue "clearly means unlawful killing, treacherously, for private vendetta or gain." *J. FLETCHER, MORALS AND MEDICINE* 195-96 (1954). This interpretation would exclude euthanasia.

39. *Judges* 16:23-30 (Samson caused a building to fall on him and bury him with his enemy); *2 Samuel* 17:23 (David's counselor, Ahitophel, hung himself after his advice had been rejected). *Compare 1 Chronicles* 10:1-7 (After being wounded in battle, Saul purposely falls on his own sword) with *2 Samuel* 1:5-10 (An Amalekite slays Saul who begs to die after being wounded in battle).


In *City of God*, Augustine also opposed the choice of death because God always turned sin and suffering into good. *Id. See generally E. KLUGE, supra* note 4, at 32 (discussing Augustine's attitude towards suicide).


In 533, the Council of Orleans decided to deny funeral rights to anyone who killed himself while accused of a crime. Three decades later, the Council of Braga extended that policy to all suicides. In 693, the Council of Toledo declared that anyone who attempted suicide would be excommunicated. *D. HUMPHRY & A. WICKETT, supra* note 8, at 6.

43. *2 T. AQUINAS, SUMMA THEOLOGICA* 1468-70 (Fathers of the English Dominican Province trans. 1947). Suicide was a transgression against oneself because it was against the natural inclination of self-preservation. It was transgression against God because only God, who had given life, had the right to decide who lived and died. Finally, suicide was a transgression against the community because it hurt those relatives and friends who survived. *Id.*
According to folktales in the British Isles, it was the custom to kill the aged and deformed by means of strangulation or a blow to the head. In Brittany, a holy hammer made of stone was kept in the chapel of each district. The oldest person in the village would take it and crush the head of a dying person while all the villagers prayed.

During the Middle Ages, Jews removed the pillow of a dying person so that he or she would die more quickly. This practice was officially prohibited in the fourteenth century but continued until the seventeenth century.

Although religious teachings of the Middle Ages prohibited suicide, euthanasia continued to be practiced perhaps because these religions gave their followers a life after death.

With the Renaissance came the reaffirmation of Greek and Roman values, especially among philosophers who embraced the concept of a good and easy death.

The questioning of traditional Medieval doctrines and values also marked the Enlightenment of the eighteenth century. Individual freedom and choice were lauded, and religious differences were more toler-

45. Id.
47. D. HUMPHRY & A. WICKETT, supra note 8, at 7.


Ambroise Paré, surgeon to Francis I, told of finding several severely wounded and unconscious soldiers in Turin in 1537:

"[A]n old soldier asked me if there was any way to cure them. I said 'No.' Then he went up to them and cut their throats, gently and without ill will. I told him that he was a villain; he answered that he prayed God that when he should be in such a plight, he might find someone to do the same for him."


According to Francis Bacon, the English philosopher, when there is no hope for recovery, the physician should "serve to make a fair and easy passage" from this life. F. BACON, THE ADVANCEMENT OF LEARNING 114 (G. Kitchin ed. 1915).

The poet and clergyman John Donne argued in favor of suicide as a form of voluntary euthanasia, but refrained from setting rules, because "the limits are obscure and steepy and slippery and narrow, and every error deadly." J. DONNE, BIATHANATOS 193 (M. Rudick & P. Battin ed. 1980).
ated. The use of reason and the scientific method were central to the philosophy of the era. During the late eighteenth and early nineteenth centuries, in reaction to the Enlightenment, philosophers venerated emotions and death. These new ideas led some countries to scrutinize the issues of suicide and euthanasia.

In 1790, the French National Assembly repealed all sanctions against the body and property of a suicide victim. In 1864, Sweden decriminalized attempted suicide and complicity in suicide. In contrast, it was not until 1961 that suicide was decriminalized in Great Britain.

Throughout the ages, people have struggled with the issue of euthanasia. Their response has fluctuated, yet even criminalization has been unable to halt the practice. Although the moral issue seems unique to our times, euthanasia has been practiced since the Biblical era. Opponents argue that legalizing euthanasia is the beginning of a “slippery slope” to society’s demise, but, in fact, society faces the same moral dilemma today that has been faced for hundreds of years.

IV. COMPARISON OF CRIMINAL SANCTIONS

Nations have responded to euthanasia in a variety of ways through their criminal law. A comparison of these methods will demonstrate which elements should be used to produce a law that more humanely addresses voluntary, active euthanasia.

A. Active Euthanasia in the Common-Law System

Although humanitarian motives underlie the practice of euthanasia, the common law does not consider these motives to justify homicide. While some European criminal codes consider motive a substantive element of the crime, under the common law, motive is not an essential element of the crime of murder but only an evidentiary factor. Moreover, the consent or request of a victim is irrelevant in homicide cases. Therefore, active euthanasia is classified as murder in the common-law

50. Hadding, Prevent or Aid Suicide?, in EUTHANASIA, supra note 38, at 149.
52. 40 C.J.S. Homicide §§ 97-98 (1944).
53. 41 C.J.S. Homicide § 318 (1944).
54. Id. at § 380.
jurisdictions of Great Britain, Canada, the Philippines, and in all fifty states of the United States.

At the end of the nineteenth century, a society organized in England to change the law. The group attracted many well-known supporters, but it was declared illegal and soon dissolved. In his 1931 presidential address to the Society of Medical Officers of Health, Dr. C. Killick Millard stated that euthanasia was an elementary human right and proposed the Voluntary Euthanasia Legislation Bill. The Bill allowed a dying person to file a "euthanasia" application which would be reviewed by a court, along with certificates from two physicians and testimony from a referee. The British Voluntary Euthanasia Society formed to support the bill, but in 1936 the House of Lords defeated it by a vote of thirty-five to fourteen.

In 1939, a poll by the British Institute of Public Opinion found that sixty-eight percent of those polled favored some kind of legalized euthanasia. Nevertheless, another attempt to pass legislation failed in 1950, and the Royal Commission of Capital Punishment refused to establish requirements for a "mercy killing" offense.

In 1969, another bill, the Voluntary Euthanasia Act, was introduced into the House of Lords. If passed, the bill would have allowed a person suffering from a terminal illness to sign a declaration requesting euthanasia; this bill had fewer safeguards than the 1936 version. After much public debate, the bill was rejected forty-one to sixty on its second reading. However, advocates of the bill looked hopefully upon the increased public support compared to the 1936 bill.

In 1976, Baroness Wooten of Abinger introduced the Incurable Patient's Bill into the House of Lords. This bill would have allowed incurable persons to make written requests to cause their own death or not to

56. Id.
63. Id. at 32.
64. G. WILLIAMS, supra note 14, at 332.
66. G. WILLIAMS, supra note 14, at 331 (citing ROYAL COMMISSION OF CAPITAL PUNISHMENT, 1953, CMND. No. 8932 paras. 177-80).
67. O. RUSSELL, FREEDOM TO DIE 185 (1975).
have their lives prolonged. The House of Lords rejected it eighty-five to twenty-three, partly because the vague wording could have led to abuses. Later that year, the Criminal Law Revision Committee (CLRC) proposed a new offense of mercy killing but dropped its recommendation when it became too controversial.

In 1983, Canada specifically rejected the proposal to make euthanasia a separate offense from homicide or to formulate special provisions mitigating the sentence imposed.

Although United States law has prohibited the practice of active euthanasia, the medical profession and lay people have debated alternatives. As early as 1889, the medical profession officially discussed active euthanasia and its ramifications.

In the first half of the twentieth century, several bills were introduced into the state legislatures to legalize voluntary euthanasia, but these attempts failed. In 1939, the American Institute of Public Opinion asked the question: "Do you favor mercy deaths under government supervision for hospital invalids?" Fifty-four percent of the respondents replied negatively. Subsequent polls came to similar conclusions.

In 1938, the Euthanasia Society of America was founded and, in

69. Leng, supra note 55, at 77.
70. LAW REFORM COMMISSION OF CANADA, supra note 57, at 18-20.
71. F. Hitchcock, Euthanasia, 10 TRANSACTIONS OF THE ME. MED. A. 42 (1889), quoted in J. WILSON, supra note 16, at 27. In 1889, Dr. Frank Hitchcock addressed the Maine Medical Association stating his opposition to active euthanasia, but urging doctors to relieve the suffering of dying patients. Id.
74. In 1947 and 1950, the question asked was: "When a person has a disease that cannot be cured, do you think doctors should be allowed by law to end the patient's life by some painless means if the patient and family his request it?" The responses were:

<table>
<thead>
<tr>
<th>Year</th>
<th>Yes</th>
<th>No</th>
<th>No Opinion</th>
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<tr>
<td>1947</td>
<td>37.0%</td>
<td>54.0%</td>
<td>9.0%</td>
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<tr>
<td>1950</td>
<td>43.0%</td>
<td>46.0%</td>
<td>11.0%</td>
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The Quarter Polls, 11 PUB. OPINION Q. 477 (1947); The Quarter Polls, 14 PUB. OPINION Q. 375 (1950).
1967, its sister organization, the Euthanasia Education Fund, was established to disseminate information about euthanasia. This latter group prepared and widely distributed the "living will," enabling a person to declare his wishes in regard to life sustaining treatment only. Reaching an even broader spectrum of the population, Abigail van Buren, the advice columnist "Dear Abby," has repeatedly discussed living wills in her column and reports receiving thousands of requests for copies each time the issue is raised.

Cultural and legal considerations of euthanasia are often regarded in light of laws regarding suicide. By the mid-1970s, almost all American states had decriminalized suicide. However, the states retain prohibitions against assisting a suicide. These prohibitions generally take one of three forms. Some states consider assistance to suicide to be murder. Other states statutorily define assistance to suicide as voluntary manslaughter. Still other states have made assisting a suicide a separate

76. Other groups promulgating "living wills" include Concern for Dying, Society for the Right to Die, the American Protestant Hospital Association, the American Catholic Hospital Association and the American Public Health Association. PRESIDENT'S COMMISSION, supra note 4, at 139.
78. Letter from Abigail van Buren to Joanne Lynn (Sept. 10, 1981), quoted in President's Commission, supra note 4, at 139-40.
79. Weir, Suicide, in ETHICAL ISSUES IN DEATH AND DYING, supra note 4, at 319. Great Britain, Australia, Canada, and the Philippines have decriminalized suicide and attempted suicide, but have retained prohibitions against assisting another in suicide. Note, supra note 51, at 338, 343 (citing Suicide Act, 9 Eliz. (1961)); Maher, Euthanasia, 59 LAW INST. J. 445 (1985) (citing Crimes Act § 6B(2) (Austl. 1985) (one who incites or counsels another to commit suicide or aids and abets another in committing suicide can be imprisoned for up to fourteen years)); LAW REFORM COMMISSION OF CANADA, supra note 57, at 21 (citing CAN. REV. STAT. ch. c-46, § 224 (1985) (This section, criminalizing assistance to suicide, was retained despite an original proposal by the Law Reform Commission of Canada requiring the written authorization of the Attorney General to prosecute these cases. The opponents to this proposal claimed that this would politicize the issue, lead to differing results in different regions, and was unnecessary since the offense was almost never prosecuted anyway. The Commission finally decided to retain § 224 as it was.)); Note, supra note 51, at 334 (citing PHIL. REV. PENAL CODE art. 253).
81. COLO. REV. STAT. § 18-3-104(1)(b) (1986); CONN. GEN. STAT. ANN. §§ 53(a)-56(a)(2) (West 1985) (manslaughter but murder if one causes suicide by force, duress, or deception); HAW. REV. STAT. § 707-702(1)(b)(1985); N.Y. PENAL LAW §§ 120.30, 125.15(3) (McKinney 1987) (felony or manslaughter); OR. REV. STAT. § 163.125(1)(b) (1985); WIS. STAT. § 940.12 (1982).
offense.\textsuperscript{82} However, some jurisdictions distinguish euthanasia and suicide to the the degree of specifically legislating that the withdrawal or withholding life sustaining procedures from a "qualified" patient is not suicide or assisted suicide.\textsuperscript{83}

Advocates of a constitutional right to die argue that the foundations for this right are the right of privacy, the right of autonomy, and the right to refuse medical treatment.\textsuperscript{84} The United States Supreme Court has not yet ruled on the constitutionality of the right to die.\textsuperscript{85}

A Louis Harris survey in 1973 showed that sixty-two percent of those questioned favored passive euthanasia, but only thirty-seven percent favored active euthanasia.\textsuperscript{86} According to a 1988 poll by the Roper Organization, fifty-eight percent of Americans believed that a doctor should, upon request of the patient, be allowed to end a patient's life when there is no hope of recovery and the patient requests it.\textsuperscript{87} That same year, the medical community was deeply shaken by an anonymous essay in the Journal of the American Medical Association which described a resident physician administering a fatal dose of morphine to a twenty year old cancer patient.\textsuperscript{88} Americans continue to debate the legalization of voluntary, active euthanasia.

When faced with an euthanasia case common-law jurisdictions, like the United States, try to address the issues it raises while leaving the


\textsuperscript{83} ALA. CODE § 22-8A-9(a) (1984); D.C. CODE ANN. § 6-2428(a) (1989).


\textsuperscript{86} Medicine & Health, FACTS ON FILE, Sept. 23-29, 1973, at 812.


common law intact. The American response is to rely on the discretion of the judicial system to reach a just result: the prosecution’s discretion to bring the case, a jury’s discretion to acquit, and the judge’s discretion in sentencing. This strategy has led to a variety of outcomes: murder convictions with penalties of life imprisonment, acquittals, acquittals because of temporary insanity, case dismissals, and refusals to in-

89. See President’s Commission, supra note 4, at 4.

Common-law countries are not the only ones that have used prosecutorial discretion to address an euthanasia case. The issue of euthanasia recently came to the forefront in China over the death of a woman named Xia who was unconscious and dying of liver disease. Two of Xia’s children and two doctors were charged with the murder of Xia by lethal injection. Xia’s other two children took their siblings to court over the death of their mother. China has no special laws to cover this situation. The two children and the doctors were freed pending further investigation and trial. This controversy was called China’s first court case on mercy killing. Euthanasia Debate Revives in China, N.Y. Times, Feb. 2, 1988, at C9, col. 1.

90. P. v. Roberts, 211 Mich. 187, 195 N.W. 690, 693 (1920) (At the insistence of his wife, who had multiple sclerosis and who had previously attempted suicide, Roberts mixed a glass of water and Paris Green which his wife used to commit suicide. Roberts was convicted of willful murder and sentenced to life imprisonment at hard labor and solitary confinement.).

In 1950, Harold Mohr was convicted of the voluntary manslaughter of his brother who was blind and had cancer. Mohr unsuccessfully pleaded temporary insanity. The jury recommended mercy and Mohr was sentenced to 3-6 years in jail and a $500 fine. 3 Years for Mercy Death, N.Y. Times, Apr. 11, 1950, at 20, col. 5; see also Gilbert v. Florida, 487 So. 2d 1185 (Fla. Dist. Ct. App.), review denied, 494 So. 2d 1150 (Fla. 1986).

91. In 1950 in New Hampshire, Dr. Herman Sander was tried for murder after he injected air into the veins of a patient dying of cancer. Dr. Sander was acquitted. Porter, Sander Acquitted in an Hour; Crowd Outside Court Cheers, N.Y. Times, Mar. 10, 1950, at A1, col. 6.

Otto Werner pled guilty to suffocating his wife who had rheumatoid arthritis and begged to be killed. Werner was acquitted. P. v. Werner, Crim. No. 58-3636 (Cook Co., Ill. Dec. 30, 1958), partially reported in Williams, Euthanasia and Abortion, 38 U. COLO. L. REV. 178, 186-87 (1966).

In 1974, another doctor in New York was charged with willful murder when he administered a lethal dose of potassium chloride to a comatose patient dying of throat cancer. Dr. Montemarano was acquitted. Silver, Physician Acquitted in Patient’s Death, N.Y. Times, Feb. 6, 1974, at A1, col. 1.

92. In 1950, Carol Paight, a twenty year old college student, killed her father after exploratory surgery revealed cancer. Paight was charged with second degree murder but was acquitted because of temporary insanity. Faber, Carol Paight Acquitted as Insane at Time She Killed Ailing Father, N.Y. Times, Feb. 8, 1950, at 1, col. 2.

In 1967, another college student, Robert Waskin, entered a Chicago hospital and shot his mother who was terminally ill with leukemia. She had previously attempted suicide and had begged her son to kill her. Waskin was acquitted on a plea of insanity and released on the grounds of no longer being insane. J. Wilson, supra note 16, at 40.

In 1973 in New Jersey, Lester Zymanaki shot his brother who had been paralyzed in a motorcycle accident and who had begged to be killed. Zymanaki was charged with first degree murder and acquitted on the basis of temporary insanity. Johnston, ”Mercy Killer” Acquitted on Insanity Plea, N.Y. Times, Nov. 6, 1973, at A1, col. 6.

93. In 1925 in Colorado, Dr. Harold Blazer was tried for killing his thirty-two year old invalid daughter. The jury was unable to reach a verdict and the case was dismissed. D. Humphry & A. Wickett, supra note 8, at 15.
dict. These vastly differing outcomes often occur in factually similar situations, leading to disparities in justice which are not unique to the United States.

B. Euthanasia in the Civil-Law System

In the seventeenth and eighteenth centuries, civil-law states developed a doctrine that distinguished euthanasia from other forms of willful homicide although they still treated it as a criminal offense. Under this system the absolute value of life was not denied, but the law made allowances in its sanctions for specified acts. The German Criminal Code of 1871 embodied this idea by classifying euthanasia not as willful murder, but rather as homicide upon request, imposing a milder sanction. In Hungary, the drafters of the Criminal Code of 1878 also included the separate offense of homicide upon request. In the twentieth century, many of the other continental countries of Europe such as Italy, Switzerland, Denmark, Norway, and Poland adopted this concept of homicide upon request in their own codes.

After the Holocaust, several European countries which recognized euthanasia as homicide upon request temporarily repealed these sections, reemphasizing the absolute value of human life in their criminal codes. Despite these changes, in January 1986 after a prominent surgeon had been charged with giving cyanide to an old woman with cancer, a poll of West German doctors reported that forty percent of the respondents ad-

94. In New York in 1938, a Nassau County grand jury refused to indict Harry Johnson for asphyxiating his wife who had cancer and wanted to die. NASSAU MAN FREED IN "MERCY KILLING", N.Y. Times, Oct. 19, 1938, at 46, col. 1.
95. In two separate cases in South Africa, a son killed a parent suffering from a fatal and incurable disease and constant pain. In both instances, the sons were charged with murder. One was acquitted because of the absence of a capacity for criminal responsibility (irresistible impulse), and the other was convicted and given the minimum sentence. Rall, The Doctor's Dilemma: Relieve Suffering or Prolong Life, 94 S. Afr. J. 40, 43-45 (1977).
96. Horvath, supra note 25, at 82-83.
97. Id. at 83.
98. Id.
99. Id.
100. Id.
101. Id. at 85. See generally supra note 23.
mitted having killed incurably ill patients.102

Today West Germany and other civil-law countries have two basic statutory approaches to euthanasia.103 First, these countries have established the separate offense of homicide upon request, defined as the killing of another at the "express and genuine request" of that person.104 In West Germany, for example, the penalty for homicide upon request is imprisonment from six months to five years as opposed to the punishment for murder which can be life imprisonment.105 In Italy, homicide upon request is punishable by imprisonment for six to fifteen years.106 At the other end of the spectrum, in Denmark, the punishment for homicide upon request is between sixty days simple detention and three years imprisonment107 with the judge having the discretion to suspend the sentence.108

Second, under the civil-law system, motive is considered in grading

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108. In 1971, the adult children of a woman, who had an extremely painful illness of the joints and had asked to die several times, killed her and were sentenced to three months imprisonment for homicide upon request. The sentence was suspended.

In 1975, a nurse, who gave a totally paralyzed patient suffering from poliomyelitis an injection of morphine and then removed his respirator tube, was sentenced to one year imprisonment for homicide upon request. The sentence was suspended. Greve, *supra* note 103, at 96-104.
the offense and in sentencing. In Germany, a mercy motivated killing would not fall under the definition of murder. Under German law a murderer is anyone who kills from "a lust to kill, to satisfy his sex drive, from covetousness or other base motive . . . ." Therefore, someone who administers euthanasia would not be convicted of murder.

Without condoning euthanasia, these civil-law countries have developed laws which acknowledge that euthanasia is distinguishable from murder and should be punished less harshly. Furthermore, unlike under the common law, a person who decides to administer euthanasia understands the legal consequences.

V. NEW APPROACHES TO EUTHANASIA

Both Japan and the Netherlands have adopted more humane methods of addressing euthanasia cases. In both countries, the judiciary has led the change in existing laws; case law provides specific guidelines for legally administering euthanasia. Both countries present model laws which the United States could use in developing its own laws.

A. Euthanasia in Japan

In 1963, the Japanese judiciary established a separate offense of euthanasia. Komei Yamanouchi had given poison to his incurably ill father upon his request to die. Presiding justice of the High Court of Nogoya, Toichi Kobayashi, set forth the following conditions which would distinguish legal euthanasia from culpable homicide:

1. The victim must be suffering from an illness not curable by modern medicine.
2. The victim must be suffering unbearable pain, obvious to any observer.
3. The purpose of the doctor must be the relief of pain.
4. The victim's consciousness must be clear and he or she must have seriously requested or approved the mercy killing.
5. Wherever possible the means of inducing death must be administered by a physician.
6. The method of inducing death must be morally acceptable.


111. O. Russell, supra note 67, at 253.
In the *Yamanouchi* case, the court found at least two conditions lacking and held Yamanouchi guilty of homicide upon request. His sentence was reduced from three years to one year and then suspended with three years probation.\(^\text{112}\)

Points five and six of the opinion emphasize that the legalization of euthanasia attempts to make the manner of death in mercy killing cases the least painful for the dying person and the easiest for family and friends. In many euthanasia cases the death is violent, resulting from a gunshot or improperly administered drugs, because the relative or friend of the dying person acts without rational planning or simply does not know the best way to administer euthanasia.\(^\text{113}\) These cases do not provide the "easy death" which both the patient and relative or friend desire. Legalizing euthanasia and requiring a doctor to administer it in a morally acceptable way is more likely to fulfill the wishes of those involved.

B. Euthanasia in The Netherlands

The Dutch Penal Code of 1886, article 293 states: "‘He who robs another of his life at his express and serious wish, is punished with a prison sentence of at most twelve years or a fine . . . .'"\(^\text{114}\) The maximum sentence for murder is fifteen years imprisonment.\(^\text{115}\) Article 294 provides that: "‘Someone who deliberately incites another to suicide, assists him therein or provides him with the means, is punished, if suicide follows, with a prison sentences of at most 3 years or a fine . . . .'"\(^\text{116}\)

However, the courts, and foreseeably the legislature, have circumvented these sections with various exceptions.

Interest in euthanasia in the Netherlands was an outgrowth of the development of the right of self-determination in the 1960s.\(^\text{117}\) In 1970, the State Secretary of Social Affairs and Health requested that a commission study the medical and ethical issues surrounding death and dying. The commission concluded that although passive euthanasia should become permissible in certain circumstances, active euthanasia should re-

\(^{112}\) *Id.*

\(^{113}\) *See supra* notes 1, 90-94.

\(^{114}\) A fine of the fifth category (at the maximum equal to 100,000 guilders or about $50,000) would be imposed. Driese, *supra* note 48, at 386.

\(^{115}\) *Id.*

\(^{116}\) A fine of the fourth category (a maximum of 25,000 guilders or about $2,500) would be imposed. *Id.*

main illegal.118

In 1971, Dr. Geertuida Postma was charged with mercy killing after she injected a lethal dose of morphine into her partly paralyzed and deaf mother who had suffered a cerebral hemorrhage and pneumonia.119 At that time, mercy killing carried a penalty of up to twelve years in prison.120 Dr. Postma’s story garnered both national and world-wide attention. Dr. Postma testified that her mother had asked to die and had unsuccessfully attempted suicide. However, when asked whether her mother’s suffering was unbearable, Dr. Postma testified: “No it was not unbearable. Her physical suffering was serious, no more. But the mental suffering became unbearable . . . . Now, after all these months, I am convinced that I should have done it much earlier.”121 The District Court at Leewarden found Dr. Postma guilty, but gave her only a one week suspended sentence and a year of probation.122 In reaching its decision, the court formulated conditions to exclude punishment of a doctor for euthanasia. The conditions needed to allow euthanasia were established as follows:

A. [W]hen it concerns a patient who is incurable because of illness or accident — which may or may not be coupled with shorter or longer periods of improvement or decline — or who must be regarded as incurably ill from a medical standpoint;
B. subjectively, his physical or spiritual suffering is unbearable or serious to the patient;
C. the patient has indicated in writing, it could even be before-hand, that he desires to terminate his life, in any case that he wants to be delivered from his suffering;
D. according to medical opinion the dying phase has begun for the patient or is indicated; and
E. action is taken by the doctor, that is, the attending physician or medical specialist, or in consultation with that physician.123

The criminal court in Rotterdam in 1981 and the criminal court at Alkmaar in 1983 considered the possibility of active euthanasia on request under certain strict conditions. The Rotterdam court’s guidelines for noncriminal aid-in-dying were:

118. Driese, supra note 48, at 393.
120. Id.
121. Id.
122. Id.
1. There must be physical or mental suffering which the sufferer finds unbearable.
2. The suffering and desire to die must be lasting (i.e. not temporary).
3. The decision to die must be the voluntary decision of an informed patient.
4. The person must have a correct and clear understanding of his condition and of other possibilities . . . he must be capable of weighing these options and have done so.
5. There is no other reasonable (i.e. acceptable for the patient) solution to improve the situation.
6. The [time and manner of] death will not cause avoidable misery to others (i.e. if possible, the next of kin should be informed beforehand).
7. The decision to give aid-in-dying should not be a one-person decision — consulting another profession[al] (medical doctor, psychologist, social worker, according to the circumstances of the case) is obligatory.
8. A medical doctor must be involved in the decision to prescribe the correct drugs.
9. The decision process and the actual aid must be done with the utmost care.
10. The person receiving the aid-in-dying need not be a dying person. Paraplegics can request and get aid-in-dying.124

The standards were similar to those set out in 1984 by the Royal Netherlands Medical Association.125

In the first euthanasia case to be pursued to the Netherlands Supreme Court, a doctor gave a fatal dose of curare to an elderly, invalid patient who had begged to die and had previously signed a “living will.”126 The criminal court in Alkmaar acquitted the doctor, but the appellate court reversed, recognizing that euthanasia was illegal.127 The Supreme Court set aside the ruling, but distanced itself from the self-determination rationale used by the trial court and discussed euthanasia as a kind of medical treatment rather than as killing upon request.128

In 1986, the High Court of the Hague held that dire distress of a nonterminal patient could justify euthanasia.129 In a later case, the court

124. D. HUMPHRY & A. WICKETT, supra note 8, at 177.
125. See Weir, Euthanasia, in ETHICAL ISSUES IN DEATH AND DYING, supra note 4, at 247.
127. Id.
128. Driesse, supra note 48, at 394.
Comparison of Euthanasia Law

130. If euthanasia is to be practiced, it must be done openly so that proper investigations can be carried out if needed. 131

Significantly, under the judicial guidelines, the patient, not a friend or relative, must request euthanasia repeatedly. According to Jurrit Bergsma, a psychologist teaching at Ultrect Medical School:

"Contact over many months or even years is very important ... If you see a doctor for today for the first time and ask for euthanasia, he won't do it. But if you started talking about it 5 years ago as a possibility some day, it is really a contract you have made." 132

While the courts were establishing the legal guidelines for euthanasia, the legislature was also responding to the issue with various proposals. In April 1984, the small, center-left D'66 Party proposed a bill on the subject that would allow the incurably ill of sound mind to have a doctor administer euthanasia if the doctor agreed. Four months later, a state commission recommended that the penal code be amended to clarify the law in euthanasia situations. Its proposal was that a doctor who terminates the life of a patient upon his or her expressed and serious desire should not be punished if: (1) the patient is in a hopeless condition without prospect of recovery; (2) the patient voluntarily requests to die; and (3) termination of life occurs within the framework of medical practice. 133 At the time of this writing, none of the bills have been passed. 134

According to guidelines published by the Royal Netherlands Society for the Promotion of Medicine and Recovery, the Public Prosecutor will currently only order an investigation into a euthanasia case when the doctor does not make a declaration of natural death on the death certificate. However, the Public Prosecutor will generally not initiate prosecution unless there is any suspicion of improper medical care. 135

During Dr. Postma's trial, the Society for Voluntary Euthanasia was established as a members' aid service and the Foundation for Voluntary Euthanasia was formed as a think tank organization in the

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131. Id.
132. Otten, Fateful Decision: In the Netherlands, the Very Ill have Option of Euthanasia, Wall St. J., Aug. 21, 1987, at 1, col. 1.
133. Driesse, supra note 48, at 395.
In 1975, Dutch authorities allowed the Society to establish a members' aid service, in addition to providing "Euthanasia Statements" or "Living Wills." Five years later, the Society printed an eleven page booklet advising doctors of the most suitable drugs for euthanasia and how to administer them. This booklet was sent to 19,000 doctors and 2,100 pharmacists and was bought by more than 10,000 lay people. By 1984, the group's membership had grown to 24,000, and it was the largest organization of its kind in Europe. In 1987, the group had 26,000 dues paying members. Thirty-five trained volunteers counselled the 650 to 700 people who contacted the Society that year.

A 1985 poll found that sixty-seven percent of the Dutch population favored euthanasia. Estimates range from 1,000 to 12,000 cases of euthanasia being carried out in a year. However, euthanasia is still highly controversial. A group of doctors who strongly oppose abortion and euthanasia have split from the Royal Dutch Medical Association to form the Dutch Physicians League. These doctors warn of euthanasia being used to dispose of the weak. A Dutch doctor claimed that active euthanasia was being performed involuntarily despite the strict guidelines. He also stated that the elderly now fear hospitalization because of the possibility of involuntary euthanasia.

Opinions vary as to why the Netherlands is at the forefront of the euthanasia debate. Some suggest that the reason is the lack of religious opposition and the open-mindedness of those who are affiliated with an
organized church. Others cite a Dutch dislike of wasteful spending. Still others believe that the practice of euthanasia in the Netherlands is no more prevalent than in other European neighbors but that the Dutch more openly discuss the issue.

VI. PROPOSAL

The common-law strategy of relying on the degree of discretion inherent in the legal system is problematic. If a person is faced with the difficult decision of administering euthanasia, the moral ramifications may be uncertain, but the legal ramifications must not be. The inconsistent results in factually similar euthanasia cases is not acceptable. The law in the United States must account for a greater law which governs humanity. Whether this is simply called justice or natural law or humane law, it transcends the positive law of nations.

However, it is not necessary to decriminalize euthanasia immediately. The law should not be changed in one huge step if the option of taking several smaller steps is available. By taking incremental steps, the law and lawmakers do not seem capricious and their decisions have an aura of rationality and deliberation. The United States can benefit from the experiences of the Netherlands and Japan, although these countries have smaller and more homogeneous populations. It should be noted, however, that it is too soon to determine the ultimate success or failure of euthanasia laws in the Netherlands and Japan because the law in those countries is still developing.

Nevertheless, certain smaller steps can be taken in the United States to achieve greater justice in euthanasia cases. First, a separate offense of homicide upon request should be established to differentiate euthanasia from murder.

West Germany's homicide upon request statute requires the "express and genuine request" of the victim and could serve as the basic outline for such a statute in the United States. The statute could provide that if duress, force, or undue influence were exerted on the victim, the crime would be murder, not homicide upon request. Like the Danish

146. The Catholic hierarchy in the Netherlands officially opposes euthanasia. Parachini, supra note 117.
147. See Otten, supra note 132.
148. Id.
149. "Homicide at request of the victim .... Imprisonment from six months to five years shall be imposed on anyone who kills another person at the express and genuine request of that person." PENAL CODE § 216 (W. Ger.), translated in THE PENAL CODE OF THE FEDERAL REPUBLIC OF GERMANY, supra note 104, at 176-77.
statute, this statute could still give the judge wide latitude in sentencing, including the option to suspend the sentence.\textsuperscript{150}

The second step which should be taken is the decriminalization of assisting a suicide. To avoid abuses, the burden of proof would lie with the defendant that a competent victim had requested assistance. As suggested by the District Court in Leewarden in the Netherlands, a written request or a witnessed oral request would support the defendant’s position.\textsuperscript{151}

In the results, there is little difference between a person obtaining poison for an invalid who has no other means to get the poison and injecting poison into a person who has requested the action. Therefore, if assisting a suicide is decriminalized, the third step would be to decriminalize homicide upon request under certain conditions. Japan (and soon possibly the Netherlands) has taken this step for cases when a competent and informed patient, who is suffering from a terminal and painful illness, has seriously requested euthanasia.\textsuperscript{152} At least one court in the Netherlands has stated that euthanasia should also extend to those who are not terminally ill, a paraplegic, for example.\textsuperscript{153} In the case of the nonterminal patient, the “wedge argument” of the opponents of euthanasia becomes much more convincing.\textsuperscript{154} The United States, in contrast to Japan and the Netherlands, may have too large and diverse a population to accept this step.

Under the guidelines proposed above, a patient in an irreversible coma would be excluded even though euthanasia might be the result the patient would most desire. One possibility suggested by a Dutch court would be to allow people to elect active euthanasia prior to total incapacity by signing a written document.\textsuperscript{155} In effect, the use of the “living will,” prevalent in the United States, would be extended to include the right to the administration of active euthanasia. In situations when an incompetent person has not previously signed such a document, a proxy (presumably a family member) could make the decision. This option may be uncomfortable for society as it blurs the distinction between a voluntary and involuntary act. To avoid these cases, the government should undertake a comprehensive public education program to en-

\textsuperscript{150} PENAL CODE § 239 (Den.), cited in Greve, supra note 103, at 95.
\textsuperscript{152} O. RUSSELL, supra note 67, at 253.
\textsuperscript{153} D. HUMPHRY & A. WICKETT, supra note 8, at 177.
\textsuperscript{154} See generally supra note 23.
courage adults to sign documents declaring their wishes in the event of incapacity.

VII. CONCLUSION

The advancements in medical technology which allow people to live longer today than ever before are to be applauded. Yet, technology has not found a cure for all pain, and at some point the quality of life for some people is not worth the few extra days technology may provide. Our society's ethics must keep pace with medical technology and reach a more consistent and just resolution to the cases exemplified by the tragedy of Roswell Gilbert.