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**EUTHANASIA: A STUDY IN COMPARATIVE  
CRIMINAL LAW**



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*Reprinted from*

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# EUTHANASIA: A STUDY IN COMPARATIVE CRIMINAL LAW

Helen Silving †

In *Leland v. Oregon*,<sup>1</sup> Mr. Justice Frankfurter said:

"However much conditions may have improved since 1905, when William H. (later Mr. Chief Justice) Taft expressed his disturbing conviction 'that the administration of the criminal law in all the states in the Union (there may be one or two exceptions) is a disgrace to our civilization' (Taft, 'The Administration of Criminal Law,' 15 Yale L. J. 1, 11), no informed person can be other than unhappy about the serious defects of present-day American criminal justice."<sup>2</sup>

Concern about the state of our criminal law has led the American Law Institute to renew its project of drafting a model penal code. In planning a general reform of criminal law, it is most important to proceed from a clear notion of the proper objects to be protected and of the wide range of diversity in crime. In medieval law, punishment was not meted out in proportion to the graveness of the crime. A multitude of acts constituted capital offenses. The trend of modern criminal law is to use punishment sparsely and discriminately. If we are to have a "system" of criminal law rather than a loose collection of crime and punishment, we must concern ourselves with the problem of a sound diversification of crime in accordance with relevant differences in the character of criminal acts and in accordance with the relative graveness of each offense. This the Model Penal Code promises to do; fundamentals of punishment are to be revised in the light of its purpose, criminal behavior redefined and crime reclassified in the light of the actor's potential dangerousness to society.<sup>3</sup>

It has been noted that in contrast to the deplorable state of the substantive criminal law in Great Britain and in the United States, considerable progress has been made in this field in continental European countries.<sup>4</sup> The experience of continental Europe with a particular

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1. 343 U.S. 790 (1952).

2. *Id.* at 802 (dissenting opinion).

3. See Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952).

4. Donnelly, *The New Yugoslav Criminal Code*, 61 YALE L.J. 510 (1952).

problem of criminal law may, indeed, prove stimulating to American jurisprudential thought.

The problem chosen for study concerns a most controversial subject: euthanasia—the mercy-motivated killing of a human being. A discussion of euthanasia affords an opportunity to deal with "motive," a topic which has been neglected in our criminal jurisprudence. In this country, motive is only an evidentiary factor in criminal law. By contrast, modern continental European codes of criminal law frequently regard motive as a substantive element of crime. Consideration of motive, in turn, brings into focus the entire personality of the actor as a matter of perhaps greater significance than the objective characteristics of the type of crime perpetrated by him.

Apart from the subjective element of altruistic motive which might bear on the character of the actor and the extent of his blame-worthiness, euthanasia raises the important problem of determining, in the light of a particular social philosophy, the proper objects of criminal protection and their correct classification in accordance with the degree of protection they deserve. The most diverse acts have been referred to under the common term "euthanasia." Many of them are perfectly lawful under all systems of criminal law; some are of doubtful legality; others constitute crimes of various descriptions.<sup>5</sup> Euthanasia in the

5. The most harmless among the various forms of "euthanasia" consists in relieving the pain of a patient doomed to die without shortening his life duration. Barth refers to it as "pure" euthanasia. BARTH, EUTHANASIE 6 (1924). Even this form of euthanasia, while lawful in all legal systems, raises certain theoretical legal problems. In Germany, the Reichsgericht (the highest court of the German Reich in civil and criminal matters) drew an apparently most artificial distinction between application of pain relieving means not involving infringement of the bodily integrity of the patient, and the use of means involving such infringement. An example of the former is supplying the patient with pills which he takes himself; an example of the latter is the use of injections. The first-mentioned type of treatment does not fall within any statutory definition of crime; the second technically constitutes the crime of bodily injury, but is justifiable on the ground of the express, tacit or presumptive consent of the patient. See ENGISCH, EUTHANASIE UND VERNICHTUNG LEBENSUNWERTEN LEBENS IN STRAFRECHTLICHER BELEUCHTUNG 4-5 (1948). The extent of the patient's consent necessary to justify any medical treatment is discussed in a decision of the Reichsgericht of March 3, 1943, Urt. d. Reichsgerichts v. 3 Maerz 1943 i. S.H. v. N. VII (VIII) 160/42, reported in [1943] Seufferts Archiv 81. Consent to the insertion of a needle is not sufficient to justify an injection of a foreign element into the body, but consent in general terms to "anything the physician may do" would be interpreted as including consent to an injection.

The Swiss Penal Code specifically provides for the immunity of actions performed in the discharge of a professional duty. SWISS PENAL CODE art. 32 (Code effective Jan. 1, 1942). This provision legalizes "pure" euthanasia. Under the prevailing interpretation, the physician must in such cases observe in addition to the medical rules also social rules; except in emergency cases, he must secure the consent of the patient or his guardian. See Thormann and von Overbeck, SCHWEIZERISCHES STRAFGESETZBUCH, I ALLGEMEINER TEIL 136 *et seq.* (1940).

Where the use of pain relieving devices may accelerate a certain death shortly to be expected, administration of such devices is being justified on the ground of "balancing interests." ENGISCH, *op. cit. supra*, at 5 *et seq.* The risk taken in this instance is frequently compared to that taken in surgery applied for the purpose of preserving life. The physician is allowed to take it when the interest in the



sense of killing of an incurably ill person for the purpose of putting an end to his suffering must be clearly distinguished from euthanasia in the sense of destruction of life which is "not worth living" because it is socially useless. Within the former category further distinctions must be drawn between death resulting from non-feasance and by affirmative conduct, and between euthanasia with or without the consent or request of the deceased. The example of "euthanasia" thus shows the wide difference that may exist between acts which are seemingly related to each other and are indeed referred to under the same name, and thereby demonstrates the need for a sound diversification of crime. Finally, when administered with consent or upon demand of the deceased, euthanasia borders on two significant concepts of criminal law, which bear both on motive and on the objective elements of criminal behavior: assistance in suicide and the special crime of "homicide upon request," which is unknown in Anglo-American law.

#### THE NEED FOR LAW REFORM

Certain recent instances of euthanasia have evoked a considerable measure of public sympathy. The feeling prevails that the manner in which cases involving euthanasia are disposed of within our system of law is inadequate, and there is an increasing demand for a law reform which would take into consideration the distinctive aspects of euthanasia.<sup>6</sup>

When there is a voluntary killing of an incurably ill person based upon an altruistic motive, the act usually is performed with premeditation and deliberation, and thus, within our legal system, constitutes the gravest type of homicide, murder in the first degree.<sup>7</sup> In some juris-

expected result is greater than that in avoiding the risk involved. Thereby, the degree of probability plays an important role; the risk may be taken when it is small in comparison to the degree of certainty and the benefit of the result to be achieved. Of course, the theory of "balancing interests" advanced as a basis for the use of pain relieving devices which may accelerate death implies that the requirement of preserving life is not absolute. Yet, the propriety of administering such devices is hardly ever questioned.

The next stage in the development of the euthanasia idea is voluntary causation of death based on an altruistic motive. This is the type of euthanasia discussed in the text of this Article.

Finally, medical experiments on human beings have been also occasionally labeled as "euthanasia." See WEIZSAECKER, *EUTHANASIE UND MENSCHENVERSUCHE* 12-13 (1947). They involve jeopardy of human life in the service of "humanity." The problems raised by such experiments are manifold. They range from permissibility of self-experiments of physicians to remission of penalty in exchange for a criminal's offer of his body for such experiments. Famous victims of medical self-experiments were Billroth and Robert Koch.

6. See text at note 169 and note 169 *infra*.

7. For citation and discussion of the statutes which adopt the classification into first and second degree murder, see Keedy, *A Problem of First Degree Murder: Fisher v. United States*, 99 U. OF PA. L. REV. 267 (1950).

Of course, a case may be construed in which a physician, spontaneously, swept by compassion with the sufferings of a patient, causes his death in order not to see

dictions this classification is further extended to acts which consist of merely aiding a suicide, *e.g.*, by supplying him with poison which he could not otherwise secure.<sup>8</sup>

Various devices are being used to circumvent the harshness of this result. Frequently mercy killers are not indicted.<sup>9</sup> At times, they are indicted and convicted of a lesser crime than that justified under statutory law, and put on probation. Thus, in the *Repouille* case<sup>10</sup> the accused, who killed his idiotic, malformed child, was indicted for manslaughter in the first degree, and the jury brought in a verdict of manslaughter in the second degree with a recommendation of the "utmost clemency";<sup>11</sup> the judge sentenced the defendant to not less than five nor more than ten years, execution to be stayed, and placed him on probation. Another device used in such cases consists in shifting the issue, so that the case is ultimately decided not on the ground of motive but on some other ground, such as lack of causation or temporary insanity. In the widely publicized New Hampshire case of *State v. Sander*,<sup>12</sup> a physician who dictated into the hospital record a statement that he had injected ten cubic centimeters of air four times into the veins of an incurably-ill, suffering cancer patient and that "she expired within ten minutes after this started," was acquitted by a jury of charges that he murdered "in an act of mercy," on the ground that there was no sufficient proof of causation; the trial judge had stated at the very outset that the question of mercy killing could not legally be an issue at the trial. In Connecticut, Carol Paight, a college girl, was indicted for second degree murder, carrying a mandatory life sentence, for the killing of her hospitalized father who was fatally ill from cancer; she was acquitted by a jury on the ground of temporary insanity at the

him suffer. Absent deliberation, the case might not be characterized as murder in the first degree. But is such action ethically less objectionable than that of a physician who, acting at the request of the patient, after mature deliberation and careful weighing of his medical chances, arrives at the conclusion that there is no hope of recovery or of pain relief for him, and thereafter, guided by such sympathy, applies euthanasia in accordance with what the physician regards as his medical conscience? Weizsaecker emphasizes that a physician should never be guided by compassion, which is an essentially egoistical sentiment, but should at all times apply a dispassionate and impersonal scientific judgment. WEIZSAECKER, *op. cit. supra* note 5.

8. *People v. Roberts*, 211 Mich. 187, 178 N.W. 690 (1920).

9. On this point see the material cited in 48 MICH. L. REV. 1199, 1200 (1950).

10. See the statement of the facts of this case as recited in the opinion of Judge L. Hand in *Repouille v. United States*, 165 F.2d 152 (2d Cir. 1947). The federal courts were concerned with the case in connection with Repouille's petition for naturalization. His crime, for which he served no sentence, was held to be a crime involving moral turpitude for purposes of naturalization.

11. As noted by Hermann Mannheim, juries in England will sometimes find an offender not guilty in spite of sufficient evidence to the contrary. MANNHEIM, *CRIMINAL JUSTICE AND SOCIAL RECONSTRUCTION* 14 (1946).

12. *State v. Sander* (N.H. 1950), N.Y. Times, March 10, 1950, p. 1, col. 6; 48 MICH. L. REV. 1197.



time of the commission of the act.<sup>13</sup> In Michigan, Eugene Braunsdorf, a symphony musician, was acquitted by reason of insanity in the mercy killing of his crippled adult daughter who had required hospitalization all her life.<sup>14</sup>

Whatever the legal bases on which Sander, Paight and Braunsdorf were acquitted, the public will always look upon them as mercy killers. Indeed, the use of legal technicalities in their acquittal tends to give laymen the impression that the law is a magic formula rather than an honest tool of meting out justice. Public confidence in the administration of criminal justice is hardly strengthened when moral issues are shifted instead of being solved, or when the law relegates to juries the function of correcting its inequities.

Also to be considered is the fact that the system prevailing at present does not afford equality of treatment of mercy killers. Thus, in the same year in which Miss Paight and Mr. Braunsdorf were acquitted, Harold Mohr, indicted in Allentown, Pennsylvania, for the mercy killing of his blind, cancer-stricken brother, was convicted of voluntary manslaughter and sentenced to from three to six years in prison and \$500 fine, even though he also pleaded temporary insanity and even though, in contrast to the other cases, there was in the *Mohr* case evidence that the accused had killed his brother upon the latter's urgent and repeated requests.<sup>15</sup>

As may be seen from the public reaction demonstrated whenever mercy killers are on trial,<sup>16</sup> there is a need for a law reform. Such need must be more specifically evident to the legal profession whose particular concern it should be that justice be distributed equally.

#### INDIVIDUALISTIC VERSUS COLLECTIVISTIC CONCEPT OF CRIMINAL LAW

Ours is an individualistic legal system.<sup>17</sup> We believe that man is endowed with an innate personal dignity and that he is an end in himself

13. See report of case in N.Y. Times, Feb. 8, 1950, p. 1, col. 2.

14. See report of case in N.Y. Times, May 23, 1950, p. 25, col. 4.

15. See report of case in N.Y. Times, April 4, 1950, p. 60, col. 4; April 8, 1950, p. 26, col. 1; April 11, 1950, p. 20, col. 5. The difference in the result in these cases was not necessarily due to a difference in the laws of Connecticut, Michigan and Pennsylvania. For authorities on Pennsylvania law see Keedy, *Irresistible Impulse as a Defense in the Criminal Law*, 100 U. OF PA. L. REV. 956, 983 n.185 (1952).

The relatively lenient sentence imposed upon Mohr was due to the fact that the jury had recommended mercy. In sentencing the defendant, the judge pointed out that the defendant had acted as a martyr and must suffer punishment as the price of martyrdom.

16. See particularly the newspaper reports on the cases of Sander and Paight in notes 12, 13 *supra*.

17. On the distinction between the individualistic and the collectivistic approach to euthanasia and to criminal law problems in general, see MANNHEIM, *op. cit. supra* note 11, at 14, 18-19.

and not a mere means serving extraneous social ends, such as those of the state, or even those of fellow human beings. This implies that there can be no exculpation or reduction of penalty in cases in which death is administered for the benefit of a person or a number of persons, however large, other than the suffering patient.<sup>18</sup> Respect for human dignity, furthermore, implies recognition of the human will as a value. From this recognition follows the decisive significance of the patient's consent or request in the evaluation of euthanasia cases.

The statement made above invites the obvious rejoinder that, as witnessed by capital punishment and war legislation, our laws do in some instances place the welfare of society (or of the individuals composing society) above that of the particular individual involved. It is believed, however, that in an individualistic society<sup>19</sup> all such provisions are based on a cooperative philosophy, which is not applicable to the deliberate sacrifice of an innocent human being for the benefit of the community.

The deliberate killing of a human being for the benefit of other human beings is an instance of necessity killing, which is repugnant to the common law.<sup>20</sup> True, the problem of euthanasia as necessity killing at times arises in intricate situations where reasonable men may differ on the proper course to be taken. It should be remembered, however, that the fundamental issue involved in all such situations is the same: whether the life of one human being can ever be said to be less valuable

18. This notion does not necessarily imply the converse argument that killing is justified merely because it serves the interests of the patient. Cf. *State v. Ehlers*, 98 N.J. Law 236, 240-41, 119 Atl. 15, 17 (Ct. Err. & App. 1922).

19. Of course, no society can be perfectly individualistic. Cf. Silving, *The Conflict of Liberty and Equality*, 35 IOWA L. REV. 357 (1950).

20. The principal authority for this proposition is an English case, *Regina v. Dudley and Stephens*, 15 Cox C.C. 624, 14 Q.B.D. 273 (1884). An earlier American case, *United States v. Holmes*, 26 Fed. Cas. 360, No. 15,383 (E.D. Pa. 1842), contains dicta which would seem to indicate approval of a limited right of necessity killing. In that case, a sailor, upon orders of his mate, threw overboard certain passengers when it appeared that all persons aboard would perish unless some were destroyed. He was "charged with 'unlawful homicide,' as distinguished from that sort which is malicious." *Id.* at 363. His defense was that the homicide was necessary for self-preservation. Mr. Dallas, speaking for the prosecution, stated the applicable rule to be as follows: "The law regards every man's life as of equal value. It regards it, likewise, as of sacred value. Nor may any man take away his brother's life, but where the sacrifice is indispensable to save his own." *Id.* at 363. The accused was convicted on the ground that as a sailor he owed a duty to the passengers. The court indicated that apart from such duty, where two men struggle for the only means of survival, each has a natural right to save himself at the expense of the other. For approval of a limited right of necessity killing, see HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 399 (1947); MORELAND, *THE LAW OF HOMICIDE* 257-58 (1952).

On the other hand, the immunity of abortion for medical reasons is, strictly speaking, not an instance of permissible necessity killing in our legal system, for at common law an unborn child was not regarded as a human being. See *Evans v. People*, 49 N.Y. 88 (1872).



than that of another. This may be best demonstrated by the history of the German experience with necessity killing.

*"Destruction of Life not Worth Living"*

Necessity killing for the benefit of the community is known in German legal and medical literature under a term coined by Karl Binding: "destruction of life not worth living." This phrase is used to describe not the patient's own attitude toward life but his objective uselessness to the community. Binding primarily favored destruction of institutionalized idiots by state action for the purpose of relieving society of a burden.<sup>21</sup> The project was popular with large segments of the German public.<sup>22</sup> It was later developed by Hitler into his notorious program of mass destruction of mental patients, which had to be revoked by Hitler upon overwhelming public protest.<sup>23</sup> German post-war decisions condemned the killing of insane persons whose "killing was licensed" by the Nazi regime "because their life was of no 'value,'" as "killing in the service of a cynical utilitarianism" rather than "assistance rendered to the incurably ill."<sup>24</sup> These decisions stated it to be axiomatic that the life of no person, however "useless," may be sacrificed for the benefit of any person, however "useful," or for the benefit of

21. BINDING & HOCHÉ, DIE FREIGABE DER VERNICHTUNG LEBENSUNWERTEN LEBENS (1920). It should be noted that the idea of Binding and Hoche was not new. Men like Luther subscribed to a similar one; when seeing a twelve year old boy who "tot voravit, quot quatuor rustici, et nihil aliud fecit, quam ut ederet cacaret . . . Lutherus suasit, ut suffocaretur. Aliquis interrogatus: Ob quam causam?—Respondit: Quia ego simpliciter puto esse massam carnis sine anima. . . ." 8 TISCHREDEN No. 5207 (Clemen ed.).

22. A poll conducted by the psychiatrist Meltzer in 1920 showed 73 per cent of parents and guardians of mentally deficient children favoring extermination of such children. MELTZER, DAS PROBLEM DER ABKUEERZUNG "LEBENSUNWERTEN LEBENS" 95 (1925). Binding's theory was eulogized by many writers as heroic. See, e.g., Bresler, *Karl Bindings Letzte Tat*, 22 PSYCH.-NEUROL. WOCHENSCHRIFT 283 *et seq.* (1920-21) and 23 *id.* at 4 *et seq.* On the other hand, it was also vigorously attacked, particularly by religious writers. See, for instance WALTER, DIE EUTHANASIE UND DIE HEILIGKEIT DES LEBENS (1935). The fact that Binding died before publication of his book was interpreted by adherents as surrounding his project with an atmosphere of heroism, by opponents as expression of Divine justice.

23. On the Nazi practice of euthanasia see MITSCHERLICH AND MIELKE, DAS DIKTAT DER MENSCHENVERACHTUNG (1947). By authority of an informal letter, bearing no address, signed by Hitler, 275,000 persons were killed as "useless eaters." See Judgment of the International Tribunal rendered in the case of the Minister of the Interior Frick, in 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, Proceedings of Sept. 30, 1946, at 490, 491, and Proceedings of Oct. 1, 1946, at 546, 547 (Secretariat of the Tribunal 1948).

It should be noted that the Nazis rejected euthanasia in the form of "mercy killing" for the benefit of the patient as based on an individualistic social attitude. See REPORT ON THE WORK OF THE OFFICIAL COMMISSION ON CRIMINAL LAW (Guertner ed. 1936). Cf. DAS KOMMENDE DEUTSCHE STRAFRECHT c. 21, at 375 *et seq.*

24. Judgment of the Criminal Division of the Appellate Court of Frankfurt a.M., Aug. 12, 1947, in the case of Dr. Schmidt, Ss 92/47, HOECHSTRICHTERLICHE ENTSCHEIDUNGEN—STRAFSACHEN, 68 *et seq.* (Kleine, Schilling, Duden ed. 1948).

any number of persons.<sup>25</sup> Nevertheless, in passing upon one of the numerous acts of alleged "euthanasia" performed by order of the Nazi government, the Appellate Court of Muenster developed a somewhat complex notion which, despite the court's disclaimer, is an outgrowth of the concept of necessity killing.<sup>26</sup>

The accused physician participated in the Nazi euthanasia action by serving on a committee which selected the victims. He claimed that he agreed to serve solely for the purpose of saving at least some of the patients entrusted to his care by releasing them as cured, contrary to facts, and by striking names from the lists of those doomed to die. While holding both "necessity"<sup>27</sup> and "extralegal necessity"<sup>28</sup> inapplicable to the case, the court stated that the accused may have earned a "personal immunity" if he participated in the action of killing "exclusively for the purpose of stopping, disturbing and limiting it," if he was "capable of carefully examining the situation," if his participation was "based on such examination," if his entire participation "from his first decision until termination of the participation" was "guided solely by the desire of stopping the action to the best of his ability—not as judged by the standards of the issued directives," if he had "availed

25. Judgment of the Criminal Division of the Appellate Court of Muenster, March 5, 1949, in the case of Dr. P., St. S 19/49, in 1 ENTSCHEIDUNGEN DES OBERSTEN GERICHTSHOFES FUER DIE BRITISCHE ZONE IN STRAFSACHEN 321 (1949).

26. See note 25 *supra*. The decision of the Muenster court is of general jurisprudential interest. The case demonstrates the reality value of Professor Fuller's hypothetical case, *The Case of the Speluncan Explorers*, 62 HARV. L. REV. 616 (1949).

27. The concept of "necessity" (Notstand) under German law is defined in § 54 of the Penal Code:

"Apart from the case of self-defense, an act does not constitute a crime where it was committed in a state of necessity in order to rescue the actor or his relative from an imminent danger to life or limb, provided that the necessity was not caused by the fault of the actor and could not be otherwise removed."

28. "Extralegal necessity" (uebergesetzlicher Notstand) is not a statutory concept but the product of decisional law. Where an action which bears all the characteristics of a crime is the only means of preserving a legally protected interest or fulfilling a duty imposed or recognized by law, the Reichsgericht held it not to be unlawful to fulfil the superior duty at the expense of the inferior one or to protect a more valuable interest at the expense of an interest of lesser value. 61 Decisions of the Reichsgericht in Criminal Matters 242 (hereinafter R.G. St.). However, the offender will not be excused unless he conscientiously considers whether the situation with which he is faced presents a conflict of interests, protected by law, that cannot be solved except by violation of one of them. 62 R.G. St. 138; 64 R.G. St. 104. Conscientious consideration of the conflict involved is essential. Thus, the Bundesgerichtshof, the highest court of the German Federal Republic (Bonn Republic) in civil and criminal matters, in a decision of Jan. 15, 1952, in 2 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN, herausgegeben von den Mitgliedern des Gerichtshofes und der Bundesanwaltschaft 112 (hereinafter B.G.H. St.), refused to excuse a physician who performed an abortion on deceased B.G.H. St.), in ignorance of the fact that she suffered from a disease which, under the law, justified an interruption of pregnancy. The court said that, not knowing of the existence of a state of extralegal necessity, the accused could not have considered and weighed the conflicting interests involved.



himself fully and without exception of every possibility accessible to him to save patients," if his intention was "accompanied by action," and if such action was "successful." The court based such "personal immunity" not on any particular provision of law but rather on a "super-statutory ground excluding guilt." It derived that ground from the general philosophy underlying certain provisions of German criminal law, such as capital punishment, war legislation, self-defense and necessity. It pointed out that, although the instinct of self-preservation, relied on in justification of self-defense and necessity, is a factor of questionable ethical value, nevertheless German law, within defined limits, takes notice of this elemental instinct even in cases of infringement upon the life and integrity of innocent persons.

The Bundesgerichtshof reversed this decision,<sup>29</sup> rejecting the doctrine of personal immunity enunciated by the lower court. The concepts of "necessity" and "extralegal necessity," from which that court derived its ultimate notions—the Bundesgerichtshof said—are based on the idea of "the lesser evil," which originated in rules of law for the protection of property and which is inapplicable to the branch of law concerned with the protection of life; for the value of two lives cannot be compared in the same manner as the value of material assets. Nor may "superstatutory grounds excluding guilt" be considered where the physician could simply avoid responsibility by rejecting appointment, but instead chose to set himself up as a judge over life and death. However, the court held that the problem of "necessity killing in the presence of common danger" for the purpose of saving as many lives as possible is a highly controversial subject, so that the physician could have erred concerning the applicable law. The court, therefore, remanded the case for a finding whether the physician possessed "consciousness that the act was wrongful," since such consciousness, under German law, is a prerequisite of guilt.<sup>30</sup>

In Anglo-American law no one can, on the plea of necessity, excuse himself for taking the life of an innocent person.<sup>31</sup> It is believed that this rule should be preserved. There should be neither exculpation nor reduction of penalty where death is administered for the benefit of any person or persons other than the suffering patient. Any

29. Decision of the Bundesgerichtshof rendered Nov. 28, 1952, (B.G.H. Urt. v. 28 Nov. 1952), 4 St. R. 23/50 (SchwurGer. Muenster i.W.), [1953] Neue Juristische Wochenschrift 513 (hereinafter N.J.W.).

30. Since the historic decision of the Great Senate for Criminal Matters of the Bundesgerichtshof, March 18, 1952 (2 B.G.H. St. 194), the German law recognizes cretionary reduction of penalty, depending on whether it was "insuperable" or could have been avoided by the actor had he properly "exerted his conscience."

31. Compare text at note 20 and note 20 *supra*.

project of a future reform of the law on euthanasia should include this essential limitation.

*The Significance of Consent; Inability to Express Consent;  
Euthanasia by Non-Feasance*

As noted above, in certain cases of mercy killing to which the public reacted most sympathetically there has been no showing that the patient asked to be relieved of a painful life. It is believed, however, that in determining the graveness of the act of mercy killing, within the spirit of an individualistic philosophy, consideration is due to the patient's own attitude toward the act. A sharp distinction should be drawn between euthanasia administered with the consent, or upon the express request, of the patient and euthanasia performed without his consent. Only where administered upon request, or at least with the consent of the deceased, can euthanasia be deemed comparable to assistance in suicide, which is often treated more leniently than other cases of homicide.

However, there are instances in which the patient is actually or legally incapable of expressing a desire. This factor deserves particular consideration where euthanasia consists in non-feasance rather than in active conduct. A highly individualistic philosophy of criminal law draws a distinction between active conduct and non-feasance. It does not, for instance, impose a general affirmative duty of rendering assistance to a person in peril.<sup>32</sup> The affirmative duties it imposes are rare and specific. The problem arises whether, where there is a specific duty to act, failure to do so should be regarded, under exceptional circumstances such as those which might occasion euthanasia, as equivalent to an affirmative act. A physician bound, by virtue of his employment contract, to prolong the patient's life to the best of his ability, might abstain from applying so-called analeptic medicine in the case of an incurably ill, suffering patient. Of course, no analeptic means may be applied under any conditions against the will of the patient, and a problem arises only where the patient is unable to give or to refuse consent.

According to Schoenke, "the physician's failure to prolong artificially an expiring painful life by applying stimulants, such as camphor injections, is not regarded as homicide" under German law.<sup>33</sup> Certain obiter statements of German courts justify the assumption that they would follow this rule. In holding inaction resulting in death to be punishable manslaughter where there is a duty to act, the

32. For provisions imposing such duty, see notes 94, 104 *infra*.

33. SCHOENKE, STRAFGESETZBUCH, KOMMENTAR 565 (6th rev. ed. 1952).



Bundesgerichtshof<sup>34</sup> emphasized that the victim was not incurably ill.<sup>35</sup> It pointed out that, where the crime consists of non-feasance rather than of active conduct, the motive of the accused—the purpose of inaction—is of increased significance. The issue of the legality of inaction by a physician has not been decided by our courts. However, as in German law, so under our system of jurisprudence, where there is a duty to act, deliberate non-feasance with intent to cause death is, as a rule, punishable homicide.<sup>36</sup>

The physician's dilemma is further complicated where the patient's immediate illness is not incurable but where a cure will leave him a permanent sufferer. Examples of such complication are: a patient suffering from an incurable mental disease who contracts an acute intervening illness, such as an appendicitis; a patient unconscious as a result of an accident who, when "saved" will wake up to the realization of "enormous misery"; a patient suffering from a brain disease which, when cured, will leave a mental defect.<sup>37</sup> Should life in such cases be artificially prolonged? Our law seems to require it. Yet inaction in such cases, when motivated by the physician's desire not to prolong the patient's suffering, is clearly distinguishable from active mercy killing. One might argue that, since the physician's duty to act is contractual and predicated upon the patient's consent, there being no basis in such instances for presumptive consent, non-feasance should go completely unpunished even though active euthanasia remains punishable.

#### MERCY AS MOTIVE OF HOMICIDE

As a result of vigorous reform movements, the criminal law of several continental European countries is in the course of changing its orientation. The basic concept of the conventional systems of criminal law is the concept of "crime," and the basic classification is that into different "types of crime" or "types of criminal act." Modern reform movements rather center around the personality of the criminal, the

34. The highest court of the Federal Republic of Germany (the Bonn Republic) in civil and criminal matters.

35. Decision of Bundesgerichtshof, Feb. 12, 1952, 2 B.G.H. St. 150. For a detailed discussion of this significant case see text at notes 94, 101-04 *infra*.

36. In some jurisdictions it is classified as murder. Commonwealth v. Hall, 322 Mass. 523, 78 N.E.2d 644 (1948) (failure of a mother to feed a newly born baby); Pallis v. State, 123 Ala. 12, 26 So. 339 (1899) (abandoning an infant child held assault with intent to murder). Most often, however, neglect of a duty to act resulting in death is considered as manslaughter. Territory v. Manton, 8 Mont. 95, 19 Pac. 387 (1888) (husband's failure to provide medical care for his wife). No case could be found dealing specifically with a physician's failure to prolong a patient's life where by virtue of the employment contract there was a duty to act.

37. The first two of these hypothetical cases are discussed by Binding, see BINDING & HOEHE, *op. cit. supra* note 21, at 33; the last mentioned one is discussed by ENGISCH, *op. cit. supra* note 5, at 10.

"type of actor."<sup>38</sup> The term "type of actor" does not suggest assumption of the existence of special types of individuals naturally inclined to commit certain crimes, but rather directs the judge's attention to the fact that he must consider the total personality of the actor, as evidenced by his deed.<sup>39</sup> The actor's character, his dangerousness or harmless, the probability or improbability of his repeating the crime become important elements in judging the crime. These elements are believed to be reflected in psychological guilt rather than in the consequences of the act.<sup>40</sup>

The concept of "guilt" has been subjected to a stringent analysis. In the course of such analysis, the notion has gained ground that the most significant test of guilt may be found not in the rational attitude of the actor toward the crime but rather in the ethical evaluation of the actor's motivation and in the manner of performance.<sup>41</sup> Thus, mo-

38. An outward expression of the change of orientation is the replacement in the German Penal Code of the conventional terms "murder" and "manslaughter" by the terms "murderer" and "manslayer."

39. On problems arising from the conflict of the idea of punishment based on "dangerousness" of the actor and that of punishment based on "guilt," see MAURACH, DEUTSCHES STRAFRECHT, ALLGEMEINER TEIL 35 *et seq.*, 696 *et seq.* (1954). With respect to the ideas underlying the reform of certain provisions of German criminal law discussed in this Article, see SCHOENKE, *op. cit. supra* note 33, at 564.

In this Article considerable space will be devoted to German ideas on the reform of criminal law. In this context, it is important to note that, while many of the new ideas were incorporated into the law during the Nazi regime, the reform movement originated long before the Nazi era and was not rooted in Nazi ideology. See Huelle (Justice of the Bundesgerichtshof of the Bonn Republic), *Strafrechtsreform und kein Ende?*, [1953] N.J.W. 1778-79. In addition, the code was considerably revised in the post-war period, and was republished in its entirety in 1953. Provisions bearing a Nazi imprint have been eliminated.

40. Stress on guilt is expressed in two principles: 1. that there must be no criminal responsibility unless there is guilt, in the form of either intent or "at least" negligence; 2. that responsibility attaches to guilt regardless of the consequences of the act. A most interesting provision enacted in accordance with the first principle is § 56 of the German Penal Code, added Aug. 25, 1953 (text of Sept. 1, 1953, B.G. Bl. pt. I, at 1083), which reads as follows:

"Where the law attaches a higher penalty to a special consequence of the act, such higher penalty shall not be imposed upon the actor unless he caused that consequence at least negligently."

Perhaps the best illustration of the application of the second principle may be found in a recent decision of the Swiss Supreme Court holding purported acts of abortion performed on a non-pregnant woman punishable as attempted abortion. Bruderer v. Staatsanwaltschaft des Kantons St. Gallen, Kassationshof, Sept. 1950, 76 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS pt. IV, at 153 (Amtliche Sammlung) (these official reports hereinafter cited B.G.E.). This decision and 74 B.G.E. pt. IV, at 65 overruled 70 B.G.E. pt. IV, at 9, 152.

In Germany, independence on result, as expressed in the revised provisions on instigation of crime (§ 49a), leads to such extreme positions as that criticized by Dreher, *Das Dritte Strafrechtsaenderungsgesetz*, JURISTENZEITUNG 421 (1953). A person who, unsuccessfully, instigates another to commit a street robbery is punishable more severely than a person who, successfully, instigates a simple robbery.

For discussion of the history of the notion of "guilt" and its recent development, see MAURACH, SCHULD UND VERANTWORTUNG IM STRAFRECHT (1948); BUSCH, MODERNE WANDLUNGEN DER VERBRECHENSLEHRE (1949).

41. DALCKE, STRAFRECHT UND STRAFVERFAHREN, comment to German Penal Code § 211, at 148 n.2 (35th rev. ed. 1950).



tive becomes relevant, whereas the premeditation and deliberation test decreases in importance or disappears entirely.<sup>42</sup> It is being recognized that "a man may act with deliberation while in a state of utmost despair,"<sup>43</sup> while "a crime of passion . . . can originate in a depraved mind or be committed in a highly reprehensible manner."<sup>44</sup> The type of motive which determines the act is believed to bear on the character of the actor and thus to afford the best guide for predicting whether or not he will repeat the act. It is believed that one who kills for profit may be expected to do so again, whereas a mercy killer is hardly likely to turn into an habitual criminal. On the other hand, premeditation is not deemed to indicate, in itself, probability that the actor will repeat the crime.

In contrast to the substantive use of motive and the waning importance of the premeditation and deliberation test in modern European codes,<sup>45</sup> the test remains part of our law,<sup>46</sup> though subject to sharp criticism,<sup>47</sup> and motive has only evidentiary use. As has been noted, most cases of euthanasia would meet the requirements of the premedi-

42. In some codes the test has been entirely abandoned; in others its significance has been considerably reduced. For a collection of the pertinent provisions (some of which, however, are no longer in force) see GSOVSKI, *THE STATUTORY CRIMINAL LAW OF GERMANY, WITH COMMENTS* 126 *et seq.* (1947). The element of motive in murder was stressed in Switzerland by STOOSS (*SCHWEIZERISCHES STRAFGESETZBUCH, VORENTWURF MIT MOTIVEN* 147 (1894)) and HAFTER (*SCHWEIZERISCHES STRAFRECHT* 15 *et seq.* (1943)); see also HAFTER, *LEHRBUCH DES SCHWEIZERISCHEN STRAFRECHTS, ALLGEMEINER TEIL* 352 *et seq.* (2d ed. 1946). Stooss pointed out particularly that "premeditation" is not a popular test whereas people react very strongly to "vile motives."

43. Pfenninger, *Zehn Jahre Schweizerisches Strafgesetzbuch*, *SCHWEIZERISCHE JURISTEN-ZEITUNG* 217-24, 237-40 (1953).

44. DALCKE, *op. cit. supra* note 41, at 148.

45. See text at note 42 and note 42 *supra*.

46. On the desirability of considering motive in American law see Michael & Wechsler, *A Rationale of the Law of Homicide* II, 37 *COL. L. REV.* 1261, 1277 *et seq.* (1937).

47. How inadequate the test is may be best shown by a series of cases dealing with the distinction between murder in the first degree and murder in the second degree adjudged by our courts. In *United States v. Parelius*, 83 F. Supp. 617, 618 (D. Hawaii 1949), the court said:

"Experience has shown that juries are many times perplexed in reaching a decision as to first or second degree and distinguishing the shades of meaning between 'unlawful killing . . . with malice aforethought' and 'unlawful, willful, deliberate, malicious and premeditated killing.'"

The length of time required for premeditation and deliberation is not even approximately settled by law. The approach of this test is complicated by the fact that a murder as against manslaughter to the criminal act. The embarrassment is solved by requiring a "second thought" as a test of premeditation and deliberation. "An approximate length of time" is said to be necessary to form premeditation. *Jones v. United States*, 175 F.2d 544, 552 (9th Cir. 1949). Two minutes were held insufficient in *Hiatt v. Brown*, 175 F.2d 273 (5th Cir. 1949). The instructions approved by the Supreme Court of the United States in *Fisher v. United States*, 328 U.S. 463, 469 n.3 (1946), stated that under certain circumstances the period of deliberation "may cover but a brief span of minutes."

For criticism of the premeditation and deliberation test see Keedy, *supra* note 7.

tation and deliberation test, but the test would not suffice to convict a mercy killer of the gravest type of homicide under the modern codes.

In modern continental European codes, motive is relevant both as an aggravating or mitigating factor in the traditional sense and as an express or implied constitutive part of the definition of certain concepts of crime or of criminal. As part of the definition of crime, motive a priori determines the classification of the offense in accordance with its graveness. For instance,<sup>48</sup> murder, the type of homicide punishable most severely,<sup>49</sup> is distinguishable from other types of homicide by its highly reprehensible motive or by a particularly reprehensible manner of performance, which also points to basically unethical tendencies of the actor; the actor is a "murderer." In the absence of these features, one who commits intentional homicide is merely a "manslayer," punishable more leniently.<sup>50</sup> If the motive is the altruistic desire to comply with the victim's request to be killed, the homicide turns into the separate crime of "homicide upon request," punishable by imprisonment in terms of only a few years.<sup>51</sup> All these factors, singly or in combination, afford the mercy killer a more lenient treatment under statutory law, without it being necessary to resort, as is being done in our law, to various devious maneuvers to achieve that result. Moreover, since special treatment is warranted by statute, there is a greater assurance of uniformity in the adjudication of euthanasia cases.

The operation of the new provisions may be best exemplified by showing how the revised German and Swiss law affect the treatment of mercy killing.

48. This example follows the scheme of the German Penal Code. This code has been recently revised to a large extent, particularly by the so-called "Third Statute Amending the Penal Law" of Aug. 4, 1953 (B.G. Bl. pt. I, at 735). The entire Code was republished, as amended, Sept. 1, 1953 (B.G. Bl. pt. I, at 1083). The revision, so far as the law of homicide is concerned, was necessitated by enactment of Art. 102 of the Constitution of the Bonn Republic of May 23, 1949 (B.G. Bl. at 1), which abolished capital punishment. Formerly, the maximum penalty for murder was death, the maximum penalty for manslaughter life confinement in a penitentiary (see former §§ 211, 212, as amended, Sept. 4, 1941, R.G. Bl. pt. I, at 549). Since the maximum penalty for murder is now life confinement in a penitentiary, that for manslaughter has been reduced to "confinement in a penitentiary for not less than five years," life confinement being limited to "particularly grave cases." For text of the provisions see notes 49, 50 *infra*. For discussion of the significance of the change in penalties see text at notes 144, 145 *infra*.

49. GERMAN PENAL CODE § 211 defines the concept of "murderer" as follows:

"(1) The murderer shall be punished by confinement in a penitentiary for life.  
 "(2) A person is a murderer if he kills a human being out of lust for killing (*Mordlust*); for the satisfaction of sexual desire; out of greed (*Habgier*), or any other base motives; in a treacherous or cruel manner or by means causing common danger; or in order to make possible or to conceal another crime."

50. The term "manslayer" (GERMAN PENAL CODE § 212) is now defined:

"(1) Whoever, without being a murderer, intentionally kills a human being shall be punished, as a manslayer, by confinement in a penitentiary for not less than five years.

"(2) In particularly grave cases, confinement in a penitentiary for life shall be imposed."

51. See discussion of "Homicide upon Request" in text following note 113 *infra*.



In neither law will a mercy killer be punished as a "murderer" (Germany) or for "murder" (Switzerland). In Germany, the premeditation and deliberation test has been entirely abandoned. Under the most recent amendment of the Penal Code,<sup>52</sup> a "murderer" is an individual who commits a particularly grave act of intentional homicide. The concept of murderer, as defined by statute, comprises typical forms of aggravated guilt. The murderer is distinguished from the "manslayer" either by base motive or by a manner of performance which discloses depravity of mind.<sup>53</sup> While typical base motives are specified, it

52. See note 48 *supra*.

53. There has been a total change of emphasis in the recent amendment of the Code. The "law of homicide" is now conceived as a unit. The distinction between murder and manslaughter is no longer deemed an absolute one. In aggravated cases, manslaughter may be punishable as severely as murder (compare GERMAN PENAL CODE §§ 211, 212 *supra* notes 49, 50). For integration of "homicide upon request" into the general scope of the law of homicide see text following note 138 *infra*. For discussion of the change see Lange, *Das Dritte Strafrechtsaenderungsgesetz (Strafvereinigungs-gesetz)*, [1953] N.J.W. 1161-65. However, the fact that the grounds of aggravation of guilt are enumerated would still seem to be significant. The importance of the enumeration has been repeatedly emphasized by the Bundesgerichtshof.

Thus, in a decision rendered Nov. 25, 1952, 3 B.G.H. St. 330, the court stressed the independence of certain statutory tests of murder. The accused, a farmer's son, killed his illegitimate infant child by the use of poison, after having sent away the mother under a false pretense. He committed the act in order to eliminate a source of grief of his ailing mother and in order to preserve his family farm, which he was in danger of losing due to the disturbance in family relations caused by the child's birth. The court below held that, while the act was "objectively treacherous," the actor's "personality, his attitude toward the act, toward the child's mother and toward the child, as well as the motive which dominated him, namely, regard for the parental farm and for the ailing mother, do not justify the assumption of a particularly reprehensible attitude toward the act." The Bundesgerichtshof reversed the decision below, stating:

"The types of performance, 'treacherous' and 'cruel,' characterize particularly reprehensible manners of performance of intentional homicide; in section 211 they are, in principle, independent of the particularly reprehensible 'base' motives of the actor (greed, lust for killing, satisfaction of sexual desire). True, it would be erroneous to assume that the type of the actor's motive can never bear on the description of killing as 'treacherous.' For, in addition to the external facts which determine the evaluation as murder or as manslaughter, the court must also, to a larger or smaller extent, consider the personality of the actor in context with his mental and emotional capacity, his expectations and desires. But this does not apply in an equal degree to all characteristics of murder, as is evident from their diversity. Thus, in those cases where murder is characterized by *manner of performance*, which the statute regards as particularly reprehensible and therefore classifies as characteristic of murder, consideration of the personality of the actor is greatly reduced; in general, such consideration is limited to the question whether the actor knew and desired the external characteristics of the act. On the other hand, in evaluating the characteristics of murder based on *motive*, consideration of the personality of the actor is—in accordance with the decisiveness of motive—of utmost importance. . . . Under rare circumstances, certain motives which ethically de-serve consideration may remove the treacherous character from a killing performed in exploitation of the confidence of the victim and of his inability to defend him- self. . . ."

The court held that the accused had committed the act in a treacherous manner and was therefore guilty of murder.

In a decision rendered Sept. 23, 1952, 3 B.G.H. St. 264, the court upheld the conviction of murder where a father killed his daughter, who suffered from epilepsy, in order to speed her death and rid himself of a burden, the act having been com-

is provided that "any other base motives" might bring the actor within the definition of murderer. Where the manner of performance is the decisive factor, judicial consideration of the total personality of the actor is limited, but nevertheless exceptional motive is not entirely disregarded.<sup>54</sup> Clearly, mercy does not fall within any of the types of motive which characterize the actor as a murderer. Nor is a mercy killer likely to perform the act in any of the enumerated manners which are characteristic of murder. The mercy killing of a suffering, dying patient under the pretext of applying a pain-relieving measure was judicially said not to be "treacherous" within the meaning of the law.<sup>55</sup>

The Swiss Penal Code of 1937 follows a different legislative technique. It does not enumerate either typical motives of "murder" or typical manners of its performance.<sup>56</sup> The true mark of murder is the depraved mind (base attitude or mentality) or the dangerousness of the actor. The judge has thus a broader discretion in evaluating the actor's total personality. The term "premeditation" appears in the definition of murder, but premeditation, in itself, is no longer either a sufficient or an exclusive test of murder.<sup>57</sup> As stated by the Federal

mitted by exposing the girl to hunger and cold as well as by beating. The court held that the act fell within the statutory classification "in a cruel manner." It stated:

"The attitude which characterizes the act as cruel need not be one which flows from the general character of the actor and which continuously motivates his conduct. It is sufficient that it dominated him during the act and that he, therefore, performed the acts which externally appear cruel, knowing that they caused the victim to suffer excessive physical and mental pain."

As may be seen from these examples, motive, while extremely significant, is not an exclusive characteristic distinguishing murder from manslaughter. But even where, under the statute, other features are decisive, the presence of an altruistic motive may bear on the evaluation of these features. The same does not apply where there is merely an absence of reprehensible motive.

54. In the court's view, as appears from the cited cases, even where the manner of performance is the decisive factor, consideration of motive is not entirely eliminated and such consideration may be necessary particularly where the motive is of an exceptional nature. This is especially in point where the motive of homicide is mercy and the performance externally appears to be "treacherous." Note that in the last cited case (see note 53 *supra*), where the court stressed the "manner of performance" most strongly, the cruelty of performance was clearly related to the vile motive underlying the act.

55. See judgment of the Muenster court, note 25 *supra*, at 327, reversed on other grounds. Compare also the opinion of the Bundesgerichtshof (3 B.G.H. St. 330, note 53 *supra*), last sentence of the quoted passage.

56. The Draft of 1918 contained an enumeration of types of motive and manners of performance, characterizing a particularly grave felony (Art. 99). This method was abandoned. See *Abrecht v. Staatsanwalt des Berner Seelandes*, 70 B.G.E. pt. IV, at 5 (1944), 92 *Journal des Tribunaux* pt. IV, at 73 (1944).

57. The Swiss Penal Code of 1937 defines "manslaughter" and "murder" in articles 111 and 112. These articles read as follows:

"Article 111. Whoever intentionally kills a human being shall, in the absence of circumstances set forth in the following article, be punished by confinement in a penitentiary for not less than five years."

"Article 112. Where the actor (killer) killed under circumstances or with a premeditation, which show that he possesses a particularly reprehensible attitude



Tribunal,<sup>58</sup> the actor's premeditation is not taken into consideration except to the extent that it expresses a "particularly perverse mentality or dangerousness of the actor." On the other hand, premeditation "is not a necessary element of murder, for the danger which the actor represents and his depraved mind may also appear from other circumstances."<sup>59</sup> The mental attitude of the actor, his dangerousness or harmlessness may be inferred from his motive. "An actor is dangerous where, in the light of the circumstances, it may be assumed that he will act similarly in other situations. This is in contrast to cases in which the intent is based on exceptional circumstances, so that the actor is not dangerous to other men."<sup>60</sup> A typical example of the latter type of actor is the mercy killer.

In addition to being classified as a "manslayer" rather than as a "murderer," the mercy killer may further benefit from general provisions for reduction of penalty in the case of mitigating circumstances. The German Penal Code provides that a considerable reduction of penalty (to as low as six months' imprisonment) may be granted where the homicide was committed in the heat of passion upon provocation or where there are "other extenuating circumstances."<sup>61</sup>

(depraved mind) or that he is dangerous, he shall be punished by confinement in a penitentiary for life."

58. See *Abrecht v. Staatsanwalt des Berner Seelandes*, *supra* note 56. The Federal Tribunal functioned in all cases cited in this Article as the court of last resort in matters arising under federal criminal law.

59. See *Abrecht v. Staatsanwalt des Berner Seelandes*, *supra* note 56.

60. GERMANN, *DAS VERBRECHEN IM NEUEN STRAFRECHT* comment to art. 112 of the Swiss Penal Code, at 225 (1942). Circumstances and deliberations which disclose a particularly reprehensible attitude of the actor were found to be present where a woman gave her husband poison several times at intervals, in order to be able to marry a lover. *Staatsanwaltschaft des Kantons Zuerich v. Eggmann*, decision rendered March 9, 1951, 77 B.G.E. pt. IV, at 57. The court said:

"Appellant attempted to kill under circumstances and with premeditation which disclose her particularly reprehensible attitude. The motive was particularly reprehensible: appellant wished to kill her husband in order to be able to marry her lover with whom she entertained an adulterous relation. In addition, this insincere, domineering and cold psychopath carried out her plan with unusual premeditation and persistence. The serious effects of the first attempt at murder did not deter her from repeating the act. No sooner did Hans Eggmann recover after a long illness—during which the appellant cloaked her crime by devoted care of the victim—to treachery." *Id.* at 63-64.

On the other hand, in *Bayard v. Kantonsgericht Wallis*, decided Sept. 23, 1952, 78 B.G.E. pt. IV, at 145, a woman who twice gave her husband food with poisonous substance was held guilty of attempted manslaughter rather than of attempted murder. As may be seen, the court's discretion in murder convictions is greater under Swiss than under German law.

61. GERMAN PENAL CODE §213 provides:

"Where the manslayer was aroused to anger by ill treatment or by a grave insult inflicted upon him or upon one of his relatives—without his fault—by the deceased and was thereby instantly moved to commit the act, or where there are other extenuating circumstances, the punishment shall be imprisonment for not less than six months."

The Swiss Penal Code first includes a general provision that the judge is to consider motive when meting out punishment,<sup>62</sup> and then enumerates among the mitigating circumstances the so-called "honorable motives."<sup>63</sup> This description indicates a sympathetic attitude of the Code toward these motives. Germann, a noted commentator of the Code, suggests that there might be cases in which motive, such as compassion, is of such decisive importance as to warrant total exculpation.<sup>64</sup> As a rule, however, honorable motives have an extenuating effect only, and in cases which deserve exceptional treatment recourse may be had to the pardoning power.<sup>65</sup>

The common feature of the German and Swiss provisions, so far as euthanasia is concerned, is the fact that neither the mercy motive nor the patient's condition which might give rise to such motive is specifically mentioned. By contrast, there is a group of statutes in which these factors constitute an express element of the definition of a special type of crime or of a special instance of guilt exclusion. The Prussian Landrecht of 1794<sup>66</sup> imposed upon the "killing with intention

62. Article 63 of the SWISS PENAL CODE provides:

"The judge shall mete out punishment in accordance with the guilt of the actor; he shall consider the motives, the prior life and the personal circumstances of the guilty person."

63. Article 64 provides:

"The judge may mitigate the punishment . . . where the actor was induced to commit the act (acted) by honorable motives. . . ."

64. GERMANN, *op. cit. supra* note 60, at 56.

65. A favorable consideration of euthanasia may also result from recognition of error of law concerning the illegality of euthanasia as a defense. Error of law is governed in Switzerland by article 20 of the Penal Code, in Germany by decisional law. In both countries, such error may lead to total exculpation or to reduction of penalty. In Switzerland, the Federal Penal Code of 1937 made the requirements of considering error of law as relevant more stringent than they were under prior law. See *Staatsanwaltschaft des Kantons Zug v. Husistein*, 75 B.G.E. pt. IV, at 26 (1949). Under the present rule, error of law, where based on "adequate grounds," may, in the judge's discretion, result in a reduction of penalty or in total exculpation. Thus, faultless error of law does not automatically entitle to acquittal. *Eidgenössisches Volkswirtschaftsdepartement v. Schluop*, 75 B.G.E. pt. IV, at 37; *Gesundheitsbehoerde Meilen v. Ellenberger*, 75 B.G.E. pt. IV, at 76, 82. Under German law, a person is required to search (exert or strain) his conscience in order to establish what the applicable law is. See note 30 *supra*. This means "that, when decision concerning the legality or illegality of a certain conduct is at stake, the actor is required to apply all his mental powers and all his ethical value judgments." See decision of *Bundesgerichtshof*, Dec. 23, 1952, 4 B.G.H. St. 1. Where, in spite of such exertion, the error occurs, it is considered as "insuperable," and leads to total exculpation. Where, on the other hand, the error was brought about by the actor's failure to exert his conscience, meaning that it was not "insuperable," the court may, in its discretion, reduce the penalty. As shown above, the *Bundesgerichtshof* remanded a would-be "euthanasia" case for a finding whether the actor was aware of the illegality of his action. See note 29 *supra*. Neither in Switzerland nor in Germany will belief that an act known or felt to violate a legal prohibition nevertheless fulfils the demands of a higher moral law be held to constitute a relevant "legal error." But belief that such prohibition, being in flagrant conflict with the dictates of a higher law, violates the fundamental principles of the law of the land and is therefore invalid would constitute relevant error in Germany. 4 B.G.H. St. 1.

66. *Allgemeines Landrecht fuer die Preussischen Staaten* of Feb. 5, 1794, pt. II, tit. 20, § 833.



believed to be good" of a deadly wounded or otherwise dying person a punishment similar to that imposed upon negligent killing. The penal codes of Wuerttemberg of 1839,<sup>67</sup> of Thuringia of 1850,<sup>68</sup> and of other German states reduced the penalty for homicide below that prescribed for "homicide upon request" where the request was made by a fatally ill person. While these statutes are no longer in force, the Norwegian Penal Code of 1902 contains a special provision dealing with mercy killing, which is still in effect.<sup>69</sup> This Code treats the mercy motivated killing of a hopelessly ill person like killing upon request. The measure of punishment in such homicide cases is not stated. Rather, the judge is given discretion to reduce the punishment below the minimum which would be otherwise applicable and to impose a milder form of penalty than the usual one. Where mercy motive and request are combined, the judge may take account of both and reduce the punishment below the measure he would apply if only one of the stated factors were present.<sup>70</sup>

A special rule on euthanasia also appeared in the Russian Penal Code of March 22, 1903.<sup>71</sup> This rule, later enacted in the Baltic countries,<sup>72</sup> was adopted by the Polish Penal Code of 1932,<sup>73</sup> and, in a modi-

67. Strafgesetzbuch of March 1, 1839, tit. 2, c. 1, art. 239.

68. Das Strafgesetzbuch der Thüringischen Staaten of March 20, 1850, art. 120.

69. NORWEGIAN PENAL CODE § 235 provides:

"Punishment according to sections 228 and 229 (bodily injury and rendering a person unconscious) shall not be applied where the action was committed with consent of the victim. Where a person was killed or suffered considerable damage to his body or health with his own consent, or where an actor motivated by mercy takes the life of a hopelessly ill person, or assists in such act of killing, the punishment may be reduced below the minimum fixed by statute and a milder form of penalty may be imposed.

70. The legislative reasons of this provision were summarized as follows by the Royal Commission which prepared the draft of the Code (See ENTWURF EINES ALLGEMEINEN BÜRGERLICHEN STRAFGESETZBUCHES FÜR DAS KÖNIGREICH NORWEGEN. MOTIVE, pt. 2, at 175 (Comm'n appointed by Royal Ordinance of Nov. 14, 1885, ed., transl. into German by Weber, 1912):

"The present draft advances further than the foreign laws and drafts, in that it assimilates killing motivated by mercy to killing upon request. This must be considered as perfectly justifiable in the case of hopelessly ill persons who are perhaps unable to express a request. On the other hand, there is no need for a specific reduction of punishment."

Compare also KLENNER, DIE TOETUNG AUF VERLANGEN IM DEUTSCHEN UND AUSLÄNDISCHEN STRAFRECHT SO WIE DE LEGE FERENDA 65 *et seq.* (1925), dealing at length with the Norwegian legislation on the subject.

71. Section 460 of that Code provided as follows:

"A person guilty of homicide performed at the (urgent) request of the person killed and out of compassion for him shall be punished by confinement in a fortress [*custodia honesta*] for a term not exceeding three years."

"Attempt is punishable."

72. That part of the Code which dealt with homicide was never in force in Russia, but during the First World War the Code was enacted in the Baltic countries.

73. POLISH PENAL CODE art. 227 (1932) provides:

"Whoever kills a human being at his request and under the influence of compassion for him shall be punished by imprisonment up to five years or by detention."

fied form, in the Penal Code of Uruguay of 1933.<sup>74</sup> It provides for a reduced penalty (or, in the case of Uruguay, for total exculpation) where a homicide is motivated by compassion and performed upon the victim's own request. The grounds of compassion are not stated.<sup>75</sup>

#### EUTHANASIA AND THE LAW OF SUICIDE

Mercy killing upon the patient's request is often hardly distinguishable from assistance in suicide. Indeed, at times, the distinction appears to consist in but a legal technicality. For this reason, the demand has been raised in legal literature—even in that adhering to conventional theories of criminal law—for assimilation of the law on euthanasia to the law on assistance in suicide.<sup>76</sup> This demand is strengthened as criminal legislation turns from the idea of punishment based on the effect of certain actions to the notion of punishment based on psychological guilt. Clearly, the guilt of the physician who injects poison into a patient's body hardly appears to be greater than that of his colleague who hands the injection needle to the patient and instructs him how to use it. It has, therefore, become common practice to discuss euthanasia in conjunction with the law on assistance in suicide.

A preliminary question arising in connection with the law on assistance in suicide is that of the relationship of assistance to the act of suicide itself. Conventional criminal law assumes that assistance in suicide is necessarily related in ethical judgment to the act of the principal in the suicide. Frequently, this assumption influences legal evaluation even after the view has been accepted in other parts of jurisprudence that the act of each participant in crime should be judged in accordance with his own guilt and without regard to the guilt of any other person or to any effect brought about by the latter. It thus becomes necessary to discuss the law of suicide itself.

The "right" to commit suicide is one of the most controversial subjects in the history of mankind,<sup>77</sup> and until the present time the laws

74. PENAL CODE OF URUGUAY art. 37 (Law No. 9155), promulgated Dec. 4, 1933, effective as of July 1, 1934, provides:

"The judges are authorized to forego punishment of a person whose previous life has been honorable where he commits a homicide motivated by compassion, induced by repeated requests of the victim."  
The provision is interpreted as conferring a power of judicial pardon. See BOUZA, EL HOMICIDIO POR PIEDAD Y EL NUEVO CÓDIGO PENAL (1935).

75. Judicially it has been pointed out, however, that compassion exists only where the actor is convinced that the person demanding death is suffering and that death to him is rather a relief. See Polish decision of Feb. 24, 1936 (orz. 24 II 1936, zb. nr. 336/36), cited in MAKAREWICZ, KODEKS KARNY Z KOMMENTARZEM art. 227, comment (5th ed. 1938).

76. See notes 117, 118 *infra*.

77. In Bayet's words (LE SUICIDE ET LA MORALE, Introduction, 5 *et seq.* (1922)): "After twenty centuries of discussion, the question has remained open and



on suicide vary widely in the legal systems of the world. In continental Europe, France was first in legalizing suicide.<sup>78</sup> Upon motion of the famous Docteur Guillotin, the National Assembly, on January 21, 1790, repealed all sanctions against the body and the property of the suicide,<sup>79</sup> and subsequent legislation did not reenact the provisions prohibiting suicide. This means, under the rule of the principle "*Nullum crimen sine lege*," that suicide is not a crime in France. Several German codes followed suit, and today immunity of suicide is a generally accepted principle of continental European law.

By contrast, the English law preserved the common law conception of suicide as a felony. At common law, the punishment for him who committed it was interment in the highway with a stake driven through the body, and the forfeiture of his lands, goods, and chattels to the king. While sanctions against the body and property of the suicide have been removed, the attempt by a person deliberately to end his own life is still an attempt to commit a felony, though not an "attempt to commit murder" within the Offences against the Person Act of 1861.<sup>80</sup>

In the United States, the English common law on suicide was never accepted with all its implications. As stated in *Burnett v. People*,<sup>81</sup> "as we have never had a forfeiture of goods, or seen fit to define what character of burial our citizens shall enjoy, we have never regarded the English law as to suicide as applicable to the spirit of our institutions." Yet in New York, for instance, while suicide is declared, by statute, not to be a crime, censure of the act as "a grave public

posed in the same terms as ever." Neither the Old nor the New Testament expressly dealt with the subject of suicide. However, the Canon Law condemned it as criminal homicide. Canon 12, caus. 23, quest. 4. It has been pointed out (LESS, *VOM SELBSTMORDE* (1776)) that all those who are mentioned in the Bible as having committed suicide were evildoers: Samson, Saul, Ahitophel. On the other hand, it has been noticed that Pelagia, who committed suicide, was glorified as a Saint, and that Thomas Moore, who advocated euthanasia, was beatified and later canonized. Perhaps the most noteworthy apologies of suicide are those of Seneca (Ep. 70), Hume (*ON THE SUICIDE*), Montesquieu (*LETTRES PERSANES*, Lettre 76, at 189 (1901 ed.)), and Shopenhauer (*PARERGA UND PARALIPOMENA* c. 13).

78. Montesquieu, *op. cit. supra* note 77, was first in demanding secularization of the suicide problem and a law reform granting immunity to suicides. Among the critics of the position of the Church on suicide were Diderot (*Suicide*, *DICTIONNAIRE ENCYCLOPEDIQUE*) and Voltaire (*Du Suicide*, *MELANGES DE LITTERATURE, D'HISTOIRE ET DE PHILOSOPHIE*; *Du Suicide*, *POLITIQUE, LEGISLATION*), although they did not approve of suicide. These writers of the Era of the Enlightenment influenced French revolutionary leaders, particularly Marat. See *MARAT, PLAN DE LEGISLATION CRIMINELLE* § 3 (*Du Suicide*).

79. For a comprehensive report on the development which led to this legislation and on the general history of ideas on suicide see Szittyá, *SELBSTMORDER EIN BEITRAG ZUR KULTURGESCHICHTE ALLER ZEITEN UND VOELKER* (1925).

80. 24 & 25 Vict. c. 100. See *Rex v. Mann*, 110 L.T. 781 (1914). The act is punishable like any other attempt to commit crime, *viz.*, fine or imprisonment up to two years.

81. 204 Ill. 208, 68 N.E. 505, 510 (1903).

wrong" is inserted into the very language of the statute.<sup>82</sup> Judicially, on the other hand, it has been held that suicide is not a "crime involving moral turpitude."<sup>83</sup>

In modern times, therefore, immunity of suicide actually means immunity of attempted suicide. But the law with respect to the instigator, aider and abettor of suicide varies in the different statutory systems. There are, broadly speaking, three groups of statutes dealing with such persons. In jurisdictions where the distinction between accessory and principal is abolished, they are treated as principals in homicide.<sup>84</sup> Where punishment of accessories is predicated upon the criminal character of the act of the principal, the instigator, aider and abettor of suicide enjoy immunity, the act of the principal not being a crime. Finally, certain statutes specifically define instigating, aiding and abetting suicide as independent crimes *sui generis*. Each of these rules concerning the instigating, aiding and abetting of suicide has an ethical bearing on the problem of euthanasia.

Perhaps the most objectionable feature of the first mentioned rule, under which the aider or abettor of suicide is treated as a principal in homicide, is the fact that no distinction is drawn between cases in which the suicide is an involuntary agent unaware of the consequences of his deed—a child or a lunatic—and cases in which he is a free and responsible adult.<sup>85</sup> Obviously, such disregard of the profound ethical difference that exists between the two types of acts is not within the spirit of our institutions. However, as long as this rule prevails, it would certainly be inconsistent to apply a less stringent standard to mercy killing. A reform of criminal legislation in jurisdictions which adhere to this rule would require reexamination of fundamental conceptions of crime, including accomplices in suicide and mercy killing.

The second rule, though somewhat antiquated, deserves special notice because the manner in which it is administered abroad vividly demonstrates the injustice of a differential treatment of mercy killing and aiding a suicide. Immunity of instigating, aiding and abetting

82. NEW YORK PENAL LAW § 2301 (1944) contains this peculiar legislative attempt at censuring suicide without imposing any legal sanction upon it:

"Although suicide is deemed a grave public wrong, yet from the impossibility of reaching the successful perpetrator, no forfeiture is imposed." However, neither is a penalty imposed on the unsuccessful perpetrator. Attempt is not punishable.

83. *Hundert v. Commercial Travellers' Mut. Acc. Ass'n*, 244 App. Div. 459, 279 N.Y. Supp. 555 (1st Dep't 1935).

84. *McMahan v. State*, 168 Ala. 70, 53 So. 89 (1910); *People v. Roberts*, 211 Mich. 187, 178 N.W. 690 (1920).

85. This was expressly stated to be the law in *Burnett v. State*, 204 Ill. 208, 222-23, 68 N.E. 505, 511 (1903).



suicide, in the dogmatic view prevailing in France<sup>86</sup> and in Germany, follows from the definition of the term "accessory" or "accomplice." In Germany, the accessory (instigator or aider) is defined as one who "induces another to commit an act" or "gives assistance . . . in the commission of an act . . . for which punishment is prescribed."<sup>87</sup> Since suicide is not such an act, neither is an accessory to it subject to punishment.<sup>88</sup> This position has been severely criticized both in France<sup>89</sup> and in Germany,<sup>90</sup> and in both countries recourse is taken in extreme cases to the theory of "indirect causation."<sup>91</sup>

Immunity of the accessory to suicide on the ground that suicide itself is not a crime defined by statute is particularly striking in Germany, where, in all other respects, there is a tendency to judge the act of each individual independently, in accordance with his own guilt.<sup>92</sup> Where the accessory is punishable although the principal enjoys a personal immunity,<sup>93</sup> it would seem inconsistent that the accessory to suicide should escape punishment on the ground that suicide itself is not a crime. In fact, this inconsistency has caused much judicial discomfort and, since in some cases "indirect causation" is clearly inapplicable, the Bundesgerichtshof recently developed a new doctrine bringing participation in suicide within the orbit of criminal law. It held the intentional or negligent failure of an accused, having a duty to act,

86. This position is accepted both in commentaries and in decisional law, in the latter since Appeal of Catherine Lhuillier, Cour de cassation, April 27, 1815, [1816] Sirey, pt. I. 317.

87. GERMAN PENAL CODE §§ 48, 49. The text of these sections was basically amended by a Law of May 29, 1943, [1943] Reichgesetzblatt, pt. 1, at 341, 342. Since that amendment, the accessory is punishable if the act of the principal is "an act for which punishment is prescribed." It need not be a "punishable act," as was the case in prior legislation, so that the accessory may now be punished although the principal enjoys a personal immunity. Thus, an accessory may be punishable although the principal is acquitted on the ground that he acted under a mistake of fact. B.G.H., Urt. v. 22 Oct. 1953, 4 St. R. 112/53, [1954] N.J.W. 119.

88. For a similar view, see United States v. Selph, 82 F. Supp. 56, 58 (S.D. Cal. 1949).

89. See BADR, L'INFLUENCE DU CONSENTEMENT DE LA VICTIME SUR LA RESPONSABILITÉ PÉNALE, ÉTUDE COMPARÉE 108 *et seq.* (1928), and authorities cited at 110 *et seq.*

90. See literature cited in KLENNER, *op. cit. supra* note 70, at 54 *et seq.*

91. KOHLER, STUDIEN 145 (1890), assumes in all cases of instigation of suicide an intellectual causation which renders the instigator punishable on the ground that "he killed the actor by the medium of the latter's own person." The prevailing doctrine assumes indirect causation in all cases in which the actor is legally incapable to form a valid will.

92. Of several persons participating in a crime, each is punishable in accordance with his own guilt, without regard to the guilt of another. GERMAN PENAL CODE § 50(1). Where particular qualities or circumstances aggravate, mitigate or exclude guilt, they will result in disadvantage or in benefit only to that individual to whom they apply. *Id.* § 50(2). Compare also § 56 (see note 40 *supra*).

93. Compare note 87 *supra*.

to save the life of a suicide, when the latter was no longer in a position to save himself, to be direct culpable homicide, for which the accused was responsible as a principal.<sup>94</sup>

Since the accessory to suicide enjoys immunity whereas a person killing another, however motivated, is subject to severe punishment, drawing a workable distinction between assistance in suicide and direct performance becomes a matter of vital concern. Efforts in this direction, however, so far have been unsuccessful.

The distinction between the notion of "principal" and that of "accessory" is predicated upon choice between two familiar opposing legal

94. Decision of Bundesgerichtshof, Feb. 12, 1952, 2 B.G.H. St. 150. After a quarrel with his wife, the deceased hanged himself. The wife saw him hanging but did not cut him off, although she could have easily done so. She was, as the court below found, "satisfied with the course of events—events which had occurred without any action on her part." She was convicted of the crime of "Failure to Render Assistance" (GERMAN PENAL CODE § 330(c)), and appealed. The prosecution, also appealing, asked for conviction of manslaughter. The Bundesgerichtshof reversed and remanded. It held that the crime of "failing to assist" did not apply, since, by statutory definition, assistance under § 330(c) is required only in the case of an "accident," and suicide is not an "accident." It held, however, that § 212 (manslaughter) or § 222 (negligent homicide) may be applicable. It said:

"Several persons may cause the same criminal consequence—here, the death of a human being—in different ways, by prohibited action as well as by omission contrary to duty; and, depending on their mental attitude toward the act and the consequence of the act (direction of will, dominance over the act, interest in the consequence of the act, scope of own action), they may be co-principals, instigators or accomplices. These principles apply to every culpable causation of the consequence: also to 'participation' in suicide and its causation. Therefore, the immunity of suicide under German law does not exclude criminal responsibility of other persons; it is limited to certain cases only." 2 B.G.H. St. at 151.

The court went on to say that neither instigation nor indirect causation was present in the case, both types of action requiring the exercise of influence upon the will of the suicide. Assistance in suicide not being a crime under German law, there remained to be considered the crime of direct participation in the act. Such crime—the court said—may have occurred. Since the accused could have prevented the death of her husband, her failure to prevent it contributed to such death. "In death of her husband, her failure to prevent it interrupted the chain of causation started omitting to act, contrary to duty, she failed to interrupt the chain of causation started by her husband; she thereby participated in causing his death. . . ." The duty of the accused to assist her husband was based, in the opinion of the court, on the nature of the matrimonial community under German law. Responsibility as a principal (manslaughter or negligent homicide) for failure to act in accordance with her duty depends on her attitude toward the consequence. If she desired or consciously accepted that consequence, she was guilty of manslaughter.

The court's ruling concerning the crime of "failing to render assistance" has been recently reversed. The Great Senate for Criminal Matters of the Bundesgerichtshof held (B.G.H., Besch. d. Gr. Str. Sen. v. 10 March 1954, G.S. St. 4/53, [1954] N.J.W. 1049-50) that suicide is an "accident" within the meaning of § 330(e) of the German Penal Code.

"Failure to render assistance" is also a crime under the FRENCH PENAL CODE art. 63, ¶2. For a recent decision convicting a physician for failure to respond to a call for medical assistance, see decision of the Court of Appeal of Bordeaux of Oct. 28, 1953, reported in [1954] Recueil Dalloz 13. The provision also applies to failure to assist a suicide. See *Homicide*, 2 ENCYCLOPÉDIE, DROIT CRIMINEL item 46 (Dalloz 1954). However, the courts interpret the provision rather narrowly. See Trib. corr. Lesparre, Jan. 25, 1945, Juris-Classeurs, [1945] SEMAINE JURIDIQUE II. 2896, with note, R.B., and C. de Rouen, Ch. corr., March 31, 1949, in [1950] RECUEIL Dalloz 9 (Sommaires).



theories, the subjective and the objective theory.<sup>95</sup> According to the former, the difference between a principal and an accomplice lies solely in the different will-direction of such persons, not in who performs the act. The principal has the "dominant" will or "*animus auctoris*," the accomplice has the "subordinate" will or "*animus socii*"; the former desires the action as his own, the latter as that of another person. According to the objective theory, the principal physically performs the action which the law defines as a crime; the accomplice prepares or promotes it. When applied to the problem at issue in this paper, either answer seems unsatisfactory.

In Germany the Reichsgericht adopted the subjective theory, whereby a physician who completely subjects his will to that of the patient and hence does not intend to perform the killing as "his own action," is only an accomplice in suicide, even if, from an objective point of view, he performs the decisive action, *e.g.*, injects the poison while the patient extends his arm.<sup>96</sup> In criticizing this position, Frank pointed out that in all cases of euthanasia upon request of the patient the actor subordinates his will to that of the deceased and thus would seem to be an accomplice in suicide.<sup>97</sup> The objectivists, on the other hand, draw the demarcation line in accordance with the apparent character of the action. If the physician writes the prescription for poison or concocts the poison or prepares the injection needle and instructs the patient how to use it, while the latter takes the poison, or injects the needle, the physician is merely an accomplice in suicide. He is a principal in homicide if he himself gives the poison or injects the needle. Here too there are doubtful borderline cases, such as the case in which the physician brings the glass filled with poison to the patient's lips. Mezger<sup>98</sup> made the answer dependent on the question whether the patient at all times has the power over the performance of the killing.<sup>99</sup> The patient has such power when the poison is brought to his lips but not in the case of an injection. After summarizing these arguments, Engisch exclaims:

95. On these theories, see KLENNER, *op. cit. supra* note 70, at 55 *et seq.*; SCHOENKE, *op. cit. supra* note 33, at 162 *et seq.*; BUSCH, *MODERNE WANDLUNGEN DER VERBRECHENSLEHRE* 17 *et seq.* (1949); MAURACH, *SCHULD UND VERANTWORTUNG IM STRAFRECHT* 56 *et seq.* (1948).

96. See particularly 70 R.G. St. 315 (1936).

97. 18 FRANK, *DAS STRAFGESETZBUCH FUER DAS DEUTSCHE REICH* 103 *et seq.* (18th rev. ed. 1929-30).

98. MEZGER, *STRAFRECHT* 416, 417 (3d printing 1949).

99. This is the so-called "mixed theory." On this theory see Gallas, Note to Decision of O.G.H.B.Z. Urt. v. 15 March 1949, St. S. 37/49, in 5 *Deutsche Rechtszeitschrift* 67 (1950), and literature cited in that note. As may be seen from the example set forth in the text, this theory offers no better solution than do the two principal theories.

"Now the shrewd physician knows what to do. But aren't we lawyers ashamed of ourselves? Isn't the mental attitude of the actor being neglected, the borderline between guilt and immunity made dependent on superficial factors? The Reichsgericht with its 'subjectivism' seems to be more sensible. But, of course, if its decisions are followed, there remains the danger of a too far-reaching immunity. Perhaps, however, this is no danger at all but a welcome consequence?"<sup>100</sup>

On the other hand, the Bundesgerichtshof recently emphasized that a person who has a special duty with regard to the suicide cannot arbitrarily transform his intent into an "intent of acting as an accessory" (*Gehilfenvorsatz*) by a "mental reservation of not desiring death as a consequence of his own action."<sup>101</sup> Where he desires the consequence—the court said—it is irrelevant what meaning he psychologically attributes to his conduct, and solely decisive "what meaning it actually had for the course of events." In the court's view, a person under duty to act—and a physician attending a patient undoubtedly has a duty to assist him<sup>102</sup>—is bound to save the suicide even after the act was committed, under sanction of being held responsible as a principal in homicide, provided that he desired death to occur (or was negligent with regard to it).<sup>103</sup> This ruling would seem to exclude the physician's immunity for assistance in a patient's suicide. However, the court suggested a possible exception to the new rule: the duty to act may not apply where the suicide is based on "ethically justifiable" grounds.<sup>104</sup> Thus, the distinction between the various forms of par-

100. ENGISCH, *op. cit. supra* note 5, at 11, 12.

101. See note 94 *supra*.

102. Among the persons bound to assist, the court enumerated police officers, firemen, swimming instructors, teachers, heads of educational institutions, directors of boarding schools, prison wardens, medical attendants, nurses.

103. Under German law, a person who does not directly desire the consequence but who considers such consequence as possible and approves of it in the event it occurs, as well as a person who does not desire the consequence but foresees that it will occur as a result of his conduct and permits it to occur, are deemed to have "intended" the consequence. See Decision of Bundesgerichtshof, Feb. 12, 1952, 2 B.G.H. St. 150, 156.

104. The court said:

"The husband's desire to commit suicide did not exclude the duty of the accused to avert it. This desire brought about a danger to his life, which she was in duty bound to oppose to the best of her ability. True, husband and wife have, essentially, equal rights. Within the marriage community, each may expect the other to respect his decisions which are ethically justifiable. But the facts of the case do not give occasion to examine under what special circumstances this legal idea could have freed the accused from her duty of care and of averting danger (from her husband). The husband of the accused was not incurably ill and suffering great pain; nor was he exposed to any other danger without a way out. There appear to be no facts present which might have withdrawn his decision to commit suicide from interference by another person in such a compelling manner, as to put an end to the duty of



ticipation in suicide, and hence between immunity and criminal responsibility, ultimately turns on motive. Once the motive of suicide is deemed relevant, special consideration of euthanasia seems to be close at hand.

Finally to be considered is the third rule as to instigating, aiding and abetting suicide. Under this rule, such acts are punished as crimes *sui generis*.<sup>105</sup> It is the rule adopted in the New York Penal Code. The crime is characterized as manslaughter in the first degree or as just a felony, depending on whether the suicide was successful or remained in the stage of an attempt.<sup>106</sup> Foreign legislation, on the other hand, draws distinctions on grounds bearing on the character of the act or its motives.

The most interesting special legislative provision in this field is that of Switzerland. Whoever instigates another to the commission of suicide or assists him therein is punishable provided that his action is caused by "selfish motives."<sup>107</sup> Intent alone is not sufficient;<sup>108</sup> if the

marital care and of averting danger (from the deceased) and as to exclude criminal guilt." *Ibid.*

In its decision of March 10, 1954, *supra* note 94, the Great Senate for Criminal Matters took notice of the possibility of justifiable suicide (in extreme cases) within the context of the crime of "failing to render assistance." The court pointed out that justifiable suicide is sufficiently covered by an element in the definition of "failing to render assistance": only a person who "may be expected to act" (*dem zuzumuten war*) is guilty if he fails to do so.

The court briefly brushed aside the argument that inclusion of failure to assist a victim of suicide in § 330(e) is inconsistent with the fact that active assistance in suicide is not a crime under German law. It said that the framers of § 330(e) were aware of the immunity of assistance in suicide and nevertheless chose to include failure to save a suicide in the new section. The result is that, under present German law (the criminal senates of the Bundesgerichtshof are bound by the decision of the Great Senate), by the court's express admission, "assistance in suicide, coinciding with failure to assist, is, in itself, not punishable, but leaves intact the criminality of omitted assistance in the face of the danger created by the attempted suicide." The same situation seems to prevail in France. See note 94 *supra*.

105. Accompliceship in suicide is punishable as crime *sui generis* in Norway, § 236 of the Penal Code of 1902, and Austria. In Austria punishment of suicide was first expressly abolished by Article 16 of the Imperial Decree of January 17, 1850, R.G. Bl. 24. This repeal gave rise to discussion concerning the legality of accompliceship in suicide. The Supreme Court of Austria in several cases took the position that accompliceship in suicide is subject to punishment under § 335 of the Penal Code as a "minor crime against safety." The court said (see grounds of decision of Nov. 16, 1907, No. 3395) that "suicide, though not punishable, is at any rate ethically reprehensible." On June 19, 1934, the Code was amended (*Strafrecht-saenderungsgesetz*, [1934] B.G. Bl. 77), and accompliceship in suicide was made separately punishable (§ 139b) along with homicide upon request (§ 139a).

106. NEW YORK PENAL LAW §§ 2304, 2305 (1944).

107. SWISS PENAL CODE art. 115 provides:

"Whoever, from selfish motives, induces another to commit suicide or assists him therein shall be punished, if the suicide was successful or attempted, by confinement in a penitentiary for not more than five years or by imprisonment."

108. GERMANN, *op. cit. supra* note 60, at 227, 228. Selfish motives are not always identical with the desire for profit. See GERMANN, SCHWEIZERISCHES STRAFGESETZ-*BUCH* art. 115, comment (4th rev. ed. 1947).

motives are altruistic, punishment will not lie. Thus, a physician who, motivated by mercy, assists in a patient's suicide is not subject to punishment. While the "euthanasia" motive receives full consideration in the law concerning assistance in suicide, the difference between such assistance and direct performance is, nevertheless, preserved.<sup>109</sup>

In evaluating euthanasia, it is important to distinguish between acts performed in response to an unsolicited request of the patient and acts in which the first suggestion is made by the actor. An analogy to this distinction may be found in the difference between assistance in suicide and instigation thereof. Conventional criminal law treats the two types of participation alike. In certain older, no longer valid, laws of Japan and China, however, instigation of suicide and assistance therein were governed by distinctive rules. In the Japanese Penal Code of April 23, 1907,<sup>110</sup> suicide and assistance therein were not mentioned. Hence, it may be assumed that these acts were not subject to punishment. Instigation of suicide was punishable. In the Chinese Penal Code of March 10, 1912,<sup>111</sup> instigation of suicide was punishable more severely than assistance in the act. These provisions have been amended

109. The diversification of punishment provided for by the Italian Penal Code also deserves special notice. Article 580 of that Code reads as follows:

"Whoever instigates another to commit suicide or reinforces his intention to do so or in any manner promotes the execution of suicide shall be punished, where the suicide is successful, by confinement from five to twelve years. Where the suicide is not successful, such person shall be punished by confinement from one year to five years, provided that the attempt at suicide results in a serious or very grave personal injury.

"The penalties shall be increased in case the person who is being instigated, induced or assisted is in a condition such as described in numbers 1 or 2 of the preceding article (a minor of less than eighteen years, or a mentally defective person, or a person who is in a condition of psychological deficiency caused by another in- or a person who is in a condition of alcohol or of drugs). However, if the said person is less than fourteen years old or possesses no capacity to understand or to form a will, the provision with regard to murder shall be applied."

By contrast, the special provision of the Polish Code on contribution to suicide is rather brief; it speaks solely of participation in a person's "attempt upon his own life." This provision, rather significantly, points up the distinction between causation and inducement of suicide. POLISH PENAL CODE art. 228 (1932) states:

"Whoever by instigation or by lending aid induces another to make an attempt upon his own life shall be punished by imprisonment up to five years."

As pointed out by Makarewicz (*op. cit. supra* note 75, art. 227, comment), where the suicide is an incompetent person, the actor is responsible for indirect causation of death rather than for instigation of suicide, for instigation presupposes that the object possesses a free will.

110. Reported in KLENNER, *op. cit. supra* note 70, at 74-75.

111. CHINESE PENAL CODE § 314 (March 10, 1912) provided:

"Whoever instigates another to commit suicide or kills another with the latter's consent shall be punished by imprisonment of the fourth to the second degree.

"Whoever assists another in committing suicide or kills another at the latter's request shall be punished by imprisonment of the fifth to the third degree."

The information on Chinese law in this Article was received from Mr. Choung Chan of the Library of Congress.



both in Japan<sup>112</sup> and in China,<sup>113</sup> and the same penalty has been imposed on both instigation of suicide and assistance in the act.

#### HOMICIDE UPON REQUEST

The immunity of accomplices in suicide under those laws which base such immunity on the doctrine that punishment of an accessory is necessarily predicated upon criminality of the principal act is a legislative quirk rather than the result of a considered judgment. It is undoubtedly not an expression of a recognition in these laws of a "right of suicide" or a "right to die" with a concomitant right of delegating execution to another person. Homicide committed at the request of the victim is hence a crime. Moreover, such homicide is a crime under all civilized legal systems. Yet, since homicide upon request is usually committed with premeditation so that, under conventional criminal legislation, it constitutes the gravest type of homicide, it has been felt that, in view of the rather exceptional motive underlying the act, the harsh rule on "murder" should be modified.<sup>114</sup> The notion has gained ground that killing, while always reprehensible, is less reprehensible when performed with the consent of the victim than when performed against his will. The product of such reasoning is the introduction into the law of the separate crime of "homicide upon request," which is punishable less severely than ordinary homicide. As pointed out in the Statement of Legislative Policy introducing the section on "Homicide upon Request" of the Draft of the Penal Code of the North German Federation:

"The sense of justice requires that killing a consenting person . . . should not be punished as severely as killing a person against his will. But the uncontested moral principle that life is an inalienable value permits neither immunity nor a low penalty."<sup>115</sup>

112. Article 202 of the current Japanese Penal Code, as found in *THE CONSTITUTION OF JAPAN AND CRIMINAL LAWS* 35 (ed. and transl. by the Attorney-General's Office, Japanese Government 1951), reads as follows:

"Every person who has instigated or assisted another person to commit suicide or has killed a person at such person's request or with his consent shall be punished with penal servitude or imprisonment for not less than six months nor more than seven years."

113. CHINESE PENAL CODE OF 1935, art. 275 provides:

"Whoever instigates another to commit suicide or assists another in the commission of suicide or kills another at the latter's request or with his consent shall be punished by imprisonment for not less than one nor more than seven years." See note 111 *supra*.

114. On the origins of the provision on "homicide upon request," see opinion of the Bundesgerichtshof, Feb. 7, 1952, 2 B.G.H. St. 258. The court pointed out that the provision was introduced into German law at a time when the "premeditation and deliberation" test was in force for the purpose of affording relief against the harshness of that test.

115. This code (Strafgesetzbuch fuer den Norddeutschen Bund of May 31, 1870) later became the Penal Code of the Reich (Law of May 15, 1871). The passage reproduced from the draft of the Code is quoted in KLENNER, *op. cit. supra* note 70, at 24.

In Italy, reduction of penalty in the case of homicide upon request has been justified on the ground of the "lesser intrinsic graveness of the act and the lesser social dangerousness" of the actor.<sup>116</sup> In France, Chauveau and Hélie advocated adoption of a special statute creating a distinct and separate crime of "homicide upon request" on the ground that justice requires punishment to be distributed equitably and that crime repression is jeopardized where punishment ceases to fit the seriousness of the crime.<sup>117</sup> Garçon emphasized the injustice of treating killing upon request as homicide and at the same time regarding assistance in suicide as not criminal at all, when these actions are frequently hardly distinguishable from each other.<sup>118</sup>

Homicide upon request has been frequently discussed as part of the general problem concerning the influence of the victim's consent upon criminal responsibility.<sup>119</sup> Occasionally, immunity or reduction of penalty for acts committed with consent or upon request of the victim has been advocated by reference to the Roman maxim *volenti non fit injuria*.<sup>120</sup> *Injuria*, of course, was a tort, not a crime. Hence, the maxim never had any bearing on the issue of criminal responsibility.<sup>121</sup> In any event, the application of the maxim to homicide cases would necessarily result in a total exculpation rather than in a reduction of penalty.<sup>122</sup>

While the privileged treatment of homicide upon request is not based on the assumption of the alienability of life,<sup>123</sup> denial of such treatment has been frequently justified, particularly in England and in this country,<sup>124</sup> on the ground that life is inalienable.

116. 4 SALTELLI & ROMANO-DI FALCO, *COMMENTO TEORICO-PRACTICO DEL NUOVO CODICE PENALE* comment to art. 579, at 252 (2d ed. 1940).

117. 3 CHAUVEAU & HÉLIE, *THÉORIE DU CODE PÉNAL* No. 1245, at 478 *et seq.* (6th ed. 1887/1888).

118. GARÇON, *CODE PÉNAL ANNOTÉ* 691 (1901/1906).

119. See BADR, *op. cit. supra* note 89, at 93 *et seq.*

120. This was the position taken by von Humboldt, Henke, Waechter, Ortman, Rodenbeck, Kessler, and Klee. For discussion and criticism of their views, see BINDING & HOCHÉ, *op. cit. supra* note 21, at 22.

121. So far as the specific issue of homicide upon request is concerned, the Roman source material affords no basis for assuming it to have been privileged. The Digests would seem to suggest that man was not deemed to be an absolute master over his own limbs: "Liber homo suo nomine utilem Aquiliae habet actionem, directam enim non habet, quoniam dominus membrorum suorum nemo videtur." Digest 9. 2. 13.

122. BINDING & HOCHÉ, *op. cit. supra* note 21, at 22.

123. See the rationale of "homicide upon request," as set forth in the Statement of Legislative Policy introducing the Penal Code of the North German Federation, *supra* note 115.

124. *State v. Moore*, 25 Iowa 128 (1868); *Martin v. Commonwealth*, 184 Va. 1009, 37 S.E.2d 43 (1946).



As under the Roman,<sup>125</sup> Canon<sup>126</sup> and common law,<sup>127</sup> so under the English and American statutory penal law, consent or request of the victim are entirely irrelevant in homicide cases. "Invitation and consent" to the perpetration of homicide "do not constitute defenses, adequate excuses or provocations."<sup>128</sup>

In spite of vigorous criticism by French commentators, consent or request is equally irrelevant in the French law of homicide. This rule is inferred, by way of a narrow interpretation, from the wording of the statute which defines "premeditation" as "a design formed prior to the action . . . even though such design might be dependent on some circumstance or on some condition."<sup>129</sup> Only Chauveau and Hélie made a feeble attempt at reading a different meaning into the law of homicide by requiring the intention to kill to be motivated by the desire to do harm.<sup>130</sup> This argument—similar to that advanced by the defense and rejected by the court in this country in *Turner v. State*<sup>131</sup>—was also rejected in France. Since 1827, when the Cour de cassation<sup>132</sup> affirmed a death sentence for a defendant who killed with the victim's

125. See note 121 *supra*.

126. The irrelevancy of consent follows from the fact that suicide and attempted suicide are crimes under Canon Law. Equally criminal is any participation in the suicide of another. The Corpus Juris Canonici states one universal rule as to all participation in crimes: all participants who share in the execution in the manner pointed out in Canon 2209, §§ 1-3, incur the same penalty as the principal perpetrators. Cf. Canon 2231.

The distinction between alienable and inalienable rights originated in the Canon Law. According to Wharton it is this Canon Law doctrine which swept the European continent and was finally accepted in the American Declaration of Independence and in the Bills of Rights of the several states. 1 WHARTON, CRIMINAL LAW 236 (12th ed. 1932).

127. See MILLER, CRIMINAL LAW 172 and n.3 (1934).

128. *Martin v. Commonwealth*, 184 Va. 1009, 1018-19, 37 S.E.2d 43, 47 (1946).

129. FRENCH PENAL CODE art. 297.

130. 3 CHAUVEAU & HÉLIE, *op. cit. supra*, note 117, No. 1238, at 484-85. The authors contend that, since no such motive exists in the case of killing upon request, the action is not covered by the law and is hence not subject to punishment. They then proceed to criticize the result thus reached, saying that killing upon request violates the social order and should be punished, albeit not as severely as other forms of homicide. For their advocacy of a separate crime of homicide upon request, see *id.*, No. 1245, at 478 *et seq.*

131. 119 Tenn. 663, 108 S.W. 1139 (1908). The defense argued that the action of the accused having been performed in response to a request by the deceased (suicide pact), it lacked the necessary malice and hence was not murder. The court rejected this argument, saying: ". . . it is not necessary that express malice, in the sense of hatred or malevolence toward the deceased, should be shown in order to support a verdict of murder in the first degree." *Id.* at 673, 108 S.W. at 1141. It also said: "Murder is no less murder because the homicide is committed at the desire of the victim. He who kills another upon his desire or command is, in the judgment of the law, as much a murderer as if he had done it merely of his own head." *Id.* at 671, 108 S.W. at 1141.

132. The highest court of France in civil and criminal matters.

consent,<sup>133</sup> the law is well settled that consent constitutes no defense in homicide cases.<sup>134</sup>

On the other hand, in other countries the separate crime<sup>135</sup> of "homicide upon request" has developed into an established institution. The distinctive feature of that crime, differentiating it from other forms of statutory homicide, consists in the fact that the request or consent of the victim is a material operative fact. So far as classification of an act within that crime is concerned, it is irrelevant why the request was made. It may have been made in the course of a joint suicide, for the purpose of escaping dishonor, in order to put an end to a painful life, or on some trivial ground. Clearly, where euthanasia was performed upon request of the patient, the actor may, on the ground of such request, avail himself of the benefit of the special section. But the euthanasia motive is not necessary to bring the act within the facts of "homicide upon request."<sup>136</sup> Of course, the presence of conditions which might lead to euthanasia may be used to show that the request was made.

However, in legal literature there is felt to be a kinship between euthanasia and homicide upon request. Under the Norwegian statute, where both euthanasia motive and request are present, the reduction of penalty may be considerable.<sup>137</sup>

133. Appeal of Lefloch, Cour de cassation, Nov. 16, 1827, 28 Sirey, pt. I. 135. See [1828] Dalloz Jurisprudence I. 24.

134. For a detailed discussion of the problem of homicide upon request, with special emphasis on French law, see BADR, *op. cit. supra* note 89, at 123 *et seq.*

135. The Uruguayan legislation (see note 74 *supra*) represents a distinctive type, in that, under Article 37 of the Penal Code of Uruguay, "homicide upon request" motivated by compassion (it is referred to rather as "homicidio piadoso"—compassionate homicide) entirely excludes punishment. Article 37 is part of Chapter 3 of the Penal Code, entitled "De las Causas de Impunidad."

136. This has been particularly emphasized in the legislative history of the Italian provision (ITALIAN PENAL CODE art. 579, *infra* note 138). In his report on the final draft, the Keeper of the Seals stated ("Lavori preparatori," ecc., vol. 5, parte 2a, § 661, cited in SALTELLI & ROMANO-DI FALCO, *op. cit. supra* note 116, at 253-54 n.:

"As far as the . . . project of requiring a particular motive of compassion is concerned, it seemed to me that the cases which deserve benevolent consideration, as brought out by the case material, in reality transcend the category of mercy killings which is too narrow. Where compassion and consent are combined as motives of crime, the scheme of the draft permits the application of another extenuating factor in or of the general one provided for in number 1 of Art. 66 (62 of the Code). In considering the latter, it may be pointed out that even a homicide not consented to by the victim may be, in a way, punished less severely, if it has been induced by motives of compassion, as may occur in cases of persons incapable to consent because of an intervening death struggle. When this is established, the provision of Art. 66, no. 1, will permit the judge to reduce punishment within the framework not of homicide with consent but of homicide defined in Art. 574 (Art. 575 of the Code—homicide upon request)."

137. See notes 69, 70 *supra*.



But most laws maintain the total separateness of the latter crime.<sup>138</sup> In Germany, until recently, the independence of "homicide upon request"<sup>139</sup> was expressed in the rule whereby in a conviction of such homicide mitigating circumstances could not be considered,<sup>140</sup> so that the euthanasia motive, an extenuating factor, could not be relied upon in addition to the request.<sup>141</sup> This position has been amended by recent legislation.<sup>142</sup> At present, "homicide upon request" is no longer a crime *sui generis*, but rather a special instance of the general law of homicide.<sup>143</sup> The German position is now clarified by inclusion of express provisions for reduction of penalty in the case of mitigating circumstances and for the punishment of attempt.

138. With respect to the Italian provision, Saltelli and Romano-Di Falco state: "The homicide of a consenting person is an autonomous juristic notion. Attempt and participation of several persons are possible." SALTELLI & ROMANO-DI FALCO, *op. cit. supra* note 116, at 254. The provision of the Italian Code is very specific. It reads thus:

"Whoever causes the death of another with the latter's consent shall be punished by confinement from six to fifteen years.

"The aggravating circumstances indicated in Article 61 are not applicable.

"The provisions with regard to homicide are applicable if the act was committed:

1. against a person less than eighteen years of age,
2. against a mentally defective person or a person who is in a state of psychological deficiency caused by another infirmity or by abuse of alcohol or of drugs,
3. against a person whose consent has been extorted by the guilty person by violence, threat or influence [suggestion], or obtained by deceit." ITALIAN PENAL CODE art. 579.

139. GERMAN PENAL CODE § 216 (text of Sept. 1, 1953), B.G. Bl. pt. 1, at 1083, reads as follows:

"(1) Where a person has been induced to kill another by the express and earnest request of the deceased, imprisonment for not less than three years shall be imposed.

"(2) Where there are extenuating circumstances, the punishment shall be imprisonment for not less than six months.

"(3) The attempt is punishable."

Subdivision (2) has been added by amendment of Aug. 25, 1953. Subdivision (3) was formerly subdivision 2, added by amendment of May 29, 1943, R.G. Bl. pt. I, at 340, but after the collapse of the Nazi regime it was dubious whether this amendment was in force. See SCHOENFELDER, DEUTSCHE GESETZE, note to § 216.

140. This was the prevailing opinion. See v. LISZT, LEHRBUCH DES DEUTSCHEN STRAFRECHTS 296-97 (21st & 22nd completely rev. ed. 1919); OLSHAUSEN, KOMMENTAR ZUM STRAFGESETZBUCH 997 (12th completely rev. ed. 1944); KLENNER, *op. cit. supra* note 70, at 40-41; ENGISCH, *op. cit. supra* note 5, at 16. It was upheld by the Bundesgerichtshof, Feb. 7, 1952, 2 B.G.H. St. 258. There the court said that "homicide upon request" is not a special instance of murder or manslaughter, but a crime *sui generis*, and that, for this reason, the provision on mitigating circumstances in homicide cases (§ 213) does not apply to it.

141. As to attempt to commit homicide upon request, the prevailing opinion was that, until 1943, it was not subject to punishment, homicide upon request being, as is mostly assumed, a "minor crime" (Vergehen). Compare GERMAN PENAL CODE § 43(2).

142. See GERMAN PENAL CODE § 216(2), [1953] B.G. Bl. pt. 1, at 1083.

143. See Dreher, *supra* note 40; Lange, *supra* note 53.

As now conceived, the German law of homicide constitutes a well integrated unit. As murder is merely an aggravated type of manslaughter, so homicide upon request is merely a milder type. Flexibility is achieved by the fact that, under special circumstances, punishment for murder and manslaughter on the one hand, and for manslaughter and homicide upon request on the other hand, may be the same. Thus, in aggravated cases, a "manslayer" may be subject, like a "murderer," to life confinement in a penitentiary.<sup>144</sup> In the case of mitigating circumstances, the minimum sentence for "manslaughter" and "homicide upon request," as newly amended, is the same—six months imprisonment.<sup>145</sup>

In Swiss law, "homicide upon request" is treated as an exceptional instance of intentional homicide.<sup>146</sup> The actor's motivation by the victim's request is stressed.<sup>147</sup> This is evidenced by the fact that an accused who erroneously believed that a request was made comes within the provision for "homicide upon request."<sup>148</sup> Of course, since the killing is intentional, where the belief was based on negligence, he may not further benefit from the special provision for negligent killing.<sup>149</sup>

144. Compare GERMAN PENAL CODE § 212(2), *supra* note 50; § 211(1), *supra* note 49.

145. Compare GERMAN PENAL CODE § 213, *supra* note 61; § 216(2), *supra* note 139.

146. Article 114 of the SWISS PENAL CODE art. 114, defines homicide upon request as follows:

"Whoever kills another upon the latter's earnest and urgent request is punishable by imprisonment."

147. This does not appear to be the case in Germany, where the Bundesgerichtshof pointed out that "in the case of homicide upon request, the actor may, in addition, act out of greed, out of another base motive or with cruelty." 2 B.G.H. St. 258, 259.

148. This is based on the Swiss doctrine of mistake of fact, thus defined in Article 19 out of the Penal Code ("Erroneous conception of facts"):

"Where a person has acted upon an erroneous conception of the factual situation, he will be judged in accordance with the factual situation as conceived by him when it works to his advantage.

"Where the actor could have avoided the mistake had he exercised the required care, he is punishable for negligence, provided that negligent performance of the act is subject to punishment."

In Germany the authorities are not agreed whether or not an erroneous assumption that a request was made is relevant. See KLENNER, *op. cit. supra* note 70, at 34. This is due to the narrow wording of § 59 of the Penal Code which deals with mistake of fact:

"(1) Where a person, in committing an offense, did not know of the existence of circumstances which, under the statutory definition of crime, are part of the factual conditions of punishment or increase punishment, he shall not be charged with such circumstances.

"(2) This provision applies to offenses committed by negligence only in cases where the ignorance itself has not been caused by negligence."

149. See Germann, *op. cit. supra* note 60, at 183 *et seq.*, 227.



While in Italy mere "consent" is sufficient to classify an act as "homicide with consent,"<sup>150</sup> as the crime is described in that country, in other countries there must be an express "request" emanating from the victim. Thus, in Germany, killing with the mere consent of the victim is common homicide.<sup>151</sup> In the Chinese Penal Code of 1912 a different penalty was prescribed for "homicide upon request" and "homicide with consent."<sup>152</sup> The former, like assistance in suicide, was punishable by imprisonment from two months to five years; the latter, like instigation of suicide, was punishable by imprisonment from one year to ten years.<sup>153</sup>

The requirements of a relevant "request" are most stringent. The request must be "express and earnest"<sup>154</sup> (Germany) or "earnest and urgent"<sup>155</sup> (Switzerland). It may be deemed "express" although it was conveyed not by words but rather by gestures which, however, must be unequivocal.<sup>156</sup> A request expressed in the heat of passion is not regarded as "earnest." It is considered as "urgent" particularly when it is repeatedly expressed.<sup>157</sup>

Of course, a request or a consent cannot be deemed relevant unless the person who expresses it is in possession of mental capacity. In Switzerland this is understood in a relative sense, *i.e.*, he must be capable of grasping the import of the request and be aware of its consequences. But the mere fact that a person is mentally ill does not exclude possession of the required capacity of judgment. For instance, a patient in the initial state of general paresis, who is aware of his condition and knows the consequences of a response to his request, may express a valid request. Whether or not the request is plausible, in the light of the circumstances and the opinions of the requesting person

150. In Italy, this special crime has a distinctive name, "omicidio del consenziente." The reasons for holding consent sufficient to justify application of the special provision are stated in the report of the Keeper of the Seals:

"It has been proposed that the rule be formulated differently, restricting the special crime to the case of a true and proper request of the victim, manifested with insistence. . . . I thought that proof of an express request of the victim would be exceedingly difficult to adduce and that it would be almost impossible to prove an insistence overcoming, beyond doubt, the hesitation and uncertainty of the guilty person." SALTELLI & ROMANO-DI FALCO, *op. cit. supra* note 116.

151. This is the prevailing opinion. See KLENNER, *op. cit. supra* note 70, at 27. "The first suggestion may have come from the actor, but it is not sufficient to show that the deceased merely approved of the actor's intention which was known to him, that he only agreed, or that his will was not contrary to that of the actor." [1945] R.G.D.R. 21.

152. See note 111 *supra*.

153. For the 1935 version, see note 113 *supra*.

154. See note 139 *supra*.

155. See note 146 *supra*.

156. See SCHOENKE, *op. cit. supra* note 33, at 579.

157. GERMANN, *op. cit. supra* note 60, at 227.

and his environment, may be evidentiary of his judgment capacity.<sup>158</sup> In Poland persons whom the law regards as generally incompetent<sup>159</sup> are deemed incapable of expressing a relevant request. For the same reason, no significance is attributed to the request of a child under the age of thirteen, while in the case of minors under the age of seventeen, the relevancy of a request depends upon the mental development of the individual.<sup>160</sup>

In order to evaluate fully the attitude of a particular legal system to homicide upon request or with consent, it may be helpful to compare the penalty provided for that crime with that imposed upon related acts, such as instigating or assisting suicide. Such comparison must fail in the case of legal systems, such as the German one, which on purely technical grounds impose no penalty whatever on instigating or assisting suicide. In the Swiss Code the penalty for instigating or assisting suicide is heavier than that for killing upon request.<sup>161</sup> But it should be remembered that in Switzerland an accessory to suicide is punishable only if his motive was selfish. In Poland, the mercy killer upon request and the accessory to suicide are subject to the same maximum punishment, which is, at the same time, the minimum punishment for homicide.<sup>162</sup> In Italy, the punishment for "homicide with consent" is confinement from six to fifteen years, while that for instigation of, or assistance in, suicide is confinement from five to twelve years.<sup>163</sup> In Austria, homicide upon express and earnest request of the deceased is a major crime punishable by confinement in a penitentiary from five to ten years, whereas the punishment for assistance in suicide, except in cases of "particularly aggravating circumstances," is only from one to five years.<sup>164</sup> The Japanese Penal Code of 1907 treated homicide upon request, homicide with consent, and instigation of suicide alike.<sup>165</sup> It imposed no penalty whatever on assistance in suicide, and the reasons for that were not merely technical. As amended, the Code now in-



158. *Ibid.*

159. POLISH PENAL CODE art. 17, § 1 (1932).

160. This follows from POLISH PENAL CODE art. 69, § 1 (1932). See MAKAREWICZ, *op. cit. supra* note 75, comment to art. 227.

161. See notes 107, 146 *supra*.

162. The punishment for homicide upon request is imprisonment up to five years or detention (POLISH PENAL CODE art. 227 (1932)); that for accomplices in suicide is imprisonment up to five years (*id.* art. 228). The section on homicide, *id.* art. 225, § 1, provides:

"Whoever kills a person is punishable by imprisonment for not less than five years or by imprisonment for life or by death."

163. Compare ITALIAN PENAL CODE arts. 579, 580; text quoted in notes 138, 109 *supra*.

164. AUSTRIAN PENAL CODE §§ 139a, b; see note 105 *supra*.

165. See KLENNER, *op. cit. supra* note 70, at 74-75.

cludes assistance in suicide in the group of the enumerated offenses.<sup>166</sup> The Chinese Penal Code of 1912 imposed upon homicide with consent and instigation of suicide a heavier penalty than upon homicide upon request and assistance in suicide. The Code of 1935 imposes the same penalty upon all these crime categories.<sup>167</sup>

#### CONCLUDING REMARKS

This Article does not purport to contribute to the controversy over the ethical justification of euthanasia. Its aim is rather to acquaint the American lawyer with the manner in which foreign legislation solves certain intricate legal problems which also arise within the framework of American law. Moreover, the pattern of continental European legislation must not be understood as a definite source of solution for American legal problems. Indeed, in some respects the comparison of American with continental European legal ideas serves to point out the distinctiveness of the former and to suggest the necessity for self-restraint inherent in our particular system of jurisprudence. However, once it is realized, in studying foreign legislation, that euthanasia might be accorded a more lenient treatment than other cases of premeditated homicide, an opening is made for consideration of other, perhaps less dramatic but nevertheless equally deserving, distinctions based on motive.<sup>168</sup>

Where premeditation and deliberation is no longer an exclusive test of the gravest type of homicide, and motive is, in principle, accepted as a substantive element of certain types of crime, the problem facing the legislator is to select the most appropriate legislative technique whereby homicide cases may be diversified on the ground of their distinctive motives. Two approaches are possible. The legislator may vest in judges a broad discretion in classifying cases within the various types of homicide; or he may enumerate in the statutes particularly reprehensible motives or motives deserving exceptional treatment, as aggravating or mitigating factors, which bring the respective acts within the graver or within the milder type of homicide. The two approaches may be combined in various forms of statutory schemes. The example of euthanasia, as treated in the several statutory systems, shows how the different statutory schemes affect a particular situation. Thus, under the law of Germany and Switzerland, mercy killing does not fall within the classification of murder. In Germany this is due to the fact

166. See note 112 *supra*.

167. See note 113 *supra*.

168. This may afford a basis for distinguishing cases such as *Fisher v. United States*, 328 U.S. 463 (1946), from murder committed out of greed.

that mercy is not one of the enumerated motives (or manners of performance) which bring a killer within the category of a "murderer." In Switzerland the same result follows from the fact that judges will hardly classify a mercy killing within the general description of "showing a particularly reprehensible attitude" of the actor, constituting murder. In addition, there are in many countries special statutory forms of homicide punishable less severely than ordinary homicide. They may or may not expressly include the mercy motive as a substantive element in the statute.

The example of euthanasia, as compared to assistance in suicide and homicide upon request, shows that where there is a close relationship in fact between the various forms of acts it is desirable that they be treated as a class, and thus suggests that a penal code should be conceived as a "system" of criminal law rather than as a loose collection of incoherent criminal provisions, and, finally, indicates that similarity of motive should be considered systematically as a factor uniting the pertinent provisions.

A summary description of the manner in which euthanasia cases are treated in this country and in England shows how failure to consider the ethical relevance of motive in criminal law results in circumvention of legal provisions, lack of uniformity of adjudication, and public dissatisfaction.

Since throughout this paper euthanasia has served as a background of discussion, it is appropriate to devote several remarks to the specific problem it presents, in addition to the more general issue which its example raises. Euthanasia is not always regarded as merely an instance of homicide. It has been variously suggested that it should be entirely exempted from the system of penal law, that, indeed, the practice should be declared lawful within narrow and clearly defined limits. As compared to the alternative method of according to euthanasia a special place in criminal law, that is, the method of reducing the penalty of homicide below the otherwise applicable measure where the actor was motivated by mercy, legalization of euthanasia undoubtedly would afford certain advantages. The principle of complete immunity of mercy killing lends itself to subjection of the practice to state supervision or control. A procedure may be devised for judicial safeguards against abuse.<sup>169</sup> Judge Learned Hand suggested that, while euthanasia is

169. Such procedure was devised in a bill legalizing euthanasia proposed by the Euthanasia Society. The American Advisory Council of the Euthanasia Society prepared a proposal to be submitted to the New York State Assembly, known as "The Proposed Bill to Legalize Euthanasia." Senator Comstock as early as 1937 introduced into the Nebraska Assembly his own bill for legalizing voluntary euthanasia. See SULLIVAN, *THE MORALITY OF MERCY KILLING* (1950).



objectionable to the majority of virtuous persons in this country as long as it remains in private hands, the current moral feeling as to legally administered euthanasia might be different.<sup>170</sup> Different, not because virtuous persons generally adhere to the Socratic tenet that absolute obedience to the law is a requirement of morality, but because they generally believe that the law alone can furnish anything like adequate safeguards against abuse. On the other hand, however, the method of reducing the penalty of homicide in the case of mercy killing has the advantage of not being objectionable from a religious point of view. For religions do not deny that there are degrees of sin or guilt depending on the underlying motive and that punishment ought to be differentiated in accordance with these.

In trying to find the proper solution, consideration should be given to the prevailing mores of American society.<sup>171</sup> State controlled euthanasia is predicated upon ethical approval of the act. Reduction of penalty in the case of homicide motivated by mercy merely presupposes the assumption that such act is less reprehensible than ordinary acts of homicide. There is no evidence that the majority of the American people approve of euthanasia, but it is reasonable to assume that most people consider a killing motivated by mercy less reprehensible than killing for a base motive. Thus, a specific statutory reduction of penalty for mercy killing would seem to be the most appropriate solution. The European experience with the separate crime of "homicide upon request" does not warrant apprehension of abuse. Before the enactment of the Federal Swiss Penal Code, the penal codes of six Swiss cantons recognized that type of crime as distinct from ordinary homicide. In 1937, Hafter noted that no convictions of that crime were reported from any of the six cantons.<sup>172</sup> Of course, the danger of abuse would be further decreased by addition of the qualifying fact of incurable illness of the deceased.

In planning a reform of the law on euthanasia, utmost discrimination is of the essence. The present writer firmly believes that no consideration whatever should be given to euthanasia where it is administered for the benefit of a person or persons other than the suffering patient. This belief is based on the tenet of the equal value of all human beings, which bars the sacrifice of one individual, however useless and burdensome, for the benefit of another or others, however useful.

It is further believed most important to differentiate euthanasia administered upon request or with consent of the patient from eutha-

170. *Repouille v. United States*, 165 F.2d 152, 153 (2d Cir. 1947).

171. A sound project of law reform should also take adequate account of pre-existing law. Legal continuity should not be completely disrupted.

172. HAFTER, SCHWEIZERISCHES STRAFRECHT 23-24 (Besonderer Teil 1937).

nasia performed without such consent. True, as may be recalled, a judge and a jury had shown exceptional sympathy for Repouille, whose act consisted in the killing of a hopelessly ill, mentally defective child unable to consent to his own destruction.<sup>173</sup> It is also true that acts of that nature fall within the most progressive, special statutory provision in Norway. The fact remains that there is a profound moral difference between euthanasia administered at the patient's own request and acts done of the actor's "own head." Indeed, it may be argued that mercy killing without consent or request in cases where the patient is capable of expressing a relevant will should receive no special consideration whatever. The Norwegian law draws a distinction between mercy killing upon request and mercy killing without such request. The penalty imposed upon the latter is heavier. Perhaps it may be advisable to follow this Norwegian pattern.

It may be also considered appropriate to impose a relatively heavier penalty for cases where the actor instigated the patient's request, as well as for cases where there has been mere consent rather than a request. Such cases are comparable to those of instigating suicide, whereas cases of compliance with the independent request of the deceased rather resemble those of assistance in suicide. It is felt that instigation is more reprehensible and more likely to be repeated than mere assistance or compliance with a request.

173. See *Repouille v. United States*, 165 F.2d 152, 153 (2d Cir. 1947).

