PROPOSED STATE EUTHANASIA STATUTES:  
A PHILOSOPHICAL AND LEGAL ANALYSIS

The word euthanasia is derived from the Greek eu, meaning good, and thanatos, meaning death. Its meaning has been defined in the English language as “[a] quiet and easy death,” or “[t]he action of inducing a quiet and easy death.”1 The word and the concept derive their significance from the frailty of the human condition, to which all people must ultimately succumb. The concept draws its support from the compassion that we as human beings feel towards those whose physical and mental conditions deteriorate beyond the point which they can bear while they irreversibly move toward death. It is a fact that every person’s body, barring unexpected accident, will at some time fall victim to disease from without or decay from within, and it is to this painful reality that the arguments for the administration of euthanasia address themselves.

In recent years medical science has improved its ability to prolong life through sophisticated life support systems while as yet it has been unable to reverse the progress of fatal disease or the ravages of total physical injury. We have seen an increasing number of patients incurably ill, yet not allowed to die. This has resulted in a renewed interest in euthanasia as a remedy. This comment will examine the philosophical and legal underpinnings of euthanasia legislation; and further, it will analyze three specific pieces of legislation to determine how they deal with the major concerns of both the opponents and the supporters of euthanasia.

Some Arguments For and Against Euthanasia

Doctor Leonard Colebrook, Chairman of the British Euthanasia Society in 1962, has written concerning the physical and mental sufferings of patients dying slowly from terminal disease:2

In addition to pain many of the unhappy victims of cancer have to endure the mental misery associated with the presence of a foul fungating growth; of slow starvation owing to difficulty in swallowing; of painful and very frequent micturition; of obstruction of the bowels; of incontinence; and of the utter prostration that makes each day and night a ‘death in life’. . . .

Medical progress has done much to alleviate suffering during the past century, but, in honesty, it must be admitted that the process of dying is still very often an ugly business.

Therefore, to relieve the sufferings of those who are dying slowly and painfully, the advocates of euthanasia maintain that human compassion demands that men and women suffering terminal illnesses have the right to choose a quick and painless death or have such merciful death administered to them, if they are beyond the point of conscious choice. On philosophical grounds, such advocates reject the imposition of a life deprived of "human spirit" upon those dying in agony. Joseph Fletcher, Professor of Social Ethics and Moral Theology at the Episcopal Theological School, Cambridge, Massachusetts writes:

"The beauty and spiritual depths of human stature are what should be preserved and conserved in our value system, with the flesh as the means rather than the end. The vitalist fallacy is to view life at any old level as the highest good. This betrays us into keeping 'vegetables' going and dragging the dying back to brute 'life' just because we have the medical know-how to do it."

On legal grounds, the argument of the euthanasia advocates is based upon the principle of liberty. Professor Glanville Williams has stated that the criminal law should not be invoked to repress an individual's freedom to conduct his life as he sees fit, unless such repression is "demonstrably necessary on social grounds." Williams then poses the question, "What social interest is there in preventing the sufferer from choosing to accelerate his death by a few months?" This question brings into issue the relationship between the criminal law and euthanasia, and the various justifications that have been advanced for the absolute prohibition of the intentional taking of a human life without legal excuse. A legal analysis, however, will be deferred until the various types of euthanasia have been discussed and the basic arguments against euthanasia examined.

Proposals for the implementation of euthanasia can be broken into two distinct groups. The first group advocates the administration of a treatment (for example a drug) that will kill a terminally ill person who has been suffering the pain of a slow

---

3. Fletcher, The Patient's Right to Die, in A.B. Downing, supra note 2, at 70.
5. See notes 18-62 and accompanying text, infra.
death. Such a form of euthanasia is termed active euthanasia, and its proponents have generally restricted calling for its application to situations where the dying patient has first requested its administration. The second group advocates the withdrawal of all life sustaining mechanisms and treatments (such as removal from a respirator or the non-performance of a blood transfusion) to allow a terminally ill patient to pass away quickly. This form of euthanasia has been termed passive euthanasia. Its advocates are bolder than those calling for active euthanasia, in that some maintain that life sustaining treatment should be withdrawn in situations where a dying patient is physically beyond the capacity to give his consent. Such consent, they argue, can be supplied by a close relative or even in certain situations, by attending physicians.

The strongest argument against euthanasia in any form is that it violates the principle of the sanctity of life, upon which our laws and society have been founded. The criminal law reflects the value placed upon life to the extent that it fails to recognize as a defense to a prosecution for homicide either a motive on the part of a killer to mercifully relieve his victim from suffering, or the consent of his victim to such an act. That the founders of this nation considered the sanctity of human life a fundamental principle is evidenced by the Declaration of Independence which states:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, . . . .

The Constitution of the United States also safeguards the right to life, in that “No person shall. . . . be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V.

In describing the motive element in the proof of murder, one court has stated:

If the proved facts established that the defendant in fact did the killing willfully, that is, with intent to kill (which is presumed from the proof of the killing until the contrary appears, . . . ), and as the result of premeditation and deliberation, there is murder in the first degree, no matter what defendant's motive may have been, . . . . This is so because the state has a deep interest and concern in the preservation of the life of each of its citizens, and (except in cases of self-defense) does not either commit or permit to any individual, no matter how kindly the motive, either the right or the privilege of destroying such a life, except in punishment for crime and in the manner prescribed by law.


The Supreme Court of California has stated that the euthanasia killing of another, although motivated solely by compassion, would constitute murder:

Thus, one who commits euthanasia bears no ill will toward his victim and believes his act is morally justified, but he nonetheless acts with malice if he is able to comprehend that society prohibits his act regardless of his personal belief.


An early Iowa decision, for example, stated:

6. That the founders of this nation considered the sanctity of human life a fundamental principle is evidenced by the Declaration of Independence which states:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, . . . .

The Constitution of the United States also safeguards the right to life, in that “No person shall. . . . be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V.

7. In describing the motive element in the proof of murder, one court has stated:

If the proved facts established that the defendant in fact did the killing willfully, that is, with intent to kill (which is presumed from the proof of the killing until the contrary appears, . . . ), and as the result of premeditation and deliberation, there is murder in the first degree, no matter what defendant's motive may have been, . . . . This is so because the state has a deep interest and concern in the preservation of the life of each of its citizens, and (except in cases of self-defense) does not either commit or permit to any individual, no matter how kindly the motive, either the right or the privilege of destroying such a life, except in punishment for crime and in the manner prescribed by law.


The Supreme Court of California has stated that the euthanasia killing of another, although motivated solely by compassion, would constitute murder:

Thus, one who commits euthanasia bears no ill will toward his victim and believes his act is morally justified, but he nonetheless acts with malice if he is able to comprehend that society prohibits his act regardless of his personal belief.

sanctity of life will remain predominant in our law for some time to come, is amply demonstrated by the United States Supreme Court decision of Furman v. Georgia in which the Court struck down death penalties administered by several states on the ground that they constituted “cruel and unusual punishment” as prohibited by the eighth amendment. In one of the concurring opinions, Justice Brennan wrote:

Death is a unique punishment in the United States. In a society that so strongly affirms the sanctity of life, not surprisingly the common view is that death is the ultimate sanction. This natural human feeling appears all about us. There has been no national debate about punishment, in general or by imprisonment, comparable to the debate about the punishment of death. No other punishment has been so continuously restricted . . . nor has any State yet abolished prisons, as some have abolished this punishment.

The concept of the sanctity of life expressed in the common law was presaged by the proscription of the Sixth Commandment, “thou shalt not kill.” Opposition to euthanasia on religious grounds has been vigorously maintained by theological writers, particularly those among the Catholic clergy. In his book, The Sanctity of Life and the Criminal Law, Glanville Williams outlines the Catholic argument against euthanasia:

The most thorough presentation of the Catholic case against euthanasia is that, by the Reverend Joseph V. Sullivan, published in the Studies in Sacred Theology of the Catholic University of America. The argument is that supreme dominion over life belongs to God alone, and it is never lawful for man on his own authority to kill the innocent directly. The author explains that God may authorize man to kill, as in the mass killing
reported in Deuteronomy iii, 2-6; but he adds that ‘today there is no indication that God is giving anyone orders to kill the innocent.’ ‘Innocent’ in the thesis means a person who has not been adjudged worthy of death by lawful authority, and who is not a combatant opposing a nation that is fighting a just war, or an unjust aggressor.

In any analysis of the relation of euthanasia to the criminal law in this country, the establishment clause of the first amendment, interposing itself as a Constitutional barrier between church and state, would seem to dictate that religious considerations be disregarded. Attacks against various euthanasia plans have been launched on three other grounds, however. First, plans advocating voluntary euthanasia, have been criticized on the ground that a person suffering the physical and mental agonies of a terminal illness, who may be heavily drugged to relieve his pain, cannot truly make a rational, voluntary choice as to whether he wishes to end his life. A physician who has treated such terminally ill patients has written:

Anyone who has been severely ill knows how distorted his judgment became during the worst moments of the illness. Pain and the toxic effect of disease, or the violent reaction to certain surgical procedures may change our capacity for rational and courageous thought.

A second source of attack is that all proposed euthanasia plans require a determination by a physician that a patient has reached a physical condition warranting the application of euthanasia. Any such situation entails the risk that the physician will be mistaken in his conclusion that his patient’s condition is terminal. The diagnostic skill of the physician, therefore, assumes critical importance in the enormity of its effect upon the patient. Yale Kamisar has stated with regard to the fallability of physicians:

If the range of skill and judgment among licensed physicians approaches the wide gap between the very best and the very

12. Nevertheless it is possible that the personal views of judges as well as legislatures are indeed influenced by their religious upbringing.


worst members of the bar—and I have no reason to think it does not—then the minimally competent physician is hardly the man to be given the responsibility for ending another's life.

Kamisar supports his statement by referring to a study undertaken by Doctor Daniel Laszlo, which dealt with error in the diagnosis and management of patients thought to be suffering from incurable illnesses. Doctor Laszlo wrote:\footnote{15}

The mass crowding of a group of patients labeled 'terminal' in institutions designated for that kind of care carries a grave danger. The experience gathered from this group makes it seem reasonable to conclude that a fresh evaluation of any large group in mental institutions, in institutions for chronic care, or in homes for the incurably sick, would unearth a rewarding number of salvageable patients who can be returned to their normal place in society. . . . For purposes of this study we were especially interested in those with a diagnosis of advanced cancer. In a number of these patients major errors in diagnosis or management were encountered.

The final, and perhaps most chilling argument against the imposition of euthanasia in any form has been termed the "wedge principle." The "wedge principle" holds that if we compromise the value our society and laws place on the sanctity of human life, even to the small extent dictated by compassion for those suffering terminal illness in great pain, then a wedge will be driven through such value system. This, it is argued, would lead to a gradual acceptance of other legally sanctioned acts of mercy for those deemed by society to be less fortunate than ourselves. Starting with the terminally ill, we may end with the congenitally defective, mentally incompetent and perhaps even the socially unacceptable.

Such a prediction is not to be glossed over lightly, as the history of contemporary western civilization all too unfortunately reveals. Doctor Leo Alexander, an expert medical advisor to the prosecution at the Nuremberg trials, has described the deliberate use by the Nazi Party of euthanasia for the terminally ill to gain public acceptance for the later extermination of the politically, socially and ethnically undesirable.\footnote{16}
Euthanasia Analysis

Even before the Nazis took open charge in Germany, a propaganda barrage was directed against the traditional compassionate nineteenth-century attitudes toward the chronically ill, and for the adoption of a utilitarian, Hegelian point of view. . . . Lay opinion was not neglected in this campaign. Adults were propagandized by motion pictures, one of which, entitled ‘I Accuse’, deals entirely with euthanasia. This film depicts the life history of a woman suffering from multiple sclerosis; in it her husband, a doctor, finally kills her to the accompaniment of soft piano music rendered by a sympathetic colleague in an adjoining room. Acceptance of this ideology was implanted even in the children. A widely used high-school mathematics text . . . included problems stated in distorted terms of the cost of caring for and rehabilitating the chronically sick and crippled. One of the problems asked, for instance, how many new housing units could be built and how many marriage-allowance loans could be given to newly wedded couples for the amount of money it cost the state to care for ‘the crippled, the criminal and the insane. . . .’ The beginnings at first were merely a subtle shift in emphasis in the basic attitude of the physicians. *It started with the acceptance of the attitude, basic in the euthanasia movement, that there is such a thing as life not worthy to be lived.* This attitude in its early stages concerned itself merely with the severely and chronically sick. Gradually the sphere of those to be included in this category was enlarged to encompass the socially unproductive, the ideologically unwanted, the racially unwanted and finally all non-Germans. But it is important to realize that the infinitely small wedged-in lever from which this entire trend of mind received its impetus was the attitude toward the non-rehabilitatable sick.

**Euthanasia, the Criminal Law and the Constitution**

The criminal law in respect to active euthanasia is clear and absolute in its protection of the sanctity of human life, as has been demonstrated. Passive euthanasia, however, stands in a different light in its relation to the criminal law. The withdrawal or the non-performance of life sustaining medical treatment by a physician may be viewed as an act of omission. Criminal liability for the death which necessarily results will be found only when the physician was under a *duty* to treat his patient at the time he ceased to provide medical care.17 This duty must be imposed

---

17. Generally speaking, in order that a person who fails to provide such atten-
by law, not merely by morality.\textsuperscript{18}

A legal duty to provide medical care for another will be found where a statute imposes such duty, on the basis of a relationship such as parent and child, on the basis of a contractual obligation to care for another, and in a situation where one has assumed the care of another and has secluded such person from other aid.\textsuperscript{19}

A contractual duty will be found to exist once a physician has assumed the care of a patient.\textsuperscript{20} Such duty of care is not absolute however, and may be terminated by consent of the parties, by dismissal of the physician by the patient and by withdrawal by the physician after giving his patient proper notice.\textsuperscript{21} It would seem to follow that in cases of voluntary passive euthanasia, the consent by a patient to his physician’s withdrawal of medical treatment is tantamount to the dismissal of his doctor, and as such terminates any further legal obligation on the part of the physician. Thus the physician could not be subjected to criminal liability for his failure to perform any further medical treatment.

Voluntary passive euthanasia legislation is also amenable to a favorable constitutional interpretation based on the right to privacy. A patient’s decision, based on consultations with his or her doctor and family, to refuse the administration of medical treatment while slowly dying from an illness from which there is

---

\textsuperscript{18} This rule of law is always based upon the proposition that the duty neglected must be a legal duty, and not a mere moral obligation.” People v. Beardsley, 150 Mich. 206, 209, 113 N.W. 1128, 1129 (1907).

\textsuperscript{19} See generally Annot., 100 A.L.R.2d 483 (1965).

\textsuperscript{20} “The law is well settled that a physician or surgeon, upon undertaking an operation or other case, is under the duty, in the absence of an agreement limiting the service, of continuing his attention, after the first operation or first treatment, so long as the case requires attention.” Ricks v. Budge, 91 Utah 307, 64 P.2d 208, 211 (1937).

“It is the undoubted law that a physician may elect whether or not he will give his services to a case, but, having accepted his employment, and entered upon the discharge of his duties, he is bound to devote to the patient his best skill and attention, . . . .” Lathrope v. Flood, 6 Cal. Unrep. 637, 63 P. 1007, 1007 (1901).

\textsuperscript{21} “The obligation of continuing attention can be terminated only by the cessation of the necessity which gave rise to the relationship, or by the discharge of the physician by the patient, or by the withdrawal from the case by the physician after giving the patient reasonable notice so as to enable the patient to secure other medical attention.” Ricks v. Budge, 91 Utah 307, 64 P. 2d 208, 211-12 (1937).
no hope of recovery, can be seen as being of an entirely personal
nature, having no adverse effect on the state or other people, and
thus lying within a constitutionally defined zone of privacy.

The concept of zones of privacy was enunciated by Justice
Douglas in Griswold v. Connecticut:22

The foregoing cases suggest that specific guarantees in the
Bill of Rights have penumbras, formed by emanations from
those guarantees that help give them life and substance. . . .
Various guarantees create zones of privacy. The right of associa-
tion contained in the penumbra of the First Amendment is one,
. . . . The Fourth Amendment explicitly affirms the 'right of
the people to be secure in their persons, houses, papers, and
effects, against unreasonable searches and seizures.' The Fifth
Amendment in its Self-Incrimination Clause enables the citizen
to create a zone of privacy which government may not force him
to surrender to his detriment. The Ninth Amendment provides:
'The enumeration in the Constitution, of certain rights, shall
not be construed to deny or disparage others retained by the
people.'

Assuming then, that the limited right of a terminally ill pa-
tient to choose to die quickly and peacefully could be included
within a constitutional zone of privacy,23 when could a state
through its penal law or otherwise, seek to restrict such right?
Justice Goldberg in his concurring opinion in Griswold provides
the basis for an answer:24

In a long series of cases this court has held that where funda-
mental personal liberties are involved, they may not be abridged
by states simply on a showing that a regulatory statute has some
rational relationship to the effectuation of a proper state pur-
pose. 'Where there is a significant encroachment upon personal

22. 381 U.S. 479, 484 (1965).
The Griswold case involved a Connecticut statute which forbade using or counselling the
use of contraceptive devices. The Court held that the statute intruded on a right of privacy
which emanated from the Bill of Rights and encompassed the marital relationship.

23. The right of personal privacy expounded by the Supreme Court in Griswold was
expanded in Roe v. Wade, 410 U.S. 113 (1973), to "encompass a woman's decision whether
or not to terminate her pregnancy," at least within the first trimester of pregnancy. Id. at
153. Although on the surface this holding would appear to add support for passive euthan-
asia, the Court carefully limited this right to personal privacy to the case before it, stating,
"The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear
to us that the claim asserted by some amici that one has an unlimited right to do with
one's body as one pleases bears a close relationship to the right of privacy previously
articulated in the Court's decisions. The Court has refused to recognize an unlimited right
of this kind in the past." Id. at 154.

liberty, the state may prevail only upon showing a subordinating interest which is compelling.” Bates v. Little Rock, 361 U.S. 516, 524.

Thus a state would need a compelling interest to restrict the right of a patient to voluntary passive euthanasia. Although there are no cases dealing with the withdrawal of medical treatment at a patient’s request to implement euthanasia, cases involving attempts by hospitals and state officials to obtain court orders compelling Jehovah’s Witnesses to submit to life-preserving blood transfusions are analogous. Compelling a Jehovah’s Witness to submit to a blood transfusion against his will and the dictates of his religion has been viewed as a restriction on his first amendment right to freedom of religion. However, in certain circumstances, several courts have held that the state’s interest in keeping such a patient from dying is “compelling” and as such overrides any exercise of freedom of religion.

In Application of the President & Directors of Georgetown College, Judge Skelly Wright of the United States Court of Appeals for the District of Columbia Circuit signed a court order giving a hospital the authority to administer blood transfusions necessary to save the life of a Jehovah’s Witness who was the young mother of a seven month old child. Judge Wright found that, because the patient was “in extremis and hardly compos mentis at the time in question, she was as little able competently to decide for herself as any child would be.” Therefore, the state had a duty to assume “the responsibility of guardianship for her, as for a child, at least to the extent of authorizing treatment to save her life.” Because she was the mother of a seven month old child, “the state as parens patriae, [would] not allow [her] to abandon her child, . . . .” Her lack of current capacity to make a valid choice, coupled with the fact that a life hung in the balance, combined to give the state a compelling interest in allowing the immediate transfusion.

In United States v. George the United States District Court for the District of Connecticut found a compelling state interest

25. 331 F.2d 1000 (D.C. Cir. 1964).
26. Id. at 1008.
27. Id. at 1009.
in the "doctor's conscience and professional oath," in a situation where a Jehovah's Witness who was the father of four children voluntarily submitted to hospital care but refused to allow a life sustaining blood transfusion. In upholding an order allowing the hospital to perform the transfusion, the court stated that it would not "require the doctors to ignore the mandates of their own conscience, even in the name of free religious exercise." Absent such overriding state interests, however, other courts have held that Jehovah's Witnesses could not be forced to submit to blood transfusions, even when necessary to save their lives. For example, in In the Matter of Osborne the District of Columbia Court of Appeals denied a request for the appointment of a guardian to consent to the administration of a blood transfusion as part of the emergency treatment given to a hospital patient who was a Jehovah's Witness. Although the patient was the father of two minor children, the court reasoned that in the event of his death, due to the close family relationship which existed, "the children would be well cared for, and that the family business would continue to supply material needs." The court determined that the patient's mind was clear and that he was physically capable of making a rational choice. The court also noted that the patient had executed a statement refusing to submit to the transfusion and releasing the hospital from liability. In sustaining a lower court denial of the request the court concluded,

In reaching her decision, Judge Bacon necessarily resolved the two critical questions presented—(1) has the patient validly and knowingly chosen this course for his life, and (2) is there compelling state interest which justifies overriding that decision? Based on this unique record, we have been unable to conclude that judicial intervention respecting the wishes and religious beliefs of the patient was warranted under our law.

In In re Estate of Brooks the Illinois Supreme Court held

29. Id. at 754.
31. Id. at 374.
32. Id.

This was sufficient for the court to distinguish the case from Application of President & Directors of Georgetown Coll., 331 F.2d 1000 (1964), for the court noted that the patient there lacked the current capacity to make a valid choice. In the Matter of Osborne, 294 A.2d 372, 375 n.4 (D.C. Ct. App. 1972).
33. Id. at 373.
34. Id. at 375.
35. 32 Ill.2d 361, 205 N.E.2d 435 (1965).
that the state could not force a Jehovah’s Witness, who was mentally competent, did not have any minor children and who had executed a release, to submit to a blood transfusion. The court dealt extensively with the question of freedom of religion, stressing that such freedom hinged upon what it termed a constitutional “right to be let alone,” thus grounding its decision in terms closely akin to a right to privacy.35

Even though we may consider appellant’s beliefs unwise, foolish or ridiculous, in the absence of an overriding danger to society we may not permit interference therewith in the form of a conservatorship established in the waning hours of her life for the sole purpose of compelling her to accept medical treatment forbidden by her religious principles, and previously refused by her with full knowledge of the probable consequences. In the final analysis, what has happened here involves a judicial attempt to decide what course of action is best for a particular individual, notwithstanding that individual’s contrary views based upon religious convictions. Such action cannot be constitutionally countenanced.

“'The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the Government, the right to be let alone — the most comprehensive of rights, and the right most valued by civilized man.' Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion of Justice Brandeis). Nothing in this utterance suggests that Justice Brandeis thought an individual possessed these rights only as to sensible beliefs, valid thoughts, reasonable emotions, or well-founded sensations. I suggest he intended to include a great many foolish, unreasonable and even absurd ideas which do not conform, such as refusing medical treatment even at great risk.”37

A similar result was reached by a lower New York court, despite the fact that the patient’s refusal of a transfusion was not based on religious grounds. In Erickson v. Dilgard38, Judge Bernard Meyer held that a “competent and capable” adult patient of the county hospital, who had made a “calculated decision” to refuse a blood transfusion prior to an operation, could not be compelled to submit, even though the county maintained that

36. Id. at ___, 205 N.E.2d at 442.
37. Id. citing Application of President & Directors of Georgetown Coll., 331 F.2d 1000, 1016-17 (1964) (dissenting opinion of Judge Burger).
such refusal was tantamount to suicide. Judge Meyer reasoned,\textsuperscript{39}

[I]t is the individual who is the subject of a medical decision who has the final say and that this must necessarily be so in a system of government which gives the greatest possible protection to the individual in the furtherance of his own desires.

Assuming that the patient's choice of voluntary passive euthanasia has a constitutional basis grounded in the right to privacy, the argument for allowing such a choice appears to be as compelling as that advanced in the Jehovah's Witness cases for allowing them to refuse transfusions. If the state does not have an overriding interest, based upon the sanctity of life, to force a person to submit to a blood transfusion against his religious beliefs when such transfusion will not only sustain life but will make possible his recovery, how can the state compel a person whose condition is terminal to continue to receive treatment which will only delay for a short time his inevitable demise?

\textit{Proposed Euthanasia Legislation}

Having demonstrated that voluntary passive euthanasia would be grounded in a constitutional right, it remains to examine euthanasia legislation recently proposed in several states, highlighting both the strengths and weaknesses of the various proposals.

Euthanasia bills have been proposed in the legislatures of eight states between 1971 and the present,\textsuperscript{40} while in eight more states bills are in the process of being drafted.\textsuperscript{41} Only two of the proposed bills go so far as to establish procedures for the implementation of active euthanasia, and these only advocate it in a voluntary form.\textsuperscript{42} The remainder confine themselves to legalizing the withdrawal of all life sustaining treatment from a terminally ill patient, with his consent. Some of these, additionally, make provision for consent by next of kin in situations where the patient is physically incapable of rendering such consent.\textsuperscript{43}

\textsuperscript{39} Id. at 28, 252 N.Y.S.2d at 706.
\textsuperscript{41} California; Hawaii; Idaho; Illinois; Maryland; New York; Tennessee; Utah.
Most are similar in that they employ protective measures against mistaken diagnosis by the attending physician and lack of voluntariness in the patient's decision to submit to euthanasia which provide that: terminal illness sufficient to qualify a patient for coverage of the euthanasia act is specifically defined; physicians other than the attending physician must concur in writing that the patient is in such a defined condition; the patient must execute a declaration authorizing his physicians to withdraw medical treatment or in the case of the active euthanasia bills, administer euthanasia, in the event he should succumb to the defined terminal illness (such declaration may be executed well in advance of pronounced physical deterioration or even before the onset of such condition, thus removing any influence which depression and pain caused by disease play in the patient's decision). In addition, form declarations are provided and safeguards similar to those required for the execution of a will are required for the document's proper execution. Before withdrawal of medical treatment or application of euthanasia, the physician must reconfirm the patient's intent as expressed in the document, or if the patient is physically incapable of expressing such intention, the physician must confirm the voluntariness of the original declaration; and the patient can revoke such document at any time.

Some of the bills make provision for the right of a doctor or

hospital to refuse to participate in the euthanasia on conscientious grounds. In certain instances, abuse of the euthanasia process is to be punished by severe criminal penalties, including life imprisonment. Finally, some bills provide for the non-impairment of life insurance policies in effect for at least one year before the implementation of euthanasia.

For the purposes of this paper, the proposed euthanasia bills of Florida, Washington, and Oregon have been selected for further analysis. The proposed Oregon Senate Bill goes beyond those proposed in Florida and Washington in that it attempts to implement a system of euthanasia through which a patient in an "irremediable condition" may have his life terminated by a "treatment prescribed by a physician" by virtue of his having previously executed a document authorizing such "treatment." Because this amounts to the legally sanctioned killing of one human being by another, any such program will be subject to the crushing weight of attack by all the major arguments against euthanasia. Since the sanctity of human life with its corresponding absolute prohibition of any intentional killing of another human being without legal excuse, has served as the underpinning of the criminal law in this country, any euthanasia legislation must be carefully drafted so as to provide both an acceptable definition of the physical and mental condition necessary for the imposition of such "treatment."

Although the Oregon bill provides such previously examined safeguards as (1) the requirement that two physicians certify the patient to be in an "irremediable condition," (2) the requirement that the patient execute a formal document authorizing the administration of "treatment" well in advance of qualification for such "treatment," and (3) the requirement that the physician

---

57. Id. at § 2(4).
58. Id. at § 3.
59. See notes 6-10 and accompanying text, supra.
60. Id. at § 2(3).
61. Id. at §§ 2(5), 3.
who is to administer euthanasia must ascertain if the patient has not changed his intent, the bill displays weakness in its definition of an "irremediable condition." Section 2 (4)(b) expands the definition of such condition beyond incurable, terminal and subject to severe distress to "a condition of brain damage and deterioration such that a person's normal mental faculties are severely and irreparably impaired to such an extent that he has been rendered incapable of leading a rational existence." Such a provision might be considered unacceptable in that it would result in patients who would not have died otherwise, being dispatched because of their incapacity to lead a "rational existence."

Although voluntary passive euthanasia appears to be acceptable under the criminal law and subject to favorable constitutional interpretation, the bill proposed in the Florida Legislature becomes weakened and unacceptable, in the opinion of this author, by attempting to make provision for the terminally ill patient who is incapable of consenting to the withdrawal of medical treatment. Section 2 provides that in such a situation "a spouse or person of the first degree of kinship shall be allowed to make such a decision, provided written consent is obtained from a majority of all persons of the first degree of kinship." In the event no such person can be located, the Florida bill goes even further, placing the decision to terminate medical treatment in the hands of "three licensed physicians." Withdrawal of medical treatment under such circumstances would ordinarily result in liability under the criminal law. Aside from any legal consideration, however, the desirability of this provision may be gauged by the answer to the following question: would you want your relatives (possibly your legatees and your heirs), or in their absence three doctors, who are routinely exposed to death as part of their profession, to decide that since you are to die shortly anyway, your life should not be further extended by medical means?

**Conclusion: A Model Euthanasia Bill**

The proposed Washington Senate Bill is, in this author's view, an example of a well drafted voluntary passive euthanasia bill which provides many desirable safeguards and few if any discernible weaknesses. Coverage under the bill is limited to

---

62. *Id.* at § 5(1).
64. *Id.* at § 2.
65. *Id.* at § 3.
those who have a “serious physical disability which is diagnosed as incurable and terminal,” where there is “no expectation of regaining health.” The bill requires the voluntary filing of a signed, witnessed, and notarized written declaration authorizing the “withdrawal of life sustaining mechanisms” at least thirty days prior to any cessation of medical treatment by a physician. This minimizes the influencing factors of depression and pain, caused by the advanced stages of a terminal disease, which play in the patient’s decision to forego life sustaining medical treatment. The bill makes provision for the revocation of such declaration by the patient and provides further insurance that the patient’s decision is truly voluntary by requiring the physician in charge in the case of a mentally responsible patient to “ascertain,” to his “reasonable satisfaction that the declaration and all steps proposed to be taken under it are in accord with the patient’s wishes.” Furthermore, in the case of a patient, “incapable of communicating,” the physician is required to “be satisfied that the patient had voluntarily made application for such withdrawal while he was mentally responsible and had requested such withdrawal in the event he was incapacitated and could not actually request it himself.”

The Washington bill also makes provision for physicians and institutions that conscientiously object to euthanasia, provides harsh penalties for the willful abuse of the euthanasia apparatus, and provides for the continuation of life insurance that has been in effect for more than one year. It is this author’s opinion that such draft legislation may well be the precursor of a governmentally created apparatus through which those who are dying in slow agony may be granted the mercy of a swift, painless death.

Erik Kapner

67. Id. at § 4(4).
68. Id. at § 5.
69. Id. at § 5(2).
70. Id. at § 7.
71. Id. at § 9(1).
72. Id. at § 9(2).
73. Id. at §§ 9(3)-(4).
74. Id. at § 8.
75. Id. at § 11.
APPENDIX I

Be It Enacted by the Legislature of the State of Florida:

Section 1. As used in this act terminal illness or injury means any illness or injury that would result in natural expiration of life regardless of the use or discontinuance of medical treatment to sustain the life processes. Any person eighteen (18) years of age or older and competent may at any time execute a document directing that medical treatment designed solely to sustain the life processes be discontinued. However, said document shall not take effect until said person has been declared terminally ill or injured by two (2) licensed physicians and attested to by written statement.

Section 2. In the event any terminally ill or injured person has failed to comply with section 1 above because he is unable to make such a decision due to mental or physical incapacity, as determined by two (2) licensed physicians, a spouse or person of the first degree of kinship shall be allowed to make such a decision, provided written consent is obtained from a majority of all persons of the first degree of kinship.

Section 3. In the event the terminally ill or injured person is incompetent and the procedure authorized by section 2 cannot be complied with because no person of the first degree of kinship can be located within thirty (30) days, then the decision to terminate medical procedures solely to sustain the life processes may be ordered by three (3) licensed physicians and attested to by a written statement.

Section 4. A physician who relies on a document authorized by section 1 to refuse medical treatment or who makes a determination of terminal illness or injury shall be presumed to be acting in good faith and, unless negligent, shall be immune from civil or criminal liability that otherwise might be incurred.

Section 5. No person participating in good faith in the execution of a statement or document required by the provisions of this act shall be deemed to be in violation of section 782.08, Florida Statutes.

Section 6. A person who has executed a document to refuse medical treatment shall have the power to revoke said document at any time by oral or written statement; provided however, that such revocation must be witnessed by two (2) persons.

Section 7. This act shall take effect upon becoming law.
APPENDIX II
S. 2449, 43rd Wash. Leg. (1973)

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Section 1. This act shall be known and may be cited as the "Death with dignity act of 1973."

NEW SECTION. Sec. 2. With the firm conviction that any individual should make the important decisions of daily living after he has reached majority, it is hereby declared that he should also be allowed the right to make the crucial, final decision as to the manner in which he dies.

NEW SECTION. Sec. 3. Subject to the provisions of this chapter, it shall be lawful for a physician to withdraw life sustaining mechanisms from a qualified patient who has previously made a declaration that is lawfully in force at the time of such withdrawal.

NEW SECTION. Sec. 4. For the purposes of this chapter:
(1) "Physician" means a medical practitioner licensed under the provisions of chapters 18.57 or 18.71 RCW;
(2) "Withdrawal of life sustaining mechanisms" means cessation of use of those techniques and applications which prolong life through artificial means;
(3) "Qualified patient" means an individual, over the age of eighteen, in respect of whom two physicians have certified in writing that the patient appears to be suffering from an irremediable condition;
(4) "Irremediable condition" means a serious physical disability which is diagnosed as incurable and terminal, and which is expected to cause a person severe distress, or to render him incapable of a rational existence, with no expectation of regaining health; and
(5) "Declaration" means a witnessed declaration in writing made substantially in the form set forth in section 6 of this act.

NEW SECTION. Sec. 5. Subject to the provisions of this chapter a declaration may be made by any individual on the form described in section 6 of this act that he voluntarily submits to the withdrawal of life sustaining mechanisms if he should become a qualified patient. The declaration shall not be effective unless:
(1) It has been filed with the county clerk in the county of the individual's residence;
(2) It has been filed at least thirty days prior to withdrawal of life sustaining mechanisms;
(3) It has not been subsequently revoked, and
(4) It contains the individual's fingerprints.

NEW SECTION. Sec. 6. The declaration shall be a sworn statement, duly notarized, and executed in the presence of two witnesses who shall sign the declaration. It shall be made in the following form:

"DECLARATION made this day of ________________
(date) by ____________________________ (person's name) of ____________________________ (place of residence)

I, ________________, DECLARE that I voluntarily subscribe to the code set out under the following articles.

Article A

If I should at any time suffer from a serious physical illness or impairment reasonably thought in my case to be incurable and expected to cause me severe distress or render me incapable of rational existence, I request the withdrawal of life sustaining mechanisms at a time or in circumstances to be indicated or specified by me, or if it is apparent that I have become incapable of giving directions, at the discretion of my spouse or a person of first degree of kinship, and/or the physician in charge of my case.

Article B

In the event of my suffering from the conditions specified in Article A, I request that no active steps should be taken, and in particular that no resuscitory techniques should be used, to prolong my life or restore me to consciousness.

Article C

This declaration is to remain in force unless I revoke it, which I may do at any time, and any request I may make concerning action to be taken or withheld in connection with this declaration will be made without further formalities.

I wish it to be understood that I have confidence in the good faith of my relatives and physicians, and fear degeneration and indignity far more than I fear premature death. I ask and authorize my family members and the physician in charge of my case to bear these statements in mind when considering what my wishes would be in any uncertain situation.
NEW SECTION. Sec. 7. A declaration may be revoked at any time. Any person wishing to revoke a declaration shall file a request with the county clerk having custody of the declaration. When the county clerk is satisfied that the person requesting the revocation is the same person who made the declaration, he shall mark "revoked" in large letters across the face of the declaration and the signed revocation request shall be filed with the revoked declaration.

NEW SECTION. Sec. 8. Any person who wilfully conceals, destroys, falsifies, or forges a declaration or revocation provided for in this chapter shall be guilty of a felony. Upon conviction such person shall be punished by imprisonment in the state penitentiary for life.

NEW SECTION. Sec. 9. (1) Before withdrawing life sustaining mechanisms from a mentally responsible patient, the physician in charge shall be satisfied that the patient's consent is voluntarily given, by ascertaining to the physician's reasonable satisfaction that the declaration and all steps proposed to be taken under it are in accord with the patient's wishes.

(2) Before causing withdrawal of life sustaining mechanisms from a mentally incompetent patient, or one who is incapable of communicating, the physician in charge shall be satisfied that the patient had voluntarily made application for such withdrawal while he was mentally responsible and had requested such withdrawal in the event he was incapacitated and could not actually request it himself.

(3) No person shall be under any duty, whether by contract, by statute or by other legal requirement, to participate in any aspect of the removal of life sustaining mechanisms authorized by this chapter to which he has a conscientious objection.

(4) If any physician or institution shall refuse to withdraw life sustaining mechanisms from a qualified patient who has filed the declaration provided for in section 6 of this act, such fact shall be communicated immediately to the county board of health by
the physician or institution. The county board of health shall then proceed to make arrangements to carry out the desires of the patient as soon as possible.

(5) For the purpose of ascertaining whether such declaration has been filed as provided for in this chapter, and to carry out the desires of a qualified patient, the county clerk and county board of health shall establish such procedures as may be necessary to carry out the intent of this chapter.

NEW SECTION. Sec. 10. A physician who, acting in good faith, causes the removal of life sustaining mechanisms from a qualified patient, in accordance with this chapter, shall not be guilty of any offense.

Physicians who take part in the withdrawal of life sustaining mechanisms in accordance with this chapter shall not be deemed to be in breach of any professional oath or affirmation.

NEW SECTION. Sec. 11. No policy of insurance that has been in force for more than twelve months shall be vitiated or legally impaired in any way by the withdrawal of life sustaining mechanisms from the insured.

NEW SECTION. Sec. 12. A patient suffering from an irremediable condition reasonably thought in his case to be terminal shall be entitled to the administration of whatever quantity of drugs may be required to keep him free from pain, and such a patient in whose case severe distress cannot otherwise be relieved, shall, if he so requests, be entitled to drugs rendering him continuously unconscious.

NEW SECTION. Sec. 13. The department of social and health services shall make rules and regulations, pursuant to chapter 34.04 RCW, to carry out the provisions of this chapter.

NEW SECTION. Sec. 14. Sections 1 through 14 of this act shall constitute a new chapter in Title 70 RCW.
APPENDIX III
S. 179, 57th Ore. Leg. Ass. (1973)

A BILL FOR AN ACT
Relating to voluntary euthanasia; providing penalties; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. This Act may be cited as the Voluntary Euthanasia Act of 1973.

SECTION 2. As used in this Act, unless the context requires otherwise:

(1) "Physician" means a registered medical practitioner.
(2) "Euthanasia" means the painless inducement of death.
(3) "Qualified patient" means a patient over the age that qualifies a person to vote in either state or national elections, and in respect of whom two physicians, one being of consultant status, have certified in writing that the patient appears to them to be suffering from an irremediable condition.
(4) "Irremediable condition" means either:
   (a) A serious physical illness which is diagnosed as incurable and terminal, and which is expected to cause a person severe distress, or to render him incapable of a rational existence, or
   (b) A condition of brain damage or deterioration such that a person's normal mental faculties are severely and irreparably impaired to such an extent that he has been rendered incapable of leading a rational existence.
(5) "Declaration" means a witnessed declaration in writing made substantially in the following form:

Declaration Under the Voluntary Euthanasia Act of 1973
Declaration made ______________ 19__ (and re-executed ______________ 19__)
by ___________________________________________________________
of __________________________________________________________
I DECLARE that I voluntarily subscribe to the code set out under the following articles:
A. If I should at any time suffer from a serious physical illness or impairment reasonably thought in my case to be incurable and expected to cause me severe distress or render me incapable of
rational existence, I request the administration of euthanasia at a time or in circumstances to be indicated or specified by me or, if it is apparent that I have become incapable of giving directions, at the discretion of the physician in charge of my case.

B. In the event of my suffering from any of the conditions specified above, I request that no active steps should be taken, and in particular that no resuscitative techniques should be used, to prolong my life or restore me to consciousness.

C. This declaration is to remain in force unless I revoke it, which I may do at any time by any clearly communicated act, and any request I may make concerning action to be taken or withheld in connection with this declaration will be made without further formalities.

I WISH it to be understood that I have confidence in the good faith of my relatives and physicians, and fear degeneration and indignity far more than I fear premature death. I ask and authorize the physician in charge of my case to bear these statements in mind when considering what my wishes would be in any uncertain situation.

SIGNED and

(SIGNED ON RE-EXECUTION)

WE TESTIFY that the above-named declarant voluntarily (signed) (was unable to write but voluntarily assented to) this declaration in our presence, and appeared to us to appreciate its full significance. We do not know of any pressure being brought on him to make the declaration, and we believe it is made by his own wish. So far as we are aware, we are entitled to attest this declaration and do not stand to benefit by the death of the declarant.

Signed by ________________  Signed by ________________
of ______________________  of ______________________
(Signed by ________________  (Signed by ________________
of ______________________  of ______________________
on re-execution).  on re-execution).

SECTION 3. Subject to the provisions of this Act, it shall be lawful for a physician to administer euthanasia to a qualified patient who has previously made a declaration that is lawfully in force at the time of the administering of euthanasia.

SECTION 4. (1) Subject to the provisions of this section,
a declaration shall come into force 30 days after being made and shall remain in force, unless revoked, for three years.

(2) A declaration re-executed after the lapse of one year from its execution date and prior to its expiration date shall remain in force, unless revoked, during the lifetime of the declarant.

(3) A declaration may be revoked at any time by destruction or by notice of cancellation shown on its face, or by any other clearly communicated act of revocation, effected, in any case, by the declarant or to his order.

SECTION 5. (1) Before causing euthanasia to be administered to a mentally responsible patient the physician in charge shall make sure that the patient's consent is voluntarily given by ascertaining to the physician's reasonable satisfaction that the declaration and all steps proposed to be taken under it currently are in accord with the patient's wishes, and if the physician should determine that the motivation or desire for euthanasia is supplied by relatives, or anyone other than the patient, then he shall not cause euthanasia to be administered.

(2) Euthanasia shall be deemed to be administered by a physician if treatment prescribed by a physician is given to the patient by a registered nurse.

(3) No person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any aspect of treatment or euthanasia authorized by this Act to which he has a conscientious objection.

SECTION 6. (1) A physician or nurse who, acting in good faith, causes euthanasia to be administered to a qualified patient in accordance with what the person so acting reasonably believes to be the patient's declaration and wishes shall not be guilty of any offense.

(2) Physicians and nurses who have taken part in the administration of euthanasia shall be deemed not to be in breach of any professional oath or affirmation.

SECTION 7. (1) It shall be an offense punishable, upon conviction, by a sentence of life imprisonment for any person wilfully to conceal, destroy, falsify or forge a declaration with intent to create the false impression that another person desires euthanasia.

(2) It shall be an offense punishable, upon conviction, by a sentence up to 10 years imprisonment or a fine of up to $5,000, or both, for any person wilfully to conceal, destroy, falsify or forge a declaration with intent to create the false impression that an-
other person does not desire, or no longer desires, euthanasia.

(3) A person signing a declaration by way of attestation who wilfully puts his signature to a statement he knows to be false shall be deemed to have committed an offense under ORS 162.065.

SECTION 8. No policy of insurance that has been in force for 12 months shall be vitiated or legally impaired in any way, by the administration of euthanasia to the insured.

SECTION 9. For the removal of doubt it is declared that a patient suffering from an irremediable condition reasonably thought in his case to be terminal shall be entitled to the administration of whatever quantity of drugs may be required to keep him free from pain, and such a patient in whose case severe distress cannot be otherwise relieved, shall, if he so requests, be entitled to drugs rendering him continuously unconscious.

SECTION 10. The Department of Human Resources shall make regulations under this Act for determining classes of persons who may or may not sign a declaration by way of attestation, for regulating the care and custody of declarations, for appointing, with their consent, hospital physicians having responsibility in relation to patients who have made or wish to make a declaration, and for the prescribing of any matters he may think fit to prescribe for achieving the purposes of this Act.

SECTION 11. This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect upon its passage.