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Some Non-Religious Views against Proposed “Mercy-Killing” Legislation

Yale Kamisar

PART II

A Long Range View of Euthanasia

A. Voluntary v. Involuntary Euthanasia

EVER SINCE the 1870’s, when what was probably the first euthanasia debate of the modern era took place,150 most proponents of the movement—at least when they are pressed—have taken considerable pains to restrict the question to the plight of the unbearably suffering who voluntarily seeks death while most of their opponents have striven equally hard to frame the issue in terms which would encompass certain involuntary situations as well, e.g., the “congenital idiots,” the “permanently insane,” and the senile.

Glanville Williams reflects the outward mood of many euthanasiasts when he scores those who insist on considering the question from a broader angle:

The [English Society’s] bill [debated in the House of Lords in 1936 and 1950] excluded any question of compulsory euthanasia, even for hopelessly defective infants. Unfortunately, a legislative proposal is not assured of success merely because it is worded in a studiously moderate and restrictive form. The method of attack, by those who dislike the proposal, is to use the ‘thin edge of the wedge’ argument. . . . There is no proposal for reform on any topic, however conciliatory and moderate, that cannot be opposed by this dialectic.151

Why was the bill “worded in a studiously moderate and restrictive form”? If it were done as a matter of principle, if it were done in recognition of the ethico-moral-legal “wall of separation” which stands between voluntary and compulsory “mercy killings,” much can be said for the euthanasiasts’ lament about the methods employed by the opposition. But if it were done as a matter of political

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expediency—with great hopes and expectations of pushing through a second and somewhat less restrictive bill as soon as the first one had sufficiently “educated” public opinion and next a third still less restrictive bill—what standing do the euthanasiasts then have to attack the methods of the opposition? No cry of righteous indignation could ring more hollow, I would think, than the protest from those utilizing the “wedge” principle themselves that their opponents are making the wedge objection.

In this regard the words and action of the euthanasiasts are not insignificant.

No sooner had the English Society been organized and a drive to attain “easy death” legislation launched than Dr. Harry Roberts, one of the most distinguished sympathizers of the movement, disclosed some basis for alarm as to how far the momentum would carry:

So far as its defined objects go, most informed people outside the Catholic Church will be in general sympathy with the new Society; but lovers of personal liberty may feel some of that suspicion which proved so well justified when the Eugenics movement was at its most enthusiastic height.

In the course of the discussion at the [1935] Royal Sanitary Institute Congress, two distinguished doctors urged the desirability of legalizing the painless destruction of ‘human mental monstrosities’ in whom improvement is unattainable; and at the inaugural meeting of the Euthanasia Legislation Society, the Chairman of the Executive Committee said that

... they were concerned today only with voluntary euthanasia; but, as public opinion developed, and it became possible to form a truer estimate of the value of human life, further progress along preventive lines would be possible. ... The population was an aging one, with a larger relative proportion of elderly persons—individuals who had reached a degenerative stage of life. Thus the total amount of suffering and the number of useless lives must increase.

We need to discriminate very carefully between facilitating the death of an individual at his own request and for his own relief, and the killing of an individual on the ground that, for the rest of us, such a course would be more economical or more agreeable than keeping him alive.\(^{152}\)

In the 1936 debate in the House of Lords, Lord Ponsonby of Shulbrede, who moved the second reading of the voluntary euthanasia bill, described two appealing actual cases, one where a man drowned his four year old daughter “who had contracted tuberculosis and had developed gangrene in the face,”\(^{165}\) another where a woman killed her mother who was suffering from “general paralysis of the insane.”\(^{164}\) Both cases of course were of the compulsory variety of
euthanasia. True, Lord Ponsonby readily admitted that these cases were not covered by the proposed bill, but the fact remains that they were the only specific cases he chose to describe.

In 1950, Lord Chorley once again called the voluntary euthanasia bill to the attention of the House of Lords. He was most articulate, if not too discreet, on excluding compulsory euthanasia cases from coverage:

Another objection is that the Bill does not go far enough, because it applies only to adults and does not apply to children who come into the world deaf, dumb and crippled, and who have a much better cause than those for whom the Bill provides. That may be so, but we must go step by step.\textsuperscript{155}

In 1938, two years after the English Society was organized and its bill had been introduced into the House of Lords, the Euthanasia Society of America was formed.\textsuperscript{156} At its first annual meeting the following year, it offered proposed euthanasia legislation:

Infant imbeciles, hopelessly insane persons . . . and any person not requesting his own death would not come within the scope of the proposed act.

Charles E. Nixdorff, New York lawyer and treasurer of the society, who offered the bill for consideration, explained to some of the members who desired to broaden the scope of the proposed law, that it was \textit{limited purposely to voluntary euthanasia because public opinion is not ready to accept the broader principle}. He said, however, that \textit{the society hoped eventually to legalize the putting to death of nonvolunteers beyond the help of medical science.}\textsuperscript{157}

About this time, apparently, the Society began to circulate literature in explanation and support of voluntary euthanasia, as follows:

The American and English Euthanasia Societies, after careful consideration, have both decided that more will be accomplished by devoting their efforts at present to the measure which will probably encounter the least opposition, namely \textit{voluntary euthanasia}. The public is readier to recognize the right to \textit{die} than the right to \textit{kill}, even though the latter be in mercy. To take someone's life without his consent is a very different thing from granting him release from unnecessary suffering at his own express desire. The freedom of the individual is highly prized in democracies.\textsuperscript{158}

The American Society's own "Outline of the Euthanasia Movement in the United States and England" states in part:

1941. A questionnaire was sent to all physicians of New York State
asking (1) Are you in favor of legalizing voluntary euthanasia for incurable adult sufferers? (2) Are you in favor of legalizing euthanasia for congenital monstrosities, idiots and imbeciles? Because only one-third as many physicians answered 'yes' to question 2 as to question 1, we decided that we would limit our program to voluntary euthanasia.\textsuperscript{159}

At a meeting of the Society of Medical Jurisprudence held several weeks after the American Society voluntary euthanasia bill had been drafted, Dr. Foster Kennedy, newly elected president of the society, ... urged the legalizing of euthanasia primarily in cases of born defectives who are doomed to remain defective, rather than for normal persons who have become miserable through incurable illness [and scored the] absurd and misplaced sentimental kindness [that seeks to preserve the life of a] person who is not a person. If the law sought to restrict euthanasia to those who could speak out for it, and thus overlooked these creatures who cannot speak, then, I say as Dickens did, 'The law's an ass.'\textsuperscript{160}

As pointed out elsewhere, while president of the Society, Dr. Kennedy not only eloquently advocated involuntary euthanasia but strenuously opposed the voluntary variety.\textsuperscript{161} Is it any wonder that opponents of the movement do not always respect the voluntary-involuntary dichotomy?

At the same time that Dr. Kennedy was disseminating his "personal" views, Dr. A. L. Wolbarst, long a stalwart in the movement, was adhering much more closely to the party line. In a persuasive address to medical students published in a leading medical journal he pointed out that

... a bill is now in preparation for introduction in the New York State Legislature authorizing the administration of euthanasia to incurable sufferers on their own request\textsuperscript{162} [and stressed that] the advocates of voluntary euthanasia do not seek to impose it on any one who does not ask for it. It is intended as an act of mercy for those who need it and demand it.\textsuperscript{163}

What were Dr. Wolbarst's views before the English and American societies had been organized and substantial agreement reached as to the party platform? Four years earlier, in a debate on euthanasia, he stated:

The question as usually submitted limits the discussion of legal euthanasia to those 'incurables whose physical suffering is unbearable to themselves.' That limitation is rather unfortunate, because the number of incurables within this category is actually and relatively extremely small. Very few incurables have or express the wish to die. However great their
physical suffering may be . . . they prefer to live.

If legal euthanasia has a humane and merciful motivation, it seems to me the entire question should be considered from a broad angle. There are times when euthanasia is strongly indicated as an act of mercy even though the subject's suffering is not "unbearable to himself," as in the case of an imbecile.

It goes without saying that, in recently developed cases with a possibility of cure, euthanasia should not even be considered; but when insane or defective people have suffered mental incapacity and tortures of the mind for many years—forty-three years in a case of my personal knowledge—euthanasia certainly has proper field.164

In his 1939 address, Dr. Wolbarst also quoted in full the stirring suicide message of Charlotte Perkins Gilman,

... described as one of the twelve greatest American women [who] had been in failing health for several years and chose self-euthanasia rather than endure the pains of cancer.165

He would have presented Mrs. Gilman's views more fully if he had quoted as well from her last article, left with her agent to be published after her death, where she advocates euthanasia for "incurable invalids," "hopeless idiots," "helpless paretics," and "certain grades of criminals."166 Citing with approval the experience of "practical Germany," Miss Gilman's article asserted that

... the dragging weight of the grossly unfit and dangerous could be lightened [by legalized euthanasia.] with great advantage to the normal and progressive. The millions spent in restraining and maintaining social detritus should be available for the safeguarding and improving of better lives.167

In 1950, the "mercy killings" perpetrated by Dr. Herman N. Sander on his cancer-stricken patient and by Miss Carol Ann Paight on her cancer-stricken father put the euthanasia question on page one.168 In the midst of the fervor over these cases, Dr. Clarence Cook Little, one of the leaders in the movement and a former president of the American Society, suggested specific safeguards for a law legalizing "mercy killings" for the "incurably ill but mentally fit" and for "mental defectives."169 The Reverend Charles Francis Potter, the founder and first president of the American Society, hailed Dr. Sander's action as "morally right" and hence that which "should be legally right."170 Shortly thereafter, at its annual meeting, the American Society "voted to continue support" of both Dr. Sander and Miss Paight.171

Now, one of the interesting, albeit underplayed, features of these
cases—and this was evident all along—was that both were involuntary "mercy killings." There was considerable conflict in the testimony at the Sander Trial as to whether or not the victim's husband had pleaded with the doctor to end her suffering, but nobody claimed that the victim herself had done such pleading. There was considerable evidence in the Paight case to the effect that the victim's daughter had a "cancer phobia," the cancer deaths of two aunts having left a deep mark on her, but nobody suggested that the victim had a "cancer phobia."

It is true that Mother Paight said approvingly of her "mercy killing" daughter that "she had the old Paight guts," but it is no less true that Father Paight had no opportunity to pass judgment on the question. He was asleep, still under the anesthetic of the exploratory operation which revealed the cancer in his stomach when his daughter, after having taken one practice shot in the woods, fired into his left temple. Is it not just possible that Father Paight would have preferred to have had the vaunted Paight intestinal fortitude channeled in other directions, e.g., by his daughter bearing to see him suffer?

The Sander and Paight cases amply demonstrate that to the press, the public, and many euthanasiasts, the killing of one who does not or cannot speak is no less a "mercy killing" than the killing of one who asks for death. Indeed, the overwhelming majority of known or alleged "mercy killings" have occurred without the consent of the victim. If the Sander and Paight cases are atypical at all, they are so only in that the victims were not ill or retarded children, as in the Simpson, Brownhill and Long English cases and the Greenfield, Repouille, Noxon and Braunsdorf American cases.

These situations are all quite moving. So much so that two of the strongest presentations of the need for voluntary euthanasia, free copies of which may be obtained from the American Society, lead off with sympathetic discussions of the Brownhill and Greenfield cases. This, it need hardly be said, is not the way to honor the voluntary-involuntary boundary. Not the way to ease the pressure to legalize at least this type of involuntary euthanasia as well if any changes in the broad area are to be made at all.

Nor, it should be noted, is Williams free from criticism in this regard. In his discussion of "the present law," apparently a discussion of voluntary euthanasia, he cites only one case, Simpson, an involuntary situation. In his section on "the administration of the law" he describes only the Sander case and the "compassionate acquittal" of a man who drowned his four year old daughter, a sufferer of tuber-
culosis and gangrene of the face.¹⁸⁶ Again, both are involuntary cases. For "some other" American "mercy killing" cases, Williams refers generally to an article by Helen Silving,¹⁸⁷ but two of the three cases he seems to have in mind are likewise cases of involuntary euthanasia.¹⁸⁸

That the press and general public are not alone in viewing an act as a "mercy killing," lack of consent on the part of the victim notwithstanding, is well evidenced by the recent deliberations of the Royal Commission on Capital Punishment.¹⁸⁹ The Report itself described "mercy killings" as "for example, where a mother has killed her child or a husband has killed his wife from merciful motives of pity and humanity."¹⁹⁰ The only specific proposal to exclude "mercy killings" from the category of murder discussed in the Report is a suggestion by the Society of Labour Lawyers which disregards the voluntary-involuntary distinction:

If a person who has killed another person proves that he killed that person with the compassionate intention of saving him physical or mental suffering he shall not be guilty of murder.¹⁹¹

Another proposal, one by Hector Hughes, M.P., to the effect that only those who "maliciously" cause the death of another shall be guilty of murder,¹⁹² likewise treated the voluntary and involuntary "mercy killer" as one and the same.

Testimony before the Commission underscored the great appeal of the involuntary "mercy killings." Thus, Lord Goddard, the Lord Chief Justice referred to the famous Brownhill case, which he himself had tried some fifteen years earlier, as "a dreadfully pathetic case."¹⁹³ "The son," he pointed out, "was a hopeless imbecile, more than imbecile, a mindless idiot."¹⁹⁴

Mr. Justice Humphreys recalled "one case that was the most pathetic sight I ever saw,"¹⁹⁵ a case which literally had the trial judge, Mr. Justice Hawkins, in tears. It involved a young father who smothered his infant child to death when he learned the child had contracted syphilis from the mother (whose morals turned out to be something less than represented) and would be blind for life. "That," Mr. Justice Humphreys told the Commission, "was a real 'mercy killing.'"¹⁹⁶

The boldness and daring which characterizes most of Glanville Williams' book dims perceptibly when he comes to involuntary euthanasia proposals. As to the senile, he states:

At present the problem has certainly not reached the degree of serious-
ness that would warrant an effort being made to change traditional attitudes toward the sanctity of life of the aged. Only the grimmest necessity could bring about a change that, however cautious in its approach, would probably cause apprehension and deep distress to many people, and inflict a traumatic injury upon the accepted code of behaviour built up by two thousand years of the Christian religion. It may be, however, that as the problem becomes more acute it will itself cause a reversal of generally accepted values. 197

To me, this passage is the most startling one in the book. On page 348 Williams invokes "traditional attitudes towards the sanctity of life" and "the accepted code of behavior built up by two thousand years of the Christian religion" to check the extension of euthanasia to the senile, but for 347 pages he had been merrily rolling along debunking both. Substitute "cancer victim" for "the aged" and Williams' passage is essentially the argument of many of his opponents on the voluntary euthanasia question.

The unsupported comment that "the problem [of senility] has certainly not reached the degree of seriousness" to warrant euthanasia is also rather puzzling, particularly coming as it does after an observation by Williams on the immediately preceding page that

... it is increasingly common for men and women to reach an age of 'second childishness and mere oblivion,' with a loss of almost all adult faculties except that of digestion. 198

How "serious" does a problem have to be to warrant a change in these "traditional attitudes"? If, as the statement seems to indicate, "seriousness" of a problem is to be determined numerically, the problem of the cancer victim does not appear to be as substantial as the problem of the senile. 199 For example, taking just the 95,837 first admissions to "public prolonged-care hospitals" for mental diseases in the United States in 1955, 23,561—or one fourth—were cerebral arteriosclerosis or senile brain disease cases. 200 I am not at all sure that there are 20,000 cancer victims per year who die unbearably painful deaths. Even if there were, I cannot believe that among their ranks are some 20,000 per year who, when still in a rational state, so long for a quick and easy death that they would avail themselves of legal machinery for euthanasia. 201

If the problem of the incurable cancer victim "has reached the degree of seriousness that would warrant an effort being made to change traditional attitudes toward the sanctity of life," as Williams obviously thinks it has, then so has the problem of senility. In any
event, the senility problems will undoubtedly soon reach even Williams' requisite degree of seriousness:

A decision concerning the senile may have to be taken within the next twenty years. The number of old people are increasing by leaps and bounds. Pneumonia, 'the old man's friend' is now checked by antibiotics. The effects of hardship, exposure, starvation and accident are now minimized. Where is this leading us? . . . What of the drooling, helpless, disorientated old man or the doubly incontinent old woman lying log-like in bed? Is it here that the real need for euthanasia exists?\(^{202}\)

If, as Williams indicates, "seriousness" of the problem is a major criterion for euthanatizing a category of unfortunates, the sum total of mentally deficient persons would appear to warrant high priority, indeed.\(^{203}\)

When Williams turns to the plight of the "hopelessly defective infants," his characteristic vim and vigor are, as in the senility discussion, conspicuously absent:

While the Euthanasia Society of England has never advocated this, the Euthanasia Society of America did include it in its original program. The proposal certainly escapes the chief objection to the similar proposal for senile dementia: it does not create a sense of insecurity in society, because infants cannot, like adults, feel anticipatory dread of being done to death if their condition should worsen. Moreover, the proposal receives some support on eugenic grounds, and more importantly on humanitarian grounds—both on account of the parents, to whom the child will be a burden all their lives, and on account of the handicapped child itself. (It is not, however, proposed that any child should be destroyed against the wishes of its parents.) Finally, the legalization of euthanasia for handicapped children would bring the law into closer relation to its practical administration, because juries do not regard parental mercy killing as murder. For these various reasons the proposal to legalize humanitarian infanticide is put forward from time to time by individuals. They remain in a very small minority, and the proposal may at present be dismissed as politically insignificant.\(^{204}\)

It is understandable for a reformer to limit his present proposals for change to those with a real prospect of success. But it is hardly reassuring for Williams to cite the fact that only "a very small minority" has urged euthanasia for "hopelessly defective infants" as the only reason for not pressing for such legislation now. If, as Williams sees it, the only advantage voluntary euthanasia has over the involuntary variety lies in the organized movements on its behalf, that advantage can readily be wiped out.

In any event, I do not think that such "a very small minority" has
advocated "humanitarian infanticide." Until the organization of the English and American societies led to a concentration on the voluntary type, and until the by-products of the Nazi euthanasia program somewhat embarrassed, if only temporarily, most proponents of involuntary euthanasia, about as many writers urged one type as another.\textsuperscript{205} Indeed, some euthanasiasts have taken considerable pains to demonstrate the superiority of defective infant euthanasia over incurably ill euthanasia.\textsuperscript{206}

As for dismissing euthanasia of defective infants as "politically insignificant," the only poll that I know of which measured the public response to both types of euthanasia revealed that 45 percent favored euthanasia for defective infants under certain conditions while only 37.3 percent approved euthanasia for the incurably and painfully ill under any conditions.\textsuperscript{207} Furthermore, of those who favored the "mercy killing" cure for incurable adults, some 40 percent would require only family permission or medical board approval, but not the patient's permission.\textsuperscript{208}

Nor do I think it irrelevant that while public resistance caused Hitler to yield on the adult euthanasia front, the killing of malformed and idiot children continued unhindered to the end of the war, the definition of "children" expanding all the while.\textsuperscript{209} Is it the embarrassing experience of the Nazi euthanasia program which has rendered destruction of defective infants presently "politically insignificant"? If so, is it any more of a jump from the incurably and painfully ill to the unorthodox political thinker than it is from the hopelessly defective infant to the same "unsavory character"? Or is it not so much that the euthanasiasts are troubled by the Nazi experience as it is that they are troubled that the public is troubled by the Nazi experience?

I read Williams' comments on defective infants for the proposition that there are some very good reasons for euthanatizing defective infants, but the time is not yet ripe. When will it be? When will the proposal become politically significant? After a voluntary euthanasia law is on the books and public opinion is sufficiently "educated"?

Williams' reasons for not extending euthanasia—once we legalize it in the narrow "voluntary" area—to the senile and the defective are much less forceful and much less persuasive than his arguments for legalizing voluntary euthanasia in the first place. I regard this as another reason for not legalizing voluntary euthanasia in the first place.
YALE KAMISAR

B. The Parade of Horrors

Look, when the messenger cometh, shut the door, and hold him fast at the door; is not the sound of his master's feet behind him?210

This is the "wedge principle," the "parade of horrors" objection if you will, to voluntary euthanasia. Glanville Williams' peremptory retort is:

This use of the 'wedge' objection evidently involves a particular determination as to the meaning of words, namely the words 'if raised to a general line of conduct.' The author supposes, for the sake of argument, that the merciful extinction of life in a suffering patient is not in itself immoral. Still it is immoral, because if it were permitted this would admit 'a most dangerous wedge that might eventually put all life in a precarious condition.' It seems a sufficient reply to say that this type of reasoning could be used to condemn any act whatever, because there is no human conduct from which evil cannot be imagined to follow if it is persisted in when some of the circumstances are changed. All moral questions involve the drawing of a line, but the 'wedge principle' would make it impossible to draw a line, because the line would have to be pushed farther and farther back until all action became vetoed.211

I agree with Williams that if a first step is "moral" it is moral wherever a second step may take us. The real point, however, the point that Williams sloughs, is that whether or not the first step is precarious, is perilous, is worth taking, rests in part on what the second step is likely to be.

It is true that the "wedge" objection can always be advanced, the horrors can always be paraded. But it is no less true that on some occasions the objection is much more valid than it is on others. One reason why the "parade of horrors" cannot be too lightly dismissed in this particular instance is that Miss Voluntary Euthanasia is not likely to be going it alone for very long. Many of her admirers, as I have endeavored to show in the preceding section, would be neither surprised nor distressed to see her joined by Miss Euthanatize the Congenital Idiots and Miss Euthanatize the Permanently Insane and Miss Euthanatize the Senile Dementia. And these lasses—whether or not they themselves constitute a "parade of horrors"—certainly make excellent majorettes for such a parade:

Some are proposing what is called euthanasia; at present only a proposal for killing those who are a nuisance to themselves; but soon to be applied to those who are a nuisance to other people.212

Another reason why the "parade of horrors" argument cannot be
too lightly dismissed in this particular instance, it seems to me, is that the parade has taken place in our time and the order of procession has been headed by the killing of the “incurables” and the “useless”:

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.

The apparent innocuousness of Germany’s “small beginnings” is perhaps best shown by the fact that German Jews were at first excluded from the program. For it was originally conceived that “the blessing of euthanasia should be granted only to [true] Germans.”

Relatively early in the German program, Pastor Braune, Chairman of the Executive Committee of the Domestic Welfare Council of the German Protestant Church, called for a halt to euthanasia measures

... since they strike sharply at the moral foundations of the nation as a whole. The inviolability of human life is a pillar of any social order.

And the pastor raised the same question which euthanasia opponents ask today, as well they might, considering the disinclination of many
in the movement to stop at voluntary “mercy killings”: Where do we, how do we, draw the line? The good pastor asked:

How far is the destruction of socially unfit to go? The mass methods used so far have quite evidently taken in many people who are to a considerable degree of sound mind. . . . Is it intended to strike only at the utterly hopeless cases—the idiots and imbeciles? The instruction sheet, as already mentioned, also lists senile diseases. The latest decree by the same authorities requires that children with serious congenital disease and malformation of every kind be registered, to be collected and processed in special institutions. This necessarily gives rise to grave apprehensions. Will a line be drawn at the tubercular? In the case of persons in custody by court order euthanasia measures have evidently already been initiated. Are other abnormal or antisocial persons likewise to be included? Where is the borderline? Who is abnormal, antisocial, hopelessly sick?

Williams makes no attempt to distinguish or minimize the Nazi German experience. Apparently he does not consider it worthy of mention in a euthanasia discussion. There are, however, a couple of obvious arguments by which the Nazi experience can be minimized. One goes something like this: It is silly to worry about the prospects of a dictatorship utilizing euthanasia

. . . as a pretext for putting inconvenient citizens out of the way. Dictatorships have no occasion for such subterfuges. The firing squad is less bother.217

One reason why this counter argument is not too reassuring, however, if again I may be permitted to be so unkind as to meet speculation with a concrete example to the contrary, is that Nazi Germany had considerable occasion to use just such a subterfuge.

Thus, Dr. Leo Alexander observes:

It is rather significant that the German people were considered by their Nazi leaders more ready to accept the exterminations of the sick than those for political reasons. It was for that reason that the first exterminations of the latter group were carried out under the guise of sickness. So-called ‘psychiatric experts’ were dispatched to survey the inmates of camps with the specific order to pick out members of racial minorities and political offenders from occupied territories and to dispatch them to killing centers with specially made diagnoses such as that of ‘inveterate German hater’ applied to a number of prisoners who had been active in the Czech underground.

A large number of those marked for death for political or racial reasons were made available for ‘medical experiments involving the use of involuntary human subjects.’218
The “hunting season” in Germany officially opened when Hitler signed, on his own letterhead, a secret order dated September 1, 1939, which read:

Reichsleiter Bouhler and Dr. Brandt, M.D., are charged with the responsibility of enlarging the authority of certain physicians, to be designated by name, in such a manner that persons who, according to human judgment, are incurable can, upon a more careful diagnosis of their condition of sickness, be accorded a mercy death.219

Physicians asked to participate in the program were told that the secrecy of the order was designed to prevent patients from becoming “too agitated” and that it was in keeping with the policy of not publicizing home front measures in time of war.220

About the same time that aged patients in some hospitals were being given the “mercy” treatment,221 the Gestapo was also systematically putting to death the mentally deficient population of the Reich.222

The courageous and successful refusal by a Protestant pastor to deliver up certain cases from his asylum223 well demonstrates that even the most totalitarian governments are not always indifferent to the feeling of the people, that they do not always feel free to resort to the firing squad. Indeed, vigorous protests by other ecclesiastical personalities and some physicians, numerous requests of various public prosecutors for investigation of the circumstances surrounding the mysterious passing away of relatives, and a generally aroused public opinion finally caused Hitler to yield, if only temporarily, and in August of 1941 he verbally ordered the discontinuance of the adult euthanasia program. Special gas chambers in Hadamar and other institutions were dismantled and shipped to the East for much more extensive use of Polish Jews.224

Perhaps it should be noted, too, that even dictatorships fall prey to the inertia of big government:

It is . . . interesting that there was so much talk against euthanasia in certain areas of Germany, particularly in the region of Wiesbaden, that Hitler in 1943 asked Himmler to stop it. But, it had gained so much impetus by 1943 and was such an easy way in crowded concentration camps to get rid of undesirables and make room for newcomers that it could not be stopped. The wind had become a whirlwind.225

Another obvious argument is that it just can’t happen here. I hope not. I think not.

But then, neither did I think that tens of thousands of perfectly
loyal native-born Americans would be herded into prison camps without proffer of charges and held there for many months, even years, because they were of "Japanese blood" and, although the general who required these measures emitted considerable ignorance and bigotry, his so-called military judgment would be largely sustained by the highest court of the land. The Japanese American experience of World War II undoubtedly fell somewhat short of first-class Nazi tactics, but we were getting warm. I venture to say it would not be too difficult to find American citizens of Japanese descent who would maintain we were getting very warm indeed.

In this regard, some of Justice Jackson's observations in his Korematsu dissent seem quite pertinent:

All who observe the work of courts are familiar with what Judge Cardozo described as 'the tendency of a principle to expand itself to the limit of its logic.' [Nature of the Judicial Process, p. 51.] A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court's opinion in this case.

It argues that we are bound to uphold the conviction of Korematsu because we upheld one in Hirabayashi v. United States, 320 U.S. 81, when we sustained these orders in so far as they applied a curfew requirement to a citizen of Japanese ancestry. I think we should learn something from that experience.

In that case we were urged to consider only the curfew feature, that being all that technically was involved, because it was the only count necessary to sustain Hirabayashi's conviction and sentence. We yielded, and the Chief Justice guarded the opinion as carefully as language will do. . . . However, in spite of our limiting words we did validate a discrimination on the basis of ancestry for mild and temporary deprivation of liberty. Now the principle of racial discrimination is pushed from support of mild measures to very harsh ones, and from temporary deprivations to indeterminate ones. And the precedent which it is said requires us to do so is Hirabayashi. The Court is now saying that in Hirabayashi we did decide the very things we there said we were not deciding. Because we said that these citizens could be made to stay in their homes during the hours of darkness, it is said we must require them to leave home entirely; and if that, we are told they may also be taken into custody for deportation; and if that, it is argued they may also be held for some undetermined time in detention camps. How far the principle of this case would be extended before plausible reasons would play out, I do not know.

It can't happen here. Well, maybe it cannot, but no small part of our Constitution and no small number of our Supreme Court opinions stem from the fear that it can happen here unless we darn well
make sure that it does not by adamantly holding the line, by swiftly snuffing out what are or might be small beginnings of what we do not want to happen here. To flick off, as Professor Williams does, the fears about legalized euthanasia as so much nonsense, as a chimerical “parade of horrors,” is to sweep away much of the ground on which all our civil liberties rest.

Boyd, the landmark search and seizure case which paved the way for the federal rule of exclusion, a doctrine which now prevails in over twenty state courts as well, set the mood of our day in treating those accused of crime:

It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis. . . .

Recent years have seen the Supreme Court sharply divided on search and seizure questions. The differences, however, have been over application, not over the Boyd-Weeks “wedge principle”; not over the view, as the great Learned Hand, hardly the frightened spinster type, put it in an oft-quoted phrase,

. . . that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition.

And when the dissenters have felt compelled to reiterate the reasons for the principle, lest its force be diminished by the failure to apply it in the particular case, and they have groped for the most powerful arguments in its behalf, where have they turned, what have they done? Why, they have employed the very arguments Glanville Williams dismisses so contemptuously. They have cited the Nazi experience. They have talked of the police state, the Knock at the Door, the suppression of political opposition under the guise of sedition. They have trotted out, if you will, the “parade of horrors.”

The lengths to which the Court will go in applying the “wedge principle” in the First Amendment area is well demonstrated by instances where those who have labeled Jews “slimy scum” and likened them to “bedbugs” and “snakes” or who have denounced them “as all the garbage that . . . should have been burnt in the incinerators” have been sheltered by the Court so that freedom of speech
and religion would not be impaired. Perhaps the supreme example is the *Barnette* case.238

There, in striking down the compulsory flag salute and pledge, Justice Jackson took the position that “those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.”239 “The First Amendment,” he pointed out, “was designed to avoid these ends by avoiding these beginnings.”240 Justices Black and Douglas kept in step in their concurring opinion by advancing the view that “the ceremonial, when enforced against conscientious objectors . . . is a handy implement for disguised religious persecution.”241

What were these pernicious “beginnings” again? What was this danger-laden ceremonial again? Why, requiring public school pupils “to participate in the salute honoring the Nation represented by the Flag.”242 Talk about “parades of horror”! This one is an extravaganza against which anything euthanasia opponents can muster is drab and shabby by comparison. After all, whatever else Williams and his allies make “mercy killings” out to be, these beginnings are not “patriotic ceremonies.”

The point need not be labored. If the prospects of the police state, the knock on Everyman’s door, and widespread political persecution are legitimate considerations when we enter “opium smoking dens,”243 when we deal with “not very nice people” and “sordid little cases”244 then why should the prospects of the police state and the systematic extermination of certain political or racial minorities be taken any less seriously when we enter the sickroom or the mental institution, when we deal with not very healthy or not very useful people, when we discuss “euthanasia” under whatever trade name?

If freeing some rapist or murderer is not too great a price to pay for the “sanctity of the home,” then why is allowing some cancer victim to suffer a little longer too great a price to pay for the “sanctity of life”? If the sheltering of purveyors of “hateful and hate-stirring attacks on races and faiths”245 may be justified in the name of a transcendent principle, then why may not postponing the death of the suffering “incurable” be similarly justified?

A Final Reflection

There have been and there will continue to be compelling circumstances when a doctor or relative or friend will violate The Law On The Books and, more often than not, receive protection from The Law In Action. But this is not to deny that there are other occasions
when The Law On The Books operates to stay the hand of all concerned, among them situations where the patient is in fact (1) presently incurable, (2) beyond the aid of any respite which may come along in his life expectancy, suffering (3) intolerable and (4) unmitigable pain and of a (5) fixed and (6) rational desire to die. That any euthanasia program may only be the opening wedge for far more objectionable practices, and that even within the bounds of a “voluntary” plan such as Williams’ the incidence of mistake or abuse is likely to be substantial, are not much solace to one in the above plight.

It may be conceded that in a narrow sense it is an “evil” for such a patient to have to continue to suffer—if only for a little while. But in a narrow sense, long-term sentences and capital punishment are “evils,” too. If we can justify the infliction of imprisonment and death by the state “on the ground of the social interests to be protected” then surely we can similarly justify the postponement of death by the state. The objection that the individual is thereby treated not as an “end” in himself but only as a “means” to further the common good was, I think, aptly disposed of by Holmes long ago. “If a man lives in society, he is likely to find himself so treated.”

NOTES

150. L. A. Tollemache—and not since has there been a more persuasive enthusiast—made an eloquent plea for voluntary euthanasia, The New Cure for Incurables, Fortnightly Rev. 19:218, 1873, in support of a similar proposal the previous year, S. D. Williams, Euthanasia, 1872 (a book now out of print, but a copy of which is at the British Museum). Tollemache’s article was bitterly criticized by the editors of The Spectator, Mr. Tollemache on The Right to Die, The Spectator, 46:206, 1873 who stated in part: “[I]t appears to be quite evident, though we do not think it is expressly stated in Mr. Tollemache’s article, that much the strongest arguments to be alleged for putting an end to human sufferings apply to cases where you cannot by any possibility have the consent of the sufferer to that course.”

In a letter to the editor, The Limits of Euthanasia, The Spectator, 46:240, 1873, Mr. Tollemache retorted: “I tried to make it clear that I disapproved of such relief ever being given without the dying man’s express consent. . . . But it is said that all my reasoning would apply to cases like lingering paralysis, where the sufferer might be speechless. I think not . . . where these safeguards cannot be obtained, the sufferer must be allowed to linger on. Half a loaf, says the proverb, is better than no bread; one may be anxious to relieve what suffering one can, even though the conditions necessary for the relief of other (and perhaps worse) suffering may not exist. . . . I have stated my meaning thus fully, because I believe it is a common misunderstanding of Euthanasia, that it must needs involve some such proceedings as the late Mr. Charles Buxton advocated (not perhaps quite seriously),—namely, the summary extinction of idiots and of persons in their dotage.” I give this round to the voluntary euthanasiasts.

151. Williams, pp. 333-4.

152. Roberts, supra 31, pp. 7-8.
153. 103 H.L. Deb. 466, 471, 1936.
154. Ibid.
157. ---, Jan. 27, 1939, p. 21, col. 7 (emphasis added). That the report is accurate in this regard is underscored by Mr. Nixdorff's letter to the editor, New York Times, Jan. 30, 1939, p. 12, col. 7, wherein he complained only that "the patient who petitions the court for euthanasia should not be described as a 'volunteer'" and that "the best definition of euthanasia is 'merciful release'" rather than "mercy 'killing' or even mercy 'death'" because "being killed is associated with fear, injury and the desire to escape" and "many people dislike even to talk about death."
158. Dr. Frank Hinman of the University of California Medical School quotes such literature in Euthanasia, J. Nerv. & Ment. Dis., 99:640, 643, 1944.
159. Distributed by the Euthanasia Society of America.
160. See infra 172-6. More than 100 reporters, photographers and broadcasters attended the Sander trial. In ten days of court sessions, the press corps filed 1,600,000 words. Not Since Scopes? Time, Mar. 13, 1950, p. 43
163. ---, Jan. 18, 1950, p. 33, col. 5.
164. ---, Feb. 24, 1950, p. 1, col. 6; Feb. 28, 1950, p. 1, col. 2; Similar to Murder, Time, Mar. 6, 1950, p. 20. Although Dr. Sander's own notation was to the effect that he had given the patient "ten cc of air intravenously repeated four times" and that the patient "expired within ten minutes after this was started," New York Times, Feb. 24, 1950, p. 15, col. 5; "Similar To Murder," Time, Mar. 6, 1950, p. 20, and the attending nurse testified that the patient was still "gasping" when the doctor injected the air, New York Times, Feb. 28, 1950, p. 1, col. 2, the defendant's position at the trial was that the patient was dead before he injected the air, New York Times, Mar. 7, 1950, p. 1, col. 1; The Obsessed, Time, Mar. 13, 1950, p. 23; his notes were not meant to be taken literally, "It's a casual dictation . . . merely a way of closing out the chart." New York Times, Mar. 7, 1950, p. 19, col. 2. Dr. Sander was acquitted, New York Times, Mar. 10, 1950, p. 1, col. 6. The alleged "mercy killing" split the patient's family. The husband and one brother sided with the doctor; another brother felt that the patient's fate "should have been left to the will of God." 40 cc of Air, Time, Jan. 9, 1950, p. 13. Shortly afterwards, Dr. Sander's license to practice medicine in New Hampshire was revoked, but was soon restored. New York Times, June 29, 1950, p. 31, col. 6. He was also ousted from his county medical society, but after four years struggle gained admission to one. New York Times, Dec. 2, 1954, p. 25, col. 6.
166. The Father Killer, Supra 173.
167. See supra 173. Miss Paight was obsessed with the idea that "daddy must never know he had cancer," New York Times, Jan. 28, 1950, p. 30, col. 1.
168. "I had to do it. I couldn't bear to see him suffering." . . . Once, when she woke up
from a strong sedative, she said: 'Is daddy dead yet? I can't ever sleep until he is dead.'" The Father Killer, Supra 173.

177. Rex v. Simpson, 11 Crim. App. R. 218, 84 L.J.K.B. 1893 (1915), dealt with a young soldier on leave, who, while watching his severely ill child and waiting for his unfaithful wife to return home, cut the child's throat with a razor. His statement was as follows: "The reason why I done it was I could not see it suffer any more than what it really had done. She was not looking after the child, and it was lying there from morning to night, and no one to look after it, and I could not see it suffer any longer and have to go away and leave it." Simpson was convicted of murder and his application for leave to appeal dismissed. The trial judge was held to have properly directed the jury that they were not at liberty to find a verdict of manslaughter, though the prisoner killed the child "with the best and kindest motive."


Incidentally, Mrs. Brownhill's operation was quite successful. The Times, London, Dec. 3, 1934, p. 11, col. 4.

179. Gordon Long gassed his deformed and imbecile seven year old daughter to death, stating he loved her "more so than if she had been normal." Goodbye. Time, Dec. 2, 1946, p. 32. He pleaded guilty and was sentenced to death, but within a week the sentence was commuted to life imprisonment. The Times, London, Nov. 23, 1946, p. 2, col. 7; Nov. 29, 1946, p. 7, col. 2; N.Y. Times, Nov. 29, 1946, p. 7, col. 2.

180. For 17 years, Louis Greenfield, a prosperous Bronx milliner, had washed, dressed and fed his son, an "incurable imbecile" with the mentality of a two year old who spoke in a mumble understandable only by his mother. N.Y. Times, Jan. 13, 1939, p. 3, col. 1, May 12, 1939, p. 1, col. 6. Finally, after considering killing him for several years, Greenfield sent his wife out of the house, lest she interfere with his plans, and chloroformed his son to death. He is reported to have told members of the emergency squad: "Don't revive him, he's better off dead," N.Y. Times, May 9, 1939, p. 48, col. 1. See also Better Off Dead, Time, Jan. 23, 1939, p. 24.

At the trial Greenfield testified that he killed his son because "I loved him, it was the will of God." He insisted that he was directed by an "unseen hand" and by an "unknown voice," N.Y. Times, May 11, 1939, p. 10, col. 2 and was acquitted of first degree manslaughter, N.Y. Times, May 12, 1939, p. 1, col. 6. Some psychiatrists were reported to have condemned Greenfield as "a murderer who had simply grown tired of caring for his imbecile son." Better Off Dead, supra.

181. This case is quite similar to the Greenfield case which preceded it by several months. In fact, Louis Repouille said he had read the newspaper accounts of the Greenfield case and: "It made me think about doing the same thing to my boy. I think Mr. Greenfield was justified. They didn't punish him for it. But I am not looking for sympathy," N.Y. Times, Oct. 14, 1939, p. 21, col. 2.

Repouille was an elevator operator who had spent his life's earnings trying to cure his "incurably imbecile" 13 year old son who had been blind for five years and
bedridden since infancy. Repouille is reported to have put it this way: "He was just like dead all the time... He couldn't walk, he couldn't talk, he couldn't do anything." *N.Y. Times*, Oct. 13, 1939, p. 25, col. 7. He testified at the trial that the idea of putting his son out of his misery "came to me thousands of times," *N.Y. Times*, Dec. 6, 1941, p. 34, col. 2. Finally, one day when his wife stepped out of the house for a while, he chloroformed his son to death. *N.Y. Times*, Oct. 13, 1939, p. 25, col. 7.

Repouille kept a number of canaries and lovebirds in his home. When a neighbor found the Repouille boy with a chloroform-soaked rag over his face, he removed the rag and was about to throw it on the floor when Repouille is reported to have said: "Don't, can't you see I have some birds here." *Ibid.*

Repouille was found guilty of manslaughter in the second degree, *N.Y. Times*, Dec. 10, 1941, p. 27, col. 7, and freed on a suspended sentence of 5-10 years. *N.Y. Times*, Dec. 25, 1941, p. 44, col. 1.

Subsequently, Repouille's petition for naturalization was dismissed on the ground that he had not possessed "good moral character" within the five years preceding the filing of the petition. In an opinion which makes Repouille the "mercy killing" perhaps best known to lawyers today, Judge Learned Hand said in part:

"It is reasonably clear that the jury which tried Repouille did not feel any moral repulsion at his crime. Although it was inescapably murder in the first degree, not only did they bring in a verdict that was flatly in the face of the facts and utterly absurd—for manslaughter in the second degree presupposes that the killing has not been deliberate—but they coupled even that with a recommendation which showed that in substance they wished to exculpate the offender. Moreover, it is also plain, from the sentence which he imposed, that the judge could not have seriously disagreed with their recommendation."

"Left at large as we are, without means of verifying our conclusion, and without authority to substitute our individual beliefs, the outcome must needs be tentative; and not much is gained by discussion. We can say no more than that, ... we feel reasonably secure in holding that only a minority of virtuous persons would deem the practice morally justifiable, while it remains in private hands, even when the provocation is as overwhelming as it was in this instance." *Repouille v. United States*, 165 F. 2d 152, 153 (2d Cir. 1947).

182. John F. Noxon, a 46 year old well-to-do lawyer, was charged with electrocuting his six month old mongoloid son by wrapping a frayed electric cord about him and placing him—in wet diapers—on a silver serving tray to form contact. Noxon claimed it was all an accident. *N.Y. Times*, Sept. 28, 1943, p. 27, col. 2; Sept. 29, 1943, p. 23, col. 7; Oct. 29, 1943, p. 21, col. 7; Jan. 14, 1944, p. 21, col. 3; July 7, 1944, p. 30, col. 2; July 8, 1944, p. 24, col. 1. After a mistrial because a juror became ill, *N.Y. Times*, Mar. 10, 1944, Noxon was convicted of first degree murder, *N.Y. Times*, July 7, 1944, p. 30, col. 2. His death sentence was commuted to life, but in granting the clemency, Gov. M. J. Tobin of Massachusetts did not explain the "extenuating circumstances" other than to caution that a "mercy-killing, so-called," could not be considered an extenuating circumstance and was not a factor in his decision. *N.Y. Times*, Aug. 8, 1946, p. 42, col. 4. To make parole possible, Noxon's sentence was further commuted to six years to life with the proviso that he would live under parole supervision for life upon release from prison. *N.Y. Times*, Dec. 30, 1948, p. 13, col. 5. Shortly thereafter, Noxon was paroled, *N.Y. Times*, Jan. 4, 1949, p. 16, col 3; Jan. 8, 1949, p. 30 col. 4. He was disbarred the following year. *N.Y. Times*, May 30, 1950, p. 2, col. 7.

183. Virginia Braunsdorf was a spastic-crippled 29 year old "helpless parody of womanhood," who could not hold her head upright and who talked in gobbling sounds which only her father could understand. At one time, to keep her home and well
attended, her father, Eugene, a symphony musician, had held down four jobs simultaneously, but he finally resigned himself to leaving her at a private sanitarium. Worried about his health and the fate of his daughter if he should die, Braunsdorf took her from the sanitarium on a pretense, stopped his car, put a pillow behind her head, and shot her dead. He then attempted suicide. He was found not guilty by reason of temporary insanity. Murder or Mercy? *Time*, June 5, 1950, p. 20; *N.Y. Times*, May 23, 1950, p. 25, col. 4.

The prosecution argued that the girl was "human" and "had a right to live" and accused Braundorf of slaying her because she was a "burden on his pocketbook." *N.Y. Times*, May 23, 1950, p. 25, col. 4. The prosecution failed to explain, however, why a person furthering his own financial interests by killing his daughter would then fire two shots into his own chest, and, on reviving, shoot himself twice more.

184. In Wolbarst, 1939, *supra* 74, Dr. Dr. Wolbarst describes the *Brownhill* case as an act of mercy, based on pure mother-love" for which, thanks to the growth of the euthanasia movement in England, "it is doubtful that this poor woman even would be put on trial at the present day."

In Taking Life Legally, *Magazine Digest*, 1947, Louis Greenfield's testimony that what he did "was against the law of man, but not against the law of God," is cited with apparent approval. The article continues:

"The acquittal of Mr. Greenfield is indicative of a growing attitude towards euthanasia, or 'mercy killing,' as the popular press phrases it. Years ago, a similar act would have drawn the death sentence; today, the mercy killer can usually count on the sympathy and understanding of the court—and his freedom."

185. Williams, p. 319, and n. 9. For a discussion of the *Simpson* case, see *supra* 177.

186. Williams, p. 328. For a discussion of the *Sander* case see *supra* 172. The other case as Williams notes, p. 328. n. 5, is the same one described by Lord Ponsonby in the 1936 House of Lords debate. *See* text at 153, *supra*.

187. Williams, p. 328. Williams does not cite to any particular page of the thirty-nine page Silving article, *supra* 7, but in context he appears to allude to pp. 353-4 of the article.

188. In addition to the *Sander* case, the cases Williams makes apparent reference to are the *Paight* case, see *supra* 173-6 and accompanying text; the *Braunsdorf* case, see *supra* 183; and the *Mohr* case, see *supra* 17. Only in the *Mohr* case was there apparently euthanasia by request.

189. According to the Royal Warrant, the Commission was appointed in May, 1949, "to consider and report whether liability under the criminal law in Great Britain to suffer capital punishment for murder should be limited or modified," but was precluded from considering whether capital punishment should be abolished. Royal Commission On Capital Punishment, Report, Cmd. No. 8932, p. iii, 1953 (called henceforth the *Royal Commission Report*). For an account of the circumstances which led to the appointment of the Commission, *see* Prevezer, the English Homicide Act: A New Attempt to Revise the Law of Murder, *Colum. L. Rev.*, 57: 624, 629, 1957.

190. "It was agreed by almost all witnesses" that it would "often prove extremely difficult to distinguish killings where the motive was merciful from those where it was not." *Royal Commission Report*, 1953, para. 179. Thus the Commission "reluctantly" concluded that "it would not be possible to frame and apply a definition which would satisfactorily cover these cases. *Id.* para. 180.


192. Minutes of Evidence, Dec. 1. 1949, pp. 219-20. Mr. Hughes, however, would try the apparent "mercy killer" for murder rather than for manslaughter "because the evidence should be considered not in camera but in open court, when it may turn out that it was not manslaughter." *Id.* para. 2825. "[T]he onus should rest upon the
person so charged to prove that it was not a malicious, but a merciful killing." *Id.* para. 2826.

193. Minutes of Evidence, Jan. 5, 1950, para. 3120. The Lord Chief Justice did not refer to the case by name, but his reference to Brownhill is unmistakable. For an account of this case, see *supra* 178.


195. *Id.* para. 3315.


197. Williams, p. 348.


199. Of all first admissions to New York State Civil Hospitals for mental disorders in 1950, some 5,818 patients—*or more than one third*—were classified as cerebral arteriosclerosis or senile cases. There were 3,379 psychoses with cerebral arteriosclerosis and 2,439 senile psychoses. In the case of cerebral arteriosclerosis this represented a 600% numerical increase and a 300% increase in the proportion of total first admissions since 1920. The senile psychoses constituted almost a 400% numerical increase and a 155% increase in the proportion of total first admissions since 1920. Malzberg. A Statistical Review of Mental Disorders in Later Life. In Kaplan (Ed.) *Mental Disorders in Later Life*, 1956, p. 13. Dr. George S. Stevenson classes both psychoses together as "mental illness of aging": "As a rule these patients have very limited prospect of recovery. In fact, they die on the average within fifteen months after admission to a mental hospital." Stevenson. *Mental Health Planning For Social Action*, 1956, p. 41.


201. See *supra* 143.


203. "Mental diseases are said to be responsible for as much time lost in hospitals as all other diseases combined." Boudreau, Mental Health: The New Public Frontier. *Ann. Amer. Acad. Pol. & Soc. Sci.*, 286:1, 1953. As of about ten years ago, there were "over 900,00 patients under the care and supervision of mental hospitals." Felix and Kramer. Extent of the Problem of Mental Disorders. *Id.* pp. 5, 10. Taking only the figures of persons sufficiently ill to warrant admission into a hospital for long-term care of psychiatric disorders, "at the end of 1950 there were 577,000 patients . . . in all long-term mental hospitals." *Id.* p. 9. This figure represents 3.8 per 1,000 population, and a "fourfold increase in number of patients and a twofold increase in ratio of patients to general population since 1903." *Ibid.*

"During 1950, the state, county, and city mental hospitals spent $390,000,000 for care and maintenance of their patients. *Id.* p. 13.

204. Williams, pp. 349-50.

205. In Turano, Murder by Request *Amer. Mercury*, 36:423, 1935, the author goes considerably beyond the title of his paper. He scores the "barbarous social policy" which nurtures "infant monstrosities and hopelessly injured children for whom permanent suffering is the sole joy of living" and "old men and women awaiting slow extinction from the accumulated ailments of senility," *id.* p. 424, and notes in his discussion of "permissive statutes" that "when the sufferer is not mentally competent, the decision could be left to near relatives," *id.* p. 428.

In Should They Live? *Amer. Scholar*, 7:454, 1938, Dr. W. G. Lennox refers to the congenital idiots, the incurably sick, the mentally ill and the aged as "that portion of our population which is a heavy and permanent liability," *id.* p. 457, and agrees with others that "there is somewhere a biological limit to altruism, even for-man," *id.* p. 458. Dr. Lennox would presently eliminate "only the idiots and monsters, the criminal permanently insane and the suffering incurables who themselves wish for death,"
id. p. 464. W. W. Gregg similarly advocates euthanasia for all "criminally or hope­lessly insane," The Right to Kill, No. Amer. Rev., 237:239, 247, 1934 and con­cludes, id. p. 249:

"With the coming of a more rational social order . . . it is possible to foresee the emergence of a socialized purpose to eliminate such human life as shows itself con­spicuously either inhuman, or unhuman, or unable to function happily; in order thereby to help bring about a safer and fuller living for that normal humanity which holds the hope of the future.

W. A. Shumaker, in Those Unfit to Live, L.N. 29:165, 166-7, 1925, comments:

"Could we but devise an acceptable formula, ten thousand idiots annually put to death by state boards of health would mean no more to us than ten thousand pedes­trians annually put to death by automobilists do now.

* * *

"It is impossible to give a common sense reason why an absolute idiot should be permitted to live. His life is of no value to him or to anyone else, and to maintain its existence absorbs a considerable part of the life of a normal being. Of course one shrinks at the thought of putting him to death. But why is it that we shrink? And why, though we shrink from such an act, do we find it possible to excuse him who does it?

* * *

"Is the balance swinging too far toward over-consideration not only for the idiot but for the moron and the lunatic and too little consideration for the normality on which civilization must rest?" In 1935, Dr. Alexis Carrel, the Rockefeller Institute's famed Nobel Prize winner, took the position that "not only incurables but kidnapers, murderers, habitual criminals of all kinds, as well as the hopelessly insane, should be quietly and painlessly disposed of." Newsweek, Nov. 16, 1935, p. 40; Time, Nov. 18, 1935, p. 53; Pro and Con: Right and Wrong of Mercy Killing, The Digest, 1:22, 1937.

Another debate on mercy killing, supra 92, p. 94, similarly embraced involuntary situations. The "question presented" was:

"Should physicians have the legal privilege of putting painlessly out of their suffer­ings unadjustably defective infants, patients suffering from painful and incurable illness and the hopelessly insane and feeble-minded provided, of course, that maximum legal and professional safeguards against abuse are set up, including the consent of the patient when rational and adult?" (Emphasis added.)

The proponents of euthanasia made the pitch for voluntary euthanasia, then shifted (p. 95):

"Euthanasia would also do away with our present savage insistence that some of us must live on incurably insane or degraded by the helplessness of congenital imbecility."

For the results of a 1937 national poll on the question which covered the problem of "infants born permanently deformed or mentally handicapped" as well as "persons incurably and painfully ill." See infra 207 and accompanying text.

206. Dr. Foster Kennedy believes euthanasia of congenital idiots has two major advan­tages over voluntary euthanasia (1) error in diagnosis and possibility of betterment by unforeseen discoveries are greatly reduced; (2) there is not mind enough to hold any dream or hope which is likely to be crushed by the forthright statement that one is doomed, a necessary communication under a voluntary euthanasia program. Ken­nedy's views are contained in Euthanasia: To Be Or Not To Be, supra 42, 1939, re­printed with the notation that his views remain unchanged, supra 42, 1950; The Problem of Social Control of the Congential Defective. Amer. J. Psychiat., 99:13, 1942. See also text at 72-4, supra.

Dr. Wolbarst also indicates that error in diagnosis and possibilities of a cure are reduced in the case of insane or defective people. See text at 74-6, supra.
The Fortune Quarterly Survey: IX. Fortune, July 1937, pp. 96, 106. Actually, a slight majority of those who took a position on the defective infants favored euthanasia under certain circumstances since 45% approved under certain circumstances, 40.5% were unconditionally opposed, and 14.5% were undecided. In the case of the incurably ill, only 37.3% were in favor of euthanasia under any set of safeguards, 47.5% were flatly opposed, and 15.2% took no position.

Every major poll taken in the United States on the question has shown popular opposition to voluntary euthanasia. In 1937 and 1939 the American Institute of Public Opinion polls found 46% in favor, 54% opposed. A 1947 poll by the same group found only 37% in favor, 54% opposed and 9% of no opinion. For a discussion of these and other polls by various newspapers and a breakdown of the public attitude on the question in terms of age, sex, economic and educational levels see Note, Judicial Determination of Moral Conduct In Citizenship Hearings, U. of Chi. L. Rev., 16:138, 141-2 and n. 11, 1948.

As Williams notes, however, p. 332, a 1939 British Institute of Public Opinion poll found 68% of the British in favor of some form of legal euthanasia.

The Fortune Quarterly Survey, supra 207.

Mitscherlich and Mielke. Doctors of Infamy, 1949, P. 114. The Reich Committee for Research on Hereditary Diseases and Constitutional Susceptibility to Severe Diseases originally dealt only with child patients up to the age of three, but the age limit was later raised to eight, twelve, and apparently even sixteen or seventeen years. Id p. 116.


Williams, p. 315. At this point, Williams is quoting from Sullivan, Catholic Teaching on the Morality of Euthanasia, 1949, pp. 54-5. This thorough exposition of the Catholic Church's position on euthanasia was originally published by the Catholic University of America Press, than republished by the Newman Press as The Morality of Mercy Killing, 1950.

Supra 26.

Alexander. Medical Science Under Dictatorship. N. Engl. J. Med., 241:39, 44, 40, 1949 (emphasis added). To the same effect is Ivy. Nazi War Crimes of a Medical Nature. JAMA, 139:131, 132, 1949, concluding that the practice of euthanasia was a factor which led to "mass killing of the aged, the chronically ill, 'useless eaters' and the politically undesirable," and Ivy. Nazi War Crimes of a Medical Nature, Federation Bull., 33:133, 142, 1947, noting that one of the arguments the Nazis employed to condone their criminal medical experiments was that "if it is right to take the life of useless and incurable persons which as they point out has been suggested in England and the United States then it is right to take the lives of persons who are destined to die for political reasons."

Doctors Leo Alexander and A. C. Ivy were both expert medical advisors to the prosecution at the Nuremberg Trials.

See also the Nov. 25, 1940 entry to Shirer, Berlin Diary, 1941, pp. 454, 458-9:

"I have at last got to the bottom of these 'mercy killings.' It's an evil tale. The Gestapo, with the knowledge and approval of the German government is systemically putting to death the mentally deficient population of the Reich.

"X, a German, told me yesterday that relatives are rushing to get their kin out of private asylums and out of the clutches of the authorities. He says the Gestapo is doing to death persons who are merely suffering temporary derangement or just plain nervous breakdown.

"What is still unclear to me is the motive for these murders. Germans themselves advance three:

* * *

3. That they are simply the result of the extreme Nazis deciding to carry out their eugenic and sociological ideas.

* * *
"The third motive seems most likely to me. For years a group of radical Nazi sociologists who were instrumental in putting through the Reich’s sterilization laws have pressed for a national policy of eliminating the mentally unfit. They say they have disciples among many sociologists in other lands, and perhaps they have. Paragraph two of the form letter sent the relatives plainly bears the stamp of the sociological thinking: ‘In view of the nature of his serious incurable ailment, his death, which saved him from a lifelong institutional sojourn, is to be regarded merely as a release.’" (Reprinted in CF 10:40-58, 1971.)

This contemporaneous report is supported by evidence uncovered at the Nuremberg Medical Trial. Thus, an August, 1940 form letter to the relatives of a deceased mental patient states in part: “Because of her grave mental illness life was a torment for the deceased. You must therefore look on her death as a release.” This form letter is reproduced in Mitscherlich and Mielke, supra 209, p. 103. Dr. Alexander Mitscherlich and Mr. Fred Mielke attended the trial as delegates chosen by a group of German medical societies and universities.

According to the testimony of the chief defendant at the Nuremberg Medical Trial, Karl Brandt, Reich Commissioner for Health and Sanitation and personal physician to Hitler, the Fuhrer had indicated in 1935 that if war came he would effectuate the policy of euthanasia since in the general upheaval of war the open resistance to be anticipated on the part of the church would not be the potent force it might otherwise be. Supra 209, p. 91.

Certain petitions to Hitler by parents of malformed children requesting authority for “mercy deaths” seem to have played a part in definitely making up his mind. Ibid.

214. Defendant Viktor Brack, Chief Administrative Officer in Hitler's private chancellory, so testified at the Nuremberg Medical Trial, 1 Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Council Law No. 10, 1950, pp. 877-80 (“The Medical Case”).


216. Ibid. According to testimony at the Nuremberg Medical Trial, although they were told that "only incurable patients, suffering severely, were involved," even the medical consultants to the program were "not quite clear on where the line was to be drawn." Id. p. 94.

217. Supra 92, p. 96.

218. Alexander, supra 213, p. 41. Dr. Alexander Mitscherlich and Mr. Fred Mielke similarly note:

“The granting of ‘dying aid’ in the case of incurable mental patients and malformed or idiot children may be considered to be still within the legitimate sphere of medical discussion. But as the ‘winnowing process’ continued, it moved more and more openly as purely political and ideological criteria for death, whether the subjects were considered to be ‘undesirable racial groups,’ or whether they had merely become incapable of supporting themselves. The camouflage around these murderous intentions is revealed especially by proof that in the concentration camps prisoners were selected by the same medical consultants who were simultaneously sitting in judgment over the destiny of mental institution inmates.” Supra 213, p. 41.

219. This is the translation rendered in the judgment of Military Tribunal 1, 2 Trials of War Criminals Before The Nuremberg Military Tribunals Under Control Council Law No. 10, 196 (1950) (“The Medical Case”). A slightly different but substantially identical translation appears in Mitscherlich and Mielke, supra 209, p. 92.

The letter, Document 630-PS, Prosecution Exhibit 330, as written in the original German, may be found in Trial of Major War Criminals Before the International Military Tribunal, 26:169 (1947). For conflicting views on whether or not the order was back-dated, compare Mitscherlich and Mielke, supra with Koessler, Euthanasia. In The Hadamar Sanatorium and International Law, J. Crim. L., C. & P.S., 43:735,
221. In the fall of 1940, Catholic priests at a large hospital near Urach "noticed that elderly people in the hospital were dying in increasing numbers, and dying on certain days." Straight, Germany Executes Her "Unfit," New Republic, 104:627, 1941. Such incidents led a German bishop to ask the Supreme Sacred Congregation whether it is right to kill those "who, although they have committed no crime deserving death, yet, because of mental or physical defects, are no longer able to benefit the nation, and are considered rather to burden the nation and to obstruct its energy and strength." Ibid. The answer was, of course, in the negative, ibid., but "it is doubtful if the mass of German Catholics, even if they learned of this statement from Rome, which is improbable, understood what it referred to. Only a minority in Germany knew of the 'mercy deaths.'” Shirer, supra 213, p. 459, n. 1.

222. Shirer, supra 213, p. 454.

223. "Late last summer, it seems Pastor von Bodelschwingh was asked to deliver up certain of his worst cases to the authorities. Apparently he got wind of what was in store for them. He refused. The authorities insisted. Pastor von Bodelschwingh hurried to Berlin to protest.

"Pastor von Bodelschwingh returned to Bethel. The local Gauleiter ordered him to turn over some of his inmates. Again he refused. Berlin then ordered his arrest. This time the Gauleiter protested. The pastor was the most popular man in his province. To arrest him in the middle of war would stir up a whole world of unnecessary trouble. He himself declined to arrest the man. Let the Gestapo take the responsibility; he wouldn't. This was just before the night of September 18, 1940. The bombing of the Bethel asylum followed. Now I understand why a few people wondered as to who dropped the bombs.” Shirer, supra 213, pp. 454-5.

224. Supra 209, pp. 113-4; Koessler, supra 219, p. 739.


226. As Justice Murphy pointed out in his dissenting opinion in Korematsu v. United States, 323 U.S. 214, 241-2 (1944):

"No adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry. It is asserted merely that the loyalties of this group 'were unknown and time was of the essence.' Yet nearly four months elapsed after Pearl Harbor before the first exclusion order was issued; nearly eight months went by until the last order was issued; and the last of these 'subversive' persons was not actually removed until almost eleven months had elapsed. Leisure and deliberation seem to have been more of the essence than speed. And the fact that conditions were not such as to warrant a declaration of martial law adds strength to the belief that the factors of time and military necessity were not as urgent as they have been represented to be.

"Moreover, there was no adequate proof that the Federal Bureau of Investigation and the military and naval intelligence services did not have the espionage and sabotage situation well in hand during this long period. Nor is there any denial of the fact not one person of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor while they were still free, a fact which is some evidence of the loyalty of the vast majority of these individuals and of the effectiveness of the established methods of combatting these evils. It seems incredible that under these circumstances it would have been impossible to hold loyalty hearings for the mere 112,000 persons involved or at least for the 70,000 American citizens especially when a large part of this number represented children and elderly men and women.” Justice Murphy then went on to note that shortly after the outbreak of World War II the British Government examined over 70,000 German and Austrian aliens and in six months freed 64,000 from internment and from any special restrictions. 354
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U.S. 242 n. 16.

See generally Rostow, The Japanese American Cases—A Disaster. Yale L. J. 54:489, 1945, a tale well calculated to keep you in anger and shame.

227. See, e.g., General J. L. Dewitt's Final Recommendation to the Secretary of War, U.S. Army, Western Defense Command, Final Report, Japanese Evacuation From the West Coast, 1942. 1943, p. 32 ("The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship have become 'Americanized,' the racial strains are undiluted. . . ."), and his subsequent testimony, Hearings Before Subcommittee of House Committee on Naval Affairs on H.R. 30, 78th Cong., 1st Sess. 1943, pp. 739-40. ("You needn't worry about the Italians at all except in certain cases. Also, the same for the Germans except in individual cases. But we must worry about the Japanese all the time until he is wiped off the map. Sabotage and espionage will make problems as long as he is allowed in this area—problems which I don't want to have to worry about.") After a careful study, Professor (now Dean) Rostow took this position:

"The dominant factor in the development of this policy was not a military estimate of a military problem, but familiar West Coast attitudes of race prejudice. The program of excluding all persons of Japanese ancestry from the coastal area was conceived and put through by the organized minority whose business it has been for forty-five years to increase and exploit racial tensions on the West Coast. The Native Sons and Daughters of the Gold West and their sympathizers, were lucky in their general, for General DeWitt amply proved himself to be one of them in opinion and values." Rostow, supra 226, p. 496.

228. See supra 226.

229. 323 U.S. at 246-7.


232. See Anno. 50 Amer. L. Rev. 2d 531, 536, 556-60 (1956).

233. 116 U.S. 616, 635. The search and seizure cases contain about as good an articulation of the "wedge principle" as one can find anywhere, except, perhaps if one turns to the recent Covert and Krueger cases, where Mr. Justice Black quotes the Boyd statement with approval and applies it with vigor:

"It is urged that the expansion of military jurisdiction over civilians claimed here is only slight, and that the practical necessity for it is very great. The attitude appears to be that a slight encroachment on the Bill of Rights and other safeguards in the Constitution need cause little concern. But to hold that these wives could be tried by the Military would be a tempting precedent. Slight encroachments create new boundaries from which legions of power can seek new territory to capture." Reid v. Covert, 354 U.S. 1, 39-40 (1957).


235. Thus, in Brinegar v. United States, 338 U.S. 160 (1949), it was Jackson the Chief Counsel of the United States at the Nuremberg Trials as well as Jackson the Supreme Court Justice who warned (338 U.S. at 180-1):

"Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons, and possessions are subject at any hour to unheralded search and seizure by the police."
In United States v. Rabinowitz, 339 U.S. 56, 82 (1950), Justice Frankfurter cautioned:

"By the Bill of Rights the founders of this country subordinated police action to legal restraints, not in order to convenience the guilty but to protect the innocent. Nor did they provide that only the innocent may appeal to these safeguards. They know too well that the successful prosecution of the guilty does not require jeopardy to the innocent. The knock at the door under the guise of a warrant of arrest for a venial or spurious offense was not unknown to them. . . . We have had grim reminders in our day of their experience. Arrest under a warrant for a minor or a trumped-up charge has been familiar practice in the past, is a commonplace in the police state of today, and too well known in this country. . . . The progress is too easy from police action unscreened by judicial authorization to the police state."

In Harris v. United States, 331 U.S. 145 (1947), four Justices dissented in separate opinions. The first dissent asked (331 U.S. at 163):

"How can there be freedom of thought or freedom of speech or freedom of religion, if the police can, without warrant, search your house and mine from garret to cellar merely because they are executing a warrant of arrest? How can men feel free if all their papers may be searched, as an incident to the arrest of someone in the house, on the chance that something may turn up, or rather be turned up? Yesterday the justifying document was an illicit ration book, tomorrow it may be some suspect piece of literature."

The second dissent voiced fears of "full impact of today's decision" (331 U.S. at 194):

"The principle established by the Court today can be used as easily by some future government determined to suppress political opposition under the guise of sedition as it can be used by a government determined to undo forgers and defrauders. . . . [It] takes no stretch of the imagination to picture law enforcement officers arresting those accused of believing, writing, or speaking that which is proscribed, accompanied by a thorough ransacking of their homes as an 'incident' to the arrest in an effort to uncover 'anything' of a seditious nature."

The third dissent pointed out (331 U.S. at 198):

"In view of the readiness of zealots to ride roughshod over claims of privacy for any ends that impress them as socially desirable, we should not make inroads on the rights protected by this Amendment."

237. Kunz v. New York, 340 U.S. 290 (1951), overturning a conviction and ten dollar fine for holding a religious meeting without a permit, defendant's permit having been revoked after a hearing by the police commissioner on evidence that he had ridiculed and denounced other religious beliefs at prior meetings. Samples of Kunz's prior preachings may be found in Jackson's dissenting opinion, 340 U.S. at 296. Kunz displayed a certain flair for bipartisanship; he also denounced Catholicism as "a religion of the devil" and the Pope as "The anti-Christ." Ibid.


239. 319 U.S. at 641. There was no majority opinion. Chief Justice Stone and Justice
Rutledge concurred in Justice Jackson's opinion; Justices Black and Douglas wrote a concurring opinion; and Justice Murphy wrote a separate concurring opinion.

240. Ibid.
242. 319 U.S. at 626.
244. The phrases are those of Mr. Justice Frankfurter, dissenting in United States v. Rabinowitz, 339 U.S. 56, 68-9 (1950).
246. Perhaps this would not be true if the only purpose of punishment was to reform the criminal. But whatever ought to be the case, this obviously is not. "If it were, every prisoner should be released as soon as it appears clear that he will never repeat his offence, and if he is incurable he should not be punished at all." Holmes, supra 23, p. 42.
247. Michael and Adler, Crime, Law and Social Science, 1933, p. 351. The authors continue, p. 352:

"The end of the criminal law must be the common good, the welfare of a political society determined, of course, by reference to its constitution. Punishment can be justified only as an intermediate means to the ends of deterrence and reformation which, in turn, are means for increasing and preserving the welfare of society. . . ."

248. Holmes, supra 23, p. 44.