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MERCY KILLING AND THE RIGHT TO INHERIT*

Jeffrey G. Sherman**

Polonius. My lord, I will take my leave of you.

Hamlet. You cannot take from me any thing that I will . . .¹
more willingly part withal,—except my life, except my life, except my life.

WILLIAM SHAKESPEARE, *HAMLET*, act 2, sc. 2
(The Riverside Shakespeare ed. 1974).

One summer day in 1988, a toddler named Samuel Linares swallowed a birthday balloon and started to choke. The balloon was removed in time to prevent the boy's death, but the resulting oxygen deprivation sent him into an irreversible coma.² He was kept alive by a respirator in a hospital that rejected his parents' urgent pleas to disconnect the life-support device so that nature might take its course.³ On April 26, 1989, the boy's father, Rudy Linares, entered his son's hospital room with a gun in his hand. Fending off the hospital staff at gunpoint, he disconnected his son's respirator and cradled him in his arms until the child died. The state's attorney

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1. The early editions of the play (other than the First Folio (1623)) include the word "not" at this point. To modern ears, the word mars the wit of Hamlet's retort with the illogic of what we should consider a double negative. In Shakespeare's day, however, the rules for using negatives were less firmly fixed than they are today; negatives might be doubled for emphasis: e.g.,

I'll say yon grey is not the morning's eye—
'Tis but the pale reflex of Cynthia's brow;
Nor that is *not* the lark whose notes do beat
The vaulty heav'n so high above our heads.

WILLIAM SHAKESPEARE, *ROMEO AND JULIET*, act 3, sc. 5 (The Riverside Shakespeare ed. 1974) (emphasis added).

2. *Father is Cleared in Ill Baby's Death*, N.Y. TIMES, May 19, 1989, at A12.

3. *Death of Boy in Coma Spurs Study of Laws*, L.A. TIMES, May 31, 1989, § 1, at 4.

sought a murder indictment against Rudy Linares, but the grand jury refused to indict.⁴

The legal system was less indulgent with Roswell Gilbert. He had been married for fifty-one years to Emily Gilbert, who, for the last eight of those years, suffered from osteoporosis, arthritis, and Alzheimer's disease. The pain and hopelessness of her condition led her on more than one occasion to plead tearfully for death. One afternoon,⁵ after he had eased the ailing woman onto the sofa in their home, she said, "Please, somebody help me. Please, somebody help me." Her husband, concluding "Who's that somebody but me?", put a gun to his wife's head and pulled the trigger.⁶ He was found guilty of murder in the first degree and, at the age of seventy-five, sentenced to life imprisonment:⁷ a sentence he served until clemency was granted five years later because of his failing health.⁸

These painful cases have two things in common: in each, the killer's moral culpability was at least debatable;⁹ and in each, the

4. *Father is Cleared*, *supra* note 2, at A12. Rudy Linares pleaded guilty to a minor weapons charge and was sentenced to a one-year conditional discharge; he spent no time in jail. *Id.*

5. The year of the killing was 1985, according to a report in the *L.A. Times*. *The Nation*, L.A. TIMES, Sept. 2, 1988, § 1, at 2. The published opinion in the case fails to mention the year.

6. *Gilbert v. State*, 487 So. 2d 1185, 1187 (Fla. Dist. Ct. App. 1986), *petition for review denied*, 494 So. 2d 1150 (Fla. 1986).

7. *See id.* at 1192.

The case became an instant *cause célèbre* and the subject of a TV-movie, "Mercy or Murder?" starring Robert Young and Michael Learned, broadcast by NBC on January 11, 1987. Indeed, in a subsequent unsuccessful bid for a new trial, Gilbert charged that the lawyer who had represented him at the original trial was hampered by a conflict of interest resulting from Gilbert's agreement to pay him, in lieu of a fee, 90% of any profits Gilbert might derive from the sale to the entertainment media of the rights to his story. *See The Nation*, *supra* note 5, at 2.

8. Gilbert was released from prison on August 2, 1990, as the result of a grant of clemency by Florida Governor Bob Martinez and his cabinet. The Governor stated, however, that clemency was granted only because of Gilbert's failing health, which was likely to deteriorate even more rapidly if he remained incarcerated. The statement carefully avoided any intimation that Gilbert's crime merited no further punishment. Mike Clary, 'Mercy Killing' Inmate Going Free, L.A. TIMES, Aug. 2, 1990, at A28.

9. Cecil Partee, the state's attorney who sought the indictment of Rudy Linares, subsequently allowed that Linares's removal of his son from the respirator was "understandable from the . . . perspective of a parent." Larry Green, *Tearful Father Not Charged in Death of Comatose Boy*, L.A. TIMES, May 19, 1989, § 1, at 1, 21. And Kelly Hancock, the successful prosecutor of Roswell Gilbert, subsequently announced his intention to seek Gilbert's release. Though he continued to believe that Gilbert acted improperly, Hancock "never thought he should spend [the rest of his life] in prison. . . ." *About-Face on Killing*, N.Y. NEWSDAY, July 23, 1990, at 14.

killer would have been the slain person's heir.¹⁰ I say "would have been" because every state, with the possible exceptions of Massachusetts and New Hampshire, now applies a common law or statutory rule—known as the "slayer rule"—that bars a killer from inheriting¹¹ from the person he has killed.¹² The rule, which applies

10. Under Illinois law, an intestate decedent's parent is an heir of the decedent if the decedent died with neither a surviving spouse nor surviving issue. ILL. ANN. STAT. ch. 110, para. 2-1(d) (Smith-Hurd 1934). While an unmarried childless person may ordinarily disinherit his parents by will, Samuel Linares died before he was old enough to execute a will. ILL. ANN. STAT. ch. 110, para. 4-1 (Smith-Hurd 1934).

Under Florida law, an intestate decedent's surviving spouse is an heir of the decedent. FLA. STAT. ANN. § 732.102 (West 1976). A decedent cannot disinherit his spouse by will, for the surviving spouse may claim an "elective share" of the decedent's probate estate notwithstanding the provisions of the decedent's will. FLA. STAT. ANN. §§ 732.201, 732.205-732.214 (West 1976 & Supp. 1992).

11. The slayer rule is applied not only to prevent the decedent's killer from inheriting by intestacy, *Price v. Hitaffer*, 165 A. 470 (Md. 1933); or by will, *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889); but also to prevent him from collecting life insurance proceeds, *Carter v. Carter*, 88 So. 2d 153 (Fla. 1956); from succeeding to property by survivorship as a surviving joint tenant, *Hargrove v. Taylor*, 389 P.2d 36 (Ore. 1964); and from claiming his spousal share upon renunciation of the decedent spouse's will. *In re Estate of Danforth*, 705 S.W.2d 609 (Mo. Ct. App. 1986). Because the same principle underlies the slayer rule in all these contexts, see *Wilson v. Board of Trustees*, 246 N.E.2d 701, 703 (Ill. App. Ct. 1969), little attempt will be made herein to differentiate inheritance cases from the others. See *infra* note 209.

12. Six states have no slayer statutes of any kind: Delaware, Maryland, Massachusetts, Missouri, New Hampshire, and New York. Four of those states (Delaware, Maryland, Missouri, and New York) apply a common law rule. See *Welch v. Welch*, 252 A.2d 131, 133-34 (Del. Ch. 1969) (applying common law to bar taking under victim's will); *Price v. Hitaffer*, 165 A.2d 470, 474 (Md. 1933) (taking by intestacy); *Perry v. Strawbridge*, 108 S.W. 641, 648 (Mo. 1908) (taking by intestacy); *In re Estate of Danforth*, 705 S.W.2d 609, 612 (Mo. Ct. App. 1986) (allowing wife's forced share upon renouncing husband's will); *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889) (taking by will); *In re Estate of Bach*, 383 N.Y.S.2d 653, 654 (N.Y. App. Div. 1976) (taking by intestacy). In Massachusetts, no reported slayer cases have arisen in the context of inheritance by will or intestacy, but the state's Supreme Judicial Court has held that the common law of Massachusetts bars the beneficiary under a life insurance policy from collecting the proceeds when he has murdered the insured, *Slocum v. Metropolitan Life Ins. Co.*, 139 N.E. 816, 818 (Mass. 1923); see also *Diamond v. Ganci*, 103 N.E.2d 716, 719 (Mass. 1952), and, in so holding, cited cases applying a common law slayer rule in the context of wills and intestacy: *Perry v. Strawbridge*, 108 S.W. 641 (Mo. 1908); *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889). In New Hampshire, the common law is unclear. The one New Hampshire case on point permitted a husband to inherit by intestacy from the wife he slew. *Kelley v. State*, 196 A.2d 68, 71 (N.H. 1963). In dictum, however, the court stated that a constructive trust might be imposed to prevent the unjust enrichment of an heir who intentionally and unlawfully murdered the source of the inheritance, but that the constructive trust remedy was inappropriate here because the husband—having inherited from the wife less than the amount of his own money that he had expended on her—was not unjustly enriched by the murder. *Id.* I cannot commend New Hampshire's analysis to other jurisdictions.

Two states (Arkansas and Texas) have slayer statutes that apply only in narrow circumstances—ARK. CODE ANN. § 28-11-204 (Michie 1987) (applying only to dower and curtesy); TEX. PROB. CODE ANN. § 41(D) (West 1980) (applying only to life insurance)—

whether or not the killer is convicted in a criminal proceeding, is often said to be a self-evident corollary of the venerable legal principle *nullus commodum capere potest de injuria sua propria*: no one may profit by his own wrongdoing.¹³ But how is one to apply this principle in the face of cases like the Linareses' and the Gilberts', which challenge the very notion of "wrongdoing" as an identifiable and unvarying concept?¹⁴

The criminal law's response to the question of euthanasia has been inconsistent at best,¹⁵ reflecting, perhaps, society's ambiva-

but each state's common law includes a slayer rule of broader applicability. *Wright v. Wright*, 449 S.W.2d 952, 953-54 (Ark. 1970) (taking by intestacy); *Thompson v. Mayes*, 707 S.W.2d 951, 955 (Tex. Ct. App. 1986) (taking by will); *Ovalle v. Ovalle*, 604 S.W.2d 526, 529-30 (Tex. Ct. App. 1980) (taking by intestacy).

All the remaining states and the District of Columbia have slayer statutes, although, as we shall see, these vary considerably from jurisdiction to jurisdiction.

13. "In this form the maxim seems to go back no farther than Coke, who used it to explain why entry for waste did not extinguish a rent charge." William M. McGovern, Jr., *Homicide and Succession to Property*, 68 MICH. L. REV. 65, 71 n.37 (1969).

For examples of cases applying the slayer rule and citing this Latin maxim as the foundation therefor, see *Weaver v. Hollis*, 22 So. 2d 525, 527 (Ala. 1945); *Abbey v. Lord*, 336 P.2d 226, 231 (Cal. Ct. App. 1959); *Wilkins v. Fireman's Fund Am. Life Ins. Co.*, 695 P.2d 391, 393 (Idaho 1985); *Neiman v. Hurff*, 93 A.2d 345, 347 (N.J. 1952); *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889); *Jones v. All Am. Life Ins. Co.*, 325 S.E.2d 237, 238 (N.C. 1985); *Ovalle*, 604 S.W.2d at 528; *In re Estate of Safran*, 306 N.W.2d 27, 29 (Wis. 1981). See also RESTATEMENT OF RESTITUTION § 187 cmt. a (1937); John W. Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715 (1936).

The slayer statutes in at least six jurisdictions expressly identify the *nullus commodum* principle as their underlying purpose. See IDAHO CODE § 15-2-803(n) (1979); N.C. GEN. STAT. § 31A-15 (1984); PA. STAT. ANN. tit. 20, § 8815 (1975); R.I. GEN. LAWS § 33-1.1-15 (1984); VA. CODE ANN. § 55-414 (Michie 1986); WASH. REV. CODE § 11.84.900 (1987).

Dean Ames, in this context, spoke of "the flagrant injustice of an atrocious criminal enriching himself by his crime." James B. Ames, *Can a Murderer Acquire Title by His Crime and Keep It?*, 36 AM. LAW REG. (n.s.) 225 (1897), reprinted in JAMES B. AMES, LECTURES ON LEGAL HISTORY 310 (1913).

For a persuasive argument that the slayer rule is derivable, independently of this *nullus commodum* principle, from the essentials of the Anglo-American property transfer system, see Mary L. Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489 (1986).

14. See *Some Wonder if Doctor Crossed Ethical Line*, CHI. TRIB., Mar. 8, 1991, at C10. Timothy E. Quill, M.D., prescribed some barbiturates to a leukemia patient who wished to commit suicide rather than face increasing pain and disability. He prescribed them knowing the use to which she planned to put them; he even advised her how many to take. Edward Maynard, M.D., chairman of the American College of Physician's ethics committee, criticized Dr. Quill, saying, "For doctors to . . . actively assist in suicide is not appropriate." *Id.* That Dr. Maynard used the affectless phrase "not appropriate" in this highly charged context suggests that he could not quite bring himself to characterize his colleague's conduct as "wrong." See *id.*

An indictment was sought against Dr. Quill, but the Rochester, New York grand jury refused to indict. *Jury Won't Indict Doctor in Suicide. Physician Had Written of Helping Ill Patient Kill Herself*, CHI. TRIB., July 27, 1991, at C3.

15. See, e.g., Helen Silving, *Euthanasia*, 103 U. PA. L. REV. 350 (1954).

lence. Imposing a prison sentence for conduct of which sixty-four percent of Americans approve¹⁶ seems capricious and hypocritical¹⁷

16. *Poll Claims Most Back Right To Die*, U.P.I. Wire Service, June 13, 1990 (Roper poll commissioned by Hemlock Society). Readers suspicious of the validity of this poll, commissioned as it was by an organization devoted to legalizing euthanasia, might consider a 1987 Harris poll, where the figure was 62%, Andrew H. Malcom, *What Medical Science Can't Seem to Learn: When to Call it Quits*, N.Y. TIMES, Dec. 23, 1990, § 4, at 6; and a more recent poll showing that 64% of Boston area residents favor legalizing euthanasia. *Poll: 64% Favor Doctor Aided Suicide*, CHI. TRIB., Nov. 4, 1991, at C12. All of these polls dealt with euthanasia by doctors rather than with the kind of intervention of which Rudy Linares and Roswell Gilbert furnished examples. But if we want euthanasia, we had better be willing to do it ourselves; while a recent poll showed that 60% of Colorado physicians favored legalizing euthanasia, only half that number said they would be willing to perform it themselves. N.Y. NEWSDAY, June 19, 1990, at 53.

The voters of the state of Washington recently rejected, by a 56% majority, a ballot initiative that would have legalized physician-assisted euthanasia of terminally ill patients. Observers believe, however, that the initiative was rejected not because of moral revulsion but because of fear that the proposition lacked sufficient safeguards to prevent physicians from euthanatizing the unwilling. See John Balzar, *Washington State Voters Cool Fires of Restlessness*, L.A. TIMES, Nov. 7, 1991, at A3. The defeat of the initiative had unfortunate consequences for Claude Pennell, an ailing 81-year-old who, fearful of "being a blob in a nursing home," planned to kill himself but agreed to postpone the deed pending the outcome of the vote on the initiative. *Man Kills Self After 'Right to Die' Fails*, CHI. TRIB., Nov. 22, 1991, at C10. Two days after the defeat, realizing that he would now be unable to find a doctor to send him gently into that good night, he shot himself in the head with a shotgun. *Id.*

17. Americans' ambivalence informs the opinion in *Griffith v. State*, 548 So. 2d 244 (Fla. Dist. Ct. App. 1989). Although the court held that the benignity of a father's motives in fatally shooting his irreversibly vegetative 3-year old child was not a defense to a charge of murder, the opinion seemed to invite a more favorable outcome through prosecutorial discretion or jury nullification.

[O]ur holding is restricted to the conclusion that no legal defense exists and may not be judicially created on this ground. It does not mean that the circumstances of so-called "mercy killing" such as this may not be considered in prosecutorial decisions made by a grand jury or the state attorney concerning whether or on what charge an indictment or information should be returned. Furthermore, it cannot impede a petit jury's exercise of its so-called "pardon power" in finding the defendant guilty of a lesser or of no offense even though the facts may justify (or even require) a greater offense under the letter of the law.

Id. at 248 n.7 (citations omitted).

In the case of *Repouille v. United States*, 165 F.2d 152 (2d Cir. 1947) (L. Hand, J.), a man who had fatally chloroformed his 13-year-old son (the child was mentally disabled and unable to feed himself or control his excretory functions) was denied naturalization on the ground that he lacked "good moral character" as required by the Nationality Act, now codified at 8 U.S.C.A. § 1427(a) (Supp. 1990). Although Judge Hand was not unsympathetic to euthanasia, 165 F.2d at 153, he felt that precedent required him to define "good moral character" with reference to conventional moral standards and he concluded, or rather asserted, that only a minority would consider active euthanasia morally justified. Judge Frank, in a dissent, questioned Judge Hand's assertion, pointing out that if the case really turned on popular notions of morality, a scientific poll should have been undertaken to ascertain what those notions were. *Id.* at 154 (Frank, J., dissenting). Judge Hand's decision was later characterized as "reluctant and technical." *Hallinan v. Committee of Bar Examiners*, 421 P.2d 76, 88 (Cal. 1966).

and threatens to bring the law into disrepute.¹⁸ Yet, leaving an intentional homicide unpunished may undermine the protection against murderous violence that the criminal law affords society,¹⁹ since a malicious killer may be able to mimic successfully the pattern of a mercy killer²⁰ or may in fact be slaying not out of compassion for the victim but out of weariness with the burden of caring for him.²¹

The civil law—specifically the law of wills and succession—need not suffer from the criminal law's schizophrenia when confronted with euthanasia. In this article, I shall argue that the slayer rule should not be applied in cases of mercy killing or assisted suicide,²² even if the criminal law continues to regard such actions as unlawful. This article will also suggest some statutory language for codifying this proposed exception to the slayer rule.

This proposal—like the so-called “living will”²³—is a response to a new kind of agony engendered by a new kind of death. Now that

18. “We are, by some strange habit of mind and heart, willing to impose death but unwilling to permit it: we will justify humanly contrived death when it violates the human integrity of its victims, but we condemn it when it is an intelligent voluntary decision. If death is not inevitable anyway, not desired by the subject, and not merciful, it is righteous! If it is happening anyway and is freely embraced and merciful, then it is wrong!” JOSEPH FLETCHER, *MORALS AND MEDICINE* 181 (1954).

19. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 1.3(b) (2d ed. 1986).

20. Professor Yale Kamisar reports that the Royal Commission on Capital Punishment concluded (albeit, reluctantly) that mercy killing could not prudently be removed from the category of murder, let alone completely decriminalized:

[Witnesses] thought it would be most dangerous to provide that ‘mercy killings’ should not be murder, because it would be impossible to define a category which could not be seriously abused. Such a definition could only be in terms of the motive of the offender . . . which is notoriously difficult to establish and cannot, like intent, be inferred from a person’s overt actions.

Yale Kamisar, *Some Non-Religious Views Against Proposed “Mercy-Killing” Legislation*, 42 MINN. L. REV. 969, 979-80 (1958) (quoting ROYAL COMMISSION ON CAPITAL PUNISHMENT, Report Cmd. No. 8932, para. 179 (1953)).

21. The court in the *Gilbert* case, which upheld the murder conviction of a mercy killer, noted that a euthanatizer’s motives might include a desire to be free of the burden of caring for the victim: “The manifestation of Emily’s illness which appeared to bother appellant the most was her increased dependence on him.” *Gilbert v. State*, 487 So. 2d 1185, 1187 (Fla. Dist. Ct. App. 1986), *petition for review denied*, 494 So. 2d 1150 (Fla. 1986). In the case of Louis Greenfield, charged with first degree manslaughter in connection with the chloroforming of his mentally disabled son, some “psychiatrists were reported to have condemned Greenfield as ‘a murderer who had simply grown tired of caring for his imbecile son.’” Kamisar, *supra* note 20, at 1021 n.180 (quoting *Better Off Dead*, TIME, Jan. 23, 1989, at 24). Greenfield was acquitted. *Id.*

22. Almost half the states treat assisting suicide as a crime. Catherine D. Shaffer, Note, *Criminal Liability for Assisting Suicide*, 86 COLUM. L. REV. 348, 353 (1986).

23. We have become so used to living wills in the decade and a half of their existence that it sometimes comes as a surprise to learn that these, too, were someone’s invention.

chronic, degenerative illnesses have replaced relatively swift-moving conditions like influenza as the most common causes of death, and medical technology can extend bodily functioning beyond the point where natural forces permanently deprive the patient of consciousness, the dying face terrors largely unknown to earlier generations: a protracted period of decay and ever-increasing helplessness, further blighted by the prospect of machine-supported vegetative insensibility as their final earthly condition. The AIDS epidemic lends a particular urgency to my proposal,²⁴ for the symptoms and terror associated with AIDS²⁵ have led many persons with AIDS ("PWAs"²⁶) to regard death as a preferable state. Newspapers have been telling with increasing frequency of PWAs desperately seeking release in death and caring friends helping them achieve that release; one man, for instance, admitted to having assisted eight PWAs in their suicides.²⁷ In the prevalent case where the PWA is a gay man, the person to whom he would likely turn for such assistance will be his domestic partner.²⁸ But if the PWA is estranged from his

An article by Luis Kutner, *Due Process of Euthanasia: The Living Will, a Proposal*, 44 IND. L.J. 539 (1969), has been cited as the genesis of the living will idea. See Christopher J. Condie, Comment, *Comparison of the Living Will Statutes of the Fifty States*, 14 J. CONTEMP. L. 105 (1988).

24. See Larry Doyle, *Mercy or Murder?; Public, Legal Acceptance of Mercy Killing Grows*, U.P.I. wire service, Feb. 13, 1988. Alexander Capron, University Professor of Law and Medicine at the University of Southern California Law Center and Executive Director of the 1983 President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, has remarked that the "growing specter of acquired immune deficiency syndrome" will likely increase support for euthanasia. *Id.*

25. For the first time in my life . . . I found myself bedridden with a cold that wouldn't go away, viral bronchitis, fever, diarrhea, loss of appetite, and extreme fatigue. These problems persisted for several months and were coupled with the discovery of swollen lymph nodes. . . . Then I developed chronic ear infections, shingles on the backs of both legs and a persistent sore throat. The diarrhea continued[,] and nausea became a fact of everyday life; eating became increasingly difficult—I began to lose weight.

I was frightened and depressed by the fact that the illnesses were multiple, and that no sooner would one go away than something else would appear. I then began to experience with increasing frequency the most alarming and intimidating of all these maladies—night sweats. Sometimes I would wake up crying because I was so cold and frightened. No amount of preparation before bed could relieve the anxiety and fear. . . . I dreaded what I needed most—sleep. I didn't want to close my eyes.

Quoted in Stephen F. Morin & Walter F. Batchelor, *Responding to the Psychological Crisis of AIDS: A Clinical Perspective*, 99 PUB. HEALTH REP. 4 (1984).

26. The term "PWA" has become the preferred term, as opposed to comfortless phrases like "AIDS victim" or "AIDS sufferer."

27. See Stephen Braun, *Deliver Them from AIDS*, L.A. TIMES, Aug. 28, 1988, § 6, at 1.

28. Although family members may generally be the best persons to make such medical decisions [i.e., decisions to withdraw or withhold life-

blood relations, they may, as his intestate heirs, be only too eager to invoke the slayer rule to prevent the partner from inheriting under the will of his grateful "victim."²⁹

I. PRELIMINARY QUESTIONS OF VOCABULARY

The English word "euthanasia" is compounded of two Greek words: *eu* ("good") and *thanatos* ("death").³⁰ As its etymology suggests, the word referred originally not to a motive for killing but rather to a manner of dying: a gentle and easy death.³¹ By the nineteenth century, however, the word had acquired its modern meaning: a killing, albeit still a gentle killing, motivated by compassion and performed to relieve the suffering of the killed.³² Thus, the terms "euthanasia" and "mercy killing" have become synonymous.³³

sustaining treatments], this is not always the case. For example, an AIDS patient may prefer that a sympathetic friend rather than an estranged family member act on his or her behalf.

Kristen L. Grice, *Advance Health Care Planning: Filling the Void*, 4 PROB. & PROP. 40 (1990).

29. The *New York Native* recently reported that the mother of a gay man who died of AIDS sought (unsuccessfully) to eject her son's lover from the house the two men had owned jointly. Calling the lover a "gigolo" and "golddigger," she alleged that the lover had failed to provide her son with proper care during his last months. *Mother, Son's Lover Battle for Estate*, N.Y. NATIVE, Sept. 16, 1991, at 20. She also contested her son's will, which excluded her altogether. "If this little swine dies," said the decedent's mother, referring to the lover, "who is going to get my son's stuff? I don't even care if I get it, I just don't want him to." *PWA's Lover Sued by Lover's Mother for Estate*, WINDY CITY TIMES, Jan. 9, 1992, at 8.

30. THE OXFORD ENGLISH DICTIONARY 444 (2nd ed. 1989).

31. "Give me but gentle Death: *Euthanasia*, *Euthanasia*, that is all I implore." Isaac Bickerstaff, *The Lucubrations of Isaac Bickerstaff Esq.*, in TATLER No. 44 para. 1, col. 2 (London, John Morphew 1709).

32. See *Oxford English Dictionary* definition of euthanasia. THE OXFORD ENGLISH DICTIONARY 444 (2d ed. 1989).

This is not to suggest that the idea of mercy killing was unknown before the nineteenth century. Sir Thomas More wrote that in his Utopia,

if the disease is not only incurable, but excruciatingly and continually painful, then the priests and public officials come and urge the invalid not to endure such agony any longer. They remind him that he is now unfit for any of life's duties, a burden to himself and to others; he has really outlived his own death. They tell him he should not let the disease prey on him any longer, but now that life is simply torture and the world a mere prison cell, he should not hesitate to free himself, or to let others free him, from the rack of living.

THOMAS MORE, *UTOPIA* bk. 2, at 65 (Robert Adams trans., 1975). In point of fact, Sir Thomas, in this passage, envisioned death by suicide or assisted suicide rather than by active euthanasia. *Id.*

33. See Kamisar, *supra* note 20, at 969 & n.3; National Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Facilities*, para. 28 at 7 (Nov. 1971, rev. 1975).

"Voluntary euthanasia" refers to euthanasia carried out at the request and with the informed consent of the decedent. The term "involuntary euthanasia" has been used to refer both to the compassionate killing of persons incapable of communicating their wishes, such as comatose patients, and to the killing of unwilling persons regarded as unproductive and burdensome to society.³⁴ The widespread use of the term "euthanasia"—even if modified by "involuntary"—to refer to this last class of homicides would represent a throwback to the earlier understanding of the term and would fairly permit the word to extend to the execution of a convicted criminal if the method of execution was sufficiently gentle. For this reason, I prefer not to use the phrase "involuntary euthanasia" where it might be understood to include the slaying of the unwilling.³⁵ The phrase "nonvoluntary euthanasia," however, commends itself as a term for the killing of one incapable of communicating her

Whenever a verb is needed meaning "to kill by euthanasia," I shall use the word "euthanatize." *The Oxford English Dictionary* does not sanction the word but merely notes its existence, disparaging it as a nonce word (i.e., a word coined for a particular occasion) and offering only a ponderous drollery as an illustration: "I saw a crab euthanatising a sickly fish, doubtless from the highest motives." *THE OXFORD ENGLISH DICTIONARY* 444 (2d ed. 1989). Nonetheless, the word has proved a convenience to other writers (see, e.g., Alan Parachini, *The Netherlands Debates the Legal Limits of Euthanasia*, L.A. TIMES, July 5, 1987, § 6, at 1) and seems preferable to "euthanize" (see Donald L. Beschle, *Autonomous Decisionmaking and Social Choice: Examining the "Right to Die"*, 77 KY. L.J. 319, 328 (1989)) in that "euthanatize" comprehends the Greek root *thanatos* more completely.

34. An infamous example of this second kind of killing under medical auspices was the National Socialist's systematic annihilation of "racially valueless" children. From 1939 through 1944, an estimated 5,000 mentally and physically disabled children were put to death, generally by injection, under the auspices of the disingenuously named Reich Committee for Scientific Research of Hereditary and Severe Constitutional Diseases ("Reichsausschuss zur wissenschaftlichen Erfassung von erb- und anlagebedingten schweren Leiden"). LUCY DAWIDOWICZ, *THE WAR AGAINST THE JEWS 1933-1945*, at 131-33 (1975); see generally ROBERT J. LIFTON, *THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE* (1986); Andrew C. Ivy, *Nazi War Crimes of a Medical Nature*, 139 J. AM. MED. ASS'N 131 (1949).

For examples of authors who conflate these two disparate forms of homicide by applying the term "involuntary euthanasia" to both, see Philip G. Peters, Jr., *The State's Interest in the Preservation of Life: From Quinlan to Cruzan*, 50 OHIO ST. L.J. 891, 952 (1989); *Developments in the Law—Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1652 n.70 (1990); Suzanne Levant, Comment, *Natural Death: An Alternative in New Jersey*, 73 GEO. L.J. 1331, 1342 (1985); Steven J. Wolhandler, Note, *Voluntary Active Euthanasia for the Terminally Ill and the Constitutional Right to Privacy*, 69 CORNELL L. REV. 363, 365 n.12 (1984).

35. Paradoxically, commentators and societies that have advocated the use of selective homicide to purge the community of "undesirables" have opposed mercy killing for the suffering, often on the curious ground that it is easier to determine who is "useless" to society than to determine whose suffering is sufficiently acute to warrant mercy killing. See, e.g., Kamisar, *supra* note 20, at 1017; Silving, *supra* note 15, at 356 n.23.

consent, where the killing is motivated entirely by compassion for the victim's suffering.³⁶

Much has been made of the distinction between "active euthanasia" and "passive euthanasia": a distinction easier to state in words than to sustain in fact. "Active euthanasia" is said to consist in performing a positive act to induce or hasten death and "passive euthanasia" in deliberately refraining from intervention that could avert or delay death. Thus, these terms reflect a felt need to distinguish between "doing" and "allowing": between commission and omission. The law has traditionally made this distinction, treating acts of commission more seriously and stigmatizing them more consistently than acts of omission; and in the abstract, one may defend the distinction by noting that the misfeasor has created a new risk of harm while the nonfeasor, whatever his moral failings, has at least made the situation no worse.³⁷ Furthermore, the distinction permits us to set limits on the obligations that a free society may impose on individuals.³⁸

Still, the distinction remains an elusive one. To be sure, one can point to paradigm cases: administering a lethal injection constitutes active euthanasia, while simply choosing not to resuscitate a patient whose breathing has stopped is passive euthanasia. But how are we to classify unplugging a respirator? Is it active (i.e., depriving a person of oxygen) or passive (i.e., failing to supply needed oxygen)? And if we characterize it as "active" and accordingly regard it as more culpable than declining to employ the respirator in the first place, do we not discourage families and doctors from even attempting certain types of care, lest they discover that such procedures, once instituted, cannot be discontinued without criminal liability?³⁹

36. In promoting this term, I am indebted to Jay A. Friedman, *Taking the Camel by the Nose: The Anencephalic As a Source for Pediatric Organ Transplants*, 90 COLUM. L. REV. 917, 971 n.276 (1990).

37. Cf. W. PAGE KEETON ET AL, PROSSER AND KEETON ON THE LAW OF TORTS § 56 (5th ed. 1984).

38. The distinction between omission and commission is also a necessary one for setting limits to what must be done to preserve life. Legal, moral, and religious traditions have all regarded it as more crucial to specify the harm that people must not do to one another than the helpful acts they must not omit. Otherwise, everyone might be held responsible for all the accidents and deaths in the world from which they [sic] could conceivably have protected others. To sleep at night, for instance, rather than to patrol rivers and lakes looking for drowning victims would then be turned into a culpable omission.

SISELA BOK, *Death and Dying: Euthanasia and Sustaining Life: Ethical Views*, in 1 ENCYCLOPEDIA OF BIOETHICS 268, 269 (1978).

39. This very point is made in *In re Conroy*, 486 A.2d 1209, 1234 (N.J. 1985).

Ultimately, the active/passive distinction proves an unreliable moral guidepost.⁴⁰ If a person walks into a bathroom and discovers a baby drowning in the bathtub, are we really prepared to say that his passively watching the baby drown is a less culpable act than his holding its head under the water? We shrink from unplugging a respirator sustaining the life of a conscious patient who needs it only temporarily and will soon recover; we might be readily inclined to unplug it if the patient was in a persistent vegetative state.⁴¹ Yet our conduct in both cases would be equally active or equally passive;⁴²

40. See Levant, *supra* note 34, at 1339-43; James Rachel, *Active and Passive Euthanasia*, 292 NEW ENG. J. MED. 78 (1975), reprinted in CONTEMPORARY ISSUES IN BIOETHICS 313 (Tom L. Beauchamp & Leroy Waters eds., 1982); Wolhandler, *supra* note 34, at 368-69. No one who has seen the third act of Lillian Hellman's play *The Little Foxes* will ever again regard inaction with neutrality. In that scene, Regina Giddens is told by her estranged convalescent husband, Horace, that he is about to thwart her plans by changing his will. As the conversation nears an end, Horace has a heart attack and is unable to reach his medicine. Regina starts to come to his aid, but realizing that it is in her financial interest to let him die with his old will still in place, she sits back in her chair and passively watches him die.

41. A human organism in a persistent vegetative state functions entirely in terms of its internal controls: "It maintains temperature. It maintains heartbeat and pulmonary ventilation. It maintains digestive activity. It maintains reflex activity of muscles and nerves for low level conditioned responses. But there is no behavioral evidence of either self-awareness or awareness of the surroundings in a learned manner." *In re Jobes*, 529 A.2d 434, 438 (N.J. 1987) (quoting Fred Plum, M.D., who is credited with having coined the term "persistent vegetative state"). Patients in such a state "may react reflexively to sounds, movements and normally painful stimuli, but they do not feel any pain or sense anybody or anything. Vegetative state patients may appear awake but are completely unaware." *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841, 2863 n. 2 (1990) (Brennan, J., dissenting).

42. Declining to resuscitate an unconscious patient and declining to feed a conscious but immobile patient are both, arguably, passive acts, yet instinctively we feel that the latter is more culpable. Why? Is it that the conscious patient will suffer more than the unconscious patient from our inaction? If that is the test, then declining to do any act whose performance would relieve suffering would arguably be a culpable omission. Is it that one has a moral duty to provide food but not a moral duty to resuscitate? This distinction recalls to mind the distinction between "ordinary means" and "extraordinary means," a distinction at the heart of the Roman Catholic Church's position on euthanasia: "Euthanasia ('mercy killing') in all its forms is forbidden. The failure to supply the ordinary means of preserving life is equivalent to euthanasia. However, neither the physician nor the patient is obliged to use extraordinary means." National Conference of Catholic Bishops, *supra* note 33, at 7. Yet if we overlook this distinction's circularity and attempt to use it as the basis for determining culpability, how are we to decide which means are "ordinary"? Even among Catholic commentators, there is disagreement. Compare William B. Smith, *Judeo-Christian Teaching on Euthanasia: Definitions, Distinctions and Decisions*, 54 LINACRE Q. 27, 29 (1987) (furnishing food is, by definition, ordinary means) with John R. Connery, *The Ethical Standards for Withholding/Withdrawing Nutrition and Hydration*, 2 ISSUES L. & MED. 87, 90-91 (1986) (furnishing food is not necessarily ordinary means). "[T]he point at which the means necessary to preserve [life] become 'extraordinary' [is] neither set forth in the Constitution nor known to the nine Justices of this Court" *Cruzan*, 110 S. Ct. at 2854.

the real issue is one of morals, not of means.⁴³ Furthermore, the usual examples of euthanasia characterized as passive and receiving cautious judicial acceptance⁴⁴—discontinuation of respiratory assistance, intravenous or tube feeding, and kidney dialysis—produce death from asphyxiation, malnutrition, dehydration, or uremic poisoning: deaths that are neither swift nor gentle.⁴⁵

Those who take refuge in this supposed distinction between active and passive euthanasia, countenancing the latter but not the former, often cite Arthur Hugh Clough's famous couplet as if it were an earnest and persuasive formulation of their guiding principle:

Thou shall not kill; but needst not strive
Officiously to keep alive.⁴⁶

In fact the poem was intended ironically; consider Clough's next two "commandments":

Do not adultery commit;
Advantage rarely comes of it.
Thou shalt not steal; an empty feat,
When it's so lucrative to cheat.⁴⁷

II. THE STATUS OF MERCY KILLING UNDER AMERICAN CRIMINAL LAW

Sure, I know I was breaking the law but there seems to be things more important than the law, at least to me in my private tragedy. So it's murder. So what?⁴⁸

Testimony of Roswell Gilbert. *Gilbert v. State*, 487 So. 2d 1185, 1188 (Fla. Dist. Ct. App.), *petition for review denied*, 494 So. 2d 1150 (Fla. 1986).

43. See Gregory Gelfand, *Living Will Statutes: The First Decade*, 1987 WIS. L. REV. 737, 749. "Permitting only passive euthanasia allows those who go on living to feel better because the 'forces of nature' bear the responsibility for taking the patient's life—if we can so deceive ourselves." *Id.*

44. See, e.g., *Bouvia v. Superior Court*, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986); *Barber v. Superior Court*, 195 Cal. Rptr. 484 (Cal. Ct. App. 1983); *McKay v. Bergstedt*, 801 P.2d 617 (Nev. 1990).

45. See Pieter V. Admiraal, *Justifiable Euthanasia*, 3 ISSUES L. & MED. 361, 369-70 (1988). Admiraal, a Dutch physician, stated that "passive euthanasia is nothing but abstention. And abstention, doing nothing, is surely the very last thing a patient making a request [for euthanasia] is entitled to." *Id.* at 370. For a singularly graphic description of the horrors of death by dehydration, see *Brophy v. New England Sinai Hosp.*, 497 N.E.2d 626, 641 n.2 (Mass. 1984) (Lynch, J., dissenting in part).

46. Arthur H. Clough, "The Latest Decalogue", in *THE NEW OXFORD BOOK OF ENGLISH VERSE 1250-1950*, at 682 (Helen Gardner ed., 1972).

47. *Id.*

48. Roswell Gilbert fatally shot his wife of 51 years to relieve her suffering from osteoporosis and Alzheimer's disease. *Gilbert*, 487 So. 2d at 1188.

a. *The Irrelevance of Motive*

The typical mercy killer kills voluntarily and intentionally, generally with premeditation and always without the justification of self-defense. And that, under American law, is criminal homicide—indeed, the most serious form of criminal homicide⁴⁹—regardless of the killer's motive.⁵⁰ Putting aside the "specific intent" elements of certain crimes,⁵¹ an actor's motive has no bearing on whether her act violates the criminal law.⁵² To be sure, evidence of motive is relevant in a criminal prosecution, since the trier-of-fact may more readily conclude that the accused is guilty when a motive for the act has been discovered than when no motive is apparent.⁵³ But "no

49. Silving, *supra* note 15, at 352.

50. Barber v. Superior Court, 195 Cal. Rptr. 484, 487 (Cal. Ct. App. 1983); Griffith v. State, 548 So. 2d 244 (Fla. App. 1989); Gilbert, 487 So. 2d at 1190; Commonwealth v. Noxon, 66 N.E.2d 814, 815 (Mass. 1946); State v. Ehlers, 119 A. 15, 17 (N.J. 1922); State v. Forrest, 362 S.E.2d 252, 256 (N.C. 1987).

51. For an act of breaking and entering to constitute common law burglary, as opposed to mere trespass, the breaking and entering must have been undertaken with the intent to commit a felony. See People v. Hill, 429 P.2d 586, 596 (Cal. 1967). Such intent is sometimes described as a "specific intent" element of the crime of burglary. See also section 511 of the Employee Retirement Income Security Act of 1974, codified at 29 U.S.C. § 1141 (1988), which makes it a crime "for any person through the use of fraud . . . or . . . force . . . to restrain . . . or coerce . . . any participant or beneficiary [under an employee benefit plan] for the purpose of . . . preventing the exercise of any right to which he is or may become entitled under the plan. . . ." (emphasis added).

52. The distinction between "intent" and "motive" presents some analytical difficulties. In general, an actor's "intent" is his resolve to engage in certain conduct producing a certain result; his "motive" is the stimulus that prompts his conduct or the desire that prompts his seeking that result. Thus, A may fire a gun with the "intent" to kill B or with the "intent" merely to frighten B. If A fired the gun with the intent to kill B, he may have done so because he was jealous of B's affair with A's wife or perhaps because he wanted to inherit B's money: two possible "motives" for A's intent to kill. Unfortunately, this traditional formulation reflects a willingness to divide arbitrarily what is really a logical continuum. For example, one can say that A (1) intended to pull the trigger so that (2) a bullet would leave the barrel of the gun so that (3) the bullet would enter B's chest so that (4) B would die so that (5) A would inherit B's money so that (6) A would be able to marry C. The prevailing formula draws a line between steps (4) and (5) and calls steps (1) through (4) "intent" and steps (5) and (6) "motive." Yet one could assert with equal logic that A "intends" all six events. Perhaps the most appealing qualitative formulation of the difference between intent and motive is that intent is a purpose to commit an act, while motive is the actor's purpose in committing it. Walter H. Hitchler, *Motive As an Essential Element of Crime*, 35 DICK. L. REV. 105, 109 (1931).

53. Although motive may be relevant in justifying a conclusion of guilt, it is not a necessary element of a crime; the State need not prove motive as part of its case. State v. Guilfoyle, 145 A. 761, 767 (Conn. 1929); People v. Doody, 175 N.E. 436, 443 (Ill. 1931); People v. Kuhn, 205 N.W. 188, 189 (Mich. 1925); State v. Hansen, 244 P.2d 990, 1001 (Or. 1952). But once guilt is established, the court may and often does consider motive in fashioning a sentence. See JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 100-02 (2d ed. 1960).

act otherwise criminal is excused or justified because of the motives of the actor, however good they may be."⁵⁴

Two reasons are advanced for this rule. First, "the aim of the law is not to punish sins but is to prevent certain external results."⁵⁵ If an adult snatches a coin from a child playing in the street, we punish the crime only as one of petty larceny, even if we can point to evidence of increased moral culpability (e.g., the adult likes to pick on children, or the child was a foreigner and the adult hates foreigners).⁵⁶ The public weal is harmed by injurious results, not by the mere existence of bad people. Consequently, the criminal law, in order to fulfill its protective function,⁵⁷ proscribes only *conduct*.⁵⁸ An accused's motive—good or bad—neither mitigates nor aggravates the injury she inflicts.

The second reason advanced for the criminal law's indifference to motive is the supposed difficulty in ascertaining it.⁵⁹ Upon finding that *A* instilled cyanide into *B*'s coffee cup, we can readily infer *A*'s intent (to kill *B*); *A*'s motive (possibly jealousy, possibly greed) is less readily inferred. Nonetheless, triers-of-fact routinely draw inferences concerning motive, whatever the difficulties such inferences present.⁶⁰

b. The Irrelevance of Consent

In some mercy killing cases, the "victim" expressly asks to be killed.⁶¹ Even though the request for death is unambiguous, seri-

54. Hitchler, *supra* note 52, at 109; accord *Collazo v. United States*, 196 F.2d 573, 578-79 (D.C. Cir.), *cert. denied*, 343 U.S. 968 (1952); *United States v. Harmon*, 45 F. 414, 420 (D. Kan. 1891); *Phillips v. State*, 29 Tex. 226, 236 (1867).

Recently, however, a man who stole \$135,000 at gunpoint was released with only an \$8,000 fine and five years probation because, at the time of the robbery, he thought he was dying of cancer and wanted the money to provide for his wife and children after his death. *Dying Man's Robbery Results in Probation*, CHI. TRIB., June 13, 1991, at C24. "[T]he public had . . . flooded the court with letters of support." *Id.*

55. *Commonwealth v. Kennedy*, 48 N.E. 770, 770 (Mass. 1897).

56. I am indebted to Professor George P. Fletcher for this vivid and instructive example. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 463 (1978).

57. See LAFAYE & SCOTT, *supra* note 19, at 13.

58. The "purpose of all law, and the criminal law in particular, is to conform conduct to the norms expressed in that law. . . ." *United States v. Granda*, 565 F.2d 922, 926 (5th Cir. 1978).

59. See HALL, *supra* note 53, at 99-100; see also *supra* note 20.

60. See *supra* note 53. "Barring venal motives, which a trial court has the means of ferreting out, the decision to come forward to request a judicial order to stop treatment represents a slowly and carefully considered resolution by at least one adult. . . ." *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841, 2872 (1990) (Brennan, J., dissenting) (emphasis added).

61. See, e.g., *Gilbert v. State*, 487 So.2d 1185 (Fla. Dist. Ct. App.), *petition for review denied*, 494 So.2d 1150 (Fla. 1986).

ously intended,⁶² and not procured through coercion,⁶³ American law does not regard the victim's consent as a defense to a charge of criminal homicide.⁶⁴ In theory, consent can be a defense only in those narrow circumstances where its existence "precludes the infliction of the harm or evil sought to be prevented by the law defining the offense."⁶⁵ In the case of a potentially criminal act involving serious bodily injury, therefore, the victim's consent is no defense.⁶⁶

62. "It is ridiculous and dangerous to suggest, as appellant does, that a constructive [living] will was left when Emily . . . said . . . 'I'm so sick I want to die.' Such a holding would judicially sanction open season on people who, although sick, are also chronic complainers." *Id.*

63. Even where evidence exists that the "victim" consented to the mercy killing, we may legitimately fear that if the patient was financially or physically dependent on his family, he may have been swayed against his instincts to consider euthanasia.

Is there not an important distinction between request and consent in the first place? Might there be a danger of slipping from request to resigned acquiescence? Might there be a risk of someone's asking to die out of a concern for the burden he places on his family?

Bok, *supra* note 38, at 275.

Recall the passage from the *Utopia*, where Sir Thomas described how the priests and public officials exhort the suffering terminal patient to take his own life. See MORE, *supra* note 32. Sir Thomas is careful to state in the same passage that the priests and officials "never force this step on a man against his will; nor, if he decides against it, do they lessen their care of him." *Id.* at 65.

64. See, e.g., *State v. Fuller*, 278 N.W.2d 756, 762 (Neb. 1979) ("[C]ompulsion is no excuse to a charge of murder.").

65. MODEL PENAL CODE § 2.11(1) (1985).

66. *Harley v. United States*, 373 A.2d 898, 901 (D.C. 1977) (assault and sodomy); *People v. Samuels*, 58 Cal. Rptr. 439, 447 (Cal. Ct. App. 1967) (aggravated battery), *cert. denied*, 390 U.S. 1024 (1968); *Broomall v. State*, 391 S.E.2d 918, 921 n.4 (Ga. 1990) (contract killing); *State v. Moore*, 25 Iowa 128, 136 (1868) (homicide); *State v. Cobb*, 625 P.2d 1133, 1135-36 (Kan. 1981) (homicide); *State v. McFarland*, 369 A.2d 227, 228 (Me. 1977) (fellatio); *State v. Langelier*, 8 A.2d 897, 898 (Me. 1939) (sodomy); *State v. Fuller*, 278 N.W.2d 756, 761 (Neb. 1979) (homicide); *People v. Cruciana*, 327 N.E.2d 803, 804 (N.Y. 1975) (homicide); *Martin v. Commonwealth*, 37 S.E.2d 43, 47 (Va. 1946) (homicide); see *Turner v. State*, 108 S.W. 1139, 1141 (Tenn. 1908) (homicide); *State v. Mays*, 307 S.E.2d 655, 658-59 (W. Va. 1983) (murder).

In the case of some crimes—rape and false imprisonment, for instance—lack of consent is an element of the offense, so proof of consent would serve as a defense by negating a necessary element. See, e.g., MODEL PENAL CODE § 2.11(1) (1985). In the case of criminal assault or battery, consent is a defense where only ordinary physical contact or blows incident to sports are involved, LAFAYE & SCOTT, *supra* note 19, at § 7.15(e); but consent is not a defense if the application of force is so excessive as to amount to a breach of the peace or to be likely to produce great bodily harm. *People v. Lucky*, 753 P.2d 1052, 1072 (Cal. 1988) (jailhouse scuffle), *cert. denied*, 488 U.S. 1034 (1989); *People v. Samuels*, 58 Cal. Rptr. 439, 447 (Cal. Ct. App. 1967) (volunteer is bound and whipped as part of filmed scene of sado-masochism); *Jaske v. State*, 539 N.E.2d 14, 17-18 (Ind. 1989) (prison "initiation" ceremony); *Commonwealth v. Collberg*, 119 Mass. 350, 353 (1876) (voluntary fist fight); *People v. Lenti*, 253 N.Y.S.2d 9, 15 (Nassau County Ct. 1964) (beatings administered as part of student hazing).

The victim's consent, though not a defense, may be relevant in determining the accused's state of mind. See, e.g., *People v. Matlock*, 336 P.2d 505, 508-10 (Cal. 1959).

The reasons traditionally offered for this rule have never been altogether convincing; they tend to be either circular ("Consent is a defense to theft because it is the objective of the law in that instance to control those who engage in nonconsensual interferences with the property rights of others."⁶⁷) or conclusory ("[T]he public has an interest in the personal safety of its citizens and is injured where the safety of any individual is threatened, whether by himself or another."⁶⁸). So we must look to some less frequently articulated rationales.

The first of these is derived from Biblical law:

The Decalogue states categorically, "Thou shalt not murder. . . ." It draws no distinction between murder by a family member and murder by a stranger. It draws no distinction between murder out of a misguided notion of compassion and murder for hire.⁶⁹

Judge Glickstein, from whose opinion in Roswell Gilbert's case this passage is taken, mistranslated the Hebrew word רצח as "murder," perhaps to support his unwarranted assumption that the Sixth Commandment should be interpreted like a twentieth century criminal statute. In fact, the traditional translation, "kill," is more accurate.⁷⁰ Consequently, if the prohibition were as categorical as Judge Glickstein suggested, the Decalogue would seem to prohibit killing by soldiers during wartime and, arguably, even the killing of animals. But of course, the prohibition is not so categorical as Judge Glickstein would have us believe. For example, the Sixth Commandment does not prohibit wartime killing. The word רצח means killing someone within the covenant community, and a declaration of war was thought to sever the covenant relationship.⁷¹ Although killing within the community is proscribed by the literal wording of the Sixth Commandment, other passages in the Torah authorize intra-covenant killings in certain circumstances.⁷² Nor does the Sixth Commandment's prohibition extend to the wrongful killing of an animal; that would be a tort for which damages are prescribed.⁷³

67. MODEL PENAL CODE § 2.11 commentary at 395 (1985).

68. J.H. Beale, Jr., *Consent in the Criminal Law*, 8 HARV. L. REV. 317, 325 (1894).

69. *Gilbert v. State*, 487 So. 2d 1185, 1192-93 (Fla. Dist. Ct. App.), *petition for review denied*, 494 So. 2d 1150 (Fla. 1986).

70. E.g., ANTHONY PHILLIPS, *ANCIENT ISRAEL'S CRIMINAL LAW* 83 (1970). Glanville Williams asserted that the proper rendering of the word is "murder" rather than "kill." GLANVILLE WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 314 (1957). He seems to base his assertion not on linguistics but on the context of the commandment and the kinds of homicide it was thought by contemporaries to prohibit. See *id.*

71. PHILLIPS, *supra* note 70, at 83.

72. See e.g., *Numbers* 25:1-14.

73. See, e.g., *Exodus* 21:33-37.

But however one may quibble about the meaning of נָצַח, there is no doubt that the Bible's prohibition of killing is a fundamental one, as it appears even before the Decalogue: "Whoever sheds the blood of man, by man shall his blood be shed."⁷⁴ This passage from Genesis, authorizing capital punishment for homicide, is perhaps a more likely source of our law's unwillingness to consider the victim's consent. Under the Biblical system of analysis, all life was the gift of God and accordingly belonged to God.⁷⁵ This divinely derived life force was held to reside in the blood. When a person slew another, he was understood thereby to have acquired control over the victim's blood: blood that rightly belonged to God.⁷⁶

The only way that this life force could be returned to God, the origin of all life, was to execute the slayer himself. . . . [C]apital execution for homicide served to expiate the desecration of the natural order. The desecration . . . inhered in causing death, regardless whether the actor was fairly to blame for the killing; the expiation for the desecration worked by terminating the violation of the sacred order—namely, the slayer's control over the victim's blood.⁷⁷

Indeed, even an animal had to be executed if it killed a human being,⁷⁸ and in cases of homicide where the culprit could not be identified or found, a heifer was sacrificed to expiate the blood crime.⁷⁹ Under this Biblical view of homicide, the victim's consent would be irrelevant, since, in a sense, it is God who is the victim, deprived of the blood that is rightfully God's. And the American law's refusal to regard consent as a defense in homicide cases suggests that this "religious conception of human life still prevails against the modern view that life is an interest that the bearer can dispose of at will."⁸⁰

Pointing to Biblical authority as the source of one's aversion to certain conduct smacks of caprice⁸¹ and even hypocrisy, for the Bi-

74. *Genesis* 9:6. Moreover, the Bible particularly condemns the shedding of "innocent" blood. See, e.g., *Exodus* 23:7; *Proverbs* 6:16-17.

75. See, e.g., *Jeremiah* 38:16.

76. PHILLIPS, *supra* note 70, at 93-94.

77. FLETCHER, *supra* note 56, at 236. In taxing Cain with the murder of Abel, God said, "The voice of thy brother's blood crieth unto Me from the ground." *Genesis* 4:10.

78. See *Genesis* 9:5; *Exodus* 21:28.

79. See *Deuteronomy* 21:1-9. The essentiality of blood to purge society of the desecration caused by a homicide is a common Biblical theme. "[B]lood pollutes the land, and no expiation can be made for the land, for the blood that is shed in it, except by the blood of him who shed it." *Numbers* 35:33. "[U]nder the law almost everything is purified with blood, and without the shedding of blood there is no forgiveness of sins." *Hebrews* 9:22.

80. FLETCHER, *supra* note 56, at 236.

81. One commentator has had recourse to Greek mythology to support his opposition to homicide by consent. Professor Laurence Goldstein of the University of

ble condemns as capital crimes many acts that today's criminal law disregards altogether: filial cursing, for instance.⁸² How can one respond to such selective fundamentalism except with the suspicion that something is at work besides religious observance? And even the selective fundamentalist must admit that the Bible's view of homicide by request is hardly consistent. On the one hand, we have the example of Abimelech, who, when his head was crushed by a stone dropped on him by a woman, asked his armor-bearer to kill him, lest it be said of Abimelech that he was killed by a woman.⁸³ The armor-bearer complied with this request, and no suggestion was made that the armor-bearer was culpable.⁸⁴ On the other hand, we are told that when David learned that an Amalekite had slain Saul at Saul's request, David had the Amalekite killed.⁸⁵

If recourse to religion does not provide a satisfactory explanation for the rejection of consent as a defense in homicide cases, one might consider the psychological argument: that decriminalizing homicide on request would lead to a brutalization of society. One

Michigan argued that the tale of Asklepios (more usually known by his Roman name, Aesculapius) should serve as a warning against active euthanasia. Asklepios, a son of Apollo, was taught the arts of healing by the centaur Chiron. So apt a student was Asklepios that he was able to restore the life of Hippolytus after the latter was killed by a monster bull summoned by Poseidon. Zeus thereupon slew Asklepios with a thunderbolt. Professor Goldstein argued that Asklepios was slain for his presumption in restoring the life of a dead man, from which we should learn that death is God's province, not man's, and that we should not assist suicide or otherwise hasten death. Laurence Goldstein, *Commentary: 'Thanks for Life, Mere Life,'* L.A. TIMES, Sept. 1, 1990, at B7. A very different lesson, however, may be derived from this myth. Zeus may have slain Asklepios because the god was afraid that Apollo's son would give man immortality. (Remember how Zeus punished Prometheus for giving man fire.) It is unlikely that Zeus would have been offended by assisting suicide or hastening death; he seems to have been more fearful of human longevity.

82. It is a capital offense for a child to curse a parent. See, e.g., *Exodus* 21:17; *Leviticus* 20:9; *Matthew* 15:4; *Mark* 7:10. By way of comparison, Louisiana law provides that a child may be deprived of his legitime (the child's statutory "forced share" in his deceased parent's estate):

1. If the child has raised his or her hand to strike the parent, . . . [or]

12. If the child has . . . failed without just cause to communicate with the parent for a period of two years after attaining the age of majority . . .

LA. CIV. CODE ANN. art. 1621 (West Supp. 1992).

83. *Judges* 9:53-54.

84. The Bible even records an instance where a refusal to "wound on request" was itself punished with death. A prophet requested a man to wound him, presumably to perfect the prophet's disguise (the prophet was about to denounce Ahab for disobeying God's command that Ahab slay the king of the Syrians). The man refused to wound the prophet and was slain by a lion as God's punishment for disobedience (and perhaps to serve as a lesson for Ahab, who was guilty of an analogous disobedience). *1 Kings* 20:35-36.

85. *2 Samuel* 1:2-16. Curiously, First Samuel tells us that Saul killed himself. *1 Samuel* 31:4.

encounters this argument in many contexts. Blood sports, for instance, such as cockfighting and bearbaiting, are prohibited not because they are cruel to the animals involved—indeed, gamecocks “need no encouragement to fight”⁸⁶—but rather because they are thought to debase and brutalize the people who watch them.⁸⁷ This kind of argument is troubling, notwithstanding its familiarity. Because the purpose of the criminal law is “not to punish sins but is to prevent certain external results,”⁸⁸ the decision to criminalize bearbaiting must therefore reflect a conviction that a person who passively watches a bearbaiting performance will be inexorably drawn to perform acts of battery or mayhem himself. Similarly, the criminalization of homicide by request reflects a conviction that if people become inured to the prospect of pulling a trigger instead of merely a plug, they will come to value human life less highly and, as a result, be more likely to tolerate and even commit nonconsensual acts of violence.⁸⁹

This argument—that we must prohibit an act not because it is inherently wrong but because the unpunished performance of that act will lead inevitably to the widespread performance of acts that *are* inherently wrong—is fundamentally a “slippery slope” argument, an argument we must reject because it despairs of our capacity to make moral distinctions.⁹⁰ Curiously, this “slippery slope” argument is not invoked against soldiers who kill in wartime or executioners who kill in the course of their official duties, even though such persons are far more likely to be brutalized by their acts of licensed homicide than a husband who in an isolated instance kills his suffering wife at her request.

Perhaps the best rationale for refusing to decriminalize homicide by consent is our doubt that such consent is seriously intended.⁹¹ It is perhaps a commonplace of modern popular psychology that a sui-

86. *Mikell v. Henderson*, 63 So. 2d 508, 509 (Fla. 1953).

87. IRVING KRISTOL, *ON THE DEMOCRATIC IDEA IN AMERICA* 33 (1972). Indeed, the Supreme Court of New Mexico held that the state's Cruelty to Animals statute did not prohibit cockfighting. *State v. Buford*, 331 P.2d 1110, 1115 (N.M. 1958).

88. *Commonwealth v. Kennedy*, 48 N.E. 770, 770 (Mass. 1897); *see supra* text accompanying notes 55-58.

89. *See, e.g.*, Smith, *supra* note 42, at 38-39.

90. We do not always possess clear natural lines. . . . Such a realization is sometimes thought to imply that all distinctions are useless, so long as they are not mirrored in nature. But it is crucial to see that, even though a line is not drawn in nature, it may well be needed in practice. . . . All social policy requires the drawing of lines. . . . Prohibitions have to be established and distinctions made even where human affairs are uncertain and hard to classify.

Bok, *supra* note 38, at 277.

91. *See supra* note 62.

cide attempt may be more a cry for help than an earnest endeavor,⁹² or may be the product of despair so acute as to dislodge the attempter's normal faculties.⁹³ In other cases, the factors leading to a suicide attempt may be transitory, so that the wish to die dissipates with the passage of time after the attempt.⁹⁴ A well-meaning friend or physician, by taking a person at his word who expresses a wish to die, may kill someone who did not really wish to die⁹⁵ or would have changed his mind if given the opportunity.⁹⁶

92. Robert Rubenstein et al., *On Attempted Suicide*, 79 A.M.A. ARCHIVES NEUROLOGY & PSYCHIATRY 103, 109 (1958). One commentator has gone so far as to assert that "no human being, no matter how determined he or she may seem to be to put an end to life, does not somewhere cherish the hope of being saved." Erwin Ringel, *Suicide Prevention and the Value of Human Life*, in *SUICIDE: THE PHILOSOPHICAL ISSUES* 205, 206 (M. Pabst Battin & David J. Mayo eds., 1980).

93. In *Reinking v. Philadelphia Am. Life Ins. Co.*, 910 F.2d 1210, 1212 (4th Cir. 1990), a medical plan was ordered to pay for injuries resulting from a suicide attempt, even though the plan contained an exclusion for "intentionally self-inflicted wounds." The court held that the participant was in such a state of depression that she was unable to form the requisite "intent" with respect to her self-inflicted wounds. *Id.* at 1217.

94. Thomas J. Marzen et al., *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1, 108-11 (1985).

95. Society must also be alert to the possibility that what passes for mercy killing may be simply an unreflecting exercise of dominion over the powerless. The suicides whom Dr. Kevorkian aided (see *infra* text accompanying notes 146-55) were all women. The vegetative patients in the two best known "right-to-die" cases—Karen Ann Quinlan (see *infra* note 183) and Nancy Cruzan (see *infra* text accompanying notes 185-87)—were women.

96. George Bernard Shaw put a comic spin on this notion that suicidal displays may be more affective than instrumental. In the first act of *The Millionairess*, the incalculably wealthy Epifania Fitzfassenden (née Ognisanti di Parerga) sweeps into a solicitor's office announcing her intention to write a will and then commit suicide. After she has detailed her husband's iniquities for some minutes, Sagamore, the solicitor, begins to write something on a slip of paper.

EPIFANIA. You are hardly tactful, Julius Sagamore.

SAGAMORE. That will not matter when you have taken this [*he hands her what he has written*].

EPIFANIA. Whats this?

SAGAMORE. For the suicide. You will have to sign the chemist's book for the cyanide. Say it is for a wasp's nest. The tartaric acid is harmless: the chemist will think you want it to make lemonade. Put the two separately in just enough water to dissolve them. When you mix the two solutions the tartaric and potash will combine and make tartrate of potash. This, being insoluble, will be precipitated to the bottom of the glass; and the supernatant fluid will be pure hydrocyanic acid, one sip of which will kill you like a thunderbolt.

EPIFANIA. [*fingering the prescription rather disconcertedly*] You seem to take my death very coolly, Mr Sagamore.

SAGAMORE. I am used to it.

EPIFANIA. Do you mean to tell me that you have so many clients driven to despair that you keep a prescription for them?

SAGAMORE. I do. It's infallible.

c. The European Response

In some European jurisdictions, the victim's consent, though not an absolute defense,⁹⁷ serves to mitigate the offense of homicide considerably. German law,⁹⁸ for example, recognizes a lesser degree of homicide known as "Tötung auf Verlangen": killing by request.⁹⁹ If a homicide is committed in response to an explicit, earnest request by the victim, and if this request provides a motive for the killing, then German law provides a lighter penalty than that prescribed for ordinary murder.¹⁰⁰ Furthermore, although the German Penal Code requires the request to be "explicit,"¹⁰¹ this requirement may be met by means other than words; it may also be satisfied by the victim's unambiguous conduct, gestures, or bearing.¹⁰²

EPIFANIA. You are sure that they have all died painlessly and instantaneously?

SAGAMORE. No. They are all alive.

EPIFANIA. Alive! The prescription is a harmless fraud!

SAGAMORE. No. It's a deadly poison. But they don't take it.

GEORGE BERNARD SHAW, *THE MILLIONAIRESS* act 1.

97. In at least one South American jurisdiction, the victim's consent *does* seem to be an absolute defense in cases of "homicidio piadoso" (merciful homicide). PENAL CODE art. 37 (Uru.).

98. German law may strike some readers as a tainted source of enlightenment on the euthanasia question, given the horrors of the Nazi era. Helen Silving recognized this problem and addressed it as follows:

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

Silving, *supra* note 15, at 361 n.39.

99. StGB § 216 (F.R.G.); *see also* PENAL CODE § 239 (Den.) ("explicit request"); C.P. art. 579 (Italy) ("with [the victim's] own consent"); PENAL CODE § 235 (Nor.) ("someone who has consented"); StGB art. 114 (Switz.) ("earnest and urgent request").

100. For ordinary murder, the penalty is life imprisonment. StGB § 211 (F.R.G.). For killing by request, the penalty is imprisonment for at least six months but no longer than five years. *Id.* § 216. This sentence is the same as that meted out to one who, having been provoked into a fit of anger by a battery or serious insult committed by the deceased, kills in the heat of passion. *Id.* § 213.

101. The German Code uses the phrase "ausdrücklich und ernstliche Verlangen": explicitly and earnestly demand. *Id.* § 216.

102. "Dies braucht nicht notwendig in Worten zu erfolgen, sondern kann auch durch unzweideutige Gebärden geschehen." *Id.* § 216 note II.2 (17th ed. Beck of Munich 1974) (F.R.G.).

d. *The American Jury's Response*

American juries and prosecutors, unlike many of their European counterparts, may not officially consider the accused's motive or avail themselves of the lesser charge or verdict of "killing on request." Yet Americans, no less than Europeans, feel instinctively that "the ethical quality of one's act should be the measure of criminal liability."¹⁰³ Accordingly, in mercy killing cases where the Letter of the Law will not yield to popular instincts of ethical rightness, American juries sometimes sidestep the law to achieve a result they consider sound. A grand jury may refuse to indict.¹⁰⁴ A petit jury may choose to convict the defendant of a lesser offense than that contemplated by the criminal code;¹⁰⁵ or it may acquit him on the ground of temporary insanity¹⁰⁶ or because it finds proof of causa-

103. Hitchler, *supra* note 52, at 110.

104. See, e.g., the case of Rudy Linares, *supra* text accompanying notes 1-4. Or the case of Timothy E. Quill, *supra* note 14. Or the case of Harry C. Johnson, accused of having asphyxiated his cancer-stricken wife by filling her bedroom with illuminating gas using a garden hose thrust under the door. L.I. Mineola, *Nassau Man Freed in Mercy Killing*, N.Y. TIMES, Oct. 19, 1938, at 46.

105. Louis Repouille, an elevator operator who had exhausted his earnings trying to cure his blind, "incurably imbecile" 13-year old son, was indicted for manslaughter in the first degree in connection with his chloroforming of his son. *Despairing Father Kills Imbecile Boy*, N.Y. TIMES, Oct. 13, 1939, at 25. But "the jury brought in a verdict of manslaughter in the second degree with a recommendation of the 'utmost clemency'; the judge sentenced the defendant to not less than five nor more than ten years, execution to be stayed, and placed him on probation." Silving, *supra* note 15, at 353. Nonetheless, Repouille's act of mercy killing cost him his naturalization. See *supra* note 15.

106. See, e.g., the case of Carol Paight, a college student in Connecticut, who was indicted for second degree murder, carrying a life sentence, in connection with the fatal shooting of her hospitalized, cancer-stricken father. She was acquitted by the jury on the ground of temporary insanity. Harold Faber, *Carol Paight Acquitted as Insane at Time She Killed Ailing Father*, N.Y. TIMES, Feb. 8, 1950, at 1. Eugene Braunsdorf of Michigan, having fatally shot his crippled 29-year old daughter, who had required hospitalization all her life, was likewise acquitted on the ground of temporary insanity. *Mercy Killer Freed as Insane at Time*, N.Y. TIMES, May 23, 1950, at 25.

tion to be insufficient.¹⁰⁷ As we have seen,¹⁰⁸ however, a mercy killer can hardly count on such sentimental acquittals.¹⁰⁹

III. THE STATUS OF ASSISTING SUICIDE UNDER AMERICAN CRIMINAL LAW

Law, including the criminal law, must in a free society be judged ultimately on the basis of its success in promoting human autonomy and the capacity for individual human growth and development. The prevention of crime is an essential aspect of the environmental protection required if autonomy is to flourish. It is, however, a negative aspect and one which, pursued with single-minded zeal, may end up creating an environment in which all are safe but none is free.

HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 65 (1968).

The Anglo-American tradition views suicide with horror. At common law, a suicide was considered a felon and buried in the common highway with a wooden stake driven through his body to

107. The cancer-ridden wife of Bertram R. Harper swallowed sleeping pills in an attempt to commit suicide. After she fell asleep, he slipped a plastic bag over her head to assure her success. The coroner ruled that she died of asphyxiation, not from the sleeping pills, thus making it a case of mercy killing, rather than assisted suicide. Eric Harrison, *Man Helps Wife in Suicide, Now Faces Murder Charge*, L.A. TIMES, Sept. 8, 1990, at A24. Notwithstanding the coroner's ruling, the jury acquitted Harper, evidently on the ground that the pills, rather than asphyxiation, caused Mrs. Harper's death. Eric Harrison, *Man Acquitted of Abetting Ill Wife's Suicide*, L. A. TIMES, May 11, 1991, at A1, A24. In another case, Herman N. Sander, M.D., noted in the hospital records that he had given his cancer-stricken patient four intravenous injections of air, presumably to euthanize her, and that the patient "expired within ten minutes after this was started." Russell Porter, *Sheriff Testifies Sander Told Him He Took Life 'in a Weak Moment'*, N.Y. TIMES, Feb. 24, 1950, at 1, 15. Yet at the physician's trial, the attending nurse testified that prior to the commencement of the injections, another physician had been unable to feel a pulse or detect a heartbeat in the patient, Russell Porter, *Nurse Says Sander Patient Gasp'd When Doctor Pumped Air Into Veins*, N.Y. TIMES, Feb. 28, 1950, at 1, 4, thus lending support to the defendant's position that the patient was already dead when the air was injected. Russell Porter, *Dr. Sander Denies He Killed Patient, Says Mind Snapped*, N.Y. TIMES, Mar. 7, 1950, at 1. Dr. Sander was acquitted of the charge of murder on the ground that there was insufficient proof that his actions had caused the patient's death. Russell Porter, *Sander Acquitted in an Hour; Crowd Outside Court Cheers*, N.Y. TIMES, March 10, 1950, at 1, 23.

108. See *supra* note 50 and accompanying text.

109. This felicitous phrase, "sentimental acquittal," is Glanville Williams's. WILLIAMS, *supra* note 70, at 328. Other examples of mercy killers sentenced to prison in addition to Roswell Gilbert and John Noxon (whose case is cited in *supra* note 50)) include Margaret Cowan and Richard Holden. *Release Not Rare in 'Mercy' Cases*, N.Y. TIMES, Feb. 8, 1950, at 24.

prevent his wandering soul from poisoning the soil.¹¹⁰ The source of this antipathy is often said to be religious, yet an examination of the Bible yields no basis for theological objection. Biblical legislation makes no mention of suicide; indeed, Biblical Hebrew did not even have a word for it.¹¹¹ The Bible records a number of suicides—Samson,¹¹² Saul,¹¹³ Ahithophel,¹¹⁴ and Zimri,¹¹⁵ for example—but treats their self-destruction quite neutrally, as simply a way of dying like any other. Indeed, the Bible even notes that Ahithophel received proper burial in his father's tomb.¹¹⁶ And Saint Pelagia of Antioch was canonized in the fourth century despite her suicide.¹¹⁷

Saint Augustine's classic fifth century work, *De Civitate Dei* (*The City of God*), is the likely source of the official Christian condemnation of suicide as a mortal sin. Augustine offered two reasons for his con-

110. See *Hales v. Petit*, 75 Eng. Rep. 387, 400 (C.B. 1562); 4 WILLIAM BLACKSTONE, COMMENTARIES *190; see also Joseph Fletcher, *In Defense of Suicide*, in SUICIDE AND EUTHANASIA: THE RIGHTS OF PERSONHOOD 38, 41 (Samuel E. Wallace & Albin Eser eds., 1981). It was also widely believed that a suicide's soul would be denied a resting place and would haunt the living in its aimless wanderings unless fixed to the spot by the wooden stake. See WILLIAMS, *supra* note 70, at 257-59.

When Laertes, in the penultimate scene of *Hamlet*, questions the brevity of Ophelia's burial service, he receives the following reply:

1st Priest: Her obsequies have been as far enlarged
As we have warranty. Her death was doubtful [i.e., possibly suicide];
And, but that great command o'ersways the order,
She should in ground unsanctified have lodged
Till the last trumpet; for charitable prayers,
Shards, flints, and pebbles should be thrown on her:
Yet here she is allow'd her virgin crants,
Her maiden strewments, and the bringing home
Of bell and burial.

Laertes: Must there no more be done?

1st priest: No more be done.

We should profane the service of the dead
To sing a requiem and such rest to her
As to peace-departed souls.

WILLIAM SHAKESPEARE, *HAMLET* act 5, sc.1 (The Riverside Shakespeare ed. 1974). I am grateful to Professor William M. McGovern, Jr., of UCLA School of Law for reminding me of this passage.

111. PHILLIPS, *supra* note 70, at 99.

112. *Judges* 16:30.

113. Although 1 *Samuel* 31:4 tells us that Saul killed himself, 2 *Samuel* 1:2-10 reports that an Amalekite claimed to have slain Saul at the latter's request. See *supra* text accompanying note 84.

114. 2 *Samuel* 17:23.

115. 1 *Kings* 16:18.

116. 2 *Samuel* 17:23. Ahithophel's honorable burial should be contrasted with the medieval practice of dishonoring a suicide's corpse. See *supra* note 110.

117. She had leaped to her death from a housetop to avoid being raped by soldiers. DONALD ATTWATER, *THE PENGUIN DICTIONARY OF SAINTS* 264 (2d ed. 1983).

demnation. First, suicide, the killing of a human being by a human being, is a form of homicide and therefore a violation of the Sixth Commandment.¹¹⁸ This seems a considerable oversimplification, for the church has long recognized that one has certain limited dispositive rights over one's own life that do not extend to another's. It is not sinful, for instance, to sacrifice one's own life for a noble cause,¹¹⁹ yet to "sacrifice" someone else's life for that cause would be the sin of homicide. Augustine's second stated reason for his condemnation is that the suicide, "by despairing of God's mercy in his sorrow that wrought death, . . . [leaves] to himself no place for a healing penitence."¹²⁰ A number of commentators have suggested, however, that the real reason behind Augustine's condemnation was his desire to quell the mass suicides of such sects as the Circumcelliones, who ecstatically threw themselves off cliffs in the belief that they were thereby assuring themselves a place in paradise by dying before worldly temptations had ensnared them into mortal sin.¹²¹

118. "[H]e who kills himself is a homicide." I ST. AUGUSTINE, *THE CITY OF GOD* bk I, ch. 17 (Marcus Dods trans., 1948). Ironically, St. Augustine took pains to condemn the very suicide of which St. Pelagia was guilty, although he wrote the following passage without reference to the fourth century saint: "[A] woman who has been violated by the sin of another, and without any consent of her own, has no cause to put herself to death; much less has she cause to commit suicide in order to avoid such violation, for in that case she commits certain homicide to prevent a crime which is uncertain as yet, and not her own." *Id.* at ch. 18.

Dante likewise characterized suicide as a form of homicide. When conducted by Virgil into the second circle of Hell, Dante's narrator learns the posthumous fate of suicides; they are transformed into gnarled bushes whose branches are torn away by Harpies, each tear inflicting agony upon the still-sensible soul within the branch. One of the souls whom the narrator addresses had been an honest imperial counselor whose only recorded sin was that he killed himself when unjustly accused of and imprisoned for intriguing against the Emperor Frederick II. The soul declares:

L'animo mio, per disdegnoso gusto,
credendo col morir fuggir disdegno,
ingiusto fece me contra me giusto.

DANTE ALIGHIERI, *INFERNO* XIII, 70-72 (Charles S. Singleton trans., 1970). "My mind, in scornful temper, thinking by dying to escape from scorn, made me unjust against my just self." *Id.* at 133. In his notes to the *Inferno*, Charles Singleton observed that the above-quoted "phrases 'ingiusto me' and 'giusto me' serve to distinguish two persons in the suicide"—perpetrator and victim—so that the act of suicide is no different from the killing of one person by another. 2 *Id.* at 214.

119. *Declaration on Euthanasia, The Sacred Congregation for the Doctrine of Faith* (May 5, 1980, Vatican City), reprinted in PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, *DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT* 300, 302-03 (English trans., 1983).

120. ST. AUGUSTINE, *supra* note 118, at bk I, ch. 17. The quoted passage, though of general applicability, was written with the suicide of Judas Iscariot in mind. Augustine maintained that Judas, by suggesting through his suicide that God's capacity to forgive is less than infinite, "rather aggravated than expiated the guilt of that most iniquitous betrayal. . . ." *Id.*

121. WILLIAMS, *supra* note 70, at 254-55; Marzen, et al., *supra* note 94, at 26.

Whatever Augustine's reasons, stated or unstated, his influence was so powerful that, notwithstanding the Bible's cool neutrality on the subject, by Shakespeare's day it was axiomatic throughout Christendom that "the Everlasting had . . . fix'd / His canon 'gainst self-slaughter."¹²²

Even when a suicidal individual is prompted by a longing for an end to his unbearable pain, modern theologians continue to condemn suicide, referring rather smugly to "the redemptive value of human suffering"¹²³ ordained by the Almighty, "who makes us suffer for our salvation."¹²⁴ Assertions of this kind drew from Glanville Williams the mordant observation that "even the most sadistic god [ought to] be satisfied if he has succeeded in driving a man to suicide."¹²⁵

Secular arguments against suicide have, of course, been advanced—some communitarian,¹²⁶ some psychological.¹²⁷ One

122. SHAKESPEARE, *HAMLET*, *supra* note 110, act 1, scs. 2, 22.

123. Michael Hirsley, *Euthanasia Vote Heartens Bishops*, CHI. TRIB., Nov. 13, 1991, at C18. This phrase was uttered by Thomas Murphy, Archbishop of Seattle, commenting favorably on the defeat of a recent pro-euthanasia referendum in Washington state. *Id.*

124. PAUL-LOUIS LANDSBERG, *THE EXPERIENCE OF DEATH. THE MORAL PROBLEM OF SUICIDE* (C. Rowland trans., 1953), *cited in* WILLIAMS, *supra* note 70, at 268.

125. WILLIAMS, *supra* note 70, at 268.

126. [I]n respect of each of its citizens, the State has made an investment of a substantial amount, and as a mere matter of business it is entitled to demand an adequate return. If a useful citizen, by taking his life, diminishes that return, he does an anti-social act to the detriment of the community as a whole. We cannot carry the doctrine of isolation to the extent of saying that we live unto ourselves. Hence it appears on purely rationalistic grounds that the State is entitled to discountenance suicide.

Earengy, *Voluntary Euthanasia*, 8 MED.-LEGAL REV. 91, 92 (1940), *quoted in* Kamisar, *supra* note 20, at 975 n.24.

Hume responded to this collectivist view by noting that the relation of the individual to the community is one of a continuing mutuality of obligation rather than one of a debtor who must pay for prior benefits conferred. When the suicide withdraws from society, he ceases to receive benefits and therefore ceases to owe any obligation. "A man, who retires from life does no harm to society; he only ceases to do good: which if it is an injury is of the lowest kind." DAVID HUME, *On Suicide* (first essay thereon), in *ESSAYS AND TREATISES* 225 (Boston 1868).

Playwright Jean Giraudoux responded to the collectivist view with a gibe. In the first act of his play *The Madwoman of Chaillot*, when a police sergeant pulls from the river a young man who has tried to drown himself, the eponymous mad countess confronts the officer:

COUNTESS. You're here to convince the young man that life is worth living.

....

SERGEANT. First of all, Mr. Roderick, you have to realize that suicide is a crime against the state. And why is it a crime against the state? Because every time anybody commits suicide, that means one soldier less for the army, one taxpayer less for the . . .

....

scholar—inclined toward the Epicurean view that suicide should be a matter of individual choice, free from institutional interference—has even suggested a cynical, economic reason for the common law's condemnation of suicide.¹²⁸ Although suicide and attempted suicide have been removed from the criminal codes under American law,¹²⁹ this development seems to reflect not an acceptance of the moral neutrality of these acts¹³⁰ but rather an acknowledgement of

COUNTESS. You're not earning your salary, Sergeant. I defy anybody to stop dying on your account.

JEAN GIRAUDOUX, *THE MADWOMAN OF CHAILLOT* act I (Maurice Valency trans., 1949).

This argument—that suicide is wrong because it deprives others of benefits—takes an even more intrusive form in cases and statutes that deprive a pregnant mother or a mother of a minor child of the right to be free from unwanted medical invasion when such invasions would prevent or postpone her death. See *infra* note 180.

127. "[U]nderlying a suicidal individual's ostensible wish to die is actually a wish to be rescued." Marzen et al., *supra* note 94, at 108 (quoting Viggo W. Jensen & Thomas A. Petty, *The Fantasy of Being Rescued in Suicide*, 27 *PSYCHOANALYTIC Q.* 327, 327 (1958); E. Stengel & Nancy G. Cook, *Recent Research into Suicide and Attempted Suicide*, 1 *J. FORENSIC MED.* 252, 257 (1954).

128. The rule [in Tenth Century England] was that forfeiture of goods [for felony] was to the lord, whereas according to the later rule it was to the king. The object of the king's judges was to enrich their master, and their readiest argument to this purpose was that suicide was a felony. Since every felon forfeited his goods to the king, it had only to be decided that suicide was a felony to divert the forfeiture from the suicide's immediate lord to the royal coffers. This step had been taken at least by Britton's day. It was, of course, facilitated by the ecclesiastical view of suicide as mortal sin.

WILLIAMS, *supra* note 70, at 273. "[T]he law of attempted suicide [in England] is the result not of deliberate penal policy but of a mechanical legal logic working from a premise developed by mediaeval judges for the purposes of enriching the royal treasury." *Id.* at 277.

129. See Marzen et al., *supra* note 94, at 148-242.

It has been held that attempted suicide is not a common law crime under American law. See *May v. Pennell*, 64 A. 885, 887 (Me. 1906); *Commonwealth v. Dennis*, 105 Mass. 162, 162-63 (1870). Cf. *State v. Carney*, 55 A. 44, 45 (N.J. 1903), which held that attempted suicide was an indictable misdemeanor under a statute condemning as a misdemeanor the attempt of a common law felony; the result in *Carney* was changed by statute in 1972. See Marzen et al., *supra* note 94, at 202 n.374. *State v. Willis*, 121 S.E.2d 854, 857 (N.C. 1961) likewise held attempted suicide to be an indictable misdemeanor, and this result, too, was overturned by statute. Act of Apr. 8, 1974, ch. 1205, § 1, 1973 N.C. Sess. Laws 334 (codified as amended at N.C. GEN. STAT. § 14-17.1 (1986)).

England decriminalized suicide and attempted suicide, which had previously been common law crimes, in 1961: SUICIDE ACT, 1961, 9 & 10 Eliz. 2, ch. 60, § 1 (Eng.).

130. "We do not now regard suicide with such severity [as did the English in Blackstone's time] but, nevertheless, self-destruction ordinarily involves moral turpitude and is undoubtedly regarded as being wrong." *Wyckoff v. Mutual Life Ins. Co.*, 147 P.2d 227, 229 (Or. 1944). See also Justice Scalia's concurring opinion in *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841, 2860 (1990) (Scalia, J., concurring).

the futility¹³¹ or cruelty¹³² of punishing them. Suicide and attempted suicide remain *malum in se*.¹³³

This persisting moral condemnation of suicide has led inevitably, if regrettably, to the criminalization of assisting suicide.¹³⁴ After all,

131. Obviously, the law cannot reach the successful perpetrator, and the absurdity of punishing an unsuccessful attempt is illustrated by the following grisly anecdote:

A man was hanged who had cut his throat, but who had been brought back to life. They hanged him for suicide. The doctor warned them that it was impossible to hang him as the throat would burst open and he would breathe through the aperture. They did not listen to his advice and hanged their man. The wound in the neck immediately opened and the man came back to life again although he was hanged. It took time to convoke the aldermen to decide the question of what was to be done. At length the aldermen assembled and bound up the neck below the wound until he died.

Kate E. Bloch, Note, *The Role of Law in Suicide Prevention: Beyond Civil Commitment—A Bystander Duty to Report Suicide Threats*, 39 STAN. L. REV. 929, 931 n.16, (1987) (quoting letter from Nicholas Ogarev to his mistress, which letter is itself quoted in ALFRED ALVAREZ, *THE SAVAGE GOD* 45 (1972)).

The punishment of such unsuccessful attempts does not so much discourage suicide as it encourages suicidal individuals to choose a dependable method.

132. Suicide attempts are more likely to reflect mental disorder than mens rea. Hence, the "intrusion of the criminal law into such tragedies is an abuse. . . . A person who has sought his own self-destruction . . . more properly requires medical or psychiatric attention." MODEL PENAL CODE § 210.5 cmt. 2 (1980). For a discussion of the psychological etiology of suicidal behavior, see Marzen et al., *supra* note 94, at 112-22.

133. See *State v. Willis*, 121 S.E.2d 854, 855 (N.C. 1961) (its specific holding, that attempted suicide was an indictable offense in North Carolina, was overturned by statute: Act of Apr. 8, 1974, ch. 1205, § 1, 1973 N.C. Sess. Laws 334 (codified as amended at N.C. GEN. STAT. § 14-17.1 (1986)); *People v. Chrisholtz*, 285 N.Y.S.2d 231, 235-36 (Sup. Ct. 1967).

134. See, e.g., *State v. Marti*, 290 N.W.2d 570, 581 (Iowa 1980); *People v. Roberts*, 178 N.W. 690, 693 (Mich. 1920).

Paradoxically, a number of the authoritative opponents of suicide have nonetheless condoned euthanasia and assisted suicide; to them, the immorality of suicide consists only in the solitariness—they would say the selfishness—of the act.

The act of the suicide is wrong because he takes his own life solely on his own judgment. It may be that he does so in a mood of despair or remorse and thus evades the responsibility of doing what he can to repair the wrong or improve the situation. He flings away his life when there is still the possibility of service and when there are still duties to be done. The proposals for Voluntary Euthanasia have nothing in common with suicide. They take the decision out of the hands of the individual. The case is submitted to the objective judgment of doctors and specially appointed officials whose duty it would be to enquire whether the conditions which constitute the sinfulness of suicide are present. . . .

W.R. Matthews, *Voluntary Euthanasia: The Ethical Aspects* 4-5 (Address by the Very Rev. W.R. Matthews, Dean of St. Paul's, Voluntary Euthanasia Legislation Society Annual Meeting, May 2, 1950), quoted in Kamisar, *supra* note 20, at 975 n.24.

In the *Utopia*, after describing the ceremony wherein priests and public officials urge an incurably ill person to kill himself, with or without assistance, More goes on to say: "But the suicide, who takes his own life without the approval of priests and senate, they

runs the conventional argument, if *A* helps *B* commit suicide, *A* has assisted *B* in committing a wrongful homicide and must therefore be punished;¹³⁵ *B* escapes legal punishment not because he is less blameworthy but because the act has put him beyond the reach of the state's authority.

The [person who abets a suicide] is held to answer for his conduct because it constitutes murder or manslaughter, not because it coincidentally helped someone to die who wanted to die anyway. Our law makes no distinctions as to the identity of the victim in determining culpability for homicide. The only reason we view suicide [as] noncriminal is that we consider inappropriate punishing the suicide victim or attempted suicide victim, not that we are concerned about that person's life any less than others' lives.¹³⁶

The term "assisted suicide" does not refer to cases in which the defendant is the agent of the decedent's destruction: i.e., actually pulls the trigger or injects the poison. Such cases are cases of "killing by request," which were considered earlier.¹³⁷ Nor does the term comprehend cases where the defendant coerced or induced a person to commit suicide. Those cases likewise fit under the rubric of murder.¹³⁸ Rather, when we speak of assisted suicide, we are

consider unworthy either of earth or fire, and throw his body, unburied and disgraced, into the nearest bog." MORE, *supra* note 32, at 65.

The continued moral condemnation of suicide underlies another kind of criminal liability. If *A*, in attempting to prevent *B* from shooting himself, is accidentally killed in the struggle for the gun, *B* is guilty of unlawful-act murder. See *Commonwealth v. Mink*, 123 Mass. 422, 424-25 (1877) (defendant's manslaughter conviction affirmed; court suggests that murder might have been more appropriate); *People v. Chrisholtz*, 85 N.Y.S.2d 231, 234-36 (Sup. Ct. 1967); accord *State v. Leveille*, 13 S.E. 319, 321 (S.C. 1891) (murder). *Contra State v. Campbell*, 251 N.W. 717, 719 (Iowa 1933) (since attempted suicide is not a crime, the killing of the defendant's would-be rescuer cannot be unlawful-act murder, at least in the absence of recklessness on the part of the attempter).

135. Indeed, some statutes criminalizing the assistance of suicide use the somewhat sensational term "self-murder" in place of suicide. See, e.g., FLA. STAT. ANN. § 782.08 (1992); MO. REV. STAT. § 565.023 (2) (Supp. 1992).

136. *State v. Marti*, 290 N.W.2d 570, 581 (Iowa 1980).

137. See *supra* text accompanying notes 62-65.

138. Few cases exist to serve as examples. One is *State v. Lassiter*, 484 A.2d 13, 18 (N.J. Super. Ct. App. Div. 1984), where a jury found that the victim had jumped from a window to avoid a brutal beating at the hands of the defendant, who had previously beaten her so savagely as to require her hospitalization. A neighbor had overheard the decedent threaten to jump, during their fight, and a man's reply, "go ahead and jump." *Id.* at 16. The verdict of murder was upheld on appeal. *Id.* at 19. The defendant had sought a jury instruction bringing his acts within the New Jersey statute dealing with the less serious crime of aiding suicide, N.J. STAT. ANN. § 2C:11-6 (1990), but the appellate court upheld the trial judge's refusal to give the instruction.

The offense of "aiding suicide" . . . presupposes that the suicidal plan originated with the victim and requires that the act of suicide or the attempt thereat was volitional on her part. As the evidence conclusively

concerned with cases where the suicidal impulse originated with the decedent and where the decedent was the agent of his own destruction. Even here, one can imagine a wide range of actions that might come within the described conduct, from the merely helpful (making available to the suicide a convenient place in which to commit the act) to the indispensable (furnishing the decedent with the means of self-destruction).¹³⁹

Perhaps the best-known court case involving assisted suicide is *People v. Roberts*,¹⁴⁰ where a husband, at the request of his physically helpless wife, who was hospitalized for multiple sclerosis, mixed some poison¹⁴¹ in a cup and placed it next to her bed for her to drink. She drank the poison and died. Although (1) the husband acted at the wife's request; (2) it was the wife and not the husband who raised the poison to her lips; and (3) the wife had tried unsuccessfully to poison herself about a year before her death, the husband was convicted of murder in the first degree.¹⁴² The court treated the case as arising under a statute¹⁴³ denominating "murder by means of poison" as a homicide of the most serious degree.¹⁴⁴

demonstrates, [the decedent's] behavior was provoked entirely by abuse and coercion on the part of defendant and was unrelated to any suicidal purpose.

Lassiter, 484 A.2d at 19.

The statutes of many states characterize as a serious form of criminal homicide the forcible inducement to suicide. See, e.g., IND. CODE ANN. § 35-42-1-2 (Burns 1971); ME. REV. STAT. ANN. tit. 17-A, § 201 (West 1964); 18 PA. CONS. STAT. ANN. § 2505(a) (1989).

The Model Penal Code likewise regards coercion or inducement of suicide as criminal homicide. MODEL PENAL CODE § 210.5 (1980). Clearly, causation will be an important issue in any case involving alleged criminal coercion of suicide. See generally LAFAYE & SCOTT, *supra* note 19, § 3.12, at 277-301; see generally Gregory G. Sarno, Annotation, *Liability of One Causing Physical Injuries as a Result of Which Injured Party Attempts or Commits Suicide*, 77 A.L.R.3d 311 (1977).

The issue of coerced suicide is addressed in § 2(b)(ii) of my model statute, *infra*.

139. One commentator would label the merely helpful kind of assistance "facilitation of suicide" and the indispensable kind of assistance "aiding suicide." Shaffer, *supra* note 22, at 351 nn.29-30.

140. 178 N.W. 690 (Mich. 1920).

141. Roberts used an arsenic compound popularly known as paris green, an insecticide with the distinction of being singled out in the first federal statute regulating pesticides. The Insecticide Act, Pub. L. No. 61-152, § 7, 36 Stat. 331, 332 (1910). This statute was not a safety measure designed to restrict paris green's use but rather a consumer protection measure to prevent the sale of adulterated or mislabeled pesticides. See COMMITTEE ON PROTOTYPE EXPLICIT ANALYSES FOR PESTICIDES OF THE COMMISSION ON NATURAL RESOURCES OF THE NATIONAL RESEARCH COUNCIL, REGULATING PESTICIDES 20 (Committee Print 1980).

142. 178 N.W. at 690.

143. MICH. COMP. LAWS ANN. § 750.316 (West 1948).

144. A later Michigan case held that *Roberts* no longer represented the law in Michigan, *People v. Campbell*, 35 N.W.2d 27, 29 (Mich. Ct. App. 1983), *appeal denied*, 342 N.W.2d 519 (Mich. 1984), a curious holding to emerge from a lower court than the

The practice of assisted suicide made 1990 headlines¹⁴⁵ when Dr. Jack Kevorkian, a retired¹⁴⁶ Michigan pathologist, used a "suicide device" of his own invention to enable Janet Adkins, a fifty-four year old woman afflicted with Alzheimer's disease, to kill herself. The device was designed to instill a series of chemicals intravenously into the user's vein: first thiopental, to produce unconsciousness; then potassium chloride, to stop the heartbeat. At Adkins's request, Kevorkian attached the device's intravenous tube to her arm and showed her how to start the flow of chemicals by pushing a button. She pushed it, and five minutes later she was dead; her last words were "Thank you."¹⁴⁷ First-degree murder charges brought against Kevorkian were dismissed by a judge,¹⁴⁸ but the disappointed prosecutor thereupon sought and was granted a permanent injunction barring Kevorkian from assisting in further suicides.¹⁴⁹

Notwithstanding the injunction, Dr. Kevorkian assisted in the suicides of two more women in October, 1991, in a secluded cabin some forty miles north of Detroit.¹⁵⁰ One of the women, forty-three

one that decided *Roberts*. This point was not lost on Mr. Justice Boyle, who dissented from the Michigan Supreme Court's denial of the appeal in *Campbell*: "If *People v. Roberts* . . . is no longer the law in this jurisdiction, this Court should say so." *Campbell*, 342 N.W.2d at 519 (Boyle, J., dissenting).

It was evidently the *Campbell* case that led Bertram Harper and his wife, *see supra* note 107, to regard Michigan as a hospitable venue for assisted suicide, so they flew to Michigan from their California home to carry out their plan. The Wayne County Prosecutor brought murder charges against Mr. Harper as a warning to others that Michigan "is no mecca for mercy killing." Eric Harrison, *Man Helps Wife in Suicide, Now Faces Murder Charge*, L.A. TIMES, Sept. 8, 1990, at A1, A24. Harper was acquitted. (The prosecutor's comment was no doubt made with reference with the case of Jack Kevorkian in mind.) *See infra* text accompanying notes 146-49.

145. The practice also made 1991 headlines with the phenomenal success of a how-to suicide manual, *Final Exit*, by Derek Humphry, published by the Hemlock Society. *See* George Papajohn, *Suicide Book Stirring Controversy and Sales*, CHI. TRIB., Aug. 14, 1991, at C6. The book is dedicated to the memories of Emily Gilbert (*see supra* text accompanying note 5), Janet Adkins (*see infra* notes 147-49 and accompanying text), and Virginia Harper (*see supra* note 107). Papajohn, *supra*, at C6. Mr. Humphry generally avoids the word "suicide," preferring instead the term "self-deliverance." *See id.*

146. The caption in a photograph in the *Chicago Tribune* described Kevorkian as "retired." CHI. TRIB., June 6, 1990, at C1. He was described as "unemployed" in Cynthia Gorney, *Dr. Death's Life Obsession: Suicide Machine Inventor Jack Kevorkian, Pushing the Limits of Compassion*, WASH. POST, Dec. 20, 1990, at D1.

147. This statement of facts comes from a newspaper article by Sharman Stein, *Physician Aids in Suicide. Spouse Defends Alzheimer's Victim's Decision*, CHI. TRIB., June 6, 1990, at C1. The report of Adkins's last words is taken from Gorney, *supra* note 146, at D1.

148. 'Suicide Machine' Doctor Case Will be Dropped, L.A. TIMES, Dec. 15, 1990, at A27. They were dismissed on the ground that assisting suicide is not a crime in Michigan. *Id.*

149. Eric Harrison, *Judge Bans Doctor from Using Any Suicide Device*, L.A. TIMES, Feb. 6, 1991, at A17; U.P.I. wire service, Feb. 5, 1991.

150. *Suicide Victims Were Adamant, Lawyers Claim*, L.A. TIMES, Oct. 28, 1991, at A17.

year old Sherry Miller, was afflicted with multiple sclerosis and confined to a wheelchair; the other, fifty-eight year old Marjorie Wantz, suffered from papilloma virus, a painful pelvic disease.¹⁵¹ Although neither condition was life-threatening, both women emphatically and repeatedly requested Dr. Kevorkian's aid in committing suicide to free them from their lives of pain, debility, and dependence.¹⁵² In Ms. Wantz's case, Dr. Kevorkian employed a device similar to that used in the suicide of Janet Adkins. In Ms. Miller's case, because her veins were too fragile to withstand the puncture of the needle, Dr. Kevorkian employed a device that enabled her to inhale lethal concentrations of carbon monoxide gas. In each case, the woman herself set the suicide device in motion: Wantz by tugging on a string, Miller by putting on a mask and pulling a lever.¹⁵³ Dr. Kevorkian was indicted on two counts of first-degree murder in connection with these deaths and one count of trafficking in controlled substances (the drugs that caused Ms. Wantz's death). On February 28, 1992, a Michigan district judge ordered him to stand trial for the murder counts but dismissed the drug trafficking charge.¹⁵⁴ Five months later, the murder charges were dismissed as well.¹⁵⁵

Twenty-seven states have statutes imposing criminal sanctions on those who aid or assist in suicide, even where no force or duress is used.¹⁵⁶ A twenty-eighth state, Indiana, has a statute that applies

151. *Id.*

152. *Id.*

153. *Id.*

154. William Douglas, 'Dr. Death' to Face Murder Charges, N.Y. NEWSDAY, Feb. 29, 1992, at 2. On November 20, 1991, the Michigan Board of Medicine suspended Dr. Kevorkian's license to practice, announcing through its spokesman that the suspension "reflects the policy of the state group and the American Medical Association against euthanasia." *In Wake of 3 Suicides, Dr. Kevorkian Loses Michigan License*, CHI. TRIB., Nov. 21, 1991, at C16.

155. *Kevorkian Cleared of Murder Charge*, CHI. TRIB. July 22, 1992, at C3. While these murder charges were pending, Dr. Kevorkian assisted in a fourth suicide: that of Susan Williams, who was suffering from multiple sclerosis. Ellen Goodman, *Act Now to Stop Dr. Death*, ATLANTA CONST., May 27, 1992, at A11.

156. ALASKA STAT. § 11.41.120(a) (1989); ARIZ. REV. STAT. ANN. § 13-1103 (1989); ARK. CODE ANN. § 5-10-104 (Michie 1987); CAL. PENAL CODE § 401 (West 1991); COLO. REV. STAT. § 18-3-104 (1990); CONN. GEN. STAT. § 53a-56 (1989); DEL. CODE ANN. tit. 11, § 645 (1990); FLA. STAT. ANN. § 782.08 (West 1990); HAW. REV. STAT. § 707-702(1) (1985) (applying to a person who intentionally "causes" another to commit suicide, a term that could conceivably be intended to apply only to one who persuades or coerces another to kill himself; however, the official commentary to the statute cites N.Y. Penal Law § 120.30 as an example of another state's statute dealing with the same offense, and the New York statute plainly applies to those who merely assist another's suicide); KAN. STAT. ANN. § 21-3406 (1989); ME. REV. STAT. ANN. tit. 17-A, § 204 (1989); MINN. STAT. ANN. § 609.215 (West 1946) (severity of the sentence depends on whether the suicide actually occurred); MISS. CODE ANN. § 97-3-49 (1990); MO. REV. STAT. § 565.023(2) (Supp. 1992); MONT. CODE ANN. § 45-5-105 (1990) (by its terms, this statute applies

only in cases of force or duress.¹⁵⁷ And even in jurisdictions without statutory prohibitions, case law may be found criminalizing assistance in suicide.¹⁵⁸

IV. LIVING WILLS AND DURABLE POWERS OF ATTORNEY

Is not short paine well borne, that brings long ease,
And layes the soule to sleepe in quiet grave?
Sleepe after toyle, port after stormie seas,
Ease after warre, death after life does greatly please.

EDMUND SPENSER, *THE FAERIE QUEENE*,
canto 9, stanza 40.

A limited rejection of this criminal characterization of assisting suicide inheres in statutes authorizing living wills and health care powers of attorney. A "living will" is a formally executed declaration of an individual's wishes concerning the withholding or discontinuation, by providers of medical care, of what might be termed "death-delaying" medical procedures.¹⁵⁹ If a patient has executed such a document, his physicians may, in the proper circumstances, discontinue the medical procedures that are keeping him alive, without fear of civil or criminal penalties. One commentator has characterized living wills as countenancing "passive euthanasia,"¹⁶⁰ but the drafters of these statutes would no doubt repudiate such a characterization. Indeed, legislators seeking a name for these statutes have been drawn to such soothing evasions as "Natural Death

only when the suicide does not in fact occur, but the official comments of the state's Criminal Law Commission advise that a more serious form of criminal homicide is involved if the suicide does occur); NEB. REV. STAT. § 28-307 (1989); N.H. REV. STAT. ANN. § 630:4 (1991); N.J. REV. STAT. § 2C:11-6 (1990); N.M. STAT. ANN. § 30-2-4 (Michie 1984); N.Y. PENAL LAW §§ 120.15, 120.30 (McKinney 1990) (treating assisting an unsuccessful attempt as a Class E felony; § 120.15 treats assisting a successful suicide as a more serious Class C felony); OKLA. STAT. tit. 21, § 815 (1990); OR. REV. STAT. § 163.125 (1989); 18 PA. CONS. STAT. § 2505(b) (1989) (severity of crime depends on whether suicide actually occurred); S.D. CODIFIED LAWS ANN. § 22-16-37 (1988); TEX. PENAL CODE ANN. § 22.08 (West 1989) (severity of crime depends on whether suicide actually occurred); WASH. REV. CODE § 9A.36.060 (1961); WIS. STAT. ANN. § 940.12 (West 1982).

157. IND. CODE ANN. § 35-42-1-2 (Burns 1971). Some states that criminalize mere assistance characterize forcible coercion as a more serious offense. *See, e.g.*, 18 PA. CONS. STAT. § 2505 (1989); *see also* CONN. GEN. STAT. § 53(a)-56 (1989); ME. REV. STAT. ANN. tit. 17-A, § 204 (1989).

158. *See, e.g.*, *State v. Marti*, 290 N.W.2d 570 (Iowa 1980); *Persampieri v. Commonwealth*, 175 N.E.2d 387 (Mass. 1961); *People v. Roberts*, 178 N.W. 690 (Mich. 1920), *disregarded in* *People v. Campbell*, 335 N.W.2d 27 (Mich. Ct. App. 1983), *appeal denied*, 342 N.W.2d 519 (Mich. 1984); *State v. Jones*, 67 S.E. 160 (S.C. 1910).

159. *See generally* Condie, *supra* note 23, at 105.

160. Gelfand, *supra* note 43, at 748.

Act”¹⁶¹ or “Medical Treatment Decision Act.”¹⁶² More to the point, all but a few living will statutes expressly disclaim any intention to authorize or even condone euthanasia.¹⁶³ Some living will statutes declare that a death precipitated by compliance with the instructions in a living will shall not be considered suicide for any purposes.¹⁶⁴ Perhaps more important, some statutes declare that health-care providers who withhold life-sustaining care pursuant to a direction in a living will shall not be chargeable with the crime of assisting suicide.¹⁶⁵

Nonetheless, the existence of the living will option is unlikely, for three reasons, to provide relief in the kind of cases that have typically led to euthanasia. First, the provisions of a living will never become operative until the declarant is in a terminal or permanently unconscious condition.¹⁶⁶ For these purposes “terminal condition” is generally defined as “an incurable and irreversible condition which is such that death is imminent”¹⁶⁷ Consequently, a patient suffering from the anguish of Alzheimer’s disease like Emily

161. See Alabama Natural Death Act, ALA. CODE §§ 22-8A-1 to -10 (1981); California Natural Death Act, CAL. HEALTH & SAFETY CODE §§ 7185-94.5 (West Supp. 1992); District of Columbia Natural Death Act, D.C. CODE ANN. §§ 6-2421 to -2430 (1981); Idaho Natural Death Act, IDAHO CODE §§ 39-4501 to -4508 (1985); Kansas Natural Death Act, KAN. STAT. ANN. §§ 65-28,101 to -28,109 (1985); North Carolina Right to Natural Death Act, N.C. GEN. STAT. §§ 90-320 to -323 (1991); Oklahoma Natural Death Act, OKLA. STAT. ANN. tit. 63, §§ 3101-3111 (West 1985), *repealed by* 1992 Ok. HB 1893 (1992); Tennessee Right to Natural Death Act, TENN. CODE ANN. §§ 32-11-101 to -112 (Supp. 1992); Texas Natural Death Act, TEX. HEALTH & SAFETY CODE ANN. §§ 672.001 to .021 (West 1992), *repealed by* Acts 1989, 71st Leg., ch. 678, § 13(1); Virginia Health Care Decisions Act, VA. CODE ANN. §§ 54.1-2981 to -2993 (Michie Supp. 1992); Washington Natural Death Act, WASH. REV. CODE ANN. §§ 70.122.010 to 122.905 (West 1979); West Virginia Natural Death Act, W. VA. CODE §§ 16-30-1 to -13 (Supp. 1992); Wisconsin Natural Death Act, WIS. STAT. ANN. §§ 154.01 to .15 (West 1989).

162. COLO. REV. STAT. §§ 15-18-101 to -113 (1987); HAW. REV. STAT. §§ 327D-1 to -27 (1991).

163. See Condie, *supra* note 23, at 123-29.

164. See, e.g., ALASKA STAT. § 18.12.080(a) (1991); ILL. ANN. STAT. ch. 110 1/2, para. 709, (Smith-Hurd Supp. 1991); N.H. REV. STAT. ANN. § 137-H:10 (I) (1990); OR. REV. STAT. § 127.645(3) (1990); VA. CODE ANN. § 54.1-2991 (Michie 1991). The importance of this disclaimer may be felt more sharply in the insurance law context than in the criminal law context, since many life insurance policies preclude payment in the event of the insured’s suicide.

165. See, e.g., D.C. CODE ANN. § 6-2428(a) (1989); KAN. STAT. ANN. § 65-28,108(a) (1985); UTAH CODE ANN. § 75-2-1116 (Supp. 1992); W. VA. CODE § 16-30-8(a) (1991 & Supp. 1991). Curiously, in three of these jurisdictions that purport to immunize complying physicians from criminal charges of assisting suicide (the District of Columbia, Utah, and West Virginia), assisting suicide is not a crime.

166. See Gelfand, *supra* note 43, at 740 n.8.

167. E.g., ILL. ANN. STAT. ch. 110 1/2, para. 702(h) (Smith-Hurd 1934). OKLA. STAT. ANN. tit. 63, § 3102(8) (1990 Supp.) defines “terminal” as leading to death “within hours or days.” Note that persistently comatose patients are not for that reason “terminal”; indeed, they have been known to live as long as 37 years on artificial feeding

Gilbert¹⁶⁸ or Janet Adkins¹⁶⁹ would find no relief through a living will, since Alzheimer's disease affects its victims' physical well-being only indirectly and cannot be regarded as a terminal condition.¹⁷⁰ Even a person infected with the AIDS virus, in spite of his substantially diminished remaining life expectancy and the future terrors¹⁷¹ he is likely to confront, cannot be described as facing imminent death.¹⁷²

Second, the living will authorizes only the "withholding" or "discontinuation"¹⁷³ of certain medical procedures, such as kidney dialysis, assisted ventilation, blood transfusions, and (in a few jurisdictions) intravenous or nasogastric tube feeding and hydration.¹⁷⁴ Even if terminal, a fully conscious patient, or a semi-con-

and hydration. See *Brophy v. New England Sinai Hosp., Inc.*, 497 N.E.2d 626, 637 (Mass. 1986).

168. See *supra* text accompanying note 5.

169. See *supra* text accompanying notes 146-47.

170. The remaining life expectancy of persons in an advanced stage of Alzheimer's disease "is definitely decreased because of the lessened ability of these persons to care for themselves. Nevertheless, even [these] persons may live for many years if they are adequately supported and cared for." BARRY REISBERG, *A GUIDE TO ALZHEIMER'S DISEASE* 99 (1981). "On the average, victims of Alzheimer's disease die between 7 and 10 years after the onset of the illness." WILLIAM A. CHECK, *ALZHEIMER'S DISEASE* 28 (1989).

Dr. Kevorkian's second and third suicide patients—Sherry Miller and Marjorie Wantz—likewise chose death even though their conditions were not terminal or even life-threatening. See *supra* notes 150-53.

171. See *supra* note 25.

172. A recent article in the *Journal of the American Medical Association* stated that PWAs live an average of about 1.5 years after being diagnosed with AIDS, though the mean incubation period for HIV infection (that is, the average period between the date of first exposure to the virus believed to cause AIDS (human immunodeficiency virus) and the date the infection first manifests itself through an AIDS-specific illness, such as *Pneumocystis carinii* pneumonia, which permits the AIDS diagnosis) is about eight years. Theresa J. Jordan et al., *Isoniazid as Preventive Therapy in HIV-Infected Drug Abusers: A Decision Analysis*, 265 JAMA 2987, 2989 (1991). A Presidential commission reported that 10% of PWAs live for at least five years after diagnosis. REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC 8 (1988).

173. See Gelfand, *supra* note 43, at 748 n.40.

174. See *id.* at 750 nn.49-51. Many living will statutes except feeding and hydration from the list of procedures whose discontinuation may be authorized by a terminal patient. Such exceptions reflect a judgment that the provision of food and water is a more fundamental medical obligation than the furnishing of blood or dialysis: that if a patient dies only because kidney dialysis is discontinued, her death may be regarded as "natural," whereas if she dies because feeding and hydration are discontinued, her death should be regarded as having been "caused" by the physician's actions. Courts have not been sympathetic to this view of artificial feeding:

Nasogastric tubes, gastrostomies, or intravenous infusions are medical treatments and therefore analytically distinguishable from spoon-feeding or bottle-feeding. Termination of these intrusive procedures does not deprive the patient of life; rather, the inability of the patient to chew or swallow, as a result of his illness is viewed as the ultimate agent of death.

scious or brain-injured patient still sensible to pain, who was dependent on continued artificial ventilation or hydration would face an agonizing death from asphyxiation or dehydration if the instructions in his living will were followed and his respirator or hydration was withdrawn. Such a patient might prefer the dreadful mercy of Dr. Kevorkian's suicide device, yet the living will statutes—not to mention the criminal law—preclude such a medical response.¹⁷⁵

Third, the patient's physician may be unwilling to follow the instructions in a living will. It is generally assumed that the "philosophy of living will statutes is that the patient's wishes must be followed,"¹⁷⁶ but the language of living will statutes belies this popular assumption. A living will does not empower a patient to impose his wishes on his physician; it merely immunizes the physician from liability for murder or malpractice should the physician choose to accede to those wishes. The living will statutes that address the problem of the noncompliant physician require only that he "permit the transfer"¹⁷⁷ of the patient to another physician, presumably one more acquiescent. But if the original physician, in good faith, declines to certify that the patient is in a terminal condition, the physician may be exempt from even this limited duty.¹⁷⁸

In re Estate of Longeway, 549 N.E.2d 292, 296 (Ill. 1989); *accord Brophy v. New England Sinai Hosp., Inc.*, 497 N.E.2d 626, 638 (Mass. 1984). Physicians agree. "The artificial provision of nutrition and hydration is a form of medical treatment. . . ." *Position of the American Academy of Neurology on Certain Aspects of the Care and Management of the Persistent Vegetative State Patient*, 39 NEUROLOGY 125 (1989). Furthermore, formulas used in artificial feeding are regulated by the FDA as "medical foods," *see* 21 U.S.C. § 360ee (1988), and the feeding tubes are regulated as medical devices. 21 C.F.R. § 876.5980 (1991).

175. A state court may conclude that, as a matter of common law, a patient whose artificial ventilation has been properly discontinued is entitled to sedation or anaesthesia to block the pain of his asphyxiation. *See, e.g., McKay v. Bergstedt*, 801 P.2d 617, 630 (Nev. 1990).

176. Gelfand, *supra* note 43, at 770.

177. *E.g., ALA. CODE* § 22-8A-8(a) (1990); *ILL. ANN. STAT.* ch. 110 1/2, para. 703(d) (Smith-Hurd 1934) ("[I]t is the patient's responsibility to initiate the transfer to another physician."); *VA. CODE ANN.* § 54.1-2987 (Michie 1991) ("shall make a reasonable effort to transfer the patient to another physician").

178. In Illinois, for example, a physician who discontinues life-support is immunized by a living will only if the patient is a "qualified patient" at the time of the discontinuation, *ILL. ANN. STAT.* ch. 110 1/2, para. 707 (Smith-Hurd Supp. 1992), and the term "qualified patient" means one "who has been diagnosed and verified in writing to be afflicted with a terminal condition by his or her attending physician who has personally examined the patient." *Id.* para. 702(g). Consequently, notwithstanding the patient's wishes, the physician will presumably be reluctant to discontinue life-support if she believes the patient to be nonterminal. The transfer process envisioned by paragraph 703 is activated only if the physician "is unwilling to comply with the [living will]"; and it is unlikely that a good-faith nonterminal diagnosis would be regarded as unwillingness to comply. *See also ALA. CODE* §§ 22-8A-8(a), -3(5) (requiring that

Few individuals ever execute living wills,¹⁷⁹ but fortunately, even without the authority of living will statutes, courts have permitted competent patients to compass their own deaths by refusing life-sustaining medical treatment.¹⁸⁰ Indeed, courts have sometimes au-

diagnosis of a qualifying terminal condition must be made by two physicians); VA. CODE ANN. §§ 54.1-2982 -2987 (Michie 1991).

179. A survey sponsored by the American Medical Association revealed that only 15% of those surveyed had executed living wills. *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841, 2857 n.1 (1990) (O'Connor, J., concurring) (citing *American Medical Association Surveys of Physician and Public Opinion on Health Care Issues* 29-30 (1988)). "The probability of becoming irreversibly vegetative is so low than many people may not feel an urgency to marshal formal evidence of their preferences. Some may not wish to dwell on their own physical deterioration and mortality. Even someone with a resolute determination to avoid life-support . . . would still need to know that such things as living wills exist and how to execute one. *Id.* at 2875 (Brennan, J., dissenting).

Living wills may become more common now that the Patient Self-Determination Act of 1990 is in effect. This federal statute, included in the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (1990), in evident response to the *Cruzan* case, requires federally funded health care organizations to advise patients of their rights under state law to execute living wills, health care powers of attorney, and similar advance directives. *See* Pub. L. No. 101-508, 104 Stat. 1388 (1990).

180. *E.g.*, *Bouvia v. Superior Court*, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986); *Satz v. Perlmutter*, 379 So. 2d 359, 360 (Fla. 1980); *McKay v. Bergstedt*, 801 P.2d 617 (Nev. 1990).

Isolated exceptions have been made in the name of child welfare. For example, in *Application of President and Directors of Georgetown College, Inc.*, a court ordered a blood transfusion for an unwilling patient whose religious beliefs the transfusion violated. 331 F.2d 1000, 1002 (D.C. Cir.), *reh'g denied*, 331 F.2d 1010 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964). The court issued the order in part because the patient was the mother of an infant, *id.* at 1008, though the decision may also have rested on the court's willingness to persuade itself that the patient "was not in a condition to make a decision," *id.* at 1007, and that (somewhat inconsistently) she "really" wanted to live, her death being only "an unwanted side effect of a religious scruple." *Id.* at 1009. On the other hand, in *Public Health Trust v. Wons*, the court held that "the state's interest in maintaining a home with two parents for the minor children does not override Mrs. Wons' constitutional rights of privacy and religion." 541 So. 2d 96, 98 (Fla. 1989).

The refusal by a pregnant patient to be transfused presents a somewhat different question, since her death would not simply leave a child motherless; it would terminate a fetus's existence. In such cases, court-ordered transfusions are perhaps less indefensible, *see, e.g.*, *In re Jamaica Hosp.*, 491 N.Y.S.2d 898 (Sup. Ct. 1985), though one cannot help wondering what other bodily invasions might be visited upon an unwilling woman in the name of fetal protection.

A pregnant woman's directives concerning transfusions and other artificial procedures might be expressed in a living will that is consulted after she becomes incompetent. Most living will statutes provide that a woman's repudiation of death-delaying procedures is to be disregarded during her pregnancy, at least where the continued administration of such procedures might enable the fetus to develop to the point of live birth. For a listing of relevant acts, *see* Janice MacAvoy-Snitzer, Note, *Pregnancy Clauses in Living Wills Statutes*, 87 COLUM. L. REV. 1280, 1282 nn.10-11 (1987). Such clauses are defensible only if we should likewise disregard refusals by competent pregnant women. The very notion of a living will presupposes our acceptance of the principle that an individual does not lose her personhood and moral autonomy merely by becoming incompetent. If we honor the demand of competent pregnant women to be disengaged from artificial death-delaying devices, then such pregnancy clauses in living will statutes

thorized the discontinuation of nutrition and hydration even where an applicable living will statute excluded "provision of sustenance" from the list of procedures whose discontinuation might be authorized by a living will.¹⁸¹ In the case of incompetent patients, courts have likewise permitted the discontinuation of life-sustaining treatments even in the absence of a living will, where some surrogate decisionmaker has requested the discontinuation on behalf of the patient.¹⁸² In the seminal case of *In re Quinlan*, the New Jersey Supreme Court suggested that a surrogate's choosing life or choosing death for a patient are equally valid choices; the only important

are improper, and we ought to follow the instructions given in a living will even where doing so terminates the existence of a fetus. One student commentator has urged that the privacy principle inherent in *Roe v. Wade*, 410 U.S. 113 (1973), requires the invalidation of this pregnancy exception in living will statutes insofar as the exception would apply to a pregnant patient prior to the viability of the fetus. See MacAvoy-Snitzer, *supra*, at 1282 nn.10-11. One might argue that even this criticism does not go far enough: that a woman's right to be free from unwanted medical incursions should prevail over her obligations as an incubator for her fetus. This is not an easy choice to make, since it allows a fetus to die that might be saved by a medical procedure that arguably does the mother no harm. That prospect is necessarily a disquieting one. The response, however, is that the procedure *does* do the mother harm in that it contravenes her wishes, violates her bodily integrity, and thus violates her very personhood as well.

Of course, maintaining the procedure for the duration of her pregnancy might not contravene her wishes, and it is here that the solution to the dilemma lies. Few women, when executing a living will, are likely to consider the future possibility of their being simultaneously pregnant and incompetent. Accordingly, living will statutes should require a female declarant to state in her living will whether she would wish death-delaying procedures to be maintained throughout pregnancy. If she directs in her living will that such procedures be discontinued notwithstanding pregnancy, then that direction should not be countermanded. Consider the case of a pregnant woman in a persistent vegetative state who would die but for the continued application of artificial feeding and hydration. Suppose we continue the feeding and hydration notwithstanding her previously expressed demand. Suppose further that the infant is born with defective kidneys and that the mother is the only suitable donor, but the transplant operation cannot be performed until the infant is six months old. If we accept a pregnancy exception in living will statutes, how can we distinguish this case? Are we not required to keep the insensate mother alive until the operation can be performed and her kidney crop harvested? This distressing prospect results naturally from any pregnancy exception to the rule permitting one to be free from unwanted medical interference.

It should be noted in passing that the *Roe v. Wade* "right of privacy" analysis, on which some of the above authorities relied, may no longer be apposite now that the United States Supreme Court has characterized as a Fourteenth Amendment "liberty" interest, rather than a privacy interest, the right to be free from unwanted medical incursions. *Cruzan*, 110 S. Ct. at 2851 n.7.

181. See, e.g., *Corbett v. D'Allessandro*, 487 So. 2d 368 (Fla. Dist. Ct. App. 1986), *review denied*, 492 So. 2d 1331 (Fla. 1986).

182. See, e.g., *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 417, 430 (Mass. 1977) (involving decision to administer treatment); *In re Quinlan*, 355 A.2d 647, 664 (N.J.); *In re Storar*, 420 N.E.2d 64 (N.Y.), *cert. denied*, 454 U.S. 858 (1981).

consideration is honoring the patient's presumed wishes.¹⁸³ This same court stated on another occasion:

To err either way—to keep a person alive under circumstances under which he would rather have been allowed to die, or to allow that person to die when he would have chosen to cling to life—would be deeply unfortunate.¹⁸⁴

Any doubts concerning the existence of a constitutional right to reject unwanted medical treatments were laid to rest by the United States Supreme Court in the recent “right-to-die” case of *Cruzan v. Director, Missouri Department of Health*.¹⁸⁵ Although five separate opinions were written in the case and only five justices associated themselves with the specific holding, eight justices agreed that a patient has a constitutionally protected liberty interest in being free from unwanted medical treatment.¹⁸⁶ The only issue in *Cruzan* as to which the justices disagreed was whether a state might constitutionally require, before medical treatment of an incompetent is discontinued, that there be clear and convincing evidence (such as a living will) of the incompetent's wishes. A five-justice majority held that a state might indeed require such evidence.¹⁸⁷ Thus, if a state wishes to restrict surrogate decisionmaking to application of the “substituted judgment”¹⁸⁸ standard and bar decisionmaking based on the “best interests” standard,¹⁸⁹ nothing in the Constitution forbids the state to do so, according to the *Cruzan* majority.

183. 355 A.2d 647 (N.J. 1976).

184. *In re Conroy*, 486 A.2d 1209, 1220 (N.J. 1985).

185. 110 S. Ct. 2841 (1990).

186. *See id.* at 2851. Chief Justice Rehnquist wrote the opinion of the Court in which Justices White, O'Connor, Scalia, and Kennedy joined. Justice Brennan wrote a dissent in which Justices Blackmun and Marshall joined. Justice Stevens wrote a separate dissenting opinion. Although Justice Scalia joined in the Court's opinion, his separate concurrence rejects the notion that “liberty” includes the right to refuse unwanted medical treatment. *See id.* at 2859-63.

187. *Id.* at 2854-55.

188. The “substituted judgment” standard is a subjective standard calling for the surrogate to decide as the patient would have decided were the patient competent. *See, e.g., Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 417, 430 (Mass. 1977).

189. The “best interests” standard is an objective standard calling for the surrogate to decide as a reasonable, competent patient would decide under the circumstances. *In re Quinlan*, 355 A.2d 647 (N.J. 1976); *In re Storar*, 420 N.E.2d 64 (N.Y.), *cert. denied*, 454 U.S. 858 (1981). This standard must necessarily be the applicable one where the patient has never been competent or never made any reliable statements concerning the discontinuation of life-supporting procedures. The Supreme Court of New Jersey ventured the opinion that the decision to discontinue the artificial life-support maintaining a patient in a persistent vegetative state is a decision that “the overwhelming majority” of the members of our society would make if they themselves were the patient. *Quinlan*, 355 A.2d at 664.

Like the living will device, the holdings of these nonstatutory cases arising in the absence of a living will offer no relief to the victims of Alzheimer's disease, AIDS, and other conditions that cause neither imminent death nor permanent unconsciousness. But in recent years, courts have occasionally shown a willingness to order the discontinuation of medical treatments sustaining the lives of hopeless but nonterminal patients. In *McKay v. Bergstedt*,¹⁹⁰ for example, the Nevada Supreme Court was confronted with a competent, nonterminal, quadriplegic patient on a respirator. The patient was not in physical pain; his principal reason for seeking death was that his father, on whom he depended for nurture, had died. He was terrified that, if left unattended, his respirator might break down and, because he was living at home rather than in a hospital, he would die an agonizing death. The court granted the patient's request for an order permitting the removal of the respirator by someone who could administer a sedative so that the patient's death would be painless.

All fifty states and the District of Columbia have adopted statutes authorizing the granting of general durable powers of attorney.¹⁹¹

190. 801 P.2d 617, 620 (Nev. 1990).

191. See ALA. CODE § 26-1-2 (1986); ALASKA STAT. §§ 13-26-350 to -353 (Supp. 1991); ARIZ. REV. STAT. ANN. § 14-5501 (1975); ARK. CODE ANN. §§ 28-68-201 to -203 (Michie 1987); CAL. CIV. CODE §§ 2400-07 (West Supp. 1992); COLO. REV. STAT. § 15-14-501 (1987 & Supp. 1991); CONN. GEN. STAT. ANN. § 45a-562 (West Supp. 1992); DEL. CODE ANN. tit. 12, §§ 4901-05 (1987); D.C. CODE ANN. § 21-2081 to -2085 (1989); FLA. STAT. ANN. § 709.08 (West Supp. 1992); GA. CODE ANN. § 10-6-36 (Michie 1989); HAW. REV. STAT. §§ 551D-1 to -7 (Supp. 1991); IDAHO CODE § 15-5-501 to -507 (Supp. 1992); ILL. ANN. STAT., ch. 110 1/2, para. 802-6 (1934); IND. CODE ANN. §§ 30-5-1-1 to 30-5-10-4 (Burns Supp. 1992); IOWA CODE ANN. § 633.705 (West Supp. 1992); KAN. STAT. ANN. §§ 58-610 to -617 (1983); KY. REV. STAT. ANN. § 386.093 (Michie/Bobbs-Merrill 1970); LA. CIV. CODE ANN. art. 3027 (West Supp. 1992); ME. REV. STAT. ANN. tit. 18-A, § 5-501 (West Supp. 1992); MD. EST. & TRUSTS CODE ANN. §§ 13-601 to -602 (1991) (as interpreted by the Attorney General, see 73 Op. Md. Atty. Gen. No. 88-046 (Oct. 17, 1988)); MASS. GEN. LAWS ANN. ch. 201B, §§ 1-7 (West 1989); MICH. COMP. LAWS §§ 700-495, -497 (1980); MINN. STAT. ANN. §§ 523.07 to .08 (West 1946); MISS. CODE ANN. § 87-3-13 (1991); MO. ANN. STAT. § 404.705 (Vernon 1990); MONT. CODE ANN. §§ 72-5-501 to -502 (1990); NEB. REV. STAT. §§ 30-2664 to -2672 (1985); NEV. REV. STAT. ANN. §§ 111.460, 470 (Michie 1986); N.H. REV. STAT. ANN. § 506:6 (Supp. 1991); N.J. STAT. ANN. § 46:2B-8 (West 1989); N.M. STAT. ANN. §§ 45-5-501 to -502 (Michie 1989); N.Y. GEN. OBLIG. LAW § 5-1602 (McKinney 1989); N.C. GEN. STAT. §§ 32A-8 to -141 (1991); N.D. CENT. CODE §§ 30.1-30-01 to -05 (Supp. 1991); OHIO REV. CODE ANN. § 1337.09 (Anderson 1991); OKLA. STAT. ANN. tit. 58, §§ 1071-77 (West 1992); OR. REV. STAT. § 127.005 to .015 (1991); PA. STAT. ANN. tit. 20, § 5604 (Supp. 1991); R.I. GEN. LAWS § 34-22-6.1 (1984); S.C. CODE ANN. §§ 62-5-50 to -502 (Law. Co-op 1987 & Supp. 1991); S.D. CODIFIED LAWS ANN. § 59-7-2.1 (1987 & Supp. 1992); TENN. CODE ANN. § 34-6-101 to -109 (1991); TEX. PROB. CODE ANN. § 36A (West Supp. 1990); UTAH CODE ANN. §§ 75-5-501 to -502 (1978 & Supp. 1992); VT. STAT. ANN. tit. 14, §§ 3051-52 (1989); VA. CODE ANN. § 11-9.1 (Michie 1989); WASH. REV. CODE § 11.94.020 (1987); W. VA. CODE §§ 39-4-1 to -7 (Supp. 1992); WIS. STAT. ANN. § 243.07 (West 1987 &

While a common law power of attorney automatically terminates upon the principal's becoming mentally incapacitated,¹⁹² the durable power of attorney, as its name suggests, remains effective even after the principal has become incompetent. Consequently, this device could be used to empower a surrogate decisionmaker to make health-care decisions, including the discontinuation of life-support, on behalf of the principal, and at least one court has suggested that a surrogate granted such a durable power of attorney would indeed be so empowered.¹⁹³ However, some twenty-six states and the District of Columbia, evidently not trusting courts to give such an expansive reading to general durable power of attorney statutes, have adopted statutes expressly authorizing the appointment (on a "durable" basis) of proxies for making health care decisions.¹⁹⁴ These "health care power of attorney" statutes may give the appointed proxy more authority over a recalcitrant physician than could be wielded under a living will. For example, in many states the withdrawal or withholding of artificial hydration or nutrition cannot be

Supp. 1991) (as interpreted by State Attorney General, see Wis. Op. Atty. Gen. 35-88 (1988)); WYO. STAT. § 3-5-103 (1971 & Supp. 1992).

192. See RESTATEMENT (SECOND) OF AGENCY § 122 (1957).

193. See *In re Peter*, 529 A.2d 419, 426 (N.J. 1987).

194. See ALASKA STAT. §§ 13.26.335, 13.26.344(l) (Supp. 1991); CAL. CIV. CODE § 2500 (West Supp. 1992); CONN. GEN. STAT. ANN. § 1-54a (West Supp. 1992); D.C. CODE ANN. § 21-2205 (1989); GA. CODE ANN. §§ 31-36-1 to -13 (Michie 1991); IDAHO CODE § 39-4505 (Supp. 1992); ILL. ANN. STAT., ch. 110 1/2, paras. 804-1 to -12 (Smith-Hurd Supp. 1992); 1991 Iowa Legis. Serv. 501 (West); KAN. STAT. ANN. § 58-625 (Supp. 1990); ME. REV. STAT. ANN. tit. 14, §§ 3451-67 (West Supp. 1992); MISS. CODE ANN. §§ 41-41-151 to -183 (Supp. 1991); MO. REV. STAT. §§ 404.800 to .870 (Supp. 1992); 1992 Neb. Advance Legis. Serv. 696; NEV. REV. STAT. ANN. § 449.800 (Michie 1991); 1991 N.H. Laws 146; 1991 N.J. Laws 201; N.C. GEN. STAT. § 32A, art. 3 (1991); N.D. CENT. CODE § 23-06.5 (Supp. 1991); OHIO REV. CODE ANN. §§ 1337.11 to .17 (Anderson 1991); OR. REV. STAT. § 127.510 (1991); PA. STAT. ANN. tit. 20, § 5603(h) (Supp. 1991); R.I. GEN. LAWS §§ 23-4.10-1 to .10-2 (1989); TENN. CODE ANN. §§ 34-6-201 to -215 (1991); VT. STAT. ANN. tit. 14, §§ 3451-67 (1989 & Supp. 1991); W. VA. CODE §§ 16-30A-2 to -20 (1991); WIS. STAT. ANN. §§ 155.01 to .80 (West Supp. 1991); WYO. STAT. §§ 3-5-201 to -213 (1991).

Twelve other states have included in their living wills statutes provisions authorizing the appointment of healthcare proxies. See ARK. CODE ANN. § 20-17-202 (Michie 1991); DEL. CODE ANN. tit. 16, § 2502 (1983); FLA. STAT. ANN. § 765.05(2) (West 1986); IND. CODE ANN. § 16-8-11-14(g)(2) (Burns 1971); IOWA CODE ANN. § 144A.7(1)(a) (West 1989); LA. REV. STAT. ANN. §§ 40:1299.58.1, 40:1299.58.3(C) (West Supp. 1992); MINN. STAT. ANN. §§ 145B.01 - .17 (West Supp. 1992); TEX. HEALTH & SAFETY CODE ANN. § 672.003(d) (West Supp. 1991); UTAH CODE ANN. §§ 75-2-1105 to -1106 (Supp. 1992); VA. CODE ANN. § 54.1-2986(2) (Michie 1991 & Supp. 1992); 1987 Wash. Laws 162.1 (1) (b); WYO. STAT. § 35-22-102 (Supp. 1992).

As a response to the *Cruzan* case, Illinois established recently a statutory procedure for appointing health care surrogates to act in the absence of an executed living will or health care power of attorney. Stephen M. Fatum et al., *A Review of the Illinois Health Care Surrogate Act*, 80 ILL. B.J. 124 (1992).

authorized by a living will,¹⁹⁵ whereas the proxy designated through a durable power of attorney for health care may compel such withdrawal or withholding.¹⁹⁶ Despite the relative boldness of the concept of durable health care powers of attorney, however, it is doubtful that they would be construed as authorizing a proxy to direct the active euthanatizing of the principal.

V. A QUICK GLANCE AT AMERICAN SLAYER STATUTES

My fault is past, but, O what form of prayer
Can serve my turn? "Forgive me my foul murder"?
That cannot be, since I am still possess'd
Of those effects for which I did the murder.

WILLIAM SHAKESPEARE, *HAMLET*, act 3, sc.
3 (The Riverside Shakespeare ed. 1974).

a. Background

At early common law, the problem of a slayer's inheriting from his victim was addressed, in a rough sort of way, by the feudal doctrines of attainder, forfeiture, and corruption of blood, which applied to all felons whether or not they were slayers.¹⁹⁷ Not until the English Parliament abolished these doctrines by statute in 1870¹⁹⁸ was the narrow question of a slayer's right to inherit from his victim litigated in an English court.¹⁹⁹ In America, federal and many state constitutions extinguished these doctrines at the inception of their respective jurisdictions²⁰⁰—considerably earlier than 1870—yet reported

195. See, e.g., ILL. ANN. STAT. ch. 110 1/2, para. 702(d) (Smith-Hurd Supp. 1992).

196. See, e.g., ILL. ANN. STAT. ch. 110 1/2, para. 804-10 (Smith-Hurd Supp. 1992).

197. When sentence was pronounced upon a convicted traitor or felon, he was deemed thereby to be attainted.

Among the consequences which followed from attainder was forfeiture of lands of the attainted person to the king, absolutely in the case of treason and for a year and a day in the case of other felonies. Subject to [the foregoing forfeitures], the lands escheated to the lord. As an extension of the escheat principle there was corruption of the blood of the attainted person so that land could not pass through or from him by descent, but instead escheated to the lord, subject to the king's superior right of forfeiture.

3 AM. L. PROP. § 14.5 (1952). Personal property was forfeited to the king upon conviction for treason or felony. JOSEPH CHITTY, *CRIMINAL LAW* *730 (1836).

198. The Forfeiture Act, 187 33 & 34 Vict., ch. 23 (Eng.).

199. See Alison Reppy, *The Slayer's Bounty—History of Problem in Anglo-American Law*, 19 N.Y.U. L. REV. 229, 230-44 (1942) (reviewing cases involving a slayer's right to inherit in English courts).

200. The United States Constitution provides: "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." U.S. CONST. art. III, § 3, cl. 2. A federal statute, first enacted in 1796, provides: "No conviction or

case law suggests that American judges first confronted this issue at about the same time as their English counterparts.²⁰¹ From this absence of earlier American case law, Professor McGovern has inferred that American courts at one time routinely permitted slayers to inherit and no one thought to question that result.²⁰²

Although English judges, once confronted with the issue, tended to bar such inheritance on public policy grounds,²⁰³ American judges seem—at least initially—to have regarded such a public policy exception as impermissible judicial legislation, for the first reported American cases generally permitted slayers to inherit and left any remedy to the legislature.²⁰⁴

judgment shall work corruption of blood or forfeiture of estate." 18 U.S.C. § 3563 (1988).

For examples of corresponding state constitutional provisions, see CONN. CONST. art. 1, § 13; DEL. CONST. art. 1, § 15; MD. CONST. DECLARATION OF RIGHTS art. 27; N.C. CONST. art. I, § 29, and art. XI, § 1, (interpreted by *State v. Willis*, 121 S.E.2d 854, 856 (N.C. 1961)). For an example of a state statute of similar import, see R.I. GEN. LAWS § 12-9-4 (1981).

201. The first English case squarely presenting and deciding the issue of the slayer's bounty was *Cleaver v. Mutual Reserve Fund L. Ass'n*, 1 Q.B. 147 (C.A. 1892) (holding that rights of a wife designated as beneficiary under her husband's life insurance policy were extinguished by her murder of the insured husband). The first American case was *Owens v. Owens*, 6 S.E. 794 (N.C. 1888) (wife convicted as an accessory before the fact to her husband's murder yet permitted to take her dower interest upon his death). The facts of a somewhat earlier case—*Carter v. Montgomery*, 2 Tenn. Ch. 216 (1875)—presented the problem as well, but the issue was not discussed. The court would have been perfectly willing to permit a husband to inherit land from the wife he had murdered, but in this case the marriage on which the husband's heirship depended was held void *ab initio* because it violated Tennessee's anti-miscegenation statute.

202. McGovern, *supra* note 13, at 66. "Otherwise—if the courts assumed that the murderer could *not* inherit—the more doubtful cases would have given rise to a host of subsidiary questions which would surely have found their way into the reports." *Id.*

203. *E.g.*, *In re Sigsworth*, 104 L.J.R. 46 (Ch. 1934).

204. *Hagan v. Cone*, 94 S.E. 602, 603-04 (Ga. Ct. App. 1917); *Wall v. Pfanschmidt*, 106 N.E. 785, 788-90 (Ill. 1914); *McAllister v. Fair*, 84 P. 112, 114-15 (Kan. 1906); *In re Gollnik's Estate*, 128 N.W. 292, 292-93 (Minn. 1910); *Shellenberger v. Ransom*, 59 N.W. 935, 941 (Neb. 1894); *Deem v. Millikin*, 44 N.E. 1134, 1134 (Ohio 1896); *In re Carpenter's Estate*, 32 A. 637, 637 (Pa. 1895); *Hill v. Noland*, 149 S.W. 288, 289 (Tex. Civ. App. 1912). *Contra* *Perry v. Strawbridge*, 108 S.W. 641 (Mo. 1908); *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889). It is worth noting that Missouri and New York are among the few states that have never enacted a slayer statute. Perhaps their legislatures have seen no need in view of their courts' early adoption of a common law slayer rule.

Some scholars have observed that while American courts originally refused to apply a common law slayer rule in the context of intestacy, they have always applied it in the case of wills, barring a devisee from inheriting under the will of the testator he slew. See 1 WILLIAM J. BOWE & DOUGLAS H. PARKER, *PAGE ON WILLS* §§ 17.19-17.20 (Bowe-Parker rev. ed. 1960); McGovern, *supra* note 13, at 75. It would be incorrect, however, to infer from this historical fact that the rationale for creating a common law slayer rule in the context of wills was thought at one time not to be applicable in the case of intestacy. On the contrary, the rationale is the same in both instances, as courts have acknowledged. See, *e.g.*, *Bryant v. Bryant*, 137 S.E. 188 (N.C. 1927); *Garwols v. Bankers' Trust Co.*, 232

Although the result [a fratricidal son inheriting from his murdered father] shocks our conscience (and well it should), we believe that the existing applicable statutes can only be construed to permit appellant to inherit his father's estate. . . . We have no doubt that the legislature will take prompt action so the result we are forced to reach in the instant case may be avoided in the future.²⁰⁵

Most later cases, however, that arose before the enactment of slayer statutes applied equitable principles to prevent a slayer from inheriting.²⁰⁶ And so many legislatures have now responded to the problem of the slayer's bounty by enacting statutes barring it that the American slayer rule of today is primarily, though not exclusively, a statutory rule.²⁰⁷ The discussion that follows will concentrate therefore on these statutory formulations.

N.W. 239 (Mich. 1930); *Perry v. Strawbridge*, 108 S.W. 641 (Mo. 1908); *In re Duncan's Estate*, 246 P.2d 445, 447 (Wash. 1952). With the exception of *Riggs v. Palmer*, the cases applying a common law slayer rule in the context of wills—e.g., *Whitney v. Lott*, 36 A.2d 888 (N.J. 1944); *In re Wilson's Will*, 92 N.W.2d 282 (Wis. 1958)—were decided at a time when courts had already begun to apply the rule in the context of intestacy as well. See *infra* note 206.

205. *In re Duncan's Estate*, 246 P.2d 445, 447-48 (Wash. 1952) (an unusually late example of judicial willingness to allow such inheritance). The Washington legislature's response was not quite so prompt as the court anticipated, but three years later Washington had a slayer statute. Wash. Laws ch. 141 (1955).

206. E.g., *Weaver v. Hollis*, 22 So. 2d 525 (Ala. 1945); *Price v. Hitaffer*, 165 A. 470 (Md. 1933); *Bryant v. Bryant*, 137 S.E. 188 (N.C. 1927); *Pritchett v. Henry*, 287 S.W.2d 546 (Tex. Civ. App. 1955) (applying common law slayer rule to bar inheritance by will where slayer statute applied only to life insurance proceeds).

In some jurisdictions, the court ordered the distribution of the decedent's property directly to the "worthy" candidates. *Garwols*, 232 N.W. at 241; *Perry v. Strawbridge*, 108 S.W. 641 (Mo. 1908). In others, legal title to the property was decreed initially to those entitled under the intestacy statute or the testator's will, and only then was a constructive trust impressed upon the property in the slayer's hands for the benefit of the worthy candidates. *Dutell v. Dana*, 113 A.2d 499, 502 (Me. 1952); *In re Estate of Mahoney*, 220 A.2d 475, 477-78 (Vt. 1966). Under modern slayer statutes, the constructive trust approach is not used; the statutes bar the slayer from acquiring legal title.

207. See *supra* note 12 and accompanying text. The existing statutes are: ALA. CODE § 43-8-253 (1991); ALASKA STAT. § 13.11.305 (1985 & Supp. 1991); ARIZ. REV. STAT. ANN. § 14-2803 (1975 & Supp. 1991); ARK. CODE ANN. § 28-11-204 (Michie 1987) (applying only to dower and curtesy); CAL. PROB. CODE §§ 250-52 (West 1991 & Supp. 1992); COLO. REV. STAT. § 15-11-803 (1987); CONN. GEN. STAT. ANN. § 45a-447 (West Supp. 1992); D.C. CODE ANN. § 19-320 (1989); FLA. STAT. ANN. § 732.802 (West Supp. 1992); GA. CODE ANN. § 53-4-6 (1982); HAW. REV. STAT. § 560:2-803 (1985 & Supp. 1991); IDAHO CODE § 15-2-803 (1979); ILL. ANN. STAT. ch. 110 1/2, para. 2-6 (Smith-Hurd 1934); IND. CODE ANN. § 29-1-2-12.1 (Burns 1971); IOWA CODE ANN. § 633.535 (West Supp. 1992); KAN. STAT. ANN. § 59-513 (1983); KY. REV. STAT. ANN. § 381.280 (Michie/Bobbs-Merrill 1972); LA. REV. STAT. ANN. § 966 (West Supp. 1992); ME. REV. STAT. ANN. tit. 18-A, § 2-803 (West 1981); MICH. COMP. LAWS ANN. § 700.251 (West Supp. 1991); MINN. STAT. ANN. § 524.2-803 (West Supp. 1992); MISS. CODE ANN. §§ 91-1-25, 91-5-33 (1972); MONT. CODE ANN. § 72-2-104 (1991); NEB. REV. STAT. § 30-2354

Slayer statutes must deal not only with inheritance by will or intestacy, but also with dower and related interests, with succession through survivorship in the case of jointly held interests, and with acquisition of life insurance proceeds. Since the principle underlying the slayer rule remains the same in all these contexts,²⁰⁸ the application of a slayer statute is not limited to the particular kinds of testamentary transfers enumerated in it. For example, in jurisdictions where the slayer statute referred only to inheritance by will or intestacy, courts nonetheless applied a common law slayer rule to preclude a joint tenant who had slain his co-tenant from benefiting from the victim's death.²⁰⁹

(1989); NEV. REV. STAT. ANN. § 134.007 (Michie 1986 & Supp. 1991); N.J. STAT. ANN. §§ 3B:7-1 to 7-5 (West 1983); N.M. STAT. ANN. § 45-2-803 (Michie 1991); N.C. GEN. STAT. §§ 31A-3 to -11 (1984 & Supp. 1991); N.D. CENT. CODE § 30.1-10-03 (1976 & Supp. 1991); OHIO REV. CODE ANN. § 2105.19 (Anderson 1990); OKLA. STAT. ANN. tit. 84, § 231 (West 1990); OR. REV. STAT. §§ 112.455 to .555 (1990); PA. STAT. ANN. tit. 20, §§ 8801-15 (1975); R.I. GEN. LAWS §§ 33-1.1-1 to -16 (1988); S.C. CODE ANN. § 62-2-803 (Law. Co-op 1987); S.D. CODIFIED LAWS ANN. §§ 22-16-37 to 29-9-20 (1984); TENN. CODE ANN. § 31-1-106 (1984); TEX. PROB. CODE ANN. art. 41(D) (West 1980) (applying only to life insurance); UTAH CODE ANN. § 75-2-804 (1978); VT. STAT. ANN. tit. 14, § 551(6) (1989); VA. CODE ANN. §§ 55-401 to -414 (Michie 1991 & Supp. 1992); WASH. REV. CODE §§ 11.84.010 to .900 (1987); W. VA. CODE § 42-4-2 (1982); WIS. STAT. ANN. § 852.01 (2)(m) (1991); WYO. STAT. § 2-14-101 (Supp. 1992).

208. See *Wilson v. Board of Trustees*, 246 N.E.2d 701, 703 (Ill. Ct. App. 1969).

209. *Ashwood v. Patterson*, 49 So. 2d 848, 850-51 (Fla. 1951); *Bradley v. Fox*, 129 N.E.2d 699, 706 (Ill. 1955); *Vesey v. Vesey*, 54 N.W.2d 385, 388-89 (Minn. 1952); *Duncan v. Vassaur*, 550 P.2d 929, 931 (Okla. 1976); see *Abbey v. Lord*, 336 P.2d 226 (Cal. Ct. App. 1959). Joint tenancy property presents some difficult problems identifying the particular property interest of which the slayer should be deprived, since a joint tenant, unlike a devisee or life insurance beneficiary, has some interest in the subject property even before he kills. In *Ashwood*, *Bradley*, and *Duncan*, the courts decreed—after making reference to the *nullus commodum* principle—that the slaying of the co-tenant transformed the joint tenancy into a tenancy in common, so the slayer was permitted to keep his own undivided one-half interest but the other one-half interest was held for the benefit of the victim's estate. Accord *Barnett v. Couey*, 27 S.W.2d 757, 762 (Mo. Ct. App. 1930) (Missouri had no slayer statute of any kind). It seems not unjust to allow the slayer to keep his one-half, since he might, at any time prior to the murder, have partitioned the joint tenancy and taken the one-half to himself. That is, his own one-half does not represent "profit" derived from wrongdoing. "The principle to be applied is that the slayer should not be permitted to improve his position by the killing, but should not be compelled to surrender property to which he would have been entitled if there had been no killing." *In re Estate of Mahoney*, 220 A.2d 475, 478 (Vt. 1966). The *Restatement of Restitution* deals more harshly with a murderous joint tenant, dictating that the slayer holds the entire property as constructive trustee for the estate of the victim, except that the slayer is entitled for life to the income from his undivided one-half interest. RESTATEMENT OF RESTITUTION § 188, cmt. b (1937). *Vesey* involved a joint bank account rather than a joint tenancy in land. In the case of a joint bank account, either joint accountholder is entitled to all the money in the account if he can withdraw it before the other accountholder does. Thus, it could be argued that when one accountholder murders the other, he has prevented the victim from withdrawing all the money in the account; that is, the entire account represents "profit" to the slayer,

b. What Kinds of Homicide Trigger the Slayer Rule?

It should come as no surprise that slayer statutes, by their terms, apply only in cases of wrongful homicide.²¹⁰ The most common statutory formulation is "feloniously and intentionally";²¹¹ that is, only a slayer who kills feloniously and intentionally is barred under such a formulation. Other statutes are more specific, identifying "first or second degree murder" as the kind of killing that will require their application.²¹² A few other statutes go further, embracing unintentional, though criminal, killings within their purview;²¹³

and on that theory *Vesey* deprived the slayer of the entire account. See 54 N.W.2d 385 (Minn. 1952).

Isolated instances can be found in which courts, faced with a slayer statute applying only to wills and intestacy, held that a murderous joint tenant was entitled to keep the entire property. Such holdings were based on the somewhat artificial notion that a conveyance in joint tenancy gives each grantee a present vested estate in the entire property, so that a joint tenant's death merely relieves the survivor of further interference or participation on the part of the decedent but does not increase the estate owned by the survivor. *E.g., In re Foster's Estate*, 320 P.2d 855, 858-60 (Kan. 1958). It is worth noting that some time after *Foster* was decided, the Kansas slayer statute was amended to apply expressly to joint tenancy property. KAN. STAT. ANN. § 59-513 (1983).

For a considerably more thorough treatment of the mechanics of applying slayer statutes to joint interests and life insurance, see Fellows, *supra* note 13, at 504-21; McGovern, *supra* note 13, at 78-90.

210. Mississippi's slayer statute, by its terms, applies to one who "willfully kills": a phrase broad enough to encompass even killing in self-defense. MISS. CODE ANN. § 91-1-25 (1972). The statute has been interpreted, however, as applying only to unjustified killings. *Henry v. Toney*, 50 So. 2d 921, 923 (Miss. 1951). Texas's slayer statute likewise applies to one who "willfully" kills, but in this context the word "willfully" has been held to connote "something more than that the beneficiary shall have intended the death of the insured to result from his or her act. Obviously the factor of illegality must also be present." *Greer v. Franklin Life Ins. Co.*, 221 S.W.2d 857, 859 (Tex. 1949).

211. This phrase, or one very much like it, is the key phrase in the slayer statutes of twenty-five states: Alabama, Alaska, California, Florida ("unlawfully and intentionally"), Hawaii ("feloniously and intentionally or knowingly"), Idaho ("willfully and unlawfully"), Louisiana, Maine, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Carolina ("willfully and unlawfully"), North Dakota, Oregon, Pennsylvania ("willfully and unlawfully"), Rhode Island ("willfully and unlawfully"), South Carolina, South Dakota ("intentionally and unlawfully"), Utah, Vermont ("intentionally and unlawfully"), Washington ("willfully and unlawfully"), and Wisconsin ("unlawfully and intentionally"). The German Civil Code contains a slayer statute that bars from inheriting one who has willfully and unlawfully ("vorsätzlich und widerrechtlich") killed the source of the inheritance. BÜRGERLICHES GESETZBUCH [BGB] § 2339 (F.R.G.).

212. Arizona, Arkansas, Connecticut, Nevada, and Virginia.

213. The slayer statutes of Colorado, the District of Columbia, Indiana, and Oklahoma refer specifically to "manslaughter," and the criminal statutes of each of those jurisdictions characterize some unintentional homicides as manslaughter. COLO. REV. STAT. § 18-3-104 (1986); D.C. CODE ANN. §§ 40-713, 40-714 (1990); IND. CODE ANN. § 35-42-1-4 (Burns 1971); OKLA. STAT. ANN. tit. 21 § 711 (1983).

The slayer statutes of Kansas, Kentucky, West Virginia, and Wyoming apply to one who "feloniously kills," and the criminal statutes of each of those jurisdictions characterize some unintentional homicides as felonies. KAN. STAT. ANN. § 21-3404

and some bar not only the principal but also accomplices and instigators.²¹⁴

Too literal a reading of a slayer statute—too ready a willingness to regard it as the sole source of law on the point—may lead to questionable results. While slayer statutes are plainly designed to codify the common law slayer rule, it is unhelpful to think of them as having superseded the common law rule.²¹⁵ One must apply a slayer statute keeping its purpose clearly in mind.²¹⁶ No case better illustrates the pitfalls of a slavish attention to the literal wording of a slayer statute than the litigation involving the estate of Jerry Dean Seipel. In a 1972 proceeding, Seipel's wife, who had been convicted of his voluntary manslaughter, was denied survivor's benefits under the Illinois State Employee's Retirement System in which her husband had participated.²¹⁷ The court acknowledged that the slayer statute applied only to murder and not manslaughter and only to inheritance and not to nonprobate transfers such as employee death benefits; but the court concluded, correctly, that common law principles worked to deprive her of her survivor's benefits.²¹⁸ As a re-

(1964); KY. REV. STAT. ANN. § 507.040 (Michie/Bobbs-Merrill 1984); W. VA. CODE § 61-2-4 (1989); WYO. STAT. § 6-2-105 (1977).

New York courts have applied a common law slayer rule to reckless but unintentional killing (second degree manslaughter). *In re Wells*, 350 N.Y.S.2d 114, 119 (Sur. Ct. 1973), *aff'd without opinion*, 359 N.Y.S.2d 872 (N.Y. 1974).

Louisiana goes so far as to bar one who merely *attempts* killing. LA. REV. STAT ANN. § 966 (West Supp. 1992).

Prior to the enactment of its slayer statute, Alabama's common law slayer rule applied only to felonious killing; a slayer who pled guilty to second degree manslaughter, which was classified as a misdemeanor, was not barred from inheriting. *Floyd v. Franklin*, 36 So. 2d 234, 236 (Ala. 1948).

214. Connecticut, Florida, Georgia, Idaho, Iowa, Kansas, Michigan, Mississippi, Nebraska, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Washington, and West Virginia.

215. *See supra* note 209.

216. In *Chase's Estate*, 44 D. & C.3d 34, 36-38 (Pa. Orphans Ct. 1987), a husband pled guilty to the vehicular homicide of his wife. The crime did not come within the literal purview of Pennsylvania's slayer statute, which applied only in cases of "willful and unlawful killing." *Id.* at 38. Nonetheless, the court barred the husband from inheriting by intestacy from his deceased wife. *Id.* at 41. "[T]he focus is on the resultant unjust enrichment, not on the [slayer's] intention." *Id.* at 40.

217. *Seipel v. State Employees' Retirement Sys.*, 289 N.E.2d 288, 290 (Ill. Ct. App. 1972).

218. Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 829 (1974), "supersede[s] any and all State laws insofar as they may . . . relate to any employee benefit plan." 29 U.S.C. § 1144(a) (1988). Although Title I of ERISA did not apply to the plan at issue in the *Seipel* litigation, since the plan was a government plan, 29 U.S.C. § 1003(b)(1) (1988), the question might arise in the context of a private pension plan: does a state's slayer rule "relate to" such a plan so that the rule is preempted by ERISA to the extent it purports to bar a murderer from collecting benefits as beneficiary under the pension plan in which the victim

sult of this holding, there being no properly designated alternate beneficiary, the retirement benefits were paid to the administrator of the husband's estate; that is, they became probate assets of the decedent husband's. But now came the interesting question, because under the Illinois intestacy statute the wife was the husband's sole heir and therefore entitled to all his probate assets (including the retirement benefits) unless barred by the slayer rule. In a 1975 proceeding, the same court—indeed the same judge—that had declined in 1972 to treat the slayer statute as the sole source of Illinois law on the subject now *did* regard the statute as having superseded the common law slayer rule.²¹⁹ Since the statute applied only to murder and not manslaughter, the wife was permitted to inherit her husband's estate, including the retirement benefits that were denied her in the 1972 proceeding.²²⁰

These two holdings seem irreconcilable. Either the slayer statute is or is not the sole source of law on the point. Had the court considered the question of supersession with reference to the purpose of the slayer rule rather than as an abstract proposition, it might have reached a more satisfactory result. Three courts in jurisdictions without slayer statutes have managed to avoid this absurd inconsistency.²²¹ These courts held that a wife who had feloniously killed her husband was barred by the common law slayer rule from acquiring as beneficiary the life insurance proceeds payable on his

participated? It was held in *Mendez-Bellido v. Board of Trustees*, 709 F. Supp. 329, 331 (E.D.N.Y. 1989), that a state's common law slayer rule was not preempted. *See also* IRS Gen. Couns. Mem. 39000 (Jan. 26, 1983) (advising that the payment of survivor's benefits to a contingent beneficiary when the primary beneficiary is barred by the state's slayer rule will not violate the statutory prohibition against assignments and alienations in I.R.C. § 401(a)(13)). While the result in *Mendez-Bellido* (that the slayer rule applies to survivor's benefits under an ERISA-covered pension plan) is correct, the court's specific holding on the preemption issue is questionable. A sounder analysis might have been that ERISA preempted the state slayer rule, *see* *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987), but that the federal common law of pension plans comprehends a slayer rule applicable to the plan in question. For a case adopting this federal common law approach, *see* *New Orleans Elec. Pension Fund v. DeRocha*, 779 F. Supp. 845, 850 (E.D. La. 1991).

219. *In re Estate of Seipel*, 329 N.E.2d 419, 421 (Ill. Ct. App. 1975).

220. In isolation, this holding is not without its supporters. A number of courts, when faced with slayer statutes referring only to murder, have permitted heirs convicted of lesser homicidal crimes to inherit. *In re Kirby's Estate*, 121 P. 370, 371 (Cal. 1912) (intestacy); *Bird v. Plunkett*, 95 A.2d 71 (Conn. 1953) (will); *Nable v. Estate of Godfrey*, 403 So. 2d 1038, 1041 (Fla. Dist. Ct. App. 1981) (intestacy); *Rose v. Rose*, 444 P.2d 762, 764 (N.M. 1968) (life insurance). But coming on the heels of its 1972 holding, the *Seipel* court's 1975 holding is indefensible.

221. *United States v. Foster*, 238 F. Supp. 867 (E.D. Mich. 1965) (applying Hawaii common law); *Metropolitan Ins. Co. v. McDavid*, 39 F. Supp. 228 (E.D. Mich. 1941); *De Zotell v. Mutual Life Ins. Co.*, 245 N.W. 58 (S.D. 1932).

death.²²² Ordinarily, such disqualification of a beneficiary requires that the insurance proceeds be paid to the husband's estate for distribution under his will or to his heirs. However, because the wife in these cases was also a devisee or heir, the courts acknowledged that it would be absurd to allow the wife to collect indirectly what she was barred from collecting directly and held that the insurance proceeds were to be distributed to the persons who would have taken by will or intestacy had the wife predeceased her husband.²²³

In our discussion of the American jury's response to mercy killings, we saw that juries may hit upon a verdict of temporary insanity as a convenient device for shielding a mercy killer from the criminal law's extreme penalties.²²⁴ In general, such a verdict will likewise shield a mercy killer from the lash of the slayer rule²²⁵—on the theory that an insane killer is, as a matter of law, incapable of committing the wrongdoing that merits forfeiture under the slayer rule²²⁶—just as one guilty of negligent homicide may likewise inherit under the slayer rule.²²⁷ It has been held, however, that the mere fact that a convicted killer's sentence was suspended will not prevent the operation of the slayer rule.²²⁸

c. *Who Takes the Property in Lieu of the Slayer?*

It is generally agreed that the simplest and perhaps most often-applied solution is to distribute the property as if the slayer had predeceased the victim.²²⁹ This solution suffices where the victim died

222. See cases cited *supra* note 221.

223. See cases cited *supra* note 221.

224. See *supra* note 106.

225. *Estates of Ladd*, 153 Cal. Rptr. 888, 894 (Ct. App. 1979); *Turner v. Estate of Turner*, 454 N.E.2d 1247, 1252 (Ind. Ct. App. 1983); *Ford v. Ford*, 512 A.2d 389, 398 (Md. 1986); *In re Estate of Vadlamudi*, 443 A.2d 1113, 1117 (N.J. Super. Ct. Law Div. 1982); *Simon v. Dibble*, 380 S.W.2d 898, 899 (Tex. Civ. App.), *writ refused*, 8 Tex. Sup. Ct. J. 9 (1964). Curiously, the slayer statute of Ohio expressly applies to a slayer found not guilty by reason of insanity. OHIO REV. CODE ANN. § 2105.19(A) (Anderson 1990).

226. Some cases have permitted an insane slayer to inherit on the ground that the pertinent slayer statute, by its terms, applied only to a person "convicted" of felonious homicide, and a person acquitted by reason of insanity would fail to meet the conviction requirement. See, e.g., *Turner*, 454 N.E.2d at 1252.

227. *Beene v. Gibraltar Indus. Life Ins. Co.*, 63 N.E.2d 299, 300 (Ind. App. 1945); *Commercial Travelers Mut. Accident Ass'n v. Witte*, 406 S.W.2d 145, 149 (Ky. 1966); *Schreiner v. High Court*, 35 Ill. App. 576, 580 (1890). *Contra Chase Estate*, 44 D & C.3d 34 (Pa. Orphans Ct. 1987) (vehicular homicide by a driver whose blood alcohol level was 0.151%).

228. *United States v. Foster*, 238 F. Supp. 867 (E.D. Mich. 1965) (applying common law of Hawaii).

229. McGovern, *supra* note 13, at 73. Some slayer statutes direct just such an outcome. E.g., NEB. REV. STAT. § 30-2354 (1989); N.J. REV. STAT. ANN. § 3B:7-1 (West1991); N.C. GEN. STAT. § 31A-4 (1984).

intestate,²³⁰ but where the slayer was a devisee under the victim's will, the question becomes more complex. Suppose the testator's will devises "my entire estate to *A*, but if *A* should predecease me, then to *B*." Suppose further that *A* murders the testator and is therefore barred by the slayer rule from inheriting. Will the alternate taker named in the will (*B*) be entitled to take, or will the property pass by intestacy to the testator's heirs? Most courts would give the estate to *B*, unless there is clear evidence that the testator would have preferred a different result.²³¹ For example, in *In re Wilson's Will*, where a legatee-husband had murdered his testatrix-wife and her alternate legatees were the husband's children by a prior marriage, the court noted that in these special circumstances the wife might have preferred her property to go to her heirs rather than to the legatees designated to take upon the husband's predecease:

Mr. and Mrs. Wilson were married . . . after a very short courtship, and the will of testatrix was executed approximately a month after the marriage. On the record before us it does not appear how long she had known the alternate legatees or whether she had any particular attachment for them. . . .

In determining who should [inherit the testatrix's property], the question to be resolved is how the wishes of the testatrix would best be carried out under the fact situation which has resulted from the murder. To properly decide such issue in our opinion will require the taking of further testimony by the trial court.²³²

A few courts would hold, in our *A* and *B* hypothetical, that the testator's property should pass by intestacy because the condition precedent to *B*'s taking—namely, *A*'s death prior to the testator's—did not in fact occur.²³³ This is an inappropriately literal interpretation of the testator's language. As the *Wilson* court stated, the fundamental inquiry should be the determination of the testator's

230. Fellows, *supra* note 13, at 524. Professor Fellows has demonstrated that the fiction of the slayer's predecease may not provide quite so simple a solution in jurisdictions under the pre-1990 Uniform Probate Code, if the mechanics of distribution by right of representation require the initial division into shares to be made at the level of the first generation to have a living member. *See id.* at 524-27.

231. *E.g.*, *Glass v. Adkins*, 436 So. 2d 844, 847 (Ala. 1983); *Whitfield v. Flaherty*, 39 Cal. Rptr. 857, 861 (Dist. Ct. App. 1964); *Welch v. Welch*, 252 A.2d 131 (Del. Ch. 1969); *Carter v. Carter*, 88 So. 2d 153 Fla. 1956 (life insurance case, where, upon the disqualification of the primary beneficiary, the proceeds were paid to the alternate beneficiary rather than to the insured's heirs).

232. 92 N.W.2d 282, 287-88 (Wis. 1958).

233. *E.g.*, *Reliable Life Ins. Co. v. Spurgeon*, 763 S.W.2d 674 (Mo. Ct. App. 1988) (involving life insurance proceeds); *Bullock v. Expressmen's Mut. Life Ins. Co.*, 67 S.E.2d 71 (N.C. 1951) (same); *In re Dellow's Will Trusts*, 1 All E.R. 771 (1964).

intent.²³⁴ When the testator provided for a gift over to *B* in the case of *A*'s death, he did so not because he regarded *B* as worthy to take only if a specific melancholy event occurred; rather, he did so because he intended *B* to take if *A* was for any reason unable to take. The will mentioned only death simply because death is the most likely disability to be anticipated by the testator; the will plainly expresses his intention that the interests of his heirs be subordinate to those of *B*. An analogous issue arises in the context of statutes providing that a testator's divorce after executing a will voids all bequests to the former spouse. Under such statutes, if the testator bequeaths property to the spouse, with a gift over in the event the spouse predeceases the testator, most courts, in the event of divorce, give effect to the gift over even though the literal condition precedent (the spouse's predecease) has not occurred.²³⁵ Similarly, if a legacy is voided by statute because the legatee is also a witness to the will,²³⁶ courts generally decree the distribution of the property to the person or persons who would have taken had the legatee-witness predeceased the testator.²³⁷

d. The Necessity and Sufficiency of Criminal Conviction

For an heir or legatee to be barred by the slayer rule from inheriting, it must be proved, generally by a preponderance of the evidence,²³⁸ that he feloniously killed the decedent. To what extent will a lack of criminal conviction preclude operation of the slayer rule? To what extent will the fact of criminal conviction require the operation of the slayer rule?

234. See 92 N.W.2d 282 (Wis. 1958).

235. E.g., *In re Estate of Fredericks*, 311 So. 2d 376 (Fla. Dist. Ct. App. 1975), cert. denied, 320 So. 2d 394 (1975); *In re Estate of Shelton*, 311 N.E.2d 780, 782 (Ill. App. Ct. 1974); *Peiffer v. Old Nat'l Bank & Union Trust Co.*, 6 P.2d 386, 388 (Wash. 1931). A few courts, however, apply the condition literally and refuse to effectuate the gift over; intestacy or partial intestacy is the unfortunate result. *In re Rosecrantz's Estate*, 198 N.W. 728 (Wis. 1924); see generally J.R. Kemper, Annotation, *Devolution of Gift Over Upon Spouse Predeceasing Testator Where Gift to Spouse Fails Because of Divorce*, 74 A.L.R.3d 1108 (1976).

236. See generally WILLIAM M. MCGOVERN, JR. ET AL., *WILLS, TRUSTS AND ESTATES* 164-65 (1988) ("[M]ost states specifically invalidate a bequest to an interested witness.")

237. E.g., *In re Estate of Webster*, 574 N.E.2d 245, 246 (Ill. App. Ct.), appeal denied, 580 N.E.2d 116 (Ill. 1991), cert. denied sub nom. *Williams v. Harley*, 112 S. Ct. 1178 (1992).

238. Fellows, *supra* note 13, at 500, 501. Professor Fellows noted an emerging trend requiring proof of the homicide to be made by clear and convincing evidence, a trend of which she approves "given the stigma of a finding that a person feloniously and intentionally killed the decedent." *Id.* at 502. In §§ 2(a) and 3(a) of my model statute, *infra*, I adopt a "clear and convincing" standard with respect to proving entitlement to the exception to the slayer rule; and in §§ 2(b) and 3(b) of the statute, I adopt the same standard with respect to forfeiting that entitlement through malign or reckless conduct.

(1) The Necessity of Criminal Conviction

In the absence of a statutory requirement of conviction, the slayer rule can operate to bar a killer who was never convicted. Thus, where the slayer commits suicide before criminal charges can be brought or resolved, the slayer rule has been invoked, with the result that the victim's property passes to the victim's heirs or alternative legatees rather than to the heirs or legatees of the slayer.²³⁹ Indeed, even where an accused slayer is acquitted in a criminal proceeding, he may still be barred by the slayer rule if his guilt is proved in the civil proceeding.²⁴⁰ This latter result is justified in part by the differences in the burdens of proof between the criminal proceeding and the civil proceeding (it may be possible to prove the slaying by a preponderance of the evidence but not beyond a reasonable doubt) and in part by the principles of *res judicata* and due process (a private litigant seeking to block inheritance by a suspected killer should not be bound by the state's failure to convict, since the private litigant was not a party to the state proceeding).

A significant minority of slayer statutes declare that a person *convicted* of criminal homicide, however defined or restricted, shall not inherit from the victim.²⁴¹ Strictly speaking, it does not follow from such language that *only* a person convicted can be barred from inheriting; just as it does not follow from a statute stating "all drunk drivers shall lose their licenses" that drunkenness behind the wheel

239. *E.g.*, *National City Bank v. Bledsoe*, 144 N.E.2d 710, 715 (Ind. 1957); *In re Estate of Cox*, 380 P.2d 584, 588 (Mont. 1963); *Thompson v. Mayes*, 707 S.W.2d 951 (Tex. Civ. App. 1986).

240. *E.g.*, *Horn v. Cole*, 156 S.W.2d 787, 788-90 (Ark. 1941); *Carter v. Carter*, 88 So. 2d 153 (Fla. 1956); *In re Estate of Congdon*, 309 N.W.2d 261, 271 (Minn. 1981); *Anderson v. Anderson*, 130 So. 91 (Miss. 1930); *State Mut. Life Assurance Co. v. Hampton*, 696 P.2d 1027, 1033 (Okla. 1985); *Estate of D'Amore*, 37 Del. Co. 360, 360 (Pa. Orphans' Ct. 1950).

Similarly, where a slayer statute, by its terms, applies only in cases of homicide of a specified degree of culpability, the slayer's conviction of only a lesser offense than that specified in the slayer statute will not preclude the application of the statute if the more serious crime can be proved in the civil proceeding. For example, in *Bounds v. Caudle*, 549 S.W.2d 438 (Tex. Civ. App.), *rev'd on other grounds*, 560 S.W.2d 925, 926 (Tex. 1977), a husband pleaded *nolo contendere* to negligent homicide of his wife in the first degree. The Texas statute barring a slayer from taking insurance proceeds applied by its terms only to one who slew "willfully," and the crime of negligent homicide excludes homicidal intent. 560 S.W.2d at 928 (quoting TEX. INS. CODE ANN. art. 21.23 (West 1951)). The court held, however, that the judgment of the criminal court as to lack of intent was not binding on the civil court, particularly where the conviction was based on plea bargaining. *Id.* The husband was barred from collecting the proceeds. *Id.*; see also *In re Loud's Estate*, 334 N.Y.S.2d 969 (Sur. Ct. 1972) (holding that beneficiary convicted of felonious assault forfeited right to insurance policy proceeds).

241. *E.g.*, D.C. CODE ANN. § 19-320 (1989); KY. REV. STAT. ANN. § 381.280 (Michie/Bobbs-Merrill 1920); OKLA. STAT. ANN. tit. 84, § 231 (West 1990).

is the only misbehavior that can cost a driver his license. Consequently, many courts faced with slayer statutes referring expressly to conviction have interpreted those statutes as supplementing rather than superseding the common law slayer rule and have accordingly barred even unconvicted slayers from inheriting.²⁴² A few courts, however, have interpreted the reference to conviction as a legislative command that conviction be a necessary condition for operation of the statute.²⁴³ This latter interpretation is ill-founded as a matter of logic and ill-considered as a matter of policy; in view of the higher standard of proof required for criminal conviction, an acquittal should not be regarded as conclusive in a civil proceeding brought to apply the slayer rule.

(2) The Sufficiency of Criminal Conviction

If a person is convicted of the kind of homicide that would ordinarily give rise to a forfeiture under the relevant slayer rule, is the conviction conclusive on the issue of the rule's applicability? In the absence of a statutory direction on the question, courts generally hold that criminal conviction is not sufficient; the alleged slayer's act must be proved in the civil proceeding as well, lest civil litigants capitalize on proceedings to which they were not a party.²⁴⁴ Indeed, some civil courts go so far as to treat evidence of the conviction as inadmissible, on the theory that the conviction "is only an opinion

242. *Smith v. Greenburg*, 218 P.2d 514 (Colo. 1950); *National City Bank v. Bledsoe*, 144 N.E.2d 710, 715 (Ind. 1957), *overruling* *Bruns v. Cope*, 105 N.E. 471 (Ind. 1914); *Jones v. All Am. Life Ins. Co.*, 325 S.E.2d 237, 244 (N.C. 1985); *Parker v. Potter*, 157 S.E. 68, 70-71 (N.C. 1931); *Shrader v. Equitable Life Assurance Soc'y*, 485 N.E.2d 1031, 1034 (Ohio 1985). Statutes referring expressly to conviction, though they have not generally been construed as making conviction a necessary condition for application of the slayer rule, have been construed as making conviction a sufficient condition. See *Legette v. Smith*, 85 S.E.2d 576, 578 (S.C. 1955) (dictum); *infra* note 247.

Under the Uniform Probate Code's slayer rule, conviction is a sufficient condition but plainly not a necessary condition.

[A final] judgment of conviction establishing criminal accountability for the felonious and intentional killing of the decedent conclusively establishes the convicted individual as the decedent's killer for purposes of this section. In the absence of a conviction, the court, upon the petition of an interested person, must determine whether, under the preponderance of evidence standard, the individual would be found criminally accountable for the felonious and intentional killing of the decedent.

UNIF. PROBATE CODE § 2-803(g) (1990).

243. *E.g.*, *Peeples v. Corbett*, 157 So. 510, 512 (Fla. 1934); *In re Estate of Buehnemann*, 324 N.E.2d 97, 98 (Ill. App. Ct. 1975); *Hogg v. Whitham*, 242 P. 1021, 1022 (Kan. 1926); *Holiday v. McMullen*, 756 P.2d 1179, 1180 (Nev. 1988).

244. *E.g.*, *Davis v. Aetna Life Ins. Co.*, 279 F.2d 304, 311 (9th Cir. 1960) (interpreting California law); *Sovereign Camp W.O.W. v. Gunn*, 150 So. 491 (Ala. 1933); *In re Estate of Mahoney*, 220 A.2d 475, 479 (Vt. 1966).

by the finder of fact in the criminal trial, who, having no personal knowledge, could not be a witness, and even if he could, his opinion would be . . . hearsay . . . unless he appeared in court in the civil case."²⁴⁵

Nonetheless, it is a great convenience to be spared the trouble and expense of relitigating the question of the alleged slayer's guilt in the civil proceeding, and accordingly most courts permit the conviction at least to be offered as evidence for purposes of applying the slayer rule. A few courts even treat the record of conviction as conclusive evidence of the slayer's guilt: a result reached by judicial decision²⁴⁶ or mandated by statute.²⁴⁷ In view of the greater burden of proof required for criminal conviction and the undeniable efficiency of treating the conviction as conclusive, such treatment is certainly defensible where the slayer had an opportunity in the criminal trial to litigate every defense that might be raised in the civil proceeding. But where, as I am urging, the slayer may assert as a defense in the civil proceeding that the killing was a mercy killing, the fact of criminal conviction should not be regarded as conclusive, since the mercy killing defense is not available in criminal proceedings.²⁴⁸

VI. THE EXCEPTION FOR EUTHANASIA AND ASSISTED SUICIDE

Where some collateral matter arises out of the general words [of a statute], and happens to be unreasonable, there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity and . . . *quoad hoc* disregard it.²⁴⁹

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245. McGovern, *supra* note 13, at 101. For examples of cases barring evidence of the conviction, see *Smith v. Dean*, 290 S.W.2d 439 (Ark. 1956); *Lillie v. Modern Woodmen of Am.*, 130 N.W. 1004 (Neb. 1911).

246. *E.g.*, *Travelers Ins. Co. v. Thompson*, 163 N.W.2d 289 (Minn. 1968), *cert. denied and appeal dismissed*, 395 U.S. 161 (1969); *In re Estate of Kravitz*, 211 A.2d 443 (Pa. 1965).

247. *See, e.g.*, CAL. PROB. CODE § 254(a) (West 1991); ILL. ANN. STAT. ch. 110 1/2, § 2-6 (1983); N.J. STAT. ANN. § 3B:7-6 (West 1991); UNIF. PROBATE CODE § 2-803(g) (1990).

248. *See supra* notes 49-96 and accompanying text.

249. This passage is quoted in *Riggs v. Palmer*, 22 N.E. 188, 189 (N.Y. 1889), where it is offered as justification for a departure from the literal language of the statutes regarding wills and their revocation (statutes which would have allowed a murderous heir to inherit) in order to annul a will that had been executed in the slayer's favor. But Blackstone's remark could no less readily serve as justification for a departure from the literal wording of a slayer statute to permit a mercy killer to inherit.

Some three decades ago, Harold Dellow—who had executed a will leaving all his property to his wife, or, if she predeceased him, to two charities—suffered two strokes, which left him in a childlike state, unable to read and unable to converse coherently. His wife, depressed by his helplessness and by her fear that there would be no one to care for him after her death, killed him and then herself by filling the room with asphyxiating gas.²⁵⁰ Because she survived her husband,²⁵¹ she would have been entitled to inherit under his will but for the court's application of a common law slayer rule, which barred her inheritance.²⁵² The court was unhappy with this result, however, and did not shrink from expressing its dissatisfaction with the rule's rigidity:

Here was a woman who quite clearly enacted this tragedy not out of any hatred of her husband—she and her husband had apparently been happily married for many years. She was deeply concerned for him particularly in the event of his surviving her. Doubtless she was exhausted by the work of continually looking after such a helpless man as the husband. It is in these circumstances that I find it somewhat repellant to have to hold that the wife was guilty of a crime which ranks amongst the most serious that can possibly be committed. The law in its concern for the protection of human life must be strong, and, indeed, severe, but I cannot refrain from saying that, in its bearing on such a case as this, it is clumsy, crude, and, indeed, nowadays, if the case is regarded sympathetically, somewhat uncivilised. I, therefore, wish to make it perfectly plain that, though the wife must be held by me to have feloniously killed the husband, nevertheless it is not, in my judgment, a crime which should attract the deep stigma which still, rightly and fortunately for good order in our country, attaches to the commission of crime. This is clearly a case for compassion rather than for condemnation.²⁵³

250. Her death may have been hastened by ingesting barbiturates. *Re Dellow's Will Trusts*, 1 All E.R. 771, 774 (1964).

251. Under applicable law, she was presumed to have survived him. No evidence of the actual order of deaths existed. *Id.* at 772.

252. Though the means she employed to kill her husband also killed her, she had nonetheless committed a criminal homicide. "One who has maliciously caused the death of another is not relieved from guilt of murder by the fact that he was trying to take his own life also." ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 121 (3d ed. 1982). For examples of English cases applying this rule in the context of suicide pacts, where one participant survived the attempt, see *Regina v. Allison*, 173 Eng. Rep. 557 (Central Crim. Ct. 1838); *Rex v. Dyson*, 168 Eng. Rep. 930 (1823).

253. *Dellow's Will Trusts*, 1 All E.R. at 775. The bequest to the wife was void under the slayer rule, but since the alternate bequest was to take effect only if the wife predeceased the husband (which she did not), the husband was found to be intestate. *Id.* The court

Cases like *Dellow* illustrate the need for an exception to the slayer rule: an exception where the slaying was an assisted suicide²⁵⁴ or was carried out to relieve the suffering of one afflicted with a permanent and incurable illness that would ultimately have caused his death or with a permanent and irreversible incapacity that imposed severe physiological or psychological²⁵⁵ pain on him.²⁵⁶ The rest of this article will be devoted to promoting just such an exception.

The slayer rule seems at first glance to be self-evidently just, requiring no defense and permitting no exception. Indeed, one court asserted confidently that the rule was based on "principles of equity and morality as understood and practiced by the average citizen and almost universally applied by the Christian nations of the world."²⁵⁷ Yet, as Blackstone reminded us, "we often mistake for nature what we find established by long and inveterate custom."²⁵⁸ Tradition views the slayer rule as a corollary of the *nullus commodum* maxim; but that maxim goes too far.

In fact, people often profit, perfectly legally, from their legal wrongs. The most notorious case is adverse possession—if I

decreed that his property should pass to his heirs determined as if his wife had predeceased him. *Id.*

254. "[P]ublic policy would most certainly condemn any one who was guilty of such offense [encouraging or assisting a suicide] to the extent as would deprive such offender from taking a gift by the person so . . . encouraged . . . or assisted, whether the effect was successful or not." *Ray v. Leader Fed. Sav. & Loan Ass'n*, 292 S.W.2d 458, 468 (Tenn. Ct. App. 1953) (dictum). For an example of a case applying the slayer rule to bar inheritance by the survivor of a 50% successful suicide pact, see *Whitelaw v. Wilson*, 3 D.L.R. 554 (Ont. 1934).

255. The suffering of physical pain is not a prerequisite to the application of the proposed exception. First of all, "presently available drugs and techniques allow pain to be reduced to a level acceptable to virtually every patient, usually without unacceptable sedation," PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, DECIDING TO FORGO LIFE-SUSTAINING TREATMENT 50-51 (1983), although physicians' concern about turning their patients into addicts may prevent physicians from using such painkilling techniques as they possess. Second, the psychological pain produced by helpless dependance may be very great indeed, though at least one commentator dismisses such pain with the startling suggestion that our preference for "death with dignity" is simple vanity: sorrow that our once polished, healthy bodies are now infirm and unattractive. Goldstein, *supra* note 81, at B7.

256. This language appears in the definition of the determinative word "affliction" in § 3(a) of my model statute, *infra*. To resolve any possible ambiguity, the statutory definition expressly includes the persistent vegetative state.

257. *Price v. Hitaffer*, 165 A. 471, 471 (Md. 1933). Just for the record, Israel has a slayer statute, too: § 5 of the Succession Law, 5725-1965 (19 L.S.I. 58), cited in Anel Rosen-Zvi & Asher Maoz, *Principles of Intestate Succession in Israeli Law*, 22 ISRAEL L. REV. 287, 342 (1988).

258. 2 BLACKSTONE, *supra* note 110, at *10-13. The full quotation is: "We are apt to conceive, at first view that [the right of inheritance] has nature on its side; yet we often mistake for nature what we find established by long and inveterate custom."

trespass on your land long enough, some day I will gain a right to cross your land whenever I please. There are many less dramatic examples. . . . If a man jumps bail and crosses state lines to make a brilliant investment in another state, he may be sent back to jail, but he will keep his profits.²⁵⁹

Thus, *nullus commodum*, though an oft-quoted legal maxim, is not what we should call a rule. Rather, it constitutes what Ronald Dworkin characterized in *Taking Rights Seriously* as a mere principle:

A principle . . . does not even purport to set out conditions that make its application necessary. Rather, it states a reason that argues in one direction, but does not necessitate a particular decision. . . . [It] is one which officials must take into account, if it is relevant, as a consideration pointing in one direction or another.²⁶⁰

By applying *nullus commodum* in wills cases but not in adverse possession or bail-jumper cases, we are acknowledging either that (1) factors exist in the adverse possession and bail-jumper cases that override *nullus commodum* (factors that do not exist in wills cases); or (2) factors exist in wills cases requiring application of the *nullus commodum* principle (factors that do not exist in the adverse possession or bail-jumper cases). I am arguing the second: a factor exists in the wills cases that does not exist in the others, and that factor is the "victim's" intent.

The slayer rule is not a criminal penalty;²⁶¹ the sanction it imposes on the slayer depends only on the size of the estate, not on the heinousness of the homicide.²⁶² A brutal premeditated slaying of a penniless ancestor brings about no penalty under the slayer rule, while the voluntary or even involuntary manslaughter of a rich

259. Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 25-26 (1967), reprinted in RONALD M. DWORKIN, *TAKING RIGHTS SERIOUSLY* 25 (1977).

260. *Id.* at 26.

261. See Fellows, *supra* note 13, at 546 & nn.174-75.

262. Indeed, if the property passes to the slayer's children, on the theory that they would have taken had the slayer predeceased the testator, see *supra* note 218, arguably there is no penalty at all, merely a form of disclaimer in favor of the children. It might be urged that in such circumstances the slayer's children should likewise be barred from inheriting, lest their potential benefit serve as a temptation to the slayer. See *In re Norton's Estate*, 151 P.2d 719 (Or. 1944). *Contra In re Estate of Benson*, 548 So. 2d 775 (Fla. Dist. Ct. App. 1989). "But that argument proves too much. Under such a theory, a court in every case would have to determine what might have tempted the murderer and then act to frustrate realization of that goal—a speculative and fruitless task." McGovern, *supra* note 13, at 73. Such an argument would also be irrelevant, for the slayer rule bars a murderer even if his motive had nothing to do with the prospect of inheritance. See, e.g., *Budwit v. Herr*, 63 N.W.2d 841, 842 (Mich. 1954); *Leavy, Taber, Schultz & Bergdahl v. Metropolitan Life Ins. Co.*, 581 P.2d 167, 169-70 (Wash. Ct. App. 1978).

uncle may visit a sizable penalty upon the nephew. Thus, the slayer rule should not be thought of as a kind of fine imposed on account of the slayer's criminal status, for the slayer rule affects only the property whose succession would be altered by the slaying.²⁶³ Rather, the rule is designed to preserve the integrity of our property-transfer system by preventing a person from altering, by means of a wrongful slaying, the course of property succession as intended by the source of the property.

The slayer rule undoubtedly serves as a deterrent to those who would murder in hope of gain, and many of the early American cases applying the slayer rule involved killers motivated by the prospect of inheritance.²⁶⁴ But because the rule likewise applies where gain is not a motive for the homicide,²⁶⁵ and because mercy killing cases clearly involve no mercenary motives, we must examine the other purposes behind the slayer rule.

Professor Mary Louise Fellows has identified these purposes, finding them, as I have suggested earlier, to be independent of the *nullus commodum* principle. She finds the slayer rule to be "an essential element of the property transfer law system,"²⁶⁶ for slayers, by their acts, disrupt the expected succession to property in three ways:

[(1)] they cause the victims to lose personal enjoyment of their property; [(2) they] deny the victims the opportunity to

263. The Ohio slayer statute presents an interpretive challenge on this point. The statute bars a convicted slayer from "in any way benefit[ing] by the death." OHIO REV. CODE ANN. § 2105.19 (Anderson 1990). Suppose *O* conveys property to *X* for life, reversion in *O*. If *O* then kills *X*, are we to deprive *O* of his reversion? In a sense, the only "benefit" *O* derives from killing *X* is the acceleration of the reversion, represented by the interest on the property for *X*'s remaining life expectancy determined as of one instant before *X*'s death. Yet the statute goes on to declare that the property "shall pass or be paid or distributed as if the guilty person had predeceased the decedent." If *O* had died before *X*, the property upon *X*'s death would have passed to *O*'s distributees; but if we assign the entire property to *O*'s distributees, we thereby deprive *O* of a property interest that was not increased by *X*'s predecease. A sounder result would be to assign the income from the property to someone other than *O* (but to whom? *O*'s distributee's? *X*'s distributees?) for the remainder of *X*'s life expectancy, and then the property itself to *O*. Professor Fellows, who considered the case of a remainderman killing a life tenant, would seem to recommend that the income (or, rather, its present value) go to *X*'s distributees, on the theory that that would ameliorate *X*'s loss. See Fellows, *supra* note 13, at 537-38; see also *In re Estate of Karas*, 485 A.2d 1083 (N.J. Super. Ct. 1984).

264. *E.g.*, *Garwols v. Bankers Trust Co.*, 232 N.W. 239 (Mich. 1930); *Wellner v. Eckstein*, 117 N.W. 830 (Minn. 1908); *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889). A dissenting judge in *Riggs* argued that the criminal punishment for homicide was a sufficient penalty, though it is unclear from the opinion whether he thought the criminal punishment a sufficient deterrent or sufficient only from the point of view of moral retribution. *Id.* at 192 (Gray, J., dissenting).

265. See *supra* note 262.

266. Fellows, *supra* note 13, at 490.

change their existing estate plans^[267]; and [(3) they] interfere with the order of death of the victims and slayers, placing property transfers conditioned on survivorship in jeopardy of being controlled by surviving slayers. Only if the law denies slayers the right to succeed to their victims' property can the law ameliorate potential disruptions to property transfers and protect donative freedom. . . .²⁶⁸

When one examines these three untoward effects produced by a slayer's actions, one sees that they are not morally objectionable except insofar as they frustrate intentions we are otherwise disposed to honor. It is of course a commonplace of the law that causing someone to "lose personal enjoyment of [his] property" is neither civilly nor criminally wrongful if the loss of enjoyment is effected with the property owner's consent. It is equally true that nullifying a person's power to change his estate plan is not wrongful if the person has no wish to change the plan. Nor is it wrongful to cause a joint tenancy's survivorship condition to have an unforeseen effect if the tenants agree that the effect should occur.

To state the principle behind the slayer rule as baldly as possible: if *A*, a legatee under *B*'s will, murders *B*, *A* is barred from inheriting not because *A* has done something bad—the badness will, after all, be addressed by the criminal law—but because we can infer with confidence that *B* would have wanted *A* disinherited. Of course, this formulation somewhat overstates the reach of the slayer rule and must therefore be refined. For the slayer rule to be properly invoked, the slaying must have interfered with the power of the transferor to alter the order of succession. If *A* murdered *B*'s daughter instead of murdering *B*, *B* would likewise presumably want to disinherit *A*, but the slayer rule would not apply since *B* could disinherit *A* by changing his will; if *B* does not avail himself of the opportunity to disinherit *A*, we should not infer a desire to disinherit and use the slayer rule to effect such disinheritance.²⁶⁹

267. For example, in *In re Wilkins' Estate*, 211 N.W. 652, 654 (Wis. 1927), *overruled on other grounds by In re Wilson's Will*, 92 N.W.2d 282 (Wis. 1958), a legatee was barred from inheriting under the will of a woman he had murdered because "[b]y the commission of murder, she was by the very act of the murderer deprived of the sacred right to change her will in accordance with her volition." The court declared that if the testator had lived long enough after the murderous attack to change her will yet made no changes, the legatee would have been permitted to inherit. 211 N.W. at 654.

268. Fellows, *supra* note 13, at 493-94 (footnotes omitted).

269. Similarly, if *A* killed *B* in self-defense, the slayer rule should be inoperative, not because *A* was morally blameless, but because *B* had the opportunity of disinheriting *A* before trying to kill him.

If *B* is legally incompetent at the time of the slaying, the result under the slayer rule should match the result that would have obtained had *B* been competent. Thus, if *A*

In other words, intent is the key.²⁷⁰ Although the federal Constitution does not require the bestowal of a right to bequeath or inherit,²⁷¹ every American jurisdiction has chosen to grant such a right. The justification for this grant has always focused not on the transferee's deserts but on the transferor's desires and expectations.

[An argument in support of the institution of inheritance] is that inheritance is natural and proper as both an expression and a reinforcement of family ties, which in turn are important to a healthy society and a good life. After all, a society should be concerned with the total amount of happiness it can offer, and to many of its members it is a great comfort and satisfaction to know during that life that, even after death, those whom one cares about can be provided for and may be able to enjoy better lives because of the inheritance that can be left to them. Furthermore, it is argued, giving and bequeathing not only express but beget affection, or at least responsibility. Thus, society is seen as offering a better and happier life by responding to the understandable desire of an individual to provide for his or her family after death.²⁷²

Even *Riggs v. Palmer*, which established the slayer rule in New York, acknowledged that the purpose of statutes regulating the execution

murders *B* while *B* is incompetent, *A*'s inheritance should be barred. If *A* kills *B* in self-defense or murders *B*'s daughter while *B* is incompetent, *A*'s inheritance should not be barred by the slayer rule. Cf. *Pennsylvania Bank & Trust Co. v. United States*, 597 F.2d 382 (3d Cir.), *cert denied*, 444 U.S. 980 (1979); *Fish v. United States*, 432 F.2d 1278 (9th Cir. 1970) (these cases held that the donee of a general power of appointment is subject to federal estate tax under I.R.C. § 2041 by reason of that power even though his incompetence renders him incapable of exercising the power).

270. See discussion of the *Wilson* case *supra* text accompanying note 232.

271. Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.

Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942). *Hodel v. Irving*, 481 U.S. 704 (1987), may signal a retreat from the position enunciated in *Irving Trust*. This later case held that Congress could not abolish the right to transmit by inheritance or devise a particular kind of asset (small fractional shares of land allotted to Native American tribes) without furnishing compensation pursuant to the "takings" clause of the Fifth Amendment.

272. Edward Halbach, *An Introduction to Death, Taxes and Family Property*, in *DEATH, TAXES AND FAMILY PROPERTY* 3, 5-7 (Edward Halbach ed., 1977). Dean Halbach's argument is based on something akin to "natural rights." The reader interested in an economic defense of inheritance is directed to Gordon Tullock, *Inheritance Justified*, 14 J.L. & ECON. 465 (1971), and the exchange it engendered: Kenneth V. Greene, *Inheritance Unjustified?*, 16 J.L. & ECON. 417 (1973); Thomas R. Ireland, *Inheritance Justified: A Comment*, 16 J.L. & ECON. 421 (1973); Gordon Tullock, *Inheritance Rejustified*, 16 J.L. & ECON. 425 (1973). Inheritance also raises issues of social justice, see JOHN RAWLS, *A THEORY OF JUSTICE* 278 (1971), and class conflict, see EUGENIO RIGNANO, *THE SOCIAL SIGNIFICANCE OF THE INHERITANCE TAX* (William J. Schultz trans. & adapt., 1924).

and revocation of wills is to "carry into effect [testators'] final wishes. . . ." ²⁷³ Thus, if a legatee under a will euthanatizes or assists in the suicide of the testator, or if an intestate heir euthanatizes or assists in the suicide of the source of an inheritance, the decedent would presumably be grateful to the heir or legatee for his actions; we should not assume that he would have wished to disinherit the mercy killer. When the slayer rule is applied to bar someone's inheritance, the effect is to disregard the wording of the intestacy statute or the decedent's will; such disregard is defensible only when it accords with the presumed intentions of the decedent. ²⁷⁴

The history of dower provides a rough analogy to this proposed modification in the slayer rule. Under English common law prior to 1285 a wife's adultery and abandonment of her husband did not nullify her dower rights, ²⁷⁵ just as under earlier American common law an heir's murder of his ancestor did not nullify his inheritance rights. ²⁷⁶ The preservation of dower rights in the face of adultery caused much dissatisfaction and was overturned in 1285 ²⁷⁷ by the Statute of Westminster II, which provided: ²⁷⁸

If a wife willingly leave her husband and go away and continue with her [adulterer], she shall be barred for ever of action to

273. 22 N.E. 188, 189 (N.Y. 1889).

274. While it is obvious that wills express decedents' wishes, it is not so obvious that intestacy statutes reflect decedents' wishes. It might be urged that an intestacy statute represents the distribution that the legislature regards as the most fair or "natural," rather than the distribution most in keeping with the wishes of the electorate. In point of fact, however, it is generally agreed that intestacy statutes *are* designed to carry out the presumed wishes of the electorate. LAWRENCE H. AVERILL, JR., *UNIFORM PROBATE CODE* 31 (2d ed. 1987); 1 BOWE & PARKER, *supra* note 204, § 1.6; McGovern, *supra* note 13, at 71.

275. 2 RICHARD R. POWELL ON REAL PROPERTY ¶ 212[1] n.3 (Patrick J. Rohan ed., 1989 & Supp. 1991).

276. *See supra* note 204.

277. This "dissatisfaction" was undoubtedly confined to men. The post-1285 rule denying the adulterous runaway wife her dower rights may seem natural and even essential, if one considers only the case of the stereotypically devoted husband betrayed by his stereotypically dissolute wife. Other stories are possible, however: such as an honest wife married to a violently abusive husband. A wife in thirteenth century England was unable to obtain on the ground of cruelty the kind of divorce (*a vinculo*) that would permit her to remarry and was probably unable, on such a ground, to obtain even a judicial separation coupled with financial maintenance. *See, e.g.,* J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 559-62 (3d ed. 1990); R.H. HELMHOLZ, *MARRIAGE LITIGATION IN MEDIEVAL ENGLAND* 74-107 (reprint 1986). One wonders, given medieval women's meager economic opportunities, what options lay before a thirteenth century Englishwoman married to an abusive husband: options besides submission on the one hand or flight and sexual infidelity on the other.

278. Statute of Westminster II, 13 Edw. I, ch. 34 (1285) (Eng.). The first chapter of this lengthy statute was the famous *De Donis*, dealing with entailments. *See* THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 28 (5th ed. 1956).

demand her dower that she ought to have of her husband's lands. . . .

Most American jurisdictions adopted this rule, either by statute or as a matter of common law.²⁷⁹ The Statute of Westminster II did not effect a cancellation of a wife's dower, however, if the husband later became reconciled to her.

[E]xcept that [if] her husband willingly and without coercion of the church reconcile her, and suffer her to dwell with him, . . . she shall be restored to her action [to demand her dower].²⁸⁰

Consequently, although dower was ordinarily granted independently of the husband's presumed wishes,²⁸¹ in this one instance the husband's intentions were determinative and his forgiveness allowed the wife to take a property interest at his death that she otherwise could not have enjoyed, much as a "victim's" implicit consent in cases of mercy killing should trump the slayer rule. The analogy is admittedly flawed, since one cannot restore a murdered life as one can restore a marriage. Still, the husband's forgiveness could not undo the harm that thirteenth century Englishmen thought inhered in adultery; consequently the legislators who enacted the Statute of

279. See, e.g., *Stegall v. Stegall*, 22 F. Cas. 1226 (C.C. Va. 1825) (No. 13,351) (statute); *McGrenra v. McGrenra*, 44 A. 816 (Del. Orphans' Ct. 1890) (statute); *Wiseman v. Wiseman*, 73 Ind. 112 (1880) (statute); *McQuinn v. McQuinn*, 61 S.W. 358 (Ky. Ct. App. 1902) (statute); *Wilson v. Craig*, 75 S.W. 419 (Mo. 1903) (statute); *Cogswell v. Tibbets*, 3 N.H. 41 (1824) (common law); *Phillips v. Wiseman*, 42 S.E. 861 (N.C. 1902) (statute); *Morello v. Cantalupo*, 111 A. 255 (N.J. Ch. 1920) (statute); *Reel v. Elder*, 62 Pa. 308 (1869) (common law).

At the time the Statute of Westminster II was enacted, adultery was not grounds for divorce in England. (This is strongly suggested by JOEL P. BISHOP, *MARRIAGE, DIVORCE, AND SEPARATION* §§ 1495-98 (1891)). Pollock and Maitland, however, suggest that divorce was indeed obtainable at that time on grounds of adultery. See FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW* 147 (reprint 1968). So, but for the Statute, a freeholder might be faced with the prospect of his adulterous wife's claiming an interest in his lands after his death. But it would be erroneous to assert, as some have (see Harold A. Turteltaub, Comment, *Misconduct in the Marital Relation: Adultery as a Bar to Dower*, 13 U. MIAMI L. REV. 83, 84 (1958); see also *Davis v. Davis' Ex'r*, 167 N.W. 819 (Wis. 1918) (holding that the Statute of Westminster II did not represent the common law of Wisconsin since there was no need for the 1285 rule, divorce being obtainable in Wisconsin on the ground of divorce and divorce being a bar to dower)) that the Statute of Westminster II was grounded on the unavailability of divorce. The assertion would be erroneous for two reasons: first, the dower rule persisted even after divorce became obtainable upon proof of adultery; and second, the dower rule, from its inception, required and requires more than proof of adultery: it requires abandonment. *Cogswell v. Tibbets*, 3 N.H. 41 (1824); *Jarnigan v. Jarnigan*, 80 Tenn. 292 (1883).

280. Statute of Westminster II, 13 Edw. I, ch. 34 (Eng. 1285).

281. The purpose of dower was not to carry out the husband's presumed intention to benefit his widow but rather to assure "the sustenance of the wife and the nurture and education of the younger children." 2 BLACKSTONE, *supra* note 110, *130.

Westminster II might have found the analogy of murder and adultery more powerful than we.²⁸²

The foregoing discussion of the Statute of Westminster II is not intended to suggest that the slayer rule should be disregarded whenever the victim has "forgiven" the slayer.²⁸³ Evidence of the victim's forgiveness may be too easily manufactured or the forgiveness itself coerced. One need only recall the medieval and Renaissance practice of a condemned person's ceremoniously forgiving²⁸⁴ and even tipping the headsman in the hope of quick and painless service²⁸⁵ to realize how likely it is that a victim's alleged forgiveness may have been extorted through threats of even more inhumane dispatch.²⁸⁶ The proposed exception is accordingly confined to

282. "As early as 753 B.C., Romulus proclaimed the first marriage law, admonishing wives to 'conform themselves entirely to the temper of their husbands and the husbands to rule their wives as necessary and inseparable possessions.'" Kathleen A. McDonald, *Battered Wives, Religion, & Law: An Interdisciplinary Approach*, 2 YALE J.L. & FEMINISM 251, 254 (1989) (quoting R. Emerson Dobash & Russel P. Dobash, *Wives: The 'Appropriate' Victims of Marital Violence*, 2 VICTIMOLOGY: AN INTERNATIONAL JOURNAL 426, 427 (1978)). Even Blackstone opined that a husband could suffer no greater civil injury than his wife's adultery. 3 BLACKSTONE, *supra* note 110, at *139; see also SUSAN BROWNMILLER, *AGAINST OUR WILL* 16-18 (1975).

283. Advocates of this position can be found, however. A British commentator has argued for an exception to the slayer rule in the case of a testator who forgives his victim prior to death. J. Chadwick, *A Testator's Bounty to his Slayer*, 30 L.Q. REV. 211, 213 (1914). And the slayer rules of Louisiana and Germany likewise exclude cases where the victim has pardoned the slayer. LA. CIV. CODE ANN. art. 975 (West 1952); BGB § 2343 (F.R.G.) ("Die Anfechtung ist ausgeschlossen, wenn der Erblasser dem Erbunwürdigen verziehen hat.").

284. On the occasion of his execution for treason in 1601, Robert Devereux, the Earl of Essex, "called the executioner, and asked him how he must dispose himself on the block; and after having given him directions, the executioner kneeled before him, and besought him to forgive him. He turned himself and said, 'I forgive thee with all my heart, thou art the true executioner of justice.'" JOHN LAURENCE, *A HISTORY OF CAPITAL PUNISHMENT* 189-90 (Citadel Press, 1960) (1932) (quoting unidentified contemporary "State papers"). The careful reader will observe that Essex used the familiar form in addressing the executioner; evidently, the noble earl was not so transported with tenderness as to forget the difference in their ranks.

One must not overlook the possibility that the statements attributed to Essex by these State papers were official fabrications calculated to frustrate those who would impugn the justice of Elizabeth I, the monarch against whom the treason was allegedly committed and in whose name the sentence was carried out.

285. See HORACE W. BLEACKLEY & JOHN LOFLAND, *STATE EXECUTIONS VIEWED HISTORICALLY AND SOCIOLOGICALLY* 305 (1977).

In spite of Essex's eloquent expressions of forgiveness, *see supra* note 284, his executioner required three blows to sever the earl's head, though a contemporary account hastens to assure us that the first blow "absolutely deprived him of all sense and motion." LAURENCE, *supra* note 284, at 190.

286. A case of one, John James, is dealt with in a tract. The hangman demanded money of him "that he might be favourable at his death," and brusquely put the sum at £20. James pleaded poverty and could not rise to even £5: whereupon the hangman said he would "torture him

cases where the inference of the victim's consent may to some extent be objectively substantiated, either by the victim's physical condition prior to the homicide or by the fact that the victim was the agent of her own destruction.²⁸⁷

Suppose a testator's will provides: "I devise and bequeath my estate to *A*, even if *A* should kill me." Does such a testamentary instruction furnish that degree of "objective substantiation" the proposal requires so that the slayer rule would be inapplicable even if *A* maliciously slew the testator in cold blood? Assuming that *A* did not in any way participate in the will's procurement,²⁸⁸ such a testamentary instruction *should* insulate *A* from the operation of the slayer rule.²⁸⁹ The rule is founded on our concern for the testator's intent. A will, authenticated by means of a ceremony that reinforces the seriousness of this expression of intent, affords us direct access to the testator's wishes without the need for recourse to presumptions.²⁹⁰ It follows, of course, that a testator should likewise be able, by means of an express provision in his will, to rebut any presumed

exceedingly." James said he must "leave that to his mercy . . .," however, the sheriff and hangmen were so civil to him in his execution as to suffer him to be dead before he was cut down.

CHARLES DUFF, A HANDBOOK ON HANGING 151 (1961).

287. The proposed exception for assisting suicide, unlike the proposed exception for euthanatizing, is not limited to the dying or permanently disabled. Suppose a burn victim, though certain to survive her injuries, faces months of excruciating treatment and likely permanent disfigurement. The euthanatizing of such a person would not fall within the proposed mercy killing exception since she is neither dying nor permanently disabled. Although one could hardly fault her for preferring death in these circumstances ("[E]very competent adult has the right to forego treatment, *or even cure*, if it entails what for him are intolerable consequences or risks, however unwise his sense of values may be to others." *Downer v. Veilleux*, 322 A.2d 82, 91 (Me. 1974) (emphasis added)), such a decision—preferring death to a temporary ordeal—is less readily inferable from surrounding circumstances than is preferring death to a life-long ordeal. Accordingly, we should require some clearer indication of the earnestness of the burn-victim's decision. But surely suicide, even if assisted, would be satisfactory evidence of such earnestness; so if an heir or legatee assisted in her suicide, the assistant should be exempt from the reach of the slayer rule.

288. Every American living will statute requires that living wills be witnessed, and 28 of those statutes disqualify as witnesses any person expecting to inherit from the declarant. See the statutes cited in Gelfand, *supra* note 43, at 758 n.77. This exclusion reflects a legislative concern that someone standing to gain from another's death would be tempted to press him to sign a living will. One cannot deny the surface plausibility of this reservation, yet as Professor Gelfand pointed out: "Since most of the right-to-die judicial decisions . . . rely heavily on family members to actually make the euthanasia decision, and since a number of the living will statutes provide for decisionmaking by relatives when the patient has not executed a declaration, it seems incongruous that these same persons should be unacceptable as mere witness." *Id.* at 759 (footnotes omitted).

289. See § 4 of my model statute, *infra*. The testamentary instruction would not insulate *A* from the reach of the criminal law.

290. See Gelfand, *supra* note 43, at 755-56.

consent to euthanasia: i.e., "I bequeath my estate to *A*, but if *A* should kill me—even under circumstances suggesting mercy killing prompted by my sickness or disability—I bequeath my estate to *B*."

Presumably, testamentary instructions anticipating the testator's homicide would—if the will so provided—govern not only probate assets but also nonprobate assets, such as life insurance or joint tenancy property. True, the provisions of a testator's will cannot control the disposition of nonprobate assets²⁹¹ (except to the extent the doctrine of equitable election applies²⁹²); but a provision in a will purporting to exempt nonprobate transfers from the slayer rule would not be a dispositive provision but merely an evidentiary one, manifesting the testator's intentions regarding the operation of the slayer rule. However, a provision in a will could not exempt a nonprobate transfer from the operation of the slayer rule unless the testator was the source of the nonprobate transfer. Suppose, for example, that *O* transferred property to *A* for life, remainder to *B* if *B* survives *A* and to *C* if *B* does not survive *A*. If *B* euthanatizes *A*, *A*

291. Where a life insurance policy is silent as to the methods whereby a designation of beneficiary may be changed or revoked, the better view holds that the owner-insured may not effectively change the beneficiary by will, since the will has no effect until the insured's death, at which time the beneficiary's interest vests immediately. *Bellinger v. Bellinger*, 46 N.Y.S.2d 263 (Sup. Ct. 1943); *Stone v. Stephens*, 99 N.E.2d 766 (Ohio 1951). *Contra* *Doss v. Calas*, 383 P.2d 169 (Ariz. 1963); *Townsend v. Fidelity & Casualty Co.*, 144 N.W. 574 (Iowa 1913). All American courts agree that if a policy specifies the methods by which a change of beneficiary designation may be effected and such specifications do not include a will, the beneficiary may not be changed by will. *Holland v. Taylor*, 12 N.E. 116 (Ind. 1887); *Wannamaker v. Stroman*, 166 S.E. 621 (S.C. 1932); *Damon v. Northern Life Ins. Co.*, 598 P.2d 780 (Wash. Ct. App. 1979).

The first to die of two joint tenants may not devise her undivided half-interest; rather, it passes to the surviving joint tenant automatically by right of survivorship. 2 AM. L. PROP. § 6.2 (1952).

Whether the settlor of a revocable inter vivos trust may revoke it by will depends upon the trust provision prescribing the method of revocation. If the trust instrument expressly provides that the trust may be revoked by the settlor's will, then it may be so revoked. RESTATEMENT (SECOND) OF TRUSTS § 330, cmt. j (1959). But a mere reserved power of revocation that does not expressly refer to revocation by will is construed to permit only inter vivos revocation. *Rosenauer v. Title Ins. & Trust Co.*, 106 Cal. Rptr. 321 (Ct. App. 1973); *In re Estate of Anderson*, 217 N.E.2d 444 (Ill. App. Ct. 1966); *Kelley v. Snow*, 70 N.E. 89 (Mass. 1904); *Cohn v. Central Nat'l Bank*, 60 S.E.2d 30 (Va. 1950). *But see In re Estate of Lowry*, 418 N.E.2d 10 (Ill. App. Ct. 1981) (where the trust instrument provided that settlor could revoke by written instrument delivered to the trustee and where settlor executed a will expressly revoking the trust and delivered that will to the trustee, it was held that the delivered will effectively revoked the trust). Totten trusts (i.e., savings account trusts), however, because of their "thinness" as trusts (i.e., no one is bound as a fiduciary), may be revoked by an express provision to that effect in the depositor's will. *Delaware Trust Co. v. Fitzmaurice*, 31 A.2d 383 (Del. Ch. 1943), *modified on other grounds*, 38 A.2d 463 (Del. Ch. 1944); *In re Onodny's Will*, 226 N.Y.S.2d 645 (Sur. Ct. 1962), *aff'd*, 235 N.Y.S.2d 374 (App. Div. 1962); *In re Ludwig's Will*, 140 N.Y.S.2d 742 (Sur. Ct. 1955).

292. *See, e.g., In re Schaech's Will*, 31 N.W.2d 614 (Wis. 1948).

may very well be grateful for *B*'s intervention, but the person whose dispositive intentions must be determinative is *O*, not *A*. If *O* is morally averse to euthanasia, she might "intend" that the remainder pass to *C* rather than *B*, despite *A*'s presumed gratitude—indeed, declared gratitude—for *B*'s act of mercy.²⁹³

The issues become more complicated if the testator's slayer is also a testamentary witness. Again, consider the will that provides: "I devise and bequeath my estate to *A*, even if *A* should kill me." If *A* was a witness to the will, the "interested witness" statutes of most states would bar him from inheriting, even if he did not kill the testator.²⁹⁴ But "interested witness" statutes, though they may void a beneficiary-witness's bequest, generally permit the beneficiary-witness to take so much of the bequest as does not exceed the share of the estate he would have inherited had the will not been executed.²⁹⁵ Suppose the testator's two heirs are *A* and *B* and that, had the will not been written, *A* would have taken half the testator's property. If the slayer rule is invoked, the testator's estate will descend, let us suppose, to *B*, testator's heir determined as if *A* had predeceased him. Ordinarily, the testamentary provision under discussion should permit *A* to inherit half the testator's estate. However, the policy underlying "interested witness" statutes causes us to suspect the origin of any provision in favor of a witness. Accordingly, "interested witness" statutes should prevail over the testamentary instruction anticipating the slayer's homicide, and the estate should descend entirely to *B*.

The adoption of my proposed exception to the slayer rule would confront us with the prospect of property being inherited by imprisoned persons, possibly by permanently imprisoned persons.²⁹⁶

293. Outside the mercy killing context, it is reasonable to assume that a transferor of successive interests would not wish to allow a remainderman to accelerate his inheritance by killing the life tenant. Accordingly, courts should and often do use the slayer rule to bar a murderous remainderman's inheritance. *Petrie v. Chase Manhattan Bank*, 328 N.Y.S.2d 312 (App. Div. 1972), *modified*, 307 N.E.2d 253 (N.Y. 1973); *see also* R.I. GEN. LAWS § 33-1.1-9 (1984); WASH. REV. CODE § 11.84.080 (1987). Occasionally, however, courts have limited the slayer rule's application to cases where the victim was the source of the slayer's inheritance, thus permitting murderous remaindermen to accelerate their inheritances. *See, e.g., In re Emerson's Estate*, 183 N.W. 327 (Iowa 1921); *Blanks v. Jiggets*, 64 S.E.2d 809 (Va. 1951).

294. *See, e.g., ILL. ANN. STAT. ch. 110 1/2*, para. 4-6 (Smith-Hurd Supp. 1992).

295. *Id.*

296. It should be clear that the slayer rule was not a response to the anomaly of allowing an incarcerated person to inherit. In *New Orleans Pension Fund v. Derocha*, 779 F. Supp. 845 (E.D. La. 1991), for example, a woman was barred by the slayer rule from taking property as beneficiary of the man of whose murder (manslaughter, actually) she was convicted, even though she spent no time in prison because her sentence was ordered suspended.

While inheritance by the incarcerated might present some practical difficulties, this anomaly should not serve as a barrier to implementing my proposal unless the doctrine of "civil death" proves a factor. Although the doctrines of forfeiture, attainder, and corruption of blood as consequences of conviction for felony have had no place in American law since the early days of the Republic,²⁹⁷ a number of states enacted statutes, most of them now repealed, decreeing that a felon sentenced to life imprisonment in the state penitentiary thereupon suffered a "civil death," which one court defined as "a deprivation of all rights whose exercise or enjoyment depends upon some provision of positive law."²⁹⁸ A life convict might thus be barred by such statutes from instituting a civil suit²⁹⁹ or from marrying.³⁰⁰

Would these civil death statutes likewise bar a life convict from inheriting property? At present, only four states have civil death statutes: California,³⁰¹ Idaho,³⁰² New York,³⁰³ and Rhode Island.³⁰⁴ California has enacted another statute that preserves life convicts' inheritance rights notwithstanding the general civil death statute,³⁰⁵ and New York courts have consistently construed the New York civil death statute to permit life convicts to inherit.³⁰⁶ The Idaho and Rhode Island statutes have yet to be construed on this point; although it is doubtful that they would be interpreted to bar a life convict's inheritance rights, some discussion of these statutes would be useful.

297. See *supra* text accompanying note 200.

298. *In re Donnelly's Estate*, 58 P. 61, 61 (Cal. 1899); see *Town of Baltimore v. Town of Chester*, 53 Vt. 315 (1881); see generally *Legislation, Civil Death Statutes—Medieval Fiction in a Modern World*, 50 HARV. L. REV. 968 (1937). In the absence of a statute, American courts have not recognized civil death. *Platner v. Sherwood*, 6 Johns. Ch. 118 (N.Y. 1822); *Frazer v. Fulcher*, 17 Ohio 260 (1848); *Kenyon v. Saunders*, 30 A. 470 (R.I. 1894); *Davis v. Laning*, 19 S.W. 846 (Tex. 1892).

299. *Quick v. Western Ry.*, 92 So. 608 (Ala. 1922); *New v. Smith*, 84 P. 1030 (Kan. 1906). The logic of this rule at common law lay in the fact that conviction worked a forfeiture of goods to the Crown, so a convicted felon had no goods for which to sue.

300. *Miner v. New York State Dep't of Correctional Servs.*, 519 N.E.2d 301 (N.Y. 1987), *cert. denied*, 488 U.S. 941 (1988).

301. CAL. PENAL CODE § 2600 (West 1982 & Supp. 1992).

302. IDAHO CODE § 18-311 (1987).

303. N.Y. CIV. RIGHTS LAW § 79-a(1) (McKinney 1992).

304. R.I. GEN. LAWS § 13-6-1 (1981).

305. CAL. PENAL CODE § 2601(a) (West 1982 & Supp. 1992).

306. *Avery v. Everett*, 18 N.E. 148 (N.Y. 1888); *In re Estate of Hartman*, 351 N.Y.S.2d 43 (Sur. Ct. 1973); *In re Johnson*, 56 N.Y.S.2d 568 (Sur. Ct. 1945). One case—*In re Donnelly's Estate*, 58 P. 61 (Cal. 1899)—asserted that *Avery* stood only for the proposition that a life convict could retain the property he possessed at the time of conviction, and not for the proposition that a life convict could retain property inherited after conviction; having thus "distinguished" *Avery*, the Supreme Court of California barred a life convict from inheriting. 58 P. at 61. *Donnelly* strikes me as a serious misreading of *Avery*.

Rhode Island's civil death statute can be read as providing that a convicted felon's property, upon the commencement of his sentence, passes as if he had died on the date of his conviction; that is, the statute may contemplate the immediate administration of the convict's estate and the distribution thereof to his heirs.³⁰⁷ It would seem to follow logically from such an interpretation that a life convict could not inherit by will or intestacy³⁰⁸ or, if the convict could inherit, that the property inherited passed immediately from him to his heirs pursuant to the property-divestment feature of the civil death statute.³⁰⁹

307. Rhode Island's statute provides in part:

Every person imprisoned in the adult correctional institutions for life shall thereupon, with respect to *all rights of property*, to the bond of matrimony and to all civil rights and relations, of any nature whatsoever, be deemed to be dead in all respects, as if his or her natural death had taken place at the time of such conviction. . . .

R.I. GEN. LAWS § 13-6-1 (1981) (emphasis added). Rhode Island courts take the position that civil death does not occur while the criminal conviction is still under appeal. *Bogolian v. Vaccaro*, 422 A.2d 1253 (R.I. 1980). In Wisconsin, whose now-repealed civil death statute treated any life convict's pre-conviction marriage as terminated, a life convict's wife was permitted to remarry even while an appeal from the husband's conviction was still pending. *Civil Death Statutes*, *supra* note 298, at 975. Even had the felon executed a will prior to conviction, his property would not pass to his devisees upon his civil death. Without special authority, a probate court lacks jurisdiction to admit to probate the will of a person who has not actually died. *See Stevenson v. Montgomery*, 104 N.E. 1075 (Ill. 1914); *see generally* THOMAS E. ATKINSON, WILLS § 107 (2d ed. 1953). (Three states, by statute, have granted probate courts such "special authority" to certify the validity of the will of a living testator: ARK. CODE ANN. §§ 28-40-201 to -203 (Michie 1987); N.D. CENT. CODE §§ 30.1-08.1-01 to -04 (West Supp. 1991); OHIO REV. CODE ANN. §§ 2107.081 to -.083 (Anderson 1990)). Yet one commentator has asserted that the admission to probate of the will of a living testator was contemplated under four now-repealed death statutes. *Civil Death Statutes*, *supra* note 298, at 974. Alabama's now-repealed civil death statute provided that the felon had six months after conviction within which to write a will. ALA. CODE § 5293 (1923). If he wrote such a statutory will, it could be admitted to probate and its provisions executed; if he did not write such a will, the property passed to his heirs. *See Holmes v. King*, 113 So. 274 (Ala. 1927). That the Alabama legislature saw the need to enact such special will legislation suggests it assumed that in the absence of such legislation a person's property could pass upon civil death only to heirs and not under a pre-conviction will.

The Alabama statute, involving as it does the admission to probate of the will of a living testator, raises the anomalous possibility of a person summoned into court to testify to the due execution of his own will. ALA. CODE § 5293 (1923).

308. A dead person cannot inherit property from someone who has survived him. *See In re Estate of Skinner*, 397 So. 2d 1193 (Fla. Dist. Ct. App. 1981); *In re Kay*, 260 P.2d 391 (Mont. 1953); *In re Tamargo*, 115 N.E. 462 (N.Y. 1917); *Scott v. Ford*, 97 P. 99 (Or. 1908).

309. In that event, the inherited property should pass to the convict's heirs determined as of the date his civil death occurred, rather than to the heirs determined as of the (later) date on which he inherited the property. *Cf. North v. Graham*, 85 N.E. 267 (Ill. 1908) (holding that where a grantor of a determinable fee dies before the occurrence of the event that is to terminate the fee and precipitate a reversion to the grantor, the possibility of reverter descends to the heirs of the grantor who were living

The Idaho statute, unlike Rhode Island's, does not expressly mention property rights as among those lost upon civil death.³¹⁰ Little should be inferred, however, from such silence alone, for other civil death statutes that were likewise silent as to property rights have been construed to bar a life convict from inheriting.³¹¹ Idaho has another statute expressly barring property forfeitures as a criminal penalty.³¹² Again, little should be inferred from the existence of such a statute; the forfeitures prohibited thereby are forfeitures in favor of the Sovereign (forfeitures depriving the felon's heirs of their inheritance), while a civil death statute, if interpreted to bar a convict's inheritance rights, would accelerate the felon's heirs' inheritance.³¹³

It is most unlikely, however, that these few remaining civil death statutes will be interpreted to bar a life convict from inheriting. If nothing else, the obvious problems that would arise if the life convict were pardoned or paroled argue strongly against such an application of the general language of a civil death statute. Indeed, courts have been somewhat reluctant to interpret the general language of a civil death statute as barring a life convict from inheriting; of the six states whose courts were asked thus to construe a civil death statute, four held that the civil death statute did not bar a life

at the time of his death, and not merely to those who were living when the event happened that terminated the fee or to those who would have been the grantor's heirs had the grantor died on the date of such event).

310. "A person sentenced to imprisonment in the state prison for life is thereafter deemed civilly dead and shall not have any civil rights. . . ." IDAHO CODE § 18-311 (1987).

311. *In re Donnelly's Estate*, 58 P. 61, 61 (Cal. 1899) (arising prior to the enactment of the statute expressly preserving life convicts' inheritance rights, CAL. PENAL CODE § 2601 (a) (West 1982 & Supp. 1992)); see *Town of Baltimore v. Town of Chester*, 53 Vt. 315 (1881).

312. IDAHO CODE § 18-314 (1987).

313. 3 AM. L. PROP. § 14.5 (1952); *Quick v. Western Ry.*, 92 So. 608 (Ala. 1922); *Hamblin v. Marchant*, 175 P. 678 (Kan. 1918) (holding that the inheritance bar required by a slayer statute is not a forfeiture within the meaning of Kansas's constitutional prohibition of forfeitures: KAN. CONST. BILL OF RIGHTS § 12); *Frazer v. Fulcher*, 17 Ohio 260, 263-64 (1848) (dictum); *Rasor v. Rasor*, 175 S.E. 545 (S.C. 1934), criticized in *Recent Decisions*, 21 VA. L. REV. 232 (1935); see also *In re Lindewall*, 39 N.E.2d 907 (N.Y. 1942). *Contra Williams v. Shackelford*, 11 S.W. 222 (Mo. 1889) (holding that the "no forfeiture" provision in the state's constitution—Art. I, § 30—precluded the civil death statute's being interpreted to bar a life convict from inheriting); *Grooms v. Thomas*, 219 P. 700 (Okla. 1923) (same).

convict from inheriting,³¹⁴ and only two held that the statute did bar the inheritance.³¹⁵

The most fundamental and perhaps intractable objection to the proposal may be one of seemliness: that there is simply something offensive about allowing a killer to inherit from his victim. The essence of this sentiment may be captured in the traditional phrase "unworthy heirs," which has been applied not only to killers seeking to inherit from their victims but also to adulterous spouses claiming dower rights and to parents who, having previously abandoned their children, sought to inherit from them as their intestate heirs.³¹⁶

314. *Smith v. Becker*, 64 P. 70 (Kan. 1901); *Williams v. Shackelford*, 11 S.W. 222 (Mo. 1889); *Avery v. Everett*, 18 N.E. 148 (N.Y. 1888); *In re Estate of Hartman*, 351 N.Y.S.2d 43 (Sur. Ct. 1973); *In re Johnson*, 56 N.Y.S.2d 568 (Sur. Ct. 1945); *Grooms v. Thomas*, 219 P. 700 (Okla. 1923). The *Smith* case, in interpreting Kansas's civil death statute, held not that a life convict must be permitted to inherit new property, but rather that a life convict could not be stripped of his already-acquired property in favor of his heirs. As a matter of statutory construction, there is surely no basis for holding that the general language of the civil death statute requires one result without requiring the other (that is, that the statute bars a convict from inheriting but does not strip him of the property he owns at conviction). 3 AM. L. PROP. § 14.5 (1952); *In re Johnson*, 56 N.Y.S.2d 568 (Sur. Ct. 1945). *Contra In re Donnelly's Estate*, 58 P. 61, 61 (Cal. 1899) (stating that the two issues are different but not explaining why). But there may be a policy basis for permitting a life convict to keep the property he owns at conviction even though he is denied inheritance rights. To deprive a living person of his property in favor of his heirs requires that there be some mechanism for the identification of the convict's property, the identification of his heirs, and the transfer of title to them. No such mechanism is readily available in dealing with a living person's property. In the case of inheritance, on the other hand, a mechanism for identifying the property owner's property and successors and for transferring title to such successors does exist and will already have been invoked whether or not one of the successors is a life convict. The administration of the deceased property owner's estate can proceed normally; the only change required is the distribution of the estate as if the life convict predeceased the decedent. I suppose one might argue, to the contrary, that if a civil death statute is construed to allow the life convict to keep the property he owns at conviction, he cannot protect that property when the civil death statute deprives him of the right to bring civil actions such as ejectment or breach of contract. But that argues for the abolition of civil death statutes, not for their being construed to strip a life convict of his property. In any event, a civilly dead convict's property, if he is allowed to keep it, can be protected by the appointment of a committee to manage his assets while he is incarcerated. Indeed, even some states without civil death statutes nonetheless mandate the establishment of such committees. *E.g.*, N.Y. CORRECT. LAW §§ 320-25 (McKinney 1987); VA. CODE ANN. §§ 53.1-221 to -228 (Michie 1991); *see generally* Walter M. Grant et al., Special Project, *The Collateral Consequences of Criminal Conviction*, 23 VAND. L. REV. 929, 1101-09 (1970).

The most natural reading of the statute in *Smith* is that the life convict is indeed to be deprived of his property in favor of his heirs. In arriving at its conclusion that the statute did not deprive the convict of his property, the court employed so tortured a construction as to suggest the strongest possible judicial aversion to denying a life convict his property rights.

315. *Donnelly's Estate*, 58 P. at 61; *Town Of Baltimore v. Town Of Chester*, 53 Vt. 315 (1881). The civil death statute of Alabama was so worded as to make unescapable the conclusion that a life convict lost the right to inherit. *See supra* note 307.

316. *See Atkinson, supra* note 307, at § 37.

This "seemliness" objection prompts a two-fold response. First, "unworthiness" is an extremely fluid and slippery concept with some unfortunate antecedents. English common law regarded as unworthy (and hence excluded from heirship) infidels, aliens, sexually active unmarried women, usurers, and, for a time, Roman Catholics.³¹⁷ Second, the criminal law and the law of succession have vastly different purposes. The criminal law's response to homicide has ignored the victim's intent; killing by consent, mercy killing, and assisted suicide are all subject to criminal sanction regardless of the decedent's presumed wishes.³¹⁸ But because the purposes of the criminal law are so very different from those of the laws of succession, the former's condemnation of consensual homicide should not compel the latter's condemnation. There is no anomaly in continuing to impose criminal punishment while permitting the punished to inherit.

Criminal sanctions serve two functions: deterrence and retribution.³¹⁹ We punish to prevent transgressions and to inflict what we regard as deserved suffering upon the transgressor.³²⁰ Civil penalties can undoubtedly have deterrent effects: the penalty of disbarment of attorneys, for instance. Indeed, the slayer rule can have a deterrent effect, but only with respect to a person contemplating homicide for the purpose of inheriting from the victim; a potential killer with a different motive would not be deterred by the thought of losing an inheritance. Thus, with respect to mercy killing, the slayer rule affords no additional deterrence, and, should society think deterrence necessary for such cases, the criminal law is surely adequate.

But while deterrence may inhere in both civil law and criminal law, retribution is purely of the criminal law.

Retributive punishment, in the only sense in which it is admissible in any rational system of administering justice, is that which serves for the satisfaction of that emotion or retributive indignation which in all healthy communities is stirred up by injustice. It gratifies the instinct of revenge or retaliation,

317. 5 GEORGE W. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 2419 n.8 (John S. Grimes replacement 1979); *see also* 1 BLACKSTONE, *supra* note 110, at *132.

318. In a 1950 case of killing-by-consent, the judge, in passing sentence, remarked with satisfaction that the defendant "had acted as a martyr and must suffer punishment as the price of martyrdom." *Silving*, *supra* note 15, at 354.

319. "In my view, there are two and only two ultimate purposes to be served by criminal punishment: the deserved infliction of suffering on evildoers and the prevention of crime." HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 36 (1968).

320. *See id.* at 9-10.

which exists, not merely in the individual wronged, but also by way of sympathetic extension in society at large.³²¹

For this reason, we speak of a criminal who has served his prison sentence as having "paid his debt to society." That is, the debt discharged by the sentence is a debt *to society*, not to the victim. The slayer rule, on the other hand, being part of the law of property succession rather than the criminal law, deals only with relations between the killer and the victim. If the victim would be willing to have the killer inherit, why should society frustrate the victim's wishes? We allow a murderer to inherit if he killed someone other than the testator; why should we bar him if he killed a willing testator? Even the criminal law, though it does not regard consent as a defense to crimes to the person, has always regarded consent as a defense to property crimes.³²²

CONCLUSION

Sometimes killing can be a kindness and death a consummation devoutly to be wished. While the retributive purposes of the criminal law may be well served by continuing to punish mercy killings and assisted suicides, the dispositive purposes of the slayer rule are not well served by applying it in those instances. An exception to the slayer rule should be found whenever the slaying was an assisted suicide or was carried out to relieve the suffering of one afflicted with a permanent and incurable illness that would ultimately have caused his death or with a permanent and irreversible incapacity that imposed severe physiological or psychological pain on the victim.

321. JOHN SALMOND, JURISPRUDENCE 116-17 (10th ed. 1947).

322. *Edmondson v. State*, 89 S.E. 189, 190-91 (Ga. Ct. App. 1916) (larceny); *Tones v. State*, 88 S.W. 217, 218 (Tex. Crim. App. 1905) (robbery). *Cf.* *Union Stock-Yard & Transit Co. v. Mallory, Son & Zimmerman Co.*, 41 N.E. 888, 893 (Ill. 1895) (consent is a defense in cases of the tort of conversion); *Tousley v. Board of Educ.*, 40 N.W. 509, 510 (Minn. 1888) (same).

APPENDIX: A MODEL STATUTE

I offer the following model statute, which incorporates my recommendations, as a convenient summary of the ideas presented in this article.

§ 1. *Effect of Homicide on Testate and Intestate Succession.* An heir or devisee who feloniously and intentionally kills the decedent is not entitled to any benefits under the decedent's will or under the laws of intestate succession as the decedent's heir, and the estate of the decedent shall pass as if the killer had predeceased the decedent.³²³

§ 2. *Exception for Assistance to Suicide.*

(a) Section 1 shall not apply if the killer proves by clear and convincing evidence that (i) the homicide consisted solely in his providing assistance in the decedent's suicide; and (ii) the killer reasonably believed that the decedent was a competent adult at the time of the assistance.

(b) Subsection (a) of this section shall not apply if (i) the decedent's will expressly provides that a person who assists in his suicide shall not inherit; or (ii) the party seeking to bar the killer's inheritance pursuant to section 1 proves by clear and convincing evidence that the killer, by fraud, force, or duress, intentionally caused the decedent to commit suicide.³²⁴

§ 3. *Exception for Mercy Killing.*

(a) Section 1 shall not apply if the killer proves by clear and convincing evidence that he killed the decedent with the intention of relieving the decedent's suffering attributable to the decedent's affliction. For purposes of this section, the term "affliction" means (i) a persistent vegetative state, (ii) a perma-

323. The purpose here is to suggest statutory language embodying an exception to the slayer rule, rather than to suggest statutory language for the slayer rule itself. So that the suggested language will have a point of reference, however, this model statute begins with language similar to § 2-803(a) of the 1983 Uniform Probate Code (since amended). The UPC provision also dealt with surviving spouses' statutory shares as well as with the rights of joint tenants, life insurance beneficiaries, and donees of powers of appointment. For the sake of simplicity, this model statute deals only with testate and intestate succession. One division of the UPC's slayer rule seemed designed to prevent a remainderman from accelerating his remainder by murdering the life tenant. UNIF. PROBATE CODE § 2-803(d) (1983) (since amended). For the reasons discussed in the text at *supra* note 293, the proposed exception to the slayer rule would not apply in the case of such a murder.

324. One might wish to create a third exception (i.e., a third clause in § 2(b)): where the killer knew that the suicidal decedent was pregnant. While a person may properly consent to her own death, she may not properly consent (one might argue) to the death of a third party (the fetus). Therefore, by aiding the slaying of a third party, the killer has performed an act to which, arguably, the decedent may not properly consent. For the reasons adverted to in *supra* note 180, this is not an argument with which I am entirely sympathetic.

nent and incurable illness that would ultimately have caused the decedent's death, or (iii) a permanent and irreversible incapacity that imposed severe physiological or psychological pain on the decedent.

(b) Subsection (a) of this section shall not apply if the party seeking to bar the killer's inheritance pursuant to section 1 proves by clear and convincing evidence that (i) the killer inflicted excessive pain on the decedent in causing the decedent's death, or (ii) the killer, in causing the decedent's death, acted with reckless disregard for the physical safety of persons other than the decedent or the killer and thereby caused the death or serious physical injury of a person other than the decedent or the killer.

(c) Subsection (a) of this section shall not apply if the decedent's will expressly provides that a person who kills him shall not inherit.

§ 4. *Exception for Express Testamentary Direction.* Section 1 shall not apply if the decedent's will, attested by at least three credible witnesses none of whom is the killer, expressly provides that a person who kills the decedent may nonetheless inherit. Such a testamentary direction may be expressly limited, in its applicability, to the case of individually named persons or to particular circumstances, such as grave illness or injury.