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LEGAL ASPECTS OF EUTHANASIA

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THIS paper will discuss euthanasia, or "mercy killing," from a legal viewpoint. The discussion is particularly directed to that form of euthanasia contemplated in a proposed bill, introduction of which was unsuccessfully attempted at the 1947 session of the New York General Assembly. The proposed bill would have permitted that "any person of sound mind over twenty-one years of age who is suffering from severe physical pain caused by a disease, for which no remedy affording lasting relief or recovery is at this time known to medical science, may have euthanasia administered" at his own request and after a judicial hearing. It, therefore, contemplated euthanasia of a voluntary type. However, if a statute permitting voluntary euthanasia is ever enacted, we can be sure that there will be immediate agitation to broaden its provisions so as to authorize its compulsory application to certain classes, for instance, those suffering from painful and incurable illness, the mentally deficient, the aged, and others in ever broadening categories. The author will limit his discussion to the legal aspects of the subject. It is taken for granted, of course, that euthanasia in any form is a most heinous violation of the Divine and natural law.

EUTHANASIA IN A NON-EXISTENT LEGAL STATUS

The actual present status of euthanasia may be summed up in a few words. In the United States euthanasia is prohibited everywhere and under all conditions. Nowhere is it tolerated either by statute or judicial decision. However, if a statute purporting to legalize euthanasia should ever be enacted, then mercy killing could be practiced under its sanction without fear of legal penalties. (There will be no discussion as to the

possibility that state legislation of this nature might be held invalid under the Constitution of the United States.) How would this legislation square with previously existing concepts of law? To answer these questions, we must review briefly some fundamental principles of jurisprudence.

DIVINE AND NATURAL LAW

The law under which we live in the United States is derived from the common law of England. The common law, in turn, was the product of social evolution over centuries. It represents a social and political development the origin of which is lost in the antiquities of the Angles, the Saxons, and other ancient inhabitants of Britain. It was developed in the every day life of a rude community. Its principles were evolved by hard headed men of action. In all respects the common law is, and always has been, eminently practical and keyed to the everyday life of men. Christianity softened many of its harsher features and made men more conscious of the need for abstract justice in their dealings with one another. Two of England's chancellors have been canonized, St. Thomas a'Becket and St. Thomas More. It is certain that in a legal system, sometimes presided over by saints, there would be of necessity a striving to follow the Divine and natural law, however far it might fall short of that ideal in everyday experience.

The judges and lawyers who developed the common law were cognizant of the precepts of Divine and natural law. Nor was this consciousness lost when England left the Catholic Church. English lawyers, migrating to America, took with them these high principles, and, from the beginning, they have been an element of our own law. It has been said that:

"Christianity has been declared to be the alpha and omega of our moral law and the power which directs the operation of our judicial system. It underlies the whole administration of the government, state and national, enters into its laws, and is applicable to all because it embodies these essentials of religious faith which are broad enough to include all believers." Zollman, *American Church Law*, 1933, p. 26.

Sire William Blackstone has very concisely defined the relationship existing between Divine and natural law, and the laws enacted by men:

"*Law of Nature.* This law, being coeval with mankind and dictated by God Himself is obligatory on all. No human laws are of any validity if contrary to this, as they derive their force and authority from this original. We must discover what the law of nature directs in every circumstance of life, by considering what method will tend the most effectively to our own substantial happiness."

"*Revealed Divine Law.* In compassion for the imperfections of human reason, God has mercifully at times discovered and enforced his laws by direct revelations. These are found in the holy scriptures. These

precepts, when revealed, are really a part of the original law of nature. The revealed law is of greater authenticity, than the moral system framed by ethical writers, termed the natural law, because the one is the law of nature, as declared to be by God Himself; the other is only what, by the light of human reason, we imagine to be that law."

"Foundations of Human Law. Upon these two foundations, the law of nature and the law of revelation, depend all human law; i.e., no human law should contradict them. Upon indifferent points, the divine and natural law leave a man at his own liberty, subject for the benefit of society to restrain within certain limits * * *."

"Example Instance of Murder. This crime is expressly forbidden by the Divine law, and demonstrably by the natural law, and from these prohibitions arise the true unlawfulness of the crime. Those human laws that annex a punishment to it do not increase its moral guilt. If, therefore, any human law should allow or enjoin the commission of such crime, we should disobey such law, or we would offend both the natural and the divine."

"Unimportant Matters. In unimportant matters, not commanded or forbidden by those superior laws, the inferior legislature has opportunity to interpose and to make that action lawful which before was not so." Blackstone's Commentaries on the Law, Gavit's Edition, p. 27.

How was mercy killing regarded under common law? One may search in vain among the ancient writers for even a mention of mercy killing. The killing of the helpless aged was practiced among Teutonic peoples in early pagan times (Westermarck, Ethical Relativity). This was definitely a savage custom and disappeared before the dawn of the historical era.

Attention is called to Blackstone's remarks, above quoted, on the subject of murder, and his opinion of any human law which might attempt to legalize it. In another portion of his Commentaries he speaks thus of the sanctity of human life:

"Right of Personal Security. Defined. This right consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation.

"Life. This right is inherent by nature in every individual and exists even before the child is actually born.

"Natural Death. The natural life, the gift of the Creator cannot be legally destroyed by an individual, neither by the person himself, nor by any class of individuals, merely on their own authority." Blackstone's Commentaries on the Common Law, Gavit's Edition, p. 70.

MERCY KILLING IN THE LAW

There is nowhere in the common law any toleration for mercy killing. Nowhere is it even mentioned by the law writers of Blackstone's period and before. We might, therefore, inquire into the treatment afforded under the common law to subjects akin to mercy killing, such as assisting and abetting a suicide, abortion, and so forth. Under the Euthanasia bill, recently proposed to the New York Legislature, the consent of the victim is required, so that he participates in his own death, and the transaction bears considerable resemblance to suicide. How was suicide regarded under common law, both as to the party himself, and as to any person who might assist him in his effort? Let us return to Blackstone:

"Self murder is one form of this crime (felonious homicide) which was the pretended heroism, but real cowardice, of the Stoic philosophers; who thus avoided ills, which they had not the fortitude to endure. Though apparently countenanced by the Civil Law it was denounced by the Athenian law, which ordered the offenders hand to be severed from his body. The English law ranks suicide among the highest crimes, and if it has been done through the advice of another, such accessory is guilty of murder."

"The law in such cases can only reach the man's reputation and fortune. Hence, it has ordered an ignominious burial in the highway with a stake driven through the offender's body and the forfeiture of his goods and chattels to the king." *Supra*, 830.

We cannot, of course, justify the forfeiture of goods which will affect only the surviving relatives, who may be innocent, nor the ghastly revenge wreaked on the corpse, but at least this method of punishment does graphically illustrate the horror with which self destruction was regarded. It will be noted that the accessory to a successful suicide was deemed guilty of murder.

How is suicide, and assistance thereto, regarded in the United States? To date, all jurisdictions follow the common law rule. In most states the criminal law has been codified. The statutory codes follow common law principles, however, and the courts turn to the common law for interpretation in doubtful cases. In some states there are statutes specifically providing that any person aiding in a suicidal attempt is guilty of criminal offense. Statutes of Kansas and New York are set forth as typical of this group:

"Every person deliberately assisting another in commission of self murder shall be guilty of manslaughter in the first degree." Section 21-408, General Statute of Kansas, 1939.

"Suicide is the intentional taking of one's own life." Section 2300, Article 202, Book 39, McKinney's Consolidated Laws of New York.

“Although suicide is deemed a grave public wrong, yet from the impossibility of reaching the successful perpetrator, no forfeiture is imposed.” Section 2301, *supra*.

“A person who willfully, in any manner, advises, encourages, abets or assists another person in taking the latter’s life is guilty of manslaughter in the first degree.” Section 2304, *supra*.

Even in states which have not enacted statutes on the subject, persons who aid in suicide attempts have been held guilty of murder or manslaughter by application of common law principles. The case of *People v Roberts*, 178 N.W. 690, (Michigan 1920) 13 American Law Reports 1253, is a leading case on this point. It will be noted that this case also involves the principle of mercy slaying.

In that case the defendant’s wife suffered from an incurable illness, and desiring to die she requested the defendant to place near her bed a cup containing a mixture of Paris green. Defendant did as she requested, and his wife drank the mixture and died. He was convicted of murder in the first degree and the sentence sustained by the Supreme Court of Michigan. Quoting from the opinion:

“*** counsel contends, in substance, that suicide is not a crime in Michigan; that defendant’s wife committed no offense in committing suicide; that if she, as principal committed no offense, defendant committed none as an accessory before the fact; in short, if the principal is not guilty the accessory is not. *** But defendant *** is charged with murder. *** The important question, therefore, arises as to whether what defendant did constitutes murder by means of poison ***.”

“In considering the status of one who advises or aids another to commit suicide, Cye has this to say:

“Where one person advises, aids or abets another to commit suicide and the other by reason thereof, kills himself, and the advisor is present when he does so, he is guilty of murder as a principal, or in some jurisdictions, of manslaughter, or if two persons mutually agree to kill themselves together, and the means employed to produce death take effect upon one only, the survivor is guilty of murder of the one who dies. But if the one who encourages another to commit suicide is not present when the act is done, he is an accessory before the fact, and at common law, escapes punishment because his principal cannot be first tried and convicted. The abolition of the distinction between aiders and accessories in some jurisdictions has, however, carried away this distinction, so that a person may now be convicted of murder for advising a suicide, whether absent or present at the time it is committed, providing the suicide is the result of the advice.” (37 *Cyclopedia of Law and Procedure* 521)

“It is said in *Tiffany on Criminal Law*, p. 828, that ‘he who kills another at his own desire or command is a murderer as much as if he had done it of his own head.’

"We are of the opinion that, when defendant mixed the Paris green with water and placed it within reach of his wife, to enable her to put an end to her suffering by putting an end to her life, he was guilty of murder by means of poison within the meaning of the statute, even though she requested him to do so."

THE LEGAL GUILT OF THE ACCESSORY

It will be noted that the legal guilt of the accessory to a suicide was definitely established at common law, but, on account of a procedural point, the accessory was sometimes able to escape punishment. This "blind spot" has been corrected in most jurisdictions as illustrated in the Roberts case. It may be said that there is today no state in the union in which the person who assists in a suicide attempt is free of criminal guilt. The case of *Grace v State*, 69 S.W. 529 (Texas 1902) and *Saunders v State* 112 S.W. 68 (Texas 1908) are sometimes cited in an attempt to hold that this rule does not hold in Texas. However, attention is called to the following language in the Saunders decision:

"If appellant furnished with the carbolic acid at her request, with full knowledge on his part that she intended to take it, and did take it, and destroyed her life, he, having no further agency in it, would not be guilty. But if, knowing her purpose of destroying her life, at her request, he prepared the medicine and himself placed it in her mouth, and she swallowed it, then it would be an administration of this poison, and he would be punished in case of death as a murderer."

It may be considered then that the decision in the Saunders case turns on the point of causation only, and while the soundness of its reasoning may be questioned from the viewpoint of logic and morals, it does not make the Texas rule an exception to the basic principle upheld elsewhere. (For other cases on this point of the guilt of the accomplice to a suicide, see the annotation to the Roberts case, 13 A.L.R. 1253.)

While speaking of suicide, the "suicide pact" might be mentioned as bearing on the topic of mercy slaying. The rule is stated as follows in American Jurisprudence:

"With the possible exception of those jurisdictions where neither the person who commits suicide nor the one furnishing the means of committing it, violates the law if two persons mutually agree to kill themselves together, and the means employed to produce death take effect on one only, the survivor is guilty of the murder of the one who dies. The fact that the deceased consented will not remove the case from the grade of felonious homicide." 26 Am. Jur. 217.

The case of *Turner v State*, 108 S.W. 1139 (Tennessee 1908) 15 Law Reports Annotated, New Series 988, concerned a suicide pact. In the opinion is found a very concise exposition on the law on this subject:

Defendant was convicted of murder, having shot to death the deceased woman, with whom he had carried on a love affair. Evidence indicated that the two had planned a suicide pact, but after the death of the deceased, defendant could not go through with his part. The Supreme Court of the State sustained the conviction. Quoting from the opinion:

"The fact that the woman consented and the crime was in execution of a joint agreement would not remove the case from this grade of felonious homicide, since the crime embraced all the elements of malice, deliberation, and premeditation necessary to constitute murder in the first degree. Murder is no less murder because the homicide is committed at the desire of the victim. He who kills another upon his desire or command is, in the judgment of the law as much a murderer as if he had done it merely of his own head * * *."

MERCY KILLING AND ABORTION

Another matter which is akin in principle to mercy killing is that of abortion, together with the offense involved when the woman dies in consequence. As abortion, is usually performed with the consent of the woman, the element of consent by the victim is involved. "In criminal law the crime of abortion is the wilful bringing about of an abortion without justification or excuse. At common law such act was a misdemeanor only." 1 American Jurisprudence 133.

All the American states have enacted statutes specifically providing that any abortion not deemed necessary for the preservation of the mother's life is an offense. In addition most states have specifically provided that, if the woman dies, the perpetrator is guilty of felonious homicide in some degree. The statute of Illinois is typical:

"Whoever, by means of any instrument, medicine, drug or other means whatever, causes any woman, pregnant with child, to abort or miscarry, or attempts to procure or produce an abortion or miscarriage, unless the same were done as necessary for the preservation of the mother's life, shall be imprisoned in the penitentiary not less than one year, nor more than ten years; and if the death of the mother results therefrom, the person procuring or causing the abortion or miscarriage shall be guilty of murder." Section 3, Chapter 38, Smith Hurd Annotated Statutes of Illinois.

The decision of *State v Moore*, 25 Iowa 128, 95 American Decisions 776 (1868) contains a very concise resumé of the common law principles underlying these points:

The Supreme Court of Iowa approved conviction of murder in second degree of defendant who administered a drug to the deceased woman, with her consent, to produce an abortion. She died in consequence. Quoting from the opinion:

"The right to life and to personal safety is not only sacred in the estimation of the common law, but is inalienable. It is no defense to the defendant that the abortion was procured with the consent of the deceased. * * *."

"We hold, therefore, that, in cases of homicide, malice may, as at common law be implied from any act unlawful and dangerous in its nature, unjustifiably committed."

"Nearly two hundred years ago, Lord Hale laid down the law as follows: 'If a woman be with child, and any one give her a potion to destroy the child within her, and she takes it, and it works so strongly that it kills her, this is murder: for it was not to cure her of a disease, but unlawfully to destroy the child within her and, therefore he that gives a potion to this end must take the hazard and if it kills the mother, it is murder.' (Hale, Pleas of the Crown, 429.)"

DUELLING

Another instance of legal guilt despite the consent of the deceased is in regard to the duel. The common law principle is stated in American Jurisprudence as follows:

"If two men deliberately agree to fight a duel with deadly weapons, and the duel is fought pursuant to agreement, and one of them is killed, his slayer is guilty of murder." 26 American Jurisprudence 290.

There were times in the past when this principle of law was honored more in the breach than in the observance. However, the principle has always been in force. Some of the American states have enacted legislation specifically prohibiting the duel.

MUTILATION

The same moral principle heretofore discussed in connection with euthanasia has been applied to the common law offenses of mayhem and mutilation. "Mayhem * * * is the violently depriving another of the use of such of his members as may weaken him in fight. Hence, the cutting off or disabling a man's hand or finger, the striking out his eye or foretooth, or depriving him of parts of his body which sustain his courage are held to be mayhems." Blackstone's Commentaries, Gavit's Edition, page 838. This common law concept of mayhem had its origin in the king's solicitude that his subjects be preserved from such physical injury as would detract from their effectiveness as soldiers. The infliction of other physical injuries was covered under the lesser common law offenses of assault, battery or wounding.

"It has been held that if one maimed himself or procured himself to be maimed, both he and the party by whom the maiming was effected were subject to fine and imprisonment." 40 C. J. 2.

It is probable that the royal prerogative had something to do with this element of non-consent in mutilation cases. Yet the principle established is in conformity with that prevailing in other fields of the criminal law. There is no reason to suppose that it would have been otherwise, even had there been no consideration involved in connection with military effectiveness.

MOTIVES AND MERCY KILLINGS

We find few American cases turning on the point of mercy killing specifically. It is stated in American Jurisprudence:

"Only a very small number of cases of homicide have turned on the humanitarian motives of the slayer. In all such cases, however, where the strict legal rights of the people (the prosecution) have been pressed, the courts have held that the fact that the killing was done to relieve suffering, present or prospective, or was done from some other humanitarian motive, neither excused the killing nor mitigated the offense. The fact that the motive of the slayer is unselfish, or, according to moral standards what may be termed 'good' is not ordinarily recognized as a defense." 26 American Jurisprudence 228. (The propriety of this reference by American Jurisprudence to such standards as "good" may, of course, be questioned, but that does not affect the principle stated.)

One case in which the defendant attempted to make "mercy killing" a defense was that of *People v Roberts*, supra.

Another case of interest, although the defense of mercy killing was not specifically invoked was that of *People v Sherwood*, 3 N.E. (2d) 581 (New York 1936).

The defendant, a poverty stricken widow, drowned her two year old son, because, being unable to find work, she feared she could not support him. She was indicted for first degree murder. It appeared from the official report that on her trial the matter of mercy killing was not interposed as a defense, but rather a question of sanity. She was convicted as charged, but the conviction was set aside in the Court of Appeals on account of procedural errors. When again arraigned for trial she was permitted to enter a plea of guilty of manslaughter. She was sentenced to prison, and paroled after serving two and a half years on a fifteen year sentence. (Sunday Mirror Magazine, August 18, 1940)

There have been a number of other cases chronicled in the daily press, and on which, there being no appeal to an appellate court, there are no official reports available. The results in such cases have sometimes been influenced by the personal feelings of judges and juries, so that while in some instances the full penalty of the law was enacted, in others the accused received mild punishment or complete exoneration. Under our system of trial by jury, the jury has the power to acquit if it unanimously

sees fit, no matter how clear the guilt of the accused may appear. For instance, juries sometimes acquit the husband who had killed in cold blood his spouse's lover, when court room appeal is made to the so called "unwritten law."

It has been held in cases where death resulted from abortion that "While consent to, desire for, or request of criminal abortion would not constitute a defense, the jury is privileged to consider such facts in reaching their verdicts." *State v Decker*, 104 S.W. (2d) 307 (Missouri, 1937)

These situations where an accused may win acquittal, or conviction in a lesser degree of the offense, through the sympathy of the jury do not constitute any weakening of legal principles involved. The jury system, of itself, tends to incline our criminal procedure on the side of clemency. It is in this regard, a safety valve, against instances where to follow the strict letter of the law might work a real injustice in fact. For one thing it permits consideration of circumstances to indicate that the accused may have been truly ignorant of the actual malice of his deed, or may have acted under the stress of some overwhelming emotion, not amounting to legal insanity. It is almost inevitable that there will be instances where jurymen blinded by well meaning, but misguided sympathies, will bring in verdicts contrary to legal principles or the precepts of morality. That is part of the price we pay for the great boon of the jury system, and the remedy is not its abolition, but rather education of the public from which juries are drawn.

But regardless of what judges, juries or governors, with their pardoning power, may do in individual cases involving mercy killing, the principle of law remains unchanged.

As long as common law principles in regard to the sanctity of human life remain in effect, euthanasia, voluntary or otherwise, will be unlawful.

"The right to life and to personal safety is not only sacred in the estimation of the common law, but it is unalienable." *State v Moore*, supra.

The observation of the court on the suicide pact in the case of *Turner v State*, supra, is equally applicable to euthanasia. "The fact that the woman consented and the crime was in execution of a joint agreement would not remove the case from this grade of felonious homicide, since the crime embraced all the elements of malice, deliberation and premeditation necessary to constitute murder in the first degree." Murder is legally defined as "the killing of one human being by another with malice aforethought." 26 *American Jurisprudence* 161.

There may be some callous enough to say that persons in some of the classes proposed for extinction by proponents of euthanasia can hardly be called human beings, for instance idiots or frightfully deformed infants. But it is the law that "the killing of a lunatic, an idiot, or even a child unborn is murder." *State v Jones*, 1 *Mississippi* 83 (1821)

Likewise there may be some who will say that the element of "malice" is absent in mercy killing, as the killer may have the most kindly feeling toward his victim. Such persons betray their ignorance that the term "malice" is used in this connection to express an extremely technical meaning. It does not necessarily indicate that the killer had any personal hatred or ill will toward the victim. This point is well covered in the case of *Turner v State*, supra:

"It may be said, however, that there is an absence of express malice, a necessary ingredient of the crime of murder, in the first degree, since it is not shown there was hatred, or ill will, or malevolence on the part of the prisoner toward the deceased.* * * An actual and deliberate intention to take the life of another, or to do him some great bodily harm from which death might probably result, constitutes express malice.* * * It thus appears that it is not necessary that express malice, in the sense of hatred or malevolence toward the deceased, should be shown in order to support a verdict of murder in the first degree."

Furthermore, legal malice is the element which differentiates the more serious offense of murder from that type of felonious homicide known as manslaughter. Manslaughter is a serious offense, only slightly less culpable than murder. At common law manslaughter "is an unlawful killing of a human being done without malice, express or implied, either in a sudden quarrel or unintentionally while in the commission of an unlawful act." 26 *American Jurisprudence* 165. Most states have enacted statutes setting out the elements of murder and manslaughter, and often providing for different grades or degrees in each offense. These statutes in general follow common law principles, however, therefore, even if the element of malice be omitted, mercy killing still contains all the elements of manslaughter. However, if it is difficult to see how euthanasia could fit in any classification other than that of murder "with malice aforethought."

THE FUTURE LEGAL STATUS OF EUTHANASIA

Such is the law as it exists in the 48 states today. But, after all, existing law may be changed, and new laws enacted by constitutional conventions and legislative assemblies. If the legislature of any state sees fit to enact a statute legalizing euthanasia, then euthanasia will be technically legal in that state. We know that there is some sentiment in this country, and elsewhere, in favor of legalizing euthanasia. It is difficult to say how numerous may be the proponents of this sentiment, but they are quite vociferous. Bills to legalize the practice were introduced unsuccessfully in the British Parliament in 1936, and in the Legislature of Nebraska in 1937. And as above stated there was an attempt made to introduce such a measure at the 1947 session of the New York General Assembly. It is probable that the proponents of euthanasia expected these early failures. Most likely their thought is to try again and again

in the hope that each succeeding effort will bring them nearer to success.

The agitation for euthanasia cannot be justified under the principles of the common law, which looks to the Divine and natural law as supreme on all vital concerns. But of late years there has arisen a school of jurisprudence which refuses to acknowledge either Divine or natural law as having any binding force. Legal pragmatism is defined as "a philosophy of law for the adjustment of principles and doctrines to the human condition as they are to govern, rather than from assumed first principles * * * Pragmatism worships at the altar of social reform. The pages of the sociologist teem with the inequalities of our social, marital and industrial relations * * *." Pragmatism as a Philosophy of Law, by Walter B. Kennedy, 9 Marquette Law Review 63, February 1925.

PRAGMATIC JURISPRUDENCE

The pragmatic philosophy of law is sometimes referred to as sociological jurisprudence." In the work, "Jurisprudence" by Francis P. LeBuffe, S.J., Ph.D., and James V. Hayes, LLB, 1938, we find the following comments on this system:

"Sociological jurisprudence proposes a social theory of the nature of the legal order. It sees the present day stress on the social purposes of law rather than on the analysis of legal rules and maxims as a progressive step in legal philosophy.* * * It believes law to be a modern instrument for the satisfaction of human interests. The task of lawmakers is to recognize the human desires that are seeking realization in our society and satisfy them with the least of friction and the least of waste. * * * Sociological jurisprudence knows no way of valuing the respective merits of the interests which are presently being realized by law. Likewise it is without any norm for determining the relative worth of conflicting interests when one group in society proposes the legalization of a particular interest, the prescription of which is demanded by a different group. It has no method of getting at the intrinsic importance of any human want, and it seems skeptical of the possibility of establishing an ultimate norm against which to measure the merits of suggested legal aims.* * * It advocates pursuing whatever purposes are recognized as the 'received ideals' of the time and place." Page 70.

It is not intended to go into any exhaustive discussion of the relative merits of conflicting views on jurisprudence. But it is easy to see that, in the philosophy of legal pragmatism, one may find the arguments by which it is sought to justify euthanasia. If we should determine, as the proponents of euthanasia claim, that those suffering from incurable malady should be permitted the privilege of self-destruction, then, according to the pragmatist, the law should be amended to authorize such procedure. That such is prohibited by the natural law and the law of God is immaterial to them. Natural law and Divine law, according to the

pragmatist are persuasive only, not binding. And, of course, there are not lacking those who deny the existence of any higher law. Law, they say, is the command of the sovereign, the will of the people. It is a thing in the last analysis of brute force. If you have enough bayonets and atom bombs you can make and enforce any kind of law you wish.

It is not claimed that all advocates of legal pragmatism favor euthanasia. Probably the great majority of them abhor euthanasia as much as we do. But they have debarred themselves from urging against it the most effective argument. They may argue that it is socially undesirable, that it violates concepts of human pity, and so forth. But, of the sovereign power in the state (the majority of the people in a democracy, or the dictator in a totalitarian regime) decides in favor of euthanasia, they can argue no further. There is no stronghold of moral power to which they can retreat. They cannot say with Blackstone: "if, therefore, any human law should allow or enjoin the commission of such crime, we should disobey such law, or we would offend both the natural and the divine." Even less could they say, as did St. Peter "We must obey God, rather than men." Regardless of how the followers of legal pragmatism may personally feel on the subject of euthanasia, if this practice is ever legalized, it must be under the principle they advocate. That is, that the legislature has the right to legalize any practice, no matter how it may square with the Divine and natural law, if only the same is deemed socially desirable at a given time and place.

STERILIZATION AND EUTHANASIA

At this point it might be in order to say a few words about the sterilization legislation which has been enacted in a number of American states. Statutes of this nature, while differing in detail, provide in general that the operation of sterilization may be performed on mental defectives who might otherwise transmit this deficiency to their children. The constitutionality of such statutes has been sustained in the Supreme Court of the United States in the case of *Buck v Bell*, 274 U. S. 200, 71 L. Ed. 1000, 47 S. Ct. 584 (1927). In the opinion in that case it is stated as follows: "The judgment finds the facts that have been recited, and that Carrie Buck 'is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health, and that her welfare and that of society will be promoted by her sterilization.' In view of the general declarations of the legislature and the specific findings of the court, obviously we cannot say as a matter of law that the grounds do not exist, and if they exist they justify the result."

Catholic thought regards sterilization as morally wrong for the reason that it is an unwarranted mutilation of the human body and sinful. It does not deprive the subject of life, but it does deprive him of a physical

member on the one hand, and denies life to his otherwise possible offspring on the other. It was observed by a legal annotator for American Law Reports in an annotation to a sterilization case reported at 40 A.L.R. 535 as follows: "It may be said in limine that asexualization of the feeble minded opens a dangerous door which leads to the position that the state may in its discretion destroy all feeble minded persons." This theoretical speculation calls to mind the recent Nazi gas chambers.

There is, of course, a wide difference in fact between sterilization and euthanasia, if only because the one destroys already existing life, while the other does not. But, as pointed out, the former is a "dangerous door" to the latter. Among other things it would appear that the legal justification for sterilization is another instance where the doctrines of pragmatism have been applied in jurisprudence. It is sustained, not by any reference to the moral or natural law, nor by appeal to legal deduction, but solely on the basis of a newly originated social theory to the effect that the state is justified in going to this length of human mutilation to prevent the possibility of "socially inadequate offspring." Those social and legal mentalities which approve sterilization can very readily fall into acceptance of euthanasia. This illustrates the basic fallacy inherent in the pragmatic conception of law. "It has no method of getting at the intrinsic importance of any human want * * * It advocates pursuing whatever purposes are recognized as the 'received ideals' of the time and place." Jurisprudence, by LeBuffe and Hayes, *supra*. It has been used to secure judicial approval for sterilization. It can be urged as a justification for euthanasia.

EUTHANASIA IN JUDICIAL PHILOSOPHY

It would appear, therefore, that insofar as its legal aspects are concerned, the controversy over euthanasia does not concern judicial precedent as much as judicial philosophy. If we follow the common law view that human law must be in harmony with Divine and natural law, insofar as vital principle is concerned, euthanasia is unthinkable. If we follow the philosophy of pragmatic jurisprudence then we can only argue as to the social factors involved and cite legal precedents.

Mercy killing has been practiced in savage communities. "We find, for instance, among many people the custom of killing or abandoning parents worn out with age or disease. It prevails among a large number of savage tribes and occurred formerly among many Asiatic and European nations, including the Vedic people and people of Teutonic extraction * * * This custom is particularly common among nomadic hunting tribes, owing to the hardships of life and the inability of decrepit persons to keep up in the march. In times when the food supply is insufficient to support all the members of a community it also seems more reasonable that the old and useless should have to perish than the young and vigorous."

"And among peoples who have reached a certain degree of wealth and comfort the practice of killing the old folks, though no longer justified by necessity, may still go on, partly through survival of a custom inherited from harder times, and partly from the human intent of putting an end to lingering misery. What appears to most of us as an atrocious practice may really be an act of kindness, and is commonly approved of, or even insisted upon, by the old people themselves." Westermarck *Ethical Relativity*, page 184.

As civilization progresses mercy killing tends to disappear. Instead of killing their aged parents men began to pride themselves on caring for the helpless old folks. And with Christianity there appeared the sublime conception that suffering ennobles both the one who suffers, and him who ministers to the sufferer. And these principles, even if not expressed in so many words, were deeply written into the common law under which our civilization reached its maturity.

The advocates of mercy killing say that we are all wrong about this. All the great judges and lawyers of the common law, were wrong. The experience of fifteen hundred years has been a blind alley in this respect. The skin clad caveman was socially correct and morally justified when he beat out his mother's brains because the old woman asked for an extra portion at dinner.

Of course, they will say that the New York bill provides for only voluntary euthanasia with all sorts of safeguards to prevent abuse. But one thing leads to another, and once we have voluntary liquidation, there will be an agitation to broaden the law to include all those whom the mercy killers feel are not fit to live. There is no help for it; when we adopt euthanasia in any form we are on the path back to the jungle.

THEOCENTRIC OR ANTHROCENTRIC MORALITY

Therefore, in conclusion, let us repeat that while there is no legal precedent for euthanasia, citation of legal precedents alone will not avail. The issues are too deep and fundamental. It is part of the conflict between two systems of thought; between that system which recognizes its obligation to God and His Law and the other system which claims that man need have no higher motive than the gratification of his own desires. And as reflected in the law, the conflict is between the common law school of thought which pays reverent tribute to the Divine and natural law, and those new legal philosophies which hold that law is no more than the command of the sovereign, be that sovereign a legislative majority or the dictator of a totalitarian state.