

THE TESTIMONY OF JOE ROBERTS BEFORE THE BILL OF
RIGHTS COMMITTEE CONCERNING THE RIGHT TO DIE

After the very poignant testimony of Mrs. George Franks before this committee, recounting her very personal encounter with the agonizing death of her father, the committee was made well aware of the problem which euthanasia attempts to meet. However, the consensus of the delegates I have talked to indicated that while they were sympathetic to Mrs. Frank's personal tragedy, they were afraid of the implications of stating broadly a Right to Die in the Montana Constitution. The purpose of this testimony then is to consider the implications of stating a Right to Die in the Montana Constitution, to discuss possible legislative alternatives under such a provision and to urge adoption of such a right.

The word euthanasia derives from the Greek elements of "Thanatos" -- which means death -- and "eu" which means gentle or happy. Translated then, euthanasia means "gentle death". Despite the antiquity of its semantic elements, euthanasia is basically a modern question. In fact, it can be argued that euthanasia must now be seriously considered because of the success of modern medicine. Twenty-five years ago, medical techniques were often ineffective in combatting death; today, medicine is much more sophisticated and more often successful. For this, we are tremendously grateful. However, a by-product of our medical advances, has been the situation where life in its barest form is preserved -- the breathing, the heartbeat, the very basic body functions, but little else. It is an ironic situation -- modern medicine may be able to continue life -- the breathing, the heartbeat -- for several years beyond what would be its natural expiration -- but those extra years are often full of excruciating pain and suffering, untold loss of personal dignity, and heartbreak and trauma for relations and loved one's who must stand by as inevitable death comes inch by inch, day by day. In such a situation it has been well stated: "It is the living that fear death, not the dying."¹

I am proceeding fast -- perhaps too fast -- to the premise that some legal recognition of euthanasia is now necessary. It is important to realize that euthanasia presently is recognized outside of the legal system in at least two forms:

(1) The most prevalent form of euthanasia is where a doctor, usually in consultation with close friends and relatives, withdraws the medicine which supports life. Perhaps because this is an omission -- withdrawing medicine -- rather than an affirmative commission -- such as giving a pill which would bring death -- the doctor is less apprehensive of any prosecution. In actuality, under present legal doctrine, a doctor would be just as culpable for an omission as a commission.

(2) The second form of the recognition of euthanasia outside the legal system is by a failure to prosecute the statutory penalty. In all American jurisdictions, euthanasia would meet the definition of 1st degree murder. It is a deliberate, premeditated act intending to, and causing death. However, confronted with the prosecution of a merciful act of euthanasia, judges and juries have generally avoided the full brunt of 1st degree murder. In these cases the defendant was either given an extremely low sentence, acquitted by reason of temporary insanity, or

simply given an outright acquittal.

Given this covert, sub rosa existence of euthanasia, the argument is made that legal recognition is not now necessary. This argument, however, must fail. In principle, a legal system cannot demand the respect essential to its preservation when it refuses to recognize a common social value. When, for instance, a defendant prosecuted for mercy-killing is acquitted for temporary insanity--when that was surely not the case--most of us would applaud the result, but at the same time the integrity of the legal system itself is jeopardized. The lack of legal recognition of euthanasia also puts a severe burden on doctors -- while some doctors, as mentioned earlier, in effect recognize euthanasia, they do so presently at considerable risk to themselves. Each time their humanitarian impulse leads them to consider euthanasia they must weigh this against the possibility of an over-zealous prosecutor indicting for 1st degree murder. The "chilling effect" of a possible prosecution surely leads some doctors perhaps most, to simply never consider the alternative of euthanasia.

It may be best to consider here further objectives made to the legal recognition of euthanasia. One objection is the difficulty of ascertaining voluntary consent. This may be a real problem where the patient is in severe pain or heavily drugged--either hardly rational states of mind. The best answer to this objection is to provide that a document be executed by any person who feels he might at some time in the future desire euthanasia--this document, executed while sane and rational and attested by witnesses, would grant consent to a doctor to utilize euthanasia when the prolongation of life is no longer consistent with the personal integrity of the patient. Of course, at the present time such a document would not be effective because there is no legislative or constitutional recognition of its legality.

A third objection involves the risk of incorrect medical diagnosis. While plausible, upon examination this argument becomes weak. Euthanasia, by its very nature, would be applied only at the terminal stage of a disease. Up until that point, certainly every attempt would be made to interrupt the progression towards death. No doctor would ever apply euthanasia, until he was satisfied to the limits of his knowledge that the disease was incurable and terminal. It must be conceded that the possibility of incorrect diagnosis exists, but by the terminal stage of a disease the diagnosis is almost always correct, and the barest of possibilities that it is not correct is hardly grounds to deny euthanasia in the overwhelming number of cases where the diagnosis is correct.

A somewhat parallel argument is that new medical discoveries may arrive. On its face, this argument too is very plausible. However, several factors must be recognized. Most so-called discoveries are predictable; they are the end of logical links and only the date of their culmination is in question. Also, there is a time lag between any discovery and its actual application, so a discovery today may be of little practical effect to a patient suffering today. Finally, even an important discovery for a particular disease would be of doubtful significance to the terminal stages of that disease. Again it must be conceded that the rare possibility of a new medical discovery cannot be totally dismissed--but are we to allow the untold suffering of the over-whelming number of cases to be sacrificed to this extremely remote possibility?

It is also argued that modern drugs and medical devices can effectively relieve pain, thus obviating any need for euthanasia. While it is certainly true that much pain can be alleviated, it is simply not true that all pain can be eliminated. For some diseases, in fact, modern medicine is essentially helpless; one such disease is cancer of the throat, where the excruciating pain of swallowing and breathing cannot be relieved, another is the slow suffocation of terminal lung cancer. Furthermore, drugs for physical pain cannot reach the psychological anguish of impending death.

The final argument against euthanasia to be considered is designated the "wedge" argument. This is a familiar argument to any new proposal. Its thrust is that the new proposal is the first "wedge" that, once accepted, will be followed by an onslaught of horrors. In the context of euthanasia, the horrible memories of Nazi Germany are often invoked where racial minorities and other "deviants" were exterminated by the state.

Several replies must be made. It must first be noted the argument totally avoids the merits of voluntary euthanasia. Secondly, the euthanasia proposal I will develop, is entirely voluntary, so that it could never be applied unless a person made a voluntary choice. Finally, very simply, this is not Nazi Germany. This country has proceeded from its very inception on the premise of individual liberty and freedom of choice; we have no philosophy of the super-race; our protection of individuals and minorities has been a model to the world.

The question must now be considered as to what form legal recognition of euthanasia could take. I will briefly discuss four possible alternatives.

The first alternative is to make motive an element of homicide. Several European countries allow greatly reduced sentencing where the motive for killing was merciful. However, only the country of Uruguay recognizes a complete defense for "homicide motivated by compassion."² I do not find this first alternative appealing because it fails to provide any directives or safeguards for euthanasia. Another objection is that introducing motive as an element of homicide is a revolutionary change in our criminal law not justified by a problem which could be rectified by other means.

The second alternative is of the variety proposed by the British Euthanasia Society.³ This is a complex, intricate judicial procedure designed to provide maximum safeguards against any misuse of euthanasia. A court of law is petitioned, independent medical examiners are appointed to report to the court, and a hearing is held when the report is readied. While these safeguards largely dispel any fears of abuse, their objection is that it introduces a cumbersome, bureaucratic procedure into a situation which by its nature demands immediate action. However, although I do not personally find this to be the most attractive-alternative, it is certainly a plausible one and would meet objections that euthanasia could be misused.

The third alternative takes the opposite tack, in that safeguards are minimal and discretion is largely vested with the physician. It states: "It shall be lawful for any physician, after consultation with another physician, to accelerate by any merciful means the death of a patient who is seriously ill, unless it is proved that the act was not

done in good faith with the consent of the patient and for the purpose of saving him from severe pain in an illness believed to be of an incurable and fatal character.⁴ This, too, is a plausible alternative but, as suggested, may be too void of safeguards to satisfy some objections.

The fourth alternative represents one of the best plans available.⁵ Its strength is that it combines adequate safeguards and medical discretion. Its premise is that euthanasia must be entirely voluntary--as to both doctor and patient--and provides that in order to be available for euthanasia a person shall have executed a document, revocable at any time, granting permission to a doctor to employ euthanasia in either of two situations: (1) where there is "a serious physical illness which is diagnosed as incurable and terminal, and which is expected to cause a person severe distress, or to render him incapable of a rational existence", or (2) where there is "a condition of brain damage or deterioration such that a person's normal mental faculties are severely and irreparably impaired to such an extent that he has been rendered incapable of leading a rational existence". It is important to emphasize that the essence of such legislation is its voluntariness -- a valid document must be executed by the person stating his desire for euthanasia where the prolongation of life is no longer consistent with a rational existence or personal dignity. It is revocable at any time. Since an affirmative, rational act is required, it precludes application to persons with gross genetic and mental defects who could never manifest the capacity to make such a choice. As to the doctor, performance of euthanasia would never be required when it violates his own ethical standards. He is also required to consult with at least one other doctor who must confirm his diagnosis and decision that euthanasia should be performed.

These four possible legislative alternatives have been considered to indicate that there are several ways that properly defined and safeguarded substantive content could be given to the Right to Die. This right could be embodied in the Constitution in the following terms.

"There shall be a right to die. The legislature shall make appropriate provisions therefor."

It should be noted the right would not be self-executing, but would require enabling legislation by the legislature. There would be no element of coercion, merely a recognition of the free choice basic to our free society.

By what authority I ask does the state presently justify saying to a dying man in excruciating pain, gasping for each breath that he cannot choose euthanasia, the "gentle death." We can make abstract arguments - What of abuse? What of new discoveries? - but I ask - what solace are these abstract questions to this dying man? It is his very personal need - his ability to choose - so consistent with our ideals of liberty - that we are presently denying.

Merely 22 years ago in a leading legal journal the following objections to euthanasia were advanced⁶: 1. Christ suffered and died on the cross - so, presumably, we all should suffer in death; 2. it is best that a person's estate be used up in the course of a final illness than to pass to the heirs; and 3. the actuarial tables of insurance companies would not be as accurate if euthanasia were allowed. Imagine that: We should require a suffering, painful death to all individuals rather than risk making actuarial tables less accurate!!

Today, needless to say, these arguments are not convincing. And yet, they contain a lesson on how people may judge us twenty years from now. Your task as delegates is to draft a document which adequately anticipates the needs of the future. I am firmly convinced that in another short twenty years our present-day treatment of dying - our failure to give a choice of the "gentle death" - will be seen as essentially barbaric and inhuman. I urge you then to look to the future - consider that the question of euthanasia will be more acute as medicine advances - consider that the flow of civil liberties is towards the enhancement of free choice and individual dignity - consider carefully the plight of those we condemn to die a painful and humiliating death devoid of dignity. As you look to the future, then, as you must, I urge you to provide a Right To Die in the Montana Constitution.

1. Joseph Fletcher, "The Patient's Right to Die", 221 Harpers 139 (1960).
2. Helen Silving, "Euthanasia: A Study in Comparative Law", 103 U. of Penn. l Rev. 350 (1954).
3. Discussed in Joseph Sanders, "Euthanasia: None Dare Call It Murder", 60 J. of Crim. Law 351, (1969).
4. Glanville Williams, The Sanctity of Life and the Criminal Law, P. 345. (1957).
5. Arval Morris, "Voluntary Euthanasia", 45 Wash. l. Rev. 239. (1970).
6. Thomas Martin, "Euthanasia and Modern Morality", The Jurist, Oct. 1950.

Further References

- Glanville Williams, "Euthanasia and Abortion", 38 U. of Col. Law Rev 178 (1966).
Yale Kamisar, "Same Non-Religious Views Against Proposed 'Mercy Killing' Legislation", 42 Minn. Law Rev. 969 (1958).
Williams, "'Mercy Killing' Legislation - A Rejoinder", 43 Minn. L. Rev. 1 (1958).

Appendix A.: A Voluntary Euthanasia Bill

Authorization of euthanasia	<p>1.-(1) Subject to the provisions of this Act, it shall be lawful for a physician to administer euthanasia to a qualified patient who has previously made a declaration that is lawfully in force at the time of the administering of euthanasia.</p> <p>(2) For the purposes of the Act:</p> <p>"physician" means a registered medical practitioner;</p> <p>"euthanasia" means the painless inducement of death;</p> <p>"qualified patient" means a patient over the age that qualifies a person to vote in either state or national elections, and in respect of whom two physicians, one being of consultant status, have certified in writing that the patient appears to them to be suffering from an irremediable condition;</p> <p>"irremediable condition" means either (1) a serious physical illness which is diagnosed as incurable and terminal, and which is expected to cause a person severe distress, or to render him incapable of rational existence, or (2) a condition of brain damage or deterioration such that a person's normal mental faculties are severely and irreparably impaired to such an extent that he has been rendered incapable of leading a rational existence;</p> <p>"declaration" means a witnessed declaration in writing made substantially in the form set out in the schedule to this Act.</p>
Declaration made in advance	<p>2.-(1) Subject to the provisions of this section, a declaration shall come into force 30 days after being made and shall remain in force, unless revoked, for 3 years.</p> <p>(2) A declaration re-executed after the lapse of one year from its execution date and prior to its expiration date shall remain in force, unless revoked, during the lifetime of the declarant.</p>
Mode of revocation	<p>3.- A declaration may be revoked at any time by destruction or by notice of cancellation shown on its face, or by any other clearly communicated act of revocation, effected, in any case, by the declarant or to his order.</p>
Duties and rights of physicians and nurses	<p>4.-(1) Before causing euthanasia to be administered to a mentally responsible patient the physician in charge shall make sure that the patient's consent is voluntarily given by ascertaining to the physician's reasonable satisfaction that the declaration and all steps proposed to be taken under it are in accord with the patient's wishes, and if the physician should determine</p>

that the motivation or desire is supplied by relatives, or anyone other than the patient, then he shall not cause eithanasia to be administered.

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

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

Protection for
physicians and
nurses

5.-(1) A physician or nurse who, action in good faith, caused eithanasia to be administered to a qualified patient in accordance with what the person so action reasonably believes to be the patient's declaration and wishes shall not be guilty of any offense.

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

Offenses

6.-(1) It shall be an offense punishable on information or indictment by a sentence of life imprisonment for any person willfully to conceal, destroy, falsify or forge a declaration with intent to create the false impression that another person desires euthanasia; furthermore, it shall be an offense punishable on information or indictment by a sentence up to ten years imprisonment or a fine of up to \$5,000, or both, for any person willfully to conceal, destroy, falsify or forge a declaration with intent to create the false impression that another person does not desire, or no longer desires, euthanasia.

(2) A person signing a declaration by way of attestation who wilfully puts his signature to a statement he knows to be false shall be deemed to have committed the offense of perjury.

Insurance
policies

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

Administration
of drugs to
patients
suffering
severe
distress

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

Power to make
regulations

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

PROPOSED FORM OF DECLARATION

Declaration made _____ 19__ (and re-executed _____ 19__)
by _____
of _____

I DECLARE that I voluntarily subscribe to the code set out under the following articles:-

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

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

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

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

SIGNED _____

ATTESTATION.

Note: the proposed statute and form are taken from Arval A. Morris, "Voluntary Euthanasia", 45 Washington Law Review 239. (1970).