Euthanasia: right to die or mercy killing?
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La terza, nonché ultima parte dell’elaborato, riguarda il tema dell’eutanasia negli Stati Uniti d’America. Come per l’Olanda, la tematica è stata analizzata brevemente dal punto di vista storico, di modo da comprendere meglio i processi che hanno portato all’attuale legislazione riguardante l’eutanasia, e considerando anche l’evoluzione dei movimenti eutanasici.

Dopo queste premesse, è stata considerata la legislazione attuale e, in quanto caso emblematico, ho deciso di trattare la legislazione dello stato dell’Oregon, uno dei pochi Stati americani che, al giorno d’oggi, permettono l’eutanasia.

Infine, ho considerato il caso Cruzan, inserendo parte della sentenza originaria.

CHAPTER 5: EUTHANASIA IN THE UNITED STATES

5.1. A little of History

The relevance of history to the constitutional debate over euthanasia is very discussed; some sees an analysis of historical legal rules as critical to any substantive due process analysis. Others think it bears no importance. Another ones still have questioned the practice of relying upon the preferences of past to interpret the Fourteenth Amendment, which was added to the Constitution after the Civil War, with special respect to the minority rights. [1]

In the pre-revolutionary America, suicide or homicide law generally followed contemporary English common law and norms; however the ancient pagan practice of forfeiture was really important. This was never formally approved in English common law, but it consisted on dishonouring the suicide’s corpse, often by burying it at a crossroads where some thought the dead person’s spirit would be lost to find its way home to hunt others. [2]

In Virginia there were cases of ignominious burial in 1660 and 1661; in the latter instance, the coroner’s jury explicitly sustained that the suicide was “to be buried at the next cross as the Law Requires with a stake driven through the middle of him in his grave”. [3]

In Massachusetts, forfeiture was abandoned about in 1641; the 1672 compilation of the “General Laws and Liberties” of the Massachusetts colonies, for example, affirms that “considering how for Satan doth prevail”, it is

“Therefore ordered that from henceforth if any person shall at any time be found by any Jury to be wilfully guilty of their own death (…) he shall be buried in some Common High-way where a Cart-load of Stones shall be laid upon the Grave as a brand of Infamy and as a warming to others to beware of like Damnable practices.” [4]

In 1647, what was to become Rhode Island, also passed a statute condemning all the intentional suicide or homicide and applying traditional common law penalties; also South Carolina appears to have proscribed suicide as early as 1706, instructing coroner juries to return a felony verdict “against the peace of our Sovereign Lady the Queen, her Crown and Dignity” in case of suicide. In 1715 North Carolina adopted English common law and, with it, the traditional prescriptions for suicide.

Like England, eighteen-century America participated to a change concerning the criminal penalties associated
with suicide: for example, Pennsylvania led the way in 1701 when it rejected criminal penalties for suicide in its new “Charter of Privileges to the Province and Countries”. [5]

Then, the American ethicist Dan Brock[6] suggested that the eventual decriminalization of suicide amounted to recognition of a de facto right to commit the act. Judge Reinhardt, in Compassion in Dying, did the same reading of the historical record. Clearly this reading opens a question: to be sure, dragging a corpse around town and driving stakes through it had lost all the appeal they once held, but it is a large leap from that merciful fact to the conclusion that suicide had become legally normalized.

Zephaniah Swift, an American writer and later chief of justice of the Connecticut Supreme Court, explained that “there can be no greater cruelty, than the inflicting a punishment, as the forfeiture of goods, which must fall on the innocent offspring of the offender”[7]: also Thomas Jefferson, drafting a bill to reform Virginia laws, wrote that the law “should not add to the miseries of the party by punishments of forfeiture”. [8]

Starting from these years, euthanasia and assisted suicide took different directions: in 1868 the Fourteenth Amendment was ratified and nine of the thirty-seven states had adopted statutes making assisted suicide a crime. The Field Code, a reformist model code that influenced legislative codification efforts during the nineteenth century, included an adopted prohibition against assisted suicide.

The question spontaneously arises: considering that between euthanasia and assisted suicide there are not many differences, if these are the preconditions, how did we get to where we are today? And, where did today’s movement to legalize euthanasia come from?

5.2. The Euthanasia Movement

The first push for legalization of euthanasia in America dates to the latter part of the nineteenth century and this happened thanks to the book “On the origin of Species” and “Descent of Man”, both written by Darwin. So many readers in America took away from Darwin’s works a keen sense that civilization’s philanthropic impulses to provide hospitals, charities and therapeutic medicine obstructing the power of natural selection.

Less than fifty years later, in 1931, the ideas expressed by Darwin have been a little transformed and this change can be seen in the statement of the Illinois Homeopathic Medical Association that defended euthanasia for “imbeciles and suffers from incurable disease”. Harvard Professor and social Darwinist Earnest Hooton advocated that euthanasia for “the hopelessly diseased and the congenitally deformed and deficient” was necessary if America was ever going to reverse what he saw as its continuing biological decline. [9]

In 1937 MD. Inez Philbrick sought to introduce a bill in Nebraska legislature legalizing euthanasia.[10] Besides allowing voluntary euthanasia for adults with a fatal illness, the bill also included provisions for killing, without their consent, mental incompetents and minors suffering from incurable diseases. The state legislature never took up the bill, but for Philbrick this was only a little step back and she hoped to eventually extend euthanasia to mental patients in institutions and the mentally retarded, regardless their physical conditions or wishes. [11]

A year later, in 1938, was founded the Euthanasia Society of America (ESA), and included, among its founders and leaders, an array of eugenics scholars and polemicists like MD. Philbrick.

Charles Potter, one of the most important presences in ESA, promoted mercy killing for suffering patients in the final stages of their life, but he also saw euthanasia as a social instrument for killing disabled infants and the mentally retarded. [12]

Wyllistine Goodsell, a Columbia professor and member of ESA opined that “there are certain children born
congenital idiots and of course I do not think we should keep them alive at all." Despite all of these eugenics ideas, Goodsell and the other members presented on ESA obtained their first model euthanasia bill, with a few mitigated principles. The bill, which would have authorized only acts of voluntary euthanasia was, according to Potter’s private statements, quite self-consciously meant to be the thin edge of the wedge to non voluntary euthanasia.

Potter’s successor as president of ESA was Foster Kennedy, who, in 1939, declined to support voluntary euthanasia for the terminally ill people, because he found that the medical community often misdiagnosed illness as incurable.[13]

While these efforts to pass bill legalizing were continued, euthanasia was being practiced on a massive scale in the Nazi Germany; as early as 1941, American newspapers were reporting that the Nazi government had put to death “85,000 blind, incurably ill or aged Germans”. [14] Theoretically we might expect that euthanasia supporters in United States would give up the hope of offering euthanasia to the “defectives”, but this was not the case: ESA did not change its course of action, until the late 1960.

Yet immediately after the war, the ESA was ready to again launch the battle to legalize euthanasia, as we can understand from a post-war letter sent to a member of the society:

“Through the war we have been quietly but steadily building up support for the legalization of voluntary euthanasia, to make merciful release available for incurable sufferers.” [15]

As a matter of fact, the society flourished during the years after the war: there were clear signs of growing interest in the question of euthanasia.

In 1946, forty-three new members joined the society, making a total of 305 members; in addition 158 members were registered to the Special Physician Committee for Legalization of Voluntary Euthanasia in New York, which still exists.

The new reinvigorated movement of euthanasia began an ambitious and multistate legislative campaign; one important member of ESA, Joseph Fletcher, an Episcopal priest, spent a lot of time in 1960s, 1970s and 1980s calling upon the euthanasia movement not only to press for voluntary euthanasia, but also to promote euthanasia for “helpless new-borns or minors still too young to make any decision about when to stop life-prolonging treatment.” The topic of the infants in permanent vegetative state become for the first time very important in those years; a brilliant psychiatrist affirmed that she did not think it would be necessary to consult with the child’s parents, believing that it was much better for the psyche of the parents to believe that the baby was died soon after the death. Furthermore, for infants with serious handicaps, she suggested that parents should be informed only as far as needed to make “a human and wise decision for the babies.” [16]

In 1989 there was a case that disturbed the entire American system: Derek Humphry, one of the most influential figures in the ESA and the founder of another association in Los Angeles, left his second wife soon after she had undergone a surgery for breast cancer. After many pressures by Humphry, his wife committed suicide, even though her cancer was in remission; she left to her husband a note where she wrote the following words: “There, You got what you wanted. Ever since I was diagnosed as having cancer, you have done everything conceivable to precipitate my death.” Then she sent a copy of the note to an anti-euthanasia activist, writing “My final words to Derek: He is a killer. I know.” Her note then proceeded to accuse Humphry of suffocating his wife. [17]

Although he formally resigned from his society in 1992, Humphry remains a public defending of euthanasia; and while to present the right of individual to choose their own way to die, more than occasionally he has suggested not only a right to die, but also something more similar to a duty to do so.
Ronald Dworkin expressed, in those same years, the argument of autonomy of choice, which is similar to the topic of the right to die. While advocating for voluntary euthanasia, Dworkin discusses a hypothetical case involving an elderly woman suffering from Alzheimer’s; while still capable, the woman in Dworkin’s hypothetical expressed a strong desire to be killed when dementia set in. But now, after dementia has set it, she seems to enjoy life and says she firmly want to live. Dworkin asks properly which request we should respect: the earlier and rational request or the choice affected by dementia?

His response is that:

“We might consider it morally unforgivable not to try to save the life of someone who enjoys her life, no matter how demented she is, and we might think it beyond imagining that we should actually kill her. We might have other good reasons for treating her as she now wishes, rather than, as, in my imaginary case, she once asked. But still, that violates rather than respects her autonomy.”[18]

Though he stops of saying so expressly, respect for autonomy seems to go so far to require society to ignore the request for life of the dement person in favour of some previously signed document or comment –as in this case- that the person in question would rather die than become demented.

Others closely associated with the theories of moral autonomy and right to die have sounded remarkably similar themes: Margaret Battin declares that principles of distributive justice require legalization of non-voluntary euthanasia for those who do not have a “realistic desire” to continued care. [19] To Battin, it is an act of injustice to allow certain person to live if they fail to enjoy a certain quality of life; this includes, in Battin’s formulation, all the people who are “permanently comatose, profoundly brain damaged, and others who lack cognitive function.” [20]

It remains unclear just how brain damaged or mentally handicapped must be to qualify for non-voluntary euthanasia concerning Battin’s formulation, or what society should or should not consider a realist desire for continued care in such cases. But Battin does make clear that, for the individuals who fall within her formulation, it means killing them even if they left directives expressing a different preference.

The ideas expressed by Battin and Brock are picked up by Peter Singer who improves it; he sustains that it is morally neutral or even morally upright act to kill infants, depending on the circumstances and whether the killing would maximize overall social welfare and happiness. In the circumstances of children with birth defects, like Down’s syndrome, Singer asserts the case for infanticide is particularly clear because of the devastating effects that, raising that child, can have on parents.

In conclusion, as we have seen in this paragraph, a variety leading euthanasia activist, from 1960 to 1990, have presented arguments well adapted to their times, reflecting the increasing impulse for autonomy in our society. It is hard to disagree with Dowbiggen’s conclusion that “today defenders of the right to die often echo the justification of euthanasia first uttered” by early movements leaders. [21]

Yet, many of the policies they present would embrace not just a right to die, but a duty for certain person to do so suggesting that, the history of euthanasia’s legalization in America remains a “gravely complex social, political, economic and cultural matter.”

5.3. Predominant Law Today

Current State Law against euthanasia and assisted suicide date back a century or more, in some cases to the Field Code. Yet, in recent years, many jurisdictions have reconsidered and reaffirmed them; in 1980 the American Law Institute conducted a review of state laws on euthanasia and on assisted suicide, accepted the continuing prevalent support for criminalization.[22]
In 1990, both New York and Michigan convened commissions to reconsider euthanasia; the New York commission issued a report unanimously recommending that existing laws against the practices be retained. In the other hand, Michigan committee was unable to achieve unanimity, the state legislature chose to enact a statute banning the practice, and its Court have confirmed that it violates the state’s common law. Also Maryland has recently passed a statute for the first time codifying that state’s common law teachings against assisted suicide and euthanasia; Iowa, Oklahoma and Virginia followed the same behaviour in those recent years. Beyond that, since 1994, over fifty bills have been introduced to legalize euthanasia or assisted suicide in at least nineteen states.

5.3.1. Oregon’s situation

During the same period, voters also rejected Oregon-styled assisted suicide initiatives in Maine and in Michigan.

It had been sufficient only three years and the Oregon’s position radically changed: on November 5, 1997 Oregon enacted the Death with Dignity Act, recognizing the right physician-assisted suicide and euthanasia for the first time in the modern American History. The move toward the legalization in Oregon began in November 1994, when Oregon voters approved a Right to Die initiative, but before the initiative could take effect, the National Right of Life Committee held it unconstitutional and granted an injunction halting the law.

In February 1997, the U.S. Circuit Court of Appeals vacated the District Court on standing, ripeness, and jurisdictional ground; on October 27 the Court of Appeals lifted the injunction and, in November 4, Oregon voters overwhelmingly rejected an attempt to repeal the Right to Die Statute. Finally, on November 5, 1997, the Oregon Attorney General declared that terminally ill patients were free to ask doctors to help end their lives. [23]

With regard to those few states without statutes formally prohibiting assisted suicide, most of them have disapproved of assisted suicide in some other way; as noted above Michigan enacted a statute banning assisted suicide that may or may not have ended but, in any case, the State recently confirmed that it considers assisted suicide or euthanasia to be a common law crime. [24]

Montana treats euthanasia as a species of homicide and thus subject to the general homicide statute; on the remaining states, some appear to treat assisted suicide or euthanasia as a common law crime, and several have health care directive statutes expressly disavowing any approval of assisted suicide. As a matter of fact, in recent years, virtually every state in the United States of America has passed statutes establishing living wills or durable powers of attorney in health-care situations and a lot of these laws contain language stating that the statute is not designed and may not be used to encourage or facilitate euthanasia or assisted suicide.

To put it briefly, as we can notice by the things said in this paragraph, the law of euthanasia runs an even straighter course than the law of assisted suicide: consensual euthanasia is a form of intentional homicide, motivated by a sense of mercy and, sometimes, performed with the consent of the deceased. Courts have refused to treat the victim’s consent or the killer’s motivations as a defence or as a reason to accede to defendant’s requests for a jury instruction on assisted suicide as a lesser included offense, though they have treated both the victim’s consent and the killer’s motives as a reason to mitigate the defendant’s punishment. [25]

This is a general outline about the status of euthanasia’s legalization in the United States of America from the ancient time to the last several years; now it is time to expose a full trial concerning this theme. Considering
that this essay has euthanasia as topic, I decided not to explain cases perhaps more famous and important but
not strictly about euthanasia; for example, I concluded not to treat the lawsuit of Terry Schiavo, which is very
controversial, because it is a case of assisted suicide, more than a case of euthanasia.

5.4. The Cruzan Case [26]

Cruzan, Missouri Department of Health. Supreme Court of the United States. 497 U.S. 261, No. 88-1503
Argued: December 6, 1989, Decided: June 25, 1990

“The case

on the night of January 11, 1983, Nancy Cruzan lost control of her car. The vehicle overturned, and Cruzan
was discovered lying face down in a ditch without detectable respiratory or cardiac function. Paramedics were
able to restore her breathing and heartbeat at the accident site, and she was transported to a hospital in an
unconscious state. A neurosurgeon diagnosed her as having sustained probable cerebral contusions
compounded by significant lack of oxygen. The Missouri trial court in this case found that permanent brain
damage generally results after 6 minutes in an anoxic state; it was estimated that Cruzan was deprived of
oxygen from 12 to 14 minutes. She remained in a coma for approximately three weeks, and then progressed
to an unconscious state in which she was able to orally ingest some nutrition. In order to ease feeding and
further the recovery, surgeons implanted a gastrostomy feeding and hydration tube in Cruzan with the consent
of her then husband. She now lies in a Missouri state hospital in what is commonly referred to as a persistent
vegetative state.

Procedure

Hospital employees refused, without court approval, to honour the request of Cruzan's parents, co-petitioners
here, to terminate her artificial nutrition and hydration, since that would result in death. A state trial court
authorized the termination, finding that a person in Cruzan’s condition has a fundamental right under the State
and Federal Constitutions to direct or refuse the withdrawal of death-prolonging procedures. The State
Supreme Court reversed. While recognizing a right to refuse treatment embodied in the common-law doctrine
of informed consent, the court questioned its applicability in this case. As a matter of fact, most state courts
have based a right to refuse treatment on the common law right to informed consent[27], or on both that right
and a constitutional privacy right.[28] It also declined to read into the State Constitution a broad right to
privacy that would support an unrestricted right to refuse treatment and expressed doubt that the Federal
Constitution embodied such a right.

Final Decision

In a 5-to-4 decision, the Court held that while individuals enjoyed the right to refuse medical treatment under
the Due Process Clause, incompetent persons were not able to exercise such rights. Absent “clear and
convincing” evidence that Cruzan desired treatment to be withdrawn, the Court found the State of Missouri’s
actions designed to preserve human life to be constitutional. Because there was no guarantee family members
would always act in the best interests of incompetent patients, the Court upheld the state’s heightened
evidentiary requirements.”[29]

CONCLUSION

In conclusion, we can sustain that the recourse to euthanasia emerges as a consequence of how we consider
death nowadays. During the treatment of the essay I have notice that, with the civilization’s evolvement, the
death’s conception changed: in the pre-revolutionary America there was the predominance of a mystical and
such superstitious aspect and there were many other changes, till we can consider our society.
Nowadays it is not only the exitus, but also the entire process which, from the illness to the death, has no more nothing natural: it is not a case that we can talk about “death medicalization”[30], to indicate how much medical’s technology have changed, especially in the last ten or twenty years, the natural aspect of death.

Dying, which once was a natural and unavoidable event, becomes a manageable process almost by two people: the immediate concerned and the physician. Then, we are facing a medical science that it is more involved in the cure than in the recovery and, all of these aspects, make difficult to pick out the border between life and death.

We have argued that the question of legal policy, that is central to the euthanasia debate, concerns the authority of the State to regulate euthanasia. We have seen that the Dutch euthanasia debate is characterized by a number of oppositions: its legal system is not as liberal as we previously thought and the oppositions that characterize the debate are such relatives. This happens because most participants discuss the issues in more or less the same terms: both supporters and opponent of legalization are concerned with the social climate in which decision can take place.

The same happens in United States of America, where the debate is still very glowing and, in some cases, not very distinct; as a matter of fact, as we have seen in the chapter before, not all the Court’s decision are completely uniform to what American’s law prescribed.

However, after these considerations, I think it is important to underline that in the states that I have consider there were changes that have require generations of courageous men which have fight for their certainties and, this persistence, is more important than any other aspect.

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[20] See the note above

[21] Dowbiggen, 176

[22] Model Penal Code, at. 101 n.23

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[26] I take the entire lawsuit from the website of the Cornell University Law School:


[27] See, e.g., *In re Storar*, 52 N.Y.2d 363, 438 N.Y.S.2d 266, 420 N.E.2d 64


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