

9-1-1988

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Recommended Citation

Timothy P. Brooks, *State v. Forrest: Mercy Killing and Malice in North Carolina*, 66 N.C. L. REV. 1160 (1988).Available at: <http://scholarship.law.unc.edu/nclr/vol66/iss6/8>

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State v. Forrest: Mercy Killing and Malice in North Carolina

A man enters a hospital room where his eighty-three year old father lies dying. The father is suffering from what seem to be innumerable ailments and diseases and is in continuous pain. The man knows his father will die soon but until then there is nothing that can be done to relieve the unrelenting suffering. In the midst of his anguish, the man is struck with one recurring thought: *he* could put an end to his father's suffering. He may even be requested or begged to do so by his father. It occurs to the man that killing his father would be illegal. Somehow, however, this seems less important than relieving his father's suffering, and the man finds the strength and the means to end his father's life.

This scenario has become increasingly more common as developments in technology enhance our ability to sustain life.¹ As new methods of keeping individuals alive longer are developed, we must confront the myriad ethical, moral, and legal issues which arise. The North Carolina Supreme Court addressed for the first time the "mercy killing" issue in *State v. Forrest*,² in which the defendant, John Forrest, had killed his critically ill father to end his father's suffering. In a six to one decision, the supreme court upheld the trial court's conviction of first-degree murder. Although the court applied the existing North Carolina law, one commentator stated the decision "shocks the ordinary person's sense of justice."³ Should we treat the humanitarian killing in the same manner in which we handle the depraved-heart murder? This Note suggests that mercy killings present in certain situations a mitigating circumstance capable of reducing first-degree murder to voluntary manslaughter. Additionally, this Note concludes that the state legislature should enact legislation providing that under certain circumstances and when proper procedures have been followed, killing for the purpose of ending an individual's suffering should be permitted. Only by these actions can our laws begin to reflect the effect of technological advances on our concept of human life.

On December 22, 1985, John Forrest admitted his eighty-three year old father, Clyde Forrest, into Moore Memorial Hospital.⁴ Clyde Forrest had already had one heart attack and presently was suffering from numerous ailments, including severe heart disease, hypertension, calcification of his heart valves, a

1. See T. BEAUCHAMP & S. PERLIN, *ETHICAL ISSUES IN DEATH & DYING* 216 (1978).

2. 321 N.C. 186, 362 S.E.2d 253 (1987). The term "mercy killing" is given the following definition:

MERCY KILLING. Euthanasia. The affirmative act of bringing about immediate death allegedly in a painless way and generally administered by one who thinks that the dying person wishes to die because of a terminal or hopeless disease or condition.

BLACK'S LAW DICTIONARY 891 (5th ed. 1979). Euthanasia, from the Greek meaning "happy death," is often divided into the categories "passive" and "active." For a discussion of the passive/active distinction, see *infra* notes 83 to 89 and accompanying text.

3. *Court Shows No Mercy*, The News and Observer (Raleigh, N.C.), Dec. 5, 1987, at 14A, col. 1.

4. *Forrest*, 321 N.C. at 188, 362 S.E.2d at 253.

thorac aneurism, pulmonary emboli, and a peptic ulcer.⁵ Clyde Forrest had spent all but six of the last forty-two days in the hospital.⁶ By the morning of December 23, his medical condition was determined untreatable and he was moved to a comfortable room.⁷ John Forrest spent December 23 at home in his room alone, crying and waiting for word of his father's death.⁸

On December 24, 1985, Forrest went to the hospital to visit his father. While a nurse's assistant tended to his father, Forrest told her, "There is no need in doing that. He's dying." She responded, "Well, I think he's better." Forrest was then left alone with his father. When the nurse's assistant and a nurse returned, Forrest restated his belief that his father was dying. The nurse told the defendant, "I don't think your father is as sick as you think he is." Defendant responded, "Go to hell. I've been taking care of him for years. I'll take care of him."⁹ Left alone with his father a second time, Forrest began to cry and to tell his father how much he loved him. Soon thereafter, his father began to cough, emitting a gurgling and rattling noise. Extremely upset, Forrest pulled a small pistol from his pants pocket, put it to his father's temple, and fired four times.¹⁰ After the shooting, Forrest, crying and mumbling, walked out to the hallway where he dropped the gun on the floor. He did not threaten anyone or attempt to run. The pathologist who performed the autopsy on Clyde Forrest, determining the cause of death to be the four bullet wounds to the head,¹¹ stated the deceased had been "in a great deal of stress" and probably would have died within twenty-four hours.¹²

When questioned at the hospital by police, an emotionally wrought John Forrest made the following statements:

You can't do anything to him now. He's out of his suffering. . . . I killed my daddy. He won't have to suffer any more. . . . You can put me in jail, lock me up. You can do anything you want with me, but my father won't have to suffer any longer. . . . I know they can burn me for it, but my dad will not have to suffer anymore. . . . I know the doctors couldn't do it, but I could. . . . I promised my dad I wouldn't let him suffer.¹³

At Forrest's trial, the case was submitted to the jury for one of four possible

5. Defendant-Appellant's Brief at 2, *State v. Forrest*, 321 N.C. 186, 362 S.E.2d 253 (1987) (No. 705A86).

6. *Id.* at app. 29.

7. Mr. Forrest was classified as "No Code," meaning no extraordinary measures would be used to save his life. *Forrest*, 321 N.C. at 188, 362 S.E.2d at 253. Life-support treatment may have prolonged Clyde Forrest's life by a matter of days. Defendant-Appellant's Brief at app. 36-37. The doctor, the hospital and the family all agreed to forego such extraordinary efforts. *Id.* at app. 30.

8. Defendant-Appellant's Brief at 2.

9. *Forrest*, 321 N.C. at 189, 362 S.E.2d at 254.

10. Forrest's gun was a single action .22-caliber five shot revolver and had to be cocked each time it was fired. *Id.* Forrest stated that as a truck driver, he carried the gun with him at all times for protection. The court noted, however, that Forrest had not worked that day. *Id.* at 196, 362 S.E.2d at 258.

11. *Id.* at 189, 362 S.E.2d at 254.

12. Defendant-Appellant's Brief at 3.

13. Brief for the State at 2.

verdicts: first-degree murder, second-degree murder, voluntary manslaughter, or not guilty.¹⁴ After deliberating at great length,¹⁵ the jury found John Forrest guilty of first-degree murder.¹⁶ The trial judge accordingly sentenced Forrest to imprisonment for life as required by state law.¹⁷

Forrest's primary argument on appeal was that the trial court committed reversible error in its jury instruction concerning malice.¹⁸ Forrest maintained that inasmuch as the evidence rebutted the existence of malice, his constitutional right to due process was violated by the instruction permitting an inference of malice from the use of a deadly weapon.¹⁹ Forrest further argued the instruction was inadequate and misleading because it failed to define the phrase "just cause, excuse or justification,"²⁰ thus "improperly suggesting the exculpatory evidence did not negate malice or show heat of passion."²¹

The North Carolina Supreme Court found no fault with the jury instruction. The court first held that the instruction used by the trial court was "in accord with the North Carolina Pattern Jury Instruction and the extensive North Carolina case law."²² Second, the court stated that the jury was properly instructed that malice could only be *inferred*, not *presumed*, and that the jury was not compelled to reach such a finding.²³ Third, the court held that it was unnecessary for the trial court to instruct the jury on heat of passion.²⁴ The

14. *Forrest*, 321 N.C. at 189, 362 S.E.2d at 254. The trial court gave instructions on each of the four possible verdicts. See Defendant-Appellant's Brief at app. 6-9.

15. After several hours of deliberation, during which the jury requested to have the instructions concerning malice repeated three times, the jury was unable to reach a decision and was allowed to recess for the evening. The jury finally reached its verdict the next morning. Defendant-Appellant's Brief at app. 11-28.

16. *Forrest*, 321 N.C. at 189, 362 S.E.2d at 254.

17. Conviction of first-degree murder in North Carolina is punishable by death or life imprisonment. N.C. GEN. STAT. § 14-17 (Cum. Supp. 1987). A jury must make a finding of aggravating circumstances to impose the death penalty. N.C. GEN. STAT. § 15A-2000 (1983). Before the Forrest trial, the state stipulated to the absence of any such factors, precluding the possibility of a death sentence. *Forrest*, 321 N.C. at 189, 362 S.E.2d at 253.

18. The trial court instructed the jury as follows:

Malice means not only hatred, ill-will or spite, as it is ordinarily understood; to be sure that's malice. But it also means that condition of the mind that prompts a person to take the life of another intentionally, or to intentionally inflict serious bodily harm which proximately results in his death without just cause, excuse or justification.

If the State proves beyond a reasonable doubt that the defendant killed the victim with a deadly weapon, or intentionally inflicted a wound upon the victim with a deadly weapon that proximately [sic] caused the victim's death you may infer, first, that the killing was unlawful. Second, that it was done with malice. But you are not compelled to do so. You may consider this, along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice.

I charge that it is not a legal defense to the offense of murder if the defendant, John Forrest, at the time of the shooting believed his father, Clyde Forrest, to be terminally ill or in danger of immediate death. But you may consider such belief in determining whether the killing was done with malice.

Forrest, 321 N.C. at 190-91, 362 S.E.2d at 255.

19. *Id.* at 190, 362 S.E.2d at 255.

20. *Id.* at 192, 362 S.E.2d at 255.

21. Defendant-Appellant's Brief at 9.

22. *Forrest*, 321 N.C. at 191, 362 S.E.2d at 255.

23. *Id.*

24. *Id.* at 192, 362 S.E.2d at 256.

court stated that in the past it had "narrowly construed the requirement under the 'heat of passion' doctrine that provocation be adequate and reasonable."²⁵ The court was unwilling to hold that "where defendant kills a loved one in order to end the deceased's suffering, adequate provocation to negate malice is necessarily present."²⁶ Accordingly, the court upheld the decision of the trial court.²⁷

In dissent, Chief Justice Exum argued that:

[S]omeone who kills because of a desire to end a loved one's physical suffering caused by an illness which is both terminal and incurable should not be deemed in law as culpable and deserving of the same punishment as one who kills because of unmitigated spite, hatred or ill will.²⁸

Exum stated that the two types of killing differed because "the former [was] without, and the latter with, malice."²⁹ The Chief Justice believed the absence of malice, though not a defense to murder, was a mitigating factor, justifying reducing murder to manslaughter.³⁰ Exum concluded that the jury was confused by the instruction which first suggested that only matters which excused or justified the killing altogether could rebut the element of malice, and second, failed to explain that circumstances in mitigation were capable of negating malice.³¹ The Chief Justice believed this error was sufficiently prejudicial to warrant a new trial.³²

Homicide laws in North Carolina are not dissimilar to laws in other jurisdictions. First-degree murder in North Carolina is "the intentional and unlawful killing of a human being with malice and with premeditation and

25. *Id.*

26. *Id.* at 193, 362 S.E.2d at 256. The court stated that the heat of passion doctrine was to be reserved for those instances when a defendant killed without premeditation and deliberation and without malice. See *infra* note 52 and accompanying text. The court concluded that in the present action there was "irrefutable proof" of premeditation and deliberation. *Forrest*, 321 N.C. at 193, 362 S.E.2d at 256.

27. *Forrest* raised two additional issues on appeal. *Forrest's* second argument was that the prosecution presented insufficient evidence of premeditation and deliberation for the trial court to have submitted the first-degree murder charge to the jury. *Forrest*, 321 N.C. at 194, 362 S.E.2d at 257. The supreme court noted, however, that Clyde *Forrest* did not provoke his son's actions and that John *Forrest* fired four shots with a gun which had to be cocked each time. Additionally, the court noted that although *Forrest* carried a gun for protection as a truck driver, he was not working on the day of the shooting. Of more significance, the court believed, were *Forrest's* statements made to police following the shooting. The court held these facts all contributed to a finding that the killing was premeditated and deliberate. *Id.*

Finally, *Forrest* assigned as error the trial court's inquiry into the numerical division of the deliberating jury and the court's subsequent instruction to try to reach a unanimous decision. *Id.* at 197, 362 S.E.2d at 258. The supreme court held that the trial court properly emphasized that no juror was to surrender his or her own conscientious convictions and that the court's instruction therefore did not constitute error. *Id.* at 199, 362 S.E.2d at 260.

28. *Id.* at 200, 362 S.E.2d at 260 (Exum, C.J., dissenting).

29. *Id.* (Exum, C.J., dissenting).

30. *Id.* (Exum, C.J., dissenting).

31. *Id.* (Exum, C.J., dissenting). Exum argued this confusion was demonstrated by the jury's three requests that the trial court repeat the malice instructions. *Id.* at 201, 362 S.E.2d at 260 (Exum, C.J., dissenting); see *supra* note 15.

32. *Forrest*, 321 N.C. at 201, 362 S.E.2d at 260 (Exum, C.J., dissenting).

deliberation."³³ Murder in the second degree is any unlawful killing of a human being with malice but without premeditation and deliberation.³⁴ Voluntary manslaughter, on the other hand, is the intentional and "unlawful killing of another without malice and without premeditation and deliberation."³⁵

The term "malice" has one of the more conceptually elusive meanings in criminal law. Although its non-legal meaning is "ill-will," "spite," or "malevolence," in law "malice" is used "to indicate generally a wrongful act which is done intentionally without just cause or excuse."³⁶ One commentator has written:

Although when used in its non-legal sense the word clearly denotes an evil or wicked state of mind, at law it does not necessarily have such a connotation; at law it simply means that the actor intentionally did something unlawful. Thus, the legal meaning of "malice" is confusing to a non-lawyer because an individual may act with good reason or from humanitarian motives but, as a matter of legal terminology, he has acted with "malice" if his act is against the law.³⁷

The North Carolina Supreme Court has defined malice as "not only hatred, ill-will, or spite . . . but . . . also . . . that condition of the mind which prompts a person to take the life of another intentionally, without just cause, excuse, or justification."³⁸ The supreme court has also stated that malice exists as a matter of law "whenever there has been a wrongful and intentional killing of another without excuse or mitigating circumstances."³⁹ Although North Carolina courts appear to use these definitions interchangeably, the two meanings differ

33. *State v. Jackson*, 317 N.C. 1, 23, 343 S.E.2d 814, 827 (1986), *rev'd on other grounds*, 107 S. Ct. 1271 (1987); see N.C. GEN. STAT. § 14-17 (Cum. Supp. 1987). Premeditation exists when an act is thought out beforehand for some length of time, no matter how short. *Jackson*, 317 N.C. at 23, 343 S.E.2d at 827. Deliberation is an intent to kill carried out in a cool state of blood and not under the influence of a violent uncontrollable passion. *Id.* The term "cool state of blood" means the defendant's anger or emotion must not have been such as to overcome her ability to reason. *Id.*; see also *State v. Tyson*, 307 N.C. 679, 683, 300 S.E.2d 366, 368 (1983) (anger and emotion must not be such as to "disturb the faculties and reason").

34. *Tyson*, 307 N.C. at 682, 300 S.E.2d at 368. Second-degree murder does not require an actual intent to kill but does require some intentional act which sufficiently demonstrates malice and which proximately causes death. *State v. Wilkerson*, 295 N.C. 559, 580, 247 S.E.2d 905, 915 (1978).

35. *State v. Barts*, 316 N.C. 666, 692, 343 S.E.2d 828, 845 (1986). Voluntary manslaughter is a lesser included offense of murder. *Id.*

36. Purver, *The Language of Murder*, 14 UCLA L. REV. 1306, 1306 (1967). Black's Law Dictionary defines malice as it relates to murder as "that condition of the mind which prompts one to take the life of another without just cause or provocation. A willful or corrupt intention of the mind. It includes not only anger, hatred and revenge, but also every other unlawful and unjustifiable motive." BLACK'S LAW DICTIONARY 862 (5th ed. 1979).

37. Purver, *supra* note 36, at 1306.

38. *State v. Benson*, 183 N.C. 795, 799, 111 S.E. 869, 871 (1922); *accord State v. Myers*, 299 N.C. 671, 677, 263 S.E.2d 768, 772 (1980); *State v. Hamilton*, 77 N.C. App. 506, 511, 335 S.E.2d 506, 509-10 (1985), *cert. denied*, 395 N.C. 593, 315 S.E.2d 33 (1986). This language has been adopted by the courts as part of the jury instruction concerning malice and was used by the *Forrest* trial court judge. See *supra* note 18. Malice has also been defined as any act evidencing "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind bent on mischief." *State v. Wrenn*, 279 N.C. 676, 687, 185 S.E.2d 129, 135 (1971) (Sharp, J., dissenting); *accord State v. Wilkerson*, 295 N.C. 559, 581, 247 S.E.2d 905, 917 (1978).

39. *State v. Baldwin*, 152 N.C. 822, 829, 68 S.E. 148, 151 (1910); *accord State v. Moore*, 275 N.C. 198, 206, 166 S.E.2d 652, 657 (1969); *State v. Hough*, 61 N.C. App. 132, 134, 300 S.E.2d 409, 411, *cert. denied*, 308 N.C. 193, 302 S.E.2d 246 (1983); see also W. LAFAYE & A. SCOTT, CRIMINAL

substantially. Mitigating circumstances do not justify or excuse the crime but may reduce the degree of culpability.⁴⁰

The supreme court has stated on more than one occasion that "[t]he intentional use of a deadly weapon proximately causing death gives rise to the presumption that (1) the killing was unlawful, and (2) the killing was done with malice."⁴¹ In *State v. Hankerson*,⁴² however, the North Carolina Supreme Court held that a presumption of malice and unlawfulness are not constitutionally acceptable when evidence of mitigating or justifying circumstances have been properly put before the court.⁴³ Once such evidence has been introduced, proof of intentional killing with a deadly weapon could raise only an inference of malice and unlawfulness.⁴⁴ To reduce a conviction of murder to voluntary manslaughter, therefore, the defendant must overcome an inference of malice by showing that he killed his victim in the heat of passion "caused by provocation adequate to negate the element of malice."⁴⁵

The term "heat of passion" is not limited to rage, anger, or resentment, but may also include fear, terror, excitement, or nervousness.⁴⁶ North Carolina courts have consistently held that mere words or insulting language are insufficient to provide adequate provocation.⁴⁷ On the other hand, assault or threatened assault is sufficient to constitute adequate provocation,⁴⁸ as is discov-

LAW § 7.10 (2d ed. 1986) (voluntary manslaughter is a killing under circumstances which mitigate though do not justify or excuse the killing).

40. BLACK'S LAW DICTIONARY 903-04 (5th ed. 1979); see *infra* note 59 and accompanying text.

41. *State v. Myers*, 299 N.C. 671, 677, 263 S.E.2d 768, 772 (1980) (quoting *State v. Bush*, 289 N.C. 159, 221 S.E.2d 333, *death sentence vacated*, 429 U.S. 809 (1976)); accord *State v. Strickland*, 307 N.C. 274, 295, 298 S.E.2d 645, 659 (1983). The presumption of malice dates back to *State v. Ellick*, 60 N.C. 450 (1864), in which the North Carolina Supreme Court stated:

When it is proved that one has killed intentionally, with a deadly weapon, the burden of showing justification, excuse or mitigation is on him. . . . [T]he fact of the homicide must be proved by the State; but if found, or admitted, the onus of showing justification, excuse, or mitigation is upon the prisoner.

Ellick, 60 N.C. at 459, 462; see *State v. Hankerson*, 288 N.C. 632, 644-45, 220 S.E.2d 575, 586 (1975), *rev'd on other grounds*, 432 U.S. 233 (1977).

42. 288 N.C. 632, 220 S.E.2d 575 (1975), *rev'd on other grounds*, 432 U.S. 233 (1977).

43. *Id.* at 651, 220 S.E.2d at 589. *Hankerson* was based on a United States Supreme Court ruling in *Mullaney v. Wilbur*, 421 U.S. 684 (1975). *Hankerson*, 288 N.C. at 643, 220 S.E.2d at 584. The *Mullaney* Court held that when evidence of heat of passion has been properly introduced the presumption of malice is unconstitutional. *Mullaney*, at 704. The Court in *Mullaney* was asked to rule on a Maine law requiring the defendant to prove by a fair preponderance of the evidence that he acted in the heat of passion once the prosecution proved an unlawful and intentional killing. *Id.* at 686. The Supreme Court held that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation." *Id.* at 703-04.

44. *Hankerson*, 288 N.C. at 651, 220 S.E.2d at 589; see *State v. Jones*, 56 N.C. App. 259, 271, 289 S.E.2d 383, 391-92, *cert. denied*, 305 N.C. 762, 292 S.E.2d 578 (1982); see also, *State v. Batts*, 303 N.C. 155, 161, 277 S.E.2d 385, 389 (1981) ("Malice may be proven either by direct evidence or by inference from the circumstances surrounding the killing.").

45. *State v. Best*, 79 N.C. App. 734, 736, 340 S.E.2d 524, 526 (1986). Voluntary manslaughter can also be found when the defendant kills in self-defense using greater than necessary force. See *State v. Rummage*, 280 N.C. 51, 185 S.E.2d 221 (1971); *State v. Burden*, 36 N.C. App. 332, 244 S.E.2d 204, *cert. denied*, 295 N.C. 468, 246 S.E.2d 216 (1978).

46. BLACK'S LAW DICTIONARY 650 (5th ed. 1979).

47. *State v. McCray*, 312 N.C. 519, 324 S.E.2d 606 (1985); *State v. Montague*, 298 N.C. 752, 259 S.E.2d 899 (1979).

48. *State v. Williams*, 296 N.C. 693, 252 S.E.2d 739 (1979); *State v. Hamilton*, 77 N.C. App.

ery of a spouse committing an act of adultery.⁴⁹ Although North Carolina heretofore has not faced the issue of euthanasia, other jurisdictions have held that a killing committed to end another's suffering is not performed in the heat of passion.⁵⁰

Applying the above definitions, the decision by the supreme court in *State v. Forrest*, arguably, was correct. The defendant walked into a room and shot his victim four times in the head, the victim by no means having provoked the defendant. After the shooting, the defendant confessed to having shot the victim intentionally, and to having thought about it beforehand. Viewed abstractly and without regard to the defendant's motive or emotional state, the court's conviction was clearly correct. The *Forrest* case, however, should not be viewed in such a simplistic manner.

The supreme court held that because "irrefutable proof" of premeditation and deliberation was introduced, a jury instruction on heat of passion would have been improper.⁵¹ The mere fact that specific conduct does not fit into the traditional notions of heat of passion, however, should not, without more, give rise to a presumption of malice when the evidence rebuts the existence of malice.⁵²

Chief Justice Exum argued that *Forrest's* conviction should have been reduced to voluntary manslaughter.⁵³ Indeed, one is left questioning why John *Forrest* should be punished more severely than an individual who, in a fit of rage, intentionally kills an unfaithful spouse,⁵⁴ or kills in retaliation for an as-

506, 335 S.E.2d 506 (1985), *cert. denied*, 315 N.C. 593, 341 S.E.2d 33 (1986). Indeed, one court of appeals decision stated that only "circumstances amounting to an assault or a threatened assault" can give rise to reasonable or adequate provocation. *State v. Spicer*, 50 N.C. App. 214, 222-23, 273 S.E.2d 521, 527, *appeal dismissed*, 302 N.C. 401, 279 S.E.2d 356 (1981).

49. *State v. Ward*, 286 N.C. 304, 312-13, 210 S.E.2d 407, 413-14 (1974), *vacated in part*, 428 U.S. 903 (1976); *State v. Long*, 87 N.C. App. 137, 141, 360 S.E.2d 121, 123-24 (1987).

50. See *People v. Gindorf*, 159 Ill. App. 3d 647, 661, 512 N.E.2d 770, 779 (1987); *Gilbert v. State*, 487 So. 2d 1185, 1190 (Fla. Dist. Ct. App.), *cert. denied*, 494 So. 2d 1150 (Fla. 1986); *State v. Lancaster*, 106 Ohio App. 401, 407, 155 N.E.2d 215, 219 (1957), *aff'd*, 167 Ohio St. 391, 149 N.E.2d 157 (1958); *People v. Kirby*, 2 Park. Crim. Rep. (N.Y.) 28, 31 (1823). Courts in the United States have long held that a person who intentionally takes the life of another can be convicted of murder even if the victim was about to die from other causes. See *State v. Be Bee*, 113 Utah 398, 195 P.2d 746 (1948); *People v. Cione*, 293 Ill. 321, 127 N.E. 646 (1920); *People v. Ah Fat*, 48 Cal. 61 (1874); *Commonwealth v. Bowen*, 13 Mass. 356 (1816).

51. *Forrest*, 321 N.C. at 193, 362 S.E.2d at 256. It is worth noting, however, that the North Carolina Supreme Court has recognized that because premeditation and deliberation relate to mental processes, they are *not* readily susceptible to direct proof but must be *implied* by the jury from circumstantial evidence. *State v. Jackson*, 317 N.C. 1, 23, 343 S.E.2d 814, 827 (1986), *rev'd on other grounds*, 107 S. Ct. 1271 (1987); see also *State v. Marshall*, 304 N.C. 167, 173, 282 S.E.2d 422, 426 (1981) (deliberation can rarely be proved but must be determined from the circumstances). *But cf.* *State v. Newsome*, 195 N.C. 552, 564, 143 S.E. 187, 193 (1928) (premeditation and deliberation must be proved by the evidence beyond a reasonable doubt).

52. By emphasizing the propriety of the given instruction, the court indicated malice could not be presumed. Had the supreme court believed mitigating circumstances were not validly introduced, it would have been more consistent to conclude that the trial court's instruction to the jury erred in favor of *Forrest*, and that the trial court could have instructed the jury that malice could be presumed.

53. *Forrest*, 321 N.C. at 200, 362 S.E.2d at 260 (Exum, C.J., dissenting).

54. See *State v. Ward*, 286 N.C. 304, 312-13, 210 S.E.2d 407, 413-14 (1974), *vacated in part*, 428 U.S. 903 (1976); *State v. Long*, 87 N.C. App. 137, 141, 360 S.E.2d 121, 123-24 (1987).

sault on a family member,⁵⁵ or kills in fear of threatened assault.⁵⁶ The supreme court's decision equates this humanitarian killing with the murder committed out of "wickedness of heart."⁵⁷ When viewed in light of other North Carolina homicide cases, the *Forrest* decision appears to lack consistency.⁵⁸

Chief Justice Exum believed the trial court failed to recognize the distinction between excuse and mitigation.⁵⁹ The Chief Justice argued "[t]he instructions were that only matters which excused the killing altogether were sufficient to rebut the element of malice."⁶⁰ Without adding "and without mitigation," Exum concluded, the instruction was incomplete.⁶¹ Additionally, the court provided no definition for "just cause, excuse or justification." Though the trial judge instructed the jury it was not compelled to infer malice, he also stated "it is not a legal defense to the charge of murder if the defendant . . . believed his father . . . to be terminally ill or in danger of death."⁶² It was never explained to the jury that the defendant's belief could serve as a mitigating circumstance reducing the crime to manslaughter. Therefore, because no explanation was given as to what could constitute "just cause, excuse or justification," and the one mitigating circumstance was not a legal defense to murder, the jury was left with no theory by which the inference of malice could be negated and appears to have concluded by default that *Forrest* acted with malice.⁶³

The supreme court's holding leaves uncertain what the State must prove and the defendant must rebut. It has become evident that malice, at law, does not mean hatred or enmity. The aching question thus remains what does malice,

55. See *State v. John*, 30 N.C. 330 (1848).

56. See *State v. Haight*, 66 N.C. App. 104, 310 S.E.2d 795 (1984).

57. One commentator was forced to query, "Is the law so heartless that it does not distinguish between the gravity of these offenses—or is it the court that is heartless?" *Court Shows No Mercy*, *The News and Observer* (Raleigh, N.C.), Dec. 5, 1987, at 14A, col. 1.

58. See, e.g., *State v. Flemming*, 296 N.C. 559, 251 S.E.2d 430 (1979) (defendant convicted of second-degree murder after chasing his totally naked victim down the street with a knife and then standing over her roughly five minutes inflicting thirty-three stab wounds); *State v. Blake*, 83 N.C. App. 77, 349 S.E.2d 78 (1986), *aff'd*, 319 N.C. 599, 356 S.E.2d 352 (1987) (Hours after the victim had shot at the defendant's car and police had taken the victim's weapon, the defendant drove to the victim's home and chased the victim out to the street where the defendant shot and killed him. The defendant was convicted of second-degree murder.); see also *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978) (father of abused child convicted of second-degree murder for his total disregard for human life after his two-year-old son died from being kicked and abused generally); *State v. Mapps*, 45 N.C. App. 574, 264 S.E.2d 348 (1980) (mother of severely battered, developmentally slow five-year-old child with many broken bones which had never been treated found guilty of second-degree murder when child died as a result of the beatings).

59. *Forrest*, 321 N.C. at 200, 362 S.E.2d at 260 (Exum, C.J., dissenting). "Mitigating circumstances" are defined as such that "do not constitute a justification or excuse of the offense in question, but which in fairness and mercy, may be considered as extenuating or reducing the degree of normal culpability." BLACK'S LAW DICTIONARY 903-04 (5th ed. 1979). An "excuse" at law is a justification for a specific act which will serve to excuse liability altogether. See *id.* at 804.

60. *Forrest*, 321 N.C. at 200, 362 S.E.2d at 260 (Exum, C.J., dissenting).

61. *Id.* (Exum, C.J., dissenting). Indeed, at least one authority has defined malice as an attempt to do the actual harm done without "justification, excuse or mitigation." See R. PERKINS & R. BOYCE, CRIMINAL LAW AND PROCEDURE 428 (5th ed. 1977). Some North Carolina courts have ruled that malice exists where there has been no "excuse or mitigation." See *supra* note 39 and accompanying text.

62. *Forrest*, 321 N.C. at 191, 362 S.E.2d at 255; see *supra* note 18 and accompanying text.

63. *Forrest*, 321 N.C. at 201, 362 S.E.2d at 260 (Exum, C.J., dissenting).

in law, mean? Clearly the jury in the *Forrest* trial struggled with this same question.⁶⁴ The supreme court in *Forrest* offers no further explanation as to the legal meaning of malice. Taking a 'you-know-it-when-you-see-it' approach, the court has defined malice by stating what it is not. With this decision, the court has effectively broadened the concept of malice to include any act not committed in self-defense or in the heat of passion. At the same time, it has narrowly construed 'heat of passion' so as to not include the passionate killing of a loved one committed to end that individual's implacable pain and suffering. According to the supreme court, malice exists when no mitigating circumstances are present. This holding fails to recognize that an absence of malice is itself a mitigating circumstance.

In the written law, mercy killing is murder.⁶⁵ When brought to trial, however, defendants in mercy killing cases are rarely convicted of murder.⁶⁶ By one count, fifty-six cases of mercy killing were reported between 1920 and 1985.⁶⁷ In only ten of these fifty-six cases were the defendants found guilty of criminal homicide and imprisoned.⁶⁸ Of the remaining forty-six, twenty received suspended sentences, fifteen were acquitted, six cases were dismissed, and five were never brought to trial.⁶⁹

This inconsistency often is the result of jury sympathy with the defendant. As an example, in 1967 Robert Waskin shot his mother who was dying of leukemia and in terrible pain. Waskin was charged with murder but the jury found him not guilty.⁷⁰ One commentator stated that "[f]rom a legal point of view, the jury's verdict was incorrect. . . . But, when juries are faced with cases like this

64. See *supra* note 15.

65. See R. PERKINS & R. BOYCE, CRIMINAL LAW 58 (3d ed. 1982); Kamisar, *Some Non-Religious Views Against Proposed "Mercy-Killing" Legislation*, 42 MINN. L. REV. 969, 970 (1958); see also J. RACHELS, THE END OF LIFE 168 (1986) (American law makes no distinction between murder and euthanasia); Survey, *Euthanasia: Criminal, Tort, Constitutional and Legislative Considerations*, 48 NOTRE DAME L. REV. 1202, 1205 (1973) ("[T]hose special factors which may be said to distinguish euthanasia from more reprehensible forms of killing—a humanitarian motive, possible consent from the victim, the victim's hopeless condition—are irrelevant in the eyes of the law.").

66. This gap between law and practice does not always exist as a court occasionally will apply the law as written. In a recent case in Florida, in which seventy-five-year-old Roswell Gilbert shot and killed his ailing wife, the Florida Supreme Court held that euthanasia is not a defense to first-degree murder and sentenced the defendant to life imprisonment. *Gilbert v. State*, 487 So. 2d 1185, 1190 (Fla. 1986). The *Gilbert* case marked the first instance in several years in which a defendant had been handed the full weight of the law for a mercy killing. One attorney, trying to explain the excessiveness of Gilbert's sentence, stated, "The jury was over worked. They were tired. Gilbert wouldn't cry. The weather was real bad, too." D. HUMPHRY & A. WICKETT, THE RIGHT TO DIE 216 (1986). The court in *Gilbert* concluded that whether courts should be allowed to distinguish between different kinds of wrong-doers "must be decided by the legislature and not by the judicial branch." *Gilbert*, 487 So. 2d at 1192. Ironically, only two years earlier in the same Florida county, Hans Florian was not even indicted for the shooting of his Alzheimer-stricken wife, committed under "strikingly similar circumstances." D. HUMPHRY & A. WICKETT, *supra*, at 215.

Gilbert does not support the *Forrest* decision. Whereas Clyde Forrest was confined to a bed and expected to die soon, Emily Gilbert, although suffering from osteoporosis and Alzheimer's disease and in continuous pain, was active and able to move about on her own. See *Gilbert*, 487 So. 2d at 1187.

67. D. HUMPHRY & A. WICKETT, *supra* note 66, at 208.

68. D. HUMPHRY & A. WICKETT, *supra* note 66, at 208.

69. D. HUMPHRY & A. WICKETT, *supra* note 66, at 208-09; see also Survey, *supra* note 65, at 1213-14 & n.82.

70. J. RACHELS, *supra* note 65, at 168. As another example, in a 1939 case a jury acquitted

one, they often refuse to convict.”⁷¹

On other occasions, it is the judge who softens the law's harsh impact. When William Jones's wife, an amputee/diabetic in continuous pain, begged to be put to death, Jones electrocuted her. The judge, “who was said to have wept as he pronounced the sentence, sentenced [Jones] only to a year and a day.”⁷²

Defense tactics also can operate to avoid first-degree murder convictions. Carol Ann Paight was acquitted on the grounds of temporary insanity in 1950 after shooting her cancer-stricken father once in the temple.⁷³ In 1938 Harry Johnson was charged with first-degree murder for asphyxiating his wife who had been ill with cancer for four and a half years. Johnson was judged temporarily insane and was freed without a trial.⁷⁴

The recent trend in mercy killing cases has been to order probation or suspended sentencing. In 1978 George Hoffman fired three shots into his seventy-nine-year-old bedridden wife. After plea bargaining to manslaughter, the judge ordered fifteen years probation.⁷⁵ In 1981 Woodrow Collums, age sixty-nine, shot his brother Jim three times in the head and twice in the stomach. Jim Collums, who was dying of Alzheimer's disease and being kept alive by feeding tubes, had previously asked his doctor to end his life. Woodrow Collums was given ten years probation and ten hours of work per week at a senior citizen center.⁷⁶ In 1982 Martin Stephenson, age 27, received burns over 62% of his body after dousing himself with gasoline and igniting it. The night before Martin was to undergo further reconstructive surgery on his neck and head, he was shot and killed by his father. Martin Stephenson's father was found guilty of manslaughter and given a suspended sentence of five to fifteen years and one hundred hours community service per month for five years.⁷⁷

Louis Greenfield of first-degree manslaughter after he killed his “incurable imbecile” son through chloroform poisoning. Kamisar, *supra* note 65, at 1021 n.180.

71. J. RACHELS, *supra* note 65, at 169. Juries are not always sympathetic. After John Noxon electrocuted his six month old Down's syndrome son in 1943, he tried to lie his way out of it by claiming it had been an accident. The jury did not believe Noxon and convicted him of first-degree murder. In an ironic twist, Noxon was sentenced to death by electrocution. The sentence was later commuted to six years to life and Noxon was paroled after six years. Kamisar, *supra* note 65, at 1022 n.182.

72. J. RACHELS, *supra* note 65, at 169.

73. Kamisar, *supra* note 65, at 1020. Paight's father, still under the anesthetic from the operation which revealed the stomach cancer, never knew he had cancer. *Id.*

74. D. HUMPHRY & A. WICKETT, *supra* note 66, at 16.

75. D. HUMPHRY & A. WICKETT, *supra* note 66, at 145.

76. D. HUMPHRY & A. WICKETT, *supra* note 66, at 139-40. The judge later remarked, “This was a murder with no justification but an awful lot of mitigation.” *Id.* at 140.

77. D. HUMPHRY & A. WICKETT, *supra* note 66, at 146. The judge stated, “I am satisfied that there is no punishment I can impose that's more severe than what you have already suffered with the death of your son.” *Id.*

This list of cases is by no means exhaustive. As a further example, in 1983 Dorothy Healy, age 71, collapsed from the strain of trying to care for her severely ill husband and strangled him with a nylon stocking. Healy pleaded guilty to voluntary manslaughter and was given five years probation, a \$10,000 fine, and 1,000 hours community service. *Id.* at 144. The judge stated that there were “moral and ethical reasons for her actions.” *Id.* at 144-45. Sixty-six-year-old Joe Wilson was found guilty of attempted murder in 1985 and given three years probation and 250 hours community service after slashing the veins of his wife who had suffered several strokes in the past seven years. *Id.* at 142.

These cases clearly illustrate the discrepancy between the law as written and as practiced. This gap between law and practice, like all legal fictions, creates more harm than good. One commentator recently noted:

Some commentators think this is as it should be: the law must not condone mercy-killing, they say; but at the same time, it is appropriate for judges and juries to treat defendants in these cases compassionately. However, it is at least *prima facie* undesirable for there to be such a wide gap here, for if we deem a type of behaviour not fit for punishment, why should we continue to stigmatize that behaviour as criminal? What is gained by putting the defendants through the ordeal?⁷⁸

Mercy killings are different from the standard homicide and should not receive the same treatment. Two steps should be taken, one judicial, one legislative, to close the gap between law and practice. First, judges must instruct juries differently in mercy killing cases. The jury in the *Forrest* case was instructed that malice exists when a person takes the life of another intentionally or "intentionally inflict[s] serious bodily harm which proximately results in death without just cause, excuse or justification."⁷⁹ This description omitted the word "mitigation," included originally by the supreme court in *State v. Ellick*⁸⁰ and repeated by North Carolina courts more recently.⁸¹ A more appropriate jury instruction would have provided that malice is that condition of the mind that prompts a person to take the life of another without just cause, excuse, or mitigation. Additionally, the trial court should have stated that if the defendant reasonably believed his father to be suffering and close to death, such a belief would not serve as a legal defense to murder but could be a factor capable of negating malice and mitigating the offense to the lesser crime of voluntary manslaughter. This instruction, applicable only in mercy killing cases, would have allowed the jury to determine first, whether the defendant believed his father to be in pain and near death, second, whether such a belief was reasonable, third, whether the belief prompted the defendant to kill, and fourth, whether this belief was sufficient to negate the element of malice.

A second solution to the law-practice gap is for state legislatures to take action in the area of mercy killing. Many states have enacted "right to die" or "living will" statutes permitting physicians to withhold or withdraw life support treatment at the request of the patient.⁸² A legal distinction continues to be

78. J. RACHELS, *supra* note 65, at 170.

79. *Forrest*, 321 N.C. at 190, 362 S.E.2d at 255; *see supra* note 18. Because of poor wording, the instruction could have been misinterpreted to mean that malice existed if the defendant inflicted serious harm resulting in death without just cause, excuse or justification, or if defendant intentionally took the life of the victim. In other words, as was argued by defendant on appeal, the instruction could be understood as stating that malice exists *whenever* a person takes the life of another.

80. 60 N.C. 450, 459 (1864); *see supra* note 41.

81. *See supra* note 39 and accompanying text.

82. *See, e.g.*, Natural Death Act, ALA. CODE §§ 22-8A-1 to -10 (Cum. Supp. 1983); Death With Dignity, ARK. STAT. ANN. §§ 83-3801 to -3804 (Cum. Supp. 1983); Natural Death Act, CAL. HEALTH & SAFETY CODE §§ 7185-95 (West Cum. Supp. 1988); Death with Dignity Act, DEL. CODE ANN. tit. 16, §§ 2501-2508 (1983); Natural Death Act of 1981, D.C. CODE ANN. §§ 6-2421 to -2430 (1987); Life Prolonging Procedure Act, FLA. STAT. ANN. § 765.01 to .15 (West 1986); Living

made, however, between passive euthanasia—*letting* one die—and active euthanasia—*bringing about* one's death.⁸³ While the former is becoming more widely accepted, the latter continues to be viewed by the law as an act of murder.⁸⁴ This distinction between passive and active euthanasia lies in the nature of the action of the attending physician.⁸⁵ If the physician takes no action at all, such as by withholding treatment, the omission constitutes a passive act. Legislatures and courts have also held that disconnecting or withdrawing life-sustaining treatment, although clearly an action as opposed to an omission, is passive since the patient still dies a natural death.⁸⁶ Arguably, however, the passive/active distinction is often unclear and should be discarded entirely.⁸⁷ The argument to

Will Act, ILL. ANN. STAT., ch. 110 1/2, para. 701-710 (Smith-Hurd Cum. Supp. 1987); Right to Natural Death Act, N.C. GEN. STAT. §§ 90-320 to -322 (1985); Natural Death Act, VA. CODE ANN. §§ 54-325.8:1 to :13 (Cum. Supp. 1987); Natural Death Act, WASH. REV. CODE ANN. §§ 70.122.010 to .905 (West Cum. Supp. 1988). The North Carolina Natural Death Act provides that in the event "a person has declared . . . a desire that his life not be prolonged by extraordinary means" and that declaration is in accordance with the requirements of the statute and has not been revoked, "extraordinary means may be withheld or discontinued upon the direction and under the supervision of the attending physician." N.C. GEN. STAT. § 90-321 (1985). The purpose of this Act is to recognize:

that an individual's rights include the right to a peaceful and natural death and that a patient or his representative has the fundamental right to control the decisions relating to the rendering of his own medical care, including the decision to have extraordinary means withheld or withdrawn in instances of a terminal condition.

Id. § 90-320. For a discussion of North Carolina's Natural Death Act, see Comment, *North Carolina's Natural Death Act: Confronting Death with Dignity*, 14 WAKE FOREST L. REV. 771 (1978). For a general discussion of living will legislation, see Sherlock, *For Everything There is a Season: The Right to Die in the United States*, 1982 B.Y.U. L. REV. 545, 597-615.

83. See Rachels, *Active and Passive Euthanasia*, in *ETHICAL ISSUES IN MODERN MEDICINE* 219 (J. Arras & R. Hunt eds. 1983). This distinction was highlighted fifteen years ago by the American Medical Association which stated:

The intentional termination of the life of one human being by another—mercy killing—is contrary to that for which the medical profession stands and is contrary to the policy of the American Medical Association.

The cessation of the employment of extraordinary means to prolong the life of the body when there is irrefutable evidence that biological death is imminent is the decision of the patient/or his immediate family.

Id. at 219-20 (quoting the House of Delegates of the American Medical Association, December 4, 1973).

84. See *supra* note 65 and accompanying text.

85. See Sherlock, *supra* note 82, at 550.

86. For cases permitting acts of passive euthanasia, see *In re Osborne*, 294 A.2d 372 (D.C. Cir. 1972); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977); *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976). For a thorough discussion of the *Quinlan* case, see Collesler, *Death, Dying and the Law: A Prosecutorial View of the Quinlan Case*, 30 RUTGERS L. REV. 304 (1977); Comment, *The Role of the Family in Medical Decisionmaking for Incompetent Adult Patients: A Historical Perspective and Case Analysis*, 48 U. PITT. L. REV. 539 (1987). The *Quinlan* court held that the right to refuse medical treatment stems from the constitutional right to privacy. *Quinlan*, 70 N.J. at 40, 355 A.2d at 663. This ruling reverses the traditional concept that states have a legal duty to preserve all life. See D. HUMPHRY & A. WICKETT, *supra* note 66, at 231. Other courts have stated that the right to refuse medical treatment is not constitutionally guaranteed, but is founded in the common law. See *In re Storar*, 52 N.Y.2d 363, 420 N.E.2d 64, *cert. denied*, 454 U.S. 858 (1981).

A number of states have passed "right to die" or "living will" statutes that permit a patient to determine his or her own medical treatment. See *supra* note 82.

87. See Rachels, *supra* note 83, at 222; Note, *Voluntary Active Euthanasia for the Terminally Ill and the Constitutional Right to Privacy*, 69 CORNELL L. REV. 363, 366 (1984); cf. Gelfand, *Euthanasia and the Terminally Ill Patient*, 63 NEB. L. REV. 741, 753 (1984) (active and passive euthanasia are legally indistinguishable and both should be illegal).

dispense with the distinction has become more persuasive in recent years following a series of cases in which courts have allowed doctors to remove feeding and hydration tubes from dying patients.⁸⁸ In such instances, the patient may literally starve to death.⁸⁹ It is difficult to see the legal distinction between allowing a patient to die by starvation and bringing about death through injection. The practical distinction, on the other hand, is clear: whereas the former may result in protracted and painful death, the latter is quick and painless and thus more humane.

If the intended effect of withdrawing medical treatment is to end suffering by bringing about death as quickly as possible,⁹⁰ one must question why it is so unthinkable, ethically and at law, to terminate life altogether. The debate becomes a head-to-head conflict between two seemingly antithetical principals: on one side a legal and ethical duty to preserve life;⁹¹ on the other a desire to minimize suffering. It is arguable, however, that these goals are not entirely at odds; when a patient's life holds only the prospect of pain and deterioration, the life to be sustained can no longer be "the sort of free and rational activity that gives us dignity."⁹² Some commentators argue, therefore, that the law has not reached far enough and that mercy killings committed pursuant to strict regulations should be legalized.⁹³

Objections to the legalization of euthanasia are founded on both religious and non-religious principles.⁹⁴ Generally, opponents to active euthanasia emphasize the sanctity of human life.⁹⁵ Other non-religious arguments against legalization include the danger of faulty medical determinations⁹⁶ and the

88. See *Bouvia v. Superior Court of Los Angeles County*, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986); *Barber v. Superior Court of Los Angeles*, 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484 (1983); *Brophy v. New England Sinai Hosp.*, 398 Mass. 417, 497 N.E.2d 626 (1986); *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985); *In re Guardianship of Grant*, 109 Wash. 2d 545, 747 P.2d 445 (1987).

In *Barber*, two doctors were charged with murder for removing intravenous tubes providing a patient hydration and nourishment. *Barber*, 147 Cal. App. 3d at 1010-11, 195 Cal. Rptr. at 486. The prosecution argued the doctors had, in effect, starved the patient to death, an act constituting murder. The California court of appeals dismissed the action finding no difference between the use of a respirator and intravenous feeding tubes. *Id.* at 1017, 195 Cal. Rptr. at 490. The *Barber* decision reversed California's position that removing any life-support treatment was an act of murder. See *People v. Conley*, 64 Cal. 2d 310, 411 P.2d 607 (1966).

89. Death by starvation in North Carolina and most states constitutes first-degree murder. See N.C. GEN. STAT. § 14-17 (Cum. Supp. 1987).

90. See N.C. GEN. STAT. § 90-320 (1985); *supra* note 82.

91. See Dyke, *Beneficent Euthanasia and Benemortasia*, in *ETHICAL ISSUES IN MODERN MEDICINE*, *supra* note 83, at 216.

92. Arras & Hunt, *Euthanasia and the Care of Dying Patients*, in *ETHICAL ISSUES IN MODERN MEDICINE*, *supra* note 83, at 204.

93. See D. HUMPHRY & A. WICKETT, *supra* note 66, at 295-98; J. RACHELS, *supra* note 65, at 182-87; Schiffer, *Euthanasia and the Criminal Law*, 42 U. TORONTO FAC. L. REV. 93, 103 (1984).

94. The religious view generally can be summed up as follows: all life comes from God; only God can take life away. See Jakobovitz, *Some Recent Jewish Views on Euthanasia*, in *DEATH, DYING AND EUTHANASIA* 344 (D. Horan & D. Mall eds. 1980); O'Rourke, *Christian Affirmation of Life*, in *DEATH, DYING AND EUTHANASIA*, *supra*, at 362. For an example of non-religious objections to euthanasia, see generally Kamisar, *supra* note 65.

95. See, e.g., Dyke, *supra* note 91, at 216 (killing is *prima facie* wrong).

96. See Kamisar, *supra* note 65, at 1005-13.

probability of abuse.⁹⁷ Clearly the most persuasive argument against the legalization of active euthanasia, however, is the "slippery slope" or "wedge" theory.⁹⁸ This argument urges that no matter how justified active euthanasia may seem at times, legalizing active euthanasia would so radically diminish our respect for human life that it would become difficult to limit the use of euthanasia or control its abuse. In other words, taking the first step would necessarily lead to a second, less socially desirable one. It is asserted that permitting *voluntary* active euthanasia would soon lead to legalization of *involuntary* active euthanasia⁹⁹ and that, in time, we would be unable to stop the cold-blooded killing of "inconvenient" relatives.¹⁰⁰ However, as was noted by one commentator, "[i]f our laws were altered so that anyone could carry out an act of euthanasia, the absence of a clear line between those who might justifiably be killed and those who might not would pose a real danger; but that is not what advocates of euthanasia propose."¹⁰¹

97. See, e.g., Kamisar, *supra* note 65, at 979 (removing "mercy-killings" from the ban of the criminal law [should be strongly] resisted on the ground that it offers the patient far too little protection from not-so-necessary or not-so-merciful killings").

A recent *Journal of the American Medical Association* article illustrates the problem of abuse and the need for control and guidelines. See *It's over, Debbie*, 259 J. A.M.A. 272 (1988). The piece describes a young hospital resident who was awakened in the middle of the night to assist a patient with whom he had had no prior contact. The twenty-year-old patient reportedly was having difficulty sleeping. On reviewing the patient's chart, the resident learned that she was dying of ovarian cancer, would not respond to chemotherapy treatments, and was suffering from unrelenting vomiting. When the resident entered the room, the patient's only words were "Let's get this over with." Without consulting with the patient or the patient's mother, both of whom were in the room, the resident decided to administer a lethal dose of morphine. He told the patient only that he was giving her something to help her rest and told the patient's mother to say good-bye. *Id.*

This article has caused a tremendous uproar in the medical community. One doctor called the incident an "ethical travesty." *Essay on Mercy Killing has Doctors in Uproar*, *The News & Observer* (Raleigh, N.C.), Feb. 2, 1988, at 2A, col. 1 (quoting Dr. Arthur Caplan, director of the Center for Biomedical Ethics at the University of Minnesota). Prosecutors have initiated proceedings against the American Medical Association in an effort to learn the identity of the author of the article. The AMA has refused to release the author's name based on first amendment grounds. See *Euthanasia Essay Raises Ethics Debate*, *The News & Observer* (Raleigh, N.C.), Feb. 28, 1988, at 9A, col. 1.

98. See Kamisar, *supra* note 65, at 1030-41.

99. Voluntary euthanasia is when an incurably ill patient chooses to die. Some believe this is encouragement to commit suicide. See J. FLETCHER, *MORALS AND MEDICINE* 173 (1960). Involuntary euthanasia is the merciful killing of a human being who is incapable of consenting to the request. See G. WILLIAMS, *THE SANCTITY OF LIFE* 347 (1957); Note, *supra* note 87, at 365 n.12. See generally Sherlock, *supra* note 82, at 548-50. Because "involuntary" suggests acting *against* the will of the patient, it has been suggested the term "non-voluntary" would be a more accurate description of the euthanatizing of an incompetent patient. J. RACHELS, *supra* note 65, at 179.

100. See J. RACHELS, *supra* note 65, at 172-75. Advocates of the slippery slope theory point to the results which occurred in Nazi Germany. See Kamisar, *supra* note 65, at 1038. There, the legalization of euthanasia for persons incurably ill gradually developed into the killing of persons "socially unproductive" and eventually into the killing of all non-Germans. Singer, *Killing and Letting Die*, in *ETHICAL ISSUES IN MODERN MEDICINE*, *supra* note 83, at 210, 214. Professor Kamisar suggested we must "snuff out" such "small beginnings" here. Kamisar, *supra* note 65, at 1038. Although it is naive to believe that the atrocities of Nazi Germany were the result of legalizing euthanasia, this does not negate entirely the threat of the slippery slope.

101. Singer, *supra* note 100, at 215. Others believe legalization is either unnecessary or undesirable and that courts should simply recognize euthanasia as justification for a killing. See M. HEIFETZ, *THE RIGHT TO DIE* 117 (1975) (stating that although killing must remain a crime and never be legalized, "[w]e must pass laws that grant the courts the right to consider and honor *motivation and intent* in cases of euthanasia and the right to declare no penalty"); J. RACHELS, *supra* note 65, at 182-87 (mercy killing should be recognized as a legal defense to murder). This approach,

Proponents of legalizing active euthanasia stress the importance of individual liberty¹⁰² and human dignity,¹⁰³ and the humane goal of reducing suffering.¹⁰⁴ Laws that propose legalizing voluntary active euthanasia contain protections against the risks of misdiagnosis and abuse. The best example of such legislation to date is California's proposed Humane and Dignified Death Act.¹⁰⁵ This act would permit physicians under certain strict conditions to respond to terminally ill patients' written directives and to either withhold or withdraw life-sustaining procedures or administer "aid-in-dying."¹⁰⁶ Under the proposed act, patients who have executed directives requesting aid-in-dying within the past seven years may be humanely put to death if the patient has been diagnosed as suffering from a terminal condition.¹⁰⁷ The directive would have to be signed by the declarant in the presence of two disinterested witnesses¹⁰⁸

however, would be the least protective we could take. The potential for abuse would be overwhelming since facts could be exaggerated or altered to justify a killing.

102. See, e.g., Singer, *supra* note 100, at 211.

103. See, e.g., T. BEAUCHAMP & S. PERLIN, *supra* note 1, at 217.

104. One commentator has stated that not permitting mercy killing amounts to an act of "cruelty" by forcing a human being to linger in agony and refusing his demand for "merciful release." Williams, "Mercy-Killing" Legislation—A Rejoinder, 43 MINN. L. REV. 1 (1958).

105. This proposed legislation, to be introduced before the California legislature some time during 1988, is authored by Los Angeles attorneys Robert Risley and Michael White with the assistance of the Hemlock Society and sponsored by Americans Against Human Suffering. See D. HUMPHRY & A. WICKETT, *supra* note 66, at 295. In their preamble, the authors state:

Adult persons have the fundamental right to control the decisions relating to the rendering of their own medical care, including the decisions to have life-sustaining procedures withheld or withdrawn or, if suffering from terminal condition, to request a physician to administer aid-in-dying.

Modern medical technology has made possible the artificial prolongation of human life beyond natural limits. The prolongation of life for persons with terminal conditions may cause loss of patient dignity and unnecessary pain and suffering, while providing nothing medically necessary or beneficial to the patient.

In recognition of the dignity and privacy which patients have a right to expect, the State of California shall recognize the right of an adult person to make a written directive instructing his or her physician to withhold or withdraw life-sustaining procedures or, if suffering from a terminal condition, to administer aid-in-dying.

AMERICANS AGAINST HUMAN SUFFERING, HUMANE AND DIGNIFIED DEATH ACT § 2525.1 (November 1, 1987) [hereinafter "HDDA"].

106. "Aid-in-dying" is defined by the HDDA as "any medical procedure that will terminate the life of the qualified patient swiftly, painlessly, and humanely." HDDA § 2525.2(h).

107. Under the HDDA, "terminal condition" means:

an incurable condition which would, in the opinion of the two certifying physicians exercising reasonable medical judgment, produce death, and when the application of the life-sustaining procedures would serve only to postpone the moment of death of the patient, and in the case of a patient requesting aid-in-dying, in the opinion of such physicians such condition or conditions would produce death within six months.

HDDA § 2525.2(g).

108. The HDDA provides:

The directive shall be signed by the declarant in the presence of two witnesses not related to the declarant by blood or marriage and who would not be entitled to any portion of the estate of the declarant upon his or her death under any will of the declarant or codicil thereto then existing or, at the time of the directive, by operation of law then existing. In addition, a witness to a directive shall not be the attending physician, an employee of the attending physician or a health care facility in which the declarant is a patient, or any person who, at the time of the execution of the directive, has a claim against any portion of the estate of the declarant upon his or her death.

HDDA § 2525.3.

and could be revoked at any time without regard to the declarant's mental condition.¹⁰⁹ Additionally, the declarant would be able to name an "attorney-in-fact" who would have the power to make health-care decisions for a patient incapable of doing so herself.¹¹⁰ Any request by an attorney-in-fact to administer aid-in-dying, however, would have to be reviewed by a three member hospital committee to ensure that all procedures had been followed and the time of death had been properly decided by the attorney-in-fact and the physicians.¹¹¹ The proposed Humane and Dignified Death Act is carefully worded to protect against the fears of voluntary active euthanasia legislation opponents. The possibility of abuse or misdiagnosis has been virtually eliminated and no legal protection is available to those who commit an act of active euthanasia which does not strictly follow the procedures set forth.

Any legislation permitting active voluntary euthanasia presents the threat of the slippery slope. However, to maintain the legal fiction that mercy killing will not be tolerated is the most senseless and least protective approach we can take. Our legal system must recognize that merciful killing is both widely accepted and practiced. Without laying down guidelines as to how and under what circumstances active euthanasia may be applied, the situation will only become steadily worse. Specific statutes such as the Humane and Dignified Death Act can correct the constant threat a grieving family member will attempt to take the law into his own hands or that a sleepy-eyed resident will quickly misread a chart, incorrectly interpret a request, and put an innocent victim to death.¹¹²

John Forrest's actions cannot be exonerated. However, in light of societal trends, court decisions in other jurisdictions, and recent developments in the law concerning the right to die, the first-degree murder charge and life sentence were too harsh. One cannot help but question the sense of inequity in a legal system that imprisons one defendant for life while it lets another go free, though both committed practically identical crimes. Advances in technology will force an increase in the number of cases like John Forrest's. It is up to our courts and legislatures to respond in a way that reflects society's changing attitude. First,

109. HDDA § 2525.5.

110. The HDDA defines "attorney-in-fact" as:

an agent of the person or patient signing the directive, appointed for the purpose of making decisions relating to the patient's medical care and treatment, including withdrawal of life-sustaining procedures and physician aid in dying, in the event the patient becomes incompetent to make those decisions. An attorney-in-fact shall be an adult, who may, but need not, be related to the person or patient, but an attorney-in-fact need not be an attorney or a lawyer.

HDDA § 2525.2(i).

111. The HDDA provides:

The decision of a attorney-in-fact to request a physician to administer aid-in-dying shall first be reviewed by a hospital committee of three persons to assure all the following:

- (1) The directive was properly executed and witnessed.
- (2) The directive has not been revoked by the patient.
- (3) The physicians have certified the patient is terminal.
- (4) The time of death is properly decided by the attorney-in-fact and the physician.

HDDA § 2525.10(a)

112. See *supra* note 97.

courts in North Carolina should respond by adjusting the jury instruction to recognize mercy killing as a mitigating circumstance capable of negating the element of malice and reducing first-degree murder to the lesser offense of manslaughter. Second, the legislature must consider and pass voluntary active euthanasia laws which allow terminally ill patients to choose quick and painless death over death which is prolonged, debilitating, and painful.¹¹³ Technological advances have greatly enhanced our ability to sustain life. The life sustained, however, is often of questionable quality. The law must respond with advances of its own and allow individuals to die a painless and dignified death.

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113. See *supra* notes 102-11 and accompanying text. When Charlotte Perkins Gilman, an early feminist crusader who was dying of cancer, committed suicide, she left a note stating, "The time is approaching when we shall consider it abhorrent to our civilization to allow a human being to lie in prolonged agony which we should mercifully end in any other creature." D. HUMPHRY & A. WICKETT, *supra* note 66, at 15 (quoting Charlotte Perkins Gilman in Wolbarst, *The Doctor Looks at Euthanasia*, 149 MED. RECORD 354 (1939)).