AUTOPSYSES, NIHILISM AND
TECHNIQUE: ON DEATH AND THE
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Abstract

According to autopoietic theory, modern law can be characterized by two fundamental paradoxes: self-reference and self-regulation. The following inquiry takes as its departing point the autopoietic theory of law and its formulation of these two paradoxes but proceeds to criticize autopoiesis for misrepresenting their.

Through a case study of the history of dying in the United States, the paper proceeds first to show how these paradoxes emerged, and second, to argue that underlying the paradoxes lie the historic phenomena to which Nietzsche refers to as nihilism, and Heidegger as technique. The study concludes by reflecting on the relation between the autopoietic account of modern law and the one offered here.
Autopoiesis, Nihilism and Technique:

On Death and the Origins of Legal Paradoxes

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Introduction

In his book on *Law as an Autopoietic System*, Professor Teubner illustrates the fundamental paradox of law by referring to two classic texts, one from Greek tragedy, the other from the Jewish Babylonian Talmud. The first is the famous dispute between Antigone and Creon regarding the unlawful burial of Polynices. The second, perhaps less known, tells of a dispute between Rabbi Eliezer and the other Rabbis on a halachic question. After failing to convince his fellow Rabbis with reason, Rabbi Eliezer turned to the help of miracles, making a tree move, a stream of water flow backwards, and the walls of the synagogue to bend. Even after a voice from heaven confirmed Rabbi Eliezer’s view, the other rabbis remained unconvinced. They maintained their position claiming that the law is not in heaven, but as God himself said on Mount Sinai, “One must bend to the will of the majority.” The Talmud concludes by describing God’s response. He laughed and said: “My sons have defeated me, my sons have defeated me.”

Both Tragedy and Talmud teach how the self-referential character of law gives rise to the fundamental paradox of law, namely, that law’s attempt to distinguish legal

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3 Talmud, Baba Mezia 59b, quoted in Ibid. 1.
from illegal can itself be illegal. According to Teubner, one should neither attempt to resolve this paradox, nor should one think of it as paralyzing. Rather, a careful study of law may carry on not despite the paradox but through it.\(^4\) Teubner recommends neither to shy away from the paradox nor to move quickly to resolve it but rather, perhaps like God Himself, to remain amused.\(^5\)

This article is concerned not with the Ancient paradox of law, but rather with its reincarnation and renewed significance in modern times. According to autopoietic theory, modern law can be characterized by two fundamental and interrelated paradoxes.\(^6\) First, the radicalization of the ancient paradox of self-reference as it appears in the form of positive law. Positive law brings the notion of self-reference to its extreme by seeking the validity of law within law itself and by rejecting all extra-legal sources of authority.\(^7\) But how can positive law, which claims no ground, ground itself? - The first paradox.

Second, a new yet related paradox emerges, the paradox of self-regulation. Modern law is often characterized as regulatory law due to its growing involvement in the ordering of different spheres of human existence from domestic partnerships to international markets. The paradox emerges from the fact that it is precisely the self-referentiality of law (i.e., law’s normative closure), which enables the modern legal


system to regulate other social spheres (i.e., law’s cognitive openness). But how can law, which claims autonomy, regulate that which is external to it? – The second paradox.

The following inquiry takes as its departing point the autopoietic theory of law and its formulation of these two paradoxes but proceeds to criticize autopoiesis for offering a merely descriptive account of modern law. The critique is based on the notion that truth entails more than an accurate account of reality by providing a sense of significance as well. We may agree that in our times law has become an autopoietic system, and still wonder what is the significance of this fact. Can the autopoietic existence of law be accounted for, not merely described, by autopoietic theory itself?

One immediate objection to this mode of questioning may arise. How can one search for the significance of autopoietic systems outside of any particular autopoietic system? After all is it not the central claim of system theory that description is nothing but another operation of systems and consequently that there is no truth outside of the system? Is the search for the “essence” of the system as distinguished from its operation and the correlative adoption of a “totalizing” standpoint from which the phenomenon of systems can be viewed, not a relic of metaphysical thinking? And if so, is the attempt to search for the significance of autopoiesis not neglectful of system’s theory endeavour to free us from the oppressing heritage of metaphysics?

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9 Within the autopoietic analysis of developed systems, specifyal the psychic and social systems, one may find the concept of significance or meaning as well Niklas Luhmann, Social Systems, Writing Science (Stanford, Calif.: Stanford University Press, 1995) 59-102. Yet, it is essential that autopoiesis does not draw a stark distinction between description and meaning precisely because for autopoiesis in the final analysis there is no meaning outside of description. 10 See, for instance, Ibid. 36-37.
To this one may reply that autopoietic theory is indeed driven by the desire to overcome metaphysics in the study of law. Yet, here as elsewhere, willfulness does not guarantee success. After all, autopoietic theory offers its own metaphysics by assuming first, that the essence of law is “system”, and second, that this essence is characteristic not only of law but of the totality of sociological, psychological, and biological phenomena. The force of the critique is thus turned against autopoietic theory itself. To think through and beyond metaphysics one must view “system” not as the essence of law but only as one possible way in which law is.\(^{11}\)

In order to avoid an overly abstract discussion of theoretical concepts, the inquiry will be based on the history of euthanasia as a case study of the emerging paradoxes of self-reference and self-regulation.\(^{12}\) These modern paradoxes of autopoiesis emerge when law regulates (or becomes able to regulate) the practice of euthanasia. The paradox of self-reference lies in the fact that euthanasia, the taking of undesired life, becomes justified merely because the law says so. Modern euthanasia is distinguishable from other forms of lawful killing, such as self-defense\(^ {13}\), the death penalty and killing in war. The former is an inherently modern problem, which bares intimate connections to positive law, while the latter have long been recognized and justified within natural law. Euthanasia as a modern practice seeks its justification in positive law. The medical hastening of death, an otherwise unlawful act, becomes legal only because the law posits


\(^{12}\) A more elaborate account of the history of euthanasia can be found in Shai Lavi, The Modern Art of Dying: A History of Euthanasia in the United States (Princeton: Princeton University Press, 2005, forthcoming). While relying on my previous work, this paper is concerned with a new and more narrowly defined question of the relation between the history of euthanasia, system theory and metaphysics. This discussion is presented here for the first time.

so. With euthanasia the ancient paradox seems to reemerge: can law’s attempt to
distinguish the legal (euthanasia) from the illegal (murder) itself be illegal? Hence,
euthanasia can serve as a paradigm to what system theory calls law’s self-referential
character.

The attempts to legalize euthanasia bring to the fore the paradox of self-regulation
as well. Positive law not only legalizes the practice of euthanasia, but also regulates it.
For euthanasia to be lawful it is not enough for law to decree that it is no longer a crime.
As we shall see, the regulation of euthanasia does not (or does not merely) determine for
patients or doctors whether euthanasia should be practiced but rather prescribes the
conditions and procedures under which euthanasia may take place.\footnote{The legal
regulation of euthanasia marks the practice as a specifically modern form of legalized
killing. It is in this sense that contemporary euthanasia proposals are distinguishable from
previous euthanasia proposals in the history of the West. While both Thomas More and Francis
Bacon advocated euthanasia already in the 16th and 17th century, the earlier proposals emerged in
the philosophical and imaginary genre of utopias. Not so with the late 19th century euthanasia
proposals which offer the practice as public policy and positive law. The new proposals share the
concreteness of a regulatory regime rather than the abstractness of a thought-experiment.}
It is self-regulation, i.e. the creation of transparent legal procedures, which allows for the external regulation
of euthanasia, thus manifesting the paradox of self-regulation.

In autopoietic terms, the emergence of the two paradoxes can be described in the
following stages. First, the undeferentiated character of law and society as a totalal
normative system and its decline (Part I). Second, the emergence of medicine (Part II)
and law (Part III) as subsystems of autonomous rationality. And finally, the emergence of
law as an autopoietic system of self-regulation, through which the regulation of medical
euthanasia takes place (Part IV).\footnote{Ewald, "The Law of Law."} While the essay is organized along this line of
development, the development itself cannot be understood from within the logic of system theory.

Thus before proceeding, another layer should be added to our understanding of autopoietic paradoxes. What is the phenomenon of self-reference in law? Understood from within system theory it means little more than the closure of the legal system. But if law is not understood in advance as a system, what does self-reference imply? Self-reference points, first, to the decline of natural law and the rise of positive law. It invokes the loss of a world order that was grounded in the unity of God or Reason. Second, it signifies the attempt by modern Man, now facing the groundlessness of existence, to overcome metaphysics by seeking the ground of law within the law (or the legal system) itself. Rather than a playful autopoietic paradox, we are facing that which Nietzsche has called nihilism.

Similarly, one may ask what is the significance of the phenomenon of self-regulation? Again, from the point of view of system theory it means primarily the cognitive openness of the legal system, which exists side-by-side with its normative closure. And yet, law as self-regulation signifies much more than that. Though all normative orders strive to regulate, most aim to order human conduct with the purpose of achieving a further good (e.g., religious ethics seeking salvation, medical ethics seeking health etc.). Law as an autopoietic system operates differently. The term self-regulation itself hints at the character of autopoiesis as a unique way in which law is. For autopoietic law regulation is not merely a means, but rather an end in itself (e.g., regulatory law in public health seeking transparency and accountability, which are themselves regulatory ideals).
This insight into the way regulatory law operates, leads to a deeper understanding of the conditions of its possibility. For regulation to take place the phenomenon to be regulated, dying in our case, must undergo a transformation through which it severs its connections with anything that cannot itself be regulated. Thus we shall see, how dying traditionally a liminal moment between this world and the world to come, gradually became a “this worldly” problem and a question of life proper. This change in dying, its coming under the sway of technique, is fundamental for understanding the significance of autopoiesis. Again, what we are facing is not the innocent evolution of a social system, but rather the phenomenon to which Heidegger refers to as the rise of technique. The underlying movements of nihilism and technique give autopoiesis its significance, but remain a (deliberate) blind spot for the theory itself.

I. Dying and Religion: The Collapse of a Unified World

Two explanations are commonly offered to the rise of euthanasia as an end-of-life treatment. One explanation points to advances in medical technology, which include the growing medical capacity to prolong life and significant changes in the causes of death. Throughout the course of the twentieth-century antibiotics, dialysis machines and respirators have changed the way we die, and patients are more likely to die from slow and painful killers such as heart disease and cancer than from the swift and painless ailments of the nineteenth century such as influenza, cholera and pneumonia. Under these new circumstances of death and dying, so the argument goes, there is an ever-growing need for new solutions to the problem of painful death. 

17 Ibid.
The second explanation ties euthanasia proposals with the development of patient rights, and the emerging struggle for patient autonomy and control over end-of-life decision making. Indeed, since the 1960s alongside the development of civil rights movements, patients have claimed a right to be fully informed about their medical condition and to be treated only on the basis of informed consent. Gradually, patients' demands to withhold and withdraw medical treatment were recognized, culminating in the legal recognition of a “right to die” short of taking life. 18

Both explanations, convincing as they may seem, relate the rise of euthanasia to developments characteristic of the second half of the twentieth-century. And yet, the modern problem of dying along with euthanasia proposals predate the advances that are so commonly associated with it. Moreover, both explanations assume that dying gives rise to medical and legal concerns without reflecting on the historical conditions that have brought the deathbed under the supervision of medicine and law. These questions are closely related to the rise of medicine and law as autopoietic systems.

The first euthanasia proposal in the English speaking world dates back to 1870. 19 It is a piece entitled “Euthanasia,” written by Samuel D. Williams, an otherwise unknown businessman. 20 Its author proposes a solution to the problem of dying patients suffering from unbearable pain. He writes that:

…In all cases of hopeless and painful illness it should be the recognized duty of the medical attendant, whenever so desired by the patient, to administer

18 See, for example, Norman Cantor, "Twenty-Five Years after Quinlan: A Review of the Jurisprudence of Death and Dying," Law, Medicine and Ethics 29, no. 2 (2001).
20 Samuel D. Williams, Euthanasia (London: Williams and Norgate, 1872). For a more general discussion of the history of euthanasia and Williams proposal, see Emanuel, "The History of Euthanasia in the United States and Britain."
chloroform—or such other anaesthetic as may by and by supersede chloroform—so as to destroy consciousness at once, and put the sufferer to a quick and painless death; all needful precautions being adopted to prevent any possible abuse of such duty; and means being taken to establish beyond the possibility of doubt or question, that the remedy was applied at the express wish of the patient.21

Soon after Williams’ proposal stirred a hot debate in the United Stated leading to the first attempts to legalize euthanasia already in 1906. Several years later, in 1938, the first American association for euthanasia was established.22

Thus, while there is little doubt that medical and legal advances have indeed revolutionized the experience of dying, the problem of dying and euthanasia as one possible solution predates these developments and cannot be explained by them. What then are the historical conditions that had to be met in order for euthanasia to emerge as a possible solution to the problem of dying? Most notably dying had first to emerge as a medical problem. But what allowed for this transition? For this we must first learn how Americans died prior to the medicalization of death. What were the laws governing the deathbed before medicine and law emerged as autopoietic systems?

It is commonly said that dying, prior to the 19th was ordered by religion. Such a saying is true but, as we shall see, somewhat misleading. During the time, especially in the context of death and dying, religion was not a separate sphere of human existence, but rather signified the totality of the human world. For centuries, in the Catholic world, dying was a highly ritualized and structured event. The rituals of the deathbed were led not by the dying patient herself, but by the help of the Catholic priest, who would offer guidance to the dying in her final hours. There was much at stake in the death of the Catholic believer. On the one hand, the deathbed presented the dying with the hope of

21 Quoted in Charles B. Williams, “Euthanasia,” Medical Record 70 (1894).
eternal salvation, through repentance for sins and forgiveness. On the other hand, the last article of life was a test and a final temptation. The dying man will see his entire life passing before his eyes, and he will be tempted either by despair over his sins, by the “vainglory” of his good deeds, or by the passionate love for things and persons. His attitude during this fleeting moment will erase at once all the sins of his life if he wards off temptation or, on the contrary, will cancel out his good deeds if he gives way.23

There were clear ways of overcoming the fear and danger of the hour of death, to secure a good death. The dying was not expected to face death on his own, and the responsibility to die a good death did not lie, at least not entirely, on his shoulders. The presence of the priest at the deathbed, and the power vested in him to administer the Eucharist and the Extreme Unction structured the deathbed scene and assisted the dying to achieve a good death. These rituals that could be practiced even if the dying patient was not in full senses, emphasizing the fact that not all depended on her will. Moreover, the Catholic believed in Purgatory, where sinners could still be saved from the fires of hell.24

The ritualized death of the Catholic correlated with an understanding of dying as a passage between this world and the world to come. The rituals at the deathbed were in this sense a rite de passage, preparing the dying person for his final journey into a better world. With the intervening role of the priest, mediating between this world and the world to come, the dying Catholic could maintain the hope that through the love of God, and the power invested in the Church, he would achieve eternal salvation.

23 [Ariès, 1974 #20@35-37]
24 Ariès, however, argues that the 16th century transitions in the deathbed were not directly related to the Reformation [Ariès, 1974 #20]
Yet, the deathbed in early America was much more likely to be ordered through Protestant, or more accurately Puritan beliefs and practices than by Catholic dogma. And it is in the Puritan way of dying that we may find the first seeds to the rise of the self-reference and self-regulation paradoxes of euthanasia. Indeed, the Protestant ethic of dying, characteristic of pre-19th century America, was quite at odds with the traditional Catholic death. For the Protestant dying belonged to this world, and thus lost the unique transformative power it had. Accordingly, there was no place at the deathbed neither for the traditional rituals, which were considered a superstitious belief, nor was there place for the priest as mediator between this world and the world beyond. In comparison to the Catholic death, the Protestant way of dying had no place for ritual, and thus put the believer in an intense uncertainty as to how to confront his death.

It is in this context that the emergence of the *ars moriendi* tradition should be understood. The *ars moriendi* consists of manuals detailing exactly how dying should take place. The first printed manuals on the art of dying were published in the late 15th century, and though the tradition was revised and revitalized by the Humanists, the Reformers and Counter-Reformers, by far the majority of works in the English *ars moriendi* are Protestant. The *ars moriendi* tradition was highly popular throughout the 18th century.  

Books on the craft of dying were a compilation of guidelines concerning the proper way of passing the final test of the deathbed. Focusing on the last hours of the dying person, they gave rules for appropriate conduct to be practiced and beliefs to be

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held before death approached. In addition, such books would occasionally include suggestions on how to overcome bodily and spiritual pain, as well as rites that should be practiced on the corpse of the dead.

In essence, these were practical manuals designed to assist the dying in preparing for the deathbed and its temptations. In some cases additional advice was given to bystanders on how to assist the dying patient, and in other cases recommendations were made regarding prayers that were especially appropriate at the hour of death.

One highly influential book of this kind, was Jeremy Taylor’s, 17th century, Holy Living and Holy Dying.\(^{26}\) Taylor was writing within and yet against the tradition of ars moriendi. Unlike the tradition, his advice does not address the dying but rather the living, long before the first signs of their approaching death appear. The practice of ars moriendi, according to Taylor, cannot wait for the last moment, and must be exercised throughout one’s life.\(^{27}\) This is the case not only because a long preparation is needed in advance, but also because death is no longer seen primarily as a passage from this life to a world to come. Rather, death for Taylor becomes another way of approaching life, and facing death changes from an otherworldly into a this-worldly experience.

For Taylor, death is transformed from an event taking place at the outer limit of life to the condition under which life itself takes place. This understanding of death shares, no doubt, the old Christian notion that man after Original Sin is afflicted by death.

\(^{27}\) Ariès makes this point more generally about a new variety of *artes moriendi*, which he names, “The New Arts of Dying,” arguing that already in the 16th century, “the art of dying was replaced by an art of living.” For Ariès, the emergence of these new “arts of dying” is a manifestation of the devaluation of the hour of death, which will ultimately lead to the modern denial of death, [Ariès, 1981 #19@300-305]
And yet Taylor diverges from tradition in his application of this insight to the practice of \textit{ars moriendi}. Death is not merely a metaphor for the condition of man in a corrupted world but an actual practice of living–living towards death.

Taylor’s great innovation in rethinking the relationship between living and dying marks a transformation in the Anglo-American way of death. For Taylor and for many who followed, living and dying were no longer two distinct temporalities of human life. Rather, living and dying became different aspects of one continuum, and thus became equally amenable to the desire of humanity to master its destiny.

The doubt, hope and fear that characterized the pre-Reformation \textit{ars moriendi}, for which dying was still a bridge between this world and the world to come, were no longer acceptable for early Americans who were influenced by Taylor and his followers. The latter wished to secure the experience of dying with a this-worldly assurance of salvation; a way of dying that was accompanied by a disposition of certainty in the power to master death. It is here, at the turn of the 19th century deathbed, that one may find the first signs of law (here, Protestant ethics) attempting to escape metaphysics (here, Catholic ethics) through self-referentiality (this-worldly salvation), an attempt driven by the desire for self-regulation, regulation for the sake of regulation alone. It is on the basis of this transition that euthanasia, soon understood as the this-worldly \textit{medical} treatment of dying, became possible.

\section*{II. Dying and Medicine: Medicine as a Self-Referential System}

The decline of the art of holy dying was captured in an 1861 edition of the \textit{Sick Man’s Passing Bell}, an \textit{ars moriendi} book first published early in the 17th century. The edition had a melancholic tone, lamenting especially the fact that the physician and the
lawyer are sent for when a man is dying, but the “physician of the soul stands outside the door.”

A new way of dying was emerging, and its most visible sign was the increasingly dominating presence of the physician at the bedside. Whereas in past centuries the medical doctor would commonly leave the bedside when it was clear that the patient was hopelessly ill, a new ethic developed in which the physician was expected to remain at the deathbed. While the content of the duty was still unclear, its name was quickly spreading among physicians of the 19th century; it was called “euthanasia”.

But the appearance of the physician at the deathbed signified a deeper change, namely, the medicalization of dying and its ordering within the now autonomous sphere of medical action (or communication). Only in the 19th century did the treatment of the dying, as such, become a medical concern, and thus medically governed. The law of the deathbed shifted from the unified world of religion to the specialized sphere of medicine. A shift that in its turn gave rise to a paradox of medical self-referentiality.

The new competence of the medical profession proceeded neither from new scientific knowledge nor from innovations in medical technique. On the contrary, the physician’s role at the deathbed was secured long before he had any medical treatment to offer the dying patient. It is precisely this paradox that physicians did not have the means to cure dying patients, but nevertheless became the new governors of the process of dying, that characterizes the rise of dying as a medical problem. And it is precisely out of this paradox that the final shift in euthanasia takes place: from the benign duty of easing death to the troubling practice of hastening death.

Despite the hopelessness and the inevitable decline associated with the dying condition, and perhaps, precisely because of it, the medical profession followed a deeper calling to attend the deathbed. The physician’s new duty was to remain with the dying patient to the very end, despite the fact that nothing of the *materia medica* in his possession was of any avail. What the physician had to offer the dying patient was a new kind of treatment in the face of immanent despair: hope.

Thomas Percival, the first to institute a modern code of medical ethics, identified this new role,

> For, the physician should be the minister of hope and comfort to the sick…. The life of a sick person can be shortened not only by the acts, but also by the words or the manner of a physician. It is therefore, a sacred duty to guard himself carefully in this respect, and to avoid all things which have a tendency to discourage the patient and to depress his spirits.²⁹

It is hope, but more accurately a specific kind of hope, which characterizes the medical treatment of the dying and the medicalization of the deathbed in mid-19th century America. To clarify this new identity of the medical profession as a hopeful profession, we can contrast it with two alternatives. First, with the role of the clergy at the deathbed and second, with the role assumed by alternative practitioners of medicine, or “quacks” as they were more commonly referred to by the emerging medical establishment.

As mentioned, physicians tended to relinquish their responsibilities at the deathbed, leaving the treatment of the dying in the hands of the clergy. Early in the 19th century, however, young physicians were reproved for such behavior, and were reminded that not only were they capable of caring for the dying, but also that they might be even

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more suitable for the task than the clergy. Marx, a 19th century German physician, warns his colleagues:

Whoever refuses his part in this duty [administering some kind of higher comfort] and assigns it solely to priests deprives himself of the most noble and rewarding aspect of his work. Where the priest, administering the sacraments, comes to the bedside to soothe the longing soul with the last solace of religion and comfort, who will not see the patient’s deep shock when he faces this quasi-harbinger of death? 30

Not so with the physician. The physician will not raise such terror, for he is associated with hope for a cure, not with the inevitability of death. Of the two, the minister of hope rather than the minister of fate should accompany the sick in his last hour. From the medical viewpoint, the presence of the priest at the deathbed could offer nothing but fear and terror. The possibility of saving the soul that was so intimately related to the *ars moriendi* deathbed was no longer acceptable in principle to the medical profession. Regardless of one’s religious belief, the only hope that the clergy could offer was a hope in a world to come. In this world, the presence of the minister at the deathbed could mean only one thing—imminent death. Therefore, only medicine could offer real hope—i.e., this-worldly hope—grounded in the powers available to medical science and technique.

But what were these powers? What possible content could there be to the hope ministered to the dying patient? And how could the medical physician become the minister of hope, when it was medicine itself that announced that the dying patient was incurable? The answer that mid-19th century physicians came up with was in the form of a new breed of hope—one that did not deny the dying patient’s incurable condition in the name of the all-powerful capacities of medicine, but that would at the same time refrain from undermining the new role of the physician at the deathbed as the minister of hope.

30 Ibid.
The hope that the physician was to inspire in the patient should neither be a groundless optimism nor, as it had been in the past, a manipulative effort to deceive the patient. Precisely in this way, the hope ministered by the physician differed from that exerted by the quack. This distinction was particularly important at a time when medical orthodoxy was trying to establish its professional boundaries. Physicians of the mid-nineteenth century were forming professional organizations to secure public recognition in their professional capacities. The American Medical Association, which was established in 1847, launched a war against quackery and excluded from its ranks homeopaths and other non-orthodox practitioners. Similar distinctions were drawn in day-to-day practice. Specifically with respect to the treatment of the dying, the medical profession sought to offer a scientifically grounded hope that would win the confidence of the dying patient and counter the deceitful practices of non-orthodox sectarian groups.31 Hooker explains:

The quack always gives assurances of a cure to those whom he undertakes to dupe; for, besides being incompetent to estimate the degree of danger in any case, he is unable to inspire confidence in his measures except by a strong appeal to the hopes of the patient. And some physicians imitate the quack in this particular.32

One of the many deceitful strategies of the quack doctor was to first give a disparaging diagnosis of the patient’s condition, and then match it with an excessive confidence in the

31 Some medical historians have ignored the importance of this distinction, and hence undermined the central place of the administration of hope in modern medicine. Most explicitly, Rothstein writes, “The therapeutic value of hope and confidence exists solely because of the patient’s faith in the physician. Therefore, any practitioner who inspires faith in his patients is the physician’s equal in this regard. Indeed, lay healers, faith healers, Indian doctors, nostrum vendors, and the whole range of practitioners who relied largely on their charismatic qualities for their success were probably more successful than most physicians in inspiring hope and confidence in their patients.” William G. Rothstein, American Physicians in the Nineteenth Century: From Sects to Science (Baltimore: Johns Hopkins University Press, 1972) 10.
powers of the drugs that he could offer. For the quack this seemed to be a win-win situation. Either his dire prediction would come true or, if it did not, he could take credit for the recovery.  

The physician, like the quack, had to minister hope. And though the physician might benefit from raising false hopes, and at times a deceived patient might enjoy temporary comfort, such practice was highly criticized. This was not only because of the moral objection that the end (i.e., a hopeful patient) could not justify the means (i.e., deceit). Nor could the physician’s duty to express scientific hope be explained solely as an attempt to distinguish the honorable medical profession from the unprofessional quacks. More importantly, the kind of hope that the physician was expected to minister to the dying patient was essentially different from the one provided by the quack. The task of the physician was not merely to create a feeling of hope, but to secure one based on the scientific healing powers of medicine.

Hope was much more than an emotion characterizing the personality of the medical doctor or the dying patient. Hope, and specifically the incremental hope offered at the deathbed, colored the entire deathbed scene and ordered its interactions. Hope should be seen as the most articulate mark of dying coming under the control of a closed medical system. As opposed to otherworldly salvation or even to complete recovery in this world, both of which depend on external measures of success, “intelligent hope” offered a promise of self-referential medical treatment of the dying.

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33 Early in the century, Rush criticizes this practice in medicine. “I know that the practice of predicting danger and death, upon every occasion, is sometimes made use of by physicians, in order to enhance the credit of their prescriptions, if their patient recover, and to save a retreat from blame, if they should die.” Benjamin Rush, Selected Writings of Benjamin Rush (Philosophical Library, 1947). For a general discussion of orthodox medicine and its relation to the different varieties of sectarian medicine, see Harris L. Coulter, Divided Legacy: A History of the Schism in Medical Thought (Washington,: Wehawken Book Co., 1973).
Carrying the logic of self-reference to its logical ends, would entail a further change in the sense of euthanasia. From this benign sense given by mid-19th century physician to euthanasia, as a hopeful death, a more radical form of euthanasia as the medical hastening of death would soon emerge. Death itself could become a medical operation bearing a medical logic.

In the age of medical therapeutics and technique, hope became a call for action. It was no longer possible to wait passively for death; something must be done. Awaiting death was no longer fitting for the modern science of dying, which demanded action. Not only was awaiting a state of uncertainty but it was a state of indifference. Oliver W. Holmes, arguably the most notable American physician of the mid-19th century, expressed this notion when he declared “No human being can rest for any time in a state of equilibrium where the desire to live and that to depart just balance each other.”34 As long as the patient is in good mind and hopeful, he will not be bothered by inconveniences. But when hope of cure or improvement are gone, “every incommodity stares out at him, each one of them packing up his little bundle of circumstances and calling him to move to his new home, even before the apartment is ready to receive the new bodily tenant.”35

Though Holmes was by no means advocating euthanasia, his telling metaphor demonstrates how the modern impatience toward awaiting death gave rise not only to euthanasia as the medical treatment of the dying patient, but also to euthanasia as the medical hastening of death. The over-ambitious desire to profess hope at the deathbed,

35 Ibid.
despite the incurable condition of the dying patient, was the origin of the medical hastening of death as a last resort to the problem of dying. It is simultaneously the moment when all hope is lost, but also the moment in which a final effort is made to overcome the helplessness of the deathbed by hastening death.

At times, the dying could be comforted with the promise of partial or temporary recovery. At other times, or for other people, this was not sufficient, and a new call for action was made despite the apparent hopelessness of the situation. In the same way that dying was defined as a problem of medical mastery (as the apparent incapacity to cure), so the solution to the problem became a task of mastery—i.e., the ability of medicine to prolong life, or when such an attempt fails, to provide a good death. Medical technique was summoned to save the patient from dying, not by curing him, but by hastening death.

Thus we find the same logic behind the prolonging of life and the hastening of death. In both, the treatment of the dying becomes a duty; in both, the determination of the time of death shifts from the providence of nature to the intercession of technique. Both share a belief in the power of medicine to secure a good death by technical means; and for both, euthanasia is seen as medical treatment in aid of dying. Finally, both share the same disposition of hope, i.e. the possibility of technique to become the modern art of dying.

Modern medicine could no longer guarantee the great promise of salvation. Thus physicians opted for a more tangible and limited promise of hope. This hope was not the promise of a world to come, but a this-worldly guarantee that, as long as life persisted, hope could be renewed indefinitely. It is this modest megalomania that characterized the medical practitioner of the latter half of the 19th century, and it is the paradoxical nature...
of his duty that eventually lead some physicians to offer euthanasia of a very different kind, i.e. medically hastened death. Euthanasia, from this perspective, can be seen as the attempt of physicians to “do something” when really nothing more could be done. This desire demonstrates how close late 19th century medicine came to will the mastery of death for the sake of mastery alone. The movement toward regulation would become complete once dying turned from a limited medical problem to a problem of public policy and positive law.

### III. Dying and Law: Law as an Self-Referential System

Early on it became clear to both advocates and opponents of euthanasia that the law was the main obstacle standing in the way of institutionalizing medical euthanasia. By “law” both sides meant the traditional norms of criminal law, which in principle prohibited the taking of life. There were very few exceptions to this rule and euthanasia did not seem to fall under any of the traditional defenses.

For centuries, criminal law was unequivocal. The common law made no distinction between the life of a dying patient and any other human life. Shortening life by a few minutes or by a few years was equally considered murder. Moreover, the fact that the patient was suffering from intolerable pain could serve as no justification for the action, since motivation under common law could only affect the severity of punishment, not culpability itself. The medical responsibility to seek the relief of pain could not legally justify shortening the life of a dying patient.³⁶

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³⁶ Such a medical duty could be legally justified on the basis of the necessity defense. This hypothetical justification of euthanasia was not raised at the time. Compare, however, with more recent discussions: e.g., Glanville Williams, *The Sanctity of Life and the Criminal Law* (New York: Alfred A. Knopf, 1957).
The simple solution to this problem that proponents of euthanasia were advocating was changing the law. And though to contemporary readers this may seem as an obvious solution to the problem, it was not as obvious to jurists of the turn of the 20th century. The prohibition on euthanasia was not only legal but also moral. For euthanasia to take place either the moral evaluation of the practice had to change, to the extent that the general public would view euthanasia as a positive act, or what was more likely that the strong connection between law and morality would desolve, and specifically, that the moral judgement of euthanasia would become irrelevant to the question of its legal validity. If euthanasia were to be considered as anything other than murder, law would have to change from a common law tradition based on ancient custom and morality, to a modern instrument for regulating medical practice. Law, in other words, would have to become a normatively closed autopoietic system.

Early attempts to justify the practice of euthanasia were based on the argument that euthanasia is a specific case of the more general problem of suicide. And it is through the legal developments in suicide that one can see clearly the transition of law into a closed system. Supporters of euthanasia emphasized the patient’s wish to die, and the physician was construed as merely assisting the patient in the fulfillment of his wish. Euthanasia, accordingly, would not be murder but a particular way of committing suicide. The legitimacy of the first would then depend on that of the latter.

The linking of euthanasia to suicide was especially important, since the legal status of suicide underwent gradual change throughout the nineteenth century.37 Suicide,
which was considered a crime for many centuries, was slowly losing its criminal character. Thus suicide seemed to be a particularly appealing venue for grounding the legality of euthanasia. The decriminalization of suicide suggested that not every taking of human life would be considered murder.

While Williams’ original proposal did not mention suicide, one of the very early reviews of the essay by Dr. Tollemache praised the proposal by describing it as an attempt to “legalize suicide by proxy.” Moreover, Tollemache believed that Williams’ proposal could have been stronger if he had advocated the more general “legalizability of suicide.” Therefore, the move to legalize euthanasia was tied up from its very inception with the legality of suicide.

Juxtaposing euthanasia to suicide was more than a scholastic exercise. It raised a fundamental question regarding the grounds of the legal objection to euthanasia. The prohibition on euthanasia could no longer be stated in the simple terms of the sanctity of life, because that principle no longer governed the legal status of suicide. Even if euthanasia and suicide were not precisely the same, on what basis could the law continue to object to euthanasia while removing its ban from suicide?

A close examination of the history of suicide will demonstrate not only that the legal status of suicide had changed, but also and more importantly for our concerns that the relation between law and morality had shifted, and that law was emerging as an

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autonomous normative system. This latter shift had direct implications on the possible regulation of euthanasia.

Suicide was a crime under common law up to the nineteenth century. It was treated like any other crime and was punishable even when successfully performed. Bracton, one of the earlier common-law scholars who wrote in the thirteenth century, mentions two such punishments. First, there was the financial sanction of forfeiture to the king of possessions held by the person who had committed suicide. In applying fiscal sanctions to suicide, the law treated suicide like many other crimes against the Crown. However, a second punishment uniquely applied to the case of suicide. This punishment was to mutilate the body by driving a stake through it, and then burying it at a crossroad. These sanctions were practiced throughout the eighteenth century, and were still on the books during the first part of the nineteenth century.

The original prohibition against suicide was grounded on the presupposition that suicide was an act of self-murder. The same logic that prohibited the taking of another’s life applied to the taking of one’s own. Suicide was known as the act of *felo de se*, a felony against oneself.

Gradually, however, the punishments inflicted were changed. In 1701, Pennsylvania became the first to depart clearly from the common-law tradition by abolishing forfeiture as punishment for suicide. This position spread throughout most of the colonies by the end of the century. Suicide, however, was still a crime in most states at the end of the eighteenth century. Blackstone admits that the laws of suicide may be too extreme, but still mentions them as valid law. On the other hand, Zephaniah Swift,

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39 See discussion in Marzen et al., “Suicide: A Constitutional Right?.” The latter have found interesting variations among the different colonies.
later Chief Justice of Connecticut, was much more critical. Speaking of the more modern approach to suicide, he wrote:

There can be no act more contemptible, than to attempt to punish an offender for a crime, by exercising a mean act of revenge upon his lifeless clay, that is insensible of the punishment. There can be no greater cruelty, than the inflicting a punishment, as the forfeiture of goods, which must fall solely on the innocent offspring of the offender.  

And yet, Swift admitted that suicide was immoral:

Indeed, this crime is so abhorrent to the feelings of mankind, and that strong love of life which is implanted in the human heart, that it cannot be so frequently committed, as to become dangerous to society.

In the course of the nineteenth century, ignominious burial was also abolished. But although suicide was no longer punishable, for a while it was still considered a crime. However, this anomalous condition did not persist for long, and soon after the crime as well as the punishment was entirely dropped out of the law books.

The gradual decriminalization of suicide does not imply that suicide became morally more acceptable. It rather points to a widening separation between legal, on the one hand, and moral and religious norms, on the other. Law could not punish the deceased after his death, neither by degrading his honor, nor by confiscating his property.

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41 Ibid.
42 Interestingly, even after suicide could no longer be punished, it was still considered a crime, as the following Massachusetts case suggests. In 1877 a woman accidentally killed her lover in an attempt to commit suicide. The legal question was whether her attempt to commit suicide would be considered a felony, in which case killing her lover—since it was performed in the course of committing a felony—would be considered murder. The defense lawyer argued that since suicide was no longer a crime, neither was the attempt to commit suicide. The trial judge, however, ruled that suicide had not ceased to be criminal even if it was no longer punishable by statute and the prisoner was convicted of manslaughter. In reviewing the case, the Supreme Court did not challenge the notion that suicide was still a crime, but only doubted whether the act of the defendant, in attempting to take her own life, was malicious enough to make the killing of another person, in the attempt, murder. See discussion in Marzen et al., "Suicide: A Constitutional Right?."
Law could only be concerned with the this-worldly being of the criminal, not with his “afterlife”. Moreover, modern law, unlike morality, was concerned only with harms caused by individuals to others, and wrongs committed against oneself could no longer be considered a crime, without showing the price society would have to pay. The decline of the strong ties between law and morality is precisely what allowed law to transform into a vehicle of social regulation through self-regulation.

Indeed, that the law no longer understood suicide to be a crime did not mean that suicide became socially legitimate. To the contrary, as the criminality of suicide was subsiding, the deviant nature of the act persisted. While it was no longer prohibited under the law, it became suspect in the eyes of the human sciences. For example, suicide was often considered an act of insanity, and those who attempted suicide were treated as insane and were often locked up in asylums to cure them of their destructive impulses.

Consequently, the legal status of suicide reemerged as a problem. Did the law merely decriminalize suicide, i.e., remove the negative prohibition on suicide? Or did the law positively protect the right to perform suicide? Very tellingly, the question of the positive legitimacy of suicide was now tied to the question of whether suicide could ever be a rational act.

In 1895 an article appropriately titled, “The Right to Commit Suicide,” argued that:

Suicide is frequently a consequence of a species of insanity, particularly melancholia, but it is not necessarily a positive proof of a diseased mind. It is,

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43 In fact, there is evidence that in some law books, suicide was still considered a crime, at least nominally. Boehm, for instance, mentions that in 1895 suicide is still present in the Penal Code of New York. G. Boehm, "The Right to Commit Suicide," Bulletin of the Medico-Legal Congress (1895).

44 Minois, History of Suicide: Voluntary Death in Western Culture.
therefore, unjust in many cases to declare the suicide a lunatic, and while it may greatly benefit the relatives of the unfortunate as far as provisions through life insurance policies are concerned, to insist on this view and bless the law for it, it is certainly not proper for the thinker to admit it.45

The right to commit suicide became dependent on the rationality of suicide. The prevailing view was that not all suicides should be seen as illegitimate, only those that stemmed from irrational motivations. This new approach to the problem of suicide was, in an important way, diametrically opposed to the older legal tradition expressed by Blackstone. The latter, discussing the conditions for suicide to be a crime, wrote:

The party must be of years of discretion and in his senses, else it is no crime. But this excuse ought not to be strained to that length to which our coroner’s juries are apt to carry it, viz.: that the very act of suicide is an evidence of insanity; as if every man who acts contrary to reason, had no reason at all; for the same argument would prove every other criminal non compos, as well as the self-murderer. The law very rationally judges, that every melancholy or hypochondriac fit does not deprive a man of the capacity of discovering right from wrong, which is necessary to form a legal excuse. And therefore, if a real lunatic kills himself in a lucid interval he is a felo de se as much as another man.46

While for Boehm suicide is socially legitimate only if it is rational, for Blackstone, almost to the contrary, it is illegal and illegitimate only if it is rational. This historical reversal makes sense only if we understand the different kinds of problems that suicide posed.

Under the old legal regime, suicide that was committed while the person was of sound mind was viewed as a threat to sovereignty both temporal and divine, since it was performed in defiance of the Crown. The suicide of the insane, on the other hand, could

45 Boehm, "The Right to Commit Suicide," 462.
be treated with forgiveness. However, with the decline of sovereignty—not only as a political form but, more importantly, as a way of perceiving the legal order and threats to it, suicide posed a new challenge to the social order. But this time the challenge was not to sovereignty, but rather to the rational organization of society. It was therefore irrational suicide that now posed the greater threat.

The shift in the conceptualization of suicide from a challenge to the sovereign’s right over death to a problem of rational and scientific governance of life has been explored by one of the most insightful thinkers of modern times,

It is not surprising that suicide—once a crime, since it was a way to usurp the power of death which the sovereign alone, whether the one here below or the Lord above, had the right to exercise—became, in the course of the nineteenth century, one of the first conducts to enter into the sphere of sociological analysis.... This determination to die, strange and yet so persistent and constant in its manifestations, and consequently so difficult to explain as being due to particular circumstances or individual accidents, was one of the first astonishments of a society in which political power has assigned itself the task of administering life.

The new concern with suicide had little to do with its offense against sovereignty, and much more to do with its offense against the rational order of society. The new legal and social question that the practice posed was not so much how to punish rational

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47 The question of what, precisely, makes a suicide rational, was highly debated in the literature. It is interesting to note that the wish of the dying patient who is suffering from great pain to commit suicide was interpreted both as rational and irrational. This is a problem that to this day is at the center of the physician-assisted suicide and euthanasia debate.

48 From a strictly legal point of view, only rational suicide counted as suicide proper. Thus, for instance, when the question of life insurance came up, it was clear that the benefits of the policy could be contractually deprived only from a person who committed suicide while being in sound mind.

suicide, but how to prevent irrational suicide. Suicide that could be rationally explained was less threatening and therefore more easily acceptable than suicide that had no rational or possible explanation. The more rational the suicide, the more likely for it to be socially and legally acceptable. The possibility of euthanasia becoming legal was dependent, therefore, on proving its rational grounds.

IV. Euthanasia and Autopoiesis: Coupling Law and Medicine

The legalization of the medical hastening of death entailed first the operative closure of both the legal and the medical systems. Operative closure had different significance in medicine and in law. For medicine, operative closure referred first to the monopoly of the physician over the deathbed as master of ceremony, and second to the rise of a this-worldly hope that colored the treatment of the dying. More radically, operative closure meant that even death could become part of the medical arsenal in the treatment of the dying patient. The external expectation of recovery was replaced by the internal goal of medical control.

For the legal system operative closure implied normative closure in its most radical sense. In theory at least, any deed could become legal simply because positive law declared it as such. Thus, suicide previously considered an illegal and immoral act of self-murder lost its inherently criminal character. Not even the sanctity of life remained outside the scope of positive law.

Operative closure, however, was a necessary but not sufficient condition for the emergence of the legal regulation of euthanasia. Each system considered on its own, as we shall now see, could not achieve this result. It is only through the coupling of law and
medicine that the legal regulation of medical euthanasia became possible. Thus a further development of law and medicine into a cognitively open autopoietic system had to take place.

Legal self-closure in itself was insufficient for the regulation of medical euthanasia. The legal system was required to distinguish between legitimate and illegitimate suicide and more importantly between the legitimate act of euthanasia and the illegitimate act of murder but lacked the internal resources to ground such a distinction. The internal distinction had to be grounded on external input from the medical environment which determined to what extent the taking of life served a medically rational ordering of society. It is the incorporation of medical cognition within the legal system (rational/irrational suicide) that allowed normative selection (legitimate/illegitimate suicide).

Similarly, the self-closure of the medical system could not suffice for the regulation of euthanasia. While for the medical system euthanasia could be a legitimate practice it was not clear when it should be applied. The medical ban on euthanasia could not simply be removed. After all, removing the ban could mean opening a door to unjustified killing. True, the physician could easily put an end to his patient’s suffering by hastening death. Yet medical ethics gave no guidelines for how the physician should choose between prolonging life and hastening death. There was always the danger that the physician might abuse his power of discretion by illicitly bringing life to an end.

For this reason even advocates of euthanasia believed that the treatment of the dying should not simply decriminalized but regulated. Whereas decriminalization is a removal of the legal sanction, regulation brings the practice under the domain of law.
Proponents of legalized euthanasia viewed the law as an instrument to shape the conditions and safeguards under which euthanasia could be performed. Law was to play a central role in institutionalizing euthanasia, turning it from a discreet medical practice into an established public policy. The power of the law was, in other words, constitutive and formative, not only preventive and nay saying.\textsuperscript{50}

The first wave of attempts to legalize euthanasia took place during the early decades of the twentieth century. In 1906, an attempt to legalize euthanasia took place in Ohio and Iowa. The Euthanasia Society of America was founded in 1938, and set as its main objective the legalization of medically hastened death. Its agenda was based on an odd combination of humanitarian and eugenic concerns.

The second wave of attempts to legalize euthanasia began in the aftermath of World-War II. On its face, the new advocates broke from previous attempts to legalize the practice. From the 1960s onward supporters of euthanasia were more likely to base their claims on patient autonomy and rights, than on social Darwinism and eugenics. A closer examination, however, shows an affinity between the two movements. What characterizes both is the reliance on legal process not merely to mark the conditions under which euthanasia would be illegal, but more importantly to devise the process and procedure under which euthanasia would be legitimate. The formal and procedural regulation of euthanasia was more important for advocates of euthanasia than its moral and legal content both before and after the Second World War. In autopoietic terms, internal legal regulation became the means for external medical and social regulation. In

\begin{footnotesize}
\textsuperscript{50} The constitutive power of law has often been neglected in the analysis of juridical power. The constitutive role of law is especially important with respect to legalization during the turn of the twentieth century, in the context of emerging welfare and public health legislation Alan Hunt and Gary Wickham, *Foucault and Law: Toward a Sociology of Law as Governance, Law and Social Theory*, (London ; Boulder, Colo.: Pluto, 1994).
\end{footnotesize}
terms of technique, the regulation of dying through euthanasia became not merely a means but an end in-itself.

**The Euthanasia Society of America**

On January 16, 1938, the National Society for the Legalization of Euthanasia was incorporated in New York City. With its establishment, the efforts to legalize euthanasia entered a new phase. The Society set as its goal to “create public demand for the legalization of voluntary euthanasia, and to secure the enactment of state laws permitting voluntary euthanasia with procedure as simple as is consistent with security against abuse in the state of New York.” A year later it changed its name, but not its goal, and became known as the Euthanasia Society of America (ESA).

The founding of the ESA entailed more than just a change in organizational tactics. It manifested a more radical shift in the understanding of euthanasia and its goals. Both the problem of dying and its solution—euthanasia, which had initially been understood as confined medical concerns—were now understood more broadly as social concerns. Dying became one among a broad array of public health issues, such as birth rates and mental health. Similarly, euthanasia became one among several new practices regulating the biological processes of birth and death, such as birth control, abortion and sterilization. All reflected a belief that human beings could use their knowledge to control events and better their lives.  

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51 Founding statement of the National Society for the Legalization of Euthanasia, January 16, 1938 (from the archives of the Society).
In addition, for the ESA euthanasia no longer meant merely hastening the death of patients who were already dying. Rather, by the early 20th century euthanasia was advocated as a solution to a broader range of cases, which included the “physically handicapped.” For both its supporters and its opponents, euthanasia was no longer confined to the dying patient.

What is most striking about the ESA’s agenda is not that a small group of individuals believed that mentally retarded patients should be killed. The debate showed a much broader and more troubling phenomenon. At no point along the way, as far as the documents can tell, was the question raised whether the killing of the mentally retarded and physically handicapped people was justified independently of its social benefits. Most concretely, the question whether law itself posed a challenge to such a practice, one that could not be overcome by legislation, was never seriously debated. The only obstacle that seemed to stand in the way of legalizing non-voluntary euthanasia was public opinion. It is in the court of public opinion that law in its regulatory capacity (rather than normative capacity) played a central role as a justificatory mechanism.

During the first meeting of the ESA’s Executive Committee on March 30, 1938, the Committee discussed whether the Society should support euthanasia for incurable idiots. The discussion ended with the decision that while the ultimate aim of the Society did include such cases, it would be well not to raise the issue in the first bill to be introduced. The Committee decided that at first its goal would be limited to securing the legislation of voluntary euthanasia.

The standard ESA bill stated that a person of sound mind over 21 years of age who suffered from a painful and incurable disease could petition any court of record or
judge thereof (except appellate courts) for euthanasia. The court was to appoint a committee of three persons, at least one of whom was a physician, to determine the merits of the request. If two or more of the committee members agreed that merciful death was warranted, and if the court approved, then the patient’s life could be terminated. Death would be administered by a physician, or any other person under a physician’s direction, in the presence of two witnesses.

The emphasis on regulation as a grounds for justification reached a peak after World War II, after the Nazi atrocities and specifically the Nazi euthanasia project were revealed. The society, continuing its activities, tried to for off any attempt to compare its euthanasia proposals with those of the Third Reich. One strategy that the ESA chose was to clarify the voluntary character of the American proposals; another and much more striking strategy was to emphasize the fact that American euthanasia, unlike Nazi euthanasia, would be regulated by law:

Misunderstandings of our aim still exists. Some people think we’re in favor of the government secretly killing off defectives, as in Nazi Germany; others believe that even now, before the law is amended, the Society can somehow arrange to have euthanasia administered, as we receive piteous appeals from hopeless sufferers.

So during the past year we have taken every opportunity to explain that we are opposed to illegal, surreptitious, compulsory, “mercy killings”, that what we are working for is to legalize medically supervised euthanasia for incurable sufferers who ask for it.”

The problem with Nazi euthanasia, according to the ESA, was not so much its non-voluntary character as its arbitrariness manifested by its “illegal, surreptitious” and “compulsory” character. In a single word, the problem of the Nazi euthanasia was its *unlawfulness*, while the moral superiority of the ESA proposal was its lawfulness.

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53 Taken from notes from the annual meeting of the ESA in 1943.
The “law” was seen as a means of controlling the dangers of an unfettered application of euthanasia. The Nazi euthanasia allowed medical technology to run amok, while euthanasia, according to the ESA, would be restrained by the law. Law was therefore praised for its capacity to implement public policy and medical technique, and not for its independent moral judgement, independent from both public opinion and technical concern.

V. Conclusion: Death and the Law

From the first euthanasia debate in late 19th century America, to its most recent application in early 21st century Oregon, the problem of dying and its solution have been framed in medico-legal terms. Though the involvement of medicine and law in the way we die has become natural for us, it is by, or more precisely through, autopoietic theory that we can begin to unpack its significance.

In the beginning, so opens the autopoietic book of Genesis, there was the undifferentiated social system. It is through a historical process of (self-)differentiation that law, medicine, economics, aesthetics and other operatively closed subsystems developed. Since the operation of a closed system can only take place according to the systems own terms, self-reference is a necessary characteristic of autopoietic systems.

In the history of euthanasia, the paradox of medical self-reference became manifest once the physician took responsibility over the care of the dying patient. Health proper was no longer the criteria for medical care. Rather than health, the medical profession offered the dying patient hope, which now signified the exclusive power of the
proficient doctor to control the condition of the dying patient either by temporary relief or by accurate diagnosis and short-term prognosis. The paradox of self-reference achieved a climatic peak once death in the form of the medical hastening of death became one more way to inspire the new hope of medical control.

In the legal field, the paradox of self-reference became apparent once law was divorced from morality, akin to the way in which medical treatment became separate from health proper. The decriminalization of suicide in the course of the 19th century signified the rise of a new form of legality, positive law. It is this transformation that allowed law to declare the unlawful practice of taking life lawful.

Decriminalization of suicide was the first step toward the regulation of euthanasia. The latter included the creation of a bureaucratic mechanism under which the taking of life would become possible. What is important to notice is that in the case of euthanasia, as in many similar instances of bureaucratic regulation, the setting of formal procedures becomes the primary source of legitimation, regardless of the content of the act. This at least was the line of defense suggested by the ESA in the years before and after WWII.

The rise of law and medicine as autopoietic systems is only one way to characterize the historical transformations of the treatment of dying. This story captures quite accurately the facts of the story, but leaves unveiled their deeper significance. We are now able to layout the deeper layers of the history of euthanasia, first, as the rise of nihilism and second, as the coming of death and law under the sway of technique.

Nihilism as the attempt to overcome metaphysics, or in Nietzsche’s words “the devaluing all values,” unfolds as a tale of three subsequent deaths. First came the death of God. Dying which in the traditional Catholic world was a rite de passage between this
world and the next became in the *ars moriendi* tradition, a way of living. The
otherworldly nature of dying gradually disappeared.

Second came the death of death, as the question of dying became a question of
living and the physician, the caretaker of life par-excellence, became the master of death.
The desire to master the hour of death gradually expanded: dying was medicalized, and
the treatment of the dying patient became regulated by medical technique. Mastery over
death, in other words, was not the consequence of the growing power of medicine but
rather the reverse. The new disposition toward dying gave rise to a constant search for
treatment, and to impatience toward what was perceived as a merely passive waiting for
death.

Finally, came the death of law, as law became nothing more than an instrument of
regulation. While law always entails an ordering of human action, the history of
euthanasia suggests that for some normative forms mastery is only a means for achieving
a further goal. This was the case with the Methodist art of dying, which had the further
purpose of achieving Christian perfection. Likewise with medical ethics, which initially
directed the physician to ease the pangs of death and support the dying in his final hours.

The narrative of subsequent deaths captures, however, only the nihilistic and
deprived character of this historic movement. The movement can also be captured in
positive terms under the name of technique.

Far from a mere instrument or device, technique stands for a radical
transformation in the way different phenomena, such as death, become amenable to
regulation. Though death in all known cultures is subject to regulation, it is only under
the modern conditions of medicine as health management that regulation becomes a
purpose in itself, no longer answerable to the religious faith in other-worldly salvation, or to the secularized desire for this-worldly salvation. It is this basic transformation in the way dying has become which allows for its regulation to take place.

Similarly, what is unique about modern law as regulatory law is that the ultimate end of the law is further mastery. The history of euthanasia suggests precisely this development. At first, the ethics of the deathbed were religious belief and *ars moriendi* practice. Gradually, however, the deathbed became governed by legal measures aimed at the regulation of the treatment of the dying. Under the rule of technique humans are dominated by the desire to master their world for the sake of mastery alone.

Though foreign to the language of system theory, the notions of nihilism and technique are, in the final analysis, quite close to self-reference and self-regulation. Is not self-reference precisely the attempt to overcome metaphysics and the grounding of the system in-itself, and does not self-regulation signify the regulation of the system for the sake of its own regulation and production? But even if one may argue that the notions of nihilism and technique lie dormant in self-reference and self-regulation, the former carry with them a further truth.

It is at this point that we should return to the stories we had opened with, to Greek Tragedy and Talmud, though not in order to further reflect on the competing sides of the paradox, but rather to bring to life a third voice, that of the divine witness, which gives the paradox its sense and significance. It is precisely the absence of the divine voice which characterizes the modern condition, and it is an account of this absence which should be present in any account of historic transformations.\(^54\)

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First, as we turn to Sophocles’ tragedy we should listen to the Dionysian choir, which sings, in the wondrous Ode to Man, of the powers of humans to conquer the earth, the skies and the seas.

Manyfold the deinon\textsuperscript{55} and nothing towers more deinon than man. He who even across the grey sea by wintery south-wind advances, amidst engulfing waves traversing. Of gods the highest, Earth, imperishable untiring, he wears-out with ploughs moved-back-and-forth year upon year, with horses turning-over.

A name is given to these powers, techne. And it is this acquired wisdom that allows man to reign (mēchnoen texnas) over nature beyond expectation. The power of mortals to control their destiny seems boundless. Nothing appears to stand in the way of Man blocking his future (aporia). Nothing but these two: thanatos and dikē.

First, appears death: Though Man is known for “Overcoming-all obstacles” – “from the one that approaches, Hades, flight he cannot find”. Second, comes the law: “joining together the laws of the earth, and the sworn dikē of the gods” he is “Tower-ing-high-over-the-polis” but “he loses the polis, he with whom the not-shining always is, for the sake of bold-venture.”\textsuperscript{56} (apolis hotōi to mē kalon exunisti tolmas charin)

Though at first it may seem that law and death are still present today as limits to the power of medical technique, in truth a radical transformation has taken place. As we have seen, both death and law have succumbed to the reigning powers of modern technique and have thus fundamentally transformed.

Similarly, when we think of the Talmudic text, it is not the dispute between the Rabbis, nor the overruling voice from heaven that should concern us, but rather God’s

\textsuperscript{55} The translation cited is by Philippe Nonet (Unpublished). Nonet writes, “The Greek word deinon is a key word of tragic poetry. It will be left untranslated. It signifies at once all the following, with various emphases: “terrifying”, “awesome”, “powerful,” and “wonderful.””

\textsuperscript{56} I owe this close translation of the Greek text to Philippe Nonet.
response. Again, while it may seem that our modern law is no different than that of the
Jewish Talmud -- both committed to the paradox of self-reference -- the differences are
more striking than the similarities.

The key here is to see the way in which the voice from heaven differs from the
word of God. While the former partakes in the dispute the latter observes not merely from
outside but from above. While the former attempts to ground the law, the latter
transcends it. Thus, the voice from heaven is captured within the legal system, whereas
the divine standpoint is free for reflection.

The unique character of the Dionysian choir and the Divine gaze is not accounted
for by autopoietic theory. The problem, to be sure, is not that transcendence is missing
from the autopoietic description of the modern world, but rather that transcendence is
missing from the modern world, and that autopoietic attempts to overcome this want
through the notion of system. The turn to the Ancient texts thus allows us precisely what
the history of euthanasia has, namely, a moment of reflection from which we can think of
ourselves as different from who we are. Far from amusement this moment of reflection
may more properly lead to angstful hope.

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