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PERMITTING VOLUNTARY EUTHANASIA AND ASSISTED SUICIDE: LAW REFORM PATHWAYS FOR COMMON LAW JURISDICTIONS

JOCELYN DOWNIE*

End-of-life law and policy reform is the subject of much discussion around the world. This paper explores the pathways to permissive legal regimes that have been tried in various common law jurisdictions. These include legislation, prosecutorial charging guidelines, court challenges, jury nullification, the exercise of prosecutorial discretion in the absence of offence-specific charging guidelines, and the exercise of judicial discretion in sentencing. In this paper, I describe these pathways as taken (or attempted) in five common law jurisdictions (USA, UK, Australia, New Zealand, and Canada) and reflect briefly on lessons that can be drawn from the recent experiences with law reform in Canada. Through its bird's eye view, it highlights the remarkable number and variable nature of past attempts at law reform and suggests a shifting tide. It debunks some common myths that have either limited or stymied reform in the past. Finally, it illuminates jurisdictional similarities and differences and lessons learned by those who have gone before so as to inform choices about pathways to pursue for those who will seek to advance a law reform agenda in the future.

I INTRODUCTION

End-of-life law and policy reform is the subject of much discussion around the world. Many jurisdictions, including Canada, have been actively exploring the issue of whether to move to more permissive regimes with respect to voluntary euthanasia and assisted suicide. However, this is not a paper on that well-travelled terrain. Rather, it explores the pathways to permissive legal regimes that have been tried in various common law jurisdictions.

There are, of course, a number of pathways to permissive legal regimes with respect to voluntary euthanasia and assisted suicide. These include legislation, prosecutorial charging guidelines, court challenges, jury nullification, the exercise of prosecutorial discretion in the absence of offence-specific charging guidelines, and the exercise of judicial discretion in sentencing. In this paper, I describe these pathways as taken (or attempted) in five common law jurisdictions (USA, UK,

* BA Hons (Philosophy) (Queens University), MA (Philosophy) (Queens University), MLitt (Philosophy) (University of Cambridge), LLB (University of Toronto), LLM (University of Michigan, SJD (University of Michigan), Professor, Schulich School of Law, Dalhousie University and Adjunct Professor, Australian Centre for Health Law Research, Queensland University of Technology (QUT). The author would like to thank Georgia Lloyd-Smith for her research assistance on this project and Lindy Willmott, Ben White, and Brad Abernethy for their extremely helpful comments on earlier drafts of this paper.

Australia, New Zealand, and Canada) and reflect briefly on lessons that can be drawn from the recent experiences with law reform in Canada.

I seek to gather into one place descriptions of law reform initiatives across a significant set of jurisdictions. This consolidation provides a useful resource for those simply seeking a record of past activities in order to do further comparative work across jurisdictions or across spans of time. Through its bird's eye view, it highlights the remarkable number and variable nature of past attempts at law reform and suggests a shifting tide. It debunks some common myths that have either limited or stymied reform in the past. Finally, it illuminates jurisdictional similarities and differences and lessons learned by those who have gone before so as to inform choices about pathways to pursue for those who will seek to advance a law reform agenda in the future.

II LOOKING BACKWARD

First, looking backward – what have the five subject common law jurisdictions tried with respect to permitting voluntary euthanasia and assisted suicide?

A *Legislation*

Canada has a long history of failed attempts at legislative reform at the federal level. There have been a host of bills and motions introduced in the Federal Parliament over more than two decades, none of which have been successful (see Table 1 below). In 2010, the most recent completed attempt at introducing a new Bill was defeated 59 – 228.[1]

Table 1: Unsuccessful Legislative Attempts in Canada

Date	Bill/Motion	Sponsor
March 1991	Bill C-351[2]	Robert Wenman
16 May 1991	Bill C-203[3]	Robert Wenman
19 June 1991	Bill C-261[4]	Chris Axworthy
December 1992	Bill C-385[5]	Svend Robinson
March 1993	Motion in house	Ian Waddell
November 1996	Bill S-13[6]	Sharon Carstairs
November 1997	Motion in house	Svend Robinson
April 1999	Bill S-29[7]	Thérèse Lavoie-Roux

[1] Bill C-384, *An Act To Amend The Criminal Code (Right To Die With Dignity)*, 2nd Sess, 40th Parl, 2009.
[2] Bill C-351, *An Act To Amend The Criminal Code (Terminally Ill Persons)*, 2nd Sess, 34th Parl, 1989-90-91.
[3] Bill C-203, *An Act To Amend The Criminal Code (Terminally Ill Persons)*, 3rd Sess, 34th Parl, 1991-92-93.
[4] Bill C-261, *An Act To Legalize The Administration Of Euthanasia Under Certain Conditions*, 3rd sess, 34th Parl, 1991-92-93.
[5] Bill C-385, *An Act To Amend The Criminal Code (Aiding Suicide*), 3rd Sess, 34th Parl, 1992.
[6] Bill S-13, *An Act To Amend The Criminal Code (Protection Of Health Care Providers)*, 2nd Sess, 35th Parl, 1996-97.
[7] Bill S-29, *An Act To Amend The Criminal Code (Protection Of Health Care Providers)*, 1st Sess, 36th Parl, 1997-98-99.

Date	Bill/Motion	Sponsor
February 2004	Bill C-215[8]	Svend Robinson
15 June 2005	Bill C-407[9]	Francine Lalonde
12 June 2008	Bill C-562[10]	Francine Lalonde
12 May 2009	Bill C-384[11]	Francine Lalonde

Other common law countries similarly have many occupants in their graveyards of unsuccessful bills (see Table 2 below). Attempts have been made, without success, in the United Kingdom, Australia[12], and New Zealand. That said, the defeats are becoming narrower over time. For example, in the United Kingdom, the most recent attempt was defeated in 2006 by a margin of 148 to 100, receiving the most support of any proposed end-of-life bill in the UK.[13] In Tasmania, the most recent attempt was defeated in 2013 by just two votes.[14]

Table 2: Unsuccessful Legislative Attempts in England and Wales, Scotland, Australia, New Zealand

Country	Date	Jurisdiction	Bill
England and Wales	2003		Patient (Assisted Dying) Bill[15]
	2004 2005		Assisted Dying for the Terminally Ill Bill[16]
	2009		Coroners and Justice Bill – Amendment Bill[17]
Scotland	2010		End of Life Assistance (Scotland) Bill[18]
Australia	2000 2003 2005	South Australia	Dignity in Dying Bill[19]

[8] Bill C-215, *An Act To Amend The Criminal Code (Consecutive Sentence For Use Of Firearm In Commission Of Offence)*, 1st Sess, 38th Parl, 2004.
[9] Bill C-407, An Act to amend the Criminal Code (right to die with dignity), 1st Sess, 38th Parl, 2005.
[10] Bill C-562, An Act To Amend The Criminal Code (Right To Die With Dignity), 2nd Sess, 39th Parl, 2008.
[11] Bill C-384, An Act To Amend The Criminal Code (Right To Die With Dignity), 2nd Sess, 40th Parl, 2009.
[12] For a thorough review of legislative attempts to reform the law in Australia, see Lindy Wilmott et al, '(Failed) Voluntary Euthanasia Law Reform in Australia: Two Decades of Trends, Models and Politics' *University of New South Wales Law Review* (forthcoming).
[13] Julia Shaw, 'Recent Developments in the Reform of English Law on Assisted Suicide' (2009) 16 *European Journal of Health Law* 333, 340.
[14] Voluntary Assisted Dying Bill 2013 (Tas); David Beniuk, 'Tasmania's Euthanasia Bill Fails Narrowly' News.com.au (online), 17 October 2013 <http://www.news.com.au/national/breaking-news/tasmanias-euthanasia-bill-fails-narrowly/story-e6frfku9-1226741999723>.
[15] Patient (Assisted Dying) Bill 2003 (UK).
[16] Assisted Dying for the Terminally Ill Bill 2004 (UK); Assisted Dying for the Terminally Ill Bill 2005 (UK).
[17] Coroners and Justice Bill – Amendment Bill 2009 (UK).
[18] End of Life Assistance (Scotland) Bill 2010 (Scot).
[19] Dignity in Dying Bill 2000 (SA); Dignity in Dying Bill 2003 (SA); Dignity in Dying Bill 2005 (SA).

Country	Date	Jurisdiction	Bill
Australia	1995 1996 2006 2007 2008 2010 2012	South Australia	Voluntary Euthanasia Bill[20]
	2008	South Australia	Consent to Medical Treatment and Palliative Care (Voluntary Euthanasia) Amendment Bill[21]
	2008 2010	South Australia	Consent to Medical Treatment and Palliative Care (End of Life Arrangements) Amendment Bill[22]
	2011	South Australia	Criminal Law Consolidation (Medical Defences - End of Life) Arrangements Amendment Bill[23]
	2013	South Australia	Ending Life with Dignity Bill[24] Ending Life with Dignity (No 2) Bill[25]
	2008	Victoria	Medical Treatment (Physician Assisted Dying) Bill[26]
	2009	Tasmania	Dying with Dignity Bill[27]
	2013		Voluntary Assisted Dying Bill[28]
	1993	Australian Capital Territory	Voluntary and Natural Death Bill[29]
	1995 1997		Medical Treatment (Amendment) Bill[30]
	1997		Euthanasia Referendum Bill[31]
	1997		Crimes (Assisted Suicide) Bill[32]
	1995 1997	Northern Territory	Rights of the Terminally Ill Bill[33] Criminal Code (Euthanasia) Amendment Bill[34]
	1997	NSW	Voluntary Euthanasia Referendum Bill[35]

[20] Voluntary Euthanasia Bill 1995 (SA); Voluntary Euthanasia Bill 1996 (SA); Voluntary Euthanasia Bill 2006 (SA); Voluntary Euthanasia Bill 2007 (SA); Voluntary Euthanasia Bill 2008 (SA); Voluntary Euthanasia Bill 2010 (SA); Voluntary Euthanasia Bill 2012 (SA).
[21] Consent to Medical Treatment and Palliative Care (Voluntary Euthanasia) Amendment Bill 2008 (SA).
[22] Consent to Medical Treatment and Palliative Care (End of Life Arrangements) Amendment Bill 2008 (SA); Consent to Medical Treatment and Palliative Care (End of Life Arrangements) Amendment Bill 2010 (SA).
[23] Criminal Law Consolidation (Medical Defences - End of Life) Arrangements Amendment Bill 2011 (SA).
[24] Ending Life with Dignity Bill 2013 (SA).
[25] Ending Life with Dignity (No 2) Bill 2013 (SA).
[26] Medical Treatment (Physician Assisted Dying) Bill 2008 (Vic).
[27] Dying with Dignity Bill 2009 (Tas).
[28] Voluntary Assisted Dying Bill 2013 (Tas).
[29] Voluntary and Natural Death Bill 1993 (ACT).
[30] Medical Treatment (Amendment) Bill 1995 (ACT); Medical Treatment (Amendment) Bill 1997 (ACT).
[31] Euthanasia Referendum Bill 1997 (ACT).
[32] Crimes (Assisted Suicide) Bill 1997 (ACT).
[33] Rights of the Terminally Ill Bill 1995 (NT). [Included here because subsequently repealed].
[34] Criminal Code (Euthanasia) Amendment Bill 1997 (NT).
[35] Voluntary Euthanasia Referendum Bill 1997 (NSW).

Country	Date	Jurisdiction	Bill
	2002 2003	New South Wales	Voluntary Euthanasia Trial (Referendum) Bill[36]
	2001 2003 2010 2013		Rights of the Terminally Ill Bill[37]
	2007	Commonwealth of Australia	Australian Territories Rights of the Terminally Ill Bill[38]
	2008		Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill[39]
	2010 2012		Restoring Territory Rights (Voluntary Euthanasia Legislation) Bill[40]
New Zealand	1995 2003		Death With Dignity Bill[41]
	2013		End of Life Choice Bill[42]

In the United States, attempts have been unsuccessful in Washington (although it eventually succeeded there), California, Michigan, Massachusetts, and Maine.

Table 3: Unsuccessful Legislative Attempts in the United States

State	Date	Legislative Attempt
Washington	1991	Aid-in-Dying Initiative 119[43]
California	1992	Aid-in-Dying Act Proposition 161[44]
	1995	Bills AB 1080 and 1310[45]
	1999	Bill AB 1592[46]
	2005	Bill AB 654[47]

[36] Voluntary Euthanasia Trial (Referendum) Bill 2002 (NSW); Voluntary Euthanasia Trial (Referendum) Bill 2003 (NSW).

[37] Rights of the Terminally Ill Bill 2001 (NSW); Rights of the Terminally Ill Bill 2003 (NSW); Rights of the Terminally Ill Bill 2010 (NSW); Rights of the Terminally Ill Bill 2013 (NSW).

[38] Australian Territories Rights of the Terminally Ill Bill 2007 (Cth).

[39] Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008 (Cth).

[40] Restoring Territory Rights (Voluntary Euthanasia Legislation) Bill 2010 (Cth); Restoring Territory Rights (Voluntary Euthanasia Legislation) Bill 2012 (Cth).

[41] Death With Dignity Bill 1995 (NZ). Vote recorded: Parliamentary Conscience Votes Database, *Death with Dignity 1995 Bill* (16 August 1995) <votes.wotfun.com/bill/33>; Death With Dignity Bill 2003 (NZ).

[42] End of Life Choice Bill 2012 (NZ) <http://www.parliament.nz/resource/0000197305>.

[43] Ballotpedia.org, *Washington Aid-in-Dying Initiative 119* (1991) <http://ballotpedia.org/Washington_Aid-in-Dying,_Initiative_119_(1991)>.

[44] Ballotpedia.org, *California Aid-in-Dying Act proposition 161* (1992) <http://ballotpedia.org/California_Proposition_161,_the_Aid-in-Dying_Act_(1992)>.

[45] US, AB 1080, AB 1310 *An Act To Add Chapter 3.95 (Commencing With Section 7195) To Part 1 Of Division 7 Of The Health And Safety Code, Relating To The Death With Dignity Act,* 1995-96, Reg Sess, Cal, 1995.

[46] US, AB 1592, *An Act To Add Chapter 3.95 (Commencing With Section 7195) To Part 1 Of Division 7 Of The Health And Safety Code, Relating To The Death With Dignity Act,* 1999-2000, Reg Sess, Cal, 1999.

[47] US, AB 654, *An Act To Add Chapter 3.95 (Commencing With Section 7195) To Part 1 Of Division 7 Of The Health And Safety Code, Relating To Death,* 2005-06, Reg Sess, Cal, 2005.

State	Date	Legislative Attempt
	2006	Bill AB 651[48]
Michigan	1998	Legalization of Lethal Medication to Terminally Ill, proposal B[49]
Massachusetts	2012	Death with Dignity initiative, question 2[50]
Maine	2000	Physician-assisted Deaths for Terminally Ill Adults, question 1[51]
	2013	An Act Regarding Patient-directed Care at the End of Life[52]

There have, however, also been some successes in moving toward permissive regimes through legislation.

On June 5, 2014, *An Act Respecting End-of-Life Care*, was passed by the National Assembly in Quebec by a vote of 94-22.[53] This Act establishes the right to end-of-life care and regulates 'continuous palliative sedation'[54] and 'medical aid in dying.'[55] More specifically, it legalises medical aid in dying in cases where an individual: 1) is at the end of life; 2) has an incurable disease; 3) is in an advanced state of irreversible decline; and 4) is experiencing unbearable and intolerable suffering.[56] The Act also establishes a Commission on end-of-life care to examine all matters relating to end-of-life care and to oversee the specific requirements relating to medical aid in dying.[57] This legislation was introduced at a provincial level because, in Canada, the criminal law falls within federal jurisdiction while the administration of health falls within provincial jurisdiction. The Bills listed in Table 1 were all introduced at the federal level and sought to change the *Criminal Code*. The Quebec legislation, in contrast, was cast as ensuring proper health care for individuals at the end of their lives.[58]

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[48] US, AB 651, *An Act To Amend Sections 14132.27 And 14132.100 Of The Welfare And Institutions Code, Relating To Medi-Cal*, 2005-06, Reg Sess, Cal, 2005.

[49] Ballotpedia.org, *Michigan Legalization of Lethal Medication to Terminally Ill, Proposal B* (1998) <http://ballotpedia.org/Michigan_Legalization_of_Lethal_Medication_to_Terminally_Ill,_Proposal_B_%281998%29>.

[50] Ballotpedia.org, *Massachusetts "Death with Dignity" Initiative, Question 2* (2012) <http://ballotpedia.org/Massachusetts_%22Death_with_Dignity%22_Initiative,_Question_2_%282012%29>.

[51] Ballotpedia.org, *Maine Physician-Assisted Deaths for Terminally Ill Adults, Question* 1 (2000) <http://ballotpedia.org/Maine_Physician-Assisted_Deaths_for_Terminally_Ill_Adults,_Question_1_%282000%29>.

[52] US, LD 1065, *An Act Regarding Patient-directed Care at the End of Life*, 126th Maine Legislature, Reg Sess, Me, 2013.

[53] Bill 52, An Act Respecting End-of-Life, 1st Sess, 41st Leg, 2014.

[54] Ibid 3(5) "continuous palliative sedation" means care that is offered as part of palliative care and consists in administering medications or substances to an end-of-life patient to relieve their suffering by rendering them unconscious without interruption until death ensues.

[55] Ibid 3(6) "medical aid in dying" means care consisting in the administration by a physician of medications or substances to an end-of-life patient, at the patient's request, in order to relieve their suffering by hastening death.

[56] Ibid 26.

[57] Ibid 35.

[58] The question of whether Quebec has jurisdiction to legislate in this way was before the Supreme Court of Canada in *Carter v Canada (Attorney General),* 2015 SCC 5: 'Are the impugned laws constitutionally inapplicable to PAD [physician-assisted death] by reason of the doctrine of interjurisdictional immunity?', Supreme Court of Canada, *Case Information 35591* <http://www.scc-csc.gc.ca/case-dossier/info/sum-som-eng.aspx?cas=35591> and see arguments as presented by parties and intervenors: Supreme Court of Canada, *Factums 35591* (17 March 2015) <http://www.scc-csc.gc.ca/case-dossier/info/fac-mem-eng.aspx?cas=35591>. The Supreme Court of Canada concluded that

There have also been some successes outside Canada. Voluntary euthanasia was briefly legal in the Northern Territory in Australia by virtue of the *Rights of the Terminally Ill Act* of 1995.[59] However, this success was only temporary as it was rendered of no force and effect by the *Euthanasia Laws Act* of the federal parliament in 1997.[60]

More long-lasting success has been enjoyed in the United States. Successful legislative reform started in Oregon in 1997, followed by Washington State in 2008, and Vermont in 2013. Law reform in both Oregon and Washington was initiated by ballot initiatives and in Vermont it was initiated by the legislature. All of these states now have statutes that establish a permissive (circumscribed and regulated) regime for assisted suicide for terminally ill competent adults.

Table 4: Successful Legislative Attempts in the United States

State	Date	Legislation
Oregon	1994	Measure 16, 'Allows Terminally ill adults to obtain prescription for lethal drugs'[61]
	1997	*Death with Dignity Act*[62]
Washington	2008	Initiative 1000, 'Assisted Death Initiative'[63]
	2008	*Death with Dignity Act*[64]
Vermont	2013	*An Act Relating to Patient Choice and Control at End of Life*[65]

In sum, there have, to date, been more failures than successes in efforts to establish more permissive regimes with respect to voluntary euthanasia and assisted suicide through legislation. That said, there have been some significant successes in Canada and the United States, close votes in other jurisdictions, and it appears that the pace of change along this pathway may be picking up (see below, 'Looking Forward').

> [i]n our view, the appellants have not established that the prohibition on physician-assisted dying impairs the core of the provincial jurisdiction. Health is an area of concurrent jurisdiction; both Parliament and the provinces may validly legislate on the topic: *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199, [32]; *Schneider v The Queen*, [1982] 2 SCR 112, 142. This suggests that aspects of physician-assisted dying may be the subject of valid legislation by both levels of government, depending on the circumstances and focus of the legislation. We are not satisfied on the record before us that the provincial power over health excludes the power of the federal Parliament to legislate on physician-assisted dying. It follows that the interjurisdictional immunity claim cannot succeed. [53].

[59] *Rights of the Terminally Ill Act 1995* (NT) held to be valid in *Wake v Northern Territory* (1996) 109 NTR 1; rendered of no force and effect by *Euthanasia Laws Act 1997* (Cth).

[60] *Euthanasia Laws Act 1997* (Cth).

[61] Ballotpedia.org, *Oregon Death with Dignity Measure 16* (1994) <http://ballotpedia.org/Oregon_%22Death_with_Dignity%22,_Measure_16_%281994%29>.

[62] *Death with Dignity Act* ORS 127.800-995 (1997).

[63] Ballotpedia.org, 'Washington "Death with Dignity Act" Initiative 1000' (2008) <http://ballotpedia.org/Washington_%22Death_with_Dignity_Act%22,_Initiative_1000_%282008%29>.

[64] *Death with Dignity Act* RCW 70.245 (2008).

[65] *An Act Relating to Patient Choice and Control at End of Life* 18 VSA 113 (2013).

B *Guidelines for the Exercise of Prosecutorial Discretion*

Offence-specific guidelines for how prosecutorial discretion should be exercised in cases of assisted suicide and voluntary euthanasia may also be a pathway to a more permissive legal regime. In Canada, many people point to the British Columbia 'Crown Counsel Policy Manual: Euthanasia and Assisted Suicide'[66] as evidence of some euthanasia or assisted suicide being permitted through guidelines for the exercise of prosecutorial discretion. However, these guidelines do not in fact perform that function. The Guidelines are useful in clarifying the difference between conduct that will not be prosecuted (palliative care and withholding or withdrawal of treatment) and conduct that will be prosecuted (all cases of euthanasia and assisted suicide, and those cases of palliative care and withholding or withdrawal that were not provided or administered according to accepted ethical medical standards). However, they do not expand the circumstances in which voluntary euthanasia or assisted suicide will not be prosecuted.[67]

In England and Wales, however, there are charging guidelines that explicitly address assisted suicide and arguably render the system more permissive. The first attempt at compelling the creation of these prosecutorial charging guidelines was the case of Ms Diane Pretty.[68] Ms Pretty suffered from advanced motor neuron disease and hoped that her husband could assist her to end her life. She sought immunity from prosecution for her husband from the Director of Public Prosecutions ('DPP') but this was denied by the courts. The court held that the DPP had no power to undertake that a crime yet to be committed and should be immune from prosecution because this power required Parliamentary consent.[69] Ms Pretty was also unsuccessful in her challenge to the European Court of Human Rights under the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.[70]

The second attempt at compelling the creation of prosecutorial charging guidelines was successful. Ms Debbie Purdy, a woman with primary progressive multiple sclerosis, wanted to travel with her husband's assistance to a jurisdiction where assisted suicide was lawful. Ms Purdy was concerned that her husband might be prosecuted for assisting in her suicide. She requested information from the DPP about the factors that would be considered when deciding whether to prosecute someone for assisted suicide.[71] When the DPP declined to provide such information, Ms Purdy challenged that decision. The House of Lords held that Ms Purdy, under her right to 'respect for private life' in Article 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, had a right to know what factors the DPP used to decide whether or not to prosecute someone for assisted suicide. The court concluded there was a disparity between the prohibition and practice and directed the DPP to release an offence-specific policy to address this disparity.[72]

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[66] British Columbia, Ministry of Attorney General, 'Crown Counsel Policy Manual: Euthanasia and Assisted Suicide', Criminal Justice Branch (BC: AG 200) <http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/EUT1-EuthanasiaAndAssistedSuicide-15Mar2004.pdf>.

[67] For a proposal for permissive prosecutorial charging guidelines in Canada, see Jocelyn Downie and Ben White, 'Prosecutorial Discretion in Assisted Dying in Canada: A Proposal for Charging Guidelines' (2012) 6(2) *McGill Journal of Law and Health* 113.

[68] *R (on the application of Pretty) v Director of Public Prosecutions* [2001] UKHL 61.

[69] Ibid para 39.

[70] *Pretty v the United Kingdom* [2002] ECHR 427, ECHR 2346/02.

[71] *R (on the application of Purdy) v Director of Public Prosecutions* [2010] 1 AC 345.

[72] Ibid.

In response, the DPP issued the 'Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide'[73] which establishes 16 factors that favour prosecution and six factors that tend against it.

The Policy faced a subsequent challenge in *R (Nicklinson & Lamb) v Ministry of Justice*.[74] In this case, a man using the pseudonym Martin had suffered a brain stem stroke which left him very severely disabled and, eventually, with a wish to end his life but a need for assistance in doing so.[75] Without a family member willing to assist him to die, he wanted the assistance of a health care worker, a member of the public, or a solicitor. However, he was unsure whether they would be prosecuted if they helped him. Martin challenged the lack of clarity in the DPP prosecutorial charging guidelines with respect to health care providers. On July 31, 2013, the Court of Appeal held that the Policy was not sufficiently clear and urged the DPP to clarify the prosecution criteria with respect to health care workers. The Supreme Court, in turn, unanimously allowed the DPP's appeal and found that 'the Court should [not] involve itself with the terms of the DPP's policy on assisted suicide.'[76]

It should be noted here, however, that during the trial, counsel for the DPP stated on instructions from the DPP, that it was the view of the DPP that a professional care-worker, who does not have previous influence or authority over the person wishing to die and provides services, would not be more likely to be prosecuted than a family member for providing assistance with death. The Supreme Court majority noted the confusion over the content and interpretation of the Policy and the appearance that the Policy 'does not appear to reflect what the DPP intends'[77] and indicated that the DPP has an obligation to clarify any confusion about the meaning of the Policy.[78] If the DPP does not meet that obligation, Lord Neuberger stated 'the court's powers could be properly invoked to require appropriate action.'[79] Until the Policy is clarified, it seems unlikely that a professional care-worker will be prosecuted for providing assistance with death.

There is no evidence that definitively demonstrates that the legal regime in the UK is more permissive with respect to assisted suicide than it was before the introduction of the Policy and it is true that the criminal law has not changed. However, there are some indicators of an increase in permissibility. It is clear from the official reports that conduct that clearly constitutes assisted

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[73] England and Wales, Director of Public Prosecutions, *Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide* (DPP, 2010) <www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.pdf>. Following the *Purdy* case, the Director of the Public Prosecution Service for Northern Ireland issued a policy to similar effect: Public Prosecution Service for Northern Island, *Policy on Prosecuting the Offence of Assisted Suicide* (2010) <http://www.ppsni.gov.uk/SiteDocuments/PPS%20Press%20Office/Policy%20on%20Prosecuting%20the%20Offence%20of%20Assisted%20Suicide.pdf>. The Scottish Lord Advocate Elish Angiolini stated that the DPP's policy would apply only to England and Wales and that she believed that any changes in law in Scotland rested with the Scottish Parliament. See Hector L MacQueen and Scott Wortley, 'Lord Advocate's Statement on Assisted Suicide' *Scots Law News* (Scotland), 23 September 2009 <http://www.sln.law.ed.ac.uk/2009/09/23/lord-advocates-statement-on-assisted-suicide/>.

[74] *R (Nicklinson & Lamb) v Ministry of Justice* [2013] EWCA Civ 961.

[75] Ibid [9].

[76] *R (Nicklinson & Lamb) v Ministry of Justice*; *R (AM) v Director of Public Prosecutions* [2014] UKSC 38, 148.

[77] Ibid 146.

[78] Ibid 142-143.

[79] Ibid 146.

suicide is not being prosecuted (as prosecution is seen as not being in the public interest) and that only a small number of cases of assisted suicide are still being prosecuted. The DPP reports every six months on the 'Latest Assisted Suicide Figures.' From April 1, 2009 to February 13, 2014,

> there have been 91 cases referred to the CPS by the police that have been recorded as assisted suicide or euthanasia. Of these 91 cases, 65 were not proceeded with by the CPS, 13 cases were withdrawn by the police. There are currently 8 ongoing cases, 1 case of assisted attempted suicide was successfully prosecuted in October 2013 and 4 cases were referred onwards for prosecution for murder or serious assault.[80]

There is also evidence of an increase in the number of individuals from Great Britain dying as a result of assisted suicide in Switzerland following the publication of the DPP Policy.[81]

In sum it can be seen that prosecutorial charging guidelines may be a path to a somewhat permissive legal regime with respect to voluntary euthanasia or assisted suicide in some circumstances.[82] Use of this path, however, has been exceedingly rare.

C *Court Challenges to Prohibitive Regimes*

1 *Unsuccessful*

In Canada, there have been two unsuccessful court cases.[83] The first, and most famous, was the case of Sue Rodriguez in 1993.[84] Ms Rodriguez, a woman with ALS, argued that the Criminal Code prohibitions on assisted suicide violated her rights with respect to equality (section 15)[85] and the right not to be deprived of life, liberty, or security of the person except in accordance with the principles of fundamental justice (section 7)[86] and that these violations were not demonstrably

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[80] Crown Prosecution Service, *Assisted Suicide: Latest Assisted Suicide Figures* (2014) <http://www.cps.gov.uk/publications/prosecution/assisted_suicide.html>.

[81] Sasika Gauthier et al, 'Suicide Tourism: A Pilot Study on the Swiss Phenomenon' (2014) *Journal of Medical Ethics* (online) <http://jme.bmj.com/content/early/2014/07/03/medethics-2014-102091.abstract>.

[82] On the release of the Policy, the Director of Public Prosecutions said 'The policy does not change the law on assisted suicide. It does not open the door for euthanasia. It does not override the will of Parliament. What it does is to provide a clear framework for prosecutors to decide which cases should proceed to court and which should not.' By 'permissive' I therefore mean 'not subject to prosecution' as opposed to 'expressly allowed by statute.' Crown Prosecution Service, *Assisted Suicide* (2010) <http://www.cps.gov.uk/publications/prosecution/assisted_suicide.html>.

[83] The LeBlanc case will not be discussed here because, while Ginette LeBlanc challenged the Criminal Code provisions that serve to prohibit assisted dying, she died before her case could be heard. *Ginette LeBlanc v Canada (Attorney General) and Quebec (Attorney General)*, October 31, 2011 (Notice of Claim) <http://choiceisanillusion.files.wordpress.com/2012/01/ leblanc_ncc_001.pdf>.

[84] *Rodriguez v British Columbia (Attorney General)* [1993] 3 SCR 519.

[85] *Canadian Charter of Rights and Freedoms*, s 15, *Constitution Act 1982,* Part I, being Schedule B to the *Canada Act 1982* (UK) c 11 provides that '(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

[86] Section 7 of the *Charter* provides that 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.' The principles of fundamental justice are not a closed set but include, for example, arbitrariness, vagueness, overbreadth, and gross disproportionality.

justified in a free and democratic society (section 1).[87] She was unsuccessful at the Supreme Court of Canada by a margin of one vote. The case, in large part, hinged on the view that it was reasonable to fear the slippery slope. Justice Sopinka, for the majority, relied on concerns that exceptions to the blanket prohibition could not be relied upon to prevent abuses and effectively protect the vulnerable. The majority 'assumed without deciding' a violation of equality rights but found that was saved by section 1 and found that the limits on the right to life, liberty, and security of the person were in accordance with the principles of fundamental justice and so there was no violation of section 7. The later case of *Wakeford* in 2001 was another challenge to the same provisions.[88] It failed to progress on the grounds that the matter had already been determined by the Supreme Court of Canada in *Rodriguez*. The plaintiff conceded that the adjudicative facts had not changed since *Rodriguez* and he had not demonstrated that the legislative facts had changed sufficiently.

2 *Other Common Law Jurisdictions Have Also Seen Unsuccessful Cases*

The US Supreme Court has ruled unanimously that there is no constitutional right to assisted suicide. In *Washington v Glucksberg*, in a challenge by a group of physicians and Compassion in Dying to Washington State's prohibition of assisted suicide, the US Supreme Court concluded that assistance in suicide is not a fundamental liberty interest protected by the due process clause of the US Constitution.[89] In *Vacco v Quill*, a group of physicians challenged the New York State prohibition of assisted suicide as violating patients' equal protection rights under the US Constitution.[90] The District Court ruled against them, the Court of Appeals reversed the decision, but the US Supreme Court ultimately also ruled against them – finding the legislation did not infringe a fundamental right. However, it is worth noting here that this case and *Glucksberg* have been taken by many as an invitation for states to legislate in this arena – they do not have to under the US Constitution (it is not a federal constitutional violation to prohibit assisted death) but they are free to (criminal law is a state matter).

In *Kirsher v McIver*, a patient and his physician argued that Florida's prohibition of assisted suicide violated the privacy clause of the Florida Constitution and the due process and equal protection clauses of the US Constitution.[91] The trial judge agreed with the privacy and equal protection arguments but not the due process argument. However, the Florida Supreme Court overturned the decision (following *Vacco* and *Glucksberg* on the US Constitution arguments and concluding that the privacy amendment of the Florida Constitution does not include a right to assisted suicide). It too, though, issued an invitation for permissive legislation: 'We do not hold that a carefully crafted

[87] Section 1 of the *Charter* provides that 'The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Under the *Charter*, the plaintiff must first demonstrate a violation of one or more of their *Charter* rights. If successful in persuading the court of the violation, the burden shifts to the government who must demonstrate that the limits on the right are 'demonstrably justified in a free and democratic society.' That is, the limits must serve a pressing and substantial objective, there must be a rational connection between the ends and the means, the limits must minimally impair the rights, and there must be proportionality between the ends and means as well as between the salutary and deleterious effects of the challenged law.

[88] *Wakeford v Canada* (2001), 81 CRR (2d) 342, upheld in *Wakeford v Canada* 91 CRR (2d) 213, leave to appeal denied SCC 2002.

[89] *Washington v Glucksberg* 521 US 702 (1997) USSC.

[90] *Vacco v Quill* 521 US 793 (1997) USSC.

[91] *Krischer v McIver* 697 So.2d 97, 100, 104 (Fla 1997).

statute authorizing assisted suicide would be unconstitutional.'[92] In *Sampson v Alaska* in 1998, two terminally ill patients challenged the prohibition of assisted suicide as violating their constitutional rights to privacy and liberty but were unsuccessful.[93] The Superior Court ruled that the prohibition did not violate the state's constitution and that decision was affirmed by the State Supreme Court.

In the United Kingdom, Tony Nicklinson and Paul Lamb argued for the recognition of the defence of necessity for individuals who assist in suicide and challenged the prohibition of assisted suicide in section 2 of the *Suicide Act* [94] under Article 8 of the *European Convention on Human Rights* (the right to respect for private and family life).[95] Both of these claims were unsuccessful at the Court of Appeal.[96] A further appeal was heard by the Supreme Court of the United Kingdom in December 2013. On June 25, 2014, the Supreme Court, by a majority of seven to two, dismissed the appeals.[97] In response to the first argument, Lord Neuberger concluded that applying the defence of necessity to a charge of assisted suicide would be 'wholly inconsistent with both recent judicial dicta of high authority, and the legislature's intentions.'[98] In response to the second argument, a slim majority, five Justices, concluded that the court has constitutional authority to make a declaration that the general prohibition on assisted suicide in section 2 is incompatible with Article 8 of the *ECHR*. However, the Justices declined to do so in this case; instead they urged Parliament to take the opportunity to address the issue through legislation in the near future. Lord Neuberger, writing for the majority, held that 'Parliament now has the opportunity to address the issue of whether section 2 [of the *Suicide Act*] should be relaxed or modified, and if so how, in the knowledge that, if it is not satisfactorily addressed there is a real prospect that a further, and successful, application for a declaration of incompatibility may be made.'[99] Though the Supreme Court did not make a declaration of incompatibility in this case, they did send a strong message to Parliament to address the issue in the near future and hinted that if another challenge reached the court in the future, it would likely be successful.

3 *Successful*

In the United States, there has been success in the more recent cases. Courts have held that the criminal law does not prohibit assisted suicide in some circumstances (*Baxter v Montana*)[100] or that state constitutional rights protect assisted suicide in some circumstances (*Morris v Brandenberg*).[101]

In *Baxter v Montana*, the Supreme Court of Montana held that physicians who provide 'aid in dying' (so termed and limited to assisted suicide by the court) to terminally ill, mentally competent adult patients are shielded from criminal liability by the patient's consent. The court did not address

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[92] Ibid 104.
[93] *Sampson and Doe v State of Alaska* 31 P 3d 88 (Alaska Supreme Court 2001).
[94] *Suicide Act 1961* (UK).
[95] *Nicklinson v Ministry of Justice; R (AM) v Director of Public Prosecutions* [2012] EWHC 2381.
[96] *R (Nicklinson & Lamb) v Ministry of Justice* [2013] EWCA Civ 961.
[97] *R (Nicklinson & Lamb) v Ministry of Justice*; *R (AM) v Director of Public Prosecutions* [2014] UKSC 38, 148.
[98] Ibid 130.
[99] Ibid 118.
[100] *Baxter v Montana* 2009 WL 5155363.
[101] *Morris v Brandenberg* No. D-202-CV 2012-02909 (NM 2d Jud Dist Jan 13, 2014).

the constitutional rights arguments and instead decided the case based on state criminal law.[102] Montana criminal law provides that consent to a criminal act is a defense unless it is against public policy. The Supreme Court held that a patient's end-of-life autonomy and a physician's duty to comply with patient's wishes are reflected in state law and therefore are not against public policy. As a result, a patient's consent to the prescription of lethal drugs is an adequate defense to the crime of homicide in situations when a competent, terminally ill patient makes the decision whether or not to take the prescribed medication.[103]

In *Morris v Brandenberg*,[104] the Second Judicial District Court of New Mexico held that the liberty, safety and happiness interest of a competent, terminally ill patient to choose 'aid in dying' (again so termed and limited to assisted suicide by the court) is a fundamental right under the Constitution of the State of New Mexico. In deciding that the due process clause of the New Mexico Constitution contains a right to choose aid in dying, the court recognised that the US Supreme Court had denied the existence of this right under the US Constitution, but found that the New Mexico Constitution provides more rights than the federal constitution.

There has also been a dramatic success in a recent case in Canada. Kay Carter and Gloria Taylor, two women dying from degenerative conditions, believed that the Canadian Criminal Code prohibitions on assisted death violated their Charter rights – their section 15 equality rights and their section 7 right not to be deprived of life, liberty, and security of the person except in accordance with the principles of fundamental justice. After consideration of a truly extraordinary volume of evidence, Justice Lynn Smith of the British Columbia Supreme Court, struck down the Criminal Code prohibitions on assisted death – finding they violate section 7 and section 15 and are not demonstrably justified in a free and democratic society.[105] She rejected the slippery slope arguments and found that palliative care would not suffer and that the vulnerable could be protected from abuse if assisted death was made available only to individuals who met certain conditions. Not surprisingly, the Government appealed to the British Columbia Court of Appeal. Justice Smith's decision was overturned but it is very important to understand the basis of the court's decision.[106] By a 2:1 margin, the Court of Appeal allowed the appeal on the grounds of stare decisis – concluding that the issue had been decided by the Supreme Court of Canada in the 1993 case of Sue Rodriguez and so it was not for a trial judge to oust the Supreme Court's ruling – only the Supreme Court of Canada can overturn Supreme Court of Canada judgments. It is important to emphasise that the Court of Appeal did not reject Justice Smith's arguments with respect to equality, life, liberty, and security of the person, and the principles of fundamental justice. The Court of Appeal did not (nor could it) dislodge the findings of fact made by Justice Smith regarding palliative care and slippery slopes. The case proceeded to the Supreme Court of

[102] *Baxter v Montana* 2009 WL 5155363, 10.
[103] Ibid 38.
[104] No. D-202-CV 2012-02909 (NM 2d Jud Dist Jan 13, 2014).
[105] *Carter v Canada (Attorney General)* 2012 BCSC 886. Justice Smith described the evidentiary record as follows, at [114]: 36 binders of affidavits, transcripts and documents entered through admission. There were 116 affidavits filed. Some of these run to hundreds of pages in length and attach as exhibits many secondary sources. In addition, 18 witnesses were cross-examined on their affidavits, including 11 witnesses who were cross-examined on their affidavits before the Court.
[106] *Carter v Canada (Attorney General)* 2013 BCCA 435.

Canada (who obviously did not have their hands tied by the principle of vertical stare decisis).[107] The arguments were heard in mid-October 2014 and the decision was released on 6 February, 2015.[108] The Supreme Court of Canada, in a unanimous decision authored by 'The Court', held that: the prohibitions on physician-assisted death violate the section 7 rights to life, liberty, and security of the person; they are overbroad and therefore not in accordance with the principles of fundamental justice (catching more people in the prohibitive net than required to serve the objective of protecting the vulnerable); the prohibitions do not minimally impair the rights (a regime less restrictive of life, liberty, and security of the person could address the risks associated with physician-assisted death); and therefore the legislation is not demonstrably justified in a free and democratic society and so cannot be saved under section 1.

The trial judge made a series of factual findings that were critical to her decision, were endorsed or relied upon by the Supreme Court of Canada, and are relevant to other jurisdictions contemplating law reform.

- 'vulnerability can be assessed on an individual basis using the procedures physicians apply in their assessment of informed consent and decision capacity in the context of medical decision-making more generally.'[109]
- 'no evidence from permissive regimes that people with disabilities are at heightened risk of accessing physician-assisted dying.'[110]
- 'no evidence of inordinate impact on socially vulnerable populations in permissive jurisdictions'[111]
- 'in some cases palliative care actually improved post-legalisation'[112]
- 'physicians were better able to provide overall end-of-life treatment once assisted death legalised.'[113]
- 'The trial judge, after an exhaustive review of the evidence, rejected the argument that adoption of a regulatory regime would initiate a descent down a slippery slope into homicide.'[114]

The Supreme Court of Canada issued the following declaration:

> [t]hat s. 241 (b) and s. 14 of the *Criminal Code* are void insofar as they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition (including an illness, disease or disability)

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[107] See for example: *Canada v Craig* [2012] SCC 43 which overturned *Moldowan* to allow a more generous interpretation of farming under the *Income Tax Act*; *United States of America v Burns* [2001] 195 DLR 1 which overturned *Kindler v Canada* in finding that the extradition of individuals to places where they may face the death penalty breached section 7 of the Charter; *R v Robinson* [1996] 1 SCR 683 which overturned *MacAskill v The King* on admissibility of intoxication evidence; *R v B(KG)* [1993] 1 SCR 740 which overturned *Deacon v The King* on admissibility of prior inconsistent statements; *Brooks v Safeway Canada* [1989] 1 SCR 1219 which over turned *Bliss v Canada* to find that pregnancy policies are considered discrimination on the basis of sex.

[108] *Carter v Canada (Attorney General)* 2015 SCC 5.

[109] *Carter v Canada (Attorney General)* 2015 SCC 5, 115.

[110] Ibid 107.

[111] Ibid.

[112] Ibid.

[113] Ibid.

[114] Ibid 120.

> that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition. 'Irremediable,' it should be added, does not require the patient to undertake treatments that are not acceptable to the individual.[115]

The Supreme Court of Canada then suspended the declaration of invalidity for 12 months to give federal/provincial/territorial governments time to develop and implement a regulatory framework for physician-assisted death.

As a consequence of these cases, assisted death can, in some circumstances in parts of the US and all of Canada (as of February 2016) proceed without (or with less) fear of prosecution. Again, there have been fewer successes than failures but, with the recent successes, the tide may have turned on this pathway to law reform.

4 *Jury Nullification*

Jury nullification occurs when a jury acquits because its members disagree with the application of the law in a particular instance (the offence and/or the sentence attached to the offence), because they believe that the law is simply unjust or that the application of the law in the specific case would be unjust.

Canada has a dramatic history with respect to jury nullification in the context of contentious moral issues. Dr Henry Morgentaler publicly operated an abortion clinic for several years before being charged under s 251 of the Criminal Code for intending to procure the miscarriage of a female person. At his first jury trial, Morgentaler admitted to performing over 5000 abortions but he argued the defence of necessity and was acquitted by the jury. Between 1973 and 1975, Morgentaler was tried three more times by the Quebec Crown. He was acquitted by the jury each time and in the third trial, the jury only deliberated for one hour before returning their verdict.[116] It became clear to the Quebec Crown that even if Morgentaler admitted to performing abortions, Quebec juries would not convict him. This became known as the Morgentaler phenomenon.[117]

In a 1976 trial, Morgentaler's defence counsel, Morris Manning, told the jury that 'it is up to you and you alone to apply the law to this evidence and you have a right to say it shouldn't be applied.'[118] On appeal, the Supreme Court of Canada held that, while the jury has the power to disregard the law, Manning was wrong to tell the jury members that if they did not like the law they need not enforce it.[119] This decision has been interpreted to mean that jury nullification is still a valid component of the Canadian justice system but lawyers are not allowed to tell the jury that jury nullification is an option.

In 1976, the newly appointed Justice Minister in Quebec, Marc-Andre Bedard, dropped all charges against Morgentaler and announced that the Crown would not lay any more charges against doctors

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[115] Ibid 127.
[116] Wayne Sumner, 'The Morgentaler Effect', *The Walrus Magazine* (2011) <http://thewalrus.ca/the-morgentaler-effect>.
[117] Ibid.
[118] *R v Morgentaler* [1988] 1 SCR 30, 77.
[119] Ibid.

performing clinic abortions in Quebec.[120] Morgentaler then began operating abortion clinics in Winnipeg and Toronto where he was predictably charged under s 251 of the Criminal Code. He went to trial, argued the defence of necessity, and was acquitted by juries every time.[121]

While there have been no reported cases of jury nullification in the context of voluntary euthanasia or assisted suicide in Canada, the issue has surfaced in two ways. First, in testimony before the Special Senate Committee on Euthanasia and Assisted Suicide on 12 December, 1994, David Thomas, a Crown prosecutor, explained his decision to charge Dr de la Rocha with administering a noxious substance with intent to cause bodily harm instead of murder as follows: 'if we went to trial, we would see 12 common folk from Timmins kind of chart the course for euthanasia at this point in time.'[122] It is possible that a number of the decisions with respect to the exercise of prosecutorial discretion discussed below can be traced to a similar fear of jury nullification and a repeat of the Morgentaler phenomenon.

Second, in the Robert Latimer case, the prospect of jury nullification was certainly viable (given the differing opinions on euthanasia among the Canadian public).[123] Robert Latimer was charged with murder in the death of his severely disabled daughter Tracy in circumstances that might well have been conducive to jury nullification (constant pain and repeated surgeries). However, Mr Latimer's lawyer was precluded from alluding to jury nullification as a result of the Supreme Court of Canada decision in *Morgentaler*. Furthermore, despite Latimer's lawyer requesting that the jury be told of the mandatory minimum sentence for murder and the jury having asked the judge a specific question about the sentence that would attach to a conviction,[124] the jury was not informed about the sentence that would or could attach. After the fact, and very unusually as Canadian jurors are prohibited from disclosing jury discussions,[125] some jurors indicated that had they known that there would be a mandatory sentence of life imprisonment with no possibility of parole for 25 or 10 years (for first and second degree murder respectively), they would not have convicted Latimer of murder in the death of his daughter.[126]

Jury nullification has also played a significant role in assisted suicide cases in the United States. In Michigan, Dr Jack Kevorkian was charged with assisting the suicide of Thomas Hyde, a 30-

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[120] Dave Thomas, 'Quebec Drops Case Against Morgentaler' *The Montreal Gazette* (Montreal) 11 December 1976 <http://news.google.com/newspapers?nid=1946&dat=19761211&id=2R4uAAAAIBAJ&sjid=eqEFAAAAIBAJ&pg=4579,2551456>.

[121] *R v Morgentaler, Smoling and Scott* [1985] ONCA 116.

[122] Mr David Thomas, Crown Attorney's Office, Timmins, Ontario, testimony before the Special Senate Committee on Euthanasia and Assisted Suicide. Senate Special Cttee No 29 (12 Dec 1994) 42-3.

[123] In 1994, at the time of the Latimer trial, 69 per cent of Canadians believed that assisting suicide should not be charged as a crime. The Environics Institute, 'Canadian Public Opinion on Assisted Suicide' (Toronto) October 11 2013 <http://www.environicsinstitute.org/news-events/news-events/canadian-public-opinion-on-assisted-suicide>.

[124] The jury requested more information about sentencing, including 'Is there any possible way we can have input into a recommendation for sentencing?' Justice Noble declined to give them information about sentencing and emphasised that it was the jury's role to focus on the issue of guilt and innocence, not on the penalty. Michael Stingl, *The Price of Compassion: Assisted Suicide and Euthanasia* (Broadview Press, 2010) 78.

[125] Criminal Code, RS 1985 c C-46, s 469. Pursuant to section 649 of the Criminal Code, 'any jury member…who discloses any information relating to the proceedings of the jury when it was absent from the courtroom that was not subsequently disclosed in open court is guilty of an offence.'

[126] The Canadian Press, 'Robert Latimer Deserves Parole: Jury Member' *CTV News* (online) 23 December 2007 <http://www.ctvnews.ca/robert-latimer-deserves-parole-jury-member-1.268689>.

year-old with Lou Gehrig's disease. Before his jury trial, Kevorkian's lawyer, Geoffrey Fieger, told media outlets that he would urge the jury to disregard the law.[127] At a pre-trial motion, Fieger was banned from communicating with the media but his comments had already been extensively reported across the United States.[128] At trial, Kevorkian admitted to placing a mask connected to a canister of carbon monoxide on Hyde's face and placing a string to release the gas in Hyde's hand. Despite this evidence, the jury acquitted him. Between 1994 and 1997, Kevorkian was tried four more times for assisting suicides and was acquitted three times by juries (the fourth ended in a mistrial).[129] It is possible that some or all of these acquittals were cases of jury nullification. By 1998, Dr Kevorkian had assisted in 100 suicides and had yet to be found guilty. Eventually, Kevorkian was found guilty of second-degree murder after he released a video of himself giving a lethal injection to Thomas Youk.[130]

Thus it can be concluded that jury nullification might but has not yet had a transformative effect on the application of any prohibitive criminal law regime.

5 *Exercise of Prosecutorial Discretion in the Absence of Offence-Specific Charging Guidelines/Judicial Discretion in Sentencing*

While murder carries mandatory minimum sentences in Canada, cases of assisted death often end in charges and convictions for lesser offences (eg, administration of a noxious substance or manslaughter), which do not. Many cases of assisted death begin with a murder charge (first or second degree) but result in a guilty plea for a lesser offence such as administering a noxious substance. Prosecutors are using their discretion in plea bargaining to reduce the seriousness of the state's response to the conduct. Furthermore, unlike murder, the lesser offences noted above do not carry a mandatory minimum sentence. Therefore, judges often have the opportunity to exercise discretion in sentencing in assisted death cases. The results of prosecutions given in reported cases to date are set out in the table below:

Table 5: Results in Reported Canadian Prosecutions

Case	Charge	Plea or Verdict	Maximum Sentence for Charge	Actual Sentence
R v Mataya, 1992 CarswellOnt 5214, Ont Ct J (August 24, 1992)	First-degree murder	Pled guilty to administering a noxious substance	Life	3 year suspended sentence
R v de la Rocha, 1993WL1447201 (2 April 1993), Timmins (Ont Ct (Gen Div))	Second-degree murder	Pled guilty to administering a noxious substance to endanger life	Life	3 year suspended sentence

[127] Ralph Slovenko, 'Jury Nullification' (1994) *The Journal of Psychiatry and Law* 22, 165.
[128] Ibid 165.
[129] Fred Charatan, 'Dr Kevorkian Found Guilty Of Second Degree Murder' (1999) 318 *British Medical Journal* 7189.
[130] Ibid.

Case	Charge	Plea or Verdict	Maximum Sentence for Charge	Actual Sentence
R v Myers, [1994] NJ No 688 (23 Dec 1994), Halifax (NSSC)	Second-degree murder	Pled guilty to manslaughter	Life	3 years probation
R v Brush, [1995] OJ No 656 (2 March 1995) Toronto (Ont Ct J (Prov Div))	First-degree murder	Pled guilty to manslaughter	Life	18 months probation
R v Morrison, [1998] NSJ No 75, Case No 720188	First degree murder	Trial judge declined to commit Dr. Morrison to stand trial Appeal to NSSC was dismissed	Life	No trial
R v Genereux, [1999] OJ No 1387 (ONCA)	Aiding and abetting suicide	Pled guilty	14 years	2 years less one day and 3 years probation
R v Latimer, 2001 SCC 1	Second degree murder	Guilty verdict	Life	Life (no possibility of parole for 10 years)
R v Zsiros, 2004 BCCA 530	Aiding and abetting suicide	Guilty verdict	14 years	Suspended sentence
R v Martens, 2004 BCSC 1450	Aiding and abetting suicide	Acquittal	14 years	Acquitted by jury
R c Houle, 2006 QCCS 319	Aiding and abetting suicide	Pled guilty	14 years	3 years probation with conditions
R c Bergeron [2005] QCCS 5634	Attempted murder	Guilty verdict	Attempted murder = Life Aggravated assault = 14 years	3 years probation for aggravated assault
R v Kirk, 2006 ONCJ 509	Aiding and abetting suicide	Pled guilty	14 years	3 years probation
Ramesh Kumar Sharma (June 2007)	Aiding and abetting suicide	Pled guilty	14 years	Conditional sentence of 2 years less a day to be served in the community

Case	Charge	Plea or Verdict	Maximum Sentence for Charge	Actual Sentence
R c Dufour, 2010 QCCA 2413	Aiding and abetting suicide	Acquittal	14 years	Acquitted due to limited mental capacity Appeal dismissed by Quebec Court of Appeal
R v Fonteece, 2010 ONSC 2075	Assisted suicide and criminal negligence causing death	Pled guilty to criminal negligence causing death Not guilty verdict of assisting suicide	Aiding and abetting suicide = 14 years Criminal negligence causing death = Life	Time served and 12 months probation
R v Jeanvenne, 2010 ONCA 706	First degree murder in 1983 shooting	Pled guilty to mercy killing New trial ordered, hung jury at new trial in 2012	Life	Crown stayed charges in 2012

The same phenomena with respect to exercises of prosecutorial discretion with respect to plea bargains and judicial discretion with respect to sentencing have been seen in other countries as well. Consider, for example, New Zealand.

Table 6: Results In Reported New Zealand Prosecutions

Case	Charge	Plea or Verdict	Maximum Sentence for Charge	Actual Sentence
R v Ruscoe (1992) 8 CRNZ 68, 20 March 1992	Aiding and abetting suicide	Guilty		12 months supervision
R v Karnon (HC Auckland, S14/99, 29 April 1999)		Guilty		2 years supervision
R v Law (HC Hamilton T 021094, 19 August 2002)	Murder	Guilty		18 months imprisonment, leave granted to apply for home detention

Case	Charge	Plea or Verdict	Maximum Sentence for Charge	Actual Sentence
R v Martin [2005] NZCA 3	Attempted murder	Guilty	14 years	15 months imprisonment with leave to apply for home detention
R v Crutchley HC Hamilton CRI-2007-069-000083, 9 July 2008	Attempted murder	Guilty	14 years	Six months community detention, 150 hours community work
R v Davison HC Dunedin CRI-2010-012-004876 24 Nov 2011	Attempted murder	Guilty to inciting and procuring suicide	14 years	Five months home detention
R. v Mott [2012] NZHC 2366 (13 September 2012)	Assisted suicide	Guilty		Discharge without conviction

Similarly, in Australia, sentences tend to be much lower than the maximum and often do not include a prison sentence.[131]

Table 7: Results in Reported Australian Prosecutions

Case	Charge	Plea or Verdict	Maximum Sentence for Charge	Actual Sentence
R v Hood [2003] [2002] VSC 123	aiding or abetting suicide	Guilty	five years imprisonment	18-month prison sentence that was suspended in entirety
R v Maxwell [2003] VSC 278	aiding or abetting suicide	Guilty	five years imprisonment	18-month prison sentence that was suspended in entirety
DPP v Karaca [2007] VSC 190	Attempted murder	Guilty	25 years imprisonment	3 years imprisonment wholly suspended for 3 years
DPP v Nestorowycz [2008] VSC 385	Attempted murder	Guilty	25 years imprisonment	2 years and 9 months imprisonment but the sentence was wholly suspended
DPP v Rolfe [2008] VSC 528	Manslaughter by suicide pact	Guilty	10 years imprisonment	Wholly suspended sentence of imprisonment for two years

[131] Lorana Bartels and Margaret Otlowski, 'A Right to Die? Euthanasia and the Law in Australia' (2010) 17 *Journal of Law and Medicine* 532.

Case	Charge	Plea or Verdict	Maximum Sentence for Charge	Actual Sentence
R v Justins [2011] NSWSC 568	aiding and abetting suicide	Guilty	10 years imprisonment	22 months of jail time to be served on the weekends
R v Mathers [2011] NSWSC 339	Murder	Guilty to manslaughter	25 years imprisonment	2 years imprisonment
R v Nielsen [2012] QSC 29 [Note: the deceased was not terminally ill and Mr. Nielsen was the sole beneficiary under the deceased's will]	Aiding and abetting suicide	Guilty	5 years imprisonment	3 years imprisonment
R v Klinkermann [2013] VSC 65	Attempted murder	Guilty	25 years imprisonment	Community corrections order of 18 months with conditions of medical and mental health treatment and rehabilitation
Walmsley v R [2014] ACTCA 24 (1 Aug 2014) [Note: the far less compelling facts may account for the severity of sentence]	Aiding and abetting suicide	Guilty	5 years imprisonment	2 years and 9 months imprisonment, non parole period of 1 year and 8 months is fixed. (sentence backdated to account of time spent in custody)

Similarly, in the United Kingdom, the rare convictions in cases of assisted suicide or euthanasia result in lenient sentences. For example, in *R v Webb*, the Court of Appeal gave a man a twelve months suspended sentence for 'manslaughter committed as a mercy killing intended by the appellant to help his wife achieve her settled intention to end her own life.'[132] In *R v March*,[133] David March was charged with murder but pled guilty to aiding and abetting the suicide of his wife. Despite the maximum sentence of 14 years imprisonment, he was given a nine month suspended sentence.[134] According to Julia Shaw in 'Recent Developments in the Reform of English Law on Assisted Suicide',

> [a]lthough assisting suicide is a criminal offence in the UK, no health professional has been convicted in spite of anecdotal evidence and voluntary disclosures … [and] Law Lord Baroness

[132] *R v Webb* [2011] EWCA Crim 152 [24].
[133] *R v March* (Unreported, Central Criminal Court, Barker J, 19 October 2006).
[134] Maxine Frith, 'Freedom for Husband Who Helped Disabled Wife to Die' (20 October 2006) *The Independent* <http://www.independent.co.uk/news/uk/crime/freedom-for-husband-who-helped-disabled-wife-to-die-420869.html>.

> Murphy recently observed, 'In more than 15 years, not one mercy-killing case has resulted in a sentence for murder.' Juries are similarly reluctant to convict in cases which involve close relatives claiming to have acted in good faith to alleviate suffering.[135]

It can be concluded that the exercise of discretion by prosecutors (re: plea bargains) and judges (re: sentences) could have a transformative effect on the application of a prohibitive criminal law regime. Indeed, looking at the cases noted above, one could reasonably conclude that, in a number of jurisdictions, the law de facto is not nearly as prohibitive as the law de jure.

D *Looking Backwards Conclusion*

In sum, law reform has come about (and failed to come about) in various common law jurisdictions through legislative reform, prosecutorial charging guidelines, court decisions, jury nullification, the exercise of prosecutorial discretion in the absence of offence-specific charging guidelines, and the exercise of judicial discretion in sentencing.

III LOOKING FORWARD

Before turning to lessons learned, it is worth briefly reviewing the voluntary euthanasia and/or assisted suicide law reform initiatives that are currently active in the five countries under consideration.

A *Canada*

In February 2014, the National Liberal Party (the Official Opposition in the Federal Parliament), passed a resolution that calls for voluntary medically-assisted death to be decriminalised. The resolution calls for a public consultation process to make recommendations to Parliament with respect to criteria for access to, and appropriate oversight of, medically-assisted end-of-life.[136] According to the National Liberal Party's website, 'Policy resolutions adopted by convention delegates officially become "Party policies" and inspire [but do not direct] the next electoral platform.'[137] Ultimately, however, the decision to include a policy resolution in the electoral platform rests with the party leadership. Following the release of the Supreme Court of Canada decision in *Carter*[138], the leader of the Liberal Party expressed support for the decision and made a motion in the House of Commons to appoint a special committee to 'consider the ruling of the Supreme Court; that the committee consult with experts and with Canadians, and make recommendations for a legislative framework that will respect the Constitution, the Charter of Rights and Freedoms, and the priorities of Canadians.'[139] The motion failed with 132 in favour 146 against.[140] If the Liberal Party forms the Government after the 2015 election, it seems

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[135] Julia Shaw, 'Recent Developments in the Reform of English Law on Assisted Suicide' (2009) 16(4) *European Journal of Health Law* 333, 336-337.

[136] Liberal Party resolution 165, *Death with Dignity: Legalizing Medically-Assisted Death* (2014) <http://www.liberal.ca/165-death-dignity-legalizing-medicallyassisted-death/>.

[137] National Liberal Party, *Policy Process FAQ* (2015) <http://convention.liberal.ca/policy-faq/>.

[138] *Carter v Canada (Attorney General)* 2012 BCSC 886.

[139] iPolitics, *Daily Watch: Liberals Push Motion on Assisted Suicide* (2015) <http://www.ipolitics.ca/2015/02/24/daily-watch-liberals-push-motion-on-assisted-suicide/>.

[140] OpenParliament, *Vote #340 on February 24th, 2015* (2015) <https://openparliament.ca/votes/41-2/340/>.

reasonable to assume that the goal of the policy resolution and the Supreme Court of Canada decision will be reflected in legislative action by the Government.

On March 27, 2014, Conservative MP Steven Fletcher and NDP MP Manon Perreault introduced Bill C-581 to decriminalise physician-assisted death[141] and Bill C-582 to establish an oversight commission on physician-assisted death.[142] To the same end and in much the same form, Bill S-225 was subsequently introduced into the Senate by Senators Larry Campbell and Nancy Ruth.[143] However, even when introduced it was clear that, barring some extraordinary parliamentary maneuvering, none of these bills would ever proceed to a vote. Nonetheless, they reopened the conversation at the federal legislative level and may be taken as a foundation upon which to build legislation if Parliament decides to legislate in response to the Supreme Court of Canada decision in *Carter*.

Outside Canada, there is also considerable law reform activity in progress.

B *United Kingdom*

In the United Kingdom, the *Assisted Dying Bill* was introduced in front of the House of Lords on 15 May, 2013.[144] It passed second reading and moved to Committee on 18 July, 2014. It was considered by the Committee on 7 November, 2014 and 16 January, 2015.[145] The Bill provides for a person over the age of 18 who is terminally ill and has six months or less to live to seek and lawfully be provided with assistance to end their own life. Health care professionals can prescribe the lethal medication and prepare it for administration. However, the individual would need to take the final act that ended their own life by self-administering the medication.[146]

In Scotland, the Assisted Suicide Bill was introduced in the Scottish Parliament on 13 November, 2013.[147] The Bill is working its way through various Committees and may reach Parliament in the Spring of 2015.[148] The Bill enables people with terminal or life-shortening illnesses or progressive conditions which are terminal or life-shortening and who wish to end their own lives to obtain assistance in doing so. It does this by removing criminal and civil liability from those who provide such assistance provided that the procedure set out in the Bill is followed. The individual must be over the age of 16 and must have an illness which, in his or her case, is terminal or life-shortening or a condition which, in his or her case, is progressive and either terminal or life-shortening.[149]

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[141] Bill C-581, *An Act To Amend The Criminal Code (Physician-Assisted Death)*, 2nd Sess, 41st Parl, 2014.

[142] Bill C-582, *An Act To Establish The Canadian Commission On Physician-Assisted Death*, 2nd Sess, 41st Parl, 2014.

[143] Bill S-225. *An Act To Amend The Criminal Code (Physician-Assisted Death) 2014* <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6811259&File=27&utm_source=Euthanasia+Prevention+Coalition+Newsletter&utm_campaign=66625d55e8Canadian_Senate_to_debate_euthanasia+bill&utm_medium=email&utm_term=0_105a5cdd2d-66625d55e8-157171481#1>.

[144] Assisted Dying Bill 2013-2014 (UK).

[145] UK Parliament, *Assisted Dying Bill [HL] 2014-15* <http://services.parliament.uk/bills/2014-15/assisteddying.html>.

[146] Explanatory Notes, Assisted Dying Bill 2013-2014 (UK) <http://www.publications.parliament.uk/pa/bills/lbill/2013-2014/0024/en/2014024en.pdf>.

[147] Assisted Suicide (Scotland) Bill 2013 (Scot).

[148] The Scottish Parliament, *Assisted Suicide (Scotland) Bill* (2015) <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/69604.aspx>.

[149] Explanatory Notes, Assisted Suicide (Scotland) Bill 2013 (Scot).

C *United States*

In the United States, successful legislative reform in Oregon, Vermont, and Washington has encouraged other states to consider passing permissive assisted suicide legislation. Legislation is being considered in 27 states and the District of Columbia.[150]

D *Australia*

In South Australia, the Ending Life with Dignity (No 2) Bill 2013 provides for the administration of medical procedures to assist death for those who are terminally ill, suffering unbearably and who have expressed a desire for the procedures.[151] It was introduced in October 2013, but the Bill lapsed when Parliament was prorogued. At the federal level, on June 24, 2014, Senator Richard Di Natale released an Exposure Draft of a bill - *Bill for an Act relating to the provision of medical services to assist terminally ill people to die with dignity, and for related purposes* (*Medical Services (Dying with Dignity) Bill 2014*).[152] The Exposure Draft of the Bill was considered by the Legal and Constitutional Affairs Legislation Committee which issued its report in November 2014.[153] The Committee made two key recommendations:

> (1) That Senator Di Natale should address the technical and other issues raised in evidence to the committee, and seek the advice of relevant experts before drafting the final Bill.
> (2) That if the Bill is introduced in the Senate, Party Leaders should allow Senators a conscience vote.[154]

This Bill seeks:

> (a) to recognise the right of a mentally competent adult who is suffering intolerably from a terminal illness to request a medical practitioner to provide medical services that allows the person to end his or her life peacefully, humanely and with dignity; and
>
> (b) to grant a medical practitioner who provides such services immunity from liability in civil, criminal and disciplinary proceedings.[155]

E *New Zealand*

On March 20 2015, Lecretia Seales filed a claim in the New Zealand High Court claiming that the prohibition on physician-assisted death violates her right not to be deprived of life or subjected to cruel treatment under the *Bill of Rights Act* and seeking a ruling on whether her physician can provide her with physician-assisted death without fear of criminal liability.[156]

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[150] For details on current legislative initiatives, see Compassion & Choices, *In Your State* (2015) <https://www.compassionandchoices.org/what-you-can-do/in-your-state/>.
[151] Ending Life with Dignity (No 2) Bill 2013 (SA).
[152] Medical Services (Dying with Dignity) Bill 2014 (Cth) <http://richard-di-natale.greensmps.org.au/sites/default/files/dying_with_dignity_medical_services_draft.pdf>.
[153] Medical Services (Dying with Dignity) Exposure Draft Bill 2014 <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Dying_with_Dignity/~/media/Committees/legcon_ctte/Dying_with_Dignity/report/report.pdf>.
[154] Ibid
[155] Ibid.
[156] Jared Savage, 'Lecretia Seales Story' *The New Zealand Herald* (online) 21 March 2015 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11420767>.

F *Looking Forward Conclusions*

Here it can be concluded that there is a significant amount of law reform activity aimed at moving toward more permissive regimes with respect to voluntary euthanasia and assisted suicide taking place right now in Canada and in other common law jurisdictions. Whether we will see significant increases in the number of permissive regimes of course remains to be seen.

IV LESSONS FROM LOOKING BACKWARD AND FORWARD

Given recent developments in Canada (in particular the Quebec legislation and the Supreme Court of Canada decision in *Carter*[157] there are lessons from Canada for those seeking law reform in common law jurisdictions.

First, reform is possible. There are now 13 jurisdictions which have, in one way or another, permitted voluntary euthanasia and/or assisted suicide in some circumstances. As Canada has recently demonstrated, it may take years, but with persistence it can come.

Second, legislators and judges can be persuaded of the fact that slippery slopes do not materialise after decriminalisation. First, permissive regimes do not slide from voluntary euthanasia to non-voluntary or involuntary euthanasia (either in relation to the criteria for access or in practice).[158] Second, palliative care and, more generally, end of life care, is benefitted rather than harmed by the decriminalisation of assisted death. [159]

Third, there is wisdom in linking palliative care to assisted death in the reform process. The decriminalisation of voluntary euthanasia and/or assisted suicide can be used to benefit access to and quality of palliative care – this has been seen, for example, in Oregon.[160] This lesson was clearly learned by the Quebec legislators as *An Act Respecting End of Life Care* explicitly addresses and strengthens palliative care in Quebec (including, for example, the establishment of a right to palliative care). [161]

Fourth, it is important to prepare in advance for the (legislative or judicial) window of opportunity to open. Academics had been developing the legal and philosophical arguments for a number of years in anticipation of there being the political will for legislative reform or an appropriate case upon which to build a court challenge. For example, I published my first paper advocating for the decriminalisation of voluntary euthanasia in 1993,[162] and a book on the same topic in 2004.[163]

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[157] *Carter v Canada (Attorney General)* 2015 SCC 5.

[158] The Royal Society of Canada Expert Panel, *End-of-Life Decision Making* (RSC, 2011) <http://rscsrc.ca/sites/default/files/pdf/RSCEndofLifeReport2011_EN_Formatted_FINAL.pdf> 12; *Carter v Canada (Attorney General)*, 2012 BCSC 886, [1241]; Quebec Select Committee on Dying with Dignity (Report of the National Assembly of Quebec, 2012) <www.assnat.qc.ca/en/actualites-sallepresse/nouvelle/Actualite-25939.html> 37.

[159] Ibid.

[160] 98 per cent have health care insurance and most are enrolled in hospice before death. See Ronald Lindsay, 'Oregon's Experience: Evaluating the Record' (2009) 9(3) *American Journal of Bioethics* 19-27.

[161] Bill 52, *An Act Respecting End-of-Life Care*, 1st Sess, 41st Leg, 2014, Quebec, section 5.

[162] Jocelyn Downie, 'Voluntary Euthanasia in Canada' (1993) 14(1) *Health Law in Canada* 13-30.

[163] Jocelyn Downie, *Dying Justice: A Case for Decriminalizing Euthanasia and Assisted Suicide in Canada* (University of Toronto Press, 2004).

When the facts about the impact of decriminalisation became known over a significant period of time (particularly in the Netherlands and Oregon) and the legal principles driving the analysis in section 7 of the *Charter* changed, I published a paper arguing that the time had come to launch another *Charter* challenge to the prohibitions on assisted death under section 7 in 2008.[164] So when the right plaintiffs and counsel came along ready to launch a challenge in *Carter v Canada*[165], the foundation for the case had been laid (by these pieces as well as essential scholarship produced by others in Canada and abroad) and the academic analysis was ready for the litigation strategy (both to shape, support, and be used by it). By way of an example from the political arena, in the same paper in which the argument for a *Charter* challenge was laid out, my co-author and I included a draft federal statute. When Stephen Fletcher indicated that he was going to introduce a private members bill into the Federal Parliament, a collection of key documents laying out the core arguments and evidence was ready along with draft legislation and so the window of opportunity for such an initiative could be capitalised upon.[166]

Fifth, evidence and the law itself changes over time. The evidence in front of the court in Rodriguez in 1993 and in front of the Senate Special Committee on Euthanasia and Assisted Suicide in June 1995, was taken to demonstrate that: medical associations around the world were opposed to decriminalising assisted suicide[167]; palliative care was threatened by decriminalisation[168]; and descents down the slippery slope from voluntary to non-voluntary and even involuntary euthanasia follow decriminalisation.[169] The evidence in front of the court in Carter and presented to the Special Committee on Dying with Dignity in Quebec and the Quebec National Assembly, by contrast, was taken to demonstrate that: some medical associations now support or have taken a position of 'studied neutrality' on decriminalisation[170]; palliative care is not harmed (and may be helped) by decriminalisation[171]; and the slippery slopes have not materialised.[172] These facts certainly made a difference in the results in these various venues. The law had changed as between

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[164] Jocelyn Downie and Simone Bern, 'Rodriguez Redux' (2008) 16 *Health Law Journal* 27. Recall, section 7 is the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[165] *Carter v Canada (Attorney General)* 2012 BCSC 886.

[166] See Bill C-581, *An Act To Amend The Criminal Code (Physician-Assisted Death)*, 2nd Sess, 41st Parl, 2014 and Bill C-582, *An Act To Establish The Canadian Commission On Physician-Assisted Death*, 2nd Sess, 41st Parl, 2014.

[167] Justice Sopinka concluded that 'I also place some significance in the fact that the official position of various medical associations is against decriminalizing assisted suicide (Canadian Medical Association, British Medical Association, Council of Ethical and Judicial Affairs of the American Medical Association, World Medical Association and the American Nurses Association).' *Rodriguez v British Columbia (Attorney General)* [1993] 3 SCR 519, 613.

[168] Canada, Special Senate Committee on Euthanasia and Assisted Suicide, 'Of Life and Death: Final Report' Chapter VII Assisted Suicide (Ottawa: Special Committee on Euthanasia and Assisted Suicide, June 1995) <www.parl.gc.ca/Content/SEN/Committee/351/euth/rep/lad-e.htm>.

[169] *Rodriguez v British Columbia (Attorney General)* [1993] 3 SCR 519.

[170] *Carter v Canada (Attorney General)* [2012] BCSC 886, [276]. Even the Canadian Medical Association recently modified its stance with the adoption of the following resolution at the 2014 Annual Meeting '6. The Canadian Medical Association (CMA) supports the right of all physicians, within the bounds of existing legislation, to follow their conscience when deciding whether to provide medical aid in dying as defined in CMA's policy on euthanasia and assisted suicide. (DM 5-6) (Confirmed by the Board of Directors on August 21, 2014)' <https://www.cma.ca/Assets/assets-library/document/en/GC/Final-Resolutions-GC-2014-unconfirmed-e.pdf>.

[171] Justice Smith found that 'Legislation of assisted death has not undermined palliative care; on the contrary, palliative care provision has improved since legalization by some measures.' *Carter v Canada (Attorney General)* [2012] BCSC 886, [731].

[172] Ibid [1241].

Rodriguez and Carter with respect to the principles of fundamental justice (neither overbreadth nor gross disproportionality were recognised as principles of fundamental justice in Rodriguez and yet played important roles in Carter)[173] and the role of administrative facts in section 1 analysis.[174] These changes made a difference in terms of the case even being heard (affecting the stare decisis analysis) and the result (affecting the sections 7 and 1 analyses).

Sixth, empirical evidence matters, so it is important to build good evidence-gathering processes into any permissive regime. The results in the Quebec National Assembly and in Justice Smith and the Supreme Court of Canada's decisions in Carter turned in large part on the availability of reliable and reassuring evidence from other permissive regimes, in particular with respect to the impact of decriminalisation on vulnerable people. It is therefore important for all permissive regimes to maintain accurate, comprehensive, and transparent oversight systems to continue to provide the empirical foundation for law reform initiatives elsewhere.

Seventh, it is not necessary to restrict permissible assisted death to assisted suicide or terminal illness in order to appropriately circumscribe access. The Supreme Court of Canada's decision in *Carter* applies to both voluntary euthanasia and assisted suicide. The Quebec legislation permits voluntary euthanasia (termed 'medical aid in dying'). The criteria for access to voluntary euthanasia and assisted suicide in Justice Smith's decision in *Carter* and in Quebec's *An Act Respecting End-of-Life Care* do not include 'terminal illness'. This term has been rightly criticised in the literature[175], and the Supreme Court of Canada and the Quebec legislators wisely used other terminology and concepts to limit access to assisted death.

Eighth, some strategies that worked elsewhere could not be used in Canada (but might be workable elsewhere and so should not be forgotten). In Canada, we do not have the *European Convention for the Protection of Human Rights and Fundamental Freedoms* that provoked the prosecutorial charging guidelines in England and Wales so we could not motivate or launch any actions under that.[176] Except in British Columbia,[177] we also do not have the people's ballot initiatives process, unlike Oregon and Washington State, so we could not translate the 70-80+ per cent support among Canadians for decriminalising assisted death into statutory reform through that form of direct

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[173] Ibid [983]. Justice Smith concluded that 'additional principles of fundamental justice [overbreadth and gross disproportionality] have been recognized and defined since Rodriguez was decided.' The Supreme Court of Canada agreed with respect to overbreadth and did not opine on gross disproportionality (as not necessary to do so given their conclusion that the prohibitions are overbroad) [90].

[174] Ibid [994]. Justice Smith found that 'in my view Hutterian Brethren marks a substantive change [to section 1 analysis]…Courts are to widen their perspective at the final stage to take full account of the deleterious effects of the infringement on individuals or groups, and determine whether the benefits of the legislation are worth that cost.'

[175] See, for example, the RSC: end-of life decision making panel, 'The Panel recommends against using 'terminal illness' as a prerequisite for requesting assistance. The term is too vague…there is no precise science to providing a prognosis of a terminal illness in terms of a specific length of time…there are many individuals whose lives are no longer worth living to them who have not been diagnosed with a terminal illness…There is no principled basis for excluding them from assisted suicide of voluntary euthanasia.' The Royal Society of Canada Expert Panel, 'End-of-Life Decision Making' (Ottawa: RSC, 2011) 102-103 <http://rsc-src.ca/sites/default/files/pdf/RSCEndofLife Report2011_EN_Formatted_FINAL.pdf >.

[176] See earlier discussion under 'Guidelines for the exercise of prosecutorial discretion'.

[177] Elections BC, *Initiative* <http://www.elections.bc.ca/index.php/referendum-plebiscite-recall-initiative/initiative/>

democracy.[178] Furthermore, criminal law is federal in Canada (unlike in the United States where jurisdiction rests with the state) so we did not have the option of situating the criminal law reform theatre at the state (ie provincial/territorial) level. Others, however, may be able to pursue these pathways.

Finally, not only is a consultative, rigourous, evidence-based, non-partisan process of legislative reform possible (albeit hard work), it may even increase the chances of successful legislative reform. Quebec provides powerful evidence for this claim. In Quebec, the process of passing Bill 52, *An Act Respecting End-of-Life Care*, required over five years of cross-party work. It began in 2009 when the National Assembly responded to a discussion paper from the Collège Des Médecins Du Québec well as polls showing support for decriminalizing assisted death among general practitioners[179], specialist physicians[180], and the general public.[181] The National Assembly unanimously passed a motion to create the Select Committee on Dying with Dignity to study the issue of dying with dignity.[182] The all-party committee was chaired by Liberal MNA Geoff Kelley with opposition Parti Quebecois MNA Veronique Hivon as co-chair. The Select Committee engaged in extensive consultation across the province with a first stage focused on experts and a second phase on members of the public. They heard from 32 experts and received over 16 000 comments online.[183] The Committee made a trip to France to learn about the on-going debate there and to the Netherlands and Belgium to learn from those countries' experiences with assisted death legislation. The final March 2012 report, *Dying with Dignity*, made 24 recommendations, including that Quebec allow medically assisted death and increase accessibility to palliative care.

On June 12, 2013, Bill 52 was introduced to the National Assembly by then Minister Veronique Hivon and subsequently went through consideration by the Health and Social Services Committee which studied the Bill and made 57 amendments.[184] This amended Bill 52 was introduced to the National Assembly on February 11, 2014 but its progress stalled when a provincial election was called. After the election, though, on 22 May 2014, Bill 52 was reintroduced into the National Assembly in a motion adopted unanimously by all four provincial parties.[185] Remarkably, Veronique Hivon was included as a co-author of the Bill, along with Gaetan Barrette, the current minister of Health and Social Services, even though her political party, the Parti Quebecois, was

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[178] Dying With Dignity Canada, *Ipsos-Reid Survey 2014* (2014) <http://www.dyingwithdignity.ca/resources/first-release-poll-results>.

[179] Fédération des Médecins Omnipraticiens du Québec, *Press release 'The FMOQ Reveals the Results of its Consultation on Euthanasia* (29 October 2009), Quebec, 'Select Committee on Dying with Dignity Report' (Quebec City: National Assembly of Quebec, 2012) 11.

[180] Ibid.

[181] Catherine Handfield, *Les Québécois Favorables à l'euthanasie* (11 August 2009) <http://www.cyberpresse.ca/actualites/quebec-canada/sante/200908/10/01-891423-les-quebecois-favorables-a-leuthanasie.php>.

[182] Quebec, 'Select Committee on Dying with Dignity Report' (Quebec City: National Assembly of Quebec, 2012) 90 <www.assnat.qc.ca/en/actualites-sallepresse/nouvelle/Actualite-25939.html>

[183] Ibid 11.

[184] National Assembly of Quebec, *Commission De La Sante Et Des Services Sociaux: Etude Detaillee Du Projet De Loi No 52 – Loi Concernant Les Soins De Fin De Vie* (11 February 2014) <http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-52-40-1.html>.

[185] Jeff Heinrich, 'Bill 52: A Timeline', *The Montreal Gazette* (Montreal), 14 February 2014 <http://www.montrealgazette.com/health/Bill+timeline/9510618/story.html>.

no longer in power. On 5 June 2014, the Quebec National Assembly passed Bill 52 by a vote of 94 to 22.

V CONCLUSION

As the discussions of end of life law and policy reform continue around the world, the pathways followed by those who have already moved to permissive regimes lie before those who have not. Those who seek permissive law reform can, and should, take notice of what has (and has not) worked elsewhere as described above. In common law countries, change is possible. In fact, if the lessons are learned and advocates engaged, it may even be likely.

VI ADDENDUM

There have, of course, been significant developments in a number of the jurisdictions discussed in this paper since the paper was submitted. For example:

1) The Canadian Conservative government was defeated and the Liberal Party was elected. This new government sought a six-month extension on the suspension of the declaration of invalidity that had been issued by the Supreme Court of Canada in *Carter v Canada (Attorney General)* and was granted a four-month extension (equivalent to the suspension of activity caused by the election process). The Supreme Court of Canada also allowed for constitutional exemptions during the period of the extension to enable individuals who meet the *Carter* criteria to apply to a superior court for authorisation of physician-assisted death.[186]
2) California Governor Jerry Brown signed into law the *End of Life Option Act* to permit physician-assisted suicide.[187]
3) In New Zealand, Lecretia Seales was unsuccessful in her effort to challenge the prohibitions on assisted dying.[188] However, the New Zealand Health Select Committee is now holding an inquiry on the issue of assisted dying.[189]
4) The Assisted Suicide (Scotland) Bill was defeated.[190]
5) The United Kingdom Assisted Dying Bill was defeated.[191]

While these examples represent mixed results, the paper's conclusions remain sound: there are important lessons to be learned from efforts at law reform in jurisdictions around the world; and change is possible.

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[186] *Carter v Canada* (Attorney General) 2016 SCC 4 <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15696/index.do>. Federal legislation is expected to be in force by 6 June 2016.

[187] An Act to Add and Repeal Part 1.85 (commencing with Section 443) of Division 1 of the Health and Safety Code, Relating To End Of Life, AB-15, 2015 <https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520162AB15>.

[188] *Seales v Attorney-General* [2015] NZHC 1239.

[189] House of Representatives, *Petition of Hon Maryan Street and 8974 Others* (1 February 2016) New Zealand Parliament <http://www.parliament.nz/en-nz/pb/sc/make-submission/0SCHE_SCF_51DBHOH_PET63268_1/petition-of-hon-maryan-street-and-8974-others>.

[190] Assisted Suicide (Scotland) Bill 2013 (UK) <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/69604.aspx>.

[191] Assisted Dying (No 2) Bill 2015-16 (UK) <http://services.parliament.uk/bills/2015-16/assisteddyingno2.html>.