

**WHY NOT A LIMITED DEFENCE?  
A COMMENT ON THE PROPOSALS OF  
THE LAW REFORM COMMISSION OF CANADA  
ON MERCY-KILLING**

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**Introduction**

Should the law recognize as a defence the claim by one accused of murder that his act was a mercy-killing? Particularly when the victim was dying a prolonged, debilitating and agonizing death and had pleaded with her devoted husband of 51 years to "let me die!" — does justice require that the husband who inflicts painless, instantaneous death be condemned as a common murderer?

In a Florida courtroom last May, the law's response was an emphatic Yes. Roswell Gilbert, a 75-year-old retired engineer, was sentenced to life imprisonment after a Fort Lauderdale jury convicted him of first-degree murder for firing two bullets into his wife's temple as she lay on a sofa. Mrs. Gilbert had been suffering excruciating back pain caused by spinal degeneration, as well as progressive senility from the dreaded brain disorder, Alzheimer's disease. Her husband testified that he could think of no other way to end her misery.<sup>1</sup>

The unusual feature of the case, which was extensively reported by the media, is not that a mercy-killer was prosecuted for murder but that he was convicted as charged. The more typical verdict in comparable cases is that the jury either acquits or else finds the accused not guilty by reason of temporary insanity.

The latter result, for example, marked the jury's resolution of the widely publicized *Zygmank* case.<sup>2</sup> In 1973, Lester Zygmank was indicted for first-degree murder following the premeditated killing of his quadriplegic, 26-year-old brother, George. The accused, who was three years his junior, had carried a sawed-off shotgun into the intensive care unit of a New Jersey hospital and fired one shell into the back of his brother's head. The victim had been grievously injured three days before in a motorcycle accident and was permanently paralyzed from the neck down. He had begged his younger brother to kill him: "I want you to promise to kill me. I want you to swear to God."<sup>3</sup> The accused, who idolized his older brother, complied with his plea; and the jury in effect vindicated his act by its finding of temporary insanity.

Another common response to the mercy-killer is that the court orders probation after permitting a guilty plea to manslaughter. In fact, one such outcome was reported in the press within days of the *Gilbert* verdict. In

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1. *Winnipeg Free Press*, May 9, 1985 at 72; May 10, 1985, at 20.

2. *State v. Zygmank*, No. 1197-72 (Super. Ct., Monmouth County, N.J., Oct. 15, 1973).

3. P. Mitchell, *Act of Love* (1976) 18.

Maidstone, England, Norman and Janey Houghton were sentenced to two years probation for asphyxiating their 22-year-old quadriplegic son by covering his head with a plastic bag. Initially indicted for murder, they succeeded in negotiating a plea to the reduced charge.<sup>4</sup>

That the result in *Gilbert* is atypical is dramatically illustrated by the *Florian* case.<sup>5</sup> Both cases were not only presented in the same Fort Lauderdale courtroom but also their facts were remarkably similar. Mrs. Florian, 62, was confined to a nursing home as a sufferer from Alzheimer's disease. She was bedridden and would scream continually unless sedated. Her 79-year-old husband wheeled her into a stairwell, where he shot her in the brain. Although the accused readily admitted the homicide, the grand jury nonetheless refused to return an indictment, thereby terminating the proceedings.

Yet, whatever the outcome of the particular case, in all common law jurisdictions the mercy-killer theoretically stands defenceless before the bar of justice. Accordingly, under our *Criminal Code*, the factor that distinguishes his case from all other intentional killings — compassion for the victim — is legally irrelevant. According to the accepted wisdom, the reason is that the criminal law has traditionally discounted motive as the basis of a defence to a charge of murder. As explained by the Law Reform Commission of Canada:

... Canadian criminal law does not take into account the motive of the person who commits homicide. Only the fact that he did or did not mean to cause death is considered relevant. The motive behind this intention is of little significance from the legal point of view.<sup>6</sup>

Thus, if the accused has purposely killed his victim, it matters not whether his motive (the reason why he committed the crime) was grounded in greed, anger, jealousy, or revenge — or that it was prompted by compassion, empathy, and love. The stark fact that the killing was intentional is sufficient to convict for murder. (The accepted wisdom also has it that the principle is of general application and hence not restricted to homicide. As the Supreme Court stated in *Lewis*: "Motive is no part of the crime and is legally irrelevant to criminal responsibility. It is not an essential element of the prosecution's case as matter of law."<sup>7</sup>)

### Motive

With due deference to the Law Reform Commission, its assertion that the Canadian jurisprudence on homicide ignores motive is mistaken. Consider the defence of self-defence to a charge of murder, as defined in subsection 34(2) of the *Criminal Code*. An accused who so pleads does not contest the *mens rea* element of the offence. After all, if he shot the deceased between the eyes, it would be absurd to deny his intention to kill. Rather,

4. Canadian Press Wire Service, May 14, 1985.

5. *Toronto Globe and Mail*, April 2, 1983, at 13.

6. Law Reform Commission of Canada, Working Paper 28, *Euthanasia, Aiding Suicide and Cessation of Treatment* (1982) 48.

7. *Lewis v. The Queen* (1977), 47 C.C.C. (2d) 24, at 35 (S.C.C.) (referring to the judgment in *R v. Barbour*, [1938] S.C.R. 465, [1939] 1 D.L.R. 65, 71 C.C.C. 1.)

his defence is that, although he admittedly intended his lethal act, he committed justifiable homicide because his reason for killing (his motive) was to defend his own life against an unlawful aggressor. Unlike the previously enumerated base motives, such explanation provides a defence for an accused who killed with the requisite *mens rea* for murder. In other words, self-defence is a plea grounded in motive, and its existence belies the claim that “[o]nly the fact that [the accused] did or did not mean to cause death is considered relevant.”<sup>8</sup>

Aside from self-defence, our jurisprudence has recognized an additional defence to murder that arises from motive. In *Paquette*,<sup>9</sup> the Supreme Court held that the common law defence of duress is available to one charged as an accomplice to murder. At gunpoint, the accused had been forced to drive two men to a store for the purpose of robbery. While he remained in his vehicle under threat of harm, they committed the robbery and in the process slew a bystander. Although section 17, the duress provision in the *Criminal Code*, exempts its application to a charge of murder, Martland J. ruled for the full court that such restriction was inapplicable to the case at bar. The reason was that the statute is directed at “a person who commits an offence” — the perpetrator — and thus does not bind an accused whose alleged criminal responsibility rests as a party under section 21.

In the result, the court ruled that the common law defence could be pleaded by one charged as a party to constructive murder by virtue of the common intention proviso under subsection 21(2). The court was led to that conclusion by the decision the previous year of the House of Lords in *Lynch*,<sup>10</sup> in which their Lordships had accepted that, at common law, duress was a permissible defence to a charge of aiding and abetting murder. In approving *Lynch*, Martland J. reasoned that, if appropriate for an aider and abettor (whose liability is defined by subsection 21(1)(b)), the defence should likewise apply to one whose liability is found under subsection 21(2).<sup>11</sup>

Unfortunately, the court ran aground when it chose to rule, as an independent reason for judgment, that the requisite “common intention” was lacking. In holding that the threat had nullified such intention, the court expressly overruled its decision in *Dunbar*,<sup>12</sup> a 1936 case in which the facts were materially the same as in *Paquette*. In *Dunbar*, the Supreme Court had ruled that threats had not negated the operation of subsection 21(2) against the accused. That is, the fact of duress established the motive for an intentional act; and, as his motive was legally irrelevant, the accused was rightfully convicted of murder.<sup>13</sup>

It would appear, however, that it is the overruled judgment that is conceptually sound, and that the court in *Paquette* erred by failing to grasp

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8. *Supra* n. 6.

9. *R. v. Paquette* (1976), 30 C.C.C. (2d) 417 (S.C.C.).

10. *Director of Public Prosecutions for Northern Ireland v. Lynch*, [1975] A.C. 653.

11. *Supra* n. 9, at 423.

12. *Dunbar v. The King*, [1936] 4 D.L.R. 737 (S.C.C.).

13. *Ibid.*, at 744.

the distinction between motive and *mens rea*. Its perspective contrasts sharply with that of the House of Lords in *Lynch*. As the latter reasoned, an unwilling act performed under duress is still an intentional act. What the defence addresses is the accused's motive for intentionally committing the act.<sup>14</sup>

Motive also provides the basis for necessity, a common law defence that is conceptually related to duress. In *Perka*,<sup>15</sup> a 1984 landmark decision by the Supreme Court, Dickson J. (as he then was) refined the jurisprudential underpinning of the necessity defence that he had initially formulated in *Morgentaler*.<sup>16</sup> The several accused were charged with importation of marijuana and its possession for the purpose of trafficking. Their drug-laden vessel, which was bound for Alaskan waters, took refuge in a sheltered cove on the British Columbia coast. Their unscheduled landing was occasioned by mechanical problems aggravated by deteriorating weather. In the result, the court rejected the Crown's contention that the trial judge had erred in leaving the defence of necessity with the jury.

Briefly put, Dickson J. held that the defence was available in emergency situations when there was no reasonable alternative to breaking the law. However, he was prompt to qualify the principle by tacking on a requirement of proportionality: that the harm averted must outweigh the harm inflicted. In other words, necessity cannot excuse the imposition of a greater evil so as to permit the accused to escape a lesser evil.

Dickson J. was clearly mindful of the fact that the common law has traditionally cast a wary eye at the claim that necessitous circumstances should ever excuse criminal conduct. On the other hand, as he conceded in *Perka*, a liberal and humane system of criminal justice cannot demand rigid compliance with the letter of the law when an emergency arises such that "normal human instincts, whether of self-preservation or altruism, overwhelmingly impel disobedience."<sup>17</sup> But, as he warned, the defence must be "strictly controlled and scrupulously limited to situations that correspond to its underlying *rationale*."<sup>18</sup>

Thus, an accused who acted with *mens rea* may nonetheless plead that his motive was in accordance with the parameters of the necessity defence as outlined in *Perka*.<sup>19</sup> Of course, the granting of necessity as a defence to narcotics offences does not necessarily imply that the same defence should also be available for mercy-killing. The reason is that, although the defence

14. *Supra* n. 10, at 690. That duress addresses motive, not *mens rea*, is illustrated by *R. v. Smith* (1977), 40 C.R.N.S. 390 (B.C.Prov.Ct.). The accused was charged with impaired driving, and the nature of the charge was such as to preclude a denial of *mens rea*. The accused pleaded duress, and the court acquitted because she had been threatened with bodily harm by her enraged husband and had fled in her automobile to escape his wrath. In accepting the defence, the court in effect recognized that it was the motive behind the act that forged its legal excuse.

15. *Perka v. The Queen* (1984), 14 C.C.C. (3d) 385 (S.C.C.).

16. *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616.

17. *Supra* n. 15, at 398.

18. *Ibid.*, at 399.

19. That the defence of necessity does not address *mens rea* is illustrated by *R. v. Fry* (1977), 36 C.C.C. (2d) 396 (Sask.Prov.Ct.). The accused was charged with dangerous driving (speeding), traditionally an offence of strict liability. His defence was that he was forced to break the speed limit because he was being "tailed" by a truck driver. In the result, he was acquitted. As the court explained, "an extremity of circumstance can arise where a choice is made, that is, forced to be made . . . to flee by speed an actual present danger thrust upon him, or to suffer its continuance with its fearsome potential." [36 C.C.C. (2d) 398.] Although the court did not specifically refer to motive, the case can only be explained on that ground.

is grounded in the philosophy of utilitarianism, it is nonetheless assumed that it cannot excuse the deliberate killing of a defenceless person. As Glanville Williams explains:

We do regard the right to life as almost a supreme value, and it is very unlikely that anyone would be held to be justified in killing for any purpose except the saving of other life, or perhaps the saving of great pain or distress. Our revulsion against a deliberate killing is so strong that we are loth to consider utilitarian reasons for it.<sup>20</sup>

William's comment admittedly suggests a mercy-killing defence. However, it is submitted that our society's professed commitment to the sanctity-of-human-life principle renders it doubtful that the law would accept a mercy-killer's plea that his deed was necessary to spare the victim 'great pain or distress'. In other words, it is highly unlikely that the strict formulation announced in *Perka* endows the mercy-killer with a viable defence. This is not to infer a categorical rejection of the defence. Consider the following scenario. A small airplane crash-lands in a field and bursts into flames, trapping the pilot. A deer hunter is at the crash site moments later but cannot attempt rescue because of the intense heat. The horrified realization that the struggling pilot is doomed to be roasted alive impels him to an act of compassion and mercy. He aims his rifle and shoots the pilot dead moments before his body is consumed in flames. Granted that he has intentionally committed the *actus reus* of murder, as the victim's imminent death does not sever his causal responsibility for the death of a defenceless person. Yet, it is inconceivable that the law as proclaimed in *Perka* would fail to excuse the deer hunter's deliberate taking of an innocent human life. Absent such extreme circumstances, however, our jurisprudence is clearly not prepared to recognize necessity as a defence for the general run of mercy-killers who stand in the dock.

It should now be evident that the Supreme Court's assessment of motive in *Lewis* is unwarranted. It is true that "[motive] is not an essential element of the prosecution's case as a matter of law."<sup>21</sup> But, this simply means that the Crown's burden is to prove the constituent elements of the particular offence: the *actus reus*, causation and *mens rea*. If there is a motive-based defence, the accused — not the prosecution — has the onus to raise it. When the court in *Lewis* remarked that motive "is legally irrelevant to criminal responsibility", it obviously spoke with too broad a brush.<sup>21a</sup> When motive grounds a defence, it is clearly legally relevant precisely because it addresses the very question of criminal responsibility.<sup>22</sup>

In conclusion, the common bond that links self-defence, duress, and necessity is that they are all motive-based, pressure-cooker defences. In each instance, the accused has reacted to extreme stress by committing the

20. Williams, *Textbook of Criminal Law* (1978) 559.

21. *Supra* n. 7.

21a. *Ibid.*

22. This analysis also applies to entrapment. According to Laskin C.J.C., who developed the common law test in Canada, it arises when an accused commits certain offences as the result of 'calculated inveigling and persistent importuning' by an enforcement agency operative. Thus, for example, an accused pleading entrapment, who is charged with trafficking in drugs, does not deny *mens rea*. His argument, simply put, is that entrapment explains his reason (or motive) for intentionally trafficking. See *R v. Ormerod*, [1969] 4 C.C.C. 3 (Ont. C.A.) for the decision by Laskin J.A. (as he then was).

*actus reus* of the particular offence with the requisite mental element. Even so, the law's response is absolution from criminal responsibility. Clearly, the social policy underlying this response is the moral judgment that, under certain circumstances, the motive behind the offence may oblige the law to stay its punitive hand.

### Policy

It should now be obvious that the proverbial straw man is an apt metaphor with which to adorn the argument that mercy-killing is murder because the criminal law ignores motive. In its 1982 working paper, *Euthanasia, Aiding Suicide, and Cessation of Treatment*, the Law Reform Commission of Canada drew upon that article of faith as part of its case in favor of the status quo on mercy-killing.<sup>23</sup> Yet, the argument from motive goes beyond that, as illustrated by the pragmatic objection presented by the Commission to buttress its position. Although it did not deny that authentic compassionate killings happen, it expressed doubt whether such "clear-cut cases" are readily distinguishable from those "in which the purity and disinterested nature of the motive are far less evident."<sup>24</sup> Its reasoning was that:

The infliction of death may be inspired by infinitely more complex and mixed motives. For example, there may be a degree of compassion, but also a desire to put an end to a psychologically and physically difficult and exhausting period for oneself. How can the complexity of human motivation be determined by others with certainty, or even with probability?<sup>25</sup>

Scepticism and caution are without quarrel the appropriate responses to a mercy-killing claim. But, when one peruses the cases in which judges and juries have rendered compassionate judgments and verdicts for those pleading compassionate murder, the evidence suggests that the Commission's concern is exaggerated. Consider, for example, Paige Mitchell's book, *Act of Love*,<sup>26</sup> an engrossing account of the *Zygmank* case. The reader comes away satisfied beyond doubt that, when Lester Zygmank killed his quadriplegic brother, his was an act of selfless devotion, love, and compassion. In that sense, *Zygmank* typifies the kind of mercy-killing case that produces a compassionate courtroom response. In short, the historical record supports the proposition that our fact-finders are fully competent to assess motive.

It should be recorded that the Law Reform Commission later tempered its pragmatic objection to a compassionate motive defence. In its 1983 report, *Euthanasia, Aiding Suicide and Cessation of Treatment* (its follow-up to the 1982 working paper), it noted that some respondents to the previous year's document had argued the impossibility of determining the 'purity' of motives in mercy-killing cases. As it replied:

The Commission does not necessarily agree. It believes, and current criminal law in fact bears this out, that it is indeed legally possible, though difficult, to prove the motive behind an accused's act.<sup>27</sup>

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23. *Supra* n. 6.

24. *Ibid.*, at 50.

25. *Ibid.*, at 50-51.

26. *Supra* n. 3.

27. Law Reform Commission of Canada, Report 20, *Report on Euthanasia, Aiding Suicide and Cessation of Treatment* (1983) 19.

This cautious concession did not, however, affect its position, for in its next breath the Commission endorsed a do-nothing policy. Its brief remarks to that effect are summed up by its sympathetic reference to the argument that law reform would "amount to accepting a devaluation of human life."<sup>28</sup> A considered look at this statement is appropriate, as it is likely that herein lies the reason why the letter of the law had adopted a stance of persistent insensitivity to the mercy-killer's plight.

It is submitted that our social policy is frozen because we as a community dread the symbolism that might cling to the total, or even partial, decriminalization of compassionate homicide. Bear in mind that one of the vital strands that weaves the social fabric is our professed allegiance to the sanctity-of-human-life principle. The depth of that commitment is no doubt exaggerated and no doubt contains some portion of lip service. Yet, the belief and faith in its living presence is part of the mythology that grounds our sanity and societal self-respect. For if Parliament were to grant a mercy-killing defence, it would in essence authorize accused murderers to plead that the lives they extinguished were not worth living. And that is a concession that our society cannot psychologically afford to adopt. After all, an ever present feature of the human condition is that we and our loved ones suffer and die; but, unlike our ancestors, we generally get older before dying because the diseases that kill us are not contagious but degenerative. The grim fact of life in the age of medical miracles is that dying is by inches, and that we cannot in good faith write off the dead until they are dead. Mercy-killing exposes a raw nerve because we are all potential candidates for degenerative decline; and in that sense our denunciation of the crime is a weapon of self-defence that springs from our instinct for survival.

Admittedly, the common law (particularly in the United States) has begun to confront the perplexing questions that address the termination of medical treatment in hopeless cases. But the terms of reference are the attending physicians and the efforts to formulate guidelines under which medical personnel can hasten natural death by the cessation of treatment.<sup>29</sup> Whatever public policy emerges in this regard bears no kinship with *ad hoc* killings by those who believe, however sincerely, that their victims are better off dead.

Furthermore, it matters not that the mercy-killer may well have been prompted to act by the victim's insistence. The reason is that the sanctity-of-human-life principle stipulates that no one is empowered to authorize another to serve as his legal executioner (a principle enshrined in section 14 of the *Criminal Code*: "No person is entitled to consent to have death inflicted upon him."). This aspect of the principle is also invoked in response to proposals to legalize voluntary euthanasia — the enactment of a statute authorizing a terminally ill person to request that a physician provide him with a quick, painless death by lethal injection. In other words, the design

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28. *Ibid.*

29. Although literally dozens of American courts have considered such questions, beginning with the widely publicized case of Karen Quinlan [*In the Matter of Karen Quinlan* 355 A. 2d 647 (N.J.S.C. 1976)], Canadian jurisprudence has yet to enter the fray.

is to cast the physician in the role of legally sanctioned mercy-killer. In its 1982 working paper, the Law Reform Commission categorically repudiated the proposal as contrary to "a well established tradition based on time-honoured morality."<sup>30</sup>

The Commission in this context also made reference to Nazi Germany's so-called Euthanasia Programme, thereby summoning the spectre that haunts the euthanasia debate — regardless of whether the mercy-killer is a physician cloaked with legal immunity, or a lay person who takes the law into his own hands. Although it commented that "important historical lessons" emerged from that experience, it did not elaborate.<sup>31</sup> The sentiment can surely not be gainsaid. In 1939, Adolph Hitler issued a decree which he titled the 'Order for the Destruction of Lives Which are Unworthy of Being Lived'. Its implementation produced the extermination of some 100,000 German citizens. The initial victims were institutionalized mental patients, and its web was later expanded to swallow up patients who were senile, tubercular, and afflicted with birth defects.<sup>32</sup> Those who were killed were written off by Hitler as 'useless eaters', a phrase that captures the spirit of this exercise in mass murder. The Nazis excelled in the use of euphemisms;<sup>33</sup> and it is regrettable that the question of euthanasia is warped by reference to a policy that had nothing to do with mercy and compassion and everything to do with the diabolical ideology of Hitler and his Third Reich.<sup>34</sup>

Nonetheless, the term itself — euthanasia — has been irrevocably tainted by its appropriation by the Nazis. The proponent of either legalized voluntary euthanasia or a compassionate motive defence for the mercy-killer is inevitably met by a recitation on the fiendish outcome of Hitler's decree. And that history lesson is bound to be accompanied by invocation of the so-called slippery slope argument: that we dare not bend the law today because the likely, if not certain, result somewhere down the road is an Orwellian nightmare. The argument may merit commendation as a rhetorical flourish but is of doubtful relevance for contemporary Canadian society. It stands nevertheless as a forceful expression of a social policy that comes wrapped in mystique and that obliges the letter of the law to brand the mercy-killer with the mark of Cain, because to do otherwise would undermine the principle that all human life, however debilitated in particular cases, is sacred.

It is arguable that it is enough that the mercy-killer's crime is denounced as murder to satisfy the principle. The sanctity-of-human-life principle assuredly does not stipulate that compassionate motive cannot be considered in mitigation of punishment. In fact, would not its proponents betray its

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30. *Supra* n. 6.

31. *Ibid.*, at 44.

32. R. Waite, *The Psychopathic God: Adolph Hitler* (1977) 414.

33. History certainly records 'The Final Solution of the Jewish Question' as its most egregious euphemism.

34. What captures the essence of the Euthanasia Programme is that the petty bureaucrats who administered it were selected in 1941 to staff the Einsatzgruppen, the killing squads on the Eastern Front, who zealously carried out their Fuhrer's order to murder in excess of one million 'Jews, gypsies, racial inferiors, asocials, and Soviet political commissars.' See G. Sereny, *Into That Darkness: From Mercy Killing to Mass Murder* (1974) 96.



very essence — its humanitarian ethic — by insisting that the sentencing process regard the mercy-killer no differently from the general run of convicted murderers? Nevertheless, in its 1982 working paper, the Law Reform Commission advised that compassionate motive not mitigate punishment, even though it surmised that public opinion would not accept that mercy-killers should be sentenced as severely as those “killing out of vengeance or greed.”<sup>35</sup> In its 1983 report, it reiterated that position, recommending that “mercy-killing should not be treated as a separate or included offence, nor entail as of right a reduction of sentence.”<sup>36</sup>

It should be noted, however, that this hard line policy was not intended as its final word on the subject, as the Commission during this period was in the process of reviewing the *Criminal Code* provisions on homicide. Its viewpoint on mercy-killing thus represented an interim position, pending its overall assessment of Canadian homicide law.<sup>37</sup> Accordingly, in its 1984 working paper, *Homicide*, the Commission addressed the question of mercy-killing within the context of homicide law generally.<sup>37a</sup>

In that document, the Commission decried the mandatory minimum sentencing provisos in the *Criminal Code* for both degrees of murder. It recommended that such inflexibility be confined to its redefinition of first-degree murder, which it restricted to categories of killing involving the “deliberate subordination of the victim’s life to [the murderer’s] own purpose.”<sup>38</sup> It relegated mercy-killing to the status of second-degree murder, which it defined as homicide that failed to exhibit the “contempt for life” that marked its subtypes of first-degree murder.<sup>39</sup> Second-degree murder would carry no mandatory minimum penalty, thereby enabling the court to exercise the degree of latitude in sentencing that is particularly appropriate in cases of compassionate homicide.

While the Commission cannot be faulted for its manner of resolution of the mercy-killing dilemma, it must be understood that its proposal was offered in the context of a far-ranging law reform package. Failing a general overhaul of the law on homicide, the Commission would presumably revert back to the posture adopted in its 1983 report.

In any event, the Commission perceives the *status quo* as the best of both worlds. The steadfast refusal to recognize a euthanasia defence enables society’s commitment to the sanctity-of-human-life principle to remain unswayed. At the same time, the legal system contains escape hatches that offer the mercy-killer the hope of redemption. As the Commission reminds us,<sup>40</sup> there are three such internal regulating mechanisms: (1) the Crown’s discretion to lay a reduced charge; (2) the trial judge’s authority to accept a guilty plea to a lesser offence (invariably manslaughter); and (3) the

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35. *Supra* n. 6, at 50.

36. *Supra* n. 27.

37. *Supra* n. 6, at 49.

37a. Law Reform Commission of Canada, Working Paper 33, *Homicide* (1984) 81.

38. *Ibid.*

39. *Ibid.*, at 82.

40. *Supra* n. 6, at 51-2.

jury's inherent power to acquit on compassionate grounds, even if instructed that the accused has no defence in law (or to render insanity or manslaughter verdicts). In other words, the mercy that the sanctimonious face of the law denies the mercy-killer remains an option that can be exercised by the Crown, trial judge, or jury.

### Resolution

The question is whether this Janus-faced policy is truly necessary in order for the law to have it both ways. It is submitted that there is another path, one that bypasses the hypocrisy of the current policy and still accomplishes the same goals. That alternative is to treat compassionately motivated homicide as a limited defence, which leads not to outright acquittal but rather conviction for manslaughter.

In defining the defence of provocation, Parliament has already set the precedent for such a limited defence by one who has intentionally slain his victim. Section 215 of the *Criminal Code* enables an accused, who exploded in murderous rage after being assaulted or merely insulted, to plead his entitlement to a manslaughter verdict because he killed in hot blood. Unlike the mercy-killer who in effect slays in cold blood, one who satisfies the requirements of section 215 has killed in what is describable as a state of situational diminished capacity. The mental state of the mercy-killer is usually sufficient to constitute the *mens rea* for first-degree murder, in that his act is generally a product of planning and deliberation. Although the mental state in provocation lacks that element, it is yet sufficient to establish the *mens rea* for second-degree murder. The reason is that he who is provoked into a murderous rage nonetheless intends to kill or inflict grievous bodily harm. After all, since provocation is a defence to murder, it only applies to an accused who otherwise has the requisite *mens rea* for murder. If he did not, that would surely obviate the utility of the defence.

Furthermore, provocation as a defence contains a motivational component. If mercy and compassion describe the forces that drive the mercy-killer, then anger and rage define the triggering mechanism that impels a provoked killing. Thus, in a sense, it is murderous rage that is the motive for the accused who is provoked to kill.<sup>41</sup> Of course, the law's *rationale* is that what motivated the provoked killing is in itself evidence that the accused was not quite in his right mind. For example, the courts have resorted to such phrases as "heat of blood", "ungovernable passion", and "dethronement of reason" to describe the accused's mental state.<sup>42</sup> But such language does not necessarily imply that the accused was acting out of character. Since only an infinitesimal fraction of assaults and insults provoke lethal retaliation, it is likely that the act cannot be understood without reference to the psychological make-up of the particular accused.

Still, the law defines his crime as manslaughter, whereas the mercy-killer's deed is murder. Since our *Criminal Code* is not only a political

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41. As Glanville Williams explains: "One who kills in a rage does what he wants to do in those circumstances, just as much as the calculating robber does. There is a difference in his emotional state, in his *motivation*, and in the degree of reflection . . ." (Emphasis Added). *Supra* n. 20, at 480.

42. *Ibid.*

document but also an ordering of moral culpability, such differential treatment can only signify that society regards the mercy-killer as more blameworthy than the provoked killer. However, the fact that guilty verdicts and maximum sentences are very rarely handed down in mercy-killing cases would appear to belie that assumption.<sup>43</sup> In any case, how does one quantify moral guilt as between the provoked killer and the mercy-killer? On the one hand, the law regards the latter's *mens rea* as more culpable than that of the former. Granted that the mercy-killer reacts to heightened stress and emotional agony, he is yet able to reason through his situation and act in a calculating fashion, whereas the provoked killer has precious little time for reflection and acts, if you will, on the spur of the moment. On the other hand, the mercy-killer's motivation is grounded in altruism, while the provoked killer acts from base motives. Although *mens rea* and motive are no more fungible than apples and oranges, it is submitted that no moral calculus would assign a greater degree of blameworthiness to the mercy-killer than to the killer acting out his murderous rage.<sup>44</sup> In other words, if the latter is granted a limited defence, reasoned moral judgment dictates that it not be withheld from the former.

Furthermore, as a tactical measure, the enactment of a limited euthanasia defence is more feasible than the implementation of the Law Reform Commission's proposal, which would entail a thorough revamping of the law on homicide. In contrast, the limited defence can be injected into the *Criminal Code* without any ripple effect.

As a tactical matter, what also counts is not the label that goes with the crime but rather the sentencing options at the court's disposal. In that sense, the proposal is an expression of the tail-wagging-the-dog philosophy. That is, the special attraction to manslaughter is that it carries no mandatory penalty.

In the result, the enactment of the suggested limited defence would promote the resolution of mercy-killing cases in accordance with — and not in spite of — the law. Should compassion for the accused dictate a merciful judgment, there would be no necessity to flout the law to achieve it. An approach that prefers honesty to hypocrisy would surely commend itself to Justice Oliver Wendell Holmes. As he once wrote, "the law must keep its promises"<sup>45</sup> — which is another way of expressing the principle that the law should mean what it says.

Finally, the adoption of a limited defence for mercy-killers would truly serve the best of both worlds. As noted, it would enable the court to temper

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43. *Gilbert* is apparently the first mercy-killing case since 1943 in which the accused was convicted of first-degree murder. According to *Time Magazine*, courtroom observers thought that the accused damaged his case by his stoic demeanor and calm description of the shooting. The jury was also apparently influenced by the fact that Gilbert fired two bullets into his wife's head. One juror was reported as commenting that the second proved premeditation, and the others presumably agreed. See *Time*, May 27, 1985, at 66-7.

44. A first-year law student would be quick to point out that the provoked killer must also pass an objective test: that an 'ordinary person' found in his situation would have acted as he did. Thus, the mere fact that the accused was provoked is necessary but not sufficient to establish the defence. Given the absurd fiction that an 'ordinary person' is ever provoked to commit an act that is otherwise murder, it is likely that the accused would fail the objective test only when the act that provoked him was of a generally trifling nature. In any event, the principle still stands that one who kills a defenceless person in a murderous rage is entitled to rely upon the defence of provocation.

45. *The Holmes-Laski Letters* (1953) 806.

justice with mercy when passing sentence. Yet, in the process, the verdict would reaffirm the principle that, however altruistic his motives, no person has the legal right to play God by committing an act of euthanasia.