Latimer, Davis, and *Doerksen*: Mercy Killing and Assisted Suicide on the Op. Ed. Page

BARNEY SNEIDERMAN*

FORWARD**

THE TRIAL OF ROBERT LATIMER for the second degree murder of his disabled daughter has touched off a national debate, one that focuses on the very essence of morality and justice, of crime and punishment.

The media, of course, plays an important role in this debate, not only through the reporting of the trial but by also providing Canadians with a forum to continue discussing the nature of Mr. Latimer's crime and the law under which he was tried and punished. It is through debate and discussion of this kind that we can gain a better understanding of the law—whether it truly reflects our values and if it should be changed.

Barney Sneiderman, Professor of Law at the University of Manitoba, contributed to this debate by writing a series of articles for the *Winnipeg Free Press* including two explored some of the underlying issues in the *Latimer* case. Not only did he raise questions about the efficacy of minimum sentence provisions contained in the *Criminal Code of Canada*, he also offered a potential solution by suggesting the creation of a presumptive sentencing model for murder. Under this model, a convicted person could petition the court for a special hearing to determine whether the circumstances of the case warranted a sentence less than the minimum.

Professor Sneiderman's most important contribution, however, was not in offering legal arguments, but in his search for perspective and understanding of the human dimension inherent in all cases of mercy killing or assisted suicide. One example of this quest can be found in a recent article concerning the case

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Editor's Note: While Professor Sneiderman's articles appear as they did in the *Winnipeg Free Press*, footnotes have been added to assist the reader.

** By Brian Cole, Editor—Editorial Page, *Winnipeg Free Press*.

of Bert Doerksen, the 79-year-old Winnipeg man who is alleged to have helped his wife commit suicide.

Another example can be found in an earlier article published in the *Free Press* concerning the 1942 case of George Herbert Davis, a 68-year-old pensioner who killed his wife with an axe because he could no longer stand to see her suffer from her numerous disabilities. The story tells of how a group of ordinary Manitoba citizens, faced with a clear case of murder, wrestled with the larger questions of morality and justice and ended up returning a verdict of not guilty on compassionate grounds. This is an important story, not only because it shows us that questions concerning mercy killing and assisted suicide are not new, but because it reminds us that court cases are not simply about law, they are also about justice. Here is a compilation of Professor Sneiderman's articles published earlier this year and last in the *Free Press*.

Brian Cole
Editor—Editorial Page
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A Fitting Punishment

Winnipeg Free Press (9 June 1997)

An object most sublime. I shall achieve in time to make the punishment fit the crime.
—Gilbert and Sullivan, *The Mikado*

WHAT INDEED IS THE PUNISHMENT to fit the crime of Robert Latimer? In a case that attracted nation-wide attention, Latimer, a Saskatchewan farmer, asphyxiated his severely physically and mentally disabled 12-year-old daughter by venting exhaust fumes from his pickup truck's tail pipe into the cab where he had placed her. Convicted by the jury of second-degree murder, he received the mandatory minimum sentence for that offence—life imprisonment with no eligibility for parole for ten years. The Supreme Court of Canada, however, recently overturned the conviction because of prosecutorial misconduct by the Crown attorney, and the new trial is scheduled for this October.

Although the sentence prompted a nation-wide outpouring of sympathy for Latimer, many disabled Canadians (and advocates for the disabled) have lauded

the punishment as befitting the crime. In their view, murder is murder, and whether the victim was disabled or not is beside the point. The case has struck a raw nerve among the disabled, who have interpreted calls for mercy for a so-called mercy killer as a message that calls into question the very worth of their lives. What they are saying is that—regardless of what prompted her father to the deed—if the punishment can be discounted because Tracy Latimer was disabled, it means that her life (and theirs by extension) was of lesser value than if she had been physically and mentally intact.

They thus applaud the original verdict and sentence as standing for the principle that, whatever the degree of handicap, the lives of all Canadians stand on equal footing. Beyond that, it is also contended that to hold otherwise would put the very lives of the disabled in jeopardy—that if Robert Latimer "could get away with murder" it would encourage other caregivers of the disabled to resort to the same means to relieve themselves of the burden of caring. Many of the disabled are no doubt haunted by the fear that the second trial will be resolved either by a guilty plea to manslaughter (with a lighter sentence than the minimum ten years), or that the jury will acquit. In fact, most so-called mercy killing cases are resolved by pleas to manslaughter or jury acquittals. In that sense, the most unusual feature of the *Latimer* case is that he was convicted of murder.

If convicted at his second trial, it is likely that Latimer will again be sentenced to life imprisonment with no parole eligibility for ten years. Would such a punishment fit the crime? In order to resolve that question, one must place the *Latimer* case within the parameters of the principles of sentencing that have been laid down by our courts. There has to be a rationale behind every sentence, and in Latimer's case two such principles are implicated.

First, there is general deterrence—the expectation that by punishing the offender, others will be deterred from following in his footsteps. The philosophy of general deterrence was nicely put by a 19th century English judge who in sentencing a sheep stealer to death advised him: "[w]e hang you not because you have stolen sheep but to discourage others from stealing sheep." General deterrence thus rests on the morally dubious premise of punishing someone to set an example for others.

There is, however, precious little evidence of the general deterrent effect of punishment, keeping in mind the adage that it is the certainty, not the severity, of punishment that deters. In any case, there is no credible indication that severe penalties deter the commission of crimes of violence.

Still, it is argued that deterrence justifies at the very least a minimum 10-year sentence for Robert Latimer. According to the lawyer for a Winnipeg disability rights organisation, if his conviction and sentence do not stand, then "every disabled person who was perceived to be living a miserable existence would be at risk. Such persons would be put to the ongoing obligation literally to justify their existence." This is the spectre of the floodgate scenario—that if

the line is not held in the *Latimer* case, the dam will burst to release the murderous impulses of those caring for the disabled.

It is thus assumed that there are parents and other caregivers who would be tempted to kill their disabled dependants under the cloak of compassion if Latimer is not sentenced to long-term imprisonment. Yet, even if such persons harbour homicidal impulses, wouldn't they know that a so-called mercy killing is defined as murder and that, whatever the outcome of Latimer's second trial, there is no guarantee that they would likewise escape the full rigour of the law? Or is one to suppose that they would be so inspired to kill if Latimer were not subject to lengthy imprisonment that they would act without contemplating the consequences?

I am frankly led to the conclusion that the slippery slope argument rests upon mere speculation, and that in any event it belies the historical experience that penal sanctions exert little if any deterrent impact upon murder and other acts of violence. It is also my view that where the slippery slope is truly found is in the cutbacks in health care and social services for people with disabilities and their families—that if anything, it is not the *Latimer* case but rather official neglect that could imperil the lives of the disabled.

So much then for general deterrence. And that leaves us with retribution (or just deserts), which according to contemporary penal theory is the most legitimate and just goal of punishment. It centres exclusively on the offender and the objective is to impose the punishment that is deserved; because he has harmed society, he must receive a penalty that seeks to redress the imbalance caused by his crime.

If Latimer had killed his daughter out of contempt for her life as a disabled person, then the law would be right to impose a lengthy sentence. But that is not why he killed her; he killed her out of compassion and heartbreak for the pain and suffering that flowed from her disability. This is not to excuse his act. But it is enough to question whether a 10-year minimum sentence is deserved.

A recent case that attracted nation-wide attention was that of a New Brunswick married couple named Turner, who were convicted of the manslaughter crime of criminal negligence causing death. The victim was their three-year-old son who was subjected to the most unspeakable physical and emotional abuse. His last days were spent bound to a bed in a darkened room, gagged with a sock to stifle his cries. The pathologist found his stomach lined with black scars of numerous hemorrhages that were likely caused by repeated bouts of crying. It was said that he died not only from physical abuse but also from emotional dwarfism, that the abuse caused him to wither away and die.

In affirming the 16-year sentence, the Court of Appeal said it was a fit and reasonable punishment for a horrendous crime. But aside from murder, an incarcerated offender is eligible for parole after serving one-third of the sentence. Thus, the Turners are eligible for parole after five years, four months.

If space permitted, I could enumerate numerous other cases of atrocious crimes short of murder—including crimes of sexual assault against children and adults that might have shocked the Marquis de Sade—in which the time of parole eligibility is less than that which Latimer will receive if once again convicted of second-degree murder.

Nevertheless, when Latimer was convicted of second-degree murder, the trial judge was obliged to sentence him to life imprisonment with parole eligibility set somewhere between 10 and 25 years. Thus, by decreeing that everyone convicted of second-degree murder must serve at least ten years, the law severely limits the extent to which the sentencing judge can consider mitigating circumstances in weighing the accountability of the offender. In other words, Parliament has decreed that for murder, the punishment must fit the crime alone, with scant attention paid to the offender himself and the circumstances under which he acted. Yet, how can one assign the fitting punishment for a crime by focusing solely upon the label that the law attaches to the act itself? Aside from murder, *Criminal Code* offences carry considerable sentencing ranges, for example: kidnapping, maximum ten years (but no minimum); sexual assault causing bodily harm, maximum 14 years (but no minimum); and manslaughter, maximum life (but no minimum). And even a life sentence means eligibility for parole after seven years.

I personally abhor a "No Never" rule—a rule that in this context says that, no matter what the circumstances of the particular case, if convicted of murder the accused must serve a mandatory minimum sentence.

What I would prefer is a so-called presumptive sentencing model for murder: leave the mandatory minimums (25 years for first-degree murder and 10 years for second) in place, but allow the defence to petition the court after conviction for a special hearing to consider whether the circumstances of the case warrant a sentence below the minimum.

I am uncomfortable with a conviction for murder in Latimer's second trial only because of the mandatory minimum sentencing provision. On the other hand, I would not like to see an acquittal because to my mind that is also undeserved. It is simply unacceptable for anyone, whether motivated by compassion or love, to kill someone because he believes that the person is better off dead.

Note, however, that the *Criminal Code* does allow the defence of provocation to reduce a charge of murder to manslaughter. The defence applies when an enraged accused responds to a wrongful act or insult by deliberately killing the person who provoked him. For that reason, a Winnipeg woman who was charged with murder for the stabbing death of her niece was recently allowed to plead guilty to manslaughter and was sentenced to one year in jail. Although she killed her niece in a blind rage because she was having and affair with her husband, it was still an intentional killing. Yet, even the one-year sentence—with parole eligibility after four months—was considered too harsh by the Manitoba Court of Appeal, which ruled two weeks ago that there was little likelihood

that she would re-offend and that her sentence should be served in the community.

Although a one-year community sentence for an intentional killing (which I applaud in that case) is arguably unfair when compared with Latimer's minimum ten-year sentence, the disparity between the two cases is nonetheless justified by the law. That is because a killing prompted by compassion or mercy is still murder, whereas a killing prompted by rage or anger may be reduced to manslaughter. Thus, for the mercy killer there is no mercy, whereas for the provoked killer the law is prepared to reduce the crime to manslaughter as a concession to human frailty.

Lest I be misunderstood, I must repeat that Latimer did wrong and should be held accountable. However, I do not pretend to know the fitting sentence for Robert Latimer. But if the case were resolved by a guilty plea to manslaughter, then that would allow the court to do what it can do as a matter of general policy: after conviction, the court can move to a pre-sentencing phase and determine the appropriate sentence for the offender.

I say this because Gilbert and Sullivan only got it half right. It is not enough that the punishment fit the crime. The punishment should fit not only the crime but also the criminal.

There is a Middle Ground

Winnipeg Free Press (8 November 1997)

FOR THE SECOND TIME a jury has convicted Robert Latimer of the crime of second-degree murder for the killing of his severely disabled 12-year-old daughter, Tracy. His conviction would appear the inevitable result because Canadian law does not allow a mercy-killing defence to a charge of murder. Accordingly, the trial judge instructed the jury that the only issue was whether Latimer had intentionally killed his daughter. The law thus dismisses as beside the point the factor that distinguishes his kind of case from other murder cases: that he killed not out of base motives such as hatred, jealousy, or greed but rather out of compassion to end the relentless suffering of a loved one.

Still, a conviction was not a foregone conclusion because, notwithstanding the absence of a legal defence, the most common outcome of a mercy-killing trial is a jury acquittal. Trial by jury means, after all, that the jury, not the judge, is the ultimate arbiter of the fate of the accused. The jury is told that it has a

sworn duty to reach a verdict based upon the evidence; but it is still for the jury to deliberate and decide. Thus, no matter how persuasive the case for the Crown, an acquittal is always open because the trial judge cannot direct the jury to convict. If the jury acquits in an open-and-shut case, it has rendered a so-called perverse verdict that the judge is powerless to overturn. The phenomenon is called jury nullification—an apt term for the inherent power of the jury to nullify the law when it deems an acquittal the fitting result notwithstanding the obvious guilt of the accused.

However, the defence attorney is not allowed to inform the jury that it has that power, which means that the jury has to figure it out for itself. Yet that has happened often enough in mercy-killing trials in the United States and in the only Canadian mercy-killing trial before the *Latimer* case—a 1941 Alberta case in which the jury deliberated for only ten minutes before acquitting a couple named Ramberg who had killed their cancer-stricken two-year-old son. Like Tracy Latimer, the Ramberg child was asphyxiated by exhaust fumes.

Thus, what could distinguish a conviction and an acquittal in two mercy-killing trials is not the facts of the particular cases but that one jury was reluctant to convict but believed it had no other choice, whereas the other jury knew that it could get away with nullifying the law. This hardly seems to fit into the ideal of equal justice under law.

In any event, one might wonder why, instead of retrying Latimer, the Crown was not prepared to take a guilty plea either to manslaughter or to the crime "of administering a noxious thing." With the exception of the *Latimer* and *Ramberg* cases, that is how the small handful of Canadian mercy-killing cases have been resolved, even though the law of record is emphatic that a mercy-killing is murder pure and simple. By contrast, there are penal codes in Europe and Latin America that rank a compassionate killing as a lesser degree of culpable homicide than a killing prompted by base motives.

Although the law is different here, the Special Senate Committee on Euthanasia and Assisted Suicide had the *Latimer* case in mind when it recommended in its 1995 report, *Of Life and Death*,[1] that, "[t]he *Criminal Code* be amended to provide for a less severe penalty in cases where there is the essential element of compassion or mercy." While the Committee was sharply divided on the question whether assisted suicide should be legalised (four were in favour and five opposed), all nine Committee members endorsed the call for a mercy-killing defence.

Not surprisingly, disability advocates have spoken out against the Committee's proposal. In their view, such a law would be tantamount to declaring open season on the disabled because society is flooded with care givers who would respond by acting upon the self-interested belief that their disabled dependants

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[1] Special Senate Committee on Euthanasia and Assisted Suicide, *Of Life and Death* (Ottawa: Queen's Printer, 1995).

should be put out of their misery. And if such a person were to kill and claim that she had acted out of compassion, who could prove otherwise?

I suggest that this concern can be obviated by prudently drafted legislation along the lines of this model statute:

Murder Reduced To Manslaughter—Compassionate Homicide

(a) Culpable homicide that otherwise would be murder in the first-degree or second-degree shall be reduced to manslaughter if the accused was prompted to kill out of compassion for the grievous suffering of the deceased, but only if an ordinary person found in the circumstances of the accused might have committed the act.

(b) The accused has the burden to prove on a preponderance of evidence that he falls within the purview of subsection (a).

The starting point is that the accused must have been led to kill not for his own convenience but rather to end the suffering of the deceased. However, beyond the actual state of mind of the accused, the model statute would direct the jury to determine whether an ordinary person caught in the same circumstances as the accused might have responded in the same way.

Since the model statute puts the ordinary person in the circumstances of the accused, it follows that the relationship of the accused to the deceased would be ascribed to the ordinary person. If the *Latimer* case were played out with the proposed defence, then the ordinary person would be the father of Tracy Latimer facing the same situation that had confronted the accused, seeing events unfold through his eyes.

Although the policy is centred upon shifting mercy-killing from murder to manslaughter, compassion should not be enough in itself to establish the defence. It may not be true—as I have heard disabled people say—that the public at large cannot abide either their presumed unsightly presence or their burden upon the public purse. But it is true that all too many of the unafflicted believe that marked disability condemns its bearer to a pointless existence.

The ordinary person test, then, is a call to the jury to hinge recognition of the defence upon the finding that people such as themselves likewise might have been driven to the deed if found in the shoes of the accused. In other words, the solitary compassion of the accused is not enough—it must be compassion shared by the jurors as well.

The added stipulation of "grievous suffering" by the deceased serves to reinforce the principle that disability in itself is never a reason to allow the defence. (Although one cannot precisely define "grievous," the adjective makes it clear that at the very least the suffering of the deceased was of marked/appreciable severity.)

I also suggest that, along the lines of the mental disorder (legal insanity) defence, compassionate homicide be treated as an affirmative defence. In other words, instead of the Crown having the burden to disprove the defence beyond

a reasonable doubt, the accused would have the burden to prove the defence, albeit on a balance of probabilities (the standard of proof in a civil case).

Disability advocates have expressed the fear that a compassionate homicide defence would be abused by those motivated not by compassion but by less worthy motives. The inclusion of a "reverse onus" clause is meant to alleviate that concern; and, in any case, if an accused were truly prompted to commit the act by compassion, it is not an onerous burden to require him to prove the matter.

Disability advocates were ardent in the belief that Robert Latimer had to be convicted of murder—that no one has the legal or moral right to act on the belief that another person is better off dead. The model statute does not contravene that principle. It simply provides a mechanism to reduce the criminal responsibility of a mercy-killer to a lesser degree of culpable homicide. That is already the case with the *Criminal Code* defence of provocation which if successful reduces a charge of murder to manslaughter. The defence applies when an accused responds either to a wrongful act—*e.g.*, a slap in the face or a confession of adultery—or to a mere insult by becoming so angered as to deliberately kill the person who provoked him.

The provocation defence thus reflects the policy of the law that an accused's reason for an intentional wrongful killing may be enough to negate criminal responsibility for murder. It is said to stand as a concession to human frailty. Fair enough, but why should the law treat anger and rage more leniently than compassion?

So much, then, for this modest proposal. Actually, this commentary on a compassionate-homicide defence is simply an effort to find a way around the mandatory minimum sentencing provisions for murder. For if a convicted mercy-killer such as Robert Latimer were not locked into at the very least a mandatory ten year prison sentence, then such a defence would be only a matter of academic interest.

My quarrel with mandatory minimum sentencing for murder is that it ties the trial judge's hands. As a general rule, *Criminal Code* offences carry considerable sentencing ranges; for example, the maximum for manslaughter is life but there is no minimum. And even a life sentence means eligibility for parole after seven years. The wide penalty ranges found in the *Criminal Code* enable the judge to tailor the punishment not only to the crime but also to the criminal. If it is that way for the provoked killer, why should it be different for the mercy-killer?

The Crown Attorney had argued that Tracy Latimer was not as disabled as her parents claim, whereas the defence claimed that Latimer acted to end a tortured existence of unremitting pain and suffering. Latimer's only hope was that the jury knew that it had the power to defy the law by rendering an acquittal, and that the defence evidence would have persuaded it to do precisely that. Although an acquittal would have indicated the jury's reluctance to con-

vict the accused of murder, disability advocates feared that such a perverse verdict would have sent the message that society sanctions the killing of the disabled. Yet that was a risk caused by the law's refusal to recognise a mercy-killing defence, leaving the jury with no middle ground between murder and acquittal.

On the other hand, the jury's recommendation of a one year sentence indicates that it did not regard Latimer as a run-of-the mill murderer. However, the recommendation has no legal effect because the minimum sentence for murder is life imprisonment with no parole eligibility for ten years. Still, this may well suggest that the jury would have been more comfortable with a manslaughter verdict if that had been an option.

In my view, the enactment of a compassionate-homicide 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 then be no need to flout the law to achieve it. A policy that prefers honesty to subterfuge would surely commend itself to the great American jurist, Oliver Wendell Holmes, who wrote that "the law must keep its promises"—which is another way of expressing the principle that the law should mean what it says.

Finally, the adoption of such a defence would truly serve the best of two worlds. To begin with, it would enable the court to temper justice with mercy by passing a lenient manslaughter sentence. And in the process, the jury verdict would reaffirm the principle that, however genuine his compassion, no person has the right to play God by the mercy-killing of a loved one that he believes is better off dead.

Mercy Killing an Old Debate

Winnipeg Free Press (31 January 1998)

WHEN ROBERT LATIMER was prosecuted in 1994 for killing his disabled daughter, it was initially labelled as the first mercy-killing trial in Canadian legal history. But it was not the first such trial, because a retired Supreme Court of Canada Justice, Ronald Martland, informed the media that in 1941 he was junior defence counsel in an Alberta case, *The King* v. *Ramberg*.[2] In that case, a married couple was acquitted of the murder of their cancer-stricken two-

[2] (1941), Alta. K.B. [unreported].

year-old son. And now, Kara Quann of Manitoba Provincial Archives has uncovered a third mercy-killing trial. It happened in Winnipeg in 1942 and, as in the *Ramberg* case a year earlier, it too resulted in a jury acquittal. What follows is a brief account of the case of *The King* v. *George Herbert Davis*.[3]

It was 17 July 1942, and the lead headline in the *Winnipeg Free Press* was: "Hong Kong Bravery Extolled—Escapee Tells Stirring Story." The escapee was an Ottawa stockbroker who had just arrived back home after a perilous journey through China. As the *Free Press* reported, "[h]e told a story of bloodshed, of slaughtered prisoners of war, and of Canadian soldiers fighting against hopeless odds."[4]

Although local news rarely rated page one headlines during the war, it did that day. "Ailing Elmwood Wife Slain With Axe" was the second lead headline of a story that began,

> Grief-stricken because he was unable to see his legless wife suffer any longer, George Herbert Davis, a 68-year-old pensioner, killed her with the blunt end of an axe in their modest little home at 483 Harbison Avenue, Elmwood, about 10 p.m. yesterday.[5]

Mr. Davis was a retired Canadian Pacific railway baggage man and army veteran. He and his wife had no children.

The story reported what appeared to be an open-and-shut case. When arrested he admitted to the killing, telling detectives that, "[s]he kept asking all the time for morphine, and I couldn't give her any more."[6] Neighbours of the couple, many of whom had known them for over 25 years, were quick to extol the slayer's virtues. Four neighbours/friends of the family who had helped look after Mrs. Davis stated that she had often expressed the wish to die, and they described her husband as "the kindest, most patient and the most devoted man they had ever known."[7]

Other neighbours were interviewed by the *Free Press*. According to one, "He is a man in a million, the most patient, kind, understanding man you could ever hope to know." Another said that he was a man incapable of an unkind act and was "the soul of devotion" to his wife. Another remarked that "Mr. Davis wore himself out looking after her"[8] and that the tragedy could have been avoided if his wife had been hospitalised. And another, who had recently visited

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3 (1942), Man. K.B. [unreported].

4 "Hong Kong Bravery Extolled" *Winnipeg Free Press* (17 July 1942).

5 "Ailing Elmwood Wife Slain With Axe" *Winnipeg Free Press* (17 July 1942).

6 *Ibid.*

7 *Ibid.*

8 *Ibid.*

the couple, said that Mrs. Davis was extremely distraught, voicing such comments as, "[i]f God would only kill me" and, "I'll kill myself, I'll kill myself."[9]

In his statement to the police, Mr. Davis never suggested that he killed his wife at her request. Even if so, it would have made no difference legally because mercy-killing is murder whether or not the deceased asked for it. It is in that sense that one can understand the comment by the Chief of Police, George Smith, when informed that the case was being described as a "mercy-killing." He responded that there was no such thing, explaining that the phrase was "a newspaper term."

After Davis killed his wife, he phoned her physician, Dr. Henry McFarlane, and asked him to come immediately to their home. When Dr. McFarlane arrived, Davis met him at the door and said, "I have finished her. I couldn't bear to see her in distress any longer."[10] Dr. McFarlane had been treating her since 1924 and, as he testified a week later at the preliminary hearing, she was afflicted with asthma, a severe heart condition, and had had both legs amputated in 1937. As he described her condition over the weeks before her death, "[s]he was in a great deal of distress, moaning continually. I told Mr. Davis I didn't think she would live very long."[11]

The neighbourhood was quick to rally around Mr. Davis, and if there were any dissenting voices to condemn him for what he did, they were not reported in the *Free Press*. The newspaper drew a stark contrast between the mood of the neighbours and their surroundings:

> The sense of tragedy hung like a thunder-cloud over the neighbourhood, mocking the sunlight that shone brightly upon the one-storey little houses that stand close together along Harbison Avenue, and upon the colourful flower beds and rows of vegetables in homicide plots.[12]

The two day trial was held on 6–7 October 1942. Mr. Justice Dysart presided; the prosecutor was D.G. Potter and the defence attorney was John Ross. Dr. McFarlane testified that the accused was kind and attentive to his wife and that, in his opinion, he was doing her a favour by killing her! According to the pathologist, Mrs. Davis was at death's door from heart disease when her husband killed her. The friends and neighbours of the couple who appeared as witnesses for the Crown agreed that the accused was kind to his wife and that no one had ever heard them quarrel. (The defence called no witnesses.)

On 8 October, the *Free Press* reported in a headline in the left bottom corner of page one that: "Davis Exonerated in Murder Case." But it was not the lead headline, which was—as almost always the case during that time—about

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9 *Supra* note 5.

10 *Ibid.*

11 *Ibid.*

12 *Ibid.*

the war. And it was one that hit close to home: "Nazis Manacle Dieppe Prisoners." And just below was another headline, about a battle on the Russian Front that would become the turning point of the war: "Invader Stalled at Stalingrad."

In any event, when the six-man jury returned with its verdict after deliberating less than 30 minutes, the judge expressed astonishment. After all, Davis had admitted to the murder and had no legal defence to the charge. Nonetheless, the jury had chosen to ignore the trial judge's instructions that it must convict if convinced beyond a reasonable doubt that the accused had killed his wife. The jury had on compassionate grounds returned a so-called perverse verdict, but there was nothing that the judge could do about it. He accordingly turned toward Mr. Davis and informed him that he was a free man. Perhaps he himself did not regret that result because he added, "I think your record of many years as a kindly, faithful husband has served you in good stead and brought about this reward at the hands of the jury."[13] With that pronouncement, Mr. Davis vanished into history and out of the pages of the *Free Press*.

The next day's headline was about the occupied Channel Islands: "Nazis conscript Guernsey Men." If you read the *Free Press* from the day that Mr. Davis killed his wife to the day of the verdict, you come across one obituary after the other of Manitobans, mostly in their early twenties, dying far from home—airmen shot out of the skies over Germany and France, soldiers cut down by shot and shell on the beaches at Dieppe, and sailors sent to the bottom of the Atlantic by U-Boat torpedoes.

The world was at war and the outcome still in doubt, but at least a dollar was really a dollar. An advertisement by City Meat & Sausage Co., 611-3 Main Street, announced the following prices: butter, 3 pounds for $1.04; prime rib roast 23 cents a pound; roast chicken 27–30 cents a pound; and beef and pork sausage, two pounds for 27 cents. But then, when my colleague Roland Penner enlisted in the army in August 1942, his pay was $45 a month. The times have indeed changed in so many ways since 1942 but as the *Latimer* case illustrates, the kind of desperation that drove George Herbert Davis to do what he did is still part of the human condition.

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[13] "Davis Exonerated in Murder Case" *Winnipeg Free Press* (8 October 1942).

Temper Justice With Mercy

Winnipeg Free Press (11 April 1998)

ACCORDING TO SECTION 241(B) of the *Criminal Code of Canada*, "everyone who aids a person to commit suicide is guilty of an indictable offence and is liable to imprisonment for a term not exceeding 14 years."[14] Although aiding suicide (also called assisting suicide) is a crime that is rarely prosecuted, its actual practice is not that uncommon. A criminologist recently documented 37 cases in Vancouver of assisted suicide in the AIDS community, and a Vancouver AIDS support group estimates that throughout the province somewhere between ten percent and 20 percent of the deaths of persons with AIDS are the result of assisted suicide. However, it is the kind of crime that rarely comes to the attention of the police because the person is usually dying in any event and there is no reason to suspect anything other than an expected natural death. Or if it is a suspected suicide, the police are unlikely to investigate unless it appears that the deceased was assisted to that end and there is a suspect at hand.

But then there is the Winnipeg case of Bert Doerksen, 79, who is alleged to have helped his 78-year-old wife Susan commit suicide by carbon monoxide poisoning. The death of Mrs. Doerksen in the family garage has led to a charge of aiding suicide against her husband, and according to the media this is the first time that anyone in Manitoba has been charged with that offence.[15]

Although aiding suicide is a crime, it is not a crime to commit or attempt to commit suicide. Thus, one commits a crime by helping someone to do something that for the person helped is not a crime. Committing suicide is not a crime for the obvious reason that, if it were, it would be the perfect crime because the offender would be beyond the jurisdiction of the court. Still, in England hundreds of years ago it was a crime to commit suicide, and the punishment was inflicted on the deceased's family—the law decreeing that the estate of anyone committing suicide was forfeited to the Crown.

Although there is no record of anyone ever being prosecuted in Canada for the offence of attempted suicide, it was a crime until repealed in 1972. It was removed from the *Criminal Code* when Parliament came to the common sense realisation that those attempting suicide were troubled enough without adding to their woes by criminal prosecution.

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[14] R.S.C. 1985, c. C-46, s. 241(B).

[15] The case has not yet gone to trial.

Aiding suicide is of course connected in the public mind to the bizarre career of a 70-year-old Michigan doctor (no longer licensed to practise medicine), Jack Kevorkian, who has been involved in about 100 such cases. He is able to do what he does because there is no law in his state comparable to s. 241(b) of our *Criminal Code*. In other words, in Michigan aiding suicide is perfectly legal. His clients die by way of carbon monoxide poisoning, and although he will provide the gas and the face mask, he insists that the client trigger the switch that releases it. That is because he knows that if he pulls the switch, he has crossed the line from aiding suicide to murder. The reason is that it is aided or assisted suicide only if the deceased has performed the physical act that directly causes death.

In the *Doerksen* case, the crime of aiding suicide would be proven by evidence that the accused helped his wife to kill herself but that she was the one who actually started the ignition. Yet consider a hypothetical variant of this case, in which at the last minute she is too weak to turn the key and at her urgent request her husband does it for her. In that scenario, he would be guilty of murder. The reason is that by turning on the ignition, he would have performed the physical act that directly caused his wife's death. There is thus a thin dividing line between aiding suicide, which has no mandatory minimum sentence, and murder, which has a 10 year mandatory minimum sentence.

Since anyone is at liberty to commit suicide, why is it a crime to assist someone to that end? That was the issue before the Supreme Court in the 1992 *Rodriguez* case.[16] Sue Rodriguez, 42, was afflicted with amyotrophic lateral sclerosis, a devastating neurological condition commonly known as Lou Gehrig's disease. She challenged the constitutionality of the *Criminal Code* prohibition against assisted suicide, arguing that when she no longer found life tolerable she should be allowed the help of a physician to commit suicide if she were unable at that time to act on her own.

The court ruled against her by the narrow margin of five to four,[17] and the view of the majority was as follows. When Parliament abolished the offence of attempted suicide, it was not thereby signifying approval of suicide but simply its recognition that the criminal law is not the rational way to deal with suicide attempts, which more often than not are ill considered acts by mentally disturbed and desperate people. The law against aiding suicide is justified because of "concerns about abuse and the great difficulty in creating appropriate safeguards"[18] pursuant to which physicians would be allowed to assist the suicide of

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[16] *Rodriguez* v. *British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 [hereinafter *Rodriguez*].

[17] LaForest, Sopinka, Gonthier, Iacobucci, and Major J.J. for the majority; Lamer C.J.C., McLachlin, L'Heureux-Dube, and Cory J.J. for the minority.

[18] *Rodriguez, supra* note 16 at para. 56.

mentally competent patients. Thus, the prohibition legitimately relates "to the state's interest in protecting the vulnerable."[19]

The majority's concern has been echoed by disabled Canadians, who are fearful that, if legalised, a so-called right to assisted suicide could become transformed into a *duty* to commit suicide. It is a concern that cannot easily be dismissed—that as our health care resources are stretched to the limit, the dying and the disabled could feel themselves under pressure, subtle or direct, to do "the right thing" and save the state money by exercising their right to assisted suicide.

Even if one regards the risk to the vulnerable as reason enough to rule against Sue Rodriguez—and bear in mind that four of the nine Supreme Court of Canada justices did not endorse that position—it surely cannot be argued that every person who seeks help in committing suicide needs the protection of the current prohibition against assisted suicide. However, the Supreme Court deemed it necessary as a matter of public policy to uphold an absolute ban—that no matter how dire your condition, you cannot legally be assisted to commit suicide. But therein lies the dilemma caused by a legal prohibition that makes no allowance for cases of grievous and relentless suffering that cannot be alleviated. Because it speaks in absolute terms, the law is seen as cruel and unfeeling when confronted by compelling cases such as that of Sue Rodriguez. Thus, although the law is upheld to protect the vulnerable, its broad sweep will catch those cases which do not need its protection.

Is Doerksen the kind of "vulnerability" case that the Supreme Court majority in *Rodriguez* had in mind? It arguably is not. As reported in the *Free Press*, Mrs. Doerksen had persistently expressed the wish to die because of her medical problems, including severe arthritis and chronic back pain that her medication was unable to relieve. As Mr. Doerksen said, "[s]he was in pain all the time. There were no pain-free hours." (I do wonder though whether her caregivers could have better managed her intractable pain.) Furthermore, friends and neighbours have all described him as thoroughly devoted to the woman who had been part of his life since they were both teen-agers.

There is the viewpoint that whenever a law is broken, the offender should be convicted and that mitigating circumstances can be taken into account when passing sentence. There are, however, those who contend that there is no public interest in bringing Doersken to trial when—according to media accounts—he acted at the behest of his wife to help her leave a life of unrelenting pain and misery. The response of the Crown is that, whatever the public sentiment on the matter, a jury is the appropriate forum to weigh the evidence and to decide whether Doerksen should be held accountable.

A few years ago, an acquaintance of mine aided the suicide of an elderly man in a neighbouring province. Her friend was dying of a neurological condi-

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[19] *Rodriguez, supra* note 16 at para. 29.

tion and had phoned to ask her to visit him for the last time and to help him die. Her involvement was to mix a lethal dose of barbiturates into a dish of custard, hand him a spoon and then hold the dish near his mouth. When he stopped breathing, she notified the police and later gave a detailed statement of her role in the death. She was told to return home pending the completion of the investigation. But she never received the dreaded call because the authorities chose not to prosecute. Sometimes justice is better served when it is tempered with mercy. It was in that case and the question is whether justice likewise dictates a compassionate result in the case of Bert Doerksen.

Post-script

Manitoba Law Journal (21 September 1998)

SINCE THE ARTICLES on the *Latimer* and *Doerksen* cases were published in the *Winnipeg Free Press*, there have been developments that warrant the following update.

The second *Latimer* article was written after the Saskatchewan farmer was again convicted of second-degree murder, but before he was sentenced. I had assumed that once again he would be sentenced to the mandatory minimum sentence for that offence—life imprisonment with no parole eligibility for ten years. But I was wrong. Surprisingly, the trial judge acknowledged the jury's recommendation of a one-year sentence by ruling that on *Charter* grounds—the prohibition against "cruel and unusual punishment" in s. 12—it was unconstitutional to impose a mandatory sentence upon Latimer. As the judge explained, there was no suggestion by any of the witnesses or by the Crown prosecutor that Latimer "was motivated in any way by Tracy's disability."[20] The evidence was rather that Latimer had killed his daughter not because she was disabled but because he saw no end to the constant pain that afflicted her. According to the judge,

> Murder like any other crime is committed in countless ways by people with countless reasons for doing it. There is in the commission of murder as there is in the commission

[20] *R. v. Latimer* (1998) 121 C.C.C. (3d) 326, pg. 338.

> of any crime varying degrees of culpability revealed by the evidence and circumstances surrounding the act.[21]

He thus applied a so-called "constitutional exemption," sentencing Latimer to two years imprisonment, the second to be served as a community sentence on his farm. (Latimer served about six weeks in jail before parole.) The Crown has appealed this extraordinary sentence, and the Saskatchewan Court of Appeal will have the opportunity to revisit an issue that it decided on Latimer's appeal from his first conviction.[22] In that judgment, although the three-judge panel unanimously upheld his conviction, one of the three (the Chief Justice) would have struck down the mandatory sentence on s. 12 *Charter* grounds. It remains to be seen whether the Court will reverse itself; in any event, whatever it decides, the case is likely to go to the Supreme Court.

In the *Doerksen* case, the defence attorney has asked the Crown to stay the charge because the accused has been diagnosed with cancer of the lymph nodes and bone marrow. Fortunately, his condition is currently in remission; and in any case the prognosis is that his is likely to die of the disease in two years, if not sooner. Even so, the Crown has refused to stay proceedings. In an article published in the *Free Press* on 27 August 1998, it was reported that,

> [F]ear of a public outcry from special interest groups representing Manitoba's disabled community may have prompted the Crown's office to pursue the charge.[23]

This is where the cases stand as of September 1998.

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21 *Supra* note 20 at 341.

22 *R. v. Latimer* (1995) D.L.R. (4th) 203.

23 "Public Outcry Feared if Case Dropped" Winnipeg Free Press (27 August 1998).