MAID ReMade

Humanism is a view of how to live which emphasizes rationality, compassion, freedom, and absence of religious or any other dogma. Given that dying is a part of life – albeit the last part – humanism should also have a view of how humans are entitled to die. What follows is a sketch of such a view presented in the guise of how Canada's law on MAID (Medical Assistance in Dying) should read.

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In 2015, the Supreme Court of Canada (SCC) in *Carter v. Canada* paved the way to legalizing MAID by striking down the law prohibiting Physician Assisted Death. Parliament filled the gap by passing Bill C-14, which is now the law in Canada. This specifies that medical assistance in dying can be provided to competent adults who make an in-person and contemporaneous request for it and

> (a) have a serious and incurable illness, disease or disability;
> (b) are in an advanced state of irreversible decline in capability;
> (c) that illness, disease or disability or that state of decline causes them enduring physical or psychological suffering that is intolerable to them and that cannot be relieved under conditions that they consider acceptable, and
> (d) their natural death has become reasonably foreseeable, taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining. [241.2 (1)]

The Bill further specifies that requests for MAID must be:

> (a) made in writing after the person was informed that his or her natural death is reasonably foreseeable;
> (b) signed and dated in the presence of two independent witnesses;
> (c) accompanied by a written opinion by a second independent medical practitioner or nurse practitioner confirming the person's eligibility;
> (d) made at least 15 days before provision of MAID (unless both practitioners agree that death or loss of capacity to consent is imminent);
> (e) confirmed immediately before providing MAID. [241.2 (3) selections]

C-14 ends with the government's promise to review the possibility of access to MAID by mature minors, advance directives, and patients whose distress is the result of mental illness alone. These proposals are now under consideration, and the public debate over them is beginning. This debate – as indeed the whole question of legalizing MAID at all – raises two kinds of questions. The first is philosophical, the second political. The philosophical question concerns what is the best way to legalize MAID. The political, what is the best way to legalize MAID that will pass Parliament. I will take the philosophical first, and argue that the principles the SCC relied on to arrive at its recommendations do not support C-14, but rather the much more radical view that MAID should be available whenever it is permissible to withhold or withdraw life-sustaining treatment (WLST). Thus, the three liberalizations on the table should be made, but much more besides. This will then raise the political question, for the view that logic leads us to will certainly not pass Parliament, and that will lead us to consider C-14 and the alternatives to it.

The Philosophical Question

The SCC's argument that MAID should be legalized begins with the fact that it is legally permissible in Canada for physicians to withhold or withdraw life-sustaining treatment. It then proceeds to argue that there is no morally relevant difference between decisions to WLST and to provide MAID. We cannot find such a difference in what the physician does, viz., injecting the patient with a lethal dose of drugs vs. removing treatment necessary for life or not supplying that treatment. Nor is there any difference in the speed, seriousness, or certainty of death. It is thus hard to see how there can be a morally significant difference between decisions to WLST and to provide MAID. There is a large literature opposing this, but the SCC swept it aside with the comment that the "preponderance of the evidence of ethicists is that there is no ethical distinction between physician-assisted death and other end-of-life practices whose outcome is highly likely to be death." [para. 23]

But if there is no morally relevant difference between decisions to WLST and to provide MAID, MAID should be available in all those circumstances in which it is permissible to WLST. It immediately follows that MAID should be available to mature minors, by advance directive, and for patients who are suffering because of mental illness alone. We thus arrive at a clear and decisive answer to the question of liberalizing MAID now under consideration. This is not to say that decisions to provide MAID to these populations will always or even ever be easy. Physicians have to be sure that patients are competent, informed, not ambivalent, and not be compromised by social vulnerabilities such as age or disability. These issues can be difficult and especially acute in the populations in question, but they do not introduce any problems that are not already present in decisions to WLST from these patients.

But since, as Schopenhauer once commented, principles cannot be treated like taxicabs and dismissed once they take you to your destination, we cannot stop with those extensions. Liberalization must continue to all the circumstances to which the principles apply, and that means to all circumstances in which it is permissible to WLST. It follows that access to MAID cannot be limited to voluntary MAID, since substitute decision makers can also authorize physicians to WLST to prevent or eliminate suffering. Thus, MAID must be available for infants, children, adolescents, and incompetent adults in the charge of substitute decision-makers.

We likewise cannot restrict the availability to MAID to patients who are *suffering*. A second and equally important reason for MAID is to allow individuals to be able as much as possible to control the time and manner of their death. This encompasses being able to avoid existing in a permanent state of helplessness and dependency, to prevent distress to loved ones having to watch a marginal existence or lingering death, and to leave others with favourable memories of themselves. One of Sue Rodriquez's striking reasons for requesting MAID was to allow her son to remember her as "a relatively intact person." These considerations have always been part of the moral case for legalizing MAID and are regularly and legally used by people who request their physicians to WLST. There is also no reason why the extension of reasons for MAID must end here. If, for example, physicians can WLST from patients who are simply tired of life – "existential fatigue" as it is sometimes called – or in order to be an organ donor, what is the argument that says they cannot have MAID for those reasons, and many more besides?

The principle that there is no greater risk to provide MAID than to WLST not only entails that patients for whom it is permissible to WLST should be able to receive MAID, they should be able to receive it *in the same manner*, specifically, without the special safeguards with which C-14 surrounds its delivery. If there is no difference in risk, there also is no justification for the law requiring that death be reasonably foreseeable, a wait period between the request and the injection, and additional paperwork or consultations. Such safeguards can be imposed if the family or physician want them, but there is no reason to require them by law. Removing the proposed safeguards is a harder sell than simply

giving access to MAID, for every jurisdiction in the world that has legalized MAID has such safeguards, and there is comfort in copying. But there is good reason for Canada not to follow suit. This comes from conjoining the facts that the safeguards are burdensome, physicians in Canada have demonstrated that they can safely WLST without special safeguards, and the SCC's claim that there are no greater risks in providing MAID than to WLST.

We thus arrive at an answer to the philosophical question. Given that there is no morally relevant difference between decisions to WLST and to provide MAID, the circumstances and conditions under which each can be provided must be identical. There is nothing to add except "QED." The means by which such a view can be made into law is also readily at hand. The distinguished jurist Glanville Williams (*The Sanctity of Life and the Criminal Law*, 1957, pp. 339-46) has proposed that the law could come into being simply by granting physicians the right to provide MAID in just those circumstances in which they think it appropriate to do so. MAID would then be permitted in exactly the way that physicians can currently WLST, i.e., unregulated by criminal law and without special safeguards. There would still be legal requirements that physicians could violate in providing MAID, just as there are when they WLST, and criminal prosecution and defense would run on parallel lines. On this view, it would be up to the physician, if charged, to show that the patient was suitably suffering or otherwise a candidate for MAID, but also for the prosecution to prove that the physician acted from some motive other than the humanitarian one allowed by law.

The Political Question

This brings us to the political question, which arises because Canada is a Parliamentary Democracy. In contrast to a Constitutional Democracy like America, where the Supreme Court is the final arbiter of the law, in Canada Parliament is supreme, and this means that nothing can become law until it is passed by Parliament. Sec. 33 of the Charter (with some conditions) allows the federal government and provincial legislatures to pass any law notwithstanding that it is in conflict with the Charter of Rights and Freedoms, as long as they acknowledge this. The protection of civil liberties is thus weaker, but the supremacy of Parliament and genuine self-government by the people is maintained. The problem this poses for the philosophical solution provided above is that there is no chance that it would pass Parliament.

The solution that suggests itself to this problem is to add to the proposed law whatever is needed to make it possible to pass. It may be a liberal ideal to say, as does the Canadian Committee on Corrections (CCC) when, channeling John Stuart Mill's theory of liberty, it writes that: "No act should be criminally proscribed unless its incidence, actual or potential, is substantially damaging to society."[1] This principle rules out, as absolutely irrelevant, restrictions on liberty based on things such as paternalism, religious doctrine, cultural tradition, received morality, and popular prejudices. But for a government to follow this is a recipe for failure. The political reality is that unless proposed legislation accommodates a variety of perspectives it will fail, and this means that all those considerations that the CCC carefully excludes must find their way back into the legislation. The result is C-14.

C-14 had the virtue of passing Parliament, but considered in itself it is awful legislation. The requirement that death must be foreseeable denies access to MAID to patients who suffer from disorders such as MS or spinal stenosis who are in unrelievable distress, but not expected to die in the foreseeable future. Ironically, this would exclude Kay Carter and Gloria Taylor, who brought the case to the SCC, from having access to MAID. The requirement that the patient must be competent at the time of making the request forces patients who are now capable but expected to become incapable to choose between a premature death and exposing themselves and their family to a natural death they want to avoid. And the consultations and paperwork intrude into the sickroom and turn what is naturally a private matter between the

patient, family, and physicians into a partially public and bureaucratic one.

But, awful as all this is, C-14 gets full marks as being arguably the legislation that is more in accord with the SCC judgement than any other that could have passed Parliament. Thus, if the choice is between having C-14 or no MAID legislation at all, C-14 is perhaps the perfect answer to the political question. It is also not presented as a finished or permanent solution. The three extensions currently under consideration already will expand eligibility requirements beyond what the law now requires, and thus begin a process that could be expanded still further. And the imperfections in the law could be chipped away over time by Charter and other challenges.

Indeed, if the purpose of adding the qualifications and safeguards in C-14 was only to have a bill that will pass, all those features should be able to be removed and the law returned to the pristine and elegant form entailed by the SCC's arguments. We could also reasonably expect them to be able to be removed. For any restrictions that deviate from the SCC's view must either be not based on evidence (and hence arbitrary) or treat MAID differently from WLST (and hence discriminatory). Since restrictions that are arbitrary or discriminatory would presumably violate the Charter, they could be struck down, and if they are, there would be no difference in the answers given to the philosophical question and the political question. This may even have been the government's strategy all along in introducing C-14: first get a foothold in legislation by something that will pass political muster, and then make the necessary additions and subtractions to make it consistent with the Charter, evidence-based decision making, and the Canadian Committee on Corrections.

But while everything may work out well in the end, the end is a long way away, and the route to it is costly, littered with cruelty, and uncertain. There is no avoiding that, but there is one possible Charter challenge that could expedite the process. As the law now stands, there is an asymmetry of advantages between opponents and proponents of MAID. Those who oppose MAID can always experience the death they want, viz., a natural (i.e., unassisted) death. But proponents of MAID cannot always have the death they want, viz., a medically assisted death. There is thus an inequality in law similar to that which existed when physician-assisted suicide was illegal between the able-bodied who could commit suicide and the disabled who could not. This inequality was removed when the SCC legalized MAID. Similarly, the inequality that now exists between those who can receive the death they want and those who cannot could be removed by extending access to MAID in the way described above.

As long as the asymmetry continues, there would seem to be a situation that is ripe for a Charter challenge under Sec. 7 (which protects life, liberty, and the security of the person) or Sec. 15 (which – among other things – prohibits discrimination based on religion). A challenge along these lines, if successful, would in one swoop make MAID required by the Charter and thus take a big step towards making it available under MAID legislation. Nonetheless, even if there is this light at the end of the tunnel, the tunnel is long and, failing some unforeseen courageous compassionate exceptions being made, Canada will remain for some time as no country for people who have painful and distressing disorders from which they will not die quickly or predictably.•

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Endnote

1. *Report of the Canadian Committee on Corrections. Toward Unity: Criminal Justice and Corrections*, Ottawa, The Queen's Printer, 1969, Chapter 2, "Basic principles and purposes of criminal justice."

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