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# Motivated by Compassion: Reviewing the Proposed Public Interest Guidance for Prosecuting Mercy Killings

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## Abstract

In 2022, the Crown Prosecution Service started a public consultation on a proposed update to legal guidance on homicide. Among the objectives of this consultation was to guide prosecutors on the public interest factors relevant when deciding whether to prosecute a mercy killing. This article reviews this consultation, focusing on the role of compassion within the CPS's guidelines. The discussion examines the meaning of compassion, how some of the public interest factors relate to this and whether additional factors should be added within the guidelines to help prosecutors identify the suspects' motives. The suggested adjustments to the prosecutorial guidance will help the prosecution assess whether the suspect indeed acted out of compassion and whether their actions were appropriate given the circumstances.

## Keywords

Mercy killing, euthanasia, prosecutorial discretion, compassion, crown prosecution service

## Introduction

A 'mercy killing' is any killing the suspect believes they are acting wholly motivated by compassion for the deceased.<sup>1</sup> These cases are not legally distinguished from murder or manslaughter. Whether one is motivated by compassion or acting upon the express wish of the victim, causing someone's death still leads to charges of murder or manslaughter.<sup>2</sup> Mercy killings are different from 'assisted suicide', which is criminalised under the Suicide Act 1961 and refers to assisting the suicide of another where

1. Crown Prosecution Service, 'Consultation on public interest guidance for suicide pact and "mercy killing" type cases' (CPS, 14 January 2022)

<https://www.cps.gov.uk/consultation/consultation-public-interest-guidance-suicide-pact-and-mercy-killing-type-cases>  
accessed 2 May 2023.

2. Ibid.

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the final act causing death is taken by the person wanting to die rather than the agent assisting.<sup>3</sup> In 2022, the Crown Prosecution Service (CPS) started a public consultation on a proposed update to legal guidance on homicide, which intends to guide prosecutors on the public interest factors relevant when considering mercy killings.<sup>4</sup> A similar policy exists for assisted suicides, as no proceedings shall be instituted except with the consent of the Director of Public Prosecutions (DPP).<sup>5</sup> In 2009, the case of *Purdy* sought clarification from the DPP regarding the policy on prosecuting assisted suicides.<sup>6</sup> *Purdy* resulted in the publication of a policy outlining factors tending in favour and against prosecution of assisted suicides.<sup>7</sup> The CPS's prosecutorial guidance on mercy killings is similar to that published in 2010 for assisted suicides since they arise from similar circumstances.<sup>8</sup> However, the guidelines on mercy killings will be evaluated differently since the overall criminal conduct is more serious.<sup>9</sup>

In the definition of mercy killings, the suspect's compassionate motives are important in describing and differentiating this behaviour. Thus, one of the most noticeable public interest considerations for the prosecution in the prosecutorial guidance for mercy killings is whether the suspect was compassionately motivated.<sup>10</sup> This article reviews the 2022 consultation on mercy killings, focusing on the role of compassion within the guidelines. The discussion will assess whether creating a prosecutorial policy is warranted and whether this will lead to decriminalising mercy killings. Furthermore, this article will examine the meaning of compassion within the prosecutorial guidelines. In light of this, there will be an assessment of what new factors might be added and how some already proposed factors fit compassion's definition.

In addressing these questions, this article will first explain motives' role in criminal law and set the framework under which the CPS proposed prosecutorial guidelines for mercy killings. This decision was mainly influenced by the prosecution of cases like Mavis Eccleston's<sup>11</sup> and pressure from pro-assisted death organisations such as 'Dignity in Dying'.<sup>12</sup> This article will support that using prosecutorial discretion is a positive development in a complicated area of the law. It achieves to avoid putting the suspect through a criminal trial, even if their sentence might be mitigated. Moreover, the slippery slope concerns that the prosecutorial guidance will eventually lead to decriminalising mercy killing or accepting undesirable cases will be rejected.

Finally, this article will evaluate the CPS's proposed public interest factors in light of compassion. Using Martha Nussbaum's account of compassion, it will be supported that compassion is the feeling of identification and sympathy towards someone in serious suffering. In light of this definition, it will be proposed that two further factors must be added to the CPS's guidance on mercy killings to help prosecutors assess the suspect's compassionate motives. More specifically, prosecutors should consider whether the suspect had a reasonable belief that the victim was under intense suffering and whether

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3. Suicide Act 1961, s. 2(1).

4. See Crown Prosecution Service, above n. 1.

5. See Suicide Act 1961, above n. 3 at s. 2(4).

6. *R (Purdy) v Director of Public Prosecutions* (2009) 3 WLR 403 at para 56.

7. Crown Prosecution Service, 'Suicide: Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide' (CPS, February 2010)

<<https://www.cps.gov.uk/legal-guidance/suicide-policy-prosecutors-respect-cases-encouraging-or-assisting-suicide>> accessed 2 May 2023.

8. Crown Prosecution Service, 'Proposed changes to "Homicide: Murder and Manslaughter" Guidance' (CPS, 14 January 2022) <<https://www.cps.gov.uk/proposed-changes-homicide-murder-and-manslaughter-guidance>> accessed 2 May 2023.

9. *Ibid.*

10. *Ibid.*

11. Campaign for Dignity in Dying, 'Mavis Eccleston has been found not guilty of the murder or manslaughter of her terminally ill husband' (Dignity in Dying, September 2019) <<https://www.dignityindying.org.uk/news/mavis-eccleston-not-guilty-murder-manslaughter-husband/>> accessed 23 March 2023.

12. Campaign for Dignity in Dying, 'Compassion is not a crime: A new campaign "Acts of Love" launched by families devastated by ban on assisted dying' (Dignity in Dying, May 2019) <<https://www.dignityindying.org.uk/news/compassion-not-crime-acts-of-love-assisted-dying/>> accessed 23 March 2023.

the suspect had a close relationship with the victim.<sup>13</sup> Lastly, this article will argue that the factor tending against prosecution that the victim ‘reached a voluntary, clear, settled and informed decision’ to end their life is irrelevant in examining the suspect’s compassionate motives. Nonetheless, it should be retained in the guidelines as it is a way to shield individuals contemplating asking for assistance to die from pressure and abuse.

## The Role of Motives in Criminal Law

Many civil law jurisdictions consider motives, as compassion, in criminal liability. For example, Colombia recognises mercy killing as a separate category of homicide. Killing another to end intense suffering from a serious or incurable illness or a severe injury is distinguished from murder and is punished from one to three years imprisonment.<sup>14</sup> Moreover, Switzerland has a separate offence for homicide upon request. Any person who, for commendable motives, such as out of compassion, causes the death of a person at their request is liable to a custodial sentence not exceeding three years or to a monetary penalty.<sup>15</sup>

In contrast, in common law jurisdictions, motives are traditionally not considered in criminal liability<sup>16</sup> unless explicitly defined as part of a crime.<sup>17</sup> For example, the offence of terrorism in England involves serious violence against people and property<sup>18</sup> designed to intimidate the public or influence the Government for racial, religious, political or ideological purposes.<sup>19</sup> Thus, the defendant’s motive is a core definitional element differentiating this offence. Furthermore, common law jurisdictions often consider motives during prosecution and sentencing. For example, offences specified in the Crime and Disorder Act 1998 become racially or religiously aggravated with an enhanced penalty if motivated, wholly or partly, by hostility towards members of a racial group.<sup>20</sup> An example, more relevant to mercy killings, is that a ‘belief’ by the defendant that their actions were done out of ‘mercy’ is a factor that may count towards reducing the minimum period of imprisonment for the offence of murder.<sup>21</sup> Additionally, under the 2010 prosecutorial policy for assisted suicides, being motivated by compassion is a factor against prosecution.<sup>22</sup>

Therefore, motives are sometimes relevant in criminal liability in common law jurisdictions, particularly in prosecution and sentencing. Certain offenders, such as those compassionately motivated, seem to be differentiated ethically. These offenders do not show the same disregard for the law and the social principles the law attempts to protect as those who offend for selfish or malicious motives.<sup>23</sup> In the law of homicide, defendants are usually punished for being aggressive and malicious under the offences of murder or voluntary manslaughter.<sup>24</sup> Other times, offenders are punished for acting unlawfully and

13. For reasons of consistency, this discussion refers to the terms ‘suspect’ and ‘victim’ when discussing the public interest factors on prosecuting mercy killings, as these terms are used in the CPS’s Guidance of ‘Proposed changes to “Homicide: Murder and Manslaughter”’.

14. Colombian Penal Code, article 106.

15. Swiss Penal Code, article 114.

16. A full examination of the debate regarding the relevance of motives in criminal liability is beyond the scope of this article. See e.g., A Duff, ‘Principle and Contradiction in the Criminal Law: Motives and Criminal Liability’ in A Duff (ed.) *Philosophy and the Criminal Law* (Cambridge University Press, United Kingdom 1998).

17. WRP Kaufman, ‘Motive, Intention, and Morality in the Criminal Law’ (2003) 28 Criminal Justice Review 317, 318.

18. Terrorism Act 2000, s. 1(2).

19. Ibid at s. 1(1).

20. Crime and Disorder Act 1998, s. 28(1)(b).

21. Crown Prosecution Service, ‘Homicide: Murder and Manslaughter’ (CPS, March 2019)

<<https://www.cps.gov.uk/legal-guidance/homicide-murder-and-manslaughter#:~:text=himself%20or%20not.,Murder%20Sentencing,a%20whole%20life%20order>> accessed 23 March 2023.

22. See Crown Prosecution Service, above n. 7 at para 45(2).

23. C Sistare, ‘Agent Motives and the Criminal Law’ (1987) 13 Social Theory and Practice 303, 314.

24. See Crown Prosecution Service, above n. 21.

dangerously under unlawful act manslaughter or for being grossly negligent in killing another person under gross negligence manslaughter.<sup>25</sup> Through such behaviours, they often represent a significant danger to the public. A person who is motivated by compassion and decides to kill another is differentiated from these cases because they are somewhat less culpable than other defendants.

Dressler rightly noted that certain offenders might elicit compassion more readily than others. Courts often view individuals who commit compassionate killings of loved ones with more sympathy than those motivated by greed or anger.<sup>26</sup> A notable example is Heather Pratten, a 76-year-old mother who suffocated her son, Nigel, who was afflicted with a hereditary degenerative neurological disorder and frequently expressed a desire to die.<sup>27</sup> Pratten was initially charged with murder, but it was revealed that Nigel was close to dying, and her actions made no difference to his passing. The charge of murder was reduced to aiding and abetting suicide, resulting in a conditional discharge.<sup>28</sup> Compassionately motivated individuals like Heather Pratten pose no threat to the public as they are not violent and are unlikely to repeat their actions. Thus, compassionate motives can significantly affect the crime's moral character. Reflecting this in criminal law is important for reasons of justice and ensuring more sympathetic treatment of mercy killings.

Nonetheless, England and Wales have no specific offence or defence for mercy killings, and courts have remained firmly against allowing existing criminal law defences to cover these cases. Notably, in 2012, the High Court refused to allow a declaration by Tony Nicklinson, a stroke victim left completely paralysed, that the defence of necessity would be available if a physician assisted him in dying.<sup>29</sup> The High Court noted that no rights, including autonomy, are as important as life.<sup>30</sup> This decision followed *Dudley and Stephens*, which established that necessity could not be a defence in cases of murder and thus could not be used for two shipwrecked sailors that killed and ate a cabin boy to save themselves from starvation.<sup>31</sup> Thus, mercy killings are not legally differentiated from other crimes in the law of homicide.

## The Framework for Creating New Prosecutorial Guidelines

Since 2019, there has been a renewed interest and debate in mercy killings. Although the CPS did not precisely specify what prompted the public consultation, it seems that this was initially led by the case of Mavis Eccleston, an 80-year-old woman prosecuted for the murder of her terminally ill husband, who had repeatedly requested assistance to end his life.<sup>32</sup> While the CPS chose to prosecute Eccleston, the jury found her not guilty of both murder and manslaughter after hearing evidence that the couple had agreed to take a lethal cocktail of drugs to end their lives together, but Mavis survived the suicide attempt.<sup>33</sup> The media heavily reported this case, which led to renewed interest and debate questioning whether prosecuting mercy killings is in the public interest if the suspect is compassionately motivated and the jury is likely to acquit.

A short time after Eccleston's prosecution, the organisation 'Dignity in Dying' launched a campaign called 'Compassion Is Not A Crime'. This was led by loved ones who had been criminalised for mercy killing cases, including the daughter of Mavis Eccleston.<sup>34</sup> This campaign urged the Ministry of Justice to

25. Ibid.

26. J Dressler, 'Some Very Modest Reflections on Excusing Criminal Wrongdoers' (2009) 42 Texas Tech law review 247, 256.

27. Campaign for Dignity in Dying, 'Heather Pratten' (Dignity in Dying) <https://www.dignityindying.org.uk/story/heather-pratten/> accessed 23 March 2023.

28. Ibid.

29. *R (Nicklinson) v Ministry of Justice* [2012] EWHC 2381 (Admin) at para 14.

30. Ibid at para 14.

31. *R v Dudley and Stephens* (1884) 14 Q.B.D. 273 at 273.

32. See Campaign for Dignity in Dying, above n. 11.

33. Ibid.

34. See Campaign for Dignity in Dying, above n. 12.

announce a call for evidence on the functioning and impact of the current blanket ban on mercy killings. Eventually, it garnered much support from Parliamentarians and Police and Crime Commissioners, many of whom wrote to the former Justice Secretary Robert Buckland expressing their concerns that the current laws around mercy killings are unfit for purpose.<sup>35</sup>

The intense media attention and the public debate that started through this campaign highlighted that there might be no benefit in prosecuting cases, such as Mavis Eccleston's, that are wholly motivated by compassion. This realisation was instrumental in leading the CPS to start a public consultation in January 2022 on a proposed update to the legal guidance on homicide.<sup>36</sup> Shortly after, a non-exhaustive list of public interest factors was proposed, which, if adopted, will guide prosecutors on charging decisions for mercy killings.<sup>37</sup>

## The Appeal of Prosecutorial Discretion for Mercy Killings

The proposal to address mercy killings through prosecutorial discretion is a welcomed update compared to the current reliance on sentencing discretion. Prosecutorial discretion allows compassionately motivated individuals who do not deserve to be punished under homicide laws to avoid the distress of a criminal trial, conviction, and associated stigma, even if their sentence might be mitigated. The House of Commons in 2020 noted that there is a two-tier system resulting from the DPP's prosecutorial guidance on assisted suicides, while no similar policy exists for mercy killings.<sup>38</sup> Only those with loved ones healthy enough to proceed with assisted suicide or wealthy enough to travel to Switzerland, where assisted suicide is legal, could avoid prosecution. The different treatment could be partly explained because the DPP's prosecutorial guidelines on assisted suicides, contrary to the sentencing discretion for murder, consider whether there was a request for assistance in dying.<sup>39</sup> Enabling autonomy makes suspects in assisted suicides somewhat less deserving of prosecution and potential imprisonment. If the CPS's prosecutorial guidance on mercy killings is implemented, it will introduce similar considerations on whether there was a request for assistance in dying.<sup>40</sup>

Sentencing discretion in mercy killings lacks efficacy in serving the purposes of deterrence, rehabilitation, and public protection, but perhaps only of retributive justice. Individuals compassionately motivated to end the suffering of a loved one act altruistically and are unlikely to re-offend. Thus, there is no benefit in rehabilitating or protecting the public from them. Assessing the deterrent impact of criminal law on mercy killings presents challenges. Nonetheless, criminal convictions tend to stigmatise offenders, impeding future employability and earning power<sup>41</sup> and possibly deterring some potential offenders. On the other hand, those contemplating mercy killing might prioritise alleviating their loved one's suffering over selfish concerns like the fear of criminal consequences. Then they will not be deterred even if they face a criminal sentence. Using prosecutorial discretion will maintain the deterrence needed for ill-motivated suspects, as they will be prosecuted while excusing those compassionately motivated and not putting them through a criminal trial.<sup>42</sup> Since dealing with mercy killings through sentencing has no real benefit in deterrence, rehabilitation and public protection, it is better to deal with them through prosecutorial discretion.

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35. Ibid.

36. See Crown Prosecution Service, above n. 1.

37. See Crown Prosecution Service, above n. 8.

38. House of Commons 23 January 2020, vol 670 at col 190WH

<<https://hansard.parliament.uk/Commons/2020-01-23/debates/B0F8B659-0411-45E7-9341-05C2B3529102/AssistedDyingLaw>> accessed 2 May 2023.

39. See Crown Prosecution Service, above n. 7 at para 45(1).

40. See Crown Prosecution Service, above n. 8.

41. J Chalmers and F Leverick, 'Fair Labelling in Criminal Law' (2008) 71 *The Modern Law Review* 217, 223.

42. See Crown Prosecution Service, above n. 8.

Most public interest factors in the CPS's guidance on prosecuting mercy killings are likely already considered by prosecutors unofficially. The codification of these considerations in an official policy is a positive development in a complicated area of the law. It balances the conflicting social, moral and political debates by achieving a pragmatic compromise that can satisfy everyone.<sup>43</sup> This policy clarifies when mercy killings will be prosecuted, while theoretically, it will not change the law of homicide. Sceptics might argue that the law's purpose is not to satisfy everyone and is preferable to have a precise position through the substantive law on matters such as mercy killings. Leading on from this, those opposing prosecutorial discretion for a complicated subject such as mercy killings might argue that this approach puts too much burden and excessive power on a single law officer.<sup>44</sup> Such concerns might raise constitutional legitimacy issues, as sceptics could support that regulatory decisions for such controversial matters should generally fall to the Parliament.<sup>45</sup> Using prosecutorial discretion could also create uncertainty and raise concerns about the ease of amending the prosecutorial guidelines compared to legislation.

Whether the substantive law should change to embrace the prosecutorial policy's qualifications raises an extensive discussion.<sup>46</sup> It is important to acknowledge that dealing with mercy killings through legislation does not necessarily imply replacing the current law with something increasingly more permissive. Instead, a new lesser offence for mercy killings could be created, following the examples of Colombia and Switzerland, or a new criminal law defence, with specific criteria to be met.<sup>47</sup> In the case of a new offence, the police would investigate the circumstances to decide whether to refer it to the prosecutor.<sup>48</sup> Alternatively, if a mercy killing defence is created, the prosecutor might decide not to proceed if there is evidence that the defendant is entitled to the defence.

Nonetheless, the CPS clarified that the prosecutorial guidance on mercy killings would not change the substantive law.<sup>49</sup> It will serve as a tool to direct prosecutors' discretion and not to create a list of offence qualifications or decriminalise mercy killings. Opponents of prosecutorial discretion will raise concerns about the 'slippery slope' argument,<sup>50</sup> suggesting that relaxing the approach to assisted death will lead to unacceptable consequences.<sup>51</sup> An empirical prediction of the slippery slope argument indicates that implementing a prosecutorial policy on mercy killings will gradually shift our values, accepting cases previously deemed unacceptable.<sup>52</sup> Then, in the event of legalisation, we will be unable to draft, enforce effectively and police any safeguards.<sup>53</sup>

There is no plausible reason to assume a connection between creating prosecutorial guidelines on mercy killings and decriminalisation. For example, suppose we now believe that mercy killing is wrong and thus is criminalised under the law of homicide. In that case, it is unlikely that we will lose this ability in the future, even if some cases do not warrant prosecution.<sup>54</sup> Such slippery slope arguments

43. A Norrie, 'Legal Form and Moral Judgement: Euthanasia and Assisted Suicide' in A Duff, L Farmer, S Marshall, M Renzo, and V Tadros (eds), *The Structures of the Criminal Law* (Oxford University Press, Oxford 2011) 134.

44. J Keown, *The Law and Ethics of Medicine: Essays on the Inviolability of Human Life* (Oxford University Press, Oxford 2012) 306.

45. B Livings, 'A Right to Assist? Assisted Dying and the Interim Policy' (2010) 74 *Journal of criminal law* 31, 52.

46. Whether and in which manner the substantive law needs to change to embrace the prosecutorial policy's qualifications is a separate question that will not be addressed in this article.

47. E Jackson, 'In Favour of the Legalisation of Assisted Dying' in E Jackson and J Keown (eds), *Debating Euthanasia* (Hart, Oxford 2012) 66.

48. Ibid at 66.

49. See Crown Prosecution Service, above n. 8.

50. A full-scale investigation into the merits of the 'slippery slope' argument is beyond the scope of this article.

51. J Keown, 'Euthanasia in the Netherlands: Sliding down the Slippery Slope?' in J Keown (ed.), *Euthanasia Examined* (Cambridge University Press, Cambridge 1995).

52. A Jefferson, 'Slippery Slope Arguments' (2014) 9 *Philosophy Compass* 672, 676.

53. J Keown, *Euthanasia, Ethics and Public Policy: An Argument Against Legalisation* (Cambridge University Press, Cambridge 2018) 72.

54. See Jefferson, above n. 52 at 676.

essentially lead us into falling down a slippery slope ourselves, as we effectively say that we do not trust ourselves to follow the law, establish limits and respect them. Thus, in theory, there is no reason not to trust that we will be able to understand the law, which criminalises mercy killings, and at the same time, effectively implement the CPS's prosecutorial guidelines.<sup>55</sup>

However, experience from foreign jurisdictions with right-to-die legislation raises practical concerns about the slippery slope argument. Evidence suggests that taking the first step to a more relaxed approach under certain conditions will lead to widening those conditions in the future. For example, assisted death legislation in the Netherlands widened to include those with physical and mental suffering, such as those at the onset of dementia.<sup>56</sup> Similarly, Belgium extended its legislation on assisted death to 'anticipation of a future coma, loss of independence, or progressive dementia'.<sup>57</sup> Accurately comparing evidence from foreign jurisdictions to the potential consequences of the prosecutorial policy on mercy killing in England and Wales is speculative. This is because there are differences in social sentiments, legal norms, and culture.<sup>58</sup> Nonetheless, even if, as in foreign jurisdictions, the English position were to gradually widen, as the Health and Social Care Committee rightly acknowledged, in an inquiry on assisted death, in March 2023, this is not necessarily a negative slippery slope. This is because widespread public support or practical reasons might justify this.<sup>59</sup>

Another view on the slippery slope argument is that, according to Keown, logically, once something becomes de facto allowed, the argument for its de jure legalisation becomes even more robust.<sup>60</sup> Thus, by creating an official policy of non-prosecution for mercy killings, their decriminalisation will eventually be unavoidable. Then, if we accept the decriminalisation of some instances under specific limitations, this is also a case for legalisation without them.<sup>61</sup> For example, we might eventually proceed in allowing assistance in dying for people, regardless of whether they are suffering or have made a request.<sup>62</sup> The prosecutorial policy on mercy killings would be the first step towards permitting many different types of assistance in dying.<sup>63</sup>

However, such slippery slope concerns exist whenever we attempt to regulate anything and are not always valid. Even if the prosecutorial policy on mercy killings leads to a more relaxed approach to assisted death and legislation under certain conditions that does not necessarily mean it will lead to legalisation without those conditions. Keown's argument is either considering autonomy as a rhetorical tool or increasing autonomy to an absolute right. Smith rightly noted that this argument is valid only when unbearable suffering and autonomy are considered separately.<sup>64</sup> As long as these two elements are necessary legislative conditions, the risk of slippage is minimised. Consequently, there is no logical link to suggest that even if the prosecutorial policy on mercy killings leads to some form of legalisation under certain conditions, we will eventually allow cases without these.

According to a different argument by Greasley, it does not matter if the prosecutorial discretion is not law or will not become law, as it nonetheless creates a public expectation of non-prosecution.<sup>65</sup> Thus,

55. M Otlowski, 'Getting the law right on Physician Assisted Suicide' (2011) 3 Amsterdam Law Forum 127, 135.

56. Wet toetsing levensbeëindiging op verzoek en hulp bij zelfdoding van 12 april 2001 [Termination of Life on Request and Assisted Suicide (Review Procedures) Act of 12 April 2001] Stb 2001 194 sub-s 2(1) and *Regionale toetsingscommissies euthanasie: Jaarverslag 2004* [Regional Euthanasia Review Committees: Annual Report 2004] (English edn).

57. Belgian Act on Euthanasia 2002 s. 3 and *Commission fédérale de contrôle et d'évaluation de l'euthanasie, Troisième rapport aux chambres législatives* (2006–2007) [CFCE, Third Report to the Legislative Chamber (2006–2007)].

58. See Jefferson, above n. 52 at 679

59. Health and Social Care Committee, Oral evidence: Assisted dying/assisted suicide (HC 2023, 711) at Q. 66.

60. See Keown, above n. 44 at 306.

61. See Keown, above n. 53 at 77.

62. Ibid at 77.

63. Ibid at 77.

64. S Smith, 'Fallacies of the logical slippery slope in the debate on physician-assisted suicide and euthanasia' (2005) 13 Medical Law Review 224, 232.

65. K Greasley, 'R(Purdy) v DPP and the Case for Wilful Blindness' (2010) 30 Oxford Journal of Legal Studies 301, 326.



whether mercy killings are decriminalised in statute becomes irrelevant, as public perception has been modified to think it is. For Greasley, the publication of an official policy of non-prosecution undermines the formal prohibition on mercy killings in a way that an identical non-official policy does not.<sup>66</sup> However, in practice, it is clear that a prosecutorial policy on mercy killings does not promise non-prosecution. It only offers different reasons in favour and against prosecution that will be considered in the decision-making process and were probably already considered in cases like Mavis Eccleston's. But, even if some people form an expectation of non-prosecution, this would be easily discounted when some mercy killing cases are prosecuted after the implementation of the prosecutorial policy.

## Evaluating the Public Interest Factors in Light of Compassion

In the CPS's guidance on prosecuting mercy killings, eleven public interest factors tend to favour prosecution, and six tend against it.<sup>67</sup> Each case will be considered on its facts as one factor may outweigh several others in the opposite direction.<sup>68</sup> However, the nature of this policy invites some concerns about the parameters considered in deciding whether to prosecute. This is primarily because the consultation document listed public interest factors but did not attempt to justify how these fit within assessing mercy killings and why these factors were chosen instead of others.

### *The Suspect was Wholly Motivated by Compassion*

The CPS's guidance emphasises the suspect's compassionate motives, as a reference can be found in the reasons in favour and against prosecution.<sup>69</sup> Nonetheless, understanding the meaning of compassionate motives is complicated. The definition of compassion has a contingent evolutionary and cultural history.<sup>70</sup> One of its most famous accounts is Martha Nussbaum's analysis of Aristotle's examination of pity in Rhetoric, which identified three core components. Firstly there needs to be a belief that the suffering is serious rather than trivial; secondly, a belief that this suffering was not caused primarily by the person's culpable actions; and finally, a belief that the pitier's possibilities are similar to those of the sufferer.<sup>71</sup>

Nussbaum's definition of compassion emphasises its connection with the experience of another's suffering. This seems to be a predominant element of compassion across different scholarly definitions. For example, Lazarus treats compassion as 'feeling personal distress at the suffering of another and wanting to ameliorate it'.<sup>72</sup> However, Nussbaum's criteria that the suffering was not primarily caused by the person's culpable actions appear unconvincing. For example, a mother will still feel compassion for her son, who was left paralysed after having a car accident, even if the son was driving dangerously. Similarly, Nussbaum's third requirement of believing that the pitier's possibilities are similar to those of the sufferer seems unconvincing. For example, one can have compassion for someone suffering napalm burns without believing they could be in the same condition.<sup>73</sup> Thus, to feel compassion, one does not need to believe that the afflicting condition could happen to oneself. As Carr noted convincingly, compassion seems to involve viewing another person's suffering in the sense of shared humanity, of regarding the other as a fellow human being.<sup>74</sup>

66. Ibid at 323-324.

67. See Crown Prosecution Service, above n. 8.

68. Ibid.

69. Ibid.

70. D Feenan, 'Law and compassion' (2017) 13 International journal of law in context 121, 122.

71. MC Nussbaum, 'Compassion: the Basic Social Emotion' (1996) 13 Social Philosophy and Policy 27, 31.

72. RS Lazarus, *Emotion and Adaptation* (Oxford University Press, New York 1991) 289.

73. B Carr, 'Pity and Compassion as Social Virtues' (1999) 74 Philosophy 411, 422.

74. Ibid.

This analysis of Nussbaum's three components of compassion indicates that at its basis lies an identification with the sufferer as a fellow human being, recognising that similar misfortunes may also befall one insofar as one is human. Consequently, compassion refers to the feeling of identification and sympathy towards someone in serious suffering. In light of this, it is worth exploring what new factors might be added to the guidelines to help prosecutors assess the suspect's compassionate motives and how some of the CPS's proposed public interest factors fit this definition.

### *The Suspect had a Reasonable Belief That the Victim Was Under Intense Suffering*

As noted, compassion relates to seeing someone in intense suffering. Thus, mercy killings entail a proactive reaction to alleviate others' suffering, motivated by an altruistic desire to help them in their time of need. However, the CPS's guidelines do not reference the victim's suffering or medical condition. This is similar to the existing guidelines on prosecuting assisted suicides, as the DPP removed references to the victim's medical condition to avoid symbolisms identifying which lives are worth living.<sup>75</sup> The mercy killings policy might not consider the victim's suffering because of similar concerns. Thus, the DPP could avoid cultivating a social environment in which controlled death is an accessible and normalised option for certain people, such as those who are disabled, leading to potential social pressurisation and manipulation of the vulnerable.

Nonetheless, judgements on the worthwhileness of individual lives are already made in medical law. Healthcare professionals are legally allowed to bring about death through an omission of withdrawing or withholding life-sustaining treatment for incompetent patients once their duty to treat has expired, but not to take active measures.<sup>76</sup> For example, in *Aintree*, the widow of an incompetent man who was seriously ill and placed on a ventilator appealed against a Court of Appeal's decision that it was in his best interests to have life-sustaining treatment withheld.<sup>77</sup> The Supreme Court dismissed the appeal and affirmed that decision-makers when considering the patient's best interests, must look at the nature of the medical treatment along with what the patient's attitude would likely be.<sup>78</sup> Thus, even if an assessment of the victim's suffering within the CPS's policy might create untenable symbolisms for the value of individual lives, this problem is not unique to mercy killings and thus is not enough to indicate against adding such a factor.

Consequently, a further factor should be added to the policy on mercy killings, which will consider the victim's suffering and allow the prosecutors to better evaluate the suspect's compassionate motives. This suffering could be physical or mental, as psychological suffering might be equally painful to physical deterioration. In codifying this factor, it is important to understand that our rational grasp of the world can often be fallible, making our compassionate emotions sometimes irrational and disproportionate to the evidence of suffering.<sup>79</sup> We might experience legitimate compassion for someone we honestly think is suffering, but whether this feeling is justified depends on the circumstances.<sup>80</sup> For example, a daughter might honestly believe that her blind father is suffering intensely and thus would decide to kill him. However, this would not be an appropriate expression of her compassion, as often, non-disabled individuals underestimate the life of others with disabilities.

The guidelines on mercy killing should state as a factor against prosecution that the suspect reasonably believed the victim was under intense physical or mental suffering. Then the prosecution will consider whether the suspect's actual belief in the victim's suffering is also reasonable. Objective evidence,

75. R Heywood, 'The DPP's Prosecutorial Policy on Assisted Suicide' (2010) 21 King's Law Journal 425, 432.

76. *Airedale NHS Trust v Bland* [1993] A.C. 789 at 790.

77. *Aintree University Hospitals NHS Foundation Trust v James* [2013] EWCA Civ 65 at 22.

78. *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67 at para 39.

79. A Duff, 'Criminal Responsibility and the Emotions: If Fear and Anger Can Exculpate, Why Not Compassion?' (2015) 58 Inquiry 189, 210.

80. *Ibid* at 210.

such as a medical diagnosis of a painful condition, can support assessing the suspect's belief. In that case, the suspect might have reasonably believed they should help the victim stop that intense suffering through a mercy killing.<sup>81</sup> However, suffering is subjective and cannot be determined by clinical methods. In mercy killing cases, a suspect may genuinely believe in the victim's suffering, regardless of whether the victim is conscious or formally diagnosed. For example, Frances Inglis attempted to end her son's life after an accident through a heroin injection, convinced he wouldn't want to live disfigured and dependent.<sup>82</sup> Due to this incident, he suffered further consequential deterioration leaving him in a vegetative state. A year later, Frances injected him again with a lethal dose of heroin.<sup>83</sup> Thus, prosecutors in mercy killings, in addition to a medical diagnosis, can also rely on subjective evidence. The prosecution will evaluate whether the suspect had a reasonable belief, based on the victim's circumstances, that they deserved help to die because they would not want to continue living.

### *The Suspect had a Close Relationship With the Victim*

It is easy to accept that a suspect will feel compassion for a loved one in suffering. Loved ones often experience emotional pain with the person suffering with whom they have a close bond. According to Feinberg, only in close relationships of love would a suspect have a genuine stake in the victim's well-being as an end in itself.<sup>84</sup> Then what harms the victim directly, ipso facto, harms the suspect indirectly.<sup>85</sup> Those in close relationships of love also have special knowledge of their loved ones suffering. This further prompts their compassionate feelings. As Del Mar convincingly noted, compassion would necessarily involve understanding what another is experiencing and the situation in which they are experiencing it.<sup>86</sup>

It is harder to accept that a stranger, or a medical practitioner, will feel the same compassion for a suffering patient. While some medical professionals might legitimately experience compassion in some instances, usually, the only bond they have with the patient is a duty of care. The unique nature of their job, frequently witnessing patients' deaths, often limits the emotional and psychological impact causing compassionate feelings. Similarly, sometimes someone might experience compassion for a stranger merely as a fellow human being who is suffering. But, the depth or extent of compassion for a stranger is different. As Feinberg rightly argued, A, a stranger, may be unhappy from seeing B suffering and, compassionately motivated, might try to help him. Still, the harm B is experiencing is not also harm done to A. A only suffers some vicarious unhappiness, which leaves their interests largely unaffected.<sup>87</sup> It is thus an inappropriate expression of compassion for a stranger who watches a child starving in a television program to travel to their country to take their life. The mercy killing of a terminally ill husband by his wife is a more appropriate expression of compassion, based on her special knowledge of his circumstances and the strong bond of love between them, making her motives more profound than those of strangers.

The guidelines address the possibility that the suspect might be a stranger or a medical practitioner in the considerations tending in favour of prosecution.<sup>88</sup> Nonetheless, these factors seem to be included in the policy to avoid undue influence on the victim's decision. This is evident from the CPS's clarification that 'it will be necessary to consider whether the suspect may have exerted some influence on the

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81. Select Committee Report 2004 House of Lords Vols I, II and III at paras 127–130.

82. *R v Inglis* [2011] 1 W.L.R. 1110 at para 32.

83. *Ibid* at para 32.

84. J Feinberg, *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton University Press, Princeton 1980) 51.

85. *Ibid* at 51.

86. M Del Mar, 'Imagining by Feeling: A Case for Compassion in Legal Reasoning' (2017) 13 *International Journal of Law in Context* 143–157.

87. See Feinberg, above n. 84 at 51.

88. See Crown Prosecution Service, above n. 8.

victim'.<sup>89</sup> Thus, a factor should be added within the guidelines to evaluate the closeness of the suspect's and the victim's relationship. This factor would state that prosecution is less likely if the suspect had a close relationship with the victim. This imposes an evidential question of whether it was credible for the suspect to end the victim's suffering based on their relationship, which is significantly broad. It will encompass relationships such as parents, foster parents, stepparents, children, siblings, grandparents, aunts, uncles, cousins, nephews, and close friends and neighbours. Therefore, the prosecution will evaluate the proximity of the suspect's and the victim's relationship. Then there will be an assessment of whether the proximity of the relationship warranted the suspect to feel compassion to the extent of taking their loved one's life.

Potential evidence for the prosecution to assess this factor might be that the suspect and the victim lived together or that the suspect was the victim's carer. The prosecution could also consider whether the suspect sought any other means of alleviating the suffering of their loved one, such as by placing them in palliative care. Sceptics might oppose placing someone in palliative care obviates the need for mercy killing. However, as it was rightly noted by the Health and Social Care Committee in 2023, palliative care often cannot eliminate unbearable suffering for everyone.<sup>90</sup> Often there is such intense suffering physical integrity, and functional ability are so minimised that even with skilled care, someone's life remains of very low quality.<sup>91</sup>

Sometimes even in cases where the suspect is not living with the victim, and there is considerable help from caring agencies, loved ones will continue to feel compassion as intense suffering cannot be completely alleviated. We might feel a very strong sense of compassion and be able to appreciate someone's suffering from the overall relationship we have with them, even if we do not see them often or take care of them. For example, a child will feel compassion for their parent, who might suffer from their advanced age, even if they live in a care home. Thus, while the prosecution can consider such evidence, these will not be a determinate factor in assessing the closeness of the suspect's and the victim's relationship.

### *The Victim had Reached a Voluntary, Clear, Settled and Informed Decision to End Their Life*

One of the most frequently argued concerns against having the option to request assisted death is that this will place those most vulnerable in danger of being pressured to make this choice. An example would be someone who has something to gain from their passing, such as an inheritance, or a victim who feels they are a burden to their loved ones. As the House of Commons noted in one of the most recent discussions on assisted death in July 2022, legalising assisted death would pressure vulnerable family members to choose this option and avoid being a burden to their loved ones.<sup>92</sup> 'Care Not Killing', an organisation campaigning against legalising assisted death in the UK, agrees with such concerns and warns that any relaxation of the law will leave vulnerable people without adequate legal protection.<sup>93</sup> Furthermore, the Health and Social Care Committee acknowledged that elderly abuse is a particular concern. Although there is no robust evidence that people choosing to travel to Switzerland for assisted suicide are coerced,<sup>94</sup> elderly abuse is hard to identify as it often is not physical but emotional.<sup>95</sup>

89. Ibid.

90. See Health and Social Care Committee, above n. 59 at Q. 21.

91. D Harris, B Richard and P Khanna, 'Assisted Dying: The Ongoing Debate' (2006) 82 Postgraduate Medical Journal 479, 479.

92. House of Commons, 'Assisted Dying', 4 July 2022, vol 717 at col 235WH <<https://hansard.parliament.uk/commons/2022-07-04/debates/65B4AB0B-D148-42C6-8D8B-43AAC29219FB/AssistedDying>> accessed 2 May 2023.

93. Care not Killing, 'About Care Not Killing' <<https://www.carenotkilling.org.uk/about/>> accessed 24 March 2023.

94. See Health and Social Care Committee, above n. 59 at Q. 59 and Q. 69.

95. Ibid at Q. 26.

The importance of protecting vulnerable people was also highlighted in the case of *Pretty*.<sup>96</sup> The applicant was completely paralysed and wished to end her life. Her husband was willing to assist her, but he could face prosecution under English law.<sup>97</sup> The case of *Pretty* was before the challenge of *Purdy* and before the publication of the DPP's prosecutorial policy on assisted suicides.<sup>98</sup> Thus the DPP was asked but refused to agree to grant *Pretty*'s husband immunity from prosecution. *Pretty* took her case to the European Court of Human Rights (ECtHR),<sup>99</sup> arguing that the prohibition of assisted death was against Article 2, her right to life and Article 8, her right to a private life of the European Convention on Human Rights.<sup>100</sup> The ECtHR concluded that the interference with Article 8 might be justified because it aims to protect vulnerable people in society.<sup>101</sup> According to the ECtHR, if there is a chance to change the law on assisted dying, robust safeguards must be enforced to protect those vulnerable from pressure.<sup>102</sup>

Accordingly, one of the primary objectives of implementing the prosecutorial policy on mercy killings is to protect those vulnerable from being pressured into requesting to die. The CPS's policy on mercy killings makes several references to assessing potential abuse, such as whether there was a violent history between the suspect and the victim or if the suspect had something to gain from the victim's passing.<sup>103</sup> More importantly, the guidelines include a consideration both in favour and against prosecution on whether the victim reached a voluntary, clear, settled and informed decision to end their lives.<sup>104</sup> Such considerations draw upon the argument that a person has a right to shape their life through their autonomous choices, extending to choosing the manner of their death. They could also guarantee that the mercy killing was not abusive and that the victim wanted to die.

It is evident that the CPS's policy focuses on assessing the victim's request. However, the guidelines seem open to mercy killings committed at the victim's request and without. This is because, as noted under the prosecutorial policy, one factor may outweigh several other factors.<sup>105</sup> Thus, there might be cases where the victim does not want to die; nonetheless, the prosecution decides not to prosecute. There might be strong evidence that the suspect acted motivated by compassion, which might outweigh the lack of a request. Similarly, some cases might not be prosecuted, provided the victim requested to end their life, and the DPP believes this might outweigh the lack of compassionate motives.

If the guidelines focus primarily on finding evidence of compassion, it is debatable how considerations of the victim's request to die fit into this. Compassion can arise when the victim is suffering, regardless of whether they requested their life to end. For example, a mother may compassionately decide to end the life of her seriously ill son, who has repeatedly requested her assistance due to unbearable pain.<sup>106</sup> Similarly, a mother may compassionately end the life of her comatose son, believing that he would not want to live in such a condition, as in the case of *Inglis*.<sup>107</sup> In both instances, compassion motivates the mother's actions, irrespective of the victim's explicit request. Therefore, considering the victim's request to end their life may not help the prosecution determine whether the suspect acted out of compassion. This argument finds support in the recommendation by the Criminal Law Revision Committee in 1980, proposing a mercy killing offence which required the defendant to act out of

96. *Pretty v United Kingdom* [2002] 4 WLUK 606.

97. *Ibid* at 1.

98. See Crown Prosecution Service, above n. 7.

99. See *Pretty*, above n. 96 at 1.

100. *Ibid* at 4.

101. *Ibid* at 37.

102. *Ibid* at 4.

103. See Crown Prosecution Service, above n. 8.

104. *Ibid*.

105. *Ibid*.

106. Sandra Laville, 'Trapped by ME, Lynn Gilderdale made it clear she wanted to die' *The Guardian* (25 January 2010)

<https://www.theguardian.com/society/2010/jan/25/lynn-gilderdale-me-assisted-suicide> accessed 6 June 2023.

107. *R v Inglis*, above n. 82 at para 32.

mercy under the belief that the victim was suffering.<sup>108</sup> However, this proposal did not mention the victim's competence or request to end their life, which was the main reason for being rejected.<sup>109</sup> It was believed that not including such provisions weakened the offence and provided less effective protection for disabled individuals than those fit and well.<sup>110</sup>

While the victim's request to die may not directly help assess the suspect's compassionate motives, it remains essential in shielding the victim from coercion. Moreover, when someone autonomously requests to end their life, they are not as wronged as when killed against their will. There is something more culpable about killing against our express wishes or the absence of a request, making such cases warrant prosecution more than cases where the victim requested to end their life. Therefore, the CPS must retain as a consideration that the victim had reached a voluntary, clear, settled and informed decision to end their life.<sup>111</sup> Even though the guidelines seem open to mercy killings with or without the victim's request, the prosecution will likely require evidence of both compassionate motives from the suspect and a request to die from the victim to support a decision not to prosecute.

Assessing the validity of the victim's decision to end their life effectively is challenging for the prosecution. The guidelines do not specify the evidence needed to determine whether the victim has clearly and unequivocally communicated their decision, presumably because there might be many considerations. For example, a written request by the victim could be considered strong evidence for the prosecution. However, victims vary in their intellectual abilities, experiences, and emotional responses to intense suffering, making not all written requests equally reliable. To address such concerns, the CPS rightly proposes to evaluate whether the victim was competent under the Mental Capacity Act of 2005,<sup>112</sup> which is the current test used for patients' decisions in medical law.

A further consideration for the prosecution might be evidence that the victim had undergone psychological or psychiatric consultation before deciding to die. Often people might have a strong emotional reaction to suffering, which might impair their capacity. Depressive disorders, for example, can lead to impaired cognitive functioning and a limited perspective that perceives death as the only viable solution.<sup>113</sup> This does not suggest that everyone thinking of assisted dying is mentally ill, nor does the lack of a psychological assessment indicate incompetence. Nonetheless, evidence of whether the victim received psychological or psychiatric support can help the prosecution assess the victim's capacity to decide to die.

The prosecution could also consider evidence regarding the length of time the victim spent deliberating their decision to die and whether they made repeated requests. While assigning appropriate weight to assessments made at different times and emotional states can be difficult,<sup>114</sup> such evidence will allow prosecutors to evaluate the victim's competence and whether their decision was influenced by temporary emotional distress caused by suffering. Similarly to the above-proposed consideration, the absence of fulfilling these criteria does not imply that the victim is incompetent or is not acting voluntarily. A terminally ill victim might not have enough time to deliberate over a long period, but that does not necessarily invalidate their decision. Prosecutors will use such evidence to assess the victim's decision; still, it will not automatically indicate against or in favour of prosecution, as each case will be judged on its own merits.<sup>115</sup>

108. Fourteenth Report of the Criminal Law Revision Committee on Offences Against the Person, Cmnd 7844 (1980).

109. *Ibid.*

110. *Ibid.*

111. See Crown Prosecution Service, above n. 8.

112. Mental Capacity Act 2005, s. 3.

113. H Hendin and K Foley, 'Physician-Assisted Suicide in Oregon: A Medical Perspective' (2008) 106 *Michigan Law Review* 1613, 1614.

114. J Glover, *Causing death and saving lives* (Penguin Books, Harmondsworth 1977) 174.

115. See Crown Prosecution Service, above n. 8.

## **Conclusion**

Mercy killings pose complicated legal questions, as defendants in these cases are morally differentiated from others in the law of homicide. The intense public debate that these cases do not deserve to be punished under the law of murder and manslaughter led the CPS in 2022 to propose a list of public interest factors relevant when deciding whether to prosecute. This policy places much emphasis on the suspect being compassionately motivated. While compassion is difficult to define, after examining Nussbaum's definition, this article supported that it relates to a strong identification or sympathy towards a loved one in serious suffering. In light of this, some policy adjustments to the CPS's guidelines were discussed to help prosecutors identify the suspects' compassionate motives.

Firstly, it was proposed that an additional factor should be added against prosecution, examining whether the suspect had a reasonable belief that the victim was under intense suffering. This factor will better ensure that the suspect's actions were a reasonable and proper expression of compassion. Furthermore, a second factor should be added against prosecution when the suspect has a close relationship with the victim. This factor will impose an evidential question of whether it was credible for the suspect to end the victim's suffering based on their relationship. Finally, the CPS's guidelines on mercy killings already focus on whether the suspect acted after the victim's request to end their life. Such considerations are important in end-of-life decisions and should be retained in the guidelines to prevent abuse and ensure the victim's autonomy. However, they are irrelevant in examining the suspect's motivations. Compassion is felt when the suspect sees a loved one enduring physical or mental suffering, regardless of whether the victim requests to end their life.

The proposal for creating a prosecutorial policy on mercy killing is one significant step in a much wider discussion. Since the CPS published the proposed update to legal guidance on homicide in 2022, no further progress has been made in this area. But, this significant development must maintain its momentum. If the policy is passed, it will be a welcomed update to this area of the law. It will facilitate a more sympathetic approach to mercy killing cases without putting the suspect through the distress of a criminal trial. Nonetheless, before the policy comes into effect, additional factors should be included for the guidelines to appropriately work and effectively assist prosecutors in identifying the suspect's compassionate motives.

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