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Mercy Killing, Partial Defences and Charge Decisions: 50 Shades of Grey

Abstract

The revolution of the partial defences to murder by the Coroners and Justice Act 2009 may have had a catastrophic impact on cases of mercy killing.¹ Whilst previously shoehorned into the diminished responsibility plea, the medicalisation of this defence may prevent such a ploy. However, a recent case has offered insight into the circumstances which may still result in a manslaughter conviction for mercy killers through a new avenue previously thought impermissible. This article will discuss the case and those similar, alongside charging decisions and just results. Mercy Killing remains a grey area in the criminal justice system, but is there light at the end of the tunnel?

Key Words: murder, voluntary manslaughter, mercy killing, plea bargains, partial defences, loss of control, diminished responsibility

Mercy Killing and Partial Defences

Murder has long been established as the intentional killing of another human being - the intentional requirement being that actions will kill, or cause serious harm at the very least. Criminal law in England and Wales does not concern itself with the *reason* for such an intention to end the life of another. This makes it incredibly difficult to proceed in cases which are driven by compassion

There are partial defences which seek to reduce a conviction to manslaughter, when the criteria for murder is present but there are exceptional circumstances born of emotion or abnormality of mental functioning.² These are diminished responsibility,³ and loss of control.⁴ Both received a rigorous overhaul ten years ago, mostly due to concerns with the old provocation defence (predecessor to loss of control) being gender biased and inadequate due to a hierarchy placing anger above other emotions. This made the partial defence accessible to angry and jealous defendants but not those acting from fear or desperation.⁵ The subsequent sweeping up of diminished responsibility to be included in this revolution to archaic homicide defences was unnecessary – there was little concern over the operation of this defence, which merely needed some clarity.⁶

Why is this problematic? The criminal law is often altered to keep up-to-date with ever changing societal norms and standards. Provocation had significant problems that needed to be addressed, most notably that the defence conceded to jealous and angry men, whilst ignoring the plight of domestic abuse survivors who killed their abusers after years of torment.⁷ Diminished responsibility did not have such serious issues. In particular, the vague terminology was useful to encompass cases such as mercy killing cases stemming from depression or a highly emotive state. This is an act of compassion, ending the life of a loved one who is suffering, in pain and distressed.⁸ Often referred to as a 'benevolent conspiracy',⁹ this allowed compassion to enter the courtroom as it did the

¹ Clough, A, 'Mercy Killing: Three's a Crowd?', (2015) 79(5) Journal of Criminal Law 358-372

² There is also a partial defence relating to suicide pact, but this will not be discussed in this work

³ S52 Coroners and Justice Act 2009

⁴ S54-55 Coroners Justice Act 2009

⁵ For example, R v Ahluwalia (1993) 96 Cr App R 133

⁶ Mackay, R, 'The New Diminished Responsibility Plea', (2010) Crim LR 290, Law Commission (2006) No 304. Report on Murder, Manslaughter and Infanticide,

⁷ For example, R v Ahluwalia (1993) 96 Cr App R 133, R v Thornton (1996) 1 WLR 1174, see also Clough, A, 'Battered Women: Loss of Control and Lost Opportunities', (2016) 3(2) Journal of International and Comparative Law 279-316

⁸ This is distinguished from assisted suicide

⁹ Mackay n(6) 295

defendant's actions.¹⁰ The strict new structure of diminished responsibility requires the defendant to be suffering from a recognised medical condition at the time of the fatal act, so continuing to stretch the defence to accommodate mercy killers might prove difficult. Gibson speculates that because the need to lessen the label and the sentence for a mercy killer remains, so must the 'charitable accommodation of these offenders', with this 'supervening over legal integrity'.¹¹ Even though the pragmatism for a partial excuse that reflects moral culpability in such situations remains, that does not mean the defence continues to be accessible by default. Arguably, the mandatory life sentence of a murder conviction would seem disproportionate to the social heinousness of a genuine mercy killing case, and a separate offence or defence as recommended by the Law Commission would have been wise, but without this the court's hands are likely tied.¹²

The new diminished responsibility plea requires a much more rigid application of the law, initially stemming from a 'recognised medical condition'.¹³ In many cases, a close relative suffering from a terminal illness may cause depression to form and be diagnosed in the accused, making a diminished responsibility plea a possibility, but this will not always be the case nor the reason for such drastic actions. The present author has previously advocated for, instead, an extension to the new partial defence of loss of control – a defence based on emotions. Presently, the defence covers the emotions of fear or anger which causes the accused to lose control and act as they did, alongside an objective limb allowing the notion of the 'reasonable man' to remain a yardstick for social standards.¹⁴ Adding the emotion of compassion as a third limb to the defence would allow mercy killing cases a new avenue for reducing a murder charge to manslaughter.¹⁵ This would also allow a consistency in application that does not rely on the generosity of medical experts.¹⁶

Though academics have previously agreed that 'murderer' or otherwise is not the label that should be applied in a mercy killing situation,¹⁷ the Law Commission had unfortunately considered it to be outside of their remit when reviewing the defences to homicide.¹⁸ Such cases were discussed during debates on the new defences themselves, with Lord Lloyd¹⁹ speculating on the usefulness of a partial defence based on extenuating circumstances, perhaps not dissimilar to the American Penal Code's 'extreme emotional disturbance' defence.²⁰ This defence mitigates murder to manslaughter when the killing is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse, using the actor's situation and circumstances to determine this. Robinson has commented that such a concession is justified because 'passion frequently obscures reason'.²¹ He also notes that there is no emotion excluded by this defence, unlike our current loss of control defence which currently encompasses only anger and fear:

¹⁰ See Foster, C, 'Mercy Killing: All Change of Business as Usual', (2006) 156 Law and Justice 48-52

¹¹ Gibson, M, 'Pragmatism Preserved? The Challenges of Accommodating Mercy Killers in the Reformed Diminished Responsibility Plea', (2017) 81(3) Journal of Criminal Law 177-200, 178, 198

¹² Law Commission (2006) No 304. Report on Murder, Manslaughter and Infanticide, 7.7

¹³ S52 Coroners and Justice Act 2009

¹⁴ S54 Coroners and Justice Act 2009

¹⁵ Clough n(1)

¹⁶ See Gibson n(10) 193

¹⁷ Livings, B, 'A New Partial Defence for the Mercy Killer: Revisiting Loss of Control', (2014) 65(2) NILQ 187-204, 188

¹⁸ Law Commission n(12) 3.63

¹⁹ HL Debate 30th June 2009 Vol 99 Col 150

²⁰ Model Penal Code Section 210.3(1)(b)

²¹ Robinson, P H, 'Abnormal Mental State Mitigations of Murder – The U.S. Perspective', in Reed, A and Bohlander, M, *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives on the Coroners and Justice Act 2009*, (Hart 2012)

“Unlike the common law rules, it does not explicitly require, or exclude, particular situations; there are no conditions that are inadequate as a matter of law to provide mitigation”²²

This was equally speculated to be of value by Mitchell, Mackay and Brookbanks, who favour a defence which merges diminished responsibility and the traditional provocation defence as overlap between the two was often evident.²³ Nourse has also commented that the question isn't allowing a concession in this area, but trying to answer the important question of *which* losses of control deserve the law's compassion.²⁴

The partial defence of loss of control (much like its predecessor provocation) has generally been deemed inadequate in its current form due to the requirement of a qualifying trigger. This asks that the defendant lost control due to either a fear of serious violence, or circumstances of an extremely grave character which gave the defendant a justifiable sense of being seriously wronged.²⁵ Livings has discussed the possibility of using the loss of control defence as it currently stands for mercy killing cases, with the manifestation of a painful illness acting as 'things done or said' as required by statute to trigger the loss of control.²⁶ Gibson described this as an 'unusually abstract' interpretation of the qualifying trigger.²⁷ At breaking point in such a situation, when the accused has watched their loved one suffer and snaps, their loss of control is provoked by a disease, not the words or actions of a person.²⁸ This is a bar to the defence. This was evident in the case of *Cocker*,²⁹ where the wife's suffering rather than her repeated requests to die were the conduct causing the fatal act. The victim had an incurable disease and begged the defendant to end her life repeatedly. On the fatal night, she deliberately woke him throughout the night, clawing at his back and repeating her demands. He put a pillow over her face to suffocate her. He appealed his murder conviction on the basis that provocation should have reduced the conviction to manslaughter, but the Court of Appeal decided such behaviour was the opposite of losing control. What the defendant had done was acceded to his wife's wishes, as he could no longer watch her suffer from an incurable disease. As this article will later discuss, there may be some situations in which the 'words done or said' criteria may be fulfilled.

One of the most prominent cases from the last ten years in this arena is that of *Inglis*,³⁰ in which a mother convicted of murdering her son had a nine year sentence reduced to five years. The victim had received serious head injuries due to falling from the back of an ambulance after an altercation in a pub. Though disfigured through partial removal of the skull to relieve pressure, the surgeon was encouraged by the victim's initial recovery and said he would one day live an independent life. The defendant did not believe this, and thought her 21 year old son continued to suffer, and should be relieved of this distressing state. It was shown in this case that even a lack of remorse over actions would not reduce the mitigating factors of grief and compassion, but the conundrum of how to treat mercy killers in the criminal justice system remains evident. In particular, the problems caused by Para 10 (a), Para 10(b) and Para 10 (d) Schedule 21 Criminal Justice Act 2003 which lists

²² Ibid, 6.

²³ Mitchell, B, Mackay, R, Brookbanks, W, 'Pleading for Provoked Killers: In Defence of Morgan Smith', (2008) 124 (oct) Law Quarterly Review 975-705, 685

²⁴ Nourse, V, 'Passion's Progress: Modern Law Reform and the Provocation Defense', (1997) 106 Yale Law Journal 1331, 1333

²⁵ S55 Coroners and Justice Act 2009

²⁶ Livings n(17) 199

²⁷ Gibson n(11) 182

²⁸ Clough, A n(1) 363

²⁹ Cocker (1989) Crim L R 740 (CA Crim Div)

³⁰ Inglis [2010] EWCA Crim 2637

premeditation, a vulnerable victim and a position of trust as aggravating factors in sentencing. Invariably, at least the latter two factors will be present in cases of mercy killing, but the *Inglis* case gave direction on how to proceed in a genuine case of killing for compassionate reasons. In fact, the Court of Appeal did refer to this case as one of the most difficult the court has had to deal with in regards to sentencing.³¹

We are certainly not the only jurisdiction trying to navigate this problem and find suitable solutions. The Canadian case of *Latimer* proved just as troublesome.³² Tried twice due to a Supreme Court overturning for prosecutorial misconduct, this case involved a man who killed his severely disabled quadriplegic daughter. She suffered from continuous seizures and spasms, was in constant pain due to a hip defect, and would frequently vomit. When she reached the age of twelve, he ended her life using car exhaust fumes, as an avenue to finally end her pain. Charged with first degree murder, the judge left second degree murder to the jury, allowing a ten-year minimum sentence rather than twenty-five.³³ Whilst many such cases are dealt with through manslaughter pleas or jury acquittals,³⁴ there was public concern that allowing such reductions in conviction would “encourage other caregivers of the disabled to resort to the same means to relieve themselves of the burden of caring”.³⁵ The case seemed to suggest that there was a hopelessness about her tortured existence rather than any kind of burden felt on the part of the accused.³⁶

How then, should the courts treat a case where malice is presumed (intention to end life is always present) but the evidence suggests something different? Such cases cannot be viewed in such a simplistic manner.³⁷ They present as murder, but should they be prosecuted as such? The case of Robert Knight certainly created such an argument.

The case of Robert Knight

If there is no suitable defence for your case, will jury sympathy allow for access to justice? Interestingly, in the case of *Inglis*,³⁸ the defendant refused to plead guilty or advance the diminished responsibility plea, asking that the court hear full details of her case. This also proved to be the situation in the case of Robert Knight, a very recent case in which a devoted son killed his mother and refused an early guilty plea or offer evidence of diminished responsibility.

Robert Knight was arrested 10th December 2018 and subsequently charged with murder after dropping his mother from the balcony railing of her care home with the purpose of ending her life. He had been willing to plead guilty to manslaughter on grounds of loss of control, but a lesser charge would not be accepted, and a jury trial proceeded. After a hung jury, a retrial was ordered, with the Crown still unwilling to accept a lesser plea than murder. On Friday 2nd August 2019 at Basildon Crown Court, a jury found Knight guilty of manslaughter, based on a successful partial defence of loss of control. This ground-breaking case, where not only the judge found sufficient evidence of loss of control to leave the defence to the jury, but the jury also accepted it, is revolutionary for mercy killing cases. It has been speculated by both academics and the Court of Appeal previously that

³¹ Ibid, Para 61

³² R v Latimer (1995) 8 W.W.R. 609, R v Latimer (1997) 1 S.C.R. 217

³³ See Sneiderman, B, ‘*The Latimer Mercy-Killing Case: A Ruminaton on Crime and Punishment*’, (1997) 5 Health Law Journal 1-26

³⁴ ibid 4

³⁵ ibid 3

³⁶ Hutchinson, B, ‘*Latimer’s Choice*’, (1995) 110 Saturday Night 38-43

³⁷ Brooks, T P, ‘*State v Forrest: Mercy Killing and Malice in North Carolina*’, (1988) 66 North Carolina Law Review 5, 1160-1176, 1166

³⁸ Inglis n(30)

provocation and loss of control would not succeed in a case of compassionate killing.³⁹ Gibson said the very idea of mercy killing and loss of control were inconsistent.⁴⁰ However, the very unique circumstances of the case will likely only apply to a small amount of future cases.

The facts of the case are these⁴¹. Knight, a man in his fifties, had an exceptionally close relationship with his mother June. She had cared for him during his thirties when he was first diagnosed with Myalgic Encephalomyelitis, and in return he took great care of her when old age eventually began to take its toll. When the victim died, she was in her third care home, with her son moving her each time he considered her care to be less than his very high standards. She suffered from Alzheimer's, and her body was continuously curled into the foetal position. When she died, she was at the end of her life, with doctors confirming she had only days to live.

On 7th December 2018, Knight had insisted his mother be taken to hospital when she began to suffer from a vomiting. At the hospital, she was diagnosed with winter virus, and treated for dehydration. She returned to the care home, but her son continued to be deeply concerned for his mother. On Monday 10th December 2018, he attended the home to visit and was very distressed about his mother's state. He believed she was suffering, in distress and in pain. His mother had been non-verbal for some time, and could not communicate feeling such a way. Staff would instead assess her using a MAR chart, noting non-verbal cues to check for signs of discomfort. Whilst he insisted she was suffering and should receive end of life medication which she had been prescribed, the care home staff said she was not in distress, but obviously at the end of her life.

Later, after work, Knight visited the care home again to check if his mother had improved, or received any treatment. He found her to be in, what he considered, an even worse state. His pleas to medicate her had fallen on deaf ears, even though he had insisted he knew when she was in pain from the way she looked at him. He snapped. After picking her up from the bed still curled in her usual position, he carried her out of the first floor fire exit and dropped her from the fire escape stairwell. He then alerted staff to his actions, and explained this to the police, telling them he could not stand to see her suffering, and the care home staff did not believe she was suffering as he did.

The prosecution's case was that the fatal act was premeditated, precluding the possibility of a momentary loss of control. Some of their evidence to support this was a still from CCTV footage showing the defendant glance over the rail of the staircase on his way to his mother's room. However, Knight did not then leave the room with his mother in his arms until 14 minutes later, negating the likelihood that he was checking he was not being followed to carry out a preconceived plan. In fact, all of the prosecution's witnesses (staff from the care home) spoke highly of Mr Knight. They described him as a loving and devoted son who cared deeply for his mother - a far cry from the merciless man who murdered his mother. They also spoke of his reaction after the murder, pale and quiet as if in shock.

The crown suggested there should be a verdict of murder for this man who acted without mercy, but the defence offered a very different view. A man who had lost his self-control after the words and actions of staff at the home, in complete disagreement as to the best way to care for the victim, had left him feeling a sense of being wronged. The Coroners and Justice Act 2009 states that for the loss

³⁹ For example, Inglis n(30) Para 41

⁴⁰ Gibson n(11) 181

⁴¹ Unreported, 29th July – 2nd August 2019, Basildon Crown Court. The initial trial occurred in May 2019, and the author attended court.

of control partial defence of murder to come into play, the following qualifying trigger must be present:

*“D’s loss of self-control was attributable to a thing or things done or said (or both) which—
(a) constituted circumstances of an extremely grave character, and
(b) caused D to have a justifiable sense of being seriously wronged”*⁴²

In addition, the objective test requires a person of Defendant's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of the defendant, might have reacted in the same or in a similar way to that of the defendant.⁴³

In *Knight’s* case, his mother’s apparent distress and his close relationship with his mother would be considered D’s circumstances. What was less clear was if ‘the same or in a similar way’ should be interpreted merely to be that a someone in Knight’s circumstances might have killed, rather than killed in the same manner. With counsel for Mr Knight, Michael Levy, advancing the loss of control defence in this new and unique way, Judge Samantha Leigh had a decision to make as to whether this was to be left to the jury for consideration, as stated in the new defence:

*(6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.*⁴⁴

Justice Leigh instructed the jury on loss of control, having established sufficient evidence to do so. The directions gave an enlightened approach to the provisions of s55, as she stated that the defendant could not rely on a loss of control unless it was triggered by something done or said, *or not done or said*, in this case the level of medication given to ease the victim’s pain.⁴⁵ This allowed the jury to return a verdict of manslaughter, and once again remove the murder label from the situation for a case motivated by compassion. The trial judge also referred to the extremely grave circumstances of the case as the defendant’s feeling of helplessness and a genuine belief that pain relief was needed but not given.

It is unlikely that the majority of mercy killing cases will have such circumstances which fit with the words of the qualifying trigger to loss of control as written in s55, but it certainly means that some ground has been made in such cases. This relates to the contextualisation presented by Livings that “decisions taken by people or bodies” could fulfil the ‘things said or done’ criteria.⁴⁶ For the rest of the mercy killing cases, where the defendant snaps based on the humiliating and degrading afflictions brought on by illness, the future remains unclear. The decision in *Zebedee*,⁴⁷ proved this, when a man who killed his 96 year old father who suffered dementia was convicted of murder. Though he had taken on a substantial burden of caring for him for a number of years, those final moments in which the disease manifested through soiling the bed became the final straw, but loss of control was not accepted here, despite him telling police that a ‘red mist’ came over him. The defendant had telephoned The Samaritans just days before the fatal incident in a state of depression and exhaustion.⁴⁸ How can a man in this position conform to the expectations of the criminal law? The biggest concession the court could make in this case was to reduce the minimum sentence from fourteen years to ten.

⁴² S55 Coroners and Justice Act 2009

⁴³ S54(1)(c) Coroners and Justice Act 2009

⁴⁴ S54 Coroners and Justice Act 2009

⁴⁵ Thursday 1st August, Basildon Crown Court

⁴⁶ Livings n(17) 199

⁴⁷ *Zebedee* [2012] EWCA Crim 1428

⁴⁸ *Ibid*, Para 13

As Norrie has noted,⁴⁹ the judge's instruction to the jury gives them the opportunity to make the right moral and political call. In *Knight's* case, she certainly did. Justice Leigh offered the jury an avenue the Crown Prosecution Service was not willing to concede on. An important question to ask is this: was the murder trial necessary when the result was the exact same plea that might have been offered in the first instance?

Charge Bargaining

A case at Crown Court costs the tax payer an average of £3000 per day.⁵⁰ Two week-long trials can therefore be calculated at around £30,000. Is it possible to shift the 'benign conspiracy' the criminal law has long held for mercy killing cases to charge bargaining? Perhaps it was the unusual mode of killing in *Knight's* case that caused the decision to proceed with a trial not once, but twice. Academia has long debated plea bargains and the decision of prosecutors to reduce charges in acceptance of a guilty⁵¹ – often referred to as a necessary evil in the U.S. The criminal justice system in England and Wales offers an early guilty plea scheme, where a reduction in sentence is given to a defendant who is willing to accept their guilt.⁵² This saves resources within the justice system, as well as preventing the witnesses and possibly the victim for having to go through the painful process of giving evidence. The problem occurs when the defence and prosecution cannot agree as to what charge the defendant should be pleading guilty to.

Much like plea bargains in America, the process encourages both parties working together – which must promote our 'Better Case Management' initiative. The cost to the defendant can be huge – after all, he has the most to lose.⁵³ By giving up their right to a trial by jury, the defendant gives up the gold standard of jurisprudence. This problem carries much more weight when the defendant claims not to have acted unlawfully at all. For a case like *Knight*, where the *level* of culpability is debated over, it is a grey area. We think of jury trials as having the function of separating the guilty from the not guilty, and of course, any system wanting to be efficient would find a way to avoid that costly procedure.⁵⁴ How do we find an equally efficient procedure for cases like mercy killing, where we often rely the sympathies of the lay people involved in the process? For an initial charge as heinous as murder, perhaps full trial adjudication is always the correct course of action.⁵⁵

The system to decide on accepting a lesser plea of manslaughter based on a partial defence still needs to a robust one – after all, Peter Sutcliffe (The Yorkshire Ripper) was almost successful in offering such a plea on grounds of diminished responsibility and avoiding a trial.⁵⁶ In particular, the family of the victim might need consideration:

*“generous waiver rewards could result in offenders being assigned such a small portion of the punishment they deserve for their crimes that victims or their family members will be outraged, rather than satisfied, by the outcomes”.*⁵⁷

Mercy killing cases are unique in this respect because, invariably, the victim and the defendant will be from the same family. This makes their 'satisfaction' at the outcome less troublesome. The

⁴⁹ Norrie, A, *The Coroners and Justice Act 2009 – Partial Defences to Murder (1) Loss of Control*, (2010) Criminal Law Review 275

⁵⁰ <https://www.dailymail.co.uk/news/article-2087212/Trial-jury-faces-axe-thousands-cases-courts-try-cut-costs.html> accessed 22nd September 2019

⁵¹ Lippke, R L, *The Ethics of Plea Bargaining*, (2011, Oxford University Press, Oxford) 4

⁵² S144 Criminal Justice Act 2003

⁵³ Rauxloh, R, *Plea Bargaining in National and International Law*, (2012, Routledge, Oxon)

⁵⁴ Lippke n(51)

⁵⁵ Lippke n(51) 7

⁵⁶ See Herschel, A P, *'Diminished Responsibility and the Sutcliffe Case: Legal, Psychiatric and Social Aspects (A Layman's View)*, (1983) 23(1) *Medicine, Science and the Law* 17-24

⁵⁷ Lippke n(51) 208

Prosecution Code the personal circumstances of the defendant and the victim, as well as motive, are relevant to public interest considerations in charge decisions.⁵⁸ These reasons seem to suggest that dealing with such cases at this level utilising charge bargaining is an option seriously worth considering. As Ashworth states:

*"It is not unknown for defendants charged with murder to offer a plea of guilty to manslaughter; this is often done in cases of diminished responsibility but may also be done on other grounds".*⁵⁹

For a category of cases not catered for time and time again despite legislative changes, this is certainly an option.

Plea Bargaining: The US System

*"Here's the thing: prosecutors also hold the key to change. They can protect against convicting the innocent. They can guard against racial bias. They can curtail mass incarceration".*⁶⁰

District Attorneys in America appear to be unique players in the system. As elected officials, they can fix "what is broken" in the system without changing laws.⁶¹ For a murder with compassion rather than malice present, the level of culpability offered is at their mercy. A plea bargain is a deal struck between prosecutor and counsel for the defence; and can sometimes be a plea of guilty as a trade-off to a lesser charge. The lesser charge may not necessarily fit the circumstances of the crime, but can be beneficial as an offering in cases invoking public sympathy. For example, the case of Gypsy Rose Blanchard, who conspired with her boyfriend to kill her mother. Blanchard's mother suffered from Munchausen By Proxy, and had long abused her daughter in such a way. Although a high degree of planning was involved, usually conducive to a first degree murder charge, the plea offer made was second degree murder and a sentence of ten years imprisonment.⁶²

The practice of plea bargaining as to charge or sentence is offered in many common law jurisdictions.⁶³ Though it trades the accused's right to trial, it is a well-known and established practice, and has been referred to as 'inevitable'.⁶⁴ That does not necessarily mean such a practice is supported by strong evidence as to its benefit. As Rauxloh notes:

*"The main arguments supporting plea bargaining are quite weak and largely based on assumptions rather than empirical evidence".*⁶⁵

It is true that such enticing offers have induced the not-guilty to plead guilty for a reduced charge or sentence rather than gamble with the jury. Of the 22 people exonerated by the innocence project in America using DNA evidence, 18% had accepted such a plea.⁶⁶ 95% of crimes are resolved by use of plea bargaining in the United States,⁶⁷ where prosecutors have an exceptional amount of

⁵⁸Crown Office and Prosecutor Fiscal Service Prosecution Code, Page 8-9, www.copfs.gov.uk

⁵⁹ Ashworth, A, *The Criminal Process: An Evaluative Study* (1998, Oxford University Press, Oxford, 2nd Edition)

⁶⁰ Bazelon, E, *Charged: The New Movement to Transform American Prosecution and End Mass Incarceration*, (2019, Random House, New York)

⁶¹ Ibid, xxvii

⁶² <https://eu.news-leader.com/story/news/crime/2016/07/05/gypsy-blanchard-pleads-guilty-murder/86617662/> accessed 1st February 2020

⁶³ For example, Australia. See Gerber, P, 'When is Plea Bargaining Justified?', (2003) 3(1) Queensland University of Technology, Law and Justice Journal 210-215

⁶⁴ Rauxloh n(53) 26

⁶⁵ Rauxloh n(53) 41

⁶⁶ <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> accessed 1st February 2020

⁶⁷ Lipkke n(51) 1

discretion.⁶⁸ This being the case even though jury trials “have an essential place in the American constitution” as a shield against tyranny.⁶⁹ Plea bargains have no such place, and had even been compared to torture in that both seek to induce a confession.⁷⁰ The Supreme Court has taken the view that, despite such concerns, the practice of offering a charge reduction or sentencing discount for pleading guilty does not undermine the Fifth Amendment (the right not to plead).⁷¹ It is a tool for leniency for cooperation with the system.

This amount of discretion might have been a useful tool in the high profile European Courts of Human Rights cases such as *Pretty*, *Nicklinson* and *Lamb*.⁷² *Pretty* in particular, a woman suffering motor neurone disease and wishing to avoid the distressing end stages of the disease, sought assurance from the Director of Public Prosecutions that if her husband assisted with her suicide he would not be prosecuted. No such assurance was provided. Equally in *Nicklinson*, the case involved a man who, after a stroke left him severely disabled and suffering ‘locked-in’ syndrome, wished to end his pain and mental anguish by ending his life. Obviously, he was in no position to carry out such an act, and would need assistance. Mr Nicklinson said his only option would be to suffer an awful death by resisting food or water, which would have caused his family their own pain and suffering in watching him die this way. Each case resulted in an appeal to the European Court claiming rights had been breached, and a discussion on whether the right to life included a right to die.⁷³ The Court decided that there was no discrimination against the incapacitated in such situations based on the idea that an able-bodied person may end their own life whenever they like, though such situations may infringe the Article 8 right to private life.⁷⁴ They also acknowledged that there is no necessity defence available here.⁷⁵ The problem is the ‘slippery slope’ idea, though the judgment in *Nicklinson* did acknowledge the possibility of applications for assisted suicide being considered by the courts.⁷⁶ This will be discussed again later in this piece.

EGP Scheme

The system in America is said to be “a product of the English common law legal heritage”.⁷⁷ Australia has also been said to follow “early English precedents” in allowing guilty pleas to a lesser charge of manslaughter in cases such as mercy killing, excessive self-defence and diminished responsibility.⁷⁸ The courts in England and Wales throughout the 1970s tried to establish how the plea bargaining and sentence reduction practice should evolve.⁷⁹ Eventually, initial concerns were overcome by efficiency considerations.⁸⁰ Today, such case negotiations are covered by statute, with a definitive guideline on the amount of sentence reduction to be given for an early guilty plea laid out in scale.⁸¹ This was further reiterated by the Sentencing Council for England and Wales with their definitive

⁶⁸ Bazelon n(60) xxiv

⁶⁹ Bazelon n(60) 131

⁷⁰ Bazelon n(60) 136

⁷¹ Ashworth n(59) 288

⁷² *Nicklinson and Lamb v UK* (2015) 61 EHRR SE7, *Pretty v UK* (2002) 35 EHRR 1

⁷³ Article 2, European Convention of Human Rights

⁷⁴ European Convention of Human Rights

⁷⁵ *Nicklinson* n(72) Para 18

⁷⁶ *Nicklinson* n(72)

⁷⁷ Vogel, M E, *Coercion to Compromise: Plea Bargaining, The Courts, and the Making of Political Authority*, (2007, Oxford University Press, Oxford)

⁷⁸ Gerber n(63) 212

⁷⁹ Turner (1970) 2 Q B 321, Cain (1976) Criminal LR 464, Erice (1977) 66 Cr app R 167

⁸⁰ Rauxloh n(53) 32

⁸¹ S144 Criminal Justice Act 2003

guidelines for such circumstances, where the reduction in sentence is provided alongside overarching guidelines for individual offences using the culpability and harm matrix.

Enticing a guilty plea is difficult and unethical ground. It teeters on the edge of several right infringements, such as fair trial, public hearing, presumption of innocence and against self-incrimination.⁸² This scheme may well go hand-in-hand with the practice of strategic over-charging, also evident in England and Wales.⁸³ This circumvents the solid structure for an early guilty plea which is non-negotiable by allowing a reduced charge. The scheme allows up to 30% reduction in sentence for a guilty plea at the earliest opportunity, which lessens the further through proceedings the plea is offered. Even at 10% for a cracked trial, such a discount still invokes such a plea and motivates the accused to forgo a full trial.⁸⁴

Such a scheme as idealised over the phenomenal discretion of American prosecutors. As Lippke shrewdly observes:

*“Waiver rewards should be fixed and modest. If they are not, then prosecutors or judges, in pursuing and finalizing plea agreements, are dealing in counterfeit currency”.*⁸⁵

Though their system was developed in parallel to “the British system of episodic leniency”,⁸⁶ the lack of mechanisms of control make for a very inconsistent approach. The English system has that advantage, but can it encompass those cases outside statutory boundaries of leniency like mercy killing? Reduced sentencing for an early guilty plea allows efficiency as well as empathy for victims and witnesses, but acceptance of a guilty plea to an appropriately reduced charge may still allow the courts to effectively deal with an offender. They will still be sentenced, the court will still consider mitigating and aggravating factors, but with a costly trial avoided.

The Benign Conspiracy: Mercy Killing and The New Diminished Responsibility Plea

Can any system of charge bargaining and plea bargains adequately account for the lost conspiracy to treat mercy killing cases with sympathy? In the decades preceding the enactment of the Coroners and Justice Act 2009, diminished responsibility would often fill a gap based on very little medical evidence to allow mercy killing cases motivated by compassion to avoid the murder label.⁸⁷ This was done by using a morality yardstick over psychiatric concepts.⁸⁸ One of the problems with the early guilty plea system is that it has no moral compass – no remorse needs to be shown in exchange for such a reduction in sentence.⁸⁹ In mercy killing cases, remorse is a strained issue. The accused is often relieved that their loved one is no longer suffering rather than regretting their actions. Perhaps for a reduction in charge it does need to be shown to have the privilege of the prosecutor’s leniency. Remorse might be the wrong word for mercy killing cases:

*“Individuals experience remorse when they recognise that their conduct has violated legitimate moral standards enforced by criminal law”.*⁹⁰

⁸² For further discussion see Lippke n(51) 2

⁸³ See Ashworth, A and Redmayne, M, *The Criminal Process*, (2010, Oxford University Press, Oxford, 4th Edition)

⁸⁴ Lippke n(51) 78

⁸⁵ Lippke n(51) 181

⁸⁶ Vogel n(77) 325

⁸⁷ See Sneiderman n(33) 12

⁸⁸ Williams, G, *Textbook of Criminal Law*, (1978, Stevens and Sons, London) 629

⁸⁹ Lippke n(51) 97

⁹⁰ Lippke n(51) 100

The moral standard violated is overridden for the accused in such cases by the violation of integrity and dignity of their loved ones. Perhaps society requires remorse because it shows that the accused is not “committed to wrongdoing”,⁹¹ but surely the mercy killer is no danger to the general public in this capacity. It may suggest that the accused is simply willing to take some punishment, which to them, will be lesser than the punishment the disease was inflicting on their loved one.

With the Coroners and Justice Act creating “an entirely new diminished responsibility plea”,⁹² a solution is required, and the new requirement of a recognised medical condition will only provide to exacerbate this conundrum. Whether diminished responsibility is still advanced in a mercy killing case, or the circumstances give rise to the possibility of a loss of control defence like in Knight, chances are that contested cases are more likely than ever.⁹³ A less medicalised route has certainly been suggested as the way forward rather than still shoehorning such cases into the diminished responsibility plea,⁹⁴ but is charge bargaining the new solution?

Moving Forward: Looking For Remedies

Legislating to allow the mercy killer a reduced charge of manslaughter brings its own difficulties. As the *Knight* case as shown, the criminal justice system is not always considering how to charge a more ‘typical’ or straightforward situation, such as a case based on smothering or overdose. The method may be drastic and attract much media attention. Indeed, in *Knight’s* case, the unusual method may have been evidence itself that control was lost, allowing the jury to accept the defence. The Canadian case of *Latimer* proved that there is a perceived danger of transforming the law at all when it comes to those who care for the ill or disabled and the value attached to that life.⁹⁵ Parliament must tread carefully with any legislative reform to ensure the value of life is not diminished with ill-health.

There are other defences that could be said to be based on excusable motives, such as necessity and duress,⁹⁶ though necessity is rarely accepted by the courts or even acknowledged to exist outside of the unique situation of separating conjoined twins.⁹⁷ This does not leave it as any kind of option for the compassionate killer and so does not represent the answer for this kind of case. As a society, we always ask the *why* question. Do we need to if we are not going to act according to the answer? Often, it is the victim’s family who need such answers, but when the answers are clear and the victim’s family is also that of the defendant, the motive needs to be a bigger part of the equation. As Livings speculated:

*“it must be assumed that the desire to avoid murder convictions that manifested in the benign conspiracy is unlikely to dissipate simply because of the enactment of the Coroners and Justice Act 2009”.*⁹⁸

⁹¹ Lippke n(51) 104

⁹² Mackay, R D, ‘*The Coroners and Justice Act 2009 – Partial Defences to Murder (2) The New Diminished Responsibility Plea*’, (2010), 4 Criminal Law Review 290-302

⁹³ *ibid* 301

⁹⁴ Ost, S, ‘*The De-Medicalisation of Assisted Dying: Is a Less Medicalised Model the Way Forward?*’, (2010) 18 Medical Law Review 497

⁹⁵ Sneiderman n(33) 5

⁹⁶ See Sneiderman n(33) 14 for a discussion on this

⁹⁷ *Re A (conjoined twins)* [2001] 2 WLR 480

⁹⁸ Livings n(17) 193

When Knight was sentenced,⁹⁹ Judge Leigh gave a two-year custodial sentence, suspended for two years, alongside sixty hours of community service. Would such a lenient sentence have been given had the initial offer to plead guilty to manslaughter been acceptable to the Crown Prosecution Service? It is questionable, and that suggests that a trial may be advantageous for such cases. Perhaps we should have more trials and less bargains because in the end, the jury get it right. Justice is to be valued over efficiency, and plea bargaining undermines the fundamental principles of the criminal justice system.¹⁰⁰

Also problematic is the fact that in some cases, like *Cocker*, the victim asks to die. In others, such as *Knight* and *Inglis*, the victim is unable to voice any such wishes, and the defendant proceeds based on their close relationship with the victim and knowing ‘what is best’ for them in the situation. Both defendants believed that the alternative would be the victim dying anyway, but in ‘barbaric’ circumstances. For *Inglis*, this could be the withdrawal of hydration and nutrition.¹⁰¹ For *Knight*, this would be a painful death in which his mother was denied the pain relief he believed she needed. Any solution would need to cover both scenarios in worthy cases, those who request to die and those who have this chosen for them by the genuinely compassionate actor.

Accepting the Plea

As cost effective as plea or charge bargaining might be, it offers no long-term solutions for repeat offenders. One study showed that 85% of early guilty pleas were given for sentencing discount alone rather than remorse.¹⁰² Mercy Killers are not repeat offenders. Reducing their charge and ultimately, their sentence, is unlikely to open the floodgates to carers killing their loved ones. In England and Wales, and in America, the practice of charge bargaining will continue regardless of measures to combat its excesses. Perhaps the answer is meaningful judicial scrutiny of the crown’s evidence before a guilty plea to a particular charge is accepted.¹⁰³

It is understandable that the accused in a mercy killing case will not want to plead guilty to murder. They do not see their actions as murder regardless of how the criminal law establishes such a crime through actus reus and mens rea concepts. Though the sliding scale of early guilty plea rewards can be a very useful tool in allowing a cost-effective system which gives the courts time for the cases which require a full trial, they are not conducive to deciding on level of culpability without a very clear scheme of charge bargaining which accompanies it. A sentence reduction alone might not invoke such a plea, but a change of label might. The only viable alternative is to legislate to provide better avenues to defences which allow charge reductions in all the right places. We did this ten years ago to aid battered women who kill their abusers, but we did not go far enough in considering how best to accommodate the most just cases.¹⁰⁴ Bazelon discussed this in her recent book:

*“Ending mass incarceration means narrowing the current conception of who counts as a violent felon and doing far more to ensure that the jailgate isn’t a revolving door”.*¹⁰⁵

A mercy killer taking an early guilty plea to murder because there is no adequate defence based on his motives and no cohesion in charge bargaining is hardly logical, nor a necessary burden on

⁹⁹ Unreported, 20th September 2019, Basildon Crown Court

¹⁰⁰ Rauxloh n(53) 217

¹⁰¹ Inglis n(30) Para 29

¹⁰² Zander, M and Henderson, P, *Crown Court Study*, The Royal Commission of Criminal Justice Research Study No19 (1993, London:HMSO)

¹⁰³ Lipkke n(51) 3

¹⁰⁴ For example, see n(7)

¹⁰⁵ Bazelon n(60) xxviii

overcrowded prisons with another life sentence.¹⁰⁶ The prosecutor should of course consider if the lesser charge will allow adequate sentencing to reflect culpability. The Sentencing Council for England and Wales guidelines for sentencing loss of control manslaughter allows a custodial sentence of between three and twenty years. Would that not have been sufficient for the *Knight* case without the need to two costly trials?

There are many advantages to the English early guilty plea system – American states vary wildly in their plea bargain systems, with some not even giving full details of the prosecutors case before the plea is offered.¹⁰⁷ Our system is transparent, but for mercy killers, cohesion is needed in a way that only legislation can provide.

An Exclusive Partial Defence

Diminished responsibility is unlikely to be available as a defence to reduce murder to manslaughter in mercy killing cases unless the defendant has been diagnosed with a recognised medical condition (unless this too is stretched within the conspiracy).¹⁰⁸ The Law Commission had imagined that the defence would cover such situations, speculating it might come into play when a person puts their ill spouse out of their misery after many years.¹⁰⁹ Even with a diagnosed medical condition, this is the tip of the iceberg. The defence still requires that the condition substantially impairs the defendant's ability to form a rational judgment, understand the nature of their conduct, or exercise self-control. A causal link must also be established.

As for loss of control, the qualifying trigger is unlikely to be met unless the circumstances resemble those of *knight*, perhaps over a dispute with medical or care staff. This certainly fits with Livings argument that “decisions taken by people or bodies” may give rise to things said or done as expressed by the qualifying trigger.¹¹⁰ As for the more usual case of the painful and distressing symptoms of a disease or illness triggering loss of control, the defendant may have to count on the jury using the defence as a ‘get out of jail free’ card which allows them to deliver a sympathetic verdict. This may speak more about their own compassion as jurors rather than legal requirements and restraints. The judge will explain the defence and evidence relevant to that, but the rest is in their hands.

It has previously been adumbrated that a third limb to loss of control based on compassion - watching a loved one suffer due to terminal illness or severe disability which substantially impairs life expectancy or quality of life, motivated wholly by compassion.¹¹¹ Loss of control is already a defence founded on emotions, making it the most convenient ally to a compassionate motive. This remains the best avenue for change. Mitchell, Mackay and Brookbanks have shrewdly observed that the highly emotive situations that might lead to a loss of control give the defendant a distorted view of the situation where an abnormal amount of significance is given to some of the circumstances.¹¹² For Robert Knight, this might have been the focus on the lack of medication received by his mother in her end of life care. For a battered woman, a small behavioural change which she instinctively knows could lead to violence. The emotional responses are intrinsically linked, so mercy killing cases

¹⁰⁶ <http://www.prisonreformtrust.org.uk/PressPolicy/News/Overcrowding> accessed 23rd September 2019

¹⁰⁷ For example, see [https://www.courtinnovation.org/sites/default/files/media/document/2019/Discovery-NYS_ New York](https://www.courtinnovation.org/sites/default/files/media/document/2019/Discovery-NYS_New_York), having recently changed their rules of discovery

¹⁰⁸ Livings n(17) 194

¹⁰⁹ Law commission n(12) 306

¹¹⁰ Livings n(17) 199

¹¹¹ Clough n(1) 371

¹¹² Mitchell et al n(23) 678

could be encompassed with a widening of the partial defence to include the third qualifying trigger. This is a rational solution to an irrational problem currently the responsibility of the Crown Prosecution Service, Judge and jury. Mercy killers consider their actions the only way to alleviate the victim's suffering in the same way that battered women see killing their abuser as the only way to alleviate their own suffering.

Loss of control is a concession to human frailty, where the defendant had no fair opportunity to adhere to the law. Is the mercy killer in a fair situation? Are they fuelled by any less emotion than the battered woman who kills her abuser? The grey area of ending the life of those who wish for it or are clearly suffering greatly must finally be resolved in black and white, and that requires innovative legislation:

*“Until Parliament decides otherwise, the law recognises a distinction between the withdrawal of treatment supporting life, which, subject to stringent conditions may be lawful, and the active termination of life, which is unlawful”.*¹¹³

The recent case of *Challen* has shown that the courts are open to exploring change when possible. Challen had killed her husband after years of abuse and turmoil, and was convicted of murder after her diminished responsibility plea failed.¹¹⁴ Her appeal was allowed in 2018, with the introduction of the new controlling and coercing behaviour offence¹¹⁵ being cited as fresh evidence unavailable at the time.¹¹⁶ Could this same effort be applied to mercy killing cases, without the need for legislation? It is highly unlikely.

Assisted Suicide

Perhaps cases like *Cocker*¹¹⁷ would not occur had Lord Falconer's Assisted Dying Bill been accepted.¹¹⁸ This was a Bill put forward to suggest that a competent person may be able to request assistance needed to end their life to prevent pain in suffering if that person was terminally ill with less than six months to live. It was defeated 330 to 118. This was a very unfortunate end to a promising piece of legislation.

It would not be a far stretch to speculate that in some mercy killing instances, such an option of a medically assisted death might have prevented the death in the manner in which it occurred, with a layperson feeling compelled to take things into their own hands. A very controversial issue, the question of when and how we might one day find assisted suicide or euthanasia acceptable has been widely debated in academia, the courts, and the media. A full discussion of this topic is outside of the scope of this article, but briefly visiting the effect such changes to the law might have in this arena is advantageous.

The cases of *Pretty*¹¹⁹ and *Purdy*¹²⁰ brought to the attention of the courts a difficult juxtaposition of the right to die with dignity against the aim of protecting the vulnerable. It was questioned whether s2 Suicide Act 1961,¹²¹ a serious crime carrying a sentence of up to fourteen years, would apply in

¹¹³ Inglis n(30) Para 38

¹¹⁴ Challen [2011] EWCA Crim 2912

¹¹⁵ S76 Serious Crime Act

¹¹⁶ Challen [2018] EWCA Crim 471 (CA Crim Div)

¹¹⁷ Cocker n(29)

¹¹⁸ Assisted Dying Bill HL 2015-2016

¹¹⁹ Pretty n(72)

¹²⁰ R (on the application of Purdy) v Director of Public Prosecutions [2009] UKHL45

¹²¹ Section 59(4) of the Coroners and Justice Act 2009 adds section 2A into the Suicide Act 1961

cases of those who help a spouse who is terminally ill or incapacitated, and therefore unable to end their own life. While the Director of Public Prosecutions must consent to prosecution in such circumstances, and would eventually issue guidelines on this issue because of such cases,¹²² the matter remains somewhat unresolved. In fact, the guidelines specifically state that whilst the case of *Purdy* instigated the DPP to produce such guidelines, the decision in the case had not changed the law in this area at all. What remains is the usual process – the Crown Prosecution Service will apply their usual test of evidence and public interest. The guidelines make specific reference to Lord Hope’s observations in the case of *Purdy* that commission of a crime is not automatically followed by prosecution.¹²³ In particular, the need to take each case on its merits and look at all of the surrounding circumstances is paramount.¹²⁴ Paragraph 45 lists factors which may lead to a decision against prosecution as including a clear decision made by the victim and a defendant who acted solely from compassion.

A later case of *Nicklinson*¹²⁵ continued to pursue the Human Rights angle, arguing that not being allowed to choose a dignified death was incompatible with Article 8 of the European Convention of Human Rights, which protects a person’s right to respect for private and family life (though 6, 8, 13 and 14 were also cited and discussed). *Nicklinson* had a catastrophic stroke which rendered him almost completely paralysed other than eye movement. He wished to die, but due to the law (and not wanting any of his family to risk prosecution) he knew the only way to do this himself was to refuse food and water. He knew this would be painful for his family to watch, and wanted a more humane death. This case divided the judges. Whilst it was acknowledged by all that the current UK situation in regards to the right to die may be incompatible with Article 8, the majority decision was that no declaration of incompatibility would be made. It was considered that Parliament was best positioned to debate and decide on the issue. As Foster notes, ‘the general and current view of both courts is that it is Parliament who should act as the final arbiter on whether the existing law should be changed, and if so the content of that law’.¹²⁶ Both Lady Hale and Lord Kerr, dissenting, were of the opinion that such a declaration should and could be made. Whilst Lady Hale noted that the blanket ban on assisted suicide was the problem,¹²⁷ Lord Kerr observed that the justification for use of margin of appreciation in the situation, to protect the vulnerable, was without adequate evidence.¹²⁸

Finally, in the case of *Conway*,¹²⁹ the blanket ban to assisted suicide was decided to be compatible with Article 8(2) which allows for deviation from the right to private life if this is to achieve a legitimate aim, such as protecting the rights of others and preventing crime.¹³⁰ In fact, the continuous scientific advancement of palliative care means that dying for those with a terminal or

¹²² <https://www.cps.gov.uk/legal-guidance/suicide-policy-prosecutors-respect-cases-encouraging-or-assisting-suicide> Accessed 1st February 2020

¹²³ *Ibid*, [36]

¹²⁴ *Ibid*, [39]

¹²⁵ *Nicklinson* [2014] UKSC 38; [2015] AC 657

¹²⁶ Foster, S, ‘*Human Rights, Judicial Activism or Deference and the Case of Assisted Suicide*’, (2019) 24(1) *Coventry Law Journal* 69-86, 79

¹²⁷ *Nicklinson* n(125) [300], Also see Draghici, C, ‘*The Blanket Ban on Assisted Suicide: Between Moral Paternalism and Utilitarian Justice*’, (2015) 3 *EHRLR* 286

¹²⁸ *Nicklinson* n(125)

¹²⁹ *R (on the application of Conway) v Secretary of State for Justice* [2017] EWHC 2447 (admin)

¹³⁰ See Foster, S, ‘*The Right to Die and Private Autonomy*’, (2017) 22(2) *Coventry Law Journal* 71-77, 71

debilitating illness is now less distressing than ever.¹³¹ This makes a change in the law in this area seem ever further away.

There are other jurisdictions who allow medical intervention ending life. For example, Washington's Death and Dignity Act 2009,¹³² which allows those with less than six months to live a lethal dose of medication to be administered by a doctor. Interestingly, this limitation of six months or less to live was also that suggested by Lord Falconer in the UK, and would not have covered many of the high profile cases discussed like *Purdy* and *Nicklinson*. Another jurisdiction offering life-ending treatment is Switzerland, with the Dignitas clinic being one such facility. Currently, every eight days one British person will travel there to end their life.¹³³ This is a very costly and difficult process. For this reason, ending one's life seems to be treated in a discriminatory way by the law. An able-bodied person can, but an incapacitated person cannot. A wealthy person may travel to do so; a poor person cannot.

Would the passing of such legislation allowing assisted suicide or euthanasia see a decline in mercy killing cases? It is debatable. Though situations such as those in *Cocker*¹³⁴ would have inevitably benefited (and relieved the husband the awful task) it is questionable in others such as *Inglis* and *Knight*, where the victim may have been unable to communicate their wishes. Regardless of this, a positive effect in even a small number of cases would be advantageous, but this seems a very unlikely prospect and certainly no solution for cases like *Knight's*.

Conclusion

Whilst we allow the withdrawal or withholding of treatment in cases of patients with little to no hope of recovery, such as 'do not resuscitate' orders or withdrawal or treatment,¹³⁵ a positive act to end life is not sanctionable within our criminal law. Whether this is euthanasia, assisted suicide, or mercy killing, no concession is made nor has any declaration of this being incompatible with human rights been made, though it has been highlighted as an issue for Parliament to act upon. Certainly, the decision not to make such a declaration has been criticised,¹³⁶ but Parliament, for the moment, seem determined to retain the status quo.¹³⁷

As we get closer to death, failing any legal avenues to alleviate what a loved-one perceives to be unnecessary suffering before the inevitable, the courts are left to deal with the unfortunate leftovers. We question our right to die with dignity, or to die what many would refer to as a 'good death'.¹³⁸ Surrounded by family, at home in bed, and without suffering or becoming a burden to others:

*"We all hope that when it is our turn, we will not be in pain or suffering, we will not be a burden on our families, or be completely dependent on others".*¹³⁹

Inglis was positive her son would not wish to live the life he now faced as this would cause him great suffering, whilst Knight knew his mother was in pain that he had no hope of her being relieved of.

¹³¹ Ibid, 75

¹³² RCW 70.245

¹³³ <https://www.dignityindying.org.uk/why-we-need-change/dignitas/> accessed 16th Feb 2020

¹³⁴ Cocker n(29)

¹³⁵ Airedale NHS Trust v Bland (1993) A.C. 789

¹³⁶ Martin, S, 'Declaratory Misgivings: Assisted Suicide in a Post-Nicklinson Context', (2018) Public Law, April 209-223, 222

¹³⁷ Foster n(126) 86

¹³⁸ Madden, D, 'Is There a Right to a Good Death?' (2013) 19(2) Medico-Legal Journal of Ireland 60-68

¹³⁹ ibid 61

Parliament currently have an option of granting those who face such illness and infirmity the right to die a 'good' death, and to partially excuse those who attempt this for themselves. At the very least, the CPS have the ability to appreciate this contention.

The Select Committee Report 1989 suggested an uncoupling of the mandatory life sentence from the murder conviction for mercy killers.¹⁴⁰ Motive is morally significant, and there are times the criminal law should reflect this.¹⁴¹ Certainly, we do not want the disabled or terminally ill to think their lives and worth are questioned because a charge or sentence is discounted lower than a case of an able-bodied victim.¹⁴² Sneiderman suggested a compassionate homicide partial defence.¹⁴³ Lord Lloyd suggested one of exceptional circumstances.¹⁴⁴ The American Penal Code's Extreme Emotional Disturbance defence would encompass this adequately, without the suggestion we currently deal with of why only some passions are deemed rational.¹⁴⁵ Certainly, we need an honest policy that does not attempt to fit such cases into defences or pleas with which they do not sit comfortably. As we descend into an age where technological advancements and scientific breakthroughs allow life to be prolonged, we may increasingly see such cases. The law needs to reflect our concept of when and how life ends.¹⁴⁶

A lengthy legal punishment such as a life sentence creates a large amount of suffering for the person and those around them.¹⁴⁷ It is life-changing. Sometimes, we see that as deserved, especially when a life has been taken. Whether a life has been cut short by fifty years or a single minute, it is unlawful for anyone to take such a decision into their own hands. Taking a life for compassionate reasons, such as Inglis trying to put her disfigured son out of his misery and end his suffering, presents a moral dilemma. A benign conspiracy to fit these cases wherever we can leads to inconsistency. The only way forward is for mercy killing situations to be legislated for, allowing a partial defence in such circumstances. Equally, sufficient weight must be given to the mitigating circumstances, including reading Schedule 21 Criminal Justice Act 2003's aggravating features list in a way that is compatible with the situation of a compassionate killer. Robert Knight was found guilty of manslaughter and given a lenient sentence, but many other cases may not end this way. Every mercy killer lives not only with their legal punishment, but the knowledge of their actions every day. Ending their loved one's suffering merely starts theirs. It is illogical to add a murder conviction to that. Unless we get a third trigger to loss of control, the Crown Prosecution service will need to play along with the conspiracy and keep the compassionate killer where they belong; away from the murder label.

¹⁴⁰ Select Committee of the House of Lords, 1989, Report on Murder and Life Imprisonment

¹⁴¹ Foster n(130) 51

¹⁴² Sneiderman n(33) 3

¹⁴³ Sneiderman n(33) 19

¹⁴⁴ Lord Lloyd n(19)

¹⁴⁵ Nourse n(24) 1336

¹⁴⁶ Brooks n(37) 1160

¹⁴⁷ Lippke n(51) 120