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Let's use common sense in cases of mercy killing

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Prof. Arthur Schafer

TONY Jaworski's wife, Sophie, was dying of colon cancer. At the same time, she was suffering from Alzheimer's disease. He killed her -- stabbed her to death with a knife -- to spare her further suffering.

For this crime, Manitoba's Justice Department was determined to send Tony Jaworski to jail for life. Neither Mr. Jaworski's motive for killing (mercy), nor his age (87) and ill health (cancer, blindness, partial deafness) softened their passion for severe punishment. The Crown could have exercised its discretion to charge Mr. Jaworski with manslaughter, which gives the court discretion to tailor the punishment to fit the circumstances of the crime. Instead, they insisted on charging him with the crime of murder, which carries a mandatory sentence of life imprisonment.

Public pressure eventually forced the Crown to reduce the charge against Mr. Jaworski to manslaughter, and an enlightened judge recently sentenced him to time already served.

In an earlier Manitoba case, that of Bert Doerksen, the Crown was similarly determined to obtain a criminal conviction and jail term. Bert Doerksen, 79, was charged with assisting his wife to take her own life. Susan Doerksen, 78, had been suffering for years from cancer, heart disease and crippling arthritic pain. She chose death over unremitting pain; and her loving husband of 59 years chose to assist her. There was great public sympathy for Mr. Doerksen and charges against him were eventually dropped, but only after his own cancer advanced so far that he became unfit to stand trial. By that time, the Doerksen family had suffered an unconscionable burden, both emotional and financial.

What accounts for the Manitoba Crown's determination to imprison these two sick old men, both of whom acted from the desire to end the suffering of their beloved spouses?

Some historical background may help. Over the decades, there have been a number of mercy killings and assisted suicides in Canada. Only a dozen or so have come to court. Of this dozen, none has resulted in a jail term -- with the notable and tragic exception of Robert Latimer. In short, elsewhere in Canada, when the motive for killing or assisted suicide is clearly merciful, juries either ignore the law by voting to acquit or the Crown exercises its discretion to reduce the charge from murder to some lesser offence, such as manslaughter or administering a noxious substance. Conviction on these lesser charges has never led to imprisonment.

In some provinces, the Crown has enough wisdom and humanity not to bring a criminal charge. So, for example, the doctor who bravely assisted Sue Rodriguez to die was never prosecuted. The attorney general of British Columbia understood full well that no jury would ever have convicted this physician, so it would have been foolish to charge him.

Let's explore for a moment the reasons why Manitoba's Justice Department is so determined to imprison loving husbands such as Tony Jaworski and Bert Doerksen.

One rationale for stern punishment is individual deterrence: preventing the criminal from repeating his or her crime. However, in cases such as these it seems absurd to suppose that the public is in need of protection. As Queen's Bench Justice John Scurfield commented, ironically, a sentence is needed which "adequately protects the public from an 87-year-old blind man who is infirm."

Should they have been punished, instead, on retributive grounds? The vicious deserve to suffer, sure enough. But who could fail to understand the love and empathy that motivated these "killers"? Was either truly deserving of a severe punishment?

Alternatively, imprisonment might be justified on grounds of denunciation: the need to express society's abhorrence for heinous crimes. This rationale applies poorly to cases of genuine mercy killing, however, where a majority of Canadians express the view that "if I were ever dying in unrelievable pain I hope that someone would hasten my death".

The most plausible argument for punishing mercy killers would have to be general deterrence. Our old friend the slippery slope argument makes its appearance here: If we don't punish severely the Jaworskis and Doerksens of the world, the floodgates will be opened and the sick and disabled of our society will be vulnerable to lethal assault.

It sounds plausible in theory. In reality, it just isn't true. Canada has almost never punished mercy killers with imprisonment, and yet the predicted flood of merciless killings hasn't materialized. Canadian judges and juries are quite capable of distinguishing those who kill from greed or hatred, on the one hand, from those who kill from love or mercy, on the other.

Canadian law relating to mercy killing and assisted suicide is in need of reform. Family members clearly cannot be allowed unfettered discretion to kill loved ones who are suffering; but Canadians should now be thinking seriously about the kinds of carefully regulated law reforms that have been introduced in the state of Oregon (physician-assisted suicide) and in Holland (euthanasia). Meanwhile, until Canadian law is reformed, it makes no legal and even less moral sense for the Crown to exercise its discretion harshly against mercy killers or those who help their loved ones to end their own life when that life is blighted by unrelievable pain and suffering.

A personal comment to conclude. I have lectured to dozens of senior citizen groups on the topic of death and dying. Over coffee and biscuits, hundreds of old people have discussed their concerns with me. These concerns focus on the pain, suffering and indignity that often blight the last stages of life. Old people fear dying in hospital, surrounded by rotating teams of anonymous strangers, intubated from every orifice, unable to feed or toilet themselves. They fear that cancer or stroke or Alzheimer's disease will drastically reduce the quality of their lives.

But, significantly, not a single older person has ever expressed to me a fear that when they are suffering with a painful terminal illness someone might have a mind to end their life prematurely. Indeed, many have expressed the wish for assistance to hasten their death if the quality of their life becomes more burdensome than beneficial.

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